# CURRENT LAW

A COMPLETE ENCYCLOPEDIA
OF NEW LAW

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VOLUME XII

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INDICTMENT
TO
WITNESSES

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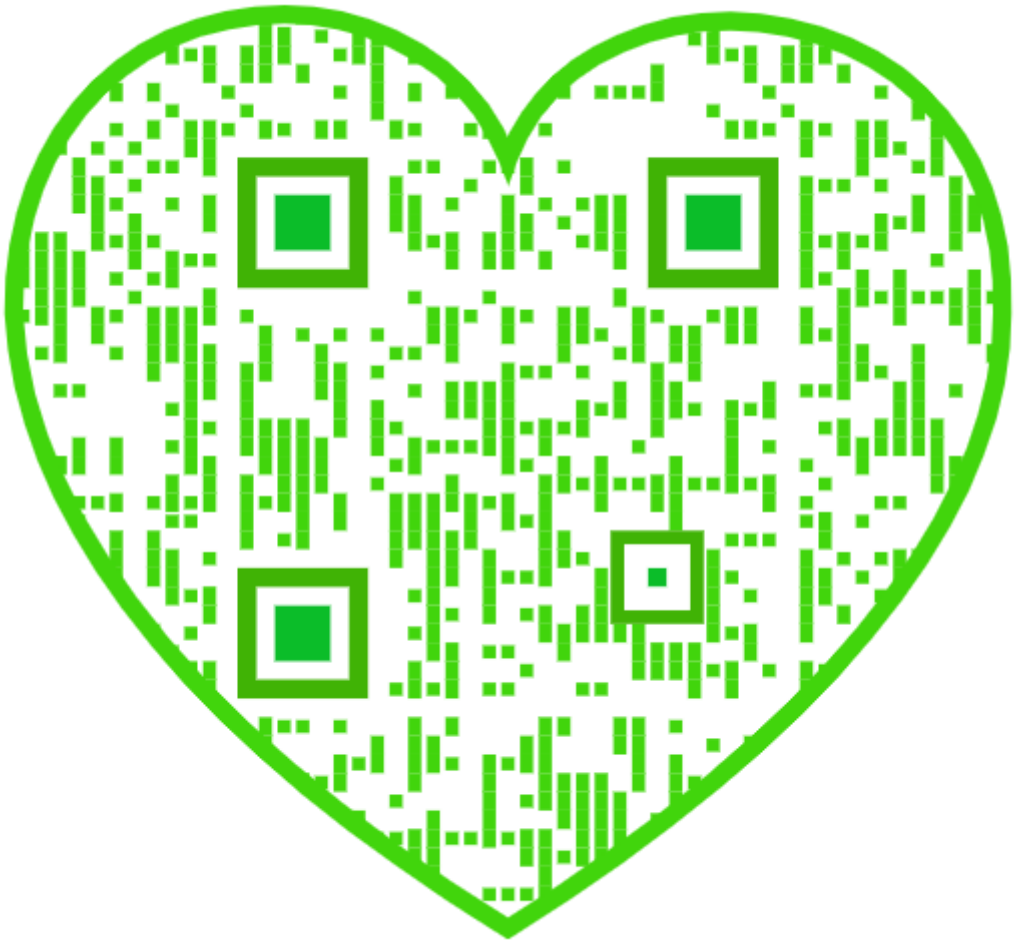

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# CURRENT LAW

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*The scope of this topic* is noted below.[82]

*Sources of the criminal procedure.* See 10 C. L. 88—Criminal cases in the federal courts are governed and controlled by federal statutes, and federal decisions and

82. This topic includes general criminal procedure from indictment to final judgment. The substantive law of crimes (see Criminal Law, 11 C. L. 940) and procedure before indictment (see Arrest and Binding Over, 11 C. L. 273), are elsewhere treated, and matters of

state statutes and decisions are inapplicable,[83] though in the absence of federal statutes, state statutes control;[84] but omission of the state satute to provide a remedy for the preservation of a substantial right of accused will not operate to deprive him of the right.[85] The act of congress creating the United States court for China and the treaty provisions relating thereto give to American citizens in China the benefit of American laws regulating criminal procedure,[86] but also make such citizens subject to American laws defining and punishing crimes, including the common law.[87] An indictment cannot be predicated on a statute which became effective after the act charged was committed.[88] A defendant proceeded against under the general penal laws of the state, in the superior court, is not, though a minor, entitled, in New Hampshire, to be tried under the provisions of the juvenile court act.[89]

§ 1. *Limitation of time to institute.* See 10 C. L. 58—The time within which criminal prosecutions must be instituted is fixed by statute.[90] The federal statute providing that crimes committed in territory, jurisdiction over which is ceded to and vested in the United State, shall receive the same punishment as provided by the law of the state in which the act was done, in the absence of a federal statute punishing such act, does not make the state statute of limitations applicable.[91] Whether a particular statute applies so as to bar a prosecution,[92] when the limitation period commences to run,[93] and under what circumstances the statute will be tolled,[94] depends upon the terms of the statute and the nature of the offense. The commencement of a criminal proceeding does not date from the filing of the information, but from the issuance of the warrant which is served.[95] A defective warrant is effective as a commencement of the prosecution if accused fails to object and gives bail for appearance.[96]

§ 2. *Jurisdiction.* See 10 C. L. 59—Proceedings had without jurisdiction are of course wholly void.[97] A court has no power to proceed except at a term authorized

indictment, evidence and procedure peculiar to particular crimes are treated under topics dealing with such crimes (see Homicide, 11 C. L. 1799; Larceny, 10 C. L. 600, and like topics).

**83.** Jones v. U. S. [C. C. A.] 162 F 417.

**84.** United States v. Wells, 163 F 313.

**85.** Plea in abatement proper remedy by which to attack indictment on account of improper conduct of district attorney before grand jury, though statutes did not provide therefor. United States v. Wells, 163 F 313.

**86.** Biddle v. U. S. [C. C. A.] 156 F 759.

**87.** Act June 30, 1906, c. 3934 (34 Stat. 814), expressly extends common law as well as federal statutes. Biddle v. U. S. [C. C. A.] 156 F 759. Obtaining money by false pretenses is a crime punishable by such court. Id.

**88.** Barton v. State [Miss.] 47 S 521.

**89.** State v. Burt [N. H.] 71 A 30.

**90.** Prosecution for rape barred where more than one year had elapsed since first intercourse. Ex parte Black [Tex. Cr. App.] 113 SW 534.

**91.** Federal limitations act applies in such case. United States v. Andem, 158 F 996.

**92.** U. S. Rev. St. § 1044, limiting offenses not capital to three years, is general and applies to all misdemeanors constituting offenses against the United States whenever added by congress to list of statutory offenses. United States v. Central Vermont R. Co., 157 F 291. One year limitation for prosecution of violation of Bankr. Act 1898, c. 541, § 29d, does not apply to prosecution for conspiracy to commit such offense. United States v. Comstock, 162 F 416.

**93.** The statute does not commence to run until the offense is complete. In conspiracy to defraud government of public lands, not until patents were obtained. United States v. Lonabaugh, 158 F 314. Prosecution of public officials for receiving bribes not barred until 5 years after bribe was actually received. People v. Gibson, 191 N. Y. 227, 83 NE 976. Prosecution for conspiracy under Rev. St. U. S. § 5440, is not barred until 3 years after the last overt act alleged. Jones v. U. S. [C. C. A.] 162 F 417. Indictment for conspiracy to defraud the United States of public lands held not to charge any overt act within 3 years preceding filing of indictment, as such conspiracy may be complete before issuance of patent. United States v. Black [C. C. A.] 160 F 431.

**94.** Time during which defendant was out of the state is not a part of the time limited, under Code Cr. Proc. §§ 142, 143, though defendant was in the state when the crime was committed. People v. Sewell, 56 Misc. 250, 107 NYS 382.

**95, 96.** State v. White, 76 Kan. 654, 92 P 829.

**97.** Court of special sessions having imposed a fine beyond its jurisdiction to impose, the judgment is void, and county court cannot remit the cause for imposition of a proper sentence, but can only reverse and declare the judgment void. People v. De Graff, 56 Misc. 429, 107 NYS 1038.

by law.[98] Courts can acquire jurisdiction of causes only in the mode prescribed by law, and agreements of parties in contravention thereof are of no effect.[99]

The power and jurisdiction of municipal and other inferior courts, and whether the same is concurrent or exclusive,[1] must be determined by reference to statutes applicable to the particular count or crime, the measure of jurisdiction being usually the nature and gravity of the offense and the penalty provided by law.[2] Statutes also determine and fix the territorial jurisdiction of inferior courts.[3] Courts of one state have no jurisdiction over an offense committed in another.[4]

**98.** Conviction at term of court held pursuant to void law was void. Hodo v. State [Ala.] 47 S 134. Proceedings void when held at term of court not authorized. Gordy v. State [Ala.] 45 S 901. Judgment at term of court not authorized without jurisdiction and void. Rawlinson v. State [Ala.] 45 S 891.

**99.** Morse v. People, 43 Colo. 118, 95 P 285. Where cause originated in justice court and was pending on appeal in county court, parties could not, by agreeing to transfer, confer jurisdiction on district court, though latter court would have jurisdiction of cause if properly invoked. Id.

**1.** See, also, post, § 18. Mayor of city which has no police court has not exclusive jurisdiction of violations of health ordinance. Justice of peace also has jurisdiction. Bourgeois v. Ocean City Board of Health [N. J. Law] 71 A 53. Justice court has exclusive jurisdiction of prosecution for failure to work roads (Revisal 1905, § 2721), and superior court had no jurisdiction where justice bound defendant over to that court. State v. Clayton, 146 N. C. 599, 60 SE 415. City of Butte has authority from state to define by ordinance and punish vagrancy. Police courts of city have exclusive jurisdiction of prosecutions for violations of such ordinance, and such prosecutions must be in name of city. State v. Second Judicial Dist. Ct., 37 Mont. 202, 95 P 841. Police courts of city also have concurrent jurisdiction with justices' courts over prosecution of offense of vagrancy defined and made punishable by state penal code, and such prosecutions must be in name of state. Id. The offense of practicing medicine without authority (Laws 1896, c. 165, § 8) is one of which district court has exclusive jurisdiction. Proceedings in superior court improper. State v. Heffernan, 28 R. I. 477, 68 A 364.

**2.** County judge has jurisdiction to try offense of obstructing passway (Ky. St. 1903, § 4354), penalty being fine of $10. Evans v. Cook, 33 Ky. L. R. 788, 111 SW 326. Justice has jurisdiction of same offense. Hughes v. Holbrook, 32 Ky. L. R. 1210, 108 SW 225. Justice has jurisdiction of prosecution of obtaining property by false pretenses, property being of less value than $10. Code 1896, § 4630. Davis v. State [Ala.] 45 S 154. Under Code Cr. Proc. § 717, court of special sessions has no jurisdiction to impose a fine of more than $50. People v. De Graff, 56 Misc. 429, 107 NYS 1038. City court had jurisdiction of offense of "stabbing another," allegations making it a felony not appearing. Norwood v. State, 3 Ga. App. 325, 59 SE 828. New York City magistrate has jurisdiction of charge of disorderly conduct within the city, though acts charged constitute misdemeanor under penal code of state. In re Jacobs, 57 Misc. 655, 109 NYS 1068. Duluth municipal court held not to have jurisdiction to try offense punishable by both fine and imprisonment. State v. Bates [Minn.] 117 NW 844. Justice of peace has jurisdiction over violation of Pen. Code, § 436 (conducting business without license in violation of town ordinance). Ex parte Bagshaw, 152 Cal. 701, 93 P 864. Justice of peace, not superior court, has original jurisdiction of offense of cruelty to animals (Revisal 1905, § 3299), penalty being fine of not more than $50 or imprisonment for not more than 30 days. State v. Bossee, 145 N. C. 579, 59 SE 879. Forfeiture of liquor, in prosecution for transporting contraband liquor, is not part of punishment, which consists of fine not to exceed $100 or imprisonment not to exceed 30 days. Hence magistrate has jurisdiction. State v. Pope, 79 S. C. 87, 60 SE 234. Juvenile court held to have power to decide whether affidavit charged a misdemeanor, causing or encouraging a delinquency of girl in Industrial School, or rape; and having decided that it charged former, it had power to try the accused and assess punishment, and judgment was not subject to collateral attack. Tullis v. Shaw, 169 Ind. 662, 83 NE 376. City court had no jurisdiction over prosecution for pointing pistol where undisputed evidence showed that the act of pointing the pistol was a part of and simply preceded the shooting at another, or assault with intent to murder, the misdemeanor being merger in the felony. Eberhart v. State [Ga. App.] 62 SE 730.

**3.** Municipal court of Chicago has no jurisdiction outside city limits. People v. Strassheim, 228 Ill. 681, 81 NE 1129. The municipal court of Chicago has no jurisdiction to try a case transferred to it by the criminal court of Cook county where the indictment charges an offense committed at and within said county, but does not allege it to have been committed within the city of Chicago. Ullrich v. People, 137 Ill. App. 85. Justice of peace has jurisdiction in criminal cases throughout county in which he is elected and where he resides. His authority to hear and determine such cases is not confined to township for which he is elected and where he resides. Rev. St. 1906, § 610. Steele v. Karb, 78 Ohio St. 376, 85 NE 680. In Idaho, though justice of peace has jurisdiction throughout county, he is required to reside and exercise his jurisdiction within his own precinct. State v. Noyes [Idaho] 96 P 435. But an exercise of jurisdiction outside his precinct is a mere irregularity, and where accused stipulated for trial in another precinct, he was not entitled to be discharged, on appeal, for want of jurisdiction of the justice to try him in such precinct. Id.

**4.** Kentucky courts cannot take cognizance

Where two courts have concurrent jurisdiction of an offense, jurisdiction of one does not attach exclusively until defendant has been formally charged therein [5] and arrested under the accusation thus filed.[6] When jurisdiction of one attaches, it becomes exclusive,[7] and an acquittal or conviction in one bars prosecution in the other,[8] even though the sentence imposed is illegal and less than that required by law,[9] in the absence of fraud or collusion practiced to defeat jurisdiction of such other court.[10] That one is confined under sentence pronounced by one court does not prevent his prosecution for another offense in an inferior court.[11]

Federal courts have no jurisdiction over crimes except such as are made cognizable before them by act of congress.[12] Congress has provided that offenses committed in territory ceded to the United States, but not specifically prohibited or made punishable by federal statute, shall be liable to and shall receive the same punishment as like offenses are liable to under the laws of the state within which such territory is located.[13] Where the state has ceded jurisdiction over such territory to the United State, state courts have no jurisdiction over offenses committed therein.[14] The jurisdiction of state courts over crimes being general, and that of federal courts special,[15] an indictment in a state court need not negative jurisdiction.[16]

State courts of Oklahoma have jurisdiction to proceed with criminal cases, not of a federal character, pending and not finally disposed of in the district courts of Oklahoma Territory and in the United States courts of Indian Territory, when the state was admitted to the union,[17] actual prosecution not having been commenced. The district court of the county in which the crime was committed has jurisdiction to proceed in such case.[18]

of crimes committed in neighboring state. Hylton v. Com., 29 Ky. L. R. 64, 91 SW 696. No jurisdiction where offense, violation of crop pooling law, took place in Ohio, if at all. O'Bannlon v. Com. [Ky.] 113 SW 907.

5. Bare arrest of person and preliminary examination before justice, no indictment being returned, did not attach jurisdiction so as to exclude jurisdiction of district court. Greathouse v. State, 53 Tex. Cr. App. 218, 109 SW 165.

6. In a case in which a justice of the peace and the circuit court have concurrent jurisdiction, the jurisdiction of the latter does not attach exclusively until defendant has been arrested under the indictment. Smithey v. State [Miss.] 46 S 410.

7. Petit larceny, second offense, is only misdemeanor, not felony; hence, where one accused of that crime is first brought before police court, that court has exclusive jurisdiction, and has no power to order him bound over to grand jury in absence of motion under Code Cr. Proc. § 57. People v. Craig, 112 NYS 781.

8. Acquittal of assault in mayor's court held bar to prosecution in state court. Brooke v. State [Ala.] 46 S 491. Plea setting up such acquittal held sufficient. Id. Conviction in justice court may be pleaded in bar of prosecution in circuit court. Smithey v. State [Miss.] 46 S 410.

9. Fine only imposed. Imprisonment also required. Smithey v. State [Miss.] 46 S 410.

10. No fraud or collusion shown. Smithey v. State [Miss.] 46 S 410.

11. That defendant in criminal case is confined in jail under sentence for felony pronounced by superior court is no ground why he cannot be tried on misdemeanor in city court. At any rate, being before the court for trial, he cannot object that his presence there was illegally obtained. Coleman v. State [Ga. App.] 62 SE 487.

12. Common-law offenses cannot be punished by federal courts without federal statutory authority. State v. Morris [N. J. Law] 68 A 1103.

13. Rev. St. U. S. § 539. State v. Morris [N. J. Law] 68 A 1103. Federal court held to have jurisdiction over prosecution of crime denounced by state law of New Jersey committed in post-office on land purchased with consent of state and jurisdiction over which had been ceded by the state to the United States. United States v. Andem, 158 F 996.

14. State courts have no jurisdiction to try assault and battery case where offense was committed on territory ceded to United States with consent of state, state having ceded jurisdiction to United States. State v. Morris [N. J. Law] 68 A 1103. Where there is no proof that building used as post-office, in which assault was committed, was on ground owned by the United States, but proof is that building was leased by postmaster, question of jurisdiction of state is not material. Brooks v. State [Ala.] 46 S 491.

15. State v. Buckaroo Jack [Nev.] 96 P 497.

16. Indictment of Indian for killing another Indian need not show that crime was not committed on Indian reservation. State v. Buckaroo Jack [Nev.] 96 P 497.

17. State courts are successors of such territorial and United States courts. Higgins v. Brown [Okl.] 94 P 703.

18. Indictment for murder alleged to have been committed within jurisdiction of United States court for Northern district of Indian

*Transfer.* See 10 C. L. 61—Statutes usually govern the transfer of causes from one court to another.[19] In Kentucky, where it develops on the trial that the court has no jurisdiction, the offense having been committed in another county, the case may be transferred to such county,[20] but it cannot be there tried upon the same indictment.[21] On a preliminary hearing before a United States commissioner to determine whether defendants shall be held and removed to another district for trial, it is necessary to determine whether any offense against the United States has been committed [22] and whether there is reasonable cause to believe defendants guilty.[23] In such proceeding the indictment is presumptive evidence of probable cause as against defendants,[24] though other competent evidence may be received on the issue.[25] If the indictment produced as evidence of probable cause is framed in the language of the statute with ordinary averments of time and place, and sets out the substance of the offense in language sufficient to apprise accused of the nature of the charge against him, it is sufficient to justify removal even though it may be open to a motion to quash or in arrest of judgment in the court in which it was originally filed.[26] That it appears in such proceedings that acts have been committed which could be prosecuted in the district where the proceedings are had is no reason to deny the removal, when it also appears that accused may properly be proceeded against in the district where the indictment has been filed.[27] Removal may be had from another district to the District of Columbia, though the offense charged is a common-law offense.[28]

§ 3. *Place of prosecution and change of venue.* See 10 C. L. 61—Usually the prosecution must be in the county where the offense was committed. But the matter is largely controlled by statute, and in some cases an offense may be prosecuted in either of two or more counties.[29] In the notes are given decisions as to the venue of the

Territory, and pending in said court on admission of state into Union, is cognizable in district court of state in county where offense was committed. Higgins v. Brown [Okl.] 94 P 703. Same holding as to crime of assault with intent to kill with a deadly weapon. Ex Parte Brown [Okl.] 94 P 556. Same holding as to crime of receiving stolen goods. Ex parte Ellis [Okl.] 94 P 656. No indictment for murder being returned nor prosecution commenced prior to the admission of the state, district court of county where committed had jurisdiction. Ex parte Bailey [Okl.] 94 P 653. Indictment for manslaughter, committed under laws of Indian Territory, returned after admission of Oklahoma as state, no prosecution having been begun prior to such date, cognizable in district court in county where offense committed. Ex parte Buchanen [Okl.] 94 P 943. Same holding in embezzlement case, complaint having been filed by United States commissioner, warrant issued, and prisoner apprehended prior to admission of Indian Territory as state, and indictment filed and prosecution commenced thereafter. Ex parte Curiee [Okl.] 96 P 414.

19. Order transferring cause from district to county court need not set out name and nature of offense charged. Setting it out is surplusage and immaterial. Massie v. State, 52 Tex. Cr. App. 648, 107 SW 846. Where, after change of venue from police court to justice of peace, defendant appeared and expressly waived all informalities and irregularties, and submitted to trial without objection, he cannot object to irregularities in transfer of cause, if justice has jurisdiction of subject-matter. Ex parte Graye, 36 Mont. 394, 93 P 266. Entry on minutes of city court of order of judge of superior court directing transfer of certain indictments for misdemeanors to city court, where such transfer is authorized by law, is sufficient to give city court jurisdiction of the transferred cases. Coleman v. State [Ga. App.] 62 SE 487.

20. Gearhart v. Com., 33 Ky. L. R. 989, 112 SW 572.

21. Since accused could not be convicted under charge of crime in another county, he should be held to answer to new indictment. Gearhart v. Com., 33 Ky. L. R. 989, 112 SW 572.

22, 23. Pereles v. Weil, 167 F 419.

24. Pereles v. Weil, 157 F 419. Certified copy of indictment is sufficient to make out prima facie case of probable cause in proceeding for removal. United States v. Barber, 157 F 889.

25. In proceedings to remove persons from one federal district to another where they were charged with conspiracy to defraud the United States of public lands, entries in the General Land Office showing certificates of purchase to have been issued more than 8 years before filing of indictment were admissible on question of probable cause. United States v. Black [C. C. A.] 160 F 431.

26, 27. United States v. Wimsatt, 161 F 586.

28. Commission of common-law offense against United States is indictable in District of Columbia. United States v. Wimsatt, 161 F 586.

29. See following citations; also topics dealing with particular crimes.

offense of homicide,[30] conspiracy,[31] conversion,[32] theft,[33] receiving stolen property,[34] discrimination in freight rates under federal statute,[35] violation of statute requiring maintenance of railway station,[36] and violation of statute regulating form of corporate advertisements.[37]

*Change of venue.*[See 10 C. L. 62]—The right to a change of venue is not absolute [38] but rests upon statute. Thus the right may be denied as to certain cases [39] or may be limited to but one change.[40] In some states the state may secure a change of the place of trial under the same circumstances as a defendant may,[41] and statutes which so provide are constitutional.[42] In any case statutory requirements as to procedure must be complied with and some statutory ground for a change must be shown, the burden being upon defendant to make the proper showing.[43] Illustrative holdings as to notice of the application [44] and other prerequisites,[45] the form and sufficiency of the application and supporting affidavits,[46] power and duty of courts to hear the application and act upon it,[47] procedure at hearing, and scope of inquiry,[48] are given

30. By statute in some states, homicide may be prosecuted either in county where injury was inflicted or in that where death occurred. Cr. Code 1902, § 119. State v. McCoomer, 79 S. C. 63, 60 SE 237.

31. An indictment for conspiracy in the federal courts may be prosecuted either where the conspiracy was formed or where any overt act done to effect it takes place. Arnold v. Weil, 157 F 429.

32. Conversion of money by draft drawn on St. Louis bank occurred in St. Louis, though defendant was in another county. State v. Mispagel, 207 Mo. 557, 106 SW 513.

33. Offense of theft, committed within 400 yards of county line, may be prosecuted in either county, under statute. McElroy v. State, 53 Tex. Cr. App. 57, 111 SW 948.

34. Venue of crime of receiving stolen property is in county where it was received. No jurisdiction in county to which property was later sent. State v. Pray [Nev.] 94 P 218.

35. Requirement that prosecution of crimes against United States be had in district where offense was committed as required by U. S. Const. 6th Amend. is not violated by Elkins Act of Feb. 19, 1903, permitting offense of obtaining transportation of goods at less than publisher's rates to be tried in any federal district through which such transportation was conducted. Armour Packing Co. v. U. S., 207 U. S. 590, 52 Law. Ed. 354.

36. Violation of statute by failure to erect station (railway) at certain point was committed at that place, and not where office of company was located. Louisiana & A. R. Co. v. State, 85 Ark. 12, 106 SW 960.

37. Prosecution for failure to use word "incorporated" after name in advertising matter must be in county where corporation has principal office or agent for service, not in any county where advertisement is published. Paracamph Co. v. Com. [Ky.] 112 SW 587.

38. Glazier v. Ingham Circuit Judge [Mich.] 15 Det. Leg. N. 465, 116 NW 1007.

39. Change of venue is not authorized in misdemeanor cases in Texas. Fox v. State, 53 Tex. Cr. App. 150, 109 SW 370.

40. Defendant entitled to only one change of venue. Gibson v. State, 53 Tex. Cr. App. 349, 110 SW 41.

41. Rev. Code 1905, § 9931. Zinn v. Morton County Dist. Ct. [N. D.] 114 NW 472. Thus a change of venue may be had by the state in North Dakota, on account of local prejudice against enforcement of the law involved. Prohibition law. Id.

42. Zinn v. Morton County Dist. Ct. [N. D.] 114 NW 472.

43. The burden is upon defendant to show his inability to obtain a fair and impartial trial in the county in which the offense was committed. Showing insufficient. Johnson v. State [Okl. Cr. App.] 97 P 1059.

44. Statute shortening notice of application for change of venue from 10 to 4 days is valid. State v. Hunter, 79 S. C. 91, 60 SE 226.

45. Under Virginia practice, an application for change of venue on the ground of difficulty in obtaining qualified jurors must be preceded by an application to summon jurors beyond the county, but such preliminary application is not necessary where change of venue is asked for on the ground of local feeling and prejudice. Uzzle v. Com., 107 Va. 919, 60 SE 52.

46. In Texas an application for change of venue must be supported by the affidavits of two credible persons, residents of the county where the prosecution is instituted. Gibson v. State, 53 Tex. Cr. App. 349, 110 SW 41. This requirement is not met by the affidavit of defendant and one other person. Id. Denial of change of venue not error where application was not supported by affidavits of credible residents of the county as required by Code Cr. Proc. art. 615, though accused claimed he was unable to obtain them on account of local prejudice, court having refused to grant application of its own motion, as authorized by art. 613. Macklin v. State, 53 Tex. Cr. App. 197, 109 SW 145.

47. Under statutes, courts of general sessions and of common pleas may be open at same time, and application for change of venue made to former when common pleas was in session was made at a "regular term." State v. Hunter, 79 S. C. 91, 60 SE 226. Under Laws 1907, p. 210, creating an additional division of the criminal court of Jackson county, and providing for changes of venue, either division is to receive and try changes of venue from the other independent of the will of the judge of division, and that judge has no power to

in the notes. Whether the application should be granted or refused depends upon the circumstances shown.[49] The matter is one resting very largely in the sound discretion of the trial court,[50] the exercise of which is not reviewable except for abuse resulting in prejudice,[51] and the same rule applies to the selection of a county to which the cause is transferred.[52] An order granting change of venue, before issue joined, is premature.[53] Where a change of venue has been had, the court of the county to which the trial is transferred is invested with complete and exclusive jurisdiction,[54] and the court of the county in which the prosecution originated can-

call in another judge. State v. Fort, 210 Me. 512, 109 SW 737. The grant of power to try changes of venus carries with it the power to meet, open court, try the cass, and adjourn. Id. The absence of counter affidavits does not deprive the judge of his discretion to grant or refuse an application for a change of venue on account alleged prejudice of inhabitants of the county in which trial is to occur, but the judge may weigh and consider what he himself judicially knows of the development of the trial, of the situatien of the case, and of the facts alluded to in the applicatien. Shields v. People, 132 Ill. App. 109.

**48.** A motion for change of venue in felony case must be heard on affidavits. State v. Kline [Or.] 93 P 237. A request to allow an amendment to a motion for change of venue should specify the respect in which it is to be amended. Kinslew v. State, 85 Ark. 514, 109 SW 524. The Arkansas statute requiring a petition for a change of venue to be supported by the affidavits of two credible persons does not contemplate that the truth or falsity of the facts shall be inquired into on the hearing. The inquiry must be confined to the question whether affiants are credible persons. Not error to exclude testimony of sheriff as to facts. Strong v. State, 85 Ark. 536, 109 SW 536. State only sought te prove denial of one fact stated in accused's petition for change of venue, and court refused to receive evidence from either side. Held, facts stated in petition must be taken as true, except that which state sought te disprove. Uzzle v. Com., 107 Va. 919, 60 SE 52. On hearing of application for change of venue, witnesses should have been allowed to testify that "sentiment was against the man," but not that "he could not have a fair trial;" but latter was harmless where all facts were testified to. State v. Vickers, 209 Mo. 12, 106 SW 999.

**49. Denial of motion proper,** it not being shown that defendant could have fairer or more impartial trial in another county. Glazier v. Ingham Circuit Judge [Mich.] 15 Det. Leg. N. 465, 116 NW 1007. Denial of motion held within discretien of court. People v. Boyd, 151 Mich. 577, 15 Det. Leg. N. 36, 115 NW 687. Evidence insufficient to show such local prejudice as to prevent defendant from having a fair and impartial trial. State v. Vickers, 209 Mo. 12, 106 SW 999. Refusal of change within court's discretion, court having heard evidence on credibility of affiants. Strong v. State, 85 Ark. 536, 109 SW 536. Motion properly denied where persons making supporting affidavits admitted that they had been in only one locality in the county and did not even know whether persons they had talked to were inhabitants of the county. Kinslow v. State, 85 Ark. 514, 109 SW 524. Proper to overrule application for change of venue where persons making affidavit that inhabitants were prejudiced swore recklessly, it appearing on their examination that they knew only a few people in a small hamlet. Duckworth v. State [Ark.] 111 SW 268. Second application properly disregarded, first having been denied and no facts warranting reinvestigation appearing. Id. Defendant not entitled to change of venus where he and deceased were strangers in community and jurors testified that they knew nothing about the crime or parties and would give accused an impartial trial. Cason v. State, 52 Tex. Cr. App. 220, 20 Tex. Ct. Rep. 339, 106 SW 337. That sheriff had put a similar hypothetical case te judge and asked whether it would be a violation of law did net disqualify the judge. Owens v. State, 52 Tex. Cr. App. 362, 107 SW 548. Where judge is disqualified and requests another to sit and hear the case, and he is also unable to hear it, and a third is requested, a change of venue need not be granted. State v. Leng, 209 Mo. 366, 108 SW 35. That court indicated in the afternoon of one day that he would grant change of venue, but next day denied the motion without receiving other evidence, was not ground for new trial. Glover v. State, 129 Ga. 717, 59 SE 816.

**Change of venue should have been granted** where feeling of white people against accused's race was such that military had to be called out and posse comitatus summened by court te aid sheriff in protecting accused, and jail of another county had to be used, and such condition continued during trial and during proceedings for review. Uzzle v. Com., 107 Va. 919, 60 SE 52. Change of venus should have been granted on account of local feeling and prejudice, on showing made. Johnson v. Com., 32 Ky. L. R. 1117, 107 SW 768. Evidence held to shew that accused (negro, charged with shooting white man) could not have fair and impartial trial in county. Error to refuse change of venue. Anderson v. State [Miss.] 46 S 65. If it appears from the evidence offered in suppert of a motion for a change of venue that it is improbable the defendant can secure a fair and impartial trial or an unbiased or unprejudiced jury in the county of his residence, it is the duty of the court to order a change of venue. State v. Dickerson, 7 Ohio N. P. (N. S.) 193.

**50, 51.** Glazier v. Ingham Circuit Judge [Mich.] 15 Det. Leg. N. 465, 116 NW 1007.

**52.** No abuse of discretion in transferring cause under circumstances shown. Zinn v. Morton County Dist. Ct. [N. D.] 114 NW 472.

**53.** Writ of mandamus issued ordering judge to set aside such order. Bresnahan v. Acting Cass Circuit Judge [Mich.] 15 Det. Leg. N. 805, 117 NW 1053.

**54.** Keefe v. Carbon County Dist. Ct., 16

not, after a change of venue, proceed to try defendant upon a second information or indictment charging the same offense.[55] The clerk may be allowed to place file mark upon papers, after transfer, nunc pro tunc, papers having been properly received and filed.[56]

§ 4. *Indictment and information. A. Necessity of indictment.* See 10 C. L. 64—Constitutional and statutory provisions control the question whether prosecution must be by indictment [57] or whether it may be by information or indictment.[58] In New York a court of special sessions of the city of New York may be divested of jurisdiction in misdemeanor cases by a certificate, issued by a judge of a court of general sessions or other officer authorized by statute, that it is reasonable that the charge against defendant should be prosecuted by indictment.[59]

§ 4. *B. Finding and filing and formal requisites.* See 10 C. L. 61

*Indictment.* See 10 C. L. 65—No preliminary examination is essential to the finding of an indictment by a grand jury.[60] Where a bill is founded upon a constable's re-

Wyo. 381, 94 P 459. Since a defendant cannot be subject to trial at the same time upon two informations or indictments charging the same offense. Id.

55. Two informations charging murder of same man at same time and place charge same offense, though one charges two persons jointly with the crime, one being defendant in first information. Keefs v. Carbon County Dist. Ct., 16 Wyo. 381, 94 P 459.

56. Papers were treated as properly filed, and neglect to place file mark on was oversight. Rios v. State [Tex. Cr. App.] 112 SW 299.

57. Felony can be prosecuted only upon indictment. People v. Craig, 112 NYS 781. Infamous offenses can only be tried, in the federal courts, upon indictment. Charge of violation of U. S. Rsv. St. § 5440 is an infamous offense. United States v. Wells, 163 F 313. A statute authorizing prosecution of the offense of keeping a disorderly house otherwise than upon an indictment by the grand jury is invalid on constitutional grounds. Atlantic City v. Rollins [N. J. Law] 69 A 964. Under Rhode Island statutes a violation of act regulating practice of dentistry must be prosecuted by indictment, and not by complaint and warrant. State v. Rosenkrans, 28 R. I. 474, 68 A 309. Failure of railroad company to build station at certain point properly prosecuted by indictment under Laws 1905, p. 265. Louisiana & A. R. Co. v. State, 85 Ark. 12, 106 SW 960.

58. Const. art. 2, § 23, authorizes legislature to change, regulate, or abolish grand jury system; hence legislature has power to provide for prosecution by indictment or information. Saleen v. People, 41 Colo. 317, 92 P 731. A prosecution by information for a felony is not repugnant to the fifth amendment to the federal constitution. Mo. Const. art. 2, § 12, providing for prosecution by indictment or information, is valid. Ex parte McLaughlin, 210 Mo. 657, 109 SW 626. Prosecuting attornsy may file information when grand jury are not in actual session, having adjourned. Ball. Ann. Codes & St. § 6802. State v. Strange [Wash.] 97 P 233. In Illinois, under constitution and municipal court act, the Chicago municipal Court has jurisdiction to try on information all violations of criminal laws punishable by fine or by imprisonment otherwise than in penitentiary. People v. Glowacki, 236 Ill. 612, 86 NE 368. If offense is one punishable either by fine or imprisonment in the penitentiary, or both by fine and imprisonment in penitentiary, then prosecution can be on indictment only. Id.

59. People v. Rosenberg, 112 NYS 316. The burden is upon accused to show that such application is reasonable. Id. While such application is addressed largely to the discretion of the judicial officer to whom it is presented, it may be said that it should not be granted unless it is made to appear (1) that a case presents intricate and complicated questions of fact, rendering a jury trial proper; (2) that it presents difficult questions of law; or (3) that a property right is involved; or (4) that a decision may be far-reaching in its effect and becoming a precedent which will regulats a matter of general interest; or (5) that the case is of exceptional character, and that defendant cannot, for some special reason, have a fair trial in the court of special sessions. Id. Charge against pawnbroker of violating Greater New York Charter, Laws 1901, p. 137, c. 466, § 317, in that he refused to exhibit property pawned and for which pawn ticket had been issued, held not to involve any question or right warranting issuance of certificate. Id. Where accused was police officer charged with misdemeanor in violating Pen. Code, § 289, his case was held exceptional and to involve a matter of public interest so as to make a jury trial desirable; hence granting of certificate that it was reasonable to prosecute by indictment hsld proper. People v. Willis, 112 NYS 368. Under Laws 1897, p. 600, committing trials of certain misdemeanors to court of special sessions subject to the power of certain judges to certify that it is reasonable that a charge should be prosecuted by indictment, one charged with violating Sabbath laws was entitled to such certificate. People v. Butts, 121 App. Div. 226, 105 NYS 677.

60. In the federal courts the grand jury may return an indictment based on evidence brought before them though there has been no preliminary hearing before a commissioner. United States v. Kerr, 159 F 185. Preliminary examination before magistrate not essential to finding of indictment by grand jury; hence immaterial that preliminary proceedings had been commenced and dismissed before indictment found. State v. Gieseke, 209 Mo. 331, 108 SW 525.

turn, the offense charged in the bill must be identical with that, the essentials of which appear in the constable's return.[61] The grand jury must be legally constituted.[62] Irregularities in the drawing of the grand jury [63] or in proceedings before it [64] which do not prejudicially affect the rights of the accused person are immaterial, but a violation of accused's constitutional rights invalidates the indictment.[65] An indictment is not found until it is presented to the court.[66] The indictment should show that it was returned by a grand jury [67] and that the grand jurors were properly qualified, though in the latter respect the bill may be aided by the caption [68] or by statements in the record.[69] An indictment otherwise legally returned will not be set aside solely because returned on a legal holiday.[70] Holdings as to signature [71] and endorsements [72] are given in the note.

61. Court of indictment held properly quashed where it charged common-law offense of unlawfully obstructing highway, while constable's return charges taking and using public road under act Feb. 19, 1849, P. L. 79, without constructing new road to take its place. Commonwealth v. Huntingdon & B. T. Mt. R. & Coal Co., 35 Pa. Super. Ct. 416. Count of indictment charging taking and using public road under act Feb. 19, 1849, P. L. 79, without substituting new one in its place, held sufficient where it followed constable's return and particularly could have left defendant in no doubt as to offense intended to be charged. Commonwealth v. Huntingdon & Broadtop Mountain R. & Coal Co., 35 Pa. Super. Ct. 416.

62. Indictment by grand jury consisting originally of 15, reduced to 14, and then increased to 15, void. Reduction must be made, if at all, to 13, under statute. Osborn v. State [Ala.] 45 S 666.

63. Indictment will not be quashed on ground that panel of grand jurors was not original panel made by jury commissioners where, while it appeared blank upon which jury list was written was signed by commissioners before names were written thereon, it was shown list was filled in under direction of clerk of jury commissioners from list made out by him at time jury was drawn and lists certified were correct and that he had list of jurors and that it contained the same names as list returned by commissioners to clerk of court of quarter sessions. Commonwealth v. Hughes, 33 Pa. Super. Ct. 90. An indictment will not be quashed because the sheriff failed to lock the jury wheel and cause it to be sealed with the seal of himself and commissioners after completing the selection and depositing of the juror's names in the wheel where the wheel would have been immediately opened for the selection of the jury and there was no possibility of interference by unauthorized persons. Commonwealth v. Hughes, 33 Pa. Super. Ct. 90; Commonwealth v. Tilly, 33 Pa. Super. Ct. 35.

64. Accused cannot complain of a charge to the grand jury, general in character, before the petit jury was impanelled. State v. Owens, 79 S. C. 125, 60 SE 305. General instructions to a grand jury cannot constitute ground for reversal of a verdict of a petit jury. State v. Walker, 79 S. C. 107, 60 SE 309. Presence of deputy attorney general in grand jury room during investigation of matter brought before jury by attorney general at direction of governor no ground for dismissal. People v. Acritelli, 57 Misc. 574, 110 NYS 430. Consideration of evidence relating to more than one offense of the same kind, at the same time, is not improper. Id.

65. An indictment based on testimony given by accused before the grand jury pursuant to a subpoena should be quashed. Code 1896, § 1792. No person may be prosecuted for matters so disclosed. State v. Bramlett [Miss.] 47 S 433. Gen. St. 1902, § 664, providing that no verdict shall be set aside on account of any irregularity in summoning the jury, does not apply to a case where jurors were improperly drawn by deputy sheriff instead of by clerk and an appeal taken from a ruling disallowing a challenge duly taken to an illegal panel. State v. McGee, 80 Conn. 614, 69 A 1059.

66. Until that time, grand jury may withdraw it; hence improper to question accused before grand jury in another case, but relative to matters for which an indictment has been voted against him. People v. Flaherty, 110 NYS 154.

67. Indictment returned into federal court, reciting that the "grand inquest" of the United States of America, inquiring for, etc., held not objectionable as failing to show that it was returned by a grand jury. Geiger v. U. S. [C. C. A.] 162 F 844.

68. While the caption is not a part of the indictment for the purpose of amendment, it may be used to aid the indictment. State v. Moore [N. J. Err. & App.] 68 A 165. Thus, where the caption shows that the grand jurors were all sworn, no further statement of their qualification is necessary. Objection was that indictment did not show privilege to take an affirmation in place of an oath, there being a recital of a presentment on "oaths and affirmations." Id.

69. Statement in record that "grand jurors were duly sworn" is sufficient as against motion to quash indictment on ground that record failed to show foreman of grand jury was properly and separately sworn. Shields v. People, 132 Ill. App. 109.

70. Macklin v. State, 53 Tex. Cr. App. 197, 109 SW 145.

71. Indictment for commission of offense against election law, prosecuted by attorney general or assistant, is not demurrable because not signed by district attorney. Code Cr. Proc. § 276 not mandatory. People v. Foster, 112 NYS 706. Signature of prosecuting attorney as such on indictment without adding name of county, held sufficient. State v. Walker, 129 Mo. App. 371, 108 SW 615.

72. Indictment endorsed: "This is a true

*Information.*[See 10 C. L. 68]—A preliminary hearing before and commitment by a magistrate [73] is sometimes prerequisite to the filing of a valid information,[74] and usually there must be a proper complaint affidavit or other accusation,[75] and the information and preliminary complaint must correspond and charge the same offense,[76] or at least be based upon the same transaction.[77] An affidavit on which an information is based is sufficient if it charges the elements of the offense.[78] An information can be exhibited only by the authorized public prosecutor.[79] In the notes are holdings relating to signature,[80] verification,[81] endorsement of names of witnesses,[82] and filing [83] of the information.

bill. Marion Phillips, Foreman of Grand Jury Filed Dec. 5th, 1906. Josiah M. Harrell, Clerk." Held sufficient to show indictment returned by grand jury into proper court. State v. Campbell, 210 Mo. 202, 109 SW 706. If an indictment sufficiently charges an offense under any statute, it is immaterial that the wrong statute is endorsed on the indictment. Wechsler v. U. S. [C. C. A.] 158 F 579. The **names of witnesses** who testify before the grand jury or who are known to the state's attorney when the information is filed must be endorsed on the indictment or information. Rev. Code Cr. Proc. §§ 206, 216, 263. State v. Matejousky [S. D.] 115 NW 96. Failure to endorse the names of such witnesses is ground for setting aside the indictment or information. Id. Failure to endorse names of witnesses on indictment does not invalidate it nor prevent the witnesses whose names are omitted from testifying. Dowell v. Com., 32 Ky. L. R. 1344, 108 SW 847. Failure to endorse names of all witnesses on information not ground for quashal where accused knew they had been summoned and prosecuting attorney testified that he indorsed the names of all he knew about at the time. State v. Jeffries, 210 Mo. 302, 109 SW 614. Names of witnesses may be permitted to be endorsed pending a motion to quash. Id.

**73.** See, also, Arrest and Binding Over, 11 C. L. 278.

**74.** In Utah an information cannot be filed until after examination and commitment by a magistrate, unless such examination be waived. Where one information was filed after examination and commitment, second charging separate offense, could not be filed after first was quashed, without new examination. State v. Jensen [Utah] 96 P 1085. Information was filed and bench warrant was then issued and accused arrested. Procedure held not to violate his constitutional rights. State v. Ju Nun [Or.] 97 P 96. That person jointly accused with defendant was fugitive from justice and had never been granted preliminary hearing held not ground for quashal of information against defendant. State v. Jeffries, 210 Mo. 302, 109 SW 614. Under Pen. Code, § 809, an information cannot be legally filed until the committing magistrate has made or endorsed on the complaint an order holding accused to answer. People v. Sienfsen, 153 Cal. 387, 95 P 863.

**75.** Complaint is jurisdictional prerequisite of information. Ross v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 528, 106 SW 340. Complaint charging an offense may be sworn to before county judge. Stepp v. State, 53 Tex. Cr. App. 158, 109 SW 1093. Wife may sign and file complaint against husband for rape. Harris v. State [Neb.] 114 NW 168. Where the affidavit on which an information is based conforms to statutory requirements, the information cannot be attacked on the ground that the person who verified it had no personal knowledge of the commission of the offense charged. 3 Mills' Ann. St. Rev. Supp. § 1432h. Wickham v. People, 41 Colo. 345, 93 P 478.

**76.** Variance between affidavit charging assault on Dec. 29, 1907, and information charging it on Dec. 29, 1906, held fatal. Lackey v. State, 53 Tex. Cr. App. 459, 110 SW 903. That affidavit on which accusation is based is defective in not properly denominating or describing the offense charged is not ground for quashing the accusation if the identity of the offense set forth in the affidavit with that charged in the accusation is sufficiently shown. Crawford v. State [Ga. App.] 62 SE 501.

**77.** Where complaint charged assault on female under sixteen with intent to ravish by force, and evidence showed only intent to ravish with consent, accused not entitled to dismissal for failure of evidence, since new information properly charging offense could be filed without being objectionable as variance from complaint. People v. Chamblin, 149 Mich. 653, 14 Det. Leg. N. 628, 113 NW 27.

**78.** Need not be as technically complete as information itself. State v. Santhuff [Mo. App.] 110 SW 624.

**79.** No original prosecution can be instituted in court of record except by presentment of indictment by grand jury or by information exhibited by county attorney or some other officer authorized by law. Evans v. Willis [Okl.] 97 P 1047. Where pretended information was exhibited by unauthorized private prosecutor, it was not capable of amendment and gave court no jurisdiction. Id.

**80.** Signature as "prosecuting attorney" sufficient without adding name of county. State v. Campbell, 210 Mo. 202, 109 SW 706.

**81.** Information signed by state's attorney need not be verified. Hall v. People, 134 Ill. App. 559; Giroux v. People, 132 Ill. App. 562.

**82.** It is not essential that the names of the witnesses upon whose testimony an information was returned be indorsed on the back thereof. Hall v. People, 134 Ill. App. 559.

**83.** Information in noncapital case may be filed in clerk's office without leave of court, under statutes. State v. Petrich [La.] 47 S 438. Papers are filed when deposited with and received by the clerk. Starbeck v. State, 53 Tex. Cr. App. 192, 109 SW 162. Where papers have been properly and legally filed, but the clerk has neglected to make a nota-

*Presentment.*[See 10 C. L. 67]

*Affidavits.*[See 10 C. L. 68]

(§ 4) *C. Requisites and sufficiency of the accusation. General rules.*[See 10 C. L. 68]—The pleading cannot be aided by inference or presumption, since presumptions are in favor of accused,[84] but it is held that reasonable implications from facts clearly alleged may be properly made in determining the true meaning of the accusation.[85] The descriptive part of an indictment is to be construed with relation to the charging part.[86] The state in its pleading need not anticipate or negative any defense of accused,[87] and the taking of necessary steps preliminary to information need not be alleged.[88] Matters of which courts take judicial notice need not be set out.[89]

*Certainty.*[See 10 C. L. 70]—Every essential element of the crime sought to be charged must be alleged [90] directly and positively, and not merely by way of recital or as a conclusion of the pleader,[91] and with sufficient clearness, particularity and certainty,[92] as to inform accused of the nature and character of the charge against

tion thereof on them, the court may order the indorsement to be made nunc pro tunc. Affidavit and information. Id. In Nebraska an information filed when the court is not in session is void. Error not waived by demurrer, plea of not guilty and trial. Writ of habeas corpus granted after conviction and sentence of imprisonment. Cubbison v. Beemer [Neb.] 116 NW 862.

84. Indictment must show commission of crime; cannot be aided by presumptions, the presumption being in favor of innocence. People v. Schmitz [Cal.] 94 P 419. Presumptions against accused cannot be indulged in considering sufficiency of indictment. State v. Metsker, 169 Ind. 555, 83 NE 241. Any doubt as to what an indictment charges is to be resolved in favor of the accused. Indictment for conspiracy to commit subornation of perjury under stone and timber act held not to charge offense in connection with final proofs. Williamson v. U. S., 207 U. S. 425, 52 Law. Ed. 278.

85. United States v. Barber, 157 F 889.

86. Commonwealth v. White, 33 Ky. L. R. 70, 109 SW 324.

87. State v. Bridgewater [Ind.] 85 NE 715.

88. The fact that defendant has been given a preliminary examination need not, in Missouri, be alleged in the information. State v. McKee, 212 Mo. 138, 110 SW 729.

89. Regulations made by an executive department, pursuant to authority delegated by congress, have the force of law, and courts take judicial notice of their existence and provisions. Rules violated need not be set out in indictment either in terms or by number. United States v. Moody, 164 F 269.

90. Smith v. U. S. [C. C. A.] 157 F 721. Nothing will be taken by intendment or implication. State v. Hall, 130 Mo. App. 170, 108 SW 1077. Indictment is insufficient if all allegations, taken as true, fail to charge an offense. Id. Indictment insufficient to charge criminal negligence in operation of railroad train, resulting in death of certain named persons. State v. MacDonald [Minn.] 117 NW 482.

91. No material matter should be introduced wholly by way of argument, conclusion, or recital. Hewitt v. State [Ind.] 86 NE 63. Charge must specifically describe offense; mere conclusions of law insufficient. State v. Bridgewater [Ind.] 85 NE 715. Monopoly in coal not properly charged where essential facts were shown only by intendment, implication, or inference. State v. Eastern Coal Co. [R. I.] 70 A 1. Indictment for maintaining nuisance must state facts constituting the nuisance; allegation that nuisance was permitted is mere conclusion. Louisville & N. R. Co. v. Com. [Ky.] 113 SW 517. Statement in information that it was based on affidavit of another held not to render information defective as not directly alleging facts, they being also alleged. Alderson v. State, 53 Tex. Cr. App. 525, 111 SW 738.

92. Language used must be such as to inform one of ordinary understanding of crime charged. State v. McGowan, 36 Mont. 422, 93 P 552. Averments of the essential elements of the offense which are plain and intelligible to the common understanding are, as against a demurrer, entirely sufficient without regard to their technical accuracy. Smith v. U. S. [C. C. A.] 157 F 721.

**Held sufficient:** Indictment held not so contradictory in terms, ambiguous or uncertain, as to charge failure to perpetrate attempt, instead of failing to perpetrate offense which he attempted. Commonwealth v. Rodman, 34 Pa. Super. Ct. 607. Indictment, under Elkin's rebate law, held sufficient. Armour Packing Co. v. U. S., 209 U. S. 56, 52 Law. Ed. 681. Indictment charging burglary, and prior conviction of attempted burglary, approved. State v. Miller, 209 Mo. 389, 107 SW 1057. Indictment of one as accessary before the fact, alleging that he advised and encouraged perpetration of the crime, sufficient without alleging that he was not present. Larimore v. State, 84 Ark. 606, 107 SW 165. The Philippine Bill of Rights requiring accused to be informed of the nature and cause of the accusation against him, is satisfied where such complaint leaves no doubt that it means to charge the falsification of documents, contrary to the penal code of the islands. Paraiso v. U. S., 207 U. S. 368, 52 Law. Ed. 249. Indictment for larceny from insurance association held sufficient, under Code Cr. Proc. §§ 283, 284, providing that indictment is good if it sufficiently informs defendant of the accusation against him, and enables him to prepare his defense, and when record would be bar to second prosecution. People v. Mead, 109 NYS 163. Information before a magistrate charging that § 675 of Penal Code was violated by an act

him,[93] enable him properly to prepare his defense,[94] and to plead the result, whether conviction or acquittal, as his protection against another prosecution for the same offense.[95] Only the ultimate facts need, however, be alleged.[96] Introductory matter, or matter of inducement, need not be charged directly or in detail but may be alleged in general terms.[97] The entire indictment is to be considered in determining whether the offense is fully stated.[98]

An indictment in the form prescribed by statue,[99] or in the language of the statute creating and defining the offense,[1] or in language of equivalent meaning and import,[2] is sufficient, if the statute sets forth all the essential elements of the crime with sufficient particularity.[3] But, where the statute defines a crime in generic terms

endangering public peace, and openly outraging public decency, held sufficient in absence of any objection. People v. Keeper of Erie County Penitentiary, 109 NYS 531.

**Held insufficient:** Indictment held properly quashed for uncertainty. Wilkinson v. People, 226 Ill. 135, 80 NE 699. Information held insufficient to charge a crime by violation of Yonker's Sanitary Code, art. 15, § 144 (using certain building as boarding house which did not answer requirements), because not alleging a "willful" violation and not describing the acts done. People v. Potter, 112 NYS 298. Indictment failing to state time or place of offense properly quashed. State v. Glennen [Miss.] 47 S 560.

**93.** Smith v. U. S. [C. C. A.] 157 F 721. The charging part of the indictment must sufficiently advise accused in advance of the trial of the nature and character of the offense. Nurnberger v. U. S. [C. C. A.] 166 F 721. It will be presumed that accused is a person of common understanding. State v. Faulk [S. D.] 116 NW 72.

**94.** Smith v. U. S. [C. C. A.] 157 F 721. Crime charged must be shown with reasonable certainty by express averments, so as to enable court and jury to understand it, so that accused may be fully informed, and so that there will be no difficulty in determining what evidence is admissible thereunder. Stats v. Metsker, 169 Ind. 555, 83 NE 241.

**95.** Smith v. U. S. [C. C. A.] 157 F 721. An indictment will not be quashed for any defect in form unless it is so vague, indistinct, and indefinite, as to mislead and embarrass defendant in preparing his defense, or expose him after conviction or acquittal to substantial danger of another prosecution for same offense. Strobhar v. State [Fla.] 47 S 4. Indictment for conspiracy sufficient, if so clear and specific as to enable defendants to prepare for trial and to bar another prosecution for same charge. People v. Miles, 108 NYS 510.

**96.** Not necessary to plead evidence. State v. Whitman, 103 Minn. 92, 114 NW 363. Information sufficient, which charged all elements of offense with such certainty that judgment could be pronounced, though all details of act were not given. State v. Garrett [Kan.] 98 P 219. Under a statute providing for an increase in punishment in case defendant has been twice convicted, sentenced and committed to prison, the indictment charging such prior convictions and punishments need not state the location of prison or prisons to which defendant was committed. State v. Dowden, 137 Iowa, 573, 115 NW 211.

**97.** So held as to matter of inducement in perjury charge. People v. Tatum, 112 NYS 36. The use of the participle "being" is allowable in setting out matter of inducement, but not in alleging material issuable facts. Hewitt v. State [Ind.] 86 NE 63.

**98.** Smith v. U. S. [C. C. A.] 157 F 721.

**99.** Mills' Ann. St. § 1333 provides that indictment for obtaining money by confidence game, as defined by section 1332, shall be sufficient if in language of that section. Held, section 1333 not invalid as in violation of Const. art. 2, § 16, that accused is entitled to be informed of nature of accusation. Lace v. People, 43 Colo. 199, 95 P 802.

**1.** Usually, following the statutory language in describing the offense is sufficient. State v. Mitchell [Iowa] 116 NW 808. Indictment for misdemeanor is sufficient if it follows the language of the statute constituting the offense. State v. Merget, 129 Mo. App. 46, 107 SW 1015. Accusation sufficient which set forth offense in language of statute, and so plainly that nature of it could easily be understood. Holt v. State [Ga. App.] 62 SE 992. An information charging a statutory offense in the language of the statute, which fully defines the offense, is sufficient. Koppala v. State [Wyo.] 93 P 662. Code 1896, § 4305, defines offense (attempt to procure abortion), and also prescribes punishment. Indictment in statutory language sufficient. Thomas v. State [Ala.] 47 S 257. Indictment charging illegal sale of liquor in language of statute, sufficient. White v. Com., 107 Va. 901, 59 SE 1101. Indictment of dramshop keeper for selling on Sunday, sufficient, which followed language of statute. State v. Cragg [Mo. App.] 111 SW 856. Indictment substantially pursuing language of statute sufficient (intoxicating liquor sold to convict). Askew v. State [Ala.] 46 S 751. Language of statute charging neglect of public officer, sufficient. State v. Leeper, 146 N. C. 655, 61 SE 585.

**2.** Precise words of statute need not be used, if equivalent language is used and essential facts stated. Blevins v. State, 85 Ark. 195, 107 SW 393. Precise words of the statute need not be used if words of like import are used and all the facts which constitute the offense are stated. Sherrill v. State, 84 Ark. 470, 106 SW 967. Indictment for embezzlement, in language equivalent to that used in statute, sufficient, without setting out particular facts constituting the offense. Chamberlain v. State [Neb.] 115 NW 555. Information substantially in words of Gen. St. 1902, § 1359 (prohibiting pool selling), would have been good. State v. Scott, 80 Conn. 317, 68 A 258.

**3.** If every element of the crime as de-

only, an indictment in the language of the statute alone is insufficient.[4] In such case, additional facts must be alleged so as to inform accused with certainty as to the nature of the charge.[5] In some states it is held that the information or indictment should name the crime and state the acts constituting it,[6] and that a variance between the designation and the facts pleaded is fatal;[7] in others it is held that, where the facts set out clearly show an offense defined by statute, it is immaterial that the information designates the offense by another name.[8]

Where, by statute, the common-law distinction between principals and accessories has been abolished, one who at common law would be an accessory before the fact may be charged directly in the indictment with the commission of the offense,[9] and on his trial evidence may be received to show that he procured the crime to be committed,[10] or he may be charged as principal by setting out the facts which at common law would constitute him such accessory.[11] An indictment charging him directly with the commission of the offense is not objectionable on the ground that it does not sufficiently inform him of the nature and cause of the accusation.[12] But where the common-law distinction still exists, one charged as principal cannot be convicted upon evidence showing merely that he was an accessory.[13]

*Bad spelling and ungrammatical construction* See 10 C. L. 71 will not alone vitiate an accusation.[14]

scribed in the statute is charged in the indictment, it is sufficient. State v. Leasman, 137 Iowa, 191, 114 NW 1032. If the act or acts constituting the offense are clearly defined by statute, it is sufficient to charge the crime in the languags of the statute. Affidavit charging entering gambling house, sufficient as against motion to quash. State v. Bridgewater [Ind.] 85 NE 715. Indictment for kidnapping, following language of statute which states essentials of the crime, held sufficient. State v. Harrison, 145 N. C. 408, 59 SE 867. Indictment against bankrupt for concealing from trustee property of estate is sufficient if it follows language of statute (30 U. S. Stat. 554). United States v. Comstock, 161 F 644. Complaint in language of Gen. Laws, 1896, c. 74, § 5, as amended by Pub. Laws 1901, c. 925, prohibiting riding or driving "faster than a common traveling pace" in certain towns or parts thereof, charges the offense with sufficient particularity. State v. Smith [R. I.] 69 A 1061. Indictment in language of Pen. Code, § 246, making assault by convict, likely to produce great bodily injury punishable by death, is sufficient; need not allege that sentence was by court of competent jurisdiction. People v. Finley, 153 Cal. 59, 94 P 248.

4. Indictment under Burns' Ann. St. 1901. False claims to county commissioners must allege particulars of offense. State v. Metsker, 159 Ind. 556, 83 NE 241.

5. It is necessary in some way to individualize the offense charged, though statutory language is used. State v. Mitchell [Iowa] 118 NW 808. Where a statute upon which a prosecution is based defines the offense in generic terms only, the pleader must resort to particulars; mere language of statute insufficient. State v. Bridgewater [Ind.] 85 NE 715. General language of statute may be used, but must be accompanied by details sufficient to inform accused of the nature of the charge and the facts which he will be obliged to meet on the trial. Weston v. Ter. [Okl. Cr. App.] 98 P 360. Indictment in statutory language, for bigamy, held insufficient because not alleging all essential elements of offense (validity and existence of former marriage). Bryan v. State [Tex. Cr. App.] 111 SW 744. Indictment under Ky. St. 1903, § 1222, relating to sending of threatening letters, etc., in language of statute, insufficient. Letters sent should have been set out. Commonwealth v. Patrick, 32 Ky. L. R. 343, 105 SW 981. Indictment in language of Rev. St. 1899, § 2991, charging that defendant at certain time and place "sold intoxicating liquor in less quantity than three gallons," held insufficient. State v. Gibbs, 129 Mo. App. 700, 108 SW 688. Language of statute is sufficient only when statute is complete in itself, and when the acts set out in statute have been done or performed. Indictment for assault with deadly weapon insufficient which did not describe weapon. Commonwealth v. White, 33 Ky. L. R. 70, 109 SW 324. Affidavit charging the aiding of an escape, substantially in the language of the statute but also stating the facts out of which the offense arose and the acts done by accused, held sufficient. State v. Sutton [Ind.] 84 NE 824.

6. People v. Schlessel, 112 NYS 45. An indictment must charge or name a crime and must also allege facts showing the means or manner in which it is alleged to have been committed. People v. Foster, 112 NYS 705.

7. It is demurrable if it charges or names one crime and sets up facts constituting a different crime. Such indictment does not conform to Code Cr. Proc. § 323, subd. 2. People v. Foster, 112 NYS 705.

8. Information called crime arson, but facts showed crime under Pen. Code, § 548. People v. Morley [Cal. App.] 97 P 84. The name given the offense is immaterial if the facts charging an offense be clearly stated. People v. Izlar [Cal. App.] 97 P 685.

9, 10, 11, 12. State v. Whitman, 103 Minn. 92, 114 NW 363.

13. Distinction still exists in Nebraska. Skidmore v. State [Neb.] 115 NW 288.

14. Clerical errors immaterial. Omission of "is" and of "ed" from word "kill." Stall-

*Surplusage.*See 10 C. L. 71—Unnecessary words may be rejected as surplusage and are harmless so long as they do not negative the offense meant to be charged.[15]

*Venue.*See 10 C. L. 72—It must appear that the crime charged was committed within the jurisdiction of the court.[16] Reference to the caption may be had to aid allegations of the pleading,[17] and in Missouri, venue may be shown in the margin and need not be alleged in the body of the indictment.[18] An indictment in a state court need not negative federal jurisdiction.[19]

*Intent or knowledge.*[20]—Alleging a particular intent in the language of the statute is usually sufficient.[21] Where the offense is one prohibited out of regard for the public health or safety the names of specific persons, and an intent to injure them, need not be alleged.[22] Where the intent constitutes the aggravation material to the punishment prescribed, the facts need not be alleged with the same particularity as where the statute prohibits some particular act.[23] Where the indictment alleges that the offense charged was against the form of the statute, it need not allege that the acts were unlawful or unlawfully done, unless this is an element of the statutory definition,[24] nor is an allegation that the act was feloniously done necessary in the case of a felony, unless required by the statute,[25] but, in the case of common-law felonies, the term "felonious" or "felonious intent" must be used.[26]

*Time* See 10 C. L. 72 *and place.*—Time need not be alleged unless it is of the essence of the offense,[27] except in so far as it may be necessary to avoid prescription,[28]

worth v. State [Ala.] 46 S 518. Bad grammar will not vitiate an indictment, if two constructions are possible, that will be accepted which will uphold the proceedings. Strobhar v. State [Fla.] 47 S 4.

15. State v. Barrett, 121 La. 1058, 46 S 1016. Words without which information is sufficient may be treated as surplusage, and disregarded. State v. McGowan, 36 Mont. 422, 93 P 552. Indictment charged aiding, counseling, procuring, and consenting, to setting fire to property which was insured. Words "aiding, procuring, and consenting" could be rejected as surplusage and indictment would then charge substantive crime of "counseling" setting the fire under Crimes Act, § 126. State v. Brand [N. J. Law] 69 A 1092. Where an indictment contains facts sufficient to withstand a demurrer, other defective allegations may be disregarded as surplusage. Bailey v. Com. [Ky.] 113 SW 140. Surplusage in indictment is not ground for quashing it. United States v. Moody, 164 F 269.

16. Where accusation of embezzlement mentioned county, and stated offense was, "then and there," committed, venue was sufficiently shown. People v. Amer [Cal. App.] 96 P 401. Information held to show venue of embezzlement with required certainty. People v. O'Brian [Cal. App.] 97 P 679. Venue of larceny sufficiently alleged. McGinnis v. State [Wyo.] 96 P 525. Act June 6, 1900, c. 786, § 4, establishing district court for district of Alaska, and dividing such district into three divisions, gives court in each division jurisdiction throughout district. Hence, indictment is not defective for failing to state that offense was committed in division where indictment was returned. Griggs v. U. S. [C. C. A.] 158 F 572.

17. Where caption of information gave county of prosecution, and charging part of information alleged commission of offense in "said county of ———," the information was held to show venue of crime sufficiently. People v. Thompson [Cal. App.] 95 P 386.

18. Under Rev. St. 1899, § 2527, county named in margin is taken as venue and it need not be laid in body of indictment. State v. Long, 209 Mo. 366, 108 SW 35.

19. An indictment in a state court against an Indian for the killing of another Indian need not allege that crime was not committed on an Indian reservation. State v. Buckaroo Jack [Nev.] 96 P 497.

20. See 10 C. L. 72. Also topics relating to crimes in which specific intent is essential, such as Homicide, 9 C. L. 1636; Rape, 10 C. L. 1440.

21. Affidavit charging one with obtaining accommodations at hotel "with intent to defraud" sufficiently charges intent, the language of the statute being followed. Clark v. State [Ind.] 84 NE 984.

22. In charge of throwing stones at railroad train, names of persons immaterial, under Code § 5289, par. 6. State v. Leasman, 137 Iowa, 191, 114 NW 1032.

23. State v. Mitchell [Iowa] 116 NW 808.

24. McCaskill v. State [Fla.] 45 S 843. Indictment for carrying concealed weapon must charge that act was "unlawful." Whittaker v. State [Miss.] 45 S 145.

25. Allegation unnecessary under statutes. McCaskill v. State [Fla.] 45 S 843. Where a crime is purely statutory and is defined by statute, an indictment in the language of the statute need not allege a felonious intent. Statutory rape. Howerton v. Com., 33 Ky. L. R. 1008, 112 SW 606. The word "feloniously" need not be used in charging a statutory offense if the word is not used in the statute and the offense was not a felony at common law. Kidnapping. State v. Holland, 120 La. 429, 45 S 380.

26. Howerton v. Com., 33 Ky. L. R. 1008, 112 SW 606. Word "feloniously" is essential in all indictments for felonies, at common law or under statutes. Hocker v. Com., 33 Ky. L. R. 944, 111 SW 676.

27. Not of the essence in prosecution for illegal sale of liquor. State v. Conega, 121

nor is an allegation of the exact place usually necessary if commission within the court's jurisdiction appears.[29] Where the court may look into prior proceedings and ascertain when the statute of limitations was arrested, facts relied on to avoid the bar of the statute need not be alleged.[30] It is not necessary that an indictment, under a statute which has been repealed or amended since the offense was committed, allege in express terms that the crime charged was committed in violation of said statute while it was in force. It is sufficient if the time of the commission of the offense was prior to the change in the law.[31] Time and place need be directly alleged but once.[32]

*Designation of persons.*[See 10 C. L. 72]—In designating accused, the use of his initials [33] and of a well known abbreviation of his Christian name [34] have been held sufficient. Where his name is correctly stated several times, an error in one place is immaterial.[35] Where other persons must be designated, failure to set out their names or to allege that their names are unknown is fatal error.[36]

*Setting forth written or printed matter.*[37]—Indictment for certifying bank check when there were no funds in the bank, to cover the check, need not set out words of certification.[38]

*Description and ownership of property.*[39]—In Nebraska an allegation of ownership in any one of several owners is sufficient.[40]

La. 522, 46 S 614. Exact time need not be alleged in charge of rape on female under age of consent, time not being an essential element. People v. Sheffield [Cal. App.] 98 P 67.

**NOTE: Charging an offense at an impossible date** is a fatal defect in the absence of statute abrogating the common law, whether the date is in the future (State v. Sexton, 10 N. C. [Hawks] 184, 14 Am. Dec. 584; Dickson v. State, 20 Fla. 800; State v. Litch, 33 Vt. 67; State v. Ray, Rice L. [S. C.] 33 Am. Dec. 90; Markley v. State, 10 Mo. 291) or at a date too far past (State v. O'Donnell, 81 Me. 271, 17 A 66; Serpentine v. State, 1 How [Miss.] 256), although there are two decisions to the contrary (Conner v. State, 25 Ga. 515, 71 Am. Dec. 184; State v. Pierre, 39 La. Ann. 915, 3 S 60). Under the Missouri statute specifically remedying such defects, indictments placing the date of the offense on a future day have been sustained (State v. Burnett, 81 Mo. 121; State v. McDaniel, 94 Mo. 301, 7 SW 634; State v. Crawford, 99 Mo. 74, 12 SW 354), likewise under a statute requiring the appellate tribunal to disregard technical errors (State v. Brooks, 85 Iowa, 366, 52 NW 240). Under Tennessee Code, § 5124, requiring the offense to be charged to have been committed previous to the finding of the indictment, it is held that an objection to the indictment upon that ground comes too late after verdict, although under a similar provision of the Texas code a contrary result is reached (York v. State, 3 Tex. App. 15; Lee v. State, 22 Tex. App. 547, 3 SW 89; McJunkins v. State, 37 Tex. Cr. Rep. 117, 38 SW 994; Hall v. State [Tex. Cr. App.] 38 SW 996), even when the mistake was obviously clerical (Robles v. State, 5 Tex. App. 347); and in Massachusetts, in spite of a statute requiring all objections to process to be raised before judgment, it is held that an indictment charging a future offense charges no offense and the objection may be raised for the first time on appeal (Commonwealth v. Doyle, 110 Mass. 103).—From 2 L. R. A. (N. S.) 251.

28. Where time is not of the essence of the offense, it need not be stated in the indictment except so far as may be necessary to avoid limitations. State v. Sloan, 120 La. 170, 45 S 50.

29. As where act is unlawful wherever done. Bergstrasser v. People, 134 Ill. App. 609.

30. State v. White, 76 Kan. 654, 92 P 829.

31. State v. Bell, 6 Ohio N. P. (N. S.) 475.

32. When the offense charged is a misdemeanor, if time and place be added to the first act alleged it is deemed to be connected with all the facts subsequently alleged. Indictment charging keeping meat of calves less than 4 weeks old for sale held to charge time and place sufficiently. State v. Peet, 80 Vt. 449, 68 A 661. Where it is alleged that defendant did a certain act upon a certain day and in a certain place, a subsequent allegation that defendant then and there did, or omitted to do, a certain other act, connected with the first, is equivalent to charging one transaction at the same time and place. Grier v. State [Neb.] 115 NW 551.

33. Indictment naming accused by initials and alleging his true name to be unknown to the grand jury is sufficient, under statute. Wellborn v. State [Ala.] 45 S 646. Affidavit charging accused with carrying concealed weapon, designating him by initials, and alleging that his name was unknown to affidavit, held good. Rogers v. State [Ala.] 45 S 221. Where accused was as well known by name "C. H. Libby" as by name "Cyrille H. Libby," indictment in former name was good. State v. Libby, 103 Me. 147, 68 A 631.

34. Abbreviation "Jno." used in describing defendant in indictment not error, abbreviation being in common use and generally understood. McDonald v. State [Fla.] 46 S 176.

35. But one defendant being named. Morris v. State [Fla.] 45 S 456.

36. Indictment charging sales of liquor to "John Doe and divers other persons," without naming them or alleging that they are unknown, is fatally defective. State v. Delancey [N. J. Law] 69 A 958.

37. See 10 C. L. 73. Also Forgery, 11 C. L. 1533.

38. United States v. Heinze, 161 F 425.

39. See 10 C. L. 73. Also topics relating to

*Description of money.*[See 10 C. L. 74]—In Missouri this matter is provided for by statute.[41]

*Duplicity.*[See 10 C. L. 74]—An information or indictment may not in a single count charge more than one offense,[42] but the state may, in separate counts, charge the same offense in various ways in order to meet the proof.[43] If but one crime is charged, it is immaterial that the facts alleged incidentally, show the commission of another crime.[44] Where a statute defining a crime enumerates several acts, either of which or all of which constitute the offense, all or any of such acts may be charged conjunctively without rendering the accusation double.[45] But an indictment alleging several of such acts disjunctively is bad.[46] When a statute makes either of two or more distinct acts connected with the same general offense and subject to the same measure and kind of punishment indictable as separate and distinct crimes when committed by different persons, or at different times, they may, when com-

crimes against property, such as Larceny, 10 C. L. 600; Trespass, 10 C. L. 1875.

40. Under Cr. Code, § 418. Brinegar v. State [Neb.] 118 NW 475.

41. Describing money as "seventeen dollars lawful money of the United States, of the value of seventeen dollars," held sufficient in robbery charge, under Rev. St. 1899, § 2531, relating to description of money. State v. Calvert, 209 Mo. 280, 107 SW 1078.

42. **Held double:** Counts charging false entries of a transaction in violation of Rev. St. § 5209 by officers of national bank held double because charging two false entries in one count. United States v. Morse, 161 F 429. Unlawful sales of liquor to two or more minors constitute separate offenses. Cannot be charged in one indictment. State v. Salkowski [Del.] 69 A 839. Indictment for perjury alleged to have been committed in trial of another complaint containing two counts held to state two separate offenses, one in each count, where there was no allegation that the two counts were different descriptions of the same act. Commonwealth v. Hollander, 200 Mass. 73, 85 NE 844.

**Held not double:** Affidavit held to charge but one offense under intoxicating liquor law. Yazel v. State [Ind.] 84 NE 972. Indictment charging theft of property of two persons is not double where taking is charged as one act at one time and place. Peck v. State [Tex. Cr. App.] 111 SW 1019. Indictment charging in one count violation of Pen. Code 1895, § 420, in running six freight trains on a railroad in the county on Sunday, is not demurrable as charging six separate offenses in one count. Westfall v. State [Ga. App.] 62 SE 558. Accusation for violating Laws 1903, p. 90, embracing in one count various amounts alleged to have been fraudulently obtained at various times, is not double where aggregate makes sum alleged to have been fraudulently obtained. Young v. State [Ga. App.] 62 SE 558. Information charged violation of statute penalizing certain acts in connection with dealing with corporations and stock. Part of statute relating to dealings in stock being held invalid, information was not double since dealings in stock would not constitute a crime thereunder. State v. Merchant, 48 Wash. 69, 92 P 890.

43. People v. McDonnell, 103 NYS 749. State has right to allege commission of crime in different ways, and jury are entitled to pass on evidence and find defendant guilty on any count which is sustained by evidence. State v. Jeffries, 210 Mo. 302, 109 SW 614. Under Pen. Code 1895, § 1836, permitting same offense to be set up in different forms in different counts, an information was not bad for charging forgery in one count by false making of an instrument, and in another count by uttering the same instrument. State v. Mitton, 37 Mont. 366, 96 P 926. Indictment charging burglary of private residence at night, and also, in another count, burglary in the daytime, omitting allegation as to private residence, held not double. More than one count charging same offense permissible under Code Cr. Proc. 1895, art. 469. Johnson v. State, 52 Tex. Cr. App. 201, 20 Tex. Ct. Rep. 853, 107 SW 52. An assault and battery with intent to kill, and an assault and battery in the attempt to kill, may be charged together in one count where both grow out of same act and punishment is same. Jimerson v. State [Miss.] 46 S 948.

44. The statement of an act committed as a mere incident of the crime charged does not make the indictment double. State v. Waymire [Or.] 97 P 46. That an indictment in one count describes more than one crime does not make it defective, provided defendant is charged with the commission of only one crime. People v. Schlessel, 112 NYS 45. Indictment held to charge only crime of larceny, though facts were alleged, going upon state forest reserve to cut trees stolen, which constituted also misdemeanor. People v. Gallagher, 58 Misc. 512, 111 NYS 473.

45. Strobhar v. State [Fla.] 47 S 4; State v. Des Moines Union R. Co., 137 Iowa, 570, 115 NW 232; State v. Dvoracek [Iowa] 118 NW 399; State v. Grossman [Mo.] 113 SW 1074; People v. Gagliardi, 111 NYS 395. Conviction may be had on proof of the commission of any one without proof of the commission of the others. People v. Schlessel, 112 NYS 45. Indictment charging conjunctively acts set forth in election statute (Sess. Acts 1903, p. 159) not double. State v. Fielder, 210 Mo. 188, 109 SW 580. Count not double which charged conjunctively several acts made illegal by intoxicating liquor law and charged that all such acts were done before obtaining license. Ex parte Johnson, 6 Cal. App. 734, 93 P 199.

46. State v. Grossman [Mo.] 113 SW 1074.

mitted by the same person at the same time, be coupled in one count as constituting on offense.[47]

*Exceptions and provisos.*[See 10 C. L. 78]—Exceptions or provisos which qualify or describe or form a part of the definition of the offense must be negatived.[48] Those which form no part of the definition or description of the offense need not be negatived,[49] but are matters of defense.[50] This rule is applied by the majority of the courts regardless of whether the proviso or exception is in the enacting clause or a subsequent section [51] though some courts seem to consider the location of the exception or proviso as decisive.[52] The negation of an exception need not be in the statutory language.[53] It is sufficient if the indictment as a whole shows that accused does not belong in any excepted class.[54] Where an allegation covering the affirmative part of a statute involves a negation of an exception contained in the statute, no further negation thereof is necessary.[55]

*Conclusion.*—The indictment or information must conclude "against the peace and dignity of the state," [56] though such conclusion need not be repeated in each count.[57] Where the offense is indictable at common law, the conclusion in the indictment, "contrary to the form of the statute," may be treated as surplusage and wholly disregarded.[58]

(§ 4) *D. Issues, proof and variance.*[See 10 C. L. 77]—Every essential averment must be proved substantially as laid,[59] but unnecessary allegations need not be

47. Indictment for certifying check without having funds to cover it held not double. United States v. Heinze, 161 F 425.

48. Conviction of performing worldly work on Sunday reversed where neither complaint nor record negatived exceptions contained in the statute nor showed that worldly business done was not works of necessity nor charity. Wright v. State [Del.] 69 A 1003.

49. Yazel v. State [Ind.] 84 NE 972. Proviso in Rev. St. § 4364-25, unlawfully keeping place where intoxicating liquors are kept for sale, is not part of description of offense, and need not be negatived in indictment. Hamilton v. State, 78 Ohio St. 76, 84 NE 601. Where affidavit charging sale of wheat middlings without label as required by law negatived all proviso contained in defining clause, it was sufficient though it did not negative an exception stated in a subsequent independent section. State v. Weller [Ind.] 85 NE 761.

50. If the proviso or exception contains only matter of excuse, it need not be negatived, but is defensive matter. Proviso in dental act need not be negatived. Ex parte Hornef [Cal.] 97 P 891. If a proviso comes in a separate clause of the statute, that the offense charged is within the proviso is matter of defense. Hyde v. State [Ala.] 46 S 489. Indictment for conspiracy to subject persons to involuntary servitude is not bad for failing to negative exception that such involuntary servitude was as a punishment for crime. The exception in 13th amendment is defensive in character. Smith v. U. S. [C. C. A.] 157 F 721. Indictment for practicing medicine without authority need not show that accused was not within class allowed to practice without authority (Laws 1901, c. 926, § 3). Burden is on accused to show that defense. State v. Heffernan, 28 R. I. 477, 68 A 364.

51. Whether a statutory exception or proviso is contained in the clause of the statute creating the offense or in a subsequent clause, it must be negatived if it is so interwoven with the clause defining the offense as to constitute a material part thereof and be one of the essential ingredients of the criminal act. Applied to Drugs Act, Rev. St. 1899, § 3036. State v. Hamlett, 129 Mo. App. 70, 107 SW 1012. Proviso or exception need be negatived only when it is incorporated in and is a part of the description or definition of the offense. Its location in the statute is immaterial. Ex parte Hornef [Cal.] 97 P 891.

52. Exceptions in the enacting clause must be negatived. Adams Exp. Co. v. Com., 33 Ky. L. R. 967, 112 SW 577. If the exception is in a subsequent section or in a separate proviso in the same section, it need not be negatived. Rule applied to intoxicating liquor law. Yazel v. State [Ind.] 84 NE 972.

53, 54. Adams Exp. Co. v. Com., 33 Ky. L. R. 967, 112 SW 577.

55. Holmes v. State [Neb.] 118 NW 99.

56. Const. art. 6, § 38, requires informations to conclude "against the peace and dignity of the state." Omission of "the" before "state" held fatal. State v. Skillman, 209 Mo. 408, 107 SW 1071. Indictment concluding "against the peace and dignity of state" held not to comply with constitutional requirement that all indictments must conclude "against the peace and dignity of the state." Defect fatal. State v. Campbell, 210 Mo. 202, 109 SW 706. Indictment for murder held insufficient to support conviction because not concluding "against the peace and dignity of the state of Alabama" as required by Const. 1901, art. 6, § 170, and Code 1896, § 4893. Fowler v. State [Ala.] 45 S 913.

57. Information concluded "against the peace and dignity of the state," etc. Held not objectionable because each count did not so conclude. Mercer v. State, 52 Tex. Cr. App. 321, 20 Tex. Ct. Rep. 402, 106 SW 365.

58. Indictment sustained. Maloney v. People, 132 Ill. App. 184.

59. Fatal variance between information

proved,[60] and an immaterial variance may be disregarded.[61] Proof of a crime other than that charged will not warrant conviction,[62] but where an offense is charged in different ways in separate counts, proof sufficient to sustain one good count is enough,[63] and a proper conviction on one count will not be set aside because of an unwarranted conviction of another count.[64] Under statutes abolishing the common-law distinctions between principles and accessories, one indicted as principal may be convicted on proof that he procured the commission of the crime [65] or was present, aiding, counseling or assisting in its perpetuation,[66] though no other was jointly indicted with him,[67] and one indicted as an accessory may be convicted on proof showing him to be a principal.[68] But where the common-law rule still exists, this rule does not prevail.[69] Where persons are charged jointly with the commission of a crime,

for forgery and proof. People v. Johnson [Cal. App.] 93 P 1042. Variance between charge of larceny of diamond shirt stud and proof of larceny of diamond ring is fatal. State v. Plant, 209 Mo. 307, 107 SW 1076. Variance fatal in slander case, words proved not being those charged. Porter v. State [Tex. Cr. App.] 107 SW 817. Proof held not to conform to allegations of indictment for perjury. Reversal. Belvins v. State, 85 Ark. 195, 107 SW 393. Charge that coroner extorted money for services in inquest not sustained by proof that no inquest was held and money was paid in order that none might be held. State v. Wainright [Wash.] 97 P 51. Where information stated specifically the manner in which accused committed the offense of assisting in pool selling the proof was limited to the facts charged, though an accusation in the statutory language would have been sufficient. State v. Scott, 80 Conn. 317, 68 A 258. Under indictment for burglary in the daytime, a charge that defendant could not be convicted if evidence showed beyond a reasonable doubt that the burglary was committed in the nighttime, but could be convicted if evidence showed commission of the act, but did not show beyond a reasonable doubt whether it was done in the daytime or nighttime, was sufficiently favorable to accused. Egan v. State, 136 Wis. 114, 116 NW 755. A description of the place is material and must be proved according to the averment thereof. Where indictment charged keeping room for gaming purposes at No. 239 E. Twenty Second St., Chicago, proof of keeping such room at corner of Dearborn and Twenty Second streets in same city is insufficient. People v. Lewis, 140 Ill. App. 493.

**60.** State need only prove so much of matter alleged as is necessary to establish crime charged. State v. Bresee, 137 Iowa, 673, 114 NW 45. In criminal as in civil cases, only substance of charge need be proved. Tullis v. Shaw, 169 Ind. 662, 83 NE 376.

**61. Under the modern rule, declared by statute in many states,** a variance is not to be regarded as material unless it is such that it might prejudice or mislead the defense or might expose the accused to the danger of twice being put in jeopardy for the same offense. State v. Turnbaugh [Ohio] 85 NE 1060. Variance as to description of burglarized building held immaterial under Rev. St. § 7216. Id. In prosecution for conspiracy to commit assault, proof of assault upon one is not variance from indictment charging conspiracy to assault number of persons, including person shown to have been assaulted. Shields v. People, 132 Ill. App. 109. Variance between allegation and proof of ownership of injured property held not material. Pate v. State [Tex. Cr. App.] 113 SW 757. No variance where charge was obstructing highway where it crossed "Smith's Fork of Platte River," and proof was that stream was "Smith's Fork Creek," both referring to same stream. State v. Transue [Mo. App.] 111 SW 523. Allegation in indictment that certain details were to grand jury unknown need not be proved. Jacobs v. U. S. [C. C. A.] 161 F 694. While an allegation in an indictment that the defendant conspired with "persons unknown" is material, it is necessary that the knowledge as to who the co-conspirators were existed with the grand jury at the time of the return of the indictment in order to render the variance fatal. No presumption that grand jury knew witness testifying before them was conspirator. Cooke v. People, 134 Ill. App. 41. Charge of keeping of disorderly house by two persons not variant from proof of keeping by one of them. People v. Elston, 231 Ill. 215, 83 NE 153.

**62.** Information was sufficient to charge larceny, but insufficient to charge robbery, but cause was submitted and accused was tried for and convicted of robbery. Judgment reversed. People v. Ho Sing, 6 Cal. App. 752, 93 P 204.

**63.** Conviction on one or more of the counts, supported by sufficient legal proof, will be upheld. Parham v. State, 3 Ga. App. 468, 60 SE 123. Verdict of conviction will be referred to valid count. Moseley v. State [Miss.] 45 S 833.

**64.** Conviction on latter count harmless, punishment being same regardless of number of counts upon which conviction is had. Parham v. State, 3 Ga. App. 468, 60 SE 123.

**65.** State v. Whitman, 103 Minn. 92, 114 NW 363.

**66.** Steely v. Com., 33 Ky. L. R. 1033, 112 SW 655.

**67.** In misdemeanor case. State v. Hunter, 79 S. C. 73, 60 SE 240.

**68.** Though indictment charged one as principal and another as aider and abettor, both could be convicted as principals, and court was not required to distinguish between them in instructions. Combs v. Com., 33 Ky. L. R. 1058, 112 SW 658.

**69.** In Nebraska one indicted as principal cannot be convicted on proof showing him to be an accessory. Skidmore v. State [Neb.] 115 NW 288.

proof of a conspiracy to commit it is admissible without an express allegation of such conspiracy,[70] though where conspiracy is the real crime or offense, it must be expressly alleged.[71]

*Names.*[See 10 C. L. 78]—Names of third persons or persons injured must be proved as laid [72] unless the allegation is immaterial.[73] The rule of idem sonans applies,[74] however, and an immaterial error will be disregarded.[75] Where a defendant is indicted under two names, alleged by an alias dictus, it is necessary only that state should show that he is commonly known by either of them.[76]

*Time* [See 10 C. L. 79] need be proved as laid only when it is an essential element of the crime.[77] The state is not restricted to proof of the date alleged. Proof of commission of the crime charged at any time within the limitation period, prior to the indictment, is sufficient.[78] But the allegation that prescription has been interrupted by the filing of an indictment is affirmative in character and must be proved.[79]

(§ 4) *E. Defects, defenses and objections.*[See 10 C. L. 79]—Formal or technical errors may be cured by verdict [80] or curative statute [81] and should be disregarded,[82] but fundamental defects cannot be cured or waived.[83] A motion to quash or plea in abatement is the proper remedy to raise defects not appearing on the face of the pleading or record,[84] such as irregularities prior to the finding of the indictment [85]

**70, 71.** Cook v. State, 169 Ind. 430, 82 NE 1047.

**72.** Where indictment alleged sale of liquor to "C. Wiltis" and proof showed sale to "C. Willis," variance was held fatal. Carnes v. State, 53 Tex. Cr. App. 490, 110 SW 750.

**73.** Variance as to name of owner of stolen property immaterial. Territory v. Caldwell [N. M.] 98 P 167. In prosecution for embezzlement of check, variance between allegation and proof of names of parties to check held immaterial. State v. Laechelt [N. D.] 118 NW 240.

**74.** Indictment alleged deceased's name as "Frederico Tersero" and proof was "Fedrico Tersero." Spanish pronunciation same. Variance not fatal. Hernandez v. State, 53 Tex. Cr. App. 468, 110 SW 753. In prosecution for bigamy, proof that first wife's name was "Stanton" would support statement in indictment that it was "Staunton," the two being idem sonans. People v. Spoor, 235 Ill. 230, 85 NE 207.

**75.** Error in name of purchaser not fatal variance in prosecution under liquor law. Holland v. State [Tex. Cr. App.] 107 SW 354.

**76.** Jenkins v. State [Ga. App.] 62 SE 574.

**77.** Exact date of burglary immaterial. Approximate date may be proved. State v. Daniels [La.] 47 S 599. Time not being of the essence of the crime of rape, proof need not show commission on day charged. Proof of commission on substantially the date charged is sufficient. State v. Ferris [Conn.] 70 A 587.

**78.** Cripe v. State [Ga. App.] 62 SE 567. Proof of any illegal liquor sale within two years competent, no particular date being alleged. Wheeler v. State [Ga. App.] 61 SE 409.

**79.** State v. Hoffman, 120 La. 949, 45 S 951.

**80.** Information for obtaining money by false pretences sufficient after verdict. Davis v. State, 134 Wis. 632, 115 NW 150.

**81.** Under U. S. Rev. St. § 1025, that no indictment shall be deemed insufficient by reason of a defect or imperfection in form only, which does not tend to prejudice accused, objections not affecting the merits will be overruled. Jones v. U. S. [C. C. A.] 162 F 417. Objection that indictment did not show on its face that grand jury came from district in which indictment was found held mere defect of form. Cured by U. S. Rev. St. § 1025. Morris v. U. S. [C. C. A.] 161 F 672.

**82.** Failure to allege venue directly not prejudicial, reference to caption making it plain. People v. Thompson [Cal. App.] 95 P 386. Formal defects in indictment under Sherman anti-trust act held not ground for quashal. Tribolet v. U. S. [Ariz.] 95 P 85. Indictments will not be set aside on account of a technical objection based on disqualification of a grand juror unless accused has been prejudiced. Pontier v. State, 107 Md. 384, 68 A 1059. Technical objections to the impaneling of a grand jury will not be considered after presentment of the indictment, or even on challenge to the array. State v. Laning, 7 Ohio N. P. (N. S.) 281.

**83.** A void indictment cannot support a judgment, nor can it be aided by a curative statute. Indictment void for illegality in constitution of grand jury. Osborn v. State [Ala.] 45 S 666. An omission of an essential element of the offense is not cured by verdict. Roberts v. State [Ark.] 108 SW 842.

**84.** Issues not shown by the record may be raised by pleas in abatement. United States v. Wells, 163 F 313.

**85.** Inquiry by the court or prosecuting attorney as to the qualification of grand jurors is not required, but does not prejudice the rights of the accused, who under a plea in abatement may show disqualification if any exist and thus be relieved from the indictment. State v. Laning, 7 Ohio N. P. (N. S.) 281.

**Improper conduct of the district attorney before the federal grand jury** which returned the indictment may be raised by plea in abatement. United States v. Wells, 163 F 313. An objection to the **qualification of grand jurors** or the **mode of summoning** or

or filing of the information.[86] Defects apparent on the face of the indictment or information should be raised by demurrer [87] or motion to quash.[88] Defects of this nature not raised before pleading to the merits [89] by proper and timely objection are waived [90] and cannot subsequently be raised by objection to the introduction of evidence [91] or by motion in arrest of judgment.[92] Matters of defense cannot be raised

**empaneling** them must be made by a motion to quash or by plea in abatement before pleading in bar. Pontier v. State, 107 Md. 384, 68 A 1059. Motion to quash at time of arraignment and before plea, supported by affidavits, is proper way to raise objection that grand jury was not properly constituted. State v. Paramore, 146 N. C. 604, 60 SE 502. Where a sheriff fails to summon a grand jury impartially as required by his oath of office, the court may, upon motion, quash the indictment found by such grand jury. As where sheriff was head of a political faction and summoned grand jurors from his own faction only, who indicated members of opposite faction for political offense. State v. McCarthy [N. J. Law] 69 A 1075.

**86.** The objection that accused was not legally committed by a magistrate before the information was filed is waived by failure to urge it by motion to set information aside. People v. Morley [Cal. App.] 97 P 84.

**87.** Indictment or information is demurrable if more than one offense is charged. State v. Mudie [S. D.] 115 NW 107.

**88.** A motion to quash is directed to defects appearing on the face of the pleading. State v. Conega, 121 La. 522, 46 S 614. Cr. Code 1902, § 57, requires defect apparent on face of indictment to be raised by demurrer or motion to quash before jury is sworn. Request to charge that certain count was fatally defective because of lack of averments unavailing. State v. Maddox [S. C.] 61 SE 964.

**89.** Motion to quash too late, coming after plea of not guilty. State v. Banner [N. C.] 63 SE 84. Objection that prosecuting attorney had no power to file information, grand jury being in session, waived when not raised at time of arraignment and plea of not guilty. State v. Strange [Wash.] 97 P 233. Disqualification of a grand juror must be taken advantage of by plea in abatement, which must precede the plea of not guilty. State v. Heffernan, 28 R. I. 477, 68 A 364. Objection that count of indictment is not sufficiently specific must be raised by demurrer before plea of not guilty. Too late when made in motion for arrest of judgment. Id.

**90.** Cannot be urged after judgment that names of some of the witnesses were not endorsed on the indictment. State v. Long, 209 Mo. 366, 108 SW 35. Defect of duplicity, if any, waived by failure to demur. State v. Kline [Or.] 93 P 237. A motion to quash is the proper procedure to point out the defect of duplicity and indefiniteness in an indictment, and failure to file such a motion and entry of a general plea to the indictment is a waiver of those defects. Arnsman v. Ohio, 11 Ohio C. C. (N. S.) 113. Failure to object to formal defects or clerical errors by demurrer or motion is waiver thereof. State v. Means [S. C.] 61 SE 898. Formal defects in information, correctible by amendment, cannot be taken advantage of on motion for new trial when not urged at or before the trial. State v. McGee, 80 Conn. 614, 69 A 1059. After a challenge to the sufficiency of an indictment by motion to quash, a plea of misnomer is too late and may be stricken on motion. Lee v. U. S. [C. C. A.] 156 F 948. A plea of misnomer is waived by a subsequent demurrer. Id. Objection that information for robbery charged both violence and putting in fear waived by failure to demur or make motion to quash. State v. Calvert, 209 Mo. 280, 107 SW 1078. Lack of certainty and precision in information before magistrate waived by failure to object. People v. Keeper of Erie County Penitentiary, 109 NYS 531. Plea of guilty to count for stealing "gold pins, silverware and jewelry of the value of $50" is a waiver of objection that charge does not state an offense because articles are not specifically enumerated, such objection not being urged before plea. State v. Webber [N. J. Law] 68 A 1100. Several persons being in custody, jointly indicted for same offense, either may be called to testify against the others before the grand jury. One who appears willingly, is warned that he need not testify or incriminate himself, and does not in fact incriminate himself but testifies freely, cannot move to quash indictment on ground of being compelled to testify against himself. State v. Firmatura, 121 La. 676, 46 S 691. A demurrer is waived by pleading over. Ground of demurrer cannot be subsequently raised in any form. State v. Christopher, 212 Mo. 244, 110 SW 697.

**91.** The sufficiency of a criminal accusation cannot be tested by an objection to the introduction of evidence after the first witness has been sworn. City of Ft. Scott v. Dunkerton [Kan.] 96 P 50. The sufficiency of the indictment to state any offense cannot be tested in the federal courts by an objection to the introduction of evidence. Morris v. U. S. [C. C. A.] 161 F 672. Defects in form or inartificialities must be raised by motion to quash or demurrer. The objection to the introduction of evidence under the indictment is not the proper way to reach such defects. Nurnberger v. U. S. [C. C. A.] 156 F 721.

**92.** See post, § 11. Information for rape sufficient when first attached by motion in arrest, though resistance was not alleged in direct and positive terms. State v. Rhoades [N. D.] 118 NW 233. Objection that information for robbery was bad because charging conjunctively taking by violence and by putting in fear too late when first made by motion in arrest. State v. Calvert, 209 Mo. 280, 107 SW 1078. The objection that a juror is not competent because of some personal incapacity or disqualification, such as that he is not a legal voter in town where trial is held, is too late when first raised after verdict and conviction. Not ground for setting verdict aside and granting new trial. Thurman v. Com., 107 Va. 912, 60 SE 99.

by motion to quash.[93] It will be presumed that the indictment was based on legal and sufficient evidence,[94] and illegality or insufficiency of evidence before the grand jury is not ground for motion to quash.[95] In New York inspection of the minutes of the grand jury, in aid of a motion to quash, cannot be had as a matter of right,[96] and does not depend upon whether or not a preliminary examination has been had.[97] The sole purpose for which an inspection of the minutes can be granted is to enable defendant to make a motion to set aside the indictment for irregularities of procedure mentioned in the statute,[98] or where his constitutional rights have been invaded.[99] Application for such inspection must fully disclose a right thereto.[1] Where the application is on the ground that defendant's constitutional rights have been invaded in that he has been illegally compelled to be a witness against himself, and that it is thought such evidence may have been used by the grand jury, it is insufficient unless it also shows that the legal evidence received was insufficient to warrant the finding of the indictment, or that illegal evidence was the sole basis for the indictment.[2] This must appear in order to give a person indicted a constitutional right to make a motion to dismiss.[3] A motion for inspection on constitutional grounds may be made after plea.[4] Neither absence from the jurisdiction at the time the investigation was made by the grand jury nor ignorance that an investigation was in progress afford ground for a plea in abatement,[5] nor is an omission by the court to call matters to the attention of the grand jury ground for such plea.[6] The fact

**93.** That oath given accused was not that prescribed by law is matter of defense in prosecution for perjury. Not ground for setting aside indictment. People v. Welz, 112 NYS 326. A motion to quash does not raise the objection that prosecution is barred by limitations, no time being alleged and time not being of the essence. State v. Conega, 121 La. 522, 46 S 614. Where the indictment does not show that the prosecution is barred, defendant may plead and prove prescription. Id.

**94.** People v. Gassett, 112 NYS 555.

**95.** That indictment was based on illegal evidence is not ground for setting indictment aside. Borello v. Amador County Super. Ct. [Cal. App.] 96 P 404. Motion to quash because of insufficiency of evidence cannot be entertained. Question is for jury. Cox v. State, 3 Ga. App. 609, 60 SE 283. On motion to set aside information, sufficiency of complaint on which accused was arrested is immaterial. It will be presumed that commitment was based on sufficient evidence, and information is based on commitment. People v. Gregory [Cal. App.] 97 P 912. The court is not authorized, on motion to set aside an indictment, to review the sufficiency of the evidence on which it was based. People v. Glaser, 112 NYS 321. Motion to dismiss indictment for insufficency of evidence before grand jury denied. Indictment for willfully destroying highway, under Pen. Code, § 639. People v. Gillies, 57 Misc. 568, 109 NYS 945. Indictment will not be dismissed because illegal evidence was received before grand jury, if indictment was sufficiently supported by competent evidence. People v. White, 111 NYS 1070. Evidence held insufficient. Id.

**Contra:** An indictment may be quashed for insufficiency of evidence before the grand jury. People v. Hegeman, 57 Misc. 295, 107 NYS 261. Indictment may be set aside for insufficiency of evidence before grand jury. People v. Acritelli, 57 Misc. 574, 110 NYS 430. Indictment founded solely on testimony of accomplice, dismissed. Id. Reception of illegal evidence ground for quashal where competent evidence was not alone sufficient. Id.

**96.** People v. Gassett, 112 NYS 555. Ruling of court refusing, on motion to set aside indictment, to allow character of evidence heard by grand jury to be shown, upheld. Borell v. Amador County Super. Ct. [Cal. App.] 96 P 404.

**97.** People v. Gassett, 112 NYS 555.

**98.** Code Cr. Proc. § 313. People v. Gassett, 112 NYS 555.

**99.** People v. Gassett, 112 NYS 555.

**1.** A motion for leave to inspect the minutes of the grand jury or to have a copy thereof should disclose as a reason the want of legal or competent evidence to sustain the indictment, or the violation of some constitutional right of accused. Motion denied. People v. Glaser, 112 NYS 321. Something more than general allegations of insufficiency of testimony or irregularity of procedure before the grand jury is required to warrant giving defendant full access to the people's case (by copy of grand jury minutes) before trial. People v. Welz, 112 NYS 326. Affidavit in support of motion for inspection of grand jury minutes, in aid of motion to set aside indictment on ground of unauthorized presence of persons in the grand jury room, held insufficient, not giving names of affiant's informants nor source of their knowledge. Id.

**2, 3.** People v. Gassett, 112 NYS 555.

**4.** A motion for leave to inspect the minutes of the grand jury, in aid of a motion to set aside an indictment because based on incompetent and insufficient evidence, may be entertained after plea, since the latter motion is on constitutional grounds, and not on grounds mentioned in Code Cr. Proc. §§ 313, 315. People v. Phifer, 112 NYS 285.

**5.** State v. Laning, 7 Ohio N. P. (N. S.) 281.

**6.** It is duty of court to call attention of

that previous indictments have not been disposed of does not afford ground for the quashing of an indictment.[7] Where greater certainty or particularity is desired, the remedy is a motion to make more specific [8] or a motion for a bill of particulars.[9] Whether such motion should be granted is largely discretionary with the trial court.[10] The validity of the indictment cannot be tested by the writ of habeas corpus.[11] A motion to quash should be disposed of before hearing on the merits is had.[12]

A demurrer or motion to quash must specify the grounds of objection relied upon [13] by allegations of facts,[14] and, if not shown by the record, the matters set up must be supported by proof [15] or an offer of proof,[16] though a defect in the form of the plea may be waived.[17] A general objection will be overruled if the pleading contains a single good count [18] or is sufficient to charge an offense.[19] But a general

grand jury to matters requiring investigation, and if a mistake were made in that respect it would not afford ground for a plea in abatement. State v. Laning, 7 Ohio N. P. (N. S.) 281.

7. State v. Williams, 6 Ohio N. P. (N. S.) 406.

8. Motion to make specific is the remedy when an allegation of time is deemed essential. State v. Conega, 121 La. 522, 46 S 614.

9. Morris v. U. S. [C. C. A.] 161 F 672. Not a demurrer. Bailey v. Com. [Ky.] 113 SW 140. Revisal 1905, § 3244, provides for bill of particulars in case indictment is claimed to be defective in alleging facts. State v. Leeper, 146 N. C. 655, 61 SE 585. Rev. Laws, c. 218, § 39, provides for bill of particulars. Commonwealth v. Bailey, 199 Mass. 583, 85 NE 857. Object of bill of particulars is to make charge so definite and specific as to enable defendant to prepare defense. State v. Seaboard Air Line R. Co. [N. C.] 62 SE 1088.

10. Subject to review for abuse. Bailey v. Com. [Ky.] 113 SW 140. Not error to refuse in prosecution under Mills' Ann. St. § 1332 (obtaining money by confidence game), indictment being in statutory language. Lace v. People, 43 Colo. 199, 95 P 302. Bill of particulars may be ordered in proper cases, but commonwealth need not supply facts within knowledge of other party, and should be allowed reasonable time to supply facts. Commonwealth v. Chesapeake & O. R. Co., 33 Ky. L. R. 92, 110 SW 253. That bill of particulars obtained at second trial was insufficient was harmless where accused had learned all the state's case in former trial. State v. Seaboard Air Line R. Co. [N. C.] 62 SE 1088.

11. Ex parte Webb [Tex. Cr. App.] 113 SW 545.

12. State v. Conega, 121 La. 522, 46 S 614.

13. Mere claim in demurrer that statute on which it was based was unconstitutional held insufficient. State v. Christopher, 212 Mo. 244, 110 SW 697.

14. A demurrer to a plea in abatement to an indictment is properly sustained when the grounds assigned in support of the plea do not consist of certain and distinct allegations of fact, but merely conclusions of law. Thompson v. U. S., 30 App. D. C. 352.

15. A plea in abatement or other dilatory plea must be verified or supported by some matter of record or by evidence. Beverett v. State [Ala.] 47 S 133. A demurrer on the ground that the grand jury had no authority to investigate the crime charged because it was not within the local jurisdiction of the county must show that it was not within such jurisdiction, where the indictment shows on its face commission of the crime within the jurisdiction. People v. Foster, 112 NYS 706. Indictment for perjury will not be set aside because of the unauthorized presence in grand jury room of some person when the false testimony was given by accused. It must appear, under Code Cr. Proc. § 313, that such person was present when indictment was being considered. People v. Glaser, 112 NYS 323. Moving papers, in motion to set aside indictment, held not to show latter fact, as against presumption that grand jury proceedings were regular. Id.

16. Mere filing of motion to quash without offering proof of the ground alleged is insufficient to raise the question. State v. McKee, 212 Mo. 138, 110 SW 729. Verified motion to quash indictment on ground that no person of accused's race was permitted to serve on grand jury, filed on day case was called for trial, insufficient. There must be an offer to prove facts alleged in motion. Franklin v. State, 85 Ark. 534, 109 SW 298. Not an abuse of discretion to refuse additional time to procure proof, no effort having been made previously. Id.

17. The objection that a plea in abatement, supported by affidavits, is not the proper way to raise an issue, is waived by meeting the issue by counter affidavits. United States v. Wells, 163 F 313.

18. A motion to quash directed at an entire complaint containing several counts cannot be sustained if the complaint contains one good count. City of Ft. Scott v. Dunkerton [Kan.] 96 P 50. Where an information charges but one offense, though in several counts, a demurrer will not lie to a single count. State v. Leekins [Neb.] 115 NW 1080.

19. A motion to quash directed generally to a count, charging assault and battery coupled with a felonious intent to murder is properly overruled where assault and battery is properly charged. Stucker v. State [Ind.] 84 NE 971. Where two sections of statute are separable from and entirely independent of each other, it is error for police court to sustain motion to quash indictment based on one on grounds of invalidity of other. District of Columbia v. Green, 29 App. D. C. 296.

demurrer which enumerates each count is in effect a separate demurrer to every count.[20]

(§ 4) *F. Joinder, separation and election.* See 10 C. L. 81—Separate and distinct offenses cannot be joined in a single count,[21] but in some jurisdictions offenses of the same nature may be joined,[22] and no election by the state is required in such cases.[23] A motion to require an election is the proper remedy, where it is claimed that two offenses are improperly joined,[24] or that the evidence discloses more than one offense, only one being charged.[25] A motion to require an election, on the latter ground, is premature if made before the evidence discloses more than one offense.[26] It should usually be made at the close of the state's case, and it is not error or an abuse of discretion to defer ruling on the motion until such time.[27] An election is not required where an indictment charges in different counts one offense committed in different ways,[28] all referring to the same transaction,[29] nor where all the acts alleged in a single count constitute but one offense.[30] A motion to require an election waives

**20.** State v. Peet, 80 Vt. 449, 68 A 661.

**21.** See supra, § 4C, Duplicity. Where a statute defines different offenses, and provides different penalties, they cannot be joined. Murdock v. State, 62 Tex. Cr. App. 262, 20 Tex. Ct. Rep. 588, 106 SW 374. Indictment charged obtaining property by assault and putting in fear, and, also, by exhibiting a pistol. Pen. Code 1895, art. 856, makes first punishable by imprisonment and second by death or imprisonment. Two offenses could not be joined. Id.

**22.** In Texas, different misdemeanors may be joined in separate counts in the same indictment or information and conviction had for each offense. Roseboro v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 352, 106 SW 134. A single accusation or indictment may include, in separate counts, any number of distinct misdemeanors of the same nature. Tooke v. State [Ga. App.] 61 SE 917. Held, proper to join in one information a count for rape and one for incest, both relating to same act, nor was state required to elect, as it was entitled to go to jury on either phase of the evidence. State v. Goodale, 210 Mo. 275, 109 SW 9. Under the federal statute, violations of the same statute, constituting crimes or offenses of the same class, may be joined in one indictment, when stated in separate counts (Violations of oleomargarine law, 24 Stat. 209, Morris v. U. S. [C. C. A.] 161 F 672); the only limitation being that the offenses ought not to be so numerous as to confound the accused in his defense or prejudice him. Id.

**23.** No election required between count for larceny and count for receiving stolen goods. State v. Roundtree [S. C.] 61 SE 1072.

**24.** Where it is claimed that two cognate offenses under one statute are charged, remedy is to require an election, not a motion to quash. State v. Leeper, 146 N. C. 655, 61 SE 585. Where indictment charged illicit intercourse on a certain day and on various other days up to a certain date, and on motion of defense, state elected to stand on day first charged, jury was not misled as to specific charge submitted to them. Leedom v. State [Neb.] 116 NW 496.

**25.** Where two distinct felonies are charged, the court should require the state to elect at the close of its case (Forgery of endorsement, and uttering forged instrument distinct. State v. Carragin, 210 Mo. 351, 109 SW 553), or should instruct the jury that they could not convict on both counts. State v. Carragin, 210 Mo. 351, 109 SW 553.

**26.** Motion could not be entertained until state's proof disclosed an attempt to prove two offenses under the one charge. Warford v. People, 43 Colo. 107, 96 P 556. Where information charged but one assault, alleging place only in the county, a motion before trial to compel state to elect was premature, though defendants in fact made two assaults on person named on same day. Id.

**27.** Refusal to require election until after evidence was in, not prejudicial, no evidence having been received which would have been inadmissible under charge relied on. State v. Johns [Iowa] 118 NW 295. Not an abuse of discretion to refuse to compel an election between count for larceny and one for receiving stolen goods at beginning of trial, motion being granted at close of state's case. State v. Roundtree [S. C.] 61 SE 1072. Where complaint contained two counts and court reserved decision on motion to compel election by state until the close of the case, when the state elected to stand on second count, accused was not prejudiced, trial having proceeded exactly as it would had the election been made sooner. People v. Burman [Mich.] 15 Det. Leg. N. 640, 117 NW 589. Defendant not entitled to have state elect, at beginning of trial, between two counts charging rape, one specifying a certain day, and the other stating a period between two dates. Accused not prejudiced where state elected to stand on first count before closing its case. State v. Sebastian [Conn.] 69 A 1054.

**28.** Parham v. State, 3 Ga. App. 468, 60 SE 123; State v. Jeffries, 210 Mo. 302, 109 SW 614.

**29.** State v. Sharpless, 212 Mo. 176, 111 SW 69.

**30.** Motion to compel an election is properly denied where the indictment contains but one count, though several violations of a statute are therein conjunctively alleged. Schultz v. State, 135 Wis. 644, 14 Det. Leg. N. 868, 114 NW 505. Defendant may be found guilty of one of the offenses cumulated in different clauses of one section without having first to inform him of the particular clause under which the state

the claim that the state had elected to stand on the offense, evidence of which was first introduced.[31] Where an indictment charges an offense and also a previous conviction in aggravation, the prosecuting attorney may waive proof of the prior conviction and try defendant only on the offense charged.[32]

(§ 4) *G. Amendments.*See 10 C. L. 84—In most jurisdictions, an indictment or information may be amended as to formal or immaterial matters at any time.[33] The amended pleading should be verified when the statute so requires.[34] In South Carolina, where clerical errors or formal defects in an indictment may be amended at any time before the plea, with the consent of the grand jury.[35] Further testimony need be taken only when a further finding of fact is necessary.[36]

*Substitution* is usually provided for in case of loss of papers.[37]

(§ 4) *H. Conviction of lesser degrees and included offenses.*See 10 C. L. 85—Conviction may be had of any offense included in that charged,[38] or any lesser degree of

prosecutes. State v. Dudenhefer [La.] 47 S 614.

31. Warford v. People, 43 Colo. 107, 96 P 556.

32. Selling liquor illegally. State v. Doyle [W. Va.] 62 SE 453.

33. Formal amendment of information not prejudicial under Rev. St. 1899, § 2481, allowing such amendments in court's discretion. State v. Sharpless, 212 Mo. 176, 111 SW 69. Under Cr. Code Prac. § 125, an error in name of accused does not vitiate indictment; order may be entered of record showing true name of accused. Russellville Home Tel. Co. v. Com., 33 Ky. L. R. 132, 109 SW 340. Under Kirby's Dig. § 2232, where corporation was called "railroad" instead of "railway," the court, on finding the true name, properly made an order directing further proceedings to be in correct name, party before the court being the one indicted. Louisiana & A. R. Co. v. State, 85 Ark. 12, 106 SW 960. The public officer by whom the information is presented being always present in court, but may be amended on his application to any extent which the judge deems to be consistent with the orderly conduct of judicial business with the public interest and private rights. Bergstrasser v. People, 134 Ill. App. 609. Amendment to information held properly allowed. Giroux v. People, 132 Ill. App. 562. Proper to permit amendment so that date of filing information and jurat to affidavit correctly appear. People v. Nylin, 139 Ill. App. 500. Amendment to indictment held merely one of form, properly made under statute. State v. Gibson, 120 La. 343, 45 S 271. Amendment to affidavit charging use of profane language properly allowed; affidavit filed in justice court, and warrant issued returnable in county criminal court, and amendment being to make affidavit conform to warrant. Cobb v. State [Ala.] 45 S 223. Filing amended information **without leave of court** held not jurisdictional error and not prejudicial to rights of accused who pleaded thereto without objection. McGinnis v. State [Wyo.] 96 P 525. Correction of date in indictment by person who drew it **before presentment in court** not ground of error. Haney v. State, 52 Tex. Cr. App. 545, 107 SW 858. Indictment may be amended, **after announcement of** ready for trial, as to form, but not as to matters of substance. Wade v. State, 52 Tex. Cr. App. 619, 108 SW 677. Amendment **during trial** proper, where information was sufficient without it, since Rev. St. 1899, § 2481, allows amendments as to form and variance to be so made. State v. Standifer, 209 Mo. 264, 108 SW 17. Under Code 1906, § 1508, relating to amendments, held proper for court to allow indictment charging murder to be amended **during trial** so as to change name of deceased from "Will Johnson" to "Convict No. 12." Witnesses identifying him by latter name, but not being positive as to his real name. Thurmond v. State [Miss.] 47 S 434. Amendments which do not change the substance of the indictment may be allowed **at the close of the state's case** to make it conform to the proof. Amendments as to dates and other matters not affecting the substance of the charge. Schultz v. State, 135 Wis. 644, 14 Det. Leg. N. 868, 114 NW 505.

34. Under the Oklahoma statute allowing amendments to informations, a conviction under an amended information not sworn to is invalid. Hubbard v. Ter. [Okl.] 95 P 217.

35. State v. Means [S. C.] 61 SE 898.

36. Not where correction may be made from context. State v. Means [S. C.] 61 SE 898.

37. Where last indictment had been substituted at previous term but minutes had not been signed, a nunc pro tunc order of substitution was proper. Moore v. State, 52 Tex. Cr. App. 336, 107 SW 540.

38. One indicted under one section of a statute and shown to be guilty under another may be convicted under latter, if indictment is broad enough to include it. State v. Hamill, 127 Mo. App. 661, 106 SW 1103. Cr. Code Prac. § 264 provides that where an indictment charges an offense with circumstances of time, place, intent, etc., the offense without such circumstances, or part of them, is included. Price v. Com. [Ky.] 112 SW 855. Under charge for breaking and entering railroad car with intent to steal (Ky. St. 1903, § 1163), accused may be convicted of trespass (§ 1256). Id. Under charge of larceny from person, accused may be convicted of petit larceny. State v. Clem [Wash.] 94 P 1079. Under Washington statutes, one charged with conducting gambling resort may be convicted of conducting and carrying on game of roulette, latter offense being included in former. State v. Preston [Wash.] 95 P 82. Where indictment charges burglary, and also charges larceny after the breaking

the offense charged,[39] or of an attempt to commit the offense charged,[40] but not of an offense containing elements not included in the offense charged.[41]

§ 5. *Arraignment and plea.* See 10 C. L. 86—A *plea to the merits* waives prior informalities [42] which are properly raised by motion to quash or plea in abatement.[43] Defendant may plead guilty, and such plea authorizes the sentence prescribed by law upon a verdict of guilty.[44] Such plea should be entirely voluntary, with knowledge of consequences, and not induced by fear, misapprehension, persuasion, promises, inadvertence or ignorance.[45] A plea of guilty will be referred to a good count, where some are good and some bad.[46] A plea of guilty admits only facts charged, and if

and entering as illustrative of intent, defendant may be convicted of larceny though not guilty of burglary. Hutchings v. State, 3 Ga. App. 300, 59 SE 848. Though accusation and evidence make out case of burglary, yet defendant may be convicted of larceny from the house, if that offense also is shown. Lockhart v. State, 3 Ga. App. 480, 60 SE 215. Accused may be sentenced under verdict of "guilty of misdemeanor" as charged, where indictment charges also a prior conviction, proof of which was waived by the state. State v. Doyle [W. Va.] 62 SE 453. Under Kentucky statutes under an indictment for murder by stabbing, conviction may be had for malicious cutting and wounding, or cutting and wounding in sudden affray, or sudden heat and passion, where proof fails to show that death resulted from wound inflicted. Housman v. Com., 33 Ky. L. R. 311, 110 SW 236. Where, in prosecution for maliciously disturbing any railway fixtures, evidence does not show malice in carrying away switch light, malice being required by Ky. St. 1903, § 807, court may authorize conviction, under § 1256, for carrying away property of another. Commonwealth v. Wells, 33 Ky. L. R. 964, 112 SW 568. Conviction of larceny is warranted under indictment charging greater offense of breaking into railroad car and stealing and carrying away property therefrom (statutes construed). State v. Shapiro [R. I.] 69 A 340. Conviction for offense less than that defined in statute on which prosecution is primarily based may be sustained if information alleges existence of all essential facts constituting such offense, and more liberal construction of pleading is allowed in such case than ordinarily. State v. Way, 76 Kan. 928, 93 P 159. Conviction of petit larceny may be had under indictment for grand larceny, where evidence shows value of property to be less than $30. State v. Walken [Mo. App.] 113 SW 221.

**39.** Where evidence submitted authorizes it. Fields v. State, 2 Ga. App. 41, 58 SE 327. Under indictment for murder in first degree, defendant may be convicted of any lesser degree of homicide. Montgomery v. State, 136 Wis. 119, 116 NW 876; Commonwealth v. Couch, 32 Ky. L. R. 638, 106 SW 830. Verdict of manslaughter may be found under charge of murder. People v. Borrego [Cal. App.] 95 P 381. Verdict of manslaughter may be returned under indictment charging murder by attempting criminal abortion. People v. Huntington [Cal. App.[ 97 P 760. One indicted for assault with intent to murder may be convicted of lesser offense. State v. Harris, 209 Mo. 423, 108 SW 28. Under indictment for assault with intent to murder, accused may be convicted of that offense or of simple assault. State v. Mills [Del.] 69 A 841. Conviction of assault in second degree, under charge of assault in first degree, sustained. People v. Randazzo, 112 NYS 104. Under charge of assault with intent to do bodily harm, simple assault may be found. People v. Hoffman [Mich.] 15 Det. Leg. N. 646, 117 NW 568. No distinction need be made, in an indictment or in a verdict, between principals in the first and second degree, and, where two persons are charged with murder as principals in the first degree, if evidence shows one to be guilty in second degree, he can be convicted under such indictment. Jones v. State, 130 Ga. 274, 60 SE 840.

**40.** Conviction of attempt to commit rape on infant may be had under indictment for rape. Begley v. Com., 32 Ky. L. R. 890, 107 SW 243.

**41.** Where evidence, under indictment for assault with intent to murder, shows no assault other than one consummated by a completed battery, a verdict of simple assault is not lawful. Harris v. State, 3 Ga. App. 457, 60 SE 127. Under indictment for assault with intent to kill a specified person, accused cannot be convicted of shooting at another. Spencer v. State, 52 Tex. Cr. App. 289, 20 Tex. Ct. Rep. 408, 106 SW 386.

**42.** Want of preliminary examination waived by plea of not guilty. Ex parte McLaughlin, 210 Mo. 657, 109 SW 626. Failure to read the formal concluding portion of an indictment will not vitiate a sentence pronounced after a plea of guilty. State v. Crane, 121 La. 1039, 46 S 1009. Failure to deliver to accused a copy of endorsements on the information, including the list of witnesses, at time of arraignment, is waived by pleading to merits without objection. State v. De Lea, 36 Mont. 531, 93 P 814. Where a defendant charged with willfully violating a borough ordinance pleads guilty and appeals to the court of quarter sessions, he thereby waives mere irregularities in the proceedings, and to avoid the effect of his plea he is bound to establish the invalidity of the ordinance as a whole or to show that his act was not prohibited by the valid part of the ordinance. Commonwealth v. Jackson, 34 Pa. Super. Ct. 174.

**43.** Plea of not guilty waives all defenses which may be raised by motion to quash or plea in abatement. Ingraham v. State [Neb.] 118 NW 320.

**44, 45.** Pope v. State [Fla.] 47 S 487.

**46.** A plea of guilty is applicable to all the counts of the indictment, and where there are good and bad counts, the plea will be referred to good counts, and judgment will

these do not state an offense, judgment on the plea is erroneous.[47] The plea of nolo contendere when accepted by the court, is, in its effect upon the case, equivalent to the plea of guilty.[48] The judgment of conviction follows upon such a plea, as well as upon a plea of guilty. And such plea, if accepted, cannot be withdrawn and a plea of not guilty entered except by leave of court.[49] The plea of not guilty puts in issue every material allegation of the indictment or information, and casts the burden of proving facts necessary to convict on the prosecution.[50] A plea to the merits cannot be withdrawn or changed without leave of court,[51] and when a new trial has been granted, a change of plea should not be allowed and sentence pronounced without notice to the state's attorney.[52] Whether withdrawal or change of plea shall be allowed is a matter resting largely in the trial court's discretion,[53] and whether it has been properly exercised in a particular case depends upon the circumstances.[54]

*Pleas in abatement and special pleas.* See 10 C. L. 87—Pleas testing sufficiency of indictment or information are treated in another section.[55]

Lack of jurisdiction, not appearing on the face of the record, must be raised by answer.[56] The defense of insanity may be shown under a plea of not guilty entered by accused or by the court.[57] The validity of the statute on which the prosecution is based may be raised by special preliminary plea,[58] and on the hearing of the plea

be affirmed after conviction where one count is not assailed, though others are held bad. State v. Zimmerman, 79 S. C. 289, 60 SE 680.

47. Patrick v. State [Wyo.] 96 P 527.

48. State v. Siddall, 103 Me. 144, 68 A 634.

49. State v. Siddall, 103 Me. 144, 68 A 634. Where accused pleaded not guilty and then withdrew that plea and pleaded nolo contendere, it was not an abuse of discretion to refuse to allow him to withdraw the plea of nolo contendere and to plead not guilty, after a verdict of not guilty by jury on another charge involving the same facts. Id.

50. State v. Pressler, 16 Wyo. 214, 92 P 806; Phillips v. State [Ga.] 62 SE 239.

51. A plea of not guilty and traverse before the country cannot be withdrawn and pleas in abatement filed without leave of court. Pontier v. State, 107 Md. 384, 68 A 1059.

52. After a new trial has been granted, the case is at large, reinstated on the trial docket, and in charge of the district attorney. State v. Labry, 120 La. 434, 45 S 382. It is error, after accused has been convicted of murder and a new trial granted, to allow him to withdraw his plea of not guilty and enter a plea of guilty of manslaughter, and to sentence accused on that plea without any formal appearance or hearing of the district attorney. Id.

53. Change of plea of guilty to one of not guilty. State v. Garrett [Kan.] 98 P 219. Application for leave to withdraw a plea of not guilty. People v. Dabner, 153 Cal. 398, 95 P 880. Discretionary to permit or refuse withdrawal of plea of not guilty in order to file plea in abatement. Ingraham v. State [Neb.] 118 NW 320.

54. Refusal to allow change of plea of guilty not error where defendant was represented by counsel and no pressure was brought to bear and he had time to deliberate. State v. Garrett [Kan.] 98 P 219. Refusal of leave to withdraw plea of guilty not abuse of discretion where court allowed several days, accused had advice of three attorneys who advised against the plea of guilty, and accused was fully advised as to power of court to determine degree of crime and fix sentence and yet pleaded guilty on advice of his father. People v. Dabner, 153 Cal. 398, 95 P 880. Defendant should be permitted to withdraw a plea of guilty given unadvisedly when application therefor is duly made in good faith and sustained by proofs, and proper offer is made to go to trial on plea of not guilty. Pope v. State [Fla.] 47 S 487. Where plea of guilty is entered deliberately, and no motion for leave to withdraw is made until state's witnesses have been discharged, and there is no direct allegation or proof that plea was induced by fear, or ignorance, or circumstances putting defendant at disadvantage, it is no abuse of discretion to refuse to allow withdrawal of plea. Id. No abuse of discretion in refusal to allow withdrawal of plea of not guilty where accused had forfeited recognizance and been rearrested, had had continuance, and had filed and withdrawn plea in abatement similar to that desired to be again filed. Ingraham v. State [Neb.] 118 NW 320. Exercise of discretion by court in refusing to allow plea of guilty to be withdrawn, after sentence, a plea of not guilty having previously been withdrawn and plea of guilty entered, not reviewable. State v. Stevenson [W. Va.] 62 SE 688. Where indictment contained two counts, one for burglary and one for larceny, and defendant pleaded guilty to larceny charge, and record shows he could not have been mistaken, he will not be allowed to claim that he was in error, though he did not have advice of counsel, not having requested any. State v. Crane, 121 La. 1039, 46 S 1009.

55. Supra, § 4E.

56. Paracamph Co. v. Com., 33 Ky. L. R. 981, 112 SW 587.

57. Need not be specially pleaded. State v. Speyer, 207 Mo. 540, 106 SW 505.

58. Special plea so construed. Court should have heard it. Louisiana & A. R. Co. v. State, 85 Ark. 12, 106 SW 960.

the court should receive evidence relative to the question raised.[59] Evidence may be received in support of a replication to a plea of misnomer.[60] Where, before pleading to the indictment, defendant suggests his true name, the court should comply with the suggestion and correct the indictment.[61] Accused cannot complain of the overruling of special pleas available to him under the plea of not guilty.[62] A demurrer to a replication to a plea in abatement admits facts stated in the replication.[63] The defense that the prosecution is barred by the statute of limitations cannot, in the federal courts, be raised by demurrer.[64] If the evidence shows that the prosecution is barred, the defendant is entitled to the benefit of it, though he has not pleaded the statute in bar.[65]

*Former jeopardy.*[See 10 C. L. 87]—The plea of former jeopardy should be interposed in the trial court[66] at time of arraignment[67] and a ruling obtained.[68] If it raises a question of fact, it is triable by jury.[69] But the sufficiency of the plea in the first instance is for the court, and if it is specific and raises only a question of law, that question is one for the court alone.[70] If frivolous or clearly insufficient, it may be stricken.[71] A demurrer to a plea of former jeopardy need not set out facts.[72] It admits the truth[73] and tests the sufficiency of[74] facts alleged in the plea. The plea should show the former accusation,[75] an acquittal or conviction thereunder,[76] and judgment,[77] and also facts showing identity of the offense and of the person.[78] The plea is not of a criminal nature, but is a collateral civil issue as to former action of the court, and the verdict on such issue, whether for or against defendant, may be set aside by the judge in his discretion or if against the weight of the evidence.[79] Defendant is a competent witness on such issue, and he may testify thereon without being compelled to testify on the main issue.[80] The two issues can be tried separately.[81] To sustain the plea it must appear that defendant was in fact placed in jeopardy[82] and that the two offenses are identical in fact and in law,[83] and the burden of showing these matters is on the defendant.[84]

**59.** Louisiana & A. R. Co. v. State, 85 Ark. 12, 106 SW 960.

**60.** Plea of misnomer alleged that accused's name was "Hadley Y. B." and not "Hodley" as set up in indictment, and state replied that second letter of accused's name was "a" and not "o," and it was the intention to so write it in indictment. Replication held not demurrable. Brooke v. State [Ala.] 46 S 491. Testimony by person who wrote indictment in support of replication held competent. Id.

**61.** Popinaw v. State, 52 Tex. Cr. App. 409, 107 SW 350.

**62.** Brooke v. State [Ala.] 45 S 622.

**63.** State v. Libby, 103 Me. 147, 68 A 631.

**64.** United States v. Andem, 158 F 996.

**65.** Hatton v. State [Miss.] 46 S 708.

**66.** It is not ground for discharge by habeas corpus. Yeates v. Roberson [Ga. App.] 62 SE 104.

**67.** Former conviction. McGinnis v. State [Wyo.] 96 P 525.

**68.** Plea of former acquittal properly treated as abandoned where accused went to trial without getting ruling of court thereon. Norwood v. State, 3 Ga. App. 355, 59 SE 828.

**69.** McGinnis v. State [Wyo.] 96 P 525. A plea of former jeopardy raises an issue of fact which must be tried by a jury. Dockstader v. People, 43 Colo. 437, 97 P 254.

**70.** McGinnis v. State [Wyo.] 96 P 525.

**71.** Where a plea of former jeopardy does not state facts constituting a defense, it may be stricken by the court, and the jury need not be required to bring in a special verdict on the plea. Johnson v. State [Okl. Cr. App.] 97 P 1059. A plea of former acquittal which is plainly frivolous and trifling, such as one which, if true, fails to state any reason why defendant could not be again tried, will be treated as a nullity and may be stricken on motion, no demurrer being necessary. Strobhar v. State [Fla.] 47 S 4; O'Brien v. State [Fla.] 47 S 11.

**72.** O'Brien v. State [Fla.] 47 S 11.

**73.** Dockstader v. People, 43 Colo. 437, 97 P 254.

**74.** O'Brien v. State [Fla.] 47 S 11.

**75.** Indictment should appear. Strobhar v. State [Fla.] 47 S 4. Plea of former conviction insufficient where neither complaint nor information was set out as a part of the plea or by exhibit. Benson v. State, 53 Tex. Cr. App. 254, 109 SW 166.

**76.** Strobhar v. State [Fla.] 47 S 4.

**77.** Conviction includes sentence or judgment of conviction, and the plea should show a judgment unreversed and in full effect. Plea showing only verdict insufficient. O'Brien v. State [Fla.] 47 S 11.

**78.** Strobhar v. State [Fla.] 47 S 4.

**79, 80, 81.** State v. White, 146 N. C. 608, 60 SE 505.

**82.** Plea should be sustained where evidence was introduced in first trial which would prove second charge, and jury was not limited to one transaction. Piper v. State, 53 Tex. Cr. App. 550, 110 SW 899. Affidavits

§ 6. *Preparation for, and matters preliminary to, trial.*[85]—In the notes are given decisions in regard to such preliminary matters as appointment of counsel for accused,[86] the allowance of time to file pleadings,[87] services of venire on accused,[88] services of copy of indictment or information,[89] and the right to subpoenas for witnesses.[90] Under federal laws, if the indictment is not for a capital offense, defendant is not entitled as a matter of right to a list of witnesses or jurors.[91] The right

and informations for two offenses of same kind on same day being copies of each other, and witnesses testifying to two transactions, and conviction is had, with nothing to show which transaction is basis of conviction, second prosecution was barred. Alexander v. State, 53 Tex. Cr. App. 553, 110 SW 918. Where two indictments charged separate offenses, but were consolidated for trial, a plea of not guilty and judgment discharging defendants on one was not a bar to prosecution on the other. Thomas v. U. S. [C. C. A.] 156 F 897. The entry of a nolle prosequi on a count for manslaughter, at the close of the state's case, is not an acquittal of the crime of manslaughter under other counts of the indictment. People v. McGinnis, 234 Ill. 68, 84 NE 687. An affidavit charging the commission of two or more things in the disjunctive is bad for uncertainty, and the record of the dismissal of a case predicated upon such an affidavit is not a bar to a subsequent prosecution. Gilliam v. State, 7 Ohio N. P. (N. S.) 482. Where court caused charges against accused to be dismissed because of defects in indictment, and it did not appear that there was any trial, but new charges were at once filed, accused was not thereby placed in jeopardy twice. Price v. U. S. [C. C. A.] 156 F 950. The reversal of the judgment in a criminal case places the state and defendant in the same position they occupied before the trial, and where a defendant secures a reversal of a verdict which was silent as to the first and second counts and found him guilty under the third count of the indictment, he cannot thereafter maintain a plea in bar to the first and second counts. State v. Dickerson, 7 Ohio N. P. (N. S.) 208. Where a new trial has been granted on motion of defendant, he cannot, upon such trial, rely upon the plea of former jeopardy. Yeates v. Roberson [Ga. App.] 62 SE 104.

**83.** Thomas v. U. S. [C. C. A.] 156 F 897; State v. White, 146 N. C. 608, 60 SE 505. After conviction for assault with intent to kill, the victim died, and prisoner was indicted for murder. Held, plea of former jeopardy was untenable. Commonwealth v. Ramunno, 219 Pa. 204, 68 A 184. Demurrer to plea of former jeopardy is properly sustained where prosecution is for carrying concealed pistol, and plea sets up a former conviction for carrying the pistol to a church, though it is alleged that the two transactions were one and the same. Veasy v. State [Ga. App.] 62 SE 561. Transactions not identical as matter of law, since one who carries a concealed pistol to church is guilty of two offenses, neither of which includes the other. Id.

**84.** Burden of proof is on defendant to sustain plea of former jeopardy. Mance v. State [Ga. App.] 62 SE 1053. The burden is upon defendant to prove that a former acquittal or conviction was for the identical offense. State v. White, 146 N. C. 608, 60 SE 505. Burden is on accused to show by preponderance that offenses are same transaction. Benton v. State, 52 Tex. Cr. App. 422, 107 SW 837. The production of the indictment and judgment in former action is enough to show nature of offense charged therein, except date and place, when they are by statute immaterial, and defendant must then show by parol the identity of the two charges. State v. White, 146 N. C. 608, 60 SE 505.

**85.** See 10 C. L. 90. As to rights of accused, see, also, Constitutional Law, 11 C. L. 689.

**86.** If accused has no counsel when brought up for arraignment, it is customary to ask him if he desires counsel, and to appoint counsel to assist him if he signifies a desire for such appointment. Such is general practice in Florida. Cutts v. State [Fla.] 45 S 491. It is court's duty to appoint counsel for a defendant who appears to be ignorant or weak minded, though in the case of intelligent persons he need not do so unless requested. Williams v. Com., 32 Ky. L. R. 330, 110 SW 339. Where court appointed two attorneys to defend accused, held not error to excuse one and appoint a substitute, under circumstances shown. Brown v. State, 52 Tex. Cr. App. 267, 20 Tex. Ct. Rep. 555, 106 SW 368.

**87.** Defendant is allowed 2 days after arrest and during term to file written pleadings. Starbeck v. State, 52 Tex. Cr. App. 192, 109 SW 162.

**88.** Service of venire on defendant held to conform to statute, being in time and copy served containing names of all jurors. Hunter v. State [Ala.] 47 S 133.

**89.** Clerical error in sheriff's return immaterial where accused was in fact served with correct copy of indictment. Anderson v. State, 53 Tex. Cr. App. 341, 110 SW 54. Where charge was burglary of a box car, service of copy of information omitting word "car" was insufficient, and not cured by endorsement which was no part of information. Cause should have been continued for proper service. State v. Daniels [La.] 47 S 599. Where indictment had defendant's name "Dove" Smith, and copy served on him read "Dave" Smith, his real name was not ground for quashing indictment or service of copy, especially since letter "o" could be read "a" equally well. Smith v. State, 52 Tex. Cr. App. 344, 20 Tex. Ct. Rep. 845, 106 SW 1161.

**90.** In Iowa an application for subpoenas for witnesses for the defense, at the expense of the state, is addressed to the sound discretion of the court. State v. Gilbert [Iowa] 116 NW 142. Where on appeal the record does not disclose what, if any, showing was made as to the materiality of the desired testimony, the order granting the application will not be disturbed. Code, § 5492, does not provide manner of procedure. Id.

**91.** Jones v. U. S. [C. C. A.] 162 F 417.

of accused to have returned to him property alleged to have been obtained by an unconstitutional search and seizure may be determined on motion in advance of trial.[92]

*Right to speedy trial.*[See 10 C. L. 92]—Accused has a constitutional right to a speedy trial [93] which is regulated by statutes in many states,[94] which usually provide that defendant shall be entitled to be discharged if not brought to trial within the time limited.[95] Such statutes should be liberally construed in favor of accused.[96] Decisions under statutes of this nature are given in the note.[97] Void proceedings in a court having no jurisdiction do not operate to extend the time.[98] It is held that the fact that accused is serving a penitentiary sentence on another charge does not excuse delay in prosecution,[99] since convicts are entitled to the benefit of the constitutional and statutory right to speedy trial.[1] In a habeas corpus proceeding, the burden of showing good cause for delay is upon the state.[2]

*Preliminary inquest as to sanity.*[3]—Whether a plea of not guilty should be permitted to be withdrawn in order that a preliminary hearing, as to accused's sanity may be had is a matter resting largely in the trial court's discretion.[4] Denial of such request is not error where the suggestion of insanity is not supported by affidavit and the court offers to and does receive, at the trial, evidence of accused's mental condition both at the time of the commission of the offense and at the time of trial.[5]

§ 7. *Postponement of trial.*[See 10 C. L. 94]—An application for a continuance is addressed to the sound discretion of the trial court,[6] and its ruling will be inter-

**92.** United States v. Wilson, 163 F 338.

**93.** See, also, Constitutional Law, 11 C. L. 689.

**94.** Statutes construed. State v. Keefe [Wyo.] 98 P 122.

**95.** Const. art. 2, § 9, guarantees speedy trial. Hurd's Rev. St. 1905, c. 38, § 438, allows 4 months after commitment. People v. Jonas, 234 Ill. 56, 84 NE 685.

**96.** State v. Keefe [Wyo.] 98 P 122.

**97.** Under Cr. Code Proc. § 221, defendant is not entitled to be discharged until after end of three terms after filing of information. Time prior to filing of information is not to be considered. State v. Braden [Kan.] 96 P 840. Right to speedy trial not violated where one trial resulted in disagreement and cause was continued to next term, accused being under three indictments, having been discharged on one and tried on two, two disagreements resulting. State v. Dilts [N. J. Law] 69 A 255. A statute requiring every indictment to be tried the term or session in which issue is joined, or the term after, unless the court allows further time for cause, is not violated where the prisoner is tried but remanded owing to a disagreement of the jury. Cr. Proc. Act 1898, § 53, held not violated, prisoner being indicted on three charges and tried on two, disagreements resulting. Id. The Washington statute entitling accused to a discharge unless accused is brought to trial within 60 days after indictment found or information filed does not apply where he has been convicted in police court of city and appeals to superior court. State v. Parmeter [Wash.] 95 P 1012. In such case he is not entitled to be discharged after 60 days from time of taking appeal where he has not demanded a trial in the superior court. Id. Good cause for delay shown where it appeared attorney for accused requested prosecuting attorney not to file information as matter might be disposed of without trial. State v. Fletcher [Wash.] 97 P 242. Absence of important witness who was unable to attend at grand jury session held good cause for refusal to dismiss prosecution because accused was not informed against or indicted within 30 days after being held to answer as required by Pen. Code, § 1382. People v. Quijada [Cal.] 97 P 689.

**Waiver of right:** The right to a dismissal if no information or indictment is filed within 30 days after the order holding defendant to answer, under the Washington act, is waived if not exercised before or at the time when accused is called on to plead. Motion to dismiss made at beginning of trial, too late. State v. Seright, 48 Wash. 307, 93 P 521. Where within the 60 days after filing of information accused consented to setting trial of cause, state was not required to show cause why motion to dismiss should be denied. People v. Claudius [Cal. App.] 97 P 687.

**98.** Where accused was not brought to trial in court having jurisdiction within 4 months, his conviction was reversed and he was ordered discharged, notwithstanding a preliminary trial in municipal court, since that court had no jurisdiction and proceedings therein were void. People v. Jonas, 234 Ill. 56, 84 NE 685. Steps taken by accused in municipal court to avoid judgment and obtain his discharge held not a waiver of his right to speedy trial in a court of competent jurisdiction. Id.

**99.** Defendant entitled to be discharged, only excuse for delay being that he was in prison. State v. Keefe [Wyo.] 98 P 122.

**1.** State v. Keefe [Wyo.] 98 P 122.

**2.** State v. Fletcher [Wash.] 97 P 242.

**3.** See 10 C. L. 93. Also Insane Persons, 10 C. L. 287; Criminal Law, 11 C. L. 940.

**4, 5.** State v. Khaury [N. C.] 62 SE 638.

**6.** Lyles v. State, 130 Ga. 294, 60 SE 578. Motion for continuance on ground of absence

fered with on appeal only, where a clear abuse of discretion appears.[7] Subject to this rule, lack of time for preparation,[8] absence or illness of counsel,[9] and surprise,[10] may or may not be ground for continuance, according to the showing made. While the showing for a continuance should make it appear that the continuance is not sought for delay only,[11] this need not appear by direct oath of defendant; it is sufficient if the showing as a whole indicates that mere delay is not sought.[12] Though failure to produce an eye witness in a homicide case would entitle defendant to a postponement of the proceedings, the absence of such witness[13] is not ground for continuance at his request, before trial. In Georgia, motions for a continuance made at the term at which the indictment is found, while addressed to the discretion of the court, stands on a different footing from such motions made at a subsequent term.[14] That the regular jury for the week has been excused and a new one called is not ground for a continuance, in Texas, where the cause has been set by agreement of counsel, without the knowledge of the court.[15] The right to one day's time for preparation for trial, after plea, given by statute in North Dakota is absolute, if requested in time.[16] In Rhode Island, the court has no power to adjourn for more than fourteen days without consent of accused, and his consent to a longer

of nonresident witnesses. State v. Thompson, 121 La. 1051, 46 S 1013.

7. Parker v. State, 3 Ga. App. 336, 59 SE 823. No abuse of discretion in denying continuance. Duckworth v. State [Ark.] 111 SW 268; People v. Boyd, 151 Mich. 577, 15 Det. Leg. N. 36, 115 NW 687. Refusal of continuance for absence of witness, proper. State v. Mills, 79 S. C. 187, 60 SE 664. Discretion of court exercised in passing on weight of evidence contained in showing and counter showing made upon hearing motion for continuance will not be controlled by appellate court. Kimberly v. State [Ga. App.] 62 SE 571.

8. Refusal of continuance asked to allow counsel additional time to prepare, not an abuse of discretion. State v. Walker, 79 S. C. 107, 60 SE 309. No abuse to deny continuance asked by defendant for preparation where he had had from Jan. 24 to Feb. 5, and had no reason except assumption that trial would not occur until next term. State v. Rabene, 79 S. C. 542, 60 SE 442. Refusal to postpone until next day on account of fatigue of defendant's counsel not abuse, where defendant had other counsel and court had no other word. Id. Defendant entitled to continuance, where he had no notice of trial sufficient to enable him to obtain witness. Howell v. State [Ga. App.] 62 SE 1000. Application for continuance for more time to prepare addressed to discretion, where accused has had 6 or 7 weeks and has been represented by counsel. Johnson v. State [Okl. Cr. App.] 97 P 1059. Denial of continuance on ground of want of time to examine evidence heard by coroner, not an abuse of discretion. State v. Franklin [S. C.] 60 SE 953.

9. Illness and absence of one attorney not ground for continuance, two being present to try the case. Howerton v. Com., 33 Ky. L. R. 1008, 112 SW 606. Absence of one attorney not ground for continuance when defendant had three present. Kennedy v. Com., 32 Ky. L. R. 1381, 108 SW 891. Continuance for absence of defendant's counsel properly refused where several prior continuances had been granted, counsel had not been heard from, accused was in jail unable to give bond, and trial would have gone over 5 months had continuance been granted. State v. Clay, 121 La. 529, 46 S 616. No abuse of discretion to deny continuance on account of absence of leading counsel where only issues were of fact, and accused was represented by able counsel. State v. Hunter, 79 S. C. 84, 60 SE 241. Discretion of court not abused in refusing second continuance on ground of absence of defendant's leading counsel. Cate v. State [Neb.] 114 NW 942.

10. Continuance should have been granted where accused claimed surprise on offering of confession, and offered to prove by absent witnesses that it was not made. Johnson v. Com., 32 Ky. L. R. 1117, 107 SW 768.

11. Brooks v. State, 3 Ga. App. 458, 60 SE 211. Where trial lasted longer than continuance asked for, and witness was not brought in, there was no error in denying it. Railsback v. State, 53 Tex. Cr. App. 542, 110 SW 916. Court may overrule motion for continuance based on absence of witness, though showing made would require continuance if true, where counter showing leads him to believe that continuance is sought merely for delay. Kimberly v. State [Ga. App.] 62 SE 571. No abuse of discretion to refuse continuance, where there had been 5 prior continuances extending over 5 years, and there were three forfeitures on appearance bond and facts tending to show want of diligence and attempt to evade trial. Williams v. State [Miss.] 45 S 146.

12. Showing sufficient, where one day only was asked to procure witnesses who would directly contradict the state's case. Brooks v. State, 3 Ga. App. 458, 60 SE 211.

13. In re McHugh, 152 Mich. 505, 15 Det. Leg. N. 273, 116 NW 459.

14. Greater liberality should be shown in case of former, and interests of justice should not be sacrificed to speed. Brooks v. State, 3 Ga. App. 458, 60 SE 211.

15. Haney v. State, 52 Tex. Cr. App. 545, 107 SW 858.

16. State v. Chase [N. D.] 117 NW 537.

adjournment should appear of record,[17] but any error in this regard is waived where accused voluntarily appears without objection after such adjournment.[18]

*Continuance should be granted for the absence of a witness* See 10 C. L. 95 when it is made to appear that due diligence has been exercised to procure the attendance of the witness,[19] that he will probably be present at the time to which the continuance is taken,[20] that the facts to which he would testify cannot otherwise be proved,[21] and when it is further made to appear that the testimony of the witness would be competent, relevant and material,[22] probably true,[23] and not merely cumulative,[24] or

17. Court & Prac. Act 1905, § 167. State v. Spink [R. I.] 69 A 364.

18. State is for benefit of accused. State v. Spink [R. I.] 69 A 364.

19. Continuance should have been granted where testimony was material, and witness had promised, personally and by letter, to be present, and had been duly subpoenaed. Marsden v. State [Tex. Cr. App.] 111 SW 945. Due diligence shown to procure absent witnesses, where all were subpoenaed but one, and attachment issued for him at showing that he absented himself with connivance of accused, was insufficient. Leonard v. State, 53 Tex. Cr. App. 187, 109 SW 149.

**Continuance properly denied,** diligence in obtaining presence of witness not being shown. State v. Kemp, 120 La. 378, 45 S 283; Alderson v. State, 53 Tex. Cr. App. 525, 111 SW 738; Fox v. State, 53 Tex. Cr. App. 150, 109 SW 370; Stepp v. State, 53 Tex. Cr. App. 158, 109 SW 1093. No effort made to get witness. Pruitt v. State, 53 Tex. Cr. App. 316, 109 SW 171. No due effort to obtain or learn whereabouts of witness was made. Bush v. State, 53 Tex. Cr. App. 213, 109 SW 184. Showing as to efforts to obtain witness from adjoining county insufficient. State v. Horn, 209 Mo. 452, 108 SW 3. Continuance properly denied when no showing was made, on request by court as to what was done with subpoena for witness, nor when his testimony was discovered. Price v. State, 53 Tex. Cr. App. 428, 111 SW 654. Refusal of continuance proper, where offer of proof was not definite, and no diligence to obtain presence of witnesses was shown. Robinson v. State, 53 Tex. Cr. App. 567, 110 SW 905. Refusal of continuance not error when affidavit did not allege facts showing due diligence to procure testimony, it not appearing what became of process which was issued. Sykes v. State, 53 Tex. Cr. App. 165, 108 SW 1179. Application for second continuance properly refused where no process was asked to compel attendance of witnesses, and no effort made to obtain their presence. Diligence must be shown on second application. McCrimmon v. State, 52 Tex. Cr. App. 318, 20 Tex. Ct. Rep. 842, 106 SW 1158. Where court offered compulsory process attachment to obtain presence of witnesses, and defendant declined the offer, he could not complain of being forced to trial without the witnesses, and without showings in lieu of their presence. Millender v. State [Ala.] 46 S 756.

20. A continuance for absence of a witness is properly refused where there is no reasonable certainty that witness will be present at postponed hearing. State v. Simmons, 121 La. 561, 46 S 651. Application for continuance properly refused where no diligence to procure witness was shown, and it appeared that witness was fugitive from justice, and there was no reasonable expectation that he would appear. Anderson v. State, 53 Tex. Cr. App. 341, 110 SW 54.

21. Affidavit for continuance fatally defective for failure to allege that proof expected to be made by absent witneeses could not be made by witnesses who were available. State v. Howard, 120 La. 311, 45 S 260. Continuance properly refused where application did not show materiality of desired testimony, nor that it could not be obtained from resident witnesses. Moore v. State, 53 Tex. Cr. App. 559, 110 SW 911. Not error to refuse continuance to allow doctor to be obtained to testify that defendant was weak minded, affidavit with showing being read. Webb v. Com., 33 Ky. L. R. 316, 110 SW 281. Not error to refuse continuance where failure of witnesses to appear was not explained, no reason for expecting them to attend later was shown, and it was not shown that proof could not be made otherwise. Le Grand v. State [Ark.] 113 SW 1028. Showing for continuance insufficient, witnesses being present, there having been time for preparation and part of desired testimony being only impeaching. Sizemore v. Com., 32 Ky. L. R. 1154, 108 SW 254.

22. **Continuance properly denied** where desired testimony appeared to be immaterial. Westerman v. State, 53 Tex. Cr. App. 109, 111 SW 655; Strong v. State, 85 Ark. 536, 109 SW 536; Morphew v. State, 84 Ark. 487, 106 SW 480. Not error to refuse continuance where testimony of absent witness would not be competent or material. Richter v. State [Ga. App.] 61 SE 147. Absent evidence immaterial; refusal of continuance proper. Johnson v. State, 52 Tex. Cr. App. 201, 20 Tex. Ct. Rep. 853, 107 SW 52.

**Error to refuse continuance** to obtain two witnesses who had been subpoenaed, and would testify to facts directly contradicting state's case. White v. State [Miss.] 45 S 611. Absent testimony material. Leonard v. State, 53 Tex. Cr. App. 187, 109 SW 149. Refusal of first application for continuance error, residence of witnesses being shown, and that subpoena had been returned not found, and testimony being material to show self-defense. Jones v. State [Tex. Cr. App.] 113 SW 928. Refusal to allow short continuance to secure attendance of witness, error, where evidence was slight. Mahs v. State [Tex. Cr. App.] 113 SW 11. Refusal of continuance until following morning error, where witness had been called and sworn, but went away before being called, and his testimony was material. Etly v. Com. [Ky.] 113 SW 896. Error to refuse continuance to enable defendant to obtain witnesses, when he had just been indicted and had been confined in jail, and continuance of only one day was asked, and showing was that witnesses

impeaching.[25] A continuance sought on the ground of absence of witnesses may be avoided by the state by admitting as true the facts to which the absent witness would testify.[26] A mere admission that the witness would, if present, testify as alleged is not sufficient,[27] unless it appears that there is no reasonable certainty that the attendance of the witness can be procured within a reasonable time.[28] An admission of the latter character suffices where continuance is sought to obtain the deposition of the witness.[29] In Kentucky, where the trial is called at the same term at which the indictment is returned, the state, in order to avoid a continuance, must admit the truth of the facts to which absent witnesses would testify,[30] but if continuance is asked at a subsequent term, the state need only admit that the witnesses would testify as alleged.[31] Where the state admits the truth of testimony as stated in showing for continuance, it cannot thereafter contravene the same.[32] Only that portion of an affidavit for continuance which sets out the facts to which the witnesses would testify, if present, may be read to the jury.[33]

would directly contradict the state's evidence. Brooks v. State, 3 Ga. App. 458, 60 SE 211. Continuance should have been granted where testimony was material, and was not merely cumulative, though corroborative of accused. Morgan v. State [Tex. Cr. App.] 113 SW 934. First application for continuance should be granted where testimony is material, and diligence was shown. Green v. State, 53 Tex. Cr. App. 534, 110 SW 929. Continuance should have been granted to obtain witnesses when application was the first one, evidence would be material, and defendant was the only witness in his own behalf. Hardin v. State, 52 Tex. Cr. App. 238, 20 Tex. Ct. Rep. 529, 106 SW 352. Continuance should have been granted. Desired testimony material. Local option case. Wingo v. State, 53 Tex. Cr. App. 16, 108 SW 372. Where defendant was arrested and placed on trial for murder a few days later, it was reversible error to refuse continuance to allow him to procure attendance of only disinterested witness, the case being close one. Magee v. State [Miss.] 45 S 360. Continuance should have been granted to allow defendant to secure, as witnesses, persons who were on car where alleged assault occurred. Collins v. State, 52 Tex. Cr. App. 455, 107 SW 852.

**23.** Continuance properly refused when application did not show that desired testimony was material or probably true. Robinson v. State, 53 Tex. Cr. App. 565, 110 SW 908. Where desired testimony appears to be probably untrue, continuance need not be granted. Price v. State, 53 Tex. Cr. App. 428, 111 SW 654.

**24.** Merely cumulative testimony not ground for continuance. State v. Horn, 209 Mo. 452, 108 SW 3; Owen v. State [Ark.] 111 SW 466; Dobbs v. State [Tex. Cr. App.] 113 SW 921; Burnett v. State, 53 Tex. Cr. App. 515, 112 SW 74. Continuance properly refused where testimony of absent witnesses would have been cumulative only, and court offered compulsory process. Brock v. Com., 33 Ky. L. R. 630, 110 SW 878.

**25.** Continuance to obtain merely impeaching testimony properly refused. Elsworth v. State [Tex. Cr. App.] 111 SW 963. Refusal of continuance to allow accused to get proof of conviction of witness for state not abuse of discretion. Murph v. State [Ala.] 45 S 208.

**26.** State v. Wilcox [S. D.] 114 NW 687. Where a stipulation is made conceding all that would have been obtained by granting continuance, a motion therefor is properly denied. People v. Nylin, 139 Ill. App. 500. Commonwealth's attorney, to avoid continuance, admitted truth of facts stated in showing for witness. Accused not prejudiced by failure of court to charge that such facts were to be taken as true, in absence of request so to charge. Stamper v. Com., 33 Ky. L. R. 580, 110 SW 389.

**27.** Continuance should have been granted where absent witnesses would contradict state's case, and prosecuting attorney would not admit as true the showing made, but offered to admit that witnesses would so testify. Purvis v. State, 52 Tex. Cr. App. 316, 20 Tex. Ct. Rep. 396, 106 SW 355. If it appears that the presence of the witness can be secured within a reasonable period, that due diligence has been used to procure his presence, and that his testimony is material, it is error to allow the state to avoid a continuance by an admission that witness, if present, would testify as alleged. Error to deny continuance where witness was in hospital, within state, suffering from temporary insanity. State v. Wilcox [S. D.] 114 NW 687. A denial of a continuance under such circumstances is the denial of the absolute substantial right of a defendant to have compulsory process for witnesses. Id.

**28.** Under these circumstances, reading of the alleged testimony from the affidavit for continuance is equivalent to a deposition, which is all defendant could get in any case. State v. Wilcox [S. D.] 114 NW 687.

**29.** Where adverse party admits that witness, if present, would testify as stated in an affidavit for continuance, and such statement is read to the jury as evidence, judgment will not be reversed for refusal of continuance to enable depositions of witness to be taken. Shumway v. State [Neb.] 117 NW 407.

**30, 31.** Brock v. Com., 33 Ky. L. R. 630, 110 SW 878.

**32.** Contravention on immaterial point held harmless. Davis v. State, 52 Tex. Cr. App. 332, 107 SW 855.

**33.** Other parts, showing efforts to obtain testimony, etc., properly excluded. Shumway v. State [Neb.] 117 NW 407.

*The application* See 10 C. L. 99 must be timely made.[34] The supporting affidavits must conform to statutory requirements.[35] The showing for an absent witness must be definite and certain.[36]

§ 8. *Dismissal or nolle prosequi before trial.*[37]—Where an indictment is quashed or dismissed for curable defects,[38] or a jury discharged because of a variance between the allegations and the proof,[39] accused may be held to answer to another charge, and a dismissal does not in such case operate as a final judgment or bar.[40] Where an indictment is dismissed because of insufficient proof before the grand jury, the court may direct a resubmission of the matter to the grand jury if it appears that the missing evidence is of a technical nature and may be supplied,[41] but where it appears that all the evidence at hand has been submitted, there will be no direction to resubmit.[42] Where an information is dismissed because not filed in time, the dismissal is held not to bar further proceedings.[43] Where a demurrer is sustained for misjoinder of counts, a subsequent allowance to the state of a nolle prosequi as to all but one count operates to set aside the judgment on demurrer, and cures the indictment as to the remaining count.[44] In Louisiana the district attorney has

34. Where a defendant proceeds to trial without requesting a continuance or suggesting the absence of expected witnesses, he is not entitled to a continuance to obtain witnesses when the evidence has all been introduced. Napier v. Com., 33 Ky. L. R. 635, 110 SW 842. The request for one day's time, under Dakota statute, should ordinarily be made immediately after the plea and before the taking of any other step preliminary to trial. Too late when not made until four jurors had been called. State v. Chase [N. D.] 117 NW 537. Unless timely made, the right to the day's time is waived. Id. Whether the request is in time may depend upon special circumstances, and in such cases the decision of the trial court will be entitled to great weight on appeal. Id.

35. Where evidence in support of motion to continue did not meet requirements of Pen. Code 1895, § 962, denial of motion was not an abuse of discretion. Lewis v. State, 129 Ga. 731, 59 SE 782.

36. **Showing held too general.** Blue v. State, 52 Tex. Cr. App. 324, 20 Tex. Ct. Rep. 841, 106 SW 1157. Facts to be proved by absent witness too generally stated, and not shown to be material. Stepp v. State, 53 Tex. Cr. App. 158, 109 SW 1093. Not error to refuse continuance where showing of testimony of absent witness was **vague and indefinite,** so that it could not form basis of perjury. Mitchell v. State, 52 Tex. Cr. App. 37, 20 Tex. Ct. Rep. 372, 106 SW 124. Application for continuance is fatally defective which does not give **names of witnesses** and state **facts expected to be proved.** Johnson v. State [Okl. Cr. App.] 97 P 1059. Application for continuance insufficient which did not state names of witnesses nor what they would prove. Martin v. State [Tex. Cr. App.] 113 SW 274. Where affidavit for continuance stated that absent witness knew a certain fact, it was sufficient. Should have set out the facts he could testify to, not mere conclusion therefrom. Richie v. State, 85 Ark. 413, 108 SW 511. Affidavit for continuance to obtain testimony must, under Rev. St. 1899, § 2600, give the **names** of the witnesses and their **place of residence.** State v. Horn, 209 Mo. 452, 108 SW 3.

37. See 10 C. L. 100. See, also, § 6, Right to Speedy Trial.

38. Where an indictment is quashed for curable defects, defendants should not be discharged, but should be held to answer to a proper indictment. State v. Glennen [Miss.] 47 S 550.

39. Where a variance between the allegations and proof appears, and jury is discharged, and court is of opinion that new indictment or information can be framed on which defendant can be legally convicted, it is court's duty to commit defendant or admit him to bail to await a new indictment or information. Ex parte Johnson [Okl. Cr. App.] 97 P 1023.

40. Pen. Code, § 1008. Direction of court to submit case to another grand jury prevents dismissal from operating as final judgment or bar. People v. Quijada [Cal.] 97 P 689. Pen. Code, § 1387, provides that dismissal is bar to another prosecution, if offense is misdemeanor, unless order expressly states it is to allow complaint to be amended, but shall not be bar in case of felony. Order sustaining demurrer, but remanding prisoner to wait action of subsequent grand jury, held not bar to prosecution (assault with deadly weapon). Id. Where presentment is returned within time required by statute of limitations, and a nolle prosequi is thereafter entered thereon for any informality, prosecution may be continued by an accusation in the city court having jurisdiction, provided the accusation be preferred within 6 months from the date of the order of nolle prosequi. Crawford v. State [Ga. App.] 62 SE 501.

41, 42. People v. Acritelli, 57 Misc. 574, 110 NYS 430.

43. A dismissal because information was not filed within 30 days after binding over of accused is not a bar to another prosecution for same offense, nor are new proceedings before a magistrate necessary. Information may be filed at once, after dismissal of original proceedings, without violating accused's rights. State v. Fletcher [Wash.] 97 P 242; State v. Seright, 48 Wash. 307, 93 P 521.

44. Stevens v. State [Ala.] 47 S 208.

power to enter a nolle prosequi upon an indictment, though its validity has been recognized by the trial court, where he doubts its sufficiency.[45] The accused is not thereby injured, not having been placed in jeopardy.[46] In Texas the county attorney may for good cause and with consent of county court enter a dismissal of a cause appealed from justice court.[47] The statute requiring him to file his reasons for such action is directory only, and failure to do so does not invalidate the judgment of dismissal.[48] Where two parties are jointly indicted and a severance allowed, the district attorney may, for proper reasons, dismiss one case,[49] and it is not improper, where this is done, to tender to the remaining defendant, as a witness, the person against whom the prosecution has been dismissed.[50] In Missouri it is provided by statute that if there are two indictments pending against accused for the same offense the one first found shall be suspended by the second.[51] Hence defendant cannot be legally tried upon an indictment when a second has been found for the same offense.[52]

§ 9. *Evidence. Judicial notice.* See 10 C. L. 100—Courts take judicial notice of public laws and statutes,[53] public documents and maps,[54] regulations of the executive departments of the federal government pursuant to authority delegated by congress,[55] of the fact that prohibition is in force in a certain county,[56] of the location of a city within the county,[57] and of matter of common knowledge.[58] The court will not take judicial notice that a certain object is a deadly weapon.[59]

*Presumptions and burden of proof.* See 10 C. L. 101—Innocence being presumed,[60] the burden is upon the state [61] to establish beyond a reasonable doubt [62] every essential element of the crime charged.[63] It is now generally held that the interposition

45, 46. State v. Ayles, 120 La. 661, 45 S 540.

47, 48. Williams v. State, 53 Tex. Cr. App. 396, 110 SW 63.

49. Harville v. State [Tex. Cr. App.] 113 SW 283. Defendants were granted a severance, and it was ordered that this defendant be tried last. Subsequently prosecuting attorney entered nolle prosequi as to other two defendants and they were not tried. They were not used as witnesses by the state nor by defendant. Held, defendant could not complain. Hobbs v. State, 53 Tex. Cr. App. 71, 112 SW 308.

50. Harville v. State [Tex. Cr. App.] 113 SW 283.

51. Rev. St. 1899, § 2522. State v. Mayer, 209 Mo. 391, 107 SW 1085.

52. Judgment reversed where trial was under information suspended by a second one. State v. Mayer, 209 Mo. 391, 107 SW 1085.

53. See 10 C. L. 100.

54. Maps published by state authority. Davis v. State, 134 Wis. 632, 115 NW 150.

55. United States v. Moody, 164 F 269. Circular of department of interior regarding public land entries held a permanent and regular rule adopted and promulgated pursuant to statutory authority. Federal courts take judicial notice of it. Nurnberger v. U. S. [C. C. A.] 156 F 721.

56. That it is unlawful to manufacture or sell intoxicating liquors anywhere within certain county. State v. Arnold [S. C.] 61 SE 891.

57. That city of Waukesha is within eastern municipal district of Waukesha county. Davis v. State, 134 Wis. 632, 115 NW 150. Where crime was shown to have been committed within a certain distance of a certain town, judicial notice could be taken of the location of the town as being within a certain county. State v. Mitchell [Iowa] 116 NW 808.

58. Meaning of word "certify" as used in connection with bank checks judicially noticed. United States v. Heinze, 161 F 425. Merchandising establishments, stores, restaurants, soft drink dispensaries, etc., are judicially recognized as places of business, and court may so inform jury. Bashinski v. State [Ga. App.] 62 SE 577. Usual abbreviations of christian names in common use. McDonald v. State [Fla.] 46 S 176. That "Manhattan cocktails" are intoxicating. State v. Pigg [Kan.] 97 P 859. That whisky is spirituous, alcoholic and intoxicating. O'Connell v. State [Ga. App.] 62 SE 1007. That lager beer is intoxicating malt liquor. Cripe v. State [Ga. App.] 62 SE 567. That beer is intoxicating when taken in sufficient quantities. O'Connell v. State [Ga. App.] 62 SE 1007.

59. An axe. Bush v. State, 52 Tex. Cr. App. 398, 107 SW 348.

60. Defendant is presumed to be innocent until he is proven guilty beyond a reasonable doubt. State v. Snyder, 137 Iowa, 600, 115 NW 225; O'Donnell v. Com. [Va.] 62 SE 373.

61. The burden of proof never shifts in criminal prosecutions but rests with the government throughout, and the benefit of a reasonable doubt in favor of accused extends to every matter offered in evidence for as well as against him. Williams v. U. S. [C. C. A.] 158 F 30.

62. For definitions of "reasonable doubt," see decisions cited post, § 10E. Also post, § 9, Quantity, etc.

63. Chamberlain v. State [Neb.] 115 NW 555; State v. Pressler, 16 Wyo. 214, 92 P 806.

of the defense of insanity or an alibi does not cause the burden of proof to shift. In such case, defendant is entitled to be acquitted if, upon all the evidence, the jury entertain a reasonable doubt of guilt.[64] The burden is upon defendant to show by a fair preponderance of evidence circumstances reducing the degree of crime [65] or excusing the act proved against him,[66] and to show an alleged lack of jurisdiction of a state court of general jurisdiction.[67] It is competent for the legislature to make proof of certain facts prima facie evidence of a violation of law,[68] and a statute imposing upon a defendant the burden of proof upon a particular issue does not violate any vested right.[69] The ordinary inferences or presumptions commonly recognized by courts are indulged in criminal cases,[70] but are, of course, disputable.[71] One inference or presumption cannot be based upon another.[72] In the absence of any testimony as to defendant's character, there is no presumption in regard to it.[73] Failure of defendant to call available witnesses is a circumstance which may be considered by the jury,[74] though no legal presumption is thereby raised.[75] In Georgia

64. An **alibi** is no longer considered an affirmative defense, to establish which defendant has the burden of proof; but if the proof thereof is, with the other evidence in the case, sufficient to raise a reasonable doubt as to the guilt of accused, he is entitled to an acquittal. Instruction that proof of alibi must be of "strong convincing character, and exclude any reasonable hypothesis except the nonpresence of accused," held prejudicially erroneous. State v. Nelson [N. D.] 114 NW 478. Where defense is an alibi, accused should be acquitted if upon a consideration of the evidence thereof, together with all the other evidence in the case, there remains a reasonable doubt of accused's guilt. Tais v. Ter. [N. M.] 94 P 947. Where the defense of **insanity** is interposed, it is the duty of the jury to consider all the evidence, and if they then entertain a reasonable doubt of the sanity of accused at the time of committing the offense he must be acquitted. People v. Casey, 231 Ill. 261, 83 NE 278. The defense of insanity is not to be separately tried, but is a part of the issue of not guilty and the burden is on the state. State v. Speyer, 207 Mo. 540, 106 SW 505. The defense of insanity admits only the commission of the act charged, not that it was a crime. Id. While sanity is presumed in the first instance, yet, where accused introduces evidence of insanity, the burden of proof does not shift, but still rests with the state to prove defendant was criminally responsible. If jury entertain a reasonable doubt of guilt upon all the evidence, they must acquit. State v. Pressler, 16 Wyo. 214, 92 P 806. Where insanity is relied on as defense, it is not error to refuse a charge that if evidence creates a reasonable doubt of defendant's sanity jury must acquit. State v. Herron [N. J. Err. & App.] 71 A 274.

65. Burden is on prisoner to reduce crime or show self-defense, killing being proved. State v. Peterson [N. C.] 63 SE 87. State need not show that former judgment of conviction had not been reversed, vacated or set aside. Such proof is for defendant. Tall v. Com., 33 Ky. L. R. 541, 110 SW 425.

66. Accused must show self-defense by fair preponderance only. Commonwealth v. Palmer [Pa.] 71 A 100.

67. An Indian indicted in a state court for killing another Indian has burden of showing that crime was committed on Indian reservation and that federal courts had exclusive jurisdiction. Evidence held not to show such fact. State v. Buckaroo Jack [Nev.] 96 P 497.

68. Legislature has power to make proof of possession of federal license prima facie proof of violation of local option law. King v. State, 53 Tex. Cr. App. 101, 109 SW 182. Competent to provide that issuance of revenue stamp shall be prima facie evidence of sale of intoxicating liquor by person to whom it was issued. People v. McBride, 234 Ill. 146, 84 NE 865. Ky. St. 1903, § 1967, making proof of setting up or exhibiting gaming table prima facie evidence that it was done with permission of person occupying or controlling the house, is valid. Jarboe v. Com., 32 Ky. L. R. 755, 107 SW 227.

69. Local option law making county court's order declaring result of election prima facie evidence that provisions of law have been complied with, thus placing on defendant, prosecuted under that law, burden of showing invalidity of initiatory steps, is valid. State v. Kline [Or.] 93 P 237.

70. Person presumed to have **ordinary capacity** for hearing. Holcombe v. State [Ga. App.] 62 SE 647. **Soundness of mental and bodily faculties** presumed. Id. Presumptions raised by Code Civ. Proc. § 1963, subd. 15, that **official duty has been performed,** and subd. 23, that writing is truly dated, while disputable, are evidence in themselves sufficient to support finding, though there is evidence to contrary. People v. Liemsen, 153 Cal. 387, 95 P 863.

71. Presumption of **identity of person from identity of name** (Code Civ. Proc. § 1963) is disputable. People v. Mullen [Cal. App.] 94 P 867. Presumption of **legality of acts of officials** in selecting jurors held overcome by proof showing discrimination against colored men in selecting panel. Montgomery v. State [Fla.] 45 S 879. Whenever the law indulges a presumption adverse to accused from proof of certain facts, he may rebut such presumption by evidence. Vanhouser v. State, 52 Tex. Cr. App. 572, 108 SW 386.

72. State v. Jacobs [Mo. App.] 113 SW 244.

73. People v. Kemmis [Mich.] 15 Det. Leg. N. 382, 116 NW 554.

74. Commonwealth v. Johnson, 199 Mass. 55, 85 NE 188.

75. Failure to call two physicians who examined deceased, and who testified before

the statutory presumption arising from failure of defendant to produce the strongest evidence available does not apply where he introduces no evidence, but relies wholly on his statement,[76] nor is it applicable where witnesses are equally accessible to the state.[77]

*Relevancy and competency in general.*[See 10 C. L. 104]—In general, all evidence, otherwise competent, having any tendency to prove or disprove any fact in issue, is relevant and admissible[78] while evidence not shown to be relevant should be excluded.[79] Where evidence is admissible only for a limited purpose, its effect should be properly limited by the court.[80] Evidence too remote should be excluded,[81] but where the question of admissibility depends solely upon the weight or remoteness of the evidence, its exclusion or admission rests in court's discretion.[82] Where there is

the grand jury, was a circumstance which jury could consider, though no legal presumption arose therefrom. People v. Fiori, 123 App. Div. 174, 108 NYS 416. Failure to produce available witnesses to explain facts making a prima facie case against accused may be considered by the jury, but does not raise any arbitrary presumption of suppression of evidence nor any presumption of guilt or innocence. State v. Callahan [N. J. Law] 69 A 957.

**76.** Pen. Code 1895, § 989, inapplicable. Davis v. State [Ga. App.] 61 SE 843.

**77.** Not error to refuse charge as to presumption from failure to call available witness (Pen. Code 1895, § 989) where witness was present in court who was at place of killing, but who was not shown to have seen the act, and state did not call him, but relied on other evidence, and accused could have called him. Harper v. State, 129 Ga. 770, 59 SE 792. Where accused relies solely on his statement, Pen. Code 1895, § 989 (presumption from failure to produce available evidence), applies only where the statement discloses the existence of evidence accessible to accused, but not to the state. Davis v. State [Ga. App.] 61 SE 843.

**78.** A fact is relevant which as a matter of logic tends to sustain or impeach a hypothesis, and, being relevant, is admissible unless excluded by statute or controlling principle. State v. Gebbia [La.] 47 S 32. One fact is relevant to another whenever, according to the common course of events, the existence of the one, taken alone or in connection with other facts, renders the existence of the other either certain or more probable. State v. Sebastian [Conn.] 69 A 1054. Any evidence tending to connect the evidentiary fact with the factum probandum is admissible. State v. Ryder, 80 Vt. 422, 68 A 652. Great latitude is allowed in admitting evidence on issue of insanity. State v. Porter [Mo.] 111 SW 529. Testimony of accused on former trials admissible to rebut evidence of insanity. State v. Speyer, 207 Mo. 540, 106 SW 505. Proof tending to show commission of offense by another improperly excluded. Mason v. State [Ala.] 45 S 472. Deed admissible, though information alleging its forgery did not set out its acknowledgment. State v. Sharpless, 212 Mo. 176, 111 SW 69. Acts and statements of defendant just after killing of deceased admissible on issue of insanity, though not res gestae. State v. Porter [Mo.] 111 SW 529.

**79.** Evidence properly excluded when not shown relevant at time it is offered and no further offer to show relevancy is made. State v. McGowan, 36 Mont. 422, 93 P 552. Questions seeking to elicit testimony neither relevant nor material properly excluded. McCall v. State [Fla.] 46 S 321. Record in another case incomplete and properly excluded. State v. Ayles, 120 La. 661, 45 S 540. Evidence of size of accused's family inadmissible. State v. Gallman, 79 S. C. 229, 60 SE 682. Testimony as to conduct and appearance of accused's brother inadmissible, there being no proof of conspiracy between them. Jay v. State, 52 Tex. Cr. App. 567, 109 SW 131. Held error to allow witness, who was present at time alleged affidavit, contradicting defendant's testimony, was read to defendant, to state everything occurring in no way tending to prove falsity of defendant'e testimony. Wilkinson v. People, 226 Ill. 135, 80 NE 699. Statement of witness giving his testimony before grand jury, in absence of accused, inadmissible, there being no controversy as to what occurred before grand jury. Pride v. State, 52 Tex. Cr. App. 441, 107 SW 819. In prosecution for perjury alleged to have been committed in divorce proceeding, admissions of accused's former wife could not be proved, she not being party. State v. Luper [Or.] 95 P 811. Record in another case and statements of defendant in that case, which was for same crime, hearsay. Way v. State [Ala.] 46 S 273. Defendant, accused of indecent assault, claimed prosecuting witness was intoxicated at time, and offered to show that she made similar charges against others when intoxicated. Offer properly excluded when there was no offer to show further that she had delusions when intoxicated or was in the habit of imagining such aseaults. State v. Quinn, 80 Conn. 546, 69 A 349.

**80.** Where evidence was competent to corroborate witness if he was detective, but not if he was accomplice, court should have so limited effect of testimony. Spencer v. State, 52 Tex. Cr. App. 289, 20 Tex. Ct. Rep. 408, 106 SW 386.

**81.** In homicide for killing of defendant's wife, evidence of divorce proceedings, mistreatment and trouble several years before held inadmissible and prejudicial to accused. State v. Moore [Kan.] 95 P 409. Proof of blood and semen stains on accused's shirt, and that button found at place of assault was like the one missing from his shirt, and had similar material attached to it, held too remote to be admissible on question of identity of accused with man who committed rape. State v. Alton [Minn.] 117 NW 617.

**82.** Where admissibility depends on the weight of the evidence, question is for trial

serious doubt as to the admissibility of evidence, the doubt should be resolved in favor of accused.[83] Evidence is admissible which tends to connect accused with the crime [84] or to establish his identity,[85] and to show animus, motive, guilty knowledge or intent.[86] Proof of the actions of bloodhounds used to track criminals is admitted in most jurisdictions, when the proper foundation has been laid,[87] by proper proof of the training, experience and breeding of the dog used, and by further proof connecting accused with the trail followed.[88] Proof of the conduct of other bloodhounds trained by the same person is inadmissible.[89] Evidence which is relevant and competent to show guilt of accused is not inadmissible because of an admission or offer to admit the fact sought to be proved,[90] epecially where defendant's conces-

court. People v. Hutchings [Cal. App.] 97 P 325. Remoteness of testimony goes to its weight, not to its competency. State v. Porter [Mo.] 111 SW 629. Proper to refuse to exclude proof of tracks into which defendant's feet had been placed on ground that evidence was not reliable, the weight of it being for jury. State v. Williams, 120 La. 175, 45 S 94. Letter by deceased to defendant prior to their marriage, and three years prior to homicide, properly excluded as too remote. Montgomery v. State, 136 Wis. 119, 116 NW 876. An objection to evidence or a motion to strike is addressed to the sound discretion of the court where the evidence is admissible in some aspects of the case but inadmissible to show character of defendant or separate offenses. State v. Deliso [N. J. Err. & App.] 69 A 218. Evidence offered by state in rebuttal not being clearly inadmissible, action of court in receiving it was not erroneous, though its relevancy was remote. State v. Gallagher, 14 Idaho, 581, 94 P 581.

83. Gambrell v. State [Miss.] 46 S 138.

84. Proof of tracks, and attendant facts, connecting defendant with crime, admissible. State v. Jeffries, 210 Mo. 302, 109 SW 614. Tracks leading from burglarized house admissible, with other evidence. State v. Freeman, 146 N. C. 615, 60 SE 986. That tracks corresponded in size to shoes found at accused's house admissible, though stick with which measurements were made was not produced. Cordes v. State [Tex. Cr. App.] 112 SW 943. Finding of revolver with which accused was connected, competent. State v. Jeffries, 210 Mo. 302, 109 SW 614. Proof of finding articles in accused's possession and at places where he had been admissible to connect him with crime of burglary. Lynne v. State, 53 Tex. Cr. App. 386, 111 SW 151. Proper to allow witnesses to identify bottle as one seen in accused's possession where there was evidence of shooting with oiled shot and a bottle was found near the scene containing oiled shot. Richards v. Com., 107 Va. 881, 59 SE 1104. Where crime indicates that at least two persons participated in it, and circumstances indicate a certain person as one of them, proof that accused was in the company of such person soon after the crime was relevant and admissible. Baker v. State [Ga. App.] 62 SE 99. Testimony of witness as to circumstance connecting accused with crime admissible, though witness did not positively identify accused. Objection goes to weight, not to competency. People v. Strollo, 191 N. Y. 42, 83 NE 573. Homicide, committed in robbing bank. Proof of expenditures by accused after crime admissible, especially to corroborate confession which detailed them. People v. Siemsen, 153 Cal. 387, 95 P 863.

85. Testimony of witness as to how long she had known defendant, how often he had visited her, by what name he was known, etc., competent in identification of defendant. Way v. State [Ala.] 46 S 273.

86. Evidence showing participation and guilty knowledge of accused, accomplice in forgery, properly received. Hinson v. State, 53 Tex. Cr. App. 143, 109 SW 174. Question whether defendant had not returned portion of sum received by him in pursuance of alleged conspiracy to cheat and defraud county held proper to show guilty knowledge. Commonwealth v. Tilly, 33 Pa. Super. Ct. 35. Evidence of motive is admissible. City of Gallatin v. Fannin, 128 Mo. App. 324, 107 SW 479. Evidence tending to show improper relations between accused and another man admissible to show motive in prosecution for murdering her husband. Lawson v. State [Ind.] 84 NE 974. Threat by accused against attorney for owner of building burned not admissible in arson case to show motive. Clinton v. State [Fla.] 47 S 389.

87. See discussion of authorities pro and con in State v. Dickerson, 77 Ohio St. 34, 82 NE 969. Where the training, character and conduct of a dog make his acts evidence, such acts may be admitted. Such evidence is not restricted to corroborative evidence only. State v. Freeman, 146 N. C. 615, 60 SE 986.

88. It should appear that the particular dog used was trained and tested in tracking human beings, and by experience had been found reliable in such cases, and that the dog was laid on the trail, whether visible or invisible, at a point where the circumstances tended clearly to show that the guilty party had been, or upon a track which the circumstances indicated to have been made by him. In addition to this, the reliability of the dog must be proved by a person or persons having personal knowledge thereof. This foundation may be strengthened by proof of pedigree, purity of blood or the exalted standing of his breed in the performance of such peculiar work. State v. Dickerson, 77 Ohio St. 34, 82 NE 969. Proof of tracking by bloodhounds competent where there was evidence that they were of pure blood, well trained, had been tested, were in charge of an experienced trainer, and were put on trail within six feet of where criminal agency must have originated, close to building, burning of which was charged. Spears v. State [Miss.] 46 S 166.

89. Spears v. State [Miss.] 46 S 166.

90. Character of wounds could be proved

sion is not as broad as the fact alleged.[91] Evidence of a certain kind or to show certain facts having been introduced by one side, evidence similar in nature is admissible in behalf of the other side.[92]

*Competency of evidence as affected by rights of accused.*[93]—The right of accused to be confronted by witnesses against him includes the right to cross-examine,[94] and where this right is unduly limited by the circumstances, though formally permitted by the court, prejudicial error results.[95] The right of accused, to be confronted with witnesses is not violated by the introduction of documentary evidence.[96] Accused cannot be compelled to testify, and his failure to testify cannot be shown or commented on.[97] But it has been held that failure of accused to deny facts within his knowledge warrants inference that he could not truthfully deny them.[98] Evidence obtained from him with his consent or voluntarily disclosed is competent.[99] Accused is not compelled to give testimony against himself by being compelled to put his foot in a track found near the scene of the crime in order to identify him.[1] Evidence of guilt which a defendant either directly or indirectly is compelled to disclose by an illegal seizure and search of his person under an unlawful arrest is inadmissible against him.[2] But if his premises or belongings are searched by an-

though accused admitted shooting and pleaded justification. State v. Young [Or.] 96 P 1067.

**91.** The state is not precluded from introducing proof to establish a prior conviction, charged in the indictment, by a concession of the fact of prior conviction by the defense after the state had commenced to make its proof, the concession not being as broad as the indictment. People v. Jordan, 109 NYS 840.

**92.** Where accused claimed an alibi and that he was sick, it was not error for state to ask him what he was sick of, though he answered that he had a "bad" disease. Moore v. State, 52 Tex. Cr. App. 364, 107 SW 355. Where accused proved incompetent statements by deceased, he could not object to similar proof by state. Thomas v. State [Tenn.] 113 SW 1041. Evidence of certain kind being offered by accused, evidence of same character was competent for state. Brown v. State, 52 Tex. Cr. App. 267, 20 Tex. Ct. Rep. 555, 106 SW 368. Where statement by accused admitting killing was proved, accused should have been permitted to prove other details and explanation given to witness by accused a short time after. Code Cr. Proc. 1895, art. 791, makes entire conversation competent. Pratt v. State, 53 Tex. Cr. App. 281, 109 SW 138. Where defendant brought out part of conversation, state could show all of it. Lowry v. State, 53 Tex. Cr. App. 562, 110 SW 911. Showing for witness being offered, it was competent to show by persons familiar with and acquainted in community where witness was claimed to reside that no such person lived there. Walker v. State [Ala.] 45 S 640.

**93.** See, also, Constitutional Law, 11 C. L. 689; Witnesses, 10 C. L. 2079.

**94.** Wray v. State [Ala.] 45 S 697.

**95.** Witness was brought in on cot, and court, on consultation with physician, refused to allow him to be examined on the ground that it might cause death of witness. He allowed witness to answer one question, however, whether witness shot deceased. Defendant's counsel declined to cross-examine, though court gave permission. Held, prejudicial error, it being proper to decline to cross-examine under these circumstances, and improper to permit state to ask the one important question. Wray v. State [Ala.] 45 S 697.

**96.** The provision of the intoxicating liquor law that possession of United States license as liquor dealer shall be presumptive proof of guilt, and that such proof may be made by copy of record of United States revenue collector, held constitutional and valid. Runde v. Com. [Va.] 61 SE 792.

**97.** Accused's failure to testify on preliminary trial is inadmissible. Pryse v. State [Tex. Cr. App.] 113 SW 938.

**98.** Where defendant was in court and offered testimony by physician that his health was such that he could not be allowed to testify, and he did not testify, jury was warranted, if they found he was able to testify, in drawing inference that he could not truthfully deny facts shown in evidence. State v. Skillman [N. J. Law] 70 A 83. Instruction that where evidence, if true, would be conclusive of the guilt of accused, and he can disprove it by his own oath as a witness, then his silence would justify a strong inference that he could not deny the charge, approved. State v. Callahan [N. J. Law] 69 A 957; State v. Skillman [N. J. Law] 70 A 83.

**99.** Physical condition of accused could be shown when examination by witness was with accused's consent. Cordes v. State [Tex. Cr. App.] 112 SW 943. Search and examination of accused before he was formally accused of crime, and not against his protest, held not a violation of his rights. People v. Strollo, 191 N. Y. 42, 83 NE 573. Letter by accused while in jail, addressed to his mother and father, delivered unsealed to the sheriff, for mailing, and containing an admission of his participation in the crime, held not objectionable as compelling him to testify against himself. State v. Vey [S. D.] 114 NW 719.

**1.** Magee v. State [Miss.] 46 S 529.

**2.** Glover v. State [Ga. App.] 61 SE 862. Defendant's consent to be searched for $10 held not to include consent to be searched for pistol which he was trying to conceal

other, although without a vestige of authority, the evidence thus disclosed may be used against him.[3] The rule is applicable only to searches of a defendant's person after an unlawful seizure thereof.[4] Evidence obtained by a search of his person after a lawful arrest is admissible.[5] A defendant, being separately tried cannot successfully object to evidence on the ground that it was obtained by means of an illegal search and seizure of a codefendant.[6] Failure to object to the admission of evidence illegally obtained is a waiver of its incompetency, and evidence so obtained and received without objection may warrant conviction.[7] That evidence was obtained by the illegal act of a private person or petty officer does not make it inadmissible,[8] nor does its introduction violate any constitutional right of defendant.[9] Where the appearance of the defendant is relied upon to sustain a material ingredient of the offense charged, he should be identified and his appearance proved in the regular manner.[10]

Witnesses whose names were not endorsed on the indictment or information may testify,[11] especially where their testimony is purely rebuttal,[12] and their names may be endorsed subsequent to the filing of the indictment or information.[13] The state may call as witnesses persons whose names are not endorsed when they did not testify before the grand jury and were not known to the state's attorney when the in-

and which was discovered by use of force. Reference to pistol inadmissible, defendant not having been arrested. Davis v. State [Ga. App.] 61 SE 404.

3. The test is: Who furnished or produced the evidence. Glover v. State [Ga. App.] 61 SE 862. Evidence obtained by searching defendant's house without warrant admissible. Rogers v. State [Ga. App.] 62 SE 96. Arrest and seizure being legal, though without warrant, evidence as to finding liquor in locked box was competent. Jenkins v. State [Ga. App.] 62 SE 574. That evidence was obtained by an illegal search of defendant's house held not to render it inadmissible, though he was under illegal arrest at the time. Tooke v. State [Ga. App.] 61 SE 917. Evidence elicited through use of a search warrant is admissible however irregular the search warrant may have been and however improper its use for the purpose of securing evidence. Hardesty v. U. S. [C. C. A.] 164 F 420.

4. Glover v. State [Ga. App.] 61 SE 862. Evidence taken from the person of one illegally detained is inadmissible. Concealed weapons. Hughes v. State, 2 Ga. App. 29, 58 SE 390. When by an unlawful search and seizure under an illegal arrest a person is compelled by an officer to furnish incriminating evidence against himself, such evidence is not admissible against him in a criminal prosecution. Croy v. State [Ga. App.] 61 SE 848. But where accused interfered in an attempt to arrest another, and in a scuffle disclosed a pistol in his pocket, which officer then took from him, proof of these facts was competent. Id.

5. Eaker v. State [Ga. App.] 62 SE 99. Competent to prove that shoes taken from defendants while under legal arrest, and without force or intimidation, fitted certain tracks. Id. Shoes worn by defendant at time of arrest competent. State v. Jeffries, 210 Mo. 302, 109 SW 614. Papers taken from accused after his arrest, by the officer arresting him, may be received in evidence. State v. Sharpless, 212 Mo. 176, 111 SW 69. Evidences of guilt found upon a person in legal custody are admissible in evidence. Hughes v. State, 2 Ga. App. 29, 58 SE 390. Trunk check was found on person of accused when arrested, and officers obtained trunk and took property and papers. Held, accused not entitled to return of such property before trial, nor was it obtained by unlawful search or seizure. United States v. Wilson, 163 F 338. Such property would be admissible at trial subject to objections based on materiality and on constitutional grounds of compelling accused to furnish evidence against himself and of having been obtained by an unlawful search or seizure. Id.

6. Jones v. State [Ga. App.] 62 SE 482.

7. Davis v. State [Ga. App.] 61 SE 404.

8. Deputy sheriffs made hole in wall of saloon and looked in on Sunday, and then seized cigarette papers sold and sale book as evidence. Held admissible. Cohn v. State [Tenn.] 109 SW 1149.

9. Cohn v. State [Tenn.] 109 SW 1149.

10. Held improper to merely instruct jury to judge defendant's age by his appearance, in rape case where age was essential element of offense. Commonwealth v. Walker, 33 Pa. Super. Ct. 167.

11. Witnesses whose names are not on information may be called to testify. State v. Jeffries, 210 Mo. 302, 109 SW 614. Witness whose name was not endorsed on indictment properly allowed to testify. State v. Henderson, 212 Mo. 208, 110 SW 1078.

12. Evidence obviously and purely in rebuttal of evidence offered in behalf of defendant may be given by witnesses whose names are not endorsed on the information. Clements v. State [Neb.] 114 NW 271.

13. In absence of any claim or showing of prejudice to defendant, and in absence of any request for continuance, not error to allow prosecuting attorney to endorse on information, the day before case was set, names of additional witnesses said to have been known to him when he filed information. Wickham v. People, 41 Colo. 345, 93 P 478.

formation was filed,[14] and, in such case, accused is not entitled as a matter of right to notice of the names of witnesses who will be called against him.[15]

*Acts disclosing consciousness of guilt,*[16] such as flight,[17] resistance of arrest,[18] attempts to suppress evidence,[19] if defendant is connected therewith,[20] and incriminating statements and conduct of accused,[21] may be proved.

*Other offenses, convictions, and acquittals.*[See 10 C. L. 107]—Evidence relating to separate and distinct offenses committed by accused wholly unconnected with the offense charged is inadmissible,[22] but evidence otherwise competent and relevant is

**14.** State v. Matejousky [S. D.] 115 NW 96.

**15.** Matter of protecting defendant from surprise is discretionary with jury. State v. Matejousky [S. D.] 115 NW 96.

**16.** See 10 C. L. 106. Conduct of defendant indicative of his consciousness of guilt or of his doubt of the merits of his defense may be shown. Efforts to have prosecution dropped. State v. Farr [R. I.] 69 A 5. In prosecution for kidnapping boy, proof that defendant, neighbor of boy's parents, took no part in search, was admissible. State v. Harrison, 145 N. C. 408, 59 SE 867.

**17.** State v. Anderson, 121 La. 366, 46 S 357; State v. Ralston [Iowa] 116 NW 1058. Flight of accused, his arrest, escape and going to place where detection was unlikely, could be shown. Shumway v. State [Neb.] 117 NW 407. That sheriff looked for accused for 3 or 4 weeks before finding him admissible. Weight for jury. Sweatt v. State [Ala.] 47 S 194.

**18.** Mitchell v. State, 52 Tex. Cr. App. 37, 20 Tex. Ct. Rep. 372, 106 SW 124.

**19.** Evidence admissible to show that witness was one whom defendant had caused to leave the county. Rice v. State [Tex. Cr. App.] 112 SW 299. Attempts to get the prosecuting witness to leave the state and offers to pay him money, admissible as circumstances against accused when connected with him. State v. Constantine, 48 Wash. 218, 93 P 317. Proof that defendant forced a witness to sign an affidavit for the purpose of suppressing evidence against himself, and evidence tending to show the affidavit was not properly sworn to, were admissible. Minor v. State [Fla.] 46 S 297. Letter written by accused attempting to prevent person from testifying against him admissible. Booth v. State, 52 Tex. Cr. App. 452, 108 SW 687.

**20.** Admission of proof of attempts to bribe witnesses is error when such attempts are not connected with accused. Bruner v. U. S. [Okl.] 96 P 597. Proof of efforts of accused or third persons, at accused's instance, to procure absence of state's witnesses, is competent. Eacock v. State, 169 Ind. 488, 82 NE 1039. Whether accused was a privy to such efforts may be a question for jury. Id.

**21.** Statements or conduct of one showing consciousness of guilt may be shown. Hixon v. State, 130 Ga. 479, 61 SE 14. Conduct of accused after shooting tending to show consciousness of guilt and malice, competent. People v. Garnett [Cal. App.] 98 P 247. Proof of accused's manner, that he did nothing and said nothing, while his wife was dying, admissible, he being accused of having poisoned her. Rice v. State [Tex. Cr. App.] 112 SW 299. Movements, acts and voluntary statements of accused, after commission of offense, tending to incriminate him, are always admissible. State v. Daly, 210 Mo. 664, 109 SW 53. Conduct and acts of accused and statements after homicide, admissible. Elsworth v. State [Tex. Cr. App.] 111 SW 963.

**22.** Hargrove v. State, 53 Tex. Cr. App. 541, 110 SW 913; Alford v. State, 53 Tex. Cr. App. 621, 108 SW 364; Commonwealth v. Rodman, 34 Pa. Super. Ct. 607. Proof of other offenses, not tending to show motive, is inadmissible. Bailey v. Com. [Ky.] 113 SW 140. Proof of prior violation of local option law, in different way, inadmissible to show system. Curtis v. State, 52 Tex. Cr. App. 606, 607, 108 SW 380. In prosecution for illegal sale in August, another sale in following December could not be shown. Holloway v. State [Tex. Cr. App.] 111 SW 937. Former conviction for violation of liquor law, not connected with present charge, inadmissible. Southerland v. State, 52 Tex. Cr. App. 424, 107 SW 349. Commonwealth, having elected to stand on charge of sale of liquor to certain person could not prove sale to others. Devine v. Com., 107 Va. 860, 60 SE 37. Where, in embezzlement case, intent was not an issue, proof of other similar acts was inadmissible to show intent, though competent on issue of identity. Morse v. Com., 33 Ky. L. R. 831, 894, 111 SW 714. Proof of other embezzlements, inadmissible in embezzlement case. State v. Laechelt [N. D.] 118 NW 240. In homicide, evidence tending to show accused had burned house where deceased lived was inadmissible, no connection being shown between the acts. State v. Dickerson, 77 Ohio St. 34, 82 NE 969. In murder case, proof of assault by accused on witness, more than a year before, was inadmissible. State v. McNamara, 212 Mo. 150, 110 SW 1067. In homicide cases, it is better to limit the evidence strictly to case in hand and exclude admissions and testimony of extraneous offenses, contests, controversies and difficulties. Brown v. State [Tex. Cr. App.] 112 SW 80. Where charge was keeping disorderly house, proof of specific acts of immorality of the habitues of the place, committed elsewhere, was not admissible. State v. Baans [N. J. Law] 71 A 111. In prosecution for keeping disorderly house, proof that town was "no-license" one, and that defendant sold liquors, was improperly admitted. People v. Jones, 191 N. Y. 291, 84 NE 61. In prosecution for kidnapping, evidence to show another kidnapping by accused is inadmissible, no particular criminal intent or evil motive being involved. State v. Holland, 120 La. 429, 45 S 380. Proof of plea of guilty to similar charge 3 years before, inadmissible (obtaining money by fraudulent promise to perform services).

not inadmissible, because it incidentally tends to show commission of other similar offenses by accused.[23] Thus, proof of crimes other than that charged is admissible where some connection between them is shown,[24] or where other offenses are so blended with the one charged that proof of one involves proof of the other,[25] both being part of the same transaction.[26] Evidence of other crimes is also admissible to show motive, guilty knowledge, or criminal intent,[27] and to identify accused

Clarke v. State [Ga. App.] 62 SE 663. Evidence of disgraceful, immoral, or criminal conduct of one accused of crime, which is in no way connected with the crime itself, is inadmissible. Dungan v. State [Wis.] 115 NW 350. In rape case, other acts than that charged between prosecuting witness and defendant could not be proved. People v. Ah Lean [Cal. App.] 95 P 380. Proof that defendant had been indicted for another offense and that there was record of conviction, prejudicial error, though record was excluded when offered. People v. Jones, 191 N. Y. 291, 84 NE 61. Proof of other burglaries, not in any way connected with charge on trial, erroneously admitted. Lightfoot v. State [Tex. Cr. App.] 106 SW 345.

23. State v. Dulaney [Ark.] 112 SW 158. Evidence which is distinctly relevant is not inadmissible, because it tends to show accused's connection with other crimes. Ray v. State [Ga. App.] 60 SE 816. Evidence relevant to crime charged is admissible, though it tends to show another crime also. State v. Bell, 212 Mo. 111, 111 SW 24. Proof of other murders not inadmissible, all the acts being part of one scheme and closely connected. People v. Rogers [N. Y.] 85 NE 135. In prosecution for killing an officer, the reason for the arrest without a warrant became material, competent on this issue to show that accused was being arrested for commission of felony. Wounding of witness by defendant. State v. Honore, 121 La. 573, 46 S 655. In prosecution for gambling, evidence tending to sustain the charge was admissible though it incidentally tended to show another offense similar in nature. State v. Landrum, 127 Mo. App. 653, 106 SW 1111. Where conversation with defendant was competent to prove an admission by him, it was admissible for that purpose though it disclosed commission of another offense. People v. Cahill [N. Y.] 86 NE 39. Where defendant attempted to prove he was railroad conductor by showing certain cards, proof by the real conductor and owner that the cards had been stolen from him was admissible, though it incidentally tended to show another crime. Eaker v. State [Ga. App.] 62 SE 99. In prosecution for having burglarious tools with intent to use same, proof that hall near defendants' abode was broken into and a safe blown open was held admissible. Commonwealth v. Johnson, 199 Mass. 55, 85 NE 188. Defendant accused of conspiracy to commit subornation of perjury, under stone and timber act, is not prejudiced by admitting evidence of attempt to acquire state lands similarly unlawful, because such evidence tends to show commission of crimes other than those charged, especially where judge carefully limited use of testimony by his charge so as to prevent improper use. Williamson v. U. S., 207 U. S. 425, 52 Law Ed. 278. Acquittal of accused on a charge protects him from another prosecution for the same offense but does not estop the state from proving the same facts where they tend to prove a different charge. State v. Hooker, 145 N. C. 581, 59 SE 866.

24. State v. Dickerson, 77 Ohio St. 34, 82 NE 969. Proof of other offenses is inadmissible unless necessary to establish identity, or guilty knowledge, or intent or motive, or unless such acts are so interwoven with crime charged that they cannot well be separated, or unless such other offense or offenses were committed to conceal the crime charged, or vice versa. Morse v. Com., 33 Ky. L. R. 831, 894, 111 SW 714.

25. Several offenses, forming parts of a series of acts evincing a continuous state of mind in defendant and culminating in the criminal act for which he is indicted, are admissible on trial of such indictment. Breaking into shanty and assault on inmates by defendant and others, prior to homicide. State v. Deliso [N. J. Err. & App.] 69 A 218.

26. Renfroe v. State, 84 Ark. 16, 104 SW 542. Under charge of embezzling a horse, proof of appropriating notes, as part of same transaction, was admissible to show intent. Smith v. State, 52 Tex. Cr. App. 527, 107 SW 844. Where shooting of one and murder of another were part of same transaction, proof of shooting and evidence corroborative of testimony to it was admissible in trial of charge of murder. People v. Manasse, 153 Cal. 10, 94 P 92. An offense other than that for which accused is being tried may be proved as a part of the res gestae, or as tending to establish the offense charged. Proof of breaking down door of house before shooting, which was offense charged. State v. Anderson, 120 La. 331, 45 S 267.

27. Guilty knowledge. State v. Dickerson, 77 Ohio St. 34, 82 NE 969. Proof of other acts of same character admissible to show guilty knowledge or particular intent. People v. Hagenow, 236 Ill. 514, 86 NE 370. Such proof admissible in prosecution of homicide by abortion. Id. In cases involving fraudulent intent, other acts and dealings of accused of a kindred character to that charged, and performed at or about the same time, are admissible to illustrate and establish the motive and intent in the act in question. Thomas v. U. S. [C. C. A.] 156 F 897. Facts tending to show motive may be proved though they involve another offense, but defendant cannot be compelled to testify thereto. Welch v. Com., 33 Ky. L. R. 51, 108 SW 863. Another similar transaction by defendant, about same time, admissible in prosecution for uttering forged note. State v. Mitton, 37 Mont. 366, 96 P 926. To prove defendants' intent and guilty knowledge in prosecution for conspiracy to defraud the United States of public lands, proof of certain other similar transaction to have other persons file for defendants' benefit was admissible. Jones v. U. S. [C. C. A.]

and connect him with the offense charged.[28] Where evidence of this kind is admitted for a limited purpose, the jury should be so informed at the time,[29] though a proper charge to the jury at the close of the evidence may be sufficient.[30]

Former conviction of crime or commitment to prison may be proved when charged in aggravation or as a part of the offense.[31] Details of former charges should, however, be excluded,[32] and proof of former conviction is not to be considered on the issue of guilt of the principal charge.[33]

162 F 417. In prosecution for perjury in swearing to another's residence on public lands, proof that witness took up a homestead on certain lands in section and that defendant swore to his residence on the land, though he had not in fact resided there, as defendant knew, was admissible to show knowledge, design, and system to defraud. Barnard v. U. S. [C. C. A.] 162 F 618. Proof of other similar sales admissible in prosecution for keeping "blind tiger." Gorman v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 406, 106 SW 384. Stealing of other property at same time as that alleged, admissible on intent and as part of same transaction. Territory v. Caldwell [N. M.] 98 P 167. In prosecution for obtaining money by false pretenses, proof that same representations were made to others for same fraudulent purpose competent. People v. Whalen [Cal.] 98 P 194. In prosecution for obtaining money by false pretenses from county by presenting claims twice, proof that he had collected twice for other claims about the same time admissible, where he claimed he did not know he had been previously paid for claim in question. State v. Sparks [Neb.] 114 NW 598. On trial of defendant charged jointly with another of obtaining money by false pretenses, proof of a general scheme by the two to defraud others and of similar representations by defendant to others was admissible. Griggs v. U. S. [C. C. A.] 158 F 572. Under indictment charging bank officer with embezzling funds of bank, proof of embezzlement of different amounts at various times and the manner in which he did it was held admissible to show offense charged. Chamberlain v. State [Neb.] 115 NW 555. In prosecuting of county auditor for corruptly countersigning warrant, proof of the giving and receiving of bribes to induce favorable action in condemnation proceedings, the acts being part of a series culminating in the one being prosecuted, was competent to show a guilty purpose. People v. Neff, 191 N. Y. 210, 83 NE 970. First assault on sheriff was to secure release of companion, second was in resisting arrest when sheriff overtook accused and his companion a short time later in the day Held, proof of either was admissible to show motive and intent in other, though indictment charged but one assault. Warford v. People, 43 Colo. 107, 96 P 556. In trial of charge of incest, criminal acts of like nature prior to the one charged may be proved. Smothers v. State [Neb.] 116 NW 152. In prosecution for conspiracy to obtain money from prostitute by allowing her to carry on her occupation without being molested, proof of payments by others under like agreements, about the same time, was admissible. State v. Routzahn [Neb.] 115 NW 759. In prosecution for uttering forged instrument knowingly with intent to defraud, proof of other similar acts is admissible only on question of intent. Such evidence is admissible on this issue regardless of other evidence as to the same issue. State v. Murphy [N. D.] 115 NW 84. In prosecution for bribery of member of legislature, course taken by other bills, tending to show a corrupt combination of men to obtain money for certain legislation, was competent to show guilty knowledge and general scheme. State v. Dulaney [Ark.] 112 SW 158. In prosecution for maintaining liquor nuisance, proof of unlawful sales is admissible to show unlawful intent in keeping liquors. State v. Johns [Iowa] 118 NW 295. In prosecution for conspiracy to blackmail, proof of other conspiracies to blackmail is admissible to show guilty knowledge, intent, or motive. Eacock v. State, 169 Ind. 488, 82 NE 1039. Evidence of relations of defendant in Africa, England and this country with prosecutor's wife held admissible as showing events leading up to and making possible act charged. Commonwealth v. Levinson, 34 Pa. Super. Ct. 286.

28. Possession of other stolen articles properly shown in theft case, evidence being properly limited by court to purpose of connecting accused with crime charged. Lynne v. State, 53 Tex. Cr. App. 375, 111 SW 729. Prior burglary by defendant provable, when it had tendency to connect accused with offense charged. Johnson v. State, 52 Tex. Cr. App. 201, 20 Tex. Ct. Rep. 853, 107 SW 52. Where defendant claimed another had done act with which he was charged, proof of other similar acts by accused, and of the name used by him in such transactions, was admissible to identify him (embezzlement). Morse v. Com., 33 Ky. L. R. 831, 894, 111 SW 714. Other previous acts, conviction under another name, and previous assumed names, also admissible. Id.

29. Where proof of other offenses is admitted for a limited purpose, the jury should be so informed at the time. Morse v. Com., 33 Ky. L. R. 831, 894, 111 SW 714.

30. Evidence of independent assault being admitted in homicide case, court should have instructed jury limiting its consideration within proper bounds. Bruner v. U. S. [Okl.] 96 P 597. Usually a limitation of the purpose for which evidence of other acts may be considered should be made when it is received, but a proper limitation in the court's charge may cure any error in failing to do so. Warford v. People, 43 Colo. 107, 96 P 556.

31. In prosecution of convict for assault likely to produce great bodily injury, under Pen. Code, § 246, record of commitment of accused to prison is competent. People v. Finley, 153 Cal. 59, 94 P 248. Record of prior conviction competent, such conviction being alleged in indictment. Mitchell v. State, 52 Tex. Cr. App. 37, 20 Tex. Ct. Rep. 372, 106 SW 124.

32. Proof of former convictions by the "record" (Ky. St. 1903, § 1130) means proof

*Character and reputation.*[See 10 C. L. 110]—Proof of the good character of defendant,[34] or of his good reputation,[35] is admissible in his behalf, but the evidence should be confined to the trait involved in the crime charged.[36] "General character" is the same as "general reputation" and is determined by how the person is generally regarded or esteemed in the community in which he lives.[37] Hence, proof of particular acts or conduct is inadmissible on the issue.[38] Testimony that witness has never heard the reputation of defendant questioned is competent.[39] Proof that accused has never before been arrested or accused of crime is incompetent.[40] Proof of specific good conduct in certain respects is not competent to negative proof of bad conduct afforded by defendant's confession.[41] The prosecution cannot impeach defendant's character or reputation unless he puts it in issue.[42] But, where defendant calls witnesses to testify as to his good reputation, the state may cross-examine as to what they have heard concerning defendant.[43] Proof of reputation is properly confined to the reputation of the individual in the vicinity in which he lives or in which he formerly resided,[44] and only witnesses acquainted with the general reputation of the prisoner in such neighborhood or vicinity are qualified to testify in regard thereto.[45]

*Hearsay.*[See 10 C. L. 111]—Unsworn statements of third persons, not in the presence of accused,[46] and testimony based on information derived from others,[47] is inadmissible.

by record of verdict and judgment of conviction and sentence, not by entire record, since this would show all the facts of former charges, which is not permissible. Indictments should have been excluded. Tall v. Com., 33 Ky. L. R. 541, 110 SW 425.

33. Davis v. State, 134 Wis. 632, 115 NW 150.

34. Evidence of good character is always admissible for defense. Lewis v. State [Miss.] 47 S 467. Evidence of good character of defendant is substantive evidence and may of itself create a reasonable doubt and lead to an acquittal. Error to charge that if jury is satisfied of defendant's guilt beyond a reasonable doubt, under all the evidence, evidence of previous good character cannot overcome such conclusion. Commonwealth v. Cate, 220 Pa. 138, 69 A 322.

35. State v. Dickerson, 77 Ohio St. 34, 82 NE 969.

36. Character for peace and quiet competent in homicide case. State v. Dickerson, 77 Ohio St. 34, 82 NE 969. Reputation of accused for honesty relevant in prosecution for larceny. People v. Ryder, 151 Mich. 187, 14 Det. Leg. N. 912, 114 NW 1021.

37. Way v. State [Ala.] 46 S 273.

38. Such proof should be excluded on cross-examination of witness to general character. Way v. State [Ala.] 46 S 273. In prosecution for theft as bailee, proof of the general reputation of accused as to honesty and integrity is competent but not proof of particular acts. Leonard v. State, 53 Tex. Cr. App. 187, 109 SW 149. While accused may put his general character in issue, he cannot show special traits or particular instances not bearing on the peculiar nature of the crime charged. Arnold v. State [Ga.] 62 SE 806. Where court permitted defendant (larceny) to show generally his previous occupations, proof of particular matters concerning such occupations, and of his family history, was properly excluded. State v. Clem [Wash.] 94 P 1079.

39. Witness had known defendant, but had never heard anyone except members of his family speak of him. State v. McClellan [Kan.] 98 P 209.

40. State v. Marfaudille, 48 Wash. 117, 92 P 939.

41. State v. Foster, 136 Iowa, 527, 114 NW 36.

42. State v. Blodgett [Or.] 92 P 820. Proof of bad reputation of defendant inadmissible, where he had not himself offered evidence of good reputation. People v. Hinksman [N. Y.] 85 NE 676. In prosecution for unlawfully retailing intoxicating liquor, defendant not having put her reputation in issue, proof that she had the reputation of being a blind pig keeper was inadmissible. Smothers v. Jackson [Miss.] 45 S 982. Where accused offered proof of good character but not of reputation, it was prejudicial error to allow state to cross-examine character witnesses as to rumors of other crimes by defendant, and allow defendant to offer evidence to disprove the rumored charges. State v. Dickerson, 77 Ohio St. 34, 82 NE 969.

43. Where witness testified to defendant's good reputation for peace and quiet, it was proper to cross-examine as to how many men she had heard he had shot. People v. Laudiero [N. Y.] 85 NE 132.

44. Younger v. State [Neb.] 114 NW 170.

45. Mere fact witness heard prisoner's reputation discussed in town, other than that in which prisoner resided, is insufficient in absence of evidence that prisoner was known where discussions occurred and had a reputation there. Commonwealth v. Howe, 35 Pa. Super. Ct. 554.

46. Conversations in defendant's absence. People v. Schmitz [Cal. App.] 94 P 407. What was said after killing, in defendant's absence. State v. Long, 209 Mo. 366, 108 SW 35. Statement of third person not in accused's presence. Alford v. State, 52 Tex. Cr. App. 621, 108 SW 364. Statement of accused's mother, not shown to have been heard by him. Irving v. State [Miss.] 47 S 518. Conversation between witness and

*Admissions and declarations.*[See 10 C. L. 1112]—Self-serving declarations by accused are not admissible,[48] but inculpatory or incriminating statements and admissions are admissible,[49] if freely and voluntarily made.[50] A statement made in the

third person as to what accused said. Choice v. State, 52 Tex. Cr. App. 285, 20 Tex. Ct. Rep. 549, 106 SW 387. What prosecuting witness said to another witness about obtaining liquor from accused. Smith v. State, 52 Tex. Cr. App. 507, 107 SW 819; Henderson v. State, 52 Tex. Cr. App. 514, 107 SW 820. What witness had said out of court. Halloway v. State [Tex. Cr. App.] 113 SW 928. Statements by deceased, before the murder, that she was afraid to stay with accused (her husband). State v. McNamara, 212 Mo. 150, 110 SW 1067. Prosecutor testified to description which he gave sheriff of man who robbed him. Testimony by sheriff as to such description being given to him, held hearsay. Gillotti v. State, 135 Wis. 634, 116 NW 252. Mere accusation against one is hearsay and inadmissible, unless it appears that accused failed to deny it or in some way admitted it. People v. Long [Cal. App.] 93 P 387.

**Held not within hearsay rule:** Statements in presence of accused may be proved, object not being to show truth of facts stated. State v. Monfre [La.] 47 S 543. That witness gave to prosecuting attorney a bottle of whiskey, which he obtained from certain person, not hearsay. Henderson v. State, 52 Tex. Cr. App. 514, 107 SW 820. Fixing a time as of the date of a rumor of a certain event is not hearsay. Hodge v. State [Ala.] 45 S 906.

**47.** Machem v. State, 53 Tex. Cr. App. 115, 109 SW 126. Information obtained by hearsay. Patterson v. State [Ala.] 47 S 52. What another said. McBryde v. State [Ala.] 47 S 302. That another pointed out whiskey to witness as that which defendant had. Welch v. State [Ala.] 46 S 856. Evidence of making of assays, based on information given by others. People v. Whalen [Cal.] 98 P 194. Testimony that witnesses understood, had heard, or had been informed of certain facts. Gorman v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 406, 106 SW 384. What witnesses had heard about accused doing certain acts. Hargrove v. State, 53 Tex. Cr. App. 541, 110 SW 913. Testimony that witness "obtained information" from certain source. Griffin v. State [Ala.] 46 S 481. Hearsay opinion of expert on insanity. State v. Heidelberg, 120 La. 300, 45 S 256. Statements by witness, which must have been based on hearsay, and which accused resented. State v. McNamara, 212 Mo. 150, 110 SW 1067.

**48.** State v. Peterson [N. C.] 63 SE 87; Anglin v. State, 52 Tex. Cr. App. 475, 107 SW 835; Booth v. State, 52 Tex. Cr. App. 452, 108 SW 687; Crawford v. U. S., 30 App. D. C. 1. Proof of self-serving acts and declarations. Caldwell v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 349, 106 SW 343. Statements of accused in his own behalf prior to trial. Barnes v. State, 3 Ga. App. 333, 59 SE 937. Self-serving statement prior to homicide. Jay v. State, 52 Tex. Cr. App. 567, 109 SW 131. Self-serving declaration of defendant prior to killing. Redman v. State, 52 Tex. Cr. App. 591, 108 SW 365. Question apparently calling for self-serving declaration after killing. Hill v. State [Ala.] 46 S 864. Self-serving declaration, long prior to alleged false entry by bank president in report to comptroller, incompetent. May v. U. S. [C. C. A.] 157 F 1. Acts and declarations of accused are not admissible unless part of res gestae. Mason v. State [Ind.] 85 NE 776. Self-serving declarations by defendant, 30 minutes after shooting deceased, on reaching jail, telling why he did it. Pryse v. State [Tex. Cr. App.] 113 SW 938. Private account book of accused, showing moneys drawn on account of certain company and kept for purpose of submitting to president of company and actually so submitted, is inadmissible to corroborate his testimony that he had verbally informed president of moneys so drawn. Crawford v. U. S., 30 App. D. C. 1.

**49.** Inculpatory admissions voluntarily made. Smarrs v. State [Ga.] 61 SE 914. Statements to sheriff before arrest. Cordes v. State [Tex. Cr. App.] 112 SW 943. Statement of accused over telephone. Chapman v. Com. [Ky.] 112 SW 567. Letter found on defendant's person when arrested which he admitted having written. Nioum v. Com. [Ky.] 108 SW 945. Statements by accused tending to show guilt. Booth v. State, 52 Tex. Cr. App. 452, 108 SW 687. Conversation between defendant and companions just after shooting. Poe v. State [Ala.] 46 S 521. Implied admissions of defendant during attempt to get station agent to "settle" and drop case for burglarizing freight house admissible against him. State v. Richmond [Iowa] 116 NW 609. Letter by one charged with illicit intercourse, written after act alleged to the girl, admitting his responsibility for her condition, competent. Leedom v. State [Neb.] 116 NW 496. Admission of defendant in perjury case properly admitted. People v. Cahill [N. Y.] 86 NE 39. Statement by defendant to his wife competent in vagrancy case. Thomas v. State [Ala.] 46 S 771. Remark of defendant to deputy sheriff made as soon as he saw him, "I know what you came for and am ready to go," admissible. Heningburg v. State [Ala.] 45 S 246. Record describing articles of freight received at local station and delivered to consignee, and signed by him on receipt of goods, is evidence of the nature of the goods received. State v. Dahlquist [N. D.] 115 NW 81. Records so signed by consignee's authorized agent competent against consignee. Id. Deed reciting that grantors are husband and wife, and acknowledged by them as husband and wife, admissible in adultery case as admission by man that he was married. State v. Greene, 33 Utah, 497, 94 P 987. Declarations or admissions of accused in conflict with testimony admissible, though not confessions, and though sheriff told him it would be best to make statement regarding entire matter. People v. Hutchings [Cal. App.] 97 P 325. Conversation between detective and accused over telephone competent, though detective did not at time of conversation know accused, where he afterwards knew him and then recognized his voice as the same he heard over the telephone. People v. Strollo, 191 N. Y. 42, 83 NE 573. In prosecution for obtaining

presence and hearing of accused, charging him with the crime, not denied by him, may be shown,[51] though accused is under arrest at the time.[52] An admission of one defendant is not ordinarily competent against his codefendant.[53] Confessions, admissions and declarations of the accused must be given in their entirety,[54] and the whole conversation in which they were made should be proved.[55] Accused should be allowed full latitude in explaining alleged written or verbal admission or equivocal statements.[56]

*Confessions.*[See 10 C. L. 114]—The admissibility of confessions is goverened by statute in many jurisdictions.[57] A confession offered in evidence is prima facie competent, and the necessity of showing its incompetency devolves upon accused.[58] For this purpose a preliminary examination by the defense should be allowed,[59] and a

goods on credit, concealing them, and becoming bankrupt, admission of defendant, after date of alleged conspiracy, while trying to induce a third person to enter into such a scheme, that he had "handled several such cases," was admissible against him. Alkon v. U. S. [C. C. A.] 163 F 810. Testimony by the accused before the grand jury that he was not guilty but knew how the murder was committed was properly admitted at the trial, together with other incriminating statements and admission on his part showing guilty knowledge. Williams v. State, 11 Ohio C. C. (N. S.) 4. Where it was sought to prove an admission of accused while in jail made to another through a pipe connecting two floors, held the identity of accused with the person speaking must be shown, though it could be shown by circumstantial evidence. Held admissible. Clark v. Com., 32 Ky. L. R. 836, 106 SW 1191; Id. [Ky.] 112 SW 571.

50. Voluntary statements by accused while under arrest giving information as to whereabouts of stolen property admissible. Smith v. State, 53 Tex. Cr. App. 643, 111 SW 939. Any voluntary statement by defendant concerning his part in the transaction in issue is admissible against him. Anderson v. State, 133 Wis. 601, 114 NW 112. Inculpatory admissions, as well as plenary confessions, to be admissible against defendant must be voluntary and not induced by the slightest hope of benefit or the remotest fear of injury. Mill v. State, 3 Ga. App. 414, 60 SE 4. Not necessary to warn and instruct dsfendant at preliminary inquest when he was not under accusation at the time and inquest was not the formal one. People v. Strollo, 191 N. Y. 42, 83 NE 573. Statements and conduct of accused at funeral of deceased admissible, being freely and voluntarily made, and no duress or threats or promises being shown, and defendant having made similar statements while on the stand as a witness. State v. Williams, 120 La. 175, 45 S 94.

51. Silence of accused when charged with the crime, under circumstances ordinarily calling for a denial, if innocent, may be shown. Raymond v. State [Ala.] 45 S 895. Statement of woman in presence of accused (charged with living in adultery with her) that she had been with him three times, and that he paid her, admissible, circumstances being such as to call for denial if untrue. Jones v. State [Ala.] 47 S 100. Fact that defendant was approached as a Mason and asked to deny charge on his Masonic honor, and that defendant asked to have charge investigated, could be proved. Smith v. State, 52 Tex. Cr. App. 344, 20 Tex. Ct. Rep. 845, 106 SW 1161.

52. Raymond v. State [Ala.] 45 S 895.

53. In separate trial of one defendant, a declaration of the other, jointly indicted with defendant, incriminating defendant is inadmissible against defendant. Foster v. State [Miss.] 45 S 859. Where two defendants are tried together, proof of an admission by one, not in the presence of the other, should be limited at the time it is offered to the one making it. Polson v. Com., 32 Ky. L. R. 1398, 108 SW 844.

54. State v. Price, 121 La. 53, 46 S 99.

55. Not error to admit question of absent witness to which admission of accused was the answer, both heard by witness testifying. State v. Price, 121 La. 53, 46 S 99.

56. State v. Johnson [N. D.] 118 NW 230.

57. State v. Laughlin [Ind.] 84 NE 756.

58. So held under Indiana statute. State v. Laughlin [Ind.] 84 NE 756.

59. Confession being offered, defense is entitled to preliminary examination of witness to ascertain its competency. People v. Fiori, 123 App. Div. 174, 108 NYS 416. Where confession when offered is objected to as not properly obtained, the court should receive evidence on the part of defendant to sustain the objection. People v. Rogers [N. Y.] 85 NE 135. Where defendant did not offer to make any proof to sustain his objection, and court ascertained by questioning witness that confession was given without threats or inducements, it was properly received. Id. When an alleged confession is offered, defendant has the right to show by preliminary cross-examination of the proposed witness, or by other witnesses or testimony, that the confession was secured by improper influences. People v. Brasch [N. Y.] 85 NE 809. Where defendant was allowed to cross-examine the first proposed witness to a confession, he was not prejudiced by denial of right to preliminary cross-examination of second witness, where he cross-examined fully after his testimony in chief, and developed nothing to show that the confession was not competent. Id. Where court offered preliminary examination if defendant's counsel thought he could show that confession was improperly obtained, but counsel made no offer or promise of such proof, such preliminary cross-examination was properly excluded. Id. Where court did not expressly rule that defendant could not introduce other testimony prior to admission of confession, and defendant's counsel made

preliminary ruling made as to the admissibility of the proposed evidence.[60] If possible, this preliminary inquiry should be made in the absence of the jury.[61] Ordinarily, the competency of a confession is for the trial court,[62] and its finding on the question will not be disturbed on appeal in the absence of clear and manifest error,[63] but the question may properly be submitted to the jury if the evidence is conflicting,[64] though some courts hold that the question is always one of law for the court.[65] The witness to the confession should not be allowed to state that it was voluntarily made, but should be required to testify to the facts from which the court may decide the question.[66]

A confession is admissible if freely and voluntarily made [67] and not induced by threats, duress, or improper promises or influences.[68] In some jurisdictions it must

no offer of further proof, after cross-examining the state's witnesses to the confession defendant's rights were not violated. Id.

**60.** People v. Brasch [N. Y.] 85 NE 809. When confession is offered, court must first determine whether made under influence of hope or fear, and this inquiry is preliminary to admission of the evidence. State v. Blodgett [Or.] 92 P 820.

**61.** Court should so direct though not requested so to do. State v. Vey [S. D.] 114 NW 719.

**62.** Instruction submitting question whether confession was properly obtained properly refused where evidence showing it to be voluntary was strong and undisputed. State v. Landers [S. D.] 114 NW 717. The admissibility of confessions at common law was determined by the trial judge under the particular circumstances of each case. State v. Laughlin [Ind.] 84 NE 756.

**63.** State v. Blodgett [Or.] 92 P 820.

**64.** State v. Foster, 136 Iowa, 527, 114 NW 36; State v. Landers [S. D.] 114 NW 717.

**65.** See cases cited in State v. Landers [S. D.] 114 NW 717.

**66.** Jones v. State [Ala.] 47 S 100.

**67.** Confession must be free and voluntary. People v. Siemsen, 153 Cal. 387, 95 P 863. The test of admissibility of statements of accused, whether made in judicial proceedings or otherwise, is whether they were voluntary. People v. Rogers [N. Y.] 85 NE 135. Admissions and confessions admissible, other evidence showing that crime had been committed by some one. People v. Carlson [Cal. App.] 97 P 827. Statements made by defendant, charged with murder, that he did the killing charged because of certain facts which, if true, furnished no legal excuse or justification therefor, amount to a confession. Jones v. State, 130 Ga. 274, 60 SE 840. Statement made by accused while in custody, in presence of prosecuting attorney and officers, in answer to questions competent, where prosecuting attorney told him he need not make a statement, that he could have counsel if he desired, and that anything he said could be used against him, and that he would not be promised immunity. State v. Laughlin [Ind.] 84 NE 756.

**68.** Under Burns' Ann. St. 1908, § 2115, confessions are admissible except when made under influence of fear, or produced by threats, undue influence, or intimidation. State v. Laughlin [Ind.] 84 NE 756. Where one confession was excluded because improper inducements were used, a second confession to same persons was improperly admitted when it did not appear that accused was not still acting under improper inducements used to obtain the first. Banks v. State [Miss.] 47 S 437. Second confession inadmissible, it appearing that first had been induced by threats of imprisonment if accused did not confess, and by promise not to imprison if he did confess. Durham v. State [Miss.] 47 S 545. Where affidavit admitted to avoid continuance showed that confession was obtained by duress, it could not be considered. Sowers v. State [Tex. Cr. App.] 113 SW 148. Confession of manufacture of whiskey inadmissible, when given in response to demand of posse of armed men, who tied accused and left him in the woods four or five hours, and then demanded an explanation of his presence with a negro who had been lynched for assault. Allen v. State [Ga. App.] 61 SE 840. The confession will be received though it was induced by a promise of some collateral benefit, no hope or favor being held out in respect to the criminal charge against him, provided there is no reason to suppose that the inducement held out was calculated to produce any untrue confession, which is the manifest point to be considered. Instruction held improper but not prejudicial. Shields v. People, 132 Ill. App. 109. Confession held admissible. Id. Confession made to officer while under arrest, after he was told his accomplice had confessed and after being confronted with his accomplice and shown his written statement, held competent, no pressure being put on accused and no promises made. People v. Siemsen, 153 Cal. 387, 95 P 863. Confession admissible, when made to state's attorney, in sheriff's office, after attorney told accused "he was up against it," as his accomplice had told that accused fired the shot, and accused thereupon became angry and said he would tell all just as it occurred. State v. Landers [S. D.] 114 NW 717. Confession competent where accused told sheriff he wanted to tell all, and sheriff telephoned for state's attorney, and accused then told his story and asked officers to do what they could for him, no inducements being made prior to his statement. State v. Vey [S. D.] 114 NW 719. A statement is voluntary unless made under the influence of a threat or menace which inspires dread or alarm, or induced by artifice or promise or inducement of some profit, benefit, or amelioration of punishment. Statement by defendant that he was sorry he did it admissible, when made to captors in response to rough question. Anderson v. State, 133 Wis. 601, 114 NW 112. Statements made by defendant in morning to husband, after assurances by him that he did not wish

also appear that accused was duly warned that his statement could be used against him,[69] in others no formal warning is necessary.[70] A confession otherwise voluntary and competent is not rendered incompetent by the fact that accused was at the time in custody of officers,[71] or under illegal arrest,[72] or in confinement,[73] or that the confession was made in response to leading questions,[74] or that accused was sworn before a notary.[75] In Texas, a confession by accused while under arrest[76] for the crime to which his statement relates[77] is inadmissible,[78] unless reduced to writing and signed,[79] and unless the written statement itself[80] shows that accused was duly warned[81] by the person to whom the confession was made.[82]

A written report of a confession is competent if properly verified.[83] A con-

to prosecute her (for assault on himself), held not to affect admissibility of confession in afternoon to county attorney and another, no promises or threats being then made. State v. Foster, 136 Iowa, 527, 114 NW 36.

**69.** Confessions purely voluntary, no improper means being used to procure them, and defendants being warned as to rights, admissible. People v. Bedeff, 110 NYS 750. Transcript of statement by defendant, before he was formally accused, but after due warning that anything he said could be used against him, held competent. People v. Strollo, 191 N. Y. 42, 83 NE 573.

**70.** No formal preliminary inquiry is necessary if circumstances shown make it appear that accused's statement was freely and voluntarily made. Heningburg v. State [Ala.] 45 S 246.

**71.** State v. Laughlin [Ind.] 84 NE 756. Statement to officers while under arrest not inadmissible for that reason. People v. Owen [Mich.] 15 Det. Leg. N. 881, 118 NW 590. Statements after arrest, while accused was nervous and excited, admissible, if voluntary. State v. Pamelia [La.] 47 S 508. Mere fact that confession was made to police officer, while under arrest, does not make it involuntary. People v. Siemsen, 153 Cal. 387, 95 P 863. Confession admissible though accused was in custody of public officer to whom it was made, unless it was elicited by improper means. State v. Blodgett [Or.] 92 P 820. Confession admissible under Code Cr. Proc. § 395, though made to officers, sheriffs and police. Statute does not exclude confessions except when made in "judicial proceedings" or to "private persons," but latter phrase means statements not made in judicial proceedings. People v. Rogers [N. Y.] 85 NE 135.

**72.** Voluntary confession or incriminating statement not inadmissible merely because made pending an illegal arrest. Ivey v. State [Ga. App.] 62 SE 565. Confessions or inculpatory statements are not inadmissible if voluntarily made merely because defendant was under arrest, even though arrest was illegal. Brown v. State, 3 Ga. App. 479, 60 SE 216.

**73.** Confinement or imprisonment will not alone make confession, otherwise properly obtained, incompetent. State v. Blodgett [Or.] 92 P 820.

**74.** Confession will not be rejected merely because made in response to questions assuming guilt of person questioned (State v. Blodgett [Or.] 92 P 820), or that statements were made in response to questions put to him by the prosecuting attorney (State v. Laughlin [Ind.] 84 NE 756). Confession voluntary and competent, though accused was under arrest, and confession was in response to leading questions, where accused was warned that confession would be used against him and that he need not make any statement. State v. Blodgett [Or.] 92 P 820.

**75.** Statement made to officers just after arrest, no formal charge against defendant having been made, not inadmissible because he was first sworn by a notary. People v. Owen [Mich.] 15 Det. Leg. N. 881, 118 NW 590.

**76.** Held that defendant was not under arrest at time he made statements; hence latter admissible. Williams v. State, 53 Tex. Cr. App. 2, 108 SW 371. Statements by accused before he was arrested admissible, though made to and in presence of officers who afterwards arrested him. Elsworth v. State [Tex. Cr. App.] 111 SW 963.

**77.** Statements of defendant admissible where, if under arrest, it was for different crime than that for which he was being tried. Reinhard v. State, 52 Tex. Cr. App. 59, 20 Tex. Ct. Rep. 379, 106 SW 128.

**78.** Confession inadmissible when made while accused was under arrest. Layton v. State, 52 Tex. Cr. App. 513, 107 SW 819. Evidence of confession improperly admitted when given while accused was under arrest and had not been warned. Jones v. State, 52 Tex. Cr. App. 206, 20 Tex. Ct. Rep. 333, 106 SW 126. Admission of killing made by accused while in legal custody of officer inadmissible, though officer was not actually present when statements were made. Buckner v. State, 52 Tex. Cr. App. 271, 20 Tex. Ct. Rep. 547, 106 SW 363.

**79.** Voluntary statement before grand jury, reduced to writing and signed, admissible. Pierce v. State [Tex. Cr. App.] 113 SW 148. Confession after due warning, reduced to writing and signed, admissible. Id.

**80.** Recital of warning in the notary's acknowledgment is insufficient. Robertson v. State [Tex. Cr. App.] 111 SW 741.

**81.** Written confession inadmissible unless it shows, within itself, that the person signing it was duly warned. White's Ann. Code Cr. Proc. art. 790, as amended by Laws 1907, c. 118. Robertson v. State [Tex. Cr. App.] 111 SW 741.

**82.** Young v. State [Tex. Cr. App.] 113 SW 276.

**83.** Stenographer's transcript of statement of accused to officers, taken down in shorthand, the transcript being verified by stenographer, and it appearing that accused understood English, held competent against him. People v. Strollo, 191 N. Y. 42, 83 NE 573.

fession is admissible as a whole though it refers to other crimes than the one on trial, and evidence to corroborate it may cover the same acts as the confession.[84] Facts, discovered in consequence of confessions obtained by threats or violence, may, if relevant, be proved.[85] A confession made by one of several defendants jointly indicted is binding upon any other of the defendants, if made in his presence and approved by him, to the extent of his ratification or approval.[86]

*Acts and declarations of co-conspirators* See 10 C. L. 117 in furtherance of the conspiracy,[87] after the formation of the conspiracy,[88] and prior to the accomplishment of its purpose,[89] are admissible against each other,[90] when accompanied by proof of the existence of the conspiracy.[91] The latter fact may be shown by circumstantial evidence.[92] Ordinarily, a prima facie showing of the fact of conspiracy should be made before proof of acts or declarations of a co-conspirator are received,[93] but the order of proof is largely discretionary.[94] Whether a conspiracy has been shown, so as to render evidence of this kind competent, may be for the jury.[95] In the trial of one indicted as an accomplice or accessory, the guilt of the principal must be proved beyond a reasonable doubt,[96] and evidence competent to show guilt of the principal, in his trial, is admissible in the trial of the accessory.[97] Thus, declarations of the principal, tending to show his guilt, are competent, though made in the absence of the accessory and after the commission of the offense.[98]

**84.** Where confession covered several murders, all associated and connected, corroborative evidence covering same ground was competent. People v. Rogers [N. Y.] 85 NE 135.

**85.** State v. Gebbia [La.] 47 S 32.

**86.** Instructions when considered together held correct. Shields v. People, 132 Ill. App. 109.

**87.** Statements not in furtherance of conspiracy, in absence of one against whom offered, inadmissible. Choice v. State, 52 Tex. Cr. App. 285, 20 Tex. Ct. Rep. 549, 106 SW 387.

**88.** Acts and declarations of one conspirator, prior to formation of conspiracy, inadmissible. Driggers v. U. S. [Okl.] 95 P 612.

**89.** Statements after accomplishment of conspiracy inadmissible. Napier v. Com. [Ky.] 110 SW 842. Confession of one burglar, after arrest, and after burglary was over, inadmissible against the other on trial. People v. Quinn, 123 App. Div. 682, 107 NYS 1101. Where proof tended to show conspiracy to rob but not to dispose of property afterwards, statement of one as to disposal of a watch was inadmissible against accused, who claimed he tried to prevent robbery and took no part therein. People v. Martin, 123 App. Div. 715, 108 NYS 343.

**90.** Eacock v. State, 169 Ind. 488, 82 NE 1039. Acts or declarations of one, after conspiracy is formed, in furtherance, aid, or perpetration of conspiracy, may be shown against all. Cumnock v. State [Ark.] 112 SW 147. In prosecution of conspiracy to obtain rebates, books of one defendant, showing transactions, were competent against all. Thomas v. U. S. [C. C. A.] 156 F 897. Acts and declarations of one conspirator, pending and in pursuance of the common design, and tending to throw light thereon, admissible against all. Richards v. State, 53 Tex. Cr. App. 400, 110 SW 432. Acts and declarations of a co-conspirator admissible, though he has been acquitted of complicity in the crime. Id.

**91.** Eacock v. State, 169 Ind. 488, 82 NE 1039. Proof of conspiracy held sufficient to permit introduction of proof of declarations of a conspirator. Brummett v. Com. [Ky.] 108 SW 861. Showing as to existence of conspiracy sufficient. Richards v. State, 53 Tex. Cr. App. 400, 110 SW 432. Conspiracy being clearly shown, words or acts of co-conspirators admissible. Hobbs v. State [Ark.] 111 SW 264. Conspiracy being shown, acts and declarations of a conspirator in furtherance of or relating to the conspiracy are admissible against all. State v. Horseman [Or.] 98 P 135. Mere association between persons not showing conspiracy not sufficient to admit statement of one against other. People v. Long [Cal. App.] 93 P 387.

**92.** Conspiracy to commit crime may be shown by circumstantial evidence. Cook v. State, 169 Ind. 430, 82 NE 1047.

**93.** Cumnock v. State [Ark.] 112 SW 147; Driggers v. U. S. [Okl.] 95 P 612. Acts of conspirators admissible only after prima facie showing of conspiracy. Cook v. State, 169 Ind. 430, 82 NE 1047.

**94.** Proof of acts and declarations may be received at any time, in the court's discretion, to be given effect only in case proof of conspiracy is made. State v. Gebbia [La.] 47 S 32; Cook v. State, 169 Ind. 430, 82 NE 1047. Acts and declarations of conspirator may be received before proof of conspiracy. State v. Lewis [Or.] 94 P 831; People v. Emmons [Cal. App.] 95 P 1032. Statements of conspirator competent, conspiracy being later shown. Banks v. State, 52 Tex. Cr. App. 480, 108 SW 693. Declarations of person indicted for conspiracy may be admitted against him as evidence of the conspiracy although the fact of the conspiracy has not been shown by other evidence and no offer made to show it if it appears that case is not pressed against other defendants. Commonwealth v. Boulos, 35 Pa. Super. Ct. 102.

**95.** Richards v. State, 53 Tex. Cr. App. 400, 110 SW 432.

**96, 97, 98.** Gibson v. State, 53 Tex. Cr. App. 349, 110 SW 41.

*Res gestae.*[See 10 C. L. 119]—In general, all the facts and circumstances forming part of the transaction in issue may be shown,[99] and this has been held to include, in homicide and assault cases, the killing or injury of a person not charged.[1] Exclamations or declarations of parties to the transaction, or persons present, contemporaneous or nearly so with the facts in issue, which they tend to explain or illuminate, are admissible as a part of the res gestae,[2] provided they may be fairly considered as arising naturally from the transaction,[3] and where all idea of premeditation and de-

99. Where charge was robbery of certain persons in a residence, proof of means used to get others away from house was admissible as part of res gestae. People v. Whitelaw [Cal. App.] 95 P 379. Proper to admit evidence to show witnesses to be feigned accomplices, and to show what they did, as part of res gestae. People v. Emmons [Cal. App.] 95 P 1032. In prosecution for robbery of express agent and taking of certain package, taking of other packages at same time was provable. Tabor v. State, 52 Tex. Cr. App. 387, 107 SW 1116. That large number of people were present at time and place of alleged shooting. Mangum v. State [Ala.] 47 S 104. Occurrence which caused assault admissible as part of res gestae. Thompson v. State [Tex. Cr. App.] 113 SW 536. Statements and acts during assault admissible as res gestae. Vanhooser v. State [Tex. Cr. App.] 113 SW 285. Acts and declarations of parties at time of alleged illegal purchase of whisky competent. Potts v. State, 52 Tex. Cr. App. 368, 108 SW 695. In assault case, where it was claimed that prosecuting witness threatened accused with a knife, proof that a witness picked up a knife at the place and gave it to a boy who claimed it held not part of res gestae. Peacock v. State, 52 Tex. Cr. App. 432, 107 SW 346.

1. Assault on husband of deceased at time of killing deceased admissible as part of res gestae. Fay v. State, 52 Tex. Cr. App. 185, 20 Tex. Ct. Rep. 857, 107 SW 55. Shooting of sister of deceased by defendant as she ran from house, and her screams for help, admissible as part of res gestae. Arnold v. State [Ga.] 62 SE 806. All that occurred at time and place of shooting, including wounding of another, admiseible ae part of res gestae. State v. Baker, 209 Mo. 444, 108 SW 6. Fact that appellant slapped woman who was cause of trouble shortly before the killing part of res gestae. Moore v. State, 52 Tex. Cr. App. 336, 107 SW 540. That accused shot his wife just after killing deceased admissible as part of res gestae and to show his motive and state of mind. Young v. State [Tex. Cr. App.] 113 SW 276.

2. Declaration by deceased at time she destroyed letters from prisoner. State v. Ryder, 80 Vt. 422, 68 A 652. What person accused of theft said to police officer to explain possession of etolen property immediately after his arrest. State v. Jacobs [Mo. App.] 113 SW 244. Proof that defendant said, just after stabbing deceased, that "I have got shut of you now." Bradley v. State [Tex. Cr. App.] 111 SW 733. Conversation between person assaulted and another immediately after assault. State v. Harris [R. I.] 69 A 506. Statements by deceased shortly after being stabbed. Stovall v. State, 53 Tex. Cr. App. 30, 108 SW 699. Statement by decedent immediately after being wounded that accused stabbed him. People v. Del Vermo [N. Y.] 85 NE 690. Statement of deceased, in response to question, just after transaction in question, that defendant had hit him in the head with a pick. State v. Lewis [Iowa] 116 NW 606. Acts, conduct and statements of deceased within an hour after poison had been taken (due to defendant's instrumentality). Rice v. State [Tex. Cr. App.] 112 SW 299. Statements of deceased within 10 minutes after shooting that accused shot him. Tinsley v. State, 52 Tex. Cr. App. 91, 20 Tex. Ct. Rep. 356, 106 SW 347. Statements of boy of 4, soon after assault upon him, describing the same to his mother while suffering and excited. Soto v. Ter. [Ariz.] 94 P 1104. Acts, conduct and declarations of one in whose possession stolen goods were found admissible in prosecution for larceny. Mason v. State [Ind.] 85 NE 776. Prayer of deceased, after being shot and mortally wounded by accused, that God would forgive latter "for doing him" held, under circumstances, part of res gestae. Herrington v. State, 130 Ga. 307, 60 SE 572. Prosecution for perjury in swearing to another's residence on public land. Declarations of such other tending to show nonresidence, made at the time, were admissible as part of res gestae to show falsity of accused's testimony. Barnard v. U. S. [C. C. A.] 162 F 618. Statement of mother of defendant to him, indicating that he had threatened to kill deceased and she had begged him not to, and his answer that he would do the same again, admissible as res gestae, it accurring shortly after the killing. Reinhard v. State, 52 Tex. Cr. App. 59, 20 Tex. Ct. Rep. 379, 106 SW 128.

3. It is only when declarations accompany a transaction so as to be wrought into it and to emanate from it that they can be rightly regarded as excepted from the rule that excludes hearsay. Commonwealth v. Howe, 35 Pa. Super. Ct. 554. Statement to third person after assault **not res gestae.** Vanhooser v. State [Tex. Cr. App.] 113 SW 285. Statement of decedent day after difficulty. Thomas v. State [Tenn.] 113 SW 1041. What deceased said half hour after difficulty when a half mile away. Ludlow v. State [Ala.] 47 S 321. Remark of deceased after being shot, "I would not have done my fellow man that way." Baker v. State, 85 Ark. 300, 107 SW 983. Statement, after occurrence, made to accused. State v. Bradley, 120 La. 248, 45 S 120. Statements narrating past events called out by suggestive questions. Lockhart v. State, 53 Tex. Cr. App. 589, 111 SW 1024. Statements by victim of rape, 12 days after act alleged, in response to questions. State v. Hoskinson [Kan.] 96 P 138. Declarations of party to contract, after its completion, and in absence of other party. State v. Murphy [N. D.] 115 NW 84. Statement of deceased, after being shot while riding in a buggy, that a

sign is excluded.[4] Declarations may be admitted though declarant would not be competent as a witness.[5]

*Expert and opinion evidence.*[See 10 C. L. 121]—Ordinarily witnesses are not allowed to testify to bare conclusions of fact.[6] An opinion or conclusion is admissible, however, where the nature of the facts on which it is founded makes their adequate statement impossible, or where the matter is one involving such special knowledge,

person other than accused rode with him in the buggy and got out and left him before reaching the place where he was shot. Richards v. Com., 107 Va. 881, 59 SE 1104. Statement of one who crossed the street to see what trouble was that "she guessed, etc.," held hearsay. People v. Long [Cal. App.] 93 P 387. Acts and saying of participants at time of homicide or so soon after striking of blow as to preclude idea of reflection are part of res gestae and admissible; subsequent statements of mere observers cannot be so proved; they must be called to testify. State v. Howard, 120 La. 311, 45 S 260. Declarations by prosecutrix in rape case, shortly after regaining consciousness, and while excited about disappearance of her baby and baby carriage during the assault, held competent as res gestae; those made after baby was found, defendant not being present, incompetent. State v. Alton [Minn.] 117 NW 617.

**4.** Declarations of a self-serving character, made some time after one is accused of theft, to explain possession of the property, should be excluded. State v. Jacobs [Mo. App.] 113 SW 244. Words of accused after shooting wife, on being discovered by witnesses with gun in hands, held not so connected with act as to be free from suspicion, and not res gestae. Lyles v. State, 130 Ga. 294, 60 SE 578. The court may refuse evidence of accused's conduct after he had reason to believe he was suspected of the offense charged, tending to show a consciousness of innocence on his part, although the prosecution has offered evidence of conduct tending to show a consciousness of guilt. Crawford v. U. S., 30 App. D. C. 1.

**5.** Statements of boy of 4 as to injuries admissible as res gestae, though he would not be a competent witness. Soto v. Ter. [Ariz.] 94 P 1104.

**6. Held incompetent:** Mere opinion on question of fact. State v. Hunskor, 16 N. D. 420, 114 NW 996. Testimony by prosecutrix that she was worried because she was afraid she was pregnant. People v. Corey [Cal. App.] 97 P 907. Statement that there were bloody prints on defendant's shirt "in the judgment" of witness. Walker v. State [Ala.] 45 S 640. Whether another witness was condemning defendant in harsh terms. Decker v. State, 85 Ark. 64, 107 SW 182. Testimony by witness that he did not see where pistol came from but that "in his judgment" it came from accused's pocket. Hammond v. State [Ala.] 45 S 654. Nonexpert improperly allowed to give conclusion or opinion on identity of certain letter paper. State v. Denny [N. D.] 117 NW 869. Question calling for opinion of witness as to cause of killing improper. Marsh v. State [Tex. Cr. App.] 112 SW 320. Questions to witness as to how drunk his father was, and whether he was crazy, held to call for mere conclusions. Heningburg v. State [Ala.] 45 S 246. Question calling merely for opinion of witness on connection of accused with crime charged properly excluded. State v. Boyles [S. C.] 60 SE 233. Not error to exclude hypothetical question which assumed facts from which conclusion sought followed as matter of course. Ludwig v. State [Ind.] 85 NE 345.

**Held not objectionable as mere conclusion:** Testimony that garment looked as though the blood had been washed off. Walker v. State [Ala.] 45 S 640. Statement that mustache worn by one said to be accused was false. Richards v. Com., 107 Va. 881, 59 SE 1104. Testimony of examining physician as to nature and direction of cut on deceased. Stovall v. State, 53 Tex. Cr. App. 30, 108 SW 699. Testimony that witness saw bruises on body of deceased, and describing their location. Fowler v. State [Ala.] 45 S 913. Testimony to facts, wounds, bullet marks, tending to show other shooting. State v. Peterson [N. C.] 63 SE 87. Whether person was within hearing distance of another at time of making a remark. Holcombe v. State [Ga. App.] 62 SE 647. Testimony by deputy sheriff that he noticed that accused's left foot made a mark similar to one seen at place of homicide. Johnson v. State [Fla.] 46 S 154. That certain garments were "like" those stolen. Wright v. State [Ala.] 47 S 201. That money found on accused looked like what he, prosecuting witness, lost. Anglin v. State, 52 Tex. Cr. App. 475, 107 SW 835. Testimony of witness identifying object "to the best of his knowledge." Minor v. State [Fla.] 46 S 297. To characterize conversation as "secret" is not to give expert testimony. Clinton v. State [Fla.] 47 S 389. Physician properly allowed to give course of bullet in body of deceased, this not involving an opinion on relative position of parties. People v. Fossetti [Cal. App.] 95 P 384. Testimony that hole in window was big enough for man to go through competent, also that one could come through from saloon to restaurant. Welch v. State [Ala.] 46 S 856. Witness may state that she knew very well what a question to her meant. Holloway v. State [Tex. Cr. App.] 113 SW 928. Testimony that what witness got was whisky admissible, though he did not state that he smelt or tasted of it. Rice v. State [Tex. Cr. App.] 107 SW 833. Witness, having testified that he felt a hard object on deceased's person, could state that in his judgment the object was a pistol. Way v. State [Ala.] 46 S 273. Witness who said she did not recognize a voice she heard properly allowed to state that in her judgment it was defendant's, it appearing she had heard his voice before. Id. Witness may testify that he believes or is of opinion that accused committed the offense. Weight of such testimony for jury. Craig v. State [Ind.] 86 NE 397.

skill or experience that it is not to be supposed that the jury can, unaided, draw a proper conclusion therefrom.[7] As to such matters, any person shown to have the requisite learning or experience may testify,[8] the proper qualification of such a witness being a preliminary question addressed largely to the discretion of the trial court.[9] Nonexpert opinion is received on matters adequate knowledge of which may be gained by observation,[10] including a person's sanity or insanity,[11] mental or physical condition or appearance,[12] when a proper predicate has been laid by a statement of the facts on which the opinion is based [13] accompanied by a showing as to the extent and means of observation of the witness.[14] Some courts hold that where

**7. Expert may testify** to probable effect of liquor on the mind. State v. Bridgham [Wash.] 97 P 1096. That wounds examined by witness, physician, produced death. Fay v. State, 52 Tex. Cr. App. 185, 20 Tex. Ct. Rep. 867, 107 SW 55. Cause of and manner of producing death (abortion case) proper subject for expert medical testimony. People v. Hagenow, 236 Ill. 514, 86 NE 370. Doctor properly allowed to testify whether wound caused death. Burkett v. State [Ala.] 46 S 682. Meaning of abbreviation used in forged bill of lading could be shown by agent of railroad. Fischl v. State [Tex. Cr. App.] 111 SW 410. Proper to allow expert to testify that metal jacketed bullet would produce infection and inflammation. Harper v. State, 129 Ga. 770, 59 SE 792. Not error to allow deputy sheriff to testify that 38 calibre pistol was deadly and dangerous weapon. Earles v. State, 52 Tex. Cr. App. 140, 20 Tex. Ct. Rep. 522, 106 SW 138. Experts may explain bank books so far as they may be unintelligible to jury. State v. Hoffman, 120 La. 949, 45 S 951. Testimony of a physician as to the condition of a person treated by him, and his opinion of the cause of that condition based on the conditions observed, are admissible. Thompson v. U. S., 30 App. D. C. 352.

**Held not proper subject for opinion evidence:** How ordinary syringe is used, not matter for expert testimony. Rice v. State [Tex. Cr. App.] 112 SW 299. Opinion of witness as to what kind of mark a spur strap on a shoe would make in sand properly excluded. Johnson v. State [Fla.] 46 S 154.

**8.** If a witness shows that he possesses necessary qualifications and knowledge, he may properly be allowed to testify as an expert, though he does not claim to be one. State v. Daly, 210 Mo. 664, 109 SW 63. Only an expert may testify whether wound is fatal. Jones v. State [Ala.] 46 S 579. Physician competent to testify that deceased came to her death from strychnine poisoning, though he had never had a previous similar case. Rice v. State [Tex. Cr. App.] 112 SW 299. Physician **not qualified** as expert on insanity where he had not treated insanity cases, and declined to testify as expert on subject. State v. Bell, 212 Mo. 111, 111 SW 24. Person who never bought or sold any of bonds in question and never saw any except those in evidence not qualified as witness to value. People v. Turpin, 233 Ill. 452, 84 NE 679.

**9.** State v. Daly, 210 Mo. 664, 109 SW 53. A ruling permitting a physician to testify as an expert is not objectionable as intimating an opinion on the evidence. Glover v. State, 129 Ga. 717, 59 SE 816. Whether a witness is qualified as an expert is for the court, and not for the witness. Physician held qualified on insanity, though he disclaimed being an expert. Id.

**10.** Nonexpert may testify whether gun had been recently discharged. Fay v. State, 52 Tex. Cr. App. 185, 20 Tex. Ct. Rep. 857, 107 SW 55. Proper to allow one who measured bicycle tracks, but had lost memoranda, to give opinion or estimate of width. People v. Helm, 152 Cal. 632, 93 P 99. Nonexpert may testify that cartridge appeared to be freshly fired. Patton v. State [Ala.] 46 S 862. That liquor which witness drank was intoxicating. Curtis v. State, 52 Tex. Cr. App. 606, 607, 108 SW 380.

**11.** Nonprofessional persons may testify to insanity of person known to them. Rice v. State [Tex. Cr. App.] 112 SW 299. Testimony of nonexperts on question of sanity may be received under proper safeguards. State v. Montgomery, 121 La. 1005, 46 S 997. A nonexpert may give an opinion as to the sanity of accused based on accused's manner, appearance and conduct during witness' acquaintanceship with him. Glover v. State, 129 Ga. 717, 59 SE 816. Nonexpert may give opinion as to sanity of person whom he has observed. State v. Banner [N. C.] 63 SE 84.

**12.** Whether person was angry. Earles v. State, 52 Tex. Cr. App. 140, 20 Tex. Ct. Rep. 522, 106 SW 138. That woman "looked like a white woman." Jones v. State [Ala.] 47 S 100. Nonexpert's testimony that defendant's mind was disordered admissible, though he said he was not an expert and could not say whether a man was sane or insane. State v. Constantine, 48 Wash. 218, 93 P 317. That accused, shortly before finding of dead babe, appeared to be pregnant. Cordes v. State [Tex. Cr. App.] 112 SW 943. Testimony of physician who saw defendant that he would not consider him drunk, competent. Heningburg v. State [Ala.] 45 S 246.

**13.** Nonexpert may give opinion on insanity after stating all the facts. State v. Bell, 212 Mo. 111, 111 SW 24. Opinion that certain substance was oil not objectionable, witness stating the facts observed by him. Richards v. Com., 107 Va. 881, 59 SE 1104. The naked opinion of a nonexpert on the subject of insanity is incompetent. It must be accompanied by a statement of all the facts on which it is based. Lawson v. State [Ind.] 84 NE 974.

**14.** Witness not qualified to state how much beer it would take to intoxicate accused. Clark v. State, 53 Tex. Cr. App. 529, 111 SW 659. Persons who have seen accused and had more or less opportunity to form an opinion as to his mental condition may express opinion on sanity. State v. Khoury [N. C.] 62 SE 638.

a person's intent is material, he may testify directly thereto;[15] others that one cannot testify to his secret, uncommunicated motives or intentions.[16] The trial court is vested with wide discretion in the matter of permitting hypothetical questions to be propounded to experts.[17] Such questions must be based on facts shown by evidence,[18] but they need not embrace all the facts so shown.[19] They may properly state the theory contended for by the party propounding them if supported by evidence.[20] Medical works are inadmissible, and, when not alluded to in direct examination of an expert, cannot be placed before the jury on cross-examination.[21] Where a witness, however, bases his opinion on a particular treatise, extracts from it may be introduced to impeach him.[22]

*Best and secondary evidence.*[See 10 C. L. 125]—The rule that best evidence available must be produced[23] excludes oral or other secondary proof of the contents of a writing[24] or record,[25] except where it is but collaterally involved,[26] or where the writing or record has been lost or destroyed,[27] and due search made, if lost,[28] or

**15.** Crawford v. U. S., 30 App. D. C. 1. Refusal to permit defendant to testify as to his intent in removing letters from file held not prejudicial under facts of case. Id. Where a corrupt intent is essential to the crime charged, accused may testify directly to his intent in doing the acts alleged. State v. Johnson [N. D.] 118 NW 230. Where question of intent is involved, accused may testify as to his intent, but where the intent was necessarily, in the particular case (killing by spring gun in trunk), general, proof of no intent to injure or kill deceased was inadmissible. State v. Marfaudille, 48 Wash. 117, 92 P 939. Reasons of witness for doing certain act inadmissible unless intent is the gist of the crime and witness' intent is material. People v. Corey [Cal. App.] 97 P 907.

**16.** Defendant may not prove an unexpressed motive or purpose (homicide case). Gibbs v. State [Ala.] 47 S 65. Though he may be cross-examined as to his motives in doing acts testified to by him. Patterson v. State [Ala.] 47 S 52.

**17.** On insanity. State v. Ayles, 120 La. 661, 45 S 540. Hypothetical question proper in view of examination of expert by defendant. Rice v. State [Tex. Cr. App.] 112 SW 299.

**18.** Proper to exclude hypothetical question based on facts not yet shown, no offer being made to prove such facts being made as condition of receiving the expert opinion. State v. Ayles, 120 La. 661, 45 S 540. Hypothetical question reciting practically all the evidence on the issue, proper. Cordes v. State [Tex. Cr. App.] 112 SW 943. Hypothetical question assuming facts proved, and answer that instrument looked like one of two named instruments, proper. People v. Weick, 123 App. Div. 328, 107 NYS 968.

**19.** Hamblin v. State [Neb.] 115 NW 850. Hypothetical questions based on evidence not objectionable because not covering all the evidence. State v. Bell, 212 Mo. 111, 111 SW 24.

**20.** Hamblin v. State [Neb.] 115 NW 850.

**21, 22.** State v. Blackburn, 136 Iowa, 743, 114 NW 531.

**23.** Express agent's testimony from his own knowledge and recollection of the facts **not objectionable as secondary.** He did not testify from his books. Cox v. State, 3 Ga. App. 609, 60 SE 283. Proof of incorporation may be by parol where embezzlement from corporation is charged. Morse v. Com., 33 Ky. L. R. 831, 894, 111 SW 714. Proof of existence of liquor license may be by parol. Oldham v. State, 52 Tex. Cr. App. 516, 108 SW 667. Proof of issuance of liquor license by exemplified copy of federal records proper. King v. State, 53 Tex. Cr. App. 101, 109 SW 182. Fact of possession of federal license by accused may be proved by parol, since its contents are not in issue and it cannot be removed from accused's place of business without violating federal statute. Joliff v. State, 53 Tex. Cr. App. 61, 109 SW 176. What occurred at preliminary inquest could be proved by oral testimony of coroner and others present. People v. Strollo, 191 N. Y. 42, 83 NE 573.

**24.** Secondary evidence of contents of letter inadmissible, no foundation being laid therefor. State v. Denny [N. D.] 117 NW 869. Letter and envelope best evidence of source and contents of letter, postmark, etc. Bell v. State [Ala.] 47 S 242. Where writing is accessible, contents cannot be proved by parol. Starling v. State [Ga. App.] 62 SE 993. Testimony of physician that he has a diploma licensing him to practice medicine is not best evidence. McAllister v. State [Ala.] 47 S 161.

**25.** Corporate capacity being material issue, proof thereof by parol was error. Records should be produced. State v. Merchant, 48 Wash. 69, 92 P 890. Best evidence of existence of corporation is charter or certificate of incorporation, but it may be proved by general reputation as secondary evidence. Dick v. State, 107 Md. 11, 68 A 286. Previous conviction should be proved by record, not by parol. Miller v. Com. [Ky.] 113 SW 518.

**26.** Oral proof of written order for whisky not incompetent, written order being merely collateral to main issue. Wilson v. State [Tex. Cr. App.] 111 SW 1018.

**27.** Contents of lost telegram provable by parol. Commonwealth v. Johnson, 199 Mass. 55, 85 NE 188. Secondary evidence of statement of financial condition admissible, original having been lost. People v. Schlessel, 112 NYS 45. Contents of lost writing may be proved by copy in brief of evidence on former appeal, approved by the judge. Crawford v. State [Ga. App.] 62 SE 501. Loss or absence of inquest papers sufficiently shown. Parol proof of witness' testimony at

where the writing is in the possession of the other party [29] who has failed to produce it after notice to do so.[30] Where there is evidence showing that certain documents material to the issues are in defendant's possession the state may prove the contents orally without giving defendant notice to produce them,[31] since defendant could not be compelled to furnish evidence against himself.[32] There are no degrees of secondary evidence.[33]

*Documentary evidence.*[See 10 C. L. 726]—Private writings, the contents of which are relevant, are admissible [34] when properly authenticated [35] and connected with accused.[36] Summaries or abstracts of book accounts are competent where the accounts are complicated and voluminous.[37] Entries contained in the books of account of a bank may be competent without the production of the persons who actually made the entries when the production of such persons is practically impossible.[38] Properly certified copies of records are competent.[39] A mere certificate that a record does not show certain facts is incompetent.[40] The state cannot be compelled to produce a written unsigned statement by a witness which would not be competent as evidence.[41]

*Depositions*[42]—In Idaho, where it appears that the presence of the witness can-

inquest competent. Summerlin v. State, 130 Ga. 791, 61 SE 849.

28. Part of written statement of testimony on preliminary hearing having been lost, but no due diligence to find it being shown, secondary evidence was inadmissible. Dowd v. State, 52 Tex. Cr. App. 563, 108 SW 389. Written confession having been lost and unsuccessful search made, oral proof of contents was admissible. Pierce v. State [Tex. Cr. App.] 113 SW 148. Must appear that every reasonable effort had been made to produce original, without avail. Sims v. State [Ala.] 46 S 493. Error to receive oral evidence of contents of receipt, no proof of search in place where it was likely to be being made. Id.

29. Copy of letter properly received where defendant appeared to have original in his possession. State v. Phillips [Minn.] 117 NW 508. Secondary proof of license competent where it appeared that defendant had original and it did not appear that he had not been given notice to produce it. State v. Kline [Or.] 93 P 237.

30. Secondary evidence of license competent where defendant failed to produce original after notice to do so. State v. Walker, 129 Mo. App. 371, 108 SW 615. A demand by state's attorney of defendant to produce a certain paper is proper, where made for the purpose of removing an objection interposed by such defendant that such paper was best evidence of matter under inquiry by state's attorney. Shields v. People, 132 Ill. App. 109.

31. Moore v. State, 130 Ga. 322, 60 SE 544.

32. Notice would be ineffective and would violate his constitutional rights. Moore v. State, 130 Ga. 322, 60 SE 544.

33. Parol proof of dying declaration competent, though a copy was unaccounted for and original was in writing. State v. Barnes [N. J. Law] 68 A 145.

34. Letters whose subject-matter tended to show the relations between the parties and a possible motive for the crime. Gent v. People, 133 Ill. App. 159. Letter not inadmissible because of memoranda thereon where memoranda are not offered and are not to be read to jury. State v. Hoffman, 120 La. 949, 45 S 951.

35. Certificate of assayer inadmissible, he not being produced and authenticity or correctness of writing not being shown. People v. Whalen [Cal.] 98 P 194. Slips taken from books of express agent incompetent to show receipt of liquor by accused without other proof to show competency. Gorman v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 406, 106 SW 384.

36. Unclaimed and returned letter inadmissible against addressee, defendant. People v. Frankenberg, 236 Ill. 408, 86 NE 128. Admission in evidence of letters claimed to have been written by accused, error when no proof of his handwriting was made, and only proof of his authorship was slight internal evidence in letter and place where found. Ashlock v. Com. [Va.] 61 SE 752. That defendant denied knowledge of contents of telegram held not ground for excluding it. Commonwealth v. Johnson, 199 Mass. 55, 85 NE 188.

37. Summary of account books held admissible. People v. Miles, 108 NYS 510. Where books and documents are multifarious and voluminous, abstracts and schedules which have been prepared therefrom by an expert accountant may be admitted in evidence, but in such case the books and documents must either be first offered in evidence or be in the custody of the court so that the party against whom such abstracts and schedules are offered may have an opportunity from their examination to verify their correctness. Ford v. State, 11 Ohio C. C. (N. S.) 324.

38. Cooke v. People, 134 Ill. App. 41.

39. Copy of decree of divorce and docket entries properly certified by clerk of court rendering decree competent. Pontier v. State, 107 Md. 384, 68 A 1059.

40. Certificate of keeper of vital statistics of city of another state, that a certain marriage was not shown by his records, that certain minister's name did not appear therein, etc., inadmissible. Not a copy of any record. Pontier v. State, 107 Md. 384, 68 A 1059.

41. People v. Emmons [Cal. App.] 95 P 1032.

42. See, also, topic Depositions, 11 C. L. 1069.

not be secured owing to his death, infirmity, sickness, or insanity, or because he is absent from the state, and that due diligence has been used to secure his attendance, his deposition may be read if all the statutory requirments have been observed in the taking of it.[43] These facts must all appear at time deposition is offered.[44]

*Demonstrative evidence and experiments.*[See 10 C. L. 127]—Objects and articles are admissible in evidence,[45] when relevant and material to the issues.[46] Photographs,[47] diagrams,[48] and models,[49] illustrative of the testimony, and throwing light on the facts in issue, are admissible. Where articles are offered in evidence which are pertinent to the issue, the court will not exclude them on account of the manner in which they were obtained.[50] Where the appearance of a person is in issue, it is proper to make profert of the person.[51] Whether experiments in the presence of the jury shall be permitted rests in the trial court's discretion.[52] Proof of experiments made out of court is admissible when conditions surrounding them are shown similar to those

**43.** The necessary steps are: (1) That deposition was taken before the magistrate who conducted the preliminary examination, or the judge of the court to which such party had been held for trial; (2) that it was shown to such magistrate or judge upon oath that there was reason to believe that witness whose deposition was sought would not appear and testify unless security was given; (3) that the magistrate or judge made an order requiring witness to enter into a written undertaking, with sureties, under provisions of Rev. St. 1897, § 7585. State v. Zarlenga, 14 Idaho, 305, 94 P 55. When all the preliminary steps have been taken and witness is shown under oath to be unable to procure sureties, he may be forthwith conditionally examined on behalf of the people under Rev. St. 1887, § 7588; but it should further be shown (1) that defendant had been advised of his right to counsel and to be represented by such, and that defendant was present in person and by counsel if he desired it, or had notice of such examination if on bail; (2) that deposition was taken and examination conducted in the same manner as the examination before a committing magistrate, and certified as required by Rev. St. 1887, § 7576. Id.

**44.** Proper to exclude deposition where facts were not shown. State v. Zarlenga, 14 Idaho, 305, 94 P 55.

**45.** Prosecution under liquor law. Not error to allow exhibition of bottle. Phillips v. State [Ala.] 47 S 245. Vessels officially tested and stamped, and used by witnesses in measuring liquor sold by defendant, competent evidence. People v. Nylin, 236 Ill. 19, 86 NE 156. On trial of indictment for receiving pigs of tin stolen from certain piles, it was proper to receive in evidence other pigs from the same piles to show identity of those in question. Ahearn v. U. S. [C. C. A.] 158 F 606. Articles of wearing apparel shown to have been **property of defendant** properly admitted in evidence. State v. Jeffries, 210 Mo. 302, 109 SW 614. Coat and handkerchief referred to in confession, and found by officer just where accused said they would be, admissible. State v. Landers [S. D.] 114 NW 717; State v. Vey [S. D.] 114 NW 719. Broken gun, used in striking deceased, admissible. Tolliver v. State, 53 Tex. Cr. App. 329, 111 SW 655.

**Garments worn by deceased** admissible, their present condition being properly explained. People v. Besold [Cal.] 97 P 871. Clothing of deceased showing where he was stabbed. State v. Long, 209 Mo. 366, 108 SW 35. Portion of blanket wrapped around dead body of babe, similar to another portion in accused's possession. Cordes v. State [Tex. Cr. App.] 112 SW 943. Proper to receive decedent's shirt and allow witness to put it on. Dobbs v. State [Tex. Cr. App.] 113 SW 923.

**Portion of skull,** showing fracture, and pick with which blow was struck, admissible in homicide case. State v. Lewis [Iowa] 116 NW 606. Nothing improper shown in connection with custody or handling of **viscera of deceased,** examination and condition and contents of which were testified to by expert. State v. Daly, 210 Mo. 664, 109 SW 53.

**46.** Deceased's hat inadmissible, not being shown material on any issue in homicide case. West v. State [Fla.] 46 S 93.

**47.** Photographs of scene of homicide, shown to represent place correctly, held competent. Gibson v. State, 53 Tex. Cr. App. 349, 110 SW 41. Photograph of accused, referred to in conversation with him, which was proved, competent on question of identity. Not error to admit it, though accused's criminal history was on the back (it being from Rogues' Gallery), no objection being made on that ground and it not appearing that jury saw endorsement. Commonwealth v. Johnson, 199 Mass. 55, 85 NE 188.

**48.** Diagram of cattle brand, and hide of steer, admissible, charge being larceny of steer. People v. Hutchings [Cal. App.] 97 P 325.

**49.** Model knife properly allowed in evidence to assist jury in understanding testimony. People v. Del Vermo [N. Y.] 85 NE 690. Not error to receive model of porch of house without showing vines, a tree, a fence, etc., where purpose was only to show distances on porch, and photographs and other evidence showed other objects. People v. Maughs [Cal. App.] 96 P 407.

**50.** Younger v. State [Neb.] 114 NW 170.

**51.** Not error to allow state to make profert of woman to enable jury to decide whether she was white woman. Jones v. State [Ala.] 47 S 100.

**52.** Proper to refuse to allow experiments in presence of jury to show what mark a spur strap on a shoe would make in sand. Johnson v. State [Fla.] 46 S 154.

in issue.[53] The purpose of a view is not to supply evidence but to enable jury to understand it.[54] Granting or refusing it in a particular case is a matter resting in the trial court's discretion.[55]

*Evidence at preliminary examination and at former trial.* See 10 C. L. 128—Where it is shown that the witness is dead or beyond the jurisdiction, or otherwise inaccessible,[56] his testimony at the preliminary hearing, coroner's inquest, or former trial, is admissible,[57] and may be proved by the testimony of persons who heard it,[58] or by properly authenticated report or record.[59] But to render competent testimony at a preliminary hearing or inquest, it should appear that accused was present and had opportunity to confront and cross-examine the witness.[60] Testimony of the defendant himself, voluntarily given in a former trial, or hearing, and properly preserved and authenticated, may be introduced at subsequent trial,[61] accused having thus waived his privilege.[62] Testimony at a preliminary hearing on one charge is not competent on the trial of a different charge.[63] The offer of the record in another case is not an offer of the evidence taken therein.[64] The offer should specifically refer to the evidence desired to be introduced.[65] Acquittal of one offense does not exclude evidence used in that trial from being used in the trial for the second offense.[66]

**53.** Proof of experiments **inadmissible,** unless conditions shown same. Richards v. Com., 107 Va. 881, 59 SE 1104. Experiments to show distance at which shots passing through cloth were fired, **admissible,** but not to show distance at which shot which struck deceased's head, conditions not being shown same. People v. Fiori, 123 App. Div. 174, 108 NYS 416. In homicide case, experiments made by shooting off revolver at various distances to show effect on cloth, powder marks, etc., could be proved, circumstances being shown similar. Pollock v. State, 136 Wis. 136, 116 NW 851.

**54.** Hanley v. Com. [Va.] 63 SE 10.

**55.** No error in refusing to allow view of premises, where diagram was in evidence. Stanley v. Com. [Va.] 63 SE 10.

**56.** Witnesses shown to be beyond jurisdiction, so as to make competent their testimony on the preliminary hearing. Somers v. State [Tex. Cr. App.] 113 SW 533. Former testimony of witness should not be received unless it appears that witness cannot, with reasonable diligence, be produced. State v. McClellan [Kan.] 98 P 209. Mere production of subpoena, with return, without showing as to witness' whereabouts or search for him, is insufficient. Id. Testimony of witnesses on preliminary hearing inadmissible, the only showing as to their whereabouts being that sheriff had been unable to locate them in southern part of county and neighboring part of Florida. Bell v. State [Ala.] 47 S 242. Sheriff's statement in return on subpoena that witness was dead, and evidence of others that they had heard of his death, being hearsay, held insufficient to make competent witness' testimony at preliminary trial. Driggers v. U. S. [Okl.] 95 P 612.

**57.** Testimony of witness on former trial who had subsequently removed from the state. State v. Simmons [Kan.] 98 P 277. Testimony of witnesses on former trial admissible, witnesses being shown to be beyond jurisdiction. Burrow v. Hot Springs, 85 Ark. 396, 108 SW 823. Testimony of witness on former trial, when defendant had opportunity to cross-examine, admissible on subsequent trial after witness' death, after proper predicate. Pratt v. State, 53 Tex. Cr. App. 281, 108 SW 138. If such testimony is competent, it is immaterial how or by which side it was introduced on former trial. Id.

**58.** Court reporter, who took stenographic notes at former trial, properly allowed to state testimony of accused on such trial. Cornelius v. State [Tex. Cr. App.] 112 SW 1050.

**59.** Testimony of witness at preliminary hearing held to be properly authenticated, proved by transcript. People v. Garnett [Cal. App.] 98 P 247. Testimony of witness, since deceased, given at preliminary hearing is inadmissible, unless it is authenticated by some person who heard it or by certificate of officer who took it. Written statement not so authenticated. Dowd v. State, 52 Tex. Cr. App. 563, 108 SW 389.

**60.** Testimony reduced to writing at inquest, defendant and counsel being present, admissible on trial, witnesses being out of jurisdiction. Hobbs v. State, 53 Tex. Cr. App. 71, 112 SW 308. Admission of testimony at preliminary hearing does not violate right to be confronted by witnesses. Somers v. State [Tex. Cr. App.] 113 SW 533. Testimony by witnesses at preliminary hearing, at which accused confronted the witnesses and had opportunity to cross-examine them, is admissible at the trial, if witness is dead or beyond the jurisdiction. Nixon v. State, 53 Tex. Cr. App. 325, 109 SW 931. Testimony at combined inquest and preliminary **inadmissible,** where it did not appear that accused was present, he having waived examination, and it did not appear that witness was dead or beyond the jurisdiction. Id.

**61.** State v. Simmons [Kan.] 98 P 277.

**62.** State v. Simmons [Kan.] 98 P 277. Defendant's testimony at coroner's inquest admissible, where it appeared to be voluntarily given and he appeared to understand his rights by refusing to answer certain questions. Anderson v. State, 133 Wis. 601, 114 NW 112.

**63.** Different thefts. Somers v. State [Tex. Cr. App.] 113 SW 533.

**64.** State v. Ayles, 120 La. 661, 45 S 540.

**65.** Evidence in preliminary hearing in a

*Quantity required and probative effect.* See 10 C. L. 130—The credibility of witnesses and the weight of testimony, including that of experts and of the accused are for the jury, who may apply the usual tests of credibility.[67] Ordinarily, positive testimony is to be given greater weight than negative,[68] but the rule is not absolute,[69] since the opportunity of the respective witnesses for observation should be considered.[70] The rule does not apply when one of two persons having equal facilities for seeing or hearing a thing swears that it occurred and the other that it did not occur.[71] In such case the testimony of neither is negative.[72] Every essential element of the crime must be proved [73] beyond a reasonable doubt,[74] but need not be proved by direct or positive testimony; circumstantial evidence may

different case, not used on the trial of that case, inadmissible under offer of record in that case. State v. Ayles, 120 La. 661, 45 S 540.

**66.** Acquittal from robbery does not exclude admission of the same evidence to show burglary with intent to murder. Nagel v. People, 229 Ill. 598, 82 NE 315.

**67.** There is no presumption that a witness tells the truth. Error to so instruct. State v. Halvorson, 103 Minn. 265, 114 NW 957.

**Expert opinion** on insanity not conclusive but should be considered. United States v. Chrisholm, 149 F 284. Opinions on value are not to be accepted by jury as conclusive. Schwartz v. State, 53 Tex. Cr. App. 449, 111 SW 399.

**Nonexpert opinions** on insanity are entitled to little weight when unaccompanied by proof of acts tending to show insanity. Smith v. Com., 33 Ky. L. R. 998, 112 SW 615.

**Interest of defendant may be considered** in weighing his testimony. Burkett v. State [Ala.] 45 S 682; State v. Shaffner [Del.] 69 A 1004. Court may properly so charge. Commonwealth v. McKwayne [Pa.] 70 A 809. What defendant has said against himself presumed to be true, but jury not bound to believe statements in his own favor. State v. Clow [Mo. App.] 110 SW 632.

**68.** Hunter v. State [Ga. App.] 62 SE 466.

**69.** Jury not absolutely bound to accept positive in preference to negative testimony. Hunter v. State [Ga. App.] 62 SE 466.

**70.** Positive testimony is not in all cases to be believed in preference to negative. Comparative weight depends upon opportunities of witnesses and their credibility. Peak v. State [Ga. App.] 62 SE 665.

**71.** Benton v. State, 3 Ga. App. 453, 60 SE 116.

**72.** Within rule of Civ. Code 1895, § 5165. Hunter v. State [Ga. App.] 62 SE 466. Instruction on "negative" and "positive" evidence erroneous, under above rule. Daniel v. State [Ga. App.] 62 SE 539.

**73.** Prosecution must establish every essential element of crime charged. City of Kinsley v. Dyerly [Kan.] 98 P 228. Proof insufficient where one essential element of crime was based upon a mere inference. State v. James [Mo. App.] 113 SW 232. Instruction erroneous because not requiring finding of essential elements of crime. People v. Lemen, 231 Ill. 193, 83 NE 147.

**Venue** should never be left in doubt when it can readily be proved. Walker v. State [Ala.] 45 S 640. Lack of proof of venue fatal. Wall v. State [Ga. App.] 63 SE 27. The state must show commission of the offense within the period of **limitation.** Judgment of conviction reversed where evidence showed prosecution was barred. Hatton v. State [Miss.] 46 S 708. No presumption can be indulged that limitation statute was avoided by certain former proceeding. Id. Judgment reversed where evidence left in doubt question whether crime was committed prior to **filing of information.** Pruitt v. State, 53 Tex. Cr. App. 316, 109 SW 171. When an act becomes criminal only by reason of the existence of a specific intent, the **intent** must be proved; proof of the doing of the act is not enough. People v. Hegeman, 57 Misc. 295, 107 NYS 261.

**74.** Guilt must be shown beyond a reasonable doubt. McDonald v. State [Fla.] 47 S 485. Jury should acquit if they have reasonable doubt on whole case. Mann v. Com., 33 Ky. L. R. 269, 110 SW 243. Mere grounds of suspicion does not warrant conviction; there must be substantial proof. Jones v. State, 85 Ark. 360, 108 SW 222. Guilt must be proved beyond reasonable doubt; verdict founded only on suspicion or conjecture set aside. State v. Wilson, 130 Mo. App. 151, 108 SW 1086. "Reasonable doubt" discussed. Abbott v. Ter. [Okl.] 94 P 179. The reasonable doubt which warrants an acquittal is one which arises from evidence or lack of evidence. People v. Zajicek, 233 Ill. 198, 84 NE 249. Beyond a reasonable doubt means to a moral certainty, not to an absolute certainty. People v. Bonifacio, 190 N. Y. 150, 82 NE 1098. Reasonable doubt is not a vague, fanciful or merely possible doubt, but such a substantial doubt as intelligent, reasonable and impartial jurors may honestly and justly entertain after a careful examination and conscientious consideration of all the evidence. State v. Mills [Del.] 69 A 841; State v. Underhill [Del.] 69 A 880.

**Venue** of offense must be proved beyond reasonable doubt. Davis v. State, 134 Wis. 632, 115 NW 150. And it must affirmatively appear that place of crime was within jurisdiction of court. Green v. State [Ga. App.] 61 SE 234.

**Contra:** Venue need not be proved beyond a reasonable doubt. Wylie v. State, 53 Tex. Cr. App. 182, 109 SW 186.

**Evidence sufficient** to show venue in prosecution of barber for violating Sunday law. State v. Schatt, 128 Mo. App. 622, 107 SW 10. Venue of stealing from railway car not sufficiently proved. Howard v. State, 3 Ga. App. 659, 60 SE 328. Proof that alleged offense was committed in a designated town or city is **not sufficient** to establish fact of venue and jurisdiction of a court whose jurisdiction is coextensive with the county. Stringfield v. State [Ga. App.] 62 SE 569.

be sufficient[75] and will alone support a conviction when it is such as to exclude every reasonable hypothesis of innocence, being at the same time consistent with the theory of guilt.[76] In passing on the weight of circumstantial evidence, the circumstances need not be segregated, nor it is necessary that each subordinate fact should be proved beyond a reasonable doubt.[77] A motive need not in all cases be proved.[78] While it is the duty of the state's counsel to present all the testimony on the material facts, whether adverse to the defendant or favorable to him,[79] he need not call every available eye witness,[80] particularly where he is led to believe that a witness is unreliable.[81] In such case it is sufficient if he notifies accused that such witness will not be called by the state.[82] The state is not bound by every statement made by its witnesses.[83] Testimony of an accomplice[84] is not ordinarily sufficient to support

**75.** Identity of accused need not be shown by direct or positive testimony. Craig v. State [Ind.] 86 NE 397. The corpus delicti need not be proved by evidence independent of that which tends to connect accused with the commission of the offense. Existence of crime and guilt of defendant may be shown by same circumstantial evidence. George v. U. S. [Okl.] 97 P 1052. Intent is rarely susceptible of direct proof but must be inferred from facts and circumstances shown. Pumphrey v. State [Ala.] 47 S 156. The corpus delicti may be proved by circumstantial evidence. Larceny. Perry v. State [Ala.] 46 S 470. Venue may be proved by circumstantial evidence. Harrison v. Anniston [Ala.] 46 S 980. Venue need not be proved by positive testimony; it may be inferred from proof of other facts. Warford v. People, 43 Colo. 107, 96 P 556. Venue need not be proved by direct testimony to commission of the crime at the designated place; it is enough if the evidence incidentally shows that the venue was properly laid. State v. Gilluly [Wash.] 96 P 512. Where crime was proved to have been committed in Berrien County, presumption arose that county referred to was in Georgia, and express proof that commission was in Georgia was unnecessary. Lewis v. State, 129 Ga. 731, 59 SE 782.

**76.** The evidence must exclude every reasonable hypothesis of innocence and be consistent only with theory of guilt. Burton v. Com. [Va.] 62 SE 376. Facts proved must be inconsistent with innocence of accused. Woodson v. Com., 107 Va. 895, 59 SE 1097. Evidence held insufficient to exclude every reasonable hypothesis except that of defendant's guilt, and judgment reversed. Case was based on proof of tracks made by burglar and similarity of those made by accused's shoes. Warren v. State, 52 Tex. Cr. App. 218, 20 Tex. Ct. Rep. 355, 106 SW 132. Evidence, wholly circumstantial, held insufficient where it was consistent with innocence and did not exclude every reasonable hypothesis except that of guilt. Jamison v. State [Ga. App.] 63 SE 25. Conviction not sustained where evidence, wholly circumstantial, did not exclude every reasonable hypothesis of innocence. Long v. State [Ga. App.] 62 SE 711. Judgment on conviction reversed where evidence was circumstantial only and presented several reasonable theories other than that of defendant's guilt. Barker v. State [Ga. App.] 61 SE 133. Circumstantial evidence must exclude every reasonable hypothesis except that of guilt. Verdict based on suspicion only, though that was warranted, held not sufficiently supported. Thompson v. State [Ga. App.] 62 SE 571. Evidence insufficient (circumstantial) to exclude every reasonable hypothesis except that of guilt (of larceny). Johnson v. State, 52 Tex. Cr. App. 610, 107 SW 845. New trial should have been granted where circumstantial evidence was consistent with guilt of accused, but not inconsistent with theory of innocence, and insufficient to show criminal intent beyond reasonable doubt. Wilson v. State [Ga. App.] 62 SE 1003.

**77.** State v. Fisk [Ind.] 83 NE 995.

**78.** Motive is merely matter of evidence; proof of guilt may be made without it. State v. Hoel [Kan.] 94 P 267. Proof of motive is not indispensable in homicide case. People v. Besold [Cal.] 97 P 871. Instruction leading jury to believe that motive must be proved by actual, direct proof properly refused. Ward v. State [Ala.] 45 S 221.

**79.** Commonwealth v. Deitrick [Pa.] 70 A 275.

**80.** Need not call every eye witness to crime. Commonwealth v. Deitrick [Pa.] 70 A 275. State cannot be forced to place certain witnesses, such as eye witnesses, on the stand. Lard v. State [Tex. Cr. App.] 113 SW 762. The state need not put on the stand all the witnesses who know anything about the case. Sanders v. State [Tex. Cr App.] 112 SW 938. Not error to deny motion to require name of eye witness to be endorsed on information (made during trial) where prosecuting attorney said he knew nothing about the witness nor his whereabouts. People v. Hoffman [Mich.] 15 Det. Leg. N. 646, 117 NW 568. Failure to endorse name of prosecuting witness on information and to call him as witness properly explained by statement of prosecuting attorney that witness had disappeared and could not be found. People v. Boyd, 151 Mich. 577, 15 Det. Leg. N. 36, 115 NW 687. Conviction of violation of Pen. Code, § 675, by annoying, interfering with, jostling, etc., a street car passenger, sustained, though passenger was not a witness. People v. Goldberg, 109 NYS 906.

**81, 82.** Commonwealth v. Deitrick [Pa.] 70 A 275.

**83.** Jury may consider all the circumstances. Oldham v. State, 52 Tex. Cr. App. 516, 108 SW 667.

**84.** See, also, Criminal Law, 11 C. L. 940. Testimony of one who is principal because of nature of offense, misdemeanor, is within rule. People v. Acritelli, 110 NYS 430. Witness held an accomplice in burglary; her evidence insufficient without corroboration;

conviction unless corroborated,[85] though in same jurisdictions uncorroborated testimony of an accomplice is sufficient [86] in certain cases.[87] Evidence in corroboration of an accomplice is sufficient if, independently of the testimony of the accomplice, it tends in some degree to establish the guilt of the accused,[88] it need not be of sufficient weight, standing alone, to make out a prima facie case.[89] The testimony of one accomplice cannot be considered as corroborating that of another witness who is also an accomplice,[90] nor can an accomplice be corroborated by proof of statements made by him in absence of accused.[91] Testimony of accused himself has been held sufficient corroboration.[92] An extra-judicial confession will not alone sustain a conviction;[93] it must be corroborated [94] by other proof tending to show commission of

reversible error to instruct to the contrary. People v. Holden, 111 NYS 1019. Boys who stole wire held not accomplices of one charged with crime of knowingly receiving the stolen property; their testimony not that of accomplices. State v. Gordon [Minn.] 117 NW 483. Where there was some evidence that a witness was an accomplice, but he denied having anything to do with the crime, it was proper to instruct jury that if they believed him his testimony would be sufficient to corroborate other witnesses who were accomplices and to sustain conviction. People v. Russo, 111 NYS 190. Proper for postal agents to enter into correspondence with persons suspected of violating postal laws and induce such persons to mail improper matter, and such agents do not become accomplices so as to require corroboration of their testimony. Shepard v. U. S. [C. C. A.] 160 F 584.

**Detective's testimony** need not be corroborated though that of an accomplice must be. Spencer v. State, 52 Tex. Cr. App. 289, 20 Tex. Ct. Rep. 408, 106 SW 386. Whether a witness is an accomplice requiring corroboration is **question for the jury.** Proper to refuse requested instruction that witness was an accomplice. Driggers v. U. S. [Okl.] 95 P 612.

**85.** Conviction cannot be had upon testimony of accomplices unless corroborated. Rev. Laws 1905, § 4744. State v. Gordon, [Minn.] 117 NW 483. Conviction of offense of aiding, etc., an illegal registration (for voting) cannot be had upon testimony of accomplice alone. People v. Acritelli, 110 NYS 430.

**86.** Jury may convict on uncorroborated evidence of accomplice if they believe such evidence to be true and worthy of belief. People v. Frankenberg, 236 Ill. 408, 86 NE 128. A conviction may be had and sustained in a criminal case upon the uncorroborated testimony of an accomplice. Shields v. People, 132 Ill. App. 109. Corroboration of the testimony of a codefendant or accomplice is desirable but not always indispensable. State v. Firmatura, 121 La. 676, 46 S 691. Corroboration of an accomplice is not necessary in the federal court; the weight of such testimony is for the jury. Ahearn v. U. S. [C. C. A.] 158 F 606.

**87.** In misdemeanor cases law does not require corroboration of accomplice. Pen. Code 1895, § 991. Gamble v. State [Ga. App.] 62 SE 544. Testimony of accomplices sufficient; indictment of accused as accessory before fact of arson. Larimore v. State, 84 Ark. 606, 107 SW 166.

**88.** State v. Whitman, 103 Minn. 92, 114 NW 363. Corroborative evidence is sufficient if it tends to connect the defendant with the commission of the crime, and comes from an independent source and goes to some material facts tending to show commission of the offense and that defendant was implicated, but it must amount to more than suspicious circumstances. People v. Acritelli, 110 NYS 430. Evidence to corroborate accomplices is sufficient if it tends to connect accused, with the crime; it is insufficient if it does not connect him with it. Celender v. State [Ark.] 109 SW 1024.

**Corroboration of accomplice sufficient in** burglary case. Criner v. State, 53 Tex. Cr. App. 174, 109 SW 128. Testimony of accomplice sufficiently corroborated in robbery case. People v. Ortega [Cal. App.] 94 P 869.

**Evidence insufficient** to corroborate testimony of accomplice in burglary to show participation of defendant. Denney v. State [Tex. Cr. App.] 111 SW 404. Corroboration of accomplices insufficient to connect accused with burglary. Franklin v. State, 53 Tex. Cr. App. 388, 110 SW 64. Testimony of accomplices not sufficiently corroborated in arson case. People v. O'Brien, 109 NYS 267. Witness held an accomplice in theft, and judgment reversed for want of corroboration. Shilling v. State, 52 Tex. Cr. App. 326, 20 Tex. Ct. Rep. 551, 106 SW 357. Where accomplices to charge of bribing witness to stay away from trial of gambling case were not corroborated except by proof of flight of the witness bribed, the corroborating evidence was insufficient. Birch v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 350, 106 SW 344.

**In a prosecution of an accomplice,** corroborative evidence must show not only commission of the offense but that accused was connected therewith as an accomplice. Testimony of alleged burglar that accused advised the crime, and proof of the burglary, held insufficient. Hall v. State, 52 Tex. Cr. App. 250, 20 Tex. Ct. Rep. 590, 106 SW 379.

**89.** Stato v. Whitman, 103 Minn. 92, 114 NW 363.

**90.** Franklin v. State, 53 Tex. Cr. App. 547, 110 SW 909.

**91.** Spencer v. State, 52 Tex. Cr. App. 289, 20 Tex. Ct. Rep. 408, 106 SW 386.

**92.** Testimony of accused himself to his connection with the crime is sufficient corroboration of the testimony of an accomplice under Code Cr. Proc. § 399. People v. Eaton, 122 App. Div. 706, 107 NYS 849.

**93.** People v. Rogers [N. Y.] 85 NE 136; Sowers v. State [Tex. Cr. App.] 113 SW 148. Confession alone not sufficient, when denied

the crime.[95] Corroboration by circumstantial evidence is competent.[96] A confession is not conclusive; accused may disprove statements in it and jury may give it such weight as it is entitled to under all the evidence.[97] A judicial confession may alone sustain conviction,[98] and a confession in open court before a magistrate, in a preliminary hearing is held, a judicial confession.[99] Statutes in some states require corroboration of the prosecuting witness,[1] or testimony of more than a single witness in particular crimes,[2] or testimony equivalent to that of at least two winesses.[3] Evidence inherently incompetent cannot be considered though admitted without objection.[4] Evidence of good character or reputation is substantive evidence and may have the effect of creating a reasonable doubt and thereby produce an acquittal; the weight to be given it is for the jury.[5]

§ 10. *Trial.*[See 10 C. L. 132]—The right to trial by jury and matters connected with the selection of the jury are elsewhere discussed.[6]

(§ 10) *A. Conduct of trial in general.*[See 10 C. L. 132]—This is a matter which must of necessity be left largely to the discretion of the trial court.[7] Accused is of course entitled to a fair [8] and public [9] trial. While the judge, in the exercise of a

by defendant. Layton v. State, 52 Tex. Cr. App. 513, 107 SW 819.

**94.** People v. Rogers [N. Y.] 85 NE 1135. To corroborate means not merely to tend to produce confidence in the truth of the confession but to refer to the facts which constitute the corpus delicti. People v. Ranney [Mich.] 15 Det. Leg. N. 442, 116 NW 999.

**95.** There must be evidence to show commission of crime outside confession or statements of accused. People v. Besold [Cal.] 97 P 871. Confession, not in open court, insufficient without other proof of commission of offense. Moseby v. Com. [Ky.] 113 SW 850. Confession, without proof aliunde of corpus delicti, is not sufficient to convict. Boyd v. State [Ga. App.] 60 SE 801. Confession of having made whisky held not corroborated. Allen v. State [Ga. App.] 61 SE 840. A confession may be considered in determining whether defendant was connected with the crime charged, though not alone sufficient proof thereof. People v. Brasch [N. Y.] 85 NE 809. The corpus delicti may not be proved by the naked, extra-judicial confession of accused. Corpus delicti held shown by corroborative evidence in prosecution for obtaining money by false pretenses; check returned unpaid. People v. Ranney [Mich.] 15 Det. Leg. N. 442, 116 NW 999.

**96.** Defendant's confession held sufficiently corroborated as to his connection with death of his wife by circumstantial evidence. People v. Brasch [N. Y.] 85 NE 809.

**97.** State v. Blodgett [Or.] 92 P 820.

**98, 99.** Skaggs v. State [Ark.] 113 SW 346.

**1.** See, also, Rape, 10 C. L. 1040; Seduction, 10 C. L. 1619.

**2.** See, also, Perjury, 10 C. L. 1162.

**3.** Gen. St. 1902, § 1508, that "no person shall be convicted of any crime punishable by death without the testimony of at least two witnesses or that which is equivalent thereto," does not require two witnesses to the homicidal or other act or particular fact; statute is complied with where testimony is equivalent to that of two witnesses or where two or more witnesses testify, though to different facts or circumstances. State v. Washelesky [Conn.] 70 A 62.

**4.** State v. Daniels [S. C.] 61 SE 1073. Oral **testimony as to prior indictment** of accused having gone in without objection could be considered by jury. Pontier v. State, 107 Md. 384, 68 A 1059.

**5.** Distinct issue is not raised by evidence of good reputation but it is to be taken into consideration with all other evidence against accused. When jury is satisfied beyond reasonable doubt of defendant's guilt, it is their duty to convict, but conclusion should be reached only after having given due regard to evidence of good reputation along with other testimony in case. Commonwealth v. Howe, 35 Pa. Super. Ct. 554.

**6.** See Jury, 10 C. L. 541.

**7.** Not error to take recess at 4 P. M. until regular time of convening next morning to allow state to produce another witness. Adams v. State [Fla.] 46 S 152.

**8.** A witness for accused was arrested during trial for offense for which grand jury had twice refused to indict him, and for which a justice had released him for want of evidence. Court granted him immunity during trial if he would tell the truth, but he was kept practically under arrest during trial. Held accused was deprived of a fair trial. Dodson v. State, 52 Tex. Cr. App. 247, 20 Tex. Ct. Rep. 545, 106 SW 378. Audience broke into applause, lasting several minutes, when state's counsel made sharp retort to counsel for accused during altercation. Court sharply rebuked audience, imprisoned one man, and instructed jury in strong terms on duty to disregard matter. Held no reversible error. State v. Harrison, 145 N. C. 408, 59 SE 867.

**NOTE. Protection of deaf defendant in criminal prosecution:** It is held in Raiph v. State, 124 Ga. 81, 52 SE 298, 2 L. R. A. (N. S.) 509, that a deaf prisoner is entitled to be informed of the proceedings and testimony against him but cannot require the court to employ an expert stenographer or typewriter for that purpose and should, in view of his known infirmity, make provisions for his own assistance. In this case it was held that for the court to allow counsel for the accused to write out and exhibit the testimony to the prisoner was not an abuse of discretion. The

sound discretion, may, without violating this right, exclude from the court room during the trial, for any sufficient special reason,[10] such portion of the spectators as fall within the class to which the special reason applies,[11] Yet an order over defendant's objection to clear the room of all persons except those connected with the case is too sweeping and is error [12] from which prejudice to accused is conclusively presumed.[13] Private counsel may be employed to assist in the prosecution.[14]

*Order of proof* See 10 C. L. 133 is discretionary, and the action of the court in admitting proof out of its usual and regular order,[15] or in permitting or refusing to permit the case to be reopened to admit further proof,[16] will not be interfered with on appeal unless an abuse of discretion resulting in prejudice appears.[17] All evi-

proper course to be pursued for the protection of a deaf defendant in criminal trial has received little consideration in the reported cases. In Felts v. Murphy, 201 U. S. 123, 50 Law. Ed. 689, the court's failure to see that the testimony was read or repeated to the accused was held not to deprive the court of jurisdiction or the accused of due process of law. This case was brought up upon habeas corpus and the court expressly refrained from passing upon the question of whether such failure constituted error. Where a deaf mute charged with crime is found incapable of understanding the nature of the proceedings, although able to communicate and receive communications by signs as to elementary matters, the English practice has been to find the prisoner insane, quash the proceedings, and order his imprisonment during the pleasure of the crown, but in Reg. v. Whitfield, 3 Car. & K. 121, the jury found the prisoner to be sane, whereupon the trial proceeded to a conviction, although the evidence was not translated to him. In State v. Harris, 53 N. C. (8 Jones L.) 136, 78 Am. Dec. 272, the supreme court approves proceedings nisi prius similar to those in the English cases, i. e., submission to the jury of the question of sanity of a deaf mute prisoner and quashing the proceedings upon a finding of insanity by the jury. In a similar case (Chase v. State, 41 Tex. Cr. Rep. 560, 55 SW 833), upon the jury finding the deaf mute charged with murder to be insane, he was released on bail. It was held that the finding was not conclusive on the issue of insanity and did not prevent trial.—Adapted from 2 L. R. A. (N. S.) 509.

9. Tilton v. State [Ga. App.] 62 SE 651. In general, all proceedings in a criminal case should be open and public. Accused entitled to copies of subpoenas for witnesses. Jackson v. Mobley [Ala.] 47 S 590. Judge refused to clear court room because of lack of power, but remarked that in his judgment there would be no evidence that any right minded person would care to hear, whereupon the entire audience left. Held accused was not denied right to public trial. People v. Gregory [Cal. App.] 97 P 912.

10. Such as character of evidence to be produced, indecent or lewd. Tilton v. State [Ga. App.] 62 SE 651.

11. Women and children may properly be excluded if matters to be investigated are indecent. Tilton v. State [Ga. App.] 62 SE 651.

12, 13. Tilton v. State [Ga. App.] 62 SE 651.

14. Private counsel may be employed and permitted to assist the attorney general or district attorney, and such officer, being present, may entrust to his associate the exclusive conduct of the case. State v. Petrich [La.] 47 S 438.

15. Proof of declarations of co-conspirators may be received before proof of conspiracy. People v. Simmons, 109 NYS 190; People v. Stone, 109 NYS 199; People v. Miles, 108 NYS 510; Proctor v. State [Tex. Cr. App.] 112 SW 770. Where proof of conspiracy is afterwards made, such order is not prejudicial to accused. Cohen v. U. S. [C. C. A.] 157 F 651. Failure to prove corpus delicti (homicide) before receiving proof of admissions by accused not reversible error. People v. Maughs [Cal. App.] 96 P 407. Not improper to allow introduction of identification card, on promise of state's attorney to connect it with accused, this connection being afterwards made. State v. Washelesky [Conn.] 70 A 62. Receiving conversation prior to identifying party talking (over telephone) not error. State v. Vickers, 209 Mo. 12, 106 SW 999. Irregularity in allowing proof of threats before proof or corpus delicti cured by subsequent introduction of such proof. Ridgell v. State [Ala.] 47 S 71. Proof tending to connect accused with killing may be received in advance of proof of death of deceased in the discretion of the court. State v. Gebbia [La.] 47 S 32.

16. Allowing state to reopen case and introduce additional evidence held not an abuse of discretion. Johnson v. State, 130 Ga. 27, 60 SE 160. Permitting state to reopen case after both sides had rested held within discretion of court. State v. Callahan [N. J. Law] 69 A 957. Refusal of request to reopen case for further testimony, after arguments had commenced, held not abuse of discretion. State v. Crayton [Iowa] 116 NW 597. Within discretion of court to require defendant to proceed with evidence, though state had one more witness who was absent, and to allow etate to put such witness on stand later. Way v. State [Ala.] 46 S 273.

17. Refusal to allow newly-discovered evidence to be introduced at close of case error, where state's case was not clear and evidence was material. Etly v. Com. [Ky.] 113 SW 896. Error to refuse to allow defense to recall witness for state who had just stepped down, in order to allow foundation for impeachment to be laid. Johnson v. State [Fla.] 46 S 154. Evidence offered during argument, having been just discovered, tending to support accused's contention that confession was obtained by duress and

dence tending to show guilt of defendant should be introduced in chief [18] and in rebuttal; evidence tending to meet defendant's case is proper,[19] but a departure from this rule may be permitted, in the discretion of the court.[20] A confession is not rebuttal,[21] and where it is admitted out of its regular order, the case is reopened and accused should be allowed to prove that he did not make a confession.[22] The court may, of its own motion, withdraw testimony when other testimony, proposed to show its competency, is not introduced.[23] In Texas, failure to read the indictment to the jury until the state's case is closed, in a felony case, is reversible error, though it would be competent to reintroduce the testimony after the reading of the indictment. It cannot be presumed that the testimony was introduced.[24] Accused may waive the reading of the indictment or the reintroduction of proof, but such waiver must be made to appear clearly.[25]

*Conduct and remarks of judge.* See 10 C. L. 135—The presiding judge must at all times during the trial be present and in control,[26] but the integrity of a trial is not destroyed by his changing his seat or by a temporary absence from the room if he remains within hearing and in control.[27] The judge should carefully avoid any intimation or expression of opinion on witnesses, testimony, counsel, the parties, or the cause, during the progress of the trial,[28] but error in this regard may be cured by proper instructions to the jury,[29] and will not result in reversal in the absence of a showing of prejudice.[30] Illustrative holdings are given in the note.[31]

ill-treatment, should have been admitted. Garrett v. State, 52 Tex. Cr. App. 255, 20 Tex. Ct. Rep. 552, 106 SW 389.

18. Error to withhold it and offer it in guise of rebuttal. People v. Schmitz [Cal. App.] 94 P 407.

19. Evidence to meet that first offered by defendant is proper. State v. Skillman [N. J. Law] 70 A 83. The state has the right to rebut testimony elicited on cross-examination of accused testifying in his own behalf. State v. Heidelberg, 120 La. 300, 45 S 256. Evidence properly offered in rebuttal is not inadmissible because it incidentally strengthens the case made by the state originally. State v. Howard, 120 La. 311, 46 S 260.

20. Admission of testimony in reply is largely discretionary. State v. Harmon, 79 S. C. 80, 60 SE 230; State v. Skillman [N. J. Law] 70 A 83. Proper to allow in rebuttal evidence to meet testimony of accused, though some of it would have been proper in chief. Adams v. Com., 33 Ky. L. R. 779, 111 SW 348. Admission in chief of evidence properly receivable in rebuttal not error. People v. Maughs [Cal. App.] 96 P 407. It is within the sound legal discretion of the judge to allow prosecution to introduce evidence at the close of defendant's case which might have been more properly introduced as part of the case in chief, and such discretion will not be reviewed in the absence of gross abuse. Crawford v. U. S., 30 App. D. C. 1.

21. Should be offered as part of case in chief. State v. Smith, 120 La. 530, 45 S 416.

22. Reversible error to refuse to allow accused to rebut proof of confession so received. State v. Smith, 120 La. 530, 45 S 416.

23. Wickham v. People, 41 Colo. 346, 93 P 478.

24. Record must show it. Essary v. State, 53 Tex. Cr. App. 596, 111 SW 927.

25. No waiver shown. Essary v. State, 53 Tex. Cr. App. 596, 111 SW 927.

26. Skaggs v. State [Ark.] 113 SW 346.

27. Absence in adjoining room two minutes not error, it not appearing that he was out of hearing. Skaggs v. State [Ark.] 113 SW 346.

28. Court should not directly or indirectly intimate any opinion on credibility of a witness. Slater v. U. S. [Okl.] 98 P 110. Utmost care should be used by trial judge to avoid any expression or intimation of opinion on the facts, or counsel, or defendant, in remarks, instructions or otherwise. Lewis v. State [Fla.] 45 S 998. Remarks of court intimating that counsel was attempting to lead witness and was repeating his answers incorrectly held improper. People v. Firori, 123 App. Div. 174, 108 NYS 416. Remarks by the trial judge, in making rulings during the trial, in the hearing of the jury, have the same effect as instructions. If erroneous, same result follows. West v. State [Fla.] 46 S 93.

29. Remarks of judge upon offer of certain real evidence not erroneous in view of subsequent cautionary instructions. Pollock v. State, 136 Wis. 136, 116 NW 851. While case was being tried, jury in another case brought in verdict of "not guilty," and court remarked that verdict was a surprise, and solicitor said "render one more verdict and quit." Court instructed jury trying case to disregard these remarks. No error, cases not being connected in any way. Welch v. State [Ala.] 46 S 856. Remark of court addressed to counsel, upon sustaining objection to question that counsel ought to know question was improper, etc., not prejudicial, court having told jury to disregard it. Watson v. State [Ala.] 46 S 232. On motion to exclude testimony of a witness, court remarked, "he didn't really give any." Held, any error was cured by later telling the jury that the remark was not well expressed, and was not intended as express-

*Consolidation.*[See 10 C. L. 136]—Where a defendant is under two charges both must be tried at the same term, and sentence imposed after conviction in both cases.[32] In Missouri one who has been tried, convicted and sentenced for a felony cannot be tried for another felony until he has served his time or the judgment has been set aside or reversed.[33]

*Severance.*[See 10 C. L. 136]—The right of persons jointly indicted to be separately tried is granted by statute in some states as to some offenses.[34] In other cases the granting or refusal of severance is discretionary.[35] There is usually no right to a joint trial.[36] One defendant may be tried where a codefendant has not been taken

ing any opinion on the weight or credibility of the testimony. Pollock v. State, 136 Wis. 136, 116 NW 851.

**30.** Reversal will result for remarks of court only on showing of error and prejudice. Crawford v. State [Ga. App.] 62 SE 501. Remark of court intended to indicate to witness proper limits of testimony as to insanity held not prejudicial. State v. Malloy, 79 S. C. 76, 60 SE 228. Remarks of court during examination of witness held not prejudicial. Pollock v. State, 136 Wis. 136, 116 NW 851.

**31. Held not reversible error:** Mere passing remark of judge, in passing on motion for new trial, referring to accused's failure to testify. State v. Henderson [S. C.] 60 SE 314. Reason given by court for ruling on evidence. Burley v. State, 130 Ga. 343, 60 SE 1006. Remark of court, on objection to allowance of leading questions, that such questions were allowed as though witness was unfriendly. Moore v. State, 130 Ga. 322, 60 SE 544. Remark of court during examination of witness by state's attorney that "he has a right to get the truth." Ward v. State, 85 Ark. 179, 107 SW 677. Remark of court, in requiring defendant's counsel to make statement of defense to jury, that nature of the case was such that defendant ought to be required to make such statement, held not reversible error. State v. King [Wash.] 97 P 247. Improper for judge to give personal feelings or views, but remarks held not prejudicial error in view of conceded facts. State v. Reed [Or.] 97 P 627. Remark relating to admissibility of certain book entries, depending on their date, **held not comment on evidence.** State v. Hoffman, 120 La. 949, 45 S 951. Remark of judge indicating opinion on conduct of witness as being illegal, harmless, being on collateral issue. State v. Boyles [S. C.] 60 SE 233. Where court, after striking evidence which state's counsel insisted should be introduced, remarked that he wanted the case tried according to law so that it would not be reversed, this was not an opinion on the effect of evidence already introduced. Hood v. State, 52 Tex. Cr. App. 524, 107 SW 848. That court, in making rulings as to testimony, frequently announced that burning of deceased's barn had nothing to do with case, and accusations of having burned it would not excuse killing a man, held not to amount to expression of opinion on the facts. State v. Gallman, 79 S. C. 229, 60 SE 682. Judge does not express opinion by giving answer of witness, and slight inaccuracy in answer as given by him is not ground for new trial. Herrington v. State, 130 Ga. 307, 60 SE 572. Court may confine counsel to material issues during argument, no prejudice to accused resulting from language or manner of judge in so doing. Wheeler v. State [Ga. App.] 61 SE 409. Remarks of court during trial held not to intimate any opinion on the evidence or the merits of the case. Glover v. State, 129 Ga. 717, 59 SE 816. Reference by judge to certain evidence for jury in overruling motion for directed verdict held not charge on facts, court having charged that jury were not to take the facts from him, etc. State v. Arnold [S. C.] 61 SE 891. Remark of court in admitting evidence, "I will admit it and let the jury pass on it for what it is worth," held not error as intimating an opinion. Young v. State [Ga.] 62 SE 707. Statement by court as to purpose for which evidence could be considered **held not misleading.** Sweat v. State [Ala.] 45 S 588.

**Questioning witnesses:** That judge asked questions of witnesses held not prejudicial. O'Connell v. State [Ga. App.] 62 SE 1007. Usually improper for court to ask many questions of witnesses, but error not shown prejudicial. Ray v. State [Ga. App.] 60 SE 816.

**Reversible error** for court, in overruling motion for directed verdict, in adultery case, to state to counsel in presence of jury, that he did not think defendant ought to get off merely because marriage was proved by repute, and not by documentary evidence. State v. Greene, 33 Utah, 497, 94 P 987.

**32, 33.** State v. Bell, 212 Mo. 130, 111 SW 29.

**34.** In felony cases, any defendant has right to separate trial. State v. Kline [Or.] 93 P 237.

**35.** In all except felony cases, matter is discretionary with court under B. & C. Comp. § 1395. Hence, denial of motion in misdemeanor case not error. State v. Kline [Or.] 93 P 237. Decision of judge to try defendants, charged with disturbing public peace, jointly, held within his discretion and not reviewable. Comp. Laws 1897, §§ 3100, 11956. People v. Burman [Mich.] 15 Det. Leg. N. 640, 117 NW 589. No abuse of discretion to overrule motion for severance and separate trial where ground of motion was confessed by other defendant which it was believed would be used in evidence, but which actually was not so used. Maxey v. U. S., 30 App. D. C. 63.

**36.** One jointly indicted has no absolute right to be tried jointly with a codefendant, especially where the codefendant has not been taken into custody and made actual party, and he could have demanded separate trial. State v. Merchant, 48 Wash. 69, 92 P 890. Where the statute gives defendants jointly indicted the right to a severance, but not the right to a joint trial, joint

into custody when the indictment is returned [87] or at time of trial.[88] Where several persons jointly indicted demand and are granted separate trials, the state may elect which one it will try first,[89] and if conviction of one is reversed may elect to try another before a second trial of the first.[40] Where two defendants, jointly indicted and tried, are represented by separate counsel, each is entitled to cross-examine witnesses for the state.[41]

*Production, examination and supervision of witnesses.*[42]—In such matters as the separation or exclusion of witnesses from the court room,[43] of cautioning witnesses excluded,[44] of allowing witnesses who have violated a rule of exclusion to testify,[45] and of limiting the number of witnesses to particular facts,[46] the trial court is vested with wide discretion, the exercise of which is reviewable only for an abuse resulting in prejudice. Courts have power to allow the use of interpreters when justice demands.[47] An inquiry as to the qualifications of an interpreter may be waived.[48] An objection to the testimony of a witness on the ground of his mental incompetency does not require the court to stop the trial at that point and immediately institute an inquisition as to the mental capacity of the witness.[49]

*Statement of accused under Georgia practice.*See 10 C. L. 140—In Georgia accused has the right to make a statement to the court and jury not under oath.[50] The contents of the statement are not to be restricted or governed by the rules controlling the admissibility of evidence,[51] and the fact that statements made by accused are irrelevant is no ground for a ruling or interruption by the court excluding them,[52]

trial may be denied, and the various parties may be tried severally, separately and successively, in the discretion of the court. Not error to refuse joint trial under Alabama statute. Burkett v. State [Ala.] 45 S 682.

37. Only one being before court at term at which indictment was returned. Sizemore v. Com., 32 Ky. L. R. 1154, 108 SW 254.

38. Especially where the codefendant could have demanded a separate trial under the statute. State v. Merchant, 48 Wash. 69, 92 P 890.

39, 40. Napier v. Com., 33 Ky. L. R. 635, 110 SW 842.

41. People v. Billis, 58 Misc. 150, 110 NYS 387.

42. See 10 C. L. 137; Examination of Witnesses, 11 C. L. 1420; Witnesses, 10 C. L. 2079 (for privileges of witnesses). As to rights of accused, see Constitutional Law, 11 C. L. 689; also, ante, § 9, Competency of Evidence as Affected by Rights of Accused.

43. Granting or refusing motion for separation or sequestration of witnesses is within sound discretion of trial judge. State v. Daniels [La.] 47 S 599. Excluding witnesses from court room rests in trial court's discretion. People v. Oliver [Cal. App.] 95 P 172. It is proper to allow some officer active in the prosecution to remain for the purpose of advising with the district attorney, though other witnesses for state are excluded. Id. In trial of charge of felony, the court should, upon request, exclude from the court room witnesses for the state who are not testifying. Maynard v. State [Neb.] 116 NW 53. But a denial of such request is not a ground of reversal in the absence of an abuse of discretion resulting in prejudice to accused. Id.

44. Matter of instructing witnesses excluded from court room not to talk with each other or other persons concerning the case is one resting in court's discretion. Refusal not prejudicial. People v. Hutchings [Cal. App.] 97 P 325.

45. Whether witness who violates rule of exclusion and hears other testimony should be allowed to testify rests in trial court's discretion. Boyd v. State [Ala.] 45 S 591. Not error to allow newspaper reporter to testify, though he had heard part of trial. other witnesses having been excluded, but this witness not having been sworn. State v. Benjamin [R. I.] 71 A 65. Witness who remains in or returns to court room in violation of order separating witnesses, and who thus hears testimony of other witnesses, is not rendered incompetent as witness. State v. Stewart, 63 W. Va. 597, 60 SE 591. Violation of a rule separating witnesses and excluding them from the court room does not render the witness incompetent. Price v. U. S. [Okl.] 97 P 1056. Such violation can only affect his credibility or subject him to punishment for contempt of court. Id. Witness held not disqualified by reason of fact that he remained in court room after witnesses had been sworn and put under the rule. Green v. State, 125 Ga. 742, 54 SE 724.

46. Court may limit number of witnesses to fact already proved and not in dispute. Cote v. State [Neb.] 114 NW 942.

47. Nioum v. Com., 33 Ky. L. R. 62, 108 SW 945.

48. Where defendant introduced and used an interpreter, and state did not object, failure to examine as to his qualifications was not error. Nioum v. Com., 33 Ky. L. R. 62, 108 SW 945.

49. Williams v. State, 11 Ohio C. C. (N. S.) 4.

50. Freeney v. State, 129 Ga. 759, 59 SE 788.

51. Richardson v. State, 3 Ga. App. 313, 59 SE 916.

52. Richardson v. State, 3 Ga. App. 313, 59

though the court may properly prevent repetition or exclude facts wholly disconnected with any fact in issue or with the defense.[53] The right to make a statement is a personal right granted to defendant and extends no further than to permit him personally to make to the court and jury such statement as he deems proper.[54] His counsel has no right to ask him questions while he is making the statement,[55] though the trial judge may in his discretion permit counsel to make suggestions to defendant while he is making or when he has concluded it.[56] The statement cannot properly be made the means of introducing documentary evidence. Such evidence should be formally offered.[57] Defendant cannot be cross-examined on his statement without his consent.[58]

*Accused should be present* See 10 C. L. 140 throughout the trial, but this rule does not require his presence during the taking of preliminary steps before the trial[59] or formal proceedings after sentence.[60] The right of accused to be present may be waived, in some jurisdictions, where the trial is for a misdemeanor,[61] or error in proceeding in his absence may be cured,[62] and this rule is applied by some courts even in felony cases.[63] But if the right to be present is held to be absolute, it cannot be waived or cured.[64] Defendant may waive his right to be present with jury when

SE 916. Prejudicial error for court to interrupt accused while making statement and compel him to confine the statement to what took place on a certain day, when accused was stating reasons for his acts. Woodall v. State [Ga. App.] 62 SE 485.

**53.** Richardson v. State, 3 Ga. App. 313, 59 SE 916. Trial judge, in refusing to allow counsel to examine defendant or call his attention to "one other matter," did not err in saying in presence of jury, "I have allowed him to make a free and full statement," this remark not relating to weight or credit of statement. Bass v. State [Ga. App.] 62 SE 540.

**54, 55, 56.** Bass v. State [Ga. App.] 62 SE 540.

**57.** Freeney v. State, 129 Ga. 759, 59 SE 788.

**58.** Harper v. State, 129 Ga. 770, 59 SE 792.

**59.** Disqualification of presiding judge, calling of another, adjourning court on his failure to appear, application for continuance, and denial thereof, held not steps at trial at which defendant must be present. State v. Long, 209 Mo. 366, 108 SW 35.

**60.** Accused need not be personally present, when bills of exceptions are presented and signed. Thurman v. Com., 107 Va. 912, 60 SE 99. The personal presence of defendant in proceedings connected with his case subsequent to his trial and sentence is not required where such proceeding relates merely to the correction of the record. Nagel v. People, 229 Ill. 598, 82 NE 315.

**61.** In South Carolina a defendant may be tried for a misdemeanor punishable only by imprisonment in his absence. State v. Rabens, 79 S. C. 542, 60 SE 442. The trial of a misdemeanor may proceed in the absence of accused if he is represented by an attorney. B. & C. Comp. § 1378. State v. Waymire [Or.] 97 P 46. Right of accused and his attorney to be present when the verdict is rendered may be waived. Right waived where accused and counsel left court room without leave and were not present. Id. In misdemeanor cases, defendant may, if duly summoned, or on bail, be tried in his absence, and any plea save that of guilty may be entered by counsel. Walston v. Com., 32 Ky. L. R. 535, 106 SW 224. Where defendant was at liberty on bail and left court room shortly after jurors went to view scene of crime, and court did not refuse to allow him to accompany them, his absence was construed as voluntary, and he could not complain. Owen v. State [Ark.] 111 SW 466. Right to be present when verdict is returned may be waived, and is waived where defendant is at liberty on bond and is voluntarily absent when verdict is received. State v. Way, 76 Kan. 928, 93 P 159.

**62.** No prejudicial error where testimony given during defendant's temporary absence was stricken when objection was made. Boyd v. State [Ala.] 45 S 591. Testimony taken in absence of accused not reversible error where court did not know of his absence and when he learned of it the testimony taken was withdrawn and juror told to disregard it, and same testimony was then taken in his presence. Cason v. State, 52 Tex. Cr. App. 220, 20 Tex. Ct. Rep. 339, 106 SW 337. In local option case, defendant temporarily went to an adjoining room during argument of his attorney, and when court noticed his absence he stopped the argument and had defendant brought back. Code Cr. Proc. art. 633 not violated. Killman v. State, 53 Tex. Cr. App. 570, 112 SW 92.

**63.** The rule that right to be present when verdict is returned may be waived has been applied to trials of felonies by some courts. See authorities in State v. Waymire [Or.] 97 P 46. The right to be present at every step of the trial may be waived. State v. Thurston [Kan.] 94 P 1011. Where defendant in arson case, at liberty on bond, was voluntarily absent without having been excused by court when jury was brought in at its request after it had retired to consider the verdict, and the court permitted the stenographer to read part of the evidence which had been given in presence of accused, new trial not granted on account of absence of accused. Id.

**64.** The right to be present during the whole of the trial cannot be waived or

they go to view premises.[65] In noncapital cases in Mississippi, accused, when out on bond, may waive the right to be present when the verdict is received, having been present throughout the trial.[66] But such waiver is strictly his personal right and cannot be exercised by his counsel.[67] In capital cases, whether defendant is in jail subject to the power of the court to produce him, or on bond, it is fatal error to receive the verdict in his absence, and in noncapital cases it is fatal error to receive the verdict in his absence where he is in jail.[69] In Kentucky, upon an indictment for a misdemeanor, defendant, if duly summoned, or on bail, may be tried in his absence, and may though absent, by counsel, put in any plea save that of guilty.[70] If no plea is entered, judgment may go against defendant by default and the court may impose a fine if fixed by law.[71] If the fine be not fixed by law, or if imprisonment may be part of the punishment, a jury must be called to assess the punishment,[72] but may be instructed by the court to find defendant guilty and assess the punishment.[73]

(§ 10) *B. Argument and conduct of counsel.*[See 10 C. L. 141]—It is improper for counsel to persist in attempting to get incompetent evidence before the jury,[74] or to introduce incompetent matters by indirect means,[75] but the offering of incompetent evidence, in good faith, is not error.[76]

*Opening address.*[See 10 C. L. 142]—While the opening statement should include only facts which are material and competent and proper to be proved[77] and which counsel expects to prove,[78] reasonable latitude should be allowed where the subject

taken away by the court. State v. Stevenson [W. Va.] 62 SE 688. Where special judge heard case and received plea of guilty, and regular judge then appeared and examined witnesses and questioned special judge in absence of accused to inform himself of the facts, and then pronounced judgment, held reversible error. Id. It being necessary for court to inform himself of facts to ascertain degree of crime, this is a part of the trial, and accused is entitled to be present. Id. Rendition of verdict in felony case in absence of accused and his counsel, and dispersal of jury without giving accused right to poll the jury, under Code 1896, § 5308, held to amount to an acquittal. Judgment reversed and prisoner ordered discharged. Harris v. State [Ala.] 45 S 216. Fact that court called jurors forward after they had dispersed and asked them if verdict read to them was their verdict, to which "some of them" replied it was, did not cure the error. Id. In trial of misdemeanor where imprisonment is part of penalty, no part of trial can be had in defendant's absence, and error in receiving evidence in his absence cannot be cured by an offer to have it reintroduced. Washington v. State, 52 Tex. Cr. App. 323, 20 Tex. Ct. Rep. 393, 106 SW 361.

**65.** Where jurors were sent to view scene of crime, in charge of sworn officer, and defendant was present in court room at time and could have accompanied them, but made no request, being at liberty on bail, there was no error. Owen v. State [Ark.] 111 SW 466.

**66, 67, 68, 69.** Sherrod v. State [Miss.] 47 S 554.

**70, 71, 72, 73.** Walston v. Com., 32 Ky. L. R. 535, 106 SW 224.

**74.** Misconduct of counsel in repeating questions calling for incompetent matter, after objections thereto had been sustained, reversible error. Spencer v. Com., 32 Ky. L. R. 880, 107 SW 342. It is only where district attorney persists in asking improper questions or attempting indirectly to get improper matter before the jury that judgment will be reversed on account of improper conduct. No error where he voluntarily abandoned a line of questions, saying he would stop for fear of making an error. People v. Cowley [Cal. App.] 94 P 866.

**75.** Prejudicial error for counsel to state in presence of jury what witness would testify to, court having excluded the matter. Pridemore v. State, 53 Tex. Cr. App. 620, 111 SW 155. In rape case, prosecutrix married accused before trial. At end of trial, wife was in advanced stage of pregnancy. Held error for prosecution to call wife as witness and compel accused to object to her competency, where the jury could thus see her and she was in effect compelled to testify against her husband, though she gave no oral testimony. State v. Winnett, 48 Wash. 93, 92 P 904.

**76.** Asking, in good faith, of improper question not reversible error. State v. McGowan, 36 Mont. 422, 93 P 552. Not reversible to offer certain documentary and real evidence, in good faith, and have it marked for identification, though it was excluded. People v. Simmons, 109 NYS 190.

**77.** Numerous statements by prosecuting attorney held within the evidence, in larceny case, against "confidence men." People v. Simmons, 109 NYS 190; People v. Stone, 109 NYS 199.

**78.** Not error to refer to confession of accomplice, signed also by accused, which was proved by state. People v. Siemsen, 153 Cal. 387, 95 P 863. Opening statement should be confined to statement of case and evidence expected to be produced. Proper for court

is not so elementary that every lawyer should know it.[79] Discussion of the law or admonitions or instructions to the jury are improper.[80] The bill of particulars filed by the state may be read.[81] In Indiana, the defendant has the absolute right to present his defense in the order fixed by statute.[82] A request to be allowed to make the opening statement out of the statutory order is addressed to the court's discretion.[83] In Washington, the court may require the opening statement for accused to be made at the close of the state's case.[84] In Georgia, accused has the right to open and close only when no evidence has been offered in his behalf.[85] Where evidence has been introduced on behalf of accused, or heard and examined by the jury, counsel for accused cannot, as a matter of right, withdraw such evidence and thus gain the right to open and close.[86]

*In summing up.*[See 10 C. L. 142]—Counsel may refer to any matter proved,[87] draw legitimate inferences from the testimony,[88] discuss the character and credibility of witnesses,[89] illustrate his argument,[90] show the enormity of the crime,[91] call attention to the form of the instructions,[92] and within the limits of the record and well settled rules of procedure use in his argument any arts and devices,[93] and all the

to so confine counsel. Maynard v. State [Neb.] 116 NW 53.

79. References to matter not admissible in evidence held not reversible error. People v. Simmons, 109 NYS 190; People v. Stone, 109 NYS 199.

80. Maynard v. State [Neb.] 116 NW 53.

81. Cooke v. People, 134 Ill. App. 41.

82. Statute provides for statement of defense after state's evidence in chief is in. Williams v. State [Ind.] 85 NE 349.

83. A request by defendant to vary the statutory order is addressed to the discretion of the trial judge, the exercise of which is reviewable only for abuse. Held not abuse of discretion to deny request of defendant to make statement to jury directly after statement of state's case by prosecuting attorney. Williams v. State [Ind.] 85 NE 349.

84. Under Ball. Ann. Codes & St., § 4993, it is proper for court to require defendant to make a statement to the jury at the close of the state's case, though it is optional with defendant to make such statement before or at close of state's case. State v. King [Wash.] 97 P 247.

85. Proceedings at trial reviewed, and held that certain documentary evidence was offered and received in behalf of accused. Hence, counsel for accused did not have the right to open and close the argument. Lewis v. State, 129 Ga. 731, 59 SE 782.

86. Lewis v. State, 129 Ga. 731, 59 SE 782.

87. Evidence held to warrant argument of prosecuting attorney. Lacy v. State [Ala.] 45 S 680. Where testimony showed death of person robbed, proper for prosecuting attorney to allude to his death to account for his failure to testify. State v. Martin [Mo.] 113 SW 1089. Where it appeared, in robbery case, that defendant gave his grips to his attorney and that they were spirited away and could not be searched, comment of such facts was proper, though the attorney could not be made to testify. Tabor v. State, 52 Tex. Cr. App. 387, 107 SW 1116.

88. Statement by district attorney as to what evidence showed held not improper. Gillotti v. State, 135 Wis. 634, 116 NW 252. Argument of prosecuting attorney as to fair inferences from the evidence held not reversible error. People v. Kirk, 151 Mich. 253, 14 Det. Leg. N. 927, 114 NW 1023. State's attorney may comment on facts deduoible from evidence by direct proof or fair inference. People v. Hagenow, 236 Ill. 514, 86 NE 370. Proper to argue that certain competent evidence proved certain fact, though court charged it could be considered only as impeaching a witness. Chapman v. Com. [Ky.] 112 SW 567. Where evidence showed accused was living with woman to whom he was not married, it was not reversible error for prosecuting attorney to state that he was committing adultery, though there was no proof that either of them was married. People v. Ranney [Mich.] 15 Det. Leg. N. 442, 116 NW 999.

89. Not error for counsel to eulogize state's witness. Parson v. Com. [Ky.] 112 SW 617. That counsel called witness "henchman" of defendant not reversible error. Davis v. State, 52 Tex. Cr. App. 149, 20 Tex. Ct. Rep. 362, 106 SW 144. Argument, tending to show that witnesses were influenced by reason of the fact that they belonged to the same order and church and race as defendant, held legitimate. State v. Howard, 120 La. 311, 45 S 260.

90. Discretion not abused in allowing prosecuting attorney to illustrate argument by use of deputy sheriff, placing him before jury, in certain position. State v. Simmons [Kan.] 98 P 277.

91. Kinslow v. State, 85 Ark. 514, 109 SW 524.

92. Argument of district attorney that instructions given were sometimes prepared by counsel, and contained hypothetical statements, and should be carefully considered, held not error. People v. Fossetti [Cal. App.] 95 P 384.

93. Argument that jury could not turn defendant loose and look him (county attorney) in the face and say he was not guilty, not reversible error. Wilson v. State, 53 Tex. Cr. App. 556, 110 SW 904. Not reversible error for county attorney to repeat witness' answer and to smile as he did so. Kennedy v. Com., 33 Ky. L. R. 88, 109 SW 313.

skill, power and learning at his command.[94] He should not refer to matters not in evidence,[95] especially where such matters are legally incompetent or have been expressly excluded,[96] deny the truth of a showing made for an absent witness, admitted to avoid a continuance,[97] assert his personal belief as to the merits,[98] discuss the question of punishment, where the jury does not fix it,[99] use abusive epithets,[1] seek to inflame the minds of the jurors [2] by appeals to prejudice [3] or by reference to mat-

94. Within the limit of the facts proved and fair inferences therefrom, counsel may employ all the skill, learning, power and force at his command in argument. Housman v. Com., 33 Ky. L. R. 311, 110 SW 236. Counsel may employ wit, satire, invective, and imaginative illustration in argument, but license is confined to facts in evidence. State v. Martel, 103 Me. 63, 68 A 464. Violation of this rule is ground for new trial by motion or for exception to the court's refusal to check counsel and caution jury. Id.

95. Comments of counsel should be confined to evidence. Lightfoot v. State [Tex. Cr. App.] 106 SW 345. Proper for court to stop argument not warranted by evidence. Pittman v. State [Ala.] 45 S 245. Argument not based on testimony should have been excluded. Hill v. State [Ala.] 46 S 864. Prosecuting attorney should not read to jury affidavit of prosecutrix on preliminary which has not been introduced in evidence. State v. Campbell, 210 Mo. 202, 109 SW 706. Remark of county attorney interrupting argument of accused's counsel, and outside the evidence, held erroneous. Garrett v. State, 52 Tex. Cr. App. 255, 20 Tex. Ct. Rep. 552, 106 SW 889. Argument as to "break in pretended alibi" improper, defendant not relying on that defense, and offering no proof thereof. Johnson v. State [Fla.] 46 S 154. Argument as to mistake made by jury in another case, improper, and court properly stopped it. Battles v. State, 53 Tex. Cr. App. 202, 109 SW 195. Argument that defendant has been previously convicted for violating local option law, and had "bootlegged" whiskey over the country, prejudicial error, when there was no evidence to support it, and defendant's character was not in issue. Instruction to jury to disregard it held not to cure error. McKinley v. State, 52 Tex. Cr. App. 182, 20 Tex. Ct. Rep. 350, 106 SW 342.

96. Argument outside the record, to get in inadmissible evidence, held reversible error. Askew v. State [Tex. Cr. App.] 113 SW 287. Argument that defendant was charged with other acts but state could not show them, improper. Battles v. State, 53 Tex. Cr. App. 202, 109 SW 195. Argument held not such allusion to former conviction of manslaughter as to constitue error. Burnett v. State, 53 Tex. Cr. App. 515, 112 SW 74. Reference to another murder improper where there was no evidence of it, though jurors were questioned as to it on the voir dire. People v. Helm, 152 Cal. 532, 93 P 99. In prosecution for carrying a pistol, it was reversible error for counsel to argue that pistol was carried for purpose of shooting another person. Hubbard v. State, 52 Tex. Cr. App. 399, 107 SW 351. Reference to feeling in community and to evidence which court excluded, unchecked by court, reversible error. Polson v. Com., 32 Ky. L. R. 1398, 108 SW 844. Held prejudicial error for prosecuting attorney to refer to wholly different crime committed by other men, where the argument was persisted in after objection and court refused specific ruling at the time, though general instructions told jury to disregard such remarks. State v. Blodgett [Or.] 92 P 820. Where prosecution was dismissed as to one of two defendants, jointly indicted, it is improper for counsel to comment on the failure of defendant to place the other on the stand as a witness. Harville v. State [Tex. Cr. App.] 113 SW 283.

97. Reversal error for state's attorney to argue that absent witness would not have testified as alleged in affidavit which commonwealth had admitted to be read to avoid a continuance. Howerton v. Com. [Ky.] 112 SW 606.

98. Better practice is not to state personal opinions on effect of evidence; but argument held not error. Crenshaw v. State [Ala.] 45 S 631. It is improper for prosecuting attorney to state his personal opinion of the guilt of accused; but not improper to argue that evidence shows guilt, produces a conviction of guilt in his mind, and should in jurors' minds. Adams v. State [Fla.] 45 S 494.

99. Argument relating to power of court to impose punishment held improper, as tending to induce conviction of certain degree of homicide. Windham v. State [Miss.] 45 S 861. Proper to refuse to allow counsel for accused to argue for penitentiary sentence rather than death sentence, because if former was imposed no appeal would be taken and county would be saved expense. Phillips v. State [Miss.] 45 S 572.

1. Where defendants did not testify, and district attorney called jury's attention to their "hard" and "criminal" faces and argued they were just the kind of men to commit the crime charged, and court expressly sanctioned such argument, prejudicial error was committed. Perez v. Ter. [Ariz.] 94 P 1097.

2. Verdict obtained by improper, inflammatory argument, outside the case, should be reversed. Machem v. State [Tex. Cr. App.] 108 SW 1184. Inflammatory remarks, outside record, improper. Holloway v. State [Tex. Cr. App.] 113 SW 928. Inflammatory and abusive argument improper. Howerton v. Com. [Ky.] 112 SW 606. Argument, in homicide case, held not so inflammatory as to be cause for revereal. Howard v. State, 53 Tex. Cr. App. 378, 111 SW 1038.

3. Remarks calculated to prejudice jury against defendant (negro) held objectionable. State v. Cook [Mo. App.] 112 SW 710. Comment of facts outside the record, calculated to excite prejudice and inflame passions of jury, error. State v. Upton, 130 Mo. App. 316, 109 SW 821. Conduct and argument of counsel (specially hired to prosecute),

ters which jurors ought not to consider.[4] Direct or indirect reference to the failure of accused to testify is error.[5] Reference to the appearance [6] or demeanor [7] of defendant, while testifying, and of his failure to produce available witnesses [8] has been held proper. Reference to failure to introduce evidence of good character,[9] or to offer proof which would be incompetent,[10] improper. Argument or remarks otherwise improper may be permitted when provoked by or in answer to argument for the other side.[11] The reading of law to the jury is a matter resting in the sound discretion of the trial court.[12] Errors in statements of fact may be corrected,[13] and a

outside ths record, appealing to prejudices of jury, dramatic, disregarding decisions of court and rules which should govern trial of criminal causes, held prejudicial and cause for reversal. State v. Kaufman [S. D.] 118 NW 337. Held proper for court to interrupt counsel and ask him to make argument, not tending to degrade administration of justice where counsel stated "you will believe a white man not on his oath before you will a negro who is sworn. You can swallow those negroes if you want to but John R. Cooper will never swallow them." Battle v. U. S., 209 U. S. 36, 52 Law. Ed. 670.

4. Remarks of counsel relative to accused being forced to trial properly arrested by court. Watson v. State [Ala.] 46 S 232.

5. Reference by district attorney to failure of accused to testify held reversible error. Vaden v. State, 52 Tex. Cr. App. 299, 20 Tex. Ct. Rep. 404, 106 SW 367. Where accused testified in second trial but had not done so on first, question relating to former trial, and comment on failure to testify before, was error. Wilson v. State [Tex. Cr. App.] 113 SW 529. In Mississippi any reference whatever to failure of accused to testify is reversible error. Statement in argument that confession of accused "stands uncontradicted," reversible error. Prince v. State [Miss.] 46 S 537. Argument that there was not a scintilla of evidence to support defendant's theory **held not a comment on his failure to testify.** Begley v. Com., 32 Ky. L. R. 890, 107 SW 243. Argument by state's attorney that accused "made his own confession and it is not disputed" not a comment on his failure to testify. State v. Landers [S. D.] 114 NW 717. Statement that there had been no witness on stand to contradict prosecuting witness held not reversible error as comment on failure of accused to testify. Sample v. State, 52 Tex. Cr. App. 505, 108 SW 685. Counsel may characterize certain testimony as uncontradicted and undenied, though testimony is as to private conversations between witness and accused. This is not comment on failure of accused to testify so as to violate his rights. Clinton v. State [Fla.] 47 S 389. Solicitor's argument that evidence for state had not been contradicted "and no one had said it was not true" held not a comment on failure of accused to testify. No error, especially where court gave cautionary instruction. State v. Hooker, 145 N. C. 581, 59 SE 866.

6. Personal reference to jewels worn by accused, charged with running disorderly house, and sarcastic reference to her attorneys as having stopped at her "hotel," held not reversible error. Moore v. State, 53 Tex. Cr. App. 529, 110 SW 911.

7. Reference to fact that appellant laughed while on stand in his own behalf not improper. Moore v. State, 52 Tex. Cr. App. 336, 107 SW 540.

8. Failure of defendant to place his wife on the stand is matter which can properly be commented on. Battles v. State, 53 Tex. Cr. App. 202, 109 SW 195. No error where counsel referred to fact that accused failed to put certain person, present in court, on the stand, but did not refer to failure of accused to testify. Bagley v. State, 53 Tex. Cr. App. 324, 109 SW 1095.

9. Comments on defendant's failure to adduce evidence of his good character, when the latter has not been put in issue, has been held error not cured by instructions to jury to disregard same. State v. Blodgett [Or.] 92 P 820. Prejudicial error for district attorney to emphasize failure of defendant's attorney to cross-examine state's witnesses to bad reputation of defendant, and failure of defendant to produce witnesses to good reputation, the state's evidence being improper, accused not having put his reputation or character in issue. People v. Hinksman [N. Y.] 85 NE 676.

10. It is proper for the court to refuse to allow counsel for accused to argue concerning failure of prosecution to ask witness regarding fact which prosecution would not have been allowed to prove over objection. Crawford v. U. S., 30 App. D. C. 1.

11. Remarks in answer to argument of counsel for defendant not improper. Adams v. Com. [Ky.] 111 SW 348. Argument made in response to one made by counsel for defendant held proper. Pittman v. State [Ala.] 45 S 245. Where accused's counsel charged that prosecution had tried to find evidence against accused's character and had failed, retaliatory remarks by prosecuting attorney that accused had right to produce character witnesses and had not dared to do so was not reversible error. Irving v. People, 43 Colo. 260, 95 P 940. Where the impropriety of the remark is not clear, it is not error to overrule motion that jury be instructed to disregard a remark made by prosecution during defendant's argument to jury, when remark was provoked by question asked by defendant's counsel and was not made to jury. Crawford v. U. S., 30 App. D. C. 1. Where the prosecuting attorney was challenged by counsel for the defendant to state to the jury why he had not tried the case long before, and in his reply the prosecutor declared the reason was the defendant absconded and could not be found by the police, the declaration does not, if true, amount to misconduct and the trial is not vitiated thereby. Ryan v. State, 10 Ohio C. C. (N. S.) 497.

12. Not an abuse of discretion to allow

legally erroneous argument made in good faith is not ground for reversal.[14] It is the duty of the court to keep attorneys within the bounds of legitimate argument and to check them when they exceed such bounds.[15] In case of controversy as to the testimony of a witness, during the arguments, the court may have the witness recalled or have his testimony read by the reporter, and, if neither of these courses is insisted on by counsel, the matter may be left to the recollection of the jury. It is not the duty of the court to settle such controversy by stating his recollection of the testimony.[16] The time to be allowed in preparation for argument,[17] the length,[18] and the number [19] of arguments, and the interruption of arguments by the taking of a recess,[20] are matters resting in the court's discretion. In Georgia the party entitled to the concluding argument should be required to state to his adversary, before he addresses the jury, the questions of law which he will raise and read or present the authorities he expects to use.[21] But this rule does not apply where the only question is one of fact, and there is no controversy as to the law. Refusal of the court to require notice of questions and authorities used in concluding argument is not ground for new trial, the proper practice being to apply for leave to reply to arguments not used excepting in concluding address.[22]

Improper remarks or argument are not cause for reversal, unless under the circumstances, prejudicial to accused.[23] Error of this kind is usually held to be cured when the remarks are withdrawn, or when the court checks or rebukes counsel, and instructs or cautions the jury to disregard the objectionable remarks or argument.[24]

counsel to read authorities and portion of court's charge, which was afterwards given. Buchanan v. State, 52 Tex. Cr. App. 235, 20 Tex. Ct. Rep. 337, 106 SW 134. Reading from decisions as part of argument held legitimate. Robinson v. State [Ala.] 45 S 916. Not error to refuse to allow decision in another case to be read to the jury. Cordes v. State [Tex. Cr. App.] 112 SW 943.

**13.** Error in statements by prosecuting officer may be corrected. State v. Montgomery, 121 La. 1005, 46 S 997.

**14.** Verdict will not be set aside because prosecuting attorney argued an erroneous proposition of law to the jury. State v. Wren, 121 La. 55, 46 S 99. That claim made by counsel is legally erroneous, not ground for reversal. People v. Boyd, 151 Mich. 577, 15 Det. Leg. N. 36, 115 NW 687.

**15.** State v. Blodgett [Or.] 92 P 820.

**16.** Fort v. State, 3 Ga. App. 448, 60 SE 282.

**17.** Time to be allowed in preparation for argument after evidence is in rests in court's discretion. State v. Heidelberg, 120 La. 300, 45 S 256.

**18.** Limiting time of argument discretionary. Welch v. State [Ala.] 46 S 856.

**19.** Within court's discretionary power to limit arguments for accused to two, state having same number. Watson v. State [Ala.] 46 S 232.

**20.** No rule requires that arguments of counsel should be completed before a recess is taken; such matters discretionary. State v. Walker, 79 S. C. 107, 60 SE 309.

**21, 22.** Fort v. State, 3 Ga. App. 448, 60 SE 282.

**23.** Argument **harmless** where record showed guilt. Cordona v. State, 53 Tex. Cr. App. 619, 111 SW 145. Extravagant statements of counsel and statements unsustained by evidence are not ground for reversal when harmless. **Lowell v. People, 131 Ill. App. 137.** Remarks of counsel in opening statement referring to another act of accused, harmless where accused testified to act without objection. Crofton v. State, 84 Ark. 623, 106 SW 671. Harmless error to allow employed counsel to make argument, trial being otherwise regular. Adams v. Com. [Ky.] 111 SW 348. Remark of prosecuting attorney that jury had nothing to do with the law of the case, **cause for reversal** where judge did not instruct jury to disregard the remark, though he told them they were not bound for an opinion given by him (the judge) on the law. Dick v. State, 107 Md. 11, 68 A 286.

**24. Argument cured by instruction to jury to disregard it.** Starnes v. State, 52 Tex. Cr. App. 403, 107 SW 550. Argument outside record. Adams v. Com., 33 Ky. L. R. 779, 111 SW 348; Clark v. State, 53 Tex. Cr. App. 529, 111 SW 659. Reference to another killing, not shown in evidence. Jones v. State [Tex. Cr. App.] 113 SW 761. Intemperate and hasty remarks of counsel not ground for reversal. State v. Montgomery, 121 La. 1005, 46 S 997. Ordinarily presumed that prejudicial effects of improper remarks are cured by instructions to jury to disregard them. State v. Heidelberg, 120 La. 300, 45 S 256. Unimportant remark of district attorney, not addressed to jury. State v. Gibson, 120 La. 343, 45 S 271. Reference to change of venue and failure of accused to testify cured, where court stopped counsel and cautioned jury to disregard it. State v. Harrison, 145 N. C. 408, 59 SE 867. Characterization of alibi as "the rogue's defense" cured by court's instructions giving due dignity to the defense. Gillotti v. State, 135 Wis. 634, 116 NW 252. Argument relating to number of murders in county not reversible, court having sustained objection and warned jury to disregard it. Jackson v. State [Miss.] 47 S 502. Reference by district attorney to failure of

(§ 10) *C. Questions of law and fact.*[See 10 C. L. 147]—The weight of evidence and credibility of witnesses,[25] and all controverted questions of fact,[26] are for the jury. Where facts are undisputed, whether they constitute the crime charged is a question of law.[27] In Maryland, the jury are the judges of the law as well as of the facts in criminal cases,[28] though it is proper for the presiding judge to advise them in regard to his interpretation of the law, where he informs them that they are free to reject or adopt his view as they see fit.[29] If there is any doubt as to whether a witness was an accomplice, the issue should be submitted to the jury,[30] but if there is no

accused to testify not reversible error where court at once admonished jury to disregard it, and it could not have been prejudicial in view of proof. People v. Amer [Cal. App.] 96 P 401. Argument that it has been a long time since such a crime had been committed because it had been punished, not prejudicial, especially in view of cautionary instructions by court. State v. Peterson [N. C.] 63 SE 87. Remark of counsel, based on evidence, not error, being excepted to and court having told jury not to rely on it. State v. Stevens [Vt.] 70 A 1060. Remark of counsel not ground for new trial where at once withdrawn and court instructed jury to disregard it. Reese v. State, 3 Ga. App. 610, 60 SE 284. Argument outside the case cured by its withdrawal by counsel and court's instructions to disregard it. Parson v. Com. [Ky.] 112 SW 617. An improper remark to the jury by prosecuting attorney, where the trial court held the remark improper, counsel withdrew it and jury was told to disregard it. Remark that co-conspirator not on trial had pleaded guilty. Crawford v. U. S., 30 App. D. C. 1. Improper statement of counsel, at once withdrawn on objection, sustained by court, held not prejudicial. People v. Zajicek, 233 Ill. 198, 84 NE 249. Improper comments of counsel not cause for reversal when withdrawn and when court cautioned jury to disregard them. People v. Gillette, 191 N. Y. 107, 83 NE 680. Where court offered to order mistrial for improper remarks of counsel or to instruct jury to disregard them and defendant elected to proceed and court did caution the jury, no reversible error was shown. Drane v. State [Miss.] 45 S 149. Comments of private prosecuting counsel not prejudicial error when withdrawn and jury were instructed to disregard them. Wilson v. State, 52 Tex. Cr. App. 173, 20 Tex. Ct. Rep. 134, 105 SW 1026.

**Admonition to counsel** held to cure improper argument. Gibson v. State, 53 Tex. Cr. App. 349, 110 SW 41. Argument by prosecuting attorney outside the evidence not prejudicial when he was admonished by court on objection. People v. Weick, 123 App. Div. 828, 107 NYS 968. Argument outside the evidence cured by admonition of court to counsel and jury. Cordes v. State [Tex. Cr. App.] 112 SW 943. Argument, relating to objections to excluded testimony, not shown to be prejudicial, court having told counsel to confine himself to the record. Innocente v. State, 53 Tex. Cr. App. 390, 110 SW 61. Remark of counsel that parties to shooting were negroes, and if allowed to shoot each other they would soon be shooting white men, cured by rebuke of court. State v. Baker, 209 Mo. 444, 108 SW 6. No error where counsel was addressing remarks to accused, and court, on objection, rebuked him and told him to address jury. State v. Jeffries, 210 Mo. 302, 109 SW 614. Where defendant's counsel referred to possible 30-year sentence, it was improper for solicitor to state that defendant would probably never see a prison wall, but not prejudicial where court rebuked counsel. State v. Burt [N. H.] 71 A 30. The declaration by the prosecuting attorneys in this case as to what a certain "black jack" could tell and what the accused could tell, where followed by an admonition from the court that the remark should be disregarded and not repeated, did not amount to prejudicial misconduct. Williams v. Ohio, 11 Ohio C. C. (N. S.) 4.

25. Starke v. State [Wyo.] 96 P 148. Weight to be given testimony of experts on insanity for jury. Commonwealth v. Shults [Pa.] 70 A 823. Jury not obliged to believe exculpatory statements of defendant inconsistent with physical facts and other testimony, though defendant admitted the killing. Wingo v. State [Miss.] 45 S 862.-Weight and effect of evidence is for jury. State v. Walker [N. C.] 63 SE 76.

26. Questions of fact for jury, evidence being conflicting. State v. Farr [R. I.] 69 A 5. Whether time charged was proved held for jury; not error to refuse to exclude testimony. Hodge v. State [Ala.] 45 S 900. Capacity of defendant to entertain criminal intent for jury. Reynolds v. State [Ala.] 45 S 894.

27. People v. Hegeman, 57 Misc. 295, 107 NYS 261.

28. In trial of charge of embezzlement, held not error to refuse to strike all evidence because insufficient to show that defendant was "agent," within the meaning of the statute, since jury were judges of that question. Dick v. State, 107 Md. 11, 68 A. 286. Improper for counsel for state to state to the jury that they had nothing to do with question whether defendant (embezzlement) was "agent" within meaning of statute. Id. After evidence has been admitted by the trial court in a criminal case, the construction of the statute on which the indictment is found, and the legal effect of the evidence admitted in support of the indictment, are exclusively for the jury. Dick v. State, 107 Md. 11, 68 A 576. Remarks of judge in excluding evidence held not to infringe on province of jury. Pontier v. State, 107 Md. 384, 68 A 1059.

29. Dick v. State, 107 Md. 11, 68 A 286.

30. Franklin v. State, 53 Tex. Cr. App. 547, 110 SW 909.

question as to this fact, the court should charge that the witness was an accomplice.[31] The form or extent of punishment is sometimes left to the jury.[32]

(§ 10) *D. Taking case from jury.*[See 10 C. L. 148]—If there is evidence to support conviction, the case should not be withdrawn from the jury,[33] but a verdict of not guilty should be directed,[34] or the prosecution dismissed,[35] where the proof is insufficient to sustain convictions. Defendant is entitled to have the cause submitted to the jury if there is any evidence from which they might infer that he is not guilty,[36] and ordinarily a court has no power to direct a verdict of guilty [37] after plea of not guilty.[38] In Michigan the court may inform the jury that they should render a verdict of guilty, but cannot compel them to render such verdict.[39] In Arkansas it is held that a court has power, in a prosecution of a misdemeanor punishable by fine only, to direct a verdict of guilty where the facts are undisputed and admit of but one inference,[40] but it has no such power where the offense is one punishable by fine or imprisonment.[41] Where there is no dispute as to the facts, it is the duty of the court to direct a verdict on a plea of former jeopardy or former acquittal.[42]

(§ 10) *E. Instructions. Necessity and duty of charging.*[See 10 C. L. 148]—It is the duty of the court to give full, clear and proper instructions on the law of the case,[43] and requested instructions should be given if the request is timely [44] and is

31. Franklin v. State, 53 Tex. Cr. App. 547, 110 SW 909. Where facts are apparent, court may charge that witness is an accomplice. Spencer v. State, 52 Tex. Cr. App. 289, 20 Tex. Ct. Rep. 408, 106 SW 386.

32. Where accused was over 16 at time of trial, by his own confession, not error to leave it to jury's discretion to send him to reformatory. Walker v. State, 53 Tex. Cr. App. 336, 110 SW 59. Proper to instruct jury to assess punishment at confinement in reformatory if they found her guilty (of theft), there being no evidence that she was under 16 years of age. Cummings v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 397, 106 SW 363.

33. Evidence is for jury unless it is so palpably inconclusive as to fail to make prima facie case. Way v. State [Ala.] 46 S 273. General charge properly refused where evidence is in conflict. Wright v. State [Ala.] 47 S 201. General affirmative charge properly refused. Burkett v. State [Ala.] 45 S 682. Question of guilt for jury; general affirmative charge properly refused. Fowler v. State [Ala.] 45 S 913. Evidence being sufficient to go to jury on issue of guilt, instructions in the nature of an affirmative charge for defendant were properly refused. Moore v. State [Ala.] 45 S 656. Verdict of not guilty will not be directed unless proof is exceedingly clear and without contradiction. State v. Franklin [S. C.] 60 SE 953. Evidence sufficient to go to jury on question of guilt of shooting at another with intent to do bodily harm. State v. Hunskor, 16 N. D. 420, 114 NW 996. In Louisiana, judge does not take case from jury on ground of want of evidence. State v. Dudenhefer [La.] 47 S 614. Case is for jury if there is any evidence connecting accused with crime. Creech v. Com., 32 Ky. L. R. 808, 107 SW 212. If there is any evidence, however slight, tending to show the guilt of accused, the issue must be left to the jury. Commonwealth v. Murphy [Ky.] 109 SW 353. Testimony should go to jury, though weak, unless wholly conjectural, if it reasonably tends to show guilt. State v. Dobbins [N. C.] 62 SE 635. Case should go to jury if there is any evidence which, if true, would justify conviction. State v. Walker [N. C.] 63 SE 76. It is not a ground of demurrer that the jury may not draw from all the testimony the inference necessary to sustain the indictment. United States v. Heinze, 161 F 425.

34. Where state failed to prove material element of offense charged, court should have instructed verdict of not guilty. State v. Brown, 33 Utah, 109, 93 P 52. If the evidence introduced by the state fails to incriminate defendant or is wholly insufficient to show him guilty of the offense charged, it is the right and duty of the trial judge to direct a verdict of not guilty. Verdict of not guilty properly directed. Charge was attempt to commit abortion. Commonwealth v. Murphy [Ky.] 109 SW 353. It is the duty of the court to instruct a verdict for accused unless the evidence is sufficient to warrant a reasonable conclusion of defendant's guilt. Mickle v. U. S. [C. C. A.] 157 F 229.

35. Allegations and proof must correspond, and if allegations are insufficient and state refuses to recommit to grand jury, prosecution must be dismissed. Commonwealth v. White [Ky.] 109 SW 324.

36. State v. Seaboard Air Line R. Co., 145 N. C. 570, 59 SE 1048.

37. Instruction to find accused guilty, erroneous. State v. McNamara, 212 Mo. 150, 110 SW 1067.

38. After plea of not guilty, court cannot direct verdict for state, however clear the proof. State v. Reed [Or.] 97 P 627.

39. Held that judge compelled jury to render verdict without leaving their seats, and conviction set aside. People v. North [Mich.] 15 Det. Leg. N. 549, 117 NW 63.

40, 41. Roberts v. State, 84 Ark. 564, 106 SW 952.

42. Storm v. Ter. [Ariz.] 94 P 1099.

43. See post, Form and Substance in General.

in due form,[45] and if it is a correct statement of law [46] and applicable to the facts.[47] Requests which are incorrect,[48] or which are not responsive to the issues,[49] or warranted by the evidence,[50] or which are argumentative,[51] misleading,[52] unintelligible,[53]

**44.** Refusal to give requested instructions is not available error where requests were not signed by accused or his counsel and delivered to court before commencement of argument, as required by Burns' Ann. St. 1901, § 1892, subd. 6. Eacock v. State, 169 Ind. 488, 82 NE 1039. Not error to refuse to recall jury for additional instructions requested by accused where no former request had been made to give such instructions. Barton v. State, 53 Tex. Cr. App. 443, 111 SW 1042.

**45.** Oral request for general charge properly refused. Stallworth v. State [Ala.] 46 S 518. Charge on impeachment of witnesses not required, no written request therefor having been made; not error to refuse oral request. Strickland v. State [Ga. App.] 61 SE 841.

**46.** Request to charge that state must show commission of crime in county of prosecution should have been granted. Holcombe v. State [Ga. App.] 62 SE 647.

**47.** Court should give requested instructions applicable to evidence. State v. Short, 120 La. 187, 45 S 98. Error to refuse charge that testimony of witnesses considered unworthy of belief might be disregarded. Burkett v. State [Ala.] 45 S 682. Requested charge on issue whether crime was committed within limitation period should have been given. Battles v. State, 53 Tex. Cr. App. 202, 109 SW 195. Held error to refuse to charge jury in rape case that delay in prosecution should be considered, and that acquittal should follow if her explanation of delay is unreasonable, or delay was for purpose of extorting money or property. Commonwealth v. Mtynarczyk, 34 Pa. Super. Ct. 256. Where one accused of violating liquor law stated that he acted as agent for two named buyers and obtained whiskey from a named illegal vendor, and prosecuting attorney commented on his failure to produce the named men as witnesses to corroborate his statement, it was prejudicial error to refuse a proper request to charge that no man can be compelled to incriminate himself. Williams v. State [Ga. App.] 62 SE 671.

**48.** Instruction not stating correctly law applicable to facts shown properly refused. Clements v. State [Neb.] 114 NW 271. Erroneous requests should be refused though errors favor the state. Smith v. State [Ala.] 45 S 626. Instruction partially incorrect may be refused. Id. Not error to refuse charges requested by defendant requiring acquittal on hypothesis warranting conviction. Lacy v. State [Ala.] 45 S 680. Proper to refuse charge that jury are not to consider fact that grand jury have found indictment, since it must necessarily be considered. Crenshaw v. State [Ala.] 45 S 631. Requested charges properly refused because argumentative, confusing, incorrect in law, invading province of jury, and misleading. Way v. State [Ala.] 46 S 273.

**49.** Instructions not applicable to evidence properly refused. Reynolds v. State [Ala.] 45 S 894; Fowler v. State [Ala.] 45 S 913; West v. State [Fla.] 46 S 93; Lawson v. State [Ind.] 84 NE 974; State v. Pigg [Kan.] 97 P 859; Jones v. State [Tex. Cr. App.] 111 SW 653. Instruction assuming narrower scope to proof than evidence warrants properly refused. Minor v. State [Fla.] 45 S 816. Charges not properly hypothesizing facts properly refused. Parker v. State [Ala.] 45 S 248. Instructions ignoring certain evidence properly refused. Lacy v. State [Ala.] 45 S 680. Evidence held not to require instruction on defense of intoxication; request properly refused. People v. Kirk, 151 Mich. 253, 14 Det. Leg. N. 927, 114 NW 1023. Request not based on any evidence in case, and outside issues, properly refused. State v. Skillman [N. J. Law] 70 A 83.

**50.** Instructions not based on evidence should not be given. Pittman v. State [Ala.] 45 S 245; People v. Emmons [Cal. App.] 95 P 1032; Steely v. Com. [Ky.] 112 SW 655; State v. Anderson, 120 La. 331, 45 S 267; State v. Whitman, 103 Minn. 92, 114 NW 363; State v. Stitt, 146 N. C. 643, 61 SE 566; Commonwealth v. Palmer [Pa.] 71 A 100; State v. Landers [S. D.] 114 NW 717; Hooton v. State, 53 Tex. Cr. App. 6, 108 SW 651. Charge on issue not raised by evidence properly refused. Baker v. State, 53 Tex. Cr. App. 14, 108 SW 665. Request to charge must be based on facts in evidence. State v. Skillman [N. J. Law] 70 A 83. Requested instruction that evidence must exclude every reasonable hypothesis except that of accused's guilt properly refused where evidence was not wholly circumstantial. People v. Bonifacio, 190 N. Y. 150, 82 NE 1098. Where defendant expressly waived proof that law was in force, refusal to charge that it must be proved was not error. Starnes v. State, 52 Tex. Cr. App. 403, 107 SW 550. Instruction that witness' testimony must be corroborated properly refused, there being no evidence that witness was an accomplice. Powell v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 395, 106 SW 362. Failure to charge on corroboration of accomplice not error, there being no accomplice who testified. Scott v. State, 53 Tex. Cr. App. 332, 111 SW 657. Charge relating to testimony of accomplice properly refused where there was no accomplice in the case. Moore v. State, 53 Tex. Cr. App. 559, 110 SW 911. Refusal of instruction on defendant's mental irresponsibility proper, there being no evidence that he was insane. State v. McNamara, 212 Mo. 150, 110 SW 1067. Instructions on permanent insanity properly refused, there being no evidence thereof. Kinslow v. State, 85 Ark. 514, 109 SW 524. Instructions treating evidence as purely circumstantial properly refused where there was some direct evidence. Minor v. State [Fla.] 46 S 297. Requested instruction cautioning jury against "popular feeling" and "outside feeling" held not required by evidence. People v. Yun Kee [Cal. App.] 96 P 95. Instruction on good character properly refused, there being no competent evidence on that issue. Lewis v. State [Miss.] 47 S 467.

**51.** Argumentative instruction properly refused. Parker v. State [Ala.] 45 S 248; Boyd

elliptical,[54] or which invade the province of the jury,[55] are properly refused. If the general charge covers the case, more particular instructions need not be given unless requested,[56] and defendant cannot complain of the omission of an instruction which he failed to request[57] in the manner required by law or the rules of the

v. State [Ala.] 45 S 591; Lacy v. State [Ala.] 45 S 680; Burkett v. State [Ala.] 45 S 682. Fowler v. State [Ala.] 45 S 913; Robinson v. State [Ala.] 45 S 916; Logan v. State [Ala.] 46 S 480; Patton v. State [Ala.] 46 S 862; Gibbs v. State [Ala.] 47 S 65; Carter v. State [Ala.] 47 S 191; Sweatt v. State [Ala.] 47 S 194; People v. Cowley [Cal. App.] 94 P 866; People v. Coulon, 151 Mich. 200, 14 Det. Leg. N. 907, 114 NW 1013. Instruction answering argument of prosecuting attorney properly refused. Ward v. State [Ala.] 45 S 221. Requested charge on quantum and character of proof held argumentative and on the weight of the evidence. Gibson v. State, 53 Tex. Cr. App. 349, 110 SW 41.

**52.** Morrison v. State [Ala.] 46 S 646; O'Grady v. People, 42 Colo. 312, 95 P 346; Minor v. State [Fla.] 45 S 816. Misleading; abstract. Thomas v. State [Ala.] 41 S 257. Argumentative, confused, misleading. Hill v. State [Ala.] 46 S 864. Confused and misleading request properly refused. Burkett v. State [Ala.] 45 S 682. Proper to refuse instructions, bad in law, misleading, and abstract. Birt v. State [Ala.] 46 S 858. Request to charge containing correct law in the abstract may be refused if likely to be misleading or confusing as applied to facts of case. Hagood v. State [Ga. App.] 62 SE 641. Requested charge, misleading in view of facts, properly refused, though abstractly correct. Lawson v. State [Ala.] 46 S 259. Charge not based on evidence and misleading. Hays v. State [Ala.] 46 S 471. Charge singling out certain phases of evidence, misleading and argumentative, properly refused. Swint v. State [Ala.] 45 S 901. Requested charge containing an erroneous designation of party properly refused. Moore v. State [Ala.] 45 S 656.

**53.** Unintelligible charge properly refused. Lacy v. State [Ala.] 45 S 680. Unintelligible, defective and misleading. Greer v. State [Ala.] 47 S 300. Unintelligible, abstract, elliptical, ignoring lower offenses charged. McBryde v. State [Ala.] 47 S 302.

**54.** Brooke v. State [Ala.] 46 S 491. Elliptical and partially unintelligible charge properly refused. Parker v. State [Ala.] 45 S 248. Elliptical; properly refused, charge being on effect of evidence of character. Burkett v. State [Ala.] 45 S 682.

**55.** Charge on weight of evidence properly refused. Wilson v. State, 53 Tex. Cr. App. 556, 110 SW 904; Cordes v. State [Tex. Cr. App.] 112 SW 943. Proper to refuse instruction invading province of jury on question of intent. Crenshaw v. State [Ala.] 45 S 631. Requested instruction in conflict with rule that jury are sole judges of weight of testimony and credibility of witnesses properly refused. People v. Oliver [Cal. App.] 95 P 172. Request that testimony of persons who say they saw a will signed by testator, should outweigh "opinion" evidence that he did not sign properly refused. State v. Skillman [N. J. Law] 70 A 83. Charge that there was no evidence of certain fact properly refused where there was evidence from which the fact could be inferred. Way v. State [Ala.] 46 S 273.

**56.** Johnson v. State [Fla.] 46 S 174; McDonald v. State [Fla.] 46 S 176; State v. Ross [Kan.] 94 P 270; State v. Zempel, 103 Minn. 428, 115 NW 275. Not error to further amplify instructions in absence of any request therefor. State v. Lee, 79 S. C. 223, 60 SE 524. Charge on character sufficient, in absence of written request for further charge. Jones v. State, 130 Ga. 274, 60 SE 840. Instruction not required by evidence on defense of insanity, none being requested. Cate v. State [Neb.] 114 NW 942. Omission to give particular instruction on circumstantial evidence not error when no such instruction was requested and court's general charge on subject was sufficient. State v. Wolfley, 75 Kan. 406, 93 P 337. Where theory of involuntary manslaughter arose solely from accused's statement, and evidence was in conflict therewith, court was not bound to charge on the law thereof in the absence of a timely and pertinent written request. Johnson v. State [Ga. App.] 60 SE 813. Omission of special instructions, such as definitions of common terms, will not be held error, in the absence of written requests for such instructions. Lewis v. State [Fla.] 45 S 998. Evidence held not to require instruction on circumstantial evidence, no request therefor being made. State v. Mitchell [Iowa] 116 NW 808. Failure to charge on character evidence in murder case not error, in absence of request. Commonwealth v. Caraffa [Pa.] 71 A 17. Charge sufficient in absence of request for more specific reference to evidence. State v. Whimpey [Iowa] 118 NW 281. An instruction that an accomplice must be corroborated was held sufficient where no further instruction was requested except that witness was an accomplice, this request being improper, since the question was one for the jury. Driggers v. U. S. [Okl.] 95 P 612.

**57.** Failure to charge on alibi not error in absence of request. Maulding v. State, 53 Tex. Cr. App. 220, 108 SW 1182. Court need not instruct on reasonable doubt if not requested to do so. Snyder v. State [Ark.] 111 SW 465. While it is proper to instruct as to lesser degrees of the crime charged, it is not error to fail to give such instructions in the absence of any request therefor. People v. Jordan, 109 NYS 840. Defendant failing to request charge cannot complain of failure to charge as to second count charging fornication and bastardy in prosecution where the first court charged rape. Commonwealth v. Walker, 33 Pa. Super. Ct. 167. Where venue was clearly proved, failure to refer to it in the charge was not error, no request for such charge being made. McDonald v. State [Fla.] 46 S 176. Not error to fail to charge on temporary insanity as lowering degree of offense, in absence of any request. Young v. State, 53 Tex. Cr. App. 416, 110 SW 445. Defendant cannot complain of failure to instruct on corroboration of accomplices in misdemeanor case, in absence of

court.[58] In some jurisdictions it is held that a request may properly be refused if any modification is required.[59] The practice of requesting an unnecessarily large number of instructions is disapproved.[60] In Texas, requests given for accused must be signed and verified by the judge.[61] The jury should be instructed with especial accuracy where the evidence is close and conflicting.[62] Doubt as to the propriety of a particular instruction should be resolved in favor of accused.[63] Additional instructions should be given when requested by jurors,[64] and such instruction is properly confined to the point covered by their request.[65]

*A requested instruction substantially covered by the charge given* may be refused.[66] The exact language of the request need not be used; it is sufficient if the charge covers the point fully and correctly.[67]

See 10 C. L. 158

any request. Williams v. State, 53 Tex. Cr. App. 396, 110 SW 63.

**58.** Failure to give particular instruction not error in absence of written request. Randall v. State, 3 Ga. App. 653, 60 SE 328. Assignments of error to refusal to charge not reviewable, requests to charge being oral. Coleman v. State [Ga. App.] 62 SE 487. Failure to instruct on particular mode of impeaching witnesses not error, no written request for charge being made. Roberson v. State [Ga. App.] 62 SE 539. Failure to charge on contradictory evidence or credibility of witnesses not ground for new trial, in absence of timely written request. Lewis v. State, 129 Ga. 731, 59 SE 782.

**59.** Requested charge need not be given unless it can be given without change. Davis v. State, 134 Wis. 632, 115 NW 150. A request to charge should be refused unless the form of the proposed charge is such that it may be read without change. State v. Vey [S. D.] 114 NW 719.

**60.** McCall v. State [Fla.] 46 S 321.

**61.** Failure to do so held reversible error under White's Ann. Code Cr. Proc. art. 718. Alderson v. State [Tex. Cr. App.] 111 SW 412.

**62.** Sheppelman v. People, 134 Ill. App. 556.

**63.** Gambrell v. State [Miss.] 46 S 138. Instruction on lower degrees should be given if court has any reasonable doubt whether evidence requires such instruction; if court is not in doubt, such instruction need not be given. State v. McGowan, 36 Mont. 422, 93 P 552.

**64.** Additional instructions may be properly given, though requested by only one juror. State v. Daly, 210 Mo. 664, 109 SW 53. Where the jury returns and asks for additional instructions, the court should give them, even though instructions have already been given on requested points. Error to refuse to give additional instructions in answer to questions by jury, on ground that they had already been answered. Commonwealth v. Smith [Pa.] 70 A 850.

**65.** Where the jury, having been charged, returns and requests an instruction on a particular question, it is not error to confine the instruction to the specific point suggested by the jury. Kimberly v. State [Ga. App.] 62 SE 571.

**66.** Smith v. State [Ala.] 45 S 626; Boyd v. State [Ala.] 45 S 634; Burkett v. State [Ala.] 45 S 682; Lawson v. State [Ala.] 46 S 259; Way v. State [Ala.] 46 S 273; Millender v. State [Ala.] 46 S 756; Carter v. State [Ala.] 47 S 191; Greer v. State [Ala.] 47 S 300; Thomas v. State, 85 Ark. 357, 108 SW 224; Burrow v. Hot Springs, 85 Ark. 396, 108 SW 823; Grissom v. State [Ark.] 113 SW 1011; People v. Simmons [Cal. App.] 95 P 48; People v. Oliver [Cal. App.] 95 P 172; People v. Emmons [Cal. App.] 95 P 1032; People v. Maughs [Cal. App.] 96 P 407; People v. King [Cal. App.] 96 P 916; People v. Whalen [Cal.] 98 P 194; O'Grady v. People, 42 Colo. 312, 95 P 346; Hamilton v. State, 129 Ga. 747, 59 SE 803; Crawford v. State [Ga. App.] 62 SE 501; Hagood v. State [Ga. App.] 62 SE 641; Holcombe v. State [Ga. App.] 62 SE 647; People v. Horchler, 231 Ill. 566, 83 NE 428; People v. Frankenberg, 236 Ill. 408, 86 NE 128; Eacock v. State, 169 Ind. 488, 82 NE 1039; State v. Gage [Iowa] 116 NW 596; State v. Hoel [Kan.] 94 P 267; Dowell v. Com., 32 Ky. L. R. 1344, 108 SW 847; Commonwealth v. Jewelle, 199 Mass. 558, 85 NE 858; People v. Coulon, 151 Mich. 200, 14 Det. Leg. N. 907, 114 NW 1013; State v. Soper, 207 Mo. 502, 106 SW 3; State v. Campbell, 210 Mo. 202, 109 SW 706; State v. Page, 212 Mo. 224, 110 SW 1057; State v. Miller, 212 Mo. 73, 111 SW 18; Leedom v. State [Neb.] 116 NW 496; Shumway v. State [Neb.] 117 NW 407; State v. Skillman [N. J. Law] 70 A 83; George v. U. S. [Okl. Cr. App.] 97 P 1052; Norris v. State, 52 Tex. Cr. App. 166, 20 Tex. Ct. Rep. 361, 106 SW 136; Fay v. State, 52 Tex. Cr. App. 185, 20 Tex. Ct. Rep. 857, 107 SW 55; Fields v. State, 52 Tex. Cr. App. 451, 107 SW 857; Crouch v. State, 52 Tex. Cr. App. 460, 107 SW 859; Everts v. State [Tex. Cr. App.] 108 SW 364; Ross v. State [Tex. Cr. App.] 108 SW 697; Stovall v. State, 53 Tex. Cr. App. 30, 108 SW 699; Gibson v. State, 53 Tex. Cr. App. 349, 110 SW 41; Moore v. State, 53 Tex. Cr. App. 559, 110 SW 911; Russell v. State, 53 Tex. Cr. App. 500, 111 SW 658; Henderson v. State, 53 Tex. Cr. App. 533, 111 SW 736; Prescott v. State [Tex. Cr. App.] 113 SW 530; Holloway v. State [Tex. Cr. App.] 113 SW 928; Richards v. Com., 107 Va. 881, 59 SE 1104; State v. Gillispie, 63 W. Va. 152, 59 SE 957. Requests which are repetitions of charge given may be refused. Minor v. State [Fla.] 45 S 816; Shear v. State [Fla.] 45 S 986; Strobhar v. State [Fla.] 47 S 4; State v. Haney, 130 Mo. App. 95, 108 SW 1080. Charge on circumstantial evidence properly refused. Larimore v. State, 84 Ark. 606, 107 SW 165. Requested charge on weight to be given testimony. People v. Laudiero [N. Y.] 85 NE 132. Refusal of requested instructions on motive, intent, and advice of counsel, held unprejudicial where instructions given were as favorable to defendant as would be consistent with right. Williamson v. U. S., 28 S. Ct. 163.

*Form and substance of charge in general.* See 10 C. L. 156—In some jurisdictions the charge must be in writing [68] if requested,[69] though the right to a written charge may be waived,[70] and a written charge may be supplemented by an oral presentation of issues.[71] Instructions should be addressed to jury as a whole.[72] While it is not reversible error to state that an intruction is given by request, the better practice is to omit any reference to the fact that an instruction is requested by counsel.[73] The giving of numerous and repetitious instructions in improper,[74] especially the undue repetition of instructions favorable to one side.[75]

The court should define the crime charged,[76] and in so doing may follow the statutory language,[77] but is not required to do so.[78] The punishment which may be inflicted is not a proper subject of instruction to the jury [79] where it is not to be

Where question of personal identity and fact of alibi are virtually the same defense, a charge on one substantially covers the other. Carr v. State [Ga. App.] 61 SE 293. Not error to refuse charge that good character is presumed, where court charged that evidence of good character could be considered on the issue of guilt or innocence, and that the weight of such evidence was for the jury. People v. Brasch [N. Y.] 85 NE 809. There being no objections to court's charges, instructions merely amplifying certain portions of those given were properly refused. State v. Laborde, 120 La. 136, 45 S 38. Where the law of reasonable doubt was fully and fairly charged, refusal to give a request on reasonable doubt as applied to a particular line of defense was not error. Dotson v. State, 129 Ga. 727, 59 SE 774. Failure to charge that jury must, if possible, reconcile evidence with presumption of accused's innocence not prejudicial, where court charged on presumption of innocence in language of Pen. Code, § 1096. People v. Patino [Cal.] 98 P 199. Not error to refuse particular instruction of weight to be given testimony of detectives where court properly charged on weight of testimony and credibility of witnesses. O'Grady v. People, 42 Colo. 312, 95 P 346. Instructions were "given" within meaning of statute when written requests were marked "given" and handed to jury, who were told orally by court that they were instructions given at request of defendant. Boyd v. State [Ala.] 45 S 634.

**67.** City of Gallatin v. Fannen, 128 Mo. App. 324, 107 SW 479; Beavers v. State, 52 Tex. Cr. App. 598, 108 SW 682. Requests need not be given in exact words; instruction held sufficiently responsive to request. State v. Dobbins [N. C.] 62 SE 635. The judge need not charge in the language of the requests; if the law is fully and accurately charged this is sufficient. Charge on insanity covered requests. Commonwealth v. Lewis [Pa.] 71 A 18. Requested instructions need not be given in the language of the request; it is sufficient if the substance is given in any form of statement. Smith v. U. S. [C. C. A.] 157 F 721.

**68.** Remarks of court to jury, during trial, on request of district attorney, that state had elected to stand on one of two acts testified to, and that testimony as to other could only be considered in corroboration, held not an oral instruction prohibited by Mills' Ann. St. § 1468a. Irving v. People, 43 Colo. 260, 95 P 940.

**69.** Error to refuse to give charge in writing when requested, and also to refuse to give special requests. Gonzales v. State, 53 Tex. Cr. App. 430, 110 SW 740.

**70.** The right to written instructions may be waived and is waived where parties do not object at the time but interrupt and request the giving of certain charges. Williams v. U. S. [C. C. A.] 158 F 30.

**71.** Charge on law being in writing, not error to read from notes of evidence in stating state's contentions. State v. Dixon [N. C.] 62 SE 615. Though the entire charge should be in writing, when a written charge is requested (State v. Khoury [N. C.] 62 SE 638), yet an oral presentation of issues, or oral instructions to supply slight omissions in the written charge, are not reversible error if correct (Id.).

**72.** Better practice is to address instructions to jury as a whole; not error to so address them instead of addressing each juror individually. Shepard v. U. S. [C. C. A.] 160 F 584.

**73.** Hamilton v. State, 129 Ga. 747, 59 SE 803.

**74.** State v. Soper, 207 Mo. 502, 106 SW 3.

**75.** State v. Fisk [Ind.] 83 NE 995.

**76.** The court should explain the legal definition of the crime charged; error to charge that materiality of allegations in accusation is for jury. Holt v. State [Ga. App.] 62 SE 992.

**77.** Court may quote statutes defining the crime charged and it is not usually prejudicial error to include in the quotation the portion of the statute providing for punishment. Shumway v. State [Neb.] 117 NW 407.

**78.** Court not required to follow language of statute, defining crime if its import is properly given. Holmes v. State [Neb.] 118 NW 99.

**79.** Not error to refuse instruction that prior conviction was charged only to increase punishment. People v. Jordan, 109 NYS 840. Instruction that if, after conviction, defendant was found to be under 18 years of age he was to be sent to the training school and not to jail, was erroneous, the matter being for the court alone. State v. McGee, 212 Mo. 95, 110 SW 699. Held not error to inform jury, in response to query by juryman as to what penalty was, that penalty was exclusively for court and that they should not consider it or enter into a discussion on that subject, but that any recommendation of mercy or severity would be punished. Commonwealth v. Martin, 34 Pa. Super. Co. 451.

assessed by them. Proper instructions on the burden of proof, presumption of innocence, and reasonable doubt should be given,[80] though definition of terms may be unnecessary.[81]

The instructions should be predicated upon and conform to the evidence,[82] and should be responsive to the issues [83] and cover and submit every issue, theory or defense raised by any evidence; [84] and instructions ignoring any material issue or

**80.** Accused is entitled to instruction, that he is presumed innocent until proved guilty beyond reasonable doubt. Yeoman v. State [Neb.] 117 NW 997. Failure to give instruction on reasonable doubt was error. Gatliff v. Com., 32 Ky. L. R. 1063, 107 SW 739. When the attention of the court is called to the law on the presumption of innocence, it is his duty to instruct the jury thereon (Yeoman v. State [Neb.] 115 NW 784), and he is not relieved therefrom by reason of the fact that defendant's counsel has requested an instruction on the subject which is erroneous (Id.). It is reversible error to refuse to give a requested charge that accused is presumed innocent, until that presumption is overcome by proof, notwithstanding a proper charge that accused must be found guilty beyond reasonable doubt. Thomas v. U. S. [C. C. A.] 156 F 897. Where state introduced accused's statement in which he claimed shooting of his wife was accidental, court should have charged that burden was on state to disprove claim that it was accidental. Combs v. State, 52 Tex. Cr. App. 613, 108 SW 649.

**Exception:** Statute making it an offense to keep and have in possession intoxicating liquors with intent to sell unlawfully makes possession presumptive evidence of unlawful intent. In such case accused is not entitled to instruction as to presumption of innocence. Yeoman v. State [Neb.] 117 NW 997.

**81.** "Burden of proof" and "preponderance of evidence," used in charge, held not to require definition. State v. Richardson, 137 Iowa, 591, 115 NW 220.

**82.** Instructions not applicable to facts should not be given. State v. Campbell, 210 Mo. 202, 109 SW 706. A charge on negative and positive evidence should be given only where clearly applicable. Not error to give the charge. Clay v. State [Ga. App.] 60 SE 1028. Charge on confessions not required nor proper where no confession was proved but there were statements by which accused sought to justify himself. Gibson v. State, 53 Tex. Cr. App. 349, 110 SW 41. Error to charge on comparative weight of positive and negative testimony where all the testimony is positive. Peak v. State [Ga. App.] 62 SE 665. Instruction erroneous as authorizing conviction on incompetent and irrelevant evidence. Curtis v. State [Tex. Cr. App.] 108 SW 380. Instruction treating evidence as both direct and circumstantial, proper. Shumway v. State [Neb.] 117 NW 407. Instruction on flight of accused warranted by evidence. State v. Anderson, 121 La. 366, 46 S 357. Error to charge Pen. Code 1895, § 989 (presumptions from failure to produce accessible evidence, or from production of weak evidence, stronger being available), where accused introduced no testimony but relied on statement, and a witness was in the court room, accessible to state and accused alike, who saw the act. Davis v. State [Ga. App.] 61 SE 843.

**Necessity and propriety of charge on circumstantial evidence:** A charge on circumstantial evidence is not required unless the evidence relied on is wholly of that character. State v. Crone, 209 Mo. 316, 108 SW 555; Barnes v. State, 53 Tex. Cr. App. 628, 111 SW 943; High v. State [Tex. Cr. App.] 112 SW 939. Evidence held not to require charge on circumstantial evidence. Booth v. State, 52 Tex. Cr. App. 452, 108 SW 687. Charge on circumstantial evidence not required where there was direct and positive evidence of crime and identity of accused. Moore v. State, 52 Tex. Cr. App. 364, 107 SW 355. Instruction on sufficiency of circumstantial evidence properly refused where evidence relied on was almost wholly that of eye witnesses. Anderson v. State, 133 Wis. 601, 114 NW 112. Instruction on circumstantial evidence not required where most of the evidence was direct and positive. State v. Clow [Mo. App.] 110 SW 632. Court should instruct on circumstantial evidence, whether so requested or not, when state relies on evidence of that kind. White v. State [Ga. App.] 60 SE 803. Charge on circumstantial evidence should have been given, there being no direct evidence of act. Jones v. State [Tex. Cr. App.] 111 SW 653. Court should have charged on circumstantial evidence, where it was purely of that character. Taylor v. State, 53 Tex. Cr. App. 615, 111 SW 151. Request for charge on circumstantial evidence held to require a charge on that subject, though request was not properly worded. State v. Barton [Mo.] 113 SW 1111. Where circumstantial evidence solely is relied on for conviction, it is error for trial court to fail and refuse to instruct on the law applicable. Rutherford v. U. S. [Okl.] 95 P 753. Where evidence is wholly circumstantial, it is error not to instruct that defendant must be acquitted if proved facts are reasonably consistent with innocence. Holt v. State [Ga. App.] 62 SE 992.

**83.** Judgment reversed where charge submitted was different from, and not included in, that charged. Gaming. Chancellor v. State, 52 Tex. Cr. App. 464, 107 SW 823. Charge inaccurately submitting defendant's claims erroneous, being on a vital point. Butler v. State, 52 Tex. Cr. App. 528, 107 SW 840. Not error to charge on argument of state based on failure of appellant to place his wife on the stand. Moore v. State, 52 Tex. Cr. App. 336, 107 SW 540.

**84.** Every defense or question, raised by any evidence should be submitted. Coleman v. State [Tex. Cr. App.] 112 SW 1072. Court should instruct on every phase of case having basis in evidence, leaving jury to decide

theory are erroneous.[85] On the other hand, no issue or theory not raised by the accusation [86] or supported by any evidence [87] should be submitted. The instructions

between conflicting theories. Gatliff v. Com. 32 Ky. L. R. 1063, 107 SW 739. Court should charge on every theory having any support in the evidence, regardless of the probability of such evidence. Washington v. State, 53 Tex. Cr. App. 480, 110 SW 751. Charge should cover every phase of the evidence and every defense, though judge may believe certain evidence untrue. Freeman v. State, 52 Tex. Cr. App. 500, 107 SW 1127. State is entitled to have given instructions fully presenting its theory as shown by evidence. Cook v. State, 169 Ind. 430, 82 NE 1047. Failure to charge on embezzlement, which was charged in indictment, error. Maulding v. State, 53 Tex. Cr. App. 220, 108 SW 1182. Assault with intent to rape should have been submitted where evidence warranted finding thereof. State v. Blackburn, 136 Iowa, 743, 114 NW 531. Proper to submit phase of evidence partly shown by one side and partly by the other. Cooper v. State [Ark.] 109 SW 1023. Proper to charge in reference to facts which some evidence tends to show, though preponderance of evidence is against such facts. Lyles v. State, 130 Ga. 294, 60 SE 578. Accused has right to instruction presenting his theory of case. De Silva v. State [Miss.] 45 S 611. Failure to instruct on defense of habitation (homicide case) harmful error. State v. Brooks, 79 S. C. 144, 60 SE 518. Failure to charge on defense of alibi reversible error where that was the sole defense and there was evidence to support it. Ballentine v. State, 52 Tex. Cr. App. 369, 107 SW 546. Facts held to require charge on alibi defense. Colbert v. State, 52 Tex. Cr. App. 486, 107 SW 1115. Where alibi was the main defense, court should have instructed thereon without request. Duggan v. State, 3 Ga. App. 332, 59 SE 846. Where evidence to show accused's presence at scene of robbery was all circumstantial, charge on alibi was not error. Tabor v. State, 52 Tex. Cr. App. 387, 107 SW 1116. Error to omit charge on defense shown by evidence. Noble v. State [Tex. Cr. App.] 113 SW 281. Error to fail to submit defense and mitigating circumstances shown by evidence. Long v. Com. [Ky.] 112 SW 841. Statement of accused held to warrant court's instructions as to contentions of accused and what was admitted. Johnson v. State, 130 Ga. 22, 60 SE 158. Instructions on flight of accused supported by evidence. People v. Maughs [Cal. App.] 96 P 407. Where court trying man for procuring abortion and woman for having committed it charged jury that if they failed to find woman did act there was no offense on part of man, and if they found she did commit it question would be whether he procured her "to do what she did," held not to have effect of withdrawing question from jury. Maxey v. U. S., 30 App. D. C. 63. Where evidence was circumstantial, aside from admission of one defendant (two being on trial), court should have charged that confession alone, unless made in open court, unaccompanied by other proof, is insufficient. Polson v. Com., 32 Ky. L. R. 1398, 108 SW 844. Where there were two theories, one that witness was detective and one that he was an accomplice, court should have charged on both theories. Spencer v. State, 52 Tex. Cr. App. 289, 20 Tex. Ct. Rep. 408, 106 SW 386. Failure to give charge requiring proof of venue error, evidence being conflicting as to which of two counties had jurisdiction. Patterson v. State [Ala.] 47 S 52. Where defendant is only eye witness, and his statements concerning the killing are proved, court should instruct that his statements tending to show he acted in self-defense must be disproved by the state, but this may not be necessary where defendant takes the stand. Casey v. State [Tex. Cr. App.] 113 SW 534.

85. Held error for trial court in prosecution for rape to charge only on first count for rape and to utterly ignore second count for fornication and bastardy. Commonwealth v. Walker, 33 Pa. Super. Ct. 167. Instruction disregarding evidence and claim of state error. People v. Helm, 152 Cal. 532, 93 P 99. Instruction erroneous because ignoring theory of self-defense. Terrell v. State, 53 Tex. Cr. App. 604, 111 SW 152. Where there was evidence tending to show justifiable homicide, it was error to instruct that proof of an unjustifiable killing is sufficient evidence of malice. State v. Smith [Kan.] 96 P 39. Charge on presumption of innocence and reasonable doubt erroneous because not applicable to one degree of crime which might be found. Redman v. State, 52 Tex. Cr. App. 591, 108 SW 365. Instruction in substance that accused's prominence or lowliness ought not to be considered, held not erroneous as directing jury to disregard accused's character. State v. Hunter, 79 S. C. 84, 60 SE 241. Instruction held not objectionable as depriving accused of benefit of evidence of good character. Eacock v. State, 169 Ind. 488, 82 NE 1039. Instruction that time of committing offense (obtaining money by false pretenses) was immaterial, held misleading and erroneous, where defense was an alibi and there was evidence to support it. State v. King [Wash.] 97 P 247. Instruction ignoring defendant's evidence in considering sufficiency of evidence to convict properly refused. Stallwarth v. State [Ala.] 46 S 518. Instructions held not to exclude defense. Herrington v. State, 130 Ga. 307, 60 SE 572. Instruction held not to ignore defense of insanity in homicide case. People v. Casey, 231 Ill. 261, 83 NE 278.

86. The court should instruct only as to degrees of offense shown by evidence and included in indictment. State v. Kemp, 102 La. 378, 45 S 283. Error to authorize conviction of offense not charged. Williams v. State, 53 Tex. Cr. App. 2, 108 SW 871. Instruction authorizing conviction on facts not alleged in indictment erroneous. Taylor v. State, 53 Tex. Cr. App. 615, 111 SW 151.

87. No instruction required on issue not presented by evidence. Woodard v. State [Tex. Cr. App.] 111 SW 941; Day v. Com., 33 Ky. L. R. 560, 110 SW 417. Alleged omitted charge not required by evidence. Guenther v. State [Wis.] 118 NW 640. Instruction on facts excluded from the case error.

should not give undue prominence to any particular evidence, issue or phase of the case.[88]

The instructions should not invade the province of the jury.[89] Thus instruc-

State v. Prater, 130 Mo. App. 348, 109 SW 1047. An instruction which submits defendant's guilt or innocence of an offense when the state has failed to prove an essential element of it is error. Chamberlain v. State [Neb.] 115 NW 555. Instruction on testimony of accomplice not required, witness not being an accomplice. Brinegar v. State [Neb.] 118 NW 475. Evidence held not to require charge on insanity. Mitchell v. State, 52 Tex. Cr. App. 37, 20 Tex. Ct. Rep. 372, 106 SW 124. Evidence in homicide case held not to warrant charge on voluntary manslaughter. Bates v. State [Ga. App.] 61 SE 888. Error to charge on responsibility of accused in aiding and abetting in killing, where undisputed evidence showed that accused alone did the killing. Commonwealth v. West [Ky.] 113 SW 76. Where the evidence shows that accused is guilty of the offense charged, or not guilty, no instruction need be given on lesser degrees. Ross v. State, 16 Wyo. 285, 93 P 299. Where evidence requires verdict of guilty as charged or not guilty, no instructions on other offenses need be given. People v. Finley, 153 Cal. 59, 94 P 248. Where the offense charged is not divided into degrees, the court is not required to charge, as to an offense that might be included in the charge made, but conviction for which would not be warranted by the evidence. State v. Vey [S. D.] 114 NW 719. Charge on involuntary manslaughter not required by evidence. Toomer v. State, 130 Ga. 63, 60 SE 198. No instruction on statute of limitations necessary where act charged, if committed at all, was committed within limitation period. State v. Goodsell [Iowa] 116 NW 605. Specific charge on recent possession of stolen property not required in evidence in burglary case. Young v. State [Tex. Cr. App.] 113 SW 764. Instruction on theory favorable to state, not supported by evidence, reversible error. Yopp v. State [Ga.] 62 SE 1036.

88. Instructions should not unduly emphasize particular facts. Wrist v. Com., 33 Ky. L. R. 718, 110 SW 849. Requested charge singling out certain evidence properly refused. Hays v. State [Ala.] 46 S 471; Kauffman v. State, 53 Tex. Cr. App. 209, 109 SW 172; Cordes v. State [Tex. Cr. App.] 112 SW 943. Instruction calling attention to particular testimony properly refused, court having properly charged on credibility of witnesses. People v. Emmons [Cal. App.] 95 P 1032. Instruction not erroneous as singling out or giving undue prominence to evidence of particular witness. People v. Frankenberg, 236 Ill. 408, 86 NE 128. Court not required to charge that testimony of defendant's experts on insanity was uncontradicted, though state offered no experts, where charge properly left the issue to the jury. State v. Herron [N. J. Err. & App.] 71 A 274. Court is not required to single out one item of evidence and charge on the effect of it. Burkett v. State [Ala.] 45 S 682. The practice of calling attention to particular testimony or particular witnesses is not to be commended. People v. Campbell, 234 Ill. 391, 84 NE 1035. Remark of court during charge calling attention to certain evidence held proper and not misstatement of the evidence. State v. Spink [R. I.] 69 A 364. Court is not bound to single out character evidence and give a specific instruction upon it but where this is done, it is proper to instruct that such evidence is to be considered with other evidence, and that defendants should be acquitted if evidence as a whole raises a reasonable doubt of guilt. McCall v. State [Fla.] 46 S 321. Charge erroneous as on weight of evidence, and as singling out and giving undue prominence to certain evidence. Pannell v. State [Tex. Cr. App.] 113 SW 536. Prejudicial error to instruct that "it is to be taken for granted that a witness tells the truth," where attention of jury was thue called to particular witness and burden was placed on defendant to show truth of testimony. State v. Halvorson, 130 Minn. 265, 114 NW 957.

89. See ante, § 10C. Instruction held not objectionable as invading province of jury because referring to "duty" of jury in certain circumstances. Burley v. State, 130 Ga. 343, 60 SE 1006. Charge: "If you believe the evidence you will find defendant not guilty," invades jury's province and is properly refused. Boyd v. State [Ala.] 45 S 591. Instruction that it would be duty of jury to have "manhood" to say so if they found certain fact, not improper. State v. Gallman, 79 S. C. 229, 60 SE 682. Requested charge that it was duty of jury to reconcile conflicting testimony without imputing willful perjury to any witness unless the conclusion is unavoidable held properly refused because invading the province of the jury. State v. Skillman [N. J. Law] 70 A 83. Instruction of judge in requiring jury to retire for further deliberation held not coercive. State v. Gallman, 79 S. C. 229, 60 SE 682. Instruction that jury "dare not go beyond jury box in considering testimony" held not intimidative or coercive. State v. Mills, 79 S. C. 187, 60 SE 664. Instructions by court urging them to endeavor to agree on a verdict held not reversible error, in view of evidence and all the circumstances. Golatt v. State, 130 Ga. 18, 60 SE 107. Instruction to jury, which had been out 17 hours, to effect that opinions of jurors should be considered by each other, proper. State v. Richardson, 137 Iowa, 591, 115 NW 220. Not error for court to instruct that only about one hour remained before Sunday, and that they should cease considering or deliberating on the case at a certain hour until Monday, though jury returned verdict before Sunday. Moore v. State, 130 Ga. 322, 60 SE 544. Instruction that jury were judges of law as well as of facts in criminal cases, but that it was court's duty to instruct them as to the law if they desired it, but that they were not bound by such instructions, but should not reject court's instructions and adapt their own views without reflection or from caprice, etc, approved. People v. Campbell, 234 Ill. 391, 84 NE 1035.

tions which intimate any opinion on the weight of the evidence [90] or the merits,[91]

**90. Instruction held erroneous.** Wright v. State, 52 Tex. Cr. App. 542, 107 SW 822. Charge that recent possession of stolen property raises presumption which must be explained. Slater v. U. S. [Okl.] 98 P 110. In prosecution for receiving stolen property, instruction on effect of evidence of possession of recently stolen goods. Thomas v. State, 85 Ark. 138, 107 SW 390. Charge on weight of testimony of defendant and other witnesses. Ross v. State, 53 Tex. Cr. App. 295, 109 SW 152. Charge on accomplices, including instruction that certain witness is an accomplice. Oldham v. State, 53 Tex. Cr. App. 280, 109 SW 148. In embezzlement case, instruction that employer, whose money was taken, and an employe, were not interested. State v. Ownby, 146 N. C. 677, 61 SE 630. Instruction authorizing jury to discard so much and such parts of the evidence as is deemed "worthy of belief." Feagle v. State [Fla.] 46 S 182. Charge that there was no evidence that certain person other than defendant did the killing. Wright v. State [Ala.] 46 S 469. Instruction that proof of oral admissions is to be received with caution. State v. Fisk [Ind.] 83 NE 995. Instruction that evidence of various witnesses was negative and did not disprove affirmative testimony of same fact. Sheppelman v. People, 134 Ill. App. 556. Statement by court to jury of what prosecuting witness testified to. Edwards v. State [Ga. App.] 60 SE 1033. Instruction that defendant should be convicted if certain facts were shown. State v. Atlantic Coast Line R. Co. [N. C.] 62 SE 755. Instruction that testimony of detective should be received with greatest caution and distrust. State v. Oliphant, 128 Mo. App. 252, 107 SW 32. Instruction that unexplained possession of goods warrants conviction of larceny. Reeder v. State [Ark.] 111 SW 272. Instruction that weight to be given testimony of accused, "if any," criticized for use of quoted phrase. State v. Porter [Mo.] 111 SW 529. In California an instruction calling attention to the situation and interest of defendant and requiring jury to consider these facts in weighing his testimony is reversible error. People v. Borrego [Cal. App.] 95 P 381. Remark of court, while instructing jury, that he did not think it necessary to give requested instruction on defense of alibi held reversible error, as comment on evidence, though he did instruct on the defense. State v. King [Wash.] 97 P 247. Held reversible error to include in instruction on weight to be given testimony of accused the statement "and you are to consider the great temptation which one so situated in under, so to speak, as to procure his acquittal," this tending to reflect judge's opinion that accused's testimony was false. State v. Bartlett [Or.] 93 P 243. It is error to use the expression "if the jury believe the evidence." The proper instruction is that if they find from the evidence certain facts to be true, then defendant should be found guilty or not guilty as the case may be. State v. Seaboard Air Line R. Co., 145 N. C. 570, 59 SE 1048. Instruction to return verdict of guilty "if jury believed the evidence" held erroneous as on weight of evidence. Id. Instruction to find defendant guilty if jury believe certain facts is reversible error if more than one inference from facts is possible, or where evidence is conflicting. State v. Seaboard Air Line R. Co. [N. C.] 62 SE 1088. Where the case was close, an instruction that jury might consider conduct and demeanor of accused "during the trial" in passing on the weight of his testimony was held prejudicial error. People v. McGinnis, 234 Ill. 68, 84 NE 687. Instruction improper as comment on evidence of conduct of accused. State v. Vickers, 209 Mo. 12, 106 SW 999.

**Not on weight of evidence:** Homicide. Davis v. State, 52 Tex. Cr. App. 198, 107 SW 851. Burglary. Taylor v. State, 52 Tex. Cr. App. 190, 20 Tex. Ct. Rep. 860, 107 SW 58. Illegal sale of liquor. Gardenhire v. State [Tex. Cr. App.] 107 SW 836. Intoxicating liquor case. Trail v. State [Tex. Cr. App.] 107 SW 545. Prosecution of accomplice in forgery. Hinson v. State, 53 Tex. Cr. App. 143, 109 SW 174. Instruction on alibi. Graham v. State [Ala.] 45 S 580. Instruction in burglary case relative to possession of stolen property by accused. Johnson v. State, 52 Tex. Cr. App. 201, 20 Tex. Ct. Rep. 853, 107 SW 52. Charge using illustrations of how jury could reason from facts proved. State v. Nelson, 79 S. C. 97, 60 SE 307. Charge limiting evidence to issue of credibility of witness. Banks v. State, 52 Tex. Cr. App. 480, 108 SW 693. Instruction to consider evidence tending to prove certain facts and also that "tending to disprove" them held proper. State v. Richardson, 137 Iowa, 591, 115 NW 220. Statement in charge that witness did not claim to be an expert, yet was permitted to give his opinion and answer a hypothetical question, not error, not being an opinion on the evidence, and the correctness of his statement not being challenged. Glover v. State, 129 Ga. 717, 59 SE 816. Not material error to instruct that voluntary and deliberate confession furnishes evidence of the highest character, where court also instructs that its weight is to be determined by jury. State v. Wortman [Kan.] 98 P 217. Court may define "place of business" if jury is left to decide whether place in question comes within definition. Bashinski v. State [Ga. App.] 62 SE 577.

**91.** Instructions near close of charge which could be construed as reflecting judge's opinion that verdict of guilty should be brought in, and emphasizing necessity for punishing violations of law, held prejudicial error. State v. Dickerson, 77 Ohio St. 34, 82 NE 969. Cautionary instructions as to gravity of offense held not prejudicial to accused. Lyles v. State, 130 Ga. 294, 60 SE 578. Reference to argument of prosecuting attorney, with approval, in the general charge is improper, but if instruction is correct, no reversible error results. Lewis v. State [Fla.] 45 S 998. Remark of court, in instructing on jury's power over punishment and recommendation of mercy, that court could not change it "if it desired to do so," held not error requiring new trial. Burley v. State, 130 Ga. 843, 60 SE 1006. Use of term "crime of which he is accused" and "committed the crime" in instruction not

or which assume as true disputed facts,[92] are improper, though conceded or undisputed facts may properly be assumed.[93] In some states it is improper for the court to sum up the facts;[94] in others the court may summarize or state the facts hypothetically [95] and even comment on the evidence,[96] provided the jury is left entirely free to find the truth of the matter.[97] If the evidence for the state is summarized, that for the defense should be stated also.[98]

error, as intimating opinion that accused committed crime charged; some such reference to accusation is necessary. State v. McGowan, 36 Mont. 422, 93 P 552.

**92.** Improper to assume that any fact has been proved against accused. Schwartz v. State, 53 Tex. Cr. App. 449, 111 SW 399.

**Instruction erroneous as assuming facts** which were disputed. State v. Vickers, 209 Mo. 12, 106 SW 999. Where a defendant enters a plea of not guilty, he puts in issue all the material facts, including the corpus delicti, and a charge to the jury in such a case to the effect that the theft of the goods was not disputed or open to controversy is an invasion of the province of the jury and constitutes reversible error. Premack v. State, 11 Ohio C. C. (N. S.) 364. Error to charge that defendant admits an essential element of crime charged, which he did not in fact admit. Bendross v. State [Ga. App.] 52 SE 728. Charge erroneous as assuming a fact, and on weight of evidence. Marsden v. State, 53 Tex. Cr. App. 458, 110 SW 897. Instruction erroneous because reversing burden of proof by assuming facts relied on by state. Moody v. State, 52 Tex. Cr. App. 232, 20 Tex. Ct. Rep. 334, 105 SW 1127. Instruction assuming two facts which should have gone to jury erroneous. De Silva v. State [Miss.[ 47 S 464. Where accused neither contended nor conceded that killing was a crime, instructions assuming that it was a crime were erroneous. Phillips v. State [Ga.] 62 SE 239.

**Charge not erroneous** as assuming guilt, or other facts in issue (homicide). Barton v. State, 53 Tex. Cr. App. 443, 111 SW 1042. Instruction held not to assume fact in dispute. State v. Baker [Or.] 92 P 1076. Charge, construed as whole, held not to assume death of murdered man as established, but to require jury to find it beyond reasonable doubt. State v. Washelesky [Conn.] 70 A 62.

**93.** Not error to assume facts which are not in dispute. People v. Casey, 231 Ill. 261, 83 NE 278. Not error for charge to assume fact admitted by accused on witness stand. May v. U. S. [C. C. A.] 157 F 1. Assumption of killing not improper in homicide case. Jones v. State, 130 Ga. 274, 60 SE 840. Not error to assume fact of killing by accused which he admitted in statement, claiming it was accidental. Lyles v. State, 130 Ga. 294, 60 SE 578. Court may give to jury conceded facts and law applicable thereto. State v. Reed [Or.] 97 P 627. Where facts are admitted to be true, or are placed beyond doubt without contest, the court may so assume in its charge assumption of marriage of defendant in adultery case proper where he admitted it. Russell v. State, 53 Tex. Cr. App. 500, 111 SW 658. Existence of local option law properly assumed, being proved without dispute. Cordona v. State, 53 Tex. Cr. App. 619, 111 SW 145.

**94.** The charge should not collate the facts. Young v. State [Tex. Cr. App.] 113 SW 276.

**95.** Instruction based on hypothetical statement of evidence not error. State v. Mills, 79 S. C. 187, 60 SE 664. Charge that defendant could be convicted if certain facts (recited, and shown by evidence) were found true, held proper. Sanders v. State [Tex. Cr. App.] 112 SW 938. Charge held not on weight of evidence, but merely to state contentions of state. Hooton v. State, 53 Tex. Cr. App. 6, 108 SW 651.

**96.** Comments on testimony during the charge for the purpose of explaining, applying, and elucidating the testimony for the convenience and assistance of the jury, present no ground for exceptions. State v. Skillman [N. J. Law] 70 A 83. The court may direct jury's attention to obvious inconsistency in defendant's case. Leading questions as to alleged conversation with witness which, if it occurred, defeated alibi. State v. Feiss, 74 N. J. Law, 633, 66 A 418.

**97.** Held not error for court to intimate to jury that he considered testimony of little weight, so long as jury were left free to exercise their own judgment. Commonwealth v. Shults [Pa.] 70 A 823. Comments by the court concerning the value of evidence are not assignable for error when the jury are left at full liberty to determine the issues of fact for themselves. Comment by judge, where jury had returned after being out nearly a day, discussing evidence, and telling them he did not believe one witness, held not error, jury being left free to form conclusions. Smith v. U. S. [C. C. A.] 157 F 721. The expression of his opinion upon the facts by judge of federal court in his charge to jury is not reviewable on appeal if no rule of law is incorrectly stated, and the matters of fact are ultimately submitted to the determination of the jury. Instruction held not erroneous if it was possible to construe it as expression of opinion on evidence where facts were left to jury to find. Maxey v. U. S., 30 App. D. C. 63. Court may properly call attention of jury to evidence or lack of it on any point and comment on the weight of it, so long as he does not direct or advise the jury how to decide the matter. State v. Ferris [Conn.] 70 A 587. Comment on evidence not reversible error, where facts are properly submitted to the jury for decision. State v. Herron [N. J. Err. & App.] 71 A 274.

**98.** Summary of all the evidence in favor of the state and omission of a like statement of the evidence in favor of accused held prejudicial error. Scott v. State [Ga. App.] 60 SE 803. Held error for court in charge to sum up facts for state, and not those shown by defendant's evidence and to characterize his summary thus: "These are some of the

In determining the sufficiency of the charge, it is to be construed as a whole.[99] There need be no repetition,[1] and each particular instruction need not state all the law relating to the subject-matter.[2] An error in one instruction may be cured or rendered harmless by other instructions.[3] Instructions should be clear,[4] definite[5] and concrete,[6] and not argumentative.[7] Minor errors are usually harmless.[8]

facts relied on by the state." Waters v. State, 3 Ga. App. 649, 60 SE 335.

**99.** Ward v. State, 85 Ark. 179, 107 SW 677; People v. Cain [Cal. App.] 93 P 1037; Warford v. People, 43 Colo. 107, 96 P 556; State v. McGee, 80 Conn. 614, 69 A 1059; Lewis v. State [Fla.] 45 S 998; Leedom v. State [Neb.] 116 NW 496; Proctor v. State [Tex. Cr. App.] 112 SW 770. Instructions sufficient if, when taken together, they fairly and fully present the law. Hacker v. Com., 33 Ky. L. R. 944, 111 SW 676; Territory v. Caldwell [N. M.] 98 P 167. Charge not erroneous when construed as whole. Jones v. State, 130 Ga. 274, 60 SE 840; People v. Hagenow, 236 Ill. 514, 86 NE 370; Gebhardt v. State [Neb.] 114 NW 290; Hamblin v. State [Neb.] 115 NW 850; State v. Hampton, 79 S. C. 179, 60 SE 669; Moore v. State, 53 Tex. Cr. App. 113, 107 SW 833; Criner v. State, 53 Tex. Cr App. 174, 109 SW 128; Thomas v. State, 53 Tex. Cr. App. 272, 109 SW 155; Banton v. State, 53 Tex. Cr. App. 251, 109 SW 159; Hernandez v. State, 53 Tex. Cr. App. 468, 110 SW 753. Instruction not erroneous as requiring conviction of some crime, when taken as whole. State v. Hampton, 79 S. C. 179, 60 SE 669. Qualification of requested instructions relating to particular case held proper, and charge as a whole proper. Commonwealth v. Strail, 220 Pa. 483, 69 A 866. An assignment to a portion of the charge must fail, if, taken as a whole, the charge is full, fair, and correct. Johnson v. State [Fla.] 46 S 174. If entire charge, taken together, is correct, error cannot be predicated on single clause or expression. Clements v. State [Neb.] 114 NW 271. Alleged erroneous instruction is to be reviewed in connection with entire charge. Tinsley v. State [Ga. App.] 62 SE 93.

**1.** Correct rule being once given need not be repeated. State v. Connars, 37 Mont. 15, 94 P 199. Usual instruction on reasonable doubt being given need not be repeated with reference to each element of crime. Territory v. Caldwell [N. M.] 98 P 167.

**2.** Lewis v. State [Fla.] 45 S 998. Each paragraph of the instructions need not cover all elements of the crime. Instructions are sufficient if, as a whole, they cover all elements of the crime and correctly state the law. Shumway v. State [Neb.] 117 NW 407.

**3.** If instructions are correct, construed as a whole, inaccuracies or technical errors are not ground for reversal. Eacock v. State, 169 Ind 488, 82 NE 1039; Cate v. State [Neb.] 114 NW 942; State v. Hibler, 79 S. C. 170, 60 SE 438. Isolated errors in charge not ground for reversal when charge as whole is correct. Jiron v. State, 53 Tex. Cr. App. 18, 108 SW 655. Erroneous instruction may be cured by subsequent one. State v. De Lea, 36 Mont. 531, 93 P 814. Defect in one instruction may be remedied or supplied by another. Lewis v. State [Fla.] 45 S 998. Slip of tongue by judge in stating general designation of offense not error, when immediately corrected and full instructions given. Carr v. State [Ga. App.] 61 SE 293. Giving of abstract instructions may be cured by charge as a whole. State v. Dickerson, 77 Ohio St. 34, 82 NE 969. New trial not granted for minor errors in charge corrected by charge as a whole. Crawford v. State [Ga. App.] 62 SE 501.

**4.** Instruction not misleading, considered as a whole. People v. Jordan, 109 NYS 840. In trial of one charged with having committed crime through instrumentality of innocent agent, guilt or innocence of latter is for jury and instructions, which are so general and indefinite as to warrant finding of guilt of both, are misleading and improper. State v. Bailey, 63 W. Va. 668, 60 SE 785.

**5.** Charge defective because not definitely specifying punishment which jury might assess. Alford v. State [Tex. Cr. App.] 108 SW 364.

**6.** Abstract instruction properly refused. Wright v. State [Ala.] 47 S 201. Charge in burglary case held objectionable as misleading or abstract. Smith v. State, 53 Tex. Cr. App. 643, 111 SW 939. The charge should not only state the law but should state it as applicable to the facts. Godsoe v. State, 52 Tex. Cr. App. 626, 108 SW 388. Instructions ought not to be given which do not relate to issues in the case, though they are correct as abstract propositions of law. State v. Mitten, 36 Mont. 376, 92 P 969. The court should be careful to guard against abstract legal quotations and sententious judicial utterances in such manner as to make them misleading under the particular circumstances of the case. Holland v. State, 3 Ga. App. 465, 60 SE 205. In capital cases it is the duty of the trial court to instruct the jury clearly and distinctly upon the law applicable to the facts disclosed by the evidence. Mere abstract charge is not enough unless jury are told and understand how to apply the law to the facts. Commonwealth v. Smith [Pa.] 70 A 850.

**7.** Contentions of parties should not be argumentatively emphasized. Scott v. State [Ga. App.] 60 SE 803. Instruction erroneous because a comment on evidence and argumentative. State v. Campbell, 210 Mo. 202, 109 SW 706.

**8.** Clerical errors, not tending to confuse or mislead, are immaterial. Johnson v. State [Fla.] 46 S 174. Use of word "credit," in place of "credibility," harmless. Dooley v. State, 52 Tex. Cr. App. 491, 108 SW 676. Instruction relating to testimony not erroneous for use of phrase jury "will" consider it instead of "may" consider it. Proctor v. State [Tex. Cr. App.] 112 SW 770. Instruction using phrase "if you acquit defendant altogether" held not objectionable as requiring jury to find defendant not guilty of any wrong before acquitting. Pryse v. State [Tex. Cr. App.] 113 SW 938. Use of "should" instead of "may" in instruction on what jury might consider in passing on credibility of

*Form and propriety of particular charges.*[See 10 C. L. 161]—Holdings as to the form and sufficiency of instructions as to the burden and degree of proof,[9] presumption of innocence,[10] presumption from failure to call witness,[11] rules for considering evidence in general,[12] and of particular kinds of evidence, such as circum-

witnesses not ground for new trial. Jordan v. State, 130 Ga. 406, 60 SE 1063. Mere repetition of part of charge not ground for reversal. Woodard v. State [Tex. Cr. App.] 111 SW 941. Use of "or" instead of "and" immaterial. Schooler v. State, 52 Tex. Cr. App. 331, 20 Tex. Ct. Rep. 403, 106 SW 359.

**9.** Charge on burden of proof and reasonable doubt approved. Moore v. State, 52 Tex. Cr. App. 364, 107 SW 355; Clay v. State [Ga. App.] 60 SE 1028. Instructions on weight of evidence proper when construed as a whole. Anderson v. State, 133 Wis. 601, 114 NW 112. Instruction erroneous because authorizing verdict based on preponderance of evidence. Commonwealth v. Deitrick [Pa.] 70 A 275. Instruction that "proof may be by direct and positive testimony or by circumstantial evidence" not erroneous. State v. Fisk [Ind.] 83 NE 995. Request on burden of proof and quantum of proof properly covered. Cook v. U. S. [C. C. A.] 159 F 919. Charge in murder case erroneous because not requiring acquittal of manslaughter, if jury have reasonable doubt of facts essential to constitute that offense. Fuller v. State [Tex. Cr. App.] 113 SW 540. In prosecution for carrying weapon, instruction which required accused to show beyond reasonable doubt defense that he was a traveler was error. Steel v. State [Tex. Cr. App.] 113 SW 15. Instruction in homicide case not erroneous as shifting burden of proof, or misleading, or on weight of evidence. Dobbs v. State [Tex. Cr. App.] 113 SW 923. Instructions given on quantum of proof proper; those requested properly refused. People v. Corey [Cal. App.] 97 P 907. Error to charge that "should you believe from the testimony that defendant is not guilty beyond a reasonable doubt" etc., since it shifts the burden of proof. Godsoe v. State, 52 Tex. Cr. App. 626, 108 SW 388. Charge held not erroneous as placing burden on defendant. Clay v. State, 52 Tex. Cr. App. 555, 107 SW 1129. Instruction erroneous because shifting burden of proof. Huddleston v. State [Tex. Cr. App.] 112 SW 64. Instruction erroneous because shifting burden of proof on defendant to prove innocence. Greer v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 397, 106 SW 359. Properly refused: "If the evidence is evenly balanced as to the guilt or innocence of defendant, then * * * you should lean to the side of mercy and decide in favor of defendant." Way v. State [Ala.] 46 S 273. If there are two plausible theories, one tending to prove defendant guilty and the other tending to show that bystanders committed the act, it is the jury's duty, if they cannot determine from the evidence which is true, to adopt that theory most favorable to defendant. Instruction approved. Windham v. State [Miss.] 45 S 861. Requested instructions on quantum of proof erroneous and properly refused. Mason v. State [Ala.] 45 S 472. Instruction requiring jury to be satisfied of truth of state's evidence required too high a degree of proof; properly refused. Patton v. State [Ala.] 46 S 862. Instruction on burden of proof held not improper as shifting burden to defendant. Yeoman v. State [Neb.] 115 NW 784. Instruction which shifts burden of proof to defendant and requires evidence to show beyond reasonable doubt that he acted in good faith in doing an act complained of is erroneous. Chamberlain v. State [Neb.] 115 NW 555. Instruction on presumption and burden of proof in larceny case correct taken together. State v. McDermet [Iowa] 115 NW 884. Instructions in homicide held inconsistent and erroneous on burden of proof in relation to degrees of crime. Kennison v. State [Neb.] 115 NW 289. Modification by court of requested instructions on quantity of proof and weighing of testimony held not error. State v. Shapiro [R. I.] 69 A 340. Instruction on quantum of proof necessary approved. People v. Simmons [Cal. App.] 95 P 48. Instructions, construed as whole, not misleading as allowing conviction without finding commission of crime by defendant beyond reasonable doubt. State v. Barton [Mo.] 113 SW 1111. Instruction as to time within which commission of crime must be found held proper. State v. McKee, 212 Mo. 138, 110 SW 729.

**10.** Charge correct on presumption of innocence and reasonable doubt. Snyder v. State [Ark.] 111 SW 465; People v. Yun Kee [Cal. App.] 96 P 95; State v. Clow [Mo. App.] 110 SW 632; Wylie v. State, 53 Tex. Cr. App. 182, 109 SW 186; Howard v. State, 53 Tex. Cr. App. 378, 111 SW 1038. Instruction on presumption of innocence of accused sufficient in absence of request for more particular charge. State v. Wolfley, 75 Kan. 406, 93 P 337. Charge on presumption of innocence and reasonable doubt should have been given. Keeton v. Com., 32 Ky. L. R. 1164, 108 SW 315. Instruction on presumption of innocence held not improper because of words "this presumption partakes of nature of evidence" instead of saying that it is evidence. Holmes v. State [Neb.] 118 NW 99.

**11.** Instruction that defendant's failure to introduce evidence is not the fault of court or jury has been held no error. Held not unfavorable comment on such failure. State v. Rabens, 79 S. C. 542, 60 SE 442.

**12.** Instruction as to extent to which proof of death of members of family of deceased could be considered held not misleading so as to permit consideration of death of other persons. People v. Zajicek, 233 Ill. 198, 84 NE 249. Instruction erroneous which authorized jury to reject evidence which they could not reconcile, irrespective of whether other evidence convinced them beyond a reasonable doubt. Frink v. State [Fla.] 47 S 514. Properly refused; "If there are two conflicting theories, one showing guilt of accused and the other showing his innocence, the jury should adopt the theory

stantial evidence,[12] positive and negative testimony,[14] character evidence,[15] statement[16] or testimony of defendant,[17] failure of accused to testify,[18] confessions,[19] testimony of accomplices and corroboration thereof,[20] credibility and impeachment

which shows his innocence." Burkett v. State [Ala.] 45 S 682.

**13.** Charge on circumstantial evidence approved. State v. Sharpless, 212 Mo. 176, 111 SW 69; People v. Simmons [Cal. App.] 95 P 48. Instruction on circumstantial evidence and quantum required held not erroneous. People v. Cain [Cal. App.] 93 P 1037. Error to refuse charge that "evidence is partly circumstantial, and his innocence must be presumed by the jury until his guilt is established by evidence in all the material aspects in the case beyond a reasonable doubt and to a moral certainty." Fowler v. State [Ala.] 45 S 913. Charge, in substance, that if circumstantial evidence is capable of explanation on any reasonable hypothesis consistent with defendant's innocence he should be acquitted, should have been given. Way v. State [Ala.] 46 S 273. Requested charge that, "If the evidence is reasonably consistent with defendant's innocence, you should promptly acquit him," should have been given. Id. Instruction on quantity of circumstantial evidence required disapproved. State v. Fisk [Ind.] 83 NE 995.

**14.** Reversible error to charge, without qualification, that positive testimony is to be believed in preference to negative. Its weight is for jury. Peak v. State [Ga. App.] 62 SE 665. Instructions on weight of negative and positive testimony held proper as whole, in view of evidence. Benton v. State, 3 Ga. App. 453, 60 SE 116. Portion of instruction discussing relative weight and credit to be given positive evidence and negative evidence or want of knowledge held argumentative and proper to be refused but harmless under circumstances of case. Gent v. People, 133 Ill. App. 159.

**15.** Charge on consideration of character of accused held not erroneous. Jordan v. State, 130 Ga. 406, 60 SE 1063. Instruction hypothesizing that evidence of good character, taken in connection with all the evidence, is sufficient to generate a reasonable doubt, erroneous; evidence must be believed, and then it may, in connection with other evidence, raise such doubt. Abrams v. State [Ala.] 46 S 464. Answer to point that "evidence of good character is positive evidence and may of itself by creation of reasonable doubt produce acquittal" that "evidence of previous good character is to be regarded as substantive proof, and as such, evidence upon which reasonable doubt of guilt may rest. It should be observed, however, that there comes a time in life of every criminal when he commits his first offense, and when he leaves the high plane upon which walks the upright, law-abiding citizen." Held not above criticism but not reversible error. Commonwealth v. King, 35 Pa. Super. Ct. 454.

**16.** Charge held not to eliminate prisoner's statement from consideration, in view of former instruction on such statement. Jordan v. State, 130 Ga. 406, 60 SE 1063. Not error to charge substantially. Pen. Code 1895, § 1010, that accused could make statement, not under oath and could not be cross-examined without his consent, and jury could give it such weight as they thought proper. Harper v. State, 129 Ga. 770, 59 SE 792.

**17.** Instruction that defendant's testimony may be considered in light of fact that he is defendant, and nature and enormity of crime charged may be considered, held not erroneous. State v. De Lea, 36 Mont. 531, 93 P 814. Instruction on credibility of accused as witness sustained. State v. Dixon [N. C.] 62 SE 615. Instruction, "you are not required to believe the testimony of said accused as true, but you are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction," held reversible error. State v. Fuller [Or.] 96 P 456. It is proper to instruct that jury may, in weighing testimony of accused, consider his interest and all the facts and circumstances, and give it such weight as they consider it entitled to. State v. Bartlett [Or.] 93 P 243. Instruction, on credibility of defendant's testimony held not error. People v. Zajicek, 233 Ill. 198, 84 NE 249. Instruction on credibility of testimony by accused criticised but held not ground for reversal. People v. Ryan, 152 Cal. 364, 92 P 853. Instruction that credibility of defendant testifying in his own behalf is left by statute to jury and that jury may consider his interest in case and desire to avoid punishment of crime of which he is charged, held proper. Lemen v. People, 133 Ill. App. 295.

**18.** Charge on Code Cr. Proc. Art. 770, that failure of accused to testify shall not be considered nor commented on, held sufficient, though jury were not told to refrain from any discussion of the fact or allow it to influence them. Anderson v. State, 53 Tex. Cr. App. 341, 110 SW 54.

**19.** Instruction on corroboration of confession not erroneous, though not in commendable form. Skaggs v. State [Ark.] 113 SW 346. Where corpus delicti is sufficiently proved, instruction in language of Cr. Code Prac. § 240, should not be given; when such instruction is given it should be in language of statute (weight to be given confession) and should in addition require proof connecting accused with the offense. Chapman v. Com. [Ky.] 112 SW 567. Instructions on competency and effect of written confession proper, in view of evidence, and requested instructions properly refused. People v. Rogers [N. Y.] 85 NE 135. Charge on effect of confessions, and manner in which they are to be considered by jury approved. Pratt v. State, 53 Tex. Cr. App. 281, 109 SW 138.

**20.** Charge on accomplices and necessity for corroboration approved as against objections urged. Criner v. State, 53 Tex. Cr. App. 174, 109 SW 128. Instruction that testimony of accomplice, not corroborated, should be received with great caution, etc., approved. State v. Daly, 210 Mo. 664, 109 SW 53. Charge on corroboration of accomplice erroneous because failing to require jury to find accomplice's testimony to be true before

of witnesses,[21] definition of reasonable doubt,[22] definition and description of crime charged,[23] and the issues of insanity [24] and alibi,[25] are noted below.

they can consider it. Taylor v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 400, 106 SW 366.

**21.** Instruction on credibility sufficient. Decker v. State, 85 Ark. 64, 107 SW 182. Instructions of credibility approved. People v. Maughs [Cal. App.] 96 P 407. Instruction on weight of testimony and credibility of witnesses approved. State v. Connors, 37 Mont. 15, 94 P 199. Instructions on impeachment sufficient. Summerlin v. State, 130 Ga. 791, 61 SE 849. Charge on impeachment approved. Arnold v. State [Ga.] 62 SE 806; Parker v. State, 3 Ga. App. 336, 59 SE 823. Instruction on credibility of witnesses and duty of jury in passing thereon criticised but held not prejudicially erroneous. People v. Horchler, 231 Ill. 566, 83 NE 428. Instructions on weight of evidence and credibility of witnesses being for jury, held sufficient. State v. Sharpless, 212 Mo. 176, 111 SW 69. Charge that in passing on credibility of witness jury should consider fact that every statement he made on stand was unchallenged, and that he was not contradicted by any evidence, held not erroneous, words unchallenged and uncontradicted being used in same sense and indicated that no one had been called who contradicted testimony of witness and jury could only have had same understanding. Commonwealth v. Martin, 34 Pa. Super. Ct. 451. Charge that it was for jury, etc., whether impeaching evidence "absolutely disproved or falsified" testimony improper. Benson v. State [Tex. Cr. App.] 111 SW 403. Instruction on disregarding testimony of witnesses believed to have willfully testified falsely, etc., held not objectionable as being directed specially at defendant, who was a witness. Shumway v. State [Neb.] 117 NW 407.

**22.** The law requires no particular formula in charging on reasonable doubt. State v. Dobbins [N. C.] 62 SE 635. Instruction on reasonable doubt approved. People v. Manasse, 153 Cal. 10, 94 P 92; People v. Yun Kee [Cal. App.] 96 P 95; Parker v. State, 3 Ga. App. 336, 59 SE 823; Jordan v. State, 130 Ga. 406, 60 SE 1063; Arnold v. State [Ga.] 62 SE 806; People v. Zajicek, 233 Ill. 198, 84 NE 249; Kennedy v. Com. [Ky.] 109 SW 313; Shumway v. State [Neb.] 117 NW 407; Holmes v. State [Neb.] 118 NW 99; State v. Dixon [N. C.] 62 SE 615; Commonwealth v. Belserawitz, 35 Pa. Super. Ct. 77; State v. Hampton, 79 S. C. 170, 60 SE 669; Bryant v. State [Tex. Cr. App.] 111 SW 1009; Harrolson v. State [Tex. Cr. App.] 113 SW 544. Instruction not open to objection urged. People v. Buettner, 233 Ill. 272, 84 NE 218; State v. De Lea, 36 Mont. 531, 93 P 814. Instruction disapproved. State v. Kaufmann [S. D.] 118 NW 337. Charge on reasonable doubt and burden of proof approved. Brinegar v. State [Neb.] 118 NW 475. Charge authorizing acquittal for reasonable doubt of innocence properly refused. Parker v. State [Ala.] 45 S 248. Charge correct, and burden of proof not improperly shifted. State v. Owens, 79 S. C. 125, 60 SE 305. Instruction held not ground for reversal, though not to be commended. Clements v. State [Neb.] 114 NW 271. Instructions not erroneous or misleading taken as a whole. State v. King [Wash.] 94 P 663. Charge on quantum of proof and reasonable doubt not erroneous. State v. Brown, 79 S. C. 390, 60 SE 945. Charge not erroneous in absence of written request for further instruction. Riley v. State, 3 Ga. App. 534, 60 SE 274. Instruction: "By the term 'reasonable doubt' is meant a doubt that has a reason for it. It is a doubt that you can give a reason for." Held reversible error. Gibbons v. Ter. [Okl.] 96 P 466. Not improper to refuse request that jury must be satisfied beyond reasonable doubt that certain witnesses did not tell the truth, where court properly charged that guilt must be shown beyond a reasonable doubt upon all the evidence. State v. Skillman [N. J. Law] 70 A 83. Count need not charge that guilt must appear to a "moral certainty;" charge as to reasonable doubt proper. People v. Coulon, 151 Mich. 200, 14 Det. Leg. N. 907, 114 NW 1013. Instruction using language "by reasonable doubt is meant a doubt that has a reason for it; it is a doubt you can give a reason for," held prejudicial error. Abbott v. Ter. [Okl.] 94 P 179. Having charged on weight which might be given prisoner's statement, not error in defining reasonable doubt to state that it might arise from such statement. Jordan v. State, 130 Ga. 406, 60 SE 1063. Instruction that a reasonable doubt may be raised by "ingenuity of counsel upon any reasonable hypothesis consistent with the evidence, properly refused. Strobhar v. State [Fla.] 47 S 4. Charge that "if there is one single fact proved to the satisfaction of the jury which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit," held proper; error to refuse it. Walker v. State [Ala.] 45 S 640. Properly refused: "If any one of the jury have a reasonable doubt growing out of the evidence as to whether or not any material allegation of the indictment has been proven, you must acquit." McCall v. State [Fla.] 46 S 321. Instruction that "reasonable doubt" must be founded on same evidence presented in the case erroneous because it excludes reasonable doubts arising from lack or want of evidence. State v. Andrews [N. J. Law] 71 A 109. Instruction that "reasonable doubt is a doubt must arise from the evidence, or lack of evidence, and for which some reason can be given," held improper but not reversible error. Griggs v. U. S. [C. C. A.] 158 F 572. Instruction on reasonable doubt held not objectionable as leading jury to believe that rule as to reasonable doubt applies only where persons are unjustly accused of crime. Cook v. State, 169 Ind. 430, 82 NE 1047. Requested instruction on reasonable doubt requiring absolute certainty in proof of guilt properly refused; moral certainty only required. People v. Bonifacio, 190 N. Y. 150, 82 NE 1098.

**23.** Failure to define word "deliberately" in perjury case not error, where general charge covered point that accused should be acquitted if he made statement by mistake or under agitation. Clay v. State, 52 Tex. Cr. App. 555, 107 SW 1129.

**24.** Charge on insanity as defense approved. Commonwealth v. Lewis [Pa.] 71

*Cautionary instructions* See 10 C. L. 170 limiting the effect of evidence,[20] or requiring corroboration,[27] should be given when the evidence is such as to require them, and it is proper for the court to correct any erroneous impressions which might arise from argument of counsel,[28] but no instruction is required as to matters well known to the jurors and as to which they could not be misled.[29] The giving of cautionary instructions rests largely in discretion.[30]

(§ 10) *F. Custody of jury, conduct and deliberations.* See 10 C. L. 170—Whether misconduct of jurors, or acts or language of the court or acts or language of the court or deputies or others during the trial and deliberations of the jury, are such as to call for a reversal of the judgment or the granting of a new trial depends upon the circumstances. Whether accused has been injured is the test.[31] In the notes are

A 18. Instructions construed as a whole held proper on defense of insanity and burden of proof thereon. People v. Casey, 231 Ill. 261, 83 NE 278. Instructions on insanity as defense approved; others criticized. State v. Porter [Mo.] 111 SW 529. Instruction that if defendant introduces evidence sufficient to raise a doubt as to his sanity, state must prove sanity beyond a reasonable doubt, proper. Hamblin v. State [Neb.] 115 NW 850. Instruction on mental condition of accused as defense proper and applicable to evidence. Id. Charge on defense of insanity held not erroneous to prejudice of accused. Rusk v. State, 53 Tex. Cr. App. 338, 110 SW 58.

25. Charge on alibi approved. Tinsley v. State, 52 Tex. Cr. App. 91, 20 Tex. Ct. Rep. 356, 106 SW 347; Benge v. State, 52 Tex. Cr. App. 361, 107 SW 831. Charge on burden of proof as to alibi approved. Jones v. State, 130 Ga. 274, 60 SE 840. Charge on alibi sufficient; request properly refused. Fox v. State, 53 Tex. Cr. App. 150, 109 SW 370. Instruction: "Law does not require that defendant prove alibi beyond reasonable doubt or even by preponderance of evidence, but if evidence offered upon that point where considered with all other evidence raises reasonable doubt, defendant should be acquitted," held subject to criticism but not reversible error under circumstancee of case. Gent v. People, 133 Ill. App. 159. Charge that evidence of alibi should be considered with other evidence, and that if evidence as a whole raises a reasonable doubt of guilt, accused should be acquitted, approved. Failure to charge that burden is on accused to establish alibi is not ground for reversal. Smith v. State, 3 Ga. App. 803, 61 SE 737. General charge on alibi proper; special requested charge too restrictive. Williams v. State [Tex. Cr. App.] 111 SW 1031.

26. Proper to limit effect of evidence by instruction. People v. Hagenow, 236 Ill. 514, 86 NE 370. Where impeaching testimony cannot be considered for any other purpose, a charge limiting it to that purpose is not necessary. Thompson v. State [Tex. Cr. App.] 113 SW 536. Where evidence is admissible only as matter of impeachment, it is error to refuse an instruction so limiting the effect of the evidence. Vanhouser v. State, 52 Tex. Cr. App. 602, 108 SW 387. Testimony admitted only for impeaching purposes should be limited by the court to such purpose. Poison v. Com., 32 Ky. L. R. 1398, 108 SW 844. Where evidence is admitted for restricted purposes, it is not error to instruct as to the limits within which it may be considered. People v. Casey, 231 Ill. 261, 83 NE 278. Charge on proof of former conviction erroneous because not clearly limiting such proof to issue of accused's credibility. Franklin v. State, 53 Tex. Cr. App. 388, 110 SW 64. Court should instruct that proof of conviction of another felony can be considered only on issue of accused's credibility. Ochsner v. Com. [Ky.] 109 SW 326. No instruction limiting the effect of testimony need be given when it also tends to prove the main fact. Rice v. State [Tex. Cr. App.] 112 SW 299.

27. Where there were only two witnesses and both were accomplices, and their testimony was not supported by independent testimony or corroborating circumstances, failure to give a cautionary instruction on the weight to be given testimony of accomplices was prejudicial error. O'Brien v. People, 42 Colo. 40, 94 P 284.

28. Instruction, called forth by appeal to jury by counsel for accused, intended to prevent verdict on sentimental grounds, held not erroneous. State v. Malloy, 79 S. C. 76, 60 SE 228. Where counsel argued that if accused was found not guilty by reason of insanity court could send him to asylum, court properly instructed that he could not do so, the statute authorizing such action having been declared unconstitutional. State v. Banner [N. C.] 63 SE 84.

29. Not necessary for court to instruct that hypothetical questions to experts are not evidence of the truth of facts stated. State v. Daly, 210 Mo. 664, 109 SW 53. The court need not explain language used in the indictment which would be understood by men of ordinary intelligence and understanding. State v. Bresee, 137 Iowa, 673, 114 NW 45. Where ruling of court excluding certain testimony was made near close of case, just before giving instructions, and in presence of jury, held not error to fail to again advise jury in charge to disregard such testimony. State v. Foster, 136 Iowa, 527, 114 NW 36.

30. The giving of cautionary instructions is usually a matter of discretion with the trial court, and unless an appellate court can see from the facts that a fair trial was not had owing to failure to give such instructions, a reversal will not result. Minor v. State [Fla.] 45 S 816.

31. While investigation into charges of misconduct of the jury should be full and

collected decisions relating to such matters as separation of jurors,[32] admonitions to jurors by the court,[33] their custody and conduct,[34] mode of living and place of abode,[35] and amusements,[36] newspaper comment,[37] remarks of bystanders in hearing of jury,[38] attempts to influence jurors,[39] misconduct of deputy in charge of jury,[40] qualification of officer in charge,[41] requests by jury for testimony [42] or bill of particulars,[43] taking evidence to the jury room,[44] sending jury back for further deliberation,[45] the length of time the jury may properly be kept out,[46] and their discharge.[47]

searching, a trial really fair and proper should not be set aside for the mere suspicion or appearance of irregularity shown to have done no actual injury. Commonwealth v. Lombardi [Pa.] 70 A 122. Where misconduct of a juror is relied on as a cause of new trial, the showing of misconduct must be such as to indicate prejudice to the party complaining in order to throw upon the state the burden of explanation. Mere showing that juror, name unknown, was called out by a stranger and handed sum of money not sufficient. State v. Foster, 136 Iowa, 527, 114 NW 36. Misconduct of jury in discussing former verdict not ground for reversal where evidence supported conviction, unless it clearly appears that accused was prejudiced. Smith v. State, 52 Tex. Cr. App. 344, 20 Tex. Ct. Rep. 845, 106 SW 1161. No prejudice where only result was to make two jurors who favored death penalty agree to life sentence. Id.

**32.** Separation of jury, not shown to be prejudicial, not reversible error, court not having intended to make order that they be kept together. People v. Maughs [Cal. App.] 96 P 407. Separation of jurors, after order of court that they be kept together, held not cause for reversal where affidavits showed separations to be for innocent purposes. People v. Emmons [Cal. App.] 95 P 1032. Where court exercised discretion and allowed nine jurors selected to separate, burden was on accused to show that they heard remarks prejudicial to him and that they were influenced thereby. Reeves v. State, 84 Ark. 569, 106 SW 945.

**33.** Presumed that court properly admonished jury before allowing them to separate; failure to do so not prejudicial in absence of some showing. State v. Walker, 79 S. C. 107, 60 SE 309.

**34.** Evidence insufficient to show misconduct of jurors in excessive drinking during trial. People v. Emmons [Cal. App.] 95 P 1032. Not reversible error for juror to say that question had been asked a number of times and to tell judge that jury wanted to hear the evidence. Kennedy v. Com., 33 Ky. L. R. 83, 109 SW 313. Held not ground for new trial that jurors took meals in common dining room of hotel, sat on balcony and spoke to passersby, and were shaved by a barber, two tipstaves being always present, and it being admitted that the trial was never discussed by them with third persons. Commonwealth v. Lombardi [Pa.] 70 A 122. Mere fact that jury passed and saw place of killing as testified to by witness not ground for reversal. Sims v. Com., 32 Ky. L. R. 443, 106 SW 214. That juror visited outhouse where crime was charged to have been committed not a cause for reversal, it not appearing that he went there for any improper purpose. State v. Gage [Iowa] 116 NW 596.

**35.** Improper for jurors trying a case to board at home of prosecuting attorney who has charge of it. Napier v. Com., 33 Ky. L. R. 635, 110 SW 842.

**36.** Allowing the jury in a capital case to be taken in a body to a theatrical performance is disapproved (State v. Jeffries, 210 Mo. 302, 109 SW 614), but will not be held prejudicial error unless it is shown that improper influences were thus brought to bear upon them (Id.). No prejudice where jury attended minstrel show, did not separate, and had no communication with others. Id.

**37.** Fact that local newspaper commented on case during trial, and that jury was allowed to separate, will not be ground for discharging the jury unless it appears that the jurors, or some of them, read such comments and were so impressed thereby as to be disqualified for service. State v. Hoffman, 120 La. 949, 45 S 951.

**38.** Remark of bystander in hearing of jury not prejudicial when subject-matter was cleared up by evidence beyond question. State v. Hoffman, 120 La. 949, 45 S 951.

**39.** Where during trial of criminal case the court is informed of an alleged attempt to influence one of the jurors, the court may stop proceedings long enough to examine juror, and continue case if satisfied that no harm has been done. Evidence held to show juror was uninfluenced and to sustain lower court's conduct. Commonwealth v. Tilly, 33 Pa. Super. Ct. 35.

**40.** Reversal required where deputy sheriff, in charge of jury, said to two jurors who were holding out for acquittal that they were hard headed and were holding out against ten men of brains. Booker v. State [Tex. Cr. App.] 111 SW 744.

**41.** That the officer appointed by the court to have charge of the jury was not sworn does not of itself constitute prejudicial error requiring the granting of a new trial. State v. Foster, 136 Iowa, 527, 114 NW 36.

**42.** That request of jury for certain testimony was not at once complied with, stenographer not being present, not error, jury having returned verdict without it after being told it would be read to them as soon as he could be brought. Moore v. State, 52 Tex. Cr. App. 364, 107 SW 355.

**43.** The court may permit the jury upon their request to have a bill of particulars during their deliberations. Cooke v. People, 134 Ill. App. 41.

**44.** Proper for jury to take demonstrative evidence out with them. Bottle. Phillips v. State [Ala.] 47 S 245.

**45.** Held not error for court to ask jury to return to jury room and make effort to agree after they had come in third time, and at such third time only asked to be discharged when foreman on being asked replied that they were not suffering seriously

Any communication between court and jury while the jury are deliberating, without the consent of the parties, or in their absence, is reversible error.[48] The verdict must rest solely upon the evidence, and a reversal will result if it appears that the jurors discussed and considered other matters.[49] Where the prosecution claims the right to have an elisor appointed to take charge of the jury, under the California practice, defendant has a right to be heard as to the qualifications of the sheriff and coroner and the proposed elisor.[50]

(§ 10) *G. Verdict.*[See 10 C. L. 172]—The verdict must be responsive to the information or indictment[51] and the issues submitted,[52] and should be certain, positive

from their confinement. Commonwealth v. Martin, 34 Pa. Super. Ct. 451. No error where witness' testimony was re-read to jury, and court refused to hear a juror's testimony as to their disagreement, jury having again retired and returned verdict of guilty. Harrolson v. State [Tex. Cr. App.] 113 SW 544. Further charge by court, on jury returning, as to desirability of arriving at some verdict, and direct them to retire for further deliberation, held not coercive. People v. Coulon, 151 Mich. 200, 14 Det. Leg. N. 907, 114 NW 1013. Case was submitted to jury on Friday. Next day court told jury he would soon leave and told them they could separate in case they reached an agreement and return a sealed verdict, and that he would return at 7:30 Monday evening. Jury said there was a chance of agreement. They returned verdict three hours later before court adjourned. Held verdict not coerced. Gebhardt v. State [Neb.] 114 NW 290.

46. Jury was out 17 hours, received further instructions, and then were out 14 hours. Claim that they were kept together an unreasonable length of time not tenable. State v. Richardson, 137 Iowa, 591, 115 NW 220.

47. The discharge of a jury before the end of the term without defendant's consent, and without any necessary or legal warrant, entitles defendants to a discharge. Dockstader v. People, 43 Colo. 437, 97 P 254. A minute entry by the clerk, without order or direction of the court, that jury was discharged because unable to agree, was of no force or effect. Id.

48. Judge stepped to door of jury room in answer to knock, and being asked as to nature of offense and what he could do, said it was a minor offense punishable by fine of not over $500 or imprisonment for not over one year, and that he could fine or suspend sentence. Reversible error. People v. Bowers, 111 NYS 623. It is prejudicial error as a matter of law for the judge to have any conversation or communication with the jury, in the jury room during their deliberations, in the absence of defendant and his counsel. New trial necessary where judge was told jurors wanted to communicate with him, and he went to the jury room, knocked, and opened the door and on being told jury could not agree asked them to consider further, door remaining open. State v. Murphy [N. D.] 115 NW 84.

49. Under Code Cr. Proc. 1895, art. 823, providing that effect of new trial is to place cause in same position as if it had never been tried, etc., discussion by some of jurors while deliberating of the sentence received on previous trial is reversible error. Casey v. State, 51 Tex. Cr. App. 433, 19 Tex. Ct. Rep. 351, 102 SW 725. Judgment reversed where compromise verdict of guilty was obtained by one of the jurors stating that he had just recognized accused as one who had been acquitted of charge of carrying a pistol, though in fact guilty, that he was bad man, etc. Helvenston v. State, 53 Tex. Cr. App. 636, 111 SW 959. Reversible error where jury discussed and considered matters not in evidence, such as credibility of witness personally known to a juror, fact that accused was under other indictments for similar offenses and willingnesses of jurors to sign petitions for pardon. Battles v. State, 53 Tex. Cr. App. 202, 109 SW 195. New trial granted where jurors discussed accused's character and life, the failure of his wife to testify, and matters resting in a juror's personal knowledge, these matters not being in evidence. Hall v. State, 52 Tex. Cr. App. 250, 20 Tex. Ct. Rep. 590, 106 SW 379.

**Proof not sufficient to show misconduct** of jury in commenting on failure of accused to testify. Stepp v. State, 53 Tex. Cr. App. 158, 109 SW 1093. Casual reference to former conviction of defendant not cause for reversal, no discussion of it having taken place in jury room. Moore v. State, 52 Tex. Cr. App. 336, 107 SW 540.

50. Error to act on ex parte affidavits of prosecution and refuse to allow defendant to file counter-affidavits. People v. Schmitz [Cal. App.] 94 P 407.

51. Where indictment charges defendants with living together in open state of fornication and adultery, verdict finding one defendant guilty of fornication and other of adultery is not responsive. Janssen v. People, 131 Ill. App. 73. Verdict finding defendant "guilty of robbery" and assessing punishment at confinement in penitentiary for life held responsive to indictment charging simple robbery and robbery with deadly weapon. Tabor v. State, 52 Tex. Cr. App. 387, 107 SW 1116. Under indictment charging grand larceny (stealing property worth more than $5), verdict finding defendant guilty as charged and assessing value of property at $4.35 was for petit larceny and sentence for that offense was proper. Thomas v. State [Ala.] 46 S 565. In prosecution under Laws 1901, p. 197, c. 105, § 1, penalizing sale of mortgaged chattels, a verdict finding defendant "guilty of crime of grand larceny as in manner and form charged" is void for uncertainty where information does not charge grand larceny nor contain language intended to describe that offense, nor state any act done by defendant, nor

and free from ambiguity [53] as to the offense,[54] and the person or persons convicted.[55] The verdict should be read in connection with the indictment or information,[56] and so construed as to give effect to the manifest intention of the jury.[57] All fair intendments should be made to sustain verdicts,[58] and if the language used clearly manifests the jury's intention, a verdict is not vitiated by informalities,[59] such as bad spelling and faulty grammar,[60] or surplusage.[61] Where defendant is found guilty of two offenses, punishment should be assessed for each separately.[62] A verdict "guilty as charged" must be construed as a conviction of the offense charged and submitted by the court's instructions.[63] A verdict of guilty should show the count on which it is based, where there is more than one,[64] but a general verdict of guilty is not contrary to law if there is evidence sufficient to authorize it on any or all counts.[65] Upon an indictment containing more than one count, all charging misdemeanors, a general verdict of guilty is to be construed as convicting defendants on all the counts.[66] Where the indictment states but one offense, though it contains

the value of the property concerned. State v. Braden [Kan.] 96 P 840.

52. People v. Lemen, 231 Ill. 193, 83 NE 147. Where court submitted issues of aggravated and simple assault, verdict finding defendant guilty, and assessing punishment at fine of $25, is too indefinite, since the degree of assault must be specified. Moody v. State, 52 Tex. Cr. App. 232, 20 Tex. Ct. Rep. 334, 105 SW 1127.

53. Washington v. State [Fla.] 46 S 417; Morris v. State [Fla.] 45 S 456; Pugh v. State [Fla.] 45 S 1023. The verdict should be regarded with reference to the intention of the jury, and effect given accordingly, and if the verdict is not sufficient clearly to show their intention, it is fatally defective. Smithey v. State [Miss.] 46 S 410. A test of certainty is whether the court can give judgment upon it. Washington v. State [Fla.] 46 S 417.

54. A verdict finding defendant guilty of one act "or" another is fatally defective where either constitutes the offense charged. State v. Grossman [Mo.] 113 SW 1074. Verdict must contain, either in itself or by reference to the indictment, every material fact constituting the crime. Verdict fatally defective because not containing or showing finding on essential elements of crime. People v. Lemen, 231 Ill. 193, 83 NE 147. Verdict held fatally defective: "We the jury find the defendant guilty of aggravated assault with intent to murder. So say we all." Two separate offenses are included under Florida statutes. Smithey v. State [Miss.] 46 S 410. Verdict in murder case, reading: "We, the jury, find defendant guilty as charged, but cannot agree as to punishment, but do agree to ask the mercy of the court," was held too indefinite; court should have required jury to clear it up. Sykes v. State [Miss.] 45 S 838.

55. Where verdict found each defendant guilty of a certain crime by name, use of words "defendants" was unnecessary. McDonald v. State [Fla.] 46 S 176. Accused indicted as "Jno. M." and identity of person pleading to indictment was not questioned and defendant himself used names "Jno. M.," and "John M." indifferently in record. Verdict and judgment convicting him as "John M." not error, though verdict did not refer to him as "defendant." Id.

56. Edwards v. State [Fla.] 45 S 21. Verdict so construed held to find that property burned was insured and that burning was to defraud insurance company. People v. Morley [Cal. App.] 97 P 84.

57. People v. Morley [Cal. App.] 97 P 84.

58. Morris v. State [Fla.] 45 S 456.

59. Verdict finding defendant to be an "habitual criminal," etc., as charged, held sufficient finding of prior conviction alleged in indictment, though informal. State v. Baldwin [Mo.] 113 SW 1123.

60. Verdict of guilty of "assault with intent to murdery" held sufficient, intent of jury being clear. Bryant v. State [Tex. Cr. App.] 111 SW 1009. "We the juror find the defendant guilty as charged" held sufficient. Morris v. State [Fla.] 45 S 456. Verdict reading: "We find defendant guilty of murder in the first drgee" held sufficient. Pugh v. State [Fla.] 45 S 1023. Where information charged larceny and also set up a former offense, a verdict in following words was held to support judgment and sentence as for conviction for second offense: "We the jury find the defendant guilty of 2nd larceny." Henderson v. State [Fla.] 46 S 151.

61. Verdict of guilty of assault and battery with intent to commit manslaughter is verdict of guilty of assault and battery; remainder is surplusage. Ex parte Burden [Miss.] 45 S 1; Burden v. State [Miss.] 45 S 705.

62. Verdict invalid for uncertainty where it found defendant guilty of burglary and larceny, but assessed punishment as a term of years without separating punishment for each offense. State v. McCune, 209 Mo. 399, 107 SW 1058; State v. Logan, 209 Mo. 401, 107 SW 1058.

63. So held where one charge was withdrawn from jury by court. Schultz v. State, 135 Wis. 644, 116 NW 259, 571. It must be assumed, on appeal, that the verdict was based upon the charge submitted to the jury by the court and not upon one expressly withdrawn from the jury. Schultz v. State, 135 Wis. 644, 114 NW 505. If the charge submitted does not constitute an offense, a verdict of guilty and judgment thereon must be reversed. Id.

64. Verdict held to show counts on which accused were found guilty. State v. Pigg [Kan.] 97 P 859.

65. Howell v. State [Ga. App.] 62 SE 1001.

66, 67, 68, 69, 70. Tooke v. State [Ga. App.] 61 SE 917.

a number of counts variously stating the manner of committing the offense, a general verdict of guilty will be upheld as against the objection that it is contrary to the evidence, if any of the counts are supported by proof.[67] If the indictment states in different counts several distinct offenses, a general verdict of guilty cannot be upheld unless there is sufficient proof to sustain a conviction upon each count.[68] The jury may legally acquit as to some of the counts and convict as to others.[69] Where there are several counts charging more than one distinct misdemeanor, the better practice is to require a separate verdict as to each count not abandoned or withdrawn, and the jury should be instructed to return a general verdict of guilty only in case defendant is found guilty on every count.[70] Where several persons are jointly indicted but the evidence as to acts committed by each differs, one may be convicted though others are acquitted.[71] A special finding under erroneous instructions will not invalidate a general verdict and judgment of guilty where another special finding justifies the verdict.[72] A defective verdict need not be entered, but the jury should be required to correct it,[73] or the court may correct it with the consent of the jury.[74] Where this is not done, the verdict must be set aside and a new trial ordered.[75] Where the verdict, fairly construed, finds defendant not guilty,[76] the court has no power to amend it to the prejudice of accused.[77] The verdict must be returned by a jury of twelve.[78]

*Receiving verdict.*[79]

§ 11. *New trial, arrest of judgment, and writ of error coram nobis.* See 10 C. L. 175

*Grounds for new trial in general.* See 10 C. L. 176—New trial should be granted only where it appears that substantial rights of accused have been violated so as to deprive

71. Larceny of town orders, several persons participating in scheme, but evidence showing cashing of orders only by one convicted. Vought v. State [Wis.] 114 NW 518.

72. State v. Martin [N. J. Law] 69 A 1091.

73. Smithey v. State [Miss.] 46 S 410. Where the verdict returned is improper and contrary to the charge of the court, it is proper to direct the jury to retire and consider their verdict further. As where verdict was guilty of murder in first degree and assessed punishment of 99 years in penitentiary. Jones v. State [Tex. Cr. App.] 113 SW 761. No error where verdict was signed only with foreman's name, the word "foreman" being omitted, and court directed jury to return and sign it. State v. Gibson, 120 La. 343, 45 S 271. It would have been valid without the word "foreman." Id.

74. Not error for court to add line to verdict, inserting name of offense found by jury where jury consented and said it was their verdict when read to them. Tinsley v. State, 52 Tex. Cr. App. 91, 20 Tex. Ct. Rep. 356, 106 SW 347.

**NOTE. Right to amend sealed verdict after separation of jurors:** While in many jurisdictions a sealed verdict in a civil action may be amended under certain circumstances by the court or jury after separation of the jury, and there is not lacking text book authority for the general right to amend such verdicts irrespective of the nature of the action (Proffatt, Jury Trial, §§ 456, 460; 1 Bishop, Crim. Proc. § 1003, A. & E. Enc. Pl. & Prac. 1011), the weight of American authority is against such practice in criminal proceedings. In Pehlman v. State, 115 Ind. 131, 17 NE 270, the jury was allowed to reconsider its sealed verdict and correct an obvious omission which rendered the verdict inoperative, and in Hechter v. State, 94 Md. 429, 50 A 1041, 56 L. R. A. 457, an omission was supplied to make the sealed and the oral verdict correspond, but in neither instance was there a substantial change in the general findings and in the latter the sealed verdict would have been good without correction. It is to be noted that the case of Beal v. Cunningham, 42 Me. 362, which has been cited as authority for permitting the jury to reverse its sealed verdict by correction after separation, was a civil action. On the other hand the right to amend a sealed verdict after separation of the jury in a criminal trial has been denied in the following cases. Allen v. State, 85 Wis. 22, 54 NW 999; Farley v. People, 138 Ill. 97, 27 NE 927; Koch v. State, 126 Wis. 470, 106 NW 531, 3 L. R. A. (N. S.) 1086; Commonwealth v. Dorus, 108 Mass. 488; Commonwealth v. Tobin, 125 Mass. 203, 28 Am. Rep. 220. In the last case the distinction between criminal and civil actions as affecting the rule is clearly drawn. Corrections have, however, been permitted in a criminal action where the error in the verdict was pointed out and reconsideration took place before actual separation of the jury. State v. Clementson, 69 Wis. 628, 35 NW 56.—Ed.

75. Smithey v. State [Miss.] 46 S 410.

76. Verdict, though informal, so construed. State v. Whisenant [N. C.] 63 SE 91.

77. State v. Whisenant [N. C.] 63 SE 91.

78. Accused cannot waive a trial by a jury of twelve and consent to a jury of eleven (Jennings v. State, 134 Wis. 307, 114 NW 492. See, also, Jury, 10 C. L. 541), and a verdict by a jury of eleven, and judgment therson, are invalid (Id.).

79. See 10 C. L. 175; also ante, § 10a, Accused Must be Present, etc.

him of a fair trial.[80] Prejudicial misconduct of the jury,[81] or the prosecution,[82] and manifest insufficiency of evidence to support the verdict,[83] have been held grounds for new trial. The reading by jurors of unfair and highly colored newspaper articles, calculated to prejudice them, constitutes ground for new trial in a proper case,[84] but may be waived by accused.[85] Misconduct of counsel,[86] absence of a witness,[87] surprise [88] and disqualification of a juror,[89] are not grounds for new trial when they have not been properly raised during the trial. Error in ruling on demurrer,[90] or motion for change of venue,[91] and matters defensive in nature,[92] are not available as grounds of the motion. The matter rests largely in the trial court's

**80.** Failure of record to show that sheriff, at close of case, was sworn when he took charge of jury, not ground for new trial. State v. Page, 212 Mo. 224, 110 SW 1057.

**81.** New trial granted where jurors discussed matters concerning accused's life and character not connected with offense charged nor shown in evidence. Hall v. State, 52 Tex. Cr. App. 250, 20 Tex. Ct. Rep. 590, 106 SW 379.

**82.** Comment by state's counsel on failure of accused to take the stand, and refusal of court to grant a new trial or instruct jury to disregard the argument, objection being duly made, is ground for new trial. Griffin v. State, 3 Ga. App. 476, 60 SE 277. In prosecution for gaming, the act of the prosecutor, without the knowledge of defendant or his counsel, in entering the jury room and laying on a table a pack of cards which had been identified as the ones used by defendant, but not offered or introduced in evidence, was ground for new trial. Griffin v. State [Ga. App.] 62 SE 685.

**83.** Refusal to grant new trial error, there being no proof of corpus delicti. Varner v. State, 3 Ga. App. 605, 60 SE 283. New trial should be granted if it appears to court difficult to reconcile verdict with justice and manifest weight of evidence. McDonald v. State [Fla.] 47 S 485. Verdict held contrary to law because evidence as whole justified defendant's act. New trial should have been granted. Lewis v. State [Ga. App.] 60 SE 1068. Proper to deny new trial, verdict being based on **conflicting evidence.** Stanley v. Com. [Va.] 63 SE 10.

**84.** See cases cited in which new trials were granted in United States v. Marrin, 159 F 767.

**85.** Where accused told counsel to withdraw motion for withdrawal of juror, after examining jurors, and learning that same had read newspaper articles. United States v. Marrin, 159 F 767.

**86.** Misconduct of counsel, in argument, on which no action or ruling of court was asked, not a ground for new trial. Hill v. State, 169 Ind. 561, 83 NE 243.

**87.** Absence of witness not ground for new trial, no postponement of trial being requested. Shows v. State [Miss.] 45 S 705. Denial of new trial on ground of absence of witnesses not error, where no continuance was asked for and accused did not take stand in support of theory which absent witnesses would have sustained, though he could have done so. Nickelson v. State, 53 Tex. Cr. App. 631, 111 SW 414.

**88.** Where evidence was offered to prove commission of offense on day other than that charged, and accused makes no claim of surprise on the trial, does not ask for continuance, and reverses no exception, he is not entitled to a new trial on the ground of surprise. State v. Sloan, 120 La. 170, 45 S 50.

**89.** That juror had served at preceding term not ground for new trial, there having been no challenge. Morris v. State [Ga.] 62 SE 806. In prosecution for burglarizing bank, where motion for new trial is on ground that a juror was related to a stockholder of bank, which accused or counsel did not know until after verdict, proof must be that relationship existed at time of trial, and proof cannot be made by juror's affidavit. Eaker v. State [Ga. App.] 62 SE 99. Code D. C. § 919, providing that no verdict shall be set aside for any cause which might have been assigned as ground for challenge of juror before jury was sworn except in case of bias such as would have disqualified him, etc., does not affect discretionary power of trial court to deny motion for new trial based on alleged disqualification of juror. Paolucci v. U. S., 30 App. D. C. 217. Held no abuse of discretion to deny motion for new trial based on uncontradicted affidavits of juryman's wife and another showing declarations of animosity on part of juryman toward nationality of accused occurring months prior to trial, where there was no showing of prejudice against accused and he stated on examination that he had no prejudice against persons of nationality in question. Id. Accused may not show that juror, after being sworn, said that accused was guilty and should be punished, on motion for new trial, this not constituting misconduct but going to his qualification as juror, and latter not being ground for new trial. People v. Emmons [Cal. App.] 95 P 1032. Where attorney for accused knew when a juror was called and sworn that he was not the one whose name was in the box and who had been summoned, and he did not challenge the juror, his disqualification was not ground for new trial after verdict. People v. Duncan [Cal. App.] 96 P 414.

**90.** Wheeler v. State [Ga. App.] 61 SE 409. Overruling of demurrer is not ground for motion for new trial. Williams v. State [Ga. App.] 62 SE 525.

**91.** Refusal of motion for change of venue cannot be made ground for new trial. Jones v. State, 130 Ga. 274, 60 SE 840.

**92.** Where the indictment charges a prior conviction for the same offense, a conditional pardon for the former offense is available as a defense only in mitigation of sentence, and must be proved to be availed of for any purpose. Henderson v. State [Fla.] 46 S 151.

discretion.[93] A new trial cannot be granted after verdict of not guilty.[94] The California statute authorizing grant of new trial where records have been destroyed and motion for new trial was pending does not apply where motion for new trial had been made and denied and an appeal taken.[95]

*Newly-discovered evidence.*[See 10 C. L. 178]—Motions based on this ground are not favored [96] and are addressed to the discretion of the trial court.[97] To require granting of the motion, it must appear that the alleged newly discovered evidence was not previously known,[98] that due diligence had been used to discover it,[99] that the evidence is material [1] and not merely cumulative [2] or impeaching,[3] that it is probably true,[4] and likely to change the result of the trial.[5] Evidence is not merely cumu-

**93.** Where judge appears to be in doubt on grounds for new trial, his ruling thereon is discretionary. State v. McCoomer, 79 S. C. 63, 60 SE 237. Question of alleged misconduct of prosecuting attorney having been submitted to trial court, on conflicting evidence, decision of that court, supported by evidence, was not subject to review. Holmes v. State [Neb.] 118 NW 99.

**94.** Court cannot grant new trial after verdict of not guilty, however clear the proof of guilt. State v. Reed [Or.] 97 P 627.

**95.** Act of 1907. People v. Napoli [Cal. App.] 93 P 500.

**96.** Orr v. State [Ga. App.] 62 SE 676.

**97.** Ward v. State, 85 Ark. 179, 107 SW 677.

**98.** It should appear that the evidence has come to applicant's knowledge subsequent to the trial. State v. Estes, 209 Mo. 288, 107 SW 1059. New trial properly refused on ground of alleged newly discovered evidence, which defendant had known but which he said he did not tell his counsel about. People v. Laudiers [N. Y.] 85 NE 132.

**99.** Parker v. State, 3 Ga. App. 336, 59 SE 823; Cheek v. State [Ind.] 85 NE 779; State v. Estes, 209 Mo. 288, 107 SW 1059. Whether ordinary diligence has been used to discover the new testimony must be determined from the facts of each particular case. Showing of diligence sufficient. Orr v. State [Ga. App.] 62 SE 676. Sufficient showing for new trial on ground of newly discovered evidence; new trial should have been granted. White v. State [Miss.] 45 S 611. Affidavit held not to show due diligence to obtain absent testimony. Shows v. State [Miss.] 45 S 705. Where affiants in affidavits for new trial were present during trial, having been subpoenaed, due diligence to procure alleged newly discovered evidence was not shown. Williams v. State [Ga. App.] 62 SE 525.

**1.** Newly discovered evidence, which is immaterial, incompetent, or merely impeaching in character, is not ground for new trial. Fort v. State, 3 Ga. App. 448, 60 SE 282.

**New evidence immaterial** in intoxicating liquor case. Merrinweather v. State, 52 Tex. Cr. App. 410, 108 SW 661.

**Newly discovered evidence held material** and ground for new trial in homicide case. Pate v. State [Tex. Cr. App.] 113 SW 759. Newly discovered material evidence ground for new trial, due diligence having been used. State v. Brown, 121 La. 599, 46 S 664. Evidence tending to show that decedent committed suicide held ground for new trial in homicide case, where evidence was circumstantial. Wilson v. State, 53 Tex. Cr. App. 436, 110 SW 444. Evidence, tending to show defendant's absence from place of killing at the time, sufficiently material to require grant of new trial. Lopez v. State, 52 Tex. Cr. App. 226, 20 Tex. Ct. Rep. 348, 106 SW 336. Where the evidence raises grave doubt as to defendant's guilt, the general rule excluding consideration of newly discovered evidence, which is merely cumulative or in rebuttal of the state's case, as ground for new trial, should be relaxed. New trial granted. Adams v. State [Fla.] 46 S 152. New trial should be granted where witness who testifies to confession makes affidavit that he had another person in mind, and that his testimony did not refer to defendant but to another person of the same name. Shropshire v. State [Ark.] 111 SW 470. In prosecution for shooting a person, evidence, by the person alleged to have been shot, that accused never shot or shot at him, and that he had never been shot at in his life, is, when affiant is vouched for, substantial, and sufficient ground for new trial. Orr v. State [Ga. App.] 62 SE 676.

**2.** Williams v. State [Ind.] 85 NE 113; State v. Powell [Iowa] 113 NW 761; State v. Estes, 209 Mo. 288, 107 SW 1059; Hamblin v. State [Neb.] 115 NW 850; Harrolson v. State [Tex. Cr. App.] 113 SW 544. Evidence held purely cumulative. Young v. State [Ga.] 62 SE 707; State v. Bridgham [Wash.] 97 P 1096. Evidence doubtful in character and merely cumulative. Clements v. State [Neb.] 114 NW 271.

**3.** Williams v. State [Ga. App.] 62 SE 525; Coppage v. State [Ga. App.] 62 SE 113; State v. Estes, 209 Mo. 288, 107 SW 1059; Harralson v. State [Tex. Cr. App.] 113 SW 544; Drennan v. State, 53 Tex. Cr. App. 311, 109 SW 1090. Where affidavits setting out newly discovered evidence were contradicted, and sought only to contradict prosecuting witness by proof of statements by her out of court, petition for new trial denied. State v. Lynch, 28 R. I. 463, 68 A 315.

**4.** The alleged newly discovered evidence must bear such marks of credibility as to warrant a jury in believing it. New evidence incredible on its face. People v. Henry, 111 NYS 1005. Newly discovered evidence, inconsistent with accused's testimony and improbable, and bearing evidence of being an invention, not ground for new trial. People v. Poole, 111 NYS 258. New trial properly refused where new evidence was cumulative, probably not true in light of record, and no diligence in obtaining it was shown. Biddy v. State [Tex. Cr. App.] 108 SW 692.

**5.** Parker v. State, 3 Ga. App. 336, 59 SE 823; Williams v. State [Ind.] 85 NE 113; State v. Estes, 209 Mo. 288, 107 SW 1059. Evidence

lative when it relates to a particular fact concerning which no witness testified,[6] though there was other evidence tending to support the same contention.[7] Where two persons are jointly indicted and one is tried and convicted, and subsequently the other is tried and acquitted, a new trial will be granted the former to obtain the testimony of the latter, where the new evidence appears to be competent, relevant, and material.[8]

*Practice on motion.*[See 10 C. L. 181]—The motion[9] or petition[10] and the supporting affidavits[11] must be filed within the time allowed by law, must state specifically the grounds relied upon[12] and support them by a showing of facts[13] properly made,[14] and must otherwise substantially comply with statutory requirements.[15]

must be of very material character and well calculated to change the result. Ludwig v. State [Ind.] 85 NE 345. Evidence held not such that it would probably change result on new trial. Nioum v. Com. [Ky.] 108 SW 945. Newly discovered evidence held not to warrant new trial. Williams v. State [Ind.] 85 NE 349; Edwards v. State [Ga. App.] 61 SE 502. Alleged new evidence held immaterial; not likely to change verdict; due diligence not shown. Davis v. State, 52 Tex. Cr. App. 149, 20 Tex. Ct. Rep. 362, 106 SW 144. Supreme court will not reverse judgment refusing new trial on ground of newly discovered evidence, where such evidence is only cumulative and impeaching and of such character that it would not constrain a different verdict. Drane v. State, 130 Ga. 349, 60 SE 863. When such evidence is adduced from witnesses properly vouched for, and it appears there was no want of diligence in discovering the new evidence, which may probably cause a different result on another hearing, it is error to refuse a new trial. Grow v. State [Ga. App.] 62 SE 669. That trial judge did not consider that alleged new evidence would change result was immaterial, the effect of that evidence being for jury. State v. Brown, 121 La. 599, 46 S 664.

**6, 7.** Grow v. State [Ga. App.] 62 SE 669.

**8.** Sanders v. State, 52 Tex. Cr. App. 465, 20 Tex. Ct. Rep. 801, 107 SW 839.

**9.** Court has no power to pass on motion for new trial or in arrest unless filed during term at which trial was had. State v. Fawcett, 212 Mo. 729, 111 SW 562. Motion for new trial must be filed within four days after verdict or it will not be considered on appeal. State v. Chenault, 212 Mo. 132, 110 SW 696. After expiration of term at which accused was convicted and sentenced, court has no power to grant new trial for newly discovered evidence. Saleen v. People, 41 Colo. 317, 92 P 731. Where court adjourns for term after sentencing one convicted of crime, court loses jurisdiction of cause. Id.

**10.** Newly discovered evidence is ground for new trial, and may be presented by petition within one year, under Court and Practice Act 1905, § 473, though that statute does not specifically refer to criminal judgments. State v. Lynch, 28 R. I. 463, 68 A 315. Inconvenience of allowing such remedy where sentence has been partly executed is no ground for denying it. Id.

**11.** Ground of new trial, newly discovered evidence, properly overruled, statutory affidavits not being filed. Mitchell v. State, 52 Tex. Cr. App. 231, 106 SW 135. Proof in support of motion for new trial must be filed during the term. Misconduct of jury in discussing failure of accused to testify. Reinhard v. State, 52 Tex. Cr. App. 59, 20 Tex. Ct. Rep. 379, 106 SW 128.

**12.** Motion for new trial must specify errors relied on, and grounds not so pointed out will not be considered. State v. Scott [Mo.] 113 SW 1069. Assertion in such motion that conviction is against the law is insufficient. Id. New trial properly refused, where only general grounds were raised, insufficient to raise any question as to admissibility of evidence. Hart v. State [Ga. App.] 61 SE 511. Grounds of motion for new trial should be complete within themselves. Appellate court will not search record for evidence or error; it must be specifically pointed out. Fouraker v. State [Ga. App.] 62 SE 116.

**13.** Showing for new trial held not to show separation of jury, or any misconduct by them. State v. Baker, 209 Mo. 444, 108 SW 6. Affidavit for new trial should set out proposed evidence, and affidavit of witness should be presented if possible. Slater v. U. S. [Okl.] 98 P 110. Due diligence should be shown in affidavit. Id. The facts claimed to constitute such diligence must be set out; mere general statements and conclusions are insufficient. Cheek v. State [Ind.] 85 NE 779. Affidavits in support of new trial should state facts showing reasonable diligence to obtain alleged new evidence. Ward v. State, 85 Ark. 179, 107 SW 677.

**14.** The affidavit of the witness himself should be produced or his absence accounted for, where ground is new evidence. State v. Estes, 209 Mo. 288, 107 SW 1059. Motion for new trial for newly discovered evidence was not verified, witnesses were not named, nor their affidavits presented. Refusal not reviewable. Sykes v. State, 53 Tex. Cr. App. 165, 108 SW 1179. A motion for new trial on account of misconduct of the jury must be based on affidavits (Code, § 3756. State v. Foster, 136 Iowa, 527, 114 NW 36), and leave to summon witnesses to testify on the hearing is properly refused, no showing as to inability to procure affidavits being made (Id.). To entitle accused to new trial on ground of misconduct of jury shown only by his own affidavit, the affidavit must be explicit, must show whether he was an eyewitness, and why he cannot obtain other affidavits. State v. Page, 212 Mo. 224, 110 SW 1057. While motion for new trial may be filed and referred to for grounds, yet it must be made orally and called to court's attention in some way. People v. Long [Cal. App.] 93 P 387.

**15.** After final judgment and expiration of the term, there must be substantial compli-

Affidavits of jurors may be received to sustain but not to impeach their verdict.[16] Holdings relating to the granting of leave to file a motion,[17] amendment thereof,[18] postponement of hearing,[19] and service of rule fixing day for hearing,[20] are given in the notes. Where motion in arrest of judgment precedes motion for new trial, the right to a new trial is waived.[21] The order granting a new trial should specify the ground or grounds on which it is based.[22] If it appears to the court after overruling motion for new trial, or in arrest, that there was irregularity in obtaining judgment he may of his own motion modify or set aside his order, at the same term.[23] In the federal court, a motion for new trial is addressed to the discretion of the court,[24] and the court has power to act any time before final judgment has been entered and at a term subsequent to that in which verdict was rendred.[25] Where a new trial is granted because pleadings are defective, the filing of a new affidavit and information constitues a new case.[26]

*A motion in arrest of judgment* See 10 C. L. 188 must be predicated upon some defect appearing on the face of the record or pleadings,[27] and where controlled by statute a statutory ground must appear.[28] Alleged errors during the tial,[29] insufficiency of the evidence,[30] question of former conviction [31] or acquittal,[32] or curable defects

ance with the statute to give the court further jurisdiction. Johnson v. State [Okl.] 97 P 1059.

**16.** New trial properly refused where one juror made affidavit to misconduct which was denied by the affidavits of all the other jurors. Glover v. State, 129 Ga. 717, 59 SE 816. Affidavits that instructions were misunderstood not considered. Hamblin v. State [Neb.] 115 NW 850. Affidavit of a juror, after conviction, that he still believed accused innocent, could not be considered to impeach the verdict. Booker v. State [Tex. Cr. App.] 111 SW 744. Jurors may not attack verdict by stating what they would or might have done with other testimony. Drennan v. State, 53 Tex. Cr. App. 311, 109 SW 1090. Affidavit of juror that he was influenced by misstatement of law by prosecuting attorney held insufficient to warrant setting verdict aside, where court instructed jury correctly, jurors being sworn to take the law from the court. Davis v. State, 52 Tex. Cr. App. 149, 20 Tex. Ct. Rep. 362, 106 SW 144.

**17.** Where hearing on motion for delay in filing motion for new trial was postponed, court erred in refusing to allow motion for new trial to be filed because too late. Court should have acted on motion and made it part of record. State v. Lewis, 120 La. 543, 45 S 433.

**18.** Motion to have endorsed on motion for new trial a certificate of filing prior to the date when it was really filed, being in nature of amendment of motion for new trial, held incompetent. People v. Long [Cal. App.] 93 P 387.

**19.** Application to continue motion for new trial to allow movant to obtain an affidavit as to alleged newly discovered evidence is addressed to sound discretion of trial court. Tinsley v. State [Ga. App.] 62 SE 93.

**20.** Where rule nisi fixed hearing on motion for new trial for certain day and directed service on adverse party five days before hearing, and thereafter hearing was postponed and service on adverse party was not had five days before day first fixed but was had five days before actual hearing, error to dismiss motion for new trial for want of service. Johnson v. State [Ga. App.] 62 SE 540.

**21.** Rule applies in criminal as well as civil cases. Yazel v. State [Ind.] 84 NE 972.

**22.** State v. Barber [Idaho] 96 P 116.

**23.** Johnson v. State [Okl.] 97 P 1059.

**24, 25.** United States v. Rogers, 164 F 520.

**26.** Martin v. State [Tex. Cr. App.] 113 SW 274.

**27.** Williams v. State [Ga. App.] 62 SE 525. That accused had been conditionally pardoned for former offense, conviction of which was alleged and proved, not ground for such motion, it not appearing in the record. Henderson v. State [Fla.] 46 S 151. The verdict being a part of the record proper, any defect appearing on the face of it should be determined on a motion in arrest. Edwards v. State [Fla.] 45 S 21. After verdict a judgment will only be arrested for matter appearing in the record which would render the judgment erroneous if given. United States v. Marrin, 159 F 767. Only the indictment and record of the trial can be considered in passing on a motion to arrest judgment, the evidence being no part of the record for this purpose. Id. Objections necessitating a consideration of the evidence must be raised by motion for new trial. Id.

**28.** Motion to arrest properly denied, no statutory ground being stated. McGinnis v. State [Wyo.] 96 P 525. Under Court and Practice Act 1905, § 301, no motion in arrest can be made except upon jurisdictional grounds. State v. Heffernan, 28 R. I. 477, 68 A 364.

**29.** Motion in arrest not proper mode of presenting errors in overruling motion for continuance or in allowing separation of jury. Williams v. State [Ga. App.] 62 SE 525.

**Error in admission of evidence.** Pfieffer v. U. S., 31 App. D. C. 109.

**30.** Commonwealth v. Bartholomew, 35 Pa. Super. Ct. 114; Commonwealth v. Walker, 33 Pa. Super. Ct. 167.

**31.** McGinnis v. State [Wyo.] 96 P 525.

**32.** People v. McGinnis, 234 Ill. 68, 84 NE 687.

in the accusation [33] cannot be raised by the motion. The motion should be granted if the accusation is insufficient to state an offense,[34] but the sufficiency of the charge will be more liberally construed when so attacked than when attacked by motion or demurrer,[35] and the motion will be denied if any count is good.[36] A mere suggestion of insanity, after trial, not supported by affidavit, is not ground for arresting judgment.[37] Where a motion for new trial has been granted, a motion in arrest of judgment need not be considered.[38]

*Writ of error coram nobis.* See 10 C. L. 184

§ 12. *Sentence and judgment.* See 10 C. L. 184—It is generally the court's duty to fix the sentence,[39] though the jury may make recommendations concerning it.[40] It is held proper for the court to allow affidavits in aggravation of the offense of which accused has been found guilty to be read when defendant is called for sentence.[41] Such course is not a denial of defendant's right to be confronted by witnesses against him, since the verdict is not affected.[42] Where a special judge has heard a cause and taken the defendant's plea of guilty, it is reversible error for the regular judge to assume jurisdiction, proceed with the trial, and pronounce judgment.[43] Upon a plea of guilty, the court, and not the jury, must, in Oklahoma, fix the punishment.[44] Where a plea of guilty is entered in a homicide case, accused should be fully advised of the nature and consequences of his act and his rights in the premises before sentence is passed, and usually evidence should be taken to determine the nature and circumstances of the act and the degree of the crime.[45] After plea of guilty, accused cannot complain that sentence is excessive.[46] A sentence and commitment on

**33.** The invalidity of a count in the information on ground that defendant's name was omitted from blank space provided in the printed form cannot be raised in motion in arrest of judgment after an adverse verdict where it appears defendant's name appears elsewhere in the count and charge is clearly against him. Pfieffer v. U. S., 31 App. D. C. 109.

**Duplicity** cannot be taken advantage of by motion in arrest. State v. Stevens [Vt.] 70 A 1060.

**Technical error** in form or an imperfection in statement which might be held bad on a motion to quash is not always sufficient, after verdict of guilty, to arrest judgment. City of Ft. Scott v. Dunkerton [Kan.] 96 P 50.

**Surplusage** in complaint for maintaining nuisance under liquor laws not ground for arresting judgment. City of Ft. Scott v. Dunkerton [Kan.] 96 P 50.

**34.** Judgment should have been arrested where indictment for larceny failed to allege value of bill of exchange stolen. People v. Silbertrust, 236 Ill. 144, 86 NE 203. Insufficiency of indictment to charge an offense may be first raised by motion in arrest. State v. Hall, 130 Mo. App. 170, 108 SW 1077.

**35.** Sufficiency of allegations of information will be more liberally construed when attacked by motion in arrest than when raised by demurrer. State v. Johnson [N. D.] 118 NW 230. Information in language of statute stating offense in general language, sufficient though some necessary allegations were made by way of recital or inference. Id.

**36.** Motion in arrest properly denied, at least one count in accusation being good. Howell v. State [Ga. App.] 62 SE 1000.

**37.** State v. Khoury [N. C.] 62 SE 638.

**38.** Johnson v. State [Okl.] 97 P 1059.

**39.** Generally it is court's duty to give sentence, as in larceny case, though jury is authorized in some cases to determine punishment to be imposed. Saleen v. People, 41 Colo. 317, 92 P 731.

**40.** What weight is to be attached to the jury's recommendation, in felony cases, that defendant be punished as for a misdemeanor, is for the trial judge. He may disregard it and impose any sentence authorized by law. Coppage v. State [Ga. App.] 62 SE 113. In a misdemeanor case, the defendant may waive his right to have the jury assess the fine. Holland v. People, 132 Ill. App. 449.

**41.** Within court's discretion in pronouncing sentence. State v. Reeder, 79 S. C. 139, 60 SE 434.

**42.** State v. Reeder, 79 S. C. 139, 60 SE 434.

**43.** Construing statutes and reviewing decisions. State v. Stevenson [W. Va.] 62 SE 688.

**44.** Plea of guilty entered after prosecuting attorney's opening statement. Held error to allow jury to fix punishment. State v. Johnson [Okl.] 96 P 26.

**45.** Proceedings irregular where plea was made to jury after opening statement for state and jury was allowed to fix punishment of death, and no evidence was taken. State v. Johnson [Okl.] 96 P 26.

**46.** After plea of guilty to count charging stealing articles of the value of $50, accused is barred from setting up that articles were worth only $20 and that sentence was excessive. State v. Webber [N. J. Law] 68 A 1100.

a legal holiday is void.[47] It is not necessary that the court formally adjudge defendant guilty before pronouncing sentence on the verdict.[48]

The sentence should be definite and certain [49] and should conform to statutory requirements or provisions.[50] Where different counts charge the same offense and there is a conviction on each count, there should be but one sentence on all the counts for the one offense.[51] Where sentence is imposed generally, without application to any particular one of several counts on which accused was convicted, it will be referred to a count which warrants the sentence.[52] A sentence different from the kind or character authorized by law is void.[53] A sentence of the kind authorized by law, but excessive, is not wholly void,[54] but is enforcible to the extent that it is authorized by law.[55] A sentence less than the minimum fixed by law is not void.[56] Where the trial court has imposed an illegal sentence, it has power to substitute a valid sentence, though the illegal sentence has been partly executed.[57] But it cannot set aside a valid sentence and impose a new and different one after defendant has been remanded to jail to await execution of the sentence [58] or after expiration of the term at which sentence was imposed.[59]

In some jurisdictions, sentence may be imposed at a term subsequent to that at which conviction occurred;[60] in others the court has no power to impose sentence at a future term.[61] In Massachusetts the court may, with the consent of defendant,

**47.** Under California statutes. Ex parte Smith, 152 Cal. 566, 93 P 191.

**48.** Nagel v. People, 229 Ill. 598, 82 NE 315.

**49.** A sentence of imprisonment must in and of itself be definite and complete in all its material terms, and so certain and accurate as to the time of its commencement and proper termination as that it shall not be necessary for either the prisoner or the officers charged with its execution to apply to a court to ascertain its meaning. Hamilton v. State, 78 Ohio St. 76, 84 NE 601.

**50.** Defendant convicted in Lucas county of violation of anti-trust law (Rev. St. §§ 4427-1 to 4427-12) must be sentenced, if imprisonment is part of penalty, to county jail. Sentence to Toledo workhouse void. Lemmon v. State, 77 Ohio St. 427, 83 NE 608. Sentence to workhouse until a fine imposed and costs are paid held erroneous because omitting statutory provision or until he is discharged therefrom by allowing a credit of sixty cents a day on such fine and costs." Hamilton v. State, 78 Ohio St. 76, 84 NE 601. Under the Michigan indeterminate sentence law the judge is required to fix a minimum sentence and recommend a maximum sentence, and the minimum must not exceed one-half the maximum. Sentence fixing 6 years as minimum and recommending 7 years as maximum held not to comply with law. In re Richards, 150 Mich. 421, 14 Det. Leg. N. 703, 114 NW 348. Such sentence was not void, however, but was valid as sentence of 3 1-2 years as minimum and 7 years maximum. Id. Hence court held no power to set it aside after commitment under it. Id.

**51.** Yoeman v. State [Neb.] 115 NW 784.

**52.** Sentence of 7 years for bank clerk's offense of making false entries referred to good count where he was convicted on 33 and maximum sentence for any one was 10 years. Harvey v. U. S. [C. C. A.] 159 F 419.

**53.** Ex parte Burden [Miss.] 45 S 1.

**54.** May be corrected on appeal. Ex parte Burden [Miss.] 45 S 1.

**55.** Sentence of 6 years minimum and 7 years maximum valid as 3 1-2 years minimum and 7 years maximum under indeterminate sentence act. In re Richards, 150 Mich. 421, 14 Det. Leg. N. 703, 114 NW 348. Statute authorized punishment by imprisonment or fine, and court imposed sentence of imprisonment. Held, additional sentence of $50 and costs, suspending the sentence of imprisonment on payment thereof, is void. Payment of fine is no defense against enforcement of sentence of imprisonment. Tanner v. Wiggins [Fla.] 45 S 459.

**56.** People v. Oliver [Cal. App.] 95 P 172.

**57.** Ex parte Vitali [Mich.] 15 Det. Leg. N. 451, 116 NW 1066.

**58.** Most court could do was to correct record to make it show valid sentence. In re Richards, 150 Mich. 421, 14 Det. Leg. N. 703, 114 NW 348.

**59.** When court has legally imposed sentence and the term at which it was imposed has passed, the power of the trial court over it is at an end except for the purpose of enforcement. Exclusive control of sentence is then vested in other officials. Tanner v. Wiggins [Fla.] 45 S 459.

**60.** So under Texas statute. Mitchell v. State, 52 Tex. Cr. App. 37, 20 Tex. Ct. Rep. 372, 106 SW 124. Where judgment was affirmed without a discovery of the fact that defendant had never been sentenced, the affirmance was of no effect, and court below had jurisdiction to pass sentence at subsequent term when matter was called to its attention. Robinson v. State [Tex. Cr. App.] 113 SW 763.

**61.** Where a case is continued indefinitely after plea of guilty, though the postponement is by agreement of parties, the court has no power to impose sentence at a future term. There was no pretense of proceeding under parole statute, under which sentence

after a plea or verdict of guilty, place the case on file where it appears best not to impose sentence at once.[62] The case then stands on the records and may be called up at any time and sentence imposed or other disposition of the case made.[63] But this course may be pursued only where defendant consents. He may insist on final disposition without unreasonable delay [64] and may enforce his right by a resort to mandamus proceedings.[65] Where sentence is not imposed but defendant is placed on probation, where the court deems the object of probation to have been accomplished and punishment unnecessary the cause may be finally dismissed.[66] In North Carolina the court has power to hold the matter of final punishment under consideration during the term and to take further testimony,[67] and where this is done at defendant's request he cannot complain of the sentence finally pronounced.[68] It is held by some courts that a court has inherent power to stay execution of sentence and that consent of accused thereto will be presumed.[69] By others it is held that, though a court has power to suspend or postpone imposition of sentence, it has no power to enter judgment and then suspend execution thereof.[70] The time at which a judgment or sentence shall be carried into effect is, however, no part of the judgment,[71] and the judgment is not invalidated by a void order suspending punishment or staying execution.[72] Sentence of imprisonment can be executed only by suffering actual confinement, unless sentence is remitted,[73] and mere lapse of time without imprisonment is not an execution of the sentence.[74] Hence a convicted defendant who is at liberty and who has not served his sentence may, in the absence of a statute to the contrary, be rearrested as an escape and ordered into custody upon the unexecuted sentence.[75] But it is elsewhere held that where the court makes an illegal order suspending sentence, under which defendant is discharged from cus-

could be imposed and then suspended. State v. Hockett, 129 Mo. App. 639, 108 SW 599.

62. This practice is recognized by statute and authorized for all courts, including police court. Marks v. Wentworth, 199 Mass. 44, 85 NE 81.

63. Marks v. Wentworth, 199 Mass. 44, 85 NE 81.

64. Error to continue cause against defendant's objection, he having long been on probation. Marks v. Wentworth, 199 Mass. 44, 85 NE 81.

65. Writ issued requiring police justice to make final disposition of case. Marks v. Wentworth, 199 Mass. 44, 84 NE 81.

66. Though statute does not expressly confer this power. Rev. Laws, c. 217, § 84; c. 220, § 2. Marks v. Wentworth, 199 Mass. 44, 85 NE 81.

67. State v. Stevens, 146 N. C. 679, 61 SE 629.

68. Court gave sentence, but set it aside at defendant's request and heard testimony of doctor, and gave more severe sentence. Second sentence valid. State v. Stevens, 146 N. C. 679, 61 SE 629.

69. Being for his benefit. Ex parte Collins [Cal. App.] 97 P 188.

70. Execution rests with other officials. Ragland v. State [Fla.] 46 S 724. While court has power to suspend sentence in proper cases, it has no power to suspend execution of sentence lawfully imposed except for purpose of giving effect to an appeal, or where cumulative sentences are imposed, and in some cases of necessity and emergency. Tanner v. Wiggins [Fla.] 45 S 459. In Oklahoma when a judgment of imprisonment is imposed by a court on plea of guilty or conviction and the same is not stayed as provided by law, court has no power to suspend sentence. Ex parte Clendenning [Okl.] 97 P 650. Defendant should forthwith be committed to the proper officer for incarceration. Constitution and statutes contemplate this procedure. Id.

71. Ex parte Collins [Cal. App.] 97 P 188.

72. Hence unnecessary to consider whether order of justice "withholding commitment" was void. Ex parte Collins [Cal. App.] 97 P 188. Valid sentence of imprisonment is not rendered illegal but on attempt to suspend execution thereof. Ragland v. State [Fla.] 46 S 724.

73. Ex parte Collins [Cal. App.] 97 P 188. Valid judgment stands until satisfied. Ragland v. State [Fla.] 46 S 724.

74. Term of imprisonment does not begin until actual delivery to place of imprisonment. Ex parte Collins [Cal. App.] 97 P 188. Expiration of the time without imprisonment is not an execution of the sentence and does not entitle defendant to a discharge. Terrell v. Wiggins [Fla.] 46 S 727. Judgment imposed valid sentence of imprisonment and contained a void provision attempting to suspend sentence on payment of a fine and compliance with certain conditions. Payment of fine and compliance with conditions did not relieve defendant from valid portion of sentence. Ragland v. State [Fla.] 46 S 724.

75. Ex parte Collins [Cal. App.] 97 P 188. Where justice withheld commitment, accused making no objection or demand for immediate commitment, justice had power to issue commitment subsequently and compel accused to serve sentence. Id.

tody, it has no power or jurisdiction, after the lapse of time involved in the sentence and after the term, to issue commitment on such judgment.[76]

*Judgment.*[See 10 C. L. 188]—The judgment should be properly entered[77] and should conform to statutory requirements.[78] It should follow the verdict,[79] should specifically show the offense of which accused was found guilty[80] and the punishment imposed,[81] though it may be aided in these respects by the accusation[82] or by statutes upon which the proceedings are based.[83] A judgment rendered against "defendants and each of them" is several and not joint and is sufficient in form.[84] A criminal judgment abates on death of the defendant.[85] But it is held that when the term at which a final judgment was rendered has expired, the court has no power to make an order declaring the judgment abated by defendant's death.[86]

§ 13. *Record or minutes and commitment.*[See 10 C. L. 187]—The record must show every fact or step essential to the jurisdiction of the court and validity of the proceedings,[87] but misakes or omissions may usually be corrected or supplied by amendment.[88] Where an attack is made upon the minutes at the same term at which they

**76.** Authorities collected and reviewed. Ex parte Clendenning [Okl.] 97 P 650.

**77.** The judge need not sign the entry of judgment. Judgment record showing proceedings held sufficient, though signature of judge did not appear. Connella v. Haskell [C. C. A.] 158 F 285. Mere inadvertence in entering judgment at law in book used for entry of chancery orders and decrees by same court does not, as between parties, invalidate or affect such judgment. It is sufficient memorial for enforcement of judgment or appeal therefrom by writ of error. State v. Blair, 63 W. Va. 635, 60 SE 795.

**78.** Entry of judgment held not to conform to Code Cr. Proc. 1895, § 845, defective. Caskey v. State [Tex. Cr. App.] 108 SW 665. Judgment held not to conform to Code Cr. Proc. 1895, § 845, prescribing form of judgment imposing fine. Hence no final judgment to support appeal. Trayler v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 348, 106 SW 142.

**79.** Indictment charged larceny of property and alleged value making offense a felony. Conviction thereon was reversed, and on second trial it was agreed that prosecution under same indictment should be for misdemeanor only. Verdict was guilty as charged. Held, judgment adjudging defendant guilty of misdemeanor followed the verdict. Boyd v. State [Ala.] 45 S 634; Commonwealth v. Bartholomew, 35 Pa. Super. Ct. 114. Judgment on the verdict is properly entered where jurisdiction, trial and verdict are all regular.

**80.** Judgment held sufficient to show nature of offense of which accused was found guilty. People v. Gregory [Cal. App.] 97 P 912. A judgment which recites conviction of a felony, but does not designate the particular felony, is sufficient as against an attack upon habeas corpus. Ex parte Von Vetsera [Cal. App.] 93 P 1036.

**81.** A judgment of conviction need not specify that the defendants convicted be put to hard labor. Shields v. People, 132 Ill. App. 109. Recital in judgment "terms not to run together" does not make sentence of 7 years indefinite. Record in another case showed judgment and sentence against accused for separate offense. State v. Webber [N. J. Law] 68 A 1100.

**82.** Judgment not void for failure to show offense where it referred to complaint which specifically charged a statutory offense, and record showed judgment to have been based on conviction of said charge, and penalty imposed was definite and certain and within power of court to impose for such offense. Ex parte Bagshaw, 152 Cal. 701, 93 P 864.

**83.** Judgment that the prisoner suffer death at the time and place and in the manner prescribed by law is sufficiently definite under the statutes of New Jersey. Statutes fix time, place and manner. State v. Tomasi [N. J. Err. & App.] 69 A 214. A judgment must be read and construed in the light of the indeterminate sentence law where such exists, and of the statute punishing the offense for which sentence is imposed. Sentence of 3 to 21 years construed as one of 2 to 21 years. Cheek v. State [Ind.] 85 NE 779.

**84.** Bergstrasser v. People, 134 Ill. App. 609.

**85.** The object of criminal punishment is to punish the criminal and not his family. A judgment for violation of the interstate commerce law abates on death of defendant. United States v. Pomeroy, 152 F 279.

**86.** Court having lost all power over judgment. United States v. New York Cent., etc., R. Co. [C. C. A.] 164 F 324.

**87.** Judgment reversed where record failed to show that accused was present when a day was set for the trial of his case. Wright v. State [Ala.] 46 S 229. Record held to show affirmatively presence of defendant when verdict was returned. State v. De Lea, 36 Mont. 531, 93 P 814. Record held to show that verdict was returned in open court in presence of accused. Thurman v. Com., 107 Va. 912, 60 SE 99. Where, after grant of new trial, accused is allowed to withdraw a plea of not guilty and substitute a plea of guilty of a lower offense, and receive sentence thereon, the fact that the district attorney appeared and was consulted or consented must appear of record. State v. Labry, 120 La. 434, 45 S 382. Where the record shows conviction on a substituted indictment, it must also show that the substitution was with permission of court. Brooks v. State [Tex. Cr. App.] 113 SW 920.

**88.** The record may be amended nunc pro tunc, even at a subsequent term, to show an order allowing substitution of indictment.

were entered, accused has the right to be heard and to offer proof as to their correctness.[89]

*Commitment.*[See 10 C. L. 188]—The commitment should state the facts required by law to be shown,[90] but if defective in this respect, the prisoner may be remanded in order that a proper commitment may be made.[91] Where a legal sentence has been imposed and the person sentenced is in custody thereunder, a defect in the commitment or mittimus is not available in habeas corpus proceeding.[92]

§ 14. *Saving questions for review. Necessity of objection motion or exception.*[See 10 C. L. 188]—Aside from objections to the jurisdiction,[93] or the sufficiency of the indictment or information to state an offense,[94] which may be raised at any time, prompt objection and exception in the trial court,[95] or a request for the exercise by the court of its discretionary power,[96] is necessary in order that any ruling or matter complained of may be reviewed by an appellate court. Objections not so

Brooks v. State [Tex. Cr. App.] 113 SW 920. The control which the common pleas court has over its own orders and judgments is sufficient to permit the correction of an entry by supplying a fact omitted from the recital through an inadvertence of the clerk. State v. Williams, 6 Ohio N. P. (N. S.) 406. It is the duty of the judge upon his own knowledge of what took place (if he is sufficiently informed) to have the minutes so corrected as to make them true, even after a motion in arrest of judgment based on the defect in question has been made. State v. West, 120 La. 747, 45 S 594. Where record below did not show affirmatively that defendant was present at all stages of proceedings, and lower court amended its record to show such fact, the supreme court granted leave to file the amended record and affirmed the judgment. People v. Nagle, 232 Ill. 148, 83 NE 549.

**89.** Minute entries as to change of plea and sentence thereon. Wilkins v. State [Miss.] 47 S 427.

**90.** Under Code Cr. Proc. § 721, the commitment and certificate of conviction need only briefly designate the offense. Statement that act charged was violation of Pen. Code, § 675, held sufficient. People v. Keeper of Erie County Penitentiary of Buffalo, 109 NYS 531. Magistrate committing minor to Protestant Episcopal House of Mercy must adjudge and state in his commitment the exact age of the prisoner, since she cannot be detained beyond her majority. People v. Protestant Episcopal House of Mercy, 57 Misc. 657, 110 NYS 172.

**91.** Commitment defective in that it does not state accurately the prisoner's age is not invalid. People v. Protestant Episcopal House of Mercy, 57 Misc. 657, 110 NYS 172.

**92.** Tanner v. Wiggins [Fla.] 45 S 459. Where defendant has been remanded to the custody of the jailer after valid sentence, he will not be discharged, on habeas corpus, merely for want of a valid written commitment. Having been remanded, probably, by oral order in open court. In re Richards, 150 Mich. 421, 14 Det. Leg. N. 703, 114 NW 348. Where a judgment is had and is sufficient, a defective mittimus will not entitle the prisoner to his liberty. Prisoner is held by virtue of judgment. People v. Wells, 57 Misc. 662, 109 NYS 1081. Similarly, prisoners are not entitled to be released by reason of the fact that the sheriff has not received the certified copies of the minutes showing entry of judgment. Copies of minutes now take place of mittimus, under Code Cr. Proc. § 486. Id.

**93.** Want of jurisdiction may be first raised in appellate court. Hanger v. Com., 107 Va. 872, 60 SE 67. Defect of jurisdiction of subject-matter may be noticed in appellate court though question not raised below. State v. Bossee, 145 N. C. 579, 59 SE 879. Lack of jurisdiction of the subject-matter may be raised at any stage of the proceedings, even in the absence of a bill of exceptions, since the record proper would disclose the defect. Patrick v. State [Wyo.] 96 P 527.

**94.** Insufficiency of indictment to charge an offense may be first raised in appellate court. State v. Hall, 130 Mo. App. 170, 108 SW 1077. Objection that the indictment does not state facts sufficient to constitute an offense may be first raised in the appellate court. Patrick v. State [Wyo.] 96 P 527.

**95.** In absence of objections or exceptions, error will not be considered except in interest of justice. George v. U. S. [Okl. Cr. App.] 97 P 1052. Error to which exception was not reserved cannot be considered. Reinhard v. State, 52 Tex. Cr. App. 59; 20 Tex. Ct. Rep. 379, 106 SW 128. Denial of new trial on ground that accused's counsel failed to appear, and another was appointed to defend him, could be reviewed, in absence of request for continuance, or any objection to proceeding to trial or exception, and motion for new trial not being verified. Hangum v. State, 52 Tex. Cr. App. 628, 108 SW 370. Where defendant had his own counsel at arraignment, and at trial this counsel announced that another would be associated with him, and this other thereafter conducted case, accused could not complain on appeal that he was not represented by counsel. People v. Garnett [Cal. App.] 98 P 247.

**96.** There can be no reversal for abuse of discretion where no request for exercise of discretion appears to have been made. State v. Tomasi [N. J. Err. & App.] 69 A 214. Not error to allow witness' name to be endorsed on information and to allow him to testify without granting continuance, where record did not show request for continuance and court probably did not know that a continuance was desired. People v. Ranney [Mich.] 15 Det. Leg. N. 442, 116 NW 999.

made below are waived [97] and will not be considered on appeal.[98] This rule has been applied to formal defects in the accusation,[99] irregularities in procedure prior thereto,[1] invalidity of statute on which prosecution was based,[2] qualification of jurors,[3] rulings of evidence,[4] failure to swear a witness,[5] misconduct of witnesses,[6] qualification of interpreter,[7] rulings on application for continuance,[8] matters occur-

97. State v. Harp, 210 Mo. 254, 109 SW 578. No exception being taken to ruling of court, objection is deemed waived. People v. Emmons [Cal. App.] 95 P 1032. Objection to drawing jury waived when not made known to the court. Tinsley v. State, 52 Tex. Cr. App. 91, 20 Tex. Ct. Rep. 356, 106 SW 347.

98. Questions not raised in lower court will not be considered. People v. Richards, 150 Mich. 434, 14 Det. Leg. N. 745, 114 NW 230. Only matters ruled on by lower court may be considered. State v. Kline [Or.] 93 P 237.

99. Imperfect statement of venue in affidavit charging illegal sale of liquor held not reversible error, no objection being made below. Smith v. Corporation of Oxford [Miss.] 45 S 365. Objection to lack of averments in affidavit not considered, not having been raised below and being curable by amendment. Evans v. State [Miss.] 45 S 706. Defects in form are waived unless raised by motion to quash or plea in abatement and exceptions taken to ruling and properly preserved. Patrick v. State [Wyo.] 96 P 527. Ruling overruling demurrer is final in absence of an exception. State v. Heffernan, 28 R. I. 477, 68 A 364. Defects in affidavit not pointed out in demurrer will not be considered. Houston v. State [Ala.] 45 S 467.

1. Failure to accord accused a preliminary examination would be a mere irregularity which must be called to court's attention by appropriate motion and offering of proof to establish the fact. State v. McKee, 212 Mo. 138, 110 SW 729. Defendant having waived preliminary hearing cannot challenge a subsequent indictment on the ground that it was found during pendency of preliminary hearing. Nonappearance at preliminary examination, indictments on same day, and another found next day. State v. Rabens, 79 S. C. 542, 60 SE 442. Objection to qualification of grand juror, not made ground of motion to set aside indictment or to dismiss, need not be considered on appeal. People v. Quijada [Cal.] 97 P 689.

2. Accused could not raise invalidity of portion of act (intoxicating liquor law) not brought into question below. People v. McBride, 234 Ill. 146, 84 NE 865. Supreme court will not pass upon constitutionality of statute, unless it appears that question was made and passed upon in the court below, and the provision claimed to have been violated clearly designated. Griggs v. State, 130 Ga. 16, 60 SE 103.

3. Failure to object to juror or challenge because of inability to understand English, which was known to counsel before jury were empanelled, waiver of incompetency. Okerhauser v. State [Wis.] 116 NW 769. That a juror had expressed an opinion that accused was guilty and had thereafter become a member of the jury not reviswable, the matter not having been brought to trial court's attention. State v. Walker, 79 S. C. 107, 60 SE 309.

4. Ruling on evidence not reviewable, no exception being taken. Washington v. State [Ala.] 46 S 778. Objection not raised below. Creech v. Com., 32 Ky. L. R. 808, 107 SW 212.

**Admission of evidence** afterwards shown to be incompetent not error in absence of motion to strike out and direct jury not to consider it. State v. Dahlquist [N. D.] 115 NW 81. Admissibility of evidence not reviewable, no proper objection being made. State v. Mills, 79 S. C. 187, 60 SE 664. Prima facie admissibility of dying declaration not reviewable, being admitted without objection, except as to certain portions. State v. Doris [Or.] 94 P 44. Objection that evidence was improperly given in rebuttal cannot be first raised in appellate court. People v. Kemmis [Mich.] 15 Det. Leg. N. 382, 116 NW 554. Objection to competency of impeaching evidence not made below. State v. Hampton, 79 S. C. 179, 60 SE 669. Evidence being admitted without objection and not motion to exclude being made, defendant cannot complain. Morphew v. State, 84 Ark. 487, 106 SW 480. Objection to introduction of record of conviction of witness cannot be first made on appeal. State v. Kennedy, 207 Mo. 528, 106 SW 57. Cross-examination of accused's wife not reviewable, no objection having been made below. State v. Bell, 212 Mo. 111, 111 SW 24. Question on cross-examination of accused not reviewable, no objection being made. State v. Oliphant, 128 Mo. App. 252, 107 SW 32.

**Exclusion of evidence** not properly reviewable, no exceptions at trial being taken. People v. Kirk, 151 Mich. 253, 14 Det. Leg. N. 927, 114 NW 1023; State v. Soper, 207 Mo. 502, 106 SW 3; State v. Skillman [N. J. Law] 70 A 83. When it does not appear that objections urged were presented below nor what objections were urged to the admission or exclusion of evidence, the points are not reviewable. Soell v. State [Ga. App.] 61 SE 514.

5. Failure to swear witnesses not reviewable, no objection being taken at time. State v. Peterson [N. C.] 63 SE 87. Where boy was called and it appeared he did not understand nature of an oath, and his testimony was taken without his being sworn, without objection, the objection could not be raised for the first time in appellate court that witness was not sworn. People v. Kemmis [Mich.] 15 Det. Leg. N. 382, 116 NW 554.

6. Misconduct of any witness, allowed to remain in court room, should be called to trial court's attention; cannot be first raised on appeal. People v. Oliver [Cal. App.] 95 P 172.

7. No objection being taken or exception being preserved to preliminary examination of interpreter in presence of jury, matter was not reviewable. People v. Weston, 236 Ill. 104, 86 NE 188.

8. Denial of continuance not reviewable, no bill of exceptions being reserved. Martin v. State [Tex. Cr. App.] 113 SW 274. Refusal to grant continuance not reviewable,

ring at trial,[9] remarks, or conduct of judge,[10] arguments [11] and misconduct of counsel,[12] errors in instructions,[13] and error in the form of substance of the judgment.[14] Irregularities or errors which are ground for new trial and which are not assigned as such in the motion for new trial will not be considered.[15] Defendant cannot complain of invited error,[16] or rulings to which he consented or in which he acquiesced.[17]

no bill of exceptions being reserved. Sample v. State, 52 Tex. Cr. App. 505, 108 SW 685.

**9.** Arrest of prosecuting witness for perjury, at conclusion of testimony, she having said she testified falsely at preliminary, not error, no objection being made at time. Skaggs v. State [Ark.] 113 SW 346.

**10.** Remarks of court not reviewable, no objection or exception being taken at trial. State v. Clem [Wash.] 94 P 1079. Course of trial judge in making preliminary examination of jurors himself, and controlling examination and challenges by counsel, not reviewable, no exceptions being taken or preserved. People v. Trask [Cal. App.] 93 P 891.

**11.** Improper argument not objected to at time not reviewable. State v. Blodgett [Or.] 92 P 820. Sufficiency of rebuke by court for improper remarks by counsel not reviewable, no exception being taken. State v. Baker, 209 Mo. 444, 108 SW 6. Improper argument not reviewable when not objected to in trial court. Chapman v. Com., 33 Ky. L. R. 965, 112 SW 567. Improper argument not reviewable, no objection or exception being taken. Napier v. Com., 33 Ky. L. R. 635, 110 SW 842. Improper argument cannot be considered on appeal where no action or ruling of court below is requested. State v. Chenault, 212 Mo. 132, 110 SW 696. Alleged improper argument is not reviewable unless objection is made and same ruling of court obtained, and exception thereto taken. State v. Jeffries, 210 Mo. 302, 109 SW 614. Where record contained no exception relating to improper remarks of counsel except an exception to a special instruction relating to them, they were not reviewable. Banton v. State, 53 Tex. Cr. App. 251, 109 SW 159. While the supreme court of errors may in flagrant cases grant a new trial on account of improper argument of the state's attorney, though no motion was made below and court's attention was not called to it, yet it will not do so in ordinary cases. State v. Washelesky [Conn.] 70 A 62. Remarks of state's attorney held not to require granting of new trial by appellate court. Id.

**12.** Misconduct of counsel cannot be considered as ground for reversal when no adverse ruling was made by lower court. Hamblin v. State [Neb.] 115 NW 850. Misconduct of district attorney in referring to failure of accused to testify not reviewable on appeal from judgment, no ruling of court being had, and it not being made ground of new trial. People v. Amer [Cal. App.] 96 P 401. Remarks of counsel not reviewable, no objection or exception being made or taken at the time. State v. Harrison, 145 N. C. 408, 59 SE 867. Remarks of district attorney not ground for reversal unless ruling of court obtained and exception taken. Gillatti v. State, 135 Wis. 634, 116 NW 252. Improper remarks of counsel not reversible error when no ruling of lower court is obtained. People v. Amer [Cal. App.] 96 P 401.

**13.** Only matters in charge to which exception was taken can be reviewed. Shepard v. U. S. [C. C. A.] 160 F 584. Errors in instructions given not reviewable, no exception being taken at the time. State v. Smith, 137 Iowa, 5, 114 NW 558. Instructions by court must be excepted to, and exceptions settled in bill of exceptions to make error reviewable. State v. Gallagher, 14 Idaho, 581, 94 P 581. Failure to request special instruction and to except to omission of it waives error, if any. Territory v. Caldwell [N. M.] 98 P 167. Error in stating issues, not called to court's attention, not ground for error. State v. Hampton, 79 S. C. 179, 60 SE 669. Failure to charge on self-defense not reviewable when no request was made at trial and no complaint was made in motion for new trial. Keye v. State, 53 Tex. Cr. App. 320, 111 SW 400. Alleged error in failing to instruct verdict for defendant on account of want of proof not reviewable when first raised on appeal. Williams v. State, 53 Tex. Cr. App. 396, 110 SW 63. A mistake in stating the issues, or an instruction on an issue as to which there is no evidence, is not reversible error unless the attention of the court is called to the matter. State v. Walker, 79 S. C. 107, 60 SE 309. Failure to charge on alibi not reversible error, no request being made and no exception taken to omission. Jones v. State, 53 Tex. Cr. App. 131, 110 SW 741.

**14.** An error in the form or substance of the judgment must be presented to the lower court by motion to modify, and error on the ruling assigned in the appellate court, or nothing is presented for review. Cheek v. State [Ind.] 85 NE 779.

**15. Held not reviewable:** Objections to evidence. Burrow v. Hot Springs, 85 Ark. 396, 108 SW 823. Rulings on evidence. Borroum v. State [Miss.] 47 S 480. Objection to exclusion of evidence. Keye v. State, 53 Tex. Cr. App. 320, 111 SW 400. Denial of continuance. State v. McKee, 212 Mo. 138, 110 SW 729. Error in instructions. Jones v. Com., 32 Ky. L. R. 598, 106 SW 802. Alleged error in charge. State v. Brown, 209 Mo. 413, 107 SW 1068. Error in instructions, or failure to instruct, not reviewable. State v. Skinner, 210 Mo. 373, 109 SW 38. Error not assigned in motion. State v. Long, 209 Mo. 366, 108 SW 35. Objections not taken at time, nor assigned as error on motion for new trial. Nioum v. Com., 33 Ky. L. R. 62, 108 SW 945. Alleged error in ruling on competency of witness. State v. Brown, 209 Mo. 413, 107 SW 1068. Nothing but record reviewable where no motion in arrest or for new trial was filed during term of trial. State v. Fawcett, 212 Mo. 729, 111 SW 562. Neither motion in arrest nor for new trial called attention to omission to rule on motion to quash; error based on such omission overruled. State v. Santhuff [Mo. App.] 110 SW 624. Where objection that defendant was not given preliminary examination was only raised in motion to quash, unsupported by proof and no mention

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*Sufficiency of objection or motion.* See 10 C. L. 192—Objection must be made or exception taken when the matter arises [18] in apt time to allow some action or ruling by the court,[19] or, in the case of exceptions, within the time allowed by rule or statute,[20]

was made in motion for new trial, question was not properly saved for review in appellate court. State v. McKee, 212 Mo. 138, 110 SW 729. Error in overruling of a motion to exclude testimony may be assigned by exceptions pendente lite, or reviewed on motion for new trial. Soell v. State [Ga. App.] 61 SE 514. Judgment affirmed where excerpts from charge to which exception was taken were not erroneous for any reason set forth in any proper assignment of error contained in motion for new trial, and evidence was sufficient to support verdict. Menefee v. State, 130 Ga. 15, 60 SE 103. Overruling motion for continuance is ground for new trial and cannot be assigned as independent error. Yazel v. State [Ind.] 84 NE 972. Errors, if any, in giving or refusing instructions, can only be presented by motion for new trial, assigning them as causes for new trial; cannot be assigned as independent error in appellate court. Cheek v. State [Ind.] 85 NE 779. Omission in charge cannot be first complained of on appeal, motion must contain all errors complained of in charge, or bill of exceptions must be reserved. Boy v. State [Tex. Cr. App.] 106 SW 149. Refusal to quash jury panel not reviewable, no evidence in support of motion having been offered in trial court. Fox v. State, 53 Tex. Cr. App. 150, 109 SW 370. Questions not assigned as ground for new trial nor assigned as error cannot be reviewed. Ross v. State, 16 Wyo. 285, 94 P 217. Where court, on objection, checked counsel in argument for going outside the record and cautioned jury, and no motion for new trial was made on this ground, the matter was not ground for exceptions. State v. Martel, 103 Me. 63, 68 A 454.

**16.** Accused, introducing hearsay and incompetent evidence, cannot object to similar evidence by state in rebuttal. People v. Duncan [Cal. App.] 96 P 414. Admission of signed statement by prosecution's witness harmless where accused first cross-examined witness in regard to it. Cohen v. U. S. [C. C. A.] 157 F 651. Charge held to contain nothing of which defendant could complain in view of his requests. State v. Ryan, 80 Conn. 582, 69 A 536. Accused cannot complain of instructions similar to those requested. Lawson v. State [Ind.] 84 NE 974; Eacock v. State, 169 Ind. 488, 82 NE 1039. Defendant cannot complain of instruction given at his request. State v. Brown, 209 Mo. 413, 107 SW 1068; People v. Emmons [Cal. App.] 95 P 1032. Especially where no harm resulted. Burley v. State, 130 Ga. 343, 60 SE 1006. Instruction relative to another sale harmless, evidence thereof having been introduced by defendant. Alderson v. State, 53 Tex. Cr. App. 525, 111 SW 738.

**17.** Admission of testimony not ground for error when state's attorney consented to its being stricken. State v. Hampton, 79 S. C. 179, 60 SE 669. Court asked counsel if his points had been covered by charge, and counsel said he was entirely satisfied. Held objections to preceding charge waived. People v. Vandriesche [Mich.] 15 Det. Leg. N. 662, 117 NW 578. But right to object to subsequent charge not waived. Id. Where, day before holiday, counsel asked if court would sit next day, and court said he knew of no law to prevent holding trials on legal holidays (February 22), and counsel made no objection when case was called next day, the point was waived. State v. Cook, 78 S. C. 253, 59 SE 862.

**18.** Evidence being received without objection and no motion to strike it being made, held not error to refuse instruction to jury at close of trial to disregard it. Younger v. State [Neb.] 114 NW 170. Objection to admission of confession must be made when it is offered. Walker v. State, 53 Tex. Cr. App. 336, 110 SW 59. Request to charge jury to disregard evidence is improper; objection should be made to its introduction. Sweatt v. State [Ala.] 47 S 194. Objection waived because not reviewed when incompetency of testimony appeared. State v. Mills, 79 S. C. 187, 60 SE 664. Where a state's attorney is assisted by outside counsel, it is not error to refuse to permit the defendant to show who employed and paid such outside counsel where no objection to their participation was made. Bergstrasser v. People, 134 Ill. App. 609. Where no objection was made to witness putting on alleged hood, mask, and jumpers of accused, worn when selling liquor, until garments were on, accused could not object on appeal. Dooley v. State, 52 Tex. Cr. App. 491, 108 SW 676. Objection that jurors were improperly summoned and selected **too late when first made in motion for new trial.** State v. Page, 212 Mo. 224, 110 SW 1057. Objections to evidence first made in motion for new trial not reviewable. Nioum v. Com., 33 Ky. L. R. 62, 108 SW 945. Objection to evidence cannot be first made in motion for new trial or on appeal. State v. Speyer, 207 Mo. 540, 106 SW 505. Under Cr. Code Prac. § 281, decisions of court first made on motion for new trial are not grounds of exception. Sims v. Com., 32 Ky. L. R. 443, 106 SW 214. Under Cr. Code Prac. § 281, court of appeals has no jurisdiction to review alleged error which is presented for first time in motion for new trial. Napier v. Com., 33 Ky. L. R. 635, 110 SW 842. Overruling motion for change of venue must be raised by exceptions to judgment, not by motion for new trial. Jones v. State, 130 Ga. 274, 60 SE 840.

**19.** Objections must be made at trial in apt time to allow action by trial court. Johnson v. State [Okl.] 97 P 1059.

**20.** Motion for new trial must be made before judgment, and exceptions to ruling must be prepared and presented within 10 days after ruling. People v. Long [Cal. App.] 93 P 387. Bill of exceptions must be reserved during the term; recital in judgment overruling application for continuance that defendant excepted not sufficient. Norris v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 527, 106 SW 137. Exceptions to erroneous rulings admitting or rejecting evidence may be embodied in a bill of exceptions which may be presented within 10 days after judgment, and such exceptions may be used on appeal from judgment, though no motion for

and the objection or exception must be specific and certain [21] as to the matter objected to [22] and the ground of the objection,[23] and some ruling of the court must be obtained thereon,[24] as only the particular objection urged and passed upon below will be considered on appeal,[25] and objections not insisted upon will be considered waived.[26] Mere exception to remarks of counsel without a request to exclude or to

new trial was made. People v. Long [Cal. App.] 93 P 387.

**21.** Remark of counsel held not an exception to admission of testimony. Pryse v. State [Tex. Cr. App.] 113 SW 938. Objection that charge did not fairly and properly charge the law and was on weight of evidence too general. Taylor v. State, 53 Tex. Cr. App. 615, 111 SW 151.

**Motion for new trial** did not assign error in charge given, but alleged that court did not instruct on all the law of the case. Instructions given not reviewable. State v. Espenschied, 212 Mo. 215, 110 SW 1072. Such exception too general, without request to give certain charges, or particular exceptions to portions of charge. Id. Allegation in motion for new trial that verdict is against the evidence is not sufficient; verdict will be disturbed only when there is no substantial evidence to support it. Id. Grounds of motion for new trial based on exclusion of questions insufficient because not showing evidence to be elicited. Morris v. State [Ga.] 62 SE 806.

**22.** Objection to letters should specify objectionable parts, other parts being competent. People v. Gillette, 191 N. Y. 107, 83 NE 680. Request for ruling as to each of two counts properly refused where inapplicable to one. Commonwealth v. Hollander, 200 Mass. 73, 85 NE 844. Exception to refusal to give particular request does not avail to open objections to charge as a whole but raises only the matters to which the attention of the court was specifically called. Commonwealth v. Jewelle, 199 Mass. 558, 85 NE 858. Accused cannot complain that court allowed state to select county to which cause was removed, defendant objecting only to one county and not objecting to selection made by state. State v. Harrison, 145 N. C. 408, 59 SE 867.

**23.** A mere objection to a question does not raise objection that proof was not subsequently offered to make it competent. Raymond v. State [Ala.] 45 S 895. Objection to evidence on wrong ground, and failure to move to have it stricken, held waiver of any error. Commonwealth v. Johnson, 199 Mass. 55, 85 NE 188. Objection to materiality of testimony does not raise qualifications of witness. People v. Burmans [Mich.] 15 Det. Leg. N. 640, 117 NW 589. Objection to cross-examination as irrelevant, immaterial and incompetent, held not to raise point that witness, who was being examined as to testimony on preliminary examination had not testified at such examination. People v. Hart, 153 Cal. 261, 94 P 1042. Objection to witness stating his "understanding" is not an objection to the admissibility of the facts sought to be shown. People v. Weston, 236 Ill. 104, 86 NE 188. Exceptions so general that particular objection cannot be determined not considered. Leonard v. State, 53 Tex. Cr. App. 187, 109 SW 149. Objection to question on cross-examination of expert held insufficient. State v. Speyer, 207 Mo. 540, 106 SW 505. Objection that question was incompetent and immaterial held not to raise point that is was not proper redirect examination. State v. Vickers, 209 Mo. 12, 106 SW 999.

**24.** Defendant held to have sufficiently urged objection to testimony and preserved exception to ruling. People v. Long [Cal. App.] 93 P 387. No ruling of court being shown, no assignable error. Phillips v. State [Ala.] 47 S 245. No action by court on application for change of venue shown, nothing presented for review. Oates v. State [Ala.] 47 S 74. Exception must be to same ruling, direction or decision of the court. Court & Prac. Act. 1905, § 482. State v. Farr [R. I.] 69 A 5. Right of exception is conferred by statute and is based on same opinion, direction or judgment of the court which is erroneous and prejudicial. State v. Martel, 103 Me. 63, 68 A 454. Where counsel objected repeatedly to argument of state's attorney, and requested ruling of court, defendant's rights were saved, though court refused to make any direct ruling where he signed bill of exceptions covering the objections. State v. Blodgett [Or.] 92 P 820.

**25.** Only grounds of objection to evidence which were urged below will be considered. Lewis v. State [Fla.] 45 S 998. Only objection to evidence made below can be reviewed on appeal. State v. Bridgham [Wash.] 97 P 1096. When accused did not apply for continuance, he cannot complain of being forced to trial without witnesses. State v. Bell, 212 Mo. 111, 111 SW 24. Where defendant entered plea of not guilty, and then a plea in abatement and motion to quash without withdrawing his plea of not guilty, he could not contend for the first time on appeal that he was given no opportunity to plead after his motions were overruled. State v. Gieseke, 209 Mo. 331, 108 SW 525.

**26.** Appellant must show that in the trial below he was deprived of a substantial right, after having used all means in his power to preserve it. Error in admitting testimony in reply not reviewable, no attempt to rebut it being made. State v. Harmon, 79 S. C. 80, 60 SE 230. An exception by the accused to the overruling of his motion to direct a verdict in his favor at the close of the prosecution's case is waived by the introduction by him of evidence in his own behalf. Pfieffer v. U. S., 31 App. D. C. 109. Remark of court, directing witness not to answer, held not reviewable where counsel for accused did not insist on an answer to question asked witness. State v. Malloy, 79 S. C. 76, 60 SE 228. Where objection to testimony is sustained, but testimony is admitted immediately thereafter, the objection will be considered overruled. Clemens v. State [Miss.] 45 S 834. Error in overruling motion to strike out evidence because of fatal variance is not waived by failure to except to instruction that variance was not material; denial of motion to strike may be urged

instruct the jury to disregard them presents nothing for review.[27] A general objection to evidence is insufficient[28] unless all of the evidence objected to[29] is clearly inadmissible in any view.[30] The refusal to allow a witness to testify,[31] or a ruling sustaining an objection to a question, is not reviewable unless an offer of proof is made,[32] and an offer of proof is properly rejected unless all the offered evidence is competent.[33] Where a question calls for improper or incompetent evidence, an objection must be made to the question and a ruling obtained[34] as ordinarily, evidence received without objection will not be stricken;[35] but where a question is proper, a motion to strike is the proper remedy when the testimony given is nonresponsive,[36] or is otherwise objectionable and incompetent.[37] A motion to strike

as error upon writ of error. State v. Ham [S. D.] 114 NW 713.

**27.** Improper argument not reviewable when merely objected to, no action of trial court being requested. Skaggs v. State [Ark.] 113 SW 346. Mere interruptions of argument, no ruling of court being asked, held not exceptions. Pryse v. State [Tex. Cr. App.] 113 SW 938. Where objection was to remark of district attorney to explain why he abandoned a line of questions, and no motion to strike testimony or remark was made, refusal to strike was not error. People v. Cowley [Cal. App.] 94 P 866. Defendant not entitled to review of conduct of solicitor in attempting to get improper evidence before the jury where no objection was made or ruling of court requested in lower court. State v. Boyles [S. C.] 60 SE 233. Misconduct of state's counsel is not a statutory ground for new trial. Accused's counsel should have asked court to withdraw statement from jury and excepted to any refusal to do so. Mere objection to arguments presents nothing for review. Hill v. State, 169 Ind. 561, 83 NE 243. Where defendant excepted to argument of prosecuting attorney, but failed to ask the court to give cautionary instructions or to take any action in the matter, there was nothing for appellate court to review. State v. Farr [R. I.] 69 A 5.

**28.** Admission of evidence over general objections proper. State v. Long, 209 Mo. 366, 108 SW 35. General objection to question properly overruled. Patton v. State [Ala.] 46 S 862. An objection that evidence is incompetent, irrelevant and immaterial is too general. State v. Crone, 209 Mo. 316, 108 SW 555. Objection that evidence is irrelevant and immaterial held insufficient. State v. Page, 212 Mo. 225, 110 SW 1057.

**29.** Paper containing dying declaration being admissible in part, general objection was properly overruled. State v. Hood, 63 W. Va. 182, 59 SE 971. Objection to admission in evidence of a record as a whole not sufficient when part of it was competent. State v. Dahlquist [N. D.] 115 NW 81. General exception unavailing where part of evidence objected to came within offer of proof to which accused had made no objection. State v. Ryder, 80 Vt. 422, 68 A 652.

**30.** Where evidence called for is not patently irrelevant, general objection to question is properly overruled, though it was leading. Moore v. State [Ala.] 45 S 656. General objections to evidence, not specifying grounds, will not be considered unless evidence is inadmissible in any view. Lewis v. State [Fla.] 45 S 998. Where deed was competent as an admission, and only a general objection was made, its admission was not error; defendant should have requested that it be considered only as an admission of marriage. State v. Greene, 33 Utah, 497, 94 P 987.

**31.** Refusal to allow witness to testify who had not been called and sworn with other witnesses not error, there being no offer of proof by him. Pittman v. State [Ala.] 45 S 245.

**32.** McCall v. State [Fla.] 56 S 321; State v. Hunskor, 16 N. D. 520, 114 NW 996. Sustaining objection to question on cross-examination not error, its purpose not appearing. Poe v. State [Ala.] 46 S 521. Exclusion of questions not reviewable, nature of evidence sought to be shown not being made known to trial court. State v. Page, 212 Mo. 224, 110 SW 1057. When an objection to question is sustained, an offer showing the relevancy proof expected to be made should appear in order that court below and appellate court may be fully informed; error not shown when offer of proof was not made. Kelly v. State [Fla.] 45 S 990. Exclusion of questions proper if relevancy does not appear when offered; if relevancy subsequently appears, evidence must be reoffered to place court in error. Pugh v. State [Fla.] 45 S 1023.

**33.** Where testimony is offered as a whole, some being competent and some incompetent, its rejection is not ground for new trial. Arnold v. State [Ga.] 62 SE 806.

**34.** Thompson v. State [Fla.] 46 S 842. If the question calls for an incompetent answer, it must be objected to or the right to have the answer stricken is waived. People v. Long [Cal. App.] 93 P 387.

**35.** State v. Blodgett [Or.] 92 P 820. Where evidence is admitted without objection and is responsive, a motion to strike may be denied though evidence would be held inadmissible were proper objection made. Lewis v. State [Fla.] 45 S 998. An objection to testimony, responsive to questions after it is in, is too late. Dick v. State, 107 Md. 11, 68 A 286; Commonwealth v. Johnson, 199 Mass. 55, 85 NE 188. If improper testimony is given in response to an improper question to which no objection has been made, a motion to strike is only remedy, but such motion is addressed to sound discretion of trial court. Thompson v. State [Fla.] 46 S 842.

**36.** Commonwealth v. Johnson, 199 Mass. 55, 85 NE 188; State v. Blodgett [Or.] 92 P 820. Where a question is properly propounded to a witness but the answer is not

should be directed specifically to the alleged improper testimony.[38] A motion to strike all of a witness' testimony is properly denied if a part of it is competent.[39] A motion to strike must be based upon some feature of the evidence rendering it inadmissible; it cannot properly be based on the sufficiency of the evidence.[40] The omission of a particular instruction,[41] or an error in a portion of the charge,[42] cannot be complained of unless a request for a proper instruction is made in due season [43] and in proper form,[44] and an exception reserved to its refusal [45] or omission.[46] An exception to the charge as a whole is properly overruled if it is correct in part.[47] A mere objection to a portion of the charge presents nothing for review; an exception must be taken.[48] Objection to change of venue cannot be made by a plea to the jurisdiction of the court to which the cause is removed.[49] Exception must be taken to the order directing the change in the court making the order.[50] Plain and vital error should be corrected, regardless of the sufficiency of the exception saved below.[51]

§ 15. *Harmless or prejudicial error.* See 10 C. L. 195—In respect to some matters

responsive to the question, containing both matters of opinion and hearsay, the answer should be stricken out by the trial judge. Commonwealth v. Howe, 35 Pa. Super. Ct. 554.

**37.** State v. Blodgett [Or.] 92 P 820. Where question is proper, only remedy against improper answer is motion to strike. People v. Emmons [Cal. App.] 95 P 1032. When question is unobjectionable, and the answer is incompetent or irrelevant, the answer may be stricken without previous objection to the question. People v. Long [Cal. App.] 93 P 387. If improper testimony is given in response to a proper question, a motion to strike is the proper remedy. Thompson v. State [Fla.] 46 S 842.

**38.** Thomas v. State [Ala.] 46 S 771.

**39.** Objection should be specific. Lewis v. State [Fla.] 45 S 998; Celender v. State [Ark.] 109 SW 1024. A motion by accused to strike out all physician's evidence as prosecution's witness as hearsay is properly denied where on direct examination the witness testified as to patient's condition and his opinion of the cause thereof, and on cross-examination in response to questions asked by defendant's counsel he testified as to patient's declarations as to the cause of her condition. Thompson v. U. S., 30 App. D. C. 352.

**40.** Lewis v. State [Fla.] 45 S 998.

**41.** Failure to give particular instruction cannot be complained of, accused not having requested it. Hobbs v. State [Ark.] 111 SW 264. Where defendant's counsel requested 7 instructions and court gave 6, and counsel did not request the giving of others which he claimed to have handed to judge, but which judge claimed not to have received, no question was raised as to others. People v. Laudiero [N. Y.] 85 NE 132.

**42.** Defendant cannot complain of misleading oral charge when he did not request an explanation. Millender v. State [Ala.] 46 S 756. If accused considers charge misleading, he should request explanatory charge. Henlngburg v. State [Ala.] 45 S 246. If counsel does not consider an instruction given sufficiently clear or intelligible, it is his duty to suggest the supposed defect and a suitable instruction, and, failing to do so, he cannot complain of the charge as given. Yeoman v. State [Neb.] 115 NW 784.

**43.** Written requests to charge were marked "Given" and handed to jury to take out with them, and defendant did not request that they be read by the court until jury had left the box. Defendant not entitled to an exception to refusal of court to read instructions. Boyd v. State [Ala.] 45 S 634.

**44.** Requests to charge should be submitted in writing (circuit court rule 11) that error therein may be reviewed. State v. Owens, 79 S. C. 125, 60 SE 305. Where requested instructions are not separately requested, their refusal is not error unless all are good. Bell v. State [Ala.] 47 S 242.

**45.** Omission of instruction not error unless specifically requested and exception to refusal taken. Pugh v. State [Fla.] 45 S 1023. Exceptions must be saved at the time to failure of court to give certain instructions. State v. Chenault, 212 Mo. 132, 110 SW 696.

**46.** Defendant must take exception at time to failure of court to instruct that proof of conviction of other felony can be considered only on issue of his credibility. Ochsner v. Com., 33 Ky. L. R. 119, 109 SW 326. In prosecution for misdemeanor, failure to charge that accused has benefit of reasonable doubt was not grounds for new trial when such instruction was not requested and no exception was taken to its omission. United States v. Monongahela Bridge Co., 160 F 712.

**47.** Lacy v. State [Ala.] 45 S 680; Martin v. State, 85 Ark. 130, 107 SW 380. Exception to entire charge, no particular error being specified, not well taken. State v. Heidelberg, 120 La. 300, 45 S 256; State v. Anderson, 120 La. 331, 45 S 267; State v. Ryder, 80 Vt. 422, 68 A 652. General exception to several instructions will not be entertained on appeal if any of them be good. Owen v. State [Ark.] 111 SW 466. General exception to charge insufficient where not made the basis of any assignment of error pointing out any legal error in any portion of the charge. State v. Zeilman [N. J. Law] 68 A 468.

**48.** Abrams v. State [Ala.] 46 S 464.

**49, 50.** Gibson v. State, 53 Tex. Cr. App. 349, 110 SW 41.

**51.** Williams v. U. S. [C. C. A.] 158 F 30.

of procedure, notably argument and conduct of counsel,[52] and custody and conduct of the jury,[53] the rulings usually blend the propriety of particular acts and their harmful effect in such manner that separate treatment would be misleading, and sections of this article dealing therewith should be consulted in connection with the holdings here given. Error is presumptively prejudicial,[54] doubt as to its harmful effect being resolved in favor of accused,[55] especially in close cases.[56] Defendant cannot complain of error which is in his favor [57] or prejudicial only to the state's

52. See ante, § 10B.

53. See ante, § 10F.

54. Error apparent in the record is presumptively prejudicial unless the contrary appears beyond doubt. Williams v. U. S. [C. C. A.] 158 F 30.

55. Errors in charge are prejudicial if they affect prejudicially defendant's rights as to a lower offense, or as to a defense, and if errors have tendency to induce conviction of higher offense, or conviction rather than acquittal. Pannell v. State [Tex. Cr. App.] 113 SW 536. Erroneous charge on interest of witnesses prejudicial though inadvertently made; effect on accused's case must be considered. State v. Ownby, 146 N. C. 677, 61 SE 630. Giving of incorrect charge, and refusal of correct charge, reversible error; court not called upon to speculate as to what jury would have done if correct charge had been given. Cohen v. State, 53 Tex. Cr. App. 422, 110 SW 66. Giving of manslaughter instruction reversible error where accused was manifestly guilty of murder or innocent and was convicted of manslaughter. Stovall v. State [Miss.] 47 S 479. Judgment must be reversed if the charge on the law is incorrect, motion for new trial on this ground having been denied. Lee v. State [Tex. Cr. App.] 113 SW 301. In the federal courts the rule is that where a party persists in putting in testimony which was objected to and which was erroneous, the error is fatal if the testimony was or might have been prejudicial. Alkan v. U. S. [C. C. A.] 163 F 810. Two conflicting charges on measure of proof in murder case, one of them erroneous, held to require reversal. Commonwealth v. Deitrick [Pa.] 70 A 275. The admission of hearsay upon material matters is reversible error. Evidence based on things coming to witnesses' knowledge and otherwise and what he had heard regarding certain facts. Sheppelman v. People, 134 Ill. App. 556. Admission of hearsay injurious to defendant reversible error. People v. Schmitz [Cal. App.] 94 P 407. New trial must be granted when it cannot be said that erroneous admission of evidence did not affect verdict. People v. Jones, 191 N. Y. 291, 84 NE 61. Erroneous admission of evidence prejudicial. State v. Dickerson, 77 Ohio St. 34, 82 NE 969. Erroneous admission of written confession not cured by statement made by accused as witness which was different from confession in material respects. Robertson v. State [Tex. Cr. App.] 111 SW 741. Admission of disgraceful, immoral or criminal conduct of accused not connected with crime charged, or attempts by counsel to get such facts before the jury by indirect or suggestive means, will usually lead to reversal. Dungan v. State [Wis.] 115 NW 350. Unwarranted cross-examination prejudicial error where used as basis for evidence which should have been offered in chief. People v. Schmitz [Cal. App.] 94 P 407. Erroneous rejection of questions on cross-examination to test witness' credibility held prejudicial. People v. Hart, 153 Cal. 261, 94 P 1042. Improper exclusion of jurors, after they had been sworn to try the cause, presumed prejudicial, accused having exhausted his peremptory challenges. People v. Schmitz [Cal. App.] 94 P 407. Withdrawal of certain testimony concerning confession, after argument, in general charge, held prejudicial to accused. Garrett v. State, 52 Tex. Cr. App. 225, 20 Tex. Ct. Rep. 552, 106 SW 389.

56. Where evidence is circumstantial and not very strong, substantial errors cannot be overlooked. People v. Hinksman [N. Y.] 85 NE 676. Where the evidence is close and convicting, the rulings of the court with respect to the evidence admitted and excluded must be especially accurate. Sheppelman v. People, 134 Ill. App. 556.

57. Defendant cannot complain of ruling which is favorable to him. State v. Daly, 210 Mo. 664, 108 SW 53. Conviction and judgment thereon will not be reversed because the sentence imposed is less than the minimum fixed by law. Accused cannot complain of error in his favor. People v. Oliver [Cal. App.] 95 P 172. Accused cannot complain of a waiver by prosecuting attorney of felony charge (prior conviction) and trial on misdemeanor charge alone. State v. Doyle [W. Va.] 62 SE 453. Where defendant's witness testifies to having had sexual intercourse with prosecutrix, the court may order his immediate arrest for the crime of fornication. This is not prejudicial since it assumes the truth, rather than the falsity, of the witness' testimony. Johnson v. State, 133 Wis. 453, 113 NW 674.

**Admission of evidence favorable to accused.** Washington v. State [Ala.] 46 S 778; Fouraker v. State [Ga. App.] 62 SE 116. Admission of evidence not prejudicial to defendant where defendant argued from it in his favor. People v. Helm, 152 Cal. 532, 93 P 99.

**Remark of court,** favorable to accused, not reversible error. Irving v. People, 43 Colo. 260, 95 P 940.

**Defendant cannot complain of instruction unduly favorable to him.** Burkett v. State [Ala.] 45 S 682; Hays v. State [Ala.] 46 S 471; People v. Carey [Cal. App.] 97 P 907; State v. Johns [Iowa] 118 NW 295; State v. Betz, 207 Mo. 589, 106 SW 64; State v. Calvert, 209 Mo. 280, 107 SW 1078; State v. Stratford [N. C.] 62 SE 882; Baker v. State, 53 Tex. Cr. App. 27, 108 SW 684. Instruction on circumstantial evidence harmless where proof

case [58] or to a codefendant.[59] The rule that trivial or technical errors may be disregarded, when defendant appears to have had a fair trial,[60] does not warrant courts in disregarding violations of established rules of procedure or evidence,[61] or substantial rights of the defendant [62] guaranteed by the constitution or statutes.[63]

*Trivial or immaterial error.* See 10 C. L. 196—The rule that reversal will not ordinarily be had for errors not affecting the result [64] or the substantial rights of the parties [65] has been applied to the qualifications of grand jurors,[66] defects in pleadings,[67] allowing amendment of pleadings,[68] drawing,[69] qualification,[70] examination,[71] and selection [72] of trial jurors, failure to arraign,[73] granting [74] or refusal of

was direct and positive. Wimberly v. State, 53 Tex. Cr. App. 11, 108 SW 384. Charge that it was for jury to decide whether defendant had been denied constitutional guaranty of speedy and public trial before impartial jury cannot avail defendant where judge had already ruled defendant had not been deprived of his guaranty and it was in defendant's favor that court allowed jury to reopen questions. State v Rabens, 79 S. C. 542, 60 SE 442.

**58.** Admission of testimony prejudicial only to state's case not ground for complaint by accused. People v. Hutchings [Cal. App.] 97 P 325.

**59.** Where a confession by one of two persons jointly indicted is proved, he cannot complain that court failed to instruct that confession could be considered only as against him. Jones v. State, 130 Ga. 274, 60 SE 840. Where evidence showed tenants guilty of maintaining nuisance, and landlord innocent, error in finding both guilty jointly was not prejudicial to the tenants. People v. Kent, 151 Mich. 134, 14 Det. Leg. N. 904, 114 NW 1012.

**60.** Courts should not be astute to sustain technical errors where it appears that accused has had a fair trial. Commonwealth v. Fisher [Pa.] 70 A 865.

**61.** Judgment reversed because of admission in evidence of letters sent by accused to his wife and given by her to prosecuting attorney. Commonwealth v. Fisher [Pa.] 70 A 865.

**62.** Rev. Code Cr. Proc. § 500, requiring technical errors to be disregarded by supreme court, does not authorize court to disregard a variance such that judgment would not bar second prosecution for same offense. State v. Ham [S. D.] 114 NW 713.

**63.** Commonwealth v. Fisher [Pa.] 70 A 865.

**64.** Where jurors could not, without disregarding their oaths, have found any verdict but guilty under the evidence, errors in charge held harmless, under Burns' Ann. St. Supp. 1905, § 1977. Mason v. State [Ind.] 83 NE 613. Instruction and evidence which could not have affected result, harmless. People v. Monreal [Cal. App.] 93 P 385. If exclusion of evidence was correct, ruling will not be reversed because erroneous reasons were assigned. State v. Ayles, 120 La. 661, 45 S 540.

**65.** Judgment must be given without regard to technical errors or defects or to exceptions which do not affect substantial rights. Code Cr. Proc. § 542. People v. Simmons, 109 NYS 190. Exception overruled, no prejudice being made to appear. State v. Washington [S. C.] 61 SE 896. In criminal cases the Court of Appeals of New York is required by Code Cr. Proc. § 542 to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of parties. People v. Strollo, 191 N. Y. 42, 83 NE 573. Parol proof that defendant was a wholesale liquor dealer, admitted without objection, held not a ground of error, where license was in accused's possession if he had one. Williams v. U. S. [C. C. A.] 158 F 30. Conviction not reversed because jury may have considered evidence for a purpose not permitted by trial court where that court too narrowly restricted the scope of the evidence. People v. Gillette, 191 N. Y. 107, 83 NE 680. Where evidence fully warrants verdict, error must be shown to be prejudicial to warrant reversal. Taylor v. State [Ga. App.] 62 SE 1048.

**66.** That one member of grand jury was disqualified is not ground for reversal in absence of showing of prejudice to accused. State v. Graham, 79 N. C. 116, 60 SE 431.

**67.** Bad similiter, joining issue, not ground for reversal. State v. Lavin [W. Va.] 60 SE 888. Insufficiency of second count not available error, where first count, under which accused was convicted on sufficient evidence, was good. Stucker v. State [Ind.] 84 NE 971. Where affidavit charged assault and battery and also felonious intent to murder and the charge of assault and battery of which only accused was convicted, was sufficient, accused could not complain that felonious intent to murder was not properly charged. Id.

**68.** Allowance of amendment to indictment, not necessary to sustain conviction, not reversible error. Martin v. State [Miss.] 47 S 426.

**69.** State's challenge of jurors rendered irregularity in summoning and selecting them harmless. Rice v. State [Tex. Cr. App.] 112 SW 299.

**70.** Accused cannot complain that juror was disqualified when he did not exhaust peremptory challenges. State v. Banner [N. C.] 63 SE 84.

**71.** Refusal to allow certain questions to jurors on their voir dire, harmless, where peremptory challenges were not exhausted. State v. Ayles, 120 La. 661, 45 S 540. Refusal to allow examination of each veniremen in absence of others not reviewable, no prejudice being shown. Macklin v. State, 53 Tex. Cr. App. 197, 109 SW 145.

**72.** No prejudicial error in qualifying jurors where no objectionable juror was forced on defendant by his exhausting his peremptory challenges. Rice v. State [Tex. Cr. App.] 112 SW 299. Overruling challenges to jurors for cause not prejudicial, unless it is shown that party was compelled to accept

continuance,[75] change of place of trial,[76] exclusion of evidence,[77] admission of evidence,[78] receiving evidence out of its proper order,[79] cross-examination of witnesses,[80]

one or more objectionable jurors for want of peremptory challenges. Shumway v. State [Neb.] 117 NW 407. Error in disallowing challenge to juror not reversible where accused did not exercise all peremptory challenges. People v. Maughs [Cal. App.] 96 P 407.

**73.** Omission of arraignment not prejudicial, accused having been tried as on a plea of not guilty, and having enjoyed all rights which he would have had had he been duly arraigned. Hobbs v. State [Ark.] 111 SW 264.

**74.** Error in continuance of cause did not entitle accused to be discharged, and was not ground for reversing judgment. Ashlock v. Com. [Va.] 61 SE 752.

**75.** Refusal of continuance not prejudicial where it developed that testimony of absent witness would not have been admissible. State v. Simmons, 121 La. 561, 46 S 651.

**76.** That November term was extended into December, and place of trial changed from criminal court building to county court house, held not ground for reversal. People v. Weick, 123 App. Div. 328, 107 NYS 968.

**77.** Exclusion of evidence harmless, facts being otherwise proved. State v. Harris, 209 Mo. 423, 108 SW 28; Boyd v. State [Ala.] 45 S 591; Brooks v. State, 85 Ark. 376, 108 SW 205; State v. Long, 209 Mo. 366, 108 SW 35; State v. Hunter, 79 S. C. 84, 60 SE 241. Exclusion of evidence, which could not have been material, harmless. Groce v. Ter. [Ariz.] 94 P 1108; Kennedy v. Com., 33 Ky. L. R. 83, 109 SW 313. Exclusion of evidence harmless in view of negative answer of witness. Drennan v. State, 53 Tex. Cr. App. 311, 109 SW 1090. Erroneous exclusion of testimony of defendant, as to whether he had ever been convicted of crime in Italy, harmless. People v. Laudiero [N. Y.] 85 NE 132. Witness having admitted inconsistency in former testimony, not error to refuse to allow to be read portion of affidavit for continuance relating to such former testimony, state having admitted truth of facts in affidavit to avoid continuance. Stamper v. Com., 33 Ky. L. R. 580, 110 SW 389. Exclusion of testimony not ground for reversal, where trial was by court without jury and court had denied continuance and held evidence immaterial. Turner v. State [Tex. Cr. App.] 108 SW 661. Where dying declaration had been reduced to writing and writing was lost, not prejudicial error to strike oral proof of declaration after a copy of the writing had been admitted. State v. Barnes [N. J. Law] 68 A 145. Error in excluding evidence on cross-examination waived, where defendant later made witness his own and could have shown facts had he so desired. Maynard v. State [Neb.] 116 NW 53. Where, in prosecution for murder in first degree, jury found crime was not premeditated but was committed in heat of passion, defendant was not prejudiced by exclusion of letters from deceased showing absence of ill feeling or criminal intent. Montgomery v. State, 136 Wis. 119, 116 NW 876.

**78.** Cook v. U. S. [C. C. A.] 159 F 919. Error in admitting immaterial evidence, harmless. Boyd v. State [Ala.] 45 S 591; Robinson v. State, 130 Ga. 361, 60 SE 1005; Riddell v. Com., 33 Ky. L. R. 764, 111 SW 301; Shumway v. State [Neb.] 117 NW 407; Biddy v. State [Tex. Cr. App.] 108 SW 689; Tabor v. State, 52 Tex. Cr. App. 387, 107 SW 1116; Jones v. State, 52 Tex. Cr. App. 519, 107 SW 849; Faulkner v. State, 53 Tex. Cr. App. 258, 109 SW 199. Erroneous admission of evidence harmless, where facts were proved by other competent evidence. State v. Brand [N. J. Law] 69 A 1092; Le Grand v. State [Ark.] 113 SW 1028; People v. Ryan, 152 Cal. 364, 92 P 853; People v. Hutchings [Cal. App.] 97 P 325; State v. Miller [Iowa] 115 NW 493; Pontier v. State, 107 Md. 384, 68 A 1059; McCormick v. State, 52 Tex. Cr. App. 493, 108 SW 669; Biddy v. State [Tex. Cr. App.] 108 SW 689; Cooke v. People, 134 Ill. App. 41. Admission of hearsay harmless, facts being otherwise properly shown. Hixon v. State, 130 Ga. 479, 61 SE 14. Admission of evidence to prove facts admitted by defendant is not usually prejudicial, though evidence might properly have been excluded. State v. Lewis [Iowa] 116 NW 606. The erroneous admission of testimony is not cause for reversal if the same fact is proved by other testimony not objected to. Wagner v. State, 53 Tex. Cr. App. 306, 109 SW 169. Admission of opinion evidence harmless, facts being clearly proved. Fay v. State, 52 Tex. Cr. App. 185, 20 Tex. Ct. Rep. 857, 107 SW 55. Admission of incompetent evidence harmless, proof of guilt being clear without it. Smith v. State, 52 Tex. Cr. App. 357, 107 SW 353. Admission of evidence harmless, where verdict would have been demanded without it. Smith v. State, 3 Ga. App. 326, 59 SE 934. Where the competent evidence clearly justifies the finding, the admission of certain incompetent evidence will not be ground for reversal. Shields v. People, 132 Ill. App. 109. Admission of incompetent evidence harmless, where verdict is abundantly sustained by competent evidence. People v. Weston, 236 Ill. 104, 86 NE 188. Where verdict shows that jury did not act on evidence erroneously admitted, the error is harmless. Pyle v. State [Ga. App.] 62 SE 540. Opinion harmless where witness afterwards gave positive testimony to same fact. Tatum v. State [Ala.] 47 S 339. Permitting state to account for absence of witness. Thomas v. State [Ala.] 47 S 257. That witness was cousin of defendant and engaged to marry deceased. Stovall v. State, 53 Tex. Cr. App. 30, 108 SW 699. Proof that accused declined to make a statement. State v. Sharpless, 212 Mo. 176, 111 SW 69. Admission of proof that some one, not shown to be connected with defendant, had told witness not to testify against defendant. Strong v. State, 85 Ark. 536, 109 SW 536. Receiving conversation, some parts of which were incompetent. Wimberly v. State, 53 Tex. Cr. App. 11, 108 SW 384. Proof that witness had warrant for arrest of accused on charge on which he was convicted. Benge v. State, 52 Tex. Cr. App. 361, 107 SW 831. Proof by prosecuting witness that he had ordered whisky elsewhere than from defendant. Beckham v.

instructions [81] and submission of issues,[82] refusal of requested instruction,[83] con-

State [Tex. Cr. App.] 111 SW 1017. Admission of incompetent evidence to impeach immaterial testimony. Lord v. State [Tex. Cr. App.] 113 SW 762. Testimony that witness did not at once go to scene of homicide because she was afraid she might be killed. Cano v. State, 53 Tex. Cr. App. 609, 111 SW 406. Repetition on redirect examination of testimony drawn out by accused on the cross. People v. Corey [Cal. App.] 97 P 907. Parol proof of contents of telegrams. Harper v. State, 129 Ga. 770, 59 SE 792. Answers to improper questions, not containing any evidence. People v. Maughs [Cal. App.] 96 P 407. Error in admitting incompetent testimony must be prejudicial to constitute cause for reversal. Jones v. Com., 32 Ky. L. R. 598, 106 SW 802. Admission of evidence harmless, unless it strengthens the state's case. Tinsley v. State, 52 Tex. Cr. App. 91, 20 Tex. Ct. Rep. 356, 106 SW 347. Admission of immaterial evidence harmless, accused having received minimum fine. Coleman v. State, 53 Tex. Cr. App. 578, 111 SW 1011. Admission of evidence of another prior crime harmless, where defendant referred to it in voluntary statement which was admitted without objection. State v. Speyer, 207 Mo. 540, 106 SW 505. To warrant reversal for error in admitting evidence, the evidence must be important for defendant in view of the whole case as presented. Sims v. Com., 32 Ky. L. R. 443, 106 SW 214. In prosecution for killing dog, evidence that dog was worth $100 was harmless, where only $10 fine could be imposed. Henderson v. State, 53 Tex. Cr. App. 533, 111 SW 736. Cross-examination harmless in view of negative answers. Southworth v. State, 52 Tex. Cr. App. 532, 109 SW 133. Introduction of evidence by state harmless, accused having offered complete record of same matter. Dobbs v. State [Tex. Cr. App.] 113 SW 921. Admission of accused's statement harmless, if error, when made directly after arrest by officers who took him in the act of committing the crime, about which there was no question. People v. Owen [Mich.] 15 Det. Leg. N. 881, 118 NW 590. Admission of penitentiary record without identifying accused as convict harmless, where he admitted prior convictions of an offense. State v. Baldwin [Mo.] 113 SW 1123. Objectionable question, not shown to have been answered, not prejudicial, other similar questions being answered positively in negative. Gillotti v. State, 135 Wis. 634, 116 NW 252. Minor and immaterial errors in admission of testimony. Ray v. State [Ga. App.] 60 SE 816. Admission of testimony on cross-examination not prejudicial. State v. Zeilman [N. J. Law] 68 A 468. Harmless error to allow proof of facts already shown by defendant on cross-examination of prosecutrix. Younger v. State [Neb.] 114 NW 170. Admission of testimony pertinent to a count not prejudicial, when count was subsequently withdrawn and evidence was also admissible under second count. State v. Mitton, 37 Mont. 366, 96 P 926. Financial condition of accused being in issue and he having admitted his insolvency at a certain time, admission of a circular letter written by his attorney showing his condition was not prejudicial. People v. Andre [Mich.] 15 Det. Leg. N. 503, 117 NW 55. Admission of evidence of attempt to settle prosecution harmless, where evidence conclusively showed that defendant did not authorize the acts shown. People v. Ryder, 151 Mich. 187, 14 Det. Leg. N. 912, 114 NW 1021. The admission of former testimony of a witness for the purpose of impeaching him is harmless, where it is not contradicted. Barnard v. U. S. [C. C. A.] 162 F 618. Asking of improper questions, not persisted in after objection, and admission of irrelevant testimony, not prejudicial in view of admitted facts and verdict. People v. Campbell, 234 Ill. 391, 84 NE 1035. Admission of evidence harmless, where court made finding contrary to it. State v. Howell, 80 Conn. 668, 69 A 1057. Objection that testimony of expert to handwriting in letter that it was insufficient, disregarded where letter was plainly spurious and verdict was abundantly supported without expert's testimony. People v. Strollo, 191 N. Y. 42, 83 NE 573.

**79.** Introduction of evidence in rebuttal, instead of in chief. Chapman v. Com., 33 Ky. L. R. 965, 112 SW 567.

**80.** Cross-examination harmless, answers not being prejudicial to defendant. Earles v. State, 52 Tex. Cr. App. 140, 20 Tex. Ct. Rep. 522, 106 SW 138. Where defendant had benefit of all testimony proper to be elicited by questions on cross-examination, particular erroneous rulings on questions were harmless. Thomas v. State [Ala.] 46 S 771. Admission of hearsay on cross-examination. Blue v. State, 52 Tex. Cr. App. 324, 20 Tex. Ct. Rep. 841, 106 SW 1157.

**81.** Erroneous instruction is not ground for reversal if not prejudicial to accused. Eacock v. State, 169 Ind. 488, 82 NE 1039. Judgment otherwise free from error will not be reversed because instructions are too long. People v. Buettner, 233 Ill. 272, 84 NE 218. Errors in charge are harmless, if accused is convicted of a lower offense than that to which the charge refers, or if the evidence shows guilt conclusively and the minimum punishment is imposed. Pannell v. State [Tex. Cr. App.] 113 SW 536. Error in charge on less degree of crime than that set up in indictment and shown by evidence is harmless, where jury convicted of such less degree. La Moyne v. State, 53 Tex. Cr. App. 221, 111 SW 950. Instructions relating to offense of assault to murder harmless, conviction being of assault and battery. Ward v. State [Ala.] 45 S 221. Refusal to instruct also cured by verdict. Id. Instructions relating to murder harmless, accused having been convicted of manslaughter. State v. Owens, 79 S. C. 125, 60 SE 305; Marsh v. State [Tex. Cr. App.] 112 SW 320. Error in instruction on malice (homicide case) harmless, defendant being convicted of manslaughter. State v. Henderson [S. C.] 60 SE 314. Error in charge on first degree murder harmless, accused having been convicted of murder in second degree. People v. Besold [Cal.] 97 P 871. Erroneous charge on manslaughter harmless, where state's evidence showed murder and accused's defense was self-defense. Jirou v. State, 53 Tex. Cr. App. 18, 108 SW 655. Conviction being for manslaughter, errors in charge on murder will not be reviewed. High v. State [Tex. Cr. App.] 112 SW 939. Limiting effect of

viction of lower degree of crime than evidence warrants,[84] and to various other rulings,[85] errors,[86] and omissions[87] occuring at the trial.

state's evidence not prejudicial to accused. Watson v. State [Ala.] 46 S 232. Instruction erroneous in defining public place harmless, where evidence showed without conflict that place in question was a "public" one. Tatum v. State [Ala.] 47 S 339. Charge on circumstantial evidence not prejudicial error, though not required. Conway v. State, 53 Tex. Cr. App. 216, 108 SW 1185. Instruction invading jury's province, harmless, where only commonplace matters were covered. People v. Corey [Cal. App.] 97 P 907. Instruction, that "it is for counsel to argue the case as to counsel may seem proper" but that facts were for jury, held not prejudicial when the record did not show any improper argument of counsel which court could be said to have approved. People v. Zajicek, 233 Ill. 198, 84 NE 249. Error in instructions harmless when issue was clear and jury could not have been misled. Kennedy v. Com., 32 Ky. L. R. 1381, 108 SW 891. Instruction assuming undisputed fact, harmless. Merrinweather v. State, 52 Tex. Cr. App. 410, 108 SW 661. Erroneous instructions harmless, when evidence left no reasonable doubt of defendant's guilt. State v. Vickers, 209 Mo. 12, 106 SW 999. Error in instruction on embezzlement harmless, where accused was convicted of larceny. State v. Soper, 207 Mo. 502, 106 SW 3. Error in charge which, in view of proof, could not have affected result. Byrd v. State, 53 Tex. Cr. App. 507, 111 SW 149. Charge on corroboration of accomplices, requiring too low a degree of proof, harmless, where there was no evidence that any witness was an accomplice. Greathouse v. State, 53 Tex. Cr. App. 218, 109 SW 1165. Erroneous instruction harmless, where verdict shows jury could not have been affected by it. Tinsley v. State [Ga. App.] 62 SE 93. Error in charge on reasonable doubt held harmless, in view of evidence. Johnson v. State [Ga. App.] 60 SE 813. Error in instruction which could not have mislead jury or prejudiced defendant held not cause for reversal. People v. Horton [Cal. App.] 93 P 382. Error in instruction, allowing jury to consider on question of intent evidence incompetent for that purpose, harmless where jury, by verdict, found a lower offense eliminating the intent. People v. Hoffman [Mich.] 15 Det. Leg. N. 646, 117 NW 568. Technical error in instruction. State v. McGowan, 36 Mont. 422, 93 P 552. Though instructions be in part technically incorrect, reversal will result only if accused is prejudiced. People v. Casey, 231 Ill. 261, 83 NE 278. Instruction not applicable to case not prejudicial, where verdict shows that it did not affect result. People v. Horchler, 231 Ill. 566, 83 NE 428. Rulings and instructions directed to first count not error when accused was convicted under a different one. State v. Sharplese, 212 Mo. 176, 111 SW 69. Omission of charge on effect and weight of evidence of good character harmless. Hagood v. State [Ga. App.] 62 SE 641.

82. Failure to state special pleas of former jeopardy and former acquittal to jury harmless, no evidence in support thereof being given. People v. Maughs [Cal. App.] 96 P 407. Instruction as to punishment, in case defendants were found to be under 18, harmless, matter being for court alone. State v. McGee, 212 Mo. 95, 110 SW 699. Error in not requiring finding of particular fact, harmless, where accused practically admitted the fact and no issue was raised thereon. State v. Baldwin [Mo.] 113 SW 1123. Refusal to instruct on higher crimes harmless where jury found verdict of lower offense. People v. Izlar [Cal. App.] 97 P 685. Instruction as to form of verdict which should be rendered in event of finding of guilty, and form of verdict itself, in prosecution for assault, in omitting element of "no considerable provocation appearing," are not fatally defective where sole defense interposed was alibi and no contention that defendant acted under provocation was made. Lemen v. People, 133 Ill. App. 295. Failure of court to instruct jury to return verdict for territory on pleas of former jeopardy and former acquittal, not prejudicial to accused, court having instructed jury only on issue of guilt of charge in indictment and withdrawn other pleas which were not supported by evidence. Storm v. Ter. [Ariz.] 94 P 1099. Error in withdrawing from jury all degrees of homicide except murder in the first degree harmless, where evidence would not have warranted conviction of anything less than murder in second degree, and punishment imposed was for that crime. Wickham v. People, 41 Colo. 345, 93 P 478.

83. Failure to give requested instruction not ground for reversal, when court gave an instruction more favorable to accused than the one requested. Johnson v. State, 130 Ga. 27, 60 SE 160. Refusal of charges requiring acquittal of certain offenses, harmless, conviction being of lower offense. Pittman v. State [Ala.] 45 S 245.

84. Defendant, convicted of manslaughter, cannot complain that evidence warranted conviction of murder. People v. Borrego [Cal. App.] 95 P 381. Accused cannot complain of verdict of manslaughter when there was evidence tending to show murder. State v. Henderson [S. C.] 60 SE 314. One convicted of manslaughter cannot complain that verdict should have been murder or acquittal. State v. Owens, 79 S. C. 125, 60 SE 305. Submission of manslaughter, and conviction thereof, harmless, where evidence shows that accused is guilty of murder, or innocent. High v. State [Tex. Cr. App.] 112 SW 939.

85. That court assigned wrong reason for admitting testimony, immaterial, it being competent. Morse v. Com., 33 Ky. L. R. 831, 894, 111 SW 714. Overruling objections to questions, harmless, questions not being answered. Morrison v. State [Ala.] 46 S 646.

86. Error by court and counsel in trying a misdemeanor case as though it were a felony is prima facie, harmless, where the error is discovered before sentence. Ayers v. State, 3 Ga. App. 305, 59 SE 924. Admonition to witness, harmless, where he did not testify to anything material. Ehrlick v. Com., 33 Ky. L. R. 979, 112 SW 565.

87. Failure to call names of jurors on return of verdict not prejudicial, record re-

*Cure of error.*[See 10 C. L. 204]—Error in admitting evidence may be cured by withdrawing it or striking it out and instructing the jury to disregard it.[88] Error in the exclusion of evidence is cured by subsequently admitting it [89] or offering to admit it,[90] or by proof of the same facts by other evidence.[91] An erroneous instruction may be cured by one subsequently given [92] or by withdrawing it and instructing the jury to disregard it wholly.[93] Curing of error in the conduct of the court or in the conduct and arguments of counsel has been already discussed.[94]

§ 16. *Stay of proceedings after conviction.*[See 10 C. L. 209]—The perfection of an appeal stays proceedings below.[95] A certificate of doubt, to stay execution of judgment, should be granted when, in the opinion of the trial court, there are questions proper to be reviewed by the appellate division,[96] regardless of the probability of reversal or affirmance.[97] After notice of appeal has been given, the trial court has no further jurisdiction, in Texas, except to substitute lost or destroyed portions of the record.[98] It therefore has no power to pass sentence.[99] Granting writ of error by

citing all were present. State v. De Lea, 36 Mont. 531, 93 P 814. Failure of prosecuting attorney to read indictment and defendant's plea to the jury, not prejudicial, where court stated the plea and presumption was that indictment was read by clerk. State v. Ralston [Iowa] 116 NW 1058.

88. Admission of evidence cured by charge. Stacy v. State, 53 Tex. Cr. App. 461, 110 SW 901. Admission of testimony harmless where court ordered it stricken at once and cautioned jury to disregard it. State v. Dickerson, 77 Ohio St. 34, 82 NE 969. Reception of incompetent evidence not reversible error where it is afterwards stricken and jury instructed to disregard it. State v. Towers [Minn.] 118 NW 361; Vought v. State [Wis.] 114 NW 518. Admission of evidence harmless where court instructed that it could not be considered as proof of guilt. Pride v. State, 52 Tex. Cr. App. 449, 108 SW 675. Admission of incompetent evidence harmless where court sustained objection and instructed jury to disregard it. State v. Soper, 207 Mo. 502, 106 SW 3. Admission of hearsay, volunteered by witness, which jury is instructed to disregard. State v. Gebbia [La.] 47 S 32. Held not prejudicial error to exclude confession in toto after portion had been read to jury, trace of intimidation in procurement thereof did not appear until portion had gone to jury, where defendant did not secure hearing and ruling on admissibility from court before any was read to jury, and where objections were heeded as soon as made, and jury was instructed to disregard portion read. Shields v. People, 132 Ill. App. 109. Where court ordered stricken testimony relating to another offense and directed jury to disregard it, failure to caution jury a second time, after ordering similar testimony stricken immediately after the first ruling, was not prejudicial error, no request for such cautionary instruction being made. State v. Whitman, 103 Minn. 92, 114 NW 363.

89. Poe v. State [Ala.] 46 S 521; McCall v. State [Fla.] 46 S 321; People v. Veltri, 111 NYS 251; Proctor v. State [Tex. Cr. App.] 112 SW 770. Error in refusing to admit testimony cured by reversal of ruling and admission of testimony immediately. People v. Wycoff, 150 Mich. 449, 14 Det. Leg. N. 732, 114 NW 242.

90. Exclusion of evidence harmless where accused was given opportunity to offer same evidence subsequently. People v. Huntington [Cal. App.] 97 P 760. Technical error in excluding evidence harmless where court changed its ruling and defendant did not again offer the evidence. State v. Williams [Kan.] 94 P 160.

91. Error in excluding evidence cured where same facts were proved by other evidence. People v. Izlar [Cal. App.] 97 P 685; Ludwig v. State [Ind.] 85 NE 345; Stamper v. Com., 33 Ky. L. R. 580, 110 SW 389; People v. Kirk, 151 Mich. 253, 14 Det. Leg. N. 927, 114 NW 1023; Lohrey v. State [Miss.] 45 S 145; State v. McGowan, 36 Mont. 422, 93 P 552; State v. Harmon, 79 S. C. 80, 60 SE 230; Jay v. State, 52 Tex. Cr. App. 567, 109 SW 131. Facts sought to be shown otherwise conclusively shown. People v. Ryder, 151 Mich. 187, 14 Det. Leg. N. 912, 114 NW 1021. Where accused is permitted to testify as to his conversations with fellow conspirators, and to facts inducing him to enter into agreement and motives for so doing, after refusal of court to permit him to testify as to what he thought when he entered alleged unlawful agreement, there is no merit in assignment based on such refusal. Crawford v. U. S., 30 App. D. C. 1. Where letter written by witness for prosecution to accused, charging him with having abstracted certain correspondence and having made erasure in index of letter-press book, is erroneously admitted in evidence without objection by accused, subsequent motion to strike it out is addressed to sound discretion of trial court, and any error committed in exclusion of reply of accused to such letter, explaining action, is cured by defendant thereafter offering same explanation on stand. Id.

92. Sullivan v. State [Miss.] 46 S 248; State v. Denny [N. D.] 117 NW 869; State v. Deal [Or.] 98 P 165. Erroneous instruction cured by subsequent charge and by evidence. People v. Garnett [Cal. App.] 98 App. 247.

93. State v. Hood, 63 W. Va. 182, 59 SE 971.

94. See ante, §§ 10B, 10A.

95. Justice has no power to issue commitment after an appeal has been taken and proper bond given. Ray v. Dodd [Mo. App.] 112 SW 2.

96, 97. People v. Flaherty, 110 NYS 154.

98. Hinman v. State [Tex. Cr. App.] 113 SW 280. Term of court adjourned without

state court for review of habeas corpus proceedings by federal court does not deprive state court of power to set aside its order admitting prisoner to bail before bail has been accepted thereunder.[1]

§ 17. *Appeal and review. A. Right of review.*[See 10 C. L. 210]—The right of appeal is purely statutory,[2] and no appeal can be taken in the absence of a statute authorizing it.[3] Usually the state of government has no right to an appeal or writ of error [4] for the purpose of reversing the cause on the merits, but a right to a review of purely legal questions is conferred by statute in many jurisdictions [5] in order that criminal procedure may be settled and uniform.[6] The state may appeal only in cases provided for by statute,[7] and upon a review of questions of law judgment operating as

defendant giving recognizance, and notice of appeal had been given. Held, jurisdiction of appellate court had attached, and trial court had no power to accept recognizance or do any act except supply missing papers. Ex parte Bambaugh [Tex. Cr. App.] 20 Tex. Ct. Rep. 405, 106 SW 362.

99. Judgment after appeal taken, entered nunc pro tunc, is void. Hinman v. State [Tex. Cr. App.] 113 SW 280.

1. Ex parte Collins, 151 F 358.

2. In re Montgomery, 110 NYS 793. An appeal from a judgment of conviction is not a matter of right, nor is it a necessary element of due process of law. Yeates v. Roberson [Ga. App.] 62 SE 104.

3. Hebberd v. Loeb, 109 NYS 1116. Const. art. 85 makes liability to imprisonment at labor, and not actual sentence, test of appealability in a prosecution under a statute. State v. Davis, 121 La. 623, 46 S 673. Sentence to imprisonment in penitentiary is in fact, though not in words, sentence to "imprisonment at hard labor." Id. Dismissal of misdemeanor case by justice is final disposition of case. Pen. Code, § 1387. Donati v. Rigetti [Cal. App.] 97 P 1128. Municipality has no right of appeal from judgment discharging defendant in prosecution for violation of ordinance, charter giving no such right. Code 1896, § 2696, confers right on defendant only. Town of Brighton v. Miles [Ala.] 45 S 160. City of Bessemer has no statutory right to appeal from judgments in favor of defendants charged with violation of ordinances. City of Bessemer v. Smith [Ala.] 46 S 467. Where accused has been acquitted of violation of an ordinance of city of St. Paul, city cannot appeal to have constitutionality of ordinance determined. City of St. Paul v. Stamm [Minn.] 118 NW 154. Defendant prosecuted before a justice of the peace by complaint and warrant for violation of village ordinance, the acts charged being misdemeanors under state laws, has not right of appeal from judgment of guilty under Civ. Code § 1006. Ruffling v. State [Neb.] 114 NW 533. In such case the right of appeal under Cr. Code § 324, applies pursuant to Comp. St. 1907, art. 1, c. 14, § 52. Id. On appeal to county court from inferior courts where fine imposed is not over $100, its decision is final and not appealable. Cramer v. State [Tex. Cr. App.] 111 SW 931.

4. A writ of error will not lie at the instance of the government in a criminal case. United States v. Baltimore, etc., R. Co. [C. C. A.] 159 F 33.

5. By recent statute, the United States is entitled to review by writ of error where motion to quash or demurrer is sustained. United States v. Corbett, 162 F 687. Act March 2, 1907 (34 Stat. 1246, c. 2564, U. S. Comp. St. Supp. 1907, p. 209), is constitutional although authorizing government to bring up case to supreme court from circuit court on direct writ of error where indictment has been quashed or set aside, or demurrer to indictment or any count thereof has been sustained on ground of invalidity or construction of statute upon which indictment was founded, while not allowing accused same privilege when demurrer is overruled. United States v. Bitty, 208 U. S. 393, 52 Law. Ed. 543. State may appeal when indictment is quashed or held bad on demurrer. State v. Labry, 120 La. 434, 45 S 382. State may appeal from order sustaining motion in arrest of judgment. Id. The state may appeal to determine the validity of the court's action in permitting accused to withdraw a plea of not guilty and enter a plea of guilty of a lower offense and in passing sentence on accused without any formal appearance of the district attorney. All these acts objected to by counsel retained to assist the state, in absence of regular district attorney. Id. Appeal of state from acquittal sustained for error of court in instructions. State v. Fisk [Ind.] 83 NE 995. The improper exclusion of evidence constitutes error of law upon which the state may reserve a question for appeal in case of acquittal. Whether statement of accused was admissible as confession, it being excluded by trial court. State v. Laughlin [Ind.] 84 NE 756. Appeal by state from order granting new trial after conviction of accused. State v. Barber [Idaho] 96 P 116. The attorney general of the state may, upon common-law authority, prosecute an appeal by the state in a case where such appeal is allowed by law. State v. Key [Miss.] 46 S 75.

6. In Iowa the state may appeal in order that errors in proceedings may be pointed out for guidance in future cases. State v. Gilbert [Iowa] 116 NW 142. Under Cr. Code Prac. § 337, appeal may be taken by state to review errors prejudicial to commonwealth in interest of correct and uniform administration of criminal law. Commonwealth v. Murphy, 33 Ky. L. R. 141, 109 SW 353. Appeal allowed state on exceptions by county attorney to instructions on burden of proof on insanity. Purpose not to change judgment, but to settle the rule of law to govern in the future and to obtain due and uniform administration of the criminal law. State v. Pressler, 16 Wyo. 214, 92 P 806.

7. State cannot appeal from judgment granting bail to defendants in murder case, on a continuance, after indictment, such

a bar to further prosecution cannot be reversed.[8] On such appeal the appellate court will only discuss and dispose of questions proper to be determined as precedents.[9] Questions of fact will not be reviewed.[10]

(§ 17) *B. The remedy for obtaining review.*[See 10 C. L. 210]—The statutory remedy by appeal or writ of error should be pursued where applicable,[11] and not certiorari,[12] prohibition[13] or habeas corpus.[14] Thus the writ of habeas corpus cannot be employed to correct errors,[15] but is available only where proceedings are void or the court is without jurisdiction.[16] An appeal is a statutory right and is a continuation of the original suit.[17] A writ of error is regarded as a new suit, and, at common law, was a writ of right.[18] In Wyoming pending constitutional questions may be reserved to the supreme court by the district court.[19] In Oklahoma where there is

appeal not being allowed by Code 1906, § 40. State v. Key [Miss.] 46 S 75. Under D. C. Code § 935 (31 Stat. 1341, c. 854), giving prosecution right to appeal and bill of exceptions in criminal cases, but providing that if error is found a verdict for defendant shall not be set aside, appeal from judgment discharging accused after verdict of acquittal based on exceptions taken during trial does not lie. United States v. Evans, 30 App. D. C. 58.

8. Judgment cannot be disturbed. Code § 5463. State v. Gilbert [Iowa] 116 NW 142. Though verdict in favor of defendant was found on appeal by state to be presumptively wrong owing to erroneous instructions, yet the judgment was affirmed by operation of law. State v. Cooper [Iowa] 116 NW 691. State may have review but judgment operating as bar cannot be reversed. Kirby's Dig. §§ 2602-2604, prescribe procedure. State v. Dulaney [Ark.] 112 SW 158. State may appeal, but where defendants may be punished if convicted, judgment of acquittal cannot be reversed. Kirby's Dig. §§ 2613, 2614, 2618, 5146. State v. Black [Ark.] 111 SW 993.

9. Code § 5463. State v. Gilbert [Iowa] 116 NW 142.

10. Instructed verdict for defendant not reviewable. State v. Gilbert [Iowa] 116 NW 142. State cannot except to finding by court that presumption of malice (homicide case) was rebutted. State v. Walker, 145 N. C. 567, 59 SE 878.

11. A writ of error is the only mode by which judgment of trial court in criminal case may be brought to appellate court for review. Statute has made no provision for appeal in criminal case. Griffith v. People, 133 Ill. App. 275. There being no right to appeal, the people are not bound to follow the case to the appellate court even to move for a dismissal. Appeal dismissed where state's attorney failed to appear by brief, argument or otherwise. Id. Under Laws 1907, c. 162, only judgments and sentences upon convictions for felonies and misdemeanors under the criminal code may be brought to supreme court by petition in error. All other cases, such as those for violating city ordinances, not constituting offenses against the state, must go up by appeal. Brandt v. State [Neb.] 115 NW 327.

12. Certiorari not proper where right of appeal existed. In re Goldsmith [Ark.] 113 SW 799.

13. Irregularities in drawing, summoning or impaneling grand jury cannot be reviewed through writ of prohibition, no question of jurisdiction of the person or subject-matter being involved. Zinn v. Barnes County Dist. Ct. [N. D.] 114 NW 475.

14. Decision of trial court on facts cannot be reviewed on habeas corpus. Ex parte Hornef [Cal.] 97 P 891. Writ of habeas corpus not proper to review question of former jeopardy. Yeates v. Roberson [Ga. App.] 62 SE 104. Writ of habeas corpus cannot be resorted to for purpose of discharging accused on plea of former jeopardy. Ex parte Johnson [Okl. Cr. App.] 97 P 1023.

15. Habeas corpus does not lie to review action of a court which has jurisdiction. Chappell v. State [Ala.] 47 S 329. Conviction cannot be reviewed by habeas corpus where court had jurisdiction of parties and subject-matter. Davis v. State [Ala.] 45 S 154. Habeas corpus refused where court had jurisdiction. Correctness of proceedings not examined. Ex parte McLaughlin, 210 Mo. 657, 109 SW 626. Where sentence was 5 years for each of two offenses, terms to run concurrently, and law (Okl.) required sentences to be cumulative in such cases, the error was one of procedure for which accused was not entitled to be freed on habeas corpus. Connella v. Haskell [C. C. A.] 158 F 285. Overruling of pleas and motions and demurrer on ground that no preliminary examination was had not reviewable on habeas corpus. Ex parte McLaughlin, 210 Mo. 657, 109 SW 626. An accused will not be released on habeas corpus because of insufficiency of complaint, if under any possible construction complaint states an offense. Ex parte Caldwell [Neb.] 118 NW 133; Ex parte Rhyn [Neb.] 118 NW 136. The conviction being valid, habeas corpus is not the remedy for relief from the illegal sentence. Ex parte Vitali [Mich.] 15 Det. Leg. N. 451, 116 NW 1066.

16. The writ of habeas corpus is available only when judgment is void. Ex parte Cox, 53 Tex. Cr. App. 240, 109 SW 369. Collateral attack on judgment by habeas corpus can succeed only if judgment is void. Tullis v. Shaw, 169 Ind. 622, 83 NE 376. As where sentence is for felony, but conviction is of misdemeanor. Ex parte Burden [Miss.] 45 S 1. If a sentence is absolutely void, defendant is entitled to relief by habeas corpus. If sentence is merely excessive, his only remedy is by appeal. Id.

17, 18. State v. Preston [Nev.] 97 P 388.

19. Questions involving the right of accused to a speedy trial involve constitutional question, and can be reserved to supreme court by order of district court under Sess.

a conviction requiring judgment of death, a statement of the conviction, judgment, and testimony taken on the trial must be at once transmitted to the governor, who may require the opinion of the justices of the supreme court upon the statement.[20] The supreme court then has power to review the case on the statement and render its opinion but has no power to affirm or reverse the judgment.[21]

(§ 17) *C. Adjudications which may be reviewed.* See 10 C. L. 211—Appeal or error ordinarily lies only from final judgment,[22] and not from intermediate orders [23] or orders after judgment [24] reviewable on appeal from the judgment,[25] though there are statutory exceptions to this rule.[26] Usually, the judgment must have been entered on the record [27] in the statutory form,[28] but entry of judgment is not essential in some jurisdictions.[29]

Laws 1903, c. 72. State v. Keefe [Wyo.] 98 P 122.

**20.** Wilson's Rev. & Ann. St. 1903, §§ 5588, 5589. State v. Johnson [Okl.] 96 P 26.

**21.** State v. Johnson [Okl.] 96 P 26.

**22.** In the absence of a statute authorizing it, no appeal can be taken from a judgment or order which is not a final disposition of the matter in controversy. Commonwealth v. Reinsel, 34 Pa. Super. Ct. 265. Appeal is authorized only from judgment of conviction, under Cr. Code 1896, § 4313. Vick v. State [Ala.] 46 S 566. There is no right of appeal from a conviction by court of special sessions on which sentence is suspended without judgment. People v. Flaherty, 110 NYS 699. Court of appeals cannot affirm or reverse unless sentence has been passed. Robinson v. State [Tex. Cr. App.] 113 SW 763. A sentence is the final judgment, without which an appeal cannot be consummated except in capital cases. Hinman v. State [Tex. Cr. App.] 113 SW 280. An order requiring the giving of a bond to keep the peace is not appealable. Not final, and not given by statute. Lowe v. Com., 33 Ky. L. R. 1078, 112 SW 647. In proceeding by state for destruction of gambling devices seized under search warrant, an order of court overruling motion to destroy, and directing property to remain in possession of sheriff until ordered destroyed in due course of law, and directing money taken from slot machines to be paid to defendant, is not final or appealable, there being no controversy as to the money. State v. Derry [Ind.] 85 NE 765.

**23.** Ruling on motion to quash indictment is not reviewable. Cr. Code Prac. § 281. Ehrlick v. Com., 33 Ky. L. R. 979, 112 SW 565. No appeal from an order denying motion to require stenographer of grand jury to furnish copy of evidence taken before them on which indictment was based. In re Montgomery, 110 NYS 793. Order denying continuance not appealable. People v. Besold [Cal.] 97 P 871. No appeal lies from order granting new trial, made before sentence, since the sentence is the final judgment, and supreme court can review only appeals after final judgment. State v. Byars, 79 S. C. 174, 60 SE 448.

**24.** Denial of a motion in arrest of judgment is not appealable. People v. Mullen [Cal. App.] 94 P 867; People v. Oliner [Cal. App.] 95 P 172; People v. Amer [Cal. App.] 96 P 401.

**25.** An order refusing to allow withdrawal of plea of guilty is not appealable, but is reviewable on appeal from judgment. People v. Dabner, 153 Cal. 398, 95 P 880. Order denying motion to set aside indictment is not appealable but is reviewable on appeal from judgment. People v. Williams [Cal. App.] 97 P 684; People v. Izlar [Cal. App.] 97 P 685. Order denying leave to interpose additional plea of former jeopardy is not appealable, being an intermediate order reviewable on appeal from judgment on conviction. People v. Wendel, 128 App. Div. 437, 112 NYS 837. Court of appeals may review ruling of trial court on admissibility of evidence in criminal case. Dick v. State, 107 Md. 11, 68 A 576.

**26.** In New York a denial of a motion for new trial in court of special sessions upon the ground of newly-discovered evidence is appealable as an intermediate order, and papers and proceedings thereon must be attached to judgment roll, and may be considered on appeal from judgment. Hebberd v. Loeb, 109 NYS 1116. Prejudicial misconduct reviewable on appeal from order denying new trial. State v. Kaufmann [S. D.] 118 NW 337. An order denying a transcript of the evidence at the expense of the county is appealable under Iowa statute allowing pauper's right to transcript in criminal cases at expense of county. State v. Shaffer, 137 Iowa, 93, 114 NW 540.

**27.** Appeal, premature, no final judgment on verdict being shown by the record. State v. Hodges, 207 Mo. 517, 106 SW 51.

**28.** Appeal dismissed where judgment did not conform to statutory requirements for judgment's imposing fine. Trayler v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 348, 106 SW 142. Where entry of judgment was not in statutory form, appellate court had no jurisdiction. Caskey v. State [Tex. Cr. App.] 108 SW 665.

**29.** Under Pen. Code, §§ 1239, 1240, an appeal may be taken before the judgment or order appealed from is entered. People v. Schmitz [Cal. App.] 94 P 407. In Wisconsin the fact that no judgment has been entered is not alone ground for refusal to consider writ of error, since court has power to amend writ to permit review of proper orders. Lovesee v. State [Wis.] 118 NW 553. Under St. 1898, § 4719, defendant may present rulings on trial to judge below, and on denial of relief, may have writ of error, though final judgment has not been entered. Id. But if a motion is made for new trial upon newly-discovered evidence after the affirmance of the judgment, and denied, no appeal will lie therefrom. Hebberd v. Loeb,

(§ 17) *D. Courts of review and their jurisdiction.*[See 10 C. L. 212]—Appellate courts have supervising and controlling power over lower courts in criminal as well as civil cases.[30] This supervisory power, as distinguished from the strictly revisory power, is elsewhere discussed.[31] Appellate jurisdiction depends upon the jurisdiction of the trial court.[32] A judgment void for want of jurisdiction will not support on appeal.[33] In Texas the court of appeals has no power to amend the judgment below so as to make the sentence cumulative.[34] The jurisdiction of the federal supreme court depends upon the existence of a constitutional question at the time when the writ of error was sued out.[35] The question must have been raised in the lower court.[36] A federal question cannot be brought into the record by denial of a motion for rehearing by supreme court of Philippine Islands so as to sustain a writ of error to the United States supreme court.[37] The court of appeals of Georgia is not authorized or required to certify any question to the supreme court on the ground that it is a constitutional question, unless it is specifically raised in the record necessary to a determination of the case.[38] Whether a cause should be dismissed or sent to the supreme court is to be decided by the court of appeals.[39] Questions settled by decisions of the supreme court will not be certified, especially where no review of these decisions is requested.[40] The court of appeals has power to grant a supersedeas in proper cases.[41] The supreme court of South Carolina now holds that it has no jurisdiction to entertain a motion to suspend an appeal in order that a motion for new trial may be made in the trial court.[42] The circuit court alone has jurisdiction

109 NYS 1116. But where application is motion for new trial upon minutes of the court, on the ground that verdict is contrary to evidence, etc., this comes under § 4724, and writ of error lies only after final judgment. Id.

**30.** State v. Helms [Wis.] 118 NW 158.

**31.** See Certiorari, 11 C. L. 591; Mandamus, 10 C. L. 662; Prohibition, Writ of, 10 C. L. 1277.

**32.** Appeal dismissed, court below being without jurisdiction (court held at term not authorized by law). Hodo v. State [Ala.] 47 S 134. Justice court not having power to remove defendant from office, in addition to imposing fine, circuit court could not, on appeal, impose such fine. Moore v. State [Miss.] 45 S 866.

**33.** Courts below not having jurisdiction of offense, there was nothing to support an appeal. Martin v. State [Ala.] 47 S 104. Judgment void because rendered at unauthorized term of court will not support an appeal. Gordon v. State [Ala.] 45 S 901.

**34.** Defendant had been convicted of two offenses and clerk failed to make second sentence cumulative. Killman v. State, 53 Tex. Cr. App. 512, 112 SW 90.

**35.** Writ of error bringing up question of congressman's constitutional privilege from arrest will not be dismissed because the congress of which he was member had ceased to exist. Williamson v. U. S., 207 U. S. 425, 52 Law. Ed. 278. Contention that constitutional privilege from arrest and punishment extends to criminal offense while congress is not in session is not frivolous so as to be ground for dismissing writ of error. Id.

**36.** Where most that could be gathered from record was that plaintiff in error contended complaint was bad by rules of criminal pleading, it is insufficient. Paraiso v. U. S., 207 U. S. 368, 52 Law. Ed. 249. Conviction under P. I. Pen. Code, art 300, subds. 4, 7, is not reviewable by United States supreme court under such circumstances. Id.

**37.** Paraiso v. U. S., 207 U. S. 368, 52 Law. Ed. 249.

**38.** Allegation in demurrer that statute on which prosecution is based is unconstitutional, not sufficiently specific because grounds not stated. Tooke v. State [Ga. App.] 61 SE 917. Not necessary to certify constitutionality of Acts 1896, p. 44, § 3, providing for affirmance of judgment when judges are equally divided, since this result would follow even though no such statute existed. Yeates v. Roberson [Ga. App.] 62 SE 104.

**39.** Where a record and bill of exceptions is transmitted to the court of appeals and that court is of the opinion that it is a case of which the supreme court has jurisdiction, it may direct that such record be transmitted to the supreme court for determination of such question, and if it is decided that the supreme court has jurisdiction, the case will be retained and entered on the docket for hearing. Dawson v. State, 130 Ga. 127, 60 SE 315.

**40.** Young v. State [Ga. App.] 62 SE 558.

**41.** When necessary to carry out its review of judgment of inferior court, or when justice requires it. Yeates v. Roberson [Ga. App.] 62 SE 104. Supersedeas refused where it appeared that appeal was taken merely for delay, no meritorious question being raised. Id.

**42.** State v. Lee [S. C.] 61 SE 657, overruling former decisions to contrary.

**Contra:** Showing was that juror had said he had determined to convict defendant, before he heard any evidence; he denied it; proper to allow court to pass upon question. State v. Foster [S. C.] 61 SE 564.

to entertain such motion.[43] In Missouri, jurisdiction to review misdemeanor cases is vested in the courts of appeal,[44] and the supreme court has jurisdiction in such cases only when the constitutionality of a statute is raised.[45] The supreme court has exclusive jurisdiction of appeals in felony cases.[46]

(§ 17) *E. Procedure to bring up the cause.* See 10 C. L. 218—The statutes regulating appeals must be substantially complied with; otherwise the appellate court acquires no jurisdiction.[47] A proper notice of appeal,[48] definitely describing and identifying the judgment or order appealed from,[49] must be duly filed and served.[50]

*A recognizance on appeal* See 10 C. L. 215 is required in misdemeanor cases [51] in Texas. The recognizance must correctly recite the offense of which appellant was convicted [52] and the punishment imposed by the lower court.[53] Where several persons appeal, a separate recognizance must be given by each.[54]

(§ 17) *F. Perpetuation of proceedings in the "record."* See 10 C. L. 215—The record proper must show an appeal duly taken [55] and perfected,[56] and other matters

**43.** State v. Lee [S. C.] 61 SE 657.

**44.** Filing demurrer on ground that information does not inform accused of nature of charge against him does not give supreme court jurisdiction. State v. Christopher, 212 Mo. 244, 110 SW 697.

**45.** Constitutional question not raised by demurrer which did not raise specific point. State v. Christopher, 212 Mo. 244, 110 SW 697.

**46.** Appeal from conviction of assault with intent to kill (a felony) is within exclusive jurisdiction of supreme court. State v. McMahill [Mo.] 113 SW 1071.

**47.** State v. Preston [Nev.] 95 P 918.

**48.** Under Cr. Prac. Act, § 474, written notice of defendant's "intention" to appeal is defective; notice should be that he does appeal. State v. Preston [Nev.] 95 P 918.

**49.** State v. Preston [Nev.] 95 P 918. Where separate verdicts and judgments were entered against two defendants, a notice that they appealed from "the judgment," etc., was fatally defective as failing to show judgment appealed from, or that each appealed. Id.

**50.** Supreme court without jurisdiction, no notice of appeal having been filed. State v. Davis [Iowa] 118 NW 318. Where record did not show notice of appeal, and clerk certified none had been entered, appeal dismissed. Teague v. State, 53 Tex. Cr. App. 503, 111 SW 405. Filing and service on county clerk and district attorney of proper notice of appeal (as required by Cr. Prac. Act, §§ 474, 475) are necessary in order to give supreme court jurisdiction. State v. Preston [Nev.] 95 P 918. Where notice of appeal is served and filed about same time of same day, it is immaterial which is done first, under Pen. Code, § 1240. People v. Schmitz [Cal. App.] 94 P 407. No jurisdiction where record failed to show **service of notice** of appeal. People v. Finerty [Cal. App.] 97 P 73. District attorney cannot set up want of proper service after admission of "due service." People v. Schmitz [Cal. App.] 94 P 407. In case of appeal from judgment under conviction for violating city ordinance, notice must be given attorney for city, who appeared in case below, under supreme court rules 33 to 37. Brandt v. State [Neb.] 115 NW 327. Under Rev. St. 1887, § 8045, appeal in criminal case is effected by filing with clerk of court in which order or judgment appealed from is filed or entered, a notice stating the appeal from the same, and serving a copy thereof upon the attorney for the adverse party. State v. Squires [Idaho] 97 P 411. The attorney general becomes attorney for the state when a statutory appeal it taken and he has authority to act for the state. Id. Civil Code sections relating to appeals do not apply to criminal appeals, and **oral notice** of appeal in open court is not sufficient. Notice of appeal must be served on clerk of court and district attorney. Cr. Code §§ 1468, 1469. State v. Berger [Or.] 94 P 181.

**51.** Recognizance available only in such cases. Williams v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 880, 20 Tex. Ct. Rep. 517, 105 SW 1024.

**52.** Words "violating local option law" in a bond in a criminal proceeding do not describe any offense and there can be no recovery thereon. Stephens v. State, 50 Tex. Cr. App. 531, 17 Tex. Ct. Rep. 788, 98 SW 859. A recognizance which recites the conviction of a felony will not support an appeal, since recognizance is available only in misdemeanor cases. Williams v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 880, 20 Tex. Ct. Rep. 517, 105 SW 1024. Recital of assault with intent to murder, on conviction of an aggravated asault; recognizance bad. Id.

**53.** Where judgment assessed punishment as fine and imprisonment, recognizance reciting only imprisonment was insufficient. Blackman v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 838, 106 SW 1155. Where punishment was fine of $400 and 4 months confinement, and recognizance recited fine of $50 and 90 days imprisonment, variance was fatal. Davis v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 853, 106 SW 1169.

**54.** Yates v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 850, 106 SW 1166.

**55.** Court without jurisdiction when case was submitted on short transcript which failed to show that an appeal had been taken. State v. Green [Iowa] 115 NW 492. Cause submitted on transcript of indictment and judgment entries; nothing to show appeal had been taken; cause stricken. State v. Jackson [Iowa] 118 NW 439.

**56.** No jurisdiction where record failed to show service of notice of appeal. People v.

forming a part of the record proper should appear thereby [57] and cannot be brought up by bill of exceptions.[58] Matters not a part of the record proper should be brought up by bill of exceptions.[59] Petitions signed by jurors and citizens asking judge to set aside verdict should not be made part of record on appeal.[60] In some jurisdictions the record proper must show filing of the bill of exceptions.[61]

*Form, transmission and filing of transcript or statement of facts.* See 10 C. L. 216 The transcript or statement of facts must be in the form required by law or the rules of the court,[62] must be properly verified,[63] must be filed within the time prescribed by law or the court's order,[64] and must be served on the adverse party when this is

Finerty [Cal. App.] 97 P 73. Record failed to show notice of appeal given or entered; appeal dismissed. Teague v. State, 53 Tex. Cr. App. 503, 111 SW 405.

**57.** Case being submitted on short transcript showing only indictment and notice of appeal, there being nothing to show judgment against defendant, appeal was dismissed. State v. Westerman [Iowa] 116 NW 149. Transcript of docket of justice of peace on summary prosecution properly forms part of record on appeal. Ex parte Graye, 36 Mont. 394, 93 P 166.

**58.** Motion in arrest of judgment, shown only by bill of exceptions, not reviewable. Welch v. State [Ala.] 46 S 856.

**59.** Motion to dismiss information, and minutes relating thereto, are not part of judgment roll, should be brought into record by bill of exceptions. People v. Russo [Cal. App.] 97 P 700. All matters occurring in open court in the progress of a case should be brought into the record by bill or bills of exception. Alleged improper remarks of counsel must be so shown. State v. Young, 77 Ohio St. 529, 83 NE 898. Such matters cannot be brought up for review by affidavit. Id.

**60.** State v. Arnold, 146 N. C. 602, 60 SE 504.

**61.** Purported bill of exceptions no part of record where record proper did not show that it was filed with clerk after being signed by judge. Williams v. State [Ind.] 85 NE 350.

**62.** Statement of facts consisting wholly of questions and answers cannot be considered in absence of anything in record to show judge considered it necessary to have it in such form. Essary v. State, 53 Tex. Cr. App. 596, 111 SW 927. Statement of facts containing evidence in form of questions and answers not considered, there being nothing in record showing court considered that form necessary. Hargrave v. State, 53 Tex. Cr. App. 147, 109 SW 163. Transcript of stenographer's notes, containing, besides the evidence, objections, statements and arguments of counsel, and colloquies between counsel and court and counsel, not a proper brief of evidence, which should contain evidence alone. Wright v. State, 3 Ga. App. 663, 60 SE 329. Assignment or error requiring consideration of evidence not considered. Id. The certified copy of the record below which the clerk is required to transmit, without charge to the clerk of the appellate court, under Pen. Code, § 2281, must conform to the rules of the supreme court rule 6, subd. 2, and rule 7. State v. Foster, 36 Mont. 278, 92 P 761. Clerk had no authority to copy into record minutes in full of court where substituted copy contained only words "clerk will here insert orders of commissioners' court." Davis v. State, 52 Tex. Cr. App. 546, 107 SW 828.

**63.** Transcript will be stricken when not certified by clerk, and there is no stipulation as to its correctness. State v. Squires [Idaho] 97 P 411. Rev. St. 1887, § 8051, requiring certification by clerk, may be waived by stipulation as to correctness and completeness of record. Id. To make oral matters occurring at trial part of record for review, judge must certify statement of facts showing objections, or reporter's transcript. Molina v. Ter. [Ariz.] 95 P 102. Unauthenticated and unexplained lead pencil interlineations (exceptions) in typewritten record cannot be considered as part of record. Hobbs v. State [Ark.] 111 SW 264. Stenographic report of proceedings becomes part of transcript only when approved and made part of bill of exceptions. Snyder v. State [Ark.] 111 SW 465. Statement of facts, not certified by judge, could not be considered. Reese v. State, 53 Tex. Cr. App. 565, 110 SW 910. Statement of facts not signed or approved by court cannot be considered. Green v. State [Tex. Cr. App.] 107 SW 840.

**64.** Evidence showed statement filed out of time. Benson v. State, 53 Tex. Cr. App. 254, 109 SW 166. Statement of facts not filed in time and record free from error; judgment affirmed. Id. Court of appeals has no jurisdiction in misdemeanor cases where record is not filed within 60 days, and no extension of time is granted, though parties stipulate to waive delay. Attorney general objected, district attorney having stipulated with accused's counsel. Putnam v. Com., 33 Ky. L. R. 266, 109 SW 903. Agreed statement of facts, filed after adjournment, not considered. Green v. State, 53 Tex. Cr. App. 466, 110 SW 919. Where statement of facts is tendered and finally filed in time, failure to take preliminary steps in preparations and settlement thereof within time provided in Laws 1907, p. 512, § 14, is immaterial. Howard v. State, 53 Tex. Cr. App. 378, 111 SW 1038. Statement filed within 30 days after adjournment, as allowed by law, considered, though not within time allowed by court's order. Dobbs v. State [Tex. Cr. App.] 113 SW 921. Statement of facts not filed in time; assignments based thereon not considered. Wilson v. State, 52 Tex. Cr. App. 173, 20 Tex. Ct. Rep. 134, 105 SW 1026. Statement filed after adjournment, without an order allowing it to be so filed, cannot be considered. Ross v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 528, 106 SW 340.

required.[65] Delay in filing may be excused if the appellant shows that he was not at fault,[66] but where there is a conflict between the court and counsel as to diligence shown in obtaining a statement, the appellate court will not interfere.[67] In some jurisdictions it is the duty of the clerk to transmit the record,[68] and his default is not chargeable to appellant.[69] In Iowa a transcript will be ordered at the expense of the county only where it appears to be necessary,[70] and where appellant has, in fact, no means, and is not seeking to avoid the cost.[71]

*Making, settling, approval, and filing of bills of exceptions.*See 10 C. L. 217.—The bill of exceptions should be made up and prepared in the manner prescribed by rule or statute [72] and presented,[73] signed,[74] and filed [75] within the time allowed by law,

65. Transcript must be served on attorney general; if not so served, it may be stricken. State v. Squires [Idaho] 97 P 411.

66. A statement of facts not signed or filed in time will be considered, if the delay is due to no fault of appellant or his attorney, but to causes beyond their control. Caruthers v. State, 52 Tex. Cr. App. 458, 107 SW 857.

67. Affidavits of court and state's attorney controverted that of appellant's counsel as to cause for delay and what appellant's counsel had done. Caruthers v. State, 52 Tex. Cr. App. 458, 107 SW 857. Affidavits, controverted by state, held not to show due diligence in filing statement of facts, so as to require consideration of same, when filed too late. Crawford v. State, 53 Tex. Cr. App. 310, 108 SW 1181.

68. Clerk of court must transmit record to supreme court and certify it. State v. Squires [Idaho] 97 P 411. Under Pen. Code, § 2281, it is the duty of the clerk with whom notice of appeal has been filed to transmit to the clerk of the appellate court, without charge, a copy of the record, though no bill of exceptions has been settled, and review is desired on the technical record only. State v. Foster, 36 Mont. 278, 92 P 761. In Texas, it is the duty of the clerk to transmit the record to the appellate court in criminal cases. Attorneys have nothing to do with it. Davis v. State, 52 Tex. Cr. App. 546, 107 SW 828.

69. Failure of the clerk to file record within ninety days is not ground for dismissal. Davis v. State, 52 Tex. Cr. App. 546, 107 SW 828.

70. Not an abuse of discretion to refuse to order transcript at expense of county where accused had been once convicted and judgment reversed for an erroneous instruction, evidence being same on both trials, and it not appearing that accused could not have bill of exceptions settled on second appeal without having transcript made. State v. Kehr, 137 Iowa, 91, 114 NW 542.

71. One who makes a voluntary transfer of all his property, after a formal accusation against him, is not entitled to the benefit of the statute allowing to paupers a transcript of the evidence at the expense of the county. Transfer of land in trust for wife and children and to pay debts held voluntary and for the purpose of saddling expense on county. State v. Shaffer, 137 Iowa, 93, 114 NW 540.

72. Statute making shorthand notes and their extension a bill of exceptions does not take away authority of court to approve and settle a bill of exceptions according to former practice. State v. Kehr, 137 Iowa, 91, 114 NW 542. Bill of exceptions **sufficiently entitled** which states names of parties in beginning. Starling v. State [Ga. App.] 62 SE 993. Under statute, **reporter's transcript** cannot serve as bill of exceptions unless certified by judge. Romero v. Ter. [Ariz.] 95 P 101. Statutes and rules of court providing the manner and time of making up, filing and authenticating a bill of exceptions must be complied with or appellate court cannot consider it. Montgomery v. State [Fla.] 45 S 813.

73. Judge may refuse to sign bill of exceptions presented too late under rules of his court. State v. Berry [La.] 47 S 597. Writ of error will not be dismissed for failure to have bill of exceptions certified in time, when it appears that it was presented in time, returned for correction, and received again within 10 days and then certified and signed by judge. McDonald v. Ludowici, 3 Ga. App. 654, 60 SE 337.

74. Bill of exceptions signed after adjournment cannot be considered, record proper failing to show any order extending time or allowing signing in vacation. Battle v. State [Ala.] 45 S 67; Id. [Ala.] 45 S 68. Court had no power to sign bill of exceptions after expiration of time allowed by orders and bill so signed was not a proper part of the record. State v. Brannon, 212 Mo. 173, 110 SW 695. Time for signing bill of exceptions cannot be extended beyond commencement of term succeeding that of trial, even by written agreement of parties or counsel. Bill signed after such time, by agreement, stricken, on motion. Dates v. State [Ala.] 45 S 163. Bill of exceptions stricken where it was signed after adjournment, and record proper did not show any order extending the time. Brooke v. State [Ala.] 45 S 622. Irregularities in settlement of bill of exceptions not reviewable on appeal from denial of new trial, and from judgment, bill having been settled more than a year after taking of such appeal. People v. Garnett [Cal. App.] 98 P 247.

75. Bill of exceptions must be filed at the time of or before taking appeal, unless time of settling same has been enlarged by trial court. Filing within time allowed by court sufficient. State v. Frazer [S. D.] 117 NW 366. Bill of exceptions which does not affirmatively show that it was filed with the clerk, as required by statute, cannot be considered. Donovan v. State [Ind.] 83 NE 744. Bill of exceptions and statement of

unless the time has been duly extended by the court,[78] though unavoidable delay, not caused by appellant, will not be charged against him.[77] If bill is duly prepared and presented within time allowed by statute or order of court, it may be authenticated afterwards as of the day it was presented,[78] appellant not being at fault.[79] A valid order extending the time cannot be made after the expiration of the time prescribed by law.[80] A bill of exceptions not signed [81] or otherwise identified, certified or authenticated [82] cannot be considered. The certificate of the trial judge to a bill of exceptions imports absolute verity,[83] and the bill of exceptions must be accepted by the appellate court as true where defendant has not availed himself of the statutory mode of settling a bill refused by the court.[84] In case of disagreement between the court and counsel as to what took place before the court, the statement of the court transmitted with the record must be accepted.[85] Qualifications of a bill by the judge will control over statements in the main body of the bill,[86] and where the court states

facts filed after adjournment could not be considered, record not containing any order extending time. State v. Jackson, 209 Mo. 397, 107 SW 1057; Aden v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 838, 106 SW 1154; Davis v. State [Tex. Cr. App.] 108 SW 669; Moots v. State [Tex. Cr. App.] 108 SW 683; Machem v. State [Tex. Cr. App.] 108 SW 1184. Nothing to review where record did not contain 20-day order authorizing filing of bill of exceptions and statement of facts. Benge v. State [Tex. Cr. App.] 107 SW 832.

**76.** Recital in judgment entry that defendant has 60 days in which to take an appeal is not an extension of time for signing bill of exceptions. Battle v. State [Ala.] 45 S 67; Id. [Ala.] 45 S 68.

**77.** If a party does everything in his power to present a bill for authentication but there is no judge to sign it, and the party is in no way at fault, the time during which he is unable for such reason to have the bill signed is not to be counted against him. Montgomery v. State [Fla.] 45 S 813.

**78.** Montgomery v. State [Fla.] 45 S 813.

**79.** Where bill was duly prepared and filed with clerk in time, and party had it certified by clerk and three persons present at trial but could not have it signed because the judge was suspended, and his successor had not been appointed, he was allowed to present it to the succeeding judge, who was allowed to sign it nunc pro tunc as of date of presentation to clerk. Montgomery v. State [Fla.] 45 S 813.

**80.** When the time for filing a bill of exceptions has expired, the court is without power to extend the time. State v. Bragg, 207 Mo. 586, 106 SW 23. And a bill filed during time fixed by a void order cannot be considered. Id. Order extending time for signing bill of exceptions is without effect unless made within time allowed for signing the bill. Thomas v. State [Ala.] 46 S 757.

**81.** Bill of exceptions, filed before being signed by judge, no part of record. Williams v. State [Ind.] 85 NE 350. Purported bill of exceptions, not signed or approved by judge, not considered. Williams v. State, 52 Tex. Cr. App. 430, 107 SW 825. Bill refused by court and not otherwise verified not considered. Reinhard v. State, 52 Tex. Cr. App. 59, 20 Tex. Ct. Rep. 379, 106 SW 128.

**82.** Affidavits on which motion for change of venue is based must be made part of bill of exceptions, in order that appellate court may review ruling. Certification by clerk merely does not make them part of bill of exceptions. State v. Kline [Or.] 93 P 237. Bill of exceptions, to become part of record, must, if made in term time, be plainly recognized by record as such and if made in vacation, within time allowed by law, must be certified by order duly entered of record as required by statute. State v. Blair, 63 W. Va. 635, 60 SE 795. No bill of exceptions before court where evidence is sought to be brought in by appending what purports to be the original bill of exceptions to the transcript, following clerk's general certificate, and adding clerk's special certificate that defendant filed "above and foregoing original longhand manuscript of the evidence" taken and certified by the official reporter. Black v. State [Ind.] 86 NE 72. The clerk's special certificate is of no effect since he is authorized to authenticate only the bill of exceptions. Original bill must be looked to and this must be authenticated by act of the court. Id. Must be verified by certificate of trial judge. State v. Young, 77 Ohio St. 529, 83 NE 898. Certificate to bill of exceptions in form of code sufficient. Starling v. State [Ga. App.] 62 SE 993.

**83.** State v. Young, 77 Ohio St. 529, 83 NE 898.

**84.** Appellate court must take and accept bill of exceptions as true where defendant has not availed himself of the statutory remedy where trial court refuses to properly settle a bill (application to appellate court. Pen. Code, § 1174). People v. Izlar [Cal. App.] 97 P 685. Amendment found in bill considered as a part thereof. Id.

**85.** Dispute was concerning bill of exceptions. State v. Gibson, 120 La. 343, 45 S 271. In case of disagreement between court and counsel as to what occurred at trial, court's statement must prevail. State v. Anderson, 121 La. 366, 46 S 357. Statement of trial court conclusive, where counsel and court, or counsel, disagree as to what occurred on the trial. State v. Clay, 121 La. 529, 46 S 616. Statement of testimony by judge controls, there being no testimony in bill of exceptions. State v. Robichaux, 121 La. 860, 46 S 888.

**86.** No bystander's bill being perfected. McCrimmon v. State, 52 Tex. Cr. App. 318, 20 Tex. Ct. Rep. 842, 106 SW 1158.

that matter contained in a bill is incorrect, it will not be considered.[87] Statutes provide modes for proving bills of exceptions by bystanders [88] or persons present at the trial who know the truth of matters presented,[89] when the judge refuses to approve the same; but when a party accepts and files bills of exceptions given by the judge, he cannot thereafter contradict them by bills proved by bystanders.[90] In California a valid extension of time in which to present a bill of exceptions for settlement can be had only by complying with statutory provisions,[91] and where relief is sought for a default in failing to follow the statute, facts must be presented showing excusable neglect.[92] The question whether statutory requirements may be waived seems to be unsettled.[93] In Georgia, grounds of a motion for new trial not approved by the trial judge will not be considered by the appellate court.[94] This approval may be entered on the motion or ground of the motion may be verified in the bill of exceptions.[95] The approval of a ground of a motion extends no further than to verify statements contained therein as written.[96] A mere allowance of an amendment to a motion for new trial is not a sufficient verification.[97] The duty of authenticating the record on appeal rests primarily on the trial court,[98] and an appellate court will not interfere, in the trial court's exercise of that duty in the settlement of a particular bill.[99] The

**87.** Drennan v. State, 53 Tex. Cr. App. 311, 109 SW 1090. Where court refused to approve bill of exceptions, but made a statement contrary to matters stated therein, and no bill was proved by bystanders, the bill could not be considered. Wade v. State, 53 Tex. Cr. App. 184, 109 SW 191.

**88.** Where court refused to sign a bill of exceptions showing that district attorney referred, in argument, to failure of accused to testify, and a bill was proved by bystanders, it was held, the bystander's bill, supported by several affidavits, should be considered, though controverted by district attorney. Vaden v. State, 52 Tex. Cr. App. 299, 20 Tex. Ct. Rep. 404, 106 SW 367.

**89.** When judge refuses to sign a bill properly tendered, it is lawful for three persons to sign same in the presence of the judge, and to certify that it was presented to the judge and that he refused to sign it, and such bill of exceptions is then valid if the persons certifying it were present at the trial, had knowledge of matters stated and of the truthfulness thereof. Montgomery v. State [Fla.] 45 S 813.

**90.** Drennan v. State, 53 Tex. Cr. App. 311, 109 SW 1090. Bills held to have been accepted where counsel paid no further attention to them, after court modified, signed and filed them. Id.

**91.** People v. Simmons [Cal. App.] 95 P 48.

**92.** Mere opinion not availing. People v. Simmons [Cal. App.] 95 P 48. Proper to refuse to settle bill of exceptions when presented after expiration of statutory time, an order of court granting an extension being invalid because no cause was shown, and a subsequent stipulation being without effect. Pen. Code, §§ 1171, 1174. Id. Code Civ. Prac. § 473, allowing court to grant relief from default caused by excusable neglect, applies where accused has presented bill of exceptions after statutory time, in reliance upon orders extending time, made without statutory prerequisites of notice and cause shown. People v. Everett [Cal. App.] 97 P 175.

**93.** Pen. Code, § 1174, that time in which to present a bill of exceptions for settlement cannot be extended by stipulation, does not exclude oral stipulations in open courts, accompanied by statement of the facts, in the presence of both attorneys, sanctioned by the court. People v. Soto [Cal. App.] 96 P 913. Order extending time for 10 days under such circumstances was valid, though not formally entered, time allowed by law having expired. Notice of intention to apply for such relief was waived by district attorney's consenting to the order. Id. Subsequent order granting further extension of time to accused also valid, accused having made proper showing by affidavit, district attorney being present, and a continuance having been allowed to permit him to make a counter showing, which he did not make. Id. Failure to make formal order granting relief for excusable neglect, as allowed by Code Civ. Proc. § 473 was immaterial, on hearing for writ of prohibition to prevent court from settling a bill, since it would be presumed that court would make such order if necessary. Id.

**Contra:** Requirement of Pen. Code, § 1174, that time can be extended upon after cause shown by affidavit, and after notice to district attorney, cannot be waived; hence immaterial that district attorney was in court, and cause was shown orally. People v. Everett [Cal. App.] 97 P 175.

**94.** Truth of grounds must be shown. Soell v. State [Ga. App.] 61 SE 514.

**95, 96, 97.** Soell v. State [Ga. App.] 61 SE 514.

**98.** People v. Lapique [Cal. App.] 98 P 256. Settlement of bill of exceptions is for trial court. People v. Lapique [Cal. App.] 98 P 46. It is the duty of the judge to authenticate by signing any bill of exceptions taken during the progress of the cause and tendered to him, if it fairly states the truth of the matter, and the exception taken, and the same, when signed, is a part of the record. Montgomery v. State [Fla.] 45 S 813.

**99.** Where the trial court has acted and has settled and allowed one bill of excep-

appellate court may interfere only when the trial court refuses to act [1] or is without power to grant the desired relief.[2] The petition for such relief should disclose facts authorizing interference by the appellate court.[3] A bill of exceptions will not in any event be acted upon by the appellate court without notice to the adverse party.[4]

The supreme court of California will not interfere in the matter of settling a bill of exceptions where the appeal is one which must be considered by the court of appeals, and that court has already acted in the matter.[5]

*Sufficiency of "record" to present particular question.*[See 10 C. L. 221]—Since every presumption is in favor of the correctness of the ruling below,[6] errors not apparent on the face of the record proper [7] must be presented by proper bill of exceptions and statement of facts,[8] which must show the motion of objection raised,[9] the ruling of

tions, the appellate court cannot compel the settlement of another, or assume to settle one itself. People v. Lapique [Cal. App.] 98 P 256. Appellate court will not by mandamus direct the settlement of a particular bill, the trial court not having refused to settle any bill. People v. Lapique [Cal. App.] 98 P 46.

1. Appellate court will not interfere unless it clearly appears that the trial court refused to embody in the bill an objection to a decision on a question of law to which exception was duly taken. People v. Lapique [Cal. App.] 98 P 256.

2. Writ of prohibition does not lie to prevent settlement of bill of exceptions presented after statutory time, where judge may grant relief for default, under Code Civ. Proc. § 473. People v. Everett [Cal. App.] 97 P 175.

3. Petition insufficient where it did not disclose status of record and proceedings below. People v. Lapique [Cal. App.] 98 P 256.

4. People v. Lapique [Cal. App.] 98 P 256.

5. People v. Lapique [Cal.] 98 P 257. See Id. [Cal. App.] 98 P 256.

6. See post, § 17 H. Rulings of trial court presumptively correct. Norris v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 527, 106 SW 137.

7. As to matters so shown, see ante, § 17 F. Where no declarations of law are asked and none given by court trying case without a jury, no exceptions are necessary, being preserved in record and carried forward in motion for new trial. Fort v. Brinkley [Ark.] 112 SW 1084.

8. See preceding paragraphs in this section.

**No review of matters not presented by bill of exceptions:** Denial of continuance. Norris v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 527, 106 SW 137; Earles v. State, 52 Tex. Cr. App. 140, 20 Tex. Ct. Rep. 522, 106 SW 138; Cason v. State, 52 Tex. Cr. App. 220, 20 Tex. Ct. Rep. 339, 106 SW 337; Johnson v. State, 52 Tex. Cr. App. 201, 20 Tex. Ct. Rep. 853, 107 SW 52; Thomas v. State [Tex. Cr. App.] 108 SW 664; Woodard v. State [Tex. Cr. App.] 111 SW 941. Admission of evidence. Fears v. State [Tex. Cr. App.] 111 SW 734; Henderson v. State, 52 Tex. Cr. App. 514, 107 SW 820. Admission of accused's statement at preliminary. Mitchell v. State, 52 Tex. Cr. App. 231, 106 SW 135. Rulings on testimony. Carter v. State [Tex. Cr. App.] 110 SW 61. Rulings on evidence. Williams v. State [Tex. Cr. App.] 111 SW 1031. Alleged improper remarks of counsel. Sykes v. State, 53 Tex. Cr. App. 165, 108 SW 1179. Alleged errors in impaneling jury. Douglass v. State [Tex. Cr. App.] 107 SW 548. Denial of motion to quash venire. Norris v. State, 52 Tex. Cr. App. 166, 20 Tex. Ct. Rep. 361, 106 SW 136. That verdict was without support in evidence. State v. Porter [S. C.] 61 SE 1087. Admission or exclusion of evidence. State v. Hayes [Or.] 94 P 751. Exception is not reviewable unless properly authenticated in bill of exceptions. People v. Emmons [Cal. App.] 95 P 1032. Denial of motion to discharge defendant because not brought to trial within 60 days will not be reviewed unless motion, grounds, ruling and exceptions are embodied in properly authenticated bill of exceptions. People v. Gregory [Cal. App.] 97 P 912. To obtain review of order denying continuance, the motion, evidence and ruling must be embodied in bill of exceptions. People v. Besold [Cal.] 97 P 871. Error based on improper argument must be shown by bill of exceptions, as must all rulings at trial. Cannot be brought in in affidavits supporting motion for new trial. Bibb v. Com., 33 Ky. L. R. 726, 112 SW 401. Ruling on application for continuance not reviewable where application is not preserved in bill of exceptions duly signed and filed in trial court. State v. Page, 212 Mo. 224, 110 SW 1057. Grant or refusal of change of venue is not reviewable without bill of exceptions presenting facts prepared, signed, approved and filed at term of court at which order was made. Gibson v. State, 53 Tex. Cr. App. 349, 110 SW 41. Objection to overruling of demurrer must be preserved by exceptions pendente lite, unless main bill of exceptions containing this assignment be certified within 20 days after demurrer is overruled. Williams v. State [Ga. App.] 62 SE 525. Alleged error in overruling demurrer must be made ground of special exceptions pendente lite, or must be presented in bill of exceptions which has been certified within 20 days after ruling complained of. Wheeler v. State [Ga. App.] 61 SE 409. Under the rule that only matters which are brought into the record can be considered by the circuit court on review, a verdict of conviction will not be set aside on the ground that a true copy of the panel as returned by the sheriff was not delivered to the accused as required by § 7273, Rev. St., where the irregularity complained of is not carried into the bill of exception but is brought to the attention of the court by an affidavit to which is attached a paper

the court thereon [10] and the exception taken,[11] and sufficient of the evidence, instructions or proceedings to show affirmatively the alleged error.[12] Where there is no

writing and what purports to be a copy of the jury panel. Williams v. Ohio, 11 Ohio C. C. (N. S.) 4. On appeal from judgment, appellate court may not examine sufficiency of evidence to support verdict and judgment, nor affidavits filed on motion for new trial on ground of misconduct of jurors, but may examine bill of exceptions to review errors committed on trial. State v. Gallagher, 14 Idaho, 581, 94 P 581.

**Wherever matters of fact are involved** in the rulings of the trial court, such rulings will not be revised on appeal unless the facts are verified by proper bills of exceptions. Norris v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 527, 106 SW 137; Mitchell v. State, 52 Tex. Cr. App. 37, 20 Tex. Ct. Rep. 372, 106 SW 124. Bill of exceptions as verified held not to include fact relied on as ground of exception. Hill v. State, 52 Tex. Cr. App. 241, 20 Tex. Ct. Rep. 326, 106 SW 145. Statements in a motion for new trial or in assignments of error will not be sufficient. Norris v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 527, 106 SW 137; Hubert v. State [Tex. Cr. App.] 109 SW 934. Errors not reviewable unless raised in motion for new trial or by bill of exceptions. White v. State, 52 Tex. Cr. App. 193, 20 Tex. Ct. Rep. 852, 106 SW 1167; Greathouse v. State, 53 Tex. Cr. App. 218, 109 SW 165.

**Matters presented in motion for new trial not reviewable in absence of bill of exceptions or statement of facts.** Ross v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 528, 106 SW 340; Perkins v. State [Tex. Cr. App.] 106 SW 343; Mayberry v. State, 52 Tex. Cr. App. 601, 108 SW 659; Aguillar v. State [Tex. Cr. App.] 109 SW 934; Brown v. State [Tex. Cr. App.] 109 SW 937; Davis v. State [Tex. Cr. App.] 110 SW 60; Innocente v. State, 53 Tex. Cr. App. 390, 110 SW 61; Sanders v. State [Tex. Cr. App.] 112 SW 938; McConnico v. State [Tex. Cr. App.] 113 SW 14; Jones v. State [Tex. Cr. App.] 113 SW 17. Unverified statement in ground of motion for new trial not embodied in bill of exceptions not reviewable. Roberson v. State, 53 Tex. Cr. App. 297, 109 SW 160; Sanders v. State [Tex. Cr. App.] 112 SW 938. Evidence insufficient to support verdict. Taylor v. State [Tex. Cr. App.] 111 SW 734. Improper argument presented only in motion for new trial. Bryant v. State [Tex. Cr. App.] 111 SW 1009.

9. Motions for **change of venue and continuance,** not made part of bill of exceptions, and supporting affidavits not being referred to therein, cannot be considered. People v. Weston, 236 Ill. 104, 86 NE 188. **Ruling on application for continuance** not reviewable when motion was indicated in record only by statement in motion for new trial and there was no bill of exceptione. Walker v. State, 53 Tex. Cr. App. 336, 110 SW 59. Alleged refusal of continuance not reviewable, no application for continuance appearing in record and there being no bill of exceptions to court's ruling. Mims v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 840, 106 SW 1157. Exception should have been taken to action of court **refusing to allow motion for new trial to be filed,** and motion made part of record, in order that appellate court could pass on question. State v. Lewis, 120 La. 543, 45 S 433. Action of court in **overruling demurrer** cannot be considered when demurrer is not in record. Lacy v. State [Ala.] 45 S 680. Where **motion to dismiss** is not in the record and no exception is reserved to ruling, it is not reviewable. State v. Hamlett, 212 Mo. 80, 110 SW 1082. Alleged **errors in instructions** and in argument of counsel cannot be considered in absence of objections and exceptions. State v. Young [Or.] 96 P 1067. **Admission of testimony** over objection will not be reviewed where neither purpose of testimony nor ground of objection is shown by record. O'Leary v. U. S. [C. C. A.] 158 F 796. The objection to evidence and ground thereof must be shown or refusal to exclude will not be reviewed. Waters v. State, 3 Ga. App. 649, 60 SE 335. Objection to admission of improper evidence should show evidence objected to and specific ground of objection. Johnson v. State [Okl.] 97 P 1059.

10. Improper remarks not reviewable, record not disclosing any ruling by trial court. State v. Cook [Mo. App.] 112 SW 710. Neither information, motion to quash, nor ruling thereon being in record, no review could be had of ruling. Irving v. People, 43 Colo. 260, 95 P 940. Where the record fails to show any action by the lower court on the defendant's motion in arrest of judgment, but error was assigned by him and the case argued as though motion was overruled and exception taken, it will be reviewed as if such action had been taken. Pfieffer v. U. S. 31 App. D. C. 109.

11. Assignments cannot be considered where record shows no exceptions to rulings of court below. People v. Vandriesche [Mich.] 15 Det. Leg. N. 662, 117 NW 578. Overruling motion for verdict after state rested not reviewable, no exception to ruling being shown by bill of exceptions. Ross v. State, 16 Wyo. 285, 93 P 299. Record must show exceptions taken to instructions complained of. Carson v. State [Neb.] 114 NW 938. It should appear specifically whether exception was reserved to particular ruling. Long statement of facts will not be searched. Johnson v. State, 52 Tex. Cr. App. 201, 20 Tex. Ct. Rep. 853, 107 SW 52. Nothing to review where it did not appear whether requested instructions were given or refused, and no bill of exceptions was saved. Bryant v. State [Tex. Cr. App.] 111 SW 1009. Motion for new trial unsupported by proof, and bill of exceptions to overruling of same, do not afford sufficient basis for consideration, in appellate court of complaints as to conduct of jury or as to matters occurring during the trial, and not then made subjects of bills of exceptions. State v. Gebbia [La.] 47 S 32. Ground of motion for new trial merely that court misdirected the jury as to the law, too general, no particular erroneous portion being pointed out. Mercer v. State, 52 Tex. Cr. App. 321, 20 Tex. Ct. Rep. 402, 106 SW 365.

12. The function of a bill of exceptions is to point out to a court of review an alleged erroneous ruling by the trial judge adhered

to after an exception taken at the time. State v. Zeilman [N. J. Law] 68 A 468. Assignments of error predicated upon asserted facts not disclosed by the record cannot be considered. Shear v. State [Fla.] 45 S 986. Bill of exceptions calling attention to ruling and objections, but not containing anything further to show error in the rulings, held insufficient. State v. Zeilman [N. J. Law] 68 A 468. Bill of exceptions must contain so much of evidence as may be necessary to present the question of law upon which exceptions were taken. Id. Where transcript omits evidence, rulings of court, and instruction given and refused, court cannot, on appeal from judgment, review errors at the trial. State v. Baker [Kan.] 97 P 785. Alleged errors not reviewable in absence of statement of facts. Green v. State [Tex. Cr. App.] 107 SW 840. Where there was no bill of exceptions nor statement of facts, alleged error in charge, in rulings on evidence, and misconduct of jury, could not be reviewed. Douglass v. State [Tex. Cr. App.] 107 SW 350.

**Record insufficient to present question:** Alleged **improper remarks** cannot be reviewed when not presented in bill of exceptions or elsewhere in record. Groce v. Ter. [Ariz.] 94 P 1108. Bill of exceptions held not to show that remarks of counsel referred to failure of accused to testify. Hargrave v. State, 53 Tex. Cr. App. 147, 109 SW 163. Bills of exceptions failing to show counsel's comments, objections thereto were not reviewable. Tinsley v. State, 52 Tex. Cr. App. 91, 20 Tex. Ct. Rep. 356, 106 SW 347. Bill of exceptions not purporting to show all the evidence, question whether evidence warranted **argument** not reviewable. Jones v. State [Ala.] 47 S 100. Improper statement in argument must be shown in bill of exceptions. Miller v. Com. [Ky.] 113 SW 518. Question of **misconduct** of county attorney and jury relied on as cause for new trial not considered where record did not disclose what it consisted of. State v. Powell [Iowa] 113 NW 761. **Mere objection** that witness was not an expert does not show that fact. Cornelius v. State [Tex. Cr. App.] 112 SW 1050. Bill of exceptions held not to present issue of **invalidity of ordinance** for violation of which accused was prosecuted. Smith v. Oxford Corp. [Miss.] 45 S 365. Authority of town board to pass resolution at special meeting could not be considered where record of board was introduced in evidence but was not made part of record on appeal. People v. Richards, 150 Mich. 434, 14 Det. Leg. N. 745, 114 NW 230. **Ruling on application for continuance** not reviewable without statement of facts. Reese v. State, 53 Tex. Cr. App. 565, 110 SW 910. Where record showed no variance between complaint and information and original papers were not before court, **alleged variance** could not be considered. Rice v. State [Tex. Cr. App.] 107 SW 833. Where facts do not appear in record and there is no bill of exceptions to court's action, ruling on plea **that accused was not subject to prosecution because not properly extradited** was not reviewable. Fischi v. State [Tex. Cr. App.] 111 SW 410. Appellate court could not pass on question of **former convictions** when no record of conviction was produced in lower court, and made part of record on appeal. McGinnis v. State [Wyo.] 96 P 525. Where record does not show facts on which motion to quash indictment because not found within six weeks after grand jury was impanelled, was based, trial court's **refusal to quash** cannot be reviewed. State v. Kelly [N. J. Err. & App.] 70 A 342. On appeal from judgment, order denying motion to set aside indictment cannot be reviewed where evidence and proceedings are not set out by bill of exceptions properly verified. Merely showing evidence in minutes of trial, insufficient. People v. Williams [Cal. App.] 97 P 684. Where there was no evidence in the record to support motion to quash on ground that third person, unauthorized, was present in grand jury room when indictment was found, ruling was not reviewable. Innocente v. State, 53 Tex. Cr. App. 390, 110 SW 61.

**Ground of motion for new trial** held not sufficient to present question whether judge, by a question to accused's counsel during argument, or by his manner, expressed an opinion on the defense being urged by counsel for first time. Herrington v. State, 130 Ga. 307, 60 SE 572. Affidavits relating to a ground of a motion for new trial not referred to in the motion nor attached thereto as exhibits nor filed with motion as part thereof, cannot be considered by appellate court, though it appears from a statement of the judge on each affidavit that it was used on hearing of the motion, and each affidavit was actually filed. Summerlin v. State, 130 Ga. 791, 61 SE 849. Trial judge having ruled that alleged newly discovered evidence would be cumulative merely, and there is no transcript of the evidence received on the trial, the ruling cannot be reviewed. State v. Sloan, 120 La. 170, 45 S 50.

**Instructions:** Charge refused, not being set out. Refusal not reviewable. Oates v. State [Ala.] 47 S 74. Giving and refusal of instructions not reviewable when abstract does not set out instructions. Emerson v. McNeil, 84 Ark. 552, 106 SW 479. Exceptions to refusals to charge cannot be sustained where record does not contain all instructions given. State v. Smith, 137 Iowa, 5, 114 NW 558. Errors in instructions cannot be reviewed when not brought into record by bill of exceptions. Snyder v. State [Ark.] 111 SW 465; Donovan v. State [Ind.] 83 NE 744; Stucker v. State [Ind.] 84 NE 971; Williams v. State [Ind.] 85 NE 349; Id. [Ind.] 85 NE 350. Error in refusal of instructions cannot be considered when bill of exceptions does not show who signed the requests, though entries in record contain certain signed instructions. Ludwig v. State [Ind.] 85 NE 345. In **absence of evidence** objection that instructions were not warranted could not be reviewed. People v. Silva [Cal. App.] 97 P 202. In absence of evidence, it cannot be determined whether instructions were applicable to evidence. Irving v. People, 43 Colo. 260, 95 P 940. Where instructions could be applicable to facts, provable under indictment, they will not be held erroneous in absence of facts in record. Brown v. State [Tex. Cr. App.] 109 SW 937. Failure to give certain instructions not reviewable in absence of statement of facts, unless error under state of facts. Wilson

v. State, 52 Tex. Cr. App. 173, 20 Tex. Ct, Rep. 134, 105 SW 1026. Charge responsive to facts which could be shown under indictment not reviewable in absence of statement of facts or bill of exceptions. Booher v. State [Tex. Cr. App.] 107 SW 832. Sufficiency and correctness of charge are not ordinarily reviewable in absence of statement of facts. Mims v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 840, 106 SW 1157; White v. State, 52 Tex. Cr. App. 193, 20 Tex. Ct. Rep. 852, 106 SW 1167; Davenport v. State [Tex. Cr. App.] 107 SW 353; Holland v. State [Tex. Cr. App.] 107 W 354; Weatherford v. State [Tex. Cr. App.] 107 SW 825; Moland v. State [Tex. Cr. App.] 113 SW 15. Action of court in giving and refusing instructions must be considered in light of any conceivable evidence against defendant where evidence actually received is not in record. People v. Simmons [Cal. App.] 95 P 48.

**Admission of evidence:** No objection to evidence below shown and all evidence not set out. Admissibility of evidence not reviewable. Oates v. State [Ala.] 47 S 74. In absence of proper bill of exceptions, rulings on admission and exclusion of evidence are not reviewable. Romero v. Ter. [Ariz.] 95 P 101. Evidence not being made part of record by bill of exceptions, errors in admission thereof cannot be considered. Summerlin v. State, 130 Ga. 791, 61 SE 849; Donovan v. State [Ind.] 83 NE 744; Thomas v. State [Tex. Cr. App.] 108 SW 664. Objection to question not considered, no answer of witness being shown by bill. Earles v. State, 52 Tex. Cr. App. 140, 20 Tex. Ct. Rep. 522, 106 SW 138. Bill of exception showing introduction of proof that accused had been warned in hearing before justice, not showing that any statement of accused was offered, presented nothing for review in support of objection to the introduction of such statement. Mitchell v. State, 52 Tex. Cr. App. 37, 20 Tex. Ct. Rep. 372, 106 SW 124. Bill of exceptions to admission of evidence of prior charge against witness, to impeach him, should show date of occurrence in order to show whether or not it is too remote. Caldwell v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 349, 106 SW 343. Exception to refusal to exclude testimony cannot be considered when it does not state the testimony nor show where it may be found in the record. Cornelius v. State [Tex. Cr. App.] 112 SW 1050. Bill of exceptions to admission of evidence must show its inadmissibility. Hargrave v. State, 53 Tex. Cr. App. 147, 109 SW 163. Bill of exceptions must show how or wherein admission of evidence was prejudicial. Biddy v. State [Tex. Cr. App.] 108 SW 689. Objection to alleged admission by defendant, that it appeared to have been made while asleep, not tenable, the record not showing whether it was made while asleep or awake. State v. Rocker [Iowa] 116 NW 797. Where ordinance alleged to have been violated was not abstracted in record, alleged error in admitting testimony as to acts prior to that charged to show character of house of accused could not be passed upon. La Fitte v. Ft. Collins, 43 Colo. 299, 95 P 927. Errors in admission of testimony not considered, no objection being made below and bill of exceptions not including matter necessary to determine question of prejudice. People v. Robinson, 152 Mich. 41, 15 Det. Leg. N. 181, 115 NW 997. Objection to admission of evidence that it was not connected with defendant not considered where record did not show whether connection was made or not, promise to connect being made when evidence was offered. Dickinson v. U. S. [C. C. A.] 159 F 801. Ground of motion for new trial alleging error in admitting evidence must set out in substance the evidence admitted, as appellate court will not search the brief of the evidence for it. Pyle v. State [Ga. App.] 62 SE 540. Evidence not contained in statement of facts not considered. Brodie v. State, 53 Tex. Cr. App. 195, 108 SW 1182.

**Exclusion of evidence:** Answer expected to question not appearing, excluding question cannot be held error. Poe v. State [Ala.] 46 S 521; Cagle v. State, 52 Tex. Cr. App. 307, 20 Tex. Ct. Rep. 550, 106 SW 356; Wade v. State [Tex. Cr. App.] 108 SW 369; Roberson v. State, 53 Tex. Cr. App. 297, 109 SW 160. Exclusion of question not reviewable, question not being set out in bill of exceptions. Patton v. State [Ala.] 46 S 862. Bill complaining of exclusion of testimony must show object and purpose of excluded testimony. Drennan v. State, 53 Tex. Cr. App. 311, 109 SW 1090. Bill of exceptions to exclusion of evidence defective which failed to show what would and could have been proved. McCormick v. State, 52 Tex. Cr. App. 493, 108 SW 669. Bill of exceptions insufficient which recited that offer of proof was made, but did not show what the offer was. Davis v. State, 52 Tex. Cr. App. 629, 108 SW 667. Bills of exceptions to exclusion of evidence insufficient which did not show purpose of excluded testimony. Kilgore v. State, 52 Tex. Cr. App. 447, 108 SW 662. Record must show what rejected testimony would have been. Leach v. Com., 33 Ky. L. R. 1016, 112 SW 595. Finding of trial court that no proof of any overt act had been made and that proof of prior threats was therefore inadmissible not reviewable, the record not containing all the evidence heard below. State v. Simmons, 121 La. 561, 46 S 651. Alleged error in overruling objection to testimony not reviewable where evidence is not set forth literally or in substance in motion for new trial or bill of exceptions. Moore v. State, 130 Ga. 322, 60 SE 544.

**Insufficiency of evidence** not reviewable without statement of facts. Pettiway v. State [Tex. Cr. App.] 108 SW 1184; Moland v. State [Tex. Cr. App.] 113 SW 15; Farrell v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 841, 106 SW 1157; Essary v. State, 53 Tex. Cr. App. 596, 111 SW 927. Assignments in motion for new trial not considered for want of brief of evidence. Wright v. State, 3 Ga. App. 663, 60 SE 329. Whether verdict is contrary to or not supported by evidence, not reviewable where record does not contain the facts. Erwin v. State [Tex. Cr. App.] 109 SW 935. While it is settled that, in a criminal case where it plainly appears that there was no evidence whatever justifying conviction, the supreme court of the United States would so hold despite the failure to request an instruction of acquittal, this rule is inapplicable where it is not certified that the bill of exceptions contains the entire evidence, and the court is not otherwise satisfied that it does, and it is recited in the bill of excep-

bill of exceptions or statement of facts, only error appearing on the face of the record will be considered [13] and if no error thus appears, judgment will be affirmed.[14] Matters not shown by the record [15] or bill of exceptions [16] cannot be considered. It will not be assumed that a bill of exceptions contains all the evidence unless there is a recital to that effect.[17] A bill of exceptions should be specific [18] and complete in itself.[19]

*Amendment and correction.*[See 10 C. L. 227]—The minutes cannot be corrected by

tions that the plaintiff affords evidence sufficient to go to the jury, tending to prove each material allegation. Williamson v. U. S., 207 U. S. 425, 52 Law. Ed. 278.

**Record sufficient:** Absence of original writings, principally letters, from record sent up on appeal, held not to require granting of new trial or to prevent affirmance, where copies and translations, duly admitted or proved correct and true, were in the record. People v. Strollo, 191 N. Y. 42, 83 NE 573.

**13.** State v. Hamilton [Mo.] 113 SW 1050; State v. Bragg, 207 Mo. 586, 106 SW 23; State v. Klug, 207 Mo. 516, 106 SW 51. Only indictment and sufficiency of evidence reviewable in absence of bill of exceptions. Bay v. State [Tex. Cr. App.] 106 SW 149. In absence of statement of facts or bill of exceptions rulings on evidence and errors in charge cannot be reviewed. Sumners v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 850, 106 SW 1166. Only action of court in giving and refusing instructions can be reviewed on appeal from judgment without bill of exceptions. People v. Simmons [Cal. App.] 95 P 48. Two terms elapsed between sentence of accused, after conviction, and motion for new trial. Transcript on writ of error to denial of motion contained record of original cause, and transcript of evidence and instructions were made part of bill of exceptions by incorporation in motion for new trial, but there was no bill of exceptions in original cause. Held, only record proper could be considered. Saleen v. People, 41 Colo. 317, 92 P 731. Record held to show under which of two affidavits, sent up therewith, conviction (selling intoxicants) was had. Smith v. Oxford Corp. [Miss.] 45 S 365.

**14.** Battle v. State [Ala.] 45 S 67; Id. [Ala.] 45 S 68; State v. Marks, 119 La. 1035, 44 S 856; State v. Kane [Mo. App.] 109 SW 1083; State v. Long [Mo.] 113 SW 1077; Duckworth v. State [Tex. Cr. App.] 107 SW 543; Crawford v. State, 53 Tex. Cr. App. 310, 108 SW 1131; Smart v. State [Tex. Cr. App.] 110 SW 69; Mayfield v. State [Tex. Cr. App.] 110 SW 897; Sublet v. State [Tex. Cr. App.] 111 SW 932; Wheeler v. State [Tex. Cr. App.] 113 SW 758. Judgment affirmed where indictment was sufficient, no error in record, and no statement of facts. Bush v. State, 53 Tex. Cr. App. 213, 109 SW 184; Batterton v. State [Tex. Cr. App.] 109 SW 194. Judgment affirmed, there being no bill of exceptions or statement of facts, and affidavit and information being sufficient. Purvis v. State, 52 Tex. Cr. App. 342, 20 Tex. Ct. Rep. 55, 107 SW 55; Zimmerman v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 843, 106 SW 1160. Judgment affirmed where information was good and there was no statement of facts or bill of exceptions. Batterton v. State [Tex. Cr. App.] 107 SW 828; Kinley v. State [Tex. Cr. App.] 107 SW 837. No review where there was no statement of facts, no bills of exceptions, and no motion for new trial. Mathis v. State [Tex. Cr. App.] 113 SW 529. Where only matter complained of was that verdict was contrary to law and evidence, and there was no bill of exceptions or statement of facts, judgment affirmed, no error being apparent on record. Epps v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 838, 106 SW 1154; McGullus v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 840, 106 SW 1156. Judgment affirmed, record proper being regular, and evidence and instructions not being preserved. State v. Cronin [Mo. App.] 113 SW 1134. Record proper being in due form and free from error, judgment affirmed, bill of exceptions not having been signed in time. State v. Brannon, 212 Mo. 173, 110 SW 695. Conviction affirmed in absence of bill of exceptions, arraignment and information being proper and regular. State v. Foley [Mo.] 113 SW 1050. Judgment affirmed where case was brought up on record proper, and no abstracts or briefs were filed, and information, verdict and judgment were in due form. State v. Wilkensen [Mo. App.] 110 SW 605.

**15.** Matters not stated in record cannot be referred to. State v. Atlantic Coast Line R. Co. [N. C.] 62 SE 755.

**16.** Affidavit not appearing to have been used on motion for new trial, not authenticated, and not made part of bill of exceptions, could not be considered. People v. Emmons [Cal. App.] 95 P 1032. Documentary evidence not made part of bill of exceptions cannot be considered. State v. Kline [Or.] 93 P 237.

**17.** Where the bill of exceptions does not state that it contains all the evidence, it will be treated as though it did not contain all of it. Pope v. State [Fla.] 47 S 487.

**18.** Bill of exceptions must be specific and definite in pointing out alleged error. Reinhard v. State, 52 Tex. Cr. App. 59, 20 Tex. Ct. Rep. 379, 106 SW 128. General exceptions to portion of charge, abstractly correct, will not be reviewed, as record will not be searched to see if it applies to facts. Jefferson v. State [Ga.] 61 SE 997. Bill of exceptions need not refer to sentence, no error being assigned upon it. Exception to judgment overruling motion for new trial sufficient which assigns error on that judgment. Starling v. State [Ga. App.] 62 SE 993.

**19.** Biddy v. State [Tex. Cr. App.] 108 SW 689. Appellate court will not refer to statement of facts for matter necessary to pass upon an objection. Earles v. State, 52 Tex. Cr. App. 140, 20 Tex. Ct. Rep. 522, 106 SW 138. Statement of facts will not be consulted in aid of bill of exceptions to admission of testimony. Young v. State [Tex. Cr. App.] 113 SW 276.

the clerk, after the term, without an order of the court.[20] Proper practice is for court to correct the minutes upon notice and motion.[21] After such correction either party may file a copy of a record as finally corrected, or a copy of the corrected portion, as an addition to the record.[22] Where a bill of exceptions is returned by the judge for corrections, it must be again presented within a reasonable time or the exceptions will be considered waived.[23] Judgment of the trial court substituting papers, after loss of originals, cannot be attacked by affidavits,[24] through error in copying substituted papers into the record may be shown.[25] The court which is to hear a cause may order substitution of a lost record.[26] Such order being made upon notice, a motion to strike the substituted record as incorrect will not be entertained.[27] Amendments or correcttions may be made in the appellate court [28] by complying with statutory requirements,[29] and the appellate court may of its own motion order a defective record to be corrected.[30]

( § 17) *G. Practice and procedure in reviewing court.* See 10 C. L. 228—The record will not be returned to the trial court to allow it to pass upon a motion for new trial for newly-discovered evidence where that court would be without power to entertain the motion owing to lapse of time,[31] or where the alleged new evidence does not warrant granting of a new trial.[32] Appellant need not, in Texas, be notified of the day on which the appeal will be submitted.[33] In Georgia, a plaintiff in error has no unqualified right to withdraw his writ of error after argument or submission.[34] Whether such withdrawal should be permitted is a question addressed to the sound discretion of the court.[35] Jurisdiction to allow withdrawal remains in the court of appeals, though that court has certified questions in the case to the supreme court, but in passing on the question, what has taken place in the supreme court will be duly considered.[36]

**20, 21.** Mann v. Com., 32 Ky. L. R. 449, 105 SW 1182.

**22.** Appeal continued for this to be done where clerk, without authority, corrected and transmitted corrected record. Mann v. Com., 32 Ky. L. R. 449, 105 SW 1182.

**23.** Forty days unreasonable time. Clay v. State [Ga. App.] 60 SE 1028.

**24, 25.** Davis v. State, 52 Tex. Cr. App. 546, 107 SW 828.

**26.** Transcript having been destroyed before transfer of course by supreme court to court of appeal, latter had power to make order substituting record, under act June 16, 1906. People v. Garnett [Cal. App.] 98 P 247.

**27.** Court of appeals having made order of substitution of transcript, after due notice to appellant, would not thereafter entertain appellant's motion to strike substituted record on ground that substituted copy was incorrect. People v. Garnett [Cal. App.] 98 P 247.

**28.** When original bill of exceptions was signed by judge below, by order of supreme court, after time allowed by law, owing to special circumstances, plaintiff in error was allowed to take steps to have certified transcript on file in supreme court amended to correspond with duly authenticated record below. Montgomery v. State [Fla.] 45 S 813.

**29.** Amendments to bill of exceptions allowable under Civ. Code 1895, § 5570, are such as contain matters which relate to imperfections or omissions of necessary and proper allegations which can be supplied from the transcript of the record. Summerlin v. State, 130 Ga. 791, 61 SE 849. Though affidavits may be brought up under supplemental certificate, under Acts 1905, p. 84, application for such certificate cannot be made after the expiration of 20 days from the service of the bill of exceptions. Id.

**30.** If there is a plain assignment of error duly certified by the judge, and a portion of the record necessary to understand and pass upon the error is missing, it would be the duty of the court of its own motion to require clerk of trial court to transmit such portion of the record as would be required. Mason v. Terrell, 3 Ga. App. 348, 60 SE 4. Conviction in circuit court on appeal from judgment of justice court. Cause remanded to docket with instructions to clerk to issue certiorari to circuit court to send up justice's judgment. Jones v. State [Miss.] 47 S 479.

**31.** As where no application was made before expiration of term succeeding that at which trial was had. State v. Holborn [S. D.] 118 NW 704.

**32.** Motion in supreme court for leave to apply for new trial on after-discovered evidence denied, principal affidavits setting up threats by deceased against accused, and false testimony by witness. State v. Adams, 78 S. C. 523, 60 SE 658. But see § 17D, Power of Court to Entertain Motion.

**33.** Attorneys and parties must keep in touch with their cases if they desire to be present or file a brief. Ross v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 528, 106 SW 340.

**34, 35.** McNelis v. State [Ga. App.] 61 SE 842.

**36.** Withdrawal allowed, in view of action of supreme court (shown below). McNelis

*Assignments, briefs, etc.*[See 10 C. L. 229]—Questions raised in the trial court, or exceptions there taken, will not be considered by an appellate court unless assigned as error [37] and discussed in the brief [38] or otherwise argued.[39] Assignments of error must be specific [40] and not multifarious,[41] and should be complete in themselves [42] or make specific references to portions of the record which must be examined.[43] It should appear that the matter was fairly presented in the lower court,[44] and the reasons for the alleged error should be pointed out.[45] The statement of facts in the

v. State [Ga. App.] 61 SE 842. Court of appeals certified questions to supreme court and thereafter plaintiff in error applied to court of appeals for permission to withdraw his writ of error, and the court of appeals then certified to supreme court question whether such withdrawal should be allowed. Supreme court sent back record and certified questions to court of appeals, and directed it to decide question whether withdrawal of writ of error should be allowed. In case of refusal to allow withdrawal, certified questions and record could be resubmitted; if withdrawal permitted, no such return would be necessary. McNelis v. State, 130 Ga. 748, 61 SE 540.

**37.** Exceptions to portions of the trial court's charges to the jury will not be considered where error is not assigned upon them. Pfieffer v. U. S., 31 App. D. C. 109. Errors not assigned will not be considered by the United States supreme court on writ of error. Paraiso v. U. S., 207 U. S. 368, 52 Law. Ed. 249. Objection that judge, by questions to witnesses, intimated opinions in disparagement of witnesses not raised by assignment that verdict is contrary to law and evidence. Smith v. State, 3 Ga. App. 509, 60 SE 274.

**38.** Exceptions to jurors waived when not relied on in brief. State v. Banner [N. C.] 63 SE 84. Question not argued in brief waived. Ross v. State, 16 Wyo. 285, 94 P 217. Exceptions taken at trial but not relied on in brief are taken as abandoned. State v. Freeman, 146 N. C. 615, 60 SE 986. Assignment not mentioned in brief considered waived. State v. Doyle [W. Va.] 62 SE 453. Points made in record but not referred to in briefs will be considered as waived. Jones v. State, 130 Ga. 274, 60 SE 840. Demurrers held abandoned when not referred to in brief or argument on appeal. Dick v. State, 107 Md. 11, 68 A 286. Where an assignment is based on denial of motion for new trial, and none of the grounds of the motion are argued, defendant simply stating in his brief that motion should have been granted, the assignment will be considered as abandoned. McCall v. State [Fla.] 46 S 321. Where brief contains bare statement that ruling complained of is erroneous, and there is no discussion or citation of authorities, the assignment will be treated as waived unless the error is so glaring and patent that no argument is needed to demonstrate it. Id.

**39.** Assignments not argued, abandoned. Pugh v. State [Fla.] 45 S 1023; Baker v. State [Ark.] 113 SW 205. Only grounds of objection to evidence argued in appellate court (and urged below) will be considered. Lewis v. State [Fla.] 45 S 998. Where one assignment of error is the overruling of a motion for new trial, only such grounds as are argued will be considered on appeal. Johnson v. State [Fla.] 46 S 174. Exception to exclusion of evidence, not pressed in appellate court, overruled. State v. Farr [R. I.] 69 A 5.

**40.** Assignments not directing attention to specific error relied on will not be considered. Crawford v. State [Ga. App.] 62 SE 501. Error must be made to appear affirmatively. Raymond v. State [Ala.] 45 S 895. Assignments that court erred in not charging fully on law of justifiable homicide, and in not charging on every theory of case presented by evidence, too general under rule 7. Jaime v. Ter. [Ariz.] 94 P 1092. Assignment that "court erred in overruling defendant's objections to the admissibility in the several instances during the progress of the trial as shown by the record of the testimony," held too general. Strobhar v. State [Fla.] 47 S 4. When all the instructions are assigned as error, as showing when taken as a whole, that court was prejudiced against accused, the appellate court will examine the entire charge. Maynard v. State [Neb.] 116 NW 53. Exception to instruction properly served, and assignment of error sufficiently definite. Thomas v. State, 85 Ark. 138, 107 SW 390.

**41.** While several exceptions may be embraced in a single bill, assignments of error should be single, not multifarious. State v. Zeilman [N. J. Law] 68 A 468.

**42.** Under rule 31, assignments must set out testimony and rulings of court. Commonwealth v. McKwayne [Pa.] 70 A 809.

**43.** Attention of appellate court should be called to specific grounds of error, reasons should be stated in the brief, authorities cited, and, where reference is necessary, pages of the transcript should be referred to. Lewis v. State [Fla.] 45 S 998. Where entire record is sent up, appellant must specify errors relied upon so that search of entire record will not be necessary. State v. Herron [N. J. Err. & App.] 71 A 274. Where copy of paper offered in evidence was not set out in the record, and no reference was given to page and line of record where offer and ruling appeared, the error was treated as waived. Cheek v. State [Ind.] 85 NE 779.

**44.** Assignments that certain questions were permitted to be asked, but not showing any objections thereto, nor what the answers were, cannot be considered. Glover v. State, 129 Ga. 717, 59 SE 816. Assignment of error to exclusion of question should show that lower court knew what answer was expected. Brown v. State, 3 Ga. App. 479, 60 SE 216. Assignment of error to remarks of counsel, not showing that objection was made below or any action by court invoked, will not be considered. Clarke v. State [Ga. App.] 62 SE 663.

**45.** Reasons why instructions excepted to were erroneous not being pointed out in record or brief, alleged errors not considered. People v. Oliver [Cal. App.] 95 P 172. When

brief should conform to the rules of the court.[46] Motion to strike argument because not filed in time is properly denied where adverse party has replied.[47]

*Dismissal.*[See 10 C. L. 229]—If the motion for dismissal is timely,[48] an appeal may be dismissed for want of jurisdiction of the appellate [49] or lower court,[50] for failure of the record to show an appealable judgment,[51] or to show that an appeal had been taken,[52] for want of notice of appeal,[53] or for a fatal defect in the notice [54] or want of service,[55] for defect in the recognizance,[56] for want of prosecution,[57] for failure to file the record within the time prescribed,[58] unless that duty devolves solely upon the clerk,[59] or for lack of certification of record.[60] The appeal may also be dismissed where the judgment has been executed,[61] or where the prisoner has escaped and is

counsel rely on error in refusal to give instruction, they should state the instruction and point out reasons why refusal to give it was error, and same rule applies to pointing out alleged error in instructions given. People v. Fossetti [Cal. App.] 95 P 384.

**46.** Appellant's brief did not contain a clear and concise statement of the facts, apart from argument, as required by rule 40; hence, statement in brief for people taken as statement of facts. People v. Boyd, 151 Mich. 577, 15 Det. Leg. N. 36, 115 NW 687.

**47.** No prejudice was made to appear. State v. Foster, 136 Iowa, 527, 114 NW 36.

**48.** Motions to dismiss, predicated upon alleged defects in the order of appeal or bond given, must be filed within three days after filing of transcript. State v. Simpson [La.] 47 S 622.

**49.** When a case not within jurisdiction of court of appeals is lodged in its files, such court may order that it be peremptorily dismissed, or that it be transmitted to the supreme court as interests of justice may require. Dawson v. State, 3 Ga. App. 664, 60 SE 319.

**50.** Appeal dismissed where court below had no jurisdiction of offense. Martin v. State [Ala.] 47 S 104. Appeal dismissed for want of jurisdiction below (court held at term not authorized by law). Hodo v. State [Ala.] 47 S 134. Forfeiture for breach of Sunday law cannot be recovered in criminal proceedings; dismissed for want of jurisdiction. Hanger v. Com., 107 Va. 872, 60 SE 67.

**51.** Appeal dismissed where record failed to show any judgment of conviction. Vick v. State [Ala.] 46 S 566. Appeal dismissed for want of jurisdiction where record did not show proper entry of final judgment. Caskey v. State [Tex. Cr. App.] 108 SW 665. Cause dismissed where short transcript failed to show that judgment had been rendered against defendant. State v. Westerman [Iowa] 116 NW 149. Appeal will be dismissed where lower court has not passed sentence. Robinson v. State [Tex. Cr. App.] 113 SW 763. Where an appeal is taken before legal sentence has been entered below, the appeal will be dismissed with instructions to the lower court to enter proper sentence. Hinman v. State [Tex. Cr. App.] 113 SW 280.

**52.** Cause stricken where nothing in record showed an appeal had been taken. State v. Jackson [Iowa] 118 NW 439.

**53.** Appeal dismissed, no notice of appeal appearing in record. State v. Davis [Iowa] 118 NW 318. Appeal dismissed, record not showing notice of appeal given or entered. Teague v. State, 53 Tex. Cr. App. 503, 506, 111 SW 405 (2 cases).

**54.** Appeal dismissed for fatally defective notice of appeal. State v. Preston [Nev.] 95 P 918.

**55.** Appeal dismissed where notice of appeal was not served on clerk of court and district attorney (Cr. Code, §§ 1468, 1469), being only given orally in open court. State v. Berger [Or.] 94 P 181.

**56.** Appeal dismissed for failure of recognizance to correctly recite judgment. Blackman v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 838, 106 SW 1155. Appeal dismissed for variance between punishment assessed and as recited in recognizance. Davis v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 853, 106 SW 1169. Appeal dismissed where joint recognizance was given by several appellants; each must give separate recognizance. Yates v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 850, 106 SW 1166.

**57.** Where counsel failed to appear and case was dismissed, the fact that he read the clerk's calendar and failed to see the cause, or a statement that all criminal cases would be peremptorily called on certain day was not ground for reinstatement. St. Louis, etc., R. Co. v. State [Ark.] 111 SW 266.

**58.** Appeal in misdemeanor case dismissed for failure to file record within 60 days, as required by Cr. Code Prac. § 348. Clark v. Com., 33 Ky. L. R. 72, 109 SW 301. Appeal dismissed for failure to file record within 60 days. Misdemeanor case. Cr. Code Prac. § 348. Id.

**59.** An appeal will not be dismissed for failure of the clerk to forward the transcript in time, defendant being in no way responsible for the delay. State v. Clay, 121 La. 529, 46 S 616. Failure of clerk to transmit transcript within 90 days is not ground for dismissal. Davis v. State, 52 Tex. Cr. App. 546, 107 SW 828.

**60.** Appeal dismissed where there was no certified transcript or offer to substitute or supply one. State v. Squires [Idaho] 97 P 411.

**61.** An appeal will be dismissed where the judgment has been executed and there is nothing left upon which a judgment of reversal can operate. Appeal dismissed where fine imposed had been paid and could not be returned, under the statute. State v. Pray [Nev.] 94 P 218. Writ of error dismissed where it appeared that defendant had voluntarily and without protest complied with alternative sentence of fine or imprisonment by payment of fine. Kitchens v. State [Ga. App.] 61 SE 736.

still at large.[62] Dismissal will not be granted merely to allow appellant to obtain better bills of exception, when it appears from an unofficial report of the trial that no prejudicial error was committed.[63] The merits of the cause will not be considered on a motion to dismiss.[64] Motion to reinstate must be timely.[65] An appeal, dismissed for want of a good recognizance, will be reinstated when it is made to appear by proper evidence, accompanied by the clerk's certificate, that the cognizance was correctly taken in the trial court, but incorrectly transcribed in the record.[66]

*Rehearing.*[See 8 C. L. 262]—A motion for rehearing will not be granted where substantial justice has been done in the original decision, even though all the reasoning in the opinion is not approved.[67] A petition for hearing need not be considered where defendant has been pardoned.[68] Questions not before raised will not be considered on a rehearing.[69] Whether judgment may be reviewed on writ of error cannot be determined upon a petition for rehearing after the dismissal of an appeal.[70]

(§ 17) *H. Scope of review.*[See 10 C. L. 230]—The appellate court is not required to consider matters not properly saved for review [71] or not presented by the record [72] in the manner required by law or rule of court,[73] but may consider such matters in the interests of justice.[74] Only those assignments of error, consideration of which

**62.** Appeal dismissed where it appeared defendant had broken jail and was still at large. State v. Moses [N. C.] 63 SE 68. The appeal will be dismissed when it appears that the prisoner has broken jail and escaped, and is beyond the court's jurisdiction when his case is called. State v. Keebler, 145 N. C. 560, 59 SE 872. Appeal dismissed where, pending same, appellant escaped from jail and remained at large and had not entered into recognizance. Jackson v. State [Tex. Cr. App.] 109 SW 149. Where defendant escapes from jail, pending the appeal, and does not voluntarily return, the appeal will be dismissed. McCullough v. State [Tex. Cr. App.] 108 SW 1171.

**Motion to dismiss denied** where accused had escaped and was recaptured and permitted to give bond; lower court, by permitting him to give appeal bond, judicially recognized that he was in custody and entitled to prosecute an appeal. Bush v. State, 53 Tex. Cr. App. 213, 109 SW 184. Motion to dismiss appeal, on ground that appellant had escaped from jail, denied where he was retaken and made a showing that his escape was for the sole purpose of procuring bond. Leonard v. State, 53 Tex. Cr. App. 187, 109 SW 149.

**63.** State v. Zeilman [N. J. Law] 68 A 468.

**64.** Insufficiency of the indictment to charge an offense, and want of jurisdiction of the subject-matter, involve the validity of the judgment and will not be considered on motion to dismiss. Patrick v. State [Wyo.] 96 P 527.

**65.** Where dismissal is for defect in the recognizance, motion to reinstate must be made within the time allowed by the rules (15 days). Fontenberry v. State [Tex. Cr. App.] 111 SW 740.

**66.** Williams v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 880, 20 Tex. Ct. Rep. 517, 105 SW 1024.

**67.** Roper v. U. S. [Okl. Cr. App.] 97 P 1022.

**68.** Former opinion unofficially published in 95 Pac. 811, withheld from official publication. State v. Luper [Or.] 96 P 1069.

**69.** Errors in charge will not be considered when presented for first time on motion for rehearing. Wilson v. State, 52 Tex. Cr. App. 173, 20 Tex. Ct. Rep. 134, 105 SW 1026. Question not raised or argued in brief cannot be raised for first time on petition for rehearing. Ross v. State, 16 Wyo. 285, 94 P 217.

**70.** Quaere, whether writ of error lies in Nevada? State v. Preston [Nev.] 97 P 388.

**71.** See ante, § 14.

**72.** See ante, § 17F. Constitutionality of a statute will not be considered when it is not raised by the record proper but only by an agreed statement of facts. Ex parte Thompson [Ark.] 109 SW 1171. Question of constitutionality of statute relating to carrying of concealed weapons not considered because not presented by the record. McIntire v. State [Ind.] 83 NE 1005.

**73.** See ante, § 17F.

**74.** Where defendant's counsel rested the defense on an erroneous theory of law, the appellate division reversed the judgment in order that a trial on the merits on a correct theory might be had. People v. Hopkins, 111 NYS 423. Where the court is satisfied that the verdict is against the weight of the evidence or against the law, or that justice requires a new trial, it may reverse though no exception was taken in the court below; but it is not required to reverse unless a proper exception is taken below. People v. Jordan, 109 NYS 840. In capital cases the New York Court of Appeals may order a new trial if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether or not any exception was taken in the court below. People v Strollo, 191 N. Y. 42, 83 NE 573. In capital cases, the court of appeals has power to reverse in the interests of justice, though no exceptions are taken, and it is its duty to disregard errors which, though excepted to, do not affect substantial rights of accused. Id. Where record shows that motion in arrest of judgment on ground that statute on

is necessary to a decision, will be reviewed.[75] Though moot questions will not be considered, a cause involving personal rights will be reviewed though the decision can have no other practical result.[76]

Every presumption is in favor of the regularity of the proceedings prior to [77] and during the trial,[78] and all fair intendments consistent with the record are to be indulged in favor of the verdict,[79] and the rulings of the trial court.[80] Thus, on a silent record or on one which does not disclose all that transpired in the trial court, it is presumed jurors were qualified [81] that jury was properly impanelled,[82] that in-

which prosecution was based was unconstitutional was submitted to the court, the point will be considered on appeal though it does not appear that court made a ruling on it. State v. Davis, 121 La. 623, 46 S 673.

**75.** Where assignment that evidence does not support verdict is overruled but cause is remanded for errors of law at trial, evidence will not be discussed. Slater v. U. S. [Okl.] Cr. App.] 98 P 110. Where one count warrants sentence imposed, assignments of error affecting only other counts need not be considered. Cook v. U. S. [C. C. A.] 159 F 919.

**76.** Where, on appeal from sentence of fine and removal (of sheriff) from office, the court found the sentence invalid as to the removal, and the affidavit defective, the judgment was reversed and cause remanded, though it appeared dehors the record that the sheriff had resigned. Moore v. State [Miss.] 45 S 866.

**77.** Presumed that grand jury which returned indictment was composed of 12 men. State v. Vaughn [Mo. App.] 112 SW 728. Presumed that grand jury was properly organized. Id. Presumed that complaint was legally filed in county court, with information, though complaint appeared to have been originally filed in justice court. Griffin v. State [Tex. Cr. App.] 112 SW 1066. Where no objection was made to filing of motion to quash after plea of not guilty, it will be considered that motion was filed with leave of court. Commonwealth v. Bailey, 199 Mass. 583, 85 NE 857. Where record showed only that motions made by accused relating to irregularities in grand jury panel were denied by court, without showing grounds on which court acted, it was presumed that court's rulings were correct. State v. Bronzo [Nev.] 95 P 1001.

**78.** Bill of exceptions is to be most strongly construed against exceptor. Dozier v. State [Ala.] 46 S 9. Every presumption favors regularity of proceedings, and one complaining must show error. Johnson v. State [Okl. Cr. App.] 97 P 1059. Record not showing any ruling on a motion, presumption is that ruling was waived. State v. Smith, 137 Iowa, 5, 114 NW 558. Proceedings below presumed regular, in absence of statement of facts, or bill of exceptions. Beyer v. State [Tex. Cr. App.] 110 SW 749. Presumption is that testimony of witness, recalled at request of jury, who desired to know what his testimony was on a certain point, was the same as on his first examination; bill of exceptions should show difference, if any. Kiliman v. State, 53 Tex. Cr. App. 570, 112 SW 92. Testimony on recall, as shown by bill, held substantially same. Id. Presumed that indictment was read to jury by clerk, if not by prosecuting attorney. State v. Ralston [Iowa] 116 NW 1058. Where abstract showed demurrer and overruling thereof, and that defendant was adjudged guilty, it was presumed that court entered plea of not guilty after defendant refused to plead further, and that evidence was then taken on the charge. State v. Pitkin, 137 Iowa, 22, 114 NW 550. Assumed, in absence of any showing, that court followed usual practice and informed accused of his right to counsel, and that accused waived his right to have counsel appointed. Cutts v. State [Fla.] 45 S 491.

**79.** Edwards v. State [Fla.] 45 S 21. Where the evidence on which a person has been convicted is not in the record, appellate court must assume that it authorized conviction. State v. Morris [La.] 47 S 597. Conviction will be referred to good count, in absence of any contrary showing. Jones v. State, 52 Tex. Cr. App. 519, 107 SW 849. In absence of evidence, presumed that crime was committed after enactment of statute defining it, as charged in indictment. Matlock v. State, 52 Tex. Cr. App. 544, 109 SW 193.

**80.** Every presumption is in favor of the rulings of the trial court. Lewis v. State [Fla.] 45 S 998. It is the duty of the party appealing to show error affirmatively. Id. Accused has burden of showing prejudicial error in rulings at trial. People v. Hutchings [Cal. App.] 97 P 325. Ruling of court presumed correct; error must be made to appear. Reinhard v. State, 52 Tex. Cr. App. 59, 20 Tex. Ct. Rep. 379, 106 SW 128. Motion for continuance not appearing in record, action of trial court presumed correct. Kinslow v. State, 85 Ark. 514, 109 SW 524. In absence of proper statement of facts, presumed that evidence heard by court on motion for new trial sustained his denial thereof. Essary v. State, 53 Tex. Cr. App. 596, 111 SW 927. Presumed that documentary evidence properly admitted, bill of exceptions not containing it. State v. Kline [Or.] 93 P 237. Where a plea in bar, made specific so as to set out alleged former conviction, etc., is not in the record, which shows only original plea, demurrer, and overruling of plea, it will be presumed that only a question of law was presented and that court's ruling was proper. McGinnis v. State [Wyo.] 96 P 525.

**81.** Ruling denying new trial on ground of remark by juror after being sworn, showing he was disqualified by his opinion, must be sustained, since it must be presumed that accused knew the facts concerning the juror and could have shown them on the voir dire. People v. Emmons [Cal. App.] 95 P 1032.

**82.** Where record recited trial by jury "impaneled and returned agreeably to the

structions were proper and adequate,[83] and that they were followed by the jury,[84] that jurors conducted themselves properly,[85] that sentence was proper,[86] and that settlement of bill of exceptions was proper and after due notice given.[87] Where record shows presence of accused at any stage of the trial, his presence throughout will be presumed in the absence of any showing to the contrary.[88] Where the same name appears in different parts of the record, it will, in the absence of any dispute as to identity, be presumed to refer to the same person in each instance.[89]

*Law of the case.*[See 10 C. L. 233]—A decision on a former review becomes the law of the case,[90] where the facts are the same.[91]

*Rulings on matters within the discretion of the trial court,*[See 10 C. L. 233] such as rulings on application for bail,[92] rulings on qualifications of jurors challenged for cause,[93] rulings on motion for withdrawal of plea,[94] for change of venue,[95] for con-

statute" and nothing in bill of exceptions negatived correctness of recital and no challenge to array appeared, there could be no reversal on ground that jury was not properly impaneled. State v. Tomasi [N. J. Err. & App.] 69 A 214. Overruling of challenge for cause presumed proper, evidence heard not being in record. State v. Howard, 120 La. 311, 45 S 260. Cannot be presumed that accused exhausted all perempory challenges, no showing being made, complaint being error in disallowing challenge for bias. People v. Maughs [Cal. App.] 96 P 407.

**83.** Charge is to be construed as a whole. People v. Besold [Cal.] 97 P 871; State v. Doherty [Or.] 98 P 152. Charges should receive fair and reasonable construction and should be tested with reference to language used as a whole and in its proper connection. Hooton v. State, 53 Tex. Cr. App. 6, 108 SW 651. Instruction presumed correct, not appearing in record. Stamper v. Com., 33 Ky. L. R. 580, 110 SW 389. Charge presumed correct in absence of facts. White v. State, 52 Tex. Cr. App. 193, 20 Tex. Ct. Rep. 852, 106 SW 1167. Omissions in charge will not be presumed erroneous in absence of bills of exception or statement of facts. Wilson v. State, 52 Tex. Cr. App. 173, 20 Tex. Ct. Rep. 134, 105 SW 1026. Burden on accused, on appeal, to show alleged error in instruction and prejudice therefrom. People v. Cain [Cal. App.] 93 P 1037. Presumed that instruction was refused because inapplicable to evidence, there being no showing by record or statement of judge that evidence required it. State v. Haywood, 121 La. 862, 46 S 889. In absence of evidence, it will be presumed that instructions refused by court were not applicable to the evidence. People v. Simmons [Cal. App.] 95 P 48. Presumption is that instruction not shown in record was correct and sufficient. People v. Russo [Cal. App.] 97 P 700. Evidence not being in record, presumption was that it warranted instructions given by court. State v. Pressler, 16 Wyo. 214, 92 P 806. In absence of evidence, instructions will be presumed to have been applicable thereto. State v. Connors, 37 Mont. 15, 94 P 199. Presumed that court told jurors that if a juror knew anything relative to the case he should disclose it in open court and not to the jury. State v. Lavin [W. Va.] 60 SE 888.

**84.** Presumed that jury followed law as given them by court. Schultz v. State, 135 Wis. 644, 15 Det. Leg. N. 358, 116 NW 259, 571; State v. Symens [Iowa] 115 NW 878. Presumed that jury observed instructions and conceded facts. State v. Reed [Or.] 97 P 627. Presumed that jury observed cautionary instruction to disregard improper remarks of counsel. People v. Amer [Cal. App.] 96 P 401. Paper containing former finding, in prior trial, was admitted without concealing former verdict from jury, and court instructed jury to disregard it. Presumed that jury were not influenced by former verdict. Crawford v. State [Ga. App.] 62 SE 501.

**85.** Burden on accused to show prejudice resulting from separation of jurors. People v. Emmons [Cal. App.] 95 P 1032. Decision of trial court on question of alleged misconduct of jury presumed fair and impartial. State v. Page, 212 Mo. 224, 110 SW 1057.

**86.** Cannot be assumed that court abused discretion in fixing sentence, where facts are not in record. Saleen v. People, 41 Colo. 317, 92 P 731.

**87.** Presumed that bill of exceptions was properly settled, and due notice given. People v. Garnett [Cal. App.] 98 P 247.

**88.** Owen v. State [Ark.] 111 SW 466. Trial being commenced and finished on same day, and presence of accused at commencement being shown, he will be presumed to have been present throughout. State v. Daniels [La.] 47 S 599. Where minutes show presence of accused at opening of session, it will be presumed that he remained in attendance. People v. Garnett [Cal. App.] 98 P 247. Where record showed accused was present at several stages of trial, presumption was that he was present throughout. State v. Long, 209 Mo. 366, 109 SW 35.

**89.** Crawford v. State [Ga. App.] 61 SE 886.

**90.** Kennedy v. Com., 33 Ky. L. R. 83, 109 SW 313.

**91.** Evidence and statement of accused, as shown by record, being substantially the same as on a former trial and appeal, the decision that voluntary manslaughter was not involved in the case became the law of the case. Herrington v. State, 130 Ga. 307, 60 SE 572.

**92.** Under Rev. St. 1887, § 8042, the action of the trial court with reference to bail cannot be reviewed on appeal from final judgment. State v. Peck, 14 Idaho, 712, 95 P 515.

**93.** Finding on competency of juror not reviewable. State v. Banner [N. C.], 63 SE

titnuance,[96] for bill of particulars,[97] rulings on competency of witnesses,[98] and on motions for new trial,[99] are not ordinarily reviewable, in the absence of abuse or manifest error. The sentence will not be disturbed, if authorized by law.[1]

*On questions of fact* See 10 C. L. 284 the finding of the trial court is conclusive, unless manifestly erroneous.[2] In like manner, the verdict of the jury will be sus-

84. Prisoner cannot object to court's excusing a juror. State v. Peterson [N. C.] 63 SE 87.

94. Exercise of discretion in permitting or refusing to allow withdrawal of plea of guilty is reviewable for abuse. Pope v. State [Fla.] 47 S 487.

95. Application for change of venue addressed to discretion. Johnson v. State [Okl. Cr. App.] 97 P 1059. Application for change of venue on ground of local prejudice is addressed largely to court's discretion, and its finding of fact will not be disturbed unless manifest error occurred. State v. Vickers, 209 Mo. 12, 106 SW 999.

96. Granting or refusal of continuance discretionary. State v. Horn, 209 Mo. 452, 108 SW 3. Refusal of continuance not reviewable, no prejudice being shown and grounds of motion not appearing. Gibson v. State, 53 Tex. Cr. App. 349, 110 SW 41.

97. Requiring of bill of particulars and proper compliance therewith. State v. Seaboard Air Line R. Co. [N. C.] 62 SE 1088.

98. Ruling of court on competency of child as witness not reviewable. People v. Gregory [Cal. App.] 97 P 912. Competency of witness about 10 years old. McCormick v. State, 52 Tex. Cr. App. 493, 108 SW 669.

99. Permitting application for new trial to be made more than 2 days after conviction being discretionary, refusal to allow it 5 days after will not be reviewed in absence of showing of abuse. Young v. State [Tex. Cr. App.] 113 SW 16. The **granting of new trial** will be sustained unless a clear abuse of discretion appears. State v. Barber [Idaho] 96 P 116.

**Denial of new trial** not reviewable, under Cr. Code Prac. § 281. Jenkins v. Com. [Ky.] 113 SW 846. Cr. Code Prac. § 281 provides that decisions on motions for new trial are not subject to exceptions. Hence, matters so arising cannot be considered. Thomas v. Com., 33 Ky. L. R. 849, 111 SW 286. Refusal to grant a new trial is not assignable as error. Commonwealth v. Lombardi [Pa.] 70 A 122. Refusal of new trial not ground for reversal on evidence submitted. Scott v. State, 3 Ga. App. 479, 60 SE 112. Refusal of new trial on general grounds not disturbed, verdict being supported by same evidence. Waters v. State, 3 Ga. App. 649, 60 SE 335. No error in overruling motion for new trial where evidence authorized verdict. Lovett v. State, 130 Ga. 349, 60 SE 851. Refusal on new trial on ground of insufficiency of evidence not reviewable in absence of abuse of discretion. Hinsley v. U. S. [Okl. Cr. App.] 98 P 363. Refusal to grant new trial, not reviewable. Patton v. State [Ala.] 46 S 862. Refusal of new trial on ground of newly discovered impeaching evidence not reviewable. State v. Pamelia [La.] 47 S 508. Finding of court, on motion for new trial on ground that a juror had expressed an opinion, not distrubed. Essary v. State, 53 Tex. Cr. App. 596, 111 SW 927. Refusal of new trial not an abuse of discretion, verdict being supported. State v. Henderson [S. C.] 60 SE 314. Judgment refusing new trial affirmed, where no error of law was assigned and verdict was supported by evidence. Jackson v. State [Ga. App.] 62 SE 538; Marshall v. State [Ga. App.] 62 SE 539. In the courts of the United States, the action of a trial court in denying a motion for new trial is not reviewable on appeal. Not necessarily abuse of discretion on part of trial court subjecting its action to review on appeal and requiring reversal, where court on motion for new trial refuses to give effect of changes of misconduct in trial when supported by affidavit and uncontradicted. Paolucci v. U. S., 30 App. D. C. 217.

1. Sentence will not be reviewed unless it exceeds statutory limit. Taylor v. State [Ga. App.] 62 SE 1048. Objection that sentence is excessive will not be considered unless it is in excess of that provided by law for offense charged. Reese v. State, 3 Ga. App. 532, 60 SE 284. The discretion of the court in fixing punishment cannot be interfered with on review, if sentence is within legal limits. Coppage v. State [Ga. App.] 62 SE 113.

2. Finding that person was an accomplice, based on evidence not disturbed. State v. Second Judicial Dist. Ct., 37 Mont. 191, 95 P 593. Findings of fact by a trial judge, made on hearing of motion and based on conflicting evidence, are conclusive. People v. Siemsen, 153 Cal. 387, 95 P 863. Finding of trial court on juror's qualifications, based on conflicting statements by juror, not reviewable. People v. Maughs [Cal. App.] 96 P 407. If there is any evidence to support judgment of judge, trying case without jury, it will not be disturbed. Huff v. State, 53 Tex. Cr. App. 454, 111 SW 731. Court's finding that no motion for new trial was actually made conclusive, affidavits being conflicting. People v. Long [Cal. App.] 93 P 387. Where by agreement a criminal action is tried without a jury, the finding of the court is entitled to the same consideration on review as a jury's verdict. State v. Ozias, 136 Iowa, 175, 113 NW 761. On appeal by state from order quashing indictment, sufficiency of evidence (heard in part by trial court) cannot be considered. State v. Cline, 146 N. C. 640, 61 SE 522. Order denying challenge to juror for cause is reviewable only when evidence is so opposed to decision as to make question one of law. People v. Duncan [Cal. App.] 96 P 414. Finding of court that jurors had not been guilty of prejudicial misconduct, supported by evidence, not disturbed. Fox v. State, 53 Tex. Cr. App. 150, 109 SW 370. Where trial is by the court without a jury, and no declarations of law are asked or given, there is nothing for review except the evidence, and judgment will be affirmed if court's verdict is supported by substantial evidence. State v. Willis, 128 Mo. App. 214, 106 SW 584.

**Finding of fact by trial court on motion for new trial conclusive** on appeal. Decker.

tained if supported by any evidence,[3] or if the evidence is conflicting,[4] or if its suffi-

v. State, 85 Ark. 64, 107 SW 182. Supreme court will not weigh evidence submitted to trial court on motion for new trial. State v. Baker [Kan.] 97 P 785. Discretion of trial court in passing upon weight and credibility of evidence submitted on hearing of motion for new trial is not reviewable. Fouraker v. State [Ga. App.] 62 SE 116. Denial of motion for new trial on ground of insufficiency of evidence not reviewable. Mason v. State [Ind.] 85 NE 776. Overruling of motion for new trial not disturbed where evidence in support thereof was conflicting (ground was disqualification of juror by expression of opinion). State v. Smith [Mo.] 113 SW 1062. Discretion of court in refusing to set aside verdict for insufficiency of evidence not reviewable. State v. Arnold, 146 N. C. 602, 60 SE 504. Great weight is to be given action of trial court in granting or refusing a motion to set aside verdict, especially in capital cases. State v. Washelesky [Conn.] 70 A 62. Motion for new trial on ground that juror had disqualified himself by an expression of opinion is addressed to court's discretion. Commonwealth v. Garrito [Pa.] 71 A 20.

3. Verdict not disturbed if supported by evidence. Nelson v. State [Ga. App.] 60 SE 1072; Mathews v. State [Ga. App.] 61 SE 292; Brown v. State, 130 Ga. 623, 61 SE 477; Strickland v. State, 130 Ga. 740, 61 SE 529; Ryals v. State, 130 Ga. 770, 61 SE 720; Thornton v. State [Ga. App.] 61 SE 736; Patterson v. State [Ga. App.] 61 SE 881; Boyer v. State [Ga. App.] 62 SE 95; Robereon v. State [Ga. App.] 62 SE 539; Craig v. State [Ind.] 86 NE 397; State v. Hibler, 79 S. C. 170, 60 SE 438; Tyler v. State [Tex. Cr. App.] 106 SW 363; Fox v. State, 53 Tex. Cr. App. 150, 109 SW 370; Curlee v. State, 53 Tex. Cr. App. 395, 110 SW 65; Howard v. State, 53 Tex. Cr. App. 378, 111 SW 1038; Olds v. State [Tex. Cr. App.] 113 SW 272. If supported by substantial evidence. State v. Hamlett, 212 Mo. 80, 110 SW 1082; State v. Sharpless, 212 Mo. 176, 111 SW 69; State v. Scott [Mo.] 113 SW 1069. Verdict will not be disturbed if supported by any evidence. People v. Kauffman, 152 Cal. 331, 92 P 861; People v. Oliver [Cal. App.] 95 P 172; Jarboe v. Com., 32 Ky. L. R. 755, 107 SW 227. Only question on appeal is whether there is any evidence tending to show guilt. Sims v. Com., 32 Ky. L. R. 443, 106 SE 214; Martin v. Com., 32 Ky. L. R. 657, 106 SW 863; Begley v. Com., 32 Ky. L. R. 890, 107 SW 243; Spencer v. Com., 32 Ky. L. R. 880, 107 SW 342; Payne v. Com., 33 Ky. L. R. 229, 110 SW 311; Foster v. Com., 33 Ky. L. R. 975, 112 SW 563; Ehrlick v. Com., 33 Ky. L. R. 979, 112 SW 565; Miller v. Com., 33 Ky. L. R. 1001, 112 SW 598; Jenkins v. Com. [Ky.] 113 SW 846. Verdict will not be disturbed when supported by legally sufficient evidence. Strobhar v. State [Fla.] 47 S 4; McDonald v. State [Fla.] 47 S 485. Evidence, though meager, held not so deficient as to warrant appellate court in disturbing verdict. Jordan v. State [Ga. App.] 61 SE 838. Evidence sufficient to authorize verdict; no review. White v. State, 3 Ga. App. 608, 60 SE 287. Verdict will not be disturbed unless there is an absolute failure of proof, or proof is of such character as to warrant inference that verdict is result of passion, prejudice or mistake. State v. Barton [Mo.] 113 SW 1111. Refusal to set aside verdict is error of law only if there is no material testimony tending reasonably to establish it. State v. Hampton, 79 S. C. 179, 60 SE 669. Case for jury where evidence raised more than suspicion or conjecture of guilt. State v. Harrison, 145 N. C. 408, 59 SE 867. It is only when there is no evidence to support one or more of the essential elements of the offense that an appellate court may reverse a cause on the ground that it is contrary to the law and the evidence. Eacock v. State, 169 Ind. 488, 82 NE 1039. Verdict not disturbed where evidence was sufficient if believed by jury. State v. Gilluly [Wash.] 96 P 512. When there is evidence to sustain verdict, appellate court has no jurisdiction to set it aside, no question of law being involved. People v. Caulfield [Cal. App.] 95 P 666. Verdict based on circumstantial evidence not disturbed. People v. Morris [Cal. App.] 93 P 1132. In a criminal case where the weight and sufficiency of the evidence is brought into question, a conviction should not stand unless the evidence is such, if credible, that a jury may reasonably conclude defendant's guilt beyond a reasonable doubt, and it ought not to be set aside and a new trial granted unless it is so manifestly against the weight of the evidence as to impeach the integrity, motive or intelligence of the jury so that in justice it ought to be set aside. Conviction held warranted. Lemen v. People, 133 Ill. App. 295. Verdict **sustained by substantial evidence and approved by trial judge** will not be disturbed. State v. Page, 212 Mo. 224, 110 SW 1057. Verdict approved by trial court not disturbed. Jones v. State [Ga. App.] 61 SE 133; Cox v. State, 3 Ga. App. 609, 60 SE 283; Askew v. State [Ga. App.] 61 SE 737. Verdict fairly supported by evidence and approved by trial court will not be disturbed. McDonald v. State [Fla.] 47 S 485.

4. Jaime v. Ter. [Ariz.] 94 P 1092; People v. Russo [Cal. App.] 97 P 700; McDonald v. State [Fla.] 47 S 485; People v. Honchler, 231 Ill. 566, 83 NE 428; Brock v. Com., 33 Ky. L. R. 630, 110 SW 878; Carson v. State [Neb.] 114 NW 938; State v. Preston [Nev.] 97 P 388; Williams v. State, 52 Tex. Cr. App. 430, 107 SW 825; Hangum v. State, 52 Tex. Cr. App. 628, 108 SW 370; Cunningham v. State, 52 Tex. Cr. App. 522, 108 SW 678; Wylie v. State, 53 Tex. Cr. App. 182, 109 SW 186; Drennan v. State, 53 Tex. Cr. App. 311, 109 SW 1090; Harryman v. State, 53 Tex. Cr. App. 474, 110 SW 926; Smith v. State [Tex. Cr. App.] 111 SW 144; Starke v. State [Wyo.] 96 P 148. Verdict based on conflicting evidence, with which trial court has refused to interfere, not disturbed on appeal. State v. Stewart, 63 W. Va. 597, 60 SE 591. Conflict in evidence conclusively determined by jury. Smith v. State, 3 Ga. App. 509, 60 SE 274. Conviction, based on conflicting evidence, approved by trial court, not disturbed on appeal. State v. Clem [Wash.] 94 P 1079. Judgment in misdemeanor case based on conflicting evidence will not be reversed unless it appears to appellate court to be clearly wrong. Gebhardt v. State [Neb.] 114

ciency cannot be determined without passing upon the credibility of the witnesses [5] or the weight of the evidence,[6] appellate courts being generally without power to review questions of fact;[7] but a verdict will be set aside as contrary to law if there is not evidence to support it,[8] or if it appears that the jury arbitrarily disregarded evidence which should have been considered.[9] On a review of the evidence, only that received on the trial will be considered.[10] In New York the unanimous affirmance of a judgment of conviction by the appellate division precludes consideration of the sufficiency of evidence by the court of appeals.[11]

NW 290. Whers evidence is conflicting, verdict will not be disturbed if supported by evidence. Van Schaick v. U. S. [C. C. A.] 159 F 847. Controverted questions of fact are not reviewable. McElroy v. State, 53 Tex. Cr. App. 57, 111 SW 948. Vedict imposing death penalty, based on conflicting testimony as to defendant's age, not disturbed. Gibson v. State, 53 Tex. Cr. App. 349, 110 SW 41. Verdicts on conflicting evidence not disturbed unless palpably contrary to decided weight of evidence. People v. Nylin, 236 Ill. 19, 86 NE 156. Verdict based on conflicting evidence will not be disturbed if substantially supported. State v. Baldwin [Mo.] 113 SW 1123. Finding of jury on plea of former jeopardy, based on conflicting evidence, not disturbed. Benton v. State, 52 Tex. Civ. App. 422, 107 SW 837.

5. Jury are judges of credibility of witnesses and weight of testimony. Thomas v. State, 85 Ark. 357, 108 SW 224; Dowell v. Com., 32 Ky. L. R. 1344, 108 SW 847; State v. Halvorson, 103 Minn. 265, 114 NW 957. Jury being sole judges of credibility of witnesses, verdict will not be disturbed because prosecuting witness was impeached. Henderson v. State, 52 Tex. Cr. App. 514, 107 SW 820. Court will not interfere in prosecution in police court for betting on horse race, credibility and weight of evidence being involved. Pfieffer v. U. S., 31 App. D. C. 109. Conviction based on conflicting evidence not disturbed as contrary to evidence, weight thereof, and credibility of witnesses being for jury and trial court, which denied new trial. People v. Cain [Cal. App.] 93 P 1037. Act Feb. 15, 1870, requiring supreme court to review law and evidence in first degree murder cases, does not require court to pass on credibility of witnesses and weight of evidence, but only to investigate whether there is sufficient evidence, if believed, to sustain the verdict. Commonwealth v. Garrito [Pa.] 71 A 20.

6. Weight of evidence, and whether it establishes facts claimed by state is for jury. State v. Washelesky [Conn.] 70 A 62; State v. McDowell [Mo.] 113 SW 1113; Malone v. State [Tex. Cr. App.] 113 SW 530. Appellate court cannot weigh the evidence. Cheek v. State [Ind.] 85 NE 779; State v. Long, 209 Mo. 366, 108 SW 35; Cordes v. State [Tex. Cr. App.] 112 SW 943. Determination of jury as to sufficiency of evidence and degree of crime not reviewable where based solely on facts. People v. Fossetti [Cal. App.] 95 P 384. Appellate court does not pass on question of preponderance of evidence. City of Gallatin v. Fannin, 128 Mo. App. 324, 107 SW 479. An appellate court will not weigh conflicting evidence, or attempt to determine its preponderance, and will reverse only in case of a failure or want of evidence to support some material element of the offense charged. Williams v. State [Ind.] 85 NE 113. Judgment of circuit court affirming that of common pleas, after weighing the evidence, held final and conclusive on the facts. Lemmon v. State, 77 Ohio St. 427, 83 NE 608.

7. Findings of facts below are conclusive on supreme court. State v. Yoe [S. C.] 61 SE 880. Finding of jury on issue of fact not revewable. Soell v. State [Ga. App.] 61 SE 514. Since revision of Cr. Proc. Act, § 136, where entire record is returned with writ of error, appellate court is not authorized to review the evidence adduced at the trial. State v. Herron [N. J. Err. & App.] 71 A 274. Where issue whether witness was accomplice was submitted to jury, with instructions as to corroboration which was necessary, a verdict of guilty is a finding that witness was not an accomplice and is not reviewable. McElroy v. State, 53 Tex. Cr. App. 57, 111 SW 948. Verdict of jury on admissibility of confession, where made under proper circumstances, binding on supreme court. State v. Foster, 136 Iowa, 527, 114 NW 36. Exception involving mere question of fact not considered. State v. Washington [S. C.] 61 SE 896.

8. New trial ordered where verdict was without evidence to support it. Allen v. State [Ga. App.] 62 SE 1003. Verdict set aside as contrary to law where there was no evidence to show malice or intent to kill in assault case. Crumley v. State [Ga. App.] 62 SE 1005. Evidence will be reviewed and new trial granted if there is no evidence to support verdict, question being properly saved for review. Hinsley v. U. S. [Okl. Cr. App.] 98 P 363. To sustain conviction, evidence must be sufficient to show commission of offense and to connect defendant with it. Id. Verdict set aside because not supported by required amount of evidence, being based on suspicion only. Thompson v. State [Ga. App.] 62 SE 571.

9. Judgment reversed and cause remanded where jury appeared to have arbitrarily and without reason rejected and disregarded testimony of unimpeached independent eye witness to killing. Jones v. State [Miss.] 45 S 145.

10. An appeal from judgment of conviction only indictment and evidence received under it at trial can be considered; not evidence in affidavits for new trial. People v. Henry, 111 NYS 1005. Evidence heard on motion to place defendant on probation, and not given in the trial, cannot be considered in appellate court where sufficiency of evidence to sustain verdict is questioned. People v. Scobie [Cal. App.] 95 P 667.

11. People v. Gibson, 191 N. Y. 227, 83 NE 976.

(§ 17) *I. Decision and judgment of the reviewing court.*[See 10 C. L. 236]—Affirmance results where the members of the appellate court are equally divided in opinion [12] and, in some jurisdictions, where appellant fails to appear,[13] or fails to present a proper record.[14] Where no final judgment appears, the cause may be remanded.[15] Where the error results only in a mistrial, the cause will be remanded for new trial.[16] If the proceedings, were otherwise valid, an erroneous or illegal sentence does not necessitate a new trial; in such case the cause will be remanded with instructions to impose proper sentence.[17] A judgment of conviction on several counts should not be affirmed in part and reversed in part but should be reversed or affirmed as a whole;[18] but judgment may be reversed in part and affirmed in part when the legal part is severable from the illegal part.[19] Judgment may be affirmed as to one defendant and reversed as to a codefendant.[20] Evidence being admitted on two charges, and case being submitted thereon, reversal must follow where part of statute on which one charge was based is held inavlid.[21] Reversal, with instructions to dismiss, follows where indictment is fatally defective and evidence shows no offense.[22] Defendant will be ordered discharged where further prosecution would be barred.[23] The judgment on appeal must conform to the law in force at the time.[24] The su-

**12.** Judgment of district court affirmed, members of supreme court being equally divided. Martin v. Ter. [Ariz.] 94 P 1091. Judgment affirmed by operation of law, judges being equally divided. Yeates v. State, 129 Ga. 636, 59 SE 771. Judgment affirmed as to question on which judges were equally divided. Lewis v. State, 129 Ga. 731, 59 SE 782.

**13.** Failure of appellant to file brief or appear on oral argument warrants affirmance of judgment. Pen. Code, § 1253. People v. Albitre, 153 Cal. 367, 95 P 653.

**14.** All assignments of error depending on consideration of evidence, and brief of evidence not being approved by trial judge, judgment was affirmed. Madison v. State [Ga. App.] 60 SE 1068. No statement of case having been served on solicitor, or tendered, and none appearing in the record, judgment affirmed. State v. Lewis, 145 N. C. 585, 59 SE 999. Affirmance of judgment of lower court will not result from failure to transmit part of record material to clear understanding of errors complained of, if there is a sufficient assignment of error to enable the court to understand and pass upon the errors, either by reference to the bill of exceptions or the bill and the record together. Mason v. Terrell, 3 Ga. App. 348, 60 SE 4.

**15.** Where no final judgment appeared, opinion which had been filed was withdrawn, submission of appeal set aside, and cause remanded for final judgment on verdict. State v. Hodges, 207 Mo. 517, 106 SW 51.

**16.** Cusiter v. Silverton [Or.] 93 P 234.

**17.** State v. Gilluly [Wash.] 96 P 512; State v. King [Wash.] 97 P 247. Where sentence is void and the judgment otherwise is affirmed. Lemmon v. State, 77 Ohio St. 427, 83 NE 608. Sentence under wrong statute does not render the prosecution of no effect. Wechsler v. U. S. [C. C. A.] 158 F 579. Where sentence is erroneous and has not been executed. Hamilton v. State, 78 Ohio St. 76, 84 NE 601. Where sentence was under intermediate sentence act (Laws 1907, p. 344), which was ex post facto as to defendant, cause was reserved and remanded with instructions to pronounce sentence according to law. State v. Gilluly [Wash.] 96 P 512. A workhouse sentence having been illegally imposed for violation of the Valentine anti-trust law will be set aside on review and the case remanded to the trial court for resentence, which may be by fine or imprisonment or both, in the discretion of the court as on original hearing. Arnsman v. Ohio, 11 Ohio C. C. (N. S.) 113. Where the verdict failed to provide for punishment by fine, an imposition of a fine in the judgment is erroneous, and the appellate court may correct the same without reversal. Shields v. People, 132 Ill. App. 109. Where the sentence is void, but the verdict is valid, relator should be remanded for proper sentence. Ex parte Burden [Miss.] 45 S 1.

**18.** Judgment on certain counts of information charging illegal sales of liquor held a unit. People v. Gaul, 233 Ill. 630, 84 NE 721.

**19.** Yeoman v. State [Neb.] 117 NW 997.

**20.** Instructions being correct as to one of two defendants, and evidence tending to show guilt, judgment affirmed as to him, though reversed as to codefendant. Williams v. Com., 33 Ky. L. R. 330, 110 SW 339.

**21.** State v. Merchant, 48 Wash. 69, 92 P 890.

**22.** Weston v. Ter. [Okl. Cr. App.] 98 P 360.

**23.** Where conviction of robbery was reversed because information was sufficient to charge only larceny, defendant was ordered discharged, since he had been placed in jeopardy on larceny charge, and new trial would be useless. People v. Ho Sing, 6 Cal. App. 752, 93 P 204.

**24.** In Texas the repeal of a law, where the repealing law substitutes no other penalty, will exempt from punishment persons who have offended against the repealed law, unless the repealing statute otherwise provides. Pen. Code 1895, art. 16. Hall v. State, 52 Tex. Cr. App. 195, 20 Tex. Ct. Rep. 335, 106 SW 149. Where such repeal takes place pending an appeal, the cause must be disposed of according to the law in force of the time, and no proceeding to enforce pun-

preme court of the Philippine Islands may reverse the judgment of the lower court in a criminal case on defendant's appeal and convict him on the same facts of a different offense calling for an increased penalty,[25] and defendant is not thereby placed twice in jeopardy for the same offense.[26] The decision may be controlled by practical considerations, such as the purpose of obtaining an authoritative decision by a federal court on a federal question.[27]

(§ 17) *J. Proceedings after reversal and remand.*[See 10 C. L. 237]—It is the duty of the lower court, on receiving the mandate of the appellate court affirming the judgment complained of to see that it is carried into execution,[28] unless leave is granted the lower court to exercise its discretion in the matter of granting a new trial on the ground of newly-discovered evidence.[29] When a judgment is affirmed by the supreme court, all questions raised by assignments of error and all questions that might have been so raised are to be regarded as finally adjudicated,[30] and no lower court or judge thereof has jurisdiction to declare the judgment void or to grant a writ of habeas corpus to determine the validity of the imprisonment thereunder.[31] Where a trial is had upon an indictment charging murder in the first degree, a verdict for manslaughter is an acquittal of higher degrees of homicide,[32] and on a new trial, obtained by defendant, he cannot be again tried for or convicted of any degree higher than manslaughter.[33] In such cases the court should at the outset of the new trial instruct the jury that they must confine their inquiries to the offense of manslaughter and to lower degrees of crime included therein.[34] Evidence tending to establish elements of the higher degrees of homicide, and not tending to establish the crime of manslaughter, should not be received,[35] and argument with reference to such matters should be excluded,[36] though it has been held that a conviction of manslaughter may be had on evidence showing murder.[37] Similarly, conviction of murder in the second degree is an acquittal of murder in the first degree and bars subsequent prosecution for that offense.[38]

ishment will be taken. Judgment reversed and prosecution dismissed where law violated had been repealed. Fish law. Id. Cause was transferred from county to circuit court, and conviction therein reversed and cause ordered sent back to county court. Act establishing county court was then repealed, and causes pending therein transferred to circuit court. On error, former judgment and order recalled and cause ordered to remain in circuit court, conviction being set aside. Ex parte Bennefield [Ala.] 46 S 772.

**25, 26.** Flemister v. U. S., 207 U. S. 372, 52 Law. Ed. 252.

**27.** Where demurrer to indictment raised question of power of legislature to legislate regarding national banks, supreme court overruled exception to trial court's ruling overruling the demurrer in order that an authoritative decision might be had in federal courts, if case was not otherwise disposed of on the trial. State v. People's Nat. Bank [N. H.] 70 A 542.

**28.** Angle v. U. S. [C. C. A.] 162 F 264.

**29.** Modification to grant leave to lower court to grant new trial refused. Judgment affirmed. Angle v. U. S. [C. C. A.] 162 F 264.

**30.** Sufficiency of evidence adjudicated though that question not specifically raised. People v. Cook County Super. Ct., 234 Ill. 186, 84 NE 875.

**31.** People v. Cook County Super. Ct., 234 Ill. 186, 84 NE 875.

**32.** West v. State [Fla.] 46 S 93. Where information charges murder, conviction of manslaughter is an acquittal of first and second degree murder. People v. Huntington [Cal. App.] 97 P 760.

**33.** West v. State [Fla.] 46 S 93.

**34.** Error to refuse to give such instruction, when requested, at beginning of case. West v. State [Fla.] 46 S 93.

**35.** Issues of premeditation, etc., tending only to show murder, should not be submitted to jury. West v. State [Fla.] 46 S 93.

**36.** Error to refuse to exclude argument, and for court to state in presence of jury that premeditation, etc., could be considered, but conviction could not be had of any offense higher than manslaughter. West v. State [Fla.] 46 S 93.

**37.** Where accused was convicted of manslaughter on former trial, being thus acquitted of murder, he was not, on second trial, entitled to an instruction that if evidence showed murder only he must be acquitted, since he could be convicted of manslaughter under evidence showing murder. Burnett v. State, 53 Tex. Cr. App. 515, 112 SW 74.

**38.** Where one indicted for murder in the first degree is convicted of murder in the second degree, this is an acquittal of murder in the first degree, and he cannot be tried on that charge on a second trial, and the court should so instruct the jury. Commonwealth v. Deitrick [Pa.] 70 A 275.

§ 18. *Summary prosecutions and review thereof.*[See 10 C. L. 238]—Prosecutions for violations of municipal ordinances are sometimes considered civil in nature.[39] Prosecutions in city courts and before magistrates and justices and other inferior courts are regulated by ordinance, charter or statute, and procedure varies in different jurisdictions. In the notes are given decisions relating to the jurisdictions of such courts,[40] disqualifications of presiding officer,[41] the sufficiency of the accusation [42] and amendment thereof,[43] variance between accusation and proof,[44] right to jury trial and waiver thereof,[45] necessity of bond for costs,[46] power to continue causes,[47] perpetua-

**39.** A proceeding against one charged with violation of a municipal ordinance is partly civil and partly criminal in nature. Character of proceeding and power of municipality discussed, validity of ordinance being issue. O'Haver v. Montgomery [Tenn.] 111 SW 449.

**40.** Justice of peace held to have no jurisdiction of assault committed by throwing scalding water. Martin v. State [Ala.] 47 S 104. Intendant of town of Central has jurisdiction of violation of ordinance punishable by fine of "not less than $100," or 30 days imprisonment. Town of Central v. Madden [S. C.] 61 SE 1028. The legislature has power to authorize municipal courts to arrest and try offenders against municipal ordinances for offenses committed outside the county. Intoxicating liquor ordinances. Jurisdiction beyond county lines upheld Town of Gower v. Agee, 128 Mo. App. 427, 107 SW 999. Accused were arrested on magistrate's warrant, but taken before circuit court, which alone had power to try them and require then to be put under bond to keep the peace. Held, accused could not complain. Lowe v. Com., 33 Ky. L. R. 1078, 112 SW 647. Loc. Acts 1907, p. 329, creating inferior court and conferring on it original and exclusive jurisdiction of all misdemeanors committed in county, held valid. Ex parte O'Neal [Ala.] 45 S 712. Unless one accused of violating Rev. St. § 4405, governing sale of drugs by registered pharmacists, waive a jury in writing, the magistrate has no authority to punish and can only bind prisoner over to the proper court. Sickles v. State, 7 Ohio N. P. (N. S.) 338.

**41.** Bias or prejudice on part of presiding justice of peace does not disqualify him; only kinship or pecuniary interest. Const. § 171; Code 1906, § 2724. Evans v. State [Miss.] 45 S 706.

**42.** In prosecutions in police court for violations of ordinances, no written information or indictment is required, and proceedings are not closely scrutinized as to form. Burrow v. Hot Springs, 85 Ark. 396, 108 SW 823. A complaint charging a violation of an ordinance is not to be so strictly construed as an indictment. Only that degree of certainty is required which will inform defendant of what he is called upon to defend. City of Gallatin v. Fannin, 128 Mo. App. 324, 107 SW 479. Accusation in city court based on affidavit made before magistrate for purpose of procuring warrant for arrest of accused is sufficient compliance with act creating city court, requiring trial on "written accusation, setting forth plainly the offense charged, founded on the affidavit of the prosecutor." Griffin v. State, 3 Ga. App. 476, 60 SE 277. Claim of maximum fine in complaint in city court held surplusage. Harrison v. Anniston [Ala.] 46 S 980. Affidavit in police court is sufficient if it charges an offense substantially in language of statute and ordinance violated. Burrow v. Hot Springs, 85 Ark. 396, 108 SW 823. In proceeding for violation of fish and game act (Laws 1903, p. 534, § 33), before a justice, it is not essential that a special note of the day, month and year of institution of action be endorsed on the complaint, or that name of person prosecuting or title of statute be endorsed on summons. Minard v. Dover, R. & P. O. Gas Co. [N. J. Law] 68 A 910. Under statutes giving a mayor jurisdiction as police justice over violations of city ordinances, and also as justice of the peace over prosecutions under state laws, an accusation must show whether a violation of an ordinance or of a state law is charged (Washington v. State [Miss.] 46 S 539), and the record on appeal must clearly show whether an offense against the city or state is charged (Id.). An affidavit purporting to be made in the city police court, but charging only an offense against the state, is fatally defective. Id. Where a constable served upon a saloonkeeper, for violation of the Sunday liquor law, a warrant calling for the arrest of "John Doe, whose real name to the affiant was unknown," and made a return upon this warrant, and a trial and conviction followed, and no additional affidavit was made and no other warrant served, and at the trial the conviction was procured on facts occurring after the taking out of the "John Doe" warrant and before it was served, the defendant was tried without an affidavit supporting the charge. Murray v. State, 6 Ohio N. P. (N. S.) 155.

**43.** Solicitor of city court has right to amend accusation prior to arraignment, and interlineations will be presumed to have been properly made. Crawford v. State [Ga. App.] 62 SE 501. Amendment of judgment of police court to correct mere clerical error proper. Not a second judgment. Ex parte Hornef [Cal.] 97 P 891. Solicitor of city court may amend an accusation in said court at any time before defendant pleads thereto if the affidavit of the prosecutor will support the accusation and the statute creating the court does not forbid amendments. Jackson v. State [Ga. App.] 61 SE 862.

**44.** Where complaint charged sale of "whole milk" and proof showed sale of "skimmed milk," two being regulated by different sections of ordinance, variance fatal. City of St. Louis v. Klausmeier, 212 Mo. 724, 111 SW 507.

**45.** Under Gen. Laws 1886-87, p. 838, establishing criminal court of Jefferson county, accused must apply for jury trial within 10

tion of testimony,[48] power to find facts and necessity or propriety of such findings,[49] power to assess punishment,[50] and as to the form,[51] correction [52] and suspension [53] of sentence. In Wisconsin a commitment by a justice is proper where the sentence is imprisonment without a fine, and where sentence is imprisonment in default of payment of a fine, a commitment issued to carry such judgment into effect is not void,[54] though an execution against the body would be the appropriate mode of enforcing the judgment.[55] Upon conviction and sentence of imprisonment before a justice of the peace, in Minnesota, a commitment may be issued at any time while the judgment stands unexecuted,[56] and where an appeal is taken to the district court, but dismissed, the justice may proceed after the dismissal.[57]

*Review.*[See 10 C. L. 238]—Jurisdiction to review proceedings of inferior courts is statutory,[58] as are proceedings necessary to perfect an appeal. Holdings as to transmission [59] and amendment [60] of the transcript or record and sufficiency of appeal bond [61] are given in the notes. Payment of a fine by one prosecuted for violation of

days after being arrested or taken into custody. Merriweather v. State [Ala.] 45 S 420. Right to jury trial in city court waived by failure to make timely demand. Harrison v. Anniston [Ala.] 46 S 980. Jury trial in county court waived by failure to demand jury before first jury term after arrest, under statute. Hammond v. State [Ala.] 45 S 654. Same ruling under statute and rule of Gadsen City court. Demand for jury trial too late. Stafford v. State [Ala.] 45 S 673.

46. Under Kirby's Dig. § 2476, accused need not give bond for costs in prosecution in city court for violating ordinance. Emerson v. McNeil, 84 Ark. 552, 106 SW 479.

47. Postponements by justice of peace not exceeding 60 days are within his discretion under Pen. Code, § 1052. Alleged abuse of discretion can be reviewed only on appeal from judgment, with proper record. In re Yung [Cal. App.] 96 P 24. Magistrates have power to continue causes for cause shown, in South Carolina, though no statute expressly confers the power. Power incidental to power to hear causes; also would probably exist under provisions of Cr. Code 1902, § 20. State v. Pope, 79 S. C. 87, 60 SE 234.

48. Mayors having powers of magistrates, must take down testimony of witnesses in summary proceedings in writing and have same signed by witnesses. Cr. Code 1902, §§ 66, 67, 68, contemplates this procedure, since appeals can be heard under such statutes, only on evidence so reduced to writing. City of Greenville v. Latimer [S. C.] 61 SE 224.

49. In trial by judge without jury in Jefferson county court, no special finding of facts can be required. Thomas v. State [Ala.] 46 S 771. Special findings by the court are unauthorized in criminal cases. So held in criminal trial in city court, without a jury. Dean v. State [Ala.] 45 S 651.

50. Under Acts 1894-95, p. 1062, § 19, city court may award punishment of hard labor. Harrison v. Anniston [Ala.] 46 S 980. A police court has authority under the law of Ohio to commit to the workhouse upon conviction of a misdemeanor. In re Schooler, 7 Ohio N. P. (N. S.) 276. Prisoner between ages of 16 and 30, convicted before magistrate of disorderly conduct, may be committed to New York City Reformatory, under Greater New York Charter, Laws 1905, c. 305, § 698. In re Jacobs, 57 Misc. 655, 109 NYS 1068.

51. Laws 1905, p. 574, c. 305, provides that magistrate shall not fix limit of period of imprisonment, but that a sentence fixing a definite time shall not be void, but person sentenced shall be entitled to benefits of act. Commitment for "three years, unless sooner dicharged or paroled," not invalid. In re Jacobs, 57 Misc. 655, 109 NYS 1068.

52. Where a justice of the peace has imposed an erroneous sentence, he should issue an alias caplas for defendant and impose a proper sentence. Smithey v. State [Miss.] 46 S 410.

53. Sentence of fine and imprisonment passed by police judge is not invalidated by provision that defendant may go upon his own recognizance until order of commitment is issued. Order may issue any time before his term would expire, though not thereafter. In re Murphy [Kan.] 98 P 214.

54. It protects the officer issuing and the one executing it. Olson v. Hawkins [Wis.] 116 NW 18.

55. Olson v. Hawkins [Wis.] 116 NW 18.

56. State v. Long, 103 Minn. 29, 114 NW 248.

57. Justice does not lose jurisdiction to issue commitment. State v. Long, 103 Minn. 29, 114 NW 248.

58. No appeal lies from recorder's court of city of Anniston to circuit court. Appeal must be to city court under charter. Reid v. Greene [Ala.] 47 S 195. Under Rev. St. 1908, § 7356, circuit court may in first instance take and intertain jurisdiction of proceedings in error to review judgment of mayor of incorporated village convicting a defendant of crime. State v. Mattingly [Ohio] 86 NE 353.

59. Under Acts 1905, p. 376, § 2, on appeal from justice to circuit court, it is duty of justice to file transcript in circuit clerk's office. Where transcript was filed in time and accused was present on proper day demanding trial dismissal of appeal was error. Cain v. State [Ark.] 111 SW 267.

60. In appeal to district court from magistrate's judgment, rule to compel magistrate to make further or amended transcript properly refused where facts shown would not affect questions to be considered by the court. Thomsen v. State [Neb.] 118 NW 330.

61. Appeal from justice to county court should have been dismissed, bond not being conditioned as required by statute. Bunton

an ordinance is not a bar to proceedings for review.[62] On appeal from the judgment of an inferior court or magistrate, trial is commonly de novo.[63] In such case, accused is entitled, in some jurisdictions, to be arraigned in the appellate court.[64] Usually pleadings may be amended in the reviewing court [65] or new pleadings filed therein.[66] No presumptions are indulged in favor of the judgment below.[67] Special findings of the trial court, not authorized by law, will not be considered.[68] But when authorized, findings of facts, in a trial by a judge without a jury, will not be disturbed on appeal [69] unless the evidence is legally insufficient.[70] If conviction is supported by competent evidence, a reversal need not result from the introductiton of incompetent evidence.[71] Erroneous sentence in a police court may be corrected on appeal.[72] In Kentucky where a defendant pleads guilty in a justice court, he may, on appeal, introduce evidence for the purpose of reducing the sentence without withdrawing the plea of guilty.[73] Such plea may, however, be withdrawn at any time in the circuit court,[74] and if the former plea of guilty be then offered in evidence, defendant may show that it was entered under duress and fear.[75] In Mississippi on appeal from a mayor's court, verbal testimony of the mayor is incompetent to amend the transcript of the record.[76] Such amendment must be by the book itself or by certified amended transcript from the book.[77]

In many jurisdictions, review is by certiorari. In the notes are given holdings as to the necessity and sufficiency of the bond required in such cases,[78] sufficiency of

v. State, 52 Tex. Cr. App. 618, 108 SW 373. Bond on appeal from justice to district court not conditioned "that defendant abide by judgment of the court," insufficient under Rev. Laws 1905, § 4018. State v. Mattson [Minn.] 117 NW 503. Bond on appeal from municipal to district court, conditioned that defendant shall be and appear at first general term of district court, and shall not depart thence without leave duly granted, does not conform to Rev. Laws 1905, § 4018, and is void. Id. Rev. Laws 1905, § 3989, that lack of or defect in bond shall not defeat appeal if sufficient bond be given, applies only to civil cases. Id. Hence defective bond could not be remedied by new bond in criminal appeal. Id.

**62.** Fruehwirth v. South Amboy [N. J. Law] 68 A 1075.

**63.** On appeal from recorder's to city court (Anniston), trial is de novo. Harrison v. Anniston [Ala.] 46 S 980. On appeal from justice to county court, trial in latter court is de novo. Williams v. State, 53 Tex. Cr. App. 396, 110 SW 63. Under Pen. Code, § 2717, appeals from justice court are tried de novo in district court. Hence, if action in justice court properly instituted, failure to give judgment in time or holding court on legal holiday would not invalidate proceedings. In re Graye, 36 Mont. 394, 93 P 266.

**64.** Error where record showed there was no arraignment and that court's attention was called thereto. Washington v. State [Miss.] 46 S 539.

**65.** Pending appeal under Cr. Code, § 324, from judgment of magistrate, district court may permit filing of amended complaint which does not essentially or materialy alter the original charge. Ruffing v. State [Neb.] 114 NW 583. Circuit court has power to allow amendment to warrant on appeal to it from inferior court proceedings and trial being de novo. Pabst Brew. Co. v. Com., 32 Ky. L. R. 1010, 107 SW 728.

**66.** On appeal from police court to district court, latter may allow new complaint to be filed without quashing old one and without new warrant of arrest, accused being under recognizance. City of Topeka v. Durein [Kan.] 97 P 967.

**67.** In reviewing judgments and conclusions of city court, supreme court must pass on evidence without any presumptions in favor of judgment below. Dean v. State [Ala.] 45 S 651.

**68.** Special findings by city court trying case without a jury, not being authorized, cannot be considered on appeal. Dean v. State [Ala.] 45 S 651. Recitals or findings of fact incorporated by a justice in his judgment are unauthorized, and cannot be considered on appeal. Ex parte Thompson [Ark.] 109 SW 1171.

**69.** Exception that finding of guilt by judge, in trial without a jury, is not supported by evidence, is not reviewable. Thomas v. State [Ala.] 46 S 771. Where statute requires review of judgment on evidence, and the evidence is oral, or partly oral and partly in writing, the finding of the trial judge is on same footing as a verdict, and will not be set aside unless plainly incorrect. York v. State [Ala.] 45 S 893.

**70.** On appeal from a mayor's court, a conviction without introduction in evidence of the ordinance alleged to have been violated cannot be sustained. Spears v. Osyka [Miss.] 46 S 558.

**71.** Where trial was before police justice without a jury, receiving of incompetent evidence was held not ground for reversal where conviction was supported by other competent evidence. People v. Bradley, 58 Misc. 507, 111 NYS 625.

**72.** Excess of fine or sentence to wrong jail may be so corrected. Washington v. State [Miss.] 46 S 539.

**73, 74, 75.** Holtman v. Com. [Ky.] 112 SW 851.

**76, 77.** Washington v. State [Miss.] 46 S 539.

**78.** Supersedeas bond required by Laws

the petition for certiorari,[79] the office [80] and sufficiency of the answer or return,[81] the time of hearing thereon [82] and notice of such hearing,[83] the nature and office of the writ of certiorari and scope of review theron.[84] Application for a writ of certiorari

1902, p. 105, as condition precedent to application for certiorari from municipal court, is in effect payable to corporation when made payable to mayor and his successors in office. Such bond, otherwise good, is a sufficient compliance with statute. Williams v. Tifton, 3 Ga. App. 445, 60 SE 113. A writ of certiorari without a legal bond is a nullity and must be dismissed. The filing of a proper bond or an affidavit in forma pauperis is an indispensable prerequisite to the issuance of the writ. Simon v. Savannah [Ga. App.] 60 SE 1036. Certiorari bond, in proceeding to review judgment of mayor of municipality, must be conditioned for appearance of defendant to abide final order, judgment or sentence of municipal court or of superior court. McDonald v. Ludowici, 3 Ga. App. 654, 60 SE 337. Such bond should be payable to municipality and be in an amount and with surety approved by officer giving judgment or clerk of the court. Id. Certiorari properly dismissed where bond was not conditioned as required by statute, and not approved. McDonald v. Ludowici, 3 Ga. App. 654, 60 SE 337; Tooke v. Oglethorpe [Ga. App.] 62 SE 544. Bond conditioned to pay eventual condemnation money not a substitute for bond required by Acts 1902, p. 105. Simon v. Savannah [Ga. App.] 60 SE 1036.

**79.** Petition for certiorari to correct errors of criminal court of Atlanta is properly verified by affidavit in the former prescribed by Civ. Code 1895, § 4638. Hood v. State [Ga. App.] 62 SE 570. The allegations of the petition for certiorari must be taken as prima facie true until the answer is filed. Green v. State [Ga. App.] 61 SE 234. It is unnecessary that a copy of the accusation upon which defendant is convicted be attached to his petition for certiorari, or that such copy be presented or identified by the trial court prior to the coming in of the answer to the writ. Id. Where the accusation is attached to the petition to support a claim of error in failing to sustain a demurrer to it, it need not be verified by the trial judge in advance of his answer. Id. When a petition purports to contain all the evidence, and it does not appear therefrom that the venue of the crime was proved, it is error to refuse to sanction the petition for certiorari, assigning error upon the ground that the verdict was contrary to the evidence and not supported thereby. Id. Error to refuse to sanction petition for certiorari properly verified where according to statement of evidence contained in petition, finding sought to be reviewed is unwarranted. Hood v. State [Ga. App.] 62 SE 570. A petition for the writ of certiorari to review the proceedings and judgment of a court should make it appear that an illegal proceeding appears by the face of the record complained of. Ragland v. State [Fla.] 46 S 724.

**80.** It is the office of the answer to verify all proceedings had in the trial court, whether oral or written. Green v. State [Ga. App.] 61 SE 234.

**81.** The evidence as specifically set forth by the county judge in his answer to the writ of certiorari is conclusive unless traversed (Carter v. State, 3 Ga. App. 476, 60 SE 123), and a reviewing court will not look to the evidence as set forth in the petition for certiorari to add to or in any manner change the evidence as set forth in the answer (Id.). Where evidence set forth in answer to writ of certiorari, though weak, is sufficient to support finding, only error assigned being that finding is not supported by evidence, appellate court will not interfere with judgment of superior court overruling certiorari. Id. Where transcript of magistrate's record in desertion case is duly certified by magistrate and indorsed "filed" on certain date, and docket of quarter session sets forth exactly contents of magistrate's transcript, but does not state in so many words that same was filed in office of clerk of quarter sessions, superior court, when record is taken up by certiorari, will dismiss as untenable the objection that record does not show that the transcript was filed in the court below. Commonwealth v. Brownell, 35 Pa. Super. Ct. 249. Where return on certiorari bringing up proceedings for violation of borough ordinance before mayor failed to show evidence or conviction, record was insufficient, and mayor's affidavit could not be considered in aid of it. Court below should be ruled for further return. Fruehwirth v. South Amboy [N. J. Law] 68 A 1075. Proceedings reversed. Id.

**82.** Judges of superior courts may hear and determine certioraries in vacation and in a county other than that in which trial was held. Statute construed. Avery v. State [Ga. App.] 61 SE 839. The judge may fix the time and place of hearing on the application of either party. Id.

**83.** When fixed on application of the solicitor general, accused or his attorney must be given ten days' notice. Avery v. State [Ga. App.] 61 SE 839 The notice need not be given by the solicitor general officially, but is sufficient if given by any one acting under his direction. Id. If accused, by his counsel, appears at the time and place so fixed and participates in the hearing, he will be held to have waived the statutory ten days' notice. Id. Solicitor general does not represent state in quasi criminal proceedings in municipal courts in his district, and notice of sanction of certiorari directed to municipal corporation need not be served on him, and failure to make such service is not ground for dismissing certiorari or error to court of appeals. McDonald v. Ludowici, 3 Ga. App. 654, 60 SE 337.

**84.** On certiorari the court issuing the writ considers only the face of the record of the inferior court. Matters in pais are not within the purview of the writ. Ragland v. State [Fla.] 46 S 724. A writ of certiorari requires production of a copy of the record of the inferior court, not the person of the defendant convicted therein. Id. It is not the province of the writ to act directly upon a commitment and to discharge a prisoner,

and prohibition, made before rendition of any judgment, is premature where the trial court has jurisdiction on the face of the record.[85]

**Indorsing Papers; Infamous Crimes,** see latest topical index.

## INFANTS.

§ 1. Status and Disabilities in General, 140.
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*The scope of this topic* is noted below.[88]

§ 1. *Status and disabilities in general.*See 10 C. L. 239—Under some statutes the word "man" may include infants.[87]

§ 2. *Custody, protection, support and earnings.*See 10 C. L. 239—Generally the natural parents are entitled to the care, custody, and control, of their minor children,[88] the father usually,[89] but not always, having the primary right.[90] This right of the parents, however, is not absolute, and the parents cannot by contract, or otherwise, except as provided by law, put themselves beyond all responsibility for the support or maintenance of their children,[91] nor is the authority of the parents ex-

but to act on the record proceedings and judgment of the court alleged to be illegal. Id. One on whom lawful sentence has been imposed cannot, on certiorari, set up that he had an agreement with the prosecuting attorney as to the sentence, if such matters can ever be set up, since these matters do not appear on the record. Id. Where petition shows that petitioner pleaded guilty to an information charging a crime of which the court had jurisdiction, and that the sentence imposed is authorized by law, the writ is properly denied, no illegality being shown to appear on the face of the record of the inferior court. Id. Evidence given in desertion case and facts recited in judge's opinion filed in quarter session cannot be considered by superior court reviewing proceedings in certiorari. Commonwealth v. Brownell, 35 Pa. Super. Ct. 249. On certiorari to review a conviction of violation of fish and game law before a justice, evidence taken before him, but not embraced in the conviction, form of which is prescribed by statute, and not a proper part of the record, cannot be examined. Minard v. Dover, R. & P. O. Gas Co. [N. J. Law] 68 A 910.

85. After evidence is heard and judgment rendered, relief may be had by certiorari if want of jurisdiction be then disclosed. State v. Josephson, 120 La. 182, 45 S 97.

86. Rights and duties as between parent and child (see Parent and Child, 10 C. L. 1072), all matters pertaining to guardianship (see Guardianship, 11 C. L. 1671), and Guardian's Ad Litem (see Guardians Ad Litem and Next Friends, 11 C. L. 1668), disposition of children in divorce proceedings (see Divorce, 11 C. L. 1111), contributory negligence as applicable to infants (see Negligence, 10 C. L. 922), and assumption of risk (see Master and Servant, 10 C. L. 691), are elsewhere treated, as is also, the right of the parent to the earnings of an unemancipated child (see Parent and Child, 10 C. L. 1072).

87. Word "man" under statute punishing rape (Pub. St. 1901, c. 278, § 15), applies to all males who have reached age of puberty or are capable of committing rape. State v. Burt [N. H.] 71 A 30.

88. Smidt v. Benenga [Iowa] 118 NW 439. Mere fact child is happy and contented where he has been placed, and even shows greater present affection for his grandmother than for his mother, does not warrant judge in refusing to recognize rights of mother to care and custody of child. State v. Steel, 121 La. 215, 46 S 215.

89. Sloan v. Jones, 130 Ga. 836, 62 SE 21. Father held entitled to custody of child as against grandmother, with whom mother, acknowledged to be unfit custodian, lived. Id.

90. Under Laws 1906, p. 223, c. 272, §51, providing that mother is joint guardian of her children with her husband, with equal powers, rights and duties in regard to them, and that, upon death of either mother or father, surviving parent may dispose of custody of unmarried infant child during its minority or for any less time. Father cannot, without mother's consent, legally dispose of custody of child so as to deprive mother of her right of custody after father's death. People v. Beaudoin, 110 NYS 592.

91. Slattery v. Slattery [Iowa] 116 NW 608. Irrespective of any rights which might arise from such contract, personal to immediate parties, children have rights which must be protected by their parents, and courts in interest of children and of general public, will enforce such rights whenever it becomes necessary to do so. Id. Where custody and maintenance of children is provided for by contract, it is within power of court, acting in authority of statute, to set contract aside and decree such provisions in lieu thereof as interests of children seem to demand. See Code, § 3180. Id. Evidence held to show change of condition sufficient to justify order setting contract aside, where all money received by wife by

clusive, the state through its courts [92] also having the right to exercise control over infants,[93] and to deprive the parents or others of their custody and control where the same has been relinquished or forfeited,[94] or the circumstances af the case would justify the court acting against their right for the welfare of the child, which in such cases is a primary consideration.[95]

The custody of an infant may usually be determined only by the court of the infant's domicile,[96] in a proper proceeding for that purpose.[97] The determination of

way of alimony was invested in house, and wife had become sick and unable to support children. Id. Parents cannot by contract between themselves, nor can court by any order it may make in divorce suit, irrevocably determine amount of money father shall contribute for support and education of children, so as to deprive that court of power upon proper showing and notice to alter said decree in interests of justice and for benefit of children. Connett v. Connett [Neb.] 116 NW 658. Decree changed so as to require father to contribute $30 instead of $10 per month. Id.

92. Supreme court under its equity power may in proper case, having regard for welfare of infant, take its custody from one legally entitled thereto and give it to another. People v. Beaudoin, 110 NYS 592. Circuit court held to have jurisdiction to award custody of child to mother suing for separate maintenance, where husband has refused to further support him. Low v. Low, 133 Ill. App. 613.

93. Juvenile Court Bill, Laws 1905, ch. 59, p. 305, does not repeal Laws 1897, ch. 36, p. 241, providing for guardianship in certain cases. In re Quinette [Neb.] 115 NW 545.

94. Sloan v. Jones, 130 Ga. 836, 62 SE 21. Interests of child brought up by aunt without assistance or aid of father, who only infrequently visited him, held to require his custody to remain in aunt. Smidt v. Benenga [Iowa] 118 NW 439. Matter of gift of child was properly alleged and considered with other facts arriving at conclusions as to where custody of child should be placed. Id. While parent has no property interest in child which is subject of being given away, and cannot relieve himself of his parental obligations, and while standing alone on attempted gift of child would be invalid, still fact of gift having been made would place parent in attitude of invoking powers of court of equity in seeking to regain possession of child and give equity jurisdiction of all facts controlling case. Peese v. Gellerman [Tex. Civ. App.] 110 SW 196. Evidence held insufficient to warrant taking girl of eight from custody and control of aunt, with whom she had been since birth and giving her to father who had neglected her for eight years until he married woman of questionable character. Id. When father sues for custody of child, and it appears that he voluntarily parted with such custody, contributed little or nothing to its support, and allowed someone else to do what he should have done, any presumption that might arise as to his peculiar fitness to rear child is destroyed and he will be required to establish his superior fitness before he can be awarded child's custody. Id. There is no presumption that promptings of parental affection will cause father to tenderly care for his child in future, when he has failed to so act in past. Id. If man has voluntarily surrendered control of his child for first seven or eight years of its life and permitted some one else to feed, clothe, and care for it, there is not much room for any sentimental dissertation on subject of court sundering ties existing between father and child. Id. Widow who, by reason of her necessitous circumstances at time, places her little son in care and custody of its paternal grandmother and leaves him with her for several years does not thereby forfeit her right to reclaim her child when she comes later to better fortune. State v. Steel, 121 La. 215, 46 S 215. Act in so leaving child does not imply promise on her part never to retake him. Id.

95. Sloan v. Jones, 130 Ga. 836, 62 SE 21. Every doubt should be resolved in favor of child's welfare and happiness and future moral training. Peese v. Gellerman [Tex. Civ. App.] 110 SW 196. Best interests of child held to be that it should remain with adopted parents rather than that it be given mother. Barclay v. People, 132 Ill. App. 338. Evidence held to clearly show that it was for child's best interest that it remain in father's care and custody. Scott v. Cohn, 134 Ill. App. 195. Held proper for court in divorce proceedings to award custody of child to father where shown that wife, since leaving husband, resided with parents in "red light" vicinity of town, though no immorality was alleged as to her or her parents. Blid v. Blid [Neb.] 117 NW 700. Custody of child will not be given to mother where child of eleven has for over ten years been reared by foster parents as their own child, and mother called to see child only three times for few minutes each and contributed but $50 to her support, and where child clearly wishes to remain away from her mother. People v. Phelps, 58 Misc. 625, 109 NYS 943. Child of seven taken from mother and given to father, where mother abandoned father without cause, did not always conduct herself as dutiful wife and mother and was without means of supporting child. In re Tierney, 112 NYS 1039. Custody of daughter, nine years old, will be given to mother of high character, well situated to care for her, who has proved ability to rear children and has full measure of parental affection, in preference to adopted parents who failed to notify mother of juvenile court proceeding to adopt child though they knew of her residence. Carter v. Botts [Kan.] 93 P 584. Decree of lower court reversed and children placed in mother's charge, and family meeting ordered to be called, judge of district court with advice of family meeting to change custody if deemed for greater advantage of children. Schlater v. Le Blanc, 121 La. 919, 46 S 921.

96. Smidt v. Benenga [Iowa] 118 NW 439.

97. Habeas corpus proper. Sloan v. Jones, 130 Ga. 836, 62 SE 21.

the question of custody rests largely in the discretion of the court,[98] but such discretion should be governed by the rules of law, and be exercised in favor of the party having the legal right,[99] unless, as before indicated, the evidence shows that the interest and welfare of the child justify awarding the custody to another.[1] In this connection, the relative financial ability of the respective parties, seeking custody of the infant[2] and religious belief,[3] are usually proper to be considered, though not controlling. General fitness and qualifications to act as custodians of an infant,[4] and the extreme youth of the child,[5] are usually controlling considerations. No agreement between counsel can bind the minor so as to permit the chancellor to decide the question of a child's custody partially from evidence produced in court and partially on an investigation which he caused others to make out of court.[6] The mere issuance of letters of guardianship is not an adjudication as to the right of custody where the guardianship is of the person, and jurisdiction of the person of the infant or his guardian was not obtained.[7]

In New York the state in its protection of the rights of infants can prohibit the use of an infant's photograph or portrait, except under such conditions as will prevent an abuse of its use.[8]

Where a minor plaintiff has been emancipated and permitted by his parents to

98. Sloan v. Jones, 130 Ga. 836, 62 SE 21. Which home is best for child is question of fact to be determined primarily by trial court. Peese v. Gellerman [Tex. Civ. App.] 110 SW 196. Court held not to have abused discretion in refusing to remove children in mother's custody to that of father, where shown that mother, due to sickness, was unable to support them, but where father was ordered to contribute to such support. Slattery v. Slattery [Iowa] 116 NW 608. Where custody of female infant of prostitute legally adopted by keeper of brothel has been awarded on habeas corpus to an incorporated benevolent society, and no exception is taken to such judgment, and foster mother, within two months thereafter, sues out writ of habeas corpus on ground that since former proceedings she had abandoned her immoral life and is proper person to be intrusted with care of infant, judgment denying relief sought will not be changed in absence of abuse of discretion. Vandiver v. Augusta Associated Charities, 130 Ga. 413, 60 SE 999.

99, 1. Sloan v. Jones, 130 Ga. 836, 62 SE 21.

2. Where financial ability of parties was about equal and mother lived near her parents who were willing to and had in past taken care of child, while husband wished to have child cared for by his brother's family, held proper not to make permanent award but to give child to mother temporarily. Wallace v. Wallace [Miss.] 46 S 398. Court will give mother custody, though grandparents have held it for some time, where she is fit person and amply able to care for child under eight years old, even though grandparents are better situated financially. People v. Beaudoin, 110 NYS 592. Mere difference in worldly circumstances is not cause for disturbing custody of child, except perhaps in extreme cases of poverty. Sloan v. Jones, 130 Ga. 836, 62 SE 21. Fact grandmother was more wealthy than father is insufficient to deprive him of child's custody, where he is otherwise suitable. Id.

3. Neither can catholic father be deprived of his child because mother had early imparted protestant faith to it and father might change it to catholic. Sloan v. Jones, 130 Ga. 836, 62 SE 21.

4. Allegation that new wife of father was not woman of good reputation, and that, although she was not married prior to her marriage with him, she had given birth to child, and that she was not suitable person to care for and advise a girl, held proper and pertinent to question of interest of child being subserved by giving custody to father whose home was presided over by such wife. Peese v. Gellerman [Tex. Civ. App.] 110 SW 196. Evidence held to sustain finding that wife was not addicted to use of narcotics and alcoholic liquors so as to be unfit custodian for children. Page v. Page, 124 App. Div. 421, 108 NYS 864.

5. In case of child of less than two, whose mother resided with wealthy parents, held improper to divide custody between parents but that child of such age should be given to mother by event reserving right to alter or modify decree on subsequent application under changed circumstances. Turner v. Turner [Miss.] 46 S 413. Child of one and one-half years old held of too tender age to be removed from mother, shown to be capable of properly caring for and nurturing it. Patterson v. Patterson [Ark.] 109 SW 1168.

6. Scott v. Cohn, 134 Ill. App. 195. Decree awarding custody to mother based on such evidence and investigation reversed as contrary to weight of evidence introduced in court. Id.

7. Father obtaining letters in county other than that of infant's domicile not thereby entitled to custody of child. Smidt v. Benenga [Iowa] 118 NW 439.

8. Laws 1903, p. 308, c. 132, § 2, requiring written consent of parent or guardian before infant's photograph or portrait may be so used, are constitutional. Wyatt v. James McCreery Co., 111 NYS 86.

work for himself, he may recover for loss of time or wages during his minority as a result of injuries caused by defendant.[9]

§ 3. *Statutes for the protection of infants.* See 10 C. L. 241—The presence of minors in certain specified places, usually deemed injurious to health or morals,[10] except under certain conditions [11] is frequently prohibited by statute. Child labor laws,[12] founded on the supervisory control of the state over minors,[13] and passed by the legislature in exercise of the police power,[14] are usually upheld as constitutional.[15] Such statutes are usually penal,[16] and should be strictly construed.[17] The term person, however, may include a corporation,[18] and the penalty may also be incurred not only by the owner of the establishment in which a child is illegally employed [19] but also

9. Donk Bros. Coal & Coke Co. v. Retzloff, 133 Ill. App. 277. Evidence held to show emancipation. Id.

10. Evidence held insufficient to sustain conviction, under Pen. Code, § 290, punishing person permitting children to remain in places of entertainment injurious to health and morals, etc., unless accompanied by parent or guardian, where there was no evidence that place was injurious to health and morals, nothing but moving pictures being exhibited, nor was there any evidence that children were unaccompanied by guardian. People v. Samwick, 111 NYS 11. Laws 1908, c. 185, § 2, (P. L. 1908, p. 375), making it misdemeanor to admit children below certain age to certain places of amusement but exempting entertainment upon piers devoted to public entertainment is unconstitutional on account of such exemption as violation of U. S. Const. Amend. 14. In re Van Horne [N. J. Eq.] 70 A 986. Ordinance prohibiting minors from visiting billiard and pool rooms (Ordinance of Los Angeles, 9671, § 2), is not void neither because in conflict with Pen. Code, §§ 273, 397b, nor as an invalid exercise of police power. Ex parte Meyers [Cal. App.] 94 P 870.

11. Word guardian, under Pen. Code, § 290, punishing one allowing children, unattended by parent or guardian, to remain in certain places injurious to their health or morals, does not mean guardian appointed by law but may mean person, such as brother, sister, neighbor, or friend, if not excluded in some way or by reason of some law. People v. Samwick, 111 NYS 11.

12. Laws 1897, p. 477, c. 415, § 70, forbids employment of child under fourteen years of age in any factory in state. Danaher v. American Mfg. Co., 110 NYS 617. Pub. Acts 1901, p. 157, No. 113, § 3, providing that child under 16 shall not be employed where life and limb is endangered. Braasch v. Michigan Stove Co. [Mich.] 15 Det. Leg. N. 748, 118 NW 366.

13. Child labor laws are founded on principle that supreme right of state to guardianship of children controls natural right of parent, when welfare of society or of children themselves conflict with parental rights. Starnes v. Albion Mfg. Co. [N. C.] 61 SE 525. Supervision and control of minors is subject which has always been regarded as within province of legislative authority. Id.

14. Legislature, under its police power, has authority to enact legislation limiting age below which children may not be employed at certain work. Stehle v. Jaeger Automatic Mach. Co., 220 Pa. 617, 69 A 1116. How far legislative authority shall be exercised is question of expediency, which it is province of legislature to determine. Starnes v. Albion Mfg. Co. [N. C.] 61 SE 525. Labor Laws (Laws 1897, p. 477, c. 415), §§ 70, 6 as amended by Laws 1903, c. 184, p. 437, and Pen. Code, § 3841. Id. Sections of labor law prohibiting employment of children under certain age, except upon certain conditions, is police regulation for public health. Violation of its provisions is not malum in se but malum prohibitum. People v. Taylor [N. Y.] 85 NE 759.

15. Revisal 1905, § 3362 is not violative of Art. 1, § 17 State Const. nor 14th Amend. U. S. Const. but was framed in good faith to protect welfare of minors, is not undue restriction of parent's right and does not close all fields of employment to child. Starnes v. Albion Mfg. Co. [N. C.] 61 SE 525. Right of parent to labor of child is not vested right in parent nor is it of any more importance than right to control its education, matter over which state has assumed supervisory control. Id. Constitutional guaranty of liberty of contract does not apply to children of tender years nor prevent legislation for their protection. Id. 14th Amend. does not in any way limit power of state to regulate labor of minors in good faith. Id. Act of Mar. 24, 1904 (P. L. p. 152), commonly known as child labor law, is not unconstitutional as vioating State Const. Art. 1, § 1, nor as containing provisions touching objects not expressed in its title, since it is not pretended that alleged obnoxious provisions are not severable, nor as special or private legislation. Bryant v. Skillman Hardware Co. [N. J. Law] 69 A 23.

16. Violation of provisions Act May 2, 1905 (P. L. 352) § 2, punishable by fine or imprisonment. Stehle v. Jaeger Automatic Mach. Co., 220 Pa. 617, 69 A 1116.

17. People v. Taylor [N. Y.] 85 NE 759. Rev. St. 1899, § 6434 (Ann. St. 1906, p. 3217) does not render it unlawful to obtain employment where there is stationary or traversing machinery but only for them to clean or work between parts of such machinery. Peters v. Gille [Mo. App.] 113 SW 706.

18. Statutory construction laws (Laws 1892, p. 1487, c. 677), § 5. People v. Taylor [N. Y.] 85 NE 759.

19. Person who owns factory is liable for violation of labor law, if child is employed contrary to provisions thereof by owner, either directly or through officer, agent, or employe. People v. Taylor [N. Y.] 85 NE 759. Owner by or for whom child is employed is liable because such employment is prohibited. Id.

any person actually entering into the contract by which such child is employed,[20] without regard to any illegal intent,[21] but an employe of a corporation, superior in authority to another, is not individually liable for such employment in the interest of, and for the beneficial purposes of, the corporation, when such employment is made by the subordinate without the knowledge or consent of the person charged with the crime and contrary to his express direction.[22] The remedies provided in such acts do not necessarily supersede the right of action for damages in a civil proceeding.[23] One who deliberately falsifies, regarding his age, to get employment is not estopped from recovering a claim for injuries.[24] Where the act is not intended to advance education but to promote the health, safety and general welfare of minors, the fact that a minor also attends school does not excuse his employment.[25] The practice under such acts is usually regulated by statute.[26]

*Crimes against children.* See 10 C. L. 241

*Juvenile courts.* See 10 C. L. 241—In some states the juvenile court is given jurisdiction only of charges of misdemeanor under the act,[27] in others the law covers the punishment of both misdemeanors and certain felonies,[28] while in still others, the provisions of the juvenile court acts are held not to contemplate the punishment of infractions of the criminal laws.[29] The juvenile court law of the District of Columbia, gives such court no power to punish the father of an illegitimate child for failing to support it.[30] Such statutes, so far as they provide for the punishment of children, are usually held not to be criminal or penal statutes.[31] The Idaho act, providing for the care of delinquent children, has been held constitutional by the courts of the state,[32] while the Florida law has been held constitutional as to certain

**20, 21.** People v. Taylor [N. Y.] 85 NE 759.

**22.** Defendant held not liable either as principal or accessory. People v. Taylor [N. Y.] 85 NE 759.

**23.** Act May 2, 1905 (P. L. 352) § 2, does not supersede right of action for damages. Stehle v. Jaeger Automatic Mach. Co., 220 Pa. 617, 69 A 1116.

**24.** Recovery and Public Acts 1901, p. 157, No. 113, § 3. Braasch v. Michigan Stove Co. [Mich.] 15 Det. Leg. N. 748, 118 NW 366.

**25.** Under Act Mar. 24, 1904 (P. L. p. 152), fact that minor within its provisions attends school while otherwise employed in violation of act, instead of avoiding act, is peculiarly obnoxious instance of violation. Bryant v. Skillman Hardware Co. [N. J. Law] 69 A 23.

**26.** Action brought by state official by virtue of office under Act March 24, 1904 (P. L. p. 152) for violation of § 1 thereof is not within Practice Act, § 219 (P. L. 1903, p. 594), touching suits instituted by an informer. Bryant v. Skillman Hardware Co. [N. J. Law] 69 A 23.

**27.** Acts 1905, p. 441, c. 145, § 2, as amended by Acts 1907, c. 169, pp. 266, 267. Tullis v. Shaw, 169 Ind. 662, 83 NE 376. Charge of illicit intercourse with girl under 15 held intended as charge of such intercourse with girl under 17, and latter offense being misdemeanor, as distinguished from rape, the juvenile court had jurisdiction of merits. Id.

**28.** Comp. St. 1907, c. 75, art. 1, § 5, authorizes commitment of boy of sane mind under age of 18 to state industrial school when found guilty of any crime except murder and manslaughter, whether the same be a felony or misdemeanor. Roberts v. State [Neb.] 118 NW 574.

**29.** Laws 1907, p. 120, c. 125, § 18, expressly provides that it shall not be construed to repeal any portion of criminal law of state, nor in any manner abridge powers of superior court. State v. Burt [N. H.] 71 A 30. Request of defendant under 17 years of age, accused of rape, to be tried under provisions of such act held properly denied. Id.

**30.** 23 Stat. at L. 302, c. 58; 27 Stat. at L. 268, c. 250, 31 Stat. at L. 1095, c. 847; 34 Stat. at L. 73, c. 817; 34 Stat. at L. 73, c. 960; 34 Stat. at L. 86, c. 1131. Moss v. U. S., 29 App. D. C. 188.

**31.** Act Mar. 2, 1905 (Sess. Laws 1905, p. 106). Its purpose is rather to relieve such children from odium of criminal prosecutions and punishment. Ex parte Sharp [Idaho] 96 P 563. Under law, state assumes discharge of parental duty, directs custody and assumes restraint, at time when infant is not entitled to absolute freedom but is subject to restraint either by natural or legal guardian. Id. Commitment is in no sense punishment nor is industrial school a prison in ordinary acceptation of term. Roberts v. State [Neb.] 118 NW 574. Rule that, where two or more punishments may be inflicted, one less severe and which would result in less disgrace will be inflicted held not violated by commitment instead of fine. Id.

**32.** Act Mar. 2, 1905 (Sess. Laws 1905, p. 106) is not unconstitutional as violative of constitutional guaranties applicable to criminal procedure, or as improperly conferring jurisdiction upon probate courts, or for lack of or limiting appeal. Ex parte Sharp [Idaho] 96 P 563. State is only demanding and enforcing obedience to both natural duties and obligations of parent or guardian as well as legal duties and obligations demanded by society and public welfare.

of its provisions,[33] but unconstitutional as to others.[34] Under the Florida act a commitment on a finding not in conformity with the statute is invalid.[35] For all offenses against the district of Columbia and against the United States within the jurisdiction of the Juvenile court of the District of Columbia, the prosecution should be on information by the corporation counsel, and in the name of the District of Columbia or of the United States.[36]

§ 4. *Property and conveyances.* See 10 C. L. 242—Rights and liabilities respecting the minor's property as between guardian and ward, the effect of guardian buying at sale of infant's land, and the rights of an infant to recover property improperly disposed of by his guardian, are treated in another topic.[37]

and is not depriving either parent or child of any constitutional or inalienable right. Id. It is not unconstitutional as depriving parent of custody of child without due process of law, and in violation of constitutional rights, since order or decree of probate court in such matter is one in personam and acts upon child alone. It is paternal and benevolent hand of state reaching out as parens patriae to take hold of child during minority for purposes of fostering, protecting and educating child, and this power, authority and duty is intended to be exercised only in cases where child is without care and protection of parent or guardian, or where parent or guardian has become unable or neglects or refuses to control, manage, care for, educate, and protect child. Id. Law not obnoxious as depriving parent of natural right to care and custody of child, since he may appear and present objections if he objects to state's action; is not bound by judgment, nor his rights precluded if he is not party to hearing and proceeding, may contest state's right to act in court and have his own rights fully and completely adjudicated. Id. Such order or decree should adjudge both that child is delinquent within meaning of that term as defined in act, and that he is either without care and protection of parent or guardian, or that parent or guardian is neglecting and failing to discharge duties he owes to child, but such decree simply establishes status and condition of child and existing necessity for granting it protection, nurture or aid of state, and in no respect does it determine or adjudicate right of parent or guardian. Id. Const. art. 5, § 21, conferring jurisdiction on probate courts, is sufficiently broad to sustain delinquent children's act, and probate court, under constitutional jurisdiction to take charge of orphans and minors left without protectors and to appoint guardians and direct and control them in exercise of their duties, has clear and unmistakable power and jurisdiction to lay hold upon child and make such summary investigation as is necessary, and ascertain its true status and condition, and place it in custody of authorities at state industrial training school. Id. Act not unconstitutional for reason that probate courts as such are courts of record and that procedure provided for in act is not procedure of courts of record, since if act made no provision for record it would still be duty of court, as constitutional court of record, to keep proper record and since act itself also provides for keeping record. Id. Fact records and dockets kept are called juvenile records and dockets immaterial. Id. Section 3 of act held to merely make ruling of probate court final on matters termed "irregularities or defects of form" or "technical pleas or objections," and to be mere reenactment of Rev. St. 1887, § 4231. Id. Section 13 of act providing for review only upon questions of law does not affect parent unless he has appeared, and if he does appear and order affecting or binding him is made he may appeal under Rev. St. 1887, § 4831. Id. Minor is entitled to no right to appeal since he has no standing in court as an individual to exercise it except through legal representative, and legal representative may appeal under Rev. St. 1887, § 4831. Id. Matter of appeals from probate courts is within legislative will, and law making power may regulate it, extend or limit it as it sees fit. Id.

33. Law not unconstitutional as permitting commitment to state reform school without trial by jury. Pugh v. Bowden [Fla.] 45 S 499. Laws 1905, c. 5388, p. 66, § 9, is constitutional and valid in so far as it confers jurisdiction upon judge of any circuit court or county judge to commit persons of incorrigible and vicious conduct to state reform school. Id.

34. Law unconstitutional in so far as it authorizes judge of any criminal court of record to commit persons therein mentioned to state reform school, since judge of criminal court of record may commit to state reform school only under Laws 1905, c. 5388, p. 63, § 1, after regular conviction in such court for crime. Pugh v. Bowden [Fla.] 45 S 499.

35. In proceedings before a circuit or county judge to commit certain minors to guardianship of state reform school under Acts 1905, c. 5388, p. 66, § 9, where there is no finding by court that minor is proper person for guardianship of state reform school in consequence of incorrigible and vicious conduct, judgment that minor is suitable person to be committed to Florida State reform school is insufficient to support commitment, and discharge may be secured on habeas corpus. Belch v. Manning [Fla.] 46 S 93.

36. Moss v. U. S., 29 App. D. C. 188.

37. See Guardianship, 11 C. L. 1671.

38. Stons v. Wolfe [Tex. Civ. App.] 109 SW 981; Tomczek v. Wieser, 58 Misc. 46, 108 NYS 784. Infant disaffirming conveyance held entitled to rents only from time of disaffirmance, which in case at bar was time of bringing suit. Tobin v. Spann, 85 Ark. 556, 109 SW 534. Where conveyance by married woman was signed by minor husband, latter might avoid same after ma-

The conveyance of a minor is usually not absolutely void, but only voidable,[38] and unless the grantor disaffirms within a reasonable time after attaining his majority [39] and proves his infancy at the time the conveyance was made,[40] the conveyance is binding upon him; but an infant conveying a contingent remainder need not disaffirm until after the death of the life tenant.[41] To constitute a ratification of a conveyance by an infant after reaching his majority, there must be some act which necessarily recognizes the existence and efficacy of the obligation.[42] A simple declaration acknowledging the title of the grantee being insufficient,[43] and while a new consideration is not usually requisite,[44] some states require the ratification to be by an instrument in writing.[45] The infant, may, by his conduct after attaining his majority, be prevented from availing himself of the statute under the doctrine of equitable estoppel,[46] or he may be estopped by his conduct at the time of the conveyance from setting up his infancy [47] though in the latter respect the contrary is the rule in many states.[48] In some states before a suit by an infant for the possession of land deeded away by him during his minority may be brought, some previous act of disaffirmance must have been made.[49] In Arkansas a purchaser whose conveyance from an infant has been disaffirmed is entitled to and chargeable with certain setoffs.[50]

jority. Phillips v. Hoskins, 33 Ky. L. R. 378, 108 SW 283. Infant on arriving at age may avoid his deed **in an action at law.** Smith v. Ryan, 191 N. Y. 452, 84 NE 402.

**39.** Minor testifying that she signed deed conveying land to father without understanding purport and effect of deed because she was told by her father to do so, and her brothers and sisters did likewise, that she received no part of consideration, but continued to live with father in joint possession with him, and she refused to affirm deed on first occasion offered her after disabilities were removed, held to have disaffirmed within reasonable time, though not until two years after disabilitites were removed. Stone v. Wolfe [Tex. Civ. App.] 109 SW 981. Mortgage by husband and wife after former has attained his majority operates as disaffirmance of deed previously given while husband was minor. Phillips v. Hoskins, 33 Ky. L. R. 378, 108 SW 283.

**40.** Edgar v. Gertison [Ky.] 112 SW 831. Evidence held to show alleged minor was twenty-one. Pace v. Cawood, 33 Ky. L. R. 677, 110 SW 414. Evidence held insufficient to show grantor was minor at time conveyance was made. Edgar v. Gertison [Ky.] 112 SW 831.

**41.** Has no interest to protect until death of life tenant, and need not disaffirm within reasonable time after reaching majority. Steele v. Poe, 79 S. C. 407, 60 SE 951.

**42.** There must be after majority, with full knowledge of his right, acquiescence from which assent may be fairly inferred, adequate benefit enjoyed which has grown directly or indirectly out of contract, or some direct act or express consent. Steele v. Poe, 79 S. C. 407, 60 SE 951.

**43.** Steele v. Poe, 79 S. C. 407, 60 SE 951.

**44.** No new consideration is requisite to sustain validity of deed given by one after he has attained his majority to same grantee, or to another at his request, in ratification of conveyance of property made during minority. Calhoun v. Anderson [Kan.] 98 P 275.

**45.** Under Civ. Code 1902, § 2656, providing that no action seeking to charge infant with payment of debt contracted during infancy on promise made after majority shall be maintained unless promise or ratification is in writing, defendants, in suit by infants to recover land conveyed during infancy, cannot be defeated by alleged parol ratification. Steele v. Poe, 79 S. C. 407, 60 SE 951.

**46.** As when one by his statements, conduct or silence causes adverse party to do some act or change his position to his detriment. Steele v. Poe, 79 S. C. 407, 60 SE 951. Evidence held to show no change of position to defendant's detriment. Id.

**47.** Plaintiff grantor held estopped to assert infancy where she and her parents made affidavits at time of conveyance that she was of full age, and proof clearly showed that she was not deceived or overreached in any way. Edgar v. Gertison [Ky.] 112 SW 831. Where the evidence is not sufficient to justify finding that purchaser knew grantor was minor, latter having obtained purchase price on faith and credit of his verified statement that he was twenty-one years of age at time he executed and delivered deed, he will not be permitted to controvert it to prejudice of other persons. Pace v. Cawood, 33 Ky. L. R. 592, 110 SW 414.

**48.** Doctrine that infant is not estopped by false representation as to his age rests upon principle that one under disability of minority has no power to remove disability by representation, and that representations cannot be of greater force than contract itself. Tobin v. Spann, 85 Ark. 556, 109 SW 534. Minor omitted from the will of his ancestor cannot be estopped by any conduct during minority to claim his inheritance, nor can the defense of innocent purchaser be set up against his incapacity. Rowe v. Allison [Ark.] 112 SW 395.

**49.** Ejectment will not lie by infant where he made no reentry, gave no notice of election to rescind, and took no other affirmative action to repudiate conveyance. Tomczek v. Wieser, 58 Misc. 46, 108 NYS 784.

**50.** Under betterment act, one whose contract with minor is disaffirmed is entitled

It is the special duty of the chancellor to guard the interests of infants, and the law has carefully provided that their rights shall be protected.[51] While there is a conflict as to whether the court of chancery has inherent power to decree the sale of an infant's real estate for the purpose of investment,[52] such power is often conferred by statute,[53] or may attach by virtue of the provisions of the instrument under which the infant's title is derived.[54] The chancellor is vested with a broad discretion in the matter of affirmance or disaffirmance of sales of the property of infants,[55] but such discretion is not an arbitrary one [56] and must be exercised according to settled principles.[57] If a judgment against infants is reversed, the purchaser, if he be the plaintiff or a party to the action, will not be permitted to hold against their interest real property bought under it at a judicial sale.[58] In such case, however, the infants may either elect to allow the sale to stand or they may have the sale set aside and take the property upon the payment of the debt which is a lien thereon.[59] In New York, upon a sale of real estate of an infant, the proceeds are deemed property of the same nature as the estate or interest sold until the infant arrives at full age.[60] In Arkansas, where a will is by statute inoperative as to an omitted child, he cannot be divested if his rights by a sale of the estate under the will,[61] and the statutory remedy against the devisees or legatees is not exclusive.[62] In Georgia a trust estate may be created for the benefit of minors.[63] In Kentucky a deed signed by a minor husband and his wife is not binding upon either.[64] In Louisiana a family meeting in which the minors are not represented by an undertutor is illegal, and the defect is not cured by the subsequent appointment of the husband of one of the major plaintiffs in the suit to that position.[65]

to consideration for taxes, repairs and improvements, which infant may offset with rents, accruing within three years. Tobin v. Spann, 85 Ark. 556, 109 SW 534.

**51.** District of Clifton v. Pferman, 33 Ky. L. R. 529, 110 SW 406. Record held to show nothing prejudicial to rights of infants in proceedings to sell land to enforce purchase-money lien. Leavell v. Carter [Ky.] 112 SW 1118. Where adult coparceners conceal from infant coparcener true value of land, and after taking it at its appraised value sell it at greatly enhanced figure, they will be required to account to minor for profits thus derived, and in such case the court is not bound to apportion judgment among joint wrongdoers, but may render general judgment against all defendants. Murr v. Murr, 11 Ohio C. C. (N. S.) 439.

**52.** Equity court has no inherent power to decree sale of infant's real estate for purpose of investment, and its jurisdiction to decree sale of infant's realty is wholly statutory. Morse v. U. S., 29 App. D. C. 433. Court of chancery has inherent power to convert estates of persons under disabilities for purposes of reinvestment where to their manifest interest. Holt v. Hamlin [Tenn.] 111 SW 241. Held error for chancellor to dismiss certain bill where under facts alleged, if proved, duty of chancellor would have been to order sale of real estate for purposes of reinvestment. Id.

**53.** Court has jurisdiction, under Civ. Code Prac. § 491, to sell property left in trust for minors for purposes of reinvestment. Curry's Guardian v. Monsch's Guardian, 31 Ky. L. R. 856, 104 SW 313.

**54.** Will held to authorize such sale. Curry's Guardian v. Monsch's Guardian, 31 Ky. L. R. 856, 104 SW 313. Prior to adoption of code there existed no statutory authority in District of Columbia for sale of vested remainder in fee in lands belonging to infant at suit of tenant for life, or for sale at suit of such tenant of contingent interest in land limited over by will or deed to infants not issue of such life tenant. Morse v. U. S., 29 App. D. C. 433.

**55, 56.** Stivers v. Stivers, 236 Ill. 160, 86 NE 209.

**57.** Confirmation should not be refused for inadequacy of consideration unless it clearly appears that resale will realize substantially larger sum. Stivers v. Stivers, 236 Ill. 160, 86 NE 209. Evidence held insufficient to make such showing where witnesses attacking sale testified that land bringing $7,800 was worth $200 to $500 more. Id.

**58.** District of Clifton v. Pfirman, 33 Ky. L. R. 529, 110 SW 406. Under Civ. Code Prac. § 518, lower court is given power, after term at which judgment has been rendered, to vacate it upon application of infants, and when upon their application, regularly and properly made, judgment decreeing sale of their land is set aside, sale should also be set aside to end that no injustice may be done them. Id.

**59.** District of Clifton v. Pfirman, 33 Ky. L. R. 529, 110 SW 406.

**60.** Code Civ. Proc. § 2359. In re McMillan, 110 NYS 622.

**61, 62.** Rowe v. Allison [Ark.] 112 SW 395.

**63.** Code 1895, § 3149. Turner v. Barber [Ga.] 62 SE 587.

**64.** Deed by married woman and minor husband not binding as to either, since infant may avoid on grounds of infancy, and to hold married woman bound would enable her to convey without joinder of husband required by statute. Phillips v. Hoskins, 33 Ky. L. R. 378, 108 SW 283.

**65.** Terms for partition fixed by such

§ 5. *Contracts.*[See 10 C. L. 243]—Except in the case of necessaries, an infant's contract is ordinarily voidable,[66] and may be affirmed or disaffirmed upon the majority of the infant.[67] In some states a minor may be estopped by his conduct from setting up his infancy,[68] while in other states he cannot be so estopped,[69] and in still others cannot be estopped in the absence of fraud.[70] One holding an infant out as of full age is estopped to set up the infancy.[71]

A contract made with a minor for necessaries is usually invalid unless the parent or guardian on such minor refuses or fails to supply him with sufficient necessaries,[72] and then only for the reasonable value of such necessaries.[73] A minor cannot ordinarily bind himself by an executory contract for necessaries[74] and may repudiate[75] or ratify it as in the case of other contracts.[76] The determination of what

meeting illegal. Doucet v. Fenelon, 120 La. 18, 44 S 908.

66. Agreement by minor to release her interest in legacy in exchange for interest in joint conveyance to herself and others is voidable at her election upon attaining her majority. Appell v. Appell, 235 Ill. 27, 85 NE 205. Court during infant's minority will not partition property so conveyed until infant reaches majority, since court cannot compel infant to so exchange her property. Id. Minors signing shipping articles are entitled to disaffirm contract of shipment and recover reasonable value of their services. Belyea v. Cook, 162 F 180. Where infant purchased land by means of having third person give note and take title, infant assuming payment of note and possession of land, transaction constituted such third person infant's trustee. Id. Trust called into existence by minor is valid until avoided. Eldriedge v. Hoefer [Or.] 93 P 246.

67. One demanding and receiving share of proceeds of sale of land after majority in conformity with agreement entered into during minority ratifies such agreement. La Cotts v. Quertermous, 84 Ark. 610, 107 SW 167.

68. Evidence held insufficient to justify finding that minors were estopped to disaffirm shipping contract and recover on quantum meruit. Belyea v. Cook, 162 F 180. Evidence that alleged minor was not intoxicated when note was executed, and that he fraudulently represented himself to be of age, and wanted money for articles which were necessaries, held sufficient basis for jury's verdict against alleged minor. Clayton v. Ingram [Tex. Civ. App.] 107 SW 880.

69. Minor who has reached that age of maturity where his appearance indicates that he is of full age cannot estop himself from disaffirming his contract by false representations that he is of full age. Tobin v. Spann, 85 Ark. 556, 109 SW 534. No error to refuse to submit question of estoppel of infant to jury. Barbieri v. Messner [Minn.] 118 NW 256. Conceding that fraud might estop infant evidence in case held insufficient to show such fraud since not shown to be connected therewith. Id.

70. In absence of fraud on infant's part, infant, writing his age as twenty-one under advice of plaintiff's agent who knew facts, is not estopped from relying on infancy. International Text-Book Co. v. Doran, 80 Conn. 307, 68 A 255. Evidence held to show that son alleged to have signed note with father received no benefit from transaction, had no knowledge thereof, and committed no fraud sufficient to bind him to his contract. Memphis Coffin Co. v. Patton [Tex. Civ. App.] 20 Tex. Ct. Rep. 670, 106 SW 697.

71. Parties held estopped by recitals in deed that alleged infants were of full age. Harris v. Ronk, 32 Ky. L. R. 966, 107 SW 341.

72. Where suit is brought against minor for necessaries furnished to him, it must affirmatively appear that parent failed to supply him with sufficient necessaries. McAllister v. Gatlin, 3 Ga. App. 731, 60 SE 355. Where surgeon, at father's instance and request, rendered necessary professional services to minor child, solely on father's credit, child having no credit at time, but subsequently becoming possessed of property for which guardian was appointed, equitable action will not lie against guardian and ward to subject latter's property to payment of debt for such services, though father was insolvent. Gaston v. Thompson, 129 Ga. 754, 59 SE 799.

73. Suit cannot be maintained against infant on his express contract for necessaries without averment and proof that price to be paid for such necessaries is reasonable. International Text Book Co. v. Alberton, 10 Ohio C. C. (N. S.) 583. Where infant received instruction under contract with correspondence school. Id.

74. Minor cannot bind himself by contract with business college so as to prevent recovery of amount paid therefor when infant fails to take course. Mauldin v. Southern Shorthand & Business University, 3 Ga. App. 800, 60 SE 358. In contracts for necessaries furnished to minor, recovery can only be had for fair value of executed part of contract, and infant may repudiate executory part of his contract at any time even though such executory part of such contract be for necessaries. Contract for correspondence school education. International Text Book Co. v. Alberton, 10 Ohio C. C. (N. S.) 583.

75. Although education received under contract with correspondence school could not be restored, repudiation of contract shortly before attaining majority was effectual where books lent were returned thereafter and before suit. International Text-Book Co. v. Doran, 80 Conn. 307, 68 A 255.

76. Delay in returning textbooks borrowed in connection with correspondence school contract, repudiated before attaining majority, until some time thereafter, may be consid-

are necessaries involves a variety of considerations.[77] Education furnished to an infant may be necessary to him, but is so only when it is suitable to his wants and condition,[78] and whether such is the case is a question of fact.[79]

In Texas the rule that if a minor uses money or other property for purchasing necessaries he must restore or account for its equivalent if he seeks to set aside an act performed by him during minority, or if he retains possession or control of property obtained by him during minority he must restore such property if on reaching majority he seeks to avoid the contract through which he obtained the property, does not apply when he has never received anything beneficial through the contract.[80] In Georgia an infant engaged in business with his parent's consent is liable under the statute, upon contracts connected with such business,[81] but not upon any contract of guaranty or suretyship;[82] and in Alabama an infant properly decreed relieved of the disabilities of nonage is liable upon contracts made under such decree.[83]

ered on question of ratification. International Text-Book Co. v. Doran, 80 Conn. 307, 68 A 255.

77. **NOTE. What are necessaries:** The necessaries for which an infant may become liable are not alone the bare necessities of life, but articles suitable for the use and maintenance of the infant in the station of life appropriate to his fortune and condition. De Moss v. Giltner, 5 Ky. L. R. 691; Jordan v. Coffield, 70 N. C. 110; Rivers v. Gregg, 5 Rich. Eq. [S. C.] 274; Brent v. Manning, 10 Vt. 225; Breed v. Judd, 67 Mass. [1 Gray] 455; Middleburg College v. Chandler, 16 Vt. 683, 42 Am. Dec. 537; Hamilton v. Lane, 138 Mass. 358; Cory v. Cook, 24 R. I. 421, 53 A 315. Thus suitable board, lodging, clothes, medical attendance and education are held to be necessities (People v. Pierson, 176 N. Y. 201, 68 NE 243, 98 Am. St. Rep. 666, 63 L. R. A. 187; Bouchell v. Clary, 3 Brev. [S. C.] 194), depending upon the circumstances of the particular case (Englebert v. Troxell, 40 Neb. 195, 58 NW 852, 42 Am. St. Rep. 665, 26 L. R. A. 177; Grace v. Hale, 21 Tenn. (2 Humph.) 27, 36 Am. Dec. 296). So a common school education is held to be a necessity, but not so a college (Middleburg College v. Chandler, 16 Vt. 683, 42 Am. Dec. 537) or professional education (Bouchell v. Clary, 3 Brev. [S. C.] 194), or instruction in music and painting (De Moss v. Giltner, 5 Ky. L. R. 691) or religious instruction (St. John's Parish v. Bronson, 40 Conn. 75, 16 Am. Rep. 17). A room is necessary to an infant only so long as he occupies it (Gregory v. Lee, 64 Conn. 407, 30 A 53, 25 L. R. A. 618), and dwelling houses (Allen v. Lardner, 78 Hun, 603, 29 NYS 213; Price v. Jennings, 62 Ind. 111; Wornack v. Loar, 11 Ky. L. R. 6, 11 SW 438) or repairs thereon (Wells v. Bardwell, 128 Mass. 366; Tupper v. Caldwell, 53 Mass. 559, 46 Am. Dec. 704; Horstmeyer v. Connors, 56 Mo. App. 115) are not necessaries. Suitable clothing for particular occasions may be necessary (Sams v. Stockton, 53 Ky. 232; Kilgore v. Rich, 83 Me. 305, 22 A 176, 23 Am. St. Rep. 780, 12 L. R. A. 859), but jewelry, fads and ornaments are not generally so held (Le Fils v. Sugg, 15 Ark. 137; Perrin v. Wilson, 10 Mo. 451.) Articles used in business are not necessities (House v. Alexander, 105 Ind. 109, 4 NE 891, 55 Am. Rep. 189; Wood v. Losey, 50 Mich. 475, 15 NW 557; Merriam v. Cunningham, 65 Mass. 40; Decell v. Sewenthal, 57 Misc. 331, 34 Am. Rep. 449; Ryan v. Smith, 165 Mass. 303, 43 NE 109) except in extraordinary cases (Chapman v. Hughes, 61 Miss. 339; Breed v. Judd, 67 Mass. 455; Rundel v. Keeler, 7 Watts [Pa.] 237; Watson v. Hensee, 7 Watts [Pa.] 344), nor are horses and vehicles generally so held (Rainwater v. Durham, 2 Nott & McCord, 524, [S. C.] 10 Am. Dec. 637; Pyne v. Wood, 145 Mass. 553, 14 NE 775; Miller v. Smith, 26 Minn. 248, 2 NW 942, 37 Am. Rep. 407; Beeler v. Young, 4 Ky. 519; Grace v. Hale, 21 Tenn. [2 Humph.] 27, 36 Am. Dec. 296), but attorney's fees, in an action properly brought by or against an infant, are necessities (Nagel v. Schilling, 14 Mo. App. 576; Munson v. Washband, 31 Conn. 303, 83 Am. Dec. 151; Banker v. Hibbard, 54 N. H. 539, 20 Am. Rep .160). [Ed.]

78. International Text-Book Co. v. Doran, 80 Conn. 307, 68 A 255.

79. Whether education of preliminary character is necessary to one who has spent two years in high school is for jury. International Text-Book Co. v. Doran, 80 Conn. 307, 68 A 255.

80. Minor joining father in executing note for goods received by father in business conducted by latter in former's name, where infant is not shown to have had any knowledge of transaction, received no benefit therefrom, never had any possession of property for which note was given, nor received any proceeds arising from sale of goods, held not bound. Memphis Coffin Co. v. Patton [Tex. Civ. App.] 20 Tex. Ct. Rep. 402, 106 SW 697.

81. Infant engaging in farming with parent's consent may lawfully contract for fertilizer, under Civil Code 1895, § 3650. James v. Sasser, 3 Ga. App. 568, 60 SE 329. Minor held not engaged in business in contemplation of law. McAllister v. Gatlin, 3 Ga. App. 731, 60 SE 355.

82. Where infant and adult, upon joint note, buy fertilizer, some of which infant uses on farm he is running with parent's permission, infant cannot be held on balance of note after he pays for poriton used by him. James v. Sasser, 3 Ga. App. 568, 60 SE 329.

83. Under Civ. Code 1896, § 833, decree that petitioner was entitled to relief, that minor was authorized to sue and be sued, contract and be contracted with, buy, sell, and convey real estate, and generally do and perform all acts which such minor might do

The burden of proving all the conditions necessary to the validity of the contract of an infant is upon the party asserting such validity.[84]

§ 6. *Torts.* See 8 C. L. 275

§ 7. *Crimes.* See 8 C. L. 278—In Georgia in order to convict a minor between the ages of sixteen and twenty-one of the offense of vagrancy, the state must allege and prove, in addition to the usual allegations, that the minor's parents were unable to support him and that he was not in attendance upon an educational institution.[85]

§ 8. *Actions by and against.* See 10 C. L. 244—Chancery has general jurisdiction over the persons and property of infants.[86] Minors can neither sue nor be sued except as specially provided by law,[87] nor can any valid judgment or order be rendered against them where the suit is not prosecuted in the manner so provided.[88] However, the failure to appoint a guardian ad litem for an infant plaintiff is not a jurisdictional defect, but a mere irregularity which can be cured, if necessary, during the progress of the trial,[89] and a plea based on such irregularity is usually inefficacious where the infant has become of age before such plea is filed.[90] Such a plea must, therefore, allege that the plaintiff is still an infant.[91] A guardian ad litem cannot be appointed where the court has failed to acquire jurisdiction of the case.[92] In West Virginia suits upon contracts affecting the infant's interests not made by his guardian must

were he of age, is not void because not specifically decreeing that minor was relieved of disabilities of nonage. Ketchum v. Faircloth-Segrest Co. [Ala.] 46 S 476. Under Civ. Code 1896, § 835, minor is relieved of disabilities of nonage as soon as decree to that effect is rendered, and liability thereunder does not depend on filing thereof. Ketchum v. Faircloth-Segrest Co. [Ala.] 46 S 476. No error in action in detinue against minor for personal property covered by certain mortgages to admit certified transcript of proceeding in chancery court decreeing infant relieved of disabilities of nonage. Id.

84. James v. Sasser, 3 Ga. App. 568, 60 SE 329. Evidence held not to warrant reversal of finding against defense of infancy where testimony was inconclusive and apparently inconsistent with certain facts disclosed at trial. Brook v. Kalfon, 58 Misc. 192, 108 NYS 1102. Evidence held to show that alleged minors were of age when conveyance in question was signed. Harris v. Ronk, 32 Ky. L. R. 966, 107 SW 341.

85. Act Aug. 7, 1903 (Laws Ga. 1903, p. 46). Rogers v. State [Ga. App.] 61 SE 496.

86. Greenlee v. Rowland, 85 Ark. 101, 107 SW 193. See ante, § 4, Property and Conveyances.

87. See Guardians Ad Litem and Next Friend, 11 C. L. 1668. Gilbert v. Mazerat, 121 La. 35, 46 S 47. In order to subject land descending to minors under statute of descent and distribution to vendor's lien, it is necessary that minors be represented by guardian ad litem. Shehane v. Caraway [Ala.] 45 S 469. Answer in behalf of minors cannot be considered where no guardian ad litem was appointed. Id. Complaint cannot subject property of minors to sale in absence of their being properly before court. Id. Infant may sue during his infancy by guardian ad litem. Muller v. Manhattan R. Co., 124 App. Div. 295, 108 NYS 852. Action for injury to inheritance by erection of elevated railroad. Id.

88. Minors appearing in their own right not properly before court. Gilbert v. Mazerat, 121 La. 35, 46 S 47. Father never confirmed as guardian cannot represent his minor children in judicial proceeding. Id. Where it does not appear that the guardian ad litem appointed consented to act, a judgment in favor of an infant must be reversed. Cowan v. Ganuing, 58 Misc. 141, 110 NYS 470. Code Civ. Proc. § 2888. Where minutes of justice show appointment, but no written consent is attached to or made part of return. Id. No order can be made in action against infant until infant is properly before court by guardian ad litem. Gross v. Gross, 128 App. Div. 429, 112 NYS 790. Under Code Civ. Proc. § 471, court cannot order infant defendant not represented by guardian ad litem to pay money to receiver, and infant cannot be punished for contempt for failing to obey order. Id. Minor does not become party before guardian ad litem is appointed by court and appointment accepted by guardian ad litem as provided by statute. Douglas v. Johnson, 130 Ga. 472, 60 SE 1041. Under Civ. Code 1895, § 4987, writ of partition improper otherwise. Id.

89. Error to dismiss complaint. Conroy v. Bigg, 109 NYS 914. Where bill is filed by complainant as an adult, and it is afterwards discovered that he was an infant at the time of filing the bill and still continues so, in the face of a motion by the defendant to dismiss the bill the complainant will be allowed to amend by inserting a next friend. Moore v. Moore [N. J. Eq.] 70 A 684.

90. Moore v. Moore [N. J. Eq.] 70 A 684.

91. Proper form of plea, where infant is complainant and no guardian or next friend has been appointed, is to aver that plaintiff before and at time of filing bill was and now is infant under age of 21 years; that is to say of age of (blank) or thereabouts. Moore v. Moore [N. J. Eq.] 70 A 684. Plea merely alleging that complainant was infant at time of exhibiting bill held bad. Id.

92. Where notice of a suit for the foreclosure of a mortgage is indorsed as served after the date fixed for appearance therein, the court is without jurisdiction even to appoint a guardian ad litem. Cummings v. Landes [Iowa] 117 NW 22.

be in the name of the infant by next friend.[93] In Indiana the guardian is neither a necessary nor proper party to an action affecting the title of the infant's real estate.[94] The service of process upon minors is usually regulated by statute,[95] which, as a general rule, requires personal service on all minors,[96] and, as to all minors under fourteen years of age, service on the father, mother or guardian is also required,[97] and in the latter case, in Iowa, the parent or guardian cannot waive the minor's right to such personal service.[98] The same presumptions are indulged in favor of regularity of service as in other cases.[99] In Arkansas, where a guardian acts as counsel, hostile to the interests of his ward and chooses inferior counsel for them, proper counsel may be employed, and the infants and their estates are liable for reasonable attorney's fees.[1]

If infancy exists where a cause of action first accrues, the time for commencing the action is usually extended for a certain period after the infant becomes of age.[2] So, also, it is held that a decree against an infant must be attacked by him within a certain time after reaching his majority.[3]

It is not necessary that the minor join with his guardian ad litem in an appeal

**93.** McMullen v. Blecker [W. Va.] 60 SE 1093.

**94.** Harrison v. Western Const. Co., 41 Ind. App. 6, 83 NE 256. All actions seeking to affect title of infant to real estate must be brought directly against infant, and process must be served upon such infant precisely same as though it were adult, otherwise court obtains no jurisdiction to render decree which would bind infant or its interest in property. Id. Failure to make infant codefendant party to appeal held to require dismissal for want of jurisdiction. Id.

**95.** Where record shows service on person with whom infants resided, but failed to show that father was absent from state, as required by Code 1902, § 155, subd. 2, father's absence from state will be presumed. Kaylor v. Hiller, 77 S. C. 393, 58 SE 2.

**96.** Where record shows that mother as guardian at litem admitted service upon herself and certified to service upon infants, record held sufficient to show that infants were parties to suit, at least where long period of time had elapsed. Clark v. Neves, 76 S. C. 484, 57 SE 614. When it affirmatively appears on face of record that infant has not been served with summons, infant is not bound by proceedings. Id. Minor over age of 14 who has no guardian may be served personally. Douglas v. Johnson, 130 Ga. 472, 60 SE 1041. Statutory action for partition of land where minor is interested. Id. Since Acts 1876, p. 103 (Civ. Code 1895, § 4987), personal service of application to sell trust property must be made on infant. Turner v. Barber [Ga.] 62 SE 587.

**97.** Civ. Code 1902, § 155. Clark v. Neves, 76 S. C. 484, 57 SE 614. Service on minors under age of 14, in Iowa, is required by statute to be upon father, mother, guardian, person caring for them, or person with whom they reside or are employed. Cummings v. Landes [Iowa] 117 NW 22. Code, § 3535. Service not effected where return shows same to have been made by reading to minors and delivering minors true copy in mother's presence and hearing. Id.

**98.** Code, § 3533, does not authorize parent or guardian to waive service nor timely notice thereof. Cummings v. Landes [Iowa] 117 NW 22. Where mother of minors was also party to action and apparently in acknowledging service acted for herself alone, and was not served with notice as mother of minors, and from all that appeared she may not have noticed that they were made parties, her acknowledgment did not bind them. Id.

**99.** Service appearing on record, though not with strict proof required, held sufficient where shown that mother was served and certified to service on infants. Clark v. Neves, 76 S. C. 484, 57 SE 614.

**1.** Where guardian of minors becomes counsel for their opponents, he assumes such attitude of opposition that it is entirely proper for relatives to employ other counsel than guardian had employed for them when guardian admits that he picked inferior counsel, and the infants and their estates are liable for reasonable attorney's fees. Greenlee v. Rowland, 85 Ark. 101, 107 SW 193.

**2.** Alleged adverse possession by elevated railway of easement. Muller v. Manhattan R. Co., 124 App. Div. 295, 108 NYS 852. Ten-year statute of limitations held to apply to case where infant's money was used by guardian to purchase property and ward did not know until after majority, when he attempted to sell property, that deed had been taken in name of third person. Manahan v. Holmes, 58 Misc. 86, 110 NYS 300. Within 12 months after majority, infant may show cause against judgment by petition. Civ. Code Proc. §§ 391, 745, 518, subd. 81. Leavell v. Carter [Ky.] 112 SW 1118. Defense of adverse possession unavailable where inception of possession was during infancy and suit was brought few months after majority. Kazebeer v. Nunemaker [Neb.] 118 NW 646. Statute of limitations does not run against right of child omitted from will to enforce his rights in the testator's property during his minority. Rowe v. Allison [Ark.] 112 SW 395.

**3.** Judgment in partition concludes infants if they fail to directly attack decree either by appeal or by bill of review for error apparent on fact of record within six months after becoming of age. Gillespie v. Pocahontas Coal & Coke Co., 162 F 742.

bond,[4] nor need the affidavit given by the guardian ad litem in lieu of a bond show that the minor is unable to pay cost of appeal or give security therefor,[5] but if a minor have an estate sufficient to pay the cost of an appeal adjudged against him, this estate is liable to the party to whom the cost is due, and such cost may be recovered in a proper proceeding for that purpose unless the litigation out of which it grew was instituted and prosecuted under conditions which would not be binding on the minor.[6]

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**Information; Informers; Initiative and Referendum,** see latest topical index.

## INJUNCTION.


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*The scope of this topic* is noted below.[7]

§ 1. *Nature of remedy and grounds therefor.*[See 10 C. L. 246]—Relief by way of injunction is essentially equitable.[8] The writ of injunction is the strong arm of the court, and to render its protection benign and useful the power to issue it should be exercised with great discretion,[9] the particular function of the remedy being to restrain and prevent,[10] but there is unquestioned power in a court of equity to issue mandatory injunctions on proper occasions.[11]

4. Biggins v. Gulf, etc., R. Co. [Tex. Civ. App.] 110 SW 561.

5. Affidavit of poverty. Biggins v. Gulf, etc., R. Co. [Tex. Civ. App.] 110 SW 561.

6. Biggins v. Gulf, etc., R. Co. Tex. Civ. App.] 110 SW 561.

7. This topic purports to cover the whole subject of injunctions, but as the principles herein discussed necessarily receive incidental treatment on many, more specific, topics, reference should be had to such topics. See such topics as Corporations, 11 C. L. 810; Trade Marks and Trade Names, 10 C. L. 1865. As to malicious prosecution of a suit for injunction or abuse of the writ, see Malicious Prosecution and Abuse of Process, 10 C. L. 657.

8. Action for relief by injunction is always equitable. Atlantic & C. Air Line R. Co. v. Victor Mfg. Co., 79 S. C. 266, 60 SE 675.

9. McLean v. Farmers' Highline Canal & Reservoir Co. [Colo.] 98 P 16.

10. Atchison, etc., R. Co. v. Billings [Kan.] 93 P 590. Will not lie to restore expelled member of fraternal benefit society. Champion v. Hannahan, 138 Ill. App. 387. Purchaser of abutting property, after completion of permanent obstruction to street under valid claim of title by grant from city, held not entitled to injunctive relief. Kehoe v. Rourke [Ga.] 62 SE 185.

11. Where a railway company neglects for a long time to construct cattle guards, a mandatory injunction may issue. Atchison, etc., R. Co. v. Billings [Kan.] 93 P 590. See cases cited for further instances. Farnsworth v. Wilbur [Wash.] 95 P 642. Mandatory injunctions are often granted where defendant is guilty of continuing wrong upon plaintiff, from further perpetration of which he ought to be enjoined, and where termination of wrongful conduct involves restoration of conditions existing prior to wrongful conduct. Cox v. Malden & Melrose Gaslight Co., 199 Mass. 324, 85 NE 180. Will compel defendant to deliver cars upon complainant's switches as theretofore done, where complainant claimed a right under a contract. Gates v. Detroit & M. R. Co., 151 Mich. 543, 15 Det. Leg. N. 2, 115 NW 420.

An injunction will be granted only where a proper case in accordance with the principles and practice of equity is made out,[12] being issued by grace, when, upon a broad consideration of all the parties in interest, good conscience requires it,[13] and it is the duty of the court to inquire if complainant has a clear legal right to the use, occupation, or enjoyment of the property or right, the invasion of which it is sought to enjoin.[14] The plaintiff, furthermore, must make out a plain case of injury and damages [15] of a permanent and irreparable character,[16] for which there is no adequate remedy at law,[17] but irreparable injury does not mean beyond the possibility of compensation in damages or that it must be very great, and the fact that no actual damages can be proved, so that in an action at law the jury could award only nominal damages, often furnishes the best reason why equity should interfere,[18] though an injunction may be refused on the ground that the injury is merely nominal or theoretical.[19] There is considerable confusion upon the doctrine of comparative equities as affecting the right to an injunction.[20] The conflict, however, is more seeming

**12.** Myersdale, etc., R. Co. v. Pennsylvania, etc., R. Co, 219 Pa. 558, 69 A 92. Remedy by injunction should not be extended in its operation to cases not falling within well recognized principles. People v. Grand Trunk Western R. Co., 232 Ill. 292, 83 NE 839. Party cannot be deprived of his right to trial by jury nor subjected to the stringent methods frequently employed to enforce judgments rendered by courts of equity, unless the facts conferring equitable jurisdiction are alleged proved and found. Fox v. Fitzpatrick, 190 N. Y. 259, 82 NE 1103. Statute provides that district court may issue injunctions in all cases where the applicant for such writ shows himself entitled thereto under the principles of equity. Rev. St. 1895, art. 2989, cl. 3. Steger & Sons Piano Mfg. Co. v. MacMaster [Tex. Civ. App.] 115 SW 337.

**13.** Denied where abutting owner permitted and consented to construction of street railway and then sought to enjoin its operation. Maust v. Pennsylvania, etc., R. Co., 219 Pa. 568, 69 A 80.

**14.** Myersdale, etc., R. Co. v. Pennsylvania, etc., R. Co., 219 Pa. 558, 69 A 92.

**15.** Berkey v. Berwind-White Coal Min. Co., 220 Pa. 65, 69 A 329. A petition to restrain the enforcement of a law, on the ground that it would destroy a business built up after a period of years and that it is unconstitutional, authorizes as against a demurrer relief in equity to prevent irreparable injury. Merchants' Exch. of St. Louis v. Knott, 212 Mo. 616, 111 SW 565. The digging of a trench and laying a steam pipe across a town lot, which was occupied by another under contract with the city, is not an injury of such irreparable nature that injunction will issue. Jacobs v. Lakeside Lumber Co., 134 Wis. 179, 114 NW 443. Threatened cancellation of an insurance certificate by officers of the company is not ground for an injunction, unless such threats, if carried into execution, would produce some substantial injury. Royal Fraternal Union v. Lundy [Tex. Civ. App.] 113 SW 185.

**16.** Myersdale, etc., R. Co. v. Pensylvania, etc., R. Co., 219 Pa. 558, 69 A 92; Devon v. Pence, 32 Ky. L. R. 697, 106 SW 874.

**17.** No necessity for injunction without notice to restrain collection of judgment at law, where law court had jurisdiction of matter as set forth. Heslip v. Anderson, 134 Ill. App. 8.

**18.** Espenscheid v. Bauer, 235 Ill. 172, 85 NE 230. Injury to one's right is irreparable within rule that an injury is irreparable so as to sustain an injunction, when it cannot be adequately compensated for in damages, or when there exists no pecuniary standard for measurement of damages due to nature of the right to occupy. Ainsworth v. Munoskong Hunting & Fishing Club [Mich.] 15 Det. Leg. N. 412, 116 NW 992.

**19.** Devou v. Pence, 32 Ky. L. R. 697, 106 SW 874. Threatened nuisance enjoined. Caskey v. Edwards, 129 Mo. App. 237, 107 SW 37. Unlawful interference, actual or threatened, with plaintiff's property rights must be chosen. Delaware, etc., R. Co. v. Switchmen's Union of North America, 158 F 541. Under Laws 1906, p. 269, c. 227, creating the office of cotton weigher but providing that nothing therein shall prevent anyone from withholding his cotton from said weigher, a warehouse cannot be enjoined from having its cotton privately weighed. Miller v. Winston County Union Warehouse Co. [Miss.] 47 S 501.

**20.** See American Smelting & Refining Co. v. Godfrey [C. C. A.] 158 F 225.

**NOTE. Doctrine of comparative injury as affecting right to injunction:** While it is generally held that, in considering the application for an interlocutory injunction, the courts will balance the consideration of relative convenience and inconvenience, and ordinarily refuse an injunction which will bear heavily upon the defendant or the public generally without materially benefiting the plaintiff (Rau v. Seidenberg, 53 Misc. 386, 104 NYS 798; Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P 330; Karfoil v. Rothner, 151 F 777; Howard v. Belows, 148 Mich. 410, 14 Det. Leg. N. 219, 111 NW 1047) and that, moreover, no injunction of any kind will issue where great hardship would ensue to no advantage of the plaintiff, or where the plaintiff's rights are not clear (Schefer v. Ball, 53 Misc. 448, 104 NYS 1028; Savage v. Port Reading R. Co. [N. J. Eq.] 67 A 436; Tolman v. Mulcahy, 119 App. Div. 42, 103 NYS 936; Pennsylvania R. Co. v. Inland Trac. Co., 25 Pa. Super. Ct. 115; Cleveland v. Martin, 218 Ill. 73, 75 NE 772, 3 L. R. A. (N. S.) 629;

than real, and the cases may usually be reconciled under the doctrine that, while as a general rule the comparative injury to the parties will not control the grant or refusal of an injunction where the complainant's rights and the injury thereto are

Roberts v. West Jersey & S. R. Co. [N. J. Eq.] 65 A 460; Nittany Valley R. Co. v. Empire Co., 218 Pa. 224, 67 A 349), or where there is an adequate remedy at law (McCarthy v. Mining & Coal Co., 147 F 981; Mann v. Parker, 48 Or. 321, 86 P 598; Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 NE 335; McClure v. Leaycraft, 183 N. Y. 36, 75 NE 961), or the plaintiff has been guilty of laches (Washington Lodge v. Frelinghuysen, 138 Mich. 350, 101 NW 569), a somewhat extended examination of the cases reveals no conflict upon the proposition that actual damage to the rights of another may, in the absence of laches or an adequate remedy at law, be perpetually enjoined, irrespective of the annoyance or injury such injunction may work to the defendant as compared with the injury sought to be remedied or the inconvenience suffered by private persons or by the public by reason thereof (Corning v. Factory, 40 N. Y. 191; Stock v. Judson Twp., 114 Mich. 357, 72 NW 132, 38 L. R. A. 355; Village v. Hayes, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367; Harper v. Water Co., 65 N. J. Eq. 479, 56 A 297; Higgins v. Water Co., 36 N. J. Eq. 538; Hennessy v. Carmony, 50 N. J. Eq. 616, 25 A 374; Evans v. Fertilizing Co., 160 Pa. 209, 28 A 702; Weaver v. Eureka Lake Co., 15 Cal. 271; Amsterdam Co. v. Dean, 13 App. Div. 42, 43 NYS 29; Banks v. Frazier, 111 Ky. 909, 64 SW 983; Suffolk Co. v. San Miguel Co., 9 Colo. 40, 48 P 828; Hobbs v. Amador Co., 66 Cal. 161, 4 P 1147; Chestatee Co. v. Cavendars Co., 118 Ga. 255, 45 SE 267; Weston Paper Co. v. Pope, 155 Ind. 394, 57 NE 719, 56 L. R. A. 899; Townsend v. Bell, 62 Hun [N. Y.] 306, 17 NYS 210; Brown v. Ontario Co., 81 App. Div. 273, 80 NYS 837; Beckwith v. Howard, 6 R. I. 1; American Smelting & Refining Co. v. Godfrey [C. C. A.] 158 F 225; Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 A 1065, 66 L. R. A. 712; Burrall v. American Tel. Co., 224 Ill. 266, 79 NE 705).

Thus, in Commonwealth v. Pittsburg, etc., R. Co., 24 Pa. 159, 62 Am. Dec. 372, the court says "Where rights are invaded it is no question of the amount of damage," and in Corning v. Factory, 40 N. Y. 191, "No man is justified in withholding property from the owner on the ground that he does not need it." So, in Stock v. Judson Tp., 114 Mich. 357, 72 NW 132, 38 L. R. A. 355, "If the parties have expended a considerable sum in trespass, it is their own fault, and they must lose it" (Citing Koopman v. Blodgett, 70 Mich. 610, 38 NW 649, 14 Am. St. Rep. 527; Hall v. Ionia, 38 Mich. 493). Similar are the following judicial announcements: "The fact that a large population is inconvenienced is immaterial where private rights are invaded." Village v. Hayes, 150 Ill. 273, 37 NE 218, 41 Am. St. Rep. 367. "Where justice is properly administered, rights are never measured by their mere money value neither are wrongs tolerated, because it may be to the advantage of the powerful to impose upon the weak." Pennsylvania Lead Co.'s Appeal, 96 Pa. 116, 42 Am. Rep. 534. "In such a case it cannot be said that injury would result from an injunction, for no man can complain that he is injured by being prevented from doing to the hurt of another what he has no right to do." Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 A 1065, 66 L. R. A. 712. "We do not think that the fact that an actual injury resulting from a right is small and the interest to be affected by the injunction is large should weigh against the interposition of preventative power in equity, when it is clear that on one hand a right is violated and on the other a wrong is committed." American S. & R. Co. v. Godfrey [C. C. A.] 158 F 225.

Modern English cases are to the same effect. Shelfer v. London, 1 Ch. 287; Imperial Gas Co. v. Broadbent, 7 H. L. C. 600, (afg. 7 De Gex M. & G. 436). Attorney General v. Birmingham, 4 Kay & J. 528; Cowper v. Laidler, 2 Ch. 337; Attorney General v. Colney Asylum, 4 Ch. App. 146; Clowes v. Staffordshire Co., 8 Ch. App. 125; Pennington v. Brinsop Co., 5 Ch. Div. 769; Young v. Banker Co., [1893] App. Cas. 691; Wilts Co. v. Water Co., 9 Ch. App. 451; Goodson v. Richardson, 9 Ch. App. 221.

It will be noted that the Pennsylvania courts, when dealing with the exact point herein discussed, arrive at a very different result from that indicated by the language of the cases cited infra, and that the New Jersey court, in the cases of Higgins v. Water Co., 36 N. J. Eq. 538 and Hennessy v. Carmony, 50 N. J. Eq. 616, 25 A 374, takes occasion to discuss and distinguish previous New Jersey cases, which might seem to indicate a rule contrary to the one stated.

It is true that the comparative convenience of the parties was the ground upon which injunction was refused, in Mountain Copper Co. v. U. S., 73 C. C. A. 621, 142 F 625, where the owners of practically valueless land sought to restrain the operation of a valuable smelting plant which had already done all possible damage to the land in question, but, as pointed out in American S. & R. Co. v. Godfrey, supra, the rule announced in the Mountain Copper Co. case should be confined to the particular case under consideration and not applied generally. It will be noted, moreover, that the damage was complete and that a remedy therefor existed at law. There are not lacking authoritative statements to the effect that injunctions will not be granted, when against good conscience and productive of hardship, oppression, or injustice (Sheldan v. Rockwell, 9 Wis. 166, 76 Am. Dec. 265; Potter v. Saginaw Union St. R. Co., 83 Mich. 297, 47 NW 217, 10 L. R. A. 176), and particularly in Pennsylvania is it said that equity decrees are of grace rather than of right and that injunction will be refused if it appears that such a course will cause less aggregate damage than to enjoin (Richards Appeal, 57 Pa. St. 105, 98 Am. Dec. 202; Huckenstine's Appeal, 70 Pa. 102, 10 Am. Rep. 669 [Expressly dissapproved in Campbell v. Seamans, 2 Thomp. & C. 231, afd. in 63 N. Y. 568, 20 Am. Rep. 567]). In each of the foregoing cases, however, it will be

clearly established,[21] yet in certain cases, each depending upon its own peculiar circumstances, an injunction may be refused because the injury complained of is so trivial or so doubtful that, in view of the grave consequences which would result from the granting of such relief, it would be unconscionable to grant the writ.[22] In no case will the seriousness of damage from lawful acts raise the equities of trespasser to the dignity of rights enforcible by injunction.[23] The mere imminency of an act, of the possibility in case of necessity, without a showing of a necessity or an attempt or intent to do the act, affords no grounds for injunctive relief.[24] Courts will

found that there was present either the element of laches or that the damage to the plaintiff was doubtful or an adequate remedy existed at law, or the case arose upon an interlocutory application. The same will be found true with regard to the following cases which are frequently cited in support of the "balance of injury" theory (Hall v. Rood, 40 Mich. 46, 29 Am. Rep. 528; Buchanan v. Log. Co., 48 Mich. 364, 12 NW 490; Big Rapids v. Comstock, 65 Mich. 78, 31 NW 811; Miller v. Cornwall, 71 Mich. 270, 38 NW 912; Blake v. Cornwall, 65 Mich. 467, 32 NW 803; Logansport v. Uhl, 99 Ind. 531, 50 Am. Rep. 112; Powell v. Bentley & Gerwig Fur. Co., 34 W. Va. 804, 12 SE 1085, 12 L. R. A. 53; Amelia Mill. Co. v. Tenn. Coal, Iron & R. Co., 123 F 811; Sellers v. Parvis, 30 F 164; Mann v. Parker, 48 Or. 321, 86 P 598. See, also, 16 Am. & Eng. Enc. of Law [2nd Ed.] 363, 364 and cases cited), and the strongly contra case of Madison v. Ducktown, etc., Co., 113 Tenn. 331, 83 SW 658, will be found to be based upon the construction of a local statute. In the recent case of Dun v. Lumbermen's Credit Assn., 209 U. S. 20, 52 Law. Ed. 663, the supreme court of the United States seems to hold that comparative injury may be considered in determining the adequacy of the remedy at law in such cases. It is to be noted, however, that in this case, also, the evidence of defendant's wrong seems to have left the court in doubt in regard thereto. [Ed.]

**21.** American Smelting & Refining Co. v. Godfrey [C. C. A.] 158 F 225. The right of injunction is not defeated by reason of the fact that to compel defendant to desist from operating its cars in a street so as to constitute a nuisance would cut the throat of its yards and destroy the value of its property. Galveston, etc., R. Co. v. De Groff [Tex. Civ. App.] 110 SW 1006.

**22.** Injunction to restrain owner of coal rights from endangering the surface refused, where there were no buildings or structures. Berkey v. Berwind-White Coal Min. Co., 220 Pa. 65, 69 A 329. Injunction will not lie restraining emptying drainage upon complainant's land where it was necessary to preserve a highway. Devon v. Pence, 32 Ky. L. R. 697, 106 SW 874. Where the construction of a sewer and dicharge of sewage onto land was consented to by a former owner and conditions had existed for some time, and the sewer had been extended and its discontinuance would work a great hardship, and the injury was permanent and all damages could be recovered in one action, the land owner was not entitled to an injunction. Somerset Water, Light & Trac. Co. v. Hyde, 33 Ky. L. R. 866, 111 SW 1005. Use of a few names from plaintiff's copyrighted trade book in a much larger and more complete book issued by defendant held not ground for injunction, complainant being remitted to remedy at law. Dun v. Lumbermen's Credit Asso., 209 U. S. 20, 52 Law. Ed. 663. Where railroad breaks its contract to operate a spur track in consideration of a location granted, an injunction will not lie to prevent the operation of the main track, for the public have acquired rights requiring uninterrupted service. Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574. Where government had spent millions of dollars in improving river in vicinity of an island, and had contracts for six millions more of improvements, and use of dynamite was necessary, and dynamite had been stored on said island for more than 25 years without protest, an injunction would be granted only to restrain storage of dynamite on the island in such quantity as to create danger to complainant, who resided in the vicinity, or danger to his property located at his place of residence. Henderson v. Sullivan [C. C. A.] 159 F 46. Equity will not enjoin the excavation by a railroad company beneath land claimed by a city to constitute parts of streets, where it appears that as to one of the tracts the work is finished that ejectment involving it is pending, and that the city was restrained from interfering with the work, and as to the other tract the travel is not seriously obstructed, and the work is partly completed, and to stop it would endanger the whole place, the improvement being also a great public work. City of Hoboken v. Hoboken & M. R. Co. [N. J. Eq.] 70 A 926.

**23.** Writ will not issue to protect a self-confessed trespasser in his occupancy of his neighbor's premises, on the ground that his interests and operations are large and the landowner's damages small. Booming logs in a river. Garth Lumber & Shingle Co. v. Johnson, 151 Mich. 205, 14 Det. Leg. N. 898, 115 NW 52. Inconvenience or even damage to the individual proprietor does not authorize an act which in its nature is a purpresture of government lands. Suit to enjoin use of government reserve for grazing purposes. Shannon v. U. S. [C. C. A.] 160 F 870.

**24.** Contract by a city to erect an overhead crossing when it became necessary. Southern R. Co. v. Albes [Ala.] 45 S 234. Bill to enjoin refusal to supply water based on mere conclusions and on apprehension that it might be done in future, if certain necessities arose, is insufficient. Orcutt v. Pasadena Land & Water Co., 152 Cal. 599, 93 P 497.

refuse to grant novel requests for relief until the right is established by law,[25] nor will a non-enforcible injunction be granted.[26]

One of the well settled grounds of equitable jurisdiction already adverted to is want of an adequate remedy at law, and in such cases relief will be granted by injunction,[27] as in the case of irreparable injury for which damages will not be an adequate compensation.[28] Jurisdiction of equity, however, is not tested alone by the fact that there are existing remedies at law, the jurisdiction of equity being predicated rather upon the principle that equity can give more adequate and complete relief than can be obtained at law.[29] Insolvency of the person against whom relief is sought is rarely alone sufficient to grant jurisdiction,[30] but if joined with other grounds it may strengthen the plaintiff's claim for relief.[31] The right to injunction may be lost by laches or acquiescence,[32] or estoppel,[33] and one cannot claim relief who does not come into court with clean hands.[34]

25. Claim of a municipality that, by reason of authority to outlet a sewer into a stream, it might enjoin its use by an upper riparian owner is an assertion of a right so novel that it must be established at law before a court of equity will grant relief. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

26. Hawley v. State Bank of Chicago, 134 Ill. App. 96.

27. Eisenhauer v. Quinn, 36 Mont. 368, 93 P 38.

**Held inadequate:** Remedy at law of railroad company to test validity of statute fixing rates, by disobeying statute once and submitting to a criminal prosecution, is not so adequate as to deprive equity of jurisdiction where several years might elapse before final determination of question, pending which observance of the statute, if finally found to be invalid, would result in taking its property without due process of law, with no possibility of its recovery. Ex parte Young, 209 U. S. 123, 52 Law. Ed. 714.

Plaintiff's claim for damages in ejectment did not affect his right to preserve property from further damage. Waskey v. McNaught [C. C. A.] 163 F 929. To prevent erection of gate across private alley. Espensheid v. Bauer, 235 Ill. 172, 85 NE 230.

**Held adequate:** Equity will not enjoin the owner of coal rights from endangering the surface or causing it to cave in, there being an adequate remedy at law. Berkey v. Berwind-White Coal Min. Co., 220 Pa. 65, 69 A 329. Where city ordinances provided penalties for deposit of manure on city lot without consent of adjoining owners, there was adequate remedy at law for the misuse of stable property. Bonaparte v. Denmead [Md.] 69 A 697. Where telegraph company obtained from bridge company right to lay wires across bridge for annual rental and thereafter county acquired bridge, the county could not compel removal of all wires or payment of rental, it having an adequate remedy at law to recover damages for use. Beaver County v. Central Dist. & Printing Tel. Co., 219 Pa. 340, 68 A 846. Injunction to restrain construction of a drain established under drain laws refused. Grandchamp v. McCormick, 150 Mich. 232, 14 Det. Leg. N. 666, 114 NW 80. There was an adequate remedy at law to enforce a contract for the delivery of logs to a mill and no injunction would issue. Fox v. Fitzpatrick, 190 N. Y. 259, 82 NE 1108. Threat of a town marshal that, unless work is done on roads or tax paid, he would take plaintiff before mayor's court, held not to authorize injunction, all defenses being open to taxpayer in such proceeding. Mathews v. Farmerville, 121 La. 314, 46 S 339. Writ of sequestration was ample to secure **possession of personal property.** Frazier v. Coleman [Tex. Civ. App.] 111 SW 662. Abutting owner having title to middle of street cannot have injunction to compel the removal of a switch in equity, for he has an adequate **remedy by ejectment.** St. Columbia's Church v. North Jersey St. R. Co. [N. J. Eq.] 70 A 692.

28. Berkey v. Berwind-White Coal Min. Co., 220 Pa. 65, 69 A 329.

29. Dittgen v. Racine Paper Goods Co., 164 F 84. Injury to health and vegetation from a nuisance is irreparable and a court of equity is not without jurisdiction merely because they might recover damages at law. American Smelting & Refining Co. v. Godfrey [C. C. A.] 158 F 225. Under B. & C. Comp. § 390, equity jurisdiction is not defeated by concurrent law jurisdiction unless the legal remedy, as to final relief and mode of securing it, is as efficient as that in equity. Remedy by writ of review does not necessarily exclude a remedy in equity. Hall v. Dunn [Or.] 97 P 811.

30. Where injunction has been granted and only allegation in bill which could in any event sustain injunction is the insolvency of defendant which is denied and no proof is taken, the injunction will be dissolved. Lewis v. Hall [W. Va.] 61 SE 317.

31. Insolvency and multiplicity of suits. Merchants' Exch. of St. Louis v. Knott, 212 Mo. 616, 111 SW 565. Insolvency of plaintiffs at law, multiplicity of suits, and counterclaims not available at law. Aimee Realty Co. v. Haller, 128 Mo. App. 66, 106 SW 588. Where plaintiff gave defendant a license to use a way on payment of half the cost of construction, the fact that defendant refused to pay his half is admissible on the question of enjoining his use only in case he be shown insolvent. Meinecke v. Smith [Wis.] 115 NW 816. No injunction will issue to restrain the removal by a city of a wooden building outside of the fire limits in the absence of a showing that the city is insolvent. Clark v. Deadwood [S. D.] 117 NW 131.

32. Failure to act must be with knowledge of conditions amounting to acquiescence in the doing of the thing complained of.

§ 2. *Particular occasions for injunction; who and what may be enjoined.* *A. In general.*[See 10 C. L. 250]—Equity will prevent by injunction the threatened invasion of property rights,[35] and where one undertakes to decide for himself a question involving controverted rights, he may be enjoined regardless of the absolute merits of the controversy.[36] On the other hand, an injunction may issue to protect a party from exposure to the risk of litigation.[37] An injunction may also issue to preserve the status quo pending litigation.[38] Statutory injunctions are allowable in particular situations or for the protection of particular rights.[39] The question of who may be enjoined is usually reducible to one of parties,[40] or one of the nature of the remedy,[41] or one of the nature of the particular wrong.[42]

(§ 2) *B. Actions or proceedings.*[See 10 C. L. 251]—Courts of different sovereignties cannot interfere with the power of each to enforce its own judgments, even indirectly by injunction operating upon the parties litigant,[43] nor will a court of equity enjoin the prosecution of an equitable action in a court of full equity jurisdiction in a sister state upon any theory that the former can better weigh evidence or more justly apply any general principle of law or equity,[44] or upon the ground that such

Adams v. Birmingham Realty Co. [Ala.] 45 S 891. Delay is not necessarily laches. Daly v. Foss, 199 Mass. 104, 85 NE 94. Facts did not show laches preventing plaintiff from enjoining use of well which depleted water supply. Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655, 93 P 1021. Failure of one owing royalties to require equitable claimant to establish right thereto, prior to injunction against collection by legal claimant, held, under circumstances of case, not laches. Benziger v. Steinhauser, 154 F 151. Where defendant before beginning erection of building was notified by plaintiff that certain area must be left open for his benefit and tendered amount of money required to entitle him to have area left open, which defendant refused to accept but continued to build, it was held that right of complainant would not be denied on ground that he had delayed until injunction would cause more damage to defendant than its refusal would cause complainant. Tolsma v. James E. Scripps Corporation [Mich.] 15 Det. Leg. N. 853, 116 NW 622.

33. Lester v. Sullivan, 32 Ky. L. R. 925, 107 SW 300. Where one pleaded and prosecuted defenses for a period of five years in an action in one state, he is estopped from bringing bill in a sister state to restrain proceedings, on the ground that the truth is contrary to the findings in the original action because of delay and acquiescence. Bigelow v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 71 A 153. Complainant who saw defendant's plans for building projecting into street and watched building, taking no action until year after its completion, was estopped from maintaining suit for mandatory injunction for removal of projection. Adams v. Birmingham Realty Co. [Ala.] 45 S 891. Upon the evidence plaintiff **not estopped** from enjoining defendant as prayed. Piedmont Cotton Mills v. Georgia R. & Elec. Co. [Ga.] 62 SE 52. Facts held not to estop plaintiff from enjoining use of a well which depleted his water supply. Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655, 93 P 1021.

34. Where evidence shows that the plaintiff, who is not an abutting owner, purchased fee of small section of railroad right of way for sole purpose of taking advantage of necessities of pipe line company by enjoining them from using right of way in laying their pipe line, an injunction will be denied on ground that plaintiff does not come into court with clean hands. Hawkins v. Buckeye Pipe Line Co., 6 Ohio N. P. (N. S.) 553.

35. Southern Bell Tel. & T. Co. v. Mobile, 162 F 523.

36. An injunction will be granted to restrain a party from deciding for himself a question involving controverted rights and to compel him to resort to the courts, and this without regard to absolute merits of controversy. Southern Bell Tel. & T. Co. v. Mobile, 162 F 523. Injunction against removal by city of telephone poles from streets where they have been placed under claim of right. Id.

37. Where a defendant is attempting wrongfully to assert a liability against plaintiff under a written contract which plaintiff intended to sign as agent only, the court is not limited to relief by reformation, but may restrain a wrongful use of the instrument to plaintiff's prejudice. Contract for sale of an engine. Eustis Mfg. Co. v. Saco Brick Co., 198 Mass. 212, 84 NE 449.

38. See post, § 4, Preliminary Injunction.

39. See such titles as Corporations, 11 C. L. 810; Intoxicating Liquors, 10 C. L. 417. Provisions of Act April 5, 1907 (Laws 1907, p. 156, c. 77), relating to searches and seizures for intoxicating liquors in local option districts, are separable from those authorizing injunctions, and constitutionality of former does not affect validity of latter. Ex parte Dupree [Tex.] 19 Tex. Ct. Rep. 851, 105 SW 493.

40. See post, § 3.

41. See ante, § 1.

42. See post, § 2B-J.

43. State court will not enjoin issuing of execution on a judgment procured in a federal court in favor of a third party. Smith v. Reed [N. J. Eq.] 70 A 961.

44. Bill in New Jersey chancery to restrain proceedings in Massachusetts against a corporation organized in New Jersey cannot be maintained on a mere showing that the

court recognizes rules of law or equity different from those which obtain in the sister state,[45] but equity may enjoin proceedings pending or threatened in another court to prevent oppressive and vexatious litigation, especially when not brought in good faith, and to that end will act upon parties within its jurisdiction with respect to an action in a foreign state,[46] but upon grounds of comity this power should be sparingly exercised,[47] nor will it be exercised uselessly [48] or where there is an adequate remedy at law.[49] Federal statutes expressly prohibit the federal courts from enjoining actions in the state courts,[50] but this provision does not apply to the proceedings of a special commission not strictly constituting a court, though possessed of judicial powers,[51] nor does it preclude the granting of an injunction restraining the institu-

cause of action in Massachusetts is unconscionable or that the plaintiff is estopped from maintaining its actions there. Bigelow v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 71 A 153. Where, upon allegations of secret profits made by one in a capacity of trust in promoting a mining company organized in New Jersey, suit is brought in equity against the promoter in Massachusetts, the state of his residence, there is nothing in the law or policy of the state of New Jersey to prevent this company from maintaining its action. Id.

**45.** The fact that the federal courts entertain a different view upon the law pertinent to a controversy from that held by the courts of Massachusetts, where the controversy is pending, does not justify the chancery courts of New Jersey in restraining a corporation of this state from the prosecution of its action in Massachusetts against a resident of that state. Bigelow v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 71 A 153. Injunction will not be granted to restrain action upon benefit certificate brought in foreign state merely because courts of such state have placed more favorable construction on contract. Royal League v. Kavanagh, 134 Ill. App. 75.

**46.** Royal League v. Kavanaugh, 233 Ill. 175, 84 NE 178. Where suit is brought in a foreign jurisdiction for the purpose of evading some local policy of the jurisdiction in which the parties are domiciled, equity will, in a proper case and upon proper terms, restrain the prosecution of such action. Bigelow v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 71 A 153. May enjoin an attempt by a creditor to avoid the exemption laws of the state, by bringing suit in another state, where both creditor and debtor are domiciled. Greer v. Cook [Ark.] 113 SW 1009. Same doctrine is often extended to prevent other evasions of the laws of the state of the domicile of both parties. Id. Question of ownership and right of disposition of corporate stock could be more conveniently and decisively determined in an action in New York than in an action by the receiver in another state. Guaranty Trust Co. of New York v. Edison United Phonograph Co., 128 App. Div. 591, 112 NYS 929.

**47.** Bigelow v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 71 A 153. To justify equitable interposition, it must be made to appear that an equitable right will otherwise be denied. Royal League v. Kavanagh, 233 Ill. 175, 84 NE 178. The granting of an injunction to stay proceedings in another jurisdiction on the ground that they will affect the rights of a party rests largely in the discretion of the court and should be granted only in extraordinary cases. Not granted under the facts, and especially in view of the fact that plaintiff had defaulted and allowed a decree pro confesso against him. Johnson v. Victoria Chief Copper Min. & Smelting Co., 60 Misc. 468, 112 NYS 346. Where a contract was executed and the parties were domiciled in one state, equity will not enjoin the bringing of an action on the contract in another state on the ground that it is inequitable, because the law as decided by a certain court of that state is contrary to the law of the state where the contract was executed, without a showing that such court has final jurisdiction for there is no sufficient showing that the courts of the state where the action was brought would decide differently. Royal League v. Kavanagh, 233 Ill. 175, 84 NE 178.

**48.** An injunction will not lie at the instance of a receiver to restrain a nonresident from prosecuting an attachment proceeding against the effects of an insolvent in another state, such injunction being nonenforcible. Hawley v. Chicago State Bank, 134 Ill. App. 96.

**49.** The fact that a creditor institutes a suit in a foreign jurisdiction for the sole purpose of vexation and oppression does not authorize interposition by a court of equity. Remedy at law for malicious abuse of process. Greer v. Cook [Ark.] 113 SW 1009.

**50.** Fleischman Co. v. Murray, 161 F 152.

**51.** State dispensary commission of South Carolina does not constitute a "court" within the meaning of Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), prohibiting the granting of injunctions by federal courts to stay proceedings in a state court. Murray v. Wilson Distilling Co. [C. C. A.] 164 F 1. The South Carolina dispensary commission created by statute to wind up the South Carolina state dispensary is not a "court of a state" within Rev. St. § 720, providing that an injunction shall not be granted by any court of the United States to stay proceedings in any "court of a state" except where such injunction may be authorized by any law relating to proceedings in bankruptcy. Fleischman Co. v. Murray, 161 F 152. Federal court may enjoin railroad rates fixed by a state commission where same are confiscatory, despite the fact that the commission is for some purposes a court, for the act of fixing rates is legislative. Prentis v. Atlantic Coast Line Co., 29 S. Ct. 67.

tion of proceedings in state courts in futuro.[52] The policy of the law is, likewise, to prevent a conflict of jurisdiction between the courts of the same state.[53] Equity, therefore, has no jurisdiction to enjoin the prosecution of a criminal proceeding [54] except where property rights are involved [55] or where the equity proceedings are merely ancillary to proceedings already pending; [56] nor will equity entertain a suit, the sole purpose of which is to enjoin regular and orderly proceedings at law,[57] nor enjoin the prosecution of an action at law for matters which may be asserted in defense thereto; [58] nor will equity enjoin the enforcement of a judgment where there is other adequate remedy; [59] nor will such an injunction issue for mere error of law [60]

**52.** Suit in a federal court against attorney general to enjoin the enforcement of an unconstitutional state statute by bringing criminal proceedings for its violation is not within this prohibition. Lindsley v. Natural Carbonic Gas Co., 162 F 954.

**53.** Under Burns' Ann. St. 1908, §§ 1437, 1438, providing that where the subject-matter of a suit is located in more than one county the court first taking cognizance shall retain the same, etc., injunction will not lie in one county to enjoin the destruction of a highway bridge in the construction of a drain under a drainage proceeding brought in another county, any one affected by the proceeding and not a party to it having an adequate remedy by being made a party. American Steel Dredge Works v. Putnam County Com'rs [Ind.] 85 NE 1. See, also, American Steel Dredge Works v. Putnam County Com'rs [Ind. App.] 82 NE 995.

**54.** Logan v. Postal Tel. & Cable Co., 157 F 570. Threatened prosecution for alleged crimes will not be enjoined. State v. Canty, 207 Mo. 439, 105 SW 1078; Logan v. Postal Tel. & Cable Co., 157 F 570. See § 2D, infra. **Enforcement of ordinances and statutes.** See post, this section, subsection D.

**55.** Hall v. Dunn [Or.] 97 P 811; Logan v. Postal Tel. & Cable Co., 157 F 570.

**56.** Logan v. Postal Tel. & Cable Co., 157 F 570. Criminal proceedings commenced by one already a party to a suit in equity may be enjoined. Ex parte Young, 209 U. S. 123, 52 Law. Ed. 714.

**57.** Will not enjoin proceedings to correct the record of a judgment so as to show true date of entry. Thompson v. Great Western Acc. Ass'n, 136 Iowa, 557, 114 NW 31.

**58.** Steger & Sons Piano Mfg. Co. v. MacMaster [Tex. Civ. App.] 113 SW 337. Injunction against **forcible entry** and detainer refused. Josey v. Perlstein [Tex. Civ. App.] 20 Tex. Ct. Rep. 790, 107 SW 558. A bill to enjoin an **ejectment** suit and for cancellation of a deed cannot rest for its equity upon cancellation independent of other relief sought. Hall v. Slaughter [Ala.] 47 S 103. **Suit to recover statutory penalty** for cutting trees will not be enjoined on the ground that defendant entered under the belief that he had title, for such a defense could be made in this original action. Ryder v. Johnston [Ala.] 45 S 181. Where the maker of a promissory note brought **suit to recover possession of note** on the ground of payment, and its possession had been refused on demand, it furnished no ground for an equitable proceeding on behalf of the payee that he denied the full payment and that he could not obtain payment and that he could not obtain judgment on it in the trover suit, or that the city court in which that suit had been brought had no equitable jurisdiction. Long v. McIntosh, 129 Ga. 660, 59 SE 779. Where, in **suit on note,** defenses are complete and final judgment will relieve defendant of all liability on note, prayer in defendant's plea that note be cancelled does not make it proper for equity to enjoin suit and take jurisdiction thereof in order to determine issues. Norton v. Graham, 130 Ga. 391, 60 SE 1049. Complainant not entitled to restrain prosecution of suits on certain notes on ground of no consideration, remedy at law being adequate. Pepper Dist. Co. v. Alexander, 137 Ill. App. 369. A bill in equity cannot be maintained to enjoin the prosecution of an action on a promissory note for balance due after sale of collateral on ground that the sale was unauthorized, where no fraud or other ground of equitable jurisdiction is shown. Adams v. Western Maryland R. Co., 161 F 776. Equity will not restrain an action to dispossess tenant or, for rent on the ground that a certain covenant by the lessor was a **condition precedent** to payment of rent, for such defense could be made in an action at law. White v. Young Men's Christian Ass'n, 233 Ill. 526, 84 NE 658. **Equitable estoppel** may be pleaded in law as well as in equity, so that a failure to plead the same is no ground for enjoining entry of judgment. Monmouth County Elec. Co. v. Eatontown Tp. [N. J. Eq.] 70 A 994. Whether the **venue** of an action against receiver of corporation was proper under the statutes was a matter of defense to the action, and not ground to enjoin the proceedings. Paine v. Carpenter [Tex. Civ. App.] 111 SW 430. A temporary injunction **in a suit for specific performance** of a lease is properly dissolved, the filing of the suit for specific performance being ample protection against any person who may, pending suit, lease of defendant. Josey v. Perlstein [Tex. Civ. App.] 20 Tex. Ct. Rep. 790, 107 SW 558. Where **remedy by motion** in action at law is complete and adequate. Stone v. Fritts, 169 Ind. 361, 82 NE 792.

**59.** Matthews v. Carman, 122 App. Div. 582, 107 NYS 694. It must appear as in the case of enjoining proceedings that the complainant has an equitable defense of which he could not avail himself at law. Tyrrell v. Wood [R. I.] 68 A 545. Bill to enjoin sheriff from removing house which was then a chattel refused where it did not appear that sheriff was insolvent, or his bond insufficient, or that damages would not adequately compensate him for his injury. Eisenhauer v. Quinn, 36 Mont. 368, 93 P 38. Defendant in execution cannot enjoin sheriff's sale of his property on the ground that he is not the

or for a mere irregularity,[61] or where there is an appeal pending,[62] or where the grounds relied on could have been asserted by way of defense to the action at law.[63] In a proper case,[64] however, and subject to such conditions as the court may impose in the sound exercise of its discretion,[65] actions at law may be enjoined, as where the defendant in such an action has a defense which he cannot interpose therein,[66] or to prevent a multiplicity of suits[67] by the party seeking the injunction[68] or against him,[69] provided there is no adequate remedy at law;[70] but the bare fact of imminent

defendant, but a party of similar name is the real defendant. Mantz v. Kistler [Pa.] 70 A. 545. Whether complainants were entitled under an agreement to a larger estate in defendant's premises than a monthly tenancy, as found by the court, will not be considered in a suit to enjoin enforcement of the judgment, since, if true, there is a remedy at law. M. Redgrave Co. v. Redgrave [N. J. Eq.] 71 A 147.

**60.** Steger & Sons Piano Mfg. Co. v. MacMaster [Tex. Civ. App.] 113 SW 337; Coca Cola Co. v. Allison [Tex. Civ. App.] 113 SW 308. Allegations of errors of law in a bill to restrain the entry of final judgment and issuance of execution thereon must be disregarded. Monmouth County Elec. Co. v. Eatontown Tp. [N. J. Eq.] 70 A 994.

**61.** Where there was valid claim and no defense. Lindberg v. Thomas, 137 Iowa, 48, 114 NW 562.

**62.** Where courts of equity in one state have rendered an alleged unjust judgment against one, and an appeal is entered, courts of equity in a sister state will not enjoin parties from proceeding further, for there is a plain remedy in the prosecution of the appeal. Bigelow v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 71 A 153.

**63.** Tyrrell v. Wood [R. I.] 68 A 545. Injunction restraining collection of judgment will not be issued where relief sought could have been obtained from trial judge in action at law. Central Stock & G. Co. v. Pine Tree Lumber Co., 140 Ill. App. 471. Where a plea of privilege to be sued in another county is ignored or improperly overruled, the district court may enjoin the execution of judgment. Coca Cola Co. v. Allison [Tex. Civ. App.] 113 SW 308.

**Failure to appeal** from the denial of motion to be made party does not preclude one who was a proper but not necessary party from proceeding to enjoin the enforcement of any judgment recovered in such action at law. Spaulding Mfg. Co. v. Chaudoin [Ark.] 112 SW 1087. Right to enjoin fraudulent judgment may be lost by failure to appeal. Hughes v. Clark, 35 Pa. Super. Ct. 518.

**64.** Where a mortgage was executed by two coprincipals, the foreclosure thereof by the mortgagee could not be enjoined until the debtors adjusted their liability between themselves. Eureka Lumber Co. v. Satchwell [N. C.] 62 SE 310. It was improper to enjoin an action by a guardian for the illegal detention of her ward on allegations that the guardian, after a release by the ward, fraudulently attempted to show that the ward was incompetent at the time and for that purpose procured appointment as her guardian, since the appointment of the guardian cannot affect the validity of the release, she not having been under guardianship when it was made, and having been then presumptively competent. Gallon v. Mandell, 150 Mich. 621, 14 Det. Leg. N. 791, 114 NW 392.

**65.** It is within sound discretion of court to determine whether confession of judgment by a defendant is a necessary condition to granting him an injunction to restrain the proceeding at law, and where defendant has a legal defense to his action at law on which he relies, as well as a distinct ground of equitable relief, he should not be required to abandon his legal defense by confessing judgment before proceeding in equity to enjoin the action at law. Home Gas Co. v. Mannington Co-operative Window Glass Co., 63 W. Va. 266, 61 SE 329. An injunction at the instance of a railroad company against sale of car of foreign company which by contract the former has right to use for interstate traffic may be conditioned upon the complainants giving bond conditioned to return the car to proper officers of court after complainant's right, under its contract, to use it has expired. Southern R. Co. v. Brown [Ga.] 62 SE 177. Where insured requested that various claimants to insurance money due on two policies be enjoined from prosecuting their suits, relief would not be granted unless insurer paid into court the full amount of insurance, subject to deductions to which it was entitled upon proof. Metropolitan Life Ins. Co. v. Hamilton [N. J. Eq.] 70 A 677.

**66.** Unexecuted accord constitutes ground for injunction against action at law when not available as defense therein, as where, after agreement of compromise and after defendant had dismissed his witnesses and surrendered right to go to trial at time when prepared, plaintiff refused to carry out contract and moved case for trial, etc. Trenton St. R. Co. v. Lawlor [N. J. Err. & App.] 71 A 234.

**67.** Steger & Sons Piano Mfg. Co. v. MacMaster [Tex. Civ. App.] 113 SW 337. Equity will interpose to avoid a multiplicity of suits without the aid of any independent equity; where numerous parties jointly and severally claim against one, or where one claims against many liable jointly or severally, and the same title or right of defense will be questioned and will determine the issue for or against all. Southern Steel Co. v. Hopkins [Ala.] 47 S 274.

**68.** Where defendant's servants had repeatedly interfered with plaintiff's right to hunt on the navigable waters of the state and threatened to continue, plaintiff's remedy at law by a multiplicity of suits was inadequate, and such remedy was no objection to their right to an injunction. Ainsworth v. Munoskong Hunting & Fishing Club [Mich.] 15 Det. Leg. N. 412, 116 NW 992.

**69.** Where complainants failed to make payments under contracts to work on 25 houses and suits were brought, they were

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or pending criminal prosecutions is not ground for the intervention of equity.[71] The enforcement of a judgment or decree may, likewise, be enjoined where a proper case for equitable relief is made out,[72] as where a judgment or decree is obtained by fraud [73] or without jurisdiction.[74] The enforcement of an execution may be enjoined where it is fraudulently obtained [75] or where the judgment upon which it issues is invalid [76] or dormant,[77] but not where the execution is void on its face.[78] No court

entitled to enjoin the bringing of separate actions, where the defendants were insolvent, and complainants had counterclaims which might not be available in the law actions. Aimee Realty Co. v. Haller, 128 Mo. App. 66, 106 SW 588. Equity will enjoin the prosecution of 110 suits for death by negligent operation of a mine where the defense is the same in each suit although not established in law, for the plaintiffs are all insolvent and the defense of so many actions at different times and in different courts would be ruinously expensive. Southern Steel Co. v. Hopkins [Ala.] 47 S 274. Where complainants to the number of 400 sued to enjoin the operation of smelters owned by different corporations as nulsances, equity had jurisdiction to avoid multiplicity of suits. American Smelting & Refining Co. v. Godfrey [C. C. A.] 158 F 225. An unconstitutional legislative act may be enjoined where a failure to comply therewith would subject the complainant to innumerable **suits for penalties.** Act provided for the furnishing of gas at a certain price, the gas company to be subject to a penalty on account of each consumer to whom it failed to furnish gas at that price. Consolidated Gas Co. v. New York, 157 F 849. A suit by property owners on behalf of themselves and all others interested to restrain the **enforcement of a city ordinance requiring owners to construct sidewalks,** curbing, etc., is within the rule that equity will in a single suit take cognizance of a controversy to avoid a multiplicity of suits. Brizzolara v. Ft. Smith [Ark.] 112 SW 181. Under Const. 1890, § 160, of Miss., equity may enjoin **ejectment proceedings** where complainant has several defenses, both legal and equitable, to avoid a multiplicity of suits and to allow all matters to be adjudicated in one proceeding. Butler v. Scottish-American Mortg. Co. [Miss.] 46 S 829. Equity has jurisdiction to enjoin **enforcement of rates by different boards of supervisors** to determine in a single suit the legality of such rates. San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus County, 163 F 567.

**70.** Multiplicity of criminal or civil actions is not alone sufficient to authorize an injunction where relief may be obtained at law. Hall v. Dunn [Or.] 97 P 811. Purchaser of corporate stock may enjoin sheriff from selling stock under execution against vendor. Everett v. Farmers' & Merchants' Bank of Elm Creek [Neb.] 117 NW 401. Remedy by consolidation adequate. Aimee Realty Co. v. Haller, 128 Mo. App. 66, 106 SW 588. That numerous suits are threatened does not necessitate an injunction where such suits are between the same parties, growing out of contract. Heslip v. Anderson, 134 Ill. App. 8.

**71.** Prosecutions by railroad and warehouse commission against officers, employes, etc., of merchants' board of exchange. Merchants' Exchange of St. Louis v. Knott, 212 Mo. 616, 111 SW 565.

**72.** The collection of a judgment at law may be properly restrained by an injunction, plaintiff offering to pay the claim if established in the proceeding. Brin v. Topp, 131 Ill. App. 394. Court was authorized to enjoin sale of realty under execution against a husband on the ground that it was the wife's separate property. Texas Brew. Co. v. Bisso [Tex. Civ. App.] 109 SW 270. Requirement of **meritorious defense** not met by statement that declaration in action where judgment was rendered did not state cause of action. Reed v. New York Nat. Exch. Bank, 131 Ill. App. 434.

**Injunction refused:** Where, pending suit to enjoin execution, a levy thereunder is released and execution returned with the release endorsed thereon, an injunction will be denied. Thompson v. Gooldsby [Tex. Civ. App.] 20 Tex. Ct. Rep. 733, 106 SW 936. Injunction restraining sale under venditioni exponas properly dissolved, as proceedings were proper. Dillard v. Stringfellow [Tex. Civ. App.] 111 SW 769.

**73.** Matthews v. Carman, 122 App. Div. 582, 107 NYS 694. The collection of a judgment at law procured by fraud may be restrained where it is clear that defendant has used due diligence and exhausted every legal means of defense or redress, or was prevented, without fault of his own, from so doing. Hughes v. Clark, 35 Pa. Super. Ct. 518. Equities of defendant in fraudulent judgment may be lost by negligence in ascertainment of fact of judgment. Id.

**74.** Coca Cola Co. v. Allison [Tex. Civ. App.] 113 SW 308. Equity will enjoin judgment procured in an action where neither plaintiff nor wife were served with process and an attorney who accepted service and acted for them did so without authority. Lindberg v. Thomas, 137 Iowa, 48, 114 NW 562. Where the record affirmatively shows service, and judgment debtor desires to assail truthfulness of return of officer or recital of service in judgment, the remedy it would seem is by bill for injunction. United States v. Taylor, 157 F 718.

**75.** Spaulding Mfg. Co. v. Chaudoin [Ark.] 112 SW 1087.

**76.** Judgment not signed. Ewell v. Jackson, 33 Ky. L. R. 673, 110 SW 860.

**77.** Proposed sale of real estate under an execution issued on dormant judgment will be enjoined at suit of one who acquired title to property during life of the judgment lien. Lincoln Upholstering Co. v. Baker [Neb.] 118 NW 321. Judgment becomes dormant upon death of judgment creditor, although judgment in fact belongs to another,

can directly enjoin proceedings in another court by restraining action of the court itself.[79] Equity may enjoin the introduction of evidence obtained by fraud and duress,[80] but objections available upon the offer of evidence will not support an injunction against the introduction thereof.

Preliminary injunctions against actions jeopardizing the status quo are treated in a subsequent section.[81]

(§ 2) *C. Public, official, and municipal acts.* See 10 C. L. 253—A court of equity cannot, by injunction, control the exercise of political [82] or legislative [83] functions, nor will it thus control the discretion of public officers and authorities,[84] except to prevent an abuse of discretion [85] and to require that such discretion be exercised in good faith [86] and according to law,[87] there being no other adequate remedy,[88] one of

and under such circumstances, where no steps have been taken to revive judgment within a year of death, an execution issued is void and may be enjoined. Updegraff v. Lucas, 76 Kan. 456, 93 P 630.

78. Under Rev. St. 1895, art. 2989, of Texas, authorizing an injunction where it shall appear that the party applying for relief is entitled to the same and such relief requires restraint, etc., an execution running against property, showing on its face that it is void and that it cannot constitute a cloud on title, will not be enjoined. Thompson v. Gooldsby [Tex. Civ. App.] 20 Tex. Ct. Rep. 733, 106 SW 936.

79. Smith v. Reed [N. J. Eq.] 70 A 961. Injunction staying proceedings at law operates in restraint of party and not of court, and judgment rendered in disobedience of injunction is not void. Geddis v. Donovan, 151 Mich. 122, 14 Det. Leg. N. 878, 114 NW 874.

80. Matthews v. Carman, 122 App. Div. 582, 107 NYS 694. Where order for petitioner in summary proceeding is void for lack of jurisdiction, defendant may not enjoin its use as evidence in a law action, since advantage of the defects may be taken when the order is offered in evidence. Id.

81. See post, § 4A.

82. Political powers of county boards. Roberts v. Thompson [Neb.] 118 NW 106. Will not enjoin opening and canvassing returns and declaring the result of an election to determine the location of a county seat. Townsen v. Mersfelder [Tex. Civ. App.] 109 SW 420. Injunction will not lie to restrain the holding of an election. Thompson v. Mahoney, 136 Ill. App. 403.

83. Legislative acts of city authorities not subject to injunction on ground of extravagance. Brummitt v. Ogden Waterworks Co., 33 Utah, 285, 93 P 828. Equity will not interfere to enjoin the exercise of the power of legislatures to fix rates for transportation of passengers and freight. Chicago, etc., R. Co. v. Winnett [C. C. A.] 162 F 242. Passage of ordinance which is in exercise of legislative discretion will not be enjoined. Missouri & K. I. R. Co. v. Olathe, 156 F 624.

84. Discretion of city officers not controllable by injunction on ground of mere extravagance. Brummitt v. Ogden Waterworks Co., 33 Utah, 285, 93 P 828. Injunction against use of armory hall for dancing and roller skating refused. Hamill v. Dungan [N. J. Eq.] 68 A 1096. A federal court will not enjoin collection of **taxes against foreign corporation** because of methods adopted in valuing property, in absence of fraud or clearly shown adoption of a wrong principle. Western Union Tel. Co. v. Wright, 158 F 1004.

**Location of school districts,** etc., is left to judgment of school board and in the absence of misconduct their action cannot be restrained. Pickler v. Davie County Board of Education [N. C.] 62 SE 902. Administrative **powers of county boards.** Roberts v. Thompson [Neb.] 118 NW 106. **Relinquishment of city's rights** in matter of purchasing water plant. Brummitt v. Ogden Waterworks Co., 33 Utah, 285, 93 P 828. Enforcement of **railroad rate regulations.** Central of Georgia R. Co. v. McLendon, 157 F 961. Equity will not restrain collection of **tax** assessed by municipality against complainant's property. Buchanan v. MacFarland, 31 App. D. C. 6. Under statute permitting postmaster general to **issue fraud orders** where there is some evidence which is satisfactory to the postmaster general to sustain a fraud order, his decision of the question of fact upon which the order was issued is conclusive and will not be reviewed by the courts. People's United States Bank v. Gilson [C. C. A.] 161 F 286. Insufficient where bill shows hearing upon due notice on charges of fraud clearly within the statute but does not show the proofs adduced. Appleby v. Cluss, 160 F 984.

85. Suit to compel payment by South Carolina dispensary commission. Fleischman Co. v. Murray, 161 F 162. Must appear that the facts could not possibly support a fraud order. Appleby v. Cluss, 160 F 984. Bill for injunction in effect charging that an armory is being applied by regimental officers for commercial purposes with intent to injure the business of relators and that business is destructive of the armory, states a cause of action. Hamill v. Dungan [N. J. Eq.] 68 A 1096.

86. Mandatory injunction to set aside attempted compromise and settlement of a judgment in favor of the town, where there was no substantial controversy. Farnsworth v. Wilbur [Wash.] 95 P 642.

87. State v. District Court [N. D.] 115 NW 675; Fleischman Co. v. Murray, 161 F 152. Fraud order. Appleby v. Cluss, 160 F 984. Injunction restraining county drain commissioner from proceeding to construct ditch without having procured necessary assents. Chandler v. Helsler [Mich.] 15 Det. Leg. N. 333, 116 NW 626. Injunction restraining town from compelling construction of temporary sidewalks without performing necessary prerequisites. Convers-

the most frequent occasions for the intervention of equity being to protect taxpayers from an unreasonable increase of their burden by waste or illegal disposition of public funds,[89] or by the incurring of illegal debts [90] or by making assessments therefor.[91] Entirely unauthorized interference with property rights may be enjoined.[92] Officers

v. Deep River [Iowa] 117 NW 1078. Injunction against carrying out proposition to build school house under School Laws, § 147, clauses 11, 12, where election on proposition is void. Thompson v. Mahoney, 136 Ill. App. 403. Injunction against acts of food commissioner in distributing bulletins condemning property of manufacturers as harmful. State v. District Court [N. D.] 115 NW 675. A suit for perpetual injunction is the proper remedy to prevent the collection of illegally levied **taxes** from citizens of annexed territory. Luterloh v. Fayetteville [N. C.] 62 SE 758. Will enjoin illegal and unconstitutional tax levy. Southern R. Co. v. Mecklenburg County Com'rs [N. C.] 61 SE 690; Jordan v. Logansport [Ind.] 86 NE 47. Where the sole question in proceedings by a county treasurer to assess property withheld from taxation was whether the property was exempt, and it was established beyond controversy that the property was exempt, the enforcement of a tax thereon might be enjoined. Bednar v. Carroll [Iowa] 116 NW 315. Where decision of state board in equalizing back taxes is void for lack of quorum to hear an appeal, a bill to enjoin enforcement of the judgment is maintainable. Smoky Mountain Land, Lumber & Imp. Co. v. Lattimore [Tenn.] 105 SW 1028.

**88.** Injunction against municipality restraining it from cutting off a supply of water will only be granted to prevent irreparable injury or injustice. Anderson v. Berwyn, 135 Ill. App. 8. Drain commissioners may be enjoined from wrongfully overflowing complainant's land by constructing a new drain which empties into a stream above complainant's land, where drain does not traverse such lands and complainants are not parties to the drainage proceedings. Smafield v. Smith [Mich.] 15 Det. Leg. N. 487, 116 NW 990. A saloonkeeper may enjoin county officers from prohibiting the sale of liquors pursuant to the result of an election, for if he used a writ of review he would be liable to prosecution for sales made, and further, the prosecutors appearing insolvent and the municipality not being liable, it might be impossible to recover damages. Hall v. Dunn [Or.] 97 P 811. As the landowner's remedy at law was ample, it was not erroneous to refuse to enjoin county commissioners from continuing a proceeding to establish a public road pursuant to Code, §§ 520-522, in advance of the hearing provided for in § 521. Hutchinson v. Lowndes County [Ga.] 62 SE 1048. No injunction against issue of bonds which will be void on their face. Streator v. Linscott, 153 Cal. 285, 95 P 42. Collection of **taxes** will not be enjoined if any part thereof are valid and unpaid. Transient merchant's license fee. Clay v. Wrought Iron Range Co. [Ind. App.] 95 NE 119. Equity will not lie to restrain a municipal treasurer from collecting an illegal personal property tax, proper remedy being at law to pay under protest and sue to recover. A. H. Stange Co. v. Merrill, 134 Wis. 514, 115 NW 115. Unlawful seizure is a mere trespass remediable at law. H. W. Metcalf Co. v. Martin [Fla.] 45 S 463. City acquiring waterworks used to supply water for public use does so as corporation engaged in supplying public use, and on its refusal to furnish water to those entitled thereto an injunction will not issue as there is a **remedy by mandamus.** Orcutt v. Pasadena Land & Water Co., 152 Cal. 599, 93 P 497. Injunction restraining a county drain commissioner from proceeding to construct a drainage ditch without having procured necessary assent, **certiorari** provided for in the drain law being evidently intended as a means of reviewing merely the action of the commissioner in establishing the drain, and any appeal under the law was not permissible. Chandler v. Heisler [Mich.] 15 Det. Leg. N. 333, 116 NW 626.

**Remedy by appeal:** Where statute provides for appeal in proceedings to relocate school house, a temporary injunction granted on petition containing no allegation of taking of such appeal should be dissolved. Baswell v. Fundenberger [Tex. Civ. App.] 20 Tex. Ct. Rep. 64, 105 SW 1017. In proceedings by a county treasurer to assess property withheld from taxation for several years, where there was a question as to exemptions claimed, the treasurer had jurisdiction and his decision was reviewable on appeal as provided by the code, and a suit to enjoin enforcement of the assessment did not lie. Bednar v. Carroll [Iowa] 116 NW 315. Remedy provided by code for review on appeal of an assessment of property withheld from taxation is exclusive and equity will not enjoin such assessment unless tax imposed is illegal and void. Id. Federal court on principles of comity should not entertain suit to enjoin acts of state commission in advance of appeal to highest state court. Railroad rates fixed by state corporation commission. Prentis v. Atlantic Coast Line Co., 29 S. Ct. 67.

**89.** Waste. Roberts v. Thompson [Neb.] 118 NW 106; Brummitt v. Ogden Waterworks Co., 33 Utah, 285, 93 P 828. Misappropriation. Jordan v. Logansport [Ind.] 86 NE 47. Illegal disposition of public money. Roberts v. Thompson [Neb.] 118 NW 106.

**90.** Roberts v. Thompson [Neb.] 118 NW 106.

**91.** Assessment on account of a debt in excess of the constitutional limitation. Jordan v. Logansport [Ind.] 86 NE 47.

**92.** Injunction will lie to restrain a municipality from interfering with use by private party of space beneath public alley, where right to use such space has been lawfully obtained. City of Chicago v. J. Burton Co., 140 Ill. App. 344. Injunction will lie against municipality for illegally interfering with or destroying property of telephone company, conducting system pursuant to accepted ordinance. City of Rock Island v. Central Union Tel. Co., 132 Ill. App. 248.

may usually be enjoined from enforcing unconstitutional statutes where they act in a ministerial capacity only,[93] but acts made mandatory by a valid statute cannot be enjoined.[94] Courts may enjoin official acts to avoid a multiplicity of suits,[95] and one may avoid the acts of an executive officer and enjoin its execution on the ground that it was issued in a case which was not within the jurisdiction of such officer,[96] or that through fraud or a gross mistake of fact the officer fell into a misapprehension of the facts which caused him to act in a manner palpably wrong,[97] or that it was issued in the absence of any evidence to sustain it, or upon facts found which do not sustain it, or that its issue was induced by any other error of law.[98] Equity will not restrain the acts of authorized officers for mere informality or irregularity,[99] but will enjoin acts done contrary to mandatory requirements of statute.[1] Official acts within the proper scope of authority will be enjoined only in a clear case of illegality or fraud.[2] The aid of equity cannot be invoked to declare in advance that certain acts of public officers proposed or threatened to be done in the future will, if performed, be illegal and void,[3] and as a general rule official acts will not be enjoined until

93. See § 2B, infra, and § 26, post. General discretion of attorney general of state regarding enforcement of laws when and as he deems fit, is not interfered with by an injunction restraining him from enforcing an unconstitutional statute. Ex parte Young, 209 U. S. 123, 52 Law. Ed. 714.

94. Where petition for removal of county seat has been filed, notice required by statute must be issued by auditor and he cannot be enjoined from so doing on ground that petition has been taken from his office and cannot be found. Evenson v. O'Brien [Minn.] 118 NW 364.

95. State v. District Court [N. D.] 115 NW 675. Equity has jurisdiction of suit by irrigation company to enjoin boards of supervisors of counties through which its canal passes from enforcing rates which do not enable company to earn reasonable income, and to determine in single suit legality of such rates. San Joaquin & Kings' River Canal & Irr. Co. v. Stanislaus County, 163 F 567.

96. Postmaster general's fraud order. People's United States Bank v. Gilson [C. C. A.] 161 F 286.

97. Fraud order issued by postmaster general. People's United States Bank v. Gilson [C. C. A.] 161 F 286.

98. Fraud order by postmaster general. People's United States Bank v. Gilson [C. C. A.] 161 F 286.

99. In proceeding to establish drainage ditch, if county board possesses jurisdiction and authority to act in premises, injunction will not lie on account of mere irregularities in exercise of power conferred. Campbell v. Youngson [Neb.] 114 NW 415. Irregularities and informalities in levies by school authorities cannot be questioned by bill in equity, and payment of tax warrants sold in anticipation of such levies. Gray v. School Inspectors, 231 Ill. 63, 83 NE 95. Even in case of perpetual lease, lessee to pay taxes, the assessment of taxes in the name of another upon the land and buildings erected by the lessee is not such error as to create a ground for having collection of taxes enjoined. City of Norfolk v. J. W. Perry Co. [Va.] 61 SE 867. Where change in boundaries of school district is made by irregular proceedings, they are not subject to collateral attack in injunction proceedings. School Dist. No. 116 v. Wolf [Kan.] 98 P 237. Injunction will not issue to restrain payment of school orders which are irregular and contrary to statute in form, where money thereon has been obtained and taxes collected and orders themselves have matured. Gray v. Board of School Inspectors, 135 Ill. App. 494.

1. Where a statute requiring notice of assessment to a taxpayer is mandatory, a failure to give such notice renders the assessment void, and it may be enjoined. Ward v. Wentz [Ky.] 113 SW 892.

2. Tax for sewer construction and contract for the improvement. Mead v. Turner, 112 NYS 127. Complainant must state facts bringing his case within some acknowledged head of equity jurisdiction in order to enjoin collection of taxes. Gray v. School Inspectors, 231 Ill. 63, 83 NE 95.

3. Will not restrain the levy of a tax and issue of town orders in anticipation of the collection thereof. Lewis v. Eagle [Wis.] 115 NW 361. Rule that taxpayer cannot enjoin levy of tax until lien or apparent lien or cloud on title is about to be wrongfully created applies to cases involving legality of specific assessment against property of complainant. Jordan v. Logansport [Ind.] 86 NE 47. Action to enjoin election proceedings brought prior to promulgation of returns held premature. Election ordered by a police jury and held under statute authorizing local option elections. Town of Ponchatoula v. Police Jury, 120 La. 1040, 46 S 16. Where statute provides for decision by sealer of weights and measures as to correctness of computing scales, a suit will not lie to enjoin him on ground that certain scales are correct but he threatens to find them incorrect, for such suit would take away his right to come to decision. Moneyweight Scale Co. v. McBride, 199 Mass. 503, 85 NE 870. Equity will not enjoin reassessment of a tax on stock and real property of national bank because of an apprehension that U. S. Rev. St. § 5219 will be violated by officer in making assessment. First Nat. Bank v. Albright, 208 U. S. 548, 52 Law. Ed. 614.

some injury to the complainant is at least threatened.[4] Equity will not interfere to enforce a public duty where no private right is involved,[5] and a private party cannot enjoin a threatened wrong where the injury which he would sustain would be no other or different from that suffered by the community generally,[6] but equity will restrain an attempted wrong when it clearly appears that in no other proceeding can public or private interests be fully protected, and the writ will issue at the instance of a private individual who shows that he may suffer financial injury if the contemplated wrong be not enjoined, even though it appears that part of the public may suffer in the same way.[7] Mandatory injunctions are not granted where the only ground of equitable relief is the failure of the defendant to perform an independent public duty which he owes to the plaintiff individually as well as to others.[8] Title to public office cannot be tried in a suit for injunction,[9] but interference with an officer in the performance of his duties may be enjoined.[10]

(§ 2) *D. Enforcement of statutes and ordinances.* See 10 C. L. 256—Injunction will not, as a general rule, lie to enforce a municipal ordinance,[11] especially where no private right is involved,[12] but the legislature may establish such remedy,[13] and it is held, even in the absence of statutory provision to such effect, that violation of building restrictions may, in some cases, be enjoined at the instance of a property owner.[14] Injunction is the appropriate remedy for avoiding the enforcement of an illegal and unconstitutional statute or ordinance,[15] where such enforcement will

4. Mere illegality of a certificate of public convenience and necessity issued pursuant to the railroad law, Laws 1892, p. 1395, c. 676, § 59, is insufficient to warrant injunctive relief, but it must appear that pursuant to certificate defendant is about to do something or threatening to do something harmful to plaintiff. Erie R. Co. v. Rochester-Corning-Elmira Trac. Co., 57 Misc. 180, 107 NYS 940. Equity should not entertain a bill for an injunction against a tax collector who threatens to seize and sell personal property except in rare cases where the property is peculiarly valuable and cannot be compensated for adequately in damages. H. W. Metcalf Co v. Martin [Fla.] 45 S 463. As general rule, injunction will not issue against passage of unauthorized municipal resolutions or ordinances, no one having cause to complain until some attempt at enforcement is made. Lee v. McCook [Neb.] 116 NW 955.

5. Erection of livery stable infringing no private rights although contrary to ordinance. Mason v. Deitering [Mo. App.] 111 SW 862.

6. Lee v. McCook [Neb.] 116 NW 955; Semones v. Needles, 137 Iowa, 177, 114 NW 904. Validity of special assessments for local improvements cannot be determined in action brought by general taxpayer to restrain the authorities from making improvement. Merritt v. Duluth, 103 Minn. 236, 114 NW 758. Taxpayer cannot enjoin the removal of public records temporarily from the state for use in a federal court. Dickinson v. Kingsbury [Cal. App.] 96 P 329.

7. Where statutes provided for the sale of liquor in communities of certain size, individual citizens of a city might enjoin the retaining of names on the census roll fraudulently padded. Semones v. Needles, 137 Iowa, 177, 114 NW 904. If the city enacts an invalid ordinance regulating its relations with a water company so as to bind itself to pay unreasonable rates or require the payment of unjust charges, taxpayers affected directly as users of water, or indirectly as taxpayers, may sue to enjoin enforcement of the ordinance, although taxes of others are proportionately raised. Brummitt v. Ogden Waterworks Co., 33 Utah, 285, 93 P 828.

8. To compel performance of quasi public duty to furnish gas. Cox v. Malden & Melrose Gaslight Co., 199 Mass. 324, 85 NE 180.

9. Harrison v. Stroud, 33 Ky. L. R. 653, 110 SW 828. Injunction cannot issue in election contest to prevent one holding certificate of election from qualifying and discharging duties of office pending contest. Id. Public officer not in possession of office is not entitled to injunction to enforce his right of possession. Lucas v. Futrall, 84 Ark. 540, 106 SW 667.

10. Injunction is proper remedy to prevent interference with county infirmary superintendent in the performance of the duties of his position or enjoyment thereof. Zeigler v. Palmer, 10 Ohio C. C. (N. S.) 545.

11. City of New York v. M. Wineburgh Advertising Co., 122 App. Div. 748, 107 NYS 478.

12. Erection of livery stable infringing no private rights although contrary to ordinance. Mason v. Deitering [Mo. App.] 111 SW 862.

13. By statute in New York, proceedings in law or in equity may be brought to correct, restrain or remove any structure in violation of the building laws. May enjoin maintenance of a "sky sign." City of New York v. M. Wineburgh Advertising Co., 122 App. Div. 748, 107 NYS 478.

14. Restrictions intended to guard against fire. O'Bryan v. Highland Apartment Co., 33 Ky. L. R. 349, 108 SW 257.

15. Tax levy. Southern R. Co. v. Mecklenburg County Com'rs [N. C.] 61 SE 690. The question of the constitutionality of

injure property rights,[16] but only to the extent that the complainant will thus be injured.[17] As in other cases, a proper case for equitable relief must be made out, the limitations upon the power of equity to interfere with the exercise of discretionary powers being the same as in other cases,[18] and the grounds of equitable relief being the same, such as inadequacy of other remedies [19] and multiplicity of suits.[20] Federal courts may enjoin the enforcement of unconstitutional state statutes and regulations,[21] and for that purpose may enjoin officers empowered to enforce them.[22] A federal court of first instance acting upon affidavits, which pronounces a state statute unconstitutional, assumes a grave responsibility justified only by most exceptional circumstances,[23] and such an injunction should issue only in a clear case.[24] The

a statute is properly raised in a suit to restrain action under it. Suit to restrain sealer of weights from condemning a computing scale under Statutes 1907, p. 517, c. 535. Moneyweight Scale Co. v. McBride, 199 Mass. 503, 85 NE 870.

16. Plumbing regulations preventing a firm from securing the services of journeymen plumbers. Robinson v. Galveston [Tex. Civ. App.] 111 SW 1076. Petition to restrain enforcement of law on ground that it would destroy business built up after period of years, and that it is unconstitutional, authorizes, as against a demurrer, relief in equity to prevent irreparable injury. Merchants' Exch. v. Knott, 212 Mo. 616, 111 SW 565. Court having power to declare statute unconstitutional may also, where its unconstitutionality depends on controverted facts which can only be determined on hearing, suspend operation of statute in proper case to prevent irreparable injury until final hearing. Louisville & N. R. Co. v. Railroad Commission, 157 F 944.

17. Though part of an ordinance is invalid, if it does not affect interest of taxpayers who are suing to restrain its enforcement, effect of invalid part upon other provisions need not necessarily be considered in action to enjoin enforcement of ordinance. Brummitt v. Ogden Waterworks Co., 33 Utah, 285, 93 P 828. Ordinance granting right to water company which at most grants monopoly of right to furnish water for limited period. Id. Where an excessive tax was levied and practically all taxes had been paid, a taxpayer who had not paid his taxes could not enjoin collection of whole tax, but could enjoin appropriation of any part of excess to any other purpose than that for which it was levied and compel its being held until the next year for same purpose. Southern R. Co. v. Mecklenburg County Com'rs [N. C.] 61 SE 690.

18. Evidence insufficient to show that ordinance prohibiting cemeteries within certain limits was invalid as arbitrary discrimination, so that it might be enjoined. Bryan v. Birmingham [Ala.] 45 S 922. Wisdom of ordinance adjusting water rates, etc., not so favorable to the city as former arrangements, held not reviewable. Brummitt v. Ogden Waterworks Co., 33 Utah, 285, 93 P 828.

19. One cannot enjoin an ordinance as void where no property rights are involved, invalidity of the ordinance being a defense to a prosecution for its violation,and one qualified to engage in trade of plumber cannot enjoin regulating state. Robinson v. Galveston [Tex. Civ. App.] 111 SW 1076.

20. Act provided for the furnishing of gas at certain rate, gas company to be subject to penalty for breach to each consumer. Consolidated Gas Co. v. New York, 157 F 849. Suit by property owners on behalf of themselves and all others interested to restrain enforcement of city ordinance requiring owners to construct sidewalks, curbing, etc., is within rule that equity will in a single suit take cognizance of controversy to avoid a multiplicity of suits. Brizzolara v. Ft. Smith [Ark.] 112 SW 181.

21. Consolidated Gas Co. v. New York, 157 F 849. South Carolina dispensary commission. Fleischman Co. v. Murray, 161 F 152; Murray v. Wilson Distilling Co. [C. C. A.] 164 F 1; St. Louis & S. F. R. Co. v. Hadley, 161 F 419; Prentis v. Atlantic Coast Line Co., 29 S. Ct. 67; Merchants' Exch. v. Knott, 212 Mo. 616, 111 SW 565. Federal courts may enjoin attorney general of a state from proceeding to enforce an unconstitutional statute. Ex parte Young, 209 U. S. 123, 52 Law. Ed. 714. Bill in equity is proper, if not only, mode of judicial relief against unreasonable tariff rates established by legislature or its commission. Id. May enjoin either civil or criminal proceedings instituted to enforce confiscatory rates. Louisville & N. R. Co. v. Railroad Commission, 157 F 944. Where a railroad commission is given continuing power of supervision over the matter of compliance with its orders and regulations, with power to change or repeal the same, and is made suable by statute, suit may be brought in a federal court to enjoin enforcement of order it has promulgated on ground that same is confiscatory. Central of Georgia R. Co. v. McLendon, 157 F 961. Suit in federal court, against attorney general, to enjoin enforcement of unconstitutional state statute by bringing criminal proceedings for its violation, is not within prohibition of Rev. St. § 720 (Comp. St. 1901, p. 581), as one to stay proceedings in a state court. Lindsley v. Natural Carbonic Gas Co., 162 F 954.

22. See ante, this section, subsections B, and C.

23. Lindsley v. Natural Carbonic Gas Co., 162 F 954.

24. No injunction ought to be awarded by a federal court against the enforcement of a state railroad rate law which is alleged to violate the federal constitution, unless the case is reasonably free from doubt. Ex parte Young, 209 U. S. 123, 52 Law. Ed. 714.

equity jurisdiction of a federal court to enjoin enforcement of an unconstitutional state statute to protect the property rights of complainant from irreparable injury is not defeated by the fact that the means of enforcement provided by the act are by criminal prosecutions for its violation.[25] Equity will not usually interfere with the enforcement of municipal penal ordinances either by enjoining prosecutions thereunder [26] or by enjoining police interference.[27] Equity may, however, enjoin a seeming attempt to enforce the law which is in reality a continuous trespass,[28] or where property rights are involved,[29] or where an officer undertakes to construe a law ex parte and to enforce as thus construed.[30] Complainant does not lose his right to injunction because after being denied a preliminary hearing and pending final hearing he complies with the statutory order to avoid penalties to which he would otherwise be liable.[31] Equity will not enjoin proceedings authorized by positive statute upon any other ground than the invalidity of the statute.[32]

Act N. Y. May 20, 1908, to prevent waste of natural mineral waters, and prohibiting pumping of mineral waters, etc., is not so clearly unconstitutional or beyond police powers of state as to justify a federal court in granting a preliminary injunction to restrain its enforcement at suit of a land-owner engaged in pumping gas for sale from wells drilled into rocks in his lands. Lindsley v. Natural Carbonic Gas Co., 162 F 954. On motion for preliminary injunction to restrain enforcement of order made by railroad commission reducing passenger rates, on ground that such rates are unreasonable and confiscatory, evidence held insufficient to warrant granting of such injunction, in that it did not show in absence of an actual trial that effect of enforcement would be to lessen complainant's net earnings. Central of Georgia R. Co. v. McLenden, 157 F 961.

25. Lindsley v. Natural Carbonic Gas Co., 162 F 954.

26. Gonyo v. Wilmette, 133 Ill. App. 645. Equity generally has no power to enjoin threatened prosecutions under municipal ordinances or state laws. Ordinance against maintaining any cemeteries except a certain one named. Bryan v. Birmingham [Ala.] 45 S 922; Canon City v. Manning, 43 Colo. 144, 95 P 537. Equity will not interfere to prevent anticipated criminal prosecutions, especially where ordinance has been found valid as a police regulation. Rider v. Leatherman, 85 Ark. 230, 107 SW 996.

**Adequate remedy at law:** Court of chancery will not entertain contest as to validity of ordinance and restrain prosecutions pending settling of that question, as the whole matter can be settled in a court of law. Ordinance against procuring patients through agents. Rider v. Leatherman, 85 Ark. 230, 107 SW 996. Injunction will not lie to prevent enforcement of a local option act, as an adequate remedy at law is afforded in a criminal prosecution under the act. Gassman v. Kerns, 7 Ohio N. P. (N. S.) 626.

27. Cannot enjoin police interference. Keith & Proctor Amusement Co. v. Bingham, 110 NYS 219; Schimkevitz v. Bingham, 110 NYS 219. Injunction will not lie to prevent city from enforcing ordinances against displaying advertisements on wagons. Fifth Ave. Coach Co. v. New York, 110 NYS 1037. Arrest of person for giving picture and wax work shows on Sunday. Eden Musee American Co. v. Bingham, 110 NYS 210. Cannot enjoin police from interfering with Sunday roller skating. Olympic Athletic Club v. Bingham, 110 NYS 216. Equity cannot restrain interference by police in enforcing law against Sunday violation. Dana hall. Suesskind v. Bingham, 110 NYS 213. Will not enjoin police from interfering with the giving of a moving picture show on Sunday. Moore v. Owen, 58 Misc. 332, 109 NYS 585. Police interference with moving picture show. Shepard v. Bingham, 110 NYS 217. Requiring license for vehicles and regulating use of street for public hack stands. Kissinger v. Hay [Tex. Civ. App.] 113 SW 1005. Will not enjoin board of health from prosecuting for slaughtering, etc., poultry in certain districts of a city without a license. Cohen v. Department of Health, 113 NYS 88.

28. The fact that a newspaper has printed improper matter does not warrant the authorities in supressing its future publication. Ulster Square Dealer v. Fowler, 58 Misc. 325, 111 NYS 16. Where property rights may be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree in equity. Ex parte Young, 209 U. S. 123, 52 Law. Ed. 714.

29. Hall v. Dunn [Or.] 97 P 811.

30. Where a penal ordinance forbids the sale of liquor, equity will enjoin the officers of the city from declaring ex parte that the sale of liquor for social enjoyment by members and guests of a club is a nuisance and attempting to prevent same. Canon City v. Manning, 43 Colo. 144, 95 P 537.

31. In a suit to enjoin the enforcement of railroad rates as fixed by a railroad commission, complainant's right to a preliminary injunction or to relief on the merits is not prejudiced by the fact that, being denied preliminary injunction on its ex parte application, it put into effect the rates prescribed by the order, being constrained thereto by the statutory penalties to which it would otherwise be liable. Central of Georgia R. Co. v. McLendon, 157 F 961.

32. Will not enjoin a multiplicity of liens on the ground of overpayment. Aimee Realty Co. v. Haller, 128 Mo. App. 66, 106 SW 588.

(§ 2) *E. Exercise of right of eminent domain.*[See 10 C. L. 257]—An injunction will issue to enforce the constitutional right of a property owner against dangerous aggression, under the guise of the exercise of the right of eminent domain,[33] and damages may be awarded for the trespass,[34] unless as an alternative such damages as would be awarded in condemnation proceedings are paid.[35] The rule that the taking and injuring of private property for public use will not be restrained if compensation in damages can be made and defendant is willing to make such compensation and a serious injury will result from the issuance of the injunction is confined in its application to takings by public service corporations.[36] A property owner may be estopped to complain in equity of the violation of his rights.[37] A property owner will not ordinarily be enjoined from resisting a trespass upon his property in order that the trespasser may have time to ascertain the damages to be paid,[38] but in an action to enjoin condemnation of land, it is not error to admit testimony of the condemnor that he sought to purchase the land sought to be condemned but failed.[39]

(§ 2) *F. Acts affecting rights in highways and public or quasi public places.*[See 10 C. L. 258]—A municipality may sue to restrain injury to or encroachments upon,[40] or obstructions[41] of highways under its care and charge, where there is no adequate remedy at law.[42] An injunction against a street obstruction may issue at the instance

**33.** In absence of consent, tacit or express, it is well settled in Minnesota that, without compensation first made, entry by railroad company upon lands with intention to permanently appropriate them is unlawful and will be restrained. McCord v. Eastern R. Co., 136 Wis. 254, 116 NW 845. In action against railroad company for damages to property, by reason of elevation of its tracks in front of said property and operation of same, plaintiffs were entitled to decree enjoining operation of such trains until payment of any damages recovered. Anderson v. New York Cent., etc., R. Co., 58 Misc. 72, 110 NYS 232. Where statute provides that one taking waters from stream must give bond to riparian owners to secure payment of any damages, a riparian owner may enjoin use of water from stream until water company secures payment of damages as provided by statute. Bland v. Tipton Water Co. [Pa.] 71 A 101. If in condemnation proceedings an attempt to condemn more than is necessary is made, owner may enjoin condemnation of unnecessary part. Piedmont Cotton Mills v. Georgia R. & Elec. Co. [Ga.] 62 SE 52.

**34.** Duncan v. Nassau Elec. R. Co., 111 NYS 210.

**35.** Laying of tracks in a street. Duncan v. Nassau Elec. R. Co., 111 NYS 210. One suing to enjoin maintenance of elevated railroad in street in front of his premises, and for damages for past maintenance is entitled to no greater relief than he would obtain in condemnation proceedings. Smyth v. Brooklyn Union El. R. Co. [N. Y.] 85 NE 1100.

**36.** City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

**37.** Where owner consented to laying of tracks in highway and made no objection to construction of road. Maust v. Pennsylvania, etc., R. Co., 219 Pa. 568, 69 A 80. In action to enjoin street railway from operation of line, where abutting owner had told defendant's manager, "I know where you want to go, go ahead. I will see you in a few days," such statement is sufficient to justify finding of consent. Id.

**38.** Where telephone company violated property rights of owners of land by going thereon and constructing lines without any right, an injunction restraining interference by property owners will not be continued until compensation to such owners may be ascertained and made by the telephone company, in absence of laches or acquiescence on the part of the property owners. Northeastern Tel. & T. Co. v. Hepburn [N. J. Err. & App.] 69 A 249.

**39.** Piedmont Cotton Mills v. Georgia R. & Elec. Co. [Ga.] 62 SE 52.

**40.** Digging upon adjacent lands so as to affect lateral support or threaten subsidence of highway. Village of Haverstraw v. Eckerson, 192 N. Y. 54, 84 NE 578, afg. 124 App. Div. 18, 108 NYS 506.

**41.** Under rule authorizing relief by injunction to public authorities from invasion of highways by public service corporations under color of statutory authority, where pipes are laid in a highway without authority, the court may, by mandatory injunction, require removal of pipes laid pending suit. Woodbridge Tp. v. Middlesex Water Co. [N. J. Eq.] 68 A 464.

**42.** Board of commissioners having complied with law in proceedings to establish a road may enjoin interference by landowner with opening of road, as there is no adequate remedy at law. Boothroyd v. Larimer County Com'rs, 43 Colo. 428, 97 P 255. Remedy by appearance and objections in drainage proceedings held adequate to protect injury to public bridge by construction of drain. American Steel Dredge Works v. Putnam County Com'rs [Ind.] 85 NE 1. See, also, Id. [Ind. App.] 82 NE 995.

**Criminal liability** for obstruction will not preclude injunction. Lawrence v. Ewert [S. D.] 114 NW 709.

of a private person where he is or will be specially damaged,[43] but not otherwise,[44] and these principles apply also in the case of abandonment of a highway.[45] An obstruction cannot be enjoined by an adjacent landowner where the place obstructed is not a public one, the landowner having, furthermore, no private rights therein.[46] An injunction may issue even though the title to property is involved.[47] The fact that a complainant summarily and illegally abated an unlawful obstruction of a public alley would not justify the denial of an injunction to restrain further threatened obstructions.[48] Highway commissioners may be restrained from opening a road where the petition therefor does not confer jurisdiction.[49] In an action to enjoin repeated trespass for traveling over a discontinued highway, evidence that another highway which was open and might have been used was not regularly laid out was properly rejected.[50] In enforcing, as against a municipality, the right to use streets for a particular purpose, the court may impose terms to protect the rights of the municipality.[51]

(§ 2) *G. Acts of quasi public and private corporations or associations.* See 10 C. L. 258—The internal management of a corporation will not ordinarily be interfered with by the court at the instance of a minority stockholder,[52] but the rights of a stockholder will nevertheless be protected by injunction from injury by illegal acts on the part of the corporate officers.[53] A bona fide purchaser of corporate stock may

43. Where manner of construction of street railway and use to which it is put destroys practical usefulness of street to abutting owners, they have no adequate remedy at law and may obtain relief by injunction, especially where occupation of street is unlawful. Swinhart v. St. Louis & S. R. Co., 207 Mo. 423, 105 SW 1043. One obstructing public highway, thereby preventing its use by public at places of encroachment and causing special damage to another, is liable in special damages and may also be enjoined from maintaining such obstruction. Barnes v. Midland R. Terminal Co., 110 NYS 545. Abutting property owners may enjoin the unreasonable use of a highway by a railway company. Facts held not to show an unreasonable interference. Foundry v. St. Louis, etc., R. Co., 130 Mo. App. 104, 109 SW 80. Abutting owner may restrain street railway company from maintaining siding on his property where street railway has right by ordinance to construct its railway in street. Breen v. Pittsburg, Harmon, Butler, etc., R. Co., 220 Pa. 612, 69 A 1047.

44. Injunction will not lie on petition of property owner against the connecting of buildings on opposite sides of street by bridge twenty feet above pavement, where ingress and egress of plaintiff are in nowise impaired, and injury which he will sustain, if any, is not different in kind from that suffered by the public at large. Offutt v. Roth Packing Co., 11 Ohio C. C. (N. S.) 357.

45. To enjoin abandonment of public street, plaintiff must allege and show a damage different in kind and not merely in degree from that of the public generally. Petition alleging diminution in value of lots insufficient. Southern R. Co. v. Albes [Ala.] 45 S 234. Although authority of common council under city charter is not absolute as to location, closing, etc., of alleys, a contemplated change in an alley will not be enjoined where, as a means of ingress and egress, the alley as changed will furnish the same service as before. Schmoit v. Nagel, 151 Mich. 502, 15 Det. Leg. N. 45, 115 NW 411. Bill to restrain abandonment of street can not be maintained if it is not alleged that plaintiff's land abuts upon street, for it is not within provisions of Const. 1901, § 235, providing for compensation for takings for public use. Southern R. Co. v. Albes [Ala.] 45 S 234. Alderman and taxpayer cannot enjoin acts of balance of board in voting to suspend by-street, where he has no property on such street. Trotter v. Franklin, 146 N. C. 554, 60 SE 509.

46. Owner of upland cannot enjoin construction of pier on adjoining land between high and low water, on ground that it interferes with convenience of persons in passing over land. Barnes v. Midland R. Terminal Co., 110 NYS 545.

47. Where there is threatened wrongful obstruction of public alley, same will be restrained, even if title to land is in dispute, and defendant is entitled to a trial of that question at law, and even though he is in possession of premises. Detroit Mineral Bath Co. v. Stroh Brew. Co., 151 Mich. 555, 15 Det. Leg. N. 68, 115 NW 717.

48. Detroit Mineral Bath Co. v. Stroh Brew. Co., 151 Mich. 555, 15 Det. Leg. N. 68, 115 NW 717.

49. Where petition to open road was not signed by majority of abutting landowners. Sholty v. Stewart, 134 Ill. App. 541.

50. Shannon v. Dorsinski, 134 Wis. 68, 114 NW 129.

51. Use of streets by street car company. Economic Power & Const. Co. v. Buffalo, 111 NYS 443.

52. Bartow Lumber Co. v. Enwright [Ga.] 62 SE 233. A stockholder cannot enjoin dissolution proceedings taken in good faith, in accordance with the statute and with the approval of a majority. Colby v. Equitable Trust Co., 124 App. Div. 262, 108 NYS 978.

53. An injunction will lie in favor of a stockholder to restrain the officers of a

sue in equity to compel the corporation to enter the assignment upon its books and to issue a new certificate therefor.[54] Equity has no inherent power to try disputed title to corporate office and enjoin one in possession from the exercise of its functions.[55] In some states an injunction is the statutory remedy for usurpation of corporate franchises,[56] but in the absence of statute such a remedy is not available,[57] and, in any case where a statute authorizes injunction against certain acts of corporations, it will not be extended by the courts.[58] Equity will not, in the absence of fraud, interfere with the enforcement of by-laws, rules and regulations of beneficial or other associations,[59] but will protect property rights from injury or forfeiture under invalid regulations.[60]

(§ 2) *H. Breach or enforcement of contract or trust.*[See 10 C. L. 259]—An injunction may, in a proper case, issue against an apprehended breach of contract,[61] where

corporation from changing its articles so as to change its location, where defendants contend for their right to make such change at a called meeting. Bobzin v. Gould Balance Valve Co. [Iowa] 118 NW 40. A circuit court of the United States, other requisites to the exercise of jurisdiction being satisfied, will enjoin de facto equally with de jure officers of a corporation from perpetrating, facilitating, or permitting violations of law to the detriment of innocent stockholders who have no adequate remedy at law and are unable to induce the corporation to adopt effective measures for their protection. Morrell v. Brooks & Son Co., 164 F 501.

**54.** No remedy at law. Everitt v. Farmers' & Merchants' Bank of Elm Creek [Neb.] 117 NW 401.

**55.** Office of director. Moir v. Provident Sav. Life Assur. Soc., 112 NYS 57.

**56.** Remedy, under St. 1906, p. 346, c. 372, is exclusive. Attorney General v. New York, etc., R. Co., 197 Mass. 194, 83 NE 408.

**57.** P. L. 1871, p. 1360, does not authorize determination of charter powers in injunction proceedings. Myersdale, etc., R. Co. v. Pennsylvania, etc., R. Co., 219 Pa. 558, 69 A 92.

**58.** While P. L. 1871, p. 1360, has been given liberal construction in attempt to reach equities between rival street railroad companies, it has not been and cannot be extended so as to authorize determination of charter powers or forfeiture thereof. Myersdale, etc., R. Co. v. Pennsylvania, etc., R. Co., 219 Pa. 558, 69 A 92. Does not authorize injunction by individual. Id.

**59.** Complainant had been expelled by lower tribunal on order but case had not been tried by higher tribunal as required by by-laws. Camp No. 6, Patriotic Sons of America v. Arrington, 107 Md. 319, 68 A 548. Equity will not enjoin the expulsion of a member of an association not organized for pecuniary profit for violation of the rules and by-laws, the remedy, if any, being at law. Allen v. Chicago Undertakers' Ass'n, 232 Ill. 458, 83 NE 952. Where member of fraternal benefit society agreed to abide by regularly made amendments to constitution and by-laws, injunction will not lie to prevent enforcement of such amendment, increasing dues. Champion v. Hannahan, 138 Ill. App. 387. Where constitution and by-laws of benefit society provided for expelling member, ipso facto, for nonpayment of dues, which provision was agreed to by members joining such society, injunction will not lie to prevent such expulsion. Id.

**60.** Where members of employers' association agreed to abide by associations, constitutions, etc., and secured performance by depositing undated notes to be negotiated and treated as forfeiture in case of disobedience, a member was entitled to restrain negotiation of notes as forfeit because of alleged disobedience to unlawful regulation. Sackett & Wilhelms Lithographers & Printing Co. v. National Ass'n of Employing Lithographers, 113 NYS 110.

**61.** Where prayer of petition is for injunction, restraining defendant from violating contract by routing its business over lines of plaintiff, action is not open to objection that it is an attempt to enforce a contract by mandatory injunction and will lie. United States Tel. Co. v. Middlepoint Home Tel. Co., 7 Ohio N. P. (N. S.) 425.

**Breach enjoined:** Threatened forfeiture by city of rights under contract for maintenance of dam. Eau Claire Dells Imp. Co. v. Eau Claire, 134 Wis. 548, 115 NW 155. Equity will enjoin the foreclosure of a mortgage for breach of a condition to insure, where the property remained uninsured one day only and the mortgagor then tendered sufficient insurance but the mortgagee refused to waive forfeiture unless insurance was placed in a certain company which he knew would not insure the risk. McCombs v. Elmes, 197 Mass. 19, 83 NE 306. The A railroad secured control of the B by issuing to its stockholders trust certificates under an agreement to pay semi-annual dividends and a specified sum per share at a designated date. The stock was delivered to a trustee to secure performance which bound A not to permit the issue of any bonds, etc., by B or the use of the proceeds thereof, except for specified purposes, until the stock had been paid. Held, in a suit, by the minority trust certificate holders for an accounting of obligations issued by B in violation of the agreement, and requiring A to place in B's treasury the equivalent in money of such obligations, etc., the court was authorized to issue a temporary injunction restraining A from issuing obligations in violation of the trust and enjoining their sale, but could not restrain B from dividing its surplus as dividends declared on its stock and paying such dividends to A under the trust agreement.

there is no adequate remedy at law.[62] There must be a valid and subsisting contract between the parties,[63] susceptible of specific enforcement.[64] Negativve or restrictive covenants, provided they are legal and valid,[65] may be enforced by injunction against the violation thereof.[66] Breach of contract for personal services usually will

Kissel v. St. Louis, etc., R. Co., 111 NYS 965. Where a lessee of privilege of carriage service for hotel shows clearly his rights in premises and invasion thereof by lessor, injunction pendente lite will be granted in action by lessee against lessor. Lynch v. Robert P. Murphy Hotel Co., 112 NYS 915.

**Breach not enjoined:** No error in refusing to enjoin breach of contract as to operation of street cars over plaintiff's land. Virginia-Carolina Chemical Co. v. Rome R. & Light Co. [Ga.] 61 SE 1116.

**62.** Threatened revocation of contract will not be enjoined where party seeking to revoke is financially responsible, though such revocation is threatened at time when contract is peculiarly valuable, latter consideration affecting only amount of damages. Hess v. Roberts, 124 App. Div. 328, 108 NYS 894. No injunction against sale of pledges where there is no allegation that defendant is insolvent or that property threatened to be sold has no ascertainable value, it not appearing that there is no adequate remedy at law. Howley v. Press, 111 NYS 1080. Where school board authorized committee to erect school building and to procure plans under arrangement for competitive examination with agreement to select plan from those presented, losing competitors to be paid a certain sum, and plans were submitted and board then proceeded to selection of architect under different plan, an action at law for breach would afford no adequate remedy and a bill to compel board to act would lie. Palmer v. Pittsburg Board of Education, 220 Pa. 568, 70 A 433.

**63.** Length of time of contract was uncertain. Platte County Independent Tel. Co. v. Leigh Independent Tel. Co. [Neb.] 116 NW 511. Evidence held to establish allegations of answer that contract as alleged in bill was only part of contract, which in its entirety was in violation of public policy and would not sustain suit in court of justice. Camors-McConnell Co. v. McConnell, 163 F 638. Oral agreement, without consideration, ceding possession of property in perpetuity without obligation upon party receiving possession to retain same, will not be enjoined in face of legal decision that legal relation of parties is at an end and that owner is entitled to possession. M. Redgrave Co. v. Redgrave [N. J. Eq.] 71 A 147.

**64.** Gillespie v. Fulton Oil & Gas Co., 140 Ill. App. 147. Bill praying injunction to enforce covenant of lease equivalent to bill for specific performance. Launtz v. Vogt, 133 Ill. App. 255. Injunction to restrain breach of contract is a negative specific performance, and jurisdiction does not attach unless contract is one which might affirmatively be specifically enforced. Fox v. Fitzpatrick, 190 N. Y. 259, 82 NE 1103. Where injunction if granted would accomplish all that decree for specific performance could effect, the principles governing bill for specific performance control. Whalen v. Baltimore & O. R. Co. [Md.] 69 A 390.

**65.** Contract in restraint of trade will not be enforced unless no more so than is reasonably required to protect the interest of the party in favor of whom given. Taylor Iron & Steel Co. v. Nichols [N. J. Err. & App.] 69 A 186. Equity will not enjoin a salesman and shipping clerk from engaging in a competing business in breach of contract. Simms v. Patterson [Fla.] 46 S 91. Equity will not enforce agreement made between employer and employe that employe should not engage to work for anyone in similar line of business in state for two years after termination of employment. Witkop & Holmes Co. v. Boyce, 112 NYS 874.

**66.** Restriction as to sale of liquor. Guyer v. Auers, 132 Ill. App. 520. Covenant by vendor not to trade in vendee's territory. New York Phonograph Co. v. Davega, 111 NYS 363. Contract not to enter into competing ice business for one year within certain area. American Ice Co. v. Lynch [N. J. Eq.] 70 A 138. Claim for injunction against breach of agreement not to engage in business of extracting teeth by use of nitrous oxide gas or any other method invented and used exclusively by complainant is without foundation where such method was neither invented not used exclusively by complainant. Thomas v. Borden [Pa.] 70 A 1051.

**Restrictive covenants as to use of land** are enforcible by injunction, unless there has been such a change in the neighborhood that the reasons therefor have ceased to exist. Adams v. Howell, 58 Misc. 435, 108 NYS 945. Fact that there have been other violations by other parties is immaterial. Id. Erection of a building projecting on to part of a restricted area may be enjoined by one whose steps project for a few feet onto the same. Id. Where restriction is placed upon land providing against fencing of same east of a certain line, easement or servitude is created enforcible in equity, and it is immaterial that right has no substantial money value. Beck v. Heckman [Iowa] 118 NW 510. Bill lies to enjoin the use of leased premises for any other purpose than that to which it was restricted under lease, regardless of damage. Use restricted to "billiard & pool" enjoin use for moving picture show. Dycus v. Traders' Bank & Trust Co. [Tex. Civ. App.] 113 SW 329. A covenant restricting the use of land will be enforced by injunction although not of class technically running with the land, as in case of representation that adjacent land would not be used for a feed stable and wagon yard. Woods v. Lowrance [Tex. Civ. App.] 109 SW 418.

**Laches and acquiescence:** Where defendant purchased certain land, as part of a tract divided up under a common scheme whereby no offensive businesses were to be carried on, and rushed the work of building a garage, purposely refraining from asking

not be enjoined.[67] Where, however, the contract relates to personal services of a special unique or extraordinary character which can be performed by no one else, and there is a negative covenant, the court sometimes enforces the negative covenant by injunction.[68] A covenant restricting the use of land will be enforced by injunction, although not of the class technically running with the land.[69] The disclosure of trade secrets[70] in violation of contract will be enjoined.[71] Difficulty in detecting all violations of a contract and the alleged insolvency of the defendant do not make out an equity for an injunction upon an original bill.[72]

(§ 2) *I. Interference with property, business, or comfort of private persons.* See 10 C. L. 262—Equity will enjoin the unlawful interference with one's business,[73] but only where some injury has been inflicted on the person or some right of property has been invaded, destroyed or prejudiced,[74] or where such acts are threatened.[75] By statute in New York one may restrain the use of his portrait for advertising.[76] Ordinarily an adjacent property owner, suffering injury in his proprietary rights from an enterprise for the public benefit under a quasi public charter, is restricted to an action for damages, or some statutory method of redress and cannot enjoin the owner of the enterprise from carrying it on.[77] The unreasonable use of water in a stream to the injury of another riparian owner may be enjoined,[78] despite the fact that the

permission or views of adjoining owners and secretly purchasing the land of an adjoining owner who had already brought suit, the delay of another owner in bringing suit pending decision of the first suit was not laches. Daly v. Foss, 199 Mass. 104, 85 NE 94. Injunction is not granted where conduct of plaintiff renders it inequitable that it be granted, as where plaintiff has acquiesced in breach of contract by doctor not to practice in certain locality. Lester v. Sullivan, 82 Ky. L. R. 925, 107 SW 300.

67. A breach of a contract to enter employment will not usually be enjoined, as a substitute can readily be obtained, and remedy at law is adequate. Dentist. Simms v. Burnette [Fla.] 46 S 90; Osius v. Hinchman, 150 Mich. 603, 14 Det. Leg. N. 792, 114 NW 402. Agreement by employe to serve for term of years and during that time to devote his entire time, skill, and labor to service of his employer will not be enforced, though valid. Taylor Iron & Steel Co. v. Nichols [N. J. Err. & App.] 69 A 186. Breach of contract of personal service is fully remediable at law. Bookkeeper agreed not to engage in the liquor business in the state. Simms v. Burnette [Fla.] 46 S 90.

68. Simms v. Burnette [Fla.] 46 S 90. Services held not unique where party contracted to manufacture a secret formula and not divulge to others. Taylor Iron & Steel Co. v. Nichols [N. J. Err. & App.] 69 A 186.

69. Representation that adjacent land would not be used for a feed stable and wagon yard. Woods v. Lowrance [Tex. Civ. App.] 109 SW 418. See § 21, Easements and Rights of Way.

70. As to injunctions against disclosure of trade secrets not protected by specific contractual stipulations, see post, § 2I, Interference with Property, etc., subd. Trade Secrets.

71. Witkop & Holmes Co. v. Boyce, 112 NYS 874.

72. Simms v. Burnette [Fla.] 46 S 90.

73. If legitimate business of citizen is unlawfully interfered with, either by one acting in private or official capacity, courts will enjoin commission of such wrong. Revocation of liquor license. Ex parte Sherwood, 41 Ind. App. 642, 84 NE 783. Rights of trading stamp company protected by injunction where rival company purchased partly filled books of former from customers of merchants and exchanged its own books and stamps therefor, some of the stamps thus acquired being thereafter sold at reduced price. Sperry & Hutchinson Co. v. Louis & Weber Co., 161 F 219. Plaintiff was not entitled to enjoin defendant to prevent him from interfering with harvesting of crops purchased from defendant's tenant and grown on defendant's premises, where only acts of interference shown consisted in ordering plaintiff not to come on premises and to leave after he had entered and in fastening up certain gates. Kirkpatrick v. Fonner [Neb.] 116 NW 779.

74. Conspirators are amenable to Pen. Code, § 168, prohibiting such acts. Russell v. Stampers' & Gold Leaf Local Union No. 22, 57 Misc. 96, 107 NYS 303.

75. Delaware, etc., R. Co. v. Switchmen's Union of North America, 158 F 541.

76. Wyatt v. James McCreery Co., 111 NYS 86. Defenses in suit under Laws 1903, p. 308, c. 132, to enjoin use of plaintiff's picture for advertising purposes considered and held insufficient. Wyatt v. Wanamaker, 58 Misc. 429, 110 NYS 900. Plaintiff cannot enjoin publication of his photograph in daily newspaper in connection with news items, Laws of 1903, p. 308, c. 132, providing for enjoining publication of one's portrait for purposes of trade not applying. Moser v. Press Pub. Co., 109 NYS 963.

77. Lake Drummond Canal & Water Co. v. Burnham [N. C.] 60 SE 650.

78. Lower owner injured by release of excessive amounts of water from a dam. Mason v. Apalache Mills [S. C.] 62 SE 399. Electric light and power company, owning property across which river flows and util-

plaintiff cannot prove the extent of his injury with absolute precision.[79] The flooding of lands may also be enjoined.[80] Further, miscellaneous instances of the protection of the property and comfort of private persons are given in the note.[81]

*Trade and firm name.*[See 10 C. L. 288]—Equity will enjoin an unfair use of trade names, labels, etc.,[82] but only when such use is likely to deceive the public or purchasers of ordinary caution.[83] Use of a trade mark or name to describe the lawful use of an article lawfully acquired will not be enjoined.[84] In a suit to enjoin the use of a trade name and a conspiracy to deprive the plaintiff of its use, there can be no relief where the right to and ownership of the name is in defendants, or one of them.[85] One who is himself practicing what amounts to a fraud on the public cannot

izing it to run its plant, may enjoin driving company from interfering with its riparian rights by storing water, causing artificial freshets so as to compel plaintiff's plant to remain idle. Kalami Elec. L. & P. Co. v. Kalama Driving Co., 48 Wash. 612, 94 P 469. In suit to restrain diversion of water of stream to injury of plaintiff's riparian rights, question whether unlawfulness of diversion depends on proof of actual perceptible damage, if diversion is made permanent and for purpose of sale, is one the solution of which depends on decisions of courts of this state which control it, and hence plaintiff as preliminary condition to equitable relief will not be required to bring action at law to reaffirm right already settled as matter of law. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

79. Where one sunk well on his land and pumped underground water for his use, thereby interfering with rights of another, latter is not limited to action for damages but may enjoin continuance of wrongful act. Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655, 93 P 1021. Where lower riparian owner may restrain unlawful diversion though he fails to show actual diminution, where continuance of diversion may ripen into right of appropriation by prescription and defendant has made long term contracts to supply water. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

80. Flooding of lands in reservoir basin constitutes permanent and continuing obstruction to free use by owner, and is wrong which equity will prevent by injunction. United States v. Rickey Land & Cattle Co., 164 F 496. Injunction against diversion of natural watercouse by landowner, effect of which will be to cause stream to overflow land of lower proprietor, although act is not completed and damage which will result therefrom has not been inflicted. Wood v. Craig [Mo. App.] 113 SW 676.

81. Attorney may be enjoined from paying excessive charges from amount recovered. After recovery for personal injuries client sought to enjoin payment of physician's bills. Falardeau v. Washburn, 199 Mass. 363, 85 NE 171. Equity has jurisdiction to enjoin illegal sale of land to prevent **cloud on title** but will not interfere where proceeding or instrument on which claim is asserted is void on its face, or where threatened proceeding will necessarily show on its face that it is void. Brizzolara v. Ft. Smith [Ark.] 112 SW 181. Evidence insufficient to warrant enjoining defendant from **shooting firearms over plaintiff's premises.** Mentzel v. Wall [Colo.] 96 P 965. Equity will enjoin interference with one's **right to hunt** on the navigable waters of a stream. Ainsworth v. Munoskong Hunting & Fishing Club [Mich.] 15 Det. Leg. N. 412, 116 NW 992. Injunction is proper remedy for continuing partner, where retiring partner interferes with his enjoyment and possession of **mail** addressed to old firm by claiming an interest therein and notifying the postal authorities to withhold it from delivery. Pedretti v. Pedritti, 6 Ohio N. P. (N. S.) 113. One causing and permitting **sewage** to flow into ditch forming boundary of another's land causing damage thereto is liable for damages and may be enjoined. Barnes v. Midland R. Terminal Co., 110 NYS 545. Injunction will lie to restrain proposed survey of lands and **change of boundaries,** where boundaries have been permanently established by former lawful survey from which no appeal was taken. Washington v. Richards [Kan.] 96 P 32. Vendor in possession of strip of land reserved under sale to vendee may enjoin removal of fence erected by him to mark boundary, and need not submit to trespass and bring ejectment. Cullen v. Ksiaszkiewicz [Mich.] 15 Det. Leg. N. 844, 118 NW 496. Gas company may enjoin **interference with gas meters** causing damage and leaks by company attaching apparatus to check flow of gas but cannot interfere with property owner's right to have appliances instituted. Laclede Gaslight Co. v. Gas Consumers' Ass'n, 127 Mo. App. 442, 106 SW 91. Employe of telephone company may be enjoined from making **unjust discrimination as to use of telephone exchange,** especially where employe acts perversely, without authority and to gratify his own spite Plummer v. Hattelsted [Iowa] 117 NW 680.

82. Use by baker of label which, though having distinguishing names at a casual glance, resemble that adopted by labor union according to law, may be enjoined. Myrap v. Friedman, 58 Misc. 323, 110 NYS 1106.

83. Trade mark. Myrup v. Friedman, 58 Misc. 323, 110 NYS 1106.

84. Use of word "Edisonia" by concern giving exhibitions with Edison machine. Edison v. Mills-Edisonia [N. J. Eq.] 70 A 191.

85. Solar Baking Powder Co. v. Royal Baking Powder Co., 128 App. Div. 550, 112 NYS 1013.

enjoin unfair competition.[86] Where one acquires by use the right to use a name, whether an individual, partnership or corporation, equity will protect its use by injunction.[87]

*Copyrights, trade secrets, literary property, and the like.*[See 10 C. L. 264]—Equity will protect trade secrets by injunction as against those trying to disclose or use them in violation of confidential relations [88] or obtained by fraud or bad faith,[89] especially where there is a written contract not to reveal them.[90] This doctrine is not confined to secret processes, but includes the use of names of customers.[91] Where one is not only making use of information gained through his employment with the complainant to win complainant's customers for a competitor but is also making fraudulent misrepresentations of fact, the complainant has no adequate remedy at law.[92] Any person, however, lawfully acquiring knowledge of such secrets, not patented, may use them, if the manner of obtaining such knowledge and the use thereof does not constitute a breach of good faith.[93] Equity will enjoin the infringement of a patent, irrespective of the fact that the patented device has never gone into commercial use,[94] and of its nonuser,[95] but a preliminary injunction should not be granted in a patent case without a showing that the patent has been adjudged valid by a court of competent jurisdiction or that its validity has been generally acquiesced in by the public or has been admitted by the defendant.[96] No notice of patent rights is necessary under the statute where the object is merely to secure an injunction to restrain the defendant from

**86.** Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 NE 132. Evidence reviewed. Id.

**87.** For many years Carthusian monks manufactured a liqueur called Chartreuse, which trade name was registered in this country as a trade mark. The French government expelled the monks and placed a receiver over their property who, though not knowing the secret formula, manufactured a liqueur which he called Chartreuse and sent out in the same shaped bottles. The monks meanwhile continued the manufacture of their Chartreuse in Spain, but put it up in different shaped bottles. Held that the action of the French government did not affect the trade mark rights of the Carthusian monks in the United States, that such rights were not dependent on the place or country in which their business was conducted, that the receiver became a competitor, and that they were entitled to an injunction restraining the sale of his products in this country in competition with their own under their trade mark and dress and as the original and genuine Chartreuse. Baglin v. Cusenier Co., 156 F 1016. An advertisement by defendant stated that a certain person of a recognized standing as a salesman and with a large acquaintance in the trade in which plaintiff and defendant were engaged, who was formerly in the employ of the plaintiff generally known as "Georges" and "Fishers," announced that he could be found at Balsam's Misfit Parlors. There was nothing misleading in the advertisement. Held an injunction pendente lite restraining defendant from using the names "Georges" or "Fishers" at present used by plaintiff in conducting its business, would not be restrained. Sultzbach Clothing Co. v. Balsam, 56 Misc. 324, 107 NYS 622. An interlocutory order granting a preliminary injunction against the unlawful imitation of a trade name and unfair competition affirmed, but, especially as parties do not agree as to completeness of record, full reservation made for final hearing. Modox Co. v. Moxie Nerve Food Co. [C. C. A.] 162 F 649.

**Property right in corporate name.** See 9 C. L. 736.

**88.** Witkop & Holmes Co. v. Boyce, 112 NYS 874, and cases cited. Elaterite Paint & Mfg. Co. v. S. E. Frost Co. [Minn.] 117 NW 388. Right to use secret process in manufacture is of same character as trade marks, copyrights or right of patent, and remedies are same for its protection. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 69 A 1103.

**89.** Process of extracting alcohol from empty barrels. Eastern Extracting Co. v. Greater New York Extracting Co., 110 NYS 738.

**90.** Witkop & Holmes Co. v. Boyce, 112 NYS 874. See, also, ante, § 2H.

**91.** Witkop & Holmes Co. v. Boyce, 112 NYS 874, and cases cited. Grand Union Tea Co. v. Lewitsky [Mich.] 15 Det. Leg. N. 434, 116 NW 1090.

**92.** Grand Union Tea Co. v. Lewitsky [Mich.] 15 Det. Leg. N. 434, 116 NW 1090.

**93.** Elaterite Paint & Mfg. Co. v. S. E. Frost Co. [Minn.] 117 NW 388.

**94.** Morton Trust Co. v. American Car & Foundry Co., 161 F 546.

**95.** Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 52 Law. Ed. 1122.

**96.** St. Louis Street Flushing Mach. Co. v. Sanitary Street Flushing Mach. Co. [C. C. A.] 161 F 725. Preliminary injunction to restrain infringement of a patent for clothes drier denied on showing made as to prior art affecting construction and perhaps validity of patent. American Laundry Mach. Mfg. Co. v. Adams Laundry M. Co., 161 F 556.

future infringement.[97] State courts have no jurisdiction to enjoin infringements of patents.[98] Where a decision in favor of the defendant gives him the right to make and sell the article covered by the patent, a subsequent injunction by the complainant against the defendant's customers is a violation of the first injunction,[99] but this rule does not preclude an injunction in one circuit against the infringement of a patent declared invalid in another circuit, the parties defendant being different,[1] especially where the rights of the defendant in such other circuit are protected by a special provision in the restraining order.[2] A bill to restrain the alleged violation of a license contract under a patent states no ground for relief under the patent laws, and a federal court is without jurisdiction to grant relief thereon.[3] An injunction will not issue against improper use of copyrighted matter where the complainant's injury is comparatively insignificant and he has a remedy at law.[4]

*Waste.*[See 10 C. L. 264]—Equity will enjoin threatened waste by a tenant for years,[5] and one in possession under claim of title is entitled to an injunction pending adjudication of his title to prevent waste and injury by the defendant.[6] Equity will not grant an injunction to restrain waste at the suit of one tenant in common, coparcener or joint tenant against another except in special circumstances, as where the waste is destructive to the estate or where the respondent is sworn to be insolvent.[7]

*Incorporeal property.*[See 8 C. L. 296]—An injunction may issue to protect incorporeal property right.[8]

*Easements and rights of way.*[See 10 C. L. 264]—Equity will restrain interference with the enjoyment of an easement where the right is clear and certain and an injurious interference is threatened, even though the easement has not been established at law.[9] In determining what will be enjoined as an obstruction, the questions are what use can the complainant reasonably be expected to have occasion to make of it, and what right has he to such use?[10] Grade crossings, whether private or public,

97. Morton Trust Co. v. American Car & Foundry Co., 161 F 546.

98. Eastern Extracting Co. v. Greater New York Extracting Co., 110 NYS 738. Bill to enjoin secret process which, while employing some of the elemental ideas covered by patent, is unpatented and much superior to patented process, is cognizable by state court. Id.

99. Kesser v. Eldred, 206 U. S. 285, 51 Law. Ed. 1065.

1. Consolidated Rubber Tire Co. v. Diamond Rubber Co. [C. C. A.] 157 F 677; Id., 162 F 892.

2. Consolidated Rubber Tire Co. v. Diamond Rubber Co. [C. C. A.] 162 F 892. A decree enjoining infringement of a patent may provide that it shall not apply to a sale by defendant of articles made by the defendant in another suit in another jurisdiction in which the patent was adjudged void; but this proviso will not be extended to cover other articles made in the latter circuit where the question of such right is not directly involved. Id.

3. St. Louis Street Flushing Mach. Co. v. Sanitary Street Flushing Mach. Co. [C. C. A.] 161 F 725.

4. Equity will not enjoin improper use of a copyrighted book published by a mercantile agency with respect to a few names by a corporation engaged in publishing a similar work limited to a special trade, where the latter has 25 per cent more names and 6 times as much information as the former. Dun v. Lumbermen's Credit Ass'n, 209 U. S. 20, 52 Law. Ed. 663.

5. Drilling holes into brick wall and driving wooden pegs therein for purpose of attaching sign when such use would cause brick to become loose or misplaced. Hayman v. Rownd [Neb.] 118 NW 328.

6. Chancey v. Allison [Tex. Civ. App.] 20 Tex. Ct. Rep. 530, 107 SW 605.

7. Where executors acting under directions in will sold timber to pay debts and repair and improve buildings, and complainant, a disinherited son, having unsuccessfully contested the will, was proceeding to obtain a review, and was one of eleven heirs who would inherit land as coparceners if contest should prevail, and executors had given bond and were solvent, an injunction to stay waste was refused as against executors and purchaser. Burris v. Jackson [Del.] 68 A 331.

8. Right to operate mine. Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 F 500.

9. Espenscheid v. Bauer, 235 Ill. 172, 85 NE 230. Injunction against pasturing cows on right of way. Id. Injunction against further encroachment of building on easement, and requiring removal of that constructed. Taylor v. McAdam, 112 NYS 50.

10. In inquiring whether an injunction ought to be granted against the construction of a bay window over a private right of way, the question is not what use the plaintiff might possibly wish to make of

are so dangerous that equity will protect the right to use them only when such right is so clear that the chancellor must recognize it.[11] One cannot have an injunction, where no easement has been acquired, merely because he may suffer damage.[12] A littoral owner, though not entitled to construct a wharf out of tide lands in front of his property is entitled to enjoin the erection of a structure interfering with his right of access.[13] The application of the maxim "de minimis non curat lex" as a defense to an injunction against the diversion of water of a stream depends upon the condition of stream, whether the water is at its lowest flow or at its flood stage.[14] Restrictive covenants may create easements enforcible by injunction.[15] A street railroad company may by injunction protect its easement in streets.[16] One seeking to enforce an easement must himself have so acted as to entitle his claim to the consideration of equity,[17] but relief will not be denied on account of violations by other parties,[18] or even on account of a violation by the complainant, where such violation is not a substantial one.[19]

the way, but what use can he reasonably be expected to have occasion to make of it. Will not enjoin construction of a bay window 11½ ft. above the ground. Bitello v. Lipson, 80 Conn. 497, 69 A 21. Where an existing easement to erect telephone lines incidental to the maintenance of a water plant will be but slightly increased by permitting the erection of additional lines for commercial uses, this will not justify the interference of equity to enjoin the owners of the right of way from interfering with the construction of such additional lines, where the rights of the owners to possession and use of the land were expressly reserved by the grant to the water company subject only to that grant. Northeastern Tel. & T. Co. v. Hepburn [N. J. Err. & App.] 69 A 249.

11. McKinney v. Pennsylvania R. Co. [Pa.] 70 A 946.

12. Where upper owner constructs dam for temporary use which does not affect rights of lower owner and which may be abandoned at any time, lower tenant acquires no right to continuance of structure and cannot enjoin change. Lake Drummond Canal & Water Co. v. Burnham [N. C.] 60 SE 650.

13. Construction of a street across tide land. McCloskey v. Pacific Coast Co. [C. C. A.] 160 F 794.

14. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

15. See ante, § 2H.

16. Injunction under P. L. 1871, p. 1360, against use of right of way by rival street railroad company, does not necessarily involve determination of charter powers, though charters of both companies cover practically same route. Myersdale & S. St. R. Co. v. Pennsylvania & M. St. R Co., 219 Pa. 558, 69 A 92. Charter powers not involved in such case where complainant company is in possession of and has undoubted right to use street and defendant invades such right. Id. See ante, § 2 G.

17. Injunction will not lie to enjoin neighbor from making use of adjacent alley, on theory that easement had been abandoned by nonuser and also estoppel, where abandonment was not shown and complainant, when purchasing, had made no inquiries. Brunthaver v. Talty, 31 App. D. C. 134.

18, 19. Adams v. Howell, 58 Misc. 435, 108 NYS 945.

20. **NOTE. Scope of injunction restraining operation of furnace:** Complainants secured an injunction perpetually restraining defendants from so operating their furnaces as to cause injuries, viz., emitting ore dust which destroyed trees and shrubberies, drove tenants from their houses, and practically confiscated their whole property. Defendants continued to operate their furnaces, trying all possible means to prevent the injuries complained of. The dust still escaped to a certain extent. Complainants now petition that the directors and officers of the defendant corporation be adjudged in contempt of court. Held, that the petition be refused. Sullivan v. Jones & Laughlin Steel Co. [Pa.] 70 A 775. Mestrezat, J., in dissenting, said: "The defendants are still causing their furnaces to be operated so as * * * to be emitted from them clouds of ore dust, * * * causing substantially the same kind of injury, though not as great in extent." The court refused to grant the petition because the acts complained of were not clearly within the inhibition of the injunction, saying no injunction would have issued had there been no other injuries than the ones objected to in the petition. The following cases accord in principle: Celluloid Co. v. Collar & Cuff Co., 24 F 585; Woodruff v. Gravel Co., 45 F 129; Verplank v. Hall, 21 Mich. 470; Porous Plaster Co. v. Seabury, 48 Hun, 620, 1 NYS 134. The majority opinion is most practical. The acts enjoined were such as brought exceptional injuries to complainants. These had ceased. The damage objected to in the petition was such as must come to all who choose to live in a manufacturing centre.—From 7 Mich. L. R. 266.

Where one puts his property to such a use that it emits offensive, poisonous or noxious fumes and vapors, producing danger to health and injury to adjoining property, he may be enjoined from continuing this injurious use of his property. Appeal of Pennsylvania Lead Co., 96 Pa. 116, 42 Am. Rep. 534. See, also, Sullivan v. Royer, 72 Cal. 248, 13 P 655, 1 Am. St. Rep. 51; McMorran v. Fitzgerald, 106 Mich. 649, 64 NW 569, 58 Am. St. Rep. 511. And the owner

*Nuisances.*[See 10 C. L. 205]—In a proper case an injunction will issue against the maintenance of a nuisance.[20] Equity will abate a public nuisance injurious to public safety and good morals, and may perpetually enjoin the owners of property from maintaining and conducting it in the future.[21] The rule that property rights must be involved does not apply to proceedings to enjoin a public nuisance as such,[22] but a private person cannot restrain a public nuisance unless he sustains damages different in kind from those sustained by the public generally.[23] The thing complained of need not be a nuisance per se[24] or exist in praesenti,[25] nor is it essential that the complainant's rights shall have been established at law,[26] though all doubt as to the existence of the nuisance may be settled by a finding of a court of law.[27] Where the fact of the existence of a nuisance has not been established at law, an injunction will not lie unless the allegations of the bill are proved by clear and satisfactory evidence.[28]

of real property who wrongfully causes noxious vapors to rise on the land of another is liable therefor the same as if such vapors had been wrongfully caused to rise from his own land. Garland v. Aurin, 103 Tenn. 555, 53 SW 940, 76 Am. St. Rep. 699, 48 L. R. A. 862.—From 123 Am. St. Rep. 575.

21. State v. Canty, 207 Mo. 439, 105 SW 1078. Wall eight feet high, constituting part of stoop and entrance to residence. City of New York v. Rice, 56 Misc. 360, 107 NYS 641. Where dealer conducting saloon business keeps open in violation of code, his business thereupon becomes a nuisance and so continues though he ceases to violate law, and hence suit to enjoin business lies at any time after violation. Hammond v. King, 137 Iowa, 548, 114 NW 1062.

22. State v. Canty, 207 Mo. 439, 105 SW 1078.

23. Van Buskirk v. Bond [Or.] 96 P 1103. Though matter is not nuisance per se, where it is clearly shown to be a nuisance in fact not merely greater in degree than that of general public, but special in character, it may be enjoined at the suit of individual. Caskey v. Edwards, 128 Mo. App. 237, 107 SW 37.

**No special damage:** Where railway tracks are laid across a street and at a grade which raises grade of street at that point, inconvenience to dealer in coal and sand located in same square, who is obliged to haul heavy loads over obstructions thus created, is of the same kind as though different in degree from, that suffered by general public. Hall v. P. C. C. & St. L. R. Co., 11 Ohio C. C. (N. S.) 97. Where lawful use of street by railroad resulted in noises and vibrations caused by such user in making up trains, switching, etc. Galveston, etc., R. Co. v. De Groff [Tex. Civ. App.] 110 SW 1006. From unavoidable noises resulting from operation of ice plant under municipal permit as provided for by cods. Le Blanc v. Orleans Ice Mfg. Co., 121 La. 249, 46 S 226.

**Special damage:** Where an unlawful act is of special and particular irreparable hurt to an individual, he may enjoin it, as where a livery stable is erected within fifty feet of a private house. Caskey v. Edwards, 128 Mo. App. 237, 107 SW 37. Evidence insufficient to warrant enjoining use of a stable in city. Bonaparte v. Denmead [Md.] 69 A 697. Injunction refused where complainant showed no special damage in excess of that sustained by public at large from stable, and no interference with property rights. Oehler v. Levy, 139 Ill. App. 294. Facts alleged as to erection of livery stable held sufficient to show special injury, and fact that structure would not be nuisance per se was immaterial. Mason v. Deitering [Mo. App.] 111 SW 862. Where hotelkeeper is injured by vibrations and noises of switching engines in unlawful use of city street as yard. Galveston, etc., R. Co. v. De Groff [Tex. Civ. App.] 110 SW 1006. Where railway tracks are laid across street and at grade in such manner as to cause drains to fill up and turn surface water into middle of street whence gullies have formed in front of plaintiff's property materially interfering with access thereto, continuing nuisance is created for which there is no adequate remedy at law and as to which injunction will lie. Hall v. P. C. C. & St. L. R. Co., 11 Ohio C. C. (N. S.) 97.

24. Mason v. Deitering [Mo. App.] 111 SW 862. Under code abolishing distinction between law and equity actions, a complaint alleging that defendant is maintaining bowling alley causing much noise and impairing plaintiff's enjoyment of his premises is sufficient, although such act did not constitute a nuisance per se, because further facts may be shown entitling restraint of alley's operation at unreasonable hours, etc. Pape v. Pratt Institute, 111 NYS 354.

25. If there is reasonable ground to apprehend the erection of a nuisance, and defendant threatens it and has the power to commit it, injunction will issue. Caskey v. Edwards, 128 Mo. App. 237, 107 SW 37. Facts alleged in regard to erection of a livery stable were sufficient, after judgment to show that a nuisance would reasonably result. Mason v. Deitering [Mo. App.] 111 SW 862.

26. Prior determination at law is unnecessary to maintenance of suit to enjoin a nuisance caused by stabling of horses adjoining apartment house. Oehler v. Levy, 234 Ill. 595, 85 NE 271.

27. A judgment of conviction for obstructing a highway under the statute sufficiently establishes the existence of the highway so as to settle all doubts as to the existence of a nuisance. Van Buskirk v. Bond [Or.] 96 P 1103.

28. Bill to restrain use of stream to carry off sewage. Crane v. Roselle [Ill.] 86 NE 181.

As in other cases, it must appear that there is no adequate remedy at law [29] and that the injury is or will be irreparable.[30] In an action to enjoin a nuisance, it is no defense that the nuisance is located in the most convenient place for the purposes of the nuisance,[31] not is it a defense that the business is conducted in reasonable manner, employing all the latest devices.[32] Both lessee and lessor may be enjoined where the latter knowingly and willfully permits a nuisance to be conducted on his premises by the former.[33] The statute of Utah authorizing a court in its discretion to refuse an injunction in a suit to abate a nuisance, upon defendant's giving a bond to pay all damages, applies only to preliminary injunctions, and does not confer the power to perpetuate a nuisance for all time, amounting to the taking of private property merely upon the giving of a bond.[34]

*Trespass.* See 10 C. L. 266—A single trespass, temporary in its nature, will not usually be enjoined,[35] but if continuous in its nature, if repeated acts of trespass are done or threatened, the entire wrong will be enjoined [36] if it is accompanied by such peculiar circumstances as will make the injury irreparable [37] or will avoid a multiplicity of suits, despite the fact that no irreparable damage is shown.[38] If defendant is not pecuniarily responsible, an injunction should be granted.[39] No action will lie where there is an adequate remedy at law,[40] and so where a bill alleges a continuous

29. Randall v. Freed [Cal.] 97 P 669. Where plaintiff sued to restrain operation of bowling alley, nuisance being continuous, there was no adequate remedy at law, and plaintiff was entitled to equitable relief. Pape v. Pratt Institute, 111 NYS 354.

30. Erection and use of a tuberculosis hospital in a residential locality temporarily restrained. Cherry v. Williams [N. C.] 61 SE 267. Threatened acts of repeated trespass and use of offensive language do not authorize injunctive relief, even though nuisance will be created by such acts. Randall v. Freed [Cal.] 97 P 669. One threatening to commit repeated trespasses and use of offensive language does not threaten to create a nuisance within Civ. Code, § 3480, defining a public nuisance. Id.

31, 32. American Smelting & Refining Co. v. Godfrey [C. C. A.] 158 F 225.

33. Sale of liquor a nuisance under Dispensary Act 1907, § 29. State v. Riddock [S. C.] 61 SE 210.

34. American Smelting & Refining Co. v. Godfrey [C. C. A.] 158 F 225.

35. McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 NE 174; Munger v. Yeiser [Neb.] 114 NW 166; Sooy Oyster Co. v. Gaskill [N. J. Eq.] 69 A 1084. Allegation in answer whereby defendant seeks to justify single act of trespass is not sufficient to show attempt or purpose to repeat trespass. Cox v. Sheen [Neb.] 118 NW 125.

36. Destruction of a fence and threatened repetition thereof as often as replaced. Munger v. Yeiser [Neb.] 114 NW 166. Act intended to be committed which is in nature of trespass or tort may be enjoined. Berkey v. Berwind-White Coal Min. Co., 220 Pa. 65, 69 A 329. Interlocutory injunction properly granted in action to try title and to enjoin cutting of timber. Revisal 1905, §§ 807, 808. Sherrod v. Battle [N. C.] 60 SE 647. Holder of tide lands under lease from state is entitled to enjoin another from trespassing and removing claims, there being no adsquate compensation for continuing trespass and constantly accruing damages. Sequim Bay Canning Co. v. Bugge [Wash.] 94 P 922. Extraction of ores, etc., from mine, cutting timber, or extraction of oil and gas, will be enjoined. McGuire v. Boyd Coal & Coke Co. [Ill.] 86 NE 174. Wrong amounting to nuisance, which by reason of persistency with which it is repeated threatens to become permanent, may be enjoined. Berkey v. Berwind-White Coal Min. Co., 220 Pa. 65, 69 A 329. Construction or use of sewer by incorporated town without having complied with statutory requirements is such trespass as entitles injured landowner to injunctive relief. Leibole v. Traster, 41 Ind. App. 278, 83 NE 781.

37. Devon v. Pence, 32 Ky. L. R. 697, 106 SW 874; McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 NE 174. Trespass will be enjoined only in case of irreparable injury, which must be shown, not merely alleged. Randall v. Freed [Cal.] 97 P 669. Equity will interfere to restrain trespass or stay waste threatened or being committed, when acts complained of go to substantial injury or destruction of estate or will cause irreparable injury to plaintiff. Cutting timber, removing ore, and the like. Roots v. Boring Junction Lumber Co. [Or.] 92 P 811.

38. Lambert v. St. Louis & G. R. Co., 212 Mo. 692, 111 SW 550. Threatened trespasses will not be enjoined except to prevent irreparable injury and where defendant is insolvent, and to prevent multiplicity of suits. Bill insufficient. Gony v. Wilmette, 133 Ill. App. 645.

39. Sooy Oyster Co. v. Gaskill [N. J. Eq.] 69 A 1084.

40. Will refuse injunction to restrain threatened trespass where remedy at law is adequate, as where the opposed interests to be affected by injunction, of large proportional consequence and other and independent circumstances negative the right of complainant to equitable relief. Garth

trespass and asks damages therefor and for an injunction, the remedies are inconsistent, for if the plaintiff is willing to accept damages for the future injury he cannot ask to have it enjoined.[41] Damages for trespass may be allowed, however, as an incident to injunctive relief.[42] As a general rule a verdict for damages for trespass given on the law side of the court, though conclusive on the right of possession, is not conclusive of the right to relief by injunction.[43] The complainant must show that he has title,[44] or possession and entire right to possession as against the defendant,[45] or a property interest.[46]

*Conspiracies by labor unions.* See 10 C. L. 267—Equity will enjoin unlawful acts by labor unions, such as interfering with employes or those desiring to become such by means of threats, intimidation or personal violence on the one hand,[47] or by boycotting

Lumber & Shingle Co. v. Johnson, 161 Mich. 205, 14 Det. Leg. N. 898, 115 NW 52. Where part of foundation wall encroaches upon adjoining property, there is a trespass for which there is an adequate remedy at law, and a mandatory injunction compelling removal will not issue. Mercantile Library Co. v. University of Pennsylvania, 220 Pa. 328, 69 A 861.

41. Where, however, counsel stated to the jury in asking for damages that the plaintiff intended further to ask for an injunction, the verdict cannot be held to cover future damages. Mason v. Apalache Mills [S. C.] 62 SE 399.

42. Taking by eminent domain. Duncan v. Nassau Elec. R. Co., 111 NYS 210. Where damages are asked for a trespass and it appears that it is a continuous one, the fact that a verdict was rendered for damages was not inconsistent with the view that the trespass was continuing, and hence an injunction was rightly granted. Mason v. Apalache Mills [S. C.] 62 SE 399.

43. Wood v. Pacolet Mfg. Co. [S. C.] 61 SE 95.

44. Injunction will not lie to restrain cutting of timber where only issue is as to title to land. Simmons v. Day, 161 Mich. 14 Det. Leg. N. 863, 114 NW 853. Evidence of title to land in action by one railroad to enjoin construction of roadbed by another considered, and held to justify finding that plaintiff had no title on which it would maintain injunction. Columbia Valley R. Co. v. Portland & S. R. Co. [Wash.] 94 P 918. In action to enjoin trespass, it is not necessary for complainant who is suing his grantor to prove title in grantor's grantor. Loudermilk v. Martin, 130 Ga. 525, 61 SE 122. One having **equitable title** may enjoin trespass. Id.

45. Mining lessee, though he cannot maintain an action for unlawful detainer, may restrain trespass upon his possession. Integrity Min. & Mill. Co. v. Moore, 130 Mo. App. 627, 109 SW 1057.

46. Where the owner of property by contract so restricts its use as to confer upon a third party a species of property interest in it, a purchaser may be sued to restrain his use so as not to interfere with such property interest not on the ground of negative covenant, but because he cannot trespass on the special property right known to be in another. New York Phonograph Co. v. Davega, 111 NYS 363.

47. When defendants attempt to coerce complainants as to whom they should employ and what business policy they should adopt. Barnes v. Chicago Typographical Union No. 16, 232 Ill. 424, 83 NE 940. Where union attempts to coerce employers to sign agreement, in such manner as to constitute duress, seeking by conspiracy, violence, and threats to make such employers agree to employ only union employes, etc., such acts may be enjoined. Chicago Typo Union No. 16 v. Barnes & Co., 134 Ill. App. 20. Injunction lies to prevent members of incorporated labor unions from intimidating by fines or threats of fines persons entering or remaining in plaintiff's employ, or by being parties to such acts. Willcutt & Sons Co. v. Bricklayers' Benevolent & Protective Union No. 3 [Mass.] 85 NE 897. Strikers who assail nonunion men with threats, ridicule, or insult and follow them to and from work with vile language and epithets in order to compel them to quit work or refrain from offering to work are guilty of unlawful conduct. Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 F 500. Bill to enjoin a striking union which charged a combination, the intent and the acts of the defendants, and averred that they proposed to continue the same conduct in the furtherance of their scheme, is not defective as not sufficiently specific. Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 424, 83 NE 940. Complaint for strike injunction against unions alleging that defendants had conspired by abuse, intimidations, threats, and violence to coerce plaintiff's employes and to induce them to leave and force plaintiff to accede to union's demands; that, with intent to injure and destroy plaintiff's business and property, said unions were committing and continued to commit acts of intimidation, abuse, and violence against plaintiff and its employes, followed by a recital of the alleged acts, etc., states a cause of action for threatened injury to person and property. Russell v. Stampers' & Gold Leaf Local Union No. 22, 57 Misc. 96, 107 NYS 303. **Evidence** sufficient to show a conspiracy to subject complainant to unlawful picketing and interference with its business and property by intimidating its workmen, which the union either originated or countenanced, entitling complainant to relief by injunction against the union and its members. Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 F

on the other.[48] A strike will not be enjoined, however, when no such unlawful means are employed,[49] and unlawful interference or threatened interference with the complainant's property rights must be shown in order to authorize the writ.[50] Equity will not enjoin strikers from attempting to persuade others by proper argument as by picketing from taking their places,[51] so long as they do not resort to intimidation,[52] or obstruct the public thoroughfares,[53] but some courts hold that the act of picketing is in itself an annoyance and embarrassment of an employer's business, and is unlawful and will be enjoined.[54] As to where the line of demarcation between intimidation and inoffensive persuasion lies, this is a question depending upon the circumstances of each case.[55] If there is a malevolent intent to produce an illegal result and it is produced, it makes no difference whether it is accomplished by mere persuasion or physical violence.[56] A labor union is a legal entity endowed with the same right as an individual to threaten to do that which it may lawfully do,[57] and mere apprehension of injury from striking members of a union is insufficient to justify an injunction.[58] Peaceful quitting of work, singly, collectively, or as a union, and the use of lawful means to make the strike effective, is legal and will not be enjoined.[59] Courts

500. In a suit to restrain labor unions and their members, evidence held insufficient to warrant a finding that acts of violence already committed were for the benefit of the union or that they were the result of a conspiracy to injure plaintiff or his business. Russell v. Stampers' & Gold Leaf Local Union No. 22, 57 Misc. 96, 107 NYS 303. Though ratification by a trade union of acts of violence committed by its members during a strike may be proved by circumstantial evidence, where a conspiracy is alleged the circumstances must amount to direct proof. Id.

48. Where purpose and effect of putting employer on "unfair list" is to establish boycott, members of a union will be restrained from so doing. Wilson v. Hey, 232 Ill. 389, 83 NE 928. During strike of local employes of complainant, the members of certain labor organizations by concerted action posted circulars for the expressed purpose of inducing patrons of complainant to withdraw patronage and preventing persons entering its employ unless it would accede to defendant's demands. Defendants, also, exhorted people not to patronize complainant and stated that the members had voted to give patronage only to certain firms because others had refused to stop using complainant's telephones. Held, such acts established an unlawful conspiracy to destroy business, and complainant was entitled to an injunction to restrain defendants prosecuting the object of the conspiracy by such methods. Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor, 156 F 809.

49. The unlawful interference or threatensd interference with complainant's property rights must be shown. Will not enjoin strike where no unlawful measures are used. Delaware, etc., R. Co. v. Switchmen's Union of North America, 158 F 541. Where the by-laws of a union provided for a two-thirds' vote and the consent of the president of the union in order to justify a strike, and a poll was taken resulting in favor of a strike, the consent of the president did not constitute such an incitement or inducement to strike as would justify the continuance of a strike injunction, there being no proof of an intention on the part of defendants to conspire to inflict a wrong on complainant nor to induce others to strike. Id.

50. Will not enjoin strike where no unlawful measures are used. Delaware, etc., R. Co. v. Switchmen's Union of North America, 158 F 541.

51. Jones v. E. Van Winkle Gin & Mach. Works [Ga.] 62 SE 236. Picketing confined strictly and in good faith to gaining information and peaceful persuasion will not be restrained. Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 F 500.

52. When strikers patrol streets and approaches of the premises where a strike is in progress, and their number is so great or their conduct is such as to intimidate and coerce employes into quitting or others from seeking employment, they are guilty of unlawful acts and will be enjoined. Jones v. E. Van Winkle Gin & Mach. Works [Ga.] 62 SE 236. Massing of unnecessary members of pickets at a point which must be passed by nonunion men, whom the strikers desire to influence, is an act of intimidation in itself and will be enjoined. Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 F 500.

53. Jones v. E. Van Winkle Gin & Mach. Works [Ga.] 62 SE 236.

54. Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 424, 83 NE 940.

55. Facts held to show more than peaceful persuasion. Jones v. E. Van Winkle Gin & Mach. Works [Ga.] 62 SE 236. Important element in determining whether injurious conduct is to be feared from union during a strike, which ought to be enjoined, is character of dominant factor in such union. Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 F 500.

56. Power of persuasion by argument enjoined. Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 424, 83 NE 940.

57, 58. Russell v. Stampers' & Gold Leaf Local Union No. 22, 57 Misc. 96, 107 NYS 303.

59. Goldfield Consol. Mines Co. v. Gold-

will not enjoin employes from seeking, taking, or following the advice of officers of their union with reference to the advisability of a strike.[60] Unlawful acts of violence committed by individual members of a trade union during a strike are not ipso facto binding on the union in the absence of proof that the union as such promoted or ratified the acts,[61] and an injunction pendente lite will only be granted against such members of the union as can be identified as having committed acts of violence or intimidation.[62] A labor organization may legally employ a boycott to further the objects of its existence, though pecuniary loss results to the boycotted, unless illegal means are used.[63] Equity will enjoin illegal combination to compel employer to agree that grievances between individual members of a union and his employer, which are not common to the members of the union as a class, shall be decided by the employes and that decision enforced by a strike, and defendants will be enjoined doing any acts whatever, whether peaceful or otherwise, in furtherance thereof, including payment of strike benefits and putting plaintiffs on an unfair list.[64]

*Libel.* See 10 C. L. 269—In some instances libel or slander may be enjoined.[65]

(§ 2) *J. Crimes.* See 10 C. L. 269—Equity has no power to enjoin the commission of threatened crimes as such,[66] but will enjoin any act, whether a crime or not, tending to destroy or impair property rights.[67] If, therefore, equity has jurisdiction on other grounds, relief will not be withheld on the ground that the threatened act would be a crime.[68] In some cases injunctions are authorized by statute.[69]

§ 3. *Suits or actions for injunction.* See 10 C. L. 270—A suit for an injunction must be timely.[70] A statute requiring applications for a new trial to be filed in the same cause and entitled in the original action do not apply to a suit in equity to enjoin enforcement of a decree as unenforcible against the plaintiff.[71]

field Miners' Union No. 220, 159 F 500. The payment of strike benefits. Barnes & Co. v. Berry, 157 F 883.

60. Delaware, etc., R. Co. v. Switchmen's Union, 158 F 541.

61, 62. Russell v. Stampers & Gold Leaf Local Union No. 22, 57 Misc. 96, 107 NYS 303.

63. The withdrawal of patronage or agreement to withdraw patronage from anyone patronizing the plaintiff is not illegal. Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 96 P 127.

64. Reynolds v. Davis, 198 Mass. 294, 84 NE 457.

65. Where threatened publication of libel was in violation of contract, in furtherance of conspiracy to destroy property rights and injure complainant's business, and to be issued by certain insolvents with malicious and wrongful intent. National Life Ins. Co. v. Myers, 140 Ill. App. 392. Equity has jurisdiction to restrain issue of statements that complainant's product is infringement and statements threatening suit, in bad faith and for sole purpose of injuring complainant's trade without any intention of suit. Dittgen v. Racine Paper Goods Co., 164 F 84; Id., 164 F 85.

66. State v. Canty, 207 Mo. 439, 105 SW 1078. Will not enjoin publication of a criminal libel. Circular issued by union stating that plaintiff is unfair. Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 96 P 127.

67. Bryan v. Birmingham [Ala.] 45 S 922. Where complainant has acquired property rights which by the enforcement of the criminal laws enacted thereafter would be destroyed and rendered worthless, such laws will be enjoined. Logan v. Postal Tel. & Cable Co., 157 F 570.

68. Court of equity is not ousted of its jurisdiction and exercise of its peculiar functions of preventing irreparable damage merely because in exercising such functions it may also prevent commission of crime. Jones v. E. Van Winkle Gin & Mach. Works [Ga.] 62 SE 236. Fact that, in action for injunction, one of grounds of complaint is that defendants, acting under provisions of unconstitutional statute, are about to publish libel, does not deprive court of equity of jurisdiction in that behalf. Smith Agricultural Chem. Co. v. Calvert, 7 Ohio N. P. (N. S.) 103. Bull fight enjoined. State v. Canty, 207 Mo. 439, 105 SW 1078.

69. Gaming may by statute be enjoined in Texas. Act 29th. Leg. April, 1905 (Laws 1905, p. 372, c. 153). Cain v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 732, 106 SW 770. Use of premises for bawdy house. Clopton v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 83, 105 SW 994.

70. Laws 1903, § 130, c. 122, p. 207, prohibiting an action to enjoin special assessments after 30 days after amount of assessment is ascertained, apply to cases where assessments have been relieved, notwithstanding the suit to enjoin is based upon a judgment holding the original levy void. Kansas City v. McGrew [Kan.] 96 P 484. Suit to restrain certification of assessments to county auditor held subject to statute of limitations, notwithstanding that the incidental relief sought was the quieting of title. Bell v. Cincinnati, 7 Ohio N. P. (N. S.) 393.

71. Code, §§ 4091-4094. Lindberg v. Thomas, 137 Iowa, 48, 114 NW 562.

*Necessity of suit or action.* See 10 C. L. 270

*Jurisdiction.* See 10 C. L. 270—Jurisdiction as dependent upon the existence of grounds for equitable relief and upon the subject-matter is treated in other sections.[72] Jurisdiction may be dependent on the amount in controversy, as is the case in federal courts.[73] Federal courts have exclusive jurisdiction of suits to enjoin matters arising under the laws of the United States.[74] Federal courts have jurisdiction to enjoin the enforcement of void or unconstitutional state statutes.[75] Where the jurisdiction of the court has attached, it will usually be retained, regardless of subsequent proceedings in other courts.[76] So, also, where the court has acquired jurisdiction on other grounds, it may issue injunctions if necessary, to do complete justice.[77] The supreme court of Oklahoma is essentially a court of appeals and is without original jurisdiction to issue writs of injunction in cases where the relief prayed for is purely injunctional.[78] A bankruptcy court has no jurisdiction to enjoin the sale of property under a judgment rendered in a state court enforcing mortgage liens of a date prior to four months preceding the filing of petition or adjudication of the mortgagor a bankrupt.[79] Jurisdiction is sometimes conferred upon one court to issue injunctions in suits pending in another court, where the judge of the latter court is absent,[80] but such jurisdiction should not be invoked, except where the delay in reaching the district judge would work irreparable injury.[81] By statute, in some states, writs of in-

72. See ante, §§ 1, 2.

73. In a suit to restrain a conspiracy to interfere with complainant's business, the amount in dispute for the purpose of determining the jurisdiction of the federal court is the value of complainant's right to conduct his business, and an allegation of damage in the sum of $2,000 is sufficient to confer jurisdiction. Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor, 156 F 809. When an injunction is asked against the erection and maintenance of a nuisance, it is not important to discuss what kind of damage would result if the nuisance were operated, but rather what the cost of the alleged nuisance will be. American Smelting & Refining Co. v. Godfrey [C. C. A.] 158 F 225. Facts held to show that a bill against a tax collector to enjoin collection of taxes amounting to $1,724, and alleging that a sale for such taxes cast a cloud upon the land, was not a bill to remove cloud on title, but to enjoin the taxes, the amount of which, and not the value of the land, constituting the amount in controversy; hence the suit was without the jurisdiction of the federal court. Turner v. Jackson Lumber Co. [C. C. A.] 159 F 923.

74. Suit in equity to enjoin enforcement of freight rates, until passed upon by Interstate Commerce Commission, is one arising under laws of United States, for enforcement of which federal courts have exclusive jurisdiction. Kalispell Lumber Co. v. Great Northern R. Co., 157 F 845.

75. See § 2 D, infra.

76. When an indictment or criminal proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a federal court, the latter court, having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction to the exclusion of all other courts until its duty is fully performed. Ex parte Young, 209 U. S. 123, 52 Law. Ed. 714. Where federal court, in foreclosure, ordered receivers of a railroad to institute condemnation proceedings in a state court and pending such condemnation a decree of foreclosure was entered, it was held that under the decree the federal court retained jurisdiction over the property and suit to such an extent as to entitle it to entertain a supplemental bill by the purchaser to enjoin foreclosure until completion of condemnation proceedings. Taylor v. Norfolk, etc., R. Co. [C. C. A.] 162 F 452.

77. Where a court of equity properly acquires jurisdiction of a cause to enforce specific performance of a contract, the court will proceed to administer complete justice by adjudicating all matters properly presented and involved in the case. Injunctions, both mandatory and restraining may be granted and damages awarded, upon proper allegations and proofs, when necessary to do complete justice. Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574.

78. State v. Kenner [Okl.] 97 P 258.

79. Sample v. Beasley [C. C. A.] 158 F 607. Where foreclosure proceedings were instituted prior to the bankruptcy of the mortgagor on a mortgage given more than four months before and a receiver was appointed and in possession at the time of bankruptcy, a sale under the decree of foreclosure cannot be stayed by the bankruptcy court. In re McKane, 158 F 647.

80. Under Civ. Code Prac. § 273, providing that injunction may be granted at the commencement of the action or before judgment by the court or by any circuit judge, etc., the county judge in the absence of the circuit judge has jurisdiction to hear and determine the question whether a temporary injunction should be granted. Renshaw v. Cook, 33 Ky. L. R. 860, 895, 111 SW 377.

81. McLean v. Farmers' Highline Canal & Reservoir Co. [Colo.] 98 P 16.

junctions to stay proceedings in a suit or execution on a judgment shall be returned to and tried in the court where such suit is pending or such execution issued.[82] Courts of equity cannot by injunction usurp or interfere with the proper exercise of courts of law.[83] Nor has one court of chancery jurisdiction to grant an injunction affecting the subject-matter of another pending a suspensive appeal in such suit.[84] Equity has jurisdiction to enjoin the performance of acts beyond its jurisdiction in cases where the parties reside within the jurisdiction,[85] and the entry of a general appearance by a nonresident confers jurisdiction to grant an injunction, though the subject-matter is in another state,[86] but the injunction may, in such case, be refused because not enforcible.[87]

*Parties.*[See 10 C. L. 270]—The right of particular parties to sue and the liability of particular parties to suit are treated more particularly in another section.[88] Necessary parties are all who have an interest in the subject and object of the suit and all persons against whom relief must be obtained in order to accomplish the object of the suit.[89] Where the court has acquired jurisdiction of receivership proceedings, it may, in order to render such jurisdiction effective, issue an injunction against any of the parties.[90] Where an injunction bond provides that loss or injury sustained by defendants shall be "ascertained as the court directs," the surety becomes a quasi party to the proceeding, and the court may enter a summary decree and award execution against it in the original suit.[91] Suits involving only public rights cannot usually be maintained by private individuals,[92] but should be instituted by the duly authorized public officers

82. Injunction issued by district court of O county to restrain sale of lands by order of court in L county should have been returned in L county. Broocks v. Lee [Tex. Civ. App.] 110 SW 756. Suit to enjoin enforcement of a fine imposed by a county judge in a prosecution for obstructing a highway cannot be maintained in a circuit court, under Civ. Code, § 285, providing for bringing suit to enjoin in court in which judgment was obtained. Evans v. Cook, 33 Ky. L. R. 788, 111 SW 326.

83. Supreme court having taken jurisdiction of matter in ejectment, the court of chancery cannot seize jurisdiction or attempt to deprive the supreme court of it or interfere in any way with the ordinary process of common-law courts. City of Hoboken v. Hoboken & M. R. Co. [N. J. Eq.] 70 A 926.

84. Where A and B were contestants for the nomination for a judgeship and A was declared the nominee by the party committee and B sought relief in the district court which found in his favor and A and the committee obtained a suspensive appeal to the supreme court, whereupon B instituted an independent suit in a different parish praying an injunction restraining the secretary of state from placing A's name on the ballot, neither A nor the committee being made party and injunction issued and the secretary of state excepted to the jurisdiction of the court, the district judge, being of opinion that his court was without jurisdiction, properly sustained the exception and, further, the court was without jurisdiction to grant the injunction pending suspensive appeal. Le Blanc v. Michel [La.] 47 S 632.

85. Will not enjoin acts of a foreign corporation domiciled in another state. Royal Fraternal Union v. Lundy [Tex. Civ. App.] 113 SW 185. See further, § 2 B, infra.

86. Hawley v. State Bk. of Chicago, 134 Ill. App. 96.

87. Injunction against attachment in another state. Hawley v. State Bk. of Chicago, 134 Ill. App. 96.

88. See ante, § 2.

89. McLean v. Farmers' Highline Cahal & Reservoir Co. [Colo.] 98 P 16. Rule that a defect of parties is waived by the defendant by joining issue and going to trial does not apply where the court cannot proceed to judgment without the presence of others who have not been made parties. Id. On bill to enjoin administrator from prosecuting ejectment covering land deeded to his intestate on the ground that deed was intended as mortgage and to divest title out of intestate's estate, his heirs were necessary parties. Winn v. Fitzwater, 151 Ala. 171, 44 S 97. In suit to enjoin cutting of timber, one who is in no way interested in subject-matter and whose only connection with matter was because he had procured defendant's contracts is not a necessary party. Roots v. Boring Junction Lumber Co. [Or.] 94 P 182. Where state officer by virtue of his office has some connection with enforcement of an act, he is necessary party defendant in a suit to enjoin enforcement of the act. Attorney general. Ex parte Young, 209 U. S. 123, 52 Law. Ed 714.

90. Where creditor filed petition for intervention in receivership proceedings and asked to have it taken as her return to rule to show cause why receiver should not be appointed, she could not afterward maintain that she was not a party and that court had no jurisdiction to enjoin her from proceeding to collect judgment otherwise than in receivership proceedings. Whilden v. Chapman [S. C.] 61 SE 249.

91. Cimiotti Unhairing Co. v. American Fur Refining Co., 158 F 171.

92. See ante, § 2I, subd. Nuisances.

or authorities.[93] In a suit to restrain the exercise of public functions, a public officer is not a necessary party defendant merely because he bears an official relation to the defendant,[94] though he may be a proper party by reason of his statutory relation to the subject-matter of the suit.[95] A private individual having no interest in such a suit cannot intervene therein.[96] A bill to enjoin enforcement of a statute must be brought against one clothed with the duty of enforcing it, and not against an officer whose duty is merely to determine whether or not the statute applies to the complainant.[97] An unincorporated trades union may not be made defendant in a suit to restrain acts in furtherance of a strike,[98] but members of such an association may be sued as representatives of the total membership.[99] Where a suit is brought by a corporation to enforce or protect a private right by injunction, a claim that the corporation is illegal or is a monopoly cannot be made collaterally as a defense.[1]

*Pleading and evidence.* See 10 C. L. 271—Where the practice is to transfer to the proper docket cases improperly docketed, failure to style a petition for an injunction as a petition in equity is not ground for dismissal.[2] In a suit for injunction, the pleadings must allege clearly and definitely the facts on which complainant relies for relief,[3] and must show an interest in the subject of the

**93.** A suit to enjoin a public nuisance is properly brought in the name of the state on the relation of the attorney general. Bull fight. State v. Canty, 207 Mo. 439, 105 SW 1078.

**94.** Where the relation of the attorney general to a railroad commission is no more than that of his general official relation, he is not a necessary nor proper party to a suit to enjoin the enforcement of an order made by the commission. Central of Georgia R. Co. v. McLendon, 157 F 961.

**95.** Under statute appropriating money to be used by attorney general in prosecution or defense of suits wherein validity of any act of general assembly relating to railroads is attached, both attorney general and members of state board of railroad commissioners are proper parties defendant to a suit to enjoin the enforcement of any such statute. St. Louis, etc., R. Co. v. Hadley, 161 F 419.

**96.** Suit to restrain revocation of license. Hapgood v. Bogart, 124 App. Div. 875, 109 NYS 537.

**97.** Where a bill was filed against the secretary of state of California as an officer and individually, stating that it was a foreign railroad corporation, but not doing business within the state within the meaning of the corporation license tax statute, and that the secretary had reported the complainant as delinquent thereunder and claimed that it was subject to such tax and threatened to enforce the statute against it, and praying an injunction against the defendant and a construction of the statute as unconstitutional, such bill did not state a cause of action for any relief in equity or within the jurisdiction of the court, since defendant was charged with no duty in enforcing the law and had already performed all acts required of him thereunder, except filing lists with county clerks which did not affect complainant's liability or status. Grand Trunk Western R. Co. v. Curry, 162 F 978.

**98.** Reynolds v. Davis, 198 Mass. 294, 84 NE 457.

**99.** Willcutt & Sons v. Bricklayers' Benevolent & Protective Union No. 3 [Mass.] 85 NE 897; Reynolds v. Davis, 198 Mass. 294, 84 NE 457; Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor, 156 F 809.

**Under New York statute,** voluntary associations are properly made parties to a bill by service on their officers, and an injunction against them is binding on each and every member. Russell v. Stampers' & Gold Leaf Local Union No. 22, 57 Misc. 96, 107 NYS 303.

**1.** Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 F 500.

**2.** See Civ. Code Prac. § 10. Owen County Burley Tobacco Soc. v. Brumbach, 32 Ky. L. R. 916, 107 SW 710.

**3.** Injunction pendente lite cannot be granted unless complaint states facts sufficient to constitute cause of action. Hart v. Clarke & Co., 111 NYS 886. In order to enjoin enforcement of judgment as void, it is necessary that averments of petition should affirmatively state facts which show that judgment was void. Zimmerman v. Trude [Neb.] 114 NW 641. Under statute providing for injunction to restrain use of premises for gaming, a complaint alleging conviction for gaming on premises is not defective for failing to show nature of the game, the allegations as to conviction being merely in the nature of evidence. Cain v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 732, 106 SW 770. Sufficiency of a complaint considered in an action to protect water rights. McLean v. Farmers' Highline Canal & Reservoir Co. [Colo.] 98 P 16. A complaint alleging that defendant ran water past plaintiff's headgates for use in other districts does not state a cause of action, for this might properly be done to supply senior priorities, and the presumption is that the defendant was doing his duty. Id. Pleadings insufficient to sustain an injunction against defendants restraining interference with the plaintiff's conduct of school. Eppo v. Thomas [Ga.] 61 SE 1117. No error in dismissing bill to enjoin sale of real estate by administratrix upon general

suit, a right to the thing demanded, and a proper status to institute suit concerning it.[4] If no facts are alleged upon which injunctional or other equitable relief should be granted, the bill of complaint should be dismissed,[5] but where defect may easily be cured by amendment, it is not available on a motion to dismiss.[6] The allegations will not be aided by presumption.[7] Averments of mere opinions or conclusions are too general and indefinite to afford a basis for relief by injunction,[8] and thus a mere allegation that injury will be irreparable is insufficient.[9]

demurrer, where it did not appear that intestate owed petitioner any money and there was no prayer to subject land to payment of debts. Hutchinson v. Wiley, 130 Ga. 536, 61 SE 130. Petition to enjoin breach of contract to sell tobacco **held to state sufficient facts** to warrant temporary injunction. Owen County Burley Tobacco Soc. v. Brumback, 32 Ky. L. R. 916, 107 SW 710. Allegations of threatened trespass sufficiently positive and certain to sustain injunction upon demurrer. City of Chicago v. Burton Co., 140 Ill. App. 344.

4. Consolidated Gas, Elec. L. & P. Co. v. Northern Cent. R. Co., 107 Md. 671, 69 A 518. In an action to enjoin use of a switch in street, abutting property owner should allege title to middle of street. St. Columba's Church v. North Jersey St. R. Co. [N. J. Eq.] 70 A 692. It is unnecessary for plaintiff, in an action to enjoin interference with growing timber, to allege how he acquired title or to attach an abstract of title thereto. Williams v. Hicks, 129 Ga. 785, 59 SE 897. Bill to enjoin interference with erection of poles **held insufficient** in not showing right to use land to erect and maintain poles. Consolidated Gas, Elec. L. & P. Co. v. Northern Cent. R. Co., 107 Md. 671, 69 A 518. Where creditor commences an action under the statute to restrain sheriff from sale of personal property covered by chattel mortgage, but fails to connect himself in any way with any interest in or demand upon property about to be sold, complaint does not state a good cause of action. Neustadter Bros. v. Doust, 13 Idaho, 617, 92 P 978. Petition to enjoin refusal of city to supply water held bad for failing to show plaintiff an inhabitant of city or that he required water for use within its limits. City of Paris v. Sturgeon [Tex. Civ. App.] 110 SW 459. Complaint in action to restrain public nuisance held to insufficiency allege damages differing in kind from that of general public. Van Buskirk v. Bond [Or.] 96 P 1103. Facts alleged in petition by wife, in which husband joined, to enjoin sale of realty on execution against husband on ground that it was her separate property, **held sufficient.** Texas Brew. Co. v. Bisso [Tex. Civ. App.] 109 SW 270. Bill to restrain interference with plaintiff and a cross complaint, both alleging possession of office by plaintiff and defendant respectively, states cause for equitable relief. Lucas v. Futrall, 84 Ark. 540, 106 SW 667. Petition to enjoin interference by city with erection of building held good, as allegations did not show that it was sought to enjoin any ordinance making act criminal, but that all acts were done with city's permission and no ordinance applied. City of Brunswick v. Williams [Ga.] 62 SE 230.

5. Metcalf Co. v. Martin [Fla.] 45 S 463. Where in suit to enjoin use of trade secret there is no allegation of damage or prayer for accounting and no evidence which might be used as basis for accounting, a motion for an order directing that defendant account for damages complainant has suffered must be denied. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 69 A 1103.

6. Name of a party not stated. Southern Steel Co. v. Hopkins [Ala.] 47 S 274.

7. Bill to enjoin audit and allowance of claims against municipality on ground that no appropriation had been made therefor held insufficient in that it did not show that claims were not such as might, under the statute, be allowed without prior appropriation. Bishop v. Huff [Neb.] 116 NW 665. Petition held not to state facts sufficient to constitute a cause of action to restrain refunding school tax, etc., in that it did not show whether parties demanding return of taxes were proceeding under the first provision of Cobbey's Ann. St. 1903, § 10,561, in which case the petitioner might appear, and hence could not have injunction, or whether such taxpayers were proceeding under second provision of such section, in which case no appeal would lie. School Dist. No. 25 v. De Long [Neb.] 114 NW 934. In action to enjoin making of improvements where complaint did not allege that statutory notice was not given, it must be presumed against collateral attack that proper notice was given. Martindale v. Rochester [Ind.] 86 NE 321.

8. In original action in supreme court brought to restrain issue of municipal bonds, general allegation of unconstitutionality and illegality is defective in failing to specify in what particular the issue is not authorized. Jordan v. Greenville, 79 S. C. 436, 60 SE 973. Conclusion of law stating that defendant's acts are unlawful, etc., unsupported by facts where the illegality of official action relied on is of no avail. McLean v. Farmers' Highline Canal & Reservoir Co. [Colo.] 93 P 16. Petition in suit to enjoin execution of justice's judgment based on improper overruling of plea of privilege to be sued in another county should allege existence of valid defense and nature thereof, and mere allegation that answer, a general denial, showed good defense, was insufficient. Coca Cola v. Allison [Tex. Civ. App.] 113 SW 308. Petition to enjoin execution of justice's judgment based on erroneous overruling of plea of privilege to be sued in another county should set out evidence. A mere allegation of proof is insufficient. Id. Where bill sought to restrain work of elevating railway tracks under ordinance which provided that railway company should dedicate land to city for street, on

A bill to enjoin a threatened act must show with reasonable certainty that such act will be committed,[10] but it need not appear that the anticipated result will necessarily follow.[11] The code rule of liberal construction of pleadings does not apply in cases of applications for extraordinary writs, such as injunctions.[12] On the contrary, the rule that the pleadings will be taken most strongly against the pleader applies particularly in injunction suits.[13] It has been held that where a complaint was not clear and distinct in its averments, from which the court might determine whether the threatened injury was likely to be irreparable, or that a remedy at law was available, it was good as against a general demurrer.[14] Although a complaint would be insufficient in an action to quiet title, yet as a complaint for an injunction it may be sufficient,[15] and where a statutory cause of action is defectively framed, but enough is alleged to constitute a cause of action to restrain a trespass or waste, the allegations under the statute will be treated as surplusage and the cause retained.[16] Conclusions of fact are not admitted by demurrer.[17] A bill is not necessarily multifarious because uniting a demand for relief and a demand for damages.[18] If the affidavit to a bill is defective, it should be pointed out at the proper time, and such defects cannot be relied on to cure defective verification of the answer.[19] No particular form of verification to a petition is necessary,[20] but positive affirmation of facts as to which the affiant has no means of knowing the truth is insufficient.[21] The absence of an offer

ground that no dedication had been made, and there was nothing in bill to show that parties to ordinance had not by waiver or other arrangement satisfactorily adjusted matter, equity could not restrain proceedings under ordinance, though there had been no waiver or other arrangement made by city. People v. Grand Trunk Western R. Co., 232 Ill. 292, 83 NE 839. Allegation that corporate election is void, mere conclusion and insufficient. West End Athletic Ass'n v. Geiger, 140 Ill. App. 378.

9. Schock v. Garrison [N. J. Eq.] 70 A 147; H. W. Metcalf Co. v. Martin [Fla.] 45 S 463. Where bill alleges in general terms that irreparable injury will result from act, but does not specify how it will arise, or that defendant is pecuniarily irresponsible, or that damages will not be easily ascertainable and recoverable, no ground for relief is shown. Schock v. Garrison [N. J. Eq.] 70 A 147. Bill to restrain interference with erection of poles by electric company, which merely shows beginning of new line and interference by defendant with erection thereof, and alleging generally that irreparable injury will result, does not show sufficiently that the injury is or is likely to be irreparable. Consolidated Gas, Elec. L & P. Co. v. Northern Cent. R. Co., 107 Md. 671, 69 A 518.

10. Nuisance. Mason v. Deiting [Mo. App.] 111 SW 862.

11. Especially where life and health are involved. Mason v. Deitering [Mo. App.] 111 SW 862. Allegation that plaintiff has contested issuance to railroad of certificate of public convenience and necessity cannot be regarded as substitute for fact that plaintiff will be irreparably injured by threatened proceedings under the certificate. Erie R. Co. v. Rochester-Corning-Elmira Trac. Co., 57 Misc. 180, 107 NYS 940.

12. Bishop v. Huff [Neb.] 116 NW 665; School Dist. No. 25 v. De Long [Neb.] 114 NW 934.

13. The rule that statements are to be taken most strongly against the party making them is reinforced in injunction suits by the further requirement that the material allegations entitling him to relief shall be sufficiently certain to negative every reasonable inference from which it might be deduced that he might not, under other supposable facts connected with the subject, be entitled to relief. City of Paris v. Sturgeon [Tex. Civ. App.] 110 SW 459.

14. Action to enjoin use of plaintiff's land above low-water mark. Gianella v. Gray [Cal. App.] 96 P 329.

15. Small v. Binford, 41 Ind. App. 440, 83 NE 507.

16. Cutting timber. Roots v. Boring Junction Lumber Co. [Or.] 92 P 811.

17. Allegations in a bill to restrain orders of a railroad commission as to rates before the same have gone into effect, that the new rate is unreasonable and if enforced will result in a loss of revenue, are not admitted by a demurrer. Central of Georgia R. Co. v. McLendon, 157 F 961.

18. Bill in action to enjoin continuance of nuisance, to creation of which separate acts of several defendants had contributed, is not demurrable as multifarious for uniting demand for equitable relief and demand for damages. Burghen v. Erie R. Co., 123 App. Div. 204, 108 NYS 311. Where several defendants join in action to enjoin nuisance and recover damages suffered, there is a misjoinder of causes of action precluding recovery. Id.

19. Empire Guano Co. v. Jefferson Fertilizer Co. [Ala.] 45 S 657.

20. A bill signed by the plaintiff, and the jurat of the proper officer appended thereto, certifying that it was subscribed and sworn to before him, is sufficiently verified. Chancey v. Allison [Tex. Civ. App.] 20 Tex. Ct. Rep. 530, 107 SW 605.

21. Pepper Distributing Co. v. Alexander, 137 Ill. App. 369.

to do equity, in an action to restrain the collection of a judgment, is waived by failure to demur.[22] As in other equity suits, the answer must be responsive.[23] The answer in a suit against county commissioners may be verified by one of such commissioners.[24] The same matter may be pleaded in defense and as a counterclaim.[25] Where parties joined are merely formal, the court can proceed to hear the application for an injunction without their answers being filed.[26] Overruling a demurrer to an answer is harmless when the plaintiff will have an opportunity to urge his objection on the trial on the merits.[27]

In federal courts it is not an objection to affidavits filed with the bill and motion for a preliminary injunction in support thereof that they were previously executed and not entitled in the cause, where it is reasonably apparent that they were made for the purpose of being used in a suit between the parties.[28] Objections to affidavits filed with a motion for a preliminary injunction in a federal court which go to a matter of form only must be made in advance of hearing where there is ample time.[29] An affidavit on information and belief as to immaterial facts is sufficient.[30] Affidavits must usually be served on the opposite party if so required by the court,[31] and where affidavits are refused because the opposite party was not notified as required by the court, the persons making the affidavits cannot testify orally to matter contained therein,[32] nor is it error to refuse another continuance that notice may be given.[33] Cross-examination of the affiant is sometimes allowed.[34] Proof may be rendered unnecessary by the admissions of the answer.[35] Otherwise the complainant must prove his case [36] substantially as laid,[37] the burden of proof being upon the plaintiff to make

22. Brin v. Topp, 131 Ill. App. 394.

23. An answer which states the particulars of the transactions charged and inquired into by the bill is responsive. Thomas v. Borden [Pa.] 70 A 1051. An averment in an answer that the written agreement sued on had been rescinded and an oral agreement substituted is responsive, and if not overcome by proof the bill is properly dismissed. Id.

24. Answer signed by counsel and affidavit sworn to by one of county commissioners which does not show his authority to make affidavit are admissible in evidence upon hearing for interlocutory injunction to restrain taking of land for a road. Hutchinson v. Lowndes [Ga.] 62 SE 1048.

25. Telulah Paper Co. v. Patten Paper Co., 132 Wis. 425, 112 NW 522.

26. Camp No. 6, Patriotic Order Sons of American v. Arrington, 107 Md. 319, 68 A 548.

27. Where an answer to a bill to enjoin condemnation proceedings does not set up a defense, but merely states defendant's view of the facts, an order overruling plaintiff's demurrer to answer for want of facts is no ground for reversal, for plaintiff would be afforded an opportunity of having question whether condemnation was appropriate remedy determined on trial on merits on plaintiff attempting to show equitable grounds. City of Columbia v. Melton [S. C.] 62 SE 245.

28. Modox Co. v. Moxie Nerve Food Co. [C. C. A.] 162 F 649.

29. No caption to affidavits. Modox Co. v. Moxie Nerve Food Co. [C. C. A.] 162 F 649.

30. Paine v. Carpenter [Tex. Civ. App.] 111 SW 430.

31. Where at the time set for the interlocutory hearing of a petition for injunction the case was continued, and the judge notified the parties that all affidavits intended for use as evidence must be served on the opposite party 24 hours before the hearing, it was no error to refuse to allow affidavits to be introduced which had not been thus served. Hester v. Exley, 130 Ga. 460, 60 SE 1053.

32, 33. Hester v. Exley, 130 Ga. 460, 60 SE 1053.

34. By Equity Rule 124a. Campbell v. Hough [N. J. Eq.] 68 A 759. Such cross-examination when taken is available to adverse party, even if party taking it sees fit not to use it. Id.

35. In an action to enjoin cutting of timber where the answer admits many allegations of the bill as to title, etc., it is not necessary for the plaintiff to prove the things admitted, and where the averment of new matter as to defendant's rights is not sufficiently established, the burden of proof is not cast on the plaintiff, and he is entitled to a decree. Griffith v. Henderson [Fla.] 45 S 1003.

36. Evidence insufficient to sustain injunction against interference with plaintiff's conduct of school. Epps v. Thomas [Ga.] 61 SE 1117. In an action for an accounting and to restrain a partner from disposing of partnership property, **evidence held sufficient** to warrant injunction restraining defendant from transferring certain property pending an accounting. Causten v. Barnette [Wash.] 96 P 225.

37. Where, in a suit on a complaint to restrain cutting of timber on the theory of trespass, it appears that there was no unlawful trespass but a lawful entry and commission of waste, a motion to dismiss was properly denied, since the relief sought was substantially the same. Roots v. Boring

out his case,[38] and it being the defendant's right to insist on proof of every material allegation controverted by the answer;[39] but the defendant has the burden of proving an affirmative defense.[40] A complainant need not resort first to a court of law to establish his title to land and damage where defendant has not raised the question in his answer and the parties have argued and submitted such questions of legal right to the court.[41]

*Trial.* See 10 C. L. 273—The court cannot, on motion before trial, make an order granting a permanent injunction, the relief demanded by complainant.[42] It is error to submit a case to a jury on the assumption that if any of the complainants are entitled to a decree all are.[43] As in the case of suits in equity generally,[44] when a case is set down for hearing on bill and answer, all the facts well pleaded in the answer are taken for true whether responsive to the bill or not,[45] but where it is set down for hearing on bill, answer and replication, only those averments of the answer which are reponsive are taken as true,[46] and all allegations in avoidance or justification, denied by the replication, are taken as untrue.[47] Where the only issue is as to which party is liable for costs, the court may suspend the trial of the main case and in the exercise of sound discretion proceeed to tax the costs.[48] A finding by a referee that certain acts committed were in the interest and for the benefit of defendant labor unions is a conclusion of law rather than a finding of fact.[49] The general principles of appeals are treated elsewhere.[50]

*Appeals.* See 10 C. L. 273—The right to appeal and enjoy the fruits of a judgment or decree are wholly inconsistent, and an election to take one course is a renunciation of the other.[51] An appeal must, of course, be timely.[52] The dismissal of a bill without

Junction Lumber Co. [Or.] 92 P 811. Where plaintiffs in a suit to enjoin interference with growing trees show title but not as alleged, and there is no evidence of any right or title in anyone else, it is error to direct a verdict for defendant because of failure to prove title as alleged. Williams v. Hicks, 129 Ga. 785, 59 SE 897.

38. In an action to enjoin the diversion of water by irrigation, the burden is on the plaintiff to prove an abandonment of priorities awarded thereto by a prior statutory decree. Alamosa Creek Canal Co. v. Nelson, 42 Colo. 140, 93 P 1112.

39. Suit to enjoin a union from interfering with plaintiff's business. Crescent Feather Co. v. United Upholsterers' Union Local No. 28, 153 Cal. 433, 95 P 871.

40. Where defendant leased a room in his hotel to plaintiff and sought thereafter to remove a post projecting up through the floor which supported certain noisy and jarring machinery, the burden was on plaintiff to show that it was operating the machinery by authority of defendant. Spokane Stamp Works v. Ridpath, 48 Wash. 370, 93 P 533. Where a senior seeks to enjoin a junior appropriator of water from diverting the same, and the junior seeks to avoid the same upon the ground that if the use which he threatens to make is restrained the owner of the senior right will derive no benefit, such defense should be clearly established. Alamosa Creek Canal Co. v. Nelson, 42 Colo. 140, 93 P 1112. Where the constitution provides for corporate authority to permit construction of street railways, it is not incumbent on the plaintiff, in a bill to enjoin construction of a street railway, to prove the negative averment of lack of authority, as such must be shown by defendant as without it he is a mere trespasser. Swinheart v. St. Louis & S. R. Co., 207 Mo. 423, 105 SW 1043.

41. Where, in suit to restrain diversion of water to injury of plaintiff's riparian rights, the defendant does not present by answer the necessity of a preliminary settlement of question of plaintiff's title, court may determine such question as one of law where facts are not disputed and determination rests on construction of deeds. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

42. Oppenheim v. Thanasoulis, 123 App. Div. 494, 108 NYS 505.

43. Bill to enjoin cemetery on the ground of danger to health and pollution of springs and wells. Evidence of probable pollution of wells much weaker in some cases than in others. Error not to instruct the jury that they should specify the wells which would be polluted. Elliott v. Ferguson [Tex.] 20 Tex. Ct. Rep. 444, 107 SW 51.

44. See Equity, 11 C. L. 1235.

45, 46, 47. Peoples United States Bank v. Gilson [C. C. A.] 161 F 286.

48. Epps v. Thomas [Ga.] 61 SE 1117.

49. Russell v. Stampers' & Gold Leaf Local Union, 57 Misc. 96, 107 NYS 303.

50. See Appeal and Review, 11 C. L. 118.

51. Where plaintiff sought to enjoin cutting of trees under 12 inches in diameter, and all over that except such as were suitable for being manufactured into lumber, and the court granted relief as to trees under 12 inches, but refused it as to all others, thereby leaving defendant to proceed as to that as if no suit had been brought, there was no inconsistency in his appealing and at the same time cutting trees as to which there was no decree. Roots v. Boring Junction Lumber Co. [Or.] 92 P 811.

hearing defendant's evidence under rule of court is in the nature of a nonsuit at law, and if error is committed in granting such motion, it is not to be corrected by entering a decree for plaintiff, but by setting aside the dismissal and reinstating the bill with a procedendo.[53] On consideration of an appeal, the facts alleged by the bill will be taken as true.[54]

§ 4. *Preliminary injunction. A. Issuance and grounds.*[See 10 C. L. 274]—The terms "temporary injunction" and "restraining order" are often used synonymously,[55] but a distinction is sometimes made which limits the meaning of the term "restraining order" to such orders as are operative only until a hearing can be had upon an application for an injunction,[56] and of the term "temporary injunction" to orders operative usually until the final hearing is had of, or a further order made in, the case.[57] In any aspect, however, the only purpose of a preliminary injunction is to preserve the status quo pending final hearing.[58] Where it appears that the writ is necessary for this purpose, it will issue,[59] but, in granting a preliminary injunction, the court will go no further than necessary to preserve and protect existing rights pending the litiga-

52. Where an order is made dissolving an injunction and sustaining a demurrer, and no amendment is made and judgment of dismissal is entered, and plaintiff appeals within one year after its entry and more than 60 days after entry of the first order, the appeal is timely and will be considered on its merits, but the appellate court will not review the dissolution of the injunction. Neustadter Bros. v. Doust, 13 Idaho, 617, 92 P 978.

53. See court rule 68. Thomas v. Borden [Pa.] 70 A 1051.

54. In determining propriety of order granting injunction. Chesapeake Brew. Co. v. Mt. Vernon Brew. Co., 107 Md. 528, 68 A 1046.

55. State v. Johnston [Kan.] 97 P 790.

56. An order by a probate judge made in the absence of the district judge and in an action pending in the district court, operative until the district judge shall move in the matter, is a restraining order, and not a temporary injunction. State v. Johnston [Kan.] 97 P 790. A restraining order is in aid only, and is not a part of the main action. Its office being to hold matters in statu quo until a hearing as to the propriety of issuing a temporary injunction. State v. Graves [Neb.] 117 NW 717.

57. State v. Johnston [Kan.] 97 P 790.

58. McLean v. Farmers' Highline Canal & Reservoir Co. [Colo.] 98 P 16; City of Rock Island v. Central Union Tel. Co., 132 Ill. App. 248; Evans v. Mayes [S. C.] 62 SE 207.

59. Held, under pleadings and evidence, that there was no abuse of discretion in granting ad interim injunction until final hearing of case. Unity Cotton Mills v. Dunson [Ga.] 62 SE 179. Declaration of forfeiture by city of plaintiff's rights under a contract for maintenance of dam will be enjoined pending litigation, where it would render futile the relief sought and cause serious injury. Eau Claire Dells Imp. Co. v. Eau Claire, 134 Wis. 548, 115 NW 155. **Pending determination of equitable rights of third party** in subject-matter of controversy. Benziger v. Steinhauser, 154 F 151. Injunction against doing of irremedial mischief **while legal title to land is in litigation.** Restraint upon cutting of timber. Freeman v. Ammons [Miss.] 46 S 61. By code in Alaska, an injunction may issue to restrain any act which might render any judgment obtained in a pending action ineffectual. Injunction against mining operations **pending action to recover land.** Waskey v. McNaught [C. C. A.] 163 F 929. On an application for an injunction pendente lite **ancillary to ejectment** to recover mining ground and restrain operations, it was not necessary that affidavits allege defendant's insolvency, the injury claimed being itself irreparable. Id. Proceedings to dispossess will be enjoined **pending suit for specific performance** of landlord's covenant to renew on tenants offering security. Montant v. Moore, 113 NYS 43. **In proceedings to annul promissory note,** issue of executory process to enforce payment of such note may be enjoined. Josephson v. Powers, 121 La. 28, 46 S 44. Where contractor assigned to plaintiff all moneys due him from a city and city made no objection, and later plaintiff sued contractor for accounting, injunction restraining city from making any payments **until after accounting** was proper. Watson v. McManus [Pa.] 70 A 263. **In patent infringement suit,** in which suit both validity of patent and infringement are put in issue, court has power to enjoin complainant from instituting multiplicity of suits in different parts of country against customers of defendant, who are charged with infringement by reason of sales or use of defendant's device, until issues are determined in principal suit. Commercial Acetylene Co. v. Avery Portable Lighting Co. [C. C. A.] 159 F 935. Granting of ex parte temporary injunction commanding plaintiff **in suit in nature of interpleader** to retain possession of fund in controversy pending the action is within powers conferred by Gen. St. 1902, §§ 1002-1005. Phoenix Ins. Co. v. Carey, 80 Conn. 426, 68 A 993. In code **proceedings to determine validity of will,** court, to protect its jurisdiction over the testamentary fund, may enjoin its distribution by the executor. Shea v. Bergen, 110 NYS 572. Injunction against collection of schedule freight rates **pending determination of rates by interstate commerce commission.** Kalispell Lumber Co. v. Great Northern R. Co., 157 F 845. Wife may have injunction to protect her property rights **pending suit for divorce.** McClelland v. Gasquet [La.] 47 S 540.

tion.[60] The status quo is not always a condition of rest, but may be one of action,[61] but a mandatory preliminary injunction will issue only in rare cases.[62] The granting of a preliminary injunction rests largely in the sound discretion of the chancellor,[63] but such discretion is controlled by established principles of equity.[64] A probable right, and a probable danger that such right would be defeated in case an injunction was not issued, may be sufficient to authorize a preliminary injunction,[65] and it is not necessary that the court be satisfied that plaintiff is entitled to prevail on final hearing,[66] the writ being granted in some cases even where there is doubt as to the law and

60. Eau Claire Dells Imp. Co. v. Eau Claire, 134 Wis. 548, 115 NW 155. Injury threatened must be irreparable. Alaska Pac. R. & T. Co. v. Copper River & N. W. R. Co. [C. C. A.] 160 F 862. Injunction pendente lite should not usurp place of final decree, neither should it reach out any further than is absolutely necessary to protect rights of petitioner from injury not only irreparable but which must be expected before the suit can be heard on its merits. Goldfield Consol. Mines Co. v. Goldfield Miner's Union, 159 F 500. It is improper to compel defendant to deliver logs described as shipped from various places under an alleged contract upon complainant's switches as previously done for many years, since that permitted plaintiff to determine what logs he was entitled to ship under the contract, and was not preserving a status known to both parties. Gates v. Detroit & M. R. Co., 151 Mich. 548, 15 Det. Leg. N. 2, 115 NW 420. Where landlord expressly declares that under no circumstances will he execute or consent to assignment of lease to plaintiff, it is useless to continue temporary injunction restraining defendants from interfering with plaintiff's possession. Miles v. Samuels, 111 NYS 537. Will not issue against sale of replevied goods under Code 1902, § 2435, where it does not appear that remedy at law for testing validity of replevy is unavailable. Evans v. Mayes [S. C.] 62 SE 207.

61. Will compel delivery of logs at a certain place as required by an agreement and as done for a long period of time. Gates v. Detroit & M. R. Co., 151 Mich. 548, 15 Det. Leg. N. 2, 115 NW 420. In a suit for specific performance of contract to convey land, temporary injunction restraining defendant from interfering with plaintiff's possession and an order requiring plaintiff to pay into court monthly rental to abide result of the action, were both proper. Inglis v. Fohey, 136 Wis. 28, 116 NW 857.

62. If mandatory injunction will issue at all before final hearing, it is only where case is clear and certain. Lanham v. Wenatchee Canal Co., 48 Wash. 337, 93 P 522. Except in rare cases where right is clear, mandatory injunction will not issue before final hearing. Florida East Coast R. Co. v. Taylor [Fla.] 47 S 345; Atchison, etc., R. Co. v. Billings [Kan.] 93 P 590. Court refused to enjoin revocation of license to take water. Lanham v. Wenatchee Canal Co., 48 Wash. 337, 93 P 522. Will not compel a railroad to construct a half mile of railroad and a depot and operate trains thereover. Florida East Coast R. Co. v. Taylor [Fla.] 47 S 345. Held improper, upon enjoining sale by officer, to require him to return property. Evans v. Mayes [S. C.] 62 SE 207.

63. Richards v. Meissner, 158 F 109; Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574; State v. Parsons [Kan.] 95 P 391; Somerset Water, L. & Trac. Co. v. Hyde, 33 Ky. L. R. 866, 111 SW 1005; Bonaparte v. Denmead [Md.] 69 A 597. Plaintiff, upon verified complaint, answer and reply not entitled as matter of right to temporary injunction restraining building of bridge across the Minnesota river and appropriating money therefor. Watters v. Mankato [Minn.] 118 NW 358. It is wholly in discretion of trial court to determine whether injunction shall issue and to continue or dissolve injunction and what terms should be imposed in action to recover an interest in letters patent and for an accounting. American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133. Where an injunction is permanent only as to summary abatement by defendant's personal acts, i. e., as to extrajudicial remedy of self-help and in last analysis is temporary because legal questions involved are left open for future determination, its issuance is a matter of discretion. Felt v. Elniquist [Minn.] 116 NW 592.

**Review on appeal.** See Appeal and Review, 11 C. L. 118. See, also, post, § 4E, Appeal and Review, for cases where the question of the correctness of injunctions issued or refused is discussed.

64. If the allegations of the bill are sufficient and evidence in support thereof is ample to warrant the granting of a temporary injunction and no sufficient defense is made, an order denying an injunction will be reversed. Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574.

65. It is not a defense to an application for a preliminary injunction that defendants have not actually taken any action in the matter in which they are sought to be restrained, where the bill charges an intention to take such action unless restrained which is not denied. Louisville & N. R. Co. v. Railroad Commission, 157 F 944. While it is not necessary that the court should be satisfied before granting injunction that the complainant will certainly prevail on final hearing, it should carefully consider whether he has a probable right and that the same is in probable danger of loss without intervention. Richards v. Meissner, 158 F 109.

66. Richards v. Meissner, 158 F 109; Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 F 500. Facts tending to prove contentions of the parties, but not actual proof thereof, may be considered on a motion for a preliminary injunction. The fact that words and score of an opera had been published may be taken to show abandonment, though there is no proof to show that the publication was authorized. Savage v. Hoffman, 159 F 584.

the facts,[67] but as a general rule it will issue only in a reasonably clear case.[68] A fortiori will the writ not issue ex parte where upon the showing made the defendant has a prima facie right to do the thing sought to be enjoined.[69] A preliminary injunction, being purely ancillary, should not be granted where it is apparent that the principal relief sought cannot be granted.[70] Generally the gravity of the injury which will result from the grant or refusal of the writ will be considered.[71] The writ may usually issue either at term or in vacation.[72]

67. Where there is grave doubt as to law or facts, a temporary injunction will be granted to prevent great hardship or irreparable damage until hearing and determination. Marino v. Williams [Nev.] 96 P 1073.

68. In any event, court must have sufficient facts so as to enable it to act with a thorough understanding. State v. Parsons [Kan.] 95 P 391. Injunction ought not to be granted unless the applicant shows clearly that he is entitled to one. Marino v. Williams [Nev.] 96 P 1073. Preliminary injunction should not be granted where right alleged to be invaded or threatened is doubtful and uncertain on showing made. St. Louis Street Flushing Mach. Co. v. Sanitary Street Flushing Mach. Co. [C. C. A.] 161 F. 725. Where evidence before referee **in suit to enjoin strike** did not sustain allegation of conspiracy nor show ratification by union of acts of its members, only such members as could be identified as having committed acts of violence would be enjoined pendente lite. Russell v. Stampers' & Gold Leaf Local Union No. 22, 57 Misc. 96, 107 NYS 303. Will not enjoin vaudeville performer from singing song from and using orchestration of opera which complainant claims exclusive right to produce, **where plaintiff's title is doubtful.** Savage v. Hoffmann, 159 F 584. No error in denying interlocutory injunction because of **conflicting evidence.** Spears v. Spears [Ga.] 61 SE 1124.

69. The right, under U. S. Rev. St. § 718, to grant restraining order in certain cases, is merely to preserve status quo and such an order will not be granted ex parte in suit by telephone company against state commission empowered to fix rates to enjoin interference to prevent increase of rates where application for permission to raise rates has been made and denied, decision of commission being entitled at least to be treated as prima facie correct. Cumberland Tel. & T. Co. v. Railroad Commission, 156 F 834.

70. Injunction ancillary to suit for specific performance. Hazard v. Hope Land Co. [R. I.] 69 A 602; Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574. Where preliminary injunction is sought in aid of suit for specific performance of agreement to convey lands, writ will be refused if agreement relied upon is one made by agent who clearly lacked authority to bind his principals, or if for other reasons the agreement is palpably unenforcible. Campbell v. Hough [N. J. Eq.] 68 A 759.

71. Marino v. Williams [Nev.] 96 P 1073. Where it appears that right is quite doubtful, and that as much injury would result to the defendant from the granting of the injunction as to the complainant from a failure so to do, the application should be refused. Suit to restrain **taking out of a patent.** Richards v. Meissner, 158 F 109. Evidence in suit to enjoin **Sunday ball** playing indicated that a preliminary injunction was not necessary to protect relator's rights, and that it might never become necessary. Mahon v. Donovan [Mich.] 15 Det. Leg. N. 807, 118 NW 1. Preliminary injunction will be denied to restrain **sale of encyclopedia** of law containing article written by complainant, but which appeared in form liable to cause irreparable injury to complainant, where it appears that volumes have already been published, copyrighted and extensively sold, and that complainant has recovered a judgment at law for damages covering, to some extent at least, the same matters, which judgment was under review in an appellate court. Chamberlayne v. American Law Book Co., 163 F 858. Ad interim injunction to prevent **enforcement of void tax lien** upon land and maintain the status quo is allowed almost as matter of course where there is strong probability of recovery by plaintiff, defendant being protected by bond where such is deemed necessary. A. H. Stange Co. v. Merrill, 134 Wis. 514, 115 NW 115. City, failing to invoke power of public service commission to establish rates for gas furnished by gas company, and declining to pay bills rendered on ground that rates are excessive, cannot restrain company by preliminary injunction from **shutting off gas supply,** unless it pays admittedly just rates for gas received, without prejudice to establish any other sum as reasonable value of such gas. City of Buffalo v. Buffalo Gas Co., 112 NYS 468. Erection and use of **tuberculosis hospital** enjoined until final hearing. Cherry v. Williams [N. C.] 61 SE 267. Where there are facts in evidence which give good reason to believe that owner of property in residential portion of thickly settled vicinity is about to devote it permanently to use which imports serious **menace to health** of owners and occupants of adjacent property, such user should be restrained until facts on which the rights of the parties depend are settled. Id. Under Alaska Code, plaintiffs in ejectment to recover certain mining lands were entitled to injunction ancillary to such action restraining defendants' **mining operations** on ground in question pendente lite, on a showing that such ground was chiefly valuable for placer mining, and that the continued mining operations would result in irreparable injury to plaintiffs. Waskey v. McNaught [C. C. A.] 163 F 929. Bill and showing held sufficient to entitle complainant to preliminary injunction to restrain the **fixing of water rates** to be charged for water furnished to consumers until the legality of such rates could be established, on giving of bond to secure repayment of charges collected which should finally be held illegal. San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus County,

*Notice of application.*[See 10 C. L. 277]—An injunction without notice should be granted only in extreme cases where it clearly appears that the rights of the complainant will be unduly prejudiced unless so granted,[73] but a court should not hesitate to issue an injunction ex parte upon proper showing and in a proper case.[74] Great care, however, should be exercised lest the grant of the writ cause irreparable injury to those affected instead of saving the applicant from such injury,[75] and hence the issuance of an injunction without notice must be predicated upon facts from which irreparable injury to the complainant is manifest.[76] Where the defendant is present and heard on the question at issue, the sufficiency of notice need not be considered,[77] nor can a party after hearing on the merits complain of lack of notice.[78] In New York it is provided by statute that an injunction shall not be granted ex parte which will suspend generally the ordinary business of a corporation.[79] The necessity of presenting or serving the complaint with the moving papers is sometimes dispensed with by statute.[80] Where a notice to show cause is issued, a court cannot also issue a restraining order pending hearing, as the order to show cause implies that defendant should not be restrained until hearing.[81]

(§ 4) *B. Bonds.*[See 10 C. L. 277]—Ordinarily a temporary injunction is only granted upon security to the party enjoined.[82] This is required by statute in many states,[83] and such statutes are held mandatory both as to the necessity of the bond[84]

163 F 567. Where plaintiff's business required **electric current** and defendant company was bound to furnish the same to consumers within one hundred feet of its lines, but defendant refused to so furnish current on the ground that plaintiff frauduiently interfered with its meters, a temporary injunction will be granted on plaintiff filing a bond to secure moneys due for any current heretofore consumed and for all moneys that may become due pending trial. Schmitt v. Edison Elec. Illuminating Co., 58 Misc. 19, 110 NYS 44. Injunction interfering with **landing of freight on street cars** on ground of obstructing highway will not be granted except on full hearing, since not only company but the general public is affected. Town of Ft. Edward v. Hudson Valley R. Co., 111 NYS 753. Preliminary injunction may properly be granted where all that is sought is to restrain **interference with complainant's business** by threats or inducements to agents to act, for it does the defendant no harm and preserves status. The Lloyd Sabaudo v. Cubicciotti, 159 F 191.

72. Preliminary writ of injunction may be issued by circuit court in term time, and by judge thereof in vacation. Rev. St. c. 69, § 1. Order issued by judge in term, erroneous. Smith v. Nelson, 131 Ill. App. 145.

73. Erroneously issued where complainants' belief of irreparable injury is not founded on sufficient facts, and complainant is guilty of laches, and defendant is responsible in damages. Brin v. Craig, 135 Ill. App. 301.

74. Rights to use water. McLean v. Farmers' Highline Canal & Reservoir Co. [Colo.] 98 P 16. Bill sufficient to authorize injunction without notice to restrain collection of judgment at law. Ebann v. Brown, 139 Ill. App. 213. Injunction without notice may, in discretion of court, be granted where public interest is involved, as to prevent refusal to supply water. Kerz v. Galena Water Co., 139 Ill. App. 598.

75. Right to use water from a common supply. McLean v. Farmers' Highline Canal & Reservoir Co. [Colo.] 98 P 16.

76. Averments insufficient. Goldberg v. Laughlin, 137 Ill. App. 283.

77. Owen County Burley Tobacco Soc. v. Brumback, 32 Ky. L. R. 916, 107 SW 710.

78. Kerz v. Galena Water Co., 139 Ill. App. 598.

79. Town of Ft. Edward v. Hudson Valley R. Co., 111 NYS 753.

80. Injunction to stay payment of money levied on under judgment, pending suit to vacate judgment, being granted under Code Civ. Proc. § 604, and not under section 603, no complaint was required to be presented or served with moving papers. New York & New Jersey Tel. Co. v. Rosenthal, 112 NYS 612.

81. Castleman v. State [Miss.] 62 S 647.

82. Should not enjoin defendant's business pending determination of validity of statute prohibiting it unless security be given. People v. New York Carbonic Acid Gas Co., 112 NYS 381.

83. Paine v. Carpenter [Tex. Civ. App.] 111 SW 430; Howley v. Charles Francis Press, 111 NYS 1080. Facts sufficient to show compliance with Code Civ. Proc. § 613, requiring two bonds to be given or full amount of judgment to be paid into court in case injunction is asked restraining payment under an execution. New York & New Jersey Tel. Co. v. Rosenthal, 112 NYS 612.

84. Rev. St. 1895, art. 2997, requiring complainant, except in case of state, to file bond, is mandatory, and applies to receivers. Paine v. Carpenter [Tex. Civ. App.] 111 SW 430. Temporary injunction cannot be issued unless a bond is given as provided by Code Civ. Proc. § 620. Howley v. Charles Francis Press, 111 NYS 1080. Where bond

and as to its conditions.[85] There is no statute nor rule restricting the discretion of a federal court fixing the amount of an injunction bond.[86] A bond may be given nunc pro tunc pending appeal by the defendant.[87] Under some circumstances a new bond may be required.[88] In some instances, injunctions may be allowed without bond [89] especially if public interests are involved.[90] A party cannot, after hearing on the merits, complain of the failure of the other party to give bond.[91] A statute requiring a cost bond of corporation plaintiffs does not preclude the issue of a preliminary injunction at the instance of a corporation without such bond.[92] The character of a restraining order is not affected by the giving of a bond.[93]

(§ 4) *C. Dissolution, modification or continuance; reinstatement.* See 10 C. L. 278 An injunction limited to a certain period is dissolved ex vi termini upon the expiration of such period.[94] The dissolution of the temporary injunction and the dismissal of the bill is proper where the allegations are insufficient and incapable of amendment,[95] or where the injunction has been issued without notice and is unwarranted,[96] or where every material allegation is unequivocally denied with a full re-

is required by statute, injunction issued without one is void. Castleman v. State [Miss.] 47 S 647.

**85.** It is not necessary that the order granting the injunction or bond should name the amount for which the makers are liable. Code, § 278. Alexander v. Gardner [Ky.] 113 SW 906. Where collection of judgment is enjoined, the chancellor has no discretion, but must require bond in double amount of judgment, conditioned for payment of moneys and costs due to plaintiff in judgment, and such damages may be awarded in case injunction is dissolved. Rev. St. c. 69, § 8. Reed v. New York Nat. Exch. Bank, 131 Ill. App. 434. Bond given upon granting of injunction restraining collection of judgment should be conditioned for payment of judgment and costs. Rev. St. c. 68, § 8. Central Stock & Grain Co. v. Pine Tree Lumber Co., 140 Ill. App. 471; Ebann v. Brown, 139 Ill. App. 213. Code, § 4365, providing that in action to enjoin civil proceedings, or enforcement of a judgment, the bond must be conditioned to pay any judgment recovered in civil action if injunction is not made perpetual, does not apply to case where only relief demanded is that judgment be not enforced against particular property, which could be granted without impairing validity of judgment. Lindberg v. Thomas, 137 Iowa, 48, 114 NW 562.

**86.** Cimiotti Unhairing Co. v. American Fur Refining Co., 158 F 171.

**87.** Where an injunction is awarded without giving bond as required by Code Civ. Proc. § 620, and defendant appeals, the plaintiff may be allowed to give the bond nunc pro tunc. Howley v. Charles Francis Press, 111 NYS 1080.

**88.** Where a surety company had ceased to do business in a state, and had failed to comply with the statute requiring security to be deposited with the secretary of state, the defendant was entitled to call for other surety. Ansley v. Stuart, 121 La. 629, 46 S 675.

**89.** Injunction to prevent distribution of testamentary fund pending determination of validity of will may be issued without requiring undertaking. Shea v. Bergen, 110 NYS 572. By Rev. St. U. S. § 718, court may, if there appears to be irreparable injury from delay, grant a restraining order, until hearing upon motion for injunction, with or without security. Cumberland Tel. & T. Co. v. Railroad Commission, 156 F 834.

**90, 91.** Kerz v. Galena Water Co., 139 Ill. App. 598.

**92.** Under Civ. Code Prac. § 617, an injunction bond filed by a corporation did not properly come before the court in disposing of the motion to issue the injunction on a question of the execution thereof. Owen County Burley Tobacco Soc. v. Brumback, 32 Ky. L. R. 916, 107 SW 710.

**93.** The fact that a bond is applied for and given at the time of granting a restraining order does not have the effect of changing the order to a temporary injunction. Ex parte Grimes [Okl.] 94 P 668.

**94.** Injunction restraining certification of assessments to county auditor, under Rev. St. § 2297, operates to suspend power to so certify only for time injunction is in force, and period which may have elapsed in which certification could have been made prior to granting of injunction must enter into the computation in determining whether two years limitation has expired. Bell v. Cincinnati, 7 Ohio N. P. (N. S.) 393.

**95.** Masonic Fraternity Ass'n v. Chicago, 131 Ill. App. 1.

**96.** Municipality enjoined from prosecuting complainant who maintained nuisance. Gonyo v. Willmette, 133 Ill. App. 645. The granting of a preliminary restraining order ex parte is of so perfunctory a character as to be entitled to little weight when the defendants appear to show cause against its further continuance. Richards v. Meissner, 158 F 109. A petition seeking to enjoin a trespass which as alleged might be fully compensated for in damages, which concludes with a statement of irreparable injury, but which fails to state the insolvency of the defendants, is fatally defective, and a temporary injunction was properly dissolved on affidavits showing solvency. Bracken v. Stone [Okl.] 95 P 236.

cital of facts,[97] but the court has a large discretion in the matter and will not dissolve where irreparable injury will result from dissolution.[98] An injunction awarded on a bill showing no good cause for relief is properly dissolved, though no exception is taken thereto.[99] Where an injunction is issued in contravention of one then in force, it is improvidently issued and should be vacated.[1] In Florida a temporary injunction will not be dissolved merely because the relief granted by such injunction might be obtained by equitable defense in an action at law.[2] The dismissal of a bill upon dissolving a temporary injunction is improper where the court holds that the allegations are sufficient but that the preponderance of evidence as shown by the affidavits is against its verity.[3] A motion to dissolve for want of equity apparent on the bill has the same effect as a demurrer, and facts stated are to be taken as true.[4] Affidavits in rebuttal of a motion to dissolve a temporary injunction filed in court by defendant a week before hearing need not be served on complainant.[5] On motion to quash a temporary injunction for lack of plaintiff's signature on the bond, leave may be granted to his attorney to sign, and on this being done the motion may be overruled.[6] Dissolution of injunction before final hearing is not conclusive and cannot be pleaded as res judicata of right to an injunction on final hearing.[7] Where one judge sitting for another refuses to dissolve an injunction, such order is binding upon the absent judge when he resumes the conduct of the case.[8] Dissolution by an appellate court discontinues the injunction permanently or until final trial in the lower court.[9] Where it appears that a restraining order is partly proper and partly improper, it may be modified accordingly,[10] but an injunction against the enjoyment of a public easement, based on the ground that the grant of such easement is

97. Johnson v. Howze [Ala.] 45 S 653. Dissolution proper on filing of answer denying material allegations. Frazier v. Coleman [Tex. Civ. App.] 111 SW 662; Fuller v. Chenault [Ala.] 47 S 197. Where statute provides for appeal in case of change of location of school house, and petition seeking to restrain relocation does not allege taking of such appeal, a temporary injunction should be dissolved, especially where answer contained specific denials to all allegations. Caswell v. Fundenberger [Tex. Civ. App.] 20 Tex Ct. Rep. 64, 105 SW 1017. Where action was brought to vacate liquor election resulting in favor of license, and answer denied allegations of irregularity in elections, a temporary injunction restraining issuance of licenses was properly dissolved, it being presumed that election was regular. Wallace v. Salisbury [N. C.] 60 SE 713.

**Verification of answer:** Under Chancery Practice Rule 32 (Code 1896, p. 1209), providing that injunction will not be dissolved upon denials of answer unless same is sworn to, an injunction should not be dissolved where affidavit to answer is defective. Empire Guano Co. v. Jefferson Fertilizer Co. [Ala.] 45 S 657.

98. Johnson v. Howze [Ala.] 45 S 653; Gilreath v. Carbon Hill & Lost Creek Coal Co. [Ala.] 47 S 298. Injunction can and should be continued in force if it appears that irreparable injury may follow or that it would be inequitable to dissolve the injunction. Fuller v. Chenault [Ala.] 47 S 197.

99. Cranberry Fuel Co. v. Hollandsworth [W. Va.] 61 SE 37.

1. On May 18 the defendant judge issued a temporary injunction against A from entering upon and interfering with the possession of B. On the 23rd, and while the injunction was still in force, he granted a counter injunction restraining B from interfering with the possession of A. On June 1, he modified the first injunction. On June 4 the order allowing the first injunction was vacated, but a supersedeas was granted. State v. Graves [Neb.] 117 NW 717.

2. Temporary injunction restraining eviction proceedings in county judge's court should not be dissolved on ground that relief sought may be obtained by plea on equitable grounds in eviction proceedings in county judge's court. Hobbs v. Chamberlain [Fla.] 45 S 988.

3. Amendment should be allowed and bill retained for final hearing on merits. Masonic Fraternity Temple Ass'n v. Chicago, 131 Ill. App. 1.

4. Conclusions, however, not taken as true. White v. Young Men's Christian Ass'n, 233 Ill. 526, 84 NE 658.

5. Crane v. Roselle, 236 Ill. 97, 86 NE 181.

6. Haynes v. Texas, etc., R. Co. [Tex. Civ. App.] 111 SW 427.

7. Staley v. Big Sandy, etc., R. Co., 63 W. Va. 119, 59 SE 946.

8. Where judge of one district sits in another district in absence of judge thereof, order refusing to dissolve made by former is binding on latter, and he cannot reopen issues settled by such order. McClelland v. Gasquet [La.] 47 S 540.

9. Renshaw v. Cook, 33 Ky. L. R. 860, 895, 111 SW 377.

10. Stange Co. v. Merrill, 134 Wis. 514, 115 NW 115.

invalid, cannot be modified so as to allow partial enjoyment of such easement.[11] A perpetual injunction may be granted on a motion to continue an interlocutory one.[12]

If, after dissolution of an injunction on answer denying the equity of the bill, testimony afterwards taken and filed shows the right to such relief, the injunction may be reinstated.[13] A motion to vacate a restraining order which has spent itself will not revive it for or against either party.[14] Reinstatement by an appellate court is binding on the court below and on the parties.[15] When an order dissolving an injunction has once taken effect, it will not be affected by a subsequent supersedeas.[16]

(§ 4) *D. Damages on dissolution and liability on bond.* See 10 C. L. 280—The damage arising from the granting of an injunction pendente lite, in the absence of statute or rule of court, is damnum absque injuria.[17] A formal injunction bond is not, however, an indispensable prerequisite to the assessment of damages in the dissolution of an injunction for a condition may be imposed requiring plaintiff to make good any damage sustained,[18] and in some states, in case of the wrongful suing out of an injunction, the defendant, upon dismissal, has the right to institute an independent action for damages.[19] Where a bond is required, damages will be allowed on the dissolution of the injunction.[20] The pendency of an appeal does not preclude an action on the bond after dissolution of the injunction,[21] nor is it necessary for the defendant to appeal from the order granting the injunction in order to recover upon the bond upon subsequent dissolution.[22] Where the complainant has the right to dismiss without prejudice, such a dismissal does not constitute an adjudication in favor of the defendant,[23] and the latter, in order to recover on the injunc-

11. Where the use of a street by a street railway was enjoined for want of consent by the proper authorities, it was not error to refuse to modify the injunction so as to permit the use of one side of the street instead of the center, for this would be granting a right which would only be obtained from the county court. Swinhart v. St. Louis & S. R. Co., 207 Mo. 423, 105 SW 1043.

12. In a suit to enjoin collection of taxes by a city from residents of annexed territory, it was proper, on a motion to continue a temporary restraining order to decide the case on the merits and issue a perpetual injunction, for the propriety of continuing the injunction could not be intelligently decided without determining the issues raised by the pleadings. Lutterloh v. Fayetteville [N. C.] 62 SE 753.

13. Staley v. Big Sandy, etc., R. Co., 63 W. Va. 119, 59 SE 946.

14. Ex parte Grimes [Okl.] 94 P 668.

15. Interlocutory injunctions dissolved by the trial court or judge and reinstated by a judge of the court of appeals may not thereafter be disregarded by the parties or the inferior tribunal so long as they remain interlocutory, but where, on the complete preparation of the case, the record presents a substantially different set of facts, the trial court may refuse a permanent injunction and where the trial court grants a temporary injunction which is dissolved by the court of appeals it stands dissolved throughout the litigation, or until final trial in the circuit court. Renshaw v. Cook, 33 Ky. L. R. 860, 895, 111 SW 377.

16. Where supersedeas was without effect because of failure to give bond as required by Civ. Code, § 748. United States Fidelity & Guaranty Co. v. Jones, 33 Ky. L. R. 737, 111 SW 298.

17. Cimiotti Unhairing Co. v. American Fur Refining Co., 158 F 171. Where no bond is required, there is no liability for damages. United States v. Lewis Pub. Co., 160 F 989. Where no bond is ordered or given, defendants are not entitled to assessment of damages sustained by them by reason of injunction restraining them from disposing of patents which by final decree they were allowed to retain. American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133.

18. Condition imposed upon granting of injunction was that complainant should make good to defendant any damage sustained. Mica Insulator Co. v. Commercial Mica Co., 157 F 92.

19. Clevenger v. Cariker [Tex. Civ. App.] 110 SW 796.

20. Dissolution is breach of bond. New York Nat. Exch. Bank v. Reed, 232 Ill. 123, 83 NE 548. Dissolution is breach, regardless of whether injunction was rightfully granted in first instance, and latter consideration will be considered, if at all, only in mitigation of damages. Mica Insulator Co. v. Commercial Mica Co., 157 F 92. Statutory damages will be allowed on dissolution of injunction against sale of specific property seized in execution of money judgment. Rivet v. Murrell Planting & Mfg. Co., 121 La. 201, 46 S 210.

21. New York Nat. Exch. Bank v. Reed, 232 Ill. 123, 83 NE 548.

22. Mica Insulator Co. v. Commercial Mica Co., 157 F 92.

23. See Code, § 3764. Ft. Madison St. R. Co. v. Hughes, 137 Iowa, 122, 114 NW 10. Where plaintiffs ask for a decree dismissing their bill, question of their liability on undertaking given when original injunction was given, and their liability for costs, depends upon whether the plaintiffs were en-

tion bond, must disprove the allegations upon which the injunction was sought,[24] but the dismissal of a bill on the merits for want of equity, and the dissolution of a preliminary injunction issued thereon, is a determination that the injunction was wrongfully issued for the purpose of entitling the defendant to the damages thereby sustained, even though it may have been properly granted in the first instance.[25] Where a preliminary injunction has been granted pending the action, but suspended during an appeal, and upon reversal upon appeal the action is discontinued by the plaintiff, the defendant is entitled under the bond to compensation for expenses and damages, although not actually restrained from doing anything.[26] An action on an injunction bond, filed to prevent the collection of a judgment, for costs and the judgment and damages, is only one cause of action.[27] Damages upon the dissolution of an injunction should not be awarded in favor of those who were in privity with or guilty of fraud in a former proceeding for an injunction, involving the same subject-matter.[28] While damages cannot be awarded to strangers to the suit or to solicitors who are not parties,[29] where damages are awarded to the proper party cash security deposited in lieu of a bond may be distributed to the parties ultimately entitled thereto.[30] Service upon a party is not always necessary in order to make him a party within the foregoing rule.[31] A bond may protect several parties, though it runs in terms to the defendant in the singular.[32] Liability on a bond ceases when a new and permanent injunction is granted without reference to the restraining order.[33] The penal sum fixed by the bond is the maximum of the recovery allowable,[34] but subject to this limitation the measure of damages [35] is the actual damage suffered by reason of the injunction,[36] except, of

titled to relief at the time bill was brought. Sackett & Wilhelms Lithographing & Printing Co. v. Employing Lithographers' Nat. Ass'n, 113 NYS 110.

**24.** Ft. Madison St. R. Co. v. Hughes, 137 Iowa, 122, 114 NW 10.

**25.** Mica Insulator Co. v. Commercial Mica Co., 157 F 92.

**26.** In re Reed, 110 NYS 834.

**27.** New York Nat. Exch. Bank v. Reed, 232 Ill. 123, 83 NE 548.

**28.** Order awarding damages for solicitor's fees, reversed. Vanderpoel v. Cravens, 139 Ill. App. 463.

**29.** Moore v. West, 128 Ill. App. 452.

**30.** Not error to direct such money to be paid to solicitors as fees. Moore v. West, 128 Ill. App. 452.

**31.** Where an order restraining building by defendant was served on the contractor alone, who at once ceased operations, and the defendant was not served with notice and knew nothing of the proceedings, yet she was entitled to recover on the bond given, for she suffered the injury. Hutchins v. Munn, 209 U. S. 246, 52 Law. Ed. 776.

**32.** Where bond was conditioned to pay "defendant" damages, etc., but order of injunction restrained "defendants," etc. Hutchins v. Munn, 209 U. S. 246, 52 Law. Ed. 776. A bond accompanying a temporary restraining order directed against defendants and each of them was held to run in favor of plaintiff, a woman, although the bond was expressed to "make good to the defendant all damages by him suffered." Id.

**33.** Houghton v. Cortelyou, 208 U. S. 149, 52 Law. Ed. 432.

**34.** Cimiotti Unhairing Co. v. American Fur Refining Co., 158 F 171; United States v. Lewis Pub. Co., 160 F 989; Harrison v. Hind & Harrison Plush Co., 128 App. Div. 460, 112 NYS 834. When the amount of the bond is fixed, its penal sum is notice to the applicant for injunction of the maximum risk he must assume if the injunction is issued. United States v. Lewis Pub. Co., 160 F 989; Cimiotti Unhairing Co. v. American Fur Refining Co., 158 F 171. Liability of sureties is limited by amount of bond, but **upon reference,** under Code Civ. Proc. § 623, to ascertain defendant's damages from preliminary injunction, full amount thereof, though in excess of bond, is properly found. Harrison v. Hind & Harrison Plush Co., 128 App. Div. 460, 112 NYS 834.

**35.** Instructions as to admeasurement of damages, approved. Kerz v. Wolf, 131 Ill. App. 387. Instructions of court as to damages, considered. Collins v. Huffman, 48 Wash. 184, 93 P 220.

**36.** A bond covers only the damages that are the proximate and natural result of the injunction. Cimiotti Unhairing Co. v. American Fur Refining Co., 158 F 171. Evidence held to show that collection of debt was not interfered with by injunction, and hence no damages could be allowed on this account. Collins v. Huffman, 48 Wash. 184, 93 P 220. No damage for interference with stock of goods where injunction defendant, under arrangement with plaintiff, received full credit for such stock at invoice value. Id. Value of use of dwelling house for period or season during which owner was deprived of it as direct result of wrongful use of order temporarily restraining further construction is the proper measure of damages recoverable upon undertaking to make good resulting injury, exacted by court as

course, as otherwise provided by statute.[37] If no limit is established by the bond or by order of court, the liability of the obligors is coextensive with the damages the defendants may sustain by reason of the writ.[38] Counsel fees are usually allowable,[39] but not in the federal courts,[40] and in an action in a state court on a bond given in a federal court the rule in the federal courts will be followed.[41] Where counsel fees may be recovered, they must be for services rendered in securing a dissolution of the injunction as distinguished from services rendered in connection with the main case.[42] The question of damages may be referred to a master.[43] In Illinois in case of an ancillary injunction wrongly issued, the court may hear suggestions of damages

condition of granting order. Hutchins v. Munn, 209 U. S. 246, 52 Law. Ed. 776. Evidence held to warrant amount of verdict. Hill v. Peeler [Tex. Civ. App.] 20 Tex. Ct. Rep. 53, 105 SW 1005. Where foreclosure decree was wrongfully enjoined, purchaser was entitled in a suit on bond to recover rental value of premises up to time he was placed in possession. Steves v. Smith [Tex. Civ. App.] 20 Tex. Ct. Rep. 877, 107 SW 141. In suit to enjoin enforcement of execution where injunction was dissolved, defendant could not recover on bond amount of execution without pleading and proof that temporary injunction had caused such damage. Dillard v. Stringfellow [Tex. Civ. App.] 111 SW 769. Where, because of injunction restraining cutting of timber, certain mules used in work remained idle, this is not element of damage in suit on bond; if by ordinary diligence other work might have been found. United States Fidelity & Guaranty Co. v. Jones, 33 Ky. L. R. 737, 111 SW 298. Refusal of court of original jurisdiction to allow damages in suit on bond for period during which injunction was in force cannot be sustained as appropriate exercise of discretion where by such order postmaster general was prevented from collecting postage on publications on which rates demanded should have paid, and which had for long time been carried at less rate than was proper. Houghton v. Cortelyou, 208 U. S. 149, 52 Law. Ed. 432. Where there is no proof that injunction was ever issued or served on the sheriff to restrain sale of property under an execution, it was error to direct verdict against surety and plaintiff on injunction bond. Webb v. Caldwell [Tex. Civ. App.] 112 SW 97.

**37.** Under Code Civ. Proc. § 3251, court or judge may, on any reference specified in § 3236, award costs, not exceeding $10, besides necessary disbursements for referee's fees as damages. Harrison v. Hind & Harrison Plush Co., 128 App. Div. 460, 112 NYS 834.

**38.** Alexander v. Gardner [Ky.] 113 SW 906.

**39.** On dissolution. Allison v. Taylor, 133 Ill. App. 70. Recovery upon injunction bond for solicitor's fees in procuring dissolution of injunction not precluded by fact that solicitor stated he would obtain fees out of bond. Kerz v. Wolf, 131 Ill. App. 387. Allowance of solicitor's fees upon dissolution of injunction not precluded by fact that defendant was solicitor and performed services. Reed v. New York Nat. Exch. Bank, 131 Ill. App. 434. Under Louisiana Code, on dissolution of an injunction restraining enforcement of an execution, defendant may recover for attorney's fees only 20 per cent of the amount of execution, unless greater damages are proved. Rivet v. Murrell Planting & Mfg. Co., 121 La. 201, 46 S 210; Schwann v. Sanders, 121 La. 461, 46 S 573.

**40, 41.** National Soc. of U. S. Daughters of 1812 v. American Surety Co., 56 Misc. 627, 107 NYS 820.

**42.** Where a restraining order was issued which contained an order to show cause why a temporary injunction should not issue, and no motion was made to dissolve the restraining order, but on the return day appellants simply sought to prevent the issuance of the temporary injunction, and no motion was made to dissolve the latter order, and services rendered thereafter were on the main issues, resulting incidentally in the dissolution of the injunction, no fees were recoverable. Collins v. Huffman, 48 Wash. 184, 93 P 220. Where injunction is ancillary to principal relief sought, fees for defending suit generally should not be assessed as damages upon the dissolution of injunction. Dempster v. Lansingh, 234 Ill. 381, 84 NE 1032. Where, by statute, bond is conditioned to pay costs, damages and reasonable counsel fees as may be incurred by reason of injuction, it is necessary to show that services of counsel were rendered principally in procuring dissolution of injunction, but it is immaterial that service thus rendered inured to benefit of defendant in main case. Miller v. Donovan, 13 Idaho, 735, 92 P 991. If injunction is object sought by plaintiffs, then there could be no recovery of fees and expenses; but if injunction is asked merely to aid plaintiff to preserve his rights until he has obtained desired relief or to prevent commission of wrong before he can prosecute his suit to judgment, then a recovery may be had for fees and expenses in procuring discharge of such injunction. Graham v. Rice, 33 Ky. L. R. 441, 110 SW 231. Where, upon commencement of action, order was granted to show cause why injunction should not issue pendente lite, and in and by terms of order a temporary injunction was granted until hearing and determination of motion on said order, the preliminary injunction contained in order and the proposed injunction sought on return of the order should, for purpose of determining liability under the usual undertaking accompanying the preliminary injunction, be considered parts of same order, so as to authorize recovery of expense of counsel's appearance on return of order to show cause as damages under the injunction. Sargent v. St. Mary's Orphan Boys' Asylum, 190 N. Y. 394, 83 NE 38.

**43.** Dempster v. Lansingh, 234 Ill. 381, 84 NE 1032.

and allow the same before final hearing.[44] A federal court, having required a bond as a condition to the granting of an injunction, has the power in its discretion, on dissolution of the injunction, to assess the damages recoverable on the bond.[45] The Wisconsin statute contemplates a separate suit to recover damages after a decision in the injunction suit.[46]

(§ 4) *E. Appeal and review.* See 10 C. L. 281—The appealability of an order dissolving an injunction is not affected by a reference to ascertain the damages.[47] In Louisiana an appeal will not lie from an interlocutory order dissolving an injunction on bond where the alleged injury is pecuniary in its nature and the alleged damages compensable in dollars and cents.[48] Where special provision is made for appeals from interlocutory orders, the granting of a preliminary injunction cannot be assigned as error on appeal from a permanent decree.[49] The Texas statute authorizing appeals from orders granting or dissolving temporary injunctions applies only to interlocutory orders,[50] nor does such statute authorize an appeal from an order overruling a motion to dissolve such an injunction and continuing the same until final hearing,[51] or from an order denying a temporary injunction.[52] In Nebraska an order dissolving a temporary injunction may be superseded.[53] In Louisiana a suspensive appeal should not be granted from an order dismissing an injunction for lack of jurisdiction by reason of the pendency of a suspensive appeal in the main cause of action in another district.[54] Where the plaintiff dismisses his suit after dissolution of the injunction, there is nothing from which to appeal.[55] An appeal must, of course, be perfected within the time prescribed by the statute.[56] The granting or refusal of a temporary injunction will not be reversed except for an abuse of discretion,[57]

44. See Hurd's St. 1905, c. 69, § 12. Dempster v. Lansingh, 234 Ill. 381, 84 NE 1032.

45. Cimiotti Unhairing Co. v. American Fur Refining Co., 158 F 171.

46. Lewis v. Eagle [Wis.] 115 NW 361.

47. Mica Insulator Co. v. Commercial Mica Co., 157 F 92.

48. Goldstein v. Harris, 120 La. 744, 45 S 593.

49. Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 NE 132.

50. Act April 16, 1907, § 2 (Gen. Laws, p. 207, c. 107), does not apply to penal judgments granting or dissolving temporary injunctions. Act April 16, 1907, § 2 (Gen. Laws, p. 207, c. 107), applies only to interlocutory orders. Perry v. Turner [Tex. Civ. App.] 108 SW 192.

51. Laws 30th Leg., p. 206, c. 107, do not authorize appeal from order refusing to dissolve. Baumerger v. Allen [Tex.] 107 SW 506. **Contra.** Chancery v. Allison [Tex. Civ. App.] 20 Tex. Ct. Rep. 230, 107 SW 605.

52. Proceeding held to amount to dissolution of temporary injunction, and not a denial of a temporary injunction, and was therefore appealable under the statute. Caswell v. Fundenberger [Tex. Civ. App.] 20 Tex. Ct. Rep. 64, 105 SW 1017.

53. State v. Graves [Neb.] 117 NW 717.

54. Where a suspensive appeal had been granted in a contested nomination case, and an injunction subsequently granted in another district against secretary of state from accepting name of appellant for ballot had been dismissed by court issuing it for want of jurisdiction, it was proper for such court to refuse suspensive appeal and to force opposing party to have recourse to supreme court for mandamus. Le Blanc v. Michel [La.] 47 S 632.

55. Where after dissolving of a temporary injunction the plaintiff stated in open court that he dismissed the suit, but the court refused to incorporate this in the order of dissolution and plaintiff appealed, held such appeal could not be sustained, for if the suit was dismissed there is nothing to appeal from, and if the appeal was from an interlocutory order no appeal can be taken. Clevenger v. Cariker [Tex. Civ. App.] 111 SW 177.

56. Under Laws 30th Leg. p. 206, c. 107, amending Sayles' Ann. & Civ. St. title 56, art. 2989, allowing appeals in proceedings wherein an injunction is granted or dissolved provided same be taken within 15 days after entry of order of record, and Sayles' Ann. Civ. St. 1897, § 2995, providing that party to whom any writ is granted shall file same, etc., this section being the only provision prescribing what shall be done with orders made in vacation, the filing of the petition with the judge's order endorsed thereon constitutes the "entry or record of such order," and hence an appeal from an order refusing to dissolve an injunction taken more than 15 days after such endorsement was too late, there being no provision for appeals from orders dissolving injunctions, though upon such dissolution an order was made continuing the injunction upon plaintiff's amended petition. Baumberger v. Allen [Tex.] 20 Tex. Ct. Rep. 456, 107 SW 526.

57. Temple Baptist Church v. Georgia Terminal Co., 130 Ga. 364, 60 SE 862; Hester v. Exley, 130 Ga. 460, 60 SE 1053; Pope Mfg. Co. v. Washington, 130 Ga. 524, 61 SE 20; Bradfield v. Atlanta B. & A. R. Co., 130 Ga. 610, 61 SE 401; Town of Alapha v. Paulk, 130 Ga. 595, 61 SE 401; Lines v. Savannah, 130 Ga. 747, 61 NE 598; Willis v. Akin, 130 Ga.

but if an order modifying a temporary injunction is based on a mistaken view of the law, it is reviewable upon appeal,[58] and so, also, on appeal, a permanent injunction granted on interlocutory hearing may be amended so as to make it merely interlocutory.[59] When upon the undisputed facts the complainant is not entitled to the injunction, the order granting it will not be affirmed in order to preserve the status quo,[60] but the appellate court will not enter into the merits in a complicated case.[61] In passing upon the propriety of a temporary injunction, the sufficiency of the complaint will be assumed if a fair doubt of law or fact as to plaintiff's ultimate right of recovery is presented.[62] Where a statute provides for an appeal on the bill and answer and such affidavits and evidence as may be admitted by the judge, the court on appeal is authorized to consider the answer and affidavits and evidence only when the same constitute a part of the case before the judge.[63] No case on appeal is necessary on appeal from an order granting or refusing an injunction,[64] and the appeal itself is a sufficient exception and assignment of error, likewise when the judgment is rendered upon a case agreed, as when it is rendered upon a demurrer.[65]

§ 5. *Decree, judgment, or order for injunction.*[See 10 C. L. 282]—An injunction should be as clear and precise in its terms as possible, so that there may be no excuse for disobeying or misunderstanding it.[66] Relief by injunction must not be broader than is reasonably necessary for the complainant's protection.[67] A decree may be sufficiently complete to adjust all matters and rights affected by the injunction.[68] Money damages may be awarded together with an injunction,[69] and some-

736, 61 SE 599; Stephenson v. James, 130 Ga. 782, 61 NE 735; Cannady v. Herrington [Ga.] 62 SE 20; Meagher v. Schussler [Minn.] 118 NW 664. Preliminary injunction is a matter of discretion and is not subject to reversal in an appellate court unless there has been an abuse of discretion evidenced by a disregard of the facts or the principles of equity applicable to the case. Alaska Pac. R. & Terminal Co. v. Copper River & N. W. R. Co. [C. C. A.] 160 F 862; Phoenix Ins. Co. v. Carey, 80 Conn. 426, 68 A 993.

**Discretion held not abused:** In refusing to restrain city from taking land for a street. Wall v. Clayton, 130 Ga. 428, 60 SE 1047. In refusing to enjoin proceedings to lay out road. Hutchinson v. Lowndes County [Ga.] 62 SE 1048. In refusing injunction of levy of school tax. Henslee v. McLarty [Ga.] 62 SE 66. In refusing to restrain city from preventing obstructing of alleged public crossing over tracks until final hearing. Georgia R. & Banking Co. v. Atlanta [Ga.] 61 SE 1035. In restraining cutting of trees. Loudermilk v. Martin, 130 Ga. 525, 61 SE 122. In restraining enforcement of state grain inspection law pending final hearing on its constitutionality. Andrew v. Globe Elevator Co. [C. C. A.] 156 F 664.

58 Eau Claire Dells Imp. Co. v. Eau Claire, 134 Wis. 548, 115 NW 155.

59. City of Brunswick v. Williams [Ga.] 62 SE 230. Decree for injunction entered on interlocutory hearing, directed by supreme court to be amended so as to show that it was not a perpetual injunction. Unity Cotton Mills v. Dunson [Ga.] 62 SE 179.

60. Colby v. Equitable Trust Co., 124 App. Div. 262, 108 NYS 978.

61. On appeal from order granting temporary injunction in suit by stockholder to restrain execution of contract to transfer property of company without substantial consideration, where case presented was complicated, court would not consider offer of purchaser to furnish other considerations. Robinson v. New York, etc., R. Co., 123 App. Div. 339, 108 NYS 91.

62. Eau Claire Dells Imp. Co. v. Eau Claire, 134 Wis. 548, 115 NW 155.

63. Where hearing by the judge is ex parte and the order is made on the allegations of the petition alone, the court on appeal can consider the petition alone. City of Paris v. Sturgeon [Tex. Civ. App.] 110 SW 459.

64. Pleadings and affidavits constitute record. Wallace v. Salisbury [N. C.] 60 SE 713.

65. Wallace v. Salisbury [N. C.] 60 SE 713.

66. Oehler v. Levy, 139 Ill. App. 294.

67. In enjoining stabling horses in a city residence district, the court rightly refused to enjoin defendant from keeping any horses. Oehler v. Levy, 234 Ill. 595, 85 NE 271. Decree against the manufacture and sale of salt pursuant to a contract for purpose of maintaining prices held not sufficiently specific. Lone Star Salt Co. v. Blount [Tex. Civ. App.] 107 SW 1163. Where, in a suit to restrain further trespass to real estate and for damages, it appeared that the dispute arose out of the uncertainty of the location of the thread of a stream, and there was much evidence, and the verdict for damages established nothing on the point except the fact of trespass, the order making the injunction permanent should establish with accuracy the line beyond which the defendant is forbidden to go. Wood v. Pacolet Mfg. Co. [S. C.] 61 SE 95.

68. A decree enjoining interference with gas meters, etc., by a company attaching a governing appliance, should not interfere with the owner's right to have such appliance if he desires it, and should also provide for

times in lieu thereof.[70] The court may by its final order grant a decree whether or not it has granted an injunction pending proceedings.[71] A decree should not issue where the act sought to be enjoined has been completed,[72] but the bill in such case may, under some circumstances, be amended so as to authorize relief from the effect of such act.[73] An injunction may be granted in praesenti, to take effect upon the filing of a bond,[74] and a restraining order which does not contemplate a hearing as to whether a temporary injunction shall be allowed is of itself a temporary injunction.[75] Continuing in force, a temporary restraining order made by a clerk is in effect the granting of an injunction.[76] An injunction to restrain diversion of waters is a remedy in personam, and a decree is entitled to full faith and credit in a sister state, and may be enforced there.[77] The words "until the further orders of this court," contained in a restraining order in conjunction with a day set for hearing, have no other nor further meaning than "in the meantime."[78] An injunction against acts in futuro does not usually operate retroactively.[79] An injunction against the doing of acts in an illegal manner does not prohibit the subsequent doing of such acts in a legal manner.[80] An injunction conditioned upon the plaintiffs allowing the defendant to do certain things which the plaintiff is primarily legally bound to do does not impose upon the defendant the burden of doing such things.[81] Extra-judicial provisions in an injunction should be construed as advisory only, and not as an advance adjudication.[82] An injunction temporary in effect, though permanent in form, will be treated as a temporary injunction.[83]

removal of such appliance by the company in case of failure to pay therefor. Laclede Gaslight Co. v. Gas Consumers' Ass'n, 127 Mo. App. 442, 106 SW 91. Where, in coal mining, entries are wrongfully driven by one party through the coal of another, on enjoining the former from taking of any coal of the latter he is properly enjoined from going into or using such entries. McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 NE 174.

**69.** An action for injunction is always equitable, and when the court, in the exercise of its chancery powers, undertakes to administer such relief, it has jurisdiction to award compensatory damages when there has been a trespass. Atlantic & C. Air Line R. Co. v. Victor Mfg. Co., 79 S. C. 266, 60 SE 675. For other cases, see § 2I, and other special headings.

**70.** Damages in lieu of an injunction for unreasonable diversion of waters of a river to supply a municipality. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

**71.** Hurt v. Chess & Wymond Co., 33 Ky. L. R. 767, 111 SW 285.

**72.** Error to enjoin settlement of judgment against town where settlement had already been made. Farnsworth v. Wilbur [Wash.] 95 P 642.

**73.** Court should have permitted amendment to conform to proof, and then should have set aside settlement of judgment against town, though bill asked for injunctive relief only. Farnsworth v. Wilbur [Wash.] 95 P 642.

**74.** Order that injunction be granted, and that upon giving of bond an injunction shall issue, held itself an injunction, and hence no further order was necessary upon giving of bond. Collins v. Huffman, 48 Wash. 184, 93 P 220.

**75.** State v. Graves [Neb.] 117 NW 717.

**76.** Hurt v. Chess & Wymond Co., 33 Ky. L. R. 767, 111 SW 285. But see Baumberger v. Allen [Tex.] 20 Tex. Ct. Rep. 456, 107 SW 526, where it was held that continuing of injunction previously granted by court was not granting of injunction within statute relating to appeals.

**77.** Taylor v. Hulett [Idaho] 97 P 37.

**78.** Ex parte Grimes [Okl.] 94 P 668.

**79.** Where an injunction ancillary to ejectment enjoined rocking and sluicing, or in any manner working on premises in question, it did not prevent defendants from working dirt, taken from the ground in dispute, and removing to other property. Waskey v. McNaught [C. C. A.] 163 F 929.

**80.** Injunction, permanent in form, restraining town from enforcing relaying of sidewalk because town had failed to take proper preliminary steps, does not affect town's right afterwards to compel by proper steps the relaying of the walk. Converse v. Deep River [Iowa] 117 NW 1078. Injunction restraining road commissioners from carrying out or letting contract, or from issuing bonds, or from levying tax, etc., does not enjoin board from proceeding under statute authorizing improvement and in conformity to law. Road Imp. Dist. No. 1 v. Glover [Ark.] 110 SW 1031.

**81.** Requirement that lower riparian owner allow upper owner to clean out stream in front of former's land, as condition to injunction against certain use of stream by latter, did not preclude latter from applying to health commissioners to compel former to clean out such stream. Mason v. Apalache Mills [S. C.] 62 SE 871.

**82.** Directions as to how town should proceed to relay sidewalks, proceedings to lay which were enjoined as not in conformity with legal requirements. Converse v. Deep River [Iowa] 117 NW 1078.

**83.** Where judge, on appointing receiver for partnership, continued injunction re-

§ 6. *Violation and punishment.* See 10 C. L. 283—Where the court has jurisdiction to render the decree, parties are bound to obey its terms or suffer for contempt of court[84] despite the trivial damages resulting from such violation.[85] Although the injunction may be erroneously granted, it is not void, and until set aside or reversed on appeal it must be obeyed.[86] Where, however, the injunction is void, there is no contempt.[87] An appeal from an injunction does not have the effect of dissolving or suspending it, and any violation thereof is a contempt.[88] It must appear that there was an intentional violation of the injunction in order to punish for contempt.[89]

*Punishment for violation.* See 10 C. L. 283—Where a contempt is committed in connection with an injunction, it is not necessary to docket a new case against the contemnor under the Iowa Code.[90] Where there is no statute authorizing the appropriation of a fine imposed for a contempt to the party injured, an order that execution issue for the collection of the fine in the name of the people for the use of complainants will, on appeal, be modified by striking out the latter feature.[91] An injunction enjoining officers and agents of a corporation operates in personam only, and can be enforced only by attaching the bodies of the contumacious individuals and the infliction of punishment upon them.[92] Where the plaintiff seeks to have the defendant adjudged in contempt for the violation of an injunction against interfering with the plaintiff's lands, the plaintiff's title to the lands interfered with must be proved.[93]

§ 7. *Liability for wrongful injunction.*[94]

## INNS, RESTAURANTS AND LODGING HOUSES.

*The scope of this topic* is noted below.[95]

*Definitions.* See 10 C. L. 285—The legal definition of an inn and a hotel is practically the same,[96] and a bar to supply the guests with drink and a stable for the care

straining intervening creditor from proceeding under judgment against partnership assets, injunction was in effect a temporary one pending a hearing on the merits, and the fact that it was rendered at chambers was immaterial. Whilden v. Chapman [S. C.] 61 SE 249.

84. Mutual Milk & Cream Co. v. Heldt, 123 App. Div. 509, 108 NYS 565; State v. Dowdy [Ark.] 109 SW 1175.

85. Injunction against delivering milk to any of plaintiff's customers between certain dates. Defendant on one occasion delivered to three customers. Mutual Milk & Cream Co. v. Heldt, 123 App. Div. 509, 108 NYS 565.

86. Temporary mandatory order improvidently granted. Hatlestad v. Hardin County Dist. Ct., 137 Iowa, 146, 114 NW 628. Injunction against labor union which appeared in suit and made no objection to its being sued as entity. After injunction, union violated its terms, but excused its acts on ground that it was not legal entity and could not be sued. Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 402, 83 NE 932.

87. Castleman v. State [Miss.] 47 S 647. Where defendants are charged with contempt for violation of restraining order which standing by itself is void, and issues were made thereon, they can only be adjudged guilty of violating that order; and fact that order was issued on bill amendatory of another bill on which a valid injunction was granted is immaterial, as the order and bills must be considered separately. Id. Where restraining order is issued and fixes a day for parties to appear and show cause why temporary injunction should not issue, and upon such day neither party appears, and no further order is made, order thereby spends its force, and judgment holding a party in contempt is void. Ex parte Grimes [Okl.] 94 P 668.

88. Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 402, 83 NE 932.

89. Evidence insufficient to show that salesman intentionally sold certain bitters as angostura, contrary to the provisions of injunction. Siegert v. Eiseman, 157 F 314. Evidence sufficient to show intentional violation of an injunction. Hatlestad v. Hardin County Dist. Ct., 137 Iowa, 146, 114 NW 628. Where agent violates terms of injunction, his principal is not liable for contempt if done without his approval, express or constructive. Siegert v. Eisman, 157 F 314.

90. Hatlestad v. Hardin County Dist. Ct., 137 Iowa, 146, 114 NW 628.

91. Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 402, 83 NE 932.

92. Injunction against canceling an insurance certificate. Royal Fraternal Union v. Lundy [Tex. Civ. App.] 113 SW 185.

93. State v. Dowdy [Ark.] 109 SW 1175.

94. See 10 C. L. 285. See, also, Malicious Prosecution and Abuse of Process, 10 C. L. 657.

95. Excludes discrimination on account of race. See Civil Rights, 11 C. L. 629. As to bailments generally, see Bailments, 11 C. L. 365.

96. Nelson v. Johnson, 104 Minn. 440, 116 NW 828. Such hotel or inn is a house, the

of their horses are now no longer essential requisites of an inn,[97] nor is a dining room, cafe or restaurant to supply the guests with food now an essential requisite of an inn or hotel;[98] but there is a clear distinction between a mere private lodging house and a hotel where no meals are served,[99] and between a boarding house and an inn or hotel.[1] One cannot keep an inn and tavern in a boarding house,[2] but a hotel does not lose its character as such by reason of being located at a summer resort or a watering place.[3] Whether or not a particular place is an inn or a boarding house is a question of fact depending on the intention of the proprietor as evidenced by the character of the business conducted.[4] The proprietor of a lodging house, in connection with which meals are served and a bar operated, is an innkeeper,[5] and a patron, paying a stipulated sum for board and lodging at such a house, is a guest [6] as distinguished from a boarder.[7]

*Public regulations.* See 10 C. L. 285—An innkeeper, having taken out a license for conducting a hotel business, cannot be compelled to take out another license for anything which constitutes an essential part of such business.[8] By statute in some states it is made a criminal offense to obtain food, lodging, entertainment or other accommodations at an inn with intent to defraud the owner or keeper thereof.[9]

proprietor of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided and who comes in a situation in which they are fit to be received. The keeper of such a house is bound, without making any special contract therefor, to provide for all, to the limit of his facilities at a reasonable price; but proprietor of a private lodging house is not bound to receive all who apply, but may select his guests and contract specially with each. Id. An inn or hotel is a public house of entertainment for all who choose to visit same. Holstein v. Phillips, 146 N. C. 366, 59 SE 1037.

97. Nelson v. Johnson, 104 Minn. 440, 116 NW 828.

98. Nelson v. Johnson, 104 Minn. 440, 116 NW 828. House, kept with furnished rooms which were let for single night or longer, without special contract, to all who applied in a fit condition, in which was an office in charge of clerks, open for all hours, etc., etc., held a public hotel, although there were not maintained at or in connection therewith any facilities for supplying guests with food. Id.

99. Nelson v. Johnson, 104 Minn. 440, 116 NW 828.

1. Holstein v. Phillips, 146 N. C. 366, 59 SE 1037. Generally speaking, the distinction between an inn and a boarding house is that into the former all travelers have a right to enter and demand accommodation, but the keeper of a boarding house has a right to select his guests. Atlantic City v. Hemsley [N. J. Law] 70 A 322. A boarding house keeper is one who reserves right to select and choose his patrons and takes them in only by special arrangement, and usually for a definite time. Id.

2. Atlantic City v. Hemsley [N. J. Law] 70 A 322.

3. Holstein v. Phillips, 146 N. C. 366, 59 SE 1037.

4. Licensee held ipso facto to characterize place as a hotel. Atlantic City v. Hemsley [N. J. Law] 70 A 322.

5. Hart v. Roeckers, 7 Ohio N. P. (N. S.) 395.

6. Hart v. Roeckers, 7 Ohio N. P. (N. S.) 395. A guest is a transient person who resorts to and is received at an inn for purposes of obtaining accommodations which it purports to afford. Holstein v. Phillips, 146 N. C. 366, 59 SE 1037.

7. A boarder is distinguished from a guest as one who abides at a place, the relation arising by special contract and usually for a definite time. Holstein v. Phillips, 146 N. C. 366, 59 SE 1037.

8. Under subd. 27, § 14, of city charter of Atlantic City (P. L. 1902, p. 293), city council has no power to pass ordinance imposing a sleeping room license tax upon a hotel licensed and operated as an inn and tavern with right to sell liquors. Atlantic City v. Hemsley [N. J. Law] 70 A 322. Under § 46 of license ordinance of city of Louisville, imposing an annual tax on hotels and restaurants and defining "restaurants" as "every place where food or refreshments are prepared for casual visitors and sold for consumption therein," a change in management of hotel from "American" to "European plan" does not authorize city to charge a restaurant license in addition to hotel license, the furnishing of food to casual visitors being only an incident to business of hotel. New Galt House Co. v. Louisville, 33 Ky. L. R. 869, 111 SW 351.

9. Acts 1897, p. 123, c. 80, § 1 (Burns' Ann. St. 1901, § 7254a), making it an offense punishable by imprisonment to obtain accommodations at a hotel with intent to defraud owner or keeper, held not to contravene constitutional provision (Burns' Ann St. 1901, § 6), declaring there shall be no imprisonment for debt, etc. Clark v. State [Ind.] 84 NE 984. Acts 1897, p. 123, c. 80, § 1 (Burns' Ann. St. 1901, § 7254a), held to show with sufficient clearness that subject-matter to which fraudulent intent relates is price or value of accommodations. Id. Acts 1897, p. 123, c. 80 (Burns' Ann. St. 1901, § 7254), held not repealed, either by implication or by

Criminality, in such case, consists in the fraudulent purpose with which the act is done.[10]

*Duty to receive guests.*[See 10 C. L. 285]—At common law it is an indictable offense for the keeper of an inn or hotel to refuse to receive any guest and entertain him with meals or lodging or both,[11] and by statute, in some states, it is made a misdemeanor to do so without just cause or excuse,[12] and, hence, evidence that would suffice to show that a private house was a house of assignation might entirely fail to prove that of a licensed inn or hotel.[13]

*Liability for safety of guests.*[See 10 C. L. 288]—An innkeeper, operating a passenger elevator, must exercise at least ordinary care in the character of the appliance provided and in its maintenance and operation,[14] and this duty is owed to every person entering the hotel, either as guest, visitor or otherwise, using the elevator and having lawful business on the premises.[15]

*Rights and liability of guests.*[See 10 C. L. 288]—The authorities are meager upon the question of the rights of the guest with respect to the room or apartment assigned to him as against the right of the landlord to transfer him to some other room or apartment.[16]

*Liens.*[See 10 C. L. 288]—Under the common law and in some states by statute, a landlord has a lien upon the baggage and other property in and about an inn belonging to or under the control of his guest.[17]

*Liability for effects.*[See 10 C. L. 287]—There is no substantial difference as to the rights and liabilities of the keepers thereof between an inn and a hotel.[18] An inn-

repealing clause of 1905 (Laws 1905, p. 757, c. 168, § 699). Id.

10. Not in manner of obtaining food, etc., Clark v. State [Ind.] 84 NE 984. Affidavit on which prosecution was based held sufficient, when in language of statute stating that he obtained accommodation at hotel "with intent to defraud" owner and keeper. Id.

11. People v. Drum, 110 NYS 1096.

12. Penal Code, § 381. People v. Drum, 110 NYS 1096.

13. Evidence held insufficient to show that defendant had knowledge that woman, registering twice on same evening as wife of different parties, was the same woman. People v. Drum, 110 NYS 1096. Fact that man and woman received as man and wife are not such in fact held not sufficient to convict proprietor without knowledge thereof. Id.

14. McCracken v. Meyers [N. J. Err. & App.] 68 A 805.

15. McCracken v. Meyers [N. J. Err. & App.] 68 A 805. Privity of contract not essential. Id. Member of Master Car & Locomotive Painter's Association, having headquarters at defendant's hotel, injured in fall of elevator while going to floor above in reference to matter with which association was concerned. Defendant held liable. Id.

16. **NOTE. Right of innkeeper to transfer guest:** A search of the authorities fails to reveal any reported case bearing directly upon this point, except the Canadian case of Doyle v. Walker, 26 U. C. Q. B. 502, and the recent case of Hervey v. Hart, 149 Ala. 604, 42 S 1013, 123 Am. St. Rep. 67, 9 L. R. A. (N. S.) 213, in both of which it is held that an innkeeper has the right to assign the guest to an apartment, and to change such assignment without liability, except such as might result in damages for offering improper accommodations. In Malin v. McCutcheon, 33 Tex. Civ. App. 387, 76 SW 586, although the general proposition that an innkeeper would be liable for refusing to permit a guest to occupy a room to which he had been assigned was apparently assumed, the point was not directly passed upon, the court merely reversing the trial court, which had overruled a demurrer to certain portions of the complaint.

In Brown Hotel Co. v. Burckhardt, 13 Colo. App. 59, 56 P 188, the plaintiff left the hotel with his family for a day, having paid his bill in full, but with the understanding that he was to return in the evening and occupy the same room. During the day plaintiff's baggage was taken to the basement of the hotel and the room assigned to other parties. Upon the guest's return he was assigned to other rooms, but, upon sending for his baggage, a trunk was missing. The court held that the plaintiff remained a guest of the hotel during the day, and that the hotel keeper was liable for the loss.—Adapted from 9 L. R. A. (N. S.) 213.

17. Rev. St. § 4427b relating to lien of innkeeper, is merely declaratory of common law, and does not violate any constitutional provision. Thoma v. Remington Typewriter Co., 11 Ohio C. C. (N. S.) 174. Lien attaches to typewriter left at inn by guest who departed without paying his bill, notwithstanding guest had no title to machine, and had obtained possession by false pretenses. Id. Landlord's lien superior to right of true owner. Id.

18. Nelson v. Johnson, 104 Minn. 440, 116 NW 823.

keeper, at common law, is liable as an insurer for the loss of goods and money of the guest when placed infra hospitum [19] and by virtue of statute, in some states, the common-law rule applies where the innkeeper fails to comply with statutory requirements as to the posting of notices.[20] An innkeeper is responsible for property or valuables placed in his care,[21] and this rule is extended to boarding house keepers as well.[22] An innkeeper is absolutely liable for all thefts from within or unexplained losses of property belonging to his guest,[23] irrespective of negligence on his part.[24] In some states liability for goods placed in a hotel for safe keeping is based upon the creation of a bailment,[25] and the proprietor will be held liable for failure to exercise ordinary care,[26] a presumption of negligence arising, however, in case of an unexplained loss.[27] A boarding house keeper may be discharged from liability by the contributory negligence of his guest.[28] Liability as absolute insurer does not extend to the keeper of a boarding house,[29] his duty being merely to exercise such care as a prudent man would exercise over his own property under similar circumstances,[30] and the proprietor of a hotel is liable to a regular boarder only for his own or his employe's failure to exercise ordinary care with respect to the boarder's property.[31] A boarding house keeper is responsible for negligence of his servants in respect to a boarder's property.[32] Delivery of clothing by a patron to a restaurant waiter establishes between the patron and the restaurant keeper a bailment,[33] and an unexplained loss makes a prima facie case of negligence on the part of the bailee.[34] In such a case

**19.** Holstein v. Phillips, 146 N. C. 366, 59 SE 1037. Plaintiff arranged with proprietors to stop at their hotel at summer resort at reduced rate per week, but no definite time was fixed: Held, relation of innkeeper and guest was created, rendering proprietor liable as insurer for loss of valuables in plaintiff's room, keys to room being in custody of hotel during plaintiff's temporary absence. Id.

**20.** Revisal 1905, § 1913, not followed. Common law applicable. Holstein v. Phillips, 146 N. C. 366, 59 SE 1037.

**21.** Hart v. Roeckers, 7 Ohio N. P. (N. S.) 395.

**Evidence** held to show that money was deposited for safekeeping by giving same to employe, held out and authorized to act as clerk, rendering proprietor liable for loss. Zimmerman v. Murphy, 131 Ill. App. 56. Evidence held to show that innkeeper returned money to guest, notwithstanding that latter retained former's receipt therefor and produced same in evidence. Vandergrift v. C. O. Clark Hotel Co., 140 Ill. App. 256.

**22.** Where one pays a stipulated amount for his board and lodging and deposits a sum of money with his landlord for safekeeping, the latter is liable for the money so taken, whether he be regarded as an innkeeper or boarding-house keeper. Roeckers v. Hart, 11 Ohio C. C. (N. S.) 380.

**23.** Gilbert v. Williams, 107 NYS 715.

**24.** Money stolen in nighttime, where no negligence on part of either party. Nelson v. Johnson, 104 Minn. 440, 116 NW 828.

**25.** Placing trunk in custody of proprietor of hotel, in room provided for that purpose, held to create a bailment. Hoyt v. Clinton Hotel Co., 35 Pa. Super. Ct. 297. Suit case with contents left with proprietor held to establish bailment. Heiser v. Berger Catering Co., 128 Mo. App. 210, 106 SW 579.

**26.** Hoyt v. Clinton Hotel Co., 35 Pa. Super. Ct. 297. Where evidence failed to show exercise of ordinary care or delivery of suitcase left in proprietor's care, held guest was entitled to value of case and contents. Heiser v. Berger Catering Co., 128 Mo. App. 210, 106 SW 579. Innkeeper as bailee for hire cannot by special contract relieve himself against his own fraud or negligence. Hoyt v. Clinton Hotel Co., 35 Pa. Super. Ct. 297.

**27.** Hoyt v. Clinton Hotel Co., 35 Pa. Super. Ct. 297.

**28.** Insisting on having door of boarding house left unlocked at all times held an element tending to show negligence on boarder's part. Gilbert v. Williams, 107 NYS 715.

**29.** Holstein v. Phillips, 146 N. C. 366, 59 SE 1037; Gilbert v. Williams, 107 NYS 715.

**30.** Gilbert v. Williams, 107 NYS 715.

**31.** Holstein v. Phillips, 146 N. C. 366, 59 SE 1037.

**32.** Gilbert v. Williams, 107 NYS 715. Evidence held insufficient to show actionable negligence on part of boarding house keeper for loss of wearing apparel taken from plaintiff's room. Id.

**33.** Vogelsang v. Fredkyn, 133 Ill. App. 356.

**34.** Vogelsang v. Fredkyn, 133 Ill. App. 356. That defendant did not authorize head waiter or any waiter to accept hats or coats from guests, where it did not appear that he did not permit them to so do, held no defense. Id. Fact that defendant could not find waiter who took possession of property, and that he expected to prove that no waiter took same, held no defense. Id.

"not responsible" notices are not binding upon a patron unless he has notice thereof [35] and consents to their terms.

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**Inquest of Damages; Inquest of Death,** see latest topical index.

## INSANE PERSONS.


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*The scope of this topic* is noted below.[36]

§ 1. *Existence and effect of insanity in general.* See 10 C. L. 237—One is deemed to be insane when unable to transact the ordinary affairs of life, understand their nature and effect, and exercise his will respecting them.[37] Generally, the presumption of sanity prevails and the burden of proof rests upon one who asserts the contrary; [38] but when a man becomes chronically of unsound mind,[39] or is adjudged to be of unsound mind, he will be presumed to so continue until the contrary is shown.[40] Similarly, it has been held that the appointment of a guardian for a person alleged to be non compos mentis by a court having jurisdiction creates the same presumption of mental infirmity, which presumption will prevail for at least a reasonable time thereafter.[41] An adjudication of insanity, however, cannot of itself relate to a prior time as evidence of incapacity, but, when it is shown that the mental condition of the ward had been the same for a considerable length of time and was the same at the time of the act affected by it as when the adjudication was had, the adjudication is competent evidence of previous insanity.[42]

§ 2. *Inquisitions.* See 10 C. L. 238—In the absence of any statute regulating the procedure, the chancery or probate courts of the place of residence of the supposed lunatic is usually the proper forum in which to conduct an inquiry as to sanity; [43] but

**35.** Vogelsang v. Fredkyn, 133 Ill. App. 356.

**36.** This topic includes only adjudications of insanity and the rights and disabilities of adjudicated lunatics. Contractual capacity in general (see Incompetency, 11 C. L. 1885), testamentary capacity (see Wills, 10 C. L. 2035) and capacity to commit crime (see Criminal Law, 11 C. L. 940), are elsewhere treated. General principles applicable to all guardianships, such as the person, appointment and qualifications of the guardian or committee, the compensation of the guardian, and his liability upon his bond, are more fully treated elsewhere. See Guardianship, 11 C. L. 1671.

**37.** Kaack v. Stanton [Tex. Civ. App.] 112 SW 702.

**38.** Schindler v. Parzoo [Or.] 97 P 755. Opponent of will has burden of proof as to insanity. Succession of Jones, 120 La. 986, 45 S 965.

**39.** Kaack v. Stanton [Tex. Civ. App.] 112 SW 702.

**40.** West v. McDonald [Ky.] 113 SW 872; Kaack v. Stanton [Tex. Civ. App.] 112 SW 702. Instruction held correct. Kaack v. Stanton [Tex. Civ. App.] 112 SW 702. Finding of inquisition in lunacy that party is insane, with or without lucid intervals, during given period, throws upon party relying upon act done by lunatic during this period burden of showing that it took place during lucid interval. In re Kehler [C. C. A.] 159 F 55. Where alleged bankrupt committed alleged acts of bankruptcy on Jan. 3, 1907, and petition to have him adjudged bankrupt was filed Feb. 22, and on March 2nd inquisition found him to have been insane from Dec. 22, 1906, with lucid intervals prior to Feb. 1, 1907, answering in bankruptcy proceedings showing such facts is prima facie proof of insanity at time alleged acts of bankruptcy were committed. Id.

**41.** Schindler v. Parzoo [Or.] 97 P 755.

**42.** Where mental weakness is concomitant of old age and has been gradual and continuous for considerable period and not the result of recent or intervening cause, but of natural and gradual decay, such evidence is competent to show that conditions have not changed. Schindler v. Parzoo [Or.] 97 P 755.

**43.** Probate court and upon appeal, appellate court are proper forums in which to determine fact of mental incapacity. In re Phillips [Mich.] 15 Det. Leg. N. 683, 117 NW 630. Under Rev. St. 1899, § 4160 (Ann. St. 1906, p. 2253) and Rev. St. 1899, §§ 3650, 3653, 3654 (Ann. St. 1906, p. 2060), as amended by Laws

in Kentucky, when no court of general equity jurisdiction is in session, inquests may be held by the presiding judge of the county, or city court, or the police judge,[44] and the validity of proceedings in such case depends upon the action taken at the time and not upon the failure of the judge to perform clerical duties.[45] A substantial compliance with the statutes regulating such proceedings is all that is necessary.[46] In New York any person, even a stranger, may present a petition for the issuance of a commission to inquire into the mental condition of an alleged incompetent.[47] Notice of such application is required by statute to be given certain persons,[48] unless sufficient reasons are shown to exist for dispensing with such notice,[49] and, although the statute does not so state, it is also necessary that personal and written notice shall in general be given to the alleged incompetent.[50] It is then the duty of the court to which the petition has been presented either to issue a commission or to direct the questions of fact to be tried before a jury, if it presumptively appears to the satisfaction of the court from the petition and the proofs accompanying it, that the case is one of a person incompetent to manage himself or his affairs and that a committee ought in the exercise of a sound discretion be appointed,[51] but the court is not limited to the petition and proofs accompanying it, and should accept from those entitled to be heard whatever aid that they can render to the court in the exercise of its sound discretion.[52] Finally, in this same state, the validity of a finding by the jury is not affected by the fact that the commissioners add a statement thereto that certain of their number do not concur in such finding.[53] In the District of Columbia, where the lunacy charged is of such dangerous character as to constitute a public menace, notice to the person charged on the day of the hearing is sufficient as against collateral attack, provided, of course, it be given before the hearing.[54] The Florida statute, as amended is held to be constitutional.[55]

The person charged with mental incapacity is usually entitled to a finding by a jury if he so elects.[56] Generally, any witness who knows the facts, having stated such fact, may express opinions, founded on such knowledge, as to a person's mental condition.[57] The judgment in such a proceeding merely determines the mental

1903, p. 200, wife residing with husband and having her property in certain county is resident of such county and within jurisdiction of its court in proceedings to determine sanity, though place in asylum in another county. State v. Wurdeman, 129 Mo. App. 263, 108 SW 144.

44. Under Gen. St. 1888, c. 53, § 14, county judge has authority to hold inquest while circuit court is not in session. Logan v. Vanarsdall, 33 Ky. L. R. 508, 110 SW 321.

45. Failure of judge of county court to return papers to circuit court does not affect validity of proceedings. Logan v. Vanarsdall, 33 Ky. L. R. 508, 110 SW 321.

46. Since Gen. St. 1888, c. 53, § 15, is merely directory, fact that affidavit that person found of unsound mind has been restored to his senses is by oversight signed above jurat does not affect validity of proceedings, since statute is substantially complied with. Logan v. Vanarsdall, 33 Ky. L. R. 508, 110 SW 321.

47. Under Code Civ. Proc. § 2323, nonresident distant relative, one of heirs at law, but not next of kin, may petition. In re Burke, 110 NYS 1004.

48. Code Civ. Proc. § 2325, requires notice to be given to husband or wife, if any, or to one or more relatives of alleged incompetent. In re Burke, 110 NYS 1004.

49. Reasons must be strong. In re Burke, 110 NYS 1004.

50. In re Burke, 110 NYS 1004.

51. Code Civ. Proc. § 2327. In re Burke, 110 NYS. 1004. Not every case of mental weakness or impaired intellectual power will justify court in exercising power vested in its sound discretion, but conditions of statute must be present, since if incompetency alone existed conditions might be such as would render appointment purposeless. In re Burke, 110 NYS 1004.

52. Under Code Civ. Proc. § 2327, held error for court to exclude all proof except petition and supporting affidavits. In re Burke, 110 NYS 1004.

53. Code Civ. Proc. §§ 2328, 2331, 2332, provides for finding by jury, and makes signing by commissioners mandatory regardless of their views. In re Lewis, 57 Misc. 670, 109 NYS 1112.

54. Logue v. Fenning, 29 App. D. C. 519.

55. Gen. St. 1906, § 1200, as amended by Laws 1907, c. 5706, p. 211. Ex parte Scudamore [Fla.] 46 S 279.

56. In re Phillips [Mich.] 15 Det. Leg. N. 683, 117 NW 630.

57. Kaack v. Stanton [Tex. Civ. App.] 113 SW 702.

state at the time of the last inquest and in no way conflicts with or annuls prior contrary judgments.[58]

*Appeal.*—The holdings are not uniform on the question of the right of appeal in lunacy proceedings: Thus, in Texas, no appeal lies from a decision in a proceeding to have a person adjudged a lunatic and sent to an asylum;[59] in Missouri no appeal may be taken from a verdict of the jury in lunacy proceedings,[60] the superintending control of the circuit court over the probate court being exercisable only by an original writ of certiorari, mandamus, or prohibition, issuing out of the former and directed to the latter;[61] while in Indiana a prosecuting attorney, appearing and defending a proceeding for an adjudication of incompetency and for the appointment of a guardian for a person of alleged unsound mind, cannot appeal from a judgment in favor of the petitioner.[62] In New York, it is held that the court's discretion under the statute is the discretion of supreme court, and not of any one part or term thereof, and that when an appeal from a discretionary order is taken to the appellate division the party appealing is entitled to have it reviewed.[63] Where the right to appeal lies, the ordinary rules governing appeals apply, and a verdict or finding on the question of a person's sanity will not be disturbed on appeal if sustained by the evidence,[64] and a verdict which the jury is coerced to render will be set aside.[65]

In Louisiana, where the alleged lunatic dies pending appeal from a judgment of interdiction, the suit abates and the judgment has no effect as res adjudicata.[66]

*Costs.*—In New York costs and disbursements should not be awarded against an unsuccessful petitioner where there is reason to believe that respondent was not of sound mind when the proceedings were begun,[67] nor can the court award costs in such case against the incompetent's property since a finding of sanity deprives the court of any control over such property,[68] nor should an alleged incompetent, tried and adjudged a lunatic without an opportunity to defend, be required to pay any part of the expenses incurred in such proceeding as a condition to setting aside the verdict and ordering another hearing.[69] The compensation of the commissioners in New York is fixed by court rule.[70] In New Jersey, the unsuccessful petitioner is entitled to costs, including counsel's fees and expenses, where he has acted in good faith from justifiable motives, and there is a fund under the court's control out of which payment can be ordered to be made.[71] In Missouri where the person at whose

58. Judgment of circuit court committing one to asylum does not conflict with, nor is it annulled by, a subsequent judgment of county court finding him sane about a month later, after dismissal from asylum as improved. Logan v. Vanarsdall, 33 Ky. L. R. 508, 110 SW 321.

59. Neither Rev. St. 1895, title 9, c. 1, subd. 5, nor constitutional provision conferring appellate jurisdiction on district court, are applicable; nor can proceeding be regarded as one under Rev. St. 1895, art. 2735, regulating probate proceedings. Glenn v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 828, 107 SW 621.

60. Rev. St. 1899, c. 39, §§ 278, 1674 (Ann. St. 1906, pp. 434, 1217, 2060-2072), make no provision for such appeal. Morris v. Morris, 128 Mo. App. 673, 107 SW 405.

61. Morris v. Morris, 128 Mo. App. 673, 107 SW 405.

62. Under Burns' Ann. St. 1901, § 2715, prosecutor has no further duty nor statutory authority to proceed after motion for new trial is stricken from files. Keely v. Keely, 41 Ind. App. 672, 84 NE 767.

63. In re Burke, 110 NYS 1004.

64. In re Hammond, 112 NYS 296; In re Phillips [Mich.] 15 Det. Leg. N. 683, 117 NW 630. Evidence held overwhelmingly against finding. In re Lewis, 57 Misc. 670, 109 NYS 1112.

65. Evidence held to show jury were coerced into agreement. In re Lewis, 57 Misc. 670, 109 NYS 1112.

66. Such judgment is not res adjudicata in cause contesting will on ground of testator's insanity. Succession of Jones, 120 La. 986, 45 S 965.

67, 68. In re Hammond, 112 NYS 296.

69. In re Hammond, 110 NYS 643, rvg. 55 Misc. 124, 106 NYS 285. See, also, In re Hammond, 112 NYS 297, which is apparently nullified by this decision.

70. Rule 71. In re Hammond, 112 NYS 298. Court rule 71 limits compensation of commissioners to $10 per day. In re Hammond, 112 NYS 297.

71. Funds in hands of receiver appointed pendente lite held available. In re Sulk [N. J. Eq.] 70 A 661. Where, upon application for

instance insanity proceedings are had is not an officer acting officially, the court may tax the costs against him if the suit is unsuccessful,[72] and no appeal may be taken from a judgment for costs in a lunacy inquiry or from the action of the court in any ruling on a motion to tax or retax costs.[73] In Nebraska a county cannot recover from the insane person's estate the costs and expenses incident to the examination before the commissioners of insanity.[74]

§ 3. *Custody, guardianship and support. Guardianship.*[See 10 C. L. 288]—The state has inherent jurisdiction over insane persons for the purpose of protecting both the public and the incompetents from their insane acts,[75] the jurisdiction of the courts and the manner of its exercise being usually regulated by statute,[76] though where that has not been done jurisdiction may usually be exercised according to the established practice of the courts in lunacy cases.[77] In exercising this jurisdiction in the appointment of committees, the health and comfort of the incompetent and the preservation of his estate are primary and guiding considerations, the consideration to which the claims of the next of kin are entitled being merely secondary.[78]

The proceedings for the appointment of a committee are generally initiated by petition of one authorized by statute to so petition,[79] together with notice to the persons required by statute to be notified,[80] but such notice may in some states be dispensed with.[81] After proper petition and notice, questions of the sufficiency of

commission in nature of writ de lunatico inquirendo, case is made which moves court to appoint receiver pendente lite, and afterwards, upon the inquest subject of inquisition is found to be of sound mind, court will, in discharging receiver, allow him compensation for his services, and will allow petitioner taxed costs of proceedings, including reasonable counsel fee and expenses reasonably and properly incurred. Id.

**72.** Rev. St. 1899, § 3656 (Ann. St. 1906, p. 2062). Morris v. Morris, 128 Mo. App. 673, 107 SW 405.

**73.** Rev. St. 1899, §§ 39, 278, 1674 (Ann. St. 1906, pp. 434, 1217, 2060-2072), make no provision for such appeal. Morris v. Morris, 128 Mo. App. 673, 107 SW 405.

**74.** Such action not authorized under Cobbey's Ann. St. 1903, § 9637. Kearney County v. Elsam [Neb.] 116 NW 270.

**75.** Sporza v. German Sav. Bank, 192 N. Y. 8, 84 NE 406.

**76.** In re Andrews [N. Y.] 85 NE 699, rvg. 109 NYS 831. Const. 1894, art. 6, § 1, continuing supreme court with general jurisdiction in law and equity, preserves jurisdiction over lunatics and their property, originally vested in chancellor and court of chancery, and subsequently transferred to supreme court as it existed prior to Const. 1846. Id. On separation from Great Britain at time of revolution, so much of law as formed part of king's prerogative as was applicable under our form of government was vested in people of state and by legislative enactments was transferred to chancellor, who should have care of and provide for safe keeping of all idiots and lunatics and of their real and personal estates. Act March 20, 1801 (1 Rev. Laws 1813, p. 147, c. 30). Sporza v. German Sav. Bank, 192 N. Y. 8, 84 NE 406. Upon organization of supreme court, this jurisdiction was transferred to it. Id. Superior court has jurisdiction to appoint guardians for insane persons wholly independent of its jurisdiction to commit to hospitals. Donaldson v. Winningham, 48 Wash. 374, 93 P 534.

**77.** In re Andrews [N. Y.] 85 NE 699, rvg. 109 NYS 831.

**78.** Next of kin and heirs merely entitled to be heard with respect to appointment where they themselves are eligible. In re Andrews, 109 NYS 831.

**79.** Under statute permitting friends or relatives of incompetent to apply for appointment as guardian, a brother-in-law describing himself in his petition as friend may be appointed, though incompetent has relatives by consanguinity residing within county. Wagner v. Wayne Probate Judge, 151 Mich. 74, 14 Det. Leg. N. 826, 114 NW 868. "Friend" is one entertaining regard for another and taking active interest in his welfare. Id. Under Rev. Laws 1902, c. 145, § 40, petition by mayor and overseers of poor of city, and another, named in amended petition as incompetent's friend, is sufficient for appointment of conservator. Delano v. Clark, 199 Mass. 540, 85 NE 847.

**Amendment** of petition may be allowed. Delano v. Clark, 199 Mass. 540, 85 NE 847.

**80.** Code Civ. Proc. §§ 2322, 2323a, 2325, 2339. It is legislative intent that notice shall be given, if possible, to relatives. In re Andrews [N. Y.] 85 NE 699, rvg. 109 NYS 831. Laws 1903, p. 242, c. 130. Service of notice of application for appointment of guardian upon insane person and upon person having care, custody, and control of such person, is jurisdictional, and if no such notice is served all subsequent proceedings are void. Donaldson v. Winningham, 48 Wash. 374, 93 P 534.

**81.** Personal service upon alleged incompetent may be dispensed with when judge, in exercise of sound discretion, deems such action proper, as when affidavits of physicians

the evidence to warrant the appointment,[82] and as to the person of the appointee,[83] are governed by the ordinary rules,[84] though where the next of kin or the heirs are equally as well qualified as others, they should be given the preference.[85] In New York a committee of the person and estate of an insane infant is not ordinarily appointed though there is no legal objection to such course,[86] and the court appointing a committee has power to correct the spelling of the incompetent's name by stating the various names under which he has been known.[87] In Michigan findings of law and fact need not be made in proceedings for the appointment of a guardian unless required by statute,[88] and the question of appointing a special guardian is addressed to the sound discretion of the court and is to be determined by the apparent condition of the ward or his estate or both,[89] and where the issue of incompetency has been determined on application for a general guardian, it is not necessary that there be a new hearing and determination of that issue,[90] a proper showing within the statute being made by the proofs produced at the hearing on the application for a general guardian.[91] In Washington, where the court has jurisdiction to appoint guardians for insane persons wholly independent of its jurisdiction to commit to hospitals, the validity of the order appointing the guardian depends in no manner upon the validity of the previous adjudication of insanity, in the absence of fraud or conspiracy.[92] In Virginia an order appointing a committee is an adjudication upon all the facts necessary to give the court jurisdiction to make the order and it is to be presumed that the record in which the order was entered was such as to authorize its entry, and and therefore its validity cannot be collaterally impeached or inquired into.[93] In Nebraska the heirs, apparent or presumptive, or those dependent upon an alleged incompetent for support, may appeal from an order of the county court dismissing their petition for the appointment of a guardian for such incompetent,[94] and in Ohio such an appeal transfers to the appellate court the entire case and empowers it upon a proper finding to appoint a guardian.[95] Whereupon it is the duty of the clerk of such court to certify, by a duly authenticated transcript,

state that service would excite and harm. In re Andrews, 112 NYS 167. Jurisdiction of court over person and property of incompetent is general, and, although ordinarily notice of presentation of petition originally for appointment of committee is required to be given to husband or wife, if any, or to one or more relatives of incompetent, or to public officer specified by statute, yet court acquires jurisdiction without such notice if sufficient reasons for dispensing therewith are set forth in petition or accompanying affidavits. In re Andrews, 109 NYS 831.

82. Evidence sufficient to sustain order appointing guardian of incompetent person. In re Deleglise, 134 Wis. 41, 114 NW 130. Evidence held insufficient to warrant appointment of committee where alleged incompetent 95 years old had conveyed his estate to himself and four other trustees for purpose of founding charitable organization, reserving income to himself for life. In re Burke, 110 NYS 1004.

83. In re Anderson, 109 NYS 831.

84. See Guardianship, 11 C. L. 1671.

85. In re Andrews, 109 NYS 831.

86. In re McMillan, 110 NYS 622. In case of infant incompetent, general guardian can exercise all functions of committee. Id.

87. Sporza v. German Sav. Bank, 192 N. Y. 8, 84 NE 406.

88. No statute so requires. In re Phillips [Mich.] 15 Det. Leg. N. 853, 117 NW 630.

89. Wagner v. Wayne Probate Judge, 151 Mich. 74, 14 Det. Leg. N. 826, 114 NW 868.

90. Comp. Laws, § 8710. Wagner v. Wayne Probate Judge, 151 Mich. 74, 14 Det. Leg. N. 826, 114 NW 868.

91. Wagner v. Wayne Probate Judge, 151 Mich. 74, 14 Det. Leg. N. 826, 114 NW 868.

92. Donaldson v. Winningham, 48 Wash. 374, 93 P 534.

93. Silence or incompleteness of record of county court respecting orders appointing committees of lunatic will not avail in collateral attack. Howard v. Landsberg's Committee [Va.] 60 SE 769. Lunatic's committee in ejectment to recover land sold in action against former committee cannot question validity of order appointing former committee nor of sale, where after such appointment and sale and upon temporary restoration to sanity and upon his motion order was made that his committee surrender to him such of estate as was then in his hands. Id. Alleged failure to notify incompetent. Id.

94. Tierney v. Tierney [Neb.] 115 NW 764.

95. Rev. St. § 6302. Appeal from probate order refusing to appoint guardian, and dismissing application, to court of common pleas. In re Oliver's Guardianship, 77 Ohio St. 474, 83 NE 795.

the order, judgment and proceeding to the lower court.[96] In Ohio exclusive original jurisdiction to remove a guardian is vested in the probate court and the court of common pleas is without original jurisdiction to entertain an application for such purpose.[97] In New York a committee cannot be removed without notice, or in a proceeding not asking for such relief, where proper independent proceedings for such removal have been instituted,[98] and the court has no power to amend an order removing a committee on a motion to resettle such order where the ostensible purpose is to reverse and nullify the removal ordered.[99]

Statutes regulating the appointment of guardians for insane persons must, of course, conform to constitutional limitations.[1]

*Custody.*—Where an insane person is released from a sanatorium during proceedings to remove the committee on charges involving the latter's fitness and morality, other provision should be made for the former's custody than placing him in the latter's custody pending determination of removal proceeding.[2]

*Support in general.*[See 10 C. L. 288]—At common law an insane person was liable for the reasonable value of things furnished him necessary for his support.[3] In Virginia the jurisdiction of the court to authorize the application of the proceeds of the corpus of insane infants' real estate to their maintenance is entirely statutory and, according to statute, such authority must be given, if at all, before and not after the expenditure has been made.[4] In New York, where an estate if carefully managed will yield sufficient income for the incompetents' needs, the principal should not be reduced until the income substantially fails.[5] In West Virginia the committee of a lunatic acts in a fiduciary capacity and is entitled to have doubt and uncertainties as to the construction of a will removed by a court of equity, where the law affords him no method by which his rights, powers and liabilities may be defined.[6]

**96.** In re Oliver's Guardianship, 77 Ohio St. 474, 83 NE 795.

**97.** Rev. St. § 524. In re Oliver's Guardianship, 77 Ohio St. 474, 83 NE 795. Where application for removal is made in first instance to court of common pleas, it is not error to sustain general demurrer to such application and to dismiss proceeding. Id.

**98.** Under Code Civ. Proc. §§ 2322, 2323a, 2325, 2329, 2342. In re Andrews [N. Y.] 85 NE 699, rvg. 109 NYS 831.

**99.** Where bond of substituted committee has been approved and filed and application for stay pending appeal from order is pending before another justice. In re Andrews, 57 Misc. 88, 108 NYS 915.

**1.** Gen. St. 1906, §§ 1200-3, as amended by Laws 1907, c. 5706, p. 211, do not violate Florida Const. art. 5, § 7, in conferring jurisdiction to inquire into sanity of certain persons, appoint guardians for insane, and commit them to asylums, neither do they violate Declaration of Rights, § 3, because they fail to provide jury trial, nor do they violate U. S. Const., art. 14, § 1, nor Florida Declaration of Rights, § 12, as taking property without due process of law, since they provide notice to lunatic sufficient to fulfill requirements of provisions of constitution, and opportunity to be heard and making ample provision by which any relative or friend may at any time have his insanity inquired into with view to release. Ex parte Scudmore [Fla.] 46 S 279. Appointment of committee under Code Civ. Proc. § 2323a does not deprive one of property without due process of law. Sporza v. German Sav. Bank, 192 N. Y. 8, 84 NE 406.

**2.** In re Andrews, 111 NYS 417.

**3.** State Commission in Lunacy v. Eldridge [Cal. App.] 94 P 597.

**4.** Code 1904, §§ 2604, 2605, 1702, 1703. Hess v. Hess [Va.] 62 SE 273. Error to allow guardian, who claimed only $600, $1991.35 for three years' maintenance of incompetent wards, where latter sum was more than their property was worth and guardian had no authority to charge ward's property therewith. Id. Will held to give guardian no power to appropriate any portion of principal of estate to support of wards in addition to rents and profits. Id. Where guardian, without being authorized, charges principal of estate with maintenance of wards, he cannot be reimbursed out of estate of deceased wards. Id.

**5.** In re Andrews, 112 NYS 167. Held by court that certain unoccupied premises be surrendered, that purchase price of unnecessary automobile be disallowed, that counsel fees be not allowed pending appeal, that counsel's and physician's fees in proceeding not subserving incompetent's interest be not allowed, that general allowance to committee of person be decreased on account of shrinkage of income of incompetent's estate, and that certain other sums be allowed. Id.

**6.** Where committee sought to sell certain

*Support of inmates of hospitals and asylums.*[See 10 C. L. 288]—In Iowa the relatives of a person confined in an asylum are liable for the latter's support,[7] and the auditors of the several counties are authorized and empowered by statute to collect from the property of patients in insane hospitals any sum paid by the county on their behalf in the same manner as any other claim is collected.[8] However, where such a claim is filed in guardianship proceedings in the probate court, it has been held that it is not triable by jury[9] and the district court, as a court of probate, having obtained jurisdiction of the guardianship, alone has authority to order the guardian to pay over to the state money in his hands.[10] In such an action testimony of a member of a board of supervisors that he made an estimate, based on the expenses of keeping all patients, and found that the expense for each was approximately a certain sum per month, is competent.[11] A county obtaining judgment against an insane person may obtain an order on the guardian to pay enforcible by attachment or by execution sale.[12] In the District of Columbia the reduced rates of maintenance provided by act of congress to be deducted from the pensions of the inmates of the government hospital is intended to apply to all pensioners and not alone to inmates of the national home for disabled volunteers transferred to that institution.[13] In California the statutory requirements that certain persons are liable for the support of their indigent, insane kindred confined in a state hospital have been held constitutional.[14] An action to enforce such liability for support of a patient in the state hospital[15] may be brought in the name of the hospital,[16] and

property of ward to pay indebtedness and maintenance, will construed not to authorize such procedure. McDonald v. Jarvis [W. Va.] 60 SE 990.

7. Wapello County v. Eikelberg [Iowa] 117 NW 978. Husband is liable to county for sums paid by it to state for care of wife confined in insane hospital. Id. Code, § 2297, construed. Id. Words "relative" and "relation," technically construed, refer to one connected by ties of blood, but employed in generic senses include those connected by affinity as well as consanguinity. Id.

8. Code, § 2297, authorizes collection of claim by action, judgment and execution. Gressley v. Hamilton County, 136 Iowa, 722, 114 NW 191.

**Defenses:** Evidence held sufficient to sustain finding that work done for county by insane person was only such as was necessary for his health and was performed for such purpose. Dallas County v. Thornley [Iowa] 118 NW 530.

9. Code, § 2297. Dallas County v. Thornley [Iowa] 118 NW 530. Probate court has not exclusive jurisdiction, but having gone into probate court there can be no jury trial. Id.

10, 11. Dallas County v. Thornley [Iowa] 118 NW 530.

12. Code, §§ 3954, 2297. Gressly v. Hamilton County, 136 Iowa, 722, 114 NW 191. Judgment in favor of county against insane person for amount county has paid for his support in insane hospital which declares that it was not intended as order directing sale of property by guardian, is not direction that judgment shall not be enforced by sale on execution, and judgment may be thus enforced. Id. Judgment for the amount paid by a county for his support in an insane hospital, in which the guardian appeared and did not object to the form of the proceedings nor ask to have the proceedings transferred to another court, is valid, at least as an allowance of a claim against the guardian and the incompetent's estate. Id.

13. Act Congress Feb. 20, 1905 (33 Stat. 731, c. 593, U. S. Comp. St. Supp. 1905, p. 660). Logue v. Fenning, 29 App. D. C. 519. Act is further extension of charity or bounty to pensioners in pursuance of benevolent policy shown in all legislation in respect to pensions founded on military service, and ought to be liberally construed. Id.

14. Pol. Code, § 2176, is not unconstitutional as class legislation, taking property without due process of law, nor as amounting to double taxation. State Commission in Lunacy v. Eldridge [Cal. App.] 94 P 597. Act 1897, p. 311, c. 227, providing for recovery of cost of supporting insane patients from certain classes, is not unconstitutional as class legislation. Napa State Hospital v. Dasso, 153 Cal. 698, 96 P 355. Act 1897, p. 311, c. 227, providing for recovery for cost of supporting patients of Napa Hospital, is not unconstitutional under Const. art. 12, § 1, since that section relates to creation of private corporations by special law, while law above creates public hospital as governmental agent of state. Id.

15. Action for the support of a patient in the Napa State Hospital brought in 1901 under the statute of 1897 is unaffected by the statute of 1903, and may be prosecuted to final determination regardless of the passage of such statute. Laws 1897, p. 311, c. 227, expressly not affected by St. 1903, p. 485, c. 364. Napa State Hospital v. Dasso, 153 Cal. 698, 96 P 355.

16. Action for support of patient in hospital may be brought in the name of the

in the absence of a showing that the court lacked jurisdiction of the alleged insane person, it will be presumed that the preliminary steps which the law required to be taken in order to warrant the adjudication of insanity were regularly had.[17] Where the incompetents' debts at the time of his commitment exceed the value of his estate, the state has no claim thereon for his support and maintenance.[18]

§ 4. *Commitment to asylums.*[See 10 C. L. 290] *Commitment.*—Ordinarily one may not be committed by the authorities without legal inquiry unless he be violently or dangerously insane,[19] nor may one be committed without notice to the proper persons,[20] though in New York notice may be dispensed with under certain conditions.[21] In New York, also, every individual committed to a state hospital is entitled to a trial by jury upon the demand of himself or any friend in his behalf,[22] but this right is personal to the alleged incompetent and those specially mentioned by statute [23] and may be waived.[24] In Florida the statute as amended, regulating the commitment to asylums, has been held constitutional.[25] A commitment of a person to an insane hospital is usually held to be an adjudication by the court [26] to which the ordinary rules with reference to collateral attack apply.[27] In Nebraska a county cannot recover from the estate of an insane person the costs and expenses paid by such county incident to his commitment and transportation to the hospital for the insane.[28]

*Discharge.*—The discharge of patients committed to an asylum or hospital for the insane and the effect thereof is generally regulated by statute.[29]

hospital by its treasurer, and need not be brought by the hospital trustees. Act March 3, 1897, p. 311, c. 227. Napa State Hospital v. Dasso, 153 Cal. 698, 96 P 355.

17. Held that order of commitment was admissible in suit to recover for maintenance of alleged insane person and that it was unnecessary that affidavit charging insanity, the warrant of arrest and all the preliminary proceedings be shown prior to introduction of order. Napa State Hospital v. Dasso, 153 Cal. 698, 96 P 355. In action to recover for maintenance of insane person, commitment showing that patient was brought before committing judge, who heard evidence of insanity, is admissible, though not showing that patient was duly committed nor committed according to the requirements of the statute. State Commission in Lunacy v. Eldridge [Cal. App.] 94 P 597.

18. Pol. Code, § 2176. In re Calen's Estate, 152 Cal. 769, 93 P 1011.

19. Rev. St. 1899, §§ 4879, 4883, 4886, pp. 650-652. Byers v. Solier, 16 Wyo. 232, 93 P 59. Feeble-minded person unconditionally discharged and afterwards returned from another state, who is harmless to public, cannot be committed without legal inquiry. Id.

20. Lunatic, next friend and counsel held to have had sufficient notice. Ex parte Scudamore [Fla.] 46 S 279.

21. Laws 1896, p. 492, c. 545, § 62, permitting commitment without notice to incompetent where judge upon application dispenses with such notice and states his reasons for such act in certificate, is constitutional. In re Andrews, 111 NYS 417.

22. Laws 1896, p. 471, c. 545. Sporza v. German Sav. Bank, 192 N. Y. 8, 84 NE 406. At time provision to effect that trial by jury in all cases in which it had theretofore been used should remain inviolate forever was first incorporated into constitution, custom prevailed on part of chancellor, in order to inform his conscience, to require a trial by jury of question of insanity of person in all cases of doubt, in proceedings taken with reference to his commitment and the disposal of his property. Id.

23. Sporza v. German Sav. Bank, 192 N. Y. 8, 84 NE 406. Statute does not include debtors of such persons. Id.

24. Held no waiver. Sporza v. German Sav. Bank, 192 N. Y. 8, 84 NE 406.

25. Gen. St. 1906, § 1200, as amended by Laws 1907, c. 5706, p. 211. Ex parte Scudamore [Fla.] 46 S 279.

26. Insanity laws, Laws 1896, p. 471, c. 545. Sporza v. German Sav. Bank, 192 N. Y. 8, 84 NE 406.

27. Lack of notice to lunatic, next friend and counsel cannot be inquired into. Ex parte Scudamore [Fla.] 46 S 279. Where attack upon proceedings is not direct, it will be assumed, where it does not wholly so appear upon face of such proceeding, that court, in exercise of its statutory power, did all that statute required to give it jurisdiction to act. State Commission in Lunacy v. Eldridge [Cal. App.] 94 P 597. Where alleged that commitment to insane hospital was made lawfully, under Laws 1896, p. 471, c. 545, all steps required by law, including jury trial and commitment, will be presumed to have been taken. Sporza v. German Sav. Bank, 192 N. Y. 8, 84 NE 406.

28. Recovery not authorized under Cobbey's Ann. St. 1903, § 9637. Kearney County v. Elsam [Neb.] 116 NW 270.

29. **California:** Proceeding resulting in judgment of restoration under statute is in its nature a judicial proceeding, and judgment rendered in such case is one in respect to personal, political or legal condition or relation of a particular person, and, when rendered by court having jurisdiction to pro-

§ 5. *Property and debts.*[See 10 C. L. 291]—All matters not peculiar to the property and debts of adjudicated insane persons, such as the general powers, duties and liabilities of guardians or committees, the administration of the property, the presentation and allowance of claims, judicial proceedings to sell the ward's property, accounting and settlement by the guardian or committee, and rights and liability between guardian and ward, are more fully treated elsewhere.[30] If an act of bankruptcy was committed while the bankrupt was sane, the court obtains jurisdiction and may continue the proceedings though he subsequently becomes insane, but if the act of bankruptcy is committed while the bankrupt is insane, the court has no jurisdiction.[31] In New Jersey the court may appoint a temporary receiver pending the determination of the inquisition,[32] and allow him compensation for his services upon his discharge.[33] In New York no trust results in favor of a lunatic where a conveyance to the lunatic's committee is not supported by a consideration entirely taken from the lunatic's

nounce judgment or order, it is conclusive as to the condition or relation of the person. Code Civ. Proc. §§ 1766, 1908. Aldrich v. Barton, 153 Cal. 488, 95 P 900. Proceeding for restoration of insane person to capacity under Code Civ. Proc. § 1766, is inapplicable to one confined to hospital but not put under guardianship. Id. Statute authorizing superintendent of state hospital for insane to discharge patient who in his judgment has recovered gives him no jurisdiction to issue certificate of discharge to one not a patient to extent of having been committed to asylum and having remained there, except for temporary absence, for care and treatment at time of his discharge. Id. Under Pol. Code, § 2189, one released in 1892 from asylum, occasionally visiting physicians of same until 1900, which visits ceased between 1900 and 1905, when he received certificate of discharge, was not inmate when certificate was granted. Id. Statute giving certificate of discharge same legal effect and force possessed by judgment under statute governing proceedings to judicially determine fact of restoration to sanity is not to be construed as putting it beyond power of party against whom such certificate is offered to show that in fact it was issued in case in which superintendent of asylum had no power to act. Code Civ. Proc. §§ 1766, 1908, construed. Id. Certificates of capacity granted by superintendent of insane asylum under St. 1897, p. 331, c. 227, regarding commitment and care of insane persons, or under St. 1901, p. 639, c. 211, providing for discharge of patients committed to hospital but not confined therein, constitute merely prima facie proof of sanity. Id. While a discharge by hospital authorities under Code Civ. Proc. § 1766 is adjudication that person committed has recovered from insanity, it afforded, prior to enactments of 1903, only prima facie evidence of legal capacity in the discharged person, under Code Civ. Proc. § 40. Id. Such order not within meaning of phrase "restoration to mental soundness and capacity" used in will. Id.

**New York:** While orders of court deciding that insane person shall remain in certain sanatorium until further order of court on notice to certain persons remain in full force, application for removal of such person from such sanatorium, so far as it is not based on claim that incompetent had recovered sanity and that commitment was void, should have been in form of notice of motion to modify above orders on notice to parties entitled thereto. In re Andrews, 111 NYS 417.

**Washington:** Laws providing for the commitment, detention and discharge of the insane are not penal in any sense of the word, and term "ex post facto" laws has no application to laws which merely affect or change modes of procedure. State v. Snell [Wash.] 94 P 926. Act Feb. 21, 1907 (Laws 1907, p. 35, c. 30, § 6), is not unconstitutional as ex post facto. Id. Under Laws 1907, p. 35, c. 30, §§ 6, 7, 10, on application of one committed as being criminally insane to be discharged petition is properly served on prosecuting attorney of county from which he was committed, and not on prosecuting attorney of county where case originated, since prosecuting attorney for county from which committed must resist application. Id. Act Feb. 21, 1907 (Acts 1907, p. 35, c. 30, § 6), applies to all criminal insane, regardless of time of commitment or place of detention. Id. Applicable to one committed before act took effect. Id.

**Wyoming:** Proper officers of state hospital for insane have authority to discharge recovered patient with approval of state board of charities and reform and in exercise of reasonable discretion, whenever circumstance are such as to justify such course, they may release patient not fully recovered, either unconditionally or temporarily, upon expressed conditions. Rev. St. 1899, § 4888, and §§ 633, 634. Byers v. Solier, 16 Wyo. 232, 93 P 59. Person unlawfully restrained of his liberty as insane person is entitled to writ of habeas corpus upon proper application. Id. Rev. St. 1899, §§ 4894, 4895, do not divest courts of jurisdiction to issue writ, under Const. art. 5, §§ 3, 10, in behalf of person in actual custody. Id.

30. See Guardianship, 11 C. L. 1671.

31. Bankruptcy Act, Act July 1, 1898, c. 54, § 8 (30 Stat. 5149, U. S. Comp. St. 1901, p. 3425). In re Kehler [C. C. A.] 159 F 55.

32. Appointment held justified by affidavits attached to petition. In re Sulk [N. J. Eq.] 70 A 661.

33. Where, upon application for commission in nature of writ de lunatico inquirendo, case is made which moves court to appoint receiver pendente lite, and afterwards, upon inquest, subject of inquisition is found to be sane. In re Sulk [N. J. Eq.] 70 A 661.

funds,[34] but the lunatic's estate has an equitable lien upon land for money improperly used by the committee to purchase land on the latter's own account.[35] In this state an insane widow of a testator cannot legally elect to take under the will in lieu of dower, nor can such right be exercised by the state commission of lunacy for her.[36] The proceeds of the sale of an incompetent's property are deemed property of the same nature as the estate or interest sold, until the incompetency is removed.[37] The court may authorize the committee to vote stock in a corporation owned by an insane ward.[38]

§ 6. *Contracts and conveyances.*[See 10 C. L. 291]—The cancellation of instruments on the ground of incapacity is treated elsewhere.[39] As a general rule the deeds and contracts of a person of unsound mind who has not been judicially declared incompetent are voidable,[40] but an executed contract, made with a person of unsound mind in good faith, for a valuable consideration, without knowledge of the mental un-

**34, 35.** Storm v. McGrover, 189 N. Y. 568, 82 NE 160.

**36.** Laws 1896, p. 586, c. 547, § 180; Laws 1907, p. 1010, c. 462, § 6a, subd. 2. Right is personal. Camardella v. Schwartz, 110 NYS 611. Dower right remains in land and thus renders unmarketable title derived under executor's deed from testator's administrators with will annexed. Id.

**37.** Code Civ. Proc. § 2359. Where person whose land is sold during his infancy is incurable incompetent from birth, the nature of his property remains unchanged during lifetime. In re McMillan, 110 NYS 622. Property sold descends as it would have descended if unsold. Id. See Descent and Distribution, 11 C. L. 1078.

**38.** Held proper for court to authorize committee to vote on stock of company, majority of which was owned by incompetent, and to make committee eligible to election as president. In re Andrews, 109 NYS 831.

**39.** See Cancellation of Instruments, 11 C. L. 493. See, also, Incompetency, 10 C. L. 40.

**40.** Smith v. Ryan, 191 N. Y. 452, 84 NE 402. Ground on which deed of incompetent is avoided is that by infirmity of intellect he is incapable of giving assent. Id.

**Evidence sufficient to invalidate:** Evidence in partition action held sufficient to show plaintiff's deed from aged person to have been executed while grantor was of unsound mind, and to have been procured by undue influence. Lindly v. Lindly [Tex. Civ. App.] 109 SW 467, afd. [Tex.] 113 SW 750. Evidence held to show that grantor was not mentally competent to understand transaction of executing deed. Schindler v. Parzoo [Or.] 97 P 755. Court of equity at suit of committee of lunatic will set aside transfers of his property made by lunatic to his son and agreement dissolving partnership between them where it appears from medical and other testimony that father to knowledge of son was non compos for some time before he made transfers, at which time son was transacting his father's business under power of attorney from him, and that in each transaction son and not father was benefited. Smith v. Smith, 29 App. D. C. 408.

**Evidence insufficient:** Evidence held insufficient to show grantor of deed 30 years old was so unsound at time of conveyance as to warrant setting same aside. Logan v. Vanarsdall, 33 Ky. L. R. 508, 110 SW 321. Held that there was senile dementia but too insufficient degree to invalidate will. Succession of Jones, 120 La. 986, 45 S 965. Person discharged from asylum as improved, who had sane intervals after discharge when he was quiet, inoffensive, worked efficiently, read and voted will be regarded as having sufficient capacity during lucid interval to contract with sister to give her all his property in consideration of her care for him. Reed v. Reed [Va.] 62 SE 792.

**NOTE. Effect of insanity on failure to pay insurance premiums when due:** Insanity or mental incapacity will not excuse the nonpayment of an insurance premium when due where the contract provides in unqualified terms that failure to so pay will render the policy void (Hipp v. Fidelity Mut. Life Ins. Co., 128 Ga. 491, 57 SE 892, 12 L. R. A. [N. S.] 319; Gaterman v. American L. Ins. Co., 1 Mo. App. 300; Wheeler v. Connecticut Mut. L. Ins. Co., 82 N. Y. 543, 37 Am. Rep. 594; Klein v. New York L. Ins. Co., 104 U. S. 88, 26 Law. Ed. 662; Smith v. Pennsylvania Mut. L. Ins. Co., 11 Wkly. Notes Cas. [Pa.] 295), although the insured had the money in hand and was ready and willing to pay when he became non compos (Thompson v. Knickerbocker L. Ins. Co., 104 U. S. 252, 26 Law. Ed. 765; Howell v. Knickerbocker L. Ins. Co., 44 N. Y. 276, 4 Am. Rep. 675). The rule, applied in the above cases to straight old line life insurance policies, is equally applicable to members of mutual benefit societies who have become incapacitated by reason of insanity (Hawkshaw v. Supreme Lodge K. H., 29 F 770; Grand Ladge A. O. U. W. v. Jesse, 50 Ill. App. 101; Ingram v. Supreme Council A. L. H., 28 N. Y. Wkly. Dig. 320, 14 N. Y. St. Rep. 600; Sheridan v. Modern Woodmen, 44 Wash. 230, 87 P 127, 120 Am. St. Rep. 987, 7 L. R. A. [N. S.] 673), or illness (McElhone v. Massachusetts Benev. Ass'n, 2 App. D. C. 397; Sleight v. Supreme Council M. T., 121 Iowa, 724, 96 NW 1100; Yoe v. Benjamin C. Howard Masonic Mut. Benev. Ass'n, 63 Md. 86; Curtin v. Grand Lodge A. O. U. W., 65 Mo. App. 294) and where the contract calls for payment of assessments when levied rather than at a fixed period (Carpenter v. Centennial Mut. Life Ass'n, 68 Iowa, 453, 27 NW 456, 56 Am. Rep. 855). It is also applied, although actual notice of such assessments was never brought home to the insured, where acts have been done which constitute legal notice according to the express terms of the contract (Pitts v. Hartford Life & Annuity Ins. Co., 66 Conn. 376, 34 A 95, 50 Am. St. Rep. 96; Yoe v. Benjamin C.

soundness, will not be avoided unless there is a return of the consideration,[41] though the rule is otherwise where the grantee takes with knowledge of grantor's incapacity.[42]

§ 7. *Torts.* See 8 C. L. 827

§ 8. *Crimes.* See 10 C. L. 292—In New York, where one on trial for murder defends on the ground of insanity, he has a right to appear in person, to be represented by counsel, and introduce evidence,[43] and if, on all the evidence and the verdict of the jury, the court should decide that his discharge would be dangerous to the public peace and safety, it may commit him to an insane hospital until sane,[44] and such procedure has been held constitutional.[45] In New Jersey, insanity, to prevent the execution of a sentence of death, must be of such a character as to render the prisoner incapable of understanding the nature of the proceedings against him and his impending execution.[46]

§ 9. *Actions by or against.* See 10 C. L. 293—Actions by and against guardians and committees, not peculiar alone to persons adjudicated to be insane, are treated elsewhere,[47] as is also the appointment of guardians ad litem and next friends.[48]

Since an insane person is in law incapable of making a change of residence,[49] an action against an insane defendant in tort may be brought in the county where the insane defendant has his legal residence.[50] His legally appointed guardian may be joined as a party defendant,[51] and where, in such case, the guardian waives issue and service of summons, enters his appearance, and summons is issued to another county for the insane defendant and is personally served upon him, and the action is subsequently dismissed as to the guardian only, it is error for the court to quash the service on the insane defendant and dismiss the action for want of jurisdiction over his person.[52] In New York an incompetent person is a necessary party to an action brought to recover damages for acts done by him personally,[53] but where the committee of the incompetent puts him out of the case by stipulation, such committee cannot question his absence and throw the costs of a dismissal due to the absence of the incompetent upon plaintiff,[54] though where the action, if it were to proceed against

Howard Masonic Mut. Benev. Ass'n, supra), but not where the contract makes the payments due only upon "notice" (Courtney v. U. S. Masonic Ben. Ass'n [Iowa] 53 NW 238). Where, under the by-laws of a fraternal order, the lodge upon due notice to it must pay the assessments of an incapacitated member, such incapacity will not excuse the giving of due and formal notice thereof before delinquency. Sterling v. Woodmen, 28 Utah, 505, 80 P 375; Bost v. Supreme Council R. A., 87 Minn. 417, 92 NW 337; Smith v. Sovereign Camp W. W., 179 Mo. 119, 77 SW 862. In Buchanan v. Supreme Conclave I. O. H., 178 Pa. 465, 35 A 873, 56 Am. St. Rep. 774, 34 L. R. A. 436, it was held that upon the insured becoming insane the society, upon due notice and request by the beneficiary, should notify such beneficiary of any further assessments, and that notice to the insured, under the circumstances, did not release the society. The general principle above stated was applied to fire insurance premiums in Home Ins. Co. v. Wood, 24 Ky. L. R. 1638, 72 SW 15.—Adapted from 12 L. R. A. (N. S.) 319.

41. Smith v. Ryan, 191 N. Y. 452, 84 NE 402. Deed made by person of unsound mind before an adjudication of insanity to person who has no knowledge of such incapacity is voidable only, and the grantee must be put in statu quo before the avoidance of the deed or contract. Studabaker v. Faylor [Ind.] 83 NE 747.

42. Studabaker v. Faylor [Ind.] 83 NE 747.

43. People v. Baker, 110 NYS 848.

44. Code Cr. Proc. § 454 will be presumed constitutional until contrary is shown beyond reasonable doubt, since it has been unquestioned for long period of time. People v. Baker, 110 NYS 848.

45. Under Code Cr. Proc. § 454 where one acquitted of homicide on ground of insanity and committed to hospital had opportunity to introduce evidence as to present mental condition, and was represented by able counsel, U. S. Const. art. 14, and N. Y. Const. art. 1, § 6, are not violated in that defendant was deprived of his liberty without due process of law, since he should have known court's adjudication would follow verdict of not guilty by reason of insanity. People v. Baker, 110 NYS 848.

46. P. L. 1906, p. 722, § 13, in case of convicted murderer, sentenced to death, does not alter common-law rule. In re Lang [N. J. Law] 71 A 47. Instruction given by judge held correct, and instruction offered by defendant incorrect. Id.

47. See Guardianship, 11 C. L. 1671.

48. See Guardians ad Litem and Next Friends, 11 C. L. 1668.

49. Stuard v. Porter [Ohio] 85 NE 1062. See Domicile, 11 C. L. 1130.

50. Action for wrongful death. Stuard v. Porter [Ohio] 85 NE 1062.

51, 52. Stuard v. Porter [Ohio] 85 NE 1062.

53, 54, 55. Capen v. Delaney, 113 NYS 50.

the committee, might raise serious complications to the prejudice of the incompetent, and a judgment against the committee might be prejudicial to the incompetent, the court having general supervision over incompetents and their estates may properly prevent the action from proceeding.[55] In Illinois an action affecting real estate, the title to which is in an insane person, must be against the ward, and not the conservator.[56] In Virginia a lunatic is not a necessary party to a suit to sell his property for a debt, his committee being the proper party defendant,[57] and in such a proceeding the appointment of a guardian ad litem is wholly unnecessary where there is a committee, unless there is a conflict of interest between the lunatic and the committee.[58] In Ohio in the absence of any special provision with regard to procedure as to an insane party to a divorce suit, the general statutes apply, and the appointment of a trustee for an insane defendant in a divorce proceeding is proper,[59] and property rights of parties to a divorce proceeding may be adjudicated notwithstanding the defendant is insane.[60] In Texas, in certain actions, it is a matter for the discretion of the judge whether the mental condition of an alleged lunatic be determined in limine or whether it be submitted to the jury along with the other issues of the case.[61] Where it appears that the presence of a lunatic who has escaped from a certain state to another is necessary to the trial of a cause instituted in the former state, a writ of protection will sometimes issue permitting him to enter and remain in the former state without molestation provided he remains during the entire time in the custody of designated persons.[62]

Limitations do not operate against a lunatic until his sanity is restored,[63] regardless of whether he has been so adjudged insane or not,[64] but it is held that where after one is adjudged a lunatic, he is discharged as restored to sanity, limitations commence to run and continue to do so notwithstanding a recurrence of the insanity later.[65] In some states, judgments may properly be rendered against insane persons,[66] in others a judgment rendered against an insane person is voidable.[67] In New York, where the committee of a lunatic is an unsuccessful contestant upon probate, and there has been no special guardian appointed for the lunatic, costs cannot be awarded to the committee.[68]

§ 10. *Removal to residence in another state.* See 10 C. L. 294

56. Under Illinois statute now in force changing statute existing prior to 1874. Nimmons v. Stryker, 132 Ill. App. 414.

57, 58. Howard v. Landsberg's Committee [Va.] 60 SE 769.

59, 60. Kerlick v. Kerlick, 10 Ohio C. C. (N. S.) 524.

61. In action in partition wherein deed from alleged lunatic was sought to be set aside, it is matter of discretion with trial court as to whether he would inquire into mental condition of alleged lunatic in limine or hear evidence and submit question to jury along with other issues of case. Lindly v. Lindly [Tex. Civ. App.] 109 SW 467, afd. [Tex.] 113 SW 750.

62. Where one adjudged insane in New York escaped to Virginia, where he was declared sane, and instituted action in conversion against his committee in the federal court in New York, alleging citizenship in Virginia, setting up adjudication of sanity and that New York judgments were void for lack of jurisdiction, federal court, where it appears that his presence in New York is necessary to trial of issues joined, will issue writ of protection permitting him to enter New York, remain there during trial, and depart thereafter without molestation by state authorities, provided he remains during entire time he is in New York in custody of U. S. marshals. Chanler v. Sherman [C. C. A.] 162 F 19. Writ granted conditioned upon issues remaining such that petitioner's presence in New York was necessary. Id.

63. Four-year statute held not to operate against lunatic in case of remedy in nature of bill of review and to set aside certain sales. McLean v. Stith [Tex. Civ. App.] 112 SW 355.

64. Right to recover land not barred. Kaack v. Stanton [Tex. Civ. App.] 112 SW 702.

65. Howard v. Landsberg's Committee [Va.] 60 SE 769.

66. Gressly v. Hamilton County, 136 Iowa, 722, 114 NW 191. In action affecting real estate, title to which is in insane person, judgment can only be against ward, and not against conservator. Nimmons v. Stryker, 132 Ill. App. 414.

67. Voidable but not void. West v. McDonald [Ky.] 113 SW 872.

68. Code Civ. Proc. § 2558. In re Davis' Will, 113 NYS 287.

## INSOLVENCY.

§ 1. Effect of Federal Bankruptcy Act on State Insolvency Laws, 217.
§ 2. Procedure and Parties to Adjudicate Insolvency, 217.
§ 3. Property Passing to Assignee, 217.
§ 4. Administration of Insolvent Estate, 217.
§ 5. Rights and Liabilities Affected by Insolvency and Discharge of Insolvent, 218.

*The scope of this topic* is noted below.[69]

§ 1. *Effect of federal bankruptcy act on state insolvency laws.* See 10 C. L. 296—The suspension of state statutes by the national bankruptcy act is treated in an appropriate topic.[70]

§ 2. *Procedure and parties to adjudicate insolvency.* See 10 C. L. 295—The supreme judicial court of Massachusetts has supervisory jurisdiction of insolvency cases,[71] and a motion to dismiss a bill for relief without prejudice before the entry of the decree of that court is discretionary.[72]

§ 3. *Property passing to assignee.* See 8 C. L. 330

§ 4. *Administration of insolvent estate.* See 10 C. L. 295—A claim is provable which is recoverable in an action at law.[73] Damage for breach of contract is a legitimate claim against an insolvent's estate.[74] The right to priority generally depends upon the character of the creditor's claim.[75] An unlawful preference made by the insolvent may be recovered by the assignee,[76] but a receiver of an insolvent cannot, in addition to having an assignment of uncollected claims set aside, recover the sums collected which have been applied to the payment of another creditor's claim.[77] In

69. This article treats only of the general law of insolvency and insolvency procedure and settlement. Matters pertinent to bankruptcy (see Bankruptcy, 11 C. L. 383), assignments for the benefit of creditors (see Assignments for Benefit of Creditors, 11 C. L. 300), the appointment, rights, and duties of receivers (see Receivers, 10 C. L. 1465), the discharge of insolvents from imprisonment for debt (see Civil Arrest, 11 C. L. 627), the marshaling of assets (see Marshaling Assets and Securities, 10 C. L. 690), and composition with creditors (see Composition with Creditors, 11 C. L. 662), are elsewhere treated.

70. See Bankruptcy, 11 C. L. 383.

71. Rev. Laws, c. 163, § 17. Jackson v. Ensign, 199 Mass. 116, 85 NE 527. Jurisdiction invoked by bill in equity. Id. Not technically an appeal, as suit does not stay proceedings below, but in nature of appeal. Id.

72. Jackson v. Ensign, 199 Mass. 116, 85 NE 527. Dismissal of bill to revise decision of court of insolvency but not "without prejudice," not harmful to plaintiff, since subsequent revision by plaintiff on grounds alleged would be barred by dismissal without prejudice. Id.

73. Where bucket shop represented profits to customer which it would be estopped to deny in action at law. No collusion of creditor. Weiss v. Haight & Freese Co., 156 F 877.

74. Forest City Steel & Iron Co. v. Detroit, etc., R. Co. [Mich.] 117 NW 645.

75. Debts due **United States** are entitled to priority by Rev St. U. S. §§ 3466, 3467, Comp. St. 1901, p. 2314. Claim based on insolvent trespassing on government land and removing timber. United States v. Flint Lumber Co. [Ark.] 112 SW 217. **Creditor of insolvent railroad** company for supplies furnished not entitled to preference over prior mortgagee from corpus of estate unless it be shown that credit was given upon faith of payment out of net earnings of company and also that there was diversion of such income for benefit of mortgagee. Fordyce v. Kansas City & N. Connecting R. Co., 145 F 566. Buyer ordered **brokers** to purchase certain stock and purchase was made by another concern which advanced purchase price, whereupon buyer paid amount due and requested transfer of stock, but before that was accomplished brokers suspended and purchasing concern sold stock and applied proceeds to brokers' general account. Buyer held preferred creditor, entitled to stock or value thereof. Harmon v. Sprague [C. C. A.] 163 F 486. Where, pursuant to instructions, brokers sold certain stock and received proceeds to be applied to purchase of other stock, but sale was not consummated on account of failure, principal was not preferred creditor. Id.

76. Fraudulent sale by partnership and transfer of notes. Jaquith v. Davenport, 197 Mass. 397, 84 NE 125. Sale of goods by insolvents in name of clerk as latter's property held not "transfer" in usual course of insolvent's business. Id. Ruling of law as to whether sale was made in usual course of business, applicable. Id. Ruling that buyer knew that partnership was insolvent not applicable, since one partner was solvent at time of sale. Id. Where insolvents indorsed notes to defendant and discharged them with money supplied by maker, ruling that such fact would constitute no defense inasmuch as insolvent's estates were not diminished held properly refused, since fraud consisted in transfer of notes by insolvents, and not in payment. Id.

77. Claims assigned to bank and proceeds collected paid to creditor. Farmers' & Mechanics' Bank v. Strahorn [Wash.] 94 P 1090.

determining whether a sale by an insolvent was in the usual course of business, the criterion is the conduct of the insolvent's business.[78]

§ 5. *Rights and liabilities affected by insolvency and discharge of insolvent.*[See 8 C. L. 382]

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**Inspection,** see latest topical index.

### INSPECTION LAWS.[79]

*The scope of this topic* is noted below.[80]

In Kentucky the selling or offering for sale of oil below a certain standard, or oil that has been condemned by an authorized inspector as unsafe for illuminating purposes, is prohibited by statute,[81] but such statute does not prohibit one whose oil has been found below the test or has been condemned from mixing it before it is sold or offered for sale so as to bring the entire quantity up to the statutory test.[82] One pleading such mixing as a defense to a penal action for offering for sale oil below the required test has the burden of proving that the mixture was up to the standard.[83] The enforcement of inspection laws may be restrained in a proper case.[84] Such suits, though against state officers, are not necessarily suits against the state.[85] Inspection laws are subject to constitutional limitations.[86]

### INSTRUCTIONS.

**§ 1. Object and Purpose, 219.**
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**§ 3. Duty of Instructing, 220.** Necessity of Request in Particular Cases, 222. Limiting Number of Instructions, 223. Form and Sufficiency of Request, 223. Time of Making Requests, 224. Disposition of Requests, 224. Repetition, 225.
**§ 4. Assumption of Facts, 227.**
**§ 5. Charging with Respect to Matters of Fact or Commenting on the Weight of Evidence, 229.**

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78. Jaquith v. Davenport, 197 Mass. 397, 84 NE 125. Fact that sale was by clerk outside of office, or that insolvent was overstocked and required ready money, would not of itself establish sale as out of usual course of business. Id.

**Evidence** as to value of goods held admissible. Jaquith v. Davenport, 197 Mass. 397, 84 NE 125. Remote evidence properly excluded. Id. Evidence of sale by buyer admissible to show that buyer purchased from insolvents at true value. Id. Sale not in course of business as matter of law when made out of office under statements that ready money was required, etc. Id.

79. See 10 C. L. 295.

80. Includes both state and federal inspection. Excludes regulation of food products (see Food, 11 C. L. 1481), adulteration (see Adulteration, 11 C. L. 38), police power of state and municipalities to legislate in the interest of purity of food products (see Constitutional Law, 11 C. L. 689; Municipal Corporations, 10 C. L. 881), health regulations (see Health, 11 C. L. 1717), and regulations as to purity of drugs and medicines (see Medicine and Surgery, 10 C. L. 828).

81. Ky. St. 1903, § 2209. Commonwealth v. Standard Oil Co., 33 Ky. L. R. 1074, 112 SW 632.

82. Ky St. 1903, § 2209, held not to prohibit mixing of oil below test. Commonwealth v. Standard Oil Co., 33 Ky. L. R. 1074, 112 SW 632.

83. In penal action for offering for sale illuminating oil below test fixed by Ky. St. 1903, § 2209, where defendant admitted that oil had been condemned as below standard. Commonwealth v. Standard Oil Co., 33 Ky. L. R. 1074, 112 SW 632.

84. Bill to restrain railroad and warehouse commissioners from enforcing grain inspection laws (Rev. St. 1899, §§ 7654 et seq. [Ann. St. 1906, p. 3663], and Laws 1907, p. 285) held not maintainable on ground of danger of multiplicity of suits, statutes providing for criminal prosecution only, and there being no duty on commissioners or employes to bring civil suits. Merchants' Exch. of St. Louis v. Knott, 212 Mo. 616, 111 SW 565. Bill alleging that plaintiffs are engaged in business of grain weighing and certification, that business has been built up by them during a period of years, that grain markets would be ruined, in ways pointed out, by enforcement of statutes alleged unconstitutional, held to show irreparable injury, and hence not demurrable. Id.

85. Suit against railroad and warehouse commission to restrain enforcement of grain inspection laws. Merchants' Exch. of St. Louis v. Knott, 212 Mo. 616, 111 SW 565.

86. Rev. St. 1899, §§ 7654, 7657-7660, 7662, 7665, 7670, 7673, 7674 (Ann. St. 1906, pp. 3663-3665, 3667), and Laws 1907, p. 285, authorizing board of railroad and warehouse commissioners to establish state inspection of grain, with power to fix charges for inspection, charges to be regulated so as to produce sufficient revenue to meet necessary expenses of inspection, and no more, etc., held not unconstitutional as delegating legislative power to fix official fees. Merchants' Exch.

§ 6. Form and General Substance of Instructions, 231.
§ 7. Relation of Instructions to Pleading and Evidence, 236.
§ 8. Stating Issues to the Jury, 240.
§ 9. Ignoring Material Evidence, Theories and Defenses, 241.
§ 10. Giving Undue Prominence to Evidence, Issues and Theories, 242.
§ 11. Definition of Terms Used, 244.
§ 12. Rules of Evidence; Credibility and Conflicts, 244.
§ 13. Admonitory and Cautionary Instructions, 247.
14. Necessity of Instructing in Writing, 247.
§ 15. Presentation of Instructions, 248.
§ 16. Additional Instructions After Retirement, 248.
§ 17. Review, 248. Instructions Must be Considered as a Whole, 248. Curing Error in Instructions, 251.

*The scope of this topic* is noted below.[87]

§ 1. *Object and purpose.*[See 10 C. L. 296]—The purpose of instructions is to explain the issues [88] and lay down the law applicable thereto [89] for the guidance of the jury.[90]

§ 2. *Province of court and jury.*[91]—It is the exclusive province of the jury to pass on controverted questions of fact [92] in respect to which the evidence is conflicting [93] or into which any element of uncertainty enters,[94] the weight and sufficiency of the evidence introduced being for them.[95] Where such a question exists, the court may not take the case from the jury,[96] assume the existence of disputed facts,[97] comment on the weight of the evidence,[98] or in any manner invade the province of the jury.[99] The jury are not the sole judges of ultimate facts,[1] nor should questions of

of St. Louis v. Knott, 212 Mo. 616, 111 SW 565. Laws 1907, pp. 285-298, authorizing board of railroad and warehouse commissioners to establish state inspection of grain, "at such places or in such territory * * * as in their opinion may be necessary, etc., etc.," held invalid as a delegation to commissioners of legislative power to determine where, when and against whom law shall be enforced. Id.

87. The topic is confined to instructions in civil cases. Instructions in criminal cases are treated elsewhere. See Indictment and Prosecution, 12 C. L. 1. It deals only with general rules. Instructions in particular actions or relating to particular subjects are treated in topic dealing with such actions and subjects. The effect of instructions withdrawing evidence or otherwise seeking to cure error is also excluded. See argument and conduct of counsel, 11 C. L. 268; Harmless and Prejudicial Error, 11 C. L. 1690.

88. St. Louis S. W. R. Co. v. Cleland [Tex. Civ. App.] 110 SW 122.

89. Instructions are intended to give jury a clear and concise statement of law governing case. Rosenkovitz v. United Railways & Elec. Co. [Md.] 70 A 108; Kelly v. Chicago, etc., R. Co. [Iowa] 114 NW 536. To declare rule of law applicable to state of facts found in evidence. St. Louis S. W. R. Co. v. Cleland [Tex. Civ. App.] 110 SW 122.

90. Ong Chair Co. v. Cook, 85 Ark. 390, 108 SW 203; Rio Grande So. R. Co. v. Campbell [Colo.] 96 P 986; Terry v. Davenport [Ind.] 83 NE 636; Neff v. Cameron [Mo.] 111 SW 1139.

91. See 10 C. L. 296. See, also, post, §§ 4, 5.

92. Harton v. Forest City Tel. Co., 146 N. C. 429, 59 SE 1022.

93. St. Louis, etc., R. Co. v. Richardson [Ark.] 113 SW 794; Schulte v. Meehan, 133 Ill. App. 491; Louisville & N. R. Co. v. Mahan [Ky.] 113 SW 886; Douglass v. Southern R. Co. [S. C.] 62 SE 15. But refusal to give a proffered instruction where the evidence is not seriously conflicting does not constitute reversible error. Champlin v. Baltimore, etc., R. Co., 140 Ill. App. 94.

94. The question should be submitted to the jury if any element of uncertainty enters into case. Thompson v. Galveston, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 756, 106 SW 910.

95. Value and weight of testimony is for jury. Parkersburg Nat. Bank v. Hannaman, 63 W. Va. 358, 60 SE 242. Evidentiary value of facts jury alone has right to pass on. Garbutt Lumber Co. v. Prescott [Ga.] 62 SE 228. To tell jury what weight to give to evidence is improper. Starett v. Chesapeake & O. R. Co., 33 Ky. L. R. 309, 110 SW 282. Where evidence is conflicting, instruction that if jury believe plaintiff's evidence, although not corroborated, they shall find for him, is invasion of province of jury. Cooke v. Union R. Co., 111 NYS 708. Instruction undertaking to tell jury strength of a presumption, objectionable. Jury should determine whether a presumption of facts exists, and, if it does, strength thereof. Leiserowitz v. Fogarty, 135 Ill. App. 609.

96. See Directing Verdict and Demurrer to Evidence, 11 C. L. 1085; Discontinuance, Dismissal and Nonsuit, 11 C. L. 1093.

97. See post, § 4.

98. See post, § 5.

99. McBride v. Sullivan [Ala.] 45 S 902; Morris v. McClellan [Ala.] 45 S 641; Southern R. Co. v. Grizzle [Ga.] 62 SE 177; Fullbright v. Neely [Ga.] 62 SE 188; Hapary v. Chicago, 133 Ill. App. 452; Southern R. Co. v. Limhack [Ind.] 85 NE 354; Lunde v. Cudahy Packing Co. [Iowa] 117 NW 1063; Chesapeake & Potomac Tel. Co. v. Lysher, 107 Md. 237, 68 A 619; Plummer v. Boston El. R. Co., 198 Mass. 499, 84 NE 849; Lederer v. Morrow [Mo. App.] 111 SW 902; Kansas City So. R. Co. v. Williams [Tex. Civ. App.] 111 SW 196. A charge which assumes to determine a material fact is an invasion of province of the jury. Southern R. Co. v. Hopkins [C. C. A.] 161 F 266.

**Held to invade province of jury:** Instructions assuming that certain acts were negligent. City of Chicago v. Kubler, 133 Ill. App. 520; Elgin, Aurora & So. Trac. Co. v.

law [2] or mixed questions of law and fact [3] be submitted, and a question of law is presented by the evidence when reasonable minds cannot differ as to the inference to be drawn therefrom [4] or when the facts are admitted,[5] or undisputed.[6] It is not, however, error to submit an undisputed issue in connection with others as to which there is conflict.[7]

§ 3. *Duty of instructing.*[See 10 C. L. 297]—As each party has the right to instructions on his theory of the case,[8] unless the issues are already covered [9] or abandoned,[10] instructions which are applicable [11] and correctly state the law [12] on ma-

Wilcox, 132 Ill. App. 446; Village of Hennepin v. Coleman, 132 Ill. App. 604. Instruction, "there is no evidence that X had any authority to act for and on behalf of defendant," vicious as invading province of jury to determine facts. Dornfeld-Kunert Co. v. Volkmann, 138 Ill. App 421. Instruction that collision "was caused by reason of trolley wire or pole being out of repair, etc., objectionable as taking questions of fact from jury. Asher v. East St. Louis & Suburban R. Co., 140 Ill. App. 220. What may be claimed experience and observation have established as true are questions for jury, and instruction thereon invades its province. Pittsburgh, etc., R. Co. v. O'Conner [Ind.] 85 NE 969. Question whether injury occurred at a point where public had right to use way is for jury. Tarashonsky v. Illinois Cent. R. Co. [Iowa] 117 NW 1074.

**Held not to invade province of jury:** Instruction that preponderance of evidence does not necessarily lie with party who may have introduced greater number of witnesses, but it depends upon greatest weight of evidence, in view of all testimony and facts and circumstances, is not objectionable. Hammond W. & E. C. Elec. R. Co. v. Antonia, 41 Ind. App. 335, 83 NE 766. An instruction undertaking to explain a question in order to get an answer decisive thereof, but which does not tell jury how to answer it, is not improper. Bennett v. Greenwood, 151 Mich. 274, 14 Det. Leg. N. 940, 114 NW 1019. Province of jury is not invaded by charge applying legal principles; hence it is proper to charge that carrier owed passenger duty to afford her reasonable opportunity to alight in safety, and for breach of such duty, plaintiff exercising ordinary care, recovery could be had. Savannah Elec. Co. v. Bennett, 130 Ga. 597, 61 SE 529.

1. Instruction, "the law applicable to this case is given you in form of instructions but you are sole judges of all questions of fact in this case," held to erroneously state province of jury. Maxwell v. Chicago, etc., R. Co., 140 Ill. App. 156.

2. Hays v. Lemoine [Ala.] 47 S 97; Ham v. State [Ala.] 47 S 126; American Home Circle v. Schneider, 134 Ill. App. 600; Cincinnati, etc., R. Co. v. Evans, 33 Ky. L. R. 596, 110 SW 844; Woodbury v. Sparrell Print, 198 Mass. 1, 84 NE 441; Barree v. Cape Girardeau [Mo. App.] 112 SW 724; Twentieth Century Co. v. Quilling [Wis.] 117 NW 1007. Where court sits as jury, instruction presenting issue of law will not be given. Dronenburg v. Harris [Md.] 71 A 81. It is not province of jury to interpret **laws**, but it may be left to them whether sections of a certain code are laws of a particular state. White v. Reitz, 129 Mo. App. 307, 108 SW 601. Whether **title** to stock passed, question of law. Cowie v. Kinser, 138 Ill. App. 143. Objectionable as submitting to jury construction of phrases of **contract.** American Home Circle v. Eggers, 137 Ill. App. 595. Instruction submitting to jury question of what is and what is not a **pledge**, erroneous. Beggs v. First Nat. Bank of Arcola, 134 Ill. App. 403. Propositions as to law of **pleading** are for court. Peck v. Springfield Trac. Co. [Mo. App.] 110 SW 659. Instruction in effect submitting to jury question as to what are material allegations of a declaration, erroneous. Trustees of Schools v. Yoch, 133 Ill. App. 32. Competency of **witnesses** is question for court. Parkersburg Nat. Bank v. Hannaman, 63 W. Va. 358, 60 SE 242.

3. Electric Vehicle Co. v. Price, 138 Ill. App. 594.

4. New Madrid Banking Co. v. Poplin, 129 Mo. App. 121, 108 SW 115; Theobald v. Shepard [N. H.] 71 A 26. It is only when proper inference from testimony is so clear as to be free from doubt that it becomes matter of law for court. Forquer v. Slater Brick Co., 37 Mont. 426, 97 P 843.

5. Harton v. Forest City Tel. Co., 146 N. C. 429, 59 SE 1022.

6. Dauphiney v. Buhne, 153 Cal. 757, 96 P 880; Stouffer v. Erwin [S. C.] 62 SE 843. Should not submit as a doubtful question a matter on which evidence is not conflicting. Mobile, etc., R. Co. v. Jackson [Miss.] 46 S 142.

7. St. Louis S. W. R. Co. v. Nelson [Tex. Civ. App.] 111 SW 1062.

8. Taylor v. McClintock [Ark.] 112 SW 405; Colbeck v. Sampsell, 140 Ill. App. 566.

9. See post, this section, Repetition. Conlon v. Chicago G. W. R. Co., 139 Ill. App. 555; Maxwell v. Chicago, etc., R. Co., 140 Ill. App. 156. It is duty of court to give requested instruction on proposition of law applicable to issues and evidence in case when not submitted or covered by other instruction of charge or by charge taken as a whole. Dunlap v. Flowers [Okl.] 96 P 643.

10. Abandoned issues need not be instructed upon. Dronenburg v. Harris [Md.] 71 A 81; Penny v. St. Joseph Stockyards Co., 212 Mo. 309, 111 SW 79.

11. See post, § 6. Rules of law put in form applicable to case should be given. Southern R. Co. v. Grizzle [Ga.] 62 SE 177; Aldrich v. Peckham, 74 N. J. Law, 711, 68 A 346; Pulcino v. Long Island R. Co., 109 NYS 1076; Franklin v. Hoadley, 111 NYS 300; Pettersen v. Rathjen's American Compositon Co., 111 NYS 329; Wolf Cigar Stores Co. v. Kramer [Tex. Civ. App.] 109 SW 990.

12. See post, § 6. Alabama City G. & A. R. Co. v. Bullard [Ala.] 47 S 578; Bryant Lumber Co. v. Stastney [Ark.] 112 SW 740; Lepman

terial[13] issues,[14] supported by the pleading and evidence,[15] should be given, but as a general rule, only when asked for.[16] By constitution in some states, however, it is made the court's duty to declare the law,[17] while in other jurisdictions it is the court's duty to instruct on all issues properly raised, whether requested or not,[18] and again, although not requested, the court may instruct on any proposition of law when, in its opinion, justice requires it.[19] It is not the court's duty, however, to instruct separately on particular phases of evidence not decisive of the case,[20] nor to give unnecessary instructions,[21] nor to charge that its refusal to dismiss is not an intimation on the facts of the case.[22]

v. Woldert Grocery Co., 133 Ill. App. 362; Matton Heat L. & P. Co. v. Walker, 134 Ill. App. 414; Kidd v. White, 138 Ill. App. 107; Brougham v. Paul, 138 Ill. App. 455; City of Chicago v. Wieland, 139 Ill. App. 197; Illinois Commercial Men's Ass'n v. Perrin, 139 Ill. App. 543; Champlin v. Baltimore, etc., R. Co., 140 Ill. App. 94; Power v. Turner [Mont.] 97 P 950; Struble v. De Witt [Neb.] 116 NW 154; Swing v. Bates Mach. Co., 32 Pa. Super. Ct. 403; El Paso Elec. R. Co. v. Borgiano [Tex. Civ. App.] 109 SW 388; Love v. Perry [Tex. Civ. App.] 111 SW 203; International & G. N. R. Co. v. Welbourne [Tex. Civ. App.] 113 SW 780; Burgess Sulphite Fibre Co. v. Drew [C. C. A.] 157 F 212. It is court's duty to instruct when request clearly and affirmatively presents issue raised. Missouri K. & T. R. Co. v. Kennedy [Tex. Civ. App.] 112 SW 339. Error in refusing to give special instructions before argument where of a proper character and correctly expressed, is not cured by giving of like instructions in the general charge. Mueller v. Busch, 11 Ohio C. C. (N. S.) 353. See post, § 17, Curing Bad Instructione.

**13.** See post, § 7. Request submitting a correct proposition of law on a material issue should be given unless covered by general charge. Bishop v. Riddle [Tex. Civ. App.] 113 SW 151.

**14.** See post, §§ 7, 8. Dolvin v. American Harrow Co. [Ga.] 62 SE 198; Bowman v. Saigling [Tex. Civ. App.] 111 SW 1082; Western Union Tel. Co. v. Johnsey [Tex. Civ. App.] 109 SW 251. It is duty of court to instruct as to facts presented upon and within issues, but duty ends there. In re Darrow [Ind. App.] 83 NE 1026. Party who raises an issue and introduces testimony thereon cannot complain of instructions given with referenec thereto. Miles v. Schrunk [Iowa] 117 NW 971.

**15.** See. post, § 7. Mississippi Valley Trac. Co. v. Coburn, 132 Ill. App. 624; Walkup v. Beebe [Iowa] 116 NW 321; Lee v. Conrad [Iowa] 117 NW 1096; Harrison v. McLaughlin [Md.] 70 A 424; Ghere v. Zey, 128 Mo. App. 362, 107 SW 418; Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038; Joyce v. Miller [Neb.] 116 NW 506; Jacobson v. Fraade, 56 Misc. 631, 107 NYS 706; Stouffer v. Erwin [S. C.] 62 SE 843; Galveston, etc., R. Co. v. Berry [Tex. Civ. App.] 109 W 393; Northern Texas Trac. Co. v. Moberly [Tex. Civ. App.] 109 SW 483; Houston & T. C. R. Co. v. Roberts [Tex Civ. App.] 109 SW 982; Missouri, K. & T R. Co. v. Pennewell [Tex. Civ. App.] 110 SW 758; Rushing v. Lanier [Tex. Civ. App.] 111 SW 1089; Atchison, etc., R. Co. v. Harrington [Tex. Civ. App.] 112 SW 100; Kaack v. Stanton [Tex. Civ. App.] 112 SW 702; Trimble v. Burroughs [Tex. Civ. App.] 113 SW 551; Childs v. Childs [Wash.] 94 P 660. Where there is any evidence upon an issue raised by pleadings, it is duty of court to submit issue to jury. Citizens' R. Co. v. Griffin [Tex Civ. App.] 109 SW 999.

**16.** See post, this section, Necessity of Request in Particular Cases. In absence of request, court need not instruct. Beck v. Lowell [Kan.] 95 P 1131; Cooper v. Harvey [Kan.] 94 P 213; Swann-Daly Lumber Co. v. Thomas [Ky.] 112 SW 907; Burdett v. Mullin's Ex'x, 33 Ky. L. R. 691, 110 SW 855; Brown v. Globe Printing Co. [Mo.] 112 SW 462; O'Flynn v. Butte, 36 Mont. 493, 93 P 643; O'Connor v. Padget [Neb.] 116 NW 1131; Barson v. Mulligan, 191 N. Y. 306, 84 NE 75; Kingfisher Nat. Bank v. Johnson [Okl.] 98 P 343; Morrison v. Superior Water, L. & P. Co., 134 Wis. 167, 114 NW 434. If request properly refused, court need not give instruction on same subject unless so requested. Horton v. Jackson [Ark.] 113 SW 45. In absence of conflict in evidence, court need not instruct unless requested. Lee v. Conrad [Iowa] 117 NW 1096. When evidence is conflioting, it is court's duty to charge negative side of issue, if requested. Northern Texas Trac. Co. v. Moberly [Tex. Civ. App.] 109 SW 483. Mere nondirection, in absence of request for instruction, is not error. Newton v. Cardwell's Blue Print & Supply Co., 41 Colo. 492, 92 P 914. Mere omission to give pertinent charge, when not requested, or to state some legal principle applicable to facts of case, is no ground of error. Chess v. Vockroth [N. J. Err. & App.] 70 A 73. One not asking for a particular instruction is not in a position to complain that it was not given. Asher v. East St. Louis & Suburban R. Co., 140 Ill. App. 220. Party making no requests is not in a position to complain unless instruction misleading. Baker v. Mathew, 137 Iowa, 410, 115 NW 15.

**17.** Sandford v. Seaboard Air Line R. Co., 79 S. C. 519, 61 SE 74.

**18.** Court must look to pleadings to ascertain issues, and is not, perhaps, required to charge on defense not urged. Merchants' & Miners' Transp. Co. v. Corcoran [Ga. App.] 62 SE 130.

**19.** Parkersburg Nat. Bank v. Hannaman, 63 W. Va. 358, 60 SE 242.

**20.** Herlihy v. Little [Mass.] 86 NE 294.

**21.** City of Chicago v. Kubler, 133 Ill. App. 520.

**22.** Hanley v. Brooklyn Heights R. Co., 111 NYS 575.

*Necessity of request in particular cases.*[See 10 C. L. 298]—A request is necessary if it is desired that instructions be restricted [23] or amplified,[24] made more explanatory,[25] specific,[26] or definite.[27] Hence a request must be made if it is desired that the court should instruct on the principles of law necessary to constitute adverse possession,[28] on the converse of a proposition,[29] or if it is desired that issue be presented affirmatively as well as negatively,[30] or if instruction in language of the statute is desired,[31] or if a repetition is desired.[32] Likewise if a party relies on a different theory repugnant to that of his adversary, he must ask instructions presenting his theory;[33] or if a particular feature of the case is desired to be noticed,[34] or if a charge on burden of proof is desired,[35] or it is desired that testimony be touched on,[36] a request must be made. It must also be made if instructions are to be corrected [37] or omissions

23. Waddell v. Metropolitan St. R. Co. [Mo.] 111 SW 542.

24. City Deposit Bank of Columbus, Ohio v. Green [Iowa] 115 NW 893; Wilson v. Pennsylvania & Mahoning Valley R. Co., 34 Pa. Super. Ct. 504; McCarty v. Piedmont Mut. Ins. Co. [S. C.] 62 SE 1; Waters-Pierce Oil Co. v. Snell [Tex. Civ. App.] 20 Tex Ct. Rep. 190, 106 SW 170; St. Louis S. W. R. Co. v. Cunningham [Tex. Civ. App.] 20 Tex. Ct. Rep. 245, 106 SW 407; Texas & P. R. Co. v. Johnson [Tex. Civ. App.] 20 Tex. Ct. Rep. 410, 106 SW 773; Gonzales v. Galveston, etc., R. Co. [Tex. Civ. App.] 107 SW 896; Morgan v. Missouri, etc., R. Co. [Tex. Civ. App.] 110 SW 978; Kaack v. Stanton [Tex. Civ. App.] 112 SW 702. If fuller statement of pleadings desired, request necessary St. Louis S. W. R. Co. v. Hawkins [Tex. Civ. App.] 108 SW 736.

25. Birmingham R. L. & P. Co. v. Lee [Ala.] 45 S 164; McBride v. Sullivan [Ala.] 45 S 902; Kress v. Lawrence [Ala.] 47 S 574; Herring v. Galveston, etc., R. Co. [Tex. Civ. App.] 108 SW 977; El Paso, etc., R. Co. v. O'Keefe [Tex. Civ. App.] 110 SW 1002.

26. Burnside v. Peterson, 43 Colo. 382, 96 P 250; Bunn v. Hargraves, 3 Ga. App. 518, 60 SE 223; Merchants' & Miners' Transp. Co. v. Corcoran [Ga. App.] 62 SE 130; Mitchell v. Chicago, etc., R. Co. [Iowa] 114 NW 622; Aughey v. Windrem, 137 Iowa, 315, 114 NW 1047; Helverson v. Chicago, etc., R. Co. [Iowa] 116 NW 699; Beans v. Denny [Iowa] 117 NW 1091; Cashman v. Proctor [Mass.] 86 NE 284; Hammond v. Porter, 150 Mich. 328, 14 Det. Leg. N. 733, 114 NW 64; Flaherty v. St. Louis Transit Co., 207 Mo. 318, 106 SW 15; Armelio v. Whitman, 127 Mo. App. 698, 106 SW 1113; Ghere v. Zey, 128 Mo. App. 362, 107 SW 418; Moss v. Missouri Pac R. Co., 128 Mo. App. 385, 107 SW 422; Thompson v. Independence [Mo. App.] 111 SW 521; Gay v. Mitchell, 146 N. C. 509, 60 SE 426; Dyer v. McWhirter [Tex. Civ. App.] 111 SW 1053.

27. Kostrzeba v. Hobart Iron Co., 103 Minn. 337, 114 NW 949; Peck v. Springfield Trac. Co. [Mo. App.] 110 SW 659; Brown v. Globe Printing Co. [Mo.] 112 SW 462; Carroll v. Grande Ronde Elec. Co. [Or.] 97 P 552; Western Union Tel. Co. v. Kauffman [Tex. Civ. App.] 20 Tex. Ct. Rep. 807, 107 SW 630; Wilkins v. Clawson [Tex. Civ. App.] 110 SW 103.

28. Dodge v. Cowart [Ga.] 62 SE 987.

29. Memphis Coffin Co. v. Patton [Tex. Civ. App.] 20 Tex. Ct. Rep. 670, 106 SW 697; Runnells v. Pecos, etc., R. Co. [Tex. Civ. App.] 107 SW 647.

30. El Paso Elec. R. Co. v. Boer [Tex. Civ. App.] 108 SW 199.

31. Donati v. Righetti [Cal. App.] 97 P 1128.

32. Pelton v. Goldberg [Conn.] 70 A 1020.

33. Hagen v. Schleuter, 236 Ill. 467, 86 NE 112; McMahon v. Scott, 132 Ill. App. 582.

34. Maxson v. Case Threshing Mach. Co. [Neb.] 116 NW 281; Gerock v. Western Union Tel. Co. [N. C.] 60 SE 637; Missouri, etc., R. Co. v. Wall [Tex. Civ. App.] 110 SW 453; Dotson v. Milliken, 209 U. S. 237, 52 Law. Ed. 768. Where court has made general presentation of an issue, if fuller charge desired on that issue, correct request is necessary. Wade v. Galveston, etc., R. Co. [Tex. Civ. App.] 110 SW 84 If it is desired that affirmative defense be referred to request should be made. International Harvester Co. v. Walker [Iowa] 116 NW 706. If instruction as to common phenomena of human nature desired, request necessary. Merchants' & Miners' Transp. Co. v. Corcoran [Ga. App.] 62 SE 130. If more distinct separation of phases of contributory negligence is desired, request necessary. Chicago, etc., R. Co. v. Johnson [Tex.] 108 SW 964. If charge as to diminution of damages because of contributory negligence is desired, it must be requested. Savannah Elec. Co. v. Bennett, 130 Ga. 597, 61 SE 529.

35. Louisiana & L. Lumber Co. v. Dupuy [Tex. Civ. App.] 113 SW 973.

36. If instruction is desired on preponderance of evidence, request is necessary. Mallary Bros. & Co. v. Moon, 130 Ga. 591, 61 SE 401. If desired to limit testimony, request necessary. Aughey v. Windrem, 137 Iowa, 315, 114 NW 1047; Cooper v. Harvey [Kan.] 94 P 213; Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631. If desired that jury should consider testimony given on personal knowledge of witness, request is necessary. Parkersburg Nat. Bank v. Hannaman, 63 W. Va. 358, 60 SE 242. If it is desired to have a phase of evidence expressly alluded to, request is necessary. Tarashonsky v. Illinois Cent. R. Co. [Iowa] 117 NW 1074; Prudential Insurance Co. of America v. Lear, 31 App. D. C. 184.

37. Chicago Great Western R. Co. v. McDonough [C. C. A.] 161 F 657; St. Louis, etc., R. Co. v. Richardson [Ark.] 113 SW 794.

cured.[38] A party may, however, avail himself of a positive error in the charge without having requested a correction.[39]

*Limiting number of instructions.* See 10 C. L. 800—Only such instructions should be given as will fully and clearly present the pivotal points,[40] hence they should not be multiplied wholly out of proportion to the necessities of the case;[41] and while it is technically erroneous to limit their number,[42] the court may, in a proper case, refuse to consider more than a specified number, if the jury is fully and fairly instructed.[43]

*Form and sufficiency of request.*[44]—Requests must be in writing[45] and are sometimes required to be signed,[46] but, as the object of the signature is to identify the instructions,[47] the statute requiring it is not mandatory.[48] The requests should be correct in form,[49] couched in apt,[50] intelligible[51] and definite[52] language, and should not be made in the form of mere suggestions.[53] They must be consistent with each other[54] and must correctly state the law.[55] If bad in part, a request may be

38. St. Louis S. W. R. Co. v. Shipp [Tex Civ. App.] 109 SW 286; El Paso Elec. R. Co. v. Kelly [Tex. Civ. App.] 109 SW 415; Dallas Consol. Elec. St. R. Co. v. Motwiller [Tex.] 109 SW 918; Missouri, etc., R. Co. v. McDuffey [Tex Civ. App.] 109 SW 1104; St. Louis S. W. R. Co. v. Cleland [Tex. Civ. App.] 110 SW 122; St. Louis S. W. R. Co. v. Nelson [Tex. Civ. App.] 111 SW 1062; Galveston, etc., R. Co. v. Olds [Tex. Civ. App.] 112 SW 787; Steger & Sons Piano Mfg. Co. v. McMaster [Tex. Civ. App.] 113 SW 337; Orange Lumber Co. v. Thompson [Tex. Civ. App.] 118 SW 563. Omission to instruct on a particular point is not error unless instruction be specially requested. Daggett v. North Jersey W. R. Co. [N. J. Err. & App.] 66 A 179.

39. Thompson v. Galveston, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 756, 106 SW 910; Rapid Transit R. Co. v. Strong [Tex. Civ. App.] 108 SW 394; Missouri, etc., R. Co. v. Groseclose [Tex. Civ. App.] 110 SW 477.

40. Mobile, etc., R. Co. v. Jackson [Miss.] 46 S 142.

41. When controlling facts and circumstances are few, a few instructions, properly directed, are ample. Southern R. Co. v. Hansbrough's Adm'x, 107 Va. 733, 60 SE 58. Where questions of law involved were simple and well settled and could have been given in 6 instructions, no error in refusal to give 17 out of 31. City of Farmington v. Wallace, 134 Ill. App. 366. Where 40 were tendered, held not reversible to refuse 20. Crane Co. v. Hogan, 131 Ill. App. 314.

42. Crane Co. v. Hogan, 131 Ill. App. 314.

43. The court may refuse to consider more than a specified number, if it appears that instructions actually given fully and fairly present to jury law applicable to case. Crane Co. v. Hogan, 131 Ill. App. 314.

44. See 10 C. L. 801. See post, §§ 6, 14.

45. Monroe County v. Driskell, 3 Ga. App. 533, 60 SE 293; Cooper v. Harvey [Kan.] 94 P 213; Du Cate v. Brighton, 133 Wis. 628, 114 NW 103.

46. Pittsburgh, etc., R. Co. v. O'Conner [Ind.] 85 NE 969; St. Louis S. W. R. Co. v. Cleland [Tex. Civ. App.] 110 SW 122.

47. It makes no difference whether signature is at beginning or close of instructions. City of Garrett v. Winterich [Ind. App.] 84 NE 1006.

48. But where unsigned request is refused, failure to sign may be invoked by opposite party to sustain refusal. Terry v. Davenport [Ind.] 83 NE 636.

49. Kress v. Lawrence [Ala.] 47 S 574; Western Union Tel. Co. v. Rowell [Ala.] 45 S 73; Alabama Iron Co. v. Smith [Ala.] 46 S 475.

50. Instructions containing most apt language should be offered. Clifford v. Pioneer Fireproofing Co., 232 Ill. 150, 83 NE 448.

51. See post, § 6. Birmingham R. L. & P. Co. v. Landrum [Ala.] 45 S 198. Must not be verbally inaccurate and unintelligible. Louisville & N. R. Co. v. Lile [Ala.] 45 S 699.

52. Prayer that under pleadings and evidence verdict must be for plaintiff too general and indefinite. Palatine Ins. Co. v. O'Brien, 107 Md. 341, 68 A 484. Request to charge law as to prescriptive rights and adverse possession too general and indefinite. McElwaney v. McDiarmid [Ga.] 62 SE 20. If offered to correct omission in charge, it must point out the omission complained of. Texas & N. O. R. Co. v. Parsons [Tex. Civ. App.] 109 SW 240.

53. Charge should be requested, properly framed, presenting question desired to be passed on. Orient Ins. Co. v. Wingfield [Tex. Civ. App.] 108 SW 738.

54. See post, § 6. The request offered must not conflict with another given at instance of same party. Texas & N. O. R. Co. v. Jackson [Tex. Civ. App.] 113 SW 628.

55. Macon, etc., R. Co. v. Joyner, 129 Ga. 683, 59 SE 902; Summerville v. Klein, 140 Ill. App. 39; Stoker v. Fugitt [Tex. Civ. App.] 113 SW 310; Texas & N. O. R. Co. v. Jackson [Tex. Civ. App.] 113 SW 628. Request should incorporate proper principles applicable to facts in proof. Williamson v. St. Louis & M. R. R. Co. [Mo. App.] 113 SW 239; Kansas City So. R. Co. v. Williams [Tex. Civ. App.] 111 SW 196. Although either party may ask for an instruction upon effect of segregating portions of evidence if believed by jury, such prayer, if it conclude with direction to jury to find in favor of author, must present legal proposition which is sound, even if other evidence in case be found by jury to be true. Darrin v. Whittingham, 107 Md. 46, 68 A 269.

wholly rejected.[56] It has been held, however, that when there has been no instruction on an issue an erroneous request is sufficient to call the attention of the court to its duty in that respect.[57]

*Time of making requests.*[58]—Requests are often required to be presented before the argument begins,[59] and the court is not ordinarily required to receive them when presented out of time.[60]

*Disposition of requests.*[See 10 C. L. 301]—It is usually held that the court need not give instructions in the precise form in which they are requested [61] and may modify the instruction and give it as modified,[62] though in some states the power of the court to modify a requesed instruction is denied.[63]

While the duty to correct an imperfect instruction is sometimes declared,[64] the

**56.** Maffi v. Stephens [Tex. Civ. App] 108 SW 1008. A request containing both a sound and unsound proposition of law should be refused. Armour & Co. v. Kollmeyer [C. C. A.] 161 F 78.

**57.** Wade v. Galveston, etc., R. Co. [Tex. Civ. App.] 110 SW 84. And see post, this section, Disposition of Requests, as to power and duty to modify.

**58.** See 10 C. L. 301. See post, § 16.

**59.** Gracz v. Anderson, 104 Minn. 476, 116 NW 1116. A request comes too late during closing argument. Quimby v. Jay, 196 Mass. 584, 82 NE 1084. A court rule which requires all instructions to be presented at the conclusion of evidence does not prevent court from giving an instruction not so presented if, in the court's opinion, it is proper to do so. Frank Parmelee Co. v. Griffin, 136 Ill. App. 307. Rule has no application where an instruction has been presented in apt time, examined by the court and handed back to counsel with suggestion that in its then form it was erroneous, and when amended a request is made to have it given. Chicago City R. Co. v. Hackett, 136 Ill. App. 594.

**60.** At close of charge. Zamore v. Boston El. R. Co., 198 Mass. 594, 84 NE 858.

**61.** Dunham v. Cox [Conn.] 70 A 1033; J. C. Stevenson Co. v. Bethea, 79 S. C. 478, 61 SE 99; Salchert v. Reinig [Wis.] 115 NW 132. If charge given is better statement of law, no grounds for complaint. McFeat v. Philadelphia, W. & B. R. Co. [Del.] 69 A 744. Court may reject all prayers and instruct in its own language, but when this is done, law ought to be fully and accurately declared in explicit and intelligible terms. Rosenkovitz v. United Railways & Elec. Co. [Md.] 70 A 108. Where proper special instructions are requested, but not to be given before argument, court is not required to give them in precise terms or language submitted. It is sufficient if substance thereof be given in other instructions or in general charge. Rheinheimer v. Aetna Life Ins. C., 77 Ohio St. 360, 83 NE 491. Modifying request stating rule of law by which appellee's testimony should be weighed by adding that it is to be weighed by same tests as applied to other witnesses, not improper. Mertens v. Southern Coal & Min. Co., 235 Ill. 540, 85 NE 743. It is safe general rule not to give instructions in language in which asked. Hanrahan v. O'Toole [Iowa] 117 NW 675.

**62.** Court may make proper modifications. St. Louis, etc., R. Co. [Ark.] 110 SW 220; Powell v. Fowler, 85 Ark. 451, 108 SW 827; Cashman v. Proctor [Mass.] 86 NE 284; Ratliff v. Quincy, etc., R. Co. [Mo. App]. 110 SW 606; Douglass v. Southern R. Co. [S. C.] 62 SE 15; St. Louis S. W. R. Co. v. Shipp [Tex. Civ. App.] 109 SW 286; St. Louis S. W. R. Co. v. Cockrill [Tex. Civ. App.] 111 SW 1092. Court may modify by striking out comment on evidence. Garner v. Metropolitan St. R. Co., 128 Mo. App. 401, 107 SW 427. Instruction argumentative in form is properly modified by eradication of argumentative portion. Illinois Steel Co. v. Koshinski, 135 Ill. App. 587. An instruction giving undue prominence to matter may be modified. Pauckner v. Waken, 231 Ill. 276, 83 NE 202. Modification is not objectionable when original draft is misleading. Eckels v. Hawkinson, 138 Ill. App. 627. Modification of proffered instruction not embracing all material facts for an estoppel held not prejudicial. Central Brew. Co. v. American Brew. Co., 135 Ill. App. 648. Instruction containing "and you will return verdict for defendant if evidence is evenly balanced, or if it preponderates for defendant, or if you are in doubt as to its preponderance," properly modified by changing latter clause to "or if you are unable to determine as to its preponderance." Illinois Steel Co. v. Koshinski, 135 Ill. App. 587.

**Formal and trivial modifications.** Ramey v. Baltimore, etc., R. Co., 235 Ill. 502, 85 NE 639. Phraseology may be changed so long as meaning is not. Grimes v. Cole [Mo. App.] 113 SW 685. Qualifications not amounting to improper restrictions, but simply statements of converse of proposition, may be added. Central of Georgia R. Co. v. Mote [Ga.] 62 SE 164. A modification of a tendered instruction is not error where modification does not state an incorrect or inaccurate proposition of law. Eckels v. Hawkinson, 138 Ill. App. 627.

**63.** In some jurisdictions, trial court cannot change verbiage, but must give charge in exact language asked. Louisville & N. R. Co. v. Lile [Ala.] 45 S 699. Special charges should not be modified, but given or rejected as presumed. Gulf, etc., R. Co. v. Farmer [Tex. Civ. App.] 108 SW 729.

**64.** See post, § 6. When a party offers an instruction on some point of law involved in case, and it is not correctly drawn or in proper form, it is duty of court to prepare, or have prepared, instruction on that point and give it to jury, and failure to do so is error. Whitley v. Whitley's Adm'r, 32 Ky.

general rule is that the court need not correct imperfect requests, but may refuse them.[65]

Where an instruction is modified, the court need not indicate to the jury what part thereof is as originally requested,[66] but a requested instruction should not be made confusing by the addition of modifying matter not germane to the request.[67]

Statutes in some states require that the disposition of requests be noted thereon,[68] the purpose being to preserve a proper record,[69] and, on review, unmarked requests are deemed to have been refused.[70] In the absence of statute, the disposition of requests need not be so indicated.[71]

*Repetition.*[See 10 C. L. 303]—Though the court may in some cases repeat an instruction,[72] yet, as repetitions tend to mislead the jury [73] and give undue prominence to issues,[74] the court should not and cannot be required [75] to repeat matters previously charged [76] where such repetition can serve no useful purpose,[77] even if the request is

L. R. 1211, 108 SW 241. If evidence is sufficient to raise issue, an imperfect request which suggests issue should be corrected and given. Rushing v. Lanier [Tex. Civ. App.] 111 SW 1089.

**65.** Edwards v. Western Union Tel. Co. [N. C.] 60 SE 900; Houston & T. C. R. Co. v. Oram [Tex. Civ. App.] 30 Tex. Ct. Rep. 681, 107 SW 74; Chicago, etc., R. Co. v. Johnson [Tex. Civ. App.] 111 SW 758; Ramm v. Hewitt-Lea Lumber Co. [Wash.] 94 P 1081. Court need not revise a faulty request nor frame a correct one. Williams v. Lansing, 152 Mich. 169, 15 Det. Leg. N. 168, 115 NW 961; Chicago, etc., R. Co. v. Johnson [Tex.] 108 SW 964; Kansas City So. R. Co. v. Williams [Tex. Civ. App.] 111 SW 196.

**66.** Farrell v. Citizens' Light & R. Co., 137 Iowa, 309, 114 NW 1063.

**67.** Taylor v. McClintock [Ark.] 112 SW 405.

**68.** The failure of court to mark instructions not given is improper under statute. Leman v. U. S. Fidelity & Casualty Co., 137 Ill. App. 258.

**69.** The object of designating requests as "given," "refused" or "modified" is intended simply to preserve a proper record. Farrell v. Citizens' Light & R. Co., 137 Iowa, 309, 114 NW 1063.

**70.** Leman v. U. S. Fidelity & Casualty Co., 137 Ill. App. 258.

**71.** The dispositon of requests need not be noted on margin of instructions. Van Buskirk v. Quincy, etc., R. Co. [Mo. App.] 111 SW 832.

**72.** If instruction asked does not give undue prominence to a phase of case covered by court's charge, it may be given. Wolf Cigar Stores Co. v. Kramer [Tex. Civ. App.] 109 SW 990. Held, two charges on issue of contributory negligence did not give undue prominence to that issue. Wade v. Galveston, etc., R. Co. [Tex. Civ. App.] 110 SW 84. Two instructions covering same question but worded differently, may be given. Huss v. Heydt Bakery Co., 210 Mo. 44, 108 SW 63.

**73.** Rosenkovitz v. United Railways & Elec. Co. [Md.] 70 A 108.

**74.** As undue prominence may be given an issue by recurring to it often in a charge when an issue is fully presented there is no necessity for repeating it in a special charge. Herring v. Galveston, etc., R. Co. [Tex. Civ. App.] 108 SW 977; Missouri, etc., T. R. Co. v. Dunbar [Tex. Civ. App.] 108 SW 500. See post, § 10.

**75.** Court should not and cannot be required to repeat a charge on any phase of the case. Galveston, etc., R. Co. v. Conutesan [Tex. Civ. App.] 111 SW 187.

**76. Requests covered, or substantially covered by instruction given, may be refused.** Burns v. George [Ala.] 45 S 421; Morris v. McClellan [Ala.] 45 S 641; Greene v. Hereford [Ariz.] 95 P 105; St. Louis, etc., R. Co. v. Saunders, 85 Ark. 111, 107 SW 194; Powell v. Fowler, 85 Ark. 451, 108 SW 827; McDonough v. Williams [Ark.] 112 SW 164; Shafstall v. Downey [Ark.] 112 SW 176; Chicago, etc., R. Co. v. Lannon [Ark.] 112 SW 177; Taylor v. McClintock [Ark.] 112 SW 405; St. Louis, etc., R. Co. v. Stell [Ark.] 112 SW 876; St. Louis, etc., R. Co. v. Gilbreath [Ark.] 113 W 200; Central Pac. R. Co. v. Feldman, 152 Cal. 303, 92 P 849; Wistrom v. Redlick Bros., 6 Cal. App. 671, 92 P 1048; Bonneau v. North Shore R. Co., 152 Cal. 406, 93 P 106; Fleischauer v. Fabens [Cal. App.] 96 P 17; Bailey v. Carlton, 43 Colo. 4, 95 P 542; Rio Grande Western R. Co. v. Boyd [Colo.] 96 P 781; City & County of Denver v. Bacon [Colo.] 96 P 974; Cadwell v. Canton [Conn.] 70 A 1025; McFeat v. Philadelphia, etc., R. Co. [Del.] 69 A 744; District of Columbia v. Duryee, 29 App. D. C. 327; Cooper v. Sillers, 30 App. D. C. 567; City of Madison v. Thomas, 130 Ga. 153, 60 SE 461; Southern R. Co. v. Brewer, 130 Ga. 538, 61 SE 116; Millen, etc., R. Co. v. Allen, 130 Ga. 656, 61 SE 541; Central of Georgia R. Co. v. Mote [Ga.] 62 SE 164; Southern R. Co. v. Grizzle [Ga.] 62 SE 177; Sims v. Sims [Ga.] 62 SE 192; Roseborough v. Wittington [Idaho] 96 P 437; Koshinski v. Illinois Steel Co., 231 Ill. 198, 83 NE 149; Wallace v. Farmington, 231 Ill. 232, 83 NE 180; Pauckner v. Wakem, 231 Ill. 276, 83 NE 202; Clifford v. Pioneer Fireproofing Co., 232 Ill. 150, 83 NE 448; McCann v. Mayer, 232 Ill. 507, 83 NE 1042; Miroslawski v. Ferguson & Lange Foundry Co., 232 Ill. 630, 83 NE 1086; Floto v. Floto, 233 Ill. 605, 84 NE 712; Klofski v. Railroad Supply Co., 235 Ill. 146, 85 NE 274; Kennedy v. Swift & Co., 234 Ill. 606, 85 NE 287; Mertens v. Southern Coal & Min. Co., 235 Ill. 540, 85 NE 743, afg. 140 Ill. App. 190; Tinsman v. Illinois Commercial Men's Ass'n, 235 Ill. 635, 85 NE 913; Ragsdale v. Illinois Cent. R. Co., 236 Ill. 175, 86 NE 214; Henry v. Cleveland.

etc., R. Co., 236 Ill. 219, 86 NE 231; Chicago City R. Co. v. Hagenback, 131 Ill. App. 537; Village of Montgomery v. Robertson, 132 Ill. App. 362; East St. Louis, etc., R. Co. v. Zink, 133 Ill. App. 127; City of Chicago v. Kubler, 133 Ill App. 520; Press v. Hair, 133 Ill. App. 528; Mattoon Heat L. & P. Co. v. Walker, 134 Ill. App. 414; Chicago City R. Co. v. Donnelly, 136 Ill. App. 204; Chicago City R. Co. v. Phillips, 138 Ill. App. 438; Mohr v. Martewicz, 139 Ill. App. 173; Illinois Commercial Men's Ass'n v. Perrin, 139 Ill. App. 543; Yezner v. Roberts, Johnson & Rand Shoe Co., 140 Ill. App. 61; Cleveland, etc., R. Co. v. Wuest, 41 Ind. App. 210, 83 NE 620; Oil Well Supply Co. v. Priddy, 41 Ind. App. 200, 83 NE 623; City of La Porte v. Henry, 41 Ind. App. 197, 83 NE 655; City of Whiting v. Eagan, 41 Ind. App. 377, 83 NE 1016; Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730; Brinkman v. Pacholke, 41 Ind. App. 662, 84 NE 762; Kelly v. Chicago, etc., R. Co. [Iowa] 114 NW 536; Mickey v. Indianola [Iowa] 114 NW 1072; Swiney v. American Exp. Co. [Iowa] 115 NW 212; Beck v. Umshler [Iowa] 116 NW 138; Walkup v. Beebe [Iowa] 116 NW 321; McGuire v. Chicago, B. & Q. R. Co. [Iowa] 116 NW 801; Burger v. Omaha, etc., R. Co. [Iowa] 117 NW 35; Hanrahan v. O'Toole [Iowa] 117 NW 675; Murphy v. Chicago G. W. R. Co. [Iowa] 118 NW 390; Votaw v. McKeever, 76 Kan. 870, 92 P 1120; Switchmen's Union of North America v. Johnson, 32 Ky. L. R. 583, 105 SW 1193; Louisville & N. R. Co. v. Rayl, 32 Ky. L. R. 870, 107 SW 298; Louisville & N. R Co. v. Crow, 32 Ky. L. R. 1145, 107 SW 807; Hubbard v. Louisville, etc., R. Co., 32 Ky. L. R. 1337, 108 SW 331; Black Diamond Coal & Min. Co. v. Price, 33 Ky. L. R. 334, 108 SW 345; Matthews' Adm'r v. Louisville & N. R. Co. [Ky.] 113 SW 459; Rosenkovitz v. United Railways & Elec. Co. [Md.] 70 A 108; Harrison v. McLaughlin [Md.] 70 A 424; Miller v. Boston, etc., R. Co. Co., 197 Mass. 535, 83 NE 990; Gurney v. Tenney, 197 Mass. 457, 84 NE 428; Plummer v. Boston El. R. Co., 198 Mass. 499, 84 NE 849; Cashman v. Proctor [Mass.] 86 NE 284; Goodes v. Lansing & Suburban Trac. Co., 150 Mich. 494, 14 Det. Leg. N. 768, 114 NW 338; Smith v. Hubbell, 151 Mich. 59, 14 Det. Leg. N. 874, 114 NW 865; Schweyer v. Jones, 152 Mich. 241, 15 Det. Leg. N. 187, 115 NW 974; In re Smith's Estate [Mich.] 15 Det. Leg. N. 146, 115 NW 1052; Hazen v. Bay City Trac. & Elec. Co., 152 Mich. 457, 15 Det. Leg. N. 304, 116 NW 364; Ferris v. Court of Honor, 152 Mich. 322, 15 Det. Leg. N. 195, 116 NW 448; Buxton v. Ainsworth [Mich.] 15 Det. Leg. N. 475, 116 NW 1094; Charette v. L'anse [Mich.] 15 Det. Leg. N. 738, 117 NW 737; LaBarre v. Bent [Mich.] 15 Det. Leg. N. 822, 118 NW 8; Balder v. Zenith Furnace Co., 103 Minn. 345, 114 NW 948; Flaherty v. St. Louis Transit Co., 207 Mo. 318, 106 SW 15; Dee v. Nachbar, 207 Mo. 680, 106 SW 35; Lattimore v. Union Elec. L. & P. Co., 128 Mo. App. 37, 106 SW 643; Lange v. Missouri Pac. R. Co., 208 Mo. 458, 108 SW 660; Armello v. Whitman, 127 Mo. App. 698, 106 SW 1113; Chenoweth v. Sutherland, 129 Mo. App. 431, 107 SW 6; Smith v. Wabash R. Co., 129 Mo. App. 413, 107 SW 22; Ghere v. Zey, 128 Mo. App. 362, 107 SW 418; Cobb v. Holloway, 129 Mo. App. 212, 108 SW 109; Collins v. Fillingham, 129 Mo. App. 340, 108 SW 616; Ryley-Wilson Grocer Co. v. Seymour Canning Co., 129 Mo. App. 325, 108 SW 628; Penney v. St. Joseph Stockyards Co., 212 Mo. 309, 111 SW 79; Thompson v. Independence [Mo.] 111 SW 521; Heingle v. Metropolitan St. R. Co. [Mo.] 111 SW 536; Waddell v. Metropolitan St. R. Co. [Mo.] 111 SW 542; Porter v. St. Joseph Stockyards Co. [Mo.] 111 SW 1136; Brown v. Globe Print. Co. [Mo.] 112 SW 462; Sires v. Clark [Mo. App.] 112 SW 526; International Bank v. Enderle [Mo. App.] 113 SW 262; Hudson v. Truman [Neb.] 112 NW 325; Struble v. De Witt [Neb.] 116 NW 154; Piper v. Neylon [Neb.] 116 NW 159; Maxson v. J. I. Case Threshing Co. [Neb.] 116 NW 281; Billingsley v. Dutton [Neb.] 116 NW 301; Joyce v. Miller [Neb.] 116 NW 506; Perrine v. Union Stockyards Co. [Neb.] 116 NW 776; Morse v. Chicago B. & Q. R. Co. [Neb.] 116 NW 859; Daggett v. North Jersey St. R. Co., [N. J. Err. & App.] 68 A 179; Hanley v. Brooklyn Heights R. Co., 111 NYS 575; Britt v. Carolina Northern R. Co. [N. C.] 61 SE 601; Grant v. Milam [Okl.] 95 P 424; Citizens' Bank of Wakita v. Garnett [Okl.] 95 P 755; McGregor v. Oregon R. Co. [Or.] 93 P 466; Miller v. James Smith Woolen Mach. Co., 220 Pa. 181, 69 A 598; Fugere v. Cook [R. I.] 69 A 555; Thiebault v. Prendergast [R. I.] 69 A 922. Instruction will not be modified if it fairly embodies the principles of law involved in the request. Barber v. Allen [R. I.] 68 A 366; Neilson v. Oium [S. D.] 114 NW 691; San Antonio, etc., R. Co. v. Muecke [Tex. Civ. App.] 20 Tex. Ct. Rep. 52, 105 SW 1009; Galveston, etc., R. Co. v. Berry [Tex. Civ. App.] 20 Tex. Ct. Rep. 156, 105 SW 1019; Houston, etc., R. Co. v. McHale [Tex. Civ. App.] 20 Tex. Ct. Rep. 161, 105 SW 1149; Waters-Pierce Oil Co. v. Snell [Tex. Civ. App.] 20 Tex. Ct. Rep. 190, 106 SW 170; St. Louis S. W. R. Co. v. Cunningham [Tex. Civ. App.] 20 Tex. Ct. Rep. 245, 106 SW 407; Stockton v. Brown [Tex. Civ. App.] 20 Tex. Ct. Rep. 678, 106 W 423; Southern Pac. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441; Thompson v. Planters' Compress Co. [Tex. Civ. App.] 106 SW 470; Guffey Petroleum Co. v. Hooks [Tex. Civ. App.] 20 Tex. Ct. Rep. 254, 106 SW 690; Texas & P. R. Co. v. Johnson [Tex. Civ. App.] 20 Tex. Ct. Rep. 410, 106 SW 773; Paris, etc., R. Co. v. Calvin [Tex.] 20 Tex. Ct. Rep. 316, 106 SW 879; Galveston, etc., R. Co. v. Wafer [Tex. Civ. App.] 20 Tex. Ct. Rep. 331, 106 SW 897; Harris v. Jackson [Tex. Civ. App.] 20 Tex. Ct. Rep. 470, 106 SW 1144; Western Union Tel. Co. v. Bell [Tex. Civ. App.] 20 Tex. Ct. Rep. 695, 106 SW 1147; Houston, etc., R. Co. v. Oram [Tex. Civ. App.] 20 Tex. Ct. Rep. 681, 107 SW 74; Houston, etc., R. Co. v. Finn [Tex. Civ. App.] 107 SW 94; Pullman Co. v. Vanderhoeven [Tex. Civ. App.] 20 Tex. Ct. Rep. 889, 107 SW 147; St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 107 SW 638; Butler v. Anderson [Tex. Civ. App.] 107 SW 656; St. Louis S. W. R. Co. v. Moore [Tex. Civ. App.] 107 SW 658; Missouri, etc., R. Co. v. Thomas [Tex. Civ. App.] 107 SW 868; Kansas City Consol. Smelting & Refining Co. v. Taylor [Tex. Civ. App.] 107 SW 889; Missouri, etc., R. Co. v. Balliet [Tex. Civ. App.] 107 SW 906; Texas, etc., R. Co. v. Davidson [Tex. Civ. App.] 20 Tex. Ct. Rep. 643, 107 SW 949; Dunn v. Taylor [Tex. Civ. App.] 20 Tex. Ct. Rep. 864, 107 SW 952; Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 20 Tex Ct. Rep. 772, 107 SW 968; Southern Pac. Co. v. Godfrey [Tex. Civ. App.] 107 SW

in proper form.[78] A refusal to charge, except as already charged, is however, an intimation to the jury that the rule requested is not wholly sound, and is error if the requested instruction has not been fully given.[79]

§ 4. *Assumption of facts.*[80]—The court may not assume the existence of controverted facts [81] as to which there is an issue for the jury,[82] and a fortiori must not

1135; San Marcos Elec. L. & P. Co. v. Compton [Tex. Civ. App.] 107 SW 1151; Rapid Transit R. Co. v. Strong [Tex. Civ. App.] 108 SW 394; Houston, etc., R. Co. v. Burnet [Tex. Civ. App.] 108 SW 404; Missouri, etc., R. Co. v. Morgan [Tex. Civ. App.] 108 SW 724; Gulf, etc., R. Co. v. Farmer [Tex. Civ. App.] 108 SW 729; Texas Midland R. R. v. Ritchey [Tex. Civ. App.] 108 SW 732; St. Louis S. W. R. Co. v. Hawkins [Tex. Civ. App.] 108 SW 736; Missouri, etc., R. Co. v. Hendricks [Tex. Civ. App.] 108 SW 745; San Antonio, etc., R. Co. v. Martin [Tex. Civ. App.] 108 SW 981; El Paso, etc., R. Co. v. Smith [Tex Civ. App.] 108 SW 988; Maffi v. Stephens [Tex. Civ. App.] 108 SW 1008; Seligmann v. Grief [Tex. Civ. App.] 109 SW 214; Missouri, etc., R. Co. v. Hibbitts [Tex. Civ App.] 109 SW 228; City of San Antonio v. Wildenstein [Tex. Civ. App.] 109 SW 231; Texas, etc., R. Co. v. Parsons [Tex. Civ. App.] 109 SW 240; Western Union Tel. Co. v. Johnsey [Tex. Civ. App.] 109 SW 251; Galveston, etc., R. Co. v. Cochran [Tex. Civ. App.] 109 SW 261; Postal Tel.-Cable Co. v. Sunset Const. Co. [Tex. Civ. App.] 109 SW 265; Galveston, etc., R. Co. v. Berry [Tex. Civ. App.] 109 SW 393; El Paso Elec. R. Co. v. Kelly [Tex. Civ. App.] 109 SW 415; Gulf, etc., R. Co. v. Jackson [Tex. Civ. App.] 109 SW 478; McCormick v. Kampmann [Tex. Civ. App.] 109 SW 492; Consolidated Kansas City Smelting & Refining Co. v. Gonzales [Tex. Civ. App.] 109 SW 946; Louisiana & T. Lumber Co. v. Brown [Tex. Civ. App.] 109 SW 950; El Paso Elec. R. Co. v. Sierra [Tex. Civ. App.] 109 SW 986; Wolf Cigar Stores Co. v. Kramer [Tex. Civ. App.] 109 SW 990; Houston, etc., R. Co. v. Patrick [Tex. Civ. App.] 109 SW 1097; Missouri, etc., R. Co. v. Dawson [Tex Civ. App.] 109 SW 1110; Whitney v. Texas Cent. R. Co. [Tex. Civ. App.] 110 SW 70; St. Louis S. W. R. Co. v. Cleland [Tex. Civ. App.] 110 W 122; Gaar, Scott & Co. v. Burge [Tex. Civ. App.] 110 SW 181; Texas Midland R. R. v. Byrd [Tex. Civ. App.] 110 SW 199; Southwestern Tel. & T. Co. v. Tucker [Tex. Civ. App.] 110 SW 481; Overall v. Graves [Tex. Civ. App.] 110 SW 549; Missouri, etc., R. Co. v. Pennewell [Tex. Civ. App.] 110 SW 758; Morgan v. Missouri, etc., R. Co. [Tex. Civ. App.] 110 SW 978; Houston, etc., R. Co. v. Lindsey [Tex. Civ. App.] 110 SW 995; Galveston, etc., R. Co. v. Conuteson [Tex. Civ. App.] 111 SW 187; Robertson & Co. v. Russell [Tex. Civ. App.] 111 SW 205; St. Louis, etc., R. Co. v. Summers [Tex. Civ. App.] 111 SW 211; St. Louis S. W. R. Co. v. Garber [Tex. Civ. App.] 111 SW 227; Missouri, etc., R. Co. v. Cannon [Tex. Civ. App.] 111 SW 661; Chicago, etc., R. Co. v. Groner [Tex. Civ. App.] 111 SW 667; Chicago, etc., R. Co. v. Josnson [Tex. Civ. App.] 111 SW 758; Dyer v. McWhirter [Tex. Civ. App.] 111 SW 1053; St. Louis S. W. R. Co. v. Nelson [Tex. Civ. App.] 111 SW 1062; St. Louis S. W. R. Co. v. Cockrill [Tex. Civ. App.] 111 SW 1092; Missouri, K. & T. R. Co. v. Kennedy [Tex. Civ. App.] 112 SW 839; Gulf, etc., R. Co. v. Coleman [Tex Civ. App.] 112 SW 690; Missouri, K. & T. R. Co. v. Hagler [Tex. Civ. App.] 112 SW 783; Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787; Crouch Hardware Co. v. Walker [Tex. Civ. App.] 113 SW 163; Alexander v. Brillhart [Tex. Civ. App.] 113 SW 184; Hansen v. Williams [Tex. Civ. App.] 113 SW 312; San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574; Texas & N. O. R. Co. v. Jackson [Tex. Civ, App.] 113 SW 628; Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631; Schow v. McCloskey [Tex.] 113 SW 739; Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767; Williams v. Livingston [Tex. Civ. App.] 113 SW 786; Spiking v. Consolidated R. & P. Co., 33 Utah, 313, 93 P 838; Herndon v. Salt Lake City [Utah] 95 P 646; Condie v. Rio Grande Western R. Co. [Utah] 97 P 120; Davidson v. Utah Independent Tel. Co. [Utah] 97 P 124, Drown v. New England Tel. & T. Co. [Vt.] 70 A 599; Chesapeake & O. R. Co. v. Fortune, 107 Va. 412, 59 SE 1095; Southern R. Co. v. Daves [Va.] 61 SE 748; Burton v. Seifert Plastic Relief Co. [Va.] 61 SE 933; Long Pole Lumber Co. v. Saxon Lime & Lumber Co. [Va.] 62 SE 849; Life Ins. Co. of Virginia v. Haviston [Va.] 62 SE 1057; Ramm v. Hewitt-Lea Lumber Co. [Wash.] 94 P 1081; Heinzerling v. Agen [Wash.] 96 P 223; Olsen v. Tacoma Smelting Co. [Wash.] 96 P 1036; Engelker v. Seattle Elec. Co. [Wash.] 96 P 1039; Duskey v. Green Lake Shingle Co. [Wash.] 98 P 99; Squilache v. Tidewater Coal & Coke Co. [W. Va.] 62 SE 446; Du Cate v. Brighton, 133 Wis. 628, 114 NW 103; Hein v. Mildebrandt, 134 Wis. 582, 115 NW 121; Salchert v. Reinig [Wis.] 115 NW 132; Salmon v. Helena Box Co. [C. C. A.] 158 F 300; Mills Novelty Co. v. Peck [C. C. A.] 158 F 811; Jackson Fibre Co. v. Meadows [C. C. A.] 159 F 110; Toledo, etc., R. Co. v. Reardon [C. C. A.] 159 F 366; Texas & P. R. Co. v. Bourman [C. C. A.] 160 F 452; Murhard Estate Co. v. Portland & Seattle R. Co. [C. C. A.] 163 F 194; Bolen-Darnall Coal Co. v. Williams [C. C. A.] 164 F 665.

77. Ingemarson v. Coffey, 41 Colo. 407, 92 P 908.

78. Donnelly v. Chicago City R. Co., 235 Ill. 35, 85 NE 233; Volkman v. McMullen, 138 Ill. App. 616; City of Chicago v. Wieland, 139 Ill. App. 197; Wells Bros. Co. v. Flanagan, 139 Ill. App. 237; Miller v. James Smith Woolen Mach. Co., 220 Pa. 181, 69 A 698.

79. Petterson v. Rahtjen's American Composition Co., 111 NYS 329.

80. See 10 C. L. 805. See, also, ante, § 2; post, §§ 5, 7.

81. Cahill v. Dellenback, 139 Ill. App. 320. If court is satisfied that a fact is not really in dispute, its existence may be assumed. Jackson v. Tribble [Ala.] 47 S 810; Kelley v. Tourington, 80 Conn. 378, 68 A 855; Davideon v. St. Louis Transit Co., 211 Mo. 320, 109 SW 583. Must not assume fact if evidence close or conflicting. Southern

assume the existence of facts as to which there is no evidence.[83] The court may assume facts when but one inference can be drawn [84] or where they are admitted [85] or

R. Co. v. Limback [Ind.] 85 NE 354; Hollerbach & May Contract Co. v. Wilkins [Ky.] 112 SW 1126; Crown Cork & Seal Co. v. O'Leary [Md.] 69 A 1068; Seaboard Air Line R. Co. v. Phillips [Md.] 70 A 232; Ruthruff v. Faust [Mich.] 15 Det. Leg. N. 783, 117 NW 902; Hartley v. Calbreath, 127 Mo. App. 559, 106 SW 570; Christian v. McDonnell, 127 Mo. App. 630, 106 SW 1104; Glover v. Atchison, etc., R. Co., 129 Mo. App. 563, 108 SW 105; Haynor v. Excelsior Springs L. P. H. & Water Co., 129 Mo. App. 691, 108 SW 580; Gessner v. Metropolitan St. R. Co. [Mo. App.] 112 SW 30; International Bank v. Enderle [Mo. App.] 113 SW 262; Holton v. Cochran, 208 Mo. 314, 106 SW 1035; Crow v. Houck's Missouri & A. R. Co., 212 Mo. 589, 111 SW 583; Wilson v. New York, etc., R. Co. [R. I.] 69 A 364; Dallas Consol. Elec. St. R. Co. v. Lytle [Tex. Civ. App.] 20 Tex. Ct. Rep. 820, 106 SW 900; Thompson v. Galveston, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 756, 106 SW 910; Feille v. San Antonio Trac. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 862, 107 SW 367; Hunter v. Malone [Tex. Civ. App.] 108 SW 709; St. Louis S. W. R. Co. v. Shipp [Tex. Civ. App.] 109 SW 286; Champion v. Johnson County [Tex. Civ. App.] 109 SW 1146; Missouri, K. & T. R. Co. v. Steele [Tex. Civ. App.] 110 SW 171; Kansas City So. R. Co. v. Williams [Tex. Civ. App.] 111 SW 196; Yates v. Bratton [Tex. Civ. App.] 111 SW 416; Chicago, etc., R. Co. v. Groner [Tex. Civ. App.] 111 SW 667; Texas, etc., R. Co. v. Powell [Tex. Civ. App.] 112 SW 697; Hansen v. Williams [Tex. Civ. App.] 113 SW 312; Orange Lumber Co. v. Thompson [Tex. Civ. App.] 113 SW 563; Hess v. Webb [Tex. Civ. App.] 113 SW 618; Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631; St. Louis, etc., R. Co. v. Boshear [Tex.] 113 SW 6; District of Columbia v. Duryee, 29 App. D. C. 327.

**Rule violated:** Assumption that statement is true. American Nat. Bank v. Fountain [N. C.] 62 SE 738. That sale was not bona fide. Griffin v. Griffin [Miss.] 46 S 945. That plaintiff has made prima facie case. Barry v. Madaris [Ala.] 47 S 152. Actual damages from levy of attachment. Seal v. Holcomb [Tex. Civ. App.] 20 Tex. Ct. Rep. 808, 107 SW 916. That contract claimed by appellant to have been made was made. Brougham v. Paul, 138 Ill. App. 455. That contract was parol one relied on by appellee, and not written one relied upon by appellants. Summerville v. Klein, 140 Ill. App. 39. That disputed words "in full to date" were in a check at time of delivery. McKinnie v. Lane, 133 Ill. App. 438. Instruction which in effect directs verdict. Klofski v. Railroad Supply Co., 235 Ill. 146, 85 NE 274; Chicago, etc., R. Co. v. Gurck, 131 Ill. App. 128. That facts recited did not constitute contributory negligence. Conklin Const. Co. v. Walsh, 131 Ill. App. 609. That certain facts tend to show exercise of ordinary care. Illinois Cent. R. Co. v. Collison, 134 Ill. App. 443. That it was negligence to fail to look and listen. Missouri K. & T. R. Co. v. Balliet [Tex. Civ. App.] 107 SW 906. That collision was due to defects in machinery. Asher v. East St. Louis, etc., R. Co., 140 Ill. App. 220. That appellee had been derelict in duty owed employers. Campbell v. Fierlein, 134 Ill. App. 207. That if appellant had given appellee proper care and treatment no permanent injury would have resulted from broken bones, etc. McIlwain v. Gaebe, 137 Ill. App. 25.

**Not violated:** Advising jury of existence of law does not assume violation of it. Perkins v. Wabash R. Co., 233 Ill. 458, 84 NE 677. May assume eligibility to office, it not being controverted. Ham v. State [Ala.] 47 S 126. Where instruction expressly leaves determination of question to jury, it cannot be said to assume fact. City of Garrett v. Winterich [Ind App.] 84 NE 1006; Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038; Blue Ridge L. & P. Co. v. Price [Va.] 62 SE 938. Requirement that jury believe, from evidence, every fact stated in instruction, need not be repeated before each separate fact. Schmitt v. Kurrus, 234 Ill. 578, 85 NE 261. Requiring jury to find essential elements necessary to recovery, and distinctly telling them that before recovery can be had certain things must be shown. Murphy v. Chicago G. W. R. Co. [Iowa] 118 NW 390. Setting out facts alleged and directing verdict if facts are proved. Ramey v. Baltimore, etc., R. Co., 235 Ill. 502, 85 NE 639. That defendant may be liable for arrest under charge of embezzlement, and jury, in considering that question, may consider all evidence before them as to what was said and done, does not assume fact of arrest. Kress v. Lawrence [Ala.] 47 S 574.

**82.** Cannot assume facts that jury must determine from evidence adduced. Bryant Lumber Co. v. Stastney [Ark.] 112 SW 740; Fehd v. Oskaloosa [Iowa] 117 NW 989. Must not assume, as matter of law, existence of contributory negligence. Birmingham R. L. & P. Co. v. Landrum [Ala.] 45 S 198. In action of assumpsit for brokerage commissions, instruction which assumes absence of special contract and existence of established custom respecting such commissions, with reference to which parties must be presumed to have contracted, is erroneous, fact of existence of such custom being one which should be submitted to jury. Cobb v. Dunlevie, 63 W. Va. 398, 60 SE 384.

**83.** Hughes v. Hughes, 133 Ill. App. 654; Muscarelli v. Hodge Fence & Lumber Co., 120 La. 335, 45 S 268; Marklewitz v. Olds Motor Works, 152 Mich 113, 15 Det. Leg. N. 125, 115 NW 999; Kneale v. Lopez [Miss.] 46 S 715; Davidson v. Utah Independent Tel. Co. [Utah] 97 P 124; Taplin v. Marcy [Vt.] 71 A 72. Jury has right to discredit opinion of an expert. Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 20 Tex. Ct. Rep. 772, 107 SW 958.

**84.** See ante, § 3, Duty of Instructing. Where evidence is undisputed and but one just conclusion can be drawn from it by rational minds, or where thing proves itself, court may deal with it as matter of law. Cornovski v. St. Louis Transit Co., 207 Mo. 263, 106 SW 51; Redepenning v. Rock, 136 Wis. 372, 117 NW 805.

**85.** Cramer v. Nelson, 128 Mo. App. 393, 107

uncontroverted.[86] However, the failure to assume an undisputed fact is not error if the charge does not authorize a finding if such fact be not found.[87] To determine whether an instruction assumes a fact, the language must be construed as a whole.[88]

§ 5. *Charging with respect to matters of fact or commenting on the weight of evidence.*[89]—Reference to evidence should be made in a general way [90] and only so far as is necessary to present leading issues,[91] unless the ruling being made is necessarily the conclusion of the case.[92] Federal courts are allowed to comment on the weight of the evidence,[93] but the general rule, declared by statutes in some states,[94] is that trial courts may not charge with respect to matters of fact nor comment on the weight of evidence.[95] Before an instruction is obnoxious in this respect, there

SW 450; Ft. Worth, etc., R. Co. v. Hawes [Tex. Civ. App.] 107 SW 556. Appellant having expressly admitted agreement to pay for board, washing, etc., cannot be heard to say that court erred in assuming liability to pay. Tierney v. Kane, 133 Ill. App. 72. It is not error to state that a fact which is admitted by either party is so admitted, provided a correct statement of admission is made. Cooley v. Bergstrom, 3 Ga. App. 496, 60 SE 220. If court gives correct interpretation and exposition of law as it relates to admitted or uncontroverted facts, there can be no ground for complaint. Choctaw, O. & G. R. Co. v. Burgess [Okl.] 97 P 271.

**86.** Cahill v. Dellenback, 139 Ill. App. 320; Louisville & N. R. Co. v. Crow, 32 Ky. L. R. 1145, 107 SW 807; Dee v. Nachbar, 207 Mo. 680, 106 SW 35; McMahon v. Welsh [Mo. App.] 112 SW 43; Orcutt v. Century Bldg. Co. [Mo.] 112 SW 532; Anderson v. South Carolina & G. R. Co. [S. C.] 61 SE 1096; McCarty v. Piedmont Mut. Ins. Co. [S. C.] 62 SE 1; Harris v. Jackson [Tex. Civ. App.] 20 Tex. Ct. Rep. 470, 106 SW 1144; St. Louis, etc., R. Co. v. Cassidy S. W. Commission Co. [Tex. Civ. App.] 107 SW 628; El Paso & S. W. R. Co. v. Smith [Tex. Civ. App.] 108 SW 988; Alexander v. Brillhart [Tex. Civ. App.] 113 SW 184; San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574; Anderson v. Lewis [W. Va.] 61 SE 160.

**87.** Parkham v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 113 SW 154.

**88.** Crowley v. Taylor [Wash.] 95 P 1016.

**89.** See 10 C. L. 307. See ante, §§ 2, 4.

**90.** It is sufficient to charge in a general way as to light in which testimony should be weighed. Drown v. New England Tel. & T. Co. [Vt.] 70 A 599.

**91.** Should refer to evidence only as far as is necessary to present leading issues, and should omit reference to minor details of testimony. Farkas v. Brown [Ga. App.] 60 SE 1014.

**92.** Language likely to be prejudicial to rights of either party should be studiously avoided, unless ruling being made is necessarily conclusive of case. Martin v. Thrower, 3 Ga. App. 784, 60 SE 825.

**93.** In federal courts, trial judges may express their opinion on facts. Mead v. Darling [C. C. A.] 159 F 684.

**94.** Statute prohibiting court from commenting on weight of evidence is mandatory. Orange Lumber Co. v. Thompson [Tex. Civ. App.] 113 SW 563. Constitution, art. 5, § 26, provides that judges shall not charge juries in respect to matters of fact. Wilson v. Moss, 79 S. C. 120, 60 SE 313; Stouffer v. Erwin [S. C.] 62 SE 843.

**95. Arizona.** Greene v. Hereford [Ariz.] 95 P 105.

**Connecticut.** Barry v. McCollom [Conn.] 70 A 1035.

**Georgia.** North Georgia Mill. Co. v. Henderson Elevator Co., 130 Ga. 113, 60 SE 258; Dodge v. Cowart [Ga.] 62 SE 987.

**Illinois.** Summerville v. Klein, 140 Ill. App. 39; Maxwell v. Chicago, etc., R. Co., 140 Ill. App. 156.

**Indiana.** Louisville & S. I. Trac. Co. v. Worrell [Ind.] 86 NE 78.

**Massachusetts.** Plummer v. Boston El. R. Co., 198 Mass. 499, 84 NE 849; Ryan v. Fall River Iron Works Co. [Mass.] 86 NE 310.

**Mississippi.** Moblie, etc., R. Co. v. Jackson [Miss.] 46 S 142.

**Missouri.** Ford v. Gray [Mo. App.] 110 SW 692; International Bank v. Enderle [Mo. App.] 113 SW 262.

**Rhode Island.** Tucker v. Rhode Island Co. [R. I.] 69 A 850.

**South Carolina.** Anderson v. South Carolina & G. R. Co. [S. C.] 61 SE 1096.

**Texas.** Houston Elec. Co. v. Green [Tex. Civ. App.] 20 Tex. Ct. Rep. 260, 106 SW 463; Seal v. Holcomb [Tex. Civ. App.] 20 Tex. Ct. Rep. 808, 107 SW 916; El Paso Elec. R. Co. v. Boer [Tex. Civ. App.] 108 SW 199; Rapid Transit R. Co. v. Strong [Tex. Civ. App.] 108 SW 394; Ft. Worth & D. C. R. Co. v. Watkins [Tex. Civ. App.] 108 SW 487; Hunter v. Malone [Tex. Civ. App.] 108 SW 709; Orient Ins. Co. v. Wingfield [Tex. Civ. App.] 108 SW 788; St. Louis, etc., R. Co. v. Boshear [Tex. Civ. App.] 108 SW 1032; Sellgmann v. Greif [Tex. Civ. App.] 109 SW 214; Suderman v. Kriger [Tex. Civ. App.] 109 SW 373; Northern Texas Trac. Co. v. Moberly [Tex. Civ. App.] 109 SW 483; Hart v. Hart [Tex. Civ. App.] 110 SW 91; Missouri, K. & T. R. Co. v. Steele [Tex. Civ. App.] 110 SW 171; Missouri, K. & T. R. Co. v. Malone [Tex. Civ. App.] 110 SW 958; St. Louis & S. F. R. Co. v. Summers [Tex. Civ. App.] 111 SW 211; Yates v. Bratton [Tex. Civ. App.] 111 SW 416; Rushing v. Lanier [Tex. Civ. App.] 111 SW 1089; Crouch Hardware Co. v. Walker [Tex. Civ. App.] 113 SW 163; Doty v. Moore [Tex. Civ. App.] 113 SW 955; McKay v. Peterson [Tex. Civ. App.] 113 SW 981.

**Vermont.** Taplin v. Marcy [Vt.] 71 A 72.

**West Virginia.** White v. Sohn, 63 W. Va. 80, 59 SE 890.

**Rule violated:** Error to charge that issuable fact has been proved. Central of Georgia R. Co. v. Augusta Brokerage Co., 2 Ga.

App. 511, 58 SE 904. Effect of certain isolated facts. Woodbury v. Sparrell Print, 198 Mass. 1, 84 NE 441. Directing jury to adopt lowest estimate made by any of the witnesses. Missouri, K. & T. R. Co. v. Rich [Tex. Civ. App.] 112 SW 114. That certain facts constitute negligence. Lay v. Nashville, etc., R. Co. [Ga.] 62 SE 189; Anderson v. South Carolina & G. R. Co. [S. C.] 61 SE 1096. That it was plaintiff's duty to look and listen. Missouri, K. & T. R. Co. v. Balliet [Tex. Civ. App.] 107 SW 906. "If jury find that evidence sustaining plaintiff's case preponderates in his favor, although but slightly, that it is sufficient for jury to find issues in his favor and to find a verdict against defendant." City of Chicago v. Fields, 139 Ill. App. 250. In action for slander, in that plaintiff had not "even externals of refinement" instruction that "possession of externals of refinement is subject of observation, because you know by seeing person whether they have externals of refinement," is erroneous. Barry v. McCollom [Conn.] 70 A 1035. Error to instruct that because a witness has not been impeached presumption is in favor of truth of statements. Elder Dempster & Co. v. Menge [C. C. A.] 160 F 341. That plaintiff, being present and not testifying, is bound by evidence given in his hearing and not disputed by him. Smith v. Wabash R. Co., 129 Mo. App. 413, 107 SW 22. That plaintiff is interested in result of issue, and any statement made against his own interest is presumed true, but jury must give only such weight to statements in his own favor as they believe from all facts and circumstances they are entitled to. Brown v. Quincy, etc., R. Co., 127 Mo. App. 614, 106 SW 551. Term "if jury believe from evidence" should be used instead of speaking of a preponderating probability "if it exists in minds of jury." Clinchfield Coal Co. v. Wheeler's Adm'r [Va.] 62 SE 269.

**Not violated:** On motion to strike, remark of court that evidence is proper. Fritz v. Chicago Grain Elevator Co., 136 Iowa, 699, 114 NW 193. That court does not intend to intimate what its opinion is as to any fact in dispute. Chicago Terminal Transfer R. Co. v. Reddick, 131 Ill. App. 515. That before recovery can be had, jury must find that contract was ratified, with full knowledge of its terms. Sterling v. De Laune [Tex. Civ. App.] 20 Tex. Ct. Rep. 198, 105 SW 1169. Not to find certain amount claimed in certain item is not intimation to find for plaintiff everything claimed by him except said amount. Missouri, K. & T. R. Co. v. House [Tex. Civ. App.] 113 SW 154. "Did plaintiff or not abandon her husband with intention of remaining away from him?" Mabry v. Kennedy [Tex. Civ. App.] 108 SW 176. Language "if you find and believe from the evidence," etc. Missouri, K. & T. R. Co. v. Hendricks [Tex. Civ. App.] 108 SW 745. Words "if you so find," etc., cannot be fairly construed as into making an opinion of court as to existence of certain facts. St. Louis, S. W. R. Co. v. Cleland [Tex. Civ. App.] 110 SW 122. To say that defendant is prima facie liable where, viewed in light of remainder of charge, this meant no more than to say defendants were liable unless they showed loss not due to their negligence. Davis v. Blue Ridge R. Co. [S. C.] 62 SE 856. That, if jury found certain facts to be true, there was no contributory negligence. Kitchens v. Southern R. Co. [S. C.] 61 SE 1016. That railroad company must use ordinary care in running trains over part of track commonly used by pedestrians. Gulf, etc., R. Co. v. Coleman [Tex. Civ. App.] 112 SW 690. That if accident occurred by reason of failure of engineer to place reverse lever at center of notch of quadrant or by reason of failure to open cylinder cocks to permit steam to escape, or both, defendant liable. Atchison, etc., R. Co. v. Mills [Tex. Civ. App.] 108 SW 480. Court may say, in personal injury case, "I do not understand it is claimed, on part of defendant, that it was custom to have such space uncovered by movable platform, so perhaps it is unnecessary to say plaintiff was called on to notice there was such space there, when it was not claimed it was custom." Plummer v. Boston El. R. Co., 188 Mass. 499, 84 NE 849. On question from jury whether evidence was clear enough to decide whether motorman was in fault or not, statement by court that "there is testimony from which you might find defendant guilty of negligence, but that depends on whose evidence you believe." Harker v. Detroit United Ry. Co., 150 Mich. 697, 14 Det. Leg. N. 871, 114 NW 657. In action for fire caused by locomotive, statement by court on examination of witness that if witness did not know whose engine it was court did not know how anybody was to find out. Stroud v. Columbia N. & L. R. Co., 79 S. C. 447, 60 SE 963. That person not deemed of sound mind if he has no ability to transact ordinary affairs, understand their nature, and exercise his will in relation to them. Kaack v. Stanton [Tex. Civ. App.] 112 SW 702. That court said: "I don't know much about life insurance companies. They are smartest people on face of globe. Let court pass one rule today and they will frame rule to meet it the next." Rearden v. State Mut. Life Ins. Co., 79 S. C. 526, 60 SE 1106. A statement that "you heard me admit testimony from parties to show what their sales were before. Jury is to take that for what it is worth. If it is worth anything, take it, if it is not, throw it away." Pittsburg Plate Glass Co. v. Monroe, 79 S. C. 564, 61 SE 92. That if plaintiff has made out case as charged by greater weight of evidence, duty of jury to find for him. Graham v. Mattoon City R. Co., 234 Ill. 483, 84 NE 1070. That "if preponderance of evidence satisfies you," etc. Coweta County v. Central of Georgia R. Co. [Ga. App.] 60 SE 1018. That preponderance of evidence does not depend on number of witnesses. Model Clothing House v. Hirsch [Ind. App.] 85 NE 719. That weight of evidence does not depend, necessarily, on number of witnesses. Hoskavec v. Omaha St. R. Co. [Neb.] 115 NW 312. "That slightest difference in weight of evidence is a preponderance." The term "fair preponderance of evidence" is often used in instructions, and really is meaningless. Hammond, etc., R. Co. v. Antonia, 41 Ind. App. 335, 83 NE 766. Court may tell jury that a charge on a contested issue of fact is properly determined either way, according to preponderance of evidence. Burkett v. Miller [Tex. Civ. App.] 20 Tex. Ct. Rep. 885, 106 SW 1153.

must be some comment [96] addressed to the jury,[97] and not a mere general remark.[98] The prohibition applies only to expressions of opinion as to whether a fact or series of facts is or is not established; [99] hence the court may state a general legal proposition [1] such as the legal effect of conclusions of fact which the jury are at liberty to deduce from the evidence,[2] or that certain conclusions necessarily result from a given statement of facts,[3] so that the jury may be enabled to see their way clearly to a right verdict.[4] The court may also present in detail facts pertaining to a theory,[5] and may remark on admissibility of evidence,[6] and it has been held that an instruction as to the weight to be given to expert testimony is proper.[7]

§ 6. *Form and general substance of instructions.*[8]—The instructions should embrace only material matters [9] with which the jury are concerned.[10] Since the charge is to be construed as a whole,[11] matters once given need not be repeated in connection with other instructions [12] or portion of a charge.[13] The charge may present a hypothetical case,[14] but if it does it must put before the jury all the facts.[15] It may also

96. In action for damages to timber by gases, the word "noxious" used in instruction adds nothing to it. Johnson v. Northport Smelting & Refining Co. [Wash.] 97 P 746.

97. Provision that judges shall not charge juries with respect to matters of fact, but may state facts in issue and declare law, has no application to remarks of court that it had considered motion for nonsuit, and, while it had grave doubt of right to recover, case should go to jury, such remarks, though in presence of jury, not being directed to them. McFeat v. Philadelphia, W. & B. R. Co. [Del.] 69 A 744.

98. A mere general comment in a charge disparaging quality and value of expert testimony is not ground for reversal. Berkley v. Maurer, 34 Pa. Super. Ct. 363.

99. This prohibition must be regarded as restraint only on expression of opinion as to whether a fact or series of facts is or is not established. It was not designed to deprive court of all power to deal with facts proved. It may sum up evidence, state its legal effect, and indicate its proper application. Plummer v. Boston El. R. Co., 198 Mass. 499, 84 NE 849.

1. Anderson v. South Carolina & G. R. Co. [S. C.] 61 SE 1096.

2. Jacobson v. Fraade, 56 Misc. 631, 107 NYS 706.

3. Crauf v. Chicago City R. Co., 235 Ill. 262, 85 NE 235. When evidence uncontroverted, court may charge that facts proved. Fitzgerald Cotton Oil Co. v. Farmers' Supply Co., 3 Ga. App. 212, 59 SE 713. A statement that there is a conflict in evidence, where such fact is not in dispute, is not a charge on facts. Wilson v. Moss, 79 S. C. 120, 60 SE 313.

4. To this end, court may elucidate proper application of legal principals by illustrations drawn from common experience, or by reference to cases where similar questions have been decided, and define degree of weight which law attaches to whole class of testimony. Whitney v. Wellesley & Boston St. R. Co., 197 Mass. 495, 84 NE 95.

5. A charge is not upon weight of evidence simply because it presents in detail facts pertaining to theory of recovery relied on by plaintiff. El Paso Elec. R. Co. v. Ruckman [Tex. Civ. App.] 107 SW 1158.

6. General rule is that remarks by court in course of trial upon admissibility of evidence, or refusing nonsuit, or to direct verdict, not within inhibition of constitution against charging as to matters of fact. Latimer v. General Elec. Co. [S. C.] 62 SE 438.

7. Court may instruct jury that they are "not bound to accept as true opinions of expert witnesses, but may give such opinions such weight as they may, under all evidence, consider proper, or may altogether disregard such opinions, if, from all facts, they believe them unreasonable." Wiley v. St. Joseph Gas Co. [Mo. App.] 111 SW 1185.

8. See 10 C. L. 310. See ante, § 3, Form and Sufficiency of Request. See also, post, §§ 7, 8.

9. Murhard Estate Co. v. Portland & Seattle R. Co. [C. C. A.] 163 F 194.

10. Richardson v. Augusta & A. R. Co., 79 S. C. 535, 61 SE 83. Not error for court to refuse to instruct jury as to effect of verdict and judgment. Smith v. Ross, 31 App. D. C. 348.

11. See post, § 17.

12. Each separate instruction need not embody every fact or element essential to sustain or defeat an action. Grant v. Milam [Okl.] 95 P 424. The law can be more clearly given by being set out in a series of instructions. Illinois Cent. R. Co. v. France's Adm'x [Ky.] 112 SW 929. So long as all instructions are each correct statements, and, when considered together, present every proper view of facts and are not in conflict, there is no error in presenting them separately. St. Louis S. W. R. Co. v. Leder [Ark.] 112 SW 744.

13. Court may convey one idea on one element of a rule of law in one portion of its charge disassociated from other portions or elements, so long as those other elements are conveyed to minds of jury as necessary to be found by them. Buchman v. Jeffery [Wis.] 115 NW 372.

14. Sandford v. Seaboard Air Line R. Co., 79 S. C. 519, 61 SE 74.

15. If instruction presents hypothetical case, it should put before jury all facts bearing upon issue which evidence proves or tends to prove. Life Ins. Co. v. Hairston [Va.] 62 SE 1057.

group the facts,[16] or state them, and tell the jury if they find them that way they must find for the plaintiff.[17] A charge upon a statute is sufficient if in the language of the statute.[18] It should be fair [19] and complete,[20] clearly,[21] unambiguously,[22] and substantially covering the matter requested [23] in such a way as not to mislead the jury.[24] It should proceed on a correct theory,[25] not reversing [26] but presenting,

**16.** Facts relied on may be grouped even though plea is not as specific as testimony. Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 20 Tex. Ct. Rep. 772, 107 SW 958.

**17.** An instruction which puts certain facts to jury, and tells them, if they find facts that way, they must find for plaintiff, is general. Flaherty v. St. Louis Transit Co., 207 Mo. 318, 106 SW 15.

**18.** Martens v. Southern Coal & Min. Co., 235 Ill. 540, 85 NE 743, afg. 140 Ill. App. 190; Herring v. Galveston, etc., R. Co. [Tex. Civ. App.] 108 SW 977; Life Ins. Co. v. Hairston [Va.] 62 SE 1057. The term "ordinarily prudent person" is synonymous with term "person of ordinary care" used in statute. Texas & P. R. Co. v. Johnson [Tex. Civ. App.] 20 Tex. Ct. Rep. 410, 106 SW 773.

**19.** See post, §§ 9, 10. Courts should not undertake to state specifically contention of one party without in like manner stating corresponding contention of other party. Seaboard Air Line R. Co. v. Sikes [Ga. App.] 60 SE 868.

**20.** Barry v. Madaris [Ala.] 47 S 152.

**21.** Atlanta & B. Air Line R. Co. v. Wheeler [Ala.] 46 S 262; Alabama City G. & A. R. Co. v. Bullard [Ala.] 47 S 578; Georgia S. & F. R. Co. v. Wright, 130 Ga. 696, 61 SE 718; Conklin Const. Co. v. Walsh, 131 Ill. App. 609; Settles v. Threlkeld, 140 Ill. App. 275; Crown Cork & Seal Co. v. O'Leary [Md.] 69 A 1068; Wilson v. Pennsylvania & Mahoning Valley R. Co., 34 Pa. Super. Ct. 504; Clinchfield Coal Co. v. Wheeler's Adm'r [Va.] 62 SE 269. Granting of a special instruction which is too technical and too apt to mislead is not reversible error, where court in its charge correctly instructs jury on subject and removes ambiguity. O'Dwyer v. Northern Market Co., 30 App. D. C. 244. Should be expressed in plain and direct terms when addressed to substantial issue in case. Toncrey v. Metropolitan St. R. Co., 129 Mo. App. 596, 107 SW 1091. Should not use same word in different senses. Neff v. Cameron [Mo.] 111 SW 1139. If instruction conforms to correct rule of law, it will not be held erroneous because verbiage not as explicit as it should be. St. Louis, etc., R. Co. v. Richardson [Ark.] 113 SW 794. A direction may be implied from one already given, hence, under charge that, "if you find that contract consummated was as testified to by plaintiff's witnesses, then you may find in plaintiff's favor," it is implied that jurors may understand that terms of contract should make difference in verdict. Duford v. Pompeil Parliament of Prudent Patricians, 152 Mich. 151, 15 Det. Leg. N. 115, 115 NW 1057.

**22.** Conklin Const. Co. v. Walsh, 131 Ill. App. 609; Pittsburg, etc., R. Co. v. Gates, 137 Ill. App. 309; Asher v. East St. Louis & Suburban R. Co., 140 Ill. App. 220.

**23.** Aldrich v. Peckham, 74 N. J. Law, 711, 68 A 345.

**24. Alabama.** Western Union Tel. Co. v. Rowell [Ala.] 45 S 73; Birmingham R., L. & P. Co. v. Lee [Ala.] 45 S 164; Birmingham R., L. & P. Co. v. Landrum [Ala.] 45 S 198; Louisville & N. R. Co. v. Church [Ala.] 46 S 457; Hays v. Lemoine [Ala.] 47 S 97; Barry v. Madaris [Ala.] 47 S 152.

**Georgia.** Albany & N. R. Co. v. Wheeler, 3 Ga. App. 414, 59 SE 1116; Neel v. Powell, 130 Ga. 756, 61 SE 729.

**Illinois.** Village of Hennepin v. Coleman, 132 Ill. App. 604; McHale v. Chicago City R. Co., 137 Ill. App. 90; Chicago & Eastern R. Co. v. Fowler, 138 Ill. App. 352; Chicago City R. Co. v. Phillips, 138 Ill. App. 438; Mohr v. Martewicz, 139 Ill. App. 173; St. Louis & I. B. R. Co. v. Barnsback, 234 Ill. 344, 84 NE 931.

**Indiana.** Cleveland, etc., R. Co. v. Lynn [Ind.] 85 NE 999. Must not lay down improper basis upon which to found verdict. Abney v. Indiana Union Trac. Co., 41 Ind. App. 53, 83 NE 387.

**Iowa.** Dorn v. Cooper [Iowa] 117 NW 1; Lauer v. Banning [Iowa] 118 NW 446.

**Kentucky.** Illinois Cent. R. Co. v. Tandy, 32 Ky. L. R. 962, 107 SW 715.

**Maryland.** Darrin v. Whittingham, 107 Md. 46, 68 A 269; Young v. Boyd, 107 Md. 449, 69 A 33; United Rys. & Elec. Co. v. Cloman, 107 Md. 681, 69 A 379; Dronenburg v. Harris [Md.] 71 A 81.

**Massachusetts.** Loveland v. Rand, 200 Mass. 142, 85 NE 948.

**Michigan.** Charette v. L'Anse [Mich.] 15 Det. Leg. N. 738, 117 NW 737.

**Minnesota.** Balder v. Zenith Furnace Co., 103 Minn. 345, 114 NW 948; Froberg v. Smith [Minn.] 118 NW 57.

**Missouri.** Hartley v. Calbreath, 127 Mo. App. 559, 106 SW 570; Holton v. Cochran, 208 Mo. 314, 106 SW 1035; In re Huffman's Estate [Mo. App.] 111 SW 848; Huff v. St. Joseph R. L. H. & P. Co. [Mo.] 111 SW 1145. Court may refuse to give instructions containing unexplained expressions, "burden of proof" or "preponderance of evidence," and with equal propriety may give such instructions in cases where it does not clearly appear they might tend to confuse jury. Cramer v. Nelson, 128 Mo. App. 393, 107 SW 450.

**Nebraska.** Hoskovec v. Omaha St. R. Co. [Neb.] 115 NW 312.

**New Hampshire:** An instruction is not misleading for an omission necessary to a complete statement of a legal proposition where essential omitted has been given over and over in general charge. Charrier v. Boston & M. R. Co. [N. H.] 70 A 1078.

**South Dakota.** Tosini v. Cascade Mill. Co. [S. D.] 117 NW 1037.

**Texas.** San Antonio Trac. Co. v. Kelleher [Tex. Civ. App.] 20 Tex. Ct. Rep. 801, 107 SW 64; Works v. Hill [Tex. Civ. App.] 107 SW 581; Rapid Transit R. Co. v. Strong [Tex. Civ. App.] 108 SW 394; Norton v. Galveston, etc., R. Co. [Tex. Civ. App.] 108 SW 1044; Champion v. Johnson County [Tex. Civ.

as a whole,[27] correct principles of law [28] applicable to the case,[29] and while substantial

App.] 109 SW 1146; Sparks v. De Bord [Tex. Civ. App.] 110 SW 757; Trout v. Gulf, etc., R. Co. [Tex. Civ. App.] 111 SW 220; Yates v. Bratton [Tex. Civ. App.] 111 SW 416; Schow v. McCloskey [Tex.] 113 SW 739.

**Utah.** Manti City Sav. Bank v. Peterson, 33 Utah, 209, 93 P 566.

**Vermont.** Drown v. New England Tel. & T. Co. [Vt.] 70 A 599.

**Virginia.** Southern R. Co. v. Hansbrough's Adm'x, 107 Va. 733, 60 SE 58; Southern R. Co. v. Daves [Va.] 61 SE 748; Norfolk R. & L. Co. v. Higgins [Va.] 61 SE 766; Life Ins. Co. v. Hairston [Va.] 62 SE 1057.

**West Virginia.** White v. Sohn, 63 W. Va. 80, 59 SE 890.

**Wisconsin.** Wenger v. Marty [Wis.] 116 NW 7.

**Wyoming.** Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921.

**Rule violated:** Instruction susceptible of two different constructions, one of which is prejudicial to party. White v. Sohn, 63 W. Va. 80, 59 SE 890. Instruction to return verdict not exceeding specified sum, especially in view of fact that verdict was for sum specified. Missouri, K. & T. R. Co. v. Rich [Tex. Civ. App.] 112 SW 114. In action for damages resulting from assault and battery upon plaintiff by defendant, to instruct jury that a crime has been committed, and to define crime of assault and battery. Carlile v. Bentley [Neb.] 116 NW 772. Instruction, in substance telling jury that if they believed from evidence that appellant pledged certificates and delivered them to bank to secure notes, bank had an interest in shares, etc. Beggs v. First Nat. Bank of Arcola, 134 Ill. App. 403. Instruction singling out one established fact in case and informing jury that, as a matter of law, a certain conclusion does not necessarily follow. Atterbury v. Chicago, etc., R. Co., 134 Ill. App. 330. Where there is no conflict or an entire absence of evidence, instruction that evidence is conflicting on several subjects Wenger v. Marty [Wis.] 116 NW 7. Instruction limiting kind of evidence to prove contributory negligence. Pittsburg, etc., R. Co. v. O'Conner [Ind.] 85 NE 969. In close personal injury case instruction speaking of "wrongful acts, negligence and default," even limiting them to such as were charged in declaration. City of Chicago v. Sutton, 136 Ill. App. 221. Instruction in personal injury case instituted under Mines and Miners' Act, employing phrase "knowingly negligent." Clark v. O'Gara Coal Co., 140 Ill. App. 207. Instruction held misleading as giving jury to understand that parents could ignore street car company in permitting child less than 2 years old to play on street. Englund v. Mississippi Valley Trac. Co., 139 Ill. App. 572. Instruction terminating "without liability to plaintiff therefor" objectionable, as it might have led jury to believe there could be no recovery at all, etc., properly refused. Brougham v. Paul, 138 Ill. App. 455.

**Not violated:** The opening of charge need not be predicated on "belief of evidence by jury." Birmingham R. L. & P. Co. v. Lee [Ala.] 45 S 164. Use of word "natural" instead of "reasonable." Sicard v. Albenberg Co. [Wis.] 118 NW 179. Charge that there is no material difference as to amount due between plaintiff and defendant. Duford v. Pompeii Parliament of Prudent Patricians, 152 Mich. 151, 15 Det. Leg. N. 115, 115 NW 1057. Instruction that if jury answer first question in negative they need not answer second. Sicard v. Albenberg Co. [Wis.] 118 NW 179. Instruction "that jury are to find facts from evidence and apply to them, so found, law stated by court," other instructions given at defendant's request. Eckels v. Hawkinson, 138 Ill. App. 627. The use of word "moral" in instruction that witness may be impeached by general bad moral character. Sparks v. Bedford [Ga. App.] 60 SE 809. Omission of word "if" where jury could not have been misled thereby. Madrey v. Meyers, 140 Ill. App. 218. Instruction relating to burden of proof, duty of jury in weighing evidence and measuring credibility of witnesses, and elements constituting contract sued on, applicable to several questions and definitive of terms therein used Salchert v. Reinig [Wis.] 115 NW 132. Instruction authorizing recovery if plaintiff proves case as stated in declaration, though not commended, is permissible where declaration alleges all facts necessary to recovery. East St. Louis R. Co. v. Gray, 135 Ill. App. 642. Instruction, when taken in connection with all others given, held not misleading as limiting exercise of due care to exact time of injury. City of Farmington v. Wallace, 134 Ill. App. 368.

25. Instruction in action of assumpsit to recover for work and labor performed held not objectionable as proceeding upon theory of an account stated. Boyce v. Expanded Metal Fire Proofing Co., 136 Ill. App. 352.

26. Missouri, K. & T. R. Co. v. Malone [Tex. Civ. App.] 110 SW 958.

27. Must be good, not only as a part, but as a whole. Condie v. Rio Grande Western R. Co. [Utah] 97 P 120. Instruction partly erroneous should not be given. Williams v. Lansing, 152 Mich. 169, 15 Det. Leg. N. 168, 115 NW 961.

28. **Alabama.** Western Union Tel. Co. v. Rowell [Ala.] 45 S 73; Birmingham R., L. & P. Co. v. Landrum [Ala.] 45 S 198; Morris v. McClelland [Ala.] 45 S 641; Neff v. Williamson [Ala.] 46 S 238; Pelham v. Chattahoochee Grocery Co. [Ala.] 47 S 172; Jackson v. Tribble [Ala.] 47 S 310.

**Arkansas.** Taylor v. McClintock [Ark.] 112 SW 405; St. Louis, S. W. R. Co. v. Leder [Ark.] 112 SW 744; Little Rock & M. R. Co. v. Russell [Ark.] 113 SW 1021.

**Colorado.** Reynolds v. Hart, 42 Colo. 150, 94 P 14.

**Florida:** Departure from this rule not reversible if, viewing whole evidence, no prejudice resulted. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761.

**Georgia.** American Surety Co. v. Wood, 2 Ga. App. 641, 58 SE 1116; Roberts, Cranford & Co. v. Devane, 129 Ga. 604, 59 SE 289; McElwaney v. McDiarmid [Ga.] 62 SE 20. Charge must be correct and perfect. Macon, D. & S. R. Co. v. Joyner, 129 Ga. 683, 59 SE 902.

**Idaho.** Rosenborough v. Whittington [Idaho] 96 P 437.

**Illinois.** Chicago Terminal Transfer R. Co.

accuracy is sufficient where there is no countervailing testimony and the evidence justifies the verdict,[30] if the case is close,[31] or the evidence conflicting,[32] great ac-

v. Reddick, 181 Ill. App. 515; Campbell v. Fierlein, 134 Ill. App. 207; Chicago City R. Co. v. Hackett, 136 Ill. App. 594; Wells Bros. Co. v. Flanagan, 139 Ill. App. 237; Asher v. East St. Louis & Suburban R. Co., 140 Ill. App. 220; Funston v. Hoffman, 232 Ill. 360, 83 NE 917. Instruction should state the law correctly as far as it goes. Ratner v. Chicago City R. Co., 233 Ill. 169, 84 NE 201. Must properly state law as to pleadings. Trustees of Schools v. Yoch, 133 Ill. App. 32. An instruction which does not purport to sum up entire case not erroneous in failing to state particular proposition of law applicable to case, if same, standing alone, is correct statement of law. American Steel Foundries v. Kistner, 136 Ill. App. 48.

**Indiana.** Toledo & C. I. R. Co. v. Wagner [Ind.] 85 NE 1025; Reed v. Light [Ind.] 85 NE 9.

**Iowa.** Mickey v. Indianola [Iowa] 114 NW 1072; Baker v. Mathew, 137 Iowa, 410, 115 NW 15; Beck v. Unshler [Iowa] 116 NW 138; Sheker v. Machovec [Iowa] 116 NW 1042.

**Kansas.** Missouri Pac. R. Co. v. Bentley [Kan.] 93 P 150.

**Kentucky.** Louisville & N. R. Co. v. Rayl, 82 Ky. L. R. 870, 107 SW 298; Illinois Cent. R. Co. v. Tandy, 32 Ky. L. R. 962, 107 SW 715; Louisville & N. R. Co. v. Onan's Adm'r, 33 Ky. L. R. 462, 110 SW 380; Cincinnati, etc. R. Co. v. Evans' Adm'r, 33 Ky. L. R. 596, 110 SW 844.

**Louisiana.** Muscarelli v. Hodge Fence & Lumber Co., 120 La. 335, 45 S 268.

**Massachusetts:** If error pointed out, is duty of court to correct it. Zamore v. Boston El. R. Co., 198 Mass. 594, 84 NE 858.

**Michigan.** Goodes v. Lansing & Suburban Trac. Co., 150 Mich. 494, 14 Det. Leg. N. 768, 114 NW 338.

**Mississippi.** Mobile, etc., R. Co. v. Jackson [Miss.] 46 S 142; Kneale v. Lopez [Miss.] 46 S 715.

**Missouri.** Dee v. Nachbar, 207 Mo. 680, 106 SW 85; Brown v. St. Louis, etc., R. Co., 127 Mo. App. 499, 106 SW 83; Holton v. Cochran, 208 Mo. 314, 106 SW 1035; Toncrey v. Metropolitan St. R. Co., 129 Mo. App. 596, 107 SW 1091; Kirkpatrick v. Metropolitan St. R. Co., 211 Mo. 68, 109 SW 682; Wann v. Scullin, 210 Mo. 429, 109 SW 688; Sackman v. Freeman, 130 Mo. App. 384, 109 SW 818; Peterson v. Metropolitan St. R. Co., 211 Mo. 498, 111 SW 87; Neff v. Cameron [Mo.] 111 SW 1139; Huff v. St. Joseph R. L., H. & P. Co. [Mo.] 111 SW 1145; Wiley v. St. Joseph Gas. Co. [Mo. App.] 111 SW 1185; Ross v. Metropolitan St. R. Co. [Mo. App.] 112 SW 9; Brown v. Knapp & Co. [Mo.] 112 SW 474; Sires v. Clark [Mo. App.] 112 SW 526; Hovey v. Aaron [Mo. App.] 113 SW 718.

**Montana.** Riley v. Northern Pac. R. Co., 38 Mont. 545, 93 P 948.

**New York.** Goodman v. Linetzky, 107 NYS 50; Newman v. New York & Q. C. R. Co., 111 NYS 289.

**North Carolina.** Tuttle v. Tuttle, 146 N. C. 484, 59 SE 1008; Currie v. Gilchrist [N. C.] 61 SE 581.

**Texas.** Texas & P. R. Co. v. Johnson [Tex. Civ. App.] 20 Tex. Ct. Rep. 410, 106 SW 773; Pullman Co. v. Vanderhoven [Tex. Civ. App.] 20 Tex. Ct. Rep. 889, 107 SW 147; Feille v San Antonio Trac. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 862, 107 SW 367; St. Louis, S. W. R. Co. v. Smith [Tex. Civ. App.] 107 SW 638; Missouri, K. & T. R. Co. v. Hollan [Tex. Civ. App.] 107 SW 642; Texas & N. O. R. Co. v. Davidson [Tex. Civ. App.] 20 Tex. Ct. Rep. 643, 107 SW 949; Rapid Transit R. Co. v. Strong [Tex. Civ. App.] 108 SW 394; Atchison, etc., R. Co. v. Mills [Tex. Civ. App.] 108 SW 480; Missouri, K. & T. R. Co. v. Dunbar [Tex. Civ. App.] 108 SW 500; Texas Midland R. Co. v. Ritchey [Tex. Civ. App.] 108 SW 732; El Paso & S. W. R. Co. v. Smith [Tex. Civ. App.] 108 SW 988; Gulf, etc., R. Co. v. Jackson [Tex. Civ. App.] 109 SW 478; McCormick v. Kampmann [Tex. Civ. App.] 109 SW 492; Wade v. Galveston, etc., R. Co. [Tex. Civ. App.] 110 SW 84; Gaar, Scott & Co. v. Burge [Tex. Civ. App.] 110 SW 181; Southwestern Tel. & T. Co. v. Tucker [Tex. Civ. App.] 110 SW 481; Texas & P. R. Co. v. Jowers [Tex. Civ. App.] 110 SW 946; Morgan v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 110 SW 978; Lyon v. Files [Tex. Civ. App.] 110 SW 999; Robertson & Co. v. Russell [Tex. Civ. App.] 111 SW 205; Chicago, etc., R. Co. v. Johnson [Tex. Civ. App.] 111 SW 758; Rushing v. Lanier [Tex. Civ. App.] 111 SW 1089; Texas & N. O. R. Co. v. Powell [Tex. Civ. App.] 112 SW 697; Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 737; San Antonio Light Pub. Co v. Lewy [Tex. Civ. App.] 113 SW 574; Hess v. Webb [Tex. Civ. App.] 113 SW 618; Louisiana & T. Lumber Co. v. Dupuy [Tex. Civ. App.] 113 SW 973.

**Utah.** Herndon v. Salt Lake City [Utah] 95 P 646.

**Virginia.** Clinchfield Coal Co. v. Wheeler's Adm'r [Va.] 62 SE 269.

**West Virginia.** Squilache v. Tidewater Coal & Coke Co. [W. Va.] 62 SE 446.

**U. S. Courts.** Bolen-Darnall Coal Co. v. Williams [C. C. A.] 164 F 665; Cooper v. Sillers, 30 App. D. C. 567.

**20.** See post, § 7, see notes above. McKenzie Furnace Co. v. Mallers, 231 Ill. 561, 83 NE 451; Madrey v. Meyers, 140 Ill. App. 218; Starett v. Chesapeake & O. R. Co., 33 Ky. L. R. 309, 110 SW 282; Rand v. Boston El. R. Co., 198 Mass. 569, 84 NE 841; Hitt v. Terry [Miss.] 46 S 829; Brown v. Quincy, etc., R. Co., 127 Mo. App. 614, 106 SW 551; Becker v. Interborough Rapid Transit Co., 128 App. Div. 455, 112 NYS 816; First State Bank of Larned, Kan. v. McGaughey [Tex. Civ. App.] 108 SW 475; Lipscomb v. Amend [Tex. Civ. App.] 108 SW 483. Case admitted for special verdict, instructions should not be suitable only to case submitted for general verdict. Collins v. Mineral Point & M. R. Co., 136 Wis. 421, 117 NW 1014.

**30.** City of Chicago v. Kubler, 133 Ill. App. 520.

**31.** Chicago, etc., R. Co. v. Turck, 131 Ill. App. 128; City of Chicago v. Sutton, 136 Ill. App. 221; Summerville v. Klein, 140 Ill. App. 39. When evidence on point is in equilibrium, it is essential that jury be correctly instructed. Coors v. Brock [Colo.] 96 P 988.

**32.** Press v. Hair, 133 Ill. App. 528; Hughes v. Hughes, 133 Ill. App. 654; Koehn v. Tom-

curacy of instruction is necessary and the practical test of the soundness of a charge is how the jurors understand it.[33] While a rule of law may be first stated in the abstract and then in the concrete,[34] abstract instructions are apt to mislead[35] and should be avoided,[36] especially in a closely contested case.[37] A charge is not abstract which merely eliminates the effect of improper evidence,[38] nor where there is any evidence from which the jury may infer the existence of the facts supposed.[39]

*Instructions should be certain*[40] *and definite,*[41] but they need not give any statement of facts if none are disclosed by the evidence.[42]

*Instructions need not be numbered.*[See 10 C. L. 815]

*Verbal inaccuracies and inelegancies.*[See 10 C. L. 815]—Although surplusage should be avoided,[43] inaccuracies which do not mislead the jury[44] are not ground for reversal.[45]

lenson, 134 Ill. App. 256; Kidd v. White, 138 Ill. App. 107; City of Chicago v. Fields, 139 Ill. App. 250.

33. The practical test as to soundness of instructions is not what ingenuity of counsel can, at leisure, work out instructions to mean, but how and in what sense, under evidence before them and circumstances of trial, ordinary men and jurors understand instructions. Eckels v. Cooper, 136 Ill. App. 60.

34. San Antonio & A. P. R. Co. v. Martin [Tex. Civ. App.] 108 SW 981.

35. Abstract instructions should be avoided when it is possible to do so, because they are sometimes misleading, but to be ground for reversal, it must affirmatively appear they were misleading. Alabama Consol. Coal & Iron Co. v. Heald [Ala.] 45 S 686; Florala Sawmill Co. v. Smith [Fla.] 46 S 332; Salmon v. Helena Box Co., 158 F 300.

36. St. Louis, etc., R. Co. v. Brooksher [Ark.] 109 SW 1169; Bryant Lumber Co. v. Stastney [Ark.] 112 SW 740; Ducharme v. St. Peter, 135 Ill. App. 530; Leiserowitz v. Fogarty, 135 Ill. App. 609; Chicago City R. Co. v. Reddick, 139 Ill. App. 160; Englund v. Mississippi Valley Trac. Co., 139 Ill. App. 572; McKenzie Furnace Co. v. Mallers, 231 Ill. 561, 83 NE 451; Davis v. Illinois Collieries Co., 232 Ill. 284, 83 NE 836; Kenyon v. Chicago City R. Co., 235 Ill. 406, 85 NE 660; Tarashonsky v. Illinois Cent. R. Co. [Iowa] 117 NW 1074; Starett v. Chesapeake & O. R. Co., 33 Ky. L. R. 309, 110 SW 282; Edwards v. Western Union Tel. Co. [N. C.] 60 SE 900; Richardson v. Augusta & A. R. Co., 79 S. C. 535, 61 SE 83; Maffi v. Stephens [Tex. Civ. App.] 108 SW 1003; Squilache v. Tidewater Coal & Coke Co. [W. Va.] 62 SE 446. Murhard Estats Co. v. Portland & Seattle R. Co. [C. C. A.] 163 F 194. It is better in all cases to abstain from statement of merely abstract propositions of law, and at times it may be positive error to state them. Thompson v. Galveston, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 756, 106 SW 910. There should be a setting of facts to make them applicable to the case. Kelley v. Torrington, 80 Conn. 378, 68 A 855. Refusal of court to give abstract instruction works no prejudice against party asking it, hence no error in refusing it. Ong Chair Co. v. Cook, 85 Ark. 390, 108 SW 203. An instruction which states a correct abstract legal proposition applicable to case need not refer to evidence. East St. Louis R. Co. v. Gray, 135 Ill. App. 642. Giving abstract rule of law is reversible if jury was misled thereby. City of Macomb v. McDonough, 134 Ill. App. 532; Wheeler v. Milner [Wis.] 118 NW 187. Abstract propositions of law which neither give light or aid to jury to solve questions should not be given. Elgin, Joliet & Eastern R. Co. v. Lawlor, 132 Ill. App. 280; Hughes v. Hughes, 133 Ill. App. 654; Campbell v. Fierlein, 134 Ill. App. 207. The giving of an instruction containing an abstract proposition of law, not correctly applied to a case, will not reverse in absence of a showing of prejudice resulting. City of Farmington v. Wallace, 134 Ill. App. 366. Although stating abstract proposition, if it states laws with substantial accuracy is not misleading. Wallace v. Farmington, 231 Ill. 232, 83 NE 180.

37. City of Chicago v. Sutton, 136 Ill. App. 221.

38. Instruction eliminating effect of improper evidence received without objection is not abstract proposition of law. Pereira v. Star Sand Co. [Or.] 94 P 835.

39. Arkadelphia Lumber Co. v. Asman, 85 Ark. 568, 107 SW 1171.

40. See 10 C. L. 815. See ante, this section post, § 8.

41. Should direct attention of jury to specific issues, embracing only statements of law by which evidence on issues is to be examined and applied. Rio Grande So. R. Co. v. Campbell [Colo.] 96 P 986. It is sufficient if charge definitely explains issues and law applicable thereto. Van Orman v. Lake Shore & M. S. R. Co., 152 Mich. 185, 15 Det. Leg. N. 176, 115 NW 968. In stating allegations of pleadings, charge should always give their substance correctly. Gulf, etc., R. Co. v. Walters [Tex. Civ. App.] 20 Tex. Ct. Rep. 616, 107 SW 369. Must instruct jury in respect of what facts they must find to enable them to decide. Homberg v. Tiffany Studios, 123 App. Div. 800, 108 NYS 575. Must include all facts material to right of party. Reynolds v. Hart, 42 Colo. 150, 94 P 14; Illinois Cent. R. Co. v. Mason, 132 Ill. App. 403.

42. Brown v. Globe Printing Co. [Mo.] 113 SW 462.

43. Phrase, "as a person should do," is unnecessary. Dyer v. McWhirter [Tex. Civ. App.] 111 SW 1053.

44. Reference to person in charge of engine in plural instead of singular is not misleading when evidence shows only that

*Argumentative instructions*[46] should not be given,[47] though this fault alone will not ordinarily require a reversal.[48] Repetition,[49] and not merely calling attention to certain facts in evidence necessary to a recovery,[50] may make a charge argumentative, but to determine whether it is so the whole of it must be looked to.[51]

*Instructions should be consistent,*[52] but they cannot be held in conflict where one explains and qualifies the other,[53] and if, reading them together, they are found to be consistent in their main scope, they will be upheld.[54]

§ 7. *Relation of instructions to pleading and evidence.*[55]—Instructions must be based on the material issues[56] made by the pleadings,[57] and the competent[58] evi-

person was in charge. Galveston, etc., R. Co. v. Cochran [Tex. Civ. App.] 109 SW 261. Meaningless misuse of word "physical" for "mental," when read in connection with other instructions, not misleading. St. Louis, etc., R. Co. v. Day [Ark.] 110 SW 220. Inadvertent misplacing of words "plaintiff" and "defendant," not misleading. Galveston, etc., R. Co. v. Wafer [Tex. Civ. App.] 20 Tex. Ct. Rep. 831, 106 SW 897. Use of word "Williamson" instead of "Williams" held not misleading. Rushing v. Lanier [Tex. Civ. App.] 111 SW 1089. Use of word "and" instead of "or" not material as jury not misled. Selkirk v. Watkins [Tex. Civ. App.] 20 Tex. Ct. Rep. 586, 105 SW 1161.

**45.** Fowler Packing Co. v. Enzenperger [Kan.] 94 P 995.

**46.** See 10 C. L. 315. See post, §§ 9, 10.

**47.** Morris v. McClellan [Ala.] 45 S 641; Nashville, etc., R. Co. v. Garth [Ala.] 46 S 583; Hays v. Lemoine [Ala.] 47 S 97; Jackson v. Tribble [Ala.] 47 S 310; Taylor v. McClintock [Ark.] 112 SW 405; Dodge v. Cowart [Ga.] 62 SE 987; Perkins v. Wabash R. Co., 233 Ill. 458, 84 NE 677; Elgin Aurora & So. Trac. Co. v. Wilcox, 132 Ill. App. 446; Sangster v. Hatch, 134 Ill. App. 340; City of Farmington v. Wallace, 134 Ill. App. 366; Illinois Cent. R. Co. v. Collison, 134 Ill. App. 443; Wabash R. Co. v. Perkins, 137 Ill. App. 514; Louisville & S. I. Trac. Co. v. Short, 41 Ind. App. 570, 83 NE 265; Ryley-Wilson Grocery Co. v. Seymour Canning Co., 129 Mo. App. 325, 108 SW 628; Ford v. Gray [Mo. App.] 110 SW 692; Missouri, K. & T. R. Co. v. Hibbitts [Tex. Civ. App.] 109 SW 228; Missouri, K. & T. R. Co. v. Malone [Tex. Civ. App.] 110 SW 958; Ramm v. Hewitt-Lea Lumber Co. [Wash.] 94 P 1081.

**48.** Louisville & N. R. Co. v. Lile [Ala.] 45 S 699.

**49.** Instruction that "if you find for plaintiff, in estimating damages, you have right to take into consideration nature of accident and character of injuries, pain, if any, caused thereby, loss of sight, disfigurement, mental and physical pain, and loss of service," held to contain unnecessary repetition. Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730.

**50.** Landrum v. St. Louis & S. F. R. Co. [Mo. App.] 112 SW 1000.

**51.** Whitney v. Wellesley & Boston St. R. Co., 197 Mass. 495, 84 NE 95.

**52.** See 10 C. L. 315. See ante, this section. Taylor v. McClintock [Ark.] 112 SW 405; O'Dwyer v. Northern Market Co., 30 App. D. C. 244; Swiercz v. Illinois Steel Co., 231 Ill. 456, 83 NE 168; Cleveland, etc., R. Co. v. Lynn [Ind.] 85 NE 999; Rosenkovitz v. United Railways & Elec. Co. [Md.] 70 A 108; Illinois Cent. R. Co. v. McGowan [Miss.] 46 S 55; Gessner v. Metropolitan St. R. Co. [Mo. App.] 112 SW 30; Central Mantel Co. v. Thaler [Mo. App.] 113 SW 220; Hoskovec v. Omaha St. R. Co. [Neb.] 115 NW 312; Hartman v. Joline, 112 NYS 1057; Southern R. Co. v. Hansbrough's Adm'x, 107 Va. 733, 60 SE 58; City of Richmond v. Pemberton [Va.] 61 SE 787. Instructions in direct conflict in theory and conclusions are erroneous. B. F. Sturtevant Co. v. Cumberland Dugan & Co., 106 Md. 587, 68 A 351. It is error to give instructions which contradict each other as to material propositions of law in a case. City of Lincoln v. Heinzel, 134 Ill. App. 439. Where instructions are conflicting or inconsistent, a new trial has to be awarded. Norfolk R. & L. Co. v. Higgins [Va.] 61 SE 766; Norton Coal Co. v. Hanks' Adm'r [Va.] 62 SE 335. An instruction applying to cases where premium had been paid in cash, and another to cases where notes had been given, are not inconsistent. State Life Ins. Co. v. Postal [Ind. App.] 84 NE 156.

**53.** See post, § 17, Curing Bad Instructions. Pettus v. Kerr [Ark.] 112 SW 886.

**54.** Prindeville v. St. Louis Transit Co., 128 Mo. App. 596, 107 SW 453.

**55.** See 10 C. L. 316. See ante, § 6, post, § 9.

**56.** Cowie v. Kinser, 138 Ill. App. 143; Swiney v. American Exp. Co. [Iowa] 115 NW 212; Peck v. Springfield Trac. Co. [Mo. App.] 110 SW 659; Kingfisher Nat. Bank v. Johnson [Okl.] 98 P 343; Jones v. Parker [S. C.] 62 SE 261. A general instruction not applying to any question of verdict may be refused, though it be a fair statement of the law. Blankavag v. Badger Box & Lumber Co., 136 Wis. 380, 117 NW 852. On question whether or not wife was an adulteress, instruction on animus of husband in bringing suit held without warrant of law. Hughes v. Hughes, 133 Ill. App. 654. Instruction telling jury that before plaintiff could recover they must find by a preponderance of evidence that defendant gave them exclusive contract to sell farm, erroneous, where whether contract was exclusive or not was of no moment, and where question was not raised on the trial. Summerville v. Klein, 140 Ill. App. 39. Instructions must be relevant to the issues. Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730; Lindsay v. Kroeger, 37 Mont. 231, 95 P 839; Heyward v. Christiensen [S. C.] 61 SE 399. Though instruction states correct principles of law, if inapplicable to issue it is erroneous. Rude v. Sisack [Colo.] 96 P 976. In action for injuries resulting from negligence, an instruction that if jury believe defendant's witnesses they must find

for defendant is improper, as it submits only question of credibility of witnesses of defendant instead of question of negligence of plaintiff and defendant. Gabel v. Brooklyn, etc., R. Co., 112 NYS 1047.

**57.** See ante, § 3, Duty of Instructing.

**Alabama:** Alabama, G. S. R. Co. v. McWhorter [Ala.] 47 S 84; Alabama City, G. & A. R. Co. v. Bullard [Ala.] 47 S 578.

**Arkansas.** St. Louis, etc., R. Co. v. Ozier [Ark.] 110 SW 595.

**Colorado.** Rude v. Sisack [Colo.] 96 P 976.

**Georgia.** Martin v. Monroe, 130 Ga. 79, 60 SE 253; Coweta County v. Central of Georgia R. Co. [Ga. App.] 60 SE 1018; Georgia, F. & A. R. Co. v. Sasser [Ga. App.] 61 SE 505; Hewitt v. Lamb, 130 Ga. 709, 61 SE 716.

**Idaho:** If no allegation as to loss of time and no evidence showing loss thereof or value of it, instruction thereon improper. Tarr v. Oregon Short Line R. Co., 14 Idaho, 192, 93 P 957.

**Illinois.** Ratner v. Chicago City R. Co., 233 Ill. 169, 84 NE 201; Hackett v. Chicago City R. Co., 235 Ill. 116, 85 NE 320; Kenyon v. Chicago City R. Co., 235 Ill. 406, 85 NE 660; Chicago, etc., R. Co. v. Redfearin, 133 Ill. App. 88; American Home Circle v. Schneider, 134 Ill. App. 600; Reynolds v. Wray, 135 Ill. App. 527; City of Rock Island v. Larkin, 136 Ill. App. 579.

**Iowa.** Kirkpatrick v. Aetna Life Ins. Co. [Iowa] 117 NW 1111.

**Kentucky.** Morgan v. Chesapeake & O. R. Co., 32 Ky. L. R. 330, 105 SW 961; Smith v. Garrison, 32 Ky. L. R. 1278, 108 SW 293; Sympson v. Bell [Ky.] 112 SW 1133.

**Massachusetts.** Plummer v. Boston El. R. Co., 198 Mass. 499, 84 NE 849.

**Michigan.** Ruthruff v. Faust [Mich.] 15 Det. Leg. N. 783, 117 NW 902.

**Missouri.** Dee v. Nachbar, 207 Mo. 680, 106 SW 35; Lattimore v. Union Elec. L. & P. Co., 128 Mo. App. 37, 106 SW 543; Zalotuchin v. Metropolitan St. R. C., 127 Mo. App. 577, 106 SW 548; Collins v. Fillingham, 129 Mo. App. 340, 108 SW 616; Davidson v. St. Louis Transit Co., 211 Mo. 320, 109 SW 583; Kirkpatrick v. Metropolitan St. R. Co., 211 Mo. 68, 109 SW 682; Beave v. St. Louis Transit Co., 212 Mo. 331, 111 SW 52; Crow v. Houck's Missouri & A. R. Co., 212 Mo. 589, 111 SW 583; Van Buskirk v. Quincy, etc., R. Co. [Mo. App.] 111 SW 832; Central Mantel Co. v. Thaler [Mo. App.] 113 SW 220. If without the issues, instruction erroneous, but not necessarily reversible error. Connelly v. Illinois Cent. R. Co. [Mo. App.] 113 SW 233. A charge submitting an hypothesis not authorized by pleadings should not be given. Atchison v. St. Joseph [Mo. App.] 113 SW 679. No rule is better settled than that which prohibits an enlargement in instructions of scope of cause pleaded. Kellogg v. Kirksville [Mo. App.] 112 SW 296.

**Montana.** Mitchell v. Henderson, 37 Mont. 515, 97 P 942.

**Nebraska:** It is reversible error to instruct on questions not raised by pleadings nor applicable to evidence, when such instructions have tendency to mislead jury or have prejudicial effect upon party complaining. Sabin v. Cameron [Neb.] 117 NW 95.

**New York.** Smith v. Green Fuel Economizer Co., 123 App. Div. 672, 108 NYS 45; Finnegan v. Andrew J Robinson Co., 124 App. Div. 117, 108 NYS 135. Complaint drawn on theory that defendant owed duty which primarily rests upon municipality to have sidewalk in reasonably safe condition, and trial proceeding on such theory, it is error to charge that hols in sidewalk constituted nuisance, leaving to jury question whether defendant, by removal of tree, caused hole. Furst v. Zucker, 110 NYS 63.

**Oklahoma:** Court will not instruct on a question presented by neither pleading nor evidence. Citizens' Bank of Wakita v. Garnett [Okl.] 95 P 755.

**Texas.** Nash v. Noble [Tex. Civ. App.] 18 Tex. Ct. Rep. 543, 102 SW 736; San Antonio & A. P. R. Co. v. Muecke [Tex. Civ. App.] 20 Tex. Ct. Rep. 52, 105 SW 1009; San Antonio Trac. Co. v. Kelleher [Tex. Civ. App.] 20 Tex. Ct. Rep. 801, 107 SW 64; Pullman Co. v. Vanderhoeven [Tex. Civ. App.] 20 Tex. Ct. Rep. 889, 107 SW 147; Gulf, etc., R. Co. v. Walters [Tex. Civ. App.] 20 Tex. Ct. Rep. 616, 107 SW 369; Missouri, K. & T. R. Co. v. Hollan [Tex. Civ. App.] 107 SW 642; Missouri, K. & T. R. Co. v. Thomas [Tex. Civ. App.] 107 SW 868; Rapid Transit R. Co. v. Strong [Tex. Civ. App.] 108 SW 394; Ft. Worth & D. C. R. Co. v. Watkins [Tex. Civ. App.] 108 SW 487; Earnest v. Waggoner [Tex. Civ. App.] 108 SW 495; St. Louis, etc., R. Co. v. Rogers [Tex. Civ. App.] 108 SW 1027; Postal Tel. Cable Co. v. Sunset Const. Co. [Tex. Civ. App.] 109 SW 265; Suderman v. Kriger [Tex. Civ. App.] 109 SW 373; El Paso Elec. R. Co. v. Sierra [Tex. Civ. App.] 109 SW 986; Champion v. Johnson County [Tex. Civ. App.] 109 SW 1146; Kindlea v. Kosub [Tex. Civ. App.] 110 SW 79; Texas M. R. Co. v. Byrd [Tex. Civ. App.] 110 SW 199; Missouri, K. & T. R. Co. v. Groseclose [Tex. Civ. App.] 110 SW 477; Missouri, K. & T. R. Co. v. Malone [Tex. Civ. App.] 110 SW 958; Houston & T. C. R. Co. v. Lindsey [Tex. Civ. App.] 110 SW 995; Front & Newbury v. Gulf, etc., R. Co. [Tex. Civ. App.] 111 SW 220; Texas & N. O. R. Co. v. Powell [Tex. Civ. App.] 112 SW 697; Landry v. Western Union Tel. Co. [Tex.] 113 SW 10; Missouri, K. & T. R. Co. v. House [Tex. Civ. App.] 113 SW 154; Parham v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 113 SW 154; San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574; Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631. Where charge presents issue outside of those made by pleadings, and upon which verdict might have been founded, judgment based upon such verdict must be reversed. Farenthold v. Tell [Tex. Civ. App.] 113 SW 635.

**Utah.** Smith v. Ogden, etc., R. Co., 33 Utah, 129, 93 P 185. If neither pleadings nor evidence raised a question of estoppel, instruction thereon is error. Manti City Sav. Bank v. Peterson, 33 Utah, 209, 93 P 566.

**Virginia.** Clinchfield Coal Co. v. Wheeler's Adm'r [Va.] 62 SE 269.

**Washington.** Behling v. Seattle Elec. Co. [Wash.] 96 P 954. Instruction is proper if the complaint substantially alleges matters upon which it is predicated. Olsen v. Tacoma Smelting Co. [Wash.] 96 P 1036. If there is issue of fraud in procuring contract, instruction based on assumption that contract was entered into which is sought to be set aside is erroneous. Loveland v. Jenkins-Boys Co. [Wash.] 95 P 490.

**Wisconsin.** Salchert v. Reinig [Wis.] 115 NW 132.

dence introduced.[59] It cannot be said that an instruction is a departure from the

58. First Nat. Bank v. Brown [Neb.] 116 NW 685; Anderson v. Lewis [W. Va.] 61 SE 160.

59. See ante, § 3, Duty of Instructing.

**Alabama.** Birmingham R., L. & P. Co. v. Lee [Ala.] 45 S 164; Birmingham R., L. & P. Co. v. Landrum [Ala.] 45 S 198; Neff v Williamson [Ala.] 46 L. 238; Pelham v. Chattahoochee Grocery Co. [Ala.] 47 S 172. When there are two or more counts in complaint, and evidence to support any one of them, charges directed to other counts, unsupported by any evidence, but which instruct generally to find for defendant, should not be given. Burns v. George [Ala.] 45 S 421. Instruction authorizing jury to adopt any theory which may be suggested, whether supported by evidence or not, is erroneous. McBride v. Sullivan [Ala.] 45 S 902.

**Arizona.** Greene v. Hereford [Ariz.] 95 P 105.

**Arkansas.** Ong Chair Co. v. Cook, 85 Ark. 390, 108 SW 203; Taylor v. McClintock [Ark.] 112 SW 405; Arkansas Cent. R. Co. v. Workman [Ark.] 112 SW 1082; Little Rock & M. R. Co. v. Russell [Ark.] 113 SW 1021.

**California.** Central Pac. R. Co. v. Feldman, 152 Cal. 303, 92 P 849. That a different theory may also find support in evidence is no valid ground of objection where instruction is hypothetical and pertinent. Wistrom v. Redlick, 6 Cal. App. 671, 92 P 1048.

**Colorado.** Rimmer v. Wilson, 42 Colo. 180, 93 P 1110; Reynolds v. Hart, 42 Colo. 150, 94 P 14; Coors v. Brock [Colo.] 96 P 963; Rio Grande So. R. Co. v. Campbell [Colo.] 96 P 986.

**Florida.** Florala Sawmill Co. v. Smith [Fla.] 46 S 332.

**Georgia.** Cooley v. Bergstrom, 3 Ga. App. 486, 60 SE 220; Georgia S. & F. R. Co. v. Wright, 130 Ga. 696, 61 SE 518; Neel v. Powell, 130 Ga. 756, 61 SE 729; Darsey v. Darsey [Ga.] 62 SE 20; McElwaney v. McDiarmid [Ga.] 62 SE 20; Southern R. Co. v. Grizzle [Ga.] 62 SE 177; Fullbright v. Neeley [Ga.] 62 SE 188; Dodge v. Cowart [Ga.] 62 SE 987.

**Illinois.** Davis v. Illinois Collieries Co., 232 Ill. 284, 83 NE 836; Dorrance v. Dearborn Power Co., 233 Ill. 354, 84 NE 269; Kennedy v. Swift & Co., 234 Ill. 606, 85 NE 187; Smith v. Treat, 234 Ill. 552, 85 NE 289; Murphy v. Evanston Elec. R. Co., 235 Ill. 275, 85 NE 334; Jacobsen v. Heywood & Morrill Rattan Co., 236 Ill. 570, 86 NE 110; Chicago, etc., R. Co. v. Gill, 132 Ill. App. 310; McMahon v. Scott, 132 Ill. App. 582; Donk Bros. Coal & Coke Co. v Stroeter, 133 Ill. App. 199; Lepman v. Woldert Grocery Co., 133 Ill. App. 362; Koehn v. Tomlinson, 134 Ill. App. 256; Springfield Consol. R. Co. v. Johnson, 134 Ill. App. 536; Litchfield & M. R. Co. v. Shuler, 134 Ill. App. 615; Tripoli Sav. Bank v. Schnadt, 135 Ill. App. 373; Telserowitz v. Fogarty, 135 Ill. App. 609; Cowle v. Kinser, 138 Ill. App. 143; Henreddy v. Pallinnas, 139 Ill. App. 148; Summerville v. Klein, 140 Ill. App. 39. Error to refuse tendered instruction to eliminate count for consideration of jury where no evidence tending to support averments of such count. Chicago City R. Co. v. Reddick, 139 Ill. App. 160.

**Indiana.** Closson v. Bligh, 41 Ind. App. 14, 83 NE 263; Grand Rapids & I. R. Co. v. King, 41 Ind. App. 701, 83 NE 778; Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730; Reed v. Light [Ind.] 85 NE 9. Evidence of facts, having been refused when offered, instructions thereon will be refused. City of La Porte v. Henry, 41 Ind. App. 197, 83 NE 655. Where court cannot say there is no evidence to support averments, it is not improper to instruct thereon. Model Clothing House v. Hirsch [Ind. App.] 85 NE 719.

**Iowa.** Mickey v. Indianola [Iowa] 114 NW 1072; Sieberts v. Spangler [Iowa] 118 NW 292; Hetland v. Bilstad [Iowa] 118 NW 422.

**Kentucky.** Owensboro Wagon Co. v. Boling, 32 Ky. L. R. 816, 107 SW 264; Murphy's Ex'r v. Hoagland, 32 Ky. L. R. 839, 107 SW 303; Lexington R. Co. v. Van Laden's Adm'r, 32 Ky. L. R. 1047, 107 SW 740; Louisville & N. R. Co. v. Onan's Adm'r [Ky.] 33 Ky. L. R. 462, 110 SW 380; Louisville & N. R. Co. v Joshlin, 33 Ky. L. R. 513, 110 SW 382; Hightower v. Borden [Ky.] 112 SW 675; Louisville & N. R. Co. v. Veach's Adm'r [Ky.] 112 SW 869; Swann-Day Lumber Co. v. Thomas [Ky.] 112 SW 907; Illinois Cent. R. Co. v. France's Adm'x [Ky.] 112 SW 929; Louisville R. Co. v. Buckner's Adm'r [Ky.] 113 SW 90; Matthews' Adm'r v. Louisville & N. R. Co. [Ky.] 113 SW 459.

**Louisiana.** Muscarelli v. Hodge Fence & Lumber Co., 120 La. 335, 45 S 268.

**Maryland.** Darrin v. Whittingham, 107 Md. 46, 68 A 269; B. F. Sturtevant Co. v. Cumberland Dugan & Co., 106 Md. 587, 68 A 351; Palatine Ins. Co. v. O'Brien, 107 Md. 341, 68 A 484; Brinsfield v. Howeth, 107 Md. 278, 68 A 566; United Rys. & Elec. Co. v. Cloman, 107 Md. 681, 69 A 379; Mutual Life Ins. Co. v. Mullan, 107 Md. 457, 69 A 385; Mount Vernon Brew. Co. v. Teschner [Md.] 69 A 702; Dronenburg v. Harris [Md. App.] 71 A 81.

**Massachusetts.** Herlihy v. Little [Mass.] 86 NE 294.

**Michigan.** Bennett v. Greenwood, 151 Mich. 274, 14 Det. Leg. N. 940, 114 NW 1019; Woods v. Palmer, 151 Mich. 30, 14 Det. Leg. N. 963, 115 NW 242; Blakeslee & Co. v. Reinhold Mfg. Co. [Mich.] 15 Det. Leg. N. 468, 117 NW 92.

**Mississippi.** Mobile, etc R. Co. v. Jackson [Miss.] 46 S 142.

**Missouri.** Dee v. Nachbar, 207 Mo. 680, 106 SW 35; Brown v. St. Louis & S. R. Co., 127 Mo. App. 499, 106 SW 83; Chenowith v. Sutherland, 129 Mo. App. 431, 107 SW 6; Prendeville v. St. Louis Transit Co., 128 Mo. App. 596, 107 SW 453; Anderson v. St. Louis, etc., R. Co., 129 Mo. App. 384, 108 SW 605; Davidson v. St. Louis Transit Co., 211 Mo. 320, 109 SW 583; Stetzler v. Metropolitan St. R. Co., 210 Mo. 704, 109 SW 666; Wann v. Scullin, 210 Mo. 429, 109 SW 688; Star Bottling Co. v. Cleveland Faucet Co., 128 Mo. App. 517, 109 SW 802; Peters & Reed Pottery Co. v. Folockemer [Mo. App.] 110 SW 598; Beave v. St. Louis Transit Co., 212 Mo. 331, 111 SW 52; Crow v. Houck's Missouri & N. R. Co., 212 Mo. 589, 111 SW 583; Cole v. Fitzgerald [Mo. App.] 111 SW 628; Walkeen Lewis Millinery Co. v. Johnston [Mo. App.] 111 SW 639; Porter v. St. Joseph Stockyards Co. [Mo.] 111 SW 1136; Young v. Lanznar [Mo. App.]

pleadings where the pleadings contain all the allegations of fact which the instruction requires to be found,[60] nor is a departure from them in an immaterial matter

112 SW 17; Gessner v. Metropolitan St. R. Co. [Mo. App.] 112 SW 30; Brown v. Globe Printing Co. [Mo.] 112 SW 462; Barree v. Cape Girardeau [Mo. App.] 112 SW 724; Heidbrink v. United R. Co. [Mo. App.] 113 SW 223; International Bank v. Enderle [Mo. App.] 113 SW 262. Court will not instruct in face of evidence. Atchison v. St. Joseph [Mo. App.] 113 SW 679. Must be predicated on evidence and not a mere surmise. New Madrid Bank. Co. v. Poplin, 129 Mo. App. 121, 108 SW 115. Comment on city ordinance not in evidence, but excluded when offered, is error. Lattimore v. Union Elec. L. & P. Co., 128 Mo. App. 37, 106 SW 543.

**Montana.** Power v. Turner, 37 Mont. 521, 97 P 950.

**Nebraska.** Allen v. Chicago, etc., R. Co. [Neb.] 118 NW 655.

**New Hampshire.** Stearns v. Boston, etc. R. Co. [N. H.] 71 A 21.

**New Jersey.** There must be some basis in evidence for hypothesis proposed by request. Daggett v. North Jersey St. R. Co. [N. J. Err. & App.] 68 A 179.

**New York.** Rockmore v. Kramer, 108 NYS 553; Pulcino v. Long Island R. Co., 109 NYS 1076. If evidence shows that accident was not caused by any act of operator, it is error to instruct that if elevator negligently operated recovery may be had. Keller v. Wove Realty Co., 112 NYS 538.

**North Carolina.** Weaver v. Love, 146 N. C. 414, 59 SE 1041; Wade v. McLean Contracting Co. [N. C.] 62 SE 919.

**Oregon.** Anderson v. Aupperle [Or.] 95 P 330.

**Pennsylvania.** Weir v. Haverford Elec. Light Co., [Pa.] 70 A 874.

**South Carolina** Hall v Latimer [S. C.] 61 SE 1057; Jones v. Parker [S. C.] 62 SE 261; Cheek v. Seaboard A. L. R. [S. C.] 62 SE 402. Unless attention of court is called to matter, that there is no basis in evidence or issues for instruction, it is not reversible error. Plunkett v. Piedmont Mut. Ins. Co. [S. C.] 61 SE 893.

**South Dakota.** Ewing v. Lunn [S. D.] 115 NW 527.

**Texas.** Waters-Pierce Oil Co. v. Snell [Tex. Civ. App.] 20 Tex. Ct. Rep. 190, 106 SW 170; Stockton v. Brown [Tex. Civ. App.] 20 Tex. Ct. Rep. 678, 106 SW 423; Mare v. Morris [Tex. Civ. App.] 20 Tex. Ct. Rep. 374, 106 SW 430; Texas & P. R. Co. v. Johnson [Tex. Civ. App.] 20 Tex. Ct. Rep. 410, 106 SW 773; Dallas Consol. Elec. St. R. Co. v. Lytle [Tex. Civ. App.] 20 Tex. Ct. Rep. 820, 106 SW 900; Western Union Tel. Co. v. Bell [Tex. Civ. App.] 20 Tex. Ct. Rep. 695, 106 SW 1147; Buchanan v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 829, 107 SW 552; Runnells v. Pecos & N. T. R. Co. [Tex. Civ. App.] 107 SW 647; Houston & T. C. R. Co. v. Burnet [Tex. Civ. App.] 108 SW 404; Missouri, K. & T. R. Co. v. Morgan [Tex. Civ. App.] 108 SW 724; El Paso & S. W. R. Co. v. Smith [Tex. Civ. App.] 108 SW 988; Maffi v. Stephens [Tex. Civ. App.] 108 SW 1008; St Louis, etc., R. Co. v. Rogers [Tex. Civ. App.] 108 SW 1027; Cleveland v. Taylor [Tex. Civ. App.] 108 SW 1037; Norton v. Galveston, etc., R. Co. [Tex. Civ. App.] 108 SW 1044; Texas & N. O. R. Co. v. Parsons [Tex. Civ. App.] 109 SW 240; Western Union Tel. Co. v. Johnsey [Tex. Civ. App.] 109 SW 251; Texas Brew. Co. v Bisso [Tex. Civ. App.] 109 SW 270; St. Louis S. W. R. Co. v. Johnson [Tex. Civ. App.] 109 SW 486; Houston & T. C. R. Co. v. Roberts [Tex. Civ. App.] 109 SW 982; El Paso Elec. R. Co. v. Sierra [Tex. Civ. App.] 109 SW 986; Houston & T. C. R. Co. v. Patrick [Tex. Civ. App.] 109 SW 1097; Champion v. Johnson County [Tex. Civ. App.] 109 SW 1146; Galveston, etc., R. Co. v. Noelke [Tex. Civ. App.] 110 SW 82; St. Louis S. W. R. Co. v. Cleland [Tex. Civ. App.] 110 SW 122; Overall v. Graves [Tex. Civ. App.] 110 SW 549; Missouri, K. & T. R. Co. v. Pennewell [Tex. Civ. App.] 110 SW 758; San Antonio Machine & Supply Co. v. Campbell [Tex. Civ. App.] 110 SW 770; Morgan v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 110 SW 978; Houston & T. C. R. Co. v. Lindsey [Tex. Civ. App.] 110 SW 995; St. Louis S. W. R. Co. v. Garber [Tex. Civ. App.] 111 SW 227; St. Louis S. W. R. Co. v. Cockrill [Tex. Civ. App.] 111 SW 1092; Texas & N. O. R. Co. v. Powell [Tex. Civ. App.] 112 SW 697; Missouri, K. & T. R. Co. v. Hagler [Tex. Civ. App.] 112 SW 783; Galveston, H. & N. R. Co. v. Olds [Tex Civ. App.] 112 SW 787; Texas & P. R. Co. v. Boleman [Tex. Civ. App.] 112 SW 805; Parham v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 113 SW 154; Dunn v. Taylor [Tex.] 113 SW 265; Stoker v. Fugitt [Tex. Civ. App.] 113 SW 310; Hess v. Webb [Tex. Civ. App.] 113 SW 618; Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767; International & G. N. R. Co. v. Welbourne [Tex. Civ. App ] 113 SW 780. If there are no pleadings to base charge, it cannot be sustained on evidence admitted without objection. Farenthold v. Tell [Tex. Civ. App.] 113 SW 635. Though negligence in employing conductor is alleged, if no proof to establish such negligence, charge thereon is uncalled for. Trinity & B. V. R. Co. v. Bradshaw [Tex. Civ. App.] 107 SW 618. Instructions should in all cases apply the law to existing facts and circumstances. Herndon v. Salt Lake City [Utah] 95 P 646.

**Vermont.** Drown v. New England Tel. & T. Co. [Vt.] 70 A 599; Brown v. People's Gaslight Co. [Vt.] 71 A 204.

**Virginia.** Norfolk & W. R. Co. v. Bondurant's Adm'r, 107 Va. 515, 59 SE 1091; Southern R. Co. v. Hansbrough's Adm'r, 107 Va. 733, 60 SE 58; Long Pole Lumber Co. v. Saxon Lime & Lumber Co. [Va.] 62 SE 349; Life Ins. Co. v. Halrston [Va.] 62 SE 1057.

**Washington.** Harris v. Washington Portland Cement Co. [Wash.] 95 P 84; Behling v. Seattle Elec. Co. [Wash.] 96 P 954; Hendelman v. Kahan [Wash.] 97 P 109.

**West Virginia.** Squllache v. Tidewater Coal & Coke Co. [W. Va.] 62 SE 446.

**U. S. Courts.** Crosby v. Cuba R. Co., 158 F 144; Adams Exp. Co. v. Adams, 29 App. D. C. 250; O'Dwyer v. Northern Market Co., 30 App. D. C. 244; Wallach v. MacFarland, 31 App. D. C. 130.

**60.** Lang v. Missouri Pac. R. Co., 208 Mo. 458, 106 SW 660; Pullman Co. v. Vanderhoeven [Tex. Civ. App.] 20 Tex. Ct. Rep.

erroneous.[61] An instruction may be based on matters judicially noticed[62] or on circumstantial evidence [63] or other evidence which is not full and clear [64] or conclusive.[65]

§ 8. *Stating issues to the jury.*[66]—The court should submit all material issues [67] clearly [68] and fairly,[69] and this may be done in the language of the pleading,[70] or, "as set forth and claimed in some count thereof," though some counts be withdrawn, if the jury know of such withdrawal.[71] Failure to state all the issues is not waived by omission to ask for an instruction thereon,[72] but if an error is made in the statement it is the duty of counsel to call the court's attention to it.[73] The court may state what issues are made by the pleadings, as preliminary to stating what are withdrawn, and what are left for consideration,[74] but issues stated should include, or be followed immediately by, the instruction applicable thereto.[75] Where action is based on two theories, both should be submitted, if recovery may be had on either,[76] and, in submitting special issues, it may be necessary to instruct in such a way as will assist the jury in returning pertinent and intelligent answers,[77] but points answered in the negative need not be submitted,[78] nor is it necessary to construe an in-

889, 107 SW 147; St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 107 SW 638; Kansas City Consol. Smelting & Refining Co. v. Taylor [Tex. Civ. App.] 107 SW 889. Issues need not be specifically set out, if substance is there. Southern Pac. Co. v. Godfrey [Tex. Civ. App.] 107 SW 1135; Lorts & Frey Planing Mill Co. v. Weil [Ky.] 113 SW 474.

**61.** Gibson v. Seney [Iowa] 116 NW 325.

**62.** While instruction must be based on evidence, facts of which courts take judicial notice are a part of case as facts, and court may instruct upon them. Spiking v. Consolidated R. & Power Co., 33 Utah, 313, 93 P 838. That some men could drink more intoxicants than others without showing it need not be proved. Hoagland v. Canfield, 160 F 146.

**63.** Lillard v. Chicago, etc., R. Co. [Kan.] 98 P 213.

**64.** Beave v. St. Louis Transit Co., 212 Mo. 331, 111 SW 52.

**65.** Crow v. Houck's Missouri, etc., R. Co., 212 Mo. 589, 111 SW 583; Texas & P. R. Co. v. Corn [Tex. Civ. App.] 110 SW 485.

**66.** See 10 C. L. 321. See, ante, §§ 2, 3, 6, 7; post, §§ 9-11. As to the framing and submission of issues for special findings, see Verdicts and Findings, 10 C. L. 1974.

**67.** See ante, §§ 3, 6, 7, post. § 9. Stratton Cripple Creek Min. & Development Co. v. Ellison, 42 Colo. 498, 94 P 303; Merchants' & Miners' Transp. Co. v. Corcoran [Ga. App.] 62 SE 130; Funston v. Hoffman, 232 Ill. 360, 83 NE 917; Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730; Brinkman v. Pacholke, 41 Ind. App. 662, 84 NE 762; Pulcino v. Long Island R. Co., 109 NYS 1076; Mabry v. Kennedy [Tex. Civ. App.] 108 SW 176; New York Transp. Co. v. O'Donnell [C. C. A.] 159 F 659.

**68.** See ante, § 6. Alabama G. S. R. Co. v. McWhorter [Ala.] 47 S 84. Charge should be so framed as to enable jury to pass upon issues by examining charge and applying evidence to same, and not so as to require a resort to examination of pleadings. Id. An instruction that clearly and plainly states an issue is not objectionable. Indianapolis Trac. & T. Co. v. Holtsclaw, 41 Ind. App. 520, 82 NE 986; Seal v. Holcomb [Tex. Civ. App.] 20 Tex. Ct. Rep. 808, 107 SW 916.

**69.** See post, §§ 9, 10; ante, § 6. Issues should be clearly and impartially submitted. Cooley v. Bergstrom, 3 Ga. App. 496, 60 SE 220. In submitting issues, defense should not be misstated. Earnest v. Waggoner [Tex. Civ. App.] 108 SW 495. Should correctly state terms of contract alleged and proven. Cobb v. Dunlevie, 63 W. Va. 398, 60 SE 384. An immaterial misstatement of the issues is not objectionable. Sheffield v. Hanna, 136 Iowa. 579, 114 NW 24.

**70.** See ante, § 6. Instruction may put issue to jury precisely as petition did. Flaherty v. St. Louis Transit Co., 207 Mo. 318, 106 SW 15. Where issues are simple and pleading concise, it is not prejudicial to state issues in language of pleader. McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459.

**71.** An instruction permitting jury to render verdict for plaintiff if defendant's negligence should be found "as set forth and claimed in his declaration or some count thereof," even where some counts had been withdrawn from jury, held not erroneous where dismissal was called to jury's attention by other instructions given. Chicago City R. Co. v. Hagenback, 131 Ill. App. 537.

**72.** The court must state to jury all issues joined by pleadings upon which any testimony is offered, and failure to do so is not waived by omission to ask for instructions thereon. Wise v. Outtrim [Iowa] 117 NW 264.

**73.** If error is made in stating issues, it is duty of counsel to call court's attention to such fact so that such error may be corrected. Jones v. Parker [S. C.] 62 SE 261.

**74.** Court should be prompt in directing jury to issues submitted. McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459.

**75.** McDivitt v. Des Moines City R. Co., [Iowa] 118 NW 459.

**76.** See ante, §§ 3, 6. City of Covington v. Webster, 33 Ky. L. R. 649, 110 SW 878.

**77.** Kalteyer v. Mitchell [Tex. Civ. App.] 110 SW 462.

**78.** Clay v. Western Maryland R. Co. [Pa.] 70 A 807.

strument not affecting the issues,[79] and if there is no evidence to sustain a fact, it is proper for the court to say so.[80] Though inquiry should be narrowed to the precise issue,[81] and this reduced to as limited compass as is consistent with full instructions,[82] if the pleading is broad enough to embrace the issue, it should not be narrowed.[83]

§ 9. *Ignoring material evidence, theories and defenses.*[84]—Instructions should not ignore essential elements of the cause of action presented,[85] material issues[86] or defenses,[87] or evidence[88] nor should they ignore material theories[89] hypothesis[90] or

79. Geraty v. Atlantic C. L. R. Co. [S. C.] 62 SE 444.

80. This may be done in order to clear issues. Lindsay v. Kroeger, 37 Mont. 231, 95 P 839.

81. Proper instruction, narrowing inquiry to precise issue of case, should be given. St. Louis & S. F. R. Co. v. Dyer [Ark.] 113 SW 49.

82. Salmon v. Helena Box Co. [C. C. A.] 158 F 300.

83. Marklewitz v. Olds Motor Works, 152 Mich. 113, 15 Det. Leg. N. 125, 115 NW 999.

84. See 10 C. L. 323. See ante, §§ 3, 7, 8.

85. Mohr v. Martewicz, 139 Ill. App. 173; Herlihy v. Little [Mass.] 86 NE 294; Flaherty v. St. Louis Transit Co., 207 Mo. 318, 106 SW 15; Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787; San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574.

86. See ante, §§ 7, 8.

**Colorado:** Issue raised by replication should not be withdrawn, especially when such issue is main one in case. Loucks v. Davis, 43 Colo. 490, 96 P 191.

**Illinois.** Hagen v. Schleuter, 236 Ill. 467, 86 NE 112; Swiercz v. Illinois Steel Co., 231 Ill. 456, 83 NE 168. Instruction "that where husband and wife live together on a farm and wife contributes working capital and husband personal labor only, products will not belong to him or be liable for his debts," erroneous as ignoring question whether husband was a tenant who rented farm for himself. Leiserowitz v. Forgarty, 135 Ill. App. 609.

**Maryland.** Dronenburg v. Harris [Md.] 71 A 81.

**Missouri.** Bradbury Marble Co. v. Laclede Gas Light Co., 128 Mo. App. 96, 106 SW 594; Christian v. McDonnell, 127 Mo. App. 630, 106 SW 1104; White v. Reitz, 129 Mo. App. 307, 108 SW 601; Saller v. Friedman Bros. Shoe Co., 130 Mo. App. 712, 109 SW 794; Tinkle v. St. Louis & S. F. R. Co., 212 Mo. 445, 110 SW 1086; Penney v. St. Joseph Stockyards Co., 212 Mo. 309, 111 SW 79.

**New York:** Instruction having effect of withdrawing material issue is erroneous. Silleck v. Robinson, 108 NYS 999.

**Texas.** Southern Pac. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441; Paris, etc., R. Co. v. Calvin [Tex.] 20 Tex. Ct. Rep. 316, 106 SW 879; St. Louis S. W. R. Co. v. Thompson [Tex. Civ. App.] 108 SW 453; Missouri, K. & T. R. Co. v. Hendricks [Tex. Civ. App.] 108 SW 745; St. Louis, etc., R. Co. v. Boshear [Tex. Civ. App.] 108 SW 1032; Cowans v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 109 SW 403; Galveston, etc., R. Co. v. Riggs [Tex.] 109 SW 864; Whittaker v. Thayer [Tex. Civ. App.] 110 SW 787; St. Louis S. W. R. Co. v. Garber [Tex. Civ. App.] 111 SW 227; Chicago, etc., R. Co. v. Johnson [Tex. Civ. App.] 111 SW 758; Texas & C. R. Co. v. First Nat. Bank [Tex. Civ. App.] 112 SW 589; Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787; St. Louis, etc., R. Co. v. Boshear [Tex.] 113 SW 6; Steger & Sons Piano Mfg. Co. v. McMaster [Tex. Civ. App.] 113 SW 337.

**U. S. Courts.** Bolen-Darnall Coal Co. v. Williams [C. C. A.] 164 F 665. Instruction ignoring principal point in dispute properly refused. District of Columbia v. Duryee, 29 App. D. C. 327.

87. **Alabama.** Birmingham R. L. & P. Co. v. Landrum [Ala.] 45 S 198.

**Colorado.** Bailey v. Carlton, 43 Colo. 4, 95 P 542.

**Georgia:** The court may present a defense most strongly by excluding from consideration of jury all liability under plaintiff's claim of right of recovery as to that matter. Merchants' & Miners' Transp. Co. v. Corcoran [Ga. App.] 62 SE 130.

**Illinois:** Error in personal injury case, where a release was interposed by the defense, to instruct jury that they might render verdict for plaintiff without mentioning defense of release. Western Union Tel. Co. v. Nolan, 132 Ill. App. 427. In action for personal injuries, between master and servant, instruction concluding with a direction that jury shall render verdict for plaintiff if they shall find certain facts is erroneous as ignoring doctrine of assumed risk. Lake Street El. R. Co. v. Fitzgerald, 136 Ill. App. 281.

**Iowa.** Lauer v. Banning [Iowa] 118 NW 446.

**Kentucky.** Lexington R. Co. v. Van Laden's Adm'r, 32 Ky. L. R. 1047, 107 SW 740.

**Massachusetts.** Loveland v. Rand, 200 Mass. 142, 85 NE 948.

**Missouri.** Haas v. St. Louis, etc., R. Co., 128 Mo. App. 79, 106 SW 599; Toncrey v. Metropolitan St. R. Co., 129 Mo. App. 596, 107 SW 1091.

**New York.** Hartman v. Joline, 112 NYS 1057.

**South Carolina.** Winslow Bros. & Co. v. Atlantic Coast Line R. Co., 79 S. C. 344, 60 SE 709.

**Texas.** Feille v. San Antonio Trac. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 862, 107 SW 367; Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 20 Tex. Ct. Rep. 772, 107 SW 958.

88. See ante, § 7.

**Alabama.** Louisville & N. R. Co. v. Church [Ala.] 46 S 457; Barry v. Madaris [Ala.] 47 S 152. Must not ignore tendency to material testimony. Pelham v. Chattahoochee Grocery Co. [Ala.] 47 S 172.

legal presumptions.[91] The court may tell the jury to disregard evidence that has been excluded,[92] or, when it is admitted for a restricted purpose, may instruct as to the limits within which it may be considered.[93] The court may also ignore an issue which is not debatable [94] or a matter not pleaded or involved,[95] or may confine the jury to a crucial issue,[96] and need not instruct on an affirmative defense that raises no new issue.[97] Where the jury has been informed of the withdrawal of certain counts, it will be assumed they knew the instruction referred to counts not withdrawn.[98]

§ 10. *Giving undue prominence to evidence, issues and theories.*[99]—Instructions should not give undue prominence to evidence,[1] but the court may comment on evi-

**Arkansas.** Doyle v. Kavanaugh [Ark.] 112 SW 889.

**Colorado.** Coors v. Brock [Colo.] 96 P 963.

**Georgia.** Jury should not be restricted in their consideration of evidence which has been submitted for all purposes. Wilson v. Wilson, 130 Ga. 677, 61 SE 530.

**Illinois.** Long v. Long, 132 Ill. App. 409; Dornfeld-Kunert Co. v. Volkmann, 138 Ill. App. 421.

**Maryland.** Mount Vernon Brew. Co. v. Teschner [Md.] 69 A 702; Seaboard Air Line R. Co. v. Phillips [Md.] 70 A 232. An instruction should not segregate plaintiff's testimony on a point and omit defendant's testimony on same point. Strutevant Co. v. Cumberland Dugan & Co., 106 Md. 587, 68 A 351.

**Massachusetts.** Berry v. Ingalls, 199 Mass. 77, 85 NE 191.

**Missouri.** Gibler v. Quincy, etc., R. Co. 129 Mo. App. 93, 107 SW 1021; Cobb v. Holloway, 129 Mo. App. 212, 108 SW 109. Should not suggest to jury to discard testimony and indulge presumption based on absence of it. Rodan v. St. Louis Transit Co., 207 Mo. 392, 105 SW 1061.

**Montana.** Riley v. Northern Pac. R. Co., 36 Mont. 545, 93 P 948.

**North Carolina.** Wagner v. Atlantic Coast Line R. Co. [N. C.] 61 SE 171; Currie v. Gilchrist [N. C.] 61 SE 681; Davis v. Stephenson [N. C.] 62 SE 900.

**Rhode Island.** Tucker v. Rhode Island Co. [R. I.] 69 A 850.

**Texas.** Kansas City Consol. Smelting & Refining Co. v. Taylor [Tex. Civ. App.] 107 SW 889; Western Union Tel. Co. v. Landry [Tex. Civ. App.] 108 SW 461; Gulf & I. R. Co. v. Campbell [Tex. Civ. App.] 108 SW 972; Hermann v. McIver [Tex. Civ. App.] 111 SW 766. Must not ignore matter which has some evidence to establish it. Orient Ins. Co. v. Wingfield [Tex. Civ. App.] 108 SW 788.

**Vermont.** Taplin v. Marcy [Vt.] 71 A 72.

**Virginia.** Southern R. Co. v. Hansbrough's Adm'x, 107 Va. 733, 60 SE 58; Life Ins. Co. v. Hairston [Va.] 62 SE 1057.

**U. S. Courts.** Missouri, etc., R. Co. v. Wilhoit [C. C. A.] 160 F 440.

**89.** See ante, § 8. Taylor v. McClintock [Ark.] 112 SW 405; Klofski v. Railroad Supply Co., 235 Ill. 146, 85 NE 274; Dunlap v. Flowere [Okl.] 96 P 643. Should not ignore theories of either party. Gulf, etc., R. Co. v. Walters [Tex. Civ. App.] 20 Tex. Ct. Rep. 616, 107 SW 369. Should not limit theory of defense to narrower scope than that covered by evidence. Cobb v. Dunlevie, 63 W. Va. 393, 60 SE 384.

**90.** Peters & Reed Pottery Co. v. Folockemer [Mo. App.] 110 SW 598.

**91.** Presumption that stock delivered by carrier in damaged condition sustained such injury while in carrier's possession. Huggins v. Atlantic Coast Line R. Co., 79 S. C. 341, 60 SE 694.

**92.** See ante, § 7. Yezner v. Roberts, Johnson & Rand Shoe Co., 140 Ill. App. 61.

**93.** Floto v. Floto, 233 Ill. 605, 84 NE 712.

**94.** Alten v. Metropolitan St. R. Co. [Mo. App.] 113 SW 691. If the defense set up does not exist, it is not necessary to refer to it. Chenoweth v. Sutherland, 129 Mo. App. 431, 107 SW 6. Instruction cannot be said to ignore defense which defendant did not have. Brown v. Knapp & Co. [Mo.] 112 SW 474. May give instruction withdrawing issues if there is no evidence to support a verdict thereon. Beck v. Umshler [Iowa] 116 NW 138.

**95.** Matter not pleaded may be ignored. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Instruction cannot be said to ignore issue not in case. Knox v. American Rolling Mill Corp., 236 Ill. 437, 86 NE 90. Question of assumed risk, not being set up as defense, properly ignored. Graham v. Mattoon City R. Co., 234 Ill. 483, 84 NE 1070. Action on written contract and defense that defendant did not sign contract, or, if she did, signature procured by fraud, Part performance was not an issue. Sparks v. Forrest, 85 Ark. 425, 108 SW 835.

**96.** May instruct jury to ignore an issue if their finding on others ends the case. Rice v. McAdams [N. C.] 62 SE 774.

**97.** Ames v. Farmers' & Mechanics' Bank, 48 Wash. 328, 93 P 530.

**98.** Sandy v. Lake St. El. R. Co., 235 Ill. 194, 85 NE 300.

**99.** See 10 C. L. 326. See ante, §§ 4, 5; ante, § 3, Repetition.

**1.** See ante, § 5; post, § 12. Must not single out and give prominence to particular evidence. Doyle v. Burns [Iowa.] 114 NW 1; Huff v. St. Joseph R. L. H. & P. Co. [Mo.] 111 SW 1145; St. Louis, etc., R. Co. v. Boshear [Tex. Civ. App.] 108 SW 1032; St. Louis S. W. R. Co. v. Cleland [Tex. Civ. App.] 110 SW 122. Must not single out and stress a particular phase of evidence. Birmingham R. L. & P. Co. v. Lee [Ala.] 45 S 164. Instructions should not invite undue attention to one feature only of evidence and various allegations of parties. Village of Montgomery v. Robertson, 132 Ill. App. 362. Should not direct jury to consider certain classes or items of evidence. City of Farmington v. Wallace, 134 Ill. App. 366; Ghere v. Zey,

dence and merely state the claims of the respective parties,[2] and an instruction that correctly states the law may not be objectionable.[3] Undue emphasis should not be put upon disputed [4] facts [5] and issues; [6] but an instruction which might be misleading in one state of the record may be proper in another,[7] and it is not error to state the claim of a party if the evidence is not characterized,[8] nor is the mere mention of the amount sued for condemned.[9] Where the contentions of one party are as fairly presented as those of another, there can be no ground for complaint,[10] and the fact

128 Mo. App. 362, 107 SW 418; Taplin v. Maroy [Vt.] 71 A 72; Salchert v. Reinig [Wis.] 115 NW 132; Hamann v. Milwaukee Bridge Co., 136 Wis. 39, 116 NW 854. It is error to single out and isolate testimony of designated witness and lay particular stress upon it in cases where evidence is contradictory. Hughes v. Hughes, 133 Ill. App. 654; Tanner v. Clapp, 139 Ill. App. 353; Taubert v. Taubert, 108 Minn. 247, 114 NW 763. Instruction improper which singles out testimony of a particular witness as being antagonistic to other testimony. Sangster v. Hatch, 134 Ill. App. 340. Where five different instructions were given for appellee, aimed in different ways at credibility of witnesses, where there was no occasion for so many, held error to give them. Tripoli Sav. Bank v. Schnadt, 135 Ill. App. 373.

2. Sackett v. Carroll, 80 Conn. 374, 68 A 442.

3. In action for injuries from assault by baggage master in ejecting plaintiff from truck, an instruction that if jury believe from evidence that baggage master used no more force than was reasonably necessary to remove plaintiff from premises of defendant then they should find for defendant is not open to objection that it gives undue prominence to evidence of baggage master that he used no more force than was necessary to remove plaintiff from truck. Hubbard v. Louisville, etc., R. Co., 32 Ky. L. R. 1387, 108 SW 331.

4. Galveston, etc., R., Co. v. Worth [Tex. Civ. App.] 20 Tex. Ct. Rep. 772, 107 SW 958.

5. **Rule violated** when there is undue emphasis on certain facts. Gibler v. Quincy, etc., R. Co., 129 Mo. App. 93, 107 SW 1021. Giving them special importance over other facts of equal or greater importance. Landrum v. St. Louis & S. F. R. Co. [Mo. App.] 112 SW 1000. Isolated facts unduly emphasized. Swiney v. American Exp. Co. [Iowa] 115 NW 212. Excluding all but certain facts. Condie v. Rio Grande Western R. Co. [Utah] 97 P 120; Parkersburg Nat. Bank v. Hannaman, 63 W. Va. 358, 60 SE 242. Part only of relevant facts such fact given controlling effect in determining issue. Wolf Cigar Stores Co. v. Kramer [Tex. Civ. App.] 109 SW 990. Particular facts singled out. Funston v. Hoffman, 232 Ill. 360, 83 NE 917; Helbig v. Citizens' Ins. Co., 234 Ill. 251, 84 NE 897; Trustees of Schools v. Yoch, 133 Ill. App. 82; Wabash R. Co. v. Perkins, 137 Ill. App. 514; Illinois Commercial Men's Ass'n v. Perrin, 139 Ill. App. 543; Bennett v. Knott [Ky.] 112 SW 849; McKay v. Peterson [Tex. Civ. App.] 113 SW 931. Singling out relatively unimportant matter. Froberg v. Smith [Minn.] 118 NW 57. Objectionable as improperly singling out certain occasions involved in evidence and omitting reference to others. Sangster v. Hatch, 134 Ill. App. 340. An instruction purporting to summarize principal facts, but directs attention of jury only to those favorable to one of parties, is objectionable. Tanner v. Clapp, 139 Ill. App. 353. Should not call attention of jury to the amount claimed in declaration. Conlon v. Chicago G. W. R. Co., 139 Ill. App. 555.

**Not violated:** The nature of the case may warrant court in frequent repetition of certain facts. Floto v. Floto, 233 Ill. 605, 84 NE 712; Terry v. Davenport [Ind.] 83 NE 636. Plaintiff's injury resulting in prolapsus uteri, which is a pulling down of womb, instruction is not vicious for calling special attention to "pulling down sensation or prolapsus of womb." Saeger v. Wabash R. Co. [Mo. App.] 110 SW 686. Instruction that, "deceased being deaf and unable to hear, it was his duty to exercise great care and caution in use of his remaining senses to avoid danger from train," not objectionable as giving undue prominence to fact. Hummer's Ex'x v. Louisville & N. R. Co., 32 Ky. L. R. 1315, 108 SW 885. In action of ejectment in which it was conceded that plaintiff had record title to land in controversy, and defense was adverse possession, instruction containing a fair synopsis of testimony relating to facts claimed to constitute adverse possession, but not referring to plaintiff's claim, held not objectionable. Scott v. Herrell, 31 App. D. C. 45.

6. Eckels v. Cooper, 136 Ill. App. 60; San Antonio Trac. Co. v. Kelleher [Tex. Civ. App.] 20 Tex. Ct. Rep. 801, 107 SW 64; Buchanan v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 829, 107 SW 552. A matter sufficiently submitted in one paragraph of charge need not be submitted in a succeeding paragraph. Malone v. Texas & P. R. Co. [Tex. Civ. App.] 109 SW 430. Charge presenting each ground of negligence in separate paragraph, and limiting recovery on each to fact whether contributory negligence was proximate cause of injury, gives too much prominence to issue of contributory negligence. Huber v. Texas & P. R. Co. [Tex. Civ. App.] 113 SW 984.

7. Where particular evidence is asserted and certified to by judge, held not error to direct attention to single issue presented by pleadings and evidence. McHale v. Chicago City R. Co., 137 Ill. App. 90.

8. Schweyer v. Jones, 152 Mich. 271, 15 Det. Leg. N. 187, 115 NW 974.

9. Mentioning amount sued for, except when done in conjunction with a charge as to amount of verdict, is not condemned. El Paso Elec. R. Co. v. Kelly [Tex. Civ. App.] 109 SW 415.

10. Farkas v. Brown [Ga. App.] 60 SE 1014; Seaboard Air Line R. Co. v. Sikes [Ga. App.] 60 SE 868.

that the contentions of one are stated more at length than those of another will not make the charge objectionable.[11]

§ 11. *Definition of terms used.*[12]—It is not error to omit definition of terms used,[13] especially where the jury has been otherwise fully instructed,[14] or the meaning of the term is well understood,[15] or no request has been made;[16] but, if a definition is given, it should be clear [17] so as to aid the jury,[18] and though perfect accuracy is not required,[19] it should be correct.[20] While it is better to do so, it is not necessary to define terms in the very language of the statute,[21] but usual definitions should be conformed to [22] and not changed.[23] In defining terms the court should take into account what the parties understood them to mean.[24]

§ 12. *Rules of evidence; credibility and conflicts.*[25]—*Rules of evidence,* such as relate to the degree of proof required [26] the burden of proof [27] and preponderance of

**11.** That a statement goes more at length into contentions of one party than another does not make it objectionable as giving more prominence to that side than other. Macon, D. & S. R. C. v. Joyner, 129 Ga. 683, 59 SE 902; Millen, etc., R. Co. v. Allen, 130 Ga. 656, 61 SE 541.

**12.** See 10 C. L. 327. See ante, § 3, Necessity of Request in Particular Cases, also Disposition of Requests.

**13.** O'Leary v. Kansas City, 127 Mo. App. 77, 106 SW 94. Instruction in action against railway company held not erroneous because of failure to define term "accident," instruction being to effect that no liability attached if injury was result of mere accident. Larsen v. Chicago Union Trac. Co., 131 Ill. App. 286.

**14.** Where jury has been otherwise fully instructed, definitions or qualifications are not necessary. Road District No. 1. v. Beebe, 231 Ill. 147, 83 NE 131.

**15.** Court need not define "negligence." Main v. Hall, 127 Mo. App. 713, 106 SW 1099; Landrum v. St. Louis & S. F. R. Co. [Mo. App.] 112 SW 1000. It is best not to define "reasonable time." Houston & T. C. R. Co. v. Roberts [Tex. Civ. App.] 109 SW 982. "Reasonable diligence" has no such technical meaning as to call for a definition. Texas Midland R. Co. v. Ritchey [Tex. Civ. App.] 108 SW 732.

**16.** See ante, § 3, Necessity for Requests in Particular Cases. Savannah Elec. Co. v. Bennett, 130 Ga. 597, 61 SE 529; Texas Midland R. Co. v. Ritchey [Tex. Civ. App.] 108 SW 732; Missouri, K. & T. R. Co. v. Hendricks [Tex. Civ. App.] 108 SW 745.

**17.** Murphy's Ex'r v. Hoagland, 32 Ky. L. R. 839, 107 SW 303.

**18.** A definition that will not aid jury should be omitted. Fenton v. Iowa State Traveling Men's Ass'n [Iowa] 117 NW 251. Instruction that such waters as are navigable in fact are navigable waters, though useless as a guide to jury, not misleading. Orange Lumber Co. v. Thompson [Tex. Civ. App.] 113 SW 563.

**19.** Perfect accuracy is not required if jury cannot be mislead by definition as given. West Chicago Park Com'rs v. Boal, 232 Ill. 248, 83 NE 824. The use of the term "reasonable care" instead of "ordinary care" in defining negligence will not invalidate judgment. Spaulding v. Metropolitan St. R. Co., 129 Mo. App. 607, 107 SW 1049.

**20.** Should correctly state definitions. Alabama City, G. & A. R. Co. v. Bullard [Ala.] 47 S 578; Wheeler v. Milner [Wis.] 118 NW 187. It is error in charge of court to so define weight of evidence as to exclude documentary evidence, or to define preponderance of evidence as other than that evidence which determines conclusions which must be reached. Cincinnati Gas & Elec. Co. v. Coffelder, 11 Ohio C. C. (N. S.) 289. See post, § 12.

**21.** Stoker v. Fugitt [Tex. Civ. App.] 113 SW 310.

**22.** It is best to conform to usual definitions laid down by text-writers and decisions. Houston & T. C. R. Co. v. Roberts [Tex. Civ. App.] 109 SW 982.

**23.** Any change in definition of "ordinary care" is condemned. J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co. [Tex. Civ. App.] 107 SW 609.

**24.** Ryley-Wilson Grocer Co. v. Seymour Canning Co., 129 Mo. App. 325, 108 SW 628.

**25.** See 10 C. L. 327. See, also, ante, § 5.

**26.** Instruction in civil actions requiring proof on part of plaintiff to such extent as to remove all doubt from minds of jury, erroneous. Reynolds v. Wray, 135 Ill. App. 527. In action on contract it is error to instruct that party must conclusively show violation of contract, since preponderance of evidence is measure of proof in civil cases. Works v. Hill [Tex. Civ. App.] 107 SW 581. Defense of suicide should be established by clear and satisfactory proof, such as is required to establish fraud, and not merely by preponderance of evidence. Life Ins. Co. v. Hairston [Va.] 62 SE 1057.

**27.** Rule as to burden of proof should be stated clearly so as not to mislead jury. Keller v. Harrison [Iowa] 116 NW 327. Must not put burden of proof on wrong party. Bevis v. Vanceburg Tel. Co. [Ky.] 113 SW 811; Orcutt v. Century Bldg. Co. [Mo.] 112 SW 532; Herring v. Galveston, etc., R. Co. [Tex. Civ. App.] 108 SW 977; El Paso Elec. R. Co. v. Kelly [Tex. Civ. App.] 109 SW 415; Galveston, etc., R. Co. v. Conuteson [Tex. Civ. App.] 111 SW 187; International & G. N. R. Co. v. Welbourne [Tex. Civ. App.] 113 SW 780; Huber v. Texas & P. R. Co. [Tex. Civ. App.] 113 SW 984. Instructions for one party to an action need not state where burden of proof rests; it is sufficient if from all instructions given jury is told upon whom it is. Ducharme v. St. Peter, 135 Ill. App. 530. When phrase "burden of proof" is used to mean

evidence,[28] must be correctly stated.[29] Demonstration is never required,[30] and it is within the discretion of the court to charge as to the relative weight of affirmative and negative testimony.[31]

*The credibility of witnesses.* See 10 C. L. 327—Though the credibility of witnesses is for the jury,[32] and the court can hardly err in refusing instructions thereon,[33]

other than obligation on party who asserts affirmative of issue to prove same by preponderance of evidence, senss in which such word is used should be clearly indicated, hence, where burden throughout was on plaintiff to show negligence, instruction containing "then burden of proof is upon defendant of showing that injury was not due to negligence" held erroneous, no explanation being made of use of term "burden of proof." Chicago Union Trac. Co. v. Myers, 134 Ill. App. 61. Instruction shifting from plaintiff burden of proving defendant's negligence is erroneous. Continental Ins. Co. v. New York Gas. Elec. L., H. & P. Co. [N. Y.] 85 NE 1006. Instruction requiring plaintiff to "prove every material allegation of the case" erroneous as substantially requiring not only proof of allegations but disproof of contentions interposed in defense. Kidd v. White, 138 Ill. App. 107. General charge placing burden of proof to show contributory negligence upon defendant is susceptible to construction of imposing duty of discharging that burden by evidence offered by defendant alone. The better practice is to guard against such construction, and so frame charge upon that issue as to permit jury to take into consideration all testimony admitted, both of plaintiff and defendant, in determining whether or not contributory negligence has been shown. Suderman v. Kriger [Tex. Civ. App.] 109 SW 373.

28. **When not erroneous:** Use of phrase "if you find from the evidence" and not from "preponderance of the evidence" held not ground for complaint, one being equivalent to other. Illinois Cent. R. Co. v. Warriner, 132 Ill. App. 301; Ducharme v. St. Peter, 135 Ill. App. 530. In action for personal injuries instruction "if you find from evidence that plaintiff has made out her case by a preponderance of evidence as alleged in declaration, then jury should find defendant guilty," approved. City of Chicago v. Carlson, 138 Ill. App. 582. Instruction telling jury that if they believe evidence bearing upon plaintiff's case preponderated in his favor, although but slightly, it would be sufficient to warrant verdict in his favor, held not erroneous. Chicago, etc., R. Co. v. Fowler, 138 Ill. App. 352. Instruction that burden was on plaintiff to prove case by a perponderance of evidence and that slight perponderance was sufficient, held proper. City of Chicago v. Sullivan, 139 Ill. App. 675. In quasi criminal prosecution for violating ordinance prohibiting sale of liquors, instruction requiring a "clear preponderance of evidence" not erroneous. City of Waverly v. Goss, 138 Ill. App. 68. Instruction, "preponderance of evidence in a case is not necessarily alone determined by number of witnesses testifying to a particular fact or state of facts" not objectionable. Elgin, J. & E. R. Co. v. Lawlor, 132 Ill. App. 280. As to the above holding, compare Tripoli Sav. Bank v. Schnadt, 135 Ill. App. 373, post, under When Erroneous. Court may instruct as to what constitutes preponderance of evidence. Pittsburg, etc., R. Co. v. Gates, 137 Ill. App. 309.

**When erroneous:** Instruction should not require a preponderance of evidence in civil cases. McBride v. Sullivan [Ala.] 45 S 902. As plaintiff is entitled to recover on establishing material allegations by preponderance of evidence, it is error to qualify "preponderance" by word "fair." Cowans v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 109 SW 403. Instruction requiring evidence to preponderate in favor of plaintiff as to all allegations of declaration erroneous, preponderance on all material allegations sufficient. Ames v. Thren, 136 Ill. App. 568. Instruction on preponderance of evidence must not wholly omit number of witnesses, as where number is important and stands in ratio of one to ten. Sullivan v. Sullivan, 139 Ill. App. 378. Instruction upon preponderance of evidence, omitting from consideration of jury number of witnesses testifying, held properly refused. Illinois Commercial Men's Ass'n v. Perrin, 139 Ill. App. 543. An instruction "that preponderance of evidence in a case is not alone determined by number of witnesses testifying to a particular fact or state of facts" erroneous. Tripoli Sav. Bank v. Schnadt, 135 Ill. App. 373. As to the above holding, compare Elgin J. & E. R. Co. v. Lawlor, 132 Ill. App. 280. Ante, under When not Erroneous. Instruction to jury that they are at "liberty to decids that preponderance of evidence is on the side which in their judgment is sustained by more intelligent and better informed, more credible and more disinterested witnesses, whether a greater or smaller number," held erroneous. Chicago Union Trac. Co. v. Wirkus, 131 Ill. App. 485.

29. Colored Knights of Pythias v. Tucker [Miss.] 46 S 51; Lattimore v. Union Elec. L. & P. Co., 128 Mo. App. 37, 106 SW 543; Cox v. Aberdeen & A. R. Co. [N. C.] 62 SE 884; Hopkins v. Wampler [Va.] 62 SE 926; Bolen-Darnall Coal Co. v. Williams [C. C. A.] 164 F 665.

30. Instruction that jury are bound to presume divorce from first husband before second marriage contracted, unless it is conclusively proved by positive testimony that no divorce had been granted before second marriage, requires demonstration and excludes from evidence all circumstances to show no divorce had been granted. Colored Knights of Pythias v. Tucker [Miss.] 46 S 51.

31. Chicago G. W. R. Co. v. McDonough [C. C. A.] 161 F 657.

32. Maxwell v. Chicago, etc., R. Co., 140 Ill. App. 156; Mobile, etc., R. Co. v. Jackson [Miss.] 46 S 142.

33. Court can hardly err in refusing instructions designed to influence jury as to credit to be given a particular witness.

yet, charges on the subject may be given in proper cases,[84] but when given they need not refer to perjury of a witness.[85]

*Falsus in uno, falsus in omnibus* See 10 C. L. 830 may be applied when justified,[86]

Helbig v. Citizens' Ins. Co., 234 Ill. 251, 84 NE 897.

34. See ante, § 10.

**When proper:** May instruct to consider interest, intelligence, means of knowledge of witnesses, reasonableness of their statement, and extent to which corroborated by other witnesses. Hoskovec v. Omaha St. R. Co. [Neb.] 115 NW 312. Where decision in a party's favor depends largely upon weight to be given his own evidence, it is proper to instruct jury to consider his interest and motive for testifying favorably to himself. Blankavag v. Badger Box & Lumber Co., 136 Wis. 380, 117 NW 852. Refusal to give instruction informing jury that in weighing evidence of plaintiff they could determine credence to be given it, and take into consideration that he was interested in result of suit, held error. Maxwell v. Chicago, etc., R. Co., 140 Ill. App. 156. Instruction to effect that jury in weighing plaintiff's testimony had right to take into consideration fact that plaintiff was interested in result of suit held not error. Larsen v. Chicago Union Trac. Co., 131 Ill. App. 286. No error in giving charge that "jury are sole judges of weight of evidence and credibility of witnesses, and where testimony is conflicting it is your duty to reconcile it, if you can, upon theory that such witnesses have sworn to truth; but if you cannot do so, then you are privileged to discard so much or such parts of it as you deem unworthy of credit." Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761. Failure of court to instruct jury that inconsistent statements, which are not substantive evidence, may be considered by them only for purpose of affecting credibility of witness, constitutes error. Owensboro City R. Co. v. Allen, 32 Ky. L. R. 1353, 108 SW 357. Where plaintiff admitted having testified differently at former trial, it is error to refuse to instruct that in arriving at credibility jury may consider that at previous trial evidence was materially different. Clammer v. Eddy, 41 Colo. 235, 92 P 722. Instruction that alibi, when established, furnishes best of defenses, but jury must examine such evidence carefully, does not suggest doubt of credibility of witness. Harris v. Neal [Mich.] 15 Det. Leg. N. 369, 116 NW 535. Court may instruct that witness can be impeached by general bad "moral" character (Sparks v. Bedford [Ga. App.] 60 SE 809), or by disproving facts testified to by him, nor will the mere enumeration of other modes of impeachment require new trial (Farkas v. Brown [Ga. App.] 60 SE 1014).

**When improper:** Must not designate any one witness and characterize him as the one credible witness. Schwarzschild & Sulzberger Co. v. Pfaelzer, 133 Ill. App. 346. Where plaintiff was only witness on his own behalf and was contradicted by several other witnesses, following instruction is erroneous: The testimony of one credible witness may be entitled to more weight than testimony of many other witnesses if, as to other witnesses, you have reason to believe from evidence that they have knowingly testified untruthfully as to any material matter in issue, and are not corroborated by other evidence which you believe to be credible. Id. It is improper to single out a particular witness, whether a party or not, call attention to his interest as inducement to false testimony, and tell jury to be careful how they give credence to his testimony. Stetzler v. Metropolitan St. R. Co., 210 Mo. 704, 109 SW 666. It is error to say of interested witness' testimony that if it militates against him it is to be set down as truth, but if in his favor it is to be scrutinized with care. Id. When both parties were witnesses, held error to single out one and to direct attention of jury to situation and interest of such party in result of suit without making reference to situation and interest of other. Sangster v. Hatch, 134 Ill. App. 340. Improper to instruct if plaintiff, through ignorance or mistake, made statement against interest, jury bound to take it as absolutely true, whether true or not. Huff v. St. Joseph R. L. H. & P. Co. [Mo.] 111 SW 1145. Instruction on credibility of witnesses properly refused, using phrase "circumstances appearing on the trial" instead of "circumstances appearing in evidence." Illinois Commercial Men's Ass'n v. Perrin, 139 Ill. App. 543. In an action against railroad for negligent burning, witness for plaintiff testifying as to value of property destroyed and that he had rendered it for taxation, instruction directing jury to consider testimony as to assessed value of property only in passing upon credibility of witness is erroneous. Bryan Press Co. v. Houston & T. C. R. Co. [Tex. Civ. App.] 110 SW 99. An instruction permitting jury to pass upon credibility of witnesses by means of a consideration, among other things, of all "other circumstances appearing on trial" is of doubtful propriety. Ames v. Thren, 136 Ill. App. 568. The case may make it proper to refuse to instruct "that evidence of party introduced cannot be absolutely discarded or disregarded, and should not be unless evidence introduced discredits or contradicts it. In that event you should give such weight to such party's evidence as you think it deserves. You should not disregard evidence of any witness which is not discredited either by evidence or circumstances." Central of Georgia R. Co. v. Mote [Ga.] 62 SE 164.

35. Instructions calling attention of jury to various elements which might properly be considered in weighing testimony, and as affecting credibility of witnesses, need not specifically refer to perjury of witness. Murphy v. Chicago G. W. R. Co. [Iowa] 118 NW 390.

36. See ante, this section, The Credibility of Witnesses.

**When proper:** May instruct jury to disregard a witness' testimony where he had intentionally told a falsehood. Gorman v. Fitts, 80 Conn. 531, 69 A 357. Instruction

but this is largely in the discretion of the court,[37] nor is the doctrine applicable to witnesses other than those who have knowingly or willfully sworn falsely.[38]

§ 13. *Admonitory and cautionary instructions.*[See 10 C. L. 330]—The court may, within its discretion,[39] give admonitory instructions.[40]

§ 14. *Necessity of instructing in writing.*[41]—The power, when it exists, to submit oral instructions, should be cautiously exercised,[42] and though, where no prejudice results, that the jury were instructed orally will not work a reversal,[43] unless waived,[44] if the statute require it they must be in writing;[45] but in the absence of evidence to the contrary it will be presumed they were written.[46] While the presence of a stenographer taking the proceedings will not relieve the court of the duty to instruct in writing,[47] the charge, if taken by a stenographer employed by both parties, is in writing within the meaning of the statute.[48]

that if jury believe under all evidence any any witness has knowingly and willfully testified falsely to any material fact they may disregard whole of his testimony, or give it such weight on other points as they may think proper, and tells them they are exclusive judges of weight of testimony, is proper. Cobb v. Dunlevie, 63 W. Va. 398, 60 SE 384. May instruct that "if jury are reasonably satisfied from evidence that any one or more witnesses in case willfully swore falsely in any material particular in case they are authorized to reject testimony of that witness, or those witnesses entirely." Kress v. Lawrence [Ala.] 47 S 574. It is proper to instruct that if a certain witness is of bad reputation for truth and veracity that fact tends to discredit his testimony, and it may be entirely disregarded except in so far as corroborated. Johnson v. Johnson [Neb.] 115 NW 323.

**When improper:** Instruction telling jury to disregard testimony of any witness who has "knowingly testified untruthfully" is erroneous. Clark v. O'Gara Coal Co., 140 Ill. App. 207. Instruction directing jury to disregard testimony of a witness if it is believed that witness has been guilty of exaggeration improper. McDonnell v. Chicago City R. Co., 131 Ill. App. 227; Crane Co. v. Hogan, 131 Ill. App. 314. Instruction that omits word "credible" before "evidence," in telling jury they may disbelieve all evidence that has not been corroborated. Blankavag v. Badger Box & Lumber Co., 136 Wis. 380, 117 NW 852. An instruction telling jury "you are not bound to believe anything to be a fact because a witness has stated it to be so, provided you believe from all evidence that such witness is mistaken or has knowingly testified falsely," is erroneous in that it omits words "in a matter material to issue, except in so far as he has been corroborated by other credible evidence," etc. Tripoli Sav. Bank v. Schnadt, 135 Ill. App. 373. Instruction to disregard evidence of witness who has sworn falsely is erroneous if it does not limit such false testimony to material fact. Lloyd v. Meservey, 129 Mo. App. 636, 108 SW 595. Since jury cannot entirely disregard testimony which is wholly or partly contradicted by or at variance with that produced by other party, unless facts testified to are material to issue and witness has willfully or designedly testified falsely, an instruction to disregard evidence if witness had misrepresented or tried to evade in any way questions put to him is erroneous. Tucker v. Dudley, 111 NYS 700.

37. Instructions to disregard testimony of a witness who has sworn falsely are largely within discretion of trial court. Lloyd v. Meservey, 129 Mo. App. 636, 108 SW 595.

38. Hughes v. Hughes, 133 Ill. App. 654; Lack v. Weber, 113 NYS 102.

39. District of Columbia v. Durgee, 29 App. D. C. 327.

40. Courts may instruct juries to effect that fact that plaintiff is individual and defendant a corporation should not be considered in making up verdict, and same should be made up solely on evidence and on law as declared in instructions. Huss v. Heydt Bakery Co., 210 Mo. 44, 108 SW 63. Court may caution jury to consider evidence only for purpose of determining what weight should be given opinions of witnesses. Raapke & Katz Co. v. Schmoeller & Mueller Piano Co. [Neb.] 118 NW 652. Not error in personal injury case, after properly instructing jury in charge as to measure of damages, to state that there can be no recovery in excess of amount claimed in declaration. District of Columbia v. Durgee, 29 App. D. C. 327.

41. See 10 C. L. 330. See ante, § 3. Form and Sufficiency of Request.

42. Rosenkovitz v. United R. & Elec. Co. [Md.] 70 A 108.

43. Peck v. Springfield Trac. Co. [Mo. App.] 110 SW 659.

44. Such presumption obtains where it appears oral instructions were given and failure to except specially on that ground, and where record shows that exception only went to substance, and not method, of instruction. Village of Franklin Park v. Franklin, 231 Ill. 380, 83 NE 214.

45. If statute requires, instruction must be in writing. Daily v. Boudreau, 231 Ill. 228, 83 NE 218. It is reversible error to instruct orally, over objections. Tyler v. McKenzie, 43 Colo. 233, 95 P 943. Provision requiring instructions in writing when requested is mandatory. McIntosh v. Sawmill Phoenix [Wash.] 94 P 930.

46. Village of Franklin Park v. Franklin, 231 Ill. 380, 83 NE 214.

47. McIntosh v. Sawmill Phoenix [Wash.] 94 P 930.

48. Collins v. Huffman, 48 Wash. 184, 93 P 220; Sturgeon v. Tacoma Eastern R. Co. [Wash.] 98 P 87.

§ 15. *Presentation of instructions.*[See 10 C. L. 331]—There is no prescribed way in which the judge is to announce to the jury the giving of a requested instruction in writing.[49]

§ 16. *Additional instructions after retirement.*[50]—After retirement of the jury, the court may, within its discretion,[51] give additional instructions,[52] and while it is the better practice to have council present when such instructions are given,[53] if they merely urge the jury to agree and are not on a point of law neither a party nor his counsel need be present or have notice of the proceeding.[54] Such instructions must not be erroneous and misleading,[55] must not tell the jury the verdict is insufficient in amount,[56] nor impress upon them that the necessity of agreement will justify a compromise with conscience.[57]

*Recalling instructions.*[See 10 C. L. 331]—At any time before the jury is discharged, the court may withdraw erroneous instructions,[58] but not orally.[59]

§ 17. *Review. Objections and exceptions below.*[60]

*The record on appeal.*[61]

*Invited error.*[62]

*Harmless error.*[63]

*Instructions must be considered as a whole.*[64]—Putting emphasis where it properly belongs,[65] and assuming that the jury gave due consideration to them,[66] instruc-

49. It is not reversible error for judge to say, orally, after reading it, "this charge is given at request of defendant," or plaintiff, as case may be. St. Louis S. W. R. Co. v. Cleland [Tex. Civ. App.] 110 SW 122.

50. See 10 C. L. 331. See ante, § 3, Time of Making Request.

51. Where ample time has been had to present charges, it is not an abuse of discretion to refuse to give instructions after retirement of jury. Gulf, etc., R. Co. v. Walters [Tex. Civ. App.] 20 Tex. Ct. Rep. 616, 107 SW 369.

52. After retirement, court may further instruct jury to give further deliberation to case for purpose of reaching an agreement if possible. Burton v. Neill [Iowa] 118 NW 302.

53. Traders' & Truckers' Bank v. Black [Va.] 60 SE 743.

54. Burton v. Neill [Iowa] 118 NW 302.

55. Where evidence authorized jury to adopt a compromise line and case was so submitted to jury, verdict finding compromise boundary line was proper, and refusal of court to accept verdict and charge that case was not submitted on special issues, that verdict was not responsive to issues submitted, and they must find verdict for plaintiffs and defendants, erroneous and misleading, and reversible error where jury in consequence of additional charge found for plaintiff. Thatcher v. Matthews [Tex. Civ. App.] 105 SW 1006.

56. After verdict, while court may require jury to reconsider, it cannot instruct that verdict is insufficient and to bring in one for larger amount. Paff v. Union R. Co., 110 NYS 145.

57. After jury out 20 hours, it is error to instruct that they could decide case as well as anybody else; to say not is to say another jury cannot do it; that justice will be defeated in the end if that is so, as you understand; that it is almost a necessity that you come to conclusion; that in coming to that conclusion it is give and take argument you make; that you are not to report 12 individual verdicts; that you are to give verdict which on principal of give and take represents consensus verdict of you as a unit, as body of men. Highland Foundry Co. v. New York, etc., R. Co., 199 Mass. 403, 85 NE 437.

58. Broadstreet v. McKamey, 41 Ind. App. 272, 83 NE 773. Statement that if defect existed at time of lease and defendant knew it then or subsequently, he would be liable to pedestrian for injury, may be withdrawn in so far as it permits recovery simply by reason of knowledge acquired after letting. Hill v. Hayes, 199 Mass. 411, 85 NE 434.

59. Ruling under statute prohibiting modification or qualification, except in writing, after instructions given to jury. Daily v. Boudreau, 231 Ill. 228, 83 NE 218.

60. See 8 C. L. 373. See Saving Questions for Review, 10 C. L. 1572.

61. See 8 C. L. 373. See Appeal and Review, 11 C. L. 118.

62. See 8 C. L. 374. See Saving Questions for Review, 10 C. L. 1572.

63. See 8 C. L. 374. The cure of one instruction by another (see post, this section) is not harmless error, but is based on the rule that, the charge being a whole, there is no error in such case. All matters relating to harmless error in instructions and the cure of other errors by instructions, as by the withdrawal of evidence, are treated in the topic Harmless and Prejudicial Error, 11 C. L. 1690.

64. See 10 C. L. 332. See post, this section.

65. Seeley v. Swift & Co., 151 Mich. 545, 15 Det. Leg. N. 60, 115 NW 414.

66. All instructions given must be read and considered together as a whole, and where not inconsistent, but may be fairly and reasonably harmonized, it will be assumed that jury gave due consideration to

tions will be considered as a whole,[67] the court dealing with them in relation to each

them as a whole, rather than to isolated portions. Tarr v. Oregon Short Line R. Co. 14 Idaho, 192, 93 P 957. Considered as a whole in same connection in which it was given, and on assumption that jury did not overlook any portion of it. Hains v. Smith [N. C.] 62 SE 1081.

67. **Alabama.** Birmingham R. L. & P. Co. v. Lee [Ala.] 45 S 164.

**Arkansas.** Arkadelphia Lumber Co. v. Asman, 85 Ark. 568, 107 SW 1171; Taylor v. McClintock [Ark.] 112 SW 405; St. Louis S. W. R. Co. v. Leder [Ark.] 112 SW 744.

**California.** Wistrom v. Redlick, 6 Cal. App. 671, 92 P 1048; DeWitt v. Floriston Pulp & Paper Co. [Cal. App.] 96 P 397.

**Colorado.** Ingemarson v. Coffey, 41 Colo. 407, 92 P 908; Bailey v. Carlton, 43 Colo 4, 95 P 542; Burnside v. Peterson, 43 Colo. 382, 96 P 256.

**Connecticut.** Bradbury v. Norwalk, 80 Conn. 298, 68 A 321; Deming v. Johnson, 80 Conn. 553, 69 A 347; Cadwell v. Canton [Conn.] 70 A 1025.

**Florida.** Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761; Cross v. Aby [Fla.] 45 S 820; Stearns & Culver Lumber Co. v. Adams [Fla.] 46 S 156; Atlantic Coast Line R. Co. v. Peeples [Fla.] 47 S 392.

**Georgia.** City of Cedartown v. Brooks, 2 Ga. App. 583, 59 SE 836; Macon, etc., R. Co. v. Joyner, 129 Ga. 683, 59 SE 902; Southern R. Co. v. Miller, 3 Ga. App. 410, 69 SE 1115; Southern R. Co. v. Brewer, 130 Ga. 638, 61 SE 116; Southern R. Co. v. Ward [Ga.] 61 SE 913; Central of Georgia R. Co. v. Mote [Ga.] 62 SE 164; Southern R. Co. v. Grizzle [Ga.] 62 SE 177; Dolvin v. American Harrow Co. [Ga.] 62 SE 198; Atlanta, K. & N. R. Co. v. Tilson [Ga.] 62 SE 281; Averett v. Walker [Ga.] 62 SE 1046.

**Idaho.** Barrow v. Lewis Lumber Co., 14 Idaho, 698, 95 P 682.

**Illinois.** Road Dist. No. 1 v. Beebe, 231 Ill. 147, 83 NE 131; Wallace v. Farmington, 231 Ill. 232, 83 NE 180; Davis v. Illinois Colliers Co., 232 Ill. 284, 83 NE 836; Helbig v. Citizens' Ins. Co., 234 Ill. 251, 84 NE 897; Klofski v. Railroad Supply Co., 235 Ill. 146, 85 NE 274; Ragsdale v. Illinois Cent. R. Co., 236 Ill. 175, 86 NE 214; Henry v. Cleveland, etc., R. Co., 236 Ill. 219, 86 NE 231; Chicago City R. Co. v. Hagenback, 131 Ill. App. 537; Chicago Consol. Trac. Co. v. Mahoney, 131 Ill. App. 691; Varney v. Taylor, 133 Ill. App. 154; Brew v. Seymour, 133 Ill. App. 225; Village of Oden v. Nichols, 133 Ill. App. 306; Ducharme v. St. Peter, 135 Ill. App. 530; Boyce v. Expanded Metal Fire Proofing Co., 136 Ill. App. 352; Wabash R. Co. v. Perkins, 137 Ill. App. 514; Chicago, etc., R. Co. v. Fowler, 138 Ill. App. 352; Eckels v. Hawkinson, 138 Ill. App. 627; Chicago City R. Co. v. Reddick, 139 Ill. App. 160; City of Chicago v. Cohen, 139 Ill. App. 244; Page v. Smith, 139 Ill. App. 441; Madrey v. Meyers, 140 Ill. App. 218; Colbeck v. Sampsell, 140 Ill. App. 566.

**Indiana.** Indianapolis Trac. & T. Co. v. Holtsclaw, 41 Ind. App. 520, 82 NE 986; Abney v. Indiana Union Trac. Co., 41 Ind. App. 53, 83 NE 387; Cleveland, etc., R. Co. v. Wuest, 41 Ind. App. 210, 83 NE 620; Brinkman v. Pacholke, 41 Ind App. 662, 84 NE 762; City of Garrett v. Winterich [Ind. App.] 84 NE 1006; Toledo & C. I. R. Co. v. Wagner [Ind.] 85 NE 1025; Louisville & S. I. Trac. Co. v. Worrell [Ind.] 86 NE 78; Indiana Natural Gas. & Oil Co., v. Wilhelm [Ind.] 86 NE 86.

**Iowa.** Mickey v. Indianola [Iowa] 114 NW 1072; Beans v. Denny [Iowa] 117 NW 1091; Ross v. Ross [Iowa] 117 NW 1105; McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459.

**Kansas.** Votaw v. McKuver, 76 Kan. 870, 92 P 1120; Chicago, etc., R. Co. v. Brandon [Kan.] 95 P 573.

**Kentucky.** Hubbard v. Louisville, etc., R. Co., 32 Ky. L. R. 1337, 108 SW 331; Hummer's Ex'x v. Louisville & N. R. Co., 32 Ky. L. R. 1315, 108 SW 885; Illinois Cent. R. Co. v. France's Adm'x [Ky.] 112 SW 929.

**Louisiana.** Muscarelli v. Hodge Fence & Lumber Co., 120 La. 335, 45 S 268.

**Massachusetts.** Soebel v. Boston El. R. Co., 197 Mass. 46, 83 NE 3; Plummer v. Boston El. R. Co., 198 Mass. 499, 84 NE 849.

**Michigan.** Mayer v. Detroit, etc., R. Co., 152 Mich. 276, 15 Det. Leg. N. 231, 116 NW 429; Lehto v. Atlantic Min. Co., 152 Mich. 412, 15 Det. Leg. N. 242, 116 NW 405; Buxton v. Ainsworth [Mich.] 15 Det. Leg. N. 475, 116 NW 1094; Anderson Carriage Co. v. Pungs [Mich.] 15 Det. Leg. N. 591, 117 NW 162.

**Minnesota.** Balder v. Zenith Furnace Co., 103 Minn. 345 114 NW 948; McCoy v. Northern Heating & Elec. Co., 104 Minn. 234, 116 NW 488.

**Mississippi.** Hitt v. Terry [Miss.] 46 S 829.

**Missouri.** Flaherty v. St. Louis Transit Co., 207 Mo. 318, 106 SW 15; Cornovski v. St. Louis Transit Co., 207 Mo. 263, 106 SW 51; Lynch v. Chicago & A. R. Co., 208 Mo. 1, 106 SW 68; Armelio v. Whitman, 127 Mo. App. 698, 106 SW 1113; Smith v. Wabash R. Co., 129 Mo. App. 413, 107 SW 22; Atkins Bros. Co. v. Southern Grain Co., 130 Mo. App. 542, 109 SW 88; Batten v. Modern Woodmen of America [Mo. App.] 111 SW 513; Heinzle v. Metropolitan St. R. Co. [Mo.] 111 SW 636; Young v. Lanznar [Mo. App.] 112 SW 17; Brown v. Globe Printing Co. [Mo.] 112 SW 462; Orcutt v. Century Bldg. Co. [Mo.] 112 SW 532.

**Montana.** Riley v. Northern Pac. R. Co., 36 Mont. 545, 93 P 948; Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038.

**Nebraska.** Sheibley v. Fales [Neb.] 116 NW 1035; Allen v. Chicago, etc., R. Co., [Neb.] 118 NW 655.

**New Hampshire.** Curtice v. Dixon, 74 N. H. 386, 68 A 587; Theobald v. Sheppard [N. H.] 71 A 26.

**New Jersey.** Corkran v. Taylor [N. J. Law] 71 A 124.

**New York.** Newman v. New York, etc. R. Co., 111 NYS 289.

**North Carolina.** Britt v. Carolina Northern R. Co. [N. C.] 61 SE 601.

**North Dakota:** Charge should be considered in its entirety, and error cannot be predicated on parts thereof where charge as whole not subject to objection made to a part of it. Buchanan v. Minneapolis Threshing Mach. Co. [N. D.] 116 NW 335.

**Ohio:** Where an action on behalf of mi-

other [68] and in the connection in which they were used.[69] So construing them, if they fairly state the law [70] and are not so inharmonious as to be misleading,[71] they will be held sufficient, though one standing alone might be erroneous.[72]

nor, brought on account of injuries received in machine which he was feeding, is tried on theories that defendant failed to instruct plaintiff as to extra hazard arising from change in material which he was feeding into machine, charge is not erroneous because of omission in paragraph defining ordinary care to refer to age of plaintiff, if it appear from charge taken as a whole that jury were not mislead thereby. K. D. Box & Label Co. v. Caine, 11 Ohio C. C. (N. S.) 81.

**Oklahoma:** Instructions are to be considered together to end that they may be understood. Grant v. Milam [Okl.] 95 P 424.

**South Carolina.** Columbia, etc. R. Co. v. Laurens Cotton Mills [S. C.] 61 SE 1089; Cannon v. Dean [S. C.] 61 SE 1012; Du Bose v. Atlantic Coast Line R. Co. [S. C.] 62 SE 255; Jones v. Parker [S. C.] 62 SE 261.

**Texas.** Houston, etc., R. Co. v. McHale [Tex. Civ. App.] 20 Tex. Ct. Rep. 161, 105 SW 1149; Thompson v. Planters' Compress Co. [Tex. Civ. Rep.] 106 SW 470; Texas & P. R. Co. v. Holloway [Tex. Civ. App.] 107 SW 629; Missouri, etc., R. Co. v. Balliet [Tex. Civ. App.] 107 SW 906; Dunn v. Taylor [Tex. Civ. App.] 20 Tex. Ct. Rep. 864, 107 SW 952; Evans v. Ashe [Tex. Civ. App.] 108 SW 398; Ft. Worth, etc., R. Co. v. Watkins [Tex. Civ. App.] 108 SW 487; Gulf, etc., R. Co. v. Farmer [Tex. Civ. App.] 108 SW 729; St. Louis S. W. R. Co. v. Hawkins [Tex. Civ. App.] 108 SW 736; Orient Ins. Co. v. Wingfield [Tex. Civ. App.] 108 SW 788; San Antonio, etc., R. Co. v. Martin [Tex. Civ. App.] 108 SW 981; El Paso, etc., R. Co. v. Smith [Tex. Civ. App.] 108 SW 888; Galveston, etc., R. Co. v. Cochran [Tex. Civ. App.] 109 SW 261; Southern Kansas R. Co. v. Yarbrough [Tex. Civ. App.] 109 SW 890; El Paso Elec. R. Co. v. Kelly [Tex. Civ. App.] 109 SW 415; Missouri, etc., R. Co. v. Dawson [Tex. Civ. App.] 109 SW 1110; Missouri, etc., R. Co. v. Williams [Tex. Civ. App.] 109 SW 1126; Missouri, etc., R. Co. v. Steele [Tex. Civ. App.] 110 SW 171; Toland v. Sutherlin [Tex. Civ. App.] 110 SW 487; El Paso, etc., R. Co. v. O'Keefe [Tex. Civ. App.] 110 SW 1002; St. Louis S. W. R. Co. v. Garber [Tex. Civ. App.] 111 SW 227; St. Louis S. W. R. Co. v. Cockrill [Tex. Civ. App.] 111 SW 1092; Texas & G. R. Co. v. First Nat. Bank [Tex. Civ. App.] 112 SW 589; Galveston, etc., R. Co. v. Olds [Tex. Civ. App.] 112 SW 787; Parham v. Ft. Worth, etc., R. Co. [Tex. Civ. App.] 113 SW 154; Hansen v. Williams [Tex. Civ. App.] 113 SW 312. General and special charges are to be regarded as one entire instrument, and considered together. Galveston, etc., R. Co. v. Berry [Tex. Civ. App.] 20 Tex. Ct. Rep. 156, 105 SW 1019; Houston, etc., R. Co. v. Finn [Tex. Civ. App.] 107 SW 94. Clerical omissions may be supplied by reading charge as a whole. Texas & P. R. Co. v. Johnson [Tex. Civ. App.] 20 Tex. Ct Rep. 410, 106 SW 773; St. Louis S. W. R. Co. v. Wilbanks [Tex. Civ. App.] 113 SW 318.

**Virginia.** Burton v. Frank A. Seifert Plaster Relief Co. [Va.] 61 SE 933.

**Washington.** Wikstrom v. Preston Mill Co., 48 Wash. 164, 93 P 213; Ames v. Farmers' & Mechanics' Bank, 48 Wash. 328, 93 P 530; Fuller & Co. v. Harris, 48 Wash. 519, 93 P 1080; Portland & S. R. Co. v. Clarke County, 48 Wash. 509, 93 P 1083; Hoff v. Japanese American Fish & Fertilizer Co., 48 Wash. 581, 94 P 109; Childs v. Childs [Wash.] 94 P 660; Behling v. Seattle Elec. Co. [Wash.] 96 P 954; Engelker v. Seattle Elec. Co. [Wash.] 96 P 1039.

**West Virginia:** Use of general and indefinite terms in certain instructions, or in certain places in one instruction, is harmless if terms are properly defined and limited in other instructions or in same instruction at other places. Lay v. Elk Ridge Coal & Coke Co. [W. Va.] 61 SE 156.

**Wisconsin.** Morrison v. Superior Water L. & P. Co., 134 Wis. 167, 114 NW 434; Gussart v. Greenleaf Stone Co., 134 Wis. 418, 114 NW 799; Twentieth Century Co. v. Quilling [Wis.] 117 NW 1007.

**U. S. Courts.** Missouri, K. & T. R. Co. v. Wilhoit [C. C. A.] 160 F 440; Chicago G. W. R. Co. v. McDonough [C. C. A.] 161 F 657; Murhard Estate Co. v. Portland & Seattle R. Co. [C. C. A.] 163 F 194; Adams Exp. Co. v. Adams, 29 App. D. C. 250. Special instructions should be considered in connection with general charge. Turner v. American Security & Trust Co., 29 App. D. C. 460.

**68.** Charge will be considered as a whole, dealing with different instructions in relation to each other. Stratton Cripple Creek Min. & Development Co. v. Ellison, 42 Colo. 498, 94 P 303; Sterling v. Frick [Ind.] 86 NE 65. Propriety or impropriety of instruction or part of instruction is determined by consideration of all instructions and charges given in connection with questioned instruction and proven facts. Florala Sawmill Co. v. Smith [Fla.] 46 S 332.

**69.** While, if considered as abstract propositions, instructions may be erroneous, yet, if considered in connection in which used, they may be sufficiently limited, in their application, and in such way as not to mislead jury. Barclay v. Puget Sound Lumber Co., 48 Wash. 241, 93 P 430. Instruction must be construed as a part of and in connection with entire charge, in light of all facts and circumstances adduced in evidence. Southern Pac. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441. Read as a whole and considered in light of evidence and subject-matter of suit, and not tested by resolving them into their various elements and then attacking each component part separately. Atchison v. McKinnie, 233 Ill. 106, 84 NE 208.

**70.** Where instructions, when taken as a series, correctly state law, error in one no ground for reversal. Chicago, etc., R. Co. v. Turck, 131 Ill. App. 128; City of Rock Island v. Larkin, 136 Ill. App. 579; Suttle v. Brown, 137 Ill. App. 438; Chess v. Grant [C. C. A.] 163 F 500. Though instruction ambiguous, if qualified by others so as to

*Curing error in instructions.*[73]—Erroneous instructions are presumed prejudicial,[74] but they may usually be cured by the giving of correct ones,[75] especially where the error is slight[76] or consists in incompleteness,[77] omissions[78] or a tendency to

make it apparent jury not misled, and charge as a whole correctly defines law, it is sufficient. Ault v. Nebraska Tel. Co. [Neb.] 118 NW 73. That some instructions are incomplete, not covering entire case, not reversible where series states law with substantial accuracy. Varney v. Taylor, 133 Ill. App. 154. It is a familiar rule that in reviewing a charge it will be examined as a whole. While one or more paragraphs standing alone may be inaccurate or even prejudicially erroneous, yet, if they are qualified and explained by other portions of charge in pari materia, and, taken together with them and rest of charge, fully and fairly submit case to jury, verdict and judgment should be sustained. Harrington v. Butte A. & P. R. Co., 36 Mont. 478, 93 P 640.

71. Must be considered as a series, and may supplement each other, but there must be such harmony between them as that jury will not be misled. Funston v. Hoffman, 232 Ill. 360, 83 NE 917.

72. Considered as a whole, and if, when taken together, law correctly given, will not be reversed, though single instruction alone might seem incorrect. Pittsburgh, etc., R. Co. v. Wood [Ind. App.] 84 NE 1009. Even though one single instruction standing alone is misleading, a reversal will not follow if all considered together are correct in law and free from conflict. Page v. Smith, 139 Ill. App. 441. Must be read as a whole, and when so read, if they are not contradictory, and are supplementary to each other, and fairly state law, case will not be reversed because any one instruction does not state all the rule, with its modifications. De Witt v. Floriston Pulp & Paper Co. [Cal. App.] 96 P 397. When considered as a whole, if they fairly and fully state law applicable to evidence, giving them is not error, although detatched sentences or separate charges considered alone might be erroneous or misleading. Barrow v. Lewis Lumber Co., 14 Idaho, 698, 95 P 682. If, when so considered, they are not misleading and announce correct propositions of law, there will not be a reversal because a single paragraph thereof deals with but a part of proposition presented. Montrose Sav. Bank v. Clausen, 137 Iowa, 73, 114 NW 547; Hawkins v. Young, 137 Iowa, 281, 114 NW 1041. Instructions held proper taken as a series, where if one had been sole one in cause it might have been objectionable as misleading and erroneous as applied to facts. Chicago City R. Co. v. Ratner, 133 Ill. App. 628.

73. See 10 C. L. 333. See ante, this section.

74. Abney v. Indiana Union Trac. Co., 41 Ind. App. 53, 83 NE 387. Where, after all instructions are read as a whole, it is still apparent that a false doctrine was injected into the case, court will assume that jury misled by error. Hovey v. Aaron [Mo. App.] 113 SW 718. It will not do to say instruction was harmless because defendant asked for and obtained instruction setting forth its version of law applicable to facts dealt with in instruction given for plaintiff over objection of defendant. Southern R. Co. v. Hansbrough's Adm'x, 107 Va. 733, 60 SE 58.

75. Pettus & Buford v. Kerr [Ark.] 112 SW 886; Scott v. San Bernardino Valley Trac. Co., 152 Cal. 604, 93 P 677; Foote v. Brown [Conn.] 70 A 699; Closson v. Bligh, 41 Ind. App. 14, 83 NE 263; Brinkman v. Pacholke, 41 Ind. App. 662, 84 NE 762; Pittsburgh, etc., R. Co. v. Wood [Ind. App.] 84 NE 1009; Smith v. Hubbell, 151 Mich. 59, 14 Det. Leg. N. 874, 114 NW 865; Robertson v. Kennedy, 152 Mich. 553, 15 Det. Leg. N. 306, 116 NW 413; Peterson v. Metropolitan St. R. Co., 211 Mo. 498, 111 SW 37; Morrow v. Barnes [Neb.] 116 NW 657; Missouri, etc., R. Co. v. Malone [Tex. Civ. App.] 110 SW 958; Southern R. Co. v. King [C. C. A.] 160 F 332. Errors in main charge may be cured by a special charge. Trinity & B. V. R. Co. v. Bradshaw [Tex. Civ. App.] 107 SW 618; St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 107 SW 638; St. Louis S. W. R. Co. v. Hawkins [Tex. Civ. App.] 108 SW 736.

76. Instruction, that testator must have been "wholly influenced," cured by others using term "unduly influenced." Hitt v. Terry [Miss.] 46 S 829. Instruction, authorizing jury to assess such damages as they think plaintiff entitled to, cured by another authorizing them to award such damages as testimony warrants. Mississippi Cent. R. Co. v. Magee [Miss.] 46 S 716. Error in defining contributory negligence may be cured by a paragraph applying law to facts, and pointing out specifically facts, if found true, upon which plaintiff could be found guilty of contributory negligence. Thompson v. Planters' Compress Co. [Tex. Civ. App.] 106 SW 470.

77. The rule that erroneous instructions cannot be cured by correct ones does not apply where former were not complete statements of law and latter are. Gimnich Furniture Mfg. Co. v. Sorensen [Utah] 96 P 121. Instruction at most incomplete in not directing any consideration to instruction held remedied by another directing such consideration. East St. Louis & S. R. Co. v. Zink, 133 Ill. App. 127. Instruction stating law incorrectly is seldom remedied by one stating it correctly. But where instruction states law correctly as far as it goes, being merely insufficient, ambiguous or uncertain, defect may be cured by other instructions on same specific subject embraced in charge. Stratton Cripple Creek Mining & Development Co. v. Ellison, 42 Colo. 498, 94 P 303.

78. Omissions of one may be supplied by contents of another. East St. Louis & S. R. Co. v. Zink, 133 Ill. App. 127; East St. Louis & S. R. Co. v. Kath, 133 Ill. App. 107; Colbeck v. Sampsell, 140 Ill. App. 566. Where instruction, ambiguous or standing alone, is erroneous for omissions, it may be cured by another that is clear on ambiguous or omitted point. McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459. Where instruction given is incomplete but states law correctly as far as it goes, and omitted part is supplied by other instructions given, such omission is not reversible error. Truckers' Manufacturing & Supply Co. v. White [Va.] 60 SE 630. Use of phrase "if you believe from

mislead.[79] A cure may also be effected by a direct statement by the court to the jury [80] or by withdrawing the charge,[81] but where the instructions are conflicting [82] and it cannot be said by which the jury were influenced,[83] charges clearly wrong are not cured because correct ones on the same subject were given,[84] nor can an erroneous instruction be cured by another with which it has no relation [85] nor which neither modifies nor refers to it.[86]

## INSURANCE.


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the evidence" instead of phrase "if you believe from a preponderence of the evidence," though objectionable, held not prejudicial error where in other instructions jury was told that a preponderance of evidence was necessary. East St. Louis & S. R. Co. v. Zink, 133 Ill. App. 127. Instruction ignoring a question may be cured by another properly submitting it to jury. Lange v. Missouri Pac. R. Co., 208 Mo. 458, 106 SW 660.

**79.** A misleading instruction may be cured by a correct one given on court's own motion. Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730.

**80.** Cucciarre v. New York, etc., R. Co. [C. C. A.] 163 F 38; Cumberland Tel. & T. Co. v. Overfield, 32 Ky. L. R. 421, 106 SW 242.

**81.** Abney v. Indiana Union Trac. Co., 41 Ind. App. 53, 83 NE 387.

**82.** One instruction does not cure another when they are in conflict. Fowler v. Chicago & E. I. R. Co., 234 Ill. 619, 85 NE 298. Erroneous instruction is not cured by another which is contradictory in terms. Burton's Adm'r v. Cincinnati, etc., R. Co. [Ky.] 113 SW 442; Huff v. St. Joseph Ry., L., H. & P. Co. [Mo.] 111 SW 1145; Cobb v. Dunlevie, 63 W. Va. 398, 60 SE 384. Instruction free from ambiguity, but affirmatively erroneous, is not cured by contradiction contained in another instruction. McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459. One instruction not cured by another which allows jury to apply conflicting principles of law at their discretion. Blumberg v. Sterling Bronze Co., 56 Misc. 477, 107 NYS 142. Where instructions of successful party state erroneous rule of law and those of defeated party state rule correctly, latter do not cure former. Ross v. Metropolitan St. R. Co. [Mo. App.] 112 SW 9. An inaccurate instruction will not be cured by a correct one where the two are contradictory and the contradiction pertains to a material matter. Chicago, etc., R. Co. v. Turck, 131 Ill. App. 128. An instruction placing burden on one party is not corrected by a charge placing it on both parties at once. Jackman v. Inman, 134 Wis. 297, 114 NW 489.

**83.** One instruction will not cure another when it is impossible to say by which jury was influenced. Alabama City, etc., R. Co. v. Bullard [Ala.] 47 S 578; Doyle v. Kavanaugh [Ark.] 112 SW 889; Kath v. East St. Louis & S. R. Co., 232 Ill. 126, 83 NE 533.

**84.** Instruction clearly wrong cannot be cured by one giving correct rule, and it is impossible to say which one jury followed. Kath v. East St. Louis & S. R. Co., 232 Ill. 126, 83 NE 533; Ratner v. Chicago City R. Co., 233 Ill. 169, 84 NE 201. A misstatement of law contained in one instruction is not cured by a correct statement of the law in another instruction. Sloan v. Cleveland, etc., R. Co., 140 Ill. App. 31. An erroneous instruction purporting to state elements which, if proved, will warrant a verdict for a party cannot be cured by any other instructions. City of Chicago v. Fields, 139 Ill. App. 250. Instruction erroneously assuming a fact is not cured by one putting it in issue. Haynor v. Excelsior Springs, L. P., H. & W. Co., 129 Mo. App. 691, 108 SW 580. An instruction that assumes existence of controverted fact not cured by giving proper instruction. Glover v. Atchison, etc., R. Co., 129 Mo. App. 563, 108 SW 105. Instruction ignoring doctrine of assumed risk held not cured by another giving doctrine. Lake Street Elev. R. Co. v. Fitzgerald, 136 Ill. App. 281. Instruction that one becomes passenger because of his attempt and intent, if known to conductor, not cured by one stating that acceptance was necessary to make him passenger. Alabama City, etc., R. Co. v. Bates [Ala.] 46 S 776. Instruction that, if company, by acts of omission, commission or negligence, placed obstructions at or near track so as to be dangerous to trains it might reasonably expect to come along, whatever consequences that follow acts, it is liable, not cured, by instructing that if company was guilty of act of negligence in placing obstruction where it did, without taking proper precautions to warn trains, it is responsible. Draper v. Interborough Rapid Transit Co., 124 App. Div. 351, 108 NYS 686. Instruction as to care required of municipality erroneous in that it requires more than exercise of care required by law not cured by another correctly stating law. City of Lincoln v. Heinzel, 134 Ill. App. 439. Defect in one instruction on credibility of witness held not cured by correct statement in another. Tripoli Sav. Bk. v. Schnadt, 135 Ill. App. 373.

**85.** Wagner v. Atlantic C. L. R. Co. [N. C.] 61 SE 171.

**86.** Peyser v. Western Dry Goods Co., 48 Wash. 55, 92 P 886.

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*The scope of this topic* is noted below.[87]

§ 1. *Insurance laws, regulations and supervision in general.* See 10 C. L. 336—The state may regulate insurance companies either under its police power for the protection of the public or as a controller of corporations generally.[88] It may, through its legislature, prescribe standard forms of policies,[89] or require policies to contain prescribed provisions [90] or to be executed in a specified manner.[91] Insurers may be required to submit forms of policies for the inspection and approval of the insurance commissioner,[92] and may be punished for using policy forms not approved by the commissioner or by the court on review of his action.[93] Among other regulations are such as pertain to the incorporation of insurance concerns,[94] investments,[95] con-

87. Matters relating generally to agency (see Agency, 11 C. L. 60), corporations, domestic and foreign (see Corporations, 11 C. L. 810; Foreign Corporations, 11 C. L. 1508), indemnity bonds (see Indemnity, 11 C. L. 1892), marine insurance (see Shipping and Water Traffic, 10 C. L. 1655), and insurance contracts of fraternal benefit associations (see Fraternal Mutual Benefit Associations, 11 C. L. 1564), are excluded.

88. New York Life Ins. Co. v. Hardison, 199 Mass. 190, 85 NE 410.

89. New York Life Ins. Co. v. Hardison, 199 Mass. 190, 85 NE 410. For questions as to compliance with prescribed forms, see post, § 7, subd. Essentials and Validity.

90. New York Life Ins. Co. v. Hardison, 199 Mass. 190, 85 NE 410. For statutory requirements, see post, § 7, subd. Essentials and Validity.

91. For right to combine more than one class of insurance in one policy, see post, § 7, subd. Essentials and Validity. For effect of requirements that application or other matters be attached to policy, see post, § 7, subd. Construction.

92. New York Life Ins. Co. v. Hardison, 199 Mass. 190, 85 NE 410. St. 1907, p. 895, c. 576, § 75, prescribing provisions for policies, requiring submission of forms to insurance commissioner, authorizing him to determine their compliance with the law, and, if he objects, giving company right to sue for determination of the question, held not unconstitutional for conferring on insurance commissioner authority to pass on forms (Id.), or on ground that it provides for review by court of action of commissioner (Id.). Insurance commissioner in examining form of policies under St. 1907, p. 895, c. 576, § 75, is authorized to consider matters of substance entering therein, and is not limited to form of policy in other particulars. Aetna Life Ins. Co. v. Hardison, 199 Mass. 181, 85 NE 407.

93. New York Life Ins. Co. v. Hardison, 199 Mass. 190, 85 NE 410.

94. See next section.

95. Carrying out proposed merger involving exchange of shares in constituent companies for shares in merged company, so far as affecting life insurance company owning

tracts with employes[96] expenditures in procuring new business,[97] the medical examination of applicants for insurance,[98] discriminations and rebates,[99] and the filing of annual reports.[1] A superintendent of insurance cannot exercise judicial powers not expressly conferred upon him.[2]

§ 2. *Corporations and associations doing an insurance business. A. Corporate existence, character, management, rights and liabilities.*[3]—Insurance companies are generally of three kinds, namely, stock, mutual and mixed.[4] A stock insurance company is one wherein the stockholders contribute all the capital, pay the losses and take the profits.[5] In a mutual company the members are both insurers and insured, contribute by assessments toward a fund for liabilities and divide profits in proportion to their interest.[6] A mixed company has the characteristics of both stock and mutual companies.[7] Matters relating to the incorporation[8] and mutualization of companies,[9] the eligibility of directors,[10] stock subscriptions,[11] the amendment of by-

shares in constituent companies acquired by expenditure of money, made when not prohibited by law, held not violative of Insurance Law, § 100, and Laws 1906, p. 797, c. 326, prohibiting life insurance companies from investing in stock of any but municipal corporations. Morse v. Equitable Life Assur. Soc., 124 App. Div. 235, 108 NYS 986.

96. Insurance Law 1892, p. 1971, c. 690, § 89, prohibiting certain insurance companies from making contracts with employes for more than 12 months, was re-enacted and continued by Laws 1906, c. 326, § 84. Akens v. Mutual Life Ins. Co., 112 NYS 254. For right of agent to recover under prohibited contract, see post, § 4C.

97. Insurance Law, § 97 (Laws 1906, p. 794, c. 326, § 33), limiting amount life insurance companies may pay to procure new business, held not retroactive. Boswell v. Security Mut. Life Ins. Co. [N. Y.] 86 NE 532.

98. Issuance of policy of life insurance, where insured has not satisfactorily passed medical examination by duly authorized physician, is prohibited by express provisions of Burns' Ann. St. 1908, § 4713. State v. Willett [Ind.] 86 NE 68.

99. As to premiums, see post, § 8. As to effect on policies, see post, § 7, subd. Essentials and Validity.

1. Rev. St. 1895, art. 3084, subd. 7, relating to what shall be continued in annual reports of fire insurance companies, is superseded by Laws 1907, p. 482, c. 18, § 8, requiring companies to report "gross amount of premiums received in the state," in so far as the two acts are in conflict. Fire Ass'n of Philadelphia v. Love [Tex.] 108 SW 810. D. C. Code, § 647, requiring companies "hereinbefore mentioned" to make financial statements, held not applicable to domestic companies. American Home Life Ins. Co. v. Drake, 30 App. D. C. 263. Laws 1901, c. 52, § 11, requiring corporations in general to file with secretary of state reports as to capital stock, and making officers and directors liable for failure to file such reports, held inapplicable to mutual fire insurance company, statute not applying to corporations not for pecuniary profits. Steck v. Prentice, 43 Colo. 17, 95 P 552. See, also, Corporations, 11 C. L. 810.

2. Superintendent of Insurance of District of Columbia has no power to make and enforce interpretation of laws relating to insurance companies, agents or brokers, power being judicial one for the courts. Drake v. U. S., 30 App. D. C. 312.

3. See 10 C. L. 336. See, also, Corporations, 11 C. L. 810.

4. State v. Willett [Ind.] 86 NE 68.

5, 6. State v. Willett [Ind.] 86 NE 68. Contracts of assessment association with certain classes of members, whereby each class was to pay a level rate, held not to make association an ordinary life insurance company, where right was reserved to increase rates of assessments. Trisler v. Mutual Reserve Fund Life Ass'n, 128 Mo. App. 497, 106 SW 1082.

7. State v. Willett [Ind.] 86 NE 68.

8. "Live stock insurance company" incorporated under Rev. St. 1895, art. 642, subd. 46, to operate on mutual or co-operative plan without capital stock, held not a "mutual relief association" within art. 3096, providing that nothing in the title shall apply to mutual relief associations. State v. Burgess [Tex.] 109 SW 922, rvg. [Tex. Civ. App.] 20 Tex. Ct. Rep. 573, 107 SW 366. Rev. St. 1895, art. 3028, requiring submission of articles of incorporation to attorney general, construed in connection with other legislation, and held to apply to all insurance companies except those excluded by art. 3096. Id. Rev. St. 1895, art. 3029, simply prescribes amount of capital stock necessary for stock companies and does not limit general provisions of art. 3028 to stock or any other class of companies. Id.

9. Laws 1906, c. 826, providing for conferring on policy holders of life insurance companies right to vote for directors, held constitutional, and mutualization of Equitable Life Assurance Society held legally carried out as per provisions and conditions of said act. Lord v. Equitable Life Assur. Soc., 57 Misc. 417, 108 NYS 67.

10. Charter of Equitable Life Assurance Society, in so far as it provided for election of directors who should be holders of five shares of stock, was subject to reserved power of legislature to alter and amend, as provided by state constitution, and was amended by Stock Corporation Law of 1892, p. 1828, c. 688, § 22, providing that policy holders of insurance corporations shall be eligible to election as directors. Lord v. Equitable Life Assur. Soc., 57 Misc. 417, 108 NYS 67. Policy holders not stockholders held eligible to appointment to fill vacancies. Id.

11. Under Insurance Law, §§ 110, 112, incorporators of insurance companies become a corporation before stock subscriptions are

laws,[12] and the kind of insurance that may be written,[13] are usually regulated by statute or charter. A company with charter power to write insurance on different plans may discontinue a plan at any time unless prohibited by agreement with its policyholders.[14] Whether one's membership in an indemnity exchange has been withdrawn may depend upon the provisions of the subscription agreement.[15]

A company is responsible for mismanagement and misappropriations in violation of its contracts with certificate holders,[16] and for such wrongs a receiver may be appointed on application of the proper persons,[17] or the company may be restrained from unlawfully changing the securities in which funds are required to be invested.[18] When other adequate relief can be granted for alleged wrongs and there has been no

invited, and hence such subscriptione are invalid unless 10 per cent. is paid in cash as required by Stock Corporation Law, § 41 (Laws 1892, p. 1835, c. 688). Van Schaick v. Mackin, 113 NYS 408.

12. Insurance Law N. Y., Laws 1892, p. 2013, c. 690, § 209, requiring mutual companies to cause amendments to by-laws to be mailed to members so as to give them at least 5 days' notice of time and place of consideration, amounts to requirement that reasonable notice be given, and 5 days is not reasonable where amendments are complicated and members scattered over United States and foreign countries. Robinson v. Mutual Reserve Life Ins. Co., 159 F 564.

13. Mutual fire insurance companies organized under provisions of Sess. Laws 1897, c. 45, p. 257, are not impliedly authorized to transact a reinsurance business. Allison v. Fidelity Mut. Fire Ins. Co. [Neb.] 116 NW 274. Reinsurance company held not estopped to plead ultra vires in suit to recover assessments on policies of reinsurance. Id. Act March 11, 1867 (Laws 1867, p. 150, c. 71), authorizing reinsurance of life insurance risks, applies to life insurance companies generally, and should be construed together with Act March 9, 1897 (Laws 1897, p. 381, c. 195), consistent with earlier statute and recognizing and limiting right to reinsure. Federal Life Ins. Co. v. Kerr [Ind. App.] 85 NE 796. Where transferee of insurer's business notified policy holders that their policies would be continued on same terms, it would not be presumed in action on a policy that transferee had no power to insure on terms indicated. Mutual Reserve Life Ins. Co. v. Ross [Ind.] 86 NE 506.

14. Insurance company authorized by charter to write insurance on other than "safety fund" plan, and not under promise to certificate holders not to issue policies on other plans or to continue to issue safety fund certificates, held entitled to discontinue issuing such certificates against protest of holders. Dresser v. Hartford Life Ins. Co., 80 Conn. 681, 70 A 39. Company's motives immaterial. Id.

15. Subscription agreement by members of an indemnity exchange considered, and held that withdrawal of members thereunder was not complete until 30 days after notice of withdrawal, or until prior reinsurance or cancellation of unexpired insurance, and payment to him of proper portion of funds held by a committee. Williamson v. Warfield, Pratt Howell Co., 136 Ill. App. 168.

16. Allegations showing fraudulent claim by defendant that a certain "safety fund" belonged to it, though it had previously represented that it belonged to certificate holders, and charging wrongful change of securities and misappropriations and loss of large sums from such fund, held sufficient to authorize accounting. Dresser v. Hartford Life Ins. Co., 80 Conn. 681, 70 A 89. Under provisions by which safety fund should be divided among certificate holders when outstanding insurance should run below $1,000,000, suit was not premature, though outstanding certificates amounted to $40,000,000, it being admitted company claimed ownership of fund and that same had been diminished $60,000,000 since 1897. Id. Allegations held sufficient to justify money damages. Id. Certificate holders properly joined as plaintiffs. Id. Bill not multifarious for joining insurance company, its officers and directors, and a surety company which was custodian of fund in controversy. Id. Complaint held to sufficiently charge fraud by construction of certificates contrary to circulars sent out by company, so as to justify admission of such circulars to determine meaning of certificates which was not clear. Id. Complaint alleging fraudulent wording of certificates and construction thereof contrary to circulars held sufficient without alleging that plaintiffs could not understand certificates or were misled. Id. Allegations charging appropriation of fund in which plaintiffs were interested to defendants' own use held sufficient without stating that diversion was wrongfully made. Id. Certain allegations as to claims by defendant relative to construction of contract with reference to ownership of safety fund and right to continue to make assessments, though not sufficient in themselves to authorize relief, held proper, as matter of description relevant to alleged misappropriation. Id. Bill by holders of assessment policies charging fraudulent misapplication of reserve fund and waste of assets, and fraudulent charging of liens against policies, and making of assessment in interest of level premium insurance, held ground for equitable relief, so far as asking for accounting and cancellation of liens and ascertainment of amounts of assessment policies. Robinson v. Mutual Reserve Life Ins. Co., 159 F 564.

17. Application for receiver for mismanagement and misappropriations, as authorized by Gen. St. 1902, § 3490, must be made by insurance commissioner, and cannot be made by certificate holders except in so far as incidental to any accounting which may be ordered. Dresser v. Hartford Life Ins. Co., 80 Conn. 681, 70 A 39.

actual or intended rescission of the insurance a forfeiture of money lawfully received by the company from certificate holders will not be declared.[19]

*Dissolution and insolvency.* See 10 C. L. 337—Voluntary dissolution is sometimes authorized.[20] When a company is insolvent[21] and its further operation would be hazardous to its policy holders,[22] its affairs may be wound up in the manner provided by law.[23] Policy holders become creditors with the same right as other creditors to sue for liquidation,[24] and failure to reduce their claims to judgment and have executions issued thereon may be waived by the company.[25] On the insolvency of a title insurance company, policy holders are entitled to the return of unearned premiums the same as in the case of fire and similar insurance.[26] Funds set aside for the protection of policy holders must ordinarily be distributed by order of court in a proceeding wherein all interested persons may be heard.[27]

*Taxation* See 10 C. L. 338 of the property or business of foreign and domestic companies is fully treated elsewhere.[28]

**18.** Certificate holders among whom a "safety fund" is agreed to be divided on insurance in a certain department being reduced to a specified amount are sufficiently interested, even before the reduction specified, to enable them to sue to restrain a trust company from unlawfully changing the securities in which the fund is required to be kept invested. Dresser v. Hartford Life Ins. Co., 80 Conn. 681, 70 A 39.

**19.** Alleged misappropriations and mismanagement. Dresser v. Hartford Life Ins. Co., 80 Conn. 681, 70 A 39.

**20.** Hurd's Rev. St. 1905, c. 73, § 2, authorizing voluntary dissolution of insurance corporations on application of majority in number or interest of members or stockholders, is constitutional. Cullom v. Traders' Ins. Co. [C. C. A.] 163 F 45. Not essential that any controversy exists for adjudication. Id.

**21.** In determining financial condition of insurance company organized under natural premium or mutual assessment plan, probable income from premiums must be considered. Dempster v. Opocensky [Neb.] 116 NW 524. Under Rev. Laws, c. 118, § 1, St. 1907, p. 839, c. 576, § 1, defining "net assets" as the fund available for payment of obligations after deduction of unpaid losses and "claims for losses," company whose assets exceed by $30,000 its liabilities, not including claims under policies for $300,000, is insolvent, so as to authorize insurance commissioner to apply for receiver and injunction under Rev. Laws, c. 118, § 7. Cutting v. American Ins. Co., 197 Mass. 131, 83 NE 396.

**22.** Further proceedings of company held "hazardous to the policy holders" within Rev. Laws, c. 118, § 7, where company proposed to continue to settle losses while insolvent, though it did not propose to write any new insurance, and injunction and receiver was therefore authorized. Cutting v. American Ins. Co., 197 Mass. 131, 83 NE 396.

**23.** Rev. St. § 274 merely prescribes powers and duties of superintendent of insurance where assets of companies are reduced below capital required by law, and does not confer on equity courts any enlarged powers with reference to winding up affairs of a company, especially where suit is by a policy holder or shareholder. Benson v. Columbia Life Ins. Co., 7 Ohio N. P. (N. S.) 113.

**24, 25.** Robinson v. Mutual Reserve Life Ins. Co., 162 F 794.

**26.** State v. Minnesota Title Ins. & Trust Co., 104 Minn. 447, 116 NW 944. Not entitled to that part of premium which it was stipulated company could retain for investigating title. Id. In determining earned portion of premium, time elapsing between date of policy and insolvency controls. Id.

**27.** On insolvency of mutual assessment company, fund deposited with state treasurer under Laws 1891, c. 116, § 2, for benefit of its contract holders, can be reached only by suit in nature of creditor's bill, in which court may make equitable distribution with all parties before court and appoint receiver to carry out same (Engwicht v. Pacific States Life Assur. Co., 153 Cal. 183, 96 P 7); and action at law in which prayer is merely that amount found due plaintiff be declared lien on fund, and treasurer ordered to pay same, and courts' appointment of receiver with command that all persons interested appear and show cause, is not proper substitute procedure (Id.). Laws N. Y. 1884, p. 429, c. 353, § 2, authorizing any insurance company doing business under co-operative or assessment plan to deposit securities with superintendent of insurance, to be held for sole benefit of members of company and subject to provisions of such deed of trust as shall be approved by superintendent, does not impose on superintendent any duty to make distribution of fund on insolvency of company, and, in absence of such requirement in deed of trust, he holds subject to orders of court administering estate of insolvent company. Robinson v. Mutual Reserve Life Ins. Co., 162 F 800. Provision of agreement under which portion of reserve fund of association was deposited with a trust company that in case of dissolution of association "entire reserve fund shall be divided among the members of the association, or shall be distributed in such other equitable manner as the courts shall direct," did not impose duty of distribution on trustee (Robinson v. Mutual Reserve Life Ins. Co., 162 F 798), but association, having been dissolved in action by state federal court having charge of administration of its assets, could order trustee to turn over funds to court's receivers for distribution with other assets (Id.).

**28.** See Taxes, 10 C. L. 1776; Licenses, 10 C. L. 622.

(§ 2) *B. Conditions necessary to engage in insurance business, and certification and withdrawal of right.*[See 10 C. L. 333]—Companies are often required to obtain a license from the insurance commissioner [29] or pay a privilege tax,[30] and to deposit securities with some state officer for the protection of contract or policy holders,[31] or give a bond to secure the prompt payment of claims.[32] Domestic companies need not comply with provisions applicable only to foreign ones.[33]

§ 3. *Foreign insurers and companies.*[See 10 C. L. 333]—Companies doing business in foreign states [34] must comply with the insurance laws of such states applicable to foreign companies,[35] such as license [36] and process regulations,[37] and penalties are sometimes imposed on foreign companies and their agents doing insurance business without authorization.[38] An insurance commissioner cannot be compelled to license

**29.** Validity of policies issued by unlicensed companies, see post, § 7, subd. Essentials and Validity.

**30.** Validity of premium notes where privilege tax is not paid, see post, § 8.

**31.** Distribution of fund on insolvency of company, see ante, § 2A, subd. Insolvency. Statute does not make procuring of securities or depositing thereof with state auditor condition precedent to doing of business by companies organized on natural premium or mutual assessment plan. Dempster v. Opocensky [Neb.] 116 NW 524. Deposit of securities necessary only on accumulation of money for purpose of fulfillment of policies. Id. Industrial life insurance companies to be entitled to do business need only deposit with secretary of state bonds in accordance with Act 65, p. 101, of 1906, and need not also comply with Act 105, p. 132, of 1898, requiring mutual companies to first procure insurance, premiums on which shall amount to $25,000. State v. Michel, 121 La. 350, 46 S 352. Under Code 1904, § 1271, requiring companies to deposit bonds with state treasurer as security for payment of policies to residents, treasurer holds first for policy holders, then for company, and neither he nor courts can divert fund for other purposes. German Nat. Ins. Co. v. Virginia State Ins. Co. [Va.] 61 SE 870. Improper to allow fee to treasurer's private counsel. Id. Railway company taking and retaining bonds and mortgages to cover amount claimed under policies held not policy holder entitled to share in securities deposited with insurance commissioner under statute for protection of policy holders. Commonwealth v. Guarantors' Finance Co., 35 Pa. Super. Ct. 547. "Contract holders" for whose benefit money is required to be deposited with state treasurer, under Laws 1891, p. 126, c. 116, § 2, by mutual assessment companies, include only holders of insurance contracts issued by company under such law, excluding a debenture by the company in substance a mere promise to pay a certain sum two years after date with interest, and referring to insurance only by concluding provision giving owner option at its maturity to take a policy in lieu of money. Engwight v. Pacific States Life Assur. Co., 153 Cal. 183, 96 P 7.

**32.** Sufficiency of complaint, see post, § 24B.

**33.** D. C. Code, § 646 (31 St. at L. 1290, c. 854), requiring filing of copies of charters with superintendent of insurance, and § 647, calling for financial statements, held inapplicable to domestic companies. American Home Life Ins. Co. v. Drake, 30 App. D. C. 263. See post, § 3.

**34.** See, also, Foreign Corporations, 11 C. L. 1508. Where application was sent by mail to home office in another state and policy sent by mail from there to applicant, company did no business in state where applicant resided so as to preclude it from suing therein for assessments. Stone v. Penn Yan, etc., R. Co., 109 NYS 374. Contract solicited in Pennsylvania of citizen of that state and mailed to him from Ohio, where executed by company, and acceptance of which was by him signed in Pennsylvania, held made in Pennsylvania. Swing v. Dayton, 124 App. Div. 58, 108 NYS 155.

**35.** Evidence held to sustain finding that company was not authorized to do business in state so as to entitle its receiver to recover assessment against policy holders. Swing v. Red River Lumber Co. [Minn.] 117 NW 442.

**36.** Where company had not procured certificate from proper officer as required by Pennsylvania statute making it a crime for foreign insurance companies to do business without complying with the act, and Pennsylvania courts would therefore not enforce contract, it would not be enforced in New York. Swing v. Dayton, 124 App. Div. 58, 108 NYS 155.

**37.** Insurance company is estopped to defend action on policy on ground that it violated St. 1898, § 1978, prohibiting companies from doing insurance business with residents of state without qualifying insurance commissioner to receive service of process, insured being without knowledge of the facts. Corbett v. Physicians' Casualty Ass'n, 135 Wis. 505, 115 NW 365. That insurance was negotiated through mails did not apprise assurer that company was not qualified. Id. Resident assignee in good faith of contract made in another state held entitled to protection of North Carolina statute prohibiting insurance company from revoking designation of process agent so long as liabilities remained outstanding against it in state. Hunter v. Mutual Reserve Life Ins. Co., 192 N. Y. 85, 84 NE 576.

**38.** Title of chapter 93, p. 214, Laws 1871, is sufficient to embrace provisions in §§ 18, 23, including penalties prescribed for procuring insurance in or doing insurance by companies not authorized to do business in state. Harrod v. Latham Mercantile & Commercial Co. [Kan.] 95 P 11. Though provision of § 22 that half of penalty shall go to county treasury and half to informer vio-

a company while he is still engaged in a statutory investigation as to its compliance with the law.[39]

§ 4. *Agents and solicitors for insurance. A. Distinctions and kinds of agency.*[40]

(§ 4) *B. The right to negotiate insurance and regulations thereabout.* See 8 C. L. 885—Agents and brokers are often required to take out licenses [41] or pay privilege taxes,[42] and prohibited from writing insurance in companies not authorized to do business in the state,[43] or where applicant has not passed a medical examination.[44] Misconduct on the part of an agent may be ground for revocation of his certificate.[45] Questions relating to the existence of agencies and the authority of agents as between the insurer and the insured are treated in subsequent sections.[46]

(§ 4) *C. Rights and liabilities of agents.* See 10 C. L. 840—The general rules of contract and agency apply as between the company and its agents.[47] Questions relating to commissions or other compensation,[48] and the duration of the agency,[49]

lates Const. § 6, art. 6, invalidity does not affect rest of law. Id. Penalties not exclusive so as to preclude injured person from recovering from wrongdoer. Id.

39. Mandamus will not lie to compel insurance commissioner to authorize foreign company to do business in state before he has completed investigation, under Rev. St. 1895, art. 3048, to satisfy himself that company has fully complied with all requirements of law. Metropolitan Life Ins. Co. v. Love [Tex.] 108 SW 821.

40. See 6 C. L. 75. For questions affecting waiver and estoppel, see post, § 16C.

41. Superintendent of insurance of District of Columbia is mere ministerial officer in respect to issuing general insurance licenses to brokers or agents (Drake v. U. S., 30 App. D. C. 312), and cannot impose conditions precedent to issuance of licenses requested with tender of statutory fee (Id.). Certain regulations and classifications of persons required to take out licenses, under D. C. Code, § 654, held without authority. Id. When insurance broker or agent takes out general insurance license, under D. C. Code, § 654, he may act for any company or companies authorized to do business in district (Id.), and companies are not required to apply for licenses for their brokers or agents (Id.).

42. Validity of premium notes when privilege tax is not paid. See post, § 8. For jury whether agent had paid privilege tax where he resided so as to entitle him to solicit insurance. Simpson v. Goodman [Miss.] 45 S 615.

43. Title of c. 93, p. 214, Laws 1871, held to warrant penalty provisions in §§ 18, 23. Harrod v. Latham Mercantile & Commercial Co. [Kan.] 95 P 11. Unconstitutionality of provision in § 22 as to division of penalty between informer and county treasurer held not to affect rest of law. Id. Penalties held not exclusive so as to preclude injured person from recovering from wrongdoer. Id.

44. Burns' Ann. St. 1908, § 4713, expressly prohibits the issuance of policies of life insurance where insured has not satisfactorily passed a medical examination by a duly authorized physician. State v. Willett [Ind.] 86 NE 68.

45. Insurance Law (Laws 1892, p. 1972, c. 690), § 91, forbidding agents of foreign insurance companies to act as such in state without certificate of authority from state insurance superintendent, and providing for revocation of certificate on conviction of holder of violation of that or preceding section, and Insurance Law (Laws 1906, p. 774, c. 326), § 60, as amended by Laws 1908, p. 1015, c. 347, providing for revocation of licenses of companies or agents making certain misrepresentations therein made misdemeanors, are distinct, § 91, providing for revocation on conviction in criminal proceeding for violation of § 90 or 91, and § 60, for revocation of license by superintendent on violation of that section. People v. Kelsey, 113 NYS 836. Though Laws 1906, p. 774, c. 326, § 60, and Laws 1908, p. 1015, c. 347, do not expressly provide for notice to agent whose certificate it is sought to revoke for violation of § 60, investigation by superintendent with notice and hearing was contemplated. Id.

46. See post, §§ 7, 8, 16B, 16C, 19.

47. See, also, Agency, 11 C. L. 60; Contracts, 11 C. L. 729. Contract of employment entered into between general agent of life insurance company and one who was to serve under him, who was identified in contract as "agent," held contract with general agent acting in his individual capacity, and not one upon which company was jointly liable. Bigger v. Insurance Co., 8 Ohio N. P. (N. S.) 27.

48. Evidence held insufficient to show that company was to pay its agent a share of premiums collected by solicitor of company working in conjunction with agent. Rhone v. National Life Ins. Co., 43 Colo. 162, 95 P 298. Evidence held to show that no new forms of policies had been adopted within provision of agency contract that commissions specified should not apply to new forms of policies thereafter adopted. Boswell v. Security Mut. Life Ins. Co. [N. Y.] 86 NE 532. Agency contract construed and held that agent was entitled to commissions on renewal premiums for years after the first in proportion to amount of insurance procured, notwithstanding termination of agency. Heyn v. New York Life Ins. Co. [N. Y.] 84 NE 725. Contract construed and held not to allow agent commissions on renewal premiums paid after termination of agency. Dodson v. New York Life Ins. Co., 36 Pa. Super. Ct. 551.

49. Contract of agency construed and held

are usually governed by the terms of the contract of employment if this is valid.[50] Refusal to remit collected premiums held subject to the company's call renders the agent amenable to remedies for conversion or breach of trust,[51] and the contract sometimes provides that the agent shall forfeit his rights thereunder [52] if he fails to remit money as required,[53] increases the company's liabilities by corrupt acts,[54] or fails to make reports according to agreement.[55] Liability on the agent's bond will not be extended by implication.[56]

An agent may be rendered liable for a loss by failure to carry out a definite oral contract to insure.[57] One who acts for an owner of property in procuring insurance must obtain the most advantageous terms,[58] and if he fails to do so the owner is not bound to accept and pay for his services.[59]

§ 5. *Insurable risks and interests. Fire insurance.* See 10 C. L. 341—Insured must have an insurable interest in the property covered by the policy.[60] Intoxicating

to authorize company to discharge agent at any time after one year, in which case he would be entitled to commissions on renewal premiums, except that company could discharge at any time for acts operating to forfeit his rights, "good cause" applying to matters specified in contract. Armstrong v. National Life Ins. Co. [Tex. Civ. App.] 112 SW 327.

**50.** Though to corporation agent's contract of employment for more than 12 months was malum prohibitum as well as ultra vires, statutory inhibition is against company only and hence parties not being in pari delicto agent could recover value of services as on implied assumpsit. Akers v. Mutual Life Ins. Co., 112 NYS 254. Commission contract with general agent to run for 20 years, and made before adoption of Ins. Law, § 97, limiting amount life insurers may pay to procure new business, whereby agent was to devote his time to build up business in four states receiving no salary and paying expenses, held not violative of public policy nor subject to interference under general or reserved powers of legislature. Boswell v. Security Mut. Life Ins. Co. [N. Y.] 86 NE 532. Provision that contract should be void as to new business in territory where company's authority to do business should terminate held not to show that parties had in mind the possibility that legislature of company's domicile might interdict company from doing any business in such territory. Id.

**51.** Where agent had authority to collect premiums and was required to remit same when requested, refusal to remit was conversion, regardless of applicability of Insurance Law 1892, p. 1949, § 38, making insurance agents collecting moneys responsible therefor in fiduciary capacity. Washington Life Ins. Co. v. Scott, 57 Misc. 492, 110 NYS 49. Subsequent conduct and renewal of contracts held not to change fiduciary relation between company and agent into relation of debtor and creditor. Id. Where jurisdiction of person of general manager of life insurance company was required by personal service within state, plaintiff could avail itself of remedy provided by Code Civ. Proc. § 549 (2), authorizing arrest for violation of trust, whether conversion occurred in state or elsewhere. Id. Acceptance by company of checks for money collected held not to operate as waiver of right to arrest agent, nor convert claim into one of simple debt, payment of checks having been stopped by agent. Id.

**52.** Contract held to forfeit agents' rights for reasons therein stated only as to rights which would have accrued in future had contract remained in force. Armstrong v. National Life Ins. Co. [Tex. Civ. App.] 112 SW 327.

**53.** Evidence held not to show agent collected money for company and failed to remit. Armstrong v. National Life Ins. Co. [Tex. Civ. App.] 112 SW 327.

**54.** Increase of company's liabilities held not by "corrupt act" within contract where failure of agent to keep notes in his control was due to misplaced confidence in an assistant. Armstrong v. National Life Ins. Co. [Tex. Civ. App.] 112 SW 327.

**55.** Failure of agent to make reports as contract required held to forfeit his rights as therein provided. Armstrong v. National Life Ins. Co. [Tex. Civ. App.] 112 SW 327. Forfeiture not waived. Id. Failure to make reports other than monthly ones and reports on policies held not ground for forfeiture of agent's rights. Id. Premiums subsequently paid held forfeited. Id.

**56.** Under bond rendering principal and sureties liable for loans and advances made to agents "for the purpose of enlarging his business or otherwise," action would not lie for advances for support of agent's family. New York Life Ins. Co v. McDearmon [Mo. App.] 114 SW 57. Under bond conditioned that agent would perform "all other duties of such agent and comply with all instructions," sureties held not liable for agent's failure to pay a premium note indoreed by agent to general agents of insurer in strict pursuance of instructions. McClary v. Trezevant [Tex. Civ. App.] 112 SW 954.

**57.** In order to recover damages for loss by fire on ground of failure to carry out oral contract to insure, evidence must be reasonably definite that minds of parties met on subject-matter and agreed on terms. Mooney v. Merriam [Kan.] 94 P 263. Evidence held too indefinite as to subject-matter, risk, amount of insurance, and premium. Id.

**58, 59.** Strasburger v. Goldenberg, 109 NYS 803.

**60.** Change in agreement between vendor and vendee so as to render vendor liable for loss by fire before delivery held to preserve insured's interest under policy cover-

liquors are insurable in states where they are recognized as property.[61] The validity of policies covering property held or used for illegal purposes is treated in a subsequent section.[62]

*Life insurance.*See 10 C. L. 342—Insurable interest as affecting assignments is treated hereafter.[63] Though policies issued to persons who have no insurable interest are invalid,[64] one may in good faith insure his own life in favor of whomsoever he pleases, paying the premiums himself.[65] A person has an insurable interest in the life of another when there is a reasonable probability that he will gain by the latter's remaining alive or lose by his death.[66] An agreement between a person having an insurable interest in a life and one having no such interest that the latter shall insure such life and apply the proceeds towards the former's support does not operate to transfer to the policy holder the insurable interest of the obligee.[67] A beneficiary may agree with one who is without insurable interest that the latter shall receive a portion of the proceeds of the policy in consideration of paying part of the premiums.[68] If a policy is valid in its inception, subsequent cessation of interest will not avoid it in the absence of any proviso.[69] Only the insurer can raise the question of lack of insurable interest in the beneficiary.[70]

*Liability insurance.*—One has the right to protect himself by insurance from an adverse result of uncertain litigation.[71]

ing property sold by him, but not delivered, for which he might be held liable. Burke v. Continental Ins. Co., 128 App. Div. 319, 112 NYS 865.

**61.** Insurable in Missouri. Kellogg v. German-American Ins. Co. [Mo. App.] 113 SW 663.

**62.** See post, § 7, subd. Essentials and Validity.

**63.** See post, § 14.

**64.** Where object of an association was to furnish burial expenses to members by system of mutual contribution and it employed soliciting agents and was not founded on principals of philanthropy, its contracts were contracts of "life insurance" within Burns' Ann. St. 1908, § 4713, forbidding taking of applications for insurance on life of any person in favor of another person not having a bona fide insurable interest in life of insured or who is not related to him within a certain degree. State v. Willett [Ind.] 86 NE 68.

**65.** W. A. Doody Co. v. Green [Ga.] 62 SE 984. Guardian's unauthorized use of ward's money to pay premiums on policy taken out by guardian on his own life for benefit of ward is not payment of premiums by ward. Id. That one insures his life for benefit of himself or another is evidence of such good faith as will sustain contract. New York Life Ins. Co. v. Greenlee [Ind. App.] 84 NE 1101. Father could insure life for benefit of son though son had no insurable interest in life of father, and though son paid premiums. Id.

**66.** State v. Willett [Ind.] 86 NE 68.

**Held to have insurable interest:** Creditor. Peoria Life Ass'n v. Hines, 132 Ill. App. 642. Relationship between parent and child is sufficient of itself to give either an insurable interest in life of the other. Woods v. Woods' Adm'r [Ky.] 113 SW 79.

**Interest Insufficient:** Relationship of uncle and nephew. W. A. Doody Co. v. Green [Ga.] 62 SE 984. One has no insurable interest in life of brother-in-law merely because of such relationship. Chandler v. Mutual Life & Industrial Ass'n [Ga.] 61 SE 1036. Official undertakers of associations insuring burial expenses for members, who through profits from sale of funeral supplies were the real beneficiaries under the contracts between association and members, held without insurable interest in members' lives. State v. Willett [Ind.] 86 NE 68. **Corporation** has no insurable interest in lives of members of board of directors not indebted to it. Schott & Sons Co. v. Insurance Co., 7 Ohio N. P. (N. S.) 548; Security Mut. Life Ins. Co. v. Schott & Sons Co., 11 Ohio C. C. (N. S.) 401.

**67.** Agreement between father and son that latter should insure mother's life and use proceeds in support of father held to create no insurable interest in son in life of mother. Schwerdt v. Schwerdt, 235 Ill. 386, 85 NE 613. Father could not enforce agreement, same being without sufficient consideration, even though son had received insurance money from company. Id.

**68.** Agreement held not to affect validity of policy or interest of beneficiary therein. Woods v. Woods' Adm'r [Ky.] 113 SW 79.

**69.** Divorce of beneficiary from insured held not to affect her rights in policy, especially where insured was required to pay alimony. Begley v. Miller, 137 Ill. App. 278.

**70.** Where a policy is issued in favor of one whose relationship to insured is stated therein and such relationship does not give the beneficiary an insurable interest but the beneficiary is also creditor of the insured, it will not be presumed that the policy was issued in favor of the designated beneficiary as creditor for the purpose of enabling the estate of insured to recover from the beneficiary the amount of the indemnity in excess of the debt, the company having seen fit to recognize the beneficiary as entitled to the proceeds. W. A. Doody Co. v. Green [Ga.] 62 SE 984.

**71.** One may insure himself against liability to third persons for automobile accidents. Gould v. Brock [Pa.] 69 A 1122.

*Burglary insurance.*—To authorize recovery by an assignee, he must show that he had an interest in the property.[72]

§ 6. *Application.*[See 10 C. L. 842]—Insured on receiving his policy may assume that his application authorized the company to issue it,[73] and need not return the policy because of provisions therein in seeming conflict with the application.[74] The effect of statutes requiring the application or a copy thereof to be attached to the policy or delivered to insured,[75] and of information acquired by the company from the application,[76] and questions relating to the completeness of such information,[77] are discussed in other sections.

§ 7. *The contract of insurance in general, and general rules for its interpretation. Definitions and distinctions.*[See 10 C. L. 842]—Except when the insurance is against accident or death,[78] insurance contracts are plain indemnity agreements[79] whereby the insurer for a stipulated consideration undertakes to compensate the insured for loss of the kind and to the extent agreed upon.[80] A fire policy is a contract for the personal indemnity of the insured and does not follow the property to purchasers unless the policy is transferred.[81]

*Agencies, and authority of agents in general.*[82]—Agency may be established as in other cases by implication as well as by formal appointment.[83] An insurance broker is not the agent of the insurer so as to bind the latter by agreements to insure,[84] nor can an agent be said to act for his company while he procures from it insurance for himself.[85] A local agent for a certain county has no authority to appoint other agents for the company;[86] and power in an underwriter's attorney to conduct the business contemplated does not imply authority to bind the principal by stipulation that the outcome of a suit against one of the subscribers shall conclude all.[87] An agent may bind the company by any agreement within the actual or apparent scope of his authority,[88] and the company may waive express stipula-

72. Complaint by assignee of burglary policy held bad for failure to allege that goods stolen were property of plaintiff or in his possession or that he had any interest therein. Pearlman v. Metropolitan Surety Co., 111 NYS 882.

73, 74. Allen v. Phoenix Assur. Co., 14 Idaho, 728, 95 P 829.

75. See post, § 7, subd. Construction.

76. See post, § 16C.

77. See post, § 9.

78. Unlike fire insurance contracts, accident and life insurance contracts are not mere contracts of indemnity but investment contracts entitling insured to sum stipulated, regardless of damages actually suffered. Gatzweiler v. Milwaukee Elec. R. & L. Co., 136 Wis. 34, 116 NW 633. Life and accident insurance contract is agreement whereby one agrees to "indemnify" another for injuries by accident or death. State v. Willett [Ind.] 86 NE 68.

79. Policy is contract of indemnity and cannot be made subject of profit by insured. Fire policy insuring rents. Palatine Ins. Co. v. O'Brien, 107 Md. 341, 68 A 484.

80. State v. Willett [Ind.] 86 NE 68. Insurance is a contract by which one party, called insurer, binds himself to other, called insured, to pay him a sum of money or otherwise indemnify him. Rogers v. Shawnee Fire Ins. Co. [Mo. App.] 111 SW 692.

81. Purchasers continuing business in old trade name in which policy was issued could not recover. American Steam Laundry Co. v. Hamburg Bremen Fire Ins. Co. [Tenn.] 113 SW 394.

82. Power of agents to waive provisions, and estoppels based on agent's acts or knowledge, see post, this section, Essentials and Validity, and post, §§ 16C, 19, 20.

83. Wortham v. Illinois Life Ins. Co., 32 Ky. L. R. 827, 107 SW 276. Generally those who with company's assent act for it in soliciting or procuring insurance are agents though not formally appointed. Id. Evidence held to authorize insured to treat with agent on theory that he was general agent as he appeared to be with power to fix terms of contract of insurance. Sloss-Sheffield Steel & Iron Co. v. Aetna Life Ins. Co. [N. J. Eq.] 70 A 380.

84. Policy covering property other than that mentioned in agreement between broker and insured held not reformable. Fredman v. Consolidated Fire & Marine Ins. Co., 104 Minn. 76, 116 NW 221. Under Rev. Laws, §§ 1642, 1716, broker is insurer's agent only for purpose of collecting or securing premiums. Id.

85. Cauthen v. Hartford Life Ins. Co. [S. C.] 61 SE 428.

86. Company not liable for acts of appointee. Michigan Mut. Life Ins. Co. v. Thompson [Ind. App.] 86 NE 503.

87. Blair v. National Shirt & Overalls Co., 137 Ill. App. 413.

88. Agent is presumed to have authority to verbally agree that premium note shall be given back to applicant should he decline to accept policy. Mutual Reserve Life Ins. Co. v. Seidel [Tex. Civ. App.] 113 SW 945. Subagent with apparent general authority may bind company by insurance agreement.

tions negativing agency.[89] An owner of property may ratify the unauthorized act of another in procuring insurance for him,[90] but he cannot ratify after a loss when the company was without knowledge of the true conditions.[91] The liability of agents for failure to carry out agreements to insure has been treated in a previous section.[92]

*Essentials and validity; acceptance.* See 10 C. L. 843—Binding insurance may rest in parol,[93] and an agreement may become effective before a contemplated written policy is actually issued.[94]

Pelican Assur. Co. v. Schildknecht, 32 Ky. L. R. 1257, 108 SW 312.

89. Provision that no person not authorized in writing should be deemed company's agent with respect to the insurance held waived by writing policy on application taken by one not authorized in writing and accepting premium therefor. Allen v. Phoenix Assur. Co., 14 Idaho, 728, 95 P 829. Waiver of provisions against power of agents to waive stipulations in policy, see post, § 16C.

90. Insured could ratify broker's acts in overinsuring property and accept policies which remained in force after refused request by broker to company that latter mark them off. Boutwell v. Globe & Rutgers Fire Ins. Co. [N. Y.] 85 NE 1087.

91. Where company did not know that policy in another company had not been canceled because insured had not been notified, surrender of old policy and taking new one from agents after loss did not bind second company. Aetna Ins. Co. v. Renno [Miss.] 46 S 947.

92. See ante, § 4C.

93. Cunningham v. Connecticut Fire Ins. Co. [Mass.] 86 NE 787. No recovery on alleged oral contract where parties contemplated contract to spring into existence on delivery of policies and payment of premiums. Id. Agent duly authorized to make insurance contracts may bind his company by parol agreement before policy is issued, in absence of specific charter requirements that contracts be written (Ripka v. Mutual Fire Ins. Co., 36 Pa. Super. Ct. 517), but in such case contract and authority of agent must be satisfactorily proved (Id.). Mere statement by plaintiff that he knew person in question to be defendant's agent held insufficient to establish agency. Id. Liability of agents on oral contracts to insure, see ante, § 4C.

**NOTE. Oral contract; statute of frauds:** Appellee owned property known as the "Wilson property," on which she had $1,000 insurance in the appellant company, good from September 20th, 1904, to September 20th, 1907. In October, 1904, she traded this property for the "Gant property," and sought to have the policy on the former transferred to cover the latter. The agent refused to do this, but agreed to issue a policy on the Gant property for the unearned portion of the premium on the Wilson residence. In 1905 the Gant house was destroyed by fire. It then appeared that the agent had transferred the Wilson policy to one Tapscott, to whom the property had been traded. The evidence of Tapscott and appellee's two sons showed conclusively that this had not been contemplated by the parties. Held there was an oral contract here and appellee is entitled to recover. American Cent. Ins. Co. v. Leake, 31 Ky. L. R. 1016, 104 SW 373.

Oral contracts of insurance are very infrequent, and the case is of interest as showing how they may possibly arise. Although the rule is otherwise at the present time, the validity of the oral contract has been questioned in early decisions (Lindauer v. Delaware Mut. Ins. Co., 13 Ark. 461; Spitzer v. St. Marks Ins. Co., 13 N. Y. Super. Ct. 6), and even declared against (Cockerill v. Cincinnati Mut. Ins. Co., 16 Ohio, 148; Bell v. Western Marine & Fire Ins. Co., 5 Rob. [La.] 423, 39 Am. Dec. 542; Platho v. Ins. Co., 38 Mo. 248). But it is now well settled that at the common law the contract was not required to be in writing. Sanborn v. Firemen's Ins. Co., 16 Gray [Mass.] 448, 77 Am. Dec. 419; Northwestern Iron Co. v. Aetna Ins. Co., 23 Wis. 160, 99 Am. Dec. 145; Walker v. Metropolitan Ins. Co., 56 Me. 371. "Except where prevented by the operation of the statute of frauds, or some other equivalent prohibition, a policy of insurance may be made or changed by parol." Westchester Fire Ins. Co. v. Earle, 33 Mich. 143, 153. The early doctrine has been overruled in some of the states which held it. In Ohio, Amazon Ins. Co. v. Wall, 31 Ohio St. 628, 27 Am. Rep. 533, states that the doctrine of Cockerill v. Cincinnati Mut. Ins. Co., supra, is virtually overruled by Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612; see also, Newark Machine Co. v. Kenton Ins. Co., 50 Ohio St. 549, 35 NE 1060, and 22 L. R. A. 768, which contains a note reviewing the various phases of the question down to 1893. In Missouri the early doctrine is modified by Henning v. U. S. Ins. Co., 47 Mo. 425, 4 Am. Rep. 332, and the latter fully supported by Lingenfelter v. Phoenix Ins. Co., 19 Mo. App. 252, and Duff v. F. Ass'n of Philadelphia, 56 Mo. App. 355. The United States supreme court in Relief Fire Ins. Co. v. Shaw, 94 U. S. 574, 24 Law. Ed. 291, held that, in the absence of statute or other positive regulation, a contract of insurance can be made by parol. For an extensive list of cases in point see Cooley's Briefs on Ins., Vol. 1, p. 397. That the contract in the principal case is not within the statute of frauds is clear. Its complete performance depended upon a contingency which might have happened within a year. Nester v. Diamond Match Co., 143 F 72; Warner v. Texas & P. R. Co., 164 U. S. 418, 41 Law. Ed. 496; Springfield F. & M. Ins. Co. v. De Jarnett, 111 Ala. 248, 19 S 995; Firemen's Fund Ins. Co. v. Norwood, 69 F 71.—From 6 Mich. L. R. 347.

94. When an application for fire insurance is made and it is agreed that a policy shall be issued embodying terms agreed to, contract is complete though credit may be extended for premium (Roark v. City Trust,

An agreement to furnish burial is valid.[95] A policy taken out on property used for an illegal purpose is not void where it does not tend to promote the unlawful business.[96] That a collateral agreement to give special benefits to insured is violative of statute does not necessarily invalidate the contract of insurance.[97] Policies made in a state where the company was not authorized to do business are held void in some jurisdictions.[98] The validity of provisions requiring suit on the policy to be brought only in certain courts is treated in a subsequent section.[99]

Statutes requiring certain provisions to be incorporated in policies must be at least substantially complied with.[1] Companies are sometimes forbidden to include more than one kind of insurance in a single policy.[2]

Safe Deposit & Surety Co., 130 Mo. App. 401, 110 SW 1), and if a policy is subsequently issued it relates back to the time specified for the insurance to begin and covers a loss within that time (Id.).

**95.** Contract on legal consideration to furnish obligee or his near relatives with burial reasonably worth a fixed sum is valid indemnity contract. State v. Willett [Ind.] 86 NE 68.

**96.** Policy on furniture in house of ill fame. Conithan v. Royal Ins. Co. [Miss.] 45 S 361. If druggist when he insured drug stock intended to conduct unlawful liquor business, insurance would be void as protecting him in illegal purposes (Kellogg v. German-American Ins. Co. [Mo. App.] 113 SW 663), but if he intended to conduct legitimate drug store business and use liquors only in connection with that business in usual and lawful manner, insurance was valid (Id.). Presence in drug store of 10 barrels of beer and 70 gallons of whiskey and fact that insured occasionally made unlawful sales and had thriving trade in liquors held not to establish as matter of law that plaintiff's business and practices were unlawful. Id.

**97.** That agreement for special benefits violated Revisal 1905, § 4775, held no defense to action on premium note, insured having retained policy. Security Life & Annuity Co. v. Costner [N. C.] 63 SE 304. That agent returned to insured part of first premium paid which belonged to himself as commission held not to invalidate policy under Ky. St. 1903, § 653, prohibiting life insurance companies from discriminating between persons insured in amount of premiums or rates charged persons of same class, equal expectation of life, etc. Interstate Life Assur. Co. v. Dalton [C. C. A.] 165 F 176. Right to recover premium or avoid liability therefor on ground of rebate or special favor, see post, § 8.

**98.** Policies made in state where company was not authorized to do business held void though statute only prohibited companies from doing insurance business without certificate from insurance commissioner and did not expressly make policies void. Swing v. Sligo Furnace Co., 133 Ill. App. 217.

**99.** See post, § 24.

**1.** Since provisions prescribed by St. 1907, p. 895, c. 576, § 75, are intended for protection of policy holders, if policy contains them in substance their form may be varied and additional provisions inserted beneficial to insured, provided statutory provisions are satisfied and left undiminished by that which is added. Aetna Life Ins. Co. v. Hardison, 199 Mass. 181, 85 NE 407. No departure from exact provisions of St. 1907, p. 895, c. 576, § 75, should be permitted unless it is plain that substitution is in every way as advantageous to insured and as desirable as prescribed provision. New York Life Ins. Co. v. Hardison, 199 Mass. 190, 85 NE 410. Provision for grace of 30 days in payment of premiums held not substantial compliance with statutory requirement that policies provide for grace of one month for payment of every premium after the first. Id. Clause requiring policy to state that insurance contract shall consist of policy and application and that no statement not contained in application attached to policy at the time shall be used in defense must be strictly construed. Id. Recital that policy constituted entire contract and was free of conditions as to residence, etc., held not compliance with requirement that it be stated that policy "and the application" constitute entire contract, and that all statements made by insured in absence of fraud shall be deemed representations and not warranties, and that no statement shall be used in defense unless contained in written application, copy of which shall be endorsed on or attached to policy. Id. Provision making policy incontestable from date does not comply with requirement that it be made incontestable after two years from date. Id. Policy authorizing reinstatement on payment of all arrears with interest not to exceed 6 per cent held substantial compliance with requirement that it provide for reinstatement on payment of all overdue premiums and other indebtedness to company with interest not exceeding 6 per cent. Id. Table with accompanying statement held to sufficiently show actual loan values of policies as required by statute. Id. Policy held subject to modification by adding that it "and the application attached hereto" contains entire contract, etc. Aetna Life Ins. Co. v. Hardison, 199 Mass. 181, 85 NE 407. Pub. Acts 1907, p. 253, No. 187, § 1, subd. 8, requiring life policies to secure to holders in event of "default in payment of premiums" after payment for three years a stipulated form of insurance equal to reserve, less 2½ per cent of amount insured and of dividend additions, and less any indebtedness to the company, and requiring stipulation that policy may be surrendered within one month from date of default for a specified cash value at least equal to sum otherwise available for insurance, does not apply to or prohibit an automatic premium loan provision providing that if requested by insured prior to expiration of one month after date for payment of premiums arrears will be

As in the making of other contracts, the minds of the parties must meet on all essential terms.[3] To render a policy binding, it is also essential that it be delivered[4] and accepted;[5] but delivery to applicant is complete in law when nothing remains to be done but the agent's ministerial and unconditional transfer of the policy to insured.[6] So, also, delivery to insured's agent is delivery to insured,[7] and depositing the policy in the mail completes such delivery.[8] It is sometimes expressly stipulated that the insurance shall not take effect until after acceptance and approval of the application by the company at its home office[9] and payment of

charged as indebtedness against policy with 6 per cent interest, provided entire indebtedness then outstanding shall be within limits secured by cash surrender value. Mutual Ben. Life Ins. Co. v. Commissioner of Ins., 151 Mich. 610, 15 Det. Leg. N. 57, 115 NW 707.

**2.** Under St. 1907, p. 858, c. 576, §§ 32, 34, life insurance companies authorized to issue both life and accident and health insurance are not entitled to join both classes of insurance in same policy. Aetna Life Ins. Co. v. Hardison, 199 Mass. 181, 85 NE 407. Policy held objectionable as combining both life insurance and accident and health insurance. Id. Life policy providing that in cases of bodily injury preventing insured from pursuing any gainful occupation company would pay for him premiums afterward accruing held violative of P. L. 1902, p. 407 (P. L. 1907, p. 128), forbidding inclusion of life insurance and insurance against bodily injury or death by accident in same policy. Travelers' Ins. Co. v. Watkins [N. J. Law.] 71 A 325. Such statute held also violated by provision in life policy that in case of injury causing permanant and total disability to perform work or follow any occupation for compensation or profit, or in case of accidental loss of sight, hands or feet, insured in lieu of continuing policy may receive in his lifetime face value in annual instalments, or life annuity as per table in policy. Id.

**3.** Evidence held to show minds of parties had not met as to insurers premium term, or division of risk. Cunningham v. Connecticut Fire Ins. Co. [Mass.] 86 NE 787. No contract where application was made with intent not to accept policy if applicant could obtain satisfactory insurance in another company and there was no meeting of minds as to premium, term, or amount of concurrent insurance, notwithstanding attempted acceptance and payment of premium at request of company after loss of which company was ignorant. Nordness v. Mutual Cash Guar. Fire Ins. Co. [S. D.] 114 NW 1092. Evidence held to show that oral insurance contract was made with company's agent on day of fire and before loss. Pelican Assur. Co. v. Schildknecht, 32 Ky. L. R. 1257, 108 SW 312.

**4.** Where application makes delivery of policy a condition precedent to completion of contract, contract is not binding until delivery of policy, especially where it is provided policy shall not take effect until delivery while applicant is in good health. Michigan Mut. Life Ins. Co. v. Thompson [Ind. App.] 86 NE 503.

**5.** Evidence sufficient to sustain finding that policy was accepted. Citizens' Ins. Co. v. Helbig, 138 Ill. App. 115. Certain transactions and correspondence held not to show acceptance of fire policy before loss so as to bind insurer. New v. Germania Fire Ins. Co. [Ind.] 85 NE 703. Mere receipt of policy for determination as to acceptance held not sufficient to complete contract, intent being controlling. Id. Receipt and retention of policy is prima facie proof of its delivery and acceptance. Citizens' Ins. Co. v. Helbig, 138 Ill. App. 115.

**6.** Whether policy placed in possession of agent for delivery to the insured is binding on company before actual delivery to insured depends on nature of agent's remaining duties. Where insured has done everything to entitle him to possession and there rests on agent the ministerial duty of transferring policy to insured, agent holds for insured and parties are bound. New York Life Ins. Co. v. Greenlee [Ind. App.] 84 NE 1101. Where insurer executed policy in conformity with application and payment of first premium before delivery was not stipulated for, contract was thereby completed, and when sent to agent for delivery, agent became trustee for insured, making delivery to him delivery to insured though agent did not part with possession and delivery to insured was by contract made essential to validity of policy. Id. Evidence held to support finding that policy was executed and sent to agent for delivery to insured. Id. Rule that agent's receipt of policy for unconditional delivery to applicant is in law delivery to applicant, though agent does not surrender possession and though contract requires delivery to applicant, held not applicable whers first premium had not been paid to company or its agent but to agent of applicant, and when applicant was fatally ill when agent received policy which provided it should not take effect until payment of first premium and delivery of policy when insured was in good health. Michigan Mut. Life Ins. Co. v. Thompson [Ind. App.] 86 NE 503.

**7.** Brokers with unlimited instructions to procure insurance held insured's agents. Travelers' Fire Ins. Co. v. Globe Soap Co., 85 Ark. 169, 107 SW 386.

**8.** Mailing of unconditional policy to insured's brokers held sufficient so as to authorize recovery, though policy was not received till after fire. Travelers' Fire Ins. Co. v. Globe Soap Co., 85 Ark. 169, 107 SW 386.

**9.** No contract where application was never received by company at home office and approved as required by its terms. Lowe v. St. Paul Fire & Marine Ins. Co. [Neb.] 114 NW 586. Evidence held not to show that application was received and acted on by insurer before injury. Claypool v. Continental Casualty Co. [Ky.] 112 SW 835. Mere retention of application and premium note held insufficient to show acceptance and approval. Van Arsdale v. Young [Okl.]

the first premium,[10] and unless insured is alive and in sound health when the policy is delivered.[11] Payment to the company's agent is payment to the company,[12] and prepayment may be waived by the company or its agent.[13] Payment of the first

95 P 778. Where application showed on its face that issuance of policy depended on approval of application by company, agents' mere acceptance of application and small fee thereon held insufficient to bind company to issue policy or subject it to liability for loss pending its action on application. Ripka v. Mutual Fire Ins. Co., 36 Pa. Super. Ct. 517. Failure of agent to forward application or company's failure to act thereon cannot work estoppel to assert insurance was not effect where loss occurs before either of such acts can be done. Id.

**10.** No contract where premium was paid when applicant was fatally ill and policy was not delivered in his lifetime, policy requiring payment of premium and delivery while applicant was in same state of health as described in application. Powell v. Prudential Ins. Co. [Ala.] 45 S 208. No contract where agent took 30-day note instead of receiving cash for first premium, where it was expressly stipulated first premium must be paid before policy should be binding and that agent had no authority to extend credit, waive provisions, etc. Batson v. Fidelity Mut. Life Ins. Co. [Ala.] 46 S 578. Evidence held to show first premium had not been paid. Industrial Mut. Indemnity Co. v. Perkins [Ark.] 112 SW 176. Evidence as to company's demand for premium and payment of premium by plaintiff to mortgagee's agent held insufficient to show that contract had ever been consummated. Shoemaker v. Commercial Union Assur. Co. [Neb.] 114 NW 1105. Where insured has running account with company's agency and pays premiums as called upon, policy is not invalidated for failure to pay premium on receipt thereof. Pelican Assur. Co. v. Schildknecht, 32 Ky. L. R. 1257, 108 SW 312.

**11.** "Sound health" in condition of insurer's liability does not mean perfect health but absence of disease having direct tendency to shorten life. Murphy v. Metropolitan Life Ins. Co. [Minn.] 118 NW 355. Where policy provided that no obligation should be assumed by insurer unless on its date assured was alive and in sound health, promise of insurer was conditional, and fact of sound health determined insurer's liability, not insured's apparent health, or any one's opinion or belief that he was in sound health. Id. Evidence held practically conclusive insured was not in sound health. Id. Under Code, § 1812, estopping companies by medical examiner's report recommending risk from defending on ground that insured was not in condition of health required by policy when it was delivered, where risk was recommended by medical examiner, insured could not defend by asserting condition in policy that it should not be operative unless delivered to insured while in good health and showing that insured was never in good health after application was made. Roe v. National Life Ins. Ass'n, 137 Iowa, 696, 115 NW 500.

**12.** Where after rejection of application in one company applicant's husband told agent to "go ahead and get her in any good company," and agent obtained a policy through an agent of another company, he was applicant's and not insurer's agent, so that payment of premium to him was not payment to insurer. Michigan Mut. Life Ins. Co. v. Thompson [Ind. App.] 86 NE 503. If insurer received the money, or had knowledge of payment and acted on application, it made the person receiving the premium its agent by ratification. Id.

**13.** On power of agents to waive notwithstanding restrictions in policy, see post, § 16C. Accepting part of premium and extending time for balance waives payment of whole premium when policy is delivered. New York Life Ins. Co. v. Greenlee [Ind. App.] 84 NE 1101. Evidence held to show waiver. Id. Though insurers were not bound to deliver policy until payment of premium, they having done so, nonpayment did not preclude recovery. McLean v. Tobin, 58 Misc. 528, 109 NYS 926. Where company gave agent authority to accept a note for premium, he being responsible for such credits, acceptance of agent as security was sufficient to render company liable on policy, though notes were not paid at maturity or before death of insured. Clarke v. Home Fund Life Ins. Co., 79 S. C. 494, 61 SE 80. Insurer may accept liability of third person in payment of first premium, and where it debits agent and looks to him ultimately for payment, premium is paid as between insurer and insured. Life Ins. Co. v. Hairston [Va.] 62 SE 1057. Evidence held to show agent was responsible for payment of note. Id. Held proper to refuse to charge policy never took effect unless premium was paid, there being evidence of waiver of cash payment and of extension of credit. Cauthen v. Hartford Life Ins. Co. [S. C.] 61 SE 428. Delivery of policy reciting agreement by company to pay indemnity in consideration of first annual premium to be actually paid before delivery and stipulating that contract shall not take effect until delivery of policy and payment of first premium is acknowledgment of payment of premium, and delivered policy is competent evidence of that fact. Mutual Reserve Life Ins. Co. v. Heidel [C. C. A.] 161 F 535. Acknowledgment of payment of first premium estops insurer from avoiding policy for nonpayment of such premium when due (Id.), but does not estop it from proving written agreement for extension of time for payment of part or all of such premium and for forfeiture of insurance if deferred payments were not made when due (Id.). Extension of time for payment of first premium without written agreement that failure to make deferred payments when due shall work forfeiture waives all forfeiture for nonpayment of every part of such premium. Id. Where by its terms policy was not to take effect until payment of first premium during lifetime of insured, and also prohibited waivers by agents, death of insured before payment of premium precluded recovery, though agent stated to insured's father that father might pay premium later. Brown v. Mutual Ben. Life Ins. Co. [Ga.] 61 SE 1123.

premium is not a condition precedent to the taking effect of the policy unless it is made so by agreement.[14]

*Construction.* See 10 C. L. 846—The usual rules for the interpretation of contracts apply to a large extent.[15] The natural tendency is, however, to favor the insured or the beneficiary,[16] especially in the construction of conditions, warranties or representations,[17] and in cases of doubt or ambiguity[18] rendering provisions susceptible of more than one construction.[19] When there can be but one reasonable construction, that of course must govern.[20] In case of variance between the application and the policy, the latter controls as to description of the property.[21] When provisions are obscure, the acts of the parties pursuant thereto and conditions existing when the policy was written may be resorted to.[22] Custom cannot be shown to contradict the written agreement.[23]

**14.** Where neither application nor policy required payment of first premium before delivery of policy, payment was not condition precedent to contract. New York Life Ins. Co. v. Greenlee [Ind. App.] 84 NE 1101.

**15.** Insurance contract should be reasonably construed. Jacobson v. Liverpool, London & Globe Ins. Co., 135 Ill. App. 20. Effect must be given to all language if possible. Hastings v. Bankers' Acc. Ins. Co. [Iowa] 119 NW 79. Court will endeavor to arrive at intent and purpose of parties. American Ins. Co. v. Egyptian Lodge No. 802, I. O. O. F., 128 Ill. App. 161. Policy of insurance should be construed as other contracts to reach parties' intention, except forfeiture provisions and ambiguous ones should be construed most favorably to insured. French v. Fidelity & Casualty Co. [Wis.] 115 NW 869. Policy should be construed according to plain and ordinary meaning of language, and intention gathered therefrom controls. Palatine Ins. Co. v. O'Brien, 197 Md. 341, 68 A 484. Presumed parties intended to use words in ordinary sense. French v. Fidelity Casualty Co. [Wis.] 115 NW 869. Contracts of insurance, like other contracts, are to be construed according to sense and meaning of terms which parties have used, and if these are clear and unambiguous they are to be taken and understood in their plain, ordinary and common sense. Preston v. Aetna Ins. Co. [N. Y.] 85 NE 1006. Construed, like other contracts, according to plain and popular sense of terms. Standard Life & Acc. Ins. Co. v. McNulty [C. C. A.] 157 F 224. Natural and obvious meaning preferred to curious and hidden sense evolved by trained and acute intellect and exigencies of hard case. Id. Examining physician held without authority to agree to use of words of warranty in special sense. Fish v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 69 A 176. While accident policy should be interpreted so as to extend protection over as wide field of injury as is consistent with its language, natural meaning must not be violated. Banta v. Continental Casualty Co. [Mo. App.] 113 SW 1140.

**16.** Provisions of policy will be strictly construed against insurer for whose benefit they were reserved. Garvey v. Phoenix Preferred Acc. Ins. Co., 123 App. Div. 106, 108 NYS 186. Where statements as to insured's physical condition are prepared by insurer for its own protection, they must be construed in most favorable light permissible for benefit of insured or beneficiary. French v. Fidelity & Casualty Co. [Wis.] 115 NW 869. Object is indemnity, and if fairly warranted, such construction should be adopted as will best carry out this object. Cutting v. Atlas Mut. Ins. Co., 199 Mass. 380, 85 NE 174. Contract of insurance not construed liberally and favorably to insurer as contract of guarantor or surety is construed favorably to obligor therein. United States Fidelity & Guar. Co. v. First Nat. Bank, 137 Ill. App. 382. Words "legal representatives" in their strict technical sense mean executors or administrators, but these words appearing in life insurance policy may be shown, by the context and surrounding circumstances, to mean "heirs or next of kin." Hague v. Estate of Hague, 11 Ohio C. C. (N. S.) 406.

**17.** See post, § 9.

**18.** Dresser v. Hartford Life Ins. Co., 80 Conn. 681, 70 A 39; Royal Union Life Ins. Co. v. McLendon [Ga. App.] 62 SE 101; Minnesota Mut. Life Ins. Co. v. Link, 131 Ill. App. 89; Merchants' Underwriters v. Parkhurst-Davis Mercantile Co., 140 Ill. App. 504; Kirkpatrick v. Aetna Life Ins. Co. [Iowa] 117 NW 1111; Banta v. Continental Casualty Co. [Mo. App.] 113 SW 1140; Houlihan v. Preferred Acc. Ins. Co., 111 NYS 1048; Preston v. Aetna Ins. Co. [N. Y.] 85 NE 1006.

**19.** Construction most favorable to insured will be adopted. National Mut. Fire Ins. Co. v. Duncan [Colo.] 98 P 634; Arnold v. Empire Mut. Annuity & Life Ins. Co., 3 Ga. App. 685, 60 SE 470; Insurance Co. v. De Loach & Co., 3 Ga. App. 807, 61 SE 406; Hartford Fire Ins. Co. v. Tewes, 132 Ill. App. 321; Continental Casualty Co. v. Colvin [Kan.] 95 P 565; Sullivan v. Mercantile Town Mut. Ins. Co. [Okl.] 94 P 676.

**20.** Hatch v. U. S. Casualty Co., 197 Mass. 101, 83 NE 398; Wilkie v. New York Life Ins. Co. 146 N. C. 513, 60 SE 427. Plain provisions will not be construed against company so as to deprive it of protection therein stipulated. Furry's Adm'r v. General Acc. Ins. Co., 80 Vt. 526, 68 A 655.

**21.** Though by-laws made application part of contract. Tate v. Jasper County Farmers' Mut. Ins. Co. [Mo. App.] 113 SW 659.

**22.** What employes were within risk covered by employer's liability policy. New Amsterdam Casualty Co. v. Mesker, 128 Mo. App. 183, 106 SW 561.

**23.** Not permissible to show custom among insurance companies to obligate reinsuring company from date of issuance of a binder.

The contract usually consists of the policy proper and the application,[24] existing statutes[25] and other documents or regulations made part of the policy by reference[26] or attached thereto.[27] In many states the application or other agreement or representation cannot be considered as part of the contract or used in defense unless attached to or endorsed on the policy[28] or expressed therein.[29] In the District of Columbia no defense is allowed in an action on a policy of life insurance unless the insurer delivered with the policy a copy of the application.[30]

*Conflict of laws.*[See 10 C. L. 848]—This subject is fully treated separately[31] except as to questions controlled by special insurance statutes[32] and attempts to evade the insurance laws of the state by stipulations.[33]

§ 8. *Premiums and premium notes, dues and assessments, and payment of the same.*[See 10 C. L. 848]—Premiums for employer's liability insurance are commonly based on the wages paid to employes.[34]

Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co. [Minn.] 117 NW 825.

**24.** Where policy is written based on application constituting only information insurer has, application becomes part of contract and insurer is bound by its provisions and conditions to same extent as insured is bound by provisions and conditions of policy. Allen v. Phoenix Ins. Co., 14 Idaho, 728, 95 P 829.

**25.** Rev. St. 1899, § 7896 (Ann. St. 1906, p. 3750), declaring when suicide shall and when it shall not be a defense, is part of Missouri contract of insurance. Tennent v. Union Cent. Life Ins. Co. [Mo. App.] 112 SW 754.

**26.** Terms incorporated by reference are part of policy. Gill v. Manhattan Life Ins. Co. [Ariz.] 95 P 89. No defense to action on premium note that articles of incorporation, by-laws and defendant's application were not attached to nor incorporated in policy, though articles of incorporation provided they were parts of contract of insurance, since different writings taken together may constitute single contract. Dempster v. Opocensky [Neb.] 116 NW 524.

**27.** Where insurer transferred its business and transferee sent notices thereof to policy holders with direction to attach them as riders to policies, riders so attached and old policies constituted policies of insured. Mutual Reserve Life Ins. Co. v. Ross [Ind.] 86 NE 606.

**28.** Note given an obtaining loan on policy and containing forfeiture clause could be relied on by insured, same being a subsequent modification of contract and not within Code, § 1741, requiring companies "on issue or renewal" of policies to attach or indorse representations, etc. Wilson v. Royal Union Mut. Life Ins. Co., 137 Iowa, 184, 114 NW 1051. Failure to indorse or attach application or representations does not preclude reliance on conditions or warranties in policy itself. Kirkpatrick v. London Guar. & Acc. Co. [Iowa] 115 NW 1107. Provision of Code, § 1741, authorizing plaintiff to prove application, though not attached to policy, was to enable him to establish estoppel or waiver against company, and not to preclude latter from relying on stipulations and conditions in policy. Id. First page of a sheet containing "Proposal for Insurance" and "Memorandum for the Solicitor to Fill" held not part of application shown on second page, within Rev. Laws, c. 118, § 73, requiring as condition to introduction of application in evidence that copy be annexed to policy. Bonville v. John Hancock Mut. Life Ins. Co., 200 Mass. 197, 85 NE 1057. Statements to medical examiner which with application proper were made part of contract held part of application, within statute requiring application to be attached to policy, though such statements were on separate sheet of paper. Paulhamus v. Security Life & Annuity Co., 163 F 554.

**29.** Under Code 1896, § 2602, prohibiting companies from making any contract of insurance or any agreement as to policy contract other than is plainly expressed in policy conditions in application cannot be considered part of contract unless expressed in policy. Manhattan Life Ins. Co. v. Erneville [Ala.] 47 S 72.

**30.** Under D. C. Code, § 657 (31 Stat. 1294, c. 854), copy of entire application must be delivered. Metropolitan Life Ins. Co. v. Hawkins, 31 App. D. C. 493. Semble, congress had power to enact the statute. Id. Foreign corporation not in position to question validity of statute. Id.

**31.** See Conflict of Laws, 11 C. L. 665.

**32.** Under Laws 1902, p. 66, c. 59, § 14, providing that all contracts of insurance on property, lives, or interests in Mississippi shall be deemed to be made therein, policy of life insurance made in another state must be construed according to Mississippi law, despite provisions in policy to contrary. Fidelity Mut. Life Ins. Co. v. Miazza [Miss.] 46 S 817.

**33.** See post, § 9, on attempt to evade statute of forum as to materiality of representations by stipulation that laws of another state should control.

**34.** Under policy basing premiums on compensation to employes, and, under heading "Trade or Kind of Business," containing the words "galvanized iron cornice and wrought iron work, including drivers," company was entitled to premiums computed on wages of workers on skylights, and of tinners, carpenters, shippers, machinists, engineers and night watchmen. New Amsterdam Casualty Co. v. Mesker, 128 Mo. App. 183, 106 SW 561. Wages for tinners' work done outside held within schedule in other policies indemnifying against loss for injuries to employes on outside work and containing, under head Kind of Business, "galvanized iron and sheet

In the absence of waiver or estoppel,[35] policies are usually rendered void by failure to pay premiums or dues at maturity[36] or within a period of extension[37] or of grace.[38] Failure to pay premium notes will not, however, avoid the policy in the absence of stipulation to that effect,[39] and, unless expressly waived,[40] notice of maturity of premiums is often essential to forfeiture.[41] A statute against for-

iron workers, wrought iron work, erecting." Id. Where employer agreed to furnish correct statements as to wages as basis for adjustment of premiums, fact that company was unable to prove with certainty amount of such wages did not deprive it of right to recover at all on claim for additional premiums on ground of understatements as to wages, but court was authorized to accept approximate estimates. Gilbane v. Fidelity & Casualty Co. [C. C. A.] 163 F 673.

35. See post, § 16C. As to payment of first premium, see ante, § 7, subd. Essentials and Validity.

36. Nonpayment avoids where policy so provides. Security Mut. Life Ins. Co. v. Riley [Ala.] 47 S 735. Where policy and premium note made contract void so long as note remained overdue, protection was suspended during period of nonpayment, relieving insurer from liability for loss occurring during continuance of default. American Ins. Co. v. Hornbarger, 85 Ark. 337, 108 SW 213. Nonpayment of premiums after the first may or may not work forfeiture, according to circumstances. Arnold v. Empire Mut. Life Ins. Co., 3 Ga. App. 685, 60 SE 470. Letter of company's district manager and adjuster stating that premiums were paid under certain conditions held prima facie evidence of payment, so as to preclude directed verdict for defendant. Dolsen v. Phoenix Preferred Acc. Ins. Co., 151 Mich. 228, 14 Det. Leg. N. 894, 115 NW 50. Policy avoided for failure to pay premium instalment. Sewell v. Continental Casualty Co. [Miss.] 46 S 714. Provision that policy should be null and void if insured failed to pay loss dues within time specified in notice held for benefit of company, and not to render policy ipso facto void on nonpayment, so as to enable insured to defend suit for assessment on him as policy holder of mutual company. International Sav. & Trust Co. v. Tillotson, 34 Pa. Super. Ct. 521. Evidence sufficient to sustain finding that check for dues was sent by insured and received by association prior to insured's injury. Corbett v. Physicians' Casualty Ass'n, 135 Wis. 505, 115 NW 365. On payment of the initial premium on a life policy, there is a contract of insurance for the whole life of insured, and subsequent termination of the contract for nonpayment of premiums is a forfeiture, and forfeitures are not favored. State Life Ins. Co. v. Murray [C. C. A.] 159 F 408. For questions relating to payment of first premium, see ante, § 7, subd. Essentials and Validity.

37. Evidence held to authorize finding that insurer extended time for payment of premium, and that insured died prior to expiration of such time. Cauthen v. Hartford Life Ins. Co. [S. C.] 61 SE 428. For authority of agents to extend time for payment of premiums, see post, § 16C.

38. Where premium was payable October 1st, which was Sunday, and 30 days of grace were allowed, death November 1st, premium not having been paid, held not within policy protection, 30 days beginning to run midnight October 1st and terminating midnight October 31st, though Sunday made premium payable on Monday, it not being permissible to count 30 days after October 2nd. Aetna Life Ins. Co. v. Wimberly [Tex.] 112 SW 1038, rvg. [Tex. Civ. App.] 108 SW 778. Where clause allowing 30 days' grace for payment of premium did not require payment on or before any particular hour, payment could be made any time before midnight of last day of grace, though by another clause, not expressly providing for forfeiture, annual premium was payable at or before 5 o'clock, October 1st. Aetna Life Ins. Co. v. Wimberly [Tex. Civ. App.] 108 SW 778, rvd. on other grounds by opinion in [Tex.] 112 SW 1038. See above, this note. Where 30 days' grace were allowed for paying premiums and company was allowed to deduct any indebtedness to it or unpaid premiums for current year, recovery could be had for death during 30-day period, though premium was not paid before expiration of such period or thereafter. Id.

39. No such stipulation in notes or in policy. Arkansas Ins. Co. v. Cox [Okl.] 98 P 552. Note accepted in payment of premium has no relation to contract of insurance, except as stipulated in policy. Arnold v. Empire Mut. Annuity Life Ins. Co., 3 Ga. App. 685, 60 SE 470. Failure to pay note for premium after the first will not avoid policy not stipulating for forfeiture in such case, though note contains such stipulation, and though policy stipulates for forfeiture for nonpayment of "premiums." Id. Vested right of beneficiary could not be affected by forfeiture stipulation in note, though policy provided method of changing beneficiary. Id. Provision for interest on note may be considered. Id. When company accepts a note, policy will be continued in force for same length of time as if amount represented by note had been paid in cash, unless insurance contract expressly stipulates to the contrary (Id.), or unless, in event of nonpayment of note at maturity, insurer asks surrender of policy and offers to surrender note (Id.).

40. Where correspondence between insurer and insured showed that latter understood he was giving up his insurance, and for more than two months insured ignored letter from agent informing him how insurance could be kept in force, he waived right to further notice from company, even though law required notice before forfeiture. Weston v. State Mut. Life Assur. Soc., 234 Ill. 492, 84 NE 1073. Provision that notice of premiums "due or to become due is given and accepted by delivery and acceptance of this policy" held waiver of notice of time for payment of premiums and of notice of forfeiture for nonpayment. Allison's Ex'x v. Fidelity Mut. Life Ins. Co., 32 Ky. L. R. 1025, 107 SW 730.

41. Members can be put in default only by notice provided by charter of company, and

feiture without notice does not affect the doctrine of abandonment by failure to keep up the insurance.[42] The burden is on one who claims credit for overpayment of previous premiums.[43] The right to paid up or extended insurance on failure to pay premiums,[44] jury questions,[45] and presumptions relative to payment or extension of credit,[46] are postponed for subsequent treatment.

Premiums or dues usually become the absolute property of insurer when paid,[47] and cannot be recovered back in the absence of valid agreement,[48] want of consideration,[49] or circumstances justifying rescission.[50] On rescission of a life policy, premiums paid by insured go to him and not to his beneficiary.[51] A severable agreement for special benefits to insured, though void under the statute, does not relieve him of liability on his premium note[52] or entitle him to recover premiums paid.[53]

A premium note to an agent who has not paid his privilege tax is void under a statute declaring void all contracts with persons who have failed to pay the tax.[54]

knowledge otherwise acquired is insufficient. Miner v. Farmers' Mut. Fire Ins. Co. [Mich.] 15 Det. Leg. N. 571, 117 NW 211. But for great length of time during which premiums were not paid, petition held to state cause of action, though plaintiff had failed to pay premiums, it being stated contract provided it should be governed by New York laws which rsquire company to give written notice of premiums, which notice had not been given. McGeehan v. Mutual Life Ins. Co. [Mo. App.] 111 SW 604. Where policy required payment without notice, of a mortuary premium and dues, amount to be fixed by notice if one was received, otherwise to be same as last premium paid, absence of notice was no excuse for failure to pay any premium on date specified. Kray v. Mutual Reserve Life Ins. Co. [Tex. Civ. App.] 111 SW 421. For questions for jury, see post, § 24C.

**42.** Failure to pay for 8 years held abandonment, despite want of notice. McGeehan v. Mut. Life Ins. Co. [Mo. App.] 111 SW 604.

**43.** Could not be presumed, in absence of evidence, that money paid on issuance of policy was for premiums in advance and did not include policy fee, where policy was issued in consideration of premium and policy fee. Greenwaidt v. U. S. Health & Acc. Ins. Co., 52 Misc. 353, 102 NYS 157.

**44.** See post, § 13.

**45, 46.** See post § 24C.

**47.** Where company maintained a safety fund department in which certificates were issued obligating members to pay to company a fixed sum as expense dues while certificates remained in force, expense dues paid belonged to company, and certificate holders had no interest therein, though company ceased to issue new certificates. Dresser v. Hartford Life Ins. Co., 80 Conn. 681, 70 A 39.

**48.** Applicant held entitled to recover premium where it was paid on understanding with agent that it be returned if applicant should decline policy and he did decline it. Mutual Reserve Life Ins. Co. v. Seidel [Tex. Civ. App.] 113 SW 945. In absence of fraud, right to recover premiums cannot be predicated on agreement which is ultra vires, plaintiff having had valid insurance in meantime. No recovery as for money had and received where corporation had no power to agree to return sick benefit dues after 10 years, less sick benefits paid. Southern Mut. Aid Ass'n v. Watson [Ala.] 45 S 649.

**49.** Where insured gave agent I. O. U. for first premium and agent paid company, insured's wife was not entitled to recover amount of such premium on theory of double payment where shortly before insured's death she merely took up the I. O. U. by paying agent. Jackson v. Security Mut. Life Ins. Co., 233 Ill. 161, 84 NE 198. Where agent's agreement, by which he took premium note from an applicant and promised to return it should insured decline policy, was unauthorized and repudiated by company, applicant could recover from company amount of such note where agent negotiated it contrary to his agreement and company receive proceeds. Mutual Reserve Life Ins. Co. v. Seidel [Tex. Civ. App.] 113 SW 945.

**50.** See post, § 16.

**51.** Latter having no interest therein. Slocum v. Northwestern Nat. Life Ins. Co. [Wis.] 115 NW 796.

**52.** Violation of Revisal 1905, § 4775, prohibiting special benefits or rebates, held no defense, insured having retained policy for the year and enjoyed its protection. Security Life & Indemnity Co. v. Costner [N. C.] 63 SE 304. That note was payable to agent and by him transferred to company held immaterial, company being bound by agent's acts. Id.

**53.** Insured who had paid first annual premium on life policy could not recover same on ground policy was invalid because of separate agreement whereby for services rendered he was to receive a deduction from second premium, since violation of Ky. St. 1903, § 656, prohibiting discriminations between insurance, did not render policy void, and since policy was enforcible during first year, and separate contract could not be admitted in evidence under § 678, requiring certain matters to be made part of policy in order to be admitted in evidence in action on policy. Commonwealth Life Ins. Co. v. Bowling [Ky.] 114 SW 327. For rebate or special benefits as affecting validity of policy, see ante, § 7, subd. Essentials and Validity.

**54.** Acts 1898, pp. 18-30, c. 5. White v. Post [Miss.] 45 S 366. Note executed after April 21, 1906, held not void, statute going into effect on that date merely prescribing

Premium notes, like other notes, are also vitiated as between the parties by fraud[55] or failure of consideration,[56] but a slight difference in the amount of a premium as stated in the note and as stated in the policy will not prevent recovery on the note where insured retained the policy.[57] An agent may sue in his own name on a note payable to him.[58]

*Mutual companies.* See 10 C. L. 850—The right to levy assessments[59] with or without notice,[60] or to increase the same;[61] the method of proceeding[62]; and questions relating to the maximum amount of assessments,[63] the time of payment,[64] and the right to forfeit the insurance for nonpayment,—[65] are usually dependent upon

fine and imprisonment against persons or corporations exercising privilege without paying tax. Young v. State Life Ins. Co. [Miss.] 45 S 706. Whether agent resided where he paid municipal privilege tax held for jury. Simpson v. Goodman [Miss.] 45 S 615.

55. Fraud in obtaining premium note held not sustained by mere proof that insurance contract was not as advantageous as that agreed upon. State Life Ins. Co. v. Bolton [Neb.] 118 NW 122.

56. Burden of showing want of consideration held sustained by defendant, in suit on premium note, by showing that he received no policy nor any notice that application had been approved, it being then incumbent on plaintiff to show that application had been accepted and approved at home office under agreed condition precedent to liability on part of company. Van Arsdale v. Young [Okl.] 95 P 778.

57. Verdict for amount of premium note held proper where insured retained policy until maturity of note, though policy recited slightly larger sum as annual premium than that given in note. Caldwell v. Campbell [Ga. App.] 61 SE 290.

58. Where premium note was payable to agent, and on maker's refusal to accept policy agent settled with company, he could sue on note in his own name as real party in interest. Graham v. Remmel [Ark.] 112 SW 141.

59. In action by receiver of foreign mutual fire insurance company to recover assessment on policy holder under decree of foreign court, evidence held to show that company had never reorganized under amendatory statute imposing contingent liability on policy holders, so as to authorize assessment. Swing v. Red River Lumber Co. [Minn.] 117 NW 442. Evidence held to show that assessment levied by assessment company was illegal because wholly unnecessary, so that failure to pay same did not work forfeiture of insurance. King v. Hartford Life & Annuity Ins. Co. [Mo. App.] 114 SW 63. Insured held not liable for assessments. Swing v. Crane, 11 Ohio C. C. (N. S.) 297. Company held authorized by by-laws made part of contract to levy extra assessments. Kray v. Mutual Reserve Life Ins. Co. [Tex. Civ. App.] 111 SW 421.

60. Where by-law of mutual fire insurance company provided that when company was without sufficient funds to pay losses directors should make assessments on members for amount needed, directors could levy assessments without notice. Hammond v. Knox, 109 NYS 367. Under Rev. Laws Mass. c. 118, §§ 47, 48 et seq., providing that mutual fire insurance companies shall make assessments on members to meet losses and expenses, and authorizing court to order assessment in specified cases, notice by mail to policy holders is sufficient. Id. One not appearing held not entitled to notice beyond notice of original petition and of hearing. Id. Could not insist on personal service of process. Id.

61. Certificate providing for payment at stated times of mortuary premiums for such amount as executive committee might deem requisite, at such rate according to age of each member as might be established by board of directors, and that rate of such premiums might be changed to correspond with actual mortality experience of association, held to authorize association to increase premiums according to exigencies of its business. Schmierer v. Mutual Reserve Fund Life Ass'n, 153 Cal. 208, 94 P 887. Insurance certificate on "safety fund" plan construed, and held not to authorize company to increase rate of mortality calls beyond amount specified in certificate. Dresser v. Hartford Life Ins. Co., 80 Conn. 681, 70 A 39. Readjustment of rates to conform to estimated cost of insurance according to experience of association, equalized among members by considering attained age of each member, held authorized by constitution, by-laws and contracts of assessment association. Trisler v. Mutual Reserve Fund Life Ass'n, 128 Mo. App. 497, 106 SW 1082. Readjustment requiring each member of a certain class to pay actual cost of insurance according to association's experience held not discriminatory because two other classes paid flat premiums, where these covered cost of insurance based on experience of association. Id.

62. Where policy in mutual fire insurance company obligated holder to pay assesements made in pursuance of law of state of company's origin, statutes of that state regulating assessments were part of contract. Hammond v. Knox, 109 NYS 367.

63. Where mutual fire policy obligated insured to pay assessments not exceeding cash premiums, amount of assessments was determinable by amount of cash premium fixed by policy, and not by a sum paid by insured in compromise settlement of premium up to date of insolvency judgment. Hammond v. Knox, 109 NYS 367.

64. Requirement that assessments be paid within 30 days "after the issuing of said notice" of assessment means within 30 days after giving or delivery of such notice. Miner v. Farmers' Mut. Fire Ins. Co. [Mich.] 15 Det. Leg. N. 571, 117 NW 211.

65. One from whom an excessive assesement is demanded need not tender a sum equivalent to a legal assessment in order to

the terms of the statute or the contract. Levies by order of court, or by directors of a company under the contract, are prima facie valid in proceedings in other states.[86]

When an assessment is made sufficient to pay a loss in full, paying members are not subject to further assessment for that loss to make good a deficiency arising from failure of other members to pay.[87] Liens to secure assessments are sometimes provided by statute.[88] Limitations will bar recovery.[89]

§ 9. *Warranties, conditions and representations. In general.* See 10 C. L. 850 There is a well recognized distinction at common law between a warranty and a representation in that a warranty is a statement by the insured which forms a part of the contract of insurance,[70] and which must be literally true to permit a recovery on the policy, regardless of materiality to the risk,[71] while a representation is a mere inducement to the contract, must relate to a material matter, and need be

prevent a forfeiture for failure to pay the sum demanded. King v. Hartford Life & Annuity Ins. Co. [Mo. App.] 114 SW 63. Belief that extra assessment was unauthorized held not to excuse failure to pay subsequent regular bimonthly assessment. Kray v. Mutual Reserve Life Ins. Co. [Tex. Civ. App.] 111 SW 421.

66. Where court of sister state directs levy of assessments on members of mutual fire insurance company of such state in manner provided by statute made part of contract of insurance, determination of court is at least prima facie evidence of necessity and validity of assessments. Hammond v. Knox, 109 NYS 367. Common-law proof not essential. Id. Assessment by directors or court on insolvency of company held prima facie evidence of necessity thereof and that amount was proper. Stone v. Penn Yan, etc., R. Co., 109 NYS 374. Order for assessment on policy holders made by court in one state held **not conclusive** on courts of another state in proceeding to enforce same against policy holder not party to assessment proceeding. Swing v. Sligo Furnace Co., 133 Ill. App. 217.

67. Member sustaining loss held entitled only to be subrogated to company's lien for assessment and, under by-laws, to any surplus from annual assessment for expenses. McTindall v. Piedmont Mut. Ins. Co. [S. C.] 62 SE 213.

68. Under Ky. St. 1903, § 712, giving co-operative insurance associations a lien on property insured to secure assessments, and providing that subsequent purchasers or junior lienholders shall be entitled to benefit of the insurance, lien operates against a subsequent purchaser, though he had no notice thereof at time of purchase. Farmers' Home Ins. Co. v. Carey [Ky.] 113 SW 841. Lien is only for assessments and calls, not for membership fees. Id. To subject insured property to payment of pro rata of insured of indebtedness of a co-operative insurance association, petition must allege that such pro rata is based on calls or assessments, and must set up the facts showing same to have been legally made. Id.

69. Six years' statute of limitations runs against assessment levied on policy holder, and running of statute is not barred by approval by supreme court of a second assessment against same party when it covers same liability as first assessment with probable costs of collection added. Swing v. Crane, 11 Ohio C. C. (N. S.) 297.

70. Unless a statement or answer is in the policy itself or by the terms of the policy clearly made a part thereof, it is not a warranty. Where policy by express terms makes application part of contract, or makes it the basis thereof or is declared to be issued on faith of application, statements in application are part of policy and hence warranties (Spence v. Central Acc. Ins. Co., 236 Ill. 444, 86 NE 104), but mere reference to application is insufficient to make statements therein warranties (Id.). Recital that policy was issued in consideration of warranties and agreements in application and specified sum held not to make application part of policy. Id. Statement in application as to age of insured held a mere representation, though application warranted statements therein and recited that it should be basis of contract. Id. Application cannot be considered on question whether it is part of policy, this question being determinable only from language of policy itself. Id. A schedule of warranties indorsed on the policy becomes effective as a part thereof though blanks for exceptions are not filled. Error to exclude evidence to show falsity of certain warranties as to other insurance, accidents, diseases, etc., though phrases "except as follows," "other than as above stated," etc., were not followed or preceded by any exceptions. Stewart v. General Acc. Ins. Co., 35 Pa. Super. Ct. 120. Where application in which insured stated he had never had any serious illness or disease other than those incident to childhood was signed by him and incorporated into contract warranting all statements therein to be true, insured thereby warranted that he had never had any serious illness or disease except those incident to childhood. Keiper v. Equitable Life Assur. Soc., 159 F 206.

71. Warranty forms part of contract and must be literally true. Spence v. Central Acc. Ins. Co., 236 Ill. 444, 86 NE 104. False warranty avoids, whether material or not. Mutual Life Ins. Co. v. Mullan, 107 Md. 457, 69 A 385; Metropolitan Life Ins. Co. v. Brubaker [Kan.] 96 P 62; French v. Fidelity & Casualty Co. [Wis.] 115 NW 869. To allow recovery, statements made warranties must be true literally or substantially according

only substantially true.[72] Intention controls as to whether a statement is to be regarded as a warranty or as a representation,[73] mere terminology not being conclusive.[74] Courts are averse to warranties[75] and will construe them strictly against the insurer,[76] as in the case of provisos and conditions generally.[77] Where the answer to a question purports to be complete, any substantial misstatement avoids a policy issued on the faith thereof,[78] but where a question is either not answered at all or appears to be imperfectly answered, the issuance of the policy waives imperfections or deficiencies.[79] Only the insurer can take advantage of a misrepresentation.[80] Statutes in many states now provide in effect that no misrepresentation or false statement made by insured shall avoid the policy unless fraudulent[81] or material to the risk.[82] Such statutes cannot be evaded by stipulation.[83] Though

to nature of fact warranted, whether statements are material or not. National Fire Ins. Co. v. Duncan [Colo.] 98 P 634.

**72.** Spence v. Central Acc. Ins. Co., 236 Ill. 444, 86 NE 104. False representation does not avoid unless material to risk. Mutual Life Ins. Co. v. Mullan, 107 Md. 457, 69 A 385. Misrepresentation is statement of something as fact which is untrue, either with knowledge of untruth and intent to deceive or positively without knowledge as to truth, such fact in either case being material to risk. United States Fidelity & Guar. Co. v. First Nat. Bank, 137 Ill. App. 382.

**73.** Answers to question as to 28 different past ailments held not warranties, especially since they were referred to in statement to examiner as "statements and representations." Minnesota Mutual Life Ins. Co. v. Link, 131 Ill. App. 89.

**74.** Absence of stipulation voiding policy for untrue answers, uncontestable clause, and provision for adjustment of policy in accordance with correct age, if age was misstated, held to show that only utmost good faith was required of insured in making application, though application declared that all statements therein should be warranties. Prudential Ins. Co. v. Lear, 31 App. D. C. 184.

**75.** Courts will not construe a statement as a warranty unless language of policy is so clear as to preclude any other construction. Spence v. Central Acc. Ins. Co., 236 Ill. 444, 86 NE 104.

**76.** Warranties framed by company will be construed strictly against it, especially if ambiguous. Dineen v. General Acc. Ins. Co., 110 NYS 344.

**77.** Conditions and provisos strictly construed against insurer preparing same and proposing contract. Arnold v. Empire Mut. Ins. Co., 3 Ga. App. 685, 60 SE 470. Since they tend to limit scope of contract and defeat its purpose. Jennings v. Brotherhood Acc. Co. [Colo.] 96 P 982. Such compliance with terms and conditions is sufficient as is fair and reasonable under the circumstances. Leiman v. Metropolitan Surety Co., 111 NYS 536.

**78, 79.** French v. Fidelity & Casualty Co. [Wis.] 115 NW 869. Issuance of policy on application waives all matters of form or completeness of answers to questions therein. Allen v. Phoenix Assur. Co., 14 Idaho, 728, 95 P 829. That an answer is partial does not show breach of warranty if true so far as it goes and accepted by insurer. "Have none" in answer to question as to name and residence of physician, "The one whom you have personally employed or consulted," held not to establish breach where at time of application insured had no physician, though he had previously personally consulted one. Haughton v. Aetna Life Ins. Co. [Ind. App.] 85 NE 125.

**80.** Insured's misrepresentations as to age and physical condition and knowledge thereof by wife who became administratrix held not to defeat latter's right to recover proceeds from assignee in wagering transaction, defense of misrepresentation being available only to insurer. Bendet v. Ellis [Tenn.] 111 SW 795.

**81.** Statements as to previous medical treatment and use of intoxicants being within knowledge of applicant, held made in bad faith where untrue. Mutual Life Ins. Co. v. Mullan, 107 Md. 457, 69 A 385. Under Pa. Act June 23, 1885, § 1 (P. L. 134), providing that no misrepresentation or false statement made in good faith shall work forfeiture or be ground for defense unless relating to some matter material to risk, untrue statement made in good faith will not avoid policy unless material to risk, but untrue statement made in bad faith and for purpose of misleading insurer avoids, though same is not material. Kelper v. Equitable Life Assur. Soc., 159 F 206.

**82.** Warranties material to risk are unaffected by Rev. St. Mo. 1899, §§ 7973, 7974, 7975 (Ann. St. 1906, pp. 3791, 3792), providing that warranties in certain applications and policies shall, if not material to risk insured, be deemed representations only. Connecticut Fire Ins. Co. v. Manning [C. C. A.] 160 F 382. In considering materiality of answers, question is not what disease insured died of but what effect answers might have had in inducing company to issue policy. Mutual Life Ins. Co. v. Mullan, 107 Md. 457, 69 A 385. Under statute requiring that statements be material or fraudulent, a misrepresentation to be material need not be as to a defect which contributed to loss, it being sufficient if knowledge or ignorance of fact wrongfully asserted or suppressed would naturally influence insurer in making contract at all, estimating risk or fixing premium. Bryant v. Metropolitan Life Ins. Co. [N. C.] 60 SE 983. Statement that applicant had not been under care of a physician is material. Id. Acts 1894, p. 1059, c. 662, Code Pub. Gen. Laws 1904, art. 23, § 196, providing that untrue statements in warranties shall be no defense if made in good faith unless material to risk, is remedial and should be construed so as to insure judicial investigation as to truth and

it is sometimes held that the parties are entitled to determine for themselves what representations shall be deemed material to the risk,[84] it is doubtful whether they can by agreement make material in law, statements which are clearly not material in fact.[85] Good faith is usualy immaterial if a statement is untrue and material to the risk[86] except in policies which have incontestable clauses.[87] The question whether materiality is for the court or for the jury is treated in a subsequent section.[88]

*Burglary insurance.*[See 10 C. L. 352]—Insured is commonly required to keep such books and accounts as will show the actual loss.[89]

*Employer's liability insurance.*[See 10 C. L. 352]—A covenant to maintain safety devices is not a guaranty against accidents of the kind the devices are designed to prevent.[90] As a rule action lies only to recover for loss actually paid in satisfaction of a judgment.[91]

*Fire insurance.*[See 10 C. L. 352]—It is commonly stipulated that the policy shall be void if insured has concealed or misrepresented material facts or circumstances,[92] such as the value of the property,[93] or has failed to truthfuly answer questions rel-

materiality of statements. Mutual Life Ins. Co. v. Mullan, 107 Md. 457, 69 A 385.

**83.** Provision in policy that it is subject to laws of another state held contrary to public policy, statute of forum requiring that untrue statements be material to risk. Mutual Life Ins. Co. v. Mullan, 107 Md. 457, 69 A 385. Immaterial that defendant's name indicated it was a mutual company. Id.

**84.** Making inquiries and answering, shows parties deemed matters material. United States Fidelity & Guar. Co. v. First Nat. Bank, 137 Ill. App. 382.

**85.** Provision that each statement was material held ineffectual to render material a statement which was in fact immaterial. Fidelity Mut. Life Ins. Co. v. Miazza [Miss.] 46 S 817.

**86.** Mutual Life Ins. Co. v. Mullan, 107 Md. 457, 69 A 385. Positive material misstatement avoids, regardless of ignorance, mistake or good faith. United States Fidelity & Guar. Co. v. First Nat. Bank, 137 Ill. App. 382; Western & So. Life Ins. Co. v. Quinn [Ky.] 113 SW 456; Fidelity Mut. Life Ins. Co. v. Miazza [Miss.] 46 S 817. Under Act Pa. June 23, 1885, § 1, against avoidance because of statements in good faith unless material to risk. Paulhamus v. Security Life & Annuity Co., 163 F 554.

**87.** See post, § 16B.

**88.** See post, § 24C, subd. Questions of Law and Fact.

**89.** Under burgiary policy avoiding itself if "books and accounts" were not so kept that actual loss could be determined therefrom, held proper to consider both account books and invoices of purchases. Schwartz v. Metropolitan Surety Co., 113 NYS 66. Account book and invoices held sufficient if from both actual loss was ascertainable. Id. Condition in burglary policy that insured should keep books of account, being intended for protection of insurer against an excessive claim, where amount of loss was not in dispute, insurer was not relieved because books and invoices were destroyed after commission of burglary. Leiman v. Metropolitan Surety Co., 111 NYS 536. Books produced at trial from which it could not be determined what goods were on hand on any particular day held not to authorize recovery under policy requiring insured to keep such books and accounts as would show actual loss. Pearlman v. Metropolitan Surety Co., 111 NYS 882.

**90.** By provision that "all mangle machines * * * shall be provided with fixed guards or safety feed tables adjusted at the point of contact of the rolls so as to prevent the fingers or hands of employes from being drawn into the rolls," assured did not guarantee that such machines and guards should be used as would prevent injury, but merely required machines used to be so guarded that, so far as practicable, they would protect employes from injury during their labors. Despatch Laundry Co. v. Employer's Liability Assur. Corp. [Minn.] 118 NW 152.

**91.** Covenant to defend on notice and provision that no action should lie except to recover for loss actually sustained and paid by insured in satisfaction of a judgment held dependent so that insured could not recover expenses incurred in successfully defending action against him. Lawrence v. General Acc. Assur. Corp., 124 App. Div. 545, 108 NYS 939. Provision requiring action to be brought by insured himself to reimburse him for loss actually sustained and paid by him and in satisfaction of judgment after trial of the issue did not preclude action by assignee of indemnity claim who had assumed and paid judgment liability, such transaction being equivalent to payment by assured. Maryland Casualty Co. v. Omaha Elec. L. & P. Co. [C. C. A.] 157 F 514.

**92.** Representation that building was 20 by 30 feet when it was 16 by 24 held not of itself material within policy provision that insurance should be void if insured concealed or misrepresented any material fact or circumstance. National Mut. Fire Ins. Co. v. Duncan [Colo.] 98 P 634. Failure of member of mutual co-operative insurance association to answer letters to him inclosing policies and inquiring as to premiums he was paying on other insurance held not fraud or concealment of material facts. Merchants' Underwriters v. Parkhurst-Davis Mercantile Co., 140 Ill. App. 504.

**93.** Warranty that value of building was $1,500 when it was only $200 held not substantially true within rule that warranties

ative to specified matters,[94] if he is not the owner of the premises in fee,[95] or the unconditional and sole owner,[96] or if he has or obtains additional insurance,[97] or fails to observe the requirements of the so-called "iron-safe clause," [98] or to

as to cash value need be only substantially true. National Mut. Fire Ins. Co. v. Duncan [Colo.] 98 P 634. That value was merely "estimated" by insured to be $1,500 held not to relieve him of obligation to state value with reasonable degree of accuracy. Id. Evidence held to show fraudulent overvaluation. Hoyt v. Insurance Co., 103 Me. 299, 69 A 110. Under Code 1906, § 2592, requiring insurance companies in case of loss to pay full amount of policy, policy is valid though property is overinsured and though statute also prohibits companies from knowingly insuring property over fair value. Mississippi Home Ins. Co. v. Barron [Miss.] 45 S 875.

**94.** Answer as to dimensions of building held not within warranty as to truthfulness of answers touching "condition, situation, value, occupation and title" of the property. National Mut. Fire Ins. Co. v. Duncan [Colo.] 98 P 634.

**95.** Life estate held not sufficient to satisfy warranty that insured owned the land in fee simple. Johnson v. Sun Fire Ins. Co., 3 Ga. App. 430, 60 SE 118.

**96.** Condition that policy should be void if insured was not sole, entire, and unconditional owner held reasonable and valid, and failure to disclose real state of title if not sole, entire and unconditional is fatal, though unintentional. Rochester German Ins. Co. v. Schmidt [C. C. A.] 162 F 447. Insured's ownership is "sole" when no other than insured has any interest in the property as owner, and unconditional when quality of estate is not limited or affected by any condition. Id. Unexplained appearance of word "buggies" in policy held not of itself a representation that insured was owner of buggies, policy covering other property. Arkansas Ins. Co v. Cox [Okl.] 98 P 552. Where policy was void by its terms of insured's interest was other than unconditional and sole ownership, or if any change other than death took place in title, interest or possession, insurer was not liable if either clause was violated. Rochester German Ins. Co. v. Monumental Sav Ass'n, 107 Va. 701, 60 SE 93.

**Held unconditional and sole owner:** Equitable owner in actual possession and entitled to deed held vested with "sole ownership, both legal and equitable." Arkansas Ins. Co. v. McManus [Ark.] 110 SW 797. Vendee in possession under executory contract, most of price having been paid, held "unconditional and sole owner" in fee simple of equitable title. Arkansas Ins. Co. v. Cox [Okl.] 98 P 552. Existence of purchase money mortgage held no breach. Standard Leather Co. v. Mercantile Town Mut. Ins. Co. [Mo. App.] 111 SW 631. Where insurer demurred to evidence, thereby waiving all inferences not necessarily resulting from its own evidence tending to show that insured had divested himself of his unconditional and sole ownership, it could not be necessarily inferred that an alleged agreement of sale by insured was such as to divest him of his sole ownership or that it was in force when policy was issued, neither its date nor terms being shown. Rochester German Ins. Co. v. Monumental Sav. Ass'n, 107 Va. 701, 60 SE 93. "Unconditional and sole ownership" does not refer to legal title and is not affected by insured giving a mortgage, option or conditional sale, last being such as he could not specifically enforce, and he continuing to bear risk of loss. Id. Defense that insured was not unconditional and sole owner held not available by proof that insured was only lessee, description written by agent being "their interest" in a certain building, "their interest being second story," etc. American Ins. Co. v. Egyptian Lodge, 128 Ill. App. 161. Description having been written by agent without suggestion from insured, company could not complain that it is not as definite and clear as it might have been. Id.

**Held not unconditional and sole owner:** Policy held void where title had been in wife and on her death passed one-third to insured and two-thirds to daughters, though insured had paid for property, treated it as his own, paid taxes, etc., and though he made no representation as to title. Rochester German Ins. Co. v. Schmidt [C. C. A.] 162 F 447.

**97.** Provision requiring additional insurance to be assented to in writing on policy held not violated where neither company to which application for additional insurance was made nor applicant understood that any risk had yet been assumed by such company. National Mut. Fire Ins. Co. v. Duncan [Colo.] 98 P 634. "Other insurance" permitted by policy means insurance in addition to that effected by policy itself. De Loach & Co. v. Aetna Ins. Co. [Ga. App.] 62 SE 473. One who obtains from same insurer two policies issued at different times on same property may not procure total insurance in excess of largest amount permitted by either policy. Id. First policy for $1,500 permitted $1,600 "other insurance," second for $500 permitted $2,000 "other insurance." Held $1,200 policy taken out in another company avoided both. Id. Clause allowing "$150,000 total concurrent insurance" allows such amount in addition to amount of policy containing the clause. Merchants' Underwriters v. Parkhurst-Davis Mercantile Co., 140 Ill. App. 504. Policy avoided where at time of fire insured had $4,500 insurance on property and only "$2,700 total concurrent insurance" was permitted by its terms. Johnson v. Sun Fire Ins. Co., 3 Ga. App. 430, 60 SE 118. Contract held to permit endorsement as to additional insurance. Insurance Co. v. De Loach & Co., 3 Ga. App. 807, 61 SE 406. Fire policy void if other insurance should be procured held avoided where insured procured other insurance though in ignorance of prohibition in policy. Rice v. Hartford Ins. Co. [Wash.] 97 P 238. For questions on concurrent insurance not arising under avoidance clause, see post, § 17.

**98. Inventories:** Entry of mere summary of inventory in a book held not compliance with provision requiring insured to keep in fireproof safe last inventory before issuance of policy. Arkansas Ins. Co. v.

furnish plans and specifications or other proof of loss,[99] or if without the insurer's consent there is any change in title, interest or possession,[1] or in use and occu-

Luther, 85 Ark. 579, 109 SW 1022. Requirement that unless complete inventory of stock had been taken within 12 months preceding date of policy one should be taken within 30 days, and that last preceding inventory should be kept in safe, held met where, on discovering that part of inventory taken before policy issued had been destroyed, insured took new inventory and preserved it though he did not preserve undestroyed part of old inventory. Arkansas Ins. Co. v. McManus [Ark.] 110 SW 797. Complaint that part of inventory was in Hebrew held without merit, it not being stated what part and it not appearing that any part of inventory shown by record was in Hebrew. Aetna Ins. Co. v. Lipsitz, 130 Ga. 170, 60 SE 531.

**Books, accounts, inventories, etc.:** Policy avoided by failure of insured to keep inventory or keep books showing status of business. Johnson v. Sun Fire Ins. Co., 3 Ga. App. 430, 60 SE 118. Avoided as to merchandise for failure to keep cash account of goods sold, invoice of goods bought, and inventory. Hollenbeck & Co. v. Mercantile Town Mut. Fire Ins. Co. [Mo. App.] 113 SW 217. Sufficient if from books kept with assistance of those who understood system on which they were kept amount of purchases and sales could be ascertained and cash transactions distinguished from those on credit. Aetna Ins. Co. v. Lipsitz, 130 Ga. 170, 60 SE 531. Failure of insured to keep itemized account of cash sales held not to avoid, he having entered them on his books. Arkansas Ins. Co. v. McManus [Ark.] 110 SW 797. Policy not avoided by insured's failure to keep merchandise account where his accounts showed amount of his sales, and inventory and invoices made it possible to ascertain amount of goods on hand, statutes requiring only substantial compliance with terms of policies. Id. Proof that insured had taken and preserved an inventory which he produced at trial, and that he had kept a pocket memorandum book for credit and cash sales, contents of which were copied in another book after fire and produced at trial, held to authorize finding of compliance with clause requiring keeping of a set of books and preserving same in iron safe or other safe place. Home Fire Ins. Co. v. Driver [Ark.] 112 SW 200.

**Safe keeping:** No recovery where insured did not keep books in iron safe as policy required. Powell v. Com. Ins. Co., 3 Ga. App. 436, 60 SE 120. "Iron safe clause" held not breached by not keeping books of account in fireproof safe until expiration of time in which to take inventory, since books of account would be no aid in estimating damages unaccompanied by inventory. Hamann v. Nebraska Underwriters' Ins. Co. [Neb.] 118 NW 65.

**99.** See post, § 19.

**1. Instances of change in title, interest or possession:** "Interest" held broader than title and practically synonymous with "estate." Widincamp v. Phenix Ins. Co. of Brooklyn [Ga. App.] 62 SE 478. Execution of bond for title, receipt of part of purchase price, and delivery of possession, held to effect change of interest. Id. **Sale of laundry** business continued under old name held change of interest, title or possession so as to avoid policy. American Steam Laundry Co. v. Hamburg Bremen Fire Ins. Co. [Tenn.] 113 SW 394. **Bankruptcy** one hour after insurance for protection of contractors held bar to action by either owner or contractors. New Kensington Lumber Co. v. German Ins. Co. of Freeport, 35 Pa. Super. Ct. 32. Bankruptcy adjudication held not to work change of title, etc., where property was destroyed before appointment of receiver or trustee. Gordon v. Mechanics' & Traders' Ins. Co., 120 La. 441, 45 S 384. Appointment of **receiver** and his taking actual possession and control of property insured held bar to recovery under clause avoiding policy if any change should take place in title, interest or possession, "whether by legal process, or judgment or otherwise." Bronson v. New York Fire Ins. Co. [W. Va.] 63 SE 283. Waiver of objection as to interest, see post, § 16C.

**Evidence held not to show change in title, interest or possession.** Rochester German Ins. Co. v. Monumental Sav. Ass'n, 107 Va. 701, 60 SE 93. **Deed and mortgage** without consideration, no possession or right of possession being given or intended, held not to work any "change or diminution in interest, title or possession," within forfeiture clause. Cone v. Century Fire Ins. Co. [Iowa] 117 NW 307. **Mere possession** and use of lodge room by members of another lodge held insufficient to show change of interest or possession, it not appearing possession was under binding agreement with insured. American Ins. Co. v. Egyptian Lodge, 128 Ill. App. 161. **Decree declaring** insured **property a nuisance,** and insured's promises to remove building, held not to work change in interest, title and possession so long as structure remained undisturbed. Irwin v. Westchester Fire Ins. Co., 58 Misc. 441, 109 NYS 612. Maxim equity regards as done that which ought to be done held inapplicable. Id.

**Consent:** Agent held not to assent to change in ownership where, though he knew certain changes had been made, he did not know whether they were changes in interest or physical changes in operation and was then trying to cancel policy. American Steam Laundry Co. v. Hamburg Bremen Fire Ins. Co. [Tenn.] 113 SW 394. Mere knowledge of a transfer of title before loss does not preclude the insurer from relying on a clause against change of title unless otherwise agreed upon, since company could be bound only in case it consented to the transfer. Gragg v. Home Ins. Co., 32 Ky. L. R. 988, 107 SW 321. Where by agreement with agent apparently authorized policy covering goods, buildings, etc., was continued as to stock of goods after sale of farm and removal of goods to another place, and full premium paid with understanding that next full premium need not be paid, insurance on goods was not affected by removal and refusal of insured to pay next premium, especially since company kept premium and issued notice to insured recognizing policy in force. Continental Ins. Co. v. Buchanan, 32 Ky. L. R. 1298, 108 SW 355.

pancy,[2] or increase of risk,[3] or if the property becomes vacant[4] or ceases to be operated,[5] or is or becomes incumbered without insurer's consent,[6] or if foreclosure proceedings be commenced.[7] It is implied that insured will not himself voluntarily and wrongfully burn the property.[8] The severability of policies covering distinct items of property is treated later,[9] as are also waivers and estoppels.[10]

*Life, accident and health insurance.* See 10 C. L. 856—Policies are often avoided by false statements as to previous or present health,[11] past medical treatment, con-

2. Change in use and occupancy avoids policy under stipulation to that effect. Cone v. Century Fire Ins. Co. [Iowa.] 117 NW 307. Insurer need not prove that change of occupancy or use of premises made risk more hazardous, Code 1897, § 1743, expressly providing that section is inapplicable to provisions avoiding policy for vacancy or unoccupancy. Id.

3. Fire hazard held not increased by decree of court declaring building to be a nuisance and ordering its removal. Irwin v. Westchester Fire Ins. Co., 58 Misc. 441, 109 NYS 612. No defense that trustees stored baled hay in school house and that certain raftsmen occupied it at night, where neither was shown to have had any relation to fire. Mississippi Home Ins. Co. v. Stevens [Miss.] 46 S 245.

4. Vacancy clause construed and held to require notice of vacancy to insurer only in case no permits are granted authorizing vacancy. National Mut. Fire Ins. Co. v. Duncan [Colo.] 98 P 634.

5. Policy describing realty as a building "occupied as an ice factory" and personalty as engines, etc., "and all appurtenances necessary to and used in their business," held not to insure an ice manufacturing plant in operation within clause forfeiting policy if subject of insurance was a manufacturing establishment, and it should cease to be operated for more than 10 consecutive days without insurer's consent and hence continued failure to operate did not work forfeiture. Home Ins. Co. v. North Little Rock Ice & Elec. Co. [Ark.] 111 SW 994.

6. Provision avoiding policy for incumbrances not consented to in writing by insurer is reasonable and valid. Mulrooney v. Royal Ins. Co., 157 F 598; Mulrooney v. Royal Ins. Co. [C. C. A.] 163 F 833; National Fire Ins. Co. v. Kneidel, 11 Ohio C. C. (N. S.) 193. Warranty on existence or amount of incumbrances is material as matter of law. Connecticut Fire Ins. Co. v. Manning [C. C. A.] 160 F 382. Existence of mortgage is material and failure to disclose same when asked about incumbrances avoids policy. Hollenbeck & Co. v. Mercantile Town Mut. Fire Ins. Co. [Mo. App.] 113 SW 217. No recovery in absence of evidence that failure to indorse consent was through fraud or mistake. National Fire Ins. Co. v. Kneidel, 11 Ohio C. C. (N. S.) 193. Clause avoiding policy "if the subject of insurance be personalty, and be or become incumbered by a chattel mortgage," held inapplicable where property consisted of both realty and personalty, one item of personalty only being under mortgage. Sullivan v. Mercantile Town Mut. Ins. Co. [Okl.] 94 P 676. Conditional sale vendor of one article of the property, to whom loss was made payable as his interest might appear, held not **joint owner** of another article covered by policy so as to authorize insured to mortgage such other article to him without violating anti-incumbrance clause. Hartford Fire Ins. Co. v. Liddell Co., 130 Ga. 8, 60 SE 104. Loss payable clause held immaterial. Id. Where as between mortgagor and mortgagee latter would be estopped to plead want of consideration for **release of mortgage** given before property was insured, insurer could not set up want of consideration and claim breach of warranty against incumbrancer. Home Fire Ins. Co. v. Dower [Ark.] 112 SW 200.

**Consent:** Indorsement on policy by company's agents consenting that interest of insured "as owner of property covered by this policy" be assigned, held insufficient as written consent to incumbrance required by policy. Mulrooney v. Royal Ins. Co., 157 F 598. **Verbal consent** not authorized by Iowa Code 1897, § 1750, conferring on agents authority within "scope of his employment," since verbal agreements are not within scope of employment to make only written ones. Id. Written consent that interest of insured "as owner of the property" be assigned is not consent to mortgage, though agent knew that transaction was in nature of mortgage and verbally consented. Mulrooney v. Royal Ins. Co. [C. C. A.] 163 F 833. Agent who issued fire policy and afterwards took mortgage on property in favor of bank of which he was cashier and part owner could not assent to mortgage on behalf of company. Id.

7. Policy held avoided under provision that it should be void unless otherwise provided by agreement endorsed thereon or added thereto, "if with knowledge of insured foreclosure proceedings be commenced or notice given of sale * * * by virtue of mortgage or trust deed," insured having endeavored but failed to postpone foreclosure proceedings, and to obtain endorsement on policy, and having been notified on day proceedings were begun. J. I. Kelly Co. v. St. Paul Fire & Marine Ins. Co. [Fla.] 47 S 742.

8. See post, § 10, subd. Fire Insurance.

9. See post, § 16B.

10. See post, § 16C.

11. As to breach of condition that insured be alive and in sound health when policy is delivered, see ante, § 7, subd. Essentials and Validity. Warranty of **"sound condition physically"** refers to sound health, which is not same as perfect health, and does not include mere temporary indispositions or ailments. French v. Fidelity & Casualty Co. [Wis.] 115 NW 869. Warranty against **"bodily infirmity"** includes only ailments of somewhat settled character, and not mere temporary disorders from sudden derangement of system. Id. **"Serious illness"** warranted against refers to one which has ordinarily a permanently detrimental effect on the system or renders risk unusually hazardous, but does not include **any sickness** which may terminate in death. Kelper v.

sultation, or attendance,[12] other insurance,[13] earnings,[14] or use of intoxicants.[15] In the absence of fraud, the company is not relieved of liability merely because insured was not a fit subject for insurance when the policy was issued.[16] It is provided by statute in some states that statements by insured as to age, physical condition, etc., shall be binding on insurer unless insured was required to undergo a medical examination.[17] One cannot enforce a policy taken out by a minor and

Equitable Life Assur. Soc., 159 F 206. Warranty against past or present **"bronchitis"** held to mean only a chronic disease not readily treated and tending to impair health, and to exclude acute bronchitis from which insured had fully recovered. French v. Fidelity & Casualty Co. [Wis.] 115 NW 869. Evidence held not to conclusively show insured ever suffered from bronchitis. Id. Negative answer to inquiry as to **past ailments** held qualified by words "or any other 'serious' ailment," so as to refer only to serious ailments. Minnesota Mut. Life Ins. Co. v. Link, 131 Ill. App. 89. Evidence held to sustain findings that insured did not to his knowledge have bronchitis or gall stones. Id. Verdict for plaintiff on issue as to breach of representation as to **venereal disease** held against weight of evidence. Peoria Life Ass'n v. Goodwin, 134 Ill. App. 464. Evidence held not to sustain verdict for plaintiff, but to show that insured, fearing **fatal disease,** procured policy by **suppression of truth** and false statements. Iowa Life Ins. Co. v. Houghton [Ind. App.] 85 NE 127. As to sufficiency of evidence for jury, see post, § 24C, subd. Questions of Law and Fact.

**12.** Whether applicant has consulted or been treated by physicians is material to risk except where ailment is trivial. Mutual Life Ins. Co. v. Mullan, 107 Md. 457, 69 A 385. Answers held material, so as to avoid policy. Id. Proof of ear trouble and treatment therefor within 2 years held to show breach of warranty that applicant had no defects and that he had had no **medical treatment** except for stomach trouble. Colaneri v. General Acc. Assur. Corp., 110 NYS 678. Proof of previous treatment for nephritis, and death from delirium tremens and chronic nephritis, held to bar recovery under provision avoiding policy if insured before its date had been treated for any serious disease or if he had any of certain enumerated ailments. Gerlach v. Metropolitan Life Ins. Co., 112 NYS 1095. That insured had been operated on for undescended testicle by named physicians held sufficient to put company on inquiry, it not being expected that answers be more than suggestive, especially those given to medical examiner. Paulhamus v. Security Life & Annuity Co., 163 F 554. Failure to require definite finding as to truthfulness of representation that insured had not been **under a physician's care** within two years held error. Bryant v. Metropolitan Life Ins. Co. [N. C.] 60 SE 983. Not necessary that applicant should have been bedridden to constitute breach of representation that he had not been "under the care" of "a physician, it being sufficient if applicant, apprehensive as to his condition, though up and around," intrusted his case to physician for regular or continuous treatment. Id. That examining physician on being told the facts said "it did not count," and "was not considered illness," held insufficient to show that parties agreed to use words of warranty as to previous care of physicians in a special sense. Fish v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 69 A 176. Gravity of subject of consultation immaterial within warranty that applicant had not **consulted a physician.** Metropolitan Life Ins. Co. v. Brubaker [Kan.] 96 P 62. Evidence held to show falsity of answers as to medical treatment. Mutual Life Ins. Co. v. Mullan, 107 Md. 457, 69 A 385. That insured had "consulted" a physician held not breach of representation that she had not been "attended." Prudential Ins. Co. v. Lear, 31 App. D. C. 184. As to propriety of directing or failing to direct verdict, see post, § 24C, subd. Questions of Law or Fact.

**13.** That another company had insured life of applicant for a certain sum did not show breach of warranty that no application to any other company had been made on which insurance was not granted, or on which insurance was not issued for full amount and of kind applied for. Houghton v. Aetna Life Ins. Co. [Ind. App.] 85 NE 125. That other insurance had been granted held not inconsistent with negative answers as to existing insurance in other companies, since policy might have been subsequently canceled or surrendered. Id. Warranty that applicant had no accident or health insurance, that no application made by him for insurance had ever been declined, and that no accident or health policy to him had been canceled, held not to refer to life insurance. Dineen v. General Acc. Ins. Co., 110 NYS 344.

**14.** False statement as to weekly earnings held not to defeat recovery for loss of hand under policy promising specified sum for loss of hand and weekly indemnity for less severe injury. Claypool v. Continental Casualty Co. [Ky.] 112 SW 835. Similar misrepresentation held no bar to recovery of fixed sum for loss of hand, having reference only to weekly indemnity to which insured was entitled in case of incapacity not involving loss of limb. Aetna Life Ins. Co. v. Claypool, 32 Ky. L. R. 856, 107 SW 325.

**15.** That applicant used very much more than one glass of beer a day, as represented in application, held material, so as to avoid policy. Mutual Life Ins. Co. v. Mullan, 107 Md. 457, 69 A 385.

**16.** Roe v. National Life Ins. Ass'n, 137 Iowa, 696, 115 NW 500.

**17.** Evidence held to show previous medical examination rendering inapplicable Rev. Laws 1905, § 1693, providing that in absence of such examination statement in application as to insured's age, physical condition etc., shall bind company, unless willfully false or intentionally misleading. Murphy v. Metropolitan Life Ins. Co. [Minn.] 118 NW 355.

at the same time disaffirm the minor's warranties.[18] Waivers, estoppels,[19] and jury questions[20] are treated in subsequent sections.

*Tornado insurance.* See 10 C. L. 358

§ 10. *The risk or object of indemnity. Accident and health insurance.* See 10 C. L. 358—Accident policies usually promise indemnity for injuries or death[21] resulting solely and proximately[22] from external, violent and accidental means,[23] the accident and injury occurring while insured was acting in the capacity specified in the policy[24] and being of the class contemplated thereby[25] and of such character as to cause at once continuous and total disability.[26] The indemnity is often spe-

18. Metropolitan Life Ins. Co. v. Brubaker [Kan.] 96 P 62.

19. See post, § 16C.

20. See post, § 24C, subd. Questions of Law and Fact.

21. "Injury" within policy insuring against bodily injuries, effected by external, violent and accidental means, is injury to the person, traceable exclusively to the accident and every result traceable to the accident, however remote in time, is potentially caused at time of accident. Hatch v. U. S. Casualty Co., 197 Mass. 101, 83 NE 398.

22. Under a policy insuring against death resulting solely from accidental injuries, all morbid changes in exercise of vital functions or texture of bodily organs resulting from or induced by such injury should be regarded as effect thereof, and not as independent causes (Ward v. Aetna Life Ins. Co. [Neb.] 118 NW 70), and death resulting from such morbid changes is caused by accident within meaning of policy (Id.). One who, after recovery from an accident, succumbs to a disease which would not have been fatal but for lowered vitality following injury, dies from the disease, and not from lowered vitality. Id. Condition that death must have resulted "necessarily and solely" from the injury held satisfied by showing that injury was predominating and efficient cause of death, it being immaterial that other conditions were set in motion by injury which may have contributed to death. Continental Casualty Co. v. Colvin [Kan.] 95 P 565. Where death results from a disease caused directly by an accident, accident is proximate cause of the death, and death is regarded as having resulted from the accident independently of all other causes. General Acc. Fire & Life Assur. Co. v. Homely [Md.] 71 A 524. Death resulting from disease following naturally, though not necessarily, an accidental physical injury, results from such injury independently of all other causes, the disease not being considered as an independent cause. French v. Fidelity & Casualty Co. [Wis.] 115 NW 869. Death from blood poisoning 15 days after accidental injury to leg, causing abrasion of skin, held within rule. Id. If one is injured and 6 months later is again injured and dies within the 90 days limited by policy, he may recover if he would not have died but for the second injury, though last injury would not have been fatal but for the first. Baehr v. Union Casualty Co. [Mo. App.] 113 SW 689. Evidence sufficient to authorize finding that accident was sole cause of death. Cheswell v. Fraternal Acc. Ass'n, 199 Mass. 267, 85 NE 96. Evidence that deceased was injured on leg, suffering abrasion, and thereafter died of erysipelas, held insufficient to show that death was caused by injury directly and independently of all other causes. McAuley v. Casualty Co., 37 Mont. 256, 96 P 131. Death from rupture of walls of heart weakened by fatty degeneration, after overexertion or deep breathing, held not covered by insurance against disability or death entirely from bodily injuries sustained through external, violent and accidental means. Shanberg v. Fidelity & Casualty Co. [C. C. A.] 158 F 1.

23. Accident within accident insurance policy is an event taking place without one's foresight or expectation and which proceeds from an unknown cause or an unusual effect of a known cause not within expectation of person injured. Phoenix Acc. & Sick Benefit Ass'n v. Stiver [Ind. App.] 84 NE 772. Unexpected and unprovoked stabbing of insured by insane person held accident within policy insuring against injuries or death from external, violent and accidental means. Id. Not sufficient that injury or death was unexpected; "means" must be accidental. Schmid v. Indiana Travelers' Acc. Ass'n [Ind. App.] 85 NE 1032. Injury or death, though unexpected, resulting from intentional acts, is not produced by "accidental means." Id., reviewing many authorities. Death from physical exertion in climbing steps carrying heavy satchels, in rarified atmosphere, held not within accident policy. Id. Accident policy indemnifying only for death or injuries resulting from "external, violent and accidental means" covers only cases where force and accident concur in producing death or injury. Id.

24. Evidence held to show insured was engaged in line of his duty as brakeman when accident occurred, so as to authorize recovery. Kephart v. Continental Casualty Co. [N. D.] 116 NW 349. Mail clerk in mail car performing his duties held not riding "as passenger in or on any regular passenger conveyance provided by a common carrier," within policy insuring beneficiary so riding. Wood v. General Acc. Ins. Co. [C. C. A.] 160 F 926.

25. Broken ribs and fractured sternum held not within provision for indemnity for "fractured ribs with complications." Hastings v. Bankers' Acc. Ins. Co. [Iowa] 119 NW 79. Death from burning of contents of room in a building held within policy insuring against accidents caused by "burning of a building." Houlihan v. Preferred Acc. Ins. Co., 111 NYS 1048.

26. Under policy promising indemnity to insured for accidental injury "which causes at once total and continuous disability," and then providing for payment to beneficiary if within 90 days death should result necessarily and solely from "such injury," death

cifically limited or denied if the injury or death is cause or contributed to by bodily or mental infirmity[27] or by infection,[28] or if insured when injured was violating the law,[29] or was engaged in acts pertaining to more hazardous occupations,[30] or was voluntarily or unnecessarily exposing himself to obvious danger,[31] or was failing to exercise due diligence for his protection,[32] or was entering or leaving a street car[33] or a moving conveyance,[34] or was at a place prohibited by the policy,[35] or was

need not result from injury causing "at once" total and continuous disability in order to entitle beneficiary to recover. Continental Casualty Co. v. Colvin [Kan.] 95 P 565.

27. Death from blood poisoning after scratch of finger, insured not being previously afflicted with physical or mental infirmity, held not within exception in case of injury or death wholly or partly, directly or indirectly, from bodily or mental infirmity, or disease in any form, as primary, secondary or final cause of accident, injury or death. Rheinheimer v. Aetna Life Ins. Co., 77 Ohio St. 360, 83 NE 491. For injury question, see post, § 24C.

28. Under provision limiting insurer's liability if loss was occasioned or contributed to by infection, "infection" held to refer only to external injuries, and not to internal inflammations, where pus is formed by presence of pus germs. Continental Casualty Co. v. Colvin [Kan.] 95 P 565. Where original injury to bone of foot was within terms of accident policy, fact that infection resulted did not bring disability within provision limiting liability in event of "injuries or disability" resulting from poison or infection. Garvey v. Phoenix Preferred Acc. Ins. Co., 123 App. Div. 106, 108 NYS 186.

29. Injury while "attempting" to get on moving railroad car held fatal to recovery under limitation if insured should be injured "while violating the law," Code, § 4811, making it a misdemeanor "to get upon any railroad car while in motion," etc. Flower v. Continental Casualty Co. [Iowa] 118 NW 761. Instruction held not prejudicial under the evidence. Id.

30. One killed while hunting for recreation held killed while "doing any act or thing pertaining to" any occupation classified as more hazardous than that of "sheep farmer," where occupation of hunter was classified as more hazardous, though insured had not changed occupation. Lane v. General Acc. Ins. Co. [Tex. Civ. App.] 113 SW 324.

31. Under exemption in case of voluntary or unnecessary exposure to apparent danger, danger must either be known or one which in exercise of ordinary prudence should be known to insured. Correll v. National Acc. Soc. [Iowa] 116 NW 1046. "Voluntary exposure to unnecessary danger, or obvious risk of injury, or the intentional act of insured," are affirmative acts, implying knowledge of the danger and excluding mere negligence, though insured will be held to have known what an ordinarily prudent man of ordinary intelligence in the same situation would have known. Dillon v. Continental Casualty Co., 130 Mo. App. 502, 109 SW 89. Instructions properly modified by requiring knowledge in order to preclude recovery and by striking phrase "or might have known by exercise of ordinary diligence and care." Id. That insured shortly before accident had passed same car that struck him held insufficient to charge him with knowledge of its dangerous nearness to car on which he was riding. Id. Handling explosives by clerk in general store in mining region held not "unnecessary exposure to obvious danger." Alloway v. General Acc. Ins. Co., 35 Pa. Super. Ct. 371. Evidence sufficient to sustain finding that loss of hand was not due to unnecessary exposure to obvious danger. Aetna Life Ins. Co. v. Claypool, 32 Ky. L. R. 856, 107 SW 325.

32. "Due diligence," within accident policy requiring insured to exercise due diligence for his self-protection, includes not only what a reasonably careful person "would" have done, but also what such persons "might" have done. Tinsman v. Illinois Commercial Men's Ass'n, 235 Ill. 635, 85 NE 913. Instruction on due diligence held not objectionable as referring only to time insured was where he drowned. Id.

33. Injury from jumping off street car in danger of collision held injury while "getting on or off" street car, so as to limit company's liability. Banta v. Continental Casualty Co. [Mo. App.] 113 SW 1140. Rule precluding defense of contributory negligence in such case held inapplicable. Id.

34. Fatal injury while trying to enter moving passenger car held within exception "injuries sustained while entering or leaving, or trying to enter or leave, any moving conveyance," though there was also an exception in case of fatal injuries resulting from certain other causes. Standard Life & Acc. Ins. Co. v. McNulty [C. C. A.] 157 F 224. One thrown off platform of train car by jerk of train held not entering or trying to enter, leaving or trying to leave, a moving conveyance within excepted risk, where he entered while car was still and did not intend to enter or leave while train was moving. Kirkpatrick v. Aetna Life Ins. Co. [Iowa] 117 NW 1111.

35. To prevent recovery on ground that insured when injured was at place where under policy he was not permitted to be, it must appear that there was some causal relation between that fact and injury. Kirkpatrick v. Aetna Life Ins. Co. [Iowa] 117 NW 1111. Accident policy insuring against injuries to one while traveling as railway passenger, but not covering accidents resulting from entering or leaving moving conveyances using steam or electricity, or being in any place in such conveyance not provided for passengers during transit, absolves insurer when insured enters or leaves moving conveyance, or is at time of injury at a place on railway conveyance not provided for use of passengers, but covers accidents to passengers on moving trains except when boarding or alighting from trains, and accidents to all others save when they are in a place in such conveyance not provided for occupancy of passengers during transit.

under the influence of intoxicants or narcotics.[36] Contributory negligence will not bar recovery on an accident policy in the absence of stipulation to that effect.[37]

Sick benefits are frequently reduced if the disability is due to certain specified ailments,[38] and policies often do not cover an illness not requiring confinement to the house[39] or the nature of which is unknown or incapable of direct proof.[40]

Jury questions and the burden of proof are treated in the section on procedure.[41]

*Burglary insurance.*See 10 C. L. 361—The policy usually covers burglary, larceny, or theft[42] made possible by forcible entrance by means of tools or explosives.[43]

*Employer's liability insurance.*See 10 C. L. 361—Under some policies no recovery lies if explosives are used on the premises.[44] Insurer having been duly notified of the suit against the employer, the latter as well as the former is concluded by the judgment in that action on issues determinative of the insurer's liability.[45]

*Fire insurance.*See 10 C. L. 362—"Fire" includes both slow and rapid combustion.[46] What property is insured,[47] and whether the protection continues with

Id. One entering upon platform of a car when train is still, intending to alight on other side, but thrown down and injured by car wheel by sudden jerk of train while in act of alighting, held not on platform or steps of car "when injured," within liability exemption. Id. Evidence, findings and petition held not inconsistent with finding that insured when injured was crossing a railroad track on a public highway, and was not elsewhere on railroad roadbed. McClure v. Great Western Acc. Ass'n [Iowa] 118 NW 269.

**36.** Provision held reasonable limiting liability if when injured insured was under influence of intoxicants or narcotics. Furry's Adm'r v. General Acc. Ins. Co., 80 Vt. 526, 68 A 655. Finding that insured was not under influence of intoxicants, "so as to prevent him from being 'fairly' able to take care of himself," showed he was "under the influence" of intoxicants when injured, so as to limit liability. Id.

**37.** Not where policy merely limited amount of recovery in case of unnecessary exposure to danger or to obvious risks of injury. Kephart v. Continental Casualty Co. [N. D.] 116 NW 349.

**38.** Clause indemnifying for confining illness and clause limiting liability to one-fifth for disability for paralysis, etc., held not repugnant, but both effective. General Acc. Ins. Co. v. Hayes [Tex. Civ. App.] 113 SW 990.

**39.** Provision in sick benefit policy covering only ailments requiring insured to be confined to the house for 14 days did not preclude recovery because insured was not in air and sunshine by advice of physician, where he was entirely incapable of work or business. Jennings v. Brotherhood Acc. Co. [Colo.] 96 P 982.

**40.** Provision denying indemnity on account of sickness, nature of which was unknown or incapable of direct and positive proof, held intended only to guard against simulated illness, so that insured could recover where it was clearly proven he was in fact incapable of work or business, though he could not definitely name the illness or its origin or cause. Jennings v. Brotherhood Acc. Co. [Colo.] 96 P 982.

**41.** See post, § 24C.

**42.** Evidence insufficient to establish "burglary, larceny or theft" of bag of jewelry so as to authorize recovery under burglary policy. Schindler v. U. S. Fidelity & Guaranty Co., 58 Misc. 532, 109 NYS 723.

**43.** Evidence insufficient to show forcible entrance into safe "by use of tools or explosives directly thereupon and on the outside thereof." Brill v. Metropolitan Surety Co., 113 NYS 476.

**44.** Large metal tube filled with metals and materials of explosive and dangerous nature held an "explosive," within promissory warranty in employer's liability policy that no explosives should be used on premises. B. Roth Tool Co. v. New Amsterdam Casualty Co. [C. C. A.] 161 F 709.

**45.** Action against employer held to involve issue whether employer permitted use of "explosives" on premises, so that, such issue having been adjudicated in the affirmative, employer could not recover under policy excepting such risk. B. Roth Tool Co. v. New Amsterdam Casualty Co. [C. C. A.] 161 F 709.

**46.** Furbush v. Consolidated Patrons' & Farmers' Mut. Ins. Co. [Iowa] 118 NW 371. Combustion from gas explosion resulting from striking match held a "fire" within fire policy not excepting explosions. Id.

**NOTE. Meaning of "fire" in policy:** Plaintiff's wool was insured by defendant against direct loss or damage by fire. The wool was stored in a warehouse but became entirely submerged by water owing to an unusual flood, and, when the water had subsided, the wool was found to be very much heated, the strings around the wool had apparently burned and there was smoke and the odor of burnt wool in the room where it was stored, although no flame or firelight was to be seen. **Held,** that the damage was not caused by "fire" within the meaning of the policy because the evidence did not show that the internal development of heat at any time became so rapid as to produce a flame or a glow. Western Woolen Mill Co. v. Northern Assur. Co. of London [C. C. A.] 139 F 637.

It is not a damage by fire where books are charred by steam escaping from a leak in the pipes of heating apparatus in a building. Gibbons v. German Ins. & Sav. Inst., 30

change of location,[48] occupancy or use,[49] are questions of construction. Interests of third persons are not covered in the absence of proper provisions to that effect.[50] Among excepted risks are explosions,[51] earthquakes,[52] orders of civil authorities,[53]

Ill. App. 263. A lamp is not a fire so that recovery may be had for damages caused by smoke therefrom, where no ignition occurs outside the lamp. Fitzgerald v. German American Ins. Co., 62 NYS 824. The breaking of plate glass in a store by the explosion of gas generated from gasoline used to clean clothes, was not caused by fire although the explosion was caused by a lighted match. Vorse v. Jersey Plate Glass Ins. Co., 119 Iowa, 555, 93 NW 569, 97 Am. St. Rep. 330, 60 L. R. A. 838. But see Scripture v. Lowell Mutual Fire Ins. Co., 64 Mass. [10 Cush.] 356, 57 Am. Dec. 111, in which it was held that, where damage was caused in part by combustion and in part by explosion from a lighted match attached to gunpowder, the whole damage was caused by fire. Where fire is employed as an agent for the purpose of heating a building, the insurer is not liable for the consequences thereof as long as the fire is confined within the limits of the agencies employed. 1 Wood on Fire Insurance, § 103; Cannon v. Phoenix Ins. Co., 110 Ga. 562, 35 SE 775, 78 Am. St. Rep. 124. The court in this case, in applying the above principle, held that the insurer was not liable for damages caused by smoke and soot from such a fire. But see Way v. Abington Mut. Fire Ins. Co., 166 Mass. 67, 55 Am. St. Rep. 379, 32 L. R. A. 608, where it was held that, where fire in a stove used for heating purposes ignites the soot accumulated in the flue and causes smoke and burning soot to escape into a room, the resulting damage is a damage caused by fire. Insurance covering damage by fire extends to loss occasioned by water used to put out the fire and to prevent the further destruction of the insured property. Davis & Co. v. Insurance Co. of North America, 115 Mich. 382, 73 NW 393.—From 4 Mich. L. R. 238.

47. Policy insuring horses, mules, hay, wagons, buggies, harnesses and corn, held not to cover saddles, laprobes or whips, or authorize recovery for use of horses or loss of business. American Ins. Co. v. Hornbarger, 85 Ark. 337, 108 SW 213. Building detached from main dwelling but used as part of it is an "addition," within policy on "dwelling and addition." Tate v. Jasper County Farmers' Mut. Ins. Co. [Mo. App.] 113 SW 659. Policy on "dwelling and addition" and "contents of dwelling" does not cover contents of addition. Id. Fire policy covering "awnings attached to" the building but not "awnings held in storage or for repairs" held to cover awnings stored in building but attached thereto when awnings were required. Wicks v. London & Lancashire Fire Ins. Co., 111 NYS 63.

48. "Drummer floater" policy, insuring property of salesman "while travelling," though covering the property during incidental stops at points of travel, does not cover it when returned to starting point. Jacobson v. Liverpool, London & Globe Ins. Co., 135 Ill. App. 20. Fire policy, providing it should cover property "in both locations during the removal" thereof permitted by the policy, held not to cover it while temporarily stored in a building other than that in which it was insured for subsequent removal to new location. Palatine Ins. Co. v. Kehoe, 197 Mass. 354, 83 NE 866. Insurance on personalty not constantly kept in a particular location will be held to cover the property while its location is incidentally and customarily changed notwithstanding words descriptive of its particular location, such words being regarded as descriptive of the subject of insurance and its customary location. Lathers v. Mutual Fire Ins. Co. [Wis.] 116 NW 1. Fire policy against loss of farm barn and live stock "therein on the farm and from lightning at large" held to cover horse destroyed while temporarily on another farm. Id.

49. Condition that policy shall be effective only "while the premises are occupied as a store and dwelling" is a mere condition subsequent, and in action on such policy it is not erroneous to submit to jury question whether change in use of building and subsequently its being left vacant increased the risk, and to charge that, if jury found in negative, policy holder could recover. Germania Fire Insurance Co. v. Werner, 6 Ohio N. P. (N. S.) 514, following Moody v. Amazon Ins. Co., 52 Ohio St. 12, 38 NE 1011.

50. In absence of provision that policy shall inure to "benefit of whom it may concern" or words of equivalent import. Washburn-Crosby Co. v. Home Ins. Co., 199 Mass. 463, 85 NE 592. Provision that policy attached to "property, interest and legal liability" of a named railroad held equivalent to statement that policy was not for benefit of whom it might concern. Id. Descriptions considered and held not to cover interest of owner of flour held by railroad company as warehousemen and for loss of which it was not liable. Id.

51. Under policy exempting company from liability for loss caused by explosion except as to damage caused by ensuing fire, if explosion is result of preceding fire, insured may recover entire loss (German Am. Ins. Co. v. Hyman, 42 Colo. 156, 94 P 27), but if explosion precedes fire only loss by the fire can be recovered (Id.). Evidence insufficient to sustain finding that fire preceded explosion. Id. Fire preceding explosion and rendering insurer liable for entire loss under policy not covering loss by explosions must be fire as ordinarily understood and not a mere blaze produced by lighting a match, gas jet, or lamp. Id.

52. Provision excepting loss by fire caused directly or indirectly by earthquake is valid. Richmond Coal Co. v. Commercial Union Assur. Co., 159 F 985. Under such provision defendant must show that loss was proximately, either directly or indirectly, caused by earthquake, that if loss was directly due to fire, such fire would not have occurred but for the earthquake. Id. Not sufficient to prove that earthquake produced conditions but for which loss would not have occurred if it did not directly or indirectly cause fire (Id.), but if it did cause fire it is immaterial that such fire started in other property, if it spread continuously, to fire insured (Id.). Under exemption in case of

or fire originating within machines.[54] A fire policy does not cover damage by lightning without fire,[55] but lightning is often expressly insured against.[56] Voluntary and wrongful destruction of the property by insured precludes recovery,[57] unless insured was insane at the time.[58]

*Hail insurance.*—Such loss only is indemnified as occurs while the policy is in force.[59]

*Life insurance.*See 10 C. L. 363—Execution for crime is covered unless expressly excepted.[60] Insurer is often exempted if insured commits suicide[61] while sane or insane[62] or violates the law.[63] Death must occur within the policy term.[64]

*Plate glass insurance.*—Accidental breakage[65] is commonly insured against, with exception if the loss is due to fire.[66]

loss "occasioned by or through earthquake," recovery is precluded if evidence shows that but for earthquake fire would not have destroyed insured property, and fire spread from another building fired by earthquake is within exception. Henry Hilp Tailoring Co. v. Williamsburgh City Fire Ins. Co., 157 F 285. Exception against loss "caused, directly, or indirectly," by invasion, * * *, or for loss or damages "occasioned by or through" any earthquake, * * *, company was exempt only where earthquake was immediate, direct, and proximate cause of fire. Baker v. Williamsburgh City Fire Ins. Co., 157 F 280. On other hand, exemption could not be limited so as to apply only to loss or damage by earthquake and not by fire. Id. Company held exempt only where loss was caused directly by earthquake and not where fire spread from other buildings fired by earthquake. Williamsburgh City Fire Ins. Co. v. Willard [C. C. A.] 164 F 404. Insurer not exempted by Civ. Code Cal. § 2628, providing that when a peril is especially excepted loss which would not have occurred but for such peril is thereby excepted. Id.

53. Under provision against liability for loss caused by order of civil authority, while building permits were refused by city authorities pending decision concerning certain street improvements. Palatine Ins. Co. v. O'Brien, 107 Md. 341, 68 A 484.

54. Damage to automobile through explosion, by ignition from oil lamp, of gasoline flowing from tank after an accident, and covering water in a ditch, held not covered by policy excepting damage by fire originating "within" the vehicle. Preston v. Aetna Ins. Co. [N. Y.] 85 NE 1006.

55. Prior custom of company of paying damage caused by lightning without fire though policy covered only loss by fire, and fact that plaintiff had contributed assessments to meet such invalid claims, held not to entitle plaintiff to recover for damage by lightning when no fire ensued, on theory that custom of company was part of contract. Sleet v. Farmers' Mut. Fire Ins. Co. [Ky.] 113 SW 515.

56. Evidence insufficient to show mule was killed by lightning. Warren v. Farmers' Mut. Fire Ins. Co., 130 Mo. App. 226, 109 SW 88.

57. Voluntary, fraudulent, corrupt or wrongful destruction of property by insured himself precludes recovery, though policy does not provide for such contingency. Bindell v. Kenton County Assessment Fire Ins. Co., 33 Ky. L. R. 385, 108 SW 325. Evidence held to show insured procured another to burn the property. Hoyt v. Insurance Co. of North America, 103 Me. 299, 69 A 110.

58. If insane, burning no defense. Bindell v. Kenton County Assessment Fire Ins. Co., 33 Ky. L. R. 385, 108 SW 325.

59. Evidence held sufficient to sustain verdict that plaintiff suffered no loss by hail prior to noon, September 1st, when policy expired. Flakne v. Minnesota Farmers' Mut. Ins. Co. [Minn.] 117 NW 785. Where policy terminated hail insurance at noon, September 1st, and by-laws terminated it "after September 1st," but were legally amended, to conform to policy, no recovery could be had for loss by hail after noon of September 1st. Id.

60. No defense that insured was executed for murder. Collins v. Metropolitan Life Ins. Co., 232 Ill. 37, 83 NE 542, rvg. 133 Ill. App. 326.

61. Under Rev. St. 1899, § 7896, suicide is no defense unless insured contemplated it when he took out insurance. Tennent v. Union Cent. Life Ins. Co. [Mo. App.] 112 SW 754. Evidence held to show suicide. Metropolitan Life Ins. Co. v. Wagner [Tex. Civ. App.] 109 SW 1120. Evidence for jury, see post, § 24C subd, Questions of Law and Fact.

62. Under policy limiting liability, if insured should commit suicide while sane or insane, self-killing by insured while so mentally deranged as to be unconscious of the act will be regarded as a mere accident and authorize full recovery (Metropolitan Life Ins. Co. v. Thomas, 32 Ky. L. R. 770, 106 SW 1175), but recovery will be limited if, though mentally deranged, insured knew his act would probably cause death and committed it intending it should (Id.). Evidence held to sustain verdict in full. Id.

63. To defect recovery on life policy on ground that insured was carrying concealed weapon, in violation of Ky. St. 1903, § 1308, it must be shown not only that offense was being committed but further that it brought about the death. Interstate Life Assur. Co. v. Dalton [C. C. A.] 165 F 176.

64. Where question was whether term expired at five o'clock of a certain day or midnight, evidence held to justify inference that insured died before five o'clock. Aetna Life Ins. Co. v. Wimberly [Tex. Civ. App.] 108 SW 778, reversed on other grounds by opinion in [Tex.] 112 SW 1038.

65. Breakage of plate glass by dynamiting of property to prevent spread of fire held not result of accident so as to authorize recovery but result of design. Frisbie v. Fi-

*Salesman's samples.*—The excepted risks are usually specified in the policy.[67]

*Title insurance.*[See 10 C. L. 868]—Claims and liens not of record are often excepted.[68]

*Reformation of policy for mistake.*[See 10 C. L. 968]—Principles common to reformation of instruments in general are discussed in another article.[69] When there is a mere agreement to "renew" a policy, without more, reformation lies if a new policy at variance with the old is delivered.[70] Courts hesitate to reform policies in favor of insurer after loss,[71] especially when there is evidence of laches.[72]

§ 11. *The beneficiary and the insured.*[See 10 C. L. 864]—The beneficiary is the person to whose benefit the insurance contract primarily inures on the happening of the contingency insured against.[73] Insured's intention as to who shall be beneficiary must be given effect if not contrary to statute or public policy.[74] Under a policy payable to children in case of death of the designated beneficiary before death of insured, the legal representatives of the designated beneficiary take in default of children.[75] The surviving wife of one who before his marriage took

delity & Casualty Co. [Mo. App.] 112 SW 1024.

66. Breakage of glass by dynamiting of the building by town authorities or concerted action of property owners to stop progress of approaching fire, held within provision exempting company if loss should happen by or in consequence of any fire, whether on insured premises or not. Frisbie v. Fidelity & Casualty Co. [Mo. App.] 112 SW 1024.

67. Evidence held to show loss of salesman's samples by theft, in city where assured had permanent offices not covered by policy excluding losses by theft and providing it should not attach in places where assured had permanent offices or salesrooms. Cohn v. Federal Ins. Co., 113 NYS 12.

68. Title policy excepting claims of tenure by present occupants and instruments, terms, etc., not shown by any public record, covers record title only and not claims sustainable only by proof of adverse possession. Bothin v. California Title Ins. & Trust Co., 153 Cal. 718, 96 P 500. Recorded deed of trust by occupant who was stranger to record chain of title held not covered. Id.

69. See Reformation of Instruments, 10 C. L. 1496.

70. Evidence held not to authorize reformation of fire policy by striking therefrom warranty as to amount of other insurance, if appearing that policy conformed to preliminary agreement, if any existed, and, if not, then relations of parties arose only from delivery and acceptance of policy. Kenyon Paper Co. v. Nederlandsche Lloyds, 124 App. Div. 886, 109 NYS 311.

71. Where owner's agent applied for insurance on common form, which was issued in such form, and delivered to and paid for by insured, company was not entitled after fire to have policy reformed so as to cover only part of property, on ground that owner's agent asked for insurance on only part of property and that rate charged did not cover property destroyed. National Union Fire Ins. Co. v. John Spry Lumber Co., 235 Ill. 98, 85 NE 256, afg. Queen Ins. Co v. Spry Lumber Co., 138 Ill. App. 620.

72. Insurance company having copies of policies in its possession for several months is bound to know what property is covered by the policies, and cannot wait until after destruction of the property and then sue for reformation on ground of mistake as to property insured. National Union Fire Ins. Co. v. John Spry Lumber Co., 235 Ill. 98, 85 NE 256, afg. Queen Ins. Co. v. Spry Lumber Co., 138 Ill. App. 620.

73. Firm of undertakers held sole beneficiary under contract whereby members of an association were promised burial in consideration of contributing a sum on every death in membership, it being stipulated that for furnishing burial supplies and services, undertakers were to receive full amount of benefit accruing under contract. State v. Willett [Ind.] 86 NE 68.

74. Waring v. Wilcox [Cal. App.] 96 P 910. Policy payable to wife and in case of her death to "children surviving" held to exclude grandchildren. Succession of Roder, 121 La. 692, 46 S 697. Nephews and nieces held entitled to proceeds, though through mistake company made policy payable to estate of insured where both insured and agent believed it had been made payable to nephews and nieces, evidence being clear and convincing. Burt v. Burt [Pa.] 70 A. 710. Woman designated and described in policy as beneficiary and wife and living with insured as such held entitled to proceeds, though insured had a lawful wife whom he had deserted. Prudential Ins. Co. v. Morris [N. J. Eq.] 70 A 924. Paid-up policy taken in exchange for endowment policy and payable to wife, and in event of her death to children, held to govern as to parties entitled to proceeds. In re Peckham [R. I.] 69 A 1002. Life policy payable to insured's executors, administrators or assigns is payable to his estate. Mitchell v. Allis [Ala.] 47 S 715. Life company organized under laws of Illinois may issue policies payable to estate of insured. Garfinkel v. Alliance Life Ins. Co., 140 Ill. App. 380. Policy issued by company organized under Act June 22, 1893, for incorporation of companies to do life or accident insurance business on assessment plan, may be made payable to estate of insured and transferred by will to devisees generally. McMahon v. Feldman, 139 Ill. App. 624.

75. In re Peckham [R. I.] 69 A 1002.

out a policy payable to his estate is not entitled to the proceeds as community property.[76] Insurer is sometimes given the option to pay the proceeds of the policy to any person deemed by it equitably entitled thereto.[77] After full performance of a life policy by insured by payment of premiums and otherwise, the insurer cannot defend an action thereon by pleading illegality in the designation of beneficiary.[78]

As a general rule[79] the beneficiary in a life policy has a vested interest in the insurance[80] which passes to him and his legal representatives[81] free from the claims of creditors of insured[82] and which, subject to the right of insured to discontinue the payment of premiums,[83] cannot be impaired or destroyed unless the policy authorizes it by change of beneficiary or otherwise,[84] or without the consent of such beneficiary first obtained.[85] If the policy allows a change of beneficiary, provisions therefor must be at least substantially complied with,[86] but a change clearly au-

76. Succession of Verneuille, 120 La. 605, 45 S 520. Premiums paid by community held properly credited to it. Id.

77. Person who under terms of the policy is designated by company as equitably entitled to receive a sum thereunder becomes vested with the absolute property in the fund and may deal with it as his own. Husband not required to account to wife's representative where company was authorized to pay funeral benefits to legal representative, or relative by blood, connection by marriage, or other person whom it deemed equitably entitled. Althouse v. Roth, 35 Pa. Super. Ct. 400.

78. Could not assert policy was unlawfully made payable to estate of insured. Garfinkel v. Alliance Life Ins. Co., 140 Ill. App. 380.

79. Interest of beneficiary of fraternal or mutual benefit insurance, see Fraternal and Mutual Benefit Associations, 11 C. L. 1564.

**In Wisconsin** insured may dispose of policy by assignment, will or gift without consent of beneficiaries. Slocum v. Northwestern Nat. Life Ins. Co. [Wis.] 115 NW 796. Beneficiary's interest being "mere expectancy" cannot be basis of claim for damages by beneficiary on insurer's **wrongful rescission** of contract, insured being the one entitled to damages. Id. But note further this section, statute making life policy wife's separate property.

80. Where policy was payable to wife and to "heirs at law" of insured if wife died before he did, on death of wife before insured, and later of an only child, interest in policy vested in brothers and sisters of insured unaffected by his subsequent attempted assignment to another, "heirs at law" having reference to time of death of insured. Birge v. Franklin, 103 Minn. 482, 115 NW 278.

81. Where policy was payable to wife and children, their executors, etc., child living when policy was issued but who died before insured died took vested interest on delivery of policy, and on her death interest passed by descent or succession same as other personalty. Woodworth v. Aetna Life Ins. Co. [Ala.] 45 S 417. Where husband acted only as wife's agent in taking out policy on his life for wife's benefit and benefit of children in case of her death, and in keeping same in his possession and paying premium, wife acquired a vested interest therein at moment of delivery to insured, though she had no knowledge of its existence, and same passed by her will on her predeceasing husband. Bradshaw v. Mutual Life Ins. Co., 112 NYS 107. Where policy to wife on life of husband was payable to wife, her executors, administrators and assigns, and she predeceased husband, proceeds on latter's death went to her executor and not to husband's executor, though husband was wife's sole legatee and devisee. Pool v. New England Mut. Life Ins. Co., 123 App. Div. 885, 108 NYS 431.

82. See post, § 22.

83. Naming one as beneficiary does not require insured to keep policy alive for benefit of beneficiary. Smith v. Metropolitan Life Ins. Co. [Pa.] 71 A 11.

84. Beneficiary has vested right in contract which cannot be diminished or affected by subsequent agreements between insurer and insured not provided for in original contract. Arnold v. Empire Mut. Life Ins. Co., 3 Ga. App. 685, 60 SE 470. Stipulation that nonpayment of premium note should forfeit policy held not to affect beneficiary. Id. Where right to change beneficiary is reserved in policy, beneficiary has no vested interest and another may be substituted at instance of insured. Waring v. Wilcox [Cal. App.] 96 P 910. Where policy is made payable to one's wife but no further disposition of proceeds is made either to her legal representatives or otherwise, insured may designate another beneficiary on his surviving his wife. Smith v. Metropolitan Life Ins. Co. [Pa.] 71 A 11.

85. Insured could not change beneficiary after wife's death without consent of her legal representative, policy being silent on right to change beneficiary. Smith v. Metropolitan Life Ins. Co., 34 Pa. Super. Ct. 72.

86. If policy provides for change of beneficiary, vested right of beneficiary can be divested only by strict conformity with such provision. Arnold v. Empire Mut. Life Ins. Co., 3 Ga. App. 685, 60 SE 470. No change where policy was not sent to be indorsed as required by its terms and where insured continued to pay premiums and sent receipts to old beneficiary. Begley v. Miller, 137 Ill. App. 278. Immaterial whether notice and request of assured to company to change name of beneficiary was signed on sick bed or elsewhere, if in fact signed by insured. Metropolitan Life Ins. Co. v. McCray [Ala.] 47 S 65. Receipt of premiums for seven years on basis of change of beneficiary held to work estoppel to object to regularity of change. Smith v. Metropolitan Life Ins. Co. [Pa.] 71 A 11.

thorized by the policy is not affected by false representations by insured to the old beneficiary[87] or by want or illegality of consideration.[88] A substitution of beneficiary with the consent of the old beneficiary will be enforced subject to the latter's rights recognized therein by the parties, notwithstanding insured could have elected to make the substitution without the consent of the original beneficary.[89] Though the interest of a beneficiary in the proceeds of a life policy is ordinarily transmissible as well as vested,[90] the policy may be worded so as to make it nontransmissible,[91] but the presumption is that it was intended that the interest should descend.[92] It is provided by statute in some states that a life policy payable to a married woman shall be her sole and separate property.[93] Such statutes do not prevent insured from stipulating that the beneficiary shall have no interest in the cash surrender value of the policy.[94] The beneficiary has no interest in sums paid as premiums by the insured so as to be entitled thereto on rescission of the policy.[95]

*Rights of employe under employer's liability policy.* See 10 C. L. 866

*Rights of mortgagees, creditors, trustees, etc., under loss payable clauses.* See 10 C. L. 866—A mortgagee, creditor, or other third person to whom as his interest may appear the loss is made payable has an equitable lien on the proceeds of the policy,[96] and his interest cannot be affected by unauthorized adjustments between insurer and insured,[97] nor by other acts or omissions of insured guarded against by express stipulation.[98] On the other hand he is entitled to no greater rights as

87. Where policy in favor of insured's mother reserved right to change beneficiary, fact that insured falsely represented to mother that he had married and wanted to make wife beneficiary, when in fact he was living in illicit relations with the woman, held immaterial in determining rights of substituted beneficiary. Waring v. Wilcox [Cal. App.] 96 P 910. That he made such representation to company held also immaterial as between claimants to fund. Id.

88. That change of beneficiary was induced or procured by promise of substituted beneficiary to continue illicit relations with insured did not render it void, no consideration being essential. Waring v. Wilcox [Cal. App.] 96 P 910.

89. Parties having acquiesced in construction recognizing rights of original beneficiary and having undertaken to conform thereto, new beneficiary could not base rights on proposition that change would have been valid without consent of original beneficiary. Crowell v. Northwestern Nat. Life Ins. Co. [Iowa] 118 NW 412.

90, 91, 92. Diehm v. Northwestern Mut. Life Ins. Co., 129 Mo. App. 256, 108 SW 139. Where policy was payable to wife and children, their executors, etc., interest of child dying before insured passed to children of such child. Id. Rev. St. 1899, §§ 4600, 4613 (Ann. St. 1906, pp. 2499, 2507), relating to tenancies in common of realty, and giving lineal decendants of devisees the interest of their ancestor in case latter die before testator, do not regulate interests of beneficiaries in life policies. Id.

93. Under Laws 1891, p. 482, c. 376, providing that a policy of life insurance payable to a married woman shall be her sole and separate property for use and benefit of herself and children, husband has no valid claim to policy or proceeds after wife's death except under her will, regardless of source of funds for payment of premiums. Perkinson v. Clarke, 135 Wis. 584, 116 NW 229.

94. Statute of 1898, § 2347, giving wife exclusive and separate interest in policy on life of husband, expressed to be for her benefit. Hilliard v. Wisconsin Life Ins. Co. [Wis.] 117 NW 999.

95. Slocum v. Northwestern Nat. Life Ins. Co. [Wis.] 115 NW 796. See 6 Mich. L. R. 712.

96. Loss payable to mortgagee. Hanson v. W. L. Blake & Co., 155 F 342. Oral agreement followed by insurance for benefit of mortgagee gave lien as against mortgagor or trustee in bankruptcy, though made after mortgage was given and though beneficiary had been changed without consent of mortgagee. Id.

97. Mortgagee's interest under ordinary loss payable clause cannot be affected by any adjustment by insured with insurer without his knowledge. Leslie v. Firemen's Ins. Co., 112 NYS 496. Mortgagee who holds policy issued to the mortgagor with usual mortgage clause, and providing that in case of loss there shall be appraisal and award, and that insurance as to interest therein of mortgagee should not be invalidated by any act or neglect of mortgagor, is not bound by appraisement and award made by mortgagor and insurance company without knowledge of mortgagee. In such case where mortgagee repudiates appraisement and award, it is his duty to demand new appraisal and award before insisting upon payment of loss to him, either by original action or by cross petition in an action brought by mortgagor. Ohio Farmers' Ins. Co. v. Erie Brew. Co., 11 Ohio C. C. (N. S.) 28.

98. Under provision that insurance should not be invalidated as against mortgagee by any act or neglect of mortgagor or owner, mortgagee's rights were not affected by failure of insured to comply with insurer's de-

against insurer than insured could have,[99] and may be rendered liable to the latter for loss due to an unauthorized settlement with the company.[1]

*Insurance by bailee or agent.* See 10 C. L. 887

§ 12. *Policy value in cash or loans, and right to share in surplus before loss.* See 10 C. L. 368—By their terms policies often have what is called a cash surrender value, sometimes expressly exempted from any claim on the part of the beneficiary,[2] and which may be recovered by insured by complying with conditions prescribed.[3] Frequently insured may borrow a certain amount from the company on his policy under such regulations for payment as may be agreed upon.[4] Conditions in loan contracts more onerous than the terms provided in the policy on which insured may borrow money are invalid in the absence of further consideration.[5]

§ 13. *Options and privileges under policy.* See 10 C. L. 388—After the policy has been in force for a certain length of time, insured is often entitled either by its terms or by statute to a specified amount of paid up or extended insurance[6] if he should allow the policy to lapse[7] by failing to pay further premiums,[8] or he may

mand for appraisers. Reed v. Firemen's Ins. Co. [N. J. Law] 69 A 724.

99. Under clause that loss be paid to a third person, latter recovers only as insured's appointee, and where policy is avoided as to insured, appointee cannot recover. Brecht v. Law Union & Crown Ins. Co. [C. C. A.] 160 F 399. Provision that when with insurer's consent an interest under policy should exist in favor of any one having an interest in property other than insured's interest, "the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto," did not change legal effect of attached slips making loss payable to a creditor, which was merely to constitute him insured's appointee to receive whatever might become due if policy should remain valid as to insured. Id. Such provision was intended only to apply where insurer by special agreement with mortgagee or third person has consented to modifications or waivers. Id. Under change of ownership clause, neither owner nor contractors could recover on policy where owner became bankrupt one hour after insurance, though same was taken out for contractors' benefit. New Kensington Lumber Co. v. German Ins. Co., 35 Pa. Super. Ct. 32.

1. Where mortgagee made unauthorized settlement but evidence showed amount of settlement was reasonable value of loss sustained and owner made no bona fide effort to carry out pending arbitration, mortgagee was not liable to account to owner on basis of loss claimed by latter. Jacob Tome Institute v. Whitcomb [C. C. A.] 160 F 835. Mortgagee not entitled to credit for attorney's fee. Id.

2. Policy on life of married man conditioned that it shall have cash surrender value in which beneficiary shall have no interest, is not as to such feature controlled by statute of 1898, § 2347, giving wife exclusive and separate interest in policy on life of husband expressed to be for her benefit. Hilliard v. Wisconsin Life Ins. Co. [Wis.] 117 NW 999.

3. Not where plaintiff did not surrender policy as required by its terms. Hilliard v. Wisconsin Life Ins. Co. [Wis.] 117 NW 999. Where surrender of policy as provided therein would not have avoided litigation, plaintiff was entitled to judgment conditioned on surrender of policy. Id. Under policy on which premium was payable on June 6th of each year and which stipulated for cash surrender value on surrender of policy while in force, where company's answer to request of insured as to amount of surrender value and method of realizing same was sent June 5th and was in effect a refusal to pay any cash value, insured was relieved of duty of making absolute offer of surrender before June 6th or thereafter, so that company could not defend action for surrender value on ground that premium due June 6th was not paid. Hill v. Bankers' Life Ins. Co., 112 NYS 120.

4. Where reserve exceeded loan and interest, provision that if loan and interest should equal legal reserve company could demand immediate payment and cancel policy if payment was not made was inapplicable. Bozeman's Adm'r v. Prudential Ins. Co. [Ky.] 113 SW 836.

5. Forfeiture clause. Bozeman's Adm'r v. Prudential Ins. Co. [Ky.] 113 SW 836.

6. Separate paper signed by special agent of insured and delivered with policy, giving amount of paid-up insurance to which insured should be entitled at end of 15 year period under option in policy, held mere statement of expectation not binding on company, it being expressly stipulated agents should have no power to bind company by promises or representations not contained in application. Untermyer v. Mutual Life Ins. Co., 113 NYS 221.

7. Statements by agent as to amount of paid-up insurance insured would be entitled to if he should allow policy to lapse held ineffectual where policy specified method of determining such amount. United States Life Ins. Co. v. Wood, 32 Ky. L. R. 1120, 107 SW 1193.

8. Policy held in force at death of insured by virtue of provision for automatic insurance by application of cash surrender value to payment of premiums after third or any subsequent policy year. Royal Union Life Ins. Co. v. McLendon [Ga. App.] 62 SE 101. Evidence insufficient to establish existence of reserve under term policy sufficient under statute to cover period between default in

be entitled to have his policy exchanged for one of a different kind,[9] or to share in some fund on the happening of a specified contingency.[10] What deductions are permissible in fixing the amount of extended insurance,[11] and whether any affirmative notice or election is necessary to the execution of provisions conditioned on

payment of premium and death of insured. Allison's Ex'x v. Fidelity Mut. Life Ins. Co., 32 Ky. L. R. 1026, 107 SW 730. What reserve fund would have been had policy been ordinary life held immaterial. Id. Automatic extension clause held not operative, third premium not having been paid when due. Lesseps v. Fidelity Mut. Life Ins. Co., 120 La. 610, 45 S 522. Rev. St. 1899, § 7897 (Ann. St. 1906, p. 3752), providing that after payment of three annual premiums no life policy shall be forfeited for nonpayment of further premiums, and that net value of policy when premium becomes due and is not paid shall be computed with 4 per cent interest, and after deduction from three-fourths of such net value any notes or other evidence of indebtedness to company for past premiums balance shall constitute a net single premium for temporary insurance for full amount of policy, held not violative of Const. U. S. Amend. 14, or Const. Mo. art. 2, § 4. Burridge v. New York Life Ins. Co., 211 Mo. 158, 109 SW 560. Where residue of surrender value of policy after company's foreclosure of a lien was sent by check to beneficiary and insured but never received, policy was not surrendered for consideration adequate in judgment of holder" within § 7900, so as to render inapplicable above statute. Id. One who had paid only two semi-annual premiums after reinstatement within state of policy taken out and governed by law of another state held not within Rev. St. 1899, § 5856 (Ann. St. 1906, p. 2960), precluding forfeiture after payment of "two full annual premiume." McGeehan v. Mutual Life Ins. Co. [Mo. App.] 111 SW 604. Policy providing that on default after payment of three premiums it should become a policy for paid-up insurance for a specified amount "unless there should be an unpaid loan" is not within Rev. St. 1899, § 7900, providing that the three preceding sections on extended insurance after payment of three annual premiums shall not apply to policies providing for "unconditional" commutation for paid-up insurance, but is controlled by § 7897. Whittaker v. Mutual Life Ins. Co. [Mo. App.] 114 SW 63. Statutes and defendant's organization and operations considered, and held defendant was an assessment company and not an old line company so that Rev. St. 1899, § 7897 (Ann. St. 1906, p. 3752), as to nonforfeiture of policies, was not applicable. McCoy v. Bankers' Life Ass'n [Mo. App.] 114 SW 551. Policy providing for extension from date to which premiums were duly paid construed, and held date "to which premiums were duly paid" was November 22, though policy was issued and first premium paid December 2, so that automatic extension expired before death of insured. Wilkie v. New York Mut. Life Ins. Co., 146 N. C. 518, 60 SE 427. Premiums were paid to next due date, though 30 days of grace were allowed by policy to prevent forfeiture. Id. Automatic nonforfeiture clause providing that on failure to make due payment of any premium policy would be indorsed for a specified amount of paid-up life insurance on insured's request within six months after default, and in absence of request policy should automatically continue at face value for a specified term, held to continue full insurance for six months, though request for paid-up insurance be made before expiration of six months period, in view of amount of premiums small amount of paid-up insurance and policy of insurance laws prohibiting discriminations. Clappenback v. New York Life Ins. Co. [Wis.] 118 NW 245.

9. Where policy on quarterly renewal term plan with increasing rates provided it might be exchanged after insured reached 60 for level premium policy at rate of his then age shown by schedule of rates ranging from 60 to 65 and having "&c" printed beneath columns of rates, policy did not become level premium policy automatically when insured reached 65 merely because schedule did not specify rates for greater age. Jones v. Provident Sav. Life Assur. Soc. [N. C.] 61 SE 383.

10. Provision in insurance certificate that if at any time company should fail by reason of insufficient membership, or should neglect if justly and legally due, to pay maximum indemnity provided by terms of any certificate, a certain safety fund should be divided among holders of certificates then in force, held susceptible, even without aid of circulars issued by company, to construction that fund should be divided when number of certificate holders became so reduced that aggregate amount of insurance should not exceed a sum mentioned in certificate. Dresser v. Hartford Life Ins. Co., 80 Conn. 681, 70 A 39. "Fail" referred to insufficiency of mortuary fund "by reason of insufficient membership" to pay certificate claims against company. Id.

11. Policy held not to authorize deduction of certain advances under policy from cash surrender value so as to reduce extension of insurance. Royal Union Life Ins. Co. v. McLendon [Ga. App.] 62 SE 101. Policy giving options as to paid-up life insurance, extended term insurance and cash surrender, construed, and held that amount otherwise available for extended insurance was not to be diminished by any indebtedness of insured to company, policy under head of such insurance otherwise providing manner of payment of the indebtedness. Bozeman's Adm'r v. Prudential Ins. Co. [Ky.] 113 SW 836. Under Rev. St. 1899, § 7897 (Ann. St. 1906, p. 3752), providing for temporary insurance on nonpayment of premiums, indebtedness to be deducted is restricted to that for past premiums, and company cannot, because of loan and pledge contract whereby it advanced money and took policy as collateral, cancel policy to pay loan and deduct indebtedness other than for past premium payments. Burridge v. New York Life Ins. Co., 211 Mo. 158, 109 SW 560. Amendment, Laws 1903, p. 208, providing for additional deduction of "any other indebtedness" to company, held not retrospective. Id. Evidence held not to show that entire loan was for payment of past premiums.

the nonpayment of a premium,[12] will depend on the agreement or the statute. Application for paid up or extended insurance may be oral or written,[13] and time is not of the essence of a provision as to when it must be made;[14] but under a policy providing for extended insurance "if applied for" after failure to pay a premium, application therefor must be made in the lifetime of insured.[15]

§ 14. *Assignments and transfers of benefits or insurance. Accident insurance.* See 10 C. L. 370

*Employer's liability insurance.*—The policy may provide against assignment without insurer's consent.[16]

*Life insurance.*See 10 C. L. 370—A policy may be sold, assigned as collateral, or given in payment of a debt[17] subject to considerations attending fraud, duress or incapacity,[18] the laws of the state on questions relating to insurable interest,[19]

Id. Loan and pledge contract held not independent of policy but contemplated thereby. Id.

**12.** Under policy simply allowing paid-up insurance in accordance with c. 347, Laws of 1879, of New York, on failure to pay any premium after three years, insured was not required to elect between paid-up and extended insurance, statute providing that he should have either "as shall have been agreed." United States Life Ins. Co. v. Wood, 32 Ky. L. R. 1120, 107 SW 1193. Where policy provided for extended insurance "if applied for" after failure to pay premium, insurer was not required to notify insured to make election. Balthaser v. Illinois Life Ins. Co., 33 Ky. L. R. 283, 110 SW 258. Where note for policy loan provided that on nonpayment of premium or principal or interest on note policy holder elected to take cash surrender value and empowered company to cancel policy, company was not required to notify policy holder of cancellation when premium was not paid. Wilson v. Royal Union Mut. Life Ins. Co., 137 Iowa, 184, 114 NW 1051.

**13.** For extension on failure to pay third or subsequent premium. Wortham v. Illinois Life Ins. Co., 32 Ky. L. R. 827, 107 SW 276.

**14.** Five years held reasonable time, despite six months' limitation in contract. United States Life Ins. Co. v. Wood, 32 Ky. L. R. 1120, 107 SW 1193. Suit timely where brought by husband within five years though wife, who was beneficiary, did not join within such period, she not being a necessary party. Id.

**15.** Neither representative nor beneficiary may make application after death. Balthaser v. Illinois Life Ins. Co., 33 Ky. L. R. 283, 110 SW 258.

**16.** Prohibition against assignment of policy without consent of insurer held inapplicable where cause of action had already accrued thereon, and after expiration of policy by its terms. Maryland Casualty Co. v. Omaha Elec. L. & P. Co. [C. C. A.] 157 F 514.

**17.** Policy payable to estate of insured. Lake v. New York Life Ins. Co., 120 La. 971, 45 S 959. Reassignment by plaintiff to widow of insured, so as to preclude recovery by plaintiff. Sodekson v. Mutual Life Ins. Co., 111 NYS 877. In action on life policy by assignee, evidence held to show where life policy was payable to insured's wife, for her sole use and benefit, if she survived until time of payment, her interest was "settled" as separate property, within statute permitting married women to dispose of their separate estate so settled, rendering enforcible a pledge of such interest. Troendle v. Highleyman [Ky.] 113 SW 812. Judgment in action by creditor to establish a lien on proceeds of life policy assigned to him as security options under which were not yet available, could not be complained of by creditor because it merely adjudged a lien on proceeds without also allowing plaintiff to surrender policy to company when options should become available and apply money to payment of debt, plaintiff being protected in right to apply to court when options should mature. Davidson's Ex'r v. Hieatt [Ky.] 113 SW 891.

**18.** Evidence insufficient to show duress in procuring wife's signature to assignment. Ely v. Hartford Life Ins. Co., 33 Ky. L. R. 272, 110 SW 265. Conduct of husband insufficient in absence of proof connecting assignee therewith. Id. Evidence held to show insured was mentally capable of contracting with her sons to pay premiums on her life policy and take proceeds. Woods v. Woods' Adm'r [Ky.] 113 SW 79.

**19.** See, also, ante, § 5, subd. Life Insurance. Policy not assignable to one not having insurable interest. Peoria Life Ass'n v. Hines, 132 Ill. App. 642. Consenting company held estopped to question assignment for lack of insurable interest in assignee. Id. Purchaser of policy on life of another, in which he has no insurable interest except as creditor, sale being with consent of insured and beneficiaries, holds proceeds above amount of debt in trust for beneficiaries (Iron v. U. S. Life Ins. Co., 33 Ky. L. R. 46, 108 SW 904), and, where purchaser has no insurable interest, he takes a mere lien for amount paid and interest, anything over being held in trust for beneficiaries (Id.). Rule applicable to judicial sale. Id. In suit by beneficiaries against purchasers, rights of beneficiary not party could not be determined. Id. Confirmation of sale by court, no exceptions being filed, held not conclusive as to capacity of purchaser to take absolutely. Id. Ky. St. 1903, § 678, avoiding assignments of policies to persons having no insurable interest in life of insured, applies only to assessment or cooperative life insurance. Id. Bone fide transaction by which policy is taken out pursuant to **previous agreement** with creditor that it shall be transferred in satisfac-

and the requisites of assignments in general,[20] except as provided in the policy.[21] No particular phraseology is necessary,[22] and the assignment may be either for a valuable consideration or by way of gift.[23] The extent of the assignee's interest will be determined by the terms of the assignment contract.[24]

*Fire insurance.*[See 10 C. L. 372]—The consent of insurer or its agent is usually required,[25] and sometimes, also, entry on the company's books.[26] Where a policy is assigned after loss and deposited with insured, assignee's assent and acceptance may be presumed.[27] An adjusted claim for insurance is a chose in action subject to assignment.[28] The insurance may be transferred from one property to another.[29]

§ 15. *Change or substitution of contract, or risk, or of conditions thereupon*[See 10 C. L. 378]—Policies may be changed or substituted by mutual consent,[30] and mutual

tion of debt and that creditor shall pay all **future premiums** held valid, where debt and value of policy are not so disproportionate as to constitute wagering. Lake v. New York Life Ins. Co., 120 La. 971, 45 S 959. Transaction, pursuant to previous agreement, whereby policy was taken out and then assigned to one who paid all premiums under promise to pay a certain per cent of proceeds to estate of insured, held illegal so far as assignee was concerned, entitling insured's representative to proceeds less amount paid by assignee for premiums. Bendet v. Ellis [Tenn.] 111 SW 795.

**20.** Unless otherwise specifically provided, policy may be assigned in same manner as any other chose in action. McNevins v. Prudential Ins. Co., 57 Misc. 608, 108 NYS 745. Entry in pocket memorandum book kept by insured, reciting that a surety held a life policy to secure him, held insufficient as assignment, entry not being dated or policy described. Little v. Berry [Ky.] 113 SW 902. Where by terms of policy mere delivery will give no right as against the designated beneficiary, the **presumptions** arising from **mere possession** are rebutted. Stewart v. Gwynn, 41 Ind. App. 320, 83 NE 753. Proceeds of policy are payable to extent of **his** claim to assignee **without delivery,** in preference to subsequent assignee in whose possession policy was placed. Mechanics' Banking Co. v. Equitable Life Assur. Soc., 10 Ohio C. C. (N. S.) 396. Paper found in desk of assured after his death, directing payment of amount of life policy to H, held insufficient to show assignment of policy, there being no evidence paper or policy was ever delivered to H. Huestis v. Prudential Life Ins. Co., 111 NYS 461.

**21.** Though policy provided no assignment should be valid without indorsement of company's consent thereon at a designated office, separate written consent by company's agent held sufficient, assignor and assignee not knowing that agent could not waive provision as to manner of assignment, and company or agent not subsequently objecting or tendering unearned premium. Home Ins. Co. v. Myers, 32 Ky. L. R. 999, 107 SW 719. Where insurer waived strict compliance with requirements as to assignment of policy by insured to secure a debt, wife and children could not predicate rights on noncompliance, as against assignee. Clark v. Southwestern Life Ins. Co. [Tex. Civ. App.] 113 SW 335.

**22, 23.** McNevins v. Prudential Ins. Co. of America, 57 Misc. 608, 108 NYS 745. Where life policy prescribed no method of assignment and was payable to anyone connected by marriage to insured, or equitably entitled by reason of having incurred expense, and on receipt of policy insured delivered it to his wife saying "Take this policy and pay on it," and wife took it, retained it and paid premiums and insured's burial expenses, jury could find there was both a gift and an assignment of policy to wife. Id.

**24.** Proviso in assignment by insured and beneficiary that if policy matured by death assignee should recover from insurer "only to extent of his actual insurance interest properly proven" held, in light of oral evidence, to mean that assignee was entitled to recover only to extent of premium advancements. Crowell v. Northwestern Nat. Life Ins. Co. [Iowa] 118 NW 412.

**25.** Company liable to assignee of fire policy though agency of one giving consent to transfer had been revoked where company had not given sufficient notice of revocation and plaintiff was ignorant thereof. Gragg v. Home Ins. Co., 32 Ky. L. R. 988, 107 SW 321.

**26.** Giving insured permission to assign policy to a vendee of the property, though assignment was not presented to company nor recorded in its books until after fire, held waiver of strict compliance with by-laws requiring entry on books, etc., where after fire insurer's secretary approved assignment. Furbush v. Consolidated Patrons' & Farmers' Mut. Ins. Co. [Iowa] 118 NW 371.

**27.** Where after loss husband assigned to his wife and deposited with insurance companies, policies on her property made payable to himself, her assent and acceptance could be presumed, assignment being for her benefit. Kaufman v. State Sav. Bank., 151 Mich. 65, 14 Det. Leg. N. 867, 114 NW 863.

**28.** Wasem v. Gray, 43 Colo. 140, 95 P 557.

**29.** Evidence held to show that insurance on two barns was canceled after insured sold farm, and was not transferred to barn on place to which insured moved. Continental Ins. Co. v. Buchanan, 32 Ky. L. R. 1298, 108 SW 355.

**30.** Where minds of parties never met as to life policy which insured requested be substituted for one they had applied for, insured's agreement to accept and pay for original policy was not abrogated. Graham v. Remmel [Ark.] 112 SW 141. For modification of contract of **reinsurance,** see post, § 17.

companies often reserve the right to modify the contract by amendments to the by-laws.[31] An agreement between two companies by which all the assets of one, and its liabilities on outstanding policies, are transferred to the other on specified terms, is a breach of contract as against the policy holders,[32] but if they elect to accept the reinsurance offered by the transferee company, they will be bound by the terms proposed.[33] A purchasing company can defend only on such grounds as would have been available to the original insurer[34] unless it has expressly limited its liability.[35]

Renewals are common.[36] It is presumed that a contract to renew calls for a policy similar to the old.[37] Payment of premium is not essential to the validity of a contract to renew a fire policy,[38] and such contract may be made though the policy has yet several months to run.[39] An action will lie on a contract to renew.[40]

§ 16. *Rescission, forfeiture, cancellation and avoidance. A. Under statute or agreement. Burglary insurance.*See 10 C. L. 374

*Fire insurance.*See 10 C. L. 374—Cancellation may be either by virtue of statute[41] or pursuant to agreement[42] under policies authorizing same on notice.[43] Cancella-

31. Where by-laws of mutual hail insurance company provided that company should not be liable on policies "after September 1st," and were amendable by terms of policy which on its face expired "noon, September 1st," amendment of such by-laws so that company should not be liable after "noon," September 1st, held reasonable and valid. Flakne v. Minnesota Farmers' Mut Ins. Co. [Minn.] 117 NW 785.

32. Northwestern Nat. Life Ins. Co. v. Gray [C. C. A.] 161 F 488.

33. Evidence held to bind original holder of assessment policy by reinsurance subject to single premium lien. Northwestern Nat. Life Ins. Co. v. Gray [C. C. A.] 161 F 488.

34. Company taking over assets and liabilities of another company could not assert defenses not existing in favor of original issurer. Federal Life Ins. Co. v. Kerr [Ind. App.] 85 NE 796.

35. Company buying out another company and expressly limiting its liability to members or beneficiaries of other company to "claims arising by reason of death upon policies or certificates of membership of selling company, occurring subsequent to ratification of agreement," held not liable under cash surrender value provision of policy in old company. Mutual Reserve Fund Life Ass'n v. Green [Tex. Civ. App.] 109 SW 1131.

36. Evidence held to authorize finding of contract to renew, though agent claimed misunderstanding. Orient Ins. Co. v. Wingfield [Tex. Civ. App.] 108 SW 788.

37. Presumed renewal was with same insurer for same time, terms, premium and property. Orient Ins. Co. v. Wingfield [Tex. Civ. App.] 108 SW 788. Where plaintiff held $600 insurance on certain tobacco for 3 months, agent's agreement to keep it in force by renewal held not void for uncertainty, it being understood a new policy should be issued on same property and on same terms. Georgia Home Ins. Co. v. Kelley [Ky.] 113 SW 882.

38. Orient Ins. Co. v. Wingfield [Tex Civ. App.] 108 SW 788. In ascertaining whether payment of premium was waived, course of dealing between parties may be looked to. Id. Where agent had regularly renewed policy and given credit for premiums and agreed to keep certain insurance in force, it was his duty to renew old policy on its expiration unless he gave notice that further credit would be refused. Georgia Home Ins. Co. v. Kelley [Ky.] 113 SW 882.

39. Validity not affected because renewal agreement was made in August, while policy did not expire until following March. Orient Ins. Co. v. Wingfield [Tex. Civ. App.] 108 SW 788.

40. Orient Ins. Co. v. Wingfield [Tex. Civ. App.] 108 SW 788. Charge directing jury to ignore first of two alleged contracts of renewal held properly refused as on weight of evidence. Id. In action for breach of agreement to reinsure at expiration of existing contract, petition held to state cause of action. Georgia Home Ins. Co. v. Kelley [Ky.] 113 SW 882.

**Measure of damages** for total loss is amount of old policy, in absence of evidence of change in property or its value. Orient Ins. Co. v. Wingfield [Tex. Civ. App.] 108 SW 788.

41. Under Laws 1892, p. 1930, c. 690, requiring companies to cancel policies on request of insured and return premium less short-rate premium for expired time, a request to mark a policy off the books, without payment of short-rate premium differs from one to cancel policy under terms of contract and statute, since in first case company may decline to mark off, while in latter case request cancels contract ipso facto. Boutwell v. Globe & Rutgers Fire Ins. Co. [N. Y.] 85 NE 1087. Return of binding slip to company with request "mark this off" held not an unconditional request to cancel so as to terminate contract ipso facto, where company refused to mark off and suggested that policy be canceled at short rates. Id. Right of insured to have fire policy in mutual company canceled on request as provided by policy and have unearned premiums returned held not available after company's insolvency and receivership. Hammond v. Knox, 109 NYS 367.

42. Evidence that insured after fire, but before learning of it, stated policy had been canceled, held to show consent to cancellation before loss so as to preclude recovery thereon. Smith v. Scottish Union of Na-

tion provisions will be strictly construed against insurer[44] and must be fully complied with in the absence of acquiescence or waiver.[45] Insured will not be bound by the acts of persons not authorized to act for him,[46] nor by instructions not brought to his notice,[47] and unearned premiums must be returned if this was contemplated.[48] Whether withdrawal from an insurance association operates to cancel policies held by the members will depend on the terms of the agreement.[49]

*Life insurance.* See 10 C. L. 374—Voluntary abandonment of the contract by insured is treated in the next subsection.[50]

(§ 16) *B. For breach of contract, condition, or warranty, or misrepresentation.* See 10 C. L. 375—The most common grounds for forfeiture are failure to pay premiums, dues or assessments,[51] and breach of warranties, conditions or representations,[52] though the number of forfeitures is undoubtedly much reduced by the "incontestable clause" now found in many policies.[53] There is a conflict on the severability of fire policies as bearing on their avoidance for breach of condition relating to only part of the property insured.[54] The general disfavor with which forfeitures are regarded extends to policies of insurance,[55] and the one of two possible constructions should be adopted which will prevent a forfeiture.[56]

tional Ins. Co., 200 Mass. 50, 85 NE 841. Evidence held to show insured had surrendered fire policy for immediate cancellation before fire. Aetna Ins. Co. v. Robard's Tobacco Co.'s Trustee, 33 Ky. L. R. 257, 109 SW 1185.

43. Provision authorizing company to cancel policy on 5 day's notice means actual, not constructive, notice. Hartford Firs Ins. Co. v. Tewes, 132 Ill. App. 321. Notice to alleged agent insufficient. Id. Three-day notice of cancellation insufficient under five-day provision. Id. Time runs from actual receipt of notice. Id.

44. Williamson v. Warfield Pratt Howell Co., 136 Ill. App. 168.

45. Short period of silence by assured after receipt of notice of cancellation not made pursuant to terms of policy held insufficient to establish asquiescence. Hartford Fire Ins. Co. v. Tewes, 132 Ill. App. 321. That insured in proofs of loss mentioned certain insurance procured by one not authorized to act for him did not show consent to cancellation where policy required him to state "all other insurance, whether valid or not." Id. His suing on both old and new policies held not a concession that old was not in force. Id.

46. Authority in one to procure insurance on certain property for another does not confer authority to have canceled the policies obtained. Horn v. Dorchester Mut. Fire Ins. Co., 199 Mass. 534, 85 NE 853. Evidence held to show that in what a certain person did in respect to cancellation relied on by insurer he acted as agent of insurer, and not as agent of insured. Id.

47. Aetna Ins. Co. of Hartford v. Renno [Miss.] 46 S 947.

48. Insurer seeking to cancel policy under agreement therefor must tender return of unearned premiums. Williamson v. Warfield Pratt Howell Co., 136 Ill. App. 168. To effect cancellation, unearned premiums must be tendered where policy provides that when canceled by company by giving notice "it shall retain only the pro rata premium." Hartford Fire Ins. Co. v. Tewes, 132 Ill. App. 321.

49. Subscription agreement and policies held not to require ipso facto cancellation of policies on withdrawal of a member from insurance association. Williamson v. Warfield Pratt Howell Co., 136 Ill. App. 168; Warfield Pratt Howell Co. v. Williamson, 233 Ill. 487, 84 NE 706.

50. See post, § 16B.

51. See ante, § 8.

52. See ante, § 9.

53. A policy by its terms incontestable except for fraud cannot be avoided by false warranties not fraudulent. Peoria Life Ass'n v. Hines, 132 Ill. App. 642. Incontestable clause held to preclude defense of fraudulent concealments as to health of applicant and relations. Federal Life Ins. Co. v. Flanigan, 134 Ill. App. 595.

54. Where premium is single policy is entire, though covering distinct and independent items of property, and hence breach of condition as to title of buildings avoids policy also as to goods therein. Johnson v. Sun Fire Ins. Co., 3 Ga. App. 430, 60 SE 118. Where fire policy covers different classes of property, each separately stated and insured for a specific amount, breach of condition as to one class does not affect right to recover insurance on other classes in absence of fraud, act condemned by public policy or increase of risk as to property insured. Arkansas Ins. Co. v. Cox [Okl.] 98 P 552. Policy providing "This entire policy and each and every part thereof" should be void if, among other things, property was incumbered, held entire and indivisible, though different itsms of property were insured therein for separate amounts, so that if policy was void as to any part it was void in toto. Sullivan v. Mercantile Town Mut. Ins. Co. [Okl.] 94 P 676. Whole contract, construed under Louisiana law holding iron safe clause indivisible where policy covers both goods and fixtures, held invalidated by breach of such clause. Aetna Ins. Co. v. Mount, 90 Miss. 642, 45 S 835.

55. Hamann v. Nebraska Underwriters' Ins. Co. [Neb.] 118 NW 65. Forfeitures are not favored and courts will be prompt to seize hold of circumstances which will pre-

Acts on the part of insured amounting to a voluntary abandonment of the insurance contract will of course preclude recovery thereon,[57] and the doctrine of abandonment is not affected by a statute precluding forfeiture for nonpayment of premium without giving notice to insured.[58] Fraud perpetrated by insurer or its agent,[59] or by insured,[60] is ground for rescission or avoidance of liability. After successful repudiation of the policy no recovery lies thereon.[61] A beneficiary may not disaffirm warranties made by an insured minor and at the same time enforce the policy.[62]

vent them. Royal Union Life Ins. Co. v. McLendon [Ga. App.,] 62 SE 101.

56. Hamann v. Nebraska Underwriters' Ins. Co. [Neb.] 118 NW 65. If fairly susceptible thereof, policy will be construed so as to avoid forfeiture. Aetna Life Ins. Co. v. Wimberly [Tex. Civ. App.] 108 SW 778.

57. Plea of voluntary discontinuance of payment of dues and direction that policy be canceled held complete bar to action. Price v. Mutual Reserve Life Ins. Co., 107 Md. 374, 68 A 689. Plaintiff's failure to pay special assessments claimed to be unauthorized and subsequent failure to pay regular bi-monthly assessments held equivalent to voluntary abandonment of policy. Kray v. Mutual Reserve Life Ins. Co. [Tex. Civ. App.] 111 SW 421. Refusal to pay assessment solely on ground that it had been increased and formal notification of withdrawal from company held abandonment of contract precluding recovery thereon. Roth v. Mutual Reserve Life Ins. Co. [C. C. A.] 162 F 282.

58. Eight years' failure to keep up insurance held abandonment, notwithstanding statute requiring notice. McGeehan v. Mutual Life Ins. Co. [Mo. App.] 111 SW 604.

59. Fraud in representing that application was rejected and issuing policy to another under pretended assignment is ground for cancellation. Petition not demurrable. Mutual Life Ins. Co. v. Chambliss [Ga.] 61 SE 1034. Petition and evidence held to show bad faith and to authorize recovery of attorney's fees. Id. Mutual fire insurance company issuing policy without word "mutual" conspicuously printed therein, as provided by Rev. St., § 3653, and inducing its acceptance by falsely and fraudulently representing that there would be no contingent liability thereon, acts unlawfully and commits fraud on persons induced thereby to enter into agreement with company; and when insured informed agent he would not accept a policy in a mutual company, or in one where there was such contingent liability for future assessments, and there was sent him through said agent a paper writing, in form and appearance like unto a standard cash policy of insurance, which was received by him after paying sum specified therein as cash premium and placed with other like papers without criticial inspection, where it remained until he received notice to pay assessment thereunder, several months later, he did not enter into an undertaking to accept such policy, nor is he estopped from denying liability thereunder. Williams v. Aetna Fire Ass'n Receiver, 10 Ohio C. C. (N. S.) 422. Alleged fraud in inserting matter in policies without insured's consent held no defense in action for earned premiums, it not appearing insured was deceived or misled. Fidelity & Casualty Co. v. Dierks Lumber & Coal Co. [Mo. App.] 114 SW 55. Companies are responsible for **fraud of agents** within line of their agencies. Mutual Reserve Life Ins. Co. v. Seidel [Tex. Civ. App.] 113 SW 945. Evidence held to show fraud of agent in negotiating premium note contrary to oral agreement to return it to applicant should latter decline policy. Id. Held, under evidence, that defendant company had not conferred authority on alleged agent to accept premium not before acceptance of application, but that applicant was chargeable with notice of restrictions by his powers, so that agent having fraudulently negotiated note so as to render applicant liable to an innocent holder, applicant could not recover from defendant amount paid. Weidenaar v. New York Life Ins. Co., 36 Mont. 592, 94 P 1. Fraudulent acts of alleged agent in procuring application for insurance and taking premium note held not ratified by conduct of defendant company where it had no knowledge of fraud until long after rejection of application. Id. Complaint in suit for recovery of amount of premium note fraudulently negotiated by agent contrary to his oral agreement to return note if applicant should decline to take policy held to seek rescission and not damages for deceit though not expressly praying for rescission, and rescission could be had thereunder though insurance company did not expressly authorize the fraud, and hence could not be held in damages. Mutual Reserve Life Ins. Co. v. Seidel [Tex. Civ. App.] 113 SW 945.

60. Answer that plaintiff was not owner of goods, had over-valued stock, failed to keep inventory, etc., as agreed, held to warrant instruction on issue of fraud. Plunkett v. Piedmont Mut. Ins. Co. [S. C.] 61 SE 893. Allegation setting up misrepresentation as to incumbrances held to warrant instruction on fraud. Hankinson v. Piedmont Mut. Ins. Co. [S. C.] 61 SE 905. Misstatements as to health held not fraud or concealment where they did not mislead and examiner's report recommending risk would not have been different had answers been correct. Roe v. National Life Ass'n, 137 Iowa, 696, 115 NW 500. Bare statement of beneficiary after death of insured as to insured having been at hospital held insufficient to show fraud on part of insured in stating he had never been under treatment in any hospital. Thompson v. Metropolitan Life Ins. Co., 113 NYS 225.

61. Answer setting up successful repudiation of policy and recovery back of premium instalment by insured in agent's suit on premium note, which repudiation was not known to insurer when it received second premium, held sufficient defense. Citizens' Life Ins. Co. v. Riley [Ky.] 113 SW 439.

62. Metropolitan Life Ins. Co. v. Brubaker [Kan.] 96 P 62.

One seeking to rescind for fraud or breach of the contract must act with reasonable promptness,[63] otherwise he will be held to have waived his rights.[64] Return of unearned premiums within a reasonable time[65] is essential to rescission at the instance of insurer,[66] but when provable damages are sustained by fraud on the part of insured, a rescission without return of premiums received will be held effectual as against a suit in equity for reinstatement of the policy,[67] and the courts are not entirely agreed as to the necessity of affirmative rescission and tender of premiums by insurer as a condition precedent to its right to set up forfeitures in defense of an action on the policy.[68]

63. Rule that election to take advantage of breach of contract must be promptly made is peculiarly applicable to mutual insurance contracts where insured practically is both insurer and insured. Voss v. Northwestern Nat. Life Ins. Co. [Wis.] 118 NW 212.

64. Alleged breach on part of company by passage of by-law increasing premium held waived where beneficiary and insured without objection continued to pay premiums for four years. Voss v. Northwestern Nat. Life Ins. Co. [Wis.] 118 NW 212. Insured could not assert ignorance of contents of by-law where he received copy thereof and letters and notices as to premiums and their increase. Id. One who accepts and receipts for a policy different from that applied for and thereafter pays a premium note and retains the policy without objection with actual knowledge of its contents cannot after four months rescind and recover amount paid and enjoin the collection of further premiums. Smith v. Smith [Ark.] 110 SW 1038. Several years' acquiescence held laches precluding assertion of fraud on part of insurer, or mistake in including in renewal policies an additional class of employes, injuries to whom were insured against and on whose wages premiums would be in part based, action being for earned annual premiums. Fidelity & Casualty Co. v. Dierks Lumber & Coal Co. [Mo. App.] 114 SW 55. Right to recover back money paid under fraudulent representation of agent that after five years plaintiffs would get such money back with interest held not waived by plaintiffs continuing payments for another term of five years where such payments were induced by same kind of assurances. Stroud v. Life Ins. Co. [N. C.] 61 SE 626.

65. Where over two years expired after notice of breach of warranty before company tendered premiums, court could not hold time reasonable against general verdict for plaintiff. United States Health & Acc. Ins. Co. v. Clark, 41 Ind. App. 345, 83 NE 760.

66. Tender of premium note to assured's administrator held essential to rescission. Iowa Life Ins. Co. v. Haughton [Ind. App.] 85 NE 127. Tender of bill of exchange held insufficient as return or offer to return of premiums on which to base rescission. United States Health & Acc. Ins. Co. v. Clark, 41 Ind. App. 345, 83 NE 760. In suit to restore policy which company had attempted to cancel because of fraud on part of plaintiff in procuring same, answer setting up fraud but not indicating willingness to restore premiums paid showed it should be determined defendant was not entitled to retain them held insufficient. Mincho v. Bankers' Life Ins. Co., 124 App. Div. 578, 109 NYS 179. Allegation that defendant "duly canceled" policy held a mere conclusion of law. Id.

**Note:** Upon the general proposition that the insured is entitled to the premiums paid Slocum v. Northwestern Nat. Life Ins. Co. [Wis.] 115 NW 796 is in line with the authorities. See American Life Ins. Co. v. McAden, 109 Pa. 399, 1 A 256; Knight Templars v. Gravett, 49 Ill. App. 252; Lovell v. St. Louis Mut. L. Ins. Co., 111 U. S. 264, 28 Law. Ed. 423; True v. Bankers' Life, 78 Wis. 287, 47 NW 520; Van Werden v. Equitable Soc., 99 Iowa, 621, 68 NW 892; Supreme Council v. Black, 59 C. C. A. 414, 123 F 650. Whether or not the insured can recover all the premiums is a disputed question. That he can so recover, see McKee v. Phoenix L. Ins. Co., 28 Mo. 383, 75 Am. Dec. 129; McCall v. Ins. Co., 9 W. Va. 237, 27 Am. Rep. 558; Braswell v. American L. Ins. Co., 75 N. C. 8; Smallwood v. Life Ins. Co., 133 N. C. 15, 45 SE 519; Union Central Life Ins. Co. v. Pottkor, 33 Ohio, 459, 31 Am. Rep. 555; Thompson v. Insurance Co., 21 Or. 466, 28 P 628; Strauss v. Mutual Reserve Fund, 126 N. C. 971, 36 SE 352, 83 Am. St. Rep. 699, 54 L. R. A. 605; True v. Bankers' Life, supra; Supreme Council v. Black, supra; Van Werden v. Equitable Soc., supra; American L. Ins. Co. v. McAden, supra. To the effect that the insured cannot recover all of the premiums, see Lovell v. St. Louis Mut. L. Ins. Co., 111 U. S. 264, 28 Law. Ed. 423; New York Life Ins. Co. v. Statham, 93 U. S. 24, 23 Law. Ed. 789; (but see Cooley's Briefs, II, p. 1055, for note on these cases); Speer v. Phoenix Mut. Life Ins. Co., 36 Hun [N. Y.] 322; Ebert v. Mutual Reserve, 81 Minn. 116, 83 NW 506, 834, 84 NW 457; Mailhart v. Insurance Co., 87 Me. 374, 32 A 989, 47 Am. St. Rep. 336; Standley v. Ins. Co., 95 Ind. 254; Day v. Ins. Co., 45 Conn. 480, 29 Am. Rep. 693; Barney v. Dudley, 42 Kan. 212, 21 P 1079, 16 Am. St. Rep. 476.—From 6 Mich. L. R. 712.

67. Insurer entitled to offset damages against premium received. Mincho v. Bankers' Life Ins. Co., 113 NYS 346. Separate defense setting up plaintiff's fraud, notification of rescission, and willingness to return so much of premiums as defendant was not entitled to retain, held not demurrable. Id.

68. Where by its terms policy is void for fraud on part of insured, latter cannot recover the premiums paid, and hence insurer need not show repayment of premiums in order to avoid liability on the policy. National Mut. Fire Ins. Co. v. Duncan [Colo.] 98 P 634. Where contract of fire insurance was entire and risk had attached, premium was not apportionable, and to avail itself of forfeiture insurer was not required to tender any part of premium. Home Ins. Co. v. Myers, 33 Ky. L. R. 790, 111 SW 289, modify-

(§ 16) *C. Estoppel or waiver of right to cancel or avoid.*[69]—The doctrines of waiver and estoppel[70] play an important part in determining the right of insurer to insist on forfeiture provisions.[71] They apply in the many cases of unconditional[72] declarations or conduct inconsistent with its intention to take advantage of a known breach,[73] such as issuing the policy with knowledge of all the facts,[74] the collection[75] or retention of premiums after a breach,[76] or of overdue premiums,[77]

ing accordingly opinion in 32 Ky. L. R. 999, 107 SW 719. Though policy provides it shall be void for breach of warranty, it is in law **only voidable** at insurer's election, so as to require rescission and tender of premium received in order that insurer may defend action thereon for the breach. United States Health & Acc. Ins. Co. v. Clark, 41 Ind. App. 345, 83 NE 760.

69. See 10 C. L. 380. Waiver of provisions requiring prepayment of the first premium or delivery of the policy while insured is alive and in health (see ante, § 7, subd. Essentials and Validity), of notice to pay premiums (see ante, § 8), of notice or proofs of loss (see post, § 19), of provisions for arbitration (see post, § 20), and of contract limitations as to time of bringing suit (see post, § 24A), are treated in other sections.

70. Though in law of insurance terms "waiver" and "estoppel" are often used synonymously (German Am. Ins. Co. v. Hyman, 42 Colo. 156, 94 P 27; Webster v. State Mut. Fire Ins. Co. [Vt.] 69 A 319), they have distinctive characteristics, same as when used in other connections (Webster v. State Mut. Fire Ins. Co. [Vt.] 69 A 319). Waiver involves act of only one party, is voluntary relinquishment of a known right, and does not necessarily imply that other party is misled to his prejudice, while estoppel involves conduct of both parties, and misleading of one party to his prejudice. Id.

71. Doctrines of waiver and estoppel of alleged breaches by insured obtains in courts of South Carolina (Plunkett v. Piedmont Mut. Ins. Co. [S. C.] 61 SE 893) and applies to mutual as well as to other companies (Id.). Insurer bound by knowing and intentional waiver of forfeiture. Webster v. State Mut. Fire Ins. Co. [Vt.] 69 A 319.

72. Insurer may attach conditions to its waiver of forfeiture. Where it accepted premium on condition that insured was then in good health, etc., breach of such conditions would constitute defense. Mutual Reserve Fund Life Ass'n v. Tuchfeld [C. C. A.] 159 F 833. Could not be asserted company misled insured where he received notice that acceptance of overdue premiums would be subject to express condition that she was in good health and should not be construed as waiver or as establishing course of dealing. Wilson v. Royal Union Mut. Life Ins. Co., 137 Iowa, 184, 114 NW 1051.

73. Stipulation for forfeiture is waived by conduct of insurer inconsistent with intention to claim forfeiture. Jensen v. Palatine Ins. Co. [Neb.] 116 NW 286. Any agreement, declaration or course of action on part of company leading insured honestly to believe that by conforming thereto, policy will not be forfeited, followed by due conformity, estops company. Knoebel v. North American Acc. Ins. Co. [Wis.] 115 NW 1094; State Life Ins. Co. v. Murray [C. C. A.] 159 F 408. Continuing examination of insured after his admission of facts showing breach of warranty as to previous loss by burglary, held no waiver of breach, nothing being done by insurer to lead insured to believe it did not intend to take advantage thereof. Bacouby v. U. S. Fidelity & Guaranty Co., 118 NYS 20. **Treating policy in force** with knowledge of breach of condition waives same, especially where breach results from direct act of insurer, as by giving consent to insured's tenants. German Am. Ins. Co. v. Hyman, 42 Colo. 156, 94 P 27. Company's report to insurance commissioner including policy in question as in force held immaterial as between company and insured, it being explained that doubtful policies were always included. Weston v. State Mut. Life Assur. Soc., 234 Ill. 492, 84 NE 1073. Estoppel to insist on forfeiture arises though knowledge to insurer by reason of notice to its authorized agent that assured is relying on continued existence of insurance. Union Cent. Life Ins. Co. v. Burnett, 136 Ill. App. 187.

74. Insurer cannot defend for misstatements in application of which it had knowledge. Garfinkel v. Alliance Life Ins. Co., 140 Ill. App. 380. Right to forfeit for misstatement as to age held waived. Id. Company cannot avoid effect of information contained in written application for insurance on which it issues policy by showing that it does not accept written applications in its business. Allen v. Phoenix Assur. Co., 14 Idaho, 728, 95 P 829. Where applicant is examined by physician acting for insurer and insurance issues on physician's recommendation, insurer is estopped, under express terms of Code, § 1812, from defending on ground that insured was not in condition of health required by policy when delivered, unless physician's report was procured through insured's fraud or deceit. Roe v. National Life Ins. Ass'n, 137 Iowa, 696, 115 NW 500. To constitute fraud or deceit there must have been intent to deceive and examiner must have relied on false statements or representations by insured or been misled by concealments which good faith required disclosure of. Id.

75. Receipt of premiums by authorized agent waives forfeiture for misstatements in application. United States Health & Acc. Ins. Co. v. Krueger, 135 Ill. App. 432. Collection of premium held waiver of vacancy clause. Farmers' Alliance Ins. Co. v. Ferguson [Kan.] 98 P 231.

76. Mere failure to return premium before suit on policy held not waiver of forfeiture for violation of condition against incumbrances, insurer not knowing of violation until after loss. Capital Fire Ins. Co. v. Shearwood [Ark.] 112 SW 878. Retention of premium, though evidence of intention not to claim policy is invalid, is not conclusive of company's right to assert defenses.

denial of liability on grounds other than those finally asserted[78] or taking steps toward settlement of the loss.[79] All the various conditions, warranties and representations,[80] including provisions relating to the payment of premiums,[81] the

Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co. [Minn.] 117 NW 825. See, also, ante, B, this section, on necessity for return of unearned premium as condition to right to defend for breaches.

77. **Forfeiture** for default in payment of premium **held waived.** Receipt and retention of overdue payments. Security Mut. Life Ins. Co. v. Riley [Ala.] 47 S 735. Notice by general agent that provision for payment of premium on first of month would not be insisted on, and his acceptance of payments any time before tenth of month. North American Acc. Ins. Co. v. Whitesides, 134 Ill. App. 290. General agent's demand for overdue premium. New England Mut. Life Ins. Co. v. Springgate [Ky.] 113 SW 824. Acceptance of late premiums or payment of premium note after due generally waives forfeiture. Duncan v. Missouri State Life Ins. Co. [C. C. A.] 160 F 646. General agent's receipt May 8 of check of date May 7 from collecting agent for amount of premium due May 1st and failure to inquire whether premium was overdue when paid held waiver. Security Mut. Life Ins. Co. v. Riley [Ala.] 47 S 735. General agent's return of premium to company's collecting agent held not return to insured so as to avoid waiver on ground premium was not paid when due. Id. If notwithstanding forfeiture for failure to mail premiums until after due date insurer applied proceeds of draft to premium due without more, such action would be waiver. Mutual Reserve Fund Life Ass'n v. Tuchfeld [C. C. A.] 159 F 833.

**Forfeiture not waived:** Acceptance of late premiums only after insurer was satisfied of insured's good health and reinstatement after medical examination held not sufficient to waive right to forfeit for subsequent delinquency. Wilson v. Royal Union Mut. Life Ins. Co., 137 Iowa, 184, 114 NW 1051. Collection of premium note with express understanding that policy had been forfeited for nonpayment on due date and that payment should be for protection received before forfeiture held no waiver. Lesseps v. Fidelity Mut. Life Ins. Co., 120 La. 610, 45 S 522. Unsuccessful efforts to collect overdue premium note held not waiver of forfeiture already effected in law by nonpayment at maturity, insured not having changed his position in any way. Iles v. Mutual Reserve Life Ins. Co. [Wash.] 96 P 522. Provision in premium note that if not paid when due full premium shall be considered as having been earned and note payable without revivor of policy is valid (Duncan v. Missouri State Life Ins. Co. [C. C. A.] 160 F 646), and collection of such note by insurer after maturity does not operate as a waiver of forfeiture (Id.). Insured bound by provisions of note in absence of fraud or duress though he signed same without reading. Id. Where note was given on insured being reinstated after a forfeiture, insured could not claim that provision therein was invalid as in conflict with policy providing that no variance of its terms should be valid unless made in writing at home office by president, vice-president and secretary. Id. Acceptance of premium in ignorance of loss held not to revive policy. Johnson v. Continental Ins. Co. [Tenn.] 107 SW 688. Insured not misled by company's previous indulgence where notified by company of importance of paying premium both before and after default. Id. Subsequent acceptance of premiums without knowledge that insured did not meet conditions on which forfeiture for nonpayment of premiums was waived held no waiver. Mutual Reserve Fund Life Ass'n v. Tuchfeld [C. C. A.] 159 F 833. Instruction that acceptance of premiums worked estoppel held erroneous. Id.

78. Denial of liability on specified ground with knowledge of other grounds of forfeiture held waiver of such other grounds. Farmers' Alliance Ins. Co. [Kan.] 98 P 231. Company is not restricted in its defense to reasons assigned in its refusal to pay, it not appearing plaintiff has been misled or injured by failure to give other reasons. Letter stating that contract was never completed held not to preclude defense of forfeiture for nonpayment of premium. Weston v. State Mut. Life Assur. Soc., 234 Ill. 492, 84 NE 1073.

79. Treating policy in force by retaining premiums and **endeavoring to adjust loss** after knowledge of breach of conditions precedent as to ownership and incumbrances held waiver. Allen v. Phoenix Assur. Co., 14 Idaho, 728, 95 P 829. Adjuster's examination of owners with reference to sale and loss held no estoppel to assert avoidance for unauthorized incumbrance where policy expressly provided against waiver in such case. Mulrooney v. Royal Ins. Co., 157 F 598. **Payment of loss,** procured by fraudulent representations by insured, held no waiver of forfeiture. Palatine Ins. Co. v. Kehoe, 197 Mass. 354, 83 NE 866. That insured was requested by accident and health company to make out **proof of claim** for illness held not to preclude company from invoking provision in policy exempting it from liability for illness originating within 30 days after renewal of policy by payment of overdue premium. Greenwaldt v. U. S. Health & Acc. Ins. Co., 52 Misc. 353, 102 NYS 157. Forwarding blanks for proofs of death in response to request of beneficiary but without prejudice to any rights of association in the premises and with notice that policy had lapsed for nonpayment of premium held no estoppel to assert forfeiture. Roth v. Mutual Reserve Life Ins. Co. [C. C. A.] 162 F 282.

80. See the various general principles laid down in this subsection in addition to specific enumerations here given.

81. For questions of estoppel or waiver of relating to payment of **first premium** except such as bear on agent's power to override prohibitions against waivers, see ante, § 7, subd. Essentials and Validity. Waiver may be inferred from any circumstances showing that both parties understood that payment of premium would not be required on a specified date. Continental Casualty Co. v. Bridges [Tex. Civ. App.] 114 SW 176. Company may by course of dealing be estopped to deny payment of premium, as by **taking**

title or interest of insured,[82] other insurance,[83] incumbrances,[84] increase of risk,[85] the iron safe,[86] vacancies,[87] or the transfer or removal of the property,[88] may be

**note, allowing dividend, etc.** Arnold v. Empire Mut. Life Ins. Co., 3 Ga. App. 685, 60 SE 470. Where note for loan on policy gave company option to cancel policy for nonpayment of premiums or of interest on note, **acceptance of premiums** when there was interest past due on note held not to waive **condition in note** as to future payment of premiums. Wilson v. Royal Union Mut. Life Ins. Co., 137 Iowa, 184, 114 NW 1051. **Payment in cash** may be waived by acceptance of note or other obligation in lieu of cash by authorized officers. Arnold v. Empire Ins. Co., 3 Ga. App. 685, 60 SE 470. Provision that payment of premiums could be made to certain authorized persons only on production of **receipt signed by head officers** held waived where insurer knowingly accepted premium money paid to agent who did not give the required form of receipt. Matthews v. Metropolitan Life Ins. Co. [N. C.] 61 SE 192. Company estopped to assert nonpayment where insured relied on receiving **customary notice** and **stamped envelope** in which to send money and small **receipt book.** Knoebel v. North American Acc. Ins. Co. [Wis.] 115 NW 1094. If after issuing policy insurer authorizes or acquiesces in **sending of premiums by mail,** deposit in mail in time to reach home office by time premium is due will prevent forfeiture though premium does not in fact reach such office until after due date and though policy provides that premiums shall be paid at insurer's home office by a certain time. Mutual Reserve Fund Life Ass'n v. Tuchfeld [C. C. A.] 159 F 833. Agent's and company's retention of renewal policy pending negotiations for change therein on **assurance that insured would be protected** until new policy was issued held waiver of forfeiture for nonpayment of premium falling due in meantime, conduct and statements of agent and insurer being such as to lead insured reasonably to believe premium was not to be paid until new policy was issued and delivered. Continental Casualty Co. v. Bridges [Tex. Civ. App.] 114 SW 170. Agent's statements that he was attending to fire policy and that if house burned insured would get his money held not to justify insured in assuming that he could recover despite delay in paying premium. Johnson v. Continental Ins. Co. [Tenn.] 107 SW 688.

**82.** Agent's knowledge as to **absolute ownership.** Plunkett v. Piedmont Mut. Ins. Co. [S. C.] 61 SE 893. Where company issued policy requiring insured to be unconditional and sole owner of **both legal and equitable title,** though applicant's answer in application showed that he had only equitable title, it thereby waived objection that insured did not have legal title. Arkansas Ins. Co. v. Cox [Okl.] 98 P 552. Objection that title of insured was not a 99-year lease as stated in application held waived, agent issuing policy with full **knowledge of condition of title.** National Mut. Fire Ins. Co. v. Duncan [Colo.] 98 P 634. Issuing policy on application stating insured's title was 99-year lease held to preclude objection that ground was not owned by insured in fee as required by policy. Id.

**83.** Where policy destroyed before actual delivery contained provision against concurrent insurance contrary to oral agreement, and agent received premium without notifying insured of the **unauthorized prohibition,** forfeiture on ground of additional insurance was waived. Hearsh v. German Fire Ins. Co., 130 Mo. App. 457, 110 SW 23. **Agent's knowledge** of outstanding insurance held waiver though agent did not know amount of such insurance. Insurance Co. of North America v. De Loach & Co., 3 Ga. App. 807, 61 SE 406. Indorsement by agent "$500 additional concurrent insurance permitted" held to refer to insurance in addition to that outstanding when policy was written, including that then being written, and not merely to limit amount of insurance in addition to amount of policy. Id. Company's retention of policy for over a month under **promise to amend** it so as to consent to other insurance taken out, insured having requested that policy be either amended or canceled on account of such insurance, held waiver of forfeiture. Nemeyer v. Claiborne [Ark.] 112 SW 387. Immaterial that policy stipulated company should not be bound by acts or statements of agents unless inserted in policy. Id.

**84.** The ordinary loss payable clause does not waive a condition against incumbrances. Insured could not mortgage to conditional sale vendor of part of property, remainder in which mortgagee had no interest when policy issued. Hartford Fire Ins. Co. v. Liddell Co., 130 Ga. 8, 60 SE 104. That agent when informed by insured he intended to place a mortgage on the property replied that it would make no difference held not to work waiver or estoppel, especially where policy authorized mortgaging of property if company's consent was written thereon. McCarty v. Piedmont Mut. Ins. Co. [S. C.] 62 SE. 1.

**85.** Insurer may waive provision against maintaining specified articles on premiums. German Am. Ins. Co. v. Hyman, 42 Colo. 156, 94 P 27. Assent to installation of **acetylene plant** and knowledge that it was in house when assignment of policy was allowed held to preclude assertion of increase of risk by the gas plant. Furbush v. Consolidated Patrons' & Farmers' Mut. Ins. Co. [Iowa] 118 NW 371.

**86.** Clause requiring account books to be kept in an iron safe held waiver by insuring on application showing insured kept no books. Retail Merchants' Ass'n Fire Ins. Co. v. Cox, 138 Ill. App. 14. Iron safe clause could be waived by writing policy with knowledge that insured had no iron safe in which to keep books, and agent's taking possession of policy for safe keeping on that account. Jensen v. Palatine Ins. Co. [Neb.] 116 NW 286. Where agent having authority to receive premiums and transmit policy, when issued with indorsement that it was approved by him, represented to insured in soliciting policy that provision in company's by-laws that agents had no power to alter or modify iron safe clause and requirement that books be kept in safe place outside the building, did not apply in case of a small business, and that insured would not be bound thereby, defendant, by agent, waived

thus affected. The rule that a landlord cannot excuse a breach by showing it was the act of his tenant without his knowledge has no application where the insured expressly consents.[89] When a forfeiture is once waived, it cannot afterwards be invoked.[90]

The acts, declarations and knowledge of insurer's agent[91] are those of insurer,[92] when the agent acts within the scope of his authority.[93] Insurer cannot therefore,

such requirements. Plunkett v. Piedmont Mut. Ins. Co. [S. C.] 61 SE 893; Hankinson v. Piedmont Mut. Ins. Co. [S. C.] 61 SE 905. Judgment for insured on finding that insurer waived iron safe clause affirmed by equally divided court. Slawson v. Equitable Fire Ins. Co. [S. C.] 62 SE 782.

87. Objection that premises had been vacant for five days without permit held waived by issuance of permit for further vacancy. National Mut. Fire Ins. Co. v. Duncan [Colo.] 98 P 634. Agent's knowledge that building insured as school house was not occupied at night or during school vacations held to estop company to set up vacancy clause. Mississippi Home Ins. Co. v. Stevens [Miss.] 46 S 245.

88. Agent's knowledge that insured goods were removed to another place and failure of insurer to cancel policy and return unearned premium. McIntyre v. Liverpool, London & Globe Ins. Co. [Mo. App.] 110 SW 604. Waiver not affected by words insuring property while contained in a specified building "and not elsewhere." Id.

89. Where agents without landlord's knowledge permitted tenants to generate gasoline vapor. German Am. Ins. Co. v. Hyman, 42 Colo. 156, 94 P 27.

90. Company's letter that unless overdue note was paid at once it would be returned and insurance canceled held waiver where, when letter reached insured, he was unconscious and died next day and widow thereafter remitted payment. New England Mut. Life Ins. Co. v. Springgate [Ky.] 112 SW 681.

91. Knowledge of one taking application, receiving premium, and delivering policy, as to ownership of property and incumbrances, held knowledge of company, where latter accepted application and premium and issued policy thereon, company not being in position to assert such person was not its agent. Allen v. Phoenix Assur. Co., 14 Idaho, 728, 95 P 829. **Broker** affecting insurance without being employed by insurer but on commission on premium received for such risks as insurer chooses to accept is not agent of insurer so that notice of transfer of property to brokers who affected insurance and divided commissions with insurer's agent was not binding on company. American Steam Laundry Co. v. Hamburg Bremen Fire Ins Co. [Tenn.] 113 SW 394.

92. Agent's knowledge that of company. Rearden v. State Mut. Life Ins. Co., 79 S. C. 526, 60 SE 1106. Rule as to agent's knowledge being company's knowledge **applies to mutual assessment companies.** Hankinson v. Piedmont Mut. Ins. Co. [S. C.] 61 SE 905; McCarty v. Piedmont Mut. Ins. Co. [S. C.] 62 SE 1. Rule applicable whether form or substance of contract is involved. Id. Company estopped by agent's knowledge of facts respecting risk in absence of collusion or insured's knowledge of agent's limited powers and that he was exceeding his authority. Aetna Life Ins. Co. v. Howell, 32 Ky. L. R. 935, 107 SW 294. If agent has conscious knowledge when policy is issued that it contains conditions contrary to fact, it is immaterial from what source such information was obtained. Company held chargeable with knowledge of agent acquired while he was insured's director that insured had released a railroad company from liability for loss by fire set by it, so that recovery could not be barred by setting up concealment of fact affecting insurer's right to subrogation under policy. Fire Ass'n of Philadelphia v. La Grange & Lockhart Compress Co. [Tex. Civ. App.] 109 SW 1134. However, company will not be charged with knowledge of agents interested antagonistically to it. Company held not chargeable with knowledge of local agents, who were interested as stockholders and officers of insured, that plant insured was not being operated at time insurance was issued. Home Ins. Co. v. North Little Rock Ice & Elec. Co. [Ark.] 111 SW 994. Notice to agent **that goods had been removed** to another place. Continental Ins. Co. v. Buchanan, 32 Ky. L. R. 1298, 108 SW 355. Adjuster's knowledge **as to incumbrance** and ownership held imputable to company. Allen v. Phoenix Assur. Co., 14 Idaho, 728, 95 P 829. Agent's knowledge when policy was issued **that building had been condemned** and that efforts were made to resist carrying out decree and permitting policy to continue in force held to preclude company from avoiding policy because of condemnation and insured's promises to remove the building. Irwin v. Westchester Fire Ins. Co., 58 Misc. 441, 109 NYS 612. Evidence insufficient to show agent had knowledge of facts constituting breach of warranty **as to health and medical treatment.** Colaneri v. General Aco. Assur. Corp., 110 NYS 678. **Consent by general agents** that tenants of insured install device for generation of gasoline vapor held waiver of condition against **generation of illuminating gas** or vapor or allowing benzine or gasoline on premises. German American Ins. Co. v. Hyman, 42 Colo. 156, 94 P 27. Where two companies were really only one, permission by their agents acting for one of them in issuing a policy to tenants that latter maintain on premises articles forbidden by previous policy to landlord issued by same agents was notice to other company and waiver of prohibitory clause in landlord's policy. Id. Presumed despite agent's testimony to contrary that they had in mind at the time policy issued to landlord. Id.

93. General agent may waive provisions. Pelican Assur. Co. v. Schiedknecht, 32 Ky. L. R. 1257, 108 SW 312. Acts and knowledge of agents being acts and knowledge of company, manager having general supervision in several states and who received all premiums from such territory could waive forfeiture **by receiving overdue premium** with

set up the falsity of answers written by the agent after he was truthfully informed,[94] or base avoidance on matter contained in the application but not known to insured because of the agent's fault,[95] nor can it predicate rights upon a construction of a question asked insured which is at variance with that made when the insurance was written.[96] Authorities disagree on the effect of clauses prohibiting or regulating waivers or agreements on the part of agents.[97]

knowledge it was overdue, and this though company's contract with him unbeknown to public prohibited such action on his part. Security Mut. Life Ins. Co. v. Riley [Ala.] 47 S 735. Where agent has actual authority to solicit insurance, take and forward application, deliver policy, collect premium and continue negotiations for change in policies, estoppel against forfeiture for nonpayment of premium is the same as it would be in case of an individual insurer, himself present and acting. Continental Casualty Co. v. Bridges [Tex. Civ. App.] 114 SW 170. Evidence held to warrant finding of estoppel to deny authority of soliciting agent to receive premium for defendant. State Life Ins. Co. v. Murray [C. C. A.] 159 F 408. Company is not bound by statements of agent not in course of his employment. Agent's promise after execution of policy that he would take care of it and not allow forfeiture for nonpayment of premiums held not admissible in evidence. Johnson v. Continental Ins. Co. [Tenn.] 107 SW 688. To authorize recovery on ground of agent's extension of time for payment of premium note, insured must show not only agency but that continuing policy in force was within real or apparent scope of agent's authority. American Ins. Co. v. Hornbarger, 85 Ark. 337, 108 SW 213. Authority to solicit, receive and write applications, receive and deliver policies and collect premiums, held not to authorize agent to continue policy in force by extending time for payment of premium note (Id.), nor to empower him to waive proof of loss as required by policy (Id.).

**94.** United States Health & Acc. Ins. Co. v. Clark, 41 Ind. App. 345, 83 NE 760; Iowa Life Ins. Co. v. Houghton [Ind. App.] 85 NE 127. One who solicits insurance, takes application, receives premium and delivers policy is at least, for these purposes, company's agent (Allen v. Phoenix Assur. Co., 14 Idaho, 728, 95 P 829), and if he writes down false statements after he has been truthfully informed, his knowledge will be imputed to company (Id.).

**95.** Insurer is estopped to set up falsity of answers in application where insured signs same, not knowing contents, on assurance of insurer's agent that it was prepared according to insurer's regulations. Roe v. National Life Ass'n, 137 Iowa, 696, 115 NW 500. Insured held not bound by answer in application as to existing incumbrances where same was written by agent who had not inquired of insured relative thereto and insured had no knowledge of such answer when he signed application. Hollenbeck & Co. v. Mercantile Town Mut. Fire Ins. Co. [Mo. App.] 113 SW 217. Evidence sufficient to prove that insured had no actual knowledge of contents of application or policy but relied on agent who failed to call his attention to all the statements or negligently checked statements without reading them. United States Health & Acc. Ins. Co. v. Clark, 41 Ind. App. 345, 83 NE 760.

**96.** Where agent in filling out application for policy of insurance against loss by burglary or larceny construes a certain question asked of applicant to suit the circumstances of the particular case, he acts for insurer, and latter cannot escape liability on ground of incorrectness of a statement in application based on a contrary construction. Kandar v. Aetna Indemnity Co., 10 Ohio C. C. (N. S.) 449.

**97. Restrictions held controlling:** When policy provides that agreements or waivers by agent must be in writing and attached to policy, verbal agreements are not binding on company. Consent to incumbrance. Mulrooney v. Royal Ins. Co., 157 F 598. Verbal agreements not rendered binding by Code Iowa, 1897, § 1750, making persons acting for company in certain capacities its agents with authority to transact all business within "scope of his employment." Id. Provision against agent's modification or waiver of terms except by written indorsement is valid both under general law and Code Iowa, § 1750, being merely regulatory and not prohibitory. Mulrooney v. Royal Ins. Co. [C. C. A.] 163 F 833. Agent held powerless to waive conditions as to prepayment of first premium and delivery of policy while applicant was in health, policy expressly providing against waivers or modifications by agents. Powell v. Prudential Ins. Co. [Ala.] 45 S 208. Under standard policy prescribed by Revisal 1905, §§ 4759, 4760, providing that no agent, etc., shall have power to waive any condition except such or by terms of policy may be subject of agreement endorsed thereon, nor unless such waiver shall be written on or attached to policy, parol evidence is inadmissible to show waiver of condition against additional insurance not written on or attached to policy. Black v. Atlanta Home Ins. Co. [N. C.] 61 SE 672. Agent's and adjuster's collection of premium after loss and statement that claim would be adjusted held no waiver of condition against incumbrance where policy prohibited agents from waiving conditions except in certain cases and in prescribed manner. Sullivan v. Mercantile Town Mut. Ins. Co. [Okl.] 94 P 676. Agent's knowledge of existence of mortgage at time policy was issued held not waiver by company of condition against incumbrances where policy prohibited agents, etc., from waiving provisions except such as by terms of policy might be subject of agreement indorsed thereon or added thereto, and required that as to such provision waiver must be indorsed on or added to policy, federal rule being applied in the case because same was pending in United States court when state was admitted into Union. Id.

**Held not controlling:** Agent acting within

(§ 16) *D. Reinstatement.*[See 10 C. L. 388]—A fire policy cannot be reinstated after destruction of the subject-matter.[98] Health policies often provide that insurer shall not be liable for any illness originating within a specified time after reinstatement.[99]

§ 17. *Contracts of reinsurance and concurrent insurance. Reinsurance.*[See 10 C. L. 389]—The power of companies to reinsure is treated in a previous section.[1] Modifications of the contract must be clearly proven.[2] The reinsured need not pay the loss before proceeding against the reinsurer unless there are controlling provisions in the contract.[3] The usual rules of procedure apply.[4]

*Concurrent insurance.*[See 10 C. L. 389]—Breach of conditions has been treated in an earlier section.[5] The policy sometimes requires insured to take out concurrent insurance[6] or become a coinsurer in default thereof.[7] Often it is agreed that the

his actual or apparent authority may waive conditions in the policy, notwithstanding express prohibition therein. United States Health & Acc. Ins. Co. v. Clark, 41 Ind. App. 345, 83 NE 760. Where agent is authorized to collect premium and deliver policy, cash payment may be waived though contrary is stipulated in policy and enforcement of policy can be defeated only by showing bad faith or collusion. New York Life Ins. Co. v. Greenlee [Ind. App.] 84 NE 1101. Provision that waivers must be indorsed in writing by agent having authority to do so is for company's benefit, and like other conditions, may be waived by it. Allen v. Phoenix Assur. Co., 14 Idaho, 728, 95 P 829. Clause against waivers unless made in writing and signed by officers of company may be waived by any agent authorized to make contracts of insurance. New England Mut. Life Ins. Co. v. Springgate [Ky.] 112 SW 681. Provision that forfeiture cannot be waived except by written agreement signed by certain officials refers only to express agreements and does not prevent an implied or parol waiver. Security Mut. Life Ins. Co. v. Riley [Ala.] 47 S 735. Stipulation that no provision could be waived or altered except by indorsement signed by certain officers refers to provisions already in force and does not prevent agent from making contract outside of matters appearing on face of policy form. Sloss-Sheffield Steel & Iron Co. v. Aetna Life Ins. Co. [N. J. Eq.] 70 A 380. Where facts were sufficient under well recognized rules of law to establish waiver of forfeiture for breach of concurrent insurance provision, stipulation that company should not be bound by acts or statements of agents unless inserted in policy held unavailing. Neimeyer v. Claiborne [Ark.] 112 SW 387. General agents held empowered to waive inhibition against allowance of certain articles on premises despite clause that no agent could waive any restrictive clause except by writing or attaching waiver to policy in cases expressly authorized. German American Ins. Co. v. Hyman, 42 Colo. 156, 94 P 27. Company held estopped by agent's knowledge of misrepresentation despite provision in application that company should not be bound by information given agent unless written into application and presented to officers at head office. Reardon v. State Mut. Life Ins. Co., 79 S. C. 526, 60 SE 1106. Where agent was more than soliciting agent, his knowledge that insured kept no books or safe as policy required was company's knowledge, though by-laws provided agents had no power to waive conditions as to safe or books. Plunkett v. Piedmont Mut. Ins. Co. [S. C.] 61 SE 893.

98. No reinstatement after fire. Johnson v. Continental Ins. Co. [Tenn.] 107 SW 688.

99. Where policy provided that, if any renewal premium should be paid after expiration of policy, insurer should not be liable for any illness originating before expiration of 30 days from date of renewal, insured was not entitled to sick indemnity for illness originating 15 days after payment of overdue premium, resulting in renewal under policy. Greenwaldt v. U. S. Health & Acc. Ins. Co., 52 Misc. 353, 102 NYS 157.

1. See ante, § 2.

2. In action by fire insurance company against reinsuring company, evidence held to sustain finding that contract of reinsurance had not been modified so as to change time when reinsurer should become bound. Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co. [Minn.] 117 NW 825.

3. Allemannia Fire Ins. Co. v. Firemen's Ins. Co., 209 U. S. 326, 52 Law. Ed. 815. Provision that losses should be payable pro rata with, in same manner, and upon same terms and conditions as paid by reinsured under contracts reinsured, and that reinsurer should not be liable in excess of ratable proportion of sum actually paid to insured under original contracts, held not to require payment of loss first. Id. Payment not a prerequisite oecause of provision that reinsured should forward to reinsurer statement of date and probable amount of loss, and, after having adjusted, accepted proofs of, or paid such loss or damage, should forward proofs and copy of receipt taken on payment of loss. Id.

4. In suit to reform and enforce contract for reinsurance, amendment setting up a previous contract and alleging that contract originally declared on was memorandum issued and entered under such previous contract held not to add new cause of action. Delaware Ins. Co. v. Pennsylvania Fire Ins. Co., 130 Ga. 643, 61 SE 492. Petition sufficient. Id.

5. See ante, § 9, subd. Fire Insurance.

6. Covenant to take out concurrent insurance held sufficiently fulfilled if property covered by different policies is the same, though differently described, so as to allow apportionment of damages. Standard

insurance shall not attach until all specific insurance has been exhausted.[8] The extent of the liability of coinsurers is treated in the next section.[9]

§ 18. *The loss or benefit, its extent, and extent of liability therefor.* See 10 C. L. 390 Questions relating to interest, attorney's fees and penalties are treated in the section on remedies and procedure,[10] except the right of employers to interest and costs recovered from them by employes.[11]

*Accident and health insurance.* See 10 C. L. 390—The policy controls as to amount of indemnity and the period for which the same can be recovered.[12] Sometimes it is provided that any one of several promised indemnities shall be in lieu of the others,[13] in which case insured may be put to an election.[14] Provisions limiting or increasing the indemnity if illness, injury or death should result from specified causes are common.[15]

*Credit insurance.* See 10 C. L. 390

*Employer's liability insurance.* See 10 C. L. 390—If insurer is duly notified of the action against insured, it will be bound by the judgment therein, though it makes no appearance.[16] The policy often gives insurer the right to settle or defend the suit against the employer at its own cost,[17] and prohibits the latter from interfering or from voluntarily assuming or incurring any liability or expense.[18] If

Leather Co. v. Mercantile Town Mut. Ins. Co. [Mo. App.] 111 SW 631.

7. Stipulation making insured coinsurer to extent to which he should fail to maintain insurance on his property below 75 per cent of its value held not contrary to law or public policy. Simon v. Queen Ins. Co., 120 La. 477, 45 S 396.

8. Specific insurance is exhausted not only when entire amount of insurance on all property of insured is required to meet loss, but also when all collectible in respect to any given loss has been paid (Cutting v. Atlas Mut. Ins. Co., 199 Mass. 380, 85 NE 174); hence fact that there remained other insurance on other property not destroyed did not show that specific insurance had not been exhausted (Id.).

9. See post, § 18, subd. Fire Insurance.

10. See post, § 24D.

11. See post, this section, Employer's Liability Insurance.

12. Amount recovered under accident and health policy on account of illness and disability held substantially correct. United States Health & Acc. Ins. Co. v. Phelan, 135 Ill. App. 399. Terms of policy held to limit recovery for partial disability to period of 16 weeks. Hastings v. Bankers' Acc. Ins. Co. [Iowa] 119 NW 79.

13. Provision that indemnity should not be paid for more than one of certain injuries enumerated in two schedules and should be in lieu of any other indemnity "provided in this clause," held to refer to entire paragraph, and not merely to schedules, so that recovery could not be had under schedules for broken ribs and also under other provisions in the paragraph for fractured sternum. Hastings v. Bankers' Acc. Ins. Co. [Iowa] 119 NW 79.

14. Retention of check so drawn as to waive further claims held not election to claim under a particular schedule of accidents where insured refused to sign and notified insurer he would not waive claim under another provision. Hastings v. Bankers' Acc. Ins. Co. [Iowa] 119 NW 79.

15. See ante, § 10.

16. Company neglecting to defend in employe's suit against insured as contemplated by employer's liability policy could not complain of amount of damages recovered on default. Sandoval Zinc Co. v. New Amsterdam Casualty Co., 140 Ill. App. 247. Insurer's refusal to defend after notice because it disclaimed liability did not relieve it from conclusiveness of judgment rendered. B. Roth Tool Co. v. New Amsterdam Casualty Co. [C. C. A.] 161 F 709.

17. Where company had right to settle or defend suit against employer "at its own cost," quoted words meant "at its own expense" as distinguished from mere court costs and included court costs, attorneys' and stenographers' fees, etc., but not interest on judgment against assured pending appeal. Maryland Casualty Co. v. Omaha Elec. L. & P. Co. [C. C. A.] 157 F 514. Where policy expressly limits insurer's liability to a designated sum actually paid on a judgment in an action against insured, a further provision that company will defend action in name and on behalf of insured, or settle same at its own cost, does not entitle insured to recover from insurer interest accruing on verdict against him pending appeal proceedings by insurer, where entire claim of insured will exceed amount limited in the policy. Davison v. Maryland Casualty Co., 197 Mass. 167, 83 NE 407. Provision as to insurer's defense or settlement was intended only to prescribe terms on which company was to defend, and did not add to indemnity recoverable by insured, nor give latter any discretion in conduct of the case, though his interests might be prejudiced in proceedings taken. Id. That indemnity company payed taxable costs in first action, did not render it liable for interest in excess of $5,000. Id.

18. Where policy provided that insured employer should not voluntarily assume any liability, or without consent of company incur any expense or settle any claim except at his own cost, or interfere in negotiations for settlemsnt or legal proceedings, he could not charge insurer with expense voluntary

the insurer agrees that insured may settle with the employe and be entitled to the same rights as if he had paid a judgment for the amount paid in settlement, the intention of the parties in making the settlement will of course control as to the amount due under the policy.[19]

*Fire insurance.*See 10 C. L. 391—Depending on the terms of the policy and subject to statutory regulations,[20] recovery may be to the extent of the actual cash value of the property,[21] or a certain per cent thereof.[22] Policies insuring rents often require insured to rebuild or repair as soon as practicable.[23] By express stipulation, only the assets of the company named in the policy may be reached in satisfaction of policy demands.[24] Under so-called coinsurance clauses, each insurer's liability is generally determined by the proportion the amount insured by it bears to the total amount of insurance.[25]

*Valued policy laws.*See 10 C. L. 391—Statutes in many states render the insurer liable, in case of total loss for the full amount of insurance specified in the policy,[26] and prohibit the taking of risks in excess of a given fraction of the value of the property.[27]

incurred by him in defending employe's suit after company had disclaimed all liability and withdrawn from the case. Sandoval Zinc Co. v. New Amsterdam Casualty Co., 140 Ill. App. 247.

**19.** Where settlement and consent thereto were silent as to whether amount paid by employer in part covered injuries sustained by same employe before policy was issued, parol evidence held admissible to show that whole amount was in settlement of injury covered by policy. Moran Bros. Co. v. Pacific Coast Casualty Co., 48 Wash. 592, 94 P 106.

**20, 21.** Under policy insuring straw hats to extent of actual cash value "not to exceed what it would then cost the insured to repair or replace the same with material of like kind and quality," insured held entitled to actual cash value, where goods could be neither repaired nor replaced in time to be of any value. Phillips v. Home Ins. Co., 128 App. Div. 528, 112 NYS 769.

**22.** Under policy rendering company liable for 80 per cent of cash value of property, evidence held to justify finding that loss occurred after 8:55 a. m., June 8, 1905, that cash value of cotton insured was 8.55 cents per pound when loss or damage occurred. McFadden v. Liverpool & London & Globe Ins. Co., 162 F 783.

**23.** Where fire insurance policy insuring rents required insured to rebuild or repair as soon as nature of case would permit, it was presumed plaintiff took possession as soon after fire as possible. Palatine Ins. Co. v. O'Brien, 107 Md. 341, 68 A 484. Instruction against recovery for loss between fire and time plaintiff took possession held unauthorized without evidence of delay in taking possession. Id.

**24.** Provision that capital stock and funds of company named as insurer in policy shall alone be answerable to demands thereunder and that stockholders should not be liable beyond amount of stock, not only exonerated stockholders but also precluded recovery against another company claimed to be undisclosed principal. Western Sugar Refining Co. v. Helvetia Swiss Fire Ins. Co., 163 F 644.

**25.** Cutting v. Atlas Mut. Ins. Co., 199 Mass. 380, 85 NE 174. Under fire policy limiting liability to proportion of loss that amount thereof bore to "whole insurance covering such property," amount of floating policy not covering property covered by specific insurance until after exhaustion of specific insurance could not be considered in determining whole insurance, where policy in suit and other specific insurance fully covered loss. Klotz Tailoring Co. v. Eastern Fire Ins. Co., 116 App. Div. 723, 102 NYS 82.

**26.** Under Wilson's Rev. & Ann. St. 1903, § 3204, providing that "if there is no valuation in the policy the measure of indemnity in an insurance against fire is the full amount stated in the policy," measure of indemnity in case of total loss is full face value of policy, in absence of valuation therein, and plaintiff need not prove actual value of property at time of loss. Oklahoma Farmers' Mut. Indemnity Ass'n v. McCorkle [Okl.] 97 P 270. Instruction authorizing recovery of full amount of insurance specified in policy held proper notwithstanding claim of overvaluation of the property, under Code of Laws 1902, §§ 1816, 1817, prohibiting issuance of policies for more than value of property stated in policy, to be fixed by parties, authorizing recovery of full amount in case of total loss, and estopping companies after 60 days from denying truth of statements in application, except for fraud, parties having agreed on $5,000 as value on which $1,500 insurance was granted, total loss occurring within 60 days, and court having properly submitted question of fraud. McCarty v. Piedmont Mut. Ins. Co. [S. C.] 62 SE 1.

**27.** Rev. St. 1899, § 7979 (Ann. St. 1906, p. 3793), prohibiting insurance companies from taking any risk for more than three-fourths of value of property insured, and providing that when taken its value shall not be questioned in any proceeding, applies to insurance of personalty. Gragg v. Northwestern Nat. Ins. Co. [Mo. App.] 111 SW 1184. In case of total loss, insured is entitled to amount of insurance stated in policy less depreciation in value or quantity. Id. Statute is a direction to companies not to insure for more than three-fourths value, and when value is fixed it cannot be denied that sum

*Life insurance.*—The policy often provides for the deduction from its face value of any indebtedness of insured to the company,[28] and sometimes for adjustment of the insurance for understatements as to age.[29]

*Title insurance.*—When the contract is one of indemnity and not of guaranty, recovery is limited to loss actually sustained.[30]

§ 19. *Notice, claim, and proof of loss.*[See 10 C. L. 392]—Proof of loss as evidence are discussed in the last section,[31] and all jury questions are also there collected.[32] Subject to waiver[33] or other excuse sufficient in law,[34] notice and proofs containing the required information[35] must be given[36] within the time prescribed[37] or within

fixed is three-fourths value of property. Crossan v. Pennsylvania Fire Ins. Co. [Mo. App.] 113 SW 704. Where personalty was insured for gross premium in gross sum of $500 divided into three separate classes of different kinds of property, contract was severable, and should be construed as though amount of insurance assigned to each class was three-fourths of value of property included in ths particular class. Id. If insured goods are totally destroyed, recovery is for full amount insured, unless goods had depreciated in value since policy issued, in which event recovery would be face value of policy less depreciation (McIntyre v. Liverpool, London & Globe Ins. Co. [Mo. App.] 110 SW 604); **if not totally destroyed,** difference between their reasonable value before and after fire is amount of recovery (Id.).

**28.** Policy held to render notes given for a premium with interest proper charge against amount of policy. Southwestern Ins. Co. v. Woods Nat. Bank [Tex. Civ. App.] 20 Tex. Ct. Rep. 761, 107 SW 114.

**29.** Under provision for adjustment of insurance for understatement of age, equitable adjustment after death consists in paying bsneficiary such amount as premiums actually paid would have insured at true age of insured. Keenan v. Mutual Lifs Ins. Co. [N. J. Law] 71 A 37.

**30.** Policy insuring against unmarketability of title to estate, mortgags or interest in certain realty covered by mortgage held by plaintiff as collateral, and also guaranteeing completion of certain buildings, held contract of indemnity, and not guaranty, so that plaintiff, having purchased mortgage at full amount of loan as authorized, was without loss and could not show defect in title or noncompletion of buildings, in action on policy. Wheeler v. Equitable Trust Co. [Pa.] 70 A 750. Immaterial that plaintiff and not a stranger purchased mortgage, and that only other bidder was insolvent borrower. Id.

**31.** See post, § 24C, subd. Evidence.

**32.** See post, § 24C, subd. Questions of Law and Fact.

**33.** See post, Waiver.

**34.** Provision requiring notice of an accident on pain of forfeiture will not be construed to require strict performance when performance is made impossible by act of God, as where insured becomes mentally deranged. Reed v. Loyal Protective Ass'n [Mich.] 15 Det. Leg. N. 648, 117 NW 600. Evidence insufficient to show mental derangement. Id.

**35. Accident insurance:** Letter stating insured was found dead in nighttime on railroad track and that apparently death was caused by his being run over held sufficient as notice of happening of accident required by policy. Correll v. National Acc. Soc. [Iowa] 116 NW 1046. Requirement that insured give particulars of accident does not require that names of witnesses to accident be given. Id.

**Employer's liability insurance:** Statement in report to company that injured employe and another erected a staging, fall of which caused injury, whereas staging was in fact erected by carpenters, held not failure to comply with provision that insured should give immediate notice of accidents with fullest particulars, since it was not intended answers to questions furnished by company should be as certain as answer to a complaint. Moran Bros. Co. v. Pacific Coast Casualty Co., 48 Wash. 592, 94 P 106.

**Fire insurance:** Provision requ'ring statsment of certain particulars held not to require insured to prepare and furn sh proof of loss, but merely to give particulars required so far as known to him. Smith v. Scottish Union & Nat. Ins. Co., 200 Mass. 50, 85 NE 841.

**36. Accident and health:** Provision requiring written notice of illness within 10 days from beginning of illness held not unreasonable. Cra g v. U. S. Health & Acc. Ins. Co. [S. C.] 61 SE 423. Written notice within 10 days of injury, required by policy, is essential to cause of action, and not a mere condition subsequent or rule of procedure. Hatch v. U. S. Casualty Co., 197 Mass. 101, 83 NE 398. Stipulation in accident policy requiring notice of injury within 10 days of accident is reasonable one for protection of company against fraudulent or otherwise invalid claims Id.

**Fire insurance:** Failurs to furnish proof of loss is fatal in absence of waiver. Home Fire Ins. Co. v. Driver [Ark.] 112 SW 200; Stoebs v. Hanover Fire Ins. Co., 112 NYS 553; Commercial Fire Ins Co. v. Waldron [Ark.] 114 SW 210. Evidence held not to show proof was furnished as required. Commercial Fire Ins. Co. v. Waldron [Ark.] 114 SW 210. Compliance with provisions requiring insured forthwith after loss to render company sworn statement as to value of property, his interest, other insurance, use of building, and origin of fire, is condition precedent to insurer's liability. Smith v. Scottish Union & Nat. Ins. Co., 200 Mass. 50, 85 NE 841. Under Code 1906, § 2592, precluding insurance companies from asserting that property was worth less than value stated in policy, and providing that measure of recovery shall be amount of insurance, failure of insured to furnish plans and specifications of building after demand.

a reasonable time if the policy contains no controlling provision on the subject[38] or requires notice or proofs immediately;[39] but failure to furnish proofs will not work a forfeiture unless it is expressly so provided in the contract,[40] nor will delay have such effect if insurer fails to furnish blanks for proofs as agreed.[41] Unless so stipulated, no particular words are necessary in request for blanks for proofs.[42]

*False swearing.*[See 10 C. L. 394]—An affidavit overstating value of the property destroyed will not avoid the policy where the actual value exceeds the insurance.[43]

as stipulated in policy, held no defense. Mississippi Home Ins. Co. v. Barron [Miss.] 45 S 875.

**Life insurance:** Failure to furnish record and verdict of coroner's jury as required by policy held fatal, no waiver or excuse being shown. Metropolitan Life Ins. Co. v. Wagner [Tex. Civ App.] 109 SW 1120.

**37. Accident and health:** Provision in sick benefit policy requiring insured to give notice to company within 10 days after commencement of total disability does not require insured to decide at his peril when actual disability begins (Jennings v. Brotherhood Acc. Co. [Colo.] 96 P 982), and where both insured and his physician were at first mistaken as to the nature of the illness, notice given within 10 days after they discovered that insured had in fact been disabled since his doctor first prescribed for him was sufficient (Id.) Under policy promising weekly indemnity for injury and stipulated sum to beneficiary in case of death from the injury, and stipulating that notice of claim must be given by insured or by the beneficiary within 15 days from date of accident causing the loss for which claim was made, time within which notice must be given by the beneficiary does not begin to run until death of insured. Continental Casualty Co. v. Colvin [Kan.] 96 P 565. Within requirement for notice of injury within 10 days of "event causing injury" notice must be given within 10 days of the accident. Hatch v. U. S. Casualty Co., 197 Mass. 101, 83 NE 398. Where insured considered accident of no account, gave no notice of injury to company within 10 days as required by policy, and continued in usual health for one month, when he became ill and died, absence of notice was fatal to recovery by beneficiary who gave notice four days after death of insured. Id. Where company's liability began second week and policy required written notice "of any illness for which claim can be made" within ten days from beginning of illness, and claim could not be made under policy except for illness for which insured was regularly visited by a physician, notice given August 27 was sufficient where insured became sick August 16, but physician's visits did not commence until August 21. Craig v. U S. Health & Acc. Ins. Co. [S. C.] 61 SE 423. Under requirement that written notice be given company at a designated place within 10 days, **notice properly mailed** within 10 days is sufficient though it does not reach company within the time. Id.

**Fire insurance:** Where policy requires action thereon to be commenced within twelve months after loss, and also provides that indemnity shall not be payable until 60 days after proofs of loss are furnished, failure to furnish proofs of loss at least 60 days before expiration of the twelve months bars recovery, in absence of waiver. Harp v. Fireman's Fund Ins. Co., 130 Ga. 726, 61 SE 704. Serving proof of loss on local agent of fire insurance company more than 20 days after fire held not sufficient compliance with requirement to furnish company with proof within 60 days. Dunn v. Farmers' Fire Ins. Co., 34 Pa. Super. Ct. 246. Under provision on back of policy requiring compliance with all foregoing requirements, one of which was making of proof of loss within 60 days after fire unless such time is extended in writing complaint showing on face that proof was not made until 6 months after fire and alleging no extension of time or waiver states no cause of action. San Francisco Sav. Union v. Western Assur. Co., 157 F 695.

**38.** Where under policy as construed failure to furnish proofs within 60 days, as required by its terms, did not work forfeiture. Harp v. Firemen's Fund Ins. Co., 130 Ga. 726, 61 SE 704.

**39. Health insurance:** Under policy requiring immediate notice of illness, notice not given until expiration of 26 weeks, which was longest period for which company contracted to be liable, illness lasting for entire period, held not given within reasonable time. Woodall v. Fidelity & Casualty Co. [Ga.] 62 SE 808.

**Fire insurance:** Under provision requiring statement of certain particulars to company forthwith in case of loss, statement must be sent as soon as reasonable diligence will allow. Smith v. Scottish Union & Nat. Ins. Co, 200 Mass. 60, 85 NE 841. Could take a few days if necessary to inform himself. Id Not required to lay aside all other duties however urgent, nor permitted to unnecessarily postpone sending statement. Id. Evidence held to show due diligence in sending statement, though burden was on insured. Id. For questions of law and fact, see post, § 24C.

**40.** Harp v. Fireman's Fund Ins. Co., 130 Ga. 726, 61 SE 704.

**41.** Company so failing cannot complain of delay in sending proofs, beneficiary being entitled to await blanks and if not received within time limited proceed to make up proofs in his own way within reasonable time. Correll v. National Acc. Soc. [Iowa] 116 NW 1046. See jury questions, post § 24C.

**42.** Letter notifying of killing, urging settlement, and asking company to "attend to this as promptly as possible," held sufficient. Correll v. National Acc. Soc. [Iowa] 116 NW 1046.

**43.** Under clause of forfeiture for fraud or false swearing by assured touching matters relating to the insursnce before or after loss Jensen v. Palatine Ins. Co. [Neb.] 116 NW 236.

Fraud as affecting the award of adjusters or arbitrators is taken up in the next section.[44]

*Waiver*See 10 C. L. 394 or estoppel[45] may consist in absolute[46] denial of all liability[47] before expiration of the time for furnishing proofs,[48] or in failure to furnish blanks for proofs,[49] or to object to defects within a reasonable time,[50] or in admissions[51] or in conduct on the part of the adjuster.[52] Denying liability on the ground of facts shown by the proofs waives objection that the proofs do not conform to the requirements of the policy,[53] but does not adopt or admit the truth of the statements in the proofs.[54] Insurer is not bound by attempted waivers on the part of agents who act without authority.[55] The question of waiver is one of fact.[56]

§ 20. *Adjustment and arbitration.*See 10 C. L. 396—Provisions for appraisal or arbitration are enforcible in most jurisdictions[57] in the absence of waiver.[58] The char-

**44.** See post, § 20.

**45.** Replication held to set up waiver of literal requirements as to proofs of loss, and not estoppel. Webster v. State Mut. Fire Ins. Co. [Vt.] 69 A 319.

**46.** Refusal of company to pay, without making known to insured that it is predicated on failure to furnish proofs of loss or some specific ground other than denial of all liability, will be held absolute. Harp v. Fireman's Fund Ins. Co., 130 Ga. 726, 61 SE 704.

**47.** Denial of all liability waives proof of loss. United States Health & Acc. Ins. Co. v. Clark, 41 Ind. App. 345, 83 NE 760; Wortham v. Illinois Life Ins. Co., 32 Ky. L. R. 827, 107 SW 276; Continental Ins. Co. v. Buchanan, 32 Ky. L. R. 1298, 108 SW 355; Hollenbeck & Co. v. Mercantile Town Mut. Fire Ins. Co. [Mo. App.] 113 SW 217; Orient Ins. Co. v. Wingfield [Tex. Civ. App.] 108 SW 788. Denial of all liability under policy and failure to call attention to any defect in proofs or to ask for further proofs held to waive objection that proofs did not disclose insured was insane when he committed suicide. Metropolitan Life Ins. Co. v. Thomas, 32 Ky. L. R. 770, 106 SW 1175. Provision requiring insured to submit to **examination** after loss held waived by denial of all liability under policy and unreasonable delay in demanding examination. Jensen v. Palatine Ins. Co. [Neb.] 116 NW 286.

**48.** Rule is inapplicable where denial is after expiration of time within which proof should have been furnished. Commercial Fire Ins. Co. v. Waldron [Ark.] 114 SW 210. Where under policy insured has reasonable time within which to furnish proofs of loss, absolute refusal by insurer to pay, made before expiration of reasonable time, waives proofs (Harp v. Fireman's Fund Ins. Co., 130 Ga. 726, 61 SE 704), but such refusal made after the expiration of a reasonable time will not be considered a waiver (Id.).

**49.** Insurer's failure on request to furnish blanks for final proof of death held waiver of requirement that proofs be made on blanks to be furnished by insurer. Phoenix Acc. & Sick Ben. Ass'n v. Stiver [Ind. App.] 84 NE 772.

**50.** Defective verification held waived by failure to object within reasonable time. Arkansas Ins. Co. v. Cox [Okl.] 98 P 552. Company's silence on receipt of letter merely giving notice of loss and demanding payment held not waiver of proof of loss. Home Fire Ins. Co. v. Driver [Ark.] 112 SW 200. Letter acknowledging receipt of proofs prepared by beneficiary in her own way on failure of company to furnish blanks held not objection to form of proofs nor request for further proof where it merely criticised merits of claim and offered to furnish blanks. Correll v. National Acc. Soc. [Iowa] 116 NW 1046.

**51.** Insurer admitting that it waived further proof of injury thereby waived additional proofs regardless of defects, in proofs given. McClure v. Great Western Acc. Ass'n [Iowa] 118 NW 269.

**52.** Adjuster's attempt to ascertain loss and effect settlement held no waiver or estoppel, insured not having changed position. Dunn v. Farmers' Fire Ins. Co., 34 Pa. Super. Ct. 245.

**53, 54.** General Acc. Ins. Co. v. Hayes [Tex. Civ. App.] 113 SW 990.

**55.** Agent held without authority to waive proof of loss. American Ins. Co. v. Hornbarger, 85 Ark. 337, 108 SW 213.

**56.** See post, § 24C, subd. Questions of Law and Fact.

**57.** No action maintainable on fire policy until after appraisal of loss as required by policy in case of disagreement as to amount of loss. Baumgarth v. Firemen's Fund Ins. Co., 152 Mich. 479, 15 Det. Leg. N. 266, 116 NW 449. Evidence held to show that appraisal provided for was not made. Id. Though Rev. St. 1899, § 7979 (Ann. St 1906, p. 3793) declares that no company shall take risks for more than three-fourths of value of property and that when taken value shall not be questioned in any proceeding, insured could not recover without complying with condition that, in event of disagreement as to amount of loss, it should be settled by appraisers, where on claim of total loss defendant's adjusters did not deny value of property at time of insurance but merely asserted that goods destroyed did not equal in value amount of insurance, and that there had been diminution of from 20 to 30 per cent. Gragg v. Northwestern Nat. Ins. Co. [Mo. App.] 111 SW 1184.

**58.** Efforts at arbitration as per fire policy held not necessary where company denied all liability thereunder. Retail Merchants' Ass'n Mut. Fire Ins. Co. v. Cox, 138 Ill. App. 14. Insurers who neither appointed appraisers nor requested that action be taken under arbitration clause could not defeat action on policy because it contained such clause. McLean v. Tobin, 58 Misc. 528, 109 NYS 926.

acter of the loss is important in determining the necessity of hearing the parties at the appraisers' meeting.[59] The appraisers are not the agents of the persons selecting them,[60] and the latter are not precluded from complaining of the former's decision because of the selection.[61] Fraud is ground for complaint,[62] but unless set aside for such or other equitable ground the appraiser's award is conclusive.[63] Jury questions are postponed for subsequent treatment.[64]

§ 21. *Option to pay loss or restore property, or to take damaged property at appraised value.*See 4 C. L. 216

*Burglary insurance.*See 10 C. L. 396

*Fire insurance.*See 10 C. L. 396

*Plate glass insurance.*—Where insurer elects to replace broken glass it impliedly agrees to do so within a reasonable time.[65]

§ 22. *Payment of loss or benefits and adjustment of interests in proceeds.*See 10 C. L. 396—Matters relating to compromises[66] and releases[67] are elsewhere fully treated. The question of payment is usually one of fact.[68] Where proofs are waived, benefits otherwise due a specified time after filing will be due at the expiration of such period after the waiver.[69] Policies sometimes authorize insured to make payment to any person equitably entitled to the fund by reason of having incurred expense on account of insured.[70] A provision making the company's production of a receipt given by the representative of insured or legal beneficiary conclusive evidence of satisfaction of the policy does not authorize payment to the legal representative as against a beneficiary whose rights are fixed by the policy.[71] The proceeds of life policies are exempt from the claims of creditors in many states[72] and the proceeds of fire policies on exempt property are usually exempt.[73]

**59.** Where, before destruction or after partial destruction leaving sufficient to show size, architecture, and quality of material, experts are sent to estimate value of insured building, hearing and opportunity to introduce evidence of value need not be granted (Carlston v. St. Paul Fire & Marine Ins. Co., 37 Mont. 118, 94 P 756), but, where strangers are selected to estimate loss after total destruction of property, notice of time, place of appraisers' meeting and opportunity of parties to be heard is essential to validity of award (Id.).

**60, 61.** Carlston v. St. Paul Fire & Marine Ins. Co., 37 Mont. 118, 94 P 756.

**62.** Fraud in appraisal in behalf of several companies vitiates as to innocent as well as guilty companies. Meyer v. Phoenix Assur. Co., 124 App. Div. 241, 108 NYS 711. Petition against two companies jointly to set aside award of appraisers for fraud held not to join improper defendants where insured had appointed one appraiser, the two companies one, and the two apraisers had appointed an umpire, though there were two policies, one issued by each defendant. Id. In action by several companies to cancel policies and set aside appraisement and award, on ground that the loss as returned was excessive by reason of fraudulent representations as to amount of goods destroyed, fact that the interests of companies were several and their policies were issued for separate considerations and were of different classes does not render action several or present a misjoinder of parties plaintiff, where primary relief sought is cancellation of award. Michael v. Security Ins. Co., 6 Ohio N. P. (N. S.) 401. In suit in equity to set aside award for fraud, judgment may be obtained for the actual loss. Mayer v. Phoenix Assur. Co., 124 App. Div. 241, 108 NYS 711.

**63.** Under fire policy. Mayer v. Phoenix Assur. Co., 124 App. Div. 241, 108 NYS 711.

**64.** See post, § 24C. subd. Questions of Law and Fact.

**65.** Munk v. Maryland Casualty Co., 116 App. Div. 756, 102 NYS 164. Insured's tenant could not recover for delay. Id. Landlord could not recover where he proved no loss or that he was under liability to tenant on account of delay. Id.

**66.** See Accord and Satisfaction, 11 C. L. 13.

**67.** See Release, 10 C. L. 1502.

**68.** Evidence sufficient to authorize finding that insured had never received check for weekly indemnity mailed him by company, and which, if received, would have precluded further claims under policy. Cheswell v. Fraternal Acc. Ass'n, 199 Mass. 267, 85 NE 96.

**69.** Where by-law provided weekly benefits should not mature until 90 days after filing of satisfactory proofs, and proofs were waived, period must be computed from date of waiver. McClure v. Great Western Acc. Ass'n [Iowa] 118 NW 269.

**70.** See ante, § 11.

**71.** Provision, on effect of production by company of policy and receipt for amount thereof, signed by person proving to satisfaction of company that he is personal representative, husband, wife or lawful beneficiary. Smith v. Mentropolitan Life Ins. Co. [Pa.] 71 A 11.

**72.** See, also, Exemptions, 11 C. L. 1444. Creditor who became such after issuance of policy cannot claim proceeds as against des-

§ 23. *Subrogation and other secondary rights of the insurer.* See 10 C. L. 399—When an insurer pays the insured the total amount of the loss it becomes subrogated by operation of law to all of the assured's rights of action against third persons responsible for the loss,[74] and it may set up in defense of an action on the policy

ignated beneficiary. Lehman v. Gunn [Ala.] 45 S 620. Act Feb. 18, 1897 (Gen. St. 1896-97, p. 1377), entitled "an act to regulate the business of insurance in this state," must be construed as to constitutionality in form in which it was orignally enacted without reference to codification, having been merely copied into Code of 1896 by act of codifier. Rayford v. Faulk [Ala.] 45 S 714. Section 32, p. 1393, exempting insurance money from claims of creditors of insured or beneficiary held cognate to and embraced in title of act. Id. Fund held not garnishable by creditors of beneficiary. Id. Policy payable to insured's estate is exempt from creditors as against claims of wife and children, under Code 1896, § 2607, though wife and children are also mentioned in statute as persons who may be beneficiaries. Mitchell v. Allis [Ala.] 47 S 715. Proceeds of life policy vests in beneficiary and may not be subjected to insured's debts without former's consent regardless of solvency or insolvency of insured when he paid premiums. Johnson v. Bacon [Miss.] 45 S 858. Under statute exempting to amount of $10,000 proceeds of insurance policies payable to a designated beneficiary from liability for insured's debts, proceeds in excess of that sum are liable for premiums paid by insured while insolvent to keep up entire policy, not merely such excess. Id. Under Ky. St. 1903, § 655, giving proceeds of life policies to lawful beneficiaries designated therein as against creditors of representatives of insured, policy on life of bankrupt, payable to wife, does not pass to trustee. In re Pfaffinger, 164 F 526. Question not affected because insured was authorized by policy to change beneficiary and, after bankruptcy, applied for surrender value which company did not pay. Id.

73. Consult, also, the topic Exemptions, 11 C. L. 1444.

**NOTE. Garnishment proceeds:** Defendant company being indebted upon a policy of insurance to plaintiff, and plaintiff being a judgment debtor of one S., the latter sued out a writ of garnishment against defendant company. The company answered admitting its indebtedness, whereupon plaintiff intervened, claiming the money. The property insured was used by plaintiff in his business as a restaurateur and was exempt from execution. Held, that the proceeds of an insurance policy on articles exempt from execution are not subject to garnishment in the hands of the insurance company. Geise v. Pennsylvania Fire Ins. Co. [Tex. Civ. App.] 107 SW 555.

The narrow issue here presented has caused the courts considerable difficulty, giving rise to two distinct lines of authority reaching diametrically opposite conclusions. I. The Courts of New Hampshire, Illinois, and Mississippi hold that an insurance company is liable as garnishee of the insured after a loss though the property insured was exempt from attachment and execution. Wooster v. Page, 54 N. H. 125, 20 Am. Rep. 128; Monniea v. German Ins. Co., 12 Ill. App. [12 Bradw.] 240; Smith v. Ratcliff, 66 Miss. 683, 6 S 460, 14 Am. St. Rep. 606 (relying upon Wooster v. Page, supra, and disapproving of Houghton v. Lee, infra, and Cooney v. Cooney, infra). The theory upon which these courts proceed is well set forth in the leading case of Wooster v. Page, supra: "It is the furniture (i. e. the property insured) and not the avails of it in another form which is protected. * * * What is in the hands of the insurance company belonging to the defendant (the insured) is money, having no ear-mark by which it may be distinguished from any other money, and not derived by any process of transmutation from the defendant's goods; and hence the exemption which before existed cannot follow and appertain to the indebtedness of the insurance company." It should be noted, however, that in New Hampshire statutory exemptions apply only to specific chattels, pension, bounty and wages. N. H. Gen. St., c. 205, § 2. II. On the other hand a larger number of courts hold that the proceeds of insurance on exempt property is not subject to garnishment. Houghton v. Lee, 50 Cal. 101; Langley v. Finnall, 2 Cal. App. 231, 83 P 291; Cameron v. Fay, 55 Tex. 58; Ward v. Goggan, 4 Tex. Civ. App. 274, 23 SW 479; Cooney v. Cooney, 65 Barb. [N. Y.] 524; Bliss v. Raynor, 91 Hun [N. Y.] 250, 36 NYS 156. Reynolds v. Haines, 83 Iowa, 342, 49 NW 851, 32 Am. St. Rep. 311, 13 L. R. A. 719; Puget Sound, etc., Co. v. Jeffs, 11 Wash. 466, 39 P 962, 48 Am. St. Rep. 885, 27 L. R. A. 803 (relying upon Reynolds v. Haines, supra); Winsor v. McLachlan, 12 Wash. 154, 40 P 727. In Reynolds v. Haines, supra, a physician was held to be entitled to the insurance money on his library which was by statute exempt from execution. The court says that as the physician might sell his books and replace them by better ones without violating the letter of the statute so he should likewise be permitted to retain the insurance money for the same purpose. Puget Sound, etc., Co. v. Jeffs, supra, permits the exemption only in case the insured intends to invest the proceeds of the insurance in property similar to that destroyed. It would seem that, by the weight of authority and the better reason, the insurance money which stands in lieu of exempt property should not be subject to garnishment. While a debtor cannot voluntarily sell exempt property and hold the proceeds free from all attack, the situation is entirely different where the property is converted into a mere right of action by a proceeding wholly in invitum. Drake, Attach. [7th ed.], § 244a. Such is the case where the property is burned. The more recent decisions and the leading text-writers refuse to accept the technical reasoning of Wooster v. Page, supra, and almost uniformly support the position of the principal case. Freeman, Executions [3rd ed.] § 285 Drake Attach. [7th ed.] § 244ff; Rood, Garnishment, § 93; 12 Am. & Eng. Enc. of Law, 152; 18 Cyc. 1444.—From 6 Mich. L. R. 596.

74. Southern R. Co. v. Blunt Ward, 165 F

an unauthorized settlement by insured with the wrong doer;[75] but insurer takes nothing by subrogation but the rights of the insured,[76] and the rule first stated has been held inapplicable to accident insurance.[77]

§ 24. *Remedies and procedure. A. Rights of action and defenses, parties and limitations.*See 10 C. L. 400—Matters relating to venue[78] and process[79] are treated elsewhere.

*Rights of action and defenses.*See 10 C. L. 400—A provision that suit must be brought only in the highest court of original jurisdiction is against public policy.[80] Prior reformation is not essential to recovery in an action on a written policy not expressing the actual agreement entered into.[81] A tender of less than what was due is no defense.[82]

*Parties.*See 10 C. L. 401—Action must be by or in the name of the party in interest[83] or the person having legal title,[84] and against insurer or underwriters or some one agreed upon to defend.[85] Where a life policy is pledged to insurer and, on default, it makes an invalid sale thereof, the beneficiary may sue the insurer on the policy after death of insured.[86]

*Time of commencing action.*See 10 C. L. 401—A provision postponing action for a specified time after filing of proofs of loss is waived by insurer's denial of all liability under the policy.[87]

*Limitations.*See 10 C. L. 401—Contract limitations where valid[88] must be complied with[89] in the absence of fraud, estoppel,[90] or waiver.[91]

268. Insurance company subrogated under policy to rights of cotton owner against railroad company from whose locomotive sparks were thrown. Sea Ins. Co. v. Vicksburg S. & P. R. Co. [C. C. A.] 159 F 676. In suit by insured against wrongdoer, after collection of insurance money not sufficient to cover entire loss, for recovery of whole amount thereof, held permissible, under Code pleading, for insurer to file cross complaint setting out defendant's wrong and plaintiff's damage substantially as alleged in plaintiff's complaint, and asserting equitable assignment to it of a stated portion of whatever plaintiff might recover, such procedure not being objectionable as a splitting of the cause of action Lake Erie & W. R. Co. v. Hobbs, 40 Ind. App. 511, 81 NE 90. Right of subrogation is valuable and material to risk. Fire Ass'n v. La Grange & Lockhart Compress Co. [Tex. Civ. App.] 108 SW 1134.

75. To sustain defense of settlement with wrongdoer so as to prevent operation of subrogation clause, it must appear that there actually was a claim against the alleged wrongdoer, and that insured without insurer's consent actually released such claim. Merchants' Underwriters v. Parkhurst-Davis Mercantile Co., 140 Ill. App. 504. Evidence insufficient. Id.

76. Southern R. Co. v. Blunt, 165 F 258.

77. Company making payment under accident policy does not thereby become subrogated to rights of insured against person responsible for accident, rule not being same as in case of fire insurance. Gatzweiler v. Milwaukee Elec. R. & L. Co., 136 Wis. 34, 116 NW 633. Insurer not necessary party in personal injury suit. Id.

78. See Venue and Place of Trial, 10 C. L. 1965.

79. See Process, 10 C. L. 1262.

80. Blair v. National Shirt & Overalls Co., 137 Ill. App. 413.

81. Where insured had not agreed to clause forbidding concurrent insurance. Hearsh v. German Fire Ins. Co., 130 Mo. App. 457, 110 SW 23.

82. Tender not covering loss of awnings for which policy authorized recovery held insufficient as defense. Wicks v. London & Lancashire Fire Ins. Co., 111 NYS 65.

83. Where company answered that policy was issued in favor of plaintiff and defended on sole ground that policy had lapsed, it elected to pay to plaintiff in case its technical defense failed, and could not have verdict set aside on ground action should have been by executor or administrator of insured, in view of fact that such action was then barred. Ballet v. Metropolitan Life Ins. Co., 110 NYS 77.

84. At common law, action on policy must be brought in name of party who has legal title thereto. Peoria Life Ass'n v. Hines, 132 Ill. App. 642. Suit in name of insured "for the use" of an assignee held no misjoinder. Id.

85. Under Lloyd's fire policy, requiring action thereon to be brought against the manager as attorney in fact and representing all the underwriters, suit was properly brought against the attorneys in fact representing the several underwriters named in policy. McLean v. Tobin, 58 Misc. 528, 109 NYS 926.

86. Rule that, ordinarily, pledgor cannot sue alone to enforce pledged instrument held not controlling. Tennent v. Union Cent. Life Ins. Co. [Mo. App.] 112 SW 754.

87. **Accident and health insurance.** Jennings v. Brotherhood Acc. Co. [Colo.] 96 P 882; French v. Fidelity & Casualty Co. [Wis.] 115 NW 869.

**Fire insurance.** Jensen v. Palatine Ins. Co. [Neb.] 116 NW 286.

**Life insurance.** Aetna Life Ins. Co. v. Howell, 32 Ky. L. R. 935, 107 SW 294.

88. An agreement requiring action to be brought within period less than that prescribed by statute of limitations is enforcl-

(§ 24) *B. Pleading and practice.*[See 10 C. L. 402]—The usual rules of pleading apply,[92] including those relating to amendments[93] and exhibits.[94] Waiver[95] or

ble. Gill v. Manhattan Life Ins. Co. [Ariz.] 95 P 89. Held applicable to infant. Id. Action on accident policy within two years held timely under statute, notwithstanding policy contained nine-month limitation. Kephart v. Continental Casualty Co. [N. D.] 116 NW 349.

**89.** Contract limitation held applicable to infant. Gill v. Manhattan Life Ins. Co. [Ariz.] 95 P 89. In action on policy requiring suit to be brought within six months after disability terminated or assumed a permanent character, suit being brought after six months from time of injury, evidence as to gradual improvement in health held to justify jury in finding injury had not assumed a permanent character though petition, before amendment, asserted permanent character of injury. McClure v. Great Western Acc. Ass'n [Iowa] 118 NW 269. Provision in fire policy, requiring suit thereon to be brought thereon within one year after fire, relates to original suit and does not require error to be sued out within same time. Helbig v. Citizens' Ins. Co., 234 Ill. 251, 84 NE 897. Under provision in employer's liability policy, requiring action to be brought within 60 days after final judgment against assured and payment and satisfaction of same on record, action two days before satisfaction of judgment held premature. United States Tube & Iron Co. v. Maryland Casualty Co., 220 Pa. 42, 68 A 1026.

**90.** Allegation that defendant "purposely and willfully" concealed contents of application containing limitation of action to induce plaintiff to delay suit, and "purposely, willfully, and with intent to defraud," induced her to delay bringing action until expiration of time therefor, held insufficient to show fraud or estoppel so as to preclude company from pleading contract limitation. Gill v. Manhattan Life Ins. Co. [Ariz.] 95 P 89.

**91.** Contract limitation as to time of bringing suit held waived by letter of company's counsel explaining delay in taking up the matter of settlement. Dolsen v. Phoenix Preferred Acc. Ins. Co., 151 Mich. 228, 14 Det. Leg. N. 894, 115 NW 50. Provision requiring suit to be brought within six months from time of injury held waived, where general manager advised plaintiff to wait till he got well before filing final proofs and company made no objection when blanks were applied for after expiration of the six months. Mastenbrook v. U. S. Acc. Ass'n [Mich.] 15 Det. Leg. N. 697, 117 NW 543.

**92.** Count charging insurer with fraudulently procuring money on policy could not be joined with common counts in assumpsit and counts alleging breaches of contract of insurance. Price v. Mutual Reserve Life Ins. Co., 107 Md. 374, 68 A 689. Petition held to state cause of action under accident policy where insured died of blood poisoning following scratch of finger, sams not being objectionable as showing that death resulted from excepted peril. Rheinhelmer v. Aetna Life Ins. Co., 77 Ohio St. 360, 83 NE 491. Complaint held to state cause of action for breach of bond given by company and sureties to state to secure prompt payment of claims, and not to show bond had expired Neimeyer v. Claiborne [Ark.] 112 SW 387. That bond when presented in evidence should show it had expired held not to affect complaint. Id. Plea "defendant did not enter into the alleged contract sued on" held not plea of non est factum within Code 1896, § 3353, form 33. Manhattan Life Ins. Co. v. Verneuille [Ala.] 47 S 72. Where liability for rents was independent under policy, company could plead to that part only of declaration averring loss of rents. Reed v. Firemen's Ins. Co. [N. J. Law] 69 A 724. Pleas denying total destruction and setting up razing of buildings by city authorities after fire held bad as being only in mitigation of damages. Id. Under general rules of pleading, answer in action on fire policy excepting loss caused directly or indirectly by earthquake is sufficiently definite and certain where it alleges that fire and loss were caused directly by earthquake and that but for such earthquake the fire and loss would not have occurred, and where it alleges in similar manner that fire and loss were caused indirectly by earthquake. Board of Education v. Alliance Assur. Co., 159 F 994. Code Civ. Proc. Cal. § 437a, Act Cal. March 21, 1907, St. 1907, p. 836, c. 447, providing what facts must be set up by defendant when it claims that loss was remotely caused by excepted peril, and but for such peril would not have occurred, though not invalid as deprivation of equal protection on ground that it compels disclosure of defendant's evidence in advance of trial (Id.), nor inapplicable in federal courts as compelling disclosure of evidence in violation of Rev. St. § 861 (U. S. Comp. St. 1901, p. 661), prescribing mode of proof in trial of actions at common law (Id.), is unconstitutional as depriving defendant of equal protection in that it discriminates against a particular class of actions and defendants therein (Id.), and in that it is a special law regulating practice of courts in contravention of Const. Cal. art. 4, § 25, subd. 3 (Id.). Replication setting up waiver of strict compliance with requirements as to proofs of loss, denying failure to give notice of loss, and attributing failure to bring suit within one year after fire to defendant's promise to pay if suit was not brought, held not a departure, or objectionable as both traversing and confessing plea of limitations, or traversing and confessing the same allegations. Webster v. State Mut. Fire Ins. Co. [Vt.] 69 A 319.

**93.** Allegation of refusal to pay instead of nonpayment held amendable. Baumgarten v. Alliance Assur. Co., 159 F 275. Where in action on policy plaintiff referred to it as issued on date of an earlier and lapsed policy, but in bill of particulars requested by defendant gave date and amount of second as well as first policy, it in effect became part of declaration and amendment was not necessary to render admissible second policy. Hurd v. Northern Acc. Co. [Mich.] 15 Det. Leg. N. 493, 116 NW 977.

**94.** In action against transferee of insurer's business, plaintiff need not file as exhibit copy of contract of transfer where notice of

other excuse for breach of condition[96] must be pleaded. Where defendant pleads violation of a restrictive clause, plaintiff may plead waiver or estoppel without first having the contract reformed so as to embody the waiver.[97] If plaintiff has been released from performance of any condition, he should aver such facts in his petition,[98] but mere defensive matters can be met by reply.[99] In an action on a fire policy the complaint must allege the contract,[1] plaintiff's interest therein,[2] the loss and notice thereof,[3] the value [4] and location [5] of the property lost or damaged, and that the sum claimed is due and payable.[6]

As a general rule insurer must specially plead defenses based on breach of warranties, conditions or representations,[7] failure to furnish proofs,[8] facts limiting the

transfer is attached to policy as a rider by direction of transferee and does not contain terms of contract of transfer. Mutual Reserve Life Ins. Co. v. Ross [Ind.] 86 NE 506.

95. Waiver of deficiency in proofs of death. Metropolitan Life Ins. Co. v. Wagner [Tex. Civ. App.] 109 SW 1120.

96. Reply held to sufficiently, though inaptly, aver insanity of insured at time he burned the property. Bindell v. Kenton County Assessment Fire Ins. Co., 33 Ky. L. R. 385, 108 SW 325.

97. German American Ins. Co. v. Hyman, 42 Colo. 156, 94 P 27.

98, 99. Burglary and larceny insurance. Kandar v. Aetna Indemnity Co., 10 Ohio C. C. (N. S.) 449.

1. Petition alleging that defendant by written policy for stated consideration by contract insured plaintiff against loss by fire held to contain a sufficient statement of contract for indemnity against such loss and of defendant's promise to pay. Rogers v. Shawnee Fire Ins. Co. [Mo. App.] 111 SW 592.

2. Declaration that policy was payable to estate of P but plaintiffs were parties really interested and were the beneficial owners of policy and that legal and equitable title was in them alone at time it was issued and at time of loss held not demurrable. Norwich Union Fire Ins. Soc. v. Prude [Ala.] 46 S 974. Allegation that insured "assigned, transferred and delivered" policy to plaintiff held sufficient to admit proof of a gift. McNevins v. Prudential Ins. Co., 57 Misc. 608, 108 NYS 745. Averment that company had in writing consented to assignment of policy held not demurrable. Home Ins. Co. of New York v. Myers, 32 Ky. L. R. 999, 107 SW 719.

3. Must allege notice of loss. Hilburn v. Phoenix Ins. Co., 129 Mo. App. 670, 108 SW 576.

4. Hilburn v. Phoenix Ins. Co., 129 Mo. App. 670, 108 SW 576.

5. Petition bad for not stating that property was in building described therein. Hilburn v. Phoenix Ins. Co., 129 Mo. App. 670, 108 SW 576. Allegation that property was in county in which action was brought held jurisdictional. Id.

6. Hilburn v. Phoenix Ins. Co., 129 Mo. App. 670, 108 SW 576. Allegation that insurance was due though a mere conclusion held sufficient to support judgment. Rogers v. Shawnee Fire Ins. Co. [Mo. App.] 111 SW 592. Allegation that defendant company had refused to pay amount due on policy was not equivalent to allegation of nonpayment and rendered complaint defective. Baumgarten v. Alliance Assur. Co., 159 F 275.

7. As a rule defenses based on **conditions** broken must be specially pleaded. American Ins. Co. v. Egyptian Lodge No. 802, I. O. O. F., 128 Ill. App. 161. Conditions, breach of which is relied on, must be set out at least in substance. "Said policy provides that it shall be void in case of any fraud by insured," etc., held insufficient on which to predicate breach by attempt to collect insurance money by false representation as to condition of house. Norwich Union Fire Ins. Soc. v. Prude [Ala.] 46 S 974. Answer alleging that possession and occupancy of buildings described and of insured premises were changed, and premises ceased to be occupied as provided in policy, held sufficient to raise question as to **vacancy.** Cone v. Century Fire Ins. Co. [Iowa] 117 NW 307. Plea that policy was made payable to a certain estate held not to show that **insured's interest** was not truthfully stated. Norwich Union Fire Ins. Soc. v. Prude [Ala.] 46 S 974. Breach of conditions as to **sole ownership** and **change in title,** interest **or possession** held admissible under general issue. Rochester German Ins. Co. v. Monumental Sav. Ass'n, 107 Va. 701, 60 SE 93. Where company did not give notice of defenses under plea of general issue as required by court rule, it could not set up **change of occupation.** Hare v. Workingmen's Mut. Protective Ass'n, 151 Mich. 225, 14 Det. Leg. N. 897, 114 NW 1009. Breach of **warranty** must be expressly pleaded. French v. Fidelity & Casualty Co. [Wis.] 115 NW 869. Answer setting up breach of warranties P and Q against **bodily or mental infirmaties,** in that insured at time of acceptance of policy and for long time prior thereto had been suffering from chronic asthma and **bronchitis,** held not to sufficiently plead breach of warranty that insured had not had and did not have bronchitis. Id. Answer as a whole held to set up warranty as to **value of property** insured and not merely misrepresentation. National Mut. Fire Ins. Co. v. Duncan [Colo.] 98 P 634.

8. Where fire insurer did not give notice of defenses under plea of general issue as required by court rule, it could not set up failure to furnish proofs of loss. Hare v. Workingmen's Mut. Protective Ass'n, 151 Mich. 225, 14 Det. Leg. N. 897, 114 NW 1009. Failure to furnish proofs of death held not available under general issue. Manhattan Life Ins. Co. v. Verneuille [Ala.] 47 S 72.

liability,[9] payment under special provision in the policy,[10] limitations,[11] and the statutes of other states.[12] Deductions for unpaid premiums must also be claimed in the pleadings.[13]

*Variance.* See 10 C. L. 403

*Practice.* See 10 C. L. 404—It is proper to proceed in equity when the remedy at law is inadequate.[14] When there are rival claimants to the proceeds of a policy, interpleader will lie.[15]

(§ 24) *C. Evidence; questions of law and fact. Presumptions and burden of proof.* See 10 C. L. 404—Plaintiff must prove the contract and that it was in force at the time of the loss.[16] When the proofs of loss show facts rendering insurer not liable, the burden is on plaintiff to prove error.[17] If an excepted peril contributes to a loss, insured must show the extent of the damage done by the peril insured against.[18] Delivery of a policy prima facie acknowledges receipt of the first premium [19] and casts upon the insurer the burden of showing nonpayment.[20] If the policy is delivered without demand for the first premium, the presumption is that credit was extended.[21] The burden is on insurer to show affirmatively the existence of grounds of forfeiture,[22] such as breach of warranty or condition,[23] or

9. Where company's liability is limited by a separate clause following a general one, burden is on insurer to plead and prove facts rendering subsequent clause operative. General Acc. Ins. Co. v. Hayes [Tex. Civ. App.] 113 SW 990. Insurer held not entitled to benefit of evidence showing illness limiting its liability, not having pleaded such illness. Id.

10. Plea of authority under policy to pay proceeds to any relative or connection by marriage, etc., and payment to insured's husband, held not demurrable for failure to aver that plaintiff, original beneficiary, had consented to be replaced by any other beneficiary. Metropolitan Life Ins. Co. v. McCray [Ala.] 47 S 65.

11. Limitations not available, insurer not having given notice of defenses as per court rule. Hare v. Workingmen's Mut. Protective Ass'n, 151 Mich. 225, 114 Det. Leg. N. 897, 114 NW 1009. That causes of action alleged were discovered by plaintiff more than three years before suit and policy was canceled as directed by mutual consent held sufficient plea of limitations. Price v. Mutual Reserve Life Ins. Co., 107 Md. 374, 68 A 689.

12. Failure to plead statute of another state as to validity of provisions limiting time for making proof of claim and commencing suit held to preclude reliance thereon. Kephart v. Continental Casualty Co. [N. D.] 116 NW 349.

13. Kephart v. Continental Casualty Co. [N. D.] 116 NW 349.

14. Held proper to proceed in equity to enforce fire policies where insurance association was unincorporated and composed of large and shifting membership, and accounting was necessary and trust fund involved. Williamson v. Warfield, Pratt, Howell Co., 136 Ill. App. 168; Warfield, Pratt, Howell Co. v. Williamson, 233 Ill. 487, 84 NE 706; Merchants' Underwriters v. Parkhurst-Davis Mercantile Co., 140 Ill. App. 504. Prayer held sufficient to justify specific performance. Williamson v. Warfield, Pratt, Howell Co., 136 Ill. App. 168.

15. Bill by insurer praying that rival claimants to two policies on life of one person should interplead and that amount of insurance be adjusted to true age of insured as provided by policies held maintainable under the facts, in nature of bill of interpleader. Metropolitan Life Ins. Co. v. Hamilton [N. J. Eq.] 70 A 677. Claim of second wife held sufficient to entitle insurer to file bill against her and third person claiming as designated beneficiary. Id. Bill not multifarious. Id. Prayer that rival claimants should be enjoined from prosecuting pending suits on policies would not be granted unless insurer paid into court full amount of insurance, subject to deduction on distribution if insurer should establish on final hearing that deduction should be made on account of misstatements as to age. Id.

16. Interposition of verified plea of general issue casts on plaintiff burden of proving execution, delivery and acceptance of policy and that same was in force at time of loss. Fire Insurance. Citizens' Ins. Co. v. Helbig, 138 Ill. App. 115.

17. Not sufficient for plaintiff to show he swore to proofs relying on hearsay statements. Hill v. Aetna Life Ins. Co. [N. C.] 63 SE 124.

18. Where fire policy did not cover loss by explosion except that due to ensuing fire, and insurer proved explosion preceded fire, burden was on insured to prove extent of damage by the subsequent fire. German American Ins. Co. v. Hyman, 42 Colo. 126, 94 P 27.

19, 20. Cauthen v. Hartford Life Ins. Co. [S. C.] 61 SE 428.

21. Cauthen v. Hartford Life Ins. Co. [S. C.] 61 SE 428.

22. Where insured was certificate holder in good standing up to time he failed to pay an assessment, it was for insurer to prove that assessment was necessary and not excessive and was levied in manner and for purposes prescribed in contract. King v. Hartford Life & Annuity Ins. Co. [Mo. App.] 114 SW 63.

23. Burden on insurer to show violation of conditions of accident policy at time of injury. Kirkpatrick v. Aetna Life Ins. Co. [Iowa] 117 NW 1111. Promissory warranty

fraud, misrepresentation or materiality to risk,[24] and also to show excepted risks,[25] such as self-inflicted injury or suicide.[26] Presumptions in favor of plaintiff are not destroyed by defendant's verification of a plea of general issue.[27]

*Evidence.*[See 10 C. L. 404]—The usual rules of evidence apply,[28] including those as to admission of expert and opinion evidence,[29] privileged communications,[30] transactions or communications with deceased persons,[31] parol evidence,[32] secondary, hearsay and res gestae evidence,[33] self-serving statements,[34] and the declarations and

requiring insured to maintain sprinkler held condition subsequent as to which insurer had burden of proof, and not within Ballinger's Ann. Codes & St. § 4934, as to pleading and proof of conditions precedent. Port Blakely Mill Co. v. Hartford Fire Ins. Co. [Wash.] 97 P 781. General pleading that plaintiff had complied with all terms and conditions authorized by statute relative to pleading conditions precedent held to refer only to conditions precedent and not to conditions subsequent as to which insurer has burden of proof. Id.

**24.** Misrepresentation and fraud will not be assumed on doubtful evidence or circumstances of mere suspicion. Life Ins. Co. v. Hairston [Va.] 62 SE 1057. Under statute precluding forfeiture unless untrue statements were material or made in bad faith, burden is on company to prove falsity of statements and that they were material or made not in good faith. Mutual Life Ins. Co. v. Mullan, 107 Md. 457, 69 A 385. Under Rev. Laws, c. 118, § 21, providing that no misrepresentation or warranty made in negotiating insurance shall be deemed material or defeat policy unless such "misrepresentation or warranty" is made with actual intent to deceive, or unless the matter misrepresented or made warranty increased the risk, common-law rule is changed as to warranties not within body of policy, and, as in case of representations, burden of showing that broken warranty not in body of policy was fraudulent or increased risk is on insurer. Barker v. Metropolitan Life Ins. Co., 198 Mass. 375, 84 NE 490. Statute inapplicable to warranties in body of policy. Id.

**25.** After proof of execution of policy, loss, amount thereof, and notice to company, burden is on latter to show that loss or part of it was within exceptions in policy. German American Ins. Co. v. Hyman, 42 Colo. 156, 94 P 27. Burden on insurer to show voluntary or unnecessary exposure to apparent danger within accident policy. Correll v. National Acc. Soc. [Iowa] 116 NW 1046; McClure v. Great Western Acc. Ass'n [Iowa] 118 NW 269. Under accident policy exempting from liability for injury through walking or being on roadbed of a railway, insurer makes out defense on showing insured was on such roadbed and injury or death occurred from cause inhering in hazards peculiar to such place, plaintiff being then required to show that insured's presence there was excusable. Correll v. National Acc. Soc. [Iowa] 116 NW 1046. Insurer has burden of proving that insured was on railroad roadbed not at highway crossing, within stipulation reducing indemnity for injuries received while he was on roadbed of any railroad except crossing at a highway. McClure v. Great Western Acc. Ass'n [Iowa] 118 NW 269. Contention that though burden was on defendant to show insured was on a railroad roadbed burden was on insured to show that accident happened while he was at highway crossing, held untenable. Id.

**26.** Insurer has burden of showing injuries were self-inflicted within exemption. Kirkpatrick v. Aetna Life Ins. Co. [Iowa] 117 NW 1111. Burden on insurer to establish suicide. Life Ins. Co. v. Hairston [Va.] 62 SE 1057. Suicide must be established by clear and satisfactory proof, and preponderance of evidence should be such as to overcome presumption of innocence of moral turpitude. Id.

**27.** Did not remove presumption as to acceptance of policy but merely permitted defendant to introduce evidence to overcome same. Citizens' Ins. Co. v. Helbig, 138 Ill. App. 115; Helbig v. Citizens' Ins. Co., 234 Ill. 251, 84 NE 897.

**28.** See, also, Evidence, 11 C. L. 1346.

**29.** Testimony of agent that when policy was delivered it was binding on company held objectionable as opinion on point in issue. Life Ins. Co. of Virginia v. Hairston [Va.] 62 SE 1057. Where sole question was whether wounds were self-inflicted, opinion of surgeon was inadmissible. Metropolitan Life Ins. Co. v. Wagner [Tex. Civ. App.] 109 SW 1120. Surgeon could give opinion as to kind of instrument used in inflicting wounds and that they were or could have been made with knife found open near body. Id.

**30.** Applicant for life insurance may in contract waive statutory privilege rendering physician incompetent to testify as to communications with patient and knowledge obtained of him in professional way. Metropolitan Life Ins. Co. v. Brubaker [Kan.] 96 P 62.

**31.** Substituted beneficiary in life policy is not an assignee of insurance within Code § 4604, prohibiting a party from testifying to personal transactions or communications with deceased against his assignee. Crowell v. Northwestern Nat. Life Ins. Co. [Iowa] 118 NW 412.

**32.** Parol evidence inadmissible to show contemporaneous waiver of forfeiture provision for nonpayment of premium. Johnson v. Continental Ins. Co. [Tenn.] 107 SW 688. Evidence of custon and practice of car repairers of riding on cars in going from one part of railroad yards to another held proper to show insured's duties and manners of performance and held not objectionable as altering terms of contract. Dillon v. Continental Casualty Co., 130 Mo. App. 502, 109 SW 89.

**33.** Letter forming part of transaction in which policy was issued held admissible as part of res gestae to show that defendant had issued a policy different from that sued on. Keel v. New York Life Ins. Co. [Okl.] 94 P 177. Insurer having waived "iron safe clause" held proper to establish amount of loss by evidence other than books of ac-

admissions of agents, parties and others.[35] Among illustrative issues are such as relate to the making, delivery and acceptance of the contract of insurance,[36] its provisions,[37] including the term of insurance[38] and the intended beneficiary,[39] the payment of premiums,[40] the occasion for assessments,[41] misrepresentation or breach of warranty,[42] waiver or estoppel,[43] and the cause of injury or death.[44] Unless

count and inventory. Retail Merchants' Ass'n Mut. Fire Ins. Co. v. Cox, 138 Ill. App. 14.

**34.** Letter by insurer to agent and entries on its office record referring to policy both long after policy was taken out held ex parte self-serving statements not part of res gestae and not admissible. Helbig v. Citizens' Ins. Co., 234 Ill. 251, 84 NE 897.

**35.** Declarations by insured before applying for insurance and not part of res gestae are not admissible against beneficiary to show breach of warranty. Minnesota Mut. Life Ins. Co. v. Link, 131 Ill. App. 89. Beneficiary in life policy issued by fraternal society or otherwise has such interest therein that misrepresentations by assured cannot be proven by evidence of his declarations unless they are part of res gestae, and otherwise such evidence is inadmissible in absence of independent proof of falsity of statements made and then only to prove his knowledge of their falsity. Johnson v. Fraternal Reserve Ass'n [Wis.] 117 NW 1019. Declarations by beneficiary as to statements made by assured before he died concerning manner in which he had been injured held inadmissible as admissions of decedent because not denied by him. Hill v. Aetna Life Ins. Co. [N. C.] 63 SE 124. Where insurer relied on statement made by wife of insured in proofs of loss as estoppel, she could testify to facts surrounding her when statement was made. Metropolitan Life Ins. Co. v. Thomas, 32 Ky. L. R. 770, 106 SW 1175. Company's letter to obtain compromise held inadmissible. Southwestern Ins. Co. v. Woods Nat. Bank [Tex. Civ. App.] 20 Tex. Ct. Rep. 761, 107 SW 114.

**36.** On issue of meeting of minds on insurance contract, insured's testimony on cross-examination that after applying for policy but before delivery he had taken same insurance in another company held not excludable as not within issues raised by general denial of company. Nordness v. Mutual Cash Guaranty Fire Ins. Co. [S. D.] 114 NW 1092. Evidence of condition and habits of insured after policy became effective held immaterial under policy providing it should not become effective unless issued and first premium paid during good health of insured. Life Ins. Co. v. Hairston [Va.] 62 SE 1057. On issue of acceptance of policy by insured, evidence of his request for a new policy on different terms held immaterial, policy having been burned. Cauthen v. Hartford Life Ins. Co. [S. C.] 61 SE 428. On issue of acceptance of policy prior to loss, memorandum by mortgagee's agents' clerk made on his receipt of policy after insured had refused to receive it held inadmissible, clerk having no authority to accept policy as binding mortgagee. New v. Germania Fire Ins. Co. [Ind.] 85 NE 703.

**37.** Pleadings held to supply proof of terms of policy where petition alleged destruction of policy before delivery, answer admitted its issuance and set up provision against concurrent insurance, and reply invoked waiver of such stipulation. Hearsh v. German Fire Ins. Co., 130 Mo. App. 457, 110 SW 23.

**38.** In suit for reformation of fire policy so as to extend term as per real contract, evidence that after alleged expiration of policy company levied assessments on plaintiff as a member was competent to show that company understood that policy was in force. Flickinger v. Farmers' Mut. Fire Ass'n, 136 Iowa, 258, 113 NW 824.

**39.** In contract between lawful and deserted wife, and reputed wife and designated beneficiary, parol evidence held admissible to show circumstances of parties at time policy was issued. Prudential Ins. Co. v. Morris [N. J. Eq.] 70 A 924.

**40.** Letter by acting cashier of a branch office having under policy no power to waive conditions held admissible on issue of whether a certain premium had been paid so as to extend period to time of insured's death, where same was written in reply to insured's letter to vice-president inquiring as to term of extended insurance. Eames v. New York Life Ins. Co. [Mo. App.] 114 SW 85. Evidence that acting cashier when he wrote insured had before him a book showing whether premium had been paid held admissible, insurer having attempted to prove by its card system that premium had not been paid. Id. Where company claimed first premium had not been paid nor credit extended, letter written by general agent to insured after expiration of time for paying premium in which agent demanded return of policy or payment of the premium without mentioning default held admissible. Cauthen v. Hartford Life Ins. Co. [S. C.] 61 SE 428. On issue whether insurer through general agent extended time for payment of premium, held competent for agent to testify insured had not solicited credit. Id.

**41.** Where in action on life policy plaintiff contended that assessment for nonpayment of which insurer claimed forfeiture was illegal because unnecessary owing to existence of a trust fund, report filed by defendant under Rev. St. 1899, § 7880, was admissible to show defendant's financial condition. King v. Hartford Life & Annuity Ins. Co. [Mo. App.] 114 SW 63.

**42.** On issue of misrepresentation as to prior health, evidence that insured had suffered from acute mania and mental derangement held admissible. Fidelity Mut. Life Ins. Co. v. Miazza [Miss.] 46 S 817. Evidence as to bronchitis held admissible under answer pleading breach of warranties against bodily infirmities and unsoundness of physical condition, though breach of another warranty against bronchitis was not pleaded. French v. Fidelity & Casualty Co. [Wis.] 115 NW 869. Evidence as to condition and facial expression of insured on day contract was made held admissible under allegation of

otherwise provided in the policy,[45] proofs of loss or death are usually held admissible only for the purpose of showing compliance with provisions respecting them,[46] especially where not put in evidence by defendant,[47] though in some jurisdictions they are prima facie evidence against plaintiff as to facts showing nonliability.[48] In an action on a health policy, preliminary reports furnished insurer by a physician are not admissible to show the nature of the disease which confined insured.[49] The verdict of a coroner's jury is inadmissible to prove the cause of death [50] unless made so by agreement,[51] in which case insured cannot be deprived of the benefit thereof by willful omission of the same from the proofs of death.[52] A prima facie case is established by proof of the contract of insurance, the contemplated loss, and proper and timely proofs thereof.[53]

answer that despite statement in application that his vision was not impaired insured had lost an eye and that this was peculiarly within his knowledge. United States Health & Acc. Ins. Co. v. Clark, 41 Ind. App. 345, 83 NE 760. On cross-examination of medical examiner, plaintiff could show what weight examiner would have given to diagnosis of insured's physician had he known insured was treated when application was made, on question whether examiner was misled by application. Roe v. National Life Ass'n, 137 Iowa, 696, 115 NW 500. Where incorrect answers did not influence medical examiner's report, insurer could not show what weight would ordinarily be given to correct answers to inquiries similar to those involved. Id.

43. Agent's letters recognizing policy in force held competent on issue of waiver of forfeiture for nonpayment of premium. Union Cent. Life Ins. Co. v. Burnett, 136 Ill. App. 187. On issue whether insured's impaired vision was obvious to agent when he took application question, "Tell jury the condition and facial expression of" the insured, held not objectionable as calling for opinion of witness. United States Health & Acc. Ins. Co. v. Clark, 41 Ind. App. 345, 83 NE 760. Testimony for plaintiff that policy had been offered to soliciting agent held admissible, notwithstanding lack of proof that it was on account of insured's health. Rearden v. State Mut. Life Ins. Co., 79 S. C. 526, 60 SE 1106. Competent to show agent who took application had solicited business in community where insured lived. Id. Parol evidence admissible to show reparation of application by insurer's agent and latter's representation that same conformed with insurer's rules and regulations so as to estop insurer from setting up falsity of statements therein. Roe v. National Life Ass'n, 137 Iowa, 696, 115 NW 500.

44. Plaintiff held entitled to make full proof that fall of deceased from a window was accidental, though defendant admitted that deceased did fall from window, since such admission was not conclusive that fall was accidental and did not preclude defendant from showing fall was not accidental. Fenton v. Iowa State Traveling Men's Ass'n [Iowa] 117 NW 251. In suit on accident policy, issue being whether death resulted from accident, bodily condition of assured between injury and death is relevant, and so are all things done or said by insured expressing or showing his bodily condition with reference to injury. Ward v. Aetna Life Ins. Co. [Neb.] 118 NW 70.

45. Under policy providing that proofs of death required thereby should be evidence of facts therein stated for but not against insurer, statement in such proofs by attending physician that insured died of kidney disease of long standing, though evidence for insurer, was not conclusive on insured. Barker v. Metropolitan Life Ins. Co., 198 Mass. 375, 84 NE 490.

46. Held error, though harmless in this particular case, to allow introduction of proofs of loss against defendant's objection except for purpose of showing compliance with policy with respect thereto. Continental Casualty Co. v. Colvin [Kan.] 95 P 565. Instruction that jury must not take physician's statements in proofs of death as proof of facts injurious to plaintiff's case held at least not prejudicial. Minnesota Mut. Life Ins. Co. v. Link, 131 Ill. App. 89.

47. Proofs of death put in evidence by plaintiff cannot be availed of by defendant to show declarations or admissions against plaintiff; only to show requirements of policy were complied with. Defendant must introduce if it seeks to show admissions. Mutual Life Ins. Co. v. Rain [Md.] 70 A 87.

48. Facts showing insured was injured while leaving moving train. Hill v. Aetna Life Ins. Co. [N. C.] 63 SE 124. Where proofs of loss under accident policy were filed by plaintiff's authority, facts stated therein must be taken as true against him unless he showed mistake in fact. Id. Error to strike proofs merely because a witness testified that he had sent them by plaintiff's authority but that plaintiff had not seen them. Id.

49. General Acc. Ins. Co. v. Hayes [Tex. Civ. App.] 113 SW 990.

50. Metropolitan Life Ins. Co. v. Wagner [Tex. Civ. App.] 109 SW 1120.

51. Where the policy expressly provides that proofs of death shall contain record and verdict of coroner's inquest, if any be held, and that the proofs shall be evidence of facts therein stated in behalf of company, verdict of coroner's jury is competent both to show that inquest was held and as evidence of cause of death. Metropolitan Life Ins. Co. v. Wagner [Tex. Civ. App.] 109 SW 1120.

52. Metropolitan Life Ins. Co. v. Wagner [Tex. Civ. App.] 109 SW 1120.

53. Retail Merchants' Ass'n Mut. Fire Ins. Co. v. Cox, 138 Ill. App. 14. Where there was no sufficient plea denying execution of policy and complaint was in code form, prima facie case was made by introducing policy and proving death and notice. Man-

*Questions of law and fact.* See 16 C. L. 406—It is ordinarily for the jury to determine questions pertaining to the existence of agreements,[54] the acceptance of the policy,[55] the property covered thereby,[56] the meaning of ambiguous marks or figures,[57] the payment of premiums,[58] requests for extended insurance,[59] abandonment,[60] illegal trades,[61] fraud or bad faith,[62] the truth or falsity of warranties or representations,[63] breach of conditions,[64] materiality to risk,[65] agency,[66] knowledge,[67] waiver

hattan Life Ins. Co. v. Verneuille [Ala.] 47 S 72.

54. Whether there was contract of insurance, company contending policy did not become binding because of failure to comply with conditions precedent and terms of policy depending on parol testimony. Cauthen v. Hartford Life Ins. Co. [S. C.] 61 SE 428. Where it was clear employer had not contracted to insure employe against accident, as alleged affirmative charge should have been given for employer. United Statee Cast Iron Pipe & Foundry Co. v. Bragg [Ala.] 47 S 66.

55. Whether burglary policy was accepted and credit given for premium. Manson v. Metropolitan Surety Co., 128 App. Div. 577, 112 NYS 886.

56. Whether policy on stock of merchandise covered fireworks kept during Christmas holidays, whether fireworks were more hazardous than articles specified in policy, and effect of custom as to keeping fireworks in Christmas season, held for jury. Powell v. Com. Ins. Co., 3 Ga. App. 436, 60 SE 120.

57. What uncertain figures in application as to age of insured were. United States Health & Acc. Ins. Co. v. Clark, 41 Ind. App. 345, 83 NE 760. Whether check marks in blank following statements should be treated as denial of any exceptions or as waiver of statements and answers thereto. French v. Fidelity & Casualty Co. [Wis.] 115 NW 869.

58. Whether premium, payment of which was acknowledged by policy, was in fact paid. Cauthen v. Hartford Life Ins. Co. [S. C.] 61 SE 428.

59. Whether insured requested extended insurance or was misled by agent into believing that on failure to pay premium request was unnecessary. Wortham v. Illinois Life Ins. Co., 32 Ky. L. R. 827, 107 SW 276.

60. Whether insured voluntarily allowed policy to lapse, or result was accomplished by wrongful act of insurer. Balliet v. Metropolitan Life Ins. Co., 110 NYS 77.

61. Whether insured was engaged in unlawful liquor trade so as to avoid policy on drug stock. Kellogg v. German Am. Ins. Co. [Mo. App.] 113 SW 663.

62. Fraud in making proof of loss by fire. Hilburn v. Phoenix Ins. Co., 129 Mo. App. 670, 108 SW 576. Whether insured was gullty of fraud in not disclosing kind of fits he was subject to. Thompson v. Metropolitan Life Ins. Co., 113 NYS 225. Bad faith in falling to give information as to health. Keiper v. Equitable Life Assur. Soc., 159 F 206. Good faith in answering questions in application for life insurance. Prudential Ins. Co. v. Lear, 31 App. D. C. 184.

63. Falsity of warranties in accident policy. Pacific Mut. Life Ins. Co. v. Despain, [Kan.] 95 P 580. On conflicting evidence. French v. Fidelity & Casualty Co. [Wis.] 115 NW 869. Whether applicant for accident insurance was in **sound condition** physically, Id. Breach of warranty **as to age.** Mutual Reserve Life Ins. Co. v. Jay [Tex. Civ. App.] 109 SW 1116. Question of misrepresentation as to **prior health.** Fidelity Mut. Life Ins. Co. v. Mlazza [Miss.] 46 S 817. Whether insured had had any serious illness prior to that which caused death. Keiper v. Equitable Life Assur. Soc., 159 F 206. Where, under evidence, jury might have found that applicant did not have a disease warranted against, and that either he made no misstatements in application or, if he did, they were not made with intent to deceive, and were not material to risk as required by Rev. Laws, c. 118, § 21, in order to avoid policy, court properly declined to order verdict for defendant. Barker v. Metropolitan Life Ins. Co., 198 Mass. 375, 84 NE 490. On issue of misrepresentations, held, under evidence, proper to refuse to direct verdict for insurer, though weight of evidence supported defendant's contention. Supreme Lodge K. P. v. Bradley, 32 Ky. L. R. 743, 107 SW 209. When statements in application for life insurance are shown to be false by clear, convincing and uncontradicted evidence, court may so rule **as matter of law,** otherwise question is for jury. Mutual Life Ins. Co. v. Rain [Md.] 70 A 87. Though ordinarily the falsity of statements and their materiality and good faith are for the jury (Mutual Life Ins. Co. v. Mullen, 107 Md. 457, 69 A 385), when either of these facts is established by clear and uncontroverted evidence the court may so rule as a matter of law (Id.). Where entire defense was breach of warranties not available to defendant because not attached to policy as required by statute, plaintiff was entitled to directed verdict on proof of policy, proofs of death, and nonpayment. Paulhamus v. Security Life & Annuity Co., 163 F 554. Statements by physicians as to applicant's **use of liquor** held insufficient for jury in view of other testimony by same witnesses. Mutual Life Ins. Co. v. Mullan, 107 Md. 457, 69 A 385. Error to submit to jury question of truth of answers as to **medical treatment** and use of liquor, there being no evidence to contradict that of falsity. Id. Evidence held to show error in not directing verdict for defendant for breach of warranty as to last medical consultation. Life Ass'n v. Edwards [C. C. A.] 159 F 53.

64. Whether insured was in exercise of **due diligence for self-protection** as required by policy, where insured was drowned while trying to cross a river on a trolly cable ferry. Tinsman v. Illinois Commercial Men's Ass'n, 235 Ill. 635, 85 NE 913. Whether insured **was intoxicated** when he received fatal injuries. Fenton v. Iowa State Traveling Men's Ass'n [Iowa] 117 NW 251. Whether insured **voluntarily exposed himself** to obvious danger by undertaking to ride a horse alleged to be vicious. Putnam v. Phoenix Preferred Acc. Ins. Co. [Mich.] 15 Det. Leg. N. 980, 118 NW 922. Whether **premises were vacated** within

or estoppel,[68] disability,[69] suicide,[70] the cause of loss, death or injury,[71] notice,[72] consideration,[73] reasonable time,[74] and vexatious delay in paying the loss.[75]

*Instructions.*—The general rules apply to instructions[76] on the burden of

fire policy. Cone v. Century Fire Ins. Co. [Iowa] 117 NW 307. **Sole ownership** of property. Hilburn v. Phoenix Ins. Co., 129 Mo. App. 670, 108 SW 576.

**65.** Of **facts suppressed.** Keiper v. Equitable Life Assur. Soc., 159 F 206. Of representation that insured was 62 years old, when he was 64. Spence v. Central Acc. Ins. Co., 236 Ill. 444, 86 NE 104. Materiality of a representation is sometimes a **question of law** where statement is made in response to direct inquiry or where parties have settled materiality by agreement. Id. Materiality to risk is **for court** where character of warranty or entire evidence on materiality is such that decision but one way may be lawfully sustained by court. Connecticut Fire Ins. Co. v. Manning [C. C. A.] 160 F 382. **For jury** when all admissible evidence is such that decision either way may be thue lawfully sustained. Id. False warranty **as to incumbrance** held material as matter of law, and court erred in submitting question to jury. Connecticut Fire Ins. Co. v. Manning [C. C. A.] 160 F 382.

**66.** Whether one to whom notice was given by insured and who made representations as to policy, was insurer's agent. Wortham v. Illinois Life Ins. Co., 32 Ky. L. R. 827, 107 SW 276.

**67.** Whether insured, when he signed application, knew of question and answer written therein by agent. Hollenbeck & Co. v. Mercantile Town Mut. Fire Ins. Co. [Mo. App.] 113 SW 217. Whether plaintiff had such information of revocation of agency before agent's consent to transfer of title to insured property as to give person of ordinary prudence notice agency had terminated. Gragg v. Home Ins. Co., 32 Ky. L. R. 988, 107 SW 321.

**68.** Waiver of **proofs of loss** by fire. Ball v. Royal Ins. Co., 129 Mo. App. 34, 107 SW 1097; Webster v. State Mut. Fire Ins. Co. [Vt.] 69 A 319. Defendant's waiver of **appraisal.** Ball v. Royal Ins. Co., 129 Mo. App. 34, 107 SW 1097. Of provision against **incumbrances.** Id. Of **cash payment of premium.** Cauthen v. Hartford Life Ins. Co. [S. C.] 61 SE 428. Of provision in **employer's liability policy** that insured should forward to home office of company all **summons** or other **process** in suits against him. Sandoval Zinc Co. v. New Amsterdam Casualty Co., 140 Ill. App. 247.

**69.** Whether insured was wholly disabled for a year. Province v. Travelers' Ins. Co. [Mo. App.] 111 SW 1193. Evidence insufficient to warrant submission of question of temporary disability. Id.

**70.** Evidence for jury whether insured was poisoned by himself or beneficiary. McCarthy v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 69 A 170.

**71.** Whether fire preceded **explosion,** so as to render company liable for whole loss under fire policy excepting loss by explosion. German American Ins. Co. v. Hyman, 42 Colo. 156, 94 P 27. Whether death resulted from **accident or from other cause** is for jury unless proofs as to such cause are so convincing that reasonable men would adopt same conclusion. Ward v. Aetna Life Ins. Co. [Neb.] 118 NW 70. Whether death was from disease and not accident. Continental Casualty Co. v. Semple [Ky.] 112 SW 1122. Whether death resulted from being thrown from a buggy or wholly or partially from infirmity or disease of body or mind within exception in policy. McCormack v. Illinois Commercial Mens Ass'n [C. C. A.] 159 F 114. Whether accident followed by illness was **proximate cause of** illness and death. General Acc. Fire & Life Assur. Co. v. Homely [Md.] 71 A 524. Whether **drowning or intoxication** was cause of death. United States Health & Acc. Ins. Co. v. Krueger, 135 Ill. App. 432. Whether loss of sight was due wholly or partly to **injury** received **before** accident **policy was issued.** Pacific Mut Life Ins. Co. v. Despain [Kan.] 95 P 580. Whether employe was injured by reason of **violation of rule of employer** so as to bar recovery under policy. Burkhardt v. Columbia Relief Fund Ass'n, 35 Pa. Super. Ct. 284.

**72.** Whether notice of assessment had been mailed to plaintiff. Miner v. Farmer's Mut. Fire Ins. Co. [Mich.] 15 Det. Leg. N. 571, 117 NW 211.

**73.** Recitals of consideration held not sufficient to raise conflict in evidence as to consideration for deed and mortgage alleged to have worked change in interest or title in insured property. Cone v. Century Fire Ins. Co. [Iowa] 117 NW 307.

**74.** Reasonable time for beneficiary within which to furnish her own proofs of loss where company failed to furnish blanks as agreed. Correll v. National Acc. Soc., [Iowa] 116 NW 1046. If there is no dispute as to facts, question of due diligence in sending sworn particulars after fire loss is one of law. If evidence conflicts, question is for jury. Smith v. Scottish Union & Nat. Ins. Co., 200 Mass. 50, 85 NE 841. Facts are in dispute when by reason of complexity, or because on their face they do not as matter of law require finding one way or other, question must be decided by drawing an inference of fact from primary facts shown. Id.

**75.** Kellogg v. German American Ins. Co. [Mo. App.] 113 SW 663.

**76.** Instruction held not reversible error though indefinite as to date of beginning of permanent disability for which recovery was sought, verdict indicating jury were not misled. Province v. Travelers' Ins. Co. [Mo. App.] 111 SW 1193. Under evidence that on agent's being told by insured that there was an incumbrance, but that insured had money on hand sufficient to pay it, agent answered in negative inquiry as to inoumbrances, instruction hypothecating agents telling insured to pay off mortgage, and that he did not agree it should remain on goods after issuance of policy, held properly refused. Hankinson v. Piedmont Mut. Ins. Co. [S. C.] 61 SE 905.

proof,[77] misrepresentations[78] and their materiality,[79] waiver[80] and suicide,[81] or other cause of death.[82]

(§ 24) *D. Verdict, findings, judgment, costs and fees.* See 10 C. L. 407—A general verdict for plaintiff is not necessarily inconsistent with a special finding that statements in the application were untrue.[83]

Interest usually runs from the date when the loss is payable.[84] It is properly allowed on the full amount of a judgment which includes statutory damages.[85]

77. Instruction on burden of proof held erroneous as confounding two exemptions in accident policy and applying rules not in all respects applicable to both. Correll v. National Acc. Soc. [Iowa] 116 NW 1046. In suit on fire policy, instructions held not erroneous as throwing on defendant burden of proving that policy was not accepted. Citizens Ins. Co. v. Helbig, 138 Ill. App. 115. Certain instructions relating to presumptions as to acceptance of policy and payment of premium, arising from delivery of policy and plaintiff's possession thereof, held not to cast on defendant burden of proof on whole evidence. Helbig v. Citizens Ins. Co., 234 Ill. 251, 84 NE 897. Instruction on burden of proof when company sets up suicide held sufficient, but held it would have been better to have said that evidence to warrant verdict for company should exclude every reasonable hypothesis of accidental death. Life Ins. Co. v. Hairston [Va.] 62 SE 1057. Instruction erroneous as not stating evidence should exclude every reasonable hypothesis. Id.

78. Issue of misrepresentations in application held properly submitted. Life Ins. Co. v. Hairston [Va.] 62 SE 1057. Instruction requiring answers by applicant to have been willfully false or fraudulently made in order to avoid policy held in language of statute and properly given. Id.

79. Held improper to allow jury to determine according to their own standards what insurer would reasonably have done had truth been stated by applicant. Supreme Lodge K. P. v. Bradley, 32 Ky. L. R. 743, 107 SW 209. Court in one instruction should instruct that if any of the answers were substantially untrue, and according to the usual course of the insurance business policy would not have issued had truth been stated, they should find for insurer, and another instruction should state that question was not whether insured's physicians were mistaken as to his ailment, or whether he at time of application in good faith believed he was healthy, but whether answers were substantially true, and if untrue, whether according to usual course of business policy would have been issued had truth been stated. Id. Where applicant had appendicitis, held proper to mistrust he could recover unless representation in application was materially false and he thereby induced issuance of policy. Aetna Life Ins. Co. v. Howell, 32 Ky. L. R. 935, 107 SW 294.

80. Instruction submitting question of waiver must state facts which if found would constitute waiver. Robinson v. Insurance Co., 113 NYS 105. Instruction predicating waiver of prepayment of first premium on agent's delivery of policy to insured and failure of company to request cancellation of policy held misleading as ignoring agent's possible violation of instructions with knowledge of insured. Life Ins. Co. v. Hairston [Va.] 62 SE 1057.

81. Instruction that fact that insured was found in convulsions which continued until he died, and that strychnine was discovered in his stomach, was not sufficient to prove suicide, held misleading. Life Ins. Co. v. Hairston [Va.] 62 SE 1057.

82. Instructions authorizing or denying recovery, according as disease with which insured was afflicted did or did not operate to cause death in co-operation with accidental injury, held not conflicting. Continental Casualty Co. v. Semple [Ky.] 112 SW 1122. Instruction held in effect to require finding that death was caused by accident independent of all other causes, in order to entitle plaintiff to recover. General Acc. Fire & Life Assur. Co. v. Homely [Md.] 71 A 524. Instruction barring any recovery unless death was due wholly to accidental causes held properly refused where policy, in addition to promising a certain amount in case of death from purely accidental causes, also promised one-fifth of such sum if injury, fatal or otherwise, was due wholly or in part to disease or bodily infirmity. Id.

83. Held not necessarily inconsistent with special findings that statements in application as to insured's vision and surgical treatment were not true, but that insured answered all questions truthfully and had no knowledge of false answers, and loss of one eye was plainly noticeable, since untruthfulness of answers might have been due to way in which insurance agent recorded them. United States Health & Acc. Co. v. Clark, 41 Ind. App. 345, 83 NE 760.

84. Where fire loss was payable after 60 days from furnishing proofs, interest was recoverable on amount found due, after expiration of such time. Palatine Ins. Co. v. O'Brien, 107 Md. 341, 68 A 484. Since denial of liability waives provision for delay after proofs of loss by fire, interest is recoverable from date of loss. Jensen v. Palatine Ins. Co. [Neb.] 116 NW 286. Where insurer denied liability within 60 days after loss, interest did not run until denial of liability, policy not being payabe until 60 days after proof of loss. Orient Ins. Co. v. Wingfield [Tex. Civ. App.] 108 SW 788. Interest properly allowed from time of receipt of proofs of death until tender of money in court, but improperly allowed up to time of trial. Southwestern Ins. Co. v. Woods Nat. Bank [Tex. Civ. App.] 20 Tex. Ct. Rep. 761, 107 SW 114.

85. Under Rev. St. 1895, art. 3105, providing for interest on judgments generally. Mutual Reserve Life Ins. Co. v. Jay [Tex Civ. App.] 109 SW 1116.

Underwriters sometimes agree that the decision in a suit against one on a policy shall conclude all the others.[86] The subject of costs is elsewhere fully treated.[87]

Statutes in some states authorize the recovery of penalties and attorney's fees on proof that insurer wrongfully refused or delayed payment of the loss.[88] A tender after demand and refusal cannot affect the right to damages and fees.[89]

(§ 24) *E. Enforcement of judgment.* See 6 C. L. 156

## INTEREST.

**§ 1. Right to Interest and Demands Bearing Interest, 317.** It May Rest in Contract, 318. Interest as Damages Ex Contractu, 319. Interest on Damages for Torts, 319. Interest on Statutory Recoveries, 319. Cessation or Loss of Right to Interest, 320. Compound Interest, 320.
**§ 2. Rate and Computation, 321.**
**§ 3. Remedies and Procedure to Recover Interest, 322.**

*The scope of this topic* is noted below.[90]

§ 1. *Right to interest and demands bearing interest.* See 10 C. L. 408—Interest was not recoverable at the common law.[91] While in the allowance of interest equity generally follows the rules of law,[92] equity usually has a large discretion in regard to interest [93] and often may allow it where it would not be recoverable at law.[94] In some cases the question of interest is for the jury; [95] in others for the court.[96] The cases are in conflict as to the liability of a municipality for interest on contractual

**86.** Judgment of justice of peace is within agreement between underwriters making decision in suit against one conclusive on all others. Blair v. National Shirt & Overalls Co., 137 Ill. App. 413.

**87.** See Costs, 11 C. L. 886.

**88.** Laws 1905, p. 308, providing for damages and attorney's fees for failure of insurer to pay loss within time prescribed in policy after demand, held **constitutional.** Arkansas Ins. Co. v. McManus [Ark.] 110 SW 797. Civ. Code 1895, § 2140, allowing recovery of damages and attorney's fees from companies for failure or delay in meeting losses, held not violative of U. S. Const. Amend. 14, § 1, or of paragraphs 2, 3, 4, art. 1, of Georgia Const. Harp. v. Fireman's Fund Ins. Co., 130 Ga. 726, 61 SE 704. Question of vexatious delay held for jury. Kellogg v. German American Ins. Co. [Mo. App.] 113 SW 663. Statute on recovery of damages and attorney's fees "where life or health insurance company" fails to pay held **inapplicable to accident insurance.** Lane v. General Acc. Ins. Co. [Tex. Civ. App.] 113 SW 324. Additional amount required to be paid by Rev. St. 1895, art. 3071, is **not a penalty** but damages, and every life policy made in state is made in view of statute. Mutual Reserve Life Ins. Co. v. Jay [Tex. Civ. App.] 109 SW 1116. Rev. St. 1895, art. 3071, literally making companies liable for damages and attorney's fees for failure to pay loss on demand within time specified in policy, **must be reasonably construed,** and does not apply when there are adverse claimants to the fund and company merely refuses to pay until person entitled thereto has been determined in court. Southwestern Ins. Co. v. Woods Nat. Bank [Tex. Civ. App.] 20 Tex. Ct. Rep. 761, 107 SW 114. Finding that refusal to pay was because company supposed wife and children of insured claimed proceeds held to carry with it finding of **good faith,** barring liability under statute. Id. Failure of company to institute interpleader suit held not to show desire to evade payment. Id. Letter from beneficiary's attorneys "requesting" payment held sufficient **"demand"** on which to base recovery of damages and attorney's fees under Rev. St. 1895, art. 3071. Pennsylvania Mut. Life Ins. Co. v. Maner [Tex.] 109 SW 1084. Denial of liability on insured's offering proofs of death held waiver of right to demand payment, precluding objection that company had not refused to pay after demand. Aetna Life Ins. Co. v. Wimberly [Tex. Civ. App.] 108 SW 778. Under Acts Tenn. 1901, p. 248, c. 141, imposing penalty for refusal in bad faith to pay loss within 60 days after demand, when refusal inflicts additional expense on plaintiff, no penalty is recoverable in absence of formal demand for payment in addition to commencing suit on policy. Mutual Reserve Fund Life Ass'n v. Tuchfeld [C. C. A.] 159 F 833.

**89.** Pennsylvania Mut. Life Ins. Co. v. Maner [Tex.] 109 SW 1084.

**90.** Interest on judgments (see Judgments, 10 C. L. 467), taxes (see Taxes, 10 C. L. 1776), and local assessments (see Public Works and Improvements, 10 C. L. 1307), is discussed in separate articles as is also the exaction of illegal interest (see Usury, 10 C. L. 1937). As to application of payments to interest, see Payment and Tender, 10 C. L. 1147.

**91.** Recovery dependent upon statute. Schwitters v. Springer, 236 Ill. 271, 86 NE 102. Interest not recoverable at law in absence of express agreement or unless prescribed by statute. Sill v. Burgess, 134 Ill. App. 373.

**92.** Prior v. Buffalo, 113 NYS 249.

**93.** On ejectment bill to establish title to land and recover value of timber cut, allowance of interest on timber was discretionary. Not reviewable on appeal. Whitaker v. Poston [Tenn.] 110 SW 1019.

**94.** Prior v. Buffalo, 113 NYS 249.

**95.** When determined as damages. State v. Fahey [Md.] 70 A 218.

**96.** Where interest recoverable as of right in case of bills and notes, contracts, or where money has actually been used. State v. Fahey [Md.] 70 A 218.

obligations, in the absence of special contract therefor,[97] but it is well settled that a municipality is liable for interest on money wrongfully obtained or withheld.[98]

*It may rest in contract* See 10 C. L. 408 express [99] or implied [1] from usage and custom.[2] When contracted for interest is a part of the debt,[3] and interest to exceed the statutory rate can be recovered only by virtue of contract.[4] A writen contract must show when the payment is due in order that interest may be recovered thereon.[5] The ordinary rules of contract construction are applicable.[6] In the absence of special agreement, interest is not usually recoverable upon advances to a partnership [7] or joint venture.[8]

**97. Not liable** in absence of special contract provision. Conway v. Chicago, 237 Ill. 128, 86 NE 619.

**Liable** same as individuals. Appleton Waterworks Co. v. Appleton, 138 Wis. 395, 117 NW 816.

**NOTE. Implied liability of municipalities for interest on contractual obligations:** While it is held that a sovereign state is not bound to pay interest unless it has contracted so to do (Carr v. State, 127 Ind. 204, 26 NE 778, 22 Am. St. Rep. 624, 11 L. R. A. 370; United States v. North Carolina, 136 U. S. 211, 34 Law. Ed. 336; State v. Thompson, 10 Ark. 61; State v. Board of Public Works, 36 Ohio St. 409; State v. Bank, 18 Ark. 554; United States v. Sherman, 98 U. S. 565, 25 Law. Ed. 235; United States v. Bayard, 127 U. S. 251, 32 Law. Ed. 159; Tillson v. U. S., 100 U. S. 43, 25 Law. Ed. 543; In re Gosman, 17 Ch. Div. 771; Attorney General v. Cape Fear Co., 2 Ired. Eq. [N. C.] 444; Bledsoe v. State, 64 N. C. 392; Trustee v. Campbell, 16 Ohio St. 11; Josselyn v. Stone, 28 Miss. 753; Wightman v. U. S., 23 Ct. Cl. 144; Molineux v. State, 109 Cal. 378, 42 P 34, 50 Am. St. Rep. 49), and the same rule has been applied to counties (Seton v. Hoyt, 34 Or. 266, 55 P 967, 43 L. R. A. 634, 75 Am. St. Rep. 641), there is some conflict as to the applicability of the rule in the case of municipal corporations. A respectable line of authorities hold that municipal corporations are within the rule and that no liability for interest exists in the absence of express contract (City of Chicago v. People, 56 Ill. 327; Commissioners v. Dunlevy, 91 Ill. 49; Conway v. Chicago, 237 Ill. 128, 86 NE 619; Pekin v. Reynolds, 31 Ill. 529, 83 Am. Dec. 244), except where money is wrongfully obtained or illegally withheld (City of Chicago v. Northwestern Mut. Life Ins. Co., 218 Ill. 40, 75 NE 803, 1 L. R. A. [N. S.] 770; North Troy Graded School Dist. v. Troy, 80 Vt. 16, 66 A 1033; Conway v. Chicago, 237 Ill. 128, 86 NE 619; City of Danville v. Danville Water Co., 180 Ill. 235, 54 NE 224; Vider v. Chicago, 164 Ill. 354, 45 NE 720). On the other hand it is maintained in some jurisdictions that a municipal corporation is liable for interest on its debts to the same extent as an individual (Monteith v. Parker, 36 Or. 170, 59 P 192, 78 Am. St. Rep. 768; Appleton Waterworks Co. v. Appleton, 136 Wis. 395, 117 NW 816), although it is generally held that interest will run against a municipal corporation only from the time of demand for payment (Fernandez v. New Orleans, 42 La. Ann. 1, 7 S 57; Van Wart v. New York, 52 How. Prac. [N. Y.] 78; Taylor v. New York, 67 N. Y. 87; Cooke v. Saratoga Springs, 23 Hun [N. Y.] 55; Donnelly v. Brooklyn, 7 NYS 49; Wilson v. Troy, 60 Hun [N. Y.] 183, 14 NYS 721; Coles County v. Goehring, 209 Ill. 147, 70 NE 610; Lewis v. San Francisco, 2 Cal. App. 112, 82 P 1106). In Appleton Waterworks Co. v. Appleton, 136 Wis. 395, 117 NW 816, the court in denying interest upon contractual obligations of the city for the reason that no such demand had been made as would start the running of interest, said "Neither are we disposed to follow those cases which hold that a municipal corporation is not liable for interest on an indebtedness due from it in the absence of an express promise to pay. If the question is an open one in this state at all, no good reason is apparent why, after a claim is properly presented to a municipal corporation and payment is duly demanded, such claim should not draw interest if interest would be allowable on a like claim against an individual." This note excludes decisions on municipal liability for interest upon overdue coupons which are generally regarded as negotiable paper.—[Ed.]

**98.** Liable as private individual for wrongful diversion of assessment. Conway v. Chicago, 237 Ill. 128, 86 NE 619.

**99.** See 8 C. L. 473.

**1.** Right to interest implied where no express promise, unless parties have otherwise stipulated or exaction would be inequitable. Clark v. Smallwood, 156 F 409. Where mortgagee in possession is charged full rental value of property as improved without allowance for improvements, he should be given credit for interest upon reasonable cost thereof. Lynch v. Ryan [Wis.] 118 NW 174.

**2.** In contract for advances by bank. Clark v. Smallwood, 156 F 409.

**3.** First Nat. Bank v. Campbell [Tex. Civ. App.] 114 SW 887. Not separate debt unless so stipulated. Flynn v. American Banking & Trust Co. [Me.] 69 A 771.

**4.** Exceeding 5 per cent per annum. Schwitters v. Springer, 236 Ill. 271, 86 NE 102.

**5.** To secure interest under Interest Act, § 2. County of Coles v. Haynes, 134 Ill. App. 320. Refusal proper where abstract does not contain contracts in question or show dates when payment due. Id.

**6.** Under Civ. Code, § 1651, providing that written portions of contract shall control printed portions, and § 1654, providing that ambiguities shall be construed most strongly against person responsible therefor, maker of note held liable for interest where his corrections of and additions to printed form caused conflict of terms as to allowance of interest. United States Nat. Bank v. Waddingham [Cal. App.] 93 P 1046.

**7.** Borah v. O'Neill, 121 La. 733, 48 S 738. Except upon final liquidation and settlement. Id.

**8.** Contract where defendants acquired ex-

*Interest as damages ex contractu.*[See 10 C. L. 408]—When not provided for by contract, interest is usually considered as damages for the default in failing to make a payment when due,[9] and according to this rule interest should not be assessed when the failure to pay is due to the plaintiff's fault.[10] Interest may be recovered on money paid by mistake[11] or secured by fraud,[12] but of course the right is denied where the plaintiff is the perpetrator of the fraud.[13] Interest is recoverable against a guarantor on the debt after maturity though the effect is to increase the judgment beyond the limit fixed by the contract of guaranty.[14] Interest upon unliquidated, contractual demands is allowable when the amount is capable of ascertainment by computation.[15] Statutes in some states provide for interest on liquidated claims in cases of unreasonable and vexatious delay in payment,[16] or where property is held for the use of another.[17] Interest is not recoverable from a trustee whose sole duty is to hold the money in question, to pay on demand, where he is ready to comply with such demand.[18]

*Interest on damages for torts.*[See 10 C. L. 410]—Where the damage is complete at a particular time, interest is allowable.[19] Interest is usually allowable in cases of conversion[20] or the destruction of property by negligence.[21]

*Interest on statutory recoveries.*[See 10 C. L. 410]

*Verdicts.*[See 8 C. L. 475]—By statute in some states interest on a verdict from the

clusive right to manufacture patented article and they advanced money, profits to be equally divided. Thurston v. Hamblin, 199 Mass. 151, 85 NE 82.

9. Dame v. Wood [N. H.] 70 A 1081; In re Burke, 191 N. Y. 437, 84 NE 405; Evers v. Glynn, 110 NYS 405. Purchaser refusing to accept legal title and pay cash price agreed upon must pay interest from date of default. Metropolitan Bank v. Times-Democrat Pub. Co., 121 La. 547, 46 S 622.

10. Additional interest inequitable when plaintiff lost bond. Prescott v. Williamsport & N. B. R. Co., 159 F 244.

11. In action by administrator to recover amount paid by mistake or dissolution of partnership, and to recover an interest in certain lands, where notice of mistake was made few days after settlement, with demand for money, which demand was repeated, interest on amounts found due was proper. Moylan v. Moylan [Wash.] 95 P 271.

12. Statutory rate recoverable where purchase of certain notes was induced by fraud. Schwitters v. Springer, 236 Ill. 271, 86 NE 102.

13. Where pledgee of personal property fraudulently represented that he had sold same and sent a sum as balance of purchase price which pledgor retained until discovery of fraud, pledgor was not liable for interest on sum retained. Moyer v. Leavitt [Neb.] 117 NW 698.

14. Johnson v. Norton [C. C. A.] 159 F 361; American Surety Co. v. Pacific Surety Co. [Conn.] 70 A 584.

15. Coates v. Nyark, 111 NYS 476. On termination of contract before full performance entitling contractor to compensation for work done, interest is not recoverable until amount due is ascertained. Coates v. Nyack, 111 NYS 476.

**Mechanics' liens** [See 10 C. L. 814]: Interest allowed where mechanics' lien might be determined by computation or reference to market rates. Civ. Code § 3287. Farnham v. California Safe Deposit & Trust Co. [Cal. App.] 95 P 788. Not allowed where plaintiff claimed 60 per cent more than he recovered. O'Reilly v. Mahoney, 123 App. Div. 275, 108 NYS 53.

16. Delay must be both unreasonable and vexatious. Kempton v. People, 139 Ill. App. 563. Interest not allowed where there was honest difference of opinion as to amount due. Street v. Thompson, 131 Ill. App. 546. Interest not allowed where there was valid legal dispute as to validity of claim. Roberts-Manchester Pub. Co. v. Wise, 140 Ill. App. 443.

17. Property in possession of garnishee. Hubbard Mill. Co. v. Roche, 133 Ill. App. 602.

18. Strauss v. Gilbert, 135 Ill. App. 130.

19. Where soil settled because of removal of pillars in mining coal and damage was affected at that time, interest was properly allowable from such time till date of verdict. Collins v. Gleason Coal Co. [Iowa] 118 NW 36.

20. Under Okl. St. 1893, § 2640, interest is part of damages caused by conversion of personal property. Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 534, 52 Law. Ed. 606. Interest recoverable at statutory rate in case of conversion. Schwitters v. Springer, 236 Ill. 271, 86 NE 102. Where sheriff held redemption money for certain parties and by refusal to turn over such money to successor in office was guilty of conversion, such facts were not ground for charging interest for time he held funds as sheriff. Strauss v. Gilbert, 232 Ill. 441, 83 NE 946. Where treasurer of city failed to pay over moneys in possession to successor at expiration of term, after being directed to do so, city was entitled to interest on amount retained from date of demand as matter of right. State v. Fahey [Md.] 70 A 218.

21. Buel v. Chicago, etc., R. Co. [Neb.] 118 NW 299.

time of its rendition to the time of entry of judgment is to be included in and made a part of the judgment.[22]

*Cessation or loss of right to interest.* See 10 C. L. 410—Claim for interest as damages is waived by acceptance of the principal without interest,[23] but such is not the effect of the acceptance of the principal where there is an express contract to pay interest,[24] nor is a creditor debarred from claiming interest by accepting dividends from the assets of an insolvent debtor.[25] The liability of stockholders for interest on the corporation's debts is not extinguished by the exhaustion of the corporation's assets in suits by creditors.[26] The rule that interest ceases when the court takes charge of the property by a receiver applies only in so far as a distribution of the assets among the creditors is concerned.[27] The homologation of a provisional account by an administrator does not prevent the accrual of interest until the date of actual payment.[28] A creditor does not necessarily forfeit his right to interest by refusing to furnish the debtor with a statement of his account.[29]

Cessation of interest may be effected by tender of the sum due [30] and keeping the sum available for the creditor.[31] The general consideration of what constitutes a valid tender is treated elsewhere.[32]

*Compound interest.* See 10 C. L. 410—Although a stipulation for compound interest which is in effect usurious cannot be enforced,[33] an agreement for interest upon the interest after maturity is valid.[34] In an accounting between a mortgagee in posses-

22. Code Civ. Proc. § 1035. United States Nat. Bank v. Waddingham [Cal. App.] 93 P 1046. Judgment apparently entitling holder to rate of interest called for by note until execution of judgment erroneous. Id. Improper to render verdict for principal sum and provide for interest. Minnesota Mut. Life Ins. Co. v. Welsh, 131 Ill. App. 103.

23. Defendant not liable for interest where it appeared that principal had been paid three years before action. Strauss v. Gilbert, 232 Ill. 441, 83 NE 946. Creditor having accepted payment of principal cannot subsequently maintain action for interest. Flynn v. American Banking & Trust Co. [Me.] 69 A 771. Acceptance of refund of improperly exacted duties where interest was withheld on ground of no appropriation. Bidwell v. Preston [C. C. A.] 160 F 653. Repayment by government of moneys improperly collected by officer held not payment of stranger which would not inure to benefit of collector, and hence collector could plead acceptance of such payment as waiver of interest. Id.

24. Froment v. Oltarsh, 111 NYS 657.

25. In proceedings against corporation for sequestration and division of assets, the reception and application of sums received as dividends does not entail a forfeiture of the accruing and accumulated interest. Flynn v. American Banking & Trust Co. [Me.] 69 A 771.

26. Flynn v. American Banking & Trust Co. [Me.] 69 A 771.

27. Interest may still run and is chargeable against collateral security held by creditor. First Nat. Bank v. Campbell [Tex. Civ. App.] 114 SW 887.

28. Succession of Howell, 121 La. 955, 46 S 933.

29. Right of a bank to charge interest on advances held not lost by failure or refusal to furnish statements of account to a debtor. Clark v. Smallwood, 156 F 409.

30. Interest ceases after refusal to accept proper tender of amount due on mortgage note. Ordway v. Farrow, 79 Vt. 192, 64 A 1116.

31. Interest stopped where mortgagor tendered amount of debt, and, on refusal, deposited same with trust company subject to mortgagee's demand, where it was kept till brought into court. Heal v. Richmond County Sav. Bank, 111 NYS 602. To make tender effective and relieve defendant from further interest, amount must be brought into court to be available for use of plaintiff. Portsmouth Sav. Bank v. Yeiser [Neb.] 116 NW 38. Written offer to pay sum due and deposit of less amount with clerk not sufficient tender. Anderson v. Griffith [Or.] 93 P 934.

32. See Payment and Tender, 10 C. L. 1147.

33. See Usury, 10 C. L. 1937. Sanford v. Lundquist [Neb.] 118 NW 129. Agreement for interest on interest at greater rate than is allowed by statute is void in entirety. Civ. Code, § 1919. Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 P 225. Provisions of note providing for interest on instalments at greater rate than principal, before maturity of note, are in conflict with Civ. Code, § 1919. Id.

34. Under Civ. Code, § 1919, note providing for interest on interest after maturity is valid. Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 P 225. Where principal note bears maximum rate of interest allowed by statute, interest upon interest cannot be stipulated for at time of loan, but if after interest is due an agreement is made that it shall carry such interest, agreement is valid. Sanford v. Lundquist [Neb.] 118 NW 129. Forbearance and giving of additional time is sufficient consideration. Id. Where principal note bears maximum rate of interest, fact that subsequent agreement to pay interest upon interest also stipulates for payment of maximum rate is immaterial. Id.

sion and a mortgagor, there should be no rest resulting in the compounding of interest,[35] but where promissory notes provide for the payment of interest annually, the court is authorized to compound the interest,[36] and in computing interest on running accounts between an attorney and client annual rests should be made.[37]

§ 2. *Rate and computation.*[See 10 C. L. 411]—The statutes of many states contain regulations as to the rate and computation of interest [38] in addition to the ordinary usury laws.[38] In the absence of agreement fixing the rate, the legal rate applies.[40] In the absence of contractual stipulations to the contrary, when the contract rate is lower than the legal rate, the latter rate applies after maturity,[41] unless the debtor is prevented by the plaintiff from earning such higher rate.[42] Where interest is given on the theory of damage, it does not accrue until a breach of the contract.[43] On a liquidated demand, interest is payable from the date when the sum is due,[44] and interest on an unliquidated amount from the institution of the suit [45] or the adjudica-

35. Lynch v. Ryan [Wis.] 118 NW 174.

36. Foley's Guardian v. Hook [Ky.] 113 SW 105.

37. Gordon v. Mead [Vt.] 69 A 134.

38. Eight per cent rate of interest prescribed by Act Cong. 1901, § 8 (31 Stat. 795), putting in force in Indian Territory certain provisions of Arkansas laws as to corporations, is restricted to banks or trust companies organized under laws of Arkansas or other states, but authorized under § 8 to do business in Indian Territory. Brewer v. Rust [Okl.] 95 P 233. Act Cong. 1901, § 8 (31 Stat. 795), does not provide general interest law for Indian Territory, or repeal or modify Mansf. Dig. c. 109 (Ind. T. Ann. St. 1899, c. 50). Id. Taylor v. Merrill [Okl.] 97 P 571. Where a settlement was arrived at and the defendant paid in instalments, it was held that in an action on an account stated that the decree should have followed Kirby's Dig. § 5385 in calculating interest when partial payments have been made. Park v. Smith, 84 Ark. 623, 105 SW 253. Under Code Civ. Proc. § 1035, interest after verdict is computed at legal rate upon aggregate amount of principal and interest due at contract rate, until time of verdict. United States Nat. Bank v. Waddingham [Cal. App.] 93 P 1046.

39. See Usury, 10 C. L. 1937.

40. Jersey City v. Flynn [N. J. Eq.] 70 A 497. Where land was conveyed to defendants in payment of mortgage debt and defendants as trustees undertook to sell property and account for surplus, etc., agreement stating no rate of interest, rate fixed by law was applicable. Weitner v. Thurmond [Wyo.] 98 P 590. On default in purchase of corporate stock, plaintiff was entitled to 6 per cent interest from time sum became due under Rev. St. 1899, § 3705 (Ann. St. 1906, p. 2073), providing rate in absence of agreement. Pounds v. Coburn, 210 Mo. 115, 107 SW 1080. Legal rate applies to **claim for damages for fraud inducing purchase of notes.** Schwitters v. Springer, 236 Ill. 271, 86 NE 102. Statutory rate applicable to conversion. Id. In suit against city for diversion of certain funds which should have been applied to payment of special assessment bonds held by plaintiff, suit is essentially for **money had and received,** and statutory rate of interest is recoverable rather than rate specified in contract. Conway v. Chicago, 237 Ill. 128, 86 NE 619.

41. Prior v. Buffalo, 113 NYS 249.

42. Where vendor deposited purchase money with trust company to draw 4 per cent interest, and in suit for rescission purchasers made such trust company a party to tie up fund, on judgment in their favor, purchasers were entitled to only 4 per cent. Prior v. Buffalo, 113 NYS 249.

43. Action of debt on bond. American Surety Co. v. Pacific Surety Co. [Conn.] 70 A 584. Where no demand for indemnity was made of surety until rendition of judgment in suit where surety defended on theory of nonliability, interest was recoverable from breach of obligation only. Id.

44. Though cross-claims are unliquidated. Childs v. Krey, 199 Mass. 352, 85 NE 442. Interest under insurance policy not payable until proofs of death not recoverable until such proof is presented. Minnesota Mut. Life Ins. Co. v. Welsh, 131 Ill. App. 103. Under contracts whereby streets were laid out and constructed under Laws 1891, p. 880, c. 323, and amendatory acts, and assessments delayed until damages against owners for taking of land and construction were determined, such amount to be offset, owners whose damages exceeded assessments were not entitled to interest prior to determination of balance due after allowance of set-off of amounts assessed upon land for betterments. Burrage v. Boston, 198 Mass. 580, 84 NE 1017. Where one was employed to render services during football season and contract fixed no time of payment except that payment should be made at close of season, interest was properly allowable from Dec. 1. Sieberts v. Spangler [Iowa] 118 NW 292. Where **broker's commission** was to consist of last three instalments of purchase price of certain land, maturing on the first day of July, August, September, 1907, he was entitled to interest from date such sums were payable. Bankers' Loan & Investment Co. v. Spindle [Va.] 62 SE 266.

45. Childs v. Krey, 199 Mass. 352, 85 NE 442. **Contract for services** construed and held not separable, wherefore balance due not being liquidated, plaintiff was entitled to interest only from beginning of action. Cully v. Isham, 109 NYS 92. Contract for construction of hoisting towers for railroad where items were unliquidated, and interest held due from date of writ only. Hunt Co. v. Boston El. R. Co., 199 Mass. 220, 85 NE 446.

tion of liability.[46] When a demand is necessary to create a default, interest runs from demand,[47] as where no time is fixed for the payment of a debt,[48] or where the claim is against a municipality[49] or a state,[50] but a demand is not otherwise necessary to start the running of interest.[51] The method of computation adopted by the parties will usually be adopted by the courts.[52] Interest as damages for the commission of a tort is usually allowed from the date of the injury[53] but where the commission of a tort involves a breach of contract, the interest properly accrues from the breach.[54]

§ 3. *Remedies and procedure to recover interest.*[See 10 C. L. 412]—A separate action cannot be maintained for interest as damages,[55] but interest due by contract may usually be recovered in a separate action.[56] The statutory liability of shareholders may be resorted to for the recovery of interest where a corporation is insolvent and the assets suffice only for the payment of the principal of the debt,[57] and proceedings against the stockholders in such case do not constitute a separate action for interest.[58] Where interest is authorized by statute, it need not be specially pleaded.[59]

**46.** Where surety liable, on public officer's bond, to many creditors whose claims were not adjudicated, filed bill to have liability established, interest was chargeable from date of decree adjudging liability, not from date of filing bill. United States Fidelity & Guaranty Co. v. Rainey [Tenn.] 113 SW 397.

**47.** In suit by administrator against one claiming as decedent's donee, interest should be allowed from date of demand. Chamberlain v. Eddy [Mich.] 15 Det. Leg. N. 865, 118 NW 499. In action against administrator where claim did not mature until death of deceased, at which time plaintiff had election of remedies, interest should be computed only from date of demand to administrator. Contract for services payable by will. Pelton v. Smith [Wash.] 97 P 460.

**48.** Dame v. Wood [N. H.] 70 A 1081. Express money order wherein no time is stated is payable on demand, and demand is necessary to entitle holder to interest. Rosenberger v. Pacific Exp. Co., 129 Mo. App. 105, 107 SW 459.

**49.** Demand of payment is necessary to set interest running against municipality. Appleton Waterworks Co. v. Appleton, 136 Wis. 395, 117 NW 816. Under charter of city of Appleton (Laws 1876, p. 83, c. 47, subc. 5, § 25; Laws 1885, p. 1301, c. 441, subc. 5, § 24), demand is requisite before claim can draw interest. Id.

**50.** State not in default until demand. Evers v. Glynn, 110 NYS 405.

**51.** Flynn v. American Banking & Trust Co. [Me.] 69 A 771. Bank held liable for legal rate upon default with notice or demand. Id. Claims due under guaranty became due by action of directors, and interest started running without demand. Id. Vote of directors to stop payment and sequestration of assets deprived bank of right to demand. Id.

**52.** Though different from method provided by contract. Bower v. Walker, 220 Pa. 294, 69 A 984. Where interest was computed and rendered for nine years according to practical construction of contract by parties, such method will be sustained. Id. Where in equity suit the issue was the proper method of computing interest, a settlement made 7 years prior to contract and referred to therein was not admissible as to proper method; such reference not amounting to an adoption of method of computation. Id.

**53.** In action to recover damages for diversion of waters, interest is recoverable from time of diversion. Dodge v. Rockport, 199 Mass. 274, 85 NE 172. Delay in bringing suit immaterial, since either party might have brought suit Id. Where insurance company wrongfully received money and was under duty to return it to rightful owner (plaintiff), interest was properly chargeable from date such money was received. City of Newburyport v. Fidelity Mut. Life Ins. Co., 197 Mass. 596, 84 NE 111.

**54.** Where city wrongfully diverted funds due on special assessment bonds, plaintiff's right to interest accrued when bonds were due, though diversion took place previously. Conway v. Chicago, 237 Ill. 128, 86 NE 619.

**55.** Froment v. Oltarsh, 111 NYS 657; Flynn v. American Banking & Trust Co. [Me.] 69 A 771.

**56.** Froment v. Oltarsh, 111 NYS 657. Instalments of interest falling due before principal. Quackenbush v. Mapes, 123 App. Div. 242, 107 NYS 1047. Limitations begin to run against instalments of interest as they fall due. Id. **Where principal has been paid,** interest due under contract may thereafter be recovered. Froment v. Oltarsh, 111 NYS 657.

**57.** Flynn v. American Banking & Trust Co. [Me.] 69 A 771. Maine statute relative to claims against insolvent banks (Rev. St. 1883, c. 47, § 66) limits powers of receivers and liability of shareholders, but shareholders cannot escape liability imposed by charter, and hence are liable for interest. Id.

**58.** Sequestration of corporate assets by creditors and proceedings against stockholders for interest held not separate suits for principal and interest. Flynn v. American Banking & Trust Co. [Me.] 69 A 771.

**59.** Haley v. Supreme Ct. of Honor, 139 Ill. App. 478.

## INTERNAL REVENUE LAWS

§ 1. Provisions and Principles Common to All Acts, 323.
§ 2. The Tax on Liquors and Tobacco, 323.
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*The scope of this topic* is noted below.[60]

§ 1. *Provisions and principles common to all acts.* See 10 C. L. 413—A statute for raising revenue, even when highly penal, is to be construed as a whole and in a fair and reasonable manner and not strictly in favor of the one on whom the burden is imposed,[61] but such statutes should be liberally interpreted on behalf of such persons,[62] and in case of doubt or ambiguity every intendment should be taken against the taxing power.[63] The heading of a statute, while not conclusive on what is to be taxed, may be considered for the purpose of ascertaining the intention of the law makers.[64] Taxes illegally imposed and collected to be recoverable must have been paid involuntarily or under protest,[65] but the character of the protest is not of vital importance,[66] and under certain circumstances, it is wholly unnecessary to enter a protest with the collector each time a purchase of a stamp or stamps is made.[67] An appeal [68] to the commissioner and a decision thereon, unless such decision shall have been delayed more than six months, is a condition precedent to the maintenance of a suit to recover back any internal revenue tax claimed to have been illegally or erroneously collected,[69] but where before the payment of the tax a claim for abatement is presented to the commissioner and rejected, the same is equivalent to an appeal.[70] The appeal condition is not waived by failure to plead it.[71] Where different actions are brought by the same plaintiff to recover internal revenue taxes paid under the same law on the same class or articles, a judgment in one case is conclusive in the others.[72]

§ 2. *The tax on liquors and tobacco.* See 10 C. L. 413—Bay rum is not a distilled spirit within the revenue act.[73] The minimum eighty per cent capacity tax must be

60. This title covers only the federal internal taxes levied for revenue. It excludes customs duties (see Custom Laws, 11 C. L. 952), also licenses (see Licenses, 10 C. L. 622), and state revenues (see Taxes, 10 C. L. 1776; Licenses, 10 C. L. 622).

61. Construction of liquor statute, U. S. Rev. St. § 3455, U. S. Comp. St. 1901, p. 2279. United States v. Graf Distilling Co., 208 U. S. 198, 52 Law. Ed. 452.

62. Act of June 13, 1898, c. 448, § 29, 30 St. 464 (U. S. Comp. St. 1901, p. 2307), held not to cover property passing under contract based on sufficient consideration. Herold v. Blair [C. C. A.] 158 F 804.

63. Construction of legacy acts of June 13, 1898, and June 27, 1902. Lynch v. Union Trust Co. [C. C. A.] 164 F 161.

64. Construction of Act of June 13, 1898, c. 448, § 29, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307). Herold v. Blair [C. C. A.] 158 F 804.

65. Importers paying internal revenue on importations of bay rum under mistake of law without protest of any kind not entitled to relief. Newhall v. Jordan [C. C. A.] 160 F 661.

66. Protest sufficient if it shows that there was no acquiescence in demand from officials. Johnson v. Herold, 161 F 593.

made and plaintiffs were constantly using stamps in large quantities, etc. Johnson v. Herold, 161 F 593.

68. "Appeal" not used in technical sense of appeal from judgment of lower court. De Bary v. Dunne, 162 F 961.

69. Rev. St. § 3226 (U. S. Comp. St. 1901, p. 2088). De Bary v. Dunne, 162 F 961.

70. Appeal after payment in such case not necessary to suit. De Bary v. Dunne, 162 F 961.

71. De Bary v. Dunne, 162 F 961.

72. Points considered res judicata viz: that trade-mark used as plaintiff used it did not render articles taxable under act of June 13, 1898, and that payments for stamps were involuntary and under duress. Johnson v. Herold, 161 F 593.

73. Bay rum not within enumeration of "distilled spirits" defined in § 3248, Rev. St. (U. S. Comp. St. 1901, p. 2107). Anderson v. Newhall [C. C. A.] 161 F 906. Under Foraker Act Apr. 12, 1900, c. 191, § 3, 31 St. 77, authorizing an imposition of a tax on articles from Porto Rico equal to the internal revenue tax imposed in the United States "upon all like articles of merchandise of domestic manufacture," Porto Rican bay rum is not subject to the provision, notwithstanding that a tax is provided for "distilled spirits,"

paid, regardless of any reduction of the actual capacity of the distillery by reason of the quality of materials used,[74] but in order to charge a fruit distiller with a deficiency tax, due notice of the deficiency must be given to him within six months after the receipt of his monthly report.[75] In case a delinquent liable for taxes neglects or refuses to pay them after demand, the United States has a lien upon all property and rights to property belonging to the delinquent from the time the taxes were due,[76] and even in a case of conflicting liens the government's remedy by a regular suit in equity is not exclusive.[77] On a seizure and sale of distilled liquors under the internal revenue law for nonpayment of the tax thereon, the proceeds are applicable to such tax and, if sufficient, extinguish the tax,[78] and in an action by the government on a distiller's bond, an answer containing allegations under which the defendant is entitled to prove such facts is not demurrable.[79] When distilled spirits deposited in a warehouse are destroyed by accidental fire or other casualty without fraud, collusion or negligence of the owner thereof, no taxes can be collected on such spirits,[80] and such destruction may be set up as a defense to an action on the distiller's bond, to recover the taxes.[81] A surety on a distiller's bond is responsible for the taxes accruing against the distiller,[82] but before the taxes can be collected from the surety a judgment against the distiller and the surety must first have been obtained.[83] The sureties on a distiller's bond for payment of taxes are discharged by seizure of the spirits for fraudulent acts of the distiller and sale thereof by the marshal and payment of the taxes out of the proceeds of the sale.[84]

While the cardinal purpose of the provisions of the internal revenue law imposing special taxes on dealers in liquors is the raising of revenue for the United States,[85] the federal courts may in the exercise of the power vested in them rightly enforce the penalties provided for a violation of such law for the secondary purpose of aiding in the enforcement of the law of a state regulating or prohibiting the sale of liquor.[86] The term "cask" as employed in the statute respecting the manufacture and sale of spirituous liquors by wholesale dealers has a well recognized import.[87]

nomine. Id. Fact that alcohol in bay rum may be used for other purposes immaterial. Id.

**74.** Rev. St. § 3309, supplemented by Act March 1, 1879, c. 125, § 6, 20 St. 340, and Act May 28, 1880, c. 108, § 21, Stat. 147 (U. S. Comp. St. 1901, p. 2158). United States v. Ball [C. C. A.] 163 F 504.

**75.** Where notice was not given, assessment void. Rev. St. § 3309, Acts March 1, 1879, c. 125, § 6, 20 St. 340, Act May 28, 1880, c. 108, § 8, 21 St. 147 (U. S. Comp. St. 1901, p. 2158). United States v. Ball [C. C. A.] 163 F 504.

**76.** Under Act of July 20th, 1868, § 106 (15 Stat. at L. 125, 167, ch. 186, U. S. Comp. St. 1901, p. 2081), lien held to attach before execution of trust deed of Oct. 26, 1869. Blacklock v. U. S., 208 U. S. 75, 52 Law. Ed. 396.

**77.** Remedy by Act of July 13, 1866 (14 Stat. at L. 98, 107, 108, ch. 184, U. S. Comp. St. 1901, pp. 2073-74-77), of sale by distraint, not superseded by Act of July 20, 1868 (15 Stat. at L. 125, 167, ch. 186, U. S. Comp. St. 1901, p. 2081), § 106, giving right to enforce lien by regular suit in equity in a federal court. Remedies concurrent. Blacklock v. U. S., 208 U. S. 75, 52 Law. Ed. 396.

**78.** United States Fidelity & Guaranty Co. v. U. S. [C. C. A.] 158 F 604.

**79.** Sustaining demurrer under answer held error. United States Fidelity & Guaranty Co. v. U. S. [C. C. A.] 158 F 604.

**80.** Under Rev. St. § 3221, as amended by Act March 1, 1879, c. 125, § 6, 20 Stat. 341 (U. S. Comp. St. 1901, p. 2087), exemption not dependent on discretionary action of secretary of treasury. Freeman v. U. S. [C. C. A.] 157 F 195.

**81.** Sureties entitled to raise defenses available to distiller. Freeman v. U. S. [C. C. A.] 157 F 195.

**82.** United States v. National Surety Co. [C. C. A.] 157 F 174.

**83.** Freeman v. U. S. [C. C. A.] 157 F 195.

**84.** United States v. National Surety Co. [C. C. A.] 157 F 174. Where government made tax assessment against distiller of spirits made from material used and not reported, portion of spirits were seized, sold, and tax on such part paid from proceeds, surety on bond was entitled to credit for part of tax so paid but not for remainder of proceeds of sale. Id.

**85.** Act of Feb. 8, 1875, § 16 (18 Stat. 310, c. 36), amending § 3242 of Rev. St. (U. S. Comp. St. 1901, p. 2095). In re Charge to Grand Jury, 162 F 736.

**86.** In re Charge to Grand Jury, 162 F 736.

**87.** Vessel containing not less than twenty, ten or five gallons wine measure. Rev. St. §§ 3287, 3323, 3244 (U. S. Comp. St. 1901, pp. 2130, 2167, 2096). Williams v. U. S. [C. C. A.] 158 F 30. Under Rev. St. § 3244 (U. S. Comp. St. 1901, p. 2096), indictment charging defendant as wholesale dealer with

Adding mere coloring matter after the stamping of the barrel and before sale does not constitute adding "anything else" within the meaning of the statute.[88] Every person who participates in the violation of the federal laws relative to revenue on liquors is himself a complete offender, a liquor dealer within the statutes.[89] Negligence of a government storekeeper whereby an unlawful removal of liquors is allowed constitutes a misdemeanor, regardless of the storekeeper's intent.[90] Intent seems to be an essential element of the crime of failing to remove stamps from barrels after emptying them.[91] Good faith may constitute a defense for failure to keep records in strict conformity with the statute.[92] Under the statute requiring every wholesale liquor dealer to enter in his record book the day when and the name and place of business of the person to whom spirits are sent, etc., the gist of the offense being sending out of any spirits without complying with the section, the quantity sent out is not an essential element of the offense,[93] nor need the indictment for such offense specify the name of the consignee or the place where the casks were sent.[94] The burden of proof is upon the prosecutor throughout to prove every fact essential to constitute the offense charged.[95]

§ 3. *Oleomargarine Acts.*[See 10 C. L. 413]—Except as made directly applicable, the provisions of the general internal revenue legislation do not apply to the Oleomargarine Act of August 2, 1886,[96] and hence one assessed with a special tax as a "dealer" [97] under such law, who before paying the tax makes application to the commissioner for an abatement of the same, need not, as a condition precedent to an action to recover taxes illegally imposed, make an appeal to the commissioner.[98] Butter containing an abnormal quantity of water is taxable as "adulterated butter." [99] Book entries and returns by wholesale dealers must be made in accord-

sending out two "casks" of distilled spirits without marking required entriee in record book, as required by § 3318, p. 2164, held sufficient charge that casks contained each not less than five gallons. Id.

88. "Anything else" in U. S. Rev. St. § 3455, U. S. Comp. St. 1901, p. 2279, held not to embrace substances which are not in themselves taxable under laws of the United States, even though forfeiture is provided by statute where there is no intent to defraud and a heavier penalty in case of fraudulent intent. United States v. Graf Distilling Co., 208 U. S. 198, 52 Law. Ed. 452.

89. Members of "locker club" held liquor dealers. In re Charge to Grand Jury, 162 F 736. Members of "locker club" held liquor dealers within internal revenue law subject to special tax as such and to penalty imposed for carrying on business without payment of tax where a single tax stamp only was taken out in name of club. Id. Charter or license from municipal corporation held no protection to members of "locker club," municipality being without authority to grant such license or charter under Georgia statutes. Id.

90. Rev. St. § 3169 (U. S. Comp. St. 1901, p. 2059). Mason v. U. S. [C. C. A.] 162 F 23.

91. Conviction under Rev. St. § 3324 (U. S. Comp. St. 1901, p. 2168), not sustainable on evidence that on sale of a single barrel by defendant he expressly directed employe to empty it of liquor and to destroy stamp before delivery of barrel to purchaser, and that failure of removal was unknown to defendant. United States v. Rogers, 164 F 520.

92. Williams v. U. S. [C. C. A.] 158 F 30. Second of two instructions held to give defendant full benefit of defense of good faith, and hence he could not complain that instructions were contradictory. Id.

93. Indictment under Rev. St. § 3318 (U. S. Comp. St. 1901, p. 2164), not fatally defective in failing to specify quantity shipped. Williams v. U. S. [C. C. A.] 158 F 30.

94. Specifications being evidential facts. Williams v. U. S. [C. C. A.] 158 F 30.

95. Instruction under Rev. St. § 3318, U. S. Comp. St. 1901, p. 2164, that it was incumbent upon defendant to show that he made entries prescribed by internal revenue department, etc., held erroneous. Williams v. U. S. [C. C. A.] 158 F 30.

96. General provisions not applicable to Act of Aug. 2, 1886, c. 840, 24 St. 209 (U. S. Comp. St. 1901, p. 2228), except sections made applicable by section three thereof (24 St. 209 [U. S. Comp. St. 1901, p. 2229]). Tucker v. Grier [C. C. A.] 160 F 611.

97. One who prior to passage of Act of Aug. 2, 1886, c. 840, 24 St. 209 (U. S. Comp. St. 1901, p. 2228), had been a grocer handling oleomargarine, having ceased to handle it, simply ordering oleomargarine for accommodation of others and making no profit on the transactions, held not a dealer in absence of fraud or attempt at concealment. Tucker v. Grier [C. C. A.] 160 F 611.

98. Appeal required by § 3226, Rev. St. (U. S. Comp. St. 1901, p. 2088), not necessary. Tucker v. Grier [C. C. A.] 160 F 611.

99. Coopersville Co-operative Creamery Co. v. Lemon [C. C. A.] 163 F 145. Regulation, under Oleomargarine Act, May 9, 1902, c. 784, § 4, 32 Stat. 194 (U. S. Comp. St. Supp. 1907, p. 637), providing that butter containing 16

ance with provisions therefor made and provided.[1] The provisions requiring such reports are purely regulatory,[2] and prior to the revision of 1907 the oath to the report required by the commissioner's regulations, was not such that a false oath would constitute perjury under the statute relative to crimes against justice.[3] The oath required was to the recapitulation only and not to the list of customers contained in the return.[4] Under entries required may be made by an agent, an indictment for failure to make such entries should aver that the dealer did not make such entries or cause them to be made.[5] An indictment charging violation of the oleomargarine act by failure to pack the oleomargarine sold as therein described must specify in what respect the package used was unlawful.[6] An indictment for failure to pay the required license is sufficient if in the language of the statute.[7] It need not negative a statutory exception which is mere surplusage and does not except from the operation of the statute anything which would otherwise be within the same.[8] Under such an indictment a prima facie case is made by proof that the defendant carried on the designated business at a certain time and place,[9] the defendant having the burden of proving the payment of the tax when such payment is relied on as a defense.[10] All offenses created by the act of 1886 are statutory misdemeanors of the same class, regardless of the various penalties prescribed,[11] and charges under its different provisions may be joined in the same indictment.[12]

§ 4. *War Revenue Acts. The stamp acts.* See 10 C. L. 414—The taxability of articles as "proprietary, trade mark and patent medicines," cannot be determined merely from their shape and size or the style of packages in which they are packed

per cent or more of water, milk or cream, should be classified as "adulterated butter," held within authority granted and valid, being exercise of neither legislative nor judicial power. Id. Word "absorption" in act defining "adulterated butter" held not used in sense of chemical absorption, but any butter is within definition which contains an abnormal quantity of water, whether by chemical absorption or by incorporation. Id.

1. United States v. Lamson, 162 F 165. Under regulations by commissioner of internal revenue, Dec. 1904, pursuant to Act May 9, 1902, c. 784, §§ 6, 32, St. 197 (U. S. Comp. St. Supp. 1907, p. 641), entry of number of packages and pounds sold need not be made on day of sale. Id. Number of packages and pounds disposed of to each person need not be stated, even though called for in form of monthly report. Id. In expression "shall keep books and render such returns in relation thereto," term "thereto" does not apply to books but to oleomargarine, or to business of dealer. Id.

2. Act May 9, 1902, § 6, c. 784, 32 Stat. 197 (U. S. Comp. St. Supp. 1907, p. 641). United States v. Lamson, 165 F 80.

3. Making erroneous returns not punishable as perjury under Rev. St. § 5392 (U. S. Comp. St. 1901, p. 3653). United States v. Lamson, 165 F 80.

4. No perjury under regulations by commissioner to Oleomargarine Act of May 9, 1902, c. 784, § 6, 32 St. 197 (U. S. Comp. St. Supp. 1907, p. 641), and in force to 1907 to make oath to such matters of detail as names of customers. United States v. Lamson, 165 F 80.

5. Indictment under regulations made in compliance with § 6 of Act of May 9, 1902. Act May 9, 1902, c. 784, § 6, 32 St. 197 (U. S. Comp. St. Supp. 1907, p. 641), held bad on motion to quash. United States v. Lamson, 162 F 165.

6. Indictment under § 6 of Oleomargarine Act of Aug. 2, 1886, c. 840, 24 Stat. 210 (U. S. Comp. St. 1901, p. 2230), held insufficient as too indefinite and uncertain. United States v. Lockwood, 164 F 772. Indictment for violation of Act of Aug. 2, 1886, c. 840, § 6, 24 St. 210, by packing oleomargarine in packages which had previously been used for that purpose, held sufficient. Morris v. U. S. [C. C. A.] 161 F 672. Indictment under section thirteen of same act held sufficient, at least after verdict, although it did not charge that packages were "fraudulently" used. Id.

7. Indictment under Oleomargarine Act of Aug. 2, 1886, c. 840, § 4, 24 Stat. 209, charging that defendant at certain time and place did unlawfully carry on business of a manufacturer of oleomargarine without having first paid his license tax therefor, as provided by law, held sufficiently specific in absence of motion for bill of particulars showing whether defendant was charged as manufacturer in ordinary sense under act or as defined in amendment of May 9, 1902, c. 784, § 2, 32 Stat. 194. Morris v. U. S. [C. C. A.] 161 F 672.

8. Indictment for carrying on business of a manufacturing of oleomargarine without paying tax, under Act of May 9, 1902, c. 784, § 2, 32 St. 194 (U. S. Comp. St. Supp. 1907, p. 636), need not negative "except to his own family table without compensation," exception being surplusage. Morris v. U. S. [C. C. A.] 161 F 672.

9, 10, 11. Morris v. U. S. [C. C. A.] 161 F 672.

12. Charges under different provisions may be joined under Rev. St. § 1024 (U. S. Comp. St. 1901, p. 720). Morris v. U. S. [C. C. A.] 161 F 672.

and sold,[13] nor does such enumeration include an article made after a standard, known, nonproprietory formula, and sold in packages containing no semblance of trade mark, no advertisement of medicinal value, no directions for use, and no name except a pharmaceutical one.[14] In this connection, a name indicative of use as a remedy for a certain disease indicates a medicinal value,[15] and so, also, a name indicating that a certain medicinal drug is contained in the article, where such article is advertised as a medicine,[16] but not so as to names indicating merely mechanical use or application to particular parts of the body.[17] The use of a possessive proper name before the name of the article indicates proprietorship.[18] A product prepared from a natural fruit juice, without chemical compounding, does not come within the enumeration "medicinal articles compounded by any formula published or unpublished."[19]

*The legacy tax.* See 10 C. L. 414—The act imposing a tax on property transferred by "deed, grant, bargain, sale or gift," to take effect after the death of the transferrer, applies only to conveyances without consideration.[20] Property does not, within the meaning of this act pass by will or intestate laws, where it is distributed pursuant to a compromise of a will contest as authorized by a state law.[21] It is well settled that the intent of the war revenue acts, as to legacies and gifts, etc., to take effect after the death of the grantor or donor, was to tax only such interests as were virtually vested in possession or enjoyment of the beneficiary, and not interests which, though technically vested as to the title, really remained contingent as to possession or enjoyment;[22] but there is considerable confusion and some conflict as to the application of this doctrine,[23] and it is held on the one

**13.** Under Act, June 13, 1898. Johnson v. Herold, 161 F 593.

**14.** Johnson v. Herold, 161 F 593.

**15.** "Rheumatic" plasters. Johnson v. Herold, 161 F 593.

**16.** "Johnson's Belladona Plasters," inclosed in wrapper containing recommendations from patrons indicating medicinal value. Johnson v. Herold, 161 F 593.

**17.** "Corn" plasters, "dental" plasters, etc. Johnson v. Herold, 161 F 593.

**18.** "Johnson's" plasters. Johnson v. Herold, 161 F 593.

**19.** Act June 13, 1898, § 20, 30 Stat. 456 (U. S. Comp. St. 1901, p. 2297), contemplates pharmaceutical compounding, and hence does not include a natural product, such as papain made from juice of pawpaw, which is not only not chemically compounded but cannot be so compounded. Johnson v. Herold, 161 F 593. Immaterial whether natural product is used as basis of plaster or prepared in tablet or pill form by use of a nonmedicinal excipient. Id.

**20.** Herold v. Blair [C. C. A.] 158 F 804. Where testator and another entered into partnership agreement providing inter alia that, in consideration of certain sums paid testator, in case of his death during existence of partnership it should be dissolved but that his interest should pass to and belong to his son who should remain in business, and testator died, leaving will by which son was made legatee, held that interest passed by contract based on sufficient consideration, and hence was not taxable under Act of June 13, 1898, c. 448, § 29, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307). Id. Purpose to evade statuts not imputed to contract made long before enactment of statute. Id.

**21.** Compromise, under Rev. Laws Mass., c. 148, § 15, held not within Act June 13, 1898, c. 448, §§ 29, 30, 30 Stat. 464, 465 (U. S. Comp. St. 1901, pp. 2307, 2310). McCoy v. Gill, 156 F 985.

**22.** Lynch v. Union Trust Co. [C. C. A.] 164 F 161; Westhus v. Union Trust Co. [C. C. A.] 164 F 795. Interest of children, in portion of estate set apart for benefit of widow during her life, held not to vest either in possession or enjoyment during her lifetime, but to become subject to tax on occurrence of that event prior to July 1, 1902. Title Guarantee & Trust Co. v. Ward, 164 F 459.

**23. NOTE. What estates are vested in present possession or enjoyment:** Vanderbilt v. Eidman, 196 U. S. 480, 49 Law. Ed. 563, involved a limitation by will in trust to pay the net income to the beneficiary until he reached a certain age, at which time he was to receive the corpus of the estate. It was held that the beneficiary's interest in the corpus of the estate was not taxable. The question as to the taxability of the interest in the income was not involved or decided, but the scope and intent of the act under consideration was discussed generally and at some length, it being held, furthermore, that the refunding act of 1902 was merely declaratory of the proper construction of the prior acts as to what interests were taxable thereunder. In Herold v. Shanley [C. C. A.] 146 F 20, it was held that a limitation in trust to pay the income to the beneficiary until he reached a certain age, the corpus then to vest in him absolutely, created no taxable interest. It is to be noted that in this case the beneficiary's interest in the corpus was liable to defeat by his death prior to the termination of the trust, as was also the case in Vanderbilt v. Eidman, supra, but the court seems to have considered this

hand that the right to receive an income from an estate left in trust for a certain period was not taxable,[24] though under the terms of the will the corpus of the estate would vest absolutely in the beneficiary of the income,[25] while on the other hand it is held that the right to receive such an income was taxable, even though the remainder in the corpus went to another,[26] and that where there was an absolute limitation of income and corpus, subject only to the intervention of a stated period during which the corpus should be held in trust and the right of possession deferred, the beneficiary's interest in the corpus was taxable.[27] There is also some conflict as to when the tax attached, it being held on the one hand that it did not attach until the expiration of one year after the death of the testator,[28] and on the other that the statute is self-operative and the tax is imposed and attached immediately upon the vesting of the estate in the beneficiary.[29] Life tables are not available to determine the value of a life estate, the duration of which has been made certain by the death of the life tenant.[30] To authorize the recovery of taxes illegally ex-

immaterial. To the same effect see Eidman v. Tilghman [C. C. A.] 136 F 141, afd. by divided court, 203 U. S. 580, 51 Law. Ed. 326; McCoach v. Philadelphia Trust Safe Deposit & Ins. Co. [C. C. A.] 142 F 120, afd. by divided court, 205 U. S. 539, 51 Law. Ed. 821; McCoach v. Bamberger [C. C. A.] 161 F 90; Gill v. Austin [C. C. A.] 157 F 234; Disston v. McClain [C. C. A.] 147 F 114, involved a limitation in trust to pay the income to the beneficiary at stated intervals for life. It was held that the interest of the beneficiary was not a vested legacy or bequest susceptible of present valuation by means of life tables or otherwise, but was merely an interest which vested in instalments at stated intervals, the interest in each future instalment being contingent as to possession and enjoyment upon the event that the beneficiary should be alive when such instalment became due and payable. Lynch v. Union Trust Co. [C. C. A.] 164 F 161, involved a limitation in trust to pay at stated intervals the income upon stated shares of the estate to certain beneficiaries for certain terms, the corpus of such shares to vest in such beneficiaries respectively at the expiration of such terms. It was held, following Disston v. McClain, 147 F 114, that the right of one of the beneficiaries to receive future instalments of the income was not a legacy vested in present possession or enjoyment, and that it had no "actual value" or "clear value" capable of being definitely ascertained within the meaning of War Revenue Act, June 13, 1898, c. 448, §§ 29, 30, 30 Stat. 464, 465 (U. S. Comp. St. 1901, pp. 2309, 3308). On the other hand, in Westhus v. Union Trust Co. [C. C. A.] 164 F 795, it was held that the right to receive the income of a trust estate was taxable as an interest vested in present possession or enjoyment, even though there was a limitation over to other parties as to the corpus upon the expiration of the trust. This case distinguishes Clapp v. Mason, 94 U. S. 589, 24 Law. Ed. 212, Mason v. Sargent, 104 U. S. 689, 26 Law. Ed. 894, and Vanderbilt v. Eidman, 196 U. S. 480, 49 Law. Ed. 563, but recognizes a conflict among the various circuit courts of appeal, and cites and discusses many of these cases. In Title Guarantee & Trust Co. v. Ward, 164 F 459, it was held that a limitation in trust to pay the income to the beneficiaries for a certain period, at the expiration of which the absolute title to the corpus was to vest in the beneficiaries or their heirs, legatees, assignees, etc., created an absolute vested estate in the corpus, with the present vested right of enjoyment, the actual possession of the corpus only being deferred, and hence that the interest of the beneficiaries in the corpus was taxable. In this case Vanderbilt v. Eidman, 196 U. S. 480, 49 Law. Ed. 563, was distinguished on the ground that the interest of the beneficiary in the corpus was subject to defeat upon his death prior to the period fixed for the vesting thereof; the case of Herold v. Shanley [C. C. A.] 146 F 20 was distinguished on the ground that, upon the death of the beneficiary prior to the termination of the trust, the corpus was to revert to the residuary estate; the case of Disston v. McClain [C. C. A.] 147 F 114, was distinguished on the ground that the legacy sought to be taxed was merely the right to receive the income of an estate of which the final beneficiaries were uncertain; Union Trust Co. v. Lynch, 148 F 49, was adverted to as possibly in conflict with the decision rendered in the case at bar, but was not further discussed.—[Ed.]

**24.** Lynch v. Union Trust Co. [C. C. A.] 164 F 161. Held that tax attached only to so much of income as was actually received prior to repeal of act in 1902, and hence that only to this extent was the tax within the saving clause of the repealing act. Id.

**25.** Lynch v. Union Trust Co. [C. C. A.] 164 F 161.

**26.** Westhus v. Union Trust Co. [C. C. A.] 164 F 795.

**27.** Title Guarantee & Trust Co. v. Ward, 164 F 459.

**28.** Taxes not collectible on estates of persons who died within year prior to July 1st, 1902, when repeal of Act of 1898, § 29, took effect. Act Apr. 12, 1902, c. 500, § 7, 32 St. 97 (U. S. Comp. St. Supp. 1907, p. 649). McCoach v. Bamberger [C. C. A.] 161 F 90.

**29.** Westhus v. Union Trust Co. [C. C. A.] 164 F 795.

**30.** Held error to base value on tables after death of life tenant, though death was unknown when assessment was made and though tax related back to time of death. Herold v. Kahn [C. C. A.] 159 F 608.

acted, it must appear that the payment thereof was involuntary or under protest.[31] A suit against a collector to recover back such taxes is not a suit against the United States, so as to preclude the recovery of interest,[32] and interest in such case is recoverable from the date of the exaction of the tax.[33, 34]

§ 5. *Filled Cheese Act.* See 10 C. L. 414

§ 6. *Tax on playing cards.* See 10 C. L. 414

§ 7. *Civil War Revenue Laws.* See 10 C. L. 414

§ 8. *Foreign revenue acts.* See 10 C. L. 415

## INTERNATIONAL LAW.

*The scope of this topic* is noted below.[35]

Territory may be acquired by discovery[36] or conquest,[37] and the conquering nation may attach to itself a part of the territory of the nation vanquished and confiscate the land from the actual owners and occupants.[38] When sovereignty changes, the rights to the emoluments incident to offices left by the extinguished sovereignty do not survive,[39] and where an order of an officer of the new sovereignty abolishing such an office is fully ratified by such sovereignty, the courts cannot declare the act of such officer to be a tortious violation of a treaty or of the law of nations.[40] Where tortious acts of officials are subsequently ratified by a foreign government, a civil suit against the officials cannot be maintained, since there is but one tort and the foreign sovereignty as one tort feasor cannot be sued.[41] Courts of one sovereignty have no jurisdiction of a suit against the sovereign of another country.[42]

31. Payment, under protest, upon threat of collection by law and enforcement of penalty, held involuntary. Herold v. Kahn [C. C. A.] 159 F 608. Payment under protest that taxes were illegally exacted, or with notice that payor contends that they are illegal and intends to institute suit to compel their repayment, is sufficient foundation for suit to recover taxes paid. Id.

32. Fact that internal revenue collector is required by Rev. St. § 3210 (U. S. Comp. St. 1901, p. 2082) to pay taxes collected into treasury, and provisions of §§ 989 and 3220 (U. S. Comp. St. 1901, pp. 708, 2086) held not to make suit one against the United States. Conant v. Kinney, 162 F 581.

33, 34. Conant v. Kinney, 162 F 581.

35. See Aliens, 11 C. L. 90; Ambassadors and Consuls, 11 C. L. 108; Extradition, 11 C. L. 1452; Treaties, 10 C. L. 1874; War, 8 C. L. 2257. As to collision between vessels of different nations, see Shipping and Water Traffic, 10 C. L. 1655. International arbitration, see Arbitration and Award, 11 C. L. 262. Private international law, see Conflict of Laws, 11 C. L. 665.

36. Seneca Nation v. Appleby, 112 NYS 177. Discovery by Europeans of western hemisphere held to embrace all of continent within limits expressed, though boundary lines were not realized or magnitude of appropriated territory comprehended by claimant. Id. All territory within original thirteen states belonged to Great Britian by right of discovery. Id.

37. Seneca Nation v. Appleby, 112 NYS 177.

38. European settlers divesting American Indians on continent of holdings. Seneca Nation v. Appleby, 112 NYS 177.

39. Right to emoluments incident to office of high sheriff of Havana held not to survive extinction of Spanish sovereignty over Cuba. O'Reilly De Camara v. Brooke, 209 U. S. 45, 52 Law. Ed. 676. Order of military governor of Cuba after cessation of Spanish sovereignty abolishing office of and all rights pertaining to and derived from office of alguacil mayor or high sheriff of Havana, held not to deprive claimant of any property emoluments. Id.

40. General Brook's order abolishing office of high sheriff of Havana ratified by executive, congress and treaty making power. O'Reilly De Camara v. Brooke, 209 U. S. 45, 52 Law. Ed. 676.

41. Where plaintiff, a United States corporation, was ejected from holdings over which Costa Rico was exercising de facto authority by soldiers and officers of such government, and acts were ratified by government, civil action not maintainable against defendant alleged to have inspired acts by government. American Banana Co. v. United Fruit Co., 160 F 184. The ratification of acts of certain executive officers is equivalent to prior authorization. Id.

42. Mason v. Intercolonial R. Co., 197 Mass. 349, 83 NE 876. Neither foreign sovereignty nor its officers can be brought into our courts. American Banana Co. v. United Fruit Co., 160 F 184. Suit against International Railway of Canada, which is the property of king of England and operated for public purposes of Canada, is deemed a suit against a foreign sovereign, and action brought in state courts for injuries sustained in Canada by operation of International Railway of Canada dismissed for want of jurisdiction. Mason v. Intercolonial R. Co., 197 Mass. 349, 83 NE 876.

## INTERPLEADER.

§ 1. Nature of Remedy and Right Thereto, 330. § 2. Procedure and Relief, 331.

*The scope of this topic* is noted below.[43]

§ 1. *Nature of remedy and right thereto.*[See 10 C. L. 415]—A bill of strict interpleader is one in which the complainant asserts possession of a fund or property in which he claims no personal interest and in which the defendants set up conflicting claims and the plaintiff cannot determine to which he should yield.[44] It is essential that there be two or more claimants to the fund in dispute capable of interpleading and settling the matter between themselves,[45] that there be privity between the parties,[46] that the claims be of the same nature and character,[47] that the party seeking relief be not liable to any of the claimants,[48] and that there be a bona fide dispute concerning the ownership of the property or fund in possession.[49] A bill in the nature of interpleader will lie by a party in interest to ascertain his own rights and to ascertain to which of the rival claimants the property belongs.[50] Where the holder of a fund fails to require rival claimants to interplead, a judgment in a suit by one of the claimants cannot be pleaded as a defense in a suit by another claimant.[51]

*Statutory proceedings.*[See 10 C. L. 416]—The remedy of interpleader has been extended by statutes so as to include cases in which the claimants' titles are adverse to

43. Treats of right to maintain bill of interpleader and procedure thereon. As to intervention and addition of new parties generally, see Parties, 10 C. L. 1081. As to assertion of hostile claims to property in litigation, see such titles as Attachment, 11 C. L. 315; Executions, 11 C. L. 1433.

44. Metropolitan Life Ins. Co. v. Hamilton [N. J. Eq.] 70 A 677.

45. Supreme Commandery U. O. G. C. v. Donaghey, 74 N. H. 466, 69 A 263; Maxwell v. Frazier [Or.] 96 P 548.

46. Must be privity between all parties, such as privity of estate, title or contract. Maxwell v. Frazier [Or.] 96 P 548.

**NOTE. Tenant's right to interplead landlord:** In the absence of statute a tenant cannot compel his landlord and a stranger to interplead (Whitbeck v. Whiting, 59 Ill. App. 520; Johnson v. Atkinson, 3 Anstr. 798; Cook v. Rosslyn, 1 Giff. 167; Smith v. Target, 2 Anstr. 529; White Water Valley Canal Co. v. Comegys, 2 Ind. 469; Crane v. Burntarger, 1 Ind. 165, Smith [Ind.] 156; Williams v. Halbert, 7 B. Mon. [Ky.] 184; Dodd v. Bellows, 29 N. J. Eq. 127; Dungey v. Angove, 2 Ves. Jr. 304; Ketcham v. Brazil Block Coal Co., 88 Ind. 515), unless the third party claims in privity with the landlord (Ketcham v. Brazil Block Coal Co., supra; Snodgrass v. Butler, 54 Miss. 45; McCoy v. Bateman, 8 Nev. 126; Vernam v. Smith, 15 N. Y. 328; Seaman v. Wright, 12 Abb. Prac. [N. Y.] 304; Oil Run Petroleum Co. v. Gale, 6 W. Va. 525; Clark v. Byne, 13 Ves. Jr. 383), or by reason of some act of the landlord later than the lease (McCoy v. McMurtrie, 12 Phila. [Pa.] 180; Cowtan v. Williams, 9 Ves. Jr. 107; Glaser v. Priest, 29 Mo. App. 1).—Adapted from 10 L. R. A. (N. S.) 751.

47. Maxwell v. Frazier [Or.] 96 P 548.

48. Moore Print. Typewriter Co. v. National Sav. & Trust Co., 31 App. D. C. 452. Not interpleader where trustee with right to vote stock seeks appointment of new trustee, although parties asserting claims to stock of holders are also made parties and trustee seeks instructions as to how to turn over stock to successor. Id. Bill will not lie where defendant's claim is on independent demands and plaintiff is legally liable to both defendants. Maxwell v. Frazier [Or.] 96 P 548.

49. Must be some merit to claim of defendant. Fowler v. Eastman Council, No. 97, J. O. U. A. M., 58 Misc. 14, 108 NYS 1017. Danger of double vexation must be real. Metropolitan Life Ins. Co. v. Hamilton [N. J. Eq.] 70 A 677. Bill must show that plaintiff cannot without hazard determine to which party money is due. Fowler v. Eastman Council, No. 97, J. O. U. A. M., 58 Misc. 14, 108 NYS 1017. Bill seeking to ascertain amount due several parties between whom there was no controversy **not interpleader.** City of Centralia v. Norton & Co., 140 Ill. App. 46.

**Interpleader proper** where claimants brought suit on policies against plaintiff. Metropolitan Life Ins. Co. v. Hamilton [N. J. Eq.] 70 A 677.

**Bill denied** where there was no ambiguity in fraternal insurance company's by-laws, or in general laws applicable thereto, so that there was no doubt as to right of party to sum due on policy. Id. Motion for interpleader denied where assigned bank deposit had been acquiesced in for 14 years and substituted claimant made default. Edwards v. Greenwich Sav. Bank, 109 NYS 721.

50. Bill of life insurance company alleging insurance of two policies that insured had understated age, that sum due was claimed by widow and third person, and praying for adjustment of policy to true age of insured and that claimants interplead. Metropolitan Life Ins. Co. v. Hamilton [N. J. Eq.] 70 A 677.

51. Subcontractors' liens. Gillilan v. Schmidt [Mo. App.] 111 SW 611. See generally Former Adjudication, 11 C. L. 1537.

each other,[52] and in Pennsylvania the action has been extended for the relief and protection of sheriffs.[53] A statute providing for an action in the nature of interpleader[54] is remedial.[55]

§ 2. *Procedure and relief.* See 10 C. L. 417—Personal notice or the equivalent thereto is required to bring in a party.[56] When a bill is filed, the practice is first to determine whether such a bill will lie,[57] and issues cannot be made out against the plaintiff except as to whether the case is a proper one for interpleader.[58] An objection that the claimants are not properly made parties[59] must be taken before the plaintiff's discharge,[60] but a jurisdictional defect is not waived by answering to the merits.[61] In an action in the nature of interpleader, the plaintiff need not bring the fund in controversy into court,[62] but he may be commanded to retain the fund[63] until demanded by the court.[64] Where the plaintiff prays that the claimants be enjoined from prosecuting their suits, payment into court is prerequisite to such relief.[65] In New York a party can be interpleaded only on motion.[66]

*Discharge.* See 6 C. L. 104—The plaintiff's discharge is effected by the determination that the bill will lie and the payment into court of the fund or property in controversy.[67]

*Further proceedings.* See 10 C. L. 417—Upon deposit the fund passes into the cus-

52. Under Code Civ. Proc. § 386, action may be maintained and plaintiff discharged from liability, though titles have not common origin and are adverse to one another. Sullivan v. Lusk [Cal. App.] 94 P 91. Complaint held to state cause of action. Id.

53. Purpose of Act May 26, 1897, P. L. 95, to compact in one enactment statutes and principal decisions relating to interpleaders in execution with additional new provision saving sheriff from actions if he proceeded in accordance with statute. Necker v. Sedgwick, 36 Pa. Super. Ct. 593. Liability of sheriff for refusal to proceed under interpleader act is for damage sustained by party injured thereby. Id. Where in action against sheriff for refusal to sell goods levied upon sheriff has not applied for interpleader, he may show that goods belonged to stranger and that consequently plaintiff was not injured. Id.

54. Interpleader act (Gen. St. 1902, § 1019) recognizes remedy not only in favor of stakeholder within original meaning of bill but in favor of any party interested in property of any description in nature of fund held by one person which he cannot safely turn over to apparent owner because of conflicting claims. Brown v. Clark, 80 Conn. 419, 68 A 1001. Under Gen. St. 1902, § 1019, action by administrator of deceased husband's estate against bank, intestate's widow and heirs to recover deposit in name of deceased and claimed by widow is authorized. Id. Money deposited in savings bank is "money or other property in hands or possession" of bank within Gen. St. 1902, § 1019. Id.

55. Must be favorably construed. Brown v. Clark, 80 Conn. 419, 68 A 1001.

56. Code Civ. Proc. § 820. Bullowa v. Provident Life & Trust Co., 109 NYS 1058. Under Code Civ. Proc. § 820, defendant cannot obtain order interpleading nonresident, adverse claimant not subject to personal service by paying fund in controversy into court. Id. Rev. St. § 5045, providing for service by publication, does not apply to action in interpleader brought by stakeholder, and constructive service cannot be made on nonresident defendant in such action. Connecticut Mut. Life Ins. Co. v. Berman, 7 Ohio N. P. (N. S.) 145.

57. If bill will not lie, proceeding is terminated. Maxwell v. Frazier [Or.] 96 P 548.

58. Maxwell v. Frazier [Or.] 96 P 548.

59. Objection may be taken by denial and reliance upon plaintiff's failure of proof. Supreme Commandery United Order of the Golden Cross v. Donaghey, 74 N. H. 466, 69 A 263. Bill disclosing that only one complainant is in position to enforce demand against plaintiff is demurrable. Id.

60. Objection filed after decree too late. Supreme Commandery U. O. G. C. v. Donaghey, 74 N. H. 466, 69 A 263.

61. Where bill did not state cause of action. Maxwell v. Frazier [Or.] 96 P 548.

62. Not required by equity practice or by Gen. St. 1902, § 1019. Phoenix Ins. Co. v. Carey, 80 Conn. 426, 68 A 993.

63. Under Gen. St. 1902, §§ 1002, 1005, court may grant ex parte temporary injunction commanding plaintiff in interpleader to retain fund in possession pending action. Phoenix Ins. Co. v. Carey, 80 Conn. 426, 68 A 993. Granting of such injunction discretionary not reviewable on appeal. Id.

64. Court has authority under Gen. St. 1902, § 1019, to order fund paid into court on application of party. Phoenix Ins. Co. v. Carey, 80 Conn. 426, 68 A 993. Temporary injunction commanding plaintiff to retain fund may be modified to permit payment into court. Id.

65. Where insurer filed bill of interpleader against claimants for sums due on policies. Metropolitan Life Ins. Co. v. Hamilton [N. J. Eq.] 70 A 677. Payment into court as prerequisite of injunctive relief not avoided by fact that deduction would be necessary, since such matter might be adjusted on distribution of fund. Id.

66. Not by order to show cause. Code Civ. Proc. § 820. Bullowa v. Provident Life & Trust Co., 109 NYS 1058.

67. Maxwell v. Frazier [Or.] 96 P 548.

tody of the law.[68] The deposit being made primarily for the benefit of the plaintiff does not deprive the defendants of their substantial rights,[69] and their claims may be properly interposed without resorting to a new action.[70]

*Statutory interpleader.* See 8 C. L. 485

*Costs.* See 10 C. L. 417—Where the plaintiff is discharged from further liability, his costs are to be paid out of the fund in controversy,[71] and attorney's fees are part of the costs.[72] Where the defendants do not question the right to a bill but join issue and secure two judgments for the debt, necessitating an appeal, the plaintiff will be entitled to costs.[73]

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**Interpretation; Interpreters; Interstate Commerce; Intervention,** see latest topical index.

## INTOXICATING LIQUORS.

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§ 11. Drunkenness as an Offense, 392.

*The scope of this topic* is noted below.[74]

§ 1. *Control of liquor traffic and validity of statutes in general.* See 10 C. L. 418—The business of selling intoxicating liquors is not per se unlawful in the absence of state or municipal regulation or prohibition,[75] but the right to engage therein is subject to the power of the state, in the exercise of its police power, to regulate or entirely prohibit such traffic.[76] In the absence of a constitutional provision on

68. Deposit with clerk. Shelton v. Wolthausen, 80 Conn. 599, 69 A 1030. Jurisdiction over deposit could not be invaded by scire facias proceedings in common pleas or any other court. Id.

69. Court may direct issue between two adverse claimants in such form that they alone would be parties to action. D'Auria v. Barbiere [N. J. Eq.] 70 A 154. Court will require defendants to interplead and litigate their respective rights to fund. Maxwell v. Frazier [Or.] 96 P 548.

70. Where claimant conceived new right to fund in controversy. Shelton v. Wolthausen, 80 Conn. 599, 69 A 1030. In action of interpleader where court orders balance remaining in clerk's hands to be paid to one claimant, such action is final and another action in nature of garnishment to determine who is entitled to sum is irregular. Id.

71. Maxwell v. Frazier [Or.] 96 P 548.

72. Plaintiff entitled to attorney's fee as part of costs. Grooms v. Mullett [Mo. App.] 113 SW 683. Under Gen. St. 1902, § 1019, granting of allowance to party for counsel fees and expenses payable out of fund in controversy is authorized. Action in nature of interpleader. Phoenix Ins. Co. v. Cary, 80 Conn. 426, 68 A 993. No error in granting allowance under Gen. St. 1902, § 1019, where amount is reasonable and allowance is not opposed. Id. Where plaintiff offered to pay deposit to claimant entitled thereto and filed prayer for attorney's fee, judgment should be rendered for amount of claim less attorney's fee. McCormick v. National Bank of Commerce [Tex. Civ. App.] 106 SW 747. Judgment that attorney's fees be paid by plaintiff as part of costs and that claimant recover full amount of deposit improper. Id.

73. Where court without jurisdiction. Maxwell v. Frazier [Or.] 96 P 548.

74. This topic includes all matters relating to traffic in intoxicating liquors except such as involve the federal internal revenue laws (see Internal Revenue Laws, 10 C. L. 413), and sales to Indians and in Indian Territory (see Indians, 11 C. L. 1898).

75. Sale is not nuisance per se but was recognized as legitimate business at common law and is lawful except where expressly prohibited by statute. Campbell v. Jackman [Iowa] 118 NW 755. Is unrestricted and unregulated sale of it that courts have regarded as tending to pauperism and crime. State v. Roberts, 74 N. H. 476, 69 A 722. At common law sale was lawful and any one might engage in it, and license laws are not, strictly speaking, grants of special privileges but restrictions on exercise of previously existing right. Id.

76. State prohibition law of 1907, § 13, construed, and held that law went into effect on Jan. 1, 1908, in all counties in which local option election had been held on or before Dec. 12, 1907, at which it was determined that liquors should not be sold, regardless of validity of law under which such election was held, so that validity of local option law was immaterial in determining right to

the subject, the regulation of the traffic is discretionary with the legislature,[77] subject only to the general rules relative to the validity of statutes.[78] Its power in this regard is exclusive and cannot be delegated by it to the courts nor lawfully usurped by the judicial branch of the government,[79] though it may be delegated to the minor political subdivisions of the state.[80] Power to regulate authorizes a municipality to confine the exercise of the business to certain localities.[81]

license in such counties after Jan. 1. State v. Skeggs [Ala.] 46 S 268; Richter v. State [Ala.] 47 S 163. Statute held valid exercise of police power. State v. Skeggs [Ala.] 46 S 268. Absolute prohibition of sale or manufacture of intoxicants within any prescribed territory in the state is lawful exercise of police power and does not deprive liquor dealer conducting business in such territory of his property or property rights without due process of law. Local option law held not unconstitutional. Edgar v. McDonald [Tex. Civ. App.] 106 SW 1135. Legislature may regulate or entirely prohibit manufacture and sale of intoxicants, and, for purpose of making effective such legislation, make it criminal for any person to have such liquors in his possession within the territory where sale or gift is prohibited with intent to sell or give away, and may prescribe or change rules of evidence by making such possession prima facie evidence of guilty intent. State v. Williams, 146 N. C. 618, 61 SE 61. But a statute purporting to have been enacted to protect public health, safety or morals, which has no real or substantial relation to those objects, or is palpable invasion of rights secured by the fundamental law, is invalid. Id.

77. May license or prohibit sale. Campbell v. Jackman [Iowa] 118 NW 755. Mulct law (Code, §§ 2432-2455), permitting sale of intoxicants as beverage under certain conditions, held valid. Id. Code, § 2448, permitting sale of intoxicants as beverage under certain specified conditions, held not invalid as in conflict with provision of bill of rights declaring that government is instituted for protection, security and benefit of people (Const. art. 1, § 2), or Const. art. 1, § 1, or general welfare clause of federal constitution, because of inherently dangerous and demoralizing tendencies of traffic. Id. Courts cannot declare statute void as inconsistent with spirit of constitution. Id. Legislature has power to regulate or prohibit traffic under police power. In re Phillips [Neb.] 116 NW 950. Whether public good requires that sale of liquor as beverage shall be entirely or only partially prohibited is for legislature to determine in exercise of its discretion, and court will not inquire into wisdom and expediency of such legislation. State v. Roberts, 74 N. H. 476, 69 A 722.

78. For discussion of constitutionality of particular provisions, see sections dealing with subjects to which they relate. State prohibition law of 1907 held to have been adopted in conformity with Const. 1901, § 6, providing that at special sessions of legislature there shall be no legislation on subjects other than those designated in proclamation calling such session except by vote of two-thirds of each house. State v. Skeggs [Ala.] 46 S. 268. Journal entries as to adoption of statute held to conform to Const. § 66. Id. Statute held not to violate Const. 1901, § 45, providing that each law shall contain but one subject which shall be clearly expressed in its title. Id. Statute held general and not local law (Const. 1901, § 110), though going into effect in some counties in 1908 and in others not until 1909. Id.

79. In re Phillips [Neb.] 116 NW 950.

80. County board of supervisors held to have had authority, irrespective of invalid provisions of Laws 1897, c. 277, § 13, attempting to confer power on electors, to adopt ordinance prohibiting sale of intoxicants. Ex parte Young [Cal.] 97 P 822. County ordinance prohibiting sale of intoxicants which was regularly passed and adopted by board of supervisors, and duly published in manner prescribed by law, held valid though it recited that it was adopted in accordance with St. 1897, c. 277, § 13, providing for adoption of ordinances by direct vote of people, which section was unconstitutional, misrecital of source of board's power being immaterial, and to be treated as surplusage. Id. Record of board showing that ordinance was regularly adopted by board itself held not open to contradiction in collateral proceeding by affidavits showing that board merely proclaimed result of vote of people pursuant to § 13. Id. Section of ordinance prohibiting sale of intoxicants in any saloon, etc., held valid as within constitutional right to regulate or license tippling houses which is enforcible as police regulation. Id. Ordinance held not invalid as against one engaged in business of growing grapes and manufacturing wine therefrom, and having large quantities of wine on hand, as a taking of property for benefit of public without just compensation and without due process of law. Id. Ordinance held not invalid as in restraint of trade as discouraging industry of viticulture and manufacture of wines and brandies. Id. Ordinance prohibiting sale, etc., of intoxicants held proper exercise of power conferred on cities by Const. art. 11, § 11. Town of Selma v. Brewer [Cal. App.] 98 P 61. Ordinance held exercise of police power and not revenue measure, object being to suppress retail sale of intoxicants as beverage and penalty being imposed for violation. Id. Under const. art. 12, § 2, authorizing cities to make and enforce police measures, etc., and Act Feb. 10, 1899 (Sess. Laws 1899, p. 203), as amended by Act March 15, 1907 (Sess. Laws 1907, p. 518), granting to cities rights to regulate or prohibit selling or giving away of intoxicants, held that cities have power to prohibit selling or giving away of intoxicants and may properly adopt ordinances to that effect. Gale v. Moscow [Idaho] 97 P 828. Police power may be delegated to municipality over territory immediately adjacent to its limits where exercise of such authority is necessary to protection of peace and good order of municipality and its inhabitants. Town of Gower v. Agee, 128

The appointment and qualification of officers to whom the enforcement of the liquor laws is entrusted is regulated entirely by statute.[82] Duties which the constitution requires to be performed by elective officers cannot be delegated to appointive officers.[83]

§ 2. *Local option laws.*[See 10 C. L. 419]—Local option may be exercised in various ways, such as by remonstrance,[84] consent,[85] or petition,[86] or, as is most commonly

Mo. App. 427, 107 SW 999. Village ordinance making it an offense to sell intoxicants within half mile of village limits without having village license, adopted pursuant to Rev. St. 1899, § 6010, giving village trustees power to license, regulate and prohibit dramshops to distance of half mile from corporate limits of village, held not void as to person conducting dramshop in another county from which he had obtained license, but within half mile limit, as being unreasonable or as an extraterritorial revenue measure, but to be valid police regulation. Id. Rev. Laws 1905, §§ 1519-1566, provide general system for regulation of business of selling intoxicants which is operative throughout the state and imposes standard of regulation below which no municipality may fall, but does not deprive municipalities of their charter powers to provide for such supplementary and additional regulations as are required by local conditions which are not inconsistent with general law. Evans v. Redwood Falls, 103 Minn. 314, 115 NW 200.

81. City held to have power to restrict location of saloons, though charter did not confer it in express terms. Churchill v. Common Council of Detroit [Mich.] 15 Det. Leg. N. 379, 116 NW 558.

82. Provision of P. L. 1901, p. 240, § 4, that failure of one appointed to board of excise commissioners to qualify within 10 days after his appointment shall cause vacancy in such office, held to apply to all appointments, original or otherwise, so that failure of one appointed to succeed himself to take oath within prescribed time was not cured by his subsequent qualification. Anderson v. Myers [N. J. Law] 71 A. 139. Taking of prescribed oath within said time is prerequisite to qualification and as essential to enjoyment of office as appointment itself. Id. Where appointee fails to take prescribed oath within such time, no judicial declaration of vacancy is necessary, but legal appointment may be made to fill such vacancy and appointee, having legally qualified, may assert in same suit right of public to oust intruder, and his own right to take and hold such office. Id.

83. Laws 1907, p. 303, c. 187, authorizing appointment of enforcement commissioner and deputy enforcement commissioners, etc., for purpose of enforcing prohibition law, held unconstitutional as an attempt to displace state's attorney and sheriff in discharge of important functions and duties connected with their respective offices. Ex parte Corliss, 16 N. D. 470, 114 NW 962. Const. § 173, providing that duties of county officers therein enumerated shall be prescribed by law, held not to authorize legislature to take away duties of such officers in whole or in part and confer them upon other officers not elected by the people. Id. Fact that law only provides for displacing such officers by appointive officers during portion of time only held to make it none the less unconstitutional. Id. Contention that functions of such officers are state and not local functions, and that therefore act is valid under police power, held untenable. Id. Provision of Const. art. 20, authorizing legislature to prescribe regulations for enforcing provisions prohibiting sale of intoxicants, held, when construed in connection with and in light of other constitutional provisions, not to authorize creation of new offices in contravention of scheme of government provided for by other provisions thereof. Id.

84. Acts 1895, c. 127, § 9, as amended by Acts 1905, c. 6 (Burns' Ann. St. 1905, § 7283i), held to authorize majority of legal voters of township to prevent by a remonstrance the granting of license to any and all applicants to sell liquor in ward in city located in said township. Miller v. Givens, 41 Ind. App. 401, 83 NE 1018.

85. Code, § 2448, requires statement of consent as condition precedent to carrying on sale of intoxicants which in cities of 5,000 or over must be signed by a majority of the voters residing therein and voting at last preceding general election, and in cities under 5,000 must be signed by 80 per cent of voters. Held that, in view of § 2450, providing that sufficiency of statement of consent may be questioned by any citizen of county, and § 2453, requiring county auditor to keep for inspection of any citizen who may desire it all papers required by preceding sections to be filed with him, individual citizens might sue to enjoin retaining of names on its census roll which were fraudulently placed there for purpose of showing population of more than 5,000. Semones v. Needles, 137 Iowa, 177, 114 NW 904. Census enumerator alleged to have fraudulently padded returns held proper party defendant in such suit so that costs were properly taxed against him, particularly where he answered and defended. Id.

86. Persons signing petition for revocation of order of county court prohibiting sale of intoxicants **within three miles of church** held not entitled to withdraw their names after same was filed except for good cause, but held further that they could protest against granting of said petition on ground that it was not signed by majority of adult inhabitants within three mile radius. Phillips v. Goe, 85 Ark. 304, 108 SW 207. Signers who did not appear and protest against granting of order held not aggrieved by judgment granting petition, and hence not entitled to appeal therefrom. Id. Petition under act of March 22, 1906, 98 O. L. 68, commonly known as the "Jones Law," to prohibit sale **in a residence district,** is in effect voting by petition rather than by ballot. In re Petition to Prohibit Sale of Intoxicating Liquors, 6 Ohio N. P. (N. S.) 251. Number of signatures to petition must equal majority of votes cast

the case, by an election at which the question is voted on directly.[87] The political

at last regular municipal election. In re Petition to Prohibit Sale of Intoxicating Liquors in Residence Dist., 11 Ohio C. C. (N. S). 351. Proof of residence in state for one year and in district for four months makes prima facie case of qualification to sign such petition. In re Petition to Prohibit Sale of Intoxicating Liquors, 6 Ohio N. P. (N. S.) 251. Signature made in presence and at request of qualified elector, who is incapacitated from signing by his own hand, is valid. Id. Signer may withdraw his name after petition is filed upon proof that his signaturs was obtained through fraud or misrepresentation. Id. Burden of proving fraud or misrepresentation rests upon party asking for withdrawal of his name. In re Petition to Prohibit Sale of Intoxicating Liquors in Residence Dist., 11 Ohio C. C. (N. S.) 351; In re Petition, to Prohibit Sale of Intoxicating Liquors, 6 Ohio N. P. (N. S.) 251. Fraud and misrepresentation cannot be predicated upon claim that petition was not read to signer, or that he did not understand its contents, and signer has no right to rely upon statements of others as to purpose of petition or territory embraced, since both are required to be set out therein. In re Petition, to Prohibit Sale of Intoxicating Liquors, 6 Ohio N. P. (N. S.) 251. Questions to be determined by court upon hearing of such petition are: That territory described is residence district; that petition is correct in form; that signers are qualified electors of territory described; that number of qualified electors of described territory, who have signed such petition, equal a majority in number of electors in such residence district who voted at last general election; that signatures to such petition are genuine. In re Petition to Prohibit Sale of Intoxicating Liquors, 6 Ohio N. P. (N. S.) 251. Burden of proving facts alleged in petition is upon petitioners. In re Petition to Prohibit Sale of Intoxicating Liquors in Residence Dist., 11 Ohio C. C. (N. S.) 351. Petition cannot be taken as prima facie evidence of facts necessary to decide upon its sufficiency, except in absence of request on part of any elector to be heard. Id. Is prejudicial error to deny the ordinary process of court where request is made therefor in good faith and within reasonable bounds. In re Jones Law, 11 Ohio C. C. (N. S.) 33.

87. Since local option law was proposed by initiative petitions, held that it was unnecessary to its validity that it be submitted to governor for his approval or rejection before it could become operative. Const. art. 4, § 1, as amended. State v. Kline [Or.] 93 P 237.

**Constitutionality of local option laws in general:** For constitutionality of particular provisions, see sections dealing with matters to which they relate. Rev. St. 1899, c. 22, art. 3; Ann. St. 1906, pp. 1733-1740, is constitutional. State v. Harp, 210 Mo. 254, 109 SW 578. Act March 21, 1907, 24 Del. Laws, p. 135, c. 65, held not in conflict with any provision of federal constitution. State v. Fountain [Del.] 69 A 926. Laws 1907, p. 297, held not to violate Fed. Const. Amend. 14, in that it varies punishment for selling liquors in different localities by providing severer punishment for second offense, while dramshop act does not, since offenses specified by the two acts are not identical. People v. McBride, 234 Ill. 146, 84 NE 865. This held true though one accused of selling in anti-saloon territory may take change of venue to saloon territory, since change would have no effect on degree of punishment. Id. Rose local option law is not unconstitutional as denial of constitutional liberty in making it possible to prohibit liquor traffic within certain territory, or because act violates principle of inviolability of private property, or because it is general law without uniform operation, or in contravention of principle that no act shall "take effect" upon approval of any other authority than the general assembly. Gassman v. Kerns, 7 Ohio N. P. (N. S.) 626. Provision of Rev. St. 1901, tit. 43, for submission of question to popular vote, held **not delegation of legislative powers.** Thalheimer v. Maricopa County Sup'rs [Ariz.] 94 P 1129. Fact that statute fixes no date for election and provides for no action under it until petitions filed with board of supervisors (Id.), and that it provides that board of supervisors shall canvass votes and if sufficient number are in favor of prohibition, make order prohibiting sale of intoxicants within prescribed limits, held not to make statute void as delegation of legislative power (Id.). Act March 21, 1907, 24 Del. Laws, p. 135, c. 65, §§ 11, 12, held not unconstitutional as delegating legislative powers to voters in each district on theory that penalties and processes thereby provided are enforcible only if majority of electors in any district vote against license, question submitted being simply license or no license, and vote against license being merely contingency upon happening of which legislature provided penalties should become operative. State v. Fountain [Del.] 69 A 926. Laws 1907, p. 297, establishing local option, held not unconstitutional as delegation of legislative functions because it only goes into effect in particular localities as result of submitting it to popular vote. People v. McBride, 234 Ill. 146, 84 NE 865. Local option law held not invalid as delegation of legislative power but that it merely confers authority on people of county to determine whether law already passed shall be applicable to such county, duty of county court under § 10 (Laws 1905, p. 47) to make order absolutely prohibiting sale being merely tantamount to proclamation of consequences following canvass of votes. State v. Kline [Or.] 93 P 237. Laws 1907, p. 297, held not in conflict with constitutional provision prohibiting **special laws** in certain enumerated cases, and in all other cases where general law can be made applicable because it can only be put in operation in particular localities as result of popular vote, whether general law can be made applicable in any particular case being question for legislature and not for courts. People v. McBride, 234 Ill. 146, 84 NE 866. Act March 21, 1907, 24 Del. Laws, p. 135, c. 65, held not in conflict with Const. art. 2, § 16, forbidding more than one subject to be embraced in act or its **title,** provisions for submission of question of license or no license to vote and provi-

subdivisions within which an election may be ordered are fixed by statute.[88] Whether prohibition adopted by a county extends to municipalities embraced therein depends on the statutory provisions on the subject.[89] The adoption of prohibition by a county generally precludes minor subdivisions thereof which participated in the election from again voting upon the matter during the time limited in the statute, even though they had a right to vote separately on the question at or prior to said election,[90] though a contrary rule often prevails where the election is in favor of the sale of liquor.[91] In some states adoption of prohibition by a minor political subdivision does not preclude a resubmission of the question in the whole of the major subdivision in which it is situated.[92] The result of the election generally ap-

sions for penalties intended to enforce prohibition in districts voting for no license being connected with each other and germane to primary objects of statute. State v. Fountain [Del.] 69 A 926. Laws 1907, p. 297, held not in conflict with Const. art. 4, § 13, providing that no act shall embrace more than one subject, which shall be expressed in its title. People v. McBride, 234 Ill. 146, 84 NE 865. Act held not unconstitutional because of definitions of intoxicants therein contained. Id. Title of act held not misleading in that it apparently provides for abolishing anti-saloon territory by same means by which it was created, while in some cities because of changes in precincts or districts voters can never again vote on question, since no such change could render resubmission to voters of same territory impossible. Id. Nor is title misleading in that it uses words "popular vote," while act provides that majority of legal voters voting upon proposition shall govern, an election at which every elector is entitled to vote being an election by popular vote. Id. Laws 1907, p. 297, providing for local option, held not in conflict with Const. art. 4, § 13, prohibiting **ameadment** or revival of laws by reference to title only, since it does not and does not purport to amend or revise any law, though it adopts law as to other elections and prescribes special regulations for elections under act, and though it adds certain conditions to existing laws under which druggists are allowed to sell in anti-saloon territory. Id.

**88.** Const. art. 5, § 18, art. 16, § 20, as amended, Rev. St. 1895, arts. 1532, 1533, Sayles' Ann. Civ. St. 1897, art. 3384, construed, and held that commissioners' precinct is political subdivision of county within meaning of constitution so that commissioners' court may order election therein. Cofield v. Britton [Tex. Civ. App.] 109 SW 493. Authority to order election held not affected or destroyed by fact that part of justice's precincts embraced in such commissioners' precinct were wet and part dry. Id. Where contestants claimed that election was invalid because commissioners' precinct for which it was ordered divided a town, held that burden was on them to prove that town so divided was subsisting municipal corporation. Id. Court having ordered election in precinct subdividing town which had not elected officers for over 30 years, held that it would be presumed in support of their action that population of said town was over 200 and less than 5,000, and hence that its charter had become inoperative and void under Laws 1897, p. 159, c. 114; Sayles' Ann. Civ. St. 1897, art. 397. Id. Production of act incorporating town held not sufficient to sustain burden under circumstances. Id. County ordinance prohibiting granting of licenses in any precinct outside of municipal corporations if majority of electors vote against it, and providing for submission of question, held within power of board of supervisors to enact, and not to be delegation of legislative power. Denton v. Vann [Cal. App.] 97 P 675. Const. art. 11, § 11, held to confer power to make and enforce police regulations on county boards of supervisors. Id. City council held to have no authority under charter to pass ordinance providing for submission to voters of question whether sale of liquor should be allowed in city, though submitted merely for purpose of ascertaining desire of electors in regard to matter. Galindo v. Walter [Cal. App.] 96 P 505. Legislative power being conferred exclusively on city council, and there being no referendum provision in charter, power to determine whether licenses shall be issued cannot be delegated to people. Id.

**89.** Adoption of local option law by county as unit held to render sale of intoxicante unlawful in city situated therein which was operating under special charter, legislature not having attempted, in granting such charter, to exempt city from operation of local option law and having no power to do so in any event in view of Const. art. 16, § 20. Fox v. State, 53 Tex. Cr. App. 150, 109 SW 370.

**90.** Rev. St. 1899, §§ 3027, 3028, 3032, 3033, construed, and held that, where county voted in favor of prohibition, a town therein which then had less than 2,500 inhabitants, and voters of which participated in such election, could not within four years again vote on question independently of county, though in meantime its population had increased to more than 2,500. State v. Robinson, 129 Mo. App. 147, 108 SW 619; State v. Hickerson, 130 Mo. App. 47, 109 SW 108.

**91.** County election in favor of sale of liquor held not to bar local option election in magisterial district in said county for three years. Const. § 61, and St. 1903, § 2563, construed. Eggen v. Offutt, 32 Ky. L. R. 1350, 108 SW 333.

**92.** Fact that certain wards in parish had, at elections previously held, voted for prohibition, and that in accordance therewith prohibition was still in force therein, held not to preclude police jury from ordering election in whole parish, including such wards, result of parish election being binding on wards. Hagens v. Police Jury, 121 La. 634, 46 S 676.

plies in the particular political subdivision as it existed when the election was ordered though its boundaries are changed before it is actually held.[93] In case a new subdivision is carved out of an old one after the local option law has been adopted by the latter, the law ordinarily remains in force in both.[94] In some states in case of a change in boundaries after the adoption of prohibition, the result can be nullified only by a vote of the people living within the boundaries as they originally existed.[95]

The election must be conducted in the manner prescribed by law.[96] The order for the election[97] is generally made upon petition[98] signed by the required number of duly qualified petitions,[99] and filed with a designated court or tribunal. Provision is sometimes made for an appeal from an order rejecting such petition.[1]

**93.** Order of commissioners changing boundaries of justice's precinct after election had been ordered in such precinct, but before it had been held, held not to have invalidated election and that result of election embraced entire precinct as it existed at date of order of election. Const. art. 16, § 20. Hill v. Howth [Tex.] 111 SW 649; Id. [Tex. Civ. App.] 112 SW 707.

**94.** In absence of legislation inconsistent therewith, at least where no other territory differently affected is embraced in new district. Amerker v. Taylor [S. C.] 62 SE 7.

**95.** Commissioners' court has clear legal right after local option election has been held in a justice precinct to detach part of such precinct and add same to another precinct within the county, but in so doing it does not and cannot interfere with local option as adopted, and its action does not invalidate said election previously held, and it requires vote of people living within original bounds of precinct which put local option into effect to nullify same. Oxley v. Allen [Tex. Civ. App.] 107 SW 945. Election held for precinct as it existed after change in its boundaries held without authority of law and void, and to have in no way changed status of local option territory as it originally stood. Id. Election held void ab initio so that its invalidity could be determined in a collateral proceeding and a contest was not necessary for that purpose. Id. Subsequent election under order describing old territory of said precinct by metes and bounds as it originally existed held valid. Id.

**96.** Board of commissioners of elections for state and county officers may hold election under Act Feb. 16, 1907 (Acts 1907, p. 463), without participation of board of commissioners of election for congressmen, etc., two boards being entirely separate. State v. State Board of Canvassers, 79 S. C. 246, 60 SE 699. Laws enacted pursuant to Const. art. 19, § 2, for conducting elections, should conform to Id. § 1, providing that election shall be conducted in manner prescribed by law for conducting general elections. Metcalf Co. v. Orange County [Fla.] 47 S 363.

**97.** Order held not open to objection that it was made by probate court instead of probate judge, as required by law. Richter v. State [Ala.] 47 S 163. Order providing for submission of question whether or not sale of intoxicating liquors should be prohibited in county in accordance with provisions of local option law held substantial compliance with Rev. St. 1899, § 3027, providing for submission of question whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold in county. State v. Kellogg [Mo. App.] 113 SW 660. Order held not defective because submitting question "whether" sale should be prohibited instead of "whether or not." Wade v. State, 53 Tex. Cr. App. 184, 109 SW 191; Id., 53 Tex. Cr. App. 299, 109 SW 192; Id., 52 Tex. Cr. App. 608, 108 SW 376.

**98.** Petition not required to be on one piece of paper but may consist of several pieces of paper identical in wording and signed by different persons, making in aggregate the number required. Richter v. State [Ala.] 47 S 163. Petitioners **may withdraw petition** at any time before order for election is made, and by so doing divest county court of jurisdiction over subject-matter. State v. Kellogg [Mo. App.] 113 SW 660.

**99.** Words "the qualified electors at the last preceding municipal election," contained in Rev. St. §§ 4364-20e, construed in connection with preceding words contained in same section, mean "qualified electors who voted at the last preceding municipal election." Seesholtz v. Johnstown, 6 Ohio N. P. (N. S.) 187. So much of Gen. Laws 1896, c. 102, § 4, as provides that no vote shall be taken unless specified per cent of qualified electors shall petition city or town clerk therefor, that clerk shall upon such petition insert proposition providing for taking of vote in warrant calling town, ward, or district meetings, and shall file with secretary of state certificate that question is to be submitted, held void for uncertainty in failing to establish basis of computation of number of names required to make valid petition and as failing to fix method for ascertaining that signers are qualified electors. Ruhland v. Waterman [R. I.] 71 A 1. Invalidity of such provision held not to affect validity of balance of section providing for submission of question to voters and effect of vote, the remaining provisions forming in themselves a clear, complete and intelligible statute. Ruhland v. Waterman [R. I.] 71 A 1; Id. [R. I.] 71 A 450. Question should be placed on ballots in accordance with Gen. Laws 1896, c. 11, § 22, as amended by Pub. Laws 1904-05, c. 1229, § 2. Ruhland v. Waterman [R. I.] 71 A 1.

**1.** Appeal to circuit court from order of county board of supervisors rejecting petition being authorized by Code 1906, § 80, held error to dismiss properly perfected appeal even though court was powerless to

The giving of notice of the election,[2] the time when the election is to be held,[3] the

render judgment ordering election to be held. Spencer v. Washington County [Miss.] 45 S 863.

2. Invalidity of provisions of Gen. Laws 1896, c. 102, § 4, as to petition and notice, held not to render whole act void on theory that it contains only method for notifying electors that vote will be taken on question, since Gen. Laws 1896, c. 37, § 8, requires town clerk to give notice of town meeting and of business to be transacted therein, and since, under Id. c. 26, § 8, words "town clerk" include city clerk. Ruhland v. Waterman [R. I.] 71 A 1. In any event omission of provision for notice would not be fatal, since, legislature having directed vote on question to be taken at each election of general officers, it becomes duty of town and city clerks to give notice thereof in warrants calling meetings for that purpose. Id. Question of validity of provision of Laws 1907, p. 297, that failure to give notice shall not invalidate vote, held not involved on review of conviction for selling liquor in anti-saloon territory, since it could only arise on failure to give prescribed notice, and its solution might depend on facts of particular case, and since invalidity of such provision would not affect whole act. People v. McBride, 234 Ill. 146, 84 NE 865.

**Form and contents of notice:** Certified copy of order of court ordering election is proper notice to be published. State v. Brown, 130 Mo. App. 214, 109 SW 99. In view of Rev. St. 1899, § 3027, providing that election shall be conducted, etc., in accordance with laws governing election of county officers, and Id. § 6991, providing when polls shall be open at general elections, held that notice stating that election would be conducted in accordance with laws governing elections for county officers was sufficient, though it did not state hours during which polls would be open. State v. Bassett [Mo. App.] 112 SW 764. Notice held to sufficiently state date on which election was to be held. Id Notice merely containing questions themselves without setting forth fact that they would be voted on, or making any reference to election, held insufficient under Laws 1896, c. 112, § 16. In re Foster, 57 Misc. 676, 108 NYS 788.

**Posting and publication of notice and proof thereof:** Fact that no notices were posted in one precinct and less than required number in another, and that some of those posted were not posted for required number of days, held to invalidate election, provisions of Laws 1905, p. 41, c. 2, in this regard being mandatory. Guernsey v. McHaley [Or.] 98 P 158. Under Rev. St. 1899, § 3029, county court is required to direct in what newspaper notice shall be published, if there is more than one in county. State v. Kellogg [Mo. App.] 113 SW 660. Fact that order attempted to delegate selection of paper to clerk held harmless where he caused notice to be published in all papers published in county. Id. Rev. St. 1899, § 3029, providing that notice shall be published for four consecutive weeks, and that last insertion shall be within 10 days next before such election, held to require 28 days' notice of election to be computed by excluding first day of notice and including day of election, so that insertion for four consecutive weeks was sufficient where 29 days intervened between first publication and day of election and last publication was 8 days before election. State v. Brown, 130 Mo. App. 214, 109 SW 99. Since statute makes no provision for any form of proof of publication being made to county court and entered of record, entry of fact of publication is not essential. State v. Oliphant, 128 Mo. App. 252, 107 SW 32. Where record of county court shows that notice was ordered to be published in prescribed manner, will be presumed on prosecution for violation of law that it was published as ordered, in absence of showing by defendant to contrary. Id. Proof of publication may be made by oral testimony of publisher to that effect or by any other competent proof. State v. Swearingen, 128 Mo. App. 605, 107 SW 1. Held proper to allow state to establish proper publication by oral evidence of publisher, though latter had previously filed affidavit showing insufficient publication, affidavit not being conclusive because not required by statute. Id.

3. Acts 1907, p. 200, providing that election shall not be held within 30 days from time it is ordered, held not to require that 30 entire days should elapse, so that act was complied with where election was ordered Nov. 9 and held Dec. 9. Richter v. State [Ala.] 47 S 163. That only 32 days intervened between date when election was ordered and date of election held not to render election void, matter being largely in discretion of police jury in absence of statute fixing time. Hagens v. Police Jury, 121 La. 634, 46 S 676. Provisions of Rev. St. 1899, § 3027, are mandatory and election held on day more than 40 days after receipt of petition by county court is void. State v. Kellogg [Mo. App.] 113 SW 660. Since petitioners may withdraw petition at any time before election is ordered, and since they do not thereby disqualify themselves from again becoming petitioners, and may by consent again use same petition as that before presented, held that such a second filing after withdrawal was new petition and election within 40 days from second filing was in time. Id. Provisions of county local option act that election shall be held "in not less" than twenty days from presentation of petition does not create exception to provision of Rev. St. § 4951, that time within which act shall be done is to be computed by excluding first and including last day. Perry County v. Tracy, 7 Ohio N. P. (N. S.) 619. Question of license can only be voted on at annual town meeting, and hence license commissioners appointed pursuant to vote in favor of license at special town meeting were not entitled to office. Pub. St. 1906, §§ 3418, 3419, 5104, Acts 1902, p. 94, No. 90, § 2 construed. State v. Sargent [Vt.] 69 A 825. Where constitution gives legislature general discretionary power to submit question of license or no license to vote of people, and does not require that it be submitted at **general election** or prohibit its submission at **special election,** statute providing for submission at special election is valid. State v.

number of election judges,[4] and their qualifications,[5] the qualifications of voters,[6] the form of the ballots,[7] and the method of counting the same,[8] and of declaring[9] and publishing[10] the result, are regulated entirely by statute and vary in the dif-

Fountain [Del.] 69 A 926. Const. art. 13, § 1, construed, and held to authorize legislature to submit question of license or no license to be voted on at such election and time as they shall deem proper, and to further provide that if at any time majority of members of each house from any district shall request such submission, legislature must comply with such request and submit such question to be voted on at general election. Id. Each sentence of section is complete and independent provision in no way limiting other one, and fact that in proceedings of constitutional convention only general election was referred to raised no inference, under maxim "Expressio unius exclusio alterius" that convention intended mode of procedure in one case to limit grant of power contained in other, maxim having no application in such case. Id. Nor is it a condition precedent to submission of question that majority of members of general assembly in each house from each district in which such question is to be submitted request such submission. Id. Hence Act March 21, 1907, 24 Del. Laws, p. 135, c. 65, is not unconstitutional because providing that vote shall be taken at special election, nor because there was no request by majority of members from each district for its submission. Id.

4. See, also, Elections, 11 C. L. 1169. Fact that only four judges were appointed for each precinct instead of six, as required by Rev. St. 1899, §§ 3027, 6996, 7101, held not to invalidate election, in absence of showing of fraud or misconduct in election, statutes being directory only. State v. Swearingen, 128 Mo. App. 605, 107 SW 1.

5. See, also, Elections, 11 C. L. 1169. Statute requiring election judges to take prescribed oath held directory only, so that fact that it did not appear that in some precincts judge who administered oath to other judges was himself sworn did not invalidate election. State v. Swearingen, 128 Mo. App. 605, 107 SW 1.

6. See, also, Elections, 11 C. L. 1169. Persons not duly registered according to law are not qualified electors. Gen. St. 1906, § 170. Metcalf Co. v. Orange County [Fla.] 47 S 363. Payment of poll tax lawfully assessable and due held prerequisite to voting and to qualification of elector. Id.

7. In view of Const. art. 19, § 1, requiring election to be conducted in manner prescribed for conducting general elections, if Gen. St. 1906, § 1214, contemplates use of two distinct ballots, one with "For selling" and other with "Against selling" printed thereon, is invalid. Metcalf Co. v. Orange County [Fla.] 47 S 363. Ballot with quoted words above separate lines on one side of single ballot, with appropriate directions on ballot for its use, held not illegal, or vague, indefinite and misleading. Id. Form prescribed by Laws 1907, p. 297, held not deceptive or misleading. People v. McBride, 234 Ill. 146, 84 NE 865. Ballots held not even in substantial conformity to Laws 1896, p. 57, c. 112, § 16, requiring questions to be submitted to be printed in full on face of ballot. In re Gibson, 108 NYS 485. Election held valid where ballots stated question to be voted for and directed voters in favor of sale to mark word "yes" with a cross and those opposed to mark word "no" with cross as required by Rev. Pol. Code, § 2856, as amended by Laws 1903, c. 166, p. 191, though such words were not preceded by squares in which elector could place cross to indicate his vote as required by § 1911, relating to proposed constitutional amendments. State v. Harris [S. D.] 115 NW 533.

8. On contest of election, testimony as to what occurred in commissioners' court relative to canvass of returns of previous illegal election held inadmissible, it being clearly immaterial. Oxley v. Allen [Tex. Civ. App.] 107 SW 945. Acts of local option inspectors in rejecting ballots as defective and in canvassing results of election held ministerial rather than quasi judicial, and hence not reviewable on certiorari. State v. Sundquist [Wis.] 118 NW 836.

9. Rev. St. 1899, §§ 7007, 3027, construed, and held proper to admit in evidence tabulated statement of vote signed and certified by county clerk and signed by two judges of county court as witnesses, and to permit clerk to testify orally that he called such judges to his assistance and that they, together with him, examined and cast up vote, though statement did not recite such fact, statute not requiring that it should. State v. Swearingen, 128 Mo. App. 605, 107 SW 1. Is essential that commissioners' court shall declare result of election before election becomes effective. Holloway v. State, 53 Tex. Cr. App. 246, 110 SW 745. Even if Sayles' Rev. Civ. St. 1897, art. 1748, providing that all election returns and ballots shall be held by county clerk for one year and then destroyed if no contest has been instituted, applies to local option elections, it is not statute of repose and does not preclude commissioners' court from declaring result of election more than year after it is held. Oxley v. Allen [Tex. Civ. App.] 107 SW 945.

10. Provision of Acts 1907, p. 203, § 8, requiring copy of report of election to be posted at court house door, held directory only, so that noncompliance therewith did not prevent law from going into effect. Richter v. State [Ala.] 47 S 163. Order of commissioners' court declaring result of election and prohibiting sale of intoxicants need not provide or require that newspaper in which same is to be published shall be selected by county judge, law requiring him to make such selection independent of any such selection or order. Rev. St. 1895, art. 3391. Johnson v. State, 52 Tex. Cr. App. 624, 108 SW 683. Rev. St. 1895, art. 3391, providing that order shall be published for four successive weeks, held not to require publication each day for 28 days but that publication in four successive issues of weekly newspaper was sufficient, last publication contemplating and covering week in which it occurred. Williams v. State, 53 Tex. Cr. App. 156, 109 SW 189. Fact that county judge certified that notice was published

ferent states. The number of votes necessary,[11] and whether a majority vote in favor of license is essential to the granting of licenses, or whether licenses may be granted unless a majority vote against it,[12] depend on the terms of the statute. An election is proved by the records relating thereto.[13] Unless the result of an election is changed or rendered doubtful, it will not be set aside on account of mere irregularities or illegalities.[14]

four weeks on date of last publication held not to vitiate certificate which was otherwise regular. Id. Though four publications is sufficient compliance with law, one cannot be prosecuted for sale within given territory until after 28 days from time of first publication. Byrd v. State, 53 Tex. Cr. App. 507, 111 SW 149; Green v. State, 53 Tex. Cr. App. 466, 110 SW 919. Where result was properly published, held that subsequent republication did not add to or detract from regularity of proceedings putting law into operation. Beaty v. State, 53 Tex. Cr. App. 432, 110 SW 449.

**Proof of publication:** Since statute makes no provision for any form of proof of publication of notice of result being made to county court and entered of record, held not essential to validity of proceedings that fact of publication be entered of record. State v. Oliphant, 128 Mo. App. 252, 107 SW 32. Where record of county court shows that notice was ordered to be published in prescribed manner, it will be presumed, on prosecution for violating law, that it was published as ordered in absence of contrary showing, burden of showing contrary being on defendant. Id. Certified copy of entry by county judge on minutes of commissioners' court of fact of publication is prima facie evidence of due publication. Rev. Civ. St. 1895, art. 3391. Coleman v. State [Tex. Cr. App.] 112 SW 1072. Is immaterial whether judge writes entry of order himself or causes same to be transcribed by another. Id. Entry, which was made at proper time and in proper book, was entirely in handwriting of county clerk, including name of judge signed thereto. It appeared on page 131 of minutes. On page 132 appeared certificate of judge, signed by him, reciting that preceding six pages of minutes had been read over in open court and that same were approved. Held that in view of lapse of time, and absence of showing by then judge or clerk that entry was not made by consent and under authority of judge, it would be considered that it was and that same was sufficient. Id. Where county judge signed minutes, held that entry was valid though in handwriting of county clerk. Coleman v. State, 53 Tex. Cr. App. 578, 111 SW 1011. Failure of judge to make entry held not to invalidate election. Beaty v. State, 53 Tex. Cr. App. 432, 110 SW 449. Where it appears that no such entry has been made, fact of publication may be proved by other evidence. Id. Entry that publication was made in specified newspaper "for the time and in the manner required by law" held sufficient, though it did not give dates of publication or specifically show publication for four successive weeks. Byrd v. State, 53 Tex. Cr. App. 507, 111 SW 149. Though it did not in terms state that publication had been made for four consecutive weeks. Harryman v. State, 53 Tex. Cr. App. 474, 110 SW 926. Held not necessary to mention different dates of publication. Rhone v. State, 53 Tex. Cr. App. 478, 110 SW 928. Certification that such publication was made held, in absence of anything to contrary, sufficient proof that same was made in newspaper selected by judge and under his direction. Johnson v. State, 52 Tex. Cr. App. 624, 108 SW 683.

**11.** Under Rev. Pol. Code, § 2856, as amended by Laws 1902, p. 191, c. 166, where proposition is submitted at an annual election, in order to carry it must have majority of highest number of votes cast at the election, majority of those cast on proposition itself being insufficient. State v. Stakke [S. D.] 117 NW 129; Id. [S. D.] 118 NW 703.

**12.** Rev. Pol. Code, § 2837, as amended by Laws 1905, c. 124, providing that no license shall be granted in any township, town or city, where majority of electors thereof have not voted in favor of granting license, and repealing all acts and parts of acts in conflict therewith, held to repeal § 2856, as amended by Laws 1903, c. 166, in so far as they provide that if majority of voters vote against sale no license shall be granted, and to clearly require majority vote in favor of license before license can be granted. State v. Stakke [S. D.] 118 NW 703, afg. on rehearing [S. D.] 117 NW 129.

**13.** Under Laws 1905, p. 47, § 10, making order of county court declaring result prima facie evidence that law has been complied with in giving notice of and holding election, and counting votes and declaring result, such order is admissible on criminal prosecution for violation of local option law without first introducing petition for election, notices, etc., and burden is on defendant to establish irregularity of initiatory steps on which order is based. State v. Kline [Or.] 93 P 237. Imposing such burden on defendant held not violation of his vested rights. Id. On prosecution for violation of local option law, where order of commissioners' court declaring result and prohibiting sale of liquors, and certificate of county judge that same had been published, were admitted without objection, held proper to instruct that local option was in force in county. Rev. St. 1895, art. 3391. Johnson v. State, 52 Tex. Cr. App. 624, 108 SW 683. Orders and decrees of commissioners' court ordering election and publication of result held admissible. Fields v. State, 52 Tex. Cr. App. 451, 107 SW 857. Held not error to permit reading in evidence of orders of commissioners' court not pertaining to law in question, they being part and parcel of minutes of court. Coleman v. State, 53 Tex. Cr. App. 578, 111 SW 1011.

**14.** Permitting persons to vote whose names did not appear on precinct books, etc. State v. State Board of Canvassers, 79 S. C. 246, 60 SE 699.

Local option, when put into effect, suspends the operation of the general license law,[15] and ordinarily stands as the law until otherwise determined by a subsequent valid election.[16] Provision is generally made for resubmission of the question after the expiration of a certain period,[17] and sometimes in case of an improper submission.[18]

As a general rule, in the absence of a statutory provision to the contrary, the courts have no jurisdiction of an election contest based on the manner of conducting such election,[19] though they may inquire into the power to order the election and whether the same has been properly exercised.[20] Statutes usually provide for such contests, however,[21] and the method so provided is exclusive.[22] There is a conflict

15. License to sell in county held no defense to prosecution for selling contrary to law after taking effect of general prohibition law in said county. Richter v. State [Ala.] 47 S 163. Provision of Laws 1907, p. 297, that during time any territory is anti-saloon territory operation of ordinances relating to sales of liquor and licenses therein shall be suspended so far as inconsistent with the act, held not in conflict with any constitutional provision. People v. McBride, 234 Ill. 146, 84 NE 865.

**Time of going into effect:** Power of legislature to pass local option laws carries with it power to fix time when licenses shall cease in towns voting against granting of licenses and to change such dates. People v. Bashford, 128 App. Div. 351, 112 NYS 502. Change in such dates does not violate constitutional provision prohibiting passing of laws impairing contract obligations, since liquor tax laws are enacted under police power. Id. Where town voted against sale of liquor in Nov. 1907, held that prohibition became effective May 1, 1908, at beginning of excise year as fixed by Laws 1896, c. 112, notwithstanding adoption of Laws 1908, c. 144, which became effective April 21, 1908, making excise year begin Oct. 1 instead of May 1, that statute not being retroactive in effect. People v. Moore, 112 NYS 475.

**Contra:** Held that status as it existed in November, when vote was taken, did not change until Oct. 1, 1908, and that town continued to be license town until latter date, and one who was entitled to and had certificate prior to May 1, 1908, was entitled to one from that date until Oct. 1, 1908. People v. Bashford, 128 App. Div. 351, 112 NYS 502.

16. Fact that there had been prohibition election held subsequent to one under which defendant was prosecuted, which also resulted in favor of prohibition, held not to have invalidated or set aside such former election or to prevent conviction under information charging violation of law put in force by first election. Wade v. State, 52 Tex. Cr. App. 608, 108 SW 376; Tippitt v. State, 53 Tex. Cr. App. 302, 109 SW 161. Subsequent election does not nullify former one. Wade v. State, 53 Tex. Cr. App. 184, 109 SW 191. May be prosecuted under first one. Wade v. State, 53 Tex. Cr. App. 299, 109 SW 192; Johnson v. State, 53 Tex. Cr. App. 339, 109 SW 936; Massie v. State, 52 Tex. Cr. App. 548, 107 SW 846. Where two valid elections, one held in 1901 and other in 1904, both resulted in favor of prohibition, held that prosecution could be based on either, and hence that there was no variance between complaint and information based on election of 1901 and orders for publication of results of both elections. Hood v. State, 52 Tex. Cr. App. 524, 107 SW 848.

17. Law when adopted must continue in force for two years, and until set aside by vote to that effect. Killman v. State, 53 Tex. Cr. App. 570, 112 SW 92. Election ordered within less than two years after last preceding valid one held invalid. Oxley v. Allen [Tex. Civ. App.] 107 SW 945.

18. Laws 1900, p. 853, c. 367, § 16, providing for resubmission in case four propositions "have not been properly submitted," construed, and held that submission is not complete until vote has been canvassed and result ascertained, and hence quoted words include counting and certifying vote and declaring result. In re Clancy, 58 Misc. 258, 109 NYS 644. Statute held to give court reasonable discretion in determining application for resubmission. Id. Application should be denied when court can see that true result has been ascertained and declared, and that there is no reasonable ground to apprehend that irregularities changed result. Application denied. Id.

19. Are without jurisdiction ratione materiae. Darbonne v. Oberlin, 121 La. 641, 46 S 679; Hagens v. Police Jury, 121 La. 634, 46 S 676.

20. Power of police jury. Hagens v. Police Jury, 121 La. 634, 46 S 676.

21. **Time of instituting contest:** Under Laws 1907, p. 447, c. 8, providing that elections theretofore had must be contested within 60 days after taking effect of act, held that, where prosecution of defendant for violation of local option law was commenced after expiration of that time, he could not attack election for mere irregularities. Hardy v. State, 52 Tex. Cr. App. 420, 107 SW 547. Defendant cannot attack election where court convened and he was tried more than 60 days after act took effect. Wilson v. State [Tex. Cr. App.] 107 SW 818. Act held not to apply where local option law which defendant was alleged to have violated was adopted in county in 1903, and defendant was tried one month before act of 1907 went into effect. Starnes v. State, 52 Tex. Cr. App. 403, 107 SW 550. Accused held not entitled to raise objections to orders of commissioners' court where record showed that there had been no civil contest of election. Alexander v. State, 53 Tex. Cr. App. 504, 111 SW 145.

**Matters which may be considered:** Contest under Rev. St. 1895, art. 3397, as amended, is special proceeding, and courts are limited

of authority as to whether injunction will lie at the instance of interested parties to prevent the enforcement of the law on the ground of the invalidity of the election or the act under which it is held.[23] Private citizens who are members of an organization having for its object the enforcement of the law are not proper parties to such a suit.[24]

§ 3. *Licenses and license taxes. Authority to license or tax, and application of license laws.*[See 10 C. L. 425]—In the absence of a constitutional provision to the contrary, the legislature has authority, in the exercise of the police power, to license the business of selling intoxicants and to tax those engaged in it.[25] The authority

in their investigation to matters therein specified. Cofield v. Britton [Tex. Civ. App.] 109 SW 493. Under Rev. St. 1895, art. 3397, as amended by Gen. Laws 1907, p. 447, c. 8, court has power to try and determine all matters connected with election, including petition, orders putting local option into effect, etc. Id.

**Form of proceeding:** Proceedings to test legality and regularity of elections are under the statute by bill in equity filed for that purpose. Metcalf Co. v. Orange County [Fla.] 47 S 363.

**Parties:** Responsibility of defending in probate court validity of election, held under Rose county local option law (99 O. L. 35), rests upon county in which the election was held, and it is the duty of county to appear by its attorney for single purpose of making defense, and without regard as to whether result of election was for or against local option, but an elector may appear personally or by counsel at same time and take part in defense. Perry County v. Tracy, 7 Ohio N. P. (N. S.) 619.

**Pleading:** Facts relied upon by contestant to impeach validity of election should be set forth specifically and definitely. Oxley v. Allen [Tex. Civ. App.] 107 SW 945. Allegation that election was illegal because polls were closed at 6 o'clock instead of 7, as required by law, thereby depriving a large number of voters of the privilege of voting, which would have changed result and rendered same doubtful, held insufficient for failing to allege number and names of persons claimed to have been deprived of right to vote, or any excuse for such failure, or that result would have been materially changed had they voted. Id. Striking out paragraph alleging that oath administered to election officers was illegal and not valid held proper, since it devolved upon contestant to allege specifically the oath in fact taken and to show that same was different from that required by law. Id. Allegations in bill in equity that certain named persons were allowed to vote when they were not qualified voters and had not paid their poll taxes, though poll tax was due from them as condition precedent to right to vote, held, when taken in connection with other allegations to which they related, to be sufficient as against demurrer that facts were not set up to show that such persons were not entitled to vote. Metcalf Co. v. Orange County [Fla.] 47 S 363. Bill held, as against such demurrer, to sufficiently allege that tax was lawfully assessable against such persons. Id. Allegations that certain named persons were duly registered voters, but were illegally not allowed to vote because they had not paid their poll taxes when none were due by them, held insufficient to show illegal action in absence of allegation that certificate required by statute was produced to precinct inspectors, showing that no poll tax was due by such persons because they were over age. Id. Allegations that county commissioners wrongfully rejected and refused to count vote as legally polled in given precinct should be supported by allegations of facts to show a wrongful act, causing opposite results. Id.

**Review:** Where such course becomes necessary, defense of election under Rose county local option law (99 O. L. 35) may be continued by county by prosecution of error to common pleas court under Rev. St. § 6708. Perry County v. Tracy, 7 Ohio N. P. (N. S.) 619.

**22.** Remedy provided by Gen. St. 1906, § 1216. State v. Martin [Fla.] 46 S 424. Where election has been officially declared to have resulted in favor of prohibition, regularity or validity thereof cannot be inquired into in mandamus proceeding, direct object of which is to compel issuance of license to relator, right to which is predicated on alleged invalidity of such election, but invalidity must first be established under § 1216 before mandamus may be resorted to to compel issuance of license. Id. Equity will not enjoin publication of order declaring result of election in favor of prohibition on ground of irregularities in such election, though it is alleged that claimants' individual rights as saloonkeepers will be jeopardized and destroyed by enforcement of law, remedy being by contest of the election. Merrill v. Savage [Tex. Civ. App.] 109 SW 408. Act 1905, p. 95, c. 69, held not to enlarge power of district court in this regard, but to curtail it by requiring applications for injunctions relating to local option elections to be made to judge in whose district territory to be affected is situated, with certain exceptions. Id.

**23.** Retail liquor dealers held entitled to sue to enjoin making order prohibiting sale on ground of invalidity of election. Guernsey v. McHaley [Or.] 98 P 158. Injunction will not lie to prevent enforcement of local option act, as an adequate remedy at law is afforded in a criminal prosecution under the act. Gassman v. Kerns, 7 Ohio N. P. (N. S.) 626.

**24.** Not proper parties defendant to suit to test constitutionality of law. Gassman v. Kerns, 7 Ohio N. P. (N. S.) 626.

**25.** Pub. St. 1901, c. 112, § 15, held, since enactment of Laws 1903, p. 81, c. 95, to have ceased to be absolute prohibitory law, but that two statutes taken together constitute license law with local option provisions, s

of municipalities in this regard depends on the terms of their charters and the general laws under which they operate.[26] A state license does not ordinarily authorize the holder to sell in violation of municipal ordinances or excuse him from obtaining a municipal license,[27] nor can a municipality license the sale of intoxicants in violation of a state prohibition statute.[28] Whether a particular business comes within the terms of the statute or ordinances is a question of construction.[29] Wholesale

that c. 95 was not unconstitutional because state could not prohibit and license sale at same time. State v. Roberts, 74 N. H. 476, 69 A 722. Said chapter held not in conflict with Const. art. 82, requiring legislature to inculcate principles of humanity, honesty, sobriety and sincerity among people, but to be valid exercise of police power. Id. Such provision of constitution does not require sale to be absolutely prohibited. Id. Defendants in action on bonds given to secure compliance with conditions on which licenses were issued held not entitled to contend that provisions of said chapter and other statutes relating to licensing were unconstitutional as delegation of legislative power to commissioners, where it did not appear that licenses issued to defendant belonged to any of classes of licenses specified in provisions attached, or that suits were based on breaches of any conditions imposed by commissioners under powers there conferred. Id. Code §§ 2247, 2248, when construed together, held to show intention to license and legalize liquor business to extent that so long as dealer observes prescribed conditions as to payment of mulct tax, etc., he is relieved from punishment and his property from condemnation as nuisance. Campbell v. Jackman [Iowa] 118 NW 755. License fee is not tax within meaning of constitution, but price paid for privilege of doing something which legislature has right to prohibit altogether, and statutes authorizing licensing and regulation of saloon business are police regulations and not revenue measures. Town of Gower v. Agee, 128 Mo. App. 427, 107 SW 999. Act May 13, 1887 (P. L. 108), authorizing granting of licenses for sale at retail, held not in conflict with preamble of federal constitution or Pa. Const. art. 1, § 2. Gregg's License, 36 Pa. Super. Ct. 633. Fact that city derived more or less revenue from ordinance held not to tend to prove that it was not adopted in exercise of police power though it might also be exercise of taxing power. Id. Act April 25, 1907 (P. L. 122), giving wholesale dealers rights and privileges of bottlers, applies only to dealers licensed after passage of the act. McMunigal v. Ingram, 35 Pa. Super. Ct. 573.

**26.** License is granted in pursuance of police power and not of taxing power, its primary purpose being regulation and not revenue. Claussen v. Luverne, 103 Minn. 491, 115 NW 643. State has constitutional power to impose tax on liquor dealers, wholesale or retail, and to declare who shall constitute such dealers, and such exaction, whether called license fee or tax, is excise of police power and not taxing power, its primary objection being regulation and not raising of revenue. Cooper v. Hot Springs [Ark.] 111 SW 997. City held to have power, under Kirby's Dig. § 5438, to tax wholesale dealers in malt liquors. Id. Ordinance imposing tax held not invalid for discrimination in that such dealere in other liquors were exempt from its operation. Id. Under Const. art. 229, general assembly may authorize municipalities to impose upon dealers in intoxicants license tax in excess of that imposed for state purposes, but whether municipality may impose license tax upon liquor dealers, or, if so, upon what conditions, depends upon its authority as derived from general assembly. Town of Houma v. Houma Lighting & Ice Mfg. Co., 121 La. 21, 46 S 42. Provisions of Act No. 171, p. 387, of 1898, whereby state makes special provision for levying collection of license taxes, control provisions of Act No. 136, p. 224, of 1898, and Act. No. 17, p. 24, of 1902, which are general statutes applying to municipal corporations. Id. Is nothing in Act No. 136, p. 224, of 1898, Act No. 17, p. 24, of 1902, or Act. No. 142, p. 313, of 1904, requiring that, as condition to exemption of municipality from parochial license taxation, particular purpose to which municipal license tax is to be devoted shall be stated in ordinance imposing it, that matter being left for subsequent determination upon condition that tax shall be used for one of the two purposes specified in said acts. Id. Provision of section of charter repealing inconsistent laws which saved existing rights, claims, etc., vested in or asserted against city, held to have no relation to license provisions of charter and not to have continued existing licenses. Williams v. State, 52 Tex. Cr. App. 371, 107 SW 1121. Ordinance imposing license tax on persons selling beer by barrel, half barrel, or quarter barrel, held valid exercise of police power even when applied to beer in original packages brought from another state, and to be within terms of Wilson act (28 Stat. 313, c. 728, Comp. St. 1901, p. 3177) making liquors on arrival in state subject to its laws enacted in exercise of police power. Phillips v. Mobile, 208 U. S. 472, 52 Law. Ed. 578, afg. 146 Ala. 158, 40 S 826.

**27.** Securing state license in compliance with Laws 1907, p. 258, c. 138, held not to authorize licensee to violate saloon limits of city in which he was engaged in business, or to render it unnecessary for him to procure city license. Williams v. State, 52 Tex. Cr. App. 371, 107 SW 1121.

**28.** Municipality held to have no authority to license sale or punish one for selling without license, power to license being forbidden by prohibition law and right to punish reserved by state. Burch v. Ocilla [Ga. App.] 62 SE 666. "Near beer" held neither ardent nor intoxicating. Id.

**29.** Cold storage warehouse used for storage of beer shipped in until same was sold and distributed to retailers in city held subject to mulct tax. In re Des Moines Union R. Co., 137 Iowa, 730, 115 NW 740. Brewing company manufacturing and selling beer at wholesale, which maintains cold storage house in location separate from its manu-

and retail businesses are generally required to be licensed separately.[30] In some states the license fee is graded according to the gross annual receipts of the business.[31]

*Procedure.*[See 10 C. L. 426]—The licensing authorities are generally vested with more or less discretion in the matter of exercising their licensing power,[32] though this is not always the case where the applicant has complied with the statutory requirements.[33] An applicant for a license must be duly qualified,[34] and the applica-

factory, and from which cold storage house daily deliveries of beer are made to customers on orders previously taken by a soliciting agent, thereby becomes trafficker in intoxicating liquors within meaning of Rev. St. § 4364-9, and is subject to the Dow Tax provided for by that act. Christ Diehl Brew. Co. v. Beck, 6 Ohio N. P. (N. S.) 361.

**30.** General provision of Act No. 171, of 1898, applies to liquor business and to municipal corporations, and hence municipal ordinance imposing one license upon liquor business, wholesale and retail, is unauthorized and void. Town of Houma v. Houma Lighting & Ice Mfg. Co., 121 La. 21, 46 S 42.

**31.** Of Act No. 171, p. 387 of 1908, held to apply as well to municipal as to state licenses. Town of Houma v. Houma Lighting & Ice Mfg. Co., 121 La. 21, 46 S 42.

**32.** License is not privilege or right that any person may have for asking, but rather in nature of a favor that may or may not be granted by those in authority. Schweirman v. Highland Park [Ky.] 113 SW 507. Statutes construed, and board of county commissioners held to have discretionary power to issue or refuse license for sale of liquor not to be drunk on premises, so that their action in refusing license could not be interfered with or controlled by supreme court by mandamus. West & Co. v. Board of Com'rs, 14 Idaho, 353, 94 P 445. Under statutes conferring power to regulate and ordinances of city of Pocatello, held that city council has some discretion in granting licenses and might refuse to grant license to disreputable characters whose conduct of liquor business would be dangerous to peace and quiet of city. Perkins v. Loux, 14 Idaho, 607, 95 P 694. Excise board has discretion in prohibiting operation of saloons in any locality where reasonable grounds exist for such action. Jugenheimer v. State Journal Co. [Neb.] 116 NW 964. May refuse to grant license at place near postoffice and federal court house, or at any other locality in near proximity to place which women and children, in large numbers, are daily required to visit for business or other proper purposes. Id. Order refusing application for distiller's license "after hearing and upon due consideration" will not be reversed on appeal though no remonstrance was filed and petition, certificate and bond were in due form, and no reason for refusal was expressed of record, presumption being, in absence of anything in record to contrary, that refusal was for legal reason and not arbitrary. Reynoldsville Distilling Co.'s License, 34 Pa. Super. Ct. 269. Doubts as to propriety of granting writ of mandamus to compel county court to issue license should be resolved against applicant. State v. Miller, 129 Mo. App. 390, 108 SW 603. Nov. 8 county ordered issuance of license, which order it revoked Dec. 11, at adjourned term, as having been issued prematurely and without authority. Petitioner's old license did not expire until Dec. 25, and he did not request clerk to issue license pursuant to order of Nov. 8 until Dec. 5, two days before holding of local option election which resulted in favor of prohibition. He obtained alternative writ of mandamus to compel issuance of license on Dec. 6, which was returnable Dec. 18, after result of election would be known. Held that circuit court properly refused to order issuance of license, obvious purpose of defendant being to evade result of election. Id.

**33.** Under Act Cong. March 3, 1893 (27 Stat. p. 563, c. 204), as amended by Act May 11, 1894 (28 Stat. p. 75, c. 73), excise board of District of Columbia has no authority to refuse application for renewal of barroom license for hotel containing 25 rooms for lodging guests because of reputation of premises or applicant as determined by board. Griffin v. U. S., 30 App. D. C. 291. Duty of board in premises being purely ministerial, mandamus will lie to compel its performance where applicant has otherwise complied with law. Id. Where applicant had fully complied with all statutory requirements, and had procured required two-thirds majority of qualified signers to his petition, held that under Rev. St. 1899, § 2993, it became duty of court to grant license and mandamus would issue to compel it to do so. State v. Turner, 210 Mo 77, 107 SW 1064. Statute is mandatory and county court has no discretion in the matter under such circumstances. Id. Under Laws 1896, c. 112, § 19, as amended by Laws 1897, c. 312, duties of treasurer with respect to issuance of certificates are purely ministerial, and, if application is correct in form and does not show on its face that applicant is prohibited from trafficking in liquor, he is bound to issue certificate. People v. Walker, 112 NYS 1021. If applicant furnishes required bond and is in readiness to pay required tax, only objections which will warrant refusal of certificate are such as appear on face of application. Id. Reference to consents previously filed held not to make them part of application so as to warrant treasurer in examining them to determine truthfulness of statements in application. Id. One applying for mandamus to compel county judge to issue license pursuant to Acts 30 Leg. p. 260, c. 138, § 10, must show existence of all facts essential to his right, and that there was no impediment to granting of license prayed for. Harrison v. Dickinson [Tex. Civ. App.] 113 SW 776. Where findings of county judge and pleadings in mandamus raised issue as to whether place for which license was sought was within local option territory, held that applicant was bound to show that it was not

tion must be made to the proper tribunal[35] and filed with the proper officer,[36] and must conform to the statutory requirements as to notice,[37] consent of property owners,[38] and payment of fees.[39] The applicant is sometimes entitled to a hearing.[40]

and that it was error to issue writ without first determining such issue in applicant's favor. Id.

**34. Character of applicant:** Is duty of licensing board to see to it that applicant is man of respectable character and standing, and they cannot indulge in presumption that such is the case when it is denied by remonstrance, even where no evidence to contrary is introduced, but applicant must prove such fact. In re Klamm [Neb.] 117 NW 991. When alleged respectable character of applicant is denied, it is duty of board to consider ignoble acts or crimes which evidence attributes to him, and to determine therefrom whether he is proper person to receive license. Bolton v. Hegner [Neb.] 118 NW 1096. Where uncontradicted evidence showed that during preceding year applicant had permitted petty gambling at place of business under his control, and on occasion had exhibited lascivious pictures, held that license should have been refused. Id. Where sole objection urged against character of applicant was that no man of respectable character would apply for license to retail intoxicants, and only evidence presented to council on that point was testimony of one witness who swore that applicant was man of good reputation and respectable character and standing, held that council properly determined that issue in favor of applicant. In re Phillips [Neb.] 116 NW 950. One who was frequently under influence of intoxicants and who during previous year had permitted gambling in his place of business held not man of respectable standing and character, within Cobbey's St. 1897, § 7150, and hence not entitled to license. Woods v. Garvey [Neb.] 118 NW 1114. Though sale in 1906 to habitual drunkard might not have disqualified vendor from receiving license in 1908, held that it was pertinent as tending to show that he was not of respectable character and standing. In re Powell [Neb.] 119 NW 9.

**Previous violations of liquor laws:** License refused for violation of screen law during preceding year. Woods v. Varley [Neb.] 118 NW 1114; Woods v. Kirvohlarek [Neb.] 118 NW 1115; Bolton v. Becker [Neb.] 119 NW 14. Where it appeared that during previous year applicant had, as agent of another, sold or furnished liquor to minor, held that application should have been denied. In re Phillips [Neb.] 118 NW 1098. In order to require board to refuse license to applicant, it is unnecessary for them to find that he has violated penal statute found within provisions of act relating to sales of intoxicants, but it is sufficient if evidence discloses that he has violated any of provisions of act, though penalty may not be imposed. In re Adamek [Neb.] 118 NW 109. Hence it is duty of board to refuse license to one who during past year while employed as bartender is shown to have sold intoxicants to an habitual drunkard. Id.

**Corporations:** Word "person" as used in Gen. St. 1902, title 16, includes corporations, and license may be granted to corporation. Connecticut Brew. Co. v. Murphy [Conn.] 70 A 450. Mere fact that § 2712 gives court discretionary power to punish one guilty of second violation of liquor laws by imprisonment held not to show contrary intent. Id. Under Hurd's Rev. St. 1905, c. 131, § 1, p. 1946, providing that word person or persons as well as all words referring to or importing persons may extend and be applied to corporations, license may be issued to corporation. People v. Heidelberg Garden Co., 234 Ill. 146, 84 NE 230, afg. 124 Ill. App. 331. Corporation may lawfully receive license to sell at wholesale but not at retail. In re Hastings Brew. Co. [Neb.] 119 NW 27. Laws 1907, p. 297, c. 82, Cobbey's St. 1907, § 7194, though not in terms authorizing corporation to sell at wholesale, recognizes by implication that such business does exist. Id. Such statute being in pari materia with Slocumb law, the two must be construed together as parts of connected whole. Id.

**35.** Fact that petition was addressed to city council instead of fire and police board, which was only body authorized to issue license under charter, held immaterial where board treated petition as though addressed to it. Slater v. Denver Fire & Police Board, 43 Colo. 225, 96 P 554. Act March 4, 1901 (Laws 1901, p. 13), having been added to and made part of act Feb. 6, 1891 (Laws 1891, p. 33), as amended by act Feb. 2, 1899 (Laws 1899, p. 21), held to have become part of said act, and there being nothing in said added section conferring authority to issue license, act of 1891 as amended vesting such authority in board of county commissioners governs. West & Co. v. Board of Com'rs of Latah County, 14 Idaho, 353, 94 P 445. Act of 1899 held not rendered unconstitutional or void by reason of fact that title provided for adding section to act of 1891, while body of act made no such provision. Id. Fact that act of 1899 amended act of 1891 without referring to amendment of 1895 held not to affect constitutionality of act of 1899, and same held true of acts of 1901 and 1907. Id.

**36.** Held that application would not be rejected because village clerk, with whom it was filed, removed from village, thereby making it inconvenient or impossible for public to see such application, it not appearing that such facts were prejudicial to remonstrators or other interested parties. In re Phelps [Neb.] 116 NW 681.

**37.** Notice of intention to apply for license describing proposed place of business by setting out ordinary description of town lot, describing precise part of said lot occupied by building in which applicant proposed to sell, and describing room as one fronting on particular street, held sufficient compliance with Burns' Ann. St. 1901, § 7278. Kunkel v. Abell [Ind.] 84 NE 503. Term "premises" as applied to occupation of realty embraces any definite portion of land, and building and appurtenant structures thereon, over which owner or occupant has right to and does exercise authority and control. Id.

**38.** Building which had been constantly used as barroom for years held not to have changed or lost its identity within meaning

A bond is often required,[41] which must be conditioned as required by law.[42] Ac-

of ordinance providing that in all cases where building has been continuously occupied as barroom, and has not changed its identity since such occupancy, it should not be necessary to obtain permit to establish barroom therein based on written application accompanied by consent of majority of property owners within 300 feet, by reason of its being rendered temporarily uninhabitable by fire while license was still outstanding, so that council had no right to revoke license on that ground. Graziano v. New Orleans, 121 La. 440, 46 S 566.

**Number of consents required:** Word "block" as used in charter provision requiring petition of owners of majority of realty within frontage of block in which liquors are to be sold held to mean square or portion of city inclosed by streets, and that part of such a tract could not be regarded as block though so designated by party platting it. Slater v. Denver Fire & Police Board, 43 Colo. 225, 96 P 554. Ordinance held to require owners of majority of realty within frontage of entire block on all streets inclosing it to sign petition. Id. Houses not ready for immediate occupancy held not exclusively dwellings occupied as such and hence not to be considered. In re Clement, 111 NYS 1073. Laws 1896, c. 112, § 17, subds. 5, 8, as amended by Laws 1900, c. 367, requiring statement of number of dwelling houses nearest entrances to which are within 200 feet of nearest entrance to proposed saloon, and consents of majority of owners thereof to be filed, held not complied with where applicant omitted residence within 200 feet of entrance to proposed saloon as it then was, though applicant proposed to and afterwards did change said entrance so that it was more than 200 feet from said dwelling. People v. Pettit, 113 NYS 243.

**Time of filing:** Rule of court providing that all additional petitions and remonstrances shall be filed on or before first day of term at which application is to be heard, and giving period of three weeks after filing of original application in which to circulate and file additional petitions, held not to deprive applicant or remonstrant of any statutory right and not to be invalid as an abridgement of such right or as unreasonable. Reznor Hotel Co.'s License, 34 Pa. Super. Ct. 525.

**Qualifications of signers:** Petition for mandamus to compel city council to issue license held demurrable where it failed to allege that signers of petition were property owners and tenants of property owners **residing in half block** where business was to be conducted, as required by ordinance. Perkins v. Lux, 14 Idaho, 607, 95 P 694. Under Comp. St. 1907, § 4245, freeholders required as signers of petition must be bona fide **freeholders** and not such as were made freeholders merely for purpose of enabling them to sign. In re Powell [Neb.] 119 NW 9. Persons to whom property is conveyed without consideration merely for purpose of enabling them to sign are incompetent. Id. Where remonstrators deny that petitioners are freeholders, applicant must prove by competent evidence that such is case. In re Klamm [Neb.] 117 NW 991. Cannot be proved by affidavits. Id. **Wife of applicant,** even though a freeholder, is not qualified petitioner. In re Powell [Neb.] 119 NW 9. Section 2 of Inns and Taverns Act (2 Gen. St. 1895, p. 1794), providing that signers of recommendation for license **shall not have recommended another application** in same township, city or borough for same year, held unaffected by P. L. 1902, p. 628, establishing excise departments in cities, or by creation of administrative tribunals contemplated thereby, and to be unrepealed and irrepealable by legislative acts of such bodies. Read v. Camden Board of Excise Com'rs [N. J. Law] 71 A 120.

**Authority to consent:** Consent signed by husband when his wife owned property held not to be counted. In re Clement, 111 NYS 1073. Consent signed and acknowledged by husband but not by his wife, who was joint owner of property, held of no effect. Id.

**39.** Statute does not prohibit licensing board from granting application before payment of fee, and it may, in absence of ordinance to contrary, order that license be issued upon payment of fee. In re Phelps [Neb.] 116 NW 681. If such condition is not made part of order, law imposes sams and will not permit issuance of license until fee is paid. Id.

**40.** Applicant who tendered application in conformity with ordinance and statutory bond held entitled to have them considered by council at early date and approved or disapproved, with reasons in case of disapproval. Cox v. Jackson City Common Council, 152 Mich. 630, 15 Det. Leg. N. 337, 116 NW 456. Though application was refused on insufficient grounds, held that court would not issue peremptory writ of mandamus to compel council to consider application where it was not probable that it would be necessary to secure performance by council of its duty in the premises, but that writ would issus in case of unreasonable delay in so doing. Id. Where witness testified before excise board to circumstances which, if true, would establish sales of liquor by applicant to minor during preceding year, held that board should either have required him to disclose name of minor or stricken out his testimony, and its refusal to do either was error. In re Klamm [Neb.] 117 NW 991. Court of quarter sessions denied application for wholesaler's license without such hearing as applicant was entitled to. Subsequently court revoked order and fixed time for hearing application, at which time applicant had full opportunity to be heard. Held that contention that court had no power to fix hearing by special order, and that only way in which error could be corrected was by granting license, was untenable and applicant could not complain of refusal of license for adequate legal reasons. Brezger's License, 34 Pa. Super. Ct. 469.

**41.** In absence of statutory authority therefor, county court has no **authority to exact bond** conditioned to observe law in conducting business as condition precedent to issuance of merchant's license to retail liquors in quantities not less than a quart, and not to be drunk on premises. Commonwealth v. Ledford, 33 Ky. L. R. 624, 110 SW 889. Statute requiring tavern keepers to give bond

tions on such bonds are treated in subsequent sections.[43] In some states no license may be granted over the remonstrance of a certain number of property owners[44] or voters[45] in the vicinity of the place where the business is proposed to be carried

held not to apply to merchants. Id. Bond so exacted held not voluntary bond and hence not good as common-law bond. Id.

**Execution of bond:** Under Sayles' Rev. St. 1897, art. 5060j, held that there could be no recovery on bond of dealer in county in which sale of intoxicants, except for medicinal purposes, was prohibited which had not been signed by principal at the time the acts alleged as breaches were committed by him. State v. Teague [Tex. Civ. App.] 111 SW 234. Suit being one to enforce penalty for breach of statutory bond, held that there could be no recovery therein on theory that bond was good common-law obligation. Id.

**Approval:** Where application properly sworn to was filed with county clerk, as was bond, and occupation tax receipt showed that same had been paid and evidence showed that principal was conducting saloon at place named during year for which tax was paid, held that failure of county judge to approve bond did not affect its validity in action thereon. Munoz v. Brassel [Tex. Civ. App.] 108 SW 417.

**Sureties:** Act No. 183, approved May 8, 1907, authorizing board of trustees of village of Perry to accept surety company bonds in lieu of bonds required of liquor dealers, held not to require acceptance of such bonds in lieu of those prescribed by Comp. Laws, § 5333, but to be permissive only, so that mandamus would not issue to compel acceptance of such a bond. Hicks v. Perry Trustees, 151 Mich. 88, 14 Det. Leg. N. 812, 114 NW 682. Corporation having power under its charter to engage in business of buying and selling liquors at wholesale and retail, etc., held to have implied power to become surety on retail dealer's bond, even though dealer was not one of its customers. Munoz v. Brassel [Tex. Civ. App.] 108 SW 417.

**Revocation or cancellation:** There being no provision in Code, § 2448, as to term for which bond is required to be given, held that evident purpose was to permit continuing bond which should not be subject to revocation during any year with reference to which it has taken effect. Fidelity & Deposit Co. v. Jenness [Iowa] 116 NW 709. Surety, by revoking bond prior to beginning of any year, and notifying officers required to see that proper bond is on file of such revocation, terminates his liability, and no formal cancellation by such officers is necessary for that purpose. Id. Acts 29th Gen. Assem. c. 54, p. 33, relating to bonds of public officers, etc., and providing that sureties may procure cancellation of their liability thereon by giving 30 days' written notice, etc., held not to apply to liquor dealer's bond given under Code, § 2448. Id. Held further that neither said act nor Code, § 1183, referred to therein, requires any affirmative action by approving officers in canceling bond after giving of required notice, but that notice and return of unearned premium ipso facto operates as cancellation after expiration of 30 days. Id. Provision of Code, §§ 1283-1286, held not incorporated into act by reference to § 1183. Id.

42. Bond failing to provide that vendor would not violate any provisions of Comp. St. 1907, c. 50, and defective in other particulars, held insufficient. In re Clyde [Neb.] 118 NW 90; In re Johnson [Neb.] 118 NW 91. Is error for license board to approve bond not conditioned as required by Comp. St. 1907, c. 50, and to issue license thereon over objections of remonstrators. Id. Where city council erroneously accepted bond and issued license, held that applicant could not, on appeal to district court, cure defect by filing amended bond and thereby validate action of board. Id. Objections to bond by remonstrators held sufficient in view of fact that bond conditioned as required by statute is jurisdictional and is for benefit of all persons who may sue thereon. In re Johnson [Neb.] 118 NW 91.

43. For actions by state or municipality, see § 5, post; for actions by individuals aggrieved by breach, see § 9, post.

44. For exercise of local option by remonstrance against granting of any licenses, see § 2, ante. Burden is on remonstrators to prove specific allegations charged in remonstrance as reasons why license should not be granted. In re Phelps [Neb.] 116 NW 681. Laws 1906, p. 100, c. 1355, § 2, providing that no license shall be granted where owners of greater part of land within 200 feet of building or place file objection, held not unconstitutional as depriving owners of property without due process of law. American Woolen Co. v. North Smithfield Town Council, 28 R. I. 546, 68 A 719. Prescribed area held not limited to land within state so that objection by owners of greater part of land within 200 feet of premises within the state did not preclude granting of license, where they did not own greater part of land within prescribed area disregarding state boundary line. Id. Owner ordinarily means one who is seized of freehold estate and who owes no service to another which limits his dominion. American Woolen Co. v. North Smithfield Town Council [R. I.] 69 A 293. Lessees are not owners within meaning of statute. Id. One who owned fee title in street in front of premises subject only to public easement held owner of real estate within 25 feet of premises within meaning of Rev. Laws, c. 100, § 15, so as to entitle him to object to granting of license. Moran v. Gallagher, 199 Mass. 486, 85 NE 579.

45. Acts 1905, p. 7, c. 6, authorizing general or blanket remonstrance against granting licenses to any and all persons, held not to have affected or taken away previously existing right to remonstrate against granting of license to named individuals, and hence not to have affected powers of attorney to sign remonstrance against individuals previously given and executed according to law as it then existed. Nichols v. Lehman [Ind. App.] 85 NE 786. Right of remonstrance is personal privilege which is extended only to voter or voters. State v. Gorman [Ind.] 85 NE 763. No person can become party remonstrant under statute by filing remonstrance for first time after appeal has been taken

on. The granting of licenses to hotels[46] and druggists[47] is sometimes made to depend on whether in the opinion of the licensing authorities, there is any reasonable necessity therefor. In some states a license may be refused when, in the opinion of the licensing authorities the place where the business is sought to be carried on is unsuitable,[48] and a denial of an application on that ground precludes the granting of a second application for a license for the same place within a specified time.[49] In some states a new license may not be granted within a specified time after the cancellation of a former one for violation of the liquor laws.[50] Matters relating to

to circuit court from decision of board of commissioners. Id. County ordinance held to give board of supervisors authority to refuse license where majority of electors in any election district, residing within one mile of proposed saloon, sign and file written protest against granting of license, regardless of whether applicant is proper person to be licensed. Davis v. Board of Sup'rs [Cal. App.] 95 P 170. Ordinance held not unconstitutional as delegation of judicial powers conferred on board of supervisors. Id.

46. Whether there is any necessity for tavern at particular place depends upon whether or not there are persons who in going there naturally seek or desire accommodations at tavern in question, and not upon whether or not accommodations can be secured at another place. Schneider v. Com., 33 Ky. L. R. 770, 111 SW 303. Court held unable to say, in view of evidence, that no such necessity existed. Id. Evidence as to disorderly character of applicant's tavern held not such as to show abuse of discretion by county court in granting license. Id. Fact that receipts from bar were greater than those from tavern held not to show that applicant was not bona fide tavern keeper, or that keeping of tavern was mere device to enable him to sell intoxicants. Id. Provision of Act May 13, 1887, § 7 (P. L. 108), that court shall refuse license in all cases when in its opinion, "having due regard" to number and character of petitioners for and against such application, such license is not necessary for accommodation of public and entertainment of strangers or travelers, held not to require question to be determined in favor of side presenting weightiest petition in number and character of signers, quoted words meaning such regard as circumstances of case demand. Renzor Hotel Co.'s License, 34 Pa. Super. Ct. 525. Proof that applicant's place is necessary as hotel for public accommodation does not necessarily compel conclusion that license to sell intoxicants at retail at such place is necessary, or entitle him to such license on compliance with other statutory requirements. Id. Refusal of license held not abuse of discretion. Id. Refusal of application after full hearing and consideration as not necessary does not make question of necessity res judicata upon hearing of application of same person for same premises in subsequent year. Id. Though refusal is not conclusive, court may, in exercise of sound judicial discretion, consider it in connection with other relevant facts established at hearing or known to court, particularly if conditions are unchanged. Id.

47. On application of registered pharmacist for permit to keep and sell intoxicants, question whether reasonable convenience and necessities of the people, considering population and all surroundings, make granting of permit proper, as required by Code, § 2389, is one to be determined by trial court under evidence, in exercise of sound discretion and judgment, and its finding should be sustained unless record shows abuse of discretion. In re Moore [Iowa] 118 NW 879. Held proper to permit witnesses to give their opinions as to whether reasonable necessities of people made granting of permit proper, where they stated facts with reference to which court was called upon to act in that respect. Id. Evidence held sufficient to sustain finding that granting of permit was proper. Id.

48. Court held to have properly treated fact that applicant for removal permit had agreed not to sell to employes in neighboring factories during certain hours as evidence of unsuitability of place. Appeal of Bormann [Conn.] 71 A 502.

49. Denial of application for license on ground that place specified was situated in locality in which there were saloons enough, as authorized by Gen. St. 1902, § 2645, held denial because commissioners deemed place unsuitable within meaning of Id. § 2646, prohibiting granting of second application during same license year for license for place for which license has already been refused on ground that it is unsuitable place. Appeal of D'Amato, 80 Conn. 357, 68 A 445. Denial of license on such ground held to preclude granting of application by same applicant for transfer to such place of license held by another person to run saloon in another place. Id. Statute applies though conditions affecting suitability of person or place which may have controlled commissioners in denying license have changed before expiration of license year. Id.

50. Laws 1896, c. 112, § 17, subd. 8, as amended by Laws 1908, c. 144, providing that no new certificate can be issued for year following date of conviction of certificate holder for certain crimes, held not to warrant refusal because of conviction of employe of certificate holder. People v. McKee, 112 NYS 338. Provision that where cancellation or forfeiture of certificate has been had by reason of suffering premises to become disorderly or permitting gambling thereon no new certificate shall be issued for said premises to any person for one statute held valid exercise of police power and constitutional. People v. McKee, 112 NYS 385. Revocation of previous license on insufficient grounds held not of itself ground for refusing to approve application for another license and bond accompanying it. Cox v. Jackson City Common Council, 152 Mich. 630, 15 Det. Leg. N. 337, 116 NW 456.

the deliberations of the licensing authorities,[51] and the form and contents of the license,[52] and the term for which it runs,[53] are regulated by statute. The assessment of mulct taxes[54] and proceedings to procure the listing of property for taxation[55] are purely statutory.

Provision is generally made for review by appeal or otherwise.[56]

**51.** Statutory application under Burns' Ann. St. 1908, §§ 8316 et seq., to obtain license, is statutory civil proceeding, and in determination of questions therein involved board of commissioners, either with or without a remonstrance, act judicially and not as an agent of the state. State v. Gorman [Ind.] 85 NE 763. State as such has no such interest in proceedings to obtain license as will entitle it to become party defendant on its application or to be recognized as such by board of commissioners in first instance or by circuit court on appeal from its decision, and court has no power or authority to admit state or attorney general as party defendant. Id. Proceeding is neither suit by or against state within meaning of Burns' Ann. St. 1908, § 9269, providing that attorney general shall prosecute and defend all suits by and against state unless same is otherwise provided for after notice by clerk of court in which same is pending, and on appeal from decision of board clerk of circuit court is not required to notify attorney general. Id. Interest of state in general welfare of its citizens does not, in absence of statutory authority, give it right to become party. Id. Either board or court on appeal may of its own motion call and examine witnesses in regard to fitness of applicant, and may, if deemed necessary, authorize appearance of an amicus curiae. Id. Under Rev. St. 1899, §§ 5978, 5900, 5951, 5956, held that it is duty of board of aldermen of cities of fourth class to pass on sufficiency of petition for license, and **mayor** has no right to participate in proceedings except by way of advice or protest, or to vote in case of tie, or to review decision of board. State v. Russell [Mo. App.] 110 SW 667. Board of aldermen act judicially and not legislatively in passing on sufficiency of application and petition, so that their decision is conclusive and mayor has, in absence of fraud, no right to refuse to sign license granted by them because of insufficiency of petition. Id. Duty of mayor to sign license as required by § 5978 being ministerial, performance thereof may be compelled by mandamus. Id. Mayor in cities of second class may cast deciding vote in contest over application for license in case of tie vote of council. Statutes construed. In re Hastings Brew. Co. [Neb.] 119 NW 27.

**52.** Though word license as used in Gen. St. 1902, tit. 16, includes intangible right granted licensee as well as writing signed by commissioners, which is the instrument and evidence of that grant, there is nothing in statute authorizing grant of such right by commissioners otherwise than by writing signed by them, and specifying licensee and town and building in which sales are licensed to be made. Id. §§ 2669, 2672, 2673. Connecticut Brew. Co. v. Murphy [Conn.] 70 A 450. One not having written license signed by county commissioners licensing him to sell does not have license, and sales by him are illegal. Id.

**53.** Requirement of charter of city of Redwood Falls that all licenses shall commence and terminate on Jan. 20th of each year held not repealed by Gen. Laws 1895, c. 90, p. 211, or by Rev. Laws 1905, § 1522, but to be still in force. Evans v. Redwood Falls, 103 Minn. 314, 115 NW 200. Doctrine of unreasonableness held to apply only to city ordinances enacted pursuant to general charter powers over the subject-matter and not to statutes enacted by legislature. Id.

**54.** Mulct tax provided for by Code, §§ 2433-2437, as amended by Laws 1902, c. 95, held not a property tax but a charge against the person on account of business in which he is engaged. In re Des Moines Union R. Co., 137 Iowa, 730, 115 NW 740. County treasurer is without authority to assess mulct tax except upon request of party carrying on business as directed by Code, § 2448, par. 12, as amended, and cannot do so under Id. § 1374, providing that he shall assess "property subject to taxation" which has not been assessed. Id.

**55.** Under Code, §§ 2432, 2436, and Code Supp. §§ 2433, 2435, held that where assessor refuses to act three citizens may procure listing of persons and places for mulct tax after expiration of quarter year to which such listing and assessment is intended to have relation, and an assessment of taxes may in such cases be made thereon by auditor after expiration of such quarter. National Loan & Inv. Co. v. Board of Sup'rs [Iowa] 115 NW 480.

**56. Jurisdiction and right to review:** Under Laws 1905, c. 174, Cobbey's Ann. St. Supp. 1905, §§ 1702-1703c, final order of district court, rendered upon appeal from order of city council granting license, is reviewable in supreme court on appeal. In re Adamek [Neb.] 118 NW 109. Appeal from order revoking license for violation of law held within jurisdiction of criminal division of circuit court, though proceeding was not technically criminal or penal prosecution. Commonwealth v. Campbell, 32 Ky. L. R. 1131, 107 SW 797.

**Effect of appeal on licenses issued; stay of proceedings:** Where license is issued after hearing of application and remonstrance, and remonstrators appeal to district court within reasonable time, license should be recalled and revoked pending determination of appeal and mandamus will issue to compel such recall and revocation. State v. Rathsack [Neb.] 117 NW 949. Where stats commissioner was mads party to certiorari proceeding to compel special deputy commissioner to issue liquor tax certificate, held that his appeal from order directing deputy to issue certificate stayed all proceedings under Code Civ. Proc. § 1313, he being state officer within that section, and precluded punishment of deputy for contempt for failure to obey such order. People v. Judson, 112 NYS 408

**Parties:** Excise board is an aggrieved

*Nature, effect and scope of licenses.*[See 10 C. L. 480]—A license is not a contract giving vested or property rights but a mere temporary permit[57] which may be modified, annulled or revoked at any time.[58] It cannot be assigned without the consent of the licensing authorities.[59] The operation of a license is confined to the place

party within meaning of Cobbey's St. 1907, § 7153, and may appeal from judgment of district court reversing action of board in refusing licenses to applicants. In re Jugenheimer [Neb.] 116 NW 966. Cities having excise boards, which are by statute given exclusive power to license and regulate sale of liquors, cannot appeal from order denying or granting license. In re Klamm [Neb.] 117 NW 991. City held entitled to be represented by city attorney on trial in circuit court of appeal from order revoking license, it being duty of commonwealth's attorney to aid in enforcing policy of city, etc. Commonwealth v. Campbell, 32 Ky. L. R. 1131, 107 SW 797. Even if commonwealth's attorney had authority to waive summons and advance appeal, held that he should have done neither without notice to city attorney and giving him opportunity to be present at trial. Id. Licensee held proper party to certiorari proceedings to review action of county court in granting license, both because of his interest and because adjudication would finally determine his right to a license. State v. Denton, 128 Mo. App. 304, 107 SW 446.

**Notice:** City held entitled to notice of appeal by licensee from order revoking license so that judgment of circuit court restoring license after trial without summons or notice to city, license board, or city attorney, was invalid. St. 1903, §§ 3034, 986, 987, Civ. Code Prac. §§ 724, 51. Commonwealth v. Campbell, 32 Ky. L. R. 1131, 107 SW 797.

**Transfer of case:** On appeal by remonstrators from decision of licensing board granting license, jurisdiction is conferred on district court by giving notice of intended appeal and filing, within reasonable time in said court, transcript of proceedings had upon hearing before board. In re Foltyn [Neb.] 118 NW 119. It is no ground for dismissing appeal that transcript of proceedings had before board upon the hearing is defective either in substance or in certification, but such defect may be reached and considered by motion to strike from the files or on hearing on merits. Id. That certified transcript of evidence taken before licensing board is not filed with transcript of proceedings of board upon such hearing is no ground for dismissing appeal, but district court may compel board to furnish such transcript. Id.

**Scope of review:** Questions presented on appeal under Gen. St. 1902 from decision of county commissioners on application for removal permit are, have commissioners acted legally, and have they exceeded or abused their powers. Appeal of Bormann [Conn.] 71 A 502. On appeal from refusal of county commissioners to grant license, question whether commissioners exceeded their authority in granting renewal license to former occupant after purchase of premises by second applicant, but before his deed was recorded, held not open to consideration where no appeal was taken from granting of renewal. Appeal of Stavole [Conn.] 71 A 549. Proceeding on application by registered pharmacist for permit to sell intoxicants is special one, and in absence of provision that trial shall be as in equity case, appellate court can interfere with judgment only where there has been manifest abuse of discretion by trial court. In re Moore [Iowa] 118 NW 879. Determination of trial court, on conflicting evidence, that applicant had not unlawfully sold or kept for sale intoxicants at his place of business, not disturbed. Id.

57. People v. McBride, 234 Ill. 146, 84 NE 865; Hill v. Sheridan, 128 Mo. App. 415, 107 SW 426; Krueger v. Colville [Wash.] 95 P 81.

58. For grounds of revocation and procedure, see Revocation, Cancellation and Surrender, post, this section. In exercise of police power license may be revoked without judicial proceedings. Claussen v. Luverns, 103 Minn. 491, 115 NW 643. Municipality is not liable in tort for mistaken action of city council in attempting to revoke license. Id. License issued by board of county commissioners is subject to power of any city or village to prohibit sale of intoxicants within its limits, and one procuring county and state license is subject to provisions of law granting power of prohibiton to municipalities. Gale v. Moscow [Idaho] 97 P 828. Dramshop keeper has no vested right to continue use of bar fixtures for sale of liquor because he can put them to no other use, and Laws 1907, p. 297, providing for local option, is not unconstitutional as depriving dramshop keepers of property without due process of law. People v. McBride, 234 Ill. 146, 84 NE 865. Bal. Ann. Codes & St. § 2935, authorizing forfeiture of license for violation of its terms, held not unconstitutional as depriving licensee of his property without due process of law. Kruger v. Colville [Wash.] 95 P 81.

59. Burch v. Ocilla [Ga. App.] 62 SE 666. License issued by city of second class is not transferable unless transfer is authorized by ordinance, and then only in manner and form prescribed. Hill v. Sheridan, 128 Mo. App. 415, 107 SW 426. Best evidence that city consented to and participated in transfer of license held to be license itself with transfer to defendant indorsed thereon. Id. To render book claimed to be record of licenses kept by city auditor admissible to show such consent, held that it should have been identified as such record, and the entries relating to transaction in controversy then offered in evidence. Id. Oral testimony of transferror held wholly incompetent to show valid transfer. Id. Use of license or right to traffic in liquors under it cannot be transferred without consent of state upon application duly made and an undertaking given. Laws 1896, c. 112, § 27. David Mayer Brew. Co. v. Mack, 110 NYS 245.

**Contract for unauthorized transfer void:** Agreement to pay licensee for use of liquor tax certificate held void as against public policy, so that no recovery could be had thereon. Laws 1896, c. 112, § 27. David Mayer Brew. Co. v. Mack, 110 NYS 245. Plaintiff held not entitled to recover value

specified therein,[60] though provision for obtaining a removal permit is often made.[61]

*Revocation, cancellation and surrender.* See 10 C. L. 481—The right to revoke has already been considered.[62] Grounds of revocation may consist either of matters antedating the issuance of the license[63] or of a subsequent violation of the laws relating to the sale of intoxicants.[64] Discretionary power to revoke without cause is sometimes conferred on the licensing authorities.[65] Quo warranto is held to be the proper remedy to challenge the validity of a license.[66]

of unexpired license transferred by him to defendant where he did not prove ordinance authorizing such transfer without which there could be no valid sale. Hill v. Sheridan, 128 Mo. App. 415, 107 SW 426. Nor was he in position to claim benefit of presumption of right acting on part of city officials where he offered no competent evidence to show that city consented to and participated in attempted transfer. Id.

**60.** Under St. 1903, § 4198, one cannot run two barrooms in separate and distinct buildings under one license. Huber v. Com., 33 Ky. L. R. 1031, 112 SW 583. Fact that he owns both buildings does not affect question. Id. One operating two bars in separate and distinct buildings under one license cannot contend that he cannot be punished for maintaining either without license because maintenance of one or the other is lawful. Id. In any event cannot raise such contention where one bar was opened after he had located license by opening other. Id. Action of commonwealth in fining him for running one of such bars held election to recognize other as one which was licensed. Id. On prosecution of one running two bars under one license for selling without license, evidence that other men in county were running two bars under one license, and that county officials had so construed statute, held inadmissible. Id.

**61.** Gen. St. 1902, § 2669, authorizing granting of removal permit to licensee, held not to authorize or require commissioners to hear and determine application for permit brought by one not a licensee. Appeal of D'Amato, 80 Conn. 357, 68 A 445. Though application under § 2669, and application under § 2671, by licensee for transfer of his license to another person, may be heard at same time, yet they are distinct, and special process of appeal for obtaining interposition of court to limit action of commissioners within their legal powers applies to one and not to other. Id. Application may, in applying provisions of § 2645, be treated as in effect an original application for license when result of granting it would be to unduly increase number of saloons in particular locality. Appeal of Bormann [Conn.] 71 A 502. Held not to have been so treated where it appeared that transfer would have resulted in only one saloon in vicinity. Id.

**62.** See Nature, Effect and Scope of Licenses, ante, this section.

**63.** For false statements in application for license. People v. Pettit, 113 NYS 243.

**64.** Ordinance required application for license to contain express agreement that if licensee should be convicted once in any year "of a violation of the state law" and in same year of violation of ordinance such conviction should be sufficient reason for revoking license and from debarring licensee from thereafter engaging in saloon business in city. Held that state law referred to law or laws governing sale of intoxicants only and that conviction in same year of violation of some other law and of ordinance was no ground for revoking license or refusing application for another license. Cox v. Jackson City Common Council, 152 Mich. 630, 15 Det. Leg. N. 337, 116 NW 456. Agreement of applicant held agreement in terms no broader than ordinance. Id. Judgment in certiorari proceeding to review action of council in revoking license held not conclusive on question in subsequent mandamus proceeding to compel issuance of another license. Id. Laws 1896, c. 112, § 28, subd. 2, as amended by Laws 1900, c. 367, § 9. For selling within half mile of state hospital. In re Clement, 110 NYS 57. County court held to have no authority to revoke license for any cause other than **failure at all times to keep an orderly house** as provided by Ann. St. 1906, § 3012, there being no provision for revocation for selling to minors. State v. Lichta, 130 Mo. App. 284, 109 SW 825. Fact that dramshop keeper on one occasion sold liquor to two minors held not to authorize revocation of license. Id. Bal. Ann. Codes & St. § 2935, providing that licensee **violating terms of license** shall forfeit same and also be liable to other penalties imposed by law for illegal sale of intoxicants, held not unconstitutional as imposing excessive penalty. Krueger v. Colville [Wash.] 95 P 81. Town held to have authority, under Bal. Ann. Codes & St. § 2935, to forfeit license where licensee pleaded guilty to selling to minors. Id.

**65.** City council held to have such power under Pierce's Code, §§ 5714, 5715, Bal. Ann. Codes & St. §§ 2934, 2935, and that exercise thereof would not be reviewed by courts. State v. Pierce County Super. Ct. [Wash.] 97 P 778.

**66.** Validity of dramshop license. Hurd's Rev. St. 1905, c. 112, § 1, p. 1549. People v. Heidelberg Garden Co., 233 Ill. 290, 84 NE 230, afg. 124 Ill. App. 331. Defendant in quo warranto need only show prima facie right and is not required to anticipate matter that should come from other side. Id. Though information showed that defendant had license to keep dramshop in particular part of city, pleas setting out city ordinances relative to licenses, and alleging compliance therewith, held not demurrable for failure to show compliance with regulations in force in such particular part of city, it not appearing from pleadings that different regulations applied there, and, if they did, that being matter to be set up in replication. Id. Held that court would not take judicial notice that such was case, it being necessary to plead municipal ordinances. Id.

It is generally held that the licensee cannot recover any part of the license fee on the revocation of his license before its expiration,[67] unless the statute so provides,[68] though there seems to be some conflict of authority in this regard.[69] Provision is sometimes made for a rebate on the voluntary surrender of a license for cancellation.[70]

Revocation proceedings are entirely statutory,[71] and the various statutes must be looked to for the purpose of determining matters of practice and procedure,[72]

**67.** Legal representatives of deceased licensee cannot recover any part of amount paid for such license because of licensee's death, though license is thereby revoked. Wood v. School Dist. No. 32 [Neb.] 115 NW 308. Municipality held not required to return unearned portion of license fee on revocation, under Bal. Ann. Codes & St. § 2935, of license of one who pleaded guilty to selling to minor. Krueger v. Colville [Wash.] 95 P 81. Contention that as licensee had paid fine imposed on his plea of guilty he ought not to be held liable on bond and, in addition thereto, forfeit fee, held untenable. Id. City issued license and received prescribed fee. Thereafter state law raised fee for that county and licensee, without any interference or direction from city authorities, ceased doing business, and before license expired applied for return of unearned portion of fee. Application was not acted upon until after expiration of license, when it was granted. Held that, city not having terminated license and no steps having been taken to refund money before license expired, fee passed absolutely to city, and repayment of any portion thereof would be enjoined at instance of citizens. City of Fitzgerald v. Witchard, 130 Ga. 552, 61 SE 227. In action to recover money paid in monthly instalments for saloon license, held that payments were **voluntary** and hence could not be recovered. Eslow v. Albion [Mich.] 15 Det. Leg. N. 608, 117 NW 328. Held proper to refuse to permit plaintiff to introduce receipt, agreement and protest made year before on payment of license fee under another ordinance, which fee was returned on ordinance being held invalid. Id.

**68.** Provision of Laws 1907, p. 297, requiring return of unearned license fees on creation of anti-saloon territory, held not unconstitutional as an attempt to compel municipality to incur a debt. People v. McBride, 234 Ill. 146, 84 NE 865. Constitutional limitation of municipal indebtedness held not to apply to case where municipality has received money for licenses which it ought to refund. Id. Provision held within general subject of title of act. Id. Provision held not void as changing charters of municipalities, etc., since powers and privileges of municipalities may be changed, modified or taken away at any time by general law. Id. In any event held that if such provision was void it would not affect validity of rest of act. Id. Provision held not invalid as giving persons residing outside city right to determine use of money in city, since general law, and not voters, determines whether license fee shall be refunded or not. Id.

**69.** Licensee held entitled to recover back unearned portion of license fee where, without fault on his part, he was compelled to go out of business by adoption of prohibitory clause of constitution. Allsman v. Oklahoma City [Okl.] 95 P 468. Held further that such sum could be recovered in action in nature of assumpsit, since it was money of plaintiff in hands of defendant which latter in equity and good conscience had no right to retain. Id.

**70.** Under Laws 1896, c. 112, § 25, as amended by Laws 1903, c. 486, when construed in connection with Laws 1896, c. 112, § 34, as amended by Laws 1908, c. 350, held that one under arrest for previous violation of liquor tax law when certificate was issued, and who was convicted thereof prior to surrender of certificate for cancellation, was not entitled to rebate. People v. Clement, 128 App. Div. 539, 112 NYS 951, rvg. 58 Misc. 631, 111 NYS 1033. Held further that, in view of Laws 1896, c. 112, § 23, as amended by Laws 1905, c. 680, providing that no person convicted of violation of act shall traffic in liquors for three years from date of conviction, such person was not one "authorized to sell liquors" under the act within meaning of § 25, as amended, and hence neither he nor his assignees were entitled to rebate. Id. Finding of guilty held conviction of violation of liquor tax law within Laws 1896, c. 112, § 25, though sentence had been suspended and never been imposed, and hence statement of applicant that he had not been convicted of violation of said law within three years was false, though time within which sentence could have been imposed had then expired, and he was not "authorized to sell liquors under the provisions of the act" and was not entitled to rebate. Koehler & Co. v. Clement, 111 NYS 151.

**71.** Board of license commissioners held to have no jurisdiction to rescind vote of preceding board granting license, proper procedure in case it was claimed former board had no jurisdiction to grant license being by petition to court for certiorari, or, in case it was desired to revoke license, by proceedings for revocation under Pub. Gen. Laws 1898, p. 37, c. 543, § 2, amending Gen. Laws 1896, c. 102, § 12. Dziok v. Central Falls Board of License Com'rs, 28 R. I. 526, 68 A 479; Ferron v. Central Falls Board of License Com'rs, 28 R. I. 529, 68 A 480.

**72.** Proceedings for cancellation of liquor tax certificate may be instituted within 30 days after holder has delivered them to commissioner of excise for surrender. Laws 1896, c. 112, § 25, subd. 2. In re Clement, 57 Misc. 319, 109 NYS 538. Objection that proceeding could not be maintained because begun more than 30 days after surrender of certificate by defendant for cancellation overruled. In re Clement, 112 NYS 337. Under Laws 1896, c. 112, § 28, as amended by Laws 1906, c. 272, order to show cause why liquor tax certificate shall not be canceled must be made returnable before justice or

including questions relating to notice.[73] Such proceedings are usually subject to review.[74] A revocation absolutely cancels the license.[75]

*Payment and collection of fee or tax.* See 10 C. L. 433—A privilege tax may be recovered from one selling in violation of law.[76]

§ 4. *Regulation of traffic.* See 10 C. L. 433—Regulatory and prohibitive statutes are usually confined to liquors that are intoxicating.[77] There seems to be con-

judge granting it, or before special term. In re Judkins, 110 NYS 587. Order required holder to show cause at regular term of supreme court to be held at court house on certain date and at certain time. Held that naming of term would be considered merely as indication of place where justice would hear motion, and order would be regarded as returnable before justice, and objection that there was no special term then in session at which motion could be heard was properly overruled, it appearing that no prejudice resulted. Id.

73. Licensee and owner of property must be given statutory notice before court of common pleas can revoke license to keep inn and tavern in summary proceeding under § 10 of act to regulate sale of liquors, as amended in 1906 (P. L. 1906, pp. 199, 201, § 3). Tindall v. Monmouth Common Pleas [N. J. Law] 68 A 799. Fact that holder of license has been convicted in court of quarter sessions of same county of offense for which his license became forfeited and void held not to dispense with necessity for such notice. Id.

74. Though county court in revoking dramshop license acts as administrative agent of state, it is a constitutional court and acts in its character of a court of record, and cannot divest itself of that character by mere fact that function exercised at the time is ministerial or administrative one, and hence certiorari will lie to review its action if it had no jurisdiction to revoke license for cause alleged, or if it exceeded its jurisdiction. State v. Lichta, 130 Mo. App. 284, 109 SW 825. County court in revoking license on charge of not at all times keeping an orderly house does not exercise judicial function, but it does exercise judicial power in determining whether or not charges bring case within its jurisdiction to revoke license. Id.

75. Judgment of forfeiture held to have operated on license which had expired by limitation and not to have affected new one in force when it was issued. Cuirczak v. Keron [N. J. Law] 70 A 366.

76. Acts 1903, p. 599, c. 257, making business of retailing liquor privilege and imposing tax thereon, covers whole state and all sales, whether legal or illegal, and hence tax may be collected from one selling at place within four miles of school house. Foster v. Speed [Tenn.] 111 SW 925. Statute does not allow sales where prohibited by four-mile limit law, and there is no conflict between the two. Id.

77. Rev. Code, § 2834, requiring license to sell "any spirituous, vinous, malt, brewed, fermented or other intoxicating liquors" at retail, held to class all liquors therein mentioned as intoxicating, and to make it unnecessary for state, in prosecution for selling any liquors within such classes without license, to show that they were in fact intoxicating. State v. Ely [S. D.] 118 NW 687. Sale without license of any mixture containing any percentage of intoxicating liquor, or any mixture containing vinous, malt, or fermented liquor, is violation of law. Id. Words "alcoholic, spirituous, and malt liquors," as used in prohibition statute (Acts 1907, p. 81), mean intoxicating liquors which can be used as beverage and which, when drunk to excess, will produce intoxication. Roberts v. State [Ga. App.] 60 SE 1082. If liquid cannot be used as intoxicating drink because of other ingredients, or is not intoxicating because it does not contain sufficient amount of alcohol to cause intoxication when drunk to excess, it is not within prohibition of the statute, though it does contain an appreciable quantity of alcohol or spirituous liquor as one of its ingredients. Instruction held erroneous. Id. "Intoxicating liquors," or mixture thereof, mean liquors which will intoxicate and which are commonly used as beverages for such purpose, and also any mixture of such liquors as, retaining their alcoholic qualities, may be used as beverage and become substitute for ordinary intoxicating drinks. Id. Mere presence of alcohol does not bring liquor within prohibition, but there must be sufficient quantity to produce intoxication when drunk to excess. Id. Medicinal, toilet, and culinary preparations, recognized as such by standard authority, not intended to be used as intoxicating beverages and not reasonably capable of being so used, are not embraced within terms "alcoholic and spirituous liquors," though they are liquid, contain alcohol, and may produce intoxication. Id. Whether liquor is intoxicating depends upon its potableness and its intoxicating power. O'Connell v. State [Ga. App.] 62 SE 1007. Power to intoxicate does not mean power to make one dead drunk or foolishly drunk, but one is intoxicated whenever he is so much under influence of intoxicants that they affect his acts, conduct, or movements so that parties coming in contact with him or public could readily see and know that it was so affecting him. Id. White's Ann. Pen. Code 1895, art. 411a, does not apply to nonintoxicating malt liquors. Hardwick v. State [Tex. Cr. App.] 114 SW 832. On prosecution for violating local option law, evidence must show that liquor was whisky, which is judicially known to be intoxicating, or, if not, that it was capable of producing intoxication. Beaty v. State, 53 Tex. Cr. App. 432, 110 SW 449. Held error, under evidence, to refuse instruction submitting question of intoxicating quality of liquor sold. Ross v. State, 52 Tex. Cr. App. 604, 108 SW 375. Instruction to acquit, if liquor sold by another under defendant's authorization was not intoxicating, or if defendant believed that it was not, held sufficiently favorable to defendant. Southworth v. State, 52 Tex. Cr. App. 532, 109 SW 133. Fact that in answer

siderable conflict of authority as to how far such statutes apply to social clubs.[78]

to order for whisky defendant produced liquid to fill order held evidence that such liquid was whisky. People v. Marx, 112 NYS 1011. Evidence held insufficient to warrant finding that beverage sold was intoxicating. Schwulst v. State, 52 Tex. Cr. App. 426, 108 SW 698. Word "beer" when employed in connection with sales in place where intoxicating liquors are usually sold means an intoxicating drink. Hall v. People, 134 Ill. App. 559. Evidence held to justify finding that beer sold was intoxicating. Schmidt v. State, 53 Tex. Cr. App. 465, 110 SW 897. On prosecution for furnishing liquor to minor in violation of Pen. Code 1895, § 444, intoxicating character of liquor furnished, though called **grape juice,** held sufficiently shown by testimony of minor that he drank two quarts of it and it made him drunk. Askew v. State [Ga. App.] 61 SE 737. On prosecution for selling without license in violation of Acts 1904, c. 20, § 141, evidence held to show that **cider** sold by defendant did not contain more than percentage of alcohol specified by Acts 1906, p. 307, c. 181, and hence that he was entitled to verdict in his favor. Devine v. Com., 107 Va. 860, 60 SE 37.

**78.** Distribution of intoxicants among members of club constitutes sale within meaning of law. State v. Johns [Iowa] 118 NW 295. Where defendant, on prosecution for maintaining nuisance, contended that distribution of intoxicants among club members was not sale, held that he could not complain of instruction accepting such definition and authorizing conviction, even if liquors were not kept in place for sale, if they were kept for distribution through instrumentality of club. State v. Johns [Iowa] 118 NW 295. Sales of liquor by incorporated club to members held to make it retail liquor dealer, within meaning of Rev. Pol. Code §§ 2834, 2835, 2838, so that, where it had no license, its agent who made such sales was guilty of misdemeanor, under Id. § 2852. State v. Mudie [S. D.] 115 NW 107. Transactions whereby incorporated club gave liquor to members in exchange for checks purchased by them from it held sales. Id. Rev. Civ. Code, §§ 415, 742, 740, 411, 182, relating to corporations, construed and held that incorporated commercial club, whose articles provided that members should not be liable for its debts, and not its members, was owner of liquors kept by it for distribution to members only in exchange for checks for which they paid. Id. Under Laws 1905, p. 48, § 15, providing that any person who shall sell, exchange, or give away, with purpose of evading provisions of local option law, any intoxicants in dry territory, shall be subject to prosecution, held that act of incorporated social club in dispensing intoxicants to a member, with intent to pass title thereto, constitutes sale. State v. Kline [Or.] 93 P 237. Use of words "sale or gift" in instructions referring to such a transaction held proper under circumstances. Id. When prohibition law becomes operative in county as result of local option election, it, ex proprio vigore, inhibits all social clubs within that territory from selling or giving to their members intoxicants with purpose of evading said law, clubs not being included within exceptions enumerated in § 2. Id.

**NOTE. Social clubs as retailers of intoxicating liquors:** It has been held that a bona fide social club may serve its members and invited guests with liquors without being liable to pay a retail liquor dealer's license, where only the members pay therefor and the receipts are used to replenish the stock of liquor and are insufficient for that purpose (Tennessee Club v. Dwyer, 11 Lea [Tenn.] 452, 47 Am. Rep. 298; State v Austin Club, 89 Tex. 20, 33 SW 113, 30 L. R. A. 500; Piedmont Club v. Com., 87 Va. 540, 12 SE 963), and the same has been held in the case of a social club dispensing liquors to its members from a stock owned in common, such not being a sale within the statutory meaning (State v. St. Louis Club, 125 Mo. 308, 28 SW 604, 26 L. R. A. 573; State v. McMaster, 35 S. C. 1, 14 SE 290, 28 Am. St. Rep. 826; Graff v. Evans, L. R. 8 Q. B. D. 373; Newell v. Hemingway, L. J. R. 53 Q. B. D. 46; Davies v. Burnett, L. R. 1 K. B. D. 666), where such liquors are not sold at a profit (Barden v. Montana Club, 10 Mont. 330, 25 P 1042, 24 Am. St. Rep. 27, 11 L. R. A. 593), and the sales are merely incidental to the club organization and functions (State v. Austin Club, 89 Tex. 20, 33 SW 113, 30 L. R. A. 500; Manassas Club v. Mobile, 121 Ala. 561, 25 S 628; Commonwealth v. Ewig, 145 Mass. 119, 13 NE 365; People v. Adelphi Club, 149 N. Y. 5, 43 NE 410, 52 Am. St. Rep. 700, 31 L. R. A. 510 [expressly overruling People v. Sinell, 34 N. Y. St. Rep. 898, 12 NYS 40; People v. Bradley, 33 N. Y. St. Rep. 562, 11 NYS 594, and People v. Luhrs, 7 Misc. 503, 28 NYS 498, afd. in 79 Hun, 415, 29 NYS 789; explained and distinguished in People v. Andrews, 115 N. Y. 427, 22 NE 358, 6 L. R. A. 128, rvg. 50 Hun, 591, 3 NYS 508]; Klein v. Livingston, 177 Pa. 224, 35 A 606, 55 Am. St. Rep. 717, 34 L. R. A. 94, [followed in Commonwealth v. Smith, 2 Pa. Super. Ct. 474, and overruling Commonwealth v. Steffner, 2 Pa. Dist. R. 152]), and that, further, such a club is not subject to laws regulating the retail liquor traffic generally (Koenig v. State, 33 Tex. Cr. App. 367, 26 SW 835, 47 Am. St. Rep. 35; Winters v. State, 33 Tex. Cr. App. 395, 26 SW 839; Grant v. State, 33 Tex. Cr. App. 527, 27 SW 127), and that a member of such a club (Commonwealth v. Pomphret, 137 Mass. 564, 50 Am. Rep. 340), or one handling the stock of liquors for the members (Commonwealth v. Smith, 102 Mass. 144), is not a dealer in liquors, within the statutory meaning. Laws forbidding the sale of liquor on Sunday have been held to prohibit the dispensing of liquors to club members on that day (State v. Easton Club, 73 Md. 97, 20 A 783, 10 L. R. A. 64; State v. Horacek, 41 Kan. 87, 21 P 204, 3 L. R. A. 687; State v. Lockyear, 35 N. C. 633, 59 Am. Rep. 287; Krnavek v. State, 38 Tex. Cr. App. 44, 41 SW 612). Previously the Maryland court had held the contrary view (Siem v. State, 55 Md. 566, 39 Am. Rep. 419), and later was equally divided upon this point (Chesapeake Club v. State, 63 Md. 446), but, by statute in that state, the Sunday prohibition is now extended to clubs specifically (State v. Maryland Club, 105 Md. 585, 66 A 867). The gen-

Among the most common regulations are: prohibiting the keeping of a place where liquors are sold in violation of law;[79] prohibiting the storing,[80] keeping,[81] or pos-

eral doctrine of immunity of bona fide social clubs from regulation as retailers of liquor has been repudiated in some jurisdictions and such regulations held applicable both to the club itself (State v. Essex Club, 53 N. J. Law, 99, 20 A 769; Army & Navy Club v. Dist. of Col., 8 App. D. C. 544; Beauvoir Club v. State, 148 Ala. 643, 42 S 1040, 121 Am. St. Rep. 82; Mohrman v. State, 105 Ga. 709, 32 SE 143, 70 Am. St. Rep. 74, 43 L. R. A. 398; Marmont v. State, 48 Ind. 21; State v. Boston Club, 45 La. Ann. 585, 12 S 895, 20 L. R. A. 185; University Club v. Ratterman, 3 Ohio C. C. 18; People v. Soule, 74 Mich. 250, 41 NW 908, 2 L. R. A. 494. See, also, the overruled New York decisions following the supposed doctrine of People v. Andrews, infra) and to employes thereof (Martin v. State, 59 Ala. 34; State v. Neis, 108 N. C. 787, 13 SE 225, 12 L. R. A. 412; State v. Lockyear, 95 N. C. 633, 59 Am. Rep. 287), and it has been held that dispensing liquors to club members constitutes a sale within the statutory meaning (State v. Mudie [S. D.] 115 NW 107; People v. Law & Order Club, 203 Ill. 127, 67 NE 855, 62 L. R. A. 884; South Shore Country Club v. People, 228 Ill. 75, 81 NE 805, 12 L. R. A. [N. S.] 519, 119 Am. St. Rep. 417). The recent case of State v. Minnesota Club [Minn.] 119 NW 494 holds that a bona fide social club is within the statute requiring persons dispensing liquors in quantities of less than five gallons to take out a retailer's license. This case expressly disapproves the doctrine of State v. Adelphi Club, and Commonwealth v. Pomphret, supra, two justices dissenting upon the ground (inter alia) that the statute is a police rather than a revenue regulation, and is, hence, inapplicable in such cases. The still more recent case of Cuzner v. California Club [Cal.] 100 P 868 holds that such regulations do not apply to clubs. The United States revenue tax imposed upon retail liquor dealers generally is held to apply to clubs (United States v. Wittig, 2 Low. Dec. 466, Fed. Cas. No. 16,748). That clubs organized solely for the purpose of selling liquor to members are subject to laws regulating the retail traffic is not disputed (State v. Mercer, 32 Iowa, 405; Sutton v. State [Tex. Cr. App.] 40 SW 501; Feige v. State, 49 Tex. Cr. App. 513, 16 Tex. Ct. Rep. 425, 95 SW 506; Adkins v. State [Tex. Cr. App.] 95 SW 509; Rickard v. People, 79 Ill. 85; Commonwealth v. Ewig, 145 Mass. 119, 13 NE 265; State v. Tindall, 40 Mo. App. 271; Sothman v. State, 66 Neb. 302, 92 NW 303; Commonwealth v. Tierney, 148 Pa. 552, 24 A 64; Commonwealth v. Brown, 5 Pa. Super. Ct. 104; Commonwealth v. Alfa, 24 Pa. Super. Ct. 454). This was in effect the decision in People v. Andrews, 115 N. Y. 427, 22 NE 358, 6 L. R. A. 128, rvg. 50 Hun, 591, 3 NYS 508, but, through a misapprehension of its scope, this case was taken as authority for applying such laws to bona fide social clubs in People v. Sinell, 34 N. Y. St. Rep. 898, 12 NYS 40; People v. Bradley, 83 N. Y. St. Rep. 562, 11 NYS 594, and People v. Luhrs, 7 Misc. 503, 28 NYS 498, afd. in 79 Hun, 415, 29 NYS 789, a line of decisions expressly overruled in People v. Adelphi Club, 149 N. Y. 5, 43 NE 410, 52 Am. St. Rep. 700, 31 L. R. A. 510. [Ed.]

79. Acts 1907, c. 16, § 1, held not in conflict with Const. art. 4, § 19, subject embraced therein being fully expressed in title. Donovan v. State [Ind.] 83 NE 744. Fact that subjects of other sections or any of them may not be expressed in title of act held not to affect validity of § 1, under express provisions of said section of the constitution. Id. Affidavit, which was made and filed March 12, 1907, and charged offense to have been committed after taking effect of Acts 1907, c. 16, which took effect Feb. 13, 1907, held to be governed by that act and not by Acts 1907, c. 293, which took effect March 16, 1907. Id. On prosecution for maintaining place for selling and giving away liquor without license in violation of Kirby's Dig. § 5140, instructions predicating guilt on selling or giving away, or keeping for sale or gift, by any device, held erroneous, statute not being aimed at sales or gifts but at maintenance of place. State v. Black [Ark.] 111 SW 993. Refusal of instruction substantially in language of §§ 5140, 5141, as amended by Acts 1907, p. 1106, held error. Id. Evidence held to shew violation of said statute. Id. Municipality may, under general welfare clause of its charter, enact and enforce ordinance prohibiting maintenance of a "blind tiger," notwithstanding provisions of state prohibition act of 1907, there being substantial distinction between such offense and offenses of selling liquors illegally or keeping them on hand in public places of business denounced by said act. Callaway v. Mims [Ga. App.] 62 SE 654; Coggins v. Griffin [Ga. App.] 62 SE 659. Incorporation by city council into its laws and ordinances of provisions of Kirby's Dig. §§ 5140-5146, 5137, prohibiting sales of liquor by blind tigers, and authorizing their destruction, held to have made such provisions valid ordinances of city. Id. § 5463. City of Searcy v. Turner [Ark.] 114 SW 472.

80. Ordinance prohibiting storing of intoxicants for purpose of selling same held not ultra vires because not in terms limiting sale of such liquors to territorial limits of city, presumption being that such was intention. La Fitte v. Ft. Collins, 43 Colo. 299, 95 P 927.

81. Evidence held sufficient to go to jury. State v. Dobbins [N. C.] 62 SE 635. Municipality may, under general welfare clause of its charter, prohibit offense of keeping intoxicants on hand for purpose of illegal sale, notwithstanding general prohibition law of 1907, gist of crimes created by latter act being entirely different from offense created by ordinance. Callaway v. Mims [Ga. App.] 62 SE 654; Coggins v. Griffin [Ga. App.] 62 SE 659. On prosecution under ordinance making it unlawful to "keep a blind tiger, or keep for illegal sale" any intoxicants, held that it was not necessary to show continuous keeping or illegal sales, words "or keeping for illegal sale," etc., not being restricted in their meaning by association in context with word "blind tiger." Coggins v. Griffin [Ga. App.] 62 SE 659. Keeping of liquor and purpose of keeping may be inferred from single sale. Id.

session[82] of liquors for the purpose of disposing of them in violation of law; prohibiting selling without a license,[83] or in prohibition[84] or local option[85] territory;

82. Element of place held not to enter into offense of being found in possession of intoxicants for purpose of selling, bartering, or giving them away in violation of laws of state, denounced by Acts 1907, p. 27, c. 16 (Burns' Ann. St. 1908, § 8337). Barnhardt v. State [Ind.] 86 NE 481.

83. Law regulating sale of intoxicants held constitutional. People v. Kemmis [Mich.] 15 Det. Leg. N. 382, 116 NW 554. Ordinance prohibiting sale by unauthorized persons held not impliedly repealed by subsequent ordinance providing general scheme for regulation of licenses, two not being inconsistent and not covering same field. Town of Montclair v. Scola [N. J. Law] 69 A 451. Unrestricted common right to engage in business of retailing intoxicating liquors has been abrogated by statute, and privilege of conducting such business limited to particular class of persons who comply with certain prescribed conditions. City of Montpelier v. Mills [Ind.] 85 NE 6. Before anyone can rightfully exercise such privilege, he must bring himself within law and show that he has fully met all its terms and conditions. Id. Purpose of legislature in prohibiting sale without license held to provide revenue, and to restrict and regulate business. Brown v. State [Tenn.] 114 SW 198. Rev. Laws 1905, § 1519, held not void because prescribing no maximum penalty for its violation on theory that cruel or unusual punishment might be imposed, since, even if invalid when standing alone, § 4763 prescribes maximum penalty for misdemeanors when not otherwise expressly fixed, and controls when particular statute is silent on subject. State v. Kight [Minn.] 119 NW 56. Selling at retail without license, and without having receipt and notice for such license posted, held but one offense under Rev. Pol. Code, § 2834. State v. Mudie [S. D.] 115 NW 107. One not engaged in nor interested in liquor traffic, whose employe inadvertently or without authority makes sale at his place of business, is not **"interested"** in such **sale.** Partridge v. State [Ark.] 114 SW 215. Town ordinance is a "law of this state" within meaning of Pen. Code, § 435, making it misdemeanor to **carry on** without license any **business** for which license is required "by any law of this state." Ex parte Bagshaw, 152 Cal. 701, 93 P 864. One who selle single drink is **retail dealer** engaged in business of selling intoxicating liquors within meaning of Comp. Laws 1897, § 5380, providing that retail dealers shall be held to include all persons who sell liquors by the drink, etc., and liable to prosecution as such for selling without paying tax prescribed by Id. § 5379, as amended by Pub. Acts 1903, No. 62, p. 83. People v. Wilcox, 152 Mich. 39, 15 Det. Leg. N. 172, 115 NW 973.

**Intent:** On prosecution for selling liquor outside corporate limits of cities and villages in any less quantity than five gallons, intent is immaterial, and good faith on part of defendant is no defense. People v. Nylin, 236 Ill. 19, 86 NE 156, afg. 139 Ill. App. 500.

**Effect of inability to obtain license:** Where law requires license as condition precedent to engaging in sale of liquors, strict compliance therewith is necessary. City of Montpelier v. Mills [Ind.] 85 NE 6. Refusal of city officers to hear application for license and to issue required license is no defense to prosecution for selling liquor without license in violation of city ordinance. Id. Court cannot on such prosecution try collateral issues properly pertinent and material in proceedings to obtain license, and fact that defendant may have been amply able and willing to meet all conditions necessary to entitle him to license, and proffered proof of such facts, and tendered payment of fees, does not justify him in selling without license in violation of ordinance. Id. Where license is wrongfully and arbitrarily denied, remedy is by mandamus to compel its issuance, and applicant may also recover any damages sustained. Id. Under Laws 1896, c. 112, §§ 17, 18, 21, 31, and amendments thereto, held no defense to action for statutory penalties for selling without having obtained and posted certificate that county treasurer refused to issue certificate until he had received from excise department blanks for new form of bonds made necessary by change in law. Clement v. Smith, 112 NYS 955. Receipt acknowledging receipt of application, bond, and amount of tax, and letters of treasurer stating that applicant would be protected pending issue of new bonds, etc., held no defense. Id. Where county commissioners refuse to license corporation, latter has full and complete remedy by application to court to set aside such action as illegal or in excess of their powers. Connecticut Breweries Co. v. Murphy [Conn.] 70 A 450. Commissioners refused to license corporation, which was entitled to license, but licensed its secretary, with intent that such license should operate in law as license to corporation, and enable it to sell liquors without violating statute. Held that sales by corporation without any other authority therefor, though made in good faith, were in violation of Gen. St. 1902. Id.

**Sales in territory where sale is prohibited as violation of license law:** One cannot be properly indicted or convicted for selling without license in territory where sale is wholly prohibited. Pughsley v. State [Ga. App.] 61 SE 886. Special laws applicable to particular subdivisions of state, prohibiting sale of intoxicants therein, do not suspend general laws requiring license of those dealing in intoxicants, and punishing them for doing business without such license. Carpenter v. State [Tenn.] 113 SW 1042. One may be convicted of selling without license in violation of Acts 1899, p. 309, c. 161, though sale was made at place where law prohibiting sales within **four miles of schoolhouse** applied. Id. Offense of engaging in business without license, denounced by Rev. Pol. Code, §§ 2833, 2834, may be committed in locality where no license may be granted under **local option laws,** and hence information need not allege that business could have lawfully been engaged in in city and county where offense is alleged to have been committed. State v. Ely [S. D.] 118 NW 687. Offense of engaging in business without license held same as selling without license. Id. Where law prohibited any person who had not obtained license from engaging in sale of intoxicants at retail **anywhere** with-

in state, held that reason why defendant had not procured license was immaterial, so that it was not necessary for indictment to show whether license could have been procured at place where business was conducted. State v. Mudis [S. D.] 115 NW 107. Since **general prohibition law** (Acts 1907, p. 81) repealed all existing laws allowing sales of intoxicants, and became effective Jan. 1, 1908, held that one selling on Jan. 7, 1908, could not be legally convicted under accusation charging selling without license in county in which prior to Jan. 1 intoxicants could have been legally sold upon obtaining license. Glover v. State [Ga. App.] 61 SE 862. Such conviction, or an acquittal on such charge, would not bar subsequent prosecution for selling in violation of act of 1907, two offenses being distinct. Id. Persons may be prosecuted and convicted for violations occurring prior to Jan. 1, 1908, of those laws which were suspended or repealed by act of 1907. Tooke v. State [Ga. App.] 61 SE 917.

**What constitutes sale:** Must have been complete sale passing title, as distinguished from executory contract of sale. State v. Davis, 62 W. Va. 500, 60 SE 584. Whether there is actual sale or executory contract of sale is question of intention. Id. Where agreed statements of facts showed that licensed saloon keeper delivered beer to customer at latter's residence, where same was paid for, pursuant to telephone message ordering it received at his place of business, held that judgment of acquittal on theory that parties intended title to pass at saloon keeper's place of business was justified. Id. One who receives money and delivers whisky therefor will be treated as the seller, no other person filling that character in transaction being pointed out by evidence, unless other facts and circumstances shown in evidence clearly indicate that he was acting in capacity of purchaser and not seller. State v. Kiger, 63 W. Va. 450, 61 SE 362. Evidence held to justify finding that defendant was seller. Id. One not engaged in sale of intoxicants, whose employe by **mistake** sold beer kept by his employer for his personal use, held not guilty of selling. Partridge v. State [Ark.] 114 SW 215. Under Act March 12, 1907 (Acts 1907, p. 366), one acting as **agent** of purchaser may be convicted of selling without license. Phillips v. State [Ala.] 47 S 245. Fact that orders transmitted to brewers through defendant described him as agent of purchasers held not to preclude jury from finding that he was in fact agent of brewers. State v. Clow [Mo. App.] 110 SW 632. **Loan** of whisky to be repaid in kind held sale. Brown v. State [Tenn.] 114 SW 198.

**Place of sale.** Witness ordered whisky from defendant, giving him money therefor, and defendant ordered it from dealer in another state. Whiskey was shipped in package which also contained whiskey belonging to third person, not ordered through defendant, and which was addressed to such third person and witness. Third person gave whiskey belonging to witness to defendant, who delivered it to witness. Held that title to whiskey did not pass until whiskey was actually delivered to witness by defendant, and defendant was guilty of sale at place of delivery. Jossy v. State [Ark.] 114 SW 216. Where orders for beer were received and filled by brewers in another state, but beer was shipped to their agent to be delivered to customers on receipt of payment, held that sale took place where such deliveries were made. State v. Clow [Mo. App.] 110 SW 632. Evidence held to justify finding of sale in town where beer was delivered, though credit was to be extended to end of month when payment was to be made in another town. Town of Montclair v. Scola [N. J. Law] 69 A 451. Statute held not to inhibit delivery outside of place of business of retail dealer but within territory covered by his license, in fulfillment of orders received and accepted at his place of business, but to regard such sales as made at such place of business in absence of agreement to contrary. State v. Davis, 62 W. Va. 500, 60 SE 584.

**Quantity sold:** Measurement intended by statute prohibiting sale outside cities and villages in less quantities than five gallons without license held measurement of the quiet liquor, after it has been released from confinement and reached quiet condition in the open air, and gas, froth, or foam cannot be measured. People v. Nylin, 236 Ill. 19, 86 NE 156, afg. 139 Ill. App. 500. Where evidence as to number of bottles of beer to the case sold by defendant was conflicting, question held for jury. Id.

**Evidence** held to sustain conviction. State v. Budworth, 104 Minn. 257, 116 NW 486. Held to justify finding that whiskey was property of defendant and that he made sale thereof to witness. State v. Doyle [W. Va.] 62 SE 453. Evidence held sufficient to sustain finding that method adopted by defendant for making sales was shift or device to evade law, and to sustain verdict of guilty. People v. Nylin, 236 Ill. 19, 86 NE 156, afg. 139 Ill. App. 500. Held to sustain finding that brewers sold beer through defendant, who ran order house, as their agent, and hence to sustain conviction of defendant for selling without license. State v. Clow [Mo. App.] 110 SW 632. Testimony of deputy county clerk that records of his office did not show that license had been granted to defendant held sufficient proof that latter did not have license. Reed v. Ter. [Okl. Cr. App.] 98 P 588. On prosecution for engaging in business without having paid tax prescribed by Comp. Laws 1897, § 5385, held that evidence of single sale on particular day within period laid in information, coupled with evidence of other sales on that and other days, would tend to prove charge. People v. Moore [Mich.] 15 Det. Leg. N. 920, 118 NW 742.

**84.** Objection that ordinance was invalid because it did not expressly prohibit sale but only provided penalty for selling held untenable, since defendant had no right to sell liquor in city unless authorized by city to do so. City of Arcola v. Wilkinson, 233 Ill. 250, 84 NE 264. Provision of constitution prohibiting sales, etc., is valid and self-executing. Ex parte Cain [Okl.] 93 P 974.

**What constitutes sale:** Taking of orders for future delivery of liquor by one representing foreign liquor house, and accepting price at time order was taken, held sale without proof of delivery, there being no limitation on agent's authority and it appearing that transaction was effort to circumvent ordinance. State v. Small [S. C.] 60 SE 676; Id. [S. C.] 63 SE 4. One engaged in traffic of whiskey is guilty of selling whiskey. State v. Small [S. C.] 63 SE 4. Whether defendant delivered liquor to witness as latter's prop-

erty under an agreement or whether transaction constituted sale held for jury under evidence. State v. Smith [Vt.] 69 A 762. Proof that defendant took money and shortly thereafter returned with whiskey, which he delivered to purchaser, held to raise presumption that defendant was seller, and to establish prima facie case of guilt. Williams v. State [Ga. App.] 62 SE 671. Sale of five-gallon keg of whiskey to combination of persons subscribing therefor held sale to various individuals in quantities less than five gallons. Strong v. State [Ark.] 114 SW 239. Defendant being one of procuring causes of sale held accessory, and hence liable as principal in first degree under Kirby's Dig. §§ 1560, 1561. Id. In action for penalty, defendant held not entitled to attack ordinance under which action was brought on ground that it made master liable in all cases for giving away of liquor by his servant, etc., since no such questions were raised in record and ordinance might be valid in part and invalid in part. City of Arcola v. Wilkinson, 233 Ill. 250, 84 NE 264. Instruction that if defendant was proprietor of place where liquor was sold, and liquor was in his possession and control as proprietor, and was sold with his knowledge and consent, he would be guilty of a sale, though he might not have himself handed out liquor to customer, held sufficient under the evidence. State v. Pigg [Kan.] 97 P 859. Revisal 1905, § 3534, held to make it offense to procure liquor from illicit dealer by purchase and deliver it to another when both purchase and delivery are made in place where sale is prohibited by law, and to make such person **agent** of seller and not of purchaser. State v. Burchfield [N. C.] 63 SE 89. In such case person making purchase is to be considered as a principal and liable criminally as the seller, all who participate in misdemeanors being regarded as principals. Id. Person making purchase cannot escape liability by testifying that he was not seller's agent. Id. Statute does not apply where sale is legal or where state statute cannot apply to and affect transaction, as in case of interstate commerce, but in such case general rule applies that one acting entirely as agent of buyer is not indictable. State v. Whisenant [N. C.] 68 SE 91 Sale held consummated in another state, so that transaction was interstate commerce. Id.

**Place of sale:** Where contract was made in prohibition territory and it was agreed that delivery was to be made there, and it was in fact made there, held that transaction was illegal. Shelby Vinegar Co. v. Hawn [N. C.] 63 SE 78. Sale held consummated in another state so that transaction was interstate commerce. State v. Whisenant [N. C.] 63 SE 91.

**Evidence:** Held to show sale by defendant. Davis v. State [Ga. App.] 61 SE 132. Held to authorize conviction. Wheeler v. State [Ga. App.] 61 SE 409.

**85.** Gen. St. 1906, § 3556, as amended by Laws 1907, p. 203, c. 5690, § 1, held not unconstitutional because of omission of word "intoxicating" before word "liquors" therein. Ladson v. State [Fla.] 47 S 517. Whether law has been adopted in particular county is question of law for court. State v. Brown, 180 Mo. App. 214, 109 SW 99. Conviction cannot be sustained where evidence fails to show that local option election was held in county. Davis v. State, 52 Tex. Cr. App. 546, 107 SW 828. Pen. Code 1895, art. 405, providing penalty for **selling in blind tiger,** held not unconstitutional, it being within power of legislature to prohibit sales in that manner and to provide higher punishment for such character of sale than for sales of different character. Schwulst v. State, 52 Tex. Cr. App. 426, 108 SW 698.

**Intent:** In order to escape liability on ground that defendant intended to deliver nonintoxicating drink to purchaser but gave him beer by mistake, it must appear that such mistake grew out of no want of care on defendant's part, in view of statute to that effect. Coleman v. State [Tex. Cr. App.] 112 SW 1049. Held improper to refuse to permit defendant to testify that party who hired him told him that liquor was not intoxicating, and that he sold same believing that such was fact. Reed v. State, 53 Tex. Cr. App. 4, 108 SW 368.

**What constitutes sale:** Instruction that certain facts would constitute sale held proper. Owens v. State, 52 Tex. Cr. App. 362, 107 SW 548. Facts proven held to constitute sale. Potts v. State, 52 Tex. Cr. App. 440, 108 SW 660. Where defendant, who had prescription for whiskey for his own use, procured whiskey thereon for another with latter's money, held that he was guilty of selling whether he made any profit or not, transaction being mere subterfuge. Hawkins v. State [Tex. Cr. App.] 114 SW 813. Evidence that witness went to back of restaurant, where he met defendant, that he told defendant what he wanted, that defendant opened door to room where there was whiskey and told witness to help himself, and that witness did so and paid defendant, held to show sale. Robinson v. State, 53 Tex. Cr. App. 567, 110 SW 905. Held that if money was borrowed from or furnished by B to defendant for purpose of taking whiskey from express office, and whiskey was turned over to defendant in discharge of that debt, there was a sale. Fields v. State, 52 Tex. Cr. App. 451, 107 SW 857. Evidence as to whether or not such was the case held to make question for jury. Id. Transaction whereby defendant forwarded orders for beer, which was shipped consigned to him, each cask bearing name of purchaser, and out of which defendant made no profit, held not sale by defendant. Holloway v. State [Tex. Cr. App.] 111 SW 937. Instruction to acquit, if jury found that prosecuting witness did not pay for whiskey but merely went into place where defendant was and took bottle from bar or counter, or if they had reasonable doubt as to whether he paid defendant therefor, held proper. Dooley v. State, 52 Tex. Cr. App. 491, 108 SW 675. Evidence held to require charge that if witness went into defendant's wareroom and took whiskey without his consent defendant should be acquitted. Howell v. State, 53 Tex. Cr. App. 536, 110 SW 914. **Loan** of whiskey to be repaid in whiskey when person to whom loan was made received whiskey, which he had ordered or was about to order, held sale. Coleman v. State, 53 Tex. Cr. App. 578, 111 SW 1011. Where witness borrowed whiskey in defendant's club room from third person with understanding that loan should be repaid with whiskey, which witness had ordered through defendant, held that transaction was subterfuge and sale. Beckham v. State [Tex. Cr. App.] 111 SW 1017; Wilson v. State [Tex. Cr. App.] 111 SW 1018.

**By whom sale made:** Held that if, acting together as principals, defendant and another

made alleged sale, they would both be guilty, regardless of any subterfuge or evasion of law, and hence that law basing conviction on existence of subterfuge was rightly refused. Wilson v. State, 53 Tex Cr. App. 556, 110 SW 904. Instruction to effect that in order to make a sale it was not necessary that defendant should have personally delivered liquor and received money, but that it was sufficient to show that liquor was delivered with his knowledge and consent and at his instance and direction, and that he or someone for him and for his use received money therefor, etc., held proper. King v. State, 53 Tex. Cr. App. 101, 109 SW 182. Instruction that if defendant and any other person acting together sold intoxicants as alleged and both were present at time of sale, and both knew the unlawful act in making said sale, defendant would be guilty, regardless of whether he actually delivered liquor to purchaser and received pay therefor, held proper, all parties being principals in misdemeanor cases and there being evidence that defendant was present at time of sale, aiding and abetting. Reed v. State, 53 Tex. Cr. App. 4, 108 SW 368. Instruction that if prosecuting witness gave money to third person to go and get whiskey, and latter did so, or if jury had reasonable doubt that such was case, they should acquit, held improperly refused in view of evidence. Dulin v. State, 52 Tex. Cr. App. 442, 108 SW 696. Where witness borrowed whiskey in defendant's clubroom from third person with understanding that loan should be repaid with whiskey, which he had ordered from defendant, held that both defendant and such third person were guilty of selling. Beckham v. State [Tex. Cr. App.] 111 SW 1017. Person making loan held guilty. Wilson v. State [Tex. Cr. App.] 111 SW 1018. Keeper of clubroom, who was present and at whose suggestion loan was made, held equally guilty with person making loan. Coleman v. State 53 Tex. Cr. App. 578, 111 SW 1011. On prosecution for engaging in and carrying on business of dealer in liquors in county which had voted against sale, proof of delivery of whisky to person by defendant and receipt of money therefor by him is prima facie evidence of ownership of whiskey by defendant, and casts upon him burden of rebutting legal presumption. Gen. St. 1906, § 3557. Fisher v. State [Fla.] 46 S 422. One delivering property to another and receiving pay therefor, no other person being known to buyer in the transaction, is presumed to be seller. State v. Russell [Del.] 69 A 839.

**Principal and agent:** Refusal of instructions to effect that if defendant procured whiskey for prosecuting witness with money furnished him for that purpose by the latter and with prescription given defendant by physician, and in so doing acted solely for accommodation of witness and made no profit out of transaction himself, he was not guilty of selling to witness, held error. Davis v. State, 53 Tex. Cr. App. 373, 109 SW 938. Instruction that, if defendant unlawfully sold or caused to be sold, through another as his agent, intoxicating liquor, he would be guilty of violating local option law, held proper. Roberts v. State, 52 Tex. Cr. App. 855, 20 Tex. Ct. Rep. 861, 107 SW 59. Evidence that sale was made by one employed by defendant for that purpose, defendant being absent most of the time from place of business where sales were made, and absent when sale in question was made, held sufficient to sustain conviction. Id. To relieve one who has accepted money and shortly thereafter delivered whiskey to another in return therefor from presumption that he is seller, fact of his agency for buyer and lack of complicity in selling must be shown. Shaw v. State, 3 Ga. App. 607, 60 SE 326. Conviction is unauthorized where state's evidence shows that defendant was agent of buyer to bring whiskey from designated person disclosed by evidence. Id. Conviction held unauthorized where evidence failed to show that defendant either sold or solicited orders for sale of whiskey. Id. Under 24 Del. Laws, p. 135, c. 65, one selling liquor to another in Kent county, whether acting for himself or as agent of another, and whether liquor belongs to himself or another, violates statute. State v. Russell [Del.] 69 A 839. Is guilty even if acts as agent or messenger of purchaser if at same time acts as agent or representative or seller, or if himself owns liquor. Id.

**To whom sale made:** On prosecution for selling to named person held that, if whiskey was bought and paid for by latter's companion, there was no sale to such person. Tippit v. State, 53 Tex. Cr. App. 180, 109 SW 190.

**Place of sale:** Intention governs as to what contract is and when title passes Marsden v. State [Tex. Cr. App.] 111 SW 945. Though time of payment may have some bearing on intention, mere fact that purchaser of beer does or does not pay for it does not determine rule as to where sale was made or fact that it was or was not made. Instruction held erroneous as making guilt dependent on payment after delivery. Id. Mere agreement to sell without delivery does not constitute sale. Pabst Brew. Co. v. Com., 32 Ky. L. R. 1010, 107 SW 728. Sale is not complete if there is anything left to be done by seller, such as selection or segregation of parcel sold from larger quantity in bulk. Id. Defendant's agent took order for beer in local option territory, subject to approval of manager in another state. Defendant shipped beer consigned to purchaser at town not in local option territory, from which place it was delivered to purchaser in local option territory by transfer wagon. Held not a sale in local option territory, in absence of showing that delivery by transfer wagon was pursuant to an arrangement by seller, it being presumed in such case that transfer company was agent of buyer. Id. Commerce clause of federal constitution held to prevent operation of statute in case where witness, who lived in local option territory, sent order for whiskey to defendant in another state, inclosing money to pay for same and express charges, and same was shipped from such other state to witness at place where local option was in force. Doores v. Com., 33 Ky. L. R. 69, 109 SW 302. Fact that defendant also did business in Kentucky, and opened branch office in another state for purpose of taking advantage of commerce clause, held immaterial, such course not being trick or device within meaning of statute. Id. Delivery of liquor by seller to express company in wet territory to be shipped to buyer in dry territory held delivery to buyer in wet territory, express company being deemed agent of buyer in such case. People v. Young, 237 Ill. 196, 86 NE 589. Where

prohibiting the manufacturing of liquors in prohibition territory;[86] prohibiting the taking or soliciting of orders for the sale of intoxicants in prohibition territory;[87]

brewing company received and accepted order for beer in "wet" territory, held that sale was made there, though it was ordered through a saloonkeeper in wet territory by person residing in dry territory and was delivered to latter in dry territory by express, and though such order was received and accepted by saloonkeeper by telephone when purchaser was in dry territory. Id. Laws 1907, p. 302, § 13, providing that giving away or delivery for purpose of evading provisions of local option statutes, or taking of orders or making of agreements at or within anti-saloon territory for sale of liquor, or other shift or device for evading such provisions, shall be deemed unlawful selling, held not to change rule so as to make place of delivery place where liquor actually comes into hands of purchaser. Id. Where intoxicants are ordered to be shipped **C. O. D.,** sale is completed where liquor is delivered to carrier, and seller is not guilty of selling at place of delivery. State v. Rosenberger, 212 Mo. 648, 111 SW 509. Such being case, held immaterial whether its transportation into local option territory was matter of interstate commerce or not. Id. When purchaser, living in local option district, orders, in writing by mail, from a person lawfully engaged in liquor business outside of such district, package of liquor to be sent to him for his own use by express C. O. D. to station within prescribed district, and such purchaser received such package, pays price for same and charges for return of money to express company for seller, sale is complete upon delivery of package to the express company by seller. Mullen v. State, 10 Ohio C. C. (N. S.) 417.

**Evidence** held to sustain conviction. Fisher v. State [Fla.] 46 S 422; Jones v. State, 52 Tex. Cr. App. 519, 107 SW 849; Curtis v. State, 52 Tex. Cr. App. 606, 108 SW 380; Arnold v. State, 52 Tex. Cr. App. 429, 108 SW 666; Goad v. State, 52 Tex. Cr. App. 444, 108 SW 680; Harryman v. State, 53 Tex. Cr. App. 474, 110 SW 926. On theory that defendant and his agent were acting together in common enterprise to sell for mutual profit in prohibited territory, and that direction to agent not to sell in Texas was mere pretext. Oldham v. State, 52 Tex. Cr. App. 516, 108 SW 667. Evidence held to sustain finding that sale was made after law went into effect. Phillips v. State, 53 Tex. Cr. App. 505, 111 SW 144. Evidence held to show sale to person named as purchaser in indictment. Coleman v. State [Tex. Cr. App.] 112 SW 1049. Facts proven held to justify finding of sale and verdict of guilty. Robinson v. State, 53 Tex. Cr. App. 563, 110 SW 907. Evidence held to show sale by defendant, and that transaction was not gift. Human v. State, 52 Tex. Cr. App. 474, 107 SW 817. Evidence held sufficient to warrant finding of sale by defendant. Donaldson v. State, 3 Ga. App. 451, 60 SE 115; State v. Brown, 130 Mo. App. 214, 109 SW 99; Sawyer v. State, 52 Tex. Cr. App. 597, 108 SW 894; Carnes v. State, 53 Tex. Cr. App. 509, 111 SW 402. That defendant was active vendor. State v. Melton, 130 Mo. App. 262, 109 SW 858. To sustain finding that contention that defendant procured whiskey for witness from stranger was mere pretext and pretense, and to sustain conviction. Hall v. State, 53 Tex. Cr. App. 304, 109 SW 933. To show sale by proprietor of club in open violation of law. Killman v. State, 53 Tex. Cr. App. 512, 112 SW 90. Evidence held insufficient to sustain conviction. Gaddis v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 839, 106 SW 1155. To show that defendant made the sale to prosecutor. Johnson v. State, 52 Tex. Cr. App. 554, 107 SW 816. To sustain conviction on theory that defendant owned house where sale was made, and ran business, and that person making sale was his agent. King v. State, 53 Tex. Cr. App. 101, 109 SW 182.

**86.** Verdict of guilty in prosecution for manufacturing in violation of prohibition law (Act Aug. 6, 1907, Acts 1907, p. 81) held unsupported by competent evidence. Allen v. State [Ga. App.] 61 SE 840.

**87.** Act April 1, 1907 (Laws 1907, p. 326), prohibiting soliciting of orders through agents, circulars, etc., held valid exercise of police power. Zinn v. State [Ark.] 114 SW 227. Statute held not in conflict with U. S. Const. art. 1, § 8, giving congress power to establish post offices and post roads, and to designate what shall be carried by and excluded from the mails. Id. One who solicited orders for whiskey in prohibition territory and then purchased from dealer sufficient quantity to fill such orders, and delivered it to purchasers, held not to have violated statute. State v. Earles, 84 Ark. 479, 106 SW 941. Pen. Code 1895, § 428, is police regulation necessary for enforcement of prohibitory regulations, and is not affected by extension of scope of its operations caused by passage of general prohibition act of 1907. Rose v. State [Ga. App.] 62 SE 117. Term "solicit personally," as used therein, includes any act done by seller himself which may tend to affect sale, as contrasted with any like act "by an agent" of the seller tending to similar result. Id. Whether solicitation is personal or by an agent is not dependent on personal presence of solicitor, but whether means of solicitation, whether oral or written, are used by agent or principal himself. Id. Solicitation by mail is personal solicitation, if seller himself in person writes or mails letter received by buyer. Id. To solicit sale by letter or circular is crime under said section if letter is intended to be delivered, and is in fact delivered as intended, in any county where sale is prohibited. Id. Where sale is solicited by written or printed communication mailed in another state, courts of county where letter is received by addressee and contents ascertained have jurisdiction, since no crime is committed until delivery of letter in state where solicitation is forbidden. Id. State may punish for crime committed through mails as medium without infringing right of federal government to control mails. Id. Said section is not in conflict with commerce clause of federal constitution in so far as it prohibits solicitation of orders, though seller and liquor are in another state, such regulation being expressly allowed by Act Aug. 8, 1890, c. 728, 26 Stat. 313 (U. S. Comp. St. 1901, p. 2177). Id. Fact that Laws 1907, p. 297, provide that taking of orders or making of agreements in anti-saloon territory for sale or delivery

prohibiting the keeping on hand of intoxicants;[88] prohibiting the keeping or furnishing of liquors at any public place,[89] or at one's place of business;[90] prohibiting the bringing or shipping of liquors into territory where the sale thereof is prohibited,[91] and the regulation of carriers in this regard;[92] the designation of certain

of intoxicants shall be deemed an unlawful selling held not to render it invalid as interfering with interstate commerce, act not purporting to in any manner control importation of liquor from other states. People v. McBride, 234 Ill. 146, 84 NE 865. Question held not involved in prosecution for selling in anti-saloon territory. Id. Held that in any event invalidity of such provision would not affect balance of act. Id.

88. Municipal ordinance held not void as punishing mere intention, without any overt act. Callaway v. Mims [Ga. App.] 62 SE 654.

89. Acts 1907, p. 81, construed, and held that phrase "public place" is to be given relative meaning, and place may be public during some hours of the day and private during others. Tooke v. State [Ga. App.] 61 SE 917. Public place includes any place which from its public character members of the general public frequent, or where they may be expected to congregate at any time as matter of common right, also any place at which, even though it is privately owned or controlled, number of persons have assembled through common usage, or by general or indiscriminate invitation, express or implied. Id. It excludes those places which, though publicly owned, are devoted to private use and are not open to access of public, and also those places privately owned or controlled from which indiscriminate public is generally excluded, though at a particular time in question a number of persons may have congregated there, if congregation is result of special invitation for that occasion alone. Id. Town guardhouse relative to prisoner confined in cell therein with a sole companion is not public place. Id. Person's residence primarily is not public place, though it may become so through use to which owner devotes it. Id.

90. A "place of business" within purview of Acts 1907, p. 81, § 1, means place devoted by proprietor to carrying on of some form of trade or commerce. Jenkins v. State [Ga. App.] 62 SE 574. Phrase "at their place of business" includes in its meaning immediate room or place in which business in question is conducted, also any nearby place or room used by proprietor in connection with the business, or in such relation to actual place of business as to indicate that it is convenient place which proprietor would probably use for keeping therein such liquors as he might desire to furnish others for purpose of inducing trade, or for keeping therein liquors intended for unlawful sale under cover of business carried on in the main place. Id. Word "at" includes all that "in" would include, and less than "in and near" would include. Id. Reasonableness and probability of nearby place or room being used for either or both of the purposes indicated is to be judged from surrounding circumstances, and especially from manner in which it is actually used. Id. Back room of store partially cut off by partition wall, used for storage of goods and in which no goods were usually bought and sold, held within definition. Id. Nearby room, which person uses in connection with business conducted by him in his regular place of business, is a part of his "place of business." Bashinski v. State [Ga. App.] 62 SE 577. Jury held authorized, but not required, to find that storage room, etc., used in connection with restaurant, was within definition. Id. Where one makes common practice of selling illegally at fixed place, such place thereby becomes his place of business, but single sale, or even sporadic sales, will not ipso facto convert place where sale occurs into seller's place of business. Id. Definition of what is "place of business" is question of law for court, and whether any particular place falls within definition one of fact for jury, except where facts necessary to consititute particular place such are conceded to exist. Jenkins v. State [Ga. App.] 62 SE 574. Instruction telling jury what would constitute room a place of business held not invasion of province of jury. Bashinski v. State [Ga. App.] 62 SE 577. Held not necessary to show that liquor was publicly kept. Jenkins v. State [Ga. App.] 62 SE 574. Means public place of business as distinguished from place of private business, place where public, having business with owner, are impliedly or expressly invited for its transaction, word business being used in sense of trade, commerce, or traffic, and not as synonymous with occupation, vocation, or employment. Roberts v. State [Ga. App.] 60 SE 1082. Statute should be reasonably construed. Id. Whether place of business is public place is question for jury. Id. Room used solely for purpose of storage, which was kept locked, and to which public was not invited and from which they were excluded, and in which no business was transacted, held not place of business. Id. Held not unlawful to keep alcoholic liquors stored in such a room, where it appeared that liquor was never drunk therein or taken therefrom to be drunk, but that it was used by owner only for purpose of making non-alcoholic syrup or drink in private laboratory from which public was also excluded. Id. Where same place or premises is occupied both as place of business and for residential or other private purposes, proprietor cannot lawfully keep intoxicants there during any of the hours when place is open for business, or when members of public are admitted therein. Land v. State [Ga. App.] 62 SE 665. Intoxicants may be kept there during hours when place is closed to public access and all business has closed and room or premises is devoted to no other than private use, provided they are not allowed to remain there after reopening for business. Id. Mere fact that doors were open or closed not conclusive on question. Id.

91. Laws 1907, p. 1147, c. 806, making it unlawful for any person to bring more than half gallon of liquor into Burke county in any one day, except to druggist for medicinal purposes, held not valid exercise of police power, and unconstitutional in that it unduly restricts right of citizen to use of such

classes of persons who may sell and the regulation of such sales;[93] prohibiting the

property without any intent to violate any prohibited right in relation to it, taking of prohibited quantity into such county having no reasonable substantial relation to sale of liquors as prohibited by law. State v. Williams, 146 N. C. 618, 61 SE 61. Carrying liquor on the person is transporting it within meaning of Cr. Code 1902, § 589, making it crime to transport liquors from place to place within state by wagon, etc., "or by any other means or mode of carriage." State v. Pope, 79 S. C. 87, 60 SE 234. Where proof showed that defendant had liquor in his possession and was actually selling it, held that it was contraband and not within protection of commerce clause of federal constitution, though purchased out of state. Id. Where defendant was found at church selling liquor from bottles in his possession, held that it could not be contended that there was no evidence that he had transported it from one place to another, there being presumption that he carried it there. Id. Defendant held not within Cr. Code 1902, § 581, providing that liquors purchased outside of state, owned and conveyed by defendant as personal baggage, shall be exempt from seizure when quantity does not exceed one gallon. Id. Act Feb. 16, 1907, § 27, prohibiting transportation of intoxicants for unlawful use "to any place or county" where manufacture and sale are prohibited, held to make it an offense to transport liquor for unlawful use from place to place within a county. State v. Arnold [S. C.] 61 SE 891. Evidence held to make question for jury whether there was transportation for unlawful use. Id.

**92.** Acts 1906, p. 320, c. 63, making it an offense for carriers and others to deliver, etc., intoxicants in local option territory, making delivery of each package separate offense, and providing that public carriers may deliver intoxicants to licensed druggists in unbroken packages in quantity not to exceed 5 gallons at any one time, construed, and held that delivery by carrier to licensed druggist of unbroken box of whisky containing 5 gallons, and box of grain alcohol containing less than 5 gallons, at same time, was not violation of the act. Louisville & N. R. Co. v. Com., 33 Ky. L. R. 855, 111 SW 333. Carrier is not liable if its agents acting in good faith and with due caution are actually deceived as to contents of package delivered to them for shipment. Adams Exp. Co. v. Com., 33 Ky. L. R. 967, 112 SW 577. Evidence held to sustain finding that agents knew or had reason to know that box contained intoxicants and that they were not deceived as to its contents. Id. Agent in such case must exercise same kind of judgment as if he were acting for himself, and what would or ought to convince him that certain facts exist is notice to carrier. Id. In addition to acting in good faith, agents must also exercise ordinary care or due caution to avoid violation of statute. Id. Though, in absence of statutory provision to that effect, carrier has no right of inspection, where it has reasonable suspicion that shipper is attempting to use its vehicle to violate law, it should require enough evidence of legality of shipment to satisfy reasonably prudent mind that suspicion was not well founded. Id. If knows article is contraband, must reject it, no matter what shipper says to contrary. Id. Right to demand assurances, and inspection if same is reasonable and practicable under circumstances, will not be denied as interference with commerce, statute not being for benefit of commerce. Id. Provision of said act that individuals may bring into such district upon their persons or as personal baggage, and for their private use, liquor in quantities not more than 1 gallon, held to apply to private persons only, and not to corporation. Id. Express company cannot be convicted under Acts 1903, p. 130, c. 40, § 1, for unlawfully delivering intoxicants shipped from another state c. o. d. to one in state not licensed to sell such liquor and who had not in good faith ordered same for his own use, transaction being interstate commerce to which statute is inapplicable. State v. U. S. Exp. Co., 63 W. Va. 299, 60 SE 144.

**93. Hotels:** Building having 10, but less than 16, bedrooms above basement or first floor, if it otherwise complies with liquor tax law and building code, may receive liquor tax certificate and be used as hotel under Laws 1897, c. 312, § 31, though it would not be classed as hotel under New York Building Code, § 10, and be subjected to provisions of that code especially applicable to hotels as defined therein. In re Clement, 113 NYS 392.

**Manufacturers:** Manufacturer received barrel of whisky from government warehouse after paying tax thereon, barrel being stamped to show such payment. Thereafter he transferred whiskey to 5 gallon kegs, stamping each with stamps furnished free by government for that purpose. Held that sale of such kegs was sale in original packages containing not less than 5 gallons within statute authorizing such sales by manufacturer without license. Bunch v. State [Ark.] 114 SW 239. Acts 1908, c. 189, § 15, relating to sales by licensed manufacturers of malt liquors, construed, and held that manufacturer located in no license territory can make no sale and delivery at place of manufacture, and that manufacturer in license territory can sell and deliver not less than 1 gallon at place of manufacture. Robert Portner Brew. Co. v. Southern Exp. Co. [Va.] 63 SE 6.

**Druggists and physicians:** On prosecution of druggist for selling in less quantity than 4 gallons, evidence held to show sale and to sustain conviction. State v. Scanlon, 130 Mo. App. 395, 110 SW 16. Title of Laws 1907, p. 297, providing for local option, held sufficiently broad to embrace provisions exempting from its operation sales by druggists for certain purposes and under certain conditions. People v. McBride, 234 Ill. 146, 84 NE 865. Druggist or pharmacist legitimately engaged in that business held to have right, without express authority of law, to have, keep, possess and store certain liquors mentioned in ordinance, as part of necessary drugs or stock in trade of his business, subject to conditions, limitations and restrictions imposed by said ordinance, and that he could be subjected to penalties therein prescribed for having, etc., such liquors only when it appeared that he was or had been dispensing them in violation of such conditions, restrictions and limitations. Town of Selma v. Brewer [Cal. App.] 98 P 61.

renting of rooms to be used for the unlawful sale of liquor;[94] provisions against evasions of the liquor laws;[95] regulations as to place of consumption;[96] denunciation

Where ordinance prohibiting sale or possession of intoxicants authorized sales by druggists under certain conditions and for certain purposes, held that druggist had of necessity right to possess such liquors as he was authorized to sell, and complaint in action against him for having liquors in his possession was demurrable where it failed to allege that he sold or was engaged in business of selling such liquors contrary to provisions of said ordinance, or without permit therein provided for. Id. Druggist selling liquor must comply with Code, § 2394, providing that **request** must be signed by applicant in his true name, truly dated, stating that applicant is not a minor, his residence, for whom and whose use liquor is required, his true name and residence, and where numbered, by street and number, if in a city. Long v. Joder [Iowa] 116 NW 1063. Is guilty of violation of law if fails to comply even through carelessness alone. Id. If applicant lives in country, must give both county and township of his residence. Id. Sale for medicinal purposes in local option territory may be made only on **prescription** of regular practicing physician. Williams v. State, 53 Tex. Cr. App. 156, 109 SW 189. Under Rev. St. 1899, § 3047, prescription in order to afford protection to druggist must be in writing and dated and signed by licensed physician, must contain name of person for whom liquor is prescribed, and must state that it is prescribed as necessary remedy. State v. Davis, 129 Mo App. 129, 108 SW 127. Prescriptions described in indictment held not to authorize sale or to be any protection to druggist, and to be of no legal force or effect whatever, so that they could not be made basis for prosecution of physician under § 3050, making it misdemeanor to issue prescription for intoxicants to be used otherwise than for medicinal purposes. Id. Druggist held not to have violated local option law by selling on prescription stating that liquor was intended for buyer, though it was in fact for use of latter's wife, there being no showing of fraud or collusion. St. 1903, § 2558, construed. Commonwealth v. Byers, 33 Ky. L. R. 252, 109 SW 895. **Offenses by physicians:** Title of Act Aug. 13, 1907 (Acts 1907, p. 727), relating to prescriptions by physicians and others for intoxicants, held sufficiently comprehensive to embrace all matters covered by body of act. McAllister v. State [Ala.] 47 S 161. Statute held not invalid as interfering with personal liberty of a physician, since it embraces all of his class, but to be valid exercise of legislative power. Id. Provision of § 1 that no licensed physician or other person shall write or cause to be written or issued a prescription for more than one-fourth of pint of intoxicants on Sunday, etc., construed, and held that words "other person" apply to licensed physician or one not licensed who assumes to practice medicine, and hence that doctor whose name was signed to prescription by defendant was within act whether licensed or not. Id. Act No. 85, p. 124, of 1886, prohibiting physician from prescribing intoxicants in attempt to evade, or to assist any person in evading, payment of license or any law or ordinance relating to sale of intoxicants, covers but one subject, which is expressed in its title. State v. Breaux [La.] 47 S 876. Statute applies to physician who prescribes intoxicants for purpose of evading, or to assist another in evading, the Sunday law, it not being confined in its operation to evasion or attempt to evade license law. Id. Intent is essential element of offense. Id.

**94.** To render landlord guilty of violation of St. 1903, § 2567, penalizing one who "knowingly furnishes and rents a room to another" in which liquors are sold in local option territory in violation of local option law, he must know at time of renting that such is its intended use. Indictment held insufficient. Commonwealth v. Conway, 33 Ky. L. R. 996, 112 SW 575. To sustain conviction, must be some evidence tending to show that lessor knew, or had such information as would put person of ordinary prudence upon notice, at or before time lease was entered into, that it was intended to sell liquor on premises in violation of law, knowledge of illegal sales after making lease being insufficient. Commonwealth v. Morris, 33 Ky. L. R. 987, 112 SW 580.

**95.** In order to sustain conviction for giving away liquor in violation of Wilson's Rev. & Ann. St. 1903, § 3407, gift must be shown to have been made under some "pretext" or subterfuge, for purpose of evading law. Weston v. Ter. [Okl. Cr. App.] 98 P 360. Resident of dry territory arranged with employe of saloonkeeper in wet territory that he might telephone order from dry territory and have same filled. Thereafter he telephoned order to saloon, from which place it was transmitted to brewer in wet territory, who delivered beer to express company in wet territory, and beer was shipped by it to purchaser in dry territory. Held that saloonkeeper was not guilty of shift or device to evade local option laws within meaning of Laws 1907, p. 302, § 13, making such a shift or device an unlawful selling. People v. Young, 237 Ill. 196, 86 NE 589. Opening branch office in another state for purpose of taking advantage of interstate commerce clause held not trick or device to evade local option law. Doores v. Com., 33 Ky. L. R. 69, 109 SW 302.

**96.** Word "premises" as used in Code, § 2460, prohibiting any person, etc., operating any brewery from permitting drinking of products thereof or selling same at retail upon the premises of such brewery, held to include only buildings occupied by and grounds used in connection with such establishment, and not saloon in same building for which it paid mulct tax, though there was entrance from brewery into saloon through office of brewery's manager, where latter entrance was not used by any one to obtain beer, and employes who were entitled to beer under their contracts obtained same from saloon which they entered through public entrance from street. Orke v. McManus [Iowa] 115 NW 580. Term "business or occupation" as used in Gen. Laws 1905, p. 81, c. 64, making it offense for any person, etc., engaged in business or occupation of keeping or storing intoxicants in any county, etc., where sale has been prohibited, to permit any one to drink any intoxicants in

of places where liquors are sold as nuisances,[97] or as disorderly houses;[98] regulations as to the manner in which licensees must conduct their places of business;[99]

his place of business, defined, and definition in instruction held too restrictive as applied to facts. Cohen v. State, 53 Tex. Cr. App. 422, 110 SW 66.

**97.** For abatement of traffic as nuisance, see § 8, post. Any person in any way concerned in keeping or owning intoxicating liquor with intent to violate provisions of Code, § 2404, providing for punishment of any person keeping or maintaining, or aiding or assisting in keeping or maintaining, any clubrooms in which intoxicants are kept for use, gift, sale, etc., is guilty also of violation of Id. § 2382, prohibiting any person from disposing of or owning or keeping any intoxicants with intent to violate law; and if he uses any particular place for owning or keeping such intoxicants for any of the prohibited purposes, he is also guilty of maintaining nuisance under provisions of Id. § 2384. State v. Johns [Iowa] 118 NW 295. Where unlawful sales were shown for purpose of proving intent with which liquors were kept upon premises, held that fact that no sales were proved subsequent to given date raised no presumption in favor of defendant that his unlawful intent ceased on that date. Id. Where intent with which liquors were kept on premises was shown by proof of unlawful sales, such intent would be presumed to continue until contrary appeared. Id. Where state traced liquor consigned to defendant with his knowledge to particular rooms, proved presence of defendant there, and that some of liquor was disposed of to witness while defendant was there, and that witness paid assessment for some purpose, held that there was sufficient evidence to warrant finding that defendant was owning and keeping intoxicants at particular place with intent to violate law, and that he was therefore using said place for purposes prohibited within meaning of statute. Id. Where liquors were consigned to defendant with his knowledge, held that state was entitled to presumption that they were owned by him. State v. Johns [Iowa] 118 NW 295. Evidence in action to enjoin liquor nuisance held to sustain judgment for plaintiff. Bohstedt v. Shanks [Iowa] 116 NW 812. Since offense of maintaining nuisance may be committed in dwelling house or any other kind of house, complaint in criminal prosecution need not state kind of house in which nuisance was kept and maintained, or negative fact that it was dwelling house. City of Ft. Scott v. Dunkerton [Kan.] 96 P 50. On prosecution for maintaining nuisance in violation of dispensary law, evidence held sufficient to go to jury. State v. Nelson, 79 S. C. 97, 60 SE 307.

**98.** Acts 30th Leg. p. 246, c. 132, declaring house in which liquors are sold or kept for sale without license to be a disorderly house, and making it an offense to keep such a house, held not in conflict with Const. art. 8, § 35, providing that no statute shall contain more than one subject, which shall be expressed in its title. Joliff v. State, 53 Tex. Cr. App. 61, 109 SW 176. Even though title of act is not sufficiently broad to embrace matter in art. 359a attempted to be added to Pen. Code 1895, that fact does not invalidate balance of act, since such matter is separable. Id. Said statute held not impliedly repealed by Acts 30th Leg. c. 138, §§ 4, 5, 6, 27, prohibiting sale without license. Id. Statute held applicable in local option territory as well as in territory where license could be obtained. Id. Statute held not in conflict with Const. art. 16, § 20, requiring legislature to adopt local option law. Id.

**99.** Act 1907, p. 518, being an act to further regulate opening, closing and operating of saloon and the giving away or selling of intoxicants, held not to violate Const. § 61, providing that no act shall be so altered or amended on its passage through either house as to change its original purpoee (Fourment v. State [Ala.] 46 S 266), or Const. § 45, providing that each law shall contain hut one subject, which shall be expressed in its title (Id.). Even if § 2, prohibiting delivering of intoxicants during prohibited hours, is invalid because not within title, validity of balance of act is not affected thereby. Id. Word "saloon" as used in title means place where intoxicating liquors are sold. Id. Code, § 2448, prohibiting sale of intoxicants in **room having more than one entrance,** held not to apply to brewery, so that latter was not operated illegally though it had entrance into saloon run by it which also had entrance onto street, and was therefore operated in violation of law. Orke v. McManus [Iowa] 115 NW 580. Evidence held to show that defendant was interested with his bartender in operating pool and card tables in back room in connection with his saloon in aid or promotion of sales of liquors at the bar, and hence was guilty of violation of Burns' Ann. St. 1901, § 7283b, requiring licensed retailer of intoxicants to provide for sale of such liquors in a **room separate from any other business** of any kind. Mason v. State [Ind.] 83 NE 613. Subleasing of room to bartender, etc., held mere subterfuge to evade law. Id. Saloon held **operated in connection with disorderly house** authorizing cancellation of liquor tax certificate. In re Clement, 58 Misc. 257, 110 NYS 893. Ordinance prohibiting **furnishing of food by** licensed dealers in connection with intoxicants under penalty of fine or imprisonment held to define criminal offense within Const. art. 1, § 7, which prohibits putting any person twice in jeopardy. City of St. Paul v. Stamm [Minn.] 118 NW 154.

**Permitting females in saloons:** Ordinance prohibiting licensees from harboring or employing females in or about their places of business or permitting them to resort there for purpose of drinking held not unconstitutional as unwarranted discrimination against rights of females or an infringement on their equal rights, privileges and immunities, but to be valid exercise of police power. People v. Case [Mich.] 15 Det. Leg. N. 363, 116 NW 558. City held to have power under its charter to pass such ordinance. Id. On prosecution for suffering or permitting females to be or remain in saloon for purpose of being supplied with liquor, in violation of Rev. Codes, § 8385, evidence held to warrant finding that defendant was, for time being, in actual charge and control of saloon when sales to females were made. State v. Conway [Mont.] 98 P 654.

**Screen laws:** Act April 18, 1906, § 4 (P. L.

requiring the filing of lists of names of persons employed in saloons;[1] prohibiting the opening of places of sale and selling or furnishing liquors on certain days[2] and

1906, p. 203), dividing liquor dealers into two classes, first consisting of hotel and restaurant keepers, etc., and second of saloonkeepers, and providing certain regulations which are made applicable to second class and not to first, held not to contravene 14th amendment of federal constitution. Meehan v. Jersey City Excise Com'rs [N. J. Err. & App.] 70 A 363, afg. [N. J. Law] 64 A 689. Nor is such section in conflict with Const. art. 4, § 11, subd. 11, prohibiting private, local or special laws, regulating internal affairs of municipalities, or granting exclusive immunities, privileges or franchises. Id. Said section held to subject inns and taverns, as well as hotels, to restrictions therein mentioned, unless they have at least 10 spare rooms and beds for accommodation of boarders, transients and travelers. Id. Fact that § 5 of said act, relating to appointment of excise commissioners, is unconstitutional, held not to affect validity of remainder of act. Meehan v. Jersey City Excise Com'rs. [N. J. Err. & App.] 70 A 363, afg. [N. J. Law] 64 A 689. In proceedings under supplement of 1906 (P. L. 1906, p. 109), to act of 1899 (P. L. p. 77) for forfeiture of license of an inn and tavern for noncompliance with provision that if license be not in an inn and tavern or hotel having at least 10 spare rooms and beds for accommodation of guests, etc., interior shall be exposed to view from street at all times when sale of liquor is prohibited by law, complaint must show that inn and tavern whose license is sought to be revoked did not have such accommodations for guests as to bring it within class exempted by statute. Cuirczak v. Keron [N. J. Law] 70 A 366. Movable screen maintained in front of saloon sufficient to obstruct view of interior through door or window held violation of Cobbey's St. 1907, § 7179. Woods v. Varley [Neb.] 118 NW 1114. Employe of saloonkeeper who works in and around saloon cannot be held guilty of violation of § 7179 by reason of fact that screens are maintained in violation thereof, but if he can be held guilty of violation of said section at all, it must appear that he actively participated in placing or maintaining or causing to be placed or maintained, the forbiddsn screens or other obstructions. In re Adamek [Neb.] 118 NW 109. Obstruction of view of interior of saloon by screen at end of bar and by permitting pasting of advertising bills over window held violation of Laws 1881, c. 61, § 29, rendering licensee guilty of misdemeanor. Bolton v. Becker [Neb.] 119 NW 14. Screen held violation of said section. Woods v. Kirvohlavek [Neb.] 118 NW 1115.

1. Code, § 2448, subd. 4, construed, and held that where there are no persons so employed it is necessary to file statement showing that fact. Jones v. Mould [Iowa] 116 NW 733. Held that statute should be strictly construed in proceeding for contempt in violating injunction against unlawful sale of liquor, since such proceeding is quasi criminal in its nature. Id.

2. **Sunday:** Rev. St. 1899, § 3011, prohibiting dramshop keepers from keeping same open or selling or disposing of intoxicants on Sunday, held not in conflict with Const. art, 4, § 53, prohibiting class legislation. State v. Grossman [Mo.] 113 SW 1074. One charged with violation of said section held not entitled to question constitutionality of Id. § 3013, prohibiting granting license to one convicted of violating statutes relating to dramshops, two sections being separate and distinct. Id. Evidence held to support conviction for operating dramshop on Sunday and selling intoxicants therein on that day. State v. Donahue [Mo. App.] 110 SW 1102. Offense of keeping saloon open on Sunday consists in not keeping it closed, and it is not material whether or not any sale was made on that day, or whether or not any person was seen to enter or depart from the saloon, nor is intent of saloonkeeper in not keeping it closed material. State v. Schell [S. D.] 117 NW 505. City held to have power under its charter to pass ordinance requiring closing of saloons between hours of 9 p. m. and 5 a. m., and on Sunday. Thomas v. Saunders [Fla.] 47 S 796. Ordinance held not in conflict with provision of Laws 1907, p. 41, c. 5597, § 8, that no license issued under that act shall entitle holder thereof to sell between hours of 12 o'clock Saturday night and 12 o'clock Sunday night. Id. Since unlawful sale on Sunday and unlawfully allowing place where liquors are sold to remain open on Sunday are merely different forms of committing same legal offense, unlawful sale on Sunday can be charged as second offense, when first conviction relied upon was for unlawfully allowing saloon to remain open. Jung v. Ohio, 7 Ohio N. P. (N. S.) 397. Evidence in proceeding to cancel liquor tax certificate held to show sales not in connection with regular meals ordered and served. In re Clement, 112 NYS 126. On prosecution for unlawfully opening and permitting saloon to be open for traffic and for selling, evidence held insufficient to sustain conviction. Caskey v. State [Tex. Cr. App.] 108 SW 665. Evidence in proceeding for revocation of license held insufficient to show sale on Sunday. Commonwealth v. Campbell, 32 Ky. L. R. 1131, 107 SW 797.

**Election day:** Proof that defendant was engaged in saloon business and that his saloon was open by or under his direction on election day held sufficient to show violation of Pen. Code 1895, art. 185, it being unnecessary to show that he sold, gave away, or offered to sell intoxicants. Smith v. State, 52 Tex. Cr. App. 357, 107 SW 353. Sale of liquor on day of school election held violation of Code, § 2448, par. 9, prohibiting sales "on any election day." Hammond v. King, 137 Iowa, 548, 114 NW 1062. Fact that defendant was advised by county attorney, city attorney and chief of police that sale on school election day was not illegal held no defense, intent not being an essential element of offense. Id. Fact that defendant entered saloon alone for sole purpose of procuring his registration certificate, without which he could not vote, held not to render him guilty of violation of St. 1903, § 2565. Thompson v. Com., 32 Ky. L. R. 714, 107 SW 223. Evidence on prosecution for giving away whisky on election day held to make

during certain hours;[3] limiting the number of licenses to be issued;[4] the designation of saloon limits;[5] prohibiting the selling of liquor in certain vicinities,[6] or in

question for jury, so that it was error to direct verdict of guilty. Latch v. State, 84 Ark. 620, 106 SW 944. Evidence held not to require reversal of finding that applicant for license did not sell liquor on certain election day. In re Adamek [Neb.] 118 NW 109.

**NOTE: "Keeping open"** as applied to retail liquor stores or bar rooms implies a readiness to do business therein (Lynch v. People, 16 Mich. 472; Munzebrock v. State, 10 Ohio Dec. 277), and such a place is "open" when liquors are dispensed therein or therefrom, notwithstanding the fact that the usual means of ingress or egress are closed (Blahut v. State, 34 Ark. 447; Harvey v. State, 65 Ga. 568; Kroer v People, 78 Ill. 294), or that the bar is concealed by a screen marked "Bar closed" (Hussey v. State, 69 Ga. 54), or that but a single person is entertained (People v. James, 100 Mich. 522, 59 NW 236), or that the bar tender alone helps himself to liquor (People v. Crowley, 90 Mich. 366, 51 NW 617), or that the bar tender is absent and patrons are allowed to help themselves (People v. Cummerford, 58 Mich. 328, 25 NW 203), or that only employes are allowed therein and patrons are served with liquor in another room (Cooper v State, 88 Ga. 441, 14 SE 592; Harmon v. State, 92 Ga. 455, 17 SE 666; People v. Whipple, 108 Mich. 587, 66 NW 490; Peope v. Cox, 70 Mich. 247, 38 NW 235; People v. Ringsted, 90 Mich. 371, 51 NW 519; People v. Koob, 109 Mich. 358, 67 NW 320), or that the liquor is served in an adjacent room from a stock temporarily kept therein (People v. Ringsted, 90 Mich. 371, 51 NW 519). On the other hand, such a place has been held not "open" within the statutory meaning when persons are permitted to enter for another purpose than that of securing liquor (State v. Gregory, 47 Conn. 276; Patten v. Centralia, 47 Ill. 370; Weidman v. People, 7 Ill. App. 38; Miller v. State, 68 Miss. 553, 9 S 289; Lincolnton v. McCarter, 44 N. C. 429). In some jurisdictions, however, the rule is more strict, and the opening of such a room for any purpose (Baldwin v. Chicago, 68 Ill. 418; Klug v. State, 77 Ga. 734; Monses v. State, 78 Ga. 110; People v. Cox, 70 Mich. 297, 38 NW 235; People v. Woldoogel, 49 Mich. 337, 13 NW 620; Lederer v. State, 5 Ohio C. C. 623; Effinger v. State, 9 Ohio C. C. 376; State v. Helbel, 54 Ohio St. 321, 43 NE 328; McKinney v. Nashville, 96 Tenn. 79, 33 SW 724) or of rooms adjacent and connected (People v. Hughes, 97 Mich. 534, 56 NW 942; People v. Higgins, 56 Mich. 159, 22 NW 309; People v. Cox, 70 Mich 247, 38 NW 235; People v. Hughes, 90 Mich. 368, 51 NW 518) will constitute an "opening" of the bar room. [Ed.]

**3.** City held to have power under its charter to pass ordinance requiring closing of saloons between hours of 9 p. m. and 5 a. m., and on Sunday. Thomas v. Saunders [Fla.] 47 S 796. Village ordinance providing that all saloons should remain closed during certain hours, "unless by special permission of the president," held void as attempting to confer arbitrary power on an executive officer and allowing him, in executing ordinance, to make unjust and groundless discriminations among persons similarly situated. Village of Little Chute v. Van Camp [Wis.] 117 NW 1012. Held void also because legislative power to regulate saloons is lawmaking power vested in village board by St. 1898, § 893, subd. 26, which cannot be delegated. Id. Provision giving president power to suspend operation of ordinance at will held a compensation for first part of ordinance, so that its invalidity rendered whole ordinance void. Id.

**4.** St. 1903, § 3704, subd. 4, providing that in towns of sixth class which have voted in favor of sale trustees shall have no right, power, privilege, or discretion to refuse licenses, held not to deprive board of reasonable discretion to limit number of licenses that shall be granted. Schweirman v. Highland Park [Ky.] 113 SW 507. Refusal to issue license to one otherwise qualified held not arbitrary or capricious exercise of authority, or an abuse of discretion, where thers were already 4 licensed saloons in town. Id. Excise board has discretionary power to limit number of licenses. In re Jugenheimer [Neb.] 116 NW 966. This is especially true in cities where board is charged with duty of policing city and maintaining peace and good order therein, but is limited in number of officers which it may appoint and maintain for that purpose. Id.

**5.** Power to regulate held to give city power to restrict location of saloons, though charter did not confer it in express terms. Churchill v. Common Council [Mich.] 15 Det. Leg. N. 379, 116 NW 558. Bal. Ann. Codes & St. § 2934, conferring upon mayor and council power to regulate, restrain, license, or prohibit sale of intoxicants in town of Pasco, held not impliedly repealed by Id. § 1011, subd. 10, conferring on municipalties of fourth class power to license sale of intoxicants for purpose of regulation and revenus. State v. Franklin County Superior Ct. [Wash.] 94 P 1086. Power conferred by § 1011 held to include power to refuse license, and to restrict locality in which business should be carried on. Id. Municipal officers in restricting localities in which business might be carried on and in granting or refusing licenses held to be exercising legislative functions, so that their acts in so doing could not be reviewed or controlled by courts. Id. City ordinance prohibiting issuing of licenses within certain described territory, with exception of one lot on which dramshop was being conducted, held unreasonable and void. Moore v. Danville, 232 Ill. 307, 83 NE 845. Const. art. 16, § 20, requiring legislature to enact local option law, held not to preclude legislature from establishing saloon limits within cities and towns, that being in no sense a prohibition law, but merely a regulation of sale. Williams v. State, 52 Tex. Cr. App. 371, 107 SW 1121. Provision of charter of city of Dallas, art. 12, subd. 2 Sp. Laws 1907, p. 646, c. 71), that no person shall establish or maintain saloon within certain prescribed limits, held to merely authorize the inhibition of the saloon. Id. Provision that commissioners shall never have power to authorize establishment and maintenance of saloons in territory known as Oak Cliff, and that Fair Park shall not be included in prohibited limits, held bare legislative declaration, and not in conflict with state or federal constitutions

as denying equal protection of law. Id. Ordinance adopted pursuant to charter held not invalid on theory that charter provision delegates to city authorities in control of said park power to suspend said charter provision and ordinance establishing saloon limits, in so far as said park is concerned. Id. Limits as fixed by charter and ordinance adopted pursuant thereto held sufficiently definite, notwithstanding slight discrepancies in calls of boundaries and clerical errors. Id. Exemption of Oak Cliff held constitutional whether such territory be regarded as local option district or additional exempt territory. Id. Fact that ordinance did not except from its provisions Oak Cliff and Fair Park held not to render it invalid. Id. Charter provision and ordinance enacted pursuant thereto held not unconstitutional as attempt on part of legislature to delegate its power to suspend a general law. Andreas v. Beaumont [Tex. Civ. App.] 113 SW 614. Ordinance held not void as unjust and unreasonable discrimination because it permitted those who had previously obtained licenses to conduct business outside limits thereby fixed to continue in business until such licenses expired. Id. Such provision held not to be void as unequal and nonuniform taxation because after its passage occupation tax of those within limits was increased and increase did not apply to those conducting business outside of limits under unexpired licenses, since if either ordinance was void for that reason it was one increasing tax. Id. Sp. Laws 1907, p. 661, c. 73, amending charter of city of Galveston by adding provision authorizing board of commissioners to license, tax, regulate, and prescribe location of places where intoxicants are sold, held in conflict with Const. art. 3, § 36, providing that no law shall be revived or amended by reference to its title, etc. Henderson v. Galveston [Tex.] 114 SW 108. Charter provision held not unconstitutional on ground that method prescribed by constitution whereby sale of intoxicants may be prohibited is exclusive, fixing of saloon limits being mere regulation of liquor traffic and in no sense a prohibition thereof. Ex parte King, 52 Tex. Cr. App. 383, 107 SW 549. Charter provision and ordinance enacted pursuant thereto held not to violate Const. art. 1, § 28, as delegation of legislative authority to vacate, suspend, etc., laws of state. Henderson v. Galveston [Tex.] 114 SW 108. Such charter provision held not invalid as delegation of legislative power. Id. Charter provisions held not in conflict with Acts 30th Leg. p. 260, c. 138, § 10, providing that if place of business be in any block in city where there are more bona fide residences than business houses, or in any block where there is a church or school, petition must be accompanied with written consent of majority of householders of residences in said block. Williams v. State, 52 Tex. Cr. App. 371, 107 SW 1121. Ordinance adopted pursuant to express authority conferred on city council of Beaumont by charter held not to be void as in conflict with said statute. Andreas v. Beaumont [Tex. Civ. App.] 113 SW 614. Laws 1907, p. 258, c. 138, providing for licensing saloons, etc., held not to have repealed charter provision fixing saloon limits, or render invalid ordinance adopted pursuant thereto. Williams v. State, 52 Tex. Cr. App. 371, 107 SW 1121; Ex parte King, 52 Tex. Cr. App. 383, 107 SW 549.

**6. Churches, etc.:** Building built for dwelling house and occupied by two families held not used "exclusively" for church purposes within Laws 1896, c. 112, § 24, subd. 2, as amended by Laws 1900, c. 312, though owned by church organization and though parlor floor was used for regular church services. In re Finley, 58 Misc. 639, 110 NYS 71. Entrance to saloon held to be within 200 feet of church, attempted closing of such entrance and establishment of new one or another street being mere subterfuge. Id. Liquor tax law is to be liberally construed that it may accomplish purpose of its enactment, but its provisions must be given reasonable interpretation, and its prohibitions not extended to cases and situations not covered thereby. Id. Under P. L. 1906, p. 203, c. 114, § 4, no license can be granted to sell liquor by less measure than one quart in any new place within 200 feet of curtilage of church edifice, measured between nearest point of same and nearest point of building wherein such liquors are intended to be sold, though entrance to latter building is more than 200 feet distant from church curtilage. Lanning v. Burlington Excise Com'rs [N. J. Law] 68 A 1083. Act 1896 (P. L. 1896, p. 53), providing that no new license shall be granted to sell intoxicants within one mile from outside limits of any land controlled by any incorporated **camp meeting association** used for religious worship, or for any purpose for which such association is formed, held not unconstitutional as special legislation regulating internal affairs of cities. Sexton v. Asbury Park Excise Com'rs [N. J. Law] 69 A 470. Said act held to limit power to license conferred on board of excise commissioners of cities by P. L. 1902, p. 628, and not to have been repealed by latter act. Id.

**Schools, colleges and academies:** Gen. St. 1902, § 2647, as amended by Pub. Acts 1907, p. 750, c. 200, providing that no license, except renewal of a license, at discretion of county commissioners as to suitability of person or place, shall be granted within 200 feet from a schoolhouse, nor in such proximity to charitable institution, whether supported by public or private funds, as may be detrimental to same, held to give commissioners discretionary power to renew license, though school had been erected within 200 feet of applicant's place of business, should they be of opinion that his saloon was suitable place for sale of liquors. Appeal of Schusler [Conn.] 70 A 1029. Held that no place could, with propriety, be deemed suitable which was so near to any building occupied by charitable institution that its use as saloon would be detrimental to purposes of such institution. Id. Parochial school held charitable institution, though supported by private funds. Gen. St. 1902, §§ 3990, 4026. Id. Fact that site for parochial school was bought years after establishment of saloon, in close proximity to it, and after applicant had become owner of school property, held not to deprive commissioners of right to refuse to renew license because of proximity of school. Id. Value of saloon property held immaterial. Id. Proof that in other cases commissioners had renewed license to some other person to sell liquor at some other place not far from school or church held immaterial, powers of commissioners in dealing with each application being unfettered by what they may have done in dealing with any other. Id. Refusal to renew license be-

buildings owned by municipal corporations;[7] prohibiting the selling or furnishing of liquors to certain persons,[8] and prohibiting the purchase of liquors by certain persons.[9]

cause of erection of parochial school within 75 feet of applicant's saloon held not abuse of discretion. Id. Acts 1877, p. 180, prohibiting sales within 3 miles of certain academy in Emanuel county, held not repealed by Acts 1882, p. 601, and Acts 1887, p. 849, amending license law relating to said county, or by Acts 1900, p. 425, giving council of city in said county certain powers relating to intoxicants Pughsley v. State [Ga. App.] 61 SE 886. Evidence held to show that sale of liquor was within 5 miles of state university. Borroum v. State [Miss.] 47 S 480. Act May 10, 1907 (Laws 1907, p. 257), providing that no license shall be granted to keep dramshop within 5 miles of any state educational institution "which now has" 1,500 or more students enrolled, held void under Const. 1875, art. 4, § 53, prohibiting special or local legislation, there being but one institution to which it could apply. State v. Turner, 210 Mo. 77, 107 SW 1064. Applicant who had complied with all statutory requirements as to obtaining license held entitled to question constitutionality of said statute. Id.

**State hospitals:** Sale of liquor more than half mile from state hospital buildings, but within 75 feet of tract on which hospital was situated and which was used for hospital purposes, held violation of Laws 1896, c. 112, § 24, as amended by Laws 1905, c. 104, though lands within half mile of defendant's place were used for agricultural purposes. In re Clement, 110 NYS 57.

**Residential and manufacturing districts:** Renewal within meaning of Gen. St. 1902, § 2647, as amended by Pub. Acts 1907, c. 200, providing that no license "except the renewal of a license," at discretion of county commissioners as to suitability of person and place, shall be granted in the purely residential and manufacturing parts of a town, is granting to same person same privilege granted to him the previous year to sell in same place, and on review court is not required to treat petition for removal permit as application for renewal. Appeal of Bormann [Conn.] 71 A 502. License granting same privilege to same person to sell in same place specified in his license of previous year is renewal within meaning of § 2647, but license to different person to sell in said place is not. Appeal of Stavolo [Conn.] 71 A 549. Whether or not a certain place is a suitable place for a saloon is question of fact. Id. Neither the proper granting of renewal license for certain location in manufacturing and resedential district, which under § 2647 commissioners, in their discretion as to suitability of person and place, were authorized to grant, nor improper granting to licensee of permit to remove to more unsuitable location, held to have rendered former location, as matter of law upon facts found, suitable place for which to grant license which was not renewal. Id. Loc. Acts 1907, p. 324, authorizing certain towns to establish dispensaries, held not to repeal Acts 1851-52, prohibiting sales within 4 miles of any factory, so that establishment of dispensary within 4-mile limit was unauthorized. Town of Tallassee v. Toombs [Ala.] 47 S 308.

7. Gen. St. 1902, § 2674, prohibiting sale of intoxicants in any building belonging to or under control of "any county or town in the state," held not to apply to cities, and hence not to prohibit sale in building erected by lessees on land owned by city. Appeal of Camp, 80 Conn. 272, 68 A 444.

8. **Minors:** Licensed dramshop keeper selling to minor may be prosecuted either under Rev. St. 1899, § 3009, as amended by Acts 1905, p. 141, or under Rev. St. 1899, § 2179. State v. Hamill, 127 Mo. App. 661, 106 SW 1103. Fact that sale was made with written consent of parent or guardian is defense to prosecution under § 2179, but not to prosecution under § 3009 as amended. Id. Sale or delivery by licensee is violation of Laws 1903, p. 88, c. 95, § 15, as amended by Laws 1905, p. 450, c. 49, § 9, punishable under Laws 1903, p. 93, c. 95, § 33, as amended by Laws 1905, p. 456, c. 49, § 18. State v. Bean [N. H.] 71 A 216. Offense is made out by proof that defendants were licensed in certain town and then and there sold intoxicants to minor. Id. Where agent of licensee sells or furnishes in violation of Cobbey's St. 1907, § 7157, both are guilty of misdemeanor. In re Phillips [Neb.] 118 NW 1098. One acting merely as agent of purchaser cannot be convicted of selling. Moseley v. State [Ala.] 47 S 193. **Intent** is not essential element of offense of selling in violation of Laws 1904, Act No. 115, p. 134, § 20, and § 23, condition 5. State v. Gilmore, 80 Vt. 514, 68 A 658. Is not necessary to prove that defendant knew person to whom he sold was minor. Gaul v. People, 136 Ill. App. 445. Under St. 1898, § 1558, sale to minor without written authority of his parent or guardian is ground for revocation of license, regardless of licensee's intent. State v. Wausau [Wis.] 118 NW 810. Licensee held liable for **sale by his employe** without his knowledge, though he had previously instructed all his employes not to sell to minors. State v. Gilmore, 80 Vt. 514, 68 A 658. Licensee is answerable for sale by his agent, though he was absent from place of business at the time and had instructed such agent not to make forbidden sales. State v. Wausau [Wis.] 118 NW 810. Whether defendant exercised **due diligence** to find out minor's age, and was honestly mistaken, is question for jury. Askew v. State [Ga. App.] 61 SE 737. One charged with violation of 19 Del. Laws, c. 646, § 14, as amended by 21 Del. Laws, c. 246, § 1, must satisfy jury that he used that degree of care and diligence to ascertain whether person to whom it is alleged he sold was not under 21 years of age which a reasonably prudent and cautious person would exercise under like circumstances, charged with a like duty. State v. Salkowski [Del.] 69 A 839. If he uses such diligence and is reasonably and honestly deceived, he is not guilty. Id.

**Intoxicated persons:** Term "knowingly sell" as used in Acts 1908, c. 189, §§ 19, 27, held referable to condition of person to whom liquor is sold, and not to the sale, so that

*Dispensary system.* See 10 C. L. 441—Statutes in some states make provision for the establishment of public dispensaries for the sale of intoxicants[10] and prohibit sales except in such dispensaries.[11] Such dispensaries have been held to be state agencies, and their officers, officers of the government, and hence not subject to suit in the absence of an express statutory provision to the contrary.[12] The federal

licensee was criminally liable for sale during his absence by his son who was employed by him in bar room and intrusted with conduct of same. O'Donnell v. Com. [Va.] 62 SE 373. **Intent** is not essential element of offense, and proof of sale by principal or by his clerk or agent is all that is necessary to make out offense, provided sale by clerk or agent is made in conduct of business with which he was charged by principal. Id. Rule holding that principal is bound for acts of his agent done without his authority or in violation of his instructions is exception to general rule that doctrine of respondeat superior does not apply in criminal cases, and is based on doctrine that licensee engages in business at his peril and is bound to see that requirements of law are complied with. Id. Evidence held to show that person to whom sale was made was intoxicated, and that such fact was apparent to anyone having occasion to observe his condition. Id.

**Habitual drunkards:** It is violation of liquor laws for bartender or employe of licensed dealer to sell liquor to habitual drunkard, though no penalty is provided therefor. Cobbey's St. 1907, §§ 7159, 7161. In re Adamek [Neb.] 118 NW 109.

**Persons in the habit of getting intoxicated:** A person "who is in the habit of getting intoxicated" within meaning of Dramshop Act, c. 43, § 6, making it an offense to sell intoxicating liquor to such a person, is one having the involuntary tendency to become intoxicated which is acquired by frequent repetition, and proof of a fixed habit is not essential. Giroux v. People, 132 Ill. App. 562. Evidence held to authorize finding that person to whom liquor was sold was in habit of getting intoxicated. Id. Evidence held to sustain finding that defendant sold intoxicating liquor to such person. Id. Is not necessary to allege or prove that defendant knew that person to whom sale was made was in habit of getting intoxicated. Gaul v. People, 136 Ill. App. 445.

**Convicts:** Indictment for selling or giving intoxicants to convict in violation of Cr. Code 1896, § 4554, need not allege that convict was confined in any particular place, it being sufficient if he was serving a sentence at time of alleged offense. Askew v. State [Ala.] 46 S 751.

**9.** Ordinance making it an offense for **minor** to purchase liquor held not invalid as discriminatory between persons of same class because making distinction between minors having written permission of parents, guardian or family physician and those who have not such permission. Fitch v. Lewistown, 137 Ill. App. 570. Ordinance held not invalid as inconsistent with Dramshop Act, § 14, which provides that in all cases persons to whom liquor has been sold in violation of act shall be competent witnesses, on theory that imposition of penalty on minor for violation of ordinance would operate to deprive state of proof to which it is entitled in prosecutions for violation of provisions of Dramshop Act imposing penalty on saloonkeepers for selling to minors. Id.

**10.** Loc. Acts 1907, p. 324, authorizing towns and cities in precinct No. 3 in Elmore county to establish dispensaries, held not to repeal Acts 1851-52, p. 262, prohibiting sale of liquor within four miles of any factory, so that establishment of dispensary by any such town **within four-mile limit** was unauthorized. Town of Tallassee v. Toombs [Ala.] 47 S 308. Petition to enjoin election commissioners from holding special **election** on question of maintaining dispensaries in certain county, based on ground that county supervisor was in error in holding that petition asking for election was signed by requisite number of electors, denied, there being plain and adequate remedy at law, and no property rights justifying interference by injunction being involved. Little v. Barksdale [S. C.] 63 SE 308. **Creation of new county.** Under Act Feb. 14, 1908 (25 Stat. 1279), creating Calhoun County out of portions of Lexington and Orangeburg counties, and Act Feb. 16, 1907 (25 Stat. 464), providing for continuation of existing dispensaries until voted out, held that it was duty of dispensary board of Orangeburg county to maintain dispensaries existing in territory taken from that county to form part of Calhoun county until creation of dispensary board for Calhoun county, or until dispensaries were voted out of latter county in manner provided by said act of 1907. Amerker v. Taylor [S. C.] 62 SE 7.

**11.** Act 1907, § 14 (Loc. Laws 1907, p. 884), making it unlawful to sell liquor in town of Florala except by a dispensary to be established thereunder, is good law to prohibit, if otherwise valid. Ex parte Hall [Ala.] 47 S 199. Act held not unconstitutional as granting special privileges to dispensary commissioners. Id. Act held not invalid as conferring legislative power on town, though it establishes prohibition unless town opens dispensary, since fact that opening of dispensary is not made mandatory does not give town authority to legislate, nor does town legislate by failing to open dispensary. Id. Even if act authorized town to discontinue dispensary at will, which it does not, such option may be delegated to municipality, and its exercise by latter would not be legislation on its part. Id. By its express provisions act of 1907 (25 Stat. 480), repealing dispensary law, does not preclude prosecution for violations of latter law theretofore committed. State v. Williams, 79 S. C. 101, 60 SE 229.

**12.** Action under civil damage act against dispensary and dispensary commissioners and manager, for damages for illegal sale of whiskey to plaintiff's minor son, held properly dismissed on demurrer. Fowler v. Rome Dispensary [Ga. App.] 62 SE 660. Words "any person" as used in Civ. Code 1895, § 3871, giving right of action to father in certain cases against any person selling or furnishing liquor to his minor son, do not include

courts have, however, held that the commission appointed to close out the North Carolina state dispensary are not officers of the state discharging duties in its behalf,[13] that suits instituted against them by creditors of the dispensary are not suits against the state,[14] that said commission is not a court of the state,[15] and that such creditors may maintain suits in equity in the federal circuit court for the purpose of compelling the allowance and payment of their claims.[16]

§ 5. *Penalties and forfeitures.* See 10 C. L. 442—Summary proceedings at the instance of the state are treated in a subsequent section.[17] An action to recover a penalty is sometimes regarded as a civil action.[18] When held to be quasi criminae, defendant is entitled to a presumption of innocence[19] and his guilt must be proved by a clear preponderance of the evidence.[20]

Actions on liquor dealer's bonds for the benefit of individuals injured by their breach are treated in a subsequent section,[21] the treatment in this section being confined to actions for the benefit of the state or municipality. The necessity for and the form and sufficiency of such bonds have already been considered.[22] They are ordinarily confined in their operation to the premises covered by the dealer's license.[23] The licensing authorities, as a rule, have no authority to release sureties from liability for previous breaches.[24] The usual rules of evidence apply in actions

state or its officers or agents. Id. Since dispensaries are prohibited from selling to minors, such a sale would be ultra vires for which dispensary could not be held liable, even if it could be sued. Id.

13. Members of South Carolina State Dispensary Commission, appointed pursuant to Sess. Laws 1907, p. 835, No. 402, held merely agents of state empowered to take possession of certain fund and directed to administer it in particular manner. Murray v. Wilson Distilling Co. [C. C. A.] 154 F 1, afg. 161 F 152.

14. Suit against members of commission by creditors to compel adjustment and payment of their claims held not one against state within U. S. Const. Amend. 11. Murray v. Wilson Distilling Co. [C. C. A.] 164 F 1, afg. 161 F 152. Held further that to uphold contention that debts were those of state, that commissioners represent state which is real party in interest, and that they alone have power to determine validity of claims against fund in case of dispute, would, in case just debt was rejected, deprive creditor of his property without due process of law. Id. Fund in their hands held, by virtue of statute, a fund held in trust for payment of debts therein mentioned, in which creditors of dispensary have property interest to extent that their debts are shown to be just. Id. State's interest in fund held confined to residue after payment of debts of dispensary and to be subordinate to payment of said debts, so that judicial determination of true amount of such debts could in no way affect rights or interests of state. Id. Fund being trust fund in regard to which commissioner's duties are clearly defined, held that state was not indispensable party, though it might, at its election, intervene for purpose of having any rights it might claim determined. Id. Federal circuit court of appeals held not bound to follow decision of supreme court of South Carolina to the contrary which was rendered after decision of federal circuit court that it had jurisdiction, and after latter court had issued injunction and appointed receiver as prayed for in complainant's bill. Murray v. Wilson Distilling Co. [C. C. A.] 164 F 1. Such decision held not binding on circuit court where rendered after decision of that court. Fleischmann Co. v. Murray, 161 F 162.

15. Dispensary commission appointed pursuant to S. C. Sess. Laws 1907, p. 835, No. 402, held not a court within meaning of U. S. Rev. St. § 720, prohibiting federal courts from granting injunctions staying proceedings in state courts. Murray v. Wilson Distilling Co. [C. C. A.] 164 F 1, afg. 161 F 152. Duty of commission to pay all just claims is mandatory, they having no discretion in the matter. Id.

16. Bill and testimony in support thereof held sufficient to authorize decree for injunction and receivers pendente lite. Murray v. Wilson Distilling Co. [C. C. A.] 164 F 1, afg. 161 F 152.

17. See § 7, post.

18. Actions by commonwealth to recover penalties for violation of Sunday closing law held civil, both in form and in their nature. Crim. Code Prac. § 11, Civ. Code, § 92. James v. Helm, 33 Ky. L. R. 871, 111 SW 335.

19. In action to recover penalty for violation of city ordinance prohibiting sale of intoxicants, held proper to instruct that law presumes defendant to be innocent and that such presumption is substantial part of the law of the land. City of Waverly v. Goss, 138 Ill. App. 68.

20. In action to recover penalty for violation of city ordinance prohibiting sale of intoxicants, instruction held not to impose on plaintiff higher degree of proof than that required by law. City of Waverly v. Goss, 138 Ill. App. 68.

21. See § 9, post.

22. See § 3, ante.

23. Retail dealer's bond held to relate to and to be confined in its operation to premises for which liquor tax certificate was to be issued, and not to cover illegal sales by licensee in other parts of state. Clement v. Smith, 113 NYS 55.

24. Excise commissioner held to have no

on bonds.[25] Whether there has been a breach of the bond is ordinarily a question of fact for the jury,[26] unless a breach is shown by uncontradicted evidence.[27]

§ 6. *Criminal prosecutions. A. General rules of criminal responsibility.* See 10 C. L. 444—Liability for violation of particular regulations is treated in a prior section.[28] Reference should also be had to the topics dealing with criminal law and procedure generally.[29] A corporation may be held crimially liable for violation of the liquor laws.[30] The purchaser of intoxicants is not generally regarded as an accomplice of the one who sells them to him.[31] Several sales on the same day to the same person but at different times may constitute separate offenses.[32]

(§ 6) *B. Indictment and prosecution.*[33] *Jurisdiction.* See 10 C. L. 445—The jurisdiction of the various courts is regulated by statute.[34]

*Indictment, information or complaint.* See 10 C. L. 445—The indictment must not charge more than one offense in a single count.[35] Where a statute enumerates a series of acts, either of which separately or all of which together may constitute the offense, all may be charged in a single count,[36] but they must be charged conjunc-

authority to make agreement with surety on liquor tax bond given pursuant to Laws 1896, c. 112, § 18, as amended by Laws 1897, c. 312, § 11. Clement v. Empire State Surety Co., 110 NYS 418. While commissioner may determine at given time whether sufficient grounds exist to warrant prosecution on bond, such determination is not absolute so as to bind either himself or his successor not to commence action upon such bond in the future. Id. Statute does not contemplate reduction in amount of penalty based upon doubtful liability or chances of success in maintaining action. Id. Evidence held insufficient to show agreement by commissioner with surety releasing latter from liability on bond in suit. Id. Evidence held insufficient to show any consideration for such agreement even though it was established. Id.

25. In action to recover penalty of liquor tax bond for selling liquor at hotel on Sunday without serving meals, held that, in view of delay in trial, certain general evidence that on occasion in question no liquor was sold without meals was admissible. Clement v. Beers, 110 NYS 99. Statement of waiter in presence of officer who arrested him that he had served them with sandwich with their beer held not evidence of fact that they ordered or were served with sandwich, and to have been incompetent and improperly admitted. Id.

26. Evidence held to make question of fact as to certain violations. Clement v. Beers, 110 NYS 99.

27. In action to recover penalty of liquor tax bond for selling liquor at hotel on Sunday without serving meals, uncontradicted evidence as to particular violation held to require direction of verdict for plaintiff. Clement v. Beers, 110 NYS 99.

28. See § 4, ante.

29. See Criminal Law, 11 C. L. 940; Indictment and Prosecution, 12 C. L. 1.

30. May be indicted and punished for acts of its agents in conduct of its business and which it commands or ratifies, in violation of Pen. Code 1895, § 428, prohibiting soliciting of orders for intoxicants in counties where sale is prohibited. Rose v. State [Ga. App.] 62 SE 117.

31. Within rule that testimony of accomplice must be corroborated. Gamble v. State [Ga. App.] 62 SE 544. One purchasing liquor in local option territory. Laws 1887, p. 72, c. 90. Fox v. State, 53 Tex. Cr. App. 150, 109 SW 370. In view of statutory provisions that conviction may be had on uncorroborated testimony of purchaser of intoxicants in local option territory, and fact that supposed accomplice was purchaser, held that refusal to instruct that conviction could not be had on uncorroborated testimony of accomplice was proper. Ross v. State, 53 Tex. Cr. App. 295, 109 SW 152.

32. Sales in violation of local option laws. Alexander v. State, 53 Tex. Cr. App. 553, 110 SW 918. If not parts of same transaction. Robinson v. State, 53 Tex. Cr. App. 567, 110 SW 905.

33. See 10 C. L. 445. For matters applicable to indictment and prosecution generally, reference should be had to the topic Indictment and Prosecution, 12 C. L. 1.

34. Provision of Laws 1896, c. 112, § 85, subd. 1, providing that violations of liquor tax law shall be prosecuted by indictment and in court of record, held not to have been repealed by Rochester City Charter (Laws 1907, c. 755, § 468) so as to give police court of that city exclusive jurisdiction of violations therein. People v. Craig, 111 NYS 909. On prosecution for selling within city limits contrary to city ordinance, held that defendant could not question jurisdiction of city over territory where sales were made and over which it had assumed to exercise jurisdiction. City of Aledo v. Nylin, 139 Ill. App. 527.

35. Affidavit in prosecution under Burns' Ann. St. 1908, § 8351, charging defendant with keeping, running and operating place where liquors were sold in violation of law, and with keeping in his possession intoxicating liquors for purpose of making such unlawful sales, held to charge but one offense. Yazel v. State [Ind.] 84 NE 972. Indictment charging that defendant was engaged in business of selling intoxicants at retail without having paid license and without having receipt and notice posted, in violation of Rev. Pol. Code, § 2834, held to charge but one offense. State v. Mudie [S. D.] 115 NW 107.

36. Complaint charging that defendant did "then and there keep a saloon," etc., where liquors were sold, "and did then and ther sell, dispense," etc., malt beer without having ob-

tively.[37] As a general rule any number of distinct misdemeanors of the same nature may be regarded in separate counts,[38] though there is some conflict of authority in this regard.[39] The same offense may be stated in different ways in different counts to meet the proof.[40]

As in other cases the indictment must charge all the essential elements of the offense[41] directly and positively,[42] and with sufficient particularity and clearness to

tained license, in violation of city ordinance, held to state but one offense. In re Johnson, 6 Cal. App. 734, 93 P 199.

**37.** Indictment for violation of Rev. St. 1899, § 3011, making it offense for licensed dramshop keeper to sell, give away, or otherwise dispose of intoxicants, etc., may in one count charge all facts embraced in said section provided he connects them by the conjunctive conjunction "and," but if they are connected by disjunctive "or," indictment is bad. State v. Grossman [Mo.] 113 SW 1074.

**38.** Is permissible to join counts charging violation of general prohibition law (Acts 1907, p. 81) with counts charging violations of such laws regulating or prohibiting sales, etc., of intoxicants as may have been in force in particular venue of trial prior to date when such law went into effect, and within period prescribed by statute of limitations. Tooke v. State [Ga. App.] 61 SE 917.

**39.** Unlawful sales to two or more minors constitute separate offenses which cannot be properly charged in same indictment, though sales were made at same time. State v. Salkowski [Del.] 69 A 839.

**40.** Indictment for selling, etc., liquor on Sunday to one not guest of defendant's hotel, in violation of Laws 1896, c. 112, § 31, charging in different counts exposing for sale, sale and delivery, and giving away of same liquor to same named person on same day, held to state but one offense. People v. McDonnell, 108 NYS 749.

**41.** Indictment for selling without license must allege **that sale was contrary to law** (Cr. Code 1896, § 5077), though form 79 suggests two different forms. Smith v. State [Ala.] 46 S 753. On prosecution under Dramshop Act, § 7, information must allege **that defendant was the keeper of the place,** allegation that he sold intoxicating liquor there being insufficient. Grom v. People, 135 Ill. App. 453. Affidavit attempting to charge violation of Act Feb. 13, 1907 (Acts 1907, p. 27, c. 16, Burns' Ann. St. 1908, § 8338 et seq.), and Act March 16, 1907 (Acts 1907, p. 689, c. 293, Burns' Ann. St. 1908, § 8351 et seq.), by keeping liquor for sale without license, held insufficient in that it failed to show that defendant's **possession** of liquors was **for purpose of selling,** bartering, or giving them away in violation of law, or, in other words, that purposed sale would have been in violation of a license requirement. Regadanz v. State [Ind.] 86 NE 449. Use of word "unlawfully" held insufficient for that purpose, since pleader departed from language of statute. Id. Indictment charging that defendant maintained common **nuisance** in house which he held, etc., held not defective for failing to charge that there was such disorder as to disturb peace of neighborhood. Miller v. Com. [Ky.] 113 SW 518.

**Character and kind of liquors:** Indictment for violating local option law need not state kind, character and name of liquor sold, but it is sufficient to allege that it was intoxicating. Piper v. State, 53 Tex. Cr. App. 485, 110 SW 898. Indictment for selling malt liquors without license in violation of White's Ann. Pen. Code 1895, art. 411a, must allege that liquors were intoxicating. Hardwick v. State [Tex. Cr. App.] 114 SW 832. Description of liquor sold as "fermented and malt liquors" held sufficient, that being definition in Laws 1896, c. 112, § 2. People v. McDonnell, 108 NYS 749. Though Laws 1907, p. 297, provides that in prosecutions thereunder it shall not be necessary to state kind of liquor sold nor name of person to whom it was sold, it does require statement that liquor sold was intoxicating, and hence is not void as changing rule as to burden of proof and quantum of evidence in criminal cases. People v. McBride, 234 Ill. 146, 84 NE 865. Provision held not in contravention of Const. art. 2, § 9, as not informing accused of nature of charge against him. Id. In any event defendant held not entitled to raise question on appeal where he did not object to information on that ground at trial. Id. Under information charging defendant with being engaged in business of selling intoxicating liquors without license, held proper to instruct that defendant might be convicted for selling any mixture containing any percentage of intoxicating liquor, though word "mixture" was not used in information. State v. Ely [S. D.] 118 NW 687.

**Time:** Time of **selling without license** need not be alleged. Rev. St. § 1063. State v. Conega, 121 La. 522, 46 S 614. Where indictment shows on its face that prosecution for offense charged would be barred by prescription had not some fact occurred to stop running of same, existence of such fact must be alleged, but where it does not, defendant must plead and affirmatively establish prescription. Id. Indictment for **unlawfully selling and delivering** intoxicants in violation of Acts 1901-02, p. 601, c. 516, providing for suppression of tippling houses and illegal traffic in ardent spirits in certain counties, held not demurrable for failure to allege precise time when or person to whom sale was made. Runde v. Com. [Va.] 61 SE 792. On prosecution for **"engaging in the business"** of selling intoxicants without license in violation of Rev. Pol. Code, §§ 2838, 2834, held proper to allege that offense was committed by engaging in the business on specified date and was continued until a specified later date. State v. Ely [S. D.] 118 NW 687. Held not necessary for indictment for selling, etc., liquor on **Sunday** to one not guest in defendant's hotel in violation of Laws 1896, c. 112, § 31, to state particular time of day of occurrence complained of. People v. McDonnell, 108 NYS 749. Information charging keeping saloon open on Sunday must allege day of month and year as well as day of week on which offense was committed, and offense must be proven to have been com-

enable the accused to understand the nature of the charge against him.[43] An indictment for violation of the local option law must show that said law had been adopted and was in force in the county on the date when the offense is alleged to have been committed.[44] Where the statute fully defines the offense, it is sufficient

mitted on that day. State v. Schell [S. D.] 117 NW 505. Omission of words "then and there" from complaint charging keeping of liquor **nuisance** held immaterial where times of doing forbidden acts were definitely stated and concurrence shown. City of Ft. Scott v. Dunkerton [Kan.] 96 P 50.

**Place:** On prosecution under Dramshop Act, § 7, information must show that place where sale was made was public resort, mere allegation that it was a "room" being insufficient. Grom v. People, 135 Ill. App. 453. On prosecution under Dramshop Act, § 7, where it is sought to have place at which sales are alleged to have been made in violation of the act abated, information must describe location of such place with sufficient particularity so that officer undertaking to execute judgment shall be both guided and protected. Id.

**Quantity:** Indictment for selling without license in violation of Rev. Laws 1905, § 1519, need not state particular amount sold, but it is sufficient to allege, in words of statute, that it was in quantities less than five gallons. State v. Budworth, 104 Minn. 257, 116 NW 486. Indictment charging sale, etc., "in quantities of less than five gallons at a time," held sufficient, in view of Laws 1896, c. 112, § 2, declaring trafficking in liquors within meaning of act to be sale of less than five wine gallons of liquor. People v. McDonnell, 108 NYS 749.

**Name of purchaser:** Indictment for keeping saloon open and selling on Sunday need not give name of persons to whom sale was made. State v. Merget, 129 Mo. App. 46, 107 SW 1015. Indictment charging sales without license to "John Doe and divers other persons," without naming them or alleging that their names are unknown, is fatally defective. State v. Delancey [N. J. Law] 69 A 958.

**Intent:** Information against physician for unlawfully prescribing intoxicants in violation of Act No. 85, p. 124 of 1886, must allege intent. State v. Breaux [La.] 47 S 876.

**Allegations as to defendant's business:** Information charging offense of making sales as druggist contrary to Comp. Laws 1897, § 5381, must show by some proper averment that defendant had given bond prescribed therein authorizing him to sell liquor for medicinal purposes. Peters v. Eaton Circuit Judge [Mich.] 15 Det. Leg. N. 462, 117 NW 68. Allegation that defendant's business "consists in part in the sale of drugs and medicines" held insufficient to show that he had given such bond. Id. Affidavit held insufficient in that so far as appeared therefrom accused might have been licensed druggist and entitled to sell as such. Regadanz v. State [Ind.] 86 NE 449. Information held not to charge defendant with offense of selling as retail liquor dealer where it was not alleged that he had not given the retailer's bond prescribed by Comp. Laws 1897, § 5386. Peters v. Eaton Circuit Judge [Mich.] 15 Det. Leg. N. 462, 117 NW 68.

**42.** Indictment for selling on Sunday to one not guest of defendant's hotel, in violation of Laws 1896, c. 112, § 31, held sufficient. People v. McDonnell, 108 NYS 749. Affidavit that affiant "has cause to believe and does believe that in his opinion" defendant unlawfully delivered liquor in a prohibitory district held fatally defective and insufficient to support judgment. Chappell v. State [Ala.] 47 S 329.

**43.** Where pleader departs from language of statute, he must charge commission of crime by averment of substantive facts. Regadanz v. State [Ind.] 86 NE 449. Indictment for violation of Laws 1896, c. 112, § 31, held to charge not failure to comply with requirements of law as to hotels but selling, etc., in hotel on Sunday to one to whom defendant as hotelkeeper had no right to sell. People v. McDonnell, 108 NYS 749.

**Indictments, etc., held sufficient:** Indictment alleging that license law was in force in certain town, that defendants were then and there licensed to sell liquor, and that they then and there unlawfully sold liquor to certain minor, held to charge violation of special provisions of **license law** (Laws 1903, c. 95, § 15, as amended) by defendants as licensees. State v. Bean [N. H.] 71 A 216. Indictment for conducting bar without license. Huber v. Com., 33 Ky. L. R. 1031, 112 SW 583. Indictment charging **violation of Dispensary Act** Feb. 16, 1907, § 27, prohibiting transportation of intoxicants for unlawful use to any place or county where sale is prohibited. State v. Arnold [S. C.] 61 SE 891. Indictment held to sufficiently charge sale in county in **violation of local option law** even if it was insufficient to show sale within 5 miles of university, which is also forbidden by statute. Borroum v. State [Miss.] 47 S 480. Indictment charging **keeping disorderly house** where liquors were sold or kept for sale without license (Acts 30th Leg. c. 132) drawn with special reference to Wilson's Criminal Forms, No. 218. Joliff v. State, 53 Tex. Cr. App. 61, 109 SW 176. Indictment for **selling** or giving intoxicants **to convict** in violation of Cr. Code 1896, § 4554, held to sufficiently negative idea that person to whom liquor was furnished might have been under sentence from a municipality, even if statute does not apply to all convicts. Askew v. State [Ala.] 46 S 751.

**Affidavit held insufficient** to charge either offense of keeping, etc., place where liquors are sold, etc., in violation of law, or of being found in possession of liquors for purpose of selling, etc., them in violation of law, both of which are denounced by Acts 1907, p. 27, c. 16, § 1 (Burns' Ann. St. 1908, § 8337). Barnhardt v. State [Ind.] 86 NE 481. Use of word "unlawfully" held insufficient to charge that possession was in violation of law. Id.

**44.** Indictment held sufficient. Starnes v. State, 52 Tex. Cr. App. 403, 107 SW 550. Recitals held not mere conclusions of pleader. Wade v. State, 53 Tex. Cr. App. 184, 109 SW 191. Pleader may charge in detail all facts necessary to show that law had been adopt-

to follow its language in charging a violation thereof,[45] substantial accuracy in this regard being sufficient.[46] It is not necessary to negative an exception or proviso in a statute unless it forms a part of the definition of the offense,[47] or is contained in

ed in particular county on particular day, or that law had been adopted at particular time and was in force within county on date on which offense is charged. State v. Hall, 130 Mo. App. 170, 108 SW 1077. Indictment alleging that on July 8, 1904, law had been adopted and was in force in county, and charging violation thereof by defendant by selling on Oct. 6, 1906, held insufficient for failure to show that it continued to be in force on latter date. Id. Information alleging that election was held in Sept. 1903, and that sale occurred May 18, 1906, held to sufficiently allege that law was in force when sale was made, law continuing in operation until set aside by vote to that effect. Killman v. State, 53 Tex. Cr. App. 570, 112 SW 92. Is sufficient to allege adoption of prohibition at local option election and due publication of result in general terms, and it is not necessary to specifically plead evidence constituting preliminary steps necessary to put local option law into operation. Indictment held sufficient. Wade v. State, 52 Tex. Cr. App. 608, 108 SW 376. Affidavit and information held to sufficiently allege that commissioners' court had declared result of election. Starbeck v. State, 53 Tex. Cr. App. 192, 109 SW 162. Where indictment showed that votes had determined in favor of prohibition, and that commissioner's court had made order prohibiting sale of intoxicants, held that it was not fatally defective though it did not specifically allege that commissioner's court had declared result of election by order. Williams v. State, 52 Tex. Cr. App. 430, 107 SW 825. Allegation of sale after voters of county had determined that sale should be prohibited "and commissioner's court of said county had passed an order to that effect, which order had been duly published in accordance with law," held sufficient, though not in terms alleging that commissioner's court had declared result of election. Holloway v. State, 53 Tex. Cr. App. 246, 110 SW 745. Allegation that "the commissioner's court of said county did pass and publish an order declaring the result of said election and prohibiting the sale of intoxicating liquors," etc., held insufficient, statute requiring publication to be made by county judge. Smitham v. State, 53 Tex. Cr. App. 173, 108 SW 1183. Allegation that commissioner's court had caused order to be published in manner and form and for length of time required by law held sufficient. Jones v. State, 52 Tex. Cr. App. 519, 107 SW 849; Watson v. State, 52 Tex. Cr. App. 551, 107 SW 544. General allegation of publication is sufficient without in terms declaring that paper was selected by county judge. Holloway v. State, 53 Tex. Cr. App. 246, 110 SW 745. Indictment held not invalid in that it alleged that commissioners' court did pass and publish order putting law into effect. Benson v. State [Tex. Cr. App.] 109 SW 168.

**45.** Indictment for keeping saloon open on Sunday held not defective for failure to allege which of two saloons operated by defendant in county was kept open. State v. Merget, 129 Mo. App. 46, 107 SW 1015. Indictment in form prescribed in Gen. St. 1906, § 3968, charging defendant with carrying on business of liquor dealer in violation of the local option law, need not allege that liquors were intoxicating. Ladson v. State [Fla.] 47 S 517. Offenses denounced by Act Feb. 13, 1907 (Acts 1907, p. 27, c. 16, Burns' Ann. St. 1908, § 8338 et seq.), and Act March 16, 1907 (Acts 1907, p. 689, c. 253, Burns' Ann. St. 1908, § 8351 et seq.), providing that any person keeping place where liquors are sold, etc., in violation of law, or any person found in possession of such liquors for such purpose, shall be guilty of misdemeanor, may be charged in language of statute, except that matters mentioned disjunctively must be charged conjunctively. Regadanz v. State [Ind.] 86 NE 449. On prosecution under Acts 1907, c. 16, § 1, making it an offense to keep place where liquors are sold in violation of law, affidavit describing place in language of statute held sufficient, any particular locality or place not being an ingredient of offense. Donovan v. State [Ind.] 83 NE 744. Nor was it necessary to allege specific sales of liquor, nor to name person or persons to whom sales were made in violation of law. Id. Nor was it necessary to allege that such liquors were sold by defendant while he was owner or proprietor of place. Id. Nor was it necessary to mention particular kind of liquor. Id. Rule does not sanction indictment charging one generally with offense specified in statute without specifying any particular act showing that general provision has been violated. State v. Gibbs, 129 Mo. App. 700, 108 SW 588. Indictment for violation of Rev. St. 1899, § 2991, charging that defendant at certain time and place unlawfully sold "intoxicating liquors in less quantity than three gallons without taking out or having a license," held insufficient. Id. Description in general language of statute must be accompanied by statement of all particulars essential to constitute offense and to acquaint accused with what he must meet on trial. Weston v. Ter. [Okl. Cr. App.] 98 P 360. Information under Wilson's Rev. & Ann. St. 1903, § 3407, providing for punishment of any person who shall "give away upon any pretext," must name person to whom gift was made and state pretext under which it was made. Id. Information for selling in violation of said section must give name of person to whom sale was made. Id.

**46.** Indictment for selling or giving intoxicants to convict in violation of Cr. Code 1896, § 4554, held sufficient. Askew v. State [Ala.] 46 S 751. Indictment for selling without license using substantially, though not exactly, language of Wilson's Rev. & Ann. St. 1903, § 3407, held sufficient. Reed v. Ter. [Okl.] 98 P 583. On prosecution for permitting females to be or remain in saloon for purpose of being supplied with liquor, in violation of Rev. Codes, § 8385, allegation charging that defendant was "then and there" owner and manager having charge and control of saloon held sufficient to charge him with being in control "for the time being." State v. Conway [Mont.] 98 P 654.

**47.** Not if exception is in subsequent section, or in separate proviso in same section.

the enacting clause.[48] It is not ordinarily necessary to name the particular law violated.[49] Immaterial matters need not be alleged,[50] nor is it necessary to negative matters of defense.[51] Written instruments on which the prosecution is based may be pleaded either in haec verba or according to their legal effect.[52] Words which if stricken out leave the offense well charged, and which do not tend to negative any essential averment, may be disregarded as surplusage.[53]

Every essential averment must be proved substantially as laid.[54] The state

Yazel v. State [Ind.] 84 NE 972. Affidavit charging violation of that part of Burns' Ann. St. 1908, § 8351, making it an offense to keep, run or operate place where liquors are sold in violation of laws of state, or to be found in possession of such liquors for such purpose, need not allege that defendant was not licensed liquor dealer, or that he was not licensed pharmacist or wholesale liquor dealer. Id. In charging violation of Blind Tiger Law (Acts 1907, p. 27, c. 16, Burns' Ann. St. 1908, § 8338 et seq.), or Acts 1907, p. 689, c. 293 (Burns' Ann. St. 1908, § 8351 et seq.), it is not necessary to negative provisos and limitations therein contained. Regadanz v. State [Ind.] 86 NE 449. Indictment under Rev. St. § 4364-25, charging keeping, within limits of township and without limits of municipal corporation, place where liquors were sold, held not demurrable for failure to contain averments excluding defendant from operation of exception or proviso authorizing manufacture and sale of cider, etc., and sales by druggists in certain cases, since it relates only to offense of selling and not to that of keeping place. Hamilton v. State, 78 Ohio St. 76, 84 NE 601. Complaint charging violation of ordinance fixing saloon limits held not invalidated by fact that it did not except from its provisions certain territory in which charter provided that no saloons should be established or maintained, or a certain park in which charter provided sale might be licensed by city authorities having control thereof. Williams v. State, 52 Tex. Cr. App. 371, 107 SW 1121.

**48.** Though indictment must negative exceptions in enacting clause, it need not do so in terms of statute, provided as whole it leaves no doubt that accused does not belong to excepted class. Adams Exp. Co. v. Com., 33 Ky. L. R. 967, 112 SW 577. Indictment against express company for violation of Acts 1906, p. 320, c. 63, prohibiting carriers from bringing, etc., intoxicants into local option territory, held sufficient, though it did not in terms negative exception in favor of persons bringing in intoxicants in quantities of less than one gallon on their persons or as their personal baggage and for their private use, since such provision could not apply to company. Id.

**49.** That being determined from facts alleged in affidavit or indictment. Donovan v. State [Ind.] 83 NE 744. Indictment for unlawfully selling liquor held not bad for failing to allege under which of the two licensing statutes offense was committed. State v. Polk [Del.] 69 A 1006.

**50.** On prosecution under Acts 1907, c. 16, § 1, making it an offense to keep place where liquors are sold in violation of law, affidavit need not allege that place was inclosed or blinded, secrecy not being an element of the offense. Donovan v. State [Ind.] 83 NE 744. Indictment for engaging in business of selling without license need not show whether license could have been procured at place where selling is alleged to have been committed. State v. Mudie [S. D.] 115 NW 107.

**51.** Under Rev. Code 1852, p. 419, § 12, as amended in 1893, providing that in prosecutions against vendor of intoxicants it shall not be necessary to allege that defendant had no license, but fact of license shall be matter of defense under plea of not guilty, held that indictment alleging that accused unlawfully sold liquor was sufficient. State v. Polk [Del.] 69 A 1006. Statute held constitutional. Id.

**52.** Indictment for issuing prescription for intoxicants in violation of law held to sufficiently describe instrument. McAllister v. State [Ala.] 47 S 161. Indictment under Rev. St. 1899, § 3050, making it misdemeanor for physician to issue prescription for intoxicants to be used otherwise than for medicinal purposes, held not to sufficiently set out prescriptions alleged to have been issued. State v. Davis, 129 Mo. App. 129, 108 SW 127. Setting out prescription according to its tenor imports an exact copy. Id.

**53.** After conviction of maintaining nuisance at certain place on certain days, held that judgment would not be arrested because complaint alleged that defendant kept place where liquors "were and are" sold, and where persons "were and are" permitted to resort for purpose of drinking such liquors, but words "and are" would be treated as surplusage. City of Ft. Scott v. Dunkerton [Kan.] 96 P 50. On prosecution for violation of local option law, clause relating to election held not to render indictment invalid. Sawyer v. State, 52 Tex. Cr. App. 597, 108 SW 394.

**54.** Act March 12, 1907 (Gen. Acts 1907, p. 366), making it offense to act as agent of purchaser or seller in effecting unlawful sale, and providing that conviction for violation thereof may be had under an indictment for retailing without license and contrary to law, held not to authorize such conviction under indictment charging sale to minor in violation of Code 1896, § 5078. Moseley v. State [Ala.] 47 S 193. Code 1896, § 5077, held not to cover case, since it relates only to retailers. Id. Where information alleges that local option election on result of which prosecution is based was held on specified date, that fact must be proved. Green v. State, 53 Tex. Cr. App. 466, 110 SW 919. Instruction held erroneous as authorizing conviction if jury found that defendant was engaged in system of business for evading local option law without regard to whether he made sale alleged in indictment within prohibited territory. Holloway v. State, 53 Tex. Cr. App. 246, 110 SW 745; Id. [Tex. Cr. App.]

is not, however, restricted to the date alleged in the indictment, but a conviction is authorized where the offense is shown to have been committed on any day prior to the indictment and within the statute of limitations.[55] An indictment may be broad enough to cover the violation of several statutes by a single act.[56] In misdemeanor cases one may be convicted on evidence showing a sale through an agent under an indictment charging a sale by him personally.[57]

*Trial.*[See 10 C. L. 449]—In some states an attorney other than the prosecuting attorney may appear for the state on prosecution for violation of the liquor laws.[58]

*Evidence.*[See 10 C. L. 449]—The usual rules of criminal evidence are applicable to prosecutions for violation of the liquor laws,[59] including those as to hearsay[60] and opinion[61] evidence, secondary evidence,[62] and admissions.[63] Evidence to be ad-

111 SW 937. Count alleging joint sale to two named persons is not sustained by evidence showing separate sales to each of them. Yeoman v. State [Neb.] 115 NW 784; Id. [Neb.] 117 NW 997. Held fatal variance between allegation of sale to "C. Wiltis" and proof of sale to "C. Willis." Carnes v. State, 53 Tex. Cr. App. 490, 110 SW 750. Where, on prosecution for selling without license, state elected to prosecute defendant for selling to named person, held that it could not prosecute him for selling to others, or prove sales to others in aid of proof that he was guilty of offense for which he was being prosecuted. Devine v. Com., 107 Va. 860, 60 SE 37. Evidence held sufficient to establish venue as laid in indictment for selling without license. State v. Budworth, 104 Minn. 257, 116 NW 486.

**55.** Illegal sale. Cripe v. State [Ga. App.] 62 SE 567. Where indictment charges unlawful sale of whisky generally, and not to any particular individual, proof may be made of any sales by him in jurisdiction of court within two years prior to date of accusation. Wheeler v. State [Ga. App.] 61 SE 409. On prosecution for selling in violation of prohibition law, state held entitled to prove as many distinct sales as it could within two years before finding of indictment. Taylor v. State [Ga. App.] 62 SE 1048. Indictment charging defendant with maintaining common nuisance on certain day, before finding of indictment, and up to and including day of finding of indictment, held to sufficiently charge continuing offense. Miller v. Com. [Ky.] 113 SW 518. Sales by defendant within year before finding of indictment may be shown, but not sales made more than year before such time. Id. Allowing police judge to testify that defendant was convicted before him within year before finding of indictment for having intoxicants in his possession for purpose of selling them held error, both because not best evidence and because it was not shown that he had such liquors in house referred to in indictment within year before it was found. Id. On prosecution for "engaging in the business" of selling without license in violation of Rev. Pol. Code, §§ 2838, 2834, held that, under information alleging that offense was committed by engaging in the business on specified date and was continued until specified later date, state could prove any sales between those dates as tending to prove that defendant was engaged in the business. State v. Ely [S. D.] 118 NW 687. Instruction limiting time in which state must prove its case to lesser time than two years prior to presentment of indictment is erroneous. Wagner v. State, 53 Tex. Cr. App. 306, 109 SW 169.

**56.** Indictment under Rev. St. 1899, § 2179, or selling to minor without written consent of his parent or guardian, held broad enough to include offense defined by Id. § 3009, as amended by Acts 1905, p. 141, prohibiting sales to minors with or without such consent. State v. Hamill, 127 Mo. App. 661, 106 SW 1103.

**57.** Schwulst v. State, 52 Tex. Cr. App. 426, 108 SW 698. All guilty participants being principals in misdemeanor cases. Roberts v. State, 52 Tex. Cr. App. 355, 20 Tex. Ct. Rep. 861, 107 SW 59.

**58.** May appear and file reply to plea in bar on prosecution for violation of Beal law. Gilliam v. State, 7 Ohio N. P. (N. S.) 482.

**59.** See Indictment and Prosecution, 12 C. L. 1.

**60. Evidence held inadmissible:** On prosecution for violation of local option law, evidence that one who procured whisky and gave it to witness told latter that he had gotten it from defendant. Smith v. State, 52 Tex. Cr. App. 507, 107 SW 819; Henderson v. State, 52 Tex. Cr. App. 514, 107 SW 820. On prosecution for illegal sale, testimony of witnesses that he told justice of peace, to whom he gave bottle of whisky that he bought it from defendant, and testimony of justice to same effect. Holmes v. State, 52 Tex. Cr. App. 352, 353, 20 Tex. Ct. Rep. 844, 106 SW 1160. On prosecution for selling to person in habit of getting intoxicated, testimony as to losses of money by such person in so far as based upon things which had come to knowledge of witness and otherwise. Sheppelman v. People, 134 Ill. App. 556.

**Evidence held admissible:** Evidence that prosecuting witness gave witness bottle of whisky, and that witness gave same bottle of whisky to county attorney. Henderson v. State, 52 Tex. Cr. App. 514, 107 SW 820. On prosecution for violation of local option law, testimony that third person gave witness money and told him that he wanted bottle of whisky, and that witness bought whisky from defendant and gave it to such person and told him that he got it from defendant, held admissible, where defendant brought out as part of his defense fact that witness had so stated to such person. Starnes v. State, 52 Tex. Cr. App. 403, 107 SW 550.

**61.** On prosecution for violation of local option law, opinion of prosecuting attorney as to what would be violation of law, previously expressed to defendant while latter was under arrest in another case, held inad-

missible must, of course, be relevant and material to the issues involved.[64] The court will take judicial notice of the boundaries of states and counties, and of the geographical location of cities and towns within their jurisdiction,[65] of the intoxicating character of certain liquors,[66] that the liquor traffic is prohibited in a certain county under the dispensary law,[67] and of the length of time during which the local option law continues in force in a given territory after its adoption therein.[68] Evidence of the contemporaneous possession of intoxicants by defendant is generally admissible in prosecutions for unauthorized sales,[69] though it has been held improper

missible. Roberts v. State, 52 Tex. Cr. App. 355, 20 Tex. Ct. Rep. 861, 107 SW 59.

**62.** Testimony that witness to whom defendant loaned whisky had ordered whisky in writing from proprietor of clubroom in which loan was made held not objectionable as secondary evidence, it being merely incidental and preliminary to substantial charge of sale under pretense of loan, and prosecution not being based on such order. Wilson v. State [Tex. Cr. App.] 111 SW 1018.

**63.** On prosecution for having engaged in business of selling intoxicants without having paid tax prescribed by Comp. St. 1897, § 5385, held that evidence that accused, immediately after reading of warrant to him, stated to sheriff that he had paid federal tax, and exhibited to him a federal license for current year, was admissible. People v. Moore [Mich.] 15 Det. Leg. N. 920, 118 NW 742.

**64.** On prosecution for violation of local option law, testimony of accused's witnesses on cross-examination that they kept whisky in clubroom for their own purposes held irrelevant and immaterial. Ross v. State, 53 Tex. Cr. App. 295, 109 SW 152; Ross v. State, 53 Tex. Cr. App. 162, 109 SW 153. Evidence that witness other than one to whom alleged sale was made had been in habit of storing whisky in defendant's wareroom and drinking same there with defendant's knowledge, and that defendant had ordered cask of whisky for his brother, who took it home, held inadmissible. Howell v. State, 53 Tex. Cr. App. 536, 110 SW 914. Evidence as to existence of clubroom in city where alleged sale was made other than that conducted by defendant held inadmissible. Coleman v. State, 53 Tex. Cr. App. 578, 111 SW 1011. Held error to permit state to prove that defendant had signed bonds of other persons accused of violating said law. Taylor v. State [Tex. Cr. App.] 111 SW 932. On prosecution for violating local option law in certain precinct, held proper to permit state to prove that town in which sale was made was in said precinct. Coleman v. State, 53 Tex. Cr. App. 578, 111 SW 1011. Evidence of acquittal of defendant upon charge of keeping intoxicants for sale is irrelevant upon trial for selling intoxicants, since one may sell liquors which he does not keep for sale. Taylor v. State [Ga. App.] 62 SE 1048.

**65.** On prosecution for sale without license, venue held sufficiently proven. Reed v. Ter. [Ok]. Cr. App.] 98 P 583.

**66. Whisky** is judicially known to be intoxicating. Beaty v. State, 53 Tex. Cr. App. 432, 110 SW 449; Donaldson v. State, 3 Ga. App. 451, 60 SE 115. Court may take judicial cognizance that whisky is a spirituous, alcoholic and intoxicating liquor. O'Connell v. State [Ga. App.] 62 SE 1007. **A Manhattan cocktail** is generally and popularly known as an intoxicating liquor, and no proof of its intoxicating character is necessary in prosecutions under prohibitory law. State v. Pigg [Kan.] 97 P 859. Court may take judicial cognizance that an ordinary **beer,** containing such percentage of alcohol as by common knowledge may produce intoxication when beer is drunk in such quantities as may ordinarily be drunk, is an intoxicating liquor. O'Connell v. State [Ga. App.] 62 SE 1007. Court will take judicial notice of fact that **lager beer** is an intoxicating malt liquor. Cripe v. State [Ga. App.] 62 SE 567.

**67.** That it is unlawful to manufacture or sell intoxicants in certain county. State v. Arnold [S. C.] 61 SE 891.

**68.** That it continues in force in county for 4 years, as provided by Rev. St. 1899, § 3033. State v. Hall, 130 Mo. App. 170, 108 SW 1077.

**69.** On prosecution for **violation of local option law,** may show that defendant had such an amount of whisky as to forbid any reasonable presumption that it was intended for his own immediate use. Wagner v. State, 53 Tex. Cr. App. 306, 109 SW 169. Is admissible for purpose of corroborating state's witnesses and showing probability that he did sell whisky. Myers v. State, 52 Tex. Cr. App. 558, 108 SW 392. Such evidence held not proving another offense, since it is not an offense to have whisky in a local option district. Id. Possession of intoxicants about 6 weeks after alleged sale held not contemporaneous therewith within meaning of rule. Id. Held error to permit state to prove that defendant's place of business had been raided under search and seizure law more than a year after alleged offense which occurred long before law was passed. Alderson v. State [Tex. Cr. App.] 111 SW 412. Evidence that defendant had worked in clubrooms where intoxicants were sold for past 3 years, during which time local option law was in force in county, held inadmissible, it appearing that defendant had not been connected with clubroom for 2 months before alleged sale took place. McLemore v. State, 53 Tex. Cr. App. 552, 110 SW 900. That one accused of **unlawfully selling** intoxicants is in possession of quantities of liquors, beer, bottles, jugs and measures is circumstance which, in connection with other circumstances, will warrant inference that owner is engaged in unlawful sale of intoxicants. Taylor v. State [Ga. App.] 62 SE 1048. On prosecution for **selling without license,** unexplained possession by defendant of unusual quantity of whisky shortly before time of alleged sale is competent evidence. State v. Kiger, 63 W. Va. 450, 61 SE 362.

**Evidence held admissible:** On prosecution for **violating local option law,** testimony that

to show a seizure of liquor about the time of the alleged sale, or the result of litigation in respect to the liquors so seized.[70] Evidence that defendant refused to violate the law at other times is inadmissible on his behalf.[71] On prosecution for keeping a disorderly house, the general reputation of the place may be shown.[72] It is generally held proper to permit the jury to inspect the bottle containing the liquor alleged to have been sold by defendant and its contents.[73] Evidence of other transactions and offenses is generally inadmissible[74] except to show system[75] or intent,[76] or to identify the defendant.[77] In some instances the possession of a federal internal revenue license is a proper subject of inquiry.[78] Cases dealing with the

witness had found keg with whisky in it at defendant's place of business shortly after alleged sale, and that at that time defendant stated that it belonged to him and had been there for some time. Starbeck v. State, 53 Tex. Cr. App. 192, 109 SW 162. That whisky was put off train for defendant's employer, that same was carried by defendant to place where he worked, etc. Biddy v. State [Tex. Cr. App.] 108 SW 689. On prosecution for **violation of general prohibition law** (Laws 1907, p. 81), evidence that defendant received frequent shipments of liquor, that he had large amount on hand in his home, that in his house there were generally a number of persons singing, carousing, etc, Tooke v. State [Ga. App.] 61 SE 917. Evidence relative to consignment and delivery of whisky to defendant, on prosecution for **selling without license.** State v. Kiger, 63 W. Va. 450, 61 SE 362. On prosecution for **maintaining nuisance** in violation of prohibition law, records of local railway station containing record of articles received and delivered to defendant, also signature of defendant acknowledging receipt of articles specified, and testimony identifying record and defendant's signature and describing how record was kept and for what purpose, held competent to show admission by defendant of receipt of large quantities of beer. State v. Dahlquist [N. D.] 115 NW 81. Held immaterial whether railway company's agent himself kept record and made descriptive entries. Id. Receipts for freight belonging to defendant signed by drayman, who had written authority to act as defendant's agent in that regard, held competent evidence to show receipt by defendant of articles receipted for. Id. Record of local railway station showing receipt by agent of various beer receptacles from defendant and shipment of same held competent to show character of such shipments, where agent identified record and testified that he received information as to character of freight as described in record from defendant. Id.

**70.** On prosecution for sale in local option territory. Myers v. State, 52 Tex. Cr. App. 558, 108 SW 392.

**71.** On prosecution for selling in violation of local option law, refusal to permit defendant's witness to testify that on date defendant was accused of selling whisky to state's witness he refused to sell to him held not error. Donaldson v. State, 3 Ga. App. 451, 60 SE 115.

**72.** On prosecution under Acts 30th Leg. c. 132, proof that other persons beside defendant, who worked in his place of business, sold liquors therein, held admissible. Jolliff v. State, 53 Tex. Cr. App. 61, 109 SW 176.

**73.** On prosecution for selling without license, permitting bottle and its contents to be exhibited to jury in presence of court held not error, there being no proposal for jury to take bottle with them on their retirement, to be smelled, or drunk, or tasted. Phillips v. State [Ala.] 47 S 245. Permitting jury to take bottle with them into jury room held proper. Id. Held not error to permit jury to inspect, look at, and smell contents of bottle properly identified as purchased from defendant and admitted in evidence which was alleged to contain whisky. Reed v. Ter. [Okl. Cr. App.] 98 P 583.

**74.** On prosecution for violation of local option law, where it appeared that defendant as agent for outside concern received money for whisky from purchaser and forwarded same to principal, who shipped whisky to agent by open express shipment, evidence of previous transaction whereby order for beer was sent to principal by agent, and beer was sent c. o. d. direct to purchaser. Curtis v. State, 52 Tex. Cr. App. 606, 108 SW 380. On prosecution for sale in August, evidence of sale in following December. Holloway v. State [Tex. Cr. App.] 111 SW 937. On prosecution for sale or loan in violation of local option law, evidence that accused had been enjoined from operating tenpin alley in certain town was inadmissible either as original or impeaching evidence. Taylor v. State [Tex. Cr. App.] 111 SW 932.

**75.** Testimony of prosecuting witness that he had obtained whisky from defendant several times before transaction on which prosecution was based held admissible under circumstances to show whether particular transaction was subterfuge, and whether defendant was selling witness whisky or letting him have his own whisky previously purchased. Killman v. State, 53 Tex. Cr. App. 570, 112 SW 92.

**76.** On prosecution for maintaining nuisance, proof of unlawful sales is permissible. State v. Johns [Iowa] 118 NW 295. On prosecution for selling without license, evidence of sale at time other than that charged held admissible, not for purpose of convicting defendant of that sale, but as tending to show that transaction was sale, and that defendant was seller and not mere agent. Sweat v. State [Ala.] 45 S 588.

**77.** On prosecution for selling to named person contrary to law, evidence of sale to another person held properly admitted where it was limited to purpose of identifying defendant as person making sale in question. Abrams v. State [Ala.] 46 S 464.

**78.** On prosecution for selling in violation of prohibitory law and maintaining nuisance, held that **certified copies of records of**

admissibility of particular evidence to prove the adoption of ordinances,[79] to show that a sale was made,[80] to connect defendant with the transaction in question,[81] to

collector of internal revenue were admissible. State v. Pigg [Kan.] 97 P 859. On prosecution for selling and delivering in violation of Acts 1901-02, p. 601, c. 516, copy of records of office of collector showing that defendant held license as retail liquor dealer held admissible. Runde v. Com. [Va.] 61 SE 792. None of provisions of Shannon's Code, §§ 5573-5591, held broad enough to render **certificate of collector** of internal revenue showing issuance of special tax stamp to defendant admissible to show that he has paid internal revenue tax as retail liquor dealer, or is in possession of stamp, which fact is, by Acts 1903, p. 1079, c. 355, § 1, made prima facie evidence of sales in prosecutions for violations of law prohibiting sales within 4 miles of school house. Bayless v. State [Tenn.] 113 SW 1039. Certificate held not admissible under common law in absence of showing that collector had authority to issue it. Id. On prosecution for being common seller, **examined copy of record** of special liquor taxes in internal revenue office showing payment of tax by bottling company for buildings where offense was alleged to have been committed held admissible, evidence connecting defendant with business conducted at such places making relevancy of record clearly apparent as evidence competent to show that defendant, if not owner of liquors, assisted common seller in the business. State v. Martel, 103 Me. 63, 68 A 454. Under Acts 28th Leg. p. 57, c. 40, art. 407a, examined copy from books of internal revenue collector is admissible. Biddy v. State [Tex. Cr. App.] 108 SW 689. Is not necessary that such copy be certified by collector or his deputy, but any one may make examined copy and testify to same. Id. Examined copy itself must be introduced, and witness cannot testify orally as to its contents. Id. Testimony of witness who made copy of license held to sufficiently show that it was taken from records of internal revenue collector. King v. State, 53 Tex. Cr. App. 101, 109 SW 182. Held improper to permit one who had examined collector's books to testify from memory or from notes that license had been issued to defendant. Biddy v. State, 52 Tex. Cr. App. 412, 107 SW 814. **Fact** that defendant was served with subpoena duces tecum to produce license, but did not do so, held not to render such evidence admissible. Id. Certificate of collector that his records showed issuance of retail dealer's license to defendant's employer held inadmissible. Reed v. State, 53 Tex. Cr. App. 4, 108 SW 368. **Proof of existence of license may be made by parol.** Oldham v. State, 52 Tex. Cr. App. 516, 108 SW 667. Witness may testify that he saw license, issued in name of defendant's employer, posted up in place where defendant worked, though he did not remember date of said license. Biddy v. State [Tex. Cr. App.] 108 SW 689. May testify that defendant had license for sale of malt liquors in his place of business. Coleman v. State, 53 Tex. Cr. App. 578, 111 SW 1011. Witness may testify that he heard defendant testify in another similar case that there was license posted up in place where he worked. Biddy v. State [Tex. Cr. App.] 108 SW 689. On prosecution, under Acts 30th Leg. c. 132, for keeping disorderly house, witness may testify that he saw license in defendant's name posted in house in question. Joliff v. State, 53 Tex. Cr. App. 61, 109 SW 176.

79. Book in which town ordinances are engrossed and signed by town clerk as required by P. L. 1895, p. 228, § 27, is sufficient prima facie proof of existence and due publication of ordinance therein contained in view of P. L. 1907, p. 443, § 1. Town of Montclair v. Scola [N. J. Law] 69 A 451.

80. **Evidence held admissible:** On prosecution for selling without license, evidence that witness, who testified that he bought whisky from defendant, gave whisky to third person on same day and shortly after alleged sale. Murph v. State [Ala.] 45 S 208. On prosecution for having engaged in business of selling intoxicants without having paid tax required by Comp. Laws 1897, § 5385, held that prosecution had right to call witnesses who knew fact to testify that they saw sales of liquor made to identified persons, without also calling those persons as witnesses, they not being res gestae witnesses. People v. Moore [Mich.] 15 Det. Leg. N. 920, 118 NW 742. On prosecution for violating local option law where state claimed sale under pretense of loan, evidence of proprietor of clubroom where loan was made that it was custom of members to loan one another whisky when they had ordered whisky, and to make entry on order showing who had made loan. Wilson v. State [Tex. Cr. App.] 111 SW 1018. Testimony of witness who loaned whisky to prosecutor at defendant's suggestion that defendant was tenant of his, and was occupying his house at time of sale, as circumstance to show familiarity of witness with defendant, and as corroborative of state's theory of a sale. Coleman v. State, 53 Tex. Cr. App. 578, 111 SW 1011.

81. **Evidence held admissible:** On prosecution for **violating local option law,** held proper to permit witness to testify as to seeing bar fixtures in house where defendant worked. Biddy v. State [Tex. Cr. App.] 108 SW 689. Evidence that, after arrest of one who was alleged to have made the sales as defendant's agent, defendant, through a third person, got $60 from jailer which had been taken from agent's person, in view of fact that agent had shortly before brought 16 quarts of whisky to defendant's place of business which latter claimed as his property, and of other evidence, though defendant claimed that money was for sales made for him by agent in Indian Territory, and that he had directed agent not to sell it in Texas. Oldham v. State, 52 Tex. Cr. App. 516, 108 SW 667. Testimony that witness gave third person money, that latter went up street in direction of defendant's place of business, and that later he came back and gave witness bottle of whisky. Starnes v. State, 52 Tex. Cr. App. 403, 107 SW 550. On issue as to whether masked man who made sale was defendant's agent, held that defendant might show that he had transferred his business to another, and that contract between himself and latter in reference to transfer was admissible for that purpose. Schwulst v. State, 52 Tex. Cr. App. 426, 108 SW 693. Defendant held also entitled to show, for same purpose,

identify the liquor sold,[82] to prove the date of the sale,[83] to show the quantity[84] and the intoxicating quality[85] of liquor sold, to show that one was in the habit of getting intoxicated,[86] and to prove that defendant was a licensed physician,[87] will be found in the notes.

As in other cases, the evidence must establish defendant's guilt beyond a reasonable doubt.[88] The possession of a federal internal revenue license is given more

that he had conferred with federal deputy marshal as to whether he could use his federal license to carry on another business, or whether it had become worthless by reason of transfer of his business. Id. On prosecution for being **common seller,** evidence that defendant gave orders and exercised control in relation to liquors consigned to certain bottling company, and was only person with whom witness had any talk in regard to said company's liquors. State v. Martel, 103 Me. 63, 68 A 454. On prosecution for having **engaged in business of selling without having paid tax** prescribed by Comp. St. 1897, § 5385, held that evidence that goods billed as mineral water were shipped to defendant, consigned to him, and delivered at place of business which it was claimed he carried on, on issue as to whether defendant was person conducting whatever business was carried on at that particular place. People v. Moore [Mich.] 15 Det. Leg. N. 920, 118 NW 742.

**82.** On prosecution for violation of local option law, evidence to identify bottle of whisky alleged to have been purchased held properly admitted. Dooley v. State, 52 Tex. Cr. App. 491, 108 SW 676.

**83.** On prosecution for retailing contrary to law, question whether witness had gone before grand jury before he bought the whisky or afterwards held not improper, where evident purpose was to identify time of purchase and show that indictment was found within one year after sale. Wynne v. State [Ala.] 46 S 459. Where, on prosecution for selling without license, witness to whom sale was alleged to have been made testified that he did not remember date of sale, but that it was before defendant was tried in mayor's court, held not error to permit state to ask him what defendant was there tried for, sole purpose being to elicit data for definitely fixing date of sale. Sweat v. State [Ala.] 45 S 588. Admission of evidence of mayor and his docket held not error, as limited by court. Id. Remark of court limiting effect of evidence held not statement that offense for which defendant was tried in mayor's court was identical with one at bar. Id. Where different sales on same day were alleged, held proper to permit prosecuting witness to state time and hour of day he secured whisky from defendant. Robinson v. State, 53 Tex. Cr. App. 565, 110 SW 908.

**84.** On prosecution for selling in less quantities than 5 gallons without license, held that measures used by witnesses in measuring beer sold by defendant and which had been sent to secretary of state by county clerk and tested and stamped by him as correct pursuant to Hurd's Rev. St. 1905, c. 147, § 9, were admissible, testing and stamping being sufficient evidence that they were correct in absence of proof to contrary, regardless of whether they belonged to county or whether secretary was required to test them. People v. Nylin, 236 Ill. 19, 86 NE 156, afg. 139 Ill. App. 500.

**85. Evidence held admissible:** That bottle received by witness from defendant was labled "Budweiser." Coleman v. State [Tex. Cr. App.] 112 SW 769. Held proper to permit witness who drank some of beer to state that he thought it was intoxicating, particularly where there was no issue as to its being nonintoxicating. Curtis v. State, 52 Tex. Cr. App. 606, 108 SW 330. While witness may testify as to his knowledge that liquor bought was whisky or was intoxicating, evidence must show that it was whisky, which is judicially known to be intoxicating, or, if not, that it was capable of producing intoxication, and where witness believed he was buying whisky, it was error to refuse to permit cross-examination for purpose of testing his knowledge as to whisky and as to whether what he bought was whisky. Beaty v. State, 53 Tex. Cr. App. 432, 110 SW 449. Permitting witness to testify that stuff he purchased from defendant was whisky held not error, though it did not appear that he tasted or smelled it, that fact going only to weight of his testimony. Rice v. State [Tex. Cr. App.] 107 SW 833. Testimony of witness that he called upon defendant for half a pint of whisky and that he received it, put it in his pocket, and paid 40 cents for it, and that he knew it was whisky, held not open to objection that it was irrelevant, immaterial, and was but conclusion and opinion of witness. Id. Fact that witness could not tell component parts of whisky, or whether liquor served to him was a distilled or rectified spirit, or whether there are many medicines that smell like whisky, held not to render him incompetent to testify that liquor served to him was whisky. People v. Marx, 112 NYS 1011. Where sales on which state relied had been shown and it had been proven that defendant sold cider to public generally, held not prejudicial error to admit evidence that defendant sold same kind of cider to others, followed by proof of its effect on them, though it would have been better to have confined proof to effect only. Devine v. Com., 107 Va. 860, 60 SE 37.

**Evidence held inadmissible:** That certain persons shown to have been present when sale was made to prosecuting witness were arrested and convicted for drunkenness. Isom v. State, 52 Tex. Cr. App. 438, 107 SW 350.

**86.** Witnesses may testify as to whether person was in habit of drinking to excess. Sheppelman v. People, 134 Ill. App. 556.

**87.** On prosecution for issuing prescription for intoxicants in violation of law, testimony of physician that he had medical diploma held incompetent. McAllister v. State [Ala.] 47 S 161.

**88.** Sale to minors. State v. Salkowski [Del.] 69 A 339. On prosecution for selling without license, failure to instruct that defendant is presumed to be innocent, and this presumption is sufficient to acquit him un-

or less probative force by the statutes of some states.[89] The finding of liquor on defendant's premises is sometimes made prima facie evidence of selling contrary to law.[90] The burden is ordinarily on defendant to show that he comes within an exception or proviso of the statute on which the prosecution is based[91] and, on prosecutions for selling without a license, to show that he had a license.[92] The fact of the sale may be shown by direct or circumstantial evidence,[93] and the state is not confined to direct evidence on prosecutions for maintaining a nuisance.[94]

*Instructions.* See 10 C. L. 454—Instructions must be predicated upon, and applicable to, the evidence introduced,[95] and must not invade the province of the jury.[96]

til evidence establishes his guilt beyond a reasonable doubt, held reversible error. Yeoman v. State [Neb.] 117 NW 997, modifying 115 NW 784.

**89.** Evidence of issuance of license does not raise presumption of guilt in absence of statute to that effect, but it is competent evidence for purpose of showing what business defendant is engaged in, or that he keeps liquors for sale. Appling v. State [Ark.] 114 SW 927. Kirby's Dig. § 5144, making finding of license on premises occupied or controlled by defendant prima facie evidence of violation of laws against clandestine sale of liquors, held not to apply where license was not found on premises but in bank where it had been deposited by owner. Instruction held prejudicially erroneous. Id. Provision of Laws 1907, p. 297, that issuance of special stamp or receipt shall be prima facie evidence of sale by person to whom it is issued at his place of business where it is posted, held not unconstitutional as changing burden of proof and quantum of evidence in criminal case. People v. McBride, 234 Ill. 146, 84 NE 865. Defendant held not in any event affected by provision where he himself offered stamp in evidence. Id. Term "person" as used in Laws 1905, p. 50, § 18, making issuing of license or tax stamp to any person prima facie evidence that he is selling, exchanging, or giving away intoxicating liquors, is broad enough to include corporation. Instruction approved. State v. Kline [Or.] 93 P 237. Charge that possession of license by defendant was prima facie evidence that he was engaged in selling intoxicants held proper in view of express provision of Acts 28th Leg. (1903) p. 55, c. 40, art. 402. Fox v. State, 53 Tex. Cr. App. 150, 109 SW 370. Statute held not in conflict with constitutional provision guaranteeing to accused right to be confronted with witnesses against him, and to trial by jury. King v. State, 53 Tex. Cr. App. 101, 109 SW 182. Under Acts 1901-02, p. 601, c. 516, § 5, and Acts 1906, p. 411, c. 236, proof that one accused of selling without license had federal license as retail liquor dealer raises disputable presumption of guilt, placing burden of proving that he has not violated law on him, and warranting conviction in absence of exculpatory evidence. Runds v. Com. [Va.] 61 SE 792. Such statutes held not in conflict with Const. art. 1, § 8, guaranteeing right of accused in criminal prosecutions to be confronted with accusers and witnesses. Id.

**90.** On prosecution for clandestine sale of liquor, finding of liquor on premises is prima facie evidence of guilt. Kirby's Dig. § 5141. Appling v. State [Ark.] 114 SW 927. Such presumption may be rebutted by showing that liquor was used for private purposes, and not for sale. Kirby's Dig. § 5146. Id. Gen. St. 1906, authorizing searches and seizure, and providing that if liquors shall be found in such quantities as to confirm belief of illegal sales, same shall be prima facie evidence of selling contrary to law, etc., held to apply generally, and not to be confined to selling in counties or precincts voting against such sales. Putnal v. State [Fla.] 47 S 864. One charged with keeping intoxicants for purpose of unlawfully selling or disposing of same, where such liquor is found in his possession, is not entitled to usual presumption of innocence, since statute makes such possession presumptive evidence of guilt. Cobbey's Ann. St. 1907, §§ 7150-7199a. Yeoman v. State [Neb.] 117 NW 997, modifying 115 NW 784. Return of sheriff showing seizure of named articles held not to show facts necessary to operation of statute making finding of liquors in possession of one not authorized to sell same, except in private dwelling house, prima facie evidence that they are kept for sale or use in violation of law, and finding of place fitted up with bar, etc., and internal revenue stamp, prima facie evidence that person to whom stamp was issued was maintaining common nuisance, and hence not to make prima facie case for state. State v. Foren [Kan.] 97 P 791.

**91.** On prosecution for selling without license, burden held on defendant to show that cider sold by him was pure apple cider within meaning of Acts 1906, p. 307, c. 181, and hence such as he could sell without license under exception of Acts 1904, c. 20, § 141. Devine v. Com., 107 Va. 860, 60 SE 37. On prosecution for violating local option law, held proper to permit defendant to testify that he was a druggist, without requiring him to show by record that he had qualified himself and been licensed as such, since, when he justified sale on ground that it was made under authority of his druggist's license, burden was on state to show that he was not druggist, license being at least prima facie evidence of fact that he was. Commonwealth v. Byers, 33 Ky. L. R. 252, 109 SW 895.

**92.** Josey v. State [Ark.] 114 SW 216; Reed v. Ter. [Okl. Cr. App.] 98 P 583.

**93.** Taylor v. State [Ga. App.] 62 SE 1048.

**94.** State v. Johns [Iowa] 118 NW 295.

**95.** Instruction on prosecution for selling without license that jury could not, after retiring, smell or taste contents of bottle admitted in evidence held properly refused. Phillips v. State [Ala.] 47 S 245. On prosecution for illegally selling, instruction as to sale by another than defendant held properly refused. Abrams v. State [Ala.] 46 S 464.

They should not be misleading[97] and should be so framed as not to withdraw from the consideration of the jury or ignore any material issue[98] or defense,[99] nor should

On prosecution for violation of local option law where evidence was to effect that defendant as agent for outside concern received money for whisky from purchaser and forwarded same to principal, who shipped whisky to agent by open express shipment, instruction basing guilt on proof of C. O. D. shipment direct to purchaser held erroneous. Curtis v. State, 52 Tex. Cr. App. 606, 108 SW 380. On prosecution for selling in violation of local option law, instruction that if whiskey was given as an evasion of such law defendant would be guilty held not called for by facts. Tippit v. State, 53 Tex. Cr. App. 180, 109 SW 190. Evidence as to intoxicating quality of beer sold held to justify instruction to find defendant guilty if jury found that defendant sold witness bottle of beer and that same was intoxicating. Schmidt v. State, 53 Tex. Cr. App. 465, 110 SW 897. Instruction as to what would or would not constitute sale held properly refused as not called for by facts and misleading, and in view of other instructions. Killman v. State, 53 Tex. Cr. App. 512, 112 SW 90. Taking into consideration both direct and circumstantial evidence and inferences which jury might fairly draw from both, held that every hypothesis set forth in instruction, on prosecution for maintaining nuisance, as to distribution among club members, was sustained by sufficient evidence. State v. Johns [Iowa] 118 NW 295. On prosecution for keeping liquor nuisance, instruction authorizing conviction if jury found that at any time between Jan. 1, 1906, the date charged in indictment, and Oct. 12, 1907, date of finding of indictment, defendant used rooms for purpose of selling intoxicants therein, or permitting same to be sold therein unlawfully, or keeping same therein for unlawful purposes, etc., held not objectionable on ground that there was no evidence tending to show guilt as early as first date or as late as second, limiting consideration of jury to more circumscribed period than that fixed by statute of limitations, not being prejudicial to defendant. Id. Instruction held not objectionable as permitting jury to find defendant guilty for alleged use of club rooms over drug store prior to May, 1906, at which time they were first occupied, in view of another instruction that jury could only find defendant guilty for using said rooms. Id. Evidence held not to show that defendant ceased use of premises in 1906, but to warrant finding that it continued until Oct. 12, 1907. Id.

**96.** Instructions on prosecution for selling without license held not objectionable as branding method adopted by defendant for making sales as shift or device to evade law. People v. Nylin, 139 Ill. App. 500, afd. 236 Ill. 19, 86 NE 156. On prosecution of defendant for keeping intoxicants on hand at his place of business, instruction that facts proved constituted place of business held erroneous. Roberts v. State [Ga. App.] 60 SE 1082. Requested charge as to effect of understanding of parties to transaction held properly refused, it being for witness to detail facts and for jury to determine whether transaction was sale or gift. Byrd v. State [Tex. Cr. App.] 114 SW 185. Instruction that jury might judicially recognize that whiskey is intoxicating held not objectionable as expression of **opinion** by court, that it is intoxicating being fact of universal knowledge which need not be proved. Donaldson v. State, 3 Ga. App. 451, 60 SE 115. On prosecution for violation of local option law, instruction that jury should find defendant guilty if they believed beyond reasonable doubt that defendant at specified time and place sold intoxicants to named person, and that sale had theretofore been and then was prohibited in said county held not on **weight of evidence.** Trail v. State [Tex. Cr. App.] 107 SW 545. On prosecution for selling to person in habit of getting intoxicated, instruction that evidence of witnesses who testified that they had never seen such person intoxicated was negative evidence only and did not disprove affirmative evidence of those witnesses who testified to having seen him intoxicated held prejudicial error in view of conflict in evidence. Sheppelman v. People, 134 Ill. App. 556. Instruction **assuming fact** that person to whom sales were made was minor held erroneous. Gaul v. People, 136 Ill. App. 445. On prosecution for giving liquor to minor, held that error in instructions assuming that minor was given liquor by some one and that same was intoxicating was harmless, in view of evidence. Hall v. People, 134 Ill. App. 559. Where uncontradicted evidence showed that law had been legally adopted and publication thereof duly made in county, held that court was justified in assuming in instructions that it was in effect in county. Cordona v. State, 53 Tex. Cr. App. 619, 111 SW 145. Evidence held to justify instruction that local option law had been in force in county since specified date. Harryman v. State, 53 Tex. Cr. App. 474, 110 SW 926.

**97.** On prosecution under Acts 1907, p. 81, for having liquor on hand at place of business, use of phrases "connected therewith in said business" and "connected with that place of business" held not misleading as leading jury to believe that physical connection between room and defendant's restaurant was necessary to constitute former part of his place of business. Bashinski v. State [Ga. App.] 62 SE 577. On prosecution for selling in violation of local option law, instruction referring to whiskey sold as rye, where there was no evidence to that effect, held inapt but not misleading, since defendant was guilty if he sold any kind of whiskey. Donaldson v. State, 3 Ga. App. 451, 60 SE 115. On prosecution for violating local option law, instruction that sale had been prohibited in county since certain date held equivalent to charging that local option law had been in effect there since said date, there being no contention that sale was for any purpose authorized as exception to general rule prohibiting sale. Piper v. State, 53 Tex. Cr. App. 485, 110 SW 898.

**98.** Refusal of charge setting forth constituent elements of sale held error in view of evidence. Tippit v. State, 53 Tex. Cr. App. 180, 109 SW 190. On prosecution for selling in violation of local option law, held that jury should have been specifically instructed

they single out and give undue prominence to particular evidence.[1] It is not error to refuse a requested instruction substantially covered by the charge given.[2]

*Punishment.*[See 10 C. L. 455]—The punishment which may be inflicted on one convicted of a violation of the liquor laws depends entirely on the statutes of the various states.[3] Where the same offense is charged in different counts of the indictment, there should be but one sentence.[4]

*Appeal and review.*—Special provision is sometimes made for the review of judgments of conviction for violation of the liquor laws.[5] The general rules as to appeals and the procedure thereon are fully treated elsewhere.[6]

that there could be no conviction if transaction was gift. Id. Evidence held to raise issue that transaction in question was gift, and neither a sale nor a loan, so that failure to submit question of gift was reversible error. Coleman v. State [Tex. Cr. App.] 112 SW 1072.

**99.** Instruction on prosecution for selling without license that fact that defendant took money from another, went away and came back and gave him whiskey would not constitute sale, held properly refused as not covering other inculpating facts and circumstances in evidence. State v. Kiger, 63 W. Va. 450, 61 SE 362. On prosecution for violation of local option law, instruction held to have sufficiently presented defense that defendant took order on third person for price of whiskey which he furnished witness merely for purpose of getting rid of him, and that he did not intend to present order but intended to give whiskey to witness. Kilgore v. State, 52 Tex. Cr. App. 447, 108 SW 662. Where facts clearly showed that defendant sold whiskey, instruction that if defendant did not intend to sell whiskey, but only intended to enable witness to get quart to make egg nog for himself, defendant, and others, and he made no profit out of same, he would not be guilty of sale, held properly refused. Jolly v. State, 53 Tex. Cr. App. 484, 110 SW 749.

1. Instruction that if jury found that defendant sold intoxicants to prosecuting witness as alleged it was immaterial whether he was at time employed by certain person held erroneous. Green v. State [Tex. Cr. App.] 111 SW 933.

2. Refusal of instruction to effect that if witness instructed proprietor of club room to keep whiskey ahead for him, and that if money given latter was to pay express charges on whiskey previously ordered, or proprietor so believed, he would not be guilty, held not error. Killman v. State, 53 Tex. Cr. App. 570, 112 SW 92. Refusal of requested instruction based on theory that transaction was gift held not error. Coleman v. State [Tex. Cr. App.] 112 SW 769. Requested instruction to effect that gift of whiskey in prohibition territory is not violation of local option law, and that to constitute sale minds of parties must meet, etc., held covered by main charge. Byrd v. State [Tex. Cr. App.] 114 SW 135.

3. Penalty clause of Rev. St. § 4364-25, relating to sales of liquor in townships outside limits of municipal corporations and keeping places for sale of liquors, held not superseded or repealed by § 6942. Hamilton v. State, 78 Ohio St. 76, 84 NE 601. Rev. St. 1892, § 2351, providing that whenever prescribed punishment is fine or imprisonment in the alternative court may in its discretion impose both, held not to apply to Laws 1901, p. 58, c. 4930, § 1, providing that one selling intoxicants in dry territory shall be punished by fine or imprisonment. Tanner v. Wiggins [Fla.] 45 S 459. Hurd's Rev. St. 1905, c. 24, art. 5, § 1, cl. 46, 96, held to give city council discretionary power to determine amount of penalty within statutory limit, so that ordinance providing that whoever should sell liquor should be fined $200 for each offense did not, by imposing maximum fine in all cases, violate Const. art. 2, § 11, requiring all penalties to be proportioned to the nature of the offense. City of Arcola v. Wilkinson, 233 Ill. 250, 84 NE 264. Offense of selling, etc., intoxicants, contrary to prohibition provision of Constitution, is misdemeanor, word imprisonment as there used meaning imprisonment in common jail. Ex parte Cain [Okl.] 93 P 974. Maximum penalty is imprisonment in county jail not exceeding one year and fine not exceeding $500, under Wilson's Rev. & Ann. St. § 1935, providing for punishment of misdemeanors generally, minimum being fixed by constitution itself. Id. On prosecution for pursuing occupation of retail dealer without having paid tax therefor, where offense was committed before and trial took place after Acts 30th Leg. p. 258, c. 138, went into effect, held that penalty imposed by White's Pen. Code, art. 411a, should be imposed, in view of Pen. Code 1895, art. 15, providing that new penalty shall not be inflicted for offense committed before act imposing it went into effect except where punishment is ameliorated. Kendall v. State [Tex. Cr. App.] 114 SW 833.

4. Where witness purchased two glasses of whisky which he drank and bottle of whisky which he carried away, for whole of which he paid at one and the same time, held that there was but one transaction and one offense. Yeoman v. State [Neb.] 115 NW 784; Id. [Neb.] 117 NW 997.

5. Under Rev. St. 1908, § 4364-30zg, 4364-30zh, allowance by one judge of circuit court in vacation of motion for leave to file petition in error to reverse judgment of court of common pleas affirming judgment of conviction for violation of any law prohibiting sale of intoxicants held not to give to such court jurisdiction to try and determine errors complained of. Mitchell v. State, 78 Ohio St. 347, 85 NE 561. Such sections held to control error proceedings to reverse conviction or any judgment affirming conviction in such cases, though they are inconsistent with more general statutory provisions relating to review in criminal cases. Mitchell v. State, 78 Ohio St. 347, 85 NE 561. Rev. St. 1908, § 7356, and Act Feb. 23, 1906, § 20 (98 O. Laws, p. 12), construed, and held that cir-

§ 7. *Summary proceedings.*[See 10 C. L. 465]—Statutes in many states make special provision for the search for and seizure and destruction of liquor and other property kept or used in violation of the liquor laws.[7] The constitutional guaranty against unreasonable searches and seizures must be observed by the officer executing a search warrant as well as by the magistrate issuing it.[8] Whether the conduct of the officer in a given case is reasonable or unreasonable is to be determined by all the circumstances of that case.[9] An officer authorized to execute such a warrant who finds the liquors complained of and arrests the owner or keeper may also take and carry away such articles of property as may reasonably be used as evidence of guilt at the trial on the search and seizure process,[10] and may retain the same for the purpose of presenting them to the grand jury as evidence that the owner or keeper is guilty of a violation of the liquor laws.[11] The title to such property remains in the owner, but the lawful possession is temporarily in the officer for evidentiary purposes subject to the order of the court.[12]

The proceeding to secure the condemnation of liquors so seized is generally regarded as one in rem and is entirely separate and distinct from any criminal prosecution of the person in whose possession such liquors are found.[13] Provision is

cuit court has jurisdiction of proceedings in error to review judgment of mayor of incorporated village convicting defendant of violation of local option laws, and for purpose of such review may grant leave to convicted party to file petition in error therein. State v. Mattingly [Ohio] 86 NE 353.

**6.** See Indictment and Prosecution, 12 C. L. 1.

**7.** To support search and seizure process under Rev. St. c. 29, § 49, **place to be searched** must be a locality, definite, certain and fixed, and must be so described in complaint. State v. Fezzette, 103 Me. 467, 69 A 1073. Word "place" as used in statute cannot be construed as broad enough to cover search for and seizure of liquors in valise alleged merely to be in possession of person charged with unlawfully keeping or depositing liquors, but not alleged to be in any definite and fixed locality or place. Id. **Complaint** failing to designate any place in which liquors are kept and deposited otherwise than "in a valise in the possession of" defendant in certain town held not to sufficiently allege an offense under said section. Id.

**8.** Buckley v. Beaulieu [Me.] 71 A 70.

**9.** Though officers in searching dwelling house occupied by family for liquors may and should search thoroughly in every part of house where there is reason to believe liquor may be found, they should also be considerate of comfort and convenience of occupants and be careful not to injure house or furniture more than is reasonably necessary. Buckley v. Beaulieu [Me.] 71 A 70. Where they have no reason to believe that liquors are concealed within walls and partitions, sounding and probing of walls for purpose of ascertaining whether any pipes leading to some receptacle for liquors are concealed there should be done with as little damage as possible. Id. Officers cutting holes in walls with axes, pickaxes and crowbars, and leaving debris on floors and carpets, held to have acted unreasonably and to have done unnecessary damage, and to have thereby exceeded their authority and rendered themselves liable to owner. Id.

**10.** Officer authorized to execute warrant properly issued for search and seizure under Rev. St. c. 29, § 49. Getchell v. Page, 103 Me. 387, 69 A 624. Common-law right and duty of officers executing search and seizure process to take and temporarily detain articles as evidence is in no way affected by Rev. St. c. 29, § 55, specifically making it officers' duty to take certain enumerated articles, such provision being in affirmation of common-law duty of officers and not exclusive. Id. Officers held entitled to take for use as evidence cork stoppers, funnels, copper measures, bottles, and mugs. Id. Record held not to show that baskets were reasonably useful as evidence, and owner held entitled to recover their value from officers. Id. Officer executing warrant held not required to make return on warrant of taking of property, he having taken them by virtue of law and not by virtue of warrant. Id.

**11.** As evidence that he is guilty of maintaining liquor nuisance or of keeping drinking house or tippling shop, or of being common seller of intoxicating liquors. Getchell v. Page, 103 Me. 387, 69 A 624.

**12.** Getchell v. Page, 103 Me. 387, 69 A 624.

**13.** Proceeding under Act Feb. 13, 1907, Acts 1907, c. 16, §§ 2-14, is in nature of libel to procure condemnation of liquors, and a proceeding in rem which is entirely separate from provisions of act relating to criminal prosecution of possessor, and may be instituted at different time and before different court. Regadanz v. State [Ind.] 86 NE 449. Hence authority to order destruction of property is not adjunct of power to determine guilt or innocence of possessor, and judgment ordering destruction based on conviction of possessor, without hearing and determination in proceeding in rem, is erroneous. Id. Forfeiture of contraband liquor unlawfully transported within state is, under Cr. Code 1902, § 583, proceeding in rem, and not part of punishment for offense to be considered in determining jurisdiction of magistrate. State v. Pope, 79 S. C. 87, 60 SE 234.

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usually made for a trial to determine the ownership of the property seized and whether the same shall be forfeited.[14] In some states one claiming property so seized may replevy the same upon giving bond to repay the value thereof to the state in case of condemnation in a suit instituted for that purpose.[15]

§ 8. *Abatement of traffic as a nuisance; injunction.* See 10 C. L. 456—Where traffic in liquors is declared to be a nuisance,[16] it may be enjoined.[17] In the absence of a statutory provision to the contrary, however,[18] injunction for that purpose will not issue at the instance of a private citizen,[19] unless he shows resulting special injury to his property rights.[20] The petition for an injunction must describe the premises in question with sufficient accuracy to enable them to be identified.[21] The fact that there has been no violation of law by defendant since the commencement of the suit does not necessarily preclude the issuance of an injunction.[22]

**14.** Fact that **notice** in proceedings for condemnation was addressed to defendants instead of to defendants and all other persons claiming interest held not to render notice void, where it was properly served and it did not appear that claimant did not have actual notice of time and place of hearing. Greentree v. Wallace, 77 Kan. 149, 93 P 598. On prosecution for maintaining nuisance, trial to determine whether property seized by sheriff under warrant should be forfeited may be had at **time** fixed for answer in notice served on defendant, or at any other time to be fixed by court in exercise of judicial discretion. Gen. St. 1901, § 2495. State v. Foren [Kan.] 97 P 791. Held no abuse of discretion in ordering trial to proceed on answer day or in refusing new trial. Id. Wilson's Rev. & Ann. St. 1903, §§ 4997-5001, relating to procedure before magistrates and justices of peace, applies to trials as to property rights under Enforcing Act, art. 3, § 6 (Sess. Laws 1907-08, p. 605, c. 69), so that claimant may have **change of venue** in proper case. State v. Oldfield [Okl.] 98 P 925. Owner cannot maintain **replevin** against officer to recover possession of property seized under Gen. St. 1901, § 2494, and held by him pending hearing under § 2495. Greentree v. Wallace, 77 Kan. 149, 93 P 598.

**15.** Held that suit by state on bond given pursuant to Laws 1907, p. 156, c. 77, was in effect suit to declare a forfeiture or recover penalties of which district court and not county court had jurisdiction under Const. art. 5, § 8. Dupree v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 769, 107 SW 926; Malone v. State [Tex. Civ. App.] 107 SW 927.

**16.** See § 4, ante.

**17.** On violation of Acts 1907, p. 473, § 29, declaring all places where persons are permitted to resort for purpose of drinking intoxicants to be nuisances, held that owner of premises, as well as lessee who ran place, would be enjoined, allegation of petition that owner knowingly permitted use of premises by lessee for such purpose not being denied. State v. Riddock [S. C.] 61 SE 210.

**Decree:** If court finds that defendant has been selling liquor in violation of law, it should enjoin him absolutely from further prosecution of business in any manner or form. Hemmer v. Bronson [Iowa] 117 NW 257. Decree held, in effect, a license or permission for defendants to continue business complained of, subject only to certain prescribed conditions, and hence to have been unauthorized and erroneous. Id. Code, § 2408, construed, and held to require closing of building for all purposes and that it be kept so closed for a year, unless sooner released by giving bond, etc., pursuant to § 2410. Lewis v. Brennan [Iowa] 117 NW 279. Decree substantially in language of statute held to have same meaning. Id. Under Code, § 2408, any one breaking into or using building directed to be kept closed is guilty of **contempt**, regardless of their intention. Id.

**18.** Required enactment of Code, § 2405, to authorize court of equity to entertain such a suit, and right thereby given, being purely statutory, may be taken away or modified by legislature. Campbell v. Jackman Bros. [Iowa] 118 NW 755. Plaintiff in proceeding under Code § 2406, though suing as an individual, acts in representative capacity only, and decree rendered therein is primarily one for protection of the public interests. Hemmer v. Bonson [Iowa] 117 NW 257. He has neither right nor power to consent to entry of decree which shall operate as license or permit for maintenance of nuisance for abatement or prevention of which remedy was created. Id. If he permits unauthorized decree to be entered to prejudice of public and fails or refuses to seek its correction, any other citizen may, upon proper showing of his qualifications, have same reviewed under writ of certiorari. Id. Particularly true in case of citizen who suffers special injury by reason of such decree. Id. As where she owns property adjoining place where nuisance is maintained and it would therefore be necessary, under Code, § 2448, to obtain her oonsent to sale at such place under provisions of mulct law. Id. Motive of the petitioner for certiorari is immaterial, and court will not consider contention that he is seeking to compel purchase of her property by defendants. Id.

**19, 20.** Campbell v. Jackman Bros. [Iowa] 118 NW 755.

**21.** Description of premises as "Nos. 83 and 85 Market Street" held to cover 83½ Market Street, which was stairway entrance between 83 and 86, leading up to and connected with second story of 83, and in which defendant and his family lived. State v. Chicco [S. C.] 63 SE 306.

**22.** Code, §§ 2382, 2384, 2405, 2447, 2448, construed, and held that where saloonkeeper who had paid mulct tax sold liquor on election day his place and business became and

§ 9. *Civil liabilities for injuries resulting from sale.*[See 10 C. L. 456]—By statute in many states, anyone furnishing or selling [23] intoxicants to another,[24] or to persons to whom the sale of intoxicants is prohibited by law or to whom he has been notified not to sell,[25] is made liable in damages[26] to certain specified persons,[27] or to any per-

thereafter continued to be a nuisance which might be enjoined as such though he had, after such day, ceased to violate the law. Hammond v. King, 137 Iowa, 548, 114 NW 1062. Where it appeared that druggist had frequently made sales in violation of law before suit was brought, and still continued in the business, held that injunction should not have been refused on ground that he had not even technically violated law after suit was commenced and probably would not do so in future. Long v. Joder [Iowa] 116 NW 1063.

**23.** Evidence held to warrant submission of issue as to gifts made or permitted to be made to plaintiff's husband. Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428. In action for selling and furnishing liquor to plaintiff's minor son after notice, held that instruction requiring proof of sales to minor and ignoring effect of furnishing or giving liquor to him was erroneous. Liebler v. Carrel [Mich.] 15 Det. Leg. N. 976, 118 NW 975. Use of word "furnishing" instead of statutory word "giving" held immaterial, statute making licensee liable for either selling or giving in certain cases, and allegation of unlawful selling being amply sufficient. Pennington v. Gillaspie, 63 W. Va. 541, 61 SE 416.

**24.** To charge one with civil liability under Code 1895, § 3871, for selling to **minor,** it must appear that sale was made to minor by defendant in person, or in his presence, or with his consent, either express or implied. Fowler v. Rome Dispensary [Ga. App.] 62 SE 660. Said section confers civil right entirely distinct from penalty imposed by Pen. Code 1895, § 444, for selling, etc., to minors. Id. Emancipation of minor by father held no defense to suit by latter on bond. Price v. Wakeham [Tex. Civ. App.] 107 SW 132. Evidence held sufficient to support allegation that plaintiff's husband was **habitual drunkard.** Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428. Change made in Rev. Pol. Code, § 2844, by Laws 1903, p. 190, c. 165, by including in unlawful sales without notice any person in habit of getting intoxicated, held immaterial in action on bond, where court did not submit issue as to person in habit of getting intoxicated to jury, form of bond not having been changed by such amendment. Palmer v. Schurz [S. D.] 117 NW 150. Sale to **intoxicated person** being illegal, held that no notice to party selling to such a person was necessary, either under statute or terms of bond, to render seller liable on bond. Id.

**25.** Instruction that burden was on plaintiff to prove material allegation of her complaint held not objectionable as leading jury to believe that in order to recover she must prove both that her husband was habitual drunkard and that defendant sold to him after notice, proof of either entitling her to recover under pleadings. Farenthold v. Tell [Tex. Civ. App.] 113 SW 635. Right of plaintiff to serve notice not to sell to her husband held not dependent upon manner in which he treated her and her son when intoxicated, or even on whether he ever became intoxicated or not, so that evidence as to such treatment was improperly admitted. Id. Held error to allow testimony as to contents of written notice not to sell to plaintiff's husband which was not notice actually served on defendant. Montross v. Alexander, 152 Mich. 513, 15 Det. Leg. N. 228, 116 NW 190. Undisputed evidence held to support charge assuming **service of notice** on defendant. Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428. Allegation that constable served notice on defendant held sufficient, though it did not allege that he delivered it to him, served meaning service by delivery, and allegation being in language of statute. Id. Notice may be revoked, and **revocation** is complete defense to action on bond provided person to whom sale was made was not within prohibited class. Farenthold v. Tell [Tex. Civ. App.] 113 SW 635. What saloonkeeper **thought** about efficacy of revocation, or what induced plaintiff to make it, held immaterial so that evidence on those points should not have been admitted. Id. Revocation of notices given to other saloonkeepers held immaterial except as circumstance to corroborate testimony that defendant's notice had been revoked. Id. Notice must have been revoked by person giving it in order to be defense to suit by latter. Id. Testimony of son that mother sent him to defendant to tell him not to sell to husband held admissible in view of allegation of defendant that he had made no sales to husband until after plaintiff had withdrawn her notice and given her permission, notwithstanding which she made no objection to defendant until filing of suit. Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428. Evidence held also admissible as tending to show that notice was in force at the time. Id. Withdrawal of notice held not revocation as far as defendant was concerned where he had not heard of it or acted on it. Id.

**26.** In action by widow for herself and as next friend for her minor child to recover for death of her husband, **measure of damages** is present value of sum deceased would probably have contributed to support of wife during period of their joint expectancy of life and amount he would probably have contributed to support of child during its dependency, provided it is less than deceased's expectancy. Young v. Beveridge [Neb.] 115 NW 766. Instruction stating rule in general terms held not ground for reversal, where there was no request for more specific one. Id. Though no evidence was introduced to show plaintiff's age or the condition of her health, held that jury were not precluded from considering her appearance in that regard in determining probable duration of her life. Id. Verdict held justified by case made and not to be excessive. Id. Held proper to permit mother to recover **exemplary damages** for injury to her means of support by reason of sales to her minor son. Ellsworth v. Cummins, 134 Ill. App. 397. Instructions inhibiting recovery of exemplary damages held properly refused. Pennington v. Gillaspie, 63 W. Va. 541, 61 SE

son injured,[28] for any injuries resulting from such sale,[29] or from sales within a specified time before the commencement of the action.[30] In some states the liability is extended to the owners[31] and lessors[32] of buildings used for saloon purposes. Whether damages due to the death of the person to whom the sale is made may be recovered,[33] and whether damages sustained by an individual in consequence of the liquor traffic may be recovered though death follows the injury,[34] depends on the terms of the statute giving the right of action. That sales were made by his agent or servant does not relieve defendant from liability,[35] though they were made in vio-

416. Held proper to allege and prove conduct of husband inflicting **humiliation and grief** on wife in aggravation of damages. Id.

**27.** Under Rev. Pol. Code, § 2849, held that plaintiff could recover damages sustained by her children through suicide of their father even though she was not entitled to recover those sustained by herself. Palmer v. Schurz [S. D.] 117 NW 150.

**28.** Sister who was wholly without means and unable to earn livelihood, and was dependent on brother for her support, he being legally liable to support her under Hurd's Rev. St. 1908, c. 107, held entitled to sue under Hurd's Rev. St. 1908, c. 43, § 9, for damage to her means of support caused by sale to brother, regardless of whether she could have enforced brother's duty to support her. Nagle v. Keller, 237 Ill. 74, 86 NE 694. Where mother was living separate and apart from husband and derived her means of support from her own labors and those of her minor son, held that she could sue for injury to her means of support caused by sales to son, though his father was still living. Ellsworth v. Cummins, 134 Ill. App. 397. Since under compulsory school law father was bound to cause son to attend school, and hence was bound to furnish school books as part of his necessary support, held that deprivation of son's necessary school books by reason of intoxication of father was injury to means of support of son, and he was properly permitted to show such deprivation. Strattman v. Moore, 134 Ill. App. 275. Since wages earned by son during his minority belong to father, latter suffers direct pecuniary injury by death of son, and hence may maintain action under Comp. St. 1907, §§ 4235-4238, providing that license shall pay all damages that community or individuals may sustain in consequence of such traffic, though he is not dependent upon son for support, and regardless of whether son is under legal duty to support father. Murphy v. Willow Springs Brew. Co. [Neb.] 115 NW 763. Though loss of support is pecuniary injury for which recovery may be had, it is not the only pecuniary injury authorizing such recovery. Id.

**29.** Whether plaintiff's husband was intoxicated when he committed suicide held immaterial, provided his suicide was result of his previous intoxication. Palmer v. Schurz [S. D.] 117 NW 150. In action for damages for sale to plaintiff's minor son after notice, held that when plaintiff proves specific acts of intoxication and defendant denies having made any sales, it is competent to prove that intoxication complained of was caused by liquor furnished by another. Liebler v. Carrel [Mich.] 15 Det. Leg. N. 976, 118 NW 975. But neither as defense nor for purpose of dividing statutory liability may prior or contemporaneous sales be considered. Id. Saloonkeeper held liable under Comp. Laws 1897, § 5398, for injuries resulting to plaintiff from fact that husband committed suicide while intoxicated without proof that intoxication was cause of suicide. Dice v. Sherberneau, 152 Mich. 601, 15 Det. Leg. N. 255, 116 NW 416. Evidence held to justify finding that plaintiff's husband was intoxicated when he shot himself. Id. In action on bond for damages because of suicide of plaintiff's husband, allegation of complaint that sale was made to deceased on July 15, and that he continued to be intoxicated up to the time of his suicide on July 17, held to bring case within time specified in Rev. Pol. Code, § 2849, as "on that day or about that time when said acts were committed or said injuries received." Palmer v. Schurz [S. D.] 117 NW 150.

**30.** Damages recoverable under Code 1899, c. 32, § 26, should be limited to those arising from sales made within one year prior to commencement of action. Pennington v. Gillaspie, 63 W. Va. 541, 61 SE 416.

**31.** To establish liability of owner of building, it is necessary to prove guilt of occupant, and if owner and occupant of building are sued jointly, recovery is dependent on proof that occupant sold or gave intoxicants which in whole or in part caused intoxication complained of. Rev. St. 1905, c. 42. Hedlund v. Geyer, 234 Ill. 589, 85 NE 203, rvg. 137 Ill. App. 229.

**32.** Owner of building who rents it to another for saloon premises may, in proper case, be held liable for exemplary damages under Dramshop Act, § 9. Beckerle v. Brandon, 133 Ill. App. 114.

**33.** Acts 1905, p. 350, c. 36, construed, and held not to entitle widow to damages for injury to her means of support by death of her husband caused by intoxication, the consequence of liquors illegally furnished or sold to him by defendant. Pennington v. Gillaspie, 63 W. Va. 541, 61 SE 416.

**34.** Are recoverable under Comp. St. 1907, § 4235, without the aid of Lord Campbell's Act (Id. §§ 2802-2803). Murphy v. Willow Springs Brew. Co. [Neb.] 115 NW 761; Id. [Neb.] 115 NW 763. Such action is properly brought by the party or parties entitled to such damages, and is not maintainable by the personal representatives of the deceased. Id.

**35.** Saloonkeeper held responsible for sale to plaintiff's husband made by one left in sole charge of saloon, though latter received no compensation and though defendant had notified his regular barkeeper not to sell to plaintiff's husband. Dice v. Sherberneau, 152 Mich. 601, 15 Det. Leg. N. 255, 116 NW 416. Under declaration alleging sales

lation of his instructions,[36] nor is the fact that sales were made in good faith ordinarily a defense.[37] Plaintiff's consent to or acquiescence in the sale precludes recovery,[38] but the fact that he participated in the purchase does not, where he acted under coercion.[39] His bad character is no defense.[40] His motive in suing is ordinarily immaterial.[41]

The place of trial depends on the statutes of the various states.[42]

Where the parents' right of action for sales to a minor is community property, suit must be brought by the husband.[43] Where the wife dies pending a suit by both parents, the husband may prosecute it alone.[44] If the parents are divorced, both parents are necessary parties, unless the custody of the minor is awarded to one of them by the decree.[45] All persons liable under the statute may generally be joined as defendants in one suit.[46]

Plaintiff must allege all facts essential to the establishment of his cause of action.[47] Where good faith is a defense, it must be pleaded if relied on.[48] Matters laid under a videlicet need not be proved exactly as alleged.[49]

by defendant, sales by his bartender, clerk, servant, or agent may be shown, they being deemed in law to have been made by him. Pennington v. Gillaspie, 63 W. Va. 541, 61 SE 416.

**36.** Fact that defendant had previously directed servant not to furnish intoxicants to deceased held no defense. Young v. Beveridge [Neb.] 115 NW 766.

**37.** Good faith of saloonkeeper in believing that minor was of age held no defense to action by father on bond for permitting minor son to enter and remain in saloon. Markus v. Thompson [Tex. Civ. App.] 111 SW 1074.

**38.** Acquiescense of father in sales to his minor son held to preclude recovery on bond. Instruction approved. Price v. Wakeham [Tex. Civ. App.] 107 SW 132. Fact that father had expressly authorized other saloonkeepers to sell liquor to his minor son held no defense to action by him on bond for permitting minor to enter and remain in defendant's saloon. Markus v. Thompson [Tex. Civ. App.] 111 SW 1074.

**39.** Fact that sons procured liquor for father held not to preclude them from recovering where they were under his domination and control and were coerced by him. Strattman v. Moore, 134 Ill. App. 275. Nor were their rights affected, under the circumstances, by fact that, at suggestion of their sister, they kept memorandum of the several occasions upon which they so procured liquor from defendant. Id.

**40.** Action by father on bond for sale to minor son. Price v. Wakeham [Tex. Civ. App.] 107 SW 132.

**41.** Motive of wife in instituting suit on bond for sales to husband held immaterial, so that allegation that it was fraudulently instituted for purposes of speculation should have been stricken. Farenthold v. Tell [Tex. Civ. App.] 113 SW 635. In action for damages for sale of liquor to plaintiff's minor son after notice, in which she claimed damages for injury to her feelings only, held that she was entitled to statutory penalty of $50, regardless of her motive. Liebler v. Carrel [Mich.] 15 Det. Leg. N. 976, 118 NW 975.

**42.** Cause of action arising under Code 1899, c. 32, § 26 (Code 1906, § 938), is transitory, and it need not appear that it arose in county in which action was brought. Pennington v. Gillaspie, 63 W. Va. 541, 61 SE 416.

**43.** Recovery on bond for selling to minor, or permitting minor to enter and remain in saloon, is community property where both parents are living together. Price v. Wakeham [Tex. Civ. App.] 107 SW 132.

**44.** Action on bond for permitting minor to enter and remain in saloon. Munoz v. Brassel [Tex. Civ. App.] 108 SW 417.

**45.** Plea in abatement setting up divorce held insufficient where it did not show what disposition was made as to custody of minor, or that such decree was final judgment, or that it had not been appealed from, set aside, or reversed, or that wife was living at time of filing plea. Price v. Wakeham [Tex. Civ. App.] 107 SW 132.

**46.** Rev. St. 1905, c. 43, held to authorize joining of all persons, whether the sellers of the intoxicating liquors or the owners of buildings in which they were sold, though recovery can only be had against those whose liability is established by proof. Hedlund v. Geyer, 234 Ill. 589, 85 NE 203, rvg. 137 Ill. App. 229. Held that owners of buildings knowingly permitting liquors to be sold therein, which it was alleged caused intoxication of plaintiff's father, might be joined as defendants in suit to which their tenants were not parties with tenant of another building which they did not own, though they could not be made liable for latter's acts or for sales not made by tenants of their buildings. Id.

**47.** Is sufficient to allege generally that plaintiff was injured in her means of support in consequence of her husband's intoxication. Declaration held to state cause of action within rule. Pennington v. Gillaspie, 63 W. Va. 541, 61 SE 416. Contention that complaint in action on bond was insufficient for failure to allege that bond was approved and filed held untenable where bond, which was part of complaint, bore indorsement of county auditor to effect that it had been approved by county commissioners. Palmer v. Schurz [S. D.] 117 NW 150. Complaint held to sufficiently allege that defendant and his agents and servants sold plaintiff's husband liquor when he was intoxicated on or about time act complained of was committed. Id. Petition in action by father on

The burden is on plaintiff to establish the material allegations of his complaint by a preponderance of the evidence.[50] The sale of intoxicants, as well as the injury or accident claimed as a result thereof, may be established by circumstantial evidence.[51] The usual rules of evidence apply.[52] Cases dealing with the admissibility of particular evidence[53] on the issue as to whether the person to whom sales are alleged to have been made was an habitual drunkard, to show intoxication,[54] to show the nature and quality of the liquor sold,[55] or the issue as to plaintiff's good faith in instituting the suit,[56] and on the issue of damages,[57] will be found in the notes.

bond for sales to minor son held to sufficiently describe defendant's place of business. Price v. Wakeham [Tex. Civ. App.] 107 SW 132. Overruling of exception to allegations that son was obviously a minor, etc., held not reversible error in view of allegations of answer that sales to son were made in good faith under well founded belief that he was of age. Id. Where petition alleged that defendant was engaged in business of selling intoxicants in quantities less than quart, and had obtained license and executed liquor dealer's bond, held that allegation that he permitted plaintiff's minor son to enter and remain in his place of business sufficiently showed that place referred to was one where intoxicants were sold, though evidence showed that defendant had two places of business, in one of which intoxicants were not sold. Markus v. Thompson [Tex. Civ. App.] 111 SW 1074. Held unnecessary to allege length of time minor remained in saloon, whether he was allowed to remain long enough to constitute breach of bond being question for jury. Id. Allegation as to date on which minor was allowed to enter and remain held sufficiently definite to allow proof of two breaches on certain day. Id. If fact that father had authorized others to sell to minor son was defense to action by him on bond for permitting minor to enter and remain in saloon, held that it could not be shown under general denial, but must be specially pleaded. Id.

48. Instruction to find for defendant if he sold to plaintiff's husband in good faith, with belief that latter was not habitual drunkard, and there was good ground for such belief, held error, that defense not being raised by the answer. Farenthold v. Tell [Tex. Civ. App.] 113 SW 635.

49. Where petition charged violations on or about specified dates, held proper to refuse to confine recovery to violations on exact dates alleged. Munoz v. Brassel [Tex. Civ. App.] 108 SW 417. Where petition alleged sales on or about certain dates, held that plaintiff was not bound to prove sales on said dates. Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428.

50. Instruction approved. Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428.

51. In action by plaintiff in behalf of herself and minor children to recover for death of her husband, evidence held to support verdict in her favor. Sullivan v. Radznweit [Neb.] 118 NW 571.

52. **Evidence held admissible:** In action for damages for injuries resulting from sale to plaintiff's husband, held proper to permit plaintiff to show her reason for stating to another saloonkeeper that he might sell liquor to husband on Saturday nights. Montross v. Alexander, 152 Mich. 513, 15 Det. Leg. N. 228, 116 NW 190. Held proper to permit plaintiff to testify to an interview with defendant and her husband in which defendant insisted that she should settle cause for $25, and threatened her with death if she did not, such evidence being supplemented by testimony from which inference might be drawn that defendant caused husband to use his influence upon plaintiff to induce her not to press the cause. Id. Testimony of son that he remembered time when his mother claimed to have seen his father drunk held not objectionable as hearsay, it, and questions eliciting it, having reference to circumstance of what mother had claimed in her testimony in order to direct his testimony to same subject-matter. Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428.

**Evidence held inadmissible:** In action for injuries resulting from sale to plaintiff's husband, held error to permit her to testify that she had 6 children, it appearing that 3 of them were living at home. Montross v. Alexander, 152 Mich. 513, 15 Det. Leg. N. 228, 116 NW 190. Statement by defendant or his servant that he had furnished certain mild drink to deceased held inadmissible as part of res gestae in action for damages for wrongful killing of deceased by sale to him. Young v. Beveridge [Neb.] 115 NW 766. In action for damages for sale to plaintiff's minor son after notice, evidence that plaintiff's husband rented building for saloon purposes and was surety on liquor dealer's bond held immaterial, he not being party to action, and there being no evidence tending to show her assent to his dealings or sympathy with business. Liebler v. Carrel [Mich.] 15 Det. Leg. N. 976, 118 NW 975. Evidence as to drinking habits of plaintiff's husband held irrelevant. Id.

53. There being testimony that plaintiff's husband would not mistreat her when sober, evidence tending to prove frequency of such conduct toward her held admissible. Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428. Though declaration under Code 1899, c. 32, § 26 (Code 1906, § 938), states claim for damages for only one year preceding commencement of action, evidence of habitual drunkenness on part of person to whom sales were made prior to said year and continuing until time of sales complained of, and knowledge on part of seller, is admissible. Pennington v. Gillaspie, 63 W. Va. 541, 61 SE 416.

54. Held not error to allow witnesses to testify as to whether or not deceased was intoxicated. Palmer v. Schurz [S. D.] 117 NW 150.

55. Statement of witness as to probable effect of liquor consumed by patron held inadmissible, though its admission was not error where it was part of conversation

Instructions should not be on the weight of the evidence[58] or assume the existence of fact in issue.[59]

In some states on action may be maintained on a liquor dealer's bond [60] by persons aggrieved by a sale [61] or by violation of the conditions of the bond.[62] The liability of sureties is limited to the penalty named in the bond [63] and in the absence of a provision therein to the contrary,[64] to damages resulting from sales made during

properly admissible. Young v. Beveridge [Neb.] 115 NW 766.

**56.** Evidence as to husband's treatment of his family when drunk held admissible to refute plea that plaintiff and her husband fraudulently connived to obtain liquor for latter for sole purpose of fraudulently mulcting defendants in damages, even though plea was not afterwards substantiated. Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428. Testimony of wife that husband cursed her and threatened to kill her if she followed him to defendant's saloon again, etc., held admissible for same purpose. Id. In action for damages for sale to plaintiff's minor son, held that evidence as to refusal of license for another saloon in building owned by plaintiff's husband, etc., for purpose of showing that action was brought as result of conspiracy between plaintiff and those competing with defendant for opportunity to do business in community, was properly excluded, where defendant tendered no such issue by questions propounded or offers of testimony. Liebler v. Carrel [Mich.] 15 Det. Leg. N. 976, 118 NW 975.

**57.** In action for damages for sale to plaintiff's minor son after notice, held competent for defendant to prove that minor was in habit of becoming intoxicated prior to time when it is claimed he furnished him liquor. Liebler v. Carrel [Mich.] 15 Det. Leg. N. 976, 118 NW 975. Whether such evidence would tend to mitigate damages in particular case held to depend on other circumstances disclosed. Id. In action for injuries resulting from sale to plaintiff's husband, held proper to permit her to show that she had stroke of paralysis, and to introduce expert testimony as to its connection with her troubles. Montross v. Alexander, 152 Mich. 513, 15 Det. Leg. N. 228, 116 NW 190. In action by wife under Comp. Laws, § 5398, on bond for damages due to husband becoming incapacitated to maintain his family, held that mortality tables were properly admitted in evidence. Merrinane v. Miller [Mich.] 15 Det. Leg. N. 811, 118 NW 11. Permitting nonexpert witness who had worked with deceased to state in his opinion deceased was able to perform full day's manual labor held proper. Young v. Beveridge [Neb.] 115 NW 766.

**58.** Instruction as to burden of proof held not on weight of evidence. Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428.

**59.** Instructions held not objectionable as assuming fact of sales, etc. Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428. Instruction that hall where dancing was carried on was appurtenant to and part of saloon, and that permitting minor to enter and remain there would be permitting him to enter and remain in said saloon, held proper under evidence. Munoz v. Brassel [Tex. Civ. App.] 108 SW 417.

**60.** Laws 1907, p. 258, c. 138, regulating sale of liquor, held not to have repealed Rev. St. 1895, art. 5060g, giving right of action on bond. Price v. Wakeham [Tex. Civ. App.] 107 SW 132; Markus v. Thompson [Tex. Civ. App.] 111 SW 1074; Farenthold v. Tell [Tex. Civ. App.] 113 SW 635; Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428.

**61.** Laws 1897, c. 72, Pol. Code, c. 27, art. 6, giving married woman right to recover on bond damages resulting from sale of intoxicants to her husband, held not to violate Const. art. 3, § 21, providing that no law shall embrace more than one subject, which shall be expressed in its title. Palmer v. Schurz [S. D.] 117 NW 150.

**62. "Persons aggrieved"** as used in Sayles' Ann. Civ. St. art. 3380 means any person whose legal rights have been invaded by breach of bond. Saunders v. Alvido [Tex. Civ. App.] 113 SW 992. Sister standing in loco parentis held entitled to maintain action for sales to minor, where mother and fathsr were dead Id. Petition held to show moral and legal obligation on part of plaintiff to maintain, control and care for minor. Id. In action on bond by parent for permitting minor to enter and remain in saloon, instructions that defendant must knowingly have permitted minor to enter and remain held properly refused, words "permit" and "remain" as used in bond not implying **knowledge** on part of defendant. Munoz v. Brassel [Tex. Civ. App.] 108 SW 417. Fact that father was person aggrieved held to be shown by his relationship to his minor son, so that it was not necessary for him to allege that he was aggrieved. Markus v. Thompson [Tex. Civ. App.] 111 SW 1074. May be more than one breach of bond on same day by allowing same minor to enter and remain in same saloon on same day. Id.

**63.** Provision of Comp. Laws, § 5398, fixing liability of sureties, must be read in connection with provision requiring bond and fixing penalty thereof. Merrinane v. Miller [Mich.] 15 Det. Leg. N. 811, 118 NW 11. Error in rendering judgment against sureties in excess of penalty fixed by bond held not cured by later limiting liability against defendants who were joined to amount of bond and permitting judgment against other defendants to stand at amount found by jury, such a course being unauthorized. Id.

**64.** Where various sales made through 3 successive years contributed to husband of plaintiff becoming habitual drunkard and wholly incapacitated to maintain his family, held that, under Comp. Laws, § 5398, principal and sureties on bonds for each of the successive years were responsible for the final consequences. Merrinane v. Miller [Mich.] 15 Det. Leg. N. 811, 118 NW 11. Such holding held not to violate rule that surety cannot be presumed to have meant to become liable for acts committed before he

the life of the bond.[65] The fair and voluntary execution of the bond is conclusive on the sureties of everything admitted therein.[66] Where the principal enjoys the benefit of a bond fairly entered into, the surety cannot question its validity after breach.[67] Where the surety undertakes to be liable for the result of a suit against the principal under the civil damage act, he is conclusively bound by the judgment in such a suit though he was not a party thereto and had no notice thereof.[68] The plea of nul tiel record is proper to test the existence of such judgment in an action on the bond.[69] Where the bond is joint and several, the fact that the act of a corporation in becoming surety thereon was ultra vires does not necessarily discharge the other surety.[70] One not a party to the bond cannot be joined as a defendant in an action thereon.[71] The plaintiff in such an action must prove that defendant was a licensee.[72] Admissions of the principal in proceedings to which the sureties were not parties are inadmissible as against them.[73]

§ 10. *Property rights in and contracts relating to intoxicants.*[See 10 C. L. 460] Contracts for the sale of intoxicants in violation of law[74] or for the purpose of enabling another to violate the law[75] are unenforcible. The fact that corporations

signed bond, since there could be no liability unless unlawful act was committed after signing bond, and in light of statute making principal and sureties liable for any contribution to the injury, they must be held to have undertaken obligation indicated. Id.

65. Instruction held not misleading as authorizing jury to find for plaintiff for sales preceding giving of bond. Birkman v. Fahrenthold [Tex. Civ. Tex.] 114 SW 428. Proof that from date preceding bond to filing of suit there were 10 violations held not proof that 10 violations or any certain number of violations occurred during life of bond. Id. Testimony admissible against sureties held not to warrant recovery as against them for more than 2 violations. Id.

66. Town of Point Pleasant v. Greenlee, 63 W. Va. 207, 60 SE 601.

67. Estopped to contend that it was founded on illegal license. Town of Point Pleasant v. Greenlee, 63 W. Va. 207, 60 SE 601.

68. Where bond guaranteed payment of judgment for damages recovered under Code 1899, c. 32, held that surety was conclusively bound by judgment in action under that statute. Town of Point Pleasant v. Greenlee, 63 W. Va. 207, 60 SE 601.

69. The plea of nul tiel record is proper to test the existence of a judgment in a suit on a bond with collateral conditions, the breach of which assigned is the nonpayment of such judgment. Suit on bond conditioned to pay judgment recovered against principal under civil damage act. Town of Point Pleasant v. Greenlee, 63 W. Va. 207, 60 SE 601.

70. Where bond was in terms joint and several and act of corporation in becoming surety was not one which was necessarily ultra vires, held that other surety could not claim to be discharged even though plea of ultra vires was sustained. Munoz v. Brassel [Tex. Civ. App.] 108 SW 417.

71. One who was liable under statute for sale of liquors resulting in injury to plaintiffs held not proper party. Sullivan v. Radzuweit [Neb.] 118 NW 571.

72. In action by parent for permitting minor to enter and remain in saloon, held that fact of application, payment of tax, filing of bond, and prosecution of business at particular place during year, was strong presumptive evidence that license was issued, and that it was unnecessary to expressly prove that it was issued. Munoz v. Brassel [Tex Civ. App.] 108 SW 417.

73. Admissions of principal at formal trial and in ex parte depositions held admissible against him, but not against sureties. Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428.

74. Can be no recovery for liquor sold in local option territory in violation of law. Dallas Brewery v. Holmes Bros. [Tex. Civ. App.] 112 SW 122. Where contract was made in prohibition territory, and it was agreed that delivery was to be made there, and it was in fact made there, held that transaction was illegal, and parties being in pari delicto, seller could not maintain action for price. Shelby Vinegar Co. v. Hawn [N. C.] 63 SE 78. Corporation operating brewery legally held entitled to recover for beer sold at wholesale, even though fact that it also engaged in sale of beer at retail was violation of law. Orke v. McManus [Iowa] 115 NW 580. Code 1897, § 2423, providing that all liens and securities made on account of liquors sold in violation of law shall be void, and no rights can be acquired thereby, held not to apply to bond given by lessee conditioned that he should engage in no unlawful business on premises, and that lessor should be held harmless from any expenditure, or costs, or injunction, or assessment under prohibitory laws of state. Harbison v. Shirley [Iowa] 117 NW 963. Note held void under Gen. St. 1902, § 2727, providing that all contracts any part of consideration of which is illegal sale of intoxicants shall be void. Connecticut Brew. Co. v. Murphy [Conn.] 70 A 450. Statute held to include sales made without license. Id.

75. Can be no recovery where seller knows that purpose of purchaser is to retail liquor in local option territory in violation of law, and aids and abets purchaser in making such sales, and where money for payment of seller is to be derived from such sales. Dallas Brewery v. Holmes Bros. [Tex. Civ. App.] 112 SW 122. In action by lessor on bond

cannot be licensed to sell at retail has been held not to make it unlawful for a corporation to lease premises for the purpose of having beer manufactured by it sold therein.[76] The person seeking to avoid a contract ordinarily has the burden of proving its illegality.[77] It has been held that the court will not take judicial notice that beer is intoxicating,[78] or, except in the case of county seats, that a certain town is in a certain county.[79] The fact that the seller took out a federal internal revenue license may be shown on the issue as to whether the liquor sold was intoxicating.[80]

Where intoxicating liquors are recognized as property, they are insurable.[81] If at the time of effecting the insurance, however, the owner intends to use the liquors in the conduct of an unlawful business, the contract of insurance is void.[82]

The lease of a building for saloon purposes is terminated by the subsequent passage of a law prohibiting the sale of intoxicants in the city where it is located.[83]

§ 11. *Drunkenness as an offense.* See 10 C. L. 460—Drunkenness[84] in a public place or on a public street or highway[85] is made an offense in some states.

The burden is on the state to prove all the essential elements of the offense[86] and that it was committed within the territorial jurisdiction of the court in which the prosecution is instituted.[87] The mere fact that one has drunk a large quantity of

given by lessee conditioned that he should engage in no unlawful business on premises, and to hold lessor harmless from any expenditure, etc., under prohibitory laws, to recover mulct tax assessed against property because of lessee's sale of intoxicants thereon, evidence held insufficient to show that lessor connived at unlawful sales so as to preclude recovery on ground that lease and bond were made for purpose of permitting sales on leased premises in violation of law. Harbison v. Shirley [Iowa] 117 NW 963. Mere fact that lessor feared or suspected that liquor might be so sold held not to prevent recovery. Id.

76. Provision in lease for surrender of term in event license for dramshop could not be procured held not contrary to public policy. Conservative Realty Co. v. St. Louis Brew. Ass'n [Mo. App.] 113 SW 229.

77. Defendant seeking to avoid paying for intoxicant on ground that seller knew that it was to be sold in local option territory must prove that it was to be so sold. Dallas Brewery v. Holmes Bros. [Tex. Civ. App.] 112 SW 122. In action by lessor on bond given by lessee conditioned that he should engage in no unlawful business on premises and to hold lessor harmless from any expenditure, or costs, or injunction, or assessment under prohibitory laws, held that burden was on defendant to show that provision in lease against use of premises for any unlawful purpose was mere subterfuge to cover up real purpose to use premises for unlawful sale of liquor. Harbison v. Shirley [Iowa] 117 NW 963.

78. Though contrary is true as to whisky, brandy, gin, and the like. Dallas Brewery v. Holmes Bros. [Tex. Civ. App.] 112 SW 122.

79. Dallas Brewery v. Holmes Bros. [Tex. Civ. App.] 112 SW 122.

80. In action on account for sale of cider. Shelby Vinegar Co. v. Hawn [N. C.] 63 SE 78.

81. Kellogg v. German American Ins. Co. [Mo. App.] 113 SW 663.

82. On theory that its direct effect is to protect insured in his purpose to violate law. Kellogg v. German American Ins. Co. [Mo. App.] 113 SW 663. Presence in drug stock at time insurance was effected of 10 barrels of beer and 70 gallons of whisky, and fact that thereafter insured made occasional unlawful sales, while tending to prove unlawful intent, held not to be conclusive, but to merely raise issue of fact for jury. Id.

83. Lessor held not entitled to recover rent where lessee discontinued occupancy. Heart v. East Tennessee Brew. Co. [Tenn.] 113 SW 364.

84. Drunkenness held to mean under influence of intoxicants to such an extent as to have lost the normal control of one's bodily and mental faculties, and, commonly, to evince disposition to violence, quarrelsomeness and bestiality. Brooke v. Morrilton [Ark.] 111 SW 471. Evidence showing that defendant was drinking and showed some signs of effect of liquor, but that he was attending to his business in orderly manner, and had not lost control of his faculties, held not to warrant conviction. Id. Word drunkenness as used in statute is to be understood in its ordinary and popular sense as result of excessive drinking of intoxicants. Clark v. State, 53 Tex. Cr. App. 529, 111 SW 659. Evidence held to justify finding that defendant was drunk. Id.

85. City is not obliged to adopt Acts 1907, p. 290, making it an offense to appear at public gatherings in drunken condition, in order to have valid ordinance on the subject, though it may do so. Brooke v. Morrilton [Ark.] 111 SW 471. City ordinance making it misdemeanor to appear on public street in drunken or intoxicated condition held valid exercise of police power under Kirby's Dig. § 5438. Id. Evidence that defendant was drunk on certain named streets of certain city held sufficient proof that place where he was drunk was on a public street or highway. Springfield v. State [Ga. App.] 62 SE 569.

86. On prosecution for being intoxicated on public highway, to show that road in question was in fact a public highway. Cleveland v. State [Ga. App.] 60 SE 801. Conviction reversed where there was no evidence on the question. Id.

87. Proof that offense of being drunk on

beer does not render him competent to testify as to whether a named quantity would have made defendant drunk.[88] The court need not define drunkenness or intoxication in its instructions.[89]

**Intoxication; Inventions; Investments; Irrigation; Islands; Issue; Issues to Jury; Jeofail; Jeopardy; Jettison; Joinder of Causes,** see latest topical index.

### JOINT ADVENTURES.

*The scope of this topic* is noted below.[90]

*What constitutes.* See 10 C. L. 460—A joint adventure, as distinguished from agency,[91] partnership,[92] or tenancy in common,[93] is merely a combination of two or more persons in a single enterprise.[94] The implied understanding between joint purchasers is that each is engaging in an enterprise for mutual benefit and that

public highway was committed in designated town or city held insufficient to establish venue and consequent jurisdiction in court whose jurisdiction was coextensive with a county. Springfield v. State [Ga. App.] 62 SE 569.

88. There being no statement as to his particular knowledge of effect of such liquor on defendant. Clark v. State, 53 Tex. Cr. App. 529, 111 SW 659.

89. Leaving question of defendant's drunkenness to jury without defining term held not error. Brooke v. Morrilton [Ark.] 111 SW 471. Is not necessary to define "drunkenness" and "in a state of intoxication." Clark v. State, 53 Tex. Cr. App. 529, 111 SW 659. Refusal of instruction that terms meant more than that defendant had drunk intoxicants sufficient to exhilerate him held not error in view of other instructions. Id.

90. **Includes** rights and liabilities between parties to joint enterprises for profit. **Excludes** partnerships (see Partnership, 10 C. L. 1100), joint estates (see Tenants in Common and Joint Tenants, 10 C. L. 1850), joint contracts (see Contracts, 11 C. L. 729), and joint tort feasors (see Torts, 10 C. L. 1857).

91. Contract between real estate agent and landowner for securing purchaser, compensation to be amount in excess of stated price, is agency contract, not joint venture. Manker v. Tough [Kan.] 98 P 792.

92. Agreement for joint construction of private telephone not partnership, there being no element of agency, no provision for division of profits, and no intention to create partnership. Hancock v. Tharpe, 129 Ga. 812, 60 SE 168.

93. Rights held analogous to those of tenants in common, and hence to be administered according to such analogy. Hancock v. Tharpe, 129 Ga. 812, 60 SE 168.

94. Complaint alleging that parties engaged in buying, training and selling horses, one party advancing money under agreement to divide profits equally, held to sufficiently state joint venture entitling plaintiff to accounting. Rice v. Peters, 113 NYS 40.

**NOTE. Definition:** A joint adventure is an agreement to share the returns of a particular transaction. In re Camp, 15 Ct. Cl. 469; Pickerell v. Fisk, 11 La. Ann. 277; McCreery v. Green, 38 Mich. 172; Taylor v. Bradley, 4 Abb. Dec. [N. Y.] 363; Newman v. Ruby, 54 W. Va. 381, 46 SE 172; Stotts v. Miller, 128 Iowa, 633, 105 NW 127; Alderton v. Williams, 139 Mich. 296, 102 NW 753; Kirkwood v. Smith, 47 Misc. 301, 95 NYS 926; Price v. Grice, 10 Idaho, 443, 79 P 387; Berg v. Gillender, 115 App. Div. 288, 100 NYS 792; Paddock v. Bray, 40 Tex. Civ. App. 226, 13 Tex. Ct. Rep. 383, 88 SW 419; Wisconsin S. F. Co. v. D. K. Jeffris Lumber Co., 132 Wis. 1, 111 NW 237; Jones v. McNally, 53 Misc. 59, 103 NYS 1011; Voegtlin v. Bowdoin, 54 Misc. 254, 104 NYS 394; Scott v. White [Or.] 91 P 487. It is the creature of contract (Alderton v. Williams, 139 Mich. 296, 102 NW 753; Corbin v. Holmes [C. C. A.] 154 F 593; Whaples v. Fahys, 87 App. Div. 518, 84 NYS 793) and must rest upon a joint interest (Henderson v. Dougherty, 95 App. Div. 346, 88 NYS 665). The relation of joint adventures does not constitute a partnership unless the parties so intend or unless they hold themselves out to the public as partners. Brotherton v. Gilchrist, 144 Mich. 274, 13 Det. Leg. N. 150, 107 NW 890, 115 Am. St. Rep. 397; Blue v. Leathers, 15 Ill. 31; Beecher v. Bush, 45 Mich. 188, 7 NW 785, 40 Am. Rep. 465; Merrick v. Gordon, 20 N. Y. 93; Champion v. Bostwick, 18 Wend. [N. Y.] 175, 31 Am. Dec. 376; Everett v. Coe, 5 Denio [N. Y.] 180; Heimstreet v. Howland, 5 Denio [N. Y.] 68; Pattison v. Blanchard, 5 N. Y. 186; Putnam v. Wise, 1 Hill [N. Y.] 234, 37 Am. Dec. 309; Day v. Stevens, 88 N. C. 83, 43 Am. Rep. 732; Brown v. Jaquette, 94 Pa. 113, 39 Am. Rep. 770; Ambler v. Bradley, 6 Vt. 119; Cedarburg v. Guernsey, 12 S. D. 77, 80 NW 159; Mason v. Potter, 26 Vt. 722; Oppenheimer v. Clemmons, 18 F 886; Benjamin v. Porteus, 2 H. Bl. 590; Dry v. Boswell, 1 Camp. 330; Mair v. Glennie, 4 Maule & S. 240; Wilkinson v. Frasier, 4 Esp. 182; Heyhoe v. Burge, 9 C. B. 431; Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192. Contra, Jones v. McMichael, 12 Rich. [S. C.] 176; Allen v. Davis, 13 Ark. 28; Holifield v. White, 52 Ga. 567; Adams v. Carter, 53 Ga. 160. The nature of the interest of the parties in the profits is sometimes held to be determinative of the character of the relation, it being held that one is a partner where a part of the profits themselves is his property, but not a partner where the amount of the profits merely fixes the amount of a debt or duty, and the profits themselves do not belong to such party. Shumaker on Partnership, p. 41, A joint adventure has been defined as a partnership limited as to scope and duration. Ross v. Willett, 76 Hun, 211, 27 NYS 785.—[Ed.]

each has a share in the venture according to the amount of his subscription.[95] The existence of the relation is determinable from the contract,[96] either by the court[97] or the jury.[98]

*Rights and liabilities of parties.* See 10 C. L. 461—The relation being contractual, the right to the profits frequently involves a construction of the agreement[99] and the determination of what are profits.[1] Losses should fall on the party who assumed the risk and would have reaped the benefit, rather than one whose interest in confined to reimbursement for advances and who held the legal title only for the purpose of security.[2] Interest should be provided for if intended to be charged.[3] An agreement not to sell the article produced without mutual consent does not authorize a party arbitrarily to withhold his consent.[4] The relationship being fiduciary, the parties must act in the highest good faith,[5] and a concealed profit accrues for the benefit of all the parties.[6] Parties to a joint adventure, as distinguished from a partnership, are not bound by the acts and declarations of other parties thereto relative to matters outside the joint adventure.[7]

**95.** Lomita Land & Water Co. v. Robinson [Cal.] 97 P 10.

**96.** Whether managers of syndicate were partners properly determinable from agreement. Jones v. Gould, 123 App. Div. 236, 108 NYS 31. Agreement being unambiguous was only evidence. Id.

**97.** Where there is no ambiguity in contract. Jones v. Gould, 123 App. Div. 236, 108 NYS 31.

**98.** Right of partner to recover sum advanced, dependent upon existence of joint venture, held properly submitted to jury, in view of evidence. Bowman v. Saigling [Tex. Civ. App.] 111 SW 1082.

**99.** In joint adventure for manufacture of wire rope, where corporation furnished capital consisting of buildings, machinery and materials, and agreed to reception of one-half of net profits, "taxes on the capital employed and other charges as usual" to be made in ascertaining net profits, it was proper to deduct depreciation of machinery, power furnished, repairs, insurance, and deterioration of finished product stored in warehouse. Stone v. Wright Wire Co., 199 Mass. 306, 85 NE 471. Fact that parties to contract were not technically partners would be immaterial as affecting deductions from gross earnings in determining net profits. Id. In determining net profits of joint adventure, insurance held a "usual charge" within meaning of contract. Id. Where one party agreed to furnish buildings and power provision as to "power" was merely part of description of buildings to be furnished, and in ascertaining net profits it was proper to deduct value of power furnished from gross earnings. Id.

**Profits in joint adventure for sale of stocks:** Fact that person entitled to share in commission on sale of stock became purchaser immaterial as to rights of parties to commission. Boqua v. Marshall [Ark.] 114 SW 714. Where several parties were entitled to commission in sale of stock, party not active in sale was not entitled to his share free from expenditures, but must bear proportionate share. Id. Where active partners in inducing sale of stock paid bonus to person to finance deal, such bonus was legitimate item of expense to be deducted from profits before division. Id. Payment of $2,500 for extension of option to sell, $250 attorney's fees in preparing papers, $234.50 to engineer to examine property, $500 for attorney's services, and $776.78, half of operating expenses of firm, held legitimate expenses in earning $15,000 commission. Id. Amount forfeited by person for failing to consummate deal held proper item of profit to be added to commission. Id. Evidence sufficient to show verbal agreement for assistance of another in affecting sale of stock and that such person have one-third of commission. Id.

**1.** Net profits are the clear gain of a venture after deducting from net value of assets on hand capital invested and all outstanding liabilities. Thurston v. Hamblin, 199 Mass. 151, 85 NE 82. Where, under contract, party was entitled to one-half of net profits of venture, to be computed and paid quarterly, he was entitled to one-half of net profits from beginning of venture or from last division of profits, and not to one-half of profits in any quarter regardless of losses in previous quarter. Id. Right to profits vested at end of each quarter and could not be diminished by subsequent losses. Id.

**2.** Irby v. Cage, Drew & Co., 121 La. 615, 46 S 670.

**3.** Defendants not entitled to charge interest on advances to joint venture. Thurston v. Hamblin, 199 Mass. 151, 85 NE 82.

**4.** Must sell within reasonable time. Baker v. Keever, 130 Ga. 257, 60 SE 551. Where parties agreed to produce cotton and to sell same upon mutual consent, it will be presumed that mutual consent within the year was meant. Id. Refusal of party to sell cotton held a breach of contract, damages to be measured in contemplation of market price on day of breach. Id.

**5.** Taking secret profit by coadventurer is contrary to policy of law. Curry v. La Fon [Mo. App.] 113 SW 246. Partner not allowed to make profit for himself at expense of associates by deception as to purchase price. Lomita Land & Water Co. v. Robinson [Cal.] 97 P 10.

**6.** Party affecting secret profit is a trustee of such amount. Lomita Land & Water Co. v. Robinson [Cal.] 97 P 10.

**7.** Where, under syndicate agreement, managers were not partners, but rather

*Actions.*[See 10 C. L. 462]—In order to recover a share of the profits of a venture, the plaintiff must prove the contract[8] and the extent of his interest in the venture.[9]

**Joint Executors and Trustees; Joint Liabilities or Agreements,** see latest topical index.

### JOINT STOCK COMPANIES.[10]

*The scope of this topic* is noted below.[11]

A joint stock company is a partnership,[12] and the rights and duties of its members are determined from the articles of association.[13] Ordinarily a member may

agents, statement of one could not bind other managers personally on separate and independent agreement. Jones v. Gould, 123 App. Div. 236, 108 NYS 31.

**8.** Interest in fund used by defendants without authority is insufficient. Whitman v. Bartlett [Ala.] 46 S 972.

**9.** Where parties had different interests. Whitman v. Bartlett [Ala.] 46 S 972.

**10.** See 10 C. L. 462.

**11.** Includes matters peculiar to unincorporated companies having transferable shares of stock. As to matters common to all voluntary associations, see Associations and Societies, 11 C. L. 308. As to partnerships generally, see Partnership, 10 C. L. 1100.

**12.** Not corporation. Rountree v. Adams Exp. Co. [C. C. A.] 165 F 152.

**NOTE. Definition:** A joint stock company is a partnership in fact and law, and, except as modified by statute, is subject to all the rules relating to partnerships at common law. Clagett v. Kilbourne, 1 Black [U. S.] 346; Hoadley v. Essex County Com'rs, 105 Mass. 519, 1 Keener's Cas. 1; Phillips v. Blatchford, 137 Mass. 510; Tappan v. Bailey, 4 Metc. [Mass.] 529; Whitman v. Porter, 107 Mass. 522; Hedge's Appeal, 63 Pa. 273; Logan v. McNaugher, 88 Pa. 103; Tide Water Pipe Co. v. Kitchenman, 108 Pa. 630; Kramer v. Arthurs, 7 Pa. 165; Eliot v. Himrod, 108 Pa. 569; Manning v. Gasharie, 27 Ind. 399; Butterfield v. Beardsley, 28 Mich. 412; McGreary v. Chandler, 58 Me. 537; Frost v. Walker, 60 Me. 468; Pennsylvania Ins. Co. v. Murphy, 5 Minn. 36; Pettis v. Atkins, 60 Ill. 454; Robbins v. Butler, 24 Ill. 387; Bullard v. Kinney, 10 Cal. 60; Wells v. Gates, 18 Barb. [N. Y.] 554; Dennis v. Kennedy, 19 Barb. [N. Y.] 517; Schuylerville Nat. Bank v. Van Derwerker, 74 N. Y. 234; Batty v. Adams County, 16 Neb. 44, 20 NW 15; Tenney v. New England Protective Union, 37 Vt. 64; Henry v. Jackson, 37 Vt. 431. 1 Clark & Marshall, Priv. Corp. 41. The one distinguishing essential which differentiates it from a partnership proper is the division of the capital stock into a definite number of shares of which each member is the owner of one or more (Phillips v. Blatchford, 137 Mass. 510; Hedge's Appeal, 63 Pa. 273) and a transfer of which does not involve a dissolution of the company (Jones v. Clark, 42 Cal. 180; Tyrrell v. Washburn, 6 Allen [Mass.] 466; Carter v. McClure, 98 Tenn. 109, 38 SW 585; Burdick's Cases, 37). In other words, it is a partnership without the element of delectus personarum (see Shumaker, Part. §§ 154, 155). It is not, properly speaking, a corporation, lacking the element of legislative creation and the merging of individual rights and liabilities (Lane v. Albertson, 78 App. Div. 607, 79 NYS 947; Sandford v. New York Sup'rs, 15 How. Prac. [N. Y.] 172), though sometimes called a quasi corporation (Oak Ridge Coal Co. v. Rogers, 108 Pa. 147). Some confusion results from the application of the name "joint stock company" to corporations proper (Code W. Va. 1899, c. 53, § 1) or to particular kinds of corporations (Attorney General v. Merc. Marine Ins. Co., 121 Mass. 524), but the greatest difficulty in defining the term arises from statutory regulations and modifications whereby such associations are made to assume a nature approximating more or less closely to that of a true corporation (Waterbury v. Merchants' Union Exp. Co., 50 Barb. [N. Y.] 157; Oak Ridge Coal Co. v. Rogers, 108 Pa. 147; School District v. Insurance Co., 103 U. S. 707, 26 Law. Ed. 601; Sanford v. New York Sup'rs, 15 How. Prac. [N. Y.] 172; Thomas v. Dakin, 22 Wend. [N. Y.] 9; Maltz v. American Exp. Co., 1 Flip, 611, Fed. Cas. No. 9,002; United States Exp. Co. v. Bedbury, 34 Ill. 459. Shumaker on Partnership [2d Ed.] 292). Such statutes will, of course, prevail where in conflict with the general principles of partnership. Shumaker, Partn. § 155; Clark & Marshall, Priv. Corp. § 21. [Ed.]

**NOTE. Legality of joint stock companies at common law:** Owing to the general legislative recognition of joint stock companies, the question of their validity at common law seems to have been seldom raised in the United States. Research has disclosed but four decisions upon this point. The legality of such companies at common law is asserted in Spotswood v. Morris, 12 Idaho, 360, 85 P 1094, 6 L. R. A. (N. S.) 665, and Winchester v. Coleman, 133 N. Y. 279, 31 NE 96, 16 L. R. A. 183; and in Phillips v. Blatchford, 137 Mass. 510, holding to the same effect, it is said that Act 6, Geo. 1, c. 18 (known as the bubble act, from the famous South Sea Bubble speculation which led to its enactment), restraining the formation of such companies, is not to be considered as having been adopted in this country, a decision cited with approval in Howe v. Morse, 174 Mass. 491, 55 NE 213. Among the English decisions may be noted Walburn v. Ingilby, 1 Myl. & K. 61, 3 Law J. ch. 21, holding that such a company is not illegal, though its articles of association provide for limited liability, such a provision being inoperative as to third parties without notice; Garrand v. Hardey, 5 Man. & G. 471, 1 Dowl. & L. 51, 12 Law J. C. P. (N. S.) 205, 6 Scott N. R. 450, and Harrison v. Heathorn, 6 Man. & G. 81, 12 Law J. C. P. (N. S.) 282, 6 Scott N. R. 735, holding that such companies are not common nuisances per se; and In re Mexican & S. A. Co., 27 Beav. 474, wherein the master of the rolls states that he can find no case or principal upon which such an association should be declared void at common law.—Adapted from 6 L. R. A. (N. S.) 665.

**13.** Where intent to form joint stock com-

withdraw from a joint stock company at will,[14] unless prohibited from so doing by the articles of association.[15] The validity of the organization of a stock company is not necessarily affected by the failure to acquire a valid title to all the propery specified in its articles or by an overestimation of capital.[16] An officer has no authority to bargain away the capital stock of the company.[17] The right to inspect the books and records of a joint stock company by a stockholder may be enforced by mandamus,[18] provided such right is invoked for a proper purpose[19] and the conditions precedent to the right to this particular remedy have been complied with.[20] Persons dealing with a joint stock company are bound by statutory limitations.[21] The association may be dissolved by mutual consent [22] or by a court of equity for good cause shown.[23] In an action in the federal courts, an allegation that plaintiff, a joint stock company, is a citizen of a state different from that of which the defendant is a citizen, will not give jurisdiction on the ground of citizenship.[24] An averment that complainant is a joint stock company is not equivalent to a statement that it is a corporation.[25] Where a judgment is rendered against a joint stock company, such judgment cannot be avoided by a claim that the suit was against the shareholders individually.[26]

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**Joint Tenancy,** see latest topical index.

## JUDGES.

§ 1. **The Office; Appointment or Election; Qualifications and Tenure, 396.** The Acts of a De Facto Judge, 399. Salaries, 399.
§ 2. **Special, Substitute and Assistant Judges, 399.**
§ 3. **Powers, Duties and Liabilities, 402.** Powers During Vacation or at Chambers, 403. Powers After Terms of Office, 404. Immunities and Exemptions, 404. Disability to Hold Office, Practice Law or Engage in Business, 404.
§ 4. **Disqualification in Particular Cases, 404.** Interest and Kinship, 405. Disqualification By Reason of Professional Connection as Counsel, 406. Bias and Prejudice, 407. Procedure and Trial of Fact of Disqualification, 407.

*The scope of this topic* is noted below.[27]

§ 1. *The office; appointment or election; qualifications and tenure.* See 10 C. L. 463 The legislature has power under most constitutions to provide for additional judges,[28]

pany was manifest. Strang v. Osborne, 42 Colo. 187, 94 P 320.

**14.** Strang v. Osborne, 42 Colo. 187, 94 P 320.

**15.** Under articles of association, withdrawal from ditch company prohibited while member owned property which association was organized to manage, such withdrawal should operate as dissolution. Strang v. Osborne, 42 Colo. 187, 94 P 320.

**16.** Subscriber not entitled to rescind for fraud. Andrews v. Brace [Mich.] 15 Det. Leg. N. 692, 117 NW 586.

**17.** Contract by chairman to give stock for patent. Dickinson v. Matheson Motor Car Co., 161 F 874.

**18, 19.** In re Hatt, 57 Misc. 320, 108 NYS 468.

**20.** Refusal by officers to permit examination prerequisite to mandamus. In re Hatt, 57 Misc. 320, 108 NYS 468. Application for writ premature where officers had no reasonable time to act on stockholder's demand to inspect books. Id.

**21.** Liabilities must be written when exceeding $500. 1 How. Ann. St. (Mich.) § 2369. Dickinson v. Matheson Motor Car Co., 161 F 874. Under 1 How. Ann. St. Mich. § 2369, providing that debt against joint stock company be written and signed by 2 managers, oral agreement of chairman to transfer stock is unenforcible. Id. Evidence insufficient to show estoppel. Id.

**22.** Contract construed, and vote of two-thirds of shares required to dissolve association similar to joint stock company. Strang v. Osborne, 42 Colo. 187, 94 P 320.

**23.** Strang v. Osborne, 42 Colo. 187, 94 P 320

**24, 25.** Rountree v. Adams Exp. Co. [C. C A.] 165 F 152.

**26.** In personal injury action against joint stock company, where praecipe and declaration name stockholders as defendants, but declaration shows action to be against company, and company is served, appears and defends, names of shareholders may be treated as surplusage. Wilkinson v. Evans, 34 Pa. Super. Ct. 472.

**27.** Treats of judges as such, as distinguished from the courts over which they preside. Excludes organization (see Courts 11 C. L. 925) and jurisdiction (see Jurisdiction, 10 C. L. 512) of courts, and also matters relative to election, salary and tenure of officers generally (see Elections, 11 C. L 1169; Officers and Public Employes, 10 C. L 1043). As to justices of the peace, see Justices of the Peace, 10 C. L. 553.

**28.** Constitution of Kansas held not to prohibit legislature from providing for more than one judge in each judicial district State v. Hutchings [Kan.] 98 P 797.

but such power must of course, be exercised in conformity with constitutional limitations.[29] The time for holding elections to fill vacancies is generally prescribed by positive law.[30] A judge elected to fill a vacancy must resign his former office before he can qualify for the new.[31] Appellate courts take judicial notice of who is judge

**29.** Clause in § 1 of Act of May 29, 1908 (Sess. Laws 1907-08, p. 453, c. 46), providing that court shall recommend to governor the appointment of an additional judge "for such period as the court may consider necessary to meet the conditions, held, at least as to the fixing of the term of court, void, as being the exercise of legislative power. Const. § 1, art. 4. In re County Com'rs [Okl.] 98 P 557. **Title** to Act of May 29, 1908 (Sess. Laws 1907-08, pp. 453, 454, c. 46), held to contain but one separate and distinct subject, the appointment of additional judges of district courts where same are found necessary. Id. Laws 1908, c. 52, p. 50 (Sp. Sess.), creating circuit court of Wyandotte County, etc., held a **special law,** repugnant to constitution of Kansas, and to afford defendant no warrant for holding of judge of such court. State v. Hutchings [Kan.] 98 P 797. Act of May 29, 1908 (Sess. Laws 1907-08, p. 454, c. 46), being **void in part,** held void in toto, provisions being so connected and dependent upon each other that legislature would not have enacted one without the other; hence petition for recommendation for appointment of additional judge dismissed. In re County Com'rs [Okl.] 98 P 557.

**30.** Rev. St. 1899, §§ 195, 201 (Sess. Laws 1890-91, p. 392, c. 100; Sess. Laws 1890-91, p. 237, c. 68), held to authorize holding of election for district judge at any general election when office will become vacant by expiration of term subsequent to such election and prior to next general election. State v. Schmitger [Wyo.] 96 P 238. Where law providing for election of police judge biennially was modified so that council might provide by ordinance that city clerk should be ex-officio police judge, and an ordinance to that effect was passed prior to next regular election, election of police judge at next following election became unnecessary, city clerk having already been elected for both offices. Vineyard v. Grangeville City Council [Idaho] 98 P 422. Nothing in Laws 1903, p. 187, prohibited enactment of ordinance. Id. Legislature held empowered to enact Laws 1903, p. 187, by Const. § 1, art. 12. Id. Act of March 10, 1903 (Laws 1903, p. 187), held not unconstitutional as having insufficient **title.** Id.

**31.** Election probably accountable for **resignation,** so as not to show intentional failure to render decision in former office within reasonable time. Wyatt v. Arnot [Cal. App.] 94 P 86.

**NOTE. Right to hold two judicial offices simultaneously:** It is held in State v. Jones, 130 Wis. 572, 110 NW 431, 8 L. R. A. (N. S.) 1107, that the offices of county judge and justice of the peace are incompatible where preliminary examinations in criminal cases might be held before either, so that the occupancy of both offices by one person would reduce the number of judicial officers having such jurisdiction which the law has provided.

The common law did not permit a person to hold inconsistent and incompatible offices. Positions were held to be incompatible when the multiplicity of business connected with them would prevent an individual from administering each with care and ability, or when they were of such a nature as to interfere with each other. Bacon, Abr., title "Officers," K. 2. So a judge of C. B. made a judge of B. R. ceases to be a judge of C. B. Bacon, Abr., supra. And one holding the office of justice of the peace for a precinct cannot also serve as justice of the peace for a township. Eddy v. Peoria County, 15 Ill. 375.

Yet, in the absence of incompatibility, the number of positions which might be held by an individual at the same time was not restricted, although the offices were judicial and of the highest rank.

A justice of the common pleas may be a baron of the exchequer. 4 Comyns' Dig., "Office," B. 7. Notable instances of the union of two judicial offices occurred when Knevit was both chief justice and chancellor in the time of Edward III, and when Lord Hardwicke simultaneously held the same positions in the time of George II. Throop, Pub. Off. § 30. These two offices were not considered incompatible, although the chancellor was accustomed to send issues to be tried in the king's bench or common pleas and to send cases to them for their opinion, and might, in causes of great importance, call to his assistance, members of both these courts. Commonwealth v. Northumberland County, 4 Serg. & R. [Pa.] 275.

The offices of justice of the peace and associate judge of common pleas were not inherently incompatible at common law. Id.

Nor are the offices of county and probate judge and recorder of a town incompatible. State v. Townsend, 72 Ark. 180, 79 SW 782.

Under a constitutional provision that judges shall not hold any other office of profit under the commonwealth during their continuance in office, the president judge of common pleas is not eligible to election as recorder of the mayor's court of a city. Commonwealth v. Conyngham, 65 Pa. 76.

But a constitutional provision forbidding any person to hold more than one office in the same department at the same time does not prevent the county and probate judge, who is a state officer in the judicial department, from holding the position of a recorder of a town, which is a municipal judicial office. State v. Townsend, supra.

Nor does a statute providing that the duties of the judge of the municipal court shall thereafter be performed by the justices of common pleas, or some one of them, confer upon the latter an additional office. Brien v. Com., 5 Metc. [Mass.] 508.

The appointment of a judge of common pleas, by the circuit judge, to preside during the trial of a case in which the latter is incompetent, does not vest in the former two offices in contravention of the Constitution. Dukes v. State, 11 Ind. 557, 71 Am. Dec. 370.

of a particular court,[32] elected at a particular election to fill an unexpired term.[33] The appellate court will also judicially notice that the term of office of the trial judge expired pending the time for settlement of the bill of exceptions.[34]

A term of office fixed by constitution [35] cannot be changed by the legislature [36] or by the recitals of a certificate of election.[37] The tenure [38] of judges in Hawaii is for four years and until the appointment and qualification of their successors.[39] Upon a sufficient showing, a judge may be impeached and removed from office.[40] Grounds for removal are frequently prescribed by statute.[41] The accused judge is usually entitled to notice of the charges against him.[42] Oral testimony is admissible in relation to the transactions upon which the charges are based.[43]

And powers conferred upon the justices of the supreme court with reference to the appointment of commissioners, in which they act judicially with delegated powers and not under the ordinary jurisdiction of the court, are not incompatible with the constitutional prohibition against a justice holding "any other office or public trust." Striker v. Kelly, 2 Denio [N. Y.] 323, afg. 7 Hill, 9.

In Commonwealth v. Northumberland County, supra, it is said that no provision of the constitution or any act of assembly prevents the offices of justice of the peace and associate judge of common pleas from being held by one person.

Where a city is entitled to a certain number of judicial officers, one person cannot hold two of such positions. State v. Hadley, 7 Wis. 700.

The election or appointment of a judicial officer to an incompatible judicial position is not void, but he may elect which office he will hold. If he chooses to accept the latter, he thereby vacates the former. But if the appointee subsequently accepts the appointment and qualifies, the first office is ipso facto vacated. People v. Carrique, 2 Hill [N. Y.] 93; Eddy v. Peoria County, supra.—Adapted from 8 L. R. A. (N. S.) 1107.

**32.** Supreme court takes judicial notice of who is judge of circuit court of particular county. Viertel v. Viertel, 213 Mo. 562, 111 SW 579. Courts take judicial notice of who presides as regular judge of a court making an order. City of Shawnee v. Farrell [Okl.] 98 P 942. Judge presumed to be one authorized to make order. Id.

**33.** Court of appeal takes judicial notice of fact that one was elected judge of superior court for county at general election under proclamation of governor to fill unexpired term. Wyatt v. Arnot [Cal. App.] 94 P 86.

**34.** Northwestern Port Huron Co. v. Zickrick [S. D.] 115 NW 525.

**35.** Const. art. 5, §§ 19, 4, 20, 21, and art. 21, § 20, held to apply to judge elected to fill vacancy and to one elected immediately preceding expiration of term of elected incumbent, so that judge elected at any general election holds office for 6 years from first Monday in January succeeding his election. State v. Schnitger [Wyo.] 96 P 238. Words "until otherwise provided by law," in Const. art. 5, § 19, held not to qualify remainder of section, but to refer only to number of districts. Id.

**36.** Const. art. 5, § 19, should be so construed as not purporting to empower legislature to change terms of district judges. State v. Schnitger [Wyo.] 96 P 238. Clause in Act of May 29, 1908, § 2 (Sess. Laws, 1907-08, p. 454, c. 46), providing that no appointment thereunder by governor of additional judge, "shall extend beyond Jan. 1, 1911," held repugnant to Const. art. 7, § 9 (Bunn's Ed. § 178), fixing term at four years and prescribing time for elections. In re County Com'rs [Okl.] 98 P 557.

**37.** Certificate that election is for unexpired term of predecessor does not shorten term fixed by constitution. State v. Schnitger [Wyo.] 96 P 238.

**38.** "Tenure" in 31 Stat. p. 156, § 80, held to mean right to hold an office for an indefinite time, as distinguished from "term," denoting period of time with fixed limits. Robinson v. U. S., 42 Ct. Cl. 52.

**39.** Last section of 31 Stat. p. 156, § 80, to effect that "all such officers shall hold office for 4 years and until their successors are appointed and qualified," held to include judges appointed by the president. Robinson v. U. S., 42 Ct. Cl. 52. Rev. St. title XXIII, c. 1, § 1864, providing that judges "of every territory" shall hold their offices for 4 years and until their successors are appointed and qualified," held to extend to judges in Hawaii. Id.

**40.** Judge who because of malice or corruption renders an erroneous decision, or fails to render decision within reasonable time, is liable to impeachment. Wyatt v. Arnot [Cal. App.] 94 P 86.

**41.** Persistent and intentional violation of prohibition contained in Greater New York Charter, p. 605, c. 466, § 1416. In re Deuel, 111 NYS 969. In proceeding for removal for violation of Greater New York Charter, p. 605, c. 466, § 1416, in which justice is charged with editing and managing a certain publication, question whether doing such acts is an enterprise that merits contempt of all decent minded men, and disreputable, held not to be considered, where character of publication was described in connection with charge of violation of section 1416, prohibiting "carrying on my business," and where evidence showed that justice was not actively engaged in business. Id.

**42.** On application for removal of justice of court of special sessions, court can act upon no charges unless respondent has had notice thereof and an opportunity to be heard. In re Deuel, 111 NYS 969. Under Conet. art. 6, § 17, and Laws 1895, p. 1294, c. 601, § 28, court is confined to investigation of charges preferred against justice and to determination of whether such charges are sufficient to warrant removal if proved. Id.

**43.** On application for removal of city magistrate, although having admitted in

*The acts of a de facto judge* See 10 C. L. 463 are generally held valid.[44]

*Salaries.* See 10 C. L. 463—Salaries and fees are generally fixed by statute,[45] and the statutes allowing fees should be strictly construed.[46] The construction placed upon the statute by the officers acting thereunder may be considered.[47] When a judge collects fees to which he is not entitled,[48] they may be recovered back by the party entitled thereto.[49] A suit by a county against a judge and his sureties on his official bond is not one in behalf of the state to recover a penalty.[50] Liability for fees earned, but not collected is predicated upon willful or negligent failure to collect [51] or to take sufficient security therefor.[52] Penalties for the collection of excessive fees are often imposed by statute.[53] The legislature may, even contrary to what may be deemed the best policy, make the collectibility of a judge's fees more or less dependent upon the judgment rendered.[54] A judge's right to compensation ceases on the expiration of his term.[55]

§ 2. *Special, substitute and assistant judges.* See 10 C. L. 463—Usually the legislature can provide that a court may be held by a person other than the judge of that court under given circumstances,[56] and the legislatures of many states have so pro-

main facts alleged in petition, he may present oral testimony as to transactions upon which charges are based. In re Droege, 111 NYS 8.

**44.** Judgment rendered by judge acting under invalid provision of charter of city and county of Denver held not void. Rude v. Sisack [Colo.] 96 P 976.

**45.** Compensation of county judges in counties with population not exceeding 20,000 is $1,600 out of fees, as provided by Sess. Laws. Okl. 1903, § 1, ch. 14. State v. Frear [Okl.] 96 P 628. Mandamus lies to recover excess. Id. Sole compensation of county judge, in absence of other specific provision, is that fixed by county board under authority of St. 1898, § 694. Hoffman v. Lincoln County [Wis.] 118 NW 850. Laws 1891, p. 126, c. 109, held not to prevent county judge from recovering from county the per diem compensation allowed by St. 1898, § 2454, as amended by Laws 1903, p. 81, c. 45, for time devoted to matters other than probate business. Id. Laws 1895, p. 493, c. 249, held to entitle county judge of Lincoln county to compensation allowed by St. 1898, § 2454, for time actually engaged in passing on applications for permits under Laws of 1891, p. 126, c. 109. Id. Words "for each day he shall be actually engaged," in St. 1898, § 2454, as amended by Laws 1903, p. 81, c. 45, held to indicate intention to allow compensation only for time actually consumed, necessitating a splitting up of days and a charge by the hour, and to establish arbitrary number of hours as a day's work. Id. "Day" in St. 1898, § 2454, as amended by Laws 1903, p. 81, c. 45, held to mean calendar day, so as not to authorize judge working over hours to charge more than the per diem allowance for one calendar day. Id. Provisions of Comp. St. § 3484 held limited to cases in which county judge derived power to perform services solely from grant of ordinary powers and jurisdiction of a justice of the peace; hence not to confer upon county judge right to charge fee for marriage ceremonies. Douglas County v. Vinsonholer [Neb.] 118 NW 1058.

**46.** Where complaint is filed against several persons, same fees recoverable as if but a single defendant until demand for separate trials is made, and then charges should be made only for such duties as are necessarily caused by separation. Downey v. Coykendall [Neb.] 116 NW 503.

**47.** Fact that officers whose duty it was to enforce act of 1877 (Laws 1877, p. 215), had for many years construed act as not to require county judge to report fees received for performing marriage ceremonies held properly considered in construing statute under which claim to fee was made. Douglas County v. Vinsonhaler [Neb.] 118 NW 1058.

**48.** County judge is not entitled to receive any compensation or fees for criminal cases dismissed without a trial. Lane v. Delta County [Tex. Civ. App.] 109 SW 866.

**49.** By county. Lane v. Delta County [Tex. Civ. App.] 109 SW 866. Four years' **limitations** held applicable to suit upon official bond to recover fees illegally collected. Id.

**50.** Lane v. Delta County [Tex. Civ. App.] 109 SW 866.

**51.** Douglas County v. Vinsonhaler [Neb.] 118 NW 1058. Failure to collect fees for purely ministerial services would support charge of negligence, while in case of fees earned in judicial and probate proceedings actual negligence should be shown. Id.

**52.** Douglas County v. Vinsonhaler [Neb.] 118 NW 1058.

**53.** Comp. St. 1907, § 34, c. 28, imposing penalty for collection of excessive fees, held to apply to police judges. Downey v. Coykendall [Neb.] 116 NW 503. No defense to action under Comp. St. 1907, § 34, c. 28, that police judge acted under direction of prosecuting attorney. Id.

**54.** Acts 1899, p. 332, creating city court of Barnesville, sustained. Wellmaker v. Terrell, 3 Ga. App. 791, 60 SE 464.

**55.** Vineyard v. Grangeville City Council [Idaho] 98 P 422.

**56.** Georgia, etc., R. Co. v. Sasser, 130 Ga. 394, 60 SE 997. Acts of 1899, p. 48, conferring authority upon judge of city court to preside in another city court when judges of latter court is disqualified or providentially prevented from trying a case, held not in conflict with Const. art. 6, § 5, par. 1. Id. Act Dec. 21, 1899 (Acts 1899, p. 48),

vided.[57] Under some of the statutes, where a judge is disqualified, he may call in the judge of another district,[58] while under other statutes a judge pro hac vice cannot be appointed by the regular judge,[59] the power of appointment being in the parties [60] or the clerk.[61] As a rule in Louisiana, where a judge who is recusable for interest makes an order appointing the judge of an adjoining district to try the recused case, the order operates as an effective appointment,[62] but this rule does not apply where for any valid reason the appointee is authorized to refuse to accept or act under the order of appointment.[63] When no objection is raised during trial, the objection that a special judge selected by the parties failed to take the oath of office is waived.[64] The fact that the Washington constitution entitles each county to a local judge does not disqualify a judge from another county to sit as a judge in a particular case in a county other than his own.[65] One cannot be a judge pro hac vice de facto.[66]

While discharging the specific duties of the office, a person designated to preside over a court other than his own sustains to that court the relation of judge,[67] but the powers and responsibilities of a judge requested to act for another are limited to the period he shall so act,[68] and resumption of jurisdiction by the regular judge operates to vacate the office of the special judge, without any order to that effect, as to all business except that already commenced by the special judge,[69] the jurisdiction of the special judge over business so commenced being in no wise affected by the re-

providing that judge of one city court may preside in another city in absence of judge of court of latter city, held constitutional. Georgia, etc., R. Co. v. Sasser [Ga. App.] 61 SE 505.

57. Under Act Dec. 21, 1899 (Acts 1899, p. 48), judge of any constitutional city court may preside in another city court when judge of latter court is disqualified. Georgia, etc., R. Co. v. Sasser [Ga. App.] 61 SE 505. Under Civ. Code 1895, § 4177, judge of one county court may preside for the judge of another county court. Bedingfield v. First Nat. Bank [Ga. App.] 61 SE 30.

58. Under Rev. Codes, § 6315, held not error for one of judges of district court of a county divided into departments, upon being disqualified, to call in judge of another district. Gassert v. Strong [Mont.] 98 P 497.

59. Bedingfield v. First Nat. Bank [Ga. App.] 61 SE 30.

60. Bedingfield v. First Nat. Bank [Ga. App.] 61 SE 30. Where no application for a change of venue is made where the trial judge is disqualified, a special judge elected by the attorneys present in court and qualified to act may try the cause. Todd v. Hutchinson, 129 Mo. App. 633, 108 SW 593. Rev. St. 1899, art. 11, c. 8, § 818-834 (Ann. St. 1906, pp. 789-798), and Rev. St. 1899, art. 3, c. 14, §§ 1678-1685 (Ann. St. 1906, pp. 1219-1222), are separate and distinct, and, where no application for change of venue is asked, first cited statute is not applicable to case and latter statute controls. Id.

61. Selection of an attorney to preside as judge pro hac vice must be made either by parties themselves, if they can agree, or, if not, by clerk of county court, or by clerk of superior court. Civ. Code of 1895, §§ 4178, 4179. Bedingfield v. First Nat. Bank [Ga. App.] 61 SE 30. Judge acting as own clerk cannot make appointment. Id.

62. State v. Twenty-first Judicial Dist. Democratic Committee [La.] 47 S 405.

63. State v. Twenty-first Judicial Dist. Democratic Committee [La.] 47 S 405. Under Act No. 185, pp. 430 of 1898, recused judge, having appointed judge ad hoc, who was granted a leave of absence, and was neither willing nor obliged to, and who declined to accept order of appointment, held not divested of jurisdiction for purposes of appointment, the attempted appointment not having taken effect. Id. Immaterial that judge given leave of absence was still in parish when notified of order of appointment, since under statute he was not obliged to accept order. Id.

64. Johnson v. Jackson [Ky.] 114 SW 260.

65. Fact that judge who tried case in Cowlitz county was resident of Clarke county held not to deprive court of jurisdiction under constitutional provision. American Bonding Co. v. Dufur [Wash.] 96 P 160.

66. The reason being that the reputation upon which the authority of a de facto officer depends must arise from acts other than those in question, and therefore the status of a judge pro hac vice, being necessarily temporary, cannot thus prove itself, and also that there cannot be a de facto officer where there is no office, and there is no office of judge pro hac vice. Bedingfield v. First Nat. Bank [Ga. App.] 61 SE 30.

67. Georgia, etc., R. Co. v. Sasser, 130 Ga. 394, 60 SE 997.

68. Regular judge thereafter has jurisdiction of causes heard, but not finally disposed of by substitute judge. Rev. St. 1899, § 1678 (Ann. St. 1906, p. 1219), Viertel v. Viertel, 212 Mo. 562, 111 SW 579. Although local judge has called in judge from another district to try case, he may resume jurisdiction and order a new trial after settlement of statement, when other judge returns to his own circuit or when his term of office expires. Northwestern Port Huron Co. v. Zickrick [S. D.] 115 NW 525.

69. State v. Stevenson [W. Va.] 62 SE 688.

turn of the special judge;[70] and the fact that the regular judge of a district holds court in the same district and at the same time that a special judge is trying a case in no manner affects the jurisdiction of the special judge to try such case.[71] Jurisdiction of a special judge, not to try any particular case but to preside only in the absence of the regular judge, ends for all purposes with the adjournment of the term at which he was elected, except as to the matter of signing bills of exceptions in cases tried and finally determined by him.[72] When an incumbent dies, leaving official acts unfinished, they may be completed by his successor,[73] and an acting judge is sometimes authorized to sign the bill of exceptions to a cause heard by a judge who shall go out of office before doing so.[74] A judge pro tempore is without power to enter an order extending the time to make and serve a case made after he has ceased to sit as a court.[75] Temporary jurisdiction sometimes extends to the granting or refusing of injunctions,[76] but such jurisdiction usually may be exercised only in cases of emergency and urgent necessity.[77] Where a motion has been heard and determined by one circuit judge and no leave given to renew the motion, the same motion cannot be heard by another circuit judge upon the same state of facts,[78] but where an action has been tried before a substitute judge, and a motion for a new trial, not previously made before the substitute judge, is made before the regular judge upon the ground of erroneous rulings, the hearing of such a motion is not within the rule which prohibits one judge from reviewing the decisions of a co-ordinate judge.[79] Where power to act as a substitute judge is given in case of illness, absence or disqualification of

**70.** Reversible error for regular judge to assume jurisdiction of cause begun and continued before special judge duly elected to preside in regular judge's absence. State v. Stevenson [W. Va.] 62 SE 688.

**71.** Johnson v. State [Okl. Cr. App.] 97 P 1059.

**72.** State v. Stevenson [W. Va.] 62 SE 688.

**NOTE. Effect of adjournment of term:** In State v. Stevenson [W. Va.] 62 SE 688, it was intimated in view of a new trial, though the decision of the point was not necessary to the disposition of the case on the appeal, that adjournment terminates jurisdiction of special judge elected to preside in the absence of the regular judge. In connection with this point the court said: "Authorities do hold however, that such special judge may adjourn the hearing of a case beyond the regular term without losing jurisdiction thereof. 23 Cyc. 612, and cases cited in note 54. The fact that the term of a regular or special judge has ended or expired before a trial begun is completed will not preclude his successor, the regular or newly-elected judge, from trying the case, but he would have to try it de novo. 23 Cyc. 565. It is said at the page just cited, on authority of Clanton v. Ryan, 14 Colo. 419, 24 P 258, and In re Sullivan, 143 Cal. 462, 77 P 153, that 'a judge who did not hear the evidence cannot render a judgment in a cause, notwithstanding the testimony may have been written down and preserved.'"

**73.** Judge having died without signing record of judgment, successor was authorized to sign same and complete record. Montgomery v. Viers [Ky.] 114 SW 251. Ky. St. 1903, § 977, held to apply to special as well as to regular judges, that where on account of death or for reasons enumerated therein a special judge shall fail to sign orders, they may be signed by special judge who succeeds him or by regular judge, if not disqualified. Ewell v. Jackson, 33 Ky. L. R. 673, 110 SW 860.

**74.** Under Rev. St. 1899, § 731 (Ann. St. 1906, p. 726), providing that where judge who heard a cause shall "go out of office" before he signs bill of exceptions, bill, if correct, shall be signed by succeeding or acting judge of court where case was heard, an acting judge elected to hold ensuing term, as required by Rev. St. 1899, § 1679, held proper person to sign bill of exceptions at term over which he presided in a case tried before regular judge at prior term, "go out of office" not being confined to death or resignation but covering a case of being disabled by sickness. Ranney v. Hammond Packing Co. [Mo. App.] 110 SW 613. Circumstance that former judge so far recovers his strength as to enable him to again take charge of the case does not alter the rule. Id.

**75.** City of Shawnee v. Farrell [Okl.] 98 P 942. Under Wilson's Rev. & Ann. St. 1903, § 4742, such an extension can only be granted by the regular judge who is in fact in possession of office. Id.

**76.** In absence of circuit judge from county, the county judge may hear and grant or refuse motions for interlocutory injunctions of prohibitory nature and under Code Prac. § 273, it is error to invade jurisdiction of county in matter so long as he was within county, not disqualified, and circuit judge was out of county. Renshaw v. Cook, 33 Ky. L. R. 860, 895, 111 SW 377.

**77.** Under Code writ held improvidently issued by county judge means of transportation and communication between different counties of a district making use of emergency power of county judge seldom necessary. McLean v. Farmers' Highline Canal & Reservoir Co. [Colo.] 98 P 16.

**78, 79.** Northwestern Port Huron Co. v. Zickrick [S. D.] 115 NW 525.

the regular judge, the facts giving authority to act must be proved the same as other facts by competent evidence,[80] and on a motion to dismiss for disqualification of the substitute, the burden of proof is on plaintiff to affirmatively show the existence of facts upon which authority is dependent.[81] In some states where a case has been tried by a special judge, the record on appeal must show the disqualification of the regular judge, by what authority the special judge was elected or agreed upon, or in what manner he was legally designated to try the cause.[82]

§ 3. *Powers, duties and liabilities.* See 10 C. L. 484—Where a judge has been duly elected and commissioned, the law imposes in him the duty of hearing and disposing of the litigated questions that may arise in his jurisdiction, unless some cause to the contrary recognized by law as sufficient exists,[83] and where under the law it is clearly the duty of a judge to proceed to the consideration of a motion upon its merits, he cannot relieve himself of that duty or divest himself of jurisdiction by an arbitrary dismissal of the proceeding.[84] Failure to perform duties unconditionally imposed by law may render a judge liable upon his bond for the loss sustained through such failure,[85] but it is held that he cannot be held liable in damages for delay in rendering a decision,[86] though such delay, if willful and corrupt in its purpose, may constitute ground for impeachment.[87] In a proper case mandamus will lie to compel a judge to perform his duty.[88] When, therefore, for an unreasonable length of time he delays a decision, he may in a proper proceeding be compelled to decide,[89] but not in any particular way.[90] The presumption that public officers have performed their duties applies to the duty of a county judge to pay into the county treasury the surplus fees of his office,[91] but in a suit to recover the surplus uncollected fees of his office, slight evidence is sufficient to shift the burden of proof and require the officer to establish the exercise of reasonable diligence in endeavoring to collect the same.[92]

**80.** Gasson v. Atkins, 112 NYS 224.

**81.** On motion to dismiss for disqualification of recorder to act as city judge under city charter, burden on plaintiff. Gasson v. Atkins. 112 NYS 224.

**82.** Under Code Civ. Proc. 1855, art. 609, conviction where record showed that accused was tried by special judge, but not facts warranting him in trying same, reversed. Reed v. State [Tex. Cr. App.] 114 SW 834.

**83.** Keller v. Riverton Consol. Water Co., 34 Pa. Super. Ct. 301.

**84.** Dismissal of motion for an order directing witness to answer question, etc., held arbitrary so as not to preclude compelling judge by mandamus to require witnesses to answer questions and complete deposition sought to be taken. In re Scott [Cal. App.] 96 P 385.

**85.** Cornelison v. Million, 33 Ky. L. R. 1086, 112 SW 654. Ky. St. 1903, §§ 1065, 1068, providing that county judge shall at stated times require fiduciaries to settle their accounts, and that he shall each year inquire into solvency of each fiduciary, etc., held mandatory, rendering judge liable for failure to do so where loss is sustained thereby. Id. Judge cannot invoke presumption that predecessor performed his duty as excuse for his own nonperformance, and hence under Ky. St. 1903, §§ 1065, 1068, it is no excuse for nonperformance by county judge acting as such from Dec. 1899, until Jan. 1902, that last settlement was made by guardian in 1889, where record showed appointment of guardian and settlement showed that he had in his possession money due the ward. Id.

**86.** Wyatt v. Arnot [Cal. App.] 94 P 86.

**87.** Wyatt v. Arnot [Cal. App.] 94 P 86. Although delay in deciding cause is circumstance to be considered with other facts, yet it is not of itself a basis of charge of corruption. Id.

**88.** Wyatt v. Arnot [Cal. App.] 94 P 86. Mandamus to compel judge of superior court to require witness, before notary taking deposition, to answer questions and complete deposition sought to be taken, lies under Code Civ. Proc. §§ 1085-1086, no other plain, speedy and adequate remedy being available, and it being judge's duty to so act. In re Scott [Cal. App.] 96 P 385. Signing of judgment entered by judge of quarterly court, being ministerial act not involving discretion, may be compelled by mandamus. Montgomery v. Viers [Ky.] 114 SW 251.

**Complaint** or failure to decide cause submitted for decision, alleging resignation of judge without deciding cause where there was nothing to warrant conclusion that judge before resignation had mastered case as to have justified his deciding same, held not to state a cause of action. Wyatt v. Arnot [Cal. App.] 94 P 86.

**89.** Wyatt v. Arnot [Cal. App.] 94 P 86.

**Complaint** accusing judge of a willful, premeditated and intentional omission of and refusal to perform duty must allege the facts so as to enable court to determine whether refusal to do duty was willful, premeditated and intentional. Wyatt v. Arnot [Cal. App.] 94 P 86.

**90.** Wyatt v. Arnot [Cal. App.] 94 P 86.

**91, 92, 93.** Frost v. Board of Teller County Com'rs, 43 Colo. 43, 95 P 289.

The appointment of a clerk by a county judge to have charge of the collection and disbursements does not relieve the judge, who fails to see to it that the clerk properly qualify, from liability to account for surplus fees earned in the proceedings of his court.[93] The complaint in an action against a judge to recover surplus fees not turned in must allege the proportion of the amount actually collected and unpaid and the amount uncollected.[94] Liability for uncollected fees is sometimes predicated upon negligence or willfulness in failure to collect.[95] Sureties on the official bond of a judge are not liable for money which does not come to the possession of their principal by virtue of his office.[96] Where an action is tried by one judge, a statement of the case cannot be settled by another, although the term of office of the trial judge may have expired, in the absence of statute authorizing same,[97] and a judge who did not hear the evidence cannot render a judgment in a cause, notwithstanding the testimony may have been written down and preserved.[98] A judge cannot purchase at a sale, the validity of which he must pass on in his official capacity.[99] A magistrate wrongfully assuming jurisdiction of a cause may thereby render himself liable for false imprisonment.[1]

Where there are two judges with the same powers and the same territorial jurisdiction,[2] serious complications sometimes arise as to their relative powers and duties.[3]

*Powers during vacation or at chambers.* See 10 C. L. 464.—Powers conferred upon the court as distinguished from the judge thereof cannot be exercised at chambers,[4] and the validity of any act in vacation or at chambers is usually determined with reference to whether the power to do such act lies with the judge or with the court as such.[5] In South Carolina a motion for discontinuance may be heard and granted at chambers,[6] and a circuit judge may at such time grant an order striking irrele-

**94.** Under Mill's Ann. St. Rev. Supp. § 1936, c. 1. Frost v. Board of Teller County Com'rs, 43 Colo. 43, 95 P 289.

**95.** Complaint under Mill's Ann. St. Rev. Supp. § 1936, c. 1, failing to allege negligence or willfulness, held defective. Frost v. Board of Teller County Com'rs, 43 Colo. 43, 95 P 289.

**96.** Stephens v. Hendee [Neb.] 115 NW 283. Sureties not liable for fees which judge had collected but to which he was not entitled. Rice v. Vasmer [Tex. Civ. App.] 110 SW 1005. Bond not to be treated as common-law obligation so as to authorize recovery of fees wrongfully exacted, judge's conduct in so doing not being official. Id. Receiving personal property belonging to estate of deceased person prior to appointment of administrator held not act of one or performed by virtue of office as county judge so as to render sureties liable for principal's subsequent conversion of property. Stephens v. Hendee [Neb.] 115 NW 283. Even if such receiving was under color of office, bondsmen not liable. Id. Procuring of administrator's indorsement upon certificate of deposit after he had qualified held not to render sureties liable where record showed that no order was made by judge and indorsement was procured by fraud. Id.

**97.** Rev. Code Civ. Proc. § 299, held not to authorize such settlement where it does not appear that trial judge was absent from state, refused to settle statement, or that other judge was authorized by supreme court to do so. Northwestern Port Huron Co. v. Zickrick [S. D.] 115 NW 525.

**98.** State v. Stevenson [W. Va.] 62 SE 688.

**99.** Nona Mills Co. v. Wingate [Tex. Civ. App.] 113 SW 182.

**1.** Where magistrate having statutory criminal jurisdiction assumes jurisdiction on information, not alleging crime over which he has jurisdiction. Maher v. Potter, 112 NYS 102. See False Inprisonment, 11 C. L. 1456.

**2.** Act of Feb. 25, 1907, c. 1198, 34 St. 931 (U. S. Comp. St. Supp. 1907, p. 187), providing for a United States district judge for the Northern district of Alabama, held not to repeal Act of Aug. 2, 1886, c. 842, 24 Stat. 213 (U. S. Comp. St. 1901, p. 449), and prior acts, legislation being merely auxiliary and intended to add another judge in district, hence there are two judges in the Northern district. Ex parte Steele, 162 F 694. But see In re Steele, 156 F 853, 161 F 886.

**3.** Complications relative to appointment of referees in bankruptcy for northern district of Alabama, resulting from conflicting orders of the judge of the northern and middle districts and of the judge of the northern district. See In re Steele, 156 F 853, 161 F 886; Ex parte Steele, 162 F 694.

**4.** Nothing that county judge may have said as an individual permitted to militate against judgment of court as shown by record. Renshaw v. Cook, 33 Ky. L. R. 860, 895, 111 SW 377. Under Civ. Code 1895, § 2490, superior court and not judge of court at chambers is vested with authority to allow a sale made by a wife to her husband. Roland v. Roland [Ga.] 62 SE 1042.

**5.** See In re Steele, 156 F 853; Id. 161 F 886; Ex parte Steele, 162 F 694.

**6.** Constitutional and statutory provisions

vant matter from a pleading.[7] In North Carolina an application for mandamus may be filed and heard at chambers.[8]

*Powers after terms of office.* See 10 C. L. 465—Power to settle bills of exceptions in cases tried during a judge's term of office is sometimes expressly saved to him after the expiration of such term,[9] and where a case is tried before the judge of another district holding court for the regular judge, it is his duty to settle the bill of exceptions when presented to him at any time within the time fixed or extended by the regular judge, although his term of office may have expired,[10] but if he refuses the bill may be settled by the supreme court in such manner as that court may deem proper.[11]

*Immunities and exemptions.* See 10 C. L. 465—A suit cannot be maintained against the judge of a superior court for willful and intentional omission to decide a case after its trial and submission for decision,[12] nor can a judge who, because of malice or corruption, renders an erroneous decision, or fails to render a decision within a reasonable time, be required to answer to a private individual in an action for damages.[13]

*Disability to hold office, practice law or engage in business.* See 10 C. L. 465—In New York a judge of the court of special sessions cannot hold any other public office or "carry on any other business."[14]

§ 4. *Disqualification in particular cases.* See 10 C. L. 465—Disqualification statutes should be liberally construed with a view to effect their object and promote justice.[15] That a municipal court has previously tried a case which upon petition for certiorari is returned for another trial does not disqualify members of that court from again trying the case,[16] but in New Jersey, on writ of error, no justice who has given a judicial opinion in favor of or against any error complained of can sit as a member or have a voice on the hearing, or for its affirmance or reversal.[17] If the regular judge is disqualified to preside in the trial of a cause, he is likewise disqualified to sign the judgment or orders made therein by the special judge,[18] and where he is disqualified to try a criminal case, he is also disqualified to forfeit a bond in such case or to grant a rule nisi on the forfeiture,[19] but in California he may request another judge to try

considered. Shelton v. Southern R., Carolina Division [S. C.] 61 SE 220.

7. Authority conferred by circuit court rule 20, authority to hear motion necessarily implying power to decide. Guignard v. Evans [S. C.] 61 SE 1003.

8. Mandamus to compel county treasurer and road commissioners to deliver fund received from taxes levied for road purposes. Coleman v. Coleman [N. C.] 62 SE 415.

9. Rev. Code of Civ. Proc. subd. 3, §§ 303, 299. Northwestern Port Huron Co. v. Zickrick [S. D.] 115 NW 525; Id. 117 NW 685.

10. Rev. Code Civ. Proc. § 299. Northwestern Port Huron Co. v. Zickrick [S. D.] 117 NW 685.

11. Rev. Code Civ. Proc. § 298. Northwestern Port Huron Co. v. Zickrick [S. D.] 117 NW 685.

12, 13. Wyatt v. Arnot [Cal. App.] 94 P 86.

14. Under Greater New York charter, p. 695, c. 466, § 1416, to "carry on a business" implies such relation to business as identifies a person with it and imposes upon him some duty or responsibility in connection with its management, and acting as vice-president of a corporation, where the justice has no specific duties and is not actively engaged in conduct of business, is not responsible to corporations or stockholders for conduct and management of business, etc., is not a violation of such provision. In re Deuel, 111 NYS 969.

15. Rev. Codes, § 6315, construed so as to effect its object and promote justice, as required by Rev. Codes, §§ 4, 6214, 8061. Gehlert v. Quinn [Mont.] 98 P 369.

16. Proceeding one de novo, and hence not within Civ. Code of 1895, § 4045. Sutton v. Washington [Ga. App.] 60 SE 811.

17. Justice of supreme court who acted for that court in granting an order for consolidation of local actions, result of which was to work a change of venue, and who allowed a bill of exceptions upon the making of consolidated order, held to have given a judicial opinion in cause in favor of alleged error, under Const. art. 6, § 2, par. 6, so as to disqualify sitting as member of court of errors and appeals upon review of resulting judgment, where consolidation order is assigned for error. Defiance Fruit Co. v. Fox [N. J. Err. & App.] 70 A 460.

18. Ewell v. Jackson, 33 Ky. L. R. 673, 110 SW 860.

19. Judgment absolute based on such proceelings held illegal and should have been set aside upon direct attack. Marks v. Smith [Ga. App.] 60 SE 1016.

the case.[20] The acts of a judge who is subject to any constitutional disqualification are void,[21] and so also where a disqualification of a judge affirmatively appears upon the record, and there is no waiver of such disqualification as required by statute.[22] Where a judge inadvertently sits in a case where he is disqualified, the order or decree made is void,[23] and a nunc pro tunc order by a qualified judge entered after proceeding attacking the void order has been begun, reaffirming such order does not validate it.[24] It has been held that where no objection is raised, acts done by a disqualified judge before a special judge is appointed are valid.[25]

*Interest and kinship.*[See 10 C. L. 466]—A judge cannot sit in any case where he is interested,[26] and sound public policy requires that the collection of his costs should

**20.** Notwithstanding the disqualification of a judge on a criminal trial, he may, under the California constitution, request another judge to preside, since a request to so preside is not limited to a request by the governor. Const. art. 6, § 8. People v. Ebey, 6 Cal. App. 769, 93 P 379.

**21.** Under Const. 1845, art. 4, § 14, order for sale by a guardian of a certificate for land issued to minor heirs, judge granting order, also purchasing certificate, held void. Nona Mills Co. v. Wingate [Tex. Civ. App.] 113 SW 182. Confirmation of sale by judge purchasing certificate void. Id.

**22.** Order of confirmation of sale and proceedings subsequent thereto held void and subject to collateral attack. In re McHugh, 152 Mich. 505, 15 Det. Leg. N. 273, 116 NW 459.

**23, 24.** Davis Colliery Co. v. Charlevoix Sugar Co. [Mich.] 15 Det. Leg. N. 974, 118 NW 929.

**25.** Where, before a special judge was appointed in a proceeding to establish drain, regular presiding judge permitted five of petitioners to dismiss as to themselves, and though other petitioners were by counsel present in court at time they did not object, the court's action was not void because judge was owner of lands affected. Pavey v. Braddock [Ind.] 84 NE 5.

**26.** Judge, having purchased certificate for land at sale made by a guardian on an order made by himself, held interested in matter of guardianship pending before him. Const. 1845, art. 4, § 14. Nona Mills v. Wingate [Tex. Civ. App.] 113 SW 182. Acts of 1880 and 1882, giving "interest in cause" as ground for recusation, held applicable to criminal cases. State v. Banta [La.] 47 S 538.

**NOTE. Pecuniary interest,** such as will disqualify a judge from sitting in the cause, must be immediate, certain and dependent upon the result in the case, not remote, uncertain or speculative (Internal Imp. Fund v. Bailey, 10 Fla. 213), or where the interest is minute (In re Ryers, 72 N. Y. 1, 28 Am. Rep. 88, afg. 10 Hun [N. Y.] 93), or amounts to a mere bias or sympathy (Ex parte Harris, 26 Fla. 77, 7 S 1, 23 Am. St. Rep. 548, 6 L. R. A. 713). Thus, he is not disqualified to determine the validity of certain securities by reason of having once held similar securities (Gregg v. Pemberton, 53 Cal. 251), or to sit upon a case for the reason that he personally has an action pending against the plaintiff which is in no way affected by the result of the action at bar (Southern California Motor Road Co. v. San Bernardino Nat. Bank, 100 Cal. 316, 34 P 711; Southern California Motor Road Co. v. San Bernardino, 100 Cal. 316, 34 P 711), or by reason of his interest in the fees and costs incidental to the litigation (Ex parte Guereno, 69 Cal. 88, 10 P 261; Commonwealth v. Keenan, 97 Mass. 589; St. Louis, A. & T. R. Co. v. Holden, 3 Willson Civ. Cas. Ct. App. [Tex.] 323; People v. Edmonds, 15 Barb. [N. Y.] 529; Bennett v. State, 4 Tex. App. 72; White v. Hinton, 3 Wyo. 753, 30 P 953, 17 L. R. A. 66), unless he is liable therefor (Collingswood County v. Myers [Tex. Civ. App.] 35 SW 414); nor is he disqualified where his interest in the case is merely as an official repository of title (Clark v. State, 23 Tex. App. 260, 5 SW 115), although he is disqualified to pass upon claims against an estate of which he is an administrator (Knight v. Hardeman, 17 Ga. 253; In re Bacon, 73 Mass. [7 Gray] 391; Bedell v. Bailey, 58 N. H. 62), or of which he is a creditor (Thornton v. Moore, 61 Ala. 347; Coffin v. Cottle, 26 Mass. [9 Pick.] 287; Sigourney v. Sibley, 38 Mass. [21 Pick.] 101, 32 Am. Dec. 248; In re Cottle, 22 Mass. [5 Pick.] 483; Succession of Payne, 32 La. Ann. 355; Succession of Rhea, 31 La. Ann. 323; Burks v. Bennett, 62 Tex. 277), or a debtor (Gay v. Minot, 57 Mass. [3 Cush.] 352; In re Hancock, 27 Hun [N. Y.] 78). A judge has been held disqualified to act upon an injunction which would protect the judge's property equally with that of the plaintiff (North Bloomfield Gravel Min. Co. v. Keyser, 53 Cal. 251), or in a trial of title to land to which he is also claimant though not in the action at bar (Heilbron v. Campbell, 23 P 122; Casey v. Kinsey, 5 Tex. Civ. App. 3, 23 SW 818). Interest as a director or stockholder will disqualify a judge to try an action by or against a corporation (King v. Thompson, 59 Ga. 380; Kittridge v. Kinne, 80 Mich. 200, 44 NW 1051; In re Reddish, 49 Hun [N. Y.] 612, 2 NYS 259; Cincinnati, etc., R. Co. v. Gill, 1 Ohio Dec. 501; Gregory v. Cleveland, etc., R. Co., 4 Ohio St. 675; Williams v. Bank [Tex. Civ. App.] 27 SW 147), but the fact that the judge had previously been a stockholder will have no such effect (Nicholson v. Showalter, 83 Tex. 99, 18 SW 326; Johnson v. Marietta, & N. G. R. Co., 70 Ga. 712; Palmer v. Lawrence, 5 N. Y. 389). The fact that a judge is a citizen and taxpayer does not generally disqualify him to hear a suit by or against the people (Kilbourn v. State, 9 Conn. 560; Foreman v. Marianna, 43 Ark. 324; Sauk v. Freeman, 24 Fla. 209, 4 S 525, 12 Am. St. Rep. 190; State v. Intoxicating Liquors, 54 Me. 564; State v. McDonald, 26 Minn. 445, 4 NW 1107; Co. Com'rs v. Lyth, 3 Ohio, 289; State v. Cisco [Tex. Civ. App.] 33 SW 244; Colgate v. Hill, 20 Vt. 56; Wheeling v. Black, 25 W. Va. 266; Ex parte Gurrero, 69 Cal. 88, 10 P 261;

not be made to depend upon the judgment rendered,[27] but pecuniary interest in the costs, the amount of which is fixed by law, is not synonymous with pecuniary interest in a case.[28] Assistant judges are not disqualified from sitting at the trial of an information for an escape by the fact that they are members of the prison board, where membership gives them no interest,[29] nor are they disqualified by the fact that, as members of the prison board, they formed and expressed opinions as to the merits, where they took no part in the punishment inflicted by the board.[30] Relationship to a party is a disqualification in most states,[31] and the word "party" should not be construed in a technical and restricted sense but should be held to mean any one who is pecuniarly interested directly in the result of the suit, though not a party to the record and not necessarily bound by the judgment.[32] Relationship to the attorney for either party may work a disqualification.[33] The fact that a judge had been formally joined as a defendant in a former action does not disqualify him from hearing an application for a temporary injunction in a subsequent action involving the same issues.[34]

*Disqualification by reason of professional connection as counsel.* See 10 C. L. 466 A judge is not disqualified by professional connection as a lawyer with interests which may possibly become involved in the case,[35] or by the fact that at some former time he has been counsel for one of the parties,[36] but former connection as counsel in the same case disqualifies,[37] unless the disqualification is waived by the parties.[38]

Hanscomb v. Russell, 77 Mass. 373), but he is disqualified to determine the validity of a tax which he must pay if valid (Nalle v. City of Austin [Tex. Civ. App.] 21 SW 375; Wetzel v. State, 5 Tex. Civ. App. 17, 23 SW 825).—[Ed.]

27. Wellmaker v. Terrell, 3 Ga. App. 791, 60 SE 464.

28. Under Civ. Code 1895, § 4045, and other statutes considered judge of city court of Barnesville not disqualified from sitting as judge upon a scire facias to forfeit a criminal recognizance, although as ex officio clerk he is pecuniarily interested in costs in case and in collection of other costs due him, even though collectibility of latter costs may to some extent be dependent upon a judgment forfeiting the recognizance. Wellmaker v. Terrell, 3 Ga. App. 791, 60 SE 464.

29. No interest within meaning of Pub. St. 1906, § 1224. State v. Wright [Vt.] 69 A 761.

30. State v. Wright [Vt.] 69 A 761.

31. No judge can sit as such in any case in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties. Davis Colliery Co. v. Charlevoix Sugar Co. [Mich.] 15 Det. Leg. N. 974, 118 NW 929. Under Code Civ. Proc. § 46, providing that a judge "shall not sit in a case in which he is related by affinity to any party to the controversy within the sixth degree, a judge is not disqualified because he and the plaintiff's attorney are brothers-in-law, having married sisters. Zambetti v. Garton, 113 NYS 804.

32. Under Const. 1874, art. 7, § 20, and statute fixing fourth degree as line of prohibition, judge related within fourth degree to one not a party of record and not necessarily bound by judgment, but who is an attorney whose fees depend upon determination of cause, held disqualified. Johnson v. State [Ark.] 112 SW 143. **Relationship to a stockholder** of corporate party is equally disqualifying as relationship to a natural party. Davis Colliery Co. v. Charlevoix Sugar Co. [Mich.] 15 Det. Leg. N. 974, 118 NW 929. Under Comp. Laws, § 1109, circuit judge held disqualified to appoint receiver for a corporation in which stock was held in name of a sister of judge's wife, stock being held by sister as administratrix of her husband's estate and she being entitled to one-half. Id.

33. Under Code Civ. Proc. § 170, subds. 2, 4, Const. art. 6, § 8; Code Civ. Proc. § 71, where it appeared that judge was related to attorney for defendant by consanguinity within third degree, attorney for defendant and judge being half-brothers born of same mother, held judge was disqualified from presiding at an arraignment, the hearing of a plea, or other preliminary steps beyond those necessary to regulate order of business and arrange calendar. People v. Ebey, 6 Cal. App. 769, 93 P 379.

34. So held where judge had no personal interest in action. Renshaw v. Cook, 33 Ky. L. R. 860, 895, 111 SW 377.

35. The fact that special judge is counsel for railroad which may be involved in litigation in respect to land in controversy does not disqualify him. Boreing v. Wilson, 33 Ky. L. R. 14, 108 SW 914.

36. Judge not disqualified from sitting in case involving right of a merged corporation to condemn land merely because some years previously he had been employed as counsel by one of constituent corporations in other condemnation proceedings against plaintiff. Keller v. Riverton Consol. Water Co., 34 Pa. Super. Ct. 301.

37. Disqualifies from sitting in cause. Stepp v. State, 53 Tex. Cr. App. 158, 109 SW 1093. Under Comp. St. 1905, § 37, c. 19, district judge disqualified to make order confirming judicial sale in action which he commenced and prosecuted to judgment for plaintiff. Harrington v. Hayes [Neb.] 115 NW 773.

38. Kerr v. Burns [Colo.] 93 P 1120. Ac-

The fact that a judicial officer takes the affidavit of a party making a complaint does not constitute him a counsel so as to work a disqualification.[39] A judge is not necessarily disqualified by professional relationship with counsel in the case.[40]

*Bias and prejudice.*[See 10 C. L. 466]—A judge should be absolutely free from bias of any kind,[41] and no judge should preside over a trial where the evidence requires him to make an elaborate explanation of his relations to the subject-matter of the litigation.[42] At common law, bias or favor, not the result of relationship or interest,[43] will not be presumed.[44] Only judicial favoritism disqualifies; favoritism of a mere personal or social character to a party or his attorney is insufficient.[45] Hostility to a party on the part of one of two attorneys for a railway company does not disqualify the other to sit as judge.[46] Objection for disqualification on account of bias is waived if not properly presented.[47]

*Procedure and trial of fact of disqualification.*[See 10 C. L. 466]—The party who seeks to disqualify a judge has the burden of presenting facts showing disqualification by the best evidence obtainable.[48] In some states, save where purely frivolous reasons are assigned, a judge is incompetent to sit in judgment upon a motion for his own recusation,[49] while in others the judge himself trys the question of his disqualification;[50] and where uncontroverted affidavits of disqualification are filed, he must accept them as true,[51] and grant a motion to call in another judge where bias or other disqualification is shown.[52] Where disqualification is shown, judge has no discretion but must transfer proceedings commenced or pending to the nearest and most accessible court where a like objection does not exist,[53] and deny it where in his judg-

quiescence to sitting held equivalent to affirmative consent. Id. Under Mills' Ann. Code, § 429, providing that judge shall not sit in case in which he has been attorney unless by consent of all parties, judge who had acted as attorney for one party held not disqualified where all parties participated in suit without objecting to his sitting. Id.

39. Judge not disqualified for trying case on account of having taken affidavit of a party charging another with commission of an offense. Stepp v. State, 53 Tex. Cr. App. 158, 109 SW 1093.

40. Not disqualified because attorney in case is his superior in common employment of corporation not directly interested in case. Boreing v. Wilson, 33 Ky. L. R. 14, 108 SW 914.

41. Wellmaker v. Terrell, 3 Ga. App. 791, 60 SE 464. Bias and prejudice works a disqualification. State v. Banta [La.] 47 S 538.

42. Political bias, amounting to personal hostility as shown by evidence, requiring elaborate explanation, etc., held to disqualify judge under Ky. St. 1903, § 968. Kentucky Journal Pub. Co. v. Gaines, 33 Ky. L. R. 402, 110 SW 268.

43. Interest need not necessarily be pecuniary but may be a personal one to judge. Fulton v. Longshore [Ala.] 46 S 989.

44. Fulton v. Longshore [Ala.] 46 S 989. Evidence insufficient to show pecuniary or personal interest sufficient to disqualify judge to try election contest. Id.

45. Boreing v. Wilson, 33 Ky. L. R. 14, 108 SW 914. Neither acceptance nor refusal of an invitation to dine will be considered as an evidence of such bias or friendship as to indicate lack of judicial integrity. Id. Fact that judge intended to appoint as commissioner, to hear proof and settle partnership accounts, a person prejudiced against one of parties and in favor of another no ground for disqualification, although a cause for objection to such appointment. Id. The fact that in a former case, where property now in controversy was involved, judge after deciding that a partnership existed expresses his satisfaction with the proof and complimented attorney on other side for presentation of case, held not to prejudice issue of existence of partnership so as to work a disqualification. Id.

46. Boreing v. Wilson, 33 Ky. L. R. 14, 108 SW 914.

47. By failure to specify objection in written motion for new trial. Commonwealth Elec. Co. v. Rooney, 138 Ill. App. 275.

48. Motions signed by counsel not supported by affidavit insufficient. Facts should have been shown by record evidence of facts. Johnson v. State [Okl. Cr. App.] 97 P 1059.

49. State v. Banta [La.] 47 S 538. Under Act No. 40, p. 38 of 1880, and No. 34, p. 48 of 1882, where reasons assigned in motion to recuse trial judge in criminal case alleged that judge was enemy of accused and so biased and prejudiced as to be incapable of giving a fair trial, and judge denied truth of allegations and declined to recuse himself, held he was incompetent to sit in judgment on motion. Id.

50. Swan v. Talbot, 152 Cal. 142, 94 P 238.

51. Code Civ. Proc. § 398. Parrish v. Riverside Trust Co. [Cal. App.] 93 P 685.

52. Swan v. Talbot, 152 Cal. 142, 94 P 238. By entertaining affidavits, court does not exercise discretion in transferring cause nor select judge who is to try it, since law makes selection when the undisputed facts are before the court. Parrish v. Riverside Trust Co. [Cal. App.] 93 P 685.

53. Parrish v. Riverside Trust Co. [Cal. App.] 93 P 685. Under Code Civ. Proc. §§ 398, 770, where defendants filed affidavits that

ment the disqualifying cause is not shown.[54] The objections must be made promptly.[55] Affidavits of disqualification may be filed by any party to an action.[56] In some states the mere filing of an affidavit of disqualification terminates a judge's jurisdiction.[57] An affidavit of disqualification must set forth the facts upon which the general allegation is made,[58] but an affidavit alleging facts which, if true, show that the trial judge will not or cannot afford the litigant an impartial trial is sufficient.[59] In Oklahoma only one change of judge can be had.[60] If a change of venue be granted by a judge, or if he disqualifies himself on some statutory ground, an entry in the record proper should show such fact.[61]

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**Judgment Notes,** see latest topical index.

**JUDGMENTS.**


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*The scope of this topic* is noted below.[62]

§ 1. *Definition, nature, and classification of judgments.* See 10 C. L. 467—A judgment is a determination or sentence of the law, pronounced by a competent court or

both judges of county were disqualified, and that Riverside County was nearest and most accessible, plaintiff filed affidavit not controverting others but showing that judge of R county was disqualified, and defendant filed additional affidavit that judge of O county next nearest was also disqualified. Held affidavits, though not counter, were properly considered, and order transferring cause to another county was proper. Id.

**54.** Under evidence and affidavits, not error to deny motion for change of judge. Swan v. Talbot, 152 Cal. 142, 94 P 238.

**55.** Too late to complain of disqualification after trial is ended. Johnson v. State [Okl. Cr. App.] 97 P 1059.

**56.** Where sheriff was sued for conversion for property levied on, and plaintiff in original action had indemnified sheriff, held such plaintiff without intervention became a "party" within Rev. Codes, § 6315, authorizing a "party" to disqualify judge by filing affidavit of prejudice. Gehlert v. Quinn [Mont.] 98 P 369. Code of Civ. Proc. §§ 170, 398, held not to restrict right to make and file affidavits to any particular party. Parrish v. Riverside Trust Co. [Cal. App.] 93 P 685.

**57.** Under Code Civ. Proc. § 6315, where a motion to strike portions of pleading was submitted and taken under advisement, and pending decision a disqualifying affidavit was filed and thereafter motion was overruled, held jurisdiction of case was terminated. State v. Second Judicial Dist. Ct., 37 Mont. 590, 97 P 1032. Rev. Codes, § 6315, providing that a judge shall be disqualified upon filing by party of affidavit that he has reason to and does believe that he cannot have an impartial hearing before judge by reason of bias and prejudice, held the law on subject. Gehlert v. Quinn [Mont.] 98 P 369.

**58.** Setting forth inference, suspicions and conjectures insufficient. Boreing v. Wilson, 33 Ky. L. R. 14, 108 SW 914.

**59.** Affidavit under Ky. St. 1903, § 968, held sufficient, error not to vacate bench. Kentucky Journal Pub. Co. v. Gaines, 33 Ky. L. R. 402, 110 SW 268.

**60.** Under Okl. Sess. Laws of 1903, p. 220, c. 25, § 1, art. 1, not error to not grant right to change judge where defendant had already taken a change of judge. Johnson v. State [Okl. Cr. App.] 97 P 1059.

**61.** Viertel v. Viertel, 212 Mo. 562, 111 SW 579.

**62.** This topic treats of judgments in general, and for a more particular and exhaustive treatment of judgments in particular actions or proceedings reference must be had to topics relating to such actions or proceedings. See such topics as Attach-

judge as a result of a proceeding instituted in or before such court or judge, affirming that, upon the matters submitted, a legal duty or liability does or does not exist.[63] It is the pronouncement of the judge on the issue submitted to him.[64] It is more than a mere order,[65] or award.[66] There can be but one judgment in an action.[67] A judgment entered on an exemplification of the record does not become a judgment in the common interpretation of the word in the county to which it is transferred.[68]

*Judgments on offer, consent, stipulation or confession.*[69]—A decree entered by agreement is not a judicial decree in its strict legal sense but a solemn contract entered by the court.[70]

*Defaults and office judgments.*[71]

*Final and interlocutory judgments.*[See 10 C. L. 467]—There can be but one final judgment in a case.[72] The word "final" is used of a judgment in several senses, and

ment, 11 C. L. 315; Alimony, 11 C. L. 96; Eminent Domain, 11 C. L. 1198; etc. For a more particular treatment of particular kinds of judgments, without reference to the character of the proceedings, see Confession of Judgment, 11 C. L. 663; Defaults, 11 C. L. 1063; Discontinuance, Dismissal and Nonsuit, 11 C. L. 1093. Equitable relief against judgments is treated generally, but see, also, Injunction, 12 C. L. 152. This topic excludes foreign judgments (see Foreign Judgments, 11 C. L. 1518), criminal judgments (see Indictment and Prosecution, 12 C. L. 1), conclusiveness of judgments between the parties (see Former Adjudication, 11 C. L. 1537), specific modes of enforcing judgments (see Creditors' Suits, 11 C. L. 936; Executions, 11 C. L. 1433; Sequestration, 10 C. L. 1622; Supplementary Proceedings, 10 C. L. 1765). It also excludes judgments upon particular pleadings (see Pleading, 10 C. L. 1173). For other matters relative to judgments but not treated herein or treated only generally or incidentally, see Mistake and Accident, 10 C. L. 853; Fraud and Undue Influence, 11 C. L. 1583; Appeal and Review, 11 C. L. 118; New Trial and Arrest of Judgment, 10 C. L. 999; Stay of Proceedings, 10 C. L. 1726.

**63.** Document reciting trial and verdict, etc., and "it is hereby ordered that judgment be entered," etc., **held not a judgment** but an order therefor, though entitled as a judgment and entered in the judgment book. Marsh v. Johnston, 123 App. Div. 596, 108 NYS 161. Order following action "whereupon it is ordered, considered, and adjudged that judgment be entered," etc., held not a judgment but an order for judgment. Dallam v. Sanchez [Fla.] 47 S 871. Unconditional order under Cobbey's Ann. St. 1903, § 1228, that a garnishee pay money into court, **held n judgment** within a statute making judgments a lien on lands of debtor, when docketed in district court. Johnson v. Samuelson [Neb.] 117 NW 470. Under Code Civ. Proc. § 570, defining a judgment as a final determination of the rights of the parties, where court ordered, adjudged, and decreed that within 10 days defendant should pay plaintiff a certain sum, instead of that "plaintiff do have and recover," etc., held a judgment. Hentig v. Johnson [Cal. App.] 96 P 390. Under B. & C. Comp. §§ 59, 396, "judgment" includes "decree." Waymire v. Shipley [Or.] 97 P 807.

**64.** The record is merely historical and evidentiary. Montgomery v. Viers [Ky.] 114 SW 251. In a proper sense there is no filing of a decree any more than there would be a filing of a judgment, and the draft made for the guidance of the clerk is not the decree. Horn v. Horn, 234 Ill. 268, 84 NE 904.

**65.** Under Code Civ. Proc. § 1003, defining an "order" as every direction of the court made in writing and not included in a judgment, and § 577, defining a judgment as a final determination of the rights of the parties, determination of judge dismissing a certain proceeding held not a judgment, but an order. In re Scott [Cal. App.] 96 P 385. Order of seizure and sale is not a judgment and an action to annul such order is not governed by the one year prescription. Pons v. Yazoo, etc., R. Co. [La.] 47 S 449. Decision overruling demurrer to amend complaint held not a judgment, but an order subject to vacation for cause, under Code Civ. Proc. § 473. Dent v. Los Angeles County Super. Ct. [Cal. App.] 95 P 672. Where demurrer to complaint was overruled and municipal court endorsed on the summons "Demurrer overruled with leave to plead over" within a certain time, such indorsement was not a judgment. Proper practice would have been to enter interlocutory judgment on such order. Binder v. Robinson, 110 NYS 229. Memorandum made by judge on trial docket opposite statement of the cause, "Nov. 14, 1903. Judgment by default for plaintiff," etc., held not a judgment but only a direction to the clerk as to the judgment to be entered. Winn v. McCraney [Ala.] 46 S 854.

**66.** An award for costs under Code Civ. Proc. §§ 779, 1251, is not a judgment and constitutes no lien on the debtor's real estate. Clinton v. South Shore Natural Gas & Fuel Co., 113 NYS 289.

**67.** Error to make a separate judgment for costs. Pelgram v. Ehrenzweig, 58 Misc. 198, 109 NYS 54.

**68.** Lehigh & N. E. R. Co. v. Hanhauser [Pa.] 70 A 1089.

**69.** See 6 C. L. 215. See, also, Confession of Judgment, 11 C. L. 663; Stipulations, 10 C. L. 1728.

**70.** A decree entered by agreement and not as the result of findings. Hohenadel v. Steele, 237 Ill. 229, 86 NE 717. Rehearing will not be allowed as to such a decree. Id.

**71.** See 10 C. L. 467. See, also, Defaults, 11 C. L. 1063.

**72.** New trial on one of two counts does not operate to set aside verdict on other counts, but stays operation of same until final judgment is entered on both counts.

when used in any qualified sense that fact must be kept clearly in mind.[73] A judgment which terminates and completely disposes of the action is final,[74] but one which does not so dispose of the action is not final.[75] A default judgment in an action for damages is interlocutory.[76]

§ 2. *Requisites. A. In general.* See 10 C. L. 468—A judgment entered without jurisdiction is void,[77] and hence the court must have jurisdiction of both the cause of action and the subject-matter thereof,[78] and except where there is an appearance,[79] legal service of process is also necessary.[80] Unless jurisdiction is conferred by ap-

Gann v. Dearborn Mfg. Co., 129 Mo. App. 425, 107 SW 15.

**73.** What judgments are final for the purpose of appeal and res judicata is treated respectively in Appeal and Review, 11 C. L. 118, and Former Adjudication, 11 C. L. 1537.

**74.** Order setting aside judgment and dismissing complaint **held final.** Newcomb v. Burbank, 159 F 569. Where action is based on gift of money made by certain person and used by him in paying firm debts, decree of dismissal is none the less final as to plaintiff, because containing unnecessary reservation of question as between partners whether one paid out money on behalf of firm. Goldsmith v. Goldsmith [Iowa] 117 NW 1077. Order setting apart premises as homestead for widow and children is final order and can be set aside only by motion for new trial within time limited or by motion under Ball. Ann. Codes & St. § 4953, authorizing court to vacate judgment for mistake, inadvertence or excusable neglect, or § 5153. In re McKeever's Estate, 48 Wash. 429, 93 P 916. Where on appeal taken on exception to commissioner's report decree of lower court was reversed by the supreme court, proper decree entered and case remanded, decision of supreme court is final. Matthews & Co. v. Progress Distilling Co. [Va.] 62 SE 924. Decree held final and judgment properly entered thereon for amount resulting from corrections ordered by decree to be made in referee's report upon which judgment was given. Brown v. Rogers [S. C.] 61 SE 440. When demurrer to petition is sustained upon general ground of insufficient facts pleaded, and pleader stands thereon and judgment is rendered against him, such judgment is final upon facts pleaded, and such facts cannot thereafter be relitigated between same parties, in any court. Holderman v. Hood [Kan.] 96 P 71. Where condition in decree available only to appellants, their waiver by appealing of right to avail themselves of such condition had effect of making decree final and absolute and hence appealable, without waiting until time for availing themselves of condition had expired and judgment became final by its terms. Moore Printing Typewriter Co. v. Nat. Sav. & Trust Co., 31 App. D. C. 452. Where motion for new trial is entered on day judgment is rendered, judgment is **not final** until motion is determined. Vogelsang v. Fredkyn, 133 Ill. App. 356.

**75.** Judgment of partition and order of sale is interlocutory, order of distribution being final. Collier v. Catherine Lead Co., 208 Mo. 246, 106 SW 971. Order directing receiver to disburse among creditors all funds in his hands but not purporting to be a final order winding up the estate, but which sent accounts to a master, held not a final order ousting court of jurisdiction to entertain cross bill by receiver against creditor. Ledbetter v. Mendell, 124 App. Div. 854, 109 NYS 602. Where creditors filed a bill against debtor and assignee for their benefit, setting up that sale of property would sacrifice same and prayed for receiver to manage property, an order granting prayer and appointing receiver was not final judgment. Id.

**76.** One of two defendants in an action for damages, who defaults, still remains a party for the purpose of assessing damages, the default judgment being interlocutory and not final. Wilkins v. Brock [Vt.] 70 A 572.

**77.** McHenry v. State [Miss.] 44 S 831.

**78.** Judgment rendered by a court which has no jurisdiction is void. Bedingfield v. First Nat. Bank [Ga. App.] 61 SE 30; State v. State Dispensary Commission, 79 S. C. 316, 60 SE 928. This principal applies to an order of injunction. State v. State Dispensary Commission, 79 S. C. 316, 60 SE 928. Judgment is void where want of jurisdiction is apparent on its face. Churchill v. More [Cal. App.] 96 P 108. Judgment **held void** for want of jurisdiction where notice and return in attachment showed that it was not served in accordance with statute, where affidavit in attachment and writ and notice showed attachment was against personal estate of defendants representing parish, and where service of notice was too defective and irregular to be good as to either defendant and failed to comply with provisions of statute and was issued, posted and mailed prematurely. Czyston v. St. Stanislaus Parish, 131 Ill. App. 161. Judgment of adoption **held not void** for want of jurisdiction where court had jurisdiction of both parties and subject-matter necessary to render judgment. Jones v. Leeds, 41 Ind. App. 164, 83 NE 526.

**An exception** to this rule is that a judgment of the United States supreme court is binding on all the courts of the land, and the decision of the appellate courts of a state are binding on subordinate courts. State v. State Dispensary Commission, 79 S. C. 316, 60 SE 928.

**79.** See, generally Appearance, 11 C. L. 255. Where defendant was represented by attorneys who moved against pleadings and were served with notes of issue and notice of trial and motion for default, court had jurisdiction of person of defendant. Nichols v. Doak, 48 Wash. 457, 93 P 919. Evidence insufficient to show that attorneys who appeared for defendant were unauthorized to do so. Broadway v. Sidway, 84 Ark. 527, 107 SW 163.

**80.** See, also, Process, 10 C. L. 1262. Elmore v. Johnson, 121 La. 277, 46 S 310. Judg-

pearance, personal service within the court's jurisdiction is essential to a judgment in personam,[81] but a judgment in rem may be entered on constructive service.[82] One who submits himself to the jurisdiction of the court cannot raise objection as to the manner in which the court has acquired its jurisdiction.[83] A judgment is not rendered void by mere irregularities[84] or errors[85] therein. A judgment must be sup-

ment rendered without proper service of process is void. Stubbs v. McGillis [Colo.] 96 P 1005; Lindberg v. Thomas, 137 Iowa, 48, 114 NW 562; Minnesota Thresher Mfg. Co. v. L'Heureux [Neb.] 118 NW 565; Nicoll v. Midland Sav. & Loan Co. [Okl.] 96 P 744; St. Louis, etc., R. Co. v. English [Tex. Civ. App.] 109 SW 424. Judgment in personam rendered against a defendant without notice to him or appearance by him is without jurisdiction and is entirely void. Weaver v. Webb, 3 Ga. App. 726, 60 SE 367. No jurisdiction is acquired until return of process or proof of publication. Deputy v. Dollarhide [Ind. App.] 86 NE 344. Where record or judgment does not show service of summons or that parties were before the court, the judgment is void. Cox v. Fowler, 33 Ky. L. R. 928, 111 SW 703. Where personal judgment was entered but record showed no process, appearance or constructive notice, held no valid judgment was shown. Southern Timber & Inv. Co. v. Poe [Ala.] 45 S 205; Southern Timber & Inv. Co. v. English Mfg. Co. [Ala.] 45 S 206. On a showing that no service of summons has been made, it is the duty of the court to vacate the judgment. Stubbs v. McGillis [Colo.] 96 P 1005. If service of process is void, the judgment may be collaterally attacked. Town of Point Pleasant v. Greenlee, 63 W. Va. 207, 60 SE 601. Decree in a suit in personam against heirs of a deceased person, without giving their names in the complaint or warning order, is beyond the jurisdiction of the court, and void. Indiana & Ark. Lumber & Mfg. Co. v. Brinkley [C. C. A.] 164 F 963. Judgment against garnishee by court having no jurisdiction because of want of service is void and subject to collateral attack. Howell v. Sherwood [Mo.] 112 SW 50.

**Constructive service:** Decree based upon constructive service of process is void if the conditions authorizing such publication are not fulfilled. Indiana & Ark. Lumber & Mfg. Co. v. Brinkley [C. C. A.] 164 F 963. Judgment cannot be rendered against nonresident without appearance, in absence of proof of facts required by Code 1896, § 531, to constitute notice by publication. Southern Timber & Inv. Co. v. Creagh [Ala.] 45 S 666. A judgment rendered by publication against a resident of the state who might have been served personally is absolutely void. Wagner v. Lincoln County [Neb.] 114 NW 574; Hayes County v. Wileman [Neb.] 118 NW 478. Failure to give proper notice to interested parties of hearing on a petition for appointment of an administrator by publication of the citation for the full statutory time renders subsequent proceedings voidable and subject to be set aside. In re Hanson [Minn.] 117 NW 235.

**81.** Vick v. Flournoy, 147 N. C. 209, 60 SE 978. Judgment in personam, where there has been no personal service or appearance, is void. Rutherford v. Ray, 147 N. C. 253, 61 SE 57. Service of process by publication does not authorize judgment in personam. Gassert v. Strong [Mont.] 98 P 497. Under Civ. Code Prac. § 419, personal judgment cannot be rendered against one constructively served. Pendleton v. Pendleton [Ky.] 112 SW 674. Personal judgment cannot be rendered on service by publication under Rev. St. 1899, §§ 582, 575. Moss v. Fitch, 212 Mo. 484, 111 SW 475. Under Rev. St. 1899, § 582, personal judgment on service outside the state is unwarranted in action for divorce. Id. Where an absentee is called in warranty through a curator ad hoc and proceedings are carried to judgment contradictorily with the curator, a moneyed judgment against such absentee is void. Andrews v. Sheehy [La.] 47 S 771. Attachment proceedings are in rem, and no valid judgment in personam can be had where there has not been personal service. Southern Timber & Inv. Co. v. Creagh [Ala.] 45 S 666. Court of equity will not render decree in personam enjoining act on the part of nonresident. Royal Fraternal Union v. Lundy [Tex. Civ. App.] 113 SW 185.

**82.** Action to redeem from foreclosure and enforce contract in respect to land held in rem, and jurisdiction to render judgment was acquired by service under Revisal 1905, §§ 448, 442. Vick v. Flornoy, 147 N. C. 209, 60 SE 978. Judgment quasi in rem on substituted service on nonresident held valid. Code Civ. Proc. § 637. Gassert v. Strong [Mont.] 98 P 497.

**83.** Codefendant who answers cross petition on merits after decree in favor of complainant against cross petitioner cannot object that such decree eliminated cross petition from suit. Novak v. Vovak, 137 Iowa, 519, 115 NW 1.

**84.** Judgment foreclosing mortgage not rendered void by plaintiff's failure to give bond required by statute. Highland Land & Bldg. Co. v. Audas, 33 Ky. L. R. 214, 110 SW 325. Where jury trial may be waived, **failure to swear jury until after verdict** and judgment is an irregularity, but does not render the judgment void. Texas & P. R. Co. v. Butler [Tex. Civ. App.] 114 SW 671.

**Default judgment** entered in absence of both parties, but at time the cause is regularly reached, is voidable, but not void. Pitman v. Heumeier [Neb.] 115 NW 1083. Under Rev. St. 1887, § 4701, where judge of probate court entered default instead of postponing case, and 3 days later heard proofs and entered judgment, the judgment was not void, though irregular. Zimmerman v. Bradford-Kennedy Co., 14 Idaho, 681, 95 P 825. **Irregularity in affidavit for published service** will not render judgment void unless such irregularity is so great that the affidavit is rendered substantially worthless. Finn v. Howard, 77 Kan. 421, 94 P 801. Under Rev. Code Civ. Proc. §§ 237, 309, 316, **delay in filing proof of service** until after default was entered is a mere irregularity. Burton v. Cooley [S. D.] 118 NW 1028. Irregularity consisting of **clerical error** as to number of lot in tax foreclosure

ported by pleadings,[86] proof,[87] valid findings [88] and verdict.[89] It is sometimes provided by statute that a judgment in favor of the plaintiff in a joint action against several defendants must be against all the defendants, though some have not been

judgment held not sufficient to defeat judgment. Stevens v. Doohen [Wash.] 96 P 1032. **Disregard of remedial limitations** in a case of which the court has jurisdiction does not render the judgment void. In re Clark, 135 Wis. 437, 115 NW 387. In quo warranto where the subject-matter was within the power of the court, but it was prohibited from exercising jurisdiction for the purpose of restraining proceedings of a court of co-ordinate jurisdiction, the judgment was not wholly void, but was binding until set aside. Id. See, also, Harrigan v. Gilchrist, 121 Wis. 127, 99 NW 909.

85. Binding force of decree is not affected by fact that court erred. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139. Error in decreeing alimony to wife in divorce (Kirby's Dig. § 2681) does not render the decree void. Pryor v. Pryor [Ark.] 114 SW 700. In suit to foreclose mortgage against nonresidents constructively served, the fact that personal judgment was improperly rendered did not affect court's power to order sale or render judgment as to such relief void. Highland Land & Bldg. Co. v. Audas, 33 Ky. L. R. 214, 110 SW 325. Though in action of ejectment, where answer does not set up affirmative defense or counterclaim and defendant does not prove title and plaintiff does not appear, the proper judgment is one of nonsuit, yet broader one is merely erroneous and not void, the court having jurisdiction. Comstock v. Boyle, 134 Wis. 613, 114 NW 1110.

86. Must be based on pleadings stating case to support it. Hart v. Hunter [Tex. Civ. App.] 114 SW 882. A judgment cannot be rendered against person as to whom the pleadings fail to state a cause of action. Eckels v. Henning, 139 Ill. App. 660. Sufficiency of pleadings is not test of jurisdiction, and though defective they will sustain judgment if court has authority to grant relief demanded and facts are set forth intelligibly. In re Nelson's Estate [Neb.] 115 NW 1087. Whether judgment is supported by the pleadings depends on a reasonable construction of the pleadings as a whole. Chesney v. Chesney, 33 Utah, 503, 94 P 989. A judgment in an action for the value of specific personal property cannot be sustained on pleadings which raise no issue concerning its value or prayer for such recovery. Wagoner Nat. Bank v. Welch [C. C. A.] 164 F 813. A **judgment by default** upon a complaint which does not state a cause of action is void. Lewis v. Clements [Okl.] 95 P 769. Default rendered on service by publication must rest for validity on petition as it existed when order for publication was made. Cooper v. Gunter [Mo.] 114 SW 943. Cause of action set up for first time in reply which was a departure from that alleged in the petition will not sustain a default. Spiess' Adm'x v. Bartley [Ky.] 113 SW 127.

**Conformity to statutory requirements:** In action on judgment in replevin, evidence held sufficient to show that **verification** was made at the time it was filed, but that the jurat, through oversight, was not attached until later. Schattler v. Heisman, 85 Ark. 73. 107 SW 196. Under Acts 1898-99, p. 225, authorizing judgment by default on an account where plaintiff files a verified statement, a default in an action on account, rendered without stating that ths statute had been complied with, is erroneous, though complaint states that account is verified. Greer & Walker v. Lilpfert-Scales Co. [Ala.] 47 S 307. Answer cannot be regarded as a nullity and judgmsnt entered as on default because answer was verified before defendant's attorney. Zickermann v. Wohlstadter, 113 NYS 403. **Service** of amended petition is essential to sustain judgment thereon by default. Palmer v. Spandenberg [Tex. Civ. App.] 110 SW 760.

**Pleadings held sufficient** to sustain judgment. Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. [Tex. Civ. App.] 111 SW 417. Allegation on insurance policy that insurance was due, while a conclusion, was also an allegation of fact sufficient to support the judgment. Rogers v. Shawnee Fire Ins. Co. [Mo. App.] 111 SW 592. Where complaint is sufficient to support action on judgment, it may be treated as such though it sets up void transcript by which the judgment was transferred, and additional allegations did not permit one who had full opportunity after service to present his objections in a regular way to set aside judgment entered on default. Goebel Brew. Co. v. Medbury [Mich.] 15 Det. Leg. N. 335, 116 NW 543. **Where declaration is in several counts,** one of which will support verdict, a judgment entered thereon is good. Hansen v. De Vita [N. J. Law] 68 A 1062.

**Pleadings held insufficient:** Complaint held to show that defendant had been discharged and insufficient to sustain judgment against him. Palmer v. Spandenberg [Tex. Civ. App.] 110 SW 760.

87. Phelan v. New York, etc., R. Co., 113 NYS 35. Stipulation merely consenting that pleadings bs amended held not an admission of truth of allegations, and hence not a proper basis for judgment. Id. Where all material allegations of complaint were denied by answer, plaintiff was required to prove his allegations before being entitled to judgment by default. Isom v. Holcomb, 33 Ky. L. R. 307, 110 SW 249. So held under Civ. Code Proc. § 126, in action against infants. Id. A decree granting affirmative relief must be justified by the facts which it specifically finds, or by evidence appearing in the record. Warden v. Glos, 236 Ill. 511, 86 NE 116.

88. Where findings of fact are contradictory and uncertain and intention of court cannot be ascertained and certain parts of judgment are not supported by all findings, the judgment will be reversed and the case remanded for new findings and judgment. Frederickson v. Deep Creek Irr. Co. [Idaho] 96 P 117.

89. Code, § 3732, provides that a verdict shall be filed, entered on and mads a part of the record, and a judgment on a verdict not filed and made of record may be set aside on motion. Fred Heim Brew. Co. v. Hamilton, 137 Iowa, 376, 114 NW 1039.

served;[90] or if the court has jurisdiction of all the defendants, judgment may be rendered against those found liable;[91] or when there is a misjoinder of parties plaintiff, judgment may be rendered in favor of the parties entitled thereto.[92] Error in entering judgment against a defendant not served does not necessarily affect the validity of the judgment as to a defendant served.[93] A judgment against one defendant is not necessarily precluded by a directed verdict in favor of a codefendant[94] or by a discontinuance as to a codefendant.[95] Notice for judgment is sometimes essential.[96] The court may in its discretion grant a second rule for judgment, where a party abuses his rights under an order discharging a first rule.[97] Where a judgment is rendered in vacation, statutory requirements must be observed.[98] Physical appearance of parties is unnecessary to the validity of a judgment rendered by agreement.[99]

(§ 2) *B. Conformity to process, pleading, proof and verdict or findings.*[See 10 C. L. 469]—A judgment must conform to the pleadings,[1] and the issues thereby made,[2]

**90.** Under Code Civ. Proc. § 1932 where action is against several jointly, but only one or more are served, judgment must be taken against all. Abromiovitz v. Markowitz, 58 Misc. 231, 108 NYS 1044. Under St. 1898, § 2884, providing for judgment in form against all defendants jointly liable, though some have not been served, where only one partner was served in an action on a firm debt judgment was properly entered against the one served and against the firm. Gessner v. Roeming, 135 Wis. 535, 116 NW 171.

**91.** Under Code 1904, § 3395, providing that in an action against two or more plaintiff may have judgment against any one from whom he would have been entitled to recover if sued alone, one cannot complain that as to his codefendant verdict is set aside as contrary to evidence. McIntyre v. Smyth, 108 Va. 738, 62 SE 930. Code Civ. Proc. 1895, § 1002, provides that in an action against several defendants the court may in its discretion render judgment against one or more of them leaving the action to proceed against the others, where the defendants are severally liable. State v. Ninth Judicial Dist. Ct., 37 Mont. 298, 96 P 337. Where two or more are sued as partners and plaintiff fails to establish a joint liability, judgment may be had against **any found liable.** Lapinsky v. Colish, 113 NYS 733.

**92.** Under Code Civ. Proc. § 578, where there is a misjoinder of parties plaintiff, judgment should not be for defendant, but the action should be dismissed as to the party improperly joined, and retained as to the others, and such judgment rendered as they are entitled to. Gillespie v. Gouley, 152 Cal. 643, 93 P 856.

**93.** Where, in action against individual and town to compel removal of obstruction in street placed there by individual, the town was not served with process and judgment was erroneously entered against it, such fact did not require disturbing the judgment because execution thereof against the individual would abate the nuisance without affecting any property right of town. State v. Franklin [Mo. App.] 113 SW 652.

**94.** In action against city and contractor for injuries sustained because of defect in a temporary sidewalk, the city being primarily liable, a directed verdict for the contractor did not preclude judgment against the city. Jones v. Seattle [Wash.] 98 P 743.

**95.** On appeal from justice in forcible entry against husband and wife, discontinuance as to wife does not make a new case so that judgment could not be had against the husband. Monahan v. Schwartz, 32 Ky. L. R. 1285, 108 SW 285.

**96.** Notice for judgment held fatally defective because not alleging facts. State v. Keadle, 63 W. Va. 645, 60 SE 798. Notice for judgment is not defective because facts are recited under a "whereas" instead of by positive averment. Id.

**97.** Where plaintiff had his rule for judgment for want of a sufficient affidavit of defense discharged so as to accelerate a trial, and thereafter the defendant for purpose of delay ruled the case out for arbitration, the court in its discretion might grant a second rule for judgment. Pence v. Poet, 221 Pa. 434, 70 A 832.

**98.** In order to confer jurisdiction upon a judge to render judgment in vacation, the consent of the parties must be given and authenticated as required by Code 1904, § 3427. Wingfield v. McGhee, 108 Va. 120, 60 SE 755. Record showing that "on motion of plaintiff it is ordered that the cause be submitted," etc., is insufficient. Id. Pleadings must be made up and proof filed before the court can render judgment in vacation as provided by Code, § 3427, without the consent of the parties. Id. Decree void because rendered in vacation without consent of the parties as required by Code 1904, § 3427, is not made valid by proceedings in vacation to correct recitals therein under § 3451. Id.

**99.** Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. [Tex. Civ. App.] 111 SW 417.

**1.** Furst v. Zucker, 110 NYS 63. Must be responsive to pleadings. Black v. Early, 208 Mo. 281, 106 SW 1014. A judgment is void to the extent that it goes beyond the pleadings and prayer. Charles v. White [Mo.] 112 SW 545. Erroneous where not justified by pleadings though based on facts found. Berman v. Kling [Conn.] 71 A 507. Judgment will not be amended on appeal by inserting name not appearing in declaration or plea, since to do so would make variance between pleading and judgment and judgment must follow pleading. Northwest Land & Trust Co. v. Lowman, 132 Ill. App. 454. **In suit for land,** where complaint is for undivided one-half of land, judgment must be for undivided one-half. Wells v. Blackman, 121 La. 394, 46 S 437. **In suit for specified sum,** a greater

sum cannot be recovered. Morris v. Smith [Tex. Civ. App.] 113 SW 130. Judgment **in partition** held unauthorized by the pleadings and void. Davis v. Davis [Tex. Civ. App.] 112 SW 948. Where pleadings consisted of an ordinary petition in ejectment, a general denial, a plea of statute of limitations, and a general reply, a judgment for defendant for costs is consistent with the pleadings. Coleman v. Roberts [Mo.] 114 SW 39. **In trespass to try title,** plaintiff held not entitled to complain that the judgment did not adjudicate boundaries of a certain three acres, as he was not entitled to such relief under the pleadings. De Roach v. Clardy [Tex. Civ. App.] 113 SW 22. Where allegations of complaint are admitted and matter of defense set up, judgment should be for plaintiff on pleadings if allegations of **cross complaint** are insufficient to sustain judgment for defendant. Pugh v. Stigler [Okl.] 97 P 566. If a **complaint against several** fails to state a cause of action against all, a judgment against all as a unit may be arrested on motion of any defendant against whom a cause of action is not stated. Henning v. Sampsell, 236 Ill. 375, 86 NE 274.

**Effect of abolition of forms of action:** Since code abolishes forms of action, where plaintiff proceeds on theory that his remedy is by suit in equity, but complaint fails to state facts entitling him to equitable relief, but does state facts entitling him to money judgment, he will be given relief to which he appears to be entitled. Donovan v. McDevitt, 36 Mont. 61, 92 P 49.

**Judgments held not in conformity with pleadings:** Judgment in action on quantum meruit which is **contrary to admissions** in defendant's answer that work was worth certain amount. Horn v. Martinko [Cal. App.] 94 P 79. Plaintiffs having failed to prove cause of action alleged in their complaint, and proper objections having been made, and no amendment asked for, judgment in their favor **on cause of action not alleged** could not be sustained on appeal. Epstein v. Cohen, 56 Misc. 579, 107 NYS 148. Recovery may not be had on a wholly different cause of action than the one pleaded. Hayes v. American Bridge Co., 111 NYS 883. Amendment of petition on which judgment was rendered by **abandonment of cause of action** upon which such judgment was predicated, and then substitution for such judgment of entirely different judgment upon petition as amended, held improper. City of St. Louis v. G. H. Wright Contracting Co., 210 Mo. 491, 109 SW 6. Judgment on mutual benefit certificate **on theory not alleged,** as when judgment was based on theory of total disability but liability for such disability was not alleged. Brotherhood of R. Trainmen v. Dee [Tex.] 111 SW 396. Where suit to recover illegal tax was on theory that it was paid under protest, which was successfully controverted, judgment could not be rendered on any other theory. Nashville, etc., R. Co. v. Marion County [Tenn.] 108 SW 1058. One cannot plead one act of negligence and recover on another. Huss v. Heydt Bakery Co., 210 Mo. 44, 108 SW 63. May not be based on a different cause of action than that alleged. Berman v. Kling [Conn.] 71 A 507. When the only theory upon which a complaint states a cause of action is unsupported, a judgment for plaintiff will be reversed. Varn v. Pelot [Fla.] 45 S 1015. Recovery cannot be had on **facts not pleaded.** Kennedy v. Pearson [Tex. Civ. App.] 109 SW 280; Berman v. Kling [Conn.] 71 A 507. That demurrer was not acted upon so as to be deemed waived, and evidence of such unreasonable delay was not objected to, did not authorize the court to base judgment on facts not alleged. Davis v. Davis [Tex. Civ. App.] 112 SW 948. **Damages on grounds not alleged** cannot be allowed. Rich v. Western Union Tel. Co. [Tex.] 108 SW 1152. Judgment based **on allegations appearing only in replication** cannot be sustained. Manuel v. Turner, 36 Mont. 512, 93 P 808. Judgment **in excess of liability created by instrument sued on,** as where endorser, bound by endorsement to pay on demand, is held as a guarantor. Clymer v. Terry [Tex. Civ. App.] 109 SW 1129. In foreclosure proceedings where the complaint set up two mortgages of property described in both as a "homestead," but only one of which was signed by the wife, the fact that she appeared afforded no support to a decree extinguishing her rights under the mortgage signed only by her husband. Davis v. Davis [Vt.] 69 A 876. Decree in divorce suit amended so as to correctly describe property sought to be divided, thus creating **variance between decree and complaint as to description of property** which was not correctly described by complaint. Senkler v. Berry [Or.] 96 P 1070. **Money judgment in suit for conveyance** of mining property. Chenoweth v. Butterfield [Ariz.] 94 P 1131. Where only claim set up in pleadings was for land, it was error to render judgment charging land with money advanced to improve it. Allen v. Allen [Tex.] 20 Tex. Ct. Rep. 479, 107 SW 528. **Judgment at law in suit in equity** is unauthorized, and hence where complaint states equitable cause of action, such a judgment is erroneous. Craigo v. Craigo [S. D.] 118 NW 712. Judgment **on guaranty where suit was for services** performed. Stone v. Stoits, 112 NYS 1045. Quieting defendant's title is **not authorized on general denial in specific performance suit.** Mancuso v. Rosso [Neb.] 116 NW 679. Judgment over **against principal in favor of guarantor** not authorized where not asked for by pleadings. Palmer v. Spandenberg [Tex. Civ. App.] 110 SW 760.

**Judgments held in conformity with pleadings:** Judgment **in trespass to try title** held not objectionable as giving plaintiff more land than he claimed. Hildebrandt v. Hoffman [Tex. Civ. App.] 113 SW 785. Where claim for damages for cutting timber from land was withdrawn in trespass to try title, judgment on that issue was unnecessary. Haynes v. Texas & N. O. R. Co. [Tex. Civ. App.] 111 SW 427. Decree **in partition** held within scope of the pleadings. Collins v. Crawford [Mo.] 112 SW 538. **In an action for personal injuries,** where answer alleged payment of a certain sum in satisfaction of damages and the court found the claim to be untrue and plaintiff testified that the sum was paid to compensate for time lost, the judgment need not be modified to the extent of crediting the amount of such payment. Dalton v. Pacific Elec. R. Co. [Cal. App.] 94 P 868. Complaint **on contract** obligation is sufficient to sustain judgment if such obligation appear by reasonable intendment. Postal Tel.-Cable Co. v. Sunset Const. Co. [Tex. Civ. App.] 109 SW 265. Judgment **against married woman** sued as a feme sole is valid

the proof,[3] and the verdict or findings.[4] In some instances a finding manifestly er-

where the action is brought on contract made in her maiden name. Emery v. Kipp [Cal.] 97 P 17.

**Judgment including attorney's fees** is not void because such fees were not authorized by pleadings. Shahan v. Myers, 130 Ga. 724, 61 SE 702.

2. Ireland v. Bowman [Ky.] 113 SW 56; Weissenfels v. Cable, 208 Mo. 515, 106 SW 1028. A judgment in a suit for replevin which is wholly outside the issues is void for want of jurisdiction to decide the question. J. P. Jorgenson Co. v. Rapp [C. C. A.] 157 F 732. Where only issue was whether deed was void as to complaining creditor, decree divesting title held void as beyond jurisdiction of court. Charles v. White [Mo.] 112 SW 545. Where judgment could be based on no other ground than false assumption not submitted, it was held erroneous. San Antonio Mach. & Supply Co. v. Campbell [Tex. Civ. App.] 110 SW 770. Where only issue triable is whether county court erred in issuing letters of administration, judgment of circuit court on appeal attempting to determine heirs is unwarranted. In re Skelly's Estate [S. D.] 113 NW 91. In suit to recover from one a sum of money as proceeds of land sold by him on ground that he held legal title as security only, on a finding against such contention and that plaintiff held under void oral contract, the court could render judgment for plaintiff for amount of payments made by him on the contract. Richer v. Carlson, 136 Wis. 353, 117 NW 815.

**Where parties consent to litigate issue** not raised, a judgment on such issue **is final.** Engel v. Sontag, 110 NYS 933.

3. Judgment on cause of action alleged cannot be sustained where not proved. Abromovitz v. Markowitz, 56 Misc. 231, 108 NYS 1044. Judgment for amount impossible to be arrived at under pleadings and proof is erroneous. Paster v. Meyer, 107 NYS 736. Judgment based on misconception of evidence and not in conformity thereto is erroneous. Goetschius v. De Barbieri, 110 NYS 1076. Where one entitled only to equitable portion of fund demands all of it, he cannot complain of refusal of court to give any relief where evidence furnishes no basis for division of fund. Malone v. Malone, 151 Mich. 680, 15 Det. Leg. N. 79, 115 NW 716. **Motion for judgment** for the entire amount claimed is properly refused where, except as to one item, his right to recover is for jury. Hamill v. Schlitz Brew. Co. [Iowa] 115 NW 943. Where petition for cancellation of instrument for fraud alleged **offer to reimburse** plaintiff for use of property and decree showed that in open court plaintiff offered such reimbursement as price of decree, but decree by inadvertence omitted to adjudge defendants such payment, it is erroneous. Reed v. Colp [Mo.] 112 SW 255. **Judgment against several defendants** may not be had where evidence shows that but one is liable. Selnick v. Epstein, 113 NYS 827. Where firm member who owned land individually, gave a broker written authority to sell it, and in an action against firm there was no evidence that the agreement was made by the firm, a judgment against all the defendants was erroneous. Beuthien v. Alberts [Mich.] 15 Det. Leg. N. 681, 117 NW 556. Where plaintiff admitted that defendant was entitled to recover on a **counterclaim,** it is error to enter judgment without deducting such counterclaim. Fish v. Hahn, 124 App. Div. 173, 108 NYS 782. In action for money where counterclaim was set up and certain liability thereon admitted, the court properly deducted such sum from the verdict and rendered judgment for balance. Ferguson & McDaris Lumber Co. v. Tiede & Co., 130 Mo. App. 269, 109 SW 850. **Where facts are stipulated** as facts and such stipulation shows no liability on the part of defendant, it is error for court to overrule motion for judgment on stipulated facts. Andrews v. Moore, 14 Idaho, 465, 94 P 579. In trespass to try title, **where defendant disclaimed title,** judgment for plaintiff is proper though he does not offer evidence. Hildebrandt v. Hoffman [Tex. Civ. App.] 113 SW 785.

4. Must conform to verdict. Haumueller v. Ackermann, 130 Mo. App. 387, 109 SW 857. Where findings and conclusions do not support judgment, it cannot be sustained. Village of Hailey v. Riley, 14 Idaho, 481, 95 P 686. Use of word "supposed" held not to authorize basing of judgment on conjecture instead of on facts duly found. Kunz v. Oregon R. & Nav. Co. [Or.] 94 P 504. Unless answer is manifestly insufficient as defense, finding of issues in favor of defendant entitles him to judgment. Daly v. Daly, 80 Conn. 609, 69 A 1021. Fact that judgment order runs against "defendants" in action for personal injuries and provides for payment in due course of administration is not tantamount to dismissal as to all those defendants who were not receivers, where it appears that verdict was against all defendants, including those not receivers, and that separate motions for new trial and in arrest of judgment were made in behalf of several defendants. Eckels v. Henning, 139 Ill. App. 660. Judgment cannot be sustained by **general verdict** where plaintiff joined eighteen independent libels in one count, five of which were wholly insufficient. Flowers v. Smith [Mo.] 112 SW 499. Right to judgment **on special findings** returned with the general verdict, under Rev. St. 1899, § 3656, is limited to cases where there is an inconsistency between the special finding and general verdict, under § 3657. Chicago, etc., R. Co. v. Morris, 16 Wyo. 308, 93 P 664. In determining what judgment may be properly entered upon a special verdict, nothing can be looked at by court except pleadings and postea. Collins v. Whiteside [N. J. Err. & App.] 69 A 174. Where material fact found by jury on special interrogatories is in conflict with the general verdict, judgment should be given on the facts found. United States Health & Acc. Ins. Co. v. Clark, 41 Ind. App. 345, 83 NE 760. **Verdict for both plaintiff and defendant** will not sustain judgment for defendant. National Cash Register Co. v. Price, 41 Ind. App. 274, 83 NE 776. In action for price of goods, verdict was for defendant, said defendant paying $40 to plaintiff and plaintiff keeping the goods. Held it would not support an unconditional judgment for defendant. Id. Judgment must be rendered upon verdict and court has no power to render **judgment for only part of items of damage allowed.** Rich v. Western Union Tel. Co. [Tex. Civ. App.] 110 SW 93. Where **in action against several defendants** only one

roneous may be disregarded as surplusage and judgment entered in accordance with the verdict as thus corrected.[5] Generally surplusage in no manner affects the validity of the judgment proper.[6] The judgment should also conform to the prayer,[7] but this rule is modified and in some cases entirely abrogated by the codes of practice,[8] and in equitable actions the prayer for general relief authorizes any relief consistent with the facts proved.[9] A decree must pass on the entire prayer.[10] Where the judgment grants all the relief to which the plaintiff is presently entitled, he cannot complain in that it does not anticipate relief to which he may in the future be entitled.[11]

was served and action was dismissed as to others after verdict, judgment was properly entered against one served. Siltz v. Springer, 236 Ill. 276, 85 NE 748. Finding **as to sufficiency of issue of bonds** held sufficient to sustain judgment based thereon. Zimmermann v. Timmermann [N. Y.] 86 NE 540. **In suit to recover certain sum and interest** for failure to deliver property sold, the verdict of the jury is to be regarded as principal and interest and it was error for the court to add interest thereto. Houston v. Booth [Tex. Civ. App.] 20 Tex. Ct. Rep. 795, 107 SW 887. Finding in judgment order that damages awarded plaintiff were for so much money due and earned as employe of defendant held sufficient finding that recovery was for **wages, under Employment Act** of 1889, § 13. Goodridge v. Alton, 140 Ill. App. 373. **In action by creditors of decedent on bonds given by administrator** on procuring orders to sell real estate, findings that administrator failed to apply proceeds of such sales to payment of debts, or to pay the money into court in compliance with orders and that he withheld such proceeds, authorize judgment on bonds. Egoff v. Board of Children's Guardians of Madison County [Ind.] 84 NE 151. Judgment **in action against telegraph company** for failure to deliver message held not to conform to findings. Holler v. Western Union Tel. Co. [N. C.] 63 SE 92.

**Amendment to conform to verdict** may be allowed in matters of form, as where judgment provides for recovery of property excluded by verdict. Central Brew. Co. v. American Brew. Co., 135 Ill. App. 648.

5. Where the jury in an action to contest a will return a verdict establishing its validity, but by manifest error insert date of execution of will as date of its probate, and record shows that but one paper writing purporting to be last will of decedent was exhibited to the jury, and that, were date of probate as given by jury correct, right to contest the will would have been barred, it is not error for court to treat date given by jury as mere surplusage and to enter judgment upon verdict correcting error and establishing validity of will. Seal v. Goebel, 11 Ohio C. C. (N. S.) 433.

6. Bank of North Wilkesboro v. Wilkesboro Hotel Co., 147 N. C. 594, 61 SE 570.

7. Relief cannot exceed that demanded in complaint. Code Civ. Proc. § 1003. Manuel v. Turner, 36 Mont. 512, 93 P 808. City having prayed that telephone company be enjoined from doing business in city "or" from charging higher rates than authorized, latter relief was properly granted on default of company. Cumberland Tel. & T. Co. v. Hickman, 33 Ky. L. R. 730, 111 SW 311. **Amount of judgment** is limited to the sum prayed for. Ray v. Southern R. Co., 77 S. C. 103, 57 SE 636. It is error to award damages in a greater sum than prayed. Haumueller v. Ackermann, 130 Mo. App. 387, 109 SW 857. In action on notes given for purchase price of land, where one of makers was merely joined but no personal judgment was asked against him, plaintiff was not entitled to **personal judgment.** Brackett's Adm'r v. Boreing's Adm'r, 33 Ky. L. R. 292, 110 SW 276. Where pleadings **in eminent domain** did not ask adjudication of rights under former condemnation decree, held decree adjudicating such rights was unauthorized. Mundy v. Hart [Tex. Civ. App.] 111 SW 236.

**Effect of stipulations:** Alleged error in rendering judgment for amount in excess of ad damnum held eliminated from case by stipulation that under common counts and general issue each party to cause might have same benefit and advantage of all claims, causes of action and defenses appearing from statement of facts as though said causes of action and defenses were specially pleaded. City of Chicago v. Conway, 138 Ill. App. 320.

8. Under the code system, relief may be awarded according to facts pleaded, and one is not confined to the relief demanded. Bradburn v. Roberts [N. C.] 61 SE 617. Under Code Civ. Proc. § 580, providing that where answer is filed any relief consistent with the complaint and issues may be granted, the extent of relief depends on the issues and not on the prayer. Murphy v. Stelling [Cal. App.] 97 P 672. That plaintiff asks for relief which his allegations do not warrant does not prevent him having relief to which the facts entitle him. Guerard v. Jenkins [S. C.] 61 SE 258.

9. See Equity, 11 C. L. 1235. Under Civ. Code Prac. § 90. Heckling v. Gehring's Ex'r, 30 Ky. L. R. 1198, 100 SW 824. Any relief consistent with pleadings and proof. Code, § 3775. Johnston v. Myers [Iowa] 116 NW 600. **In suit to set aside judgment** on note secured by vendor's lien, decreeing foreclosure of lien, a prayer for general and special relief authorizes setting aside of sale of land. McLean v. Stith [Tex. Civ. App.] 112 SW 355. **In suit to foreclose mortgage** where prayer for relief and allegations asks establishment of priority of liens of mortgage and judgments, the decree on default of the owner of the equity may adjust such priorities. Manuel v. Turner, 36 Mont. 512, 93 P 808. **On bill to enjoin city from moving sidewalk** claimed by the owner to be the line to an inner line claimed by the city, a decree quieting complainant's title to the disputed strip was warranted by a prayer for general relief. Triece v. South Haven [Mich.] 15 Det. Leg. N. 606, 117 NW 555.

10. Decree silent as to certain subjects covered by prayer of bill for construction of will is erroneous. Lumpkin v. Lumpkin [Md.] 70 A 238.

11. Where judgment declared lien on life insurance policy held by plaintiff as collat-

*Judgment non obstante* See 10 C. L. 472 may be entered when the proceedings warrant it.[12] At common law the only occasion for such a judgment was where a verdict was given for the defendant upon an insufficient plea of confession and avoidance,[13] and even under the modern relaxations of this rule a motion for such a judgment is essentially a motion for a judgment on the record,[14] as where the pleadings do not sustain the verdict rendered.[15] Accordingly, under this practice, the evidence cannot be reviewed on such a motion,[16] but under a still more liberal practice obtaining in some states a judgment non obstante may be granted where it conclusively appears that the verdict is contrary to the evidence,[17] and that it would have been proper for the court to have directed verdict at the close of the evidence,[18] but even under the most liberal practice a motion for such a judgment will not be granted where the evidence is inconclusive [19] or where there is a substantial conflict in the evidence,[20] nor will it be granted where the judgment would be contrary to the theory presented by the pleadings and on which the case was tried,[21] or where any issues remain unde-

eral security, but did not grant plaintiff right to exercise privilege of surrender of policy and collection of cash value. Davidson's Ex'r v. Hieatt [Ky.] 113 SW 891.

**12.** Fishburne v. Robinson [Wash.] 95 P 80.

**13.** See 6 C. L. 222.

**14.** See 6 C. L. 222.

**15.** Judgment non obstante not proper where all issues offered were material except one presented by an additional plea. Haitje v. Keeler, 133 Ill. App. 461. Unless plea of contributory negligence is controverted by reply, defendant is entitled to judgment, notwithstanding verdict. Schulte v. Louisville & N. R. Co., 33 Ky. L. R. 31, 108 SW 941. Under Civ. Code Proc. § 386, judgment non obstante for insurer held proper where complaint to set aside compromise of life insurance claim for fraud did not allege that money received under compromise had been tendered to insurer. Western & So. Life Ins. Co. v. Quinn [Ky.] 113 SW 456.

**16.** Admits for purpose of motion, facts found by jury and does not challenge sufficiency of evidence to support findings and cannot be treated as a motion to set aside verdict on that ground. Maxon v. Gates, 136 Wis. 270, 116 NW 758.

**17.** Fishburne v. Robinson [Wash.] 95 P 80, following Roe v. Standard Furniture Co., 41 Wash. 546, 83 P 1109. Fact that question of fraud was submitted to jury who found for defendant did not preclude entering judgment for plaintiff non obstante veridicto. Murphey v. Greybill, 34 Pa. Super. Ct. 339.

**18.** Evidence held such as would justify court in giving peremptory instruction, and hence entry of judgment non obstante was not error. Murphey v. Greybill, 34 Pa. Super. Ct. 339; Lightcap v. Nicola, 34 Pa. Super. Ct. 189. Act Apr. 22, 1905, P. L. 286, is not intended to change relative functions of court and jury so as to permit judge to decide questions of conflicting evidence, but only to allow him to do, subsequently on review of whole case, what it then appears would have been proper to do by binding direction at trial. Lightcap v. Nicola, 34 Pa. Super. Ct. 189; Shannon v. McHenry, 219 Pa. 267, 68 A 734; Tilburg v. Northern Cent. R. Co., 221 Pa. 245, 70 A 723. Act of Apr. 22, 1905, P. L. 286, broadens power of judge so that whereas verdict formerly was required to be for plaintiff and reservation to be of leave to enter judgment for defendant non obstante, now what is reserved is request for binding direction to jury for either party. Power of judge is the same and he is to treat the motion for judgment as if it were a motion for binding direction at trial, and to either judgment as if such direction had been given and verdict rendered accordingly. Time when judge may act is enlarged so as to allow deliberate review and consideration of facts and law upon whole evidence. If upon such consideration it appears that binding instruction for either party would have been proper at close of trial, court may enter judgment later with same effect, but if such course would have been improper then or there was conflict in evidence, such course would be improper on motion for judgment non obstante. Murphey v. Greybill, 34 Pa. Super. Ct. 339. Under Pa. Act Apr. 22, 1905 (P. L. 286), **where defendant's request for binding instructions is refused,** he may under this statute file a motion for judgment, notwithstanding the verdict on the whole record. Keiper v. Equitable Life Assur. Soc., 159 F 206; American Car & Foundry Co. v. Alexandria Water Co., 221 Pa. 529, 70 A 867. Under Pennsylvania practice **where verdict is directed for plaintiff** and no question of law is reserved, court may not enter judgment for defendant, notwithstanding verdict. Collins v. Smith, 158 F 872.

**On appeal** from entry of judgment non obstante veredicto where peremptory instruction was in fact refused by lower court the appellate court will consider evidence as appellate court does where trial judge grants peremptory instruction for plaintiff and defendant appeals. Murphey v. Greybill, 34 Pa. Super. Ct. 339.

**19.** Mere fact that plaintiff who was arrested by defendant without a warrant was found not guilty on ensuing prosecution held not sufficient to require judgment for plaintiff, notwithstanding the verdict for defendant in action for false imprisonment and malicious prosecution. Conkling v. Whitmore, 132 Ill. App. 574.

**20.** Messir v. McLean [Wash.] 98 P 106. Judgment, notwithstanding verdict, is not authorized where evidence presents a close case upon facts. Kallas v. Worth Bros. Co., 158 F 1018.

**21.** Judgment non obstante for plaintiff cannot be entered in action for false im-

termined,[22] or on account of errors at the trial.[23] The motion for the judgment must be timely,[24] and all statutory conditions precedent thereto must have been performed.[25]

§ 3. *Arrest of judgment.* See 10 C. L. 473—The grounds for, the procedure on, and the effect of, a motion in arrest of judgment are treated elsewhere.[26]

§ 4. *Rendition, entry and docketing.* See 10 C. L. 473—Judgment should be rendered at a time prescribed by a valid law for the holding of court,[27] and should be rendered within the time prescribed by statute.[28] Where the statute fixing the time for rendition of judgment is mandatory, a judgment not entered within the time prescribed is invalid,[29] unless the time is extended as authorized by law or rule of court,[30] but, where the statute is directory only, failure to comply therewith is not fatal.[31] The grant of a stay of execution is not a grant of a stay of judgment.[32] In Alabama an award constitutes a judgment when the clerical act of filing it has been performed.[33] In the absence of statutory requirement, a judgment or decree need not usually be signed,[34] but in some states signature is required by statute.[35]

prisonment on evidence of malicious prosecution. Conkling v. Whitmore, 132 Ill. App. 574. In action against a bankrupt to recover a preference, it cannot be asserted on such motion that payment was made from money belonging to a partnership and not to defendant, where pleadings and trial were on theory that it was made from bankrupt's money. Smedley v. Speckman [C. C. A.] 157 F 815.

22. Where question of damages is still open to jury. Hartje v. Keeler, 133 Ill. App. 461.

23. Errors in instructions and errors of law at trial. Pease v. Magill [N. D.] 115 NW 260.

24. Must be made before judgment is entered. Wheeler v. Preston, 32 Ky. L. R. 791, 107 SW 274. After verdict rendered has been affirmed by court, judgment non obstante cannot be entered, remedy being by motion to set aside verdict and for new trial. Smith v. Lincoln, 198 Mass. 388, 84 NE 498. Motion by plaintiff for judgment on record, including testimony adduced, made after jury had been discharged after finding for defendant, and after plaintiff had been granted new trial, was properly overruled. Hamill v. Schlitz Brew. Co. [Iowa] 115 NW 943.

**Clerical misprision** in including judgment in entry of verdict will not prevent court from granting motion for judgment non obstante filed prior to pronouncement of judgment. Tait v. Locke, 130 Mo. App. 273, 109 SW 105.

25. Not proper where no motion for directed verdict was made at close of plaintiff's case. Laws 1901, p. 74, c. 63. Landis Mach. Co. v. Konantz Saddlery Co. [N. D.] 116 NW 333. Act Apr. 22, 1905, P. L. 286. Philadelphia v. Bilyeu, 36 Pa. Super. Ct. 562.

26. See New Trial and Arrest of Judgment, 10 C. L. 999.

27. If not, it is void for want of jurisdiction. Louisville & N. R. Co. v. Grant [Ala.] 45 S 226. Judgment of circuit court, rendered at adjourned term pursuant to void order entered at time fixed by void law for holding court, is void. Rigsby v. State [Ala.] 45 S 227.

28. Under Laws 1902, p. 1557, c. 580, § 230, the municipal court must render judgment within 14 days from submission of the cause, in the absence of valid stipulation of the parties extending the time. Carpenter v. Pirner, 107 NYS 875. Where court at conclusion of trial announces, "Decision reserved," the case is "submitted" within municipal Court Act, § 230, allowing the justice 14 days from such submission to render judgment. Mosehauer v. Jenkins, 112 NYS 1038.

29. Void when not entered within fourteen days as required by Municipal Court Act, Laws 1902, p. 1557, c. 580, § 230. Carpenter v. Pirner, 107 NYS 875.

30. Judgment void when not entered within time prescribed by Laws 1902, p. 1557, c. 580, § 230, and time was not extended by consent of parties as authorized by such section. Carpenter v. Pirner, 107 NYS 875. Municipal court rule 17, authorizing extension of time by stipulation, contemplates a written, filed, and recorded stipulation. Id.

31. That judgment was not rendered within 90 days after trial does not invalidate it. Moylan v. Moylan [Wash.] 95 P 271. Statute requiring decision to be filed within 30 days after submission is directory, and failure to comply with it is not fatal to judgment. Carney v. Twitchell [S. D.] 118 NW 1030.

32. An oral direction of the judge when directing entry of judgment granting "10 days' stay" merely means stay of execution. Gersman v. Levy, 57 Misc. 156, 108 NYS 1107.

33. Under Code 1896, §§ 509, 513, providing that submission and award shall be entered as a judgment nothing is required save the clerical act of filing the award. Gandy v. Tippett [Ala.] 46 S 463. Under § 521 all intendments are in favor of the award. Id.

34. Entry of decree by clerk gives it validity. Horn v. Horn, 234 Ill. 268, 84 NE 904.

35. See Civ. Code Proc. § 390; Ky. St. 1903, § 378. Ewell v. Jackson, 33 Ky. L. R. 673, 110 SW 860. It is not indispensable that **judgment entered by special judge** but not signed by him should be signed at its close by regular judge, where such judge signs orders of day among which this judgment is. Id. Under Code of Prac. title 1 and art. 546, **judgments of court of appeals** need not be signed by judges who participated therein, as is required of judges of courts of original jurisdiction. Thomas v. Goodwin, 120 La. 504, 45 S 406.

*Form and contents.* See 10 C. L. 473—A judgment should be definite and certain [36] and should recite the proceeding upon which it is based,[37] and, where it relates to land, should so describe it that its boundaries may be ascertained,[38] but a description is not insufficient if the land can be ascertained from the judgment roll.[39] Where the rights of several plaintiffs are several, the judgment should be several,[40] and if the liability of several defendants is joint, the judgment against them is properly made joint,[41] but it is error to enter a joint judgment against several defendants who cannot be held jointly liable.[42] Clerical errors may be disregarded [43] as may, also, many irregularities of form,[44] and amendments may be allowed in certain matters of form.[45] The reasons for judgment may be recited therein,[46] but a mere opinion is not a judgment.[47] A judgment may be molded to meet existing conditions.[48]

*Entry, docketing and recording.* See 10 C. L. 474—A judgment or decree is inchoate until approved by the court and filed for record or recorded.[49] The entry of

36. Judgment ordering an owner, through whose land a drainage ditch ran for the benefit of others, to remove obstructions he had placed or caused to be placed in the ditch at any time subsequent to a designated date, etc., held sufficiently definite. Brown v. Honeyfield [Iowa] 116 NW 731. Judgment on verdict that plaintiff recover $10,000 and costs from A. Railway Company, sometimes called Pennsylvania Railway Company, held in proper form and not inconsistent with verdict. Pittsburg, etc., R. Co. v. Darlington's Adm'x, 33 Ky. L. R. 818, 111 SW 360. An entry is sufficiently formal if it identifies the parties, shows the relief granted and that it is the act of the court. Montgomery v. Viers [Ky.] 114 SW 251.

37. Judgment reciting appearance of defendant, trial by jury, verdict whereupon it was adjudged that plaintiff recover from defendant a certain sum and costs, held to contain all essentials of a valid judgment. Light v. Reed, 234 Ill. 626, 85 NE 282.

38. Judgment for recovery of land or involving land should so describe it that it may be identified without reference to any other paper. Latham v. Lindsay [Ky.] 113 SW 878. Judgment in suit to quiet title should describe the land with such definiteness as to enable the parties to definitely locate it. Hill v. Barner [Cal. App.] 96 P 111.

39. Where judgment for recovery of land contains an insufficient description thereof which may be perfected by reference to the pleadings, it is erroneous but not void and may be corrected on motion. Latham v. Lindsay [Ky.] 113 SW 878. Though judgment in proceedings to establish a private road should have described the road, omission did not invalidate it where it referred to petition and report of commissioners for description. Fitzmaurice v. Turney [Mo.] 114 SW 504.

40. Where court improperly compelled several defendants to deliver rice to plaintiff on decreeing restitution, judgment was properly entered for each defendant separately, ownership of rice being several. Texas Land & Irr. Co. v. Sanders [Tex.] 111 SW 648.

41. A judgment that plaintiff "have and recover from defendants" a certain sum is in appropriate form for one on a joint, and not on a several obligation. Union Oil Co. of California v. Mercantile Refining Co. [Cal. App.] 97 P 919.

42. Entry of joint judgment against railroad company and receivers thereof for damages for injury caused by operation of road by receivers. Eckels v. Henning, 139 Ill. App. 660.

43. Slight error of form in final judgment held immaterial. Hartzell v. Maryland Casualty Co., 139 Ill. App. 366. Under Comp. Laws 1897, § 10272, providing that judgment shall not be stayed for any informality in entering or making up the record, use of word "order" instead of "adjudged" is not reversible error. Prussian Nat. Ins. Co. v. Eisenhardt [Mich.] 15 Det. Leg. N. 393, 116 NW 1097.

44. Alternative judgment that plaintiff recover goods sold on account of fraud or a specified sum of money, though not in best form, held sufficient to resist attack by injunction to enjoin enforcement, since all presumptions are in favor of it. Nichols v. Doak, 48 Wash. 457, 93 P 919.

45. Amendment of form to conform to verdict. See ante, § 2B.

46. Decree. Jackson v. Valley Tie & Lumber Co., 108 Va. 714, 62 SE 964.

47. Opinion prepared and signed in chambers by a judge of court of appeals, and filed in such court with an uncertified excerpt, indicating affirmance of the judgment appealed from, does not prove rendition of such judgment. Thomas v. Goodwin, 120 La. 504, 45 S 406.

48. Law allows molding of judgment to conditions existing at time of judgment. Gage v. Callanan, 113 NYS 227. Judgment commanded one to perform certain work within specified time, or that plaintiff recover certain damages. Held that, where to do such work it was necessary to enter plaintiff's premises and she refused to allow such entry, the court could protect defendant by clause at foot of judgment, or stay operation thereof. Groge v. Ruff, 110 NYS 259. Where appellee's evidence on trial in county court on appeal from justice court showed proper discharge in bankruptcy, pending appeal proper form of judgment is **special judgment against bankrupt** with perpetual stay of execution. Danforth Mfg. Co. v. Barrett & Co., 138 Ill. App. 244.

49. Where the record showed that a decree was not filed until May, it was rendered as

judgment is a merely ministerial act,[50] which is usually performed by the clerk of court[51] after the judgment or decree has been approved by the judge in the manner required by law,[52] but must be performed prior to adjournment of the term.[53] It must be performed under proper authority,[54] in the manner prescribed by statute,[55] and must not be prematurely made,[56] but under some statutes certain judgments may be entered before they are enforcible.[57] In some states it is required that the judgment be submitted to the adverse party before entry.[58] A party favored by a stay of judgment must see that proper entry is made.[59] An unauthorized entry is not a judgment.[60] Clerical mistakes in making entry may be corrected on motion,[61] but

of that term and not of the January term. Horn v. Metzger, 234 Ill. 240, 84 NE 893. Until then it is not final and is subject to change or modification. Horn v. Horn, 234 Ill. 268, 84 NE 904. Under Rev. Laws Hawaii 1905, § 506, title to property acquired by condemnation does not vest until judgment of condemnation has been filed and recorded with the registrar of conveyances. United States v. Merriam [C. C. A.] 161 F 303. Registration of both deed and judgment is essential. Id. Formal order denying motion for postponement should be entered so defendant may appeal. Rubenstein v. Schmuck, 113 NYS 554. No **judgment of court of appeals** can be received in evidence until it has been entered on records of court, nor can it be executed until it has been so entered and has also been recorded in records of inferior court, as provided by Code Prac. arts. 617-620, 623, 910, 915, Rev. St. § 475; Const. art. 104. Thomas v. Goodwin, 120 La. 504, 45 S 406.

**56.** Where court has made findings and pronounced judgment, clerk may enter it of that date, though form of order is not prepared until long afterwards, and judge may date judgment back to such date. Austin v. Austin, 42 Colo. 130, 94 P 309. It is clerk's duty to enter only such judgment as court rendered. City and County of San Francisco v. Brown, 153 Cal. 644, 96 P 281.

**51.** Judgment not rendered void by failure of clerk to enter same. Comstock v. Boyle, 134 Wis. 613, 114 NW 1110. Clerk may enter judgment for recovery of money. Revisal 1905, § 352. Bank of North Wilkesboro v. Wilkesboro Hotel Co., 147 N. C. 594, 61 SE 570. Competent for legislature to confer such jurisdiction on clerk. Id. Minutes of court of record, whether of original or appellate jurisdiction, should be approved by the judge, but entering of proceedings in minute book is duty of clerk who should attest his work with his signature, but if clerk fails to so attest he is not thereby disqualified from certifying to correctness of copies therefrom. Thomas v. Goodwin, 120 La. 504, 45 S 406.

**52.** Approval of decree by chancellor is authority to clerk to enter it of record. Horn v. Horn, 234 Ill. 268, 84 NE 904.

**Signature by judge** as a condition precedent to entry. See ante, this section, first subdivision.

**53.** Clerk has no power to make a judgment entry after court has finally adjourned. Winn v. McCraney [Ala.] 46 S 854. Judgment entered by clerk after term at which it was rendered, and without consent of judge, is void. Shepherd v. Shepherd, 32 Ky. L. R. 942, 107 SW 273. Decree entered in vacation as of prior term pursuant to understanding is void. Jackson v. Becktold Printing & Book Mfg. Co. [Ark.] 112 SW 161.

**54.** A county clerk has no authority to enter a judgment of dismissal on an order of dismissal made by the appellate division. Van Norstrand v. Van Norstrand, 110 NYS 665.

**55.** Under Civ. Code Prac. § 390, providing for entry of judgment in order book, and Ky. St. 1903, § 378, providing for signing of proceedings each day by judge, judgment must be entered in the order book and signed. Ewell v. Jackson, 33 Ky. L. R. 673, 110 SW 860. Municipal court act contemplates entry of judgment on trial of demurrer as indicated by Laws 1902, p. 1587, c. 580, making provisions for costs in such cases. Binder v. Robinson, 110 NYS 229.

**56.** Where decree of foreclosure was void because prematurely entered, it could be vacated, and defendant, having answered before it was legally entered, was entitled to defend. Waymire v. Shipley [Or.] 97 P 807. Default decree prematurely entered is void. Id.

**57.** Under Rev. St. 1899, § 9462, providing for proceedings to establish private road, judgment may be entered for owners for damages assessed before they have been actually paid to county treasurer, and for establishment of the way, though latter part of judgment could not be enforced until payment was made. Fitzmaurice v. Turney [Mo.] 114 SW 504.

**58.** Rule requiring counsel for party in whose favor judgment is rendered to present journal entry to adverse counsel for his approval before giving same to clerk for entry does not apply in case of default. Interstate Life Assur. Co. v. Raper, 78 Ohio St. 113, 84 NE 754.

**59.** A stay of judgment after verdict for plaintiff is a favor to defendants and they must see that it is entered by the clerk in accordance with the court's directions. Gersman v. Levy, 57 Misc. 166, 108 NYS 1107.

**60.** Erroneous entry on calendar of word "dismissed" not made in consequence of order of court is not to be taken as a judgment. Ledbetter v. Mandell, 124 App. Div. 854, 109 NYS 602. Under Mansf. Dig. Ark. §§ 3948, 3950, 3952, such entry is not evidence that a judgment was actually entered. Id. Decree which has been altered before entry is not admissible in evidence. Bates v. Hall [Colo.] 98 P 3. Where verdict was for plaintiff but new trial was granted as to one of two counts, held, where clerk entered judgment on both counts, it was improper and did not estop plaintiff on the second trial. Gann v. Dearborn Mfg. Co., 129 Mo. App. 425, 107 SW 15.

**61.** Bates v. Hall [Colo.] 98 P 3.

until corrected the judgment stands as entered.[62] Every presumption is indulged in favor of the regularity of the recordation of a judgment.[63] Judgment cannot be entered against a party who dies pending trial,[64] but where an appellant dies after submission of the cause, an affirmance may be entered as of the date of submission.[65]

Entry or docketing as affecting the lien of the judgment is treated in a subsequent section.[66]

*Nunc pro tunc entries.*See 10 C. L. 475—Judgment nunc pro tunc may be entered in two classes of cases: Where the suitors had done all in their power to place the cause in condition to be decided, but owing to delay of the court judgment had not been rendered until death of a party or some other such occurrence;[67] or where judgment, though pronounced by the court, has through accident or mistake of officers of the court never been entered.[68] Such entry, however, will not be allowed to the prejudice of a third party who has become owner of property affected by the order.[69] Judgments may also be amended nunc pro tunc,[70] but the authority thus to amend a judgment is solely to make it speak the truth, and can never be used to make the record speak what it should have spoken but what it did not in fact speak.[71] An amendment nunc pro tunc must be based on matter of record,[72] and notice of such amendment must be given the adverse party unless it is obvious that he cannot be prejudiced by the amendment.[73] Where the rendering of judgment is a ministerial act, it may be made nunc pro tunc at a subsequent term.[74]

§ 5. *Occasion and propriety of amending, opening, vacating or restraining enforcement. A. Before finality.*See 10 C. L. 476—During the term or until judgment has become a finality,[75] the court has inherent and plenary power,[76] in the exercise of its

62. If decree entered is different from that pronounced, those making such contention should make entry speak truth, and until correct it is binding and prevails over decree actually rendered. Bates v. Hall [Colo.] 98 P 3.

63. Under Code Civ. Proc. §§ 1236, 1246, relative to filing and recording of judgments, where a judgment is recorded, it is presumed that the judgment roll was actually filed in the clerk's office and that it contained the judgment. Burke v. Kaltenbach, 109 NYS 225.

64. Where plaintiff in action to quiet title died pending the suit, the judgment was a nullity both for and against all who claim under him. Bivens v. Henderson [Ind. App.] 86 NE 426.

65. Judgment on appeal will be entered as of date of submission. United States Health & Acc. Ins. Co. v. Clark, 41 Ind. App. 345, 83 NE 760.

**Abatement of appeal by death of party.** See Appeal and Review, 11 C. L. 118.

66. See post, § 8, Lien.

67. Clark & Leonard Inv. Co. v. Rich [Neb.] 115 NW 1084. Judgment may be entered nunc pro tunc as of date of submission of the cause on suggestion that the party against whom it was rendered has died in the meantime. Clark v. Van Cleef [N. J. Eq.] 71 A 260.

68. Clark & Leonard Inv. Co. v. Rich [Neb.] 115 NW 1084. When a judgment has been rendered and the clerk has neglected to enter it. Quartz Gold Min. Co. v. Patterson [Or.] 96 P 551. Where judgment was in fact rendered and proof thereof is made, but where by omission of the clerk or other casualty no entry was made. Montgomery v. Viers [Ky.] 114 SW 251.

69. He may appear and resist such entry. Clark & Leonard Inv. Co. v. Rich [Neb.] 115 NW 1084. On application to sign a judgment entry nunc pro tunc, it was proper for the court to require notice to parties and to persons who had become interested in the property affected by the judgment. Montgomery v. Viers [Ky.] 114 SW 251.

70. Where one of plaintiffs died during litigation and heirs were made parties and judgment entered for "plaintiffs," nunc pro tunc entry formally inserting names of heirs and other plaintiffs from data existing in clerk's office held proper. Dixon v. Hunter, 204 Mo. 382, 102 SW 970. Where judgment in proceedings to establish private road did not describe road, but referred to petition for description, the court could supply the description by entry nunc pro tunc. Fitzmaurice v. Turney [Mo.] 114 SW 504.

71. Liddell v. Landau [Ark.] 112 SW 1085. Where judgment was actually entered on a certain date because the clerk was behind in his work, the court would not order entry nunc pro tunc as of an earlier date so as to make notice of intention to move for new trial not premature. Power v. Turner [Mont.] 97 P 950.

72. Not on extraneous evidence. Pulitzer Pub. Co. v. Allen [Mo. App.] 113 SW 1159.

73. Pulitzer Pub. Co. v. Allen [Mo. App.] 113 SW 1159.

74. In view of Rev. St. 1895, arts. 1323, 1324, 1333, 1335, rendering of judgment on a general verdict is a ministerial act. Carwile v. Cameron & Co. [Tex.] 114 SW 100.

75. Court may in its own discretion set aside judgment during term. Knupp v. Miller [Mo. App.] 113 SW 725. Where judgment in proceedings in which bond was given conditioned upon failure to maintain

judicial direction,[77] to vacate, alter, revise or amend the judgment [78] for clerical, judicial or other errors.[79] Where a judgment is set aside at the same term, the court may not at a subsequent term render judgment without a new trial.[80] Delay in passing upon a timely motion to set aside a judgment will not preclude relief.[81]

(§ 5) *B. Right to relief after the judgment has become final, as by the expiration of the term of rendition or of the statutory extension thereof.* See 10 C. L. 478. Except as to matters of form [82] or as to clerical misprisions [83] which work no preju-

title to goods levied on was set aside because jury did not determine value of such goods, it was proper to open judgment on such bond for want of affidavit of defense. Gain v. Steinberger, 36 Pa. Super Ct. 303. Judgment of county court not final as to 2 infant plaintiffs could be corrected in term upon proper motion, but not **in vacation.** Texas Co. v. Beddingfield [Tex. Civ. App.] 114 SW 894. A party not satisfied with the **form of judgment** should move to modify it. Broeker v. Aetna Life Ins. Co., 41 Ind. App. 316, 83 NE 756. Court has power to vacate **order confirming judicial sale** at same term at which it was rendered. Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531. **Order requiring executor to give bond** in administration suit, is interlocutory, and the court has power to change or annul it so long as the case remains open and within the jurisdiction of the court. Hurt v. Hurt [Ala.] 47 S 260.

**What constitutes same term:** Under St. 1898, § 2424, amended by Laws 1905, p. 12, providing that term of court does not end until beginning of another term, an order vacating judgment held to have been made at same term at which judgment was rendered. Frost v. Meyer [Wis.] 118 NW 811.

**76.** Common-law courts have power to correct their judgments to make them conform to original facts. Montgomery v. Viers [Ky.] 114 SW 251. While action in which jury trial is waived is pending, court has power to correct its own errors and may in its discretion vacate its findings and judgment and make new findings and enter new and different judgment. Piano Mfg. Co. v. Doyle [N. D.] 116 NW 529.

**77.** Application to open default is addressed to the discretion of court, exercise of which will not be interfered with in the absence of abuse thereof. Pillock v. Buck [Idaho] 96 P 212. Trial court has wide and extended discretion in modifying, vacating or setting aside judgments or decrees rendered in its own court when it does so at the same term at which such judgment or decree was entered. McAdams v. Latham [Okl.] 96 P 584.

**78.** Justice of city court has power to recall or revise his decision. Orlando v. Palladino, 112 NYS 1118. Judgment for defendant on demurrer may be vacated at same term on motion of plaintiff and judgment of dismissal without prejudice entered. Missouri Pac. R. Co. v. Berry [Kan.] 98 P 204.

**79.** Judgment properly vacated during terms where there was good defense which, through ignorance of defendant, was not asserted. Knupf v. Miller [Mo. App.] 113 SW 725. For error apparent on record, court may, during term at which decree is entered, set aside or modify same upon motion or at its own instance without notice. Guinn v. Warbutton [W. Va.] 60 SE 1100. Where judge's minutes express intent to dismiss action without prejudice, judgment entry reciting "dismissal" should be amended to conform to such intent. O'Bryan v. American Inv. & Imp. Co. [Wash.] 97 P 241.

**80.** Vacation of judgment entered on special findings is tantamount to granting of a new trial and judgment cannot at subsequent term be entered upon such findings without new trial. Brown v. Capital Townsite Co. [Okl.] 96 P 587.

**81.** Under Ky. St. 1903, § 988, providing that courts of continuous session have jurisdiction over their judgments for 60 days, such court does not lose jurisdiction to open default on timely motion because it does not pass on the motion until after expiration of 60 days. Petty v. Wilbur Stock Food Co., 32 Ky. L. R. 956, 107 SW 699. Where defendant moved in arrest of judgment, but motion was not passed upon until following term, court did not abuse its discretion in overruling motion and setting aside judgment, and a nunc pro tunc order in doing so was not necessary. Wheeler v. Preston, 32 Ky. L. R. 791, 107 SW 274.

**82.** The fact that through clerical misprision a judgment erroneously describes a judgment debtor as a corporation organized under the laws of a certain state is not ground for reversal, but such error **may be corrected.** Seaboard Air Line R. Co. v. Harby [Fla.] 46 S 590. If court has failed to act or has acted erroneously, matter cannot be corrected by judgment at subsequent term; but if it has acted and record shows such fact, but there is not sufficient formal evidence, it may be made to conform to truth as shown by record. Montgomery v. Viers [Ky.] 114 SW 251. Court has inherent power to at any time correct or modify its judgment entry to make it conform to the judgment rendered when rights of third persons will not be prejudiced thereby. O'Bryan v. American Inv. & Imp. Co. [Wash.] 97 P 241. Entry, after judgment, of a remittitur from verdict, does not set aside or nullify judgment or amount to rendition of new judgment, but party making it should correct entry to conform to remittitur. State v. Broaddus, 212 Mo. 685, 111 SW 508. Informality merely as to form and not of substance **may be amended** at any time without remandment. Northeastern Coal Co. v. Tyrrell, 133 Ill. App. 472. Amendment of judgment in attachment by adding to it at subsequent term judgment in rem to property attached will not be set aside on ex parte application because made at subsequent term. Scarborough v. Merchants' & Farmers' Bank [Ga.] 62 SE 1040. **Where a judgment failed to conform to verdict and included a party as defendant against whom jury made no finding,** it may be amended by striking out such party so as to make it conform to the verdict. Rucker v. Williams, 129

dice to third persons,[84] a judgment cannot be altered, vacated or amended after it has become a finality,[85] unless the parties consent thereto,[86] or unless statutory authority is given therefor,[87] or unless it is void [88] or was procured by fraud [89] of

Ga. 828, 60 SE 155. Such motion was timely when made within one year. Id. Trial court at all times possesses inherent power to amend its judgments by nunc pro tunc entry so as to conform to proceedings, provided rights of third persons have not intervened. Senkler v. Berry [Or.] 96 P 1070.

**83.** Clerical misprision may be corrected at any time. Pelton v. Goldberg [Conn.] 70 A 1020; West Chicago Park Com'rs v. Boal, 232 Ill. 248, 83 NE 824; Hurt v. Chess & Wymond Co., 33 Ky. L. R. 767, 111 SW 285. Court may correct record so as to speak truth as to date of entry of judgment. Power v. Turner [Mont.] 97 P 950.

**Held correctible:** Where in ejectment court granted defendant's motion for nonsuit, act of clerk in entering judgment that defendant owned premises is a clerical and not judicial error. City and County of San Francisco v. Brown, 153 Cal. 644, 96 P 281. Error in omitting to give judgment for costs. Hilton v. Hilton's Adm'r, 32 Ky. L. R. 1082, 107 SW 736. Question of damages on affirmance is to be determined from record, and where record does not warrant judgment it is clerical error. Bank of Kentucky v. Com., 32 Ky. L. R. 1087, 107 SW 812. Every court of record has inherent power to make its record speak truth, and where a bond was ordered and given prior to sale of ward's land, and proper finding of necessity for sale was made prior to the order for sale, that these proceedings did not appear on original record but were subsequently added by amendment, did not render the decree void, since the defect was cured by the amendment. Appeal of Dunn [Conn.] 70 A 703. Amendment to order vacating judgment by adding "new trial granted" may be made after term. Frost v. Meyer [Wis.] 118 NW 811. Error in decreeing a person an entire tract where evidence showed him entitled to portion of it only may be corrected after reversal on appeal by declining his part. Langhorst v. Rogers [Ark.] 114 SW 915. Where decree enjoining diversion of water from river so that it would flow on certain land failed to describe land, court after term and after appeal, could correct error and having done so could not vacate the corrected order. New Liverpool Salt Co. v. Wellborn [C. C. A.] 160 F 923. To show time of trial. Carney v. Twitchell [S. D.] 118 NW 1030. After notice to parties in interest, court may by order entered nunc pro tunc, amend or correct its final judgment after expiration of the term at which it was rendered, when by reason of clerical misprision it does not speak the truth, as where clerk omitted words "without prejudice" from order dismissing citation. Murphy v. McMahon, 131 Ill. App. 384.

**84.** May not make such correction to prejudice of third persons. Senkler v. Berry [Or.] 96 P 1070.

**85.** Curtiss v. Bell [Mo. App.] 111 SW 131; Davidson v. Hughes, 76 Kan. 247, 91 P 913. Where federal court has jurisdiction of subject-matter and judgment recites service on defendant, it cannot be set aside on motion made after term. If defendant desires to assail truthfulness of such recital, his remedy is by suit for injunction. United States v. Taylor, 157 F 718. Where judgment on mechanic's lien was entered in accordance with claim, complaint and proof, and was identical judgment asked, court could not, after term, modify it to exclude a part of the land described and include other land. Laugesen v. Sanford, 135 Wis. 252, 115 NW 808. Erroneous judgment on merits can only be corrected on appeal, and cannot be set aside at subsequent term. Stewart v. Wood [Ark.] 111 SW 983. A court has no power to vacate or modify a **consent decree** except for fraud or mistake of both parties. Rogers v. Sluder [N. C.] 61 SE 627. Setting aside judgment of dismissal entered under agreement held void. Rivers v. Campbell [Tex. Civ. App.] 111 SW 190.

**NOTE. Power of court to abate judgment after term:** After final adjournment of the term at which a judgment was rendered, the defendant died, and upon application of his executrix the trial court entered an order declaring the judgment to have abated and to be no longer of any validity. Held, that the trial court had no control over the judgment after the term at which it was rendered, and hence had no authority to make the order abating the judgment (Ward, C. J., dissenting). United States v. New York Gent., etc. R. Co. [C. C. A.] 164 F 324.

The general rule undoubtedly is that after the expiration of the term at which a judgment is rendered the trial court has no longer any control over such judgment. Black, Judgments (2ed Ed.) § 306; Freeman, Judgments, (4th Ed.) § 96. This rule is said in Bronsen v. Schulten, 104 U. S. 410, 26 Law. Ed. 797, to be in force in the federal courts, and this doctrine is further sustained by Klever v. Seawall, 12 C. C. A. 653, 65 F 373; Austin v. Riley, 55 F 833; Allen v. Wilson, 21 F 881. The prevailing opinion in the principal case follows the general rule.—From 7 Mich. L. R. 351.

**86.** Courts may, after term, redocket and retry a cause once tried and reduced to judgment if the parties so request and the subject-matter is within the province of the court to decide and neither party may withdraw his consent after the new trial has been entered upon. First Nat. Bank of Montpelier v. Mullen, 7 Ohio N. P. (N. S.) 313.

**87.** At common law, motion was required to be filed at term at which judgment was rendered. Statutes have extended the period. Rev. St. 1899, § 4151. Three years. Cross v. Gould [Mo. App.] 110 SW 672. Aside from Code, § 4091, court has no general equitable jurisdiction to grant relief in cases of decrees obtained by fraud. Richards v. Moran, 137 Iowa, 220, 114 NW 1035. Under Municipal Court Act (Laws 1902, p. 1563, c. 580), § 254, judgment for $224.50 instead of $244.50 as proved on trial and rendered by jury may be corrected where variance was due **to clerical error** on part of clerk in entering judgment. Frankland v. Schoenfeld, 56 Misc. 547, 106 NYS 1101. Irregularity within Rev. St. 1899, § 795, means **irregularity** in judgment itself, either omitting to do something or doing something improperly. Cross v.

an adverse prevailing party,[90] or by accident, surprise or mistake.[91] Neither error [92] nor irregularities will warrant relief.[93] The granting of relief is within the sound discretion of the court,[94] especially in the case of default judgments.[95]

Gould [Mo. App.] 110 SW 672. In absence of evidence of irregularity, an unauthorized agreement of counsel to have judgment vacated is insufficient under Rev. St. § 5354, authorizing vacation for irregularity. Interstate Life Assur. Co. v. Raper, 78 Ohio St. 113, 84 NE 754. Rev. St. 1899, § 777 providing for setting aside judgment **where defendant has not been summoned,** does not apply where he has been summoned or appeared. Curtiss v. Bell [Mo. App.] 111 SW 131. Under Kirby's Dig. § 2683, a court may modify **alimony decree based on agreement** same as other decrees. Pryor v. Pryor [Ark.] 114 SW 700. Rev. St. § 5354, permitting opening of **judgment by confession** on note taken by warrant of attorney for more than was due, means more than is due plaintiff on instrument on which judgment was taken after considering defenses which might be made in bar to claim sued on, and not that defendant had right to counterclaim because it was connected with the subject of action, the subject-matter of the claim not being a matter which may be pleaded in defense of cause of action. Schubert v. State Banking & Trust Co., 6 Ohio N. P. (N. S.) 544. Under such statute, fact that judgment includes interest from date of note, whereas testimony showed payment of certain amount of interest at time note was given, is not cause for vacation, but merely for its modification. Id.

**88.** Void judgment may be vacated and set aside at any time. Nicoll v. Midland Sav. & Loan Co. [Okl.] 96 P 744. **Where attorney was not authorized** to appear for defendant's wife, but did so, and judgment was rendered affecting her property, she could have it set aside so far as she could show defense against it as affecting her homestead and separate property. Owens v. Cage [Tex.] 20 Tex. Ct. Rep. 313, 106 SW 880. **Judgment on indemnity bond** will be opened where plaintiff failed to prove that breach had been committed. Dawson v. Strouss, 219 Pa. 353, 68 A. 828. **Judgment against several** may be set aside after term for want of jurisdiction of one defendant. Thomson v. Patek, 235 Ill. 341, 85 NE 603. **Order appointing guardian,** void for failure to notify mother, held properly assailable by petition after expiration of term. Wortham v. John [Okl.] 98 P 347. Orders requiring guardian appointed without jurisdiction to make final report, etc., void for lack of jurisdiction, set aside. Id. It is not error to set aside at a subsequent term judgment without jurisdiction because **in excess of amount claimed.** American Audit Co. v. Miller, 11 Ohio C. C. (N. S.) 368.

**89.** See post, § 5C. Girard Fire & Marine Ins. Co. v. Bankard, 107 Md. 538, 69 A 415.

**90.** Of judgment plaintiff's attorney. Lithuanian Brotherhelp Soc. v. Tunila, 80 Conn. 642, 70 A 25.

**91.** See post, § 5C. Girard Fire & Marine Ins. Co. v. Bankard, 107 Md. 538, 69 A 415. Where a party by mistake or other excusable cause fails to appear in the surrogate's court, that court has power to open a decree entered against him. In re Doig, 110 NYS 93. Such decree may be opened in part only and only so far as necessary to protect defendant. Id.

**92.** Loeser v. Savings Deposit Bank Trust Co. [C. C. A.] 163 F 212. Review of judgment in bankruptcy by circuit court of appeals on appeal instead of on petition to revise held irregularity not rendering judgment void. Id. Granting affirmative relief to defendant, though he filed neither affirmative defense nor counterclaim, and though plaintiff did not appear, held mere error. Comstock v. Boyle, 134 Wis. 613, 114 NW 1110. Failure of clerk to enter judgment and findings held mere error. Id. Where court has jurisdiction and judgment is not void, garnishee cannot inquire into intervening errors. Central Stock & Grain Ex. v. Pine Tree Lumber Co., 140 Ill. App. 471.

**93.** Findings and judgment may not be vacated because they do not state time of trial, since defect can be cured by amendment. Carney v. Twitchell [S. D.] 118 SW 1030.

**94.** Exercise of such discretion will not be interfered with on appeal. Poff v. Lockridge [Okl.] 98 P 427.

**95.** Murphy v. Schoch, 135 Ill. App. 550; Finkelstein v. Schilling, 135 Ill. App. 543; Zichermann v. Wohlstadter, 113 NYS 403. Violation of arrangement between counsel not binding on court is not ground for asserting judge is guilty of abuse of discretion, when he opens default upon such terms as statute authorizes him to impose. Eppoletto v. Zuhr, 111 NYS 565. Dates held so mixed that it could not be said that court abused its discretion. Heilbrun v. Jennings [Ind. App.] 111 SW 857. Though there was no absolute right to vacation of a default, the appellate division held to properly open same in exercise of its discretion. Tierney v. Helvetia Swiss Fire Ins. Co., 110 NYS 613. An application under Rev. Code Civ. Proc. § 151 to set aside a default on ground of mistake, inadvertence or excusable neglect is addressed to the discretion of the court. Rosebud Lumber Co. v. Serr [S. D.] 117 NW 1042. Discretion not abused in setting aside such judgment where defendant was a foreigner, unfamiliar with rules of procedure, and because of such fact delayed in getting an attorney to represent him. Id. Refusal to set aside a default entered for failure to plead held proper. State v. Quantic, 37 Mont. 32, 94 P 491. It is discretionary with the trial court to open a default where a proposed answer set up a meritorious defense. Hendricks v. Connor, 104 Minn. 399, 116 NW 751. Under Rev. St. 1895, art. 1375, providing for setting aside a default procured by service by publication, it is not necessary that a wife who seeks to vacate a divorce decree so procured should allege fraud or that facts upon which such service was made were untrue. Bracht v. Bracht [Tex. Civ. App.] 20 Tex. Ct. Rep. 641, 107 SW 895. Verified petition that facts stated therein are true to the best of her knowledge and belief is sufficient. Id. In suit by wife against husband for an accounting, he permitted default without fraud, accident or mistake. Held he was not entitled to have such judgment vacated. Moore v. Martin, 233 Ill. 512, 84 NE 630.

In some states, however, the opening of default judgments is a matter of right.[96] A default judgment will not be set aside except upon a showing of due diligence on the part of the defaulting party[97] and a meritorious defense,[98] but no defense need be shown to warrant the vacation of a void judgment.[99] When the plaintiff seeks to have a judgment against him set aside, he must comply with statutory requirements as to showing a good cause of action.[1] Statutes authorizing the

**96.** Party who applies within one year after entry of default judgment on service of summons by publication is entitled to defend the action as matter of right, provided his motion is accompanied by an answer setting up good defense on merits and he has not been guilty of laches in making motion. Fink v. Woods, 102 Minn. 374, 113 NW 909.

**97.** It is essential to setting aside of default judgment that defendant has not been negligent. Finkelstein v. Schilling, 135 Ill. App. 543. Nonjurisdictional matters which might have been urged on the trial will not be considered on motion to open judgment. Waters v. New York Life Ins. Co., 127 Mo. App. 683, 106 SW 1120. Judgment against insurance company in favor of administrator will not be opened to contest question of residence of deceased. Id. Where jurisdiction was acquired of insurance company by service as provided by Rev. St. 1899, § 7991 (Ann. St. 1906, p. 3799), default judgment would not be opened for failure of declaration to allege matters relative to defendants doing business in state, compliance with state laws and appointment of attorney for service, such matters being nonjurisdictional matters which might have been urged as defense. Id. It must be shown that diligence was exercised to present the defense by plea, and unless such diligence be shown the court does not abuse its discretion in refusing to set the default aside. Reliance on casualty company not diligence. Farber v. Bolotnikoff, 131 Ill. App. 345. Petition to open decree denied where petitioner deliberately omitted to employ solicitor, enter appearance, or make defense. Weaver v. Chicago Title & Trust Co., 131 Ill. App. 66. Proper to refuse to vacate a default where defendant answered "ready" day after day when he should have known of absence of a material witness. Korenman v. Blauner, 113 NYS 736. Where parties agreed upon settlement, but defendant had not paid the sum agreed and was notified 5 days before default that default would be taken for full amount, but ignored the matter, he could not have it vacated. Lazaroff v. Shapiro, 113 NYS 572. Where failure of a party to appear is due to his own neglect or that of his attorney, he is not entitled to relief against the judgment. Andres & Co. v. Schlueter [Iowa] 118 NW 429. Default will not be set aside merely because defendant has a meritorious defense. It must appear that he was not neglectful and was not misled. Colter v. Luke, 129 Mo. App. 702, 108 SW 608. Proper to refuse to vacate where defendant depended on his associate in business to attend to and defend the suit. Id. Held no reasonable excuse for failure to make defense within statutory time when there was ample proof that judgment debtor had ample time to interpose defense with due deliberation and without haste, with exercise of reasonable diligence, and where opportunities afforded were ignored and warnings were not heeded. Farrior v. Mickle, 133 Ill. App. 444.

**98.** Farber v. Bolotnikoff, 131 Ill. App. 345; Finkelstein v. Schilling, 135 Ill. App. 543; Ziegler v. Funkhouser [Ind. App.] 85 NE 984; Dana v. Thaw, 109 NYS 826. Complaint to set aside default judgment on ground of fraud and mistake held to state a sufficient defense to the action. Lithuanian Brotherhelp Soc. v. Tunila, 80 Conn. 642, 70 A 25. Vacation of default should only be on showing of reasonable excuse for defendant's neglect and a meritorious defense. Dana v. Thaw, 56 Misc. 612, 107 NYS 870. Where no meritorious defense is shown and the history of the case shows merely an effort to stave off judgment, a default will not be opened. American Pin Co. v. Tepfer, 111 NYS 1027. Showing of a meritorious **defense based on information and belief** is not sufficient to open a default. Phillips v. Portage Transit Co. [Wis.] 118 NW 539. A default will not be opened to allow a **demurrer** to be interposed. Schaeffer v. Gold Cord Min. Co., 36 Mont. 410, 93 P 344.

**Meritorious defense shown:** Where process upon which default was based was not in conformity to statutory requirements, and meritorious defense was shown, it was proper to set aside the default. Petty v. Wilbur Stock Food Co., 32 Ky. L. R. 956, 107 SW 699. Affidavit that signatures were forgeries or induced by trick or device without intention on part of signer to sign held sufficient defense to warrant opening judgment. Murphy v. Schoch, 135 Ill. App. 550. Though proper diligence is not shown, an order denying a conditional order to open a default will not be sustained where a meritorious defense and inability to comply with the order is shown, where plaintiff fails to meet the defense. Hart v. Cram, 124 App. Div. 487, 108 NYS 925. Failure to prove cause of action is the most potent reason why default should be vacated. Merritt & Chapman Derrick & Wrecking Co. v. Koronsky, 113 NYS 744. Under Civ. Code Prac. § 90, in order to support a judgment by default, the amount must be ascertainable from the complaint. Brashears v. Brashears, 33 Ky. L. R. 233, 110 SW 303. Held insufficient. Id.

**Meritorious defense not shown:** Code, § 4096, provides that judgment shall not be vacated unless cause of action or defense be shown, and hence, where motion is based on unavoidable casualty caused by withdrawal of counsel, and it did not appear that defense could be proved, motion held properly denied. Andres & Co. v. Schlueter [Iowa] 118 NW 429.

**99.** Stubbs v. McGillis [Colo.] 96 P 1005. But see post, this subsection, subdivision Points of Equity.

**1.** Under Code, § 568, plaintiff may not have judgment against him vacated where no showing was offered and no adjudication

opening of judgments apply only to cases therein specified.[2] Authority to open judgments does not apply to a judgment which has been extinguished [3] or which has never existed,[4] though the contrary of the latter proposition is held in some states.[5] Federal courts are not controlled by state practice in the matter of vacating and modifying their own prior judgments.[6]

*Courts of equity* See 10 C. L. 482 have inherent jurisdiction to set aside or enjoin the enforcement of a judgment procured by fraud,[7] accident or mistake,[8] where its enforcement would be inequitable,[9] provided that there is no adequate remedy at law,[10] and that the party seeking relief is free from fault,[11] has a meritorious de-

made that he had cause of action as required by § 572. Brown v. Dann [Kan.] 97 P 862.

2. Under Code Civ. Proc. § 724, providing for vacation for mistake, surprise or excusable neglect, vacation for other causes is not authorized, and an intentional default should not be opened. Warth v. Moore Blind Stitcher & Overseamer Co., 109 NYS 116.

3. Laws 1902, p. 1562, c. 580, § 253, authorizing opening of defaults, does not apply to a proceeding to vacate a judgment which has been extinguished. Fluegelman v. Armstrong, 110 NYS 967.

4. Where supreme court decides that a consent decree is void on the ground that it could be entered only after hearing, the trial court cannot amend the decree to show that it was in fact rendered after hearing. Schofield v. Rankin [Ark.] 109 SW 1161. Where judgment is absolutely void for want of service, a suit to vacate is not maintainable under Code, § 4091, specifying grounds of vacation or modification. Cummings v. Landes [Iowa] 117 NW 22. Prior to Laws 1907, p. 554, c. 304, § 253, amending Laws 1902, c. 580, § 253, municipal court had no power to vacate default judgment for want of service. Duryee v. Hunt, 56 Misc. 684, 107 NYS 734; Mann v. Meryash, 107 NYS 599.

5. Motion to correct record and vacate judgment for want of service held proper. Simmons v. Defiance Box Co. [N. C.] 62 SE 435.

6. Lorser v. Savings Deposit Bank & Trust Co. [C. C. A.] 163 F 212.

7. Engler v. Knoblaugh [Mo. App.] 110 SW 16. Fraud, accident, mistake and surprise are recognized grounds for equitable interference when one without negligence has lost an opportunity to present a meritorious defense to an action and the enforcement of judgment would be inequitable. Lithuanian Brotherhelp Soc. v. Tunila, 80 Conn. 642, 70 A 25. Equity will set aside judgment taken in violation of agreement to give notice of further proceedings. Fidelity & Deposit Co. v. Crenshaw [Tenn.] 110 SW 1017. Where attorneys fraudulently and without notice to their client embodied in a decree in partition a provision awarding themselves a portion of the land, held a suit in equity was the proper proceeding to vacate the decree and have a proper decree entered. Schneider v. Lobingier [Neb.] 117 NW 473. Though **federal court** has no power to vacate judgment entered by state court under Rev. St. § 720, it may by injunction restrain the holder of such judgment from enforcing it, as such process operates on the person and not against the state authorities. Schultz v. Highland Gold Mines Co., 158 F 337.

8. Where judge inadvertently adds statement to judgment contrary to his intention. Ludwig v. Walker, 111 NYS 1102. Equity will relieve against **judicial mistake** where court has been misled as to fact and has pronounced judgment which it would not otherwise have given. Engler v. Knoblaugh [Mo. App.] 110 SW 16. Mistake **in judgment rendered on report of commissioners** appointed to establish a road in reciting that certain facts had been considered by the commissioners held correctible in a separate suit in equity. Id. Remedy for **erroneous recital** of service is by injunction. United States v. Taylor, 157 F 718.

9. Court of equity does not sit in review of judgments at law but only gives relief in extreme cases, such as where a judgment is obtained by fraudulent means, or some part of it is so unconscionable that it would be tantamount to a fraud in the plaintiff to insist on its enforcement. Central Stock & Grain Ex. v. Pine Tree Lumber Co., 140 Ill. App. 471.

10. M. Redgrave Co. v. Redgrave [N. J. Eq.] 71 A 147. Facts held to show an adequate remedy at law. Id. As against a **merely erroneous judgment,** injunctive relief cannot be had if the remedy by appeal or certiorari is available. Kansas City Life Ins. Co. v. Warbington [Tex. Civ. App.] 113 SW 988. Where certain defenses and conditions have been determined against a party, he may not sue for injunctive relief against the judgment, his remedy being restricted to appeal. Flanagan v. MacNutt, 113 NYS 42. Remedy for adverse decision on plea of equitable estoppel is by writ of error. Monmouth County Elec. Co. v. Eatontown Tp. [N. J. Eq.] 70 A 994. The remedy for **error in computing amount of judgment** so that it is excessive is by appeal or certiorari and not by injunction to enjoin enforcement. Kansas City Life Ins. Co. v. Warbington [Tex. Civ. App.] 113 SW 988. Code Civ. Proc. § 1201, providing that **when judgment is satisfied** in fact otherwise than upon execution, party or attorney must give such acknowledgment, or make such indorsement, and upon motion court may compell it, or may order entry of satisfaction to be made without it, held to afford sufficient remedy. Donavan v. McDevitt, 36 Mont. 61, 92 P 49. Where there is adequate remedy at law to set aside **default judgment** obtained by fraud and mistake, equity will not give relief. Weed v. Hunt [Vt.] 70 A 564. Equity will not set aside default on ground of want of service and that sheriff's return was false. Reiger v. Mullins, 210 Mo. 563, 109 SW 26. Equity may grant relief against a default rendered on false return of service of process. Abraham v. Miller [Or.] 95 P 814. Evidence insufficient to show false return. Id. One cannot sue in equity to enjoin enforcement

fense,[12] has acted with due diligence,[13] and has been guilty of no conduct amounting to a waiver or working an estoppel.[14] Equity may relieve from arbitrary or entirely unwarranted conduct of the court,[15] and also from void judgments,[16] but not from mere errors [17] or from failure to perfect an appeal.[18] A court of equity will not pass upon questions of fact determined by the judgment sought to be vacated.[19] A pro-

of default judgment on ground that he was prevented by accident and mistake from setting up a defense, where by statute he is given an adequate remedy at law to open the default after he had notice of the judgment, and failure to avail of such remedy is not excused. Weed v. Hunt [Vt.] 70 A 564. Error in rendering default where answer is on file can only be corrected on motion during term or appeal and not by equity after term. Curtiss v. Bell [Mo. App.] 111 SW 131.

**Statutes extending power of law courts** in this respect do not restrict the jurisdiction of equity, and Rev. St. 1899, § 3795, authorizing grant of new trial after term for fraud and perjury, does not restrict power of court of equity to do so. Harden v. Card [Wyo.] 97 P 1075.

**11.** Equity cannot grant relief where judgment would not have been rendered except for defendant's negligence. Curtiss v. Bell [Mo. App.] 111 SW 131. Decree of orphan's court cannot be interfered with by equity where parties misunderstood issue or negligently failed to offer evidence which would have produced different result. Woolsey v. Woolsey [N. J. Eq.] 71 A 408. Judgment will not be opened for fraud where petitioner has not exercised due diligence to protect himself from such fraud. Johnson v. Building & Loan Ass'n, 133 Ill. App. 213. Equity will not enjoin entry of judgment because of court's refusal to consider **equitable estoppel not properly pleaded.** Monmouth County Elec. Co. v. Eatontown Tp. [N. J. Eq.] 70 A 994.

**12.** Reed v. New York Nat. Exch. Bank, 131 Ill. App. 434. Equity cannot give relief on ground of fraud or mistake where no effort is made to show a meritorious defense. Curtiss v. Bell [Mo. App.] 111 SW 131. Though decree be entered without jurisdiction, equity will not relieve against it if plaintiff had valid claim to which there was no defense. Lindberg v. Thomas, 137 Iowa, 48, 114 NW 562. Equity will not relieve against judgment obtained without service where defendant does not show meritorious defense. Broadway v. Sidway, 84 Ark. 527, 107 SW 163.

**Decree entered without jurisdiction** will not be enjoined where it is rendered upon valid cause of action to which there is no defense. Lindberg v. Thomas, 137 Iowa, 48, 114 NW 562.

**13.** See, also, post, § 5D. Injunction against enforcement of judgment will be refused where if complainant had acted promptly and in accord with practice and precedent it could have obtained as ample relief from trial court as court of equity could give. Central Stock & Grain Exch. v. Pine Tree Lumber Co., 140 Ill. App. 471. Bill will not lie to enjoin enforcement of a judgment where reasons assigned were available in original action and no reason is given why they were not then urged. Tyrrell v. Wood [R. I.] 68 A 545. Usury and the legal inability of a married woman to make a contract of surety for her husband are legal defenses and must be set up or they are concluded by the judgment. Weed v. Hunt [Vt.] 70 A 564. Where appellant, though duly served and present at trial, failed to take appeal or certiorari and his evidence of any trick, fraud or deception practiced in procuring judgment was loose and unsatisfactory, while regularity of judgment was sustained by record, testimony of constable who served summons and was present at trial and clear, positive testimony of appellee, refusal to restrain enforcement of judgment held proper. Hughes v. Clark, 35 Pa. Super. Ct. 518. A judgment may be set aside for fraud notwithstanding the fact that no defense was made at the time it was rendered, although the defendant was properly served with summons by copy thereof left at her usual place of residence. Ulman, Einstein & Co. v. Effinger, 11 Ohio C. C. (N. S.) 383.

**14.** One who has on notice appeared and submitted his case on merits on application for modification of decree, without assailing procedure, should not afterwards be permitted to do so. Wilson v. McCutchen Estate Claimant [Iowa] 114 NW 551. Party to partition suit who was of age at time of decree and accepted fruits of the litigation and enjoyed them for many years estopped to assail the decree. Sullivan v. Holbrook, 211 Mo. 99, 109 SW 668. Judgment defendant with full knowledge of facts, having bid at sale of property under judgments and accepted overplus, held not entitled to have judgment set aside, though motion therefor was pending at the time of sale to purchaser's knowledge. Lupo v. Frazier, 130 Ga. 409, 60 SE 1003. Where city filed bill to enjoin removal through streets of smallpox hospital and consent decree was entered, that building should be destroyed and owners compensated, it was held that after such destruction, taxpayers could not demand vacation of decree on ground that city had not consented to it by ordinance. Chester City v. White, 220 Pa. 646, 70 A 125.

**15.** Ignoring plea of privilege, notwithstanding evidence conclusively establishing same. Coca Cola Co. v. Allison [Tex. Civ. App.] 113 SW 308.

**16.** Void judgment of justice for less than appealable amount. Coca Cola Co. v. Allison [Tex. Civ. App.] 113 SW 308.

**17.** No equitable aid will be extended merely for errors intervening in the progress of the cause or entry of judgment. Central Stock & Grain Exch. v. Pine Tree Lumber Co., 140 Ill. App. 471.

**18.** Where record did not show allowance of appeal or time for filing bond and could not be amended to permit appeal, collection of such judgment could not be enjoined unless the creditor would stipulate for entry of new judgment in like amount, accompanied by order allowing appeal. Wesley Hospital v. Strong, 233 Ill. 153, 84 NE 205.

**19.** Question as to alteration of an instru-

ceeding to enjoin a judgment procured by fraud, accident or mistake is a direct and not a collateral attack.[20]

(§ 5) *C. Fraud, accident, mistake, surprise, and other particular grounds.*[See 10 C. L. 485]—Fraud must lie in the procurement of the decree,[21] and must be extrinsic or collateral to the questions examined and determined in the action.[22] Cases in which the facts have been deemed to show or not to show such surprise,[23] accident,[24] mistake,[25] excusable neglect,[26] fraud,[27] or any or all of such grounds [28] as would war-

ment in issue at the trial. Harden v. Card [Wyo.] 97 P 1075.

**20.** Engler v. Knoblaugh [Mo. App.] 110 SW 16.

**21.** Fraud which justifies vacation of judgment must be practiced in procuring it and not that which merely affects the case generally. Cross v. Gould [Mo. App.] 110 SW 672. Where fraud is alleged but it does not appear from complaint that plaintiff was prevented from presenting his claim to court, complaint is insufficient. La Fitte v. Salisbury, 43 Colo. 248, 95 P 1065. Judgment may be set aside for fraud which prevented party from fully exhibiting his case, or for fraud by reason of which contest was prevented. Walker v. State [Ind. App.] 86 NE 502.

**22.** Fraud for which suit may be maintained to annul a judgment between the same parties must be extrinsic or collateral to the matter tried by the first court and not such as inhered in the issues of the prior action. Jackson v. Wilkerson [C. C. A.] 160 F 623. Where allegations of fraud were necessarily tried in the prior suit, the decree is res judicata. Id. **False swearing and perjury** do not constitute such a fraud. Richards v. Moran, 137 Iowa, 220, 114 NW 1035; Gitier v. Russian Co., 124 App. Div. 273, 108 NYS 793. Judgment will not be reviewed for perjury committed by a witness at the trial. Walker v. State [Ind. App.] 86 NE 502. Where the false **evidence** complained of is charged to relate to matters affecting the court's jurisdiction, a bill of review may lie, but such bill does not lie where the false evidence was merely evidence upon the issues tried and disposed of upon original hearing. Evidence to impeach witness upon original hearing is insufficient ground for allowing bill of review. Johnson v. Building & Loan Ass'n, 133 Ill. App. 213. Charge that decree of foreclosure was obtained upon testimony of one who swore falsely as to amount due held insufficient. Id. Allegation of fact known to be false and establishment of such fact by false testimony is not fraud under Code, § 4091. Helrick v. Smith, 137 Iowa, 622, 115 NW 226. Under Rev. Laws 1905, § 4277, providing for an action to vacate judgment for fraud or perjury, etc., such action cannot be maintained on bare allegation that, on an issue of fact so squarely made that each party knows what the other will attempt to prove, there was perjured testimony. Hayward v. Larrabee [Mich.] 118 NW 795.

**23. Surprise shown:** Default properly set aside where defendant was a foreigner and **did not understand papers presented** to him, was not served, and was not partner of codefendant served, but his wife was. Reichenbach v. Harris, 112 NYS 1069. **A judgment taken contrary to agreement** is by surprise, within B. & C. Comp. § 103, permitting relief against such judgment. Voorhees v. Geiser-Hendryx Inv. Co. [Or.] 98 P 324. Held not an abuse of discretion to vacate a judgment of divorce where **attorney for defendant was misled by a remark of court** as to probable time of trial. Jones v. Jones, 37 Mont. 155, 94 P 1056. Facts held to authorize opening of judgment taken by default where pending the action in which it was rendered leave to intervene was applied for and granted and **statements by court as to time of future proceedings** in the case were relied upon. Pitiock v. Buck [Idaho] 96 P 212. Default set aside for **failure to serve notice of motion** to place cause on short cause calendar. Donegan v. Hubbard, 110 NYS 98.

**Surprise not shown:** Under St. 1898, § 2832, permitting vacation for surprise, inadvertence, etc., where defendants knew that an action was being defended by an attorney in their name and one appeared as a witness, they are presumed to know that judgment would follow trial, and notice of entry to their attorney was notice to them, and they are not entitled to have it vacated. Emerson v. McDonell [Wis.] 118 NW 814. Where default is vacated and on last day of term another is entered for failure to answer, the latter will not be set aside where it does not appear that defendant was prevented by surprise, etc., arising from absence of counsel, from presenting his defense. Ramsey v. Ferguson, 32 Ky. L. R. 1033, 107 SW 779.

**24. Accident shown:** One held entitled to have default opened where trial was had at a time it was **impossible for defendant to reach court** and it was agreed that defendant might open it. Union Stores Corp. v. Haight, 110 NYS 423. **Sickness of defendant's counsel** is ground under Kirby's Dig. § 4421, relative to casualty or misfortune. Capital Fire Ins. Co. v. Davis, 85 Ark. 385, 108 SW 202. Sworn statements of counsel that he was sick are not overcome by affidavits that he appeared in good health. Id. That one was **accidentally shot** preventing his appearance is ground for vacating judgment under Civ. Code Prac. § 518, for unavoidable casualty or misfortune. Hargis v. Begley, 33 Ky. L. R. 1020, 112 SW 602.

**Accident not shown:** Where codefendant did not appear because of **reliance on assurance of another** that he need not, he was not entitled to have the judgment vacated on the ground that he had been misled as result of accident, fraud or mistake. Kansas City Life Ins. Co. v. Washington [Tex. Civ. App.] 113 SW 988. **Withdrawal of counsel** from case held not unavoidable casualty or misfortune within Code, § 4091. Andres & Co. v. Schlueter [Iowa] 118 NW 429.

**25. Shown:** Where cause is submitted on stipulation covering certain but not all issues, and by mistake court determined issues excluded, judgment may be amended to express intention of parties. Wright v. Krabbenhoft, 104 Minn. 460, 116 NW 940. Where wife's counsel in divorce proceedings by mistake and without her consent stipulated as

to payment of costs out of proceeds of property divided, wife could have judgment based on such stipulation vacated. Sebree v. Sabree, 33 Ky. L. R. 114, 109 SW 311. Where **judgment on report of commissioners to establish road** was by mistake entered without annexed condition, defendant was entitled to equitable relief against its enforcement. Engler v. Knoblaugh [Mo. App.] 110 SW 16. **Consent decree** in creditor's suit properly vacated for mistake where creditor who did not consent had an interest which was disposed of by the decree. Prince's Adm'r v. McLemore, 108 Va. 269, 61 SE 802. Where failure to appear in court was due to **error of court,** judgment of nonsuit was properly vacated for mistake and surprise, under Revisal 1905, § 513, or Code 1883, § 274, relative to vacation in the discretion of the court. Smith v. Holmes Bros. [N. C.] 61 SE 631. **Mistake of fact** may be ground for interposition of court of equity to vacate judgment. Hilt v. Neimberger, 235 Ill. 235, 85 NE 304. Where defendant did not understand summons, evidence held to show that he was not served. Id. Under St. 1898, § 2832, authorizing the court, in its discretion to set aside a default, judgment by default was properly set aside where defendant was **misled by plaintiff's attorney.** Wegwart v. Beneditz, 135 Wis. 422, 115 NW 1101. Mistake or oversight of party in failing to notify his attorneys of settlement before their withdrawal from case held such as not to require court to disturb judgment, there being nothing to show that the mistake was excusable. Corson v. Smith [S. D.] 118 NW 705. Where court enters consent decree in partition, it cannot correct same on motion of one of parties because of alleged **mistake as to law** governing partition. Beer v. Orthaus, 109 NYS 997.

**26.** On motion to set aside default for excusable neglect and inadvertence, defaulting party must show that he or his attorney attended to matter of appearance with at least ordinary diligence. Mutual Reserve Life Ins. Co. v. Ross [Ind. App.] 86 NE 506. Facts held to show no abuse of discretion in refusing to vacate a default. Id. Where petition to vacate default judgment for excusable neglect makes proper case under Burns' Ann. St. 1908, § 405, statute is mandatory and court has no discretion. Ziegler v. Funkhouser [Ind. App.] 85 NE 984. Application to set aside default, stating that defendant was inexperienced woman, confined and sick when action was commenced, and showing that promptly on recovering within month after rendition of judgment she applied to have it vacated, authorizes relief under Burns' Ann. St. 1908, § 405, authorizing vacation for excusable neglect. Id. **Failure to obtain counsel** after having been served with process held not sufficient to authorize vacating of a default judgment. Hannan v. St. Clair [Colo.] 96 P 822. Will not be vacated because defendant defended his own cause and did not appreciate necessity of employing counsel. Langham v. O'Meara [Ky.] 112 SW 928.

**27.** Not essential to one's right to relief against default judgment that defendant's attorney should have intentionally and fraudulently misled him, but is sufficient if he did so innocently. Lithuanian Brotherhelp Soc. v. Tunila, 80 Conn. 642, 70 A 25. **Consent decree** obtained by fraud may be vacated. Prince's Adm'r v. McLemore, 108 Va. 269, 61 SE 802.

**Held fraud:** Stipulation in action to enjoin issuance of school bonds to enter judgment for plaintiff, entered into by board and plaintiff, held fraud on school district and the court and constituted no basis for judgment. Schouweiler v. Allen [N. D.] 117 NW 866. Averment in petition that goods or merchandise were sold to husband, and that afterwards and before suit is brought to recover price thereof plaintiffs inserted name of wife of such husband in said account, and without her knowledge or consent, is a sufficient averment of fraud to constitute a cause of action, and a demurrer to such petition and pertinent interrogatories attached thereto is properly overruled. Ulman, Einstein & Co. v. Effinger, 11 Ohio C. C. (N. S.) 383. Judgment procured against party on account which she never owed, nor became either directly or indirectly liable for its payment, constitutes fraud on court rendering such judgment. Id. Failure of defendant, a foreigner, to appear to answer summons held due to misunderstanding, due in part at least to conduct of plaintiff's attorney, whereby former was led to believe that summons was only a notice to pay. Lithuanian Brotherhelp Soc. v. Tunila, 80 Conn. 642, 70 A 25.

**Held not fraud:** One alleging himself to be unable to ascertain for himself condition of his account with building and loan association, and who alleged that he was therefore compelled to rely on representations of officers of association, does not allege sufficient fraud to warrant setting aside decree of foreclosure obtained by association for greater amount than he alleged officers represented to be due, where he failed to show reason why he could not have investigated condition of account as well at time of suit as later. Johnson v. Building & Loan Ass'n, 133 Ill. App. 213. On motion to set aside **judgment entered for greater sum than agreed,** held record supported finding that judgment was based on merits and not on agreement. Stewart v. Wood [Ark.] 111 SW 983. Where plaintiff was entitled to judgment because defendant did not file his answer within statutory period, and judgment was proper, representations that defendant had no attorney and no answer was filed because of **mistake** did not constitute fraud. Curtiss v. Bell [Mo. App.] 111 SW 131. Mere **prosecution of unfounded claim** or **erroneous allegation of fact** does not constitute fraud under Code, § 4091. Hedrick v. Smith, 137 Iowa, 625, 115 NW 226. Where one demanded and took a **personal judgment by default against one not personally liable.** Id.

**28.** Allegations of agreement to extend time of redemption are immaterial in proceedings to have judgment of foreclosure set aside. Johnson v. Building & Loan Ass'n, 133 Ill. App. 213. That premises were community property and as such vested exclusively in widow held not ground for vacation of judgment setting apart homestead for widow and children, under Ball. Ann. Codes & St. § 4953, relative to **mistake, inadvertence or neglect,** or under § 5153, relative to **casualty or misfortune.** In re McKeever's Estate, 48 Wash. 429, 93 P 916. If justice announces one judgment and by **fraud, accident or mistake** enters another, equity has jurisdiction to set latter aside. Nashville,

rant or require the vacation or modification of the judgment, are collated in the notes. The casualty or misfortune must be such as reasonable skill and diligence could not have avoided.[29] A judgment founded upon a usurious contract will usually be opened.[30]

(§ 5) *D. Procedure to amend, open, vacate, or enjoin.* See 10 C. L. 488—A motion to vacate a judgment for irregularity is a common-law remedy,[31] but in the absence of statute, a court of purely statutory creation cannot ordinarily vacate its final judgments unless so authorized by statute.[32] A motion to open a judgment is an appeal to the equitable powers of the court and cannot be sustained because of a mere technical irregularity not affecting the merits or justice of the judgment.[33] Proceedings to vacate judgments are sometimes specifically provided by statute,[34] and in such proceedings the requirements of the statute must be substantially complied with.[35] Statutory proceedings are not necessarily exclusive.[36]

*Time for application.* See 10 C. L. 488—The application must be seasonably made,[37]

etc., R. v. Brown, 3 Ga. App. 561, 60 SE 319. Will not grant relief where, as is apparent from record, sole cause of complainant's acts was belief that it was immune from final process. Central Stock & Grain Exch. v. Pine Tree Lumber Co., 140 Ill. App. 471. Held error for clerk to set aside, on ground of **excusable mistake or neglect**, judgment in favor of surety who had paid judgment against principal. Bank of North Wilkesboro v. Wilkesboro Hotel Co., 147 N. C. 594, 61 SE 570. Failure of defendant, a foreigner, to appear and defend, held due to **misunderstanding**, in that he thought summons was only a notice to pay. Lithuanian Brotherhelp Soc. v. Tunila, 80 Conn. 642, 70 A 25. Decree opening a highway properly vacated where owner was **misled** as to location of road. Thomas v. Boyd, 108 Va. 584, 62 SE 346.

**29.** On application for relief on ground of inadvertence and mistake of counsel, all attendant circumstances as shown by papers are to be considered. Lunnun v. Morris [Cal. App.] 95 P 907. Where defendant's counsel was misled by plaintiff's counsel, whether he was negligent was a question for the trial court. Cross v. Gould [Mo. App.] 110 SW 672. Where defendant was negligent in failing to have her husband appear as witness, judgment will not be set aside. Badham v. Lunsford [Ala.] 46 S 762. Where the husband was sick but might have attended, held defendant did not prove that his failure to appear was not due to her fault. Id. Under Code, § 4091, providing for vacation for unavoidable casualty or misfortune, judgment properly vacated where defendant acted in **reliance on letter from clerk of court** stating that complaint had not been filed. Logan v. Southall, 137 Iowa, 372, 115 NW 19. Where only excuse for failure to appear in justice court was **mistake of attorney as to date of trial**, plaintiff held not entitled to relief in equity. Kramer v. Schulte [Mich.] 15 Det. Leg. N. 893, 118 NW 481. Mere **failure of attorney to attend to his duty** or his **luck of judgment** as to steps to be taken to protect his client is not casualty or misfortune under Code, § 4091. Hedrick v. Smith, 137 Iowa, 625, 115 NW 226. Party who is guilty of **failure to inform attorney of service of notice** of action in order that defense may be interposed is guilty of negligence barring relief under Code, § 4091, on ground of unavoidable casualty or misfortune. Id. Where defendant did not ask continuance because of **absent witness**, nor ask that plaintiff be put upon showing as to what she expected to prove by her witness, held she was not entitled to have the judgment vacated. Badham v. Lunsford [Ala.] 46 S 762.

**30.** When consideration of confessed judgment is made in part of usury, no matter in what form it may be disguised, the court will ordinarily open the judgment and afford relief. Webster v. Smith, 36 Pa. Super. Ct. 281. Held no clear evidence sufficient to estop claim to open confessed judgment on ground of usury. Id.

**31.** Cross v. Gould [Mo. App.] 110 SW 672.

**32.** Municipal court had no power to vacate final order setting aside verdict and judgment. Colwell v. New York, etc., R. Co., 57 Misc. 623, 108 NYS 540.

**33.** Manayunk Trust Co. v. Platt, 221 Pa. 248, 70 A 721; Ilyus v. Buch, 34 Pa. Super. Ct. 43; Zajaczkowski v. Jawer, 36 Pa. Super. Ct. 324. The judge exercises the functions of a chancellor, is vested with a discretion to pass upon the weight of the evidence and the credibility of the witnesses, and to dispose of the question presented upon equitable principles. Ilyus v. Buch, 34 Pa. Super. Ct. 43; Zajaczkowski v. Jawer, 36 Pa. Super. Ct. 324.

**34.** Successive steps in proceedings to vacate a judgment after term, under §§ 5354, 5359 and 5360, are: (1) an application filed in the original case, stating the ground of the vacation and the defense, upon which summons shall issue, and no further pleading is required; (2) hearing on the application; (3) if ground for vacation is found to exist and a valid defense is averred in the application, the judgment should be vacated but the lien of the original judgment saved by suspending the order of vacation pending trial on the merits; (4) a pleading setting up the defense, and a trial upon the issues then made as if no judgment had been rendered; (5) the rendering of a judgment which shall either restore the old judgment or extinguish it, as the facts found on the trial demand. First Nat. Bank v. Mullen, 7 Ohio N. P. (N. S.) 313.

**35.** McAdams v. Latham [Okl.] 96 P 584.

**36.** The provisions of § 5354, Rev. St., with reference to the vacation or modification of judgments after term, are cumulative merely and not exclusive. First Nat. Bank v. Mullen, 7 Ohio N. P. (N. S.) 313.

**37.** One who seeks relief on ground of

and within the statutory period [38] after the right to relief is ascertained.[39] A mo-

fraud must act diligently and in good faith. Cross v. Gould [Mo. App.] 110 SW 672. Movant held not barred by laches. Smith v. First Nat. Bank [Ga. App.] 62 SE 826. Not abuse of discretion to refuse to vacate for fraud, after delay of one year. Dunn v. Lawrence [Minn.] 118 NW 1118. One who moves to vacate judgment for fraud at term after discovering fraud acts with diligence and is not negligent as matter of law. Cross v. Gould [Mo. App.] 110 SW 672. Where motion is made to vacate **decree pro confesso,** four months after rule day, without sufficient excuse for the delay, it is proper to refuse to open it. King v. Bell [Fla.] 45 S 488.

**Held seasonable:** Respondents held not guilty of inexcusable laches where service was by publication and respondents had no knowledge of judgment until 9 months after rendition. Fink v. Woods, 102 Minn. 374, 113 NW 909. It is only unexcused laches in making application after notice of pendency of suit or entry of default judgment which will justify court in denying application for leave to answer on the ground of laches, and laches with reference to subject-matter and which might defeat right on trial on merite held insufficient. Id. Where owner conveys before commencement of suit in which judgment is entered, the grantee is not in laches for failing to attack judgment until after filing of a bill by the judgment creditor to set aside deed as fraudulent. In re Mullineaux [N. J. Law] 69 A 868.

**Held not seasonable:** Delay of two years under belief of corporation without visible assets that it was immune from final process, until discovery by creditors of fraudulent conveyance held laches. Central Stock & Grain Exch. v. Pine Tree Lumber Co., 140 Ill. App. 471. Held insufficient diligence where one against whom judgment was rendered waited nearly four years before seeking to have judgment alleged to have been procured by fraud set aside, even though he alleged himself to be of such limited education that he could not himself ascertain the condition of his account sued upon and reduced to judgment. Johnson v. Building & Loan Ass'n, 133 Ill. App. 213. Motion in 1907 to open default taken in 1901 comes too late where in 1901, landlord, in whose favor default judgment was entered, was 77 years old and in reasonably good health and clear mind, while in 1907 his physical and mental powers were so impaired that he could not give testimony. Schultz v. Von Der Born, 57 Misc. 625, 108 NYS 756. Petition to open final judgment denied, where petitioner received knowledge of decree against him in sufficient time to have presented petition to open same before finality and could not excuse delay or failure to do so. Weaver v. Chicago Title & Trust Co., 131 Ill. App. 66. Fourteen years' delay in seeking to vacate a judgment held not excused by fact that plaintiff knew beneficiaries of the judgment creditor and expected the judgment would become her property at her decease. Delaney v. O'Conner, 234 Ill. 546, 85 NE 226. Sixteen years' delay in seeking to vacate decree of removal of trustee held such laches as to preclude relief. Id. Equity will not vacate a decree entered in vacation where complainants, with knowledge of their rights and that decree was void, delayed for five years and innocent persons had acquired rights to be affected. Jackson v. Becktold Print. & Book Mfg. Co. [Ark.] 112 SW 161. Where court of common pleas quashed petition for appointment of viewers in proceeding to condemn a street and petitioners did not appeal, held the order would not be set aside after eleven years because the supreme court had decided in another case that the law was different from that upon which dismissal was based. In re Pulaski Ave., 220 Pa. 276, 69 A 749.

**38. California:** Under Code Civ. Proc. § 473, authorizing vacation of judgment as to party not served, judgment may be vacated if he shows meritorious defense and applies within one year. San Diego Realty Co. v. McGinn [Cal. App.] 94 P 374. Rule that motion to vacate judgment cannot be made after six months from its entry applies only where judgment which it is sought to vacate is one which was actually rendered. City & County of San Francisco v. Brown, 153 Cal. 644, 96 P 281.

**Iowa:** One is not entitled to seek to vacate judgment under Code § 4091, for unavoidable casualty or misfortune, after expiration of statutory period, unless he shows good ground for not having acted within the period. Hedrick v. Smith, 137 Iowa, 625, 115 NW 226. Code, § 3796, providing for new trial within two years where a judgment has been rendered on service by publication against a defendant who did not appear, does not apply to divorce suits. Tollefson v. Tollefson, 137 Iowa, 151, 114 NW 631.

**Kentucky:** Under Civ. Code Prac. §§ 414, 518, where action to set aside judgment is not brought for five years, it can be sustained only on ground that judgment is void. Highland Land & Bldg. Co. v. Audas, 33 Ky. L. R. 214, 110 SW 325.

**Nebraska:** A petition under Code Civ. Proc. § 602 to set aside judgment for fraud must be filed within two years. State v. Merchants' Bank [Neb.] 116 NW 667.

**North Carolina:** Revisal 1905, § 513, authorizing relief within one year for mistake or inadvertence, does not authorize relief after such time. Adams v. Joyner, 147 N. C. 77, 60 SE 725.

**South Carolina:** Cr. Code 1902, § 195, providing that court in its discretion may vacate within one year for mistake, surprise, etc., should be liberally construed in favor of justice. Jeter v. Knight [S. C.] 62 SE 259.

**Texas:** Bill to set aside judgment for fraud is barred in four years. McLean v. Smith [Tex. Civ. App.] 112 SW 355. Where decree of foreclosure recited appearance, and suit to restrain enforcement was not brought for four years, an action to annul it was barred by the four-year statute. Steves v. Smith [Tex. Civ. App.] 20 Tex. Ct. Rep. 877, 107 SW 141.

**Statute tolled** while plaintiff was insane. McLean v. Stith [Tex. Civ. App.] 112 SW 355.

**39.** Motion to set aside default because amount was not ascertainable from complaint, as required by Civ. Code Prac. § 90, is not barred by limitation where relief is sought as soon as existence of judgment is ascertained. Brashears v. Brashears, 33 Ky. L. R. 233, 110 SW 303.

tion to strike a judgment cannot be entertained by the trial court after the case has been taken to an appellate court,[40] but a bill to enjoin the enforcement of a decree on the ground of fraud may be heard though an appeal is pending.[41] Lapse of time does not bar the vacation of a void decree.[42]

*Parties.*[See 10 C. L. 489]—One neither a party to a judgment nor bound thereby cannot maintain proceedings to vacate it,[43] unless his interests are affected thereby.[44] The mere fact that the judgment debtor is insolvent and his sureties have to pay the judgment [45] does not render him an unnecessary party in a proceeding to enjoin the enforcement of the judgment.

*Modes and manner of procedure.*[See 10 C. L. 489]—The usual remedies for opening and vacating judgments are by motion or petition in the cause [46] or by independent suit,[47] the former proceeding sometimes being held exclusive of the latter,[48] and at other times the latter being held exclusive.[49] A direct attack upon a judgment is an attempt to avoid or correct it in a manner provided by law, and the proper method

**40.** Trial court has no power to strike out judgment on motion made after it was enrolled, after appeal taken, execution staid, bond given, and transcript taken to appellate court. Code Pub. Loc. Laws, art. 4, § 171, motion being founded on surprise and fraud. United R. & Elec. Co. v. Corbin [Md.] 71 A. 131.

**41.** Bill to impeach and appeal seek different remedies. Dowagiac Mfg. Co. v. McSheery Mfg. Co. [C. C. A.] 155 F 524.

**42.** Hayes County v. Wileman [Neb.] 118 NW 478. Void judgment may be assailed at any time the party holding it seeks to derive advantage from it. Stubbs v. McGillis [Colo.] 96 P 1005. Defendants' delay to vacate void judgment will not preclude relief if plaintiff is not prejudiced. Id.

**43.** One not bound. Churchhill v. More [Cal. App.] 96 P 108. Where a decree is regularly and properly entered between the parties and no fraud is alleged, it cannot be set aside at the instance of one not a party but who claims some right in the property. Englehard-Hitchcock Co. v. Southern Banking & Trust Co., 162 F 690. Judgment rendered and enrolled, by mistake, against wrong party cannot be corrected except as between real parties and before rights of third parties have intervened. Allen West Commission Co. v. Millstead [Miss.] 46 S 256. One who has apparently, but not really, been made a party cannot directly assail judgment for fraud, since he has not been injured, and besides he has adequate remedy at law by motion in action to correct record. Hargrove v. Wilson [N. C.] 62 SE 520.

**44.** Grantee of judgment debtor has standing in court in which judgment is entered to move to set it aside as irregular and thereby remove apparent cloud it casts on the title. In re Mullineaux [N. J. Law] 69 A 968.

**45.** Steele v. Culver, 29 S. Ct. 9. Mere fact that judgment debtor is insolvent and sureties will have to pay judgment does not render him unnecessary party in proceeding to enjoin enforcement of judgment. Id.

**46.** See, also, ante, § 5B. Void judgment vacated on defendant's motion. Nicholson v. Midland Sav. & Loan Co. [Okl.] 96 P 747. Motion to impeach for fraud lies though facts do not appear on face of record. Smith v. First Nat. Bank [Ga. App.] 62 SE 826. Motion to set aside stipulation and judgment for fraud and collusion is addressed to inherent power of court to control its own proceedings and judgments, and not by Code Civ. Proc. § 1282 or § 1290. People v. Santa Clara Lumber Co., 113 NYS 70. Where return of process is defective, a default based thereon may be vacated on motion either under § 1 or § 5, c. 134, Code 1899. Lynch v. West, 63 W. Va. 571, 60 SE 606. Where judgment by default is based on void process, the statute relating to pleas in abatement will not be applied so as to deny defendant the remedy provided by such statutes. Id. Where defendant in municipal court has allowed a default to be entered against him, his remedy is by motion to open default. Fong Ming v. Fong Ling, 109 NYS 750. Prior to Laws 1907, p. 554, c. 304, § 253, amending Laws 1902, c. 580, § 253, municipal court had no power to vacate judgment for want of legal service on defendant, remedy being by appeal. Duryee v. Hunt, 56 Misc. 684, 107 NYS 734; Mann v. Meryash, 107 NYS 599. Under Revisal 1905, § 2513, remedy against fraudulent decree in partition is by petition in the cause. Hargrove v. Wilson [N. C.] 62 SE 520. Judgment may be modified by practice under Ball. Ann. Codes & St. § 4953, providing for amendment of proceedings, though application is made under §§ 5153, 5162, providing for vacation or modification of judgments. O'Bryan v. American Inv. & Imp. Co. [Wash.] 97 P 241.

**47.** See ante, § 5B, subd. Courts of Equity. Code, §§ 4091-4094, requiring application for new trial to be filed in same cause and entitled in original action, have no application to suit to enjoin decree as being void for want of jurisdiction. Linderg v. Thomas, 137 Iowa, 48, 114 NW 562.

**48.** Under Revisal 1905, § 2513, a decree in partition can be assailed for fraud only by petition in the cause, and therefore an independent action to vacate will not lie. Hargrove v. Wilson [N. C.] 62 SE 520. Motion to set aside decree is proper and only remedy for irregularities in progress of cause. Lanier v. Heilig [N. C.] 63 SE 69.

**49.** Judgment procured by fraud can be vacated only by an independent proceeding. Simmons v. Defiance Box Co. [N. C.] 62 SE 435. Motion to open judgment as a default cannot be sustained where there has been no default, as where, upon denial of request for adjournment, defendant remained in court and took part in trial. Scheckter v. Reiter, 113 NYS 729.

is to bring forward the action and vacate the judgment.[50] An equitable proceeding to vacate is the proper remedy where time prescribed for prosecuting the proceeding has expired.[51] A bill of review to vacate a judgment for want of service where the judgment is not void cannot operate as an appeal.[52] On a bill to enjoin enforcement of a decree filed pending appeal, the court cannot set aside the decree for error.[53] Proceedings for relief from judgment should generally be instituted before the judge who rendered the judgment.[54] A judgment entered on an exemplification of the record does not become a judgment of the court upon the records at which such entry is made so as to give such court jurisdiction to inquire into the validity, merits or effect, of the judgment so entered.[55] Want of proper service may be cured by general appearance on motion to vacate,[56] and the right to relief may be waived.[57] A movant cannot, in a single proceeding, have three separate and distinct judgments vacated.[58] A judgment cannot be opened as a default where there has been no default.[59] A consent decree cannot be set aside by rehearing, appeal or bill of review unless through clerical error something not consented to was inserted.[60] One who seeks to vacate a judgment void as to himself is not required to first move for new trial or appeal.[61] One who seeks to open a judgment may not rely on its invalidity as to a codefendant for whose benefit it is not sought to be set aside.[62]

**50.** Bickford v. Bickford, 74 N. H. 448, 69 A 579. A motion to correct record to speak truth and show no service of process or appearance is direct proceeding and an appropriate remedy. Simmons v. Defiance Box Co. [N. C.] 62 SE 435. In action on judgment defense that judgment debtor was not in fact before the court is a direct attack. Ballou v. Skidmore [Ky.] 113 SW 441.

**51.** Where default judgment was rendered by the municipal court after it had lost jurisdiction, and defendant had no knowledge thereof until time to move to vacate had expired, an equitable action to vacate is proper. New York & N. J. Tel. Co. v. Rosenthal, 112 NYS 612.

**52.** Bill in nature of bill of review to vacate a judgment for want of service of process, where judgment was not void because of such defect, cannot operate as appeal, and where no facts are pleaded showing the judgment to be void, or that petitioners have a defense, it will not be set aside. Mueller v. Heidemeyer [Tex. Civ. App.] 109 SW 447.

**53.** On a bill by defendant to enjoin enforcement of a decree on the ground of fraud, filed pending appeal from the decree, the court has no jurisdiction to set aside the decree for error. McSherry Mfg. Co. v. Dowagiag Mfg. Co. [C. C. A.] 160 F 948.

**54.** Superior court cannot review decrees of circuit court, and vice versa. May v. May, 134 Ill. App. 638. Judgment of county court held not subject to attack by injunction issued by district court. Wheeler v. Powell [Tex. Civ. App.] 114 SW 689. An application to vacate an order setting aside a judgment and dismissing a complaint should be made to the judge who made it. Newcomb v. Burbank, 159 F 569. Rev. St. 1895, art. 2996, providing that writs of injunction to stay execution on judgment shall be tried in court where judgment was rendered, applies to county court. Wheeler v. Powell [Tex. Civ. App.] 114 SW 689. Where calendar rules required motions to postpone trials to be heard by trial judges on affidavits, one who intentionally suffers a default after a judge had denied postponement on affidavits cannot apply to another judge to open the default, as such course would be appealing from one judge to another. Warth v. Moore Blind Stitcher and Overseamer Co., 109 NYS 116. Where a probate decree allowing a will was reversed by the supreme judicial court on a jury trial and the will disallowed on ground of undue influence and it was later found that a juror was bribed, a writ of review to set aside the decree should be addressed to the probate and not to the supreme court. Crocker v. Crocker, 198 Mass. 401, 84 NE 476. The erroneous description of land in the judgment of a court of competent jurisdiction cannot be corrected by the court of another jurisdiction. Smith's Heirs v. Railroad Lands Co., 120 La. 564, 45 S 441. Especially is this so after 20 years and where the judgment was prepared at the instance of those complaining. Id.

**55.** Lehigh & N. E. R. Co. v. Hanhauser [Pa.] 70 A 1089.

**56.** A motion to vacate a judgment on ground of want of service of process and that the complaint did not state a cause of action is a general appearance and cures want of service. Barnett v. Holyoke Mut. Fire Ins. Co. [Kan.] 97 P 962.

**57.** One who appears after default and moves to correct the judgment nunc pro tunc after learning of fraud practiced upon him waives the right to vacate for such fraud. Cross v. Gould [Mo. App.] 110 SW 672. Where judgment was procured by fraud, fact that defendant moved to correct it nunc pro tunc when he had no notice of fraud **held not to estop him** from having it vacated on ground that he had consented to it. Id.

**58.** James v. Equitable Mortg. Co., 130 Ga. 87, 60 SE 258.

**59.** Where, after adjournment was denied, defendant remained in court, took part in trial, and cross-examined witnesses. Scheckter v. Reiter, 113 NYS 729.

**60.** Prince's Adm'r v. McLemore, 108 Va. 269, 61 SE 802.

**61.** One made party to judgment, but who was not served with process. Owens v. Cage [Tex.] 20 Tex. Ct. Rep. 313, 106 SW 880.

**62.** In moving to open a judgment, want

The availability of the remedies by appellate review is elsewhere treated.[63]

*Pleadings and practice.* See 10 C. L. 490—A petition in equity to vacate a judgment should show the grounds upon which such relief is asked [64] definitely and with certainty,[65] and a petition to enjoin a judgment on the ground of its invalidity should affirmatively show it to be void.[66] The facts constituting the complainant's defense to the judgment must be stated.[67] A motion for relief against a confessed judgment should be only to open the judgment and for leave to plead.[68] Motions to open or vacate judgments must usually be accompanied by affidavits [69] showing the grounds relied on [70] and a meritorious defense,[71] but in some jurisdictions an affidavit of merits may be dispensed with in the discretion of the trial court on motion to open a default,[72] and the merits of the defense are not pertinent in the face of want of diligence.[73] Affidavits must definitely designate the judgment or part

of jurisdiction of a codefendant cannot be relied upon where judgment is not sought to be opened for his benefit. Carney v. Twitchell [S. D.] 118 NW 1030.

**63.** See Appeal and Review, 11 C. L. 113; Certiorari, 11 C. L. 591.

**64.** Complaint charging misrepresentations of judgment plaintiff's attorney need not allege precise language used by him. Leithuanian Brotherhelp Soc. v. Tunila, 80 Conn. 642, 70 A 25. One who seeks equitable relief from a judgment, where he has lost his remedy at law because of statements of the trial judge, should allege that he relied on such statement. Ludwig v. Walker, 111 NYS 1102.

**65.** In a suit to vacate a judgment because entered on a legal holiday, complaint held not to sufficiently allege that it was entered on such date as against the presumption that it was entered in proper manner on a subsequent date. Stewart v. State Board of Medical Exm'rs, 48 Wash. 655, 94 P 472.

**66.** Zimmerman v. Trude [Neb.] 114 NW 641.

**67.** Mere statement that complainant has good defense is insufficient, as is also allegation that declaration on which judgment was rendered stated no cause of action. Reed v. New York Nat. Exch. Bank, 131 Ill. App. 434.

**68.** Should not be to vacate judgment. Murphy v. Schoch, 135 Ill. App. 550. Motion to vacate and set aside judgment on grounds that notes arose out of transaction of business in state by foreign corporation not authorized to transact such business under statute held properly denied. De Witt v. Flint & Walling Mfg. Co., 132 Ill. App. 356.

**69.** Motion to open default properly denied where affidavits upon which it is based are radically defective. Liebling v. Borg, 113 NYS 549.

**70.** Affidavit to vacate a default must show mistake, inadvertence or excusable neglect and a meritorious defense. Rev. St. 1887, § 4229. Beck v. Lavin [Idaho] 97 P 1028. Affidavit in proceedings to open judgment by confession, stating that notes had been given foreign corporation which had failed to comply with statute, held insufficient for failure to state that notes were not given in course of transactions with drummers or traveling salesmen excepted by the statute. De Witt v. Flint & Walling Mfg. Co., 132 Ill. App. 356. Affidavit held insufficient to authorize interference with judgment by confession on notes given foreign corporation alleged to have had no authority to transact business, where it fails to state facts forming consideration of notes. Id. Language which might have been sufficient in plea held insufficient for affidavit. Id.

**71.** Essential to motion to set aside judgment that affidavits show meritorious defense. Farrior v. Mickle, 133 Ill. App. 444. Under Code Civ. Proc. § 774, one must support his application to open a default by affidavit of merit or tender a copy of his proposed answer. Schaeffer v. Gold Cord Min. Co., 36 Mont. 410, 93 P 344. A verified answer denying every material allegation of the complaint is a sufficient affidavit of merits. Lunnun v. Morris [Cal. App.] 95 P 907. Counter affidavit tendered by a defendant in action of debt, with his plea, for purpose of setting aside an office judgment, is sufficient if it substantially complies with the statute. Ceranto v. Trimboli, 63 W. Va. 340, 60 SE 138. Use of "terms" instead of statutory word "demand" does not vitiate it, the words being equivalent. Id. Where such counter affidavit first denies indebtedness in the specific sum named in plaintiff's affidavit and then in any sum whatever, it does not impliedly admit any indebtedness. Id. Affidavit which sets forth no form of answer is insufficient. Steinman v. Blumenfeld, 113 NYS 550. Affidavit of merits on motion to set aside a default for excusable neglect merely stating that affiant has stated the facts constituting her defense to her counsel, but which does not state that she had stated all the facts. Cooper-Power v. Hanlon [Cal. App.] 95 P 678. Where the affidavit required by Cobbey's Ann. St. 1903, § 1083, is in the form of a petition verified by the attorney of a nonresident defendant who deposes that he believes the facts stated in the petition are true, it is insufficient, especially where it fails to show that the attorney had personal knowledge that defendant did not have notice of the pendency of the action in time to appear. Cass v. Nitsch [Neb.] 115 NW 753.

**72.** Motion to open default entered on published service. Fink v. Woods, 102 Minn. 374, 113 NW 909. Where answer on its face states meritorious and legal defense, issue cannot be tried on affidavits on a motion to set aside judgment, and hence laches in looking after subject-matter, as by failing to pay taxes on land for 20 years, cannot be considered. Id.

**73.** Farrior v. Mickle, 133 Ill. App. 444.

thereof complained of,[74] and must state facts and not conclusions.[75] An affidavit chiefly upon information and belief is insufficient.[76] Where a motion is denied because of insufficiency of affidavit, leave to renew the motion should be granted.[77] Where rights of third parties are concerned, one moving to vacate a decree for fraud must make unconditional tender of benefits received under such decree.[78] The necessity of notice depends upon the circumstances,[79] but merely formal corrections may usually be made without notice.[80] On motion to vacate, the court should find the facts.[81]

*Burden of proof and evidence.* See 10 C. L. 492—On direct attack, mere findings of jurisdictional facts are not conclusive of jurisdiction to render a default judgment [82] but a judgment of a court of general jurisdiction imputes verity,[83] and all reasonable intendments will be indulged in favor of the regularity of the proceedings of such courts,[84] and such proceedings cannot be attacked by evidence outside the rec-

74. Affivadit relating to only one of two notes confessed by judgment is insufficient where it does not describe or state to which note it refers. DeWitt v. Flint & Walling Mfg. Co., 132 Ill. App. 356.

75. Affidavits filed in support of motion to set aside judgment by default should set up facts sufficient to constitute meritorious defense to action. Vogelsang v. Fredkyn, 133 Ill. App. 356. Whether acts of counsel amount to a mistake is to be determined by judge from facts, and not from conclusion of counsel. Lunnun v. Morris [Cal. App.] 95 P 907. Affidavit merely stating that there was good defense, without stating facts, held insufficient. Schaeffer v. Gold Cord Min. Co., 36 Mont. 410, 93 P 344. Words "business transacted, had and conducted," held insufficient in affidavit to set aside judgment by confession in favor of foreign corporation alleged to have been without authority to transact business, since maker of affidavit may have meant something quite different from meaning of statute, and affidavit should have stated transactions merged in notes so that court could see whether they amounted to doing business in state under statute. De Witt v. Flint & Walling Mfg. Co., 132 Ill. App. 356.

76. De Witt v. Flint & Walling Mfg. Co., 132 Ill. App. 356.

77. Where motion to open default was denied because of defect in supporting affidavit, defendant should be permitted to renew the motion where it does not clearly appear that he has no defense or that he acted in bad faith. Liebling v. Borg, 113 NYS 549.

78. Crocker v. Crocker, 198 Mass. 401, 84 NE 476.

79. Doubtful whether notice is required where correction is made upon what appears on the record or rests in the recollection of the court. Hurt v. Hurt [Ala.] 47 S 260. Where, on dismissing case appealed from justice court, the circuit court wrote on the docket "Dis. by deft., App'l," it was insufficient to show that former order of dismissal was erroneous, and it was error to amend nunc pro tunc without notice to adverse party. Pulitzer Pub. Co. v. Allen [Mo. App.] 113 SW 1159.

80. Where by oversight of clerk judgment on firm indebtedness was rendered against the firm as well as against the members, but did not recite that it was rendered against the individuals. Meirkord v. Helming [Iowa] 116 NW 785.

81. On motion to vacate for excusable mistake or neglect, the judges should find the facts. Smith v. Holmes Bros. [N. C.] 61 SE 631. Where it is sought to vacate a judgment for want of service of process, the court must find the fact and correct the record and where there was no service or appearance the judgment is void. Simmons v. Defiance Box Co. [N. C.] 62 SE 435. Consent by counsel to the opening up of a judgment is a **waiver** of a formal finding by the court that the defense about to be offered is a valid one within the meaning of §§ 5359 and 5360. First Nat. Bank v. Mullen, 7 Ohio N. P. (N. S.) 313.

82. Deputy v. Dollarhide [Ind. App]. 86 NE 344.

83. Strobel v. Clark, 128 Mo. App. 48, 106 SW 585. Record of county court showing that sheriff has not filed proper bonds cannot be contradicted. Renshaw v. Cook, 33 Ky. L. R. 860, 895, 111 SW 377.

84. Berry v. St. Louis, etc., R. Co. [Mo.] 114 SW 27. When the power of a court to expunge its judgment is invoked on the ground of its nullity, every presumption in favor of the judgment which does not contradict the record must be indulged. Loeser v. Savings Deposit Bank & Trust Co. [C. C. A.] 163 F 212. Where a court had jurisdiction to determine all conflicting questions of title in a partition suit, it is presumed that it did so and that a decree not appealed from finally adjudicated the interests of the parties in the land. Gillespie v. Pocahontas Coal & Coke Co., 162 F 742. Under Rev. St. 1899, §§ 1547, 3922, providing that costs shall follow the judgment, it is presumed that only such judgment was rendered as could be rendered, and where it does not show that costs had been adjudged, it could be corrected nunc pro tunc to show such fact. Saunders v. Scott [Mo. App.] 111 SW 874. Where a decree is different from the report of the referee who tried the proceeding, it is presumed that the referee's report was modified by the court before entry. Bates v. Hall [Colo.] 98 P 3. Where court has power to make an order, its **authority to act** in the premises will be presumed. Jerrue v. Los Angeles County Super. Ct. [Cal. App.] 95 P 906. It is presumed that in rendering a judgment a county court acted within its authority. Nolan v. Hughes [Or.] 93 P 362.

ord [85] except in a court of equity; [86] but such presumption does not apply to courts of limited jurisdiction.[87] One who seeks relief on the ground of fraud must prove it by clear and convincing proof,[88] and one who seeks relief on statutory grounds must establish such grounds.[89] One who asserts a judgment to be void must prove it,[90] and so also as to irregularities.[91] One who seeks relief from false entry of a judgment must show himself free from negligence in respect to the entry.[92] On a motion to open a judgment, the facts alleged to show the existence of a defense are taken as true,[93] and the evidence goes solely to the excuse for not appearing or to show due diligence.[94] The motion, therefore, will be heard solely on the movant's affidavits or pleadings,[95] and counter affidavits will not be considered [96] except as bearing upon

Where **notice of appeal** was given, but it does not appear that the appeal was perfected, such fact cannot be presumed so as to deprive the judgment of finality. Slaughter v. Cooper [Tex. Civ. App.] 107 SW 897. **Service** of writ is presumed regular as to a justice's judgment recorded in the circuit court. Alfred v. Batson [Miss.] 45 S 465. Where a decree in chancery is entered at a term subsequent to the return term and recites due service of process, but the return on the summons is insufficient, it will be presumed that a second summons was issued but the recitals of the decree cannot prevail if it was entered at the return term of the summons. Manternach v. Studt, 230 Ill. 356, 82 NE 829. Where the record does not show service of process, proper service is presumed. Clark v. Neves, 76 S. C. 484, 57 SE 614.

**85.** A judgment by a court having jurisdiction of the parties and subject-matter imports absolute verity and cannot be attacked by evidence outside the record. Strobel v. Clark, 128 Mo. App. 48, 106 SW 585. Held incompetent to resort to evidence outside the record to prove that a probate court had exceeded its jurisdiction. Id. Clerical misprision must be shown from the record, and can be corrected only by the record. Brashears v. Brashears, 33 Ky. L. R. 233, 110 SW 303.

**86.** While the record of a court of general jurisdiction imputes absolute verity and can be impeached only by matter of record so far as amendment at law is concerned, cogent and convincing parol evidence is admissible in equity in cases of fraud and mistake. Engler v. Knoblaugh [Mo. App.] 110 SW 16. That a decree was erroneously entered in vacation may be established by proof aliunde. Jackson v. Becktold Print. & Book Mfg. Co. [Ark.] 112 SW 161.

**87.** One who claims under a judgment of a justice of the peace must show affirmatively that the justice had jurisdiction. Ferguson v. Basin Consol. Mines, 152 Cal. 712, 93 P 867. Must show that summons was issued and served in manner prescribed by law. Id.

**88.** In suit to vacate a judgment for fraud, affidavit and facts held not insufficient as a matter of law, but to present a question for the court. Cross v. Gould [Mo. App.] 110 SW 672.

**89.** One who seeks to vacate a default under Code Civ. Proc. § 151 must satisfy the court that failure to appear was the result of mistake, surprise or excusable neglect. Burton v. Cooley [S. D.] 118 NW 1028. Under Burns' Ann. St. 1908, § 410, providing for default judgment, and § 405, providing for vacation of a judgment for mistake, surprise, etc., held, where motion set up a meritorious defense, but was controverted by five affidavits, there was no error in denying the motion. Rooker v. Bruce [Ind.] 85 NE 351.

**90.** Evidence insufficient to justify setting aside a default on the ground that summons had not been served. Glauber v. Wallace, 104 Minn. 128, 116 NW 107. Showing by defendant in replevin that goods in controversy had been surrendered pursuant to an order of federal court is a showing of a meritorious defense sufficient to authorize vacation of judgment for want of jurisdiction. Thomson v. Patek, 235 Ill. 341, 85 NE 603. In a suit to enjoin enforcement of a judgment on the ground that acceptance of service in the action was forged and that defendant did not appear, defendant had the burden to prove such fact by a preponderance of evidence. Steves v. Smith [Tex. Civ. App.] 20 Tex. Ct. Rep. 877, 107 SW 141. Where judgment recited appearance in person and by attorneys, such recital, if true, rendered immaterial the fact that acceptance of service was forged. Id.

**91.** Power of court of common pleas to vacate its judgment after term on motion is controlled by Rev. St. § 5354, and where complaint is of irregularity in obtaining judgment, burden is on movant to show that alleged irregularity occurred at or before taking judgment. Interstate Life Assur. Co. v. Raper, 78 Ohio St. 113, 84 NE 754.

**92.** Engler v. Knoblaugh [Mo. App.] 110 SW 16.

**93.** Ziegler v. Funkhouser [Ind. App.] 85 NE 984. On motion to strike out a default, matters purely of defense may not be determined. Girard Fire & Marine Ins. Co. v. Bankard, 107 Md. 538, 69 A 415. Whether matter in controversy had been settled before judgment is an issue of fact not determinable on motion to open a default. Corson v. Smith [S. D.] 118 NW 705. It is sufficient to determine the validity of a defense as a matter of law from the statement pleaded, and the existence of an actual defense to the judgment sought to be vacated need not be established before the order of vacation is granted. First Nat. Bank v. Mullen, 7 Ohio N. P. (N. S.) 313.

**94.** Ziegler v. Funkhouser [Ind. App.] 85 NE 984.

**95.** The motion, so far as it relates to the merits of the alleged cause of action or defense, should be heard on the affidavits in behalf of the motion only, but such affidavits should be closely scrutinized and intend-

the question of excuse or diligence;[97] nor can grounds for a new trial be considered.[98] As bearing upon the question of diligence, the court may consider the fact that the judgment has been acted upon in good faith by third parties.[99] The facts alleged in a petition for leave to file a bill of review on account of newly discovered evidence are taken as true,[1] but counter affidavits are admissible as bearing upon the nature, relevancy and materiality of such evidence.[2] Upon petition to open judgment, the court is not limited to a consideration of what appears in the petition only, but may consider any proceedings or evidence in the case bearing upon the propriety of granting the relief sought.[3] In a statutory action for the vacation of a judgment, the plaintiff will not be allowed to show as ground for vacating the judgment that his homestead may be sold at forced sale.[4] The proper manner of addressing the discretion of the court on motion to open a default is to accompany the motion with a transcript of the court whose action is relied upon as a ground for setting motion aside and as evidence of acts alleged.[5] In proceedings to correct a clerical misprision in a final judgment after term, it is competent for the court to admit in evidence the original citation and the abbreviations indorsed thereon, and to permit the clerk who made them to testify as to which they stood for.[6]

*Questions of law and fact.* See 8 C. L. 588—No court or judge has jurisdiction to open a regular judgment without some evidence of a valid defense.[7] On conflicting evidence the question may be one for the jury.[8]

ments of the affidavits construed most strongly against the applicant. Murphy v. Schoch, 135 Ill. App. 550.

96. Farrior v. Mickle, 133 Ill. App. 444; Beck v. Lavin [Idaho] 97 P 1028. Hearing counter affidavits on merits would encroach on right to jury trial. Finkelstein v. Schilling, 135 Ill. App. 543; Murphy v. Schoch, 135 Ill. App. 550. While counter affidavits may not be entertained as to the merits, it is not error to consider affidavits controverting a prima facie defense on the merits under a general motion to open a default and vacate a judgment, where no sufficient cause is shown for opening the judgment. Farrior v. Mickle, 133 Ill. App. 444.

97. Beck v. Lavin [Idaho] 97 P 1028. Admissible on question of diligence. Farrior v. Mickle, 133 Ill. App. 444. Affidavits held to show movant was not diligent, where shown that he knew of judgment soon after its rendition but failed to act for two months. Finkelstein v. Schilling, 135 Ill. App. 543.

98. On motion to set aside judgment not filed within three days after verdict, as prescribed by Code, § 3756, for applications for new trial, grounds for new trial, § 3755, cannot be considered. Andres & Co. v. Schlueter [Iowa] 118 NW 429.

99. Where motion is made to set aside judgment in attachment, court may consider fact that garnishee served in attachment has paid judgment rendered against him. Farrior v. Mickle, 133 Ill. App. 444.

1. Truth of such statements is not to be decided on affidavits, but upon new hearing if leave to file bill of review be granted. Austin State Bank v. Morrison, 133 Ill. App. 229. Affidavit held to show, if true, that at time of transfer of certain warrants now claimed by receiver as property of firm, between partners, transferror was indebted to transferee in sum in excess of value of warrants, and to be sufficient affidavit of new evidence likely to change result on merits where judgment awarding title to warrants to receiver had been entered. Id.

2. Counter affidavits upon the hearing of a motion and petition for leave to file a bill of review, upon the ground of newly discovered evidence, are admissible to show whether the evidence claimed to be new was in fact new, or to state circumstances or explain the nature of the evidence claimed to be new, to enable the court to better judge of its relevancy and materiality. Austin State Bank v. Morrison, 133 Ill. App. 339.

3. Weaver v. Chicago Title & Trust Co., 131 Ill. App. 66.

4. Schubert v. State Banking & Trust Co., 6 Ohio N. P. (N. S.) 544.

5. Heilbrun v. Jennings [Mo. App.] 111 SW 857.

6. Where clerk omitted words "without prejudice" from order of dismissal. Murphy v. McMahon, 131 Ill. App. 384.

7. Dillen v. Dillen, 221 Pa. 435, 70 A 806. Judgment on note executed by married woman will not be opened on sole testimony of husband that he had paid payee of note more than amount thereof where it was alleged that payments so made by him were made upon lease and not on note. Boggs v. Walton, 35 Pa. Super. Ct. 353.

8. On conflicting evidence as to whether a party defendant was served or appeared in an action, it was held a question for the jury whether the judgment was absolutely void. Owens v. Cage [Tex.] 20 Tex. Ct. Rep. 313, 106 SW 880. On motion to vacate for want of proper service, affidavit of person served that he was not an officer or agent of defendant corporation is not conclusive, whether he was or not depends on character of duties performed by him. Cumberland Co. v. Lewis, 32 Ky. L. R. 1300, 108 SW 347.

*Judgment or order of vacation and extent and effect thereof.* See 10 C. L. 493—The judgment or order of vacation should protect the interests of both parties.[9] Reasonable terms[10] and conditions prescribed by statute may be imposed,[11] but conditions not authorized cannot be imposed.[12] Compliance with conditions imposed may be required.[13] The usual condition of an injunction bond is to pay the judgment and costs.[14] Some statutes do not permit the setting aside of the judgment but only authorize it to be opened and the cause set down for hearing.[15] Where a judgment by confession is opened in order to admit a defense, and the finding is against the defendant, a new judgment should not be entered.[16] Vacation for want of service will

**9.** Schneider v. Lobingier [Neb.] 117 NW 473. Where a judgment is vacated for want of service of process, but defendant by appearing submitted himself to the jurisdiction, he should be permitted to answer or demur. Stubbs v. McGillis [Colo.] 96 P 1005. Where plaintiff paid money on rendition of judgment in prior litigation between the parties under belief that case was settled and no appeal would be taken, but defendant appealed and obtained a more favorable judgment, plaintiff's suit to set aside the judgment should not be dismissed on finding that there was no compromise, without giving him judgment for money mistakenly paid. Dotson v. Carter [Ky.] 112 SW 1116. Code Civ. Proc. § 1292, providing that where judgment is set aside on motion the court may enforce restitution, does not apply to a motion to set aside a default and vacate a judgment which has been satisfied. Fluegelman v. Armstrong, 110 NYS 967.

**10.** Where interlocutory judgment in partition was obtained by false representations of plaintiff's attorney, order granting motion without costs and permitting defendant other privileges held not unduly lenient to defendant. Beer v. Orthaus, 113 NYS 533. Where a complaint was dismissed for failure of plaintiff to appear, and opening of default was conditioned on payment of $10 costs which he failed to pay, but by error of the clerk the cause was placed on the calendar and default entered against defendant, he was entitled to have such default vacated, and original judgment against plaintiff reinstated. Herman v. Hyman, 112 NYS 1077. Where defendant in divorce action defaulted, but after application was made to punish him for contempt for failure to obey default judgment, he moved to vacate and set aside judgment, proper practice is to refuse to entertain application until defendant has complied with judgment and relieved himself from contempt, but, having entertained the application without requiring such condition, applicant should not be permitted to try issues after grant of application until such condition is complied with. Krauer v. Krauer, 121 App. Div. 750, 106 NYS 490.

**11.** Under Kirby's Dig. § 6259, defendants constructively summoned, but who have not appeared, may vacate a decree and defend on giving bond for costs. Pearson v. Vance, 85 Ark. 272, 107 SW 986. Under Municipal Court Act, § 256 (Laws 1902, p. 1561, cl. 580), court may require deposit of amount of judgment or undertaking for such amount as condition for opening default, but may not require deposit of greater sum, and order requiring such greater sum will be modified on appeal. Eppoletto v. Zuhr, 111 NYS 565. Under Code Civ. Proc. §§ 783, 784, providing that court may, in its discretion, open judgment for mistake or excusable neglect, etc., within one year after notice, court may set aside default judgment on terms which will work justice. Quilhot v. Hamer, 158 F 188. Whether order on motion to show cause for opening default granted on condition of deposit provided for by Municipal Court Act (Laws 1902, p. 1563, c. 580), § 256, be appealable or not, condition requiring deposit should not be removed. Kramer v. Kerowitz, 111 NYS 697.

**12.** Under Municipal Court Act, Laws 1902, pp. 1562, 1563, 1585, 1589, c. 580, §§ 253, 256, 332, a justice held to have illegally taxed costs as a condition to opening a default. Thompson v. Hudson Bldg., 110 NYS 1077.

**13.** Where a default is set aside and defendants, with the consent of plaintiff, are permitted to file a certain answer, they cannot complain of denial of leave to file a different answer, though had they filed the answer permitted they might have been given leave to amend. Younger v. Moore [Cal. App.] 96 P 1093.

**14.** See Injunction, 12 C. L. 152. Condition should be to pay judgment entered and costs. R. S. c. 69, § 8. Central Stock & Grain Exch. v. Pine Tree Lumber Co., 140 Ill. App. 471. Chancellor has no discretion as to the injunction bond in case of an injunction against the enforcement of judgment, and must require, under statute, bond in double amount of judgment with sufficient surety conditioned for payment of all moneys and costs due plaintiff in judgment, and such damages as may be awarded against complainant in case injunction is dissolved. Reed v. New York Nat. Exch. Bank, 131 Ill. App. 434.

**15.** Laws 1902, p. 1562, c. 580, § 253, construed with prior legislation. Laws 1882, p. 351, c. 410; Laws 1862, p. 970, c. 484; Laws 1894, p. 1871; Laws 1896, p. 978, c. 748, held to confer no power on the municipal court to set aside a default absolutely but only to open it and set is down for pleading. Friedberger v. Stulpnagel, 112 NYS 89. Under Laws 1902, p. 1562, c. 580, authorizing the court to set aside a default and set the cause down for pleading, when the motion asks for equitable relief, default may be opened and the case set down for pleading if the facts warrant it. Raymond v. Keiley, 111 NYS 244; Milman v. Levine, 111 NYS 245.

**16.** Order should be that judgment already entered should stand. Northeastern Coal Co. v. Tyrrell, 133 Ill. App. 472. Recital in opening order that the judgment by confession shall "stand as security," etc., did not vacate judgment but operated merely to stay execution thereof. Id. Where a peremptory

not abate the action where defendant has appeared generally.[17] If an award of attorney's fees is unauthorized by the pleadings, proceedings to amend or vacate such award might lie,[18] but where the judgment was otherwise correct and it is attacked as a whole, the motion is properly overruled.[19] An order denying a motion to vacate a judgment is a bar to any subsequent proceeding seeking the same relief.[20] The order should show that it is made at the same time if such fact is essential.[21] Vacation as to some of the parties vacates as to all, if their interests are inseparable.[22] On vacation of a judgment it ceases to exist.[23] Where a judgment decreeing the sale of land is vacated, the sale should also be vacated.[24] Where a judgment by confession is opened to allow the interposition of a defense, the only real effect of the words "to stand as security" is to stay execution until there is a trial upon the pleas that might be filed.[25] On direct attack upon a nunc pro tunc order amending a judgment, the sufficiency of the evidence to show that the original entry was erroneous may be looked to,[26] but on collateral attack a nunc pro tunc order amending a judgment will be sustained unless it is apparent that the court was without power to make it.[27]

*Appeal and review.*[See 10 C. L. 494]—The appealability of orders on motions to open or vacate judgments depends largely upon the peculiar practice in the various states.[28] When appealable it is very generally held that the order will not be disturbed in the absence of an abuse of discretion.[29] Questions sought to be reviewed must, as in other cases, be properly saved.[30] Where a motion to modify is denied solely on the

instruction to find against the judgment debtor is given after a judgment by confession is opened, it is improper to include in the instruction to find for judgment creditor the words "and assess plaintiff's damages in sum of $862.83," but it should have ended with direction to find for plaintiff, and the judgment of court, after reciting verdict should have been as follows: "Therefore it is considered by court that judgment entered herein (giving date of judgment of confession so set aside, and amount thereof) stand in full force and effect as of the time of its rendition and that the plaintiff have execution thereon." Id.

**17.** Appeared to quash a writ of garnishment and contest a motion to amend return of service. Stubbs v. McGillis [Colo.] 96 P 1005.

**18.** Shahan v. Myers, 130 Ga. 724, 61 SE 702.

**19.** Shahan v. Myers, 130 Ga. 724, 61 SE 702. Decision denying vacation of judgment as a whole is not to be construed as precluding appropriate proceedings to vacate it as to the unauthorized portion. Id.

**20.** Though not conclusive on the merits, it is conclusive on the ground upon which it was made. Pierce County v. Alexander [Wash.] 96 P 164.

**21.** Order vacating judgment cannot be sustained as made at the same term where record fails to show that from time of entry to time of order any term was held. Carney v. Twitchell [S. D.] 118 NW 1030.

**22.** It is proper to entirely vacate a judgment and sale of land for taxes where infants who owned an interest were not made parties, and the land was indivisible, though other owners were adults and properly joined. District of Clifton v. Pfirman, 33 Ky. L. R. 529, 110 SW 406.

**23.** A judgment vacating a judgment on a recognizance bond put the proceedings on the recognizance in the same situation as when judgment was rendered, and proceeding on the recognizance should have proceeded as if no judgment had been rendered. State v. Wallace, 209 Mo. 358, 108 SW 542.

**24.** Under Civ. Code Prac. § 518, providing that judgment against infant may be vacated after time, where judgment decreeing sale of land for taxes is vacated, the sale should also be vacated. District of Clifton v. Pfirman, 33 Ky. L. R. 529, 110 SW 406.

**25.** Northeastern Coal Co. v. Tyrrell, 133 Ill. App. 472.

**26, 27.** Pulitzer Pub. Co. v. Allen [Mo. App.] 113 SW 1159.

**28.** See, also, Appeal and Review, 11 C. L. 134.

**29.** Ilyus v. Buch, 34 Pa. Super. Ct. 43. Judgment of lower court affirmed where appellant's pleadings were evasive and manifestly withheld true facts of transaction complained of. Zajaczkowski v. Jawer, 36 Pa. Super. Ct. 324. Where, while testimony of parties was conflicting, that of appellee was corroborated by dates and other circumstances, action of lower court in refusing to open judgment will not be reversed. Geiser v. Kleckner, 35 Pa. Super. Ct. 517. Where defendant and her sister who testified that signature on bond upon which judgment was obtained was forged, did not have paper before them at time and had not seen it for over ten years and their attorney had taken it from prothonotary's office years before and had not returned it, and there was no evidence of any search, and hence it could not be treated as lost document, and witnesses necessary to fair trial for judgment debtor should judgment be opened had died, judge was guilty of no abuse of discretion in refusing to open judgment. Ilyus v. Buch, 34 Pa. Super. Ct. 43.

See, also, Appeal and Review, 11 C. L. 225.

**30.** After consent by counsel for payee to vacation of judgment on promissory notes, a request to charge jury not to undertake to determine validity of notes comes too late

ground that it is too late, and it appears on appeal that the judgment sought to be modified is manifestly wrong, such judgment will be reversed.[31]

§ 6. *Construction, operation and effect of judgment.* See 10 C. L. 495—A judgment should be construed in connection with the complaint,[32] the record,[33] and opinion,[34] and a judgment on rehearing should be construed in connection with the original judgment.[35] A fair and reasonable construction is to be placed upon the language used,[36] and it should be so construed as to give effect to every part and to harmonize different parts.[37] Surplusage may be disregarded.[38] A recital in the jugment of due service prevails over defects in the record,[39] but a return showing want of service cannot be aided by the judgment.[40] The recovery of a joint judgment against several wrongdoers does not merge the several liability of each.[41] The identity of the issue

when all the evidence has been heard, and right to question action of the court in vacating judgment is lost by laches. First Nat. Bank v. Mullen, 7 Ohio N. P. (N. S.) 313.

See, also, Saving Questions for Review, 10 C. L. 1572.

31. Berger v. Buge, 110 NYS 975.

32. Hurt v. Chess & Wymond Co., 33 Ky. L. R. 767, 111 SW 285.

33. Pleadings and issues joined may be looked to to limit and explain language of judgment. Pomona Land & Water Co. v. San Antonio Water Co., 152 Cal. 618, 93 P 881. If entry of judgment is so obscure or ambiguous as not to express final determination of court with sufficient accuracy, the pleadings and record may be referred to. Reaves v. Turner [Okl.] 94 P 543. Where judgment is ambiguous and its affect is questioned, pleadings or other proceedings may be looked to to ascertain its true meaning. Hanley v. Mason [Ind. App.] 85 NE 381. Recital in minutes of court that decree was by consent but minutes of clerk and judgment showed otherwise, held to warrant finding that decree was made after trial and not by consent. Charles v. White [Mo.] 112 SW 545. In order to find infant litigants bound by consent of their guardian ad litem to decree, the record should be entirely free from doubt as to the giving of consent. Id.

34. Where decree is in general terms, opinion of court may be looked to in order to determine the questions presented and decided. D'Arcy v. Staples & Hanford Co. [C. C. A.] 161 F 733. Opinion of court may be looked to in order to determine point decided on plea of former adjudication. Moore v. Chattanooga Elec. R. Co. [Tenn.] 109 SW 497.

35. Original decree finding generally for plaintiff upon all issues involved in case, which was vacated on rehearing solely on ground of defect of parties plaintiff, construed together with second decree, held equivalent to finding for plaintiff on facts. Griffith v. Stewart, 31 App. D. C. 29.

36. Recital that rail fence is a boundary line construed to mean center of the worm of the fence. Woodford v. Clay, 32 Ky. L. R. 922, 107 SW 269. Oral statements of court at time of rendition and construction placed upon it by the parties are not to be considered. Hemmer v. Bonson [Iowa] 117 NW 257. Judgment construed and held to exclude from land adjudged to be held in common a certain lot. Featherston v. Merrimon [N. C.] 61 SE 675. A provision in a judgment limiting its effect and operation to property described therein merely restricts **lien** and does not prevent its collection from other property. Lindberg v. Thomas, 137 Iowa, 48, 114 NW 562. Decree confined to "money or other property owned and left by deceased" held not to include life insurance policy, which was property, but which had by his lawful act become property of others before his death. Dickinson v. Lane [N. Y.] 85 NE 818. **Decree in a will contest** case construed, and held to decide that proponents had proved execution of the will and that contestants had failed to prove fraud. Thames v. Rouse [S. C.] 62 SE 254. Statutory **decree establishing priorities to use of water** for irrigation confers no new rights but is merely evidence of pre-existing ones. Alamosa Creek Canal Co. v. Nelson, 42 Colo. 140, 93 P 1112. **Decree partitioning land and apportioning water rights** did not change character of water rights of the respective owners. The right apportioned each was a riparian right. Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655, 93 P 1021. Under a decree which partitions riparian land and apportions water rights, but does not specifically dispose of underground water essential to the preservation of the stream, such underground waters cannot be diverted but the surplus belongs to riparian owners, except that the decree cuts off from this right all land except those tracts which extend to some portion of the underground flow. Id.

37. Lamb v. Major & Loomis Co., 146 N. C. 531, 60 SE 425.

38. See ante, § 2A. Unwarranted recitals in a judgment may be treated as surplusage. Hentig v. Johnson [Cal. App.] 96 P 390.

39. When judgment recites that due service was had, the presumption of jurisdiction is not overcome by any defects in the record. Stevens v. Doohen [Wash.] 96 P 1032. One cannot collaterally assail a judgment on the ground of insufficiency of summons where such affidavit was held sufficient in the action in which judgment was rendered. Emery v. Kipp [Cal.] 97 P 17.

40. See Process, 10 C. L. 1262. The return of an officer serving a summons controls where it is inconsistent with recitals in the judgment; hence, where such return shows want of service, it cannot be aided by a recital in the judgment. Stubbs v. McGillis [Colo.] 96 P 1005.

41. Any or all of such wrongdoers may be pursued for satisfaction of the judgment. Tandrup v. Sampsell, 234 Ill. 526, 85 NE 331.

between several parties has no necessary bearing on the question whether a judgment is joint or several.[42] A judgment in rem adjudicates the status of particular subject-matter[43] and does not personally bind the judgment debtor.[44] A judgment at law is unit and must stand or fall as such.[45] So also one who relies upon an indivisible decree must accept it as a whole.[46] The conclusiveness of judgments between parties and privies is treated in another topic,[47] as is also their admissibility and effect as evidence.[48] Conclusiveness on collateral attack,[49] and effect as lien or notice,[50] are treated in other sections of this topic.

§ 7. *Collateral attack. What is collateral.* See 10 C. L. 495—A collateral attack is an attempt to impeach a judgment in a proceeding not instituted for the express purpose of annuling, correcting, or modifying the judgment.[51]

*Grounds.* See 10 C. L. 496—The judgment of a court of general jurisdiction which has jurisdiction of the parties and the subject-matter is not subject to collateral attack;[52] and upon such an attack such a judgment is conclusive upon all questions covered thereby.[53] It cannot thus be attacked for failure to show jurisdictional facts, where such facts appear from the entire record,[54] nor can a record of a court of general jurisdiction be attacked collaterally because it does not show correctly the

42. St. John v. Andrews Ins. for Girls [N. Y.] 85 NE 143.

43. Gassert v. Strong [Mont.] 98 P 497. See Attachment, 11 C. L. 315; Divorce, 11 C. L. 1111; Eminent Domain, 11 C. L. 1198; Liens, 10 C. L. 632, and similar topics. See, also, Process, 10 C. L. 1262; Jurisdiction, 10 C. L. 512.

44. Gassert v. Strong [Mont.] 98 P 497.

45. Judgment at law is a unit and cannot be valid in part and void in part. Czyston v. St. Stanislaus Parish, 131 Ill. App. 161. Judgment in tort is a unit and cannot be reversed as to one of two defendants and affirmed as to the other. West Chicago St. R. Co. v. Muttschall, 131 Ill. App. 639.

46. One not a party to a decree adopting and stating an administrator's account cannot rely on the allowance of his claim thereby and reject an adjudication therein that such claim has been paid. In re Murphy, 112 NYS 220.

47. See Former Adjudication, 11 C. L. 1537.

48. See Evidence, 11 C. L. 1346; Real Property, 10 C. L. 1446.

49. See post, § 7.

50. See ante, § 4, Rendition, Entry and Docketing.

51. **Held collateral:** Attack on administration proceedings in trespass to try title is collateral. Holland v. Ferris [Tex. Civ. App.] 107 SW 102.

**Held direct:** An action brought expressly to set aside a decree for fraud is not a collateral attack though further equitable relief is asked. Noble v. Aune [Wash.] 96 P 688. It is proper in such action to ask for further relief in the matter of quieting title, and that such relief be granted if appropriate. Id. Application to set aside order allowing claim against estate of a decedent on specified grounds. In re Douglas' Estate [Iowa] 117 NW 982. Action to review judgment in partition on ground that at time plaintiffs were nonresidents were not personally served, did not appear, that judgment was by default and partition was unequal and fraudulent. Deputy v. Dollarhide [Ind. App.] 86 NE 344. Since abolition of distinction between law and equity **when judgment set up in bar is assailed** and all the parties are before the court as procured by fraud, it is a direct and not a collateral attack. Houser v. Bonsal & Co. [N. C.] 62 SE 776. Court is required to submit the issue of fraud to the jury. Id. In a suit against a former owner to recover property or quiet title secured at judicial sale, a **cross complaint** by such former owner attacking the judgment is not a collateral attack and the jurisdiction of court may be looked into, but mere errors or irregularities not going to the jurisdiction may not be. Donaldson v. Winningham, 48 Wash. 374, 93 P 534. **Appeal** from an interlocutory order appointing a receiver. Marshall v. Matson [Ind.] 86 NE 339.

52. Cooper v. Gunter [Mo.] 114 SW 943; Hargrove v. Wilson [N. C.] 62 SE 520; Palmer v. Essex County Chosen Freeholders [N. J. Law] 71 A 285. Where a question of fact or law has been litigated in a court having jurisdiction of parties and subject-matter, its judgment is conclusive and not subject to collateral attack in a different court, though the latter might have reached a different conclusion. Becker v. Linton [Neb.] 114 NW 928. **Order for service** by publication cannot be collaterally attacked. Evans v. Weinstein, 124 App. Div. 316, 108 NYS 753. **Amended judgment** in partition, amended to conform to facts. Collier v. Catherine Lead Co., 208 Mo. 246, 106 SW 971. Circuit court **judgment on appeal from probate court,** affirming judgment of probate court. Hands v. Haughland [Ark.] 112 SW 184. Under Code, § 3468, relative to **judgment against partnership** and members thereof who were served, though one not served is not bound personally, he cannot collaterally attack it in a proceeding to satisfy it out of partnership property. Capital Food Co. v. Globe Coal Co. [Iowa] 116 NW 803.

53. See Former Adjudication, 11 C. L. 1157. Statutory decree establishing priorities in use of waters of stream conclusive on collateral attack as to amount of water awarded to particular ditch. Alamosa Creek Canal Co. v. Nelson, 42 Colo. 140, 93 P 1112.

54. Cooper v. Gunter [Mo.] 114 SW 943.

action of the court.[55] A judgment, void for want of jurisdiction,[56] or for other reasons,[57] may be collaterally attacked at any time,[58] but its invalidity must appear from the face of the record,[59] since every presumption will be indulged in favor of its regularity,[60] if rendered by a court of general jurisdiction.[61] Where the record is silent as to service, the defendant may testify in rebuttal of the presumption

55. Horn v. Metzger, 234 Ill. 240, 84 NE 893.

56. Bauer v. Widholm [Wash.] 95 P 277. May be collaterally attacked by debtor in supplementary proceedings on judgment. Gillespie v. Armstrong, 58 Misc. 310, 109 NYS 672. Where judgment was entered, by stipulation and the affidavit omitted a jurisdictional fact, did not describe the land in suit, one of the parties was not sui juris and the court was without power to render such judgment. Goodrum v. Buffalo [C. C. A.] 162 F 817.

57. Judgment void upon its face. Minnesota Thresher Mfg. Co. v. L'Heureux [Neb.] 118 NW 565. Void decree. Andrews v. Sheehy [La.] 47 S 771; Theobald v. Deslonde [Miss.] 46 S 712. Where land is conveyed to secure a debt and bound to reconvey given and land is sold on execution for a debt of the grantor, a petition by heirs of the obligee of the bond to set aside the sheriff's deed is not a proceeding to set aside the judgment, the attack on the judgment being on the ground that it is void. Buchan v. Williamson [Ga.] 62 SE 815. One who is sued on a foreign judgment may show that attorneys who undertook to appear for him in the case in which the judgment was rendered had no authority to do so, unless such question has been determined by a court having jurisdiction of parties and subject-matter. Thomas v. Virden [C. C. A.] 160 F 418.

58. Objection to jurisdiction of court may be raised at any time in any kind of proceeding. Jenkins v. Morrow [Mo. App.] 109 SW 1051. Void judgment may be assailed before tribunal which rendered it by any person whose interests are affected by attempt to enforce it. Andrews v. Sheely [La.] 47 S 771.

59. Not unless affected by some jurisdictional infirmity. In re Nelson's Estate [Neb.] 115 NW 1087. One assailing judgment must prove by record that facts essential to sustain order did not exist. Moore v. Hanscom [Tex.] 20 Tex. Ct. Rep. 438, 106 SW 876. It must be void on its face. Emery v. Kipp [Cal.] 97 P 17; Aldrich v. Barton, 153 Cal. 488, 95 P 900. Conditional and uncertain agreements between counsel for the parties respecting dismissal of a suit begun will not be enforced so as to avoid a judgment subsequently recovered and involved in a collateral proceeding. Pocahontas Wholesale Grocery Co. v. Gillespie, 63 W. Va. 578, 60 SE 597. Where record of county court does not negative existence of facts authorizing court to make an order, the law presumes that such facts were established and in collateral attack evidence outside the record to the contrary will not be heard. Moore v. Hanscom [Tex.] 20 Tex. Ct. Rep. 438, 106 SW 876. Under Ann. St. 1906, p. 601, publication of summons in action against a nonresident and to have a judgment adjudged a lien on land need not describe the land and judgment thereon is not void and subject to collateral attack. Randall v. Snyder [Mo.] 112 SW 529.

60. A judgment of a court having jurisdiction is presumed correct on collateral attack. Williams v. Steele [Tex.] 108 SW 155. Every jurisdictional fact which record of a court of general jurisdiction does not show was absent must be presumed in favor of the judgment. Segal v. Reisert, 32 Ky. L. R. 901, 107 SW 747. Judgment confirming judicial sale of land. Id. Where a judgment was rendered on day court adjourned but was not entered until several days later and then on a page in front of where the judge signed the minutes adjourning court, and there is no irregularity in the minutes or allegation of fraud, such facts cannot be shown to impeach the judgment. Childress v. Carley [Miss.] 46 S 164. In ejectment involving a decree in partition it is presumed that the decree which was rendered by a court of general jurisdiction had jurisdiction of all the parties as against objection that the wife of an allottee was not a party. Wright v. Johnson, 108 Va. 855, 62 SE 948. In collateral attack on judgment of county court discharging sureties on a guardian's bond, it is presumed that statutory grounds for such discharge existed. Moore v. Hanscom [Tex.] 20 Tex. Ct. Rep. 438, 106 SW 876.

**Jurisdiction of parties:** A judgment that defendant pay a certain annual sum for the support of his wife and children which shows that the parties appeared though it does not show the character of the action, cannot be attacked for want of jurisdiction on account of the character of the action. Spangle v. Spangle, 41 Ind. App. 297, 83 NE 720. Where it does not appear that a **guardian ad litem** who appeared for infant defendants was appointed, it will not be presumed that he was appointed without jurisdiction of parties having been obtained. Horn v. Horn, 234 Ill. 268, 84 NE 904. Recital in complaint on a judgment attempting to state facts showing legal **service** held not to disclose want of jurisdiction, so as to overcome the presumption of jurisdiction. Nolan v. Hughes [Or.] 94 P 504. Service of process and hearing at the first term at which the court had jurisdiction to hear it presumed. Horn v. Metzger, 234 Ill. 240, 84 NE 893. Service of process on the proper official of a municipal corporation is presumed. Curtis v. Charlevoix County Sup'rs [Mich.] 15 Det. Leg. N. 941, 118 NW 618. Where the record of a court, whether because lost or otherwise, is silent as to service and a duly entered judgment appears thereon, it will be presumed until the contrary appears, that service was made on defendant. Weaver v. Webb, 3 Ga. App. 726, 60 SE 367.

61. Where court has jurisdiction of parties and subject-matter, all intendments are in favor of judgment and only jurisdictional defects apparent on the face of the record can be collaterally attacked. Curtis v. Charlevoix County Sup'rs [Mich.] 15 Det. Leg. N. 941, 118 NW 618.

of service.[62] Recitals of jurisdictional facts are generally held conclusive,[63] unless contradicted by the record,[64] and where it is permissible to contradict such recitals, the evidence must be clear and convincing.[65] A judgment cannot be collaterally attacked for nonjurisdictional errors,[66] or irregularities of procedure.[67] The same general principles apply to probate,[68] and bankruptcy [69] decrees, and to judgments

62. Weaver v. Webb, 3 Ga. App. 726, 60 SE 367.

63. Where a court passes on facts determining its own jurisdiction, its judgment is not subject to collateral attack. Ledbetter v. Mandell, 124 App. Div. 854, 109 NYS 602. Finding as to **residence of minor in guardianship proceedings** is conclusive, and on appeal, where the evidence is not in the record, it cannot be reviewed. In re Baker, 153 Cal. 537, 96 P 12. Where the court had jurisdiction of parties and subject-matter, judgment reciting that **nunc pro tunc entries** were made upon proof from minutes and records of the court may not be collaterally attacked on ground that there was no evidence to support it. Collier v. Catherine Lead Co., 208 Mo. 246, 106 SW 971. **In action to enjoin sale under execution,** it is not permissible to impeach recitals in judgment upon which execution was based that recovery was had because of fraud by judgment creditor. Nichols v. Doak, 48 Wash. 457, 93 P 919. Judgment reciting due **service** of process cannot be collaterally attacked for want of service. Town of Point Pleasant v. Greenlee, 63 W. Va. 207, 60 SE 601. It is not ground for collateral attack for want of service where affidavit of service was not verified but subsequent affidavits were filed and judgment recited proof of personal service. McAuliff v. Hughes, 128 App. Div. 355, 112 NYS 486.

64. Where record shows lack of jurisdiction, the judgment is void and subject to collateral attack. Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley [C. C. A.] 164 F 963. Judgment is not subject to collateral attack because affidavit of service recited that service was made on a day prior to issue of summons, such error would be treated as a clerical one. McAuliff v. Hughes, 128 App. Div. 355, 112 NYS 486.

65. Evidence held insufficient to overthrow recitals of decree. Ladd v. Craig [Miss.] 47 S 777.

66. If court has jurisdiction of parties and proceeding, its judgment, however erroneous is valid, and not subject to collateral attack. Bickford v. Bickford, 74 N. H. 448, 69 A 579. Fact that complaint states a cause of **action barred** on its face by limitations does not render the judgment subject to collateral attack. Palmer v. Essex County Chosen Freeholders [N. J. Law] 71 A 285. Judgment in **tax suit** cannot be vacated on collateral attack on proof that taxes for year specified had been paid prior to suit begun. Cooper v. Gunter [Mo.] 114 SW 943. Of pleadings present issue within province of court to determine, judgment is not subject to collateral attack because complaint contains special counts which are invalid, as **validity of declaration** on direct attack does not control in a collateral attack on judgment. Curtis v. Charlevoix County Sup'rs [Mich.] 15 Det. Leg. N. 941, 118 NW 618.

67. Irregularities in proceedings in a court of general jurisdiction, as against collateral attack, are cured by the judgment. Palmer v. Essex County Chosen Freeholders [N. J. Law] 71 A 285. Judgment not open to collateral attack merely because there may have been abuse of discretion in exercise of lawful power to allow **amendments** to complaint, mere error not vitiating the judgment. Goodman v. Ft. Collins [C. C. A.] 164 F 970. Defect in **publication of summons** held not to render default therein subject to collateral attack. Randall v. Snyder [Mo.] 112 SW 529. If **service of process** is defective or irregular but not void, a judgment may be irregular and subject to direct attack but not to collateral attack. Town of Point Pleasant v. Greenlee, 63 W. Va. 207, 60 SE 601. Where in statutory suit for taxes one of defendants makes **waiver of service** by an irregular method, such irregularity does not render judgment subject to collateral attack. Walker v. Mills, 210 Mo. 684, 109 SW 44. **Failure to enter orders** and papers in action in common rule book is irregularity not subject to collateral attack. Curtis v. Charlevoix County Sup'rs [Mich.] 15 Det. Leg. N. 941, 118 NW 618.

68. Judgment of probate court as to matters of which it has jurisdiction. Jenkins v. Morrow [Mo. App.] 109 SW 1051. All proceedings presumed regular. Dennis v. Alves [Ky.] 113 SW 483. Order of probate court appointing executor is void if made without jurisdiction but, if made in exercise of proper jurisdiction, it is not subject to collateral attack though based on erroneous conclusions of law or fact. Union Sav. Bank & Trust Co. v. Western Union Tel. Co. [Ohio] 86 NE 478. Proceedings of county court in matters of administration are not subject to collateral attack except for want of jurisdiction. Holland v. Ferris [Tex. Civ. App.] 107 SW 102. County court has jurisdiction to allow expenses of administration and a judgment allowing specified sum for legal services cannot be collaterally attacked. United States Fidelity & Guar. Co. v. People [Colo.] 98 P 828. In probate proceedings the county court is a court of record and of exclusive original jurisdiction and its judgments and recitals therein are entitled to the same presumptions as attach to records of other courts of that character. Kolterman v. Chilvers [Neb.] 117 NW 405. Where a probate court has jurisdiction in admitting a will to probate, all presumptions are in favor of the regularity of its proceedings and in collateral attack the court will not look into the degree of proof required by the probate court. Id. Failure to give proper notice to interested parties of hearing on a petition for appointment of an administrator, is not necessary to give the court jurisdiction of the estate, and subsequent proceedings cannot be collaterally attacked. In re Hanson [Minn.] 117 NW 235.

69. Not subject to collateral attack in suit by trustee to avoid a preference on the ground that one of three petitioners in the involuntary proceeding was not a creditor.

in special proceedings.[70] Presumptions of verity and regularity are indulged in favor of judgments of inferior courts where jurisdiction is shown,[71] or where such presumptions are required by statute,[72] but not otherwise.[73] A judgment in a special, statutory proceeding is open to collateral attack where it does not conform to statutory requirements.[74] A judgment entered by a court of competent jurisdiction is conclusive that it was rendered as therein stated.[75] Fraud is not ground for collateral attack.[76]

§ 8. *Lien. When and to what it attaches.* See 10 C. L. 499—The judgment lien attaches to all the real property of the judgment debtor,[77] title to which stands in his name[78] and which is situated in the county where the judgment is rendered[79] or

Huttig Mfg. Co. v. Edwards [C. C. A.] 160 F 619. A bankruptcy decree discharging a debtor based on proper findings. Hoskins v. Velasco Nat. Bank [Tex. Civ. App.] 20 Tex. Ct. Rep. 462, 107 SW 598. Adjudication in bankruptcy that because of insolvency a receiver was appointed for the property of the alleged bankrupt is conclusive. Bankr. Act July 1, 1898. Hecox v. Rollestone [C. C. A.] 164 F 823.

**70.** Decree in **contempt proceedings** is not subject to collateral attack. Hoskins v. Somerset Coal Co., 219 Pa. 373, 68 A 843. Under Laws 1896, p. 227, c. 272, § 63, giving county judge and surrogate concurrent jurisdiction of **adoption proceedings,** one court cannot review order of adoption made by the other in a collateral proceeding. In re Ward's Estate, 112 NYS 282. Where a court had jurisdiction to render judgment in an adoption proceeding, its judgment is not subject to collateral attack in action by the child to quiet title and partition land claimed through the adoption. Jones v. Leeds, 41 Ind. App. 164, 83 NE 526.

**71.** Unless it is shown to have jurisdiction. Jones v. Leeds, 41 Ind. App. 164, 83 NE 526.

**72.** Where legislature did not provide method to review judgment of inferior tribunal, it intended to give finality thereto instead of laying them open to collateral attack. State v. Schenkel, 129 Mo. App. 224, 108 SW 635. County court's findings in proceeding to open county road. Id.

**73.** If jurisdiction of inferior court does not appear from record, judgment is to be treated as nullity and may be collaterally attacked. Ruckert v. Richter, 127 Mo. App. 664, 106 SW 1081.

**74.** Nothing is presumed in favor of jurisdiction of a court exercising special statutory powers and the record must affirmatively show jurisdictional facts. Illinois Cent. R. Co. v. Hasenwinkle, 232 Ill. 224, 83 NE 518. Judgment of court of general jurisdiction under a statutory proceeding unknown to the common law must contain mandatory requirements of the statute or it is open to collateral attack. Cooper v. Gunter [Mo.] 114 SW 943.

**75.** Neither parol testimony nor magistrate's recitals of fact in his answer are competent in face of record. Nashville, etc., R. Co. v. Brown, 3 Ga. App. 561, 60 SE 319. A recital in a judgment that it was entered at a regular term imports absolute verity and is controlling unless the contrary appears from the record. Curtis v. Charlevoix County Sup'rs [Mich.] 15 Det. Leg. N. 941, 118 NW 618. Omission in default for delinquent taxes to state jurisdictional fact as to years for which taxes were due cannot be supplied by clerk's order of publication or recitals in sheriff's deed, by statute made prima facie evidence of title. Cooper v. Gunter [Mo.] 114 SW 943. Where default for delinquent taxes did not state the years for which the taxes were due as required by statute, and petition was lost, it could not be presumed on collateral attack that petition alleged the years as required by statute. Id.

**76.** A final judgment may be attacked for fraud only by an independent action. Lanier v. Heilig [N. C.] 63 SE 69. On collateral attack on a judicial sale of land, that the consideration was grossly inadequate, will not avoid it where sale was made during troubled and unsettled times. Ladd v. Craig [Miss.] 47 S 777. Judgment cannot be attacked for fraud not apparent of record. Hart v. Hunter [Tex. Civ. App.] 114 SW 882.

**77.** Where judgment debtor against whom lien existed expected to inherit land from his mother, who was seriously ill, and soon thereafter died, conveyed property while his mother still lived, grantee took subject to lien of judgment. Bliss v. Brown [Kan.] 96 P 945. In suit to subject interest of defendants in tract of land to judgment rendered in December 1901, other defendant claiming that land was partnership property, fact that after partnership settlement in July 1901 judgment debtor recovered judgment against other defendant, which was discharged after beginning of this suit, was immaterial. Mann v. Paddock, 108 Va. 827, 62 SE 951. "Real estate" within statute making all real estate of defendant subject to lien means "freehold" and not mere **chattel interest** in land. Bourn v. Robinson [Tex. Civ. App.] 107 SW 873.

**78.** Judgment does not of itself constitute a lien upon land of the judgment debtor which stands of record in name of his wife. Robison v. Gumaer [Colo.] 95 P 935. Issue of execution creates such lien. Id. Where deed is deposited in **escrow** to be delivered on payment of purchase price, interest of vendor is subject to lien of judgment creditor on judgment obtained after sale was made, and subsequent payments made to vendor are at vendee's peril. May v. Emerson [Or.] 96 P 454.

**79.** Under Civ. Code 1896, § 1921, judgments are liens only on property situated in the county where judgment is recorded. Greenwood v. Trigg, Dobbs & Co. [Ala.] 46 S 227. Entry of judgment in particular county establishes lien only upon property within such county. Lehigh & N. E. R. Co. v. Hanhauser [Pa.] 70 A 1089. In record

recorded. In some states issuance of execution is a condition to the attaching of the lien,[80] and in others proper docketing only is required.[81] Destruction of the record does not destroy the lien.[82] Where a judgment debtor makes the judgment a special lien on certain land, such land is primarily liable.[83] A revived judgment is a lien only from date of revival.[84]

*Duration of lien* See 10 C. L. 500 is generally prescribed by statute[85] and is not affected by subsequent conveyances,[86] but ceases to exist when the judgment becomes dormant.[87] Reversal on appeal destroys the lien.[88]

*Rank and priority of lien.* See 10 C. L. 500—The judgment lien is inferior to rights and liens existing at the time that it attaches,[89] except in so far as the rights

ing judgments in another county, the **statutory requirements** must be substantially complied with, and judgment as recorded must be sufficiently complete in itself. Wicker v. Jenkins [Tex. Civ. App.] 108 SW 188. **Certificate of clerk** attesting correctness of abstract of judgment recorded in another county need not be recorded. Id. **Abstract of judgment** recorded in another county, showing amount, rate of interest and costs, is sufficient though blanks for credits are not filled. Id. Under Gen. Laws 1898-99, p. 34, judgment certificate held sufficient to create a lien on land in county where filed, though it omitted the surname of one of the judgment creditors. Gunter v. Belser [Ala.] 45 S 582. Abstract recorded in another county, showing amount and rate of interest, held sufficient though erroneous as to amount of costs. Wicker v. Jenkins [Tex. Civ. App.] 108 SW 188. Abstract recorded in another county stating name of plaintiff as W. B. F. W. instead of W. F. B. W. is insufficient. Id.

**80.** To establish a lien, the lienor must prove that execution was issued on judgment within 12 months after rendition as required by Sayle's Rev. Civ. St. 1897, art. 3293, to preserve the lien. Bourn v. Robinson [Tex. Civ. App.] 107 SW 873. Evidence of mere entries on execution docket of the clerk, consisting of dates entered under an orderly arranged system, held not sufficient to prove issuance of execution. Id.

**81.** Under Code Civ. Proc. § 1251, judgment becomes lien from time of docketing. Holland v. Grote [N. Y.] 86 NE 30. In New York judgment becomes a lien on real estate from date it is docketed irrespective of issuance of execution, levy, or sale. In re Tupper, 163 F 766. When properly docketed, decree in equity becomes lien on real estate of judgment debtor. Raymond v. Blancgrass, 36 Mont. 449, 93 P 648. In order to create lien, judgment must be properly docketed, and **formalities of docketing** required by statute must be complied with. Huff v. Sweetser [Cal. App.] 97 P 705. Judgment must be docketed against debtor in his correct **name.** Id.

**82.** Under Gen. St. 1906, §§ 1600, 1601, 1603, destruction by fire of record of judgment in county where rendered held not to destroy lien affected by recording of transcript of the judgment in another county before the fire, nor to prevent making the judgment a lien by recording in another county after the fire. Curry v. Lehman [Fla.] 47 S 18.

**83.** Where two persons buy separate pieces of land of a common grantor, against each of which there is a judgment lien, but upon one of which the grantor had placed a special lien for the amount of the judgments, the latter piece is primarily liable as between the purchasers for the amount. Pleasant Hill L., P. & W. Co. v. Quinlan, 130 Mo. App. 487, 109 SW 1061.

**84.** A judgment revived for the first time and made effectual against the debtor after he has transferred land by unrecorded deed is not a lien on such land. Allen West Commission Co. v. Millstead [Miss.] 46 S 256.

**85.** Code Civ. Proc. § 376, expressly provides that until after expiration of twenty years, payment of a judgment is not conclusively presumed, and though the lien has expired it presumptively constitutes a valid claim against the debtor until expiration of such period. Holland v. Grote [N. Y.] 86 NE 30.

**86.** Under Code Civ. Proc. § 1251, providing that judgment is lien on property of debtor from time it is docketed, judgment docketed before alleged fraudulent conveyance by debtor became and for 10 years continued a lien, despite any number of transfers. Holland v. Grote [N. Y.] 86 NE 30.

**87.** Proposed sale of real estate, under execution issued on dormant judgment, will be enjoined at suit of one who acquired title to property during life of judgment. Lincoln Upholstering Co. v. Baker [Neb.] 118 NW 321. In action aided by attachment upon entry of judgment, attachment lien is merged in that of judgment, and thereafter lien is mere incident to judgment and ceases to exist when judgment becomes dormant. Id.

**88.** Under Code Civ. Proc. § 1321, where judgment was reversed on appeal, it ceased to be a lien. Clinton v. South Shore Nat. Gas & Fuel Co., 113 NYS 289.

**89.** Judgment is not lien on land acquired by debtor subject to pre-existing contract to convey to intervener by fact that such intervener's contract was not recorded until after judgment was docketed. Huff v. Sweetser [Cal. App.] 97 P 705. Where land was conveyed to judgment debtor subject to contract to convey same to intervener and land was thereafter conveyed by debtor to plaintiff, intervener's equity entitling him to land free from lien was not destroyed by new contract of sale between plaintiff and intervener. Id. Where one in possession of mortgaged property under **contract of sale** pays part of purchase money, he is entitled to reimbursement out of surplus on foreclosure in preference to judgment creditors whose judgments were recovered after execution of his contract, provided he had no notice of the judgments, and he would also be entitled to reimbursement if he paid un-

of the prior claimant or encumbrancer may be affected by the recording acts.[90] It is inferior to the rights of a bona fide purchaser acquired before it becomes effective [91] or before it is docketed in such manner as to give constructive notice to subsequent purchasers.[92] Where the entry of judgment gives a lien upon the judgment debtor's real property,[93] it also operates as constructive notice to subsequent purchasers.[94] A judgment creditor may be estopped to assert his lien as against subsequent claimants or lienors.[95] A judgment lien prior in time to a mortgage is prima facie superior in rank as to property covered by the mortgage,[96] other than that for the price of which the mortgage was given.[97] Where land is conveyed to one who simultaneously transfers it as security for a loan to pay the purchase price, the title passes through the borrower without being affected by a judgment against the borrower.[98] Mere laches in enforcing a judgment is not ground for annulling it at the instance of a subsequent judgment creditor in the absence of proof of a valid defense.[99]

§ 9. *Suspension, dormancy, and revival.* See 10 C. L. 568—The objection that judgment is dormant may be raised after issue of execution,[1] and the execution may be enjoined.[2] In some states entries of execution on a judgment,[3] if made in the manner prescribed,[4] will arrest the running of the dormancy statutes. A proceeding

der constraint of forfeiture of payments made. Durling v. Stillwell [N. J. Eq.] 69 A 978. Judgment lien is inferior to **unrecorded deed** executed before judgment was rendered. McCalla v. Knight Inv. Co., 77 Kan. 770, 94 P 126. Lien under **judgment for allmony** held inferior to trust deed and judgment of foreclosure. Prather v. Hairgrove [Mo.] 112 SW 552. A **mortgage executed pending action** is prior to the lien of the judgment procured therein in absence of intent to defraud. No lien until judgment. Curie v. Wright [Iowa] 119 NW 74.

90. Under recording laws, one who acquires a judgment lien without notice of prior unrecorded deed will be protected. Feinberg v. Stearns [Fla.] 42 S 797. One who has failed to record his deed has burden of showing that creditor of grantor, who subsequently acquired judgment, had notice thereof. Id.

91. Rule is same whether judgment was rendered by state or federal court. Allen West Commission Co. v. Millstead [Miss.] 46 S 256.

92. Order for deficiency judgment on mortgage foreclosure and docket thereof as judgment is no notice as to property standing in **name** Melvina Haring where action was against Amanda Haring. Haring v. Murphy, 113 NYS 452. Where judgment was entered and enrolled against R. H. Rutledge, whereas defendant's name was R. D. Rutledge, judgment held not notice. Allen West Commission Co. v. Millstead [Miss.] 46 S 256. Rights of subsequent purchasers cannot be effected by amendment as to name after such rights have attached. Id. **Judgment against married woman** docketed against her in her maiden name is not lien against property conveyed by her to innocent purchaser by her married name. Huff v. Sweetser [Cal. App.] 97 P 705. Under Civ. Code, § 1187, married woman is authorized to convey land in her name and purchaser is not put on inquiry as to her business transactions while unmarried. Id.

93. Sess. Laws 1893, p. 65, c. 42. Young v. Davis [Wash.] 97 P 506.

94. Purchaser from mortgagor after entry of decree of foreclosure held charged with notice of such decree and sale thereunder. Young v. Davis [Wash.] 97 P 506.

95. Where judgment creditors were made parties to a suit to foreclose a mortgage, gave notice that they had no defense and that mortgage was a prior lien, they were estopped to thereafter claim that their judgments were a prior lien. Smith v. Munger [Miss.] 47 S 676. An **assignee** pending the suit stands in no better position. Id.

96, 97. Howard v. Rumber [Ga. App.] 61 SE 297.

98. Protestant Episcopal Church v. Lowe Co. [Ga.] 63 SE 136.

99. Delay of five years not ground for annulling a judgment at the instance of a subsequent creditor of the same debtor who recovered judgment after execution had been issued on the prior judgment. Great Falls Nat. Bank v. McClure [C. C. A.] 161 F 56.

1. Defendant in dormant judgment after issuance of execution may move, on rehearing of homestead appraisement after reversal of judgment of allotment of homestead, that the judgment be decreed dormant. McKeithen v. Blue [N. C.] 62 SE 769.

2. The plaintiff does not thereby seek to use the statute of limitations as a sword but as a shield to protect what the law has already given him. Updegraff v. Lucas, 76 Kan. 456, 93 P 630.

3. Entries made on an execution issued upon judgment rendered in 1877 need not, under Civ. Code 1895, § 3761, be recorded on the execution docket in order to prevent the dormancy of such judgment. Wever v. Parker [Ga.] 62 SE 813. Civ. Code 1895, § 3761, has no application to judgments rendered prior to Acts 1884-85, p. 95. Id.

4. Entries recorded on civil issue docket, instead of on the execution docket, will not arrest running of dormancy statute. Civ. Code 1895, § 3761. Oliver v. James [Ga.] 62 SE 73. Under Civ. Code, 1895, § 3763, time when record on execution docket of entry on execution was made must appear from docket in order to arrest the running of dormancy statute. Id. Bailiff of county court provided for by Civ. Code

to revive a dormant judgment [5] is a new and separate proceeding but not a new action.[6] Such proceedings must be instituted within the period prescribed [7] and by parties entitled to maintain them.[8] Jurisdiction may be acquired by published service.[9] Objections seeking to go behind the judgment cannot be interposed against the revival of a valid judgment,[10] but all defenses and objections to the revival and enforcement of the judgment may be interposed [11] and the validity of the judgment may be attacked,[12] unless such objection has been waived; [13] and all proper objections may be made without constituting such an appearance as will render valid a judgment void for want of jurisdiction,[14] but the presumption is in favor of the validity of the judgment,[15] and the record cannot be contradicted by evidence aliunde.[16] Payment

1895, §§ 4189, 4190, is not officer authorized to execute and return execution issued from justice court, or to make entry thereon that will arrest running of dormancy statute. Id. Execution merely filed by clerk and memorandum of execution made on docket is not issued as required by statute and does not prevent judgment from becoming dormant. McKeithen v. Blue [N. C.] 62 SE 769.

5. Common law and statute of 2 Westminster, applying to scire facias are in force in Colorado from 1861, save as otherwise provided by statute. Collin County Nat. Bank v. Hughes [C. C. A.] 155 F 389. After a lapse of five years the appropriate remedy of the judgment creditor is to apply for leave to sue on the judgment. Partridge v. Moynihan, 110 NYS 539; Id. 111 NYS 31. The statutes of California contain two remedies for enforcement of dormant judgment; first, an action on judgment to be brought within period of five years, and second, a statutory proceeding for leave to issue execution. Cal. Code Civ. Proc. § 685. In re Rebman [C. C. A.] 150 F 759. In Alabama residents of a town may file in the name of the state a petition in the nature of a **bill of revivor** for the effectuation of a decree abating a nuisance and perpetually enjoining the same. Deer v. State [Ala.] 46 S 848. A bill against the assignee of the person against whom the decree was rendered need not allege that he had notice of the decree. Id.

6. Reed v. Waterbury Nat. Bank, 135 Ill. App. 165; St Paul Harvester Co. v. Faulhaber [Neb.] 117 NW 702; Collin County Nat. Bank v. Hughes [C. C. A.] 155 F 389.

7. Motion to revive a judgment is barred under Ky. St. 1903, § 2548, after 7 years as to a surety, where no execution is issued or prosecuted in good faith during such period. Steele v. Dishman's Adm'r [Ky.] 113 SW 52. Proceeding to revive a judgment held barred where not brought within 10 years after judgment rendered, though brought within such period before entry thereof. Blohme v. Schmancke [S. C.], 61 SE 1060. Under Act Pa. April 3, 1903 (P. L. 139), providing that two returns of nil habit are equivalent to personal service in writs of scire facias to revive judgments, and rules of practice that such writs are a continuation of the original suit, a judgment entered on two such returns, where the court had original jurisdiction, is valid, but under Acts March 26, 1827 (P. L. 129), and Act June 1, 1887 (P. L. 289), limiting the life of a judgment to 5 years, a judgment of revival issued on two such writs, issued nine years after entry of original judgment, is void for want of jurisdiction. Davis v. Davis, 164 F 281. Under Code D. C. §§ 1213-1215 incl. and § 1078 (31 Stat. at L. 1381, c. 854), **affidavit of nonpayment** is unnecessary until after lapse of 12 years fixed by statute as life of judgment. Simpson v. Ninnix, 30 App. D. C. 582.

8. Ann. St. 1906, p. 2089, authorizing assignments of judgments and providing that assignments properly recorded vest title in the assignee, and authorizing action in the name of the assignee, authorizes action by the assignee on the judgment but not scire facias to revive it in his own name. Bick v. Robbins [Mo. App.] 111 SW 612. An executor of one of two plaintiffs in a justice's judgment cannot maintain notice or scire facias to revive it. The proceeding must be in the **sole name** of the survivor. Crim v. Rhinehart [W. Va.] 63 SE 212.

9. Code Civ. Proc. § 462, authorizing revival of dormant judgment upon service by publication, is not unconstitutional. White v Ress [Neb.] 115 NW 301. Code Civ. Proc. § 462, is applicable to revival of a dormant judgment and authorizes revival of such judgment against nonresidents upon service by publication. Id.

10. Weaver v. Webb, Galt & Kellogg, 3 Ga. App. 726, 60 SE 367; St. Paul Harvester Co. v. Fauhaber [Neb.] 117 NW 702. Defense that judgment is shown by evidence in bill of exceptions to be erroneous cannot be raised as a defense in a scire facias proceeding to revive the judgment. Reed v. Waterbury National Bank, 135 Ill. App. 165.

11. Payment. St. Paul Harvester Co. v. Faulhaber [Neb.] 117 NW 702. On a scire facias under Act April 4, 1862 (P. L. 325), and January 21, 1843 (P. L. 376), to revive judgment, affidavit of defense of party sought to be brought in as terre tenant, averring that such party has never held and does not now hold any property which he derived from defendant, is sufficient to prevent judgment. Hanhauser v. Pennsylvania, etc., R. Co. [Pa.] 71 A 5.

12. For want of jurisdiction. St. Paul Harvester Co. v. Faulhaber [Neb.] 117 NW 702. Defense that one was not served with process, did not waive service, and did not appear or plead, is complete defense in scire facias to revive judgment. Weaver v. Webb, Galt & Kellogg, 3 Ga. App. 726, 60 SE 367. Objection that defendant was not served, did not appear or plead, does not set up defense that could have been presented on trial of case. Id.

13. Where defendant is in court but fails to plead lack of jurisdiction of his person, he waives the objection. Weaver v. Webb, Galt & Kellogg, 3 Ga. App. 726, 60 SE 367.

14. St. Paul Harvester Co. v. Faulhaber [Neb.] 117 NW 702.

15. Where record is silent as to service.

is presumed if pleaded and the judgment creditor has the burden to rebut it.[17] The only issues raised by a plea of nul tiel record are whether there is such a record and whether the judgment is void for want of jursidiction,[18] and the defendant is not entitled to a jury trial thereon;[19] nor is one entitled to a trial by jury where the only plea, except that of nul tiel record, is one upon which no evidence was offered and would in any case have to be tried by the record alone.[20] The record of the judgment is admissible without proof of its genuineness.[21] In form and effect it is merely a judgment of revival and not of recovery.[22] The effect of the judgment is to adjudicate all questions necessarily involved,[23] but it does not impart any validity to a void judgment.[24] It is generally held that when a defendant answering to the writ of scire facias pleads matter which goes to his personal discharge, or any matter which does not go to the writ or to the nature of the writ or pleads such matter as constitutes a bar to the action against himself only, and of which his codefendants could not take advantage, such defendant may be discharged and the judgment revived against the other defendant or defendants.[25]

§ 10. *Assignment of judgment.* See 10 C. L. 503—An assignment may be by parol[26] or in writing.[27] When made in the manner prescribed by law, it passes an equity entitling the assignee to use on the judgment or to have the execution issued.[28] In some states the assignment must be entered of record in the court where the judg-

Weaver v. Webb, Galt & Kellogg, 3 Ga. App. 726, 60 SE 367. In scire facias to revive a judgment where the record shows that original record of judgment was introduced in evidence but that record was not incorporated or preserved in bill of exceptions, it will be presumed that judgment was regular and that it showed service on defendant. Reed v. National Bank of Eau Claire, 136 Ill. App. 378.

**16.** Evidence of lack of service. Bank of Eau Claire v. Reed, 232 Ill. 238, 83 NE 820. Plea of **nul tiel record** admits only showing that judgment is void on its face for lack of jurisdiction. Id. Plea or **lack of service** of process in action and that supposed return is incorrect and untrue is attack upon record in collateral proceeding and is demurrable. Reed v. Bank of Eau Claire, 136 Ill. App. 378. Plea of **false return** on summons in original cause does not defeat scire facias, the latter proceeding being a continuance of same suit in which sheriff's return cannot be contradicted so as to defeat jurisdiction. Reed v. Waterbury Nat. Bank, 135 Ill. App. 165.

**17.** Unless some witness having knowledge testifies to nonpayment, it is incumbent for the judgment creditor to rebut the presumption by proof of some fact which tends to make it more probable than otherwise that payment has not been made. Platte County Bank v. Clark [Neb.] 115 NW 787. Evidence insufficient to repel such presumption. Id.

**18.** Bank of Eau Claire v. Reed, 232 Ill. 238, 83 NE 820. **Evidence** in scire facias case held to sustain judgment and overcome plea of nul tiel record. Reed v. Waterbury Nat. Bank, 135 Ill. App. 165.

**19.** Bank of Eau Claire v. Reed, 232 Ill. 238, 83 NE 820.

**20.** Where second plea was lack of jurisdiction. Reed v. National Bank of Eau Claire, 136 Ill. App. 378.

**21.** Court takes judicial notice of its own records. Bank of Eau Claire v. Reed, 232 Ill. 238, 83 NE 820.

**22.** Judgment entered on scire facias is simply that defendant have execution for judgment mentioned in said scire facias and costs. Reed v. National Bank of Eau Claire, 136 Ill. App. 378. Form of judgment order in scire facias to revive judgment responding to only prayer of writ, according to established forms and giving execution on judgment to plaintiff, held correct notwithstanding words which may be surplusage. Reed v. Waterbury National Bank, 135 Ill. App. 165. Judgment under scire facias to revive judgment is not quod recuperet for amount due, its object being to revive judgment as it formerly existed and reinvest it with same attributes and conditions as originally belonged to it. The material part of it is that plaintiff have execution of judgment described in writ. Bank of Eau Claire v. Reed, 232 Ill. 238, 83 NE 820.

**23.** Where the action is by a pretended assignee of such judgment, one of the issues is whether he is assignee of the original holder of the judgment. La Fitte v. Salisbury, 43 Colo. 248, 95 P 1065. One who seeks to have judgment reviving judgment vacated on ground that assignee in whose favor it was revived procured the judgment on a forged assignment must allege that he was not served with process in the revival proceeding. Id.

**24.** Minnesota Thresher Mfg. Co. v. L'Heureux [Neb.] 118 NW 565.

**25.** Bankruptcy is personal defense which defendant may so interpose. Simpson v. Minnix, 30 App. D. C. 582. Under Bankruptcy Act 1898, § 16 (30 Stat. at L. 550, c. 541, U. S. Comp. St. 1901, p. 3428), one of codebtors under judgment may be discharged without affecting liability of others. Id.

**26, 27, 28.** Burns v. George [Ala.] 45 S 421.

**29.** Kirby's Dig. § 4457, providing that on sale of judgment, written transfer shall be entered on records of court where judgment is recorded, refers to filing assignments in trial and not in court where case is appealed. St. Louis, etc., R. Co. v. Hambright [Ark.] 112 SW 876.

ment was rendered.[29] An assignment carries with it the claim upon which the judgment is based[30] and all the rights of the assignor,[31] and the asssignee may maintain action on the judgment in his own name.[32] Objections to the assignment cannot be raised after judgment in favor of the assignee.[33] The assignee stands in no better position than his assignor,[34] and, a judgment being a non-negotiable chose in action, the assignee takes it subject to all the equities of the debtor against the assignor at the date of the assignment.[35] Where a judgment debtor has notice of an assignment of the judgment, an attempted release by the assignor does not affect the assignee nor vest any rights in the debtor.[36] A fraudulent assignment will not avail the assignee.[37]

Assignment is essential to the acquisition of an interest in a future judgment.[38]

§ 11. *Payment, discharge and satisfaction.* See 10 C. L. 503—Payment may be made either to the party primarily entitled thereto or to his duly authorized representative.[39] In some states it is provided by statute that payment is presumed after the lapse of a prescribed period.[40] The filing of a satisfaction piece is prima facie evidence of payment.[41] A discharge in bankruptcy to a firm will not discharge a judgment against an individual member.[42] Payment of a judgment out of proceeds of sale of exempt property on execution satisfies it.[43] The holder of a judgment

**30.** King v. Miller [Or.] 97 P 542. Assignment carries with it the cause of action upon which the judgment is based. Feinberg v. Stearns [Fla.] 47 S 797.

**31.** Where judgment creditor had no notice of unrecorded deed, his assignee who had such notice will be protected. Feinberg v. Stearns [Fla.] 47 S 797.

**32.** Judgment is chose in action and can be assigned in writing by administrator of deceased judgment creditor so that assignee may sue thereon in his own name. Manson v. Peaks, 103 Me. 430, 69 A 690. Assignment of judgment properly admitted in action by assignee to enforce it, without proof of execution thereof. McCormick v. National Bank of Commerce [Tex. Civ. App.] 106 SW 747.

**33.** After an otherwise valid judgment in favor of such assignee in action upon original judgment, validity and efficacy of assignment cannot be questioned. Manson v. Peaks, 103 Me. 430, 69 A 690.

**34.** Judgment may be **reversed after assignment.** King v. Miller [Or.] 97 P 542. But where it is reversed after assignment, he may recover what he paid for it on the ground of failure of consideration or continue suit on the cause of action. B. & C. Comp. § 38. Id.

**35.** McManus v. Cash & Luckel [Tex.] 108 SW 800. This rule applies to judgment on negotiable note. Selden v. Williams, 108 Va. 542, 62 SE 380. Code 1904, §§ 3299, 3300, relative to effect of failure to plead a defense, held not to preclude judgment debtor from setting up equities against assignee of judgment, though they did not defend proceeding in which judgment was obtained, nor proceedings to revive it. Id. Where payee of note deposited it as collateral and holder recovered judgment against maker who paid amount it was given to secure, they were not estopped to set up equities against assignee as to balance because they failed to defend certain chancery proceedings to subject their property to lien of judgment. Id. Where firm recovered judgment and orally assigned one-half interest therein and thereafter debtor recovered judgment against one of members of firm, the debtor was entitled to set-off against partner's interest. McManus v. Cash [Tex.] 108 SW 800.

**36.** Hence, where the validity of an assignment of a judgment is not resisted by the debtor in an action by the assignee to revive the judgment, a subsequent release by the judgment holder cannot avail the judgment debtor. La Fitte v. Salisbury, 43 Colo. 248, 95 P 1065.

**37.** Where judgment was recovered against a city and property for injuries caused by defective sidewalk and city was not responsible but thereafter owner's wife took assignment of judgment, such assignment was not taken in good faith but under arrangement with the husband so that he might evade liability. Blocker v. Owensboro, 33 Ky. L. R. 478, 110 SW 369.

**38.** McRea v. Warehime [Wash.] 94 P 924.

**39.** Payment may be made to the plaintiff or to one of several plaintiffs, or to his attorney or the levying officer, or to the next friend or his attorney unless debtor has notice that attorney is not authorized to receive it. Davis v. Gott [Ky.] 113 SW 826. Where judgment creditor referred debtor to his attorney to settle, deposit in bank to credit of attorney and acceptance thereof by him is a satisfaction. Id. Acceptance of bank deposits in plaintiff's name, interest payable to her and principal to her children at her death, constitutes payment and satisfaction of judgment for alimony. Daly v. Daly, 80 Conn. 609, 69 A 1021.

**40.** Under Code Civ. Proc. §§ 1377, 1378, lapse of five years without issuance of execution creates a presumption of payment. Partridge v. Moynihan, 111 NYS 31; Id., 116 NYS 539. Evidence held insufficient to overcome judgment. Id.

**41.** Its legal effect is extinguishment of the debt. Fluegelman v. Armstrong, 110 NYS 967.

**42.** Judgment in bankruptcy held not to discharge judgment against firm of which bankrupt was a member, no individual judgment against him. Code Civ. Proc. § 1268. In re Gruber, 113 NYS 923.

**43.** Johnson v. Motlow [Ala.] 47 S 568.

is entitled to but one satisfaction.[44] The pendency of an appeal from a judgment does not prevent the judgment debtor from paying a judgment or the judgment creditor from satisfying the same of record.[45] The filing of a remittitur nullifies the judgment and requires entry of a new one, the payment of which operates as a discharge.[46] Entry of satisfaction of judgment induced either by fraud or by mistake may be stricken by the court on notice to the parties and proof of the facts.[47] Such an application is addressed to the discretion of the court.[48] The holder of the legal title to a judgment is a necessary party where the satisfaction of a judgment is sought to be set aside for fraud.[49] The mere fact that the owner of a judgment receives assets of the judgment debtor is not alone sufficient to render such assets applicable to the payment of the judgment.[50]

§ 12. *Set-off.*[See 10 C. L. 504]—The power to set off one judgment against another is purely equitable and should be exercised only upon equitable principles and only when the court is satisfied that substantial justice is being done.[51] The power is not confined to judgments in the same court.[52] It is also immaterial that one of the judgments is in tort and the other in contract.[53] Where in the same judgment the parties are condemned to pay each other money, the two judgments should be set off pro tanto.[54] A judgment against one individually will not be set off against one in his favor as member of a partnership unless equity demands it.[55] Where the right to have one judgment set off against another does not exist at the time of the assignment of one, the right of set-off is lost by the assignment.[56]

§ 13. *Interest.*[See 10 C. L. 504]—A judgment predicated on monthly instalments bears interest only on such instalments as are matured.[57] In many states it is provided by statutes that judgments in a sum certain shall bear interest.[58] A debtor is

**44.** Where owner of mortgage which was first lien foreclosed and land was sold and surplus remained in his hands, and thereafter owner of judgment which was lien inferior to mortgage issued execution and purchased property at execution sale for amount of his judgment, and execution was returned satisfied but he never redeemed from mortgage, he was not thereafter entitled to surplus held by mortgagee. McCaffery v. Burkhardt, 104 Minn. 340, 116 NW 645.

**45.** Satisfaction being the act of the party and not an exercise of jurisdiction by the court over the judgment. Wagner v. Goldschmidt [Or.] 93 P 689.

**46.** Such new judgment may be satisfied by payment of the amount thereof regardless of interest accrued on original. Partello v. Missouri Pac. R. Co. [Mo. App.] 107 SW 473.

**47.** Campbell v. Erb, 35 Pa. Super. Ct. 436.

**48.** Court held not to have abused discretion in refusing to strike satisfaction of entry where fraud or mistake if any was fault of plaintiff. Campbell v. Erb, 35 Pa. Super. Ct. 436.

**49.** Prindle v. Curran, 132 Ill. App. 162.

**50.** Finding that surety on appeal bond who had paid judgment after affirmance and received assignment of judgment received assets of debtor held insufficient to sustain a conclusion of payment. Garrett v. Mayfield Woolen Mills [Ala.] 44 S 1026.

**51.** Reed v. Smith, 158 F 889. Court of equity, in exercise of sound discretion, will direct one judgment to be set off against another whenever such relief does not run counter to any established principles of law or equity. Murray v. Skirm [N. J. Err. & App.] 69 A 496. One held not entitled to set off a judgment on a bond where it did not appear that it could not be satisfied out of security against a judgment for slander, where he procured the former judgment by assignment for the express purpose of set-off. Reed v. Smith, 158 F 889. Where one partner advances money to prosecute judgment under agreement that he is to be reimbursed out of the judgment, he is entitled to be reimbursed before judgment against his copartner can be set off against such judgment. McManus v. Cash [Tex.] 108 SW 800. In action to renew judgment where defendant pleaded payment but default was taken against him, and an order imposing condition of opening default was modified with costs against plaintiff, but not to abide event, it was improper to set off such costs against judgment as liability on judgment was undetermined. Donegan v. Patterson, 113 NYS 830.

**52.** May be exercised with reference to judgments in different courts and in different states. Reed v. Smith, 158 F 889.

**53.** Reed v. Smith, 158 F 889.

**54.** Luderbach Plumbing Co. v. Its Creditors, 121 La. 371, 46 S 359.

**55.** Held inequitable where one-half of judgment against the firm had been assigned. McManus v. Cash [Tex.] 108 SW 800.

**56.** McManus v. Cash [Tex.] 108 SW 800.

**57.** Where judgment has been entered on penal bond given to secure payments in monthly instalments, part of which were not due when judgment was entered, interest should only be computed on such instalments as are not paid at maturity, and then from date of maturity to payment. Dike v. Andrews [Neb.] 114 NW 582.

**58.** Under Civ. Code 1902, § 1660, providing that judgment shall draw interest wherever

not liable for interest on a judgment while its payment is restrained by injunction[59] unless he has derived some advantage from the use of the money.[60] Generally the judgment creditor will not be allowed by his own acts to prolong the period for the running of interest by neglecting to take the steps provided by law to secure payment.[61] The rate of interest is regulated by the statute.[62] Interest may be compounded under some statutes in case of successive appeals.[63] When interest is allowed by way of a penalty, the allowance of an excessive rate amounts to the imposition of an excessive penalty.[64]

§ 14. *Enforcement of judgment.* See 10 C. L. 505—Proceedings to enforce judgments by creditor's suits,[65] execution and other final process[66] are treated elsewhere, as is also the enforcement of dormant judgments[67] and relief against the enforcement of judgments.[68] A judgment may be enforced by an original bill in equity,[69] notwithstanding relief might be obtained at law by garnishment proceedings,[70] but such a bill will not lie where there is no equitable necessity therefor.[71] In Montana a money decree in equity may be enforced in the same manner as a judgment at law,[72] And so also in Minnesota as to certain decrees.[73] A restraining order may be enforced only against the bodies of the offenders.[74] Nonprejudicial irregularities are unavailable on a collateral attack upon the enforcement proceedings.[75]

a certain sum of money shall be ascertained to be due, amount fixed by a decree in accounting held to bear interest. Brown v. Rogers [S. C.] 61 SE 440. Under Rev. St. 1895, art. 3105, providing that all judgments, except certain ones, shall bear interest at 6 per cent, judgment on insurance policy for face thereof and statutory damages held to bear interest from date on entire sum. Mutual Reserve Life Ins. Co. v. Jay [Tex. Civ. App.] 109 SW 116. Under Rev. St. 1895, art. 3105, judgment against city for amount due on warrants bears interest. City of San Antonio v. Alamo Nat. Bank [Tex. Civ. App.] 114 SW 909.

59. Phoenix Ins. Co. v. Carey, 80 Conn. 426, 68 A 993.

60. Fact that debtor does not keep amount of judgment unmingled with other funds does not affect liability for interest. Phoenix Ins. Co. v. Carey, 80 Conn. 426, 68 A 993. Commingling of amount of judgment with other funds raises presumption of use. Id.

61. Under Code Civ. Proc. § 269, providing that interest shall be allowed on judgment of court of claims from date thereof until twentieth day after comptroller is authorized to issue warrant for payment thereof, or until payment if payment be made sooner, but that no such judgment shall be paid until copy thereof shall be filed with comptroller, where claimant appealed instead of filing copy of judgment with comptroller, and such appeal failed, interest was allowable only until twentieth day after date of judgment, the comptroller having at all times been ready and able to pay judgment as rendered. Evers v. Glynn, 110 NYS 405.

62. U. S. Nat. Bank v. Waddingham [Cal. App.] 93 P 1046. Under Cobbey's Ann. St. 1903, § 6727, judgment draws 7 per cent interest from date of rendition, though founded upon contract for less amount. Portsmouth Sav. Bank v. Yeiser [Neb.] 116 NW 38. Judgment bears interest at rate not to exceed 6 per cent. Barber Asphalt Pav. Co. v. Field [Mo. App.] 111 SW 907. Rate **on foreign judgment** is controlled by law of state where judgment was rendered. Britton v. Chamberlain, 234 Ill. 246, 84 NE 895.

63. Under Kirby's Dig. § 5387, providing that all judgments shall bear interest from date where judgment was affirmed on appeal for the amount with interest, and thereafter a writ of error was taken to the federal supreme court, held the judgment bore interest until affirmed, and the then accumulated interest bore interest to time of judgment of the supreme court. Arkansas Southern R. Co. v. German Nat. Bank, 85 Ark. 136, 107 SW 668.

64. Imposed as penalty, and hence erroneous allowance in excess of statutory rate is not waived by failure to include objection on motion in arrest. Barber Asphalt Pav. Co. v. Field [Mo. App.] 111 SW 907.

65. See Creditor's Suit, 11 C. L. 936.

66. See Executions, 11 C. L. 1433.

67. See ante, § 9.

68. See ante, § 5B. See, also, Injunctions, 12 C. L. 152.

69. Bill in equity may be maintained to enforce decree where rights of parties have become so embarrassed by subsequent events that no ordinary process of court upon first decree will serve, and it is therefor necessary to have another decree of court to ascertain and enforce them. May v. May, 134 Ill. App. 638.

70. Feidler v. Bartleson [C. C. A.] 161 F 30.

71. Refused where nothing had transpired since original decree of divorce to change status of parties under such decree. May v. May, 134 Ill. App. 638.

72. Code Civ. Proc. §§ 1214, 1825. Raymond v. Blancgrass, 36 Mont. 449, 93 P 648. Where no method is specifically prescribed, court would be authorized to enforce it by execution, under Code Civ. Proc. § 205. Id.

73. Where judgment in divorce makes alimony a specific lien on certain land, it may be enforced by ordinary execution and sale thereunder. Makl v. Makl [Minn.] 119 NW 51.

74. Judgment enjoining officers of insurance society from canceling a certificate operates in personam only, and can be enforced only by attaching the bodies of the offender.

§ 15. *Audita querela.* See 10 C. L. 506

§ 16. *Actions on judgment.* See 10 C. L. 506—Actions on judgments must be brought within the period prescribed.[76] A limitation on final judgments is not a limitation on interlocutory decrees,[77] and a limitation on the issuance of execution is not a limitation on an action on the judgment.[78] All proper and necessary parties should be joined.[79] The complaint should conform to statutory requirements.[80] It is not always necessary to allege the date of the judgment.[81] Where a judgment is assailed for want of jurisdiction, but it appears just and no defense is shown, judgment for plaintiff is proper.[82]

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**Judicial Notice,** see latest topical index.

## JUDICIAL SALES.


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This topic excludes matters peculiar to special kinds of sales under order or process of court.[1]

Royal Fraternal Union v. Lundy [Tex. Civ. App.] 113 SW 185.

**75.** Objection that judgment in rem was enforced by execution issued as upon judgment in personam is unavailable on collateral attack upon sale, where judgment was enforced exclusively against property subject to the judgment. Maki v. Maki [Minn.] 119 NW 51.

**76.** Ann. St. 1906, p. 2364, reducing limitation on judgments from 20 to 10 years, does not operate retroactively on existing judgments, but 10-year limitation commenced to run as to such judgments when statute took effect. Bick v. Robbins [Mo. App.] 111 SW 612. Under Ball. Ann. Codes & St. § 5149, providing that lien of judgment shall not be continued longer than 6 years, and § 4798, permitting action within 6 years, an action may be maintained on a judgment at any time within 6 years after rendition. Lilly-Brackett Co. v. Sonnemann [Wash.] 97 P 505. Action may be brought upon judgment or decree of any court of United States or of any state within United States within 5 years. Cal. Code Civ. Proc. § 336. In re Rebman [C. C. A.] 150 F 759. Under Code Proc. § 375, and Code Civ. Proc. § 1937, relative to **joint judgments** where some of parties were not served, action to charge such judgment against property of debtor held barred after ten years. Hofferberth v. Nash, 191 N. Y. 446, 84 NE 400. **Surety who obtains assignment of judgment** against himself and principal is substituted to all rights of judgment creditor, and his right to enforce judgment is controlled by 15-year statute. Patton's Ex'r v. Smith [Ky.] 114 SW 315. **Statute begins to run** against an action upon judgment after lapse of period within which an appeal may be taken therefrom. Judgment entered Aug. 16, 1897, held barred Feb. 17, 1903. In re Rebman [C. C. A.] 150 F 759.

**77.** Revisal 1905, § 391, limiting time for suing on judgments, applies to final judgments only, and not to interlocutory decrees. Williams v. McFadyen, 145 N. C. 156, 58 SE 1005.

**78.** Mansf. Dig. § 4103. Reaves v. Turner [Okl.] 94 P 543.

**79.** Under the rule that in actions on judgments in which two persons are jointly interested the parties in whom the right of action exists must be made parties, where a widow acquired a claim against her husband's estate based on a judgment against husband and son, that the original judgment creditor might have proceeded against the son did not render him a necessary party in the suit by the widow against the estate. McCormick v. National Bank of Commerce [Tex. Civ. App.] 106 SW 747.

**80.** Complaint held to sufficiently plead a judgment within Mills' Ann. Code, § 65, permitting judgment to be pleaded by a declaration that it was duly made or given. United States Fidelity & Guaranty Co. v. People [Colo.] 98 P 828. Under Code Civ. Proc. § 456, providing that in pleading a judgment it is not necessary to state facts conferring jurisdiction where one claimed under a franchise given by a board of supervisors, it was not necessary to allege that the board determined that the franchise was for the public good, etc. Gurnsey v. Northern California Power Co. [Cal. App.] 94 P 858.

**81.** In pleading a judgment, it is proper to allege the date thereof, but not always necessary to do so. United States Fidelity & Guaranty Co. v. People [Colo.] 98 P 828.

**82.** Ballou v. Skidmore [Ky.] 113 SW 441.

**1.** See Bankruptcy, 11 C. L. 383; Executions, 11 C. L. 1433; Foreclosure of Mortgages on Land, 11 C. L. 1487; Estates of Decedents, 11 C. L. 1275; Guardianship, 11 C. L. 1671;

§ 1. *Occasion for and nature of judicial sales.*[See 10 C. L. 507]—A judicial sale is a sale made by order or decree under the direction of a court having competent authority[2] and requiring confirmation to become effective.[3] The term is applicable to a chancery foreclosure,[4] the foreclosure of a tax lien,[5] a partition sale,[6] or a receiver's sale.[7] A court having jurisdiction of a corporation by consent has authority to order a sale of patents owned by the corporation to satisfy a decree against it.[8]

§ 2. *The petition, order, writ, or decree.*[See 10 C. L. 507]—In Pennsylvania a judicial sale of real estate is now effected by petition and citation, answer and replication in the court of common pleas.[9]

§ 3. *Levy, seizure, appraisal, and the like.*[See 8 C. L. 575]

§ 4. *Notice and advertisement of sale.*[See 10 C. L. 507]—The method of advertisement is governed by statute.[10]

§ 5. *Sale and conduct of it and return.*[See 10 C. L. 507]—Although the place of sale is usually prescribed by statute,[11] a decree authorizing an administrator to name the place of sale is valid.[12] A sale of the land covered by a deed of trust may be made by the trustee.[13] A sale of the property en masse is proper where a division is impracticable[14] or is not requested.[15] An agreement to chill a judicial sale and stifle competition is illegal,[16] but an agreement to raise the means of payment by contribution or to divide the property for the accommodation of the purchasers is valid.[17]

§ 6. *Confirmation and setting aside sales.*[See 10 C. L. 508]—The confirmation is the judicial sanction of the court.[18] The order, being a judicial act,[19] operates to cure

Mechanics' Liens, 10 C. L. 814; Partition, 10 C. L. 1089; Taxes, 10 C. L. 1776.

2. Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co. [C. C. A.] 165 F 162. Order empowering guardian who desired to lease ward's property to file petition referable to master does not empower guardian to sell or lease, and sale by such guardian without authority is not judicial sale. Id. No sale where court never acquired jurisdiction of title to land or owners. Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley [C. C. A.] 164 F 963.

3. Kazebeer v. Nunemaker [Neb.] 118 NW 646.

4. Butters v. Butters [Mich.] 15 Det. Leg. N. 447, 117 NW 203. See, also, Foreclosure of Mortgages on Land, 11 C. L. 1487.

5. Overdue tax suit for foreclosure of tax lien, authorized by Acts Ark. 1881, p. 63, is judicial proceeding, and sale pursuant thereto is judicial sale. Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531. See, also, Taxes, 10 C. L. 1776.

6. Kazebeer v. Munemaker [Neb.] 118 NW 646; Thomas v. Elliott [Mo.] 114 SW 987. See, also, Partition, 10 C. L. 1089.

7. Under order of court. Dilley v. Jasper Lumber Co. [Tex. Civ. App.] 114 SW 878. See, also, Receivers, 10 C. L. 1465.

8. Underfeed Stoker Co. v. American Ship Windlass Co., 165 F 65. Assignment of patents not invalid because made by master pursuant to order of court rather than officers of corporation. Id.

9. Under Act of April 20, 1905 (P. L. 239), method of judicial sale of real estate by procedure before magistrate or justice and sheriff's jury was abolished (§ 19). Lancaster Trust Co. v. Long, 220 Pa. 499, 69 A 993. Act of April 20, 1905 (P. L. 239), does not affect or alter defenses that may be set up by person in possession. Id. May allege that purchaser was trustee under promise to hold property for his benefit. Id.

10. Sheriff may select any paper he pleases, subject only to the statutory requirement that the paper so selected be one printed and of general circulation in the county. Augustus v. Lynd, 7 Ohio N. P. (N. S.) 473. Refusal to insert notice of sale in particular newspaper not ground for appointment of special master commissioner to make sale. Id.

11. At county seat. Ladd v. Craig [Miss.] 47 S 777.

12. Decree by confirmation became act of court and was authorized by Rev. Code 1871, § 1038, since that statute only prescribes place of sale in absence of directions. Ladd v. Craig [Miss.] 47 S 777.

13. Where grantor, beneficiary and trustee are parties and sale by latter is proper and desirable. McDermitt v. Newman [W. Va.] 61 SE 300.

14. Sale en masse of two fractional portions of lots occupied by one building and subject to mortgage, not irregular. Bowden v. Hadley [Iowa] 116 NW 689.

15. Sale en masse valid where house and barn stood on 2 lots and court might have subdivided but failed to do so, there being no request. Butters v. Butters [Mich.] 15 Det. Leg. N. 447, 117 NW 203.

16. Venner v. Denver Union Water Co., 40 Colo. 212, 90 P 623.

17. Though parties are indirectly prevented from bidding. Venner v. Denver Union Water Co., 40 Colo. 212, 90 P 623.

18. Confirmation not sale. Robertson v. McClintock [Ark.] 110 SW 1052. By confirmation, court makes sale its own, and purchaser entitled to full benefit of contract, which is executed and will be enforced for and against him. Ladd v. Craig [Miss.] 47 S 777.

19. Not ministerial. Harrington v. Hayes County [Neb.] 115 NW 773.

irregularities[20] and authorizes a deed.[21] The statute of limitations does not run against the sale until confirmation.[22] An order of confirmation made by a district judge who is disqualified is void.[23] An owner of property who moves the court to deny confirmation because of inadequacy of price and offers to increase the bid on resale admits the jurisdiction of the court and the justice of the decree of sale.[24]

*Refusal of confirmation or setting aside of sale.*[See 10 C. L. 508]—The grant or refusal of confirmation rests in discretion,[25] but judicial sales will not be disturbed for slight causes,[26] or where a resale would not result in an increased price.[27] The court may reject any bid which is inadequate.[28]

**20.** Ladd v. Craig [Miss.] 47 S 777. Misdescriptions of land fatal to ordinary tax proceeding do not render sale pursuant to judgment in overdue tax suit, authorized by Acts Ark. 1881, p. 63, invalid after confirmation. Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531.

**21.** Robertson v. McClintock [Ark.] 110 SW 1052.

**22.** Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531.

**23.** Order confirming sale in action which judge commenced and prosecuted as attorney. Harrington v. Hayes County [Neb.] 115 NW 773.

**24.** Estopped to deny either. Prudential Real Estate Co. v. Hall, 79 Neb. 805, 116 NW 40.

**25.** Chancellor has broad though not arbitrary discretion in disapproving sales, and discretion must be exercised in accordance with established principles of law. Evidence insufficient to warrant setting sale aside. Abbott v. Beebe, 226 Ill. 417, 80 NE 991.

**26.** To protect interest of party from his own negligence. Abbott v. Beebe, 226 Ill. 417, 80 NE 991; Leavell v. Carter [Ky.] 112 SW 1118.

**27.** Where substantial and irreparable loss will result to persons under disabilities of mind, a resale is proper. Abbott v. Beebe, 226 Ill. 417, 80 NE 991.

**NOTE. Opening judicial sales for advanced bids:** Until the practice was abolished by act of parliament, a chancery sale in England might, before confirmation, be reopened upon a mere offer to advance the prices 10 per centum. Graffam v. Burgess, 117 U. S. 180, 29 Law. Ed. 839; Blackburn v. Selma R. R. Co., 3 F 689. The English practice has obtained footing in several states (Hinson v. Adrian, 92 N. C. 121; Childress v. Hart, 32 Tenn. (2 Swan) 487; Wilson v. Shields, 62 Tenn. (3 Baxt.) 65; Reese v. Copeland, 74 Tenn. (6 Lea.) 190; Dupuy v. Gorman, 77 Tenn. (9 Lea.) 144; Todd v. Gallego Mills Mfg. Co., 84 Va. 586, 5 SE 676; National Bank v. Jarvis, 28 W. Va. 805; Moore v. Triplett, 96 Va. 603, 32 SE 50, 70 Am. St. Rep. 882), but with certain limitations. Thus the opening of such a sale is held to be in the discretion of the court, and refusal to so open is not usually appealable. Owen's Admr. v. Owen, 24 Tenn. [5 Humph.] 352; Johnson v. Quarles, 44 Tenn. [4 Cold.] 615; Moore v. Triplett, 96 Va. 603, 32 SE 50, 70 Am. St. Rep. 882; Blackburn v. Selma R. Co., 3 F 689; Bright v. Bright, 80 Tenn. [12 Lea.] 630. No fixed rule is laid down as to the amount of upset bid which will warrant an opening of the sale (Hodgins v. Lanier, 23 Grat. [Va.] 494; Hansucker v. Walker, 76 Va. 753), though an advance of 10 per cent is usually considered sufficient (Pritchard v. Askew, 80 N. C. 86; Dula v. Seagle, 98 N. C. 458, 4 SE 549; Irby v. Irby, 79 Tenn. [11 Lea.] 165; Ewald v. Crockett, 85 Va. 299, 7 SE 386), and refusal to open for an advance of 30 per cent has been held error (Cole's Heirs v. Cole's Ex'r, 83 Va. 525, 5 SE 673). The advanced bid need not be paid into court, but must be absolute and unconditional and such as is considered safe and secured. Dula v. Seagle, 98 N. C. 458, 4 SE 549; Todd v. Gallego Mills Mfg. Co., 84 Va. 586, 5 SE 676; Stewart v. Stewart, 27 W. Va. 167; Blackburn v. Selma R. Co., 3 F 689. Where a sale is opened for an advance bid, the resale should be started at such bid and open to all (Marsh v. Nimoks, 122 N. C. 478, 29 SE 840, 65 Am. St. Rep. 715; Ewald v. Crockett, 85 Va. 299, 7 SE 386), and in default of other bids will be awarded to the advance bidder who must comply with the purchase or show cause why judgment should not be rendered against him (Marsh v. Nimocks, 122 N. C. 478, 29 SE 840, 65 Am. St. Rep. 715). In case of a default by the advance bidder, the court may order a resale and charge him with the deficit. Allen v. Eart, 63 Tenn. [4 Baxt.] 308. In the absence of fraud, accident or mistake, a sale will not be opened for an advance bid after confirmation (Houston v. Aycock, 37 Tenn. [5 Sneed.] 406, 73 Am. Dec. 131; Coffin v. Corruth, 41 Tenn. [1 Cold.] 194; Langyher v. Patterson, 77 Va. 470; Yost v. Porter, 80 Va. 855), and only under extraordinary circumstances will a sale be reopened a second time for advanced bids (Click v. Burris, 53 Tenn. [6 Heisk.] 539; Collins v. Woods, 88 Tenn. 779, 14 SW 221).

In many jurisdictions, however, the English rule is rejected in toto (George v. Norwood, 77 Ark. 216, 91 SW 557, 113 Am. St. Rep. 143; Glennon v. Mittenight, 86 Ala. 455, 5 S 772; Parker v. Bluffton Car-Wheel Co., 108 Ala. 140, 18 S 938; Penn's Admr. v. Tolleson, 20 Ark. 652; Colonial, etc., Mortg. Co. v. Sweet, 65 Ark. 152, 67 Am. St. Rep. 910, 45 SW 60; Ayers v. Baumgarten, 15 Ill. 444; Coffey v. Coffey, 16 Ill. 141; Harris v. Gunnell [Ky.] 95 SW 376; Lawson v. Hill [Ky.] 11 SW 606; Cohen v. Wagner, 6 Gill [Md.] 236; Page v. Cress, 80 Mich. 85, 20 Am. St. Rep. 504, 44 NW 1052; State Bank v. Green, 11 Neb. 303, 9 NW 36; Conover v. Walling, 15 N. J. Eq. 173; Fiske v. Weigle [N. J. Eq.] 21 A 452; Bethlehem Iron Co. v. Philadelphia, etc., R. Co., 49 N. J. Eq. 356, 23 A 1077; Le Fevre v. Laraway, 22 Barb. [N. Y.] 167; Adams v. Haskell, 10 Wis. 123; Pewabic Min. Co. v. Mason, 145 U. S. 349, 36 Law. Ed. 732; Auerbach v. Wolf, 22 App. D. C. 538) for the reason that such practice is held to discourage bidders at the original sale, and hence is against the interest of the owner (Morrisse v. Inglis, 46 N

A court of chancery has inherent power to set aside sales made by its order.[29] Inadequacy of price is not sufficient to set aside a sale unless so great as to establish fraud.[30] Thus the fact that the property brought considerably less than the appraised value,[31] or that it brought less than the guaranty made to the court as to the price that would be paid if the lands were resold,[32] is insufficient. The owner can object if the sale is unfairly made[33] or is for a grossly inadequate price,[34] but such objections should be made before confirmation.[35] An objection that the petition in the action did not state a cause of action cannot be relied upon by the purchasers to defeat confirmation,[36] and purchasers who were not prejudiced cannot complain because the property was sold en masse.[37] An objection may be based on the invalidity of the decree,[38] but the purchasers cannot object because of the existence of certain liens when such sums are payable out of the proceeds of the sale after satisfying the judgment.[39] A sale cannot be set aside in part.[40] Acquiescence by accepting the proceeds precludes a setting aside.[41] Fraud vitiates the sale,[42] but mere irregularities are insufficient.[43] A judgment debtor cannot have a sale set aside because the purchaser has not completed his payment.[44] The manner of seeking to vacate a confirming order and to obtain a resale is not important unless new rights have intervened.[45] The interest of the complainant should be alleged,[46] and

J. Eq. 306, 19 A 16), and that further it is contrary to public policy and the principles of fair dealing (Stump v. Martin, 72 Ky. [9 Bush.] 285; Alms & Doepke Co. v. Gates [Ky.] 32 SW 1088).—Adapted from 113 Am. St. Rep. 147.

**28.** Court is vendor, and power unaffected by Cobbey's Ann. St. 1903, §§ 10,644-10,691. Prudential Real Estate Co. v. Hall, 79 Neb. 805, 116 NW 40.

**29.** Whether property bid in by party to suit or stranger. Butters v. Butters [Mich.] 15 Det. Leg. N. 447, 117 NW 203. Court has power to vacate order of confirmation at **same term** at which it was rendered. Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531.

**30.** La Fitte v. Salisbury, 43 Colo. 248, 95 P 1065; Abbott v. Beebe, 226 Ill. 417, 80 NE 991; Bowden v. Hadley [Iowa] 116 NW 689; Dilley v. Jasper Lumber Co. [Tex. Civ. App.] 114 SW 878. Consideration sufficient in view of unsettled times and fact that land was incumbered by life estate. Ladd v. Craig [Miss.] 47 S 777. Sale of land for $3,600 after panic of 1893 will be upheld, though cost was $4,900. Leavell v. Carter [Ky.] 112 SW 1118.

**31.** Abbott v. Beebe, 226 Ill. 417, 80 NE 991.

**32.** Where costs would probably wipe out increase. Abbott v. Beebe, 226 Ill. 417, 80 NE 991.

**33, 34.** Robertson v. McClintock [Ark.] 110 SW 1052.

**35.** Inadequate price as fraudulent in receiver's sale. Dilley v. Jasper Lumber Co. [Tex. Civ. App.] 114 SW 878. Exceptions to the report of sale cannot be allowed after an order of confirmation becomes final. Circuit court continuous, and order final after 60 days. Sinder v. Conrad, 33 Ky. L. R. 723, 111 SW 287.

**36, 37.** West v. McDonald [Ky.] 113 SW 872.

**38.** Objection that defendant in action was of unsound mind and that therefore confirmation should be denied held not sustained by evidence. West v. McDonald [Ky.] 113 SW 872.

**39.** West v. McDonald [Ky.] 113 SW 872.

**40.** Judgment an entirety. District of Clifton v. Pfirman, 33 Ky. L. R. 529, 110 SW 406.

**41.** Dilley v. Jasper Lumber Co. [Tex. Civ. App.] 114 SW 878. Motion to set aside will not be granted after sale and acceptance of an overplus, though motion pending at sale and fact known to purchaser. Lupo v. Frazier, 130 Ga. 409, 60 SE 1003. Acquiescense for several years in sale of corporation's property in another state after notice to stockholders and several directors sufficient to ratify if original authority lacking. Underfeed Stoker Co. v. American Ship Windlass Co., 165 F 65. Title cannot be questioned by stranger not in privity with stockholders or creditors of corporation. Id.

**42.** Purchase of property by trustee or agent of seller presumptively fraudulent. Kazebeer v. Nunemaker [Neb.] 118 NW 646. Evidence insufficient to establish collusion between purchaser and husband, in suit to set aside mortgage sale by wife. Butters v. Butters [Mich.] 15 Det. Leg. N. 447, 117 NW 203.

**43.** Lanier v. Heilig [N. C.] 63 SE 69.

**44.** Objection that purchaser had not paid any of his bid except to cover costs, expenses of sale and overplus, not available. Matter for other parties. Lupo v. Frazier, 130 Ga. 409, 60 SE 1003.

**45.** Butters v. Butters [Mich.] 15 Det. Leg. N. 447, 117 NW 203. Original parties to suit and purchaser must have notice and an opportunity to be heard. Id.

**46.** In action to set aside sheriff's deed where order of confirmation was void, being rendered by disqualified judge, allegation that plaintiffs were owners in fee of land was sufficient plea of ownership on demurrer. Harrington v. Hayes County [Neb.] 115 NW 773. Complaint insufficient to show estate in widow necessary to set aside judicial sale. Carroll v. Draughon [Ala.] 45 S 919. Under Code 1896, § 2069, if an estate is insolvent, the widow acquires an absolute fee in homestead, but such fact must be judicially ascertained, and complaint showing that commissioners of probate court reported estate as insolvent is insufficient, widow only

a wife whose inchoate right of dower is terminated by the sale cannot bring the action.[47] An action to set aside may be barred by limitations[48] or laches.[49] Where the amount guaranteed by the first purchasers is deposited with the court before the sale has been set aside, it comes in apt time,[50] but not so when it comes after the sale has been set aside and an appeal allowed.[51]

*Costs.* See 10 C. L. 509

*Proceedings on resale.* See 8 C. L. 576

§ 7. *Completion of sale; deeds, payments and credits.* See 10 C. L. 509—In some states the recitals on the deed are prima facie evidence of the validity of the sale.[52] A deed to the supposed heirs of a purchaser by a register in chancery after a lapse of fifty years is invalid.[53]

§ 8. *Title and rights under sales and deed. A. Defects and collateral attack.* See 10 C. L. 510—A void sale is subject to collateral attack.[54] The proof necessary to overthrow the decree must be overwhelming.[55]

(§ 8) *B. Outstanding titles and interests.* See 10 C. L. 510

*The rule of caveat emptor* See 10 C. L. 510 applies to judicial sales;[56] but does not prevent a purchaser from enforcing the legal or equitable rights preserved to him.[57]

(§ 8) *C. Rights of parties under sale and in proceeds.* See 10 C. L. 511—As a general rule the title to the property sold passes upon confirmation and the payment of the purchase money,[58] and relates back to the day of sale.[59] If the judgment is set

having life estate and complainant no interest. Id. Complaint insufficient to show absolute title of wife in homestead under Code 1896, § 2071, when homestead constitutes all real property in state owned by husband at death. Id. Complaint insufficient to show absolute title to land in wife under Code 1896, §§ 2091, 2100, providing for setting apart of estate to widow when estate remaining at death is less than exemptions. Id.

**47.** Bowden v. Hadley [Iowa] 116 NW 689.

**48.** Statute limiting time to recover land sold at judicial sale inapplicable where court never acquired jurisdiction to make sale. Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley [C. C. A.] 164 F 963. Attack on sale of land under decree in overdue tax suit is barred by 5-year limitation statute prescribed by Kirby's Dig. Ark. § 5060. Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531.

**49.** Doctrine of laches inapplicable to bar suit to quiet title where neither party in possession, and purchasers at sale for taxes merely continued paying taxes. Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531. Laches inapplicable. Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley [C. C. A.] 164 F 963.

**50, 51.** Ahbott v. Beebe, 226 Ill. 417, 80 NE 991.

**52.** Recitals of deed held to show prima facie title, that court had jurisdiction, and that clerk acted under due authority in making deed, under Acts 1907, p. 1131, c. 334, §§ 1, 2, making conveyances by public officers prima facie evidence of facts therein recited, etc. Hill v. Moore [Tenn.] 113 SW 788.

**53.** Sims v. Mobile, etc., R. Co. [Ala.] 46 S 494. Deed cannot be executed until judicial determination of question as to who were heirs of purchaser. Id. Deed executed on decree which simply barred equity of redemption and let purchaser into possession. Id.

**54.** Order of confirmation by disqualified district judge. Harrington v. Hayes County [Neb.] 115 NW 773. Evidence sufficient to show payment of consideration to administrators in collateral attack on judicial sale by them. Ladd v. Craig [Miss.] 47 S 777.

**55.** Parol proof of lack of service of process insufficient. Ladd v. Craig [Miss.] 47 S 777.

**56.** Tarnow v. Carmichael [Neb.] 116 NW 1031; City of Middlesborough v. Coal & Iron Bank, 33 Ky. L. R. 469, 110 SW 355. Purchaser at sheriff's or commissioner's sale a purchaser in invitum. Wells v. Gay [Miss.] 46 S 497.

**57.** Enforcement of trust. Tarnow v. Carmichael [Neb.] 116 NW 1031.

**NOTE. Right of purchaser to bring action to quiet title:** The purchaser at a sheriff's sale cannot maintain equitable action to remove cloud on title, since he has an adequate remedy at law (Apperson v. Ford, 23 Ark. 746; Smith v. Cockrell, 66 Ala. 64; Teague v. Martin, 87 Ala. 500, 13 Am. St. Rep. 63, 6 S 362; Grigg v. Swindal, 67 Ala. 187; Pettus v. Glover, 68 Ala. 417; Thorington v. Montgomery, 82 Ala. 591, 2 S 513; Betts v. Nichols, 84 Ala. 278, 4 S 195), and earlier cases, apparently holding to the contrary, will be found to turn upon the question of fraud, a distinct ground of equity jurisdiction (e. g. Fraker v. Brawn, 2 Blatchf. [Ind.] 295). Some recent decisions hold to the general rule even where the question of fraud is involved. Ropes v. Jenerson, 45 Fla. 556, 110 Am. St. Rep. 79, 34 S 955; Thigpen v. Pitt, 54 N. C. [1 Jones Eq.] 49.—Adapted from 12 L. R. A. (N. S.) 66.

**58.** Dilley v. Jaspers Lumber Co. [Tex. Civ. App.] 114 SW 878. Purchaser who pays price at receiver's sale becomes owner, in absence of fraud. Id.

**59.** Thomas v. Elliott [Mo.] 114 SW 987.

aside, the rights of innocent purchasers will not be disturbed[60] unless the sale is void for want of jurisdiction,[61] or where a judgment against an infant is reversed.[62] A purchaser of the assets of an insolvent corporation at a judicial sale does not assume the latter's obligations.[63] Where an inheritance is partitioned and the proceeds divided among the heirs before the birth of a posthumous child, the latter may recover his interest from a remote vendee of the purchaser at such sale.[64] A judicial sale of property for the satisfaction of the debts of the husband who is the owner of the fee-simple title terminates the wife's inchoate right of dower.[65] If the property is impressed with a trust, it is enforcible against the purchaser.[66] A resulting trust does not arise where one purchased land at a sale under a parol agreement to convey to another, unless the promisee furnished the purchase money or had an actual interest in the estate or a bona fide claim thereto.[67] The redemption must take place within the statutory period,[68] and the court cannot extend the right by neglecting to confirm the sale.[69] Redemption may be barred by laches [70] or be refused when the owners were wrong doers.[71]

*Rights in proceeds and on bid.* See 10 C. L. 511—The highest bidder at a judicial sale acquires incipient rights [72] which become absolute on confirmation.[73] Such a bidder is entitled to a judicial decision of his interest,[74] and may be compelled to complete his purchase [75] though there is no remedy except in the action under which the sale was had.[76] A purchaser is not excused from completing a sale because a building encroaches on another's land, when the owner of the adjoining property does not complain.[77] If the sale is set aside, the purchaser may recover the sums which he advanced.[78]

**60.** Lanier v. Heilig [N. C.] 63 SE 69. Policy of court to protect purchaser. Rackley v. Roberts [N. C.] 60 SE 975; Kazebeer v. Nunemaker [Neb.] 118 NW 646. Under Code Civ. Proc. § 508, providing for protection of purchasers at judicial sales in case of "reversal," such word applies to any proceeding in any court having authority to set aside judgment. Id. Title not be affected by a reversal of judgment, though purchaser is party. District of Clifton v. Pfirman, 33 Ky. L. R. 529, 110 SW 406.

**61.** Purchaser need only inquire if upon face of record court has jurisdiction of parties and subject-matter. Rackley v. Roberts [N. C.] 60 SE 975. No rights can be acquired under judgment void for want of jurisdiction. Lanier v. Heilig [N. C.] 63 SE 69. Where an administrator's sale to pay debts is set aside as being made pursuant to void judgment after purchase money applied to decedent's debts, purchasers are entitled to subrogation to rights of creditors. Id.

**62.** District of Clifton v. Pfirman, 33 Ky. L. R. 529, 110 SW 406. Infant may consent or have sale vacated by payment of debt which is lien. Id.

**63.** New York Phonograph Co. v. Davega, 111 NYS 363. Grantor of patents to corporation may purchase assets at sale when corporation insolvent. Id. Where grantor of corporation purchased assets because of insolvency, there was no privity of contract between him and grantee of license from such corporation prior to insolvency. Id.

**64.** Deal v. Sexton, 144 N. C. 157, 56 SE 691.

**65.** Bowden v. Hadley [Iowa] 116 NW 689.

**66.** Irons v. U. S. Life Ins. Co., 33 Ky. L. R. 46, 108 SW 904. Doctrine of constructive trusts applies to judicial sales. Id. Where purchaser of paid-up life insurance policy had no interest in life of insured, he did not acquire absolute title to policy, and surplus after deducting purchase price was payable to beneficiaries. Id. Capacity of purchaser to take, or interest he receives, not considered in confirming sale unless question is raised by exception. Id.

**67.** Lancaster Trust Co. v. Long, 220 Pa. 499, 69 A 993.

**68, 69.** Robertson v. McClintock [Ark.] 110 SW 1052.

**70.** Redemption barred by laches where plaintiffs did not question sale for 17 years, during which time property was conveyed several times, and it did not appear that plaintiffs were under disability. Tate v. Logan [Ark.] 114 SW 696.

**71.** Title acquired by fraud. Hinsey v. Supreme Lodge Knights of Pythias, 138 Ill. App. 248.

**72.** Acquires incipient rights. Thomas v. Elliott [Mo.] 114 SW 987. Vested rights. Robertson v. McClintock [Ark.] 110 SW 1052.

**73.** Thomas v. Elliott [Mo.] 114 SW 987. Sale of land for taxes pursuant to decree in overdue tax sale no title in purchaser until confirmation. Indiana & Arkansas Lumber & Mfg. Co. [C. C. A.] 161 F 531. Order of confirmation held to apply only to certain sales of land to individuals, and not to lands struck off to state. Id.

**74.** Thomas v. Elliott [Mo.] 114 SW 987.

**75.** State Bank v. Wilchinsky, 128 App. Div. 485, 112 NYS 1002. Purchaser may be compelled to pay entire purchase price or sum to indemnify for loss. Id. Phrase "pay purchase money into court," in order to that effect, equivalent to "complete the purchase." Id.

**76.** State Bank v. Wilchinsky, 128 App. Div. 485, 112 NYS 1002.

**77.** Sinder v. Conrad, 33 Ky. L. R. 723, 111 SW 287.

**78.** Lien. District of Clifton v. Pfirman, 33 Ky. L. R. 529, 110 SW 406.

## JURISDICTION.

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*The scope of this topic* is noted below.[79]

§ 1. *Definitions and distinctions.* See 10 C. L. 512—Jurisdiction is the power of a court to hear and determine a cause or question.[80] It does not depend on the correctness of the decision made,[81] or on the existence of facts essential to a cause of action,[82] or on the title of the clerk to his office.[83] Jurisdiction of the subject-matter

79. Only civil jurisdiction is treated, criminal jurisdiction going elsewhere. See Indictment and Prosecution, 12 C. L. The jurisdiction of admiralty (see Admiralty, 11 C. L. 33), appellate (see Appeal and Review, 11 C. L. 118), bankruptcy (see Bankruptcy, 11 C. L. 383) and justice courts (see Justices of the Peace, 10 C. L. 553) is excluded, and also jurisdiction in proceedings for alimony or divorce (see Alimony, 11 C. L. 96; Divorce, 11 C. L. 1111,) and general equity jurisdiction (see Equity, 11 C. L. 1235). The articles on appearance (see Appearance, 11 C. L. 255), courts (see Courts, 11 C. L. 925), judges (see Judges, 10 C. L. 462), judgments (see Judgments, 10 C. L. 467), process (see Process, 10 C. L. 1262), removal of causes (see Removal of Causes, 10 C. L. 1508) and venue (see Venue and Place of Trial, 10 C. L. 1965) should be consulted herewith, as well as those which take up the jurisdictional phase in special proceedings (see Attachment, 11 C. L. 315; Carriers, 11 C. L. 499; Elections, 11 C. L. 1169; Eminent Domain, 11 C. L. 1198; Estates of Decedents, 11 C. L. 1275; Garnishment, 11 C. L. 1637; Highways and Streets, 11 C. L. 1720; Injunction, 10 C. L. 246; Mandamus, 10 C. L. 662; Mechanics' Liens, 10 C. L. 814; Partition, 10 C. L. 1089; Quo Warranto, 10 C. L. 1356; Wills, 10 C. L. 2035 and the like).

80. Dahlgren v. Santa Cruz County Superior Ct. [Cal. App.] 97 P 681; Carter's Adm'r v. Skillman [Va.] 60 SE 775. Is right to adjudicate concerning subject-matter in a given case. Sloan v. Byers [Mont.] 97 P 855. Is power vested by law in a tribunal to hear and determine causes properly coming before it. Saylor v. Duel, 236 Ill. 429, 86 NE 119. Tribunal or body devoid of power to hear and decide is without jurisdiction. State v. Nast, 209 Mo. 708, 108 SW 563. Jurisdiction may be defined as power to hear and decide legal controversies, though word may and often is used to include also power or authority as to other matters. Douglas County v. Vinsonhaler [Neb.] 118 NW 1058.

81. Wrong decision not jurisdictional. Dahlgren v. Santa Cruz County Super. Ct. [Cal. App.] 97 P 681. Action of district court, whether right or wrong, in passing on motion to dismiss appeal from probate court, held not reviewable on certiorari. Gunderson v. Fourth Judicial Dist. Ct. [Idaho] 94 P 166. Jurisdictional question involves power of court to act at all, while mere error relates only to its authority to act in the particular way in which it did act. Richardson v. Ruddy [Idaho] 98 P 842. Whether particular facts authorized trial court to decree partition held not to involve jurisdiction, but merely question of error. Id.

82. Sufficiency of petition is not test of jurisdiction. In re Nelson's Estate [Neb.] 115 NW 1087. That complaint did not state facts sufficient to prevent issuance of certificate of purchase of state land held not to authorize prohibition, superior court having jurisdiction of such actions. Woodworth v. Marin County Super. Ct., 153 Cal. 38, 94 P 232. Failure of a stockholder to comply with federal equity rule 94 goes merely to equity of the case, not to jurisdiction of the court. Venner v. Great Northern R. Co., 209 U. S. 24, 52 Law. Ed. 666. Mississippi courts are not without jurisdiction of causes of action arising out of gambling transactions in futures because Miss. Ann. Code 1892, § 2117, declares that contracts of that character "shall not be enforced by any court." Fauntleroy v. Lum, 210 U. S. 230, 52 Law. Ed. 1039. Jurisdiction not lost by failure of proof, in support of cross petition, to show cause of action relevant to main case. Culbertson v. Sallinger [Iowa] 117 NW 6. Whether a nonresident could maintain action for wrongful death under state statute held not to affect jurisdiction of federal court. Pennsylvania Co. v. Scoffield [C. C. A.] 161 F 911.

83. Especially when attacked collaterally.

is the abstract power to try cases of the kind pending.[84] The judgment of a court as to a matter outside its constitutional power is void,[85] while if the case is within such power, but the court is merely prohibited from exercising jurisdiction on principles of remedial procedure, the judgment, though erroneous, will be binding until vacated.[86] A final jurisdiction excludes any further jurisdiction in other courts.[87]

§ 2. *Elements and extent in general.* See 10 C. L. 513—Essential to jurisdiction is a subject-matter upon which adjudication is regularly invoked[88] in a competent forum,[89] either against adversary parties or in respect to the subject-matter itself,[90] which must be at least constructively in court.[91] Jurisdiction to afford a given kind of relief carries with it by implication power to do and decide all things necessary to effectuate the purpose for which the jurisdiction was conferred,[92] but a court is without jurisdiction of matters not in substance or effect embraced within the issues in the case.[93] The power of courts of law are limited to those recognized or defined by the common law or by constitutional or statutory provisions, either expressly or by inference from the nature and constitution of the tribunal.[94] Courts of equity having

Kruegel v. Daniels [Tex. Civ. App.] 109 SW 1108.

**84.** Regardless of question whether particular case presents cause of action or is triable before court, arising because of inherent facts which may develop during trial. Richardson v. Ruddy [Idaho] 98 P 842. Circuit court has jurisdiction of actions on contract, and hence will be presumed to have jurisdiction of action on an insurance policy. United States Health & Acc. Ins. Co. v. Clark, 41 Ind. App. 345, 83 NE 760. District court held to have jurisdiction of subject-matter of trespass, though action was brought in parish other than that in which tort was committed. Bernstein v. Clark Stave Co. [La.] 47 S 753.

**85, 86.** In re Clark, 135 Wis. 437, 115 NW 387. Where in quo warranto court could not legally act because it would nullify proceedings in court of co-ordinate jurisdiction. Id.

**87.** Under Act May 16, 1907 (Laws 1907, p. 304, § 19), conferring on county court final jurisdiction in local option election contests, no appeal lies from such court. Saylor v. Duel, 236 Ill. 429, 86 NE 119. See Appeal and Review, 11 C. L. 118. See, also, post, § 9A.

**88.** See Process, 10 C. L. 1262; Appearance, 11 C. L. 255; Pleading, 10 C. L. 1173. See, also, post, § 13. Court must have cognizance of the class of cases to which the one involved belongs. Sloan v. Byers [Mont.] 97 P 855. Municipal court held powerless to vacate default after full satisfaction of judgment. Fiuegelman v. Armstrong, 110 NYS 967. A petition is sufficient to give jurisdiction where it states the material facts necessary to enable court to hear and determine the cause. McDaniel v. Staples [Tex. Civ. App.] 123 SW 596. Jurisdiction or custody of specific property cannot be acquired by a court in proceeding containing no notice, either in pleadings or elsewhere, of any purpose to affect such property thereby. Lang v. Choctaw, Oklahoma & Gulf R. Co. [C. C. A.] 160 F 355.

**89.** See Courts, 11 C. L. 925.

**90.** Proper parties must be present. Sloan v. Byers [Mont.] 97 P 855.

**91.** See, also, post § 13, Acquisition and Divestiture. Under Rhode Island law, action of replevin is so far a proceeding in rem that until officer takes actual possession of res there is nothing before court and title cannot be determined. In re Aiton Mfg. Co., 158 F 367. A court may establish and enforce a trust in personalty when either the subject-matter or the trustee is within its reach. Corporate stock. Gassert v. Strong [Mont.] 98 P 497.

**92.** Jurisdiction of person and subject-matter vests court with full authority to determine all questions arising in case and essential to proper determination of the issues. Taylor v. Hulett [Idaho] 97 P 37. Idaho court, in suit to determine water rights within state, could, for that purpose, determine rights and priorities up stream in Wyoming, where defendants claimed right to appropriate water in that state. Id. Under Rev. St. 1887, § 3925, where jurisdiction is conferred on a court by statute, all means necessary to carry it into effect are also given, together with such mode of procedure as may appear most conformable to spirit of the law. Smith v. Clyne [Idaho] 97 P 40. Court having jurisdiction of will contest could determine whether contestant was interested or whether he had lost all interest by conveyance of expectant estate. In re Wickersham's Estate, 153 Cal. 603, 96 P 311. Court in winding up partnership could adjudicate claim against firm arising out of maritime contract, it being a necessary incident to main relief. Hulings v. Jones, 63 W. Va. 696, 60 SE 874. The courts of Porto Rico, as incident to their general and probate authority and their power over all personal and real actions concerning decedent's estates, have jurisdiction to determine whether a decedent's estate has been closed by a family settlement attacked as fraudulent, to determine whether property transferred to widow thereunder is still part of estate, and to liquidate and settle community existing between husband and wife. Garzot v. Rios De Rubio, 209 U. S. 283, 52 Law. Ed. 794.

**Proceedings ancillary** to main proceeding. See post, § 9B.

**93.** Sloan v. Byers [Mont.] 97 P 855.

**94.** As to power of court to compel submission to physical examination in personal injury action. Larson v. Salt Lake City [Utah] 97 P 488.

once acquired jurisdiction of a cause for a particular purpose will retain it for complete relief, regardless of the existence of questions properly cognizable at law.[95] Courts have inherent power to undo their own extra-jurisdictional proceedings and place the parties in statu quo.[96]

§ 3. *Legislative power respecting jurisdiction.* See 10 C. L. 513—Constitutional jurisdictions cannot be limited or enlarged by statute or rule unless the constitution so authorizes,[97] and all legislative enactments respecting jurisdiction must have proper regard for constitutional provisions in general,[98] for other superior laws,[99] and for adjoining jurisdictions.[1] State statutes cannot extend or restrict the jurisdiction of federal courts,[2] though they may enlarge equitable rights which will be enforced by the federal courts.[3]

§ 4. *Territorial limitations.* See 10 C. L. 514—All jurisdictions are bounded territorially by either the limits of the state or nation [4] or those of the district or circuit for which they were established.[5]

95. See Equity, 11 C. L. 1235.

96. County court could grant restitution of rice of value beyond its jurisdiction, it having previously required defendants to deliver same to plaintiff. Texas Land & Irr. Co. v. Sanders [Tex.] 111 SW 648; Id. [Tex. Civ. App.] 113 SW 558.

97. Acts seeking to confer original jurisdiction on circuit court in matters outside limitations fixed by Const. 1901, §§ 8, 143, are void. Larkin v. Simmons [Ala.] 46 S 451. Under Const. § 21, art. 5, conferring on probate courts jurisdiction in all matters of probate "and appointment of guardians," legislature could confer on probate courts power to investigate chargee concerning delinquent children and make all necessary orders in relation thereto, as per act March 2, 1905. Ex parte Sharp [Idaho] 96 P 563. Section 97 of acts relating to elections (Hurd's Rev. St. 1905, c. 46), giving circuit courts and superior court of Cook county jurisdiction to determine contests of election of mayors of cities, is not unconstitutional, constitution not limiting power of legislature to confer on such courts jurisdiction in addition to that conferred by that instrument. Kerr v. Flewelling, 235 Ill. 326, 85 NE 624. Legislature can confer on circuit court jurisdiction of cases involving any amount. Detroit Lumber Co. v. Petrel [Mich.] 15 Det. Leg. N. 506, 117 NW 80. Under Const. art. 6, § 18, giving justices of the peace jurisdiction with such exceptions and restrictions as may be prescribed by law, legislature can withdraw any cause from justices' jurisdiction. Id. See, also, Justices of the Peace, 10 C. L. 553. If functions conferred upon mayor and judge by Jones liquor law (98 O. L. 68) are ministerial, then § 12 is unconstitutional, being an attempt to confer original jurisdiction upon the circuit court in excess of that limited by Const. § 6, art. 12. In re Petition in Favor of Prohibiting Sale of Intoxicating Liquors v. Johnson, 9 Ohio C. C. (N. S.) 147.

98. Gen. St. 1906, § 1200 et seq., and Laws 1907, c. 5706, amendatory of § 1203, conferring on county judge's courts jurisdiction to inquire into sanity of persons, commit lunatics, and appoint guardians, held not violative of state or federal constitution, as depriving of jury trial or due process of law. Ex parte Scudamore [Fla.] 46 S 279.

99. Act March 14, 1904, conferring on supreme court of Porto Rico original jurisdiction of questions between Roman Catholic church and people or any municipality affecting property rights, was within authority conferred on legislative assembly of Porto Rico by Foraker act of April 12, 1900, to legislate regarding jurisdiction and procedure of Porto Rican courts. Ponce v. Roman Catholic Apostolic Church, 210 U. S. 296, 52 Law. Ed. 1068. Not violative of act July 30, 1886, prohibiting territorial legislatures from passing special laws regulating procedure in courts of justice, etc. Id.

1. Legislature cannot by mere enactment and without co-operation of an adjoining state extend territory of state for which it legislates at expense of adjoining state and thereby invest courts with territorial jurisdiction over lands of sister state. Rober v. Michelsen [Neb.] 116 NW 949. Cannot authorize Nebraska courts to quiet title to lands within boundaries of sister state. Id.

2. Jurisdiction and powers of federal court of equity cannot be affected by state legislation. Louisville & N. R. Co. v. Railroad Commission, 157 F 944.

3. Statute giving one in possession right to maintain suit to quiet title. Kraus v. Congdon [C. C. A.] 161 F 18.

4. See, also, post, § 5. Rule that equity court of a state may restrain performance of acts beyond its territorial jurisdiction seems to apply only where persons proceeded against reside within the jurisdiction. Royal Fraternal Union v. Lundy [Tex. Civ. App.] 113 SW 185. Texas court would not restrain nonresident officers of foreign insurance company from canceling insurance contract. Id.

5. See, also, post, § 5. Jurisdiction of inferior local courts established under Const. art. 6, § 18, is limited to actions arising within territorial limits of the tribunal or actions wherein the parties reside or are served within jurisdiction of the court. People v. Daley, 124 App. Div. 562, 108 NYS 1056. Laws 1902, p. 64, c. 35, creating city court for city of Poughkeepsie, considered, and held city court had no jurisdiction in bastardy proceeding where both complainant and defendant resided out of city and defendant had not been arrested or served therein. Id.

§ 5. *Limitations resting in situs of subject-matter or status of litigants.*[See 10 C. L. 514]—While power to adjudicate upon a subject-matter which can have no existence save at a fixed place pertains to the courts erected for that place,[6] other courts may have jurisdiction for the purpose of adjudicating personal rights of parties present in court which are in respect to, but do not directly affect, such subject-matter,[7] and if a court has jurisdiction of the parties and the general subject-matter of the suit, the fact that the res or subject-matter involved in a defensive issue is beyond its territorial jurisdiction does not deprive it of power to grant relief.[8] Jurisdiction may be affected by the nonresidence or alienage of the parties[9] or by their absence,[10] or by the place where the cause of action arose;[11] but as a rule these considerations are not controlling as to transitory actions[12] or proceedings in rem,[13] though alienage or diversity of citizenship often become important in federal practice.[14] Domestic

**6.** Action to quiet title to realty must be prosecuted where res is situated. Taylor v. Hulett [Idaho] 97 P 37. Suit to settle water rights held in nature of action to quiet title. Id. Court of sister state cannot by decree directly affect title to land in Illinois. MacDonald v. Dexter, 234 Ill. 517, 85 NE 209. Though parties are in court, jurisdiction is inadequate to try title to land in another state, parties contending at arm's length and there being no question of specific performance, enforcement of trust, or doing of any act binding on conscience of a party because of previous dealings. Sutton v. Archer [Miss.] 46 S 705. Mississippi court held without jurisdiction over land made part of state of Arkansas by change of river channel. Id.

**7.** Equity acting in personam has plenary power to affect title to **realty in foreign jurisdictions** by sale and conveyance thereof by its master in suits to execute trusts, undo frauds, or enforce contracts regarding such realty, having acquired jurisdiction of persons interested. Byrne v. Jones [C. C. A.] 159 F 321. Court of sister state could enforce agreement to divide profits from sale of land situated in Illinois. MacDonald v. Dexter, 234 Ill. 517, 85 NE 209. Suit by stockholders of a foreign corporation for recovery of assets and profits held in effect a proceeding in rem to establish a trust against certain other corporations as to certain **mining property,** giving equity jurisdiction, though title to foreign realty was incidentally involved, parties against whom relief was sought having appeared. Grant v. Greene, 111 NYS 1089. While court cannot reach and modify **deed recorded in a sister state,** where grantee appears in court to enforce rights thereunder against grantor, court may, at instance of defendant, compel reformation so as to express actual agreement. Lyndon Lumber Co. v. Sawyer, 135 Wis. 525, 116 NW 255. If court has jurisdiction of parties, it may decree **foreclosure of chattel mortgage,** though property be beyond its territorial jurisdiction. McDaniel v. Staples [Tex. Civ. App.] 113 SW 596.

**8.** In suit to settle water rights, fact that defendant set up right to divert water up stream in adjoining state did not deprive court of power to determine priorities and adjudicate plaintiff's rights. Taylor v. Hulett [Idaho] 97 P 37.

**9.** Action for commissions for sale of land located without state is maintainable, though parties are nonresidents. McFadden v. Innes, 112 NYS 912. Under Code Civ. Proc. § 341, providing that for purpose of jurisdiction of county court a domestic corporation whose principal place of business is established by statute or is actually located in county shall be deemed resident of county, county court of Kings county has no jurisdiction of action against city of New York, defendant not being resident of Kings county, its principal place of business being in New York county. Maisch v. New York [N. Y.] 86 NE 458. That an insurer was a **foreign corporation** domiciled in another state held not to deprive equity court in Texas of jurisdiction in suit to determine status of parties under an insurance policy. Royal Fraternal Union v. Lundy [Tex. Civ. App.] 113 SW 185. Where foreign corporation had not complied with laws entitling it to do business in state and claimed it was not doing business there, courts of state could not acquire jurisdiction over it except in rem by foreign attachment. Vance v. Pullman Co., 160 F 707. See, also, Foreign Corporations, 11 C. L. 1508.

**10.** See Parties, 10 C. L. 1081.

**11.** Statutory, **exclusive jurisdiction of domestic courts,** see post, § 9A. See, also, 10 C. L. 521, n. 31.

**12.** See, also, Venue and Place of Trial, 10 C. L. 1965. Action may lie in South Carolina for **tort** committed in Florida. Crosby v. Seaboard Air Line R. Co. [S. C.] 61 SE 1064. Nonresidence of parties held no obstacle to jurisdiction where action was on domestic **contract.** Atkins v. Fitzpatrick, 57 Misc. 341, 109 NYS 619. Courts of New York are open to all suitors and will enforce transitory rights of action, where liability asserted is recognized at common law, is contractual in its nature and not against public policy of state. Hutchinson v. Ward [N. Y.] 85 NE 390. Suit on **bond** executed with mortgage in New Jersey held maintainable in New York, New Jersey statute relating to enforcement of such bonds and mortgages not confining action to New Jersey courts. Id. Circuit court of county in which **partnership** property is located has jurisdiction at suit of one partner to wind up partnership and administer its assets, though parties are nonresidents, other partner being found in such county. Hulings v. Jones, 63 W. Va. 696, 60 SE 874.

**13.** Action to establish and enforce a trust in realty is quasi in rem and courts of state where property is situated have jurisdiction, though trustee may be out of state. Gassert v. Strong [Mont.] 98 P 497.

**14.** See post, § 11B.

courts can have no jurisdiction over foreign sovereigns or property owned and operated by them for public purposes.[15] Where a wrong works injury in a state other than that in which it was committed, the courts of either state may grant relief provided jurisdiction in personam can be acquired.[16]

§ 6. *Limitations resting in amount or value in controversy.* See 10 C. L. 616—Division of jurisdiction between courts is often accomplished by fixing a maximum [17] or minimum amount [18] "involved," "claimed," "demanded," [19] or in "dispute" or "controversy," [20] and these amounts include or exclude interest and costs in accord-

**15.** Action for injuries from operation of railway operated by King of England for public purposes in Canada. Mason v. Intercolonial R. Co., 197 Mass. 349, 83 NE 876.

**16.** Diversion of water in Wyoming resulting in injury in Idaho could be inquired into by Idaho court where defendants were served in Idaho. Taylor v. Hulett [Idaho] 97 P 37.

**17.** Jurisdiction of **justices of the peace** as depending on amount in controversy, see Justices of the Peace, 10 C. L. 553.

**Louisiana:** Stipulation for trial of three separate but similar cases before one judge on same evidence held not to oust jurisdiction of city court, though sum of demands exceeded $100. Wisdom v. Bille, 120 La. 700, 45 S 554.

**Massachusetts:** District court without jurisdiction of action for damages in sum of $2,000 for money had and received. Hall v. Hall [Mass.] 86 NE 363. Could have allowed amendment reducing damages so as to give jurisdiction. Id.

**New Jersey:** If "balance" in dispute does not exceed $300, district court has jurisdiction (Bowler v. Osborne [N. J. Err. & App.] 70 A 149), hence fact that defendant's counterclaim was at first over $300 was not fatal where at trial she confessed plaintiff's claim so as to reduce her own to less than $300 (Id.). In suit for services, notice of **recoupment** of damages amounting to $710 held properly stricken as exceeding jurisdiction of district court. Corkran v. Taylor [N. J. Law] 71 A 124.

**18. Arkansas:** So-called penalty under Kirby's Dig. § 6649, for delay of railroad company in paying discharged employe, may be added to claim for wages in determining jurisdiction of circuit court. St. Louis, etc., R. Co. v. Walsh [Ark.] 110 SW 222.

**California:** Superior court is without jurisdiction of action for services of value less than $300. Davis v. Treacy [Cal. App.] 97 P 78.

**Georgia:** Suit in which plaintiff states defendant is indebted to him on 77 notes for $10 each and prays judgment for principal and interest "of said notes" is within jurisdiction of city court of Atlanta, though only one note is attached as exhibit, especially when it is alleged the others are substantially in same form. Young v. Germania Sav. Bank [Ga. App.] 62 SE 999.

**Illinois:** Municipal court act (Acts 1905, p. 158), conferring on municipal court jurisdiction of actions on contracts express or implied, where amount claimed exceeds $1,000, is not class legislation. Chudnovski v. Eckels, 232 Ill. 312, 83 NE 846.

**Maryland:** Under Code Pub. Gen. Laws, art. 16, § 102, providing courts of equity shall not entertain suits "wherein the original debt or damages does not amount to $20," bill does not lie to restrain sale of land for nonpayment of taxes amounting to only $7.92. Smith v. Wells, 106 Md. 526, 68 A 134.

**Michigan:** Under Comp. Laws, §§ 10,789, 10,790, circuit courts specified therein have jurisdiction to enforce liens on certain water craft for material furnished, regardless of amount thereof. Detroit Lumber Co. v. The Petrel [Mich.] 15 Det. Leg. N. 506, 117 NW 80. Could enforce lien for less than $100. Id.

**North Carolina:** Jurisdiction is fixed by amount for which in aspect most favorable to plaintiff judgment could be rendered. Lenoir Realty & Inc. Co. v. Corpening [N. C.] 61 SE 528. In suit for 5 per cent commission for sale of realty for $4,000, recovery could not exceed $200 for breach by failure to convey. Id.

**Texas:** Suit in district court being on demand within its jurisdiction, court could entertain **cross bill** for overpayment of less than $500. Kelsey v. Collins [Tex. Civ. App.] 108 SW 793. In **actions to foreclose** chattel mortgages, jurisdiction depends on value of property. McDaniel v. Staples [Tex. Civ. App.] 113 SW 596. Fact that in suit to foreclose chattel mortgage petition stated that plaintiff did not know whether or not property was in the county held not to eliminate property from consideration in ascertaining amount in controversy. Id.

**19. California:** Jurisdiction of superior court under Const. art. 6, § 5, being dependent upon amount demanded, being as much as $300, where amount demanded exceeded this sum court had jurisdiction, though it was made up of smaller sums claimed in two different counts. Burke v. Maguire [Cal.] 98 P 21.

**20. Louisiana:** Where sublessee sued out injunction to protect himself in enjoyment of premises and also sought $2,000 damages for trespass already committed, value of sublease was part of "matter in dispute." Hirsh v. Valloft, 121 La. 66, 46 S 103.

**Federal courts:** Circuit court is without jurisdiction unless matter in dispute, exclusive of interest and costs, exceeds sum of $2,000, whether jurisdiction is based on diversity of citizenship or existence of federal question. Turner v. Jackson Lumber Co. [C. C. A.] 159 F 923. In suit to **enjoin a nuisance,** matter in dispute is not complainant's damage, but right of defendant to maintain the nuisance and value of such right controls. American Smelting & Refining Co. v. Godfrey [C. C. A.] 158 F 225. Bill to restrain **enforcement** of certain illegal **regulations and charges** held to show wrong in nature of continuing trespass of which court had jurisdiction, where complainant was subjected to charges amounting to some $1,600 a year. Chesapeake & Delaware Canal Co. v. Gring [C. C. A.] 159 F 662. In suit to enjoin rail-

ance with the terms of the various statutes.[21] The amount involved is usually determined by the amount demanded by pleadings [22] unless it is clear as a matter of law that such amount cannot be in dispute or that it is merely colorable or fictitious.[23] Unless a pleading of itself shows fraud, the opposite party must allege and prove it.[24] Ordinarily distinct claims cannot be added so as to confer jurisdiction,[25] nor can a single cause be split and jurisdiction acquired of its parts.[26] In ancillary proceedings, the amount in controversy often becomes unimportant.[27]

§ 7. *Limitations resting in character of subject-matter or object of action.* See 10 C. L. 519—Particularly with respect to courts below those of general original jurisdiction,[28] and in cases of appeals,[29] is jurisdiction denied or conferred where the action involves the title to land,[30] a freehold,[31] constitutional questions [32] properly raised

road companies **from enforcing new rates,** matter in dispute is right of defendants to enforce the rates. Northern Pac. R. Co. v. Pacific Coast Lumber Mfgrs' Ass'n [C. C. A.] 165 F 1. Suit to **enjoin taxes** and not to remove cloud from title held not cognizable, amount of taxes not exceeding $2,000. Turner v. Jackson Lumber Co. [C. C. A.] 159 F 923; Id. [C. C. A.] 159 F 926. Whole sum sued for in **action on bonds** by joint owners thereof held controlling and not interest of each. Thomas v. Green County [C. C. A.] 159 F 339. In action **on several notes,** amount in controversy is aggregate of judgment prayed for. Heffner v. Gwynne-Treadwell Cotton Co. [C. C. A.] 160 F 635. Question not local so as to be controlled by state statutes or decisions. Id. **Corporate stock** is presumed to be worth par, on question of amount in controversy. Bernier v. Griscom-Spencer Co., 161 F 438. In suit for **accounting** by surviving partner, amount involved in value of entire partnership property. Rogers v. Lawton, 162 F 203. Under Mansf. Dig. § 4026 (Ind T. Ann. St. 1899, § 2706), defining jurisdiction of justices of the peace, plaintiff in **United States commissioner's court** having concurrent jurisdiction may sue and join as many causes as he may have against same defendant, provided each separate cause does not exceed $300. Reaves v. Turner [Okl.] 94 P 543.

**21. Texas:** Where suit in justice court was for $192 only, amendment on appeal to county court increasing demand to $200 and interest and costs held to raise claim beyond jurisdiction of county court. Chicago, etc., R. Co. v. Crenshaw [Tex. Civ. App.] 112 SW 117. County court held to have jurisdiction of action for damages to shipment of cattle resulting in judgment for $675, though judgment for $908.82 and interest was demanded. Texas Cent. R. Co. v. Pool [Tex. Civ. App.] 114 SW 685.

**22.** Where damages claimed in the "writ" were $600, superior court had jurisdiction under Court and Practice Act 1905, § 10, though claim in declaration was of value of only $400. Ryder v. Brennan, 28 R. I. 538, 68 A 477. That proof showed value of property was less than $200 did not deprive court of jurisdiction to render judgment in foreclosure proceedings, it not being alleged or proven that amount alleged was frandulent or fictitious. McDaniel v. Staples [Tex. Civ. App.] 113 SW 596.

**23.** Attorney's fees and damages could be included so as to raise demand to amount, within jurisdiction of district court, though under law these items were not recoverable, claim being bona fide and defendant not objecting or excepting to inclusion of such items. Lane v. General Acc. Ins. Co. [Tex. Civ. App.] 113 SW 324. That certain matters alleged in complaint tended to disprove allegation as to amount in controversy held not fatal where such matters did not create a legal certainty that allegation was not well founded. Henry & Sons & Co. v. Colorado Farm & Live Stock Co. [C. C. A.] 164 F 986.

**24.** Lane v. General Acc. Ins. Co. [Tex. Civ. App.] 113 SW 324.

**25.** Jurisdiction could not be conferred on circuit court by bringing single suit on several notes each for $26, though notes constituted a series given for price of a chattel. American Soda Fountain Co. v. Battle, 85 Ark. 213, 107 SW 672. See ante as to federal courts.

**26.** Two suits held not maintainable in justice court, each for killing of a mule, where both mules were killed simultaneously by same cause and value aggregated over $200. Yazoo, etc., R. Co. v. Payne [Miss.] 45 S 705.

**27.** Immaterial in ancillary suit by receiver for accounting and foreclosure of deed. Cooper v. Newton, 160 F 190. In suit to enforce attorney's lien. Brown v. Morgan, 163 F 395. That amount involved in garnishment proceedings in district court was within jurisdiction of county court did not give latter court jurisdiction where proceedings were not original but ancillary for enforcement of district court judgment. Simmang v. Pennsylvania Fire Ins. Co. [Tex.] 112 SW 1044.

**28.** See Justices of the Peace, 10 C. L. 553. Also Wills, 10 C. L. 2035, and Estates of Decedents, 11 C. L. 1275.

**29.** See Appeal and Review, 11 C. L. 118.

**30.** For questions of appellate jurisdiction, see Appeal and Review, 11 C. L. 118. See, also, 10 C. L. 519.

**County court** has jurisdiction where title is only incidentally involved. Henslee v. Boyd [Tex. Civ. App.] 107 SW 128. Without jurisdiction of suit to establish an easement. Id. Action for value of timber and to enjoin cutting and removal of more timber held not to involve title to land so as to deprive county court of jurisdiction. Springer v. Collins [Tex. Civ. App.] 108 SW 758. Was not action of forcible entry and detainer though plaintiff asked for possession of land. Id.

**Municipal court** cannot be ousted of jurisdiction in summary dispossession proceedings on ground title to realty is involved. Drake

and passed upon below,[33] saved for review,[34] and assigned for error in the appellate court,[35] questions of law decided erroneously or contrary to other decisions,[36] the construction of statutes,[37] taxes or revenue,[38] penalties or forfeitures,[39] certain contractual [40] or tort liabilities,[41] and where any kind of equitable relief or cognizance is sought.[42] More often the statute merely prescribes what jurisdiction inferior courts

v. Cunningham, 111 NYS 199. Action to recover award for land owned by plaintiff but by mistake paid to defendant held to involve title where answer denied plaintiff's title. Taylor v. Gilleran, 111 NYS 719. Action should have been dismissed though defendant did not file bond under Laws 1902, §§ 179, 180, providing for such filing where title is set up for first time in answer, since in order to maintain action plaintiff would be compelled to show title in himself. Id. Plaintiff could not contend defendant did not dispute title where evidence offered by defendant showing his title was excluded on plaintiff's objection. Id. Action for loan broker's services held not to involve title to realty so as to divest jurisdiction. Hevia v. Lopardo, 111 NYS 663.

**Probate court** cannot determine title to realty. In re Strom's Estate [Mo.] 111 SW 534. Under Code 1896, § 3176 (Civ. Code 1907, § 5220), denying to probate court jurisdiction of partition proceedings when adverse claim or title is asserted, probate court is without jurisdiction if adverse claim or title is asserted in good faith, unless it is clear claimant had neither actual possession claiming adversely nor superior title. Layton v. Campbell [Ala.] 46 S 775. If clear he has neither, court has jurisdiction despite good faith of adverse claim. Id. Question of title to land as between widow and heirs of decedent cannot be determined by proceedings for settlement of the estate where sale is not required for payment of debts or legacies, since generally question can be settled only by direct action in law or equity in which issues may be properly litigated. Matheson v. Matheson [Iowa] 117 NW 755.

31. As bearing on appellate jurisdiction, see Appeal and Review, 11 C. L. 118. See, also, 10 C. L. 519.

32. Appellate jurisdiction, see Appeal and Review, 11 C. L. 118. See, also, 10 C. L. 519.

33. See Appeal and Review, 11 C. L. 518. See, also, 10 C. L. 519.

34. See Saving Questions for Review, 10 C. L. 1572.

35. See Appeal and Review, 11 C. L. 118.

36. See Appeal and Review, 11 C. L. 118. See, also, 10 C. L. 520.

37. See Appeal and Review, 11 C. L. 118. See, also, 10 C. L. 520.

38. For appellate jurisdiction, see Appeal and Review, 11 C. L. 118. See, also, 10 C. L. 520.

39. Suit on bond given to replevy liquor seized under Act April 5, 1907 (Acts 1907, p. 156, c. 77), held one to declare forfeiture or recover penalties, and hence not within jurisdiction of county court. Dupree v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 769, 107 SW 926; Malone v. State [Tex. Civ. App.] 107 SW 927.

40. Action against carrier for personal injury to passenger held action on implied contract within municipal court act, § 2 (Acts 1905, p. 158), conferring on municipal court jurisdiction of actions on contracts, express or implied, within limits as to amount involved. Chudnovski v. Eckels, 232 Ill. 312, 83 NE 846. Act held not invalid as denying equal rights. Id. Evidence in action for conversion of a piano held to bring case within Laws 1902, c. 580, § 139, prohibiting actions in municipal court of city of New York on written **contracts of conditional sale** of personalty, except to forclose lien. Jacob v Columbia Storage Warehouses, 109 NYS 1015.

41. Passenger's action **against carrier** held **for battery** and not for breach of contract, and so not within jurisdiction of municipal court. Miller v. Brooklyn Heights R. Co., 111 NYS 47. Error to admit evidence in support of action for **malicious prosecution** joined with another action cognizable by court. Telzer v. Brooklyn Union Elev. R. Co., 113 NYS 18.

Statutory, **exclusive jurisdiction** of domestic courts, see post, § 9A.

42. Terms "civil actions" as used in practice act includes actions for equitable or legal relief, or both (Luddington v. Merrill [Conn.] 71 A 504), hence all courts to which civil actions as defined by the act may properly be made returnable, except justice courts, may in absence of express law to contrary apply both legal and equitable remedies (Id.).

**Circuit court** has general equity jurisdiction to entertain action to partition personalty, appoint receiver, order property delivered to him, enter interlocutory decrees, and grant any relief necessary to exigencies of the case or contumacy of parties. Laing v. Williams, 135 Wis. 253, 115 NW 821.

**City court** of Miller county is without equity jurisdiction. Geer v. Cowart [Ga. App.] 62 SE 1054. Set-off involving equitable relief held properly stricken. Id. Sp. Act 1895 (12 Sp. Laws, p. 65), § 22, giving city court of Waterbury jurisdiction of "all civil actions" involving not more than $100, gives jurisdiction where either legal or equitable relief, or both, is demanded (Luddington v. Merrill [Conn.] 71 A 504), and court has jurisdiction of suit to foreclose a chattel mortgage securing $80 note (Id.). Though city court may entertain "equitable defenses," it is without jurisdiction where in action against a bank by transferee of an account bank by motion to interplead seeks to set aside transfer of account on ground of transferor's insanity. Edwards v. Greenwich Sav. Bank, 110 NYS 920.

**Municipal court** without power to cancel for mistake written instrument under seal. Pelgram v. Ehrenzweig, 58 Misc. 195, 109 NYS 55. Proceedings under Code Civ. Proc. §§ 2256, 2257, though equitable in nature, held not within Const. art. 6, § 18, prohibiting legislature from conferring equitable jurisdiction on inferior or local courts, or municipal court act Laws 1902, p. 1490, c. 580, § 2, providing that municipal court shall not have equitable jurisdiction. Ebling Brew. Co. v. Nimphius, 58 Misc. 545, 109 NYS

shall have, impliedly excluding all else.[43] By statute the jurisdictions of courts of bankruptcy,[44] courts of probate and the like,[45] often become exclusive or at least primary.[46] Special statutory or constitutional jurisdictions are limited to occasions and objects contemplated by the law creating them.[47] That evidence in support of an action ordinarily cognizable by the court would be equally necessary in an action without the court's jurisdiction is not fatal.[48] The division of jurisdiction between state and federal courts and the conflict of their jurisdictions are treated in subsequent sections.[49]

Courts have no power to control or supervise legislative or official administrative discretion,[50] nor do they interfere with the management or proceedings of political parties except as authorized by statute.[51]

§ 8. *Limitations resting in character or capacity of parties litigant.* See 10 C. L. 521

§ 9. *Original jurisdicton. A. Exclusive, concurrent and conflicting.* See 10 C. L. 522—When by reason of any of the statutes or rules just considered [52] only one tribunal can act authoritatively, its jurisdiction is exclusive.[53] If two or more courts have jurisdiction, this is concurrent.[54] When proceedings in one court interfere with

808. Though in summary dispossession proceedings, right to renewal of lease and waiver of conditions were not available as basis for affirmative relief, they were equitable defenses which court could determine. Flanagan v. MacNutt, 113 NYS 42.

**43.** See post. § 9C.

**44.** See Bankruptcy, 11 C. L. 383.

**45.** Superior court has probate jurisdiction but can exercise it only on appeal from court of probate which has original jurisdiction, and on appeal superior court acts as a probate court. Appeal of Woodward [Conn.] 70 A 453. Though supreme court will not entertain jurisdiction of suit to require an executor to account if that alone is involved (In re Farrell, 110 NYS 41), it will take jurisdiction if matters are involved of which surrogate's court is without jurisdiction (Id.). Would retain jurisdiction of proceeding for accounting by, and settlement with, estate of deceased executrix, and her executor as such and in his individual capacity, though proceeding for accounting by executor was pending in surrogate's court. Id.

**46.** See, also, post, § 9A.

**47.** See post, § 9C.

**48.** Municipal court had jurisdiction of action on implied contract against husband for legal services rendered wife in separation action, though it was necessary to show that there was just cause. Beyer v. Hadden, 113 NYS 529.

**49.** See post §§ 9A, 11A.

**50.** See Constitutional Law, 11 C. L. 689. Compare Elections, 11 C. L. 1169; Highways and Streets, 11 C. L. 1720; Eminent Domain, 11 C. L. 1198; Municipal Corporations, 10 C. L. 881; Public Works and Improvements, 10 C. L. 1307, and kindred topics. Ruling of post office department that mail addressed to certain corporation shall be delivered to it and not to a corporation of similar name will not be interfered with merely because majority of letters are in fact intended for latter company. National Life Ins. Co. of U. S. A. v. National Life Ins. Co., 209 U. S. 317, 52 Law. Ed. 808.

**51.** Kump v. McDonald [W. Va.] 61 SE 909. Could not issue writ of prohibition against executive committee to prohibit recount of primary election ballots. Id. In absence of statutory authorization, courts are without jurisdiction ratione materiae in matter of contesting elections. Darbonne v. Oberlin, 121 La. 641, 46 S 679. Held not authorized to pass on conduct of local option elections. Id.

**52.** See ante, §§ 4-8.

**53.** Exclusive jurisdiction of federal courts, see post, § 11A. Gen. St. 1902, § 537, providing that all actions for equitable relief against causes pending or judgments rendered in superior court shall be brought in that court, precludes suit in equity in court of common pleas by garnishee in superior court for relief relating to the garnishment. Cronan v. Mersick, 80 Conn. 593, 69 A 938. Superior courts of Georgia have exclusive jurisdiction in equity causes. Civ. Code 1895, § 5842. Geer v. Cowart [Ga. App.] 62 SE 1054. Amended charter of city of Kalamazoo construed and held to confer on municipal court justice exclusive jurisdiction of certain actions between residents of city, his jurisdiction in such cases not being merely concurrent with that of the other justices until expiration of latter's terms. Strifling v. Baden [Mich.] 15 Det. Leg. N. 948, 118 NW 740. State courts have sole jurisdiction of actions by trustees in bankruptcy to recover property except actions to avoid preferences or recover property fraudulently conveyed. Drew v. Myers [Neb.] 116 NW 781. Constitutional jurisdiction of county court over matters pertaining to minors, idiots, estates of deceased persons, etc., is exclusive and can be exercised by no other court in state. Kennedy v. Pearson [Tex. Civ. App.] 109 SW 280. Under **New Mexico statute** (Laws 1903, p. 51, c. 33), requiring all actions for **personal injuries** received in that territory to be brought in courts thereof, Texas courts have no jurisdiction of actions by resident citizens of New Mexico for injuries received by them in that territory. Southern Pac. Co. v. Dusablon [Tex. Civ. App.] 20 Tex. Ct. Rep. 712, 106 SW 766.

**54.** Concurrent jurisdiction of state and federal courts, see post, § 11A.

**Arkansas:** Circuit and chancery courts have concurrent jurisdiction to partition land but proceedings in both cannot be concurrent-

proceeedings in another, there is a conflict of jurisdictions,[55] and the court which first acquired jurisdiction retains it to the exclusion of the other.[56] When similar proceed-

ly pursued. Dunbar v. Bourland [Ark.] 114 SW 467.

**Illinois:** Superior court of Cook county and circuit court of that county have concurrent general jurisdiction. Cobe v. Guyer, 139 Ill. App. 580; Kerr v. Flewelling, 235 Ill. 326. 85 NE 624. County court and circuit court have equal and concurrent jurisdiction in proceedings to ascertain compensation for private property taken for public use. Bell v. Mattoon Waterworks & Reservoir Co., 235 Ill. 218, 85 NE 214.

**Kentucky:** Though county court has jurisdiction to determine inheritance tax questions (Acts 1906, c. 22, §§ 13, 14, 15), equity court may also require payment of such tax before distributing on estate. Barrett v. Continental Realty [Ky.] 114 SW 750.

**Michigan:** Courts of Charlevoix county have concurrent jurisdiction of prosecution under Pub. Acts 1899, p. 128, Act No. 88, § 2, for unlawfully having fish in one's possession on lake within jurisdiction of village of Manistique. People v. Coffey [Mich.] 15 Det. Leg. N. 947, 118 NW 732.

**Oklahoma:** Criminal court of appeals, supreme, district and county courts, have concurrent original jurisdiction in habeas corpus. Ex parte Johnson [Okl. Cr. App.] 98 P 461.

**Wisconsin:** Under Laws 1895, p. 66, c. 24, creating municipal court for city of Oshkosh and giving it concurrent jurisdiction with circuit court in all cases of "crimes and misdemeanors" arising in the city, with certain exceptions, and vesting it with jurisdiction in all criminal or bastardy cases, a bastardy proceeding is not a "criminal action." Goyke v. State [Wis.] 117 NW 1027. Under Laws 1905, p. 446, c. 295, conferring on superior court of Lincoln county jurisdiction equal to and concurrent with circuit court in "all civil actions and proceedings at law and in equity," etc., superior court or judge thereof has same power to appoint commissioners in condemnation proceedings as is possessed by circuit courts or judges. Wisconsin River Imp. Co. v. Pier [Wis.] 118 NW 857.

**55.** No court will entertain an application to require doing of things enjoined against by other competent judicial authority. State v. Dispensary Commission, 79 S. C. 316, 60 SE 928. Ex parte proceeding in state court to foreclose mortgage under local statute, grantee from mortgagor not being party, held not to affect jurisdiction of federal court of suit by grantee against mortgagee for accounting of proceeds of insurance policies and damages for settlement of loss for less than amount due. Jacob Tome Institute v. Whitcomb [C. C. A.] 160 F 835.

**Interference with probate proceedings:** Decree in superior court compelling specific performance of compromise between heir and devisee and directing executor to pay plaintiff her share as per agreement when time for distribution shall have come held not undue interference with settlement of estate in probate court. Blount v. Wheeler, 199 Mass. 330, 85 NE 477. Where in action in supreme court under Code Civ. Proc. § 2653a, and Laws 1892, p. 1136, c. 591, for determination of validity of probated will, court enjoins executor from distributing testamentary fund, jurisdiction of surrogate's court is pro tanto suspended. Shea v. Bergen, 110 NYS 572. See post, § 9B. Filing of claim against estate of a decedent with clerk of state district court as per state statute held not to bar suit thereon in federal court on ground action was pending in state court. Farmers' Bank of Cuba City v. Wright, 158 F 841. Action not ancillary to allege action in state court. Id. Jurisdiction of United States circuit court of bill seeking declaration and foreclosure of attorney's lien on distributive shares of heirs held not defeated because settlement of estate was pending in probate court, no interference with jurisdiction of that court being sought or decreed, but rights of parties being adjudged and decreed to be redressed only when probate should have finished its functions. Ingersoll v. Coram, 29 S. Ct. 92.

**56.** Royal League Kavanagh, 233 Ill. 175, 84 NE 178; Bigelow v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 71 A 153; In re Farrell, 110 NYS 41. As between state and federal court. State v. Palmer [C. C. A.] 158 F 705. Court first obtaining jurisdiction of controversy may proceed without interference from courts of concurrent jurisdiction, actual or constructive possession of subject-matter of suit not being essential. Vowinckel v. Clark, 162 F 991. Court first acquiring **jurisdiction of specific property** thereby withdraws same from jurisdiction of every other court so far as necessary to accomplish purpose of suit. Lang v. Choctaw, Oklahoma & Gulf R. Co. [C. C. A.] 160 F 355; Sullivan v. Algrem [C. C. A.] 160 F 366; Robinson v. Mutual Reserve Life Ins. Co., 162 F 794. Jurisdiction thus acquired includes power to protect and effectuate its decrees or judgments and titles of purchasers and others thereunder, against attempts to impair them by proceedings in other courts, and court may lawfully retain jurisdiction for that purpose after its surrender of the property. Lang v. Choctaw, Oklahoma & Gulf R. Co. [C. C. A.] 160 F 355. State court held without power to adjudge certain bonds a lien on railroad property in possession of federal court, lien being sought only as part of order of sale which could not be decreed by state court. Wabash R. Co. v. Adelbert College, 208 U. S. 609, 52 Law. Ed. 642. Taking of jurisdiction by court of competent authority excludes jurisdiction of all other courts over case and all its incidents, except courts with appellate or supervisory control. State v. Reynolds, 209 Mo. 161, 107 SW 487. Other courts powerless to interfere with **possession of receiver** appointed by equity court having jurisdiction. Id. Where a receiver is regularly appointed for a trust company for preservation of the assets, he is not superseded by receiver appointed at instance of attorney general by another court under bill to dissolve under Feb. 11, 1895 (P. L. 4), creating a banking department. Jones v. Lincoln Sav. & Trust Co. [Pa.] 71 A 209. Though under statute action against a receiver will lie in counties other than that wherein he was appointed, court in such action may not disturb receiver's possession of property in custody of court appointing him

ings are pending in courts of concurrent jurisdiction, the later proceeding should be stayed.[57] A state court has no power to enjoin proceedings in federal courts,[58] and the power of federal courts over suits in state courts is restricted by statute.[59] A final judgment of a court of competent jurisdiction renders a similar suit res adjudicata in a court of concurrent jurisdiction.[60] A court cannot review the orders or judgments of another court of concurrent jurisdiction.[61]

(Paine v. Carpenter [Tex. Civ. App.] 111 SW 430), but proceedings necessary to execution of foreign court's judgment should be taken by appointing court (Id.). Federal court cannot entertain and proceed with suit to foreclose a mortgage on the property of a railway company while it is in actual custody of a state court through its receiver appointed in a prior suit to foreclose a junior mortgage, nor can federal court remove state receiver or interfere with his management of the property. Cochran v. Pittsburg, etc., R. Co., 158 F 549. Where relief in aid of which receiver is sought cannot be obtained except by actual seizure of the property, as where a lien is enforced, actual seizure is not necessary to exclude interference by other courts, but order appointing receiver is sufficient. State v. Palmer [C. C. A.] 158 F 705. Jurisdiction acquired by state court by appointment of receiver held not lost by supersedeas on appeal so as to authorize federal court to interfere by appointment of receiver pending appeal. Id. Suit by mortgage creditor of a corporation in a state court in which receivers were appointed, though appointment was afterward vacated pending hearing, is in rem, giving court exclusive jurisdiction of property, and federal court will not interfere in subsequent suit by appointing receivers at instance of a different complainant, though bill in state court did not state it was filed for all parties interested. Interstate R. Co. v. Philadelphia, etc., R. Co., 164 F 770. Jurisdiction of federal court in administration of **property of insolvent** corporation held not divested by subsequent state court dissolution judgment. Robinson v. Mutual Reserve Life Ins. Co., 162 F 794. Federal court held without power to appoint receiver for insolvent corporation, custody of whose property was already in state courts. Sullivan v. Algrem [C. C. A.] 160 F 366. After institution of action at law for **partition of property,** defendant could not sue in equity for same purpose. Dunbar v. Bourland [Ark.] 114 SW 467. Municipal court held without jurisdiction to determine collaterally a disputed **question of heirship** where such question was already directly in issue on appeal in circuit court. Thomas v. Olenick, 140 Ill. App. 385. Jurisdiction of federal court of bankruptcy over **estate of bankrupt** continues until trustee actually pays over to distributees dividends awarded them (Rockland Sav. Bank v. Alden, 103 Me. 230, 68 A 863), and hence funds against which checks for dividends had been regularly drawn but not yet delivered to distributee were yet in custodia legis and **not subject to trustee process** from state court (Id.). Case different where distributee's creditor merely intervenes as assignee of dividend and not by trustee proceeding. Id. Supreme court having taken jurisdiction of certain **subject-matter in ejectment,** chancery court cannot divest it or interfere in any way with ordinary process of common-law courts. City of Hoboken v. Hoboken & M. R. Co. [N. J. Eq.] 70 A 926. Where pending ancillary **condemnation proceedings** in foreclosure suit in federal court property was sold under foreclosure decree of such court, decree reserving all subsequent proper questions, and conveyance was made to purchaser with benefit to him of all suits or proceedings which had been instituted by receivers, federal court retained jurisdiction to such extent as to enable it to entertain supplemental bill by purchaser to enjoin mortgagees whose interest was sought to be reached by the condemnation proceedings from prosecuting **foreclosure in state court** until conclusion of condemnation proceedings. Taylor v. Norfolk, etc., R. Co. [C. C. A.] 162 F 452.

**Probate matters:** Where orphan's court has assumed jurisdiction of suit for recovery of a legacy under Orphan's Court Act, § 3 (P. L. 1898, p. 716), chancery will not interfere unless good cause is shown. Bower v. Bower [N. J. Eq.] 69 A 1077. Surrogate having acquired complete jurisdiction of matter of appointing successor to a trustee under Code Civ. Proc. § 2818, such jurisdiction could not be ousted by intervention of supreme court having concurrent jurisdiction. In re Brady's Estate, 58 Misc. 108, 110 NYS 755.

**57.** See, also, Abatement and Revival, 11 C. L. 1; Stay of Proceedings, 10 C. L. 1726. Where court of co-ordinate jurisdiction secures by proper process the custody or dominion of specific property which it is one of the objects of a federal court to subject to its judgment or decree, later suit should not be dismissed but should be stayed until proceedings in court which obtained prior custody are concluded, or ample time for their termination has elapsed, or custody or dominion is released. Sullivan v. Algrem [C. C. A.] 160 F 366. Where state court in suit to abate a nuisance and recover damages has issued injunction pendente lite, federal court will on motion of defendant stay a subsequent suit brought therein for identical relief until first has been disposed of. Vowinckel v. Clark, 162 F 991.

**58.** See, also, Injunction, 12 C. L. 152.

**59.** See post, § 11a, and, also, Injunction, 12 C. L. 152.

**60.** See Former Adjudication, 11 C. L. 1537.

**61.** One justice of supreme court at special term held without jurisdiction to review acts of another such justice at special term. Silver & Co. v. Waterman, 111 NYS 546. Order made by court or judge without authority may be reviewed by court of co-ordinate jurisdiction and should be vacated on notice. Commitment for contempt. Stewart v. Stewart, 111 NYS 734. Terre tenants could not in their own county have injunction to restrain holders of a judgment obtained in another county from levying on complainant's property. Lehigh, etc., R. Co. v. Hanhauser [Pa.] 70 A 1089. Situs of property immaterial. Id. Election for incorporation of a village under order of circuit court of one

Though equity court may not proceed directly against foreign courts, they have power in proper cases to restrain persons within their own jurisdictions from prosecuting actions in other states or countries,[62] but to justify such relief it must appear that equitable rights will otherwise be denied the person seeking it,[63] and a court of one sovereignty may not even by injunction operating only on the parties litigant interfere with a court of another sovereignty in the regular execution of its judgments.[64]

(§ 9) *B. Ancillary or assistant jurisdiction* See 10 C. L. 524 is that which is exercised in proceedings which are incident to or in aid of a main proceeding.[65] Jurisdictional criteria essential to the main proceeding need not ordinarily coexist in the ancillary one.[66]

(§ 9) *C. General or inferior, limited and special jurisdiction.* See 10 C. L. 524—A general jurisdiction is one which is undefined, and which will embrace all judicable cases not withheld from it, either expressly or by implication.[67]

county held not void because violative of injunction order from circuit court of another county. In re Clark, 135 Wis. 437, 115 NW 387.

**62.** Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., 164 F 869. Could by decree in personam enjoin interference with complainant's business by bringing suits in a foreign country based on a patent which court had decreed complainant was not infringing. Id. Courts of equity may restrain persons within their jurisdictions from prosecuting actions in foreign states which would result in fraud or gross wrong or oppression. Royal League v. Kavanagh, 233 Ill. 175, 84 NE 178. Equity will in proper case and on proper terms restrain prosecution of action wherein a litigant oppresses his adversary by suing in a foreign jurisdiction for purpose of evading some established local policy of jurisdiction where parties are domiciled. Bigelow v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 71 A 153. Court of one state having jurisdiction in personam of receiver appointed by it in proceeding to dissolve a domestic corporation may in proper case restrain him from further prosecuting an action begun by him in another state. Guaranty Trust Co. v. Edison United Phonograph Co., 128 App. Div. 591, 112 NYS 929. Could do so where question of ownership and right to dispose of stock could be more conveniently and decisively settled in action in home state. Id.

**63.** Royal League v. Kavanagh, 233 Ill. 175, 84 NE 178. Not enough that there is reason to anticipate difference of opinion between domestic and foreign court. Id. Allegation that courts of another state had declared law to be different from that laid down by domestic courts held insufficient, it not appearing such foreign courts were courts of final appellate jurisdiction. Id. That federal courts have different views of law from that held by courts of Massachusetts where controversy is pending does not justify equity court of New Jersey from restraining corporation of latter state from prosecuting actions in Massachusetts against resident of that state. Bigelow v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 71 A 153. Power of courts of equity to restrain persons within control of their process from prosecuting suits in other states is clear, but on grounds of comity should be sparingly exercised. Id. Court will not enjoin prosecution of equitable suit already pending in court of full jurisdiction in sister state on any theory that it can better weigh evidence or more justly apply general principles, or on ground that it recognizes different rules of law or equity. Id. Mere showing that action in foreign state is unconscionable or that complainant in that action is estopped from suing there held insufficient. Id. Right to restrain proceeding in foreign state held lost by laches, acquiescence and waiver. Id.

**64.** Smith v. Reed [N. J. Eq.] 70 A 961. State court held powerless to restrain plaintiff in federal court from issuing execution, pending interpleader suit, where third person had attached judgment debt. Id.

**65.** Jurisdiction of incidental questions in same proceeding, see ante, § 2. Where court has jurisdiction of person and subject-matter, it has power to make such orders and issue such writs and process as may be necessary to effectuate its decree. In suit to determine water rights, court could award injunction restraining defendants from appropriating water in another state so as to deprive complainant of amount of water he was entitled to in state of forum. Taylor v. Hulett [Idaho] 97 P 37. After commencement of proceeding in supreme court under Code Civ. Proc. § 2653a, and Laws 1892, p. 1136, c. 591, providing for determination of validity of wills admitted to probate court to protect its jurisdiction over testamentary fund, may enjoin distribution by executor under probate decree, exercise of such control being incidental to court's jurisdiction under § 2653a. Shea v. Bergen, 110 NYS 572.

**66.** See ante, § 6, and post, §§ 11A, 11B, 11C.

**67. Existence and Extent. Colorado:** Legal and equitable constitutional jurisdiction of district court includes determination of claims to priorities in appropriation of water from public streams, and is not affected by statutes dividing state into water districts and providing for adjudication of priorities in those districts. Kerr v. Burns [Colo.] 93 P 1120.

**Illinois:** Superior court of Cook county has general jurisdiction concurrent with circuit court of that county. Cobe v. Guyer, 139 Ill. App. 580. May appoint receivers for homestead and loan associations. Id.

**Indiana:** Circuit court has jurisdiction of actions on insurance policies though policies were issued in another state. United States Health & Acc. Ins. Co. v. Clark, 41 Ind. App. 345, 83 NE 760.

**Missouri:** That a division of circuit court was assigned, criminal cases occupying its

As will be observed by reference to the heretofore enumerated indicia determinative of jurisdiction,[68] the powers of probate,[69] county,[70] mayors,[71] justice,[72] city,[73] municipal,[74] and other inferior courts is limited,[75] and varies with the statutes of the

whole time, held not to affect its jurisdiction as that of a court proceeding according to course of common law. Ex parte Clark, 208 Mo. 121, 106 SW 990.

**New York:** Supreme court special term has power during trial of an action at trial term to allow service of supplemental answer pleading recovery in another action. Jones v. Ramsey, 111 NYS 993.

**Wisconsin:** Under Const. art. 7, § 8, giving circuit courts jurisdiction in all cases "not hereafter prohibited by law," jurisdiction is prohibited by law when it has been in terms or by necessary implication conferred on some other court. Goyke v. State [Wis.] 117 NW 1027. Laws 1895, p. 66, c. 24, creating municipal court for city of Oshkosh and Winnebago county, "prohibited" circuit court of Winnebago county from exercising jurisdiction in bastardy proceedings. Id.

**68.** Amount in controversy, title to land, penalties, equitable matters, etc., see ante, §§ 6, 7.

**69. Idaho:** Act March 2, 1905, conferring on probate court power to investigate charges concerning delinquent children, held constitutional. Ex parte Sharp [Idaho] 96 P 563.

**Maryland:** Orphan's court is restricted to exercise of powers expressly delegated and these cannot be extended by construction or implication. Flater v. Weaver [Md.] 71 A 309.

**Pennsylvania:** Orphan's court is without jurisdiction in escheat proceedings except as given by Act May 2, 1889 (P. L. 66). In re Alton's Estate, 220 Pa. 258, 69 A 902.

**70. Florida:** Gen. St. 1906, §§ 1200 et seq., and Laws 1907, c. 5706, amending § 1203, empowering county judge's courts to inquire into sanity of persons, commit lunatics, and appoint guardians, held not violative of state or federal constitution as depriving of due process or of jury trial. Ex parte Scudamore [Fla.] 46 S 279.

**New York:** Constitutional and statutory provisions considered, and held county court of Kings county is without jurisdiction of action against city of New York. Maisch v. New York, 111 NYS 645.

**Oregon:** As to probate matters, county court is a superior court of general jurisdiction. Nolan v. Hughes [Or.] 93 P 362.

**Texas:** Jurisdiction of county court to transact all business pertaining to deceased persons, minors, idiots, etc., is exclusive. Kennedy v. Pearson [Tex. Civ. App.] 109 SW 280.

**West Virginia:** County court has exclusive and final jurisdiction over matter of granting license to sell liquors. Myers v. Circuit Court [W. Va.] 63 SE 201.

**71. Oklahoma:** Mayors of incorporated towns and cities in Indian Territory had jurisdiction in all civil cases arising within corporate limits, coextensive with jurisdiction of United States commissioners. Baker v. Marcum [Okl.] 97 P 572.

**72.** See Justices of the Peace, 10 C. L. 553.

**73. Georgia:** City court of Atlanta has general common-law jurisdiction, exceptions on account of exclusive jurisdiction of superior court and court of ordinary in certain cases notwithstanding. Young v. Germania Sav. Bank [Ga. App.] 62 SE 999. Has jurisdiction of action on notes for price of land in which general judgment and special lien on land are prayed. Id. Amount in controversy, see ante, § 6.

**Kansas:** City court held to have jurisdiction of statutory action against railway company for damages from fire, action not being in nature of common-law trespass quare clausum fregit, though bill of particulars stated plaintiff was "possessed" of realty in question. Chicago, etc., R. Co. v. Matson, 77 Kan. 858, 94 P 1134.

**New York:** City court of New York is without jurisdiction of **actions against city.** Maisch v. New York, 111 NYS 645. Laws 1901, p. 574, c. 466, § 1345, granting to municipal court a limited jurisdiction in actions against city of New York and omitting clause of Laws 1897, § 262, giving supreme court exclusive jurisdiction in such cases, did not give city court jurisdiction of actions against city. O'Connor v. New York, 191 N. Y. 238, 83 NE 979. Statutory provisions reviewed and held city court of New York city has jurisdiction of **supplementary proceedings** on judgments recovered in municipal court, though transcript has been filed in office of county clerk. Hottenroth v. Flaherty, 112 NYS 1111. City court of New York city has jurisdiction of action by a foreign corporation to **recover money only.** Woodward Lumber Co. v. General Supply & Const. Co., 113 NYS 628. Suit to recover money deposited to secure performance of services as janitor is **not for accounting** so as to deprive city court of New York city of jurisdiction, though defendant claims janitor received rents in excess of deposit. Niele v. Stokes, 113 NYS 704.

**74. New York:** Municipal court of city of New York is without inherent powers, being possessed of only such as the statute confers. Fluegelman v. Armstrong, 110 NYS 967; Thompson v. Hudson Bldg., 110 NYS 1077. Being of purely statutory creation every step taken by it must be based on authority expressly given or clearly to be inferred from statute. Colwell v. New York, etc., R. Co., 57 Misc. 623, 108 NYS 540. Has limited jurisdiction to foreclose **mechanic's liens.** Schumer v. Kohn, 111 NYS 728. Fact that in action by attorney against husband **for services rendered** wife in separation action it was necessary for plaintiff to show just **cause for separation** did not oust court's jurisdiction, such evidence being merely incidental to action on implied contract. Beyer v. Hadden, 113 NYS 529. Held without jurisdiction **to open default** and thus in effect set aside satisfaction of judgment duly entered and compelling plaintiff to again litigate. Fluegelman v. Armstrong, 110 NYS 967. Has no power **to set aside default judgment** but only to open default and set case for pleading. Friedberger v. Stulpnagel, 112 NYS 89. Held without authority **to reinstate verdict and judgment** by vacating its final order setting verdict aside and granting new trial. Colwell v. New York R. Co., 57 Misc. 623, 108

different states. The jurisdiction of courts cannot be affected by agreement of the parties,[76] except as to the manner of its acquisition or divestiture.[77]

(§ 9) *D. Original jurisdiction of courts of last resort.*[See 10 C. L. 526]—This includes the prerogative, common-law jurisdiction necessary to the proper control and supervision of the courts below,[78] and in its more common sense, such as the constitution and statutes prescribe.[79]

NYS 540. Action of justice in ordering payment of plaintiff's **disbursements** and in himself **taxing costs,** as condition to opening default, held extra jurisdictional. Thompson v. Hudson Bldg., 110 NYS 1077.

**75.** Powers of inferior courts will be strictly confined within the limits prescribed by statute. Friedberger v. Stulpnagel, 112 NYS 89.

**76.** Agreement not to sue on a judgment in state courts, but, if at all, only in Russia, held not within rule that parties cannot by stipulation oust state courts of jurisdiction (Gitler v. Russian Co., 124 App. Div. 273, 108 NYS 793), there being a distinction between agreement not to submit to courts a particular pending controversy and one attempting to withdraw all future controversies between contracting parties (Id.).

**77.** See post, § 13.

**78.** See, also, Appeal and Review, 11 C. L. 118; Mandamus, 10 C. L. 662; Prohibition, Writ of, 10 C. L. 1277; Quo Warranto, 10 C. L. 1356.

**Kentucky:** By virtue of general control conferred by Const. § 110, court of appeals may issue prohibition to prevent inferior courts from exceeding their jurisdictions or from invading jurisdictions of other courts, and may so control inferior courts having jurisdiction as to prevent irreparable injustice. Renshaw v. Cook, 33 Ky. L. R. 860, 895, 111 SW 377. Application for writ of mandamus to compel a judge to sign a judgment or enter new judgment nunc pro tunc should be made to circuit court, though Const. § 110 confers original jurisdiction also on supreme court. Montgomery v. Viers [Ky.] 114 SW 251.

**Louisiana:** Supervisory jurisdiction of supreme court is broader under constitution of 1898 than it was under that of 1879. McClelland v. Gasquet [La.] 47 S 540. Certain remedial writs held within power of court to grant against objections of prematurity, and appealability of orders. Id.

**Missouri:** Rev. St. 1899, § 1674, subd. 4 (Ann. St. 1906, p. 1217), conferring on circuit courts superintending control over probate courts, does not contemplate appeal (Morris v. Morris, 128 Mo. App. 673, 107 SW 405), but only means of exercising such control is by original writ such as certiorari, mandamus or prohibition (Id.).

**Pennsylvania:** Supreme court may issue all sorts of process and use and adopt all sorts of legal forms necessary to give effect to its supervisory authority. Schmuck v. Hartman [Pa.] 70 A 1091.

**Wisconsin:** Power of supreme court under Const. art. 7, § 3, to exercise superintending control over inferior courts, may be exercised in criminal as well as in civil cases. State v. Helms [Wis.] 118 NW 158. Power exists when inferior court acts beyond its jurisdiction or refuses to act within it to prejudice of the citizen and there is no other adequate remedy. Id. That it becomes necessary to review judicial action of inferior court held no obstacle in proper case (Id.), hence, notwithstanding rule that mandamus cannot be used to serve purpose of error to review judicial action of inferior court, supreme court will by mandamus **compel lower court to proceed with action** on refusal to do so after erroneous decision on a preliminary question (Id.). Any erroneous disposition of a criminal case before jury is sworn by which court refuses to proceed further on valid papers, where its duty is plain, refusal to perform clear and prejudicial, and other remedies inadequate, justifies supreme court to exercise its power of superintending control. Id. Supreme court may in proper case compel circuit court to proceed with criminal case where it wrongfully quashes complaint, information or indictment before jury is sworn. Id. **Will not interfere on light occasions** or when other remedies are sufficient, but exigency must obviously justify such action. Id. Error in quashing valid charge of practicing medicine without license held not to create exigency sufficiently extreme. Id.

**79. Louisiana:** Jurisdiction of supreme court in habeas corpus is confined to cases in which it may have appellate jurisdiction. State v. Patterson [La.] 47 S 511.

**Massachusetts:** Supreme judicial court has no original jurisdiction to revoke appointment of an administrator because of discovery of a will, though appointment was made after appeal to it and upon its decree. Crocker v. Crocker, 198 Mass. 401, 84 NE 476.

**Minnesota:** Supreme court has original jurisdiction under Rev. Laws 1905, § 202, to determine question of eligibility of members of legislature enacting law increasing compensation of members, as candidates for office for ensuing term. State v. Scott [Minn.] 117 NW 1044.

**Nebraska:** Constitutional jurisdiction conferred on supreme court "in all civil cases in which the state shall be party" is not confined to cases in which state has pecuniary interest, but may extend to all cases in which the state through its proper officers seeks enforcement of public right or restraint of public wrong. State v. Pacific Express Co. [Neb.] 115 SW 619. Action to restrain enforcement of excessive carrier's rates held one to restrain a public wrong. Id.

**North Dakota:** Jurisdiction of supreme courts to issue original writs extends to questions affecting sovereignty, franchises, or prerogatives of state or liberties of its people. State v. Fabrick [N. D.] 117 NW 860; State v. Gottbrecht [N. D.] 117 NW 864. Where right to be enforced pertains to matters of private or local concern alone, though publici juris, jurisdiction belongs to district court unless circumstances of such exceptional character are shown to exist that adequate relief cannot be obtained in dis-

§ 10. *Appellate jurisdiction.*[See 10 C. L. 527]—All questions of appellate jurisdiction in both state and federal practice are fully treated elsewhere.[80]

§ 11. *Federal jurisdiction. A. Generally.*[See 11 C. L. 528]—The jurisdiction of federal courts is dependent largely on the amount in controversy [81] and diversity of citizenship,[82] or a federal question.[83] These need not exist, however, in mere ancillary proceedings,[84] and a suit in equity dependent upon a former action of which a federal court has jurisdiction may therefore be maintained in that court regardless of diversity of citizenship or the existence of a federal question to aid, enjoin or regulate the original suit [85] to restrain, avoid, explain or enforce the judgment or decree therein,[86] or to adjudicate, restrain or enforce liens upon or claims to property in the custody of the court in the original action.[87] So, also, congress has in many cases specially conferred jurisdiction on the national courts, as in bankruptcy [88] or admiralty proceedings,[89] and where the action arises under the patent [90] or copyright laws,[91] or has for its object the removal of a cloud from title to lands lying within the district where suit is brought.[92] Federal jurisdiction attaching either at law or in equity carries with it for certain purposes both legal and equitable jurisdiction.[93]

Rights and remedies created by state statutes may be enforced and administered

trict court. State v. Fabrick [N. D.] 117 NW 860. Sovereignty or franchises of state held not directly involved in proceedings for **division of a county.** Id. Not in proceedings for **change** of location **of county seat.** State v. Gottbrecht [N. D.] 117 NW 864. Mere fact that delays might occur if legal proceedings were instituted in district court and that appeal might be taken held not to present exceptional circumstances constituting reason for issuing mandamus by supreme court to compel county commissioners to act. Id.

**Oklahoma:** Supreme court is without original jurisdiction to grant purely injunctional relief. State v. Kenner [Okl.] 97 P 258. Could not restrain county commissioners from carrying out alleged illegal court house contract. Id. In **habeas corpus** proceedings, criminal court of appeals is court of original jurisdiction. Ex parte Johnson [Okl. Cr. App.] 98 P 461.

**80.** See Appeal and Review, 11 C. L. 118. See, also, 10 C. L. 527.

**81.** See ante, § 6.

**82.** See post, § 11B.

**83.** See post, § 11C.

**84.** As to amount in controversy, see ante, § 6. Diversity of citizenship or federal question, see post, §§ 11B, C.

**85, 86, 87.** Lang v. Choctaw, Oklahoma & Gulf R. Co. [C. C. A.] 160 F 355.

**88.** See Bankruptcy, 11 C. L. 383.

**89.** See Admiralty, 11 C. L. 33.

**90.** See, also, Patents, 10 C. L. 1127. Circuit court has jurisdiction of actions arising under patent laws. Prest-o-Lite Co. v. Avery Portable Lighting Co., 164 F 60. Bill for specific performance of contract to assign a patent, and to restrain violation of a license contract under patent, states no ground for relief under patent laws. St. Louis Street Flushing Mach. Co. v. Sanitary Street Flushing Mach. [C. C. A.] 161 F 725. Suit against patentee and corporation controlling patent seeking to suspend decree of infringement obtained by former against complainant and to have established complainant's right to renewal of license contract with corporation to make and sell patented devise held not cognizable either on ground of existence of federal question or diversity of citizenship, gravamen being breach of license contract which was between residents of same state. Lefkowitz v. Foster Hose Supporter Co., 161 F 367. Bill to restrain infringement of a patent which thus presents a federal question does not draw within jurisdiction of circuit court issues in regard to unfair competition, though growing out of same acts of defendant, the two causes being independent. Cushman v. Atlantis Fountain Pen Co., 164 F 94. To confer jurisdiction of suit against a corporation for infringement of a patent, it is necessary either that defendant be an inhabitant of district where suit is brought, or that infringement was in district and defendant has at time of suit a regular place of business there. Underwood Typewriter Co. v. Fox Typewriter Co., 158 F 476. Not necessary that defendant should have had regular place of business in district at time it infringed. Id.

**91.** Where a certain matter was not subject to copyright, federal court could not acquire jurisdiction of suit by assignee to enjoin infringement on theory that assignor was estopped to set up want of jurisdiction. Royal Sales Co. v. Gaynor, 164 F 207. In suits involving rights under the copyright statutes, questions independent of such statutes cannot be considered where there is no claim of damages amounting to $2,000, and no diversity of citizenship. Scribner v. Straus, 210 U. S. 352, 52 Law. Ed. 1094. Right to relief in equity under alleged conditional sale held not cognizable. Id.

**92.** Jurisdictional act March 3, 1875, § 8, 18 St. 470, as amended by Act March 3, 1887, c. 373, 24 St. 552, and Act Aug. 13, 1888, c. 866, 25 St. 433 (U. S. Comp. St. 1901, p. 508), confers on circuit court jurisdiction of suit to remove cloud from title to land lying within district where suit is brought. Gillespie v. Pocahontas Coal & Coke Co., 162 F 742.

**93.** Receiver in equity suit required to proceed at law to recover money claimed to have been collected by agent of corporation for which receiver was appointed. Whelan v. Enterprise Transp. Co., 164 F 95.

in the national courts,[94] and rights under federal laws may be enforced by state courts unless congress has given the federal courts exclusive jurisdiction.[95] Both federal and state courts have power to determine the validity under the national constitution of either state or federal statutes.[96] A creditor's bill is maintainable in the federal circuit court to enforce a judgment of a court of the state.[97] A federal court cannot refuse to entertain jurisdiction of a cause properly cognizable therein merely because the controversy might be more expeditiously or economically determined in a state court.[98]

A federal court has no jurisdiction of an action against a state brought by a citizen of another state,[99] nor can it issue any injunction to stay proceedings in a

**94.** Either in law, equity or admiralty, as nature of rights and remedies may require. Platt v. Lecocq [C. C. A.] 158 F 723. U. S. circuit court and circuit court of appeal held to have same power as circuit court of South Dakota to determine enforcibility of order of state railroad commissioners. Id.

**95. Bankruptcy** [See, also, Bankruptcy, 11 C. L. 383]: State and federal courts have concurrent jurisdiction of actions by trustees in bankruptcy to avoid **preferences** or recover **property fraudulently conveyed.** Drew v. Myers [Neb.] 116 NW 781.

**Interstate commerce** [See, also, Carriers, 11 C. L. 499; Commerce, 11 C. L. 643]: Federal courts have exclusive jurisdiction of all questions arising under the interstate commerce act and its amendments. Northern Pac. R. Co. v. Pacific Coast Lumber Mfrs.' Ass'n [C. C. A.] 165 F 1; Pittsburgh, etc., R. Co. v. Wood [Ind. App.] 84 NE 1009. Suit in equity against a railroad company to enjoin enforcement of rates filed with interstate commerce commission and alleged to be unjust and unreasonable, until legality thereof can be passed on by commission, arises under laws of United States, and federal courts have exclusive jurisdiction. Kalispell Lumber Co. v. Great Northern R. Co., 157 F 845. But state courts have jurisdiction of actions based on a carrier's common-law duties to furnish facilities for shipping, though carrier was engaged in interstate shipping where action is not under interstate commerce act. Pittsburgh, etc., R. Co. v. Wood [Ind. App.] 84 NE 1009. That action could have been removed to federal court did not oust jurisdiction of state court, no removal steps having been taken. Id. After adjudication by interstate commerce commission that rates are unreasonable, state court may entertain action to recover overcharges on interstate shipments. Robinson v. Baltimore & O. R. Co. [W. Va.] 63 SE 323.

**Patents** [See, also, Patents, 10 C. L. 1127]: State courts may construe assignment of patent but cannot entertain suit by assignee to restrain breach thereof by assignor by using devices covered by the patents, such suit not being one in which patent rights are only collaterally involved. Jones Cold Store Door Co. v. Jones [Md.] 70 A 88. State court may take cognizance of suit in equity to determine ownership of letters patent and for accounting for use thereof. American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133. Suit to enforce or annul a contract of which a patent is subject-matter arises under contract and not under patent laws. Marshall Engine Co. v. New Marshall Engine Co., 199 Mass. 546, 85 NE 741. Jurisdiction of state court is not ousted because validity of a patent is incidentally drawn in question in suit cognizable in such court. Id. Suit on assignment of a patent did not arise under patent laws merely because decree directed assignment of patent to plaintiff and enjoined making, selling or dealing in machines covered by patent. Id. No question of infringement where such question did not appear to have been raised in evidence before master. Id. If case arises under contract and is to enforce a covenant, incidental question under patent laws will not give federal courts exclusive jurisdiction. New York Phonograph Co. v. Darega, 111 NYS 363. Where no decree is necessary to cancellation of license to manufacture or sell a patented structure, manufacture or sale after notice of cancellation would be infringement over which federal courts have exclusive jurisdiction. Schalkenbach v. National Ventilating Co., 113 NYS 352. Suit by licensee of exclusive right to sell patented articles in certain territory to enjoin defendant from purchasing patented articles from purchaser of assets of plaintiff's licensor held to involve rights under federal statute permitting assignment of patents and not mere contract rights, so that state court could not take jurisdiction. New York Phonograph Co. v. Davega, 111 NYS 363.

**96.** Under Const. U. S. art. 6, § 2, declaring federal constitution supreme law, requiring support thereof by state and federal officers, and making state judges bound thereby. Chicago, etc., R. Co. v. Swanger, 157 F 783. That regulation of rates to be charged by a public service corporation is made by direct legislative act of state and not by a subordinate body does not affect power of state or federal court to inquire into its constitutionality. Consolidated Gas Co. v. New York, 157 F 849.

**97.** Feidler v. Bartleson [C. C. A.] 161 F 30. That complainant submitted himself to jurisdiction of state court when judgment was recovered and fact that jurisdiction of such court was adequate to afford all relief prayed for in creditors' suit held not to bar suit in federal court against defendants who were not parties in state court action. Id.

**98.** Pennsylvania Steel Co. v. New York City R. Co., 157 F 440.

**99. Held suit against state:** Where state statute provides that suits to recover penalties thereunder shall be brought in name of state by direction of governor, governor acts thereunder as executive of state with discretionary power, and suit to enjoin him from exercising such power is against state. Central of Georgia R. Co. v. McLendon, 157

state court [1] except where it acts in aid of its own jurisdiction already rightfully acquired.[2] Where it so acts it may protect a litigant from seizure by state authorities while attending trial.[3]

The circuit court has power to issue writs of mandamus only as ancillary to a jurisdiction already acquired.[4] The district court of the United States for Porto Rico is without authority to exercise purely probate jurisdiction in disregard of the local courts.[5]

*Court of claim.* See 10 C. L. 531

F 961. Though question was not definitely decided, court was strongly of opinion in Grand Trunk Western R. Co. v. Curry, 162 F 978, that suit to restrain secretary of state of California from enforcing license tax statute against corporation alleged to be not subject thereto, and for judicial construction of statutes, was against state.

**Held not suit against state:** Suit against attorney general or other state officers to enjoin enforcement of unconstitutional statutes to irreparable injury of complainant is not against state. Consolidated Gas Co. v. New York, 157 F 849; Lindsley v. Natural Carbonic Gas Co., 162 F 954. Suit to restrain Missouri **secretary of state** from enforcing state statute requiring him to **cancel license** of any foreign railroad company for **removing actions** against it **to federal court,** and providing penalties in addition on ground that statute was unconstitutional, held not a suit against the state, action being against state only when property rights are not involved in addition to penalties, fees and costs. Chicago, etc., R. Co. v. Swanger, 157 F 783. **Railroad rates.** Louisville & N. R. Co. v. Railroad Commission, 157 F 944; Central of Georgia R. Co. v. Railroad Commission, 161 F 925. Immaterial that officers are specially charged with enforcement of statute. Id. Where state statute deprives of property without due process or denies equal protection, federal courts may enjoin officers of state courts from issuing or serving process in proceeding to enforce it. Id. Federal court of equity, having acquired jurisdiction and not only granted a preliminary injunction but under authority of statute itself suspended its operation pending final hearing, has power, on amended bill, to also enjoin county officers from taking either civil or criminal proceedings under suspended statute against employes of railroad, effect of which would be to interfere with operation of road, obstruct commerce and work irreparable injury to complainant. Louisville & N. R. Co. v. Railroad Commission, 157 F 944. Where state railroad commission is given continuing power of supervision over matter of compliance with its orders and regulations, with power to change or repeal same and is made suable by statute, suit lies against it and its several members and officers in federal court to enjoin enforcement of an order on ground of confiscation. Central of Georgia R. Co. v. McLendon, 157 F 961. **Suit against dairy and food commissioner** of a state to retrain conduct under color of his office but alleged to violate state laws and to injuriously affect reputation and sale of complainant's products held not against state. Scully v. Bird, 209 U. S. 481, 52 Law. Ed. 899. Suit to compel **South Carolina dispensary commission** appointed to wind up affairs of state dispensary to pay a creditor from trust funds held by commission held not against the state. Fleischman Co. v. Murray, 161 F 152; Murray v. Wilson Distilling Co. [C. C. A.] 164 F 1.

**Contra:** Commission to wind up state dispensary held representative of state exercising judicial discretion as to validity of claims precluding suit against it in federal court. State v. State Dispensary Commission, 79 S. C. 316, 60 SE 928. Injunctional orders in Wilson Distilling Co. v. Murray and Fleischman Co. v. Murray (158 F), held extra jurisdictional and void as having been made in attempted suit against state. Id.

1. Though within inhibition against nullifying or staying proceedings in state courts, federal court cannot vacate a judgment entered in a state court. Schultz v. Highland Gold Mines Co., 158 F 337. It may restrain holder of judgment from enforcing it. Id. Suit to enjoin enforcement by attorney general of unconstitutional state statute by institution of criminal proceedings held not one to stay proceedings in state court. Lindsley v. Natural Carbonic Gas Co., 162 F 954. Grant of order protecting litigant from seizure by state authorities is without court proceedings, and commitment to insane asylum because of insanity decree of state court, protection to be while litigant was in attendance on trial of his case in federal court, held not to stay proceedings in state court. Chanler v. Sherman [C. C. A.] 162 F 19. South Carolina dispensary commission for winding up state dispensary held not "court of a state." Fleischman Co. v. Murray, 161 F 152; Murray v. Wilson Distilling Co. [C. C. A.] 164 F 1.

2. Where it seeks to enforce or protect its own lawful decrees. Lang v. Choctaw, Oklahoma & Gulf R. Co. [C. C. A.] 160 F 355.

3. Especially where threatened act must rest for justification on state decree, validity of which it is called upon to determine. Chanler v. Sherman [C. C. A.] 162 F 19. Could protect citizen of another state from commitment to insane asylum under state insanity decree while coming to state, remaining during trial, and departing therefrom, suit being to declare decree void for want of jurisdiction. Id.

4. Is without jurisdiction of original proceeding for such writ. Burnham v. Fields, 157 F 246.

5. Could not entertain bill to administer estates already in local courts though bill also sought to liquidate community between husband and wife, to annul a family settlement for fraud, and to set aside sales, where these matters were merely ancillary to settlement of estates. Garzot v. Rios De Rubio, 209 U. S. 283, 52 Law. Ed. 794.

(§ 11) *B. As affected by diversity of citizenship.*[See 10 C. L. 532]—The circuit court has jurisdiction of controversies between citizens of different states,[6] the requisites amount being involved.[7] In determining the question of jurisdiction, only indispensable parties should be considered.[8] These will be alligned in accordance with their real interest in the controversy;[9] and colorable or collusive transactions or arrangements of parties will not be tolerated.[10] If the real controversy is between citizens of different states or between a citizen and an alien, the fact that by some rule of law complainant is compelled to use the name of another person as defendant who is a citizen of a territory or of the same state as complainant will not deprive the court of jurisdiction.[11] An action will not lie in a federal court by an assignee to recover the contents of a chose in action payable to bearer and not made by a corporation unless it might have been prosecuted had no transfer been made.[12] Diversity of citizenship is not essential in mere ancillary proceedings.[13]

In the absence of waiver,[14] suit must be brought in the district whereof defendant is an inhabitant,[15] unless diversity of citizenship is the sole basis of jurisdiction,[16]

**6.** Suit against corporation held to involve a "controversy" between citizens of different states though defendant admitted allegations of bill and joined in request for receivers. In the Matter of Reisenberg, 208 U. S. 92, 52 Law. Ed. 403. Court has jurisdiction where parties designated in bill as plaintiffs and defendants are respectively citizens of different states and nothing appears from bill which requires their rearrangement. Loose v. Hartford Pulp Plaster Corp., 159 F 318. Bill seeking to establish existence of partnership only for purpose of subjecting interest of a judgment debtor therein to claim of judgment creditor held not demurrable on ground that complainant sought to compel defendants who were both residents of the state to litigate a demand held by one against the other. Feidler v. Bartleson [C. C. A.] 161 F 30.

**7.** See ante, § 6.

**8.** All others may be dismissed or disregarded if their presence will oust or restrict the jurisdiction. Kuchler v. Greene, 163 F 91. In suit to restrain for fraud collection of a judgment against a railway company and a subsequent judgment against its surety on appeal, brought by such surety and by one who by contract is bound to pay original judgment, railway company though insolvent is indispensable party and must be aligned with plaintiffs for purpose of determining jurisdiction. Steele v. Culver, 29 S. Ct. 9.

**9.** Where jurisdiction depends on diversity of citizenship, court will arrange parties according to their interest, and if such arrangement defeats jurisdiction bill will be dismissed. Mann v. Gaddie [C. C. A.] 158 F 42. Where a corporation defendant unites with its president in resisting a stockholder's claim of illegality and fraud by joint action of both defendants, fact that it would be for financial interest of corporation that suit should succeed does not require alignment of corporation as plaintiff so as to defeat federal jurisdiction. Venner v. Great Northern R. Co., 209 U. S. 24, 52 Law. Ed. 666.

**10.** See post, § 11D.

**11.** Kuchler v. Greene, 163 F 91.

**12.** Circuit court is without jurisdiction of action by assignee of a chose in action though plaintiff and defendant are citizens of different states or one is an alien, unless plaintiff's assignor could have sued in same jurisdiction. Tierney v. Helvetia Swiss Fire Ins. Co., 163 F 82. Suit held not for specific enforcement of assignment of patent rights but to charge defendant as trustee ex maleficio, and therefore not within Rev. St. § 629, relating to suits by assignees to recover contents of chose in action. Prest-o-Lite Co. v. Avery Portable Lighting Co., 164 F 60. Defendant held also chargeable as trustee by virtue of official relationship with complainant at time of assignment so that suit to require accounting and transfer of patent was maintainable, diverse citizenship appearing. Id.

**13.** Immaterial in suit by attorney to enforce **attorney's lien** on judgment in favor of his client, proceeding being ancillary. Brown v. Morgan, 163 F 395. While suit to set aside an **award of arbitrators** may be regarded as ancillary to prior suit commenced by defendant to enforce same, this does not authorize bringing in of one who is citizen of same state as plaintiff for purpose of also impeaching an award in his favor made at same arbitration but distinct from that between the other parties. Hecht v. Youghiogheny & Lehigh Coal Co., 162 F 812. **Partition proceeding,** court already having custody of property. City of New Orleans v. Howard [C. C. A.] 160 F 393. Creditor's bill lies to set aside **fraudulent conveyances** which prevent collection of judgment obtained in same court. Hobbs Mfg. Co. v. Gooding, 164 F 91.

**14.** See post, § 11D.

**15.** Suit against railroad company based on interstate commerce act held maintainable only in state of defendant's incorporation. Memphis Cotton Oil Co. v. Illinois Cent. R. Co., 164 F 290. Where stockholders' bill was filed by citizens of three states against citizens of two other states in state where part of defendants resided, but was not local, jurisdiction attached as to all complainants and as to all defendants who were citizens of state of forum, but not as to other defendants. Schultz v. Highland Gold Mines Co., 158 F 337. No objection that citizens of different states other than state in which suit is instituted are combined as co-

or unless the federal court has exclusive jurisdiction.[17] A suit by a citizen against an alien can be maintained only in the district in which valid service can be made on defendant.[18]

(§ 11) *C. As affected by existence of federal question.*[See 10 C. L. 533]—A federal question exists whenever a federal statute,[19] a treaty or the federal constitution,[20] is to be construed or its effect or operation is involved,[21] and also when the action is against a corporation organized under act of congress.[22] It does not arise merely because defendant is a railroad company engaged in interstate commerce.[23] Except

complainants. Id. Federal court of district of which complainants are inhabitants has jurisdiction of suit to enjoin several railroad companies who are members of an association from putting into effect an alleged unlawful rate on all food commodities shipped in territory embraced in district, though none of defendants are citizens of the state, where they operate roads in state and district and are found and served therein. Macon Grocery Co. v. Atlantic C. L. R. Co., 163 F 736.

**16.** Where jurisdiction depends solely on diversity of citizenship, suit may be brought in district of residence of either plaintiff or defendant. Schultz v. Highland Gold Mines Co., 158 F 337. Suit to restrain carrier from enforcing a certain reconsignment charge as unreasonable, though maintainable at common law, was suit within interstate commerce act so that jurisdiction was not alone dependent on diverse citizenship and suit could therefore be brought only in district in which defendant was inhabitant. Sunderland v. Chicago, etc., R. Co., 158 F 877. Action in state whereof neither plaintiff nor defendant was citizen held not removable to federal court on ground of citizenship. Gillespie v. Pocahontas Coal & Coke Co., 162 F 742.

**17.** Provision of § 1, of acts of 1887 and 1888 (Act March 3, 1887, c. 373, 24 St. 552 [U. S. Comp. St. 1901, p. 508]), and Act Aug. 13, 1888, c. 866, 24 St. 433 (U. S. Comp. St. 1901, p. 508), relating to circuit and district courts, that "no suits shall be brought in either of such courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," does not apply to suits of which such courts are given exclusive jurisdiction. Northern Pac. R. Co. v. Pacific Coast Lumber Mfrs' Ass'n [C. C. A.] 165 F 1. Suit to enjoin railroad companies from enforcing unreasonable rates in violation of interstate commerce act may be maintained in any district in which defendants can be found. Id.

**18.** That alien corporation was authorized to do business in a state and that service of process in any suit against it could be made on state officer held not to give federal court in the state jurisdiction of suit against corporation, it not appearing service was made or could have been made within district of such court (Tierney v. Helvetia Swiss Fire Ins. Co., 163 F 82), and fact that defendant was authorized to do business in district held not sufficient to authorize service therein unless it actually did business (Id.).

**19.** By bill alleging acquisition of railroad right of way under federal statute and that defendant had taken possession under claim plaintiff's rights had been forfeited held to present federal question. Columbia Valley R. Co. v. Portland & S. R. Co. [C. C. A.] 162 F 603. Action against railroad for injuries received in Indian Territory while Mansf. Dig. Ark. c. 20, § 566, was there in force pursuant to act Cong. May 2, 1890, c. 182, 26 St. 81, held to arise under statutes of Arkansas and not under act of Congress. Missouri, etc., R. Co. v. Hollan [Tex. Civ. App.] 107 SW 642.

**20. Constitutional question involved:** Bill alleging attempt by state to destroy by legislation contract exemption from taxation. Jetton v. University of the South, 208 U. S. 489, 52 Law. Ed. 584. Contention that municipal ordinance providing for summary destruction of unwholesome foods contravened U. S. Const. 14 Amend., held to present a constitutional question, though it was unfounded. North American Cold Storage Co. v. Chicago, 29 S. Ct. 101.

**Not involved:** Provisions of U. S. Const. Amend. 14, securing personal rights, are directed against the states and their agencies and not against acts of private persons acting as such, these latter raising no constitutional question. Marten v. Holbrook, 157 F 716. Complaint alleging that defendants entered into conspiracy by unlawful means to deprive plaintiff of liberty and property and unlawfully and without due process caused his arrest and confinement in a state insane asylum held not to involve any federal question. Id. Bill by express company to restrain widow of one of its messengers from suing railroad company for husband's death and thus render complainant liable over to railroad company held not to involve interstate commerce clause of 14th amendment. Rountree v. Adams Exp. Co. [C. C. A.] 165 F 152.

**21.** Suit by riparian owners to enjoin officers of state from selling shore lands under statute enacted pursuant to Const. Wash. art. 17, § 1, declaring state to be owner of beds and shores of all navigable waters, held not to involve any real and substantial federal question either as to deprivation of property without due process or as involving construction of federal statutes under which owners claimed, Washington constitution expressly reserving owners' right to assert their claims in state courts, and U. S. supreme court having declared that U. S. patents issued under general laws do not of themselves convey title below high-water mark. McGilvra v. Ross [C. C. A.] 164 F 604.

**22.** Action against corporation organized under act of congress held to arise under laws of United States. Choctaw, etc., R. Co. v. Hendricks [Okl.] 95 P 970; Choctaw, etc., R. Co. v. Hamilton [Okl.] 95 P 972.

**23.** In re Matter of Reisenberg, 208 U. S. 92, 52 Law. Ed. 403.

where the federal court has exclusive and special jurisdiction,[24] the regular jurisdictional amount must also be involved.[25]

(§ 11) *D. Averments and objections as to jurisdiction.* See 10 C. L. 534.—Every fact essential to bring the cause within the jurisdiction of the court must affirmatively appear on the record,[26] but jurisdiction will not be renounced or denied if the requisite facts so appear either directly or by just inference from any part of the record.[27] An averment of residence is not sufficient as an averment of citizenship,[28] but an allegation that a corporation was organized and exists under the laws of a named state sufficiently alleges the citizenship of the corporation.[29] A federal question such as will confer jurisdiction must be involved in the allegations essential to plaintiff's cause of action [30] and cannot be supplied by anticipating defenses.[31] Jurisdiction is not defeated because of matters in the complaint having a tendency to show that the allegation respecting the amount in controversy is not well founded, unless they create a legal certainty of that conclusion.[32]

Plaintiff in a state court may appear specially and without leave in a federal court for the purpose of raising the question of the jurisdiction of a federal court as to a subject-matter first brought within the jurisdiction of the state court.[33] An objection that a suit against an individual is in effect a suit against the state should be raised by demurrer or plea and not by motion to dismiss.[34] Objection to being sued in the district may be waived [35] by appearance, demurrer, answer or going to trial.[36]

24. See ante, § 11A.

25. See ante, § 6.

26. Turner v. Jackson Lumber Co. [C. C. A.] 159 F 923. Diverse citizenship must be affirmatively shown by record. International Bank & Trust Co. v. Scott [C. C. A.] 159 F 58. Admission at trial of "liability of defendant in this case, and everything as alleged except the measure of damages," held not to cure failure of declaration to allege requisite citizenship. Grand Trunk Western R. Co. v. Reddick [C. C. A.] 160 F 898.

27. Pleadings held to sufficiently show diversity of citizenship. Adams Exp. Co. v. Adams [C. C. A.] 159 F 62.

28. That plaintiff was bona fide resident of state. Kolke v. Atchison, etc., R. Co., 157 F 623. Allegation that plaintiff was resident of city of D in state of Tennessee. Crosby v. Cuba R. Co., 158 F 144. Where plaintiff testified he lived in Cuba, he might be granted leave after verdict to take deposition to establish citizenship and amend declaration. Id. In action by liquidating committee of a bank, allegation that all of such committee resided in Republic of Mexico without averments that they were citizens of that republic held insufficient. International Bank & Trust Co. v. Scott [C. C. A.] 159 F 58. Defect not cured by recital in motion for rehearing of motion to dismiss that it appeared on face of defendant's pleading that "plaintiff" is a resident citizen of Republic of Mexico. Id. Pleading that plaintiff's assignor was a corporation with principal office in Florida and that defendant resided in Alabama held insufficient. J. J. McCaskill Co. v. Dickson [C. C. A.] 159 F 704.

29. An allegation that defendant is a corporation organized under and by virtue of the laws of a certain state is in legal effect an averment that it is a citizen of such state. Crosby v. Cuba R. Co., 158 F 144. Allegation that complainant was a **"joint stock company"** organized and existing under laws of New York and a citizen of that state held insufficient, a joint stock company being only a partnership, all of whose members could not be presumed to be nonresidents. Rountree v. Adams Exp. Co. [C. C. A.] 165 F 152.

30. Louisville & N. R. Co. v. Mottley, 29 S. Ct. 42.

31. Allegation that defendants acted as officers of United States. Peoples U. S. Bank v. Goodwin, 160 F 727. Suit to compel carrier's performance of agreement to issue passes held not brought within jurisdiction of circuit court as involving federal question by allegations in bill that refusal was based on act of congress of June 29, 1906, and that such act did not prohibit giving of passes under circumstances of the case, and if construed to such effect would deny due process of law. Louisville & N. R. Co. v. Mottley, 29 S. Ct. 42.

32. Henry & Sons & Co. v. Colorado Farm & Live Stock Co. [C. C. A.] 164 F 986.

33. Mortgage creditor who had first instituted receivership proceeding in state court held entitled to so appear in subsequent federal suit by another complainant seeking receivership, not being required to intervene and thus subject himself to court's jurisdiction. Interstate R. Co. v. Philadelphia, etc., R. Co., 164 F 770.

34. Court should not dismiss on own motion or on motion of defendant. Scully v. Bird, 209 U. S. 481, 52 Law. Ed. 899.

35. Joinder as defendants of citizens of states other than that in which suit is brought is not jurisdictional but may be waived by defendants erroneously joined. Schultz v. Highland Gold Mines Co., 158 F 337.

36. General appearance when complaint did not show jurisdictional facts held not to confer jurisdiction. Leonard v. Merchants'

The federal statute directs the court to dismiss the action whenever it shall appear to its satisfaction that it does not really and substantially involve a dispute or controversy properly within its jurisdiction,[37] or that the parties have been improperly or collusively made or joined for the purpose of conferring jurisdiction.[38]

§ 12. *Federal appellate jurisdiction.*[See 10 C. L. 535]—All questions under this designation are fully treated elsewhere.[39]

§ 13. *Acquisition and divestiture.*[40]—Jurisdiction in a particular case is usually acquired by either process or appearance.[41] While jurisdiction of the person may be conferred by acts or consent of parties,[42] jurisdiction of the subject-matter cannot be so conferred.[43] Only the res can be affected in an action based entirely on substituted process.[44]

Coal Co. [C. C. A.] 162 F 885. Right of a party to suit in district of residence of either plaintiff or defendant is personal and may be waived by trial, demurrer, answer or appearance without objection. McPhee & McGinnity Co. v. Union Pac. R. Co. [C. C. A.] 158 F 5. Demurring and answering. Ingersoll v. Coram, 29 S. Ct. 92. Objection that neither party was resident of district held waived by demurring on grounds going to merits is addition to jurisdictional grounds, where under local practice defendant could have appeared specially. Western Loan & S. Co. v. Butte & B. Consol. Min. Co., 210 U. S. 368, 52 Law. Ed. 1101. Such objection held waived by appearance, pleading and going to trial. Shanberg v. Fidelity & Casualty Co. [C. C. A.] 158 F 1. Under New York practice, followed by federal courts in that state in actions at law, defendant does not waive right to object to jurisdiction by including in answer every defense on which he relies. Leonard v. Merchants' Coal Co. [C. C. A.] 162 F 885. Answer denying allegation as to citizenship, joining issues on merits, and pleading counterclaim, held not to waive objection to being sued in the district. Id.

**37.** That defendant admitted plaintiffs' claims and joined in request for receivership held not to show there was no substantial controversy. In re Matter of Reisenberg, 208 U. S. 92, 52 Law. Ed. 403.

**38.** Requisite amount and diversity of citizenship being involved, agreement of parties that suit should be in federal court and that averments of bill should be admitted held insufficient to establish collusion. Pennsylvania Steel Co. v. New York City R. Co., 157 F 440. That defendant admitted allegations of bill and united in complainant's request for receivers held insufficient to establish collusion requiring dismissal under Act March 3, 1875 (18 St. at L. 470, c. 137), there being no claim allegations of bill were untrue, or that debts named did not exist, and no question as to citizenship or evidence of fraud. In re Matter of Reisenberg, 208 U. S. 92, 52 Law. Ed. 403. Omission of one of two complainants having similar claims to avoid failure of suit for want of requisite diversity of citizenship, amended bill reciting consent of omitted party to all relief sought and all orders or proceedings in the suit, held not collusion. Mathieson v. Craven, 164 F 471. Stockholders' suit held not subject to equity rule 94 where constitutional questions were involved, and corporation and directors were in sympathy with bill. Lindsley v. Natural Carbonic Gas Co., 162 F 954. Evidence held to show **collusive incorporation** of party plaintiff in another state for sole purpose of suing in federal court, requiring dismissal under act March 3, 1875, § 5. Miller v. East Side Canal & Irr. Co., 29 S. Ct. 111. Evidence held not sufficient to establish incorporation in another state for sole purpose of invoking federal jurisdiction. Percy Summer Club v. Astle [C. C. A.] 163 F 1.

**39.** See Appeal and Review, 11 C. L. 118. See, also, 10 C. L. 535, 536.

**40.** See 10 C. L. 538. Manner of acquiring jurisdiction over foreign corporations, see also Foreign Corporations, 11 C. L. 1508.

**41.** See, also, Appearance, 11 C. L. 255; Process, 10 C. L. 1262. Process or appearance essential. Chief Pub. Co. v. Schneider, 110 NYS 974. Under Municipal Court Act, § 26, parties may appear in court voluntarily and have their differences adjusted. Friedberger v. Stulpnagel, 112 NYS 89. Question of jurisdiction to reinstate cause after dismissal held waived by participation in trial after reinstatement. The Brunswick-Balke-Collender Co. v. Nix, 138 Ill. App. 559; Wilson v. Chandler, 133 Ill. App. 622. Plaintiff's appearance in state court in opposition to defendant's motion to vacate order of removal of cause to federal court held not to estop him from challenging jurisdiction of federal court on ground petition for removal was insufficient since neither consent nor estoppel can confer jurisdiction on federal courts. Tierney v. Helvetia Swiss Fire Ins. Co., 110 NYS 613. One's **knowledge** of pendency of proceedings cannot confer jurisdiction in absence of process or appearance. David Bradley Mfg. Co. v. Burrhus, 135 Iowa, 324, 112 NW 765.

**42.** See Appearance, 11 C. L. 255.

**43.** See, also, Appearance, 11 C. L. 255. Jurisdiction of subject-matter cannot be conferred by consent. Frank v. Frank [Ark.] 113 SW 640; State v. Nast, 209 Mo. 708, 108 SW 563. Mere submission of case does not confer jurisdiction of subject-matter. Goyke v. State [Wis.] 117 NW 1027. Going to trial on merits does not waive question of jurisdiction. Carriere v. U. S., 163 F 1009. Where county judge was without jurisdiction to entertain proceedings for sale of realty for taxes because statute under which same was had had been repealed, order confirming title in purchase was null and void, regardless of waiver or consent. In re McIntyre, 124 App. Div. 66, 108 NYS 242. Where action for libel, commenced by trustee process, was illegal and void, defendant's release of garnishees did not waive right to object to jurisdiction.

Jurisdiction may be divested by failure of court or parties to take steps necessary to preserve it,[45] by transfer of the cause,[46] or by legislation.[47] Provision is generally made for the preservation or transfer of existing jurisdictions upon the establishment of new courts [48] or districts.[49]

§ 14. *Objections to jurisdiction, inquiry thereof, and presumptions respecting it.* See 10 C. L. 539—In the absence of estoppel,[50] courts will at all stages entertain objections and inquiries as to jurisdiction,[51] especially in federal practice.[52] Jurisdictional questions are usually raised by motion,[53] plea in abatement or other proper and specific pleading.[54] Objection or exception to jurisdiction of the subject-matter is in-

Macurda v. Globe Newspaper Co., 165 F 104.

44. Court may render judgment in rem but not in personam. Gassert v. Strong [Mont.] 98 P 497.

45. Failure to render judgment within 14 days after submission of cause held to divest municipal court of further jurisdiction. Lebowitz v. Herman, 108 NYS 566. Judgment rendered in municipal court July 17, 1907, in case tried May 10, 1907, is void, statute requiring rendition within 14 days from time case is submitted, unless parties consent otherwise. Carpenter v. Pirner, 107 NYS 875. Statement by attorney "you may have a week and all summer if you want it," held at most to extend time one week. Id. Rule 17 of municipal court contemplates making of a record of filing of written stipulation for extension of time within which court may render judgment, in order to enable court to retain jurisdiction after expiration of statutory time. Id. Rule binding on court as well as on parties and attorneys. Id.

46. See Removal of Causes, 10 C. L. 1508; Venue and Place of Trial, 10 C. L. 1965.

47. Pending state action against government contractors and surety on bond under Act Cong. Aug. 13, 1894, c. 280, 24 St. 278, held not affected by enactment of Act Feb. 14, 1905, c. 778, 33 St. 811, limiting jurisdiction to federal courts, Rev. St. U. S. 1878, § 13 (U. S. Comp. St. 1901, p. 6), providing against release of liability under repealed statutes. Burton v. Seifert Plastic Relief Co. [Va.] 61 SE 933.

48. Act Aug. 1, 1907, attempting to repeal Acts 1900-01, p. 861, and 1903, p. 398, establishing county court of Coffee county and defining its jurisdiction and providing for certification of pending causes to circuit court, held invalid as being at variance with statutory notice of intention to pass the same. Larkin v. Simmons [Ala.] 46 S 451.

49. Where new county was carved from county of domicile of guardian and ward, guardian had option under § 7 of Act Aug. 21, 1905, creating the new county, to have jurisdiction over him changed to ordinary of new county, but if option is not exercised jurisdiction remains as before. Maloy v. Maloy [Ga.] 62 SE 991.

50. Sureties on replevin bond held estopped to assert want of jurisdiction due to value of property exceeding jurisdictional amount, papers in case stating value within jurisdiction of court. Janssen v. Duncan, 43 Colo. 286, 95 P 922. District court having jurisdiction of subject-matter of suit to determine water rights, defendant therein is estopped to question jurisdiction of court in such suit for first time in another suit brought nine years later, on ground that under statute adjudication should have covered all priorities in the district and not merely priorities for water from the single stream involved, defendant having voluntarily submitted himself to jurisdiction, participated in trial, appealed and received water as per award. Kerr v. Burns [Colo.] 93 P 1120.

51. Question of jurisdiction of subject-matter may be raised at any stage of case, in any court, by either court or counsel. Lohmeyer v. St. Louis Cordage Co. [Mo.] 113 SW 1108; Cable v. Duke, 208 Mo. 557, 106 SW 643. Supreme court may raise question at any stage and of own motion. Allott v. American Strawboard Co., 237 Ill. 55, 86 NE 685. Objection may be made at any stage, whether in due course of pleading or not. McQueen v. McDaniel [Tex. Civ. App.] 109 SW 219. Pleading to merits no waiver of right to dismissal of appeal to county court. Id. Plea to jurisdiction ratione materiae may be filed any time, as after answer. Burnstein v. Dalton Clark Stave Co. [La.] 47 S 753. Where court was without jurisdiction of divorce proceeding it could dismiss of own motion at any time while cause was pending. Watts v. Watts, 130 Ga. 683, 61 SE 593. Court may of own motion vacate order void ab initio for want of jurisdiction. Persing v. Reno Stock Brokerage Co. [Nev.] 96 P 1054. Where papers in distress proceedings were returned to court not having jurisdiction, such court could allow withdrawal thereof for lodgment in proper court for trial. Harrell v. Logue Bros., 130 Ga. 446, 60 SE 1042. Jurisdiction of federal court to administer assets of defunct corporation held not subject to question in **collateral proceeding** for partition of surplus assets. City of New Orleans v. Howard [C. C. A.] 160 F 393. Jurisdiction as to subject-matter may be first **questioned on appeal,** but not jurisdiction as to person. See Saving Questions for Review, 10 C. L. 1572.

52. Where want of jurisdiction appears on face of complaint, it is duty of federal court to notice it, regardless of manner in which it is brought to its attention. Koike v. Atchison, etc., R. Co., 157 F 623. Court bound to notice failure of complaint to sufficiently allege citizenship though no objection was made. Crosby v. Cuba R. Co., 158 F 144. Circuit court of appeal cannot ignore question of jurisdiction of circuit court appearing on record though not made ground of appeal. McGilvra v. Ross [C. C. A.] 164 F 604.

53. Objection to jurisdiction cannot be determined on preliminary motion for injunction to restrain plaintiff from proceeding further. Johnson v. Victoria Chief Copper Min. & Smelting Co., 60 Misc. 468, 112 NYS 346.

54. See, also, Pleading, 10 C. L. 1173. Where petition does not show want of juris-

effectual to raise the question of jurisdiction in personam.[55] Jurisdictional averments may be supplied by amendment in proper cases.[56] When a court is without jurisdiction, it cannot render judgment generally for defendant.[57]

*Evidence and presumptions.* See 10 C. L. 540.—Courts of general jurisdiction are presumed to have had jurisdiction in given case.[58] Though there is no presumption in favor of the existence of a limited or special jurisdiction,[59] a jurisdiction, whether limited or general, will be presumed to have been rightfully exercised where it is shown to have existed.[60]

## JURY.


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diction, defendant desiring to raise question should point out distinctly, in answer or other pleading, reasons for want of jurisdiction. Richardson v. Louisville & N. R. Co., 33 Ky. L. R. 972, 112 SW 582. Answer denying "that this court has jurisdiction as to" defendants held mere conclusion. Hendricks v. Calloway, 211 Mo. 536, 111 SW 60.

**55.** Bernstein v. Dalton Clark Stave Co. [La.] 47 S 753.

**56.** In condemnation proceedings in county courts of Colorado, complaint wanting in a requisite jurisdictional averment, such as one relating to the value of the property involved, is not void but amendable, and amendment when made relates back to time of filing complaint. Goodman v. Ft. Collins [C. C. A.] 164 F 970.

**57.** Judgment should be for dismissal and not for defendant on merits. Taylor v. Gilleran, 111 NYS 719. When a plea to the jurisdiction is sustained, the judgment should be that plaintiff take nothing and that defendant go hence without day. Hartzell v. Maryland Casualty Co., 139 Ill. App. 366.

**58.** Nothing is presumed beyond cognizance of courts of general jurisdiction. Cobe v. Guyer, 139 Ill. App. 580; Horn v. Metzger, 234 Ill. 240, 84 NE 893. City court of East St. Louis being court of general jurisdiction, it will be presumed it had jurisdiction both of parties and subject-matter to enable it to render a decree. Horn v. Metzger, 234 Ill. 240, 84 NE 893. Circuit courts being courts of general jurisdiction, jurisdiction in personam will be presumed. Richardson v. Louisville & N. R. Co., 33 Ky. L. R. 972, 112 SW 582. To sustain objection, lack of jurisdiction must appear affirmatively on record. Ex parte Pearson, 79 S. C. 302, 60 SE 706. Since as to probate matters county court is a superior court of general jurisdiction, in pleading a judgment of such court sitting in probate it is only necessary to allege that it was rendered in a probate matter. Nolan v. Hughes [Or.] 93 P 362. Presumption in favor of jurisdiction cannot prevail against record showing insufficient proof of publication of notice. Deputy v. Dollarhide [Ind. App.] 86 NE 344. Order of court of general jurisdiction authorizing sale and reinvestment by trustee held not void for failure of record to affirmatively show due perfecting of service on minor beneficiaries, though granted at chambers and in vacation. Peavy v. Dure [Ga.] 62 SE 47. Collateral **attack of judgments** for jurisdictional defects, see Judgments, 10 C. L. 467.

**59.** Since county court is of limited jurisdiction, and under Const. art 6, § 14, has jurisdiction of action to recover money where defendant resides in county and sum demanded does not exceed $2,000, complaint in such an action must allege that defendant is resident of county. Henneke v. Schmidt, 121 App. Div. 516, 106 NYS 138. Jurisdiction of justice in garnishment proceeding cannot be presumed but must affirmatively appear on face of proceedings. Walker v. O'Gara Coal Co., 140 Ill. App. 279. Jurisdiction of municipal court being limited, all facts essential thereto must appear in record. Carpenter v. Pirner, 107 NYS 875. Though in pleading judgments of inferior courts fact showing jurisdiction must be alleged or pleader may, under Code Civ. Proc. § 532, state that judgment was "duly given or made," allegation in supplementary proceedings on municipal court judgment that judgment was "duly recovered" was equivalent to allegation that it was duly given. Hottenroth v. Flaherty, 112 NYS 1111.

**60.** Carter's Adm'r v. Skillman [Va.] 60 SE 775. Rule applicable to county court, only

*The scope of this topic* is noted below.[61]

§ 1. *Necessity or occasion for a jury trial. A. As "preserved" by the constitutions.* See 10 C. L. 641—The right to a jury trial of the issues of fact[62] cannot be curtailed by the courts[63] or abridged by legislative enactments,[64] but a general provision that the right "shall remain inviolate" only preserves the right as it existed prior to the adoption of the constitution.[65] The right does not exist in equitable actions,[66]

difference between courts of general and courts of limited jurisdiction being that as to former jurisdiction is presumed, while as to latter presumption is against jurisdiction. Id.

**61. It includes** generally all matters relating to necessity of jury trial and the selection and service of petit jurors in both civil and criminal cases. **It excludes** grand juries (see Grand Jury, 11 C. L. 1658), feigned issues out of chancery (see Equity, 11 C. L. 1235), the custody and conduct of juries during the trial (see Trial, 10 C. L. 1896, as to civil trials; Indictment and Prosecution, 12 C. L. 1, as to criminal trials), misconduct as ground for new trial (see New Trial and Arrest of Judgment, 10 C. L. 999, as to civil trials; Indictment and Prosecution, 12 C. L. 1, as to criminal trials), and the rendition and reception of verdict (see Verdicts and Findings, 10 C. L. 1974; Indictment and Prosecution, 12 C. L. 1). As to powers and province of the jury, see Questions of Law and Fact, 10 C. L. 1346, and topics there referred to.

**62.** "Right to a jury trial" is right to submission of all issues in case on law given by court whereby jury determines rights of litigants. John King Co. v. Louisville & N. R. Co. [Ky.] 114 SW 308. Right not satisfied where most important part of case was submitted to jury, case having been erroneously transferred to equity docket. Id.

**63.** Supreme court may not infringe on right. Patterson v. Warfield, 233 Ill. 147, 84 NE 176; Hayward v. Sencenbaugh, 235 Ill. 580, 85 NE 939. Continual setting aside of verdicts until jury agrees with trial court an infringement under Const. art. 1, § 2, providing that right to jury shall remain "inviolate" meaning thereby unhurt, uninjured, unpolluted, unbroken. Ridgely v. Taylor, 110 NYS 665. Where three juries believed plaintiff's version of case, trial court was not justified in setting aside verdict as against weight of evidence. Id.

**64.** Wilmarth v. King, 74 N. H. 512, 69 A 889; Johnson v. State [Okl. Cr. App.] 97 P 1059. Right to jury trial secured by 7th amend. Const. not infringed by proceeding under bankrupt act of July 1, 1898, § 60d, to re-examine and reduce payments and transfers of property to counsel by bankrupt in contemplation of services to be rendered. In re Wood, 210 U. S. 247, 52 Law. Ed. 1046.

**65.** Comingor v. Louisville Trust Co., 33 Ky. L. R. 53, 108 SW 950; Lee v. Conran [Mo.] 111 SW 151; Snell v. Niagara Paper Mills [N. Y.] 86 NE 460; Steele v. Sexton [Tenn.] 114 SW 494; Pittman v. Byars [Tex. Civ. App.] 112 SW 102.

**Held constitutional:** Rev. Codes 1905, § 7047, subd. 1, relative to references. Smith v. Kunert [N. D.] 115 NW 76. Acts 1907, p. 639, c. 185, providing for trial of violators of game laws before justice of peace with right of appeal. State v. Sexton [Tenn.] 114 SW 494. Pub. St. c. 248, § 3, authorizing justices of peace to determine punishment when imprisonment does not exceed six months. Such punishment not more than public whipping and sitting in stocks which was permissible under constitution of 1784. Wilmarth v. King, 74 N. H. 512, 69 A 889. Statute providing for enforcement of mechanic's lien in equity. Mills v. Britt [Fla.] 47 S 799. Rev. St. 1895, art. 85, providing for compensation of assignee; to be allowed by county or district judge in case of difference between parties. Schutz v. Burges [Tex. Civ. App.] 110 SW 494. Laws 1905, p. 66, c. 5,388, § 9, authorizing commitment of incorrigibles by judge of circuit or county court without trial by jury, is to that extent constitutional. Pugh v. Bowden [Fla.] 45 S 499. Gen. Laws 1906, §§ 1200, 1201, 1202, and § 1203, as am'd by Laws of 1907, ch. 5706, p. 217, providing for commitment of **lunatics** by county judge's courts, do not violate § 3, of Declaration of Rights of Constitution in not providing jury trial, such right not being in use prior to adoption of constitution. Ex parte Scuddamore [Fla.] 46 S 279. Insane person has right to trial by jury on issue of insanity, it being custom of chancellor to require trial by jury on question of insanity when constitution adopted. Sporza v. German Sav. Bank, 192 N. Y. 8, 84 NE 406. Insanity Law (L. 1896, p. 471, c. 545) preserves right to trial by jury by providing for same at request of relatives or friends. Id. Court will assume that commitment to insane hospital was based on steps required by law, such as trial by jury, where record fails to disclose proceedings. Id. Right of insane person to jury trial personal to him and person's name in statute. Debtor may not claim. Id. Constitutional provision does not apply to **original suit in supreme court.** People v. Alton, 233 Ill. 542, 84 NE 664.

**Unconstitutional:** Practice Act, § 119 (L. 1907, p. 468), providing for final judgment of supreme court on appeal from decision of new trial in appellate court. Patterson v. Warfield, 233 Ill. 147, 84 NE 176. Laws 1907, p. 467, § 119, providing that appellant to supreme court must stipulate for judgment absolute on reversal. Hayward v. Sencenbaugh, 235 Ill. 580, 85 NE 939. Though jury was waived on mutual consent at trial which resulted in judgment appealed from. Id. Practice Act, § 119 (L. 1907, p. 467), providing for appeal from appellate court on judgments of new trial, and rendition of final judgment if such appeal is not prosecuted with effect, is unconstitutional as special legislation. Id.

**66.** Maas v. Dunmyer [Okl.] 96 P 591; Canavan v. Paye, 34 Pa. Super. Ct. 91; Keenan v. Leslie, 79 S. C. 473, 60 SE 1114. Action to quiet title. Bradley v. Burkhart [Iowa] 115 NW 597. Action for cancellation of certificate of stock and issuance of new certificate

and the primary relief sought, if warranted by the pleadings,[67] characterizes the action.[68] Where an equitable action involves distinct legal issues, the latter are triable by jury.[69] The retention of equitable jurisdiction for the determination of all the issues involved,[70] and the allowance of a bill to restrain a multiplicity of suits,[71] does not infringe the right, but where an equity suit is changed to a law action, the right cannot be denied.[72] A law action may become equitable by interpleader.[73] The

Noble v. Learned, 153 Cal. 245, 94 P 1047. Opinion of jury on question of fact advisory. Burns' Ann. St. 1901, § 412. Small v. Binford, 41 Ind. App. 440, 83 NE 507. Under Burns' Ann. St. 1901, § 412, providing that where there is joinder of legal and equitable actions former be tried by jury unless waived and latter by court, it was not error to deny request for jury trial on issues raised in two paragraphs of complaint where either paragraph invoked equity jurisdiction. Watt v. Barnes, 41 Ind. App. 466, 84 NE 158. In proceedings under Code Civ. Proc. c. 17, tit. 2, §§ 2256, 2257, to redeem leased property, neither party is entitled to jury trial, proceedings being equitable in nature. Statutes construed. Ebling Brew. Co. v. Nimphius, 58 Misc. 545, 109 NYS 808. Plaintiff has no absolute right to jury trial where issues in suit based on fraudulent obtaining of money are such as prior to Jan. 1, 1880, would have been properly cognizable in equity. Gen. St. 1902, § 720. Bristol v. Pitchard [Conn.] 71 A 558. Acts 1897, p. 82, providing for determination of whether law had been complied with in respect to certain bonds before their issuance, is not unconstitutional for making no reference to jury trial, since action is nearer equitable than legal. Lippitt v. Albany [Ga.] 63 SE 33.

**67.** Demand for equitable relief will not convert law case into equitable one to deprive plaintiff of jury trial. Thompson v. National Bank of Commerce [Mo. App.] 110 SW 681. Right to jury trial not forfeited by fact that petition for damages for overflowing of land also prays for injunction. Bratton v. Catawba Power Co. [S. C.] 60 SE 673.

**68. Equitable:** Right properly denied defendant who presented defense of purchaser for value without notice (Atlantic & C. Air Line R. Co. v. Victor Mfg. Co., 79 S. C. 266, 60 SE 675), estoppel (Id.), or a defense, so interwoven with plaintiff's cause as to partake of equitable nature (Id.). Issues arising where judgment is sought to be vacated or modified and validity of defense are triable by court without jury. Mansf. Dig. Ark. § 3913 (Ind. T. Ann. St. 1899, § 2593). Poff v. Lockridge [Okl.] 98 P 427. Bill in equity to enforce mechanic's lien not action to recover on contract, though labor and material furnished in accordance with contract. Mills v. Britt [Fla.] 47 S 799. In action to restrain trespass on land, defense that deed under which plaintiff claims is void for fraud does not entitle defendant to jury trial, since equity has concurrent jurisdiction. Atlantic & C. Air Line R. Co. v. Victor Mfg. Co., 79 S. C. 266, 60 SE 675. Equitable defenses interposed in ejectment may be disposed of without jury. Cassin v. Nicholson [Cal.] 98 P 190.

**Legal:** Party entitled to jury trial as matter of right in law action. Const. art. 1, § 6. Yeiser v. Broadwell [Neb.] 115 NW 293. Where issues involved can be properly disposed of by jury, action should not be tried by referee. Northrop v. Butler, 110 NYS 815. Complaint entitling plaintiff to punitive damages presents issue for jury. Bratton v. Catawba Power Co. [S. C.] 60 SE 673. Error to refuse jury trial in action for conversion of proceeds of bank check which is denied. Brockway v. Reynolds [Neb.] 118 NW 1055. Where petition for breach of contract for services is denied, issues are for jury. Snell v. Niagara Paper Mills [N. Y.] 86 NE 460. Either party entitled to jury as matter of right in action for damages for leaving fence in unsafe condition, permitting escape of cattle. Stanley v. Atchison, etc., R. Co. [Kan.] 96 P 34. Action by shipper, under **Sherman anti-trust law** (Act July 2, 1890, c. 647, § 7, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), to recover treble damages to business by reason of conspiracy and combination of interstate carriers in charging excessive rates, an action at law and parties entitled to jury trial. Meeker v. Lehigh Valley R. Co., 162 F 354.

**69.** Issues of fact exclusively for jury at common law. United States v. Ramsey, 158 F 488. Title to land. Bratton v. Catawba Power Co. [S. C.] 60 SE 673. Question of title by accretion. Const. 1875, art. 2, § 28 (Ann. St. 1906, p. 162). Lee v. Conran [Mo.] 111 SW 1151. Direct attack on validity of liquor election triable before judge and jury in suit for restraining order. Wallace v. Salisbury [N. C.] 60 SE 713. Issues of whether bankrupt rendered services at defendant's request and, if so, value thereof, are triable by jury. Breck v. U. S. Title Guaranty & Indemnity Co., 128 App. Div. 311, 112 NYS 756. Under Civ. Code Prac. §§ 10-12, party to equitable action has right to trial of legal issues by jury. Morawick v. Martineck's Guardian, 32 Ky. L. R. 971, 107 SW 759. Code refers only to legal issues. Barnes v. Johnson, 32 Ky. L. R. 803, 111 SW 372. Code Civ. Proc. 1902, § 274, refers strictly to legal issues. Keenan v. Leslie, 79 S. C. 473, 60 SE 1114. In action to enforce double lien for repairs on and storage of defendant's automobile where plaintiff had voluntarily surrendered car on artisan's lien, which was not shown to be prior to plaintiff's lien, defendant was entitled to jury trial on issue as to claim for storage and amount. Gage v. Callanan, 113 NYS 227.

**70.** In proceeding to compel assignee to settle accounts for benefit of creditors, incidental issues of fraud and value need not be submitted to jury. Cominger v. Louisville Trust Co., 33 Ky. L. R. 53, 108 SW 950.

**71.** Jury trial must give way to appeal to equity where ordinary proceeding at law will not sufficiently administer justice. Southern Steel Co. v. Hopkins [Ala.] 47 S 274.

**72.** Where equitable suit to set aside conveyance was changed to action for money damages on account of grantee's conveyance, equity court could not retain jurisdiction and deprive defendant of right to jury. Maass v. Rosenthal, 109 NYS 917. In action to enforce

right to a jury does not exist in summary proceedings,[74] contempt, [75] habeas corpus,[76] eminent domain proceedings,[77] or a motion from office,[78] unless conferred by the statute.[79] Neither is the right guaranteed in trials for violation of municipal ordinances [80] as distinguished from criminal prosecutions.[81]

*Denial of the right; conditions.* See 10 C. L. 542—It is error to deny a jury trial because its grant would necessitate a continuance,[82] because the action involves a long examination of documents,[83] or because of a refusal to advance the venire fees.[84] The entry of judgment where there is no issuable defense is not a violation of the right,[85] but a denial may take place by arresting the introduction of evidence and directing a verdict.[86] The denial of a jury trial in a case where a jury may be waived is error only [87] which may be harmless.[88] Where a jury trial is not of right, an abuse of discretion is necessary to occasion a denial.[89] Mandamus will not lie to compel a judge to call a jury where the right is not endangered.[90]

*The character of the jury guaranteed* See 10 C. L. 543 is the common-law jury com-

attorney's lien where defendant filed bond under Code, § 322, which bond operated to release lien, plaintiff's demand became one at law for recovery of compensation and he was entitled to jury trial. Jamison v. Ranck [Iowa] 119 NW 76.

**73.** Action of law in city court which by interpleader, under Code Civ. Proc. § 820, becomes equitable, is triable without jury. Schreiber v. Dry Dock Sav. Inst., 112 NYS 360.

**74.** Where a purchaser at partition sale refuses property causing a resale at a loss, the loss may be recovered by summary proceedings without a trial by jury. Rev. St. 1835, pp. 258, 259, §§ 40, 41 (Rev. St. 1899, p. 799, §§ 3202, 3203; Ann. St. 1906, p. 1819), and Wag. St. p. 970, c. 104, art. 2, § 31 (Rev. St. 1899, § 4407; Ann. St. 1906, p. 2421). McNamee v. Cole [Mo. App.] 114 SW 46. Proceedings by state board of health to revoke physician's license for cause are summary in their nature and triable by board without intervention of jury. Munk v. Frink [Neb.] 116 NW 525.

**75.** Defendant on trial for an indirect contempt is not of right entitled to jury trial. Laws 1901, ch. 123, p. 231, valid. State v. Johnston [Kan.] 97 P 790.

**76.** Const. art. 1, § 15, art. 5, § 10. Pittman v. Byars [Tex. Civ. App.] 112 SW 102.

**77.** Amount of attorney's fee in proceedings to condemn land for public use may be determined by court without jury. Richardson v. Centerville, 137 Iowa, 253, 114 NW 1071.

**78.** Burke v. Jenkins [N. C.] 61 SE 608.

**79.** See § 1B, As Conferred Where the Common Law Did Not Give It.

**80.** Const. art. 2, § 9, providing that accused in criminal prosecutions have jury trial, etc., does not apply to action for penalty for violation of city ordinance. Not criminal prosecution. City of Chicago v. Knobel, 232 Ill. 112, 83 NE 459.

**81.** Commitment of person by criminal court of record according to Laws 1905, p. 66, c. 5388, § 9, is void and unconstitutional, unless trial by jury. Pugh v. Bowden [Fla.] 45 S 499.

**82.** Error to refuse trial by jury when properly demanded in accordance with Const. art. 5, § 10, and Sayles' Ann. Civ. St. 1897, art. 3189, though grant of such right would necessitate continuance. Cleveland v. Smith [Tex. Civ. App.] 113 SW 547.

**83.** Plaintiff's right to jury trial in action for breach of contract for services not referable by fact that counterclaim involved long examination of documents, etc. Snell v. Niagara Paper Mills [N. Y.] 86 NE 460.

**84.** New Jersey Soc. for Prevention of Cruelty to Animals v. Wilbur [N. J. Law] 69 A 1010.

**85.** Entry of judgment in action on unconditional contract in writing where no issuable defense is not in violation of right to jury trial. Plea of general issue no defense. Jester v. Bainbridge State Bank [Ga. App.] 61 SE 926. Judgment upon unconditional contract in writing properly rendered by judge without jury where all defenses are stricken. Moore v. Smith Mach. Co. [Ga. App.] 60 SE 1035.

**86.** Arresting introduction of evidence before defendant rested, and instructing jury to convict, error, as defendant entitled to have question passed on by jury. Commonwealth v. Gamble, 36 Pa. Super. Ct. 146.

**87.** Not excess of jurisdiction. Writ of review applicable. Goodman v. Santa Clara County Super. Ct. [Cal. App.] 96 P 395.

**88.** Denial of right to jury pursuant to stipulation under which prior trial had been had not harmful where court made full findings of fact and added determination to verdict in accordance therewith. Twentieth Century Co. v. Quilling [Wis.] 117 NW 1007.

**89.** Where trial of issues by jury is discretionary (Code Civ. Proc. § 971), refusal of jury trial is not erroneous though based to some extent on condition of jury calendar. Borosky v. Gallin, 110 NYS 818. Where plaintiff selected equity court and waited three months before exercising right, though counterclaim presented issue of law, denial not abuse. Ettlinger v. Trustees of Sailors' Snug Harbor, 122 App. Div. 681, 107 NYS 779.

**90.** Where mistrial occurred number of times in preference case and district judge fixed case de novo for trial but refused to call jury for that day, mandamus would not lie to compel such call, since judge showed that attorney general wished for change of venue which judge intended to grant, and if such venue should not be granted case might be postponed till jury could be had. State v. Reid, 121 La. 93, 46 S 113.

posed of twelve men,[91] and the right to a jury of this number cannot be abridged by statute,[92] though in some states the right only exists where a felony is to be punished,[93] or in civil cases where the amount exceeds one hundred dollars.[94] A verdict rendered by an insufficient number of jurors should be set aside.[95]

(§ 1) *B. As conferred where the common law did not give it.*[See 19 C. L. 543]—The right to a jury trial as existing at the common law has been extended in many states, and a jury trial may be demanded in condemnation proceedings,[99] divorce,[97] probate matters,[98] in proceedings for the removal of a public officer,[99] or in deciding issues of fact in mandamus.[1] Statutory actions are substituted in some states with provision for trial by jury when the recovery of specific real property is sought,[2] or where the action is "for money only."[3]

**91.** Jury guaranteed by Const. art. 1, §§ 7, 8, is common-law jury of 12 jurors. Jennings v. State, 134 Wis. 307, 114 NW 492.

**92.** House Enrolled Bill No. 418 of 1907 (Loc. Laws 1907, p. 981, No. 684), establishing juvenile court, providing for juries of six (§ 5, p. 984), and vesting court with power to imprison children, etc., is unconstitutional as giving jury of six power to determine guilt of criminal when Const. art. 6, § 28, gives accused right to jury of 12 men. Robinson v. Wayne Circuit Judges, 151 Mich. 315, 14 Det. Leg. N. 945, 115 NW 682. House Enrolled Bill No. 418 of 1907 (Loc. Laws 1907, p. 988, No. 684), § 14, providing that if child be adjudged delinquent court may place case on trial, impose fine, etc., as in criminal prosecution with further provisions for trial by jury of 6, violates constitution. Id.

**93.** Jury of 5 trying an accused for petit larceny has no jurisdiction to convict for embezzlement, that being a felony punishable at hard labor. Art. 116 of constitution of 1898. State v. Evans [La.] 47 S 603.

**94.** Jury of 12 men required where damages or chattels claimed exceed $100. Municipal Court Act, Laws 1902, p. 1559, c. 580, § 234. Skinner v. Allison, 111 NYS 264.

**95.** Where one of 12 jurors disappeared. Jennings v. State, 134 Wis. 307, 114 NW 492. Mistrial where jury of 6 tried issue and defendant entitled to 12. Skinner v. Allison, 111 NYS 264.

**96.** Landowner in condemnation proceedings on filing exceptions to award of commission and demand for jury trial is entitled to such trial, though exceptions are pending and undetermined. St. Louis, etc., R. Co. v. Pfau, 212 Mo. 398, 111 SW 10. Where commissioners' report is filed and damages assessed paid into court, railroad may proceed to construct road though exceptions are taken to award and such action does not deprive landowner of trial by jury. Id.

**97.** Divorce in equity, but issue of adultery triable by jury under Code Civ. Proc. § 1757. Tietzel v. Tietzel, 122 App. Div. 873, 107 NYS 878. Submission of issue of marriage on divorce not authorized. Wood v. Platt, 57 Misc. 140, 108 NYS 948. Under Const. art. 1, § 15, art. 5, § 10, and Rev. St. art. 2979, parties to divorce are entitled to jury trial on issues of fact set forth in pleadings. Wright v. Wright [Tex. Civ. App.] 110 SW 158.

**98.** In proceeding to contest will, statute directs issue to be made up to be tried by jury. Dismissal of bill for want of equity after reversal on appeal erroneous. Crumbaugh v. Owen, 232 Ill. 191, 83 NE 803. Where reversal of appellate court is founded on question of fact and decree is on petition to admit will to probate, such material question of fact must be directed by reversal to be tried by jury. Code Civ. Proc. § 2588. In re O'Gorman's Will, 111 NYS 274. Under Civ. Code 1902, § 2561, extra compensation of administrator must be ascertained by jury, but such right may be waived. Anderson v. Silcox [S. C.] 63 SE 128. A contestant of a will has no right to a jury trial after the issues raised in the proceedings for probate have been tried by jury. Construing Statutes. In re Dolbeer's Estate, 153 Cal. 652, 96 P 266. Denial of jury not erroneous where court subsequently concluded that petitioner for revocation of probate of will had no interest in estate. In re Wickersham's Estate, 153 Cal. 603, 96 P 311. Right of trial by jury secured by constitution has no reference to proceedings on probate of wills. In re Dolbeer's Estate, 153 Cal. 652, 96 P 266. Proceedings special, belonging at common law to ecclesiastical jurisdiction. Id. On appeal to district court from order refusing to admit will to probate, district court has discretionary power to order any or all material issues to be tried by jury. Cartwright v. Holcomb [Okl.] 97 P 385. Proceeding to contest will not suit at common law wherein right to trial by jury is guaranteed by 7th amend. to constitution. Id.

**99.** Officer in proceedings for removal from office for malfeasance is entitled to jury trial under Comp. L. 1907, §§ 4574, 4575. Law v. Smith [Utah] 98 P 300. When accorded, the trial by jury should be conducted as in similar judicial proceedings. Doubt as to right. Territory v. Sanches [N. M.] 94 P 954.

**1.** Issue of fact joined on issuance of alternative writ of mandamus. Code Civ. Proc. §§ 2082, 2083. People v. Italian Ass'n St. B. E. of M. A., 123 App. Div. 277, 107 NYS 1101.

**2.** Action under Rev. Code Civ. Proc. § 675, which is substituted for action of ejectment and proceeding to quiet title, presents an issue of fact for recovery of specific real property, and under § 244 must be tried by jury. Burleigh v. Hecht [S. D.] 117 NW 367.

**3.** Action against partner for fraud in retaining certain money an action at law triable by jury. Rev. St. 1899, § 691 (Ann. St. 1906, p. 700). Baum v. Stephenson [Mo. App.] 113 SW 225. Rev. St. 1906, § 5130, extending trial by jury in actions for money only, is applicable, regardless of number of items of account, unless relation is such as to call for accounting. Willson Imp. Co. v. Malone, 78 Ohio St. 232, 85 NE 51. Rev. St. 1906, § 5130, providing for trial by jury in actions for money only, does not extend to equity cases. Id.

(§ 1) *C. Demand, loss, or waiver of right.*[See 10 C. L. 543]—Generally trial by jury is subject to waiver in civil cases [4] and criminal cases not amounting to felony,[5] but a person accused of an infamous crime, though not a felony, cannot waive the constitutional number of jurors.[6] An incompetent may waive trial by jury on the issue of insanity.[7] In many states the right to trial by jury is conditional upon timely demand [8] made in the prescribed manner,[9] and in a justice's court such demand oper-

4. Goodman v. Santa Clara County Super. Ct. [Cal. App.] 96 P 395.

5. Const. art. 1, § 7. Goodman v. Santa Clara County Super. Ct. [Cal. App.] 96 P 395.

6. Dickinson v. U. S. [C. C. A.] 159 F 801. Trial opened with jury of twelve, but sickness intervening two were excused, defendants agreeing that trial proceed before remaining ten. Held they could not waive right by such agreement. Id. Upon pleading not guilty to information charging felony or misdemeanor, accused cannot waive jury of less than 12. Jennings v. State, 134 Wis. 307, 114 NW 492.

**NOTE. Validity of waiver of jury trial in criminal actions:** It is held in In re Quown [Okl.] 91 P 689, 11 L. R. A. (N. S.) 1136, that one charged with a crime triable by jury at common law cannot waive such right. Although the contrary has been often asserted, it may be safely said that the courts are unanimous in holding that the right to trial by jury cannot be waived by one charged with felony, in the absence of statute to that effect. Harris v. People, 128 Ill. 585, 21 NE 563, 15 Am. St. Rep. 153; Morgan v. People, 136 Ill. 161, 26 NE 651; Paulsen v. People, 195 Ill. 518, 63 NE 144; State v. Maine, 27 Conn. 281; State v. Carman, 63 Iowa, 130, 50 Am. Rep. 741, 18 NW 691; State v. Larrigan, 66 Iowa, 426, 23 NW 907; State v. Tucker, 96 Iowa, 276, 65 NW 152; State v. Douglass, 96 Iowa, 308, 65 NW 151; State v. Lightfoot, 107 Iowa, 344, 78 NW 41; State v. Rea, 126 Iowa, 65, 101 NW 507; Neales v. State, 10 Mo. 498; Arnold v. State, 38 Neb. 752, 57 NW 378; Grant v. People, 4 Park. Crim Rep. 527; State v. Thompson, 104 La. 167, 28 S 882; State v. Jackson, 106 La. 189, 30 S 309; State v. Lockwood, 43 Wis. 403; State v. Simons, 61 Kan. 752, 60 NW 1052; State v. Holt, 90 N. C. 749, 47 Am. Rep. 544; State v. Stewart, 89 N. C. 563; Maye v. Com., 82 Va. 550; Ford v. Com., 82 Va. 553; Wilson v. State, 16 Ark. 601; Bond v. State, 17 Ark. 290; People v. Smith, 9 Mich. 193; Williams v. State, 12 Ohio St. 622. In Indiana where there is a statutory provision authorizing waiver of jury trial in all cases except capital crimes, it is held that jury cannot be waived in the latter class of cases. Warner v. State, 102 Ind. 52, 1 NE 65; Lowery v. Howard, 103 Ind. 440, 3 NE 124; Frazier v. State, 106 Ind. 562, 7 NE 378. In the case of misdemeanors the same rule is asserted by a few authorities (State v. Tucker, 96 Iowa, 276, 65 NW 152; State v. Douglass, 96 Iowa, 308, 65 NW 151; State v. Lockwood, 43 Wis. 403 [obiter]), but the very great weight of authority is to the contrary and the right to waive jury trial, even in the absence of statutory authority, is maintained (Logan v. State, 86 Ga. 266, 12 SE 406; Moore v. State, 124 Ga. 30, 52 SE 81; Hollis v. State, 118 Ga. 760, 45 SE 617; Darst v. People, 51 Ill. 286, 2 Am. Rep. 301; Austin v. People, 63 Ill. App. 298; Daliman v. People, 113 Ill. App. 507; Jacobs v. People, 218 Ill. 500, 75 NE 1034; State v. Shafer, 82 Mo. App. 60; St. Charles v. Hackman, 133 Mo. 634, 34 SW 878; Levi v. State, 4 Baxt. [Tenn.] 289; State v. Alderton, 50 W. Va. 101, 40 SE 350; State v. Packenham, 40 Wash. 403, 82 P 597; United States v. Praeger, 149 F 474; Schick v. U. S., 195 U. S. 65, 49 Law. Ed. 99). This note does not include cases upon the right of one charged with crime to waive irregularities in qualifications or number of jurors or like objections to the proceedings, for a discussion of which see Schick v. U. S., 195 U. S. 65, 49 Law. Ed. 99.—Adapted from 11 L. R. A. (N. S.) 1136.

7. Under Const. art. 1, § 2. Sporza v. German Sav. Bank, 192 N. Y. 8, 84 NE 406.

8. Court and Practice Act 1905, § 799. Arnold v. Regan [R. I.] 69 A 292. Demand waived unless made before evidence was produced. Issues on foreclosure of mechanic's lien. Spring v. Collins Bldg. & Const. Co., 113 NYS 29. Demand for jury too late where reference had been ordered by consent. Bruce v. Carolina Queen Consol. Min. Co. [N. C.] 61 SE 579. Request for jury after trial of issue has begun too late. In re Wickersham's Estate, 153 Cal. 603, 96 P 311. Under Acts 1896-97, pp. 807, 813, §§ 10, 25, right to trial by jury in misdemeanor case is waived by failure to make demand before first term of court after arrest. Hammond v. State [Ala.] 45 S 654. Under Loc. Laws, Jefferson County, p. 604, § 13 (Gen. Laws 1886-87, p. 838), demand for trial jury in misdemeanor case must be made to clerk within 10 days after arrest. Expression "or after court assumes jurisdiction" applies only to cases transferred to that court. Merriweather v. State [Ala.] 45 S 420. Under Acts 1894-95, p. 1062, § 19, and Acts 1896-97, p. 327, §§ 8, 11, where defendant took appeal from conviction in recorder's court to city court and made no demand for jury on appeal or when case was sounded for trial, demand after term at which appeal was taken was too late. Harrison v. Anniston [Ala.] 46 S 980.

9. No definite form of notice prescribed by Court and Practice Act 1905, § 799. Arnold v. Regan [R. I.] 69 A 292. Title and venue and words "in the above entitled cause the appellants move that the same be assigned for jury trial," signed by attorney, held sufficient. Id. Exception to ruling denying twelve jurors preserves right and same is not lost by partition in trial. Skinner v. Allison, 111 NYS 264. Waiver where defendant proceeded to trial merely excepting to amendment which changed equitable cause of action. Reynolds v. Wynne, 111 NYS 248. A request for submission of a disputed fact must be specific. Suggestion that issue was disputed not equivalent to request. Kinner v. Whipple, 113 NYS 337. Under act establishing city court of Thomasville (Acts 1905, p. 392), § 31, written demand "15 days after first day of term of court to which case is returnable" is requisite or waiver. No ex-

ates to deprive the justice of jurisdiction to try a cause without a jury.[10] Where the waiver is conditioned upon the failure of both parties to make a demand,[11] a request by the plaintiff assures the right to the defendant.[12] The waiver of the right operates as a waiver of the re-examination on appeal of any question of law or fact decided upon or in connection with the trial.[13] The right to a jury will not be determined on appeal where there was no demand.[14]

*What constitutes waiver.* See 10 C. L. 544—The waiver of a jury trial may be by consent [15] or the failure to make a demand.[16] The election of an equity forum constitutes waiver,[17] but the right to a jury trial on the issue of adultery is not waived by noticing for trial and filing a note of issue in the equity court.[18] A request for a directed verdict by both parties operates as a waiver,[19] unless the rule is changed by statute.[20] Where written consent is required before the court can order a reference, the right to trial by jury is not waived by silence,[21] and an agreement that a cause be referred to a referee is not a consent that the court may determine the issues.[22] Where an equity court loses jurisdiction by the change of the cause of action, the consent of the parties is required to cause a waiver of the jury trial,[23] and such con-

ception because judge is disqualified. Mills v. Ivey, 3 Ga. App. 557, 60 SE 299. Under Loc. Acts 1900-01, p. 1298, § 14, in reference to trial of misdemeanor cases in Gadsden city court, and rule of court requiring demand for jury at 9 a. m. on first Monday after arrest, written demand at 2 o'clock p. m. may be properly disregarded. Stafford v. State [Ala.] 45 S 673.

10. New Jersey Soc. for Prevention of Cruelty to Animals v. Wilbur [N. J. Law] 69 A 1010.

11. Under Municipal Court Act, L. 1902, p. 1557, c. 580, §§ 230, 231, jury trial is waived when neither party makes demand. Karch v. Nassau Elec. R. Co., 123 App. Div. 34, 107 NYS 829.

12. Trial by court after plaintiff's waiver against defendant's protest erroneous. Karch v. Nassau Elec. R. Co., 123 App. Div. 34, 107 NYS 829. Where plaintiff demanded jury and defendant's challenge to venire was sustained, plaintiff could not waive demand. Municipal Court Act, L. 1902, p. 1557, c. 580, § 230. Id.

13. Where cause triable by jury under Rev. St. § 566, U. S. Comp. St. 1901, p. 461, is tried by court by consent of parties, no question of fact or law is subject to re-examination in appellate court. United States v. Cleage [C. C. A.] 161 F 85. Rev. St. §§ 649, 700, U. S. Comp. St. 1901, pp. 525, 570, providing for waiver of jury and review of judgments, relates exclusively to trials in circuit courts. Id. Where parties agree upon statements of ultimate facts and not evidence of them, and cause is submitted to court, judgment may be reviewed upon writ of error. Id.

14. Grimm v. Pacific Creosoting Co. [Wash.] 97 P 297.

15. United States v. Ramsey, 158 F 488. Question of law and fact on mandamus by consent. Manson v. College Park [Ga.] 62 SE 278.

16. See ante, § 1C, Demand, etc. Waiver of jury trial on issue of insanity takes place where no demand for jury. Sporza v. German Sav. Bank, 192 N. Y. 8, 84 NE 406. Assessment of damages by court upon default proper where no request for jury and no exception to failure to call. Snow v. Merriam, 133 Ill. App. 641. Party in divorce action who makes no objection to submission of issue of custody of child until after verdict waives error if any in such submission. Wright v. Wright [Tex. Civ. App.] 110 SW 158.

17. Chattel mortgage creditor of bankrupt who consents to sale of property by trustee in bankruptcy and files petition in bankruptcy court to establish lien on proceeds cannot demand jury trial. In re Standard Tel. & Elec. Co., 157 F 106. Consolidation and trying issues without jury not error when appellants voluntarily came into court of equity. Slaughter v. McManigal [Iowa] 116 NW 726. In action to set aside umpire's award with reference to renewal of lease on defendant's property where plaintiff selected equitable court, he could not subsequently demand trial by jury though counterclaim presented issues at law. Ettlinger v. Trustees of Sailors' Snug Harbor, 122 App. Div. 681, 107 NYS 779.

18. Tietzel v. Tietzel, 122 App. Div. 873, 107 NYS 878. Denial of jury trial error when no purpose to delay action. Id.

19. Where neither party requests submission of issue to jury, but both ask for direction in their favor, right to jury trial is waived. Kinner v. Whipple, 113 NYS 337.

20. The fact that each party asks for a directed verdict does not amount to a waiver, within Practice Act, §§ 60, 61, 82 (L. 1907, pp. 456, 460). Wolf v. Chicago Sign Print. Co., 233 Ill. 501, 84 NE 614.

21. Under Rev. Codes 1905, §§ 7046, 7047, compulsory reference cannot be ordered unless with parties' written consent. Smith v. Kunert [N. D.] 115 NW 76.

22. United States v. Ramsey, 158 F 488. Court has no authority to determine issues of fact without the consent of the parties. Under statutes of U. S. and Idaho. Id.

23. Maass v. Rosenthal, 109 NYS 917. Where equitable suit to set aside conveyance was changed to action for money damages, it appearing that grantee had conveyed, failure of grantee to object to evidence of condition and value of property conveyed, etc., did not amount to waiver. Id.

sent cannot be implied from the filing of the answer.[24] The fact that a creditor of an insolvent corporation filed a claim against an estate with a receiver appointed in equity does not operate to cause a waiver of a jury trial in an action by the receiver on a money demand against such claimant.[25]

§ 2. *Eligibility to and exemption from jury service.* See 10 C. L. 544—Exemption is a personal privilege,[26] and exemption but not disqualification results from age,[27] prior jury service within a specified time,[28] or certain positions in the public service.[29] A juror who has been convicted of a crime,[30] or one who cannot understand English,[31] is disqualified.

§ 3. *Disqualifications pertaining to the particular cause. Right to an unbiased and unprejudiced jury.* See 10 C. L. 545—Jurors should be free from prejudice.[32] A primary cause of disqualification is the existence of a fixed opinion,[33] but a juror is not disqualified because he has an opinion[34] based on rumors[35] or newspaper re-

**24.** Objections before and after filing. Jamison v. Ranck [Iowa] 119 NW 76. Where action to enforce attorney's lien became action at law for compensation by filing of bond to release lien under Code, § 322. Id.

**25.** Whelan v. Enterprise Transp. Co., 164 F 95.

**26.** Crawford v. U. S., 30 App. D. C. 1; Albany Phosphate Co. v. Hugger Bros. [Ga. App.] 62 SE 533; State v. Graham, 79 S. C. 116, 60 SE 431.

**27.** Under Rev. St. 1899, § 3799 (Ann. St. 1906, p. 2107). Blair v. Paterson [Mo. App.] 110 SW 615. Juror over 60 exempt. Albany Phosphate Co. v. Hugger Bros. [Ga. App.] 62 SE 533.

**Not disqualification:** Juror over 60 years exempt but not disqualified. Albany Phosphate Co. v. Hugger Bros. [Ga. App.] 62 SE 533.

**28.** Juror who has served in either court within year immediately preceding his selection as member of jury panel or talesmen is not competent. Burns' Ann. St. 1901, § 1451. Mason v. State [Ind.] 83 NE 613. Under Rev. St. § 812 (U. S. Comp. St. 1901, p. 627), as modified by Act June 30, 1879, c. 52, § 2, 21 Stat. 43 (U. S. Comp. St. 1901, p. 624), prior service within one year in same court disqualifies. Morris v. U. S. [C. C. A.] 161 F 672.

**Not disqualified:** Juror not disqualified in criminal case by service as juror for six days during preceding six months in district court or during preceding three months in county court. Code Cr. Proc. 1895, art. 673. Benton v. State, 52 Tex. Cr. App. 360, 107 SW 838.

**29.** Under D. C. Code, § 215 (31 Stat. at L. 1223, c. 854), and § 217, salaried officers of government are given right to assert exemption from jury list. Crawford v. U. S., 30 App. D. C. 1.

**Not disqualification:** Under D. C. Code, § 215 (31 Stat. at L. 1223, ch. 854), salaried officers of government are not disqualified to act as jurors. Crawford v. U. S., 30 App. D. C. 1. Druggist whose store is postal substation is not ipso facto disqualified as juror, though being salaried officer of government and exempt. Id.

**30.** Under Code Cr. Proc. 1895, art. 673, subd. 3, and art. 676, juror who has been convicted and sentenced for perjury and has not been pardoned is absolutely disqualified. Rice v. State, 52 Tex. Cr. App. 359, 107 SW 832.

**31.** Mexican examined in English language answering correctly and able to read intelligently not disqualified. Essary v. State, 53 Tex. Cr. App. 596, 111 SW 927.

**32.** Johnson v. State [Okl. Cr. App.] 97 P 1059. Juror being plaintiff in suit against defendant for damages for same wrong as at issue is disqualified on account of implied bias. Stennett v. Bessemer [Ala.] 45 S 890. Where examination clearly showed bias. Heidbrink v. United R. Co. [Mo. App.] 113 SW 223. No bias within P. Code, § 1073, subd. 2, where juror stated that he had no prejudice against **organized labor,** though his employes had joined in strike he believed that labor organizations were prone to conspiracies. People v. Duncan [Cal. App.] 96 P 414.

**33.** Juror should not have opinion as to material fact in issue relating to parties, subject-matter or credibility of witnesses. Roberts v. State [Ga. App.] 61 SE 497. Juror having fixed opinion which it would require strong evidence to remove is incompetent, though he states that he will be governed by evidence and instructions. Murphy v. State [Miss.] 45 S 865.

**34.** Juror who had opinion which it would take evidence to remove but who stated himself capable to try case on merits competent. State v. Banner [N. C.] 63 SE 84. Where record did not show opinion. Smith v. Chicago, B. & Q. R. Co. [Neb.] 115 NW 755. Opinion of juror as to liability of defendant in other cases not cause for challenge. Id. Where from all evidence juror has no bias or prejudice and only desires to reach result to which evidence conduces, he is competent, though he has expressed opinion as to guilt of accused. Code 1906, § 2685. Murphy v. State [Miss.] 45 S 865. While it is rule that one qualified to sit as juror in criminal case who states that, notwithstanding an opinion he has formed as to guilt of defendant, he believes he can lay that opinion aside and render fair and impartial verdict based alone on the evidence and charge of court, it is nevertheless duty of court to secure as jurors men who do not entertain settled belief as to either guilt or innocence of defendant. State v. Dickerson, 7 Ohio N. P. (N. S.) 193.

**35.** Opinion based on rumor does not disqualify where juror states ability to give fair and impartial trial. Decker v. State, 85 Ark. 64, 107 SW 182; Russell v. State, 53 Tex Cr. App. 500, 111 SW 658.

ports [36] which he is able to lay aside. Neither is a juror necessarily incompetent because he has formed an opinion regarding the guilt of a person jointly indicted with the defendant.[37] Ordinarily, prior service does not disqualify a juror [38] unless the cases are identical,[39] or the credibility of the same witness is involved.[40] Mere knowledge of a prior conviction does not disqualify.[41] A juror who stated that he would give more weight to the testimony of a white man than a negro is not disqualified,[42] and the answer given under a misconception of the counsel's questions is not a sufficient reason to excuse the juror.[43] In criminal trials place of residence is material,[44] such fact is unimportant in an action to sever territory from a municipality where the determination of the case would not affect the juror's taxes.[45] Relationship to the accused,[46] or that the jurors is an employe of a party to the action,[47] are grounds for challenge, but the rules cannot be extended to disqualify a person engaged in a similar vocation,[48] a member of a similar [49] or rival corporation,[50]

**36.** Juror not disqualified by opinion based on newspapers, rumor, etc., when he stated ability to try case on evidence and instructions. State v. Howard, 120 La. 311, 45 S 260; Cooke v. People, 134 Ill. App. 41; State v. Rohn [Iowa] 119 NW 88. Opinion from newspaper reports of former trials. Noonan v. Luther, 112 NYS 898. Where court satisfied that opinion will not resist force of evidence. Johnson v. State [Okl. Cr. App.] 97 P 1059. No bias within Pen. Code, § 1073, subd. 2, where juror had opinion based on newspapers. People v. Duncan [Cal. App.] 96 P 414. Does not disqualify. Pen. Code, § 1076. People v. Maughs [Cal. App.] 96 P 407. Rev. St. 1899, § 2616 (Ann. St. 1906, p. 1550). State v. Vickers, 209 Mo. 12, 106 SW 999. Jurors who had read unsworn confession of party implicated in crime but who were able to lay aside opinion based on such reading and render verdict in accordance with law and evidence not disqualified, under Rev. St. 1899, § 2616 (Ann. St. 1906, p. 1550). State v. Bobbitt [Mo.] 114 SW 511.

**Disqualified:** Under Rev. Code Civ. Proc. § 6741, juror having opinion based on rumour or newspapers is disqualified to act in personal injury action against carrier. Shane v. Butte Elec. R. Co., 37 Mont. 599, 97 P 958. Rule of common law excluding jurors for actual bias not modified in civil cases. Id.

**37.** Griggs v. U. S. [C. C. A.] 158 F 572.

**38.** That juror states on voir dire that he has previously sat upon trial of murder case does not render him subject to challenge upon ground of implied bias. Johnson v. State [Okl. Cr. App.] 97 P 1059.

**39.** Jurors who have acted upon or heard testimony in identical case whereby they have formed opinion are disqualified. Ross v. State, 53 Tex. Cr. App. 162, 109 SW 153. Service on **grand jury** which returned indictment ground for disqualification. Ryan v. State, 10 Ohio C. C. (N. S.) 497.

**40.** Where prosecution relies on one witness. Hanes v. State [Tex. Cr. App.] 107 SW 818; Green v. State [Tex. Cr. App.] 111 SW 933. Similar prosecution. Holmes v. State, 52 Tex. Cr. App. 352, 353, 20 Tex. Ct. Rep. 844, 106 SW 1160. Where juror had acted in two similar cases. Roberts v. State [Ga. App.] 61 SE 497. Where jurors heard testimony of witness against one defendant, they were disqualified from acting on the trial of another defendant with same witness. Kenecht v. State, 53 Tex. Cr. App. 55, 108 SW 1183.

**41.** Arnwine v. State [Tex. Cr. App.] 114 SW 796. Jurors in court room whereby they obtained knowledge of trial and acquittal of accused on another charge of robbery. State v. Wren, 121 La. 55, 46 S 99. Presence of jurors during trial for adultery does not disqualify in action for unlawful carrying pistol where they state ability to act impartially. Hubbard v. State, 52 Tex. Cr. App. 399, 107 SW 351. Retention of juror possessing knowledge of former conviction harmless where juror was fair and did not disclose knowledge. Moore v. State, 52 Tex. Cr. App. 336, 107 SW 540.

**42.** Juror stated ability to give impartial trial and that he was free from prejudice. Moore v. State, 52 Tex. Cr. App. 336, 107 SW 540.

**43.** Where juror stated he would give accused benefit of reasonable doubt when court explained law. Rice v. State [Tex. Cr. App.] 112 SW 299.

**44.** Juror resident of county where crime committed, though retaining legal residence in another county, not disqualified, there being no injustice or intentional wrong. Thurman v. Com., 107 Va. 912, 60 SE 99.

**45.** Johnson v. Waterloo [Iowa] 119 NW 70. See, also, Eminent Domain, 11 C. L. 1198, as to peculiar disqualifications in that proceeding.

**46.** Pen. Code, § 1074, authorizes challenge for implied bias if juror is related to accused by consanguinity or affinity within fourth degree. Improper to sustain challenge where juror might be fourth or fifth cousin or something through marriage and had only recently ascertained fact. People v. Schmitz [Cal. App.] 94 P 407.

**47.** Employe of party to action disqualifies. Code Civ. Proc. § 1180. Blair v. McCormack Const. Co., 123 App. Div. 30, 107 NYS 750.

**Stockholder** in corporation which is party to action disqualifies. Code Civ. Proc. § 1180. Blair v. McCormack Const. Co., 123 App. Div. 30, 107 NYS 750.

**48.** In suit for real estate broker's commissions, persons engaged in similar vocation were not for that reason disqualified. Ballentine v. Mercer, 130 Mo. App. 605, 109 SW 1037. "Interest in the cause" means either direct or indirect interest in subject-matter of particular cause. Not mere general interest. Id.

**49.** Jurors having membership in cattle association for purpose of preventing thefts of

an employe of a stockholder of a corporation which is a party,[51] or a citizen and taxpayer of a municipality which is a party.[52] Statutes fixing disqualification in civil cases do not ordinarily apply in criminal cases.[53]

§ 4. *Discretion of court to excuse juror.* See 10 C. L. 546

§ 5. *The jury list and drawing for the term.* See 10 C. L. 546—Statutes providing for the selection of the jury list by jury commissioners[54] prescribe the manner of appointment of these officers.[55] In some states provision is made for a substitute when a member is absent or for action by the majority of the board.[56] The authority of a judge to draw a jury under the local laws is not an interference with the acts of the commissioners under the general law.[57] The Texas "jury wheel law" is constitutional.[58] Utter disregard of a statute requiring the names of the jurors to be selected in proportion to the number of qualified persons in the supervisor's districts renders the drawing invalid.[59] Under an act providing for the recording of the list of jurors upon the journals of the court and certifying to the correctness thereof, the purely ministerial duties could be performed by a deputy.[60] A provision for additional jurors to be drawn from the neighborhood is valid.[61] The right to jurors from the neighborhood is satisfied by drawing from the body of the county.[62] While a large

sheep and prosecuting offenders are not disqualified by that fact alone in prosecution for stealing sheep by another similar association. Starke v. State [Wyo.] 96 P 148.

**50.** Fact that juror is stockholder in rival corporation not ground for challenge for cause where juror states that he does not know defendant and could act impartially. Rogers Grain Co. v. Tanton, 136 Ill. App. 533.

**51.** Employe of stockholder of corporation not disqualified in case where corporation is party. Sansouver v. Glenlyon Dye Works, 28 R. I. 539, 68 A 545.

**52.** Action for injuries caused by defective street. Anderson v. Wilmington [Del.] 70 A 204.

**53.** Benton v. State, 52 Tex. Cr. App. 360, 107 SW 838.

**54.** Laws 1903, p. 136, c. 90, providing for selection of grand jurors, not violative of constitution, state or federal. Vought v. State, 135 Wis. 6, 114 NW 518.

**55.** Jury commissioners are statute officers, and under Const. art. 71, are appointive by general assembly. State v. Pierre, 121 La. 465, 46 S 574. Under Act No. 98, p. 124 of 1880, as am'd by Act No. 170, p. 211 of 1894, duty of appointing jury commissioners is vested in governor. Id. Acts 1898, p. 218, No. 135, § 3, providing that appointment of jury commission be written and entered on minutes of district court, sufficiently complied with by verbal order in open court entered on minutes. State v. Marionneaux, 120 La. 455, 45 S 389. Under Acts 1898, p. 218, No. 135, § 3, order appointing jury commission should be written only when made at chambers, purpose of statute being to provide for entry in minutes. Id. Acts 1898, p. 216, No. 135, sufficiently complied with by "it is ordered that jury commission is hereby ordered to be composed of following citizens," etc., naming five citizens. Id.

**56.** Civ. Code 1902, § 2909, providing that county auditor, county treasurer and clerk of common pleas constitute jury commissioners, and that majority of board may act, is not inconsistent with or repealed by Act Feb. 7, 1902 (23 St. at L. p. 1066), providing for county superintendent of education and sheriff to fill absent places. State v. Nelson [S. C.] 61 SE 897. Drawing of venire not vitiated by absence of clerk of common pleas when majority of authorized officers present. Id. Presence of sheriff at drawing under mistaken construction of statute harmless. Drawing by proper officers and no prejudice. Id.

**57.** Authority under Laws 1906, p. 52. Rosenblatt v. State, 2 Ga. App. 649, 58 SE 1107.

**58.** "Jury wheel law," Acts 30th Leg., c. 139, § 1 (L. 1907, p. 269), enacting jury law to be operative in counties having city or cities aggregating 20,000 inhabitants, applies to county containing two cities aggregating that number of inhabitants, though no one city so large. Logan v. State [Tex. Cr. App.] 111 SW 1028. "Jury wheel law," Acts 30th Leg. (L. 1907, p. 269), c. 139, § 1, is not in violation of constitution prohibiting special legislation, though applicable only to counties having city or cities of 20,000 population. Id. "Jury wheel law," Acts 30 Leg. (L. 1907, p. 269), c. 139, § 1, is not invalid in that it lists names of jurors for duty for period of two years, and excludes those who may become disqualified in the meanwhile. Id.; Huddleston v. State [Tex. Cr. App.] 112 SW 64; Brown v. State [Tex. Cr. App.] 112 SW 80. See, also, dissenting opinion. A general law. Smith v. State [Tex. Cr. App.] 113 SW 289; Lee v State [Tex. Cr. App.] 113 SW 301; Pate v. State [Tex. Cr. App.] 113 SW 759.

**59.** Special venire selected in disregard of Code 1906, § 2688, quashed. Letford v. State [Miss.] 46 S 246.

**60.** Act of Congress Feb. 9, 1906, 34 Stat. 11, c. 155. Reed v. Ter. [Okl. Cr. App.] 98 P 583.

**61.** Act Feb. 8, 1895 (Loc. Laws 1894-95, p. 425), providing for drawing of jurors within two miles of court house, and returning other names to jury box when number of qualified jurors in attendence is insufficient, does not violate Const. 1901, art. 1, § 6, as to impartial jury. Wray v. State [Ala.] 45 S 697.

**62.** Not violative of Const. art. 2, §§ 5, 9.

discretion is allowed the officers in selecting a jury,[63] discrimination against citizens on account of race or color is illegal,[64] but the constitutional guaranty does not entitle a person to a jury of the same race [65] and discrimination is not presumed.[66] The statutes provide for the striking of the names of persons who are deemed incompetent.[67] Statutes regulating the drawing of jurors are generally regarded as directory,[68] and an irregularity vitiates the drawing only where fraudulent;[69] thus the fact that the drawing took place before the commissioners were sworn,[70] that a sheriff did not actually draw the general panel,[71] or that the prosecuting attorney consulted with the judge as to the qualifications of the jurors,[72] has been held immaterial. On an issue as to the validity of a drawing of certain jurors, evidence that it was the object in drawing to scatter the jury over the county is admissible.[73]

§ 6. *The venire and like process.* See 10 C. L. 549—The writ with the list attached constitutes the writ of venire [74] for summoning the residents of a corporation.[75] A

City of Chicago v. Knobel, 232 Ill. 112, 83 NE 459. Courts under City Court Act (Hurd's Rev. St. 1905, p. 631, c. 37), and municipal court act of Chicago (Hurd's Rev. St. 1905, p. 635, c. 37), have same powers as to selection of petit and grand jurors. Id. Const. art. 2, § 9, provides for trial of criminal by jury of county or district where offense was committed. Word "district" means "county." Id. At common law jury, in both civil and criminal cases, were taken from neighborhood. Id. Laws 1897, p. 61, establishing terms of Lewis county circuit court at Canton in such county, does not restrict jurisdiction over entire county, and summoning of jurors from county at large to try accused for offense committed outside Canton district not prevented. State v. Vickers, 209 Mo. 12, 106 SW 999.

**63.** Montgomery v. State [Fla.] 45 S 879. Discretion of officers selecting jury should be carefully exercised by securing the best juries but without discrimination. Id. Selection in exercise of discretion not reviewable by court. Code 1906, § 2688. Lewis v. State [Miss.] 45 S 360.

**64.** Selection, summoning or empaneling rendered void if discrimination practiced. Montgomery v. State [Fla.] 45 S 879; Groce v. Ter. [Ariz.] 94 P 1108. Selection of jurors from registration books of voters by board of supervisors by selecting persons of good moral character from the various districts does not admit of discrimination against negroes. Lewis v. State [Miss.] 45 S 360. Statutory provisions for selecting jury do not authorize discrimination. Montgomery v. State [Fla.] 45 S 879. Where county supervisors in selecting jury list intentionally struck off names of negroes, such action was in violation of constitution as to due process of law. Farrow v. State [Miss.] 45 S 619. Violation of constitution granting accused trial by impartial jury. Id. Denies equal protection of laws. Id. Motion to quash venire for race discrimination properly denied where negro sat on jury, where judge instructed jury commissioners not to discriminate, and they testified that they had obeyed such instruction. Macklin v. State, 53 Tex. Cr. App. 197, 109 SW 145.

**65.** Montgomery v. State [Fla.] 45 S 879.

**66.** Montgomery v. State [Fla.] 45 S 879. Presumption may be overcome by sufficient proper evidence. Id. Illegal discrimination should be alleged and if not admitted by demurrer or otherwise must be proven in proper proceedings. Id. No discrimination against person of African descent from mere fact that jury selected was white. Groce v. Ter. [Ariz.] 94 P 1108.

**67.** Under Act 1902 (23 St. at L. p. 1066), §§ 2, 4, 7, 14, officers charged with duty of drawing jury may strike names of persons deemed by them not to possess statutory qualifications. State v. Mills, 79 S. C. 187, 60 SE 664. Under Code 1887, § 4018, as am'd by Act Feb. 10, 1904 (Acts 1904, pp. 15-17), clerk has no right to leave off name of person drawn who is incompetent unless embraced in section of statute. Ashlock v. Com. [Va.] 61 SE 752.

**68.** Subetantial compliance sufficient. Governor v. State [Ga. App.] 63 SE 241; McNeal v. State [Ga. App.] 63 SE 224; Coleman v. State [Ga. App.] 63 SE 244; Passmore v. State [Ga. App.] 63 SE 244. Rev. 1905, §§ 1957-1960, relative to revision of jury list, directory. State v. Banner [N. C.] 63 SE 84. Where the drawing and summoning is under color of law and semblance of legal authority, the jury is such at least de facto. Not open to litigant to challenge each juror on ground that act they were drawn under is unconstitutional. State v. Ju Nun [Or.] 97 P 96.

**69.** Failure to observe does not vitiate venire in absence of bad faith or corruption on part of county commissioners. State v. Banner [N. C.] 63 SE 84. Motion to quash venire because of objections to manner of drawing properly denied, where facts did not show fraud. Code 1896, § 4997. Richter v. State [Ala.] 47 S 163.

**70.** Whether the jury commissioners drew the list before or after they were sworn is immaterial. Officers de facto if not de jure. Rosenblatt v. State, 2 Ga. App. 649, 58 SE 1107. Oath immaterial. Pol. Code 1895, § 242. Id.

**71.** Where sheriff being ill supervised selection of jurors while another marked names suggested, selection was made by the sheriff. State v. Kelly [N. J. Err. & App.] 70 A 342.

**72.** Drawing of petit jurors by county court in compliance with Rev. St. 1899, §§ 3769, 3770 (Ann. St. 1906, pp. 2096, 2097), merely irregular where prosecuting attorney consulted with judge as to qualifications but no evidence of selecting jurors or of erasure of names selected. State v. Melton, 130 Mo. App. 262, 109 SW 858.

**73.** Richter v. State [Ala.] 47 S 163.

**74.** Thurman v. Com., 107 Va. 912, 60 SE 99.

**Writ returnable** on second day of term not

venire may be quashed where the required diligence in summoning the jurors was not exercised,[76] but objections to a venire may be waived.[77] A venire should not be quashed because the state's counsel assisted in checking the venire list.[78] The canvassing of the list of proposed jurors for eminent domain proceedings is legal.[79] The municipal court act of Chicago providing for the service of the venire by the sheriff is constitutional.[80] In Louisiana the proper evidence of the manner in which the venire has been drawn is the proces verbal of the drawing,[81] and sworn allegations of fraud are necessary to attack the drawing.[82]

§ 7. *Empaneling the trial jury.* See 10 C. L. 549—The trial jury must be empaneled substantially [83] as provided by statute,[84] and in criminal cases the rule is more strictly applied.[85] A mandatory requirement that the clerk draw the names of the jurors from the box cannot be evaded.[86] Technical errors, such as the absence of an officer while the panel was drawn,[87] or the overruling of a motion for a continuance,[88] will not work a reversal unless prejudice results. A defect in the panel may be waived.[89] Under the Illinois practice, where a panel is broken by challenge, the

invalid for that reason, since by Code 1887, § 4018 (Va. Code 1904, p. 2114), judge might make writ returnable on day other than first day of term. Id.

**75.** Omission of words "of his corporation" not fatal in writ, since by statute, Code 1887, §§ 3142, 3144 (Va. Code 1904, p. 1661), residents of corporation are only permitted to serve. Thurman v. Com., 107 Va. 912, 60 SE 99.

**76.** Where only 11 jurors of 50 were present, case should be postponed until sheriff had summoned venire, or venire should be quashed and new one issued. Logan v. State [Tex. Cr. App.] 111 SW 1028. Proper to refuse to quash venire as failing to show diligence in summoning jurors where sheriff and deputies searched for same, some being out of state and none omitted purposely. Rice v. State [Tex. Cr. App.] 112 SW 299.

**77.** Where exceptions were taken to venire but no motion to quash and parties proceeded to empanel jury, objection was waived. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708. Right to trial by jury regularly chosen waived where counsel consented to set trial at a time when he knew a picked up jury would have to be used. Texas & P. R. Co. v. Coggin, 44 Tex. Civ. App. 423, 18 Tex. Ct. Rep. 75, 99 SW 1052.

**78.** On theory of prior knowledge of list, since such list was subject to inspection. Rice v. State [Tex. Cr. App.] 112 SW 299.

**79.** Canvassing by marshal and deputy after which selection was made. Columbia Heights Realty Co. v. MacFarland, 31 App. D. C. 112.

**80.** Municipal Court Act of Chicago, § 25 (Hurd's Rev. St. 1095, p. 644, c. 37), providing that jurors be provided by jury commissioners of Cook county, that venires be served by sheriff at expense of county, and that jury fees be paid by city, apportion expenses between city and county and is not violative of Const. art. 2, § 2, as to deprivation of property without due process of law. Revenues subject to legislative control. City of Chicago v. Knobel, 232 Ill. 112, 83 NE 459. Not violative of Const. art. 9, §§ 9, 10, providing for levy and collection of uniform taxes by municipality. Id.

**81.** State v. Marionneaux, 120 La. 455, 45 S 389.

**82.** In absence of sworn allegations of fraud, accused may not have venire box opened to ascertain if recitals of proces verbal of drawing are true. State v. Marionneaux, 120 La. 455, 45 S 389.

**83.** Acts 1898, p. 216, No. 135, does not direct that names of jurors be drawn from envelope containing names for term rather than box. State v. Montgomery, 121 La. 1005, 46 S 997. Where 8 jurors were drawn from box rather than envelope in accordance with custom of court, and remaining four according to counsel's suggestion in pursuance with statute, accused cannot object. Id.

**84.** Jurors must be selected and returned in statutory manner. Substituted juror. People v. Duncan [Cal. App.] 96 P 414. Under St. ch. 78, §§ 21, 23, jury to be passed upon and accepted in panels of four. People v. Nylin, 139 Ill. App. 500.

**85.** Where offender against municipal ordinance demanded jury as expressly authorized by B. & C. Comp. § 2257, from jury list provided by § 2251 et seq., court cannot over objections of party direct officer to summon jury as authorized by §§ 2221, 2222. Cusiter v. Silverton, 50 Or. 419, 93 P 234. Jurors whose names were drawn from wheel by judge, district clerk and deputy sheriff were lawfully chosen. Prosecution for theft. Davis v. State, 52 Tex. Cr. App. 629, 108 SW 667.

**86.** Jury drawn by deputy sheriff by direction of clerk illegal. State v. McGee, 80 Conn. 614, 69 A 1059.

**87.** Absence of justice of peace while panel was drawn harmless where judge was present and drawing otherwise in accordance with Gen. St. 1901, § 3816. State v. Thurston, 77 Kan. 522, 94 P 1011.

**88.** Overruling of motion to postpone empanelment of jurors until two absent jurors could be secured, or to quash special venire, harmless when such jurors were subsequently brought in. Tabor v. State, 52 Tex. Cr. App. 387, 107 SW 1116.

**89.** Expressly or by implication. Ivey v. State [Ga. App.] 62 SE 565. Where no challenge to array, though panel contains less than 48 jurors, accused cannot as matter of right demand filling of panel. Id.

challengor must tender back a full panel, and, therefore, he must first examine the talesmen called to supply the place of the one challenged.[90] In a will contest in Alabama where the contestant challenges a juror the court need not supply twelve men before requiring contestant to pass on those remaining.[91]

§ 8. *Arraying and challenging. A. Challenge to the array or panel.* See 10 C. L. 549 A challenge to the array must be one which affects the entire panel [92] and must be timely made.[93] An objection that the jurors were not drawn according to law is too general to cover an objection that the sheriff failed to select the general panel.[94] The challenge to the array has been abolished in some states.[95] The refusal of a continuance for the procurement of evidence to support a challenge to the panel is discretionary.[96]

(§ 8) *B. Challenge for cause.* See 10 C. L. 550—A challenge for cause may be based upon disqualification in general [97] or on the particular cause.[98] The enumerated causes by challenge in a statute are not exclusive of other causes.[99] It is also a ground for challenge that the juror has been subpoenaed as a witness,[1] but this defect may be waived.[2] The challenge must specify the ground of disqualification.[3] It is a general rule that challenges should be made before the juror is sworn,[4] but it has been held permissible to excuse a previously accepted juror "for cause" before the jury was completed.[5] In Georgia it is not ground for a challenge to the poll that jurors who had been rejected at a previous trial were placed upon the list,[6] but the fact

**90.** People v. Nylin, 139 Ill. App. 500. Statute ch. 78, §§ 21, 23, applicable to civil and criminal cases, provides that jury be passed upon and accepted in panels of four. Id.

**91.** Hodge v. Rambow [Ala.] 45 S 678.

**92.** Where mandatory statute disregarded in drawing names for jury. State v. McGee, 80 Conn. 614, 69 A 1059. Illegal discrimination. Montgomery v. State [Fla.] 45 S 879. Where jurors had formed opinion by acting upon or hearing identical case. Ross v. State, 53 Tex. Cr. App. 162, 109 SW 153. Where panel does not contain requisite number of jurors. Pen. Code 1895, § 972. Ivey v. State [Ga. App.] 62 SE 565.

**93.** Irregularity in selection and summons of jury should be raised before they were empaneled and sworn. Columbia Heights Realty Co. v. MacFarland, 31 App. D. C. 112. Challenge to array after plea of not guilty too late. State v. Banner [N. C.] 63 SE 84. Objection to drawing after eight of jurors had been accepted is too late where drawing from box rather than envelope containing names for term. State v. Montgomery, 121 La. 1005, 46 S 997. Where accused complained that he was required to go to trial before, and challenge from, a jury drawn before announcement of ready for trial, such objection could not be made after trial on appeal. Moore v. State [Tex. Cr. App.] 114 SW 807.

**94.** State v. Kelly [N. J. Err. & App.] 70 A 342.

**95.** State v. Ju Nun [Or.] 97 P 96. Objection to individual jurors as names are drawn from jury box is challenge to panel and not to poll in effect. Abolished by statute B. & C. Comp. § 117. Id.

**96.** No abuse in refusal where race discrimination was alleged but no reason given for failure to procure such evidence. Franklin v. State, 85 Ark. 534, 109 SW 298.

**97.** See ante, § 2, Eligibility and Exemption. Where juror had served within year immediately preceding. Mason v. State [Ind.] 83 NE 613. Under Rev. St. § 812 (U. S. Comp. St. 1901, p. 627), as am'd by Act June 30, 1879, c. 52, § 2, 21 Stat. 43 (U. S. Comp. St. 1901, p. 624), it is not ground for challenge to juror that he has served within one year unless it was in same court. Morris v. U. S. [C. C. A.] 161 F 672. Convicted of felony, insane, etc. B. & C. Comp. § 119 et seq. State v. Ju Nun [Or.] 97 P 96.

**98.** See ante, § 3, Disqualifications in Particular Cause. Disqualified account of actual or implied bias. B. & C. Comp. §§ 119-123. State v. Ju Nun [Or.] 97 P 96. Where jurors had sat in similar prosecution of same defendant, they might be excluded for cause, peremptory challenges being exhausted. Holmes v. State, 52 Tex. Cr. App. 352, 353, 20 Tex. Ct. Rep. 844, 106 SW 1160. Objection that juror is not citizen and understands language imperfectly must be raised by challenge for cause. Cannot be raised on motion for new trial. Okershauser v. State, 136 Wis. 111, 116 NW 769.

**99.** Johnson v. State [Okl. Cr. App.] 97 P 1059.

**1.** Walker v State [Ala.] 45 S 640.

**2.** Error to excuse juror by court on its own motion. Walker v. State [Ala.] 45 S 640.

**3.** State v. Bobbitt [Mo.] 114 SW 511. Challenge must be based on some fact and founded upon a proper showing of facts upon which the court can exercise its discretion People v. Schmitz [Cal. App.] 94 P 407.

**4.** Pen. Code, §§ 1060, 1069. People v. Duncan [Cal. App.] 96 P 414.

**5.** Under Pen. Code, § 1068, challenge must be taken before juror is sworn, but court may permit it afterwards "for cause" before jury is completed. People v. Schmitz [Cal. App.] 94 P 407.

**6.** Johnson v. State, 130 Ga. 22, 60 SE 158. Jurors disqualified at previous trial not shown. Id.

that a traverse juror who has served at one term of the superior court may be summoned at the next succeeding term is ground for a challenge propter defectum.[7]

*Right to list of jurors.*[8]

(§ 8) *C. Peremptory challenges and standing jurors aside. Peremptory challenges.*[See 10 C. L. 550]—A premptory challenge is an objection for which no reason need be given.[9] A person accused of a crime is entitled to a complete panel before exercising his peremptory challenges.[10] While peremptory challenges exist by virtue of statute,[11] the right is valuable and must be held to exist unless the code expressly excludes.[12]

*Number allowed.*[See 10 C. L. 550]—The number of peremptory challenges is regulated by statute and is usually dependent upon the punishment to be inflicted,[13] and an accused cannot multiply his challenges by the number of counts in the complaint.[14] Additional challenges may be allowed where additional jurors are summoned.[15] Usually joint parties are only entitled in the aggregate to the number allowed to a single party [16] unless their interests are antagonistic.[17] It was not error to refuse an additional peremptory challenge where a challenge for cause was overruled, the juror being competent, and nothing was said about a particular juror being distasteful.[18]

*Time for challenge.*[See 10 C. L. 551]—The right of peremptory challenge must be exercised before the juror is sworn.[19]

(§ 8) *D. Examination of jurors and trial and decision of challenges.*[See 10 C. L. 551]—The determination of the competency of a juror rests with the court [20] from a consideration of the evidence presented [21] and other circumstances.[22] The question

7. Act Aug. 15, 1903 (Acts 1903, p. 83). Morris v. State [Ga.] 62 SE 806.

8. See 10 C. L. 550, and see Indictment and Prosecution, 12 C. L. 28.

9. B. & C. Comp. § 118. State v. Ju Nun [Or.] 97 P 96. Essence of peremptory challenge is right to reject rather than to select a juror. State v. Deliso [N. J. Err. & App.] 69 A 218.

10. Person accused of homicide entitled to full and competent panel of 30 jurors. State v. Bobbitt [Mo.] 114 SW 511.

11. People v. Schmitz [Cal. App.] 94 P 407; Butler v. Hands, 43 Colo. 541, 95 P 920. No right of peremptory challenges in civil actions at common law. Colfax Nat. Bank v. Davis Implement Co. [Wash.] 96 P 823.

12. Applicable in selection of special jury. Construing statutes. Butler v. Hands, 43 Colo. 541, 95 P 920.

13. Under Mansf. Dig. §§ 2240, 2247 (Ind. T. Ann. St. 1899, §§ 1583, 1590), joint defendants in prosecution for misdemeanor are entitled to three challenges. Wilcox v. U. S. [C. C. A.] 161 F 109. State entitled to six peremptory challenges where punishment is hard labor. State v. West, 120 La. 747, 45 S 594.

14. Where statutes provide that accused arraigned before common pleas may have two peremptory challenges, and same number in superior court except in certain classes of cases where more are allowed according to punishment, an accused cannot multiply the challenges by the number of counts in the complaint. State v. McGee, 80 Conn. 614, 69 A 1059.

15. Under Cr. Code 1896, § 5008, providing for peremptory challenges to substituted jurors summoned in case of mistaken names, and § 5015, allowing accused 21 challenges in capital cases, the former challenges are in addition to the latter ones allowed. Smith v. State [Ala.] 46 S 236.

16. Several parties on side must join in challenge under Ballinger's Ann. Codes & St. § 4979 (Pierce's Code, § 593). Colfax Nat. Bank v. Davis Implement Co. [Wash.] 96 P 823. Joint defendants in misdemeanor must join in challenge. Wilcox v. U. S. [C. C. A.] 161 F 109.

17. Each defendant not entitled to six challenges where no fact at issue between them, though one different issue between one defendant and plaintiff. Witliff v. Spreen [Tex. Civ. App.] 112 SW 1098.

18. Russell v. State, 53 Tex. Cr. App. 500, 111 SW 658.

19. State v. Deliso [N. J. Err. & App.] 69 A 218. Where jurors placed hand on book and clerk commenced to recite oath, it was not error to permit peremptory challenge. Judicial direction to administer oath absent. Id. A contestant in a will contest has no right to peremptorily challenge a juror previously accepted. Hodge v. Rambow [Ala.] 45 S 678.

20. Johnson v. State [Okl. Cr. App.] 97 P 1059; Ashlock v. Com. [Va.] 61 SE 752. By Court and Practice Act 1905, § 109, question is left to court to determine whether or not juror objected to stands indifferent to cause. Sansouver v. Glenlyon Dye Works, 28 R. I. 539, 68 A 545.

21. Bemis v. Omaha [Neb.] 116 NW 31. Where answers upon voir dire involve conflicting statements as to qualification. People v. Maughs [Cal. App.] 96 P 407. Competency of juror determined from whole examination and evidence affecting it. Sansouver v. Glenlyon Dye Works, 28 R. I. 539, 68 A 545.

22. Not confined to answers of juror but may consider appearance, demeanor, etc. Bemis v. Omaha [Neb.] 116 NW 31. Court not bound by answers of juror on voir dire but may take other means to determine com-

presented by a challenge is one of mixed law and fact to be tried as any other issue upon evidence.[23] Doubts as to competency should be resolved in favor of the accused,[24] but a party has no vested interest in the selection of any particular juror.[25] The separate examination of veniremen is a matter of discretion.[26] The challengor has the burden of establishing incompetency,[27] and the failure to examine is a waiver of disqualification.[28] Some states provide for the determination of impartiality by statutory questions, interrogated by the judge upon proper challenge.[29]

*Scope of examination.* See 10 C. L. 551—It is proper to permit questions for the intelligent exercise of the peremptory challenge [30] or to ascertain if the juror is disqualified.[31] Pertinent questions in good faith are proper though directed to matters not in issue,[32] but totally irrelevant questions,[33] questions tending to encourage a disagreement [34] by alluding to former trials,[35] should be avoided, and the court may require questions to be asked in a clear and intelligible manner.[36] The allowance of additional examination after a juror is sworn is discretionary.[37] A defendant has a right to rely on the answers given.[38] A question as to whether a juror can act on the evidence and instructions may be excluded in eminent domain proceedings,[39] and

petency. Johnson v. State [Okl. Cr. App.] 97 P 1059.

23, 24. Johnson v. State [Okl. Cr. App.] 97 P 1059.

25. Law concerned with fairness of trial and impartiality of jurors rather than particular jurors who render verdict. McHugh v. Rhode Island Co. [R. I.] 69 A 853. No prejudice w e court corrected ruling by calling another jury. State v. Rocker [Iowa] 116 NW 797.

26. Denial reviewable only when prejudicial. Macklin v. State, 53 Tex. Cr. App. 197, 109 SW 145. Accused not entitled as matter of right to examine juror individually. State v. McGee, 80 Conn. 614, 69 A 1059.

27. Person selected and returned as juror is presumed to be qualified. Shafstall v. Downey [Ark.] 112 SW 176. Where juror was related to defendant, challenging party had burden of showing relationship within prohibited degree. Kirby's Dig. § 4491. Id.

28. Okershauser v. State, 136 Wis. 111, 116 NW 769. Juror incompetent by age. Blair v. Paterson [Mo. App.] 110 SW 615. Objection to competency of juror waived though accused was unable to waive right to trial by jury of 12 men. Okershauser v. State, 136 Wis. 111, 116 NW 769.

29. Trial for misdemeanor. Roberts v. State [Ga. App.] 61 SE 497.

30. O'Connor Co. v. Gillaspy [Ind.] 83 NE 738; Saller v. Friedman Bros. Shoe Co., 130 Mo. App. 712, 109 SW 794. Competent to allow question of what verdict jury had rendered in murder case in examination of juror who had previously acted in such case. Johnson v. State [Okl. Cr. App.] 97 P 1059.

**Contra:** Defendant may not put questions to jury to gain information as to advisability of exercising peremptory challenges. People v. Trask [Cal. App.] 93 P 891.

31. Question whether jurors were connected with accident insurance company proper, in personal injury action. Owensboro Wagon Co. v. Boling, 32 Ky. L. R. 816, 107 SW 264; Saller v. Friedman Bros. Shoe Co., 130 Mo. App. 712, 109 SW 794. Question whether juror was officer or stockholder in indemnity insurance company proper. Code Civ. Proc. § 1130, provides that juror who is stockholder in party is disqualified. Blair v. McCormack Const. Co., 123 App. Div. 30, 107 NYS 750. Question whether juror was stockholder in specific insurance company not authorized. Id. Proper to ask if juror was insured in specified casualty company or interested therein. Rinklin v. Acker, 109 NYS 125. Defendant not entitled to mistrial where objection was sustained to question of whether juror was insured against accident, court stating that counsel might ask whether jurors were interested in insurance company but matter was not pursued. Banner v. O'Meara, 110 NYS 947.

32. O'Connor Co. v. Gillaspy [Ind.] 83 NE 738. Proper to ask juror on voir dire if he or relations were in any way interested in any accident insurance company, though nothing to show interest of accident company in case. M. O'Connor Co. v. Gillaspy [Ind.] 83 NE 738.

33. Questions irrelevant: (1) How long have you served as juror in this court; (2) How many men have you convicted of robbery; (3) Have you ever served as juror on charge of robbery; (4) What is your age. People v. Trask [Cal. App.] 93 P 891.

34. Guthmann Transfer Co. v. McGuire, 138 Ill. App. 162, afd. by McGuire v. Richard Guthman Transfer Co., 234 Ill. 125, 84 NE 723.

35. Askew v. State [Tex. Cr. App.] 113 SW 287.

36. Question in examination of juror on voir dirs in seduction case which was much involved and necessarily required negative answer being similar to former question properly excluded. Faulkner v. State, 53 Tex. Cr. App. 258, 109 SW 199.

37. Not matter of right. Walker v. State [Ala.] 45 S 640.

38. Where court interrogated jury as to previous service within six months to which they answered "no," accused had right to assume in exercising peremptory challenges that they had not so served. Benton v. State, 52 Tex. Cr. App. 360, 107 SW 838.

39. Where juror had no knowledge of the value of the property, and statute authorized view of premises and jurors may rely on observations. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708.

the refusal of an examination of jurors in such proceedings is not erroneous when the complainant had neglected one opportunity.[40]

*Review of trial of challenges*[41]—The decision that a juror is qualified will be reversed only in case of above.[42] The exercise of peremptory challenges is not reviewable,[43] nor is a rule adopted by the trial court for the exercise of peremptory challenges.[44]

*Improper overruling or sustaining of a challenge as a ground for reversal.*[45]—Error in excluding a juror is not ground for reversal where the jury was fair and impartial,[46] nor will a reversal be granted for the erroneous overruling of a challenge where the objecting party fails to exhaust his peremptory challenges,[47] although if a party is compelled to use a peremptory challenge and an objectionable juror is thereafter forced upon him, relief will be granted.[48] A presumption of prejudice arises from the erroneous overruling of a challenge for cause,[49] where the record shows the exhaustion of the peremptory challenges.[50] Objections are not available after the verdict,[51] though the disqualification was not discovered until then.[52] It is reversible error to excuse a juror for a defect which may be waived.[53]

§ 9. *Talesmen, special venires and additional jurors.* See 10 C. L. 552—Where the regular venire is exhausted, an open [54] or special venire may be drawn,[55] and a person

**40.** Where respondent had notice of time of empanelment and swearing with opportunity to examine and object. Columbia Heights Realty Co. v. MacFarland, 31 App. D. C. 112.

**41.** See 10 C. L. 551. See, also, Appeal and Review, 11 C. L. 118; Saving Questions for Review, 10 C. L. 1572.

**42.** Decker v. State, 85 Ark. 64, 107 SW 182; People v. Maughs [Cal. App.] 96 P 407; Bemis v. Omaha [Neb.] 116 NW 31; State v. Banner [N. C.] 63 SE 84; Sansouver v. Glenlyon Dye Works, 28 R. I. 539, 68 A 545; Essary v. State, 53 Tex. Cr. App. 596, 111 SW 927. Court only allowed to review decision where erroneous in view of evidence as matter of law. People v. Duncan [Cal. App.] 96 P 414. Where bill of exceptions fails to give all evidence as to juror's qualification, decision of trial court will be sustained. Sansouver v. Glenlyon Dye Works, 28 R. I. 539, 68 A 545. Finding as to qualification will be approved on review if supported by evidence, though conflicting. Id.

**43.** Shane v. Butte Elec. R. Co., 37 Mont. 599, 97 P 958.

**44.** Unless abuse appears. State v. McCorckle, 74 Kan. 280, 86 P 134.

**45.** See 10 C. L. 552. See, also, Harmless and Prejudicial Error, 11 C. L. 1690.

**46.** State v. McGee, 80 Conn. 614, 69 A 1059; Johnson v. Waterloo [Iowa] 119 NW 70; Sansouver v. Glenlyon Dye Works, 28 R. I. 539, 68 A 545; McHugh v. Rhode Island Co. [R. I.] 69 A 853; West v. State [Tex. Cr. App.] 114 SW 142. St. 1898, § 2881, provides that no irregularity in empaneling shall set aside verdict unless complainant was injured. Okershauser v. State, 136 Wis. 111, 116 NW 769. No evidence to support verdict for appellant. Slaughter v. McManigal [Iowa] 116 NW 726; People v. Maughs [Cal. App.] 96 P 407; Rogers Grain Co. v. Tanton, 136 Ill. App. 533; Olmstead v. Noll [Neb.] 117 NW 102.

**47.** State v. Banner [N. C.] 63 SE 84. Presumption of competent and impartial juror, unless record on appeal affirmatively shows exhaustion of peremptory challenges. Johnson v. Waterloo [Iowa] 119 NW 70.

**48.** No evidence that obnoxious juror was used. Missouri, etc., R. Co. v. Steele [Tex. Civ. App.] 110 SW 171; Rice v. State [Tex. Cr. App.] 112 SW 299.

**49.** People v. Schmitz [Cal. App.] 94 P 407. Error in overruling challenge for cause not cured by fact that accused might have exercised peremptory challenge where all peremptory challenges were used. Shane v. Butte Elec. R. Co., 37 Mont. 599, 97 P 958.

**50.** Exhaustion of peremptory challenges not presumed. People v. Maughs [Cal. App.] 96 P 407; People v. Duncan [Cal. App.] 96 P 414; Bush v. Roberts [Ga. App.] 62 SE 92.

**51.** Morris v. State [Ga.] 62 SE 806; West v. State [Tex. Cr. App.] 114 SW 142; Thurman v. Com., 107 Va. 912, 60 SE 99; Ashlock v. Com. [Va.] 61 SE 752. Not ground for setting verdict aside and granting new trial. Thurman v. Com., 107 Va. 912, 60 SE 99. Where person substituted himself as juror summoned, was accepted and sworn, verdict was not open to objection as having been rendered by 11 jurors. People v. Duncan [Cal. App.] 96 P 414. Disqualification known to counsel. Ryan v. State, 10 Ohio C. C. (N. S.) 497.

**52.** People v. Duncan [Cal. App.] 96 P 414; Morris v. State [Ga.] 62 SE 806; Sansouver v. Glenlyon Dye Works, 28 R. I. 539, 68 A 545. Service on both grand and petit juries by same person not ground for new trial where plaintiff failed to make inquiry as to disqualification. Ryan v. State, 10 Ohio C. C. (N. S.) 497.

**53.** Juror summoned as witness. Walker v. State [Ala.] 45 S 640.

**54.** Open venire to summon grand jurors from body of county permissible when names in jury box exhausted. Cavett v. Ter. [Okl. Cr. App.] 98 P 890. District courts of Oklahoma possess common-law jurisdiction to invoke that method of summoning additional jurors. Id.

**55.** Clerk must use regular venire till exhausted. Rice v. State [Tex. Cr. App.] 112 SW 299. No right to have venire drawn first where two murder cases in close proximity. Id.

cannot complain because he was convicted by such a jury.[56] The names required for a special venire must be drawn by the proper officer.[57] The issuance of a new venire returnable instanter is proper in condemnation proceedings.[58] In Alabama each capital case must have its own separate venire.[59] Mistake in the names of the veniremen is not ground for quashal,[60] or the fact that the list furnished the accused did not state the residences of the jurors.[61] In a felony case in Virginia, the court may provide for the drawing of jurors in his absence by appointing a commissioner of chancery.[62]

§ 10. *Special and struck juries and juries of less than twelve.*[See 8 C. L. 635]—A special or struck jury is authorized in New York [63] in an intricate or important case.[64]

§ 11. *Swearing.*[See 8 C. L. 635]—The fact that the jury is not sworn may be waived.[65]

§ 12. *Custody and discharge of jurors and jury.*[66]—The power to discharge a jury in a civil cause during trial is not discretionary.[67]

**56.** Under Sayles' Ann. Civ. St. 1897, art. 3150, and Code Cr. Proc. art. 695, person convicted of offense in fourth week of term cannot complain because jury was selected by sheriff at court's order instead of by jury commission, and such jurors were impartial where jury commission selected jurors for three weeks but disposition of business required another week. Green v. State, 53 Tex. Cr. App. 490, 110 SW 920.

**57.** Under Acts 30th Leg. (L. 1907) p. 269, c. 139, providing that keys for wheel containing names of jurors shall be kept by sheriff and district clerk, who shall draw names, etc., and that when special venire is ordered "clerk" shall draw names required, a special venire in criminal district court of county is properly drawn by district clerk of county. Lee v. State [Tex. Cr. App.] 113 SW 301; Moxie v. State [Tex. Cr. App.] 114 SW 375.

**58.** Under Eminent Domain Act, § 7; Hurd's Rev. St. 1908, c. 47, where venire quashed. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708.

**59.** Error to draw and summon one venire for two or more cases. Walker v. State [Ala.] 45 S 640. Under Cr. Code 1896, §§ 5004, 5005 (Cr. Code 1907, §§ 7263, 7265), providing for drawing of special jury in capital cases which with panel of petit jurors for week shall constitute venire, it was error to direct that names from jury box constitute venire without embracing petit jurors. Statute mandatory. Bradberry v. State [Ala.] 46 S 968.

**60.** Names should be discarded and other jurors summoned. Code 1896, § 5007. Walker v. State [Ala.] 45 S 640. Mistake of second initial of juror's name not ground for quashal. Patterson v. State [Ala.] 47 S 52. Where no other person by that name in beat. McBryde v. State [Ala.] 47 S 302. No ground for quashal of venire where copyist of list of jurors had corrected mistake of name, where name and number of juror on list served on accused corresponded with number and name on slip drawn from box. Ridgell v. State [Ala.] 47 S 71.

**61.** Ludlow v. State [Ala.] 47 S 321.

**62.** Under Code 1887, § 4018, as am'd by Act Feb. 10, 1904 (Acts 1904, pp. 15-17), it was not intended that commissioner in chancery in whose presence jurors may be drawn in absence of court should be deputy of clerk but court should designate commissioner. Ashlock v. Com. [Va.] 61 SE 752.

**63.** Under Laws 1901, p. 1465, c. 602, § 5, as am'd by L. 1904, p. 1147, c. 458, authorizing special jury to try issues in civil case where struck jury might be ordered, where case presented importance and intricacy authorizing struck jury under Code Civ. Proc. § 1063, practice of drawing struck jury need not be followed but special jury might be drawn. Jerome v. New York Evening Journal Pub. Co., 124 App. Div. 372, 108 NYS 801. Code Civ. Proc. § 1063, authorizes struck jury when requisite for fair and impartial trial, or where special jury is required by importance or intricacy of case. Id. Facts held to indicate importance and intricacy of case rather than inability to secure impartial jury, and struck jury proper. Id. Impartial jury most speedily obtained from special panel authorized by L. 1901, p. 1462, c. 602, as amended by L. 1904, p. 1147, c. 458, than attempting to procure struck jury. People v. McClellan, 124 App. Div. 664, 109 NYS 76.

**64.** A struck jury is proper in an action for libeling a public official in respect to his official conduct. Within discretion of court. Jerome v. New York Evening Journal Pub. Co., 124 App. Div. 372, 108 NYS 801. Case involving title to mayoralty of New York City is of such importance as to be tried before special jury. People v. McClellan, 124 App. Div. 664, 109 NYS 76.

**65.** Failure to object during trial that jury had not been sworn a waiver of defect. Texas & P. R. Co. v. Butler [Tex. Civ. App.] 114 SW 671. Where trial by jury may be waived, failure to swear jury where no objection is made till after verdict and judgment is mere irregularity. Id.

**66.** See 6 C. L. 331. See, also, Trial, 10 C. L. 1896, as to custody and conduct; New Trial and Arrest of Judgment, 10 C. L. 999, as to misconduct as ground for new trial.

**67.** Must be based on necessity or consent of both parties. Rau v. Risiden, 11 Ohio C. C. (N. S.) 255. Where record discloses no necessity for such action beyond bare request by plaintiff and no consideration by court of necessity for so doing, discharge is unauthorized and deprives court of further jurisdiction, and motion to dismiss action should be granted. Id.

§ 13. *Compensation, sustenance and comfort of jurors.*[See 8 C. L. 635]—A provision for compensation for the attendance of jurors entitles them to a fee though they did not serve.[68] In a lunacy proceeding in New York, the jurors are entitled to but one fee, regardless of the length of the hearing.[69] The allowance to the trustee of the jury fund of three per cent of the fines and forfeitures collected in Kentucky gives him no interest in damages awarded on the affirmance of a judgment for the commonwealth.[70] The refusal of a county treasurer to pay a warrant for the services is not enforcible by mandamus.[71]

## JUSTICES OF THE PEACE.


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§ 1. *The office.*[See 10 C. L. 553]—The justice of the peace is a public officer[72] and combines judicial and clerical functions.[73] He can ordinarily perform judicial acts only when actually sitting as a court.[74] A justice court is not usually deemed one of record.[75] In Mississippi only kinship or pecuniary interest in the result disqualifies as justice from presiding in a particular case.[76] Provision in a home rule charter for the establishment of police courts does not impair the legislative power to create justice courts in the municipality.[77] Where a city having justices under a special charter adopts a general charter providing for the election of police judges, the justices retain their powers under the special charter until police judges

**68.** Under Code 1896, §§ 4580, 4581, entitling jurors to $2 for each day's "service," and special jurors to same compensation for their "attendance," special juror who attended court upon summons for one day and was discharged without being sworn is entitled to compensation. Chitty v. Tisdale [Ala.] 45 S 587.

**69.** Under Code Civ. Proc. §§ 2333, 3313, fees of jurors in courts of record are 25 cents for each case in which he is empaneled, except as otherwise provided. In re Vanderbilt, 111 NYS 558.

**70.** Commonwealth v. French [Ky.] 114 SW 255. Under Ky. St. 1903, §§ 2286, 2290, trustee of jury fund collects all fines and forfeitures in favor of commonwealth and retains 3 per cent for compensation. Id. Cannot be deprived of such fee by pardon of governor. Id.

**71.** Refusal breach of official bond and suit against sureties is adequate remedy. Hines v. Salter [Ala.] 45 S 587.

**72.** Justice, a public officer, under Cr. Code 1896, § 5153 (Cr. Code 1907, § 7446), punishing any person who, being disqualified by law, enters upon any public office. State v. Albright [Ala.] 46 S 470.

**73.** Taking a bail bond by justice held a clerical act. State v. Cooper [Tenn.] 113 SW 1048. It devolves upon him to perform all ministerial acts in connection with the court as well as the judicial acts. Zimmerman v. Bradford-Kennedy Co., 14 Idaho, 681, 95 P 825. Entry of a judgment when he renders the judgment is a judicial act as distinguished from the ministerial function performed by him in entering a judgment upon the verdict of the jury in appeal. Nashville, etc., R. Co. v. Brown, 3 Ga. App. 561, 60 SE 319.

**74.** Atlantic Coast Line R. Co. v. Cohn & Co. [Ga. App.] 62 SE 572. The act of a justice in setting aside a dismissal after expiration of the term of his court is a nullity. Rivers v. Campbell [Tex. Civ. App.] 111 SW 190. Collection of judgment rendered after setting aside dismissal held properly enjoined. Id. Fact that justice has extrajudicially granted a party's sole counsel leave of absence, or has personally agreed to continue trial of case, does not require grant of a continuance. Atlantic Coast Line R. Co. v. Cohn & Co. [Ga. App.] 62 SE 572. One who absents himself from court upon a promise by the magistrate, when not actually presiding, that a leave of absence will be granted or that the cause will be continued, does so at his own peril. Civ. Code 1895, § 4133. Id.

**75.** Feld v. Loftis, 140 Ill. App. 530.

**76.** Under Constitution, § 171, and Code 1896, § 2724, bias or prejudice on the part of justice does not disqualify him from presiding. Evans v. State [Miss.] 45 S 706.

**77.** In re Johnson, 6 Cal. App. 734, 93 P 199.

are elected.[78] The legislature may confer on one of the justices of the peace in a city exclusive, civil and criminal jurisdiction over cases between residents of a city which was before possessed by four justices and make the one justice the successor of the other justices upon the separation of their terms.[79] Appointees in case of vacancies usually hold office until the "next general election," [80] and elections must be held at the time prescribed by statute.[81]

§ 2. *Compensation, duties, and liabilities.* See 10 C. L. 554—A justice collecting an unlawful fee is guilty of extortion.[82] Where the fee is to be collected for the benefit of another, the justice is liable if he fails to collect it.[83] In some states an annual salary is given in full compensation for all services performed.[84] Failure on the part of the county attorney to notify the sureties on the justices' official bond of the fact that the justice had collected and neglected to pay over costs due to the county attorney does not release the sureties,[85] but any act on the attorney's part extending the time for payment without the sureties' consent operates as a discharge.[86]

§ 3. *Civil jurisdiction.* See 10 C. L. 555—Justice courts are courts of limited and special jurisdiction,[87] possessing only such powers as are conferred by statute,[88] and appellate courts take judicial notice of the population of a county for the purpose of determining what laws govern.[89] There is no intendment in their favor [90] and

78. Adoption of Gen. Charter Law (St. 1898, c. 40a) § 925-61, held not to deprive justices of city of powers exercised under special charter until police justice was elected. Olson v. Hawkins, 135 Wis. 394, 116 NW 18. Appointment by mayor of city having adopted general charter (St. 1898, c. 40a) as authorized by § 525-31, even though premature, held to render appointee a de facto police justice. Id.

79. Kalamazoo Amended Charter Loc. Acts 1907, p. 883, Acts No. 648, and especially § 18, c. 29, creating municipal court for city of Kalamazoo, held not unconstitutional as depriving constitutional officers of their offices, constitution not requiring more than one justice in a city. Const. art. 6, §§ 1, 17. Strifling v. Baden [Mich.] 15 Det. Leg. N. 948, 118 NW 740. Under act held exclusive jurisdiction of justice was not suspended until the expiration of the other justice's terms, so as to make his jurisdiction before that time concurrent with that of the other justices. Id.

80. Next general election in Wilson's Rev. & Ann. St. 1903, § 3750, means next general election at which the particular class of officers is to be chosen. Wainwright v. Fore [Okl.] 97 P 831. Appointee to fill vacancy of officer elected at election for adoption of constitution held to hold until election of 1910, that being first general election at which a justice could be elected to fill vacancy under constitution and statutes. Id.

81. Election of justices of the peace, held in Nov. 1907 to take effect January 1, 1908, to succeed incumbents elected in November, 1904, for terms of three years and took office in April, 1905, premature and void, and petitions in quo warranto directed against such incumbents will be dismissed. State v. Brown, 11 Ohio C. C. (N. S.) 107.

82. State v. Cooper [Tenn.] 113 SW 1048. A justice has no right to collect a fee for taking a bail bond until it has been adjudged upon some disposition of the case by final judgment that the defendant was liable for the same. Id.

83. Under Laws 1899, p. 495, c. 286, where justice of the peace was called to try a case when municipal judge was disqualified, $10 fees were collectible and to be divided between municipal judge and justice who tried case. Mead v. Simpson, 134 Wis. 451, 114 NW 821.

84. Under Loc. Acts 1901, p. 671, No. 468, § 37 and § 38, justice not entitled to retain fees collected in criminal cases, they not being "costs" nor "expenses," and justice's salary being fixed at $1,500 in full for all services performed. Harrison v. Chippewa County Sup'rs, 151 Mich. 91, 14 Det. Leg. N. 811, 114 NW 851.

85. Wright v. Deaver [Tex. Civ. App.] 114 SW 165.

86. Agreement between county attorney and justice whereby time was extended in consideration of justice paying interest held to discharge sureties, not having consented to agreement. Wright v. Deaver [Tex. Civ. App.] 114 SW 165. Agreement that justice might use money for his own benefit, sureties not consenting, held to discharge sureties. Id.

87. Smith v. Lyle Rock Co. [Mo. App.] 111 SW 831; Little Rock Brick Works v. Hoyt [Ark.] 112 SW 880. Action for total destruction of personal property comprehended within Const. art. 6, § 7, par. 2, conferring jurisdiction over actions for "injuries or damages" to that kind of property. Seaboard Air Line R. Co. v. Smith, 3 Ga. App. 644, 60 SE 353. Under Const. art. 6, § 18, held legislature can withdraw any cause from justice's jurisdiction. Detroit Lumber Co. v. The Petrel [Mich.] 15 Det. Leg. N. 506, 117 NW 80.

88. Martin v. Richmond [Va.] 62 SE 800.

89. Court takes notice that on Aug. 28, 1900, Cole county had less than 50,000 inhabitants, hence jurisdiction of justice therein was governed by Rev. St. 1899, § 3835 [Ann. St. 1906, p. 2124]. Ruckert v. Richter, 127 Mo. App. 664, 107 SW 1081.

90. Smith v. Lyle Rock Co. [Mo. App.] 111 SW 831; Harlan v. Gladding, McBean & Co. [Cal. App.] 93 P 400; Ferguson v. Basin Consol. Mines, 152 Cal. 712, 93 P 867.

it is essential that the jurisdictional facts appear of record,[91] and in an action on a justice's judgment, claimant therein has the burden of showing that the justice had jurisdiction,[92] and to establish the same, the issuance and service of summons as required by law must be shown.[93] Technical defect in the summons is not, however, jurisdictional.[94] Where a justice has obtained jurisdiction,[95] it continues until divested,[96] and there is a presumption that the subsequent proceedings are regular, unless the alleged irregularity appears upon the face of the record or there is an omission to make of record that which the law expressly requires shall be so entered,[97] and where the record in an ordinary action shows an appearance by the parties, the want of jurisdiction of the person is waived where no objection is raised thereto.[98] A justice loses jurisdiction of a cause by his unauthorized denial of a timely request for a jury,[99] by an unauthorized continuance[1] or adjournment,[2] by failure to make a sufficient entry as to adjourned date,[3] by writing up and signing the judgment rendered,[4] and by giving a party to understand that proceedings are

**91.** Jurisdiction must appear on face of proceedings. Smith v. Lyle Rock Co. [Mo. App.] 111 SW 831; Fabien v. Grabow [Mo. App.] 114 SW 80; Little Rock Brick Works v. Hoyt [Ark.] 112 SW 880. Under Rev. St. 1899, § 3835 [Ann. St. 1906, p. 2124], record reciting that suit was on a note, but not the amount of principal, or that note bore interest or that amount of judgment exceeding $250 was not for face of note exclusive of interest, held insufficient to show jurisdiction. Ruckert v. Richter, 127 Mo. App. 664, 106 SW 1081.

**92.** Ferguson v. Basin Consol. Mines, 152 Cal. 712, 93 P 867. Failure to show request to sit as justice in another township during an absence as required by Code Civ. Proc. § 105. Harlan v. Gladding, McBean & Co. [Cal. App.] 93 P 400.

**93.** Where plaintiff's claim was founded on judgment. Ferguson v. Basin Consol. Mines, 152 Cal. 712, 93 P 867. Where judgment relied on was based on summons served outside of county, burden on plaintiff to prove that there was attached to summons a certificate of county clerk that person issuing summons was an acting justice of the peace at date of its issuance. Code Civ. Proc. § 849. Id.

**94.** Error in year in which summons was made returnable. Epstein v. Prosser, 112 NYS 174. Code Civ. Proc. § 2877, that summons must be returnable at time therein specified, etc., held not jurisdictional. Id.

**95.** Where action was upon promissory note for an amount less than $100 and defendants appeared by counsel, held justice had jurisdiction. Gilman v. Weiser [Iowa] 118 NW 774.

**96.** Where magistrate complied with Civ. Code of Laws 1902, § 2972, judgment in pursuance of such authority not erroneous. Lynch v. Ball, 79 S. C. 243, 60 SE 691.

**97.** Gilman v. Weiser [Iowa] 118 NW 774. Code, § 4648, requires justice to enter upon docket every adjournment ordered with a statement at whose instance it is granted and for what time, but does not require recording of cause or ground upon which order is made, hence presumption that motion was based upon sufficient ground or at least upon ground which judge deemed sufficient. Id.

**98.** Smith v. Lyle Rock Co. [Mo. App.] 111 SW 831.

**99.** Denial for failure to advance venire fees. New Jersey Soc. for Prevention of Cruelty to Animals v. Wilbur [N. J. Law] 69 A 1010.

**1.** Where justice was absent for more than two hours after cause was set for hearing, held without jurisdiction to enter an order of continuance, and all jurisdiction over case lost. Brin v. Topp, 131 Ill. App. 394. Agreement between attorneys as to a postponement of a suit not binding on parties since in Illinois attorneys are unknown in courts of justice of the peace. Id. Continuance for an indefinite period does not work a discontinuance of cause, where it is done with consent and at request of both parties thereto. Justice retains jurisdiction and is vested with authority at some future time to call case up and fix a day certain for its trial, although a longer period has elapsed than that fixed by statute. McGinniss v. Dickson, 11 Ohio C. C. (N. S.) 99. Continuances from week to week on justice's own motion where neither party is present to insist upon their statutory rights amount to a mere irregularity and not to a discontinuance of case or ouster of jurisdiction, continuances being made after several such continuances by agreement, and where neither party asserted rights under Code 1899, c. 50, §§ 59-63 [Code 1906, §§ 2010-2014]. Pocahontas Wholesale Grocery Co. v. Gillespie, 63 W. Va. 573, 60 SE 597.

**2.** Disregard of limitations of powers under Code, § 4496, deprives justice of jurisdiction. Gilman v. Weiser [Iowa] 118 NW 774. Restriction to period of three days in Code, § 4496, held to have special reference to adjournments ordered upon justices' own motion or for his own convenience. Id. Either party may have a continuance not exceeding 60 days for production of absent witnesses (Code, § 4497), and they may agree upon a longer continuance or an indefinite continuance subject to proper notice of time of trial to be subsequently fixed by justice. Id.

**3.** Where justice took an adjournment from Saturday evening, Dec. 1st, to Monday, Dec. 30, at 1 o'clock P. M., docket entry showing "case adjourned till Monday, 1 o'clock, P. M.," entry held sufficiently definite as to adjourned date so as not to defeat jurisdiction. Hanson v. Gronlie [N. D.] 115 NW 666.

**4.** After a judgment has been written up and signed, the justice's jurisdiction over the cause is ended, and he has no power or au-

ended, and his failure to either announce his decision or an adjournment of the hearing,[5] and the making of an order afterwards is a constructive fraud which avoids the judgment.[6] Upon the due and regular taking of an appeal the justice loses jurisdiction of the action,[7] but the fact that proofs are not made or judgment entered on the return day named in the summons does not ipso facto oust the court of jurisdiction.[8] In Arkansas the jurisdiction of the justice over the subject-matter in controversy is derived from the constitution, but the mode of proceeding is prescribed by statute.[9] Jurisdiction is sometimes confined to actions on contract[10] and sometimes extended to a limited class of actions ex delicto.[11] Under the various statutes a justice of the peace has been held to have jurisdiction of actions for penalties,[12] or of actions by a county against a county judge and his sureties on the former's bond for the recovery of fees unlawfully collected,[13] and to award consequential damages for injuries to personal property occasioned by mere negligence;[14] but he cannot entertain suits against a common carrier for failure to

thority to open and amend it. Pettit v. Burke, 139 Ill. App. 419.

5. Garnishment proceedings summons under Civ. Code, § 249 (Cobbey's Ann. St. 1903, § 1228). Johnson v. Samuelson [Neb.] 117 NW 470.

6. Entry of judgment against garnishee after discharge, no notice being given, held constructively fraudulent. Johnson v. Samuelson [Neb.] 117 NW 470.

7. Garnishment proceedings in justice court after perfecting appeal held void, court having lost jurisdiction. Hopkins v. McCusker, 103 Minn. 79, 114 NW 468. After appeal has been perfected, fact that an appeal bond has been given and is in full force and effect does not prevent commencement of garnishment proceedings in district court; appeal bond not bond provided for by Rev. Laws 1905, § 4256. Hopkins v. McCusker, 103 Minn. 79, 114 NW 468. Want of jurisdiction waived by a defendant who having pleaded the general issue causes case to be certified to appellate court which has jurisdiction. LaBarre v. Bent [Mich.] 15 Det. Leg. N. 822, 118 NW 6.

8. Where court entered default after expiration of one hour after time fixed for hearing, failed to make order postponing case and three days thereafter heard proofs and entered judgment, proceeding though irregular held not to oust jurisdiction or render judgment void. Rev. St. 1887, § 4701, and Sess. Laws 1905, p. 29. Zimmerman v. Bradford-Kennedy, 14 Idaho, 681, 95 P 825.

9. Little Rock Brick Works v. Hoyt [Ark.] 112 SW 880.

10. Where note was obtained from maker by false representations paid to one to whom it had been negotiated, action against payee for money had and received upon allegation of want of consideration held on contract and within jurisdiction. Manning v. Fountain [N. C.] 60 SE 645. Statute conferring jurisdiction of causes of action arising from contract either express or implied has in view only such contracts as arise immediately out of a course of dealing between the parties; no jurisdiction of action to recover cost of repairing a retaining wall which was alleged to belong to defendants, and which had fallen on plaintiff's land, no express contract being averred and no implication of contractual obligation enforcible by action of assumpsit before justice, arising. Birkhead v. Ward, 35 Pa. Super. Ct. 235. Action to recover $100 paid to insurance company, within jurisdiction, where plaintiff waives tort and sues for money had and received, though justice has no jurisdiction of actions to recover damages for fraud and deceit in amount over $50. Stroud v. Life Ins. Co. [N. C.] 61 SE 626.

11. A justice's court has no jurisdiction of actions ex delicto except for injury to personal property less than $100. Action for damages arising for failure to transport a shipment of property held ex contractu, error to dismiss for want of jurisdiction of subject-matter. Jenkins v. Seaboard Air Line R. Co., 3 Ga. App. 381, 59 SE 1120. Justice has jurisdiction of action to recover from connecting carrier $150 loss, which was due to "carelessness and negligence," action being ex contractu though contract of shipment was made by initial carrier. Midland Valley R. Co. v. Hale & Co. [Ark.] 111 SW 646. Under constitution and statute in pursuance thereof, justice has jurisdiction of action for personal injuries negligently inflicted, where amount demanded does not exceed $50. Houser v. Bousal & Co. [N. C.] 62 SE 776. In action for breach of contract for carriage and delivery of goods immaterial to jurisdiction whether action be in tort or in contract, damages being same in either case. St. Louis, etc., R. Co. v. Wilson, 85 Ark. 257, 107 SW 978. Where action is for damages to personal property, it is immaterial whether plaintiff sue in tort or in contract. Where amount did not exceed $100. Georgia, etc., R. Co. v. Elliot, 3 Ga. App. 773, 60 SE 363.

12. Comp. Laws 1897, § 9799. La Barre v. Bent [Mich.] 15 Det. Leg. N. 882, 118 NW 6. Declaration showing with reasonable definiteness that highway commissioner was proceeding under Comp. Laws 1897, § 4157, to collect penalty for obstructing highway, held to state a cause as against defendant pleading issuably and removing cause to circuit court. Inference that action was personal held unwarranted, and presence of commissioner's name might be treated as surplusage if necessary. Id.

13. Action not one in behalf of state for recovery of a penalty and amount of bond being involved only to extent of sum sought to be recovered and which was within justice's jurisdiction. Lane v. Delta County [Tex. Civ. App.] 109 SW 866.

14. Action against railway company for shrinkage in weight by reason of prolonged

perform a public duty,[15] nor an action for the killing of live stock in the absence of evidence showing that the casualty occurred either in the township where the action was brought or in an adjoining township,[16] and jurisdiction over trespass exists only where the trespass is vi et armis, and the injury is immediate.[17] He has jurisdiction of forcible entry and detainer proceedings,[18] unless the title to realty is involved,[19] but the right to proceed in a summary proceeding to obtain possession is lost and confided with the appellate court upon the filing of affidavit and recognizance as provided by statute.[20] While a justice has no equitable jurisdiction,[21] he may enforce by legal remedies the collection of money which equitably belongs to a party,[22] and especially where by assignment the plaintiff has acquired both the legal and equitable title.[23] The jurisdiction of a proceeding to lay out a road attaches upon the filing of a certificate of the highway commissioners,[24] and a certificate in substantial compliance with the requirements of statute is sufficient to confer jurisdiction.[25] Under statute providing for the filing of affidavits and

confinement of hogs in cars, loss from depreciation in market prices, extra feed, bills, etc. Cleveland, etc., R. Co. v. McNutt, 138 Ill. App. 66.

15. Allegation in petition showing suit to recover damages for breach of duty on part of railway company, justice without jurisdiction. Civ. Code 1895, § 4068. Smith & Simpson Lumber Co. v. Louisville & N. R. Co. [Ga. App.] 62 SE 472; Zuber v. Central of Georgia R. Co. [Ga. App.] 62 SE 473. Nature of action determinable by allegations and not by nomenclature of plaintiff. Smith & Simpson Lumber Co. v. Louisville & N. R. Co. [Ga. App.] 62 SE 472.

16. Daniels v. St. Louis, etc., R. Co., 130 Mo. App. 213, 109 SW 85.

17. Birkhead v. Ward, 35 Pa. Super. Ct. 235. Jurisdiction under Act of March 22, 1814, 6 Sm. L. 182, held not to extend to injuries for redress of which action of trespass on case was appropriate and exclusive remedy. Id. Act of May 25, 1887 (P. L. 271), abolishing distinction between trespass vi et armis and trespass on case held not to extend justice's jurisdiction to causes of action not theretofore embraced therein. Id. Where transcript of justice shows that plaintiff "claims ten dollars and fifty cents costs of repairing wall belonging to defendants," held not to show an action ex delicto so as to come within jurisdiction. Id.

18. Under Code Civ. Proc. § 838, justice has jurisdiction of forcible entry and detainer, and in such proceeding any evidence, otherwise competent, may be given and questions involved determined. Richmond v. California Super. Ct. [Cal. App.] 98 P 57. Statutory provisions for proceedings in forcible entry and detainer held to include proceedings in unlawful detainer. Id. Jurisdiction over forcible entry and detainer not limited to cases where lease has expired by efflux of time, but applies as well where lease has been terminated by act of lessor for violation of any of covenants of lease by express authority of provisions of lease. Rev. St. 1895, art. 2519, held to apply to all cases where landlord seeks to recover possession from tenant or one holding under him on ground that lease has terminated by term, contingency or for violation of terms. Termination by breach of covenant not to sublet held not to oust justice of jurisdiction. Walther v. Anderson [Tex. Civ. App.] 114 SW 414.

19. See post this section.

20. Under Act 1836, §§ 14, 117, proceedings before justice and 6 jurors confided in court of common pleas upon defendant's filing of affidavit that he does not claim under defendant in execution, though Act of May 24, 1878, providing for six jurors instead of twelve is unconstitutional. Reams v. Yeager, 29 Pa. Super. Ct. 520.

21. United States Fidelity & Guar. Co. v. Messick Grocery Co. [N. C.] 61 SE 375. To declare an equity or enforce an equitable lien. Id. Action by trustee in bankruptcy to recover proceeds of preference obtained by a creditor of bankrupt through legal process held a suit in equity beyond jurisdiction of justice. Action under Bankr. Act July 1, 1898, c. 541, § 60, subd. "a" (30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]). Starbuck v. Gebo, 112 NYS 312. No jurisdiction over counterclaim of an equitable nature to recover money paid under a mistake of fact. Aimee Realty Co. v. Haller, 128 Mo. App. 66, 106 SW 588. No jurisdiction of action involving settlement of partnership accounts. Rude v. Sisack [Colo.] 96 P 976. Action held based on personal agreement and not a partnership transaction so as to be beyond jurisdiction where plaintiff sued on claim assigned to him by A, defendant's partner in a business venture which alleged that defendant had agreed to pay A a fixed sum per week and withhold part of same for A to fall back on if venture failed. Id. No jurisdiction of an action at law to recover earned profits due one member of a joint enterprise, until amount of profits have been determined by an accounting either between the parties themselves or by court of competent jurisdiction. O'Rourke v. Edwards, 11 Ohio C. C. (N. S.) 124.

22. United States Fidelity & Guar. Co. v. Messick Grocery Co. [N. C.] 61 SE 375.

23. Justice held to have jurisdiction to recover from defendant on ground that defendant was surety on bond of an agent through whom defendant purchased property for principal, and that defendant with knowledge paid agent who converted payment, and surety company was compelled to pay amount to principal who assigned claim to surety company, that became legal and equitable owner. United States Fidelity & Guar. Co. v. Messick Grocery Co. [N. C.] 61 SE 375.

24. Commissioners of Highways v. Hucker, 133 Ill. App. 252.

25. Certificate held sufficient, though formally defective in not asking that benefits as

for their amendment in attachment proceedings, the jurisdiction of the justice is not dependent upon a preliminary showing of facts but upon the actual existence of the facts on which jurisdiction is made to rest,[26] and such facts may be shown at any time before trial providing they existed at the time of presentation of the original insufficient affidavit; hence, where defendant appears generally and goes to trial without objecting to the original affidavit, the jurisdictional facts are thereby admitted and objections to the attachment waived.[27] A justice of another township has no jurisdiction to sit in place of another justice in the absence of a written request from the latter,[28] but so long as a necessary absence continues, a substitute justice requested to attend in another's behalf retains jurisdiction to do and perform any act required in the proceeding.[29] Prohibition lies to prevent a justice from exceeding his jurisdiction.[30]

*Residence determining jurisdiction.* See 10 C. L. 556—A justice's jurisdiction is usually coextensive with the boundaries of the county,[31] but all actions at law commenced before a justice of the peace must be brought in the township, village or city where the plaintiff or the defendant or one of several plaintiffs or defendants reside,[32] and before one may be sued elsewhere than in his own county and precinct, the case must come clearly within one of the exceptions in the statute.[33] In New York a justice of any town has jurisdiction of a defendant who is a nonresident of the county in which the town is situated, though plaintiff be also a nonresident, provided the defendant is within the town when the action is commenced,[34] and one may be sued in any county within the state where he resides;[35] but he has no jurisdiction of an action between two nonresidents of the state.[36] A justice of the city and county where a note is payable has jurisdiction of an aciton on such note,[37] and by the service of a summons on the defendant jurisdiction of his person is also obtained.[38]

*The amount in controversy* See 10 C. L. 556 is determined by the sum demanded,[39] but a cause for a sum greater than the jurisdictional amount cannot be split up

well as damages be determined, under "Rules and Regulations prescribed in act in relation to public roads," §§ 41, 54. Commissioners of Highways v. Hucker, 133 Ill. App. 252.

**26.** St. 1898, §§ 3701, 3702. Givans v. Searle, 136 Wis. 608, 118 NW 202.

**27.** Appearance held to give justice jurisdiction not only to render personal judgment but to proceed with attachment. St. 1898, §§ 3701, 3702. Givans v. Searle, 136 Wis. 608, 118 NW 202.

**28.** Under Code Civ. Proc. § 105, where no request made, held justice was without jurisdiction. Harlow v. Gladding, McBean & Co. [Cal. App.] 93 P 400.

**29.** Under Cobbey's St. 1907, § 2037, substitute authorized to file and approve bond and make transcript, nothing showing return of regular justice before performance of acts. Carmichael v. McKay [Neb.] 116 NW 676.

**30.** Martin v. Richmond [Va.] 62 SE 800.

**31.** Rev. St. 1887, §§ 3850, 3885. State v. Noyes [Idaho] 96 P 435.

**32.** Gen. Laws 1895, c. 33, p. 151, amending Gen. St. 1878, c. 65, § 6, held a jurisdictional requirement. Stevenson v. Murphy [Minn.] 119 NW 47. Gen. St. 1894, subd. 3, § 4960, as amended by c. 321, p. 409, Laws 1899. Union Stoneware Co v. Lang, 103 Minn. 466, 115 NW 271. Requirements held not unreasonable. Id. Affidavit presented in support of motion for dismissal held sufficient to make out prima facie case. Id.

**33.** Johnson v. Lanford [Tex. Civ. App.] 114 SW 693. Sayles' Ann. Civ. St. 1897, art. 1585, held not to authorize joinder of a nonresident of county when codefendant did not reside in precinct in which suit was commenced even though codefendant did not object to being sued there, hence under Act Apr. 18, 1907, art. 1194 (Gen. Laws 1907, p. 249, c. 183), it was error for courts not to change venue on plea of privilege to be sued in one's own county. Id.

**34, 35.** Dale v. Prentice, 110 NYS 535.

**36.** Under Code Civ. Proc. §§ 2861, 2869, justice without jurisdiction where plaintiff and defendant were nonresidents of state. Judgment rendered void. Drew v. Cass, 112 NYS 607.

**37.** Where defendant a resident of San Luis Obispo county had executed note payable in city and county of San Francisco, justice of San Francisco had jurisdiction of subject-matter. Code Civ. Proc. § 832, subd. 7. Brum v. Ivins [Cal.] 96 P 876.

**38.** Brum v. Ivins [Cal.] 96 P 876.

**39.** Justice has jurisdiction of breach of contract cass where total sum demanded is $200. Teal v. Templeton [N. C.] 62 SE 737. Where one filed written petition on two notes aggregating $160, notice of such demand issued and served on defendant, jurisdictional amount being $100, held defendant not required to appear, and judgment entered by default on one of notes was void. Nauman v. Nauman, 137 Iowa, 233, 114 NW 1068.

and the defendant be vexed with several suits.[40] Where the amount claimed is within the jurisdiction, the court may adjudicate the controversy though the accumulation of interest, while the action is pending, increases the amount due to more than the jurisdictional amount;[41] but the judgment must in no case exceed the statutory amount.[42] The rule against splitting demands does not apply to actions to enforce mechanics' liens claims.[43] Sometimes the amount is determinable by the amount adjudged,[44] and the justice has no authority to determine that the total amount of the accounts of partners to an action exceeds the statutory amount over which he has jurisdiction,[45] hence he has no power to dismiss except upon proof of that fact, and an inspection of the pleadings is insufficient.[46] The value of the rights involved in forcible entry and detainer proceedings cannot serve to oust the jurisdiction of the justice court,[47] and provisions limiting the jurisdiction in replevin actions, may apply only to the plaintiffs' actions in which case there is no limit to the amount that may be rendered when the finding is for the defendant.[48] In Illinois a justice has no jurisdiction in a replevin action where the property involved is worth more than two hundred dollars,[49] and it is proper to permit the jury to determine the value of the property involved in order to determine whether such value is in excess of the statutory amount.[50] Consent to jurisdiction over an amount greater than that fixed by statute must be in writing,[51] but a remittitur of all above the jurisdictional amount sustains the jurisdiction on appeal, in cases where the amount demanded is doubtful.[52]

*Title to realty.*[See 10 C. L. 557]—A justice has no jurisdiction of summary proceedings except where there is the relation of landlord and tenant[53] as he has no

Amount claimed in summons and not that shown by testimony controlling. Pocahontas Wholesale Grocery Co. v. Gillespie, 63 W. Va. 578, 60 SE 597. Where no written complaint, sum demanded in summons is test. Teal v. Templeton [N. C.] 62 SE 737.

**40.** Giving of separate checks at different times aggregating an amount exceeding justice's jurisdiction not sufficient to show that they were for the same demand so as to defeat separate actions. Pocahontas Wholesale Grocery Co. v. Gillespie, 63 W. Va. 578, 60 SE 597. Where two mules were killed by a locomotive at same time and manner, two separate actions cannot be brought in justice's court to recover $175 for each, killing constituting but one cause of action. Jurisdiction being limited to $200, court was without jurisdiction. Yazoo & M. V. R. Co. v. Payne [Miss.] 45 S 705.

**41.** Gen. St. 1901, § 5230. Parker v. Dobson [Kan.] 96 P 472.

**42.** Cause remanded with direction to modify judgment by reducing same to $300. Gen. St. 1901, § 5230. Parker v. Dobson [Kan.] 96 P 472.

**43.** Separate actions may be instituted before a justice to enforce each lien. Aimee Realty Co. v. Hallen, 128 Mo. App. 66, 106 SW 588.

**44.** In suit by assignee of note for less than $200, where maker demanded judgment against payee for any amount the assignee might recover on ground of failure of consideration of note given for premiums on life policy, where justice was not asked to cancel policy and did not do so but adjudged that payee was liable to maker to extent of his liability to assignee which was less than $200, held justice had jurisdiction to determine suit, sum adjudged and not that sum and others claimed under contract being amount in controversy. Kansas City Life Ins. Co. v. Warbington [Tex. Civ. App.] 113 SW 988.

**45.** Under Code Civ. Proc. § 2863, subd. 4, justice not authorized to determine from pleadings that accounts exceeded $400. Dale v. Prentice, 110 NYS 535.

**46.** Code Civ. Proc. § 2863, subd. 4. Dale v. Prentice, 110 NYS 535.

**47.** Proceedings under Rev. St. 1895, art. 2519. Walther v. Anderson [Tex. Civ. App.] 114 SW 414.

**48.** Rev. St. 1899, § 3900 (Ann. St. 1906, p. 2155), fixing replevin jurisdiction at $250, and § 3914, p. 2161, held to apply merely to plaintiff's action, and under § 3921, p. 2164, there is no limit to justice's jurisdiction when finding is for defendant. Saunders v. Scott [Mo. App.] 111 SW 874. Complaint under fair construction held to show that plaintiff intended to confine claim to aggregate sum of $250 giving justice jurisdiction. Id.

**49.** Rev. St. c. 79, art. 2, par. 5. Jarrett v. McIntyre, 134 Ill. App. 581.

**50.** Jarrett v. McIntyre, 134 Ill. App. 581.

**51.** Consent under Code, § 4777, to take jurisdiction where the amount does not exceed $300, must be in writing. Nauman v. Nauman, 137 Iowa, 233, 114 NW 1068. Under Code § 4477, where neither of two notes exceeds $100 and each stipulates to give jurisdiction in action thereon to an amount not exceeding $300, claims cannot be united in one action, where combined amount exceeds $100. Id. Jurisdictional defect in such case not avoided by expedient of dismissing part of claim. Id.

**52.** Teal v. Templeton [N. C.] 62 SE 737.

**53.** Where pleadings in unlawful detainer

jurisdiction of actions in which the title to real estate is involved,[54] and as soon as a bona fide claim to a fee-simple ownership to land involved is made by the defendant, jurisdiction of the cause is ousted;[55] but jurisdiction over a proceeding to dispossess persons unlawfully in possession of the land of another is not affected by defendant's oath that the title to the land may be raised without any showing of title or justification.[56] In some states on account to the necessity of proof of land titles, jurisdiction of actions for injury to land [57] or objection of easements [58] is denied.

*Objections to the jurisdiction.* See 10 C. L. 558—In an action in a justice court judgment, the defendant may by way of answer attack the jurisdiction of the court,[59] but the facts upon which he relies must be properly pleaded,[60] and the jurisdiction of a justice in a proceeding to lay out a road cannot be questioned either before him or before the county court upon appeal, but only by certiorari.[61] Where upon the face of a complaint in a replevin suit the justice has apparent jurisdiction and on appeal the value of the property is found to exceed the statutory amount and the case is dismissed, the sureties upon the bond are estopped from denying the justice's jurisdiction.[62] Where the record does not show jurisdiction, the judgment is a nullity and may be collaterally attacked.[63]

§ 4. *Procedure in justices' courts.* See 10 C. L. 558—The commencement of an action before a justice of the peace dates from the delivery of the summons to the constable for service.[64] Justices are not supposed to be trained in technical rules of pleading and practice,[65] and mere informalities in the conduct of justices' courts, where no essential right or interest of either party suffers, prejudices, should be overlooked.[66] A litigant is not required to conduct the proceeding by counsel.[67] In some states a justice may grant a new trial,[68] but usually he has no power to

raised decisive question of the relation, which was within justice's jurisdiction, held action was not transferable as involving title to realty. Richmond v. California Super. Ct. [Cal. App.] 98 P 57. Quasi tenancy insufficient, proof must show either express letting or letting by implication, and occupancy as tenant. Id.

54. Martin v. Richmond [Va.] 62 SE 800. Under Act of March 20, 1810 (5 Sm. L. 161), even though contractual obligation to pay cost of repairing a wall might be assumed, no jurisdiction. Birkhead v. Ward, 35 Super. Ct. 235.

55. Jurisdiction to impose a fine for digging up a street in violation of ordinance ousted by claim of fee simple ownership of land on which digging was done. Martin v. Richmond [Va.] 62 SE 800.

56. Proceeding under Civ. Code 1902, § 2972. Lynch v. Ball, 79 S. C. 243, 60 SE 691.

57. Action by farm lessor against lessee for damages for failure to repair fences as required by lease, not an action to recover for damages to land so as to be beyond justice's jurisdiction. Von Berg v. Goodman, 85 Ark. 605, 109 SW 1006.

58. Action for penalty imposed by Comp. Laws 1897, § 4157, for obstructing highway, held not within § 704. La Barre v. Bent [Mich.] 15 Det. Leg. N. 822, 118 NW 6. Action brought by a private person to recover damages for disturbing a private right of way held within statute, but jurisdiction to try actions for damages resulting to private persons expressly conferred. Id.

59. Stevenson v. Murphy [Minn.] 119 NW 47.

60. General denial of jurisdiction or of service of summons, not sufficient. Defendant must plead facts sufficient to constitute a cause of action to same extent as though he had brought an original action attacking the judgment for want of jurisdiction. Stevenson v. Murphy [Minn.] 119 NW 47. Answer held not inconsistent with statement of facts but sufficient to challenge jurisdiction of justice, so as to render evidence on jurisdiction admissible. Id.

61. That being only way provided by statute. Commissioners of Highways v. Hucker, 133 Ill. App. 252.

62. Where cattle replevied were by affidavits alleged to be of $250 value and on appeal found to be $500 value, sureties estopped to challenge jurisdiction. Janssen v. Duncan, 43 Colo. 286, 95 P 922. Testimony on value of property, ownership thereof and that original judgment upon which execution was issued was obtained without service, held properly rejected as immaterial in action on replevin bond. Janssen v. Duncan, 43 Colo. 286, 95 P 922.

63. Ruckert v. Richter, 127 Mo. App. 664, 106 SW 1081.

64. Rev. St. 1899, § 3850 (Ann. St. 1906, p. 2134). Fabien v. Grabow [Mo. App.] 114 SW 80.

65. Gilman v. Weiser [Iowa] 118 NW 774. More liberal rules in respect to pleading and practice prevail in justice courts than in higher courts. State v. Brown [Nev.] 98 P 871.

66. Gilman v. Weiser [Iowa] 118 NW 774.

67. Benton v. Stakes [Md.] 71 A 532.

68. Until the expiration of five days from

set aside a judgment rendered by him[69] or to grant a new trial,[70] and while he may amend a judgment in matters of form or otherwise not affecting its legal tenor or effect,[71] yet he is without power to amend or otherwise enlarge or diminish its original scope and efficacy;[72] and it has been held that after a judgment has once been written up and signed, he is without power to open and amend the same thereafter.[73] He may take judicial notice of proceedings on his own docket and act thereon,[74] must disregard any error in the pleadings or proceedings not affecting the substantial rights of the adverse party,[75] and may in his discretion refuse a continuance.[76] Where, by appearance in a proceeding on adjournment, jurisdiction is conferred over a cause, a party is bound to take notice of a continuance ordered at the instance of the adverse party on the day to which the first adjournment was taken.[77] Where statutes do not require motions for continuance to be in writing, an oral application or motion may properly be entertained.[78] When acting within the limits of his jurisdiction, the proceedings before a justice are presumed regular.[79] The demand for a jury must be timely made,[80] but when timely made, in a proper case,[81] it cannot lawfully be denied for failure to advance the venire fees,[82] though failure to make an advance deposit for jurors' and constables' fees as required by statute and as directed by the justice waives a jury trial.[83] Objections propter defectum to jurors are of no avail after verdict,[84] and it is not error to allow the jury to take an original summons with them during the deliberation of a case.[85] A garnishment in a justice's court follows the attachment under which it issues, and the garnishee is required to appear and answer at the term to

the rendering of a judgment, the magistrate has power to grant a new trial. Williams v. Rickembaker, 79 S. C. 467, 60 SE 1122.

69. A justice of the peace has no power to set aside judgment rendered by himself. Nashville, etc., R. Co. v. Brown, 3 Ga. App. 561, 60 SE 319. Cannot sustain motion in arrest of judgment. Seaboard Air Line R. Co. v. Smith, 3 Ga. App. 644, 60 SE 353.

70. Seaboard Air Line R. Co. v. Smith, 3 Ga. App. 644, 60 SE 353.

71. Judgment against defendant and garnishee might be amended by striking name of garnishee. Nashville, etc., R. Co. v. Brown, 3 Ga. App. 561, 60 SE 319.

72. Justice not authorized to convert a judgment into two judgments, one against defendant and the other against garnishee. Nashville, etc., R. Co. v. Brown, 3 Ga. App. 561, 60 SE 319.

73. Pettit v. Burke, 139 Ill. App. 419.

74. May take judicial notice of proceedings on his own docket, and the dismissal by him of an attachment proceeding without hearing of testimony is not error, where another case is pending in same court, or in court of common pleas, between same parties and involving the same subject-matter. Beardsley v. Zacharias & Co., 19 C. C. 637, followed; Lyon v. Phares, 9 C. C. (N. S.) 614, not followed. Brown v. De Long, 6 Ohio N. P. (N. S.) 510.

75. Rev. Code Civ. Proc. §§ 150, 153, held applicable to cases triable in justice court, hence not error to disregard technical defect in summons. Bradley v. Mueller [S. D.] 118 NW 1035.

76. No abuse of discretion in action against three persons to refuse a continuance on account of absence of one of them, case having been previously continued for absence of defendant's counsel, where there was no showing that motion was not made for delay, what testimony he would have given, or that proper steps had been taken to procure his testimony. Charleston Live Stock Co. v. Collins, 79 S. C. 383, 60 SE 944.

77. Even though he then failed to appear and to give consent to continuance. Gilman v. Welser [Iowa] 118 NW 774.

78. Gilman v. Weiser [Iowa] 118 NW 774.

79. Where under Rev. Justice's Code, § 124, it was duty of justice when change of place was granted to first determine whether parties had agreed upon a justice, and in absence to send case to nearest justice, presumption that he did so, jurisdiction being admitted. State v. Carlisle [S. D.] 118 NW 1033.

80. In trial of civil action, demand for jury, after justice without objection has called case for trial and sworn plaintiff's witnesses, comes too late and should be refused, error not to do so if the amount is under twenty dollars, since it deprives the right of appeal. Burton v. Board of Education, 5 Ohio N. P. (N. S.) 294.

81. Proceedings taken in § 13 of cruelty to animals act (Gen. St. 1895, p. 36) triable by a jury. New Jersey Soc. for Prevention of Cruelty to Animals v. Wilbur [N. J. Law] 69 A 1010.

82. New Jersey Soc. for Prevention of Cruelty to Animals v. Wilbur [N. J. Law] 69 A 1010.

83. On failure to make deposit, jury trial waived and court properly proceeded without jury. Code Civ. Proc. § 2990. Martin v. Borden, 123 App. Div. 66, 107 NYS 725.

84. Objection after verdict that one juror served on jury whose name was not upon jury list of county and fact that plaintiff did not know such fact of no avail. Bush v. Roberts [Ga. App.] 62 SE 92.

85. Bush v. Roberts [Ga. App.] 62 SE 92.

which the attachment is returnable.[86] A motion to dismiss the garnishment does not reach the attachment.[87] Under statute consolidation of actions under certain circumstances is permissible.[88] A motion for nonsuit is waived by defendant introducing evidence and not reviewing the motion after the close of all the evidence.[89]

*The docket and other records* See 10 C. L. 558 need not be technically exact,[90] and the presumption is in favor of the verity and regularity of the record and judgment where there is a sufficient showing of jurisdiction of the subject-matter and parties.[91] Where from the docket entries it is inferable that both defendants were present, it is immaterial that only one is mentioned as being present when the case was called.[92] Only entries required to be made in a justice's docket are prima facie evidence of the facts stated therein,[93] and among other things the record must show that the statutory notice of intent to sue was given before beginning the action,[94] but it need not show where and before whom the summons was returnable,[95] nor where the entries were made.[96] Affirmative recitals cannot be impeached by parol,[97] nor has the circuit court authority to compel a justice to amend his docket or any right to permit him to do so.[98] The recital in a judgment that defendant failed to answer the complaint as required by law is sufficient to support a default, without a docket entry to that effect.[99]

*Change of venue.* See 10 C. L. 558—A case may be changed to some justice in an adjoining township of the same county whenever under statute a party is entitled to a change of venue,[1] and when defendant believes that the justice before whom the action is brought is prejudiced against him, he may have the venue changed to the next nearest justice,[2] but the right may be waived and is waived by consent to transfer to a third justice who thereupon properly has jurisdiction.[3] Strict compliance with all statutory requirements is necessary in order that the duty to grant a change shall become mandatory,[4] and a motion for a change should not be made after entering upon the trial on grounds which the moving party knew previous thereto.[5]

**86.** National Bank of Brunswick v. Pritchard [Ga. App.] 61 SE 841. Under Civ. Code 1895, § 4518, attachment having issued on April 19th and next regular term of court coming on April 20th, attachment properly returnable to May term. Id.

**87.** National Bank of Brunswick v. Pritchard [Ga. App.] 61 SE 841.

**88.** Under Rev. St. 1899, § 3953 [Ann. St. 1906, p. 2174], actions which may be instituted at different times and before different justices cannot be consolidated. Aimee Realty Co. v. Haller, 128 Mo. App. 66, 106 SW 588.

**89.** Teal v. Templeton [N. C.] 62 SE 737.

**90.** Justice's docket entry: "1899 May 23d, ten o'clock A. M. Case called plaintiff present in person and E. A. Bartlett as attorney. Defendant O. present in person," held to imply presence at 10 o'clock. O'Donnell v. Wade, 151 Mich. 103, 14 Det. Leg. N. 873, 114 NW 871.

**91.** Pocahontas Wholesale Grocery Co. v. Gillespie, 63 W. Va. 578, 60 SE 597. Docket containing requisite entries in action prima facie evidence of a valid judgment. O'Donnell v. Wade, 151 Mich. 103, 14 Det. Leg. N. 873, 114 NW 871.

**92.** Where docket recited that "defendants" acknowledged debt sued on, presence of both defendants inferable, though only one was mentioned. O'Donnell v. Wade, 151 Mich. 103, 14 Det. Leg. N. 873, 114 NW 871.

**93.** Under Code Civ. Proc. § 912, docket entry showing mode of service of summons not prima facie evidence of fact, such entry not being required by § 911. Ferguson v. Basin Consol. Mines, 152 Cal. 712, 93 P 867. Recital in docket that suit was instituted after filing of notice of intention to institute mechanic's lien action not evidence of such fact, entry not being required under statutes considered. Fabien v. Grabow [Mo. App.] 114 SW 80.

**94.** Rev. St. 1899, § 3893 (Ann. St. 1906, p. 2152). Action to enforce mechanic's lien. Fabien v. Grabow [Mo. App.] 114 SW 80.

**95, 96.** O'Donnell v. Wade, 151 Mich. 103, 14 Det. Leg. N. 873, 114 NW 871.

**97.** Recital of appearance and confession of judgment. Ruoff v. Fitzgerald, 128 Mo. App. 639, 106 SW 1110.

**98.** Pettit v. Burke, 139 Ill. App. 419.

**99.** Especially so where entries used are those set forth in B. & C. Comp. § 786. Stanley v. Rachofsky, 50 Or. 472, 93 P 354.

**1.** In trials as to property right under enforcing Act, § 6, art. 3 (Sess. Laws 1907-08, p. 605, c. 69), claimant may change to justice of adjoining township under terms of Wilson's Rev. & Ann. St. 1903, c. 67, art. 7. State v. Oldfield [Okl.] 98 P 925.

**2, 3.** Squires v. Curtain, 42 Colo. 51, 93 P 1106.

**4.** Insufficiency of notice and affidavit under Code Civ. Proc. 1902, § 88, subd. 19. Mayes v. Evans [S. C.] 61 SE 216.

**5.** Mayes v. Evans [S. C.] 61 SE 216.

The justice to whom a cause is sent may serve the notice of time and place of trial upon the defendant's attorney.[6]

*Transfer of cause.* See 10 C. L. 558—Under statute providing for the removal of any case in which the title to land "shall in any wise come in question," removal may be had where equitable but not legal title is in controversy,[7] but a summary proceeding in unlawful detainer where the question of relation of landlord and tenant is raised is not removable as involving title to realty.[8]

*Process and appearance.* See 10 C. L. 559—An action may, under most statutes be commenced by the service of a summons without a complaint,[9] or warrant and in such case the writ is usually required to state not only the names of both parties[10] but the nature of the demand.[11] Where the summons is served accompanied by a complaint, the defendant must look to the complaint to determine the cause of action against him.[12] The summons, in some states, supplies the place of the petition or declaration in other courts, and is indispensable to the trial.[13] If the original is still in existence and for any reason cannot be produced at the time of trial, the case should be continued until the original summons can be brought into court,[14] and if it is not forthcoming when the case is called for trial, and if it has been lost or destroyed, the justice should have a copy established before proceeding with the trial.[15] It must be served and return made within time prescribed.[16] The affidavit upon which a summons is issued,[17] the service of the summons,[18] the return thereof,[19] must be in compliance with statute. A substantial compliance as

6. Under Rev. Civ. Proc. § 561, Rev. Justices' Code § 114, service may be on defendant's attorney notwithstanding Rev. Justices' Code § 7, providing that notice must be served upon the parties. McFarland v. Cruickshank [S. D.] 116 NW 71.

7. St. 1898, §§ 3619-3621. Richer v. Carlson, 136 Wis. 353, 117 NW 815.

8. Richmond v. California Superior Ct. [Cal. App.] 98 P 57.

9. Code of Procedure, § 130. Bradey v. Mueller [S. D.] 118 NW 1035.

10. Stout v. Baltimore & O. R. Co. [W. Va.] 63 SE 317.

11. Under Code 1858, § 4146 (Shannon's Code, § 5958), warrant issued by justice notifying defendant to "appear and answer plaintiff in a plea of damages under $500" held insufficient, not notifying defendant of what he is called upon to answer. Memphis St. R. Co. v. Flood [Tenn.] 113 SW 384. Code 1858, § 2815 (Shannon's Code § 4520), so far as applicable to summons issued by a justice of the peace and authorizes omission of statement of cause of action, held in conflict with Code 1858, § 4146 (Shannon's Code, § 5958), and latter statute controls. Id. Code 1858, § 4119 (Shannon's Code § 5931) without avail in action where warrant does not contain a general statement of nature of demand sued on as required by Code 1858, § 4146, and where there was no consent to try case without a warrant. Id. Warrant containing no general statement of nature of demand sued upon not cured by Code 1858, §§ 2863, 2879. Id. Defect in warrant not cured by oral statement of cause upon trial before justice and in circuit court. Id. Statement of counsel on trial on appeal however full and explicit of cause of action held not to amend warrant. Id.

12. Defect in summons not ground for setting aside complaint setting out same facts as cause of action. Bradey v. Mueller [S. D.] 118 NW 1035.

13, 14, 15. Southern R. Co. v. Grace [Ga. App.] 61 SE 1048.

16. Since Code Civ. Proc. § 581 is not applicable to dismissals in justices' courts, hence, although summons issued out of justices' court was not served and return made within three years after commencement of action, justice had jurisdiction. Hubbard v. Santa Clara County Super. Ct. [Cal. App.] 98 P 394.

17. Where affidavit, upon which forthwith summons was issued, was signed by a person other than plaintiff as required by statute, judgment against defendant unauthorized. Dickerson v. Legore [Del.] 69 A 1004.

18. Service in an action against a railroad may be made on a freight agent, under Code Civ. Proc. § 2880, where person upon whom process may be served has not been designated, though assistant superintendent of railroad company resides in county where such superintendent is not a managing agent within § 2879. Duval v. Boston & M. R. Co., 58 Misc. 504, 111 NYS 629. Where citation as issued commanded summoning of St. L. S F. & T. R. Co., and was served on G. as defendant's agent, and return described defendant as St. L. & S. F. R. Co., held no legal service on latter road. St. Louis, etc., R. Co. v. English [Tex. Civ. App.] 109 SW 424. Where transcript, enrolled in the circuit clerk's office and recorded in chancery clerk's office, shows that justice appointed a private person to execute and return the writ, presumption that circumstances authorizing such an appointment existed and that therefore the service of the writ was legal. Presumption in favor of one claiming under execution sale on judgment of justice. Alfred v. Batson [Miss.] 45 S 465.

19. Return of service of summons in action against a railway company, service being on freight agent, held insufficient under Code Civ. Proc. § 2880, where it contained no averment that the officer left copies with person

to the issuance of summons is all that is required[20] and technical defects are not fatal.[21] In a suit against a domestic corporation,[22] the return of the officer need not show that the place of service was the place of residence of the person served.[23] Service in a proper case may be had by publication,[24] statutory requirements being complied with,[25] but, in case of service by publication, judgment by default cannot be rendered before the expiration of the statutory time allowed within which to make appearance.[26] Notice of intention to sue must be given before suit is brought in actions requiring same,[27] and it is incumbent upon the plaintiff to prove that such notice was timely given[28] a sufficient statement of claim or demand must be filed before a summons can be issued.[29] The process of garnishment is returnable to the next regular term of court to be held at the place where the original judgment was obtained.[30] A justice having no jurisdiction to issue process running out of his county is confined to the statutory method of acquiring jurisdiction of the person,[31] and since he has no jurisdiction to issue summons to another county, where all the defendants reside outside of his county, he acquires no jurisdiction of defendants by so doing.[32] Jurisdiction is conferred by a general appearance[33]

served. Duval v. Boston & M. R. Co., 58 Misc. 504, 111 NYS 629. Return of service, certifying that a copy was served, sufficient proof that instrument served was a copy, under B. & C. Comp. § 2203, requiring service of copy but requiring that it be certified as such. Stanley v. Rachofsky, 50 Or. 472, 93 P 354.

**20.** Stanley v. Rachofsky, 50 Or. 472, 93 P 354.

**21.** Error in year in which summons was made returnable. Code Civ. Proc. § 2877. Epstein v. Prosser, 112 NYS 174. Summons, under Laws 1905, p. 315, and B. & C. Comp. § 2203, being otherwise proper held not fatally defective for failure to state rate of interest demanded and date from which it was to be computed, where such facts appeared from copy of complaint served with summons. Stanley v. Rachofsky, 50 Or. 472, 93 P 354. Summons in action for damages to property by defendant's trespassing animals, though defective under Rev. Justice Code, § 13 for failure to notify defendant that unless he appears plaintiff will apply to court for relief demanded held sufficient where it notified defendant of the cause of action and required an answer or judgment by default would be taken. Bradey v. Mueller [S. D.] 118 NW 1035.

**22.** Railroad corporation doing business in state though chartered by another state or territory held a domestic corporation for purpose of receiving service. Stout v. Baltimore & O. R. Co. [W. Va.] 63 SE 317.

**23.** Acts 1903, chap. 9, p. 79. Stout v. Baltimore & O. R. Co. [W. Va.] 63 SE 317.

**24.** A justice of the peace may obtain jurisdiction by publication over a foreign railway corporation, whose president does not reside in the township and whose road does not enter the township and which cannot be served with process under § 6498. Squire v. Railway, 1 Ohio C. C. (N. S.) 354, not followed. Northern Pac. R. Co. v. Baum, 7 Ohio N. P. (N. S.) 265.

**25.** Civ. Prac. Act, § 517 (Laws 1907, p. 28, c. 16), held not to require that names of attorneys, where plaintiffs appear by attorneys, be included in notice of publication under § 517. Forsyth v. Chambers [Nev.] 96 P 930.

**26.** Forsyth v. Chambers [Nev.] 96 P 930. Held, under Civ. Prac. Act, § 517 (Laws 1869, p. 274, c. 112), amended by St. 1907, p. 28, c. 16, improper to take judgment on expiration of four weeks publication where personal service could not be had, defendant being entitled to 20 days in which to make appearance, as in cases of personal service against one served in a county other than the one in which action is brought. Id.

**27.** Under Rev. St. 1899, § 3893 (Ann. St. 1906, p. 2152), action to enforce a mechanic's lien requires notice. Fabien v. Grabow [Mo. App.] 114 SW 80. Notice, under Rev. Code Civ. Proc. §§ 829-831, not necessary in action for damages by trespassing horses and cattle, where question as to fences is not involved. Bradey v. Mueller [S. D.] 118 NW 1035.

**28.** Where only evidence of notice of intention was filing mark on notice but where summons was part of record and summons did not show hour of issuance and delivery, evidence held insufficient to show suit was commenced after notice given. Fabien v. Grabow [Mo. App.] 114 SW 80.

**29.** Filing of order for payment of a portion of a servant's wages to plaintiff directed to M. who was timekeeper for employer, making no reference to any claim against employer, held insufficient to authorize issuance of summons. Kirby's Dig. § 4565. Little Rock Brick Works v. Hoyt [Ark.] 112 SW 880.

**30.** Under Ann. Code 1892, §§ 2130, 2140, 2395, 2399, 2401, where justice held a term in two different parts of county, rendered judgment and issued writ of garnishment at one of places, held writ properly returnable to next regular term held at that place, though an intervening term at other place would be held. Edwards v. Kingston Lumber Co. [Miss.] 46 S 69.

**31.** Rutherford v. Ray, 147 N. C. 253, 61 SE 57.

**32.** Code 1883, § 871. Rutherford v. Ray, 147 N. C. 253, 61 SE 57. Action to enforce a lien for material furnished held not proceeding quasi in rem so as not to make general statutory jurisdictional provisions applicable. Id.

**33.** Appearance in ejectment proceedings under Civ. Code 1902, § 2972, where unsuc-

and by answering and participating in the trial on its merits.[34] If there is an irregularity in the process or in the manner of its service, the defendant must take advantage of such irregularity by motion or proceeding in the court where the action is pending.[35]

*Pleadings, issues, and proof.* See 10 C. L. 559—With but rare exceptions,[36] pleadings need not be in writing[37] but they cannot be dispensed with.[38] Under statute, requiring defendant to answer within seven days from the date of service, answer may be made on any one of those days.[39] The rules of pleading are greatly relaxed in justice court[40] and niceties and formalities in pleadings are not required,[41] but a statement of the facts upon which the action is as founded must be given,[42] and any statement of the cause of action, if it apprises the opposite party of the nature of the action and is sufficient to bar another action, is sufficient,[43] and, in an action on a contract, a complaint apprising the defendant of the claim against him is all that is required.[44] The petition may be signed by counsel[45] or by an

cessful attempt was made to raise question of title to land as defense, held to confer jurisdiction over person of defendant. Lynch v. Ball, 79 S. C. 243, 60 SE 691. Proceedings taken by a party showing that he appeared for any purpose consistent with jurisdiction gives court jurisdiction, even though such party states that he appeared specially to object to jurisdiction. Where defendant appeared and objected to jurisdiction on ground that summons was defective, and also moved to amend return to summons to conform to facts, held motion to amend was inconsistent with want of jurisdiction, amounted to a general appearance, and gave court jurisdiction even though party stated that he appeared specially. Bestor v. Intercounty Fair, 135 Wis. 339, 115 NW 809. By appearance, justice having jurisdiction of subject-matter, jurisdiction over person is waived where no objection is made for want thereof. Smith v. Lyle Rock Co. [Mo. App.] 111 SW 831.

**34.** In summary proceedings for recovery of leased premises where notice under Civ. Code 1902, § 2423 was not given. Mayes v. Evans [S. C.] 61 SE 216.

**35.** Stanley v. Rachofsky, 50 Or. 472, 93 P 354.

**36.** Plea and answer must be in writing and filed with justice. B. & C. Comp. § 2211. Stanley v. Rachofsky, 50 Or. 472, 93 P 354.

**37.** Morrison v. St. Louis, etc., R. Co. [Ark.] 112 SW 975. That account filed contained no statement showing corporation president's liability, under Kirby's Dig. § 859, immaterial, evidence taken without objection showing statutory liability. Mississippi Valley Const. Co. v. Abeles & Co. [Ark.] 112 SW 894.

**38.** Missouri, etc., R. Co. v. Hamilton [Tex. Civ. App.] 108 SW 1002.

**39.** Laws 1905, p. 315. Stanley v. Rachofsky, 50 Or. 472, 93 P 354.

**40.** Wernick v. St. Louis, etc., R. Co. [Mo. App.] 109 SW 1027.

**41.** Morrison v. St. Louis, etc., R. Co. [Ark.] 112 SW 975; Central of Georgia R. Co. v. Crapps [Ga. App.] 61 SE 1126; Minter v. Bush [Ga. App.] 62 SE 731; Seaboard Air Line R. Co. v. Smith, 3 Ga. App. 644, 60 SE 353; Gilman v. Neiser [Iowa] 118 NW 774; Atkins Bros. Co. v. Southern Grain Co., 130 Mo. App. 542, 109 SW 88; State v. Brown [Nev.] 98 P 871. Written statement that defendants were plaintiff's attorneys, that plaintiff delivered to them deed to certain real estate with direction to deliver same to C in settlement of a compromise upon the latter paying $50, that defendant delivered deed and received $50, which sum is due plaintiff less fee of $50, that demand has been made but money not paid, held sufficient. Lloyd v. Meservey, 129 Mo. App. 636, 108 SW 595. Bill of particulars held a sufficient pleading. Parker v. Dobson [Kan.] 96 P 472. Citation held sufficient to support default judgment for $149.35 and interest from July 6, 1907, though it stated demand to be for $137.00 and interest from Mar. 1, 1907. Kansas City Life Ins. Co. v. Warbington [Tex. Civ. App.] 113 SW 988. Allegation of accord and satisfaction, though it should have been claimed with more particularity, held sufficient. Van Allen v. Shulenburgh, 58 Misc. 136, 110 NYS 464. Suit on account may be maintained for materials furnished and work done, although agreement whereon materials were furnished or work done may be evidenced by a written contract. Southern Exp. Co. v. Hunnicutt [Ga. App.] 63 SE 26.

**42.** Under Kirby's Dig. §§ 4565, 4580, written statement, that defendant owed plaintiff $38 for stock killed by a certain train, a further sum as reasonable attorney's fee and $38 as a penalty, asking judgment for $76, cost and a reasonable attorney's fees held sufficient. Morrison v. St. Louis, etc., R. Co. [Ark.] 112 SW 975. Allegation held sufficient to admit proof as to how defendant became liable, if at all, for penalty and attorney's fee. Id.

**43.** Under Rev. St. 1899, § 3852 (Ann. St. 1906, p. 2135), complaint not destroyed by being overcharged with details, etc., where enough was left after rejecting unnecessary matter to state cause and bar another action. Dalton v. United R. Co. of St. Louis [Mo. App.] 114 SW 561. Complaint held not insufficient because plaintiffs' Christian names were set out by initials, and because note sued on showed that it was payable upon condition, performance of condition not being alleged, since any complaint which apprises defendant of nature of claim and would bar another action is sufficient, and therefore filing of note would have been sufficient. Helms v. Appleton [Ind. App.] 85 NE 733.

**44.** Amended complaint for work done held

agent,[46] and, if the complaint is sufficiently specific to apprise a person of common understanding of the exact nature and extent of plaintiff's claim, it is sufficient.[47] Even though a complaint fails to state a cause of action, a demurrer thereto may properly be overruled where it does not challenge the sufficiency of the complaint on that ground.[48] A technical plea of nul tiel record cannot be effectively used to question the existence of a justice court record, except where justice courts are courts of record,[49] but, even if such plea were proper to question a justice court judgment and process, it would not be for the jury but for the court to pass upon.[50] Issues not pleaded cannot be raised [51] nor in actions on contract can evidence of misrepresentation or partial failure of consideration be introduced where no notice of such defenses have been given,[52] but, under statute providing that in case of verdict for the defendant as to the right of property in a replevin action the jury shall also find damages for withholding the property, no counterclaim need be filed or any claim made for such damages to authorize their recovery.[53] Plaintiff must prove his case although defendant does not appear,[54] but, where the complaint is verified and the answer is an unverified general denial and counterclaim, plaintiff is entitled to a judgment without further proof.[55] In some states failure to bring forward all demands existing at the time of commencing a suit, bars a suit for the demand not so consolidated.[56] A plaintiff having pleaded a breach of contract and an offer to rescind may abandon the theory of rescission and submit the case upon a breach of the contract.[57] Where the pleadings are oral, the defendant is not entitled to a judgment on his counterclaim because no reply has been filed.[58] Statutes usually provide for making amendments to pleadings.[59] A summons may be

sufficient. Magoon v. O'Connor [Mo. App.] 114 SW 83.

45. So held where petition professed to be plaintiff's petition, and the prayer for relief was in her name. Code Pub. Gen. Laws 1904, art. 53. Benton v. Stakes [Ind.] 71 A 532.

46. Notice to quit and complaint, under Code Pub. Gen. Laws 1904, art. 53, § 1, to recover possession, signed by lessor's agent, held sufficient to confer jurisdiction. Benton v. Stokes [Md.] 71 A 532.

47. Complaint for breach of warranty and representation in sale held sufficient. Hanson v. Gronlie [N. D.] 115 NW 666.

48. Hanson v. Gronlie [N. D.] 115 NW 666.

49. Plea inappropriate in Illinois where court is not one of record. Feld v. Loftis, 140 Ill. App. 530.

50. Feld v. Loftis, 140 Ill. App. 530.

51. In pleadings "Defendant failed to ice cabbage properly and failed to carry said cabbage in proper manner," held issue as to delay or improper handling of car in which cabbages were shipped was not presented. International, etc., R. Co. v. Welbourne [Tex. Civ. App.] 113 SW 780. Evidence that by exercise of ordinary care motorman could have seen horse, stopped in time and avoided collision, held admissible under general allegation of negligence. Dalton v. United R. Co. of St. Louis [Mo. App.] 114 SW 561.

52. In an action on any contract except negotiable instruments, evidence that the contract was obtained by misrepresentations or that there was a partial failure of consideration is inadmissible where no notice of such defenses have been given; under Comp. Laws, §§ 767, 769, 828, in action for price of books received by defendant under contract providing "No agreement is valid other than as embodied on this contract," evidence of misrepresentation and failure of consideration inadmissible, no notice of defenses having been given. Fifth Avenue Library Soc. v. Hastie [Mich.] 15 Det. Leg. N. 939, 118 NW 727.

53. Rev. St. 1899, § 3921 [Ann. St. 1906, p. 2163]. Gurley Bros. v. Bunch, 130 Mo. App. 665, 108 SW 1109.

54. That note sued on was produced, filed, and canceled by judgment on return day held sufficient basis for judgment for plaintiff, without proof of execution, execution not being denied, whether defendant appeared or not. O'Donnell v. Wade, 151 Mich. 103, 14 Det. Leg. N. 873, 114 NW 871.

55. Code Civ. Proc. § 2988. Carter v. Boyle, 57 Misc. 564, 109 NYS 1102. Change of word "shall" to "may" held not to make entry of judgment discretionary. Id.

56. Under 2 Mills' Ann. St. § 2644, installments of rent subsequently to become due held not an existing demand so as to bar action for such installments, original action having been for rent due. Curtis v. Hammond, 43 Colo. 277, 95 P 921.

57. Atkins Bros. Co. v. Southern Grain Co., 130 Mo. App. 542, 109 SW 88. Although recovery for full amount of contract price was sought plus freight paid, plaintiff not precluded from recovering actual amount of damages sustained. Id.

58. Teal v. Templeton [N. C.] 62 SE 737.

59. Under Rev. St. 1899, § 4079 (Ann. St. 1906, p. 2223), statement of account, setting out that it was for work done on railroad, time of performance, amount, interest, etc., less credits, held sufficient to admit of amendment. Magoon v. O'Connor [Mo. App.] 114 SW 83. Correction of a mistake of dates

amended provided no change in the nature of the cause is involved,[60] and even the absence of an allegation of jurisdiction may be cured by amendment.[61] If a petition is ambiguous, amendment to plainly show whether the action is one in tort or for breach of contract should be allowed,[62] but an action ex delicto can not be transferred by amendment into one ex contractu.[63] There should be no variance between the pleadings and the proof,[64] but a slight variance between the process and proof is immaterial,[65] and a variance between the summons and the declaration may be waived by the pleadings.[66] The statute of limitations may be availed of by demurrer to a bill or declaration,[67] but whether a notice or scire facias to revive a judgment would come under the rule is perhaps doubtful.[68]

*Verdict and Judgment.* See 10 C. L. 561—An informal entry of judgment is good,[69] since much less degree of technicality and formality is required in the judgments of justices of the peace than is exacted in respect to judgments of courts of record,[70] and the judgment and the motion of appeal therefrom must be tested by substance rather than by form,[71] but substance cannot be dispensed with and supplied by amendment.[72] A justice is not obliged to publicly announce the judgment upon the instant after the evidence is closed.[73] Only one judgment can be rendered in an action tried in a justice court,[74] and in such judgment the justice must specify, tax and include the costs allowed by law to the prevailing party.[75] Judgment must show for and against whom[76] and in what case it was rendered,[77] but if subject to no other objections, the fact that it contains no caption to show the parties may be regarded as not fatal.[78] A mere verbal announcement by a justice after the trial of a cause as to what conclusion he has reached does not constitute a judgment,[79] but the judgment must be determined from the docket entry,[80] and although it may be valid, it is unenforcible until it is entered on the docket.[81] Judgment by

held not to add a cause of action to original statement in violation of Rev. St. 1899, § 4079 (Ann. St. 1906, p. 2223). Id.

**60.** No error in allowing amendment where amended summons simply amplified allegations of original petition and set forth more clearly jurisdiction, parties, transaction and amount being same in each. Central of Georgia R. Co. v. Crapps [Ga. App.] 61 SE 1126. Statement of same cause of action in a different form held not necessary to induce a new cause of action. Id.

**61.** Central of Georgia R. Co. v. Crapps [Ga. App.] 61 SE 1126.

**62, 63.** Jenkins v. Seaboard Air Line R. Co., 3 Ga. App. 381, 59 SE 1120.

**64.** Statement for goods sold containing name of defendant followed by "In account with" M (plaintiff), followed by itemized account of goods sold and value thereof, held merely to charge defendant with goods and to imply that they were sold to him; hence recovery on evidence that goods were bought by wife was authorized. Moore v. Rose, 130 Mo. App. 668, 108 SW 1105.

**65.** Variance of 1 year in age of heifer killed not material, property being otherwise properly identified. Seaboard Air Line R. Co. v. Smith, 3 Ga. App. 644, 60 SE 353. No error of superior court to arrest progress of certiorari by refusing writ, justice having jurisdiction under process. Id.

**66.** Departure, in that declaration was not based upon a contract or promises as was summons, held waived by plea of general issue. La Barre v. Bent [Mich.] 15 Det. Leg. N. 822, 118 NW 6.

**67, 68.** Crim v. Rhinehart [W. Va.] 63 SE 212.

**69.** Under Rev. St. 1899, § 4031 [Ann. St. 1906, p. 2196], docket showing in margin "judgment $16.00," and in body "defendant confesses judgment for $16.00" and that execution was issued, held sufficient to support revival of judgment against objection that docket showed no rendition of judgment. Ruoff v. Fitzgerald, 128 Mo. App. 639, 106 SW 1110

**70, 71.** Haag v. Burns [S. D.] 115 NW 104.

**72.** Ferrell v. Simmons, 63 W. Va. 45, 59 SE 752.

**73.** Magee v. Caramella, 36 Pa. Super. Ct. 56.

**74.** Entry held to show rendition of only one judgment as required by Rev. Justices' Code, §§ 79, 93. Haag v. Burns [S. D.] 115 NW 104.

**75.** Rev. Justices' Code, §§ 79, 93. Haag v. Burns [S. D.] 115 NW 104. Entry "I hereby order and decree judgment in favor of defendant against plaintiff for a dismissal of action and render judgment against plaintiff for costs of action" held to show rendition of only one judgment with taxation of costs as required by §§ 79, 93. Id.

**76, 77, 78.** Ferrell v. Simmons, 63 W. Va. 45, 59 SE 752.

**79.** Nashville, etc., R. Co. v. Brown, 3 Ga. App. 561, 60 SE 319.

**80.** Judgment in justice's court must be determined from docket entry. Nashville, etc., R. Co. v. Brown, 3 Ga. App. 561, 60 SE 319.

**81.** Nashville, etc., R. Co. v. Brown, 3 Ga.

default may be taken on the adjourned day where defendant is not present to make a defense,[82] but where the action is in tort and not on contract or on an account, judgment cannot be rendered on a verified complaint without proof.[83] Amounts due plaintiff may rightly be offset against those due the defendant and judgment entered for the difference.[84] The judgment of a de facto justice is not void,[85] nor is a judgment rendered void by the fact that an infant appears by next friend appointed differently than as prescribed by statute,[86] or by failure to rightly name the defendant in the summons or judgment or to correct the misnomer.[87] A judgment by default entered against a nonresident on a summons served less than the statutory time before the return day is not void but irregular or at most voidable,[88] and where the defendant does not appear to ask for time to plead or move to set the judgment aside, he will be held to have waived the irregularity.[89] A judgment is void where no summons issued,[90] when entered at an unauthorized continuance,[91] and when against a nonresident in garnishment proceedings, where it purports to be personal and not in rem.[92] Where it has been adjudged on review of a suit in attachment that the justice of the peace was without jurisdiction, any order which the justice may have as to payment of the money is void and it becomes his duty to return it to the garnishee, notwithstanding the dismissal of the petition by the reviewing court may have been erroneous.[93] A judgment of a justice of the peace docketed in the superior court continues a judgment of the justice for all purposes save those of lien on execution,[94] and as such is subject to the limitation prescribed for such judgments;[95] but in some states, when a judgment of the justice has been filed in the office of the prothonotary, it has all the force and effect of a judgment originally obtained in the court of common pleas.[96] A compelled judgment of nonsuit rendered against a

App. 561, 60 SE 319. Judgment unenforcible until reduced to writing and entered on docket during term, or announced in term and transcribed on docket after adjournment. Id. To allow a judgment to subject money in a garnishment case is to enforce it. Id.

82. Weisman v. Newton Beef Co. [Mich.] 15 Det. Leg. N. 809, 118 NW 2.

83. Under Laws 1881, p. 562, c. 414, in effect when action was tried, judgment on verified complaint could not be rendered against railroad company for damages to naphtha launch by negligence in transportation with proof. Duval v. Boston & M. R. Co., 58 Misc. 504, 111 NYS 629.

84. Connor v. McCormick [Iowa] 117 NW 976.

85. Rude v. Sisack [Colo.] 96 P 976.

86. Judgment in justice's court is not void because plaintiff, an infant, appeared by next friend appointed by clerk of superior court and not by justice trying the case, as directed by Revisal 1905, §§ 405, 1473, and Sup. Ct. Rules No. 16 (140 N. C. 683, 53 SE xiv). Houser v. Bousal & Co. [N. C.] 62 SE 776. Defect in appointment arising from failure of justice to adopt and ratify appointment of superior court held not jurisdictional but a mere irregularity. Id.

87. Judgment against "B. & O. R. R. Company," as described in summons instead of "Baltimore & Ohio Railroad Company," held not such material variance as would deprive justice of jurisdiction or vitiate judgment. Stout v. Baltimore & O. R. Co. [W. Va.] 63 SE 317.

88. Summons served less than 10 days before return day contrary to Revisal of 1905, § 1451. Laney v. Hutton [N. C.] 62 SE 1082.

89. Laney v. Hutton [N. C.] 62 SE 1082.

90. Southern R. Co. v. Grace [Ga. App.] 61 SE 1048. A judgment against a resident rendered without personal service is void. Connor v. McCormick [Iowa] 117 NW 976.

91. Brin v. Topp, 131 Ill. App. 394. Failure to render judgment until ten days after return of verdict works a discontinuance of the action; judgment so rendered absolutly void, and further proceedings upon such judgment will be enjoined. Sigler v. Shaffer, 9 Ohio C. C. (N. S.) 267.

92. Connor v. McCormick [Iowa] 117 NW 976.

93. Brandt v. Rabenstein, 11 Ohio C. C. (N. S.) 354.

94. Judgments docketed under Revisal 1905, § 1479. Oldham v. Rieger [N. C.] 62 SE 612.

95. Action on judgment itself barred after 7 years. Oldham v. Rieger [N. C.] 62 SE 612. Battle's Revisal, § 40, c. 45 (Revisal 1905, § 87), held not to fix right of judgment creditor as of date of death of decedent and revive judgment barred by limitations on death. Oldham v. Rieger [N. C.] 62 SE 612.

96. Judgment in a proceeding before a justice or alderman and a sheriff's jury, under act of June 16, 1836, to obtain possession by a purchaser at sheriff's sale, not within meaning of statutes authorizing a transcript of judgments of justices of the peace to be filed in the office of the prothonotary, and providing that such judgments shall thereafter have all the force and effect of judgments originally obtained in the courts of common pleas. Act of 1885, P. L. 160. People's Trust Sav. & Deposit Co. v. Ehrhart,

nonresident for failure to file security for costs and on a refusal of his motion to adjourn is a voluntary nonsuit.[97] When the statute prescribes the judgment and one is rendered, it is presumed to be the one prescribed, but if one not prescribed is entered it will be attributed to the misprision of the clerk and may be corrected by a nunc pro tunc order.[98] A judgment cannot be collaterally attacked for irregularities after jurisdiction has once been gained,[99] nor will conditional and uncertain agreements between counsel respecting a dismissal of a suit be enforced so as to avoid a judgment subsequently rendered and involved in collateral proceeding,[1] but relief, if at all, must be by direct proceedings instituted for that purpose.[2] An executor of one of two plaintiffs in a justice's judgment cannot maintain a notice or scire facias to revive it.[3]

*Execution.*[See 10 C. L. 562]—Execution cannot be issued by a justice after three years from the rendition of the judgment without revival,[4] but though an execution may be issued from the office of the clerk of the circuit court on the transcript of the judgment, more than three years from the date of the judgment and without its revival, that can only be done when the transcript is filed within three years,[5] and if an execution is issued which does not follow the judgment as docketed, the court has power on motion to recall or quash it,[6] but such motion does not reach any defects in the judgment not shown upon the face of the record.[7] A substantial compliance with statute requiring a certificate that justice of the peace issuing an execution is a duly qualified justice in the county and precinct from which it is issued is sufficient,[8] and a slight error in the name of the defendant in an execution does not render the execution void,[9] such process being amendable on motion before the justice so as to make it conform to the judgment.[10] Where a justice's judgment is void for want of proper service, the execution and other proceedings thereunder are likewise void.[11]

§ 5. *Appeal and error and remedies extraordinary.*[See 10 C. L. 563]—Unreasonable restrictions upon the right to appeal from a justice court cannot be imposed by the

34 Pa. Super. Ct. 16. Act of May 9, 1889, P. L. 176, held not to enlarge right to file transcript of judgments of justices of the peace. Id.

97. Walmsley v. Bowman, 151 Mich. 553, 15 Det. Leg. N. 38, 115 NW 686.

98. Under Rev. St. 1899, § 1547 (Ann. St. 1906, p. 1174), §§ 3922, 4474, where judgment for defendant in replevin suit heard on appeal from justice court as entered failed to show that costs had been adjudged against plaintiff, court could on motion by nunc pro tunc order correct judgment, making it show that costs were adjudged against plaintiff and that defendant have execution. Saunders v. Scott [Mo. App.] 111 SW 874.

99. Pocahontas Wholesale Grocery Co. v. Gillespie, 63 W. Va. 578, 60 SE 597. Not to be collaterally attacked because venire was wrong. Rutherford v. Ray, 147 N. C. 253, 61 SE 57.

1. Pocahontas Wholesale Grocery Co. v. Gillespie, 63 W. Va. 578, 60 SE 597.

2. Proceedings held direct requiring court to submit issue of fraud in obtaining judgment to jury. Houser v. Bousal & Co. [N. C.] 62 SE 776.

3. Proceeding must be in sole name of survivor. Crim v. Rhinehart [W. Va.] 63 SE 212. Notice of executor not amendable, executor not having title. Id.

4. Rev. St. 1899, § 4022 (Ann. St. 1906, p. 2194). Bick v. Boyd, 124 Mo. App. 58, 100 SW 1128.

5. Where transcript was not filed within three years from date of rendition of judgment, suit on transcript for purpose of renewing judgment not maintainable. Bick v. Boyd, 124 Mo. App. 58, 100 SW 1128.

6. Lund v. Booth, 33 Utah, 341, 93 P 987.

7. Under Rev. St. 1898, §§ 3733, 3734, 3736, district court, wherein abstract of judgment in every respect complying with statute had been filed and docketed, held not authorized on motion to strike abstract from record on ground that justice had not acquired jurisdiction of defendant, such fact not appearing on face of abstract. Lund v. Booth, 33 Utah, 341, 93 P 987. Abstract of judgment need not recite that justice had jurisdiction nor the means by which he obtained such jurisdiction. Rev. St. 1898, § 3736. Id.

8. Sayles' Ann. Civ. St. art. 1663, where venditioni exponas was issued, not having required certificate, but showing on face that it was issued by same justice, held substantially complied with and injunction restraining sale properly enjoined. Dillard v. Stringfellow [Tex. Civ. App.] 111 SW 769.

9. Describing defendant as "B. & O. Rail Road Company" where judgment and summons read "B. & O. R. R. Company" held not fatal variance. Stout v. Baltimore & O. R. Co. [W. Va.] 63 SE 317.

10. Stout v. Baltimore & O. R. Co. [W. Va.] 63 SE 317.

11. Forsyth v. Chambers [Nev.] 96 P 930.

appellate court.[12] In some states two methods of appeal from a final judgment are provided,[13] but an appeal with a trial de novo can be taken only from a "final judgment."[14] The right of appeal is sometimes given to any "person aggrieved" by the judgment though he is not a party to the record,[15] but ordinarily where the appeal is from a judgment, none but the parties tried in the justice court are parties on appeal.[16] The right to appeal from the judgment of a justice to a jury in the superior court is sometimes determined by the amount in controversy,[17] and in determining whether an appeal or certiorari is the proper remedy,[18] or whether an appeal lies,[19] the pleadings determine the amount in controversy. To what court an appeal may be taken may depend on the amount recovered or whether there was a jury trial.[20] A voluntary nonsuit[21] is not appealable.[22] The perfecting of an appeal gives the appellate court jurisdiction of the cause,[23] and the appellate court becomes possessed of the cause upon filing of transcript and papers by the justice,[24] regardless of the payment of fees,[25] or that there be no affidavit for the appeal nor any bond.[26] The jurisdiction on appeal is limited the same as that of the justice before whom the action originated.[27] Payment of fees and state tax are not juris-

**12.** District court of territory of Oklahoma could not impose rule requiring appellant to deposit with clerk $10 or any other sum to apply on costs accruing in appellate court, and on failure to do so that the appeal might be dismissed. Holmes v. Offield [Okl.] 98 P 341. Error to dismiss for failure to make deposit. Id.

**13.** Appeal under Wilson's Rev. & Ann. St. Okl. 1903, § 5044, and a trial de novo had, or one by petition in error, and the errors of law appearing upon face of record may be inquired into and judgment affirmed, modified or reversed. Maggert v. Keele [Okl.] 95 P 466.

**14.** Under Wilson's Rev. & Ann. St. Okl. 1903, § 5044. Maggert v. Keele [Okl.] 95 P 466. Order rendered by justice sustaining motion to retax costs, made on motion after judgment has been rendered, not "final judgment" from which an appeal may be taken and a new trial de novo had under Wilson's Rev. & Ann. St. Okl. 1903, § 5044, but a final order reviewable by higher court upon petition in error setting forth errors. Wilson's Rev. & Ann. St. Okl. 1903, § 4732. Id.

**15.** "Party aggrieved" used in Kirby's Dig. § 4665, is one whose pecuniary interest is affected by the decree or whose right of property may be established or divested thereby. Trustee in bankruptcy of a defendant in replevin held entitled to appeal from adverse judgment. Brown v. Frenken [Ark.] 112 SW 207.

**16.** St. Louis & S. F. R. Co. v. English [Tex. Civ. App.] 109 SW 424. Where appellants were not parties in justice court, county court acquired no jurisdiction by appeal by them, nor by issuance and service of citation by county court. Id. Under Kirby's Dig. § 4682, circuit court without authority to entertain an appeal from a judgment of justice by one not a party to action but claiming to be aggrieved by judgment. Chicago, etc., R. Co. v. Young, 85 Ark. 444, 108 SW 831.

**17.** Where defendant sued for $50 pleads set-off of $84 and judgment is rendered against him, amount exceeds $50 and appeal lies. Croft v. Broxton Artificial Stone Works [Ga. App.] 60 SE 1015. Where counterclaim increasing amount to a sum within jurisdiction of appellate court was abandoned by failure to appear and permitting judgment to be taken by default, original sum demanded was left in controversy, and being less than $20 appeal did not lie in county court. McQueen v. McDaniel [Tex. Civ. App.] 109 SW 219. Justice's judgment for less than $20 not appealable. Coca Cola Co. v. Allison [Tex. Civ. App.] 113 SW 308.

**18.** Pleadings held to embrace defendant's claim of set-off. Croft v. Broxton Artificial Stone Works [Ga. App.] 60 SE 1015.

**19.** Whether cause exceeds $50 under Civ. Code of 1895, § 4142, determinable from summons and cause of action thereto attached. Barnes v. Vandiver [Ga. App.] 62 SE 994. No positive inference that claim of one who sues upon a forthcoming bond is limited to an amount exactly one-half of bond, since interest and costs would thus be disregarded. Id.

**20.** Appeal to probate court where judgment by confession or where jury trial and neither claim more than $20, all other cases to district court, statutes considered. Maer Mfg. Co. v. Cox [Okl.] 97 P 649. Probate court without jurisdiction on appeal of action where amount claimed was less than $20, there was no jury trial, and judgment was taken on pleadings. Id.

**21.** See ante, Verdict and Judgment.

**22.** Walmsley v. Bowman, 151 Mich. 553, 15 Det. Leg. N. 38, 115 NW 686.

**23.** Carden v. Bailey [Ark.] 112 SW 743.

**24.** Drake v. Gorrell, 127 Mo. App. 636, 106 SW 1080.

**25.** Mead v. Simpson, 134 Wis. 451, 114 NW 821.

**26.** Drake v. Gorrell, 127 Mo. App. 636, 106 SW 1080.

**27.** Little Rock Brick Works v. Hoyt [Ark.] 112 SW 880; Parker v. Dobson [Kan.] 96 P 472; Saunders v. Scott [Mo. App.] 111 SW 874. If justice had jurisdiction to try and determine action upon merits, superior court will likewise have such jurisdiction on appeal. Hubbard v. Santa Clara County Sup'rs [Cal. App.] 98 P 394. Where justice court was without jurisdiction in action of replevin, no jurisdiction in circuit court to which appeal was taken. Jarrett v. McIntyre, 134 Ill. App. 581. No jurisdiction in

dictional to an appeal.[28] Under statute providing that when a bond and affidavit for an appeal have been filed an appeal shall be considered allowed, though no entry thereof appears in the record, an order granting an appeal is unnecessary,[29] but the docketing of a judgment in a higher court does not give such court jurisdiction of the action in which the judgment was entered,[30] though the statutes do not require the filing of the notice,[31] yet the fact that notice was given, being jurisdictional, it must affirmatively appear on the face of the record either by filing of the notice and the return therein with the circuit clerk or by a recital in the judgment or order disposing of the cause.[32] The notice is sufficient if it identifies the judgment appealed from and informs the nonappealing party that an appeal has been taken,[33] and a mere clerical error therein does not defeat jurisdiction to try a case de novo.[34] Where there is a failure to serve notice of appeal as required by statute, the superior court acquires no jurisdiction over the nonappealing party and it can only affirm the judgment or dismiss the appeal at the election of plaintiff.[35] Under statute providing that an appeal shall be taken by filing notice with the justice and serving a copy on the adverse party, the order in which the notice is filed and served is immaterial.[36] One desiring a new trial on the facts in the appellate court must appeal under statute relating to appeals generally,[37] and the appeal must be taken within the statutory time from the rendition of the judgment,[38] and can be allowed after the expiration of that time only upon a showing under oath of a good cause for not taking appeal within the time prescribed.[39] A justice has no power to make a contract to enter a prayer for an appeal if the verdict and judgment should be against the party so contemplating to contract,[40] the prayer must be made on the day the judgment is entered in a trial of the rights of property,[41]

justice court under Act of 1810 or 1814; none in appellate court. Birkhead v. Ward, 35 Pa. Super. Ct. 235.

28. Under St. 1898, §§ 3368, 3754, no defense to action on undertaking on appeal that appeal was not perfected by payment of fees and tax. Palin v. Probert [Wis.] 118 NW 173.

29. Rev. St. 1899, § 4066 (Ann. St. 1906, p. 2213). Ford v. Gray [Mo. App.] 110 SW 692.

30. Docketing for purpose of creating a lien and enforcing same by execution. Lund v. Booth, 33 Utah, 341, 93 P 987.

31. Rev. St. 1899, § 4074 [Ann. St. 1906, p. 2217], does not require filing of notice. Drake v. Gorrell, 127 Mo. App. 636, 106 SW 1080.

32. Drake v. Gorrell, 127 Mo. App. 636, 106 SW 1080. Notice and affidavit filed by appellant on appeal from circuit court ignored, and cause determined on record. Id.

33. Notice, though it misstates by two weeks date of rendition of judgment, held sufficient where it correctly stated title of cause, amount of judgment, justice rendering same number of case in circuit court and room in which it was pending. Collier v. Langan Storage & Moving Co., 128 Mo. App. 113, 106 SW 593.

34. Under Rev. Justices' Code, §§ 99, 101, clerical error in use of "appealed" instead of present tense for "appeals" held not to defeat jurisdiction. Haag v. Burns [S. D.] 115 NW 104.

35. Under Rev. St. 1899, §§ 4075, 4076 [Ann. St. 1906, p. 2220, 2221], where garnishee appealing gave no notice, circuit court was without jurisdiction and court erred in dismissing cause for want of prosecution, since under circumstances appellee could not have been in default. Drake v. Gorrell, 127 Mo. App. 636, 106 SW 1080. Want of notice under Rev. St. 1899, § 4075 [Ann. St. 1906, p. 2220], does not affect jurisdiction of cause. Id. Where an appeal is taken from judgment of justice on a day after judgment was rendered, and no notice of appeal is served, circuit court must affirm judgment. Rev. St. 1899, § 4076 [Ann. St. 1906, p. 2221], in such case being mandatory. Scientific American Club v. Horchitz, 128 Mo. App. 575, 106 SW 1117.

36. Comp. Laws, § 3676. State v. Brown [Nev.] 98 P 871.

37. Appellant under Rev. Codes 1905, § 8501, defeated upon every point urged, held not entitled to trial upon facts in district court, decision not reopening case for trial on issue of fact. Hanson v. Gronlie [N. D.] 115 NW 666.

38. Magee v. Caramella, 36 Pa. Super. Ct. 56. Where party to case appears at hearing and leaves at close of evidence without inquiry as to how case would be decided, and judgment is rendered against him after departure, time for taking appeal runs from entry of judgment and not from time when party heard of entry. Id.

39. Johnson v. Ridgely [W. Va.] 61 SE 42. Allegation that wife of petitioner had been seriously ill, that petitioner was compelled to have her go to hospital, etc., held insufficient to show good cause under Code 1899, § 174, c. 50 (Code 1906, § 2125). Id. Application within 90 days and good cause shown held jurisdictional facts. Id. Whether facts alleged constitute a good cause, a question for court. Id.

40. Pettit v. Burke, 139 Ill. App. 419.

41. An arrangement with the justice that in event of an adverse verdict and judgment

and the appeal papers must be presented to the justice having possession of the docket containing the record.[42] The appeal must be docketed at the ensuing term if it is more than ten days after judgment,[43] and if not so docketed the appellee may have the case placed upon the docket and upon motion the judgment will be affirmed.[44] The execution of a nonappealable judgment may be enjoined upon a proper showing.[45] Upon a proper showing a default judgment may be set aside and enjoined from enforcement in equity,[46] and notwithstanding the existence of a remedy by certiorari, where the element of fraud is present, in the entry, a party may choose his forum for relief and may seek the relief by appeal, certiorari, or by bill in equity for an injunction;[47] but a judgment will not be set aside in equity except upon a showing of diligence in prosecuting remedies at law,[48] and as against a merely erroneous judgment the proper remedy is by appeal or certiorari,[49] and relief by injunction cannot be had where these remedies are available.[50] No relief can be had in equity from a judgment rendered by default by the fact that defendant, if he had appeared and answered, would have had a defense to the action.[51] The jurisdiction of a justice may be challenged on appeal[52] at any time,[53] and when

an appeal shall be entered is not a prayer for an appeal under Hurd's St. ch. 79, art. 13, § 5. Pettit v. Burke, 139 Ill. App. 419.

42. Under St. 1898, § 3754. Mead v. Simpson, 134 Wis. 451, 114 NW 821. Under Laws 1899, p. 495, c. 286, creating Bayfield municipal court, etc., held that on an appeal from such court in a suit wherein municipal judge was disqualified, and case was tried by a justice of the peace called in, appeal papers should be certified by municipal judge and not by justice who tried case. Id.

43. Revisal 1905, § 608. McClintock v. Life Ins. Co. [N. C.] 62 SE 775.

44. McClintock v. Life Ins. Co. [N. C.] 62 SE 775. The dismissal of the appeal has same effect as motion to docket and affirm under Revisal 1905, § 607. Id.

45. Judgment for less than $20. Coca Cola Co. v. Allison [Tex. Civ. App.] 113 SW 308. In suit to enjoin execution of justice's judgment for want of jurisdiction over person of defendant entitled to be sued in another county, presumption is that evidence supported judgment and that plea in abatement setting forth right to be sued in another county was properly overruled, evidence not appearing in petition. Id. If plea of privilege is ignored by justice or improperly overruled, execution may be enjoined. Id. Petition not alleging a valid defense to action and facts showing it but containing allegation that answer showed a good defense where defense was a general denial held insufficient. Id. Petition not setting out evidence in support of plea, and if any disapproving it, but containing allegation that petitioner proved truth of plea, held insufficient. Id. Where evidence was conflicting on plea of privilege interposed by justice, and justice erred in law in overruling plea, held judgment could not be enjoined. Id.

46. Complaint showing failure to defendant due either to mistake or wrongful conduct of plaintiff's attorney in not informing defendant of action, and a valid defense, held to authorize setting aside judgment. Lithuanian Brotherhelp Soc. v. Tunila, 80 Conn. 642, 70 A 25. After expiration of five days from rendition of judgment by default, order to set such judgment aside and order a new trial will only be granted upon a showing of injustice done, and a sufficient excuse for the default. Where second default was made after a new trial had been granted, only remedy is under Code Civ. Proc. 1902, § 368, and no relief can be had thereunder where there is no showing of not having had notice of second trial, that they suffered injustice, or of excuse for default. Williams v. Rickembaker, 79 S. C. 467, 60 SE 1122.

47. Injunction, judgment having been entered at an unauthorized continuance. Brin v. Topp, 131 Ill. App. 394.

48. Weisman v. Newton Beef Co. [Mich.] 15 Det. Leg. N. 809, 118 NW 2. No relief for judgment taken against one as defendant on return day, though plaintiff's attorney assented to an adjournment asked by complainant's attorney, and forgot to tell his clerk who took judgment, since had plaintiff appeared judgment could have been vacated by consent, or an appeal taken, and since complainant paid no attention to suit for nearly three months and not until execution was presented to him. Id. Negligence of attorney attributable to client. Id. Bill, showing that suit in justice court was commenced against petitioner Oct. 31, 1906, judgment taken Jan. 10, 1907, transcript taken to circuit court Mar. 25, 1907, that he learned of situation Apr. 1, 1907, sought a dilatory appeal Apr. 6, 1907, which was denied June 10, 1907, where only excuse why attorney did not appear was statements upon information and belief that attorney was mistaken as to date of adjournment, held not to show a case calling for interference of equity. Kramer v. Schulte [Mich.] 15 Det. Leg. N. 893, 118 NW 481. Insufficient showing, showing that defendant was misled as result of accident, mistake or fault of another so as to cause default. Kansas City Life Ins. Co. v. Warbington [Tex. Civ. App.] 113 SW 988.

49, 50. Kansas City Life Ins. Co. v. Warbington [Tex. Civ. App.] 113 SW 988.

51. Brum v. Ivins [Cal.] 96 P 876.

52. Fabien v. Garbow [Mo. App.] 114 SW 80.

53. Party held not to have waived right to move to dismiss appeal for want of jurisdiction by first pleading to merits. McQueen v. McDaniel [Tex. Civ. App.] 109 SW 219.

challenged it must be determined on the record, if possible, or if jurisdiction depends on a fact which can be shown only by evidence aliunde, the evidence must be produced by the party bound to show jurisdiction.[54] Want of jurisdiction of the subject-matter cannot be waived,[55] but in irregularities in process not jurisdictional to be available must have been objected to before the justice.[56] A defect in a warrant is not waived by going to trial without making a motion to quash.[57] Where jurisdiction is not shown either by the record or evidence aliunde, the defect goes to the merits of the appeal and cannot be treated as a technicality.[58] Findings of fact are conclusive on appeal,[59] and objections to introduction of certain testimony under the pleadings cannot be first raised before the appellate court.[60] The appellate court can grant a new trial only upon terms authorized by statute.[61] Upon reversal by the common pleas court of an order of a justice of the peace overruling a motion to discharge an attachment, the common pleas court should retain the matter for trial upon appeal.[62]

*Bonds.* See 10 C. L. 564—An appeal is not effectual until a sufficient undertaking is filed[63] within the time fixed by statute.[64] Where a judgment is rendered against the plaintiff, it is not essential that he file an appeal bond in order to prosecute the appeal,[65] but where the plaintiff recovers a money judgment to perfect the appeal and confer jurisdiction upon the appellate court, it must appear from the record that an appeal bond was executed or an affidavit in lieu thereof given.[66] The amount of an undertaking must not be less than the statutory amount, but the fact that a greater amount than that required is deposited does not invalidate the ap-

54. Evidence insufficient to show that statutory notice of suit was given before suit was begun so as to give jurisdiction. Fabien v. Grabow [Mo. App.] 114 SW 80.

55. Appearance no waiver of objection for want of jurisdiction of subject-matter. Maer Mfg. Co. v. Cox [Okl.] 97 P 649.

56. Irregularity in process, under Code Civ. Proc. § 2877, not available on appeal, no objection having been made below. Epstein v. Prosser, 112 NYS 174. The question of the use of initials instead of the full Christian name, in designating plaintiffs, cannot be raised for the first time on appeal. Helm v. Appleton [Ind. App.] 85 NE 733.

57. Memphis St. R. Co. v. Flood [Tenn.] 113 SW 384.

58. Giving of notice of intention to sue before suit was actually begun not shown, jurisdiction not obtained. Fabien v. Grabow [Mo. App.] 114 SW 80.

59. Rude v. Sisack [Colo.] 96 P 976.

60. Van Allen v. Shulenburgh, 58 Misc. 136, 110 NYS 464.

61. Lithuanian Brotherhelp Soc. v. Tunila, 80 Conn. 642, 70 A 25. Under Gen. St. 1902, § 816, providing that when a judgment has been rendered by a justice against a defendant, absent from state until after trial, without notice of suit, he may, within six months after return, bring a complaint to court in county to which an appeal might have been taken for a new trial, which court may grant if it appears that judgment was wrongfully obtained and he had a good defense, court of common pleas has no jurisdiction to grant new trial where judgment was obtained while defendant was within state. Id. Complaint held an averment of a sufficient defense to suit and of nature thereof, under Gen. St. 1902, § 816. Id.

62. Henry & Scheible Co. v. Collinwood Furnace Co., 11 Ohio C. C. (N. S.) 191.

63. Where no appeal bond, no jurisdiction in district court, claim being original jurisdiction of district court. St. Louis, S. W. R. Co. v. Warren Bros. [Tex. Civ. App.] 109 SW 1144. Under Rev. St. 1887, § 4842, undertaking on appeal must be given for $100 to cover costs of appeal, and in an additional sum equal to twice the judgment, including costs, if a stay of proceeding is claimed. Libby v. Spokane Valley Land & Water Co. [Iowa] 98 P 715. Both may be united in same undertaking. Id. Where exceptions have been taken to a surety company, such company must comply with Rev. St. 1887, § 4842, by giving notice that it will justify and by justifying. Id. Method and sufficiency of justification prescribed in Act of 1899, § 9, is by presenting to court before whom justification is made notice or certified copy thereof given by state insurance commissioner, etc. Id. Bond on appeal conditioned on appellant prosecuting "this trial" to effect and paying judgment which may be rendered against it on "said trial" held insufficient to confer jurisdiction on appellate court so as to perfect appeal. S. A. Pace Grocery Co. v. Savage [Tex. Civ. App.] 114 SW 866. "All costs" used in undertaking sufficient to cover costs on appeal. State v. Brown [Nev.] 98 P 871.

64. Pettit v. Burke, 139 Ill. App. 419.

65. Error to dismiss appeal for failure to file appeal bond, judgment having been given against plaintiff. Johnson County Sav. Bank v. Midkiff [Tex. Civ. App.] 106 SW 1131.

66. Maley v. Mundy [Tex. Civ. App.] 20 Tex. Ct. Rep. 684, 107 SW 905. Rehearing granted, it appearing that bond had been filed and cause shown for not incorporating bond in record. Harris v. Robinson [Tex. Civ. App.] 109 SW 400.

peal,[67] and where the bond is made to the proper party, imposes a substantial liability upon the sureties, and is filed in good faith, jurisdiction is given, although it is defective in some respects,[68] and in such case the action should not be dismissed if the appellant applies seasonably for leave to file a good and sufficient bond.[69] Where it clearly appears that an undertaking was for the purpose of staying proceedings, it will not be considered sufficient as an undertaking on appeal where it does not cover costs on appeal,[70] but although the undertaking may be insufficient to stay proceedings, it may be sufficient to effectuate the appeal.[71] An appeal bond which is insufficient to confer jurisdiction on the appellate court is not enforcible as a common-law obligation.[72] Jurisdiction on appeal from a judgment by a justice of the peace is conferred by approval of the undertaking by another justice of the same township.[73] Where a judgment is void, so also is the stay bond.[74] A recognizance taken on appeal must be returned to the court to which the appeal is taken,[75] since without return of the recognizance the appellate court has no jurisdiction to proceed,[76] but failure to return the recognizance at the outset is not fatal, even after a motion to dismiss.[77] The recognizance on appeal is an official record and to be effective must be signed by the magistrate.[78] A party on appeal stating that deposit was made to perfect the appeal will not thereafter be heard on subsequent assertion that it was for a different purpose.[79] Sureties on an appeal bond are released by the discharge in bankruptcy of the debtor during the pendency of the appeal.[80]

*Process or appearance.* See 10 C. L. 565—Where the successful party before a justice becomes a nonresident, jurisdiction to hear and determine the appeal is acquired when two summonses have been issued to the sheriff of the county in which the suit was brought and two returns "not found" made.[81] A general appearance gives the superior court jurisdiction,[82] and the filing of the affidavit and bond for

**67.** Code Civ. Proc. §§ 978, 926. Pacific Window Glass Co. v. Smith [Cal. App.] 97 P 898. Under Civ. Proc. §§ 926, 978, where judgment had been rendered against defendants for $177, including attorney's fees and costs, and they appealed, deposited amount of judgment appealed from without stating purpose and proceedings and deposit were transferred to superior court, deposit construed as security for costs on appeal and not to stay proceedings, hence dismissal for want of jurisdiction erroneous. Id. That amount was larger than was necessary held not to destroy bond. Libby v. Spokane Valley Land & Water Co. [Idaho] 98 P 715.

**68.** Undertaking defective because of omission of words "from date of undertaking to the delivery of property" held not to oust district court of jurisdiction. Parker v. Gibson [Kan.] 96 P 35.

**69.** Where abstract shows that such application was made, held error to dismiss action and refuse to reinstate it on motion. Parker v. Gibson [Kan.] 96 P 35.

**70.** Libby v. Spokane Valley Land & Water Co. [Idaho] 98 P 715.

**71.** Under Civ. Prac. Act, § 584, Comp. Laws, § 3679, undertaking of $600 reciting desire to appeal and binding appellant to pay judgment and all costs, on withdrawal or dismissal of appeal, held good as to appeal though probably not as to stay of proceedings. State v. Oldfield [Okl.] 98 P 925.

**72.** Such bond is without consideration, and fact that no execution was issued on judgment pending litigation to test sufficiency of bond does not alter case. S. A. Pace Grocery Co. v. Savage [Tex. Civ. App.] 114 SW 866.

**73.** Meyers v. U. S. Health & Acc. Ins. Co., 11 Ohio C. C. (N. S.) 432.

**74.** Ferrell v. Simmons, 63 W. Va. 45, 59 SE 752.

**75, 76, 77, 78.** Walker v. Goding, 103 Me. 400, 69 A 621.

**79.** Where deposit was made without statement whether it was to perfect appeal or stay proceedings, and on motion to dismiss it was stated to be to perfect appeal. Pacific Window Glass Co. v. Smith [Cal. App.] 97 P 898.

**80.** Bankr. Act, July 1, 1898, c. 541, § 16, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), held not applicable. House v. Schnadig, 235 Ill. 301, 85 NE 395.

**81.** Under Rev. St. chap. 79, §§ 115, 177, not necessary to issue appeal summons to foreign county. Cumming v. Sisson, 134 Ill. App. 126.

**82.** Under Code 1906, §§ 3946, 3947, where judgment by default was taken against defendant without personal service and an appeal taken to circuit court and motion to quash original summons sustained, return being amended on motion was also quashed, and motion to dismiss suit because justice had no jurisdiction, made and denied, held appearance gave circuit jurisdiction. Illinois Cent. R. Co. v. Swanson [Miss.] 46 S 83.

appeal constitutes an appearance to the proceedings so as to give appellate court jurisdiction of person filing the same.[83] An appearance and demurrer, on appeal from a justice's judgment by default entered upon an irregular summons, is a waiver of the irregularity in the judgment.[84]

*The transcript.* See 10 C. L. 565—The appellate court is without jurisdiction to proceed with the trial of a cause in the absence of a transcript of the proceedings before the justice.[85] The transcript of judgment must be filed within the time prescribed by statute,[86] and the appellant must see that the justice files the transcript as required by statute, or on failure to do so the appellate court may in its discretion dismiss the appeal or affirm the judgment for failure to prosecute,[87] but, where a judgment is rendered upon a written instrument duly filed with the justice but which was not sent with the transcript on appeal, such instrument may be subsequently filed though not brought up on a rule upon the justice or by certiorari.[88] The affidavit, writ of replevin, and bond in an attachment suit instituted before a justice, becomes part of the record in the appeal even though filed after the term at which judgment is rendered upon the appeal,[89] and the fact that such papers were not on file at the time of hearing of the appeal is a mere irregularity, not affecting the jurisdiction to hear and determine the appeal.[90] Technical accuracy in a transcript is not required,[91] but although it need not show the affidavit in full[92] nor be under seal[93] yet it must show that the justice had obtained jurisdiction of the defendant.[94] When the transcript is certified as true, its correctness cannot be attacked in a court of review,[95] and where it shows affirmatively that the justice has performed the duty required of him and made a brief note of all the pleadings made by the parties on his docket, evidence to contradict this will not be received in the absence of fraud, accident, or mistake properly pleaded.[96] In a forcible entry and detainer suit, it is appellant's duty to produce the transcript on the return day or show that he has done all in his power to produce it.[97]

**83.** Carden v. Bailey [Ark.] 112 SW 743.

**84.** Appearance on appeal, judgment having been rendered against a nonresident upon a summons served less than 10 days before return day, contrary to Revisal 1905, § 1451. Laney v. Hutton [N. C.] 62 SE 1082.

**85.** Block Amusement Co. v. Case, 139 Ill. App. 73; Missouri, K. & T. R. Co. v. Hamilton [Tex. Civ. App.] 108 SW 1002. Even though circuit court had jurisdiction of parties, it could not render judgment until transcript was filed so as to confer jurisdiction over subject-matter. Block Amusement Co. v. Case, 139 Ill. App. 73. Where proceedings before justice were not certified as required by Code 1906, §§ 84, 85, nor shown in any manner, circuit court without jurisdiction. McPhail v. Biann [Miss.] 47 S 666; Murphy v. Hutchinson [Miss.] 47 S 666.

**86.** Transcript not having been filed within one year after judgment, rights under judgment lost. Hill's Ann. Laws 1892, § 2103. Denny v. Bean [Or.] 93 P 693. B. & C. Comp. § 2225, providing for filing "whenever a judgment is given" at any time thereafter, held to supersede Hill's Ann. Laws 1892, § 2103, providing for filing within a year, but not to have retroactive effect so as to apply to judgments theretofore rendered and even if retroactive it could not apply to judgment rendered in '96, no transcript having been filed within a year after rendition of judgment. Denny v. Bean [Or.] 93 P 693.

**87.** Kirby's Dig. § 4670. Carden v. Bailey [Ark.] 112 SW 743. Successful party filing transcript and moving for affirmance of judgment entitled to relief asked, defendant having failed to file transcript. Id.

**88.** Ford v. Gray [Mo. App.] 110 SW 692.

**89.** Cumming v. Sisson, 134 Ill. App. 126.

**90.** Where no objection was made. Cumming v. Sisson, 134 Ill. App. 126.

**91.** Transcript saying that on Feb. 28, 1900, affidavit was filed and writ of replevin issued held sufficient. Feld v. Loftis, 140 Ill. App. 530.

**92, 93.** Feld v. Loftis, 140 Ill. App. 530.

**94.** Transcript of a record in forcible entry and detainer action, which shows no more with reference to notice to the defendant than that he was served "in person," insufficient to show justice obtained jurisdiction over defendant. Power v. Neiss, 7 Ohio N. P. (N. S.) 1.

**95.** O'Rourke v. Edwards, 11 Ohio C. C. (N. S.) 124.

**96.** Missouri, K. & T. R. Co. v. Hamilton [Tex. Civ. App.] 108 SW 1002. Transcript under Rev. St. 1895, art. 1673, held to show pleadings noted and that plaintiff sued for an amount in excess of jurisdiction of justice; hence, was conclusive on question of dismissal for want of jurisdiction, fraud, accident, or mistake not being pleaded. Id. Answer that $200 "is amount in controversy" to motion to dismiss not sufficient to admit proof of mistake and correction on account thereof. Id.

**97.** Under Ann. St. 1906, § 3370, where transcript was not returned within 6 days

The justice cannot amend his transcript unless required to do so by an order of the appellate court,[98] and, where an appeal has been taken from the justice and a transcript of the judgment filed, a petition asking leave to amend by filing a transcript amended to the petition will not be granted in the absence of a showing of fraud practiced, or that the transcript attached to the petition was correct and the one filed incorrect.[99] A motion to correct or amend should be made preliminary to the trial.[1] If the motion is granted, an order to that effect in the minutes of the appellate court is sufficient.[2]

*The record.*[See 10 C. L. 566]—A justice's record need not be as precise, formal, and accurate as that of a court of record,[3] and the order in which entries have been made are not conclusive that the facts evidenced by them occurred in that order unless so stated in the record.[4] Interlineations in, and pastings to a bill of exceptions will be presumed to have been made in good faith and at the time stated,[5] and, where the record states that a reply was filed before trial and the reply is attached to the justice's transcript and returned as one of the original papers in the case, the record cannot be impeached by ex parte affidavits.[6] Upon the suggestion of a diminution of the record, the appellate court may, and unless good cause is shown will, grant leave to supply the deficiency,[7] and in a proper case a justice may be compelled to correct erroneous entries in his records.[8]

*Dismissal.*[See 10 C. L. 566]—Except for defects in the appeal proceedings, an appeal cannot be dismissed.[9] If the appellant does not appear to prosecute his appeal, or fails to make out his case for any legal reason, the case can be dismissed, but not the appeal.[10] A motion to dismiss lies on appeal where a recognizance taken by a magistrate or municipal court is not required to the appellate court [11] or where the undertaking fails to cover costs,[12] but it will not be dismissed on the ground that the affidavit and bond for appeal were defective where appellant later filed a proper bond,[13] and, where before a motion to dismiss is acted upon docket fees are tendered, a motion to dismiss for failure to pay such fees may properly be denied.[14] Under statute,

after rendition of judgment, and appellant offered no valid excuse for not doing so, held circuit had no jurisdiction. Anheuser-Busch Brew. Ass'n v. Southern Bowling Ass'n [Mo. App.] 114 SW 90. No relief to appellant who relied on clerk to file transcript, it being his duty to produce and file transcript himself within time prescribed. Id.

**98.** Ford v. Gray [Mo. App.] 110 SW 692.

**99.** Error to grant petition to amend without examining docket itself. Such right not conferred by act of May 4, 1852, § 2, Act. Apr. 12, 1858, § 1, P. L. 243, nor Act May 10, 1871, P. L. 265. McCloskey v. O'Hanlan, 35 Pa. Super. Ct. 95.

**1, 2.** Missouri, K. & T. R. Co. v. Hamilton [Tex. Civ. App.] 108 SW 1002.

**3, 4.** Cusiter v. Silverton, 50 Or. 419, 93 P 234.

**5.** An interlineation in the bill of exceptions from the court of a justice of the peace, purporting to overrule the motion to discharge the attachment and extending the time for filing the bill of exceptions, together with the pasting on the bill of a piece of paper on which is written the apparent endorsement and allowance of the bill by the justice, will be presumed by a reviewing court to have been placed there in good faith and at the time stated, as against hints by counsel that these additions were made at a later date. Speaks v. Lisey & Co., 7 Ohio N. P. (N. S.) 389.

**6.** Bade v. Hibberd, 50 Or. 501, 93 P 364. That justice failed to indorse on reply date of its filing held of no consequence. Id.

**7.** No offer to supply deficiency, defendant taking issue on motion to dismiss. Walker v. Goding, 103 Me. 400, 69 A 621.

**8.** Mandamus lies to compel a justice to correct his docket entries so as to make them correctly represent facts of which they purport to be a record. Braun v. Campbell [Wis.] 119 NW 112. Petition alleging that petitioner was not indebted to judgment plaintiff when judgment was rendered, but, not averring that he was not indebted to him at time of mandamus suit, held insufficient as not showing any pecuniary loss except costs and disbursements in case. Id. Petition held insufficient to show falsity of entries and loss of jurisdiction by not appearing within the hour after time set for hearing, variation in time as alleged being only 20 minutes. Id.

**9, 10.** Davenport v. Puett [Ga. App.] 60 SE 1031.

**11.** Walker v. Goding, 103 Me. 400, 69 A 621.

**12.** Undertaking under Rev. St. 1887, § 4842. Libby v. Spokane Valley Land & Water Co. [Idaho] 98 P 715.

**13.** Rev. St. 1899, § 4072 (Ann. St. 1906, p. 2216). Ford v. Gray [Mo. App.] 110 SW 692.

**14.** Where plaintiff had paid such fees in order to support motion to affirm. Fenrich v. Burress, 129 Mo. App. 456, 107 SW 465.

where the appellant is plaintiff and in default for a petition, the appellate court may on its own motion dismiss the action and adjudge the costs against such appellant.[15] The fact that the summons issued out of a justice's court is not served and return made thereon within three years is not a ground for dismissal.[16] To entitle one to an order setting aside a dismissal, it must not only appear that he possessed a meritorious defense to the action but also that the dismissal was not due to his own negligence.[17] A defendant, after his motion to dismiss the appeal is overruled, waives jurisdiction by appearing to the merits of the cause where the court has jurisdiction of the subject-matter.[18]

*Pleadings on appeal.*[See 10 C. L. 566]—Pleadings sufficient in the justice court are sufficient on appeal where the trial is de novo.[19] They need not be in writing[20] and they may be amended,[21] if such as afford ground for amendment,[22] at the discretion of the judge,[23] where the issues are not changed and such amendment is the correction of a clerical error.[24] A complaint cannot be amended so as to set up a new cause of action [25] nor can any set-off or counterclaim be entertained in the county court which was not pleaded in the court below,[26] but supplemental pleadings may be made after the appeal if the amendment does not pertain to subject-matters wholly beyond the jurisdiction of the justice of the peace to determine,[27] and a second supplemental petition, which is in fact a reply to defenses set up in the answer, may be filed on appeal to the county court though such pleading is erroneously denominated.[28] New matter may be pleaded if the identity of the cause of action is

15. Rev. St. § 6589. Frazier v. Walker, 10 Ohio C. C. (N. S.) 224.

16. Code Civ. Proc. § 581 not applicable to dismissals in justice's courts. Hubbard v. Santa Clara County Super. Ct. [Cal. App.] 98 P 394. Dismissal under Code Civ. Proc. § 581, is without prejudice to a new trial unless it operates as a retraxit; hence suggestion that subject-matter of § 890 is different from that of § 581 is without force. Id.

17. Where appellant was guilty of inexcusable negligence in not handing notice served upon him to place appeal on short cause calendar to attorney, not abuse of discretion not to set aside dismissal. Bostrom v. Alexander, 138 Ill. App. 428.

18. Ford v. Gray [Mo. App.] 110 SW 692.

19, 20. Morrison v. St. Louis & S. F. R. Co., [Ark.] 112 SW 975.

21. Demurrer should not be sustained to a complaint, plaintiff being entitled to amend as to defects in form. Morrison v. St. Louis & S. F. R. Co. [Ark.] 112 SW 975. Petition even in superior court may be amended by showing jurisdiction. Central of Georgia R. Co. v. Crapps [Ga. App.] 61 SE 1126.

22. Statement filed before justice claiming that defendant took possession but failed to sprout land to plaintiff's damage, etc., etc., held a sufficient basis for an amended statement. Nichols v. Hicklin, 127 Mo. App. 672, 106 SW 1109. Paper held sufficient to authorize amendment made to it in circuit court. Ford v. Gray [Mo. App.] 110 SW 692.

23. Eight months' delay held not so long as to make granting of amendment an abuse of discretion. Erickson v. Elliott [N. D.] 117 NW 361. Allowing amendments to increase amount of damage sustained through defendant's wrongful act within court's discretion. Morrison v. St. Louis & S. F. R. Co. [Ark.] 112 SW 975. Where one amendment has been filed to written pleadings in the justice court, it is within the discretion of the district court on appeal to permit or refuse further amendments on the eve of trial; no abuse of discretion shown in not allowing amendments offered. McLaughlin v. Bradley [Iowa] 118 NW 389.

24. Bill of particulars containing allegation that lease "came to an end with the last day of March 1906" amended by inserting word "first" instead of "last." Kofoid v. Lincoln Imp. & Transfer Co. [Neb.] 114 NW 937.

25. Where complaint in justice's court for injuries to property in shipment is insufficient to state a cause in tort for breach of agreement, same cannot be amended on appeal to state an action in contract, effect being to substitute a new cause of action. Wernick v. St. Louis & S. F. R. Co. [Mo. App.] 109 SW 1027. Where plaintiff in justice court sued on a contract, and amendment in appellate court declaring upon a contract made between defendant and a partnership of which plaintiff was a member set up a new cause, within Sayles' Ann. Civ. St. 1897, art. 358. Taylor v. Read [Tex. Civ. App.] 113 SW 191.

26. Sayles' Ann. Civ. St. 1897, art. 358, held to apply to all appeals from justice to county or district court; hence, counterclaim not pleaded below could not by defendant be set up on appeal. Jund v. Stute [Tex. Civ. App.] 108 SW 763.

27. Amendment under Rev. Code 1905, § 8509, setting up discharge in bankruptcy admissible after issues made up. Erickson v. Elliott [N. D.] 117 NW 361. No merit in contention that release in bankruptcy presents unconstitutional defense or plea that could not be pleaded as a matter of law. Id.

28. Such pleading, though denominated "Plaintiff's Amended Supplemental Petition," may be filed where no new cause is set up and pleading is in fact not an amendment. Clayton v. Ingram [Tex. Civ. App.] 107 SW 880.

preserved and no set-offs and counterclaims not pleaded below are raised;[29] hence, a trial amendment on appeal is not subject to a motion to strike because it pleads matter not pleaded in the justice court.[30] A garnishee's properly filed answer cannot be striken on appeal.[31] A reply to an answer is necessary only where a counterclaim is pleaded in the answer.[32] Where the summons and return do not show a misjoinder of causes of action, an objection on the ground of misjoinder should be taken by answer.[33] Objections to pleadings should be specific.[34]

*Where the case is tried de novo on appeal*[35] on its merits,[36] and judgment rendered upon the evidence adduced,[37] proceedings in the justice court in nowise affect proceedings on appeal,[38] for an appeal from a judgment vacates the judgment.[39] The burden is on the appellant to make out his case,[40] but, where the appeal is taken from a judgment by default on both law and fact, the appellant cannot for the first time file an answer and raise a question of fact.[41] The appellee may offer any defense he may have at the time of hearing;[42] so also, when upon a writ of error a ruling is reversed by the appellate court and the cause ordered back for trial, it goes back for trial as if no former order or judgment had ever been made.[43] It is not error for a court of common pleas to hear testimony de novo on appeal in an attachment proceeding from the overruling by a justice of the peace of a motion to dissolve.[44]

29. Rev. St. 1895, art. 358, held to apply to cases taken to county court by appeal and not to prohibit defendant from presenting on appeal a written plea containing a general denial of facts urged as an estoppel where there were no written pleadings below. Davis v. Morris [Tex. Civ. App.] 114 SW 684.

30. Motion to strike amendment properly overruled. Landa v. Mechler [Tex. Civ. App.] 111 SW 752.

31. Where plaintiff had obtained a judgment in justice court and M. as garnishee was commanded to answer on Dec. 20, 1902. On that date case was continued to Jan. 3, 1903, when M. failed to appear and judgment by default was entered. Within 5 days appeal taken to next term of circuit court and before term begun answer filed, admitting a certain indebtedness and tendering amount. No further steps were taken until Dec. 1906, when upon motion answer was stricken from file and judgment entered against M. Striking held error. De Jean Mitchell Co. v. Mead [Miss.] 46 S 58.

32. Reply not necessary to answer setting up a discharge in bankruptcy. Erickson v. Elliott [N. D.] 117 NW 361.

33. Objection should be by answer as required by Revisal 1905, § 477, and not by demurrer. Laney v. Hutton [N. C.] 62 SE 1082.

34. Grounds of motion to strike out amended statement that no statement had been filed before justice on which to base an amendment, and that statement as amended did not state a cause of action, held insufficient to raise question of signature of statement. Nichols v. Hicklin, 127 Mo. App. 672, 106 SW 1109.

35. See 10 C. L. 567. House v. Schnadig, 235 Ill. 301, 85 NE 395; De Armit v. Whitmer, 63 W. Va. 300, 60 SE 136; Pickenpaugh v. Keenan, 63 W. Va. 304, 60 SE 137. Action to foreclose mechanic's lien begun in justice's court on appeal triable de novo like any other appeal. Rev. St. 1899, § 4071 (Ann. St. 1906, p. 2214). Fabien v. Grabow [Mo. App.] 114 SW 80. Held error to dismiss subsequent appeal after overruling an unfounded plea of prior adjudication as to claim of exemption, right to which was denied by plaintiff's reply though somewhat obscurely. Dolan v. Simmons [Iowa] 115 NW 479. Kirby's Dig. § 6213, providing that upon trials of facts by court it shall separately state conclusions of fact and law found, held not applicable to findings of justice incorporated into his judgment, trial on appeal being de novo. Ex parte Thompson [Ark.] 109 SW 1171. Justice's recitals unauthorized, of no probative force to affect judgment, and will not be considered on appeal. Id.

36. Pickenpaugh v. Keenan, 63 W. Va. 304, 60 SE 137. No objection can be raised on appeal for want of service of summons in justice court. Carden v. Bailey [Ark.] 112 SW 743.

37. Pickenpaugh v. Keenan, 63 W. Va. 304, 60 SE 137.

38. Memphis St. R. Co. v. Flood [Tenn.] 113 SW 384.

39. De Armit v. Whitmer, 63 W. Va. 300, 60 SE 136; Pickenpaugh v. Keenan, 63 W. Va. 304, 60 SE 137.

40. Davenport v. Puett [Ga. App.] 60 SE 1031. Error to render judgment in favor of plaintiff without proof where defendant failed to appear when called. Pickenpaugh v. Keenan, 63 W. Va. 304, 60 SE 137.

41. Trial de novo in Rev. St. 1887, § 4840, implies trying anew issues previously tried. Zimmerman v. Bradford-Kennedy Co., 14 Idaho, 681, 95 P 825.

42. Trial de novo, and defendant entitled to defend by showing his discharge in bankruptcy during pendency of appeal. House v. Schnadig, 235 Ill. 301, 85 NE 395.

43. No error of justice of peace on second hearing or district court on appeal to overrule plea of prior adjudication of question of exemption, case having been sent back to justice for trial. Dolan v. Simmons [Iowa] 115 NW 479.

44. Brown v. DeLong, 6 Ohio N. P. (N. S.) 510.

*Judgment.* See 10 C. L. 567—The appellate court cannot render a judgment in an amount which the justice for lack of jurisdiction could not have rendered,[45] but, on affirming a judgment and dismissing the appeal, it may in its discretion order the record returned to the magistrate for such further proceedings as are necessary to effectuate the judgment.[46] A judgment of the circuit court dismissing, without prejudice, a cause appealed from a justice's judgment is not a bar to a subsequent action.[47] Proof of affirmative defenses must be made before the allegations of an answer can have effect, except as to settle issues.[48]

*Further appeal or error.* See 10 C. L. 568 is governed almost entirely by the rules applicable to appeals in cases originally begun in the intermediate court.[49] The right of further appeal may be had where there has been an abuse of discretion,[50] but, where the intermediate had acquired no jurisdiction, there can be no further appeal,[51] and, where the intermediate court was without jurisdiction because of the insufficiency of the record, a further appeal will be heard only where the record is perfected by certiorari.[52] The presumption is that rulings of the intermediate court upon the question of jurisdiction of the justice is correct.[53] Points not raised in the intermediate court and not raised in the affidavit for a writ of certiorari cannot be tried.[54]

§ 6. *Certiorari.* See 10 C. L. 568—Only a few cases of seemingly peculiar application to review of justice court proceedings are retained in this topic.[55]

A petition for certiorari in a civil action[56] at the time of its filing in the office of the clerk of the superior court[57] must be accompanied either by the prescribed pauper's affidavit or the statutory certiorari bond approved by the judicial officer before whom the case was originally tried.[58] The certiorari is a nullity unless a legal bond or a pauper affidavit in lieu thereof has been filed before the issuance of the writ.[59]

45. Saunders v. Scott [Mo. App.] 111 SW 874.

46. Action of superior court in ordering record returned for further proceedings, and in ordering that certified copy of order accompany record, held not error, especially where no prejudice to rights is shown. Wilson v. Atlantic Coast Line R. Co., 79 S. C. 198, 60 SE 663.

47. Since on dismissal action is out of both courts. Holman v. Lueck [Wis.] 119 NW 124. Fact that no affidavit for a new trial was filed under St. §§ 3767, 3768, held not to make dismissal a bar, since, if error was done in dismissing without prejudice without affidavit, it was error within jurisdiction of court. Id.

48. Error to grant judgment on pleadings where discharge in bankruptcy was pleaded as defense. Erickson v. Elliott [N. D.] 117 NW 361.

49. See Appeal and Review, 11 C. L. 118.

50. Under Revisal 1905, §§ 607, 608, where an appeal was taken in Sept. 1906 and transcript sent to clerk of superior court, but appeal not docketed till 1907 after five terms of court had been held and motion to dismiss was allowed, held refusal to allow docketing was not reviewable, appellant not having paid clerk's fees, or requested docketing prior to motion to dismiss. McClintock v. Life Ins. Co. [N. C.] 62 SE 775.

51. Maley v. Mundy [Tex. Civ. App.] 20 Tex. Ct. Rep. 684, 107 SW 905. Where appeal was dismissed because record failed to show jurisdiction in county court and original transcript did not contain bond nor transcript of justice, motion for rehearing not giving reason for prior omission properly overruled. Id.

52. McPhail v. Blann [Miss.] 47 S 666. Record insufficient, appeal dismissed on court's own motion. Murphy v. Hutchinson [Miss.] 47 S 666.

53. Carmichael v. McKay [Neb.] 116 NW 676.

54. Point that judgment was erroneous as not having evidence to support it, not having been raised below, not reviewable by supreme court on defendant's writ of error to review circuit court's judgment affirming justice's judgment. Foster v. Walson [Mich.] 15 Det. Leg. N. 522, 117 NW 197. Objection that statement filed before justice was not signed not reviewable, where not raised in circuit court. Nichols v. Hicklin, 127 Mo. App. 672, 106 SW 1109.

55. See Certiorari, 11 C. L. 591.

56. State v. Wynne [Ga. App.] 62 SE 499.

57. Under Civ. Code 1895, § 4639, bond with petition must be filed in office of clerk of superior court, not with magistrate whose decision is under review. State v. Wynne [Ga. App.] 62 SE 499.

58. Under Civ. Code 1895, § 4639, mere attestation is insufficient. State v. Wynne [Ga. App.] 62 SE 499. Bond being unapproved at date of filing with petition held insufficient to authorize issuance of writ and no subsequent approval, either express or implied, could cure deficiency and save certiorari from dismissal. Id.

59. New York Life Ins. Co. v. Rhodes [Ga. App.] 60 SE 828; American Inv. Co. v. Cable Co. [Ga. App.] 60 SE 1037. Under Rev. St. 1895, art. 347, bond held not defective because conditioned to perfom judgment of county

Statutes generally provide who may execute the bond[60] and the requirements thereof.[61] The bond is not amendable,[62] and if it appears to be valid and properly executed, the court will not hear evidence to sustain it though evidence may be introduced to attack it as having been executed or signed by one without authority.[63] While the fact that the surety upon an appeal bond is also the surety on the certiorari bond of the same case is a good ground for dismissing the certiorari in the superior court,[64] yet, where a dismissal is not urged, it is not a ground upon which a writ of error, issued upon a bill of exceptions, may be dismissed.[65] Notice to the opposite party of the sanction of a writ of certiorari and of the time and place of hearing as required by law is indispensable,[66] since the same is in a sense the process which brings the defendant in certiorari into court.[67] Notice may be waived but the waiver must be in writing, and either service of the notice or the written waiver must appear in the record.[68] Certiorari is the proper remedy to a justice's judgment rendered after refusal of a timely demand for a jury,[69] to correct irregularities in the summoning a jury,[70] to inquire into the jurisdiction of the inferior tribunal,[71] and after a verdict has been rendered by a jury in a justice's court for the party dissatisfied in all cases, irrespective of the character of the questions involved or the amount in controversy.[72] Certiorari will lie to review a judgment in favor of one who has entirely failed to prove his cause of action,[73] but the exclusion of testimony not of a conclusive character does not give such right, the proper remedy being an appeal.[74] A

court without referring to "district court," county court having exercised jurisdiction and issued the writ. Webb v. Texas Christian University [Tex. Civ. App.] 20 Tex. Ct. Rep. 646, 107 SW 86. Bond not approved or not in terms of Acts 1902, p. 105, held certiorari properly dismissed. McDonald v. Ludowici, 3 Ga. App. 654, 60 SE 337.

**60.** Certiorari bond may be executed by any authorized agent or any attorney of a corporation. Civ. Code 1895, § 4639. New York Life Ins. Co. v. Rhodes [Ga. App.] 60 SE 828. Under Civ. Code of 1895, either a general agent or a special agent may execute bond on behalf of principal, word "supervisor" purporting general agency and authority to bind company. New York Life Ins. Co. v. Rhodes [Ga. App.] 60 SE 828. May be executed by an agent (Bass v. Masters [Ga. App.] 63 SE 24), and presumption is that one who executed bond as agent was duly authorized to do so, unless it affirmatively appears that agency was created by an undisclosed power of attorney (Id.). When certiorari bond appears upon its face to have been signed by one apparently authorized to act as agent, authority to sign is presumed and presumption prevails until rebutted. New York Life Ins. Co. v. Rhodes [Ga. App.] 60 SE 828; American Ins. Co. v. Cable Co. [Ga. App.] 60 SE 1037. Bond may in behalf of a corporation be executed by any agent of corporation which is petitioning for the writ who may be either specially or generally authorized to take such action in its behalf, term "manager" as applied to corporations indicating one having general control, and such control in connection with seal importing power to bind corporation. Id. "Manager" implies agency and presumptively authority to bind corporation in case in which corporation was actual party when case was tried and brought up by writ. Id.

**61.** Bond under Acts 1902, p. 105, not approved, held a nullity. McDonald v. Ludowici, 3 Ga. App. 654, 60 SE 337. Requirements of a bond not same as those with reference to an appeal bond. New York Life Ins. Co. v. Rhodes [Ga. App.] 60 SE 828. Bond under seal presumptively properly executed. Id.

**62, 63.** New York Life Ins. Co. v. Rhodes [Ga. App.] 60 SE 828.

**64.** Bush v. Roberts [Ga. App.] 62 SE 92.

**65.** First, because until petition is sanctioned there is no necessity for execution of bond, second, failure to make motion to dismiss amount to waiver of objection. Bush v. Roberts [Ga. App.] 62 SE 92.

**66.** Ten days' notice under Civ. Code of 1895, § 4644, indispensable. McConnell v. Folsom Bros. [Ga. App.] 61 SE 1051. Where requirements of Civ. Code 1895, § 4644, as to written notice, were not complied with and no good reason for noncompliance shown, certiorari properly dismissed. McLeod v. Faircloth Bros. [Ga. App.] 62 SE 95.

**67.** McConnell v. Folsom Bros. [Ga. App.] 61 SE 1051.

**68.** Where not in record, court obliged to presume there had been no notice served and certiorari was a nullity. McConnell v. Folsom Bros. [Ga. App.] 61 SE 1051.

**69.** New Jersey Soc. for Prevention of Cruelty to Animals v. Wilbur [N. J. Law] 69 A 1010.

**70.** Summoning of six jurors instead of twelve, where jurors were deprived of right to act, simply an irregularity which could have been corrected by certiorari had case gone on. Reams v. Yeager, 29 Pa. Super. Ct. 520.

**71.** In certiorari to review ejectment proceedings under Civ. Code 1902, § 2972. Lynch v. Ball, 79 S. C. 243, 60 SE 691.

**72.** Section nine of rules to determine whether certiorari or appeal is proper remedy, and Civ. Code 1895, § 4149. Brown v. Parian Paint Co. [Ga. App.] 62 SE 95.

**73.** Foster v. Watson [Mich.] 15 Det. Leg. N. 522, 117 NW 197.

**74.** Where at most justice erred in exclud-

verdict in the justice's court is sometimes required before a case can be carried by certiorari to a superior court.[75] Only matters raised in the court below will be reviewed,[76] and no ground or error can be insisted or passed upon than those stated in the petition and answer.[77] Language of the court which appears to determine the right to a writ upon the merits, when the denial was in fact upon other grounds, cannot prejudice the parties not then before the court[78] nor foreclose them from presenting the question anew,[79] or preclude the superior court from determining it as if the former opinion had not been rendered.[80] The violation of a leave of absence extrajudicially granted before court is not such an abuse of discretion as can be reviewed.[81] A certiorari will not be dismissed on the ground that the petition does not negative the idea that a writ of garnishment might have been served by leaving a copy at the garnishee's principal office, where it otherwise appears therefrom that no such service was attempted,[82] nor because the writ of garnishment was not directed to the justice but to the sheriff, where in fact, the justice before whom the judgment against the garnishee was rendered complied with the law in preparing a transcript of the record and filed the same before the court from which the writ issued,[83] and the fact that the petition is not properly verified if it is sanctioned and the magistrate answers, verifying its recitals, is no ground for a dismissal.[84] The fact of approval must appear upon the papers themselves.[85] An affidavit upon information and belief is insufficient,[86] but amendments are liberally awarded.[87] The real merits of a certiorari are determinable upon the hearing by the contents of the answer, and allegations of the petition not verified by the answer are worthless,[88] but upon the presentation of a petition for sanction, all allegations of the petition, properly verified, are to be taken as true until the coming in of the answer.[89] The answer must show that there has been a final judgment or verdict rendered [90] and the record must show jurisdiction.[91]

ing evidence proffered by defendant tending to prove failure of consideration, order not reviewable by certiorari. Foster v. Watson [Mich.] 15 Det. Leg. N. 522, 117 NW 197.

75. Where amount in controversy in a justice's court is $50 or less, and issue involved one purely of facts, there must be an appeal to jury in justice's court before the case can be carried by certiorari to superior court. Certiorari properly dismissed, amount involved being less than $50, and questions of facts exclusively raised. Schultes v. Camps [Ga. App.] 63 SE 23.

76. Exception in petition for certiorari that lower court erred in refusing to continue presents nothing for review when no motion for continuance was made below, and, where no other assignments, petition should be dismissed. Atlantic Coast Line R. Co. v. Cohn & Co. [Ga. App.] 62 SE 572.

77. Lears v. Seaboard Air Line R. Co., 3 Ga. App. 614, 60 SE 343. Statement in answer "it was urged by counsel for defendant in certiorari that said act was unconstitutional" held insufficient to raise constitutionality of act. Id. A special request containing various grounds of attack on constitutionality of statute properly ignored, request not being part of petition or answer. Id.

78. Where application was denied because proceeding was directed to judge of superior court instead of to tribunal itself, and court inadvertently used language as if right was decided upon merits. Richmond v. California Super. Ct. [Cal. App.] 98 P 57.

79, 80. Richmond v. California Super. Ct. [Cal. App.] 98 P 57.

81. Atlantic Coast Line R. Co. v. Cohn & Co. [Ga. App.] 62 SE 572.

82. Under Rev. St. 1895, art. 1222, amended by Acts 1903 (28th Leg.), p. 66, c. 47, where only service attempted was by president, and it appeared that person served was not president at time. Webb v. Texas Christian University [Tex. Civ. App.] 20 Tex. Ct. Rep. 646, 107 SW 86.

83. Webb v. Texas Christian University [Tex. Civ. App.] 20 Tex. Ct. Rep. 646, 107 SW 86. Only causes for which a party may move to dismiss for defects in certiorari proceedings, under Rev. St. 1895, art. 353, are want of sufficient cause appearing in the affidavit, or for want of sufficient bond. Id.

84. Bass v. Masters [Ga. App.] 63 SE 24.

85. State v. Wynne [Ga. App.] 62 SE 499.

86. Affidavits held sufficient where there were sufficient matters alleged in petition not stated on information and belief to authorize issuance of writ. Webb v. Texas Christian University [Tex. Civ. App.] 20 Tex. Ct. Rep. 646, 107 SW 86.

87. Where petition for certiorari was based on ground that judgment by default had been taken before it was authorized, held competent to amend same in circuit court by adding as ground that judgment was taken for a sum without testimony to show value of property involved. Beasley v. New Orleans & N. E. R. Co. [Miss.] 45 S 864.

88, 89. Bush v. Roberts [Ga. App.] 62 SE 92.

90. Georgia S. & F. R. Co. v. Goodman [Ga. App.] 62 SE 97. Fact may be shown in answer in form of a direct statement or in any

In the determination of alleged errors on certiorari, the answer of the justice furnishes to court the only authoritative information as to what occurred in the trial sought to be reviewed,[92] and the return on a writ of review to review judicial proceedings is conclusive as to the facts.[93] In case of conflict between the bill of exceptions and the record, as to matters which form a part of the record, the latter controls.[94] When a case has been properly removed by certiorari, the superior court may hear and determine the case upon its merits,[95] and in its discretion determine the reasonable amount of the garnishee's fee to be taxed against appellant against whom judgment is entered,[96] but the court should not dispose of the main case on the merits while a traverse to the magistrate's return is pending.[97] The court is confined to the examination of questions of law arising or appearing on the face of the record and proceedings.[98] Judgments must be in conformity with statute,[99] and although a court may be right in dismissing a certiorari by a claimant,[1] yet it is error to include in the dismissal judgment a judgment against the principal in the certiorari bond and his security for the amount of the fi. fa. which has been levied upon the property adjudged not to be the claimant's.[2]

§ 7. *Criminal jurisdiction and procedure.*[See 10 C. L. 570]—Jurisdiction to issue warrants and as examining magistrate,[3] and proceedings in summary prosecutions generally,[4] are elsewhere treated.

The criminal jurisdiction of a justice of the peace is coextensive with the boundaries of the county in which he is elected, but he is required to exercise his jurisdiction within the precinct or city for which he is elected. The trial of a case beyond

other way which will sufficiently verify it, hence, where as part of answer justice sent up certified copy of proceedings, and a final judgment appeared therein, verification of existence of judgment sufficient. Id.

**91.** Record stating cause of action as "an action brought for compensatory damages for neglect of an agreement for labor or work to be performed by defendant, wherein plaintiff demands $14," held not to show jurisdiction. Coulbourn v. Moore [Del.] 69 A 1065.

**92.** Southern R. Co. v. Grace [Ga. App.] 61 SE 1048. Assignments of error in petition not verified by answer of justice presents nothing for consideration of superior court. Id. Where answer did not verify statement in petition that judgment was rendered against company in justice's court, held not error to dismiss petition for certiorari. Southern R. Co. v. Grace [Ga. App.] 61 SE 1048.

**93.** Cusiter v. Silverton, 50 Or. 419, 93 P 234. Return held to show that accused at time of his demand for jury, demanded, as authorized by B. & C. Comp. § 2257, a jury selected from jury list. Id.

**94.** State v. Wynne [Ga. App.] 62 SE 499.

**95.** Rev. St. 1895, art. 359. Webb v. Texas Christian University [Tex. Civ. App.] 20 Tex. Ct. Rep. 646, 107 SW 86.

**96.** Discretion not abused under Rev. St. 1895, arts. 253, 258, 259, in fixing fee at $25. Webb v. Texas Christian University [Tex. Civ. App.] 20 Tex. Ct. Rep. 646, 107 SW 86.

**97.** Southern Exp. Co. v. Hunnicutt [Ga. App.] 63 SE 26. However, where the traverse has been submitted to a jury, verdict rendered against the traverse, no motion for a new trial made, and no supersedeas of verdict and judgment applied for, it is not error to hear the certiorari upon its merits and render judgment thereon, notwithstanding time for filing motion for new trial had not expired when judgment was entered, and that notice of intention to file the motion was given court. Id. Judgment on certiorari subject to be set aside if a new trial should be subsequently granted and traverse sustained. Id.

**98.** Arky v. Cameron [Miss.] 46 S 54. Under Code 1906, § 90, where on certiorari to review judgment against garnishee there was nothing in record to show what answer was, held error to sustain writ of certiorari and order question whether garnishee filed answer required by law to jury. Arky v. Cameron [Miss.] 46 S 54, afd. [Miss.] 46 S 170. Error in ordering new trial held harmless where jury returned a negative finding. Arky v. Cameron [Miss.] 46 S 54.

**99.** Judgment held in precise conformity with statute 1906, § 90, directing that in case of affirmance of judgment of justice the same judgment shall be given as on appeals, judgment being in effect an affirmance. Arky v. Cameron [Miss.] 46 S 170.

**1.** Certiorari properly dismissed where from answer it was clear that magistrate was authorized by evidence to find that property levied upon was that of defendant in fi. fa. Jeffries v. Luke [Ga. App.] 62 SE 719.

**2.** Error in rendering such judgment where first, no question of law was involved, second, where only issue involved was that of title. Jeffries v. Luke [Ga. App.] 62 SE 719. Liability of principal and security on bond for eventual condemnation money in claim case extends only to costs and such damages as may be assessed against claimant by reason of his interposition of claim. Id.

**3.** See Arrest and Binding Over, 11 C. L. 278.

**4.** See Indictment and Prosecution, § 18, 12 C. L. 136.

**5.** Rev. St. 1887, §§ 3850, 3885. State v. Noyes [Idaho] 96 P 435.

the limits of the precinct does not involve jurisdiction, but is a matter of procedure,[6] and an irregularity that may be waived by consent and agreement of the parties.[7] Where statute provides that a justice shall have jurisdiction in criminal cases throughout the county in which he is elected and resides, his authority to hear and dispose of criminal cases is not limited to the township for which he is elected and where he resides.[8] In North Carolina criminal offenses punishable by a fine not exceeding $50, or imprisonment not exceeding 30 days, are within the final jurisdiction of justices of the peace,[9] and in New Jersey the justice has jurisdiction to hear and determine violations of health ordinances in cities where no police justice has been appointed or provided for.[10] It is not necessary that a conviction state that the cause was heard in a summary manner,[11] nor need notice before suit be given.[12] Under statute providing that when a change of the place of a preliminary examination is granted the cause shall be transferred to the next nearest justice unless the parties otherwise agree, the justice before ordering a change must first ascertain whether the parties have agreed upon a justice,[13] and in the absence of such agreement transfer the cause to the next nearest justice.[14] One desiring to appeal to the circuit court from a conviction by a justice must give the justice notice thereof in writing within the statutory time,[15] but if the notice is in substantial compliance with the statute, it is sufficient.[16] Under statutes in some states a city mayor may act as police justice to dispose of prosecutions for violations of the city ordinances, and as mayor ex officio justice of the peace he may hold the regular court of the justice of the peace to try prosecutions for violations of the state laws.[17] The two courts are wholly distinct and separate.[18] The record must show clearly what offense was charged and whether against the municipal or state power,[19] and the police justice must keep a separate docket as justice of the peace.[20] The jury must be selected in the way the law provides,[21] but the error in selecting, if otherwise the justice has full jurisdic-

6. Rev. St. 1887, §§ 3850, 3885. State v. Noyes [Idaho] 96 P 435.

7. Where by stipulation and agreement with county attorney consent to trial in another precinct was given, defendant not entitled to discharge on appeal for want of jurisdiction. State v. Noyes [Idaho] 96 P 435.

8. Under Rev. St. § 610, justice may hold criminal court in any township within county. Section 582 not applicable to criminal cases. Steele v. Karb, 78 Ohio St. 376, 85 NE 580.

9. Offense of abandoning crop without cause before paying advances, punishable under Revisal 1905, § 3366, by $50 or 30 days, within justice's jurisdiction; superior court without original jurisdiction over offense. State v. Wilkes [N. C.] 62 SE 430.

10. Bourgeois v. Ocean City Board of Health [N. J. Law] 71 A 53. Jurisdiction given mayor under § 25 (P. L. 1897, p. 60), not exclusive, and where council of city have not exercised option under § 78 of same act to establish police court, justice of county has jurisdiction in all cities of county to enforce health act of 1887 (P. L. p. 89). Id.

11. Conviction under act of 1887 (P. L. p. 89) not invalidated by failing to state that cause was heard in summary manner. Bourgeois v. Ocean City Board of Health [N. J. Law] 71 A 53.

12. Section 18 of health act (P. L. 1887, p. 89) requires no notice; § 14 only requires notice where city proposes to abate a nuisance and charge expenses to delinquent. Bourgeois v. Ocean City Board of Health [N. J. Law] 71 A 53.

13. Rev. Justices' Code, § 124. State v. Carlisle [S. D.] 118 NW 1033.

14. Rev. Justices' Code, § 124. State v. Carlisle [S. D.] 118 NW 1033.

15. Within 24 hours under St. 1898, § 4761. Cowles v. Neilsville [Wis.] 119 NW 91.

16. Defect in notice of appeal, under St. 1898, § 4761, which by Laws 1889, p. 641, c. 190, § 2, is made to govern appeal from police court in being entitled in name of state instead of city, held not to deprive circuit court of jurisdiction, notice giving date and term of judgment so as not to be misleading. Cowles v. Neillsville [Wis.] 119 NW 91.

17, 18. Washington v. State [Miss.] 46 S 539.

19. Washington v. State [Miss.] 46 S 539. Affidavit for unlawful sale of liquor was sworn to before police clerk, charged defendant with unlawfully selling liquor within corporate limits, and concluded against peace and dignity of state. In transcript it appeared "copy of records of proceedings before U. S. Vandaman, mayor of city of Greenwood and ex officio justice of the peace of Leflore county in said city, etc.," and sentence that defendant be fined $500 and imprisoned in city jail. Held jurisdiction of courts being confused, defendant was entitled to discharge. Id.

20. Code 1906, § 3398. Washington v. State [Miss.] 46 S 539.

21. Error for court to direct officer to select a jury, demand being made by ac-

tion, amounts only to a mistrial, and the cause after conviction must be remanded for a new trial.[22] A judgment in a criminal case in which the justice has jurisdiction of the parties and subject-matter cannot be collaterally attacked as void, though erroneous.[23]

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**Juvenile Courts,** see latest topical index.

### KIDNAPPING.[24]

*The scope of this topic* is noted below.[25]

Kidnapping was a misdemeanor at common law,[26] and, unless denominated a felony by statute, it is not necessary to allege that the offense was "feloniously" committed although the penalty therefor is fixed as for a felony.[27] The substantial equivalent of the statutory definition is sufficient to set forth the offense.[28] Where crim-

cused for jury selected under B. & C. Comp. § 2257. Cusiter v. Silverton, 50 Or. 419, 93 P 234. Not error for appellate court to set aside judgment. Id.

**22.** Cusiter v. Silverton, 50 Or. 419, 93 P 234.

**23.** Commonwealth v. Gill, 28 Ky. L. R. 879, 90 SW 605.

**24.** See 10 C. L. 570.

**25. Includes** the crime of unlawfully taking away any person from his home or his removal from one place to another by force, fraud or intimidation and without his consent. **Excludes** the abduction of females for purposes of prostitution or concubinage, see Abduction, 11 C. L. 9. For civil liability, see False Imprisonment, 11 C. L. 1456.

**26.** State v. Holland, 120 La. 429, 45 S 380.

**NOTE. What constitutes kidnapping:** Kidnapping, at common law and under statutes declaratory thereof, is forcible abduction or stealing away of a man, woman or child from their own country and sending them into another (4 Blackstone Com. 219; 1 East P. C. 430; Moody v. People, 20 Ill. 315; Click v. State, 3 Tex. 282; 4 Stephens' Com. 93; 1 Clark & M. Crimes, 456; People v. Chu Quong, 15 Cal. 332; Commonwealth v. Blodgett, 12 Met. [Mass.] 56; Smith v. State, 63 Wis. 453, 23 NW 879; People v. Fick, 89 Cal. 144, 26 P 759; Ex parte Keil, 85 Cal. 309, 24 P 742; Ex parte Miller, 24 P 743; State v. Stickney, 29 Mont. 523, 75 P 201), though the element of transportation to a foreign country has been repudiated as an essential, at least in one case (State v. Rollins, 8 N. H. 550). It is regarded as an aggravated false imprisonment. Costello v. State, 29 Tex. App. 127, 14 SW 1011; Smith v. State, 63 Wis. 453, 23 NW 879. No particular length of time of detention is essential. State v. Leuth, 128 Iowa, 189, 103 NW 345.

The asportation must be without consent of the kidnapped party and without lawful authority (Click v. State, 3 Tex. 282; Costello v. State, 29 Tex. App. 127, 14 SW 1011; Cochran v. State, 91 Ga. 763, 18 SE 16; People v. Fitzpatrick, 57 Hun, 459, 8 N. Y. Cr. R. 81, 10 NYS 629; Olivarez v. State, 14 SW 1012), and a child of tender years is deemed incapable of consenting (State v. Farrar, 41 N. H. 53; Commonwealth v. Nickerson, 5 Allen [Mass.] 518; United States v. Ancarola, 17 Blatchf. [U. S.] 423; Davenport v. Com., 1 Leigh [Va.] 588; Sutton v. State, 122 Ga. 158, 50 SE 60). Fraud or duress may negative consent of a person of mature years. Schnicker v. People, 88 N. Y. 193; Moody v. People, 20 Ill. 315; People v. DeLeon, 109 N. Y. 226, 16 NE 46, 4 Am. St. Rep. 444, and note; In re Kelly, 46 F 653; Sutton v. State, 122 Ga. 158, 50 SE 60; State v. White, 48 Or. 416, 87 P 137; State v. Altemus, 76 Kan. 718, 92 P 594.

Statutes frequently eliminate the element of transportation to another country or state (Hadden v. People, 25 N. Y. 373; Smith v. State, 63 Wis. 453, 23 NW 879; Eberling v. State, 136 Ind. 117, 35 NE 1023; Dehn v. Mandeville, 52 N. Y. St. Rep. 281, 22 NYS 984; State v. Buckarow, 38 La. Ann. 316; State v. Harrison, 145 N. C. 408, 59 SE 867), or substitute the element of removal from usual place of residence (Boes v. State, 125 Ind. 205, 25 NE 218; State v. Sutton, 116 Ind. 527, 19 NE 602; State v. Kimmerling, 124 Ind. 382, 24 NE 722), but where defined as taking with intent to detain and conceal, such intent must appear at the time of the taking (Smith v. State, 63 Wis. 453, 23 NW 879; Mayo v. State, 43 Ohio St. 567, 3 NE 712; People v. Black, 147 Cal. 426, 81 P 1099). In child stealing, lack of consent by the parents is sometimes made an essential, without regard to consent of child. Gravett v. State, 74 Ga. 191; Thweatt v. State, 74 Ga. 821; Arrington v. State, 3 Ga. App. 30, 59 SE 207. Removal of a prisoner from the state by an officer without extradition has been held kidnapping, irrespective of consent. Ker v. Illinois, 119 U. S. 436, 30 Law. Ed. 421. Kidnapping a child under fourteen years of age is a felony, under Statute 24 and 25, Vict. c. 100, § 56. Confinement of one adjudged insane is not kidnapping (People v. Camp, 66 Hun, 531, 21 NYS 741, afd. in 139 N. Y. 87, 34 NE 755), nor can a parent be guilty of kidnapping a minor child of whom he has the parental right of custody (Hunt v. Hunt, 94 Ga. 257, 21 SE 515; State v. Angel, 42 Kan. 216, 21 P 1075; Burns v. Commonwealth, 129 Pa. 138, 18 A 756; John v. State, 6 Wyo. 203, 44 P 51; Biggs v. State, 13 Wyo. 94, 77 P 901), but otherwise if the child is in the lawful custody of another (In re Peck, 66 Kan. 693, 72 P 265).—[Ed.]

**27.** Rev. St. 1870, § 805, hard labor, at the discretion of the court. State v. Holland, 120 La. 429, 45 S 380.

**28.** "Unlawfully" instead of "without authority of law." State v. Holland, 120 La. 429, 45 S 380.

inal intent is not an essential element, evidence of previous offenses of the same nature is not admissible.[29]

**Labels; Labor Unions; Laches; Lakes and Ponds,** see latest topical index.

## LANDLORD AND TENANT.


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**§ 12. Crimes and Penalties, 566.**


*The scope of this topic* is noted below.[30]

§ 1. *Definitions and distinctions.* See 10 C. L. 571—A lease is to be distinguished from a possession incidental to a contract of hire,[31] from a cropper's contract, so called,[32] from a license,[33] and from a mortgage.[34] While a lease is distinguishable from a sale in that it does not pass an interest in the fee, it is an "alienation of lands"

**29.** Under Rev. St. 1870, § 805. State v. Holland, 120 La. 429, 45 S 380.

**30.** Leases of chattels (see Bailments, 11 C. L. 365), gas and mining leases (see Mines and Minerals, 10 C. L. 839), and water right leases (see Waters and Water Supply, 10 C. L. 1996), are excluded, as are matters peculiar to leases by particular classes of persons (see Railroads, 10 C. L. 1365, and the like).

**31.** Janitor occupying rooms as incident to his employment is not a tenant. Tucker v. Burt, 152 Mich. 68, 15 Det. Leg. N. 83, 115 NW 722. Where farm is rented for agricultural purposes to one employed in butcher shop and not as incidental to his employment, relation of landlord and tenant exists. Womach v. Jenkins, 128 Mo. App. 408, 107 SW 423.

**32.** Where owner contracted with another to furnish, in addition to the land, the wheat to be sown, the latter to do all the work and crop to be divided between them, held that relation of landlord and tenant did not exist but contract was mere cropper's contract. Haggard v. Walker [Mo. App.] 111 SW 904. Verbal agreement whereby one was to furnish land, teams and tools to another who was to cultivate the land, get wood for first party, feed his stock, milk his cows, and make his fires, crop to be divided equally between them, held not to create relation of landlord and tenant but tenants in common of crop. Rogers v. Frazier Bros. & Co. [Tex. Civ. App.] 108 SW 727. Under Code 1896, § 2711, where one furnishes land and another labor to produce crop which is to be divided, relation of landlord and tenant exists. Kennedy v. McDiarmid [Ala.] 47 S 792. See Emblements and Natural Products, 11 C. L. 1197.

**33.** Instrument giving right to occupy side of building for advertising purposes held a license and not a lease. Manheimer v. Gudat, 55 Misc. 330, 106 NYS 461. Where defendant hired entire roof of building for two years to be used for displaying advertising signs, with right of access during business hours, owner reserving right to enter upon roof for repairing or to place lights, held lease and not a mere license. United Merchants' Realty & Imp. Co. v. New York Hippodrome, 113 NYS 740. Contract whereby plaintiff was to have exclusive privilege of public stenographer's office in certain hotel, agreeing to pay monthly rent, plaintiff to do private correspondence for hotel management and to furnish competent stenographers, held not a lease but mere contract to allow stenographer and typewriter to carry on business in hotel. Hess v. Roberts, 124 App. Div. 328, 108 NYS 894. See Licenses to Enter on Land, 10 C. L. 630.

**34.** Instrument in form a lease with the right to remove timber, etc., given as security construed a mortgage. Johnson v. Hataway [Ala.] 46 S 760. See Mortgages, 10 C. L. 855.

within the act of congress relating to the right of Indians to dispose of their lands.[35] The word "lease" is frequently used to designate the written instrument, though such instrument is in fact only evidence of the leasing.[36]

§ 2. *The contract of lease and creation of tenancy.* See 10 C. L. 571—The relation being purely contractual cannot arise by operation of law,[37] and, while the contract may be express or implied,[38] all the elements of a contract, such as the meeting of the minds,[39] must exist,[40] and if there is a writtent lease it must be delivered[41] without fraud,[42] unless the party claiming nondelivery is estopped to assert the same.[43] No particular form of expression is necessary but any language manifesting an intention to create the relation is sufficient.[44] A party is entitled to have included in his lease

**35.** Lease is an "alienation of lands" within Act April 21, 1904, c. 1402, 33 Stat. 204, relating to alienation of lands by Indians. Eldred v. Okmulgee L. & T. Co. [Okl.] 98 P 929.

**36.** Mattlage v. McGuire, 111 NYS 1083.

**37.** Vendee in possession after breach of contract cannot be treated as lessee. Stockwell v. Washburn, 111 NYS 413.

**38.** Starbuck v. Avery [Mo. App.] 112 SW 33. Though provision that lessee shall have option "at expiration of this lease" to renew, provided he gives six months prior notice of his "intention," contemplated further action at end of term after giving of notice, if lessee notifies lessor that he will take for another term and lessor accepts, a complete contract is formed. Nutmeg Park Driving Corp. v. Fiske [Conn.] 71 A 499. Where lessor sells land and vendee knows of existing tenancy and the tenant upon learning of the sale continues, relation of landlord and tenant is created between them. Starbuck v. Avery [Mo. App.] 112 SW 33. Where lessee is notified that he is lessee of the premises and agrees to pay rent to such person, held to establish relation of lessor and lessee. Friedland v. Nicholsburg, 110 NYS 1055.

**39.** Evidence of conversations and negotiations held to make question for jury whether minds had met. Robertson & Co. v. Russell [Tex. Civ. App.] 111 SW 205. Evidence of conversations, writings, etc., held to show that minds met on particular rental. Id. Where owner did not surrender lease but merely permitted it to be used to make duplicate copy to be signed by original lessors, and he was not aware that true copy was not made, his act did not operate to make new lease (Fleck v. Feldman, 110 NYS 412), and where false lease was assigned by lessee to subtenants, owner retained all rights under original lease against assignor and assignee (Id.).

**40.** Express contract for room rent asserted against son-in-law after family difficulties arise will be carefully scrutinized. Heron v. Weber, 103 Me. 178, 68 A 744. Evidence held insufficient to show express contract to pay room rent, defendant being a son-in-law and claim being asserted only after family difficulties arose. Id. Evidence held to sustain finding of written lease for one year at rental of $50 per month. Rees v. Storms [Minn.] 117 NW 498. Relation of landlord and tenant may be established by lessee's acknowledgment of the tenancy. Dunn v. Taylor [Tex.] 113 SW 265.

**Offer and acceptance:** Defendants made rental proposal and plaintiffs mailed acceptance. Defendants remained in possession and plaintiffs demanded rent under new lease. Held that receipt of acceptance was not necessary as demand of rent was an acceptance and defendants remaining in possession gave plaintiffs right to elect at any time to consider lease in effect. Robertson & Co. v. Russell [Tex. Civ. App.] 111 SW 205. In order to become a contract for the renewal of a lease there must be a meeting of minds and acceptance of the offer to renew before it is withdrawn. Landlord's offer to renew lease made while lease still in force but withdrawn before acceptance cannot be construed as of binding force. Globe Brew. Co. v. Simon, 132 Ill. App. 198.

**41.** Waldo v. Jacobs, 152 Mich. 425, 15 Det. Leg. N. 316, 116 NW 371. Delivery obtained for lessor's attorney without lessor's consent and knowledge held not a legal delivery. Morgan v. Simmons [Utah] 96 P 1018. Where lease was signed by both parties and delivered by plaintiff to his agents to be delivered to defendant but never delivered, held invalid. Harnett v. Korscherak, 110 NYS 986. Where unregistered lease from general agent to his principal is found among principal's papers in possession of agent, no delivery is shown in the absence of evidence of agent to accept delivery. Smith v. Moore [N. C.] 62 SE 892. Where lease is found among papers of lessees in possession of lessor who was general agent of lessees, and is offered on behalf of deceased lessor, burden rests on one offering. Id.

**42.** Where there was evidence that lease was signed by lessor to be delivered to lessee if he agreed thereto and signed same, but that lessee fraudulently procured delivery, finding that lease was obtained by lessee by fraud construed as finding that lease as a mere written instrument was so obtained. Morgan v. Simmons [Utah] 96 P 1018.

**43.** Where lessee recognized lease by offering to relinquish rights thereunder, he cannot resist on ground of nondelivery. Obendorfer v. Mecham, 110 NYS 340. Where tenant in possession mortgages her leasehold and there is recorded a sealed lease with two years to run, lessor is estopped to assert that lease was never delivered and that lessee is in under a subsequent parol lease. Jetter Brew. Co. v. Kurzel, 112 NYS 239.

**44.** Hancock County Sup'rs v. Imperial Naval Stores Co. [Miss.] 47 S 177. The words "agreed to let" are interpreted to mean the same as "let," unless there is something in the instrument to show that a present demise could not have been in the contemplation of the parties, and thirty days' notice does not terminate it. Instrument agree-

all the terms of the accepted option to lease.[45] The contract must be free from fraud[46] and material misrepresentation,[47] and the lease must be for a lawful purpose.[48] The mere demise by the lessor of the premises leased is not sufficient consideration to support an independent covenant of the lessee.[49] To avoid a lease because of false representations, they must be material,[50] and it must appear that the lessee relied upon them.[51] A lessee who seeks to avoid the lease on account of fraudulent representations must act promptly on discovery of the fraud.[52] The lease must be by one having an estate in the land,[53] or by one duly authorized and empowered to make the same.[54] A lease is binding upon the lessee though not signed by him if he takes possession thereunder.[55] In some states lease of certain term durations must be recorded.[56]

*Construction of leases and proof of the terms of tenancy.* See 10 C. L. 572—The rules of construction applicable to contracts generally apply to leases,[57] the cardinal principal being to give effect to the intention of the parties.[58] Leases are governed as to legal effect by the laws of the state where executed,[59] and it will be presumed that the parties contracted with reference to local established customs.[60] While a

ing to lease for a definite period and embodying all details held to be lease. Seibert v. Grace, 138 Ill. App. 361.

45. Option to lease held to contain all the essentials of a lease. O'Connor v. Harrison, 132 Ill. App. 264.

46. Where lessee covenanted that he had examined and knew the condition of the premises and had received same in good order and repair, and that no representations were made as to condition except as indorsed thereon, he could not rescind for alleged false oral representations as to condition of boiler. Jorgeson v. Hock, 234 Ill. 631, 85 NE 296.

47. Misrepresentation by sublessor that there were no restrictions in his lease except against use as saloon or restaurant held material on issue of frand. Humphreys v. Roberts, 113 NYS 792. Misrepresentation by sublessor as to rent paid by him held not as to a material matter. Id. Though lessee pleaded that written contract did not set forth the agreement, evidence that lessee did not read same and that he trusted lessor held irrelevant and immaterial. Duncan v. Jouett [Tex. Civ. App.] 111 SW 981.

48. Mere knowledge or suspicion that lessee is going to use premises for illegal purpose will not invalidate the contract. Harbison v. Shirley [Iowa] 117 NW 963. Though corporation cannot be licensed to keep saloon, it may lease premises so as to have its beer sold thereon. Conservative Realty Co. v. St. Louis Brew. Ass'n [Mo. App.] 113 SW 229.

49. Covenant for bidding other than plaintiff's beer to be sold on premises leased without agreement to sell to lessee is unilateral. Fortune Bros. Brew. Co. v. Shields, 137 Ill. App. 77.

50. Representation that defendant was owner, when in fact title was in his wife, not such representation as will entitle tenant to rescission, in absence of showing that possession was disturbed. Hock v. Jorgeson, 137 Ill. App. 199.

51. Evidence held not to show reliance upon representation that boiler and steam pipes were in good repair. Hock v. Jorgeson, 137 Ill. App. 199.

52. A lessee who claimed that he was induced to accept lease because of fraudulent representations regarding good repair of boiler and pipes of engine, but who retained possession of premises for two years, held precluded from setting up fraud. Hock v. Jorgeson, 137 Ill. App. 199.

53. Fact that lessor was not owner of the premises does not authorize lessee to rescind where he has not been disturbed. Wife of lessor owner. Jorgeson v. Hock, 234 Ill. 631, 85 NE 296.

54. Agent must have authority. Bonnazza v. Joseph Schlitz Brew. Co. [Mich.] 15 Det. Leg. N. 846, 118 NW 604. Agent possessing power to rent has power to renew lease. Steuerwald v. Jackson, 123 App. Div. 569, 108 NYS 41. Executor cannot bind estate by acceptance of lease beginning after death of testator. Grace v. Seibert, 235 Ill. 190, 85 NE 308.

See, also, Agency, 11 C. L. 72.

55. Bakker v. Fellows [Mich.] 15 Det. Leg. N. 545, 117 NW 52.

56. Lease for five years with right of renewal is for more than seven years, within Rev. Laws, c. 127, § 4, requiring such leases to be recorded. Leominster Gaslight Co. v. Hillery, 197 Mass. 267, 83 NE 870. Purchaser subject to a lease is bound by it though not recorded. Id. Where lease for more than 21 years is recorded, under Act May 28, 1715 (Smith's Law, p. 94), an estate for years vests though possession is not taken. St. Vincent's Roman Catholic Congregation of Plymouth v. Kingston Coal Co., 221 Pa. 349, 70 A 838.

57. See Contracts, 11 C. L. 729.

58. Where lease recites that "premises are now in good repair," and evidence shows it was not in good repair at time of execution of lease but was put in such condition before commencement of term, covenant to surrender "in the same condition as they now are," held to refer to commencement of term. Chesapeake Brew. Co. v. Goldberg, 107 Md. 485, 69 A 37. Lease of basement and store room, in building in which there were other tenants, held not to include roof, and lessor could erect billboard thereon. Macnair v. Ames [R. I.] 68 A 950.

59. Perpetual lease. Bowler v. Emery [R. I.] 70 A 7.

60. Permitting lessee to remove crop after expiration of term where he was prevented

lease drawn exclusively by the lessor should be construed most strongly against him,[61] and doubts as to the meaning of a restrictive covenant must be resolved against the restriction,[62] the court should give such effect to each clause as to promote the general purpose of the lease[63] if possible.[64] Where the language is clear and certain, it must be given effect, however harsh,[65] and its meaning will not be extended by implication,[66] but where indefinite and ambiguous,[67] parol evidence may be resorted to to show the intention of the parties. In case of uncertainty, a practical construction by the parties may be adopted by the court.[68] Contemporaneous parol agreements are merged in the written lease,[69] which must control the contractual rights of the parties,[70] unless they relate to collateral matters,[71] or to conditions precedent to the taking effect of the lease.[72] As to whether a tenancy is held jointly or severally is a question of fact.[73]

by circumstances from gathering during term. Bowles v. Drivir [Tex. Civ. App.] 112 SW 440.

61. Morgan v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 110 SW 978.

62. Covenant as to cigar privileges in other parts of the same building. The Apollo Cigar Co. v. O'Brien, 11 Ohio C. C. (N. S.) 63.

63. Lease binding lessor not to lease "to another saloon or dramshop on said block during this lease," and providing for termination of lease if saloon license could not be obtained, etc., held to show general purpose to lease for saloon purposes. Conservative Realty Co. v. St. Louis Brew. Ass'n [Mo. App.] 113 SW 229.

64. Conservative Realty Co. v. St. Louis Brew. Ass'n [Mo. App.] 113 SW 229. Lease of passageway of three feet requiring lessor to maintain a cistern and closet "on said premises" held in view of purpose of said lease not to authorize erection of closet so as to block way. Sultzman v. Branham, 128 Mo. App. 696, 108 SW 1074.

65. Conservative Realty Co. v. St. Louis Brew. Ass'n [Mo. App.] 113 SW 229.

66. Lease that provided for purchase of buildings and improvements by subsequent lessee held, where state sold premises and tenant sought to have lien declared to secure improvements, that lease could not be construed as containing agreement to purchase by vendee, or that lien should be created in favor of original lessee. Diederich v. Rose, 133 Ill. App. 384.

67. Where lease required lessee to put in strawberries in patch south of clover field and there were two such patches, parol evidence is admissible to identify. Lauderdale v. King, 130 Mo. App. 236, 109 SW 852. Lease containing option of purchase together with instructions in writing to holder of deed in escrow held not so ambiguous as to admit parol evidence. Pollard v. Sayre [Colo.] 98 P 816.

68. Sublease of "the premises which he (original lessee) holds under lease," etc., held to refer to premises held by lessor under a practical construction rather than by strict interpretation of his lease, where sublessee knew of such practical construction. Hirsh v. Valloft, 121 La. 66, 46 S 103. Taking of possession and compliance with terms by both lessor and lessee held to show occupancy under written lease, although words did not express lease in praesenti. Eagle Tube Co. v. Holsten, 110 NYS 242.

69. Moore v. Coughlin, 111 NYS 856. Where lease recites the rental of a particular farm at a specific rent and said nothing as to number of acres or that rental was per acre, lessee cannot show by parol that rental was by acre upon a representation that farm contained certain number of acres for purpose of establishing counterclaim. Lewis v. Muse, 130 Mo. App. 194, 108 SW 1107.

70. Word "furnished" as used in lease providing that "party of the first agrees to furnish water sufficient to irrigate land above described, said water to come from an artesian well located on land," held to mean to "deliver" and was not complied with where contractor digging well for lessor locked same on completion so that lessee could not get water without breaking lock. Smith v. Hicks [N. M.] 98 P 138. Under Greater New York Charter, §§ 475, 473, as amended by Laws 1902, p. 1219, c. 509, and Laws 1904, p. 1431, c. 600, conferring on alderman power to establish a scale of rents for supplying water, and providing that all extra charges for water shall be included in regular rents, and in case meter shall be placed in any building quantity used shall be determined by such meter, tenant stipulating to pay regular "annual rent * * * assessed * * * according to law for * * * water rent" must pay meter rent. Loewenthal v. Michels, 110 NYS 639. Where by cropping contract tenant agreed to pay one-half of expenses of maintaining both families and family of landlord was increased by her son becoming a member thereof without lessee's consent, lessee may recover additional expense. Feland v. Berry [Ky.] 113 SW 425. Where physician rented room in business block and lessor agreed to furnish heat and water, faucet in hallway some distance from office held not a compliance. Rosenbloom v. Solomon, 57 Misc. 290, 109 NYS 540. Cropping contract provided that landlord was to have a 12-acre tobacco barn built, she to pay cost of same, tenant agreeing to attend to building of same. Held that it was duty of landlord to furnish material on the premises, and, where she negligently delayed until too late to build and crop is damaged, she is liable. Feland v. Berry [Ky.] 113 SW 425.

71. A lease in writing cannot be varied by parol proof of a contemporaneous agreement to repair. Ross v. Griebel, 136 Ill. App. 399. **Contra.** Williams v. Salmond, 79 S. C. 459, 61 SE 79. Parol agreement to make certain repairs and to put in certain furniture before commencement of term held collateral. Davies v. Hotchkiss, 112 NYS 233.

72. Contemporary parol agreement that

*The statute of frauds.*[See 10 C. L. 573]—Leases are contracts for the conveyance of land and within the statute relating thereto.[74] They must also conform to the statutes requiring contracts not to be performed within one year to be in writing.[75] In many states an agent's authority must be in writing to authorize him to execute a lease,[76] but the mere fact that he exceeds his written authority as to the terms of the lease does not bring the lease within the statute.[77] Where a demise in writing extends over a fixed period, with a provision for its continuance over another fixed period at a fixed rental, the renewal is a continuation of the old term and is within the statute of frauds.[78] Where a tenant under a lease within the statute of frauds takes possession and is accepted,[79] the statute does not apply to the contract arising therefrom.[80] A bill seeking the enforcement of a lease or assignment thereof which is within the statute of frauds must show that it is in writing.[81]

*Covenants.*[See 10 C. L. 574]—While there is ordinarily no implied covenant that the premises are suitable for the tenant's business,[82] by statute in Louisiana the lessor warrants against all vices and defects which may prevent the use intended by the lease.[83] The parties may make such express covenants as they see fit provided they are not contrary to positive law or against public policy,[84] and upon breach thereof the party injured may sue for damages,[85] or rescind the contract in certain cases.[86]

*Reformations.*[87]

lessor would not enforce lessee's covenant to pay proportionate share of water rates if lessee executed the lease and paid the rent does not come within rule permitting parol conditions precedent to contract taking effect. Goerlitz v. Schwartz, 112 NYS 1119.

**73.** Evidence examined and held sufficient to sustain finding that premises rented to two persons at a certain rental "each per month" constituted a several and separate liability on each for one-half total rent. Carpenter v. Lewis, 133 Ill. App. 449.

**74.** Miles v. Janvrin [Mass.] 86 NE 785. Oral agreement between corporation landlord and tenant holding under lease from year to year, that tenant should continue in possession until certain litigation should be determined, in meantime to pay rents monthly or quarterly, held within statute. Williams v. Apothecaries' Hall Co., 80 Conn. 503, 69 A 12. Delivery of unsigned lease to tenant by agent of lessor with oral stipulation that it must be signed by designated hour or lease would be given to another, which was not signed but taken up at such hours, held not such delivery as satisfies statute of frauds. Mentzer v. Hudson Sav. Bank, 197 Mass. 325, 83 NE 1102. Where written lease is orally renewed and orally modified, instruction referring to lease as oral held not erroneous. Ashdown v. Ely [Iowa] 117 NW 976.

**75.** Lease not to be performed within year is within statute. Goldstein v. Webster [Cal. App.] 95 P 677; Moore v. Terrell, 33 Ky. L. R. 822, 111 SW 297; Womach v. Jenkins, 128 Mo. App. 408, 107 SW 423.

**76.** Where written authority of agent requiring him to take security for rent did not designate time of taking or character of security, lessor is bound by lease silent as to security where lessee offers ample security long before commencement of term. Paris v. Johnston [Ala.] 46 S 642.

**77.** Did not require security for rent as required by written authority. Paris v. Johnston [Ala.] 46 S 642.

**78.** Five-year term demised in writing with five-year renewal was not as to renewal obnoxious to statute of frauds, rendering leases for more than three years invalid. Batuia v. McBride [N. J. Err. & App.] 68 A 113.

**79.** Entry on term of former tenant without consent of landlord held not a partial performance. Moore v. Terrell [Ky.] 33 Ky. L. R. 822, 111 SW 297.

**80.** Miles v. Janvrin [Mass.] 86 NE 785. Character of tenancy by possession under void lease, see post, § 3.

**81.** Campbell v. Timmerman, 139 Ill. App. 151.

**82.** Whitcomb v. Brant [N. J. Law] 68 A 1102.

**83.** Rev. Civ. Code, art. 2695. Bennett v. Southern Scrap Material Co., 121 La. 204, 46 S 211.

**84.** Principal that contract between railroad company and individual to control location of stations, etc., is void, has no application to agreement by lessor to furnish trackage to lessee. Cole v. Brown-Hurley Hardware Co. [Iowa] 117 NW 746. Agreement by lessor to furnish trackage to business block held not void on its face as contemplating asserting undue influence on public officials (Id.), though both knew that municipal consent, necessary to valid construction, had not been obtained (Id.).

**85.** That about time lessee executed lease of fruit stand he formed partnership held not to prevent him from suing as individual for breach of lessor's covenants in absence of evidence of assignment of lease to partnership. Metzger v. Brincat [Ala.] 45 S 633.

**86.** Where lessee agrees to pay specified sum for building and trackage, invalidity of agreement to secure trackage invalidates entire contract. Cole v. Brown-Hurley Hardware Co. [Iowa] 117 NW 746.

**87.** See Reformation of Instruments, 10 C. L. 1496.

*Breach of contract to make lease.* See 10 C. L. 574—A lease is to be distinguished from a contract to make a lease,[88] and the latter from a mere option.[89] Lessor cannot recover of lessee for refusal to accept a lease where he did not put the premises into the condition required by the lease,[90] unless the lessee has waived such nonperformance or is estopped to assert it.[91] A deposit to secure performance must be returned, notwithstanding nonperformance, unless it is liquidated damages or actual damages are shown.[92]

§ 3. *The different kinds of tenancies and their incidents. Periodical tenancies.* See 10 C. L. 574—While a periodical tenancy may be created by express agreement,[93] it generally results from a holding over after the expiration of a term,[94] or from possession under a lease void under the statute of frauds[95] or otherwise.[96] The character of the tenancy is sometimes regulated by statute where the lease does not fix the time of its duration.[97] Though the payment of rent is sometimes significant as to the character of the tenancy, it cannot prevail against the terms of the leasing.[98]

*Tenancy at will.* See 10 C. L. 575—A tenancy at will may be created by express agreement,[99] and in a few states arises from possession under a lease within the stat-

88. Evidence held to show a mere tentative agreement contemplating execution of a written lease later, and not a final lease. Sherry v. Proal, 109 NYS 1008. Direction, by one who has been occupying an apartment, to janitress, who was without authority to rent, not to let any one have apartment during his absence, and a statement that when he got back he would sign a lease for a year, held not to constitute an oral lease but at most contract for a lease. Columbia Bank v. Clarke, 108 NYS 587.

89. Instrument commencing "We agree to execute a lease," etc., and not containing the word "option," held binding contract and not an option. Benedict v. Pincus, 191 N. Y. 377, 84 NE 284.

90. Failed to have premises steam heated as called for by agreement. Corinthian Lodge v. Smith, 147 N. C. 244, 61 SE 49.

91. Fact that lessee who had agreed to take lease of store from certain time if steam heat was put in remained silent when told that steam plant would not be ready held not to estop him from refusing to take lease because of lack of steam. Corinthian Lodge v. Smith, 147 N. C. 244, 61 SE 49.

92. Broadway Renting Co. v. Wolpin, 110 NYS 151.

93. Testimony of lessee that he had lived in flat for 13 years, that he had hired it from A to whom he paid rent, that he paid $25 per month, although not always in advance, etc., held to show monthly tenancy. Drake v. Cunningham, 111 NYS 199. Evidence of conversations and negotiations held to show monthly tenancy. Schnieder & Co. v. Amendola, 113 NYS 517. Evidence held for jury whether tenancy was from month to month of for term of one year. Franck v. Smolens, 113 NYS 464. Acceptance of rents held not assent that tenant was holding as tenant from month to month, though tenant was claiming a modified agreement. Williams v. Apothecaries Hall Co., 80 Conn. 503, 69 A 12.

94. Ventura Hotel Co. v. Pabst Brew. Co., 33 Ky. L. R. 149, 109 SW 354. Lease for one month from specific date, at a monthly rental, under which possession is continued after end of month, held to create tenancy from month to month though Gen. St. 1902, § 4043, provides that no holding over shall be evidence of an agreement for a further lease. Williams v. Apothecaries' Hall Co., 80 Conn. 503, 69 A 12.

95. Where tenant enters under lease for indefinite term, rent payable annually, tenancy from year to year is created though within the statute of frauds. Williams v. Apothecaries' Hall Co., 80 Conn. 503, 69 A 12. Parol lease for two years followed by possession and payment of rent creates a tenancy from year to year. Nichols v. Hicklin, 127 Mo. App. 672, 106 SW 1109. Where tenant under parol lease for stipulated rent enters into possession thereunder, a tenancy from year to year arises by implication. Griswold v. Branford, 80 Conn. 453, 68 A 987. Where possession is taken under parol lease for two years, tenancy from year to year is created (Harnett v. Korscherak, 110 NYS 986), and fact that receipts for rent recited "let by the month only," is immaterial (Id.). Where parol lease for a year is followed by possession, a tenancy from year to year arises. Nonpayment of rent does not reduce to tenancy at will. Griswold v. Branford, 80 Conn. 453, 68 A 987.

96. Where lease of community property for a year is void because not joined in by wife and rent is payable monthly, tenancy becomes one from month to month. Ryan v. Lambert [Wash.] 96 P 232.

97. Parol lease reserving monthly rent, with provision that lessee might remain paying rent so long as he desired, held not to agree upon time of termination, within Gen. St. 1902, § 4043, providing that parol leases reserving a monthly rent in which no time for termination is agreed on shall be construed as leases for a month only. Price v. Raymond, 80 Conn. 607, 69 A 935. Where tenant enters under lease for indefinite term, rent payable annually, it is a lease from year to year. Williams v. Apothecaries' Hall Co., 80 Conn. 503, 69 A 12.

98. From the payment of rent monthly, a letting from month to month will not be implied where the letting was for a longer term upon monthly payments. Seibert v. Grace, 138 Ill. App. 361.

99. Evidence held to show that defendant's predecessor took possession and used land

ute of frauds.[1] A tenancy at will of agricultural lands is in effect a tenancy from year to year in Missouri.[2]

*Tenancy at sufferance.* See 8 C. L. 664

§ 4. *Rights and interests remaining in the landlord. A. Reversion, seisin, and right of re-entry.* See 10 C. L. 575—The landlord is the owner of the estate not demised and may do with it as he sees fit, subject always to the lease.[3] While an assignee of the landlord's interest is entitled to all of his rights,[4] he is chargeable with notice of the rights of a tenant in possession,[5] and has no more right than the lessor.[6] Possession of the tenant inures to the landlord,[7] and upon a sale of the reversion the lessee will be deemed to hold under the grantee unless he repudiates the tenancy upon learning of the sale,[8] although such continued possession is not constructive notice of the vendee's unrecorded deed.[9] Upon the death of the landlord his heirs, devisees or personal representatives usually succeed to all his rights and interests.[10] A subtenant holds subject to the rights of re-entry reserved as against the tenant.[11]

(§ 4) *B. Estoppel of tenant to deny title.* See 10 C. L. 575—While one sued as a tenant may show that the relation does not exist,[12] one who has acquired [13] possession as a tenant is estopped to deny his landlord's title,[14] or to assert a superior one.[15] The estoppel applies only in actions arising out of the relationship,[16] and relates only to the lessor's title at the time of contracting and the lesee may show that such title has been lost,[17] or he may acquire and assert the same.[18] While the estoppel does not apply to the lessee's wife,[19] it extends to all succeeding to the lessee's possession.[20]

as tenant at will. Buford v. Wasson [Tex. Civ. App.] 109 SW 275. One entering into possession by express permission of the owner at will, such possession creates relation of landlord and tenant. Id.

1. Price v. Thompson [Ga. App.] 60 SE 800. Under Rev. St. 1899, § 3414 (Ann. St. 1906, p. 1948), taking of possession under a lease within statute of frauds creates tenancy at will. Womach v. Jenkins, 128 Mo. App. 408, 107 SW 423. See ante, subsec. Periodical Tenancies.

2. Womach v. Jenkins, 128 Mo. App. 408, 107 SW 423.

3. Replatting and laying out alley through leased premises is ineffective against existing lease. Budds v. Frey, 104 Minn. 481, 117 NW 158.

4. Entitled to benefit of covenant to surrender premises "in the same condition as they now are." Chesapeake Brew. Co. v. Goldberg, 107 Md. 485, 69 A 37.

5, 6. American Exch. Nat. Bank v. Smith, 113 NYS 236.

7. Harris v. Iglehart [Tex. Civ. App.] 113 SW 170.

8. Starbuck v. Avery [Mo. App.] 112 SW 33. Formal attornment in affirmative words is not necessary. Id.

9. Feinberg v. Stearns [Fla.] 47 S 797.

10. Under Hurd's Rev. St. 1905, c. 80, § 14, giving heirs and personal representatives of lessor same rights and remedies as lessor would have had, lessee sued by heirs in forcible detainer cannot litigate validity of will devising premises to another. Thomas v. Olenick, 237 Ill. 167, 86 NE 592.

11. Where lease provided that landlord might re-enter on expiration of term, landlord was held entitled to possession as against subtenant, although tenancy had terminated by tenant's surrender before expiration of term. Turn Verein Garfield v. Vocke, 131 Ill. App. 528.

12. May show that he leased from another but not by showing the plaintiff was not true owner. Johnson v. Tucker, 136 Wis. 505, 117 NW 1002. Evidence held sufficient to show that relation existed. Tefft v. Tefft [Mich.] 15 Det. Leg. N. 715, 117 NW 627.

13. True owner in actual possession does not estop himself from asserting his title by accepting lease from a claimant. Strong v. Baldwin [Cal.] 97 P 178.

14. Wallbrecht v. Blush, 43 Colo. 329, 95 P 927; Hardwick v. Karn [Ky.] 33 Ky. L. R. 776, 111 SW 293; Hulett v. Platt [Tex. Civ. App.] 109 SW 207. Doctrine applies though land is public domain. Wallbrecht v. Blush, 43 Colo. 329, 95 P 927. Doctrine does not obtain where title is derivative. Drake v. Cunningham, 111 NYS 199. Where one enters into possession under another who also remains in possession, the doctrine that he cannot dispute title of one under whom he enters without surrendering possession does not apply where there has been a disclaimer of tenancy and notice thereof to party from whom possession was obtained. Mitchell v. Allen [S. C.] 61 SE 1087.

15. Mullins v. Hall [Ky.] 112 SW 920. Tenant cannot acquire and assert patent to land. King v. Hill, 32 Ky. L. R. 1192, 108 SW 238.

16. Inapplicable to statutory action to determine adverse claims. Hebden v. Bina [N. D.] 116 NW 85.

17. Cohen v. Carpenter, 113 NYS 168. As that he was a tenant and his landlord has entered for breach of lease. Id.

18. Tenant may assert superior title acquired by purchase from landlord or at a judicial sale. Hyman v. Grant [Tex. Civ. App.] 114 SW 853.

19. Where grantor of land fronting on an oyster bed, with all oyster rights, leased oyster bed from grantee, he is estopped to deny lessor's title, but lessee's wife not a party to lease is not estopped to assert that

Likewise, one succeeding to the lessee's possession cannot assert any defense which the lessee could not assert.[21]

*Adverse possession.*—Where the relation is once established, limitations will not run against the landlord[22] until the lessee has publicly repudiated the relation and professed an adverse possession,[23] and the rule applies to all who succeed to the tenant's possession.[24] The repudiation must be open, continuous, notorious, and of such adverse character as to preclude all doubt as to lessor's knowledge thereof.[25]

§ 5. *Mutual rights and liabilities in demised premises. A. Occupation and enjoyment.* See 10 C. L. 577—The tenant is entitled to all easements running with the land and incident thereto,[26] and takes subject to all existing servitudes.[27] While the lessor cannot impose additional burdens upon the demised premises,[28] a lessee of the "lower floor" is bound to recognize the existence of the upper floors and consents that his lease does not include privileges and appurtenances necessary to such floors.[29] The landlord is bound by an express covenant to supply heat,[30] and in such case a covenant by the tenant to keep the premises in repair does not require him to repair the heating apparatus,[31] and the duty to furnish heat may be implied from the surrounding facts,[32] but the lease of a "bedroom" does not carry as an incident a right

bed lay beyond boundaries fixed by Civ. Code 1896, § 3155, granting to owners of land right to plant and gather oysters for specified distance in front of land. Cleveland v. Alba [Ala.] 46 S 757.

**20.** One acquiring possession through collusion with tenants. Williams v. Fox, 152 Mich. 215, 15 Det. Leg. N. 91, 115 NW 710. Subtenant cannot dispute title of original landlord. Orthwein v. Davis, 140 Ill. App. 107.

**21.** True owner cannot enjoin enforcement of writ of possession which had been obtained against lessee. Hardwick v. Karn, 33 Ky. L. R. 776, 111 SW 293.

**22.** In ejectment against tenant, plaintiff need not prove adverse title within prescriptive period. Fenn v. Louisell [C. C. A.] 160 F 458.

**23.** Buford v. Wasson [Tex. Civ. App.] 109 SW 275. One's possession under lease is presumed to continue until it is shown that such possession has been surrendered or the lease otherwise repudiated. Jones v. California & O. Land Co. [Or.] 97 P 625. Where lessee attorns to another and pays rent to such person with lessor's consent, possession may be adverse. Hanson v. Sommers [Minn.] 117 NW 842.

**24.** Buford v. Wasson [Tex. Civ. App.] 109 SW 275.

**25.** Coquille Mill & Mercantile Co. v. Johnson [Or.] 98 P 132; Buford v. Wasson [Tex. Civ. App.] 109 SW 275. Lessor's knowledge of adverse holding need not be proven beyond all doubt but stronger and clearer proof is required than in other cases. Buford v. Wasson [Tex. Civ. App.] 109 SW 275. Where tenancy at will was created solely to allow lessee's cattle to graze upon the land, and third person used same under right of tenant grazing of his cattle thereon was no notice of adverse possession. Id. Evidence of acts, etc., of one holding under original tenant held insufficient to show notice of adverse holding. Id. Where lessee stated to third person claiming land that he was in possession for lessor and wanted third person's authority to use land, and right to purchase from third person if he won from landlord or from landlord if he did not win, in absence of notice to landlord of surrender of possession held by him, held not to effect tenancy, and his possession inured to lessor. Hulett v. Platt [Tex. Civ. App.] 109 SW 207.

**26.** Drainage easement. Brown v. Honeyfield [Iowa] 116 NW 731.

**27.** Prior recorded release to railroad for all damages by flooding due to reconstruction, etc., held binding on lessee (Gulf, etc., R. Co. v. Thornton [Tex. Civ. App.] 109 SW 220), who could not assert lack of consideration (Id.). Under the statute giving an adjoining owner the right, without the consent of the other, to erect a party wall, one-half on the premises of the other, a party wall does not become an incumbrance for which a lessee making use of wall, and thereby obligating himself to adjoining owner for share in cost thereof, may recover of lessor for breach of covenant. Code, §§ 2994-3003. Percival v. Colonial Inv. Co. [Iowa] 115 NW 941.

**28.** Enjoined from using cess-pool for new apartment. Hirsh v. Valloft, 121 La. 66, 46 S 103.

**29.** Rojas v. Seeger [La.] 47 S 532. Where pending negotiations and granting of particular requests thereafter, lessee says nothing about stairway entrance to upper floors and about signs of tenants thereof, it will be presumed that such conditions were regarded as appurtenant to leases of upper floors. Id. Where lessee is sued by a third party claiming a part of or a servitude on the premises leased, lessee may call his lessor in warranty. Id.

**30.** An agreement by the lessor to supply steam heat requires him to supply such heat as will make the premises reasonably habitable for the purpose for which they were leased. Birtman Co. v. Thompson, 136 Ill. App. 621.

**31.** Birtman Co. v. Thompson, 136 Ill. App. 621.

**32.** Duty to furnish heat to apartment may be implied from lessor's implied covenant of quiet enjoyment, where means of furnishing heat is exclusively under lessor's con-

to a supply of water.[33] A name given to the business of the lessee and not attached to the property may be changed by the lessee.[34]

In the absence of agreed liquidated damages,[35] upon a breach of a covenant,[36] the covenantee may recover the actual damages sustained.[37] Where the breach of the covenant destroys the lessee's business, he may sue in tort.[38] The duty of a lessor or a lessee to comply with municipal police regulations depends upon the ordinance.[39] Unless restricted by the lease,[40] the tenant may put the property to any lawful[41] use not constituting a nuisance[42] or amounting to waste.[43]

A lessee is entitled to possession according to the terms of the lease,[44] and, where the lessor fails to give possession or to put the premises into a tenantable condition[45]

trol. Jackson v. Paterno, 58 Misc. 201, 108 NYS 1073. While fact that heating apparatus in apartment was under exclusive control of lessor, held not to raise implied covenant on part of lessor to heat, although, where apartment is to be used exclusively for dwelling purposes, lessor undertakes to lease premises fit for such purpose and lessee may vacate if insufficiently heated. Jackson v. Paterno, 128 App. Div. 474, 112 NYS 924.

**33.** Sturm v. Huck [N. J. Law] 71 A 44. Permit to get water from other rooms is a mere revocable license. Id.

**34.** Name "Hotel Denechaud" held given to business of tenant Denechaud and not attached to building. Sieward v. Denechaud, 120 La. 720, 45 S 561. Nothing in deed to plaintiff's ancestor to show intent to include name as part of property. Id.

**35.** Deposit of $800 as liquidated damages for failure to comply with covenants of lease for five years at $4,800 per year rent held not unreasonable. Franceschini v. Chaucer, 110 NYS 775.

**36.** Evidence held to show breach of lessor's covenant to furnish heat. Borchardt v. Parker, 108 NYS 585.

**37.** Where lessor expressly agrees to furnish heat, lessee may recover damages for refusal or failure to comply. Jackson v. Paterno, 58 Misc. 201, 108 NYS 1073. Where lessor fails to furnish heat as agreed, measure of damages is difference in value of premises if it had been heated as agreed and in its unheated condition. Borchardt v. Parker, 108 NYS 585. Retention of possession does not affect counterclaim for damages for breach of covenant to heat. Id. For breach of the landlord's covenant to heat premises leased for business purposes, the tenant may recover for resulting loss of time of employes and extra wages required to be paid. Birtman Co. v. Thompson, 136 Ill. App. 621.

**38.** Where lessee rented floor of building with steam power to run its laundry business, and steam is cut off destroying business, lessee may sue in tort for destruction of business, and is not confined to action for breach of covenant. Eagan v. Browne, 112 NYS 689.

**39.** Municipal ordinance providing that "no person or occupant or other person having control," of any building, shall permit a nuisance, etc., has no application to a lessor under lease containing no covenants as to condition or repairs. People v. Kent, 151 Mich. 134, 14 Det. Leg. N. 904, 114 NW 1012.

**40.** Where lease restricts use to a "billiard and pool hall," injunction lies to restrain use for moving picture show, though no particular damage would result. Dycus v. Traders' Bank & Trust Co. [Tex. Civ. App.] 113 SW 329. Change of name of business from "Hotel" to "Inn" held not such a change of business as to authorize annullment of lease. Sieward v. Denechaud, 120 La. 720, 45 S 561. Change from "Hotel" to "Inn" held not such a change as to prevent lessee from surrendering in condition in which received. Id. Where sublessee of part of building permitted storeroom to be expensively fitted up for saloon purposes and to run for 11 months without interruption, held estopped to enjoin such use, though she wrote to defendant that such use would not be permitted. Beebe v. Tyre [Wash.] 94 P 940. Cashier of bank held, under charter and by-laws, not to have power to waive restriction as to use. Dycus v. Traders' Bank & Trust Co. [Tex. Civ. App.] 113 SW 329. Stipulation that lessee should not allow the premises or any part thereof to be used for immoral purposes or for sale of intoxicating liquors, and giving lessor right to forfeit lease if so used, held for benefit of lessor alone and nonenforcible by sublessee of part of premises, Beebe v. Tyre [Wash.] 94 P 940.

**41.** Lessee of building for advertising purposes cannot erect signs to height prohibited by ordinance to injury of lessor (Wineburgh Advertising Co. v. Faust Co., 113 NYS 709), and fact that lessor permitted him to erect same does not bind him to permit further violations (Id.). Where lessor of advertising space wrongfully refused to permit lessee to erect sign for another, allowance of total amount lessee was to receive without deduction for cost of erection is erroneous. Id.

**42.** Whether operation of stampmill on ground floor of building otherwise used as a hotel was a nuisance held for jury. Ridpath v. Spokane Stamp Works, 48 Wash. 320, 93 P 416. Where operation of stamp mill on first floor of building is a nuisance, in suit by lessee to restrain lessor from removing post upon which stamp strikes and shutting of power, held that he had burden to show that lessor agreed to such use. Spokane Stamp Works v. Ridpath, 48 Wash. 370, 93 P 533.

**43.** City of New York v. Interborough Rapid Transit Co., 109 NYS 885.

**44.** Lease may postpone commencement of term to future day. Johnston v. Corson Gold Min. Co. [C. C. A.] 157 F 145.

**45.** Where condition remained unchanged and lessee moved in and occupied premises two weeks after commencement of term, held to show that it was not untenantable at beginning of term. Davies v. Hotchkiss, 112 NYS 233.

as agreed, thereby depriving the lessee of possession,[46] the lessee may rescind[47] or recover damages.[48]

After possession has been given, the lessee is entitled to exclusive possession,[49] unless he voluntarily surrenders the same,[50] and one unlawfully[51] disturbing his possession is liable.[52] Injunction will issue to protect such possession where irreparable injury will result.[53] As incidental to the use of the demised premises, the tenant is entitled to the produce thereof,[54] and may remove the same unless otherwise provided.[55]

*Right to enter.*[See 10 C. L. 578]—While forcible entry and unlawful detainer will not lie to recover initial possession,[56] the lessee may maintain ejectment.[57]

*Covenant for quiet enjoyment.*[See 10 C. L. 578]—Where lessor does all that he can to abate a nuisance and the lessee thereafter pays rent without objecting, he cannot recover damages for disturbance.[58]

*Nature of estate of tenant.*[See 10 C. L. 579]—The rights of a tenant of a building in the ground upon which it stands depends upon the extent of his demise.[59]

(§ 5) *B. Assignment and subletting.*[See 10 C. L. 579]—While a lease or the rents may be assigned by an express agreement,[60] a warranty deed by the lessor operates

**46.** Failure of lessor to put premises in habitable condition as agreed does not deprive lessee of possession unless he intended to take possession. Davies v. Hotchkiss, 112 NYS 233. Evidence held insufficient to show that lessee intended to take possession at time fixed for commencement of term. Id.

**47.** Where lessor agreed to have premises ready by June 1st but did not do so, and lessee thereupon agreed to take it, if ready, by the 14th, held no rescission. Davies v. Hotchkiss, 112 NYS 233.

**48.** Where lessor fails to give possession at time specified, measure of damages is excess of rental value over rent reserved (Bailey v. Krupp, 110 NYS 994), any time between time of executing contract and time of commencement of term (Paris v. Johnston [Ala.] 46 S 642). Where lessee is deprived of possession for two weeks of house leased for summer because of untenantable condition caused by lessor's neglect, measure of damages is proportionate rental. Davies v. Hotchkiss, 112 NYS 233.

**49.** St. Vincent's Roman Catholic Congregation v. Kingston Coal Co., 221 Pa. 349, 70 A 838. Hence adverse possession does not run against landlord until leasehold has been terminated. Id. Lessor cannot be removed from premises by summary proceedings on ground of forcible entry and detainer, where he has an interest in the business conducted upon the premises and no forcible detention is shown. Davis v. Shapiro, 112 NYS 1105.

**50.** Evidence held to sustain finding that lessee consented to lessor renting negro house to another. Hurt v. Kirby [Ga. App.] 60 SE 802.

**51.** Where renewal lease is of very debatable validity, lessor is not liable for damages for disturbance of possession by forcible detainer brought in good faith. Aull v. Bowling Green Opera House Co. [Ky.] 114 SW 284. Lessor procuring wrongful issuing of warrant of restitution is liable for resulting damages. Roettger v. Riefkin [Ky.] 113 SW 88. Where lessor is present when writ of possession is issued at direction of his attorney on judgment in his favor and officer is directed to serve same, he is responsible therefor. Morrison v. Price [Ky.] 112 SW 1090. Where agreed statement of facts recited that "lessors requested" magistrate to issue writ, held sufficient to go to jury as to both lessors. Roettger v. Riefkin [Ky.] 113 SW 88. In action for wrongful dispossession, evidence that plaintiffs had been ejected by other landlords is inadmissible. Id. One attempting to justify disturbance of lessee's possession under writ of possession issued on judgment in favor of lessor must plead writ. Morrison v. Price [Ky.] 112 SW 1090.

**52.** Where writ of restitution was prematurely issued through mistake only, compensatory damages can be recovered. Injury to lessee's property. Roettger v. Reifkin [Ky.] 113 SW 902.

**53.** Lessee for saloon purposes by brewing company protected against conspiracy between landlord, sublessee, and another brewing company. Chesapeake Brew. Co. v. Mt. Vernon Brew. Co., 107 Md. 528, 68 A 1046.

**54.** Lessee is entitled to crops and straw. Munier v. Zachary [Iowa] 114 NW 525.

**55.** Covenant not to remove straw from premises does not invest lessor with such interest as to enable him to recover as for conversion for removal, but he must sue for breach of covenant (Munier v. Zachary [Iowa] 114 NW 525), and measure of damages is not value of straw as such but as manure (Id.).

**56.** Taylor v. Orlansky [Miss.] 46 S 50.

**57.** Such remedy being adequate, he cannot resort to equity to establish title, though he asks for incidental equitable relief such as for injunction for waste, etc. Johnston v. Carson Gold Min. Co. [C. C. A.] 157 F 145.

**58.** Tenants in building disturbing others. McCullough v. Houar [Iowa] 117 NW 1110.

**59.** Lease of basement gives no right to ground in case building is burned. MacNair v. Ames [R. I.] 68 A 950.

**60.** Evidence held for jury whether defendant corporation was not in fact the corporation which as mortgagee and assignee of rents had been given full and complete control of premises. Carlon v. City Sav. Bank [Neb.] 118 NW 334.

as an assignment of the lease[61] and entitles the purchaser to all the rights of a lessor,[62] especially if recognized by the lessee.[63]

Unless restricted by prohibitions in the lease[64] or by statute,[65] a tenant may assign his lease,[66] but he is not thereby released from his covenants[67] unless the landlord accepts the assignee as a substitute tenant.[68] A covenant against subletting and assignment is not broken by a transfer of the leased premises by operation of law, but if the covenant expressly prohibit such a transfer the lease will be forfeited.[69] Whether a partial transaction is an assignment or a sublease depends upon its legal effect rather than its form.[70] Unless the lease is within the statute of frauds, it may be assigned by an act evincing such purpose[71] by the lessee or one having authority to act for him.[72] The assignee is entitled to all the rights of the lessee under the lease[73] but not to concessions granted as a favor,[74] and, on the other hand, so long

61. Purchaser may sue on original lease. Starbuck v. Avery [Mo. App.] 112 SW 33.

62. Ventura Hotel Co. v. Pabst Brew. Co., 33 Ky. L. R. 149, 109 SW 354.

63. Lessee's occupancy with notice of sale amounts to recognition of purchaser as lessor. Starbuck v. Avery [Mo. App.] 112 SW 33.

64. Assignment may be absolutely prohibited. E. H. Powers Shoe Co. v. Odd Fellows Hall Co. [Mo. App.] 113 SW 253. Covenant providing for forfeiture, if lessee's interest be sold under execution or other legal process without written consent of lessor, held not broken by transfer of lessee's interest by operation of law from bankrupt lessee to trustee, this not being by sale. Gazlay v. Williams, 210 U. S. 41, 52 Law. Ed. 950. The lessee's right of assignment may be restricted by agreement that no assignment shall be made without the landlord's consent. In action on contract to recover fixed sum in consideration of which landlord was to consent to assignment, evidence held to show that intent was that no right should accrue unless lessee actually made assignment. O'Brien v. Pabst Brew. Co., 31 App. D. C. 56. Covenant that assignment without consent of lessor shall be void is valid (Behrens v. Cloudy [Wash.] 97 P 450), and assignment is void as to whole lease (Id.). Assignee could not exercise option to purchase contained in lease. Id. Where lessor expressly declares that under no circumstances will she execute or consent to assignment of lease to plaintiff, temporary injunction restraining others from interfering with plaintiff's possession, pending trial, held improper. Miles v. Samuels, 111 NYS 537.

65. At common law and under Hurd's Rev. St. 1905, c. 80, § 32, providing that, when the lease is assigned, landlord shall have right to enforce his lien against assignee, etc., leases are assignable. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219.

66. Bank to accomplish voluntary liquidation, "pledged" to another bank its assets, etc., as security for advancements, and agreed to make transfers on request to satisfy recording statutes. Assignee took possession of leased property. Held in effect an assignment of lease. People v. German Bank, 110 NYS 291.

67. Fact that lease was assigned to corporation under provision therein authorizing such assignment does not release lessee, where there was no provision to that effect. Midland Tel. Co. v. National Tel. News Co., 236 Ill. 476, 86 NE 107. Assignment, though with lessor's consent, does not relieve lessee from covenant to pay rent and though lessor after assignment accepts rent from assignee. Manley v. Berman, 111 NYS 711. Where lease was actually transferred during last month of lease, for which rent was not paid, and possession taken by transferee, lessor may look to either for rent. Grauer v. Rudinsky, 111 NYS 530. Where one telegraph company leased its plant to another with privilege of assignment but collected rent only from the lessee, evidence held not to show release of lessee's liability. Chicago & Milwaukee Tel. Co. v. Type Tel. Co., 137 Ill. App. 131.

68. Evidence held to show that tenant parted with all his rights to another who occupied and became tenant of original lessor. Savage v. Cowan [Tex. Civ. App.] 113 SW 319.

69. Lease providing for forfeiture, "if lessee's interest should be sold under execution or other legal process without written consent of lessors," was not broken by sale by lessee's assignee in bankruptcy under order of bankruptcy court. Gazlay v. Williams, 210 U. S. 41, 52 Law. Ed. 950.

70. A "subleasing" is where lessee demises whole or part of leased premises for portion of term. Hudgins v. Bowes [Tex. Civ. App.] 110 SW 178. Instrument in form of sublease of part of premises for full term held assignment (Cameron Tobin Baking Co. v. Tobin, 104 Minn. 332, 116 NW 838), and original lessees cannot maintain forcible entry by unlawful detainer against assignee by virtue of reservation of right of entry for breach of covenant (Id.).

71. Lease for less than year. Grauer v. Rudinsky, 111 NYS 530.

72. Husband living separate from wife and possessing only power of attorney to collect her debts and receive personal property on which she holds liens, etc., held not to have authority to assign lease held by her. Milstein v. Mosher, 110 NYS 568.

73. Marino v. Williams [Nev.] 96 P 1073. Covenants running with the land are available to lessee's assignee. Hollander v. Central Metal & Supply Co. [Md.] 71 A 442. Covenant to convey to lessees, "their heirs and assigns," etc., held to run with the land. Id. One who loans money to another for purpose of erecting a building upon the lot upon the faith of a verbal agreement based upon a prior assignment of a lease combined with an option to purchase has an equity in the property superior to after-acquired deficiency decree in mortgage foreclosure or

as he remains in possession[75] he is liable to the lessor for rent.[76] The rights of the assignor depends upon the terms of the assignment.[77]

Subject to the restrictions in the lease,[78] a lessee may sublease,[79] and any restrictions may be waived by the landlord.[80] Landlord's consent to a subletting when required by the lease must be obtained without fraud,[81] but need not be based upon a consideration, especially where the lessee has acted thereon.[82] A subletting does not create any contractual relation between the lessor and the sublessee,[83] nor does it relieve the original lessee from his obligations[84] unless the landlord accepts a substitution.[85] The lessee cannot bind beyond his term,[86] and the sublessee, knowing of the original lease, is charged with knowledge of its terms[87] and takes subject thereto.[88] A tenant cannot voluntarily surrender a right to the prejudice of his subtenant.[89]

equity, if any, of volunteer purchaser at void execution sale against debtor though judgment existed prior to advancements. Thalheimer v. Tischler [Fla.] 46 S 514.

74. Where lease calls for specific rental, fact that lessor granted lessee concessions held not to entitle assignee to same. Kean v. Rogers [Iowa] 118 NW 515. Evidence held to show that reduction of rent was a temporary concession and not a modification of lease. Id.

75. Where assignee paid rent for some time, its officers asserted control of premises, and refused to permit lessor to sell except subject to lease, held to warrant finding that assignee was in possession under assignment. Marone v. Hinckel Brew. Co., 110 NYS 601.

76. Marone v. Hinckel Brew. Co., 110 NYS 601. Suing of assignor, original lessee, is not an election so as to preclude suit against assignee since both are liable. People v. German Bank, 110 NYS 291. Lessor cannot, though entitled to rent for entire period without regard to destruction of premises by fire, sue assignee after destruction without showing terms of assignment. Norton v. Hinecker, 137 Iowa, 750, 115 NW 612. See, also, § 4B ante, as to preclusion of assignee to deny landlord's title.

77. Where lessee sold all his right, title and interest in and to lease containing option without reservation of rebate allowed by option, he is not entitled thereto. Pollard v. Sayre [Colo.] 98 P 816.

78. Where lessor orally consented to subletting, fact that, on being informed that sublessee preferred to have his consent in writing, he stated over the telephone that he would come down to the leased store later, held not a revocation of consent. Mattox v. Wescott [Ala.] 47 S 170. Letting of two rooms for light housekeeping to separate family held a subletting within Rev. St. 1895, art. 3250, making such subletting a ground of forfeiture unless lessor's consent thereto is first obtained. Hudgins v. Bowes [Tex. Civ. App.] 110 SW 178. Covenant not to "permit any other person or persons to occupy," etc., held not violated by assigning room to mere lodger. Peaks v. Cobb, 197 Mass. 554, 83 NE 1106. Covenant against subletting is not broken by sale of matured but unharvested crop with right of removal. Kirkpatrick v. Fonner [Neb.] 116 NW 779. One of lessors having consented to subleasing and thus not entitled to recover against lessee in action of unlawful detainer, his colessors cannot do so. Mattox v. Wescott [Ala.] 47 S 170.

79. Mattox v. Wescott [Ala.] 47 S 170.

80. Although lease calls for lessor's written consent, lessor may waive same by giving parol consent. Mattox v. Wescott [Ala.] 47 S 170. Subletting with knowledge and consent of lessor held not a violation of covenant against subletting without consent in writing. Chesapeake Brew. Co. v. Mt. Vernon Brew. Co., 107 Md. 528, 68 A 1046.

81. Fact that lessee when applying for lessor's consent did not disclose names of sublessees or their business held not to show that consent was obtained by unfair means, there being no request for such information. Mattox v. Wescott [Ala.] 47 S 170.

82. Where lessor gave consent to subletting and lessee bound himself to let in reliance thereon, lessor cannot assert invalidity of consent as not supported by a consideration. Mattox v. Wescott [Ala.] 47 S 170.

83. Audubon Hotel Co. v. Braunnig, 120 La. 1089, 46 S 33. Subtenant cannot enforce lessor's covenant to renew. Audubon Hotel Co. v. Braunnig, 120 La. 1089, 46 S 33. Where lessee refuses to renew, subtenant's remedy is for damages against his lessor and he cannot compel lessor to renew. Id.

84. Lessee is liable for rent after expiration of term so long as occupied by his lessees (Erskine v. Russell, 43 Colo. 449, 96 P 249), but where lease is assigned with consent of lessor, his liability ceases with end of term (Id.).

85. Fact that lessor authorized subtenant to make certain repairs and to deduct cost thereof from rent held not to show acceptance of subtenant as lessee. Hooks v. Bailey [Ga. App.] 62 SE 1054. Mere collecting of rent from subtenant does not show election to treat subtenant as original lessee, especially where lessor retained rent notes of original lessee, and surrendered same as subtenant made payments. Id.

86. Sublease does not bind lessor beyond term unless lessee renews under privilege contained in lease. Marino v. Williams [Nev.] 96 P 1073.

87. Brock v. Desmond & Co. [Ala.] 45 S 665.

88. Where original lessee's term is forfeited for nonpayment of rent, subtenant's rights are cut off though he has paid his rent. Brock v. Desmond & Co. [Ala.] 45 S 665. Subtenant has no better standing than original lessee where lease has been forfeited. Park Laundry Co. v. Sassone, 108 NYS 725.

89. Assent to a duly declared forfeiture is not a surrender of a right. Brock v. Desmond & Co. [Ala.] 45 S 665.

(§ 5) *C. Repairs and improvements.* See 10 C. L. 580—There being no common-law implied covenant on the part of the landlord to repair,[90] he is under no obligation so to do[91] in the absence of statute[92] or an express covenant.[93] An agreement to repair made after the execution of the lease must be supported by a new consideration.[94] The lessor's covenant to repair will not be extended by judicial construction,[95] and the particular repair must come fairly within it.[96] A covenant to repair runs with the land[97] but may be waived.[98] Under an express provision, the lessor may enter upon the premises to make repairs.[99] The lessor must repair portions of the premises remaining under his control,[1] unless exempted by the lease.[2] A lessor failing to perform his covenant to repair is liable for the decreased rental value[3] and for any other proximate damages.[4]

A lessee of a part of a building only[5] need not repair portions not demised.[6]

**90.** Kirby v. Wylie [Md.] 70 A 213. Mere lease does not impose a duty upon either lessor or lessee to repair (Williams v. Salmond, 79 S. C. 459, 61 SE 79), and, hence, a collateral agreement must be made in respect thereto (Id.). While consideration for lease is usually the rent to be paid, collateral contract may be shown as additional consideration. Id.

**91.** Morgan v. Sheppard [Ala.] 47 S 147.

**92.** Under Rev. Civ. Code, art. 2693, lessor must deliver premises in good condition and free from any repairs. Bennett v. Southern Scrap Material Co., 121 La. 204, 46 S 211. Under Laws 1896, p. 589, c. 547, § 197, and express provision of lease giving lessee the right to terminate lease if it should be so injured by fire as to be untenantable, lessee cannot repair himself and counterclaim costs. Moore v. Coughlin, 111 NYS 856. Where pleadings merely raise the issue whether lessor made repairs as agreed, held error to submit issue whether premises were fit for occupancy by human beings as required by statute. Mitchell v. Henderson, 37 Mont. 515, 97 P 942.

**93.** Glenn v. Hill, 210 Mo. 291, 109 SW 27; Graff v. Lemp Brew. Co., 130 Mo. App. 618, 109 SW 1044. Where lessor agreed to repair if lessee would take a lease which he refused, held that he could not recover for lessor's failure to repair though he moved in. Byrnes v. McNevin, 112 NYS 1064. Express covenant to repair before term made at time of leasing is binding on lessor. Collins v. Fillingham, 129 Mo. App. 340, 108 SW 616. In action for injury, where plaintiff's evidence tends to show express covenant by lessor to repair, case is for jury. Id. The landlord may, by express agreement, fix the amount to be allowed tenant for making repairs. Lease provided that tenant might, with owner's written consent, make repairs and extraordinary improvements for which owner was to deduct not exceeding $1,000 a year from rent. Held that allowance of first month's rent on unauthorized repairs was a waiver of requirement of written consent. Langley v. D'Audigne, 31 App. D. C. 409.

**94.** Glenn v. Hill, 210 Mo. 291, 109 SW 27.

**95.** Richmond v. Lee, 123 App. Div. 279, 107 NYS 1072.

**96.** Lessee's covenant to make necessary "repairs" held not to render him liable for collapse of building due to decay of pillars, vices and defects of condition rendering premises unfit for leased purposes not being included in repairs. Bennett v. Southern Scrap Material Co., 121 La. 204, 46 S 211. Covenant that, if the "premises" should be injured by fire or otherwise, landlord would repair, etc., held not to require lessor to repair sewer where it was injured by excavations on adjoining lots where it crossed same. Richmond v. Lee, 123 App. Div. 279, 107 NYS 1072. Covenant by lessor to repair, if premises were injured "by the elements" so as to be uninhabitable, held to include injuries arising from action of elements causing natural decay. Hanchett v. O'Reilly [N. J. Law] 68 A 1066. Covenant to repair or rebuild, if premises are destroyed or rendered untenantable by "the elements or act of God," held not to cover dilapidation caused by gradual decay and frequent alterations by tenant. Kirby v. Wylie [Md.] 70 A 213. Where farm lease required lessor to furnish on notice such materials as he deemed necessary for repairs, and lessee claims credit for materials furnished by him, held a question for jury whether repairs were reasonably necessary. Ashdown v. Ely [Iowa] 117 NW 976.

**97.** Grantee and assignee of lessor bound. Silberberg v. Trachtenberg, 58 Misc. 536, 109 NYS 814.

**98.** Words "which is done," following agreement of lessor to repair fence, held to authorize inference that further repairs were waived. Hurt v. Kirby [Ga. App.] 60 SE 802.

**99.** MacNair v. Ames [R. I.] 68 A 950.

**1.** Goldberg v. Lloyd, 110 NYS 530; Valentine v. Woods, 110 NYS 990.

**2.** Lease of apartment requiring lessee to take care of apartment and fixtures, and make repairs at own cost, imposed duty on lessee to repair apartment, but lessor cannot create nuisance by failure to repair parts of premises remaining under his control. Goldberg v. Lloyd, 110 NYS 530.

**3.** Miller v. Sullivan, 77 Kan. 252, 94 P 266. To repair and put in certain furniture. Davies v. Hotchkiss, 112 NYS 233. Court cannot take judicial notice that failure to repair impaired value of premises. Id.

**4.** See post, subsec. E. Palmer v. Byrd, 131 Ill. App. 495.

**5.** Lease of "the building known as the Olympic Theater, * * * being the theater property above first story, with staircases leading thereto, * * * and box office on first floor," held as matter of law not lease of whole building. Valentine v. Woods, 110 NYS 990.

**6.** Tenant leasing building above first story owes no duty to keep roof in repair. Valentine v. Woods, 110 NYS 990.

Where the lease defines the lessee's obligation to repair, his duty is measured thereby,[7] although a lease obligating him to make repairs does not cover defects created by the negligence of the landlord before the commencement of the term.[8] "Reasonable use and wear" [9] are usually excepted from the lessee's obligation, but he has the burden of showing that an unusual damage comes within the exception.[10] While a covenant to surrender in good condition imposes no liability during the term,[11] it is immaterial that the term is terminated by forfeiture.[12] A lessee failing to keep his covenant to repair is liable for the resulting damages,[13] and, where the action is brought after the end of the term, the measure of damages is the cost of putting the premises in the condition required by the covenant [14] and is not affected by the fact that a new tenant makes the repair at his own expense.[15]

*Waste.*[See 10 C. L. 581]—Without the lessor's consent,[16] the lessee cannot commit waste,[17] and an injunction will issue to prevent threatened [18] waste.[19] A tenant is liable for voluntary waste [20] and impliedly covenants to make such repairs as are necessary to prevent waste.[21]

(§ 5) *D. Insurance and taxes.*[See 10 C. L. 581]—A tenant of a perpetual leasehold must pay the taxes,[22] and he is liable though the draughtsman drawing a new lease mistakenly omits the provision.[23] In some states the lessee is charged by statute with the payment of taxes,[24] but the obligation is usually controlled by the lease.[25] Where

**7.** Under covenant of tenant to "make all necessary repairs and alterations necessary to proper conducting of business" held to require him to repair sagging and leaking roof condemned by city as unsafe. Devine v. Radford, 110 NYS 982.

**8.** Negligent use of elevator and oral agreement of lessor to pay lessee expense of making such repairs may be shown. Bailey v. Krupp, 110 NYS 994.

**9.** Damages from ordinary reasonable use and wear has reference to depreciation, while tenant does nothing by affirmative act inconsistent with usual use and does not omit to do acts which it is usual for a tenant to perform. Taylor v. Campbell, 123 App. Div. 698, 108 NYS 399. Damages due to falling of picture of its own weight, in furnished house leased for five months, held in the course of ordinary reasonable use and wear. Id.

**10.** Clock and glassware broken and furniture greatly damaged at end of five months' term. Taylor v. Campbell, 123 App. Div. 698, 108 NYS 399.

**11.** Covenant to yield up premises in good repair and to maintain the premises in the condition in which "the same are in at the commencement of the term, or may be put in by the lessor," does not require lessee to repair defect existing at commencement of term during his term. Hill v. Hayes, 199 Mass. 411, 85 NE 434.

**12.** Livingston v. Robb, 113 NYS 137.

**13.** In action for breach of tenant's covenant to surrender premises in good condition, brought after removal in summary proceedings, plaintiff may recover as damages rental value and cost of removal of tenant's property, but not counsel fee, marshal's fee and charges for taking out the precept, its service and for docketing summary proceedings. Livingston v. Robb, 113 NYS 137. Where lease provided that one-half of deposit to secure performance should be applied to payment of last month's rent, it could not be applied to repairs. Schwartz v. Ribaudo, 110 NYS 352.

**14, 15.** Appleton v. Marx, 191 N. Y. 81, 83 NE 563.

**16.** Evidence held to show lessor's consent to alterations though sufficient to constitute waste. Pfister Co. v. Fitzpatrick Shoe Co., 197 Mass. 277, 83 NE 878.

**17.** Drilling of holes into brick wall for the insertion of wooden pegs as supporters of signs held waste. Hayman v. Rownd [Neb.] 118 NW 328.

**18.** Evidence held sufficient to sustain finding that lessee was threatening to drill holes into brick wall to insert wooden peg onto which to hang signs. Hayman v. Rownd [Neb.] 118 NW 328.

**19.** Hayman v. Rownd [Neb.] 118 NW 328.

**20.** Removal by stranger of things fixed to freehold, without lessee's knowledge, does not render him liable for voluntary waste. Rimoldi v. Hudson Guild, 110 NYS 881.

**21.** Unless lessor expressly covenants to make repairs, lessee is under implied covenant to make such repairs as are necessary to prevent waste, and fact that lease specifically requires him to make certain repairs does not affect the duty. Goldberg v. Lloyd, 110 NYS 530.

**22.** City of Norfolk v. Perry Co., 108 Va. 28, 61 SE 867.

**23.** Where lease, renewable forever, given by city, provides that lessee shall pay the "public and other taxes," but draughtsman, directed to renew according to its terms, changes wording of the covenant, held that original provision could be enforced where lessee knew that lease was to be renewed on old terms. City of Norfolk v. White, 108 Va. 35, 61 SE 870.

**24.** Tenant being bound by Code Pub. Gen. Laws 1904, art. 81, § 69, to pay taxes, he cannot omit to do so and purchase tax title as against lessor. Lansburg v. Donaldson [Md.] 71 A 88.

**25.** Provision in perpetual lease requiring tenant to pay the "public taxes" held to include municipal taxes, though latter were unknown at time of executing lease. City of Norfolk v. Perry Co., 108 Va. 28, 61 SE 867.

tax reimbursements are payable monthly, an eviction relieves the lessee as to future installments.[26]

The duty of the tenant to pay insurance premiums is usually covered by the lease.[27]

(§ 5) *E. Injuries from defects and dangerous condition.*[See 10 C. L. 582]—Except as to original structural defects,[28] nuisances[29] and known latent defects concealed from the tenant,[30] the latter takes the premises in the condition they are in at the time of leasing[31] and assumes all risks for obvious defects,[32] though it has been said that where the premises are rented in a bad state of repair, the landlord is liable for injuries caused thereby.[33] The landlord, however, must use reasonable care,[34] unless relieved by the lease,[35] to keep in a safe condition,[36] portions of building not demised,[37] but used by the tenants, with his consent,[38] as incident to the premises leased[39] and not merely under a license,[40] and if negligent,[41] he is liable for all in-

Extent of lessee's liability on covenant to pay his pro rata share of water rent must be computed by means at hand, unless he puts in meter. Goerlitz v. Schwartz, 112 NYS 1119. Lessee under lease, binding him to pay a proportionate part of water rents, is not liable after vacating where water is measured by meter, since there could be no charges against him. Corn v. Shapiro, 111 NYS 727.

**26.** Hall v. Middleby, 197 Mass. 485, 83 NE 1114.

**27.** Where persons not owners but liable for insurance premiums gave lease in which lessee undertook to bear "any and all increase of insurance on such premises," held to render lessee liable for increased insurance and plate glass insurance, though payable to owners. Frank v. Auerbach, 110 NYS 890. Evidence held to make question for jury whether any particular time was fixed for payment of insurance premiums by lessee. Wright v. Northrup [Iowa] 118 NW 437.

**28.** Lessor is liable for defect of construction, latent or patent, where he knows thereof or ought to know. Monahan v. National Realty Co. [Ga. App.] 62 SE 127. Construction which is not strong enough to stand strain of ordinary use is defective construction. Id. Evidence of conditions at time of accident held admissible as bearing on question of original defective construction and on question of lessor's knowledge thereof as given by physical conditions. Id.

**29.** Platform before store provided with steps in front of door only, and not throughout length, held not so unsafe as to be nuisance. Wheeler v. Pullman Palace Car Co., 131 Ill. App. 262.

**30.** Complaint failing to aver that defects were latent or were not made known held demurrable. Morgan v. Sheppard [Ala.] 47 S 147.

**31.** Miles v. Janvrin [Mass.] 86 NE 785; Morgan v. Sheppard [Ala.] 47 S 147.

**32.** "Goose neck" from gutter in eaves discharged water onto steps. Hannaford v. Kinne, 199 Mass. 63, 85 NE 187. Fact that lessor made repairs on steps used in common held not to impose duty to attach conductor to goose neck which discharged water from eaves onto steps. Id. Lessor is not liable to lessee, his servants or guests for open defects existing at time of leasing, though constituting a nuisance. Morgan v. Sheppard [Ala.] 47 S 157.

**33.** Evidence held not to show that falling of iron shutters by which plaintiff was injured was caused by any defect existing at time premises were demised. Everett v. Foley, 132 Ill. App. 438.

**34.** Marcheck v. Klute [Mo. App.] 113 SW 654. Liable for defects known or which would have been known by the exercise of reasonable care. Monahan v. National Realty Co. [Ga. App.] 62 SE 127. Stairway and landing affording access to rooms in tenement house. Peters v. Kelly, 113 NYS 357. Lessor must exercise reasonable care to keep halls, porches, etc., reserved for common use of all tenants in a safe condition. Farley v. Byers [Minn.] 118 NW 1023.

**35.** Stipulation that lessor should not be liable for injuries occasioned "by the elevators, boilers, machinery or any thing appurtenant thereto," held not to exempt from liability for negligence of operator. Cunningham v. Mutual Reserve Life Ins. Co., 109 NYS 1070.

**36.** Jackson v. Paterno, 128 App. Div. 474, 112 NYS 924. Where chute was three feet from passageway to rooms in loft and adjacent to wall so that one entering would have to turn sharply along wall after entering door to fall into it, held that chute did not render passageway dangerous. Marcheck v. Klute [Mo. App.] 113 SW 654.

**37.** Lease of three rooms in tenement house held not a hiring of yard, stairway and landing by which access was had. Peters v. Kelly, 113 NYS 351. Evidence in action by tenant of ground floor for damages caused by stoppage of drain pipe leading from skylight roof placed over part of premises held to show that landlord had control of skylight. Capwell Co. v. Blake [Cal. App.] 98 P 51.

**38.** Evidence held to sustain finding that lessee was invited by lessor to use private way in leaving leased premises. Nichols v. Jung Shoe Co., 135 Wis. 129, 115 NW 334.

**39.** Where lessor leased rooms in loft which could be reached only by stairway to loft and then along loft, lease carried right to use stairway and portion of loft necessary to reach rooms (Marcheck v. Klute [Mo. App.] 113 SW 654), and lessor owed duty to keep same in repair (Id.).

**40.** Where tenant's children are merely licensed to use unleased portions of loft for play, lessor is not bound to keep same safe and is liable only for misfeasance. Marcheck v. Klute [Mo. App.] 113 SW 654.

**41.** Evidence held insufficient to show that

juries proximately resulting therefrom [42] to one rightfully using the premises.[43] In the absence of statute [44] or express agreement, a landlord need not keep common hallways [45] or stairs [46] lighted. The liability for lack of repairs is statutory in some states,[47] but ordinarily rests upon the lessee.[48] While a landlord may covenant to repair,[49] in many states an action ex contractu [50] or in tort [51] for personal injuries cannot be based thereon as being too remote; [52] but in others recovery may be had where personal injury could reasonably be anticipated from a failure to repair.[53] The contract must be made with the lessee.[54] A contract to repair, however, must be distinguished from a covenant to maintain the premises in a safe condition,[55] or to

lessor knew of or was in any way responsible for bicycle in hall. Aldrich v. Lane, 110 NYS 897. Placing of common door mat in common hallway before lessor's door held not negligent. McGowan v. Monahan, 199 Mass. 296, 85 NE 105. Where at time of purchasing of premises vendee examined dumb waiter and it appeared all right and was notified that it had just been "overhauled," failure to inspect and discover defect for 2½ days held as matter of law not negligence. Timlan v. Dilworth [N. J. Err. & App.] 71 A 33. Where elevator boy brought elevator level with floor and stepped out to answer inquiries, during which time watchman stepped into elevator and ran it up, leaving door open, and plaintiff walked into shaft, verdict for plaintiff upheld where jury was properly instructed. Jolliffe v. Miller, 111 NYS 406.

**42.** Evidence held insufficient to warrant finding that deceased tripped on loose zinc on stair-steps. Jones v. Ryan, 109 NYS 156. Evidence held insufficient to show that tin which struck plaintiff came from roof or that defendant, who had agreed to keep roof in repair, was responsible for it. Kooperberg v. Sussman, 110 NYS 319. Finding that defendant placed mat in hallway held authorized from fact that plaintiff spoke of mat as defendant's mat and he did not deny it and that it was in front of his door. McGowan v. Monahan, 199 Mass. 296, 85 NE 105.

**43.** Evidence held to show that child was not using loft as passageway from leased rooms when he fell through chute but was playing. Marcheck v. Klute [Mo. App.] 113 SW 654. Lessor owes no greater duty to lessee's children than he owes to lessor. Id.

**44.** Failure to light halls of tenement house in violation of Tenement House Act, Laws 1901, p. 889, c. 334, held evidence of negligence. Lichtman v. Rose, 110 NYS 935. Under Tenement House Act, Laws 1901, p. 908, c. 334, defining tenement house as one occupied by at least three families who have a common right "in the halls, stairways, yards, water closets, etc.," building so divided as to constitute entirely separate residences, with no common hallways, etc., and yard used in common only by consent of lessor, held not a tenement house. Aldrich v. Lane, 110 NYS 897.

**45.** Duty to keep in condition it was in when leased. McGowan v. Monahan, 199 Mass. 296, 85 NE 105.

**46.** Injury caused by getting off steps before store on account of insufficient light, not chargeable to landlord. Wheeler v. Pullman Palace Car Co., 131 Ill. App. 262.

**47.** Under Rev. Code La. art. 2322, providing that owner of building is answerable for damage occasioned by its ruin when caused by neglect to repair, held that lessor was liable to subtenant for injuries caused by giving away of rotten rail to gallery, neither tenant nor subtenant being under obligation to make repairs. Frank v. Suthon, 159 F 174. Tenement House Act, Laws 1901, pp. 913, 1362, c. 334, 335, held only to require lessor to keep ceilings in clean and sanitary condition, and does not impose duty to keep in safe condition. Goetchius v. Gale, 57 Misc. 192, 108 NYS 1079. Description in action against lessor of apartment as "an apartment or tenement house" held insufficient to show that tenement house act is applicable. Id. Lessee of building containing an elevator, or hand hoist, is charged with statutory duty of maintaining same with safety devices required by Gen. St. 1894, § 2250 (Welker v. Anheuser-Busch Brew. Ass'n, 103 Minn. 189, 114 NW 745), and a de facto officer of a corporate lessee cannot recover for injuries due to lack thereof, though he is temporarily engaged in duties not ordinarily incident to his office, he not being a mere employe (Id.).

**48.** For duty to make repairs, see ante, subsec. C. The occupant and not the owner is responsible for injuries arising from a failure to keep the premises in repair. Where wash room under tenant's exclusive control overflowed and injured plaintiff's telephone cables, tenant was responsible. Chicago Tel. Co. v. Commercial Union Assur. Co., 131 Ill. App. 248.

**49.** Miles v. Janvrin [Mass.] 86 NE 785. Lease obligating lessor to furnish elevator service is admissible to show lessor's duty to keep same in safe condition and lessee's employe's right to use same. Sciolaro v. Asch, 113 NYS 446.

**50.** Cuilhe v. Ackerman, 58 Misc. 538, 109 NYS 714.

**51.** Nagle v. Davies, 113 NYS 834.

**52.** Graff v. Lemp Brew. Co., 130 Mo. App. 618, 109 SW 1044; Marcheck v. Klute [Mo. App.] 113 SW 654. Unless apartment was under his control, failure of lessor to repair ceiling in violation of his covenant to repair gives no right of action for injuries due to falling of a portion thereof. Goetchius v. Gale, 57 Misc. 192, 108 NYS 1079.

**53.** Graff v. Lemp Bros. Brew. Co., 130 Mo. App. 618, 109 SW 1044. Where lessor obligated to repair has knowledge of defect which is likely to result in personal injury and fails to repair, he is liable for any injury which may result. Id.; Marcheck v. Klute [Mo. App.] 113 SW 654.

**54.** Complaint for personal injuries failing to allege that agreement to repair was made with lessee, held demurrable. Morgan v. Sheppard [Ala.] 47 S 147.

**55.** Where lessor agrees merely to repair, he is not ordinarily liable for personal in-

protect against a particular danger.[56] A lessor obligated to repair is not liable for resultant injury unless he had actual or constructive notice of the defect,[57] and the injury is one which could be reasonably anticipated.[58] By express provision written notice of the defect is sometimes required.[59] Where the lessor undertakes to furnish elevator service, he cannot delegate the duty of seeing that the elevator is kept in a safe condition.[60]

Where the landlord undertakes to repair, he must do so in a careful manner,[61] and where the repairs are of a character to cause injuries if negligently done,[62] or unless certain precautionary measures are taken,[63] he is liable though he acts through an independent contractor.

While a tenant cannot ordinarily recover for damages due to the lessor's failure to repair where he could have repaired at small cost,[64] he need not make such repairs while the lessor is making ineffectual attempts to do so.[65] As in all other cases, the party injured must be free from contributory negligence.[66]

*To strangers.* See 10 C. L. 583—Where lessor lets the premises in a known [67] defective condition amounting to a nuisance,[68] he is liable for resulting injury [69] to one

juries, but where he agrees to keep premises in safe condition the rule is otherwise. Miles v. Janvrin [Mass.] 86 NE 785.

**56.** Where lessor agreed to protect certain dangerous place against children, injury to child resulting from failure is not too remote. Marcheck v. Klute [Mo. App.] 113 SW 654. Where covenant to protect dangerous place is relied on to render lessor liable, covenant and breach thereof must be pleaded. Id.

**57.** Brooks v. Schlernitzauer, 113 NYS 484. Evidence that there was a heavy fall of snow on Saturday, and on Monday roof leaked and it was found that roof was rusty and had holes in it, held insufficient to show constructive notice in absence of evidence as to length of time it had so existed. Id.

**58.** Where extraordinary rainfall on roof covered with snow and ice caused water to back up and rise above chimney flashings, held that it could not have been reasonably foreseen. Gutman v. Folsom, 113 NYS 691.

**59.** Where lease makes lessor liable for injuries caused by lack of repairs only after written notice of need, such notice must be given. Gutman v. Folsom, 113 NYS 691. Lessor's general bookkeeper held to have no authority to waive written notice of lack of repairs. Id.

**60.** Sciolaro v. Asch, 113 NYS 446.

**61.** Carlon v. City Sav. Bank [Neb.] 118 NW 334. Liable for negligence in leaving roof in leaky condition. Dalkowitz Bros. v. Schreiner [Tex. Civ. App.] 110 SW 564. Where lessor without consideration undertook to repair furnace and took out old one and failed to replace for unreasonable time, lessee injured by exposure cannot recover on theory of negligent repairs as wrong was mere omission to compute. Glenn v. Hill, 210 Mo. 291, 109 SW 27.

**62.** Moving house and did not secure steps. Doyle v. Franek [Neb.] 118 NW 468. Where lessor undertakes to put on new roof through independent contractor, he is liable for negligence in leaving in leaky condition. Dalkowitz Bros. v. Schreiner [Tex. Civ. App.] 110 SW 564.

**63.** Eberson v. Continental Inv. Co., 130 Mo. App. 296, 109 SW 62.

**64.** Bennett v. Southern Scrap Material Co., 121 La. 204, 46 S 211.

**65.** Miller v. Sullivan, 77 Kan. 252, 94 P 266. Where lessee gave due notice of defective roof and lessor made ineffectual attempts to repair, held that lessee could recover for damages to goods resulting from such defect. Id.

**66.** Where lessor is making ineffectual efforts to repair, lessee need not move out to prevent injury to goods. Miller v. Sullivan, 77 Kan. 252, 94 P 266. Mere use of defective premises knowing that lessor has not repaired is not contributory negligence as matter of law unless obviously dangerous. Graff v. Lemp Brew. Co., 130 Mo. App. 618, 109 SW 1044. Negligence of lessee in putting goods into building while roof was being repaired held for jury where contractor told him that they would be protected. Eberson v. Continental Inv. Co., 130 Mo. App. 296, 109 SW 62. Evidence that plaintiff knew that porch was out of repair, unaccompanied by evidence that she knew extent of defects does not affirmatively show negligence in using porch. Collins v. Fillingham, 129 Mo. App. 340, 108 SW 616. Where no one saw accident, evidence held insufficient to warrant finding that deceased who fell down stairs was exercising due care. Jones v. Ryan, 109 NYS 156. Evidence held to sustain finding that lessee was not negligent in falling into basement stairway on dark night in leaving premises by private way. Nichols v. Jung Shoe Co., 135 Wis. 129, 115 NW 334. Negligence in coming down stairway in dark hallway of tenement house having hold of banisters. Lichtman v. Rose, 110 NYS 935.

**Contributory negligence** must be **specifically pleaded.** Graff v. Lemp Brew. Co., 130 Mo. App. 618, 109 SW 1044. A tenant knowing of a defect in a board walk and receiving a promise to repair it is not as a matter of law guilty of contributory negligence in subsequently forgetting the defect. Udwin v. Spirkel, 136 Ill. App. 155.

**67.** Evidence held to authorize finding that lessor knew, or in exercise of due care should have known, of defective condition of coal hole in sidewalk. Hill v. Hayes, 199 Mass. 411, 85 NE 434.

**68.** One falling into open cellarway in sidewalk cannot recover of lessor on theory of a nuisance without a showing that maintenance of cellarway was in violation of

rightfully upon the premises,[70] if such injury could be reasonably anticipated;[71] but in the absence of a covenant to repair,[72] he is not liable for defects arising during the term[73] where the duty of repairing rests upon the tenant,[74] though amounting to a nuisance,[75] unless he undertakes to make repairs[76] and does so negligently.[77] A tenant is only required to exercise reasonable care to prevent injury by articles thrown from the window.[78]

(§ 5) *F. Improvements, emblements and fixtures.*[See 10 C. L. 583]—The right to improvements is frequently controlled by express provision of the lease.[79] The right

some law or ordinance. Donovan v. Gillies Coffee Co., 111 NYS 707.

**69.** Hill v. Hayes, 199 Mass. 411, 85 NE 434. Evidence of condition of coal hole in sidewalk held to show that it was in a dangerous condition at time of letting. Id. Description of coal hole held admissible as bearing on its condition at time of execution of lease and whether defect continued until time of accident. Id.

**70.** Where it appears that premises where injury occurred were leased, allegation that plaintiff was "lawfully" upon the premises held not objectionable as not showing that plaintiff was more than a mere licensee to whom defendant owed no duty to keep in safe condition. Stern v. Miller, 111 NYS 659.

**71.** Lessor of theater building with door opening into space six or seven feet above the ground held not liable to patron induced to walk out of same by exit signs and lights, since door in leased condition was clearly not intended as an exit and injury was due to lessee's negligence. McCain v. Majestic Bldg. Co., 120 La. 306, 45 S 258.

**72.** Promise to repair during term made without consideration does not render lessor liable. Morgan v. Sheppard [Ala.] 47 S 147.

**73.** Connors v. Newton [N. J. Law] 71 A 36.

**74.** Lessor held not liable for defects in grating covering window admitting light to cellar of store where duty of making repairs was expressly imposed on lessee. Gelof v. Morgenroth, 58 Misc. 557, 109 NYS 880. Fell into unguarded cellarway in sidewalk. Donovan v. Gillies Coffee Co., 111 NYS 707.

**75.** Allowed leader pipe to freeze, causing water to back up and freeze on roof, which fell onto plaintiff. Coman v. Alles, 198 Mass. 99, 83 NE 1097.

**76.** Evidence of conversation between witness and one to whom rent was paid in regard to another falling into hole prior to accident in question and of his promise to repair held admissible as bearing upon question whether subsequent repairs were by defendant lessor or by third person. Hill v. Hayes, 199 Mass. 411, 85 NE 434. Objection that complaint does not allege that repairs were made during term held not raised by demurrer that complaint does not show any duty owed by lessor to plaintiff to repair, etc., under Code 1896, § 3303, requiring demurrer to distinctly state grounds of objection. Morgan v. Sheppard [Ala.] 47 S 147.

**77.** Morgan v. Sheppard [Ala.] 47 S 147.

**78.** Carl v. Young, 103 Me. 100, 68 A 593. Complaint merely alleging injury from spittoon thrown from leased building not averring that it was thrown by tenant or his servants or showing any negligence is insufficient. Id.

**79.** Provision that lessee should surrender premises "in good order and condition, with all improvements, additions and extensions without any compensation," held not to vest title to improvement, etc., in lessor when made and lessee could remove before end of term. In re Montello Brick Works, 163 F 624. Though lease provided that improvements should remain personalty and subject to removal during last 60 days of term, failure to remove during term changed character. Hughes v. Kershow, 42 Colo. 210, 93 P 1116. "Improvements" as used in provision requiring lessor to pro rata reimburse lessee for improvement if term was terminated before its expiration by lessor to make a sale held to mean changes or betterments in existing buildings as well as new structures. Douglaston Realty Co. v. Hess, 124 App. Div. 508, 108 NYS 1036. Renewal lease, in effect an extension lease, held not to forfeit lessee's rights to certain buildings erected by him, though they were not expressly reserved. Ogden v. Garrison [Neb.] 117 NW 714. Where lessee was entitled to recover value of buildings erected by him on premises which lessor refused to permit him to remove, he is entitled to credit for value of building to lessor and not value of material after torn down and removed. Hegan Mantel Co. v. Alford [Ky.] 114 SW 290. Covenant requiring lessor to pro rata reimburse lessee for improvements upon terminating lease under its terms held to run with land, although word "assigns" was not used, especially where covenants were to be binding on personal representatives. Douglaston Realty Co. v. Hess, 124 App. Div. 508, 108 NYS 1036.

**NOTE. Effect of new lease without reserving right to remove fixtures:** The prevailing rule is that a new lease, without reserving the right to remove fixtures, is an implied surrender of such rights under the old tenancy (Wadman v. Burke, 147 Cal. 351, 81 P 1012, 1 L. R. A. [N. S.] 1192; Pronguey v. Gurney, 37 U. C. Q. B. 347; Id., 36 U. C. Q. B. 53; Loughran v. Ross, 45 N. Y. 792, 6 Am. Rep. 173; Talbot v. Cruger, 151 N. Y. 117, 45 NE 364, afg. 81 Hun [N. Y.] 504, 30 NYS 1011; Stephens v. Ely, 162 N. Y. 79, 56 NE 499, rvg. 14 App. Div. 202, 43 NYS 762; Nieland v. Mahnken, 89 App. Div. 463, 85 NYS 809; Hayes v. Schultz, 33 Misc. 137, 68 NYS 340; Scott v. Haverstraw Co., 135 N. Y. 141, 31 NE 1102; Van Vleck v. White, 66 App. Div. 14, 72 NYS 1026; Merritt v. Judd, 14 Cal. 59; Marke v. Ryan, 63 Cal. 107; Leman v. Best, 30 Ill. App. 323; Sanitary Dist. v. Cook, 169 Ill. 184, 48 NE 461, 61 Am. St. Rep. 161, 39 L. R. A. 369; Gauggel v. Ainley, 83 Ill. App. 582; Smyth v. Stoddard, 105 Ill. App. 510; afd. in 203 Ill. 424, 67 NE 980, 96 Am. St. Rep. 314; Hedderich v. Smith, 103 Ind. 205, 2 NE 315, 33 Am. St. Rep. 509; Unz v. Price, 22 Ky. L. R. 791, 58 SW 705; Carlin v. Ritter, 68 Md. 478, 13 A 370, 16 A 301, 6 Am. St. Rep. 467;

to emblements does not exist where the term expires at a fixed time,[80] but only where of indefinite and uncertain duration.[81] A tenant wrongfully holding over and putting in a crop is not entitled to remove the same.[82] A lessee may abandon his right to an unharvested crop.[83] In the absence of contract,[84] a tenant is ordinarily entitled to trade fixtures,[85] but permanent improvements made by tenant under a valid

George Bauernschmidt Brew. Co. v. McColgan, 89 Md. 135, 42 A 907; Shepard v. Spaulding, 4 Met. [Mass.] 416; Watriss v. First Nat. Bank, 124 Mass. 571, 26 Am. Rep. 694; McIver v. Estabrook, 134 Mass. 550; Williams v. Lane, 62 Mo. App. 66; Anthony v. Rockefeller, 106 Mo. App. 326, 76 SW 491; Champ Spring Co. v. Roth Tool Co., 103 Mo. App. 103, 77 SW 344; St. Louis v. Nelson, 108 Mo. App. 210, 83 SW 271; Gerbert v. Sons of Abraham, 59 N. J. Law, 160, 35 A 1121, 69 L. R. A. 764, 59 Am. St. Rep. 578; Spencer v. Commercial Co., 30 Wash. 520, 71 P 53; Wadman v. Burke, 147 Cal. 351, 81 P 1012, 1 L. R. A. [N. S.] 1192), although it would appear that the question is not regarded as settled in England (Ex parte D'Eresby, 44 L. T. N. S. 781, rvg. Ex parte Sheen, 43 L. T. N. S. 638), and the New York courts are not inclined to extend the rule to removable trade fixtures not savoring of realty (Lewis v. Ocean Nav. & Pier Co., 125 N. Y. 341, 26 NE 301; Smusch v. Kohn, 22 Misc. 344, 49 NYS 176; Burnheimer v. Adams, 70 App. Div. 114, 75 NYS 93, afd. in 175 N. Y. 472, 67 NE 1080).

The general doctrine is, however, flatly repudiated in Kerr v. Kingsbury, 39 Mich. 150, 33 Am. Rep. 362, which case is followed by Second Nat. Bank v. Merrill Co., 69 Wis. 501, 34 NW 514, and Wittenmeyer v. Board of Education, 10 Ohio C. C. 119 while in Union Terminal Co. v. Willman & S. F. R. Co., 116 Iowa, 392, 90 NW 92, citing McCarthy v. Trumacher, 108 Iowa, 284, 78 NW 1104, it is said that the doctrine has not yet been adopted in Iowa. The case of Wright v. Macdonnell, 88 Tex. 140, 30 SW 907, shows a decided leaning toward the same opinion, although in the later case of Hertzberg v. Wette, 22 Tex. Civ. App. 320, 54 SW 921, the general rule is followed upon the doctrine of stare decisis. The early New York case of Devin v. Dougherty, 27 How. Pr. [N. Y.] 455, to the same effect, has never been followed in that state and the Ohio decisions are not in harmony upon the rule, see Cook v. Scheid, 6 Ohio Dec. Reprint, 867.

Cases following the general rule frequently turn upon special covenants in the new lease (Thresher v. East London Waterworks Co., 2 Barn. & C. 608; Loughran v. Ross, 45 N. Y. 792, 6 Am. Rep. 173; Jungerman v. Bovee, 19 Cal. 355; Sanitary Dist. v. Cook, 169 Ill. 184, 48 NE 461, 61 Am. St. Rep. 161, 39 L. R. A. 369; Carlin v. Ritter, 68 Md. 478, 13 A 370, 16 A 301, 6 Am. St. Rep. 467; George Bauernschmidt Brew. Co. v. McColgan, 89 Md. 135, 42 A 907), though in Kerr v. Kingsbury, supra, similar covenants were held ineffective to that end. The following cases go to the construction of such special agreements or the intention of the parties as inferred therefrom: Fitsherbert v. Shaw, 1 H. Bl. 258; Heap v. Barton, 16 Jur. 891; Mansfield v. Blackburne, 6 Bing. N. C. 426; Sharp v. Milligan, 23 Beav. 419; Id. 5 Week. Rep. 337; Ex parte Hemenway, 2 Low. Dec. 456, F Cas. No. 6346; Jungerman v. Bovee, 19 Cal. 355; McCarthy v. Trumacher, 108 Iowa, 284, 78 NW 1104; Chaffee v. Fish, 2 Ohio, S. & C. P. Rec. 89; Abell v. Williams, 3 Daly [N. Y.] 17; Livingston v. Sulzer, 19 Hun [N. Y.] 375; Wright v. McDonnell, 88 Tex. 140, 30 SW 907, rvg. 27 SW 1024; Hertzberg v. Witte, 22 Tex. Civ. App. 320, 54 SW 921; Second Nat. Bank v. O. E. Merrill Co., 69 Wis. 501, 34 NW 514.

Where the new agreement does not amount to a new lease but is merely a continuation or renewal of the old tenancy, the cases are uniform in holding that the right of the tenant to remove fixtures survives. Ross v. Campbell, 9 Colo. App. 38, 47 P 465; Royce v. Latshaw, 15 Colo. App. 420, 62 P 627; Baker v. McClurg, 95 Ill. App. 165, afd. in 198 Ill. 28, 92 Am. St. Rep. 261, 59 L. R. A. 131, 64 NE 701; Hedderich v. Smith, 103 Ind. 205, 2 NE 315, 53 Am. Rep. 509; Howe's Cave Ass'n v. Houck, 66 Hun [N. Y.] 205, 49 NYS 5, 21 NYS 40, afd. in 141 N. Y. 606, 36 NE 740; Clarke v. Howland, 85 N. Y. 204; Radey v. McCurdy, 209 Pa. 306, 58 A 558, 103 Am. St. Rep. 1009, 67 L. R. A. 359; Young v. Consolidated Implement Co, 23 Utah, 586, 65 P 720. —Adapted from 1 L. R. A. (N. S.) 1192.

**80.** Florala Sawmill Co. v. Parrish [Ala.] 46 S 461. Where lessee plants crop which cannot be harvested within such term, he cannot thereafter harvest same. Bowles v. Driver [Tex. Civ. App.] 112 SW 440.

**81.** Florala Sawmill Co. v. Parrish [Ala.] 46 S 461.

**82.** Duncan v. Jouett [Tex. Civ. App.] 111 SW 981.

**83.** Huggins v. Reynolds [Tex. Civ. App.] 112 SW 116. Where, upon expiration of term, lessee does not act with due diligence but abandons unharvested crop, he cannot sue lessor in conversion for gathering and using same. Id.

**84.** Where lease authorized lessee to make alterations, provision that "all improvements, betterments, and changes or alterations" shall belong to lessor to end of term held not to include saloon fixtures and appliances put in by a brewery company under contract with lessee. Wright v. La May [Mich.] 15 Det. Leg. N. 1020, 118 NW 964. Covenants restricting a tenant's right to remove improvements and repairs should receive a fair and reasonable construction. Covenant that all improvements and alterations in saloon rented should belong to landlord, etc., held not to include easily removable trade fixtures but alterations and improvements provided for in lease. Webber v. Franklin Brew. Co., 123 App. Div. 465, 108 NYS 251.

**85.** See Fixtures, 11 C. L. 1477. Where award in condemnation was made for present value of fixtures, in division between landlord and tenant of award, held error to estimate value of fixtures as removed at end of term. In re Water Front on North River [N. Y.] 84 NE 1105. Tenant or his mortgagee may remove fixtures placed on premises. Combination gas and electric chandeliers, wooden partitions around a toilet, including

lease, become part of the realty,[86] as do articles so annexed as not to be removable without injury to the realty.[87] A tenant may enter upon the premises within a reasonable time after the expiration of his term to remove personal property,[88] but forfeits his right of removal if he fails to exercise it within a reasonable time.[89]

(§ 5) *G. Options of purchase or sale.*[See 10 C. L. 584]—The option must be definite and certain,[90] but where a part of the leasing transaction [91] it need not be supported by an independent consideration.[92] The relation of landlord and tenant continues until the option is exercised,[93] but thereafter the relation is that of vendor and purchaser.[94] The right must be timely exercised [95] in the prescribed manner [96] and all conditions precedent [97] and subsequent [98] complied with.

mirrors, porcelain urinals, water closet seats and connections, etc., held trade fixtures removable. Excelsior Brew. Co. v. Smith, 110 NYS 8. Permanent fixtures on surrender of a lease revert to the landlord. In re Water Front on North River, 109 NYS 921.

**86.** Not subject to mechanic's lien under statute. Langley v. D'Audigne, 31 App. D. C. 409. Alterations on building by which doors and frames were removed, openings enlarged, enclosures and doors extended and marble platforms countersunk into water table, not movable or trade fixtures which lessee or tenant could remove. Excelsior Brew. Co. v. Smith, 110 NYS 8. Steam heating plant not removable by tenant nor by his purchaser from trustee in bankruptcy. Jacob v. Kellogg, 56 Misc. 611, 107 NYS 713.

**87.** Caustic soda factory burned; lead pipes, iron, debris, etc., not removable as personalty. Niagara Falls Hydraulic Power & Mfg. Co. v. Schermerhorn, 111 NYS 576.

**88.** Turpentine which has dripped from the trees and been caught in boxes held personalty, but not "scrapings" adhering to the trees. Florada Sawmill Co. v. Parrish [Ala.] 46 S 461.

**89.** Pile v. Holloway, 129 Mo. App. 593, 107 SW 1043.

**90.** Where time of payment is optional with lessee and the place is fixed by Code Prac. art. 406, option to purchase is not void as incomplete in not fixing time and place of payment. Succession of Witting, 121 La. 501, 46 S 606. Where at time of execution of lease containing option deed was executed and placed in escrow, written instruction issued therewith may be considered as part of same transaction in construing option. Pollard v. Sayre [Colo.] 98 P 816.

**91.** Lease and option giving lessee right to purchase during term and apply rent to purchase price held part of same transaction though separately executed, and hence no separate consideration was necessary to sustain option. Brink v. Mitchell, 135 Wis. 416, 116 NW 16.

**92.** Reserved rent held sufficient. Succession of Witting, 121 La. 501, 46 S 606; Feudtner v. Ross [N. J. Eq.] 69 A 190.

**93.** Luigart v. Lexington Turf Club [Ky.] 113 SW 814.

**94.** Where lessee elects to purchase and proceeds to have appraisers appointed, he holds as purchaser and not as lessee holding over, and is not liable for rent for reasonable time. Washburn v. White, 197 Mass. 540, 84 NE 106. Summary process, under Rev. Laws, c. 181, will not lie to recover possession. Id. Lessor bound himself to convey to lessee at any time during term upon payment of $1,280, and to surrender the unpaid rent notes. Held where lessee paid said $1,280 on Aug. 30, 1907, and gave notice of his election, he was not liable on rent note maturing on Oct. 1st. Lee v. Cochran [Ala.] 47 S 581.

**95.** Where lease of sawmill required lessee to saw not less than 500,000 feet during year, and to pay $375 whether lumber was sawed or not, with right to hold for another year on same terms, option to purchase "at any time during sawing of the timber" did not continue after term though lumber was thereafter sawed. Felton v. Chellis [Vt.] 69 A 149. Option to purchase endorsed on lease to be exercised before designated date could not be exercised thereafter, especially where new leases had been executed without option. Feudtner v. Ross [N. J. Eq.] 69 A 190. Where lease provided that it was for a term of five years, 1905 to 1909, inclusive, and gave lessee an option to purchase any time during his "term," term was period of five years between 1905 and 1909, inclusive. Lee v. Cochran [Ala.] 47 S 581. Lessee in possession of premises under lease expiring January 1st, 1903, executed new lease for five years from Oct. 1, 1902, which provided for immediate possession and gave option of purchase which could be exercised at any time during term. Held immaterial where option was exercised in January, 1903, whether lessee went into immediate possession under new lease of term or continued under old until end. Swanston v. Clark, 153 Cal. 300, 95 P 1117.

**96.** Stipulation to sell for fixed price means cash and not on credit terms. Succession of Witting, 121 La. 501, 46 S 606. Where lease contained option of purchase at $20,000 but instructions directed delivery of deed upon receipt of sum or $2,500 less than stated amount, held option to purchase at $17,500. Pollard v. Sayre [Colo.] 98 P 816.

**97.** Where option specifies that lessee may exercise it at any time within a year by paying a specified sum, all taxes, etc., held that payment of taxes was not condition precedent, though it provided that, upon payment of price and taxes "to the proper officers," defendant would convey, and lessee could exercise option after defendant had paid same. Brink v. Mitchell, 135 Wis. 416, 116 NW 16.

**98.** Mere lapse of time, without obtaining an award by referees appointed on lessee electing to purchase, is insufficient to show that lessee has lost right to hold as purchase without payment of rent (Washburn v. White, 197 Mass. 540, 84 NE 106), as is unexplained failure to procure an award (Id.).

(§ 5) *H. Actions.*[See 10 C. L. 584]

§ 6. *Rent and the payment thereof, and actionable use and occupation.*[See 10 C. L. 585]—The obligation to pay rent is contractual,[99] and where the lease is under seal, only a party thereto can recover thereon.[1] Where the rent is payable in advance, the lessee may pay the same to his lessor though he sells the premises during the month.[2] The lease controls as to time,[3] amount,[4] and manner [5] of payment and the application thereof.[6] By a new agreement supported by a consideration,[7] the rent may be modified.[8] Where defendant agreed with the lessee to take his place and pay the rent, the landlord may sue him therefor without regard to whether he is an assignee or a subtenant.[9] Where a tenant abandons the premises, it is the duty of the landlord to exercise reasonable diligence [10] to relet, but he is not required to make extensive repairs,[11] or to join other parts of the building to the demised portion [12] to effect a reletting. In actions for rent, the usual rules as to variance,[13] burden of proof,[14] evidence,[15] and conformity of recovery to the pleadings and proof [16] apply.

99. Plaintiff cannot recover where evidence does not show that he owned premises or any contractual relation. Drexler v. Cohen, 108 NYS 679. Where deed to purchaser on foreclosure of mortgage to which proceeding tenant was not a party conveyed subject to leases and tenant never attorned to purchaser, he cannot recover rent. Wacht v. Erskine, 113 NYS 130.

1. Where sealed lease is in name of L as lessor, though followed by word "agent," he alone can sue, it not being shown that lessee knew who true owner was at time of executing. Buge v. Newman, 113 NYS 198.

2. Leopold v. Baum, 110 NYS 1054.

3. Evidence held to show agreement for monthly rent but not in advance. Mitchell v. Henderson, 37 Mont. 515, 97 P 942. Abandonment and offer to surrender does not enable lessor to sue for rent for term where payable monthly. Curtis v. Hammond, 43 Colo. 277, 95 P 921.

4. Where lease reserves $4 per week rent, fact that lessor's agent authorized lessee to pay at the end of the month does not change rate from $4 per week to $16 per month. Ebersole v. Addington [Ala.] 46 S 849.

5. Rent may be payable in labor. Price v. Thompson [Ga. App.] 60 SE 800.

6. Lease provided for application of rent to payment of mortgage on fee. Held that provision was for protection of lessee, and upon sale of lease held in bankruptcy purchaser cannot insist that back rents due be applied to mortgage as against lessor's proven claim. In re Ketterer Mfg. Co., 162 F 583. Lessee may show parol agreement modifying lease so as to make rents applicable to debt due from lessor to lessee. American Exch. Nat. Bank v. Smith, 113 NYS 236.

7. Agreement by lessee after execution of lease and before commencement of term to put premises into such condition as to comply with tenement house requirements is consideration for reduction of rent. Haight v. Cohen, 123 App. Div. 707, 108 NYS 502. Agreement of lessor not to enforce immediate payment of debt of lessor held sufficient consideration for promise of lessor not to enforce immediate payment of rent when due. American Exch. Nat. Bank v. Smith, 113 NYS 236.

8. Notice of increase of rent in monthly tenancy announcing that rent after certain date will be $150 per month instead of $40, "as heretofore paid," held sufficient though rent was $35 per month under prior lease. Berryman v. Gibson [Cal. App.] 95 P 671. An increase in rent forms a new contract when assented to by tenant. Where premises were rented at $30 a month and landlord served notice on subtenant that rent would be increased to $200, in absence of tenant's consent the tenancy under former rental continued. George J. Coake Co. v. Fitzgerald, 131 Ill. App. 133.

9. Foucar v. Holberg, 85 Ark. 59, 107 SW 172.

10. Answer asserting lack of due diligence held denial of element of plaintiff's cause of action and not defense by confession and avoidance. Woodbury v. Sparrell Print, 198 Mass. 1, 84 NE 441. Burden of showing diligence to release rests on plaintiff. Id.

11. While lessor need not make extensive repairs or improvements to enable him to relet, instruction held to properly submit to jury duty to make repairs rendering premises safe. Woodbury v. Sparrell Print, 198 Mass. 1, 84 NE 441.

12. Woodbury v. Sparrell Print, 198 Mass. 1, 84 NE 441. Instructions stating rule but leaving it to jury to say whether applicable held erroneous. Id.

13. Where complaint alleged assignment to defendant, it cannot be shown that assignment was merely as security, that assignor remained in possession for 20 months and then sold business to third party, whom defendant accepted as debtor and agreed to pay rent thereafter. Early v. Koehler & Co., 110 NYS 357.

14. Where in action for rent, taxes, insurance premiums, etc., court instructs that burden is on plaintiff to prove that all moneys were due at time of suit, held error to instruct that extension of time for payment of taxes as claimed by defendant must be shown by preponderance of evidence. Wright v. Northrup [Iowa] 128 NW 437.

15. Rev. St. 1899, § 4137 (Ann. St. 1906, p. 2246), requiring exhibition of deed under which title is claimed, on demand of rent by purchaser, applies to actions for possession and not to actions merely for rent. Starbuck v. Avery [Mo. App.] 112 SW 33. Where

*Defenses, set-offs and reductions.* See 10 C. L. 586—Payment,[17] rescission for fraud,[18] total failure of consideration,[19] and attornment to one entitled to immediate possession to avoid eviction,[20] are defenses to a suit for rent. The effect of assignment or subletting is treated in another section.[21] An actual eviction [22] or constructive eviction, followed by surrender of possession,[23] unless due to lessee's own default,[24] or a forfeiture,[25] relieves the tenant from future rents. The wrongful act of the landlord does not bar him from recovering rent, unless the tenant by such act has been deprived in whole or in part of the possession, or the premises rendered useless.[26] The issuance of a precept in summary proceedings or a warrant of dispossession is a defense to unaccrued rents [27] unless waived.[28] Where rent is payable monthly in advance, a surrender [29] or forfeiture [30] during the month does not relieve tenant from such month's rent, but the courts are divided as to the effect of an eviction.[31] In the absence of statute [32] or express agreement,[33] a destruction of the building [34] or of the

lessee sued on rent notes counterclaimed on theory that he was entitled to recover profits a berry crop would have yielded during designated years had he been permitted to remain in possession, evidence that patch was flooded during one of the years and of actual yield during other is admissible. Lauderdale v. King, 130 Mo. App. 236, 109 SW 852.

16. Where plaintiff, while claiming right to recover $76.17 for June rent and $475 for July, in addition to right to retain deposit, sued for $500, and defendant admitted $76.17 to be due for June and claimed deposit of $475, judgment for plaintiff for $100 held not authorized by any theory. Woodard v. Johnson, 109 NYS 741. Where lessor claimed that lessee was tenant for another year by holding over and lessee asserted a parol agreement permitting her to remain in possession upon paying pro rata for time she was actually in possession, judgment for rent for one month held unsupported where she only remained in possession nine days. Goetschius v. De Barbieri, 110 NYS 1076. In suit for reasonable rental for holding over, it is error to give judgment for amount offered by lessee for renewal where it is in excess of reasonable rental as shown by evidence and amount claimed in petition. Aull v. Bowling Green Opera House Co. [Ky.] 114 SW 284.

17. Evidence of checks held to show payment. Leopold v. Baum, 110 NYS 1054. Evidence held sufficient to sustain finding that rent for month sued for was unpaid. Lewy v. Wolfman, 110 NYS 256.

18. Defense of fraud and rescission cannot be based upon alleged false representations as to sanitary conditions where lessee remained in possession for eight months and bad odors may have been due to his neglect to repair plumbing. La Roche v. Mulhall, 112 NYS 1115.

19. Breach of covenant to improve not a condition precedent to payment of rent only relates to part of consideration, and lessee cannot continue to occupy and refuse to pay rent. White v. Y. M. C. A., 233 Ill. 526, 84 NE 658.

20. Nashua L., H. & P. Co. v. Francestown Soapstone Co., 74 N. H. 511, 69 A 883. Where tenant subleased for period beyond term, testimony of subtenant that after lessee's term he paid rent to owner to avoid eviction held to show attornment. Id.

21. See ante, § 5B.

22. As to what constitutes actual or constructive eviction, see post, § 8. Tenant wholly or partially evicted need not pay rent for time evicted. Bergman v. Papia, 58 Misc. 533, 109 NYS 856. Lessee has burden of showing eviction. Ventura Hotel Co. v. Pabst Brew. Co., 33 Ky. L. R. 149, 109 SW 354. Must show eviction by preponderance of evidence. Hermitage Co. v. Roos, 110 NYS 976.

23. Rea v. Algren, 104 Minn. 316, 116 NW 580. Constructive eviction is no defense to rent suit unless property is surrendered. Mahoney v. Broodway Brew. & Malting Co., 57 Misc. 430, 108 NYS 237.

24. Evicted by building department under order of court for failure to keep in repair. Manley v. Berman, 111 NYS 711.

25. Baxter v. Heimann [Mo. App.] 113 SW 1152.

26. Tenant holding under lease embodying agreement to install system of ventilation refused to pay rent until agreement carried out, but retained possession held liable for rent. White v. Y. M. C. A., 137 Ill. App. 286.

27. Schwartz v. Ribaudo, 110 NYS 352.

28. Effect of Code Civ. Proc. § 2253, under which issuance of warrant of dispossession terminates lease and releases tenant for future rents may be waived. Franceschini v. Chaucer, 110 NYS 775.

29. Manley v. Berman, 111 NYS 711. Where rent is payable monthly in advance and tenant vacated before end of term, no defense that lessor entered during latter part of last month and relet. Kent v. Ward, 111 NYS 743.

30. Under landlord and tenant act (Rev. St. 1899, § 4131 [Ann. St. 1906, p. 2243]), where rent payable monthly in advance is not paid, lessor may forfeit lease and recover possession and may recover rent for full month. Bradley v. Campbell [Mo. App.] 111 SW 597.

31. Cannot recover (Hall v. Middleby, 197 Mass. 485, 83 NE 1114), even up to time of eviction (Chapman-Drake Co. v. Frank Fabian Mfg. Co., 104 Minn. 176, 116 NW 207). Where rent for month is due at time of constructive eviction, lessor may recover same. Schuster v. Arscott, 110 NYS 1107; Cukor v. Wiener, 110 NYS 249.

32. Civ. Code, § 1932, providing that hirer may terminate hiring where greater portion of the "thing hired" is destroyed, does not authorize tenant to recover proportionately rent paid upon destruction of crop of aspar-

beneficial enjoyment of the premises [35] does not relieve the tenant. Arbitrary refusal of lessor to renew the lease does not authorize lessee to abandon the premises and refuse to pay rent.[36]

The tenant may counterclaim damages arising from landlord's failure to give possession at the date specified,[37] from a breach of his covenants,[38] from his fraud [39] or deceit,[40] or suspension of rent where obligation to pay is absolute.[41]

*General rents and perpetual leases.* See 8 C. L. 684—An action for the purchase price of ground rents held in effect a bill for specific performance of a contract for the sale of real estate.[42]

*Use and occupation.* See 10 C. L. 587—Use and occupation will lie only where the relation of landlord and tenant exists,[43] but, ordinarily, one occupying and using [44] the lands of another with his consent but without any express reserve rent [45] may be held on an implied contract.[46]

§ 7. *Rental on shares.* See 10 C. L. 587—A contract of rental on shares renders the landlord and lessee tenants in common [47] of the entire crop,[48] and the lessee impliedly

agus, since crop was not the thing hired. Meek v. Cunha [Cal. App.] 96 P 107. Real Property Law, Laws 1896, p. 589, c. 547, § 197, authorizing tenant to surrender where building is so injured as to become untenantable, is inapplicable to interference with enjoyment by odors from pre-existing restaurant. Kent v. Ward, 111 NYS 743.

33. Provision that if building should be damaged by fire so as to be untenantable "the rent should cease until such time as building shall be put in complete repair," held not to relieve tenant for entire month's rent during month when fire occurred but only for time that premises are actually untenantable. Einstein v. Tutelman, 110 NYS 1025.

34. Sedalia Planing Mill & Lumber Co. v. Swift & Co., 129 Mo. App. 471, 107 SW 1093. Though lessor has insured same for own benefit. Id.

35. Destruction of beneficial enjoyment of premises by an inundation does not affect tenant's liability for rent (Meek v. Cunha [Cal. App.] 96 P 107), nor entitle him to apportionment of rent (Id.).

36. Refusal of landlord to re-rent does not authorize lessee to vacate and refuse to pay rent. Kerwin v. MacMaster, 108 NYS 1016.

37. Bailey v. Krupp, 110 NYS 994.

38. Valentine v. Woods, 110 NYS 990. Lessee damaged by lessor's failure to perform covenant may recoup. White v. Y. M. C. A., 233 Ill. 526, 84 NE 658. Lessee may counterclaim expenditures for repairs which lessor covenanted to make. Silberberg v. Trachtenberg, 58 Misc. 536, 109 NYS 814. Where lessor of business block fails to secure trackage as agreed in consideration of rent, he is liable for damages. Cole v. Brown-Hurley Hardware Co. [Iowa] 117 NW 746.

39. Measure of damages is difference between rental value of premises, subject to conditions of lease if it had been as represented, and value, subject to conditions of lease in actual condition. Scovell v. Pfeffer [Iowa] 117 NW 684. Evidence held sufficient to go to jury on fraudulent representations as to tiling on land. Dougan v. Mitchell [Iowa] 115 NW 492.

40. Damages arising from deceit inducing execution of lease may be counterclaimed, lessee not being compelled to abandon lease and rescind. Myers v. Fear [Okl.] 96 P 642.

41. There being no absolute obligation to pay rent on first of month, occurrence of fire suspending rent does not create a partial defense but should be asserted as a counterclaim. Einstein v. Tutelman, 110 NYS 1025.

42. Slotter v. Patterson, 221 Pa. 68, 70 A 286.

43. Starbuck v. Avery [Mo. App.] 112 SW 33. Complaint alleging wrongful occupation of plaintiff's land for 23 months, that defendants became indebted to plaintiffs, that defendants became indebted for the reasonable value of the use and occupation, held an action for wrongful occupation and not for use and occupation. Leyson v. Davenport [Mont.] 98 P 641.

44. Where at time plaintiff bought premises defendant had some fixtures in building which remained for several months but defendant never disturbed possession of premises, held not to show such use as to render defendant liable. Bonnazza v. Schlitz Brew. Co. [Mich.] 15 Det. Leg. N. 846, 118 NW 604.

45. Where lease and evidence leaves it uncertain as to whether premises in question were included in lease, evidence that lessee was placed in possession when lease was executed rebuts presumption that he agreed to pay other rent. Gerhardt v. Boettger [N. J. Err. & App.] 70 A 173.

46. Revisal 1905, § 1986. Sessoms v. Tayloe [N. C.] 62 SE 424. If no lien exists therefore under Revisal 1905, § 1993, on crop, remedy of owner is against personal representative of deceased occupant. Id.

47. Where lessor sells entire crop with lessee's consent, lessee is entitled to an accounting. Rice v. Peters, 113 NYS 40. Tenants in common of crop, and if lessee mortgages his interest mortgagee is only subrogated to lessee's interest and as against lessor must fulfill lessee's contract. Abernethy v. Uhlman [Or.] 93 P 936. Under provisions of Revisal 1905, § 1995, that on a controversy between lessor and lessee over possession of crop, where neither avails himself of remedy by claim and delivery under §§ 1993, 1994, action may be brought in superior court, and equitable action by landlord for recovery of crop and for receiver will lie. Talbot v. Tyson, 147 N. C. 273, 60 SE 1125.

48. Lessor has undivided interest in whole crop and may advance money to protect same

covenants to operate and cultivate with due diligence.[40] A reservation of title to the entire crop in the landlord does not prevent him from taking a chattel mortgage on the lessee's share,[50] nor does the taking thereof waive the reservation.[51] Where a mortgagee of lessee's share fails to furnish money necessary to harvest the crop as agreed, the lessor may do so to protect his interest and has prior right of reimbursement,[52] though the lessee actually harvests the crop.[53] The contract controls as to the manner of division.[54]

A tenant under an agreement for a crop rental cannot abandon the premises and recover quantum meruit for the work done,[55] nor can he recover quantum meruit where evicted by the lessor.[56] A contract of rental on shares so partakes of the nature of a contract of hire as to make its principles of damages applicable,[57] and where the lessor evicts the tenant and harvests the crop, the doctrine applicable to conversion of property does not apply.[58]

§ 8. *The term, termination of tenancy, renewals, holding over.* See 10 C. L. 583—In some states a maximum term is prescribed by statute.[59] The lease controls as to the beginning,[60] duration [61] and end [62] of the term. While a term may be made to

and be reimbursed out of proceeds in preference to existing lienors. Abernethy v. Uhlman [Or.] 97 P 540.

**49.** Mining lease. National Light & Thorium Co. v. Alexander [S. C.] 61 SE 214. Complaint alleging that tenant did not cultivate large part of land and cultivated rest in unhusbandlike manner held too indefinite as to amount of tillable land, amount cultivated and amount not properly cultivated. Kennedy v. McDearmid [Ala.] 47 S 792.

**50.** Mortgage has effect of contract for a lien. McFadden v. Thorpe Elevator Co. [N. D.] 118 NW 242.

**51.** McFadden v. Thorpe Elevator Co. [N. D.] 118 NW 242.

**52.** Abernethy v. Uhlman [Or.] 93 P 936.

**53.** Abernethy v. Uhlman [Or.] 93 P 936. **Variance:** Between allegations lessee delivered crop to lessor as security for advances in harvesting crop, that lessee was unable to procure help to harvest and requested lessor to help, which he did, and evidence that lessor harvested crop. Abernethy v. Uhlman [Or.] 93 P 936.

**54.** Where evidence of both parties shows that method of dividing crop was orally modified, court may assume such division as the proper one. Cramer v. Nelson, 128 Mo. App. 393, 107 SW 450. Where lessee claimed that corn was to be divided in field by taking alternate sections of 16 rows for respective parties and lessor denied that division was to be made in field, charge that if lessee did not set over to lessor one-half of corn grown on the farm, etc., held not to charge that division was to be made in field. Id.

**55, 56.** Smart v. Borquoin [Wash.] 98 P 666.

**57.** Where lessor evicts lessee, only such sums as tenant may earn by reasonable diligence can be deducted from value of tenant's share of crop. Crews v. Cortez [Tex.] 113 SW 523. Where lessor wrongfully evicts tenant, expense incurred by lessor in maturing and harvesting crop cannot be deducted in ascertaining value of lessee's share (Id.), but such expense may be taken as evidence of what it would have cost tenant to mature and harvest crop where their same methods, etc., were pursued (Id.). Where, in action by tenant for breach of lease on shares, he is charged with what he earned or could have earned elsewhere, total cost of producing crop, including his services, should not be deducted (Somers v. Musolf [Ark.] 109 SW 1173), and, likewise, where contract called for services of his two brothers, he should not be charged with their earnings elsewhere and value thereof in producing crop (Id.). Lessor could not require lessee to keep his brothers in his employ so as to lessen damage to extent of earnings. Id.

**58.** Crews v. Cortez [Tex.] 113 SW 523.

**59.** Under Code 1896, § 1032, providing that no leasehold shall be created for longer than twenty years, provision in lease for twenty years giving lessee rights to continue is void. Tennessee Coal, I. & R. Co. v. Pratt Consol. Coal Co. [Ala.] 47 S 337. Lease for twenty years from and after January 18, 1900, was enclosed in sealed envelope and placed in escrow, the envelope bearing indorsement of lessor directing delivery at his death to lessee, held that indorsement was no part of lease and where delivered in 1906, lease is void under Const. art. 18, § 12, prohibiting lease of agricultural lands for more than 12 years. Waldo v. Jacobs, 152 Mich. 425, 15 Det. Leg. N. 316, 116 NW 371.

**60.** Lease from quarter to quarter "from and after April 1st, 1902," held to include April 1st, 1902. Budds v. Frey, 104 Minn. 481, 117 NW 158.

**61.** Lease "for the term of three years, with the privilege of five years for" an annual rental does not give right to five additional years. Glensler v. Nichols, 151 Mich. 425, 15 Det. Leg. N. 13, 115 NW 458. Lease for certain term with provision that breach of any of the covenants shall terminate it and give right of re-entry is a lease for term specified, unless terminated for breach of covenants. Walther v. Anderson [Tex. Civ. App.] 114 SW 414. Tenancy at will may be terminated at any time by notice. Buford v. Wasson [Tex. Civ. App.] 109 SW 275.

**62.** Lease conveyed premises for three years for manufacture of rosin and turpentine from cutting of boxes, boxing to start during January, held that starting of boxing was not a condition precedent or subsequent, and term expires three years from last day of January whether boxing was started or not. Davis v. Taylor, Lowenstein & Co. [Ala.] 47 S 653.

terminate ipso facto on the happening of a contingency,[68] if such contingency is a condition as distinguished from a limitation, a re-entry or other act of the lessor is necessary.[64] By statute [65] and by agreement,[66] the destruction of the buildings or impairment rendering them untenantable often gives the tenant a right to terminate the tenancy,[67] unless due to his default.[68] The term of a lessee under a tenant by the curtesy is terminated by the death of lessor.[69] Where the lease contemplates that the premises shall be used for a particular purpose and such use becomes unlawful the lease becomes void.[70] The tenant may terminate the lease where the landlord defaults in his agreement in a particular which substantially impairs the tenant's use.[71] Issuing and execution of a warrant of dispossession in summary proceeding terminates the relation,[72] and a reversal of the order does not reinstate the same unless the tenant so elects.[73] An option of cancellation may be given,[74] but all conditions precedent must be first complied with before it can be exercised.[75] Where the

**63.** Where railroad company leased piece of land on right of way for coal bin, lease providing that lease should terminate if lessee abandon same. Lessee sold business to another but nothing was said about lease, although purchaser used same. Held that lease was terminated and purchaser was tenant at will, and provision in original lease exempting company from liability for fires did not apply. Ft. Worth. etc., R. Co. v. Wooldridge [Tex.] 108 SW 1159. Where lease for five years was for general saloon business and saloon license could be issued only for six months, provision "should said saloon license be not secured on said premises," etc., lessee might terminate lease construed as not limited to initial license. Conservative Realty Co. v. St. Louis Brew. Ass'n [Mo. App.] 113 SW 229. Lease providing that lessor should not be responsible on covenant for quiet enjoyment should possession be taken by public authority and providing that award should be paid to landlord and that tenant should receive only such an award as might be made for his interest. Held that in legal effect parties contemplated that taking under eminent domain should end lease. In re Pier Old No. 11, East River, 124 App. Div. 465, 109 NYS 2. Clause "subject only to sale of property" as used in lease providing that lessee could renew" from one to five terms of two years each, subject only to a sale of said property, held to relate to word "option" and not words "from one to five terms of two years each," so that sale did not terminate lease until end of renewed term. People's Bank & Trust Co. v. Tissier Hardware Co. [Ala.] 45 S 624.

**64.** Provision in lease that it was "to commence on the 1st day of May, 1907, and to end on the 1st day of May, 1908, at noon," is a limitation and lease terminates of itself (Low v. Thompson, 111 NYS 607, afg. 58 Misc. 541, 109 NYS 750), and is not converted into a condition by covenant to surrender possession at end of term, and a provision that upon default in any covenant, lessor could at his option terminate lease (Low v. Thompson, 11 NYS 607). Provision that filing of any process against tenant "shall cause this lease immediately thereafter to cease and to come to an end," held not self-executing, but enforcible only at lessor's election. Cohen v. Afro-American Realty Co., 58 Misc. 199, 108 NYS 998. Re-entry for tenant's breach of the lease terminates the same. Cohen v. Carpenter. 113 NYS 168.

**65.** Real Property Law (Laws 1896, p. 589, c. 547), § 197, authorizing lessee to surrender where building is so impaired or destroyed by elements or any other cause as to be untenantable, does not authorize surrender because of noise and vibrations of a neighboring electric light plant with which lessor is not connected. Floyd-Jones v. Schaan, 113 NYS 472, afg. 109 NYS 362.

**66.** Lease of store room provided that if the "building or premises wherein said demised premises are contained" should be so badly injured that they could not be repaired within 60 days, etc., lease should terminate. Held that if building was so injured that it could not be repaired within 60 days, lease terminated though demised premises were not injured. Levy v. Equitable Life Assur. Soc. [C. C. A.] 161 F 283.

**67.** Where tenant remains in possession after fire, he cannot refuse to pay rent. Feinstein v. Gottfried, 107 NYS 881.

**68.** Real Property Law, Laws 1896, p. 589, c. 547, § 197, authorizing lessee to surrender lease where building becomes uninhabitable, etc., has no application where lessee owes duty to repair. Goldberg v. Lloyd, 110 NYS 530.

**69.** Barson v. Mulligan, 191 N. Y. 306, 84 NE 75.

**70.** Lease for saloon purposes. Heart v. East Tennessee Brew. Co. [Tenn.] 113 SW 364.

**71.** Where lessor failed to furnish water to office of physician as agreed, held that lessee could terminate contract. Rosenbloom v. Solomon, 57 Misc. 290, 109 NYS 540.

**72.** May sue for return of balance of deposit to secure performance. Niles v. Iroquois Realty Co., 57 Misc. 443, 109 NYS 712.

**73.** Niles v. Iroquois Realty Co., 57 Misc. 443, 109 NYS 712. Assignment of balance of deposit and institution of suit by assignee for same held sufficient notice of election not to reinstate. Id.

**74.** Option to cancel lease in event of sale during term may be exercised by lessors by giving proper notice after passing of title to purchaser. Lewis v. Agoure [Cal. App.] 96 P 327. Oral notices of intention to exercise option and conversations in respect thereto held to show no waiver nor laches. Id. Notice construed as one authorizing tenant to continue at increased rental, given under mistaken idea that term had expired and not a notice under provision giving lessor right to cancel on 30 days' notice. Anderson v. Hebbard, 56 Misc. 664, 107 NYS 824.

**75.** Provision giving lessor right to ter-

option to purchase under a lease has been exercised, the relation of landlord and tenant is terminated.[76]

*Surrender, abandonment and eviction.* See 10 C. L. 589—A surrender may be effected by mutual agreement, express or implied,[77] by substitution of a new lease,[78] or the

minate lease upon making a bona fide sale and service of notice, but requiring him to pro rate reimburse tenant for improvements, held not to entitle him to possession until he reimbursed lessee. Douglaston Realty Co. v. Hess, 124 App. Div. 508, 108 NYS 1036.

**76.** Tenant is entitled to show tender of purchase price under option to purchase, as bearing on character of his possession as against landlord. Stanwood v. Kuhn, 132 Ill. App. 466.

**77.** Under answer in action for rent alleging that plaintiff's acts compelled defendant to abandon the premises, that they consented to the rescission and abandonment and occupied premises, held sufficient to admit evidence of notice by tenant to terminate lease and acceptance by lessors. Stott v. Chamberlain [S. D.] 114 NW 683.

**Surrender:** Where trustee in bankruptcy removed lessee's property from premises and delivered key to lessor, who attempted to lease at higher rent and let contract for extensive improvements, held acceptance of surrender, although lessor accepted keys stating that it was only for purpose of renting for bankrupt. In re Schomacker Piano Forte Mfg. Co., 163 F. 413.

**No surrender:** Surrender of term by act and implication of law will not be implied from dissolution of partnership between tenants and rejected tender of key by unauthorized person. Creachen v. Achenberg [N. J. Law] 70 A 160. Where lessee of space in hotel lobby took down railing separating space on vacating, fact that guests used such space held not to authorize inference of acceptance of surrender. Chittenden v. Western Union Tel. Co. [Mich.] 15 Det. Leg. N. 688, 117 NW 548. Fact that lessor did not return key which lessee had left at his house, and inspected house when unoccupied to see if plumbing had been affected by weather, and permitted another to do so to determine its fitness for occupation, held not inconsistent with claim that he consider lease in force. Chandler v. Hinds, 135 Wis. 43, 115 NW 339. At lessee's request, lessor procured subtenant and notified lessee that she would rent it and store lessee's furniture in basement. Lessee's wife answered that she would release the lease if lessor would pack and store furniture in certain warehouse, which lessor refused to do, and notified lessee that he would be held liable. Lessee had furniture moved out and left keys with janitor or in hallway. Held not to show surrender. Obendorfer v. Mecham, 110 NYS 340. Acceptance by a landlord of the surrender of leased premises is not shown by testimony that the agent of the landlord called upon the lessee for the keys, saying, "I want to take somebody up there to show them the place," when the only testimony as to anything further said by the agent at that or any other time was that he refused to accept the premises and insisted on holding the lessee for the rent for the remainder of the term of the lease. Becker v. Shoemaker, 7 Ohio N. P. (N. S.) 272.

**For jury:** Whether lessor took possession and occupied premises on their surrender held on conflicting evidence for jury. Stott v. Chamberlain [S. D.] 114 NW 683.

**NOTE. Respective rights of parties when tenant abandons leased premises:** A lessee cannot exonerate himself from liability under his lease by an abandonment or surrender of the premises. Bonetti v. Treat, 91 Cal. 223, 27 P 612, 14 L. R. A. 151; Lockwood v. Lockwood, 22 Conn. 425; Alschuler v. Schiff, 59 Ill. App. 51; Reynolds v. Swain, 13 La. Ann. 193; Prentiss v. Warne, 10 Mo. 601; Livermore v. Eddy's Admr., 33 Mo. 547; Greene v. Waggoner, 2 Hilt. [N. Y.] 297; Scheelky v. Koch, 119 N. C. 80, 25 SE 713; Barlow v. Wainwright, 22 Vt. 88, 52 Am. Dec. 79. Except where the lessor accepts the surrender. Buckingham Apartment House Co. v. Dafoe, 78 Minn. 268, 80 NW 974; Elliott v. Aiken, 45 N. H. 30; Stotesbury v. Vail, 13 N. J. Eq. 390; Teller v. Boyle, 132 Pa. 56, 18 A 1069. An express agreement to accept the surrender need not be shown, for the assent of the landlord may be implied by operation of law from the manner in which he uses the property after its abandonment by the tenant. Hays v. Goldman, 71 Ark. 251, 72 SW 563; Buckingham Apartment House Co. v. Dafoe, 78 Minn. 268, 80 NW 974; Meeker v. Spalsbury, 66 N. J. Law, 60, 48 A 1026; Miller v. Dennis, 68 N. J. Law, 320, 53 A 394; Stern v. Thayer, 56 Minn. 93, 57 NW 329.

If a landlord, after the abandonment, takes possession without indicating to the tenant an intention to hold him for the rent, or to lease on his account, he thereby, as a general rule accepts the abandonment, and releases the tenant from further obligation. Rice v. Dudley, 65 Ala. 68; Williamson v. Crossett, 62 Ark. 393, 36 SW 27; Williams v. Vanderbilt, 145 Ill. 238, 34 NE 476, 36 Am. St. Rep. 486, 21 L. R. A. 489; Armour Packing Co. v. Des Moines Pork Co., 116 Iowa, 723, 89 NW 196, 93 Am. St. Rep. 270; Kneeland v. Schmidt, 78 Wis. 345, 47 NW 438, 11 L. R. A. 498; Lamson Consol. Store Service Co. v. Bowland, 52 C. C. A. 335, 114 F 639; Watson v. Merrill, 136 F 359, 69 L. R. A. 719. The only liability of the tenant, in such a case, is upon the covenants in the lease, if any, which survive reentry. Vogel v. Piper, 89 NYS 431, 42 Am. Rep. 303. However, the mere fact that the landlord resumes possession, or puts others in possession, temporarily, without rent (Hays v. Goldman, 71 Ark. 251, 72 SW 563; Way v. Myers, 64 Ga. 760; Hardison Whisky Co. v. Lewis, 114 Ga. 602, 40 SE 702; Joslin v. McLean, 99 Mich. 480, 58 NW 467), or advertises the abandoned premises for sale and offers immediate possession to the purchaser, does not show an acceptance of the surrender (Reeves v. McComesky, 168 Pa. 571, 32 A 96).

When a tenant abandons, the landlord may enter to care for the property (Hays v. Goldman, 71 Ark. 251, 72 SW 563; Bowen v. Clarke, 22 Or. 566, 30 P 430, 29 Am. St. Rep. 625), clean the windows (Milling v. Becker, 96 Pa. 182), or to make repairs (Biggs v. Stueler, 93 Md. 100, 48 A 727; Livermore v.

Eddy's Admr., 33 Mo. 547; Buck v. Lewis, 46 Mo. App. 227; Whitman v. Louten, 3 NYS 754; Breuckman v. Twibill, 89 Pa. 58; Texas Loan Agency v. Fleming, 92 Tex. 458, 49 SW 1039, 44 L. R. A. 279), without necessarily thereby accepting the surrender. But if he makes extensive alterations, beyond any necessity for the preservation of the property, such acts will usually be construed as an acceptance of the surrender. Lafferty v. Hawes, 63 Minn. 13, 65 NW 87; Duffy v. Day, 42 Mo. App. 638; Meeker v. Spalsbury [N. Y.] 66 N. J. Law, 60, 48 A 1026; McKellar v. Sigler, 47 How. Pr. 2.

In case a landlord receives the keys and retains them, this is a circumstance which may tend to show an acceptance of the surrender, and with other acts may be conclusive thereof. Ledsinger v. Burke, 113 Ga. 74, 38 SE 313; Hesseltine v. Seacy, 16 Me. 212; Buckingham Apartment House Co. v. Dafoe, 78 Minn. 268, 80 NW 974; Elliott v. Aiken, 45 N. H. 30. However, the fact that the landlord or his agent retains the key when sent or delivered to him by the tenant does not alone show an acceptance of the surrender. Withers v. Larrabee, 48 Me. 570; Biggs v. Stueler, 93 Md. 100, 48 A 727; Scott v. Beecher, 91 Mich. 590, 52 NW 20; Steketee v. Pratt, 122 Mich. 80, 80 NW 989; Lucy v. Wilkins, 33 Minn. 441, 23 NW 861; Blake v. Dick, 15 Mont. 236, 38 P 1072, 48 Am. St. Rep. 671; Landt v. Schneider, 31 Mont. 15, 77 P 307; Ryan v. Jones, 2 Misc. 65, 20 NYS 842; Ladd v. Smith, 6 Or. 316; Bowen v. Clarke, 22 Or. 566, 30 P 430, 29 Am. St. Rep. 625; Milling v. Becker, 96 Pa. 182; Newton v. Speare Laundering Co., 19 R. I. 546, 37 A 11. Where a tenant moves away and sends the keys to the landlord in a letter, his retention of them does not establish an acceptance of the tenant's abandonment (Thomas v. Nelson, 69 N. Y. 118), nor does the mere fact that a landlord picks up the key from his doorstep, where the tenant has thrown it, and keeps it (Diehl v. Lee [Pa.] 9 A 865). Where a lessee undertakes to surrender the premises, but the lessor refuses the key, the fact that he afterwards takes the key from a place where the lessee left it, is, in itself, of no significance. Long v. Stafford, 103 N. Y. 274, 8 NE 522. And if a landlord accepts the key, stating that he received it but not the premises, this will not be deemed an acceptance of the surrender. Townsend v. Albers, 3 E. D. Smith [N. Y.] 560.

When a tenant abandons the demised premises, the landlord is not bound to relet them to others in order to diminish his loss. Schuisler v. Ames, 16 Ala. 73, 50 Am. Dec. 168; Patterson v. Emerich, 21 Ind. App. 614, 52 NE 1012; Merrill v. Willis, 51 Neb. 162, 70 NW 914; Reich v. McCrea, 59 Hun, 625, 13 NYS 650; Clendinning v. Lindner, 9 Misc. 682, 30 NYS 543; Bowen v. Clarke, 22 Or. 566, 30 P 403, 29 Am. St. Rep. 625; Racke v. Anheuser-Busch Brew. Assn., 17 Tex. Civ. App. 167, 42 SW 774.

Nevertheless, it is generally conceded that a landlord may attempt to relet abandoned premises (Gaines v. McAdam, 79 Ill. App. 201; Vincent v. Frelich, 50 La. Ann. 378, 23 S 373, 69 Am. St. Rep. 436; Scott v. Beecher, 91 Mich. 590, 52 NW 20; Joslin v. McLean, 99 Mich. 480, 58 NW 467; Spies v. Voss, 16 Daly, 171, 9 NYS 532; Dorrance v. Bonesteel, 51 App. Div. 129, 64 NYS 307; Lane v. Nelson, 167 Pa. 602, 31 A 864), or actually relet them (Miller v. Benton, 55 Conn. 529, 13 A 678; Brown v. Cairns, 107 Iowa, 727, 77 NW 478; Brown v. Cairns, 63 Kan. 584, 66 P 639; Biggs v. Stueler, 93 Md. 100, 48 A 727; Winant v. Hines, 14 Daly [N. Y.] 187; Rich v. Doyne, 85 Hun, 510, 33 NYS 341), without necessarily accepting the surrender of the tenant. The rule as stated by some authorities is that the landlord may re-enter and relet the premises to others for the benefit or on the account of the tenant, crediting him with the proceeds. Hays v. Goldman, 71 Ark. 251, 72 SW 563; Humiston, Keeling & Co. v. Wheeler, 175 Ill. 514, 51 NE 893; Marshall v. John Grosse Clothing Co., 184 Ill. 421, 56 NE 807, 75 Am. St. Rep. 181; Brown v. Cairns, 107 Iowa, 727, 77 NW 478; Roumage v. Blatrier, 11 Rob. [La.] 101; Stewart v. Sprague, 71 Mich. 50, 38 NW 673; Doolittle v. Selkirk, 7 Misc. 722, 28 NYS 43. Having thus relet the premises, the landlord may recover as damages the difference between the rent received and what he would have received, but no more. Respini v. Porta, 89 Cal. 464, 26 P 967, 23 Am. St. Rep. 488; Minneapolis Baseball Co. v. City Bank, 74 Minn. 98, 76 NW 1024; Alsup v. Banks, 68 Miss. 664, 9 S 895, 24 Am. St. Rep. 294, 13 L. R. A. 598; Whitman v. Louten, 3 NYS 754; Auer v. Penn, 99 Pa. 370, 44 Am. Rep. 114; Dulin v. Knechtel [Tex. Civ. App.] 51 SW 350. Of course if the lessor accepts the surrender, he has no claim for diminished rents thereafter. Everett v. Williamson, 107 N. C. 204, 12 SE 187.

In case the landlord resumes possession and relets, or attempts to relet, on his own account, or under such circumstances that it is fair to assume that he does not intend to look to the tenant for the rent, he thus accepts the surrender and relieves the tenant from his obligation. Hays v. Goldman, 71 Ark. 251, 72 SW 563; Welcome v. Hess, 90 Cal. 507, 27 P 369, 25 Am. St. Rep. 145; In re Mahler, 105 F 428; Ledsinger v. Burke, 113 Ga. 74, 38 SE 313; Palmer v. Myers, 79 Ill. App. 409; Biggs v. Stueler, 93 Md. 100, 48 A 727; Duffy v. Day, 42 Mo. App. 638; Huling v. Roll, 43 Mo. App. 234; Sherman v. Engel, 18 Misc. 484, 41 NYS 959; Barkley v. McCue, 25 Misc. 738, 55 NYS 608; Crane v. Edwards, 80 App. Div. 333, 80 NYS 747; Gutman v. Conway, 45 Misc. 363, 90 NYS 290; Gray v. Kaufman Dairy & Ice Cream Co., 162 N. Y. 388, 56 NE 903, 76 Am. St. Rep. 327, 49 L. R. A. 580; White v. Berry, 24 R. I. 74, 52 A 682; Pelton v. Place, 71 Vt. 430, 46 A 63. Some authorities take the ground that if a lessor relets the abandoned premises without the consent of the lessee, or without an agreement, express or implied, with him, that a reletting may be made, then he will be held to have accepted the surrender and to have released the lessee from further liability. Underhill v. Collins, 132 N. Y. 269, 30 NE 576; Gaffney v. Paul, 29 Misc. 642, 61 NYS 173.

This question is raised in the recent case of Oldewurtle v. Wiesenfeld, 97 Md. 165, 54 A 969, where the court decides that a landlord does not necessarily accept a surrender by re-renting the premises without the assent of the tenant. The following is an extract from the opinion: "The best approved cases hold that, where a tenant repudiates the lease, and abandons the demised premises, and the lessor enters and relets the property, such re-renting does not relieve the tenant from the payment of the rent under the covenants of the lease. Auer v. Penn, 99 Pa. 370, 44 Am. Rep. 114; Meyer v. Smith, 33 Ark. 627; Bloomer v. Merrill, 1

leasing to a third party.[79] An unauthorized acceptance of a surrender may be ratified by the landlord.[80] An unexecuted [81] parol agreement to surrender is within the statute of frauds.[82] Where the premises have been sublet, the subtenant becomes the tenant of the landlord upon a surrender.[83] One asserting a surrender has the burden of proof.[84]

An actual eviction exists where the lessee is physically deprived of the demised premises [85] without right,[86] and a constructive eviction where he is not physically expelled but his beneficial enjoyment is substantially interfered with.[87] A total

Daly [N. Y.] 485; Scott v. Beecher, 91 Mich. 590, 52 NW 20; Rich v. Doyenn, 85 Hun, 510, 33 NYS 341; Alsup v. Banks, 68 Miss. 664, 9 S 895, 24 Am. St. Rep. 294, 13 L. R. A. 598."

"The rule santioned by the decided weight of authority," to quote from the supreme court of Nebraska, "if indeed there can be said to be a diversity of opinion on the subject, is that the landlord may, at his election, relet the premises upon the abandonment thereof by the tenant, in which case the measure of his damage will be the agreed rental, less the amount realized on account of such reletting; or he may permit the premises to remain vacant until the end of the term, and recover his rent in accordance with the terms of the lease." Merrill v. Willis, 51 Neb. 162, 70 NW 914, approved in Brown v. Cairns, 63 Kan. 584, 66 P 639.

When a lessor tells the lessee to quit the premises, and the lessee does quit, and the lessor then takes possession himself, or accepts rent from another, such a change of possession by mutual agreement operates as a surrender of the lease. Boyd v. George 2 Neb. Unoff. 420, 89 NW 271. If a lease authorizes the lessor to re-enter and relet the premises in case they are vacated by the tenant, a surrender by operation of law does not occur when the lessee vacates the premises and the lessor re-enters and relets them. Grommes v. St. Paul Trust Co., 147 Ill. 634, 35 NE 820, 37 Am. St. Rep. 248; Jones v. Rushmore, 67 N. J. Law, 157, 50 A 587.

The mere receipt of rent by a landlord from an under-lessee does not evidence his assent to the abandonment of the demised premises by the original lessee, and is no proof of his acceptance of such under-lessee as a tenant. Decker v. Hartshorn, 60 N. J. Law, 548, 38 A 678. But when a new tenant has, by agreement with the landlord, been substituted and accepted in place of the old tenant, a surrender of the lease by operation of law arises. Bowen v. Haskell, 53 Minn. 480, 55 NW 629.—Adapted from 114 Am. St. Rep. 717.

**78.** Douglaston Realty Co. v. Hess, 124 App. Div. 508, 108 NYS 1036.

**79.** Void parol lease to third person held not to work a surrender by operation of law within Laws 1896, p. 592, c. 547, § 207. Rogge v. Levinson, 113 NYS 525.

**80.** Lessor's silence for two months and attempts to relet, held to show ratification of agency of janitress in accepting surrender. Feust v. Craig, 109 NYS 742.

**81.** Under Rev. Civ. Code, §§ 1283, 1287, written lease may be terminated by an oral executed agreement. Stott v. Chamberlain [S. D.] 114 NW 683. Payment under parol agreement to surrender upon payment of specified sum is not a partial performance. Longacre v. Longacre [Mo. App.] 111 SW 855.

**82.** Parol agreement to surrender at future date is within statute. Longacre v. Longacre [Mo. App.] 111 SW 855. Where in response to tenant's written request for release, lessor replied that he was unable to come to terms with the tenant they proposed and would look to them for rent, held no written surrender within Laws 1896, p. 592, c. 547, § 207. Rogge v. Levinson, 113 NYS 525.

**83.** Marino v. Williams [Nev.] 96 P 1073.

**84.** Lynch v. Robert P. Murphy Hotel Co., 112 NYS 915.

**85.** Jackson v. Paterno, 58 Misc. 201, 108 NYS 1073. Where lessor, while lessee is absent, breaks into premises to show same to prospective tenant, and thereafter places new lock on door and keeps key, held an eviction, though lease provided that lessor could enter to show premises. Lester v. Griffin, 57 Misc. 628, 108 NYS 580.

**86.** Chattel mortgage on goods on premises to secure performance of covenants empowering lessor to take possession to foreclose and to sell at public auction, held not to authorize lessor to take exclusive possession of premises and sell at retail, and such acts constitute eviction. Hall v. Middleby, 197 Mass. 485, 83 NE 1114. Entry to make repairs does not constitute eviction where authorized by lease. Kent v. Ward, 111 NYS 743.

**87.** Jackson v. Paterno, 58 Misc. 201, 108 NYS 1073; Fox v. Murdock, 58 Misc. 207, 109 NYS 108.

**Held eviction:** Where roof so leaked as to deprive lessee of beneficial enjoyment. Valentine v. Woods, 110 NYS 990. Letting of other apartments in building for immoral purposes, and failure to remove such disorderly persons. Cushman & Co. v. Thompson, 58 Misc. 539, 109 NYS 757. Where lessor's superintendent listened at switchboard or at telephone in her room when lessee's wire was in use, and made insulting and slanderous remarks to elevator boys concerning lessee, with lessor's knowledge. Fox v. Murdock, 58 Misc. 207, 109 NYS 108.

**No eviction:** Insulting and slanderous remarks of lessor's servants unknown to lessee. Fox v. Murdock, 58 Misc. 207, 109 NYS 108. Landlord's refusal to assent to reasonable alterations in violation of lease. Whitcomb v. Brant [N. J. Law] 69 A 1086. Fact that tenant in overhead apartment kept dog which barked and howled when left alone, where lessor was not responsible for it or knew of it. McKinny v. Browning, 110 NYS 562. Evidence insufficient to show whether defect in bowl in toilet was due alone to plumbing in lessee's department, or whether unsanitary condition was due to want of repairs in general plumbing. Goldberg v. Lloyd, 110 NYS 530. In absence of fraud or deceit or covenant by lessor to

eviction occurs where the tenant is deprived of the entire premises, and a partial where he is evicted from only a part thereof.[88] A breach of the landlord's covenant to heat,[89] to furnish elevator service,[90] or to repair,[91] constitutes constructive eviction where the tenant's beneficial enjoyment of the premises is materially diminished. A failure to repair [92] or to furnish heat or water [93] is not an eviction where the duty so to do does not rest upon the lessor, but upon the tenant.[94] An eviction may be waived,[95] and, where the tenant has been constructively evicted he must promptly abandon the premises.[96] Where a tenant has been evicted, no duty rests upon him to demand restoration.[97]

keep premises free, existence of vermin does not constitute eviction. Jacobs v. Morand, 110 NYS 208. Constructive eviction cannot be predicated upon the acts of other tenants where lessor is no way responsible therefore and especially where no complaint has been made to him. French v. Pettingill, 128 Mo. App. 156, 106 SW 575. Where lessor has authority to enter to make repairs and lessee has agreed to leave property in as good condition as reasonable use and wear will permit held that entry by lessor to nail boards over broken windows after subtenant had vacated did not constitute constructive eviction. Mahoney v. Broadway Brew. & Malting Co., 57 Misc. 430, 108 NYS 237. Where lease requires lessor's consent to alterations, refusal to consent to unreasonable alterations does not constitute eviction, especially where not necessary for leased purposes. Whitcomb v. Brant [N. J. Law] 68 A 1102. Failure of lessor to keep gas heater in bath room in repair held not as a matter of law constructive eviction of a tenant of rooms in house. Johnson v. Tucker, 136 Wis. 505, 117 NW 1002. Held proper to submit issue by submitting question "Was defendant evicted from leased premises" instead of submitting question whether gas heater was out of repair. Id. Where there is no interference with the possession, but merely a consent to an underletting given pursuant to a request on the behalf of the tenant, it does not constitute eviction. Cafe Lakota v. Doyle, 140 Ill. App. 448. Unauthorized acts of other tenants and of adjoining owners, without evidence of intent of landlord, to deprive use of premises. John Anisfield Co. v. Covey, 140 Ill. App. 364.

**88.** Jackson v. Paterno, 58 Misc. 201, 108 NYS 1073. Where lessee of second floor of loft building was deprived of entrance when business required held partial eviction. Lawrence v. Edwin A. Denham Co., 58 Misc. 543, 109 NYS 752. Where premises were partly rendered uninhabitable by stranger, refusal of lessor to allow repairs to be made held partial eviction. Bergman v. Papia, 58 Misc. 533, 109 NYS 856.

**89.** Furnished inadequate heat. Jackson v. Paterno, 58 Misc. 201, 108 NYS 1073. Where lease contained no express covenant to heat but contained covenant of quiet enjoyment and obligated lessor to repair radiators and steam fittings, held for jury whether lessor impliedly agreed to heat. Graham v. Grape Capsule Co., 113 NYS 103.

**90.** Held for jury whether lessor agreed to operate elevator day and night and whether it had been stopped for repairs and unreasonable time. Boschardt v. Scott, 110 NYS 243.

**91.** Viehman v. Boelter [Minn.] 116 NW 1023. Evidence of nonperformance of condition in lease to make certain improvements and keep premises in sanitary condition held insufficient to warrant a cancellation. Merrill v. Hexter [Or.] 94 P 972.

**92.** Falling of plaster on ceiling in kitchen and loosening in other rooms, held not constructive eviction where lessor did not convenant that premises were fit for occupancy and lessee agreed to repair. Pollak v. Stolzenberg, 110 NYS 224. Evidence that plumbing became defective without proof that it was lessor's duty to repair or that premises were rendered untenantable thereby does not show constructive conviction. Huggins v. Jasper [Mo. App.] 114 SW 545.

**93.** Evidence not showing lessor's duty to furnish hot water or how long same was shut off held insufficient to show constructive eviction. Cukor v. Wiener, 110 NYS 249.

**94.** Constructive eviction cannot be predicated upon defective plumbing where lessee agreed to make all repairs. La Roche v. Mulhall, 112 NYS 1115.

**95.** Remaining in possession until repairs are made waives constructive eviction. Goldberg v. Lloyd, 110 NYS 530. Payment of rent at conclusion of summary dispossession proceedings in which he had been defeated, on trial judge denying stay, held involuntary and not waiver of eviction. Lawrence v. Edwin A. Denham Co., 58 Misc. 543, 109 NYS 752. Though lessor refused to consent to reasonable alterations, tenant cannot remain in possession and refuse to pay rent, his action being for damages, if any. Whitcomb v. Brant [N. J. Law] 68 A 1102. Where lessee remained in possession for six months, he cannot claim constructive eviction on account of odors arising from restaurant underneath apartments. Kent v. Ward, 111 NYS 743. Constructive eviction cannot be predicated on odors or noise arising from restaurant under apartments, where such restaurant was known to exist at time of leasing. Id.

**96.** Promptitude of lessee's removal upon learning of misconduct of lessor's superintendent held for jury. Fox v. Murdock, 58 Misc. 207, 109 NYS 108. Lessee rented premises knowing that a cafe was being operated in another part thereof, which was used by a club, the members of which used it late at night and were sometimes drunk and boisterous. Lessee, however, was not disturbed but the reputation of the place hurt her vocation as music teacher. Held that, where she remained in possession for several months and had improvements made and made no complaint, she could not claim constructive eviction. French v. Pettingill, 128 Mo. App. 156, 106 SW 575.

**97.** Lester v. Griffin, 57 Misc. 628, 108 NYS 580.

*Forfeitures.*[See 10 C. L. 590]—While forfeitures are not favored, they will be enforced according to the terms of the lease [98] unless waived.[99] Nonpayment of rent on the day due is frequently made a ground of forfeiture,[1] but, where the lessor has customarily permitted the lessee to pay at a later date without objection, he cannot declare a forfeiture without giving the lessee notice that rent must be paid when due.[2] A court of equity will not declare the forfeiture of a lease for default in payment of rent where the rent may be recovered by enforcing the lien,[3] and where the covenant to pay goes only to part of the consideration, and a breach of the covenant can be compensated in damages, the defendant cannot rely on the covenant as a condition precedent but must perform the covenant on his part and then rely on a suit for damages for breach by the other.[4] Forfeiture will not be decreed for breach of an independent covenant of the lessee, severable from the leasing.[5] A mere unlawful sale of liquors on the premises is no ground for forfeiture.[6] A forfeiture cannot be asserted by a stranger to the lease.[7] The lessor must act promptly upon learning of facts authorizing forfeiture [8] and must follow the procedure prescribed by the lease.[9] Express provisions as to the rights of the parties upon a forfeiture will be given effect,[10] but ordinarily no recovery can be had for rendering the premises uninhabitable after a forfeiture has been duly declared.[11] Equity will relieve from a forfeiture brought about by mistake or fraud,[12] where no adequate remedy exists at law.[13]

**98.** Where lease provides that breach of any condition should terminate same and give right of re-entry, subletting without lessor's consent contrary to lease, ipso facto, terminates lease. Walther v. Anderson [Tex. Civ. App.] 114 SW 414. Lessee held not to have forfeited his lease by violating covenant as to selling lessor's beer. Standard Brew. Co. v. Anderson, 121 La. 935, 46 S 926.

**99.** Acceptance of rent after known forfeiture waives forfeiture. In re Montello Brick Works, 163 F 624. Where notice of forfeiture was duly given and lessee immediately began to look for another building and moved as soon as he found one, mere fact that he did not pay double rent as per lease held not to show waiver of forfeiture or a new releasing, especially where lessee recognized liability for double rent but excused payment until a certain indebtedness against lessor could be adjusted. Baxter v. Heimann [Mo. App.] 113 SW 1152.

**1.** Tender to lessor who has agreed to sell premises but by stipulation had right to receive rents and profits at time of tender is good and prevents forfeiture. Pheasant v. Hanna, 63 W. Va. 613, 60 SE 618.

**2.** Standard Brew. Co. v. Anderson, 121 La. 935, 46 S 926.

**3.** Where payment of rent due was made by lessee, lessor's cestui qui trust could not be heard to object because forfeiture had not been declared. Patterson v. Northern Trust Co., 132 Ill. App. 208.

**4.** Consideration for tenant's covenant to pay rent were demise of premises and agreement to install ventilating plant. On landlord's failure to install plant, tenant refused to pay rent but retained possession. Held, on his bill for injunction to prevent landlord to distrain for rent, that he had no standing in equity. White v. Y. M. C. A., 137 Ill. App. 286.

**5.** Covenant forbidding lessees to use or sell any beer not manufactured by a certain company not a condition subsequent. Fortune Bros. Brew. Co. v. Shields, 137 Ill. App. 77.

**6.** Commonwealth v. Morris, 33 Ky. L. R. 987, 112 SW 580.

**7.** One in adverse possession. St. Vincent's Roman Catholic Congregation of Plymouth v. Kingston Coal Co., 221 Pa. 349, 70 A 838.

**8.** Cannot declare forfeiture for assignment of lease without consent, where assignee is led to believe that consent will be given and is permitted to make valuable improvements. Powers Shoe Co. v. Odd Fellows Hall Co. [Mo. App.] 113 SW 253.

**9.** Where lease provided that forfeiture should be made by notice in writing, such notice was sufficient without entry. Baxter v. Heimann [Mo. App.] 113 SW 1152.

**10.** Where lease provided that no action of trespass or the like should be brought in case lessor forcibly dispossessed lessee under terms of lease, lessee is estopped from claiming damages from shutting off heat after he had terminated lease. Howe v. Frith [Colo.] 95 P 603.

**11.** No recovery can be had for shutting off of heat after default of rent and notice to vacate. Howe v. Frith [Colo.] 95 P 603. Fact that lessor is prevented by injunction from recovering possession after forfeiture does not affect rule that after forfeiture no damages can be recovered for rendering premises uninhabitable or express waiver of any right of action for such trespass. Id.

**12.** Powers Shoe Co. v. Odd Fellows Hall Co. [Mo. App.] 113 SW 253. Where at time application for assent to assignment was made lessor had determined not to give same but opened up negotiations and led assignee to make valuable improvements, etc., held that forfeiture was fraudulent and equity would grant relief. Id. Where complaint in petition to enjoin forfeiture admits facts which authorized forfeiture but assails validity of declaration of forfeiture on ground that lessee was led into doing the forfeiting acts by lessor's fraud, it is sufficient without allegation that term was in fact forfeited. Id.

**13.** Where lessor was not only estopped to declare forfeiture because of his fraud but lessee was entitled to have term reinstated,

*Notice to vacate and demand of possession.*[See 10 C. L. 581]—While no notice is necessary to terminate a tenancy for a fixed term,[14] it is usually required where the term is of indefinite duration,[15] or a periodic tenancy,[16] though lessee may by terms of a lease waive all rights to notice of lessors election to declare a lease at an end.[17] It must be given by the lessor or by some one on his behalf,[18] must be of the statutory length,[19] must require surrender at the end of a rent paying period,[20] and must be served in the prescribed manner.[21] A notice is waived by the giving of another notice fixing a later date,[22] or by accepting rent for a period beyond the date of surrender.[23] Where the tenant claims under a lease which the landlord contends to be void, no notice is necessary.[24]

*Renewal under express agreement.*[See 10 C. L. 582]—Option to renew is frequently given to the lessee,[25] and such privilege runs with the land.[26] A covenant for renewal not binding on the heirs of the parties is not void as creating a perpetuity.[27] A covenant authorizing a renewal under the same terms renews all the covenants when exercised [28] except the covenant of renewal,[29] which is not renewed unless such clearly appears to have been the intention of the parties.[30] Where the right is contingent, such contingency must have happened.[31] The option must be exercised in

lessee's remedy of pleading estopped in lessor's suit to recover possession is not adequate. Powers Shoe Co. v. Odd Fellows Hall Co. [Mo. App.] 113 SW 253.

14. Agreement by tenant at will to surrender at future date does not create a new term lease. Longacre v. Longacre [Mo. App.] 111 SW 855.

15. Where tenant occupied premises under agreement that he could remain for one month or until tenement house department served notice requiring his removal, held tenancy for indefinite term, entitling tenant to a month's notice to quit. Rybicki v. Kalish, 58 Misc. 219, 108 NYS 1001. Tenancy at will can only be terminated by notice to quit. Longacre v. Longacre [Mo. App.] 111 SW 855. Lease to another to commence on July 1st, notice whereof was given to tenant on June 6th, held to render him a tenant by sufferance after July 1st, notwithstanding Rev. Laws, c. 129, § 12. Mentzer v. Hudson Sav. Bank, 197 Mass. 325, 83 NE 1102.

16. Under the Illinois statute, a thirty days' notice is required to terminate a tenancy from month to month. Rev. Stats. ch. 80, §§ 6 and 8. Golden v. Menker, 132 Ill. App. 25.

17. Sherman House Hotel Co. v. Cirkle, 136 Ill. App. 381.

18. Notice required by St. 1898, § 2183, to terminate a tenancy at will or at sufferance need not be given by landlord personally but may be given by another in his behalf. State v. Hilgendorf, 136 Wis. 21, 116 NW 848.

19. Notice of about 10 days held insufficient as to length of time, under Code 1896, § 2127. Speer v. Smoot [Ala.] 47 S 256. Under Rev. St. 1899, § 4109 (Ann. St. 1906, p. 2234), tenancy from year to year can only be terminated by 60 days' notice. Womack v. Jenkins, 128 Mo. App. 408, 107 SW 423. Thirty days' notice is necessary to terminate a tenancy from month to month. Schneider & Co. v. Amendola, 113 NYS 517. Five days' notice is necessary to terminate monthly tenancy. Id. Notice to quit on July 1st given on May 9th to tenant at will paying monthly rent held sufficient under Rev. Laws c. 129, § 12, authorizing notice equal to rent paying period. Mentzer v. Hudson Sav. Bank, 197 Mass. 325, 83 NE 1102.

20. Reck v. Caulfield [Ky.] 112 SW 843.

21. Allegation of service of notice on tenant's wife held sufficient under St. 1898, § 2184, authorizing service upon anyone of proper age residing on the premises, since it could be reasonably inferred that she was of proper age. State v. Hilgendorf, 136 Wis. 21, 116 NW 848. Defective service is waived where, in dispossession proceedings, lessee did not except to proof of such service and did not include defect as one of the grounds in motion to dismiss. J. H. Schnieder & Co. v. Amendola, 113 NYS 517.

22. Reck v. Caulfield [Ky.] 112 SW 843.

23. Speer v. Smoot [Ala.] 47 S 256.

24. Waldo v. Jacobs, 152 Mich. 425, 15 Det. Leg. N. 316, 116 NW 371.

25. Marino v. Williams [Nev.] 96 P 1073.

26. Leominster Gaslight Co. v. Hillery, 197 Mass. 267, 83 NE 870. Where lessor joined in lease to subtenant with privilege of renewal, subtenant may enforce renewal against lessor and his successor in interest. Marino v. Williams [Nev.] 96 P 1073.

27. Hudgins v. Bowes [Tex. Civ. App.] 110 SW 178.

28. Option to purchase. Pflum v. Spencer, 123 App. Div. 742, 108 NYS 344. Where lease provided for renewal on same terms if lessees signified acceptance in writing, etc., lessee held term under original lease and not under the notice. Wiener v. Graff & Co. [Cal. App.] 95 P 167.

29. Drake v. St. Louis Board of Education, 208 Mo. 540, 106 SW 650. Provision that "every renewal lease shall contain all the covenants * * * herein contained," etc., held to provide for one renewal only. Id.

30. Drake v. St. Louis Board of Education, 208 Mo. 540, 106 SW 650. Where lease for year gives right to renew same for like period on same terms and thereafter from year to year, right to renew is not exhausted by one renewal. Van Beuren & New York Bill Post Co. v. Kenney & Sullivan Advertising Co., 113 NYS 450.

31. Provision for renewal so long as premises are used for advertising purposes held to refer only to premises leased for such pur-

the prescribed manner,[32] unless waived,[33] which is usual by notice. Ordinarily, any notice which apprises the landlord of the tenant's intention to renew is sufficient.[34] Where the lease provides for an extension of the term as distinguished from a renewal, at the option of the lessee, a holding over is a sufficient election.[35] Where the lessee has the privilege of renewing at a rental to be fixed by appraisers, joining in the appointment of the appraisers is not an election.[36] Unless the lease so provides, the renewal must be as to the entire premises.[37] Where the lessor wrongfully refuses to renew, the measure of damages is the difference in the rental value and rent reserved for the full term.[38]

*Holding over without express agreement.* See 10 C. L. 593— While the effect of holding over [39] is fixed by statute in some states,[40] at common law a tenant for a year or a shorter term on holding over could be treated as a trespasser or as a tenant for a similar term [41] at the election of the landlord,[42] unless he has been misled,[43] a new agreement has been made,[44] or unless negotiations are pending,[45] and the lessor has

pose and not to entire property. Van Buren & New York Bill Post Co. v. Kenney & Sullivan Advertising Co., 113 NYS 450. Where lessor usually gave notice of rent accruing and customarily accepted rent a few days after due without objection, he could not refuse renewal on ground of nonpayment of rent due at expiration of lease where no notice was given and where lessee promptly paid same on being notified that she had lost right of renewal. Montant v. Moore, 113 NYS 43.

**32.** Where lease provides for a renewal, a new lease is unnecessary to bind parties. Mattlage v. McGuire, 111 NYS 1083. Where lease gives lessee absolute right of renewal upon notice, notice of itself constitutes a renewal. Chittenden v. Western Union Tel. Co. [Mich.] 15 Det. Leg. N. 688, 117 NW 548. Lease providing for 60 days' notice of intention to renew and that if lessor or her husband "die during said 60 days before expiration of term" granted, etc., held to contemplate that 60 days' notice of intention to renew should run during last 60 days of term. Pflum v. Spencer, 123 App. Div. 742, 108 NYS 344. Where lease provided for a further lease at increase rental, on notice of tenant that he desired to continue lease, and tenant after giving notice continued in possession, held to bind parties. Mattlage v. McGuire, 111 NYS 1083.

**33.** Joining by lessor in appointment of appraisers to fix rent two days after expiration of lease held to waive failure of lessee to give notice of election to renew and that request for appraisers was untimely. Marino v. Williams [Nev.] 96 P 1073. Where lessee claims a renewal and lessor accepts rent, held that both are bound. Chittenden v. Western Union Tel. Co. [Mich.] 15 Det. Leg. N. 688, 117 NW 548.

**34.** Where lease entitled lessees to renewal provided they "signified" their acceptance in writing on or before certain date, any notice in writing sufficient to enable lessor to hold them is sufficient to renew. Wiener v. Graff & Co. [Cal. App.] 95 P 167. Letter enclosed in lessee firm's business envelope, on firm's paper, reciting description of lease, and stating that H. Groff & Co. as lessee firm "elects to avail itself of renewal privilege," etc., held sufficient though not signed. Id.

**35.** Quinn v. Valiquette, 80 Vt. 434, 68 A 515.

**36.** But lessee may decline to renew if rent is deemed too high. Marino v. Williams [Nev.] 96 P 1073.

**37.** Assignee or subtenant of part cannot renew. Marino v. Williams [Nev.] 96 P 1073.

**38.** Though property is taken under eminent domain where lessee would be entitled to compensation for eviction. Niederstein v. v. Cusick, 110 NYS 287. But where lessee holds possession by holding over, such time should be deducted (Id.), but not time occupied after condemnation (Id.).

**39.** Leaving of furniture in apartments upon unauthorized permit of janitor held a holding over. McMann v. Bloomer, 107 NYS 882. Evidence of bales of paper and other boxes and retention of keys for 14 days held to show holding over. Fitzgerald v. St. George, 110 NYS 971. Where lessee of roof for advertising purposes left bulletin board at expiration of term, held a holding over, notwithstanding notice of intention to vacate. United Merchants' Realty & Imp. Co. v. New York Hippodrome, 113 NYS 740. Holding over of subtenant is holding over by tenant. Ventura Hotel Co. v. Pabst Brew. Co., 33 Ky. L. R. 149, 109 SW 354.

**40.** Though Gen. St. 1902, § 4043, provides that holding over shall not alone be evidence of agreement for further lease, tenancy under such circumstances may be shown by supplemental proof of oral agreement. Griswold v. Branford, 80 Conn. 453, 68 A 987.

**41.** Gifford v. Bingham [Ind. App.] 84 NE 1099; Leggett v. Louisiana Purchase Exposition Co. [Mo. App.] 114 SW 92. Tenant from year to year holding over becomes a tenant for another year. Griswold v. Branford, 80 Conn. 453, 68 A 987; Kelly v. Armstrong, 139 Ill. App. 467. Liable though he vacated. Harnett v. Korscherak, 110 NYS 986. Tenancies from year to year by implication are results of judicial legislation as a measure of equity. Griswold v. Branford, 80 Conn. 453, 68 A 987.

**42.** Bringing of action for rent on book account where no rent was sought for occupancy after end of second year held not an election to renew for another year. Felton v. Chellis [Vt.] 69 A 149.

**43.** To believe that he will not be held for such period. Leggett v. Louisiana Purchase Exposition Co. [Mo. App.] 114 SW 92.

**44.** Leggett v. Louisiana Purchase Co. [Mo. App.] 114 SW 92.

**45.** Where lease had been sent to lessee for approval and subsequent letter of lessor

consented to a retention of possession until the conclusion thereof.[46] Holding over after the expiration of the tenancy does not vest in the tenant any new right or operate to extend his term.[47] In New York a tenant whose term is to commence immediately upon the termination of an existing lease has the same rights as the landlord.[48] Where a tenant is served with notice that if he holds over an increased rent will be charged and he does not dissent,[49] a holding over renders him liable therefor.[50] In some states a tenant holding over is liable for double damages unless he acts in good faith and under the belief that he is entitled to possession.[51] Service of a demand for possession of the premises is not a condition precedent to recovery of double rent under the Illinois statute, making tenant unlawfully holding over liable for double rent,[52] and an action may be maintained although the landlord has sublet the premises but is prevented from giving possession by reason of the hold-over.[53] A subtenant who holds for a fixed term of one month only acquires, by holding over after the expiration of the term, no greater rights than the lessee had.[54]

§ 9. *Landlord's remedies for recovery of rent and advancements.* See 10 C. L. 594—Where the payment of rent is secured by a bond [55] or by a deposit,[56] the rights of the parties thereunder are controlled by their agreement. Where the lessee is disposing of the crop with the intent of avoiding payment of rent,[57] or to an extent that will impair the landlord's chances of recovery,[58] attachment may issue in some states.

shows that he was still willing that lessee should accept, held error to submit to jury question whether negotiations were closed by failure to accept within reasonable time. Leggett v. Louisiana Purchase Exposition Co. [Mo. App.] 114 SW 92. Where lease was sent to lessee before expiration of term for approval and he had not responded, held that, if he had decided to reject same, then negotiations were ended, but if at expiration of term he intended to consider it further, then they were not. Id.

**46.** Leggett v. Lousiana Purchase Exposition Co. [Mo. App.] 114 SW 92.

**47.** George J. Cooke Co. v. Fitzgerald, 131 Ill. App. 133.

**48.** Under Real Property Law (Rev. St. [9th. Ed.] p. 3573), § 193, providing that grantee of leased property, or of reversion thereof, or of any rent, etc., has same remedies as grantor, lessee whose term commences immediately upon expiration of a current term may elect to hold such prior tenant for new term upon his holding over. United Merchants' Realty & Imp. Co. v. Roth [N. Y.] 86 NE 544.

**49.** Testimony of witness that lessee did not say anything evincing dissent when notified that he would be charged additional rent if he held over held to sustain finding of assent though witness could not tell what he did say. Williams v. Foss-Armstrong Hardware Co., 135 Wis. 280, 115 NW 803.

**50.** Williams v. Foss-Armstrong Hardware Co., 135 Wis. 280, 115 NW 803.

**51.** Tenant is not liable for double damages under St. 1903, § 2293, for holding over where he in good faith claimed possession under renewal lease of debatable validity. Aull v. Bowling Green Opera House Co. [Ky.] 114 SW 284. Where term had been terminated by sale of property and notice as provided in lease, and lessee held possession on untenantable ground that there was pending a perfected appeal from order of sale, plaintiff in unlawful detainer is entitled to recover value of use of property under Civ. Code, § 3334, and not merely treble amount of rent. Buhman v. Nickels & Brown Bros. [Cal. App.] 95 P 177. An action under the landlord and tenant act (R. S. c. 80, § 2), making a tenant willfully holding over after his term liable for double rent, is not barred by a prior recovery upon an appeal bond in a forcibe entry and detainer action for the same premises, when the sum claimed as damages under the statute exceeds the sum recovered on the appeal bond. Alexander v. Loeb, 133 Ill. App. 556.

**52.** R. S. c. 80, § 20. Alexander v. Loeb, 133 Ill. App. 556.

**53.** Where by terms of lease landlord was to make alterations before giving possession to new tenant, and was prevented from making such alterations by former tenant holding over, he was entitled to possession and double rent as against such former tenant. Alexander v. Loeb, 133 Ill. App. 556.

**54.** Fitzgerald v. George J. Cooke Co., 133 Ill. App. 479.

**55.** Bond conditioned on payment "of the rent in the above written agreement," lease for one year "with the privilege to renew" upon same terms and conditions, held not to cover rent, accruing under renewal. Kanouse v. Wise [N. J. Law] 69 A 1017.

**56.** Although deposit was "to be forfeited upon failure to comply with any of the covenants," where tenant was dispossessed and premises re-rented at loss of $16.66, held that lessee was entitled to balance. Tribble v. Danahar, 108 NYS 657.

**57.** Evidence of lessee avoiding discussion as to payment of rent and of his selling corn held to authorize issuing of attachment under Ky. St. 1903, § 2302. Clark v. Burton, 32 Ky. L. R. 559, 106 SW 823.

**58.** Where lessee abandoned premises and lessor attached crop for moneys due and harvested same, it is proper to determine issue of debt by actual realization from crop, but validity of attachment must be determined.

*Parties and procedure generally.*[See 10 C. L. 594]—The general rules of pleading apply.[50] In suit for rent lessee may set off the damages or additional expenditures incurred by him through failure of lessor to fulfill covenants of lease.[60] Rent is a necessary within a statute authorizing equitable process after judgment for necessaries.[61]

*Distress.*[See 10 C. L. 594]—Distress proceedings are usually started by affidavit[62] and directed against the person of the lessee,[63] though they are in fact against the movable property upon the premises without regard to ownership.[64] One serving a distress warrant cannot break into the house to make a levy.[65] The failure of the officers to give notice of the distress as required by the Mississippi statute is a ground for quashing the writ.[66] A counter affidavit is equivalent to an admission of ownership.[67] In the absence of notice an unrecorded lease of furniture is void as against a seizure under a distress warrant.[68] Distress warrants are amendable under the same rules as pleadings,[69] and, likewise, the general rules of pleading[70] and evidence[71] apply. Where goods are retaken by replevin, recovery can be had on the replevin bond only when the rent action has terminated in favor of the lessor,[72] in which case judgment may be rendered for full amount where it is admitted that value of goods exceeds rent due.[73] Injunction will issue to enjoin an unlawful distraint only when there is no other adequate remedy.[74]

*Liens and securities for the payment of rent and advancements.*[See 10 C. L. 595]—By agreement,[75] and by statute in some states, the landlord has a lien upon the crops and the property of the lessee on the premises.[76] In some states the liens are ex-

from fair market value of crop at time of attachment without regard to amount realized. Southern Orchard Planting Co. v. Turner [Ark.] 112 SW 956.

**59.** Under Rules of Court, pp. 44, 45, allowing contracts to be pleaded according to legal effect, recovery may be had under averment of parol lease for a year, though tenancy is one by implication of law arising from act of parties. Griswold v. Branford, 80 Conn. 453, 68 A 987.

**60.** Birtman Co. v. Thompson, 136 Ill. App. 621.

**61.** Rev. L. c. 168, § 80. Darrigan v. Williams, 198 Mass. 457, 84 NE 797.

**62.** Where person made out and signed paper in form of affidavit and procured a justice of the peace to attest it by signing jurat, but in fact no oath was taken or administered, held no lawful affidavit and insufficient to support distress warrant. Britt v. Davis, 130 Ga. 74, 60 SE 180.

**63.** Where lessor did not accept tenant's assignee as a substitute, distress warrant held to properly name original lessees as defendant. In re West Side Paper Co., 159 F 241.

**64.** In re West Side Paper Co., 159 F 241.

**65.** Jones v. Parker [S. C.] 62 SE 261.

**66.** Wright v. Craig [Miss.] 45 S 835.

**67.** Price v. Thompson [Ga. App.] 60 SE 800.

**68.** Simpson v. MacDonald, 79 S. C. 277, 60 SE 674.

**69.** Distress warrant for rent of a particular tract for year 1907 cannot be amended by substituting rent for different tracts due 1906 (Brinson v. Chandler [Ga. App.] 60 SE 805), although warrant need not specify particular premises out of which the rent arises or time when rent became due (Id.).

**70.** Replication of third party who has replevied property attached by the landlord for rent, in answer to latter's avowry, should not literally follow form given in Code 1906, § 2863, and deny indebtedness, but should raise issue of ownership. Wright v. Craig [Miss.] 45 S 835.

**71.** Where answer set up damages by way of reconvention for wrongful levy of distress on mules but showed that levy was proper, evidence of value of services of mules was properly refused. Dunlap v. Thresher [Tex. Civ. App.] 20 Tex. Ct. Rep. 568, 107 SW 83.

**72.** Even if independent action may be maintained upon replevy bond executed as a part of the defense to a distress warrant, under Civ. Code, 1895, § 4819, no recovery can be had unless it appears that rent action has terminated in favor of lessor. Gober v. Barry [Ga. App.] 60 SE 807.

**73.** Where personal property has been distrained and replevin terminates in favor of landlord, under Replevin Act, § 23, Gen. St. 1895, p. 2774, where plaintiff admits that value of goods distrained exceeded rent due, judgment for whole of arrearages is properly awarded. Whitcomb v. Brant [N. J. Law] 69 A 1086.

**74.** One whose goods have been distrained is improperly granted relief by injunction where complaint does not show that remedy provided by Civ. Code 1902, § 2435, for testing validity, etc., is not available. Evans v. Mayes [S. C.] 62 SE 207.

**75.** Mere stipulation that lessee will not sell crops without written consent of lessor does not give lien for rent. Ibbetson v. Pearson [Cal. App.] 94 P 252. Where lessor brings action to have it decreed that he has a lien on goods under his lease, makes an election and cannot thereafter abandon proceedings and treat matter as a pure chattel mortgage. Wilmore v. Mintz, 42 Colo. 328, 95 P 536.

**76.** Only property of lessee on premises is

tended to farm implements.[77] In such cases the use to which articles are put determines the right to a lien[78] for the rent due.[79] The statutory lien, however, extends only to so much as is necessary to secure him for the rent due[80] and is lost by a sale with his consent,[81] as the lien cannot attach to the proceeds,[82] although by agreement an equitable lien may attach.[83] The lien may be waived.[84] Where the lease reserves a lien on the crop with a power of sale,[85] the lessor has the sole title to the crop until the lien is satisfied.[86] While the lien cannot be extended beyond the terms of the statute by stipulation, contingent amounts stipulated to be added as a part of the rent may, if so treated, where in fact a part of the consideration.[87]

While a purchase-price mortgage given at the time of purchase is superior to the landlord's lien,[88] the lien coupled with a power of sale is superior to a purchase without notice,[89] and in Pennsylvania is superior to an execution levy for one year's rent.[90] In Texas, one receiving crops upon which lessor has a lien and appropriating the same to his own use within thirty days after removal from the premises[91] is liable in conversion;[92] but in the absence of statute a landlord, having no right of possession in the tenant's crops in the absence of the levy of a distress warrant, has no right of action against a purchaser thereof in the absence of fraud or a promise of the purchaser to pay the rent out of the crops.[93] Where the landlord accepts a surrender of the premises, one holding a junior lien is entitled to have the value of the use off-set.[94] Where a payment of rent due is made by permission of a court of equity to release the landlord's lien, the tenant is entitled to possession as a matter of right.[95]

While the landlord has no lien for supplies or advancements[96] to assist in pro-

subject to lessor's privilege. Luderbach Plumbing Co. v. Its Creditors, 121 La. 371, 46 S 359. Where lessor wrongfully claims and takes possession of personalty, he is guilty of conversion. Plazzek v. Harman [Kan.] 98 P 771.

77. Lahn & Co. v. Carr, 120 La. 797, 45 S 707. Steam engine, used in connection with a pump for irrigating, a thresher engine for threshing, and plows and harrows for cultivating crops, held within the statute. Id.

78. Lahn & Co. v. Carr, 120 La. 797, 45 S 707. No lien on a buggy and horse not used on farm. Field v. Newburn [Miss.] 45 S 573.

79. Lessor cannot retain any portion of crop under alleged lien for rent without proof of amount of rent due. Sessoms v. Tayloe [N. C.] 62 SE 424. Fact that lessor was found not to be entitled to rent for entire term does not affect his right to enforce lien for amount due. Wright v. Northrup [Iowa] 118 NW 437.

80. Where lessee has died, remainder belongs to personal representative. Sessoms v. Tayloe [N. C.] 62 SE 424.

81. Kean v. Rogers [Iowa] 118 NW 515.

82. Lessor held to have no lien upon deposit in bank of money received from sale of crops. Hove v. Stanhope State Bank [Iowa] 115 NW 476.

83. Where goods are sold under agreement that proceeds should be deposited to secure rent, landlord has equitable lien. Kean v. Rogers [Iowa] 118 NW 515.

84. Mere offer to show that at time of assignment of lease, lessor was informed of sale of fixtures, etc., held not equivalent to offer to show assent to surrender lien reserved in lease. Stees v. Lind [Minn.] 119 NW 67. Lien to hay not forfeited by failure to seek a foreclosure within a month from time of removal from landlord's premises. Gaw v. Bingham [Tex. Civ. App.] 107 SW 931.

85. Lease providing that lessor should receive one-half of all produce as soon as sold until rent was paid held to reserve to lessor power of sale. Larraway v. Tillotson [Vt.] 70 A 1063.

86. Larraway v. Tillotson [Vt.] 70 A 1063.

87. Von Berg v. Goodman, 85 Ark. 605, 109 SW 1006. Provision making damages for failure to repair fences as required part of rent and a lien upon crop held valid. Id.

88. Anundson v. Standard Print. & Mfg. Co. [Iowa] 118 NW 789.

89. Larraway v. Tillotson [Vt.] 70 A 1063.

90. Under Pa. Act June 16, 1836 (P. L. 777), § 83, where goods subject to distress are taken under execution, rent for not to exceed one year, has priority, and hence is prior claim in bankruptcy. In re Pittsburg Drug Co., 164 F 482.

91. Books of tenant and third party held to sufficiently show that such third person received crop within 30 days and the quantity thereof. Sexton Rice & Irr. Co. v. Sexton [Tex. Civ. App.] 20 Tex. Ct. Rep. 697, 106 SW 728.

92. Sexton Rice & Irr. Co. v. Sexton [Tex. Civ. App.] 20 Tex. Ct. Rep. 697, 106 SW 728.

93. Wicks v. Wheeler, 139 Ill. App. 412.

94. Where lessee transferred lease and furniture of hotel with lessor's consent and took back lien on furniture junior to lessor's lien for rent and sublessee surrendered premises to owner during term who occupied same, held that lessee was entitled to have value of use by owner offset against sublessee's liability. Kennedy v. Groves [Tex. Civ. App.] 110 SW 136.

95. Lessor's cestui qui trust, who has made no objection to order allowing lien to be removed by payment, had no standing in equity to object to such payment. Patterson v. Northern Trust Co., 132 Ill. App. 208.

96. Where lessor, having valid lien on mule, cart and remainder of crop for ad-

ducing the crop [97] furnished by another, although he assumes liability therefor without the lessee's contract or is a surety therefor,[98] he has a lien where, with the lessee's consent, the goods are furnished primarily upon his credit.[99] A landlord claiming a lien for advancements must show that they were in fact made.[1]

§ 10. *Landlord's remedies for recovery of premises.* See 10 C. L. 597—The lessor, upon the breach of the lease by the tenant giving him a right of re-entry,[2] may make a peaceable re-entry without process of law.[3] A provision giving the landlord summary powers of re-entry is valid.[4] Equity will not enjoin a dispossession proceedings where an adequate remedy at law exists.[5] Sickness is no defense to dispossession proceedings.[6]

*Summary proceedings.* See 10 C. L. 597—To authorize summary proceedings,[7] a statutory ground must exist [8] and, where predicated upon a holding over, the conventional relation of landlord and tenant must exist.[9] The statutory demand [10] or notice [11] must be given by the landlord or his authorized agent.[12] The necessary par-

vancements on crop of 1905, agreed to permit lessee to use same to produce crop of 1906, and the debt to be considered as part of agreed advancements, held advancement within Code, § 1754. Windsor Bargain House v. Watson [N. C.] 62 SE 305.

97. Where advancements are appropriate and necessary to production of crop, they will be presumed to create lien, but where not in themselves so appropriate and necessary, it must affirmatively appear that they were made in aid of crop. Windsor Bargain House v. Watson [N. C.] 62 SE 305.

98. Lessor who is merely surety for the debt incurred for suppliss has no lien as against other creditors. Ranger Mercantile Co. v. Terrett [Tex. Civ. App.] 20 Tex. Ct. Rep. 471, 106 SW 1145.

99. Henderson v. Hughes [Ga. App.] 60 SE 813. Evidence held to sustain finding that goods were furnished upon sole liability of lessor and not upon mere suretyship. Id. Where landlord's credit was basis of loan, fact that lessee signed note as principal maker and that agent of lessor procuring same signed in own name as surety instead of his principals is immaterial. Stubbs & Co. v. Waddell [Ga. App.] 61 SE 145. In such case note and testimony of lender and agent are competent and relevant. Id.

1. Sessoms v. Tayloe [N. C.] 62 SE 424.

2. Where tenant from month to month is in default in rent for 15 days, landlord has immediate right of re-entry, under Gen. Laws 1896, c. 269, § 7. Rinfret v. Morrisey [R. I.] 69 A 763.

3. Cohen v. Carpenter, 113 NYS 168. Where landlord accepted lessee's principals as tenants, held sufficient re-entry. Rinfret v. Morrisey [R. I.] 69 A 763. Where landlord entered for breach of lease and subtenant pays rent to him, held that possession of subtenant was his possession. Cohen v. Carpenter, 113 NYS 168.

4. Sherman House Hotel Co. v. Cirkle, 136 Ill. App. 381.

5. Equity will not enjoin action to dispossess for nonpayment of rent on ground that condition precedent to payment had not been performed. White v. Y. M. C. A., 233 Ill. 526, 84 NE 658.

6. Sickness held no defense to summary proceedings for possession. Gifford v. Bingham [Ind. App.] 84 NE 1099.

7. Burns' Ann. St. 1901, § 7106, providing a summary proceeding before justice of the peace, held not to create a new cause of action but a summary relief. Gifford v. Bingham [Ind. App.] 84 NE 1099.

8. Under Code Civ. Proc. § 2231, providing various grounds on which summary proceedings may be maintained, held that action does not lie for breach of covenant to repair or to comply with orders of health department. Simonelli v. Di Ericco, 110 NYS 1044. Term "rent" as used in Code Civ. Proc. § 2231, does not include costs of repairs which tenant agrees to make, though lease provides that cost thereof may be "added" to the rent. Id.

9. Cullinan v. Goldstein, 113 NYS 21. Mere showing that defendant entersd into possession under contract of purchass which stipulated for rent in case purchaser defaulted, held insufficient to show relation of landlord and tenant (Lewis v. Cooley [S. C.] 62 SE 868), but where on default he surrendered bond for title and gave notes for rent and ceased to pay rent, etc., held to show such relation (Id.). Where lessees dealt with lessor as a partnership and, after change in membership, continued to pay rent to partnership as reconstructed, they could not defend on ground that partnership did not exist. Wallbrecht v. Blush, 43 Colo. 329, 95 P 927.

10. Demand of rent due by agent is sufficient. Moore v. Coughlin, 111 NYS 856. Under express provisions of Code Civ. Proc. § 2231, subd. 2, no defense that precise sum due was not demanded, as where there was counterclaim to be offset. Id. Where rent was payable in cotton to be delivered at warehouse designated by lessor, no summary proceeding for nonpayment will lie upon affidavit failing to allege demand for same, or that demand was waived, or that lessor had designated place for delivery. Hicks v. Beacham [Ga.] 62 SE 45. Tender not kept good held not to relieve lessee from duty of making payment upon service of notice under Code Civ. Proc. § 1161, subd. 2, demanding payment within three days or possession. Occidental Real Estats Co. v. Gantner [Cal. App.] 95 P 1042.

11. Failure to servs three days' notice, as required by Civ. Code 1902, § 2423, is waived by answer and trial on merits which confers jurisdiction of person. Mayes v. Evans [S. C.] 61 SE 216.

12. Notice required by Code Pub. Gen. Laws 1904, art. 53, § 1, may be given by land-

ties plaintiff [13] and defendant,[14] and the right of intervention,[15] are largely statutory. Under the New York statute, the petition must describe the petitioner's interest.[16] An allegation as to the amount of the rent reserved cannot be denied on information and belief.[17] The general power of a court to amend its pleadings applies to summary proceedings.[18] While the question of title is not ordinarily involved,[19] the statute usually prescribes the defenses that may be interposed [20] and the right to set up counterclaims.[21] Unless controlled by statute the general rules of practice apply in matters of continuances,[22] opening of default,[23] granting of discontinuances,[24] admission of evidence,[25] and trial procedure.[26] Under the New York statute, the

lord's agent. Benton v. Stokes [Md.] 71 A 532. Agent with authority to lease has authority to give notice. Id. Where lease recites that certain persons are lessor's agents and tenant occupies for term under same, he is estopped to deny agency. Id. Where, in petition for possession, lessor alleges that notice has been given, he thereby ratifies act of agent in giving same. Id.

**13.** Lessee with term commencing at end of existing term cannot maintain action, under Code Civ. Proc. § 2235. Cullinan v. Goldstein, 113 NYS 21.

**14.** Failure to make subtenants parties is not an objection available to tenants, under Code Civ. Proc. § 2235, requiring petition to name the person against whom proceeding is instituted. Atterbury v. Edwa, 113 NYS 614.

**15.** Under Code Civ. Proc. § 2244, landlord, who has re-entered, may answer in summary proceedings by tenant against subtenant. Cohen v. Carpenter, 113 NYS 168. Under Code Civ. Proc. § 2244, any person "claiming possession" may intervene in summary proceedings. Levy v. Winkler, 110 NYS 997. Though assignee of lease sublet for full term, held to have sufficient interest to intervene. Id.

**16.** Description of interest, as that of "landlord," held insufficient under Code Civ. Proc. § 2235, requiring petition to state petitioner's interest. Cappel v. London, 113 NYS 2. Petition alleging relation of landlord and tenant held sufficient. Slater v. Waterson & Law Amusement Co., 58 Misc. 215, 109 NYS 50. Petition made by secretary of corporation showing that plaintiff corporation had a lease on premises and had subleased to defendant is sufficient. Park Laundry Co. v. Sassone, 108 NYS 725.

**17.** Allegation that on March 1st, 1908, there was due, under written lease, sum of $2,000 for certain month's rent cannot be denied on information and belief. Browning v. Moses, 111 NYS 651.

**18.** Comp. Laws, § 10,268, giving court power to amend in form or substance in furtherance of justice, applies to summary proceeding under § 11,165 (Gensler v. Nicholas, 151 Mich. 529, 15 Det. Leg. N. 13, 115 NW 458), and complaint may be amended by correcting description so as to make it applicable (Id.).

**19.** Questions involved in summary proceeding is whether conventional relation of landlord and tenant exists and who is entitled to possession, and does not involve title. Drake v. Cunningham, 111 NYS 199.

**20.** Under Code Civ. Proc. § 2244, authorizing equitable defenses, lessee may plead right to renewal on proceeding for holding over. Montant v. Moore, 113 NYS 43. Lessee may show parol agreement with lessor, modifying lease and authorizing application of rents to payment of debt of lessors. American Exch. Nat. Bank v. Smith, 113 NYS 236. Under code provision that, in summary proceedings to dispossess, any legal, equitable defense or counterclaim may be asserted, held error to exclude agreement between lessor and lessee whereby goods sold to lessor were charged against rent, in suit by assignee of rents where he had notice. Costello v. Seidenberg, 110 NYS 924. Likewise held error to exclude counterclaim that, by agreement between lessee and assignee, latter agreed to accept claim against lessor, and that he refused to do so. Id.

**21.** Under express provisions of Code Civ. Proc. § 2244, damages resulting from breach of lessor's covenants may be set off as a defense in summary proceeding for nonpayment of rent (Shotland v. Mulligan, 111 NYS 642; American Exch. Nat. Bank v. Smith, 113 NYS 236), but no affirmative recovery can be had (Shotland v. Mulligan, 111 NYS 642). Excess may be recovered in independent action. American Exch. Nat. Bank v. Smith, 113 NYS 236. Breach of parol promise to make certain repairs before commencement of term cannot be counterclaimed, where tenant knew that they had not been made when he moved in. Moore v. Caughlin, 111 NYS 856.

**22.** Code Civ. Proc. § 2248, providing that justice may in his discretion grant an adjournment to enable application to procure necessary witnesses, does not prevent continuance on other legal grounds. Maher v. Edwards, 110 NYS 1083.

**23.** Condition attached to order opening default, requiring tenant to give undertaking for $4,000, amount claimed to be due for rent, held abuse of discretion. Lee v. Revolving Airship Tower Co., 111 NYS 28. Where continuance was denied tenant though legal ground therefor was presented, held error to condition opening of default entered upon payment of rent for month in question where lessee had given ample security. Maher v. Edwards, 110 NYS 1083.

**24.** Held not abuse of discretion to refuse landlord's request to discontinue, where counterclaim has been interposed. American Exch. Nat. Bank v. Smith, 113 NYS 236.

**25.** Where lessor instituted summary proceedings for nonpayment of rent, validity of assignment of lease to intervener as violative of provision requiring lessor's consent held not in issue. Levy v. Winkler, 110 NYS 997. Where tenant asserts that property is claimed by other heirs, will is admissible to show title in plaintiff upon proof of validity. Drake v. Cunningham, 111 NYS 199. Though lease is void or insufficient, it may be referred to for the terms of the lease, in-

final order closes the proceedings [27] and should not be granted in favor of the lessee for mere insufficient notice of lessor to terminate the tenancy.[28] The rights of an assignee not in possession are terminated by summary proceedings against the assignor.[29] In New York, equity may enjoin summary proceedings where it would, under like circumstances, enjoin an action of ejectment.[30] On denial of motion to open default, appeal must be taken from the order denying the motion and not from the order of eviction.[31]

*Forcible entry and unlawful detainer.* See 10 C. L. 598—All general matters of forcible entry and unlawful detainer are treated in a separate topic,[32] and only those peculiar to the relation of landlord and tenant are considered here. Unlawful detainer is the proper remedy in many states to recover possession of a tenant [33] holding over after the expiration of his term [34] or a forfeiture thereof,[35] and is available to one succeeding to the lessor's interest.[36] Forcible entry and detainer will not lie to recover possession of premises leased with option to purchase, where the opinion has been exercised.[37] It is available though the tenant's possession is partial [38] or constructive.[39] Unless the lease is of a definite duration, two notices are usually necessary, one to terminate the tenancy [40] and the other thereafter demanding possession.[41] Three days' notice to pay is necessary, under the California statute, before unlawful

cluding the time when lessor could terminate. Eagle Tube Co. v. Holsten, 110 NYS 242.

26. Summary proceedings held a "cause" within Municipal Court Act (Laws 1902, p. 1494, c. 580), providing that "causes set down for trial must be tried when reached unless legal grounds exist for an adjournment." Maher v. Edwards, 110 NYS 1083.

27. Under Code Civ. Proc. § 2249, no judgment is necessary. Steuerwald v. Jackson, 123 App. Div. 569, 108 NYS 41.

28. Where it devolves that lessee is entitled to 30 days' notice instead of 5 days', lessee is entitled merely to a dismissal and not to a final order. Franck v. Smolens, 113 NYS 464.

29. Mahoney v. Hoffman, 58 Misc. 217, 109 NYS 13. Assignment in violation of terms held not to confer any rights where possession was not taken until after term was terminated by warrant in summary proceedings (Id.), and fact that predecessor, who was disturbed, though not a party to the proceedings, secured a favorable order in forcible entry and detainer does not strengthen right where he came into possession independently (Id.).

30. Code Civ. Proc. § 2265. Montant v. Moore, 113 NYS 43. Proceeding to dispossess will be enjoined pending suit by lessee to specifically perform covenant to renew. Id.

31. On denial of motion of subtenant to open default order of eviction in proceedings against tenant and "John Doe, alleged assignee" of leasee, appeal must be taken from order denying motion and not from order of eviction. Park Laundry Co. v. Sassone, 108 NYS 725.

32. See Forcible Entry and Unlawful Detainer, 11 C. L. 1484.

33. To sustain an action for unlawful detainer, proof of express tenancy, or fact showing by implication occupation as tenant, must be made. Richmond v. California Super. Ct. [Cal. App.] 98 P 57. Evidence held to make question for jury whether premises were leased to husband or to wife. Doyle v. Franek [Neb.] 118 NW 468.

34. Under laws of Arkansas in force in Indian Territory, unlawful detainer is proper remedy to recover possession of tenant holding over. Showalter v. Ryles [Okl.] 97 P 569.

35. Rev. St. 1895, art. 2519, making one, holding over "after the termination of the time for which such lands were let to him," guilty of forcible entry and detainer, applies to holding over after forfeited term under lease. Walther v. Anderson [Tex. Civ. App.] 114 SW 414.

36. Showalter v. Ryles [Okl.] 97 P 569.

37. Where lease embodied option to purchase, fact that there was an agreement to surrender possession on expiration of term did not give landlord right to enter, it appearing that tenant had exercised option by part payment on same day that lease was executed. Stanwood v. Kuhn, 132 Ill. App. 466.

38. Under the statute in Illinois, the landlord may sue in forcible entry and unlawful detainer for the entire premises although the defendant be in possession of only a part thereof. Golden v. Menker, 132 Ill. App. 25.

39. Where tenant was not in physical possession but left premises in charge of his brother, he was in constructive possession. Geo. J. Cooke Co. v. Fitzgerald, 131 Ill. App. 133.

40. Notice given before termination of lessee's possessory right, demanding immediate possession, is insufficient as a demand for possession after termination of tenant's possessory rights. Ross v. Gray Eagle Coal Co. [Ala.] 46 S 564. Where demand in writing for possession is not necessary to terminate tenancy, no demand is necessary, under Rev. St. 1899, § 3321 (Ann. St. 1906, 1880). Campbell v. Johnson, 129 Mo. App. 201, 107 SW 1020.

41. Ross v. Gray Eagle Coal Co. [Ala.] 46 S 564. Where lease expressly provides that nonpayment of rent shall forfeit lease and entitle lessor to recover possession without demand for rent on possession, neither notice of forfeiture nor demand of possession is prerequisite to action for unlawful detainer. Dietz v. Barnard, 32 Ky. L. R. 1130, 107 SW 766.

detainer will lie for nonpayment of rent.[42] In Illinois neither demand of possession nor notice is necessary where tenant is holding over.[43] The complaint must show the relation of landlord and tenant [44] and the unlawful detention.[45] An action for rent cannot be joined within an action under the forcible entry and detainer act of Colorado.[46] Where unlawful detainer is predicated upon forfeiture for nonpayment of rent, payment may be set up in defense.[47] The liability of the traverser's bond is controlled by the statute under which it is given.[48]

§ 11. *Rights and liabilities between landlord or tenant and third persons.* See 10 C. L. 599—A tenant cannot recover for injuries resulting from wrong committed before he executed the lease,[49] which applies to a year to year tenancy from holding over.[50] Negligence of the lessor will not preclude lessee from recovering damages arising from negligent excavation by adjoining owner.[51] A tenant is liable for the negligent use of the demised premises.[52] Under a statute providing that a party need not prove more than is necessary to entitle him to the relief asked, a lessee suing for an injury to his crop need not show his interest therein.[53]

§ 12. *Crimes and penalties.* See 10 C. L. 599—The Georgia act, making it a criminal offense to entice away a cropper, is in derogation of common law and must be strictly construed,[54] and, hence, a contract executed as required by statute must be shown.[55]

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**Land Patents,** see latest topical index.

**42.** Under Code Civ. Proc. § 1161, authorizing action in unlawful detainer for nonpayment of rent after three days' written notice to pay, such notice need not state that lessee has three days within which to pay. Berryman v. Gibson [Cal. App.] 95 P 671.

**43.** Geo. J. Cooke Co. v. Fitzgerald, 131 Ill. App. 133.

**44.** Complaint alleging a verbal lease, 30 days' notice to terminate tenancy and three days' notice to quit, held to sufficiently show relation. Richmond v. California Super. Ct. [Cal. App.] 98 P 57. Complainant may allege interest by averring lease from owner covering period in question without setting out terms of lease. Berryman v. Gibson [Cal. App.] 95 P 671.

**45.** Complaint alleging that defendant entered into possession about Oct. 1st, 1905, as tenant from month to month, paying therefore a stipulated amount in advance on the first day of each month, etc., held to sufficiently allege time of beginning of term. State v. Hilgendorf, 136 Wis. 21, 116 NW 848.

**46.** Mills' Ann. St. c. 53, §§ 1969, 1996. Tyler v. McKenzie, 43 Colo. 233, 95 P 943.

**47.** Allegation that plaintiff failed to make necessary repairs, that defendant made same and sent check for balance of rent due, which was not returned until beginning of action, held not a counterclaim, but plea of payment or tender. Tipton v. Roberts, 48 Wash. 391, 93 P 906. Where, upon lessor's failure to make necessary repairs on request, lessee made same and sent check for balance of rent with bill of repairs, and thereafter check for next month's rent, all of which were retained until commencement of action, held that checks constituted payment. Id.

**48.** Under Civ. Code Prac. § 464, providing that traverser and sureties on bond shall be liable, where he fails to prosecute traverse with effect, for withholding possession and reasonable expenses of traversee, bond is not liable for rent from surrender of possession until lessor finds another tenant, though failure to surrender prevented lessor from giving possession to another tenant who repudiated contract (Columbia Trust Co. v. Reccius [Ky.] 113 SW 895), nor for compromise settlement with such lessee (Id.), nor commission to real estate agent for procuring another (Id.).

**49.** Adjoining owner had stopped outlet to drain causing crop to be flooded. Funston v. Hoffman, 232 Ill. 360, 83 NE 917.

**50.** Where during 1905, adjoining owner stopped up outlet to drain, tenant holding over another year cannot recover for crops flooded in 1906. Funston v. Hoffman, 232 Ill. 360, 83 NE 917.

**51.** Contos v. Jamison [S. C.] 62 SE 867.

**52.** Where faucet on floor, under exclusive control of one tenant, was found running and water damaged goods on floor below, presumption of negligence arises. Baker v. Schwartz, 113 NYS 727. Testimony of defendant that he opened faucet on day before it was found running and it did not run held to show that he left same open, though he testified that he was "quite sure" he turned it off. Id.

**53.** Under Code 1897, § 3639, providing that a party shall not be compelled to prove more than is necessary to entitle him to relief asked, tenant suing for injury to crop, who shows that he is in possession as tenant, need not disclose his interest in crops or land (Blunck v. Chicago & N. W. R. Co. [Iowa] 115 NW 1013), and it is not material that he may be held to his landlord for a part of the crop (Id.).

**54.** Act Dec. 17, 1901 (Acts 1901, p. 63), as amended by Act Aug. 7, 1903 (Acts 1903, p. 91). Orr v. Hardin [Ga. App.] 61 SE 518.

**55.** Orr v. Hardin [Ga. App.] 61 SE 518. Under act of December 17, 1901 (Acts 1901, p. 63), as amended by act of Aug. 7, 1903 (Acts 1903, p. 91), imposing penalty for inducing cropper to leave, etc., where oral contract

## LARCENY.

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*The scope of this topic is noted below.*[56]

§ 1. *Common-law larceny.* See 10 C. L. 600—Larceny [57] is the taking and carrying away,[58] from the actual or constructive[59] possession of the owner,[60] of the personal property [61] of another [62] by trespass [63] or fraud,[64] without his consent,[65] and with fe-

of lease partly performed was made in presence of one witness, such witness must witness establishment of relation, and, where oral contract made in his presence created relation only if certain things transpired in future, it is insufficient to support conviction. Polk v. Thomason, 130 Ga. 642, 61 SE 123.

**56. Includes** the common-law offense of simple larceny and its statutory equivalents, also such statutory variations as larceny from a dwelling or other specified place, larceny from the person, etc., which, though not amounting to robbery, are sometimes denominated compound larceny. **Excludes** the common-law offense of compound larceny (see Robbery, 10 C. L. 1531), and those statutory offenses which although denominated larceny, larceny by bailee, larceny after trust, etc., lack the essential element of trespass in the original taking (see Embezzlement, 11 C. L. 1192). Obtaining property by means of false pretense (see False Pretenses and Cheats, 11 C. L. 1460), breaking and entering (see Burglary, 11 C. L. 487), and matters common to all crimes (see Criminal Law, 11 C. L. 940 and Indictment and Prosecution, 12 C. L. 1), are elsewhere treated.

**57.** Larceny is the wrongful or fraudulent taking or carrying away by any person of the personal goods of another with intent to convert them to the taker's use without the consent of the owner. State v. James [Mo. App.] 113 SW 232.

**58.** Complete and exclusive possession by thief is essential. State v. Johnson [Kan.] 98 P 216. Where one attempts to steal article from person of another but only succeeds in dislodging it so that it falls to floor, without having control of it for a single instant, crime of larceny not complete. Id.

**59.** Money taken from wife acting as husband's agent is taken from possession of husband. Commonwealth v. Levinson, 34 Pa. Super. Ct. 286. Receipt from wife of husband's goods by an adulterer or one intending to elope with her is larceny from husband. Id. Where paramour steals husband's funds from wife, he is guilty of larceny from husband. Id. Goods accidentally left in a particular place are not lost and taking is from possession of owner. No error to refuse charge on animous furandi where livery stable keeper stole and secreted article left in buggy. Moxie v. State [Tex. Cr. App.] 114 SW 375. Upon satisfaction of judgment upon goods in warehouse under levy on execution, the owner has right of possession and unauthorized removal of the goods by another may constitute larceny. People v. Frankenberg, 236 Ill. 408, 86 NE 128.

**60.** People v. Cain [Cal. App.] 93 P 1037. Where prosecutor secured permission to use bureau drawer of defendant and defendant stole therefrom, there was larceny from possession of prosecutor. White v. State [Ala.] 47 S 192. That owner's son had used gun just previous to larceny thereof no defense on theory that gun was not in owner's possession. Crouch v. State, 52 Tex. Cr. App. 460, 107 SW 859.

**61.** Shell fish planted under public waters where they do not grow naturally and therefore cannot become mixed with those local to the place are subject of larceny, providing the person taking them has notice of their private ownership, which is orally given by enclosing the bed by stakes or otherwise. The question of whether the bed was leased is immaterial though such leases are authorized. People v. Morrison, 124 App. Div. 10, 108 NYS 262.

**62.** Ownership must be established. State v. James [Mo. App.] 113 SW 232. Unauthorized sale of wife's personal property by husband is invalid and subsequent authorized sale by him is not larceny from original vendee. Hudspeth v. State [Tex. Cr. App.] 112 SW 1069. Where machinery was delivered on agreement that title should remain in vendor until price was fully paid and that vendor had the right to enter premises at any time and remove the machinery or part thereof, vendor's agent is not guilty of larceny in removing a part. Guthrie v. State [Miss.] 47 S 639.

**63.** Bill of particulars alleging trespass in taking is supported by proof of taking from custodian's apartment in her absence, and a defense negativing trespass but otherwise of no legal efficacy may be disregarded. Commonwealth v. Levinson, 34 Pa. Super. Ct. 286.

**64.** Trespass not necessary where taking is by artifice, fraud or false pretense. Vought v. State, 135 Wis. 6, 114 NW 518. Town board issuing and obtaining money on fraudulent orders. Id. Larceny may be committed where legal process is fraudulently and feloniously used for purpose of securing possession of goods. People v. Frankenberg, 236 Ill. 408, 86 NE 128. If owner of goods parts voluntarily with both possession and title, a fraudulent taking thereof is no more than false pretense, but if he parts with possession only, felonious conversion of the goods is larceny. Beckwith v. Galice Mines Co., 50 Or. 542, 93 P 453.

**65.** Nonconsent is an essential. George v. U. S. [Okl. Cr. App.] 97 P 1052.

**NOTE. Effect of consent to taking by servant or bailee:** Where a servant is in-

lonious intent[66] entertained at the time of the taking,[67] to deprive the owner thereof and to convert the same to the use of the taker.[68] While the property taken must have some value, it need not necessarily have money value, and hence property may be the subject of larceny although not the subject of a lawful sale.[69] Special ownership is sufficient to support the charge,[70] even as against the general owner,[71] but a special owner having relinquished possession to the agent of a general owner retains no ownership which will support a charge of larceny against such agent.[72] While as a general rule the taking must be personal, where larceny is committed through an innocent agent the principal, although not actually present, is none the less guilty thereof.[73] The offense is complete with the taking and failure to act

trusted with goods for a particular purpose, the person who by fraud obtains possession thereof is guilty of larceny, but otherwise if the servant has general authority to conduct business and part with the property. Queen v. Prince, L. R. 1, C. C. 150. Thus, one obtaining goods fraudulently from a pawnbroker's clerk is not guilty of larceny (Rex v. Jackson, 1 Moody, C. C. 119), while one who fraudulently obtains property from a servant or bailee who is merely charged with the custody or delivery of the property is guilty (Shipply v. People, 86 N. Y. 375, 40 Am. Rep. 551; Queen v. Stewart, 1 Cox, C. C. 174; Rex v. Small, 8 Car. & P. 46; Reg. v. Webb, 5 Cox, C. C. 154; Reg. v. Robins, Dears, C. C. 418; Reg. v. Little, 10 Cox, C. C. 559; Aldrich v. People, 224 Ill. 622, 79 NE 964, 115 Am. St. Rep. 166, 7 L. R. A. [N. S.] 1149). Where there is no fraud, and the taker honestly believed that the owner's agent has authority to part with the property, the felonious intent essential to larceny is wanting (Fetkenhauer v. State, 112 Wis. 491, 88 NW 294; Heskew v. State, 18 Tex. App. 275), but where the taker had reason to know that there was lack of authority, he cannot defend on the ground of agent's consent (State v. McCarthy, 17 Minn. 76 (Gil. 54); Oakley v. State, 40 Ala. 372). —Adapted from 7 L. R. A. (N. S.) 1149.

**66.** Felonious intent essential. Crouch v. State, 52 Tex. Cr. App. 460, 107 SW 859; Jones v. State, 85 Ark. 360, 108 SW 223. Where one takes property under mistaken but honest belief in his own right, there is no larceny, although he knew of the adverse claims of another. State v. Bailey, 63 W. Va. 668, 60 SE 785.

**67.** If original taking is innocent, no subsequent intent can render the offense larceny. Warren v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 394, 106 SW 382; Worthington v. State, 53 Tex. Cr. App. 178, 109 SW 187. If finder really believed owner could not be found, no subsequent appropriation of the property, either before or after learning who was true owner, can constitute theft. Worthington v. State, 53 Tex. Cr. App. 178, 109 SW 187. If accused believed at the time he took cattle at the request of another that such other had authority to take the same, there was no larceny although accused later learned that the cattle were being stolen. Warren v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 394, 106 SW 382.

**68.** Intent to appropriate to taker's use is essential. Alford v. State, 52 Tex. Cr. App. 621, 108 SW 364.

**69.** Whiskey in prohibition territory. Mance v. State [Ga. App.] 62 SE 1053. Trees in forest reserve which by constitutional provision could not be legally sold. People v. Gallagher, 58 Misc. 512, 111 NYS 473.

**70.** Possession is sufficient ownership to support allegation. State v. Whitman, 103 Minn. 92, 114 NW 363. Ownership properly laid in lessee. Id. Wife's property stolen from husband is stolen from wife. Kauffman v. State, 53 Tex. Cr. App. 209, 109 SW 172.

**71.** Owner may be guilty of larceny from an agister. Under Pen. Code, § 484, defining larceny as felonious stealing of personal property of another. People v. Cain [Cal. App.] 93 P 1037. A pastured heifer with B, who sold pasturage to C, who lost the heifer. A stated he would hold B and C responsible. They thereupon found heifer in A's field and recovered it. A brings larceny against B and C, judgment for defendants; C brings larceny against A, who is convicted. Id.

**NOTE: Taking of property by a general owner to defeat lien** is generally held to constitute larceny. Tumalty v. Parker, 100 Ill. App. 382; State v. Nelson, 36 Wash. 126, 78 P 790, 104 Am. St. Rep. 945, 68 L. R. A. 283; People v. Long, 50 Mich. 249, 15 NW 105; State v. Stephens, 32 Tex. 155; Queen v. Hollingsworth, 2 Can. Cr. Cas. 291; Henry v. State, 110 Ga. 750, 36 SE 55, 78 Am. St. Rep. 137; Bruley v. Rose, 57 Iowa, 651, 11 NW 629; Atchison, etc., R. Co. v. Hinsdell, 76 Kan. 74, 90 P 800, 12 L. R. A. (N. S.) 94; Lewis v. State, 50 Tex. Cr. App. 331, 17 Tex. Ct. Rep. 301, 97 SW 481. Thus, the owner may commit larceny by feloniously taking his own property after it has been levied upon under execution (Palmer v. People, 10 Wend. [N. Y.] 165, 25 Am. Dec. 551), but it must appear that he knew of the levy (State v. Deavitt, 32 Mo. 571), and that the taking was felonious (Adams v. State, 45 N. J. Law, 448). So, also, it is held larceny for a general owner to carry away property levied upon under attachment (Commonwealth v. Greene, 111 Mass. 392), although there is authority to the contrary (Clark v. State, 41 Neb. 370, 59 NW 785).

The general rule, however, appears to be repudiated in Commonwealth v. Tobin, 2 Brewst. [Pa.] 570, upon the ground that in such cases there is no taking "of the goods of another" and hence no larceny.—Adapted from 12 L. R. A. (N. S.) 94.

**72.** Mosbey v. State [Tex. Cr. App.] 113 SW 276. The treasurer of a Masonic lodge retains no ownership in funds delivered to an organizer who had authority to receive the same for the grand master. Id.

**73.** State v. Bailey, 63 W. Va. 668, 60 SE 785.

promptly for recovery is not material.[74] After the stolen property has been found in possession of the defendant it is too late to create a defense by "voluntary" return to the owner.[75] Larceny is distinguished from embezzlement by the presence of a wrong or trespass in the original taking,[76] and from robbery by the absence of violence or putting in fear in the original trespass.[77]

§ 2. *Statutory larceny, theft, etc.*[See 10 C. L. 601]—This section includes only statutory variations of common-law larceny, and excludes statutory offenses which, although denominated larceny, are more logically embraced within the generally accepted definition of some other offense.[78]

Statutes frequently make special provisions relative to larceny of particular property[79] or larceny from a particular place[80] or in a particular manner.[81] Such statutes do not as a rule create a new offense but merely recognize a higher degree which necessarily includes the common-law offense.[82] Many statutes specify as subjects of larceny property which was not so considered at common law,[83] notably, written instruments.[84] The fact that an act violates a specific statute renders it none the less larceny if it also violates the laws denouncing that offense generally.[85] In some states the alteration of a brand or mark on an animal is an assertion of possession which may constitute larceny.[86]

74. Commonwealth v. Levinson, 34 Pa. Super. Ct. 286.

75. No error in failing to charge on voluntary return. Moxie v. State [Tex. Cr. App.] 114 SW 375. Branding an animal is assertion of possession, and the fact that after branding animal was turned loose on range and recovered by owner does not constitute voluntary return. Thorne v. State, 52 Tex. Cr. App. 309, 107 SW 831.

76. Conspiracy whereby one was elected secretary of labor union, secured its funds and submitted to mock robbery, held embezzlement rather than robbery or larceny. State v. Cothern [Iowa] 115 NW 890. At common law an employe who misappropriated goods of his master which are in his custody for a specific purpose is guilty of larceny; there is trespass in the taking for other than the specific purpose. Possession remains in the master (Minor v. State [Fla.] 46 S 297), though some embezzlement statutes are broad enough to include the above case (Id.). Possession as distinguished from custody discussed (Id.), but where employe who has access to but no possession or custody of goods of his master appropriates same to his own use, there is larceny and not embezzlement (Id.). President of mercantile company was in actual and present possession and personal custody was in certain employe. Misappropriation by general manager held larceny. Id.

77. Robbery includes larceny and larceny from person. State v. Taylor [Iowa] 118 NW 747. If jury have reasonable doubt of the element of force and fear, there can be no verdict greater than larceny from the person. Id. Distinction between larceny from the person and robbery lies in the force or intimidation used, if the article is attached to the person so that there is resistence, however slight, or if there is any active resistence to the taking, the act is robbery and not larceny. People v. Campbell, 234 Ill. 391, 84 NE 1035.

78. See Embezzlement, 11 C. L. 1192; False Pretenses and Cheats, 11 C. L. 1460; Robbery, 10 C. L. 1531.

79. Horses and cattle. Rev. Pen. Code, §§ 605, 607, 608, amended Laws 1903, p. 175, c. 151. State v. Matejowsky [S. D.] 115 NW 96. Under Laws 1903, c. 218, p. 372, § 1, denouncing theft of "any harness" as grand larceny, not necessary that thing stolen shall comprise all parts of a complete harness. State v. Wortman [Kan.] 98 P 217. See, also, Animals, 11 C. L. 109.

80. Breaking and entering is not an element of larceny from a dwelling contrary to Code 1837, §§ 4832, 4833. State v. McDermet [Iowa] 115 NW 884. Taking chickens from coop in a wagon standing in an inclosed barnyard is larceny from inclosed premises contrary to Acts 30th Gen. Assem. p. 122, c. 133. State v. Norman, 135 Iowa, 483, 113 NW 340. Right of occupancy is sufficient to maintain the charge as against the thief. Id.

81. "Privately" stealing from the person. Pen. Code, arts. 879, 880. Stealing horse on pretext of hiring. Ky. St. 1903, § 1195. If honest intent to return existed at time of hiring, not guilty. Smith v. Commonwealth, 33 Ky. L. R. 998, 112 SW 615.

82. Statute defining and punishing larceny from the person creates no new offense, hence jury may properly find guilty of included offense of petit larceny. State v. Clem [Wash.] 94 P 1079.

83. Under Pen. Code, § 537, growing trees are subject to larceny as if severed by another. People v. Gallagher, 58 Misc. 512, 111 NYS 473.

84. Under St. 1898, § 4415, denouncing as larceny the stealing of negotiable and other instruments of value, a town order is the subject of larceny although void for fraud in its issuance, if valid on its face. Vought v. State, 135 Wis. 6, 114 NW 518.

85. Laws 1900, p. 63, c. 20, § 222, forbidding spoliation of forest reserves, does not abrogate general larceny statute with regard thereto. People v. Gallagher, 58 Misc. 512, 111 NYS 473.

86. Thorne v. State, 52 Tex. Cr. App. 309. 107 SW 831.

§ 3. *Indictment and prosecution. A. Indictment.*[See 10 C. L. 602] —An indictment is none the less one for larceny alone because matter averred by way of inducement may constitute another offense.[87] The indictment must charge the essential elements of the offense,[88] including felonious intent,[89] value,[90] and ownership,[91] if known to the grand jury,[92] and must describe the property,[93] with reasonable certainty.[94] One who commits larceny through an innocent agent is properly charged as a principal,[95] as in an accessory before the fact under statutes abolishing the distinction.[96] Where articles belonging to different owners are stolen at the same time and place, the offense is single and should be so charged,[97] but the fact that they were so stolen must be charged.[98] Where the larceny of several lots is charged in a single count, it is proper to allege gross value without specifying items,[99] but such an allegation is not repugnant to further allegations of detailed values amounting to a different total, since the latter allegations control.[1] Though an allegation of gross value only, as to articles of unequal value, will fail in the absence of proof of larceny of all the property alleged, the rule is otherwise in the

87. Indictment held to charge larceny and not cheating. State v. Dowden, 137 Iowa, 573, 115 NW 211.

88. "One gold coin then and there being on the person of A, did steal," sufficiently alleges **larceny from the person.** State v. Faulk [S. D.] 116 NW 72. Under Pen. Code, art. 879, denouncing theft by **"privately" stealing** from the person, and art. 880, defining the offense, an indictment charging taking without owner's consent, and so suddenly as not to allow time for resistence, sufficiently described the offense, it not being necessary to allege "privately." Bush v. State, 53 Tex. Cr. App. 213, 109 SW 194, citing Kerry v. State, 17 Tex. App. 180, 50 Am. Rep. 122. Breaking and entering is no part of **larceny from a dwelling** and need not be alleged. State v. McDermet [Iowa] 115 NW 884.

89. Feloniously did take, steal and carry away held sufficient. State v. McDermet [Iowa] 115 NW 884.

90. Allegation of value is necessary under Hurd's Rev. St. 1905, c. 38, § 167, denouncing larceny of negotiable and other instruments in writing. People v. Silbertrust, 236 Ill. 144, 86 NE 203. Allegation that bill of exchange is of certain value "to the Bank" not a general allegation of value; the last clause cannot be rejected as surplusage. Id.

91. One gold coin of the money of A held sufficient. State v. Faulk [S. D.] 116 NW 72. Ownership of wife's separate property properly alleged in her though stolen from husband's custody. Under Code Cr. Proc. 1895, art. 445 and Rev. St. 1895, arts. 2967, 2968. Kauffman v. State, 53 Tex. Cr. App. 209, 109 SW 172. Allegation of ownership in a warehouseman from whose leased premises the property was stolen is sufficient, though general ownership was in another. State v. Whitman, 103 Minn. 92, 114 NW 363. Ownership cannot be laid in a special owner who has relinquished possession to the agent of a general owner. Mosbey v. State [Tex. Cr. App.] 113 SW 276.

92. If unknown or could not be ascertained by reasonable inquiry, need not be alleged though trial evidence subsequently reveals true owner. Ray v. State [Ga. App.] 60 SE 816.

93. One gold coin, current as money, of the value of $5.00 held sufficient. State v. Faulk [S. D.] 116 NW 72. "One man's saddle" and "one horse" held sufficient. State v. Blair, 63 W. Va. 635, 60 SE 795. "Money purse" sufficient without specifying size, weight, color, and value, where any theft from the person is felony. Bush v. State, 53 Tex. Cr. App. 213, 109 SW 184. Larceny of brown gilding, property of A, and black gilding, property of B, held to sufficiently charge larceny of the black gilding. State v. West [Idaho] 95 P 949. Need not describe stolen property with reference to any mark whereby it may be distinguished from other property of the same or a similar kind. State v. Bailey, 63 W. Va. 668, 60 SE 785. Notwithstanding Rev. Code Cr. Proc. § 226, providing that erroneous allegation as to person injured shall be deemed immaterial, an allegation of larceny of enumerated two and three year old cattle, the property of A and B is not sufficient identication of the cattle otherwise than by the allegation of ownership, and does not sufficiently describe cattle owned by A, B & C, although doing business as A & B. State v. Ham [S. D.] 114 NW 713.

94. Defect in description is immaterial in Georgia if the question might be legally investigated thereunder, and an aquittal will act as bar to subsequent prosecution. Burch v. State [Ga. App.] 61 SE 503.

95. State v. Whitman, 103 Minn. 92, 114 NW 363.

96. Under Rev. Laws 1905, § 4758, an accessory before the fact may properly be charged as principal. State v. Whitman, 103 Minn. 92, 114 NW 363.

97. Clemm v. State [Ala.] 45 S 212. Charge of taking from ginner two bales of cotton, property of M & P respectively, not bad for duplicity. Peck v. State [Tex. Civ. App.] 111 SW 1019.

98. Demurrer for failure to charge same time and place sustained. Clemm v. State [Ala.] 45 S 212. "Did then and there take from the possession of P, and did then and there take from the possession of M, held sufficient. Peck v. State [Tex. Cr. App.] 111 SW 1019.

99. Reeder v. State [Ark.] 111 SW 272.

1. 600 lbs. of cotton, 200 lbs. belonging to M, 100 to C, 140 to Y, 50 to P, 40 to D, 40 to C. Reeder v. State [Ark.] 111 SW 272.

case of a commodity, there being nothing to show that it is not of uniform value.[2] Sex is not generally a material allegation in indictments for larceny of horses or cattle.[3] Corporate existence of the owner need not be alleged except where necessary to show that defendant had not been stealing his own property.[4] That the indictment incidentally charges another offense is immaterial.[5] Where it is doubtful whether the offense is larceny or embezzlement, the indictment may contain both counts and, in Nebraska, the state is not required to elect.[6] Where any one of several elements will make an offense grand larceny, and two of them are alleged, one may be rejected as surplusage.[7]

(§ 3) *B. Admissibility of evidence.*[See 10 C. L. 603]—The general rules as to circumstantial[8] and corroborative evidence,[9] res gestae,[10] admissions,[11] and declarations,[12] are applicable. Evidence of independent crimes is not generally admissible but evidence of a series of events leading up to and making possible the commission of the act charged are admissible, though involving an independent crime,[13] and relevant testimony is not inadmissible merely because it tends to show the commission of another crime.[14] Where larceny by means of a pretended arrest is charged, it is competent to show the nonexistence of the alleged cause of arrest.[15] A check identified as given to the person selling stolen property is admissible as to the date of sale.[16] The state may always trace the stolen property by direct[17] or circumstan-

2. Pieces of brass. Smith v. State, 53 Tex. Cr. App. 170, 109 SW 127.

3. Burch v. State [Ga. App.] 61 SE 503. Aquittal for larceny of cow bars indictment for larceny of steer when in fact the transactions were the same. Id. Under Rev. Pen. Code, §§ 605, 607, 608, as amended by Laws 1903, p. 175, c. 151 denouncing the stealing of any stallion, mare, gelding, horse or colt, allegation is sufficient to cover geldings. Rulings under similar and dissimilar statutes extensively discussed. State v. Matejousky [S. D.] 115 NW 96.

4. Crime complete when it appears that property feloniously taken is not property of accused, immaterial whether owner was person, corporation, or other entity. People v. Mead, 109 NYS 163.

5. Indictment for larceny of logs from state land, which charges entering land with intent to commit larceny, in its self a misdemeanor. People v. Gallagher, 58 Misc. 512, 111 NYS 473.

6. Cohoe v. State [Neb.] 118 NW 1088.

7. A steer being one of the enumerated articles whose taking is grand larceny, averment of taking from possession of owner is surplusage. People v. Hutchings [Cal. App.] 97 P 325.

8. Evidence as to tracks left by a vehicle from place of crime to defendant's residence and of human tracks identified as those of defendant is proper. State v. Norman, 135 Iowa, 483, 113 NW 340. Evidence that the track of defendant's wagon led along unusual byways is proper as bearing upon guilty knowledge. Id.

9. Where witness testified that he had certain money on him when arrested, evidence that he displayed certain described money just previous to arrest is admissible against policeman charged with larceny from prisoner. State v. McDowell [Mo.] 113 SW 1113.

10. That accused was seen coming from scene of larceny with stolen property in his possession and offered witness money to say nothing. Perry v. State [Ala.] 46 S 470. Evidence of taking of other articles at the same time and of other facts and circumstances not charged is admissible where limited to purpose of connecting defendant with acts charged. Lynne v. State, 53 Tex. Cr. App. 375, 111 SW 729.

11. Statement to sheriff held to refer to the stolen horses and hence admissible. State v. Glover [S. D.] 113 NW 625. Explanations of possession by accused to police officer immediately upon being arrested and charged with larceny and before he has had an opportunity to concoct a story, are admissible. State v. Jacobs [Mo. App.] 113 SW 244.

12. That defendant claimed to have money previous to theft inadmissible as self-serving. Anglin v. State, 52 Tex. Cr. App. 475, 107 SW 835. One charged with larceny may show the negotiations under which he obtained possession of the property and his declarations when found in his possession but not declarations meantime, such being open to suspicion as a part of his plan of defense. Mason v. State [Ind.] 85 NE 776.

13. That defendant debauched prosecutor's wife in South Africa, induced her to sell her husband's farm, eloped with her to America, and while living with her in a state of adultery stole the proceeds of the sale. Commonwealth v. Levinson, 34 Pa. Super. Ct. 286.

14. Ray v. State [Ga. App.] 60 SE 816. Evidence of previous arrest of complainant at instance of defendant for larceny of same stock held admissible as to defendant's intent. People v. Cain [Cal. App.] 93 P 1037.

15. That complaining witness was not drunk when arrested as testified by defendant. State v. McDowell [Mo.] 113 SW 1113.

16. Dennis v. State [Ark.] 114 SW 926.

17. Hooton v. State, 53 Tex. Cr. App. 6, 108 SW 651. Prosecuting witness may testify that money found on accused looked like the money stolen. Anglin v. State, 52 Tex. Cr. App. 475, 107 SW 835. Evidence of similar chattels seen in possession of accused at about time property was missed by owner held admissible, though indictment alleged larceny at later date. Ingraham v. State [Neb.] 118 NW 320.

tial evidence,[18] unless such evidence would inflame or prejudice the jury.[19] On indictment for larceny of a branded steer, the hide and diagram of the owner's brand are admissible,[20] but evidence of third persons that they sometimes make mistakes in identifying their own cattle is irrelevant.[21] The defendant should be permitted to introduce any proper evidence tending to establish a valid defense.[22] The introduction of incompetent evidence, if immaterial, is harmless.[23]

(§ 3) *C. Effect of possession of stolen property.* See 10 C. L. 605—It is held that the personal and exclusive possession[24] of recently[25] stolen goods raises a presumption of guilt[26] which, in the absence of a satisfactory explanation,[27] may support a conviction for larceny,[28] but the decisions are not in harmony upon this point, and some courts maintain that this presumption alone will not warrant a conviction, though it may do so in connection with other evidence[29] or that it merely raises an inference of guilt,[30] which may be considered by the jury on the same footing as the other evidence in the case,[31] and in connection therewith.[32] The presumption, such as it is, is of fact rather than of law[33] and may be overthrown by other evidence.[34] The identity of the goods found in possession of the accused with the stolen goods is a question of fact,[35] but the evidence must justify the findings.[36]

18. Lynne v. State, 53 Tex. Cr. App. 375, 111 SW 729. No error to admit evidence of corresponding money hidden in room of confederate. Hooton v. State, 53 Tex. Cr. App. 6, 108 SW 651.

19. Hooton v. State, 53 Tex. Cr. App. 6, 108 SW 651.

20, 21. People v. Hutchings [Cal. App.] 97 P 325.

22. Evidence tending to show innocent possession. Mason v. State [Ind.] 85 NE 776. Evidence that defendant was authorized agent of owner. Guthrie v. State [Miss.] 47 S 639. Evidence tending to rebut felonious intent in the taking and that subsequent suspicious conduct was by advice of parent. Worthington v. State, 53 Tex. Cr. App. 178, 109 SW 187.

23. Though leases of oyster beds are authorized by Laws 1868, c. 734, p. 1652, the existence of such a lease is not material to larceny of oysters; hence parol evidence of the lease is harmless. People v. Morrison, 124 App. Div. 10, 108 NYS 262.

24. Must be complete and exclusive. State v. Johnson [Kan.] 98 P 216. Must be personal, involving a distinct and conscious assertion of possession. People v. Horton [Cal. App.] 93 P 382. Must be personal but not necessarily exclusive. The rule is satisfied if it is exclusive as to persons not particeps criminis. As to the latter class possession of one is possession of each and all. Id. Possession held to be personal. Id.

25. Must be recent. Bryant v. State [Ga. App.] 62 SE 540. Instruction on possession must include element of recency. Mance v. State [Ga. App.] 62 SE 1053. Instruction that, if jury finds defendant had possession recently after Dec. 18, it may presume, etc., held erroneous as excluding from the consideration of the jury the interval between the date mentioned and Oct. 18th, the date of the alleged offense. State v. Plant, 209 Mo. 307, 107 SW 1076.

26. Mills v. Erie R. Co., 113 NYS 641.

27. Explanation before trial held insufficient to render prosecuting witness liable for malicious prosecution in maintaining the charge. Mills v. Erie R. Co., 113 NYS 641.

28. Jones v. State, 85 Ark. 360, 108 SW 223; McDonald v. State [Fla.] 47 S 485; Mason v. State [Ind.] 85 NE 776.

29. State v. Peck, 14 Idaho, 712, 95 P 515; Mason v. State [Ind.] 85 NE 776.

30. Mason v. State [Ind.] 85 NE 776.

31. McDonald v. State [Fla.] 47 S 485; Slater v. U. S. [Okl. Cr. App.] 98 P 110. Incorrect to instruct that possession raises a presumption of guilt. Slater v. U. S. [Okl. Cr. App.] 98 P 110. Correct to instruct that unexplained possession of recently stolen property is a circumstance to be considered by the jury. Territory v. Caldwell [N. M.] 98 P 167. Presumption from possession is not conclusive but is merely a circumstance from which guilt may be inferred. Not sufficient to authorize conviction when not shown to be recent and when property had passed from hand to hand, prior holders since larceny not given good excuse for their possession. Bryant v. State [Ga. App.] 62 SE 540.

32. Defendant's denial of knowledge of the stolen property, his presence near the scene of the theft at about the time of its commission, and the other surrounding circumstances, were properly considered by the court in determining the effect of his possession of the property. Mason v. State [Ind.] 85 NE 776.

33. Instruction on presumption arising from possession held to be on weight of evidence and erroneous. Slater v. U. S. [Okl. Cr. App.] 98 P 110.

34. Evidence held to show defendant not guilty. State v. Crooke, 129 Mo. App. 490, 107 SW 1104.

35. Cox v. State, 3 Ga. App. 609, 60 SE 283; Lynne v. State, 53 Tex. Cr. App. 375, 111 SW 729; Hooton v. State, 53 Tex. Cr. App. 6, 108 SW 651.

36. Evidence insufficient. Johnson v. State, 52 Tex. Cr. App. 510, 107 SW 845; Taylor v. State, 53 Tex. Cr. App. 615, 111 SW 151.

A reasonable explanation imposes the burden of rebuttal upon the state,[37] but failure to rebut does not render the explanation conclusive of innocence.[38]

(§ 3) *D. Sufficiency of evidence.*[See 10 C. L. 605]—The state must prove beyond a reasonable doubt,[39] by competent and satisfactory evidence,[40] every essential ingredient of the offense, such as felonious intent,[41] ownership in another than the accused,[42] nonconsent by the owner,[43] value of the property taken,[44] and the guilt of the accused,[45] and must support by proof every material allegation,[46] though in

**37.** McDonald v. State [Fla.] 47 S 485. Defendant need not prove truth of explanation. Id. If explanation, considered with the whole evidence, raises a reasonable doubt, jury should acquit. Mason v. State [Ind.] 85 NE 776. When accused made an adequate explanation which, if true, warranted acquittal, neglect to charge on evidentiary value of possession when weighed in connection with the explanation is error. Morris v. State [Ga. App.] 63 SE 26.

**38.** Explanation must be not only reasonable but credible and sufficient to raise a reasonable doubt. McDonald v. State [Fla.] 47 S 485. Sufficiency of explanation is for jury. Jones v. State [Ga. App.] 61 SE 133. Jury or court sitting upon facts is sole judge of sufficiency. Mason v. State [Ind.] 85 NE 776. May convict if explanation is not believed, though there was no direct rebuttal. McDonald v. State [Fla.] 47 S 485. Verdict of guilty indicates that jury did not believe explanation. Id.

**39.** McDonald v. State [Fla.] 47 S 485. Burden of proof is always on state and never shifts. Cagle v. State, 52 Tex. Cr. App. 307, 20 Tex. Ct. Rep. 550, 106 SW 356.

**40.** Proof must be substantial, not mere suspicion. Jones v. State, 85 Ark. 360, 108 SW 223. Evidence should warrant a reasonable conclusion of guilt. Mickle v. U. S. [C. C. A.] 157 F 229. Where reliance is on circumstantial evidence, the state must reasonably identify the property found in possession of accused. Felts v. State, 53 Tex. Cr. App. 48, 108 SW 654.

**41.** Evidence held sufficient to warrant finding of criminal intent in taking. State v. Noyes [Idaho] 96 P 435. Circumstances held to rebut theory that defendant believed gun belonged to a friend. Crouch v. State, 52 Tex. Cr. App. 460, 107 SW 859. Evidence sufficient to show inclosure of shell fish plantation and notice of ownership. People v. Morrison, 124 App. Div. 10, 108 NYS 262.

**42.** Ownership must be shown. State v. James [Mo. App.] 113 SW 232. Possession is prima facie evidence of ownership but not sufficient to overcome presumption of innocence and warrant conviction of accused. One presumption cannot overthrow another and conviction cannot be had on mere inference of an essential element. Id.

**43.** Must be shown. State v. Faulk [S. D.] 116 NW 72; State v. James [Mo. App.] 113 SW 232; George v. U. S. [Okl. Cr. App.] 97 P 1052. Direct proof not necessary; may be inferred from the circumstances. State v. Faulk [S. D.] 116 NW 72. Fact that owner made search for stolen property is a cogent circumstance to show nonconsent. Not necessary to prove by testimony of owner. George v. U. S. [Okl. Cr. App.] 97 P 1052. Proof of nonconsent held sufficient. State v. Faulk [S. D.] 116 NW 72. Proof that pocket book was snatched from owner's pocket while owner's attention was diverted held sufficient to show lack of consent. State v. James [Mo. App.] 113 SW 232. Evidence held sufficient to sustain verdict of larceny from the person though there was some evidence to the effect that owner consented to part with property. Washington v. State, 53 Tex. Cr. App. 300, 109 SW 157.

**44.** With rare exceptions the question of value is for jury, notwithstanding weight of evidence. Schwartz v. State, 53 Tex. Cr. App. 449, 111 SW 399. Values are always largely a matter of opinion and a statement of value is not to be held conclusive, regardless of jury's belief in the honesty and fairness of witness. Id. Where there is no claim that value of property has undergone change, testimony as to value at time of theft is sufficient proof thereof. Cummings v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 397, 106 SW 363. The original cost of worn clothing is to be considered in fixing its actual value when stolen. State v. McDermet [Iowa] 115 NW 884. Evidence of value held sufficient. State v. Faulk [S. D.] 116 NW 72.

**45.** Accused must be positively identified with the crime. State v. James [Mo. App.] 113 SW 232.

**Held sufficient** to sustain verdict. Dennis v. State [Ark.] 114 SW 926; Minor v. State [Fla.] 46 S 297; People v. Frankenberg, 236 Ill. 408, 86 NE 128; Smith v. Com., 33 Ky. L. R. 998, 112 SW 615; State v. McGee, 212 Mo. 95, 110 SW 699; State v. Walken [Mo. App.] 113 SW 221; State v. Hayes [Mo.] 113 SW 1050; State v. McDowell [Mo.] 113 SW 1113; Crouch v. State, 52 Tex. Cr. App. 460, 107 SW 859; Hooton v. State, 53 Tex. Cr. App. 6, 108 SW 651; Lynne v. State, 53 Tex. Cr. App. 375, 111 SW 729; Gibbs v. State [Tex. Cr. App.] 114 SW 795; Moore v. State [Tex. Cr. App.] 114 SW 807; Williams v. State [Tex. Cr. App.] 114 SW 823; State v. Clem [Wash.] 94 P 1079. Evidence of larceny by trick under pretense of making change held sufficient. Taylor v. State [Ga. App.] 62 SE 482.

**Held insufficient** to sustain verdict. Jones v. State, 85 Ark. 360, 108 SW 223; State v. West [Idaho] 95 P 949; State v. James [Mo. App.] 113 SW 232. Evidence held insufficient to support verdict. Landreth v. State, 53 Tex. Cr. App. 556, 110 SW 905; Fruger v. State [Tex. Cr. App.] 114 SW 794.

**46.** "Coin" imports current money; not necessary to prove allegation of currency. State v. Faulk [S. D.] 116 NW 72. Allegation of paper currency, money of the United States, supported by proof of gold certificates and national bank notes. Anglin v. State, 52 Tex. Cr. App. 475, 107 SW 835. Husband's money stolen from wife by wife's paramour supports allegation of larceny from husband. Commonwealth v. Levinson, 34 Pa. Super. Ct. 286. Where ownership is alleged in three persons and proved in two, there is fatal

Texas the state need not prove an allegation of ownership which is not denied.[47] Testimony of an accomplice must be corroborated.[48] Where there is legal evidence of guilt, its sufficiency is ordinarily a question of fact.[49] Corpus delicti,[50] and guilt of the accused,[51] may be shown by circumstantial evidence, but circumstantial evidence must be legal evidence,[52] and of such cogency as to exclude every other hypothesis except that of guilt,[53] and its effect is for the jury to determine.[54]

(§ 3) *E. Instructions.*[See 10 C. L. 607]—The instructions should clearly[55] state the law of the case[56] when read as a whole,[57] and are not erroneous when in view of

variance. Franklin v. State, 53 Tex. Cr. App. 547, 110 SW 909. Proof that cotton raised by renter was stolen from ginner does not support allegation of ownership in landlord. Peck v. State [Tex. Cr. App.] 111 SW 1019. Indictment for larceny of diamond ring and proof of larceny of diamond shirt stud held absolute failure of proof. Stats v. Plant, 209 Mo. 307, 107 SW 1076.

**47.** Proper to omit charge on proof of ownership. Moore v. State [Tex. Cr. App.] 114 SW 807.

**48.** Corroboration held sufficient. State v. Whitman, 103 Minn. 92, 114 NW 363; State v. Shapiro [R. I.] 69 A 340; Vought v. State, 135 Wis. 6, 114 NW 518. Testimony of defendant and corroborative evidence held sufficient to support conviction for larceny from box car independent of testimony of accomplices. Celender v. State [Ark.] 109 SW 1024.

**49.** Credibility of witnesses is for jury. McDonald v. State [Fla.] 47 S 485. Sufficiency of circumstantial evidence is for jury. Perry v. State [Ala.] 46 S 470. Whether the claim of right was bona fide or pretended is for the jury. State v. Bailey, 63 W. Va. 668, 60 SE 785. Whether hiring of horse was in good faith or a fraudulent pretext held for jury. Smith v. Com., 33 Ky. L. R. 998, 112 SW 615. Testimony of prosecutor that he missed corn from his crib at time of alleged larceny, and that he believed corn in defendant's possession was his, but would not swear it, together with testimony of defendant's wife that defendant asked her to engage prosecutor in conversation while he got corn, held sufficient to take cass to jury. State v. Bailey [Del.] 69 A 1004.

**50.** Perry v. State [Ala.] 46 S 470; Ray v. State [Ga. App.] 60 SE 816; Mason v. Stats [Ind.] 85 NE 776; State v. Estes, 209 Mo. 288, 107 SW 1059; George v. U. S. [Okl. Cr. App.] 97 P 1052.

**51.** Proper to instruct that circumstantial evidence may be sufficient to warrant conviction. People v. Cain [Cal. App.] 93 P 1037. Identity of stolen money may be shown by circumstantial evidence. McDonald v. State [Fla.] 47 S 485. Facts and circumstances may disprove innocent taking under bona fide claim of right. Attempt to defeat adverse claim by concealment or disposition of property. State v. Bailey, 63 W. Va. 668, 60 SE 785. Conspiracy to commit larceny may be proved by circumstantial evidence. Conspiracy held to be proved so as to render evidence of acts and declarations of codefendant admissible. State v. Lewis [Or.] 94 P 831. That defendants were jointly in charge of carriage and that property stolen therefrom was immediately thereafter found in the possession of each held to prove felonious intent. Moxle v. State [Tex. Cr. App.] 114 SW 375. Evidence of larceny from person of prosecutor while engaged with prostitute in such a way that she could not have taken the property held to directly implicate proprietor of bawdy house who was in immediate vicinity. State v. Lewis [Or.] 94 P 831.

**Held sufficient:** To sustain conviction. People v. Maltais [Cal. App.] 93 P 890; People v. Cain [Cal. App.] 93 P 1037; McDonald v. State [Fla.] 47 S 485; Hutchings v. State [Ga. App.] 61 SE 837; State v. Swanzy [Kan.] 97 P 1134; State v. Glover [S. D.] 113 NW 625. To identify the accused with the crime. State v. Estes, 209 Mo. 288, 107 SW 1059; Moxie v. State [Tex. Cr. App.] 114 SW 375. To show larceny by conspirators. State v. Lewis [Or.] 94 P 831.

**52.** Testimony that contents of box car "checked up short" when referred to a bill of lading, which bill of lading is not shown to be a correct list of the contents of car or to have been signed by any one held insufficent. Perry v. State [Ala.] 46 S 470. Must reasonably identify property found in possession of accused. Felts v. State, 53 Tex. Cr. App. 48, 108 SW 654.

**53.** Johnson v. State, 52 Tex. Cr. App. 510, 107 SW 845. Where all parties were drunk, circumstances held insufficient to prove privately taking money from the person. Day v. State, 53 Tex. Cr. App. 648, 111 SW 408.

**54.** Dennis v. State [Ark.] 114 SW 926.

**55.** Instruction on innocent taking held confusing and contradictory. Warren v. Stats [Tex. Cr. App.] 20 Tex. Ct. Rep. 394, 106 SW 382.

**56.** Instructions must cover the essentials of the offense with regard to the evidence of the case. Instructions held sufficient in the absence of request. State v. McDermet [Iowa] 115 NW 884. Failure to instruct on taking from person "so suddenly as not to permit time to make resistance" not failure to set out law applicable to the case. Williams v. State [Tex. Cr. App.] 114 SW 823. Instruction held to sufficiently present the merits. Crouch v. State, 52 Tex. Cr. App. 460, 107 SW 859. Instruction held not to erroneously authorize conviction for larceny from another than the prosecutor. People v. Cain [Cal. App.] 93 P 1037. Failure to specify intent to appropriate to own use held fatal. Alford v. State, 52 Tex. Cr. App. 621, 108 SW 364. If the original taking is innocent, no subsequent intent can render the taking larceny and failure to so instruct is error. Warren v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 394, 106 SW 382. Allegation of possession of an agent for a corporation and charge of taking from the possession of corporation fatally variant. Taylor v. State, 53 Tex. Cr. App. 615, 111 SW 151. Charge that if explanation "accounted for defendant's innocence" he should be acquitted held erroneous since a defendant is never required to account for

the evidence they do not mislead the jury.[58] Questions of fact should be properly submitted[59] and all circumstances having evidentiary value.[60] Reasonable doubt should be sufficiently charged[61] and any proper defense raised by the evidence.[62] It is proper to charge on included lesser offenses when justified by the evidence,[63] and it is error to instruct that the accused cannot be convicted of an included lesser offense under indictment charging the greater.[64] Where the degree of the offense is not clear, it is proper to charge in the alternative.[65] It is not necessary to define larceny when all the essential elements thereof are set forth.[66] Issues not raised by the evidence are properly excluded,[67] as are requested charges as to matters already set forth[68] or misstating the law of the case.[69] A charge imposing upon the taker of lost property the burden of diligent search for the owner is error.[70] In Texas a charge authorizing the penalty for a different offense, though not prejudicial to the defendant, is held error.[71]

(§ 3) *F. Trial, sentence and review.* See 10 C. L. 609—Where the indictment incidentally charges a misdemeanor, the state cannot be compelled to try the defendant first for the misdemeanor.[72] Conviction of an included lesser offense may be proper under an indictment charging the greater.[73] Under an indictment for grand larceny, verdict of larceny without specifying degree but finding an amount as for petit will support a sentence proper for petit larceny.[74] In the absence of proof, verdict may be directed for the defendant.[75] Upon motion the trial court may

his innocence. Cagle v. State, 52 Tex. Cr. App. 307, 20 Tex. Ct. Rep. 550, 106 SW 356.

57. Two instructions, each inadequate, if read singly, held to adequately define larceny when read together. State v. De Lea, 36 Mont. 531, 93 P 814.

58. Instruction as to effect of claim of ownership by one in possession shortly after larceny, while too broad as a general proposition, held proper under the evidence. People v. Horton [Cal. App.] 93 P 383.

59. Value is a question of fact and should not be ignored in instructions. Schwartz v. State, 53 Tex. Cr. App. 449, 111 SW 399.

60. Element of recency as affecting possession of stolen goods. Mance v. State [Ga. App.] 62 SE 1053; State v. Plant, 209 Mo. 307, 107 SW 1076.

61. If the defendant took the hog, believing it to be his own, you will acquit him, or if you have a reasonable doubt of his guilt you will acquit him, held to sufficiently charge reasonable doubt under the circumstances. Harrolson v. State [Tex. Cr. App.] 113 SW 544.

62. Evidentiary value of explanation of possession. Morris v. State [Ga. App.] 63 SE 26. Where defendant testified that he received the money after it was stolen, error to refuse charge that if this were true he could not be convicted of larceny. Felts v. State, 53 Tex. Cr. App. 48, 108 SW 654.

63. State v. Clem [Wash.] 94 P 1079. In robbery trial, evidence held to justify instruction on larceny and larceny from the person. State v. Taylor [Iowa] 118 NW 747.

64. State v. Taylor [Iowa] 118 NW 747.

65. When complainant was drunk and state could not clearly show just how money was taken, an instruction on larceny from the person was not error, especially where verdict was for larceny only. Hooton v. State, 53 Tex. Cr. App. 6, 108 SW 651.

66. Where the court instructs the jury that it must find, beyond a reasonable doubt, the material allegations of the information and specifies what are such material allegations, including all essential elements of larceny, it is unnecessary to define larceny. Starke v. State [Wyo.] 96 P 148.

67. Uncontroverted facts. Moore v. State [Tex. Cr. App.] 114 SW 807. Not error to refuse charge on animus furandi where it is clearly proved. Moxie v. State [Tex. Cr. App.] 114 SW 375. Proper to omit charge on defense not suggested by the evidence. Moore v. State [Tex. Cr. App.] 114 SW 807. Charge on voluntary return properly omitted when there was no voluntary return but defendant was caught with the goods. Id. Instruction that if complainant threw his money promiscuously about and accused took it he could not be convicted properly refused where evidence shows that complainant simply arranged his money along the bar. Hooton v. State, 53 Tex. Cr. App. 6, 108 SW 651.

68. Instruction on innocent taking already covered. Gibbs v. State [Tex. Cr. App.] 114 SW 795.

69. White v. State [Ala.] 47 S 192.

70. Moxie v. State [Tex. Cr. App.] 114 SW 375.

71. A charge authorizing sentence of $500 on one year, being the penalty for a misdemeanor, is fatally defective in case of petty theft, the penalty for which is $500 or two years. Peck v. State [Tex. Cr. App.] 111 SW 1019.

72. People v. Gallagher, 58 Misc. 512, 111 NYS 473.

73. State v. Taylor [Iowa] 118 NW 747. Conviction of larceny proper under indictment for breaking and entering and stealing. State v. Shapiro [R. I.] 69 A 340. A conviction for petit larceny may be had under an indictment for grand larceny. As expressly provided by Rev. St. 1899, § 1911. State v. Walken [Mo. App.] 113 SW 221. May be convicted of petit under indictment charging grand larceny. Thomas v. State [Ala.] 46 S 565.

74. Thomas v. State [Ala.] 46 S 565.

75. Guthrie v. State [Miss.] 47 S 639.

grant a new trial for insufficiency of evidence or where the verdict is against the manifest weight of evidence,[76] but where there is any legal evidence to support the verdict, it will not ordinarily be disturbed on appeal.[77] On appellate review the general rules apply as to saving questions for review.[78] The acquittal of two of joint conspirators to commit larceny is no bar to conviction of a third who actually obtained the fruits of the larceny.[79]

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**Lasciviousness; Lateral Railroads; Lateral Support; Law of the Case; Law of the Road; Leases; Legacies and Devises; Legal Conclusions; Legatees; Letters; Letters of Credit; Levees; Lewdness,** see latest topical index.

## LIBEL AND SLANDER.

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§ 1. *Definition and distinctions, nature of tort, and persons liable or damnifiable.*[See 10 C. L. 809]—The action of libel is one to recover damages for injury to a man's reputation and good name,[80] and a libel in its most general and comprehensive sense is any false publication injurious to the reputation of another.[81] Libel may arise from insinuation as well as by explicit statement.[82] The action is maintainable though the subject of the libel is unnamed.[83] Generally an action of slander may not be maintained jointly against two or more defendants.[84] A repetition of an identical libel is not a new cause of action but an aggravation of the pre-existing cause.[85] A corporation may sue or be sued for libel,[86] but is unaffected by libels by or concerning its agents.[87] A corporation is not liable for defamation by its agents unless committed in the course of employment[88] or ratified.[89] A part-

**76.** McDonald v. State [Fla.] 47 S 485.

**77.** McDonald v. State [Fla.] 47 S 485; Cox v. State, 3 Ga. App. 609, 60 SE 283. Verdict set aside as not supported by any legal evidence. Mickle v. U. S. [C. C. A.] 157 F 229. Held no legal evidence. Taylor v. State, 53 Tex. Cr. App. 615, 111 SW 151; Johnson v. State, 52 Tex. Cr. App. 510, 107 SW 845.

**78.** See Indictment and Prosecution, 12 C. L. 1.

**79.** Conspiracy of town board to issue fraudulent orders and obtain money thereon. Vought v. State, 135 Wis. 6, 114 NW 518.

**80.** Brown v. Knapp & Co. [Mo.] 112 SW 474.

**81.** Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496.

**Definitions:** A written or printed publication which is false and defamatory and calculated to expose one to ridicule or contempt, or to render him odious, or injure him in his business or calling, or in his social standing, is a libel. Register Newspaper Co. v. Worten, 33 Ky. L. R. 840, 111 SW 693. Unprivileged publication by letter or otherwise, which causes person to be avoided, etc. Briggs v. Brown [Fla.] 46 S 325. Libel is malicious defamation of person made public by any printing or writing tending to provoke him to wrath, or expose him to public hatred, contempt or ridicule, or to deprive him of benefits of public confidence and social intercourse. Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496. Libel defined. Gen. Laws Tex. (Acts 1901, p. 30, c. 26). Belo & Co. v. Lacy [Tex. Civ. App.] 111 SW 215. Includes any case which was libelous at common law. Fleming v. Mattinson [Tex. Civ. App.] 114 SW 650.

**82.** Merrill v. Post Pub. Co., 197 Mass. 185, 83 NE 419.

**83.** When facts are so stated that any intelligent reader upon reading article and knowing facts would come to conclusion that it applied to such party. Adams v. Carrington Pub. Co., 160 F 986.

**84.** Unless connected by allegation of proof of common design and purpose. Rice v. McAdams [N. C.] 62 SE 774.

**85.** Murray v. Galbraith [Ark.] 109 SW 1011.

**86.** Farbenfabriken v. Beringer [C. C. A.] 158 F 802. Corporation may sue as distinguished from members. Hapgoods v. Crawford, 110 NYS 122. Hurt which wrong affecting reputation may do to a corporation is not coextensive with that which libel may inflict upon natural person. Farbenfabriken v. Beringer [C. C. A.] 158 F 802.

**87.** Attack on rectitude of officers does not give corporation right of action. Warner Instrument Co. v. Ingersoll, 157 F 311; Hapgoods v. Crawford, 110 NYS 122.

**88.** Insurance company not liable for slanderous statements by solicitors not spoken in course of employment. Kane v.

nership may be liable for libel by a partner in furtherance of the firm business.[90] A publisher is liable for libels by his agents within the scope of their employment, but their express malice is not ordinarily imputable to him.[91] Where a signed notice in a newspaper was entirely different from the one authorized, the fact that the defendants did not correct the published notice was not evidence of ratification.[92]

§ 2. *Elements of tort. A. Actionable words.* See 10 C. L. 610—Words actionable per se without proof of special damage include words imputing crime,[93] infectious

Boston Mut. Life Ins. Co., 200 Mass. 265, 86 NE 302. Making of slanderous statements by agents of insurance company will not authorize inference that they were made in course of employment. Id.

**89.** In action of superintendent and refusal to assist plaintiff not indicative of ratification of slander by agents. Kane v. Boston Mut. Life Ins. Co., 200 Mass. 265, 86 NE 302. Letters insufficient to ratify slander of agent when expressing disapproval of acts. Id. Proof of loss of business insufficient to show ratification where no evidence that deendants knew facts. Id.

**90.** Libelous letter in respect to business of partnership signed by partnership name per member. Burgess & Co. v. Patterson [Ky.] 106 SW 837.

**91. NOTE. Liability of newspaper editor or publisher for libelous article published in his absence or without his knowledge:** The liability of a newspaper proprietor for libelous articles published in his absence or without his knowedge is generally admitted (Crane v. Bennett, 177 N. Y. 106, 69 NE 274, 101 Am. St. Rep. 729; Morgan v. Bennett, 44 App. Div. 323, 60 NYS 619; McMahon v. Bennett, 31 App. Div. 16, 52 NYS 390; O'Brien v. Bennett, 59 App. Div. 623, 69 NYS 298; Andres v. Wells, 7 Johns. [N. Y.] 261, 5 Am. Dec. 267; Holmes v. Jones, 147 N. Y. 59, 41 NE 409, 49 Am. St. Rep. 646; Youmans v. Paine, 86 Hun [N. Y.] 479, 35 NYS 50; Warner v. Press Pub. Co., 132 N. Y. 181, 30 NE 393; Bennett v. Salisbury, 78 F 769; Mallory v. Bennett, 15 F 374; Buckley v. Knapp, 48 Mo. 152; Eviston v. Cramer, 57 Wis. 570, 15 NW 760; Bruce v. Reed, 104 Pa. 415, 49 Am. Rep. 586; Dunn v. Hall, 1 Ind. 355; Rex v. Gutch, Moody & M. 433; Rex. v. Walter, 3 Esp. 21), and this liability is held to include punitive damages in cases where such an award is proper, notwithstanding the fact that such publication may have been made contrary to the rules laid down by the proprietor for the regulation of his agents. The rule is strictly enforced in the case of unchaste or reckless publications reflecting upon personal reputation, and it is held that the hurry of getting out a large metropolitan journal is no excuse for such articles. Bennett v. Salisbury, 78 F 769; Smith v. Matthewa, 152 N. Y. 152, 46 NE 164; Warner v. Press Pub. Co., 132 N. Y. 181, 30 NE 393; Holmes v. Jones, 121 N. Y. 461, 24 NE 701; Holmes v. Jones, 147 N. Y. 59, 41 NE 409, 49 Am. St. Rep. 646; Scripps v. Reilly, 38 Mich. 27. The rule is, in effect, the same in the case of a corporate publisher, for although it is difficult to impute malice to a corporation, the act having been done by the agent in the course of his employment and for the benefit of the employer, it is but just that the employer should be held responsible therefor. Lothrop v. Adams, 133 Mass. 480, 43 Am. Rep. 528. Ratification as a proof of malice in such cases is discussed in Edsall v. Brooks, 2 Rob. [N. Y.] 417; Mallory v. Bennett, 15 F 375; Goodrich v. Stone, 11 Metc. [Mass.] 492, and Haines v. Schultz, 50 N. J. Law, 481, 14 A 488.

But in Smith v. Ashley, 11 Metc. [Mass.] 367, 45 Am. Dec. 216, it was held that where the publisher believed an article to be a fictitous narrative, but it proved to be libelous, he was not liable. See, also, Detroit Post Co. v. McArthur, 16 Mich. 447; Scripps v. Reilly, 38 Mich. 10 and Robertson v. Wylde, 2 Moody & R. 101, wherein it is held that punitive damages will not be allowed where the proprietor of the newspaper is ignorant of the publication and is not negligent.

There are strong dicta to the effect that the liability of an editor in such cases is no less than that of a proprietor (Well v. Nevin, 1 Monaghan [Pa.] 65; Spooner v. Daniek, Fed. Cas. No. 13,244a; McCabe v. Jones, 10 Daly [N. Y.] 222; Hunt v. Bennett, 19 N. Y. 173), and there are cases which include a manager within such liability (Ickes v. State, 16 Ohio C. C. 31; Danville Press Co. v. Harrison, 99 Ill. App. 244; Smith v. Utley, 92 Wis. 133, 65 NW 744, 35 L. R. A. 620). This extension of the rule is expressly disapproved in Folwell v. Miller, 75 C. C. A. 489, 145 F 495, 10 L. R. A. (N. S.) 332, where it is held the president of a publishing corporation is not liable for libels published without his knowledge or authority, and that the liability of an editor for such publications is not that of a proprietor, and hence he cannot be held for articles published without his knowledge and in his absence. In Com. v. Kneeland, Thatcher Cr. Cas. 346, it is said, obiter., that editorial orders forbidding such publications may be a defense where the libel was inserted surrepititiously. In the case of Watts v. Fraser, 7 Car. & P. 369, where the editor was held liable, it would seem that he was also proprietor of the publication in question.—[Ed.]

**92.** Instruction properly refused. Horton v. Jackson [Ark.] 113 SW 45. Where defendant requested publication of notice that plantiff was expelled from order, and another notice was published stating that plaintiff was traitor to order, defendant was not liable for second notice. Id.

**93.** Words need not charge offense in language of statute. Gordon v. Journal Pub. Co. [Vt.] 69 A 742; Brown v. Knapp & Co. [Mo.] 112 SW 474.

**Held actionable per se:** Charge of perjury. Brown v. Globe Print. Co. [Mo.] 112 SW 462; Brown v. Knapp & Co. [Mo.] 112 SW 474. Charge that plaintiff stole wheat. Rice v. McAdams [N. C.] 62 SE 774. Charge that one stole check for $36, that unless he would pay amount he would be prosecuted for forgery, obtaining money by falee pretenses, and for stealing the check. Zentzshel v. Richey, 33 Ky. L. R. 657, 110 SW 832. Letter notifying addressee that plaintiff had moved timber

disease,[94] or want of chastity,[95] or exposing one to scorn, ridicule or contempt,[96]

from writer's land, that if addressee purchased from plaintiff he received stolen property, and that addressee must heed notice or matter would be placed before proper officials. Burgess & Co. v. Patterson [Ky.] 106 SW 837. Charging plaintiff with smuggling. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Words "He has another wife back east and a wife and child here," as charging bigamy. Bleitz v. Carton [Wash.] 95 P 1099. Publication charging plaintiff, though unnamed, with throwing bomb or hiring others to throw bomb which wrecked attorney's home, and with other crimes. Dennison v. Daily News Pub. Co. [Neb.] 118 NW 568. Article stated that $70,000 had been used by enterprising individuals who had passed hat. Adams v. Carrington Pub. Co., 160 F 986. "Assault and battery with intent to kill" actionable though not in statutory words. Gordon v. Journal Pub. Co. [Vt.] 69 A 742. "Battery" may be treated as surplusage. Id. Publication of article charging persons with effecting pool or combination libelous per se, as tending to expose person to hatred or contempt or to injure business, and fact that Code §§ 5060-5062, making pools a crime, might be unconstitutional, would not lessen fact that acts were contrary to public policy of state. Dorn v. Cooper [Iowa] 117 NW 1.

**Held not actionable per se:** To charge one with having stolen land of another not actionable per se, there being no such crime as larceny of land. Jones v. Bush [Ga.] 62 SE 279. Article stating that plaintiff had procured perjured statements concerning candidate and circulated slanderous attack, that animus of attack originated in case where candidate appeared against plaintiff, that such action was to recover fees which plaintiff as county clerk had not accounted for, construed as not directly or by imputation charging plaintiff with enbezzlement, perjury or subornation of perjury. Sheibley v. Fales [Neb.] 116 NW 1035.

**94.** Article referring to plaintiff as "ill with disease" does not charge infectious disease. Merrill v. Post Pub. Co., 197 Mass. 185, 83 NE 419.

**95. Held actionable per se:** Publicly calling young white woman "a Decatur street whore." Sparks v. Bedford [Ga. App.] 60 SE 809. Charge that person had committed fornication. Harms v. Proehl, 104 Minn. 303, 116 NW 587. Article in newspaper which to common understanding charged woman referred to as mistress of plaintiff. Dempster v. Mann, 157 F 319. Words, "B was undoubtedly down the railroad track with some woman; I believe it; he is guilty and I know he is," actionable as charging adultery. Bashford v. Wells [Kan.] 96 P 663. Publication that husband of plaintiff had brought suit against attorney for alienation of affections, and later divorce suit which had not been decided, libelous per se, as imputing divorce for adultery. De Festetics v. Sun Print. & Pub. Ass'n, 57 Misc. 194, 109 NYS 30. Article regarding minister who was defendant in divorce suit imputing improper conduct. Russell v. Washing Post Co., 31 App. D. C. 277.

**Held not actionable per se:** In altercation over horses where defendant said "You will have to keep your horses away from my fence. Your horse has knocked my post off, you damned old bitch," language was not slanderous per se as imputing want of chastity. Warren v. Ray [Mich.] 15 Det. Leg. N. 935, 118 NW 741.

**96.** Publication which holds one up to ridicule, contempt, hatred or obloquy is libelous, though no crime is charged. Gordon v. New York Evening Journal Pub. Co., 111 NYS 574.

**Held actionable per se:** Writing that plaintiff is brother of sister arrested for larceny a statement affecting person's standing in community. Merrill v. Post Pub. Co., 197 Mass. 185, 83 NE 419. Finding that writing of a man that he was in such difficulties that sister stole to help him out properly libelous. Id. Article relating to dog at dog show which was dyed and imputing act to plaintiff. Van Heusen v. Argenteau, 124 App. Div. 776, 109 NYS 238. Article holding plaintiff out as going into passion and threatening to kill another without cause or provocation. Gordon v. New York Evening Journal Pub. Co., 111 NYS 574. Equivocal newspaper article capable of meaning that person referred to was member of underworld, familiar with Chinese prize fighter and on terms of intimacy with such person, and implying that relations were improper, held actionable on demurrer. Ervin v. Record Pub. Co. [Cal.] 97 P 21. Article in paper reasonably construed as holding plaintiff up to ridicule and contempt, as imputing misconduct. Chanler v. Town Topics Pub. Co. [C. C. A.] 161 F 105. Words spoken of plaintiff that he destroyed public records to cover up evidence of his misappropriation of public funds and fines belonging to the town, defamatory, per se. Johnston v. Turner [Ala.] 47 S 570. Newspaper article as to graveling district charging that commissioners overcharged neighbors over $7,000, criticising paving, etc. Murray v. Galbraith [Ark.] 109 SW 1011. Publication that lawyer procured passage of bill raising judge's salary and was rewarded by references. Hickey v. Corson Mfg. Co., 58 Misc. 70, 108 NYS 884. Article charging attorney with bringing unauthorized suit is libelous. Register Newspaper Co. v. Worten, 33 Ky. L. R. 840, 111 SW 693. Newspaper article referring to lawyer as "fellow with license to practice," and as being popular with ex-prisoners, drawing much practice from such source, libelous. Id. Article charging attorney with unprofessional conduct, as soliciting business. Id. Charge against public official importing want of integrity or corruption in discharge of official duties. Dauphing v. Buhne, 153 Cal. 757, 96 P 880. Publication charging plaintiff as unscrupulous office holder. Stewart v. Codrington [Fla.] 45 S 809. Words, "he is a hypocrite, a wolf in sheep's clothing, who steals the livery of heaven to serve the devil in." Id. Words, "he is at the head of the most villainous gang of thieves that ever plundered the taxpayers of Volusia county." Id. Words, "he is vicious, profligate, malevolent and vindictive." Id. "He is a liar or perjurer." Id. Publication impeaching plaintiff's veracity libelous per se. Fleming v. Mattinson [Tex. Civ. App.] 114 SW 650. Charge of falsehood libelous per se at common law, and rule not changed by Acts 1901, p. 30, c. 26. Id.

**Held not actionable per se:** Charge that

or injuring one in his business or occupation.[97] Words actionable per se may be spoken of a corporation.[98] Words may be libelous though if not written they would not have been slanderous.[99] The court or jury[1] in determining whether a publication is libelous per se must consider the article as a whole[2] in the light of the common acceptation of the terms employed,[3] the question being what was understood by the hearers or readers.[4] The headlines of a newspaper are frequently determinative of the question whether an article is libelous.[5] Defamation of a class of persons is not actionable by the individual members unless the libelous article is shown to refer to a particular person or to every person of the class.[6] Mere disparaging words are actionable only upon proof of special damage.[7]

(§ 2) *B. Publication.*[See 10 C. L. 612]—The libelous matter must be published by being communicated to some third person.[8] Sending a sealed letter through the mail to the person defamed thereby is not sufficient publication[9] unless the sender knows that the letter will be opened by a third person,[10] and a publication is not ef-

man was not fit to associate with decent people and had been in jail, not actionable per se. Bleitz v. Carton [Wash.] 95 P 1099. Article to effect that plaintiff had secured marriage license, that due to mysterious intervention marriage did not take place, that groom said he did not know where bride was, not libelous per se. Whitehouse v. Cowles, 48 Wash. 546, 93 P 1086. Article as to conviction of murderers wherein accused stated that jurors had been bribed not libelous per se, since article as whole condemned murderers for statement and discredited same. Tate v. Nicholson Pub. Co. [La.] 47 S 774. Series of articles in newspaper referring to another publication and stating that latter could say what it pleased, and criticising acts of mayor and governing body, held not libelous per se. Flowers v. Smith [Mo.] 112 SW 499. Newspaper article concerning feud between plaintiff's relatives not libelous as matter of law, plaintiff not being stated as living there. Merrill v. Post Pub. Co., 197 Mass. 185, 83 NE 419.

**97.** A false, unprivileged publication which necessarily causes injury to a person in his personal, social, official or business relations is actionable per se. Briggs v. Brown [Fla.] 46 S 325. Charging physician with having stolen land of another is not charge in reference to profession so as to be actionable per se. Jones v. Bush [Ga.] 62 SE 279.

**98.** Where language used is defamatory and injuriously affects credit, occasioning pecuniary injury. Hapgoods v. Crawford, 110 NYS 122. Printed words must import indictable offense involving moral turpitude, or such malevolence, misconduct or obloquy as affects the corporation or affects a pecuniary loss. Warner Instrument Co. v. Ingersoll, 157 F 311. Words held not slanderous per se, as not charging crime or disease and not prejudicing corporation in business. Farbenfabriken v. Beringer [C. C. A.] 158 F 802.

**99.** Requisite of charge of crime relates only to slander, and any written statement tending to incite hatred, contempt or ridicule is libelous. Gordon v. New York Evening Journal Pub. Co., 111 NYS 574.

**1.** See post, § 5D. Trial as to when jury determines actionable nature of words.

**2.** Tate v. Nicholson Pub. Co. [La.] 47 S 774; Johnston v. Turner [Ala.] 47 S 570. Article making libelous charge that plaintiff was smuggler not qualified. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574.

**3.** De Festetics v. Sun Print. & Pub. Ass'n, 57 Misc. 194, 109 NYS 30; Johnston v. Turner [Ala.] 47 S 570. "Misappropriation" susceptible of imputing dishonesty, embracing embezzlement. Johnston v. Turner [Ala.] 47 S 570. Newspaper article construed as not libelous, merely stating assault on small boy by two other boys which nearly culminated in death. Gordon v. Journal Pub. Co. [Vt.] 69 A 742. Words must be construed in their **more innocent sense** unless accompanied by averments of local meaning of a grosser nature. Words "she is a fast girl and not fit to teach school," "she is a girl of loose character and not fit to teach school," I am only sorry for one thing that I did not strap her when I had the chance," not actionable per se on demurrer. Brinsfield v. Howeth, 107 Md. 278, 68 A 566.

**4.** Ervin v. Record Pub. Co. [Cal.] 97 P 21; Bashford v. Wells [Kan.] 96 P 663; Gordon v. Journal Pub. Co. [Vt.] 69 A 742. Words "stolen" and "robbed" not used as implying larceny and robbery. Good v. Grit Pub. Co., 36 Pa. Super. Ct. 238. Newspaper article construed and held to charge perjury with no statement of attending circumstances showing charge to be unfounded. Brown v. Knapp & Co. [Mo.] 112 SW 474.

**5.** Tate v. Nicholson Pub. Co. [La.] 47 S 774.

**6.** No malice or ill will to be construed where publication affects a class of persons and not individual. Comes v. Cruce, 85 Ark. 79, 107 SW 185. Series of articles held not actionable in view of absence of extrinsic evidence connecting articles with plaintiff. Flowers v. Smith [Mo.] 112 SW 499. See post, § 5D, Trial, as to determination by court or jury if words were spoken of plaintiff.

**7.** Matter not libelous per se. Briggs v. Brown [Fla.] 46 S 325; Brinsfield v. Howeth, 107 Md. 278, 68 A 566; Merrill v. Post Pub. Co., 197 Mass. 185, 83 NE 419; Fagan v. New York Evening Journal Pub. Co., 113 NYS 62; Fleming v. Mattinson [Tex. Civ. App.] 114 SW 650. Charging one with stealing land of another. Jones v. Bush [Ga.] 62 SE 279.

**8.** Roberts v. English Mfg. Co. [Ala.] 46 S 752.

**9.** Roberts v. English Mfg. Co. [Ala.] 46 S 752. No proof of publication by dictation to third person. Id.

**10.** Or in ordinary course of business contents would come to knowledge of third person. Roberts v. English Mfg. Co. [Ala.] 46 S 752.

fective when brought about by the contrivance of the plaintiff.[11] Only one publication takes place where a newspaper is issued and distributed in various counties of a state.[12]

(§ 2) *C. Malice.*[See 10 C. L. 612]—Express malice may always be shown [13] and may appear from the publication itself [14] or from the circumstances surrounding the publication,[15] and repetition of the slander is competent to show malice.[16] Defendant is entitled to rebut express malice as by showing a retraction,[17] and may testify directly as to his own intent.[18] Malice is often involved in the question of privilege.[19] Failure of defendant to investigate the truth of a charge alleged by him as provocation is not conclusive of malice.[20] Malice is presumed where the words are actionable per se,[21] though the contrary has been held where the statement was made as a repetition of what others said.[22]

§ 3. *Privilege and justification.*[See 10 C. L. 613]—Answers of a witness are absolutely privileged.[23] Qualified privilege extends to all bona fide communications upon any subject in which the communicant has an interest or duty to a person having a corresponding interest or duty.[24] The doctrine of qualified privilege extends not only to official proceedings, such as police investigation of alleged crimes,[25] informations to procure arrest,[26] communications in official reports,[27] and to the publication of proceedings in the public courts of justice,[28] executive and legisla-

**11.** Laughlin v. Schnitzer [Tex. Civ. App.] 20 Tex. Civ. App. 830, 106 SW 908.

**12.** One cause of action. Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496.

**13.** Dorn v. Cooper [Iowa] 118 NW 35.

**14.** Dorn v. Cooper [Iowa] 118 NW 35. Where malice is sought to be established by publication itself, question is whether party honestly believed statement. Thompson v. Rake [Iowa] 118 NW 279. Malice not to be presumed **as matter of law** from publication of libel itself but article may be found as matter of fact to be malicious. Hubbard v. Allyn [Mass.] 86 NE 356. Evidence sufficient to support finding of actual malice in publication of libel as to use of vanilla by local baker. Id.

**15.** Dorn v. Cooper [Iowa] 118 NW 35.

**16.** Murray v. Galbraith [Ark.] 109 SW 1011.

**17.** Ellis v. Brockton Pub. Co., 198 Mass. 538, 84 NE 1018.

**18.** Dorn v. Cooper [Iowa] 118 NW 35.

**19.** See post, § 3.

**20.** Sheibley v. Fales [Neb.] 116 NW 1035.

**21.** Directed verdict refused. Brown v. Knapp Co. [Ind.] 112 SW 474. Instruction that if defendant believed plaintiff guilty of matters of which he accused her in official report and was actuated by no improper motives, etc., such statements were privileged until plaintiff removed privilege by proof of malice, error, since inevitible effect of words was to injure plaintiff. Barry v. McCollom [Conn.] 70 A 1035. See, also, ante, § 2A, as to words actionable per se.

**22.** Hill v. Leffler, 133 Ill. App. 266.

**23.** Answers in response to counsel and not disallowed. Hendrix v. Daughtry, 3 Ga. App. 481, 60 SE 206.

**24.** Privilege embraces moral or social obligation. Briggs v. Brown [Fla.] 46 S 325; Coleman v. MacLennan [Kan.] 98 P 281; Brinsfield v. Howeth, 107 Md. 278, 68 A 566; Trimble v. Morrish, 152 Mich. 624, 15 Det. Leg. N. 208, 116 NW 451; Morton v. Knipe, 112 NYS 451. Not actionable if made in good faith. Briggs v. Brown [Fla.] 46 S 325; Trimble v. Morrish, 152 Mich. 624, 15 Det. Leg. N. 208, 116 NW 451. Remark about plaintiff to district attorney in answer to question relative to case then pending against plaintiff, wherein defendant only stated what he had heard without any malice, is privileged. Brinsfield v. Howeth, 107 Md. 278, 68 A 566. Statement by defendant to another candidate for school commissioner that he was opposed to present incumbent because he appointed plaintiff, a fast girl, as teacher and that she became pregnant, with abundant evidence of malice, not privileged. Id.

**25.** Statement by police captain to landlord in seeking permission to enter demised premises that tenants conducted disorderly house is privileged. Morton v. Knipe, 112 NYS 451.

**26.** Where one had probable cause for swearing out an affidavit upon which a criminal prosecution is based, the affidavit is privileged. Slater v. Taylor, 31 App. D. C. 100.

**27.** Where superintendent of schools made libelous charge in official report, it was sufficient to his justification that statements were honestly made in good faith. Barry v. McCollom [Conn.] 70 A 1035.

**28.** Good v. Grit Pub. Co., 36 Pa. Super. Ct. 238. Fair report of judicial proceedings without malice, privileged. Brown v. Globe Printing Co. [Mo.] 112 SW 462; Brown v. Knapp & Co. [Mo.] 112 SW 474. Principal on which privileged publications respecting judicial proceedings and like matters rest is that the published matter is authorized by law to become and be publicly known because done officially under warrant of law and because of its publicity given in the course of legal requirements. Belo & Co. v. Lacy [Tex. Civ. App.] 111 SW 215. Privacy of public records inconsistent with public policy. Id. Newspaper reports of judicial proceedings must publish whole case and not state conclusion drawn from evidence imputing motives or giving opinions. Brown v. Knapp & Co. [Mo.] 112 SW 474. Publication not shown of privi-

tive proceedings and investigations,[29] fair comments on public officials and candidates for public offices,[30] or other matters of public interest,[31] but to complaints

leged character if condensed but must remain impartial. Brown v. Globe Printing Co. [Mo.] 112 SW 462; Gould v. Grit Pub. Co., 36 Pa. Super. Ct. 238. Suppression of parts of testimony in condensed report destroys privilege. Brown v. Globe Printing Co. [Mo.] 112 SW 462.

**What may be published:** Report may include pleadings which were filed. Meriwether v. Knapp & Co., 211 Mo. 199, 109 SW 750. Reports of legal proceeding from day to day are privileged. Whether full or abridged, but must be impartial. Brown v. Globe Printing Co. [Mo.] 112 SW 462. Comment on case must be deferred until proceedings terminate. Id. Where bill presented to court and special order issued for defendants to show cause why they should not be enjoined, act was judicial proceeding and subject of privilege though cause not finished. Kimball v. Post Pub. Co., 199 Mass. 248, 85 NE 103. Newspaper reporter copying court record for publication need not verify entries in absence of actual knowledge of error. Belo & Co. v. Lacy [Tex. Civ. App.] 111 SW 215. Under statute clerk's file docket is official record book and entries therein are official proceedings to be privileged. Id. Publication privileged under statute though clerk made mistake in recording object of suit and defendant had no knowledge of mistake, result being that plaintiff was advertised as to be tried for keeping disorderly house. Id. Under Acts 1901, p. 30, c. 26, § 3, providing for privilege of reports of judicial proceedings, "proceedings" relates to the form and manner of the exercise of the power conferred by law. Id. Phrase "in the administration of the law is general and includes the performance of acts or duties required by law of officers in the discharge of their duties. Id. Proceeding before governor for **extradition** of quasi judicial character. Brown v. Globe Printing Co. [Mo.] 112 SW 462; Brown v. Knapp & Co. [Mo.] 112 SW 474. Proceedings with respect to indictment and in connection therewith, extradition proceedings constitute one privileged occasion. Brown v. Globe Printing Co. [Mo.] 112 SW 462. Rule that publication of judicial or quasi judicial proceedings may be privileged on ground of public interest applies to criminal cases. Id. Telegrams passing between parties relative to extradition not part of proceedings. Id. Application for **change of venue** judicial proceeding and publishers may without malice publish news report thereof. Meriwether v. Knapp & Co., 211 Mo. 199, 109 SW 750.

**Headlines** only privileged if a fair index of truthful report. Headlines charging perjury construed as unauthorized comment and libelous. Brown v. Knapp & Co. [Mo.] 112 SW 474; Brown v. Globe Printing Co. [Mo.] 112 SW 462. Headlines not part of proceedings but voluntary statements of publisher. Brown v. Globe Printing Co. [Mo.] 112 SW 462.

**Not privileged:** Publication of partial proceedings where no judicial action has been had not privileged. Brown v. Globe Printing Co. [Mo.] 112 SW 462. Must be public investigation, at least so much as is implied in submission to judicial mind with view to judicial action. Id. Newspaper may not repeat defamatory statements made in exercise of absolute privilege, though such statements are published in good faith as matter of news. Id. Publication of portions of brief at extradition hearing which portions reflected upon character of plaintiff imputing crime not privileged. Id. Defamatory statements of counsel in court. Brown v. Knapp & Co. [Mo.] 112 SW 474. Act of publication an adoption of original calumny. Id. Interspercing headlines through body of report, such as "Charge of Perjury" and "Knew it Was Untrue," beyond privilege. Id. Publication of experts from brief reflecting on character of another not permissible after decision. Brown v. Globe Printing Co. [Mo.] 112 SW 462. Newspaper article criticising graveling district commissioners, asserting overcharge of $7,000 calling attention to wretched paving and averring that other "overcharges" would be found, not privileged. Murray v. Galbraith [Ark.] 109 SW 1011. Subsequent publication stating that libel suit had been filed, that same was conclusive of plaintiff's determination to shift responsibilities on innocent parties, and repeating charges, not privileged. Id.

29. Brown v. Globe Printing Co. [Mo.] 112 SW 462.

30. Publication of article commenting on candidate for re-election. Coleman v. MacLennan [Kan.] 98 P 281. Comments must be fair and impartial. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Acts 1901, p. 30, c. 26, § 3, subd. 4, as to privilege, relates solely to criticism of official acts and matters of public concern. Id. Under Acts 1901, p. 30, c. 26, § 3, subd. 4, privilege is not extended unless comment is fair and reasonable. Id. Article charging smuggling and possibly bribing of custom house officials **not privileged** as comment on official acts. Id. A false charge of facts amounting to moral turpitude is libelous. Sheibley v. Fales [Neb.] 116 NW 1035. False charges imputing criminal offense or moral delinquency not privileged. Russell v. Washington Post Co., 31 App. D. C. 277. Article as to minister who was defendant in divorce suit imputing misconduct not privileged, being attack on private life and character. Id. Publication of false criminal charge concerning candidate for public office not privileged within Civ. Code, § 47, subd. 3, declaring as privileged a communication without malice between interested persons. Dauphiny v. Buhne, 153 Cal. 757, 96 P 880.

31. State newspaper published primarily for state constituency is not deprived of privilege in discussion of subjects of statewide concern because paper has small circulation elsewhere. Coleman v. MacLennan [Kan.] 98 P 281. In the discussion of matters of public interest, ridicule, sarcasm and invective may be employed if based on fact. Hubbard v. Allyn [Mass.] 86 NE 356. Where chemist published article criticising plaintiff, a baker, for purchasing vanilla which according to analysis must have cost $2.75 per gallon, such price was pivotal point of article and where found to be false would authorize finding that article was not fair comment but attack on plaintiff's business. Id. Although members of board of health expressed view

made by church members in accordance with the discipline of the church,[32] and to statements fairly and reasonably necessary to the transaction of private business.[33] The application of the principle is not precluded because the communication was voluntary,[34] but the statement must not needlesssly injure the person spoken of.[35] A communication absolutely privileged is not actionable though made maliciously,[36] but qualified privilege is unavailable if the publication is malicious.[37] Malice is not presumed.[38] It may, however, be established from the publication,[39] or the evidence of malice which is apparent from the article may be used in establishing malice.[40] If defendant did in fact act in good faith, it is not necessary that he should have had probable cause to believe the statements,[41] and the fact that the statement is false does not establish malice,[42] unless that fact is known to the publisher.[43] Neither is malice to be presumed from the refusal of one making a qualifiedly privileged communication to name his informant.[44] The questions of privilege and malice are often submitted to the jury.[45]

*Truth.*[See 10 C. L. 615]—In some states the publication of a defamatory statement is not actionable if true,[46] but all the substantially defamatory statements must be

that article be published concerning use of vanilla by local baker, there is no presumption that anything but fair comment should be published. Id. Taking of **census** matter of public interest warranting criticism though libel is prohibited. Flowers v. Smith [Mo.] 112 SW 499. Newspaper may not publish defamatory **remarks of stockholder** at private meeting. Kimball v. Post Pub. Co., 199 Mass. 248, 85 NE 103. Publication of defamatory statements made at meeting of stockholders of private corporation not privileged, since matters not public or for public purpose. Id. Where defamatory statements were published in reporting a meeting of a private corporation, it is no defense that a bill in equity has been filed making the same charges. Id. Newspaper not liable for imputed malice for publication of charges as to **fraudulent racing** and action taken by racing authorities, though proceedings are ex parte. Rabb v. Trevelyan [La.] 47 S 455. A newspaper may publish the report of a quasi public body if without malicious intent. Id. Fraudulent racing concerns public. Id. Plea of justification sustained by proof. Id.

**32.** Complaint against another member. Butterworth v. Todd [N. J. Law] 70 A 139.

**33.** Communication by druggist to physician regarding latter's employe, where druggist had interest in physician's business, qualifiedly privileged. Trimble v. Morrish, 152 Mich. 624, 15 Det. Leg. N. 208, 116 NW 451. Stockholder may utter defamatory remarks upon subject of common interest at private meeting. Kimball v. Post Pub. Co., 199 Mass. 248, 85 NE 103. Where landlord in response to question replied that tenant must vacate house, being a disorderly person and keeping disorderly house, occasion was one of privilege though words heard by third person whom tenant brought along. Laughlin v. Schnitzer [Tex. Civ. App.] 20 Tex. Ct. Rep. 830, 106 SW 908. Statement by police captain to landlord that tenants kept disorderly house in former's precinct prima facie privileged, former being under duty to speak. Morton v. Knipe, 112 NYS 451.

**34.** Morton v. Knipe, 112 NYS 451.

**35.** Briggs v. Brown [Fla.] 46 S 325; Coleman v. MacLennan [Kan.] 98 P 281. Privilege does not protect communication made knowingly in presence of others not concerned, or use of stronger language than necessary. Morton v. Knipe, 112 NYS 451.

**36.** Trimble v. Morrish, 152 Mich. 624, 15 Det. Leg. N. 208, 116 NW 451.

**37.** Stewart v. Codrington [Fla.] 45 S 809; Brinsfield v. Howeth, 107 Md. 278, 68 A 566; Laughlin v. Schnitzer [Tex. Civ. App.] 20 Tex. Ct. Rep. 830, 106 SW 908; San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Publication excessive. Coleman v. MacLennan [Kan.] 98 P 281. Reports of judicial proceedings. Good v. Grit Pub. Co., 36 Pa. Super. Ct. 238.

**38.** Thompson v. Rake [Iowa] 118 NW 279. Occasion one of prima facie privilege. Morton v. Knipe, 112 NYS 451.

**39.** When considered in connection with the facts and circumstances prompting and surrounding publication. Thompson v. Rake [Iowa] 118 NW 279.

**40.** Communication not prima facie malicious. Trimble v. Morrish, 152 Mich. 624, 15 Det. Leg. N. 208, 116 NW 451.

**41.** San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Where alleged libel was injurious and court correctly charged as to protection of defendant by privilege, it was error to add that defendant must have "good reason" or "reasonable grounds" for charges. Barry v. McCollom [Conn.] 70 A 1035.

**42.** Laughlin v. Schnitzer [Tex. Civ. App.] 20 Tex. Ct. Rep. 830, 106 SW 908; Trimble v. Morrish, 152 Mich. 624, 15 Det. Leg. N. 208, 116 NW 451. Instruction that plaintiff might recover if statement on privileged occasion was false, error. Laughlin v. Schnitzer [Tex. Civ. App.] 20 Tex. Ct. Rep. 830, 106 SW 908.

**43.** Advantage of privilege is lost if statement be false and is made with knowlege of that fact. Instruction proper. Thompson v. Rake [Iowa] 118 NW 279.

**44.** Trimble v. Morrish, 152 Mich. 624, 15 Det. Leg. N. 208, 116 NW 451.

**45.** See post, § 5D, Trial.

**46.** San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Court should instruct that if words are true, or portion of them, no damages should be awarded. Whittaker v. McQueen, 32 Ky. L. R. 1094, 108 SW 236.

true to afford a complete defense.[47] In Nebraska the truth when published with good motives and justifiable ends is a sufficient defense.[48] One cannot set up defense that the libel was a truthful recital of what others asserted.[49]

§ 4. *Damages and the aggravation and mitigation thereof.*[50]—The question of damages is peculiarly for the jury.[51] While nominal damages may be awarded,[52] general damages are presumed in the publication of matter actionable per se[53] and include damages for mental suffering.[54] Damages may be recovered upon proof of special injury where the publication is not privileged and not actionable per se,[55] though the damages recoverable are only compensatory.[56] Such damages include compensation for wounded feelings and loss of reputation,[57] and proof that plaintiff has a family and of whom it consists is proper to show damage;[58] but no compensation can be allowed for the mental anguish of plaintiff's family nor for plaintiff's grief at the distress of his family.[59] The constituents of compensatory damages are not the same when a corporation is libeled.[60] Attorney's fees are not recoverable.[61] Generally[62] a recovery of exemplary damages is authorized where the publication is prompted by malice.[63] Exemplary damages may be based upon any publication libelous per se,[64] but are not allowed merely because the libel is false.[65] The jury may determine if they should be awarded.[66] In mitigation the defend-

**47.** Defense afforded by Rev. L. 1902, c. 173, § 91, not available where no sufficient evidence of truth of basic fact upon which libelous article was predicated. Hubbard v. Allyn [Mass.] 86 NE 356.

**48.** Truth alone insufficient but defendant must further allege and prove good motives. Bill of Rights, § 5, construed. Wertz v. Sprecher [Neb.] 118 NW 1071.

**49.** Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496; Good v. Grit Pub. Co., 36 Pa. Super. Ct. 238.

**50.** See 10 C. L. 615. The amount and excessiveness of damages is more fully treated in the topic Damages, 11 C. L. 958.

**51.** Register Newspaper Co. v. Worten, 33 Ky. L. R. 840, 111 SW 693; Brown v. Globe Print. Co. [Mo.] 112 SW 462; Brown v. Knapp & Co. [Mo.] 112 SW 474; Amory v. Vreeland, 110 NYS 859.

**52.** Dorn v. Cooper [Iowa] 117 NW 1; Amory v. Vreeland, 110 NYS 859. Instruction erroneously refused, since effect was to instruct that only verdict of substantial compensation could be rendered. Amory v. Vreeland, 110 NYS 859. Though trial has right to set aside verdict for nominal damages, it is erroneous to instruct that jury cannot render such verdict. Id.

**53.** Dorn v. Cooper [Iowa] 117 NW 1; Brown v. Knapp & Co. [Mo.] 112 SW 474. Where publication is false, not privileged, and libelous per se, only measure of damages remains to be determined. Brown v. Knapp & Co. [Mo.] 112 SW 474. Instruction that jury might reduce damages to minimum, if libel uttered in honest attempt to enlighten public, erroneous since jury might award much more than minimum as actual damages. Dauphiny v. Buhne, 153 Cal. 757, 96 P 880.

**54.** Mental suffering. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Plaintiff may recover as general damages for the injury to his feelings and mental anguish and suffering endured therefrom. Brown v. Knapp & Co. [Mo.] 112 SW 474. Refusal of instruction denying damages for mental suffering proper. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574.

**55.** Briggs v. Brown [Fla.] 46 S 325. Right of recovery extends to damages alleged and proved to have been sustained as natural and proximate result of false publication. Id.

**56, 57.** Ellis v. Brockton Pub. Co., 198 Mass. 538, 84 NE 1018.

**58, 59.** Dennison v. Daily News Pub. Co. [Neb.] 118 NW 568.

**60.** Farbenfabriken of Elberfeld Co. v. Beringer [C. C. A.] 158 F 802. Corporation incapable of being damaged except through business. Id.

**61.** Comp. Laws, § 10,423, provide that only actual damages suffered in respect to property, business, trade, profession, occupation, or feelings may be recovered. Warren v. Ray [Mich.] 15 Det. Leg. N. 935, 118 NW 741.

**62.** Recovery of vindictive, punitive, or exemplary damages not permitted. Ellis v. Brockton Pub. Co., 198 Mass. 538, 84 NE 1018. Rev. Laws, c. 173, § 92, declaratory of common law and emphasizes fact that punitive damages are not recoverable. Id. Exemplary damages not recoverable. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Act 1901, p. 30, c. 26, leaves measure of damages, save as to certain matters on mitigation, as it previously existed. Id.

**63.** Thompson v. Rake [Iowa] 118 NW 279. Where personal ill will, wanton or reckless conduct in publication, or where words of themselves impute degree of wrongdoing which calls for punishment. Amory v. Vreeland, 110 NYS 859; Russell v. Washington Post Co., 31 App. D. C. 277. Instruction as to exemplary damages approved, there being implied malice from publication. Brown v. Knapp & Co. [Mo.] 112 SW 474. Character of publication regarding minister, who was defendant in divorce suit, and evidence relating to publication held to warrant submission of question of punitive damages. Russell v. Washington Post Co., 31 App. D. C. 277.

**64.** Brown v. Knapp & Co. [Mo.] 112 SW 474.

**65.** Instruction erroneous. Amory v. Vreeland, 110 NYS 859.

**66.** Question of whether plaintiff was entitled to punitive damages is for the jury. Good v. Grit Pub. Co., 36 Pa. Super. Ct. 238.

ant may show that the slander was provoked by the plaintiff,[67] that a retraction was published,[68] or that he had good cause for believing the charge to be true.[69] Where the general issue is pleaded, the defendant may show in mitigation of damages the general bad reputation of the plaintiff.[70] The fact that another newspaper had previously published a substantially similar report,[71] or that the defendant had denied such other report, cannot be shown in mitigation.[72] A plea of justification reiterating the libel is an aggravation of the wrong and may be considered in assessing damages, when the defendant offers no evidence to prove the truth.[73] Damages assessed by the jury will not be interfered with in the absence of abuse of discretion.[74]

§ 5. *Actions and procedure. A. Conditions precedent and procedure in general.*[See 10 C. L. 618]—The right of action for a libel contained in a newspaper accrues wherever the newspaper is publicly circulated.[75] An action for libel cannot be commenced by trustee process,[76] and a discovery of an instrument alleged to be a libel cannot be enforced against a defendant.[77] Where an undertaking for costs is required,[78] the refusal of a new understaking in lieu of a defective one may be an abuse of discretion.[79] In some states notice to the publishers by the aggrieved party is requisite.[80]

(§ 5) *B. Pleading.*[See 10 C. L. 617]—An allegation of extrinsic facts showing that the words were spoken of the plaintiff is necessary if the defamatory words are indefinite,[81] except where the rule is changed by statute.[82] The use of the word

**67.** Andrus v. Harris, 110 NYS 819. Instruction on provocation proper where evidence showed words as uttered in street fight. Childs v. Childs [Wash.] 94 P 660.

**68.** Retraction in conspicuous place properly admissible as reducing damages. Regardless of Rev. Laws, c. 173, § 92. Ellis v. Brockton Pub Co., 198 Mass. 538, 84 NE 1018.

**69.** Probable cause may mitigate damages. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Evidence that defendant heard charges at church trial and believed them true competent for mitigating damages. Harms v. Proehl, 104 Minn. 303, 116 NW 587. Instruction that defendant might show foundation of charges in disproving malice and in mitigation approved. Sheibley v. Fales [Neb.] 116 NW 1035.

**70, 71, 72.** Good v. Grit Pub. Co., 36 Pa. Super. Ct. 238.

**73.** Instruction erroneously refused. Dauphiny v. Buhne, 153 Cal. 757, 96 P 880.

**74.** Verdict of $8,000 excessive where slander partially induced by plaintiff's attitude, and injury to plaintiff's business being of most general character. Butterworth v. Todd [N. J. Law] 70 A 139. Verdict of $887.36 not excessive for slanderous charges of unchastity wantonly and maliciously made and repeated in verified answer. Raynolds v. Vinier, 109 NYS 293. Verdict of $750 for uttering slanderous words in presence of number of persons in public street not disturbed on appeal. Childs v. Childs [Wash.] 94 P 660. $1,500 not excessive for libel charging larceny. Burgess & Co. v. Patterson, 32 Ky. L. R. 624, 106 SW 837. $5,000 actual and $5,000 punitive damages not excessive where newspaper with large circulation charged attorney with perjury. Brown v. Knapp & Co. [Mo.] 112 SW 474. $2,000 actual damages and $10,000 punitive damages not excessive. Brown v. Globe Print. Co. [Mo.] 112 SW 462.

**75.** Though published in another county and publication occurs there first. Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496; Meriwether v. Knapp & Co., 211 Mo. 199, 109 SW 750.

**76.** Rev. St. Me. 1903, c. 88, § 1, enumerating actions which may not be commenced in that manner construed, and words "slander by writing or speaking," held to include libel. Macurda v. Globe Newspaper Co., 165 F 104.

**77.** Discovery would compel furnishing of evidence which might be used on criminal prosecution. Riddle v. Blackburne, 110 NYS 748. Opposition to motion is defendant's only opportunity to object to being compelled to furnish such evidence. Id.

**78.** Jurisdiction of court in action of slander does not depend upon whether sufficient undertaking for costs is filed at commencement of action, since undertaking required by St. 1871, p. 533, c. 377, § 1, may be filed later. Becker v. Schmidlin, 153 Cal. 669, 96 P 280.

**79.** Where plaintiff believed undertaking sufficient, where sureties were in court to justify and refusal operated to defeat action because of limitations. Becker v. Schmidlin, 153 Cal. 669, 96 P 280. New undertaking may be filed in lieu of defective one. Id.

**80.** Laws 1899, p. 101, c. 59, not complied with. Whitehouse v. Cowles, 48 Wash. 546, 93 P 1086. Notice served on one defendant but no proper proof that he was publisher, since evidence submitted was incompetent because of remoteness and rule against proving agency by declarations of agent. Id.

**81.** Rule at common law and not changed by statute. Flowers v. Smith [Mo.] 112 SW 499. Where allegation will admit introduction of evidence to show that plaintiff was person referred to, it is sufficient. Van Hensen v. Argenteau, 124 App. Div. 776, 109 NYS 238. Statement in inducement that plaintiff was student in public schools, that words were published concerning him, insufficient

"whereas" in the inducement is unnecessary.[83] A special allegation of malice is proper,[84] and an allegation of falsity and malice deprives the libelous matter of its character as a privileged communication.[85] Allegations of reckless and willful publication are not objectionable as conclusions.[86] The time of every traversable fact must be stated.[87] An allegation that the libel was published concerning plaintiff in his professional or business capacity is necessary in order to recover for injury to business.[88] Only the libelous passages of an article need be set out.[89] In pleading a series of newspaper articles, the vice of duplicity must be avoided,[90] and each count must stand on its own allegations.[91] Improper joinder gives defendant the right to demand an election.[92] The innuendo is merely a form or mode of introducing explanation,[93] and it cannot operate to alter the effect of the previous words.[94] Innuendo is necessary when it is sought to attach a covert meaning to words apparently harmless[95] or where the complaint would otherwise be uncertain.[96] It is not necessary where the words are certain and actionable per se.[97] The innuendo may tend to limit the effect of the language alleged.[98] An improved innuendo is mere surplusage.[99] The legal effect of the innuendo is a question of law which arises on the demurrer.[1] Plaintiff need not allege that the publication tended to expose her to public hatred where the words are actionable per se,[2] and,

and not cured by innuendo. Gordon v. Journal Pub. Co. [Vt.] 69 A 742. No cause of action where libelous article refers to class of persons, and personal application cannot be given to plaintiff by inducement or colloquium. Comes v. Cruce, 85 Ark. 79, 107 SW 185.

82. Complaint alleging that article was published of and concerning plaintiff is sufficient where article is libelous per se, though plaintiff is not identified as person libeled. Unnecessary to allege "any extrinsic fact for the purpose of showing the application to plaintiff." Code Civ. Proc. § 535. Van Heusen v. Argenteau, 124 App. Div. 776, 109 NYS 238.

83. Defect formal and only reached at common law by special demurrer. Stewart v. Codrington [Fla.] 45 S 809.

84. Though malice may be inferred. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574.

85. Stewart v. Codrington [Fla.] 45 S 809.

86. Since statement of facts would involve pleading of evidence. San Antonio Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574.

87. Requirement not relaxed by rule that variance between time alleged and proof is not fatal. Gordon v. Journal Pub. Co. [Vt.] 69 A 742. "About" renders allegation uncertain. Id.

88. Stewart v. Codrington [Fla.] 45 S 809. Failure to allege limits damages to those sustained in private character. Id.

89. Provided nothing be omitted which qualifies or alters sense. Meriwether v. Knapp & Co., 211 Mo. 199, 109 SW 750. Defendant may present different meaning. Register Newspaper Co. v. Worten, 33 Ky. L. R. 840, 111 SW 693.

90. Each publication in separate count. Flowers v. Smith [Mo.] 112 SW 499; Gordon v. Journal Pub. Co. [Vt.] 69 A 742. Declaration consisting of three counts, each setting out separate publication, not duplicitous. Gordon v. Journal Pub. Co. [Vt.] 67 A 742. Count containing three statements of defendant at different times, i. e., three distinct causes of action, bad for duplicity. Brinsfield v. Howeth, 107 Md. 278, 68 A 566. Eighteen different libelous articles in one count. Flowers v. Smith [Mo.] 112 SW 499.

91. Libelous article annexed as exhibit to another count but no reference. Merrill v. Post Pub. Co., 197 Mass. 185, 83 NE 419. Allegation that libel was printed concerning plaintiff "in his office as postmaster" does not add to previous allegation of libel on him as citizen. Id.

92. Remaining charges to be dismissed. Flowers v. Smith [Mo.] 112 SW 499.

93. Brinsfield v. Howeth, 107 Md. 278, 68 A 566; Gordon v. Journal Pub. Co. [Vt.] 69 A 742.

94. Briggs v. Brown [Fla.] 46 S 325; Brinsfield v. Howeth, 107 Md. 278, 68 A 566; Gordon v. Journal Pub. Co. [Vt.] 69 A 742; Farbenfabriken of Elberfeld Co. v. Beringer [C. C. A.] 158 F 802.

95. Ervin v. Record Pub. Co. [Cal.] 97 P 21; Bashford v. Wells [Kan.] 96 P 663.

96. Where it appeared from article and innuendo that as a whole, article was false and malicious. Ervin v. Record Pub. Co. [Cal.] 97 P 21.

97. Words charging perjury actionable without any colloquium. Brown v. Knapp & Co. [Mo.] 112 SW 474. Innuendo in petition not a prejudice to defendant but rather advantage in pleading justification. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574.

98. Complaint of corporation construed as applying only to officers, by reason of innuendo, when alleging that defendant said "It (meaning plaintiff) is composed of a lot of fakers * * * and were persons of bad character with whom it was dangerous to do business. Hapgoods v. Crawford, 110 NYS 122.

99. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574.

1. Brinsfield v. Howeth, 107 Md. 278, 68 A 566.

2. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574.

where a publication is actionable per se, special damages need not be alleged,[3] but otherwise such allegation is necessary.[4]

*Plea or answer.*[See 10 C. L. 617]—Truth must be pleaded to be available as a defense,[5] and to be a complete defense the plea of justification must be broad enough to cover the entire charge.[6] Where the defamatory matter charged in general in its nature, the plea of justification should be specific[7] but a general allegation is proper where the alleged libel is specific.[8] To supplement the new matter set forth in a defense of justification, paragraphs of the answer proper may be repeated.[9] An affirmative defense of justification need not contain a denial of the extent of the plaintiff's damages.[10] The failure to plead the truth of the libel operates as an admission of its falsity.[11] A plea of qualified privilege must negative falsity and malice.[12] An affirmative partial defense may contain repetitions of the answer proper which are necessary,[13] and where facts are not expressly pleaded as a partial defense, the plea must be tested on demurrer as if given in complete defense.[14] A denial and a plea of privilege[15] or a denial and a plea that the words are true[16] may not be inconsistent. Allegations unsupported by evidence[17] or allegations which merely repeat the denial[18] may properly be stricken. An answer treated as adequate in the trial will not be disturbed after verdict.[19]

**3.** Burgess & Co. v. Patterson, 32 Ky. L. R. 624, 106 SW 837; San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Dempster v. Mann, 157 F 319. Libel on corporation such as to affect credit and occasion pecuniary loss. Warner Instrument Co. v. Ingersoll, 157 F 311.

**4.** Briggs v. Brown [Fla.] 47 S 325; Flowers v. Smith [Mo.] 112 SW 499; Fagan v New York Evening Journal Pub. Co., 113 NYS 62. Declaration alleging that false and malicious letter was sent by officer of improvement company to indemnity company and alleging special damages not demurrable. Briggs v. Brown [Fla.] 46 S 325. Complaint not demurrable though not alleging special damages, unless words used are incapable of any reasonable construction which will make them defamatory. Chanler v. Town Topics Pub. Co. [C. C. A.] 161 F 105.

**5.** Act 1901, p. 30, c. 26, making truth a defense does not change necessity of pleading. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574.

**6.** In libel suit for publishing letter charging plaintiff as dishonest in two transactions, plea of justification alleging that plaintiff was dishonest in one transaction is not broad enough to be a complete defense. Lapetina v. Santangelo, 124 App. Div. 519, 108 NYS 975.

**7.** Sheibley v. Fales [Neb.] 116 NW 1035. Must state specific facts showing in what instances and in what exact manner plaintiff has misconducted himself or has done things charged against him. Fodor v. Fuchs [N. J. Law] 71 A 108. Plea failing to set forth time, place, facts, or circumstances of conviction relied upon in justification bad for uncertainty and should be stricken. Id.

**8.** Sheibley v. Fales [Neb.] 116 NW 1035.

**9.** Allegations of meaning of article and denials of meaning alleged in complaint. Haffen v. Tribune Ass'n, 111 NYS 225. Paragraph of the answer proper, consisting of admission that defendant published an article, set out at length, is properly repeated. To make defense complete and include article. Id. Repetition of denial, from answer proper, of false and malicious publication, is unnecessary. Where defense alleged that article was true, privileged and published in good faith. Id.

**10.** Haffen v. Tribune Ass'n, 111 NYS 225.

**11.** Brinsfield v. Howeth, 107 Md. 278, 68 A 566.

**12.** Lapetina v. Santangelo, 124 App. Div. 519, 108 NYS 975. Defense that defendant wrote libelous letter to attorney in connection with professional services rendered and that letter was privileged is plea of qualified privilege. Id.

**13.** Defense in mitigation may contain denial of extent of damages alleged in complaint. Haffen v. Tribune Ass'n, 111 NYS 225.

**14.** Lapetina v. Santangelo, 124 App. Div. 519, 108 NYS 975.

**15.** Where complaint charged that defendant had spoken a positive charge of bigamy, defendant's denial was not inconsistent with a plea of privilege wherein defendant stated that the words were spoken in a conditional statement and such allegation was not an admission. Bleitz v. Carton [Wash.] 95 P 1099.

**16.** Under Civ. Code Prac. § 113, defendant may deny speaking words in one allegation and in another allege that the words are true without being required to elect between them. Whittaker v. McQueen, 32 Ky. L. R. 1094, 108 SW 236. Assumption in instruction that defendant admitted in answer that article was written of and concerning plaintiff erroneous where defendant pleaded general denial and special defense of jurisdiction but no admission. Flowers v. Smith [Mo.] 112 SW 499.

**17.** Portion of answer setting up plaintiff's unfitness or lack of qualification in holding certain office properly stricken. Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496.

**18.** Words alleged in answer in addition to denial giving statement of what was actually said which statement was not libelous per se should be stricken on motion being merely repetition of denial. Zentzshel v. Richi, 33 Ky. L. R. 657, 110 SW 832.

**19.** Sheibley v. Fales [Neb.] 116 NW 1035.

*Demurrer.*[See 10 C. L. 617]—An objection to the sufficiency of the declaration must be made by demurrer[20] or motion in arrest of judgment.[21] Upon demurrer it is the province of the court to determine if the words charged in the declaration amount to slander.[22] A demurrer will lie where it is apparent that the article was not published concerning the plaintiff,[23] where special damages are not sufficiently pleaded,[24] or where the complaint is otherwise fatally defective.[25] Where a libelous article did not identify the person libeled, and the plaintiff alleged that the article was published concerning her, such fact was admitted by demurrer for want of facts.[26]

*Bills of particulars.*[See 8 C. L. 725]—A bill of particulars is unnecessary to explain an allegation if injury where no special damage is alleged.[27]

(§ 5) *C. Evidence.*[See 10 C. L. 618]—The burden of proving express malice rests upon the plaintiff when the libel is qualifiedly privileged.[28] Where a conspiracy between two joint defendants to defame the plaintiff is alleged, plaintiff has the burden of proof.[29] Where the words are actionable per se, the burden of proving justification is on the defendant.[30] The libelous words must be proved as laid.[31]

**20.** Gates v. Little, 36 Pa. Super. Ct. 422.

**21.** Delay until after verdict results in curing of many defects. Gates v. Little, 36 Pa. Code 1906, § 10, words considered as insults Super. Ct. 422.

**22.** Brinsfield v. Howeth, 107 Md. 278, 68 A 566.

**23.** Article referring to nonunion telegraph operator of certain company and it appeared that plaintiff had been union man three years and had not been employed by said company for nine years. Fagan v. New York Evening Journal Pub. Co., 113 NYS 62.

**24.** Insufficient facts to state cause of action. Fagan v. New York Evening Journal Pub. Co., 113 NYS 62.

**25.** Demurrer properly sustained where truth of article not denied, where article not libelous per se and no inducement, colloquium or innuendo pleaded. Whitehouse v. Cowles, 48 Wash. 546, 93 P 1086. In action against election manager for stating that plaintiff was convict, declaration failing to aver malice, or to state that charge was not true, or that defendant did not make challenge in good faith, is subject to demurrer. Dedeaux v. King [Miss.] 45 S 466. Under and calculated to lead to breach of peace are actionable. Id.

**26.** Van Heusen v. Argenteau, 124 App. Div. 776, 109 NYS 238.

**27.** Allegation that plaintiff's reputation had been injured with reference to former employers. Loscher v. Hager, 124 App. Div. 568, 109 NYS 562. Where plaintiff alleged that defendant without provocation summoned police officer to arrest him for offense of which he was not guilty, defendant was not entitled to bill of particulars since he might ascertain officer as well as plaintiff. Id.

**28.** Butterworth v. Todd [N. J. Law] 70 A 139. Proof of express malice insufficient though word "forged" used when it appeared that such word was used in popular sense as fabrication of false charge. Id. Where plaintiff's averments that libelous statements were false and malicious, were traversed and on trial it was admitted that defendant pubnot rely on presumptions, but must prove lished libel on official report, plaintiff could both falsity and malice, though truth had been specially pleaded. Barry v. McCollom [Conn.] 70 A 1035.

**29.** Instruction approved. Rice v. McAdams [N. C.] 62 SE 774.

**30.** Rice v. McAdams [N. C.] 62 SE 774; Sheibley v. Fales [Neb.] 116 NW 1035. Instruction as to conspiracy, requiring plaintiff to produce greater weight of evidence, approved. Rice v. McAdams [N. C.] 62 SE 774. Where answer denies slander and alleges that words are true, plaintiff has burden of proof. Whittaker v. McQueen, 32 Ky. L. R. 1094, 108 SW 236.

**31.** Other equivalent words insufficient. Hill v. Leffler, 133 Ill. App. 266. Where count charged that "defendant by its agents" uttered alleged slanders, an offer of proof that agents "severally published the various oral statements set out" was insufficient to raise an issue, there being no proof that slanders were uttered in course of employment. Kane v. Boston Mut. Life Ins. Co. [Mass.] 86 NE 302. No material variance where proof sustained allegation as to stealing check but failed to add "on R. Y. Austin." Zentzshel v. Richie, 33 Ky. L. R. 657, 110 SW 832. Where pleading was contended to be insufficient as not setting out all of libel, but such matter was fully introduced in evidence and did not show variance. Meriwether v. Knapp & Co., 211 Mo. 199, 109 SW 750. Proof need not in every minute particular correspond with words alleged. Former strict rule as to variance relaxed. Bleitz v. Carton [Wash.] 95 P 1099. Reason for requiring substantial proof of the words alleged is that defendant may plead justification (Id.), but absence of a plea of justification does not decrease the amount of accuracy of proof required (Id.). Proof of slanderous words spoken in a conditional or hypothetical statement does not support an allegation of words pleaded as a positive or direct assertion. Id. Proof by other persons at other times and places insufficient to sustain verdict, where plaintiff did not amend or seek to do so, and effect of admitting such evidence to sustain verdict would be to render bill of particulars furnished of no value. Id. Variance fatal where words alleged were actionable per se as charging bigamy and words proven could not by any possible construction charge plaintiff with

Evidence of justification[32] or mitigation[33] is only admissible if pleaded, and matter pleaded in justification is not admissible in mitigation.[34] Evidence which only justifies a portion of the libel is admissible when that portion is severable.[35] Evidence of intent is inadmissible where the publication is actionable per se and unambiguous.[36] A record of a church trial is only admissible to refresh the memory of the witness.[37] Evidence of facts wholly irrelevant to the charge in the libel[38] or hearsay[39] should be excluded. Where a prosecuting attorney was accused of being a party to a conspiracy to blackmail, evidence that he did not investigate the character of a prosecuting witness was irrelevant.[40] Corroborative evidence should not be stricken.[41] Upon proper foundation, a copy of the paper containing the libel is admissible.[42] The admissibility of evidence may involve a construction of the libelous article,[43] and where a libelous utterance refers to an article in another newspaper, the latter article is competent.[44] Words written or spoken by defendant before or after those sued on, or after the commencement of the action, are admissible.[45] In slander charging theft, evidence of plaintiff's indictment and acquittal is not admissible.[46] It is admissible to prove that the plaintiff is the person referred to in a defamation[47] to show malice[48] or the absence of it,[49] to explain the

bigamy. Id. Where plaintiff alleged that defendant spoke as follows, "Blutz is a bigamist. I threw it in his teeth and he did not deny it. He has two wives," proof that defendant did not call plaintiff "a bigamist in so many words, that is, he didn't call Mr. Blutz a bigamist that I can recollect," not only was a variance but in effect a positive denial. Id. Directed verdict proper where facts completely at variance with pleadings and plaintiff not entitled to damages. Id.

32. Dorn v. Cooper [Iowa] 117 NW 1.

33. Where article charged existence of pool to buy hogs, evidence of actual prices at town and elsewhere was not admissible in mitigation of damages, such defense not being pleaded and article only purporting to be based on defendant's own knowledge. Dorn v. Cooper [Iowa] 117 NW 1.

34. Dorn v. Cooper [Iowa] 117 NW 1.

35. Farbenfabriken of Elberfeld Co. v. Beringer [C. C. A.] 158 F 802.

36. Harmes v. Proehl, 104 Minn. 303, 116 NW 587.

37. Not public or quasi public record. Harms v. Proehl, 104 Minn. 303, 116 NW 587.

38. In action of libel charging plaintiff, a village attorney, of dishonesty, advising a suit to be brought, derogatory question as to suit brought several years before properly excluded as immaterial. Smith v. Hubbell, 151 Mich. 59, 14 Det. Leg. N. 874, 114 NW 865. Deposition of witness as to what was said in conversation outside of charge on which declaration was based erroneously admitted. Yazoo & M. V. R. Co. v. Rivers [Miss.] 46 S 705. Evidence of authority of revenue officer to search houses in case of suspected smuggling irrelevant in action for libel where newspaper article charged smuggling. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Report of government officers, though official proceeding, was nevertheless inadmissible as evidence, since article charging plaintiff with smuggling did not refer to such report. Id.

39. Telegrams with reference to extradition proceedings, which proceedings were privileged. Brown v. Globe Print. Co. [Mo.] 112 SW 462. In libel charging smuggling, report of goverment officers excluded as hearsay. San Antonio Light Pub. C. v. Lewy [Tex. Civ. App.] 113 SW 574. Letter by third person to defendant not admissible since third person may be called as witness. Whittaker v. McQueen, 32 Ky. L. R. 1094, 108 SW 236.

**Authenticated copy of evidence** of witnesses before state senate hearsay, notwithstanding Rev. St. 1899, § 3091 (Ann. St. 1906, p. 1772), declaring documents prima facie evidence, since no proof of authority. Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496. Inadmissible to show justification. Id. No showing that such witnesses could not be produced at trial. Id.

40. In seeking to justify. Pickford v. Talbott, 29 S. Ct. 75.

41. Evidence that defendant showed letter to witness which read like one declared on, that defendant stated it was copy, is corroborative and should not be stricken. Briggs v. Brown [Fla.] 46 S 325.

42. Where evidence showed defendant as publisher. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574.

43. Libelous article against judge charging misconduct construed as sufficiently broad, on plea of justification to admit of evidence of misconduct both at chambers and on bench. People v. Cornell, 110 NYS 648.

44. Flowers v. Smith [Mo.] 112 SW 499.

45. Whether actionable or not. Register Newspaper Co. v. Worten, 33 Ky. L. R. 840, 111 SW 693.

46. Whittaker v. McQueen, 32 Ky. L. R. 1094, 108 SW 236.

47. When name of person did not appear in article and defendant does not admit, he is one referred to. Dennison v. Daily News Pub. Co. [Neb.] 118 NW 568. Evidence as to whom witness "considered" or "supposed" article to refer to immaterial. Id. Proof that libel did not refer to plaintiff competent. Flowers v. Smith [Mo.] 112 SW 499.

48. When elander qualifiedly privileged. Morton v. Knipe, 112 NYS 451. Deposition erroneously admitted to show malice when no inference of malice could be drawn therefrom. Yazoo & M. V. R. Co. v. Rivers [Miss.]

meaning of ambiguous phrases,[50] and to show loss of trade [51] or other evidence of damage.[52] Evidence of defendant's refusal to publish a retraction is not admissible to enhance the plaintiff's recovery.[53] Proof that plaintiff's reputation for chastity is bad is proper in mitigation,[54] and where a libelous article criticised a mayor as to a census, it was proper to show that such census was actually erroneous.[55] Improper evidence which is admitted on the promise of counsel to connect with later evidence may be stricken on his failure to introduce such evidence.[56]

(§ 5) *D. Trial.*[See 10 C. L. 620]—The question of whether an article is actionable per se is determined by the court when the words are clear and unambiguous,[57] but when doubtful in their meaning,[58] or where an ulterior meaning is imputed to

46 S 705. Evidence that witness went to defendant and requested him to cease libels and resulting conversation not competent in rebuttal. Flowers v. Smith [Mo.] 112 SW 499.

**Publications** dealing with unworthiness of plaintiff to hold office though referring to entirely different matters, admissible to show malice. Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496. Other publications than one sued on admissible to show malice, especially when dealing with same subject. Id.; Meriwether v. Knapp & Co., 211 Mo. 199, 109 SW 750. Remote evidence of malice admissible, remoteness only going to weight of evidence. Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496. Publication devoted entirely to arraigning another man admissible to show malice when such man previously associated with plaintiff in other articles. Meriwether v. Knapp & Co., 211 Mo. 199, 109 SW 750. Rule at common law that **unproved plea** of justification was evidence of malice is abrogated by Code. Whittaker v. McQueen, 32 Ky. L. R. 1094, 108 SW 236. Where there was no evidence to sustain flagrant charges of unchastity against plaintiff made in the answer, such answer might be considered as bearing on defendant's good faith. Discretionary with judge. Reynolds v. Vinier, 109 NYS 293.

**49.** Where article was published charging that pool existed for purchase of hogs, defendant to rebut inference of actual malice might show prices at town and elsewhere. Dorn v. Cooper [Iowa] 117 NW 1. Evidence that defendant's attention was called to schoolhouse, and that he replied that condition was deplorable and that he had report which he was sorry to send in, admissible to show absence of malice. Barry v. McCollom [Conn.] 70 A 1035.

**Facts in defendant's knowledge** at time of publication are competent to repel inference of malice. Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496; Flowers v. Smith [Mo.] 112 SW 499. Evidence that defendant did not act maliciously and that his **feelings** both before and after publication were friendly to plaintiff is proper since malice is in issue. Dorn v. Cooper [Iowa] 118 NW 35, rvg. [Iowa] 117 NW 1. Evidence of the opposing party's feelings to the defendant is inadmissible being mere inference or conclusion. Dorn v. Cooper [Iowa] 118 NW 35.

**50.** Evidence to prove peculiar or extraordinary meaning of words admissible upon proper foundation. Brinsfield v. Howeth, 107 Md. 278, 68 A 566. Slander and damage lie in the comprehension of the hearers. Id. Evidence of circumstances under which libel published competent to show meaning when ambiguous. Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496. Where the words are susceptible of more than one meaning or may be offensive from the circumstances under which they were uttered, evidence of **what witnesses understood** words to mean is admissible. Evidence of same character as opinion evidence to be weighed with caution. Id. Question should not be submitted to jury if words not susceptible of contended construction. Id.

**51.** Smith v. Hubbell, 151 Mich. 59, 14 Det. Leg. N. 874, 114 NW 865; Hubbard v. Allyn [Mass.] 86 NE 356. Evidence that after publication friends of plaintiff refused to call upon her, and employ her for sewing. Gates v. Little, 36 Pa. Super. Ct. 422.

**52.** Evidence of plaintiff's writings and their circulation and size of congregation proper, to show damage in libel on minister. Russell v. Washington Post Co., 31 App. D. C. 277.

**53.** Punitive damages not allowed. Dennison v. Daily News Pub. Co. [Neb.] 118 NW 568. Fact that other publishers had published retraction inadmissible. Id.

**54.** On charge of unchastity where defendant pleads in mitigation that plaintiff's reputation for chastity is bad, letters written by plaintiff to certain man tending to prove defendant's assertion are admissible. Raymond v. Ring, 112 NYS 1.

**55.** In libel regarding denial of correct census by mayor, the plaintiff, evidence that such census was incorrect was competent being matter of public interest and also admissible in mitigation. Flowers v. Smith [Mo.] 112 SW 499. On mitigation showing that census was actually erroneous, hearsay evidence is inadmissible and statements made to witness discrediting census inadmissible. Id.

**56.** Smith v. Hubbell, 151 Mich. 59, 14 Det. Leg. N. 874, 114 NW 865.

**57.** Julian & Kansas City Star Co., 209 Mo. 35, 107 SW 496; Gordon v. Journal Pub. Co. [Vt.] 69 A 742. To warrant withdrawal of case from jury, it must appear that words are in no sense susceptible of defamatory interpretation. Merrill v. Post Pub. Co., 197 Mass. 185, 83 NE 419. Quantity of alleged libel as it stands upon record is question of law for court. Whether libel simple or explained by innuendos. Good v. Grit Pub. Co., 36 Pa. Super. Ct. 238. In civil cases court is bound to instruct as to whether publication is libelous, supposing innuendos to be true. Id. Where descriptive words in publication are not equivocal, and there is no evidence from which it could be understood to apply to plaintiff, court may properly instruct they do not apply to plaintiff. Farbenfabriken of Elberfeld Co. v. Beringer [C. C. A.] 158 F 802.

**58.** Julian v. Kansas City Star Co., 209 Mo.

words inoffensive on their face,[59] a question of fact is presented. The question of whether an article was published concerning the plaintiff is a question of fact,[60] unless there is no ambiguity as to the meaning of the language used.[61] The question of malice is for the jury[62] and is properly submitted where in the publication of judicial proceedings[63] a pleading is omitted,[64] or an article given undue prominence,[65] or an account of judicial proceedings has been unfairly abridged.[66] If the facts are uncontroverted, an occasion of privilege is determined by the court,[67] but where the evidence is uncertain and conflicting, the jury should determine if the statements were privileged.[68] Some state constitutions make the jury judges of the law in libel cases,[69] and in such states the jury is not bound by the instructions.[70] The instructions should conform to the issues raised by the pleadings[71] and evidence,[72] should properly define the tort,[73] should not give undue prominence to a

35, 107 SW 496; Gordon v. Journal Pub. Co. [Vt.] 69 A 742. Libel based on newspaper article as to arrest of plaintiff's sister for larceny held for jury whether publication reasonably susceptible of defaming plaintiff. Merrill v. Post Pub. Co., 197 Mass. 185, 83 NE 419.

**59.** Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496. Newspaper article saying that plaintiff "did well in a legislative way * * * but also as * * * chief of police," it was said of him that he was not a proper man for the position, etc., sufficiently double in meaning to warrant submission to jury, in view of condition of suspicion in public mind. Id.

**60.** Ellis v. Brockton Pub. Co., 198 Mass. 538, 84 NE 1018; Flowers v. Smith [Mo.] 112 SW 499; Gates v. Little, 36 Pa. Super. Ct. 422. Evidence sufficient to require submission to jury. Hubbard v. Allyn [Mass.] 86 NE 356. Question of whether article was published concerning plaintiff for jury where it made one reference to him by name and it could not reasonably refer to two persons. Ellis v. Brockton Pub. Co., 198 Mass. 538, 84 NE 1018.

**61.** Ellis v. Brockton Pub. Co., 198 Mass. 538, 84 NE 1018.

**62.** Evidence of malice sufficient to take case to jury where person instituting proceedings for appointment of guardian because plaintiff was a habitual drunkard went far beyond what the facts known to him at the time warranted. Thompson v. Rake [Iowa] 118 NW 279.

**63.** Publication of judicial proceedings qualified privilege but claimed to be malicious. Good v. Grit Pub. Co., 36 Pa. Super. Ct. 238

**64.** Omission of a pleading as showing malice, question of fact. Meriwether v. Knapp & Co., 211 Mo. 199, 109 SW 750.

**65.** Use of headlines. Good v. Grit Pub. Co., 36 Pa. Super. Ct. 238. Act May 12, 1903, P. L. 349, does not mean that special prominence be given over every matter published in newspaper. Id.

**66.** Whether abridged report has same effect on character of one referred to as full report is question for jury. Brown v. Globe Print. Co. [Mo.] 112 SW 462. Where court finds that judicial proceeding does not justify charge of forgery as published by newspaper, such finding should be submitted to jury with instruction that if published report conveyed charge of forgery, defendant had exceeded privilege and plaintiff might recover. Good v. Grit Pub. Co., 36 Pa. Super. Ct. 238.

**67.** Dauphiny v. Buhne, 153 Cal. 757, 90 P 880; Morton v. Knipe, 112 NYS 451; Brinsfield v. Howeth, 107 Md. 278, 68 A 566; Brown v. Globe Print. Co. [Mo.] 112 SW 462; Belo & Co. v. Lacy [Tex. Civ. App.] 111 SW 215. Where facts are undisputed and show that publication was not privileged, court upon request should so instruct. Dauphiny v. Buhne, 153 Cal. 757, 96 P 880.

**68.** Brinsfield v. Howeth, 107 Ind. 278, 68 A 566.

**69.** Under constitution jury are judges of law as well as facts and instructions must so state. Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496. Report of judicial proceeding found libelous and therefor not privileged by jury who were judges of law and fact. Brown v. Globe Print. Co. [Mo.] 112 SW 462.

**70.** Jury may decide whether libel or no libel, being both judges of law and fact. Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496.

**71.** Instruction properly refused as tendering false issue on justification. Brown v. Knapp & Co. [Mo.] 112 SW 474; San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Instruction as to provocation not rendered outside issue though answer consisted of denials where evidence showed words to be uttered in street fight. Childs v. Childs [Wash.] 94 P 660. Instruction that statement that plaintiff was habitual drunkard was libel unless privileged proper where it was not claimed that publication was absolutely privileged and jury was required to find malice, justification not being pleaded. Thompson v. Rake [Iowa] 118 NW 279.

**72.** Instruction ignoring defense of privilege not erroneous being unsupported by evidence. Brown v. Knapp & Co. [Mo.] 112 SW 474. Refusal to submit defense of privilege not error because of want of evidence. Brown v. Globe Print. Co. [Mo.] 112 SW 462. An instruction on theory that there is evidence of privilege erroneous when in fact no such evidence, though from facts on request court should have instructed that publication was not privileged. Dauphiny v. Buhne, 153 Cal. 757, 96 P 880. Instruction as to no evidence of justification not erroneous. Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496. Instruction authorizing jury to find for plaintiff unless articles were true or in substance true not erroneous though articles contained immaterial matters not affecting libel. Reg-

portion of the evidence[74] or assume controverted matters as proved,[75] and should not be misleading.[76] Reference to the costs of suit is improper.[77] In admitting other publications as evidence of malice, the jury should be instructed not to give damages because of such other words.[78] The right to open and close is with the party having the burden of proof.[79] A new trial may properly be granted where newly-discovered evidence will change the result.[80]

§ 6. *Criminal libel and slander. The offense.* See 10 C. L. 621—Statutory definitions of criminal libel substantially re-enact the offense as it existed at the common law.[81] In Alabama the publication of a libel which may tend to provoke a breach of the peace is puishable,[82] and an imputation of adultery in circulars which are distributed is punishable.[83] In some jurisdictions a husband may be convicted of slandering his wife.[84] The seizure of a person after admission to bail and forcing him to submit to the photographs and measurements under the Bertillon system

ister Newspaper Co. v. Worten, 33 Ky. L. R. 840, 111 SW 693. Instruction not erroneous as authorizing recovery without regard to weight of evidence when other instructions submitted that jury must base findings and verdict on evidence. Childs v. Childs [Wash.] 94 P 660. Instruction submitting whether defendant knew plaintiffs were in business of buying hogs erreneous since such fact was not based on evidence. Dorn v. Cooper [Iowa] 117 NW 1. Instruction erroneous as excluding all evidence of good faith, in mitigation of damages. Flowers v. Smith [Mo.] 112 SW 499. Where evidence showed without conflict that defendant knew or believed that plaintiffs were in certain business, instruction submitting that issue was erroneous. Dorn v. Cooper [Iowa] 117 NW 1.

**73.** Error to refuse to charge article as libelous per se. Dauphiny v. Buhne, 153 Cal. 757, 96 P 880. In defining libel, definition should be limited to character of libel shown by evidence and instruction in libel for injury to reputation is erroneous as including financial injury not alleged or proved. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Use of words "good name" equivalent to reputation in charge. Id. Requested charge properly refused. Id. Charge as to privilege being in language of statute, refusal of instruction that substantial proof of defense of privilege was sufficient was proper. Id.

**74.** No comment on facts when instruction considered as whole, in violation of Const. art. 4, § 16. Childs v. Childs [Wash.] 94 P 660.

**75.** Assumption of publication in charge not erroneous when undisputed. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574.

**76.** Requested charge as to existence of probable cause in publication of libel refused as misleading. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Instruction erroneous as misleading since libelous matter did not refer to plaintiff. Flowers v. Smith [Mo.] 112 SW 499. Instruction as to costs misleading since an offer to confess judgment had been made and award of nominal damages would not carry costs. Dorn v. Cooper [Iowa] 117 NW 1. General instruction as to malice erroneous as being too broad and applying correct rule as to proof of malice to articles which were and were not actionable per se. Flowers v. Smith [Mo.] 112 SW 499. Where a libel stated that school teacher had not "even the externals of refinement," an instruction that such matter was rather a subject for jury's own observation was erroneous as misleading the jury to believe such observation best evidence. Barry v. McCollom [Conn.] 70 A 1035.

**77.** Dorn v. Cooper [Iowa] 117 NW 1.

**78.** Separate cause of action. Register Newspaper Co. v. Worten, 33 Ky. L. R. 840, 111 SW 693.

**79.** Where the publication of a libel actionable per se is admitted, and justification pleaded, defendant has right to produce evidence first and right to open and close argument. Shelbley v. Fales [Neb.] 116 NW 1035.

**80.** Where new evidence would amply substantiate defendant's plea in mitigation that plaintiff actually was unchaste. Raymond v. Ring, 112 NYS 1.

**81.** Criminal libel has been defined to be the malicious defamation expressed by printing, writing, signs, pictures or the like tending to blacken the memory of one who is dead, or the honesty, virtue, integrity or reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule. Pen. Code 1895, § 335. Michael v. Bacon [Ga. App.] 63 SE 228. Definition as recognized at common law. Id. Libel is a malicious defamation expressed either by writing, printing, signs or pictures, tending to impeach the honesty, integrity, virtue or reputation of a person and expose him to public hatred, contempt or ridicule. Rev. St. 1887, § 6737. State v. Sheridan, 14 Idaho, 222, 93 P 656. Libel defined. Rev. St. 1899, § 2259; Ann. St. 1906, p. 1425. State v. Santhuff [Mo. App.] 110 SW 624. Under Rev. St. 1897, § 6737, libel need not charge person with crime. State v. Sheridan, 14 Idaho, 222, 93 P 656.

**82.** Cr. Code 1896, § 5063. Brooke v. State [Ala.] 45 S 622. Common-law definition applied, since statute does not define. Id. Code 1896, § 5063, qualifies rule that whatever at common law consisted of libel is punishable by adding that the libel must have tendency to provoke breach of peace. Id.

**83.** Libel by statute (Rev. St. 1899, § 2863 [Ann. St. 1906, p. 1426]) and punishable as misdemeanor (Rev. St. 1899, § 2260). State v. Santhuff [Mo. App.] 110 SW 624. Imputing adultery libel, though charge not sufficient to state crime. Id.

**84.** Revisal 1905, § 3640. State v. Fulton [N. C.] 63 SE 145. Under Revisal 1905, § 3640, wife will be competent witness. Id.

constitutes criminal libel.[85] In some states the publication need not be false in order to maintain a prosecution.[86] False statements are presumed to be malicious and wrongful unless privileged.[87] Words which expose a person to contempt and ridicule are libelous per se,[88] and in construing a doubtful word the court should take its ordinary meaning as it would naturally be understood by persons reading the article.[89] The libelous document must have been published.[90] The publication of judicial proceedings is privileged,[91] but comments on the motives of parties to a judicial proceeding and deductions drawn therefrom as to whether proceedings are in good faith are beyond the scope of privilege.[92] Publications which are privileged as being in the discharge of a duty[93] are strictly limited to the persons to whom the duty is owing.[94]

*The prosecution.* See 10 C. L. 621—An affidavit need not be as complete, technically, as an information, and is sufficient if it states the elements of the offense.[95] The indictment should state that the libel was published concerning the prosecutor.[96] It need only set forth the libelous portion of an article.[97] Falsity may in some states be alleged in general terms.[98] Truth or good faith is a matter of defense.[99] Evidence of provocation is inadmissible,[1] as is a subsequent publication by defendant disclaiming malice.[2] In a prosecution for imputing want of chastity, evidence

85. Under Pen. Code, §§ 242, 244, 245. Gow v. Bingham, 57 Misc. 66, 107 NYS 1011.

86. Immaterial at common law, and rule not changed by Const. 1901, art. 1, § 12, authorizing evidence of truth of libel, since such provision is silent ae to purpose or extent to which evidence is admissible. Brooke v. State [Ala.] 45 S 622.

87. State v. Cooper [Iowa] 116 NW 691. Fact that libelous publication is based upon reasonable or proper cause does not justify it. Id. Where article ie libelous per se, proof of publication makes prima facie case. State v. Sheridan, 14 Idaho, 222, 93 P 656.

88. Under Rev. St. 1887, § 6737, article concerning governor stating, "Gooding and graft have become so thoroughly known as synonymous terms that the rank and file will have no more of it, etc.," is libelous per se. State v. Sheridan, 14 Idaho, 222, 93 P 656. Libel charging attorney with improper conduct and dishonest motives libelous per se under Code, § 5086, defining criminal libel ae statement which would hold party up to ridicule and contempt, etc. State v. Cooper [Iowa] 116 NW 691.

89. Unless it affirmatively appears that word was used in another sense. State v. Sheridan, 14 Idaho, 222, 93 P 656. Words actionable if epoken will be actionable if published in writing or its equivalent. Id. Use of slang word does not render article less libelous when having well recognized meaning and by tending to impeach honesty exposing person to public hatred, contempt and ridicule. Id. Word "graft" imputes dishonest gain by reason of position, use of office for personal gain without rendering compensatory service, to steal, swindle. Id.

90. By delivery, selling, reading or otherwise communicating or causing this to be done. Rev. St. 1899, § 2261. State v. Santhuff [Mo. App.] 110 SW 624.

91. State v. Cooper [Iowa] 116 NW 691.

92. State v. Cooper [Iowa] 116 NW 691. Charge that lawyer was guilty of improper motives and unprofessional conduct not privileged. Id. Article giving opinion of reporter as to proceedings of judicial, legislative or other public body is not privileged within Rev. St. 1887, § 6743. State v. Sheridan, 14 Idaho, 222, 93 P 656. Under Rev. St. 1887, § 6743, article to be privileged must be fair, true report of judicial, legislative or other public official proceeding, or of statement of speech, etc. Id.

93. Person making publication must have something more resting upon conscience than mere desire to promote public welfare. State v. Cooper [Iowa] 116 NW 691. Publisher of temperance magazine not authorized to attack lawyer for misconduct in conduct of disbarment proceedings against attorneys employed by temperance organization. Id.

94. Privilege not broader than duty. State v. Cooper [Iowa] 116 NW 691. Communication by magazine to persons outside of temperance organization an excess of privilege rendering defense unavailable. Id.

95. Affidavit held sufficient to form basis of information for criminal libel. State v. Santhuff [Mo. App.] 110 SW 624.

96. No form prescribed, but technicalities of common law not required in view of Code 1896, § 5064, permitting general allegations. Brooke v. State [Ala.] 45 S 622.

97. Not entire article. Brooke v. State [Ala.] 45 S 622.

98. Indictment setting out libelous publication in full, alleging that same is "false, scandalous, malicious and defamatory," is sufficient without specific assertion of falsity of each statement contained in publication. Robinson v. State [Md.] 71 A 433.

99. State v. Sheridan, 14 Idaho, 222, 93 P 656. Prosecution need not prove negative of such defense. Id. Under Rev. St. 1887, § 6740, defendant may prove truth of charge as justification. Id.

1. Evidence of abusive language used by prosecutor in regard to defendant before publication of libel for which prosecution was laid not admissible. Robinson v. State [Md.] 71 A 433.

2. Robinson v. State [Md.] 71 A 433.

that the words were spoken to another person than the one alleged is error.[3] Where the language is not libelous per se, its meaning is for the jury,[4] but it is error to submit the meaning of unambiguous language libelous as a matter of law.[5] Where the jury are judges of the law, the instructions are advisory only.[6] Where the libel as circulated by defendant is alleged with exactness, variance with the original manuscript submitted to the printer is immaterial.[7]

§ 7. *Jactitation or slander of title.* See 10 C. L. 622—An action for slander of title is an action on the case for special damage by reason of the speaking or publication of the slander of the plaintiff's title,[8] and it follows that actual malice and special damage is of the gist of the action.[9]

**Libraries,** see latest topical index.

## LICENSES.


§ 1. Definition and Nature, 593.
§ 2. Power to Require and Validity of Statutes, 594.
§ 3. Issuance and Revocation, 600.
§ 4. Interpretation of Statutes and Ordinances and Persons Subject, 600.
§ 5. Assessment and Recovery of License Fees; Prosecution for Failure to Pay, 602.
§ 6. Effect of Failure to Obtain, 604.
§ 7. Disposition of License Moneys, 604.


*The scope of this topic is noted below.*[10]

§ 1. *Definition and nature.* See 10 C. L. 622—While a license is a privilege to do something which without such privilege would be unlawful,[11] the thing to be done may sometimes be prohibited solely for the purpose of giving rise to the necessity of the license.[12] The privilege granted is personal to the licensee[13] and cannot be assigned without the consent of the licensing authority,[14] nor can the personal representative of a deceased licensee receive the benefits of the license.[15] A license is not an appointment to office.[16] The distinction between regulatory fees and revenue taxes is considered in a subsequent section.[17]

**3.** Porter v. State [Tex. Cr. App.] 107 SW 817. Proof utterly irrelevant when witness testified no one present when accused told him slanderous statement. Id.

**4.** Where the alleged libel does not import a crime or misdemeanor, its libelous character must be referred to the jury as a question of fact. Michael v. Bacon [Ga. App.] 63 SE 228. Language may be reasonably construed by jury as libelous when accusing a man of falsehood in dealing with employes. Id.

**5.** Imputing criminal misconduct to lawyer. State v. Cooper [Iowa] 116 NW 691.

**6.** State v. Williams, 77 Kan. 857, 94 P 160.

**7.** Where printer corrected bad spelling and accused then distributed article, conviction was proper since printed article agreed exactly with information. State v. Santhuff [Mo. App.] 110 SW 624.

**8.** Not like ordinary defamation. Hygienic Fleeced Underwear Co. v. Way, 35 Pa. Super. Ct. 229.

**9.** No special damage shown. Hygienic Fleeced Underwear Co. v. Way, 35 Pa. Super. Ct. 229.

**10.** This topic treats of the general principles applicable to police regulation of occupations and of privilege, business, and occupation taxes as distinguished from general property taxes. Rights relative to the use of land (see Licenses to Enter on Land, 10 C. L. 630), liability of and to licensees of the use of property (see Negligence, 10 C. L. 922), and the specific application of the general principles herein dealt with to particular subject-matter (see such topics as Attorneys and Counselors, 11 C. L. 332; Intoxicating Liquors, 12 C. L. 332; Peddling, 10 C. L. 1159; Pawnbrokers and Secondhand Dealers, 10 C. L. 1147; Medicine and Surgery, 10 C. L. 828; Street Railways, 10 C. L. 1730), are treated elsewhere. As to licenses to teach, see Schools and Education, 10 C. L. 1597. As to licensing of pilots, see Shipping and Water Traffic, 10 C. L. 1655.

**11.** Harder's Fireproof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 NE 245. A **license to carry on business** or trade is an official permit to carry on same, or to perform other acts forbidden by law except to persons obtaining such permit. City of Savannah v. Cooper [Ga.] 63 SE 138.

**12.** Use of city streets by vehicles. Harder's Fireproof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 NE 245.

**13.** Wood v. School Dist. No. 32, Cass County [Neb.] 115 NW 308. See, also, Hannon v. Harper [Cal. App.] 98 P 685.

**14.** Burch v. Ocilla [Ga. App.] 62 SE 666.

**15.** Cannot recover amount paid for liquor license. Wood v. School Dist. No. 32. Cass County [Neb.] 115 NW 308.

**16.** License to person to follow any particular trade or business is not an appointment to officer, nor does it confer any of the

§ 2. *Power to require and validity of statutes.* See 10 C. L. 622—It is a well recognized attribute of sovereign power to tax any occupation for the purpose of raising revenue, and such tax may be laid and collected in the form of a license fee.[18] The power to regulate includes the power to license as a means of regulation.[19] Any business the pursuit of which may be prohibited by the state as an exercise of police power may be licensed if not malum in se,[20] and even a prohibited business may be taxed.[21]

The freedom from judicial control enjoyed by the legislature in regard to property taxes in general, subject only to constitutional limitations, does not extend to license, privilege and business taxes.[22] On the other hand, while license, privilege and business taxes are subject to such general constitutional limitations as those relating to the title and subject-matter of legislative acts,[23] abridgement of the natural rights of citizens,[24] liberties guaranteed by the fourteenth amendment to the federal constitution,[25] equality before the laws or the equal protection thereof,[26] due process of law,[27] retroactive laws,[28] rights and privileges of citizens of other states,[29] freedom of contract,[30] inviolability of contract,[31] interference with interstate com-

powers or privileges of a public officer, its object being to control the business and prevent its being conducted in manner injurious to the public welfare. People v. Rosenberg, 112 NYS 316.

17. See post § 4.

18. **Use of streets by vehicles.** Harder's Fireproof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 NE 245.

19. Under Kirby's Dig. § 5454, empowering cities to regulate hotels, etc., hotels may be licensed. City of Helena v. Miller [Ark.] 114 SW 237.

**Held subject to regulation by license: Private detectives.** Fox v. Smith, 123 App. Div. 369, 108 NYS 181. **Plumbing.** Felton v. Atlanta [Ga. App.] 61 SE 27; Milton Schnaier & Co. v. Grigsby, 113 NYS 548. **Employment agencies.** City of Spokane v. Macho [Wash.] 98 P 755. **Slaughtering business.** Territory v. Kenney [Ariz.] 95 P 93. **Dogs.** McGlone v. Womack, 33 Ky. L. R. 811, 864, 111 SW 688.

**Held not Subject To License: Real estate dealers.** Hager v. Walker, 32 Ky. L. R. 748, 107 SW 254. **Horseshoeing.** Ex parte Diehl [Cal. App.] 96 P 98.

20. Canning salmon. State v. Hume [Or.] 95 P 808.

21. Sale of liquor within 4 miles of schoolhouse, prohibited by law, held taxable. Foster v. Speed [Tenn.] 111 SW 925. See Intoxicating Liquors, 12 C. L. 332.

22. Hager v. Walker, 32 Ky. L. R. 748, 107 SW 254.

23. Must not infringe inhibitions against acts embracing more than one subject-matter. Carroll v. Wright [Ga.] 63 SE 260. Act Mar. 1, 1906, to promote sheep industry and tax dogs does not violate such limitation. McGlone v. Womack, 33 Ky. L. R. 811, 864, 111 SW 688. P. L. 161, requiring license of merchandise and real estate brokers, held not violative of Const. art. III, §§ 3, 6. Commonwealth v. Black Co., 34 Pa. Super. Ct. 431.

24. Wilby v. State [Miss.] 47 S 465.

25. Hyonen v. Hector Iron Co., 103 Minn. 331, 115 NW 167; Wilby v. State [Miss.] 47 S 465; Owens v. State, 53 Tex. Cr. App. 105, 112 SW 1075.

26. Hardee v. Brown [Fla.] 47 S 834; Carroll v. Wright [Ga.] 63 SE 260; Owens v. State, 53 Tex. Cr. App. 105, 112 SW 1075. Section 6962 as amended April 26, 1898 (93 Ohio Laws, p. 304), in so far as it enacts that every person, firm, or corporation desiring to engage in fishing in the waters of Lake Erie and the estuaries and bays thereof within this state shall make application to the commissioners of fish and game and obtain a license or authority to do so, and for such license or authority shall pay the fee therein specified, is valid. State v. Hanlon, 77 Ohio St. 19, 82 NE 662.

27. Hardee v. Brown [Fla.] 47 S 834. See, also, Carroll v. Wright [Ga.] 63 SE 260.

28. Carroll v. Wright [Ga.] 63 SE 260. Laws 1908, p. 271, c. 140, relative to allegation and proof of payment of annual license tax by corporations, not applicable to suits begun before it went into effect. Exposition Amusement Co. v. Empire State Surety Co. [Wash.] 96 P 158.

29. Provision in Act Mar. 7, 1907, § 17, requiring a license from persons or corporations soliciting orders or selling picture frames, held not in violation of U. S. Const., as discriminatory in favor of merchants having a permanent place of business as against merchants residing without the state, by reason of a provision that "this act shall not apply to merchants or dealers having a permanent place of business in this state and keeping picture frames as a part or all of their stock in trade." Dozier v. State [Ala.] 46 S 9.

30. Laws 1905, p. 1267, c. 572, requiring license as embalmer or certain term of service as licensed undertaker's assistant, as condition to right to engage in business of undertaking, held arbitrary interference with right to contract. People v. Ringe, 125 App. Div. 592, 110 NYS 74.

31. No inviolable contract is created by ordinance granting street railroad company for compensation paid by it the right to use streets, where there is no express release of right to impose taxes and license fees. St. Louis v. United R. Co., 210 U. S. 266, 52 Law. Ed. 1054.

merce,[32] and restraint of trade,[33] the legislature has a large discretion in the matter of such taxes,[34] unrestricted by the usual constitutional limitations applicable to property taxes in general,[35] one of the limitations most commonly invoked in this connection and held inapplicable being the limitation as to uniformity of taxes,[36] such limitation being limited to direct property taxes which are assessed and collected in the usual way.[37] Occupations may be classified for the purpose of license taxation and regulation,[38] and subclassification within a class is also permissible,[39] but not always essential.[40] The classification in either case must be reasonable and

32. See Commerce, 11 C. L. 643. Ordinance imposing license fee upon **agents representing citizens of another state** who offer goods in one state for sale by sample held void. City of Kinsley v. Dyerly [Kan.] 98 P 228. Ordinance not applied to **agents of foreign corporation** making **no sales** but taking orders for delivery of stoves similar to sample. Lee v. La Fayette [Ala.] 45 S 294. Grocer who simply delivered goods on payment of purchase price for foreign corporation held engaged in interstate commerce, and not subject to ordinance imposing a license. Crum v. Prattville [Ala.] 46 S 750. Sale of picture frames by corporation held intrastate commerce where frames delivered to and receipted for by agents soliciting order and exhibited by them to the purchasers with the price and accepted by the latter. Dozier v. State [Ala.] 46 S 9. Under a statute requiring **"transient merchants"** to pay a license, a manufacturer who shipped ranges to itself in care of its agents, stored them in a business room, and supplied wagons for hauling, exhibiting for sale and selling purposes, was held not liable therefor. Clay v. Wrought Iron Range Co. [Ind. App.] 85 NE 119. **Express companies** doing an intrastate and also an interstate business not relieved. Hardee v. Brown [Fla.] 47 S 834. A **correspondence school** may be taxed by a state. International Text-Book Co. v. Lynch [Vt.] 69 A 541.

33. Owens v. State, 53 Tex. Cr. App. 105, 112 SW 1075.

34. Classification, amount and manner of collection is largely, if not entirely, within legislative discretion. Blackrock Copper Min. & Mill. Co. v. Tingey [Utah] 98 P 180. An act imposing an annual license tax on corporations is not objectionable as depriving the corporation of its privileges in case of default of payment of the tax. Id.

35. Meushaw v. State [Md. App.] 71 A 457. No restriction in Utah Const. to prevent imposition of occupation, franchise or license taxee. Salt Lake City v. Christensen Co. [Utah] 95 P 523. **Amount** of license tax not controlled by general revenue law of state. Hardee v. Brown [Fla.] 47 S 834. Dog tax designed to remunerate owners of sheep killed by dogs held not within Const. § 171, prohibiting levy of taxes except for public **purposes**. McGlone v. Womack, 33 Ky. L. R. 811, 864, 111 SW 688. Tax of $100 on business of gas companies held not a property tax, and hence not within Const. art. 13, § 1, requiring all property to be taxed **in proportion to value** to be ascertained as provided by law. City of Los Angeles v. Los Angeles Independent Gas Co., 152 Cal. 765, 93 P 1006.

36. Limitation as to uniformity held inapplicable. Salt Lake City v. Christensen Co. [Utah] 95 P 523; Harder's Fireproof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 NE 245; Waters-Pierce Oil Co. v. Hot Springs, 85 Ark. 509, 109 SW 293. Const. § 171, providing that taxation shall be uniform upon all property subject to taxation, etc., held not to apply specifically and directly to license fees on franchises, trades, occupations, professions, etc. Hager v. Walker, 32 Ky. L. R. 748, 107 SW 254. License on salmon canning not repugnant to uniformity clause of Const. Ohio, art. 2, § 26. State v. Hanlon, 77 Ohio St. 19, 82 NE 662. Act to promote sheep industry and to tax dogs held valid. McGlone v. Womack, 33 Ky. L. R. 811, 864, 111 SW 688. Annual license tax on corporations held not violation of constitutional provision requiring all property to be taxed in proportion to value. Blackrock Copper Min. & Mill. Co. v. Tingey [Utah] 98 P 180. Constitutional provision as to taxation of property according to value, and that no species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, held not to apply to taxation of privileges. Waters-Pierce Oil Co. v. Hot Springs, 85 Ark. 509, 109 SW 293.

37. License tax on carrying on business of shoe merchant held not direct property tax. Salt Lake City v. Christensen Co. [Utah] 95 P 523. See, also, Blackrock Copper Min. & Mill. Co. [Utah] 98 P 180. License tax on persons engaging in any "business, trade, profession or calling" held not a direct property tax. Salt Lake City v. Christensen Co. [Utah] 95 P. 523. Tax on barbershops by chairs held not a property tax, but an occupation tax. City of Louisville v. Schnell [Ky.] 114 SW 742.

38. Carroll v. Wright [Ga.] 63 SE 260; Hager v. Walker, 32 Ky. L. R. 748, 107 SW 254. Provisions of Rev. Laws 1905, §§ 2180, 2181, with reference to the classification, qualification and licensing of engineers, not self-contradictory or unconstitutional. Hyvonen v. Hector Iron Co., 103 Minn. 331, 115 NW 167.

39. Classification of barber shops by chairs held valid. City of Louisville v. Schnell [Ky.] 114 SW 742. Classification according to business done held valid. Hager v. Walker, 32 Ky. L. R. 748, 107 SW 254. Classification of bankers and brokers according to capital employed in a sense arbitrary, but reasonable and valid. Salt Lake City v. Christensen Co. [Utah] 95 P 523.

40. License tax imposing same amount upon all engaged in same business, regardless of business done or profits received therefrom, is not an unreasonable discrimination by reason of the fact that different persons in business may have much more capital employed and earn much more profit than others. So held in case of $100 license tax on gas companies where city charter had following proviso: That no discrimination shall be made between persons engaged in the

not arbitrary,[41] must be based on some reason suggested by a difference in the situation and circumstances of the subjects treated,[42] and must operate equally upon all within a class.[43] The fact that a discriminating tax applies to all persons of a given class does not render it any the less obnoxious as an unjust discrimination against a class of citizens.[44] An ordinance cannot make a particular act penal when done by one person and impose no penalty for the same act done under like circumstances by another.[45] One who has not been refused a license cannot attack the license law as discriminatory.[46] The fact that property is subject to an ad valorem tax does not prevent the imposition of a tax upon the occupation in which such property is used,[47] and in some instances still another tax may be imposed for the privilege of using such property in certain places.[48] A tax on each vehicle used by hackmen has been held not to be double taxation within a state constitution.[49] Occupation or vocation taxes are not taxes upon labor or upon the right to work.[50]

The power to license and regulate cannot be used as a means of raising revenue,[51] and to be valid as a license tax it must be imposed upon the privilege of engaging in the particular business and not on the property pertaining thereto,[52]

same business otherwise than by proportioning the tax upon any business to the amount of business done. City of Los Angeles v. Los Angeles Independent Gas Co., 152 Cal. 765, 93 P 1006.

**41.** Carroll v. Wright [Ga.] 63 SE 260. Legislature may not impose **different** taxes on real estate dealers in cities of different classes. Hager v. Walker, 32 Ky. L. R. 748, 107 SW 254. Const. art. 2, § 18, providing that no privileges or immunities shall be granted to any citizen or class of citizens which upon the same terms shall not equally belong to all citizens, held to prevent arbitrary and unreasonable discrimination against persons. Waters-Pierce Oil Co. v. Hot Springs, 85 Ark. 509, 109 SW 293. License tax on business of cotton and stock brokerage by § 2 of Act No. 214, p. 384, of 1896, so graduated as to make smaller business pay in proportion 100 per cent more than the larger business, held not an equitable graduation, as required by art. 229 of La. Const. of 1898, for protection of citizens against arbitrary taxation. State v. Pinckard & Co., 119 La. 228, 43 S 1015. Municipal ordinance classification of packing house agents on basis of those who sell fresh meat in city and those who do not is not so arbitrary on its face as to require court upon mere inspection to declare it void. City of Savannah v. Cooper [Ga.] 63 SE 138. Tax for revenue on commission merchants of $200 per year held reasonable. Meushaw v. State [Md.] 71 A 457.

**42.** City of Spokane v. Macho [Wash.] 98 P 755.

**43.** When exercising power to regulate business, a municipality may classify subjects of legislation, but law must treat alike all of a class to which it applies, and must bring within its classification all who are similarly situated or under the same condition. City of Spokane v. Macho [Wash.] 98 P 755. Under Kentucky constitution, cities of one class may require different amounts of license taxes on same calling from cities of another class, but license fees imposed upon any such calling must be uniform in sense that same fee must be charged upon every person engaged in such calling. Hager v. Walker, 32 Ky. L. R. 748, 107 SW 254. Act 29th Leg. p. 217, c. 111, imposing tax on persons purchasing assignments of wages, held invalid by reason of exemptions. Owens v. State, 53 Tex. Cr. App. 105, 112 SW 1075.

**44.** Use of wagons not sufficient basis of classification unless the use affords some substantial distinction as to wear and tear upon streets. Waters-Pierce Oil Co. v. Hot Springs, 85 Ark. 509, 109 SW 293.

**45.** Levi v. Anniston [Ala.] 46 S 237. Penalizing of obtaining money by willful misrepresentation by one conducting employment office to one seeking employment held invalid in that it confined the offense to persons conducting such an office. City of Spokane v. Macho [Wash.] 98 P 755.

**46.** Where in petition to enjoin enforcement of licensing ordinance there was no allegation of application for and refusal of license, petitioner could not attack ordinance on ground that it was discriminatory in that it conferred too much discretion on licensing officers as to persons to whom licenses should be granted. Kissinger v. Hay [Tex. Civ. App.] 113 SW 1005.

**47.** Taxes on property and occupation of retail grocers held valid. City of Monett v. Hall, 128 Mo. App. 91, 106 SW 579.

**48.** Payment of ad valorem duty on vehicles and license tax on right to pursue occupation in which vehicles may be used held not to prevent imposition of tax for privilege of using streets. Harder's Fireproof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 NE 245.

**49.** Kissinger v. Hay [Tex. Civ. App.] 113 SW 1005.

**50.** City of Savannah v. Cooper [Ga.] 63 SE 138.

**51.** Waters-Pierce Oil Co. v. Hot Springs, 85 Ark. 509, 109 SW 293.

**52.** Use of streets. City of New York v. Union Ry. Co., 125 App. Div. 861, 110 NYS 944. Laying gas pipes. Kittanning Borough v. Consolidated Natural Gas Co., 219 Pa. 250, 68 A 728. Specific tax upon all agents and representatives of packing houses and upon all agents and representatives of dealers in packing house goods and products having a place of business or stock of merchandise in the city of Savannah and selling to customers therein held an occupation tax. City of Savannah v. Cooper [Ga.] 63 SE 138.

but the power and authority to license and regulate necessarily implies the right to charge and fix the amount of a license fee.[53] Such fee must be reasonable [54] with reference to the expense of enforcing the regulation,[55] and fees in excess of those necessary for regulation are significant of an intent to raise revenue.[56] The rule as to reasonable proportion between the tax and the expense of regulation does not apply to revenue taxes.[57] Regulations imposed under the police power must be reasonable with reference to the health, safety and comfort of the public,[58] and legitimate callings cannot be prohibited under the guise of regulation;[59] but lines of business harmful to public morals or productive of disorder may be so highly taxed as to limit or discourage this business.[60] Reasonableness depends upon the circumstances of the case,[61] and the courts will not interfere on the ground of unreasonableness except in cases of manifest abuse of discretion on the part of the licensing authorities.[62] The rule as to certainty in the description of the acts to be performed

**53.** State v. Cedaraski, 80 Conn. 478, 69 A 19.

**54.** City of Savannah v. Cooper [Ga.] 63 SE 138; Hager v. Walker, 32 Ky. L. R. 748, 107 SW 254. Ordinance passed by city having less than 3,000 inhabitants, imposing a license tax of $50 upon express companies, is unauthorized and illegal. State v. Lewis [Fla.] 46 S 630. An ordinance requiring brokers engaged in making chattel mortgages or salary loans to secure a license as a condition precedent to doing business within the municipality is not invalid because the license fee is fixed at as high a figure as $250. Chambers v. Cincinnati, 11 Ohio C. C. (N. S.) 273. Requiring same license fee of itinerant merchant, regardless of number of days in which he engages in his business, held unreasonable and invalid. Endleman v. Bloomington, 137 Ill. App. 483. Regulatory tax of $5 per day upon distributive advertising, without reference to amount of advertising, held unreasonable, prohibitory and void. Commonwealth v. Jackson, 34 Pa. Super. Ct. 178.

**55.** License fee of $2.50 per one-horse and $5.00 per two-horse vehicle held reasonable. Kissinger v. Hay [Tex. Civ. App.] 113 SW 1005. License tax on "business, trade, profession or calling" not imposed for regulation, but revenue. Salt Lake City v. Christensen Co. [Utah] 95 P 523. $25 license fee on hotels not shown to be excessive, though evidence tended to show that no additional policemen or sanitary officers had been employed for purpose of inspection and enforcement of sanitary measures. City of Helena v. Miller [Ark.] 114 SW 237. $50 license fee on oil wagons held excessive. Waters-Pierce Oil Co. v. Hot Springs, 85 Ark. 509, 109 SW 293. In action to recover tax on telegraph and telephone poles, affidavit of defense alleging that tax is over twenty times as much as is necessary for costs of inspection held sufficient. Collingdale Borough v. Keystone State Tel. & T. Co., 33 Pa. Super. Ct. 351. Annual license tax on street cars contemplates not only inspection but also regulation and supervision. Gettysburg Borough v. Gettysburg Transit Co., 36 Pa. Super. Ct. 598. Reasonableness of regulatory tax on street cars must be considered in connection with other fees charged for inspection and supervision of poles and wires, since costs of general regulation are cut down pro tanto by fees exacted for such specific matters. Id. Probable cost of maintaining street outside car tracks cannot be considered in fixing amount of regulatory tax on street cars. Id. Fact that construction of tracks casts burden of travel upon street outside tracks cannot be considered. Id.

**56.** See post, § 4.

**57.** Tax of $100 per month on business of gas companies held valid. City of Los Angeles v. Los Angeles Independent Gas Co., 152 Cal. 765, 93 P 1006.

**58.** License ordinance which is unreasonable and prohibitory is void. Endleman v. Bloomington, 137 Ill. App. 483. Statute (Laws 1905, p. 1267, c. 572), requiring persons engaging in business of undertaker to have license as embalmers, and 3 years' employment as assistant, held invalid. People v. Ringe, 125 App. Div. 592, 110 NYS 74. State constitution held to authorize tax on every business and person in any amount not so unreasonable or arbitrary as to amount to a confiscation or property or denial of right to engage in particular trade or profession. Hager v. Walker, 32 Ky. L. R. 748, 107 SW 254. An ordinance requiring brokers engaged in making chattel mortgages or salary loans to secure a license as a condition precedent to doing business within the municipality is not invalid because brokers are required to keep records of the name of each pledgor, the amount of the loan, the rate of interest charged the date when the loan is payable, and a description of the articles pledged, which record shall be filed in the office of the city auditor and be open to inspection by the mayor and chief of police; but a provision requiring that if the pledgor is a married man his wife must sign the application for the loan is of no effect. Chambers v. Cincinnati, 11 Ohio C. C. (N. S.) 273.

**59.** Hager v. Walker, 32 Ky. L. R. 748, 107 SW 254; State v. Hume [Or.] 95 P 808; Commonwealth v. Jackson, 34 Pa. Super. Ct. 178. Ordinance preventing hack stands and hacks standing in certain street held not prohibitory. Kissinger v. Hay [Tex. Civ. App.] 113 SW 1005.

**60.** State v. Hume [Or.] 95 P 808. Where it is within police power to prohibit, it seems that licensee cannot question amount of license fee. Id.

**61.** Endelman v. Bloomington, 137 Ill. App. 483. Circumstances of particular municipality, objects sought to be obtained, and necessity for ordinance. Commonwealth v. Jackson, 34 Pa. Super. Ct. 178.

**62.** Gettysburg Borough v. Gettysburg Transit Co., 36 Pa. Super. Ct. 598.

thereunder applies to licensing statutes and ordinances,[63] but the fact that a law imposing an annual license tax is somewhat crude and imperfect and not the best that could be devised for the purposes of raising revenue cannot affect its validity.[64]

Where uniformity is required of occupation taxes, such a tax is invalidated by arbitrary exemptions,[65] but in most of the states liberal exemptions are allowed,[66] the rule being, as in the case of the imposition of a tax, that an exemption accorded to persons or with reference to things as a class and not of a class will be upheld if it operates equally upon all subjects within such class.[67] A license tax may be imposed in lieu of and to the exclusion of all other taxes.[68]

The power to impose license and privilege taxes may be delegated to municipal corporations,[69] with full discretion as to the issuance of the license and the amount of the tax or fee,[70] to be exercised by municipal officers.[71] This, however, does not mean that arbitrary power may be so granted,[72] or that it may be exercised in an arbitrary manner by such officers,[73] but the courts are slow to review their action.[74]

**63.** Blackrock Copper Min. & Mill. Co. v. Tingey [Utah] 98 P 180.

**64.** Annual license tax on corporations held sufficiently certain as to time of payment. Blackrock Copper Min. & Mill. Co. v. Tingey [Utah] 98 P 180.

**65.** Act 30th Leg. p. 212, c. 112, imposing tax on certain nonintoxicating liquors, held invalid under Const. art. 8, § 2, on account of exemption of druggists. Ex parte Woods, 52 Tex. Cr. App. 575, 108 SW 1171. Act held invalid also because made applicable only to prohibition territory. Id.

**66.** Under Ky. Const. any class calling may be exempted. Hager v. Walker, 32 Ky. L. R. 748, 107 SW 254. It is within power of legislature and policy of state of Georgia to exempt certain classes of confederate veterans from all special license taxes. Burch v. Ocilla [Ga. App.] 62 SE 666.

**67.** Junk dealers and corporation engaged in manufacturing brass goods, pig iron, cast iron, pipe belting and mining cars, or other cars not of same class, and ordinance exempting latter class is valid. Levi v. Anniston [Ala.] 46 S 237.

**68.** See Taxes, 10 C. L. 1781, 1782. Under Alabama statutes, traction company, having paid license tax required of railway corporations, is not liable for any other corporate license or privilege tax. Exempted under subd. 55, § 4122, as amended. Montgomery Trac. Co. v. State, 150 Ala. 664, 43 S 541.

**69.** Hardee v. Brown [Fla.] 47 S 834. Authority delegated to city to require license of hackmen sustained. Kissinger v. Hay [Tex. Civ. App.] 113 SW 1005. Power of a municipality to impose an annual license fee per mile of gas pipes was upheld. Kittanning Borough v. Consolidated Natural Gas Co., 219 Pa. 250, 68 A 728. Under Ky. Const. power may be delegated to municipal corporations to exact license fees. Hager v. Walker, 32 Ky. L. R. 748, 107 SW 254.

**70.** Issuance of hackman's licenses to **"Proper persons."** Kissinger v. Hay [Tex. Civ. App.] 113 SW 1005; Hager v. Walker, 32 Ky. L. R. 748, 107 SW 254.

**71.** Delegated to mayor and city council of Baltimore as to seller of produce. Meushaw v. State [Md.] 71 A 457. Fact that plaintiff was required to obtain license from ordinary held not to invalidate ordinance. Carroll v. Wright [Ga.] 63 SE 260. Where statute provided that "the selectmen of a town may license persons, deemed by them to be suitable, to be dealers in and keepers of shops for the purchase and sale or barter of old junk (Pub. St. 1901, c. 124, § 1; Laws 1905, p. 484, c. 7691), the question of suitableness of applicant for license under statute in question is a fact for determination of selectmen. Silverman v. Gagnon, 74 N. H. 502, 69 A 886. Under this statute dealer whose methods of doing business does not afford reasonable protection against perpetration of evils known to be connected with business, he is not a suitable person and selectmen would be guilty of no abuse in refusing him license. Id. Under this statute, nonresident was reasonably refused license on ground that he was not a suitable person. Id.

**72.** Ordinance giving arbitrary power to highway commissioner as to issuing license for transportation of garbage held invalid. Buffalo Fertilizer Co. v. Cheektowaga, 113 NYS 901. Discretion cannot be delegated to an administrative officer to grant or refuse a license at will, so as to give him power to discriminate between applicants. Village of Silverton v. Davis, 10 Ohio C. C. (N. S.) 60. Present statutes relating to examination and licensing of steam engineers of certain classes is not in contravention of the state constitution, in that the chief examiner is clothed with legislative powers with reference to the qualifications that shall be required of those to whom licenses may be issued; or because of exemption of engineers holding licenses from examination during the remainder of the year the license had to run; or because in some quarters the law, contrary to its express provisions, has been construed to permit engineers holding licenses to obtain a renewal of their licenses without examination. Theobald v. State, 10 Ohio C. C. (N. S.) 536.

**73.** Silverman v. Gagnon, 74 N. H. 502, 69 A 886.

**74.** Meushaw v. State [Md.] 71 A 457; Silverman v. Gagnon, 74 N. H. 502, 69 A 886. In prosecution for failure to pay tax on commission merchant using market stalls, defense that market stalls were defective and hence tax unreasonable denied consideration on ground that arrangement of stalls was purely discretionary with mayor and city counsel. Meushaw v. State [Md.] 71 A 457. Where an ordinance is authorized by the city charter and constitutional, the discretion exercised in

In all cases the authority of the municipality is dependent upon charter or statute,[75] and must be exercised in the manner prescribed,[76] and while in some cases a municipality may impose an occupation or business tax, notwithstanding a license previously granted by the state,[77] it can neither require a license of one holding an exempting permit from the state[78] or where such a license is expressly prohibited by statute,[79] nor license illegal occupations[80] or acts.[81] A municipality may impose a regulatory license tax under a general welfare clause,[82] but cannot impose revenue tax under such clause[83] nor can it tax for revenue under the power to regulate.[84] A municipality cannot be authorized to levy a tax for revenue outside of its territorial jurisdiction.[85] The extent of the licensing powers of a municipality under a particular charter or statute is purely a matter of construction.[86]

prescribing a license fee cannot be reviewed as it is not a judicial question. State v. Cederaski, 80 Conn. 478, 69 A 19.

**75.** Right of certain cities to license businesses, trades, occupations and profession, not narrowed but extended by later repealing and reenacting statute. City of Louisville v. Roberts & Krieger, 32 Ky. L. R. 823, 106 SW 1197. The "Act respecting licenses in cities, townships, incorporated towns, incorporated boroughs" (P. L. 1905, p. 360), supersedes section 22 of the township act (P. L. 1899, p. 380), so far as relates to the licensing of hacks, omnibuses and other vehicles and the imposition of penalties for failure to take out licenses therefor. Lakewood Tp. v. Havens [N. J. Law] 68 A 1113. Authority of municipality is derived solely from legislature and coextensive only with the legislative grant. Town of Houma v. Houma Lighting & Ice Mfg. Co., 121 La. 21, 46 S 42. Act No. 136, p. 224, of 1898, Act No. 17, p. 24 of 1902, and Act No. 142, p. 313, of 1904, are general statutes applying to municipal corporations; but Act No. 171, p. 387, of 1898, is a statute making special provision for levy and collection of license taxes by and for both the state and municipal and parochial corporations, and its provisions control those of the other statutes with respect to the subjects included. Id. Provisions of Act No. 171, p. 387, of 1898, requiring granting of licenses applies as well to municipal licenses as to state licenses. Id.

**76.** Act No. 171, p. 387, of 1898, requires municipalities to license "wholesale and retail businesses separately, and a wholesale and retail license" is invalid and cannot be enforced. Town of Houma v. Houma Lighting & Ice Mfg. Co., 121 La. 21, 46 S 42.

**77.** Tax on agents of packing houses held not invalid for this reason. City of Savannah v. Cooper [Ga.] 63 SE 138.

**78.** Confederates selling "near beer." Burch v. Ocilla [Ga. App.] 62 SE 666.

**79.** Ordinance imposing "tax" for privilege of operating automobiles repealed by statute forbidding requirement of license from motor vehicles (Laws 1904, c. 538, p. 1311). City of Buffalo v. Lewis, 123 App. Div. 163, 108 NYS 450.

**80.** Licensing sale of intoxicating liquor in prohibition territory held invalid. Burch v. Ocilla [Ga. App.] 62 SE 666.

**81.** General licensing powers conferred upon municipalities by section 2669 (1536-327) do not render valid an ordinance whereby municipality permits a peddler, under the guise of a license, to occupy a portion of the inside of the sidewalk by a structure built against the wall and used by him for the purpose of vending his wares. United Cigar Stores Co. v. Von Bargen, 7 Ohio N. P. (N. S.) 420. Fact that such peddler's stand has been maintained for period of seventeen years does not create any right in sidewalk or relieve municipality from duty of clearing sidewalk of such obstruction; nor does fact that structure is maintained under agreement with property owner create any right to such occupancy of sidewalk as against rights of the general public. Id.

**82, 83, 84.** Titusville v. Gahan, 34 Pa. Super. Ct. 613.

**85.** Code 1887, § 1032, relative to tax on circus exhibitions outside territorial limits of city, held void. Robinson v. Norfolk, 108 Va. 14, 60 SE 762.

**86.** Charter of city of Savannah confers ample authority to impose a business or occupation tax. City of Savannah v. Cooper [Ga.] 63 SE 138. Freeholder charters not affected by section 3366 of Pol. Code, restricting power of licensing by local legislative bodies to purposes of regulation. Ex parte Diehl [Cal. App.] 96 P 98. Cities of second class have no power under Ky. St. 1903, § 3058, subsec. 2, to tax vehicles not used or let for hire. In re City of Newport [Ky.] 113 SW 467. Power to impose revenue tax on **commission merchants** held conferred by new charter of Baltimore city. Meushaw v. State [Md.] 71 A 457. Town may regulate **transportation of garbage.** Buffalo Fertilizer Co. v. Cheektowaga, 113 NYS 901. Schedule B, c. 5597, p. 48, of Laws of 1907, authorizes imposition of a license tax by cities of 1000 to 3000 inhabitants upon any **express company** having an office therein of a sum not to exceed $25, and chapter 5811, p. 430, of the Laws of 1907, neither in express terms nor by implication authorizes the city of Jasper to impose such license tax for a greater amount than $25. State v. Lewis [Fla.] 46 S 630.

**Punishment:** Under statute authorizing city to pass ordinances for levy and collection of license taxes and to prescribe penalties for enforcement of such ordinances by inflicting fine not exceeding $100 and imprisonment for each offense, an ordinance imposing a fine of not less than $5 nor more than $100, or imprisonment not exceeding 30 days or both such fine and imprisonment, for each violation, is within the limits of the statutory grant of power. City of Holton v. Tatlock, 77 Kan. 376, 94 P 204.

§ 3. *Issuance and revocation.*[See 10 C. L. 827]—The wrongful refusal of a license does not justify the applicant in proceeding to act without a license,[87] his remedy being by writ of mandamus to compel the issuance of the license,[88] or it has been declared, by action for the damages sustained from such refusal,[89] but with reference to such liability it has been held that an applicant cannot neglect to avail himself of his remedy by mandamus and thus lay up damages for himself by reason of the failure of ministerial officers to perform their duty.[90] Express authority to revoke for cause is sometimes conferred upon municipalities.[91] A bare license may at any time be revoked or terminated,[92] but not so where the authority to revoke is expressly qualified.[93] Notice is sometimes required.[94] The payment of an occupation tax does not relieve the taxpayer from subsequent regulation.[95] The right to enjoy a privilege under a municipal license is not property of such a character that a court of equity will protect it after an implied revocation of the license.[96] A license is not necessarily revoked ipso facto by violations of the law and regulatory provisions by the licensee.[97] Proceedings to review revocation of a license and to compel reissue abate upon the death of the licensee.[98]

§ 4. *Interpretation of statutes and ordinances and persons subject.*[See 10 C. L. 828]—Judicial construction of particular statutes and ordinances is determinative of questions relative to the time within which a licensing statute becomes operative,[99] the scope of the classification,[1] acts authorized by the license,[2] the manner of com-

**87, 88, 89.** City of Montpelier v. Mills [Ind.] 85 NE 6.

**90.** City held not liable for officers' wrongful refusal to grant peddler's license. Butler v. Moberly [Mo. App.] 110 SW 682.

**91.** Greater New York Charter, Laws 1897, p. 520, c. 378, § 1481, for violation of which revocation of theatrical license is authorized by section 1476, held repealed by Penal Code, § 277, so far as concerns penal prosecution thereunder, but not as to authority to forfeit license for its violation. People v. O'Gorman, 124 App. Div. 222, 108 NYS 737.

**92.** Such license need not be used by the licensee in absence of agreement to contrary. Selectmen of Amesbury v. Citizens' Elec. St. R. Co., 199 Mass. 394, 85 NE 419.

**93.** Where revocation is authorized for cause. People v. Rosenberg, 112 NYS 316.

**94.** Must be due notice of revocation charges as required by Laws 1906, p. 837, c. 327, § 8 relative to regulation of employment agencies. People v. Bogart, 122 App. Div. 872, 107 NYS 831.

**95.** Under Cobbey's Ann. St. 1903, §§ 8719, 8723, city held to have power to require keeper of billiard and pool hall who had paid occupation tax imposed by city to obtain license from mayor and council. McCarter v. Lexington [Neb.] 115 NW 303.

**96.** McCarter v. Lexington [Neb.] 115 NW 303.

**97.** Neither violation of Greater N. Y. Charter (Laws 1901, p. 137, c. 466) relative to pawnbrokers nor conviction of petit larceny would work revocation of pawnbrokers' license ipso facto. People v. Rosenberg, 112 NYS 316.

**98.** Hannon v. Harper [Cal. App.] 98 P 685.

**99.** Calendar year. Carroll v. Wright [Ga.] 63 SE 260.

**1.** Clarksdale Charter and ordinances held not to cover sale of coca cola in bottles so as to authorize penalty provided by Code 1906, § 3894, for violation of section 3790. Marce v. Clarksdale [Miss.] 47 S 780. One assisting in management of corporation's grocery business held liable for failure to take out license under ordinance requiring license of managers of corporations conducting grocery business. City of Monett v. Hall, 128 Mo. App. 91, 106 SW 579. Laws 1896, p. 1052, c. 803, providing that no **"person"** shall carry on business of employing or master plumber, held applicable to corporations. Schnaier Co., v. Grigsby, 113 NYS 548; Milton M. Schnaier Co. v. Grigsby, 112 NYS 505. P. L. 1905, 161, expressly includes corporations in category of "all merchandise **brokers** and real estate brokers." Commonwealth v. Samuel W. Black Co., 34 Pa. Super. Ct. 431. Horseshoeing held a **"business"** within the meaning of charter. Ex parte Diehl [Cal. App.] 96 P 98. Where proprietor or keeper of saloon keeps or maintains a billiard table in connection therewith, it will be held that such table is kept and used in **"doing business"** within meaning of section 2 of art. 7 of Const., although no separate or specific fee is exacted or charge made for playing games on such tables, incidental advantage and adjunct which the table affords to business in connection with which it is used being held sufficient to bring it within purview of term "doing business." In re Gale, 14 Idaho, 761, 95 P 679. Licensed junk **dealer** in one municipality who buys junk in another municipality is a junk dealer in latter municipality within Pub. St. 1901, c. 124, § 4. State v. Silverman [N. H.] 70 A 1076. Statute regulating **doing plumbing business** has no application to any individual plumber working by day or making contracts for himself alone. Wilby v. State [Miss.] 47 S 465. Ordinance including within its terms only **master employing and journeyman plumbers** held not to exclude apprentices. Wilby v. State [Miss.] 47 S 465. Under N. Y. statutes corporations may conduct business of **plumbers.** William Messer Co. v. Rothstein, 113 NYS 772. Act of employe of heating plant manufacturer in connecting boiler

puting the license tax,[3] and persons exempt.[4] Statutes or ordinances regulating the inherent right to follow an honest employment approach an abridgement of constitutional rights, and are strictly construed.[5] So, also, a statute or ordinance providing for the punishment of persons engaging in work without a license is penal, and will be strictly construed against the government,[6] and hence an act which is not within the spirit of the statute, though within its letter, will not be construed as included in the enactment,[7] but such statutes or ordinances will be construed, nevertheless, according to the manifest extent of the legislative body.[8] The grant of a privilege in consideration of compensation will not of itself operate as a release of the right subsequently to enact license fees.[9]

The distinction between license taxes as such and taxes for revenue is that in the former the revenue is a mere incident to regulation, while in the latter the rev-

and tank of apparatus sold to customer held not within 30 Stat. 477, c. 467, relative to engaging in **"work of plumbing"** within District of Columbia. Garrison v. District of Columbia, 30 App. D. C. 515. Selling coca cola in bottles held not **selling at retail** within Clarksdale charter and ordinances. Marce v. Clarksdale [Miss.] 47 S 780. One having store in which he kept sewing machines and who employed agents on commission to travel about and sell such machines held engaged in **occupation of** wholesale dealer in old and new metals, part of which he refined, held not engaged in conducting a **junk shop or second-hand store.** West Side Metal Refin. Co. v. Chicago, 140 Ill. App. 599. **Selling sewing machines** within Act 1896, p. 186, c. 22, art. 12, § 1, subd. 4. Morgan Oates & Co. v. Com., 33 Ky. L. R. 281, 109 SW 907. Person who undertook to do one piece of detective work held liable under statute requiring license from all persons engaging in **business of private detective** for hire or reward. Fox v. Smith, 123 App. Div. 369, 108 NYS 181. Greater New York Charter § 1472, Laws 1897, p. 519, c. 378, held not to cover **moving picture shows.** Such shows held **"common shows"** under section 51 of Charter Laws 1901, p. 30, c. 466. Weistblatt v. Bingham, 58 Misc. 328, 109 NYS 545. Boer War Spectacle not assessable under § 11, cl. 1448, Act 1902-3, which provides for assessment and license of shows, **circuses and menageries.** Boer War Spectacle v. Com., 107 Va. 653, 60 SE 85. Hotels paying license as such not required to pay for **restaurant** license whether run on American or European plan. New Galt House Co. v. Louisville, 33 Ky. L. R. 869, 111 SW 351. Buggy or automobile when in use on public street for carriage of persons, whether for pleasure or hire, held in use as a **vehicle carrying a load** within Hurd's Rev. St. 1905, c. 24, art. 5, § 1, cl. 96. Harder v. Chicago, 235 Ill. 294, 85 NE 255. Right of licensed employment agency under ch. 432, p. 1053, Laws of 1904, and amendatory acts thereof relating to licensing **employment agencies,** to employ an unlicensed agency sustained. Calugerovich v. Yuzzolino, 110 NYS 984. **Hawker and peddler** license under Laws 1896, p. 315, c. 371, held not to include right to permanent possession of certain part of highway. Eggleston v. Scheibel, 112 NYS 114. Sale of oil from wagons to retail dealer held not to require peddler license; otherwise as to sales to others. Commonwealth v. Standard Oil Co. [Ky.] 112 SW 902. Defendant delivering gasoline to regular customers by filling tanks weekly under a previous arrangement, held not to require a peddler's license. Id. One maintaining ball grounds and pavilion on his own private grounds held not engaged in a **business or occupation** and not a **keeper, proprietor, or manager of public ball ground.** Village of Silverton v. Davis, 10 Ohio C. C. (N. S.) 60.

**2.** Peddler's license under Laws 1896, p. 315, c. 371, held not to authorize maintenance of stand in public street. Eggleston v. Scheibel, 112 NYS 114.

**3.** Gross earnings tax on street railways. Boston El. R. Co. v. Com., 199 Mass. 96, 84 NE 845; City of New York v. Union Ry. Co., 125 App. Div. 861, 110 NYS 944.

**Rule of practical construction** by parties applied in construing license tax on street cars, provisions of statute being doubtful. City of New York v. New York City R. Co. [N. Y.] 86 NE 565. Statute imposing license tax on street cars held too clear for application of rule of practical construction. City of New York v. New York City R. Co., 110 NYS 720.

**4.** International Text-Book Co. v. Lynch [Vt.] 69 A 541. A confederate veteran having a certificate authorizing him to peddle and conduct business in any county or municipality in Georgia without procuring a license which certificate has been regularly granted under Pol. Code 1895, § 1642, et seq., as amended (Acts 1897, p. 24; Van Epps Code, 6146a), is not subject to a license tax imposed upon this sale of "carrier." Burch v. Ocilla [Ga. App.] 62 SE 666. A foreign correspondence school is not exempt from payment of license tax under statute which reads "corporations organized solely for charitable, religious or educational purposes, cemetery associations * * * shall be exempt from the payment of the annual license tax" as this applies only to domestic corporations. International Text Book v. Lynch [Vt.] 69 A 541.

**5.** Wilby v. State [Miss.] 47 S 465.

**6, 7.** Garrison v. District of Columbia, 30 App. D. C. 515.

**8.** Engaging in practice of veterinary medicine in District of Columbia without license held penal offense by reason of direct and express requirement of license, though practice without license is not expressly forbidden. District of Columbia v. Dewalt, 31 App. D. C. 326.

**9.** In absence of express release of right to exact such fees. St. Louis v. United R. Co., 210 U. S. 266, 52 Law. Ed. 1054.

enue is the primary object,[10] and the real purpose of the tax is determinative of its nature, regardless of the disposition of the proceeds thereof,[11] and regardless, likewise, of the name by which the tax is called,[12] though such name may, in a proper case, be considered, in arriving at the legislative intent,[13] and in some cases the expressed purpose of the tax is held to be determinative.[14] Where any imposition is laid upon persons or property under a general taxing ordinance, the only conclusion that can be drawn is that such tax is laid for revenue purposes alone unless the contrary is made to appear,[15] but specific reference to regulation is not essential to constitute a tax a regulatory one,[16] and where the tax will be valid if regulatory and invalid if for revenue, the presumption is that it is for regulation where there is nothing to indicate a contrary intent.[17]

§ 5. *Assessment and recovery of license fees; prosecutions for failure to pay.* See 10 C. L. 630—A municipal ordinance is a state law within the meaning of an act making the violation of a state licensing law a crime.[18] Payment of license taxes may be enforced by fine and imprisonment[19] or by legal process issued for its collection,[20]

**10.** City of Buffalo v. Lewis, 192 N. Y. 193, 84 NE 809; Ex parte Woods, 52 Tex. Cr. App. 575, 108 SW 1171. See, also, State v. Cedaraski, 80 Conn. 478, 69 A 19. Act (Laws 1907, p. 212, c. 112) imposing license tax on sellers of Uno, Ino, Frosty & Tintop may not be treated under police power as it was passed solely as tax and not as regulation. Ex parte Woods, 52 Tex. Cr. App. 575, 108 SW 1171.

**11.** Direction of ordinance imposing tax on motor vehicles, that proceeds shall be placed in fund for repair of streets, held not significant of purpoee to impose revenue tax as distinguished from license tax. City of Buffalo v. Lewis, 192 N. Y. 193, 84 NE 809.

**12.** Designation of burden imposed as a "tax" does not render such burden a tax for revenue, where plain purpose of the imposition is to regulate or prohibit. City of Buffalo v. Lewis, 192 N. Y. 193, 84 NE 809.

**13.** Failure to use word tax in one authorizing statute and use of such word in a subsequent statute is significant to intent of second statute to authorize tax for revenue. Meushaw v. State [Md.] 71 A 457.

**14.** Tax expressly stated to be for revenue held a revenue tax. Titusville v. Gahan, 34 Pa. Super. Ct. 613.

**15.** License tax on circuses. Robinson v. Norfolk, 108 Va. 14, 60 SE 762. To construe a general taxing ordinance as a police ordinance it must be shown that the tax collected thereunder is donated to the expense incident to carrying out its provisions, otherwise there would be nothing to distinguish a revenue ordinance from a police ordinance. City of Los Angeles v. Los Angeles Independent Gas Co., 152 Cal. 765, 93 P 1006; Robinson v. Norfolk, 108 Va. 14, 60 SE 762. An ordinance imposing a license on vehicles making no provision for inspection and expressly providing that fund be applied to street held an attempt to tax rather than to regulate. Waters-Pierce Oil Co. v. Hot Springs, 85 Ark. 509, 109 SW 293. Presumption that license on business which cannot be regulated is for revenue. Ex parte Diehl [Cal. App.] 96 P 98.

**16, 17.** Gettyeburg Borough v. Gettysburg Transit Co., 36 Pa. Super. Ct. 598.

**18.** Ex parte Bagshaw, 152 Cal. 701, 93 P 864. Justice of peace has jurisdiction to try cases of violatione of California license statutes. Id.

**19.** Salt Lake City v. Christensen Co. [Utah] 95 P 523. Ordinance is not invalid because it imposes a penalty by fine or imprisonment for failure to pay a license, which penalty is not imposed for a failure to pay taxes generally. Id. Subjecting person to penal punishment for failure or refusal to pay license does not constitute "imprisonment for debt." Ex parte Diehl [Cal. App.] 96 P 98.

**NOTE. Liability of agent or employe in case license tax is unpaid:** It is held very generally that one may be penalized for carrying on a business or employment subject to license tax when such tax has not been paid, although his only interest therein is as an agent or employe (Dentler v. State, 112 Ala. 70, 20 S 592; Abel v. State, 90 Ala. 631, 8 S 760; Campbell v. Anthony, 40 Kan. 652, 20 P 492; Com. v. Hadley, 11 Metc. [Mass.] 66; People v. Metzger, 95 Mich. 121, 54 NW 639; State v. Chastain, 19 Or. 176, 23 P 963; City of Emporia v. Becker, 76 Kan. 181, 90 P 798, 12 L. R. A. [N. S.] 946; Bond v. Royston, 130 Ga. 646, 61 SE 491, distinguishing Gould v. Atlanta, 55 Ga. 678), and that the fact that he receives no compensation for his services is immaterial (State v. Keith, 46 Mo. App. 525; State v. Bugbee, 22 Vt. 32). Where both the business and the employment are subject to license, it is held that a licensed agent may become penally liable for conducting the business of an unlicensed employer (Farmington v. Rutherford, 94 Mo. App. 328, 68 SW 83), or an unlicensed agent may be liable for serving a licensed employer (Wason v. Underhill, 2 N. H. 505), and the same was held in the case of one who conducted on unlicensed agency, although the actual sales were made by licensed subagents (Mitcheli v. Meridian, 67 Miss. 644, 7 S 493). It is held that proof of sale of an article subject to license tax throws the burden on defendant to prove that his employer is a licensed dealer (Rana v. State, 51 Ark. 481, 11 SW 692; Klepfer v. State, 121 Ind. 491, 23 NE 287), and that it is the employer's duty to ascertain that his employer is so licensed before entering his service (Commonwealth v. Hadley, 11 Metc. [Mass.] 66; Hays v. State, 13 Mo. 246; Tardiff v. State, 23 Tex. 169, 62 Am. Dec. 550; State

and both the tax and the penalty for its nonpayment may be made a lien upon property.[21] On a prosecution for engaging in a business without a license, the defendant's failure to secure a license must be alleged.[22] On a prosecution for violation of a license law, the burden is upon the prosecution to make out its case,[23] but when an ordinance prescribes separate offenses, proof of a single offense is sufficient.[24] The burden is upon the defendant to show the unreasonableness of the tax.[25] Partial failure to perform duties of regulation is not alone a defense to an action to recover a license fee.[26] On the question of whether a given occupation comes within a particular class of which a municipal occupation tax is required, evidence which tends to show the character of the business is admissible,[27] but the licensee's belief as to the scope of his license will not excuse a plain violation of the law.[28] In some instances the enforcement of an invalid license ordinance will be enjoined,[29] but it is held that enforcement by criminal prosecution will not be enjoined,[30] and that criminal or other prosecution will not be enjoined after an implied revocation of a license.[31] In a suit for an injunction against the sale of the complainant's property, the defendant has the burden of establishing any other charge against the property than that for which the assessment was made.[32] The form of prosecution is sometimes

v. Chastain, 19 Or. 176, 23 P 963; City of Emporia v. Becker, 76 Kan. 181, 90 P 798, 12 L. R. A. [N. S.] 946). The last cited case holds that honest belief that the employer is a licensed dealer is no defense, but a contrary view is indicated in Tardiff v. State, 23 Tex. 169, 62 Am. Dec. 550. These cases have most frequently arisen in connection with the unlicensed sale of liquors (Abel v. State, 90 Ala. 631, 8 S 760; State v. Keith, 37 Ark. 96; Johnson v. State, 37 Ark. 98; Baird v. State, 52 Ark. 326, 12 SW 566; Com. v. Hadley, 11 Metc. [Mass.] 66; People v. Metzger, 95 Mich. 121, 54 NW 639; People v. De Groot, 111 Mich. 245, 69 NW 248; Isbell v. State, 13 Mo. 86; Hays v. State, 13 Mo. 246; State v. Bryant, 14 Mo. 340; Board of Excise v. Dougherty, 55 Barb. [N. Y.] 332; French v. People, 3 Park. Crim. Rep. 114; State v. Chastain, 19 Or. 176, 23 P 963; Tardiff v. State, 23 Tex. 169, 62 Am. Dec. 550; La Norris v. State, 13 Tex. App. 33, 44 Am. Rep. 699; Davidson v. State, 27 Tex. App. 262, 11 SW 371; State v. Bugbee, 22 Vt. 32; Reg. v. Howard, 45 U. C. Q. B. 346), but the same rule has been applied to merchants (City of Emporia v. Becker, 76 Kan. 181, 90 P 798, 12 L. R. A. [N. S.] 946; Campbell v. Anthony, 40 Kan. 652, 20 P 492), commission merchants (Elsberry v. State, 52 Ala. 8), street railway employes (Springfield v. Smith, 138 Mo. 645, 40 SW 757, 60 Am. St. Rep. 569, 37 L. R. A. 446; Wyandotte v. Corrigan, 35 Kan. 21, 10 P 99), dealers in playing cards (Dentler v. State, 112 Ala. 70, 20 S 592), sewing machine (Mitchell v. Meridian, 67 Miss. 644, 7 S 493), insurance (Farmington v. Rutherford, 94 Mo. App. 328, 68 SW 83), express (Montgomery v. Shoemaker, 51 Ala. 114), and railway agents, etc. (Nashville, etc., R. Co. v. Attalla, 118 Ala. 362, 24 S 450). The contrary view is, however, more or less clearly indicated in some cases. State v. Woods, 40 La. Ann. 175, 8 S 543; Cincinnati v. Withers, 5 Ohio S. & C. P. Dec. 570; O'Rourke v. State, 6 Ohio C. C. 612; Troy v. Harris, 102 Mo. App. 51, 76 SW 662; United States v. Paxton, 1 Cranch C. C. 44, Fed. Cas. No. 16013; United States v. Shuck, 1 Cranch, C. C. 56, Fed. Cas. No. 16285.—Adapted from 12 L. R. A. (N. S.) 946.

20. No unconstitutional mingling of judicial and ministerial functions to authorize ordinary to issue tax execution. Carroll v. Wright [Ga.] 63 SE 260.

21. Act imposing annual license tax on corporations is not invalid in that both tax and penalty constitute lien upon the tangible property of corporation. Blackrock Copper Min. & Mill. Co. v. Tingey [Utah] 98 P 180.

22. Allegation of unlawfully engaging in such business is insufficient, offense being failure to procure license. Village of Silverton v. Davis, 10 Ohio C. C. (N. S.) 60.

23. City of Kingsly v. Dyerly [Kan.] 98 P 228. Doubt as to whether sale by agent of shipper from another state was consummated by acceptance and shipment by principal cannot be resolved in the negative so as to deprive sale of interstate character and thus to sustain the license tax. Id. Facts held sufficient to sustain conviction, under Code § 2594, imposing license fee on itinerant vendors of drugs, etc. State v. Steward [Iowa] 116 NW 693.

24. Ordinance penalizing sale of junk without license and purchase of junk from one without license certificate. Levi v. Anniston [Ala.] 46 S 237.

25. Gettysburg Borough v. Gettysburg Transit Co., 36 Pa. Super. Ct. 598.

26. Fee due at beginning of year. Gettysburg Borough v. Gettysburgh Transit Co., 36 Pa. Super. Ct. 598.

27. Lines v. Savannah, 130 Ga. 747, 61 SE 598.

28. One holding peddler's license under Laws 1896, p. 315, c. 371, held not exempt from arrest for obstructing street with stand. Eggleston v. Schiebel, 112 NYS 114.

29. Enforcement of ordinance, imposing license tax on packinghouse agents, enjoined as discrimination. City of Savannah v. Cooper [Ga.] 63 SE 138.

30. Kissinger v. Hay [Tex. Civ. App.] 113 SW 1005.

31. McCarter v. Lexington [Neb.] 115 NW 303.

32. In suit to restrain sale under assessment against complainant as a transient

made to depend upon the rights and questions involved.[33] A municipal corporation is not liable for threats made by officers against person peddling without a license,[34] or for seizure of property upon a tax execution issued under an invalid ordinance.[35]

§ 6. *Effect of failure to obtain.*[See 10 C. L. 630]—Contracts executed by unlicensed persons are generally held valid in the absence of a manifest legislative intent to the contrary,[36] but the statutes of some states are held to invalidate such contracts,[37] and where such a contract is executed while an invalidating statute is in operation, it will not be validated by a subsequent general repeal of such statute.[38] Questions of fact involved in a defense of noncompliance with the statute are for the jury.[39] Where a license is not obtained there can be no obligation to pay for a license merely by reason of unlawfully engaging in business, and hence no civil action will lie for a license fee,[40] but in such case there may be criminal liability.[41] Licensees are sometimes given a right of action against persons usurping license privileges.[42]

§ 7. *Disposition of license moneys.*[See 10 C. L. 630]—The disposition of license moneys depends upon the legislative intent with regard thereto.[43] For most intents and purposes,[44] a license, statute or ordinance need not specify the purpose to which the fee or tax is to be applied.[45] Disposition as affecting the character of the tax is treated in a previous section.[46]

## LICENSES TO ENTER ON LAND.

§ 1. Nature, Creation, and Indicia of a License and Distinction from Easements and Other Estates, 604.
§ 2. Rights and Liabilities of Licensees, 606.

*The scope of this topic* is noted below.[47]

### § 1. *Nature, creation, and indicia of a license and distinction from easements*

merchant, defendant must establish charge against complainant as a peddler, if reliance is had upon such a charge. Clay v. Wrought Iron Range Co. [Ind. App.] 85 NE 119.

**33.** Prosecution against pawnbroker for violation of Greater New York Charter, Laws 1901, p. 137, c. 466, § 317, in refusal to exhibit pawned property to police, etc., held not subject under Laws 1901, p. 602, c. 466, § 1409, to prosecution by indictment as involving property rights, intricate questions of fact, difficult questions of law, or matters the decision of which would be far reaching in effect, etc. People v. Rosenberg, 112 NYS 316.

**34.** Butler v. Moberly [Mo. App.] 110 SW 682.

**35.** Reason being that enactment or attempted enactment of ordinance is in exercise of legislative function. Bond v. Royston, 130 Ga. 646, 61 SE 491.

**36.** Sale by broker failing to take out a license required by statute not void. Cobb v. Dunlevie, 63 W. Va. 398, 60 SE 384; Ober v. Stephens, 54 W. Va. 354, 46 SE 195. Unlicensed real estate agent's contract for compensation held not void. Manker v. Tough [Kan.] 98 P 792. Note for renewal of insurance policy held not void under Code 1906, which omits clause in prior statutes as to invalidity of contract, and prescribing fine and imprisonment, or both, for failure to pay privilege tax. Young v. State Life Ins. Co. [Miss.] 45 S 706.

**37.** Failure to procure plumber's license required by Laws 1896, p. 1052, c. 803, held defense to action for compensation for plumbing. Milton Schnaier & Co. v. Grigsby, 113 NYS 548, rvg. Milton M. Schnaier Co. v. Grigsby, 112 NYS 505.

**38.** Note made for insurance premiums while Acts 1898, pp. 18-30, were in operation. White v. Post [Miss.] 45 S 366.

**39.** Evidence of residence of insurance agent at time he paid tax required by Acts 1904, p. 69, c. 76, § 49, held such that it was error to give instruction for defendant. Simpson v. Goodman [Miss.] 45 S 615. Instruction for plaintiff held error in view of admissions of plaintiff in his statement of claim for commissions on sale of real estate that he was a real estate dealer, such admission being also corroborated by witnesses. Sprague v. Reilly, 34 Pa. Super. Ct. 332.

**40, 41.** Territory v. Kenney [Ariz.] 95 P 93.

**42.** Person who, without license, transported persons who helped him to repair ferry held liable in civil action to licensed ferryman, under Kirby's Digest, § 3582. Shemwell v. Finley [Ark.] 114 SW 705.

**43.** Under Act, Mar. 1, 1906 (Acts 1906, p. 25, c. 10) dog tax is to be paid into general revenue fund, and sheriff then receives compensation upon total amount. McGlone v. Womack, 33 Ky. L. R. 811, 864, 111 SW 688.

**44.** See, ante, §§ 2, 4.

**45.** Neither Act No. 136, p. 224, of 1898, Act No. 17, p. 24 of 1902, nor Act No. 142, p. 313, of 1904, requires, as a condition to exemption of municipality from parochial license taxation, that particular purpose to which municipal tax is to be devoted shall be stated in ordinance imposing the tax; that matter being left for subsequent determination, upon condition always that the tax, when used, shall be used for one or other of the purposes specified in one of the two statutes last above mentioned. Town of Houma v. Houma Lighting & Ice Mfg. Co., 121 La. 21, 46 S 42.

**46.** See ante, § 4, Interpretation of Statutes and Ordinances and Persons Subject.

**47.** Easements (see Easements, 11 C. L. 1140) and leasehold rights (see Landlord and Tenant, 12 C. L. 528) are excluded as is the

*and other estates.*[See 10 C. L. 631]—A license is a personal, revocable and nonassignable privilege conferred either by writing or parol, to do one or more acts on land without possessing any interest therein.[48] Whether a contract gives a mere license or more is a matter of interpretation.[49] A license is distinguishable from an easement [50] or a lease.[50a] The nature of a license is not changed by the use of terms in the contract, which are ordinarily used in leases.[51] A ticket of admission to an entertainment is a mere revocable license,[52] and where a landlord demises a bedroom and permits the tenant to obtain water from other rooms in the house, such permission is a license.[53] A license is ordinarily revocable at the will of the licensor,[54] unless the license is coupled with an interest [55] or is based on a consideration.[56] There is an irreconcilable conflict of authority as to whether the incurring of expense by the licensee affects the power of revocation.[57] A conveyance by the licensor operates as a revocation.[58]

duty of the licensor to exercise care to protect the licensee from personal injury (see Negligence, 10 C. L. 922).

**48.** Yeager v. Tuning [Ohio] 86 NE 657. License may be oral or written. Belzoni Oil Co. v. Yazoo, etc., R. Co. [Miss.] 47 S 468.

**49.** Construction of **sewer** by municipality with acquiescense of owner held more than mere license where owner orally gave right to construct in consideration of right to connect with sewer and to be exempt from assessments, such agreement if written being enforcible. Alderman v. New Haven [Conn.] 70 A 626. Contract for **spur track** more than license being upon valuable consideration and binding both parties to respective obligations. Illinois Cent. R. Co. v. Sanders [Miss.] 46 S 241. Agreement for spur track construed as mere license. Belzoni Oil Co. v. Yazoo, etc., R. Co. [Miss.] 47 S 468. Not license coupled with interest or easement, there being no words of grant. Id.

**50.** Parol agreement by adjoining owners to erect and maintain telephone poles, to contribute to expense of stringing wires and operating line, does not create easement but is mere revocable license. Yeager v. Tuning [Ohio] 86 NE 657.

**50a.** Agreement for bulletin board on roof of building for two years with right of access to erect and maintain signs, owner reserving right to make improvements or place lights thereon is a lease. United Merchants' Realty & Imp. Co. v. New York Hippodrome, 113 NYS 740.

**51.** R. H. White Co. v. Remick & Co., 198 Mass. 41, 84 NE 113. Where clause provided that defendant should not assign or transfer "this lease or contract, or sublet such premises, or any part of the same," that in case of breach plaintiff should have right to "reenter said premises and remove" defendant and like terms. Id.

**52.** Buenzle v. Newport Amusement Ass'n [R. I.] 68 A 721.

See, also, Exhibitions and Shows, 11 C. L. 1447.

**53.** Sturm v. Huck [N. J. Law] 71 A 44.

**54.** License by landlord to enter leased building and remove partition prior to rental period is revocable. Goldstein v. Webster [Cal. App.] 95 P 677. Permission to take water from ditch owned by company until plaintiffs could arrange to pump water from canal revocable regardless of injustice and harm done. Lanham v. Wenatchee Canal Co., 48 Wash. 337, 93 P 522.

**55.** License coupled with interest irrevocable during continuance of interest. Sale of standing timber with right of forfeiture which was waived. Newberry v. Chicago Lumbering Co. [Mich.] 15 Det. Leg. N. 663, 117 NW 592.

**56.** Ruthven v. Farmers' Co-op. Creamery Co. [Iowa] 118 NW 915.

**57. Held revocable:** Telephone line constructed. Yeager v. Tuning [Ohio] 86 NE 657. License to village trustees by landowner for sewer improvements revocable at will of owner. In re Trustees of Village of White Plains, 124 App. Div. 1, 108 NYS 596. License for drainage ditch revocable though dug and maintained. McIntyre v. Harty, 236 Ill. 629, 86 NE 581. Act June 4, 1889 (Laws 1889, p. 116), providing that drains constructed by license be deemed for mutual benefit of land, etc., does not apply to licenses revoked before act became effective. Id. A license to maintain spur track revocable without refunding expenditures made in improvements. Belzoni Oil Co. v. Yazoo, etc., R. Co. [Miss.] 47 S 468.

**Held not revocable:** Fully executed license is irrevocable since revocation would be fraud on licensee. Ruthven v. Farmers' Co-op. Creamery Co. [Iowa] 118 NW 915.

**NOTE. Revocability as affected by expenditures of licensee** (Supplementing Annotation in 8 C. L. 753): The general rule is undoubtedly that a parol license to enter land is revocable at the pleasure of the licensor and by weight of authority. This rule is not altered by reason of expenditures by the licensee in the execution of his license. Upon the latter point, however, there is marked conflict. See Stoner v. Zucker, 148 Cal. 516, 83 P 808, 113 Am. St. Rep. 301 and note, 8 C. L. 753 and note. Howes v. Barmon, 11 Idaho, 64, 81 P 48, 114 Am. St. Rep. 255 and note, 69 L. R. A. 568; Shipley v. Fink, 102 Md. 219, 62 A 360, 2 L. R. A. (N. S.) 1002, 6 C. L. 450 and note; Jones v. Stover, 131 Iowa, 119, 108 NW 112, 6 L. R. A. (N. S.) 154 and note; Levy v. Louisville Gunning System, 121 Ky. 510, 28 Ky. L. R. 481, 89 SW 528, 1 L. R. A. (N. S.) 359 and note; Ewing v. Rhea, 37 Or. 583, 62 P 790, 52 L. R. A. 140, 82 Am. St. Rep. 783 and note; Hicks v. Swift Creek Mill Co., 133 Ala. 411, 31 S 947, 91 Am. St. Rep. 38 and note, 57 L. R. A. 720 and note. See, also, notes in 7 Am. & Eng. Ann. Cas. 706.

§ 2. *Rights and liabilities of licensees.* See 10 C. L. 631—A licensee acquires only such rights as are conferred by the terms of the license.[59] The licensee is entitled to notice of revocation and a reasonable time to remove structures placed on the land,[60] but a conveyance is notice of revocation.[61] A licensee having constructed a boom in a navigable stream under a license from the riparian owner is estopped from denying the rights of such owner or those of any one claiming under him.[62]

## LIENS.

§ 1. Definition and Nature, 606.
§ 2. Common-Law, Equitable, and Statutory Liens, 606.
A. Common-Law Liens, 606.
B. Equitable Liens, 607.
C. Statutory Liens, 607.
§ 3. Rank and Priorities of Liens, 607.
§ 4. Waiver, Extinguishment, Discharge, and Revival, 608.
§ 5. Enforcement and Protection of Liens, 608.

*The scope of this topic* is noted below.[63]

§ 1. *Definition and nature.* See 10 C. L. 632

§ 2. *Common-law, equitable, and statutory liens. A. Common-law liens.* See 8 C. L. 756—Possession is essential to a lien,[64] and no artisan's lien arises where the material or object on which the work is to be done is by the contract to be delivered before payment and credit given.[65] A common-law lien must be based upon a contractual relation,[66] and a custodian of property received from a sheriff, who has absolute control of the same, has no lien thereon against the owner for the costs in keeping the same.[67] Liens by contract exist only when it is expressly agreed that a party may retain the property as security for work done or expense incurred in support of it,[68] and a person can create a lien on property only to the extent of his interest in it.[69]

and cases cited in 10 C. L. 631, notes 33, 34, 35. The authorities, down to 1900, are collated and discussed in a scholarly note by Mr. Henry P. Farnham in 49 L. R. A. 526. See, also, notes to cases cited herein and in 8 C. L. 753, note.—[Ed.]

**58.** McIntyre v. Harty, 236 Ill. 629, 86 NE 58. License by landowner to village for sewer improvements revoked by conveyance. In re Trustees of Village of White Plains, 124 App. Div. 1, 108 NYS 596.

**59.** Contract for "purely personal license" for "farming and pasturage purposes" construed and latter words held to limit use so that way might not be used for hauling sand from sand pit discovered after agreement. Meinecke v. Smith, 135 Wis. 220, 115 NW 816.

**60.** License to village for sewer improvements. In re Trustees of Village of White Plains, 124 App. Div. 1, 108 NYS 596. Decree for defendant in action to enjoin trespass based on oral contract for sale of land should contain finding that plaintiff had right to possession and removal of buildings until license terminated, it appearing that such license was accepted by him subsequent to contract of sale. Lambert v. St. Louis & G. R. Co., 212 Mo. 692, 111 SW 550.

**61.** In re Trustees of Village of White Plains, 124 App. Div. 1, 108 NYS 596.

**62.** Copuille Mill & Mercantile Co. v. Johnson [Or.] 98 P 132.

**63.** This article treats only of liens in general, particular kinds of liens being discussed in articles devoted specifically thereto or articles devoted to the subject-matter to which the particular liens relate. See Agency, 11 C. L. 60; Agriculture, 11 C. L. 86; Animals, 11 C. L. 109; Attachment, 11 C. L. 315; Attorneys and Counselors, 11 C. L. 332; Auctions and Auctioneers, 11 C. L. 360; Brokers, 11 C. L. 446; Carriers, 11 C. L. 499; Corporations, 11 C. L. 810; Executions, 11 C. L. 1433; Factors, 11 C. L. 1454; Forestry and Timber, 11 C. L. 1521; Inns, Restaurants, and Lodging Houses, 12 C. L. 201; Judgments, 12 C. L. 408; Landlord and Tenant, 12 C. L. 528; Mechanics' Liens, 10 C. L. 814; Mortgages, 10 C. L. 855; Pawnbrokers and Secondhand Dealers, 10 C. L. 1147; Pledges, 10 C. L. 1253; Railroads, 10 C. L. 1365; Sales, 10 C. L. 1534; Shipping and Water Traffic, 10 C. L. 1655; Vendors and Purchasers, 10 C. L. 1942.

**64.** Artisan's lien defective, possession being in employer, another lienholder. Gage v. Callanan, 113 NYS 227.

See post, § 4 as to loss by surrender of possession.

**65.** Lien held good only as to amount of price to be paid before delivery. Bauer v. Cohen, 111 NYS 46.

**66.** In absence of evidence that person receiving piano from owner for repairs had authority to deliver same to third person, latter has no right to enforce lien against owner. Ludwick v. Davenport-Treacy Piano Co., 112 NYS 1023.

**67.** Beck v. Lavin [Iowa] 97 P 1028.

**68.** Something more than contract for payment of purchase price required. Vance Redwood Lumber Co. v. Durphy [Cal. App.] 97 P 702.

**69.** Where land conveyed to woman and her infant children, she may create lien affecting her interest alone. Lavell v. Carter [Ky.] 112 SW 1118.

Generally a lien on real property cannot be created by parol,[70] but a lien on personalty may be.[71] A lien upon land as a general rule includes the growing timber thereupon when the lien is created,[72] but there may be circumstances to rebut this presumption,[73] or the right may be expressly or impliedly waived.[74] A guardian of infants as lessor of premises has no power in the absence of express authority of the court to agree to a lien on improvements made by the lessee.[75]

(§ 2) *B. Equitable liens.*[See 10 C. L. 632]—Equity will not ordinarily affix a specific lien for a general indebtedness in the absence of an intent by the parties that a lien arise,[76] or unless the property charged was specifically benefited.[77] A constitutional provision, rendering a contract for the payment of a tax or other lien void, does not apply to an equitable lien.[78] A vendor's equitable lien to secure the price does not arise until the purchaser defaults.[79]

(§ 2) *C. Statutory liens.*[See 10 C. L. 633]—Among the specific liens created by statute are those of livery stable keepers [80] and mechanics of every sort.[81] A special lien provided by statute does not extend to property in custodia legis.[82] To perfect a statutory lien every requirement must be complied with.[83] The right to perfect a lien given by statute is ordinarily a privilege limited to the claimant, and any assignment thereof before record carries only the chose in action constituting the basis of the intended lien.[84] A statutory provision for the filing of the evidence of debt or charge secured by the lien is not retroactive.[85]

*Construction.*[See 10 C. L. 633]—Lien laws being in derogation of the common law must be strictly construed,[86] and the enumeration of the property upon which a lien may be held is exclusive.[87]

§ 3. *Rank and priorities of liens.*[See 10 C. L. 633]—A parol promise of a debtor that another who advances money shall be substituted and have the superior lien on the premises is not effective.[88] A lien of an execution creditor is superior to that of a

70. Lane v. Lloyd, 33 Ky. L. R. 570, 110 SW 401.

71. Owner of county bonds adjudged trustee for payment of debt. Walker v. Harris Ex'rs [Ky.] 114 SW 775.

72. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176.

73. Mortgagor may have express or implied right to sell timber. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176.

74. Mortgagee may be estopped from asserting lien on timber. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176. Course of dealing which would estop landlord from asserting lien against purchaser for value from tenant would be equally effective in estopping lienholder from asserting lien upon timber disposed of by mortgagor and purchased in good faith. Id.

75. Hughes v. Kershow, 42 Colo. 210, 93 P 1116.

76. Where decedent agreed to will to plaintiff his property in consideration of her care but destroyed will devising certain lot and personalty, plaintiff on recovering reasonable value of her services was not entitled to lien against lot, no intent to create lien upon specific property appearing. Johnston v. Myers [Iowa] 116 NW 600.

77. Where a mother advances money to a son for the acquisition of real property anticipating a mortgage and the son purchases the property but refuses to execute the mortgage, she is entitled to an equitable lien for the sum advanced. Poole v. Tannis [Wis.] 118 NW 188.

78. Const. art. 13, § 5, making void contract for payment of tax, mortgage, or other lien as to such taxes and interest specified therein, does not apply to equitable liens. Vance Redwood Lumber Co. v. Durphy [Cal. App.] 97 P 702.

79. Vance Redwood Lumber Co. v. Durphy [Cal. App.] 97 P 702.

80. Under Lien Law, L. 1897, p. 533, c. 418, § 74, livery stable keeper has lien dependent upon possession upon animals boarded and kept. Campbell v. Abbott, 111 NYS 782.

81. Civ. Code 1895, § 2805, gives mechanics of every sort lien on personal property for work done and material furnished. Mulkey v. Thompson, 3 Ga. App. 522, 60 SE 223.

82. Rev. St. 1887, § 3445, as am'd by L. 1893, p. 67, providing for special lien when possessor of property renders service, has no application to property in custodia legis. Beck v. Lavin [Idaho] 97 P 1028.

83, 84. Alderson v. Lee [Or.] 96 P 234.

85. Civ. Code of 1902, § 2449, providing for filing of note, payment or written memorandum of debt or charge secured by lien. Dixon v. Roessler, 76 S. C. 415, 57 SE 203.

86. Mulkey v. Thompson, 3 Ga. App. 522, 60 SE 223.

87. Statute for logging liens. Alderson v. Lee [Or.] 96 P 234.

88. Debtor cannot give away liens of execution creditors otherwise superior, and lien on real estate must be written. Lane v. Lloyd, 33 Ky. L. R. 570, 110 SW 401.

mortgagee who loans money to pay debts superior to the lien of the execution creditor.[89] Statutes sometimes make provision for priorities in liens created thereby,[90] and laborer's liens are ordinarily given superiority.[91] Where a stable keeper parts with possession of a horse upon which he has a lien for keep, the title of a purchaser of the horse for value and without notice is superior to the lien of the stable keeper.[92]

§ 4. *Waiver, extinguishment, discharge, and revival.*[See 10 C. L. 634]—When the provisions of a contract relied upon as constituting a waiver of the statutory lien are ambiguous, the doubt should be resolved against the waiver.[93] An agreement by the original contractor not to enforce a lien is binding upon a subcontractor, whose only connection with the owner is through such contract.[94] A lien may be extinguished by a sufficient tender.[95] The voluntary surrender of the possession of the property,[96] or the wrongful conversion of property.[97] A demand for more than the amount due does not vitiate the lien.[98] A lien upon the building of a lessee as personalty terminates by the failure of the lessee to remove the improvements at the expiration of his lien.[99] A statutory lien may be lost by the failure to record the lien within a prescribed period.[1]

§ 5. *Enforcement and protection of liens.*[See 10 C. L. 634]—The foreclosure of a lien is wholly inoperative upon the rights of a person not a party to the suit.[2] Where property is seised under execution, the lien claimant may come into court and assert his rights.[3]

*Statutory proceedings to enforce or foreclose.*[See 10 C. L. 634]—The method of enforcement of statutory liens is often provided by statute.[4] In Alabama a blacksmith's lien is enforcible by attachment proceedings.[5] In some states an execution is authorized to satisfy a deficiency on the foreclosure.[6]

89. Where mortgagee simply loaned money to pay debts and did not purchase or take assignment thereof, and mortgagee had no claim as against execution creditors to be substituted to rights of original creditors. Lane v. Lloyd, 33 Ky. L. R. 570, 110 SW 401.

90. Steam traction engine, a farming utensil within meaning of Civ. Code, art. 3259, or art. 3227, and privilege of vendor primes that of lessor of land on sale of such machinery. Lahn & Co. v. Carr, 120 La. 797, 45 S 707.

91. A laborer's lien has priority of a mortgage given to secure the payment of the purchase money. Though foreclosed and levy fi. fa. before laborer's lien foreclosed and levied. Baisden & Co. v. Holmes-Hartsfield Co. [Ga. App.] 60 SE 1031. Materialman's lien superior to lien of purchase money mortgage where the material is furnished without notice of the mortgage. Civ. Code 1895, § 2804, par. 4. Baisden & Co. v. Holmes-Hartsfield Co. [Ga. App.] 60 SE 103.

92. Moore v. Whitehead, 8 Ohio N. P. (N. S.) 60.

93. Central Illinois Const. Co. v. Brown Const. Co., 137 Ill. App. 532. Provision that "completed work when offered to company for acceptance shall be delivered free from any and all liens, claims, or encumbrances of any description, not sufficient to constitute express or implied waiver. Id.

94. Central Illinois Const. Co. v. Brown Const. Co., 137 Ill. App. 532.

95. Insufficient deposit to be accepted in full payment, a defective tender. Campbell v. Abbott, 111 NYS 782.

96. Mulkey v. Thompson, 3 Ga. App. 522, 60 SE 223; Gage v. Callanan, 113 NYS 227.

97. Under express provisions of Rev. Civ. Code, § 2038. Mosteller v. Holborn [S. D.] 114 NW 693.

98. May affect tender. Livery stable keeper's lien. Campbell v. Abbott, 111 NYS 782.

99. Building became fixture. Hughes v. Kershow, 42 Colo. 210, 93 P 1116.

1. Failure to record lien within 10 days as provided by Civ. Code 1895, § 2805, is fatal. Mulkey v. Thompson, 3 Ga. App. 522, 60 SE 223.

2. Enforcement of thresher's lien without notice to buyers. Holt Mfg. Co. v. Collins [Cal.] 97 P 516. Buyers not privies of sellers in lien under Civ. Code, § 3061. Id.

3. Baisden v. Holmes-Hartsfield Co. [Ga. App.] 60 SE 1031. Where a laborer's lien is foreclosed but unenforcible by levy, property being in possession of sheriff, the lien is not lost but may be placed in hands of sheriff with notice to hold proceeds until order of court. Id.

4. Civ. Code 1895, § 2805, giving special lien, may be enforced by retention of property or as provided by § 2816. Mulkey v. Thompson, 3 Ga. App. 522, 60 SE 223.

5. In attachment to enforce blacksmith's lien, under Code 1896, §§ 2753, 2754, incorporation of affidavit by way of recital in complaint is surplusage. Mann Lumber Co. v. Bailey Iron Works [Ala.] 47 S 325. Whether statements of affidavit so incorporated were sufficient to withstand demurrer, immaterial. Id. Motion to strike affidavit as part of complaint on ground of defects, properly overruled. Id. Plea in abatement proper mode of raising question of validity of affidavit. Refusal to strike affidavit on ground that officer before whom affidavit was made was disqualified not reversible error. Code

*Equitable remedies and procedure.*See 10 C. L. 635—The enforcement of a lien may be defeated by laches,[7] and such defense is available without being pleaded.[8] A money judgment is proper in an equity foreclosure suit where the complainant loses the possession of the property.[9] In a decree of sale of property it is the correct practice to determine the priority and order of payment of the different liens[10]

**Life Estates, Reversions and Remainders; Life Insurance; Light and Air,** see latest topical index.

## LIMITATION OF ACTIONS.


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*The scope of this topic* is noted below.[11]

§ 1. *The statutes; validity and application generally.*See 10 C. L. 635—Statutes of limitation are usually held to be statutes of repose,[12] applying to the remedy and not to the right,[13] and, hence, are personal to the debtor.[14] The statute limiting the time to attack land patents of the United States, however, operates in rem to validate the patent if not assailed in time.[15] Limitation acts may be given retroactive effect.[16]

1896, §§ 2753, 2754. Mann Lumber Co. v. Bailey Iron Works Co. [Ala.] 47 S 325. When property levied on is not liable to attachment because plaintiff has no lien, motion to dissolve attachment is proper remedy. Code 1896, §§ 2753, 2754. Mann Lumber Co. v. Bailey Iron Works Co. [Ala.] 47 S 325. Plea to merits waiver of defense that property is not subject to lien. Id. Finding that plaintiff is entitled to lien as claimed against property is surplusage, no such finding being required in blacksmith's liens. Id.

6. Under Rev. St. 1895, art. 1340, though judgment contains no provision therefor. Ryan v. Raley [Tex. Civ. App.] 20 Tex. Ct. Rep. 716, 106 SW 750. Rev. St. 1895, art. 2324, requiring clerk to issue execution where judgment is rendered, etc., includes judgments of foreclosure of liens. Ryan v. Raley [Tex. Civ. App.] 20 Tex. Ct. Rep. 716, 106 SW 750.

7. Delay of 5 years in enforcing lien on leased building, and almost 5 years more in bringing action to trial without excuse. Hughes v. Kershow, 42 Colo. 210, 93 P 1116.

8. Hughes v. Kershow, 42 Colo. 210, 93 P 1116.

9. Involuntary surrender of property to artisan's prior lien. Gage v. Callanan, 113 NYS 227. Evidence insufficient to show that artisan's lien was prior to plaintiff's lien for storage or that surrender of property was not voluntary, rendering money judgment erroneous. Id.

10. Pusey v. Pennsylvania Paper Mills, 163 F 672.

11. **It includes** all matters relating to the operation of general statutes of limitation.

**It excludes** special limitations imposed on particular actions (see Death by Wrongful Act, 11 C. L. 1019), and on proceedings which do not fall within the designated "actions" (see Estates of Decedents, 11 C. L. 1275; Bankruptcy, 11 C. L. 383; Appeal and Review, 11 C. L. 118, and like topics). It likewise excludes the doctrine of laches (see Equity, 11 C. L. 1235).

12. Foster v. Jordan [Ky.] 113 SW 490.

13. The statute bars only the action and does not destroy the right. Wilson v. Chandler, 133 Ill. App. 622; Smith v. Smith, 35 Pa. Super. Ct. 323. So, where the law gives a party a remedy by two different actions, the statute may bar the one and not the other. Where plaintiff's testator was deprived of possession of bond by wrongful act of defendant, right to recover debt evidenced by bond held complete and unimpaired by tortious act. Smith v. Smith, 35 Pa. Super. Ct. 323.

14. Pendley v. Powers, 129 Ga. 69, 58 SE 653. The statute does not mean that the debt has been paid. It is a personal privilege which the law gives the debtor whereby he may say that the demand is stale and should not be enforced. Sterrett v. Sweeney [Idaho] 98 P 418.

See post, this section, as to waiver, and post, § 7C as to persons to whom bar is available.

15. Hence, after five years without attack, a patent from the United States, invalid when made, must be deemed to have same

Statutes prescribing shorter periods than the existing period prescribed may be made to apply to existing causes, providing a reasonable period for bringing action is given.[17] A statute is never given retroactive operation unless there is an express provision or necessary implication that such was the legislative intent.[18] Unless a contrary intention be expressed, new, re-enacted, or amended statutes are to be given prospective effect so as to extend the period as to existing causes to the full time prescribed by such statutes from the time they take effect.[19] They are favored in law [20] and are said to be a property right,[21] though not so in the sense of being within constitutional protection against impairment.[22] They apply to actions, not to defenses,[23] but a barred cause cannot be pleaded as set-off [24] unless otherwise provided by statute.[25] The statutes are to be liberally construed and provisions excepting certain persons or classes from their operation are to be strictly construed.[26] Short statutes are construed strictly.[27] A statute limiting the period within which

effect as against the United States as though it were valid when issued. Under Act of Mar. 3, 1891 (26 Stat. 1099, c. 561) § 8. United States v. Chandler-Dunbar Water Power Co., 209 U. S. 447, 52 Law. Ed. 881.

**16.** Mulvey v. Boston, 197 Mass. 178, 83 NE 402.

**17.** The legislature may shorten the period and make the statute applicable to existing causes, provided a reasonable period is fixed for commencing action on existing causes. Adams & Freese Co. v. Kenoyer [N. D.] 116 NW 98. The period prescribed may be reduced providing a reasonable time is given after the change to allow an action to be commenced. Mulvey v. Boston, 197 Mass. 178, 83 NE 402. Where a statute is changed from six years to two years and such change would bar a cause accrued, an allowance of 30 days within which to sue is reasonable. Id. A change in a statute from six to two years and allowing 30 days within which to sue causes accrued more than two years does not deprive a person of property without due process. Id.

**18.** Theis v. Beaver County County Com'rs [Okl.] 97 P 973. Laws 1905, c. 5, p. 9, providing that a mortgagor's absence or nonresidence shall not suspend the statute as to actions to foreclose, do not apply to accrued causes. Clarke & Co. v. Doyle [N. D.] 116 NW 348. Laws 1905, c. 5, p. 9, held not to apply to accrued actions to foreclose mortgages for the reason that no time was fixed within which such actions should be commenced, and if the time between the passage and approval of the act (four months) was intended, it was unreasonably short. Adams & Freese Co. v. Kenoyer [N. D.] 116 NW 98. Sess. Laws 1905, p. 328, § 3, providing that such set-off or counterclaim shall not be barred until the claim of the plaintiff is barred, affects only existing set-offs, and did not revive a barred one. Theis v. Beaver County County Com'rs [Okl.] 97 P 973. Ann. St. 1906, p. 2364, reducing the period as to judgments from 20 to 10 years, does not operate retroactively on existing judgments, but the period begins to run as to such judgments from the date the statute took effect. Bick v. Robbins [Mo. App.] 111 SW 612. Under Ann. St. 1906, p. 2353, providing that no action shall be maintained to foreclose any mortgage thereafter executed to secure a barred obligation, and Rev. St. 1899, § 4277, providing that no action shall be maintained to foreclose any mortgage theretofore executed after two years from date, held that § 4277 covered only mortgages securing debts barred when the statute took effect, and granted two years grace to foreclose, and mortgage secured by a note not barred when the statute took effect was not within its provisions. Martin v. Teasdale, 212 Mo. 611, 111 SW 511.

**19.** Amendment to Rev. St. 1901, tit. 41, pars. 2935-2974, relative to limitations made by par. 2954, held not to affect causes accruing before the amendment went into effect in view of pars. 2974 and 4243. Crowell v. Davenport [Ariz.] 94 P 1114.

**20.** San Diego Realty Co. v. McGinn [Cal. App.] 94 P 374. It is the policy of the law to fix in every case a limit of time for bringing actions. Foster v. Jordan [Ky.] 113 SW 490. Act May 2, 1889, limiting period within which claimants of an escheated estate may assert rights, is **not unconstitutional** as violating due process clause. In re Alton's Estate, 220 Pa. 258, 69 A 902.

**21.** San Diego Realty Co. v. McGinn [Cal. App.] 94 P 374.

**22.** The bar of the statute as a defense is not property. Removal of the bar is not a taking of property without due process. People v. Haverstraw School Board of Education, 110 NYS 769.

**23.** The statute does not bar a suit invoked as a shield. Suit in nature of cross action to correct public records and enjoin prosecution of an action at law theretofore commenced to recover possession of land. Hall v. O'Connell [Or.] 94 P 564.

**24.** Theis v. Beaver County County Com'rs [Okl.] 97 P 973.

**25.** In action against grantee on verbal promise to pay mortgage on land conveyed by plaintiff to defendant, defendant's counterclaim for false representations respecting the land while barred as an original cause was available under Code, § 3457, providing it may be asserted as a defense, though barred if it was the property of the party pleading it at the time it became barred, and was not barred at time claim sued on originated. Bradley v. Hufferd [Iowa] 116 NW 814.

**26.** Will not be construed to extend to persons not expressly mentioned. Lawson v. Tripp [Utah] 95 P 520. Exceptions in favor of the sovereignty must be strictly construed against the sovereign. Warren County v. Lamkin [Miss.] 46 S 497.

**27.** St. Louis, etc., R. Co. v. Batesville & Winerva Tel. Co. [Ark.] 110 SW 1047.

to attack judicial sales does not apply to a sale which the court had no jurisdiction to make.[28] The United States courts recognize the statutes of the several states and give them the same construction and effects as local courts.[29]

Statutes of limitation are not enforced in equity except by way of analogy to laches,[30] or in cases where jurisdiction of equity and law is concurrent,[31] or where the statute is by its terms applicable in equity.[32] One who resorts to equity to escape the defense of the statute cannot himself invoke it.[33]

*The statutes do not run against the state.* See 10 C. L. 037—This rule also applies to subordinate political bodies, including municipal corporations, with respect to litigation to enforce governmental rights.[34] The rule that limitations do not run against the state does not apply where the state holds the bare legal title,[35] nor where by statute they are made specifically to apply;[36] but a statute making limitations applicable as against the state will not be given such effect if it is repugnant to constitutional provision.[37]

**28.** Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley [C. C. A.] 164 F 963.

**29.** Cheatham v. Evans [C. C. A.] 160 F 802.

**30.** See Equity, 11 C. L. 1235. In re Fisk [Conn.] 71 A 559. The rule of laches invoked by equity in analogy to the statute of limitations does not apply to laches under Civ. Code, § 1691, requiring rescission for fraud to be promptly sought after discovery thereof. Richards v. Farmers & Merchants Bank [Cal. App.] 94 P 393. In case a defendant, as a matter of equity, is entitled to be subrogated to the lien of a mortgage, the court may as a condition precedent to granting equitable relief to the owner compel payment of the mortgage, though by its terms the lien is barred. Hobson v. Huxtable, 79 Neb. 334, 116 NW 278.

**Federal courts** sitting in equity are not bound by, but apply the statutes in analogy to, the doctrine of laches. It must appear that complainant was not guilty of laches. Redd v. Brun [C. C. A.] 157 F 190. If a complainant fail to discover fraud within the statutory period, he must plead and prove time when he discovered it and impediments which prevented earlier discovery. Id. If by the exercise of ordinary diligence he should have discovered it within the statutory period, he is guilty of laches. Held to show laches. Id.

**31.** Action to recover back money paid by mistake. Sternberg v. Sternberg & Co. [N. J. Eq.] 69 A 492. In action against directors of a corporation for misfeasance and malfeasance, the remedy at law and in equity is concurrent and the statute is applicable in equity. People v. Equitable Life Assur. Soc., 124 App. Div. 714, 109 NYS 453.

**32.** Under Civ. Code 1896, § 674, the statute is made applicable to suits in chancery and the defense may be raised by demurrer, when it appears on the face of the bill. Lady Ensley Coal, Iron & R. Co. v. Gordon [Ala.] 46 S 983.

**33.** United States & Mexican Trust Co. v. Delaware Western Const. Co. [Tex. Civ. App.] 112 SW 447. Where failure of a contractor to perform his contract is urged against his prayer for equitable relief, he may not rely on limitations, though an action at law for damages would be barred. Id. Under Shannon's Code, § 4453, there is no limitation applicable to the state in civil actions. State v. Standard Oil Co. [Tenn.] 110 SW 565. Property held in trust by district agricultural association being property of the state held by a public institution for public use, the statute does not run against an action to recover it whether the record title be held by the state at large or by a county or other official body. Sixth Dist. Agr. Ass'n v. Wright [Cal.] 97 P 144. Land dedicated to public use as a cemetery is within Ann. St. 1906, p. 2344, providing that the statute shall not run against land given to public, pious, or charitable use. Tracy v. Bittle [Mo.] 112 SW 45.

**34.** Where a county diverts money collected upon taxes levied by a city, it does not run against an action by the city to recover. City of Osawatomie v. Miami County Com'rs [Kan.] 96 P 670. Not as against streets and highways under Sayles' Ann. Civ. St. 1897, art. 3351. Perry v. Ball [Tex. Civ. App.] 113 SW 588.

**35.** In 1857 the state sold swamp lands granted it by Act Cong. Sept. 28, 1850, and the purchaser received a certificate of purchase. The land was thereafter patented to the state. Held, it was duty of state to patent to the purchaser after confirmation of the grant to the state, and limitations ran from that time. Hibben v. Malone, 85 Ark. 584, 109 SW 1008. See, also, Adverse Possession, 11 C. L. 41.

**36.** Under B. & C. Comp. § 13, providing that limitations shall apply to actions in the name of the state, it applies to all actions whether in its sovereign or proprietary capacity, and applies to an obligation of a canal company to pay a certain per cent of its tolls. State v. Portland General Elec. Co. [Or.] 95 P 722. Code 1880, §§ 2664, 2668, 10 year statute, applies as against a county in an action to recover possession of land not devoted to public use held under void lease. Warren County v. Lamkin [Miss.] 46 S 497. Runs against school district as well as against state, county, or town. Clarke v. School Dist. No. 16, 84 Ark. 516, 106 SW 677.

**37.** Ball. Ann. Codes & St. § 4807, making limitations applicable to the state, held not to apply to adverse possession of school lands, since such construction would make it repugnant to Enabling Act (Act Feb. 22, 1889) requiring school lands to be disposed of at public sale, and Const. art. 16, § 1, declaring all public lands to be held in trust. O'Brien v. Wilson [Wash.] 97 P 1115.

*Limitation is, subject to same exceptions, governed by the law of the forum.*[38]—A cause of action can accrue in but one place.[39] Statutes in many states make a bar in the state where the cause of action arose effective in the forum,[40] exception being sometimes made in favor of claims held from the time of their accrual by a citizen of the state where suit is brought.[41] Part payment in the state where the cause of action arose tolls the statute and the claim is enforcible in another state.[42]

*The defense of the statute may be waived*[43] but such waiver must be definite.[44] *Defendant may become estopped* to assert the bar of the statute.[45]

§ 2. *Classes of actions and the respective periods.*[See 10 C. L. 637]—The various statutes prescribe periods of limitation for the different kinds of actions such as actions for the recovery of land,[46] to determine adverse claims,[47] for use and occupation

38. See Conflict of Laws, 11 C. L. 671.

39. In case of a note made payable in the state where the payer lives, it arises in that state. McKee v. Dodd, 152 Cal. 637, 93 P 854.

40. **"Has arisen in another state"** in Rev. St. 1887, § 4079, providing that, when a cause accrued in another state is barred there, it cannot be maintained here, means the state in which the contract is to be discharged, and does not apply to an intermediate state through which the debtor may subsequently travel or reside for a sufficient length of time to raise the bar before coming to this state. West v. Theis [Idaho] 96 P 932. Under Rev. St. 1887, § 4079, **"a cause of action arises"** at the time and place in the state when and where the debt is to be paid, and the cause thus arising follows the debtor until it is barred in the state where it arose, or until the debtor has lived in this state until it is barred by its statutes. West v. Theis [Idaho] 96 P 932.

41. Where one acquired a cause of action by assignment after its accrual, even though he has always been a citizen of the state, he is not within the exception of Rev. St. 1898, § 2899, providing that, when a cause of action has arisen in another state and is there barred, no action shall be maintained thereon in this state, except in favor of one who was a citizen thereof and acquired the cause before its accrual. Lawson v. Tripp [Utah] 95 P 520. Code Civ. Proc. § 361 provides that when a cause has arisen in another state and is barred there an action cannot be maintained in California except in favor of one who has been a citizen and has held the cause since it accrued, where a cause accrued in New York while defendant was in Europe and he afterwards lived in Hawaii until the notes were barred there. Held the Hawaiian statutes did not bar an action in California. McKee v. Dodd, 152 Cal. 637, 93 P 854.

42. Where a resident of Idaho goes to Washington and makes a partial payment on a Washington contract, upon his return to Idaho the contract as made follows him, and the statutes of Idaho **begin to run upon his re-entry into the state.** Sterrett v. Sweeney [Idaho] 98 P 418.

43. See 10 C. L. 637. Where several years after final report of a referee he filed a petition for compensation and plaintiff moved to have its allowance set aside, but on hearing it was reduced and subsequently moved for further reduction but did not allude to limitations, held, by the last motion, he waived the question of limitations. Scott v. Bay City, 150 Mich. 694, 114 NW 675. The statute of limitations merely takes away the remedy and may be waived by not urging it. Wilson v. Chandler, 133 Ill. App. 622. See post, § 8, as to necessity of pleading statute.

44. A stipulation on a note "and the payee or holder of this note may renew or extend the time of payment of the same from time to time as often as required, without notice and without prejudice to the rights of such payee or holder, to enforce the same against the makers * * * at any time the same may become due and payable," is not a waiver of the bar of limitations. Allen v. Allen's Estate [Neb.] 116 NW 509. Where a defendant pleaded general issue to a count of a complaint and thereafter plaintiff filed an amended count stating the same cause but which superseded the original count, defendant could plead limitations notwithstanding the former plea. Maegerlein v. Chicago, 237 Ill. 159, 86 NE 670.

45. Where defendants did not use agreement to arbitrate as a means to induce inaction, it was held not to work an estoppel, plaintiff having taken no steps in matter. Hornblower v. George Washington University, 31 App. D. C. 64.

46. Where city in 1888 established building line but owner had no notice of the proceeding and the city made no entry until 1907, owner was not barred by Gen. St. 1902, § 1109, providing that no person shall enter land except within 15 years after his title shall accrue, etc. Northrop v. Waterbury [Conn.] 70 A 1024. Action of forced heirs to reduce a donation that trenches upon their legitime is prescribed in five years. Succession of Meisner, 121 La. 863, 46 S 889. Under Ind. T. Ann. St. 1899, § 2942, no action for recovery of land may be maintained where plaintiff did not claim title, or his testator or intestate had been out of possession for five years. Tynton v. Hall [Okl.] 98 P 895. Under Code Civ. Proc. S. C. 1872, § 111, amended in 1873, 15 Stat. 497, limiting actions to recover land to 10 years, but if plaintiff was a minor, 5 years after he attained majority; and Code Civ. Proc. 1882, §§ 93, 108, held where land was sold in 1875 and grantees had since been in possession an action by minors was governed by the law of 1873 five years. Cheatham v. Evans [C. C. A.] 160 F 802. Rev. St. Mo. 1890, § 4262, limiting actions to recover land to 10 years, applies to all suits legal or equitable, and may be invoked in a federal court by pur-

thereof [48] or damages for injuries thereto,[49] actions to set aside deeds,[50] to recover escheated estates,[51] actions on contracts,[52] express or implied,[53] written [54] and oral,[55]

chaser under deed at foreclosure sale in suit by mortgagor to redeem. Clapp v. Leavens [C. C. A.] 164 F 318. Possession of purchaser at foreclosure sale held adverse. Id.

See, also, Adverse Possession, 11 C. L. 41.

47. Action at law under Rev. Code Civ. Proc. § 675, to determine adverse claims, is governed by statutory sections providing for limitations of actions. Burleigh v. Hecht [S. D.] 117 NW 367.

48. Code, § 4198, limiting right of action to recover for use and occupation of property to five years, does not apply to suit to quiet title. German v. Heath [Iowa] 116 NW 1051. Action for rents and profits against one who took possession of land as a bona fide purchaser is barred in three years. Brown v. Nsims [Ark.] 112 SW 373. Right to recover rent for mill site and water privileges is barred in two years. Briggs v. Avary [Tex. Civ. App.] 20 Tex. Ct. Rep. 728, 106 SW 904.

49. Action for recurrent flowage of land caused by construction of ore reducing works is not in trespass but to recover incidental and consequential damage and is not governed by Rev. St. Idaho 1887, § 4054, limiting action in trespass to three years. Hill v. Empire State Idaho Min. & Developing Co., 158 F 881. For damages to land caused by construction of dam, five years. King v. Danville, 32 Ky. L. R. 1188, 107 SW 1189. Where dykes built along the bank of a river were permanent structures and their effect was to deflect the current of the river against the plaintiff's bank and undermine it, held damages were recoverable in a single action and action for trespass was barred in three years under Mansf. Dig. Ark. § 4478. Gulf, etc., R. Co. v. Moseley [C. C. A.] 161 F 72. Under § 2369 Gen. St. 1894 providing that an action for damages occasioned by a mill dam must be brought within two years, held no action for overflowing lands by construction of a milldam which is a permanent structure can be maintained unless brought within two years after first damages sustained. Priebe v. Ames, 104 Minn. 419, 116 NW 829.

50. Actions by grantors of land five years after youngest attained majority to set aside the deed are not proceedings to recover land or possession thereof within Code Civ. Proc. § 365, and fall within 10 year statute § 388. O'Donohue v. Smith, 57 Misc. 448, 109 NYS 929.

51. Where an estate of a decedent has been escheated under Act May 2, 1889, relatives of decedent are barred after 7 years to secure restitution, though they had no actual notice of the proceeding. In re Alton's Estate, 220 Pa. 258, 69 A 902.

52. Under Comp. Laws, § 9734, barring actions on contracts in 10 years, an action on a separation contract between husband and wife by which he bound himself to pay a certain mortgage is barred in 10 years. Clinton v. Clinton's Estate, 148 Mich. 496, 14 Det. Leg. N. 204, 111 NW 1087. Provisions of a mortgage held not to constitute a contract to pay a certain sum of money within a certain time as affected by limitations. Union Trust Co. v. Scott, 170 Ind. 666, 85 NE 481. One who acquiesces in breach of contract for 8 years, knowing that seller cannot perform, is barred. Himrod v. Kimberly, 219 Pa. 546, 69 A 72. Action for work done and material furnished on paving contract accrues on 10th day of month after estimates were allowed and was barred in two years, under Laws 1895, p. 128, c. 8. Thornton v. East Grand Forks [Minn.] 118 NW 834.

53. Where insurance company became insolvent and unable to carry out endowment policy which it had agreed to set off at maturity against mortgage made by insured to the company, the insured was released from his obligation to pay instalments and the obligation of the company was for money had and received, barred in six years. Union Trust Co. v. Scott, 170 Ind. 666, 85 NE 481. Implied obligation of principal to reimburse surety who pays the debt is barred in two years after return to state of principal. Bray v. Cohn [Cal. App.] 93 P 893.

54. Ky. St. 1903, § 2515, barring actions on contracts in writing in five years, applies to action by administrator to recover value of decedent's support, to which decedent was entitled under contract. Bryson's Adm'r v. Briggs, 32 Ky. L. R. 159, 104 SW 982. Action against common carrier for injuries to hogs in transit under written contract held governed by Ky. St. 1903, § 2514, 15 year statute. Richardson v. Louisville & N. R. Co., 33 Ky. L. R. 916, 111 SW 843. Debt evidenced by warrants issued by a de facto municipal corporation is one evidenced by an instrument in writing and is not barred by the two year statute. City of Carthage v. Burton [Tex. Civ App.] 111 SW 440. Action on town warrants commenced more than six years after repudiation of the warrants by the town is barred. Howe v. Gunnison, 42 Colo. 540, 95 P 283. In view of banking laws in force in 1839 (Rev. St. 1839, pp. 145, 146; Rev. St. 1849, c. 39) and Rev. St. 1858, c. 71, St. 1898, § 4230, part of the chapter of limitations providing that its provisions should not apply to bills, notes, or other evidences of debt put in circulation by a bank applies only to such evidences of debt and not to certificates of deposit. Lusk v. Stoughton State Bank, 135 Wis. 311, 115 NW 813. Where a benefit certificate was payable to a certain person and she died before insurer, introduction of society's by-laws to show to whom payment should be made in case of death of beneficiary did not make ths certificate an oral contract. Jones v. Supreme Lodge Knights of Honor, 236 Ill. 113, 86 NE 191. Under Code Civ. Proc. § 337, requiring actions on written contracts to be brought within four years, an action to foreclose a mortgage given by a decedent and her husband was barred as to his joint liability four years after maturity of the note. Hibernia Sav. & Loan Soc. v. Farnham, 153 Cal. 578, 96 P 9. Civ. Code § 1214, renders void as to the mortgags a deed from one to her husband before they mortgaged the land, the mortgage being first recorded until the mortgagee acquired notice of the deed and hence an action to foreclose the mortgage brought within four years after the deed was recorded is not barred under Code Civ. Proc. § 337, requiring actions on written contracts to be brought within four years. Id. Ten and not five-year limitation held to apply to action against carrier for failure to observe com-

on promissory notes,[56] for recovery back of usurious interest,[57] for services rendered,[58] for breach of warranty,[59] for delay in delivering a telegram,[60] actions on accounts,[61] for accounting,[62] actions on sealed instruments,[63] actions on judgments,[64]

mon-law obligation to transport, bill of lading having been issued soon after receipt of property sought to be transported. Coats v. Chicago, etc., R. Co., 134 Ill. App. 217.

**55.** Action for claim on oral contract against estate of a decedent which has been duly presented to administrator and allowed and subsequently disallowed at the instance of an heir or creditor may under Rev. St. 1906, § 6098, be brought within 6 months after notice of rejection, though after deducting time intervening between allowance and rejection more than 6 years have elapsed since accrual of the cause. Speidel v. Phillips, 78 Ohio St. 194, 85 NE 53. Benefit certificate sued on held clearly a contract in writing and not within proposition that where an agreement in writing is so indefinite that parol testimony is required to make it complete it will be treated as an oral contract subject to statute of limitation. Jones v. Supreme Lodge Knights of Honor, 140 Ill. App. 227.

**56.** As against a demand note which is payable when the promise is made, the statute starts to run concurrently with the making of the promise. Time of demand on note running for indefinite time held immaterial. Statute runs from time of promise. Knecht v. Boshold, 138 Ill. App. 430. Action not commenced on note within 10 years barred. Rev. St. § 16, c. 83. Id. Action on note and mortgage given to secure it is governed by Gen. St. 1901, § 4446, and § 4444 does not apply. Kirk v. Andrew [Kan.] 97 P 797. In such action the same limitation applies to each branch of the case if the action is maintainable on the note it is maintainable on the mortgage. Id. Action by accommodation indorser against maker of note for payments thereon for maker's benefit, six years. Blanchard v. Blanchard, 113 NYS 882.

**57.** An action to recover usurious interest exacted by a creditor must be brought within a year from the date of payment [Code D. C. § 1181] (Brown v. Slocum, 30 App. D. C. 576), but the statute does not in such case begin to run until the cause of action accrues upon making the last instalment, even though the usurious interest was deducted in advance (Id.). Where amount retained was called a commission but usury was admitted, action within a year from last instalment held not barred, although more than a year had elapsed since deduction was made. Code D. C. § 1181. Id.

**58.** Action for services rendered is barred in four years. Consaul v. Rawlins, 130 Ga. 726, 61 SE 704.

**59.** For breach of warranty in sale of bull that the animal was a breeder and proved to be barren, the two year statute applies. Williamson v. Heath [Tex. Civ. App.] 108 SW 983.

**60.** For delay in delivering telegram Ky. St. 1903, § 2515, five year statute applies. Western Union Tel. Co. v. Witt, 33 Ky. L. R. 685, 110 SW 889. Damages for failure to deliver telegram are not "injuries to the person" within Ky. St. 1903, § 2515, prescribing one year limitation. Id.

**61.** Account between liquor seller and customer consisting of debits on one side and cash payments and credits for returned demijohns on the other is not a mutual current account within Code Civ. Proc. § 386. Lowenthal v. Resnick, 110 NYS 1045. In order for such mutuality of account to exist as will arrest the bar of the statute, each party must extend credit to the other on faith of an admitted indebtedness on his part. It is not enough to show that there are two accounts. It must appear that the indebtedness of each party was the result of a course of dealings in which credit was extended on faith of indebtedness. Smith v. Hembree, 3 Ga. App. 510, 60 SE 126. Action on account for goods sold in 1894 is barred in 1896, two year statute. Code Civ. Proc. § 339 in absence of written acknowledgment of the debt. National Cycle Mfg. Co. v. San Diego Cycle Co. [Cal. App.] 98 P 64.

**62.** A suit by a customer against a stockbroker for accounting of gambling transactions or to recover money lost under Gen. St. 1905, p. 1606, is barred where nearly one year has elapsed since margins were paid. Blessing v. Smith [N. J. Eq.] 70 A 933. Action between partners for an accounting is barred after 6 years. Dowse v. Gaynor [Mich.] 15 Det. Leg. N. 897, 118 NW 615.

**63.** Death of a guardian constitutes "discharge" within Rev. Laws, c. 149, § 35, requiring action on guardian's bond to be brought within four years after his discharge. Hill v. Arnold, 199 Mass. 109, 85 NE 97. Section 35 and not c. 202, § 7, giving minors and insane persons such period after removal of disability, applies. Id. Action on official bond of a judge to recover fees illegally collected in criminal cases is governed by the four year and not the two year statute. Lane v. Delta County [Tex. Civ. App.] 109 SW 866. Under Rev. Laws 1905, § 4076, an action against sureties on official bond may be brought within 6 years after expiration of the term of the officer. Adams v. Overboe [Minn.] 117 NW 496. Suit on bond coupons is governed by the statute applicable to sealed instruments, and not that applicable to simple contracts. Prescott v. Williamsport, etc., R. Co., 159 F 244. Ann. St. 1906, p. 2347, limiting actions on sealed or unsealed instruments for payment of money to 10 years, applies to an attachment bond conditioned to refund all sums adjudged to be refunded and to pay damages and costs. State v. Brown, 208 Mo. 613, 106 SW 630. Where a life tenant paid a mortgage to protect her estate and was subrogated to the rights of the mortgagee, she had 20 years to foreclose. Bonhoff v. Wiehorst, 57 Misc. 456, 108 NYS 437. In action on sealed instrument, plea of statute a nullity. Smith v. Smith, 35 Pa. Super. Ct. 323.

**64.** Every settlement in probate court between guardian and ward is final unless appealed from or opened for fraud or mistake by action commenced within 2 years after the ward attains majority. Rev. St. § 6289. Errett v. Howert, 78 Ohio St. 109, 84 NE 753.

for the revival of judgments,[65] and to set aside judicial sales,[66] actions to recover taxes,[67] to cure defective acknowledgments,[68] and to enforce trusts,[69] actions to foreclose mortgages,[70] suing out letters of administration [71] or probating wills,[72] actions against decedents' estates,[73] actions to abate nuisances [74] for conversion,[75] fraud,[76]

A surety who obtains an assignment of a judgment against himself and principal is substituted to all rights of the judgment creditor and his rights are governed by the 15 year statute and not by the five year statute. Patton's Ex'r v. Smith [Ky.] 114 SW 315. Shannon's Code, § 4473, requiring actions on judgments and decrees to be brought within 10 years, applies to petition to revoke probate of a will on the ground that it was made on incompetent testimony. Scott v. Wagstaff [Tenn.] 107 SW 976. Mansf. Dig. § 4103 (Ind. T. Ann. St. § 2783), limiting time to five years within which execution may issue in commissioner's courts, is not a limitation on an action on the judgment. Reaves v. Turner [Okl.] 94 P 543. Though a judgment has expired, it remains a lien for 20 years from rendition. Civ. Code Proc. § 376. Holland v. Grote [N. Y.] 86 NE 30. Action on foreign judgment is barred in five years under Laws 1872, p. 559. Davis v. Munie, 235 Ill. 620, 85 NE 943. A common-law judgment is enforcible for twelve years. Code D. C. §§ 1212-1215 [31 Stat. 1381, c. 854]. Simpson v. Minnix, 30 App. D. C. 582.

**65.** In the District of Columbia, the common-law rule that a scire facias can only be issued after ten years from the date of a judgment, upon a motion and affidavit that the judgment has been paid, has been abrogated. Doctrine abrogated by D. C. Code, §§ 1212-1215 (31 Stat. § 1381, c. 854), fixing life of a judgment at twelve years during which time judgment may be revived by scire facias by merely filing a praecipe with clerk. Simpson v. Minnix, 30 App. D. C. 582. Prescription of one year whether under Civ. Code art. 1897, or art. 1994, has no application to attacks upon simulated sales. Lawson v. McBride, 121 La. 282, 46 S 312.

**66.** Comp. St. 1907, § 117, c. 23, apply to irregular administrative sales but not to void ones, and an action by an heir to quiet title to the homestead of his ancestor may be maintained at any time within 10 years after the right of action accrued or the attainment of his majority. Holmes v. Mason [Neb.] 114 NW 606. Four year limitation prescribed by Acts 1895, c. 4322, § 64, applies only when a purchaser at tax sale goes into actual possession and only bars suit by the former owner or claimant as to so much of the land as was sold for taxes. Dees v. Smith [Fla.] 46 S 173. Under Code 1871, § 2173, an action to recover land sold by virtue of order of probate court must be brought within one year. Jordan v. Bobbitt [Miss.] 45 S 311. Where one claimed under deed executed pursuant to decree of probate court by administrator under order directing him to execute it in compliance of contract executed under power of attorney, held the title was acquired by deed within Comp. Laws § 9714, limiting actions to recover land held under deed by administrator, though an attorney testified he acted under a different power of attorney. Chandler v. Clark, 151 Mich. 159, 14 Det. Leg. N. 931, 115 NW 65.

**67.** Actions to recover franchise taxes under Laws 1891-1893, p. 331, providing for such taxes and authorizing suits in Franklin County Circuit Court, and governed by general limitation law Ky. St. § 2515, five years. Illinois Cent. R. Co. v. Com., 32 Ky. L. R. 1112, 108 SW 245. Action by a city to enforce its lien for taxes may be brought within five years. City of Middlesborough v. Coal & Iron Bank, 33 Ky. L. R. 469, 110 SW 355.

**68.** Certificate of acknowledgment of married woman's deed is not curable after four years. Kimmey v. Abney [Tex. Civ. App.] 20 Tex. Ct. Rep. 635, 107 SW 885.

**69.** To enforce a constructive trust 10 years. Lady Ensley Coal, Iron & R. Co. v. Gordon [Ala.] 46 S 983.

**70.** In action to enforce lien on land for payment of an annuity, the statute applicable to foreclosure of mortgages should be applied and recovery allowed for payments not 15 years past due. Stringer v. Gamble [Mich.] 15 Det. Leg. N. 1030, 118 NW 979.

**71.** Under Code § 3305, letters of administration must be sued out within five years. German v. Heath [Iowa] 116 NW 1051.

**72.** A proceeding to probate a will of a nonresident is within Ky. St. 1903, § 2522, and must be commenced, within 10 years from testator's death. Foster v. Jordon [Ky.] 113 SW 490.

**73.** Claim against estate based on order in nature of a judgment of the quarter session of Allegheny county which was never a lien upon after-acquired real estate in Lawrence county has only lien of general debts upon such subsequently acquired lands, hence subject to Act of June 14, 1901 (P. L. 562), requiring commencement of action within two years after decedent's death. Henry's Estate, 34 Pa. Super. Ct. 597.

**74.** The prescription of one year is not pleadable in bar of a demand for an injunction against a present continuing nuisance. Barrow v. Gaillardanne [La.] 47 S 891.

**75.** Where action in conversion was brought within 6 years and within 3 years after discovery of the conversion, the 6 year statute was no defense. MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co. [N. Y.] 85 NE 801. Action in conversion by state to recover value of timber which had not been removed within the time prescribed is not controlled by the statute applying to actions for penalty (§ 4077) or actions for penalty or forfeiture to the state (§ 4078, Laws 1905). State v. Rat Portage Lumber Co. [Minn.] 115 NW 162. Property was converted by a sheriff at the time of sale thereof, and action was not barred for three years. Rev. Laws 1905, § 4077. Adams v. Overboe [Minn.] 117 NW 496.

**76.** Mill's Ann. St. Colo. § 2911, bars an action for fraud three years after discovery of facts which would awaken a person of ordinary diligence and lead to discovery of the fraud if pursued with reasonable diligence. Redd v. Brun [C. C. A.] 157 F 190. Under St. 1903, § 2519, barring relief on

injuries to property [77] or persons,[78] death by wrongful act.[79] An omnibus clause usually covers all actions not expressly provided for.[80]

§ 3. *Accrual of cause of action and beginning of period.* See 10 C. L. 839—A cause of action does not accrue until there is a demand capable of present enforcement,[81]

ground of fraud after 10 years, an action to surcharge an executor's final account for misappropriation of funds is barred in 10 years. Wren's Ex'r v. Wren's Ex'x, 31 Ky. L. R. 1096, 104 SW 737. Action for fraud is barred in 6 years. Rev. Laws 1902, c. 202. Marvel v. Cobb, 200 Mass. 293, 86 NE 360. Bill to set aside a conveyance and a mortgage for fraud is barred in 6 years. Id. St. 1898, §§ 1188, 1189a, 1189b, prescribing limitations of actions by former owners to recover possession of land sold for taxes, or to avoid a tax deed, does not apply to actions to annul a tax title for fraud in the proceedings. Boon v. Root [Wis.] 119 NW 121. Action for fraud, in misrepresenting title of land, is barred in one year after discovery of the fraud. Christian v. Denmark [Ala.] 47 S 82. Bill to set aside judgment and sales thereunder for fraud is barred in four years. McLean v. Stith [Tex. Civ. App.] 112 SW 355. Action to annul instrument for fraud is not barred until four years after fraud is or should have been discovered. Texas & P. R. Co. v. Jowers [Tex. Civ. App.] 110 SW 946. The limitation of time within which "an action for relief on the ground of fraud" must be commenced applies only when the party against whom the bar is interposed is required to allege fraud in pleading his cause of action or prove it to entitle him to relief. Logan v. Brown [Okl.] 95 P 441. Under Ky. St. 1903, § 2515, limiting actions for fraud and mistake to five years and § 2519 providing that a cause does not accrue until discovered, but no action shall be maintained after 10 years, held an action cannot be maintained unless within five years after discovery of the fraud or mistake and in no event after 10 years. Reid v. Singer Mfg. Co., 32 Ky. L. R. 927, 107 SW 310. Under Code Civ. Proc. § 338, limiting actions for relief on ground of fraud to three years, complaint by beneficiary under will against administrator brought 14 years after death of testator alleging fraudulent concealment, held insufficient where it did not allege that fraudulent representations were relied upon during such period. Burke v. Maguire [Cal.] 98 P 21. Code Civ. Proc. § 338, limiting actions for relief on ground of fraud, does not apply to action for breach of warranty. Murphy v. Stelling [Cal. App.] 97 P 672. Laws 1903, No. 16, barring actions for relief on ground of fraud after one year from discovery of fraud, applies only to equitable actions and not to an action against an agent to compel return of money. Sandoval v. Randolph [Ariz.] 95 P 119. In claim for having fraudulently taken money from possession of owner, statute does not begin to run against claim until time of discovery of fraud. Six year statute (Act of March 27, 1713, § 1 [Sm. L. 76]) not applicable if fraud had been practiced, at least not until discovery of fraud. Kalin v. Wehrle, 36 Pa. Super. Ct. 305.

**77.** An action in assumpsit for the value of trees wrongfully cut is governed by the six year statute and not by Shannon's Code § 4470, barring actions for injury to land in 3 years. Whitaker v. Poston [Tenn.] 110 SW 1019.

**78.** Action by husband for injuries to his wife and loss of her services is "for injuries to the person" and is barred in two years under Laws 1902, p. 322, c. 406. Mulvey v. Boston, 197 Mass. 178, 83 NE 402. Action for injuries by being accidentally struck by a beer glass is governed by St. 1898, § 4222, providing that notice of time, place, manner and description of injuries must be given or action brought within one year, and not by § 4224 limiting action for assault and battery to two years. Donner v. Graap, 134 Wis. 523, 115 NW 125.

**79.** The right of action given by the "Mines and Miners Act" for causing unlawful death is governed by the general laws governing the limitations of personal actions and not by the one year limitation law of the "Injuries Act." Donk Bros. Coal & Coke Co. v. Sapp, 133 Ill. App. 92.

**80.** Action in equity to ascertain and recover deceased partner's interest in ultimate distribution of partnership assets is within the 10 year statute, relief not specially provided for (Rev. Code Civ. Proc. § 66), and not an action on contract, within the six year statute nor an action to recover land. McPherson v. Swift [S. D.] 116 NW 76. Action to surcharge executor's account for fraud is not within St. 1903, § 2543, declaring that limitations shall not apply to active trusts. Wren's Ex'r v. Wren's Ex'x, 31 Ky. L. R. 1096, 104 SW 737. Action by creditors against assignee for benefit of creditors to set aside unlawful acquisition by assignee of corporate stock belonging to the estate is an equitable action not within Rev. St. 1895, art. 3354, two year statute, but is governed by the four year statute Rev. St. 1895, art. 3358. McCord v. Nabours [Tex.] 109 SW 913; Id. [Tex.] 111 SW 144.

**81.** St. 1898, § 3860. In re Hanlin's Estate, 133 Wis. 140, 113 NW 411; Hildebrand v. Kinney [Ind. App.] 83 NE 379. Accrues when the person owing it first has a legal right to sue. McPherson v. Swift [S. D.] 116 NW 76. On note payable in 20 years, right of action upon same **accrues upon maturity,** and limitations run from that time. Smith v. Smith, 35 Pa. Super. Ct. 323. Where **one in contemplation of marriage fraudulently deeded land to children** by a former marriage, the statute did not run against the wife until her dower interest became consummate by the death of her husband; it is against public policy to hold that a wife must, at peril of becoming barred, commence action against her husband and his grantee. Wallace v. Wallace, 137 Iowa, 169, 114 NW 913. Against the **right to redeem from a tax foreclosure,** the statute does not commence to run until the expiration of two years within which he could redeem. Young v. Jackson [Tex. Civ. App.] 110 SW 74. Limitations **run against title of a pre-emptor of public land** from his compliance with the req-

a party against whom it may be enforced,[82] a party competent to sue,[83] and a tribunal before which the claim can be asserted.[84] The cause of action for breach of warranty accrues when the breach becomes apparent,[85] for breach of covenant at the time the covenantee is compelled to yield to the outstanding title,[86] for breach of covenant against the incumbrance at the time it is paid by the covenantee,[87] to recover a bank deposit, after demand and refusal of the bank to pay.[88] An action to recover money accrues when such money becomes due,[89] but if to recover money wrongfully

uisites to entitle him to a patent in favor of one who holds adversely. Eastern Banking Co. v. Lovejoy [Neb.] 115 NW 857. Where **land is levied on under execution** but is sold and possession given by debtor before sheriff's sale, the statute runs against purchaser at sheriff's sale from time debtor executes his deed, and not from time sheriff's deed is delivered. Watt v. Killibrew [Ala.] 47 S 83. Where one member of a firm dies and the other assigns for the benefit of creditors, the holder of a **firm note** may proceed against the estate without first suing the survivor; and the running of the statute in favor of the estate is not tolled. In re Neher's Estate, 57 Misc. 527, 109 NYS 1090. The **right of majority stockholders** of a corporation to compel defendant who controlled it to pay a judgment against it based on fraudulent division by defendant of the surplus earnings, accrues when corporation is compelled to pay the judgment, and not from wrongful division of the earnings. Dodd v. Pittsburg, etc., R. Co., 32 Ky. L. R. 605, 106 SW 787. Under Burns' Ann. St. 1901, § 299, and § 2380, limitations begin to run **in favor of the estate of a decedent against a claim** for funeral expenses 20 days after his death. Hildebrand v. Kenney [Ind. App.] 83 NE 379. Does not commence to run **against city warrants payable out of a special** fund to be created until such fund is created. Rogers v. Omaha [Neb.] 117 NW 119. Laws 1889-90, p. 149, authorizing **collection of taxes** by suit within five years, and Laws 1889-90, p. 149, c. 103, placing a franchise tax on railroads but not conferring on the Franklin circuit court jurisdiction, held an action in the Franklin circuit court more than five years after taxes might have been assessed but within five years from when it was assessed was not barred. Illinois Cent. R. Co. v. Com., 32 Ky. L. R. 1112, 108 SW 245. The cause of action for **compensation for services in designing a building** and superintending its construction accrues when he approves the final bill of the contractors, when it is presumed that the work was completed. Date of presenting for payment does not establish date when bill became due or when indebtedness accrued. Hornblower v. George Washington University, 31 App. D. C. 64. Action against a railroad for breach of **contract to construct a depot in a certain place** in consideration of the grant of a right of way is not barred by the three year statute, where the line of road was not completed until two years after right of way was acquired. St. Louis, etc., R. Co. v. Berry [Ark.] 110 SW 1049.

**82.** Hildebrand v. Kinney [Ind. App.] 83 NE 379. Where a cause against a mortgagor accrued after her death and when no administration of her estate existed, the statute did **not** commence to run **until an administrator was appointed.** Hibernia Sav. & Loan Soc. v. Farnham, 153 Cal. 578, 96 P 9. Where trustee sold land to the etate for delinquent taxes and two days before period of redemption expired the clerk sold it to defendant, the three year limitation act Tenn. 1899, p. 1143, did not begin to run until such conveyance. Collier v. Goessling [C. C. A.] 160 F 604.

**83.** See, also, post, § 6. Cannot be started when there is no one who can sue or be sued. LeCroix v. Malone [Ala.] 47 S 725. Where money of an intestate's estate had been converted more than six years before action commenced but the administrator had been appointed less than one year before commencement of action, limitations did not commence to run until appointment of the administrator. Root v. Lathrop [Conn.] 70 A 614. Upon death of a partner in 1891, the surviving partner appointed an agent to care for the property and claimed it all. An administrator was appointed for decedent in 1892 and sold his interest to a third person. Held that prior to appointment of the administrator there was no one who could demand settlement, and right of action did not accrue until then. McPherson v. Swift [S. D.] 116 NW 76.

**84.** Saranac Land & Timber Co. v. Roberts, 125 App. Div. 333; 109 NYS 547.

**85.** For breach of warranty in sale of a bull that such bull was a breeder, not until satisfactory proof that the animal was barren. Williamson v. Heath [Tex. Civ. App.] 108 SW 983.

**86.** Limitations commence to run against breach of covenant of seisin from the date the covenantee is compelled to yield to an outstanding title and not from date of deed. Brooks v. Mohl, 104 Minn. 404, 116 NW 931. For breach of covenants of seisen and general warranty in a deed, though the breach is technical at the time the deed is made, no substantial damage is suffered and no cause of action accrues until eviction. Sturgis v. Slocum [Iowa] 116 NW 128. But if no possession or right passes under the deed, the covenants are broken at once and cause of action immediately accrues. Id.

**87.** Cause of action for breach of covenant against incumbrances made by persons subsequently deceased held not to arise so as to be enforcible against estate until covenantee or others entitled to benefit of covenant have suffered actual damages. Hanlin's Estate, In re, 133 Wis. 140, 113 NW 411.

**88.** Not against the right of a depositor of a bank to recover a deposit until demand therefor and refusal of the bank to pay. Missouri Pac. R. Co. v. Continental Nat. Bank, 212 Mo. 505, 111 SW 574.

**89.** If money advanced was not to be paid until some future time, the statute did not commence to run until such time. Jarvis v. Matson [Tex. Civ. App.] 113 SW 326. By writing July 14, 1898, defendant acknowledged receipt of $200 from plaintiff and

paid out it accrues at the date of payment.[90] A cause of action by a surety against a cosurety for contribution [91] or against his principal for reimbursement [92] accrues when the surety pays the debt and a like rule applies in case of other persons secondarily liable.[93] A cause of action for money due in installments accrues on maturity of each installment,[94] and the statute runs upon the whole debt from the date of the first default only when such default has the effect of maturing the entire debt.[95] A cause of action on a mutual current account accrues on the date of the last item thereof,[96] but to bring a case within this rule the account must be a mutual one,[97] and if it is not such an account, the statute runs on each item from its date.[98] A

agreed to pay him $400 from first profits of a certain mine or the $200 with interest within 6 months. Held, the statute commenced to run January 14, 1899. Davis v. Crawford, 197 Mass. 309, 83 NE 866.

**90.** Where county treasurer illegally paid out money belonging to school district, the statute ran against right to recover it back from date of payment, and it was barred n three years. Clarke v. School Dist., 84 Ark. 516, 106 SW 677.

**91.** A surety's right of action for contribution against a cosurety accrues at the time he pays the debt of the principal, and not until then. Mentzer v. Burlingame [Kan.] 97 P 371. Action by surety against cosurety for contribution does not accrue until payment of the obligation by the surety. Kelley v. Sproul [Mich.] 15 Det. Leg. N. 559, 117 NW 327. In suits for contribution, the right of action is on an implied promise, and the statute runs from the date of each advancement. Jarvis v. Matson [Tex. Civ. App.] 113 SW 326.

**92.** Against an action by a surety against a principal for reimbursement from time the surety paid, and not from maturity of note. Blanchard v. Blanchard, 113 NYS 882.

**93.** Where one agreed to pay notes of another but did not, and the latter was required to pay, limitations run from the date they were required to make payment. Enos v. Anderson, 40 Colo. 395, 93 P 475. Cause of action against a banking firm which had assumed the bank's debts to recover money which the bank was compelled to pay by reason of failure of the firm to do so did not accrue until the firm defaulted in performance of its contract and the bank paid the demand. Hoskins v. Velasco Nat. Bank [Tex. Civ. App.] 20 Tex. Ct. Rep. 462, 107 SW 598.

**94.** For interest due on a mortgage accrues when each instalment of interest becomes due. Quackenbush v. Mapes, 123 App. Div. 242, 107 NYS 1047. Where divorce was granted in 1890 awarding weekly allowance of alimony and no payment was made, where application for execution of the decree was made in 1903, the statute did not bar weekly payments accruing within the limitation period. Dewey v. Dewey, 151 Mich. 586, 14 Det. Leg. N. 997, 115 NW 735. Where a written contract of sale provides that the purchase price is to be paid at any time within two years "in amounts and **at such times as may suit the convenience**" of the purchaser, an action on the contract is not barred until three years after the expiration of the two years within which defendant had right to make payment. Plaintiff held not in default, such time not having expired when action was brought. Patterson v. Barrie, 30 App. D. C. 531.

**95.** Otherwise it runs only as to the instalment due. Clause v. Columbia Sav. & Loan Ass'n, 16 Wyo. 450, 95 P 54.

**96.** Vogel v. Kennedy, 127 Mo. App. 228, 104 SW 1151. Not governed by rule of partial payments. Rogers v. Davis, 103 Me. 405, 69 A 618. Where mutual account was opened January 1894, and from 1898 to 1902 there was but one item of twenty cents, which charge was specifically paid shortly after made and credit given therefor on the account, held an action in 1905 was not barred. Id. When parties by mutual dealings have extended, by some item of debit or credit, the time of the bar of the statute, the debtor may not then shorten the time by making specific payment of debit items. Id. Where contract was a continuous one to furnish material for several houses, materials furnished from time to time and prices entered into running account on which payments were made from time to time. Smith v. Ross, 31 App. D. C. 348.

**97.** For definition, see Accounts Stated and Open Accounts, 11 C. L. 22. One item of an account entered within the statutory period will not bring other barred items without the statute unless there were mutual and reciprocal accounts and demands between the parties. Elwood v. Hughes, 109 NYS 25. An account of loans between lender and borrower kept on borrowing firm's books or slips of paper is not a mutual open and current account within Code Civ. Proc. NYS 386. In re Girvin, 160 F 197. A current account kept by a husband of transactions with his wife's money is not a mutual account, nor is it a mutual account where it contains simply items of money. Cash items form no part of mutual account. Id. Where several items (10) seven of which were barred, were set up and it was alleged that it was impossible to state the others except one not barred, held the claims could not be regarded as a continuous account so as to suspend the statute until date of the last item. Novak v. Novak, 137 Iowa, 519, 115 NW 1. A finding as to date of the items is not a finding that they were not barred. Id. Where joint account of husband and wife with another contained items on both sides running a number of years down to 1904, an action was not barred in 1905. Mt. Nebo Anthracite Coal Co. v. Martin [Ark.] 112 SW 882.

**98.** Where several demand loans were made by a wife to a firm of which her husband was a member, limitations ran from the date of each item. In re Girvin, 160 F 197. In action for board furnished, where it appeared that it was furnished at widely divergent periods covering a number of years, the court properly regarded each as a separate transaction and not as a con-

cause of action for a continuing wrong accrues at the date of the last injury.[99] Where a condition precedent to a right of action exists, the cause does not accrue until the condition is performed.[1] Hence an action on a guardian's bond does not accrue until final account has been filed and he is discharged.[2] Where an attorney collects money for his client, the statute commences to run within a reasonable time, depending on the circumstances.[3] When the right to sue for settlement of partnership affairs accrues depends upon the circumstances.[4] If an injury to land is permanent, the cause accrues at once for the entire damage,[5] but if the injury is continuous or intermittent, it accrues at the date of each injury.[6] Where a statute of

tinuous account. Hendelman v. Kahan [Wash.] 97 P 109. Where a decedent was entitled to recover for support, each year's account should be deemed a separate cause of action. Bryson's Adm'r v. Briggs, 32 Ky. L. R. 159, 104 SW 982.

**99.** One whose logs are injured by being caught in a dam, which constitutes a nuisance, may sue for damages though the dam has existed for more than five years. Ireland v. Bowman [Ky.] 114 SW 338.

**1.** Where debt payable in instalments was secured by deed of trust, stipulating that at option of holder the entire debt should become due upon default of payment of any instalment, held, in absence of **exercise of option** by the holder, the statute did not run until maturity of the debt. Clause v. Columbia Sav. & Loan Ass'n, 16 Wyo. 450, 95 P 54. Under Code Civ. Proc. §§ 380, 381, limiting actions on sealed instrument to 20 years, and § 415, providing the cause accrues when action may be brought, where a mortgage was payable three years after date, interest payable semi-annually, and in case of default entire sum was due at option of the holder, where holder did not exercise his option, the cause did not accrue until maturity of the mortgage. Quackenbush v. Mapes, 123 App. Div. 242, 107 NYS 1047. Where judgment was obtained in 1888 and execution issued thereon in 1907, and returned unsatisfied, in an action to set aside a fraudulent conveyance made in 1893, the cause **did not accrue until issuance and return of execution.** Code Civ. Proc. § 382. Action formerly cognizable in equity to procure judgment other than for money on ground of fraud. Holland v. Grote, 125 App. Div. 413, 109 NYS 787. A provision in a mortgage that on breach of condition the mortgage should become due immediately held for the benefit of the creditor, and it had a right to indulge the debtor and hence prevent the operation of the statute. Congregational Church Bldg. Soc. v. Osborne, 153 Cal. 197, 94 P 881. Mere passive acquiescence held waiver of forfeiture. Id. One who voluntarily takes out policy of insurance on life of his infant niece payable to himself, intending to reimburse himself for premiums out of the proceeds of the policy, cannot enforce his claim until death of the niece, and his cause of action does not accrue until then. Stokes v. Waters' Ex'r, 32 Ky. L. R. 1218, 108 SW 275. Where the performance of a duty is to take place upon the happening of a certain contingency or the fulfillment of a certain condition, the cause of action does not accrue or the statute begin to run until the event occurs or the condition is complied with. Balance of attorney and accountant's claim to be paid out of proceeds of suit or when suit was terminated. Waterman v. Kirk, 139 Ill. App. 421. The death of the promissor before the contingency happens does not set the statute in motion in favor of his estate. Where promissor died before termination of suit, out of proceeds of which plaintiff was to receive fees. Id.

**2.** Under Code 1880, § 2107, terminating guardian's powers at marriage of ward, and Code 1892, § 2738, requiring actions on guardian's bonds to be brought within five years from ward's majority, held the statute does not run in favor of a guardian or his sureties for failure to deliver property until final account has been filed and guardian discharged. Pattison v. Clingan [Miss.] 47 S 503.

**3.** Goodyear Metallic Rubber Shoe Co. v. Baker's Estate [Vt.] 69 A 160. Where a decendent had collected money, as attorney but had failed to pay it over, whether reasonable time had elapsed, in addition to statutory period, 30 days before death of decedent held a question for the court. Id.

**4.** Cannot be held, as a matter of law, to accrue at date of dissolution or be carried back by relation to that date. McPherson v. Swift [S. D.] 116 NW 76.

**5.** For injury to land caused by straightening a creek where present and future effect could be ascertained with reasonable certainty at the time and the injury is permanent at the time of construction. Turner v. Overton [Ark.] 111 SW 270. For injury to land resulting from permanent structure on completion of structure. King v. Danville Council, 32 Ky. L. R. 1188, 107 SW 1189. For damages by reason of a railroad constructing a fence and failing to leave opening, by reason of which an owner was shut out from a field and deprived of its use, the cause accrues when the fence was built. Sutherland v. Galveston, etc., R. Co. [Tex. Civ. App.] 108 SW 969.

**6.** For damages to land by diversion and unlawful use of water, not on erection of the dam, but the owner may recover damages resulting during five years next preceding commencement of action. King v. Danville Council, 32 Ky. L. R. 1188, 107 SW 1189. Where, by negligent construction of railroad embankment and ditches, surface water is discharged onto adjoining property and injures crops, the cause of action accrues at date of the injury, and not at date of construction of embankment and ditches. Morse v. Chicago, etc., R. Co. [Neb.] 116 NW 859. A cause of action for flooding land and depositing waste, injurious materials thereon caused by operation of ore reduction works, is for recurrent flowage which did not accrue on construction of the works but

limitation provides that it shall not run against one until notice, actual notice is usually requisite.[7] An action for possession runs from the time the right to such possession is complete.[8] Thus, the statutes do not run against a remainderman during the existence of the life estate,[9] unless the remainderman has a present right to sue.[10] When a tenant denies his landlord's right of possession and refuses to attorn or pay rent for the premises, the cause of action in forcible detainer accrues to the landlord, and the statute begins to run.[11]

*As between stockholder, corporation and creditor,*[12] the time when a cause accrues to enforce a stockholder's liability accrues when the extent of such liability is known.[13]

*Mistake and fraud.*See 10 C. L. 642—A cause of action for relief on the ground of mistake or fraud does not ordinarily accrue until such mistake or fraud is or should in the exercise of ordinary diligence, have been discovered.[14] And what facts should

at the time of particular injury sustained. Hill v. Empire State-Idaho Min. & Developing Co., 158 F 881. Where one obstructs the channel of a stream so that at widely different dates flood waters are cast upon another's land, the cause of action accrues at the date of the injury, and not at date of obstruction. McClure v. Broken Bow [Neb.] 115 NW 1081.

7. Under Kirby's Dig. §§ 6587, 6588, providing that liabilities of a railroad assumed by a purchasing railroad shall be barred in one year "after notice" of sale the notice required is actual and not constructive notice. St. Louis, etc., R. Co. v. Batesville & Winerva Tel. Co. [Ark.] 110 SW 1047.

8. Mitchell v. Baldwin [Ala.] 45 S 715. Adult **heirs have no right to possession of the homestead** until termination of homestead interest of the minor heir, and the two year limitation to set aside a void tax deed of the homestead does not run against them until the minor attains majority. Harris v. Brady [Ark.] 112 SW 974. Where testator devised land to his widow, her estate to terminate on her remarriage, and she sold the land, the statute did not run against the **right of the heirs to recover the land** until remarriage of the widow. Haring v. Shelton [Tex. Civ. App.] 114 SW 389. Where property is given in trust for the benefit of one person for life, remainder over, the **right of action of the remainderman** to recover part of the property converted by the life beneficiary accrues on death of the life beneficiary. Putnam v. Lincoln Safe Deposit Co., 191 N. Y. 166, 83 NE 789.

9. Willhite v. Berry, 232 Ill. 331, 83 NE 852; Hobson v. Huxtable, 79 Neb. 334, 116 NW 278. A married woman, owner of land, died in 1872, leaving husband and several children, and husband took estate by curtesy. In 1882 a railroad without contract or right appropriated a part of the land; the husband died in 1892 and heirs sued in 1904. Held statute did not commence to run as against them until the death of the life tenant. Webster v. Pittsburg, etc., R. Co., 78 Ohio St. 87, 84 NE 592. Where decedent was seised of land during her life, her husband's estate by the curtesy for life suspended the statute as against the wife's heirs. Hill v. Lane [N. C.] 62 SE 1074.

10. Hobson v. Huxtable, 79 Neb. 334, 116 NW 278. Where a bank assisted a life tenant in some of its stock to sell the stock outright, vested remaindermen had a right of action at once and limitations at once commenced to run. Yeager v. Bank of Kentucky, 32 Ky. L. R. 547, 106 SW 806.

11. Twenty year provision held to commence to run when tenant refused to attorn or pay for premises. Plock v. Plock, 139 Ill. App. 416.

12. See 10 C. L. 642. See, also, Corporations, 11 C. L. 882.

13. Under the Maine statute limitations do not run against stockholders of a banking corporation on their individual liability until the assets of the corporation are fully administered and the amount of the deficiency judicially ascertained. Flynn v. American Banking & Trust Co. [Me.] 69 A 771. Right of receiver of insolvent bank to apply for order vacating order restraining him from proceeding against stockholders secondarily liable, and distributing fund derived from assessment against them, held not barred. State v. Germania Bank [Minn.] 119 NW 61.

14. St. 1898, § 4222, an **equitable action** for fraud does not accrue until discovery of the fraud. Boon v. Root [Wis.] 119 NW 121. Code Civ. Proc. § 338 expressly provides that actions **to rescind instruments** for fraud are not barred until one year after discovery of the fraud. Richards v. Farmers' & Merchants' Bank [Cal. App.] 94 P 393. **Action to reform deed** for fraud or mistake is not barred where brought within 10 years from execution of deed and within five years from discovery of the fraud. Morgan v. Combs, 32 Ky. L. R. 1205, 108 SW 272. Action **against promoters of a corporation to recover secret profits** made on sale of land to the corporation is within Code, § 3448, providing that action for fraud does not accrue until fraud is discovered. Chaffee v. Berkley [Iowa] 118 NW 267. Silence of the promoters as to price paid for land afterwards sold to the corporation is a fraudulent concealment deemed to avoid the statute. Id. Where an intestate was trustee of a secret trust, limitations did not begin to run against his administratrix for **breaches of the trust** until the right of action accrued on discovery of the fraud. Russel v. Huntington Nat. Bank [C. C. A.] 162 F 868. The statute does not run against a remainderman in trust property to recover part of the property converted by the life beneficiary until he has actual knowledge of facts upon which his right depends. Putnam v. Lincoln Safe Deposit Co., 191 N. Y.

charge a person of ordinary diligence with notice of fraud depends on the circumstances of each case.[15] Some cases confine this rule to fraud and exclude mistake. Limitation as against a tort, committed through mere mistake not involving fraud begins to run from the time the wrong was done, and not from time of discovery,[16] and some require concealment by the wrong doer of the facts.[17]

§ 4. *Time tolled and computation of the period.* See 10 C. L. 644—The time that is necessarily required to prosecute an appeal from a judgment on a verdict erroneously directed against the plaintiff in a scire facias upon a mechanic's lien is not to be excluding in computing and applying limitations.[18] In a statutory action to subject a wife to the payment of a family expense, the running of the statute of limitations is not tolled as against the wife by the rendition of a judgment against her husband.[19]

§ 5. *What is the commencement of an action. A. In general.* See 10 C. L. 644—It is generally held that an action is commenced when summons is served [20] or delivered for service,[21] or on the filing of a complaint.[22] Service must be had on one entitled

166, 83 NE 789. Where a wife on death of the husband fraudulently purchased for a grossly inadequate price at partition sale land, and a child 16 years old at the time did not understand the transaction and acquiesced in it, without fully understanding it, after attaining majority, held the statute did not run. Markley v. Camden Safe Deposit & Trust Co. [N. J. Eq.] 69 A 1100. In action to set aside a deed for fraud, **evidence insufficient** to show that fraud should not have been discovered within five years. Hendrick v. Miller, 32 Ky. L. R. 1030, 107 SW 731. Where a husband had converted money belonging to his wife, his statement after her death that he and his wife had spent most of the money was not sufficient to show fraudulent concealment, sufficient to suspend the statute. Smith v. Settle, 128 Mo. App. 379, 107 SW 430.

**15.** Held one was not negligent as a matter of law, in failing to discover mistake in description of land granted more than four years before bringing the action. Isaacks v. Wright [Tex. Civ. App.] 110 SW 970. Subpoena in foreclosure proceedings of land which defendant had contracted to plaintiff by clear title held to be considered with other facts in determining whether plaintiff has such knowledge of the foreclosure proceedings and their effect as would put her upon inquiry to ascertain defendant's good faith and start limitations against her right to recover for his fraud. Comfort v. Robinson [Mich.] 15 Det. Leg. N. 951, 118 NW 943. That grantor in deed containing a misdescription had opportunity to investigate and discover the mistake held insufficient to show that he should have discovered it more than four years before bringing the action. Isaacks v. Wright [Tex. Civ. App.] 110 SW 970.

**16.** Commonwealth v. Donnelly, 36 Pa. Super. Ct. 619.

**17.** That money was obtained by fraud does not prevent the statute running against an action to recover it back from the consummation of the transaction, unless investigation is prevented by affirmative acts of the wrongdoer, mere silence is insufficient. Boyd v. Beebe [W. Va.] 61 SE 304. Evidence sufficient to show fraudulent concealment preventing the running of the statute. Dowse v. Gaynor [Mich.] 15 Det. Leg. N. 897, 118 NW 615. Mere ignorance of plaintiff of his cause of action will not prevent running of statute. There must be concealment. Clapp v. Leavens, 164 F 318. The statute begins to run from the time plaintiff discovered that defendant had collected the money due on the judgment, unless there was a fraudulent concealment of the cause of action which tolled the statute. Held, under evidence, no fraudulent concealment such as would toll five year statute. Hurd's Statutes of 1905, p. 1334, § 22. Heckard v. Daugherty, 133 Ill. App. 420. The statute begins to run as against a cause of action sounding in tort of which fraud is a basis as soon as the fraud and subsequent injury have occurred, and not when the fraud is discovered unless there has been a fraudulent concealment of the cause of action. No averment of concealment. Nelson v. Petterson, 131 Ill. App. 443.

**18.** Five years' limitation under Act of June 16, 1836 (P. L. 695, § 24). Kountz v. Consolidated Ice Co., 36 Pa. Super. Ct. 639. Presumption is that in fixing time for reviving lien legislature took into consideration delays incident to an appeal for correction of error by trial court. Id.

**19.** In action under Husband and Wife Act, § 8, judgment against husband held not to toll statute as against wife. Staver Carriage Co. v. Beaudry, 138 Ill. App. 147.

**20.** Where service of process is quashed because made by an unauthorized person, plaintiff could cause service of another summons or an amended petition, thereby commencing a new action within Rev. St. 1899, § 3461, providing that action is deemed commenced at date of summons served. Clause v. Columbia Sav. & Loan Ass'n, 16 Wyo. 450, 95 P 54.

**21.** Where summons was issued August 2nd returnable August 14, affidavit of him to whom it was given for service made August 13, four days before an item was barred that he was unable to find defendant overcomes objection that summons was not delivered for service before limitations had run. Elwood v. Hughes, 109 NYS 25.

**22.** In proceedings under Gen. Laws 1878, § 9, to sequester property of a debtor and have a receiver appointed, the exhibition of a claim and filing of a complaint by a creditor pursuant to order of court is the commencement of an independent action. Downer v. Union Land Co., 103 Minn. 392, 115 NW 207. Where acknowledgment was taken in October

to accept it.[23] In a federal court of equity there must be filing of complaint, issuance of subpœna and bona fide attempt to serve it.[24] The commencement of an action tolls the statute only as to persons bringing and not as to others having a right to maintain an independent action.[25] A writ of error is not a new suit in the sense that the limitations applicable to the original cause of action run against it.[26] The statute does not cease to run against offsets until the time defendant files his plea of offset.[27]

(§ 5) *B. Amendment of pleading.*[28]—An amendment founded on the same cause of action [29] but in different terms,[30] or which cures a defective complaint [31] or corrects a recital therein,[32] or which set forth the cause with greater amplification,[33]

1901 and petition for correction thereof was filed July 24, 1905, and amended petition given to defendant's attorney a few days before July 24th and thereafter taken from his office and filed, held he was charged with notice of the filing of the petition so as to prevent running of the four year statute. Taylor v. Silliman [Tex. Civ. App.] 108 SW 1011.

**23.** Where city clerk was proper officer upon whom to serve complaint in action against the city for injuries, service on a clerk in the office of the corporation counsel was not the commencement of an action. Boyle v. Detroit, 152 Mich. 248, 15 Det. Leg. N. 136, 115 NW 1056.

**24.** To constitute "commencement of a suit" in federal court of equity, there must be filing of bill, due issuance of subpoena, which must come into the hands of the serving officer with intent to be served, and there must be a bona fide attempt to serve it. United States v. Miller, 164 F 444. Bona fide attempt shown where marshal made several attempts to serve, and after life of original an alias subpoena was served. Id.

**25.** The mere commencement of an action by a judgment creditor under § 9, c. 76, Gen. Laws 1878, for sequestration of property of the debtor and appointment of receiver did not toll the statute as to claims of other creditors since each might have brought a separate action and the court could have consolidated them. Downer v. Union Land Co., 103 Minn. 392, 115 NW 207.

**26.** Provision in insurance policy requiring action thereon to be brought within one year relates to original suit and not writs of error therein. Helbig v. Citizens' Ins. Co., 234 Ill. 251, 84 NE 897.

**27.** Boyd v. Beebe [W. Va.] 61 SE 304.

**28.** See 10 C. L. 644. See, also, Pleading, 10 C. L. 1173.

**29.** Amendment to complaint by assignee of a school warrant held not to set up a different cause of action since an adjudication under the original complaint would bar an action on the amended complaint, and vice versa. Michelltree School Tp. Co. v. Carnahan [Ind. App.] 84 NE 520. In an action for death resulting from negligence, where original complaint was not barred, a proper amendment made after the statute had run relates back. Alabama Consol. Coal & Iron Co. v. Heald [Aa.] 45 S 686; Townes v. Dallas Mfg. Co. [Ala.] 45 S 696. If an amendment is not a departure from the original complaint, the fact that the former is based on statute and the latter under common-law liability does not prevent the amendment from relating back. Alabama Consol. Coal & Iron Co. v. Heald [Ala.] 45 S 686.

**Held not to set up a different cause:** Amendment to complaint for damages for breach of contract. El Paso, etc., R. Co. v. Harris [Tex. Civ. App.] 110 SW 145. Where complaint against a railroad for slander though its road master alleged that he said "The old ——— is stealing and I want him discharged," an amendment alleging "and that the oldest foreman on the road was caught stealing." Yazoo, etc., R. Co. v. Rivers [Miss.] 46 S 705. Where complaint demanded foreclosure of landlord's lien on crop, subsequent amendment was based on conversion of the crop. Sexton Rice & Irr. Co. v. Sexton [Tex. Civ. App.] 20 Tex. Ct. Rep. 697, 106 SW 728. Amended petition filed under statute passed pending proceedings as a continuation of original condemnation proceedings. Columbia Heights Realty Co. v. MacFarland, 31 App. D. C. 112. New cause of action not set up by alleging in amendment that contract upon which action was grounded was in writing, first declaration being silent on point, amendment in avoidance of plea of five-year limitation statute. Coats v. Chicago, etc., R. Co., 134 Ill. App. 217. Where both declarations complained of construction by defendant of an imperfect and unsafe stone cellar wall and of procuring plaintiff to work upon wall constructed upon unsafe foundation thereby causing injury complained of. Hagen v. Schlueter, 140 Ill. App. 84.

**30.** Byrne v. Marshall Field & Co., 237 Ill. 384, 86 NE 748. Where an original complaint for injuries stated a good cause of action defectively, alleging that the company so carelessly "propelled" its car, etc., and an amendment alleging that it so carelessly "conducted and managed" its car, the amendment did not set up a new cause of action. Ratner v. Chicago City R. Co., 233 Ill. 169, 84 NE 201. Where complaint alleged injury to horses by defendant willfully running its locomotive over them, an amendment alleging that horses were injured by being frightened onto a trestle by locomotive did not set up a new cause of action. Nashville, etc., R. Co. v. Garth [Ala.] 46 S 583.

**31.** An amendment to a complaint which states a cause of action defectively relates back. Byrne v. Marshall Field & Co., 237 Ill. 384, 86 NE 748.

**32.** Where complaint on promissory note was amended merely for the purpose of correcting a recital that the copy of the note was attached so as to allege that the original instead of the copy was attached, a new cause of action was not stated. Bradley v. Pinney, 77 Kan. 763, 93 P 585.

**33.** Amendments which only amplify or make more certain the allegations of the original complaint relate back. Union Pac. R. Co. v. Sweet [Kan.] 96 P 657. Where original petition sought to recover broker's

or which substitutes [34] or brings in new parties,[35] relates back to the filing of the original complaint, but where it sets forth a new and different cause of action,[36] or a cause dependent on different grounds,[37] or where the original complaint did not state a cause of action,[38] the statute continues to run until the amendment is filed. An amendment in an action for wrongful death which changes the beneficiary of the action is, in effect, the bringing of a new action.[39] It is immaterial whether an amendment sets up a different cause of action where it sets up a cause not barred.[40]

(§ 5) *C. Nonsuit and dismissal.* See 10 C. L. 645—In many states it is prescribed by statute that if an action fail otherwise than on the merits, a new action may be

commission, an amendment embodying the same allegations, but with greater amplification and additional allegations, did not set up a new cause of action. Mayes v. Magill [Tex. Civ. App.] 20 Tex. Ct. Rep. 558, 107 SW 363. Where original complaint and amendments filed within the period all alleged failure to provide safe place to alight, averment of causes contributing to unsafeness of the place will not prevent amendments from relating back. Atlanta & B. Air Line R. v. Wheeler [Ala.] 46 S 262.

**34.** The substitution of a third party for the original plaintiff in an action is not the commencement of a new action. State Bank v. Carroll [Neb.] 116 NW 276. Where action to enforce pledged securities was brought within the period and pending suit they were assigned, an amendment substituting parties plaintiff did not constitute a new action. Merced Bank v. Price [Cal.] 98 P 383. That plaintiffs sue in amended complaint in their individual capacity does not change the cause of action set forth in the original complaint in the firm name. Mayes v. Magill [Tex. Civ. App.] 20 Tex. Ct. Rep. 558, 107 SW 363. Where original complaint was in name of plaintiff as a widow and the amendment set up that she had been deserted by her husband. Gulf, etc., R. Co. v. Overton [Tex. Civ. App.] 20 Tex. Ct. Rep. 691, 107 SW 71.

**35.** Entrance into action of other parties whether they came in voluntarily or through the agency of plaintiffs, does not constitute new cause of action. El Paso, etc., R. Co. v. Harris [Tex. Civ. App.] 110 SW 145. Where action was commenced within the period, an amendment adding another party plaintiff relates back. Cousar v. Heath [S. C.] 61 SE 973. Where one brought suit against a corporation for unfair trade and amended to show that during a part of the time the corporation was a partnership, held the amendment did not set up a different cause of action. Dittgen v. Racine Paper Goods Co., 164 F 85.

**36.** Union Pac. R. Co. v. Sweet [Kan.] 96 P 657. Where a new or different cause of action barred by the statute of limitation is introduced by an amendment, the statute may be pleaded as a bar. Chicago-Virden Coal Co. v. Bradley, 134 Ill. App. 234. In action for damages done by fire, an amendment alleging that damage was done by another and different fire from that set forth in the original complaint does not relate back. Id. After the statute has run, a new cause of action cannot be introduced or new parties brought in or a new subject-matter presented. Lane v. Sayre Water Co., 220 Pa. 599, 69 A 1126. In trespass for malicious seizure the complaint cannot be amended after six years from accrual of the cause of action to allege abuse of process by excessive seizure. Id. Where complaint for death was based on Miners' Act (Hurd's Rev. St. 1905, p. 1393), and was amended to ask recovery under common-law liability, held the amendment set up a new cause of action. Bradley v. Chicago-Virden Coal Co., 231 Ill. 622, 83 NE 424. Where cause of action predicated upon Mines and Miners' Act was amended by substitution of cause of action predicated upon Injuries Act after latter cause, if in an independent action, would have been barred, held amendment was likewise barred. Chicago-Virden Coal Co. v. Bradley, 134 Ill. App. 234. Amended declaration pleading specially policy of insurance where original declaration was on an account stated, held to state a new cause of action and barred. Heffron v. Concordia Fire Ins. Co., 138 Ill. App. 483.

**37.** A cause of action set up in an amendment, though founded on the same injury as that described in the original complaint, is a different cause of action if it is dependent entirely upon different reasons for holding defendant liable. Johnson v. American Smelting & Refining Co. [Neb.] 116 NW 517. The original complaint alleged a personal injury and consequent damages because of negligence of a third party and that defendant succeeded to his liabilities. The amended complaint alleged that the injury was caused by defendant's negligence. Held different cause of action. Id. Where complaint set up simple negligence or willful, wanton or reckless conduct of defendant and amendment charging willful and wanton conduct of defendant's servant set up a new ground of liability. Freeman v. Central of Georgia R. Co. [Ala.] 45 S 898.

**38.** Where a complaint fails to state a cause of action, and after the statute has run an amendment setting up new and additional counts stating a cause of action is filed, such amendment does not relate back. Bahr v. National Safe Deposit Co., 234 Ill. 101, 84 NE 717. Original declaration for death on wrongful act held to state cause of action. Bahr v. National Safe Deposit Co., 137 Ill. App. 397; Englund v. Mississippi Valley Trac. Co., 139 Ill. App. 572.

**39.** Gen. St. Fla. 1906, § 3146, gives right of action to widow alone. Federal Act June 11, 1906, c. 3073, gives the right to personal representative. Held where widow sued in Florida the action was based on the state statute and an amendment to change her capacity to that of administratrix introduced a new cause of action based on the federal statute. Hall v. Louisville & N. R. Co., 157 F 464.

**40.** Martin v. Simon Gregory & Co. [Ark.] 110 SW 1046.

commenced within a prescribed period.[41] Such statutes apply only to the proceedings designated,[42] and falling within their terms [43] and in Georgia the privilege can be exercised but once.[44] One who seeks the benefit of the statute must prove that he comes within its terms.[45]

§ 6. *Postponement, interruption, and revival. A. General rules.* See 10 C. L. 646 Subject to the rule that limitations do not run against sovereignty,[46] the statutes are applied generally and to all cases.[47] Where exception to their operation is not specifically made,[48] and after they have once commenced, they run over all subsequent disabilities and intermediate acts,[49] unless otherwise expressly provided,[50] but being statutes of repose, they are suspended during pendency of legal proceedings looking to settlement,[51] providing they are such as to prevent the enforcement of the remedy

41. Henderson v. Eller, 147 N. C. 582, 61 SE 446. Where holder of note brought action upon it in a county where one of makers resided and also sent a summons to another county where another maker resided and pending proceedings action was dismissed, held to have failed otherwise than on the merits within. Gen. St. 1901, § 4451. Parker v. Dobson [Kan.] 96 P 472. Quashing of service of summons because made by unauthorized person held to result in failure of plaintiff otherwise than on merits within Rev. St. § 3465, authorizing new action within one year. Clause v. Columbia Sav. & Loan Ass'n, 16 Wyo. 450, 95 P. 54. Under Starr & C. Ann. St. 1896, c. 83, where judgment for plaintiff is reversed and time for bringing action has expired pending suit, a new action may be commenced within one year. Held where plaintiff sued for injuries and after limitations expired amendments were filed setting up a new cause and a judgment for him could not be sustained, he was entitled to bring a new action within one year. McAndrews v. Chicago, etc., R. Co. [C. C. A.] 162 F 856.

42. Ann. St. 1906, p. 2357, providing that if one suffer nonsuit or his judgment be reversed on appeal or error or arrested, he may bring a new action within one year, means appeal or error prosecuted in the original manner and not appeal from quashing or refusing to quash executions on the judgment. Moore v. Gibson, 130 Mo. App. 590, 109 SW 1056.

43. A suit brought in a state court and properly removed to a federal court having concurrent jurisdiction and there dismissed on plaintiff's motion cannot under Civ. Code 1895, § 3786, be renewed in a state court within six months, so as to avoid the bar. Webb v. Southern Cotton Oil Co. [Ga.] 63 SE 135. Where a case was removed from state to federal court after the time prescribed has elapsed and a nonsuit is granted in the latter, the case could not be rebrought in the state court within six months. Id.

44. Under § 3786, Civ. Code 1895, providing that if plaintiff be nonsuited or shall discontinue or dismiss his case and shall recommence action within six months, such renewed action shall stand upon the same footing as the original, such privilege may be exercised but once. Webb v. Southern Cotton Oil Co. [Ga.] 63 SE 135. Such statute applies only to cases pending in state courts. Id.

45. Under Code Civ. Proc. § 405, providing for new action within one year after termination in any other manner than by voluntary dismissal, final judgment on merits, etc., a plaintiff in a barred action who claims that the action is brought within one year after termination by nonsuit must prove it unless it is admitted. Clifford v. Duffy, 56 Misc. 667, 107 NYS 809. Answer alleging that defendant recovered judgment on the merits does not admit that former action was terminated by nonsuit. Id.

46. See ante, § 1.

47. See ante, §§ 2, 3. Where several have an interest and each may maintain a separate action, the disability of one does not toll the statute as to others. Hobson v. Huxtable, 79 Neb. 334, 116 NW 278. Under St. 1903, § 2522, statutes of limitation apply to all actions whether based on legal or equitable rights. Wren's Ex'r v. Wren's Ex'x, 31 Ky. L. R. 1096, 104 SW 737.

48. Does not run against correction of a deed where vendee has been in possession, under Ky. St. 1903, § 2543, providing that limitations shall not apply to action by a vendee in possession for a conveyance. Hill v. Clark, 32 Ky. L. R. 595, 106 SW 805. Where a right of action had accrued prior to passage of Shannon's Code, § 4464, suspending limitations during the Civil War, the right was not affected nor impaired thereby nor by the constitutional provision on the same subject. Breckenridge Cannel Coal Co. v. Scott [Tenn.] 114 SW 930.

49. The rule is universal that with the exceptions provided by statute and in certain cases where the statute is suspended because it is impossible to commence an action, when the statute has once begun to run it can not be suspended, postponed or interrupted by any subsequent condition. Congregational Church Bldg. Soc. v. Osborn, 153 Cal. 197, 94 P 881. When the statute has once commenced to run, nothing can stop it except some positive statutory requirement. Gaston v. Gaston [S. C.] 61 SE 393.

50. Under U. S. Comp. St. 1901, p. 1986, providing that in absence of protest settlement of duties shall become final one year after entry, the filing of protest tolls the statute until it is decided. Klumpp v. Thomas [C. C. A.] 162 F 853.

51. Statutes of limitation are statutes of repose and are based on the likelihood that inaction for a protracted period would not occur unless a settlement had been made. Klumpp v. Thomas [C. C. A.] 162 F 853. A creditor's bill suspends the statute during its pendency only as to claims brought into the suit and after conclusion of the suit the statute continues to run. Prince's Adm'r v. McLemore, 108 Va. 269, 61 SE 802. An action

by action.[52] The commencement of an action to enforce the right tolls the statute,[53] but the mere reservation of a claim by an executor does not.[54] Disabilities cannot be tacked.[55] Financial distress of one entitled to sue,[56] or mere ignorance of the existence of a cause of action, does not suspend the statute,[57] nor does a mere request by the debtor not to sue.[58] The continued possession by the creditor of a note pledged as collateral suspends the statute as to the principal obligation after the collateral is prescribed on its face.[59] Mere ignorance of the whereabouts of a debtor who is not absent from the state does not toll the statute of limitation as applied to an action on an account, but the burden is on the creditor to show affirmative acts on the part of the debtor which prevented a discovery of his whereabouts.[60] A barred obligation cannot be revived by a transaction having no relation to it.[61]

(§ 6) *B. Trusts.*[See 10 C. L. 647]—The statutes do not run in favor of a trustee of an active, or continuing trust, until his repudiation thereof and notice brought home to the beneficiary,[62] but do run against constructive or implied trusts from

in 1878 by creditors of an estate against the administrator and his sureties to set aside his settlement and restate the account suspended limitations as to sureties until termination of the suit in 1893, and an action against distributees of deceased sureties on administrator's bond brought 8 years thereafter is not barred. Cole v. Hall, 85 Ark. 144, 107 SW 175.

**52.** Harrison v. Scott, 77 Kan. 637, 95 P 1045. The statute will run against a cause in favor of a stockholder of an insolvent corporation for contribution from his costockholders based on a claim in his favor against the corporation, though there is pending against him an action on his double liability in which he seeks to offset the same cause of action. Id. The fact that the subject of an action is held in custodia legis in another action in which the defendant is not a party nor in privity with a party and over which he has no control, will not suspend the statute in his favor. Hawkins v. Brown [Kan.] 97 P 479.

**53.** Where a corporation has purchased the business and stock in trade of an individual and assumed the liabilities and is impleaded in an action against the seller to recover a debt, and while such action is pending, sells to another corporation which in turn assumes the debts, held the statute did not begin to run in favor of the latter, so long as the creditor is prosecuting with reasonable diligence actions to establish liability of the successive corporations. Walterscheid v. Bowdish, 77 Kan. 665, 96 P 56.

**54.** Though executor has received a claim against the estate which he has never accepted nor rejected. In re Neher's Estate, 57 Misc. 527, 109 NYS 1090.

**55.** Rev. St. 1895, art. 3376, expressly provides that disability of minority cannot be tacked to disability of coverture of the ancestor. Laird v. Murray [Tex. Civ. App.] 111 SW 780.

**56.** The fact that a mortgagor was not financially able to redeem from foreclosure sale will not toll the statute as to his right to redeem. Clapp v. Leavens [C. C. A.] 164 F 318.

**57.** Mere ignorance of existence of cause of action does not suspend the statute unless there has been fraudulent concealment. Hibben v. Malone, 85 Ark. 584, 109 SW 1008. The statute is not tolled as to a foreign plaintiff because he is ignorant that defendant has removed to this state. Dowse v. Gaynor [Mich.] 15 Det. Leg. N. 897, 118 NW 615.

See, however, ante § 3, as to rule that cause of action for fraud accrues only on notice thereof.

**58.** Request not to sue for a tort, accompanied by a suggestion that matter would be adjusted, but unaccompanied by any acknowledgment of liability or promise to pay, and promise not to plead the statute, does not suspend it. Brown v. Atlantic Coast Line R. Co., 147 N. C. 217, 60 SE 985.

**59.** The continued possession by the creditor of a note pledged as collateral operates as a suspension of prescription on the principal obligation after the collateral note is prescribed on its face. Meyer Bros. v. Colvin [La.] 47 S 447.

**60.** Nelson Morris & Co. v. Cisler, 7 Ohio N. P. [N. S.] 142.

**61.** A debtor conveyed land to a creditor who executed a contract to reconvey within a specified time on payment of the debt. The debtor sold his equity to a third person. Held the debtor could not thereafter demand that the creditor apply in payment of the debt an amount claimed to be due from the creditor on a prior barred obligation. McCarron v. Wheeler, 151 Mich. 222, 14 Det. Leg. N. 923, 114 NW 1028.

**62.** Weitner v. Thurmond [Wyo.] 98 P 590. Not against the enforcement of an express trust until by some act or declaration of the trustee an end is put to the trust relation. Greenleaf v. Land & Lumber Co., 146 N. C. 505, 60 SE 424. Do not run where guardian purchases property for his ward and takes title in name of third person, until ward has notice that deed was taken in name of third person. Manahan v. Holmes, 58 Misc. 86, 110 NYS 300. A county which collects taxes for a city holds the funds as trustee. City of Chadron v. Dawes County [Neb.] 118 NW 469. Do not run against a trust until repudiation by the trustee and do not run against right to enforce trust obligation of purchaser of premises on a mortgage foreclosure to refund to the mortgagor what she invested in the premises, until he repudiated the trust. Carr v. Craig [Iowa] 116 NW 720. Not in favor of one cotenant against another until ouster. German v. Heath [Iowa] 116 NW 1051.

the creation thereof.[63] A sale by a trustee for his own interest is a repudiation of the trusts.[64]

(§ 6) *C. Insanity and death.*[See 10 C. L. 647]—As a general rule the statutes do not run against insane persons during the continuance of the disability.[65] Death does not toll the statute unless such exception is provided for.[66] Statutes generally provide that an action may be prosecuted on behalf of a deceased person,[67] or against his estate within a prescribed period after his death [68] or appointment of administrator,[69] but the action must be prosecuted within such period.[70]

(§ 6) *D. Infancy and coverture.*[See 10 C. L. 648]—Infants are generally excepted from the operation of the statutes [71] or are given a prescribed period after attaining majority within which to bring action,[72] but exemption of infants from the opera-

**63.** Lady Ensley Coal, Iron & R. Co. v. Gordon [Ala.] 46 S 983; Norton v. Bassett [Cal.] 97 P 894. Constructive trust. Markley v. Camden Safe Deposit & Trust Co. [N. J. Eq.] 69 A 1100. Where husband obtained money belonging to his wife and she elected to treat him as an implied or constructive trustee, such trust was not such as to suspend the statute which ran from its creation. Smith v. Settle, 128 Mo. App. 379, 107 SW 430. Where owners of land conveyed it and took a purchase money mortgage to be paid from sales of the land, if a constructive trust was created it arose from confidential relations of the parties and breach of the agreement would start the statute as to the constructive trust after expiration of a reasonable time from the sale of the land. Castro v. Adams, 153 Cal. 382, 95 P 1027. If the equity consists of a right on the part of the plaintiff to call upon the court to declare the holder of the legal title a trustee, the statute runs from the time the right or cause accrues. Greenleaf v. Land & Lumber Co., 146 N. C. 505, 60 SE 424.

**64.** Where a bank of a trustee, assisted the life tenant in some of its stock to sell it outright. Yeager v. Bank of Kentucky, 32 Ky. L. R. 547, 106 SW 806.

**65.** McLean v. Stith [Tex. Civ. App.] 112 SW 355. Not against an insane person, if in fact insane, though not adjudged insane. Kaack v. Stanton [Tex. Civ. App.] 112 SW 702. Where, after one was adjudged insane and his land sold in an action by a creditor against his committee, the statute ran against his right of action to recover it when he was discharged as restored, and was not tolled by a recurrence of insanity nine years later. Howard v. Landsberg's Committee, 108 Va. 161, 60 SE 769.

**66.** Where limitations commenced to run before a decedent's death, they were not interrupted by his death nor by the infancy of his heirs. Lewine v. Gerardo, 112 NYS 192.

**67.** Ann. St. 1906, p. 2355, providing that, if a person entitled to sue dies before limitations have run and the cause survives, his representatives may sue within a year therefrom, is limited to one year from death of decedent and not to one year from appointment of administrator. Smith v. Settle, 128 Mo. App. 379, 107 SW 430.

**68.** Under Burns' Ann. St. 1901, § 299, a claim against a decedent's estate, cause of action whereon accrued during his lifetime, is barred where no administrator is appointed within 18 months after his death. Hildebrand v. Kinney [Ind. App.] 83 NE 379.

**69.** Under Code 1902, § 2858, and Code Civ. Proc. § 123, where the maker of a note dies before limitations have run, an action may be brought against his administrator after the statute has run, but within one year after the granting of letters of administration. Gaston v. Gaston [S. C.] 61 SE 393. In computing period, time when there was no administrator should be deducted. Bryson's Adm'r v. Briggs, 32 Ky. L. R. 159, 104 SW 982.

**70.** One's husband became insane in 1875, but no guardian was appointed. In 1881 the wife moved to another state and remarried believing the husband dead. The husband died in 1894. Held an action by the wife in 1905 to quiet title to land, standing in name of deceased, was barred. German v. Heath [Iowa] 116 NW 1051.

**71.** Gary v. Landry [La.] 47 S 124. The 10 year's prescriptions are suspended during minority. Jenkins v. Salmen Brick & Lumber Co., 120 La. 549, 45 S 435. Where there is no reference to a deceased child or his representatives in a will, limitations do not run against a minor child of such deceased child during his minority. Rowe v. Allison [Ark.] 112 SW 395. Where one takes a deed to secure a debt and subsequently acquires possession under a void sheriff's deed, an action to cancel the deed and for other relief is not barred where it appears that the debtor has died less than seven years after the sheriff's sale and all but two of his heirs are minors. Buchan v. Williamson [Ga.] 62 SE 815. Not as against one under legal disability to sue until removal of the disability. Hobson v. Huxtable, 79 Neb. 334, 116 NW 278. Under Law 1893, p. 20, c. 11, limiting actions to recover land to seven years, except as to infants, adverse possession under mortgage foreclosure gives title except as against minors. Schlarb v. Castaing [Wash.] 97 P 289. Where sale under foreclosure was consummated in 1891, and at that time heirs of grantor were 18 years of age, held an action by them in 1901 to set aside the foreclosure was barred. Hendricks v. Calloway, 211 Mo. 536, 111 SW 60.

**72.** Under Code Civ. Proc. § 375, providing a twenty-year period within which to recover land, but providing in case of a minor, that the period of minority is not a part of such period, except that it cannot be extended more than 10 years after removal of disability, where land was taken against infants in 1878 and the eldest attained majority in 1881, the action was not barred in 1899. Muller v. Manhattan R. Co., 124 App. Div. 295, 108 NYS 852. As to children who

tion of the statute depends upon express provision therein,[73] and infancy of an heir cannot avail where the statute has run against the ancestor.[74] As a general rule the statute is suspended as to claims between husband and wife during the existence of the marital relation,[75] but this rule is not universal.[76] In some states coverture is not a bar to an action and the statute is not suspended.[77]

(§ 6) *E. Absence and nonresidence.*[See 10 C. L. 648]—It is generally provided that absence or nonresidence shall suspend the operation of the statute,[78] but such an exception will not be implied where the statute does not declare it.[79] Nonresidence does not suspend the statute if personal service may be had in the state.[80] A stat-

became of age in 1879 and 1880, the action was barred in 1898, but not as to a child who attained majority in 1890. Taggart v. Manhattan R. Co., 57 Misc. 184, 109 NYS 38. Where a child cotenant was 14 years of age when his right of action accrued, his right to sue was not barred until 27 years thereafter. Goggin v. Manhattan R. Co., 124 App. Div. 644, 109 NYS 83. Where a mother acquired land in the name of herself and minor children and thereafter surrendered her unrecorded deed to her grantor and took a new deed in her own name, held limitations did not run against remainder interest of minors until their mother's death and they then still being minors, not until three years after disability was removed did the statute run. Ky. St. 1903, § 2506. Sayler v. Johnson, 32 Ky. L. R. 709, 107 SW 210. Under Kirby's Dig. § 5075, providing that a minor entitled to sue may bring action within three years after attaining majority, one who attained majority in April 1904 may sue in 1905 to set aside a tax deed executed in 1902. Harris v. Brady [Ark.] 112 SW 974.

**73.** Where not prohibited by constitution, the legislature may make such statutes applicable to infants. Schlarb v. Castaing [Wash.] 97 P 289. Laws 1893, p. 20, limiting actions to recover land to seven years and exempting minors as to two classes of possession, applies to minors as to the other section. Id. The betterment act, Kirby's Dig. §§ 2754, 2757, limiting actions to recover rents and profits from one in possession as a bona fide purchaser, applies to infants. Brown v. Neims [Ark.] 112 SW 373. Not a limitation statute. Id. Rev. St. 1895, § 3376, expressly provides that, where right of action on purchase money note accrued during lifetime of holder, a married woman, the statute runs from her death as against her children, though they are minors. Laird v. Murray [Tex. Civ. App.] 111 SW 780.

**74.** Sanders v. Word [Tex. Civ. App.] 110 SW 205.

**75.** Hamby v. Brooks [Ark.] 111 SW 277.

**76.** Where husband received money belonging to his wife, the statute ran against her from date he received it, but the wife having died under coverture her representatives could sue within one year from her death. Ann. St. 1906, pp. 2354, 2355. Smith v. Settle, 128 Mo. App. 379, 107 SW 430. Action by wife against husband to recover land may accrue during coverture, but if she dies under coverture, whether the statute has run or not, and action is saved to her heirs within three years, by Ann. St. 1906, p. 2342. Id.

**77.** Runs against married woman's right to recover community homestead conveyed by her husband in hostility to her homestead rights. Sanders v. Wood [Tex. Civ. App.] 110 SW 205.

**78.** Under Rev. St. 1895, art. 3367, providing that, if a person against whom a cause accrues shall be without the state when it accrues or at any time during which action might have been maintained, such absence shall not be taken as part of the time limited, it is immaterial whether a debtor was in the state when a cause accrued, if he leaves it before the bar is complete. Dignowity v. Sullivan [Tex. Civ. App.] 109 SW 428. Where a debtor is out of the state when a cause accrues, the statute does not commence to run until he comes into the state and will continue to run so long as he remains in the state and is suspended if he again leaves. Gibson v. Simmons, 77 Kan. 461, 94 P 1013. Before a debtor, who is absent from the state when a cause accrues and who makes occasional visits to the state during the period, can set up the statute, the times of his temporary presence in the state must aggregate the statute. Id. Where grantee in tax deed was at time a nonresident and remained so until the property was conveyed, the period of his absence was not to be counted in determining whether the statute had run against a suit by the original owner to quiet title. Burleigh v. Hecht [S. D.] 117 NW 367. In action on a note barred on its face, plaintiff did not have the burden to show precise periods during which defendant visited the state, but it was sufficient for him to show that he left the state before the statute had run and remained a nonresident. Dignowity v. Sullivan [Tex. Civ. App.] 109 SW 428. Under Code Civ. Proc. § 339, limiting actions on written instruments executed outside the state to two years, and § 351, tolling the statute as to time a defendant is absent from the state, where note was made payable in New York by residents of that state, but maker was nonresident when cause accrued and later came to California, the statute ran in his favor only after he came to California, and was tolled while he was occasionally absent from the state. McKee v. Dodd, 152 Cal. 637, 93 P 854.

**79.** Laws 1872, p. 559, barring action on a foreign judgment in five years, fixes the time from which the statute runs as when facts exist which authorize the action without reference to residence of either party, and the statute runs, though all parties were nonresidents, until the judgment defendant became a resident after judgment, though if either party had been a resident when the cause accrued it would have been saved by § 18. Davis v. Munie, 235 Ill. 620, 85 NE 943.

**80.** Rev. St. 1906, p. 2356, suspending the

ute providing that one absent from the state when a cause of action accrues, who shall "return" thereto, may be sued within the time limited applies to nonresidents coming into the state for the first time.[81] Where a debtor had departed from the the state and had no place of abode therein, his temporary return and presence at court did not continue the operation of the statute.[82] The effect of bar by the statute of another state during the period of nonresidence is discussed in another section.[83]

(§ 6) *F. A new promise to pay or acknowledgment of the obligation* See 10 C. L. 649 tolls the statute or revives a cause already barred,[84] but this rule is held to apply only to causes of action ex contractu.[85] The acknowledgment must have reference to the entire claim [86] and plainly indicate the claim to which it refers.[87] Promisor may bind his successor in interest [88] or his joint debtor.[89] The promise must conform to statutory requirements [90] and is generally required to be in writing.[91] It must contain an admission of a present existing debt.[92] Letters may be sufficient.[93]

statute while a debtor is absent from the state, should be construed in connection with p. 597, providing for service of process by leaving a copy of the writ at his usual place of abode. State v. Allen [Mo. App.] 111 SW 622. The jury should be charged how ordinary process may be served by leaving a copy of the petition at his usual place of abode. Id.

81. Rev. St. 1898, § 2888. Lawson v. Tripp [Utah] 95 P 520. Rev. St. 1887, § 4069. West v. Theis [Idaho] 96 P 932.

82. State v. Allen [Mo. App.] 111 SW 622.

83. See ante, § 1.

84. A written acknowledgment within the statutory period raises an implied promise to pay within the statutory period from date of such acknowledgment. National Cycle Mfg. Co. v. San Diego Cycle Co. [Cal.] 98 P 64. Though a purchaser of mortgaged property does not in the deed assume it, his express written admission of the debt is sufficient to defeat the plea of limitations in an action to foreclose. Senninger v. Rowley [Iowa] 116 NW 695.

85. A cause of action sounding in tort is not revived by an acknowledgment. Nelson v. Petterson, 131 Ill. App. 443.

86. Tender of an amount in open court and plea accompanying it did not take the whole of plaintiff's claim out of the statute; thereby only a part of the claim was acknowledged. Antrim Lumber Co. v. Bolinger & Co., 121 La. 306, 46 S 337.

87. An acknowledgment or promise to take a case out of the statute must specify or plainly refer to the particular debt or demand or cause of action sought to be revived. Pendley v. Powers, 129 Ga. 69, 58 SE 653.

88. Where a purchaser with notice of a mortgage takes an interest in the mortgaged premises, he succeeds to the estate and occupies the position of his grantor, and so long as the mortgager retains an equity of redemption his acknowledgment binds the purchaser. DuBois v. First Nat. Bank, 43 Colo. 400, 96 P 169. A grantor in a deed of trust securing a debt may arrest the statute by acknowledging the debt, and bind one who subsequently acquires an interest in the property. Id.

89. The rule that a surety is not protected by limitations against his liability for contribution to his cosurety, who makes payment after the statute has run against the joint obligation, is not changed by Comp. Laws 1897, §§ 9734, 9742. Kelley v. Sproul [Mich.] 15 Det. Leg. N. 559, 117 NW 327.

90. A written acknowledgment of a firm debt made by two of the partners after action brought to dissolve the firm held insufficient under Code Civ. Proc. 1902, § 131, requiring the acknowledgment to be in writing and signed by the party to be charged. Bulcken v. Rhode [S. C.] 62 SE 786.

91. Code Civ. Proc. § 360, expressly provides that new promise or acknowledgment must be in writing. Norton v. Bassett [Cal.] 97 P 894.

92. An acknowledgment in writing that the debt once existed but which does not contain an admission of a present subsisting debt is insufficient. Hawkins v. Brown [Kan.] 97 P 479. One who relies upon a payment to save an account from the bar of the statute has the burden to prove it and that it was accompanied by an absolute acknowledgment by the debtor of a balance due. Cahn v. Reilly, 113 NYS 545. That debtor told his creditor to continue the account and paid a sum "on account" does not show an acknowledgment of a balance due from which a promise to pay it could be inferred. Id. Letters held insufficient because not containing any admissions except those coupled with claim of offset. R. M. Gilmour Mfg. Co. v. Johnson, 58 Misc. 553, 109 NYS 715. A letter by a debtor corporation to its creditor, stating that latter's disputed claim had been referred to one of its officers for adjustment, held insufficient. Code. § 1271 [31 Stat. 1390, ch. 854]. Hornblower v. George Washington University, 31 App. D. C. 64.

93. Under Code, § 3456, providing that a cause may be revived by a signed admission, a letter by the debtor in response to a demand for payment acknowledging the debt held sufficient. Senninger v. Rowley [Iowa] 116 NW 695. Letter referring to creditor's letter "I am sorry that I am not in a position at this time to help you out as you request * * * Just as soon as I can see my way clear I will help you out," and other letters of similar import, held sufficient to remove the bar. Sears v. Howe, 80 Conn. 414, 68 A 983. Under Gen. St. 1902, § 707, providing that in actions against representatives of deceased persons new promise

A check is sufficient though the money paid on it is subsequently returned,[94] and a warrant issued by a city in consideration of a valid debt is sufficient,[95] but mere indorsements of interest payments on a note are not where it is required that the acknowledgment be signed.[96] Where an acknowledgment, or new promise is required, either is sufficient.[97] The acknowledgment extends the time for bringing action only for the statutory period thereafter.[98]

(§ 6) *G. A partial payment.*[See 10 C. L. 650]—A partial payment tolls the statute[99] and starts it running anew from the date it is made.[1] A partial payment must be voluntary and free from any uncertainty as to the identification of the debt[2] and must be made and accepted as a partial payment on a larger debt.[3] Payment must be made by one with authority to bind the person sought to be charged.[4]

or acknowledgment must be in writing, indebtedness need not appear on the face of the instrument, and acknowledgment by letters is held sufficient. Id.

**94.** Under Code 1897, § 3456, providing that a cause may be revived by a signed admission in writing, where after computation of a debt the debtor gave a check but on discovery of an error, the money was paid back and the debt left as before, held the check was a sufficient admission. Senninger v. Rowley [Iowa] 116 NW 695. Held it could not be asserted that the transaction amounted to an agreement for a new loan and not a revivor of the original debt. Id. Where purchaser of mortgaged premises paid interest on the mortgage from year to year, secured reduction of rate, pays part of principal, and gives check for computed balance, though it is returned and his conduct is for 15 years consistent with the theory that he owed the money, his acknowledgment revived the debt. Senninger v. Rowley [Iowa] 116 NW 695.

**95.** A warrant issued by the proper authorities of a city in consideration of a valid debt is a written acknowledgment and promise to pay and arrest the running of the statute. Rogers v. Omaha [Neb.] 114 NW 833.

**96.** Indorsements of interest payments made on a firm note by one of the partners after the note had been filed in dissolution proceedings, transferring to the note entries made on the firm ledger, held insufficient. Bulcken v. Rhode [S. C.] 62 SE 786. Bookkeeper's entries of credits for interest paid on firm debt not signed by any of the partners and without intent to deliver the writing to the creditor are insufficient, under Code Civ. Proc. 1902, § 131, requiring acknowledgment to be signed by the party to be charged. Id.

**97.** Under Code, § 3456, providing that a cause may be renewed or revived by signed admission in writing or a new promise to pay, it is not necessary that both an admission and a new promise to pay be made and signed; either is sufficient. Senninger v. Rowley [Iowa] 116 NW 695.

**98.** Under Code, § 360, written acknowledgment within statutory period extends time for bringing action only for the period of limitations thereafter. National Cycle Mfg. Co. v. San Diego Cycle Co. [Cal.] 98 P 64.

**99.** Looked on as acknowledgment of debt from which promise to pay balance may be inferred. State v. Allen [Mo. App.] 111 SW 622. Where life tenant from time to time made payments of principal and interest on a mortgage to protect her estate, and was subrogated to the rights of the mortgagee, each payment operated as a new admission and postponed the running of the statute against her right to foreclose. Bonhoff v. Wiehorst, 57 Misc. 456, 108 NYS 437. Rev. Laws, c. 202, § 13, declaring that the mere indorsement by holder of note of payment thereon is not sufficient, does not apply where a maker made a payment and the holder in his presence indorsed it on the note and the maker then promised to pay balance. Mitchell v. Thomas, 197 Mass. 347, 83 NE 864. Under Cobbey's Ann. St. 1903, any payment upon a written contract made through arrangement of the maker will toll the statute. Bosler v. McShane, 78 Neb. 86, 110 NW 726. Payment of dividends on stock of a corporation assigned to payee by maker of note as collateral security, and application thereof as payments on the note tolls the statute. Id. Where a credit is indorsed on note after it is barred, resuscitating payment must be proved by evidence aliunde the indorsement. Brown v. Carson [Mo. App.] 111 SW 1181.

**1.** The Washington Statute Ball. Ann. Codes & St. § 4817, however, says that if a debter makes a partial payment he recognizes the debt and fixes the date of payment as a new date from which the statute begins to run. Sterrett v. Sweeney [Idaho] 98 P 418. Under Ball. Ann. Codes & St. Wash. § 4817, partial payment on promissory note fixes date of such payment as the time from which statute begins to run. Id.

**2.** In re Girvin, 160 F 197. One made several loans of money to her husband's firm between 1896 and 1904. Each loan was a separate transaction. $1000 was paid and the claimant was told that it was charged to her account. Held not to constitute a partial payment on outlawed claims. Id. Where a creditor holds several separate claims and a debtor makes a general payment without authorizing application to any particular claim, all of which are barred, the bar is not removed as to any. Anderson v. Nystrom, 103 Minn. 168, 114 NW 742.

**3.** In re Girvin, 160 F 197. To infer new promise from fact of partial payment of a barred obligation, debt must be definitely pointed out to debtor and intention to discharge it in part made manifest. Anderson v. Nystrom, 103 Minn. 168, 114 NW 742.

**4.** That assignee for creditors of a surviving partner made payment on firm note after death of one partner does not stop the statute running in favor of estate of deceased partner. In re Neher's Estate, 57 Misc. 527,

A partial payment by a principal tolls the statute as to a surety,[5] but if payment is made on a renewal note which the surety deems void, it will not as to him toll the statute as to the original note.[6] Partial payments by a principal debtor do not toll the statute as to a guarantor of a promissory note unless the contract of guaranty expressly so provides.[7]

§ 7. *Operation and effect of bar. A. Bar of debt as affecting security.* See 10 C. L. 651—As a general rule the bar of the debt does not bar an action on the security,[8] and an action to enforce the security is not barred so long as the debt remains alive.[9] But a vendor's lien not reserved cannot be enforced after a purchase-money note is barred.[10] Where security is void, no action can be maintained after the debt is barred.[11] The revivor of a debt revives the mortgage given to secure it.[12]

(§ 7) *B. Against whom available.* See 10 C. L. 651—The statutes run against the holder of an equitable title as well as against the holder of a legal one.[13] All persons in privity to the parties are bound by the bar,[14] and an assignee of a barred cause has no greater rights than his assignor.[15] They do not bar one whose rights are saved by a timely proceeding in which he intervenes.[16]

(§ 7) *C. To whom available.* See 10 C. L. 651—The time during which the right to sue may be exercised is governed by statute, whether natural or artificial persons, residents or nonresidents are parties litigant.[17] The defense is a personal privilege of the debtor and can be made only by him or by persons standing in his shoes,[18] and one who is not in privity with the maker of a mortgage cannot set up

109 NYS 1090. Payment made by one partner after dissolution of partnership does not toll statute as to the retired partner. Robertson Lumber Co. v. Anderson, 100 Minn. 137, 110 NW 623. Where a new partnership assumed a note, evidence held insufficient to show that when holder of note accepted interest thereon from new firm he had no notice that a partner had retired, the absence of which notice would have prevented the running of the statute as to the retired partner. Akin v. Van Wirt, 124 App. Div. 83, 108 NYS 327. Where surety on note told principal to keep interest paid or he, the surety, would have to pay it, held principal's payment of interest was not made as agent of surety so as to take the case as to the surety out of the statute. Id. Where a husband conveyed to a wife land upon which there was a mortgage which provided that any payment procured or made by the wife, she or the person making such payment should be subrogated to rights of mortgagee, held payment by wife did not toll the statute as to the husband's liability to her to pay the mortgage. Clinton v. Clinton's Estate, 148 Mich. 496, 14 Det. Leg. N. 204, 111 NW 1087.

**5, 6.** State v. Allen [Mo. App.] 111 SW 622.

**7.** Northwest Thresher Co. v. Dahltorp, 104 Minn. 130, 116 NW 106. Contract of guaranty did not so provide. Id.

**8.** Lien of mortgage may be enforced though the debt is barred. Roach v. Sanborn Land Co., 135 Wis. 354, 115 NW 1102. Where a trust deed was given as security, the bar of the statute in so far as the personal liability of the debtor was concerned was ineffective to destroy the lien against the property. In re Straub, 158 F 375. Where land is conveyed by absolute deed as security, the grantor can invoke the aid of equity only by recognizing the debt as an existing lien on the land even though the debt is statute barred. Lake v. Weaver [N. J. Eq.] 70 A 81. **See note,** 5 C. L. 1448.

**9.** The right to foreclose a trust deed lien is not barred until the debt secured is barred. Pinckney v. Young [Tex. Civ. App.] 107 SW 622.

**10.** Where a note given for the purchase price of land contains no reservation of a vendor's lien and is barred, the holder has no claim on the land. Laird v. Murray [Tex. Civ. App.] 111 SW 780.

**11.** Where deed of trust was executed to secure a barred note and the deed was void because of alteration in a suit to foreclose the deed and enforce the note as a lien, no recovery could be had on the note as against a plea of the statute. Kalteyer v. Mitchell [Tex. Civ. App.] 110 SW 462.

**12.** Senninger v. Rowley [Iowa] 116 NW 695.

**13.** Hibben v. Malone, 85 Ark. 584, 109 SW 1008.

**14.** Where the right of mortgagees to enforce their mortgage is barred, the right of one entitled to be subrogated to their lien is also barred, and the fact that such person is an infant is immaterial. Brown v. Nelms [Ark.] 112 SW 373. If trustee is barred, beneficiary is also barred. Sutton v. Jenkins, 147 N. C. 11, 60 SE 643.

**15.** Marvel v. Cobb, 200 Mass. 293, 86 NE 360.

**16.** Proceeding to contest will commenced within two years after probate inures to benefit of party who intervenes after statutory period and statute is not available as defense to intervening petition. Maurer v. Miller, 77 Kan. 92, 93 P 596.

**17.** Under Code Civ. Proc. §§ 401, 432, a foreign corporation which has a resident agent may plead limitations. Wehrenberg v. New York, etc., R. Co., 124 App. Div. 205, 108 NYS 704.

**18.** Where in a suit to foreclose a mortgage, the allegation against a defendant is that he has or claims some interest in the

limitations to an action to foreclose.[19] Any creditor of an insolvent estate may urge the statute to prevent diminution of the assets.[20] It is doubtful whether the statute can be urged as a defense by a receiver in an action against him for fraud and conspiracy.[21] One may waive the bar of the statute or be estopped to assert it,[22] and where a voluntary benefit is conferred subject to the charge of a debt, limitations cannot be urged against the debt.[23]

§ 8. *Pleading and evidence.* See 10 C. L. 652—The statute of limitations is an affirmative defense and to be available must be pleaded [24] by answer [25] and cannot be raised by demurrer [26] unless the complaint shows on its face that the cause stated is barred.[27] But if the statute is in the nature of a condition to plaintiff's cause

property and the character thereof does not appear, he must allege facts showing his right to set up the statute. Neill v. Burke [Neb.] 115 NW 321. Where deed by mortgagor to mortgaged premises was recorded before maturity of mortgage, the grantee was entitled, to plead limitations against foreclosure. San Diego Realty Co. v. McGinn [Cal. App.] 94 P 374. After a decedent conveyed land to her husband, they mortgaged it to plaintiff and later the husband conveyed to defendant. Held that defendant is entitled to whatever protection the statute would have afforded the husband as a subsequent grantee but nothing more. Hibernia Sav. & Loan Soc. v. Farnham, 153 Cal. 578, 96 P 9. An administrator or executor may plead statute as to liability of decedent, and a transferee may plead defense when action is sought to subject property transferred to him. Pendley v. Powers, 129 Ga. 69, 58 SE 653.

19. One who procured a tax deed is not a privy in title to a former owner who executed a mortgage on the land. Gibson v Ast, 77 Kan. 458, 94 P 801. Where in a suit to foreclose a mortgage a mortgagee asks account of, and offers to pay, amount due holder of tax certificate who is also a party to the action, such tax purchaser may not plead limitations against the mortgage, he having no interest in the right of the mortgagee to enforce it. Neill v. Burke [Neb.] 115 NW 321. Where a purchaser assumed part of a mortgage debt as purchase price, the mortgagee's receiver suing within 6 years from that time was entitled to judgment against the purchaser, though the action was barred as to the mortgagor. Union Trust Co. v. Scott, 170 Ind. 666, 85 NE 481. Owner cannot urge against claim of building contractor that claims against contractor by materialmen are barred. Dugue v. Levy, 120 La. 369, 45 S 280. In materialman's action against owner and contractor, owner cannot plead statute for contractor. Hildebrand v. Vanderbilt, 147 N. C. 639, 61 SE 620.

20. Pendley v. Powers, 129 Ga. 69, 58 SE 653.

21. State v. Merchants' Bank [Neb.] 116 NW 667.

22. See ante, § 1.

23. Under a will providing that a debt due from a legatee to a testator should be deducted from the legacy, the legatee could not plead limitations. In re Gillingham's Estate, 220 Pa. 353, 69 A 809.

24. Vogel v. Kennedy, 127 Mo. App. 228, 104 SW 1151; Perry v. Ball [Tex. Civ. App.] 113 SW 588; Williams v. Keith [Tex. Civ. App.] 111 SW 1056. Extinguishes the right to payment only at the option of the obligor. Roach v. Sanborn Land Co., 135 Wis. 354, 115 NW 1102. Is waived when benefits are not asserted by plea or answer or demurrer. Reaves v. Turner [Okl.] 94 P 543. In action to set aside a fraudulent conveyance where complaint alleged issuance of execution and return unsatisfied within the statutory period, if defendant relied on prior execution he should plead it. Holland v. Grote, 125 App. Div. 413, 109 NYS 787. In action to recover a bank deposit where the bank interpleaded without setting up limitations and asserted that it held the money as stakeholder and offered to pay it to the owner, limitations were not available. McCormick v. National Bank of Commerce [Tex. Civ. App.] 106 SW 747.

25. Code Civ. Proc. 1902, § 94, provides that the defense must be raised by answer and a demurrer is insufficient. Guerard v. Jenkins [S. C.] 61 SE 258. A limitation which merely affects the remedy. McRae v. New York, etc., R. Co., 199 Mass. 418, 85 NE 425. In action by surety to recover money expended in discharging a judgment against his principal if the claim of the surety was barred, the defendant should have pleaded it by answer. Bank of North Wilkesboro v. Wilkesboro Hotel Co., 147 N. C. 594, 61 SE 570. Where a complaint for fraud shows on its face that the action is not brought within the statutory period, but states facts which render the complaint obnoxious to general demurrer, an answer that the cause of action did not accrue within the statutory period is a good plea. Bank of Miller v. Moore [Neb.] 116 NW 167. In trespass to try title where defendants rest upon their title and do not seek affirmative relief, plea of the 10 year statute is not available. Kirby v. Cartwright [Tex. Civ. App.] 20 Tex. Ct. Rep. 509, 106 SW 742.

26. Corea v. Higuera, 153 Cal. 451, 95 P 882; Murphy v. Stelling [Cal. App.] 97 P 672; Keegin v. Joyce [Cal. App.] 98 P 396; Siler v. Jones, 33 Ky. L. R. 317, 110 SW 255. Cannot be asserted by demurrer unless the complaint shows on its face that the cause is barred. Earnest v. St. Louis, etc., R. Co. [Ark.] 112 SW 141. Complaint to foreclose a mortgage which alleges payment on account within the statutory period is good against demurrer. Du Bois v. First Nat. Bank, 43 Colo. 400, 96 P 169.

27. Pendley v. Powers, 129 Ga. 69, 58 SE 653. Where the face of the bill shows the cause to be barred and no circumstances are stated showing it to fall within an exception, the defense may be raised by demurrer. Dees v. Smith [Fla.] 46 S 173. The time when suit was instituted may be shown by file marks on the bill, in determining

of action, he must allege and prove that the action was brought within the time required,[28] and if it appear from the record that the action was not commenced within such period, the defense may be raised by demurrer.[29] Where an action is based on a barred cause, facts bringing the case within an exception must be specifically alleged.[30] Where an answer sufficiently sets up the statute, a reply is necessary.[31] In Georgia, however, the practice of replication has been abolished.[32] Averment of a new promise may by amendment be added to the petition.[33] One who pleads the statute as a defense has the burden to prove it.[34] One who sues on a barred claim has the burden to prove facts taking the case out of the statute.[35] Parol evidence is inadmissible to take the debt of a deceased person out of prescription.[36] The admissibility of evidence is governed by general rules.[37] The effect of evidence is sometimes limited by statute.[38] Where a party pleads an exception to toll the stat-

upon demurrer whether the statute has run. Id. Complaint for relief on ground of fraud which shows on its face that the action was not commenced within four years is demurrable. Bank of Miller v. Moore [Neb.] 116 NW 167. May be presented by special exceptions where the complaint shows the cause to be barred. Schutz v. Burges [Tex. Civ. App.] 110 SW 494. A complaint for injuries is not demurrable because allegation of date of injury showed the cause to be barred since it was competent to prove that the injury occurred at a subsequent date. Bulkley v. Norwich & W. R. Co. [Conn.] 70 A 1021.

28. Provision in Employers' Liability Act (Rev. Laws, c. 106) that injured person must within 60 days give notice of time, place, and cause of injury, and commence action within one year, is a condition to maintenance of the action. McRae v. New York, etc., R. Co., 199 Mass. 418, 85 NE 425.

29. Dowell v. Cox, 108 Va. 460, 62 SE 272.

30. In action to set aside deeds for fraud, allegations that plaintiff did not know of, nor have means of ascertaining the fraud until within three years from action commenced, is too general, especially where deeds have been recorded. Denike v. Santa Clara Valley Agr. Soc. [Cal. App.] 98 P 687. True in both common law and equity cases. Pendley v. Powers, 129 Ga. 69, 58 SE 653. An avoidance of a plea of a limitation statute may be obtained by a replication in confession and avoidance. Coats v. Chicago, etc., R. Co., 134 Ill. App. 217.

31. Code Civ. Proc. § 483, requires actions for land to be brought within 10 years. Section 486 requires that a person establishing a legal title is presumed to have been possessed within the period. Section 558, provides that the defense must be raised by answer. Held that answer setting up adverse user of water right for more than 10 years required answer. State v. Quantic, 37 Mont. 32, 94 P 491.

32, 33. Pendley v. Powers, 129 Ga. 69, 58 SE 653.

34. St. Louis, etc., R. Co. v. Berry [Ark.] 110 SW 1049; Coats v. Chicago, etc., R. Co., 134 Ill. App. 217; Goodyear Metallic Rubber Shoe Co. v. Baker's Estate [Vt.] 69 A 160. In suit to foreclose a mortgage made in 1889, evidence held not to show that the note secured which had been lost did not contain a condition that no suit to foreclose should be brought before termination of life estate. Myers v. Lees [Iowa] 117 NW 45. Question of limitations held for the jury. Cook v. Skinner [Wash.] 97 P 234. The date when prescription commenced to run as relates to trespass on property (Act No. 33, p. 41, 1902), must be shown with reasonable certainty if testimony seeks to prove that it began to run from the day that the knowledge came to the owner and not from date of act complained of. Antrim Lumber Co. v. Bolinger & Co., 121 La. 306, 46 S 337.

35. Evidence insufficient to show a partial payment made on services rendered six years prior to action brought. Holden v. Cooney, 110 NYS 1030. Under Comp. Laws, § 9739, providing that where one fraudulently conceals a cause of action, the action may be commenced two years after discovery, one who asserts fraudulent concealment has the burden to prove it. Dowse v. Gaynor [Mich.] 15 Det. Leg. N. 897, 118 NW 615. Where one sought to recover on a promise made by a decedent in his lifetime to pay her a certain amount as soon as he became able, and at the time the promise was made plaintiff was an infant and did not bring action until long after she attained majority, held that though defendant had burden to prove that decedent was able to pay the debt evidence that promise was not barred was insufficient. White v. Devendorf, 111 NYS 815. One who claims under a barred mortgage has the burden to prove facts suspending the statute. Myers v. Lees [Iowa] 117 NW 45. To take a case based on fraud out of the statute by reason of nondiscovery of fraud, plaintiff must allege that fraud was done under such circumstances that he was not presumed to have notice and he must allege when and how the fraud was discovered. Denike v. Santa Clara Valley Agr. Soc. [Cal. App.] 98 P 687.

36. O'Quin v. Russell, 121 La. 57, 46 S 100.

37. Note given held admissible on the question whether the general rule that limitations begin to run from the date of an advancement was varied by an understanding that it should not be due until a definite future period. Jarvis v. Matson [Tex. Civ. App.] 113 SW 326.

38. The object and effect of Act No. 78, p. 86, of 1888, amending Rev. Civ. Code § 3538, is not to prohibit proof of an interruption of the prescription running upon accounts sued upon which are governed by that prescription by reason of parol evidence, but to prevent such evidence when received having the effect of shifting the prescription of three years applicable to those accounts to the prescription of 10 years. Henry Block Co. v. Papania, 121 La. 683, 46 S 694.

ute, a general denial puts him upon proof thereof.[39] A plea of the statute may be determined upon an agreed statement of facts without making a special finding.[40] Amendments, the purpose of which are to avoid the effect of the statute, but which leaves the essential grounds of recovery unchanged, are favored by the courts.[41]

**Limited Partnership; Liquidated Damages,** see latest topical index.

## LIS PENDENS.

**General Rule, 633.**
**Statutory Lis Pendens, 634.**
**Property Within the Rule, 635.**
**Continuity of Lis Pendens, 635.**

*The scope of this topic is noted below.*[42]

*General rule.* See 10 C. L. 654—A purchaser of property, pending litigation in which it is involved, takes subject to the event of the action[43] and is as fully bound thereby as the parties thereto,[44] the law inferring that all persons have notice of the proceedings of the courts of record, and that he who intermeddles with property in litigation does so at his peril.[45] The doctrine cannot be invoked where the court acquired no jurisdiction of specific property sought to be subjected to claims,[46] and pending suits, which disclose no purpose of any one to change or affect in any way the title to specific property of the parties to them, may not subject the purchasers pendente lite to subsequent judgments or decrees therein which attempt to affect them.[47] If the lis pendens is prosecuted in good faith, it is notice to any and all "purchasers," [48] so as to affect and bind by the decree any interest in the property which they may acquire by reason of the purchase.[49]

39. Theis v. Beaver County Com'rs [Okl.] 97 P 973. While facts in avoidance of the plea must as a general rule be pleaded, facts which go to disprove the facts alleged may be shown under a general denial. Hyman v. Grant [Tex. Civ. App.] 114 SW 853.

40. Where on argument of plea of limitations the parties made an agreed statement of facts which was taken under advisement until the whole case should be heard. Cheatham v. Evans [C. C. A.] 160 F 802.

41. Wise v. Outtrim [Iowa] 117 NW 264. Where vendor sues on note and for foreclosure of vendor's lien and limitations are invoked, he may rescind the contract, and by proper amendment sue to recover the land. Atteberry v. Burnett [Tex. Civ. App.] 114 SW 159.

42. It excludes the lien of judgments (see Judgments, 12 C. L. 408), the general doctrines of notice of prior rights (see Notice and Record of Title, 10 C. L. 1015), and lis pendens in the sense of another action pending, involving the same subject-matter (see Abatement and Revival, 11 C. L. 1).

43. Record held sufficient to show that assignor was brought into court and made party before making assignment, so as to subject assignee to lis pendens. Baker v. Baker [Md.] 70 A 418. Grantees in voluntary deed made pendente lite takes grantor's title subject to judgment subsequently rendered against grantor in pending case. Frey v. Meyers [Tex. Civ. App.] 113 SW 592. Where after action is brought to subject property to lien for claims, jurisdiction of property and custody thereof is acquired, mortgagor's grantees and subsequent purchasers take same subject to execution of final adjudication of claim by court. Lang v. Choctaw, Oklahoma & Gulf R. Co. [C. C. A.] 160 F 355.

44. A common-law purchaser of property buying pending litigation concerning it, who is in privity with vendor, is bound by judgment in suit same as if made a party of record. Gilman v. Carpenter [S. D.] 115 NW 659.

45. Gilman v. Carpenter [S. D.] 115 NW 659. Purchaser of judgment against grantor in a deed of trust buying during suit to foreclose deed prior to lis pendens act held to have had constructive notice of suit; hence, chargeable with knowledge of facts which would have been disclosed by an inquiry. Smith v. Munger [Miss.] 47 S 676. Notice by lis pendens that party to action was real owner equivalent to actual notice of claim thereto. Aetna Life Ins. Co. v. Stryker [Ind. App.] 83 NE 647.

46. Lang v. Choctaw, Oklahoma & Gulf R. Co. [C. C. A.] 160 F 355. Court does not acquire jurisdiction of specific property of debtor by an action against him for a personal money judgment, and purchaser from debtor pendente lite takes it free from subsequent judgment against him. Id. Suit to enjoin debtor from using specific property until creditor's claim is paid confers on court no jurisdiction over property of debtor, and purchaser of latter from debtor pendente lite takes it free from any subsequent decree therein which attempts to affect same. Id.

47. Lang v. Choctaw, Oklahoma & Gulf R. Co. [C. C. A.] 160 F 355.

48. Where judgment creditor obtained a judgment to establish a lien on real estate purchased at execution sale and conveyed same to his attorney and defeated party sued out a writ of error without giving bond or obtaining a supersedeas, notice being given to attorney who appeared in court and pending rehearing attorney conveyed premises, held purchaser was a lis pendens

*Statutory lis pendens.* See 10 C. L. 655—The common-law rule charging all persons with notice of pending actions has been abrogated by statute in many states,[50] and the filing of notice of lis pendens in suits affecting title to or interest in real estate authorized.[51] One purchasing after the filing of the complaint and notice of lis pendens is chargeable with and bound by the result of the litigation as effectually as if made a party,[52] but unless the statutory notice is filed, an innocent purchaser will be protected.[53] Failure to file a notice of lis pendens as required by law in no wise affects the question of the court's jurisdiction [54] and the notice is not the commencement of an action as against the defendants,[55] but its object is to warn persons and put them on their guard in their dealings regarding the subject-matter of a pending action,[56] so as to preserve the status of the property and of the parties,[57] the only effect of omission to file being to release innocent third persons from the operation of the judgment rendered therein.[58] The filing does not charge a grantee with notice of claims not referred to in the instrument,[59] nor does it affect one hav-

purchaser taking land subject to result of rehearing. Turner v. Edmonston, 210 Mo. 411, 109 SW 33. Attorney held to occupy same position as judgment creditor, having purchased from him and taken quitclaim deed. Id. Attorney held not a stranger and innocent purchaser in transaction but a lis pendens purchaser taking premises subject to the result of suit on rehearing. Turner v. Edmonston, 212 Mo. 377, 110 SW 1076.

**49.** Turner v. Edmonston, 210 Mo. 411, 109 SW 33. Where plaintiff in ejectment proceedings shows that he was entitled to recover the premises sued for at the time of the commencement of the suit, a conveyance to a third party by plaintiff pending the action does not defeat the action. Recovery in such case inures to benefit of grantee. Glanz v. Ziabek, 233 Ill. 22, 84 NE 36.

**50.** Rev. Code of Civ. Proc. § 108, governs as to effect of lis pendens on subsequent purchasers and incumbrancers. Gilman v. Carpenter [S. D.] 115 NW 659. Code Civ. Proc. § 409 held substituted for constructive notice to all world of pendency of an action which formerly arose ipso facto upon institution of suit. Blackburn v. Bucksport, etc., R. Co. [Cal. App.] 95 P 668.

**51.** Rev. Code Civ. Proc. § 108. Gilman v. Carpenter [S. D.] 115 NW 659. Action by grantor of land to enforce a reservation of right of action for damages to easement of light, air, and access sustained before conveyance, and to compel a grantee to execute a release so that grantor may receive damages awarded or agreed upon, held an action affecting real estate so that lis pendens may be filed. Maurer v. Friedman, 125 App. Div. 754, 110 NYS 320. Lis pendens may be filed under Code Civ. Proc. § 1670, in action to enjoin defendants from interfering with plaintiff's possession of an apartment in an apartment house, and for specific performance of contract for sale of apartment together with giving of a proprietary lease of apartment to plaintiff. Lawler v. Densmore-Compton Bldg. Co., 112 NYS 435. Fact that interest was in only part of whole premises, or that interest was in a leasehold instead of the fee, held no reason why lis pendens should be denied. Id.

**52.** Under St. 1898, § 3187, defendant having purchased standing timber from patentee of land after notice of lis pendens held bound by judgment as though a party, and liable for value of timber cut pendente lite. McCord v. Akeley, 132 Wis. 195, 111 NW 1100. Dissolution of temporary injunction restraining defendant from cutting timber held not to withdraw timber from operation of lis pendens or final judgment. Id. Plaintiff held not estopped from right to enforce lis pendens in favor of his property. Id. Under Code Civ. Proc. § 1908, subd. 2, one purchasing from defendant in ejectment proceedings bound by judgment, purchase being during pendency of action after notice was filed. Nemo v. Farrington [Cal. App.] 94 P 874. Purchaser subsequent to filing of notice of lis pendens as required by Acts 1903, p. 118, not a bona fide purchaser entitled to protection. Reaves v. Coffman [Ark.] 112 SW 194.

**53.** Failure to file notice, appellant not affected by judgment. Rev. Code Civ. Proc. § 108. Gilman v. Carpenter [S. D.] 115 NW 659. Fact that appellant did not record his deed until judgment had been rendered and entered held not to affect his right to hold property as against judgment rendered. Id.

**54.** Jurisdiction of action to quiet title not affected by failure to file lis pendens as directed by Code Civ. Proc. § 749. Blackburn v. Bucksport, etc., R. Co. [Cal. App.] 95 P 668.

**55.** Cohen v. Biber, 123 App. Div. 528, 108 NYS 249.

**56.** Blackburn v. Bucksport, etc., R. Co. [Cal. App.] 95 P 668; Cohen v. Biber, 123 App. Div. 528, 108 NYS 249. Purpose of Ky. St. 1903, § 2358a, subd. 2, requiring date of attachment to be contained in body of lis pendens notice, is to put subsequent purchasers and incumbrancers on notice. Burton-Whayne Co. v. Farmers' & Drovers' Bank [Ky.] 113 SW 445.

**57.** Bond Realty Co. v. Pounds, 112 NYS 433. Partner bringing action against copartner claiming an interest in property conveyed by copartner held bound by act of copartner in conveying property, and his rights under the lis pendens not violated by decree foreclosing his interest and compelling specific performance of agreement. Id.

**58.** Blackburn v. Bucksport, etc., R. Co. [Cal. App.] 95 P 668.

**59.** Mere reference to the existence of a pending suit held insufficient to charge no-

ing purchased without notice prior to the filing of the instrument.[60] It is only necessary as to subsequent purchasers for value and without notice.[61] An unauthorized lis pendens is a nullity.[62] Where the notice is otherwise correct, the fact that the date of attachment is not contained in the body thereof does not render it ineffectual to give notice, where the date of filing is certified to by the clerk in connection with his record of the notice.[63] In New York summons must be served within sixty days after filing of the notice of lis pendens.[64]

*Property within the rule.* See 8 C. L. 793

*Continuity of lis pendens.* See 10 C. L. 656—There is no fixed rule as to when lis pendens ceases.[65] It does not necessarily terminate upon the rendition of judgment but may continue for a reasonable time thereafter to allow the perfection of an appeal or the prosecution of a remedy to set the judgment aside.[66] Where the order or judgment rendered is appealable, the lis pendens cannot be canceled until the time to appeal has expired,[67] but after the expiration of such time it will be canceled as a matter of right,[68] although, where the judgment and notice are insufficient to limit the time for appeal, the notice of lis pendens cannot be canceled until after a final judgment has been rendered and the time to appeal therefrom has expired.[69] An unreasonable neglect to prosecute an action is a ground for cancellation.[70] Upon a motion to cancel a lis pendens upon the ground that the complaint fails to

tice of existence of a contract for contingent attorney's fees for prosecution thereof. Bendheim v. Pickford, 31 App. D. C. 488.

60. Bendheim v. Pickford, 31 App. D. C. 488.

61. Notice under Ky. St. 1903, § 2358, not necessary to wife obtaining deed to real estate pending action concerning same, where husband with notice of fact paid consideration and was real purchaser; hence she takes property subject to lien asserted in action. City of Middlesborough v. Coal & Iron Bank, 33 Ky. L. R. 469, 110 SW 355.

62. Lis pendens in proceedings begun Feb. 28, 1890, under Laws 1881, p. 819, c. 609, and providing for procedure under Laws 1850, p. 211, c. 140, etc., held a nullity, no lis pendens being authorized for such proceedings, and Code Civ. Proc. § 3384, providing that title authorizing lis pendens shall take effect May 1, 1890, and not affect proceedings previously commenced. In re Trustees of Village of White Plains, 124 App. Div. 1, 108 NYS 596.

63. Notice not containing date of attachment in body thereof as required by Ky. St. 1903, § 2358a, subd. 2, held to afford proper notice to persons filing attachment on property subsequently so as not to make second attachment take precedence. Burton-Whayne Co. v. Farmers' & Drovers' Bank [Ky.] 113 SW 445.

64. Under Code Civ. Proc. § 1670, placing summons in hands of sheriff for service is insufficient but service must be actually made within 60 days or notice may be canceled upon motion. Cohen v. Biber, 123 App. Div. 528, 108 NYS 249. Statutory protection held a privilege requiring compliance with statute, and, without analogy with rule applying under statutes of limitations which tend to curtail rights. Id. Provision of Code Civ. Proc. § 1670, held peremptory, failure to comply with same a form of unreasonable neglect which requires cancellation under § 1674, hence, where lis pendens was filed Nov. 14, 1907, an amended summons and complaint filed Nov. 18, 1907, and service of summons and complaint delayed until Jan. 20, 1908, lis pendens should be cancelled. Brown v. Mando, 125 App. Div. 380, 109 NYS 726. Fact that notice to vacate was not made until after summons had actually been served held immaterial in absence of showthat defendant had knowledge of fact that notice had been filed before he was served. Id.

65. Must depend upon the facts of the particular case. McLean v. Stith [Tex. Civ. App.] 112 SW 355.

66. McLean v. Stith [Tex. Civ. App.] 112 SW 355.

67. Whalen v. Stuart, 123 App. Div. 446, 108 NYS 355. Order to vacate an order to compel acceptance of a complaint in suit for partition by an alleged heir of a decedent on ground that deed and will of decedent were procured by fraud and undue influence and dismissing action held appealable, and lis pendens under Code Civ. Proc. § 1674 could not be canceled until expiration for time to appeal. Id.

68. Code Civ. Proc. § 1674. Rosenthal v. Friedman, 112 NYS 449.

69. Under Code Civ. Proc. § 1674, where notice was ineffectual to limit time for appeal, and copy of judgment was not signed by clerk, held defendant not entitled to cancellation of lis pendens. Slater v. Grannemann, 124 App. Div. 98, 108 NYS 363.

70. Dismissal for failure to prosecute will not be granted where action was dismissed on plaintiff's failure to appear, and nothing remains to be done but to enter judgment on the dismissal. Proper remedy is cancellation under Code Civ. Proc. § 1674 after expiration of time for appealing from judgment. Rosenthal v. Friedman, 112 NYS 449. Failure to serve summons within 60 days after filing of notice, as required by Code Civ. Proc. § 1670, held a form of unreasonable neglect requiring cancellation under § 1674. Brown v. Mando, 125 App. Div. 380, 109 NYS 726.

state a cause of action, the court cannot determine whether or not the action is well brought, or critically examine the complaint to see whether a demurrer would be sustained,[71] nor can it, where the action is to recover a judgment affecting realty, cancel the lis pendens because it is of the opinion from the allegation of the complaint that the action cannot be maintained for that purpose.[72] Provision is sometimes made for the cancellation of a notice of lis pendens by making a deposit of money or giving an undertaking.[73]

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**Literary Property; Livery Stable Keepers; Live Stock Insurance; Lloyd's; Loan and Trust Companies; Loans; Local Improvements and Assessments; Local Option; Logs and Logging; Lost Instruments; Lost Property,** see latest topical index.

## LOTTERIES.

*The scope of this topic* is noted below.[74]

*What constitutes.* See 10 C. L. 656—A lottery has been judicially defined as a game of hazard in which small sums are ventured with the chance of obtaining a larger value either in goods or money.[75] Every drawing where money or property is offered as prizes to be distributed by chance is a lottery.[76] Anything of value offered as an inducement to participate in a scheme of chance is a prize.[77]

**71.** Where objection was that complaint failed to show a contract sufficiently definite to entitle plaintiff to specific performance. Lawler v. Densmore-Compton Bldg. Co., 112 NYS 435.

**72.** Where judgment sought is that specified in Code Civ. Proc. § 1670. Lawler v. Densmore-Compton Bldg. Co., 112 NYS 435.

**73.** Code Civ. Proc. § 1671, providing for cancellation, held to relate solely to an action of the character specified in § 1670, and not to a proceeding in rem against an unsafe building under Building Code, §§ 153-155. City of New York v. Unsafe Bldg., 57 Misc. 146, 107 NYS 749. Cancellation under Building Code could not be had even if Code Civ. Proc. § 1671 were applicable, cancellation being unauthorized only where adequate relief can be secured by deposit or undertaking. Id.

**74.** Gambling (see Betting and Gaming, 11 C. L. 417) and gambling contracts (see Gambling Contracts, 11 C. L. 1633), are elsewhere treated.

**75.** Fitzsimmons v. U. S. [C. C. A.] 156 F 477. Scheme whereby subscriber paid one dollar per week and received two dollars for each dollar so paid providing he continued payments until maturity, i. e. until all previous certificates had matured and been paid, also providing that there was sufficient money in treasury and that total payment should not exceed $160, the redemption fund depending entirely upon new subscribers, and upon lapse by old subscribers, held lottery. Id., following Public Clearing House v. Coyne, 109 U. S. 497, 48 Law. Ed. 1092.

**NOTE. Guessing contests as lotteries:** Whether a guessing contest constitutes a lottery depends upon whether the result is necessarily a mere matter of chance or is a question of skill and judgment upon the part of the competitors. Thus, guesses as to the number of births and deaths in London during a certain week (Hall v. Cox, 1 Q. B. 198), guesses as to the winning horses in a certain race (Stoddart v. Sagar, 2 Q. B. 474; Camenada v. Holton, 60 L. J. Mag. Cas. N. S. 116, 17 Cox C. C. 307), the number of beans (Reg. v. Dodds, 4 Ont. Rep. 390), or buttons (Reg. v. Jamieson, 7 Ont. Rep. 149), in a glass jar, the number of cigarettes to be taxed during a certain period (United States v. Rosenblum, 121 F 180), the weight of a certain bar of soap (Dunham v. St. Croix Soap Mfg. Co., 34 N. B. 243), the number of votes cast at a certain election (Opinion of Atty. Gen. Miller, 19 Ops. Atty. Gen. 679; Opinion of Atty. Gen. Griggs, 23 Ops. Atty. Gen. 207), or the number of paid admissions to a world's fair (Opinion of Atty. Gen. Knox, 23 Ops. Atty. Gen. 492), have been held to depend upon skill and judgment and not to be regarded as lotteries while guesses as to a missing word in a paragraph (Barclay v. Pearson, 2 ch. 154), or as to certain spots in a newspaper, arbitrarily selected (Hall v. McWilliams, 65 J. P. 742), or as to the number of seeds in a pumpkin (Thomas, Non Mailable Matter § 137a), have been held to depend wholly upon chance and contests based thereon are held lotteries. Recent cases hold that guessing upon the vote at a certain election is a matter of chance rather than judgment and that such contests are lotteries (Stevens v. Cincinnati Times Star Co., 72 Ohio 112, 73 NE 1058, 106 Am. St. Rep. 586; Hobing v. Enquirer Co., 2 Ohio N. P. N. S. 205; Waite v. Press Pub. Ass'n [C. C. A.] 155 F 58, 11 L. R. A. [N. S.] 609). The same is held by Atty. Gen. Moody (25 Ops. Atty. Gen. 286) in an opinion which also reverses the opinions of Atty. Gen. Knox as to guesses at paid admissions to a worlds fair. Earlier cases which find the element of chance in contests not usually so considered are Hudelson v. State, 94 Ind. 426, 48 Am. Rep. 171 (number of beans in jar), and People v. Lavin, 179 N. Y. 164, 71 NE 753, 66 L. R. A. 601 (number of cigars taxed during certain period).—Adapted from 11 L. R. A. [N. S.] 609.

**76.** That every ticket entitles holder to a certain sum does not alter the case if

*Civil rights and remedies.*[See 10 C. L. 656]—The sale of lottery tickets was not prohibited at common law,[78] and it is held that statutes forbidding such sales are for the protection of the vendee, who is not pari delicto and hence not subject to the rule denying recovery of consideration for an executed illegal contract.[79] Contracts made in contemplation of a lottery scheme are void in most states.[80]

*Criminal offenses and prosecutions.*[See 8 C. L. 795]—Any person transmitting through the mails a letter, circular or post card concerning lotteries is guilty of a criminal offense under the federal statute.[81] Statutes in most states denounce lotteries and the sale of lottery tickets as criminal.[82]

### MAIMING; MAYHEM.[83]

**Malice; Malicious Abuse of Process,** see latest topical index.

### MALICIOUS MISCHIEF.[84]

*The scope of this topic* is noted below.[84a]

Malicious intent is a necessary element of the offense at common law and under statutes declaratory thereof.[85] The word malice, as used in this connection, has a restricted meaning and signifies specific intent to injure, vex or annoy the owner of the property,[86] arising out of a spirit of revenge for real or fancied wrongs.[87] Malice is often a question of fact,[88] but may be inferred from the nature of the act and the circumstances of the case.[89] Some statutes enlarge the offense to include acts done maliciously or wantonly,[90] or substitute for malice the element of mere wantonness,[91] the latter word signifying a general malice and willful disregard of the rights of others[92] rather than a mere purpose to do an unlawful act.[93] The

there is an additional sum to be distributed by chance. Grant v. State [Tex. Cr. App.] 112 SW 1068. Contract for purchase of stamps by a merchant to deliver to his customers, which stamps shall entitle holder to chance to receive an automobile to be awarded by lot to one of such stamp holders by vendor of stamps, is lottery. American Copying Co. v. Thompson [Tex. Civ. App.] 110 SW 777.

**77.** Any inequality of value resulting from chance, whether the inequality consists in one individual receiving greater, less, or the same amount paid, as against a different relative amount received by others. Fitzsimmons v. U. S. [C. C. A.] 156 F 477.

**78, 79.** Becker v. Wilson [Neb.] 116 NW 160.

**80.** American Copying Co. v. Thompson [Tex. Civ. App.] 110 SW 777.

**81.** Rev. St. § 3894. Fitzsimmons v. U. S. [C. C. A.] 156 F 477.

**82.** Pen. Code, art. 373. Grant v. State [Tex. Cr. App.] 112 SW 1068.

**83.** No cases have been found for this subject since the last article. See 10 C. L. 656.

**84.** See 10 C. L. 657.

**84a.** Includes the common-law crime and statutory offenses closely analogous thereto. **Excludes** statutory offenses of a similar nature with reference to certain specific property, such as malicious destruction of or injury to fences (see Fences, 11 C. L. 1466), highways (see Highways and Streets, 11 C. L. 1720), or landmarks (see Boundaries, 11 C. L. 427).

**85.** Malice essential. Lynch v. People, 137 Ill. App. 444 In absence of evidence of malice, conviction not sustained. State v. Minor [N. D.] 117 NW 528. Proof of malice held sufficient to sustain verdict. Carson v. State [Neb.] 114 NW 938; State v. Tarlton [S. D.] 118 NW 706.

**86.** Intent to injure owner. State v. Graeme, 130 Mo. App. 138, 108 SW 1131. "Maliciously" in Rev. Codes 1905, § 9315, means with actual ill will or revenge and imports **a desire to vex, annoy and injure a particular person.** State v. Minor [N. D.] 117 NW 528. Cutting telephone wires in good faith in carrying out orders of superior not malicious mischief. Lynch v. People, 137 Ill. App. 444.

**87.** Rev. Pen. Code, § 712. Not only willfully but for purpose of revenge. State v. Tarlton [S. D.] 118 NW 706.

**88.** Question for jury. Carson v. State [Neb.] 114 NW 938.

**89.** State v. Tarlton [S. D.] 118 NW 706.

**90.** Rev. St. 1899, § 1959. State v Graeme, 130 Mo. App. 138, 108 SW 1131. Rev. Pen. Code § 712. One who in spirit of wantonness and revenge breaks up household goods of another is guilty. State v. Tarlton [S. D.] 118 NW 706.

**91.** Rev. Laws, c. 208, § 100. Malice not essential. Commonwealth v. Byard [Mass.] 86 NE 285.

**92.** Tree warden convicted for wantonly destroying tree on private property in excess of his authority and without attempt to ascertain his authority or the owner's rights. Commonwealth v. Byard [Mass.] 86 NE 285.

**93.** Error to instruct that it is sufficient if act is done unlawfully and purposely. State v. Graeme 130 Mo. App. 138, 108 SW 1131.

fact that a particular act is denounced in a statutory chapter on malicious mischief does not necessarily involve reading the common-law essentials into the statute.[94] And under statutes forbidding such acts in the interest of public health or safety,[95] or in the interest of humanity,[96] specific malice is not essential to the offense. Variance as to time of the offense is immaterial except as affecting a limitation of prosecution, providing the offense proved is identical with the one charged.[97] Where ownership of property is alleged, it is sufficient to prove possession.[98] Where value of the property is material, it is a question for the jury upon conflicting evidence, and the defendant cannot complain of variance by reason of a finding for less than the amount charged.[99] The defendant may testify as to his intent.[1] Circumstantial evidence may be sufficient to sustain a conviction.[2] Within the statutory maximum, the penalty to be imposed is usually within the discretion of the trial court.[3]

## MALICIOUS PROSECUTION AND ABUSE OF PROCESS.


**§ 1. Nature and Elements of the Wrong, 638.**
A. Malicious Prosecution, 638.
B. Abuse of Process, 639.
**§ 2. Responsibility of Defendant for the Prosecution or Suit and His Participation Therein, 639.**
**§ 3. The Prosecution of the Plaintiff, 639.**
**§ 4. Termination of Prosecution in Plintiff's Favor, 639.**
**§ 5. Want of Reasonable and Probable Cause, 640.**
**§ 6. Malice, 640.**
**§ 7. Advice of Private Counsel, Prosecuting Attorney or Magistrate, 640.**
**§ 8. Damages, 641.**
**§ 9. General Matters of Pleading and Practice, 641.**


*The scope of this topic is* noted below.[4]

§ 1. *Nature and elements of the wrong. A. Malicious prosecution.* See 10 C. L. 657—The elements necessary to sustain the action are prosecution instigated by defendant,[5] malice,[6] want of probable cause,[7] and a termination in favor of defendant of the proceeding complained of, before suit based upon it is brought.[8] In some

94. Under Code, § 4810, forbidding throwing stones at railway trains unnecessary to allege intent to injure particular person. State v. Leasman, 137 Iowa, 191, 114 NW 1032.

95. Throwing stones at railway trains contrary to Code § 4810. State v. Leasman, 137 Iowa, 191, 114 NW 1032.

96. Under clause forbidding shooting dog in malice, sport or cruelty, it is immaterial that offender believed dog to be property of another than true owner. Ross v. State [Tex. Cr. App.] 108 SW 697.

97. Allegation May 5, proof April 23. Carson v. State [Neb.] 114 NW 938.

98. Indictment for throwing stones at railway train sufficient that train was on tracks of alleged owner. State v. Leasman, 137 Iowa, 191, 114 NW 1032.

99. Carson v. State [Neb.] 114 NW 938.

1. Error to exclude testimony that wires were cut in obedience to orders of superior and without malicious intent. Lynch v. People, 137 Ill. App. 444.

2. Atwood v. State, 84 Ark. 623, 106 SW 953.

3. $300 fine for breaking up household goods of much less value not excessive under circumstances, maximum penalty being $500. State v. Tarlton [S. D.] 118 NW 706.

4. **It excludes** false imprisonment (see False Imprisonment, 11 C. L. 1456), and liability independent of malice for wrongful levy of attachment (see Attachment, 11 C. L. 315), execution (see Executions, 11 C. L. 1433), and the like, as well as the award of damages on disolution of injunction (see Injunction, 12 C. L. 152).

**This article supplements** (in connection with those in 10 C. L. 662; 8 C. L. 797 and 6 C. L. 490) **an exhaustive special article** in 4 C. L. 470.

5. Brantley v. Rhodes-Haverty Furniture Co. [Ga.] 62 SE 222; Orefice v. Savarese, 113 NYS 175. See, post, § 2.

6. Florida East Coast R. Co. v. Groves [Fla.] 46 S 294; Equitable Life Assur. Soc. v. Lester [Tex. Civ. App.] 110 SW 499; Miller v. Lai [N. J. Law] 71 A 63; Orefice v. Savarese, 113 NYS 175; Fleischauer v. Fabens [Cal. App.] 96 P 17.
See post, § 6.

7. Florida East Coast R. Co. v. Groves [Fla.] 46 S 294; Equitable Life Assur. Soc. Co. v. Lester [Tex. Civ. App.] 110 SW 499; Miller v. Lai [N. J. Law] 71 A 63; Clement v. Orr [Ga. App.] 60 SE 1017; Orefice v. Savarese, 113 NYS 175; Fender v. Ramsey [Ga.] 62 SE 527; Robitzek v. Daum, 220 Pa. 61, 69 A 96; Brantley v. Rhodes-Haverty Furniture Co. [Ga.] 62 SE 222.
See post, § 5.

8. Fender v. Ramsen [Ga.] 62 SE 527; Equitable Life Assur. Soc. Co. v. Lester [Tex. Civ. App.] 110 SW 499; Orefice v. Savarese, 113 NYS 175; Donati v. Righetti [Cal. App.] 97 P 1128; Brantley v. Rhodes-Haverty Furniture Co. [Ga.] 62 SE 222; Grimestad v. Lofgren [Minn.] 117 NW 515; Bartlett v. Jenkins, 150 Mich. 682, 14 Det. Leg. N. 876, 114 NW 679; Clement v. Orr [Ga. App.] 60 SE 1017; Halberstadt v. New York Life Ins. Co., 125 App. Div. 830, 110 NYS 188. See post, § 4.

jurisdictions it is said that the accusation must be false in fact.[9] Malicious prosecution is distinguished from false imprisonment.[10]

(§ 1) *B. Abuse of process.*[See 10 C. L. 658]—To constitute malicious abuse of process lawfully issued, it must be used for a purpose not intended by law.[11] Malicious abuse of process is distinguished from malicious use.[12]

§ 2. *Responsibility of defendant for the prosecution or suit and his participation therein.*[See 10 C. L. 658]—All concerned in originating and carrying on a malicious prosecution are jointly and severally liable.[13] One is liable for the authorized [14] or ratified [15] acts of his agent.[16]

§ 3. *The prosecution of the plaintiff.*[See 10 C. L. 658]—The present plaintiff must have been prosecuted.[17] Defects in the accusation in trial court or waiver of defects by defendant cannot affect his right to recover in suit for malicious prosecution.[18]

§ 4. *Termination of prosecution in plaintiff's favor.*[See 10 C. L. 658]—The prosecution must have terminated in favor of accused,[19] a conviction being conclusive as to probable cause.[20] The termination must be such as to preclude consideration of that proceeding,[21] but the reason for the termination is immaterial,[22] unless it be by fraud of accused, compromise and settlement, or by any act or procurement on part of the present plaintiff,[23, 24] or such as to amount to a virtual conviction.[25] Discharge on habeas corpus after binding over is a sufficient termination of the prosecution.[26]

§ 5. *Want of reasonable and probable cause.*[See 10 C. L. 659]—Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a reasonably prudent man in his belief that the person accused is guilty of the offense with which he is charged,[27] the test being applied as

**9.** Missouri, etc., R. Co. v. Groseclose [Tex. Civ. App.] 110 SW 477.

**10.** Pen. Code, § 236. Donati v. Righetti [Cal. App.] 97 P 1128.

See False Imprisonment, 11 C. L. 1456.

**11.** Ingalls v. Christopherson [S. D.] 114 NW 704. Methods used though vigorous held not of such character as to constitute abuse of process. Id. Petition held to state case of malicious use of process. Brantley v. Rhodes-Haverty Furniture Co. [Ga.] 62 SE 222.

**12.** In that malice and probable cause are not essential elements in malicious abuse and it is not necessary that original proceeding should have terminated. Brantley v. Rhodes-Haverty Furniture Co. [Ga.] 62 SE 222; Grimestad v. Lofgren [Minn.] 117 NW 515; Clement v. Orr [Ga. App.] 60 SE 1017.

**13.** Principal and agent. Cascarella v. National Grocer Co., 151 Mich. 15, 14 Det. Leg. N. 838, 114 NW 857.

**14.** Insurance company not liable for suit for alleged embezzlement, instituted by cashier of general agency. Equitable Life Assur. Soc. v. Lester [Tex. Civ. App.] 110 SW 499. Agent authorized to collect money has no authority to institute criminal proceedings for embezzlement. Id.

**15.** No evidence of ratification. Equitable Life Assur. Soc. v. Lester [Tex. Civ. App.] 110 SW 499. Corporation ratifying acts of agent in prosecution for larceny, liable. Cascarella v. National Grocer Co., 151 Mich. 15, 14 Det. Leg. N. 838, 114 NW 857.

**16. Evidence of agency** of prosecutor for defendant held for jury. Garden v. Holly [Ala.] 47 S 716.

**17.** Issuance of warrants, arrest thereunder made, and commitment for trial had, held sufficient. Baker v. Langley, 3 Ga. App. 751, 60 SE 371.

**18.** Baker v. Langley, 3 Ga. App. 751, 60 SE 371.

**19.** See ante, § 1 A.

**20.** See post, § 5.

**21.** Sufficient if there can be no further proceeding and no further prosecution for alleged offense without beginning new proceeding. Halberstadt v. New York Life Ins. Co., 125 App. Div. 830, 110 NYS 188.

**22.** Justice's reason for dismissing misdemeanor or charge immaterial. Donati v. Righetti [Cal. App.] 97 P 1128.

**23, 24.** Halberstadt v. New York Life Ins. Co., 125 App. Div. 830, 110 NYS 188. Dismissal as to merits on payment of costs, according to decree, to keep from going to jail, does not operate as compromise and settlement. Cascarella v. National Grocer Co., 151 Mich. 15, 114 Det. Leg. N. 838, 114 NW 857. Immediate settlement of claim, without protest, upon being arrested, bars action for malicious prosecution. Smith v. Markensohn [R. I.] 69 A 311. Otherwise where payment is made under protest and only to procure freedom. Id. No favorable termination where plaintiff was **fugitive from justice** for such period that he could not be brought to trial. Halberstadt v. New York Life Ins. Co., 125 App. Div. 830, 110 NYS 188.

**25.** Person violating injunction and in contempt, discharged on payment of costs; held a sentence to pay costs was an adjudication in contempt. Hoskins v. Somerset Coal Co., 219 Pa. 373, 68 A 843.

**26.** Millar v. Sollitt, 131 Ill. App. 196.

**27.** Deering v. Gebhard, 108 NYS 715; Equitable Life Assur. Soc. v. Lester [Tex.

of the time of the beginning of the prosecution.[23] It depends upon the honest and reasonable belief of the prosecutor, and not upon the actual facts of the cause.[29] Good faith is an element of probable cause.[30] A legitimate effort to test a third person's legal rights, when sufficiently in doubt, cannot be termed malicious prosecution.[31] A conviction in a criminal case before a court having competent jurisdiction is conclusive upon the question of probable cause,[32] and this is true though the trial was not by a jury,[33] and was subsequently reversed,[34] unless fraud, perjury or subornation of perjury in obtaining the conviction be shown.[35] An acquittal, on the other hand, is not even prima facie evidence of want of probable cause.[36]

§ 6. *Malice.*[See 10 C. L. 659]—Malice affords no ground of action if there was probable cause[37] though the rule is otherwise as to actions for abuse of process.[38] Malice does not involve the element of personal ill will,[39] and may be inferred from want of probable cause,[40] though it is not a legal presumption therefrom.[41]

§ 7. *Advice of private counsel, prosecuting attorney or magistrate.*[See 10 C. L. 660]—In some jurisdictions advice of private counsel is a complete defense apart

Civ. App.] 110 SW 499; Booraem v. Potter Hotel Co. [Cal.] 97 P 65; Kirk v. Wiener-Loeb Laundry Co., 120 La. 820, 45 S. 738; Robitzek v. Daum, 220 Pa. 61, 69 A 96; Fitzsimmons v. Mason, 135 Ill. App. 565; Frank Parmelee Co. v. Griffin, 136 Ill. App. 307.

28. Equitable Life Assur. Soc. v. Lester [Tex. Civ. App.] 110 SW 499.

29. Robitzek v. Daum, 220 Pa. 61, 69 A 96. Indications of guilt determine probable cause. Id. Does not depend upon guilt or innocence of accused. Deering v. Gebhard, 57 Misc. 451, 108 NYS 715. Knowledge of facts actual or apparent. Orefice v. Savarese, 113 NYS 175.

**Evidence of probable cause sufficient:** To show probable cause for arrest for shoplifting. Siegel, Cooper & Co. v. Tuebbecke, 133 Ill. App. 312. To show probable cause to make affidavit of fraud to procure capias ad respondendum. Fitzsimmons v. Mason, 135 Ill. App. 565. To show probable cause for charging driver with larceny of trunk. Frank Parmelee Co. v. Griffin, 136 Ill. App. 307. To show probable cause for prosecution for cutting timber and ignorance of license by owner. Gates v. Union Sawmill Co. [La.] 47 S 761. To show cause for causing arrest of laundry driver for embezzlement. Kirk v. Wiener-Loeb Laundry Co., 120 La. 820, 45 S 738. To show probable cause for arrest for attempt to extort money. Slater v. Taylor, 31 App. D. C. 100. Unexplained possession of stolen goods. Mills v. Erie R. Co., 113 NYS 641. To show guilt of refusal to pay road tax. Johnson v. Scott [Mo. App.] 114 SW 45. Conflicting evidence from which opportunity and recent possession might be found held to make case for jury. Barker v. Rouk, 134 Ill. App. 499. To warrant belief that certain property taken by plaintiff had been sold to defendant. Robitzek v. Daum, 220 Pa. 61, 69 A 96. Facts held to warrant causing arrest for disorderly conduct. Deering v. Gebhard, 57 Misc. 451, 108 NYS 715. To show probable cause for prosecution for enticing away servants. Florida East Coast R. Co. v. Groves [Fla.] 46 S 294.

**Evidence held to show want of probable cause:** Failure to make sufficient inquiry held to show want of probable cause to cause arrest for giving worthless draft. Booraem v. Potter Hotel Co. [Cal.] 97 P 65. Proof only of opportunity and suspicious conduct held to warrant finding of want of probable cause. Orefice v. Savarese, 113 NYS 175. To show want of probable cause for procuring arrest in civil action. Coleman v. Brown, 110 NYS 701.

30. Probable cause not defense where prosecution was for illegitimate purpose. Jacobson v. Doll [Neb.] 117 NW 124. Threat to inflict personal violence, no justification for prosecution on complaint to prevent such personal violence. Id. A conflict as to what defendant said after failure to sustain his case at preliminary trial does not prove bad faith, malice or want of probable cause. Kirk v. Wiener-Loeb Laundry Co., 120 La. 820, 45 S 738. Must believe charge true. Fleischauer v. Fabens [Cal. App.] 96 P 17.

As to malice, see post, § 6.

31. So held where practicing physician endeavored to prosecute "Magic Healer," under laws regulating medical practice. Bennett v. Ware [Ga. App.] 61 SE 546.

32. So held in case of conviction, on confession of guilt, before a justice having jurisdiction of offense. Smith v. Thomas [N. C.] 62 SE 772.

33. Smith v. Thomas [N. C.] 62 SE 772.

34. Smith v. Thomas [N. C.] 62 SE 772; Hegan Mantel Co. v. Alford [Ky.] 114 SW 290. But see Miller v. Sollitt, 131 Ill. App. 196.

35. Carpenter v. Sibley, 153 Cal. 215, 94 P 879; South Georgia Bldg. & Inv. Co. v. Mathews [Ga. App.] 61 SE 293.

36. Catzen v. Belcher [W. Va.] 61 SE 930. Acquittal does not affect, in weighing proof of probable cause, presumption from possession of stolen goods. Mills v. Erie R. Co., 113 NYS 641.

37. Orefice v. Savarese, 113 NYS 175; Hegan Mantel Co. v. Alford [Ky.] 114 SW 290; Miller v. Lal [N. J. Law] 71 A 63. Motive immaterial if probable cause in fact existed. Goode v. Eslow, 151 Mich. 48, 14 Det. Leg. N. 845, 114 NW 859.

38. See ante, § 1B.

39. "Personal grudge" or "ill will" not necessary. Fleischauer v. Fabens [Cal. App.] 96 P 17.

40. Wyatt v. Burdette, 43 Colo. 208, 95 P 336; Orefice v. Savarese, 113 NYS 175.

41. Wyatt v. Burdette, 43 Colo. 208, 95 P 336. Want of probable cause only evidence

from malice and want of probable cause,[42] but by the weight of authority advice of private counsel is not a complete defense although it is to be considered by the jury on questions of malice and probable cause,[43] in connection with other circumstances.[44] Whether counsel was paid for his advice may be material.[45] To be protected by advice of counsel, defendant should have made a full and honest statement of all facts known to him and such as he might have known by exercising reasonable diligence.[46] Where counsel or magistrate advises that it is doubtful if accused is guilty, prosecutor proceeds at his own risk.[47] The advice of a prosecuting attorney is a complete defense when prosecution, before acting, made a full and fair disclosure of all facts within his knowledge,[48] although by exercising reasonable diligence he might have ascertained other facts.[49] Where the prosecuting attorney investigated the case and instituted proceeding on behalf of the public, the party making complaint is not liable.[50] Advice of a justice of the peace that reasonable and probable cause existed is no sufficient defense.[51] In an action for malicious abuse of process where want of probable cause is not an element,[52] advice of counsel is no defense though it may be considered in mitigation.[53]

§ 8. *Damages.*[54]

§ 9. *General matters of pleading and practice.* See 10 C. L. 660—The complaint must set forth all the elements of the cause of action[54a] including malice[55] and favorable termination of the prosecution.[56]

*Presumptions and burden of proof.* See 10 C. L. 661—The burden of proving want of probable cause and existence of malice is upon the plaintiff.[57] Want of probable

of malice. Miller v. Lai [N. J. Law] 71 A 63.

42. Advice of reputable counsel alone, honestly sought and acted upon, is held to be a complete defense. Cragin v. De Pape [C. C. A.] 159 F 691.

43. Missouri, etc., R. Co. v. Groseclose [Tex. Civ. App.] 110 SW 477; Fitzsimmons v. Mason, 135 Ill. App. 565.

44. Conduct of servant, careful inquiry as to what had happened and how it happened, and seeking advice of counsel before taking action, show probable cause. Cragin v. De Pape [C. C. A.] 159 F 691.

45. Proper on cross-examination to ask prosecution if he paid counsel and time and amount of payment. Bartlett v. Jenkins, 150 Mich. 682, 14 Det. Leg. N. 876, 114 NW 679.

46. Failure to make reasonable investigation will charge defendant with knowledge of such facts as he might ascertain thereby. Wyatt v. Burdette, 43 Colo. 208, 95 P 336. Concealment of material facts destroys defense. Id. Defendant's testimony should disclose facts communicated to counsel, so jury may determine whether or not he made full and honest statement. Id. Held for jury whether statement was full. Thomas v. Kerr, 137 Ill. App. 479.

47. Cascarella v. National Grocer Co., 151 Mich. 15, 14 Det. Leg. N. 838, 114 NW 857.

48. Missouri, etc., R. Co. v. Groseclose [Tex. Civ. App.] 110 SW 477. No defense unless full, fair and complete statement of facts is made. Baker v. Langley, 3 Ga. App. 751, 60 SE 371. Advice of district attorney held probable cause for making affidavit. Kirk v. Wiener-Loeb Laundry Co., 120 La. 820, 45 S 738.

49. Missouri, etc., R. Co. v. Groseclose [Tex. Civ. App.] 110 SW 477.

50. Defendant entitled to assume the prosecution was instituted on behalf of public. Christy v. Rice, 152 Mich. 563, 15 Det. Leg. N. 202, 116 NW 200. Corporation not liable where agent stated facts to prosecuting attorney, giving him names of witnesses, and left it to the attorney whether or not a prosecution should be had. Florida East Coast R. Co. v. Groves [Fla.] 46 S 294.

51. Catzen v. Belcher [W. Va.] 61 SE 930. May be considered by jury as bearing on question of good faith and want of malice. Cascarella v. National Grocer Co., 151 Mich. 15, 14 Det. Leg. N. 838, 114 NW 857. That the magistrate issuing the warrant considered, from the statement of prosecutor at the time, that there was probable cause is immaterial. Bartlett v. Jenkins, 150 Mich. 682, 14 Det. Leg. N. 876, 114 NW 679.

52. See ante, § 1B.

53. Grimestad v. Lofgren [Minn.] 117 NW 515.

54. See 10 C. L. 660. See, also, Damages, 11 C. L. 985.

54a. Allegation held sufficient under S. C. Cr. Code, 1902, § 20. McCall v. Alexander [S. C.] 61 SE 1106.

55. Petition merely alleging want of probable cause insufficient. Brashears v. Frazier, 33 Ky. L. R. 662, 110 SW 826.

56. Clement v. Orr [Ga. App.] 60 SE 1017; Brashears v. Frazier, 33 Ky. L. R. 662, 110 SW 826. Petition alleging "that the said cause was terminated by plaintiff being obligated to pay the costs of said prosecution," is insufficient. Grosse v. Oppenheimer, 11 Ohio C. C. (N. S.) 374.

57. Booraem v. Potter Hotel Co. [Cal.] 97 P 65; Robitzek v. Daum, 220 Pa. 61, 69 A 96; McCall v. Alexander [S. C.] 61 SE 1106.

cause is sometimes said to raise a presumption of malice [56] and advice of counsel to raise a presumption of good faith.[59]

*Admissibility of evidence.* See 10 C. L. 661—Any evidence tending to existence of or want of probable cause is admissible.[60] Evidence that no indictment was found is admissible to show a favorable termination,[61] but not to show malice or want of probable cause.[62] Defendant may testify directly as to his own motives.[63] Where the issue is whether the prosecutor was agent of the defendant, evidence of other transactions is admissible.[64]

*Question of law and fact.* See 10 C. L. 661—The question of probable cause is a mixed question of law and fact.[65] Where the material facts are undisputed, the question is one of law.[66] It is the duty of the court to say what is probable cause and to determine as a matter of law whether the facts established do or do not amount to probable cause.[67] The presumption of larceny arising from the recent and unexplained possession of stolen goods continues after acquittal on the larceny charge,[68, 69] and if unrebutted makes the existence of probable cause a question of law.[70] It is exclusively the province of the jury to pass upon the testimony and ascertain the facts.[71] Where the facts are in dispute or capable of opposing inferences as to malice or probable cause, the question is one for the jury.[72] Existence of malice is to be determined by the jury.[73]

*Instructions.* See 10 C. L. 662—An instruction that actions for malicious prosecution have never been favored in law is properly refused.[74] Instructions as to probable cause may state what information would constitute probable cause.[75] They should clearly negative liability for malice if probable cause is found.[76]

## MANDAMUS.

§ 1. Nature and Office of Remedy in General, 643. Other Adequate Remedy, 644. Loss of Remedy by Limitations, Laches, Delay, Estoppel, etc., 645.

§ 2. Duties and Rights Enforcible by Mandamus, 645.
A. Judicial Procedure and Process, 645. Supervisory Control, 646.

58. See ante, § 6.

59. See ante, § 7.

60. Finding of not guilty in a criminal case, admissible. Jacobson v. Doll [Neb.] 117 NW 124. Admissions of guilt or language from which it might be inferred, admissible. Bartlett v. Jenkins, 150 Mich. 682, 14 Det. Leg. N. 876, 114 NW 679. Testimony of justice issuing warrant that present plaintiff complained about being arrested and made statement about settling up, which might be consistent with innocence, inadmissible. Id. Testimony of third person, present when plaintiff was accused of the crime, admissible for certain purposes. Id. Evidence that plaintiff had had other dealings with prosecutor, had owed him money and had previously spoken to him about buying the article he was accused of stealing, admissible. Id. Question on cross-examination as to whether prosecutor told prosecuting attorney that plaintiff had spoken to him about purchasing the article he was tried for stealing held proper. Id.

61, 62. Equitable Life Assur. Soc. v. Lester [Tex. Civ. App.] 110 SW 499.

63. Barker v. Ronk, 134 Ill. App. 499.

64. That alleged agent had brought suits, etc., in his own name on claims of defendant. Garden v. Holly [Ala.] 47 S 716.

65. Goode v. Eslow, 157 Mich. 48, 14 Det. Leg. N. 845, 114 NW 859; Orefice v. Savarese, 113 NYS 175. Where evidence bearing on probable cause is conflicting, facts are to be determined by jury and law applied by court. Wyatt v. Burdette, 43 Colo. 208, 95 P 336.

66. Florida East Coast R. Co. v. Groves [Fla.] 46 S 294; Orefice v. Savarese, 113 NYS 175; Slater v. Taylor, 31 App. D. C. 100; Cragin v. De Pape [C. C. A.] 159 F 691. Evidence failed to show want of probable cause, defendant held entitled to affirmative charge in his behalf. Florida East Coast R. Co. v. Groves [Fla.] 46 S 294.

67. Robitzek v. Daum, 220 Pa. 61, 69 A 96. The court properly instructed that certain information from a reliable source acted on in good faith constituted, as a matter of law, probable cause. Goode v. Eslow, 151 Mich. 48, 14 Det. Leg. N. 845, 114 NW 859. Where one of the necessary elements is clearly shown, the court may, properly, so instruct. Bartlett v. Jenkins, 150 Mich. 682, 14 Det. Leg. N. 876, 114 NW 679.

68, 69, 70. Mills v. Erie R. Co., 113 NYS 641.

71. Robitzek v Daum, 220 Pa. 61, 69 A 96.

72. Bartlett v. Jenkins, 150 Mich. 682, 14 Det. Leg. N. 876, 114 NW 679; Orefice v. Savarese, 113 NYS 175.

73. Wyatt v. Burdette, 43 Colo. 208, 95 P 336. Question as to whether plaintiff made payment by way of settlement or under duress to obtain liberty, properly referred to jury. Smith v. Markenshon [R. I.] 69 A 311.

74. Fleischauer v. Fabens [Cal. App.] 96 P 17.

75. Goode v. Eslow, 151 Mich. 48, 14 Det. Leg. N. 846, 114 NW 859.

76. Instruction held misleading. Goode v.

B. Administrative and Legislative Functions of Public Officers, 647. Duties Relating to Allowance and Payment of Claims, 649. Duties of Election Officers, 650. Enforcement of Right to Public Office, 650.
C. Quasi Public and Private Duties, 651.
§ 3. Jurisdiction and Venue, 652.
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A. Parties Plaintiff, 653.
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§ 9. Trial, Hearing and Judgment, 657.
A. Trial and Hearing, 657.
B. Judgment, 657. Costs, 658.
§ 10. Peremptory Writ, 658.
§ 11. Performance, 658.
§ 12. Review, 658.

*The scope of this topic* is noted below.[77]

§ 1. *Nature and office of remedy in general.* See 10 C. L. 862—In many states mandamus is termed as a civil action but even in such it retains some of its prerogative nature in that it is not used to redress private rights but only in matters relating to the public.[78] It is issued by appellate courts both in the exercise of their original jurisdiction and in aid of their appellate jurisdiction.[79] It is termed a writ of right [80] but the right to the writ is not absolute and it should be issued or denied in the exercise of a sound discretion in accordance with established rules of law.[81] It will not be granted when it would work injustice or produce confusion,[82] nor to perpetuate a fraud,[83] nor where the relator is not suffering any loss,[84] nor where it would prove unavailing or purposeless,[85] or where it is unnecessary,[86] nor to compel the performance of impossible [87] or illegal acts,[88] or an act which has been enjoined.[89] Manda-

Eslow, 151 Mich. 48, 14 Det. Leg. N. 845, 114 NW 859.

77. Includes all matters relating to the right to the writ and procedure thereon. Topics relating to the subject-matter in connection with which mandamus is invoked should also be consulted for fuller treatment as to the substantive right involved. For example, see Corporations as to right of stockholders to inspect books.

78. State v. Baldwin, 77 Ohio St. 532, 83 NE 907.

79. Stewart v. Torrance [Cal. App.] 98 P 396.

80. Matney v. King [Okl.] 93 P 737.

81. Lake County Com'rs v. Schradsky, 43 Colo. 84, 95 P 312; People v. Wieboldt, 138 Ill. App. 200; Id. 233 Ill. 572, 84 NE 646; Teeple v. State [Ind.] 86 NE 49; State v. Wilder, 211 Mo. 305, 109 SW 574; State v. Schnitger, 16 Wyo. 479, 95 P 698; Garfield v. U. S., 31 App. D. C. 332. Ought not to be issued in cases of doubtful right. Higgins v. Brown [Okl.] 94 P 703. The remedy should be exercised with caution and only in furtherance of justice, and to this end its exercise is not found by hard and fast rules but is largely in the discretion of the court. Nation v. Grove County Com'rs, 77 Kan. 381, 94 P 257. Mandamus will not issue in all cases where a prima facie right to it is shown, and will be denied if public policy forbids the exercise of the right sought to be enforced. Granger v. French, 152 Mich. 356, 15 Det. Leg. N. 210, 116 NW 181. If, however, relator shows a clear legal right to the relief sought and no other adequate remedy therefor, the court should exercise a sound discretion in accord with the rules of law and award the writ rather than arbitrarily withhold its issuance. State v. Donnell Mfg. Co., 129 Mo. App. 206, 107 SW 1112.

82. Teeple v. State [Ind.] 86 NE 49.

83. Fraud being admitted by demurrer, writ denied. Garfield v. U. S., 31 App. D. C. 332.

84. Will not compel state board of agriculture to sever water and sewerage connections existing between the state agricultural college and individuals owning lands adjacent. Attorney General v. State Board of Agriculture, 152 Mich. 689, 15 Det. Leg. N. 355, 116 NW 552. Not to compel board of canvassers to count rejected vote which would not affect result. Ice v. Marion County Canvassers [W. Va.] 63 SE 331.

85. Ex parte City of Mobile [Ala.] 46 S 766; State v. Schnitger, 16 Wyo. 479, 95 P 698; Hawkins v. Bare, 63 W. Va. 431, 60 SE 391. Not to compel calling of jury where it appeared that change of venue would be granted. State v. Reid, 121 La. 93, 46 S 113. Not granted to compel secretary of state to certify nominations to county auditors where it could not be done in time to get tickets printed before election. State v. Nichols [Wash.] 97 P 1087. Will not reinstate member of corporation illegally expelled where it appears that at time of his expulsion he was not properly a member. Ziegenheim v. Baltimore Wholesale Grocery Co. [Md.] 69 A 1071. Provisional writ will not issue to compel a judge to sign a bill of exceptions containing matter on account of which he refused to sign where it does not appear that he has changed his mind, as his return to the provisional writ that such bill was false would conclude the writ. Cantrell v. Golden [Tenn.] 109 SW 1154. Cannot compel placing of name on list as candidate for office abolished by legislature. Fooshe v. McDonald [S. C.] 63 SE 3.

86. Where action of board of aldermen in attempting to vacate approval of back tax assessment was a nullity, mandamus to compel board to expunge entry from records will not issue. Adams v. Clarksdale [Miss.] 48 S 242.

87. Judgment rendered in 1904 ordering

mus being a legal remedy the relator must have a clear legal right to have an act done,[90] and it must be the imperative duty of the respondent to do it.[91] Failure of another remedy without an adjudication of the merits does not conclude the relator's right.[92] In case of doubt as to the relator's right, it must be resolved against him.[93] Mandamus will not lie to set aside and so undo what has already been done, even though it ought not to have been done,[94] and cannot be made the instrument for giving a court jurisdiction of litigation on collateral matters in an irregular way.[95]

*Other adequate remedy.*[See 10 C. L. 665]—Mandamus does not lie where the petitioner has any other plain, speedy, adequate remedy at law,[96] as by appeal,[97] writ of error,[98] certiorari,[99] or a specific remedy provided by statute,[1] unless such remedy

irrigation company to deliver water during 1903 will be set aside on appeal. Agricultural Ditch Co. v. Rollins, 42 Colo. 267, 93 P 1125. Not to compel trial judge to grant suspensive appeal where no such appeal lies. Succession of Platz [La.] 47 S 119.

88. State v. Schnitger, 16 Wyo. 479, 95 P 698. Writ denied pleadings showing that it was sought to enforce an unlawful act. Garfield v. U. S., 31 App. D. C. 332.

89. State v. Murray [S. C.] 62 SE 593.

90. State v. Cummins [Ind.] 85 NE 359; Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855; State v. Boerlin [Nev.] 98 P 402; Commonwealth v. Kessler [Pa.] 70 A 941; Ginn & Co. v. School Book Board, 62 W. Va. 428, 59 SE 177; State v. Schnitger, 16 Wyo. 479, 95 P 698; Garfield v. U. S., 31 App. D. C. 332. Claim must first be established and liquidated by a judgment and if payment is refused mandamus will lie to compel same. City of Chicago v. Union Trust Co., 138 Ill. App. 545.

91. State v. Cummins [Ind.] 85 NE 359; City of Auburn v. State, 170 Ind. 511, 83 NE 997, afd. 170 Ind. 534, 84 NE 990; Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855; Commonwealth v. Kessler [Pa.] 70 A 941; State v. Schnitger, 16 Wyo. 479, 95 P 698; State v. Russell [Okl.] 95 P 463; Garfield v. U. S., 31 App. D. C. 332. Mandamus will not issue to compel commissioner of banking and insurance to accept certain sum of money and issue license, etc., before it is shown by law to be duty of such commissioner to so do. Trinity Life & Annuity Soc. v. Love [Tex.] 115 SW 26.

92. An applicant for a liquor license held not to be concluded from suing out a writ of mandamus by the finding and determination of a court in certiorari proceedings brought to set aside an order of a city council revoking his license, where certiorari finding went off on other grounds than that claimed as a defense in the mandamus proceedings. Cox v. Common Council of Jackson, 152 Mich. 630, 15 Det. Leg. N. 337, 116 NW 456.

93. State v. Miller, 129 Mo. App. 390, 108 SW 603.

94. Prayer that examination by commission be set aside on account of irregularities denied. People v. Chicago, 131 Ill. App. 266.

95. Mandamus to issue liquor license was an indirect attempt to contest the validity of an election. State v. Martin [Fla.] 46 S 424.

96. City of Auburn v. State, 170 Ind. 511, 83 NE 997; State v. Boerlin [Nev.] 98 P 402; State v. Caruthers [Okl. Cr. App.] 98 P 474; State v. Schnitger, 16 Wyo. 479, 95 P 698; Lenhart v. Newton Tp. Board of Education, 5 Ohio N. P. (N. S.) 129. Mandamus unnecessary to compel city to pay contractor amount bid for property delinquent for special assessment, city having properly made appropriation for purpose. City of Chicago v. Union Trust Co., 138 Ill. App. 545; Nation v. Gove County Com'rs, 77 Kan. 381, 94 P 257. Not to compel issue and delivery of stock unless it has some special or peculiar value or corporate control is in issue. State v. Jumbo Extension Min. Co. [Nev.] 94 P 74. Not to compel the county treasurer to pay warrant since suit against his sureties affords adequate remedy. Hines v. Salter [Ala.] 45 S 587. Peremptory writ of mandamus to compel board of county commissioners to consent to an appointment of appraisers of lands claimed to be school lands, it being conceded that such lands had prior to the application for such consent been patented by the state to a purchaser thereof. If land had been illegally conveyed, action to have same restored and conveyance set aside adequate. Nation v. Gove County Com'rs, 77 Kan. 381, 94 P 257.

97. Scheerer & Co. v. Hutton [Cal. App.] 94 P 849; Lindsey v. Carlton [Colo.] 96 P 997; Cheney v. Barker, 198 Mass. 356, 84 NE 492; Smith v. Auditor General, 151 Mich. 622, 15 Det. Leg. N. 65, 115 NW 735; Tarsney v. Lockwood, 152 Mich. 641, 15 Det. Leg. N. 321, 116 NW 465; Braun v. Campbell [Wis.] 119 NW 112. Not to vacate interlocutory order which is reviewable on appeal from final decree. Ex parte Hurt [Ala.] 47 S 264. Not to compel remand to state court when appealable judgment has entered. Ex parte Nebraska, 209 U. S. 436, 52 Law. Ed. 876. Would not compel a judge to proceed with a case on an agreed statement of facts where an equity suit to cancel the agreement was pending, although it stated no cause of action, as his action was reviewable by appeal or error. State v. McCune, 129 Mo. App. 511, 107 SW 1030. Not to compel settlement of bill of exceptions denied as not presented in time, as a question of fact reviewable on appeal is presented. Stewart v. Torrance [Cal. App.] 98 P 396. Not to compel issue of injunction where refusal is appealable. Josephson v. Powers, 121 La. 190, 46 S 206.

98. Lindsey v. Carlton [Colo.] 96 P 997; Braun v. Campbell [Wis.] 118 NW 112. Not to compel change of venue. Hamilton v. Smart [Kan.] 95 P 836. Mandamus will not lie to compel a board of equalization to make a record of objections and requests for rulings which are not required by law to be spread on the record of its proceedings. Such matters should be made a matter of

is concurrent and not exclusive.[2] A premature review cannot be obtained by a writ of mandamus.[3] The legal remedy barring interference by mandamus must not only be adequate but it must be specific and appropriate to the particular circumstances of the case and must afford relief on the subject-matter of the controversy.[4] A remedy at equity is not a remedy at law but is to be considered in the exercise of the court's discretion.[5]

*Loss of remedy by limitations, laches, delay, estoppel, etc.*[See 10 C. L. 666]—The writ may be denied because of laches.[6]

§ 2. *Duties and rights enforcible by mandamus. A. Judicial procedure and process.*[See 10 C. L. 667]—The writ of mandamus does not lie from a superior court to an inferior court to control its judicial acts,[7] or the exercise of judicial discretion,[8] unless for an abuse thereof.[9] Where a court refuses [10] or unwarrantably delays to act within its jurisdiction,[11] or acts beyond its jurisdiction,[12] action may be com-

record by a bill of exceptions. State v. State Board of Equalization & Assessment [Neb.] 115 NW 789.

99. Not for the purpose of having judgment of dismissal entered an oral order of dismissal. Kingsbery v. People's Furniture Co., 130 Ga. 365, 60 SE 865. Not to compel justice of the peace to discharge garnishee and release money garnished. Tillman v. State [Ala.] 46 S 686.

1. State v. Martin [Fla.] 46 S 424. Election contests provided for by statute. Crosby v. Haverly [Neb.] 118 NW 123.

2. The right given by statute to recover damages upon the official bond of an official who refuses to act exists independently of the right to compel performance by mandamus. Payne v. Baehr, 153 Cal. 441, 95 P 895. The remedy of mandamus granted by congress to enforce interstate commerce act is cumulative and does not exclude other remedies. Merchants' Coal Co. v. Fairmont Coal Co. [C. C. A.] 160 F 769.

3. Where there was no abuse of discretion and judge had jurisdiction over question of removability of action. Ex parte Nebraska, 209 U. S. 436, 52 Law. Ed. 876.

4. International Water Co. v. El Paso [Tex. Civ. App.] 112 SW 816. Pendency of writ of error to ruling of circuit court dismissing appeal of railroad from refusal by board of supervisors to act on petition asking board's consent to a proposed alteration of location of a road no bar to prosecution of writ of error to ruling of court refusing a writ of mandamus to compel board to act in matter on ground that remedy by appeal was adequate. Carolina, etc., R. Co. v. Scott County Sup'rs [Va.] 63 SE 412. Remedy by appeal from order denying application to take depositions is inadequate. Gas & Elec. Co. v. San Francisco Super. Ct. [Cal.] 99 P 359.

5. State v. Donnell Mfg. Co., 129 Mo. App. 206, 107 SW 1112; State v. Baldwin, 77 Ohio St. 532, 83 NE 907. When proceeding in equity is pending between same parties at time of application for mandamus, in which suit relief sought by mandamus could be fully administered, it is proper to refuse the writ. State v. Donnell Mfg. Co., 129 Mo. App. 206, 107 SW. 1112.

6. Eleven months' delay in asserting right after abolition of office held fatal. People v. Willcox, 112 NYS 341. Application must be made within reasonable time after alleged default or neglect of duty. Teeple v. State [Ind.] 86 NE 49. After lapse of over thirty years creditor of school board cannot compel tax levy. State v. New Orleans, 121 La. 762, 46 S 798.

7. Lindsey v. Carlton [Colo.] 96 P. 997. Mandamus cannot be used to perform the office of an appeal or writ of error. Ex parte Nebraska, 209 U. S. 436, 52 Law. Ed. 876. Cannot be compelled to make an entry which it must make on "satisfactory proof" being made. Jones v. Drake [Ky.] 112 SW 644. Cannot compel settlement of any particular bill of exceptions. People v. Lapique [Cal. App.] 98 P 46. Correction of statement of facts not compelled. Perry v. Turner [Tex. Civ. App.] 108 SW 194. Not to compel allowance of bill of exceptions after expiration of time for filing. State v. Taylor [Mo. App.] 114 SW 1029. As an intervention will not be allowed to retard the principal suit, mandamus will not lie to compel the granting of a suspensive appeal at the request of the intervenor whose intervention had been dismissed on exception and an appeal allowed. Filhiol v. Schmidt [La.] 48 S 157. Will not issue to compel entry of judgment so long as there remains a question for a judicial determination. Rogers v. Walsh, 114 NYS 185.

8. Matney v. King [Okl.] 93 P 737. Issuance of temporary injunction not compelled. Mahon v. Donovan [Mich.] 15 Det. Leg. N. 807, 118 NW 1. Change of venue on conflicting evidence not compelled. Glazier v. Ingham Circuit Judge [Mich.] 15 Det. Leg. N. 465, 116 NW 1007.

9. Glazier v. Ingham Circuit Judge [Mich.] 15 Det. Leg. N. 465, 116 NW 1007. Is proper remedy to enforce dismissal of criminal action where right to speedy trial has been denied in abuse of discretion. State v. Caruthers [Okl. Cr. App.] 98 P 474.

10. Jones v. Drake [Ky.] 112 SW 644; Higgins v. Brown [Okl.] 94 P 703; State v. Williams, 136 Wis. 1, 116 NW 225; State v. Helms, 136 Wis. 432, 118 NW 158. Where a court persists in refusing to permit the trial of a case to proceed, the remedy is by mandamus. Hirschfield v. Hassett, 59 Misc. 154, 110 NYS 264. Mandamus lies against a district court for refusal to take jurisdiction of an action and proceed, action of court being based upon a misconstruction of the statute as to its duty in the premises. State v. Ninth Judicial Dist. Ct. [Mont.] 99 P 291.

11. Judge who unreasonably delays a decision may be compelled to decide on the

pelled; and particular action may be compelled where the right of relator thereto is beyond all question [12] and there is no other adequate and sufficient remedy.[14] Where a duty devolving on a court is ministerial and imperative, its performance may be compelled.[15] The duties of an officer of court are ordinarily ministerial and subject to control by mandamus,[16] but are occasionally judicial.[17] Mandamus lies to compel proper disposition of criminal proceedings as well as civil.[18]

*Supervisory control.* See 10 C. L. 670—A considerable supervisory power is often exercised over lower courts by the use of mandamus.[19] Courts will not exercise supervisory control upon light occasions,[20] nor will the writ be used to serve the purpose of a writ of error to review judicial action of the trial court.[21] The power will

ground of abuse of discretion. Wyatt v. Arnot [Cal. App.] 94 P 86.

12. State v. Williams, 136 Wis. 1, 116 NW 225; State v. Helms, 136 Wis. 432, 118 NW 158.

13. Where the trial court strikes out a defective statement of fact without an opportunity of amendment, mandamus lies to compel him to vacate the order to strike out. State v. Steiner [Wash.] 98 P 609. Since an appeal does not lie from an appointment of an administrator by the probate court, the court may be compelled to follow the priority fixed by statute by mandamus. In re Flick's Estate, 212 Mo. 275, 110 SW 1074. Lies to compel a judge to require a witness before a notary taking a deposition to answer questions. In re Scott [Cal. App.] 96 P 385. If judge had no discretion to refuse in receivership proceedings to allow a petition for leave to file an independent suit, petitioner is entitled to a writ of mandate to compel the judge to grant the petition. De Forrest v. Coffey [Cal.] 98 P 27. Unwarranted refusal to admit to bail. State v. McMillan [Okl.] 96 P 618. Where more than two and one-half years had passed since one of defendants was defaulted in an action and there was little prospect of final judgment on account of absence of some of the defendants, the defaulted defendant may by mandamus compel the dismissal of the suit against him because of plaintiff's failure to have judgment entered within six months after he was entitled thereto, as the court is expressly authorized to do by § 1004 of the Code. State v. Ninth Judicial Dist. Ct., 37 Mont. 298, 96 P 337. Mandamus will not lie to compel a district judge to enter of record the district court of a certain county in his district an alleged order admitting defendant to bail, it being clear that order was not properly entitled to record there. State v. Russell [Okl.] 95 P 463. Mandamus will compel judge of district court as successor of the United States court in the Indian Territory to cause by proper order all matters, proceedings, records, books, papers and documents pertaining to all original causes or proceedings relating to estates transferred to such district court from such United States court to be transferred to the county court of such county. Davis v. Caruthers [Okl.] 97 P 581. Mandamus will lie to compel the municipal court of city of New York to vacate an order staying proceedings until plaintiff pays a judgment for costs in a prior action between the same parties and to compel the court to set the case down for hearing. McKnown v. Oppenheimer, 111 NYS 609. Mandamus lies to compel a court to issue a commission to take the deposition of a nonresident witness in the cases defined by the code before judgment. Gas & Elec. Co. v. San Francisco Super. Ct. [Cal.] 99 P 359. Mandamus lies to compel the court to fix the amount of the undertaking to be given in a partition suit as provided by statute. Gordan v. Graham, 153 Cal. 297, 95 P 145. Will issue to compel court to fix amount of supersedeas bond to which party is entitled. State v. Yakey, 48 Wash. 419, 93 P 928. Mandamus lies to compel a judge to make and file a statement of facts for use on appeal as required by statute. Applebaum v. Bass [Tex. Civ. App.] 113 SW 173. Not against a court unless it be clearly shown court has refused to perform some manifest duty. Lindsey v. Carlton [Colo.] 96 P 997.

14. See § 1, Other Adequate Remedy.

15. Braun v. Campbell [Wis.] 119 NW 112. Signing a judgment is a ministerial act not involving discretion which may be compelled. Montgomery v. Viers [Ky.] 114 SW 851. A circuit court may compel a justice to correct his docket entries to make them correctly represent facts. Braun v. Campbell [Wis.] 119 NW 112.

16. Will compel clerk to enter on docket names of witnesses summoned by the state in a criminal trial and to deliver file to defendant's attorneys and make and deliver a transcript of such subpoenas as provided for by statute. Jackson v. Mobley [Ala.] 47 S 590.

17. Not allowed to coerce clerk to attempt the collection and taxation as costs of such jury fees in cases no longer pending wherein the liability of parties for such fees has been finally determined, and a general order will not be made in anticipation of delinquency in cases hereafter to be tried. State Kingsley v. Hoover [Kan.] 98 P 276.

18. Sentence suspended and case continued against defendant's protest. Marks v. Wentworth, 199 Mass. 44, 85 NE 81. May compel criminal court to try criminal prosecution which it has dismissed. State v. Helms, 136 Wis. 432, 118 NW 158.

19. Supreme court has same supervisory power as court of king's bench had at common law. Matney v. King [Okl.] 93 P 737. The supreme court of Louisiana has no power to order a recueed case transferred but may in a proper case order the judge ad hoc to act. State v. Reid, 120 La. 200, 45 S 103.

See ante, this section, for illustrations.

20. State v. Helms, 136 Wis. 432, 118 NW 158.

21. State v. Williams, 136 Wis. 1, 116 NW 225; State v. Helms, 136 Wis. 432, 118 NW 158.

be exercised to reverse an erroneous determination of a preliminary question which precludes consideration of the merits.[22]

(§ 2) *B. Administrative and legislative functions of public officers.* See 10 C. L. 671 Mandamus lies to compel the performance of ministerial duties of public officers,[23] to compel drainage commissioners to remove injurious conditions of drainage,[24] unless they are vested with discretion in relation thereto,[25] in which case there can

22. Ruling that action of grand jury in returning indictment is void, and that no indictment exists against accused, is preliminary question. State v. Williams, 136 Wis. 1, 116 NW 225. Any question arising by objection before the jury is impaneled and sworn is a preliminary question. State v. Helms, 136 Wis. 432, 118 NW 158.

23. The power of the Utah supreme court to issue mandamus is not limited to appellate proceedings but extends to the enforcement of official action by the state board of examiners. State v. Cutler [Utah] 95 P 1071. **Duties held ministerial and enforcible: Recording judgment in condemnation proceeding** by the registrar of conveyances in Hawaii. United States v. Merriam [C. C. A.] 161 F 303. **Issue of summons** by clerk of court. In re North American Mercantile Agency Co., 124 App. Div. 657, 109 NYS 165. To compel district commissioners **to enroll a police officer** in such class as he is entitled. MacFarland v. U. S., 31 App. D. C. 321. A tax collector may be mandamused **to collect assessments** on property that has escaped taxation, though many of the assessments may be barred. Adams v. Clarksdale [Miss.] 48 S 242. Duty of board to **cancel illegal water lien** against property. Hoboken Mfrs.' R. Co. v. Hoboken [N. J. Law] 68 A 1098. Duty imposed by statute 1907, p. 260, c. 214, **to furnish list of voters** who had registered, since the great register of 1906. Cerini v. De Long, 7 Cal. App. 398, 94 P 582. To compel the performance of the ministerial duty of **levying poll tax.** Southern R. Co. v. Mecklenburg County Com'rs [N. C.] 61 SE 690. To compel officer **to make entry on minutes** of a contract judgment or other proceeding where it is his duty as officer to make such record and he fails to do so. Jones v. Bank of Cumming [Ga.] 63 SE 36. To compel officer **to approve contract** if he has no discretion in regard thereto. Id. To compel a treasurer **to transfer fund** into the possession of township road commissioners who are entitled thereto. Coleman v. Coleman [N. C.] 62 SE 415. To compel president of board of trustees of city of fifth class **to sign ordinance.** City of San Buenaventura v. McGuire [Cal. App.] 97 P 526. To compel the secretary of state to **purchase copies of annotated statutes** published by relator. State v. Junkin [Neb.] 115 NW 546. To compel municipal authorities **to allow children to attend most convenient school.** People v. Alton, 233 Ill. 542, 84 NE 664. To compel the **issue of a permit to dig up streets,** where right thereto was absolute. Cheney v. Barker, 198 Mass. 356, 84 NE 492. To compel mayor, auditor and treasurer **to pay water rents into general fund** as provided by valid ordinance. Sinclair v. Brightman, 198 Mass. 248, 84 NE 453.

24. Evidence held to warrant findings and dismissal of petition, it being without power of commission to remedy wrongs with money assessed. Latham v. Holland, 133 Ill. App. 144. To compel a board of general appraisers **to examine and decide a matter** over which they had acquired jurisdiction. Prosser v. U. S. [C. C. A.] 158 F 971. To compel public officers **to remove obstructions from streets.** People v. Ahearn, 124 App. Div. 840, 109 NYS 249. **To compel issue of license** to which relator is entitled. City of Montpelier v. Mills [Ind.] 85 NE 6; Griffin v. U. S., 30 App. D. C. 291; Cox v. Jackson Common Council, 152 Mich. 630, 15 Det. Leg. N. 337, 116 NW 456. Will compel insurance commissioner to issue license to a company to do business. Metropolitan Life Ins. Co. v. Love [Tex.] 108 SW 821. Duty of mayor to sign license duly ordered by aldermen. State v. Russell [Mo. App.] 110 SW 667. No right to refuse license to graduate of school of pharmacy, because in opinion of the board the school is not strict enough in its requirements. State v. Matthews [S. C.] 62 SE 695.

25. The exercise of discretion by executive officers acting within the scope of their authority will not be questioned by mandamus. Griffin v. U. S., 30 App. D. C. 291; Brown v. Ansel [S. C.] 63 SE 449. Judgment not to be controlled unless fraud or corruption is shown. People v. Henry, 236 Ill. 124, 86 NE 195.

**Held to involve discretion:** Discretion of county commissioners as to **amount of tax levy.** State v. Boerlin [Nev.] 98 P 402. **Findings of trial board** appointed by civil service commission. People v. Chicago, 234 Ill. 416, 84 NE 1044.

**State board of education** will not be compelled to set aside an order affirming the act of the superintendent of public instruction. McFall v. State Board of Education [Tex.] 110 SW 739. Writ denied where school board had power to **discharge teacher** without giving her a hearing. United States v. Hoover, 31 App. D. C. 311. The exercise of discretion by a civil service commission **in determining physical and other tests to be applied at an examination** will not ordinarily be interfered with or controlled by the courts in a mandamus proceeding. People v. Chicago, 131 Ill. App. 266. Power of school board **to call special meeting** on petition. Kirchner v. Muscatine County Board of Directors [Iowa] 118 NW 51. Decision of drainage commissioners **as to whether location of drain was practicable.** People v. Henry, 236 Ill. 124, 86 NE 195. Will not compel county commissioners to perform their duty **to repair or build court house.** Ward v. Beauford County Com'rs, 146 N. C. 534, 60 SE 418.

**Closing of alley** by city council. People v. Wieboldt, 233 Ill. 572, 84 NE 646. Duty **to advertise application for franchise.** McGinnis v. San Jose, 153 Cal. 711, 96 P 367. Mandamus will not lie to compel an insurance commissioner **to issue license** before

be no review except for an abuse thereof,[26] or a refusal to exercise the discretion.[27] It will lie also in some cases to compel the undoing of an unauthorized official act.[28] The exercise of the executive police power will not ordinarily be controlled by mandamus.[29] The duty sought to be compelled must be a clear and absolute one imposed by law,[30] and the officer must have the power to perform,[31] as for example where performance of an alleged duty requires payment of money it must appear that there is money which the officer has a right to apply.[32] The fact, however, that a fund has been wrongfully disbarred by the officer is no excuse.[33] The fact that the time

he has completed required investigations of the affairs of the company. Metropolitan Life Ins. Co. v. Love [Tex.] 108 SW 821. Not lie to compel county attorney **to institute criminal prosecution.** Murphy v. Sumners [Tex. Cr. App.] 112 SW 1070. Courts will not interfere with action of city council in **refusing to appoint civil war veteran to office** where they were required to give preference to veterans, other qualifications being equal unless the good faith of the council is impeached. Robertson v. Alberson [Iowa] 114 NW 885. Not to compel **city engineer to make certificates of partial performance** of work where statute makes it discretionary. State v. Icke, 136 Wis. 583, 118 NW 196.

**26.** Robertson v. Alberson [Iowa] 114 NW 885. If board of health arbitrarily or unreasonably refuse permit to keep, sell and kill poultry in certain locality in such city, remedy is by mandamus. Cohen v. Department of Health, 113 NYS 88.

**27.** Where discretion to determine whether bids were regular and whether bank whose bid was highest on face of papers would be a safe depository had not been exercised. State v. Louisiana State Board Agriculture & Immigration [La.] 48 S 148. Duty under Code 1904, § 1294b, to either consent to the alteration of a highway by a railroad upon being petitioned, or to refuse such request, may be enforced by mandamus against board of supervisors, no element of discretion being involved. Carolina C. & O. R. Co. v. Scott County Sup'rs [Va.] 63 SE 412.

**28.** Mandamus to compel secretary to erase entries upon roll and restore petitioner's name thereto, officer having changed roll after power to do so was lost. Garfield v. U. S., 30 App. D. C. 177. Mandamus to compel secretary to undo his unauthorized act held not to be refused on theory that case is within provisions of act of July 1, 1902 (32 Stat. at L. 641, c. 1362), since it did not appear whether or not name was on original or other tribal rolls. Garfield v. U. S., 29 S. Ct. 62.

**29.** Mandamus to compel mayor of city to enforce Sunday closing saloon laws denied. People v. Busse, 141 Ill. App. 218.

**30.** People v. Chicago, 131 Ill. App. 266; State v. Edwards, 33 Utah, 243, 93 P 720; Teeple v. State [Ind.] 86 NE 49; State v. Krumenauer, 135 Wis. 185, 115 NW 798; State v. Anderson, 170 Ind. 540, 85 NE 17. Will not command a state officer to do what the law does not authorize him to do. State v. Michel [La.] 47 S 460. Officer authorized act after estimate had been made by a county board cannot be compelled to act before estimate. McGill v. Osborne [Ga.] 62 SE 811. Cannot compel ordinary to enter municipal contract not validly made. Jones v. Bank of Cumming [Ga.] 63 SE 36. Will not compel county supervisors to levy tax not within their official duty or power. State v. Goodwin [S. C.] 62 SE 1100. A city having contracted a debt beyond the debt limit, its officers cannot be required to levy a tax to pay the debt. City of Bardwell v. Southern Engine & Boiler Works [Ky.] 113 SW 97. Assessment by council of cost of street. City of Auburn v. State, 170 Ind. 511, 83 NE 997, afd. 170 Ind. 534, 84 NE 990. Must show the existence of all facts essential to his right and that there is no impediment to granting relief as prayed for. Harrison v. Dickinson [Tex. Civ. App.] 113 SW 776.

**31.** State v. Anderson, 170 Ind. 540, 85 NE 17. After the tax roll has passed beyond the control of the clerk into the hands of the treasurer of a town, all authority on the part of the clerk to change it has been exhausted. State v. Krumenauer, 135 Wis. 185, 115 NW 798. Secretary of the interior cannot be mandamused to deliver a patent to public lands to entryman where entry had been canceled and affirmed on appeal and through mistake clerk issued patent, secretary being without power to correct mistake before patent had passed out of his possession. Garfield v. U. S., 31 App. D. C. 338. Where a justice was appointed to hold court in a district during January and would not be assigned again to that district until July, and the hearing on the return of an order to show cause why mandamus should not issue to compel him to retain jurisdiction in that district and there try an action was not had until February, mandamus was properly denied since he could not be compelled to hear an action in a district to which he had not been assigned. Nitchie v. Weil, 125 App. Div. 378, 109 NYS 758.

**32.** Petition did not show that trustees had money to furnish transportation of school childern demanded. State v. Anderson, 170 Ind. 540, 85 NE 17; State v. Johns, 170 Ind. 233, 84 NE 1. In order to justify a writ requiring a county board to appropriate money to meet half the expenses of constructing a bridge, even where authorized by the highway commissioners, it should appear that there is money which might lawfully be appropriated for the purpose. People v. Cumberland County Sup'rs, 234 Ill. 412, 84 NE 1043.

**33.** The fact that an ordinary, whose duty it was to hire out certain convicts and collect and disburse the hire for the same, has, after hiring them out and collecting the hire, wrongfully disbursed the fund thus received by him will not prevent mandamus absolute from being granted to compel payment over of such money as it was the legal duty of the ordinary to pay over. Hutcheson v. Manson [Ga.] 62 SE 189.

within which an official act should have been done has passed is no ground for refusing mandamus where there is still sufficient time to accomplish the pupose of the act.[34] Mandamus will not compel an officer to perform an anticipated duty which he may never be obligated under the law to perform.[35] Mandamus is limited by statute in some states to executive or ministerial officers who have failed to perform or omitted to do some act, the performance or omission of which is enjoined by law.[36] When mandamus is sought to compel an officer to perform a duty enjoined by statute, the court will not permit the officer to assert that it is unconstitutional,[37] unless the nature of the office is such as to require him to raise the question or his personal interest is such as to entitle him to do so.[38] Mandamus will not compel performance of a contractual duty even by municipal or other corporations or their officers.[39] A board performing statutory duties of private and public interest and not political duties merely may be restrained from exceeding its powers.[40] Where statute provides that mandamus shall not issue against the governor, it does not lie against a board of which he is a member.[41]

*Duties relating to allowance and payment of claims.* See 10 C. L. 673—Where a claim is duly established, mandamus will lie to compel payment of the same from funds on hand [42] or compel the levy of a tax to pay it,[43] but in some jurisdictions it is held that, when it is sought to enforce payment of an audited claim, mandamus will be refused if it appears that there are no funds available to pay the same.[44] In Louisiana statute prohibits mandamus against city officers to enforce payment out of the

34. Treasurer to file at a certain time a list of all persons paying a poll tax. Tazewell v. Herman, 108 Va. 416, 60 SE 767.

35. The certificate of the secretary of state as to the geographical center of any county is intended as a guidance to those whose duty it is to declare the result of county seat elections and the secretary is not required to prepare same until needed for that purpose. City of Blackwell v. Cross [Okl.] 98 P 905.

36. Wallace v. Grand Lodge U. B. of F., 82 Ky. L. R. 1013, 107 SW 724.

37, 38. State v. Burley [S. C.] 61 SE 255.

39. State v. Icke, 136 Wis. 583, 118 NW 196.

40. Board of state canvassers when canvassing the votes at a primary election. Bradley v. State Canvassers [Mich.] 15 Det. Leg. N. 728, 117 NW 649.

41. McFall v. State Board of Education [Tex.] 110 SW 739.

42. To compel treasurer to pay warrant. City & County of Denver v. Bottom [Colo.] 98 P 13. Payment of award in road proceedings compelled. Barber v. Delaware [N. J. Law] 69 A 641. Mandamus lies to compel the application of so much of a special fund as has been collected to the payment of certificates of indebtedness issued in payment of the work for which betterments were assessed for such special fund. People v. Monroe County Treasurer, 191 N. Y. 15, 83 NE 661. A judgment creditor of a city may compel payment by mandamus from funds on hand. Blocker v. Owensboro, 83 Ky. L. R. 478, 110 SW 369. The allowance and payment of the **compensation of public officers** fixed by law may be enforced by mandamus proceedings against auditing and disbursing officers. State v. Edwards, 33 Utah, 243, 93 P 720; Granger v. French, 152 Mich. 356, 15 Det. Leg. N. 210, 116 NW 181. Mandamus granted by statute to compel the performance of an act which the law especially enjoins as a duty resulting from office, trust or station furnishes a remedy for one having a claim for services performed for a state board, but such remedy is not exclusive, merely concurrent. Stern v. State Dental Examiners [Wash.] 96 P 693. Before mandamus to compel a city auditor to pay a city officer's salary into court to satisfy a judgment will be denied because the auditor has already drawn the warrant for the salary to another under an assignment void because executed and filed before the end of the month, it must appear that the auditor acted in good faith and that the warrant has been paid. In re Wilkes [Cal. App.] 97 P 677. To compel mayor to sign warrant for salary. Crane v. Shoenthal [N. J. Law] 69 A 972. Where borough council had ordered payment of a debt, borough president may be compelled to sign order; signing being a ministerial act, judgment of counsel determines whether bill should be paid. Breslin v. Earley, 36 Pa. Super. Ct. 49.

43. To levy tax to meet interest on bonds. Pitt County Com'rs v. MacDonald, McKoy & Co. [N. C.] 61 SE 643. The remedy of a contractor employed by city entitled to have special assessment provided for by ordinance levied and collected is by mandamus. Conway v. Chicago, 237 Ill. 128, 86 NE 619. A teacher may by mandamus compel raising of funds for the payment of his services. Dennington v. Roberta, 130 Ga. 494, 61 SE 20. Judgment creditor may compel tax levy. Lake County Com'rs v. Schradsky, 43 Colo. 84, 95 P 312; Blocker v. Owensboro, 33 Ky. L. R. 478, 110 SW 869.

44. State v. Burley [S. C.] 61 SE 255. Under South Carolina Code 1902, § 609, mandamus will not lie to require the issuance and payment of a check for past county indebtedness for which no funds had been reported. State v. Goodwin [S. C.] 62 SE 1100.

treasury.[45] While officers and boards charged with the auditing and examination of claims act sometimes in a quasi judicial capacity, their ministerial acts may be controlled.[46]

*Duties of election officers.* See 10 C. L. 674—Mandamus lies to compel election officials to act [47] provided the duty be clear and specific,[48] but it will not review their judicial action.[49]

*Enforcement of right to public office.* See 10 C. L. 674—Mandamus lies where one has been refused admittance [50] or wrongfully turned out of any office.[51] Title to office, however, cannot be determined by mandamus as between adverse claimants,[52] or

45. State v. New Orleans, 121 La. 762, 46 S 798; State v. Kennedy, 121 La. 757, 46 S 796.

46. The board of examiners created by the Utah Const. art. 7, § 13, with power to examine all claims against the state except salaries and compensation fixed by law, may in a proper case be subject to mandamus. State v. Edwards, 33 Utah, 243, 93 P 720. While the state board of examiners in the consideration of claims acts in a quasi judicial capacity, and may exercise discretion in the discharge of its official duties, it may not arbitrarily refuse to allow a claim involving questions of law only, and if it does claimant may compel allowance by mandamus. Court stenographer. State v. Cutler [Utah] 95 P 1071. Lies to compel supervisor of county **to publish statement of claims audited** by county commissioners as required by 1 Code Laws 1902, § 769. State v. Burley [S. C.] 61 SE 255.

47. Canvassing of the election and declaring the result by the county court ministerial duties. State v. Smith, 129 Mo. App. 49, 107 SW 1051. May compel canvassing officers to canvass returns. Cerini v. De Long, 7 Cal. App. 398, 94 P 582. May compel secretary of state to file nomination papers. State v. Swanger, 212 Mo. 472, 111 SW 7. To prevent secretary of state from certifying the names of certain persons as candidates for office denied. State v. Blaisdell [N. D.] 118 NW 141. Under the charter of the City of Denver the appointment of an election judge by any member of the election commission is final and must be ratified, and for failure mandamus will lie to compel the commission to certify appointments duly made. People v. Youngs, 43 Colo. 334, 95 P 1067. To require trustees of school district to hold election to determine location of a school site. State v. Lyons, 37 Mont. 354, 96 P 922. The supreme court has no jurisdiction under election laws to determine in mandamus the validity of certain ballots mentioned in the writ contained in boxes deposited with the city clerk and to order a recount and recanvass of such ballots. People v. Albany County Sup'rs [N. Y.] 84 NE 1118. The rights of a candidate arising under the primary election laws of Florida are such that when violated mandamus may be used to compel the performance of the duties imposed upon members of the congressional or standing committee of a political party in a congressional district. D'Alemberte v. State [Fla.] 47 S 489. Mandamus will lie to compel board of aldermen to hear contested election case. Sheehan v. Manchester, 74 N. H. 445, 68 A 872. Mandamus will not compel a board of canvassers for the mere personal satisfaction of a candidate to count a rejected vote. Ice v. Marion County Canvassers [W. Va.] 63 SE 331.

48. Mandamus will not be awarded against committee of political party to compel it to declare a person nominated who appears to be nominated by face of returns, when the committee has allowed an opposing candidate recount and has not yet made recount nor declared result of election. Kump v. McDonald [W. Va.] 61 SE 908. Does not lie to compel county board of canvassers to count ballots cast at a primary election for nominatione which have been rejected by the election board under provisions of the statutes because not signed by the election judges and not indorsed with the signatures of any of the election offiers. Crosby v. Haverly [Neb.] 118 NW 123. Mandamus to require the holding of an election for the determination of a school house site cannot be defeated on the ground that the discretion of the board will be controlled, since they have no discretion in the matter, nor is the financial condition of the district any defense, since the electors are the final arbiters of that question. State v. Lyons, 37 Mont. 354, 96 P 922.

49. Where election officers are vested with judicial powers, court has no power to compel them to add a name or remove one from voting list. Gainer v. Dunn [R. I.] 69 A 336; Id. [R. I.] 69 A 851.

50. Lies to compel a judge to examine credentials of two candidates for office of clerk to determine which one holds prima facie title to the office. Matney v. King [Okl.] 93 P 737. Under statutes providing for a county committee to be made up of those duly elected upon delivery of the custodian of the primary records of certificates of election, one possessing such certificate is entitled to mandamus to compel membership in the committee, the committee having no power to review his election. People v. Republican County Committee, 124 App. Div. 427, 108 NYS 1051.

51. Matney v. King [Okl.] 93 P 737. Compel restoration of office to one wrongfully removed. State v. Miles, 210 Mo. 127, 109 SW 595. Detective in police department illegally removed by mayor. State v. Baldwin, 77 Ohio St. 532, 83 NE 907. In mandamus to compel reinstatement of city employe removed contrary to civil service rules, court will not refuse to reinstate petitioner because removing officer would immediately remove him for causes stated in the answer, it being presumed that the removing officer would only remove such employe after a fair investigation of the charges. Fruitt v. Philadelphia, 221 Pa. 331, 70 A 757.

52. Burke v. Bessemer City Com'rs [N.

against one having color of right,[53] and so one wrongfully removed from office cannot compel his reinstatement by mandamus without showing that such office is vacant.[54] Mandamus is the proper remedy to compel the delivery by a former incumbent of public office of books, records and paraphernalia belonging thereto to the person having a clear prima facie title to the office and its belongings,[55] but such duty does not rest upon a mere private individual who happens to be in possession of such books, records, etc., and mandamus will not lie to compel delivery to the office entitled thereto,[56] nor will the writ issue to compel the district judge to enter an order recognizing one as the lawful incumbent of an office.[57] Where title to office is undisputed or has been settled by quo warranto, mandamus lies to compel consideration of the bond offered but not its acceptance.[58] Where a police commissioner retires a member of the police department upon a surgeon's certificate of incapacity as provided by statute, such member cannot attack the commissioner's action and jurisdiction by going back of the same and attacking the certificate and compelling reinstatement[59] by mandamus.

(§ 2) *C. Quasi public and private duties.*[See 10 C. L. 676]—While mandamus will not issue to enforce a private contractual right,[60] it may be invoked to compel performance of a public duty originating in contract.[61] It is the proper remedy to compel performance of duties arising from franchise,[62] but even conceding that an interchange of connections and business between different telephone companies may be required, mandamus to compel same will not lie in a proceeding to which one of the companies is not a party.[63] Mandamus will lie to compel restoration to an office with such characteristics as make it analogous to public office,[64] and to a considerable extent to control the affairs of private corporations, as a compelling re-

C.] 61 SE 609; State v. Miles, 210 Mo. 127, 109 SW 595.

53. Title to public office based upon mistakes of fact or misconceptions of law may impart a color of right which will bar mandamus. Matney v. King [Okl.] 93 P 737. Palpable disregard of law renders the action whereby an office is seized merely colorable and may be disregarded. Id. Mere claim to an office by one whose claim is not based at least on a reasonable color of right or where one is merely an intruder does not sufficiently raise question of title to office so as to bar mandamus. State v. Miles, 210 Mo. 127, 109 SW 595.

54. Quo warranto is proper remedy to try title to office where another has been appointed. People v. Sheehan, 113 NYS 230.

55, 56. Eberle v. King [Okl.] 93 P 748.

57. Eberle v. King [Okl.] 93 P 748.

58. Burke v. Bessemer City Com'rs [N. C.] 61 SE 609.

59. People v. Bingham, 125 App. Div. 722, 110 SW 136.

60. Mandamus will not compel performance of contractual duties even by municipal or other corporations or their officers. State v. Icke, 136 Wis. 583, 118 NW 196.

61. For example see § 2B, Allowance of Claims against Municipalities.

62. International Water Co. v. El Paso [Tex. Civ. App.] 112 SW 816. To compel public service water company to supply its customers on compliance with its reasonable regulations. Poole v. Paris Mountain Water Co. [S. C.] 62 SE 874. May compel the delivery of gas by gas company. Cox v. Malden & Melrose Gaslight Co., 199 Mass. 324, 85 NE 180. To compel street railroad to pave street as required by its franchise. Denison & S. R. Co. v. Denison [Tex. Civ. App.] 112 SW 780. Mandamus lies to compel a common carrier to perform the common-law duty of treating all shippers alike. Missouri Pac. R. Co. v. Larabee Flour Mills Co., 29 S. Ct. 214. A patron of a mutual telephone company can demand only the same service that is rendered other patrons of same class and can only require of another company use of its system on terms accorded public generally; hence mandamus does not lie to compel latter company to connect its line, and exchange service with former company on same terms and conditions as it connected with a third company. Ivanhoe Furnace Co. v. Virginia & Tennessee Tel. Co. [Va.] 63 SE 426.

63. Ivanhoe Furnace Co. v. Virginia & Tennesseee Tel. Co. [Va.] 63 SE 426. Where on application for mandamus to compel a water company to lay mains it appears that adequate mains have been laid, and that resolutions of relator's board of trustees requiring respondent to lay mains and erect hydrants did not state in any way the number or location of the hydrants, the writ should not be granted. People v. New Rochelle Water Co., 58 Misc. 287, 110 NYS 1089. Franchise provided that connections with houses for water be made free. Company made agreements with users to pay for own connections. Municipality might compel company to make connections. International Water Co. v. El Paso [Tex. Civ. App.] 112 SW 816.

64. Membership in general committee of the City of St. Louis. State v. Miles, 210 Mo. 127, 109 SW 595.

tiring secretary to deliver books and papers to his successor,[65] to enforce a stockholder's right to inspection of the corporate books,[66] or to compel the issue of stock.[67] It will sometimes lie to compel reinstatement in a fraternal benefit association,[68] though it is generally held that mandamus, will not, in the absence of statute, lie against an unincorporated association [69] or its officers in their official capacity,[70] or as individuals based on a matter growing out of their offices.[71] As in the case of public officers, the courts cannot control the discretion of quasi public officers,[72] and the duty must be plain and positive.[73] In Michigan mandamus lies to compel a sheriff to make a proper delivery of goods in a replevin action.[74]

§ 3. *Jurisdiction and venue.*[See 10 C. L. 676]—Mandamus is not an action to enforce a "money demand" and so is properly brought before the judge at chambers.[75] The Texas court of criminal appeals has no jurisdiction of an appeal from an order denying an application for a writ of mandamus to compel a county attorney to prosecute.[76] In New York, with but few exceptions, a writ of mandamus can be granted only at a special term of the supreme court held within the judicial district embracing the county wherein an issue of fact, joined upon an alternative writ of mandamus, is triable.[77]

*Federal courts.*[See 10 C. L. 675]—State courts have power to compel a common carrier engaged in interstate commerce to discharge its common-law duty to treat all shippers alike, at least in the absence of congressional action.[78] Mandamus may

65. State v. Guertin [Minn.] 119 NW 43.

66. State v. Donnell Mfg. Co., 129 Mo. App. 206, 107 SW 1112. No sufficient answer that company has offered to buy his stock at price fixed by company. Kuhbach v. Irving Cut Glass Co., 220 Pa. 427, 69 A 981. **Demand and refusal** is prerequisite to mandamus to compel inspection of books. In re Hatt, 57 Misc. 320, 108 NYS 468. To compel officers to show books, must appear that they were given a reasonable time to act on shareholder's demand. Id.

67. Mandamus will not lie to compel issue and delivery of stock of corporation except it has some special value peculiar to itself or unless shares are detained and control of corporation is at issue. State v. Jumbo Extension Min. Co. [Nev.] 94 P 74. Refusal if it appears that the application is not made in **good faith.** Kuhbach v. Irving Cut Glass Co., 220 Pa. 427, 69 A 981; Clawson v. Clayton, 33 Utah, 266, 93 P 729. Mandamus will not lie to examine books, papers, etc., where the stockholder himself shows a lack of good faith and the corporation evinces a willingness to give him such information as is proper. Bevier v. U. S. Wood Preserving Co. [N. J. Law] 69 A 1008. May be granted despite fact that he is stockholder in competing company. Kuhbach v. Irving Cut Glass Co., 220 Pa. 427, 69 A 981. Examination **at unreasonable time or in unreasonable manner** will be denied. Clawson v. Clayton, 33 Utah, 266, 93 P 729.

See, also, Corporations, 11 C. L. 844, and special article, 5 C. L. 834.

68. Wilcox v. Supreme Council, Royal Arcanum, 123 App. Div. 86, 108 NYS 483; State v. Corgiat [Wash.] 96 P 689.

69. Doyle v. Burke [R. I.] 69 A 362. Only allowable against associations enjoying public franchise. State v. Cummins [Ind.] 85 NE 359. Not allowed to compel reinstatement of member. Wallace v. Grand Lodge of U. B. F., 32 Ky. L. R. 1013, 107 SW 724.

70, 71. Doyle v. Burke [R. I.] 69 A 362.

72. Acts within the discretion of board of regents of state university. Gleason v. University of Minnesota, 104 Minn. 359, 116 NW 650.

73. Registration of a student compelled. Gleason v. University of Minnesota, 104 Minn. 359, 116 NW 650. Giving of diploma to student compelled. State v. Lincoln Medical College [Neb.] 116 NW 294.

74. Where it was claimed that property was wrongfully delivered to plaintiff in replevin and that under the statutes a delivery to plaintiff was barred by a former delivery to defendant, mandamus and not certiorari was the proper remedy to compel a redelivery to defendant. Detroit & M. R. Co. v. Alpena Circuit Judge, 152 Mich. 201, 15 Det. Leg. N. 81, 115 NW 724.

75. Mandamus to compel delivery of fund to board of commissioners. Coleman v. Coleman [N. C.] 62 SE 415. By statute in some states where a person seeks relief by mandamus, other than enforcement of a money demand, the summons shall be returnable before a judge at chambers at which time the court, except for cause shown, shall proceed to hear and determine the action. Southern Audit Co. v. McKensie, 147 N. C. 461, 61 SE 283.

76. Murphy v. Sumners [Tex. Cr. App.] 112 SW 1070.

77. Under Code Civ. Proc. § 2068, where state oil protector was dismissed from office and act took place in Albany county at an officer's place of business, application for writ to restore relator to office should be brought in Albany county, material fact being relator's removal from office. People v. Whipple, 114 NYS 307. Under Code Civ. Proc. §§ 2068, 2069, a writ of mandamus may only be issued at special term or by the appellate division, and after trial in the trial term on issue joined the case must be returned to special term for final order. People v. Supreme Lodge K. L. H., 110 NYS 148.

78. To compel transfer and return of cars

issue as ancillary relief where necessary to carry out the objects of the main case and give complete relief,[79] but the circuit court of appeals has no jurisdiction to issue mandamus as ancillary to a mandate of the supreme court.[80]

§ 4. *Parties. A. Parties plaintiff.* See 10 C. L. 879—Any private person may move without the intervention of the attorney general for a writ of mandamus to enforce the performance of a public duty not due to the government as such,[81] but some courts hold that private individuals cannot seek to remedy a purely public grievance by mandamus, but must seek redress, through action by the appropriate officers.[82] The direct and special interest of a private individual which entitles him to maintain mandamus to enforce his private right in the performance of a public duty must be independent of that which obtains to him in common with the general public, though such interest may not be different in kind from that of the general public or peculiar to the individual.[83] To enforce a private right the real party in interest

from plaintiff's mill, although carrier was engaged in interstate commerce and more than half of mill's output was to be shipped out of state, congress or Interstate Commerce Commission not having taken specific action. Missouri Pac. R. Co. v. Larabee Flour Mills Co., 29 S. Ct. 214.

79. United States v. Merriam [C. C. A.] 161 F 303.

80. Circuit court of appeals to which is addressed mandate of supreme court directing remanding cause to federal district court for further proceedings in conformity with opinion upon which mandate was based has no jurisdiction to compel district court, by mandamus, to modify decree entered in supposed compliance with such mandate to conform to view of the supreme court's opinion entertained by the circuit court of appeals. Ex parte First Nat. Bank of Chicago, 207 U. S. 61, 52 Law. Ed. 103. The denial of mandamus by the supreme court did not confer or declare jurisdiction to grant what the supreme count denied. Id.

81. A majority of the common council as such and in their private capacity may maintain mandamus to compel the recognition of an ordinance and order requiring the mayor, auditor and treasurer to pay water rents into the city's general fund and a transfer of a portion of the water fund to the general fund. Sinclair v. Brightman, 198 Mass. 248, 84 NE 453. May compel the city's executive to advertise and sell a telephone franchise as required by ordinance, where the city attorney or other representative of the state fails to act. Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855.

82. Mandamus to compel police to enforce laws against Sunday ball playing. Sweet v. Smith [Mich.] 15 Det. Leg. N. 560, 117 NW 59.

83. Application by private individuals for mandamus to compel city to advertise and sell telephone franchise as directed by ordinance held not to show that applicants had such private interest as entitled them to the writ. Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855. Where statute provides for the raising of funds to meet school expenses, a teacher has such special interest as entitles him to compel the raising of funds by mandamus to pay for his services. Dennington v. Roberta, 130 Ga. 494, 61 SE 20. Where relator is resident and taxpayer of school district, board of trustees of which have removed school house site contrary to law, so that children are required to go three and one-half miles further to school and are liable to be deprived of the benefits of school because of the danger of crossing a river, he is a party "beneficially interested" under the statute. State v. Lyons, 37 Mont. 354, 96 P 922. Where petitioner was indicted for a misdemeanor, he had sufficient interest in the performance of the clerk of court's duty to docket subpoenas to compel him to docket the same as required by law. Jackson v. Mobley [Ala.] 47 S 590. After an election to change county lines under statute, and a majority of the votes cast are in favor of a change so as to bring the city wholly within the lines of a particular one of the adjacent counties, and the mayor and clerk have certified the result and other steps have been taken, any citizens and taxpayers have such interest in common in the matter as to entitle them to join in mandamus to compel the ordinary of one county to join in completing the readjustment. Manson v. College Park [Ga.] 62 SE 278. One who has taken an assignment of warrants issued in payment of work done and being done for a county has an interest entitling him to compel the contract under which the work is being done to be spread upon the records of the county ordinary as required by statute. Jones v. Bank of Cumming [Ga.] 63 SE 36. Where franchise has been granted street railway company which has not had the same ratified by the city council, upon the refusal of the city council to ratify it upon a petition by taxpayers, a taxpayer and elector was not a party "beneficially interested" as required by code and could not by mandamus compel action by the council. Webster v. San Diego Common Council [Cal. App.] 97 P 92. Private citizen without legal, property or personal interest cannot maintain mandamus to settle a doubtful question arising upon the face of a franchise ordinance. People v. Aurora, Elgin & Chicago R. Co., 141 Ill. App. 82. Where lands have been sold and apparently valid title taken by innocent third persons, a party exhibiting no special authority in the premises nor authority to discredit such title has no standing in applying for a writ to compel the auditor and register to execute a deed of conveyance of

should be named as plaintiff and such proceeding should not be entitled in the name of the state on the relation of such party,[84] but the practice of prosecuting such actions in the name of the state on relation of the party beneficially interested is sanctioned.[85] Mandamus under the Colorado code being a civil action may be brought in the names of the real parties in interest where it is sought to protect a purely private right.[86] Where a corporation acquires rights from a municipality to perform public service acts, the municipality is the proper party to compel their performance.[87] Where parties having substantial rights were petitioners in mandamus, the defendants by pleading to the merits waived the objection that the people were not made the nominal plaintiff.[88] Failure to proceed in the name of the state may be obviated by amendment.[89] The right of intervention exists in mandamus proceedings.[90]

(§ 4) *B. Parties defendant.*[See 10 C. L. 679]—Where suit lies against a board or an officer in his official capacity, it is immaterial that there is any change in the board or office pending suit.[91] In mandamus to compel inspection of corporate books, it is sufficient to make the officer on whom the statutory duty is devolved the party respondent and the corporation need not be joined.[92] All persons claiming rights adverse to those sought to be enforced must be joined,[93] unless such rights cannot be tried in the proceeding.[94]

§ 5. *Pleading and procedure in general.*[See 10 C. L. 680]—Before making an application for the writ of mandamus, demand must be made on the defendant to perform the act sought to be enforced.[95] Under the provisions of the Washington practice act, mandamus is properly commenced by summons and complaint rather than by motion and affidavit.[96] Two or more distinct rights which the petitioner

the land in question. Where petitioner had state agency to sell lands "now belonging or that may belong to state * * * embraced within, etc." State v. Capdevielle [La.] 48 S 126.

84. State v. Caruthers [Okl. Cr. App.] 98 P 474; State v. Corgiat [Wash.] 96 P 689.

85. State v. Corgiat [Wash.] 96 P 689. In an alternative writ to compel defendants as judges of the county court to canvass and declare the result of an election to establish a road district under the statute, relators who were taxpayers, voters and citizens of the proposed district and interested therein were proper relators. State v. Smith, 129 Mo. App. 49, 107 SW 1051. Mandamus brought by the "state on the relation of [names given] constituting the board of commissioners of A county against, etc.," makes the board of commissioners of A county relators. State v. Marion County Com'rs [Ind.] 85 NE 513. An action to transfer papers, records, etc., from the United States court for the Indian Territory to the district court established in its stead may be brought in the name of the state on relation of the county judge or other proper party. Davis v. Caruthers [Okl.] 97 P 581.

86. Stockholder's right to inspect books. Merrill v. Suffa, 42 Colo. 195, 93 P 1099.

87. International Water Co. v. El Paso [Tex. Civ. App.] 112 SW 816.

88. Town of Scott v. Artman, 237 Ill. 394, 86 NE 595.

89. Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855. Where the state consents to the use of its name in mandamus instituted in the name of the petitioner, the pleadings will be amended so as to read in the name of the state on the relation of the petitioner. State v. Murray [S. C.] 62 SE 593.

90. State v. Capdevielle [La.] 48 S 126.

91. To reinstate a member of a fraternal order it is immaterial that a supreme officer ceased to be such before the motion was decided; whatever obligation rested on him devolved upon his successor. Wilcox v. Supreme Council, Royal Arcanum, 123 App. Div. 86, 108 NYS 483. A suit against a board of commissioners lies against the board whose duty it is to act as such and not against individuals composing it so that a change in the board's membership pending suit does not affect it. Town of Scott v. Artman, 237 Ill. 394, 86 NE 595.

92. Merrill v. Suffa, 42 Colo. 195, 93 P 1099.

93. On mandamus to compel the land commissioner to award to relator public land previously awarded to others, the right to land awarded to an applicant not made a party to the proceeding cannot be considered. Halbert v. Terrell [Tex.] 112 SW 1036.

94. In proceedings to compel a mayor to appoint members of a certain political party as members of a commission, members of another party already appointed are not proper parties to the action, since their title to office cannot be tried in the proceeding. Independence League v. Taylor [Cal.] 97 P 303.

95. Mandamus to compel delivery of a high school certificate. Ferguson v. Sonoma County Board of Education, 7 Cal. App. 568, 95 P 165.

96. State v. Corgiat [Wash.] 96 P 689.

may have growing out of two or more entirely distinct wrongs committed against him cannot be joined in the same mandamus.[97]

§ 6. *Petition or affidavit.*[See 10 C. L. 880]—Though in some states ordinary rules of pleading at law are made applicable,[98] the proceeding is ordinarily instituted by petition, the object of which is to secure the issue of an alternative writ or rule to show cause.[99] It must set forth the material facts relied upon so that they may be traversed or admitted,[1] negative any facts which might defeat the right to the writ,[2] and show every fact necessary to entitle the relator to the relief sought [3] and that such right exists at the time of bringing the proceeding.[4] Superfluous allegations may be expunged,[5] and motion to expunge is the proper remedy to raise the irrelevancy or evidentiary character of averments [6] but cannot take the place of a demurrer or raise questions of substantial right.[7] If additional relief is desired, it should be sought by amendment and not by a second independent petition.[8]

§ 7. *Alternative writ.*[See 10 C. L. 881]—The alternative writ corresponds in many particulars to a declaration at common law,[9] and the facts therein, aided if necessary by the facts alleged in the application therefor, must show a cause of action, that is, a duty to perform and the power to perform on part of the defendant.[10]

97. Refusal of the secretary of different corporations to allow stockholder to inspect the books. Merrill v. Suffa, 42 Colo. 195, 93 P 1099.

98. People v. Scott County Board of Education, 236 Ill. 154, 86 NE 206. Mandamus is a common-law proceeding in which the ordinary course of common-law pleading beginning with pleas to the answer follows the petition and answer. People v. Busse, 141 Ill. App. 218.

99. The general practice of the supreme court of Nevada is to issue an order to show cause on the filing of the application. State v. Jumbo Extension Min. Co. [Nev.] 94 P 74; Kuhbach v. Irving Cut Glass Co., 220 Pa. 427, 69 A 981.

1, 2. People v. La Salle County School Directors, 139 Ill. App. 620.

3. Petition insufficient to show that plaintiff was entitled to certificate authorizing him to practice medicine. Webster v. State Board of Health [Ky.] 113 SW 415; People v. La Salle County School Directors, 139 Ill. App. 620. Petition for establishment of school held defective for failure to allege abandonment of district. Teeple v. State [Ind.] 86 NE 49. Petition for mandamus to compel borrowing money to build a school house by issuing bonds, etc., held insufficient in not alleging the amount of bond that was voted to be issued, and that the amount to be issued would not make indebtedness of district beyond constitutional limit. People v. La Salle County School Directors, 139 Ill. App. 620. Petition charging obstruction in terms of Railroad Act, Chap. 114, Hurd's R. S. 1905, § 20, held sufficient on demurrer, though it did not specify with particularity, manner of obstruction. Highway Com'rs v. Fenton & Thompson R. Co., 135 Ill. App. 394. Petition to compel canvass of returns not demurrable for failure to allege that clerk certified names of additional registered voters. Cerini v. De Long, 7 Cal. App. 398, 94 P 582. Petition to compel publishing of statement by public officer need not allege that he has funds to pay for same. State v. Burley [S. C.] 61 SE 255. Petition to enforce grant of building permit held not defective for failure to allege cost of building. Coon v. San Francisco Public Works, 7 Cal. App. 760, 95 P 913.

4. In action to compel a justice to correct his docket, where judgment was entered for the plaintiff on the allegation that the petitioner was not at the time of judgment indebted to the plaintiff, such allegation was insufficient for he might be at the time of mandamus, in which event there would be no injury. Braun v. Campbell [Wis.] 119 NW 112.

5. People v. Chicago, 131 Ill. App. 266.

6, 7. People v. Busse, 141 Ill. App. 218.

8. Teeple v. State [Ind.] 86 NE 49.

9. Schnitzler v. New York Transp. Co. [N. J. Law] 68 A 905; Lindsey v. Carlton [Colo.] 96 P 997.

10. Teeple v. State [Ind.] 86 NE 49. An alternative writ is a declaration and must show title. Ginn & Co. v. Berkley County School Book Board, 62 W. Va. 428, 59 SE 177. Writ defective, being only brief resume of petition. Lindsey v. Carlton [Colo.] 96 P 997. An alternative writ to compel the board of freeholders to repair a bridge need not allege that the freeholders could not be relieved from repairing the bridge by building a new road as provided by law. Edwards v. Sussex County Freeholders [N. J. Law] 69 A 1107. Alternative writ to establish a road district as provided by law held not defective for failure to allege appointment of judges of election. State v. Smith, 129 Mo. App. 49, 107 SW 1051. Alternative writ on demurrer held not to state facts sufficient to constitute cause of action in regard to certain ballots. People v. Albany County Sup'rs [N. Y.] 84 NE 1118. To render the application and alternative writ to compel performance by an officer sufficient to withstand a demurrer for want of facts, it must appear that it is the officer's duty and that he has the power to perform the act sought to be enforced. State v. Johns, 170 Ind. 233, 84 NE 1. Allegations in an alternative writ for reinstatement after removal from office held sufficient. People v. Ahearn [N. Y.] 86 NE 474. Allegations in regard to time tending to show that a justice had lost jurisdiction in an action

The mandatory clause of a writ should expressly and clearly state the precise thing which is required of the defendant,[11] and should not grant [12] greater relief than the allegations of the petition and writ call for.

§ 8. *Demurrer to petition or writ; answer or return; subsequent pleadings.* See 10 C. L. 682—The alternative writ may be demurred to,[13] demurrer admitting all[14] material allegations,[15] but not conclusions,[16] and a like result follows from motion to quash for insufficiency of facts.[17] It is a ground of demurrer if the command of the alternative writ exceeds the legal duty of defendant as disclosed by petition and writ,[18] and if the command of a mandatory writ grant greater relief than the allegations of the petition and writ call for it may be quashed on motion,[19] but a general demurrer will not lie to a petition which shows a right to a part of the relief asked.[20] Separate demurrers are properly filed by a corporation and its individual directors.[21] A demurrer will as in other cases be carried back to the first defective pleading.[22] By appearing and filing demurrer to a petition, for want of facts, defendant waives issuance of the alternative writ.[23] By answer to the merits the objections made by demurrer are waived.[24] The answer must take issue on all that is sought to be denied,[25] or tender an issuable averment of affirmative defenses.[26] An affidavit of defendant on application for mandamus may be accepted as a return, but an affidavit replying thereto should not be received.[27] A return to an alterna-

of mandamus to correct docket entries held not sufficiently clear and certain to show the falsity of the entries and loss of jurisdiction in the light of common knowledge respecting the liability of mistake in observing the time. Braun v. Campbell [Wis.] 119 NW 112. Provisions for establishing a road district required that notice of the election by publication in a county paper should be made. Alternative writ alleged an entry of an order regarding the election reciting that this notice be published, etc. Held bad for not alleging that notice was given. State v. Smith, 129 Mo. App. 49, 107 SW 1051.

11. An alternative writ which commands an officer to do several things in the alternative will be quashed on motion. State v. Johns, 170 Ind. 233, 84 NE 1.

12. State v. Johns, 170 Ind. 233, 84 NE 1; State v. Adams Exp. Co. [Ind.] 85 NE 337.

13. Schnitzler v. New York Transp. Co. [N. J. Law] 68 A 905.

14. People v. Butler, 125 App. Div. 384, 109 NYS 900. Allegation of fraud on information and belief contained in the answer to a petition are admitted by a demurrer where the fraud is alleged with sufficient particularity. Garfield v. U. S., 31 App. D. C. 332.

15. Where a petition for mandamus to compel petitioner's reinstatement to office under the civil service laws averred that petitioner was not furnished a statement of the reasons for dismissal and given an opportunity to reply as provided by statute, and the answer without referring to the averment alleged certain cause for removal, petitioner by demurring to answer did not admit the truth of the charges therein. Truitt v. Philadelphia, 221 Pa. 331, 70 A 757.

16. People v. Butler, 125 App. Div. 384, 109 NYS 900.

17. Braun v. Campbell [Wis.] 119 NW 112.

18. Action to compel deliveries by express companies. State v. Adams Exp. Co. [Ind.] 85 NE 337.

19. State v. John, 170 Ind. 233, 84 NE 1.

20. State v. Parmenter [Wash.] 96 P 1047.

21. State v. Jumbo Extension Min. Co. [Nev.] 94 P 74.

22. Where petition was insufficient in not alleging amount of bonds that were valid to be issued, and that amount to be issued would not make indebtedness of district beyond constitutional limit, demurrer should have been carried back and sustained. People v. La Salle County School Directors, 139 Ill. App. 620.

23. State v. Anderson, 170 Ind. 540, 85 NE 17.

24. Demurrer on ground of improper parties. Town of Scott v. Artman, 237 Ill. 394, 86 NE 595.

25. Answer held to traverse averment of demand for performance of duty sought to be enforced. Ferguson v. Sonoma County Board of Education, 7 Cal. App. 568, 95 P 165. The petition and answer, too, while statutory substitutes for the alternative writ and return, are still so far common-law pleadings that a rule exactly reverse of that governing in equity prevails, and everything not explicitly denied is held admitted. Hohenadel v. Steele, 141 Ill. App. 218. In mandamus to compel payment of a reward offered by the governor, a plea alleging that the offer was signed in blank by the governor and filled in later by his secretary in his absence is available as charging that the record sued on is not genuine. Hager v. Sidebottom [Ky.] 113 SW 870.

26. When the defense of no funds to meet a claim against a municipality is relied on it should be alleged in the return of the officer so that an issue on that point may be made up and determined with the burden on the officer to show an absence of funds. State v. Burley [S. C.] 61 SE 255.

27. People v. Haffen, 124 App. Div. 230, 108 NYS 654.

tive writ can only be stricken if it is found to be manifestly false, frivolous, or calculated to embarrass or delay the remedy sought.[28]

§ 9. *Trial, hearing and judgment. A. Trial and hearing.* See 10 C. L. 684—At the hearing on the petition and answer to the order to show cause, averments of the answer must be deemed to be true.[29] The relator has the burden of proving the allegations of his complaint.[30]

*Jury.* See 10 C. L. 684—By statute in some states where an issue of fact is raised by the pleadings, the court shall on motion refer the same to a jury.[31] The practice has been adopted in Illinois of certifying issues of fact in mandamus cases to a trial court with a direction to return a verdict to the supreme court.[32] The advisory verdict of a jury will not be affirmed on the ground that in six prior trials there were four similar verdicts and two disagreements, where such verdicts were wholly unsupported by any evidence.[33]

*Damages.* See 8 C. L. 880—Damages for a false return to a writ of mandamus should not include the relator's counsel fees or other disbursements of the trial.[34] Where the court declined to issue mandamus, petitioner was not injured by the sustaining of a motion to strike evidence as to damages.[35]

*Abatement and dismissal.* See 6 C. L. 684

(§ 9) *B. Judgment.* See 6 C. L. 613

*Scope of relief.* See 10 C. L. 686—A writ may issue for a part of the relief asked for[36] but cannot go beyond the prayer.[37] Relief granted to parties does not inure to the benefit of others or bar proceedings by them,[38] though the court may to avoid multiplicity of suits grant an order which will enure to others entitled.[39] Mandamus will compel only such acts as the complaining party is entitled to at the institution of his proceeding.[40] The relief granted should be specific.[41] The operation of a writ may be temporarily suspended to allow defendants to act voluntarily.[42]

28. Borough of Pleasantville v. Pleasantville Water Co. [N. J. Law] 69 A 1096.

29. Allport v. Murphy [Mich.] 15 Det. Leg. N. 496, 116 NW 1070. Where no issue is framed the answer must for the purpose of a motion for a peremptory mandamus be taken as true. Attorney General v. State Board of Agriculture. 152 Mich. 689, 15 Det. Leg. N. 355, 116 NW 552.

30. In mandamus to compel the issuance of a license to do business, the burden is on the relator to show compliance with all requirements of the law. American Health & Acc. Ins. Co. v. Insurance Com'r [Mich.] 15 Det. Leg. N. 673, 117 NW 564. Where statute provides that liquor licenses shall not be issued in local option districts, it is incumbent on one seeking to compel the issue of a license that he is not in a local option district. Harrison v. Dickinson [Tex. Civ. App.] 113 SW 776.

31. Southern Audit Co. v. McKensie, 147 N. C. 461, 61 SE 283.

32, 33. People v. Alton, 233 Ill. 542, 84 NE 664.

34. People v. Deutscher Krieger Bund New York, 113 NYS 367.

35. Ziegenheim v. Baltimore Wholesale Grocery Co. [Md.] 69 A 1071.

36. People v. Clark County Sup'rs, 234 Ill. 62, 84 NE 695.

37. People v. Clark County Sup'rs, 234 Ill. 62, 84 NE 695; State v. John, 170 Ind. 233, 84 NE 1; State v. Adams Exp. Co. [Ind.] 85 NE 337.

38. A judgment of a federal court in a mandamus suit brought by a coal company operating mines on the line of a railroad to compel a fair distribution of cars does not inure to the benefit of any other operator not a party nor bar proceedings by him. Merchants' Coal Co. v. Fairmont Coal Co. [C. C. A.] 160 F 769.

39. Where a water company granted a franchise to supply inhabitants with water refused to make connections, the city might compel the company to act generally for all the citizens and need not wait and apply for connections in each case as it arose. International Water Co. v. El Paso [Tex. Civ. App.] 112 SW 816.

40. Cannot issue mandamus which will be effectual only in the event of certain action by an inferior tribunal. McGinnis v. San Jose, 153 Cal. 711, 96 P 367.

41. Mandamus compelling a street railway to pave part of a street with the same material as the city used was not objectionable for failure to sufficiently describe the material with which the work was to be done or the manner of doing it. Denison & S. R. Co. v. Denison [Tex. Civ. App.] 112 SW 780.

42. Where plans for certain obstructions in a street adjacent to abutting property were filed with and approved by the city's building department, and the construction thereof was knowingly acquiesced in by the officials, a writ of mandamus to compel removal of such obstructions by the city would be suspended for a reasonable time to allow the owners to do so voluntarily.

*Costs.*[See 10 C. L. 685]—There is no rule or statute in federal courts giving costs to the prevailing party on a mere order to show cause, and such a case is governed by the principles of equity.[43] In mandamus proceedings against a judge, costs will not be taxed against him.[44] If on summons to show cause adverse parties appear and resist mandamus on the merits, costs may go against them.[45] In New York costs may be awarded as in an action where an alternaitve writ of mandamus has been issued.[46]

§ 10. *Peremptory writ.*[See 10 C. L. 685]—Where both parties have been heard on a rule to show cause, and there are no disputable facts, a peremptory writ may issue in the first instance.[47] Matters arising after an alternative writ of mandamus is issued which makes it improper for the respondent to do the act relator seeks to compel afford a ground for refusing a peremptory writ.[48]

§ 11. *Performance.*[See 10 C. L. 666]—Where a writ commands that relator be restored to a position, it contemplates a restoration to duties similar to those performed by him at the time of his discharge.[49]

§ 12. *Review.*[See 10 C. L. 686]—The city of New Orleans has a right to appeal from a judgment in a mandamus suit against its treasurer ordering the payment of money out of municipal funds.[50] In New Jersey the grant or refusal of an alternative writ is reviewable by writ of error,[51] while the award of a peremptory writ or the refusal of the court to act is not so reviewable[52] in the absence of statute,[53] unless a final judgment enters on an issue of fact.[54] In New York an order for an alternative writ is not appealable, not affecting a substantial right.[55] The granting or refusal of the writ being addressed to the sound discretion of court, only in a clear case of abuse of discretion will the granting of mandamus be reversed.[56] It will be presumed on appeal where the findings support the judgment that the evidence supported the findings and that the question was heard and determined by the court as though made an issue by the pleadings.[57] Where a general direction is given to a lower court, the same is to be carried out in a form to be settled by such lower court.[58]

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**Mandate; Marine Insurance; Maritime Liens; Market Reports; Markets; Marks,** see latest topical index.

People v. Ahearn, 124 App. Div. 840, 109 NYS 249. Where in mandamus proceedings to compel the issue of a license the court found the reasons therefor insufficient, it did not grant a peremptory writ on the ground that it was not likely that the mandate of the court would be required to secure performance of the duty pointed out. Cox v. Common Council of Jackson, 152 Mich. 630, 15 Det. Leg. N. 337, 116 NW 456.

**43, 44, 45.** In re Haight & Freese Co. [C. C. A.] 164 F 688.

**46.** People v. Deutscher Krelger Bund New York, 113 NYS 367.

**47.** Palmer v. Essex County Chosen Freeholders [N. J. Law] 71 A 285. Where all the facts essential to relief sought are admitted and the defendant has filed an answer assigning every possible reason why a peremptory writ should not issue, which reasons are insufficient, the issue of an alternative writ is unnecessary, but plaintiff is entitled to a peremptory writ. Southern Audit Co. v. McKensie, 147 N. C. 461, 61 SE 283.

**48.** Writ to compel issue of license before return day, no license voted. State v. Miller, 129 Mo. App. 390, 108 SW 603.

**49.** People v. Stevenson, 57 Misc. 64, 108 NYS 860.

**50.** State v. Kennedy, 121 La. 757, 46 S 796.

**51.** Schnitzler v. New York Transp. Co. [N. J. Law] 68 A 905; Crane v. Shoenthal [N. J. Law] 69 A 972.

**52.** Schnitzler v. New York Transp. Co. [N. J. Law] 68 A 905. Error will not lie to an order of the supreme court directing mandamus to issue. Rule to compel city of Bayonne to apportion arrears of taxes made absolute. Morris & Cummings Dredging Co. v. Bayonne [N. J. Err. & App.] 70 A 134.

**53.** Where constitutionality of statute is involved, error will lie even if there is no judgment. Morris & Cummings Dredging Co. v. Bayonne [N. J. Err. & App.] 70 A 134.

**54.** Morris & Cummings Dredging Co. v. Bayonne [N. J. Err. & App.] 70 A 134.

**55.** People v. Millard, 111 NYS 22.

**56.** State v. Lincoln Medical College [Neb.] 116 NW 294.

**57.** Ferguson v. Sonnoma County Board of Education, 7 Cal. App. 568, 95 P 165.

**58.** Decree of federal district court for transfer to adverse claimants of part of proceeds of sale of property not in possession of trustee in bankruptcy without prejudice to

## MARRIAGE.

§ 1. Nature of Marriage; Capacity of Parties; Fraud and Duress, 659.
§ 2. Essentials of a Contract of Marriage, 659. A Common-Law Marriage, 660. Evidence of Marriage, 660.
§ 3. Validity and Effect, 662.
§ 4. Proceedings for Annulment, 663.
§ 5. Criminal Offenses and Penalties, 664.

*The scope of this topic* is noted below.[59]

§ 1. *Nature of marriage; capacity of parties; fraud and duress.* See 10 C. L. 686—While marriage is created by civil contract, it is a social status, the maintenance and integrity of which is of vital importance to the state.[60] The parties must have capacity to consent[61] and be free to marry.[62] Where statutory restrictions against remarriage of divorced persons exist, a marriage in violation thereof is not merely voidable but absolutely void,[63] but this does not apply to a marriage in another state.[64] A marriage induced by duress[65] or fraud[66] may be avoided, but concealment by one party of material facts cannot be urged in avoidance if the other party knew thereof[67] or was put on inquiry,[68] and cohabitation after discovery of such facts operates as a ratification.[69]

§ 2. *Essentials of a contract of marriage.* See 8 C. L. 883—All the prerequisites to a valid marriage will be presumed.[70] Failure to procure a marriage license and to have the church record signed by witnesses does not invalidate the marriage,[71] nei-

trustee "if this court shall so authorize" to litigate, etc., held a sufficient compliance with supreme court's general mandate. Ex parte First Nat. Bank, 207 U. S. 61, 52 Law. Ed. 103. Subsequent decree entered in obedience to unwarranted judgment should be set aside. Id.

**59.** This topic relates strictly to the law of marriage; the law of Alimony, Divorce, and Husband and Wife being separately treated.

See, also, Estates of Decedents, 11 C. L. 1275.

**60.** Coe v. Hill [Mass.] 86 NE 949; Taylor v. Taylor [Md.] 69 A 632. For definition and discussion of Morman, "celestial, and patriarchal" marriages. Toncray v. Budge, 14 Idaho, 621, 95 P 26.

**61.** If one party be insane at time of marriage, there is no marriage in law or fact. Floyd County v. Wolfe [Iowa] 117 NW 32. Where testator's marriage was sought to be declared invalid on ground of insanity and lack of capacity to consent, held, under art. 403, Civ. Code, that validity of decedent's acts could not be contested unless intradiction was petitioned for prior to his death, except in cases in which the mental alienation manifested itself within 10 days prior to death. Ducasse's Heirs v. Ducasse, 120 La. 731, 45 S 565.

**62.** In action for separation where wife claimed to be such by virtue of an agreement, held that evidence would have been sufficient to establish her right as a common-law wife if it were not for the fact that she had, at time when relation began, an undivorced husband by an undisputed ceremonial marriage. Dietrich v. Dietrich, 128 App. Div. 564, 112 NYS 968.

**63.** Although statute does not in terms declare such marriage void; going no further than to make it unlawful for libelee to marry person other than libellant within prohibited period. State v. Sartwell [Vt.] 69 A 151. Under Civ. Code, art. 161, prohibition of marriage of accomplices in adultery applies only where there has been a divorce. Ducasse's Heirs v. Ducasse, 120 La. 731, 45 S 565.

**64.** In re Garner's Estate, 69 Misc. 116, 112 NYS 212.

**65.** Cannot be set up as ground for annulment where plaintiff elected to marry woman alleged to be seduced in order to stop prosecution for her seduction. Griffin v. Griffin, 130 Ga. 527, 61 SE 16.

**66.** Evidence of fraud and hypnotic influence, where suit not defended, held insufficient. Vazakas v. Vazakas, 109 NYS 568.

**67.** Plaintiff's admission of knowledge that woman was unchaste at time of marriage. Griffin v. Griffin, 130 Ga. 527, 61 SE 16.

**68.** That defendant represented herself cured of epilepsy not such a fraud, husband being put on his inquiry through his knowledge that she had the disease prior to marriage. Lyon v. Barney, 132 Ill. App. 45.

**69.** Where plaintiff cohabited with defendant after knowledge that she was not cured of epilepsy, he is estopped from setting up fraud. Lyon v. Barney, 132 Ill. App. 45.

**70.** That banns were published, license obtained, and that officiating clergyman was qualified and authorized. In re Sloan's Estate [Wash.] 96 P 684.

**71.** A woman having an undivorced husband still living was married by a justice of the peace. After the first husband's death, the parties freely and intending to marry went through a ceremony before a Catholic priest, who, thinking that marriage before justice was valid under the civil law and that ceremony before him was intended only as religious one, used same license that was used in civil ceremony, and had only two witnesses sign record although three were present. Held a valid marriage before priest. Landry v. Bellanger, 120 La. 962, 45 S 956.

ther do mere irregularities [72] nor failure to comply with conditions as to filing [73] the marriage contract.

*A common-law marriage* See 10 C. L. 687 has the same effect as marriage by ceremony [74] and may be contracted in one state although parties are and continued to be residents of another state.[75] To establish a common-law marriage de praesenti, there must be a present agreement [76] to be husband and wife, entered into in good faith,[77] followed by a present assumption of the marriage status.[78] The evidence of a common-law marriage should be clear, consistent, and convincing,[79] and in absence of direct evidence of a marriage per verba de praesenti, there must be proof of conduct or declarations [80] from which the contract may be presumed.[81] While a cohabitation meritricious in inception will be presumed to continue so,[82] slight evidence is sufficient to overcome the presumption.[83]

*Evidence of marriage.* See 10 C. L. 687—Marriage may be proved by record evi-

72. Application by wife alone, if identified, is sufficient under Act of May 1, 1893, P. L. 27, amending Act of June 23, 1885, P. L. 146. Miller's Estate, 34 Pa. Super. Ct. 385. Nothing in Act of May 1, 1893, P. L. 27, amending Act of June 23, 1885, P. L. 146, requiring marriage to be performed within any given time after issuance of license. Marriage six months after. Id.

73. Sec. 19 of the Domestic Relations Law, added by c. 339, Laws of 1901, absolutely avoiding marriage by failure to comply with requirement of filing marriage contract within six months from date of marriage, was repealed before the expiration of the time for filing. Held on motion for alimony pendente lite that omission to file made the marriage possibly voidable, but not void. Kahn v. Kahn, 113 NYS 256.

74. Davis v. Stouffer [Mo. App.] 112 SW 282.

75. In contested will it appeared that decedent's wife had been divorced in New York and decree prohibited remarriage on showing that decedent and his alleged wife had gone to New Jersey and there entered into a common-law marriage, and thereupon returned to New York and cohabited as hueband and wife. Held, this constituted a marriage valid in New York. In re Garner's Estate, 59 Misc. 116, 112 NYS 212.

76. Contract per verba de praesenti by which parties intend that marriage status shall arise immediately constitutes a valid marriage in itself, and is distinct from a case where something else is intended to be done before status arises. Davis v. Stouffer [Mo. App.] 112 SW 282.

77. Parties illicitly cohabiting, on request of alleged wife's mother answered questions in Episcopal marriage service when read by her. Held not sufficient to establish contract, when considered in connection with subsequent refusal of man to have ceremony performed. Weidenhoft v. Primm, 16 Wyo. 340, 94 P 453. A mere written agreement does not create relation where it appeared that cohabitation was meretricious in inception, that parties did not consider themselves husband and wife, and that the agreement was simply made for purpose of defeating a criminal prosecution. Pegg v. Pegg [Iowa] 115 NW 1027.

78. Need be no more than recognition that by contract parties, in good faith, have come and are married for purpose of assuming and carrying out the marriage relation. Davis v. Stouffer [Mo. App.] 112 SW 282. Cohabitation or intercourse not necessary. Davis v. Stouffer [Mo. App.] 112 SW 282.

79. Evidence examined and held not sufficient, on issue in contested will. In re Rossignot's Will, 112 NYS 353. Evidence examined and held to authorize a verdict that no common-law marriage by express contract existed. In re Imboden's Estate, 128 Mo. App. 555, 107 SW 400. Evidence examined and held to show common-law marriage by contract de praesenti. Davis v. Stouffer [Mo. App.] 112 SW 282.

80. In contest of will involving issue of marriage, evidence showing that executrix and decedent had lived together as husband and wife and had represented themselves as such, in spite of showing that executrix had been divorced and that decree forbade her remarriage, held sufficient to establish the relation. In re Garner's Estate, 59 Misc. 116, 112 NYS 212.

81. Cohabitation and repute may raise presumption, but is rebuttable. Commonwealth v. Gamble, 36 Pa. Super. Ct. 146.

82. Instruction, as matter of law, that even though relation was meretricious in beginning a subsequent marriage in fact was conclusively established by evidence as to subsequent conduct, properly refused. Commonwealth v. Gamble, 36 Pa. Super. Ct. 146. Married woman left her husband in 1892 and in 1894 established a relation meretricious in inception with defendant, resulting in birth of issue. Two years later she entered into a written agreement to live with him, admittedly not a marriage contract, which agreement was suspended for a month but reinstated in 1899. Held insufficient to show marriage overthrowing presumption of continuance of meretricious relation. Dietrich v. Dietrich, 128 App. Div. 564, 112 NYS 968.

83. Instruction that marriage must be proved as other civil contracts is indefinite and tends to minimize value of evidence of general repute. Drawdy v. Hesters, 130 Ga. 161, 60 SE 451. Instruction that proof of actual marriage is necessary, erroneous. Id. Burden is on party asserting validity to show not only that illicit relation had terminated, but had terminated by parties entering into affirmative agreement to become man and wife. Id. No evidence to overcome presumption. Pegg v. Pegg [Iowa] 115 NW 1027.

dence,[84] by declarations,[85] letters,[86] or by testimony of the parties thereto,[87] or of any person having knowledge of the facts,[88] or by facts and circumstances.[89] Proof of marriage after a great length of time need not be as exact as of a recent one.[90] Proof of cohabitation and repute when coexisting [91] raises a presumption of marriage,[92] whether common-law marriages are recognized or not.[93] The evidence as to

**84. Evidence held admissible:** Introduction of license, certificate and testimony of priest held sufficient to sustain finding of actual marriage. Miller's Estate, 34 Pa. Super. Ct. 385. Certified copy of docket entries and decree granting divorce held competent evidence to prove marriage in prosecution for bigamy. Pontier v. State, 107 Md. 384, 68 A 1059. Certified copy of license and certificate of marriage competent to corroborate witness' testimony as to his marriage. Witty v. Barham, 147 N. C. 479, 61 SE 372.

**Evidence held inadmissible:** An instrument purporting to be a marriage certificate but of which there is no proof as to execution or recordation is inadmissible to prove marriage. Eames v. Woodson, 120 La. 1031, 46 S 13. Purported marriage certificate issued by justice of the peace inadmissible to show marriage, his official character and fact that he executed it in his official capacity not being proven. Holtman v. Holtman [Ky.] 114 SW 1198. Certificate of keeper of record of vital statistics, not an authenticated copy of record nor a statement of its substance. Pontier v. State, 107 Md. 384, 68 A 1059. Where statute makes issuance of license immaterial if marriage otherwise valid, a certificate of clerk of court stating that no entry of license appeared, inadmissible. Id.

**85.** Declarations of persons who knew the parties as to marriage 50 years before. Dunn v. Garnett [Ky.] 112 SW 841. Declarations of wife after husband's death as to fact of marriage inadmissible, since not against interest. Drawdy v. Hesters, 130 Ga. 161, 60 SE 451. In a suit wherein plaintiff claimed her allowance as decedent's widow, evidence that decedent declared himself a single man admissible as a member of plaintiff's family. In re Imboden's Estate, 128 Mo. App. 555, 107 SW 400.

**86.** Letters to decedent from one who claimed to be his widow not admissible as part of res gestae, where letters from decedent to plaintiff not also offered. In re Imboden's Estate, 128 Mo. App. 555, 107 SW 400.

**87.** In action for criminal conversation, testimony of the husband and wife that they were married by a minister of the Gospel twenty-five years before, that they had since constantly lived together as husband and wife, that they had a son 22 years old, showed an actual marriage. Stark v. Johnson, 43 Colo. 243, 95 P 930.

**88.** On issue of whether beneficiary under certificate issued by fraternal benefit association was wife of assured, evidence of one witness present at marriage ceremony and another who knew her as wife of assured held sufficient. Potievska v. Independent Western Star Order [Mo. App.] 114 SW 572. Parol testimony to show religious ceremony in Italy not in violation of rule requiring best evidence. Massucco v. Tomassi, 80 Vt. 186, 67 A 551.

**89.** Evidence of ceremony by priest and subsequent cohabitation as husband and wife sufficient, where statute provides that validity shall not be affected on account of want of jurisdiction or authority of official, providing the parties or either of them fully believe they have been lawfully married. Woldson v. Larson [C. C. A.] 164 F 548. Fact that man and woman have same surname, no evidence that they were husband and wife. Claxton v. Lovett, 129 Ga. 300, 58 SE 830. Facts as to residence of parties to first and second marriage held not sufficient to preclude jury from finding that first marriage had not been dissolved by divorce. Colored Knights of Pythias v. Tucker [Miss.] 46 S 51. Where wife claimed rights by marriage in 1862 as against subsequent marriage and cohabitation in 1873, question whether bonds of former marriage subsisted is for jury. Sparks v. Ross [N. J. Eq.] 70 A 679. Evidence examined and held sufficient to show marriage as basis for action for alienation of affection. Bair v. Paterson [Mo. App.] 110 SW 615. Evidence held sufficient to sustain finding that wife claiming homestead exemption did not in good faith believe herself married. Middleton v. Johnston [Tex. Civ. App.] 110 SW 789. In action to quiet title, where it was incumbent upon plaintiff to show that defendant was not divorced from his first wife at time of marriage in question, evidence held sufficient to bring case before jury. Compton v. Benham [Ind. App.] 85 NE 365. **Foreign marriage** held not proved by evidence of "ritual marriage" not made legal according to statute of Austria. Kresh v. Kresh, 58 Misc. 461, 111 NYS 437.

**90.** Proof of slave marriage after fifty years. Dunn v. Garnett [Ky.] 112 SW 841.

**91.** Where parties have cohabited as husband and wife, acknowledged themselves to be such, and reputed to be such, a legal presumption of marriage arises. Osborne v. McDonald, 159 F 791.

**92.** Evidence that plaintiff and defendant in divorce action were living together as husband and wife and passed as such in their community raises a presumption sufficient in absence of denial. Houlton v. McGuirk [La.] 47 S 681. Instruction that this proof may be made by showing general repute among neighbors correct. Drawdy v. Hesters, 130 Ga. 161, 60 SE 451. Evidence as to cohabitation and repute held relevant in proof of marriage as defense in ejectment action under mortgage. Stodenmeyer v. Hart [Ala.] 46 S 488. If certificate is not per se legal evidence, marriage may be proved by cohabitation and repute. Eames v. Woodson, 120 La. 1031, 46 S 13. In a will contest where issue was as to which of two women was decedent's widow, one of them claiming through a nonceremonial unwitnessed marriage supported by evidence of repute, the other through a formal ceremony clearly established and from which issue sprang, held no presumption in favor of

repute must be general and uniform,[94] and the cohabitation must not have been illicit in its inception.[95] Less proof is required to show a marriage in fact between persons competent to marry at the beginning of the cohabitation than when it appear that one was at that time knowingly incompetent, even though the impediment was subsequently removed.[96] There is no presumption that a contract was entered into after the removal of such impediment.[97]

§ 3. *Validity and effect.* See 10 C. L. 688—Every marriage is presumed valid[98] and when once established is presumed to continue,[99] but these presumptions while strong, may be overcome by testimony sufficient to satisfy the jury that there was no valid marriage or that it did not continue.[1] A marriage valid according to the law in force when made is valid although that law was later repealed.[2] Validity is to be determined according to the law of the place where the marriage was entered into,[3] but if valid according to that law, it is valid anywhere,[4] even when the parties have left their own state to marry elsewhere for the purpose of avoiding the laws of the state of their domicile.[5] A marriage void in inception may become valid

either will be entertained. In re Rossignot's Will, 112 NYS 353.

**93.** Where plaintiff in a suit involving community property was shown to have lived with decedent as husband and wife, to have held her out as his wife, made conveyances in which she joined as wife, buried her as such and that she was considered by friends as such, held sufficient to show marriage in Washington where common-law marriages are not valid. Nelson v. Carlson, 48 Wash. 651, 94 P 477.

**94.** Evidence examined and held not uniform. Weidenhoft v. Primm, 16 Wyo. 340, 94 P 453. Conflict in testimony as to general reputation. Penney v. St. Joseph Stockyards Co., 212 Mo. 309, 111 SW 79.

**95.** Where plaintiff on an issue of heirship admitted that her relations with decedent were meretricious in the beginning, they will be presumed to continue so, despite an alleged later contract of marriage. Weidenhoft v. Primm, 16 Wyo. 340, 94 P 453. Evidence as to nature of cohabitation considered and held insufficient to show relation of husband and wife. Id. Declarations of husband denying marriage made during period of cohabitation are admissible as part of res gestae. Drawdy v. Hesters, 130 Ga. 161, 60 SE 451.

**96.** In action to quiet title, it appeared that defendant married, having an undivorced wife who subsequently obtained a divorce from him with personal service, in absence of proof of a new contract after divorce, and on showing that he continued to cohabit with his last wife, who was ignorant of disability, held sufficient to warrant presumption that no valid marriage was ever consummated. Compton v. Benham [Ind. App.] 85 NE 365.

**97.** Where man, having a wife living, entered into illicit relations with another, cohabited with her as his wife, fact that this cohabitation was continued unchanged after divorce of first wife not of itself sufficient to show a contract of marriage after impediment removed. O'Neill v. Davis [Ark.] 113 SW 1027.

**98.** Marriage and cohabitation for eighteen years in neighborhood where wife by alleged prior marriage resided. Sparks v. Ross [N. J. Eq.] 70 A 679. Banns, license, etc., presumed. In re Sloan's Estate [Wash.] 96 P 684.

**99.** In action on insurance policy presumption is that beneficiary continued to remain wife of assured. Hilliard v. Wisconsin Life Ins. Co. [Wis.] 117 NW 999.

**1.** Where defense in suit on insurance policy was that beneficiary was not the wife of assured, an instruction that the jury was bound to presume a divorce of beneficiary from the first husband, "unless it was conclusively proved by positive evidence that no divorce had been granted before the second marriage," was erroneous since it required a degree of proof amounting to demonstration. Colored Knights of Pythias v. Tucker [Miss.] 46 S 51. In action to quiet title, evidence of marriage in 1862 did not conclusively show that it still subsisted in 1873, where it appeared that both parties subsequently married others and that plaintiff knew of defendant's marriage but made no claim that she was his wife. Sparks v. Ross [N. J. Err. & App.] 69 A 185.

**2.** A husband who entered into a valid marriage when less than 18 years old cannot base a suit annulling such marriage on the enactment of a subsequent statute authorizing a decree of nullity on ground of age, the statute not being retroactive. Williams v. Brokaw [N. J. Eq.] 70 A 665.

**3.** In absence of evidence as to laws of Greece, they will be presumed to be the same as those of the forum. Vazakas v. Vazakas, 109 NYS 568.

**4.** A common-law marriage by the sealing ceremony of the Mormon Church valid in Utah will be recognized as valid in Idaho in suit to determine widow's right to her interest in property of deceased husband. Hilton v. Stewart [Idaho] 96 P 579. Marriage according to common law alleged to have been contracted in Colorado will be recognized in Washington where such marriages are not valid if contracted there. Nelson v. Carlson, 48 Wash. 651, 94 P 477. Marriage, in another state, of divorced man forbidden by decree to remarry. In re Garner's Estate, 59 Misc. 116, 112 NYS 212.

**5.** Where statute prohibited marriage by ward without guardian's consent, parties went to another state where such restriction did not exist and were married there, held

when impediment is removed.[6] A subsequent marriage raises no presumption of invalidity of the first,[7] even between the same parties,[8] but will create a presumption of a preceding valid divorce.[9] Presumptions in favor of second marriage merely overcome a presumption as to first marriage arising from reputation and cohabitation, and do not overcome actual proof of first marriage.[10] A decision of the courts of a sister state is decisive evidence as to validity.[11] Doctrine of estoppel does not apply as between husband and wife and parent or child.[12]

§ 4. *Proceedings for annulment.*[See 10 C. L. 689]—A decree of annulment is not necessary to clothe the parties with all the rights of unmarried persons.[13] If the court has jurisdiction of the parties and proceedings,[14] its judgment, although erroneous, is valid until set aside or reversed.[15] Annulment is not equivalent to divorce.[16] The court, unless controlled by positive enactment, proceeds as a court of

marriage valid. Sturgis v. Sturgis [Or.] 93 P 696.

6. In a suit to establish plaintiff's dower, it appeared that prior to her alleged marriage to decedent she was already married to one S., of whom nothing had been heard for three years prior to the marriage to decedent. Held that, the reputed marital relations and cohabitation of plaintiff and decedent continuing on the expiration of seven years from the disappearance of S, the marriage became presumptively valid. Smith v. Fuller [Iowa] 115 NW 912.

7. Evidence of subsequent marriage will not raise a presumption that first marriage was terminated by divorce or death, where it appears that the parties were alive and in the absence of evidence showing divorce. Smith v. Fuller [Iowa] 115 NW 912. Where parties were married in Canada and subsequently in New Jersey, if first marriage was valid the second would amount to nothing. Knapp v. State [Tex. Cr. App.] 114 SW 836.

8. Remarriage subsequent to marriage contracted after first marriage does not invalidate presumption of continuance of first marriage. Smith v. Fuller [Iowa] 115 NW 912.

9. Sufficient to make wife competent witness for his child on issue in ejectment as to whether child was daughter of deceased by alleged wife. Lyon v. Lash [Kan.] 99 P 598.

10. In suit to determine title to decedent's property wherein decedent's husband claimed a valid and subsisting marriage prior to his marriage to decedent, evidence held sufficient to establish first marriage and to overcome presumption of validity of the second. In re Sloan's Estate [Wash.] 96 P 684. Defendant married plaintiff in annulment suit in good faith believing that her former husband was dead, not having heard from him for five years, held voidable but not void. Stokes v. Stokes, 113 NYS 142.

11. In a suit brought in Idaho to determine widow's right to half-interest in property of deceased, judgment and decree of supreme court of Utah in suit between same parties on same question adjudging her marriage to deceased valid is res adjudicata and controlling in Idaho court. Hilton v. Stewart [Idaho] 96 P 579.

12. In suit invoking community property where decedent's husband alleged a prior marriage, he was not estopped to deny the validity of the subsequent marriage. In re Sloan's Estate [Wash.] 96 P 684.

13. Floyd County v. Wolfe [Iowa] 117 NW 32. Fact that statute provides that a marriage where a husband or wife exists by a former marriage shall be absolutely void without any legal process does not deprive court of jurisdiction of a proceeding to annul such marriage. Bickford v. Bickford, 74 N. H. 448, 69 A 579.

14. Since marriage is a civil contract, the right to bring action for annulment is strictly personal to the parties and does not pass to the heirs. Ducasse's Heirs v. Ducasse, 120 La. 731, 45 S 565. Where a woman in good faith enters into a marriage contract with a man and they assume and enter into the marriage state pursuant to any ceremony or agreement recognized by the law of the place, which marriage would be legal except for the incompetency of the man which he conceals from the woman, a status is created which will justify a court in rendering a decree of annulment upon complaint of the woman. Buckley v. Buckley [Wash.] 96 P 1079. Evidence in suit founded on fraud and hypnotic influence, where defendant was in Greece and suit undefended, held insufficient. Vazakas v. Vazakas, 109 NYS 568.

15. Cannot be collaterally attacked. Bickford v. Bickford, 74 N. H. 448, 69 A 579. Revisory power of court over orders as to alimony, allowance and custody made upon a decree of nullity, does not open upon an application thereunder the decree upon which such orders may have been based. Id.

16. In purview of statute granting homestead exemption to wife, decree of annulment not considered of same effect as divorce. Floyd County v. Wolfe [Iowa] 117 NW 32. Same rules as to counsel fees apply in an action for annulment as in an action for divorce. Schroter v. Schroter, 57 Misc. 199, 107 NYS 1065. Under B. & C. Comp. § 508, in bringing a suit to declare a marriage void, it is sufficient, if marriage is solemnized in this state, to allege and prove that plaintiff is an inhabitant of the state at time of commencement of suit. Parrish v. Parrish [Or.] 96 P 1066. Doubtful whether equitable suit to annul is maintainable for causes recognized by statute as grounds for divorce. Griffin v. Griffin, 130 Ga. 527, 61 SE 16. Section 3534 of the code, authorizing service of summons by publication in divorce proceedings, where defendant is a

equity in the exercise of its jurisdiction of matrimonial causes, despite fact that that jurisdiction is conferred and regulated by statute,[17] and may, where a marriage is not void but voidable, deny complainant relief where he does not come into court with clean bonds.[18] Annulment will not be granted for physical incapacity where, by reason of the advanced years of the parties, the desire for support and companionship, rather than the usual motives of marriage, must have actuated them.[19]

§ 5. *Criminal offenses and penalties.* See 10 C. L. 890

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**Marriage Settlements,** see latest topical index.

### MARSHALING ASSETS AND SECURITIES.[20]

*The scope of this topic* is noted below.[21]

Broadly stated, the doctrine of marshaling assets is that a creditor who has the right to make his debt out of either of two funds must resort to that one of them which will not interfere with or defeat the rights of another creditor who has recourse to only one of the funds.[22] It is confined to cases where two or more persons are creditors of the same debtor and have successive liens upon the same property, while the creditor prior in right has also other securities belonging to the same debtor not available to the junior lien.[23] It is not a vested right or lien founded on contract, but rests upon equitable principles [24] to the end that the claims of both creditors shall be satisfied; [25] hence it is not invoked in favor of one having an adequate remedy at law,[26] nor will it be enforced to the detriment of the prior creditor.[27] Injunction will issue to prevent prosecution of a suit until another fund has been exhausted,[28] but the right to compel one to resort to a particular fund cannot be de-

nonresident, does not extend to an action to annul. Bisby v. Mould [Iowa] 115 NW 489.

17. Where plaintiff in annulment suit founded on having a former wife living was shown to have knowledge and to have acted in bad faith, the court will refuse relief. Berry v. Berry, 114 NYS 497.

18. Where husband in the second marriage entered into in good faith by both parties, after knowledge that his wife had another husband still living elected to continue to treat her as his wife. Stokes v. Stokes, 113 NYS 142. Code Civ. Proc. § 1745, providing that an action to annul a marriage upon ground that former husband or wife of one of the parties was living, the former marriage being in force, may be maintained by either of the parties during the lifetime of the other, or by former husband or wife, construed not to afford relief to one who has acted in bad faith and knowingly contracted a bigamous marriage, its object being to protect the innocent and aid those who have acted in good faith. Berry v. Berry, 114 NYS 497. Evidence, in annulment suit on ground that plaintiff had a former wife, examined and held to support finding that he acted with knowledge and in bad faith in contracting his second marriage. Id. Section 3 of the Domestic Relations Law, providing that "a marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless either:—(3) Such former husband or wife has absented himself or herself for five successive years then last past without being known to such person to be living during that time" in which event such "a marriage is void from the time its nullity is declared by a court of competent jurisdiction" held not mandatory so as to confer relief as matter of strict legal right. But court may inquire into circumstances and exercise its equitable powers. Stokes v. Stokes, 113 NYS 142.

19. Where plaintiff was 56 years old and defendant 69, it appearing that plaintiff was a soldier's widow and would recover her pension if marriage annulled. Hatch v. Hatch, 58 Misc. 54, 110 NYS 18.

20. See 10 C. L. 690.

21. **It Includes** only the general equitable doctrine of marshaling assets. It excludes rules for distribution of bankrupt (see Bankruptcy, 11 C. L. 383) and insolvent (see Assignments for Benefit of Creditors, 11 C. L. 300; Insolvency, 12 C. L. 217), estates, priority of liens (see Liens, 12 C. L. 606), mortgages (see Foreclosure of Mortgages on Land, 11 C. L. 1487), and priorities between levies and claims adverse thereto (see Attachment, 11 C. L. 315; Executions, 11 C. L. 1433).

22. Farmers' L. & T. Co. v. Kip, 192 N. Y. 266, 85 NE 59.

23. Adams v. Young, 200 Mass. 588, 86 NE 942. Where buyer of goods took an assignment of prior mortgage thereon by seller and sale was held void as to part of goods, trustee in bankruptcy could not compel him to first exhaust his mortgage against goods as to which sale was valid. Id. Where payee of note had in his hands funds of maker to meet note, and after transfer of note by him and before maturity became bankrupt, maker may compel resort to assets of bankrupt. Chemical Nat. Bank v. Kiam [Tex. Civ. App.] 113 SW 948.

24, 25, 26. Farmers' L. & T. Co. v. Kip, 192 N. Y. 266, 85 NE 59.

27. Adams v. Young, 200 Mass. 588, 86 NE 942.

28. Chemical Nat. Bank v. Kiam [Tex. Civ. App.] 112 SW 948.

cleared in an action not brought for that purpose, where all the parties necessary for the determination of the question are not before the court.[29]

If a mortgagee or other lienholder releases part of the land or premises upon which his lien exists, to the prejudice of a subsequent incumbrancer or purchaser with notice of the subsequently acquired rights, his release will operate as a discharge of his lien to the extent of the value of the land released,[30] but such release will not impair the lien unless the lienholder knows that the release must result in injury to subsequently acquired rights, or has such notice of the probable existence of such rights as to make it his duty to investigate and inquire before acting,[31] and as a general rule, such lienholder will not be chargeable with constructive notice;[32] hence the mere registration of a subsequent mortgage or deed of conveyance or possession does not operate as such notice.[33] It will be presumed that the holder of a lien who executes a release of a part of the law is acquainted with the contents of the release.[34]

As applied to the settlement of estates, the doctrine may be defined as such an arrangement of the different funds under administration as will enable all parties having equities therein to receive their due proportions, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of the funds.[35]

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**Marshaling Estate,** see latest topical index.

## MASTER AND SERVANT.


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**§ 3. Master's Liability for Injuries to Servants, 677.**

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**§ 5 Civil Liability for Interference with Relation by Third Person, 805.**

**§ 6. Crimes and Penalties, 807.**


*The scope of this topic* is noted below.[35a]

§ 1. *The relation; statutory regulations.* See 10 C. L. 691—The relation of master and servant rests upon contract,[36] express or implied, and its existence is to be de-

**29.** Where defendant's indebtedness was secured by mortgages on property of debtor and his wife and a prior indebtedness was secured by signature of a surety, question whether defendant should be required to resort to the other security could not be determined in action to set aside mortgage, where wife and surety were not made parties. Foley's Trustee v. Foley, 32 Ky. L. R. 1228, 108 SW 270.

**30.** Watson v. Vansickle [Tex. Civ. App.] 114 SW 1160.

**31, 32, 33.** Lienholder held to have had actual notice. Watson v. Vansickle [Tex. Civ. App.] 114 SW 1160.

**34.** One executing release chargeable with knowledge of claim under sale recited in release. Watson v. Vansickle [Tex. Civ. App.] 114 SW 1160.

**35.** Doctrine not applicable to decedent's debts same being payable out of her own estate before resort could be had for that purpose to another estate over which she had only a power of appointment. Farmers' L. & T. Co. v. Kip, 192 N. Y. 266, 85 NE 59.

**35a.** Includes all matters relative to rights and liabilities growing out of the relation. Excludes agency (see Agency, 11 C. L. 60), apprentices (see Apprentices, 11 C. L. 262.)

**36.** Relation arises through contract made

termined, in general, by reference to the principles applicable to other contracts,[37] and to the facts of each particular case. A contract of employment is not lacking in mutuality because the party employed does not bind himself to continue in the employment for a definite period.[38] Whether the relation created is that of master and servant or employer and independent contractor depends upon the terms of the contract,[39] the test being, in general, the degree of control exercised by the one over the other in the performance of the particular service or work contracted for.[40]

*Termination of the relation.* See 10 C. L. 691—The term for which a servant is employed must be determined by reference to the contract [41] and, where its terms are not clear and certain, by reference to all the attendant facts and circumstances,[42] and the construction which they themselves have placed upon it.[43] Where the parties mutually acquiesce in a continuance of the service without change, after expiration of a term, there is an implied hiring for another term of the same length [44] at the same compensation,[45] but a holding over in an employment to a fixed date creates an employment at will.[46] Where no definite term is fixed, the contract is terminable at will by either party [47] without notice or cause.[48] There is a conflict as to whether the use of a certain unit of time in naming compensation is sufficient evidence to sustain a finding of a hiring for that term.[49] Some courts hold that

for common benefit of both. Brown v. Rome Mach. & Foundry Co. [Ga. App.] 62 SE 720.

37. See Contracts, 11 C. L. 729.

38. Newhall v. Journal Printing Co., 105 Minn. 44, 117 NW 228.

39. See Independent Contractors, 11 C. L. 1896; also, post, § 4.

40. Where contract between parties did not show that one was to control the manner of doing things called for by contract, as well as what was to be done, and other did not give all his time, relation established was not master and servant. McKenna v. Stayman Mfg. Co., 112 NYS 1099.

41. Evidence held to warrant finding that civil engineer was employed for **certain term.** Cooke v. Independent Tel. & T. Const. Co. [N. J. Law] 68 A 790. Evidence held to show that contract for month was afterwards made for term of **one year.** Paryear v. Ould [S. C.] 62 SE 863. Whether sales manager for corporation had been hired **by the year** held for jury. Arkadelphia Lumber Co. v. Asman, 85 Ark. 568, 107 SW 1171. Plaintiff was hired at "$2,500 for the first year" and $3,000 "for the second year and thereafter." Held, hiring from year to year, action for damages would lie for discharge during third year. Mason v. New York Produce Exch., 111 NYS 163. Evidence sufficient to warrant finding of contract **for one month's** service, after expiration of yearly term. Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 85 NE 877. Salesman's contract held not hiring for one year, but at most a hiring **for by the week.** Tubbs v. Cummings Co., 200 Mass. 555, 86 NE 921; Weissman v. Robertson, 113 NYS 981; Egan v. Chabot, 124 App. Div. 593, 109 NYS 110. Evidence held to show hiring for **indefinite term.** Miller v. Ritter Lumber Co., 33 Ky. L. R. 698, 110 SW 869. Employment at "$70 a month," without agreement as to term, is **hiring at will** and not for month. Frankel v. Central R. Co., 114 NYS 137. Contract to pay $25 a week, no period being fixed, is hiring at will, terminable by either party without notice. Warden v. Hinds [C. C. A.] 163 F 201. Conversation with nurse, employed for two weeks, at $15 per week, at close of engagement held merely hiring at will for future, and not hiring for definite term. Sproule v. Gulden, 112 NYS 1076.

42. Recognition of annual term of employment, use of word "salary," and naming of year as unit in fixing salary, may all be considered in determining whether contract is for year. Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 85 NE 877.

43. See 8 C. L. 841, n. 66.

44. After expiration of contract for one year, service continued without any agreement as to time, pay being received as under contract. Held, law presumed new contract for year upon same terms. Mendelson v. Bronner, 124 App. Div. 396, 108 NYS 807.

45. See post, § 2.

46. One hired for portion of year to January 1, who holds over and is then discharged, cannot recover as for breach of contract for year, original contract not being for one year. Barnes v. Summit Silk Mfg. Co., 113 NYS 977.

47. Clarke v. Atlantic Stevedoring Co., 163 F 423. The servant cannot recover for the breach of his contract of employment where it is terminable at the will of either party. Brougham v. Paul, 138 Ill. App. 455. Letter stating that writer had work for 200 colored longshoremen and could employ them continuously held not an offer, completed by men going to work, but a mere advertisement or invitation; no breach of contract to discharge men who went to work in response to such letter which did not fix terms of contract with each man employed. Clarke v. Atlantic Stevedoring Co., 163 F 423.

48. Miller v. Ritter Lumber Co., 33 Ky. L. R. 698, 110 SW 869. Contract of employment on a commission basis, for no definite term, terminable by either of parties at will and without notice. Brougham v. Paul, 138 Ill. App. 455.

49. See Maynard v. Royal Worcester Cor-

a hiring at so much per year, no time being specified, is indefinite and may be terminated at will,[50] but it is said that the weight of authority is that this circumstance alone, in the absence of any other consideration impairing its weight, will sustain a finding of a hiring for that period.[51]

*Discharge of employe.*[See 10 C. L. 692]—No particular form of words is required to constitute a discharge; any words, written or verbal, or acts, conveying the idea that services are no longer desired and will not be accepted, may constitute a discharge.[52] The question is one of fact, dependent upon the circumstances of each case.[53] A request to resign is not a discharge when not treated as such by the parties.[54] While an employe is justified in refusing to continue services when his employer refuses payment according to contract,[55] such breach by defendant is not a discharge.[56]

A servant is bound to obey all lawful and reasonable orders of his employer,[57] and if an order is reasonable and lawful the employer's motive in giving it is immaterial.[58]

Disobedience of orders and failure to perform the work for which he was employed is ground for dismissal,[59] but disobedience of an unreasonable or unlawful order is not.[60] Whether an order is reasonable is a question of fact,[61] in determining which it may be presumed that an employe is hired with some regard to his known capabilities, when the contract contains no limitations as to the nature of services to be required.[62] A discharge is justified where the servant does not give his entire time and attention, as agreed, to the master's business,[63] or is negligent in the performance of his duties.[64] Where a contract requires services satisfactory to the employer, and the employment involves taste, fancy, interest, and personal satisfaction or judgment of the employer, he may discharge when he considers services unsatisfactory [65] and no question of good faith is involved.[66] If services do not in-

set Co., 200 Mass. 1, 85 NE 877; also cases cited supra, as to hiring by week or month.

**50.** See cases cited in Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 85 NE 877.

**51.** Evidence sufficient to warrant finding of hiring for year. Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 85 NE 877.

**52.** Reiter v. Standard Scale & Supply Co., 237 Ill. 374, 86 NE 745.

**53.** Reiter v. Standard Scale & Supply Co., 237 Ill. 374, 86 NE 745. Correspondence held too indefinite to constitute termination of contract for making of new one. Bolles v. International Specialties Co., 110 NYS 882. Correspondence construed not to constitute a discharge but mere unaccepted offer of settlement of differences. Hinchman v. Matheson Motor Car Co., 151 Mich. 214, 14 Det. Leg. N. 902, 115 NW 48. Salesman not discharged by letter saying his work was unsatisfactory where his orders were thereafter filled and commissions paid. Ames v. Snively [Kan.] 96 P 943. Manager was asked to resign but refused, and employer did not expressly discharge him but told him he need not report until notified and told another man to take charge of office. Whether manager was discharged was for the jury. Reiter v. Standard Scale & Supply Co., 237 Ill. 374, 86 NE 745. Where plaintiff was hired as general manager of defendant's stores in city, and defendent thereafter demanded that he take charge of small stand in hotel and give up his headquarters in large store, and on his refusal demanded that he surrender the store, such action amounted to wrongful discharge. Wolf Cigar Stores Co. v. Kramer [Tex. Civ. App.] 109 SW 990.

**54.** Reiter v. Standard Scale & Supply Co., 141 Ill. App. 427.

**55.** Barnett v. Cohen, 110 NYS 835.

**56.** Plaintiff allowed to recover wages due but no damages, where he left defendant's service. Barnett v. Cohen, 110 NYS 835.

**57.** Development Co. of America v. King [C. C. A.] 161 F 91.

**58.** As desire to get rid of servant by assigning distasteful work. Development Co. of America v. King [C. C. A.] 161 F 91.

**59.** Plaintiff rightfully dismissed where he refused to perform services unless another employe agreed to obey orders, latter's disobedience being unimportant. Lindner v. Cape Brewery & Ice Co., 131 Mo. App. 680, 111 SW 600.

**60.** Development Co. of America v. King [C. C. A.] 161 F 91.

**61.** Order to go to Mexico and examine and report on defendant's property there held reasonable. Development Co. of America v. King [C. C. A.] 161 F 91.

**62.** Development Co. of America v. King [C. C. A.] 161 F 91.

**63.** Discharge of salesman justified where he spent much time in idleness. Gross v. Kathairo Chemical Co., 111 NYS 481.

**64.** Negligence of plaintiff in performance of work held to warrant his discharge by defendant. Wright v. Lake, 48 Wash. 469, 93 P 1072.

**65.** Actor, employed under such contract, rightfully discharged. Saxe v. Shubert Theatrical Co., 57 Misc. 620, 108 NYS 683.

volve questions of taste and personal satisfaction, the question of good faith in discharging the employe is one of fact.[67] A servant's default in abandoning the service may be waived by the employer.[68] A wrongful breach of contract by the master relieves the servant from further performance of any of its conditions.[69]

*Remedy for wrongful discharge.*[See 10 C. L. 694]—For a wrongful discharge, the servant has a right of action for damages[70] which may be maintained before expiration of the term for which he was employed.[71] The measure of damages is the amount which the employe would have earned under the contract[72] less what he earned or could have earned by the exercise of reasonable diligence in other employment,[73] it being the duty of the discharged employe to lessen his damages by the use of such diligence,[74] to obtain other employment of the same grade and kind,[75] and if such employment cannot within a reasonable time be secured, then to seek other work for which he is fitted,[76] but he is not bound to mitigate damages by accepting employment to which he was not accustomed and for which he was not fitted.[77] Where the action is brought before expiration of the contract term, the measure of damages is the amount of wages due and unpaid at time of trial less earnings up

**66, 67.** Saxe v. Shubert Theatrical Co., 57 Misc. 620, 108 NYS 683.

**68.** Plaintiff, after having abandoned work for an unreasonable length of time, offered to allow defendant to get some one else to complete it. Defendant did not accept the offer and did not object until after plaintiff had resumed work for two days. Held plaintiff's default was waived. Reynolds v. Hart, 42 Colo. 150, 94 P 14.

**69.** Servant's covenant not to engage in loan business for one year after termination of term of contract with master released by wrongful discharge. The M. M. Mitchell Co. v. Mitchell, 134 Ill. App. 214.

**70.** Discharge of farm laborer not warranted; employer liable in damages. Bates v. Davis, 57 Misc. 557, 109 NYS 1094. Remedy of employe, who has been wrongfully discharged before expiration of his term, is action for damages for breach of the contract and not an action for wages or in assumpsit. Quick v. Swing [Or.] 99 P 418. Declaration alleged contract, breach and damages, and bill of particulars contained item of damage consisting of wages for balance of term, and defendant gave notice of justification of discharge. Held, action was for breach not on contract, and defendant could not claim otherwise. Webb v. Depew, 152 Mich. 698, 15 Det. Leg. N. 365, 116 NW 560.

**71.** Realty Co. v. Ellis [Ga. App.] 61 SE 832; Davis v. Dodge, 110 NYS 787. Right of discharged servant to sue at once for breach of contract or tender services and sue at termination of term depends upon whether facts show wrongful discharge and tender of performance. Facts found against plaintiff. In re McCahan's Estate, 221 Pa. 186, 70 A 711.

**72.** Prima facie case for such amount made by showing contract, discharge, and that no other employment was obtained. Molastowsky v. Grauer, 113 NYS 679. A servant improperly discharged before the term of his employment is prima facie entitled to recover the stipulated compensation for the whole term, if he has failed to secure other employment during that period after an honest attempt. Discharge for inefficiency. Millert v. Augustinian College, 36 Pa. Super. Ct. 511. Evidence held to show contract for year at $1,000 as rink manager; that rink burned and was not rebuilt; that plaintiff refused other employment; and to warrant recovery for accrued installments of salary. Gate City Roller Rink Co. v. McGuire [Tex. Civ. App.] 112 SW 436.

**73.** Nuckolls v. College of Physicians and Surgeons, 7 Cal. App. 233, 94 P 81; Realty Co. v. Ellis [Ga. App.] 61 SE 832. Finding of court for sum less than contract salary sustained by evidence. Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 85 NE 877. The measure of damages will be merely nominal if he obtains employment at a large or larger remuneration than that from which he was discharged, and if at a less rate, then the difference between what he received and the agreed salary would be the measure of his damages if he was wrongfully discharged. Patrick v. McAleenan, 136 Ill. App. 563. Cigar store manager, being discharged, opened up business for himself, refusing employment as bookkeeper. Held, damages should be reduced by what he could have earned as bookkeeper, or if his services to himself were worth more, then by that amount. Wolf Cigar Stores Co. v. Kramer [Tex. Civ. App.] 109 SW 990.

**74.** It is duty of discharged employe to lessen damages as much as possible by obtaining other employment. Hampton v. Buchanan [Wash.] 98 P 374. It is the duty of a discharged employe to use reasonable diligence to obtain other employment so as to obtain as large compensation as possible. Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 85 NE 877.

**75.** Wolf Cigar Stores Co. v. Kramer [Tex. Civ. App.] 109 SW 990.

**76.** Wolf Cigar Stores Co. v. Kramer [Tex. Civ. App.] 109 SW 990. Cigar store manager could not obtain similar work but could have obtained position as bookkeeper, for which he was fitted. What he would have so earned deducted. Id.

**77.** Barney v. Spangler, 131 Mo. App. 58, 109 SW 855.

to that time,[78] and what he would have earned under the contract[79] less probable future earnings.[80] But the rule that earnings of the employe are to be deducted does not apply where the contract calls for only a portion of the employe's time[81] and where the amount actually earned could have been earned in his own time after performing the services called for by the contract.[82] In an action for damages, the burden is upon plaintiff to show the contract of employment[83] and wrongful discharge.[84] It is generally held that the burden is upon defendant to show that plaintiff found or could have found other suitable employment[85] and that, in the absence of such proof, plaintiff is entitled to recover the salary fixed by the contract,[86] but it is not prejudicial error to allow plaintiff to prove, while making his case, that he in fact did not secure other employment,[87] and where such showing is made, plaintiff is entitled prima facie to wages or salary for the balance of the term.[88] The burden is upon defendant to plead[89] and prove justification for the discharge.[90] Even though plaintiff pleads that he was discharged without cause, he does not assume the burden of proving it.[91] Usually the complaint in such action should set out the contract, the wrongful discharge, ability and willingness of the employe to perform the work required, and a claim of damages for the breach.[92] But a complaint which does not allege or claim damages as such, but demands judgment

**78.** Davis v. Dodge, 110 NYS 787.

**79.** In an action for breach of contract brought before expiration of the stipulated term, plaintiff is entitled to recover as damages what he would probably have earned under contract. Webb v. Depew, 152 Mich. 698, 15 Det. Leg. N. 365, 116 NW 560.

**80.** Future damages may be allowed so far as they are reasonably certain, though amount is different to ascertain. Davis v. Dodge, 110 NYS 787.

**81.** As where dentist was employed as demonstrator from 1 to 5 o'clock each day. Nuckolls v. College of Physicians & Surgeons, 7 Cal. App. 233, 94 P 81.

**82.** Amount earned by dentist, could have earned in spare time, and he could have performed contract services also during term. Nuckolls v. College of Physicians & Surgeons, 7 Cal. App. 233, 94 P 81.

**83.** Finding of employment of plaintiff as designer for one year held contrary to great weight of evidence and judgment thereon reversed. Stein v. Mendetz, 125 App. Div. 561, 109 NYS 1025. Where memorandum of agreement left open question of mode of accounting by which to determine profits in which plaintiff was to share, and parties could not agree thereon, contract was incomplete and plaintiff could not recover damages for discharge, regardless of question of defendant's good faith in failing to agree. Petze v. Morse Dry Dock & Repair Co., 125 App. Div. 267, 109 NYS 328.

**84.** Burden is on plaintiff to establish making of contract and his wrongful discharge. Chaet v. Goldberg, 110 NYS 817.

**85.** Quick v. Swing [Or.] 99 P 418. Burden on defendant to show earnings or what employe ought to have or could have earned. Realty Co. v. Ellis [Ga. App.] 61 SE 832. Where a breach of contract by the employer is established, the burden is upon defendant to show that similar employment could have been obtained by reasonable effort and that it was refused or reasonable efforts neglected. Altes v. Blumenthal, 113 NYS 574. This burden is met by defendant where plaintiff admits on cross-examination that he has not sought other employment. Pinder v. Jenkins, 113 NYS 588.

**86.** Contrary rule has not been distinctly adapted in Massachusetts. Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 85 NE 877.

**87.** Quick v. Swing [Or.] 99 P 418.

**88.** Proof of contract, wrongful discharge, and failure to procure other employment, makes prima facie case for wages for balance of term. Molostowsky v. Grauer, 113 NYS 679. Where plaintiff testifies to his efforts to get other work and his failure to do so, and there is no showing by defendant, plaintiff is entitled to recover full amount of wages for unexpired term. Compromise verdict for less set aside. Schleiff v. Berglas, 110 NYS 266.

**89.** Discharge presumed to be without cause where no cause was pleaded by defendant. Barney v. Spangler, 131 Mo. App. 58, 109 SW 855. Matter in justification of a discharge must be pleaded. Puryear v. Ould [S. C.] 62 SE 863.

**90.** Defendant must prove good cause for discharge. Maxton v. Gilsonite Const. Co. [Mo. App.] 114 SW 577; Hinchman v. Matheson Motor Car Co., 151 Mich. 214, 14 Det. Leg. N. 902, 115 NW 48. Evidence as to disobedience and neglect examined and held to justify finding for plaintiff. Campbell v. Fierlein, 134 Ill. App. 207. Mere charge, without proof or evidence, that servant was guilty of embezzlement not sufficient as ground of discharge. M. M. Mitchell Co. v. Mitchell, 134 Ill. App. 214.

**91.** Maxton v. Gilsonite Const. Co. [Mo. App.] 114 SW 577.

**92.** Quick v. Swing [Or.] 99 P 418. In action to recover compensation for balance of term, after discharge, complaint alleging that defendant disregarded its obligation and neglected to pay plaintiff, and that plaintiff was at all times prepared and ready to discharge his duties, held proper. Hinchman v. Matheson Motor Car Co., 151 Mich. 214, 14 Det. Leg. N. 902, 115 NW 48.

for a specified sum, may be held equivalent to a claim for damages,[93] where it is not attacked by demurrer.[94] In an action for liquidated damages as fixed by the contract, its terms must control,[95] though it is not error to receive unnecessary evidence as to the reason for the clause providing for damages.[96] Whether the claim for damages was waived by voluntary resignation is a question of fact.[97] All relevant facts transpiring between the discharge and the trial may be shown and considered in estimating damages.[98] Where the employe went into business for himself after his discharge, the details of his business after the expiration of the contract term could not be proved to show the value of his services to himself before expiration of the term.[99] Receipts signed by plaintiff, reciting employment by the week only, are binding upon him unless explained.[1] In Louisiana it is provided by statute that an employe discharged without serious cause may recover as a penalty the salary for the unexpired term.[2] But this statute is held inapplicable to purely executory contracts;[3] in such cases only actual damages are recoverable.[4]

*Remedies of master for breach by servant.*[See 8 C. L. 845]—Workmen have the right to quit the service at any time, singly or in concert, even in violation of their contracts,[5] subject, of course, to the right of the employer to recover damages for the breach.[6] A court of equity will not enjoin breach of a contract for ordinary personal services, the remedy at law being adequate,[7] nor will breach of an agreement not to engage in business in the state be enjoined, in the absence of some special equity involving good will, peculiar, intellectual or other skill or capacity, secret process or other recognized ground.[8] The mere fact that the employe has secretly acquired information concerning patrons of the employer does not warrant such relief.[9] A contract between employer and employe that the latter will not quit without giving a week's notice, and that if he does so the employer shall retain a week's wages as liquidated damages, is reasonable and enforcible.[10]

*Labor laws.*[11]—That portion of the federal act of 1898, regulating relations between interstate carriers and their employes, which makes it a crime for an agent or officer of such a carrier to discharge an employe on the ground of membership in a

93. Quick v. Swing [Or.] 99 P 418.

94. Reasonable intendments favor pleading when no objection is made until trial. Quick v. Swing [Or.] 99 P 418.

95. In action for damages for discharge, whether plaintiff was stockholder of defendant held immaterial, right of recovery resting on contract alone. Blum v. Nebraska-Iowa Creamery Co. [Neb.] 117 NW 104.

96. In action for liquidated damages for discharge, as provided in contract, it was not error to receive evidence of plaintiff's former employment to which his contract referred as the reason for the clause as to damages, though such proof was unnecessary. Blum v. Nebraska-Iowa Creamery Co. [Neb.] 117 NW 104.

97. In action for liquidated damages for discharge as provided in plaintiff's contract, whether plaintiff voluntarily resigned and waived his right to damages held settled by finding of jury, to whom question was properly submitted. Blum v. Nebraska-Iowa Creamery Co. [Neb.] 117 NW 104.

98. Realty Co. v. Ellis [Ga. App.] 61 SE 832.

99. Discharged cigar store's manager opened up business for himself. Wolf Cigar Stores Co. v. Kramer [Tex. Civ. App.] 109 SW 990.

1. Error to charge that such receipts did not bind him. Morgenbesser v. Levy, 58 Misc. 554, 109 NYS 825.

2. Rev. Civ. Code, art. 2749. Lloyd v. Dickson, 121 La. 915, 46 S 919.

3. As where defendants agreed to endeavor to get plaintiff position as secretary if they succeeded in getting control of certain business, suit being brought before actual breach. Lloyd v. Dickson, 121 La. 915, 46 S 919.

4. No actual damage shown. Lloyd v. Dickson, 121 La. 915, 46 S 919.

5. Delaware, etc., R. Co. v. Switchmen's Union of North America, 158 F 541. See Trade Unions, 10 C. L. 1872, for a full treatment.

6. See 8 C. L. 845, n. 8.

7, 8. Simms v. Burnette [Fla.] 46 S 90; Simms v. Patterson [Fla.] 46 S 91.

9. The fact that the bookkeeper secretly acquired information as to where his employer bought and sold liquor does not authorize injunction to restrain him from engaging in business, no trade secret or secret process being involved. Simms v. Burnette [Fla.] 46 S 90; Simms v. Patterson [Fla.] 46 S 91.

10. Gleaton v. Fulton Bag & Cotton Mills [Ga. App.] 63 SE 520.

11. See 10 C. L. 695; as to liability for injuries, see §§ 3A, 3B, 3E.

labor organization, is held invalid.[12] The Nevada statute forbidding employers to enter into agreement with employes whereby the latter agree to join, or to remain out of, a labor organization, is held invalid.[13] The New York eight-hour law of 1906, passed pursuant to the constitutional amendment of 1906,[14] the Oregon act limiting hours of labor of women in laundries,[15] and the Montana act regulating hours of labor of railroad employes,[16] are held valid. The Missouri [17] and Wisconsin [18] acts regulating hours of work of railroad employes are held invalid because of the act of congress on the same subject. A construction of the Ohio statute regulating hours of trainmen is given below.[19]

§ 2. *The right of the master in services of the employe and right of employe to compensation; trade secrets; medical treatment; assignments of wages; statutory regulations; liens.*[See 10 C. L. 695]—The right to compensation must rest upon contract, express or implied,[20] and ceases when the employment ceases.[21] A servant cannot

12. Employer held to have legal right to discharge employe for sole reason that he was member of labor organization, where contract of employment did not fix term of employment or grounds upon which employe might be discharged. Section 10 of Act of June 1, 1898, invalid, violating 5th amendment. Adair v. U. S., 208 U. S. 161, 52 Law. Ed. 436, rvg. 152 F 737.

13. Laws Nev. 1903, p. 207, c. 111, § 1, invades freedom to contract. Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 F 500.

14. Act is valid. People v. Metz [N. Y.] 85 NE 1070. Laws 1906, c. 506, § 8, makes 8 hours a legal day's work for all employes except those engaged in farm and domestic service, but does not prohibit agreements for overwork at increased compensation, except with employes of the state or municipal corporations. Contracts with state or municipal corporations must contain provision prohibiting more than 8 hours of work per day except in emergencies. Wages paid must equal prevailing rate in like trade or occupation. Contractor violating provisions of act not entitled to compensation for state or city. Act not applicable to persons regularly employed in state institutions, or to engineers, electricians, and elevator men in public buildings during sessions of legislature, nor to construction, maintenance or repair of highways outside limits of cities and villages. The act is held within the constitutional amendment of 1906; classification is legal and does not violate federal constitution; provision as to nonpayment of contractor who violates act enforced. Id. The law is not affected by Laws 1907, p. 1076, c. 506, amending Penal Code, § 384h, providing that contractor requiring more than 8 hours' work on municipal contracts may, on conviction, be fined, and his contract forfeited, at option of municipality. The two acts are independent and provide cumulative remedies. People v. Metz [N. Y.] 86 NE 986.

15. Oregon Sess. Laws 1903, p. 148, limiting the hours of labor of women in laundries to 10 hours daily, is not unconstitutional as being an infringement of the 14th amendment of the constitution of the United States. Muller v. Oregon, 208 U. S. 412, 52 Law. Ed. 551.

16. Montana statute (Laws 1907, p. 6, c. 5) regulating hours of work of railroad employes not invalid as regulation of interstate commerce, in absence of federal legislation on subject. State v. Northern Pac. R. Co., 36 Mont. 582, 93 P 945. The act was not at once rendered inoperative by Act of Congress of Mar. 4, 1907, 34 Stat. 1415, since the latter was not to become operative until Mar. 4, 1908. Id.

17. Laws 1907, p. 332, regulating hours of service of train dispatchers and telegraph operators, is invalid in so far as it applies to interstate traffic and is also unenforcible as to intrastate traffic, because congress has passed an act regulating same matter, and state law makes no discrimination. State v. Missouri Pac. R. Co., 212 Mo. 658, 111 SW 500.

18. The Wisconsin act of 1907, prohibiting more than eight consecutive hours of work for telegraph operators, including train dispatchers, is held invalid because in conflict with act of congress. Laws 1907, p. 1188, c. 575, conflicts with Act Cong. March 4, 1907, c. 3939, 34 St. 1415, which regulates hours of employes engaged in interstate commerce. State v. Chicago, etc., R. Co., 136 Wis. 407, 117 NW 686. Act of congress is valid, and declares the federal policy, which excludes power of state to legislate on the subject so far as employes engaged in interstate commerce are concerned. Id.

19. The fact that railway trainmen have been on duty for more than fifteen consecutive hours does not amount to a violation by the company of Code § 3365-14, unless it appears that the company permitted or required them to undertake the run without at least eight hours' rest subsequent to their last preceding run, and not then unless the jury find from the evidence that the last preceding run occupied more than fifteen consecutive hours. Baltimore & O. R. Co. v. Collins, 10 Ohio C. C. (N. S.) 486.

20. Evidence warranted finding that plaintiff was employed to prepare plans as alleged. Cooke v. Independent Tel. & T. Const. Co. [N. J. Law] 68 A 790. Evidence sufficient to support verdict for plaintiff, minor, in action for wages. Kraus v. Clark [Neb.] 116 NW 164. Evidence sufficient to show hiring of plaintiff by defendant's son, and ratification, with knowledge of wages promised, by defendant. Larson v. Foss [Wis.] 118 NW 804. Evidence insufficient to sustain claim for work as brakeman. Meek v. Missouri Pac.

recover for services voluntarily performed and not included in his contract,[22] nor for work done in violation of a criminal statute.[23] The usual rules of construction of contracts apply.[24] Thus, a reasonable construction, effectuating the real intention of the parties, will be adopted rather than a harsh and unreasonable construction.[25] Where there is an express contract, the amount of compensation recoverable depends upon its terms;[26] under an implied contract,[27] or one which fails to fix the rate of compensation,[28] the reasonable value of services rendered may be recovered. Recovery may also be had as upon a quantum meruit where services have been performed and accepted and the agreement as to compensation is unenforcible.[29] One prevented by unavoidable sickness from completing services under contract may recover the reasonable value of services rendered.[30] Where a special contract is alleged, no recovery can be had as upon an implied contract.[31] Where an employe, hired at a fixed salary, continues in the same employment after the expiration of the term of the original hiring, without any new contract as to compensation, it is presumed that the parties intend the same compensation.[32] In such case there can be no recovery on a quantum meruit.[33] One who employs and agrees to pay another for services is liable therefor though services are to be performed for a third person.[34]

R. Co., 129 Mo. App. 507, 107 SW 1044. Evidence insufficient to support claim for services in obtaining for defendant, employment agency, certain number of laborers. Calugerovich v. Yuzzolino, 110 NYS 984. Contract of beer salesman construed as calling for yearly, not monthly, payments, conditioned upon salesman disposing of 30,000 barrels yearly at certain net price to defendant. Gminder v. Zeltner Brew. Co., 111 NYS 215.

**21.** There being no proof of hiring for any definite period, plaintiff could recover only for actual time she worked. Reitzfeld v. Sobel, 114 NYS 27. Plaintiff, employed to manage department of defendant's mail order medical business, was to have salary and certain commission on receipts in his department, settlements to be made monthly. Held he was not entitled to commissions on sums paid after his employment ceased, though paid by patient handled by him. Ortega v. Collins New York Medical Institute, 111 NYS 427.

**22.** Barney v. Spangler, 131 Mo. App. 58, 109 SW 855.

See, also, Implied Contracts, 11 C. L. 1876.

**23.** Sunday work not work of necessity. Barney v. Spangler, 131 Mo. App. 58, 109 SW 855.

**24.** Losee v. Brunson, 141 Ill. App. 326.

**25.** Contract held to provide for $60 per month and half profits, less salary. Losee v. Brunson, 141 Ill. App. 326.

**26.** Evidence held to sustain plaintiff's contention as to agreed price for work. Ashkanazy v. Sachs, 110 NYS 929. Evidence held to show agreement to allow manager of store 25 per cent of profits as well as salary. Sicard v. Albenberg Co., 136 Wis. 622, 118 NW 179. Action on timber cruiser's contract for compensation; contract construed, no variance between pleading and proof; recovery sustained. Western Lumber Co. v. Willis [C. C. A.] 160 F 27. Giving employe $1 extra on one payday, and acceptance by him as gift, did not change former written contract of employment. Molostowsky v. Grauer, 113 NYS 679. Evidence held to sustain contention for commissions on goods sold to customers procured by plaintiff. Altmayer v. Lahm, 113 NYS 964. Error to give judgment for defendant on plaintiff's uncontradicted testimony as to certain extra work done for defendant at stipulated price. O'Donnell v. Caspary, 113 NYS 771. Contract for salary and commission as manager of stave factory construed; verdict for plaintiff sustained. Bauer Cooperage Co. v. Shelton [Ky.] 114 SW 257. Evidence insufficient to warrant finding of agreement to pay salary as well as living and traveling expenses of plaintiff and wife. Schomburg v. Columbia Fuller's Earth Co., 125 App. Div. 925, 110 NYS 135.

**27.** If services are rendered with expectation on one side of payment therefor, and on the other of receiving payment, the employe may recover the reasonable value of services rendered as upon implied contract. Middlebrook v. Slocum, 152 Mich. 286, 15 Det. Leg. N. 322, 116 NW 422.

See, also, Implied Contracts, 11 C. L. 1876.

**28.** Where employe was to receive such compensation, in addition to rent of premises, as employer deemed reasonable, and employer died without fixing value of services rendered, employe was entitled to recover their reasonable value. Bossi's Estate, In re, 133 Wis. 119, 113 NW 433.

**29.** As where contract for stock of corporation in exchange for labor and services was void as to stock, and services were performed and accepted by corporation. Miller v. Cosmic Cement, Tile & Stone Co. [Md. App.] 71 A 91.

**30.** Farm laborer. Stolle v. Stuart [S. D.] 114 NW 1007.

**31.** Altmayer v. Lahm, 113 NYS 964.

**32.** Perry v. Noonan Furniture Co. [Cal. App.] 95 P 1128. Where service is continued after incorporation of the business, the terms of the original contract may be shown on the issue of the compensation to be paid by the corporation. Id.

**33.** Perry v. Noonan Furniture Co. [Cal. App.] 95 P 1128.

**34.** Neff v. Williamson [Ala.] 46 S 238.

An employe who leaves the employment for cause during the term for which he was employed may recover for his services until the day he quits.[35] A breach of an independent provision of the contract does not preclude recovery for services performed.[36] Where salary is payable in instalments, a servant rightfully discharged may recover instalments due and payable at the time of his discharge[37] and may also recover the proportionate part of a deferred payment if the employer has waived his right to withhold it.[38] If an employe's breach of a contract for services is inexcusable, he may recover the reasonable value of services rendered, less the damage, if any, to the employer, caused by the breach.[39] Where a discharged employe has fully performed the services contemplated by his contract, he may recover the loss sustained by breach of the contract.[40] A provision for the payment of liquidated damages to the employe for cancellation of the contract without notice is enforcible.[41] Whether a servant has released his claim against the master for compensation is a question of fact.[42]

Defendant may offset damages caused by the plaintiff's negligence in the performance of services, unless the claim therefor has been waived.[43] He is not entitled to credit for sums earned by plaintiff for services performed for others, defendant having suffered no damage.[44] The burden is upon defendant to show unfaithfulness of the employe such as to bar recovery.[45] A temporary illness of the employe will not necessarily entitle the employer to a deduction from wages.[46] After termination of a salesman's contract, an action by the employer will lie to recover advances.[47]

An action for compensation may be maintained when the compensation is due and payable.[48] The right to commissions does not usually arise until work has been

35. Employe who quit because salary was not paid him when due. F. B. Tait Mfg. Co. v. Tinsman, 138 Ill. App. 76.

36. Contract of plaintiff with corporation construed as employing him as treasurer, and as containing further independent agreement for disposal of stock; hence he could recover contract price of services as treasurer though he failed to dispose of stock. Hinchman v. Matheson Motor Car Co., 151 Mich. 214, 14 Det. Leg. N. 902, 115 NW 48.

37. Lindner v. Cape Brew. & Ice Co., 131 Mo. App. 680, 111 SW 600.

38. As where check for all instalments due and part of deferred payment had been tendered to discharged employe. Lindner v. Cape Brew. & Ice Co., 131 Mo. App. 680, 111 SW 600.

39. Stolle v. Stewart [S. D.] 114 NW 1007.

40. Architect and manager who secured tenants for building could recover agreed commissions on unexpired leases and rentals which he was to be paid for securing leases. Equitable Loan & Security Co. v. Knox [Ga.] 62 SE 1030.

41. Evidence held to show employment for year at annual salary payable monthly; and also agreement whereby defendant was to pay plaintiff $2,500 in monthly instalments in consideration of canceling the annual contract without notice; latter agreement enforced. Arnold v. Railway Steel Spring Co., 131 Mo. App. 612, 110 SW 617.

42. Meaning of words "in full" to which servant subsequently added "to date" as endorsed on check. Millert v. Augustinian College, 36 Pa. Super. Ct. 511.

43. Defendant employed plaintiff to make cheese furnishing all tools and materials, and plaintiff agreed to make cheese in workmanlike manner to best of his ability and to take care of it at defendant's factory until disposed of by defendant. Held sales of cheese by defendant, and advances to plaintiff for living expenses, without objection, did not operate as waiver of claim for damages because of plaintiff's negligence. Wenger v. Marty, 135 Wis. 408, 116 NW 7.

44. Where plaintiff was employed to run defendant's farm, defendant was not entitled, in action for compensation, to credit for money earned by plaintiff by working for others. Williams v. Crane [Mich.] 15 Det. Leg. N. 372, 116 NW 554.

45. Where services of farm servant had been accepted, burden was on defendant, in action for compensation, to show such unfaithfulness as would bar recovery. Williams v. Crane [Mich.] 15 Det. Leg. N. 372, 116 NW 554. Mere mistakes in giving defendant credit for sales of crops held not to constitute infidelity. Id.

46. Illness for three or four months, servant being absent from office most of the time but answering mail at his home and superintending by means of telephone, held sufficient performance of agreement to give "best services for promotion and welfare of business." Reiter v. Standard Scale & Supply Co., 141 Ill. App. 427.

47. Freudenberg v. Cooper, 113 NYS 493.

48. Where evidence warranted finding that defendant agreed to pay plaintiff for services as soon as lumber was sawed, suit for compensation before it was inspected was not premature. Wescott v. Wade [Mich.] 15 Det. Leg. N. 489, 116 NW 1002.

fully done.[49] Where the hiring is for a term, salary is not recoverable until the end of such term.[50] Where the contract is continuous, interest may be recovered only from the time of bringing the action.[51] By statute in Illinois, attorney's fees may be recovered by plaintiff in an action for wages.[52] An action for compensation for services, measured by a certain proportion of profits of the employer's business, is an action at law, though an accounting may be necessary.[53] Holdings as to pleadings,[54] evidence,[55] and instructions,[56] in actions for compensation, are given in the notes.

*Trade secrets and inventions.*See 10 C. L. 698—Equity will enjoin the disclosure by an employe of confidential business secrets communicated to him in the course of his employment,[57] such as the names and addresses of customers of his former employer,[58] and where an employe has expressly agreed not to disclose such information to others or to use it against the employer's interests, an additional ground for equitable intervention exists.[59] Such provisions of a contract are enforcible, though another provision, by which the employe agrees not to engage in similar business for a stipulated time after termination of his contract, is invalid.[60] It is not necessary that there should be an express agreement not to divulge trade secrets where such agreement may fairly be implied from the circumstances of the case and the relation of the parties.[61] Equity will not enjoin breach of a contract

**49.** Salesman not entitled to commissions on contracts not actually secured until he had been placed on salary basis. Freeman v. Tiffany Studios, 113 NYS 64.

**50.** Contract of employment at an annual salary held to be construed by parties as meaning that salary was payable monthly. F. B. Tait Mfg. Co. v. Tinsman, 138 Ill. App. 76.

**51.** Contract construed as one continuous contract, though plaintiff's wages were increased from time to time. Cully v. Isham, 125 App. Div. 97, 109 NYS 92.

**52.** Transit man and topographer employed at $100 a month is an "employe" and his salary is "wages" within the meaning of Employment Act of 1889, allowing recovery of attorney's fees on suit for wages. Goodridge v. Alton, 140 Ill. App. 373. Under Employment Act of 1889, the word "employe" held to comprehend all persons employed to render to another regular, continuous and exclusive services of same general nature that are due from a "mechanic, artisan, miner, laborer or servant." Id.

**53.** Lindner v. Starin, 113 NYS 201, afg. as to this point, 113 NYS 652.

**54.** Pleading, oral, held to raise issue of payment in action for wages, and evidence held to show payment. Wilson v. Du Vievier, 112 NYS 1108.

**55.** Contract of employment irrelevant in action for wages, only issue being time of discharge, and fact of employment being conceded. Geissendoerfer v. Western Horse Shoe Co., 131 Mo. App. 534, 110 SW 640. On issue of agreed salary, application for bond for plaintiff, signed by defendant's authorized agent, and reciting salary, was competent as admission against interest. Ackerman v. Berriman, 113 NYS 1015. Issue being existence of contract to pay for services of plaintiff as governess, proof of criminal assault on plaintiff by defendant five months before her discharge was inadmissible. Meyer v. Gans, 114 NYS 584. Action for wages, payment of which was in issue. Questions to plaintiff whether she paid her board during time in issue relevant on question whether she had been paid. Mann v. Schneider, 110 NYS 383. Where, in action for salary, it did not appear that certain expenses had been incurred on account of plaintiff's illness, it was proper to exclude proof of them. Reiter v. Standard Scale & Supply Co., 237 Ill. 374, 86 NE 745. Where plaintiff's compensation was to depend on results produced on farm, in part, he was entitled to testify as to value of products for year. Williams v. Crane [Mich.] 15 Det. Leg. N. 372, 116 NW 554. Where cheese maker agreed to make cheese in workmanlike manner to "best of his ability," evidence, including proof of his statements, was admissible, in action for agreed wages, to show what his ability was. Wenger v. Marty, 135 Wis. 408, 116 NW 7.

**56.** Instructions not misleading and properly presented issues. Bauer Cooperage Co. v. Shelton [Ky.] 114 SW 257.

**57.** Witkop & Holmes Co. v. Boyce, 112 NYS 874.

**58.** Employe enjoined from disclosing to new employer, a competitor of plaintiff, names of customers. Witkap & Holmes Co. v. Boyce, 112 NYS 874. In New York, Pen. Code, § 642, makes wrongful use of such list or compilation of names misdemeanor, thus declaring policy of state. Id.

**59.** Contract contained agreement not to disclose names of customers. Witkap & Holmes Co. v. Boyce, 112 NYS 874. Equity will restrain employes from disclosing trade secrets of the employer acquired during employment under an agreement not to divulge such secrets. Stevens & Co. v. Stiles [R. I.] 71 A 802.

**60.** Witkap & Holmes Co. v. Boyce, 112 NYS 874.

**61.** Employe of optician engaged in examining patrons, prescribing, manufacturing and selling glasses, enjoined from using, after termination of his contract, names and addresses of patrons copied from employer's

not to engage in business in the state, even though the employe has secretly acquired information as to the persons with whom his employer does business,[62] in the absence of some special equitable ground involving good will, peculiar, intellectual or other skill or capacity, or secret process, or other recognized ground,[63] since a court of equity will not enjoin breach of a contract for ordinary personal services, the remedy at law being adequate.[64]

An invention and patent thereon belong to the inventor to whom the patent has been issued, unless he has made an assignment of his right, or a valid agreement to make such assignment, even though it was his duty to use his skill and inventive ability to further the interests of his employer by devising improvements generally in the appliances and machinery, used in the employer's business.[65] Though a license or shop right may be found to exist in the employer, under some circumstances,[66] the employer is not entitled to a perpetual and exclusive license, since this would deprive the inventor of all beneficial interest in the patent.[67] Where a director and superintendent of a corporation acquires a patent in violation of the duty and confidence which he owes as director and servant, he holds it in trust for the corporation,[68] which may require an assignment of such patent upon making proper payment and reimbursing the servant,[69] in the absence of circumstances amounting to an estoppel to assert such claim.[70] A contract whereby an employe agrees to give all his time and labor to his employer in the improvement and perfection of machinery and devices manufactured and sold by the employer, and to obtain patents upon such devices as the employer desired to have protected, and to assign such patents to the employer, includes devices invented and perfected by the employe secretly during his term of employment,[71] and such contract is enforcible as to all devices and patents so perfected, both against the employe and his assignee of such patents.[72] One employed to perfect an invention occupies a confidential relation toward his employer, and is not at liberty to make disclosures with reference to the work in hand, nor will he be permitted, after successfully accomplishing the work for which he was employed and perfecting the machine, to claim title thereto as against his employer, or to engage in work for a rival concern on the same machine or other machines involving the same mechanical features, or involving devices or ideas peculiar to said machine.[73] One who conceives the principle of an invention is entitled to the entire result, though an assistant perfects details, and though both are fellow-servants of a common employer.[74]

records containing this and other information, though employe copied names only of those he himself had treated. Stevens & Co. v. Stiles [R. I.] 71 A 802.

62. Bookkeeper for liquor dealer secretly took names and addresses of patrons and selling firms with whom employer dealt. Simms v. Burnette [Fla.] 46 S 90; Simms v. Patterson [Fla.] 46 S 91.

63, 64. Simms v. Burnette [Fla.] 46 S 90; Simms v. Patterson [Fla.] 46 S 91.

65. American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133.

66. In this case, employer paid expense of patent, and was using improvements in shops; court left parties as it found them. American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133.

67. American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133.

68. As where he bought patent which he knew corporation wanted to protect its business. American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133.

69. Amount to be paid should have been fixed by decree requiring assignment. American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 113.

70. Where corporation had knowledge of servant's and director's acts in acquiring patent and accepted from him money paid by it, it could not, two and one-half years later, demand assignment of patent to it. American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133.

71. Detroit Lubricator Co. v. Lavigne, 151 Mich. 650, 14 Det. Leg. N. 107, 115 NW 988.

72. Thus employe and corporation formed by him, to which he assigned patents procured by him secretly, with aid of employes of defendant enticed away by him, could be compelled to assign them to the employer. Detroit Lubricator Co. v. Lavigne, 151 Mich. 650, 14 Det. Leg. N. 107, 115 NW 988.

73. Recording & Computing Mach. Co. v. Neth, 7 Ohio N. P. (N. S.) 217.

74. Where principal was assigned by employer to solve problem of stabilizing nitro-

*Medical treatment.*[See 10 C. L. 699]—Ordinarily, an employer is not bound to furnish medical assistance to an employe,[75] in the absence of an express agreement to do so,[76] and is not liable to a physician for services rendered the employe, in the absence of an agreement to pay therefor,[77] but an exception exists in cases of railroad employes injured away from home, relatives and friends, under circumstances such as to require immediate aid.[78] In such cases, the duty to furnish medical aid rests upon the employer rather than upon a stranger.[79] But in such cases the duty arises and ends with the emergency.[80] It is held that a railroad hospital association maintained in part by dues paid by employes entitled to treatment therein is not a charitable institution[81] but is liable for negligence of its agents,[82] and a railroad company which makes such association and its officers agents of the company becomes liable for their acts.[83] Elsewhere, it is held that it is the duty of a railroad company, maintaining a relief department, but deriving no pecuniary profit or benefit therefrom, to use reasonable care in selecting surgeons, attendants, and persons in charge of the hospital, and that it will be liable for want of such care,[84] but having used due care in selecting such agents, it will not be liable for their negligence.[85]

*Assignments of wages.*[86]—A mere direction or order to the employer to pay a certain amount weekly to a third person is revocable at will.[87] An assignment for wages earned during a particular period is effective to pass title without regard to whether the rate of payment remains the same or not.[88] A provision in the contract of employment that assignment of wages is prohibited and ground for discharge does not render the assignment void.[89] Where an assignment of wages is filed while such wages are in excess of the assignment, payment thereafter made to the assignee is at employer's peril so far as assignor's rights are concerned.[90]

starch, and assistant was given him to perfect details, who reduced principal's conception to practice, the result belonged to principal. Braunstein v. Holmes, 30 App. D. C. 328.

**75.** Defendant not bound to render aid to employer so as to become liable to physician for services rendered. Cushman v. Cloverland Coal & Min. Co., 170 Ind. 402, 84 NE 759; Sourwine v. McRoy Clay Works [Ind. App.] 85 NE 782.

**76.** Exception in emergency cases, prevailing in some states, does not obtain in New York. Voorhees v. New York Cent. & H. R. Co., 114 NYS 242.

**77.** Physician could not recover for services to employe in hospital in absence of any express or implied contract with defendant for compensation. Voorhees v. New York Cent. & H. R. Co., 114 NYS 242. Coal mining company not liable for medical services rendered employe at instance of superintendent, unless latter had special authority to employ physician, or unless an emergency existed requiring company to furnish medical aid to employe. Cushman v. Cloverland Coal & Min. Co., 170 Ind. 402, 84 NE 759. No recovery by physician for services rendered injured employe when no emergency was shown and case was not within exception as to railroads. Sourwine v. McRoy Clay Works [Ind. App.] 85 NE 782. Employer who merely summons physician and requests him to care for an employe who has suddenly become ill while at work and is thus unable to care for himself is not in the absense of an express stipulation between the employer and employe that former shall furnish medical aid to latter liable to physician for services so rendered. Norton v. Rourke, 130 Ga. 600, 61 SE 478.

**78.** Cushman v. Cloverland Coal & Min. Co., 170 Ind. 402, 84 NE 759; Sourwine v. McRoy Clay Works [Ind. App.] 85 NE 782. This exception to rule does not obtain in New York. Voorhees v. New York Cent. & H. R. Co., 114 NYS 242.

**79, 80.** Cushman v. Cloverland Coal & Min. Co., 170 Ind. 402, 84 NE 759.

**81.** Phillips v. St. Louis, etc., R. Co., 211 Mo. 419, 111 SW 109.

**82.** As where chief surgeon negligently allowed insane patient to be sent home alone, as result of which he was killed. Phillips v. St. Louis, etc., R. Co., 211 Mo. 419, 111 SW 109.

**83.** Hospital association held company's agent for treatment of employes under rules. Phillips v. St. Louis, etc., R. Co., 211 Mo. 419, 111 SW 109.

**84, 85.** Illinois Cent. R. Co. v. Buchanan, 31 Ky. L. R. 722, 103 SW 272.

**86.** See 8 C. L. 849; as to general rules, see, also, Assignments, 11 C. L. 291.

**87.** Employe of defendant directed payment of $10 weekly from salary to third person, which defendant agreed to do, but made no agreement or arrangement with third person. Two weeke later employe revoked order. Held defendant not liable to third person, order being revocable at will. Schreiber v. Keller Mechanical Engraving Co., 57 Misc. 644, 108 NYS 658.

**88.** Assignment of engineer's wages at rate of $4.28 for one hundred miles after certain date without limitation is valid as to amount actually earned although rate subsequently lowered to $3.50. Wabash R. Co. v. Smith, 134 Ill. App. 574.

**89, 90.** Assignment made in violation of contract recognized by master as valid. Wabash R. Co. v. Smith, 134 Ill. App. 574.

*Statutory regulations.* See 10 C. L. 699—Regulation of hours of labor,[91] and regulations relating to liability for injuries, and duties with respect to tools and appliances and places of work, are treated in other sections.[92] The Arkansas statute relating to wages of miners is upheld.[93] Holdings under the act providing that wages of railroad employes shall continue unless paid within seven days after their discharge are given in the note.[94] In that state an employe who abandons his employment before expiration of his term forfeits all wages and cannot recover compensation either on the contract or an a quantum meruit.[95] The Indiana statute requiring certain classes of employers to pay certain employes monthly is held invalid.[96] The Massachusetts statute providing that no assignment of future wages, to secure a loan of less than two hundred dollars, shall be valid against the employer unless the employer has consented thereto in writing, and unless the assignment and acceptance have been duly filed, and, if the assignor is a married man, unless his wife consents in writing, is upheld as a valid exercise of the police power.[97]

§ 3. *Master's liability for injuries to servants. A. Nature and extent in general.* See 10 C. L. 700—The right to recover for injuries is controlled by the law of the place where the injury occurred.[98] Common-law rules govern when the action is not based on statute.[99]

The duties of the master to the servant do not rest upon contract but arise by operation of law from the relation of master and servant;[1] and the law imposing these duties on the master is said to be but a phrase of the broader and more anciently recognized doctrine that every person who expressly or impliedly invites another to come upon his premises or to use his instrumentalities is bound to use ordinary care to protect the invited person from injury.[2] The master is not an insurer of the safety of his servants; the law imposes only the duty of ordinary or reasonable care for

**91.** See ante, § 1.

**92.** See post, §§ 3A, 3B, 3E, 3F.

**93.** Ark. Acts 1905, c. 219, § 1, regulating the contracting for wages of miners employed at rates of wages determined by the quantity, and prohibiting a contract paid on basis of screened coal, is valid and does not infringe on right to contract given by federal constitution. McLean v. Arkansas, 29 S. Ct. 206.

**94.** Statute must be strictly complied with or penalty will not be enforced. St. Louis, etc., R. Co. v. McClerkin [Ark.] 114 SW 240. To render railroad company liable for penalty under Acts 1905, p. 538, it must appear that servant requested money or check sent to some regular station where there was an agent, and that money or check does not reach there within 7 days. St. Louis, etc., R. Co. v. Bailey [Ark.] 112 SW 180. Company not liable for penalty under Acts 1905, p. 538, where paymaster did not absolutely refuse to pay but said they were not reasonable in not going to cars, the usual place to be paid off, and where he did not know how much men had coming and whether they had quit or had been discharged. Wisconsin & Arkansas Lumber Co. v. Thompson [Ark.] 113 SW 340. Station agent, discharged, applied to his successor for his pay, but did not indicate station where it was to be sent. Held, he should have applied to division agent who appointed him, such agent being his "foreman" or "timekeeper," and not having complied with statute, he was not entitled to the statutory penalty. St. Louis, etc., R. Co. v. McClarkin [Ark.] 114 SW 240. By Kirby's Dig. § 6649, where railroad company refuses to pay wages of discharged employe within seven days, wages continue thereafter. Under §§ 3695, 3696, no garnishment against company is valid (where sum demanded is $200 or less) until judgment against employe. Held, garnishment prior to judgment against employe does not arrest running of wages under § 6649; valid garnishment after judgment does. St. Louis, etc., R. Co. v. Walsh [Ark.] 110 SW 222.

**95.** Under Kirby's Dig. § 5028. Latham v. Barwick [Ark.] 113 SW 646.

**96.** Burns' Ann. St. 1901, §§ 7056, 7057, is unconstitutional as class legislation. Smith v. Ohio Oil Co. [Ind. App.] 86 NE 1027, following Toledo, etc., R. Co. v. Long, 169 Ind. 316, 82 NE 757.

**97.** St. 1908, p. 714, c. 605, §§ 7, 8, sustained. Mutual Loan Co. v. Martell, 200 Mass. 482, 86 NE 916. That it does not apply to assignments to secure debts other than loans of less than $200 does not invalidate it (Id.), nor is it invalidated by § 6 which exempts banks, banking companies, and loan companies and associations which are under state supervision (Id.).

**98.** Louisville & N. R. Co. v. Keiffer [Ky.] 113 SW 433. For full discussion, see Conflict of Laws, 11 C. L. 665.

**99.** Mahoney v. Cayuga Lake Cement Co., 110 NYS 549.

**1.** Gawne v. Bicknell, 162 F 587.

**2.** Seaboard Air Line R. Co. v. Chapman, 4 Ga. App. 706, 62 SE 488; Brown v. Roma Mach. & Foundry Co. [Ga. App.] 62 SE 720.

their safety,[3] that is, that degree of care which reasonably prudent and cautious persons exercise under like circumstances.[4] There are cases, however, in which the act or omission at issue is itself so clearly negligent that the fact that other persons in the same or like circumstances have been guilty of it is insufficient to modify its character or effect.[5] But in cases not of that character, the true test of actionable negligence is that just given.[6] A master is not liable for injuries which could not reasonably have been foreseen and guarded against,[7] or which are purely accidental;[8]

3. O'Connor v. Armour Packing Co. [C. C. A.] 158 F 241; Wyman v. Lehigh Valley R. Co. [C. C. A.] 158 F 957; Cotton v. North Carolina R. Co. [N. C.] 62 SE 1093. Not required to guard against every possible contingency. Martin v. Walker & Williams Mfg. Co., 113 NYS 78. Not bound to take extraordinary precautions for servant's safety. Brett v. Frank & Co., 153 Cal. 267, 94 P 1051. Not required to use best, newest or safest places, ppliances and methods. H. D. Williams Cooperage Co. v. Headrick [C. C. A.] 159 F 680. Need only use ordinary care to supply reasonably safe places, appliances and methods. Id. Owes only duty of reasonable care to provide and maintain proper and safe appliances. Stewart & Co. v. Harman [Md.] 70 A 333. Must provide reasonably safe premises. Georgetown Water, Gas, Elec. & P. Co. v. Forwood [Ky.] 113 SW 112. Charge not erroneous for making it "absolute duty" of master to provide reasonably safe place, etc. Firment v. Berwind-White Coal Min. Co., 162 F 758. Charge, "there is a duty resting on the employer to furnish a reasonably safe place to work," to which no exception was taken until jury had retired, held not reversible error, though inaccurate. Walligora v. St. Paul Foundry Co. [Minn.] 119 NW 395.

4. Test of negligence is degree of care which persons of ordinary intelligence and prudence exercise under the same circumstances. Chicago Great Western R. Co. v. Egan [C. C. A.] 159 F 40. Master owes only that reasonable care which ordinarily prudent men use under the same circumstanees. Watson v. New York Cont. Co., 111 NYS 277. What ordinarily prudent person would have done in like circumstances is test; not particular or prevailing practice of others, which is, however, competent evidence. Chicago Great Western R. Co. v. McDonough [C. C. A.] 161 F 657. Full duty is to use ordinary care to supply such places, appliances and methods as persons of ordinary intelligence and prudence commonly use under like circumstances. H. D. Williams Cooperage Co. v. Headrick [C. C. A.] 159 F 680.

**Common practice** is that of reasonably careful and prudent men. Wilson v. New York, etc., R. Co. [R. I.] 69 A 364. Not negligence for railroad company not to light switch yards (collision having occurred) where general practice of railroads was not to light such yards, and defendant had maintained unlighted yards ten years and no similar accident had occurred. Travis v. Kansas City So. R. Co., 121 La. 885, 46 S 909.

5. Lake v. Shenango Furnace Co. [C. C. A.] 160 F 887.

**A negligent act will not be excused because it is customary,** though proof of custom is admissible and may be considered on the issue whether the act is negligent. Writa v. Interstate Iron Co., 103 Minn. 303, 115 NW 169.

6. The degree of care which persons of ordinary intelligence and prudence commonly exercise under the same circumstances. Lake v. Shenango Furnace Co. [C. C. A.] 160 F 887.

7. Employe using subcontractor's **defective scaffold** without knowledge of or orders from employer. Swift & Co. v. Larson, 136 Ill. App. 93. Master not liable where plaintiff was engaged in raising mortar in pail with rope and pulley, and, on looking up, was **struck in eye by piece of mortar** which fell from pail and his eye destroyed, no defect in appliance being shown. McIlease v. James F. Meehan Co., 113 NYS 489. The business being lawful, it is necessary to recovery for negligence that there should be proved some defect from which injury might have been anticipated and from which the injury in question in fact resulted. No recovery where no cause for **fall of trip hammer** was shown. Nichols v. Central Trust Co. [Ind. App.] 86 NE 878. Iron works employe wheeling barrow between pile of dies and trip hammer struck the dies and fell, and his feet struck a treadle which started **trip hammer,** by which he was injured. Held, injury was one not reasonably to be foreseen; master not liable. Powers v. Wyman & Gordon Co., 199 Mass. 591, 85 NE 845. Defendant operating number of ordinary sewing machines with usual belts on wheels fastened to **revolving shaft** not bound to anticipate that operator would get hair caught while stooping down to adjust belt on shaft. Nelson-Bethel Clothing Co. v. Pitts [Ky.] 114 SW 331.

**Brakeman,** having assisted in unloading baggage, missed open vestibule of moving train and caught on closed vestibule and was **struck by truck** as he was trying to open or raise platform of vestibule. Held negligence of master not shown in that truck ought to have been removed or such accident anticipated. Baxter v. Minneapolis, etc., R. Co., 104 Minn. 230, 116 NW 474. Master not bound to anticipate that employe riding on **freight elevator** would be injured by allowing foot to project beyond floor so as to get it caught in hole in plaster on wall; no liability for allowing such condition, either at common law or under Rev. Laws, c. 106, § 71. McDonald v. Dutton, 198 Mass. 398, 84 NE 434. Master not chargeable with negligence for failure to foresee probability of small dent or **depression in run-way** causing barrow, being wheeled on it, to be deflected off and falling on plaintiff. Landrigan v. Taylor-Goodwin Co., 197 Mass. 582, 84 NE 314. Where **stone in quarry** showed no defect or other sign of its liability to fall, but fell for some unaccountable cause, master not liable. Mitchell Lime Co. v. Mickless [Ind. App.] 85 NE 728. Not negligence to **start machine without notice** to employe whose duties did not require him to touch it; it was not to be anticipated that he would carelessly allow his

but to expose a servant to unusual [9] or unnecessary [10] danger is negligence. The degree of care required of the master in a particular instance depends upon the nature and character of the business, the character of the agencies employed by the master with and about which the employes are required to work,[11] the known capacity and experience of the employe,[12] the methods of carrying on the work,[13] the dangers which are known,[14] or which are reasonably to be apprehended,[15] and upon all the exigencies and circumstances of the particular case.[16] It follows that the question whether due care has been execised by the master, or by those who stand in his place, in a given instance, is usually a question of fact for the jury.[17]

hand to come in contact with cogs. Harper v. Illinois Cent. R. Co. [Ky.] 115 SW 198.

8. Employers are not insurers against injury from pure accident arising in their regular line of employment. Accidental **boiler explosion.** Illinois Steel Co. v. Loughran, 136 Ill. App. 432. Death through **falling of rock from roof in mine** examined the same day and supposed to be safe, held accidental. Donk Bros. Coal & Coke Co. v. DeLaney, 133 Ill. App. 135.

**Boy,** going along passageway in mill, **tripped over cordage,** and in falling put out his hands to catch at another employe at work there and cut his hand on blade of knife sticking out of the other's pocket. Held an accident which ordinary prudence could not have guarded against. Peeno v. Overman-Schrader Cordage Co., 32 Ky. L. R. 1313, 108 SW 349.

9. Master's duty to guard against injury to servant ordered into place where he may be injured by sudden operation of machinery or other servant's acts. Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910.

10. Master may be held liable for injury suffered by servant in obeying negligent order unnecessarily exposing him to danger. Yarber v. Chicago, etc., R. Co., 235 Ill. 589, 85 NE 928. Negligence to subject employe to unnecessary dangers. Florala Sawmill Co. v. Smith [Fla.] 46 S 332.

11. It is master's duty to use every practicable precaution to protect employes from injury from **electricity** where that dangerous agency is used. Ago v. Harbach [Iowa] 117 NW 669. Electrical companies owe employes high degree of care, corresponding to danger, to keep wires properly insulated and properly suspended. Texarkana Tel. Co. v. Pemberton [Ark.] 111 SW 257. Where **dynamite** was kept in camp for blasting, degree of care required in protecting servants corresponded to danger arising from those circumstances. Froberg v. Smith [Minn.] 118 NW 57. Contractors, using dynamite in blasting frozen ground, charged with high degree of care in handling and keeping it. Anderson v. Smith, 104 Minn. 40, 115 NW 743. In determining whether mode of exploding dynamite in blasting rock was reasonably safe as to employes who handled rock after explosions, dangerous character of dynamite must be considered. Stephen v. Duffy, 237 Ill. 549, 86 NE 1082. Where the use of dynamite and the dangers arising from its use are in nowise incident to the servant's employment, the master owes as much protection to his servant as to a stranger. Proof that cranesman on steam shovel was killed through explosion of dynamite, that injury resulted without his fault and could not reasonably have been avoided by him, etc., held a prima facie case of negligence. Stephen v. Duffy, 136 Ill. App. 572.

12. As to children, see post, Injuries to Children. Telegraph company owes higher degree of care to **apprentice lineman** than to experienced men, and ought not to send apprentice to do dangerous work. Maitrejean v. New Orleans R. & L. Co., 120 La. 1056, 46 S 21.

13. **Running train backward at night,** distance of 84 miles, without headlights, being extra hazardous, requires corresponding degree of care by company to keep track clear. Norfolk & W. R. Co. v. Gardner [C. C. A.] 162 F 114.

14. Duty of master measured by known danger. Charron v. Union Carbide Co., 151 Mich. 687, 15 Det. Leg. N. 154, 115 NW 718. Master chargeable with care of careful and prudent men under the circumstances, and having reference to risk and danger of work. Williams v. Norton [Vt.] 69 A 146.

15. The degree of care must be commensurate with the **dangerous character** of the article, the circumstances under which it is used, and the seriousness of the dangers to be apprehended. Wiita v. Interstate Iron Co., 103 Minn. 303, 115 NW 169. Plumber was sent into elevator pit to repair water pipes, and water came out of pipe in contact with **calcium carbide** stored there, causing explosion which killed an employe. Held, employer should have anticipated danger and taken precautions to prevent it by removing water from pipes. Charron v. Union Carbide Co., 151 Mich. 687, 15 Det. Leg. N. 154, 115 NW 718. Master owes servant employed in **preparing meats** duty of reasonable care to protect him from **infectious diseases** which might be communicated by meats handled. O'Connor v. Armour Packing Co. [C. C. A.] 158 F 241.

16. Liability of master depends upon circumstances of each case. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761. Measure of master's duty to servant is reasonable care, and in view of situation of parties, relations they have established, nature of business, character of machinery and appliances used, the surrounding circumstances and conditions, and exigencies which require vigilance and attention. Lay v. Elk Ridge Coal & Coke Co. [W. Va.] 61 SE 156.

17. See, also, §§ 3B, et seq. Whether failure to guard stairway opening in building through which material fell on workman below was negligence. Leine v. Kellerman Cont. Co. [Mo. App.] 114 SW 1147. Whether master aught reasonably to have apprehended that rope pulley, no longer used, would hang down from revolving shaft so that employe, throwing off belt and tieing it

The common-law duties of the master to provide a reasonably safe place of work, reasonably safe tools and appliances,[18] and a sufficient number of reasonably competent servants to do the required work,[19] to provide suitable methods of work, and to make, promulgate and enforce reasonable rules and regulations,[20] and to warn and instruct servants,[21] are more fully discussed and illustrated in the succeeding paragraphs. The duties are personal to the master and cannot be delegated so as to relieve him from liability for their nonperformance.[22]

*Statutory liability.* See 10 C. L. 703—Statutes prohibiting or regulating the employment of children are treated in the following paragraph, and statutes relating particularly to subjects discussed in succeeding sections are there referred to.[23] Violation of an ordinance or statute imposing a mandatory duty is negligence per se,[24] provided the thing done or omitted is one of the things contemplated by the statute and prohibited or guarded against by it,[25] and there was a violation of a duty owed to the plaintiff personally or as a member of a class.[26] Statutes imposing certain duties on railroad companies for the protection of the general public and travelers are also for the benefit of employes.[27] A statute not retrospective in its terms can have no application to a cause of action which arose previous to its passage.[28] Statutory liability for death differs from that for injuries in some states.[29]

*Employment of, and injuries to, children, including statutory liability.*[30]—Statutes prohibiting employment in dangerous work of children of tender years are constitutional.[31] Violation of such a statute is commonly held to constitute negligence per se,[32] warranting recovery against the employer for injuries to the child[33]

up, might get caught in it, and thus injured. Trombley v. McAfee, 152 Mich. 494, 15 Det. Leg. N. 269, 116 NW 191.

18. See post, § 3B.

19. See post, §§ 3C, 3E.

20. See post, § 3C.

21. See post, § 3D.

22. See post, §§ 3B, 3C, 3D, and especially § 3E.

23. See post, §§ 3B, 3E.

24. Violation of ordinance prohibiting employment of persons as **elevator operators** who have not been duly examined and licensed is negligence per se. Cragg v. Los Angeles Trust Co. [Cal.] 98 P 1063.

25. Platt v. Southern Photo Material Co. [Ga. App.] 60 SE 1068.

26. Employment of child above prescribed age of child labor law not negligence per se, though affidavit required by law is not obtained. Platt v. Southern Photo Material Co. [Ga. App.] 60 SE 1068. Acts Tenn. 1891, p. 220, c. 101, § 2, makes railroad companies liable for killing live stock on track, in absence of contributory negligence, but exempts from liability if right of way is properly fenced. This does not create **duty to fence** as to employes so as to give a cause of action for death of engineer caused by collision with cow on track. Gill v. Louisville & N. R. Co., 160 F 260.

27. Statute requiring locomotive **whistles** to sound on approaching crossings is for benefit of sectionmen as well as travelers. Houston & T. C. R. Co. v. Burnett [Tex. Civ. App.] 108 SW 404. Statute requiring railroads to keep constant **lookout** for persons and property on the track is for benefit of employes as well as others. St. Louis, etc., R. Co. v. Puckett [Ark.] 114 SW 224.

28. Act June 10, 1907 (P. L. 523). McHugh v. Jones & Laughlin Steel Co., 219 Pa. 644, 69 A 90. Act Congress April 22, 1908, relating to liabilities of railroads to employes, is prospective only in operation; has no application where injury was received prior to enactment of statute. Winfree v. Northern Pac. R. Co., 164 F 698.

29. See, also, § 3E, Statutory Modification of Common Law Rule. Where servant, though foreman, was a farm laborer, within Rev. Laws, c. 106, § 79, master would not be liable for his death by virtue of § 73, cl. 2. Rowley v. Ellis, 197 Mass. 391, 83 NE 1103. Where evidence shows or warrants finding that appliance is defective, and that superintendent was negligent in failing to discover the defect, master would be liable both under common law and Rev. Laws, c. 106, § 71, cl. 1, for injury, without death. Id. In case of death of employe, liability is governed solely by Rev. Laws, c. 106, § 73, unless employe was farm laborer. Id.

30. See 10 C. L. 703, n. 6. For contributory negligence of children, see post, § 3G; Assumption of Risk, § 3F.

31. Revisal 1905, § 3362, prohibiting employment of children under 12 in factories, is valid. Starnes v. Albion Mfg. Co., 147 N. C. 556, 61 SE 525. Legislature has power to fix age limit of children who may be employed in dangerous work. Stehle v. Jaeger Automatic Mach. Co., 220 Pa. 617, 69 A 1116.

32. Employment of child under 12 in cotton factory, being in violation of Rev. 1905, § 3362, is negligence per se and not merely evidence of negligence. Starnes v. Albion Mfg. Co., 147 N. C. 556, 61 SE 525. Employment of child under age prescribed by Acts 1906, p. 98, in factory or manufacturing establishment, is negligence per se, and such child injured while so engaged has right of action. Platt v. Southern Photo Material Co. [Ga. App.] 60 SE 1068.

resulting proximately therefrom.[34] Proof of violation of the statute and injury to the child is at least evidence of negligence sufficient to make a prima facie case for the jury.[35] Whether a particular statute is applicable or has been violated in a particular case depends upon the terms of the statute and the facts,[36] and may be for the jury.[37] To an action based on violation of such a statute, misrepresentations by the minor as to his age,[38] or by others, in his presence,[39] or the fact that the minor was instructed,[40] is no defense, nor is the defense of contributory negligence or assumption of risk available [41] in some jurisdictions. If a child employed is above the age limit of the statute, failure to take and file the affidavit as to his age, required by statute, though criminal, is not negligence per se as to such child.[42] That a statute prohibiting employment of children provides a penalty for its violation does not bar a civil proceeding for damages.[43] Statutes like those under discussion do not change the common-law rules as to negligence in putting a minor at work near dangerous

33. Under statute, injury to child under 14 while employed in furniture factory would warrant recovery. Finley v. Acme Kitchen Furniture Co. [Tenn.] 109 SW 504. Employe liable for death of boy of 14 where he was put to work on platform near engine and shaft and pulleys, a place dangerous even for an experienced man; liability existed even independently of agreemnt with parent that boy was not to be placed in dangerous work. Bourg v. Brownell-Drews Lumber Co., 120 La. 1009, 45 S 972. Michigan statutes prohibiting employment of children under 14 in factories, and of children under 16 in work dangerous to life or limb, impose duties for benefit of classes embraced in the acts, a breach of which resulting in injury gives rise to cause of action, though statutes do not expressly provide therefor. Syneszewski v. Schmidt [Mich.] 15 Det. Leg. N. 509, 116 NW 1107.

34. Child under 12 employed in cotton factory in violation of Rev. 1905, § 3362, to sweep spinning room and make bands, was injured while on another floor to visit his father, and while attempting to pick piece of cotton from carding machine, which was no part of his duties. Employment of child held proximate cause of injury. Starnes v. Albion Mfg. Co., 147 N. C. 556, 61 SE 525.

35. If an infant under 16 years of age is employed about dangerous machinery, owner not having certificate permitting her employment, as provided in Laws 1907, p. 576, c. 408, and is injured while so employed by reason of failure to guard machinery, such facts make prima facie case of negligence. Fitzgerald v. International Flax Twine Co., 104 Minn. 138, 116 NW 475.

36. Rev. St. 1899, § 6434, does not prohibit employment of women and children in manufacturing establishments, but prohibits requiring them to work near or between moving parts of machines. Peters v. Gille [Mo. App.] 113 SW 706. Machine is in motion within meaning of § 6434, though it stops occasionally in course of its operation. Id. No recovery warranted under Rev. St. Mo. 1899, § 6434, prohibiting employment of minor between fixed or traversing parts of any machine while in motion, where plaintiff was working at side of and over moving belt which carried candy into knives which cut it. National Candy Co. v. Miller [C. C. A.] 160 F 51. Operation of electric freight elevator is "dangerous" occupation for boy under 16 within meaning of statute. Braasch v. Michigan Stove Co. [Mich.] 15 Det. Leg. N. 748, 118 NW 366. Statute recognizes that children under 16 are immature. Id.

37. **Fact of violation** of child labor law evidence for jury in injury case. Stehle v. Jaeger Automatic Mach. Co., 220 Pa. 617, 69 A 1116. Whether or not certain work done by one excluded from such work by statute is extra hazardous or not is a question for the jury and not for experts. Child 14 years old putting rags through wringer. Swift & Co. v. Miller, 139 Ill. App. 192. Where boy under 16 is injured while oiling or cleaning machinery in motion, master is liable, whether machine was being operated for ordinary purpose or for purpose of cleaning, Act May 2, 1905 (P. L. 352), being violated. Whether it was being operated at full speed for jury. Sullivan v. Hanover Cordage Co. [Pa.] 70 A 909.

38. Violation of statute prohibiting employment of children under 16 years of age in dangerous work renders employer liable for injuries resulting therefrom, though child said he was 16, where employer did not obtain and file statement of parent or guardian as to child's age, as required by statute. Syneszewski v. Schmidt [Mich.] 15 Det. Leg. N. 509, 116 NW 1107.

39. That misrepresentations as to minor's age were made in his presence when he was employed did not estop him from relying on Pub. Acts 1901, p. 157, No. 113, § 3. Braasch v. Michigan Stove Co. [Mich.] 15 Det. Leg. N. 748, 118 NW 366.

40. Instruction to children employed in violation of Act May 2, 1905 (P. L. 352), is no defense. Stehle v. Jaeger Automatic Mach. Co., 220 Pa. 617, 69 A 1116.

41. Contributory negligence or assumption of risk not available where boy under 16 injured oiling or cleaning machine. Sullivan v. Hanover Cordage Co. [Pa.] 70 A 909. An employer who employs a child under the age allowed by law to be employed in certain work cannot in an action for injuries to child in such prohibited work set up contributory negligence or assumption of risk. Stehle v. Jaeger Automatic Mach. Co., 220 Pa. 617, 69 A 1116.

42. Acts 1906, p. 98, § 5. Platt v. Southern Photo Material Co. [Ga. App.] 60 SE 1068.

43. Stehle v. Jaeger Automatic Mach. Co., 220 Pa. 617, 69 A 1116.

machinery.[44] Whether such an act constitutes negligence is usually a question of fact [45] for the jury.[46]

For injury to a minor employed in violation of a child labor law, the parent may maintain an action for loss of services.[47] Consent by the parent to the employment of the child, with knowledge of the dangerous character of the work,[48] bars recovery.[49] Consent will be presumed if not negatived in the complaint,[50] and may be inferred where the service is allowed to continue without objection.[51]

*The relation of master and servant must exist.* See 10 C. L. 704—To warrant recovery for injuries caused by an alleged breach of a master's duties, it must appear that the person injured was at the time defendant's servant,[52] and was engaged in

**44.** Platt v. Southern Photo. Material Co. [Ga. App.] 60 SE 1068.

**45.** Petition for injuries to child employed as press feeder held to state cause of action at common law, though not under child labor law of 1906. Platt v. Southern Photo. Material Co. [Ga. App.] 60 SE 1068.

**46.** Child of 13 caught by moving belt near which he was required to sweep. Goodwin v. Columbia Mills Co. [S. C.] 61 SE 390. Where boy of 14 was allowed to remain in room with belts and machinery during noon hour, and either in playing with belts or machines, or in endeavoring to adjust a belt which was loose, was caught and injured, he was entitled to recover if jury found master had failed to instruct or warn him of danger, and he had not been guilty of contributory negligence though he was not engaged in duties for which he was hired at time. Force v. Standard Silk Co., 160 F 992.

**47.** See, also, Parent and Child, 10 C. L. 1072. Employing child under 14 in factory in violation of labor law is sufficient evidence of negligence of master to sustain judgment for parent for loss of child's services. Danaher v. American Mfg. Co., 110 NYS 617.

**48.** Minor was employed as "doffer" in cotton mill with mother's consent, but his work was changed without her knowledge to work near carding machine, which was more dangerous. For injury diminishing his earning power, mother could recover. Hillsboro Cotton Mills v. King [Tex. Civ. App.] 112 SW 132. Evidence that agreement of boy's father with defendant's representative was that boy was not to be put at dangerous work, and that he was put at dangerous work by employe delegated to look after him, who failed to instruct him as to danger, made case for jury. Leopard v. Laurens Cotton Mills [S. C.] 61 SE 1029.

**49.** Evidence showed acquiescence in employment in mine; no recovery. Tennessee Coal, Iron & R. Co. v. Crotweli [Ala.] 47 S 64. In suit by parent for injuries to son while engaged in hazardous employment, held that instructions properly submitted to jury questions of employment, consent of parent, danger, etc., and verdict for defendant held supported by evidence. Mitchell v. McGee [Miss.] 48 S 234.

**50.** Parent who consents to employment of child under 10, in violation of Gen. Acts 1903, p. 68, cannot maintain action for loss of services to him caused by her injury, and consent will be presumed when not negatived by complaint. Reaves v. Anniston Knitting Mills [Ala.] 45 S 702.

**51.** Parent who acquiesced in employment of her son in dangerous work in mine was chargeable with knowledge of risk which he assumed incident to such work. Tennessee Coal, Iron & R. Co. v. Crotweil [Ala.] 47 S 64. Mother of minor employed in mine four months without objection on her part could not recover damages for injuries sustained by him. Id. Boy told father of his employment two days before injury, and father told him of danger and cautioned him to be careful. Held consent to employment implied. Warrior Mfg. Co. v. Jones [Ala.] 46 S 456.

**52. Defendant liable as master:** Evidence sufficient to show plaintiff servant of defendant, having been employed by contractor for defendant. Driscoll v. Humes, Cruise & Smiley Co. [R. I.] 69 A 766. Evidence sufficient to warrant finding that defendant was owner of plant and employer, and not mere employe of another. Lewis v. Coupe, 200 Mass. 182, 85 NE 1053. Evidence warranted finding that plaintiff was secured as substitute for defendant's engineer with knowledge of defendant and his superintendent, and that plaintiff became defendant's employe. Aga v. Harbach [Iowa] 117 NW 669. Plaintiff, acting as brakeman on logging railroad, was employe of railroad company as well as of lumber company which owned railroad company. Barrow v. B. R. Lewis Lumber Co., 14 Idaho, 698, 95 P 682. Employe hired by one who was under contract with railroad company to load and unload lumber from and to cars, at so much per 1,000 feet, actual work being done under direction of company, was held voluntary servant of company; though he was paid by contractor. Knicely v. West Virginia M. R. Co. [W. Va.] 61 SE 811. Evidence sufficient to support finding that defendant's agent was in general charge of exhibition of engine and thresher and had power to employ plaintiff to assist him, and that plaintiff was defendant's servant at time of injury. Maxson v. J. I. Case Threshing Mach. Co. [Neb.] 116 NW 281.

**Defendant not liable.** Cudziak v. Morris & Co., 141 Ill. App. 356. No recovery where person who told plaintiff to go to work had no authority to employ him, and defendant had not hired him. Nicholas v. Oram [N. J. Law] 71 A 54. Where undisputed evidence showed relation of master and servant did not exist, any error in instructions as to liability of master to servant was harmless, verdict being for defendant. Haugabook v. Atlantic & B. R. Co., 130 Ga. 264, 60 SE 455. Contract or traffic arrangement whereby one company operates a line of railroad between two points for two other companies, and the

performing, in a reasonable and proper manner,[53] duties within the scope of his employment.[54] In other words, it must appear that defendant owed the duties of a

three divide the freight according to mileage, held not a partnership or agency. Hence employes of operating company were not employes of other two companies, and have no right of action against them for injury resulting from negligence of the operating company in operation of trains. Williams v. Kansas City, S. & G. R. Co., 120 La. 870, 45 S 924. Employe of contractor who furnished hoist and man to run it held not servant of another contractor who used hoist and such employe in its masonry work. Genovesia v. Pelham Operating Co., 114 NYS 646.

**53. Recovery warranted** where green hand acted under orders in **oiling edger,** and did work in customary way with customary appliance. Avery v. West Lumber Co., 146 N. C. 592, 60 SE 646. **Flagman** on work train was in proper place—caboose—at time of injury. Illinois Cent. R. Co. v. Vaughn, 33 Ky. L. R. 906, 111 SW 707. **Mine employe,** placing loaded car on track in mine, held not negligent as matter of law in being where he was. Brooks v. Chicago W. & V. Coal Co., 234 Ill. 372, 84 NE 1028. **Switchman,** standing with foreman during switching operations, saw signal given to move cars foreward, and stepped on track between cars when engine was suddenly backed and switchman was crushed between cars. Held, relation of master and servant existed, though reason for deceased's stepping on track was not shown. Missouri K. & T. R. Co. v. Pennewell [Tex. Civ. App.] 110 SW 758. Held that **master mechanic** was properly on engine where train ran into open switch, that conductor and engineer were negligent and were not his fellow-servants. Tabor v. St. Louis, etc., R. Co., 210 Mo. 385, 109 SW 764. **Defendant not liable** where employe riding in **elevator** was injured because he leaned over and extended his foot where it was caught, out of mistaken idea that he would thus avoid injury. Avery v. Puckett [Ky.] 115 SW 723. Whether plaintiff was expressly or impliedly directed by foreman to go upon **pile of lumber** which fell **held for jury.** Bryant Lumber Co. v. Stastney [Ark.] 112 SW 740.

**54. Recovery not warranted:** Employe cannot recover for injuries resulting from his having undertaken work, outside the scope of his duties, voluntarily and without authority. Lewis v. Coupe, 200 Mass. 182, 85 NE 1053. If employe's work did not require him to be near dangerous machine by which he was injured, or if he undertook unnecessarily to perform work there and was injured, he could not recover for failure of master to guard the machine. Whiteley Malleable Castings Co. v. Wishon [Ind. App.] 85 NE 832. Master cannot be held liable for injury to servant who, without master's knowledge, leaves his place of work and puts himself in a place of danger. Schmonske v. Asphalt Ready Roofing Co., 114 NYS 87. Roundhouse employe left his work to go to restaurant outside company's yards, and in crossing yards stepped into pool of hot water. Held, defendant not liable since it owed him no duty at time, he not being in performance of duties. Wilson v. Chesapeake & O. R. Co. [Ky.] 113 SW 101. Servant could not recover for injury by being caught in cogs suddenly started, when, at time, he was not at his place of work but was talking to fellow employe at different place in factory. Schmonske v. Asphalt Ready Roofing Co., 114 NYS 87. Boy left in charge of water tank by father, an employe, with consent of defendant's superintendent, fell through rotten part of roof and was drowned. Held, no recovery for death unless he was at time engaged in performance of duties for company, adjusting float and lever of tank. Yazoo & M. V. R. Co. v. Slaughter [Miss.] 45 S 873. If he was at time amusing himself by throwing rocks at passersby, there could be no recovery. Id. But if was in performance of duties it would not matter what part of roof he was on. Id.

**Recovery warranted:** Evidence sufficient to show employe in service of defendant at time of injury, though there was no direct proof of the fact. McDuffee's Adm'x v. Boston & M. R. R. Co. [Vt.] 69 A 124. Evidence sufficient to warrant finding that plaintiff was at time of injury engaged in work, hoisting ice, which, if not done in accordance with a positive direction by defendant, was acquiesced in and approved by him or his superintendent. Recovery proper. Lewis v. Coupe, 200 Mass. 182, 85 NE 1053. Allegation that employe was "necessarily" engaged in duties at certain place in mine held sustained by proof. Brooks v. Chicago W. & V. Coal Co., 234 Ill. 372, 84 NE 1028. Plaintiff was engaged in work when he was injured as he stepped upon platform from which his work was done. Hollis v. Widener, 221 Pa. 72, 70 A 287. Boy under 15 did not depart from scope of employment by sitting down to rest for short time. Jacobson v. Merrill & Ring Mill Co. [Minn.] 119 NW 510. Switchman held to have been engaged in line of duty when killed. Penney v. St. Joseph Stockyards Co., 212 Mo. 309, 111 SW 79. Coal shoveler not volunteer in assisting in mixing of zinc chloride solution, where it appeared he was ordered to do so by persons having authority to direct his work and he objected to changing. Elliff v. Oregon R. & Nav. Co. [Or.] 99 P 76. Where it was necessary for some member of train crew to ride cars on down grade and brakeman refused, an emergency existed and conductor was not acting outside scope of duties in doing work himself. Yongue v. St. Louis & S. F. R. Co. [Mo. App.] 112 SW 985. Engineer in charge of engine and machinery by which cages in mines were run was not without scope of duties in going to shaft to look after cables, etc., before raising cage. Moseley's Adm'r v. Black Diamond Coal & Min. Co., 32 Ky. L. R. 110, 109 SW 306. Servant hired by day to work in factory was instructed by foreman to look after certain belts, and was injured while trying to adjust them in customary way. Held, he was engaged in scope of employment and was not a volunteer. Mathews v. Kerlin [La.] 48 S 123. Foreman of cement work construction crew was not trespasser or mere licensee while in yards looking for yard master to

master to the person injured at the time of the injury,[55] and that the latter was not a mere volunteer.[56] The relation of master and servant is usually held to exist during transportation of the servant to and from the place of work by the master,[57] such transportation being beneficial to both.[58] An employe is not a passenger while being so carried,[59] and some courts hold that the only duty then owed by the employer is that of reasonable care to avoid injuring him.[60] One riding on the car of a railroad company, engaged in performing duties under a contract made with an authorized representative of the company, is entitled to the same degree of care as an employe riding on the train with the company's consent.[61] Where employes were expected to remain on the premises during the period allowed for lunch, the relation of master master and servant was held to continue during that time.[62] A servant cannot be

have board and tool cars moved. Missouri K. & T. R. Co. v. Balliet [Tex. Civ. App.] 107 SW 906.

55. If plaintiff voluntarily submitted himself to orders of agent of seller of engine in work of putting it in place, seller owed him duty of careful "superintendence" under statute. Bowie v. Coffin Valve Co., 200 Mass. 571, 86 NE 914. Where plaintiff went to building with tools in response to postal card and, when there, was called by foreman to come to him, defendant owed him same duty, as to lighting basement where he was, as though he had actually commenced work. Bausert v. Thompson Starrett Co., 110 NYS 521.

56. Boy employed by defendant was put at certain work, but voluntarily left it to assist another in adjusting belt. He was ordered away but later returned in violation of orders, and in assisting with belt was killed. No recovery; he was at time **mere volunteer.** Lindquist v. King's Crown Plaster Co. [Iowa] 117 NW 46. Where freight conductor had no power to employ assistant to aid in unloading freight, such assistant could not recover for injuries received as upon theory of breach of duty owed to him as employe, especially where he expected no pay. Taylor v. Baltimore & O. R. Co., 108 Va. 817, 62 SE 798. He was mere volunteer. Id. Where freight train had full crew and did not need assistance, conductor had no authority to hire help, and one who assisted without pay was volunteer to whom company owed only ordinary care to avoid injuring him. Clarke v. Louisville & N. R. Co., 33 Ky. L. R. 797, 111 SW 344. Two linemen sent to attach guy wire to particular pole had no right to turn such work over to apprentice lineman, who was injured while doing it. Maitrejean v. New Orleans R. & L. Co., 120 La. 1056, 46 S 21. Where evidence showed custom of defendant's teamsters to assist men on street grader when it was out of order, decedent was **not volunteer** in giving such assistance at time of death. Jones v. Herrick [Iowa] 118 NW 444. Boy of 14 was directed to work with operator of trip hammer and keep dies clean and was directed by operator to assist in removing dies, and while so engaged trip hammer fell on him. Held, he was not mere volunteer. Avery v. Cottrill's Guardian [Ky.] 107 SW 332. Brakeman, who offered to make coupling, was not volunteer where engineer in charge told him to do it, though his ordinary duties did not include that work. Driver v. Southern R. Co. [Miss.] 46 S 824. Whether plaintiff was assisting in adjusting belt under orders of night boss or as mere volunteer **held for jury.** Jasper v. Bunker Hill & Sullivan Min. & Concentrating Co. [Wash.] 97 P 743.

57. Plaintiff while being carried to place of work on defendant's logging train was servant. Roland v. Tift [Ga.] 63 SE 133. Trestle and bridge builders employed by railway company, who lived in car furnished by company and were transported from place to place where services were required by company, were, while being so transported, employes and not passengers. Southern R. Co. v. West [Ga. App.] 62 SE 141.

58. Relation continued during time railway employes, working on track, were coming home on hand car furnished by master. Cicalese v. Lehigh Valley R. Co. [N. J. Err. & App.] 69 A 166.

59. **Section hand** riding on car of employer to place of work was not passenger but in exercise of mere privilege by reason of his employment. Mere fact of injury in collision did not warrant recovery; he must prove negligence. Birmingham R., L. & P. Co. v. Sawyer [Ala.] 47 S 67. **Hotel waitress** went out after dinner and on her return was injured while entering elevator to go to her room. Held, she was still servant not passenger, and hotel company owed her only duties of master. Walsh v. Cullen, 235 Ill. 91, 85 NE 223.

60. Duty owed to section hand riding on defendant's car to place of work was only exercise of reasonable care to avoid injuring him. Birmingham R. L. & P. Co. v. Sawyer [Ala.] 47 S 67.

61. Plaintiff contracted with foreman of bridge gang to cook for members of crew, using company's cars for purpose and company paying for board of men who left without paying her, though they usually paid her themselves. Held, foreman had authority to make contract, and company had knowledge thereof. Tinkle v. St. Louis & S. F. R. Co., 212 Mo. 445, 110 SW 1086. While not a passenger nor an employe, yet she performed duties for benefit of company and was more than mere licensee and was entitled to same degree of care as employe riding on train with company's consent. For negligence in stopping train, causing injury to plaintiff, company would be liable. Id. Plaintiff, being in performance of duties, did not assume risk and was not guilty of contributory negligence. Id.

62. Riley v. Cudahy Packing Co. [Neb.] 117 NW 765.

transferred from one master to another without his consent, either expressly given or implied from the nature and character of the work, when compared with his ordinary employment.[63] Whether the injured person was at the time a servant of defendant or another may be a question of fact.[64] Only ordinary care to avoid injuring him is owed to a mere volunteer.[65] A servant who enters upon his master's premises not to perform his duties but to violate the law is entitled to no higher degree of protection than any outsider under such circumstances.[66] It will not be presumed or implied, against a master engaged in lawful business, that he invited his servants to come upon his premises or to use his instrumentalities for the purpose of violating the law,[67] or that he should have anticipated their doing so.[68] An employer is not responsible for injuries caused wholly by the servants of another, over whom he has no control.[69]

One who is employed to do certain work, and who is responsible to his employer only for the result, is an independent contractor;[70] one who has no discretion as to the manner or details of the work, but is controlled therein by the employer is a servant.[71] Which relation exists in a particular case may be a question of fact for the jury.[72] The general employer does not owe the duties of a master to an independent contractor nor to the servants of an independent contractor,[73] nor will he be

**63.** Employe of vendee of engine could not be found to have become servant of vendor, under whose agent's orders he worked in putting engine in place, unless he consented to and voluntarily became the vendee's servant. Bowie v. Coffin Valve Co., 200 Mass. 571, 86 NE 914.

**64.** Whether miner was employe of owners of mine or of one who was independent contractor. Smith v. Garrison [Ky.] 108 SW 293. Engineer was in charge of dead engine being hauled on defendant's road, himself being employe of another company. Two roads were under same general management and engineer was subject to orders of defendant's conductor and engineer. Whether he was at time employe of defendant for jury. Crow v. Hauck's M. & A. R. Co., 212 Mo. 589, 111 SW 583.

**65.** That one not an employe voluntarily undertook to operate brake on train with knowledge of engineer, and was injured while so doing, did not make company liable if ordinary care to prevent injury to him was exercised after discovery of his peril. Derrickson's Adm'r v. Swann-Day Lumber Co. [Ky.] 115 SW 191.

**66.** Seaboard Air Line R. Co. v. Chapman [Ga. App.] 62 SE 488. In North Carolina it is a misdemeanor for intoxicated person to take charge of a locomotive as engineer. Hence, in that state, an intoxicated servant who comes to take charge of locomotive as engineer, is there to commit a crime, and other employes owe him only such duties as they owe to other intruders. Id. Where such person sues to recover injuries for alleged negligence of engineer, defendant may plead and prove this North Carolina statute to show it did not owe duties as master, even though plaintiff had not entered engine, and could not be prosecuted under the statute. Id.

**67, 68.** Seaboard Air Line R. v. Chapman [Ga. App.] 62 SE 488.

**69.** Independent contractor, building bridge for railway company, not responsible to one of his servants for injuries caused by negligence of employes of the railway company over which he had no control. Gurdon, etc., R. Co. v. Calhoun [Ark.] 109 SW 1017.

**70.** Person employed to construct trestles, roadway, etc., of materials furnished by defendant, subject to approval of defendant's engineer, was independent contractor. Walker v. Texas & N. O. R. Co. [Tex. Civ. App.] 112 SW 430. One employed to sink shaft at $10 a foot, the employer to furnish appliances only, and the contractor to employ, pay, and control his help, was independent contractor. Kiser v. Suppe [Mo. App.] 112 SW 1005.

**71.** Power to control details of work and to discharge is essential test of relation. Kiser v. Suppe [Mo. App.] 112 SW 1005. Man employed to shovel gumbo into cars, having no discretion as to manner of work, was not independent contractor, though paid by amount of work done. Missouri K. & T. R. Co. v. Romans [Tex. Civ. App.] 114 SW 157. One employed to load and unload lumber at certain price per 1,000 feet, under orders and directions of defendant, was servant, not independent contractor. Knicely v. West Virginia M. R. Co. [W. Va.] 61 SE 811.

**72.** Company employed to tear down building was independent contractor if responsible to employer only for result, but servant if employer controlled and directed means and details of work. Question of relation held for jury. Ballard & Ballard Co. v. Lee's Adm'r [Ky.] 115 SW 732.

**73.** Injured men held servants of an independent contractor and not of defendant. Cole v. Louisiana Gas Co., 121 La. 771, 46 S. 801. Person who employed plaintiff as carpenter had contract to do carpenter work on house for certain sum, employed, controlled, and paid his own men, with whom defendant had nothing to do. Held, plaintiff's employer was independent contractor, not vice-principal of defendant. Kipp v. Oyster [Mo. App.] 114 SW 538. Where facts showed that person who employed plaintiff was independent contractor and not vice-principal of defendant, and plaintiff produced no evidence tending to show he was

liable for negligence of the independent contractor.[74] But the owner of premises, who employs a person to do work thereon, owes to him and his servants the duties owed to a licensee.[75] While in performance of duties in a place where they have a right to be;[76] and a general employer may assume the duty of furnishing reasonably safe appliances for such persons[77] but does not thereby become bound to maintain the appliances in such condition having furnished those which are reasonably safe.[78]

*The master's negligence must have been the proximate cause*[79] *of the servant's injuries.*[80]—The proximate cause of an injury need not be the immediate cause; it is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which it would not have occurred.[81]

vice-principal, there was no question for jury. Id. Plaintiff was employed by contractor to sink shaft, and was to have one-third contractor's compensation after deducting certain expenses. General employer, defendant, had no control over plaintiff or over contractor's work but furnished derrick, hoist, and cable. Held, plaintiff was servant of contractor, not of defendant. Kiser v. Suppe [Mo. App.] 112 SW 1005.

74. Employer not liable to servants of independent contractor for latter's negligence. Ballard & Ballard Co. v. Lee's Adm'r [Ky.] 115 SW 732.

75. Defendant, operator of mine, owned to plaintiff, employe of contractor working mine, duty to inspect and keep it reasonably safe, plaintiff being licensee and for breach of this duty plaintiff could recover for injuries sustained. Tennessee Coal, Iron & R. Co. v. Burgess [Ala.] 47 S 1029.

76. Held that employe of contractor doing work on defendant's premises was not required in performance of his duties to be in vicinity of unguarded hatchway into which he fell. Defendant not liable. Hutchinson v. Cleveland-Cliffs Iron Co., 152 Mich. 367, 15 Det. Leg. N. 235, 116 NW 1132.

77. A person undertaking to furnish machinery and appliances for the use of others assumes a duty to furnish a safe appliance, but this obligation does not depend upon a contractual relation between the person injured and the person whose negligence causes the injury but upon failure to perform an assumed duty. Where subcontractor's workman was injured by defective rung in ladder belonging to general contractor, evidence held not to show negligence. Dougherty v. Weeks, 111 NYS 218.

78. General employer who agreed to furnish contractor with derrick, hoist, and cable, knowing latter would employ miners, owed to such employes of contractor ordinary care to furnish reasonably safe cable but did not owe them duty of inspection thereafter, that being duty of contractor. Kiser v. Suppe [Mo. App.] 112 SW 1005. Cable used with hoist was furnished by general employer and used by contractor 9 or 10 days and then gave way where it was attached to hook of hoist. Negligence of contractor in failing to inspect was cause of accident; general employer performed duty by supplying cable reasonably safe at first. Id.

79. For discussion of general doctrine of proximate cause, see Negligence, 10 C. L. 922.

80. See 10 C. L. 707. No recovery unless negligence of master was proximate cause of injury. Ayres v. Louisville & N. R. Co. [Ga. App.] 63 SE 530; Steele's Adm'r v. Hillman Land & Iron Co. [Ky.] 114 SW 311; Moriarity v. Schwarzchild & Sulzberger Co., 132 Mo. App. 650, 112 SW 1034; Willson v. Logan, 139 Ill. App. 204. Plaintiff suing for death of employe must show negligence of master as proximate cause. Watson's Adm'r v. Louisville & N. R. Co. [Ky.] 114 SW 292. Removal of part of machine, not a safety device and which did not contribute to cause injury, not actionable negligence. Calhoun v. Holland Laundry, 220 Pa. 281, 69 A 756. No recovery for death alleged to have been caused by defendant's want of due care to procure medical attendance promptly, where evidence was that medical attendance would have enhanced chances of recovery but there was no evidence that it would have prevented death. St. Louis, etc., R. Co. v. Allen [Ark.] 111 SW 802. Failure to comply with the requirements of building ordinances has no application where the injury was not attributable thereto. William Grace Co. v. Gallagher, 140 Ill. App. 603. Master would not be liable for injury to employe by getting hand caught in corn grinder where negligence alleged—failure to provide more light as agreed by superintendent—had nothing to do with accident. Jackson v. Gulf Elevator Co., 209 Mo. 506, 108 SW 44. Instruction allowing recovery on proof of any one of alleged grounds of negligence erroneous because not requiring act proved to be proximate cause of injury. Forquer v. Slater Brick Co., 37 Mont. 426, 97 P 843. Failure of mine foreman to adjust safety derailing device in certain way not actionable negligence when accident was not shown to have resulted therefrom. Merrigan v. Evans, 221 Pa. 1, 69 A 1113. Master is not liable for ordering plaintiff to drive mule known to be in habit of kicking and running away, where injury was solely result of balking. International Coal & Min. Co. v. Reeble, 137 Ill. App. 5. Plaintiff suing for employe's death must show alleged negligence and accident resulting therefrom to have been proximate cause of death; evidence insufficient. Moscarello v. Haines, 114 NYS 519.

81. El Paso & S. W. R. Co. v. Smith [Tex. Civ. App.] 108 SW 988. There can be no recovery on an alleged ground of negligence if some independent intervening cause produced injury. Alabama G. S. R. Co. v. Vail [Ala.] 46 S 587. Whenever causal connection between master's negligence and injury is broken by independent agency, alone sufficient to cause the injury, master's negligence is not proximate cause. Teis v.

Negligence of the master will be held the proximate cause of an injury if the master, in the exercise of ordinary care, ought reasonably to have foreseen that injury might result therefrom;[82] it is not necessary that the particular injury which occurred ought to have been foreseen,[83] provided it was the natural and probable consequence of the master's negligence.[84] If an injury would not have occurred but for negligence of the master, he is not relieved from resonsibility by the fact that an independent cause for which he is not responsible,[85] such as negligence of a fellow-servant,[86] or of a third person or other agency concurred in producing the injury.[87]

Smuggler Min. Co. [C. C. A.] 158 F 260. Where injuries were caused by head-on collision of street cars, the collision was the proximate cause, and negligence, if any, in sending out one car without notice was immaterial. Latsha v. Shamokin & E. Elec. R. Co. [Pa.] 70 A 1002. Failure to maintain or use certain appliance ought not be submitted as cause of injury when it could not have concurred in producing it or have been the independent cause of it. Huston v. Quincy, etc., R. Co., 129 Mo. App. 576, 107 SW 1045. If negligent act of foreman in directing sand hoist to be raised intervened between resulting injury and plaintiff's signal, former was proximate cause. Boyle v. McNulty, 113 NYS 240. Employe was overcome by gas, and while unconscious, and being removed, his leg was broken by reason of its being allowed to project beyond edge of cage. Master's negligence in allowing gas in mine not proximate cause of injury to leg. Teis v. Smuggler Min. Co. [C. C. A.] 158 F 260. Box of freight was placed in gangway, and fell. It was again placed in position, leaning against gangway, and fell second time injuring plaintiff. Held, first fall, and negligence in first placing box where it was was not proximate cause of injury; verdict possibly based thereon set aside. Williams v. Citizens' Steamboat Co., 113 NYS 616. The master is liable for his negligence whether the injury is directly caused thereby or whether it is caused by the attempt of the servant to avoid it. Where conductor on car with which another car collided was injured because of collision, held immaterial whether injury was caused by being thrown from car or by jumping to avoid injury where peril was imminent. South Chicago St. R. Co. v. Atton, 137 Ill. App. 364. Failure to warn plaintiff of danger of being caught between car and door, if warning was necessary, held proximate cause of his being crushed; not fact that his clothing was caught on car; latter was mere condition. Charrier v. Boston & M. R. Co. [N. H.] 70 A 1078.

82. Injury must have resulted from doing or omission of an act which a person of ordinary prudence could foresee might naturally or probably produce injury. Wilson v. Southern R. Co., 108 Va. 822, 62 SE 972.

83. It must appear that same injury was likely to occur as the natural and probable result of the alleged negligent act, but it need not appear that alleged negligent person should have been able to foresee the exact injury which occurred. Texas & N. O. R. Co. v. Barwick [Tex. Civ. App.] 110 SW 953. Particular accident which occurred need not have been reasonably anticipated; it is enough that injury of some kind ought reasonably to have been anticipated as consequence of negligence. Mobile, etc., R. Co. v. Hicks, 91 Miss. 273, 46 S 360. Master who failed to guard machine as required by statute ought to have anticipated that same injury might have resulted; immaterial that he could not reasonably have foreseen precise injury which resulted to boy who sat down on machine to rest. Jacobson v. Merrill & Ring Mill Co. [Minn.] 119 NW 510.

84. To be actionable, negligence must be the **proximate cause** of an injury which in the light of the attending circumstances ought to have been foreseen as a natural and probable consequence of the negligent act. International & G. N. R. Co. v. Rieden [Tex. Civ. App.] 20 Tex. Ct. Rep. 930, 107 SW 661. Where servant sought to recover for injuries by reason of fact that hook used to hoist bucket slipped and allowed bucket to fall because hook had spread, he had **burden** to show that accident would not probably have happened had hook not been spread. Carney v. Minnesota Dock Co., 191 N. Y. 301, 84 NE 62. Hospital surgeon sent insane patient home unattended and without notifying family, and he was later struck by street car and killed, having partly undressed and placed himself on the track. Held, his death was **natural consequence** of surgeon's act. Phillips v. St. Louis & S. F. R. Co., 211 Mo. 419, 111 SW 109. Negligence if any, in allowing end of tie to rot **could not be held proximate cause** of injury to signal man who claimed he slipped on rotten tie, fell and became unconscious, and was then struck or run over by train. International & G. N. R. Co. v. Rieden [Tex. Civ. App.] 20 Tex. Ct. Rep. 930, 107 SW 661. While employe was sitting on flat car with feet hanging over, piece of wood thrown off by another bounded back and struck him. Held, such injury was pure accident, and not a consequence which ought to have been foreseen by company, of allowing men to throw off wood near their homes as train passed. Ultima Thule, A. & M. R. Co. v. Benton [Ark.] 110 SW 1037. Maintaining post in such a position that plaintiff's arm was crushed against it on collision of car, which he was pushing, with an obstacle placed on the track by an outsider, held not the proximate cause of injury. Yunkes v. Latrobe Steel & Coupler Co., 131 Ill. App. 292.

85. Master not relieved by fact that negligence for which he is not responsible concurs in causing injury. Missouri K. & T. R. Co. v. Lasater [Tex. Civ. App.] 115 SW 103.

86. See post, § 3E.

87. Contributing negligence of third person no defense if injury would not have occurred without negligence of master. Elliff v. Oregon R. & N. Co. [Or.] 99 P 76. If

These principles are further illustrated by holdings grouped in the note.[88] What was

negligence of master was efficient cause without which injury would not have occurred, negligence of others would not bar recovery. Aga v. Harbach [Iowa] 117 NW 669.

88. **Master's negligence not shown to be proximate cause of injury:** No recovery if **negligence of servant,** and not of master, is proximate cause of injury. Washington Mills v. Cox [C. C. A.] 157 F 634. Where plaintiff **stumbled** while carrying heavy bolt, held injury was **due to accident,** not to negligence of defendant. Jones v. Pioneer Cooperage Co. [Mo. App.] 114 SW 94. Evidence insufficient to show negligence of defendant in not lighting basement, cause of injury to plaintiff who **slipped and sprained ankle** in getting out of elevator. Benson v. Peters [Neb.] 117 NW 347. Negligence of operator, and not defect in metal press, proximate cause of injury where assistant **got hand caught,** upper die being lowered too soon by operator. Ladiew v. Sherwood Metal Working Co., 125 App. Div. 65, 109 NYS 477. **Mule driver in mine** stopped to remove sprags used to keep car from running on mule, and mule suddenly started and caught driver between car and mine wall. Failure to comply with Hurd's Rev. St. 1905, c. 93, § 21, requiring places of refuge to be provided along roads, was not proximate cause of injury, since compliance by making such place within 25 feet of place of accident would not have prevented it. Schlapp v. McLean County Coal Co., 235 Ill. 630, 85 NE 916. Servant **slipped on tie,** and fell into low place on track, and before he could get out was struck by car. Held, slipping on tie was proximate cause of injury, not alleged negligence in maintaining track with low place on it. Chicago & E. R. Co. v. Dinius, 170 Ind. 222, 84 NE 9. No recovery for alleged negligence in allowing timbers of mine roof to become rotten, where injury by **fall of rock** was caused by motorman "back poling" motor, pole knocking timbers away. Williams' Adm'r v. Norton Coal Co., 108 Va. 608, 62 SE 342. Evidence held not to show master's negligence in providing reasonably safe place to work, where plaintiff was injured by **shot breaking through wall of mine.** Consolidated Coal Co. v. Francis, 133 Ill. App. 227; Consolidated Coal Co. v. Trautwein, 133 Ill. App. 231. Evidence held not to show that failure of mine manager to furnish props in room where **shot-firer was injured** was proximate cause of injury. Southern Coal & Min. Co. v. Hopp, 133 Ill. App. 239. Engineer's negligence in running ahead of schedule and not failure to send flagman out from preceding train held cause of **collision.** International & G. N. R. Co. v. Brice [Tex. Civ. App.] 111 SW 1094. Defective condition of machine held not cause of injury to employe who got his **hand caught by revolving cylinder.** Hutchison v. Cohankus Mfg. Co. [Ky.] 112 SW 899. Cause of **collision** of plaintiff's train with double header which preceded him held not leaky engine on double header nor breaking of knuckle, but negligence of employes in failing to flag his train or negligence of plaintiff—engineer—in running at prohibited speed. Louisville & N. R. Co. v. Keiffer [Ky.] 113 SW 433. No negligence of master shown where employe, familiar with premises, **walked into open door** in elevator shaft, mistaking it for door to room. Gobeil v. Ponemah Mills [R. I.] 69 A 684. Defect in machine not cause of girl's getting **fingers crushed.** Willson v. Logan, 139 Ill. App. 204. No recovery for injury to boy's hand on account of defect in nozzle of hose he was holding where **hand was injured in knives** of pug mill, and there was no evidence showing any causal connection between defect in nozzle and such injury. Forquer v. Slater Brick Co., 37 Mont. 426, 97 P 843. Plaintiff started to raise beam with crow-bar but was told by superintendent to use his hands, and while beam was being so raised other men let go and beam fell on plaintiff's hand. Proximate cause of injury was **negligent act of fellow-servants,** not superintendent's order. Carlsen v. McKee, 114 NYS 280. Lack of sufficient number of men to move engine (dismantled) not cause of injury to one, where fly wheel being rolled across floor struck projecting pipe and fell over on him; their **own negligence** was cause. Fairbanks, Morse & Co. v. Walker [C. C. A.] 160 F 896.

**Evidence held to warrant finding that negligence of master was proximate cause:** Unsafe **method used to lower machine** caused it to tip over. Hamann v. Milwaukee Bridge Co., 136 Wis. 39, 116 NW 854. That **revolving set screw** on shaft which caught servant's sleeve, was cause of injury. Little v. Bousfield & Co. [Mich.] 15 Det. Leg. N. 763, 117 NW 903. That **failure to have outside fire escape** required by statute was cause of injuries to factory girl by burning. Arnold v. National Starch Co. [N. Y.] 86 NE 815. That **failure to guard saw** was proximate cause of injury to employe who slipped and came in contact with it. Evansville Hoop & Stave Co. v. Bailey [Ind. App.] 84 NE 549. That **hole in floor** was proximate cause of overturning of "buggy" used to haul steel plates, and not servant's negligent efforts to get it out of the hole. American Sheet & Tin Plate Co. v. Urbanski [C. C. A.] 162 F 91. That use of **broken and repaired sheave wheel** was proximate cause of breaking of cable and falling of bucket of ore on employe. Alaska-Treadwell Gold Min. Co. v. Cheney [C. C. A.] 162 F 593. That brakeman's death was caused by being **struck in head by water spout.** McDuffee's Adm'x v. Boston & M. R. R. Co. [Vt.] 69 A 124. That alleged defective condition of **turn-table,** causing it to stop suddenly, was cause of brakeman's injury. Currie v. Missouri, K. & T. R. Co. [Tex.] 108 SW 1167. That **failure to warn** servant of danger attendant upon dissolving of zinc chloride in tank was proximate cause of injury to eye by splashing of solution in it, though splashing was caused by fellow-servant. Elliff v. Oregon R. & Nav. Co. [Or.] 99 P 76. That **fall into shaft** was caused by loose condition of earth at mouth on which boards were placed. Hollingsworth v. Davis-Daly Estates Copper Co. [Mont.] 99 P 142. Evidence and inferences therefrom held sufficient to take to jury question whether **failure to block switch** was cause of plaintiff's being injured by switch engine. Parker v. Union Station Ass'n [Mich.] 15 Det. Leg. N. 909, 118 NW 733. Death of employe sufficiently shown.

the proximate cause of an injury is ordinarily a question of act to be determined by the jury,[89] except in those few cases where the facts are undisputed and such that only one reasonable conclusion can be drawn therefrom.

to have been caused by **defective port,** gate of which fell out with him when he opened it. Puget Sound Nav. Co. v. Lavender [C. C. A.] 160 F 851. Negligent **construction of stoging** loose plank from which fell on plaintiff, proximate cause of injury, though another servant drove loaded truck against horse supporting staging. Vaisbord v. Nashua Mfg. Co., 74 N. H. 470, 69 A 520. Evidence sufficient to go to jury on issue whether **method used to clear obstructions from saw** caused injury. Godsoe v. Dodge Clothespin Co. [N. H.] 70 A 1073. Switchman knocked down by engine and dragged and foot caught in unblocked frog. **Failure to block frog** proximate cause of injury. Cooper v. Baltimore & O. R. Co. [C. C. A.] 159 F 82. Proximate cause of brakeman's death held **lack of automatic couplers** which caused him to go between cars, and not defect in track which caused him to get caught in unblocked frog. York v. St. Louis, etc., R. Co. [Ark.] 110 SW 803. Proximate cause of injuries to plaintiff by **breaking of saw** held its defective condition, and not "jam" caused by fellow-servant. Rice v. Reese [Tex. Civ. App.] 110 SW 502. Where plaintiff, a minor, was injured by **defective construction of hopper** in clay crusher, his employment in violation of Child Labor Law held prima facie proximate cause of injury. Frorer v. Baker, 137 Ill. App. 588. Defective **condition of chisel** proximate cause of injury to servant by sliver which flew from it and struck him in the eye. Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730. **Defect in coupler** which brakeman went between cars to investigate was proximate cause of injury by falling between cars, one of which ran over him. Sprague v. Wisconsin Cent. R Co., 104 Minn. 58, 116 NW 104. **Defective condition of gasoline engine**—prime plug had to be taken out to start it—held proximate cause of injury by explosion of nearby can of gasoline, to which fire was communicated by oil spilled on engine and floor in attempt to repair it. Meshisnek v. Seattle Sand & Gravel Co. [Wash.] 99 P 9. **Failure to have flagman out** with torpedo on track held proximate cause of injury to section hand who ran over it with car. Galveston H. & N. R. Co. v. Murphy [Tex. Civ. App.] 114 SW 443. Engineer was directed to repair engine which he was employed to operate, and superior told him what to do to overcome such defect, and in so doing he was injured, **defect in engine** was proximate cause of injury. James v. Fountain Inn Mfg. Co. [S. C.] 61 SE 391. Where **"dead block"** gave way and **allowed car to run away** and kill employe, master was liable notwithstanding negligent act of fellow-servant, which dead block was intended to render harmless. Lay v. Elk Ridge Coal & Coke Co. [W. Va.] 61 SE 156. The fact that brakeman's getting foot caught in unguarded space between ralls was immediate cause of his injury did not exclude from consideration negligence of company in allowing **coupler** to become defective, which caused brakeman to go between cars. Hynson v. St. Louis S. W. R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 755, 107 SW 625. Workman on roof of defendant's building slipped and caught at electric wire to save himself and was injured by reason of **poor insulation.** Maintaining wire in that condition at that place was proximate cause of injury. Colusa Parrot Min. & Smelting Co. v. Monahan [C. C. A.] 162 F 276. Where order as to running of regular car (so as to avoid collision with special) was given only to conductor, instead of to motorman and conductor, and it was not posted as was customary, and conductor forgot it, the **failure to take customary precautions** to prevent forgetting of such order was proximate cause of collision of cars. Fitzgerald v. Worcester, etc., R. Co., 200 Mass. 105, 85 NE 911. **Engineer's negligence** in suddenly starting train held proximate cause of plaintiff's injuries. Ft. Worth & D. C. R. Co. v. Monell [Tex. Civ. App.] 110 SW 504. **Foreman's negligence** in releasing car, which he said he would hold while plaintiff was blocking up turntable, held proximate cause of plaintiff's injury, car having left track and injured plaintiff. Missouri K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601. **Negligence of engineer** proximate cause of violent coupling, and not unavoidable accident to engine. Ft. Worth & R. G. R. Co. v. Finley [Tex. Civ. App.] 110 SW 531. Where girl had her hand in machine, repairing thread, while machine was at rest, the foreman being engaged in repairing it, and he **suddenly started** it without warning, his act could be found to be the proximate cause of the injury to her hand. Fitzgerald v. International Flax Twine Co., 104 Minn. 138, 116 NW 475. Superintendent ordered employe to release chain which fell upon and injured plaintiff. Proximate cause was **order of superintendent,** not act of fellow-servant in obedience thereto. Deon v. McClintick-Marshall Const. Co., 114 NYS 28. Plaintiff was injured while at work on car on repair track. Custom was to have blue flag up on track, and when switching on track was necessary **repair boss** gave notice to men and then removed flag, and engine and cars could then enter on repair track. Here, boss removed flag and failed to warn plaintiff. Held, removal of flag was proximate cause of plaintiff's injury, other cars having been run in against car he was working on. El Paso & S. W. R. Co. v. Smith [Tex. Civ. App.] 108 SW 988. Failure of engine to couple with car first struck, which then struck others which collided with plaintiff's car, was not proximate cause. Id.

**89. Proximate cause held question for jury.** Whether injuries to employe's finger were caused as alleged by his efforts to get out of **telephone booth** in which he was imprisoned. Georgetown Water, Gas, Elec. & P. Co. v. Forwood [Ky.] 113 SW 112. Whether negligent construction of passageway in building under construction was proximate cause of mason's tender's **fall** and death. Johnson v. Lindahl [Minn.] 118 NW 1009. Whether failure to plank over steel beams of building being constructed was cause of employe's **fall.** Schramme v. Lewinson, 110 NYS 599. Whether negligence in **allowing gas to escape** from oil tanks caused servant's

*Contractual exemption from liability.* See 10 C. L. 710—Contracts exempting the master from liability for negligence are usually held invalid on the ground of public policy [90] and are expressly prohibited by some statutes,[91] but an express agreement to assume ordinary risks is valid.[92] A contract providing that voluntary acceptance by an employe of the benefits of a relief department shall operate as a release of all claims against the employer for the injury is not void as against public policy,[93] unless opposed to a positive statute prohibiting such releases.[94] The South Carolina act providing that acceptance of benefits from a relief department to which employes are required to pay dues shall not bar an action for damages, and that a contract or release to the contrary shall be void, is held valid.[95] The act is held not to invalidate a release of a claim for damages arising out of negligence.[96]

(§ 3) *B. Tools, machinery, appliances, and places for work.* See 10 C. L. 711—It is the duty of the master to use ordinary care [97] to furnish machinery, tools and appli-

death. Boehrens v. Price [Tex. Civ. App.] 113 SW 782. Whether **explosion of boiler** was due to negligent manner of work of servants or defect which reasonable inspection by master would have disclosed. Ragsdale v. Illinois Cent. R. Co., 236 Ill. 175, 86 NE 214. Whether **injury to employe throwing off belt** to stop machine and tying up belt was caused by loose, unused rope pulley hanging on shaft. Trompley v. McAfee, 152 Mich. 494, 15 Det. Leg. N. 269, 116 NW 191. Instruction held to properly present issue of proximate cause—injury by **falling on unguarded saw.** Evansville Hoop & Stave Co. v. Bailey [Ind. App.] 84 NE 549. Whether **fall of rock from roof of mine** was caused by "squeeze," risk of which was assumed. McCarthy v. Spring Valley Coal Co., 232 Ill. 473, 83 NE 957. Whether proximate cause of **miner's injury by falling of mine roof** was willful violation of mines act by failure of examiner to inspect room or discover or post notice of defective and dangerous condition of mine roof. Mertens v. Southern Coal & Min. Co., 235 Ill. 540, 85 NE 743. Whether injury by **falling rock** was proximately caused by willful violation of Mines and Miners Act. Ingraham v. Harmon, 133 Ill. App. 82. Plaintiff injured by **explosion of detonator** which she was testing with ohmmeter. Whether defect in latter was cause of accident, for jury. Coril v. Masurite Explosive Co. [C. C. A.] 165 F 41. Brakeman trying to uncouple cars while moving slowly was unable to do it, and in going out from between cars got **foot caught in unblocked frog.** Whether failure to have car equipped with automatic coupler in working order was proximate cause of injury. Donegan v. Baltimore & N. Y. R. Co. [C. C. A.] 165 F 869. Whether **injury to switchman** was caused by slipping of push pole on switch engine or by acts of servants. Pennsylvania R. Co. v. Forstall [C. C. A.] 159 F 893. Whether **brakeman** went between moving cars in disobedience of rules and whether defective bumpers caused injury. Southern R. Co. v. Shumate, 32 Ky. L. R. 1027, 107 SW 737. Whether failure of railroad company to have switch in proper position or negligence of **engineer** was cause of his injuries. Trimmier v. Atlantic, etc., R. Co. [S. C.] 62 SE 209. Whether defective condition of track and brakes was proximate cause of death of **conductor** who jumped from train. Yongue v. St. Louis & S. F. R. Co. [Mo. App] 112 SW 985. Whether defect in rollers of machine which caught cleaning stick and jerked plaintiff or slipping on floor was cause of injuries received by **falling on machine.** Zajdak v. Lisbon Falls Fiber Co., 111 NYS 50. Whether **fall of operator into elevator shaft** was due to negligence of fellow-servant or in part to master's negligence in failing to guard shaft properly. Roth v. Buettel Bros. Co. [Iowa] 119 NW 166. Whether uninsulated wire was cause of **injuries to lineman** engaged in stringing wires over others. De Kallands v. Washtenaw Home Tel. Co. [Mich.] 15 Det. Leg. N. 337, 116 NW 564.

**90.** See 10 C. L. 710, n. 37.

**91.** Laws 1907, p. 495, c. 254, making railroad companies liable for defects in equipment, and for negligence of employes, and which provides that companies cannot be relieved by rule or contract or provision as to notice by employe injured, is held valid, since such contract or rule would defeat purpose of act and be against public policy. Kiley v. Chicago, etc., R. Co. [Wis.] 119 NW 309.

**92.** Written agreement to assume ordinary risks of employment (brakeman) and to make careful examination of tracks, yards, etc., where duties called him, held valid, since it was an assumption only of ordinary risks. Wilson v. New York, etc., R. Co. [R. I.] 69 A 364.

**93.** Since employe may elect between such relief and action for damages. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761.

**94.** Gen. St. 1906, § 3150, making void any contract restricting liability of railroad companies for injuries to employes, is valid. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761.

**95.** Act is intended to prevent corporations from contracting away liability for negligence. Sturgess v. Atlantic Coast Line R. Co. [S. C.] 60 SE 939.

**96.** Act does not apply in such a case. Sturgess v. Atlantic Coast Line R. Co. [S. C.] 60 SE 939.

**97.** Duty with respect to appliances is ordinary care, such as man of ordinary prudence would exercise for his own safety were he doing the work. Sterne v. Mariposa Commercial & Min. Co., 153 Cal. 516, 97 P 66. Railway company not absolutely bound to keep engine throttle in condition but must use ordinary care to do so. Atchison, etc., R. Co. v. Mills [Tex. Civ. App.] 108 SW 480.

ances which are reasonably safe [98] and suitable for the purposes for which they are intended to be used,[99] or for a use to which they are customarily put by employes with the knowledge or acquiescence of the master.[1] Instrumentalities of the kind ordinarily used by those engaged in the same business are reasonably safe within the meaning of this rule,[2] which does not require the latest, safest or best obtainable,[3] or those of any particular type,[4] to be provided, but the fact that an appliance is of the kind in general use will not excuse negligence in providing it, if it is not, in fact,

Duty of railway company to furnish reasonably safe hose for use of car cleaner and tank filler, and where hose broke, causing plaintiff's injury, company would be responsible for want of ordinary care. Houston, etc., R. Co. v. Patrick [Tex. Civ. App.] 109 SW 1097.

98. Pettus v. Kerr [Ark.] 112 SW 886; German-American Lumber Co. v. Brock [Fla.] 46 S 740; Kotera v. American Smelting & Refining Co. [Neb.] 114 NW 945; Lone Star Brew. Co. v. Willie [Tex. Civ. App.] 114 SW 186; Truckers' Mfg. & Supply Co. v. White, 108 Va. 147, 60 SE 630; Norfolk & Portsmouth Trac. Co. v. Ellington's Adm'r, 108 Va. 245, 61 SE 779. Master liable for injuries caused by failure to provide reasonably safe appliances. Faulkner v. Texas, etc., R. Co. [Tex. Civ. App.] 113 SW 765. Master negligent if he furnishes defective tools liable to cause injury when used. Manning v. Portland Steel Ship Bldg. Co. [Or.] 96 P 545. Master is not guarantor of appliances but is bound only to use ordinary care to provide and maintain appliances which are reasonably safe. Southern R. Co. v. Moore, 108 Va. 388, 61 SE 747.

99. De Witt v. Floriston Pulp & Paper Co., 7 Cal. App. 774, 96 P 397. Whether reasonably safe appliances have been furnished may **depend on uses** to which they are to be put. Currie v. Missouri, etc., R. Co. [Tex.] 108 SW 1167. Degree of care depends upon circumstances and use to which appliances are to be put. Houston, etc., R. Co. v. Patrick [Tex. Civ. App.] 109 SW 1097. Alleged negligence in furnishing defective **standards on flat cars** was not sustained where it did not appear that they were defective for intended purpose, to hold materials on car and master was not shown to have knowledge of their use by brakemen as handholds. Chicago, etc., R. Co. v. Murray, 85 Ark. 600, 109 SW 549. **Track and trains on logging road** need be only reasonably safe for purposes intended; not negligence to use small or slightly worn rails, or cars unlike those in use on standard roads. Equipment of defendant held not negligently defective or unsuitable. Cavaness v. Morgan Lumber Co. [Wash.] 96 P 1084. Furnishing **"spanner" wrench** instead of "socket" wrench with which to tighten nuts on machine would not be negligence unless master knew, or in exercise of ordinary care ought to have known, that wrench furnished was not safe and sufficient for purpose. Sterne v. Mariposa Commercial & Min. Co., 153 Cal. 516, 97 P 66.

1. Where master provided certain tool for certain purpose, or permitted it to be used, it was immaterial that fellow-servant told him to use it. Disalets v. International Paper Co., 74 N. H. 440, 69 A 263. Master properly found guilty of negligence where green hand was told to oil edger and used for purpose **bottle instead of oil can** to do it, which required him to get upon machine, where he slipped, bottle being customarily used for such oiling. Avery v. West Lumber Co., 146 N. C. 592, 60 SE 646.

2. Negligence cannot be inferred from use of machine of the kind ordinarily used by persons in same business. Saller v. Friedman Bros. Shoe Co., 130 Mo. App. 712, 109 SW 794; Brands v. St. Louis Car Co., 213 Mo. 698, 112 SW 511. No negligence could be found in use of pug mill (for mixing clay), such as was customarily used in factories of the kind, without guard over knives, where there was no evidence that such guard was practicable, though, if practicable, it would have made machine safer. Forquer v. Slater Brick Co., 37 Mont. 426, 97 P 843. Where emery wheel was like those ordinarily used, and evidence showed they very seldom broke, use of such wheel was not negligence, though expert testified that convex wheel would be safer. Brands v. St. Louis Car Co., 213 Mo. 698, 112 SW 511. **Doctrine not applicable** where evidence did not show general use by other companies but only that same appliances had been previously used by defendant. Kennedy v. Laclede Gaslight Co. [Mo.] 115 SW 407.

3. Louisville Veneer Mills Co. v. Clemonts, 33 Ky. L. R. 106, 109 SW 308. Only reasonably safe and suitable appliances, not best or perfect working ones, required. Burke v. International Paper Co., 112 NYS 893. Not required to furnish best known appliances, only such as are reasonably fit and safe and are in general use. Cotton v. North Carolina R. Co. [N. C.] 62 SE 1093. Master may select appliances, and need not select newest and best, but must use ordinary car to select those reasonably safe. Norfolk & Portsmouth Trac. Co. v. Ellington's, 108 Va. 245, 61 SE 779. Only duty is to provide reasonably safe tools; not tools which make accidents impossible. Smith v. Long Island R. Co., 114 NYS 228. Master not obliged to furnish absolutely safe appliances but only such as are reasonably safe for intended purposes, and to keep them in repair. McDonald v. California Timber Co., 7 Cal. App. 375, 94 P 376.

4. Only appliances of ordinary character and reasonable safety required; not latest or best or any particular kind. Brands v. St. Louis Car Co., 213 Mo. 698, 112 SW 511. If double tape fuse used in mine was reasonably safe, failure to use different kind, though safer and better, would not constitute negligence. Wiita v. Interstate Iron Co., 103 Minn. 303, 115 NW 169. Evidence that hook was made of Bessemer steel and that it would have been better if made of wrought iron improperly received. Brossman v. Drake Standard Mach. Works, 232 Ill. 412, 83 NE 936.

reasonably safe.[5] Failure to provide appliances which are necessary in order that work may be done with reasonable safety,[6] or to provide a sufficient number or quantity of appliances,[7] may constitute negligence. The duty of the master with respect to appliances extends to those permanent appliances [8] which are used in the master's business, though owned by others.[9] The duty is owed only to those employes who are required to work with [10] or near them, and who are likely to be exposed to injury by reason of their defective or unsafe condition.[11] It is not owed to one whose duty it is to keep machinery in repair.[12] Whether due care in this respect has been exercised in a given case is ordinarily a question of fact.[13] The master is liable only for

5. The fact that an appliance is of the kind in general use throughout the country in the same or similar kind of work is not conclusive upon the question of negligence, if in fact the master has not used proper care in its selection and it is not reasonably safe. Wlita v. Interstate Iron Co., 103 Minn. 303, 115 NW 169. Where no buffer, brakes, or appliances were used to keep cars used in tunnel from running into pit at end of track, master could be found negligent in failing to provide reasonably safe appliances, though one he used was in general use. Evans v. Pearson, 125 App. Div. 666, 110 NYS 69. Fact that implement was purchased from reputable dealer, and was such as was ordinarily in use in same business, does not conclusively show exercise of due care in furnishing it to employe, though such facts may be considered by jury. Longpre v. Big Blackfoot Mill. Co. [Mont.] 99 P 131.

6. Defendant negligent for failure to provide means for making cement flow through conduits into bins, plaintiff having been injured by sudden flow produced by him by use of stick. Vaughn v. Glens Falls Portland Cement Co., 59 Misc. 230, 112 NYS 240.

7. Insufficient supply of suitable and safe **rope** was furnished painters with which to make or rig swinging scaffold. Bart v. Quadt [Cal. App.] 96 P 815. Defendant liable where fellow-servant selected best rope he could find from the supply provided and it broke injuring plaintiff. Reeder v. Crystal Carbonate Lime Co., 129 Mo. App. 107, 107 SW 1016.

8. **Bolt used to fasten clamps** on carrying crane held part of appliance; master not relieved by reason of having supply of other bolts. Porter v. American Bridge Co., 111 NYS 119. **"Dead block"** designed to stop cars which ran onto track, and to offset defects in the track, was part of appliances or place of work and employe had right to assume that it was reasonably safe. Lay v. Elk Ridge Coal & Coke Co. [W. Va.] 61 SE 156. **Rope sling,** used on shipboard to lower staging over ship's side, held not mere temporary appliance but permanent and regular instrumentality as to which master was under duty of ordinary care to provide and maintain in reasonably safe condition. Doherty v. Booth, 200 Mass. 522, 86 NE 945. Employer liable if he furnished one which was defective or failed to maintain them in reasonably safe condition, injury resulting therefrom. Id. Marks or tags on cable of temporary elevator for convenience of engineer in telling where elevator was **held mere temporary device,** not part of ways, works or machinery; failure to have such tags on part of cable not negligence. Del Signore v. Thompson-Starrett Co., 198 Mass. 337, 84 NE 466.

9. Subcontractor liable for injuries to employe caused by defect in **hoisting apparatus** supplied by contractor but used by subcontractor's employes to do their work. Cavanaugh v. Windsor Cut Stone Corp., 80 Conn. 585, 69 A 345.

10. Duty to safeguard machines extends only to employes hired or expected to use them, not to volunteers. Stodden v. Anderson & Winter Mfg. Co. [Iowa] 116 NW 116. Defendant not liable where servant thoughtlessly put his hand behind him and got fingers caught in cogs of machine which had been started, where his duties did not require him to have anything to do with machine. Harker v. Illinois Cent. R. Co. [Ky.] 115 SW 198.

11. Tools and appliances must be reasonably safe, not only for those who use them but also for those required to work near them so as to expose to injury by reason of defects. Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730. Where girl 14 or 15 was instructed as to manner of work, and unnecessarily and in violation of instructions worked too close to shaft, which caught her hair and injured her, law not requiring shaft to be guarded, negligence of master not shown. Civetti v. American Hatters & Furriers' Corp., 124 App. Div. 345, 108 NYS 663.

12. When the master employes servant, not to work with machinery but to repair it when defective or out of order, the rule requiring ordinary care to provide machinery equal in kind to that in general use, and reasonably safe for one exercising ordinary care in its use, does not apply to such machinery. Green v. Babcock Bros. Lumber Co., 130 Ga. 469, 60 SE 1062.

13. **Question of negligence for jury:** Injuries to operator of **metal stamping press.** Clemens v. Gem Fibre Package Co. [Mich.] 15 Det. Leg. N. 574, 117 NW 187. **Emery wheel** broke. Huber v. Whale Creek Iron Works, 125 App. Div. 184, 109 NYS 177. Evidence tended to show knowledge by defendant's officers that **boiler** was unsafe. Hollis v. U. S. Glass Co., 220 Pa. 49, 69 A 55. Whether **belt shifter** used to change belt on pulleys of shaft defective and whether defect was cause of injury. Britton v. Hammond Packing Co. [Mo. App.] 114 SW 559. Whether **rope used in shifting belt** was in defective and dangerous condition, becoming entangled with belt and injuring plaintiff. Josher v. Bunker Hill & Sullivan Min. & Concentrating Co. [Wash.] 97 P 743. Whether belt should have been guarded to prevent **automatic starting of machine.** Cochrell v. Langley Mfg. Co. [Ga. App.] 63 SE 244. Whether master had failed

to place guard over **shaft gearing,** or whether it had been removed at time of accident. Hoffman v. Rib Lake Lumber Co., 136 Wis. 388, 117 NW 789. Employe injured on **shaft** while attempting to adjust belt; whether defendants were negligent in failing to guard shaft or supply belt shifter. Seely v. Tenant, 104 Minn. 354, 116 NW 648. Revolving **set screw** caught sleeve of servant while adjusting pulley belt. Little v. Bousfield & Co. [Mich.] 15 Det. Leg. N. 763, 117 NW 903. Whether unguarded **rip saw** was reasonably safe. Louisville Veneer Mills Co. v. Clemonts, 33 Ky. L. R. 106, 109 SW 308. Whether **saw** was properly guarded. Gustafson v. West Lumber Co. [Wash.] 97 P 1094. Plaintiff injured by hand coming in contact with knives of **buzz planer** from which **shield had been removed.** Bennett v. Carolina Mfg. Co., 147 N. C. 620, 61 SE 463. Providing defective **push-pole on switch engine.** Pennsylvania R. Co. v. Forstall [C. C. A.] 159 F 893. **Chain on elevator** or carrier attached to street grading machine, allowing carrier to fall on plaintiff's intestate. Jones v. Herrick [Iowa] 118 NW 444. Whether small **chain,** used to hitch team to cable, was furnished by defendant, chain having parted, causing cable to strike decedent. Martin v. Gould, 103 Minn. 467, 115 NW 276. Plaintiff was working on mast of derrick supported by rope and pulley, and **rope** parted, allowing him to fall. Westin v. Anderson [Minn.] 119 NW 486. Whether it was defendant's duty to supply lineman, stringing wires, with **insulated wires,** and whether it did so. De Kallands v. Washtenaw Home Tel. Co. [Mich.] 15 Det. Leg. N. 337, 116 NW 564. Employe injured where **hook fastened to cable** which was being moved sideways (attached to ditching machine) gave way, causing chain to fly back and strike him. Patterson v. Melchior [Minn.] 119 NW 402. Whether defendant was negligent in furnishing plaintiff **cant hook** with defective handle. Longpre v. Big Blackfoot Mill. Co. [Mont.] 99 P 131. Whether negligence to provide **hook bent at right angles** instead of at acute angle with which to draw up heavy slide, hook having slipped. Kotera v. American Smelting & Refining Co. [Neb.] 114 NW 945. **Bar,** shown to be defective, slipped, injuring plaintiff. Faulkner v. Texas, etc., R. Co. [Tex. Civ. App.] 113 SW 765. Evidence sufficient to go to jury which showed that **chisel,** frayed on top and with defective handle, was furnished, and that plaintiff while striking it was struck in eye by piece of steel. Manning v. Portland Steel Ship Bldg. Co. [Or.] 96 P 545. **Hose** used by car tank filler broke, causing plaintiff to lose balance and fall off car. Houston, etc., R. Co. v. Patrick [Tex. Civ. App.] 109 SW 1097. Defective, slow-burning **fuse** was furnished, and delayed explosion injured miner. Nustrom v. Shenango Furnace Co., 105 Minn. 140, 117 NW 480. Whether kind of **fuse used in mine** was reasonably safe for jury, in action for injuries caused by premature explosion, it appearing that fuse was of a kind commonly used, though another kind was being substituted by many mines. Wiita v. Interstate Iron Co., 103 Minn. 303, 115 NW 169. Whether it was negligence to continue to use **water gauge** of certain kind **on steam engine,** after several explosions, and after complaint by engineer, and promise of superintendent to substitute another. Nicolas v. Albert Lea L. & P. Co. [Minn.] 119 NW 503. **Derrick boom** fell suddenly while being operated. Miroslawski v. Ferguson & Lange Foundry Co., 232 Ill. 630, 83 NE 1086. Whether **derrick** and attachments operated by engine and friction drums, located on barge, used in bridge construction, was reasonably safe. King v. Chicago, etc., R. Co., 104 Minn. 397, 116 NW 918. Whether **hoisting appnratns,** used in digging well, was reasonably safe and suitable. Carlson v. Cucamonga Water Co., 7 Cal. App. 382, 94 P 399. Where conductor was injured in rear end collision of **cable cars,** and there was evidence that grip of colliding car was defective and would not grip cable, proper to allow case to go to jury. Toncrey v. Metropolitan St. R. Co., 129 Mo. App. 596, 107 SW 1091. Plaintiff hurt in coupling **cars.** Donk Bros. Coal & Coke Co. v. Retzloff, 133 Ill. App. 277. Evidence presented case for jury whether **coupler** was defective, whether defect ought to have been known to company, and whether its inspection was sufficient. Sprague v. Wisconsin Cent. R. Co., 104 Minn. 58, 116 NW 104. Whether it was negligent to require brakeman to work with **turntable** to turn heavy engine, which had to be carefully balanced on it in order to allow it to be safely turned, brakeman having no knowledge of that fact. Currie v. Missouri, etc., R. Co. [Tex.] 108 SW 1167. Whether use by defendant of **vicious mare,** which ran away while plaintiff was being taken home, injuring her was negligence. Henry v. Omaha Packing Co. [Neb.] 115 NW 777.

**Evidence Held Not to Show Master Negligent: Automatic coupler.** Union Pac. R. Co. v. Brady [C. C. A.] 161 F 719. **Spacer used in winding wire on lathe** held ordinarily safe. Allen v. Western Elec. Co., 131 Ill. App. 118. Servant injured by **piece of breaker in rolling mill.** Thomas v. Republic Iron & Steel Co., 140 Ill. App. 258. **Gas stove and fixtures** used to dry varnish within vat alleged to be defective in allowing gas to escape, explosion of which injured plaintiff, held reasonably safe. Eagle Brew. Co. v. Luckowitz, 138 Ill. App. 131. **Valve stem** not defective. Carr v. American Locomotive Co. [R. I.] 70 A 196. Employe's fingers caught in **pulp press.** Burke v. International Paper Co., 112 NYS 893. Construction of **freight elevator** which fell not shown negligent or defective. Young v. Mason Stable Co. [N. Y.] 86 NE 15. Plaintiff was employed to shovel clay into clay grinding machine, and while so engaged lump of clay fell from bucket in **elevating device** and struck him on the head, causing him to fall upon machine, which could not have been guarded so as to prevent such injury without reducing its efficiency. Held master not negligent. Bushtis v. Catskill Cement Co., 113 NYS 294. Ordinary **sewing machine belt** fastened together with hooks, held not dangerous appliance. Nelson-Bethel Clothing Co. v. Pitts [Ky.] 114 SW 331. **Wagon** used for hauling stone and heavy articles, with low body 18 inches from ground, held suitable for hauling heavy reel of cable wire. Kennedy v. Laclede Gaslight Co. [Mo.] 115 SW 407. **Traction motor** in mine not shown defective; ran away and operator jumped and was killed. Clinchfield Coal Co. v. Wheelers' Adm'r, 108 Va. 448, 62 SE 269. **Ice skid** slipped from wagon while plaintiff was loading ice. Lone Star Brew. Co. v. Willie [Tex. Civ. App.] 114 SW 186. Where death of employe resulted from contact between **tele-**

**phone and trolley wires,** verdict based on absence of guard between wires could not stand without evidence of feasibility of such guard. Conklin v. Central New York Telephone & T. Co., 114 NYS 180. **Skids in sawmill** being defective, an employe was stationed at the place to see that lumber and timbers were properly conveyed away, thus remedying defect, and for injury caused by his negligence a fellow employe could not recover. Carlson v. Weyerhaeuser Timber Co. [Wash.] 97 P 891. That skids in lumber mill were defective was not breach of master's duty where defect was remedied by employment of servant to take care of timbers which skids did not properly convey. Id. Guards on **candy cutting machine** held sufficient and all that could practicably be placed in it. National Candy Co. v. Miller [C. C. A.] 161 F 51. To show insufficiency or want of **guards on machinery** as cause of injury to operator. Greene v. Steere Worsted Mills [R. I.] 69 A 922. Evidence insufficient to take to jury question whether **locomotive engine** was defective, where it moved while plaintiff was under it engaged in cleaning out ashes. Douda v. Chicago, etc., R. Co. [Iowa] 113 NW 272. To show defect in **car-projecting bolt** which caused injury to switchman. Galusha v. Chicago G. W. R. Co. [C. C. A.] 168 F 333. To show **cars** between which conductor was crushed were defective because they had bumpers on them. Dermid v. Southern R. Co. [N. C.] 61 SE 657. Due care by **street railway** company does not require floors of **all cars** to be of same height so as to prevent one car from piling up on another in case of collision, thereby crushing motorman between them. Durkee v. Hudson Valley R. Co. [N. Y.] 86 NE 537.

**Evidence held to show master negligent:** Employe injured while attempting to adjust **loose belt.** Petrus v. Kerr [Ark.] 112 SW 858. Failure to provide proper appliance and method for shifting **belts** held negligence. Mathews v. Kerlin [La.] 48 S 103. Defendants negligent in requiring plaintiff to operate machine with defective belt and chargeable with knowledge of increased danger from such defect. Schow v. McCloskey [Tex. Civ. App.] 109 SW 386. Evidence held to sustain finding that exposed and **unguarded gearing** was dangerous and should have been guarded and that injury to plaintiff was within field of reasonable anticipation. Klatz v. Power & Mfg. Mach. Co., 136 Wis. 107, 116 NW 770. **Belt** was improperly repaired and defective and broke where repaired, causing plaintiff's injury. Starnes v. Pine Woods Lumber Co. [La.] 47 S 607. Employer continued after notice, to use driving belt so loose that it left pulley and took position dangerous to employes. Krohn v. Smith & Co., 151 Mich. 247, 14 Det. Leg. N. 893, 114 NW 1017. **Buzz planer** in operating which plaintiff was injured defective and its defect caused injury. Powell v. Gifford, 200 Mass. 546, 86 NE 901. Continuing use of defective **strip saw** in mill which broke, injuring plaintiff. Rice v. Reese [Tex. Civ. App.] 110 SW 502. Plaintiff, while instructing boy in use of **lath trimmer,** leaned on **box** covering saw and box tilted and saw cut arm off. Harrod v. Stout-Greer Lumber Co. [Ark.] 113 SW 39. **Guard over saw** consisting of **box** defective, part of it being caught by saw as it vibrated and thrown against plaintiff. Poczerwinski v. Smith Lumber Co., 105 Minn. 305, 117 NW 486. **Cross-cut and rip saws** maintained above surface of **work** bench **without** common appliances to render their use safe. Harney v. Chicago, etc., R. Co. [Iowa] 115 NW 836. **Saw** held in **place by** old, **worn,** and defective **rope** fell on **plaintiff, operator.** Ogilvie v. Conway Lumber Co. [S. C.] 61 SE 511. Recovery sustained where girl of 16 was injured operating **mangle** with defective **guard.** Mansell v. Conrad, 125 App. Div. 634, 109 NYS 1179. Plaintiff struck in eye by flying steel sliver **from hammer or chisel** while holding rail which was being cut. Texas Mexican R. Co. v. Trifierina [Tex. Civ. App.] 111 SW 239. Boy of 16 was given defective **sledge and burred prosser pins** to work with on boiler tubes, and **chip** from pin struck him in eye. Pelow v. Oil Well Supply Co. [N. Y.] 86 NE 511. Plaintiff, holding chisel, struck by piece of steel **chipped from sledge** wielded by helper, sledge being plainly defective. Missouri, etc., R. Co. v. Quinlan, 77 Kan. 126, 93 P 602. Weight of **dummy elevator** fell down shaft. Winkle v. George B. Peck Dry Goods Co., 132 Mo. App. 686, 112 SW 1026. Death caused by sudden drop of **elevator.** Herlihy v. Little, 200 Mass. 154, 85 NE 884. Where **air hoist** worked by ropes had been changed during plaintiff's absence, and he was not advised, and in using it pulled wrong rope, causing it to go up suddenly and jar off its load, negligence being also alleged as to its quick action and absence of safety device. Wilgora v. St. Paul Foundry Co. [Minn.] 119 NW 835. Evidence, if believed, sufficient to **show die machine** defective, in that upper die would fall of itself. Gerding v. Standard Pressed Steel Co., 220 Pa. 229, 69 A 672. Injuries caused by breaking of rotten **guy rope.** Cleveland, etc., R. Co. v. Beale [Ind. App.] 86 NE 421. **If rope** sling broke when subjected to ordinary strain, jury would be warranted in finding that it was unsafe at time of use. Doherty v. Booth, 210 Mass. 522, 96 NE 945. Servant's death caused by defective joint negligently fitted into **steam pipe.** De Witt v. Floriston Pulp & Paper Co., 7 Cal. App. 774, 96 P 397. Recovery warranted where injured employe was handed **chain** by master mechanic with which to take out armature, chain having broken owing to defect with notice of which defendant was chargeable. Eddington v. Union R. Co., 129 NYS 819. Finding of negligence warranted where **telephone lineman received shock** owing to presence of copper wires in **tape** with which he and another were making measurements. Murphy v. Hudson River Tel. Co., 112 NYS 149. Company liable for injuries to employe while **blocking up turntable,** which was rotted so that it had to be propped up to allow cars to pass over it, its condition being known to company and its foreman. Missouri, etc., R. Co. v. Bailey [Tex. Civ. App.] 115 SW 691. **Switch stand** through defective operation of which plaintiff was injured. Chicago, Wilmington & Vermillion Coal Co. v. Brooks, 138 Ill. App. 34. **Locomotive engine; brakeman** injured **between** engine and car. Rudquist v. Empire Lumber Co., 104 Minn. 505, 116 NW 1019. Defective **boiler** exploded, injuring fireman. Taylor v. White [Tex. Civ. App.] 113 SW 554. **Drawheads on cars** defective, allowing cars to come together, killing conductor while making coupling. Kansas City So. R. Co. v. Herrie [Ark.] 112 SW 967. Company negligent where tender and engine pulled apart owing

injuries which, in the exercise of ordinary care, ought to have been foreseen and guarded against.[14] The duty to provide reasonably safe and suitable appliances cannot be delegated so as to relieve the master from responsibility for its proper performance.[15]

The master, having provided reasonably safe and suitable machinery and appliances, is not liable for injuries resulting from their negligent use by an employe,[16] or from their unauthorized[17] use for a purpose for which they were not intended,[18] or from failure to use appliances which have been provided,[19] or from the negligent

to defect in **coupling apparatus** and fireman was killed. Missouri, etc., R. Co. v. Snow [Tex. Civ. App.] 115 SW 631. Employe killed between tender and loaded car owing to **defect in coupling.** Gauthier v. Wood [Wash.] 94 P 654. Negligence to allow **step on engine tender** to become worn and bent. Arkansas Cent. R. Co. v. Workman [Ark.] 112 SW 1082. Negligence for railroad company to have **defective apron between engine and tender** and to have it defectively connecting two. Missouri, etc., R. Co. v. Adams, 42 Tex. Civ. App. 274, 114 SW 453. Injuries to fireman caused by falling between engine and tender due to absence of **apron** which worked out of place by reason of defective bolt. Central of Georgia R. Co. v. Mote [Ga.] 62 SE 164.

**14.** Only obligation to guard machinery is against such dangers as ought reasonably to be foreseen; no such duty owed servant who leaves place of work. Schmonske v. Asphalt Ready Roofing Co., 114 NYS 87. Master is not liable where servant is injured through carelessness or thoughtlessness by machine with which he is not required to work, even though it is defective. Harper v. Illinois Cent. R. Co. [Ky.] 115 SW 198. Large roller of machine was not covered, and gearing at ends could not be. Employe slipped and had fingers caught in this roller, an accident which was unusual and unlikely. Master not liable, since only practical guard might not have prevented such accident. Martin v. Walker & Williams Mfg. Co., 113 NYS 78. Dump car, which worked perfectly, held not defective in construction because cross arm came down too close to plank on which workmen were, where in operating car workmen would naturally be at safe distance from where cross-arm descended. Hanson v. Superior Mfg. Co., 136 Wis. 617, 118 NW 180. There could be no recovery for injuries to boy's hand in knives of pug mill on ground that nozzle on hose he was holding was defective, causing sudden spurt of water which carried his hand into knives, since such an accident could not reasonably have been foreseen. Forquer v. Slater Brick Co., 37 Mont. 426, 97 P 843.

**15.** Bort v. Quadt [Cal. App.] 96 P 815; Heck v. International Smokeless Powder Co. [N. J. Law] 71 A 150; Carr v. American Locomotive Co. [R. I.] 70 A 196. Duty to furnish reasonably safe jointer continuing and not discharged by simply employing man to keep it in condition. Bigum v. St. Paul Sash, Door & Lumber Co. [Minn.] 119 NW 481. Complaint alleging that defective rope was an "appliance" furnished by master not demurrable on ground that selection of it was by servant. Bart v. Quadt [Cal. App.] 96 P 815. Where sledges were placed at helper's disposal by foreman, selection of one by fellow-servant did not relieve master for injury to plaintiff. Missouri, etc., R. Co. v. Quinlan, 77 Kan. 126, 93 P 632. Employer liable where employe was struck by flying chip from chisel, though fellow-servant selected chisel under orders from foreman. Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730.

**16.** Master not liable for misuse or **negligent use** of instrumentalities by employes. Chicago, etc., R. Co. v. Hamilton [Ind. App.] 85 NE 1044; Wyckoff v. Birch [N. J. Err. & App.] 71 A 243. Where an appliance has been demonstrated to be proper and safe, servant cannot recover for injuries caused by negligent operation in violation of instructions, danger being obvious. Great Western Sugar Co. v. Pray [C. C. A.] 158 F 756. Master not liable for motorman's injuries sustained in collision, where no defect in car brakes or apparatus was shown, but he failed to have **sand box** in order and could not use it. Brady v. North Jersey St. R. Co. [N. J. Err. & App.] 71 A 238. No recovery where no defect in **gas making machine** was shown but it appeared plaintiff opened both valves at once, having been warned against so doing. Mohn v. Pennsylvania Steel Co. [Pa.] 71 A 16. Master not required to provide brakes on **motor** to guard against employe's own negligence. Clinchfield Coal Co. v. Wheeler's Adm'r, 108 Va. 448, 62 SE 269. Defendant not bound to see that **ice skid** used by plaintiff was properly adjusted to his wagon. Lone Star Brew. Co. v. Willie [Tex. Civ. App.] 114 SW 186. Master not liable for negligent use by servants of **skids** supplied for unloading rails from car. Indianapolis Trac. & Ter. Co. v. Kinney [Ind.] 85 NE 954.

**17.** Men employed by defendant had used tape to measure holes and poles on ground with knowledge of foremen, but it had not been used to throw over wires to measure standing poles. Held such use was unauthorized and defendant not liable for death caused by shock of current through the tape so used. Donahue v. Northwestern Tel. Exch. Co., 103 Minn. 432, 115 NW 279.

**18.** Where an employe, as prank, turned air hose on fellow-servant, causing his death, master was not liable on theory that air hose was dangerous and ought to have been guarded. Ballard's Adm'x v. Louisville & N. R. Co., 33 Ky. L. R. 301, 423, 110 SW 296. Where railroad company was not shown to have actual or implied knowledge of customary use by brakeman of standards on flat cars for handholds, it could not be charged with negligence in failing to provide standards suitable and safe for that purpose. Chicago, etc., R. Co. v. Murray, 85 Ark. 600, 109 SW 549.

**19.** Master not liable where fall of frame to support drop hammer was due to failure

selection by an employe of such as are defective, others, reasonably safe, having been provided.[20]

*Temporary appliances; scaffolds, staging and the like.* See 10 C. L. 716—In respect to temporary appliances, such as scaffolds and the like, built and used by the employes in the ordinary course of their duties, the master fully performs his duty by supplying a sufficient quantity of suitable material,[21] and he is not liable for injuries caused by negligent construction or failure to use the suitable materials provided;[22] but if the master undertakes to furnish a completed structure or directs the servant to use such structure, he owes him the same degree of care with respect to its safety as he does with respect to other appliances.[23]

of fellow-servants to use two guy ropes provided by master. Laragy v. East Jersey Pipe Co. [N. J. Law] 68 A 1073.

**20.** Where master has furnished a sufficient supply of suitable material or appliances, he is not liable for injuries resulting from the selection of an unsafe one by a fellow-servant. Reeder v. Crystal Carbonate Lime Co., 129 Mo. App. 107, 107 SW 1016. Where servants were ordered to do simple work, and left to select tools, master was not liable for negligence in furnishing tools. Smith v. Long Island R. Co., 114 NYS 228. Employe selected defective blow-off pipe with which to change water in locomotive boiler when good ones were available. No recovery for his death caused by such obvious defect. Atchison, etc., R. Co. v. Stone, 77 Kan. 642, 95 P 1049. If master furnished several emery wheels for use on particular machine, error of judgment on part of foreman who selected defective one would be negligence of fellow-servant only; but if only one actually used was available, master would be liable. Huber v. Whale Creek Iron Works, 125 App. Div. 184, 109 NYS 177.

**21.** Where men constructed **staging** to be used by them, master would have performed duty by furnishing sufficient quantity of suitable and reasonably safe materials. Donahue v. Buck & Co., 197 Mass. 550, 83 NE 1090. Master owes duty of due care to select materials for scaffold reasonably safe and suitable. Barkley v. South Atlantic Waste Co., 147 N. C. 585, 61 SE 565. Where workmen put up staging, master liable where fall was due to defective material supplied by him, sufficient good material not being at hand. Donahue v. Buck & Co., 197 Mass. 550, 83 NE 1090. Evidence sufficient to warrant finding that board supplied for use in making staging was defective and unsafe and that an inspection would have disclosed its condition. Dunleavy v. Sullivan, 200 Mass. 29, 85 NE 866. Where defendant agreed to and accepted plan of construction of staging suggested by employes, it was his duty to furnish suitable materials for it, and was liable for injury resulting from unsafe materials supplied by him. Id.

**22.** If master furnishes suitable materials for construction of appliances to be put together and used by employes, he is not liable for negligent construction. Bort v. Quadt [Cal. App.] 96 P 815. When employes themselves were required to build staging, master was not liable for its fall unless he supplied unsafe materials. Stevens v. Strout, 200 Mass. 432, 86 NE 907. Employer not liable where he supplied sufficient proper materials for scaffold and it was constructed by journeymen plasterers, according to rules of their union, before plaintiff came to work, he having fallen through board which broke owing to knot in it. Finan v. Sutch, 220 Pa. 379, 69 A 817. Planks laid over terra cotta floor of building in course of construction for workmen to walk on held only temporary appliance which it was employes' duty to look after. Master not liable where employe stepped on end of plank over hole and fell. Eisner v. Horton, 200 Mass. 507, 86 NE 892. No duty of master to furnish platform being shown, and, master having furnished suitable material, no recovery for injury to employe caused by negligent selection by him of defective planks. Wynne v. Continental Asphalt Paving Co., 112 NYS 1024. Master furnished good materials to support frame for drop hammer, and intended to use two guy ropes, and frame was so supported at first. One guy was removed, how, not shown, and frame fell. Master not liable. Laragy v. East Jersey Pipe Co. [N. J. Law] 68 A 1073. Where the master simply directs that a scaffold be built, leaving its construction and selection to skillful servants, and provides sufficient material, he is not liable for injuries to a fellow-servant of those who built it for defects therein. Cheatham v. Hogan [Wash.] 97 P 499.

**23.** Care required in building scaffolds needed in work is such as ordinarily prudent men would use under like circumstances. Murch Bros. Const. Co. v. Hays [Ark.] 114 SW 697. Where staging was furnished by defendant, latter was liable for injuries caused by its collapse, though it was built by another employe. Driscoll v. Humes, Cruise & Smiley Co. [R. I.] 69 A 766. Derrick which had been used several months in same place held permanent appliance, not one put up as used by employes. Watson v. New York Cont. Co., 111 NYS 277. Principle that master is not liable where he provides suitable materials, and servants select unsafe ones, not applicable where selection of timber for skid was made by superintendent of works. Heck v. International Smokeless Powder Co. [N. J. Law] 71 A 150. If master directs an employe to use a scaffold built by other employes, he adopts scaffold as his own and becomes liable for injuries to such employe for defects in its construction. Cheatham v. Hogan [Wash.] 97 P 499. Evidence held to warrant recovery where scaffold was built by employes in course of construction of building and used by them, and plaintiff was directed to take it down, and it fell when he went upon it for that purpose, he having had no part in its construc-

Holdings under the New York statute, requiring persons who procure work to be done in which scaffolds or similar appliances are necessary to provide safe appliances for such work are given in the note.[24]

*Places for work.*[See 10 C. L. 716]—It is the duty of the master to use ordinary care to provide a place of work which is reasonably safe,[25] considering the nature of the business and the character of the work,[26] and the intended uses and purposes of the place provided.[27] This duty extends only to the place provided by the master for the doing of the work [28] and in which the employes are required to be while in per-

tion. Id. Proof that boards used in scaffold were partly burned and knotty made case for jury. Barkley v. South Atlantic Waste Co., 147 N. C. 585, 61 SE 565.

**24.** Laws 1897, p. 467, c. 415, § 18, providing that safe scaffolds, etc., must be provided for use of employes engaged in building, repairing, etc., any house, building or structure, held to apply where plaintiff was repairing passenger car and fell by reason of defective platform on staging used in work. Caddy v. Interborough Rapid Transit Co., 125 App. Div. 681, 110 NYS 162. Section 18 in effect makes a scaffold a "place" of work, so far as master's duty with reference to it is concerned. Pettersen v. Rahtjen's American Composition Co., 111 NYS 329. Where action was based on this section, and court had not charged on duty of inspection, error to refuse requested charge that master would not be liable for defect not discoverable by inspection. Id. Section 18 does not make master insurer. Id. Under statute, employer is bound to furnish safe scaffold. O'Donnell v. John H. Parker Co., 125 App. Div. 475, 109 NYS 875. Statute requires furnishing of "safe" scaffold, not merely one which is "reasonably safe." Bower v. Holbrook, 125 App. Div. 684, 110 NYS 164. Duty under statute is continuous; scaffold must be kept safe; and master is liable for negligence of one entrusted with duty of furnishing or maintaining it in safe condition. Id. Held that foreman was negligent, knowing of condition of defective plank which broke. Id. Recovery sustained for death of painter of iron work of subway who fell by reason of defective plank in scaffold provided for his use. Id. Steel frame building was in course of construction, and men were erecting derrick with which to raise steel beams, and to reach ropes of derrick were told to make scaffold with two horses and plank. This was 30 feet from ground. Statute held applicable. Warren v. Post, 128 App. Div. 572, 112 NYS 960. Duty imposed by § 18 is absolute and nondelegable; master liable though defective scaffold put up by plaintiff and another plank being defective. Id. Scaffold prepared for plaintiff, with horses and planks, to be used by him in putting up fixtures to hang steam coils on, was within statute, and recovery for injury due to its defective condition was warranted. Tracey v. Williams, 111 NYS 114. Where patent ladder scaffold fell or tipped over with plaintiff, painter, whether defendant was negligent in furnishing contrivance not reasonably safe was for jury. Schmitt v. Rohn, 110 NYS 1086.

**25.** Burnside v. Peterson, 43 Colo. 382, 96 P 256; Bernheimer Bros. v. Bager [Md.] 70 A 91; Koerner v. St. Louis Car Co., 209 Mo. 141, 107 SW 481; Kotera v. American Smelting & Refining Co. [Neb.] 114 NW 945; Millen v. Pacific Bridge Co. [Or.] 95 P 196. Master is under duty to exercise reasonable care to provide servant a safe place in which to work, and not to subject or expose him to **unnecessary risks.** Lohman v. Swift & Co., 105 Minn. 148, 117 NW 418. Though fact that work is necessarily attended with some danger must be considered, yet it is master's duty to use reasonable care to see that servant is not unnecessarily exposed to danger in doing his work. Yarber v. Chicago & A. R. Co., 235 Ill. 589, 85 NE 928. Where servant is put to work in **excavation** under master's direction and control, it is latter's duty to see that place is and remains reasonably safe. Hilgar v. Walla Walla [Wash.] 97 P 498.

**26.** Master owes duty of providing reasonably safe place and maintaining it in that condition, having regard to **character of services** required and dangers to be apprehended by reasonably prudent man. Louisville & N. R. Co. v. Carter [Ky.] 112 SW 904. The master is under duty to furnish a safe place to work for a servant constantly employed in close proximity to strong electric currents, so confining and controlling the **electricity** that it will not escape and injure the servant in the discharge of his duty. Miller v. Chicago & Oak Park El. R. Co., 132 Ill. App. 41. **Duty of telephone company** to see that wires of another company are not maintained so near its own as to cause danger to employes. Drown v. New England Tel. & T. Co. [Vt.] 70 A 599. Company maintaining private telephone system was under duty of keeping **poles** reasonably safe for use of workmen required to use them. Jackson Fibre Co. v. Meadows [C. C. A.] 159 F 110. Master owed duty to properly insulate **wires maintained over roof** on which employes were required to work. Colusa Parret Min. & Smelting Co. v. Monahan [C. C. A.] 162 F 276.

**27.** Master not liable where place is reasonably safe for intended purpose. International, etc., R. Co. v. Rieden [Tex. Civ. App.] 20 Tex. Ct. Rep. 930, 107 SW 661.

**28.** Ordinary rule as to place held inapplicable where servants were sent to do work on **another's premises,** where such work was not usually done. Fairbanks, Morse & Co. v. Walker [C. C. A.] 160 F 896. **Ladder** furnished employe, which he was expected to use in performing his duties, held his "place" of work. Missouri, etc., R. Co. v. Steele [Tex. Civ. App.] 110 SW 171. **"Bridge" used on stage** in presenting opera, put together by stage hands, and used in one act, was not a "place" but an "appliance" used by member of chorus, plaintiff. Hahn v. Conried Metropolitan Opera Co., 111 NYS 161. **Brick wall** in course of construction held not "place" of work of brick-

formance of their duties,[29] or which they customarily use with his knowledge or acquiescence,[30] and he is not liable for injuries received by a servant while in a place where he was not required or had no right to be,[31] the servant being then a mere licensee or trespasser.[32] The duty to provide a reasonably safe place is continuous [33] and cannot be delegated so as to relieve the master from responsibility for its nonperformance.[34] Whether due care has been exercised by the master in this respect is usually a question of fact.[35]

layer; scaffold on which he stood was place. Ripp v. Fuchs, 113 NYS 361.

**29.** Duty extends only to premises where employe is required to work. Harper v. Illinois Cent. R. Co. [Ky.] 115 SW 198.

**30.** Harris v. Det Farenede Dampskibselskab [N. J. Err. & App.] 70 A 155.

**31.** Freight mover left his place to get shovel which foreman had told him he was getting and fell into coal hole. No recovery. Harris v. Det Farenede Dampskibselskab [N. J. Err. & App.] 70 A 155.

**32.** When a servant leaves the place of work provided without cause or authority, he becomes a mere licensee or trespasser. Harris v. Det Farenede Dampskibselskab [N. J. Err. & App.] 70 A 155.

**33.** Duty as to place continuous; warning should be given as to unusual dangers. Stephen v. Duffy, 136 Ill. App. 572. Duty is violated where the place is allowed to become unsafe or is rendered dangerous without notice to employes. Koerner v. St. Louis Car Co., 209 Mo. 141, 107 SW 481. Duty to provide safe place is continuous and must be performed when conditions change, owing to nature of work. Pennsylvania Steel Co. v. Jacobsen [C. C. A.] 157 F 656. Where place may become dangerous, and this fact ought reasonably to be foreseen, reasonable care to prevent accident must be used. Palmijiana v. Hyde-McFarlin Co., 110 NYS 368. If place becomes unsafe by reason of danger which master knows or ought to know, he is under duty to use care to prevent it, regardless of its source. Leazotte v. Jackson Mfg. Co., 74 N. H. 480, 69 A 640.

**34.** Lorts & Frey Planing Mill Co. v. Weil [Ky.] 113 SW 474; Weinert v. Merchants' & Shippers' Warehouse Co., 112 NYS 123; Palmijiana v. Hyde-McFarlin Co., 110 NYS 368. Duty to see that revolving shaft in dressing room was kept covered nondelegable. Flynn v. Prince, Collins & Marston Co., 198 Mass. 224, 84 NE 321. Railway company responsible for neglect of **employe** charged with duty of keeping track in repair and safe condition. St. Louis S. W. R. Co. v. Cleland [Tex. Civ. App.] 110 SW 122. Master not relieved where prop was caused to fall on plaintiff by acts of **independent contractor.** Bernheimer Bros. v. Boger [Md.] 70 A 91. Nonassignable duty of railroads to provide reasonably safe place of work extends to all tracks used by employes and cannot be assigned to an independent contractor as to any part of it so as to relieve the company from liability for its nonperformance. Vickers v. Kanawha & W. V. R. Co. [W. Va.] 63 SE 367. Independent contractor in doing his work suspended ropes from derrick over track and they were allowed to sag so that stack of engine caught one and pulled down another, which knocked plaintiff off a car. Held company was liable for contractor's negligence. Vickers v. Kanawha & W. V. R. Co. [W. Va.] 63 SE 367. Though company had no actual notice of presence of ropes over track in time to prevent injury, yet notice to independent contractor chargeable as vice-principal with master's duties was notice to company. Id. Railroad company could not escape liability for death of trainman caused by collision with rock on track by reason of fact that independent contractor engaged in excavation near track had thrown rock there and failed to give proper warning of blast and resulting obstruction. Walton v. Miller's Adm'x [Va.] 63 SE 458.

**35. Question held for jury:** Whether master was negligent in requiring employe to stand on two horizontal bars, 12 inches apart, 8 feet from floor, to haul up slide weighing 200 pounds, by means of iron hook, **no safeguards** to prevent falling being provided. Kotera v. American Smelting & Refining Co. [Neb.] 114 NW 945. **Passageway in mill** was cluttered with rolls of cloth, owing to breakdown of machine, and employe, ordered to hurry, caught foot in passing and was injured. Perrier v. Dunn Worsted Mills [R. I.] 71 A 796. Whether **passageway** used by mason's tender in hauling material was negligently constructed, planks not being securely fastened. Johnson v. Lindahl [Minn.] 118 NW 1009. Where heavy steel plate was allowed to stand on edge in passageway year or more, finally falling on plaintiff. Riley v. Cudahy Packing Co. [Neb.] 117 NW 765. Evidence of negligence sufficient to go to jury where narrow passage between engine pit and other machinery was improperly guarded, and minor was killed by getting caught in machinery. Lunde v. Cudahy Packing Co. [Iowa] 117 NW 1063. Plaintiff, domestic servant, stepped on **trap-door,** which was not kept in place by hinges or other means, and it tipped up and caused her to fall into cellar. Burnside v. Peterson, 43 Colo. 382, 96 P 256. Employe fell through **hole in platform** on which he was working. Louisville & N. R. Co. v. Carter [Ky.] 112 SW 904. Chambermaid fell because of foot catching in hole in linoleum on **floor** in room where she was at work. Messir v. McLean [Wash.] 98 P 106. Only duty with reference to **basement** of building in course of construction was to light it sufficiently so that servant using ordinary care would not be exposed to danger. Whether it was sufficiently lighted for jury, evidence being conflicting. Bausert v. Thompson-Starrett Co., 110 NYS 521. Whether defendant was negligent in allowing **windmill platform,** on which plaintiff was required to go to oil mill, to become out of repair. Miller v. Chicago, etc., R. Co., 103 Minn. 443, 115 NW 269. Whether **elevator shaft** was properly guarded by barriers, etc. Rath v. Buettel Bros. Co. [Iowa] 119 NW 166. Servant injured by fall of smokestack

he was assisting in moving from **burned building.** Binyon v. Smith [Tex. Civ. App.] 112 SW 138. Employe ordered to work within reach of **building being dismantled,** which fell upon him. American Window Glass Co. v. Noe [C. C. A.] 158 F 777. **"Manhole"** made of concrete, was being lowered into hole and fell apart and injured plaintiff, digging to allow it to sink; negligence in failing to properly brace concrete structure. Ward v. Edison Elec. Illum. Co., 124 App. Div. 22, 108 NYS 608. **Pile of lumber** fell on plaintiff. Rigsby v. Oil Well Supply Co., 130 Mo. App. 128, 108 SW 1128; Bryant Lumber Co. v. Stastney [Ark.] 112 SW 740. **Hay chute** left uncovered in dimly lighted barn loft. Moellman v. Gieze-Henselmeier Lumber Co. [Mo. App.] 114 SW 1023. Whether **coal bin** where employe fell over rope was unsafe due to insufficient light. Chicago, etc., R. Co. v. Jackson [Tex. Civ. App.] 108 SW 483. Whether owner of **vessel** should have taken further precautions to guard hole made by servants of independent contractor in making repairs. Mella v. Northern S. S. Co., 162 F 499. Plaintiff directed to open **flume gate** to let water through, and foreman suddenly opened gate from inside, letting water down on plaintiff. Harris v. Washington Portland Cement Co. [Wash.] 95 P 84. Inexperienced man, put to work shoveling where **ground was uneven,** stepped into concealed hole. Missouri, etc., R. Co. v. Romans [Tex. Civ. App.] 114 SW 157. Whether contractor was negligent in mode used to explode dynamite in **blasting,** as to an employe engaged in loading steam shovel and killed by explosion of charge which did not explode with others. Stephen v. Duffy, 237 Ill. 549, 86 NE 1082. Whether master was negligent in putting deceased to work in **sewer trench,** and not withdrawing him while loaded blast was being removed, which exploded. Polo v. Palisade Const. Co. [N. J. Err. & App.] 70 A 161. Evidence for jury where prop which held adjoining wall fell on employe working in **excavation** for new building. Bernheimer Bros. v. Bager [Md.] 70 A 91. Whether place of work, excavation, was properly safe guarded by timbering, and was reasonably safe, bank having caved in. Sonnenberg v. Southern Pac. Co. [C. C. A.] 159 F 884. Earth fell on employe at work in excavation. Hilgar v. Walla Walla [Wash.] 97 P 498. Case for jury where it was shown that deceased was killed by **explosion of gas in manhole** in defendant's plant, and use of defective gas pipes could be found. Seager v. Solvay Process Co., 114 NYS 591.

**Evidence held sufficient to warrant finding of negligence:** Coal shoveler on **dock** injured by fall of brace intended to hold timbers in place. Lipsky v. Reiss Coal Co., 136 Wis. 307, 117 NW 803. Mill foreman fell into **pit,** planks over which had been removed without his knowledge. Knox v. American Rolling Mill Corp., 236 Ill. 437, 86 NE 90. Master unnecessarily left openings in **dust catcher in foundry,** where previous explosions had occurred, as result of which an explosion occurred, killing servant. Jenco v. Illinois Steel Co., 233 Ill. 301, 84 NE 273. Evidence warranted finding of negligence where boy of 14 was struck by piece of cloth in **factory,** he being employed to watch cloth and required to stand on boxes for the purpose. Lane v. Manchester Mills [N. H.] 71 A 629. **Revolving shaft** in dressing room was left unboxed, and hooks were placed near it for use of employes, and shaft was practically noiseless when running and was usually boxed. Flynn v. Prince, Collins & Marston Co., 198 Mass. 224, 84 NE 321. Master liable where vat of **hot liquid was left uncovered,** into which plaintiff slipped. Gilbert v. Elk Tanning Co., 221 Pa. 176, 70 A 719. Maintaining **box containing hot water and acid,** with loose cover, near time check window where men went. Cincinnati, etc., R. Co. v. Fortner [Ky.] 113 SW 847. **Hot water on floor** not obvious to servant renders master liable. Grubic v. Western Tube Co. 139 Ill. App. 470. Iron moulder injured by molten iron spilled by another moulder who tripped over **obstacle on floor.** Railroad Supply Co. v. Klofski, 138 Ill. App. 468. Piece of **lumber fell** on plaintiff's foot. Merchants' & Miners' Transp. Co. v. Corcoran [Ga. App.] 62 SE 130. If **lumber was negligently piled** in mill so that it was liable to fall at any time on employes, this would constitute negligence. Rigby v. Oil Well Supply Co., 130 Mo. App. 128, 108 SW 1128. Employe hauling concrete under **platform** injured by fall of plank, being moved by servants. Kroeger v. Marsh Bridge Co. [Iowa] 116 NW 125. Defendant liable where plaintiff was ordered to work under defective **staging,** without warning, and loose plank fell on her. Vaisbord v. Nashua Mfg. Co., 74 N. H. 470, 69 A 520. Allowing **piece of sheet metal,** placed to protect machinery from rain through leaky roof by servant, to remain there after notice, it being **liable to fall** when machinery was operated. Kolodrianski v. American Locomotive Co. [R. I.] 69 A 505. **Telephone booth** so arranged that it cannot be opened from inside is not reasonably safe. Georgetown Water, Gas, Elec. & P. Co. v. Forwood [Ky.] 113 SW 112. **Freight elevator** with hole in floor 4 inches by 12 or 16 inches not reasonably safe. Kentucky Wagon Mfg. Co. v. Duganics [Ky.] 113 SW 128. Barrel rolled down slight incline in floor, through **open elevator door,** down upon plaintiff. Held defect in floor and failure to guard door was cause of injury. Moriarity v. Schwarzchild & Sulzberger Co., 132 Mo. App. 650, 112 SW 1034. Plaintiff injured by fall of **telegraph pole** on which he was working. Southwestern Tel. & T. Co. v. Tucker [Tex. Civ. App.] 110 SW 481. **Brick wall** in course of construction fell on employe. Nelson Vitrifield Brick Co. v. Mussulman [Kan.] 99 P 236. Engine room was insufficiently supplied with electric light bulbs, and one bulb had to be used in different places, and in changing it engineer, plaintiff, received shock and burns owing to **defective wiring** and insulation. Aga v. Harbach [Iowa] 117 NW 669. **Hole in roof** covered with tar paper. Springfield Elec. L. & P. Co. v. Calvert, 134 Ill. App. 285. Complaint held to show cause of action where plaintiff fell through **trap-door** while inspecting warehouse. Taylor v. Palmer & Co., 121 La. 710, 46 S 703. Plaintiff, member of **steam shovel** crew, was ordered to clean track, and while so engaged was injured by chunk of frozen dirt being swung against him without warning. Raitila v. Consumers' Ore Co. [Minn.] 119 NW 490. Warehouse employe injured by **fall of pile of sacks** of flour, placed before he came to work, no warning of its danger-

Holdings applying these principles to the duty of railroad companies with respect to their tracks, right of way, and premises,[36] and to the duties owed by owners or operators of mines [37] to their employes, are collected in the notes.

ous condition being given. Weinert v. Merchants' & Shippers' Warehouse Co., 112 NYS 123. Workman killed by **explosion** of calcium carbide caused by plumber allowing water to run from pipe which he was repairing on to the carbide. Held master's duty to see that pipes were drained before repairs were undertaken, and this duty could not be delegated. Charron v. Union Carbide Co., 151 Mich. 687, 15 Det. Leg. N. 154, 115 NW 718. **Trench** into which plaintiff was ordered to go was not properly braced, and that its condition was discoverable by master by exercise of ordinary care. McCoy v. Northern Heating & Elec. Co., 104 Minn. 234, 116 NW 488. In **blasting,** one of three charges did not explode. Contrary to custom, no investigation was made, and when hole was drilled next day charge exploded, throwing rock on plaintiff below. Bjorklund v. Gray [Minn.] 118 NW 59. Defendants allowed **box of dynamite** to remain uncovered near tents occupied by men in which stoves were used, box having caught fire and exploded dynamite. Anderson v. Smith, 104 Minn. 40, 115 NW 743. Same holding; plaintiff injured by same explosion. Froberg v. Smith [Minn.] 118 NW 57. Master liable, having failed to locate and remove **unexploded charges** of dynamite exploding and causing death of cranesman. Stephen v. Duffy, 136 Ill. App. 572. Defendant was engaged in **excavating** cut across street and steam shovel came in contract with and **cut gas main,** from which gas escaped to fire box of engine, causing explosion and death of common laborer. Palmijiana v. Hyde-McFarlin Co., 110 NYS 368. Evidence ample to show negligence of foreman in failing to perform duty to locate and take out **unexploded charges,** where plaintiff in quarry was sent out to pick and shovel shale among hidden, unexploded charges of dynamite, of whose existence he was ignorant. Kansas Buff Brick & Mfg. Co. v. Bentley. 77 Kan. 780, 95 P 1134. Pulley through which ran **cable used to haul logs** was so changed that cable got caught on root and then swung against plaintiff when root gave way. Howland v. Standard Mill. & Logging Co. [Wash.] 96 P 686.

**Evidence held insufficient to warrant finding of negligence:** Scaffold. Rausa v. Bartzen, 140 Ill. App. 555. Plaintiff, engaged in washing floor of reservoir, was **struck by chisel** which dropped from roof where carpenters were shingling, doing their work in ordinary way. Taylor v. Washington Mill. Co. [Wash.] 97 P 243. Servant was **hit by brick** alleged to have fallen upon him while at work in constructing building. William Grace Co. v. Gallagher, 140 Ill. App. 603. Where servant was killed by falling into shaft-pit through alleged **slippery condition of floor.** Steffen v. Illinois Steel Co., 140 Ill. App. 551. Allowing place of work of plaintiff to become dangerous by reason of rock or slag being scattered on **platform,** plaintiff not having shown any condition such as would render probable an accident such as occurred. Cook v. U. S. Smelting Co. [Utah] 97 P 28. **Vats,** in which gas burners were, not unsafe. Eagle Brew. Co. v. Luckowitz, 138 Ill. App. 131. Where servant was injured in climbing from an unlighted **basement** in a building under construction in absence of showing that he exercised due care, master not liable. Falkeneau Const. Co. v. Ginley, 131 Ill. App. 399. Plaintiff was injured by **falling timber** dislodged by ascending bucket while working at bottom of sewer ditch. Evidence held not to show negligence of defendant in **construction or arrangement of timbering.** City of Chicago v. Enright, 138 Ill. App. 179. Where **wires** had only been up short time and were in good condition shortly before explosion, defect in them was not shown as cause of explosion of powder. Western Coal & Min. Co. v. Garner [Ark.] 112 SW 392. Quarryman injured by **falling stone.** Gince v. Beland [R. I.] 69 A 921.

**36. Railroads:** A railroad company may construct its road and other structures according to its own views, and solve its engineering problems in its own way, but cannot, without liability, violate rules of law governing care which must be taken for safety of passengers and employes. Clay v. Chicago, etc., R. Co., 104 Minn. 1, 115 NW 949. No cause of action can be based on **failure to block frogs.** York v. St. Louis, etc., R. Co. [Ark.] 110 SW 803. Use of unblocked frogs is not negligence. Donegan v. Baltimore & N. Y. R. Co. [C. C. A.] 165 F 869. **Failure to block switches** is negligence if they are not reasonably safe. Matthews v. New Orleans, etc., R. Co. [Miss.] 47 S 657. Company liable if injuries to engineer were caused by failure of company to have **switch** in proper position so that he could safely perform his duties. Trimmier v. Atlantic, etc., R. Co. [S. C.] 62 SE 209. Whether **track construction,** filling in level in center and leaving ties to project at ends, was negligent; jury could consider customary construction. Hall v. Chicago, etc., R. Co. [Iowa] 116 NW 113. Track defective where engine tender left in, causing brakeman to jump and sustain injury. Laughy v. Bird & Wells Lumber Co., 136 Wis. 301, 117 NW 796. Railroad company could not be held negligent where signalman stepped on rotten end of tie, fell, was knocked senseless, and injured by train, since **track** was safe for running of trains, and such use by flagman, and such injury, was not reasonably to have been foreseen. International, etc. R. Co. v. Rieden [Tex. Civ. App.] 20 Tex. Ct. Rep. 930, 107 SW 661. Brakeman, trying to catch and stop runaway cars, stumbled on **defective cross tie** and was run over by cars. St. Louis S. W. R. Co. v. Cleland [Tex. Civ. App.] 110 SW 122. Duty of railroad company to engineer with respect to **road bed, washed out by rain,** laid down in instructions to jury. Jennett v. Louisville & N. R. Co., 162 F 392. Brakeman killed while trying to uncouple car by stepping into **trench dug along track** for purpose of putting in target signals. Held company chargeable with negligence, though independent contractor did the digging of the trench. Southern R. Co. v. Newton's Adm'r, 108 Va. 114, 60 SE 625. Where brakeman was injured owing to **defect in embankment** where

he alighted to turn switch, proof of customary use of the place was admissible, since, whether it was private ground or part of the right of way company owed employes duty to keep it safe if used by them customarily. Toledo, etc., R. Co. v. Reardon [C. C. A.] 159 F 366. Switch tender on electric tram road in mine slipped through opening on footboard of motor as car struck projecting rails of **side track** and had leg injured. Sundvall v. Interstate Iron Co., 104 Minn. 499, 116 NW 1118. Duty of railroad company to brakeman to maintain **spur track** as well as main track in reasonably safe condition; and if ballasting was required in exercise of ordinary care, failure to ballast was negligence. Roenfranz v. Chicago, etc., R. Co. [Iowa] 116 NW 714. Company negligent when it allowed rails of spur track to become four inches out of alignment, causing derailment of car. Dortch v. Atlantic Coast Line R. Co. [N. C.] 62 SE 616. Railroad company is under duty of ordinary care to maintain yards, tracks, appliances, etc., in **switching yards** reasonably safe for purpose of switching and coupling and uncoupling cars. International, etc., R. Co. v. Rieden [Tex. Civ. App.] 20 Tex. Ct. Rep. 930, 107 SW 661. Negligence for company to allow depression to exist in **road bed in switching yards.** St. Louis, etc., R. Co. v. Mangan [Ark.] 112 SW 168. Where fireman in locomotive was injured by reason of locomotive dropping through **defective bridge,** evidence that bridge had given way before, and had been rebuilt in its former shape without being strengthened, and that it showed sinking at time of accident similar to first, held sufficient to sustain charge of negligence. McCabe & Steen Const. Co. v. Wilson, 209 U. S. 275, 52 Law. Ed. 788. Negligence for railroad company to maintain **bridge so low as to endanger brakemen** on cars using due care. Chesapeake & O. R. Co. v. Rowsey's Adm'r, 108 Va. 632, 62 SE 363. Railroads have **no common-law duty to fence their right of way,** and failure to fence violates no duty owed employes. Gill v. Louisville & N. R. Co., 160 F 260. Neither common law nor Act Tenn. 1891, p. 220, c. 101, §§ 2, 3, making railroad companies liable for killing stock if right of way is not fenced, makes it duty of company as to employes to fence in tracks; and there is no liability for death of employe in collision with stock because of **want of fence.** Gill v. Louisville & N. R. Co. [C. C. A.] 165 F 438. Not negligence for defendant to maintain **freight platform** to conform to curved track, so that ends of passing car were 20 inches and center 5½ inches from platform, it not being expected that men would attempt to work between car and platform. Haring v. Great Northern R. Co. [Wis.] 119 NW 325. Whether defendant was negligent in maintaining freight platform too close to track, so as to be unsafe for employes riding on cars, for jury. Clay v. Chicago, etc., R. Co., 104 Minn. 1, 115 NW 949. Failure to light **platform** where brakemen alight, or to allow 14-inch space between platform and cars, held not negligence. Arkansas Cent. R. Co. v. Workman [Ark.] 112 SW 1082. Railway company which acquiesced in custom of conductors to get off trains at station platform while trains were moving, to perform their duties, owed them duty of ordinary care to keep platforms reasonably safe and free from obstructions. Missouri, etc., R. Co. v. Kennedy [Tex. Civ. App.] 112 SW 339. Freight handler injured while handling freight owing to **insufficient light at station.** Carlson v. Great Northern R. Co. [Minn.] 118 NW 832. Railway companies may rely on its brakemen using due diligence to familiarize themselves with location of **permanent structures near tracks.** Carr v. Grand Trunk R. Co., 152 Mich. 138, 15 Det. Leg. N. 118, 115 NW 1068. Duty of railroad company to maintain **structures** at reasonably safe **distance from track** so that employes riding on cars will not be injured by them. Clay v. Chicago, etc., R. Co., 104 Minn. 1, 115 NW 949. Evidence warranted finding that **post** was maintained too near railway track. Wilson v. New York, etc., R. Co. [R. I.] 69 A 364. Evidence held insufficient to show uniform custom, on which brakeman was entitled to rely, of railroad companies to maintain **cattle chutes** sufficiently distant from tracks to avoid contact with brakemen on cars. Carr v. Grand Trunk R. Co., 152 Mich. 138, 15 Det. Leg. N. 118, 115 NW 1068. Evidence for jury whether **water spout** on railway tank was so placed as to strike man of ordinary height on car. McDuffee's Adm'x v. Boston & M. R. Co. [Vt.] 69 A 124. Evidence sufficient to show that switch engine which plaintiff was engaged in **repairing** was not properly blocked, engine having suddenly started and run over him. Halvorson v. Northern Pac. R. Co., 104 Minn. 525, 116 NW 1134. To allow servant to work as **repairer** on car, standing in such position that train running on same track collided with it, injuring him, held negligent failure to provide reasonably safe place to work. Offner v. Erie R. Co., 140 Ill. App. 562. Recovery warranted where **car repairer went under car** to make repairs under foreman's orders, when part of car fell on him in course of work. Seaboard Air Line R. Co. v. Maddox [Ga.] 63 SE 344. **Snow plow** threw snow and cinders from track through window, striking station agent's eye. Atchison, etc., R. Co. v. White, 77 Kan. 853, 94 P 265. Railway company owes to employes as well as travelers duty of ordinary care to protect them at **crossings** by giving reasonable warning of approach of cars or engines. Chicago, etc., R. Co. v. Donovan [C. C. A.] 160 F 826. Lumber company, owning and operating **logging railroad,** owed employes duty of keeping it reasonably safe; liable for injuries caused by derailment of logging train. Barrow v. Lewis Lumber Co., 14 Idaho, 698, 95 P 682. **Street railway company** not liable where conductor was injured by striking **telephone pole** with his head, such pole being maintained where it was by another company, and defendant having no power or authority to remove it. Moore v. Chattanooga Elec. R. Co. [Tenn.] 109 SW 497. Evidence held to warrant finding that defendant was negligent in allowing car **tracks lending into barn** to become oily and greasy so that car could not be stopped in usual manner, as result of which it collided with another which injured plaintiff, repair man at work in pit under car. Jelinek v. St. Paul City R. Co., 104 Minn. 249, 116 NW 480. Whether electric railway company was negligent in allowing **trolley pole** to be placed too near track and to incline inward so as to strike plaintiff while looking out of window. East St. Louis, etc., R. Co. v. Kath, 133 Ill. App. 107.

The rule requiring the master to use ordinary care to provide a reasonably safe place of work does not apply where the very nature of the work itself renders it dangerous,[38] as where a dangerous place is being made safe,[39] nor where the danger is transitory or temporary and arises during the progress of the work,[40] nor where the injured servant was at the time engaged in making the place of work,[41] nor where the conditions are constantly changing and the safety of the servant must depend upon the exercise of due care by himself.[42] In these cases the dangers are incidental to the

**37. Mines:** Every part of **entry** in mine being for passage of miners, company owed duty to keep it all reasonably safe, even part not usually used. Mammoth Vein Coal Co. v. Looper [Ark.] 112 SW 390. Mine company liable for sending miners to work in **dangerous entry,** though entries were made by others who were paid by the yard, and point of injury was beyond point to which company had measured and paid for work. Campbell Coal Min. Co. v. Smith's Adm'r [Ky.] 115 SW 256. Not negligence to have **powder stored in mine** at convenient junction point, though electric wires passed near. Western Coal & Min. Co. v. Garner [Ark.] 112 SW 392. Miners sent into new shaft, after assurance from superintendent that they had had no trouble with "air," were overcome with **powder gas** from previous explosion and one died. Seals v. Whitney, 130 Mo. App. 412, 110 SW 35. Mining company liable for injuries caused by **explosion of coal dust** negligently allowed to remain in mine in dangerous quantity. Sterns Coal Co. v. Evans' Adm'r, 32 Ky. L. R. 755, 111 SW 308. Duty of mine operators to remove **fire damp** is same, regardless of whether its presence was due to faulty plan of ventilation or defects in apparatus. Black Diamond Coal & Min. Co. v. Price, 83 Ky. L. R. 334, 108 SW 345. Sending miner into room dangerous because of fire damp, as result of which explosion occurred, injuring miner, warranted recovery for injuries. Id. Stoppage of fan on outside of mine for short periods, during suspension of work in mine, held not negligence rendering master liable for injuries caused by **explosion of gas** next day, since such negligence was chargeable to fellow-servants of miners. Squilache v. Tidewater Coal & Coke Co. [W. Va.] 62 SE 446. Mine employe sent with load of props to prop setter was not engaged in making place safe, but was entitled to reasonably safe place to work, and, for death by **fall of roof,** recovery could be had for breach of this duty. Ianne v. U. S. Gypsum Co., 110 NYS 496. Defendant liable where its foreman, whose duty it was to inspect, was notified that room was dangerous, but ordered plaintiff to work there without timbering it up, and plaintiff was injured by **falling rock.** Norton Coal Co. v. Murphy, 108 Va. 528, 62 SE 268. Slate and rock fell from side of mine entry upon miner; case for jury. Smith v. Garrison, 32 Ky. L. R. 1278, 108 SW 293. **Dirt fell from ceiling** of mine entrance; defendant liable. Spring Valley Coal Co. v. McCarthy, 136 Ill. App. 473. Miner injured in attempting to repair **timbering** in dangerous place, being assured by boss that place was all right; case for jury. Tomazin v. Shenango Furnace Co., 103 Minn. 334, 114 NW 1128. Defendant negligent in allowing large room to be excavated in gypsum mine without **propping up roof,** superintendent knowing dangerous conditions, roof having fallen and killed employe. Ianne v. U. S. Gypsum Co., 110 NYS 496. Sending miner up on twisted **set of timbers** to throw them down, timbers having fallen with him; case for jury. Swearingen v. Consol. Troup Min. Co., 212 Mo. 524, 111 SW 545. Defendant held not negligent in failing to have part of mine where servant was killed **timbered,** this not being usual custom nor expected. Hamilton's Adm'x v. Alleghany Ore & Iron Co., 108 Va. 700, 62 SE 957.

**38.** Where laborers were **removing bank of earth** by undermining it and then prying off overhanging part; danger of falling of earth necessarily involved. Logerto v. Central Bldg. Co., 123 App. Div. 840, 108 NYS 604. Safe place rule does not apply where work consists in **tearing down unsafe structure** preliminary to repairing it. Chesapeake & O. R. Co. v. Hoffman [Va. App.] 63 SE 432. Duty to provide safe place does not apply where work consists in **tearing down buildings.** American Window Glass Co. v. Noe [C. C. A.] 158 F 777; Ballard & Ballard Co. v. Lee's Adm'r [Ky.] 115 SW 732.

**39. Exception inapplicable** where employe was at work in excavation for new building and prop of adjoining wall fell on him. Bernheimer Bros. v. Bager [Md.] 70 A 91.

**40.** It is not master's duty to follow employes and protect them from unexpected and unusual dangers. Taylor v. Washington Mill. Co. [Wash.] 97 P 243. Duty with respect to place does not apply where it is made dangerous by progress of work itself or by manner of its performance by employes. Morgan Const. Co. v. Frank [C. C. A.] 158 F 964.

**41.** Rule as to place inapplicable when men were drilling and **blasting tunnel** through rock, making their place of work as they went. Toppi v. McDonald, 128 App. Div. 443, 112 NYS 821.

**42.** Where the environment and place of work changes as work progresses, master not bound to follow up employes and guard against dangers from such changes. As where **scaffold was changed as place of work changed.** Schneider v. Philadelphia Quartz Co., 220 Pa. 548, 69 A 1035. **Room in mine** which plaintiff was employed to strip preparatory to leaving it, which became more dangerous as he removed walls of coal which sustained roof. Holland v. Durham Coal & Coke Co. [Ga.] 63 SE 290. Defendant not bound to protect miner against dangers due to **changes in mine** brought about by his own work in removing coal, it being his own duty to order props and prop up roof when it became dangerous. Smith's Adm'r v. North Jellico Coal Co. [Ky.] 114 SW 785. Master is not insurer of safety of place of work and need not follow it up to see that changing place is safe **(telephone construction work).** Tweed v. Hudson River Tel. Co., 114 NYS 607.

work and are assumed risks.[43] There can be no recovery for failure of the master to maintain the place of work in a reasonably safe condition wnen that duty devolved upon the injured servant,[44] or where the place was made unsafe by the act or negligence of a fellow-servant.[45]

*Inspection, repairs, knowledge of defects.* See 10 C. L. 721—The master's duty is not fully performed by providing reasonably safe tools and appliances and a reasonably safe place of work; he must use ordinary care to maintain them in that condition,[46] and the duty of maintenance necessarily includes that of reasonable inspection [47] and repairs.[48] Whether due care in this respect, has been used in a given instance is

Master not liable for injury to workmen caused by stepping on nail in rubbish pile on floor of **building in process of construction.** Wells Bros. Co. v. Manion, 140 Ill. App. 527. Where structural iron worker stepped upon board which broke, evidence held not to show actionable negligence of defendant. Schneider v. American Bridge Co., 31 App. D. C. 420. Injury while ascending uncompleted stairway in building under construction. Falkeneau Const. Co. v. Ginley, 131 Ill. App. 399. Where building was in course of construction and carpenters were engaged in completing third floor, putting in floor beams and girders, conditions were constantly changing, and "safe place" rule did not apply. McNeill v. Bottsford-Dickinson Co., 128 App. Div. 544, 112 NYS 867. **Removing gravel from pit,** causing "cave-in." Slagle v. Averyville, 139 Ill. App. 423.

**43.** Risks incident to such work as construction, reconstruction, destruction, or repair, are assumed. Kentucky Block Cannel Coal Co. v. Nance [C. C. A.] 165 F 44.

**44.** In excavation it is master's duty to use care for the servant's safety corresponding to danger; but if materials for sharing or bracing are furnished to servant, and he fails to use them, master is not liable. Millen v. Pacific Bridge Co. [Or.] 95 P 196.

**45.** Leazotte v. Jackson Mfg. Co., 74 N. H. 480, 69 A 640; Connolly v. North Jersey, St. R. Co. [N. J. Law] 69 A 487. Master not liable if place becomes unsafe by reason of work negligently performed there. Kentucky Block Cannel Coal Co. v. Nance [C. C. A.] 165 F 44. If master has furnished reasonably safe place, he is not liable for injuries caused by dangers created by servant in course of performance of his duties. Bradley v. Forbes Tea & Coffee Co., 213 Mo. 320, 111 SW 919. Company not liable for injury caused by presence of chain on platform of caboose when it was put there by fellow-servants of plaintiff. Chicago, etc., R. Co. v. Hamilton [Ind. App.] 85 NE 1044. Master not liable where he furnishes place originally safe and it becomes unsafe by reason of the progress of the work or negligence of fellow-servants. United States Cement Co. v. Koch [Ind. App.] 85 NE 490. Duty of master to provide a safe place and to use reasonable care to maintain its safety does not involve duty to have representative present at every movement to keep place safe as against all possible negligence of coemployes. Illinois Steel Co. v. Lulenski, 136 Ill. App. 332.

**46.** Though appliances became defective by reason of negligence of employe whose duty it was to keep them in repair, master would yet be liable for injuries caused by such defective condition, if he knew or ought to have known of it, and allowed them to be used in such defective condition. Allen v. Standard Box & Lumber Co. [Or.] 97 P 555. Where plaintiff was injured by **live wire** while working as lineman, evidence examined and held to show that defendant negligently failed to maintain safe place to work by turning on current before plaintiff was through. Commonwealth Elec. Co. v. Rooney, 138 Ill. App. 275.

**47.** St. Louis, etc., R. Co. v. Holmes [Ark.] 114 SW 221. Duty to use ordinary care to provide reasonably safe appliances involves duty to use same care in inspection. Cavanaugh v. Windsor Cut Stone Corp., 80 Conn. 585, 69 A 345. Duty of providing and keeping in repair tools and appliances includes duty of proper inspection to discover defects during use. Wilson v. New York Cont. Co., 113 NYS 349. It is master's duty to discover latent defects due to gradual wearing of machinery and warn servant of them. Cochrell v. Langley Mfg. Co. [Ga. App.] 63 SE 244. Duty of inspection is continuous and absolute. Id. Unless it is made employe's own duty to inspect, the master owes him the duty of reasonable inspection to see that machinery which he has charge of is kept free from defects. Hubbard v. Macon R. & L. Co. [Ga. App.] 62 SE 1018. Duty of master with respect to appliances includes inspection even though appliances have worked properly. Converse Bridge Co. v. Grizzle [Tenn.] 109 SW 290. Duty of master to inspect walls of quarry for loose rock, especially where weather conditions increase danger from this source. Alabama Consol. Coal & Iron Co. v. Hammond [Ala.] 47 S 248. It is master's duty to use reasonable care to provide reasonably safe place of work and to use same degree of care to keep it reasonably safe, and to that end to make seasonable and timely inspection of premises. Riley v. Cudahy Packing Co. [Neb.] 117 NW 765. Duty to keep appliances in proper condition requires of **railroad companies** inspection consistent with use and operation to discover defects arising from use, etc. Rush v. Oregon Power Co. [Or.] 95 P 193. Where brakeman showed injury by reason of brake on car being in improper condition, and also that car had been in yards for 8 hours, burden was upon defendant to show that reasonable inspection had been made, or that car had been moved or changed since such inspection. Reed v. Norfolk & W. R. Co., 162 F 750. Duty to inspect and keep in repair push pole on switch engine rested on master, not on servants, it being permanent appliance. Pennsylvania R. Co. v. Forstall [C. C. A.] 159 F 893.

**48.** Duty to inspect and keep in repair belts held to rest on master. Dittman v. Edison Elec. Illuminating Co., 125 App. Div. 691, 110 NYS 87. Though electric lighting ap-

ordinarily a question of fact [49] to be determined by reference to the nature of the work, the character of the place and appliances, and the use to which they are put.[50] The duty of maintenance and inspection is personal and nondelegable.[51]

pliances were proper when installed, it was master's duty to keep them in reasonably safe condition by repairs. Aga v. Harbach [Iowa] 117 NW 669.

49. **Question for jury:** Foreman of **excavation work** struck by bar on pilot car used to haul away broken rock. Wilson v. New York Cont. Co., 113 NYS 349. Whether defect which caused cylinder of **buzz planer** to jump should have been discovered by employer. Rowell v. Gifford, 200 Mass. 546, 86 NE 901. Whether defendant was negligent in failing to discover and remedy defect in **truck, wheel** of which came off. Cotton v. North Carolina R. Co. [N. C.] 62 SE 1093. Whether defendant knew of defects in **boiler** which exploded, killing engineer. Houston & T. C. R. Co. v. Davenport [Tex. Civ. App.] 110 SW 150. Whether inspection of **elevator** was sufficient, where one cable had broken and operator was ordered to run it with only one defective cable, which also broke causing injury. Wilson v. Escanaba Woodenware Co., 152 Mich. 540, 15 Det. Leg. N. 216, 116 NW 198. Rock fell from roof of **mine entry** on driver. McCarthy v. Spring Valley Coal Co., 232 Ill. 473, 83 NE 957. Case for jury where **defect in roof,** which fell, was discoverable only by rather close inspection. Campbell Coal Min. Co. v. Smith's Adm'r [Ky.] 115 SW 256.

50. **The degree of care required** in examining for defects is such as a person of ordinary prudence would use under similar circumstances, and it must have a relation to the character of the machine, and the gravity of results of accident. Wilson v. Escanaba Woodenware Co., 152 Mich. 540, 15 Det. Leg. N. 216, 116 NW 198. Duty to inspect instrumentalities at reasonable intervals depending on facts and circumstances. Cotton v. North Carolina R. Co. [N. C.] 62 SE 1093. Master must use ordinary care to discover and repair defects and obviate dangers, and this care must be tested by business in which he is engaged and conditions surrounding it and must be commensurate with its requirements. Bryant Lumber Co. v. Stastney [Ark.] 112 SW 740. Only reasonable care required in inspection of hook to discover defects; improper to receive evidence that defect might have been discovered by tests with heat, acids, or microscope, these tests being unusual. Brossman v. Drake Standard Mach. Works, 232 Ill. 412, 83 NE 936. Duty of inspection of place does not include duty to discover and prevent negligent acts of fellow-servants, after safe place has been provided. Connolly v. North Jersey St. R. Co. [N. J. Law] 69 A 487. If broken clevis on car brake would have been discovered by an inspection such as an ordinarily prudent person would have made under the circumstances, company would be liable. Missouri K. & T. R. Co. v. Blachley [Tex. Civ. App.] 109 SW 995.

**Evidence held to warrant finding of negligence:** Hammer of **pile driver** suddenly fell on plaintiff; finding of negligence in failing to keep apparatus in repair warranted. Huston v. Quincy, etc., R. Co., 129 Mo. App. 576, 107 SW 1045. Where "water-slip" **rock fell on miner.** Mammoth Vein Coal Co. v. Looper [Ark.] 112 SW 390. Buckets attached to **ditching machine** fell on plaintiff owing to defect in brake which held them in place, no inspection of machine having been made. Engler v. La Crosse Dredging Co., 105 Minn. 74, 117 NW 242. Death of servant by breaking of hook in **hoisting apparatus,** weakened by long use, chargeable to master's negligence for failure to inspect. Wilkinson v. Evans, 34 Pa. Super. Ct. 472. **Elevator** where cable and safety device were found to be obviously defective. O'Connor & Co. v. Gillaspy, 170 Ind. 428, 83 NE 738. Where **cable of elevator and safety device** were conceded to be defective, jury was warranted in finding that master was chargeable with notice of the defects owing to their nature. Id. Failure to discover dry rot in strap which held **staging.** Donahue v. Buck & Co., 197 Mass. 550, 83 NE 1090. Inspection of **foreign car** which did not disclose loose round of ladder was negligent. Kiley v. Rutland R. Co., 80 Vt. 536, 68 A 713. Footboard and handhold of **engine tender** were smashed. Engineer delegated to repair same, merely wired handhold, which came off when plaintiff used it, causing him to fall. Master liable. Beach v. Bird & Wells Lumber Co., 135 Wis. 550, 116 NW 245. Allowing **brakes on car** to remain out of order having had notice 3 days before injury. Garner v. Metropolitan St. R. Co., 128 Mo. App. 401, 107 SW 427. Cars arrived in yards at 3 a. m. and plaintiff was injured at 11 a. m. by reason of brake being in improper condition. Reed v. Norfolk & W. R. Co., 162 F 750. Railroad company chargeable with notice of defect in **brake chain** which had been repaired and left too short, car having been left, prior to injury to brakeman, at yards where inspection was made. Rush v. Oregon Power Co. [Or.] 95 P 193. **Grab iron** defective; reasonable inspection would have disclosed defect. St. Louis, etc., R. Co. v. Holmes [Ark.] 114 SW 221.

**Evidence held not to show negligence:** Where **boiler** was bought from reputable dealer and inspected every six months by competent man, as required by statute. Cavanaugh v. Avoca Coal Co. [Pa.] 70 A 997. Where "hammer test" could not have been applied to flues of boiler, failure to use that test was not negligence. Ware v. Ithaca St. R. Co., 125 App. Div. 323, 109 NYS 426. Electric railway company performs its duty as to **controller of electric car,** if controller is shown to be of standard character, made by reputable manufacture and subjected to such inspection as is reasonable and practicable. Reasonable inspection does not require dismantling of complicated machinery. Jenkins v. St. Paul City R. Co., 105 Minn. 504, 117 NW 928. **Freight elevator** was inspected every six months and at last inspection had been repaired by experts and reported safe and in perfect condition, and defendant had no notice of any defect. Held, personal inspection not necessary, and no negligence shown as cause for fall of elevator. Young v. Mason Stable Co. [N. Y.]

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A master is not liable for injuries resulting from defects of which he had no notice,[52] and which ordinary care and a reasonable inspection would not have disclosed;[53] he is chargeable with notice of defects which ordinary care on his part would have disclosed,[54] and in such cases, lack of actual notice will not relieve him

86 NE 15. Where **pin attaching lever to coupling pin** was missing, and brakeman was injured in attempting to make coupling by hand, where it appeared that three inspections had been made in 24 hours, that absence of pin was discovered just before accident, and that inspector was after pin when brakeman was hurt. Southern R. Co. v. Moore, 108 Va. 388, 61 SE 747. Where collision was caused by breaking of link in **equalizing brake chain,** and it appeared that chain was not worn or defective, that car was inspected once a week and electrical equipment every 24 hours, failure to make inspection suggested after accident, such as was made nowhere else on similar cars, was not negligence. Donaldson v. Brooklyn Heights R. Co., 114 NYS 11.

51. Petterson v. Rahtjen's American Composition Co., 111 NYS 329. Only its proper performance relieves master. Reed v. Norfolk & W. R. Co., 162 F 750. Duty of inspecting cars is absolute and nondelegable. Southern R. Co. v. West [Ga. App.] 62 SE 141. Duty of inspecting meats, worked on by employes, to discover diseased animals and protect against infection, cannot be delegated; mere fact of government inspection or appointment of inspectors not enough. Must appear that reasonable inspection was in fact made. O'Connor v. Armour Packing Co. [C. C. A.] 158 F 241. Question for jury where it appeared that plaintiff was infected with anthrax from calf carcass and that reasonable inspection would have disclosed disease. Id. Defendant company gave linemen printed notice of duties, requiring among other things that linemen should inspect poles, cross-arms, etc., before climbing them. Plaintiff acknowledged receipt of notice in writing. Held, company was not relieved from liability for injury to lineman due to breaking of defective pole, set by gang of "ground men" week before. Ault v. Nebraska Tel. Co. [Neb.] 118 NW 73.

52. Proof of knowledge by employer that **rock which fell** on quarryman was loose held essential to recovery. Mitchell Lime Co. v. Nickless [Ind. App.] 85 NE 728. Master not liable for **defects in appliances** caused by servant's use, and not brought to his attention. Vaughn v. Longmead Iron Works, 220 Pa. 347, 69 A 810. Defect must be shown; also that master knew or ought to have known of it. Finn v. Oregon W., P. & R. Co. [Or.] 93 P 690. Evidence insufficient to show knowledge by defendant of **vicious character of horse** which kicked plaintiff. Haneman v. Western Meat Co. [Cal. App.] 97 P 695. Evidence held not to show knowledge by master that **emery wheel** was liable to explode. Brands v. St. Louis Car Co., 213 Mo. 698, 112 SW 511. Master not chargeable with negligence in failing to have **premises properly lighted,** where it appeared that lamps were provided but some were not burning, knowledge of which by master was not shown. Cook v. U. S. Smelting Co. [Utah] 97 P 28.

53. No recovery for alleged **defect in appliance** without proof that master knew or ought to have known of it. Forquer v. Slater Brick Co., 37 Mont. 426, 97 P 843. Where defect in ways, works, etc., is relied on, plaintiff must show not only existence of defect but that "it arose from or had not been discovered or remedied owing to the negligence of the master or employer, or of some person in the service of the master." Louisville & N. R. Co. v. Lowe [Ala.] 48 S 99. Evidence held not to show negligence of company with respect to projecting or **loose spike** used to hold rail to cross tie. Id. Latent defect in tube of **boiler.** Illinois Steel Co. v. Laughran, 136 Ill. App. 432. Defendant not liable for injuries caused by defective guard of **elevator** shaft, unless it knew or ought to have known in exercise of ordinary care of defect Roth v. Buettel Bros. Co. [Iowa] 119 NW 166. Where rung in **ladder** turned causing workman to fall, evidence held insufficient to show that defect had existed long enough to charge defendant with notice. Dougherty v. Weeks, 111 NYS 218. **Telephone pole** had been up about 6 years and poles of the kind lasted 12 to 15 years. Plaintiff was sent up to cut wires and, when he had done so, it fell with him. He had kicked it and discovered no defect. Held, no negligence of company shown in failing to discover its condition. Southwestern Tel. & T. Co. v. Tucker [Tex.] 114 SW 790.

54. Master chargeable with notice of defects which reasonable inspection would disclose. Burnside v. Peterson, 43 Colo. 382, 96 P 256. Duty, with respect to place and to warn, extends to dangers which master ought to know in exercise of ordinary care. Aga v. Harbach [Iowa] 117 NW 669. Master's duty extends not only to such dangers as are known but also to such as would be disclosed by reasonable care, in behalf of servant's safety, such care as corresponds to circumstances. Lohman v. Swift & Co., 105 Minn. 148, 117 NW 418. Notice of patent defects by the master will be presumed; but not of latent defects. Sack v. Ralston, 220 Pa. 216, 69 A 671. No defect is latent which an inspection will disclose. Illinois Steel Co. v. Laughran, 136 Ill. App. 432. Master is liable for defects of which he has actual knowledge, or with knowledge of which he is charged. Carr v. American Locomotive Co. [R. I.] 70 A 196. Instruction that, if defendant had notice of previous accidents at place in question by cars sliding on track and failed to use due care to prevent such occurrences by providing appliances for sanding track, it was negligent approved. Mayer v. Detroit, etc., R. Co., 152 Mich. 276, 15 Det. Leg. N. 231, 116 NW 429. **Custom** of throwing baled straw through opening in ceiling of barn was presumed to have been known and sanctioned by defendant, and he was chargeable with injury resulting therefrom, although servant who threw bale was plaintiff's fellow-servant. Standard Oil Co. v. Brown, 31 App. D. C. 371. Injury by **die-press** repeating stroke, chargeable to mas-

from liability.[55] Knowledge of dangers or defects possessed by a vice-principal is knowledge of the master.[56]

Ordinarily, the servant is under no duty to make an inspection of the place or appliances[57] but may rely on the assumption that the master has performed his

ter, knowledge of improper operation being shown. Smythe v. Parish & Co., 140 Ill. App. 405. If reasonable inspection would have disclosed that **rope sling** used to lower staging over ship's side had become unsafe by chafing of ship on wharf, master would be liable for injury caused by its breaking. Doherty v. Booth, 200 Mass. 522, 86 NE 945. Test of **boiler** failed to show defective weld in pipe. Illinois Steel Co. v. Loughran, 136 Ill. App. 432. Evidence held to show that **chisel** was known to be defective when furnished for use. Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730. Where oil, making **floor** slippery, had been there 40 hours, evidence warranted finding of negligence in not discovering and removing it. Leagotte v. Jackson Mfg. Co., 74 N. H. 480, 69 A 640. Defendant liable where **shafting** was "nicked," causing plaintiff's clothing to be caught and injuring him. Defendant was chargeable with notice of the defect making shaft more dangerous. Whitworth v. South Arkansas Lumber Co., 121 La. 894, 46 S 912. Deceased ordered to assist in using **derrick** which collapsed and fell upon him owing to rottenness of timbers. It has been used 5 years and had been in same position 2 years and had never been inspected. Held, defendant chargeable with negligence. Converse Bridge Co. v. Grizzle [Tenn.] 109 SW 290. That placing piece of **sheet metal** where it was **likely to fall** was act of servant did not relieve master, where it was allowed to remain there and knowledge of it was imputed to master. Kalodranski v. American Locomotive Co. [R. I.] 69 A 505. Inspection, negligent or done by incompetent servant, which did not disclose obvious defects in **guy line** supporting derrick, or defects discoverable by reasonable inspection. Cavanaugh v. Windsor Cut Stone Corp., 80 Conn. 585, 69 A 345. Proper to refuse directed verdict where there was evidence from which jury could find alleged defect in **hook,** which broke, was obvious and should have been discovered. Brossman v. Drake Standard Mach. Works, 232 Ill. 412, 83 NE 936. Prima facie case of negligence made where plaintiff complained of **machine,** was told it had been fixed, and was thereafter injured by reason of hammer of it falling automatically. Staskowski v. Standard Oil Co., 111 NYS 58.

**55.** Master is liable for injuries caused by such defects as it is his duty to know about. Converse Bridge Co. v. Grizzle [Tenn.] 109 SW 290. It is not essential that defendant have actual knowledge of dangerous condition of place of work; it is sufficient that, in the exercise of ordinary care, he ought to have known. Kneale v. Lopez [Miss.] 46 S 715. Actual knowledge of existence of hole in ground where plaintiff worked not necessary to charge master if ordinary care would have disclosed it. Missouri, K. & T. R. Co. v. Romans [Tex. Civ. App.] 114 SW 157. Master cannot plead ignorance of defects in construction of suspended sliding door which make it liable to fall outwards upon slight jar or disturbance. Lochbaum v. Southwestern Box & Lumber Mfg. Co., 121 La. 176, 46 S 201.

**56.** Notice to **mine** boss of dangerous condition of walls of entry was notice to owners. Smith v. Garrison [Ky.] 108 SW 293. Notice to wire chief of dangerous condition of **wires** was notice to company. Texarkana Tel. Co. v. Pemberton [Ark.] 111 SW 257. Knowledge by foreman that **belt** had been improperly repaired and was defective was knowledge of defendant. Starnes v. Pine Woods Lumber Co. [La.] 47 S 607. Master liable for injury resulting from breaking of **rope** sling if his superintendent knew or ought to have known that it was originally unsafe, or had become so and was unsafe at time of accident. Doherty v. Booth, 200 Mass. 522, 86 NE 945. Notice to defendant's superintendent of **vicious disposition** of horse which defendant used, though owned by superintendent, was notice to defendant company, though superintendent had received such notice in a private capacity. Henry v. Omaha Packing Co. [Neb.] 115 NW 777.

**57.** See, also, post, §§ 3F, 3G. Servant is not bound to discover hidden or concealed dangers. Flowers v. Louisville & N. R. Co. [Fla.] 46 S 718; Hubbard v. Macon R. & L. Co. [Ga. App.] 62 SE 1018; Cleveland, etc., R. Co. v. Beale [Ind. App.] 86 NE 431; Laughy v. Bird & Wells Lumber Co., 136 Wis. 301, 117 NW 796. Servant is under no duty to observe changes and defects in machinery due to gradual wear unless they are obvious to any careful man. Cochrell v. Langley Mfg. Co. [Ga. App.] 63 SE 244. Higher degree of care in the matter of inspection rests upon master than upon employe. Cleveland, etc., R. Co. v. Beale [Ind. App.] 86 NE 431. Master bound to use ordinary care to discover latent defects; servant only bound to observe patent defects; need not inspect. Mitchell Lime Co. v. Nickless [Ind. App.] 85 NE 728. No part of **elevator** operator's duties to keep barriers to shaft in repair, no materials being provided for that purpose. Roth v. Buettel Bros. Co. [Iowa] 119 NW 166. Miner not bound to inspect condition of walls of **mine entry,** this being duty of owner. Smith v. Garrison [Ky.] 108 SW 293. No duty devolved on plaintiff to inspect **platform,** to discover hole made by removal of plank by master, without notice. Louisville & N. R. Co. v. Carter [Ky.] 112 SW 904. Though **hose** used by servant was simple appliance, it was not, as matter of law, servant's duty to inspect and keep it in repair; its use and servant's lack of authority were to be considered by jury. Houston & T. C. R. Co. v. Patrick [Tex. Civ. App.] 109 SW 1097. Employe had right to rely on performance of master's duty to furnish only suitable material for **staging,** not bound to discover dry rot in strap which caused staging to fall. Donahue v. Buck & Co., 197 Mass. 550, 83 NE 1090.

**Railroad employes:** Not brakeman's duty to inspect track. St. Louis S. W. R. Co. v. Cleland [Tex. Civ. App.] 110 SW 122. Duty

duty with respect thereto,[56] but this is not the rule with respect to simple and common tools used by the servant in the ordinary discharge of his duties,[59] nor does the rule apply where the servant injured was one on whom the duty of inspection rested.[60] No recovery can usually be had for an injury resulting from a defect or condition discoverable by the injured employe by the use of ordinary care in the course of his usual duties,[61] or which was actually known to him and of which he failed to complain or give notice.[62]

*Statutes.*[63]—Holdings under statutes of the different states relating to duties of employers with reference to appliances and place of work, such as various factory acts, mine acts, statutes relating to buildings in course of construction, and those relating to "ways, works and machinery," are given in the note.[64]

of railway company to furnish reasonably safe car in which to transport employe, and latter not bound to inspect. Southern R. Co. v. West [Ga. App.] 62 SE 141. Custom of railroad company to inspect cars only in yards held not to relieve it from liability for death caused by defect in a car which employe was sent to get; employe was not bound to inspect or to know defect unless it was obvious. Southern R. Co. v. Hopkins [C. C. A.] 161 F 266. Rule requiring inspection of trains by employes held not to require inspection of ladders (conductor fell—round gave way). Kiley v. Rutland R. Co., 80 Vt. 536, 68 A 713. Duty of inspecting foreign cars rests on company receiving them, not on employes; and statutes requiring common carriers to receive and handle such care do not change rule. Id.

58. See, also, post, §§ 3F, 3G. Higher obligation rests upon master than upon employe as to defects in **tools** furnished employe. Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730. Fact that ties on **turn-table** were 3 or 4 inches apart was a circumstance which plaintiff could not be expected to look for, and constituted a danger which was not assumed. Chicago, etc., R. Co. v. Galloway, 137 Ill. App. 296. Brakeman not required to inspect **cars** and appliances but was entitled to assume exercise of ordinary care by company to provide reasonably safe appliances. Missouri K. & T. R. Co. v. Blachley [Tex. Civ. App.] 109 SW 995.

59. Master not required to inspect steel **hammer** used by employes which they could see and inspect in ordinary course of work. Golden v. Ellis [Me.] 71 A 649. The duty of inspection does not extend to **simple tools** well understood by any person, such as hammers, saws, spades, hoes, lanterns, push sticks, etc. See cases cited in Longpre v. Big Blackfoot Mill. Co. [Mont.] 99 P 131. As to such tools duty to inspect is not absolute, but whether inspection is required is a question of fact. Error for instructions to require inspection of handle of cant hook; whether it should have been inspected was for jury. Id. **Rule** that employe is expected to observe defects in simple tools **not applicable** when employe injured was not using tool, chip from which flew off and injured him. Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730.

60. It being duty of power house superintendent to see that place of work was reasonably safe, he could not recover from master for neglect of that duty. Woelflen v. Lewiston-Clarkston Co. [Wash.] 95 P 493. It being duty of lamp trimmer to observe and report defect in hood of lamp, defendant not chargeable with negligence in not discovering and repairing it. Gardner v. Schenectady R. Co., 112 NYS 369. Defendant not chargeable with negligence in furnishing rubber glove with hole in it to electric lamp trimmer, since employe had better opportunity to observe and remedy defect. Id. Whether it was plaintiff's duty to keep in repair platform of windmill being injured by reason of defects in it while oiling wind mill, for jury. Miller v. Chicago, etc., R. Co., 103 Minn. 443, 115 NW 269.

61. See, also, post, § 3F, Assumption of Risk. Laughy v. Bird & Wells Lumber Co., 136 Wis. 301, 117 NW 796. Evidence held to show that driver injured by operation of defective switch in coal mine was **unaware of danger** of using it, and by exercise of ordinary care could not have apprehended such danger. Chicago, W. & V. Coal Co. v. Brooks, 138 Ill. App. 34. Where it appeared that car alleged to have been defectively equipped was foreign car never before seen by decedent, there was evidence to show want of knowledge by him. Davis Adm'x v. Rutland R. Co. [Vt.] 71 A 724. **No recovery** where plaintiff—superintendent of power house—had knowledge or opportunity therefor of presence of wires which injured him equal to or greater than that of defendant. Woelfler v. Lewiston-Clarkston Co. [Wash.] 95 P 493. Verdict for defendant should have been directed where it did not appear that shot-firer, injured in mine by shot breaking through wall between rooms, had no knowledge of the dangerous condition, but where on the contrary it must be assumed that, having worked as shot-firer for years, no one was better able to judge of the danger. Green v. Jones Bros. Coal & Min. Co., 140 Ill. App. 264.

62. See, also, post, § 3F. Where plaintiff himself spliced cable between telephone poles in usual way, and he knew as much about it as foreman, he had no cause of action for parting of cable, allowing him to fall. Tweed v. Hudson River Tel. Co., 114 NYS 607.

63. See 10 C. L. 725. See, also, supra, Temporary Appliances, etc., for New York statute.

64. **Federal automatic coupler act** applies only to cars engaged in interstate traffic. Rio Grande So. R. Co. v. Campbell [Colo.] 96 P 986. Car still engaged in interstate commerce when cargo had not been delivered and car was placed on side track for repairs, there easily made. St. Louis &

S. F. R. Co. v. Delk [C. C. A.] 158 F 931. Use of car not equipped with automatic coupler as required by federal safety appliance act is negligence per se. Austin v. Central of Georgia R. Co., 3 Ga. App. 775, 61 SE 998. The automatic coupler act requires carriers to equip cars with automatic couplers and to keep them so equipped, but requires only ordinary or reasonable care to keep such equipment in repair. St. Louis & S. F. R. Co. v. Delk [C. C. A.] 158 F 931. The federal safety appliance law, 27 Stat. at L. 531, c. 196, relating to drawbars of uniform height on freight cars, does not require that the drawbars in all loaded cars should be exactly at the minimum height from the rails, but its meaning is that such drawbar on a loaded car may legally be at any point within the maximum and minimum distance from the rails. St. Louis, etc., R. Co. v. Taylor, 210 U. S. 1061, 52 Law. Ed. 281. A railroad company doing business as a common carrier engaged in interstate commerce has complied with the requirements of the safety appliance act when it equips its cars with automatic couplers as prescribed by said act, and it will not be thereafter subject to the conditions imposed for a violation thereof on account of subsequent defects occurring to the couplers which ordinary care and diligence could not have avoided. Under act March 2, 1893, 27 Stat. 531, c. 196 (U. S. Comp. St. 1901, p. 3174), amended by act March 2, 1903, 32 Stat. 943 (U. S. Comp. St. 1907, p. 885), where coupler not shown to have been out of repair or defective so as to have been possible to repair same by exercise of ordinary care and diligence, company not liable for injury caused thereby. Missouri Pac. R. Co. v. Brinkmeier, 77 Kan. 14, 93 P 621.

**Alabama:** Evidence held to show wall of quarry from which rock fell part of "ways, works," etc., under Code 1907, § 3910, subd. 1. Alabama Consol. Coal & Iron Co. v. Hammond [Ala.] 47 S 248. Violation of statutory **duty imposed on mine operators,** resulting proximately in injury, is actionable. Sloss-Sheffield Steel & Iron Co. v. Sharp [Ala.] 47 S 279. Code 1896, § 2914, imposes duty on mine operators to install ventilation system sufficient to dilute, carry off, or render harmless noxious gases in mines, but does not require such system as will carry off explosive gases not otherwise noxious. Held failure to install ventilation system that will carry out explosives is not negligence per se. Id.

**Arkansas:** Under Kirby's Dig. §§ 5352, 5350, **failure to deliver props to miner** when demanded by him, as required by statute, is negligence per se and gives right of action for injury or death caused thereby, in absence of contributory negligence. Johnson v. Mammoth Vein Coal Co. [Ark.] 114 SW 722. Under construction placed by supreme court of Alabama on Code 1907, § 3910, making employer liable for injuries to employe caused by any defect in **"ways, works, machinery or plant,"** held that wire stretched across railway track so low as to catch an employe standing on passing car is not defect in way or track, there being nothing to show that wire was only there temporarily. Hubbard v. Central of Georgia R. Co. [Ga.] 63 SE 19.

**Illinois. Mines Act:** Laws 1899, c. 93, is **valid.** The selection of mine owners as class upon which certain responsibilities is cast for defaults of certain employes who must be selected according to statute is not repugnant to 14th amendment to U. S. Constitution on grounds of denying equal protection of the laws. Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 Law. Ed. 708. An act which does not require the owner to select a particular individual, or retain one when selected, if found incompetent, is not repugnant to the 14th amendment to the U. S. Constitution. Act requiring mine owners to select mine inspectors and managers who have been licensed by state board. Id. Where Mines and Miners' Act gives a cause of action for its **willful violation,** regardless of negligence, an instruction based upon charge of negligence is erroneous. Moore v. Centralia Coal Co., 140 Ill. App. 291. "Willful" violation of mines act means conscious violation. Mertens v. Southern Coal & Min. Co., 235 Ill. 540, 85 NE 743. Evidence held to show that mine examiner's visit and **inspection** under provisions was not made in good faith or in compliance with law. Mertins v. Southern Coal & Min. Co., 140 Ill. App. 190. In action under Hurd's Rev. St. 1905, c. 93, § 18, evidence held to warrant finding that **roof of mine** was unsafe on day of injury, and that mine examiner had failed to inspect it that day, or had inspected it and failed to put up notice of danger or date of inspection. Mertens v. Southern Coal & Min. Co., 235 Ill. 540, 85 NE 743. The clause of the statute, requiring examiner to post **notice of dangerous conditions** applies to dangerous condition of roof. Id. Under mines act, if the mine examiner has actual **notice of dangerous condition** in mine, the owner or operator is bound thereby, though mine examiner does not make formal report of such condition. Olson v. Kelly Coal Co., 236 Ill. 502, 86 NE 88. If thereafter an employe is permitted to go to work in the danger place, not under direction of the manager, and is injured, that owner is guilty of willful violation of act and is liable. Hurd's Rev. St. 1905, c. 93, § 18. Id. Mine owner's statutory **duty to inspect and furnish safe place** to work does not extend to places not used for work. Injury by falling rock in unused room, on evidence, verdict for defendant should have been directed. Gallatin Coal & Coke Co. v. Jerrells, 135 Ill. App. 637. The provision requiring the mine examiner to make a **daily record** of the conditions of the mine in a book kept for the information or all concerned is not complied with merely by manager dating and signing the printed report without making an examination in fact. In view of willful violation of statute, servant's contributory negligence cannot be set up as a defense. Marquette Third Vein Coal Co. v. Allison, 132 Ill. App. 221. Under provision dispensing with **"places of refuge"** cut in wall where passageway between rail and wall is 2½ feet, the failure to keep such passage clear from obstructions constitutes a violation of act, the passage itself being construed to be a place of refuge. Moore v. Centralia Coal Co., 140 Ill. App. 291. Driver of car injured by its running down grade and leaving rails, on showing that master had failed, as required by act, to keep passageways and **places of refuge** open, and giving servant a cause of action for willful violation thereof so that he might safely have escaped from

car, is entitled to have his case submitted to jury. Id. Proof that mine operator employed certified examiner, and that examiner had inspected mine entry and found it in satisfactory condition, not sufficient to exempt operator for **failure to spray, sprinkle, or clean entry** where dust in air required it, under the statute. Davis v. Illinois Collieries Co., 232 Ill. 284, 83 NE 836. Willful failure of manager or mine examiner to comply with requirements of mine statute (as to **preventing accumulation of dust**) is chargeable to operator even though latter has no actual knowledge of such delinquency. Id. Where shot-firer was injured on account of defendant's willful violation of provisions **requiring roadways to be sprayed,** evidence held sufficient to show violation to be a cause proximately contributing to injury. Illinois Collieries Co. v. Davis, 137 Ill. App. 15. Requirement that **lower landing** at surface of mine shaft shall be "securely **fenced** with automatic or other gates" is satisfied by using nonautomatic swinging gate fastened with a hook. Donk Bros. Coal & Coke Co. v. Sapp, 133 Ill. App. 92. The purpose of the requirement in the act, imposing on master the duty of **furnishing props and caps,** is to aid the miners who use them, in protecting themselves, and is not a measure for the general safety of other employes, and only those who have a right to demand and use them can base an action for damages on the willful violation thereof. Does not apply to shot-firer. Southern Coal & Min. Co. v. Hopp, 133 Ill. App. 239. An **ordinance,** the purpose of which is **to protect workmen in places where machinery is employed** from which such machinery, where it is so located as to endanger them while in the discharge of their duties, is intended only to apply to situations where workmen are necessarily in close proximity to such machinery, and does not apply to guarding an opening over a coal crusher in a room where there was no machinery with which workmen could come in contact, except through the necessary opening over the crusher. Chicago City R. Co. v. Martinic, 138 Ill. App. 575. Where plaintiff's intestate was killed while coupling a bad order car not equipped with automatic couplers, according to requirements of §§ 2 and 9 of the **act providing for safety appliances for railroads,** and barring defense of contributory negligence where its provisions are not complied with, a verdict for defendant should have been directed on failure to ehow that car was used in moving state traffic. Kelley v. Illinois Cent. R. Co., 140 Ill. App. 125.

**Indiana:** Master liable under Burns' Ann. St. 1901, § 7083, where sliver flew off chisel and struck employe engaged in duties near by. Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730. Burns' Ann. St. 1901, § 7087l, only requires **guarding of such pieces of machinery as are dangerous** to employee whose duties require their presence near such machines. Robbins v. Fort Wayne Iron & Steel Co., 41 Ind. App. 557, 84 NE 514. To warrant recovery under said statute, it must appear (1) that injured person was employe; (2) that machinery in question was unguarded; (3) that it was dangerous; (4) that duties of employe required him to work in immediate vicinity thereof; (5) that machine could have been guarded without rendering it useless. Id. Assumpsit of risk is not available as defense under such statute, but contributory negligence is. Id. Burns' Ann. St. 1901, § 7087l, held applicable to **laundry mangle.** Pein v. Miznerr, 41 Ind. App. 255, 83 NE 784. Cause transferred to supreme court with recommendations to reverse or modify holding of La Porte Carriage Co. v. Sullender, 165 Ind. 290, 75 NE 277, that **"belting"** was not within statute. Id. Supreme court, however, upheld demurrer to complaint on ground that it disclosed contributory negligence and did not consider applicability of statute. See Pein v. Miznerr, 170 Ind. 659, 84 NE 981. Appliance operated by friction wheels held **"gearing"** within statute requiring guarding of dangerous machines. Whiteley Malleable Castings Co. v. Wishon [Ind. App.] 85 NE 832.

**Planer** is properly guarded within meaning of statute if so guarded that there is no probability of injury to an employe performing his duties in ths ordinary way, though he may be injured by unnecessarily placing some part of his body in danger. Vigo Cooperage Co. v. Kennedy [Ind. App.] 85 NE 986. Complaint held not to show that servant's duties required him to place hands where **knives** caught them in replacing boot of machine. Id. Statute requiring that in **constructing buildings** of three stories or more no story above the second shall be built until floor is laid in story below does not contemplate laying of floors between skylight covering open court and ground. Lagler v. Bye [Ind. App.] 85 NE 36. Man injured while working on skylight could not recover under statute. Id. Acts 1905, c. 50, regulating operation of **coal mines,** is not unconstitutional because not applying to mines employing less than 10 men; nor is provision as to lighting of mines invalid because not applying to mines electrically lighted. Chandler Coal Co v. Sams, 170 Ind. 623, 85 NE 341.

**Iowa:** Where there was evidence that cross cut saw could have been practically guarded, **failure to provide guard** as required by Code Supp. 1907, § 4999a, was negligence notwithstanding custom of others not to guard such saws. O'Connell v. Smith [Iowa] 118 NW 266.

**Kansas:** Proof of **failure to guard belting** being violation of Laws 1903, p. 540, c. 356, is prima facie proof of negligence. Kansas Buff Brick & Mfg. Co. v. Stark, 77 Kan. 648, 95 P 1047. Whether failure to guard belting was negligent as to particular employe held question of fact. Id. Laws 1903, p. 541, c. 356, § 4, requires only that **cogs, gearing,** etc., shall be screened, covered, boxed, or so **guarded** as to prevent employes coming in contact therewith; does not require remodeling of machine. Henschell v. Union Pac. R. Co. [Kan.] 96 P 857. Burden is upon plaintiff to show practicability of guarding gearing. Id. Operator of one elevator was injured by barrel which fell from another, **elevators** being open though run in enclosed shaft which included both. Held Laws 1903, p. 540, c. 356, was violated, the statute requiring elevators themselves to be enclosed, and injured employe could recover for such violation. Fowler Packing Co. v. Enzenperger, 77 Kan. 406, 94 P 995. Under Gen. St. 1901, § 4129, it is **duty of mining boss** to see that as excavation by coal miners proceeds the overhead rock is protected from falling

on traveling ways below. Barrett v. Dessy [Kan.] 97 P 786. Laws 1907, p. 400, c. 250, prohibiting **sale to miners of black powder** except in original packages of 12½ pounds, securely sealed, to be delivered at powder house not more than 300 feet from pit head, is held constitutional. Ex parte Williams [Kan.] 98 P 777.

**Kentucky:** Ky. St. 1903, § 2731, requiring certain ventilation of **mines,** should be strictly enforced and mining companies held strictly accountable for failure to observe it. Sterns Coal Co. v. Evans' Adm'r, 33 Ky. L. R. 755, 111 SW 308. Violation by mine owner of Ky. St. 1903, § 2731, requiring **shafts** to be guarded with fences and gates, makes him liable for injuries resulting therefrom; and statute was violated where gate could not be closed owing to accumulations of coal, etc. Moseley's Adm'r v. Black Diamond Coal & Min. Co., 33 Ky. L. R. 110, 109 SW 306.

**Massachusetts:** Employe may recover for failure to install danger signals on **elevator trap doors,** as required by Rev. Laws, c. 104, § 27, unless he assumed risk or was negligent. Doolan v. Pocasset Mfg. Co., 200 Mass. 200, 85 NE 1055.

**Michigan:** Liability for injuries caused by **failure to guard machinery** depends upon giving of order by inspector requiring guards under Pub. Acts 1901, p. 159, No. 113, § 8. Kerr v. National Fulton Brass Mfg. Co. [Mich.] 15 Det. Leg. N. 985, 118 NW 925. Notice by inspector to guard emery wheels included wheels installed after order was given. Id. Failure to obey statutory requirement as to **blocking switch,** resulting in injury, would be actionable negligence. Parker v. Union Station Ass'n [Mich.] 15 Det. Leg. N. 909, 118 NW 733.

**Minnesota:** Failure to comply with provisions of Rev. Laws 1905, § 1813 **(guarding machinery),** is negligence when machinery of a dangerous character is so located as to be dangerous, and when it is practicable to guard it. Callopy v. Atwood, 105 Minn. 80, 117 NW 238. Master is not excused by fact that machine is manufactured without guard, and that it is customary to operate such machines without guards. Id. Statute is for protection of operators as well as careless and ignorant persons who may come in contact with it. Id. Evidence sufficient to sustain finding of negligence in failing to guard lath bolter machine which injured operator. Id. Duty to guard machinery as required by statute is absolute, and violation of it negligence per se, but contributory negligence and assumption of risk may be interposed as defenses in proper cases. Davidson v. Flour City Ornamental Iron Works [Minn.] 119 NW 483. Jointer machine within statute; failure to guard it negligence. Bigum v. St. Paul Sash, Door & Lumber Co. [Minn.] 119 NW 481. Evidence showed stationary or automatic guard on jointer machine was feasible. Id. Emery wheels are included within machinery required to be guarded by Rev. Laws 1905, § 1813. Davidson v. Flour City Ornamental Iron Works [Minn.] 119 NW 483. Failure to have guard on emery wheel, being violation of statute, is negligence per se. Id. Duty to guard emery wheel, under statute, absolute and continuing; not discharged by putting on guard originally, and assigning to servant duty of seeing that it was kept there; master liable for injuries due to absence of guard. Id. Proof that boy under 15 was employed in sawmill where dangerous machinery was used, in violation of Rev. Laws 1905, § 1804, and was injured by machine not guarded, as required by § 1813, made prima facie case of negligence. Jacobson v. Merrill & Ring Mill Co. [Minn.] 119 NW 510.

**Missouri:** Rev. St. 1899, § 6433, requires **belting, shafting,** etc., to be guarded when so situated as to be dangerous, if it can be guarded, and if it cannot be guarded requires notice of danger to be posted. Failure to guard machinery, if dangerous, and guarding is possible, constitutes negligence; also failure to post notice of danger when guards are not possible. Huss v. Heydt Bakery Co., 210 Mo. 44, 108 SW 63. Statute requires **belting, shafts,** etc., to be guarded only when so situated as to be dangerous to employes engaged in their ordinary duties. Lang v. Kansas City Bolt & Nut Co., 131 Mo. App. 146, 110 SW 614. Where plaintiff left his own place of work and went to another and was there injured by unguarded machinery, he had no cause of action under statute, not being in performance of his ordinary duties; negligence of foreman in sending him there would be common-law negligence. Id. Statute held not applicable where off-bearer was injured by sandpaper smoothing machine. Ozernicke v. Ehrlich, 212 Mo. 386, 111 SW 14. Held inapplicable to knives of planing machine set in rotating cylinder or axle. Cole v. North American Lead Co., 130 Mo. App. 253, 112 SW 753. There was no common-law duty of master to fence machinery. Lohmeyer v. St. Louis Cordage Co. [Mo.] 113 SW 1108.

**New Jersey:** P. L. 1904, p. 156, § 13, requires all **vats,** etc., to be guarded, regardless of whether risk is open and obvious, if it is practical to guard them. Dix v. Union Ice Co. [N. J. Law] 68 A 1101.

**New York** [See, also, Temporary Appliances, supra]: Laws 1897, p. 468, c. 415, requiring entire tier of iron or steel beams of **buildings in course of construction** to be planked over, applies to buildings of "wall-bearing" construction where steel beams are laid in brick walls. Schramme v. Lewinson, 110 NYS 599. Apparatus used to haul beams to third story held not hoisting apparatus within Laws 1897, p. 468, c. 415, § 20, requiring **opening to be enclosed,** no floor having yet been laid. McNeill v. Battsford-Dickinson Co., 128 App. Div. 544, 112 NYS 867.

**Shaft** properly guarded within Laws 1906, p. 927, c. 366, § 1, though employe crawled under table and through guarding boards after material and was thus injured. Kirwan v. American Lithographic Co., 124 App. Div. 180, 108 NYS 805. Laws 1897, p. 481, c. 415, § 82, requiring **outside fire escapes on factories,** is mandatory and does not permit factory owners to wait until ordered by an inspector to install fire escapes; inspector's duty is to prescribe as to kind and sufficiency of escapes required. Arnold v. National Starch Co. [N. Y.] 86 NE 815. Master liable for injury caused by **failure to guard knives** of jointer (Laws 1904, p. 640, c. 291, § 81), unless servant assumed risk or was guilty of contributory negligence. Graves v. Gustave Stickley Co., 125 App. Div. 132, 109 NYS 256. Press feeder fell off platform and got foot caught in **flywheel** 11 or 12 inches above floor. Platform was supposed to be used by only one person but two were on it at time. Master

(§ 3) *C. Methods of work, rules and regulations.*[See 10 C. L. 728]—It is the duty of the master to use ordinary care to see that the work is done in a reasonably safe manner,[65] and if he or his representative orders work to be done in a dangerous way,[66] or if he has actual or constructive knowledge that a dangerous method was

not liable by reason of failure to guard flywheel under statute. King v. Reid, 124 App. Div. 121, 108 NYS 615.

**Brick wall** in course of construction held not part of **"ways, works, or means"** within statute. Ripp v. Fuchs, 113 NYS 361.

**Ohio:** Duty to protect against projecting **set screws,** etc., under 97 Ohio Laws, p. 547, is nondelegable. National Fire Proofing Co. v. Andrews [C. C. A.] 158 F 294. Where there was no evidence of plaintiff's knowledge of projecting **set screw** in shaft, proper to refuse charge limiting recovery to $3,000, under 97 Ohio Laws, p. 547, as that statute limits recovery only in case of knowledge. Id. Ohio statute requiring **railroad frogs** at crossings and in yards and stations to be blocked held applicable in favor of switchman who was knocked down and dragged by engine and got foot caught in unblocked frog. Cooper v. Baltimore & O. R. Co. [C. C. A.] 159 F 82. State law, requiring that all locomotives and cars used in moving intrastate traffic shall be equipped with **automatic couplers,** is not in conflict with federal act making same requirement as to locomotives and cars engaged in moving interstate traffic, but rather state law is supplementary to federal law and in harmony with it. Detroit, T. & I. R. Co. v. State, 11 Ohio C. C. [N. S.] 482.

**Oregon:** Where action is based on Laws 1907, p. 302, c. 158, **failure to guard saw,** fact that labor commissioner had failed to specify in notice manner in which saw was to be guarded was no defense; it is master's duty, under statute, to guard dangerous saws whether notified to do so or not. Hill v. Saugestad [Or.] 98 P 524. In action based on violation of Laws 1907, p. 302, c. 158, failure to guard saw, allegation that labor commissioner had served notice requiring saw to be guarded was sufficient allegation of practicability of guarding it after answer. Id.

**Rhode Island:** Gen. Laws 1896, c. 108, § 16, and amendments, relating to liabilities of owners and lessees of buildings for failure to protect **elevators and shafts,** is for benefit of all persons using elevators or premises as employes or licensees. Weeks v. Fletcher [R. I.] 69 A 294.

**Virginia:** Code 1904, § 1294-d, c. 36, **requiring railroad companies to maintain warning signals where bridges** are maintained so low that employes standing on cars cannot pass under them, does not relieve company for negligence in maintaining bridge too low for safety of employes thereon. Chesapeake & O. R. Co. v. Rowsey's Adm'r, 108 Va. 632, 62 SE 363. To maintain such bridge, to danger of employes using due care, is negligence. Id.

**Washington:** Laws 1905, p. 166, c. 84, **requiring machines to be guarded,** held not to require certain self-feeding device for ripsaw which would necessitate entire change in method of operating saw; statute does not contemplate such guard. McIntosh v. Sawmill Phoenix [Wash.] 94 P 930. Whether **set screws** on shaft could have been practically guarded, and whether failure to guard them other than by their position was negligence, for jury. Ramm v. Hewitt-Lea Lumber Co. [Wash.] 94 P 1081. Failure of employe to give employer **notice** provided for in Laws 1905, p. 166, c. 84, § 6, is not a bar to an action for injuries resulting from violation of statute; purpose of that notice is simply to allow employes to procure an inspection by labor commissioner. McIntosh v. Sawmill Phoenix [Wash.] 94 P 930.

**West Virginia:** Owner or operator of **coal mine** sufficiently performs his duties, under Code 1906, §§ 409, 410, if he provides ample means of ventilation and employs competent mine boss and fire boss, and he is not liable for negligence of such employes resulting in injury to fellow laborer. Squilache v. Tidewater Coal & Coke Co. [W. Va.] 62 SE 446. Fire boss, required to be employed by statute, not shown incompetent by fact that he did not understand use of anemometer, this instrument not being required to be used by him under statute. Id.

**Wisconsin:** Shaft situated some distance above floor had defective **set screw** collar which caught plaintiff as he stepped over it to go to belt which he wished to throw off. Shaft was within St. 1898, § 1636j, requiring guarding of shafting. Miller v. Kimberly & Clark Co. [Wis.] 118 NW 536. Shafting is within statute which is so located as to be dangerous to employes "in discharge of their duties;" they need not be in discharge of "ordinary" duties. Id. Violation of statute which is proximate cause of injury makes master liable in absence of contributory negligence. Id. Laws 1907, p. 495, c. 254, making **railroad companies** liable for injuries due to **defects in equipment** or to negligence of other employes, is held valid, and not improper class legislation because applying only to railroads, or because act does not apply to office and shop employes. Kiley v. Chicago, etc., R. Co. [Wis.] 119 NW 309.

**65.** It is master's duty to use reasonable care to see that work is not done in negligent manner to danger of servant; and for negligence of superintendent in this regard master is responsible. Collier v. Tennessee Coal, Iron & R. Co. [Ala.] 46 S 487.

**Negligent system or mode of using proper machinery** may render master liable. Pennsylvania R. Co. v. Hartell [C. C. A.] 157 F 667. Not only must reasonably safe appliances be furnished, but ordinary care must be used so to use them as not to cause injury. Atchison, etc., R. Co. v. Mills [Tex. Civ. App.] 108 SW 480. Duty of company to keep **lookout on front of cars** being pushed by engine in place where presence of employes is to be anticipated. Louisville & N. R. Co. v. Schroader [Ky.] 113 SW 874. It is the duty of master engaged in **running electric railway** to use reasonable care to so regulate the time of running the cars, that its servants operating them would be informed as to meeting points in order that collisions may be avoided. Mattoon City R. Co. v. Graham, 138 Ill. App. 70.

**66.** The master is liable for a reckless order unless danger is obvious. Evidence examined and held to sustain finding that master was negligent in **ordering servant to**

being used,[67] he will be liable for injuries resulting thereform, but he will not be liable where employes themselves depart from the customary manner of doing work.[68] Whether a method adopted or provided is reasonably safe depends upon the nature of the work and the danger to be apprehended,[69] and the question is usually one for the

**erect block and tackle** without using appliances at hand ordinarlly employed for that purpose. Kennedy v. Swift & Co., 140 Ill. App. 141. Master would be liable if superintendent directing **moving of beam** caused an unsafe method to be used, resulting in injury. Connolly v. Booth, 198 Mass. 577, 84 NE 799. Defendant's foreman was negligent in allowing 15-year old operator of **machine** to run it in dangerous way and in inciting him to run it at high and **dangerous speed.** Saller v. Friedman Bros. Shoe Co., 130 Mo. App. 712, 109 SW 794. General foreman who countermanded order of another foreman for other appliances with which to **load reel of wire enble,** and directed men to proceed with appliances on hand, represented master in so doing, though men usually selected their own methods. Kennedy v. Laclede Gaslight Co. [Mo.] 115 SW 407. Finding of negligence warranted where foreman assured operator of wood-shaping machine there was no danger from **revolving knives** with which he came in contact. Schmitt v. Hamilton Mfg. Co., 135 Wis. 117, 115 NW 353. To instruct inexperienced man **to operate metal stumping press in dangerous way,** there being a safe way, would be negligence per se unless danger ought to have been known to operator. Clemens v. Gem Fibre Package Co. [Mich.] 15 Det. Leg. N. 574, 117 NW 187.

**67.** Defendant responsible for manner of construction of staging in its factory when it was built in customary way and had remained for such time that defendant had notice of it. Valsbord v. Nashua Mfg. Co., 74 N. H. 470, 69 A 520. Where practice of "staking" cars across a crossing without warning or watchmen had continued for long time, so that company had acquiesced or was charged with notice of it and thus sanctioned the practice, it could not defend against action for injuries thus caused by setting up acts of fellow-servants. Chicago, etc., R. Co. v. Donovan [C. C. A.] 160 F 826. Evidence held to warrant finding that defendant's superintendent was present, observed improper method used in hoisting coal, and failed to change it or warn men of danger. Bartley v. Boston & N. St. R. Co., 198 Mass. 163, 83 NE 1093. When a servant has been allowed to do work in a certain way, the master, with knowledge of the fact, cannot say that he had no occasion to anticipate that such method would be used. Boy of 16 injured while removing obstructions from saw, while using method which he had seen used and had used in presence of superiors; whether they had seen him use it and had so sanctioned it was for jury. Godsoe v. Dodge Clothespin Co. [N. H.] 70 A 1073. In order that negligence in failing to provide safe methods of work be actionable, it must appear that the master knew, or by the exercise of reasonable care should have known, that to do the work as ordered was dangerous. Breaking of bolt suspending iron plate while enlarging rivet holes by using "drift-pin." Medley v. American Car & Foundry Co., 140 Ill. App. 284.

**68.** No violation of master's duty where collision of cars was caused by fellow-servant's act in violation of custom adopted by and known to employes. Parmaleau v. International Paper Co. [N. H.] 71 A 31.

**69. Evidence warranted finding of negligence:** Failing to provide for **escape of gases from molten metal** which exploded. Shaukair v. Sargent Co., 235 Ill. 509, 85 NE 621. Method or number of men used to **hoist heavy casting,** which swung against and injured plaintiff. Bowie v. Coffin Valve Co., 200 Mass. 571, 86 NE 914. Negligence of superintendent in **fastening rope and hook to locomotive** by reason of which it flew back and struck plaintiff. Brosnan v. New York, etc., R. Co., 200 Mass. 221, 85 NE 1050. Foreman in charge of **blasting** held negligent as to blast which killed employe. Knight v. Donnelly, 131 Mo. App. 152, 110 SW 687. Finding that **method used to lower machine** was not reasonably safe warranted by evidence that certain precautions could have been and were commonly taken to make it more safe, though plaintiff did not prove general custom to use such safer method. Hamann v. Milwaukee Bridge Co., 136 Wis. 39, 116 NW 854. Defendant liable where 10 cars loaded with logs were sent down grade in customary way with no locomotive and only four brakemen, **derailment** resulting. Barrow v. Lewis Lumber Co., 14 Idaho, 698, 95 P 682. Where **flying switch** was being made contrary to rules and cars struck car repairer crossing tracks, no warning or signals being given and no watchman being placed on front of cars. Galveston, etc., R. Co. v. Conuteson [Tex. Civ. App.] 111 SW 187. If injury to employe resulted from negligence in **switching** and from use of unusual and unnecessary force in moving cars, company would be liable whether or not employes knew or ought to have known of plaintiff's presence on track. Missouri K. & T. R. Co. v. Balliet [Tex. Civ. App.] 107 SW 906. Where execution of verbal orders as given is a matter of life and death to employes, **care** must be taken **against the orders being forgotten** or misunderstood. Fitzgerald v. Worcester & St. R. Co., 200 Mass. 105, 85 NE 911. Thus, where it was customary to give orders relative to **running of special and regular cars** to both conductor and motorman of regular car, and to post such orders on the motormen's and conductors' bulletin board at the car barns, jury was warranted in finding dispatcher negligent when he only gave orders to conductor of such regular car. Id.

**Evidence held not to show negligence:** Where engineer ran **temporary elevator** up too high on first trip, and plaintiff had directed him how to run it and failed to provide for signal. Del Signore v. Thompson-Starrett Co., 198 Mass. 337, 84 NE 466. Judgment for death of trackman reversed where jury were allowed to find negligence in manner of **running trains** on certain tracks, this being proper. Clancy v. New York, etc., R. Co., 112 NYS 541. Not negligence **to start "blower" used to heat factory** while employe was in basement, when blower was in almost constant use, and employe was often

jury.[70] The master may be guilty of negligence in adopting a mode of work not reasonably safe, although it is in accordance with custom.[71] The mere fact that a less dangerous method might have been used does not alone show negligence.[72] Failure to provide a sufficient number of men to do the required work with reasonable saftey is negligence.[73]

It is the duty of the master to provide and enforce suitable rules and regulations governing the conduct of employes and the carrying on of the work where the nature of the business is such as to require such precautions.[74] A reasonably safe method

in basement and must have known about shaft. McKenna v. Gould Wire Cord Co., 197 Mass. 406, 83 NE 1113. Master not liable for injuries to plaintiff while **unloading rails** where no negligence of master was shown but it appeared that an error of judgment of the foreman or his men caused the accident, which could not reasonably have been foreseen. Wilson v. Southern R. Co., 108 Va. 822, 62 SE 972. Duty to provide for warning to factory employes of **movement of crane** performed, though no specific rules were promulgated, where it was generally understood, and especially by operator of crane, that sharp lookout was to be kept and warning given. Ferry v. American Suction Gas Producer Co. [Mich.] 15 Det. Leg. N. 458, 116 NW 1073. Evidence held to show **car of logs was properly loaded** by defendant and that it was not liable for death of employe caused by log rolling off car. Stephens v. Louisiana Long Leaf Lumber Co. [La.] 47 S 887. Foreman of section crew not negligent in **ordering bolt to be broken** in course of taking up old track, this being customary. St. Louis,etc., R. Co. v. Jamison [Ark.] 113 SW 41.

70. Whether foreman was negligent in method employed by him to **load heavy reel of cable** on wagon. Kennedy v. Laclede Gaslight Co. [Mo.] 115 SW 407. Whether ignorant employe was allowed to **thaw out dynamite** in dangerous way, by reason of defendant's negligence. Trotto v. Bellew & Merritt Co., 111 NYS 533. Whether due care in method of **loading rails** on car required man on car to see that they did not fall back after being placed on car. Vincenzo v. Deleware & Hudson Co., 110 NYS 589. Cars of **construction train** became uncoupled, owing to **speed,** and plaintiff was thrown off car by sudden shock. Gibler v. Quincy, etc., R. Co., 129 Mo. App. 93, 107 SW 1021. Whether **belt,** in adjusting which plaintiff was injured, was too short, and whether it was negligence to attempt to adjust it while machines were in motion. Maxon v. Case Threshing Mach. Co. [Neb.] 116 NW 281. Whether **rolling barrels** of caustic soda up incline was proper method of raising them so as to prevent spilling of contents, plaintiff being struck by same and injured. Escher v. Southwark Mills Co., 221 Pa. 180, 70 A 714. Whether defendant was negligent in failing to provide for warning to plaintiff, directed to couple cars, that another car was being pushed against car which he was **coupling,** employes all being engaged in unloading cars. Pecard v. Menominee River Sugar Co. [Mich.] 15 Det. Leg. N. 346, 116 NW 532.

71. Instruction that jury should find for defendant if means employed to raise beam were usual, ordinary and customary means employed by structural iron contractors under similar circumstances held erroneous, since such means may have been negligent means. Volkman v. McMullen, 138 Ill. App. 616.

72. Method employed by wrecking boss to replace car on track held proper and reasonable, though a safer method might possibly have been used. Wyman v. Lehigh Valley R. Co. [C. C. A.] 158 F 957. Master will not be held negligent in using particular mode of work merely because some believed another method less dangerous. Wilson v. Southern R. Co., 108 Va. 822, 62 SE 972. That business could have been carried on in less dangerous way immaterial where servant has been properly instructed. Mitchell v. Comanche Cotton Oil Co. [Tex. Civ. App.] 113 SW 158.

73. Master may be liable for failure to supply sufficient number of men to do work with safety. Di Bari v. J. W. Bishop Co., 199 Mass. 254, 85 NE 89. Master must provide competent servants in sufficient number to do the work. Pennsylvania R. Co. v. Hartell [C. C. A.] 157 F 667. Duty of master to furnish sufficient number of men to perform work with reasonable safety. Meily v. St. Louis & S. F. R. Co. [Mo.] 114 SW 1013. One of nondelegable duties of master is to furnish an adequate number of competent servants to do the work. Brown v. Rome Mach. & Foundry Co. [Ga. App.] 62 SE 720. Plaintiff, ordered by foreman to carry heavy jack which caused him to fall and injured him, could recover, where superintendent had given orders that jacks should not be carried by one man, but plaintiff did not know this and relied on foreman's orders. Louisville & N. R. Co. v. Mahan [Ky.] 113 SW 886. Master liable for injuries caused by inadequate force of men to do work with reasonable safety, if he knew or ought to have known force was insufficient, and plaintiff did not know it and was in exercise of due care. Standard Sanitary Mfg. Co. v. Minor, 33 Ky. L. R. 972, 112 SW 572.

74. Master's duty to protect servant from unusual dangers by suitable rules and regulations for work. Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910. If nature of master's work is complex and involves the presence and co-operation of number of laborers so situated that independent, individual action on their respective parts would render the doing of the work unsafe, the law imposes on master duty of organizing and maintaining a system by which work can be done with reasonable safety. McDuffie v. Ocean S. S. Co. [Ga. App.] 62 SE 1008. Failure to make rules is not negligence unless it appears from the nature of the business in which the servant is engaged that master, in exercise of reasonable care, ought to have foreseen necessity for such precautions. Palmier v. Pearson, 112

adopted and customarily followed by the employes is equivalent to the establishment of reasonable rules by the employer.[75] Where a servant is employed to perform a known duty, or one of which he is informed, the master need not by rule or otherwise inform him that he is expected to do it,[76] nor is it necessary to promulgate rules that employes are not to injure others unnecessarily.[77] Negligence in failing to provide rules in a given instance is not shown unless some reasonable and practical rule is pointed out,[78] which if in force, would have prevented injury.[79] The construction of rules is sometimes for the court [80] and sometimes for the jury.[81] When a rule is relied on by an employer to exempt him from liability, it is to be strictly construed.[82] Abrogation of a rule may be shown by proof of its habitual violation with knowledge of the employer,[83] and knowledge will be presumed if the violation is shown to have continued for such length of time that he might reasonably have known of it.[84] Rules of the master defining the duties of employes and providing for the

NYS 684. It is master's duty, especially for protection of minors employed about dangerous and complicated machinery, to make, publish and enforce rules sufficiently clear and specific to be capable of being intelligently understood and obeyed. Fitzgerald v. International Flax Twine Co., 104 Minn. 138, 116 NW 475.

**Finding that rules were required warranted:** Where several hundred men were employed in railroad yards in **switching,** the jury was warranted in finding that rules for doing work were required. Nelson v. Southern R. Co. [C. C. A.] 158 F 92.

**Miner preparing entry to cross drift** in mine, injured by fall of ore caused by blasting by others without warning, no rules or regulations having been provided for such warning. Jacobson v. Hobart Iron Co., 103 Minn. 319, 114 NW 951. Where electric **lineman** was killed by current turned on without notice while he was **at work on wire,** jury were warranted in finding that defendant should have made and enforced a rule that power should not be turned on until after notice that repair man had completed work. Van Alstine v. Standard L., H. & P. Co., 112 NYS 416. Work of **trucking and loading bridge iron** by several gangs held sufficiently complex to warrant finding that rules of work ought to be provided. McDuffie v. Ocean S. S. Co. [Ga. App.] 62 SE 1008.

**Rules sufficient:** Necessity for further rules or to giving notice to employes of movement of crane not shown where plaintiff's foot was run over by crane, defendant having signalman to give signals of its movement. Palmieri v. Pearson, 112 NYS 684.

75. Parmaleau v. International Paper Co. [N. H.] 71 A 31. No duty to provide specific rules for doing work not inherently dangerous when employes themselves adopt and use a reasonably safe method. Id. Custom used to move cars down sidetrack held reasonably safe; no duty of employer to promulgate other specific rules for work. Id.

76. Where employe was poisoned by fumes, absence of servant whose duty it was to regulate discharge of fumes, and want of rules requiring him to be at his post, did not make master liable. Gorman v. Odell Mfg. Co. [N. H.] 71 A 215.

77. Rules amounting in substance only to direction to employes not to injure others unnecessarily need not be made. Van Alstine v. Standard L., H. & P. Co., 112 NYS 416.

78. Where track walker was killed by engine running backwards in yards, error to submit case to jury on theory that some rule might or should have been provided for notice or warning, no such rule being pointed or shown to be practicable or effective. Bell v. New York Cent. & H. R. Co., 113 NYS 185. Count alleging negligence in falling to promulgate rules for government of employes of street railway in crossing a "latch" should have been withdrawn from jury where evidence showed that employes were told to "look out," but no better, nor any other, rule was proved which jury could have considered. Norfolk & P. Trac. Co. v. Ellington's Adm'r, 108 Va. 245, 61 SE 779.

79. Failure to make rules for running of trains in smelter could not be basis of recovery where no practicable or approximate rules were shown, and it did not appear that absence of rules contributed to injury. Mitchell v. Boston & M. Consol. Copper & Silver Min. Co., 37 Mont. 575, 97 P 1033.

80. Construction of written rule is for court. Louisville & N. R. Co. v. Schroader [Ky.] 113 SW 874. Rule requiring lookout on leading car when cars are being pushed by engine applies to cars being pushed, whether engine is going backward or forward. Id. Railroad rule requiring cars on siding to be left with brakes set, and if on grade to be blocked, held not to apply where car was being taken over sidetrack to train on main track. Davis Adm'x v. Rutland R. Co. [Vt.] 71 A 724.

81. Existence and import of rules, when material, are usually for jury. Fitzgerald v. International Flax Twine Co., 104 Minn. 138, 116 NW 475.

82. Inspection rule held not to require inspection of car by conductor. Southern R. Co. v. Hopkins [C. C. A.] 161 F 266.

83. Hampton v. Chicago & A. R. Co., 236 Ill. 249, 86 NE 243.

84. Hampton v. Chicago & A. R. Co., 236 Ill. 249, 86 NE 243. Proof of violation of rule as to speed of trains was not inadmissible because the places shown were not under observation of officers of company, since defendant's duty extended to all its lines. Id. Evidence insufficient to show habitual violation of rule of company as to locking switches, or that any violation was known to company. Dixon v. Grand Trunk W. R. Co. [Mich.] 15 Det. Leg. N. 963, 118 NW 946.

proper and orderly conduct of the business do not fix his duties to other employes or to strangers.[85]

(§ 3) *D. Warning and instructing servant.* See 10 C. L. 781—It is the duty of the master to properly warn and instruct young and inexperienced employes [86] in regard to dangers of their employment of which they have no knowledge or appreciation,[87]

85. Rules requiring agents and conductors to see that switches are blocked imposes no duty on company as to switchmen. Dixon v. Grand Trunk W. R. Co. [Mich.] 15 Det. Leg. N. 963, 118 NW 946.

86. Failure to properly instruct inexperienced, **immature child** as to dangers incident to her work and in going to and from it, proximately resulting in injuries to her, would give cause of action to her and her parent, regardless of whether latter consented to her employment. Reaves v. Anniston Knitting Mills [Ala.] 45 S 702. Petition alleging injuries caused by employment of **inexperienced youth** on **dangerous machine** without instruction stated cause of action. Falls City Woolen Mills v. Pike, 33 Ky. L. R. 67, 109 SW 335. Evidence sufficient to show negligence where plaintiff, **inexperienced youth,** employed to work on log carriage, was ordered by superior to **adjust belt** without instructions, as result of which he was injured. Chesson v. Walker, 146 N. C. 511, 60 SE 422. **Boy of 16** without experience set to work on boiler tubes with burred prosser pins, without warning or instructions, and chip from pin flew into his eye. Pelow v. Oil Well Supply Co. [N. Y.] 86 NE 812. Petition not demurrable which alleged that **boy of 16 was put to work at dangerous machine** without warning or instruction, and that he was injured immediately on beginning to operate it, before he could have become aware of danger. Hobbs v. Small [Ga. App.] 62 SE 91. Where evidence showed that **boy of 17,** without experience, was put to work, without warning or instruction, operating **dangerous band saw** in mill, finding of negligence was warranted, and verdict justified (no claim of contributory negligence being made) though evidence did not show just how plaintiff came in contact with saw. Von Postel v. Lake Sammamish Shingle Co. [Wash.] 98 P 665. **Girl** 14 or 15 years old entitled to instructions as to danger of working too close to **revolving shaft.** Civetti v. American Hatters' & Furriers' Corp., 124 App. Div. 345, 108 NYS 663. Danger from **shifting belt,** which was part of duty of **boy of 15,** was not an incidental risk, but it was defendant's duty to properly warn and instruct him as to how it should be done, if he was inexperienced and defendant knew or ought to have known it. Lehto v. Atlantic Min. Co., 152 Mich. 412, 15 Det. Leg. N. 242, 116 NW 405. Recovery allowed for injury to **boy of 12,** put to work without warning or instruction, and injured while attempting to clean **moving roller.** Driscoll v. Rolfe [N. H.] 71 A 379. **Inexperienced boy** injured in **knives of planer** when attempting to oil it as directed, no warning or instructions having been given, could recover without showing gross negligence of his superior. Owensboro Stave & Barrel Co. v. Daugherty, 33 Ky. L. R. 328, 110 SW 319. Failure to warn and instruct **boy of 14,** directed to work opposite operator of **trip hammer,** negligence, boy being injured by fall of hammer. Avery v. Cottrill's Guardian, 32 Ky. L. R. 914, 107 SW 332. Negligence to fail to instruct **young inexperienced brakeman** how to get off moving train. Arkansas Cent. R. Co. v. Workman [Ark.] 112 SW 1082. **Boy of 17 employed as brakeman** and switchman on private road struck by engine while turning switch. Judgment for plaintiff, on ground of failure to properly warn and instruct, sustained by divided court. Gadsden v. Catawba Power Co. [S. C.] 61 SE 960. Duty to warn and instruct extends to **inexperienced adults** as well as to youthful employes. Elliffy v. Oregon R. & Nav. Co. [Or.] 99 P 76. Duty to instruct inexperienced servant put to work on dangerous machine. German-American Lumber Co. v. Brock [Fla.] 46 S 740. Master **employing inexperienced man to work on dangerous machine** owes duty of instructing him. Greco v. Pratt Chuck Co., 111 NYS 1000. To place inexperienced man at work on complicated and dangerous machine without warning or instruction is negligence. Pennsylvania R. Co. v. Harteil [C. C. A.] 157 F 667. Inexperienced employe entitled to such instruction as will enable him to operate machinery safely in exercise of ordinary care. Crown Cork & Seal Co. v. O'Leary [Md.] 69 A 1068. Where section hand was inexperienced and did not know danger involved in **unloading gravel from car** in way in which foreman told him to do it, it was foreman's duty to warn him of the danger. Gulf, etc., R. Co. v. Jackson [Tex. Civ. App.] 109 SW 478. Accident caused by failure to instruct **apprentice** regarding dangerous machine used in scope of his employment. Eckberg v. American Locomotive Co. [R. I.] 68 A 478.

87. Duty to warn exists when danger is such in character as not to be properly appreciated by servants by reason of their lack of experience, their youth, or general incompetency or ignorance. Hardy v. Chicago, etc., R. Co. [Iowa] 115 NW 8. If employe is young and inexperienced, duty to instruct and warn may extend to dangers patent but unknown to him. Arkansas Cent. R. Co. v. Workman [Ark.] 112 SW 1082. Duty to warn is most imperative where the danger is of latent or obscure character and servant is known to be inexperienced or young. Kerker v. Bettendorf Metal Wheel Co. [Iowa] 118 NW 306. Duty to warn 15 year old operator of machine exists though danger would be obvious to an adult of ordinary prudence, and though boy knows that fingers will be injured if caught. Saller v. Friedman Bros. Shoe Co., 130 Mo. App. 712, 109 SW 794. Duty of master to warn boy of 15 employed as offbearer for sandpaper smoothing machine, if danger of doing work was not apparent to one of his age and experience. Czernicke v. Ehrlich, 212 Mo. 386, 111 SW 14. Instruction should be given unskilled employe, set to work on dangerous machine, and degree of instruction depends upon the age, capacity, and experience of the operator, and the nature of the machine. Marklewitz v. Olds Motor Works, 152 Mich. 113, 15 Det. Leg. N.

the master having actual or implied knowledge of the employe's youth or inexperience and lack of knowledge.[88] It is also the duty of the master to warn and instruct the servant as to hidden or latent dangers known, or which ought to be known, to the master and unknown to the servant,[89] and as to sudden,[90] special, or unusual risks arising during the course of the work,[91] or caused by changes brought about by

125, 115 NW 999. Where workmen in factory pounded on iron and steel wheels, and splinters or spawls of steel frequently flew from hammers or steel with sufficient force to injure person struck by them, it was master's duty to warn and instruct immature and inexperienced employe in factory of danger. Kerker v. Bettendorf Metal Wheel Co. [Iowa] 118 NW 306. When hazard attending usual exercise of any work required of an inexperienced employe is not apparent, it is incumbent on master to inform him of dangers incident thereto, and if failure so to do results in injury to employe, master is liable. Elliff v. Oregon R. & Nav. Co. [Or.] 99 P 76. If servant was expected to use wood shaping machine, he was entitled to instructions, if required by nature of machine and his inexperience, though he was not specifically directed to use it. Marklewitz v. Olds Motor Works, 152 Mich. 113, 15 Det. Leg. N. 125, 115 NW 999.

88. No duty to warn unless master knows servant is inexperienced, either actually or by inference. Stolarz v. Algonquin Co. [N. J. Law] 71 A 57. Duty to warn exists only where master is chargeable with knowledge of servant's ignorance of danger. Harney v. Chicago, etc., R. Co. [Iowa] 115 NW 886. Master must have known or have been charged with knowledge of lack of knowledge or inexperience of employe and dangerous character of work. Rahles v. J. Thompson & Sons Mfg. Co. [Wis.] 118 NW 350. Duty to warn and instruct extends only to work servant is employed to do, and only to such dangers as master knows or has reason to believe servant ignorant of. Stodden v. Anderson & Winter Mfg. Co. [Iowa] 116 NW 116.

89. The duty of the master to warn and instruct employes arises when the existence of danger is or should be in the exercise of reasonable care known to him. Hardy v. Chicago, etc., R. Co. [Iowa] 115 NW 8. Duty of master to warn servant of extraneous, latent or unusual danger unknown to servant. German-American Lumber Co. v. Brock [Fla.] 46 S 740. Master bound to warn of hidden dangers known to him but not observable by servant. Crown Cork & Seal Co. v. O'Leary [Md.] 69 A 1068. Duty of foreman to warn employe of defective condition of chisel not known to employe but which foreman ought to have known. Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730. Master's duty to notify servant of risks or defects of which he does not know. German-American Lumber Co. v. Brock [Fla.] 46 S 740. Evidence warranted finding of negligence in failing to warn operator of jointer of defective condition and liability to "kick." Bigum v. St. Paul Sash, Door & Lumber Co. [Minn.] 119 NW 481. Where servant was set to work removing copper bars from table on which they were dropped by conveyor, that they dropped at irregular intervals constituted latent danger, as to which he should have been warned. Evidence as to negligence in this respect for jury. Olsen v. Tacoma Smelting Co. [Wash.] 96 P 1036. Employe installing electrical equipment testified that he was working close to wire which he did not know was charged; that master knew it was charged and failed to warn him. Held, case of negligence made for jury. Latimer v. General Elec. Co. [S. C.] 62 SE 438. Where master sends servant to repair machinery knowing it to be not only defective but to have latent danger, it is his duty to warn the servant when such latent danger attendant upon the work is unknown to servant and he has not equal knowledge with master as to such danger. Green v. Babcock Bros. Lumber Co., 130 Ga. 469, 60 SE 1062. Petition held to set out cause of action on this theory as against general demurrer, when servant sent to repair engine was killed by explosion, knowledge by master and want of it by servant being alleged. Id.

90. Where operator of twine making machine had her hand in machine mending thread, machine being at rest while repairs were made by foreman, and **machine started without warning,** injuring her, finding of negligence was warranted. Fitzgerald v. International Flax Twine Co., 104 Minn. 138, 116 NW 475. Engineer, who knew fireman was at work on running board of engine, could be found negligent in suddenly and without warning **starting engine,** though jar in coupling, which threw fireman off, was not unusual or negligent. Galveston, etc., R. Co. v. Mitchell [Tex. Civ. App.] 107 SW 374.

91. Master liable where foreman failed to notify car repairer of danger as he promised. Missouri, etc., R. Co. v. Walker [Kan.] 99 P 269. Where defendant had for a long time permitted dangerous custom of throwing baled hay through opening in ceiling of barn, he was negligent in not warning plaintiff who was injured by being struck with bale. Standard Oil Co. v. Brown, 31 App. D. C. 371. Where repair train was sent out, during storm, to repair damage already done, it was railroad company's duty to give warning to conductor and crew of dangerous places to be repaired by messages properly sent. Graham v. Detroit, etc., R. Co., 151 Mich. 629, 15 Det. Leg. N. 115, 115 NW 993. Evidence held not to support finding that message was not sent to conductor and brakemen informing them of washouts. Id. Duty to warn mill foreman of unusual danger arising from removal of planks which usually covered pit on premises. Knox v. American Rolling Mill Corp., 236 Ill. 437, 86 NE 90. Duty of foreman in charge of moving car to warn employes that particular car was of unusual size and there was danger of being caught between car and projecting door, unless employes knew of it. Charrier v. Boston & M. R. Co. [N. H.] 70 A 1078. If necessary to maintain post too near track for safety, it was company's duty to warn employes affected. Wilson v. New York, etc., R. Co. [R. I.] 69 A 364. Master liable where

the master,[92] or incidental to work which the employe is ordered or sent to perform,[93] especially where the services required are outside the scope of the usual duties of the employe [94] where knowledge of the danger is chargeable to the master but not to the employe.[95] Instructions are required if work can be done with reasonable safety in a certain way but servant uninstructed is likely to do it in an unsafe way.[96]

superintendent directed plaintiff to saw through certain timbers in bridge, as part of work of moving portion of it, superintendent knowing of defect and manifest danger and failure to warn plaintiff. Connolly v. Hall & Grant Const. Co., 192 N. Y. 182, 84 NE 807. Negligence could be found where telltales were allowed to become out of repair so that brakemen on cars would not be warned by them of nearness of low bridge. Harrison v. New York Cent., etc., R. Co., 111 NYS 812. Where masses of salt were occasionally dislodged in course of defendant's business, and pieces were thrown over the floor so as to endanger safety of employes there engaged, master owed them duty to warn when such dislodgement was to take place. Brice-Nash v. Barton Salt Co. [Kan.] 98 P 768.

**92.** Master who makes place of work more dangerous without notice to employe is negligent. Plaintiff, engaged in repairing pipe, was injured by reason of hot water being turned on without notice. Ferringer v. Crowley Oil & Mineral Co. [La.] 47 S 763. Whenever a material change in the intrinsic condition or relative arrangement of instrumentalities is made by the master, of such a nature that a servant, ignorant of the change and relying on a continuation of the existing condition, is likely to be exposed to danger, it is duty of master to inform servant of such change, unless the latter ought to discover it in the exercise of ordinary care. Seaboard Air Line R. Co. v. Witt [Ga. App.] 60 SE 1012. Recovery for death of section hand warranted where brakes of hand car had been changed, so that, when he applied brakes, car suddenly stopped and threw him off, previous condition of car brakes being such that it would have stopped gradually. Id.

**93.** Error to direct verdict on opening statement where that and declaration tended to show servant was ordered into place of danger without warning, and was killed by reason thereof. Barto v. Detroit Iron & Steel Co. [Mich.] 15 Det. Leg. N. 912, 118 NW 738. Finding of negligence warranted where workman was ordered into unsafe trench without warning of danger. McCoy v. Northern Heating & Elec. Co., 104 Minn. 234, 116 NW 488. Where defendant had notice that wiring was uninsulated and that employes had been receiving electric shocks, it was his duty to warn engineer as to danger before putting him to work in engine room where danger existed. Aga v. Harbach [Iowa] 117 NW 669. Employe smothered in coal bin where he was put to work without warning or instructions. Balder v. Zenith Furnace Co., 103 Minn. 345, 114 NW 948. Train car driver in mine sent to aid in preparing opening set of timbers to start side drift; work dangerous, and no instructions given; roof and timbers fell. Kostrzeba v. Hobart Iron Co., 103 Minn. 337, 114 NW 949. No duty to warn and instruct employes digging in clay bank against obvious danger of chunks of clay rolling down from above, nor was master bound to employ watchman to look out for such danger and warn. Ritzema v. Valley City Brick Co., 152 Mich. 75, 15 Det. Leg. N. 97, 115 NW 705. Duty of mine superintendent to warn miners sent into new shaft of presence of powder gas, and where he assured them "air" was all right without having tested it or provided for ventilation, this was negligence. Seals v. Whitney, 130 Mo. App. 412, 110 SW 35. Duty of mine boss charged with inspection to warn employes of dangers known to him before sending them to work at dangerous place. Norton Coal Co. v. Hanks' Adm'r, 108 Va. 521, 62 SE 335. Evidence sufficient to show that plaintiff was subject to and bound to obey engineer who sent him to work in dangerous place without warning him of danger. Knickerbocker Ice Co. v. Gray [Ind.] 84 NE 341. Evidence held to warrant finding that superintendent ordered plaintiff, known to be inexperienced and slow witted, to oil machinery in attempting which without instruction plaintiff was injured. Wankowski v. Crivitz Pulp & Paper Co. [Wis.] 118 NW 643. Servant sent into room to work where there was a pit of hot water, without being warned of same, was scalded. Master liable. Grubic v. Western Tube Co., 139 Ill. App. 470.

**94.** Duty to warn exists where servant without experience is sent to do new work, dangers of which he does not know, though they are incident to such work. Brandon v. Texarkana & Ft. Smith R. Co. [Tex. Civ. App.] 113 SW 968. Changing employe's work from "wheeler" or "car chaser" in smelter to motorman not negligence per se; failure to give necessary instructions would have to be shown. Mitchell v. Boston & M. Consol. Copper & Silver Min. Co., 37 Mont. 575, 97 P 1033. Defendant, taking common laborer away from ordinary work to assist in mixing or dissolving zinc chloride, owed him duty to warn of nature of substance and danger of getting it in his eye, he having no knowledge of its properties. Elliff v. Oregon R. & Nav. Co. [Or.] 99 P 76.

**95.** Hardy v. Chicago, etc., R. Co. [Iowa] 115 NW 8. Duty to warn exists where servant is put to work in dangerous place or with dangerous tools, and master knows or ought to know that servant does not know of danger. Elms v. Southern Power Co., 79 S. C. 502, 60 SE 1110. It is master's duty not to send servant into place of danger known to him, but if work is obviously dangerous there is no duty to warn except as to dangers known to master and unknown to servant, and not obvious. Ballard & Ballard Co. v. Lee's Adm'r [Ky.] 115 SW 732. Plaintiff, while passing from one point to another within rolling mill of which he was night foreman, was injured by stepping into opening caused by removal during preceding day of planks over belt-pit, and of which he had no knowledge. Held master negligent in failing to warn him of new danger. American Rolling Mill Corp. v. Knox, 140 Ill. App. 359.

No instruction is required as to incidental risks assumed by the contract of employment,[97] nor as to obvious dangers,[98] fully known to the employe,[99] or as well known to him as to his employer,[1] or which ought to have been known to him by reason of his experience and capacity,[2] or by the exercise of ordinary care,[3] that is,

**96.** Disalets v. International Paper Co., 74 N. H. 440, 69 A 263.

**97.** No duty to warn as to patent dangers, these being assumed risks. Cleveland, etc., R. Co. v. Perkins [Ind.] 86 NE 405.

**98.** Hardy v. Chicago, etc., R. Co. [Iowa] 115 NW 8; Mitchell v. Comanche Cotton Oil Co. [Tex. Civ App.] 113 SW 158. No instruction or warning required as to danger from **revolving cylinders** with teeth perfectly obvious, even if inexperienced employe. Stolarz v. Algonquin Co. [N. J. Law] 71 A 57. No duty to warn operator of **planer** not to place hand into opening of planer plate, where knives were. Vigo Cooperage Co. v. Kennedy [Ind. App.] 85 NE 986. No warning required that hands or clothing of employe might get caught in **moving machinery** of saw mill. Ramsey v. Tremont Lumber Co., 121 La. 506, 46 S 608. Plaintiff was sent aloft on **pile driving apparatus** to put iron ring on pile, and after he had signaled that ring was on and foreman had signaled for dropping of hammer, plaintiff tried to grab ring, which was off and his hand was caught, no duty to warn of such obvious danger. Mugford v. Atlantic, etc., R. Co., 7 Cal. App. 672, 95 P 674. No duty to warn mature man, who had worked on crane 3 months, of danger of getting hand caught in **gearing** which was in plain sight. Korsman v. Rice, Barton & Fales Mach. & Iron Co., 198 Mass. 126, 84 NE 311. Failure to instruct boy of 13 as to danger of allowing hand to come into contact with **knives of machine** not negligence. Forquer v. Slater Brick Co., 37 Mont. 426, 97 P 843. Where danger of **cleaning gin without stopping it** was obvious to boy of 16 of plaintiff's intelligence, and he knew the danger from the saws and moving parts, and had twice stopped gin to unchoke it, no warning or instruction was required. Brammer v. Pettyjohn [Ala.] 45 S 646. No duty to warn employe of danger of working with **icy, slippery timbers and tools on trestle,** their condition and danger being obvious. Mellette v. Indianapolis Northern Trac. Co. [Ind. App.] 86 NE 432. Where work of **repairing water crane** consisting of raising up stand-pipe so that plaintiff could insert his hands and replace ball bearings, danger of fellow-servant's crow bar slipping and allowing pipe to fall on plaintiff's hand was obvious; no specific instruction as to work was necessary. Bolsem Iowa Cent. R. Co. [Iowa] 117 NW 1098. **Common laborer, working with dump car,** had worked on similar car and on one in question 3 hours before he was injured by getting foot caught between descending cross arm and planking; that there was some danger to one in his position was obvious; held, not negligence to fail to warn and instruct him. Hanson v. Superior Mfg. Co., 136 Wis. 617, 118 NW 180. Immaterial that car was new, its operation being similar to one he had worked on, and danger being similar though greater. Id. Not negligence to fail to warn employe of danger of **attempting to work between car and freight platform** which curved to conform to track. Haring v. Great Northern R. Co. [Wis.] 119 NW 325.

**99.** Servant injured in falling from **crane** with which he was familiar; no duty to warn. Mohr v. Martewicz, 139 Ill. App. 173. Where servant working a **curd-cutting machine,** instead of using strips to press curd into machine according to custom, used hand and was injured, he was held to have known and assumed the risk. Dahlin v. Sherwin, 132 Ill. App. 566. Failure to instruct employe set to running **electric motor** not negligence where he knew all about it and its operation. Mitchell v. Boston & M. Consol. Copper & Silver Min. Co., 37 Mont. 575, 97 P 1033. No duty to warn and instruct boy of 18 with year's experience as to danger of turning on too much **steam** into barrels filled with water to swell them. Stitzel v. Wilhelm Co., 220 Pa. 564, 69 A 996.

**1.** No duty to warn experienced man of danger as obvious to him as to master, and which arose during progress of work. Morgan Const. Co. v. Frank [C. C. A.] 158 F 964. No duty to warn where servant has as much knowledge of danger and of means to avoid it as master has. Brownwood Oil Mill v. Stubblefield [Tex. Civ. App.] 115 SW 626. No duty to warn employe of danger of getting caught in **cogwheels** of machine he was oiling. Id. Woman **fell over truck** in walking through place of work in dark. She knew trucks were used. Held, failure to warn not negligence, her knowledge of conditions being equal to employers. Ahern v. Amoskeag Mfg. Co. [N. H.] 71 A 213. No duty to warn **lineman** of danger from **non-insulated wire** which was readily observable, he being an experienced man. Pembroke v. Cambridge Elec. L. Co., 197 Mass. 477, 84 NE 331.

**2.** No duty to warn as to known dangers of those obvious to persons of ordinary intelligence. Brandon v. Texarkana & Ft. Smith R. Co. [Tex. Civ. App.] 113 SW 968. No duty to warn girl of 21, of year's experience, of danger of putting her hand into an unknown part of machine after she knew some change in machine had been made. Crown Cork & Seal Co. v. O'Leary [Md.] 69 A 1068. Employe put to work at back of drop hammer to clean off anvil and obey orders of operator accidently stepped on treadle and hammer came down on his hand. Held, no duty to warn, danger being obvious to ordinary adult person. Rahles v. J. Thompson & Sons Mfg. Co. [Wis.] 118 NW 350. No warning or instruction required for experienced, technically trained operator of machine who got thumb crushed after watching machine 5 months. Excelsior Foundry Co. v. Rogers, 136 Ill. App. 36.

**3.** No duty to warn power house superintendent of certain **wires,** presence of which he ought to have known in performance of his own duty. Woelflen v. Lewiston-Clarkston Co. [Wash.[ 95 P 493. Not breach of duty to servant **killed by train** to fail to have watchman to warn him, it being his

such as are discoverable by the exercise of that reasonable care which persons of ordinary intelligence may be expected to take for their own safety.[4] Usually the master may assume that an adult employe is competent and capable of appreciating the dangers ordinarily incident to his work,[5] but if he knows or has reason to believe that such an employe is ignorant, the duty to warn and instruct[6] exists. It is not negligence to fail to give warning of a danger not reasonably to be apprehended.[7] Where servant is injured while working outside the scope of his employment, voluntarily and without orders, master is not chargeable with negligence in failing to warn him of danger.[8] Whether warnings or instructions were or should have been given in a particular instance,[9] and whether warnings or instructions given were sufficient,[10] are

own duty to look out for them. Brady v. New York Cent. etc., R. Co., 111 NYS 507.

4. No duty to instruct employe 22 years old, with year's experience, of danger of putting powder into hole within few minutes of exploding several sticks of dynamite covered with paper and ignited by cotton fuse, liability of explosion of powder by sparks in the hole being obvious. Hardy v. Chicago, etc., R. Co. [Iowa] 115 NW 8. Warning necessary only as to dangers unknown to servant or such that he would not be reasonably expected to know. Stolarz v. Algonquin Co. [N. J. Law] 71 A 57.

5. Hardy v. Chicago, etc., R. Co. [Iowa] 115 NW 8. Master may assume adult employe to be ordinarily competent and that he appreciates obvious dangers. Rahles v. J. Thompson & Sons Mfg. Co. [Wis.] 118 NW 350. No duty to warn as to dangers so apparent that one of servant's ability and experience may reasonably be held to have known and realized. Lake v. Shenango Furnace Co. [C. C. A.] 160 F 887. Anyone who hires a laborer rightfully presumes that he understands the laws of nature which operate with uniformity, and there is no duty to warn of dangers which are patent to ordinary intelligence. Man killed by "cave-in" in gravel pit. City not liable. Slagle v. Averyville, 139 Ill. App. 423.

6. Hardy v. Chicago, etc., R. Co. [Iowa] 115 NW 8.

7. The duty of instruction extends to such dangers as the master himself knows, or ought to know in the exercise of reasonable care. No recovery where machine in normal condition suddenly started, injuring employe. Rhobovsky v. New Jersey Worsted Spinning Co. [N. J. Err. & App.] 70 A 170. Not negligent to fail to warn employe using straight emery wheel of danger of its exploding, such danger being very remote. Brands v. St. Louis Car Co., 213 Mo. 698, 112 SW 511. Instruction erroneous which allowed jury to find that failure to warn boy of 18 of danger of trying to save barrel of oil from rolling under moving train would be negligence, since no warning could be required as to such particular act and it did not appear that he could be warned after he started to do the act. St. Louis S. W. R. Co. v. Johnson [Tex. Civ. App.] 109 SW 486. Elevator operator was injured by reason of being pushed by employe riding in it and attempting to jump out over rod at top, as was customary among employes. Held, master could not he held liable for such injury by reason of failure to warn or provide safeguards, in absence of knowledge, actual or implied, of such custom. Johnston v. Enterprise Mfg. Co., 130 Ga. 143, 60 SE 449. Where repair train was sent out during storm to repair washouts, company performed its duty by sending proper messages giving warning as to character and location of washouts, and was not liable for failure of station agent to deliver messages, which failure it could not reasonably have foreseen. Graham v. Detroit, etc., R. Co., 151 Mich. 629, 15 Det. Leg. N. 115, 115 NW 993.

8. Ship carpenter had no orders or authority to use "buzz saw." Marshall v. Burt & Mitchell Co. [N. J. Err. & App.] 69 A 183.

9. **No negligence of master shown** where boy, who was injured by belt, had been instructed as to danger. Mitchell v. Comanche Cotton Oil Co. [Tex. Civ. App.] 113 SW 158.

**Question of negligence for jury:** Whether inexperienced boy of 13 should have been warned of condition of floor and platform in dark place, where he was required to work. Haggblom v. Winslow Bros. & Smith Co., 198 Mass. 114, 84 NE 301. Putting inexperienced man at work on cotton picker without instruction. Shaw v. Arkwright Mills [S. C.] 61 SE 1018. Boy of 11 sent to work near two edging saws, with which he came in contact not having been warned. Louisville Cooperage Co. v. Farmer, 33 Ky. L. R. 180, 109 SW 893. Whether boy had been instructed as to proper way to shift belt. Lehto v. Atlantic Min. Co., 152 Mich. 412, 15 Det. Leg. N. 242, 116 NW 405. Whether warning was given of movement of cars to car repairer. St. Louis, etc., R. Co. v. Puckett [Ark.] 114 SW 224. Common laborer without experience in cleaning out boilers sent under boiler to let out water, without instruction, injured by hot water. Brandon v. Texarkana & Ft. Smith R. Co. [Tex. Civ. App.] 113 SW 968. Engine wiper at work in pit under engine killed by another locomotive running into one he was under. Condie v. Rio Grande Western R. Co. [Utah] 97 P 120. Whether danger to factory workmen from injury by flying spawls or splinters of steel from hammers and steel being pounded was "recognized" danger so that master ought to have known it and warned employes. Kerker v. Bettendorf Metal Wheel Co. [Iowa] 118 NW 306. Whether young workman in factory knew and appreciated danger of being struck by flying splinters or spawls of steel so as to relieve master of duty of instruction, where he had worked in factory two years but said he did not know of danger. Id. Whether warning and instruction as to oiling machinery should have been given inexperienced man. Wankowski v. Crivitz Pulp & Paper Co. [Wis.] 118 NW 643. A showing that plaintiff, who was injured

usually questions of fact to be solved by reference to the character of the risk or danger in issue, and the age, capacity, and experience of the employe concerned.[11] The master may assume that instructions given will be followed.[12] The duty to properly warn and instruct cannot be delegated.[13]

(§ 3) *E. Fellow-servants and vice-principals. Competency.* See 10 C. L. 786—The master is charged with the duty of ordinary care [14] to employ and retain in his service only such servants as are reasonably competent to perform the duties for which they are employed.[15] He is accordingly liable for injuries to a servant resulting

by attempting to remove goods from mangle while in operation, had been hired without question as to experience; that she had not been warned as to danger; that she was 13 years old and had worked about 3 months, is sufficient evidence in which to submit question of defendant's negligence to jury. French v. National Laundry Co., 31 App. D. C. 105. Instructions held to properly submit to jury question whether it was train inspector's duty to give notice of his position or switchmen's duty to warn inspector of their operations. Goess v. Chicago, etc., R. Co., 104 Minn. 495, 116 NW 1115. Failure to notify servant of danger in method used by foreman to lower machine could be found proximate cause of his death by the overturning of the machine. Hamann v. Milwaukee Bridge Co., 136 Wis. 39, 116 NW 854. Servant injured on way to work by falling into ditch open for repairs; question as to whether warning was given was for jury. Clegg v. Seaboard Steel Casting Co., 34 Pa. Super. Ct. 63. Whether employe had right to assume he was expected to use dangerous machine which injured him, by reason of nature of work and circumstances, held question for jury. Marklewitz v. Olds Motor Works, 152 Mich. 113, 15 Det. Leg. N. 125, 115 NW 999. Evidence warranted finding that boy of 14 was not warned of dangers of his employment in mill. Lane v. Manchester Mills [N. H.] 71 A 629. If boy was injured because of failure to properly warn and instruct him, it would be immaterial what the immediate cause of injury was. Forquer v. Slater Brick Co., 37 Mont. 426, 97 P 843. Ordinarily it is for jury to say whether minor so appreciated danger that master was absolved from duty to instruct him; it is matter of law for the court only when proper inference from evidence is free from doubt. Kerker v. Bettendorf Metal Wheel Co. [Iowa] 118 NW 306.

**10. For jury:** Whether operator of metal stamping press had been properly instructed. Clemens v. Gem Fibre Package Co. [Mich.] 15 Det. Leg. N. 574, 117 NW 187. Member of crew of track workers struck by train; whether proper warning was given. La Placa v. Lake Shore, etc., R. Co., 111 NYS 797. Whether proper warnings and instructions were given boy of 17, killed by machinery about which he worked. Lunde v. Cudahy Packing Co. [Iowa] 117 NW 1063. Whether minor servant, killed by machinery about which he worked, was properly instructed, it appearing that only general instructions were given. Id. Whether boss repairer sufficiently warned plaintiff, at work on car, of removal of signal flag, allowing switch engine to come on track. El Paso & S. W. R. Co. v. Smith [Tex. Civ. App.] 108 SW 988. Evidence held to show that plaintiff was **not properly instructed** as to danger of turntable. Chicago, etc., R. Co. v. Galloway, 137 Ill. App. 296.

**11.** What is reasonable care in the matter of warning and instruction will depend in each instance on the age, capacity and experience of the employe, and upon the further fact whether the danger complained of is obvious or otherwise and the character of the work and the circumstances under which it is to be performed. Kerker v. Bettendorf Metal Wheel Co. [Iowa] 118 NW 306. In determining necessity and sufficiency of instructions to boy, jury should consider his age and experience, surrounding conditions, the work to be done and manner of doing it, knowledge of boy and whether master knew or ought to know whether instructions were required. Forquer v. Slater Brick Co., 37 Mont. 426, 97 P 843. Whether master ought to have apprehended danger of injury to boy from knives of clay mixing machine, whether he should have been instructed more fully than he was, held for jury; instructions laying down duty to instruct held erroneous. Id.

**12.** Employer had right to assume that girl of 14 or 15 would follow instructions. Civetti v. American Hatters' & Furriers' Corp., 124 App. Div. 345, 108 NYS 663.

**13.** See, also, § 3E.

**14.** It is master's duty to use reasonable care to employ competent servants, the **degree of care** being commensurate with the dangers to be apprehended. Seewald v. Harding Lumber Co. [Wash.] 96 P 221. It is master's duty to use ordinary prudence in selection of servants to ascertain their competency for the duties to be performed. Beers v. Isaac Prouty & Co., 200 Mass. 19, 85 NE 864.

**Ordinary care** in selection of employes means that degree of care which a man of ordinary prudence would use in view of the nature of the employment, consequences of employing an incompetent person, and in view of nature and dangers of business and hazards to other servants arising from incompetency of one. Still v. San Francisco, etc., R. Co. [Cal.] 98 P 672. Where the service is one where lives and persons of coemployes will be endangered if the employe is incompetent, the employer is bound to make a **reasonable investigation** into his character, skill, qualifications and habits of life. Id. Personal examination of the employe may not always be essential; there should be such an investigation as will warrant assumption that employe has required qualifications. Id.

**15.** Servant cannot recover for negligence of fellow-servant unless for negligence in selecting him, or in retaining him after notice of incompetency. Harris v. De Far-

proximately from the incompetency of a fellow-servant,[16] if he had actual or implied knowledge of such competency[17] and it was unknown to the servant injured.[18] Notice to a vice-principal is, of course, notice to the master.[19] The time of a servant's employment means the time when he is assigned to the particular employment in question.[20] The employer is bound to institute affirmative inquiries as to the qualifications of a servant whom he transfers to a more responsible position for which special qualifications are required, unless the employe has given proof of his capacity in a similar position.[21] What constitutes incompetency in an employe varies with and depends upon the nature of the duties he is called upon to perform and the relations he must sustain to the other employes.[22] Proof of mere negligence is not usually

enede Dampskibselskab [N. J. Err. & App.] 70 A 155. Under direct provisions of Code, § 1970, an employer is liable for injuries resulting from mere negligence of fellow-servant when he failed to use ordinary care in the selection of such servant. Cragg v. Los Angeles Trust Co. [Cal.] 98 P 1063. It is master's duty to use ordinary care to select competent servants, that is servants of sufficient care, skill, prudence and good habits as to make it probable that they will not cause injury to each other. El Paso, etc., R. Co. v. Smith [Tex. Civ. App.] 108 SW 988. Fact that competent servants are employed to perform other duties will not excuse negligent employment of one employe who is incompetent to work with them. Wilkinson v. Kanawha & Hocking Coal & Coke Co. [W. Va.] 61 SE 875. It is master's **duty to dismiss** servants whose incompetency, arising from carelessness or bad habits, is likely to cause injury to others, and a want of ordinary care in discovering such incompetency is negligence. El Paso, etc., R. Co. v. Smith [Tex. Civ. App.] 108 SW 988.

16. Master who knowingly employs incompetent servants is liable for injuries resulting from their incompetency. Di Bari v. Bishop Co., 199 Mass. 254, 85 NE 89. Employing or retaining incompetent employe renders master liable for injuries caused by such incompetent employe's negligence. Indiana Union Trac. Co. v. Pring, 41 Ind. App. 247, 83 NE 733. If the master employs an incompetent servant, having reason to know or opportunity to discover his want of capacity, he is liable to any other servant, himself in the exercise of due care, who is injured as the proximate result of some act or omission of the incompetent servant growing out of his incapacity. Beers v. Isaac Prouty & Co., 200 Mass. 19, 85 NE 864. Master liable where molder, known to be intemperate and careless, fell when intoxicated and spilled hot metal on plaintiff. Klofski v. Railroad Supply Co., 235 Ill. 146, 85 NE 274. That an accident resulted from negligence of an employe will make the employer liable only if it appears that it was due to incompetency of the employe, and that the employer was negligent in selecting or retaining him. Smith v. Chicago, etc., R. Co., 236 Ill. 369, 86 NE 150. Where act of employe, which caused injury, was due to his incompetency, which was known to master, latter was liable, notwithstanding such employe disregarded orders, since competent man would not have needed such orders. American Steel & Wire Co. v. Keefe [C. C. A.] 165 F 189. Master liable if common laborers were put to work running engine and hoisting apparatus to unload coal from barges, being incompetent for such work, and their incompetency being known to defendant's superintendent and being cause of accident. Bartley v. Boston, etc., R. Co., 198 Mass. 163, 83 NE 1093.

**To constitute cause of action,** it must appear that servant whose negligence caused injury was incompetent; that injury resulted from his incompetency; that master knew or ought to have known of his incompetency; that he negligently retained the servant with actual or implied knowledge of his incompetency. Tucker v. Missouri & K. Tel. Co., 132 Mo. App. 418, 112 SW 6. If collision of trains was caused by incompetency of conductor of one of them, and company knew of such incompetency or ought to have known and negligently employed him, it would be liable for resulting injuries. Still v. San Francisco, etc., R. Co. [Cal.] 98 P 672. No recovery can be had by miner on account of fall of slate on him on ground of incompetency of mining boss, unless such incompetency is shown to be the **proximate** cause of the injury. Fuller v. Margaret Min. Co. [W. Va.] 63 SE 206.

17. No recovery for negligence of trolley tender where, if he was incompetent, it was not shown that employer had or was charged with knowledge of his incompetency. McKenna v. Curran [R. I.] 71 A 513. Master must learn of employe's lack of ability to understand English in employing him; cannot claim he did not know of it. Beers v. Isaac Prouty & Co., 200 Mass. 19, 85 NE 864. Evidence sufficient to charge master with knowledge of stationary engineer's incompetency. McCalls Ferry Power Co. v. Price [Md.] 69 A 832.

18. Evidence held to warrant finding that plaintiff had no notice of incompetency of employes by which he was injured. Merchants' & Miners' Transp. Co. v. Corcoran [Ga. App.] 62 SE 130. Incompetency of fellow workman not assumed risk when unknown to plaintiff. Klofski v. Railroad Supply Co., 235 Ill. 146, 85 NE 274.

19. Knowledge of superintendent, in full charge of work, of engineer's incompetency, chargeable to master. McCalls Ferry Power Co. v. Price [Md.] 69 A 832. Notice to master mechanic of incompetency of boss repairer was notice to company. El Paso, etc., R. Co. v. Smith [Tex. Civ. App.] 108 SW 988.

20, 21. Still v. San Francisco, etc., R. Co. [Cal.] 98 P 672.

22. Beers v. Isaac Prouty & Co., 200 Mass. 19, 85 NE 864.

proof of incompetency,[23] though the conduct of an employe on one occasion may show that he was incompetent.[24] Habitual negligence, however, is held to constitute incompetency.[25] The retention of an incompetent servant does not render the master liable for an act which is not negligent.[26] The master is not liable for the act of an incompetent careless fellow-servant if the act is not within the scope of his employment or performed in the course of his duties.[27] Whether a particular servant was in fact incompetent,[28] whether the master was chargeable with knowledge of his incompetency,[29] whether due care was used in selecting or retaining him,[30] and whether the injury was proximately caused by such servant's incompetency,[31] are usually

**23.** Proof of negligence of the servant is not proof of his incompetency. Tucker v. Missouri & K. Tel. Co., 132 Mo. App. 418, 112 SW 6. Jury warranted in finding negligence in employing incompetent servant where he sent man who could not understand or speak English to assist in operating machine, where two men would have to co-operate and communicate with each other. Id. Brakeman who failed to start back to signal following train soon enough to stop it held merely negligent, not incompetent. Louisville & N. R. Co. v. Keiffer [Ky.] 113 SW 433.

**24.** Conduct of an employe on one occasion may sufficiently show his incompetency, but employer would be responsible only for consequences following thereafter. Smith v. Chicago, etc., R. Co., 236 Ill. 369, 86 NE 150.

**25.** Habitual negligence constitutes incompetency. Tucker v. Missouri & K. Tel. Co., 132 Mo. App. 418, 112 SW 6.

**26.** Keeping and retaining an incompetent engineer to run mine cage held not to warrant recovery for injury due to sudden stopping of cage, where jury found that his act in so doing was not negligent. Zeller, McClelland & Co. v. Wright, 41 Ind. App. 403, 83 NE 1030.

**27.** Master not liable where minor employe turned air hose on fellow-servant as a prank, causing his death, though master knew that he had been playing such pranks. Ballard's Adm'x v. Louisville & N. R. Co., 33 Ky. L. R. 301, 423, 110 SW 296.

**28. Evidence insufficient to show incompetency** of boy of 15 employed to look after "chock blocks" at "knuckle" used to let cars down into mine. Wilkinson v. Kanawha & Hocking Coal & Coke Co. [W. Va.] 61 SE 875. Evidence insufficient to show that operator of crane, who ran it over plaintiff, forgetting he was in the way, was incompetent. Ferry v. American Suction Gas Producer Co. [Mich.] 15 Det. Leg. N. 458, 116 NW 1073.

**Evidence held to sustain finding of incompetency** of helper furnished plaintiff, operator of power drill, and that such incompetency was known to master. Kansas City Consol. Smelting & Refining Co. v. Taylor [Tex. Civ. App.] 107 SW 889. Where conductor of freight train disregarded special order for movement of trains, and observed general rules, and collision resulted, held, evidence sufficient to show his incompetency in that he did not have adequate knowledge of meaning of rules and orders. Still v. San Francisco, etc., R. Co. [Cal.] 98 P 672. Whether telegraph operator was incompetent, and whether engineer was ignorant of his incompetency, held for jury. Mahoney's Adm'r v. Rutland R. Co. [Vt.] 69 A 652.

**29.** Evidence sufficient to warrant finding that freight conductor was incompetent and that company knew or ought to have known of it. Lowe v. San Francisco, etc., R. Co. [Cal.] 98 P 678. Evidence sufficient to show conductor of work train incompetent to knowledge of defendant's superintendent. Smith v. Chicago, etc., R. Co., 236 Ill. 369, 86 NE 150. Intoxicated iron moulder tripped, spilling molten iron which he was carrying, causing it to explode and injure plaintiff, another moulder; evidence held to show that defendant could have known of servant's incompetency by using reasonable diligence. Railroad Supply Co. v. Klofski, 138 Ill. App. 468.

**30.** Whether master has made such investigation as is reasonable under all the circumstances is peculiarly a question for the jury. Still v. San Francisco, etc., R. Co. [Cal.] 98 P 672. No liability for incompetency and negligence of foreman where no negligence in his selection was shown. Carroda v. Foundation & Cont. Co., 112 NYS 1082. Evidence held to warrant finding that boss repairer was incompetent, and that vice-principal ought to have known of his incompetency and was negligent either in employing or retaining him. El Paso, etc., R. Co. v. Smith [Tex. Civ. App.] 108 SW 988. Whether due care was exercised in employing engineer to run donkey engine in logging, by whose incompetency plaintiff was injured, held for jury. Seewald v. Harding Lumber Co. [Wash.] 96 P 221. Evidence sufficient to sustain finding of negligence in employing freight conductor who was incompetent by reason of his ignorance of the meaning of rules and orders. Still v. San Francisco, etc., R. Co. [Cal.] 98 P 672.

**31.** Evidence held to sustain finding that conductor's incompetency was cause of collision and brakeman's death. Lowe v. San Francisco, etc., R. Co. [Cal.] 98 P 678. Evidence sufficient to warrant finding that elevator fell because of operator's failure to leave lever by which it was controlled in proper place when he stepped out of it. Cragg v. Los Angeles Trust Co. [Cal.] 98 P 1063. Evidence sufficient to warrant finding that negligence of engineer caused bucket to fall on plaintiff. McCalls Ferry Power Co. v. Price [Md.] 69 A 832. Where one operator, plaintiff, got fingers caught in machine, and told assistant to turn power off, but he, owing to inability to understand English, which was unknown to plaintiff, turned power on, and plaintiff's fingers were cut off, assistant's incompetency could be found

questions of fact. Statutes in some states fix the duty of the employer with respect to the employment of servants for the performance of certain acts.[32]

*Negligence of fellow-servants.* See 10 C. L. 737—A master who has used due care in the selection and retention of employes is not, at common law,[33] liable to servants for injuries resulting from the mere negligence of fellow-servants,[34] such negligence being on assumed risk.[35] But if negligence of the master, or of a vice-principal, concurs with negligence of a fellow-servant in producing the injury and if the injury would not have resulted had the master or vice-principal exercised due care, the

proximate cause of injury. Beers v. Isaac Prouty & Co., 200 Mass. 19, 85 NE 864. Evidence held not to sustain claim that collision was caused by engineer having epileptic fit, negligence charged being that engineer was employed with knowledge that he had such fits. Schoonmaker v. Erie R. Co., 113 NYS 1048.

**32.** See, also, § 3B, Statutes, and cases in Illinois under Mines and Miners Act. Pub. Acts 1905, p. 143, No. 100, § 3, provides that only competent and trustworthy **engineers** shall be permitted **to run cages and hoisting devices in coal mines,** and § 36 makes willful violation of statute, after notice by state inspector, misdemeanor. Held statute imposes duty of employing competent and trustworthy engineer, regardless of action of mine inspector. Layzell v. Sommers Coal Co. [Mich.] 15 Det. Leg. N. 404, 117 NW 179. Statute applicable where plaintiff was engaged on Sunday in removing coal at bottom of shaft so that cage could be properly operated, and was injured by the cage while so doing. Capeling v. Saginaw Coal Co. [Mich.] 16 Det. Leg. N. 407, 117 NW 182. In action for such injuries, plaintiff was entitled to instruction that statute required employment of engineer, and that one not an engineer was not authorized to operate the cage. Id. Evidence sufficient to take case to jury where it appeared operator had been told of plaintiff's position but forgot and ran cage upon him. Id. Defendant liable if superintendent knew or ought to have known of engineer's incompetency. Id. Court should have instructed that plaintiff could not recover unless free from contributory negligence. Id. Also that defendant would be liable only if engineer's act was negligent, and in case he was operating car by permission of defendant. Id.

**33.** For statutory modification of common-law rule, see post, this section.

**34.** McDonald v. California Timber Co., 7 Cal. App. 375, 94 P 376; Singleton v. Merchants' & Miners' Transp. Co. [Ga. App.] 61 SE 881; Indianapolis Trac. & T. Co. v. Kinney [Ind.] 85 NE 954; Strottman v. St. Louis, etc., R. Co., 211 Mo. 227, 109 SW 769; Faulkner v. Texas, etc., R. Co. [Tex.] 113 SW 765. No recovery for injuries caused by fall of derrick due solely to negligence of fellow-servant. Ryan v. Farley & Loetscher Mfg. Co. [Iowa] 119 NW 86. If piece of bolt was caused to fly off and strike plaintiff while being broken by fellow member of section crew, defendant not liable. St. Louis, etc., R. Co. v. Jamison [Ark.] 113 SW 41. No recovery for death of brakeman caused by explosion of dynamite, loaded car of which had been placed next caboose instead of in middle of train, as required by rules. Kelly v. Delaware, etc., R. C., 192 N. Y. 203, 84 NE 801. Plaintiff fell into vat because of slippery condition of floor, or because of jolt by fellow-servant or both causes combined. Master not liable, both being due to acts of fellow-servants. McTiernan v. American Woolen Co., 197 Mass. 238, 83 NE 673. In action by street car conductor for injuries caused by obstruction in street striking him, held (in action based on theory that he was a traveler) that motorman, being a fellow-servant, owed conductor less degree of care than he owed other travelers. No discussion whether conductor was servant or passenger, under statute. Hinckley v. Danbury [Conn.] 70 A 590. Injury to plaintiff by being struck by plank removed from concrete form held due to negligence of fellow-servants and not to negligence of master in construction of forms. Wilson v. Brown [Pa.] 71 A 540. Servant who fell into coal hole, uncovered by fellow-servants, could not recover. Harris v. Det Farenede Dampskibselskab [N. J. Err. & App.] 70 A 155. Stevedores not liable for injury to employe engaged in loading vessel when they had furnished candles to be used by the men and place was lighted by fellow-servant. The Clan Graham, 163 F 961. Switchman could not recover for negligence of engineer without proving he was incompetent and was negligently employed or retained, the two being fellow-servants. Day v. Louisiana W. R. Co., 121 La. 180, 46 S 203. Craneman lifted ladle in such manner that it fell on deceased. Illinois Steel Co. v. Lulenski, 136 Ill. App. 332.

**35.** See post, § 3F, Incidental Risks. Chicago, etc., R. Co. v. Hamilton [Ind. App.] 85 NE 1044; Rhobousky v. New Jersey Worsted Spinning Co. [N. J. Err. & App.] 70 A 170; Gadsden v. Catawba Power Co. [S. C.] 61 SE 960. Negligence of fellow-servants in piling coffee sacks assumed risk. Bradley v. Forbes Tea & Coffee Co., 213 Mo. 320, 111 SW 919. Plaintiff injured by timber falling on him from car through negligence of workman held to have assumed risk of fellow-servant's negligence. Duffy v. Chicago, 137 Ill. App. 195. Where probable injury from negligence of another employe ought reasonably to be apprehended, such danger is an assumed risk. Lukie v. Southern R. Co., 160 F 135. Where a boiler inspector was injured while engaged in course of his employment by the falling of a boiler plate occasioned by act of operator of traveling crane, instruction that servant assumed only those dangers of his employment which were apparent or known to him, or which he could have ascertained, held erroneous. McAleenan Boiler Co. v. Lines, 132 Ill. App. 593.

master is liable.[36] The rule exempting the master from liability for injuries caused by the act of a fellow-servant does not apply when the injured servant was not at the time of injury engaged in the performance or discharge of his duty under his employment.[37]

*Negligence of vice-principals (common-law and statutory).*—For the negligence or wrongful act of a vice-principal or representative [38] or other employe for whose act or negligence the master is made responsible by statute [39] resulting in injuries to another employe, the master is liable, regardless of whether there was negligence in the employment of such representative,[40] provided he was at the time engaged in the

**36. Concurring negligence of master and fellow-servant** makes master liable. Southern R. Co. v. West [Ga. App.] 62 SE 141; Klofski v. Railroad Supply Co., 235 Ill. 146, 85 NE 274; Kennedy v. Swift & Co., 234 Ill. 606, 85 NE 287; Ferringer v. Crowley Oil & Mineral Co. [La.] 47 S 763; DeKallands v. Washtenaw Home Tel. Co. [Mich.] 15 Det. Leg. N. 337, 116 NW 564; Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910; Moriarty v. Schwartzschild & Sulzberger Co., 132 Mo. App. 650, 112 SW 1034; Devine v. Hayward, 113 NYS 898; Elliff v. Oregon R. & N. Co. [Or.] 99 P 76; Weeks v. Fletcher [R. I.] 69 A 294; Elms v. Southern Power Co., 79 S. C. 502, 60 SE 1110; Lay v. Elk Ridge Coal & Coke Co. [W. Va.] 61 SE 156. Master is liable where act of fellow-servant and of vice-principal concur in causing injury. Wade v. McLean Cont. Co. [N. C.] 62 SE 919; Marcum v. Three States Lumber Co. [Ark.] 113 SW 357. Master is liable if his negligence concurs with an accident or negligence of fellow-servant without which injury would not have occurred. Yarber v. Chicago, etc., R. Co., 235 Ill. 589, 85 NE 928. Plaintiff was injured by negligent act of fellow-servant in throwing baled straw through opening in ceiling of barn. Held master liable, since he knew of and permitted this method of throwing down bales. Standard Oil Co. v. Brown, 31 App. D. C. 371. Plaintiff was clearing away boards in factory yard, knowing others would be thrown down from window above and servant above, threw one out knowing that plaintiff was somewhere below. Held negligence of plaintiff and fellow-servant concurred in causing injury; master not liable. Schmelzer v. Central Furniture Co. [Mo. App.] 114 SW 1043. Railway company not relieved from liability for negligence of engineer in suddenly starting train by fact that plaintiff's fellow-servant pushed him just as he was about to enter train. Ft. Worth, etc., R. Co. v. Monell [Tex. Civ. App.] 110 SW 504. Where servant was injured while engaged in raising a block and tackle by reason of the negligence of foreman in ordering work done in a certain manner together with the alleged negligence of his fellow-servants engaged in assisting him, the master was liable, regardless of whether the fellow-servants were negligent or not. Kennedy v. Swift & Co., 140 Ill. App. 141. Shock to lineman was received by reason of tape with which he was making measurements containing copper wires. Held furnishing of such tape was proximate cause of injury rendering company liable, though act of fellow-servant, in shaking tape near live-wire, contributed. Murphy v. Hudson River Tel. Co., 112 NYS 149. Violation of custom of inspecting blasts resulting in injury made master liable though negligence of fellow-servant contributed. Bjorklund v. Gray [Minn.] 118 NW 59. If defect in brake on car was direct contributing cause of rear-end collision, negligence of fellow-servant in violating rule would not defeat recovery. Welch v. Jackson & B. C. Trac. Co. [Mich.] 15 Det. Leg. N. 767, 117 NW 898. Where conditions allowed by master, keeping dynamite in open box in camp near tents, could be found cause of injuries by its explosion, fact that negligence of fellow-servant in setting fire to box contributed to cause accident would not relieve master. Froberg v. Smith [Minn.] 118 NW 57. Where sliding door was negligently hung and fell on plaintiff, concurring negligence of fellow-servant in closing it was no defense. Lochbaum v. Southwestern Box & Lumber Mfg. Co., 121 La. 176, 46 S 201. Where plaintiff and fellow-servant were acting under direct orders of vice-principal when plaintiff was injured, defendant was liable, though fellow-servant's act concurred in producing injury. Wade v. McLean Cont. Co. [N. C.] 62 SE 919. Recovery justified where servant was injured through negligent starting of a car down grade by fellow-servant, it appearing that master had failed to provide proper brake. Pioneer Fire Proofing Co. v. Clifford, 135 Ill. App. 417. Master being negligent in construction of overhead platform, plank from which fell upon plaintiff, was not relieved from liability by negligence of employes in handling it. Kroeger v. Marsh Bridge Co. [Iowa] 116 NW 125. Where foreman ordered men to proceed with loading on cable on wagon in method proposed by him, and injury to plaintiff resulted, master would not be relieved by concurring negligence of other servants, if they could be held negligent in avoiding injury to themselves. Kennedy v. Laclede Gaslight Co. [Mo.] 115 SW 407.

**37.** Brakeman missed train on which he worked, and in going back through the yards was struck by engine. He worked by the day and, his train having gone, was not on duty at the time. Held he was not fellow-servant of operatives of engine. Missouri, etc., R. Co. v. Hendricks [Tex. Civ. App.] 108 SW 745.

**38.** See post, Determining of Relation.

**39.** See post, Statutory Modification of Common-Law Fellow-Servant Doctrine.

**40.** The master is liable for negligence of a superintendent regardless of whether he was negligent in employing him. Mitchell Lime Co. v. Nickless [Ind. App.] 85 NE 728.

performance of duties for which he was employed.[41] The master is not relieved by the fact that the servant at fault violated his instructions if he was at the time performing a service for the master in furtherance of his business.[42] It is usually held that a failure to use ordinary care for the safety of other employes is negligence, rendering the master liable.[43] Whether this degree of care has been used in a par-

41. The master is not liable for the act of a fellow-servant, under a fellow-servant statute, unless the act complained of was performed while he was engaged in duties within the scope of his employment. So held under Rev. St. 1899, § 2873. Briscoe v. Chicago B. & Q. R. Co., 130 Mo. App. 513, 109 SW 93. Plaintiff engaged in loading car was assisted by truckman, and was injured by fall of material being loaded, which was suddenly released by the assistant. Held, injury was caused by negligence of truckman who was engaged in his duties at time. Id. If one who is a vice-principal in fact is negligent, and one under him, in same department, is injured, master is liable, regardless of nature of negligent act. But if negligent servant is not in fact foreman or vice-principal of injured servant, master is not liable if negligent act is that of mere fellow-servant. Suderman v. Kriger [Tex. Civ. App.] 109 SW 373.

42. Where engineer in charge of donkey engine left another incompetent man in charge, violating instructions, and such employe also violated his orders, and miner below was injured in consequence, defendant was liable. Lewis v. Mammoth Min. Co., 33 Utah, 273, 93 P 732.

43. Duty of **train crew,** knowing it was brakeman's duty to board train while moving, to run it at speed which would enable him to board it with reasonable safety. Galveston, etc., R. Co. v. Sullivan [Tex. Civ. App.] 115 SW 615. Duty of train operatives to use ordinary care to discover and avoid injury to persons on track. Missouri, K. & T. R. Co. v. Hendricks [Tex. Civ. App.] 108 SW 745. Duty of train operatives to keep lookout for persons on track and to use all means to avoid injury after discovering them. Houston & T. C. R. Co v. Burnet [Tex. Civ. App.] 108 SW 404. Where section hand was ordered to ride in caboose in freight train, company owed him duty of ordinary care for his safety, and could not escape liability for injuries caused by car being violently kicked against caboose by lack of knowledge of train crew of his position. St. Louis, etc., R. Co. v. Harmon, 85 Ark. 503, 109 SW 295.

**Evidence warranted finding of negligence: Of foreman** in giving rough order to men to throw tie on pile, in consequence of which pile fell on plaintiff. Sambos v. Cleveland, etc., R. Co. [Mo. App.] 114 SW 567. Foreman directed plaintiff to block up turntable to allow car to pass and said he would hold car until plaintiff was ready. He was negligent in releasing car. Causing it to leave track and injure plaintiff. Missouri, K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601. Foreman, vice-principal under statute, negligent in directing employe to open pipe containing caustic soda without knowing whether or not pressure was on, result being injury to employe. Haley v. Solvay Process Co., 112 NYS 25. Where plaintiff and others were unloading rails under direction and supervision of foreman, and one rail rolled on plaintiff's foot, fellow-servant rule did not apply, no act of fellow-servant being shown as cause. Wilson v. Southern R. Co., 108 Va. 822, 62 SE 972. **Superintendent** could be found negligent where he ordered plaintiff, in putting in window frames, to stand on beam on which crane ran, crane having passed over plaintiff's foot. Young v. Bradley, 114 NYS 164. Master liable where superintendent directed men to place coping stones on unfinished roof which gave way under weight, injuring plaintiff. Holt v. Milliken Bros., 114 NYS 250. Where **vice-principal** ordered servant to go into a part of mine known by him to be extremely dangerous to erect props, held that vice-principal's action was so reckless as to properly charge master with injury to servant. Tygett v. Sunnyside Coal Co., 140 Ill. App. 77. **Train crew.** Flagman injured by violent coupling made with knowledge of his position. Meachem v. Southern R. Co. [N. C.] 62 SE 879. **Switch crew** required to use reasonable care for safety of train crew, and master liable to member of train crew, injured between cars, due to reckless action of switching crew, injured man believing switching had been completed. Allen v. Wisconsin Cent. R. Co. [Minn.] 119 NW 423. **Switch engine crew** negligent in backing cars without orders, crushing foreman between car and post. Cunningham v. Neal [Tex. Civ. App.] 109 SW 455. **Running train at dangerous speed** is negligence as to brakeman injured thereby, though speed was not unlawful. Missouri, K. & T. R. Co. v. Lasater [Tex. Civ. App.] 115 SW 103. Negligence to place **torpedo** on track without warning section men or having flagman out with it as was customary. Galveston H. & N. R. Co. v. Murphy [Tex. Civ. App.] 114 SW 443. **Engineer,** knowing presence of switching crew near cars, negligent in suddenly backing cars together, signal being to move forward; should have anticipated some injury. Missouri K. & T. R. Co. v. Pennewell [Tex. Civ. App.] 110 SW 758. Recovery for brakeman's death warranted where engineer negligently backed cars when brakeman was between them coupling air hose without waiting for signal from him. Louisville & N. R. Co. v. Bell's Adm'r [Ky.] 114 SW 328. Of engineer of switch engine in failing to heed switchman's signals, and in running engine up to and against car at excessive and dangerous rate of speed, and that such negligence was cause of injury to switchman on front of engine. Murphy v. Chicago, etc., R. Co. [Iowa] 118 NW 390. Negligence of engineer in charge of engine in that he started it up suddenly, causing hook by which another was attached to pull out and strike plaintiff. Brosnan v. New York, etc., R. Co., 200 Mass. 221, 85 NE 1050.

ticular instance is usually a question of fact for the jury.[44] If the master has employed a competent man, he will not be held liable for injuries resulting from a mere error of judgment.[45] In Kentucky, in an action by an injured servant to recover on

Failure of engineer to use means at hand to prevent engine from moving after he had sent fireman under it would be negligence. Atchison, etc., R. Co. v. Mills [Tex. Civ. App.] 108 SW 480. Where employe was injured in railroad yards by **cars suddenly and violently sent down track** upon him as he was crossing track. Missouri K. & T. R. Co. v. Balliet [Tex. Civ. App.] 107 SW 906. Where fireman was killed by derailment while **engine was running backward** at dangerous speed around curve. Milton's Adm'x v. Norfolk W. R. Co., 108 Va. 752, 62 SE 960. **Employes engaged in moving heavy object** ought to have foreseen liability of injury to plaintiff working near, as they knew, by such object falling and knocking over pile of doors on plaintiff. Texas & N. O. R. Co. v. Barwick [Tex. Civ. App.] 110 SW 953.

**Evidence insufficient to show negligence of dispatcher** in sending out car with defective brake. Welch v. Jackson & B. C. Trac. Co. [Mich.] 15 Det. Leg. N. 767, 117 NW 898. Action for injuries to conductor caused by alleged negligence of **crew of another train.** Held, evidence did not show violation by other crew of rules of company. Cheek v. Seaboard Air Line R. Co. [S. C.] 62 SE 402. **Engineer** not shown negligent in moving train, causing brakeman to fall, where he testified that he did not see deceased's signal to back, but saw and followed signal of another brakeman to go forward. Matthew's Adm'r v. Louisville & N. R. Co. [Ky.] 113 SW 459. Engineer, on receiving signal to detach engine, was not negligent in backing it, since this was usual and necessary, and he was not bound to anticipate that conductor would go between cars and place himself in danger unnecessarily in coupling air hose. Dermid v. Southern R. Co. [N. C.] 61 SE 657. Evidence insufficient to show any negligence of defendant where servant was killed by train, **cars being prematurely moved,** crushing him. Halbert v. Texas Tie & Lumber Preserving Co. [Tex. Civ. App.] 107 SW 592.

**44.** Brakeman thrown from car and killed on account of sudden jar due to alleged negligence of **engineer.** Cincinnati, etc., R. Co. v. Evans, 33 Ky. L. R. 596, 110 SW 844. Fireman thrown from running board of engine by jar in coupling. Whether engineer was negligent in starting engine and making coupling without warning. Galveston, etc., R. Co. v. Mitchell [Tex. Civ. App.] 107 SW 374. Brakeman was told to ride on engine pilot by conductor and while so doing was jarred off by sudden jerk due to defect in track or negligence of engineer. Atlantic K. & N. R. Co. v. Tilson [Ga.] 62 SE 281. Whether engineer was running train at negligent and reckless speed when bridge watchman was struck. Kitchens v. Southern R. Co. [S. C.] 61 SE 1016. Engineer backed cars into others being unloaded and conductor was thrown out and killed. Negligence of engineer, and contributory negligence of conductor in giving orders to engineer, for jury. Chicago G. W. R. Co. v. Egan [C. C. A.] 159 F 40. Whether engineer was negligent in backing cars up to be coupled, brakeman being killed. Mahoning Ore & Steel Co. v. Blomfelt [C. C. A.] 163 F 827. Whether **section foreman** was negligent in ordering men to alight from moving train, and whether plaintiff was negligent in following order. Chicago I. & L. R. Co. v. Sanders [Ind. App.] 86 NE 430. Whether **employes in charge of train** and of plaintiff were negligent in starting construction train, causing him to fall as he tried to get on. Illinois Cent. R. Co. v. Tandy, 32 Ky. L. R. 962, 107 SW 715. Brakeman injured by sudden stopping of train. Galveston, etc., R. Co. v. Harper [Tex. Civ. App.] 114 SW 1168. Whether train which injured brakeman was running at **dangerous speed.** Missouri, K. & T. R. Co. v. Lasater [Tex. Civ. App.] 115 SW 103. Conductor of work train killed by **switch** being thrown while train was going on siding. Louisville & N. R. Co. v. King's Adm'r [Ky.] 115 SW 196. Whether train which brakeman had to board while in motion was being run at **dangerous speed.** Galveston, etc., R. Co. v. Sullivan [Tex. Civ. App.] 115 SW 615. Whether **hostler** getting up steam on engine ought reasonably to have foreseen danger of running into inspector at work on another engine in yard when he backed it up without notice. Galveston, etc., R. Co. v. Cochran [Tex. Civ. App.] 109 SW 261. Whether **brakeman** was negligent in throwing sack of ice off caboose which struck plaintiff, fellow brakeman, as he was about to board it. Galveston, etc., R. Co. v. Henefy [Tex. Civ. App.] 115 SW 57. In moving dead engine on turntable, rope attached to live engine and passing round snatch block struck handle of turntable and broke it, injuring plaintiff. Whether **foreman** in charge was negligent in signaling engine to move. Galveston, etc., R. Co. v. Janert [Tex. Civ. App.] 107 SW 963. Servant killed while erecting gas holder, side plate falling on him. Whether cause was **foreman's** act of superintendence, and whether such act was negligent, held for jury. Devine v. Hayward, 113 NYS 898. Whether foreman of tunnel work was negligent in ordering men forward to work after several blasts, roof being in dangerous condition and part of it falling. Toppi v. McDonald, 128 App. Div. 443, 112 NYS 821. Whether foreman's action in directing raising of elevator just as plaintiff was about to enter was negligent. Boyle v. McNulty Bros., 113 NYS 240.

**45.** Master having employed competent and experienced man to take charge of dynamiting was not liable for mistake of judgment resulting in injury to fellow-servant. McHugh v. Jones & Laughlin Steel Co., 219 Pa. 644, 69 A 90. Master held not liable for mere error of judgment of foreman. Martin v. Degnon Cont. Co., 111 NYS 359. That foreman of telephone construction crew made an error of judgment in directing cable to be spliced midway between poles, instead of near one pole, did

account of negligence of a superior servant engaged in work with him, gross negligence must be shown,[46] but in an action for the death of a servant, the statute authorizes recovery for negligence though it be not gross.[47]

*Determining of relation. Common-law rules.*See 10 C. L. 738—What facts are essential to the existence of the fellow-servant relation between two or more employes is a question of law. The existence of such facts in a particular case is a question for the jury.[48] The law of the place where the injury occurred controls.[49]

It is essential to the existence of the fellow-servant relation that the employes have a common master,[50] or at least be under one control.[51] Where an employe is furnished by his general employer to work as the servant of another, subject to the orders and directions of the latter,[52] he consents to, and does, become the fellow-servant of the latter's employes.[53]

It is commonly held that employes of a common master, working together in a common enterprise,[54] or performing duties tending to the accomplishment of the

not make master liable, splice having parted and allowed plaintiff to fall. Tweed v. Hudson River Tel. Co., 114 NYS 607.

**46.** Cincinnati, etc., R. Co. v. Evans, 33 Ky. L. R. 596, 110 SW 844. Gross negligence for train crews to disregard running orders or for dispatcher to allow two trains to run on same track in opposite directions. Illinois Cent. R. Co. v. Vaughn, 33 Ky. L. R. 906, 111 SW 707. Gross negligence for employe to throw stove out of window into passway below where he knew other employes might be passing. Swann-Day Lumber Co. v. Thomas [Ky.] 112 SW 907.

**47.** In action for death of brakeman, error to require proof of gross negligence on part of engineer. Ky. St. 1903, § 6. Cincinnati, etc., R. Co. v. Evans, 33 Ky. L. R. 596, 110 SW 844.

**48.** Question whether employes are fellow-servants is one of fact and never becomes one of law unless the facts proven show such relation so clearly to exist that all reasonable minds will readily agree that such is their relation. Gathman v. Chicago, 236 Ill. 9, 86 NE 152. Where the undisputed facts show that the relation of fellow-servants exists, the question is one of law, but if there is evidence fairly tending to prove that the persons involved are not fellow-servants, the issue should be submitted to the jury. Whether a boiler inspector is fellow-servant of one operating traveling crane used for purpose not connected with the inspection of boilers was properly submitted to jury. McAleenan Boiler Co. v. Lines, 132 Ill. App. 593. Evidence being conflicting, whether certain man who ordered defective rope used was foreman was for jury. Shirk v. Chicago, etc., R. Co., 235 Ill. 315, 85 NE 262. Whether foreman had authority to act as such and order plaintiff to do work in which he was injured. Louisville & N. R. Co. v. Mahan [Ky.] 113 SW 886. Whether servant injured was fellow-servant of one who failed to give warning of movement of cars by which injury was caused. Webster v. Atlantic Coast Line R. Co. [S. C.] 61 SE 1080. Whether night boss was vice-principal, and whether he ordered plaintiff to assist him, and whether he was responsible for injury. Jasper v. Bunker Hill & Sullivan Mining & Concentrating Co. [Wash.] 97 P 743. Court not justified in ruling that foreman in charge of men was fellow-servant of member of gang engaged in piling ties. Sambos v. Cleveland, etc., R. Co. [Mo. App.] 114 SW 567. Where engine repairer moved engine and caused steam to escape from cylinder cocks, thereby confusing plaintiff who was wheeling ashes up a nearby incline, causing him to fall, held that the question as to whether the relation of fellow-servants existed was properly submitted to jury. Chicago, etc., R. Co. v. Cukravony, 132 Ill. App. 367.

**49.** Where common-law fellow-servant rule obtained in Tennessee, where injury occurred, that rule governed case in Kentucky court, though in Kentucky statute changes fellow-servant rule. Louisville & N. R. Co. v. Keiffer [Ky.] 113 SW 433.

**50.** Employe of independent contractor could not be held fellow-servant of bridge gang of defendant, especially when at time of injury he was not engaged in his duties. Missouri, K. & T. R. Co. v. Hollan [Tex. Civ. App.] 107 SW 642. Engineer running elevator rented by his employer to a contractor was not fellow-servant of contractor's employes at work on building. Henry v. Stanley Hod Elevator Co., 114 NYS 38. Crew of street car owned and operated by one company are not fellow-servants to conductor of another car owned and operated by another company but using same tracks. South Chicago St. R. Co. v. Atton, 137 Ill. App. 364.

**51.** Winchman furnished by vessel from its own crew to operate winch while vessel was being discharged by stevedore employed by charterer, and who was subject to orders of stevedore during the work, was fellow-servant of stevedore's employes. The Brookby, 165 F 93.

**52.** Evidence held to show that plaintiff was so furnished to defendant. Munsie v. Springfield Breweries Co., 200 Mass. 79, 85 NE 840.

**53.** Machinist furnished by another held fellow-servant of defendant's employe, with whom, and under whose direction, he was engaged in repairing engine. Munsie v. Springfield Breweries Co., 200 Mass. 79, 85 NE 840.

**54.** Servants employed by same master, engaged in same occupation, such that they could foresee that negligence of fellow-servant would probably expose them to dan-

same general end or purpose,[55] are fellow-servants, though not at the time in question engaged in the same operation or on the same piece of work.[56]

The rule most frequently applied is that it is not the rank of an employe, nor the authority he exercises over other employes,[57] but the nature of the duty or service he is performing at the time which determines whether he was, at such time, a vice-principal or fellow-servant.[58] The duty of the master to use ordinary care for

ger, are fellow-servants. Harris v. Det Farenede Dampskibselskab [N. J. Err. & App.] 70 A 155. Servants engaged in same general employment are fellow-servants. Indianapolis Trac. & T. Co. v. Kinney [Ind.] 85 NE 954. Employes of same master, engaged in common enterprise, having common purpose, are fellow-servants. Missouri K. & T. R. Co. v. Hendricks [Tex. Civ. App.] 108 SW 745. Servant **throwing old lumber** out of factory window, and plaintiff engaged in **clearing it away** below in yard, were fellow-servants. Schmelzer v. Central Furniture Co. [Mo. App.] 114 SW 1043. Plaintiff engaged in **washing floor** of reservoir fellow-servant of **carpenter on roof,** whose chisel fell from roof on plaintiff. Taylor v. Washington Mill Co. [Wash.] 97 P 243. Defendant employed experienced man to build bridge, who hired such assistance as he needed, decedent being one. Man employed by defendant had **supervision of work but was engaged with others.** Held, he was fellow-servant of deceased, killed by fall of derrick which they were moving. Corey v. Joliet Bridge & Iron Co., 151 Mich. 558, 15 Det. Leg. N. 8, 115 NW 737. Plaintiff held fellow-servant of millwright with whom he was engaged in **moking repairs** on elevator. Christy v. Schwartzchild & Sulzberger Co. [C. C. A.] 160 F 657. **Candy mixer and man operating candy cutting machine,** working side by side, fellow-servants. National Candy Co. v. Miller [C. C. A.] 160 F 51. **Operator and assistant operator of metal press,** fellow-servants. Ladiew v. Sherwood Metal Working Co., 125 App. Div. 65, 109 NYS 477. **Superintendent and painter under him** held fellow-servants at common law. Kennedy v. New York Tel. Co., 125 App. Div. 846, 110 NYS 887. **Mine boss** and fire boss, required to be employed in mines by Code 1906, §§ 409, 410, are fellow-servants of **miners,** and owner or operator is not liable for their negligence in failing to keep mine safe, ample means of ventilation having been provided. Squilache v. Tidewater Coal & Coke Co. [W. Va.] 62 SE 446. **Boss of gang** of 4 or 5 section men or **track repairers** is, when not charged with duties of master, their fellow-servant, even though given power to direct the work and give orders relative thereto not involving master's duties. Indianapolis Trac. & T. Co. v. Kinney [Ind.] 85 NE 954. Both at common law and under fellow-servant statute, station **telegraph operator and locomotive engineer,** both working under orders of train dispatcher, neither having any control over the other, are fellow-servants. Strottman v. St. Louis, etc., R. Co., 211 Mo. 227, 109 SW 769. **Motorman** of street car and men operating **car which collided** with his, fellow-servants. Durkee v. Hudson Valley R. Co. [N. Y.] 86 NE 537. **Employes loading work train** fellow-servants of **engineer.** Lane v. New York Cont. Co., 125 App. Div. 808, 110 NYS 91. **Fireman** of one freight train held fellow-servant of **conductor** of another. Still v. San Francisco & N. W. R. Co. [Cal.] 98 P 672. Act of another member of **switching crew** in signaling for movement of cars while plaintiff was between them was act of fellow-servant. Union Pac. R. Co. v. Brady [C. C. A.] 161 F 719. Members of 2 **train crews** engaged in switching, fellow-servants. Nelson v. Southern R. Co. [C. C. A.] 158 F 92. Wood cutter or sawmill **employe being carried** to place of work on defendent's logging train held fellow-servant of **employes operating train,** who caused collision by running into fallen tree. Roland v. Tift [Ga.] 63 SE 133. Locomotive **engineer and switchman,** members of same switching crew, engineer working under signals from switchman, fellow-servants. Day v. Louisiana W. R. Co. [La.] 46 S 203. **Engineer** on engine and engaged in inspecting it was killed by hostler's negligence in moving it, **hostler** having charge at time. Held, fellow-servants. Broadwater v. Wabash R. Co., 212 Mo. 437, 110 SW 1084. **Brakeman** fellow-servant of other members of **train crew** who loaded chain on platform of caboose, where he fell over it. Chicago, etc., R. Co. v. Hamilton [Ind. App.] 85 NE 1044.

55. **Engineer** in charge of engine which controlled bucket used to convey sand from scows to cars, and **man engaged in adjusting** bucket and chains, fellow-servants. McCalls Ferry Power Co. v. Price [Md.] 69 A. 832.

56. **Architectural draughtsman** employed by defendant, and who had office in defendant's building, fellow-servant of **elevator operator** employed by defendant, who carried employes of defendant to and from offices in building. Fouquet v. New York, etc., R. Co., 123 App. Div. 804, 108 NYS 525.

57. Error to refuse charge that **superior servant rule** does not obtain in New Jersey, and that jury must find that promise to repair hand car, made by foreman of gang, was authorized by master in order to relieve servant of risk. Cicalese v. Lehigh Valley R. Co. [N. J. Err. & App.] 69 A 166. **Foreman** of gang employed in laying and repairing track is fellow-servant of members of gang. Id. **Difference in compensation or authority** of one employe over another held immaterial in determining their relation. Allen v. Standard Box & Lumber Co. [Or.] 96 P 1109. **Power to employ and discharge** men is not sole test of vice-principalship. It is act, not rank of servant which is decisive. Schmelzer v. Central Furniture Co. [Mo. App.] 114 SW 1043. That foreman or boss had **authority** to and did give orders to a fellow employe does not make him vice-principal. Pasco v. Minneapolis Steel & Mach. Co., 105 Minn. 132, 117 NW 479.

58. In Minnesota the test by which to determine whether a person is acting as **a**

the safety of his employes being personal and nondelegable,[59] any person charged with and engaged in the performance of any part of that duty is a vice-principal, for whose negligence in the performance of such duty the master is responsible.[60] Thus persons charged with and engaged in the performance of the duty of the master to provide and maintain a reasonably safe place of work,[61] or reasonably safe appliances,[62] or to direct the mode of work,[63] or to employ competent workmen,[64] or to

vice-principal or as a fellow-servant in a particular instance is whether at the time of injury he was entrusted with the performance of some absolute and personal duty of the master. Pasco v. Minneapolis Steel & Mach. Co., 105 Minn. 132, 117 NW 479. Neither the doctrine of separate departments, nor superior servant, nor the rank or authority of the employe, is controlling, the decisive question being the nature of his duty. Id. In determining who are fellow-servants, usual test is not whether one has power to direct services of other, but whether offending servant was in performance of some duty which master had entrusted to him and which master owed to injured servant. James v. Fountain Inn Mfg. Co. [S. C.] 61 SE 391. The giving of orders relating to the doing of the work is duty of the master and nondelegable. The giving of mere "work signals" is detail of operation which fellow-servant may perform. McDuffie v. Ocean S. S. Co. [Ga. App.] 62 SE 1008.

59. See, also, ante, § 3B, 3D, etc.

60. Any person to whom is entrusted any duty of master to servants is vice-principal. Salmons v. Norfolk & W. R. Co., 162 F 722. Any neglect of duty owed by master to employes makes him liable regardless of questions of coservice. Brice-Nash v. Barton Salt Co. [Kan.] 98 P 768. Servant represents master in doing nondelegable act, though he also engages in work with other servants. Wiley v. St. Joseph Gas Co., 132 Mo. App. 380, 111 SW 1185. Any servant, regardless of rank or title, who performs, with master's consent, one of his nondelegable duties, is vice-principal. McDuffie v. Ocean S. S. Co. [Ga. App.] 62 SE 1008. If master chooses to leave to an employe the regulation of matters which he ought to have provided for by specific rules, such employe will be regarded as his representative, and not as "fellow-servant" of laborers who do the work. Id. Test is not power to hire or discharge, but whether employe is entrusted with duties of master. Chesson v. Walker, 146 N. C. 511, 60 SE 422. An ordinary timberman, who on his own motion, tells one not accustomed to timber work in mines, and who had been taken away from his ordinary occupation of track laying, how to do the work, held, for time being, to represent master as vice-principal, although no authority had been conferred on him. Tygett v. Sunnyside Coal Co., 140 Ill. App. 77.

61. Duty to provide safe place nondelegable. Devine v. Alphons Custodis Chimney Const. Co., 110 NYS 119; Bryant Lumber Co. v. Stastney [Ark.] 112 SW 740. It being duty of powderman to shift boss to keep place of work safe and give warning of danger, they were vice-principals as to common laborer at work below. Ongaro v. Twohy [Wash.] 94 P 916. Foreman in charge of digging trench was representative of master in matter of seeing that it was kept in safe condition to work in. McCoy v. Northern Heating & Elec. Co., 104 Minn. 234, 116 NW 488. Defendant liable where its general supsrintendent left vat of hot liquid uncovered, into which servant fell. Gilbert v. Elk Tanning Co., 221 Pa. 176, 70 A 719. Persons employed to take down slate in mine entry and make it safe represented master. Notice to them of defects was notice to master. Campbell Coal Min. Co. v. Smith's Adm'r [Ky.] 115 SW 256. Relation does not exist between fireman on locomotive and superintendent of construction and foreman of bridge gang, both of whom were engaged in supervision of construction and repair of bridge, giving way of which caused fireman's injury. McCabe & Steen Const. Co. v. Wilson, 209 U. S. 275, 52 Law. Ed. 788. Employe who excavated hole in floor of engine room for purpose of repairing sewer, and who failed to properly guard it, was not fellow-servant of plaintiff, who came to repair pump and fell into excavation, former employe being engaged in performance of duty of master with reference to place of work. Sparling v. U. S. Sugar Co., 136 Wis. 509, 117 NW 1055. Evidence warranted finding that engineer in charge of steam shovel who ordered plaintiff to work in certain place, and then without warning made it dangerous, was vice-principal. Raitila v. Consumers' Ore Co. [Minn.] 119 NW 490. Where switchman, ordered to move finished car, negligently failed to uncouple or unfasten car on which plaintiff was at work, and moved it also without notice to plaintiff, the duty of the master to maintain safe place was violated, and master was liable to plaintiff, painter, for switchman's act. Koerner v. St. Louis Car Co., 209 Mo. 141, 107 SW 481. Servant who changed pulley through which cable used to haul logs ran, under direction of foreman, by reason of which cable swung agalnst plaintiff, was not fellow-servant, it being duty of master to keep place safe. Howland v. Standard Milling & Logging Co. [Wash.] 96 P 686. Repair man sent to repair machine was set to work by foreman of the department, who thereafter negligently and without warning started machine. Held this was violation of duty to provide safe place by master. Lohman v. Swift & Co., 105 Minn. 148, 117 NW 418.

62. Duty with respect to appllances nondelegable. Huber v. Whole Creek Iron Works, 125 App. Div. 184, 109 NYS 177. Duty to provide and maintain safe scaffold under Labor Law, § 18, is nondelegable. Bower v. Holbrook, 125 App. Div. 684, 110 NYS 164. One delegated to select materials for scaffold to be furnished complete to employe represents master. Barkley v. South Atlantic Waste Co., 147 N. C. 585, 61 SE 565; Id.

warn [65] or properly instruct [66] employes, or to inspect [67] and keep in repair [66] the ap-

[N. C.] 62 SE 1073. Operator of emery wheel took off guard to make change and neglected to put it back on, and wheel flew apart and piece struck plaintiff, at work 40 feet away. Held, duty to guard was continuing and nondelegable, under statute, and operator was not fellow-servant of plaintiff. Davidson v. Flour City Ornamental Iron Works [Minn.] 119 NW 483. Servant entrusted with duty of providing machine or appliance to do certain work and to employ assistants, and who hired an incompetent man, was vice-principal as to men under him using machine. Louisville & N. R. Co. v. Lile [Ala.] 45 S 699. Assistant superintendent set boy to work on boiler tubes and gave him defective sledge and prosser pins, and chip from pin struck his eye. For failure to furnish proper tools, and failure to warn and instruct boy, master was liable. Pelow v. Oil Well Supply Co. [N. Y.] 86 NE 812.

**63.** Foreman charged with duty of supervising blasting operations, who directed men and methods employed was vice-principal. Knight v. Donnelly Bros., 131 Mo. App. 152, 110 SW 687. Foreman in charge of work of connecting gas main with residence failed to take precautions to prevent escape of gas, by putting in stop box, and explosion resulted. Master liable. Wiley v. St. Joseph Gas Co., 132 Mo. App. 380, 111 SW 1185. Superintendent in charge of work of loading bridge iron on cars represented master in giving of specific order to men to do certain thing. McDuffie v. Ocean S. S. Co. [Ga. App.] 62 SE 1008. Rules of railroad company made telegraph operator responsible for movement of trains within his "block" and provided that no train should be allowed to proceed until the preceding one had cleared the next block station. Held, he was vice-principal of a member of train crew killed in collision caused by violation of rule. Salmons v. Norfolk & W. R. Co., 162 F 722. Where superintendent of works directed servants to use two certain planks for skid to load machine on wagon, and one broke, master was liable. Heck v. International Smokeless Powder Co. [N. J. Law] 71 A 150. Negligence of foreman in charge of raising logs to bridge in giving premature order to drop log was that of vice-principal. Gould Const. Co. v. Childer's Adm'r, 33 Ky. L. R. 1069, 112 SW 622.

**64.** Defendant liable for negligence of its superintendent in selecting and hiring as elevator operator one who was incompetent and had not been examined and licensed as required by ordinance. Crogg v. Los Angeles Trust Co. [Cal.] 98 P 1063.

**65.** It being master's duty to warn employes when masses of salt on premises were to be dislodged, mere employment of man to give such warning did not relieve master. He was liable for omission of warning resulting in injury. Brice-Nash v. Barton Salt Co. [Kan.] 98 P 768. Foreman of crew engaged in trestle building who directed employes and work was vice-principal whose duty it was to warn of danger. Cook v. Chehalis River Lumber Co., 48 Wash. 619, 94 P 189. Boss repairer charged with duty of warning repairers at work on cars when blue flag was to be removed, allowing switching to take place on repair track, was performing duty of master, and was vice-principal. El Paso & S. W. R. Co. v. Smith [Tex. Civ. App.] 108 SW 988. Foreman who readjusted machine without employe's knowledge and failed to notify him of change represented master. Flowers v. Louisville & N. R. Co. [Fla.] 46 S 718. Where servant was directed to remove permanent drain pipe in mine entry and warn employes, his failure to warn plaintiff, as result of which pipe fell on him, rendered master liable, the act relating to alteration of place of work, and not being a mere detail of work, entrusted to ordinary employes. Kentucky Block Cannel Coal Co. v. Nance [C. C. A.] 165 F 44. Foreman engaged in repairing twine machine suddenly started it without warning plaintiff who was mending thread on machine and her hand was injured. Foreman was not fellow-servant, duty to warn being duty of master. Fitzgerald v. International Flax Twine Co., 104 Minn. 138, 116 NW 475.

**66.** Failure of foreman or superintendent to warn or instruct inexperienced servants, where such warning and instruction are necessary, is negligence of master. Force v. Standard Silk Co., 160 F 992. Employe under whom plaintiff was placed and to whose orders he was subject, and whose duty it was to instruct plaintiff before ordering him to adjust belt, was vice-principal. Chesson v. Walker, 146 N. C. 511, 60 SE 422. Where new man was injured by negligence of man sent to instruct him in use of machine during such instruction, master was liable. Greco v. Pratt Chuck Co., 111 NYS 1000. Employe charged with duty of looking after young employe and instructing him and keeping him away from dangerous machinery was vice-principal, for whose neglect master was liable. Leopard v. Laurens Cotton Mills [S. C.] 61 SE 1029. Foreman delegated to put inexperienced man to work and to instruct him was vice-principal. Shaw v. Arkwright Mills [S. C.] 61 SE 1018.

**67.** Employe to whom was delegated duty to **inspect cars** and appliances was vice-principal. Missouri K. & T. R. Co. v. Blachley [Tex. Civ. App.] 109 SW 995. Duty of **inspecting belts** held to rest on master who was held liable for negligence of servant whose duty it was to make such inspection. Dittman v. Edison Elec. Illuminating Co., 125 App. Div. 691, 110 NYS 87. Foreman of blasting operations in quarry failed to investigate **holes after blast** and next day unexploded charge exploded, throwing rock on plaintiff. Foreman was vice-principal, charged with duty of inspection. Bjorklund v. Gray [Minn.] 118 NW 59. Though miner was under duty of ordinary care for his own safety, yet he was not fellow-servant of boss **whose duty it was to inspect** the entire mine. Norton Coal Co. v. Hanks' Adm'r, 108 Va. 521, 62 SE 335. Railroad **car inspectors** perform duty resting on company, which it cannot delegate and relieve itself of. Kiley v. Rutland R. Co., 80 Vt. 536, 68 A 713. Same rule applies to inspection of foreign cars. Id. **Licensed mine examiners and mine managers** are vice-principals of their employers, within the meaning of the mines and miners act, with respect to inju-

pliances and place of work, have been held vice-principals, for whose failure to perform the duties entrusted to them, or for whose negligence in the performance of those duties, the master has been held responsible. On the other hand, when a master has fully performed his duties, he may properly entrust to the employes themselves the details of the work,[69] and if the act or omissions complained of does not

ries sustained through the violation of their duties as required by the act. Illinois Collieries Co. v. Davis, 137 Ill. App. 15. **Manager** or **inspector** of mine whose duty it is to keep mine entries and galleries free from dust. Davis v. Illinois Collieries Co., 232 Ill. 284, 83 NE 836. **Mine examiner.** Mertens v. Southern Coal & Min. Co., 235 Ill. 540, 85 NE 743; Olson v. Kelly Coal Co., 236 Ill. 502, 86 NE 88.

**68.** Duty to keep press in repair held not mere detail of work, but part of master's duty. Staskowski v. Standard Oil Co., 111 NYS 58. Foreman in sawmill whose duty it was to keep hooks used in moving logs in repair was vice-principal as to one injured because of their defective condition. Allen v. Standard Box & Lumber Co. [Or.] 96 P 1109. Section foreman charged with duty of keeping tracks in repair, and roundhouse employe charged with duty of keeping engines in repair, were not, under common law of Indian Territory, fellow-servants of brakeman. Missouri K. & T. R. Co. v. Wise [Tex.] 109 SW 112. Servants charged with duty of inspection and repair of elevator not fellow-servants of employe injured by sudden rising of elevator. Byers v. Carnegie Steel Co. [C. C. A.] 159 F 347. Employe whose duty it was to keep jointer machine in repair was not fellow-servant of operator injured by reason of its defective condition. Bigum v. St. Paul Sash, Door & Lumber Co. [Minn.] 119 NW 481. Servant whose duty it was to see that machinery was kept in good order and who directed plaintiff to repair machine was acting as vice-principal in giving such direction. James v. Fountain Inn Mfg. Co. [S. C.] 61 SE 391. Master mechanic of steel works having entire charge of repairs and of repair men, and with discretion as to what repairs are necessary. Clegg v. Seaboard Steel Casting Co., 34 Pa. Super. Ct. 63. Superintendent told engineer to repair footboard and handhold of engine which had been sent in for repairs, and he repaired handhold negligently so that it came off when plaintiff used it. Held, master liable, as engineer represented him in making repairs, though ordinarily plaintiff's fellow-servant. Beach v. Bird & Wells Lumber Co., 135 Wis. 550, 116 NW 245.

**NOTE. Inspectors of foreign cars as vice-principals:** By the great weight of modern authority, the inspectors of a railway company in inspecting cars from a foreign road are vice-principals rather than fellow-servants of the trainmen who make use of such cars. Gottlieb v. New York, etc. R. Co., 100 N. Y. 462, 3 NE 344; Goodrich v. New York Cent., etc., R. Co., 116 N. Y. 398, 22 NE 397, 15 Am. St. Rep. 410, 5 L. R. A. 750; Eaton v. New York Cent., etc., R. Co., 163 N. Y. 391, 57 NE 609, 79 Am. St. Rep. 600; Jones v. New York, etc., R. Co., 20 R. I. 210, 37 A 1033; Gutridge v. Missouri Pac. R. Co., 94 Mo. 468, 7 SW 476, 4 Am. St. Rep. 392; Louisville, etc., R. Co. v. Williams, 95 Ky. 199, 24 SW 1, 44 Am. St. Rep. 214; Louisville, etc., R. Co. v. Bates, 146 Ind. 564, 45 NE 108; Missouri, etc., R. Co. v. Chambers, 17 Tex. Civ. App. 487, 43 SW 1090; International, etc., R. Co. v. Kernan, 78 Tex. 294, 14 SW 668, 22 Am. St. Rep. 52, 9 L. R. A. 703; Jones v. Shaw, 16 Tex. Civ. App. 290, 41 SW 690; Union Stockyards Co. v. Goodwin, 57 Neb. 138, 77 NW 357; Missouri, etc., R. Co. v. Barber, 44 Kan. 612, 24 P 969; Atchison, etc., R. Co. v. Penfold, 57 Kan. 148, 45 P 574; Budge v. Morgan's, etc., Co., 108 La. 349, 32 S 535, 58 L. R. A. 333; Moon v. Northern Pac. R. Co., 46 Minn. 106, 48 NW 679, 24 Am. St. Rep. 194; Dooner v. Delaware & H. Canal Co., 164 Pa. 17, 30 A 269; Mason v. Richmond, etc., R. Co., 111 N. C. 482, 16 SE 698, 32 Am. St. Rep. 814, 18 L. R. A. 845; Louisville, etc., R. Co. v. Reagan, 96 Tenn. 128, 33 SW 1050; Texas, etc., R. Co. v. Archibald, 170 U. S. 665, 42 Law. Ed. 1188; Baltimore, etc., R. Co. v. Mackey, 157 U. S. 72, 39 Law. Ed. 624; Kiley v. Rutland R. Co., 80 Vt. 536, 68 A 713. The case of Mackin v. Railroad Co., 135 Mass. 201, 46 Am. Rep. 456, sustains the contrary contention and has never been overruled, though in consequence of later legislation the Massachusetts court now applies the law as generally understood. Bowers v. Connecticut R. R. Co., 162 Mass. 312, 38 NE 508. The case of Smith v. Potter, 46 Mich. 258, 9 NW 273, 41 Am. Rep. 161, making the inspector a fellow-servant of the trainman, has been overruled. McDonald v. Michigan Cent. R. Co., 132 Mich. 372, 93 NW 1041, 102 Am. St. Rep. 426. The case of Anderson v. Erie R. Co., 68 N. J. Law, 647, 54 A 830, cited in support of the fellow-servant doctrine, disapproves the Mackin Case, supra, and holds it to be the railroad's duty to inspect a foreign car to discover conditions which would render the car unsafe to use, assuming its original condition to have been proper.—Adapted from opinion of Hazelton, J., in Kiley v. Rutland R. Co., 80 Vt. 536, 68 A 713.

**69.** When master has furnished reasonably safe tools, and place, and reasonably competent servants, he is not obliged to personally supervise details of work. Thus not liable for servant's negligent act unless foreman's order to do it was negligent. Schmelzer v. Central Furniture Co. [Mo. App.] 114 SW 1043. Master need not supervise or direct every detail of scaffold construction which is part of employes' work. Finan v. Sutch, 220 Pa. 379, 69 A 817. Duty of taking proper care of materials used in constructing boat is properly delegated to employes. Master not liable for injuries caused by fall of pile of wash plates placed there by foreman. Amoe v. Great Lakes Engineering Works, 151 Mich. 212, 14 Det. Leg. N. 896, 114 NW 1010. The duty of so using a reasonably safe place, or so operating reasonably safe machinery, and of so conforming to an established and reasonably safe method of work, is the duty of those to whom the work is entrusted, and for negligence in such particulars the master is not liable. Portland Gold Min. Co. v. Duke [C. C. A.] 164 F 180. Where work required taking up of

pertain to any duty of the master, but is a mere detail of the work which it is the duty of the employes to perform, it is the act or omission of a fellow-servant,[70] regardless of the rank or authority of the employe charged therewith.[71]

iron floor plates, temporary disposition of them was detail properly left to servants. Master not liable where they were piled up and pile fell upon plaintiff. Morgan Const. Co. v. Frank [C. C. A.] 158 F 964. Failure to warn plaintiff in ditch of a crack in the wall and of danger of cave in was negligence of fellow-servant, master having provided suitable materials for shoring up walls. Brown v. People's Gaslight Co. [Vt.] 71 A 204. Where master had provided suitable materials for shoring up trench walls, failure of foreman to use them or to warn man in ditch of danger from cave in, a crack having appeared in bank above, was negligence of fellow-servant. Id. Cars and appliances not being defective, negligent and improper placing of car of explosives in train was act of fellow-servant. Lewis v. Pennsylvania R. Co., 220 Pa. 317, 69 A 821. If it was duty of employes using hooks to sharpen them when necessary and accident happened because of their failure to do so, there could be no recovery from master. Allen v. Standard Box & Lumber Co. [Or.] 96 P 1109. Where defendant furnished suitable materials and proper design for construction of "bridge" used on etage, in presenting opera, negligence of stage hands would be negligence as to detail of work, and member of chorus could not recover from defendant. Hahn v. Conried Metropolitan Opera Co., 111 NYS 161. Where defendant employed signalman to give signals, etc., for movement of crane, his negligence in failing to warn employes would be, at common law, negligence of fellow-servant. Palmieri v. Pearson, 112 NYS 684. Defendant having employed competent foreman in quarry not liable for his negligence in removing tree in course of work, this being mere detail. Feola v. Orange County Road Const. Co., 114 NYS 70.

70. Elevator door being provided, that operator left it open was not chargeable to master. Gobeil v. Ponemah Mills [R. I.] 69 A 684. Regulation of packing under roller of ironing machine being part of operator's duty, negligence of superintendent in putting packing under it was that of fellow-servant. Calhoun v. Holland Laundry, 220 Pa. 281, 69 A 756. Negligence of trainmaster in operating cars is that of fellow-servant as to expressman and freight checker on cars. Indiana Union Trac. Co. v. Pring, 41 Ind. App. 247, 83 NE 733. Where setting up of appliances for unloading vessel was entrusted to servants as a part of their work, one employed to assist in unloading was no less their fellow-servant because he was hired after the appliance had been set up. Loud v. Lane, 103 Me. 309, 69 A 270. Master provided suitable appliances and apparatus for unloading coal from vessels and left duty of setting them up to servants who did the unloading. Held, not liable for injuries caused by negligence in setting them up. Id. "Strawboss" in charge of work of raising casting ordered plaintiff to move a block which had been placed under it, and when plaintiff said he was afraid it might fall, as it had done before, boss said it was hooked up better than before. Plaintiff undertook to move block and casting fell on him. Held, boss was fellow-servant. Pasco v. Minneapolis Steel & Mach. Co., 105 Minn. 132, 117 NW 479. Master supplied derrick and appliances to set it up properly, and it was moved from place to place, and set up by employes under direction of foreman. Held, latter was fellow-servant. Master not liable for failure to use sufficient number of guy ropes, causing fall of derrick. Christiansen v. Cane Co. [N. J. Law] 69 A 453. Duty to so operate match machine as not to allow paraffine to escape on to floor, and to keep floor clean, may be delegated to servant, and when so delegated neglect of it resulting in injury to coemploye does not make master liable. De Young v. Federal Match Co. [N. J. Law] 69 A 500. Duty of blocking loose car truck in car barn to prevent its moving rested on servants engaged in repairing cars and who placed it where it was. Connolly v. North Jersey St. R. Co. [N. J. Law] 69 A 487. Section foreman's failure to inform section hand about delayed train which struck him was negligence of fellow-servant. House v. Lehigh Valley R. Co., 113 NYS 155. Failure of telegraph operator to inform foreman would also be negligence of fellow-servant of section hand. Id. Master engaged in blasting with dynamite provided sufficient supply of cartridges and fuses. Held, negligent selection by foreman of too short a fuse and attaching same to cartridge was act relating to mere detail of work, as to which foreman was fellow-servant of other employes. Mahoney v. Cayuga Lake Cement Co., 110 NYS 549. Signal man of electric railway stationed at railroad crossing to signal motormen of cars held fellow-servant of motormen and conductors, rules requiring cars to wait for signal before crossing. Cox v. Delaware & Hudson Co., 128 App. Div. 363, 112 NYS 443.

71. While engaged with other servants in common employment, foreman or boss is fellow-servant. Pasco v. Minneapolis Steel & Mach. Co., 105 Minn. 132, 117 NW 479. If the negligent act of a vice-principal was not done in the exercise of his representative authority, but was that of colaborer, it is the act of fellow-servant. Robinson v. St. Louis & S. F. R. Co. [Mo. App.] 112 SW 730. Master not liable for negligence of superintendent of factory in performing delegable duty in detail of work. Ferry v. American Suction Gas Producer Co. [Mich.] 15 Det. Leg. N. 458, 116 NW 1073. Where foreman assigned plaintiff to work of using the spacer in winding wire on lathe, but himself assisted and co-operated, the rule of fellow-servants applied. Allen v. Western Elec. Co., 131 Ill. App. 118. Where foreman ordered telegraph wire to be cut and strung over a live wire belonging to a third party, but himself assisted in doing it, injury to servant not chargeable to master, and instruction to that effect should have been given. Western Union Tel. Co. v. Nolan, 132 Ill. App. 427. Plaintiff injured while moving car wheel by reason of foreman's act in kicking it, causing part of conveyance to strike plaintiff. Foreman was in charge of

But the authority conferred upon and exercised by employes is often applied as a test by which to determine whether they are vice-principals.[72] Thus employes who are placed in absolute control or management of an entire business or of a distinct department of a business,[73] or who have charge of a particular piece of work with authority to control or direct the men engaged thereon,[74] are held to represent the master. One who is thus made a representative of the master does not lose his representative character by engaging occasionally in work as an ordinary employe.[75]

In some jurisdictions the test applied to determine whether employes are fellow-servants is the extent to which they associate in the performance of their usual

foundry, with power to hire and discharge men, but was himself subject to yard foreman, and to superintendent who exercised active general control. Held, they were fellow-servants. Portae v. Griffin Wheel Co. [C. C. A.] 160 F 648.

72. **Superintendent** who employed, paid and discharged men and directed work was vice-principal. Brown v. Lennane [Mich.] 15 Det. Leg. N. 852, 118 NW 581. **Foreman** held not fellow-servant of injured employe when giving order directing work of moving boiler. Jacobsen v. Heywood & Morrill Rattan Co., 236 Ill. 570, 86 NE 110. **Master of barge** with authority to employ help and direct all work was representative of master. Pennsylvania R. Co. v. Hartell [C. C. A.] 157 F 667. **Master of vessel** is not fellow-servant of members of crew. Fallon v. Cornell Steamboat Co., 162 F 329. **Wire chief of telephone company** under whose orders plaintiff worked was vice-principal. Texarkana Tel. Co. v. Pemberton [Ark.] 111 SW 257. **One who had authority over men and work** and entire supervision and direction was vice-principal of men under him. Hagan v. Gibson Min. Co., 131 Mo. App. 386, 111 SW 608. Boy was directed to assist operator of trip hammer and keep dies clean, and was told by operator soon after beginning work to assist in removing dies, and in so doing was hurt by hammer, which fell owing to operator's negligence. Held, that boy had right to assume that he was to obey orders of operator, and that latter was not fellow-servant. Avery v. Cottrill's Guardian [Ky.] 107 SW 332.

73. "Inside foreman" in charge of factory and men, with power to direct them, was representative of master in directing servant to assist in certain work. National Fire Proofing Co. v. Andrews [C. C. A.] 158 F 294. One placed in entire charge of foundry, with power to hire and discharge men and direct work, was vice-principal, for whose negligence in directing unsafe mold to be used master was liable. Hickey v. Caldwell, 221 Pa. 545, 70 A 855. One in charge of floor of factory, directing workmen, held not fellow-servant of plaintiff engaged in moving lumber in yard below. Schmelzer v. Central Furniture Co. [Mo. App.] 114 SW 1043.

74. Employers liable for acts and conduct of persons placed in charge of work. Ballard & Ballard Co. v. Lee's Adm'r [Ky.] 115 SW 732. Temporary absence of foreman who left plaintiff, common laborer, in charge, did not make latter vice-principal. Cleveland, etc., R. Co. v. Beale [Ind. App.] 86 NE 431. Employe who took foreman's place during latter's absence held representative of master. Johnson v. Motor Shingle Co. [Wash.] 96 P 962. Person left in charge of work by regular foreman becomes vice-principal, for whose negligence in giving orders in execution of work master is responsible. Gould Const. Co. v. Childers' Adm'r, 33 Ky. L. R. 1069, 112 SW 622. Foreman of construction gang with entire control of repair car, men and material. East St. Louis & S. R. Co. v. Hill, 133 Ill. App. 14. One having charge of a particular piece of work by virtue of authority conferred upon him by the master is a vice-principal. Foreman of switching crew. Chicago Terminal Transfer R. Co. v. Reddick, 131 Ill. App. 515. Where plaintiff, engaged as one of crew to replace boiler, under foreman's direction as to how work was to be done, was injured by explosion of gasket, it could not be held as a matter of law that injury was caused by negligence of fellow-servant. Ragsdale v. Illinois Cent. R. Co., 140 Ill. App. 71. Superintendent present, directing men and manner of work, represented master, and directing work to be done in dangerous way without warning made master liable. Connolly v. Hall & Grant Const. Co., 192 N. Y. 182, 84 NE 807. Powderman and shift boss, in charge of blasting and drilling operations, not fellow-servant of common laborer engaged in shoveling earth into cars. Ongaro v. Twohy [Wash.] 94 P 916. If employe entrusted with dynamite work and duty of removing unexploded blasts was vested with discretion as to time of removing such blasts, he acted, in so doing, as representative of master. Polo v. Palisade Const. Co. [N. J. Err. & App.] 70 A 161. Where bridge inspector was instructing new foreman as to location of bridges, but was himself actually superintending work of loading pilings, held foreman was merely nominal, but inspector real vice-principal, for whose actions master was responsible. Shirk v. Chicago, etc., R. Co., 140 Ill. App. 22.

75. Superintendent acting as motorman in making test of car was not fellow employe of another motorman, but vice-principal. Latsha v. Shamakin & E. Elec. R. Co. [Pa.] 70 A 1002. Foreman in charge of repair car acted as motorman and ran car at such speed that employe was thrown off. Held not a fellow-servant. East St. Louis & S. R. Co. v. Hill, 133 Ill. App. 14. Section foreman, in charge of crew on hand car, directed men to run it at high speed to reach certain point before freight train reached it, and on suddenly seeing freight ahead applied brake, without warning, so that plaintiff, member of section crew, was thrown off and run over by car. Held, foreman was vice-principal though he himself was assisting men. Tills v. Great Northern R. Co. [Wash.] 97 P 737.

duties.[76] Thus it is held that employes engaged in different departments of a business are not fellow-servants.[77]

A child whose employment violates a statute will not be held a fellow-servant of other employes.[78]

**76. Illinois:** The test is whether the servants in question were co-operating with each other at the time, or whether their line of employment or usual duties necessarily brought them into habitual association, so that they might exercise upon each other a mutual influence promotive of caution. City's servant sent to make measurements on drawbridge **not fellow-servant** of those whose duty it was to operate the machinery of the bridge, by whose negligence he was injured. Gathman v. Chicago, 236 Ill. 9, 86 NE 152. Common laborer employed in clearing away debris while mechanics were making repairs and raising floor under direction of vice-principal was not fellow-servant of such mechanics, having nothing to do with them. Williams v. Morris, 237 Ill. 254, 86 NE 729. Doctrine of fellow-servants does not apply as between chief engineer in charge of unloading boiler and workman injured while working under his supervision. Heywood & Morrill Rattan Co. v. Jacobson, 140 Ill. App. 319. Death of servant caused by act of another servant working under a different foreman. Not fellow-servants. Illinois Steel Co. v. Jenco, 136 Ill. App. 555. Waitress riding on elevator and elevator operator are not fellow-servants. Cullen v. Higgins, 138 Ill. App. 168. Relation of fellow-servants did not exist between plaintiff who was injured by explosion of molten iron in mould, caused by defective vent, and other employes whose duty it was to make moulds and cores and to provide proper vents. The Sargent Co. v. Shukair, 138 Ill. App. 380. Street car conductors on different lines who may not meet at a crossing but at long intervals held not to be fellow-servants. Bennett v. Chicago City R. Co., 141 Ill. App. 560. Craneman negligently picking up ladle without instruction from deceased, under whose direction he usually did it, **held to be fellow-servant.** Illinois Steel Co. v. Lulenski, 136 Ill. App. 332. Rule of fellow-servants applied to foreman who himself helped to unload timbers from car, one of which fell on plaintiff who straightened out timbers as foreman threw them down. Duffy v. Chicago, 137 Ill. App. 195. An engine cleaner standing upon tender of coaling engine, injured by starting of engine through signal of another engine cleaner engaged in same work of coaling, held as a matter of law to be fellow-servant to the other, and also to hostler in charge of engine. Heimberger v. St. Louis Iron Mountain & S. R. Co., 140 Ill. App. 241. Helper to elevator man is fellow-servant, and cannot recover for negligent act of elevator man while in act of greasing elevator shaft. Latter not representative of company. Peterson v. Sears, Roebuck & Co., 141 Ill. App. 592.

**Missouri:** Only those employes are fellow-servants who are so associated and related in their work that they can observe and have an influence over each other's conduct and can report delinquencies to a common corrective power or head. Koerner v. St. Louis Car Co., 209 Mo. 141, 107 SW 481. Painter employed in painting cars, working under painters' foreman, held not fellow-servant of switchman whose duty it was to assist in moving cars which were finished as ordered, where switchman negligently moved car on which painter was at work, causing him to fall from scaffold. Id.

**West Virginia:** Persons engaged in the business of a common master, and so related that each in the exercise of ordinary sagacity ought to foresee, when accepting his employment, that he would be exposed to injury in the event of negligence of others, and they to injury from his, are fellow-servants. Kniceley v. West Virginia M. R. Co. [W. Va.] 61 SE 811. Plaintiff engaged in loading lumber from one car to another held fellow-servant of switching crew who negligently moved car he was on, injuring him. Id.

**77.** The rule that servants in wholly separate departments are not fellow-servants applies to any large business where men are divided and employed in separate departments under different foremen, and not only to railroads. Koerner v. St. Louis Car Co., 209 Mo. 141, 107 SW 481. Servants belong to separate departments when their services are so widely separated, so wanting in contact, that some unusual event must occur to direct results of negligence of one to the other. Lukic v. Southern Pac. Co., 160 F 135. Crew of one vessel not fellow-servants of crew of another, owned by same master. Fallon v. Cornell Steamboat Co., 162 F 329. Plaintiff employed on lower floor of mill to look after and oil machinery was not fellow-servant of employe engaged on second floor, having different duties, who threw out stave which struck plaintiff. Swann-Day Lumber Co. v. Thomas [Ky.] 112 SW 907. Mine employe whose duty it was to open door of entry on approach of motor, to open switch and place bucket of sand near door, held not fellow-servant of motorman, the two not being associated in work and latter having no control over former and having no knowledge of his qualifications. Black Diamond Coal & Min. Co. v. Parker [Ky.] 115 SW 215. Plaintiff, member of construction crew, engaged in loading and unloading cars, was not fellow-servant of engineer and men engaged in running train, they being engaged in separate departments. Illinois Cent. R. Co. v. Tandy, 32 Ky. L. R. 962, 107 SW 715. Men employed to load cars, each working separately at different places, and paid according to amount of work done by him, were not fellow-servants. Missouri K. & T. R. Co. v. Romas [Tex. Civ. App.] 114 SW 157. Where two gangs of workmen under separate foremen were engaged in constructing telephone line, one in setting poles and other in stringing wires, members of two gangs were not fellow-servants. Ault v. Nebraska Tel. Co. [Neb.] 118 NW 73.

**78.** Where child under 14 was employed in factory contrary to statute, another employe with whom he was engaged in cleaning machine could not be regarded as his fellow-

*Railroad employes.*[See 10 C. L. 745]—Holdings as to the relation existing between railroad employes are collected in the note.[79]

*Statutory modification of common-law fellow-servant doctrine.*[See 10 C. L. 746]—The operation of the common-law rule that there can be no recovery for negligence of a fellow-servant has been limited by statute in many states. In other states, statutes supply the tests by which it may be determined whether an employe charged with negligence was a fellow-servant or vice-principal of the injured employe. In the notes are grouped, by states, holdings as to the validity and application of such statutes.[80] Fellow-servant statutes are not invalid because applicable only to rail-

servant. Syneszewski v. Schmidt [Mich.] 15 Det. Leg. N. 509, 116 NW 1107.

**79. Note:** This collection of cases is merely for the convenience of those desiring to examine railroad cases. They are also considered in the preceding paragraphs in connection with principles under which they were decided. [Ed.]

**Train crew,** fellow-servants of employe, being carried to place of work. Roland v. Tift [Ga.] 63 SE 133. Members of two **train crews** engaged in switching. Nelson v. Southern R. Co. [C. C. A.] 158 F 92. **Train crew** not fellow-servants of member of **construction gang** engaged in loading and unloading cars. Illinois Cent. R. Co. v. Tandy, 32 Ky. L. R. 962, 107 SW 715. Brakeman fellow-servant of other members of **train crew,** who loaded chain on caboose, where he fell over it. Chicago, etc., R. Co. v. Hamilton [Ind. App.] 85 NE 1044. Locomotive engineer and switchman, **members of switching crew,** are fellow-servants, where engineer moves according to signals given by switchman. Day v. Louisiana Western R. Co., 121 La. 180, 46 S 203. Two brakeman engaged in switching, fellow-servants. Matthews' Adm'r v. Louisville & N. R. Co. [Ky.] 113 SW 459. Members of switching crew, fellow-servants. Union Pac. R. Co. v. Brady [C. C. A.] 161 F 719. By common law of Indiana, **conductor** of freight train, and **engineer** and **fireman** of an engine operated on same track but separate from train, are fellow-servants. Wabash R. Co. v. Hassett, 170 Ind. 370, 83 NE 705. **Engineer** and **hostler** fellow-servants where both were on engine, former to inspect and latter in charge, and engineer was killed by hostler's negligence in moving engine. Broadwater v. Wabash R. Co., 212 Mo. 437, 110 SW 1084. **Fireman** on one freight train held fellow-servant of **conductor** of another. Still v. San Francisco, etc., R. Co. [Cal.] 98 P 672. In the absence of proof to the contrary, an **engineer** will be regarded as superior to his **fireman,** and a finding by the jury that the injury to the fireman was caused by the negligence of fellow-servants is inconsistent with a finding that the engineer assured the fireman it was safe to go under the engine, although no precautions had been taken to protect him while there. Cincinnati, Hamilton & D. R. Co. v. Tangeman, 11 Ohio C. C. [N. S.] 379. **Conductor** in charge of railroad train is vice-principal as to **brakemen** and **flagmen** employed on such train, and it is duty of latter to obey all reasonable rules and orders given by conductor in relation to work. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761. **Conductor** and **engineer** of train not fellow-servants of master mechanic, injured while riding on engine. Tabor v. St. Louis, etc., R. Co., 210 Mo. 385, 109 SW 764. **Crossing tender** and **switchman,** fellow-servants. Dixon v. Grand Trunk W. R. Co. [Mich.] 15 Det. Leg. N. 936, 118 NW 946. **Employes loading work train** fellow-servants of **engineer.** Lane v. New York Cont. Co., 125 App. Div. 808, 110 NYS 91. **Brakeman** and **car inspector** not fellow-servants under statutes in force at time brakeman was injured. St. Louis, etc., R. Co. v. Holmes [Ark.] 114 SW 221. **Checkman** in charge of express and freight, and **trainmaster** who negligently operated cars, fellow-servants. Indiana Union Trac. Co. v. Pring, 41 Ind. App. 247, 83 NE 733. **Section foreman,** in charge of crew on hand car, held vice-principal as to plaintiff, member of crew, who was thrown from car by foreman's negligent act in suddenly stopping it. Tilis v. Great Northern R. Co. [Wash.] 97 P 737. **Section foreman** and **roundhouse employe** not fellow-servants of **brakeman** (under common law of Indian Territory). Missouri K. & T. R. Co. v. Wise [Tex.] 109 SW 112. Failure of **section foreman** to tell section man about train which struck him was negligence of fellow-servant. House v. Lehigh Valley R. Co., 113 NYS 155. Boss of gang of 4 or 5 **section men** or track repairers is their fellow-servant, if not entrusted with master's duties. Indianapolis Trac. & T. Co. v. Kinney [Ind.] 85 NE 954. **Telegraph operator,** as to failure to tell section foreman of delayed train, was fellow-servant of **section man** struck by such train. House v. Lehigh Valley R. Co., 113 NYS 155. Station **telegraph operator** and locomotive **engineer,** both under orders of train dispatcher, and neither having any control over other, held fellow-servants. Strottman v. St. Louis, etc., R. Co., 211 Mo. 227, 109 SW 769. **Train dispatcher** vice-principal as to member of train crew killed by former's violation of rule as to running of trains. Salmons v. Norfolk & W. R. Co., 162 F 722. **Street car dispatcher,** entrusted with management of cars, is "superintendent" under Rev. Laws, c. 106, § 71, cl. 2. Fitzgerald v. Worcester, etc., R. Co., 200 Mass. 105, 85 NE 911. **Motorman** of street car fellow-servant of men operating car which collided with his. Durkee v. Hudson Valley R. Co. [N. Y.] 86 NE 537. **Signal man** of electric railway stationed at crossing to signal cars when to cross held fellow-servant of **conductors** and **motormen.** Cox v. Delaware & Hudson Co. 128 App. Div. 363, 112 NYS 443.

**80. Act of Congress** of June 11, 1906, commonly known as the Employer's Liability Act, changing the fellow-servant doctrine is not unconstitutional in so far as it affects the District of Columbia and the Territories, since its provisions are severable. Hyde v.

Southern R. Co., 31 App. D. C. 466. But see 10 C. L. 749, n. 86, 87; p. 704, n. 9, 10.

**Alabama:** Under Civ. Code 1907, § 3910, subsec. 2, making master liable for injuries caused by negligence of one exercising superintendence, relation existing between superintendent and injured employe is immaterial. Collier v. Tennessee Coal, Iron & R. Co. [Ala.] 46 S 487. Complaint alleging that plaintiff was injured by reason of negligence of superintendent in allowing work to be done in negligent and dangerous manner, as result of which rock rolled down upon plaintiff, held good. Id. Boss in charge of men in quarry could not be held negligent in ordering employe to shovel "sprawl" or loose rock in place where rock was liable to fall on him, unless he, boss, was superintendent charged with duty of seeing that place was safe or knew that it was unsafe. Alabama Consol. Coal & Iron Co. v. Hammond [Ala.] 47 S 248. Employe at work in elevator shaft was struck by descending hoist, and sought to recover from defendant on ground that foreman negligently ordered hoist to descend without seeing if shaft was clear. Held evidence showed no duty of foreman to examine shaft before giving such order; hence no liability under Acts 1907, p. 595, c. 80, § 3910. General Supply & Const. Co. v. Shelton [Ala.] 47 S 593. Whether member of construction gang, thrown off car which collided with engine owing to failure of switchman to throw switch in time, was engaged at time about business of railroad, and in scope of his duties held for jury. Pear v. Cedar Creek Mill Co. [Ala.] 47 S 110.

**Arkansas:** Section foreman not fellow-servant of members under him, under Kirby's Dig. § 6658. St. Louis, etc., R. Co. v. Harmon, 85 Ark. 503, 109 SW 295. Section hand not fellow-servant of train operatives, they being engaged in different departments, under Kirby's Dig. § 6659. Id. Brakeman and car inspector not fellow-servants under statutes in force when brakeman was injured. St. Louis, etc., R. Co. v. Holmes [Ark.] 114 SW 221.

**Colorado:** In action under Laws 1901, p. 161, c. 67, for death of "mucker" in mine caused by negligence of coemployes, where defendant claims that alleged negligent servants were acting outside the scope of their employment, the burden is upon it to establish such defense. Big Five Tunnel Ore Reduction & Transp. Co. v. Johnson [Colo.] 99 P 63. Evidence sufficient to warrant finding that men who did drilling and blasting customarily assisted "muckers" when latter were behind with their work; that defendant was chargeable was notice of the custom; and that men were within scope of employment at time of injury. Id. Notice of such custom by foreman would be imputed to defendant. Id. Evidence admissible to show existence of custom. Id. Where injury was caused by collision of loaded with empty tram car, evidence sufficient to sustain finding of negligence of servants in charge of loaded car. Id. Action under Laws 1893, c. 77, for death of brakeman alleged to have been caused by engineer. Proof that engineer was in charge of engine on defendant's regular train, without objection, sufficient, without contradictory evidence, to show that he was "in charge of locomotive" and so within statute. Brady v. Florence & C. C. R. Co. [Colo.] 98 P 321. Evidence was held sufficient to take question to jury. Id. Also question whether he negligently backed train against cars, between which brakman was, without signals. Id. There is no statute in Colorado abrogating fellow-servant rule, as Act March 28, 1901 (Laws 1901, p. 161), never became law because not properly passed. Portland Gold Min. Co. v. Duke [C. C. A.] 164 F 180.

**Florida:** Gen. St. 1906, § 3150, limits rule that employe cannot recover for injuries caused by negligence of fellow-servants to cases where injured servant was guilty of contributory negligence. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761.

**Georgia:** Civ. Code 1895, § 2321, which raises presumption of negligence against railroad companies when damage is done "by the running of the locomotive or cars or other machinery," does not apply where engineer in charge of stationary engine in power plant of electric railway is person charged with negligence. Hubbard v. Macon R. & L. Co. [Ga. App.] 62 SE 1018. Brakeman does not assume risk of negligence of engineer or conductor under Civ. Code 1895, § 2323. Atlantic, etc., R. Co. v. Tilson [Ga.] 62 SE 281. Railway employes do not assume risks growing out of negligence of fellow-servants. Southern R. Co. v. Rutledge [Ga. App.] 60 SE 1011. Employes of a common master, engaged in labor for the furtherance of the general purpose of the business in which they contract to serve, are fellow-servants, within meaning of Civ. Code 1895, § 2610, providing that, except in case of railroad companies, master is not liable for injuries arising from negligence or misconduct of other servants about the same business. Georgia Coal & Iron Co. v. Bradford [Ga.] 62 SE 193. Teamster employed by coal and iron company to assist in hauling boiler from furnace plant of company to coal mines, to be there used in getting out coal for use in company's furnace and locomotives, is fellow-servant with engineer and fireman in locomotive operated in yards of and in connection with said furnace plant, and he cannot recover for injuries due to their negligence. Id.

**Indiana:** Burns' Ann. St. 1901, § 7083, is valid, though applicable only to railroads. Indianapolis Trac. & T. Co. v. Kinney [Ind.] 85 NE 954. Act not applicable where employe was injured by foreman's negligence while unloading rails from flat car, danger not being peculiar to use and operation of trains on railroads. Id. Character of employment and not character of employer is test by which to determine applicability of Burns' Ann. St. 1901, § 7083, liability act, making corporations liable for acts of one in their service having charge of locomotive or train on a railway, resulting in injury. American Car & Foundry Co. v. Inzer [Ind. App.] 86 NE 444. Act held applicable where employe was killed by train on track of car manufacturing company, owing to negligence of superintendent who directed movement of train, causing employe on track to be run over, his position being known to superintendent. Id. Foreman of gang employed in bridge construction held vice-principal under statute. Cleveland, etc., R. Co. v. Beale [Ind. App.] 86 NE 431. Complaint based on Burns' Ann. St. 1901, § 7083, sub. 2, demurrable, that section having been held unconstitutional by supreme court. American Car

& Foundry Co. v. Applegate [Ind. App.] 85 NE 724.

**Kansas:** Gen. St. Kansas 1889, § 1251, making railroad companies liable for injuries caused by negligence of agents, etc., applies where trackman is killed while being carried home from work on defendant's work train. Missouri Pac. R. Co. v. Larussi [C. C. A.] 161 F 66. Under Gen. St. Kansas 1889, § 1251, which exempts railway employes from assumptions of risk of negligence of fellow employes, the death of an employe, while being carried home from work, on a work train, in a collision between two trains, raises presumption of negligence of defendant, just as though he were a passenger. Id.

**Massachusetts:** Under Rev. Laws, c. 106, § 71, superintendent, present, directing method of work, remained representative of master, though he took hold of truck and assisted employes in work being done. Connolly v. Booth, 198 Mass. 577, 84 NE 799. Under the statute making master liable for acts of "superintendent," the common-law rule that a master is not liable if he furnishes suitable appliances, of which the servants select those which are unsafe, does not obtain. Doherty v. Booth, 200 Mass. 522, 86 NE 945. One in full charge of work of hoisting heavy casting could be found to be superintendent. Bowie v. Coffin Valve Co., 200 Mass. 571, 86 NE 914. Foreman who was in charge of pile driving and of moving apparatus, who directed the work, employed men, etc., was superintendent within Rev. Laws, c. 106, § 71, though he also worked with the men. Robertson v. Hersey, 198 Mass. 528, 84 NE 843. Act of engineer in starting hoist engine not an act of superintendence, though regular superintendent was absent. Moore v. Curran, 198 Mass. 60, 84 NE 113. If superintendent selected or directed use of unsafe material for staging, master would be liable for resulting injury. Donohue v. Buck & Co., 197 Mass. 550, 83 NE 1090. Selecting compound pry (one timber on another) for use in moving pile driver could be found to be an act of superintendence. Robertson v. Hersey, 198 Mass. 528, 84 NE 843. Evidence held to warrant finding that plaintiff's coemploye was superintendent in charge of department of defendant's business, and that his negligence caused collision between dummy engine and bucket car in which plaintiff was injured. Mattson v. American Steel & Wire Co., 200 Mass. 360, 86 NE 896. That employe, by reason of his experience, gave directions regarding the work did not make him superintendent. Stevens v. Strout, 200 Mass. 432, 86 NE 907. Rev. Laws, c. 106, § 71, cl. 3, making employer liable for negligence of one in charge of engine or train on railroad, makes manufacturer liable for negligence of engineer in charge of switch engine in factory yards. Hines v. Stanley-G. I. Elec. Mfg. Co., 199 Mass. 522, 85 NE 851. Street car dispatcher to whom is entrusted management of cars on tracks is a superintendent within Rev. Laws, c. 106, § 71, cl. 2. Fitzgerald v. Worcester, etc., R. Co., 200 Mass. 105, 85 NE 911. Rev. Laws 1902, c. 106, § 71, cl. 3, making vice-principal one in charge of train on railroad, did not apply to electric roads prior to St. 1908, p. 370, c. 420 (which expressly makes it applicable to trains on elevated roads), and hence accident on electric road prior to 1908 law is not within statute. McGilvery v. Boston El. R. Co., 200 Mass. 551, 86 NE 893.

**Minnesota:** Under Minnesota Gen. St. 1894, § 2701, engineer's negligence renders mining company, operating ore railroad, liable for dsath of brakeman. Mahoning Ore & Steel Co. v. Blomfelt [C. C. A.] 163 F 827. In building track extension, pile driver was built on flat car and car was moved back and forth over track on trestle while it was being built. Plaintiff, carpenter, at work on trestle, was injured by movement of car. Held this was railroad hazard within meaning of statute. Johnson v. Great Northern R. Co., 104 Minn. 444, 116 NW 936.

**Mississippi:** Ann. Code 1892, § 3559, giving railroad employes right of action for injuries caused by act or omission of superior agent or officer, or person in another department, or fellow-servant on another train of cars or engaged about a different piece of work, is valid, railroad businsss being inherently dangerous. Mobile, etc., R. Co. v. Hicks, 91 Miss. 273, 46 S 360. Where section foreman was walking beside track and was killed by car from passing train being derailed and falling over upon him, owing to negligence of engineer in running train at excessive speed over new track, decedent was within statute. Id. Test is whether injured employe is engaged in his duties and injured by other employes engaged in their duties. Id. In action for death of railroad employe, under Const. § 193, in order to take case out of fellow-servant rule, it is only necessary to show that engineer who was negligent was superior whose orders deceased was bound to obey; not necessary to show deceased was executing orders of engineer at time. Yazoo & M. V. R. Co. v. Washington [Miss.] 45 S 614.

**Missouri:** Rev. St. 1899, § 2874, makes all persons engaged in service of railroad corporation who are entrusted with authority, superintendence and control of other persons in the service or with authority to direct any servants, vice-principals as to such other servants. Section 2875 provides that all persons engaged in the common service of a railroad company, who, while so engaged, are working together at the same time or place, neither being entrusted with superintendence over other servants, are fellow-servants with each other. Foreman in charge of switching was not fellow-servant of brakeman whom he ordered to go between cars to adjust coupler, and then negligently allowed cars to "drift" against cars he was working between. McGuire v. Quincy, etc., R. Co., 128 Mo. App. 677, 107 SW 411. Petition showing that vice-principal was assisting in loading trucks and negligently removed blocks from wheels, causing them to roll on plaintiff, shows that he was fellow-servant at time, within Ann. St. 1906, § 2875. Robinson v. St. Louis & S. F. R. Co. [Mo. App.] 112 SW 730. Under Rev. St. 1899, §§ 2874, 2884, conductor and engineer of train were not fellow-servants of master mechanic, who was injured through their negligence while riding on engine. Tabor v. St. Louis, etc., R. Co., 210 Mo. 385, 109 SW 764. Plaintiff, engaged in transferring baggage between defendant's trains, using elevator for purpose, was engaged in "operation of railroad" within Ann. St. 1906, § 2873. Turner v. Terminal R. Ass'n, 132 Mo. App. 38, 111 SW 841. Held, also, that fellow-serv-

ant's negligence in loading baggage on truck was cause of plaintiff's injury. Id. Negligence of fellow-servant not assumed risk under Rev. St. 1899, § 2873. Briscoe v. Chicago, B. & Q. R. Co., 130 Mo. App. 513, 109 SW 93. Work of reconstructing railway bridge with pile driver held "operation of railroad" within Rev. St. 1899, § 2873, making railroad corporations liable for servant's negligence. Huston v. Quincy, etc., R. Co., 129 Mo. App. 576, 107 SW 1045. Manufacturing corporation, operating several miles of tracks, with cars, terminals, etc., and employing men to operate them, held "railroad" corporation within meaning of Rev. St. 1899, § 2873. Penney v. St. Joseph Stockyards Co., 212 Mo. 309, 111 SW 79. Missouri fellow-servant law does not extend to employes in candy factory engaged in mixing and cutting candy. National Candy Co. v. Miller [C. C. A.] 160 F 51. Negligent servant must have been engaged within scope of duties under Rev. St. 1899, § 2873. Briscoe v. Chicago, B. & Q. R. Co., 130 Mo. App. 513, 109 SW 93. Defendant liable for injury to car loader caused by negligence of truckman working with him. Id. Rev. St. 1899, §§ 2873-2875, held not to give cause of action to widow for death of husband caused by negligence of fellow-servant, hostler; statute gives right of action only to injured person, not to his representatives in case of his death. Broadwater v. Wabash R. Co., 212 Mo. 437, 110 SW 1084. Laws 1897, p. 96, § 1, gives right of action to railroad employe for injuries caused by negligence of fellow-servant. Strottman v. St. Louis, etc., R. Co., 211 Mo. 227, 109 SW 769. But it does not give right of action to representatives of deceased employe for wrongful death, if death results from fellow-servant's negligence. Id.

**New York: Laws 1906, p. 1682, c. 657,** making railroad employes having certain duties vice-principals, does not violate federal constitution. Schradin v. New York Cent, etc., R. Co., 124 App. Div. 705, 109 NYS 428. Proof that train intended to run on main track ran onto side track, collided with engine, and killed engineer, was sufficient to show negligence for which company would be liable, in absence of explanation by it. Van Suwegen v. Erie R. Co., 110 NYS 959. Statute need not be specially pleaded; if facts show cause of action thereunder, recovery may be had on proof thereof. Schradin v. New York Cent., etc., R. Co., 124 App. Div. 705, 109 NYS 428. Watchman employed to notify track employes of approach of trains is vice-principal under Laws 1906, c. 657, being in charge of "signals," and for his negligence recovery may be had for death of employe struck by train. Id. Defendant liable under Laws 1906, c. 657, where brakeman was injured between cars, because of conductor's negligence in signaling engineer to move cars without receiving signal for brakeman first, in accordance with rules. Brown v. New York Cent., etc., R. Co., 110 NYS 514. Under 1906 act, foreman of crew of railroad track employes was, as to duty to warn of trains, vice-principal. La Placa v. Lake Shore & M. S. R. Co., 111 NYS 797. **Under Laws 1902, p. 1748, c. 600,** it must appear not only that negligence relied on was that of one exercising superintendence, but that he was engaged in an act of superintendence at the time. Droge v. John M. Robins Co., 123 App. Div. 537, 108 NYS 457. Where employes were to make certain incidental repairs in vessel, and were told to provide themselves with lights, foreman in charge was not chargeable with negligence in failing to close hatchway in lower part of hold, or in not seeing that plaintiff had light or was warned that hatch was open. Id. Servant of ship owners, in charge of plaintiff and two others, sent by defendant to make repairs under directions of such ship owner's servant, was not "superintendent" for whose negligence defendant would be liable. Id. Foreman had power only to signal for movement of crane and materials to be carried by it; its operation was entrusted to plaintiff, subject to orders of superintendent of another department. Held foreman's act in turning on power, being unauthorized, was not an act of superintendence, under Laws 1902, c. 600. Quinlan v. Lackawanna Steel Co., 191 N. Y. 329, 84 NE 73. Failure of superintendent to have red flag placed as warning that workmen were obstructing track held negligent omission of act of superintendence. Campbell v. Long Island R. Co., 111 NYS 120. Whether an employe is engaged in an act of superintendence or in mere detail may depend on manner of work as well as on the rank and position of employe in charge. Vincenzo v. Delaware & Hudson Co., 110 NYS 589. Railroad foreman or track supervisor, who directed loading of rails, was engaged in act of superintendence. Id. Act of foreman who had personal charge of hoisting sand by elevator, in directing engineer to raise it, in response to ambiguous signal, was act of superintendence. Boyle v. McNulty, 113 NYS 240. One whose sole and actual duty was that of superintendence was not fellow-servant. Deon v. McClintic-Marshall Const. Co., 114 NYS 28.

**Oregon:** Laws 1903, p. 20, making railroad corporations liable to employes for injuries caused by wrongful act, neglect, or default of any officer or agent of such corporation superior to employe injured, rests on theory of special hazards of railroad business; object is to induce greater care in selection of superior servants. Elliff v. Oregon R. & Nav. Co. [Or.] 99 P 76.

**Pennsylvania:** Under Act April 4, 1868 (P. L. 58), pullman car conductor is fellow-servant of trainmen employed by railroad company and not a passenger. Lewis v. Pennsylvania R. Co., 220 Pa. 317, 69 A 821.

**South Carolina:** Const. art. 9, § 15, gives employes of railroad corporations right of action for damages for injuries caused by negligence of corporation or superior agent or officer, or person having right to control or direct services of injured employe. One who is superintendent, controlling and directing employes in their work, does not cease to be such by reason of his performance of some act of manual labor. Whether alleged negligent employe was superintendent held for jury. Rippy v. Southern R. Co. [S. C.] 61 SE 1010. Bridge watchman held not to have assumed risk of negligence of engineer in running train at reckless speed, they not being fellow-servants. Kitchens v. Southern R. Co. [S. C.] 61 SE 1016.

**Texas:** Sayles' Ann. St. 1897, §§ 4560g and 4560h, fixing relationship of railroad employes, are valid, and applicable to all persons of a particular class, and affecting alike all employes of railroads. Missouri, K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601. Sayles' Ann. Civ. St. 1897, art. 4560f, provides that every person, receiver or corporation

operating a railroad or street railroad shall be liable for damages sustained while engaged in operating cars, locomotives or trains by reason of the negligence of any other servant or employe, notwithstanding fact that they are fellow-servants. Standard gauge railroad tracks operated by private corporation in connection with its factory, cars being run thereon with rented locomotives, held a "railroad" within the statute. Cunningham v. Neal [Tex.] 20 Tex. Ct. Rep. 460, 107 SW 539; Cunningham v. Neal [Tex. Civ. App.] 109 SW 455. Night hostler in railroad yard, engaged under superior's orders, in inspecting switch engine to see whether it was properly oiled, wiped, etc., was not engaged in "operation of locomotive." Galveston, H. & N. R. Co. v. Cochran [Tex. Civ. App.] 109 SW 261. Loading and transporting rails on push car and unloading them where required for repair work held "operation of car" within statute though mere unloading of standing car, or using it as convenience in section work, would not be. Texarkana & Ft. S. R. Co. v. Anderson [Tex. Civ. App.] 111 SW 173. Decedent was employed by independent contractor in trestle construction for railroad company, and was unloading timbers from cars when killed. Held he was not engaged in "operating" cars or railroad (Rev. St. 1995, art. 4560f), and defendant not liable though negligence of fellow-servants as defined in arts. 4560g, 4560h, caused injury. Walker v. Texas & N. O. R. Co. [Tex. Civ. App.] 112 SW 430. Plaintiff was injured by car negligently released by foreman while he was propping up turntable to allow car to pass over it. Held they were engaged in "operating car" within Sayles' Ann. St. 1897, art. 4560f. Missouri, K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601. Brakeman did not assume risk of injury by sudden act of negligence of fellow brakeman in throwing sack of ice from caboose. Galveston, etc., R. Co. v. Henefy [Tex. Civ. App.] 115 SW 57. Negligence of brakeman in throwing sack of ice against another brakeman who was about to board caboose in course of his duties was chargeable to company under Sayles' Ann. St. 1897, § 4560f. Id. Corporation running tram cars loaded with ties in course of its work of creosoting same held not within Rev. St. 1879, art. 2899, making common carriers liable for injuries to servants caused by act or omission of another servant or agent. Halbert v. Texas Tie & Lumber Preserving Co. [Tex. Civ. App.] 107 SW 592. To constitute servants fellow-servants under Sayles' Ann. St. 1897, § 4560f, they must be in same grade of employment; they must be doing the same character of work or service; must be working together at same time and place and at same piece of work; and must be working to common purpose. Missouri, K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601. Rev. St. 1895, art. 4560g, makes fellow-servants all persons (employes of railroad or street railway company) engaged in common service in same grade of employment, who are doing same character of work, and are working together at same time and place, at the same piece of work, and for common purpose. Night hostler in railway yard, engaged, under orders of superior, in inspecting switch engine to see that it was properly oiled, wiped, etc., was not fellow-servant of another hostler putting steam into another switch engine. Galveston, etc., R. Co. v. Cochran [Tex. Civ. App.] 109 SW 261. Under Sayles' Ann. St. 1897, § 4560g, test of vice-principalship is whether servant had authority to direct other employes, superintendency over them. Mill carpenter held vice-principal as to helpers whom he directed in their work. Missouri, K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601. Foreman who directed plaintiff's work held vice-principal for whose negligence master was liable. Id. Power to employ and discharge other servants is not test of vice-principalship under statute. Id. Car repairer, at work on car, held not fellow-servant of two other employes engaged in carpenter shed but doing other work at a different place. Texas, etc., R. Co. v. Barwick [Tex. Civ. App.] 110 SW 953. Pleading authorized submission, and evidence warranted finding, of negligence of fellow employes in dropping rail on plaintiff while they were unloading it. Texarkana & Ft. S. R. Co. v. Anderson [Tex. Civ. App.] 111 SW 173.

**Utah:** Laborer engaged in construction of railroad bed fellow-servant of negligent brakeman on construction train hauling gravel, under Utah Rev. St. 1898, § 1343, defining fellow-servants. Lukic v. Southern Pac. Co., 160 F 135. Rev. St. Utah 1898, § 1343, makes fellow-servants all persons engaged in service of same employer, who are employed in same grade of service and working together at same time and place to a common purpose, neither having power of control or superintendency, servants in different departments not being within the rule. Id. "Working together" means physical nearness at time of injury, coupled with common purpose of labors, nearness required being only such as to arouse in one reasonable apprehension of probable danger from negligence of other. Id. Operator of donkey engine in mine not fellow-servant of miner at work at bottom of shaft under Rev. St. 1898, § 1343. Lewis v. Mammoth Min. Co., 33 Utah, 273, 93 P 732.

**Virginia:** Const. 1902, § 162, abolishing fellow-servant defense as to employes of railway companies engaged in physical construction, repair or maintenance of roadbed or structure connected with railroad, applies where work consists in removing rotten timber from pier preliminary to restoring it. Chesapeake & O. R. Co. v. Hoffman [Va.] 63 SE 432. The statute does not deny equal protection of law. Id. Const. art. 12, § 162, which abolishes fellow-servant doctrine so far as employes of railroad companies are concerned, does not apply to employes of street electric railways. Norfolk & Portsmouth Trac. Co. v. Ellington's Adm'r, 108 Va. 245, 61 SE 779.

**Wisconsin:** Laws 1907, p. 495, c. 254, making railroad companies liable for injuries to employes caused by negligence of fellow employes in whole or in greater part, is not invalid because applying only to railroads, since hazards are peculiar. Kiley v. Chicago, etc., R. Co. [Wis.] 119 NW 309. Nor does fact that act does not apply to office or shop employes invalidate it. Id. Complaint alleging injury caused by negligence of fellow employes while they and plaintiff were engaged in taking down wire fence along right of way of railroad held to state cause of action under Laws 1907, p. 495, c.

roads.[81] The classification refers to the character of the employment and not to the employer, and is proper in view of the peculiar hazards incident to the operation of railroads.[82] Acts which include only railroad employes apply only when the injury is a result of some danger or hazard peculiar to the use or operation of railroads.[83] The Missouri act does not confer a right of action on the representative or heirs of a deceased employe.[84]

(§ 3) *F. Risks assumed by servant. Nature of defense.*[See 10 C. L. 749]—There can be no recovery for injuries resulting from a defect or danger, the risk of injury from which was assumed by the servant.[85] The assumption of a particular risk will not, however, defeat recovery for injuries resulting from a defect or danger which was not an assumed risk.[86] Assumption of risk is said to be a matter of contract express or implied;[87] contributory negligence is a matter of conduct.[88] They are distinct.

254, employes being railroad employes and not office or shop employes. Id.

81. Burns' Ann. St. 1901, § 7083, is valid. Indianapolis Trac. & T. Co. v. Kinney [Ind.] 85 NE 954. Ann. Code 1892, § 3559, abolishing to some extent fellow-servant defense as to railroad employes, is constitutional. Mobile, etc., R. Co. v. Hicks, 91 Miss. 273, 46 S 360. Const. 1902, § 162, abolishing fellow-servant defense as to employes of railroad companies, is valid. Chesapeake & O. R. Co. v. Hoffman [Va.] 63 SE 432. Sayles' Ann. St. 1897, §§ 4560g, 4560h, fixing relationship of railroad employee, and modifying common-law fellow-servant doctrine as to railroad employes, is valid. Missouri, K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601. Laws 1906, p. 1682, c. 657, making certain classes of railroad employes vice-principals, does not violate federal constitution. Schradin v. New York Cent., etc., R. Co., 124 App. Div. 705, 109 NYS 428. Laws 1907, p. 495, c. 254, is valid though applicable only to railroad employes engaged in operation; not applicable to office or shop employes. Kiley v. Chicago, etc., R. Co. [Wis.] 119 NW 309.

82. Indianapolis Trac. & T. Co. v. Kinney [Ind.] 85 NE 954.

83. Indianapolis Trac. & T. Co. v. Kinney [Ind.] 85 NE 954, citing Iowa and Minnesota cases under similar statutes. The Indiana act is for exclusive benefit of those who are, in the course of their employment, exposed to the particular dangers incident to the use and operation of railroad engines and trains, and whose injuries are caused thereby. The injured employe need not, however, be connected with the movement of trains; it is sufficient if he is, in performing his duties, brought into a situation where he is, without fault, exposed to dangers and perils flowing from such operation and movement and is by reason thereof injured by negligence of fellow-servant. Id. Employe not entitled to benefit of act who was injured by reason of former's negligence in placing skids on flat car by which rails were being unloaded, skid falling, causing rail to strike plaintiff. Id.

84. Rev. St. 1899, §§ 2873-2875, gives right of action for injuries to servant but not right of action for his death, caused by negligence of one who is vice-principal under statute. Strottman v. St. Louis, etc., R. Co., 211 Mo. 227, 109 SW 769; Broadwater v. Wabash R. Co., 212 Mo. 437, 110 SW 1084.

85. Plaintiff may be nonsuited on ground of having assumed risk, notwithstanding Laws 1902, c. 600, § 3, where action is at common law. Bushtis v. Catskill Cement Co., 113 NYS 294. One casually employed on barge to load coal on vessel does not become a seaman; he assumes risks as ordinary employe does. Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co., 162 F 912.

86. Though section hand knew of defective condition of track, which contributed to cause his death, yet recovery could be had for negligence in failing to warn him of change in brake shoes of car, which resulted in its sudden stop, throwing him off. Seaboard Air Line R. Co. v. Witt [Ga. App.] 60 SE 1012. That brakeman assumed risks arising from defects in coupling apparatus and in manner of loading flat car would not defeat recovery for negligence of employes in backing cars without notice or signal. Texas & N. R. Co. v. Powell [Tex. Civ. App.] 112 SW 697.

87. Miller v. White Bronze Monument Co. [Iowa] 118 NW 518; Hall v. Northwestern R. Co. of South Carolina [S. C.] 62 SE 848. Assumption of risk rests on agreement, express or implied, that master shall not be liable for injuries incident to service resulting from known or obvious danger. German-American Lumber Co. v. Brock [Fla.] 46 S 740; Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910; Graves v. Gustave Stickley Co., 125 App. Div. 132, 109 NYS 256; Sans Bois Coal Co. v. Janeway [Okl.] 99 P 153; Buena Vista Extract Co. v. Hickman, 108 Va. 665, 62 SE 804. Assumption of risk rests in law of contract, and involves an implied agreement by an employe to assume risks ordinarily incident to employment, or a waiver after full knowledge of an extraordinary risk, of his right to hold master liable. James v. Fountain Inn Mfg. Co. [S. C.] 61 SE 391. Assumption of risk rests upon contract. Plaintiff, employed as cook on work train, was not regular employe of company, and did not assume risk of violent and unusual stop of car in which she was performing her work. Tinkle v. St. Louis & S. F. R. Co., 212 Mo. 445, 110 SW 1086.

**NOTE. Assumption of risk not strictly a contractual rule:** The legal basis of the doctrine of assumption of risk is a matter upon which courts and text writers seem unable to agree. Since, in its most usual form, the disability arises with a contract of hiring and exists only during the life of the contract, it has been said to arise from contract, more especially to distinguish

and separate defenses, though they may arise out of the same facts,[89] the distinction being pointed out in a number of cases.[90] There is a direct conflict of authority as to whether a servant assumes a risk arising from the master's violation of a positive statutory requirement designed to promote safety of employment.[91] In New York,

it from contributory negligence, which is wholly a question of conduct. Some courts hold squarely that the doctrine is contractual, and, reasoning upon that basis, apply to a greater or less extent the rules applicable to implied contracts. This appears to be the view of the courts which hold that a master's violation of a statutory duty bars the defense of assumption of risk with reference to such disregard of duty (see note, infra). It is pointed out, however, that the relation of assumed risk lacks all of the elements of an implied contract and that the actions arising thereon are ex delicto. Dresser, Employer's Liability, §§ 82-88, 116; Jaggard, Torts, p. 23. The contractual theory is rejected in the best considered modern opinions in which the tendency is to base the doctrine upon the maxim "volenti non fit injuria." The conflict of authorities is discussed at length by Jaggard, J., in Rase v. Minneapolis, St. P. & S. S. M. R. Co. [Minn.] 120 NW 360.

88. Brown v. Rome Mach. & Foundry Co. [Ga. App.] 62 SE 720; Miller v. White Bronze Monument Co. [Iowa] 118 NW 518.

89. Knox v. American Rolling Mill Corp., 236 Ill. 437, 86 NE 90; Miller v. White Bronze Monument Co. [Iowa] 118 NW 518. Contributory negligence and assumption of risk are separate and distinct defenses resting upon different grounds. Bowen v. Pennsylvania R. Co., 219 Pa. 405, 68 A 963. In Wisconsin, assumption of risk has been to certain extent identified with contributory negligence, but it is said that some degree of discrimination has been made. See cases collected in Campshure v. Standard Mfg. Co. [Wis.] 118 NW 633.

90. For discussion of contract theory of assumption of risk, and distinction between assumption of risk and contributory negligence, and their relation to facts as proved, see Brown v. Rome Mach. & Foundry Co. [Ga. App.] 62 SE 720. Assumption of risk and contributory negligence distinguished. Holland v. Durham Coal & Coke Co. [Ga.] 63 SE 290. Distinctions between two defenses discussed. Johnson v. Mammoth Vein Coal Co. [Ark.] 114 SW 722. Contributory negligence and asumption of risk are separate defenses and rest upon different basis, though both may arise from same facts; and, where danger is obvious, the two defenses are tested by same standard, and differences are theoretical rather than practical. Id. But distinction is vital where question of contributory negligence would be one of fact, and assumption of risk one of law, as where statutory duty is violated. Id.

See, also, 6 C. L. 565, and note.

91. NOTE. **Assumption of risk as modified by master's disregard of a statutory duty:** Whether a statute imposing duties upon a master abrogates by implication the defense of assumption of risk with regard to injuries consequent upon disregard of such statutory duty is a point upon which the courts are in direct conflict. That there is no such implication and that consequently the risk may be assumed by the servant is held in the following states:

**Alabama:** Louisville & N. R. Co. v. Banks, 104 Ala. 508, 16 S 547; Louisville & N. R. Co. v. Stutts, 105 Ala. 368, 17 S 29, 53 Am. St. Rep. 127; Birmingham R. & Elec. Co. v. Allen, 99 Ala. 359, 13 S 8, 20 L. R. A. 457, (overruling Mobile & B. R. Co. v. Holborn, 84 Ala. 133, 4 S 146 and Highland Ave. & B. R. Co. v. Walters, 91 Ala. 435, 8 S 357).

**Iowa:** Martin v. Chicago R. I. & P. R. Co., 118 Iowa, 148, 91 NW 1034, 59 L. R. A. 698, 96 Am. St. Rep. 371; Sutton v. Des Moines Bakery Co., 135 Iowa, 390, 112 NW 836.

**Massachusetts:** Marshall v. Norcross, 191 Mass. 568, 77 NE 1151; O'Maley v. South Boston Gaslight Co., 158 Mass. 135, 32 NE 1119, 47 L. R. A. 161; Keenan v. Edison Elec. Illuminating Co., 159 Mass. 379, 34 NE 366; Goodridge v. Washington Mills Co., 160 Mass. 234, 35 NE 484.

**Minnesota:** Fleming v. St. Paul & D. R. Co., 27 Minn. 111, 6 NW 448; Anderson v. C. N. Nelson Lumber Co., 67 Minn. 79, 69 NW 630; Swenson v. Osgood & Blodgett Mfg. Co., 91 Minn. 509, 98 NW 645; McGinty v. Waterman, 93 Minn. 242, 101 NW 300; Seeley v. Tenant, 104 Minn. 354, 116 NW 648. See, also, Rase v. Minneapolis, etc., R. Co. [Minn.] 120 NW 360, wherein Jaggard J. intimates that the contrary view is based upon the fallacious doctrine that assumption of risk is a matter of contract.

**New Jersey:** Mika v. Passaic Print Works [N. J. Err. & App.] 70 A 327. (Overruling Dix v. Union Ice Co. [N. J. Law] 68 A 1101).

**New York:** Wingert v. Krakauer, 76 App. Div. 34, 78 NYS 664; Sitts v. Waiontha Knitting Co., 94 App. Div. 38, 87 NYS 911; Stevens v. Gair, 109 App. Div. 621, 96 NYS 303; De Young v. Irving, 5 App. Div. 499, 38 NYS 1089; Monzi v. Friedline, 33 App. Div. 217, 52 NYS 482; Thompson v. Cary Mfg. Co., 62 App. Div. 279, 70 NYS 1086; Fitzgerald v. New York, etc., R. Co., 59 Hun, 225, 12 NYS 932; Burns v. Nichols Chemical Co., 65 App. Div. 424, 72 NYS 919; Knisley v. Pratt, 148 N. Y. 372, 42 NE 986, 32 L. R. A. 367; McRickard v. Flint, 114 N. Y. 222, 21 NE 153; White v. Wittemann Lith. Co., 131 N. Y. 631, 30 NE 236; Bushtis v. Catskill Cement Co., 113 NYS 294; Jenks v. Thompson, 179 N. Y. 20, 71 NE 266, afg. 83 App. Div. 343, 82 NYS 274; Wull v. Curtice Bros. Co., 74 App. Div. 561, 77 NYS 813; McCarthy v. Emerson, 77 App. Div. 562, 79 NYS 180; Graves v. Brewer, 4 App. Div. 327, 38 NYS 566; Johansen v. Eastmans Co., 44 App. Div. 270, 60 NYS 708, afd. in 168 N. Y. 648, 61 NE 1130; Horton v. Vulcan Iron Works Co., 13 App. Div. 508, 43 NYS 699; Ryan v. Long Island R. Co., 51 Hun, 607, 4 NYS 381; Shields v. Robins, 3 App. Div. 582, 38 NYS 582; Klein v. Garvey, 94 App. Div. 183, 87 NYS 998; McManus v. St. Regis Paper Co., 100 App. Div. 510, 91 NYS 1102; Rooney v. Brogan Const. Co., 107 App. Div. 258, 95 NYS 1; Regling v. Lehmaier, 50 Misc. 331, 98 NYS 642; Rahn v. Standard Optical Co., 110 App. Div. 501, 96 NYS 1080; Kiernan v. Eidlitz, 115 App. Div. 141, 37 Civ. Proc. R. 264, 100 NYS

731. With the limitation, however, that a statute prohibiting child labor is held to imply lack of discretion on the part of such child, and hence to negative the defense of assumption of risk. Marino v. Lehmaier, 173 N. Y. 530, 66 NE 572, 61 L. R. A. 811, and see Field v. New York, etc., R. Co., 86 App. Div. 148, 83 NYS 535.

**Ohio:** Krause v. Morgan, 53 Ohio St. 26, 40 NE 886; Johns v. Cleveland, etc., R. Co., 23 Ohio C. C. 442, afd. in 69 Ohio St. 532, 70 NE 1124; Cleveland & E. R. Co. v. Somers, 24 Ohio C. C. 67.

**Rhode Island:** Langlois v. Dunn Worsted Mills, 25 R. I. 645, 57 A 910.

**Wisconsin:** Kreider v. Wisconsin River Paper & Pulp Co., 110 Wis. 645, 86 NW 662; Abbott v. McCadden, 81 Wis. 563, 51 NW 1079, 29 Am. St. Rep. 910; Powell v. Ashland Iron & Steel Co., 98 Wis. 35, 73 NW 573; Helmke v. Thilmany, 107 Wis. 216, 83 NW 360; Thompson v. Edward P. Allis Co., 89 Wis. 523, 62 NW 527; Curry v. Chicago & N. W. R. Co., 43 Wis. 665; Holum v. Chicago, etc., R. Co., 80 Wis. 299, 50 NW 99; Dugan v. Chicago, etc., R. Co., 85 Wis. 609, 55 NW 894; Schneider v. Chicago, etc., R. Co., 99 Wis. 378, 75 NW 169; Williams v. J. G. Wagner Co., 110 Wis. 456, 86 NW 157.

Such is undoubtedly the **English rule.** Thomas v. Quartermaine, L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep., 555, 51 J. P. 516; Clark v. Holmes, 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405; Indemaur v. Dames, L. R. 1 C. P. 274, 35 L. J. C. P. N. S. 184, 12 Jur. N. S. 432, 14 L. T. N. S. 484, 14 Week. Rep. 586, 1 Harr. & R. 243; Smith v. Baker (1891) A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660; Osborne v. London & N. W. R. Co., L. R. 21 Q. B. Div. 220; Walsh v. Whitely, L. R. 21 Q. B. Div. 371; Britton v. Great Western Cotton Co., L. R. 7 Exch. 130, 41 L. J. Exch. N. S. 99; Yarmouth v. France, L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283; Caswell v. Worth, 5 El. & Bl. 849, 25 L. J. Q. B. N. S. 121, 2 Jur. N. S. 116. But see, contra, Braddeley v. Granville, L. R. 19 Q. B. Div. 423, 56 L. J. Q. B. N. S. 501, 57 L. T. N. S. 268, 36 Week. Rep. 63, 51 J. P. 822; Weblin v. Ballard, L. R. 17 Q. B. Div. 122, 55 L. J. Q. B. N. S. 395, 54 L. T. N. S. 532, 34 Week. Rep. 455, 50 J. P. 597, and opinion of Lord Esher in Thomas v. Quartermaine, supra.

On the other hand, many states hold that violation of a statutory duty bars the defense of assumption of risk, as follows:

**Arkansas:** Johnson v. Mammoth Vein Coal Co. [Ark.] 114 SW 722 (overruling Patterson Coal Co. v. Poe, 81 Ark. 343, 99 SW 538); Choctaw, O. & G. R. Co. v. Jones, 77 Ark. 367, 92 SW 244, 4 L. R. A. [N. S.] 837; St. Louis, etc., R. Co. v. Mangan [Ark.] 112 SW 168; Mammoth Vein Coal Co. v. Bublis, 83 Ark. 567, 104 SW 210.

**Illinois:** Spring Valley Coal Co. v. Patting, 210 Ill. 342, 71 NE 3711, but otherwise in the case of city ordinances. Browne v. Siegel, Cooper & Co., 191 Ill. 226, 60 NE 815; Chicago Packing & P. Co. v. Rohan, 47 Ill. App. 640; Munn v. L. Wolff Mfg. Co., 94 Ill. App. 122. See, also, Swift v. Fue, 66 Ill. App. 651; Swift & Co. v. Miller, 139 Ill. App. 192.

**Indiana:** Green v. American Car & Foundry Co., 163 Ind. 135, 71 NE 268; La Porte Carriage Co. v. Sullender [Ind. App.] 71 NE 922; Buehner Chair Co. v. Feulner, 28 Ind. App. 479, 63 NE 239; Brower v. Locke, 31 Ind. App. 353, 67 NE 1015; Whiteley Malleable Castings Co. v. Wishon [Ind. App.] 85 NE 832; Robbins v. Fort Wayne Iron & Steel Co., 41 Ind. App. 557, 84 NE 514; Muncie Pulp Co. v. Hacker, 37 Ind. App. 194, 76 NE 770; Blanchard-Hamilton Furniture Co. v. Colvin, 32 Ind. App. 398, 69 NE 1032; Chamberlain v. Waymire, 32 Ind. App. 442, 68 NE 306, 70 NE 81; Espenlaub v. Ellis, 34 Ind. App. 163, 72 NE 527; Nickey v. Dougan, 34 Ind. App. 601, 73 NE 288; Monteith v. Kokomo Wood Enameling Co., 159 Ind. 149, 64 NE 610, 58 L. R. A. 944; Island Coal Co. v. Swaggerty, 159 Ind. 664, 62 NE 1103, 65 NE 1026; Buehner Chair Co. v. Feulner, 164 Ind. 368, 73 NE 816; Brower v. Locke, 31 Ind. App. 353, 67 NE 1015; Pittsburg, etc., R. Co. v. Ross, 169 Ind. 3, 80 NE 845; United States Cement Co. v. Cooper [Ind. App.] 82 NE 981; Antioch Coal Co. v. Rockey, 169 Ind. 247, 82 NE 76; Indianapolis U. R. Co. v. Waddington, 169 Ind. 448, 82 NE 1030; Indianapolis, St. R. Co. v. Kane, 169 Ind. 25, 80 NE 841; Diamond Block Coal Co. v. Cuthbertson, 166 Ind. 290, 76 NE 1060; Davis Coal Co. v. Polland, 158 Ind. 607, 62 NE 492, 92 Am. St. Rep. 319; Davis v. Mercer Lumber Co., 164 Ind. 413, 73 NE 899; Indiana & C. Coal Co. v. Neal [Ind. App.] 76 NE 627; American Car & Foundry Co. v. Clark, 32 Ind. App. 644, 70 NE 828; Bodell v. Brazil Block Coal Co., 25 Ind. App. 654, 58 NE 865, and the same with regard to city ordinances, Pittsburg, etc., R. Co. v. Moore, 152 Ind. 345, 53 NE 290, 44 L. R. A. 638; Baltimore, etc., R. Co. v. Peterson, 156 Ind. 364, 59 NE 1044; Chicago & E. R. Co. v. Lawrence, 169 Ind. 319, 79 NE 363.

**Kansas:** Western Furniture & Mfg. Co. v Bloom, 76 Kan. 127, 90 P 821, 123 Am. St. Rep. 123; Fowler Packing Co. v. Enzenperger, 77 Kan. 406, 94 P 995; Kansas Buff Brick & Mfg. Co. v. Stark, 77 Kan. 648, 95 P 1047; Henschell v. Union P. R. Co. [Kan.] 96 P 857.

**Louisiana:** Hailey v. Texas & P. R. Co., 113 La. 633, 37 S 131.

**Michigan:** Murphy v. Grand Rapids Veneer Works, 142 Mich. 677, 106 NW 211; Sipes v. Michigan Starch Co., 137 Mich. 258, 100 NW 447; Layzell v. J. H. Somers Coal Co. [Mich.] 15 Det. Leg. N. 404, 117 NW 179; Capeling v. Saginaw Coal Co. [Mich.] 15 Det. Leg. N. 407, 117 NW 182; Syneszewski v. Schmidt [Mich.] 16 Det. Leg. N. 509, 116 NW 1107; Little v. Bausfield & Co. [Mich.] 15 Det. Leg. N. 763, 117 NW 903; Swick v. Aetna Portland Cement Co., 147 Mich. 454, 111 NW 110.

**Missouri:** McGinnis v. R. M. Rigby Print. Co., 122 Mo. App. 227, 99 SW 4; Durant v. Lexington Coal Min. Co., 97 Mo. 62, 10 SW 484; Bair v. Heibel, 103 Mo. App. 621, 77 SW 1017; Hamman v. Central Coal & Coke Co., 156 Mo. 232, 56 SW 1091; Stafford v. Adams, 113 Mo. App. 717, 88 SW 1130, but otherwise as to contributory negligence. Spiva v. Osage C. & M. Co., 88 Mo. 68.

**Oklahoma:** Sans Bois Coal Co. v. Janeway [Okl.] 99 P 153.

**Oregon:** Hill v. Saugestad [Or.] 98 P 524.

**Vermont:** Kilpatrick v. Grand Trunk R. Co., 74 Vt. 288, 52 A 531, 93 Am. St. Rep. 887.

**Washington:** Green v. Western American Co., 30 Wash. 87, 70 P 310; Hall v. West & Slade Mill. Co., 39 Wash. 447, 81 P 915; Hoveland v. Hall Bros. Marine R. & Ship-

necessary risks are assumed as a matter of law; whether other risks are assumed is a question for the jury.[92] Negligence of an employe for whose conduct the master is made responsible by statute is not an assumed risk.[93]

building Co., 41 Wash. 164, 82 P 1090; Daffron v. Majestic Laundry Co., 41 Wash. 65, 82 P 1089; Gustafson v. West Lumber Co. [Wash.] 97 P 1094; Whelan v. Washington Lumber Co., 41 Wash. 153, 83 P 98; Erickson v. McNeeley & Co., 41 Wash. 509, 84 P 3, 111 Am. St. Rep. 1006; Thomson v. Issaquah Shingle Co., 43 Wash. 253, 86 P 588; Rector v. Bryant Lumber & Shingle Mill. Co., 41 Wash. 556, 84 P 7; Johnson v. Far West Lumber Co., 47 Wash. 492, 92 P 274; Pachko v. Wilkeson Coal & Coke Co., 46 Wash. 422, 90 P 436; Miller v. Union Mill Co., 45 Wash. 199, 88 P 130; Nottage v. Sawmill Phoenix, 133 F 979.

**Certain Statutes** are held to more or less expressly bar the defense of assumption of risk as to certain employments. Bryce v. Burlington C. R. & N. R. Co., 119 Iowa, 274, 93 NW 275; Kansas City M. & B. R. Co. v. Filippo, 138 Ala. 487, 35 S 457; Mobile, etc., R. Co. v. Blomberg, 141 Ala. 258, 37 S 395; Taylor v. Boston & M. R. Co., 188 Mass. 390, 74 NE 591; Winkler v. Philadelphia & R. R. Co., 4 Penn. [Del.] 80, 53 A 90; Missouri K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601; Texas Mexican R. Co. v. Trijerina [Tex. Civ. App.] 111 SW 239; El Paso, etc., R. Co. v. Foth [Tex. Civ. App.] 18 Tex. Ct. Rep. 610, 100 SW 171; Perrotta v. Richmond Brick Co., 123 App. Div. 626, 108 NYS 10; Anderson v. Milliken Bros., 123 App. Div. 614, 108 NYS 61; Bolen-Darnall Coal Co. v. Williams, 7 Ind. T. 648, 104 SW 867; Klotz v. Power & Min. Mach. Co., 136 Wis. 107, 116 NW 770; Chicago, G. W. R. v. Crotty [C. C. A.] 141 F 913; Inland Steel Co. v. Kachwinski [C. C. A.] 151 F 219. Of such effect is the federal statute requiring the use of automatic couplers upon cars used in interstate commerce (Act March 2, 1893; Johnson v. Southern P. Co., 196 U. S. 1, 49 Law. Ed. 363, rvg. 54 C. C. A. 508, 117 F 462; Chlemmer v. Buffalo R. & P. R. Co., 205 U. S. 1, 51 Law. Ed. 681, rvg. 207 Pa. 198, 56 A 417; Denver & R. G. R. Co. v. Arrighi, 63 C. C. A. 649, 129 F 347; Donegan v. Baltimore & N. Y. R. Co. [C. C. A.] 165 F 869; Cleveland, etc., R. Co. v. Curtis, 134 Ill. App. 565; York v St. Louis, etc., R. Co. [Ark.] 110 SW 803; Turrittin v. Chicago, etc., R. Co., 95 Minn. 408, 104 NW 225; Austin v. Central of Georgia R. Co., 3 Ga. App. 775, 61 SE 998; Southern P. R. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441), and in certain states the defense is generally abolished by statute or constitutional provision (**North Carolina.** Coley v. North Carolina R. Co., 128 N. C. 534, 39 SE 43, 129 N. C. 407, 40 SE 195, 52 L. R. A. 817; Cogdell v. Southern R. Co., 129 N. C. 398, 40 SE 202; Thomas v. Raleigh, etc., R. Co., 129 N. C. 392, 40 SE 201; Mott v. Southern R. Co., 131 N. C. 234, 42 SE 601; Greenlee v. Southern R. Co., 122 N. C. 977, 30 SE 115, 65 Am. St. Rep. 734, 41 L. R. A. 399; Boney v. Atlantic & N. C. R. Co., 145 N. C. 248, 58 SE 1082; Walker v. Carolina Cent. R. Co., 135 N. C. 738, 47 SE 675. **South Carolina.** Youngblood v. South Carolina & G. R. Co., 60 S. C. 9, 38 SE 232, 85 Am. St. Rep. 824; Bodie v. Charleston & W. C. R. Co., 61 S. C. 468, 39 SE 715; Carson v. Southern R. Co., 68 S. C. 55, 46 SE 525; Hall v. Northwestern R. Co. [S. C.] 62 SE 848. **Mississippi.** Buckner v. Richmond & D. R. Co., 72 Miss. 873, 18 S 449. **Virginia.** Norfolk & W. R. Co. v. Cheatwood's, 103 Va. 356, 49 SE 489; Chesapeake & O. R. Co. v. Rowsey's Adm'r, 108 Va. 632, 62 SE 363).

Upon the general point of law the **federal courts** are not in harmony, the cases of Glenmont Lumber Co. v. Roy, 61 C. C. A. 506, 126 F 525, and E. S. Higgins Carpet Co. v. O'Keefe, 25 C. C. A. 220, 51 U. S. App. 74, 79 F 900, holding that the violation of a statutory duty does not preclude the defense of assumption of risk, are decided in harmony with the law of the state wherein the action arose. On the other hand the case of St. Louis Cordage Co. v. Miller, 61 C. C. A. 477, 126 F 495, 63 L. R. A. 551, and Federal Lead Co. v. Swyers [C. C. A.] 161 F 687, sustaining the same contention, are in direct conflict with the doctrine of the Missouri courts, while Denver & Rio Grande R. Co. v. Norgate, 72 C. C. A. 365, 141 F 247, 6 L. R. A. (N. S.) 981, to the same effect, is decided upon general principals of law. The federal cases of Chicago-Coulterville Coal Co. v. Fidelity & C. Co., 130 F 957, and Narramore v. Cleveland C. C. & St. L. R. Co., 37 C. C. A. 499, 96 F 298, 48 L. R. A. 68, which are in direct conflict with the above cases and support the contention that the statute impliedly bars the defense, are decided in harmony with the adjudications in the states wherein the action arose. The opinion of Taft, J., in the last cited case is recognized as a leading authority upon the doctrine therein announced and has been followed in a great majority of the more recent cases.

The point herein discussed is treated in Dresser's Employer's Liability, §§ 116, 117, and in notes in 47 L. R. A. 190 and 6 L. R. A. [N. S.] 981, from which sources many of the foregoing citations are adopted. The authorities are also collected and reviewed in 4 Am. & Eng. Ann. Cas. 587, and 4 Mich. L. R. 241.—Ed.

**92.** An employe may assume the risk of injury from machinery left unguarded in violation of the statute, but the question is one of fact to be submitted to the jury, such risk not being necessary one. Graves v. Gustave Stickley Co., 125 App. Div. 132, 109 NYS 256. Laws 1902, p. 1750, c. 600, § 3, distinguishes between necessary risks and obvious ones; former are assumed as matter of law; whether risk is obvious must be submitted to the jury. Logerto v. Central Bldg. Co., 123 App. Div. 840, 108 NYS 604. Risk from unguarded knives of jointer is not "necessary" one, since statutory duty to guard is violated; being obvious, whether it was assumed in particular case was for jury under Laws 1902, p. 1748, c. 600, § 3. Graves v. Gustave Stickley Co., 125 App. Div. 132, 109 NYS 256. Whether bottle wrapper assumed risk of injury by bursting of bottle, working without mask, for jury, under statute. Lobasco v. Moxie Nerve Food Co., 111 NYS 1007. Assumption of risk for jury under

*Dangers incidental to business.* See 10 C. L. 751—The servant assumes the risks ordinarily incident to the employment in which he engages,[94] and this is the rule though the employment is necessarily dangerous.[95] Ordinary risks are such as arise from the permanent, open, visible conditions of the master's business [96] as it is being

statute where plaintiff, wheeling hand truck, slipped on defective floor and fell. Knezevich v. Bush Terminal Co., 111 NYS 255.

**93.** Assumption of risk not available in action by brakeman for injuries caused by negligence of engineer under Code, § 2071. Rhodes v. Des Moines, etc., R. Co. [Iowa] 115 NW 503. Assumption of risk not available as defense in action by brakeman for injuries caused by negligence of engineer, under Code, § 2071. Id.

**94.** Haneman v. Western Meat Co. [Cal. App.] 97 P 695; Burnside v. Peterson, 43 Colo. 382, 96 P 256; Stewart & Co. v. Harmon [Md.] 70 A 333; Czernicke v. Ehrlich, 212 Mo. 386, 111 SW 14; Stitzel v. Wilhelm Co., 220 Pa. 564, 69 A 996; Wilson v. New York, etc., R. Co. [R. I.] 69 A 364; Western Union Tel. Co. v. Burton [Tex. Civ. App.] 115 SW 364. Ordinary and necessary risks. Logerto v. Central Bldg Co., 123 App. Div. 840, 108 NYS 604. Inherent risks. Mansell v. Conrad, 125 App. Div. 634, 109 NYS 1079. Incidental risks are assumed, whether known or not. Davis Adm'x v. Rutland R. Co. [Vt.] 71 A 724. Servant assumes all ordinary risks and those which are open and obvious. Truckers' Mfg. & Supply Co. v. White, 108 Va. 147, 60 SE 630. Servant engaged in his regular work assumes ordinary risks and is under same duty of observation with a view of informing himself of dangers to which he may be subjected. Johnson v. Desmond Chemical Co., 152 Mich. 84, 15 Det. Leg. N. 138, 115 NW 1043.

**95.** Ordinary risks attendant upon dangerous work of tearing down building assumed. Ballard & Ballard Co. v. Lee's Adm'r [Ky.] 115 SW 732. The risks assumed by an employe comprise those hazards or dangers which observation brings to his knowledge; and, if the employment is more than usually hazardous, the care exercised by the employe must be in proportion to the danger involved. Wallace v. Spellacy, 8 Ohio N. P. (N. S.) 41.

**96. Risks held incidental and assumed:** Servant whose duties required him to select sacks of coffee from piles laid in rows assumed risk of **pile falling** when he knew tendency of sacks to settle and bulge. Bradley v. Forbes Tea & Coffee Co., 213 Mo. 320, 111 SW 919. Risk of overhead bank of earth falling, where it was successively undermined and top pried off, assumed by **common laborer.** Logerto v. Central Bldg. Co., 123 App. Div. 840, 108 NYS 604. Common laborer injured while inserting paper into rollers on foreman's order held to have assumed risk, rollers being open and danger obvious. Barrett Mfg. Co. v. Marsh, 137 Ill. App. 110. Laborer employed to carry materials in building in course of construction assumed risk of stepping on loose and unsupported plank temporarily laid on terra cotta floor for use of workmen. Eisner v. Horton, 200 Mass. 507, 86 NE 892. Where **lineman** continued in defendant's employment with knowledge of fact that it made no inspection of trolley poles other than that made by repair crews, he assumed risk of injury from want of such inspection. Lynch v. Saginaw Valley Trac. Co. [Mich.] 15 Det. Leg. N. 444, 116 NW 983. Experienced **carpenter,** employed to assist in dismantling old building, assumed risk of decayed rafter breaking. Boisvert v. Ward, 199 Mass. 594, 85 NE 849. **Mule-driver** in mine was offered employment driving mule known to him to be dangerous, and was injured by being thrown against roof through mule's lunging. Held that risk was assumed. International Coal & Min. Co. v. Reeble, 137 Ill. App. 5. A **shot-firer** injured by shot breaking through wall between two rooms in mine will be held to have been injured in incurring a risk incident to his employment and assumed by him, where he must be assumed to have had knowledge of the danger. Green v. Jones Bros. Coal & Min. Co., 140 Ill. App. 264. Risk from **storage of powder in mine** assumed by miners. Western Coal & Min. Co. v. Garner [Ark.] 112 SW 392. **Railroad employe** assumes ordinary risk and such as he knows or must necessarily have known in ordinary discharge of his duties, but not such as are "discoverable by ordinary care." Texas & N. O. R. Co. v. Jackson [Tex. Civ. App.] 113 SW 628. **Car sealer** struck by switch engine while sealing car assumed risk, where he knew engines and cars were run on adjoining tracks without warning and that he was expected to look out for himself. Lynch v. Boston & M. R. Co., 200 Mass. 403, 86 NE 781. **Conductor** injured by sudden stopping of his train to avoid collision with another train. It appeared he was in such position that any ordinary jar would have caused him to fall. Held he assumed risk of such position. Cheek v. Seaboard Air Line R. Co. [S. C.] 62 SE 402. **Brakeman,** killed by being thrown from car, assumed ordinary risks of employment, including negligence of fellow brakemen; he did not assume risk of sudden and unusually violent stops and jars. Cincinnati, etc., R. Co. v. Evans, 33 Ky. L. R. 596, 110 SW 844. **Section hand** assumed risk of being struck by piece of bolt broken in course of taking up old track. St. Louis, etc., R. Co. v. Jamison [Ark.] 113 SW 41. Adjusting or taking up slack is incident and necessary to stopping of all trains, and **brakeman** assumes risk of undertaking to uncouple cars before train stops. Taylor v. Rock Island, A. & L. R. Co., 121 La. 543, 46 S 621. To recover from railroad company for death of **brakeman** who fell from train, the jar or jerk which caused him to fall must be shown to have been unusual and violent. Matthews' Adm'r v. Louisville & N. R. Co. [Ky.] 113 SW 459. Plaintiff got fingers into **mangle** which she was feeding. Bratfish v. Gibbons, 141 Ill. App. 256. Workman injured by **"cave in"** of ditch assumed risk. Washington Const. Co. v. Regan, 136 Ill. App. 627. Plaintiff subject to epileptic fits, during one of which he **fell from roof** upon which he was at work, held to have assumed the risk in absence of showing of want of

conducted at the time the servant enters the employment,[97] which are presumed to be known to and undertaken by the servant when he enters the employment.[98] The occasional negligence of fellow-servants is an assumed risk within the meaning of this rule,[99] but not the risk arising from a servant's incompetency.[1] Negligence of the master,[2] or of one who is, by virtue of statute or common law, a vice-principal,[3] is not an assumed risk. Unusual or extraordinary risks, unknown to the servant,[4]

mental capacity known to master. Lauth v. Harrison-Switzer Mill. Co., 140 Ill. App. 199. Servant held to assume risk of injury occasioned by **breaking of "breaker" in rolling mill,** where such breaking was well known to him to be a normal consequence of its functions and ordinarily attended with no danger. Thomas v. Republic Iron & Steel Co., 140 Ill. App. 258. The servant assumes the risk of **unusual accidents** which cannot be guarded against in the **erection of new buildings.** Where wheel barrow used by another workman slipped in snow-covered gangway and precipitated lump of coal on plaintiff, he was held to have assumed risk. William Grace Co. v. Gallagher, 137 Ill. App. 217.

**97.** Servant assumes risks involved in master's methods when he enters employment which are known to him. Lynch v. Saginaw Valley Trac. Co. [Mich.] 15 Det. Leg. N. 444, 116 NW 983. Liability of dynamite to explode at wrong time and place ie risk assumed by one entering employment where it is used. McHugh v. Jones & Laughlin Steel Co., 219 Pa. 644, 69 A 90. Where servant had worked for defendant 30 years and was familiar with method of coupling cars in elevator and with signals, he assumed risk of going between cars when signal was set that cars were ready for switch engine. Maloney v. Illinois Cent. R. Co., 131 Ill. App. 568. The negligence of the employes of a lessee railroad company is one of the risks assumed by an employe of the lessor company. Defendant owning and maintaining a number of tracks which were leased to different railroads is not liable for death of its servant through act of lessee railroad. Chicago & Western Indiana R. Co. v. Mills, 131 Ill. App. 625.

**98.** Servant assumes incidental dangers existing when he enters employment. Wilson v. Escanaba Woodenware Co., 152 Mich. 540, 15 Det. Leg. N. 216, 116 NW 198. Employe by entering employment assumes all obvious and apparent dangers incidental to business. Young v. Randall [Me.] 71 A 647; Bowen v. Pennsylvania R. Co., 219 Pa. 405, 68 A 963. An implied term of contract of employment is that work will be done with permanent conditions then existing; master is not bound to change such conditione, though they could be improved. McKenna v. Gould Wire Cord Co., 197 Mass. 406, 83 NE 1113. Servant entering or continuing in employment assumes existing known risks and cannot recover because there are safer methods than that used in master's business. Lynch v. Saginaw Valley Tract. Co. [Mich.] 15 Det. Leg. N. 444, 116 NW 983. Experienced switchman assumed obvious risk of going to work in yards which were not lighted. Travis v. Kansas City Southern R. Co., 121 La. 885, 46 S 909.

**99.** See ante, § 3E, Negligence of Fellow-Servants.

**1.** Klofski v. Railroad Supply Co., 235 Ill. 146, 85 NE 274. Incompetency of another servant, known to master but not to another employe, is not assumed risk. Christy v. Schwartzchild & Sulzberger Co. [C. C. A.] 160 F 657.

**2.** See post, Reliance on Care of Master.

**3.** Danger of plank falling on plaintiff while at work, due to gross negligence of foreman in mode of work, not assumed. Cook v. Chehalis River Lumber Co., 48 Wash. 619, 94 P 189. Plaintiff, engaged in performing duties, did not assume risk of being struck by stave thrown by employe on second floor, not his fellow-servant. Swann-Day Lumber Co. v. Thomas [Ky.] 112 SW 907. Operator of buzz planer did not assume risk of injury from knives when foreman had removed shield. Bennett v. Carolina Mfg. Co., 147 N. C. 620, 61 SE 463. Negligence of conductor on another car line not assumed. Bennett v. Chicago City R. Co., 141 Ill. App. 560. Section hand assumes ordinary risks, including those of riding on freight train to and from place of work but does not assume risk of negligence of master or servants who are not fellow-servants in handling trains. St. Louis, etc., R. Co. v. Harmon, 85 Ark. 503, 109 SW 295. Servant does not assume extraordinary risks which may arise in course of employment from negligence of vice-principal of which he has no notice and from which he has no reasonable grounds to fear danger. Williams v. Morris, 237 Ill. 254, 86 NE 729. Common laborer, engaged in removing debris, while mechanics, under vice-principal, were making repairs and raising floor in ice house did not assume risk of floor falling on him, owing to negligence of mechanic in supporting it. Id.

**4. Risk not assumed;** Extraordinary risks, or those arising from master's negligence, or latent, or known only at time of injury. Buena Vista Extract Co. v. Hickman, 108 Va. 665, 62 SE 804. **Collision of locomotive with car** upon which plaintiff was at work. Offner v. Erie R. Co., 140 Ill. App. 562. Risk of being **struck by water spout** of tank not assumed by brakeman. McDuffee's Adm'x v. Boston & M. R. Co. [Vt.] 69 A 124. Danger of **coming in contact with wires of another company,** while at work on pole, not assumed by telephone **linemnn,** unless he knew and appreciated the danger, or unless it was obvious. Drown v. New England Tel. & T. Co. [Vt.] 70 A 599. Where plaintiff, engaged as one of a crew in replacing boiler under foreman's superintendence, was injured by **explosion** of gasket, it will not be held as against verdict of jury that he was injured by one of ordinary hazards of the business which he must assume. Ragsdale v. Illinois Cent. R. Co., 140 Ill. App. 71. Where employer sent plumber to repair pipes in place where **calcium carbide** was stored without warning him to keep water

or which are encountered, under direction of the master, outside the service which the servant was hired to perform,[5] or which ordinary care in the performance of his duties would not disclose,[6] are not assumed.

*Known or obvious dangers.*[See 10 C. L. 753]—Risks which are actually known to the servant,[7] or which are so obvious [8] that a person of the same age, capacity and ex-

away from carbide, and without draining pipes, employe in another department did not assume risk of **explosion** when plumber allowed water to run out on carbide. Charron v. Union Carbide Co., 151 Mich. 687, 15 Det. Leg. N. 154, 115 NW 718. Common laborer engaged in shoveling earth into cars did not assume risk arising from use of steel rod to tamp dynamite by men employed in drilling and **blasting**, with knowledge of shift boss, this being extraordinary danger. Ongaro v. Twohy [Wash.] 94 P 916. **Removal of planks over belt-pit** not previously moved during course of plaintiff's employment, of which he had no knowledge and not obvious or apparent, created a new danger which he did not assume as incident to his employment. American Rolling Mill Corp. v. Knox, 140 Ill. App. 359. Where allegations of petition show that plaintiff was placed in dangerous **emergency** by sudden act of negligence of master, it will not be adjudged on demurrer that he assumed risk of continuing work in face of increased danger when injury followed so quickly as to leave no opportunity for choice. Brown v. Rome Mach. & Foundry Co. [Ga. App.] 62 SE 720. As where iron moulder was carrying ladle of molten iron with two helpers, and foreman called one away, and one of remaining men was overbalanced and **molten iron splashed** on plaintiff. Id.

**5. Risk not assumed:** Where employe is directed to do work outside the scope of his regular duties, the most that can be said is that he may be negligent in undertaking it, if danger is obvious to one of his age and experience; he does not assume unknown risks. Johnson v. Desmond Chemical Co., 152 Mich. 84, 15 Det. Leg. N. 138, 115 NW 1043. Where one ordinarily engaged as track layer in coal mine was ordered to assist timbermen, and while so doing was injured by falling roof. Tygett v. Sunnyside Coal Co., 140 Ill. App. 77. Common laborer who on a peremptory order undertook to open mould of hot steel and was injured because mould was opened before sufficiently cool, held not chargeable with knowledge that mould would explode if opened too soon. Illinois Steel Co. v. Swiercz, 135 Ill. App. 141.

**6.** Extraordinary risk of being struck by water spout of tank while on car not assumed by brakeman unless he knew or ought to have known of it. McDuffee's Adm'x v. Boston & M. R. Co. [Vt.] 69 A 124. Servant does not assume risks incidental to work to which he is assigned outside scope of his usual duties unless obvious to persons of ordinary intelligence.. Brandon v. Texarkana & Ft. Smith R. Co. [Tex. Civ. App.] 113 SW 968. Servant at work under platform had right to assume its reasonable safety; was not bound to investigate its construction and did not assume risk of plank falling on him, discoverable only by such inspection. Kroeger v. Marsh Bridge Co. [Iowa] 116 NW 125. Employe engaged in loading broken rock into steam shovel did not as matter of law assume risk of explosion of charge of dynamite which had not exploded with other charges; whether he assumed risk properly submitted to jury. Stephen v. Duffy, 237 Ill. 549, 86 NE 1082. Defect in elevator, by reason of which it fell, was not discoverable except by an inspection. Operator did not assume risk arising therefrom when it did not appear that he had actual knowledge of it, and it was not his duty to inspect or keep it in repair. Byene v. Marshall Field & Co., 237 Ill. 384, 86 NE 748.

**7. Risk assumed:** Plaintiff could not recover for injuries caused by **swinging circular saw** where he saw and appreciated danger. Young v. Randall [Me.] 71 A 647. Experienced mine foreman who knew dangerous condition of roof of tunnel assumed **risk of rock falling** on him. Tanner's Adm'r v. Wickliffe Coal Co., 32 Ky. L. R. 1304, 108 SW 351. No recovery for injuries caused by **breaking of ladder** which plaintiff knew was old, weak and unsafe. Christy v. Southwest Missouri R. Co., 131 Mo. App. 266, 110 SW 694. **Lineman killed by shock** received while on pole negligent where fact that wire was uninsulated and in contact with iron brace was obvious and he knew that wire carried heavy current and was dangerous. Memphis Consol. Gas & Elec. Co. v. Simpson [Tenn.] 109 SW 1155. Brakeman assumed risk of **using defective standard as handhold.** Chicago, etc., R. Co. v. Murray, 85 Ark. 600, 109 SW 549. Danger of **boards being blown from piles** in yard by wind. Schillo Lumber Co. v. Bemben, 139 Ill. App. 628. Planks had been placed in the **elevator shaft** within 11 inches of stopping place of elevator beam. When originally installed there was a space of 4 or 5 feet. Peterson v. Sears, Roebuck & Co., 141 Ill. App. 592. Boy of 16 assumed risk of **slipping on pieces of rock** or slag, being familiar with conditions. Cook v. U. S. Smelting Co. [Utah] 97 P 28. Brakeman employed in moving dump cars for mining company assumed risk of **method used to couple such cars** to engine, which he knew. Mahoning Ore & Steel Co. v. Blomfelt [C. C. A.] 163 F 827. Where servant was familiar with premises and conditions in foundry, knew of previous **dust explosions** and danger of going to place where he was when killed, he assumed the risk. Jenco v. Illinois Steel Co., 233 Ill. 301, 84 NE 273. Danger of **falling into hatch** of vessel assumed risk, injured servant being familiar with conditions. Campbell v. Trinidad Shipping & Trading Co., 165 F 270. Painter assumed risk of **using ladder** known to be defective. Kennedy v. New York Tel. Co., 125 App. Div. 846, 110 NYS 887. Error to refuse charge that plaintiff, injured by **moving of crane,** could not recover if he knew that crane was to be moved and consented to its being moved. Hamilton v. Niles-Bement-Pound Co., 192 N. Y. 179, 84 NE 801. Servant seeing fire in trench in which coal dust was being carried by conveyor, and

perience, exercising due care, would have known of them,[9] are also assumed by a

knowing danger of explosion, assumed risk of **going into trench to put out fire.** United States Cement Co. v. Koch [Ind. App.] 85 NE 490.

**8.** Obvious risks assumed. Wilson v. Escanaba Wooden-Ware Co., 152 Mich. 540, 15 Det. Leg. N. 216, 116 NW 198. Open and obvious risks which servant has opportunity to observe, assumed. Bowen v. Pennsylvania R. Co., 219 Pa. 405, 68 A 963. The rule that servant assumes obvious risks applies as well to dangers arising in course of the employment as to those existing at the time of commencement of the relation. De Kalands v. Washtenaw Home Tel. Co. [Mich.] 15 Det. Leg. N. 337, 116 NW 564. All risks and hazards that are open and apparent are assumed, whether they are necessarily incident to the service or otherwise. United States Cement Co. v. Koch [Ind. App.] 85 NE 490.

**Risk Held Obvious and Assumed: Manner of loading vessel.** Singleton v. Merchants' & Miners' Transp. Co. [Ga. App.] 61 SE 881. Employe pushing car assumed risk of falling into **hole in platform** on trestle which was obvious and of which employes had been warned. Priddy v. Black Betsey Coal & Min. Co. [W. Va.] 61 SE 163. Danger of getting **fingers mangled in machine.** Willson v. Logan, 139 Ill. App. 204. Danger of being struck by tree which had to be removed in course of **excavation in quarry** was assumed by quarryman. Feola v. Orange County Road Const. Co., 114 NYS 70. Employe assumed risk of injury due to **slippery condition of timbers and trestle** and tools caused by snow and ice, the conditions being obvious. Mellette v. Indianapolis Northern Trac. Co. [Ind. App.] 86 NE 432. Farm hand assumed risk of **falling into silo opening** in barn. Smith v. Lincoln, 198 Mass. 388, 84 NE 498. **Hole in plaster on wall of freight elevator shaft.** Injury caused by employe allowing foot to project over floor of elevator, getting it caught in hole. McDonald v. Dutton, 198 Mass. 398, 84 NE 434. **Operating windlass with only one helper.** Lake v. Shenango Furnace Co. [C. C. A.] 160 F 887. Mangle operator got **hand caught between drum and rod.** Wallace v. Haines [N. J. Law] 71 A 44. Risk of operating **cogwheels** by placing hand on one of them. Henschell v. Union Pac. R. Co. [Kan.] 96 P 857. Servant assumes risk of using ordinary **simple tools** and **simple methods** of work readily understood. Golden v. Ellis [Me.] 71 A 649. Two brick-carrying platforms were operated side by side in building under construction. Plaintiff, loading platform at bottom, was **struck by brick** which fell from barrow at top. Kelly v. Cowan [Wash.] 96 P 152. Operator of wood-working machine assumed risk of **working with defective pattern** which caused his fingers to come in contact with **revolving knives,** danger being obvious. Yunkes v. Racine-Sattley Co., 135 Wis. 81, 115 NW 348. Stevedore assumed obvious risk of trying to handle and **make fast hawser without assistance,** being pulled off wharf and drowned. Merchants' & Miners' Transp. Co. v. State [Md.] 70 A 413. Plaintiff and others **pulled over frame supporting drop hammer,** one guy rope being down; fell on plaintiff. Laragy v. East Jersey Pipe Co. [N. J. Law] 68 A 1073. Danger of getting **hand caught between cylinders** of calendar machine obvious and assumed by servant where he was told he could operate that machine or go home. Mika v. Passaic Print Works [N. J. Err. & App.] 70 A 327. **Brakeman** assumed risk of **stumbling over lantern bracket** projecting from runway on car. Grover v. New York S. & W. R. Co. [N. J. Law] 69 A 1082. **"Trouble man" for telegraph company** assumed risks arising from obvious fact that pole up which he went to test wires also held **wires of lighting company.** Ambre v. Postal-Tel. Cable Co. [Ind. App.] 86 NE 871. No recovery for death of employe engaged in blowing off water and steam from locomotive boiler caused by **defect in blow-off pipe** used by him which was obvious, where he could have selected or obtained one which was not defective. Atchison, etc., R. Co. v. Stone, 77 Kan. 642, 95 P 1049. **Street car conductor** assumed risk of **striking head against telephone pole** in leaning out of car where he must have observed the pole during his work and known of its location. Moore v. Chattanooga Elec. R. Co. [Tenn.] 109 SW 497. **Coal miner of** experience assumed risk of **fall of slate** upon him where roof was visibly and obviously dangerous and he failed to fix it as warned, but proceeded to work as it was. Elkins' Adm'r v. New Livingston Coal Co. [Ky.] 115 SW 203. Danger of **getting clothing or hands caught** in chain and sprocket wheel. Ramsey v. Tremont Lumber Co., 121 La. 506, 46 S 608. Servant charged with knowledge of **defect in ice skid** which he was required to use and adjust to his wagon in course of his duties. Lone Star Brew. Co. v. Willie [Tex. Civ. App.] 114 SW 186. **Water meter inspector** employed by city assumed risk of reading meter situated in ground close to ties of track and of being **struck by passing car** on track. Berry v. Kansas City, 128 Mo. App. 374, 107 SW 415. **Danger of standpipe raised on crowbar** by fellow-servant **falling** was obvious and assumed by plaintiff, engaged in repairs. Bolsem v. Iowa Cent. R. Co. [Iowa] 117 NW 1098. Brakeman assumed risk of **getting foot caught** between guard rail and other rail, space being unblocked, the danger being obvious. St. Louis S. W. R. Co. v. Hynson [Tex.] 109 SW 929, rev. decision in 107 SW 625.

**9.** Servant assumes risks which he knows and appreciates or which he ought to know and appreciate. Larsen v. Leonardt [Cal. App.] 96 P 395; Burnside v. Peterson, 43 Colo. 382, 96 P 256; Flowers v. Louisville & N. R. Co. [Fla.] 46 S 718; German-American Lumber Co. v. Brock [Fla.] 46 S 740; Roland v. Tift [Ga.] 63 SE 133; Charrier v. Boston & M. R. Co. [N. H.] 70 A 1078; Clinchfield Coal Co. v. Wheeler's Adm'r, 108 Va. 448, 62 SE 269. Risks which are known or which ought to be known in exercise of ordinary care are assumed. Millen v. Pacific Bridge Co. [Or.] 95 P 196; Williams v. Norton Bros. [Vt.] 69 A 146. Risk is assumed if person of ordinary prudence and same age and experience would, in same situation, appreciate danger. Brownwood Oil Mill v. Stubblefield [Tex. Civ. App.] 115 SW 626. Employe assumes all risks one of his age, care and experience ought to know and appreciate, whether ob-

servant who continues in the employment with such actual or implied knowledge of the danger.[10] Dangers which are as well known to the servant as to the master, or which the servant has equal opportunity with the master to observe, are assumed.[11]

vious or not. Young v. Randall [Me.] 71 A 647. Servant assumes such risks as he must necessarily have known "in the ordinary discharge of his duties," not such as he ought to have known "in the exercise of ordinary care and caution." Texas & N. O. R. Co. v. Davidson [Tex. Civ. App.] 20 Tex. Ct. Rep. 643, 107 SW 949. Ignorance of obvious danger will not excuse employe unless justifiable or excusable. De Kallands v. Washtenaw Heme Tel. Co. [Mich.] 16 Det. Leg. N. 337, 116 NW 564.

**Risk held to have been assumed:** Foot **injured in shaft** where elevator weights run. Gould v. Aurora, E. & C. R. Co., 141 Ill. App. 344. Killed by **explosion of hot dust.** Illinois Steel Co. v. Jenco, 136 Ill. App. 555. Carpenter going upon **dismantled scaffold** without noting its condition fell with a loose plank and was injured. Swift & Co. v. Larson, 136 Ill. App. 93. Where **press-feeder placed her hand in close proximity to unprotected chuck** in plain view and obviously dangerous and was injured, she assumed the risk. Pictorial Printing Co. v. Keil, 132 Ill. App. 480. Plaintiff injured in **mangle, guard-rail of which was too high,** held to have assumed risk when this condition was obvious and of long standing. Butler v. Frazee, 29 S. Ct. 136. Servant working upon alleged **defective scaffold,** construction of which he had full opportunity to observe. Rousa v. Bartzen, 140 Ill. App. 555. Injury by **knives in jointer,** unguarded but in plain view. Harrington Mfg. Co. v. Arendell, 135 Ill. App. 406. **Switchman** who had worked in yards 9 months assumed risk arising from **methods of work** used. Killed between cars. Nelson v. Southern R. Co. [C. C. A.] 158 F 92. Where **street car conductor** was injured in rear-end collision, owing to **defect in brakes,** instruction that he could not recover if he had actual or constructive knowledge of defect, and that he had constructive knowledge if by reasonable care he could have learned of defect, was sufficient to protect defendant's rights. Welch v. Jackson & B. C. Trac. Co. [Mich.] 16 Det. Leg. N. 767, 117 NW 898. Risk of **rolling fly wheel across floor** in method and with number of men used, assumed. Fairbanks, Morse & Co. v. Walker [C. C. A.] 160 F 896. Man of 20 who had worked 8 nights held to have assumed **slippery condition of ties on turntable** and construction (ties close together), and could not recover where his foot was caught and run over by engine. Galloway v. Chicago, etc., R. Co., 234 Ill. 474, 84 NE 1067. Where **telephone lineman** was injured by reason of wires he was handling becoming grounded and charged by other wires, held whether or not he actually knew of the danger, he was charged with it and assumed the risk, in view of his experience and the circumstances. De Kallands v. Washtenaw Heme Tel. Co. [Mich.] 15 Det. Leg. N. 337, 116 NW 564. Evidence held to show that electric lineman sent out to repair broken wire ought to have known that wire was charged and that he assumed risk of **danger of shock.** Western Union Tel. Co. v. Burton [Tex. Civ. App.] 115 SW 364. Boy of 18, with year's experience in **swelling barrels by turning steam into them** when filled with water, charged with knowledge of danger of explosion from turning on too much steam. Stitzel v. A. Wilhelm Co., 220 Pa. 564, 69 A 996. Boy of 19 who had worked 13 months and testified to complete knowledge of conditions and appreciation of danger assumed risk of **adjusting cable** leaning over shaft to do so. Federal Lead Co. v. Swyers [C. C. A.] 161 F 687. Experienced **miner** assumed risk of danger involved in **shoring up tunnel.** Martin v. Degnon Const. Co., 111 NYS 359. Man at work with **pile driver** 14 months charged with knowledge of and assumed risk of danger of pile falling owing to wearing of hammer on rope which held pile between leads. Kirkpatrick v. St. Louis & S. F. R. Co. [C. C. A.] 159 F 855. Experienced **switchman** familiar with conditions in railroad yards where construction work was going on assumed **risk of switch engine being derailed** by footboard running into pile of sand, when he could have stopped engine. Morrison v. Williams [Wash.] 96 P 691. **Brakeman** who came in contact with **cattle chute** assumed risk of injury, though he did not have actual knowledge of its location, if in the exercise of reasonable diligence he ought to have known of its location, though he did not know its exact distance from the track. Carr v. Grand Trunk R. Co., 152 Mich. 138, 15 Det. Leg. N. 118, 115 NW 1068. Evidence held to charge him with such knowledge where it appeared he had passed it 10 or 12 times before. Id. Operator of **traction motor** used to haul cars in mine held to have assumed risk of its **running away,** where he was mature man, had been thoroughly instructed and told to report any defects, and had operated it some time. Clinchfield Coal Co. v. Wheeler's Adm'r, 108 Va. 448, 62 SE 269. Engineer directed to repair **defect in engine** which he operated assumed risk of getting hand caught between defective parts where he knew of the defect and the injury was reasonable and natural consequence of his act. James v. Fountain Inn Mfg. Co. [S. C.] 61 SE 391. **Street car conductor,** in response to the warning "Look out," projected his head beyond line of car and was **struck by projecting roof** and killed. He must have known of it if he exercised ordinary care, and hence he assumed risk. Martin Adm'r v. Cincinnati Trac. Co., 10 Ohio C. C. (N. S.) 528.

**10.** Servant is deemed to have assumed risk arising from known defect when he continues to work without complaint or promise to remedy defect. Lake v. Shenange Furnace Co. [C. C. A.] 160 F 887; Mellette v. Indianapolis Northern Trac. Co. [Ind. App.] 86 NE 432; Marshall v. St. Louis S. W. R. Co. [Tex. Civ. App.] 107 SW 883; Trucker's Mfg. & Supply Co. v. White, 108 Va. 147, 60 SE 630; Meshishnek v. Seattle Sand & Gravel Co. [Wash.] 99 P 9.

**Risk assumed:** Danger of getting hand caught in **unguarded cylinders** of machine while adjusting cloth, assumed. Harris v.

Risks which are unknown to the servant and which ordinary care in the discharge of his duties would not have disclosed and which are not incidental, are not assumed.[12]

Bottom [Vt.] 70 A 560. **Defective condition of mast of derrick** assumed when servant knew it, had helped fix it, and continued to work until it fell on him. Wollington v. Missouri K. & T. R. Co. [C. C. A.] 161 F 713. **Brakeman** assumed risk of working on **yard engine without footboard or grabiron** when he had worked on it several weeks. Wilson v. New York Cent. & H. R. Co. [Pa.] 71 A 183. **Fireman** who had worked for years in engine cabs with knowledge that **glass water gauges** were not enclosed in wire screens assumed risk of injury from explosion of gauge, though he had been told by foreman that gauges were made by new process and would not explode. Chicago B. & Q. R. Co. v. Griffin [C. C. A.] 157 F 912. Mason's helper who knew boards had been removed from **scaffold,** and knew floor ought to be wider, assumd risk of falling when he continued working without complaint. Schneider v. Philadelphia Quartz Co., 220 Pa. 548, 69 A 1035. **Engineer** assumed risk arising from **location of semaphore** at place where he could not see it where he had passed it every other day for 2 months. Pearsall v. New York Cent., etc., R. Co., 128 App. Div. 397, 112 NYS 872. Experienced operator of **gin stand** assumed risk of continuing to operate it with knowledge of its defective condition. Continental Oil & Cotton Co. v. Scott [Tex. Civ. App.] 112 SW 107. Employe who knew **location of boiler, which exploded,** and had worked in shop 2 years, assumed risk of dangers arising from its position and construction of shop. Ware v. Ithaca St. R. Co., 125 App. Div. 323, 109 NYS 426. **Miner** who, on failure of timbermen to do so, undertook to prop **roof** known by him to be dangerous, held to have assumed risk. Lumaghi Coal Co. v. Grenard, 133 Ill. App. 27. Employe in **tanning plant** whose duties required him to stand 50 or 60 times a day with one foot on trough and one on tub, 4 feet apart, and who continued in service without objection, assumed risk of slipping and **falling into tub.** Buena Vista Extract Co. v. Hickman, 108 Va. 665, 62 SE 804. **Section hand** assumed risk of using car with **defective brakes** when he continued in service with knowledge of defects. St. Louis & S. F. R. Co. v. Mealman [Kan.] 97 P 381. **Switchman** would assume risk of **defect in track** by continuing in service a year with knowledge and without any promise to repair. St. Louis, etc., R. Co. v. Mangan [Ark.] 112 SW 168. **Brakeman** assumed risk of getting his hand caught in making **coupling with link and pin** where he knew condition of link and pin, method of use, and had never objected to them, though he knew danger. Louisville & N. R. Co. v. Stanfill, 32 Ky. L. R. 1043, 107 SW 721. Servant killed by **falling into shaft-pit** on account of alleged **slippery floor** held to have assumed risk where he had full opportunity to know conditions and continued in service without complaint. Steffen v. Illinois Steel Co., 140 Ill. App. 551. Experienced **stone mason** assumed risk of use of **defective hammer** which he had seen and knew was dangerous, piece being chipped off which struck him in eye. Golden v. Ellis [Me.] 71 A 649.

**11.** The servant may rely on superior knowledge of master, but is required to use his senses and observe natural laws, and when dangers are as well known to him as to the master, or are obvious, he assumes the risk. Melistte v. Indianapolis Northern Trac. Co. [Ind. App.] 86 NE 432. If servant's knowledge of defect and danger is equal to that of master, former assumes risk. Jenco v. Illinois Steel Co., 233 Ill. 301, 84 NE 273. Where dangers are or ought to be as apparent to servant as to master, they are assumed risks. Brownwood Oil Mill v. Stubblefield [Tex. Civ. App.] 115 SW 626. Servant having equal knowledge with master of incidental dangers assumes risk. Marshall v. St. Louis S. W. R. Co. [Tex. Civ. App.] 107 SW 883. Where employe was caused to fall under car by reason of obstructions, cinder piles, on track, he assumed risk of injury, the condition being obvious and as well known to him as to company. Missouri Pac. R. Co. v. Click [Kan.] 96 P 796. Employe assumed risk of falling into machine, danger of peculiar accident being better known to him than to master. Bushtis v. Catskill Cement Co., 113 NYS 294. Risk of injury by stumbling while carrying heavy bolt being as well known to plaintiff as defendant was assumed. Jones v. Pioneer Cooperage Co. [Mo. App.] 114 SW 94. A board from a pile in a yard was blown by a hurricane and injured the plaintiff. Schillo Lumber Co. v. Bemben, 139 Ill. App. 628.

**12.** Risks not known, or not appreciated by reason of ignorance or inexperience, want of knowledge not being due to want of care, are not assumed. Millen v. Pacific Bridge Co. [Or.] 95 P 196. No issue of assumed risk where there was no evidence that servant knew or ought to have known of danger. Texas & N. O. R. Co. v. Jackson [Tex. Civ. App.] 113 SW 628. Servant assumes only such risks as are obvious and discoverable by use of ordinary care in performance of his own duties. Laughy v. Bird & Wells Lumber Co., 136 Wis. 301, 117 NW 796. Where employe was obliged to shift belt and tie it up as he was doing when injured because of failure of employer to supply belt shifter and safeguards, he assumed only such risks incident thereto as were obvious. Trombley v. McAfee, 152 Mich. 494, 15 Det. Leg. N. 269, 116 NW 191. Plaintiff will not be held to have assumed risk in undertaking to perform a dangerous work unless the act itself was obviously so dangerous that in careful performance of it the inherent probabilities of injury were greater than those of safety. Rushing v. Seaboard Air Line R. Co. [N. C.] 62 SE 890. If machine was not in proper condition when plaintiff was put to work on it, he assumed only such incidental risks in operating it as his instructions made apparent to him. Clemens v. Gem Fibre Package Co. [Mich.] 15 Det. Leg. N. 574, 117 NW 187. Servant does not assume risks arising from master's negligence, nor such as are latent and not known to servant or are discovered only at time of injury. German-American Lumber Co. v. Brock [Fla.] 46 S 740. Instruction on assumed risk erroneous for omission of language of Laws

Whether a particular risk was known or ought to have been known to the servant,

29th Leg. p. 386, c. 163, that employe does not assume risk of defect or danger known to him "where a person of ordinary care would have continued in the service with the knowledge of the defect and danger." Currie v. Missouri K. & T. R. Co. [Tex.] 108 SW 1167.

**Risk held not to have been assumed:** Experienced workman did not assume risk of injury from **defect in machine** about which he knew nothing. Rowell v. Gifford, 200 Mass. 546, 86 NE 901. Employe did not assume risk of breaking of **defective steam pipe** when it did not appear that he knew of the defect. De Witt v. Floriston Pulp & Paper Co., 7 Cal. App. 774, 96 P 397. Hidden danger from noiseless **revolving shaft** in dressing room, usually boxed, not assumed risk. Flynn v. Prince, Collins & Marston Co., 198 Mass. 224, 84 NE 321. Employe killed by **fall of mine roof** did not assume risk, having no knowledge of conditions or danger. Lanne v. U. S. Gypsum Co., 110 NYS 496. **Brakeman** did not as matter of law assume risk of being struck by **ore shed near track,** though he knew its location in a general way, never having made close examination. Collins v. Mineral Point & N. R. Co., 136 Wis. 421, 117 NW 1014. Plaintiff, assisting in **unloading cars** and directed to **couple** two of them, being unfamiliar with work, did not assume risk of another car being pushed against those he was at work on. Pecard v. Menominee River Sugar Co. [Mich.] 15 Det. Leg. N. 346, 116 NW 532. Evidence warranted finding that **car repairer** at work in barn under car did not assume risk of unusually **slippery condition of track** which caused car to collide with one under which he was working. Jelinek v. St. Paul City R. Co., 104 Minn. 249, 116 NW 480. Servant did not as matter of law assume risk of **rope breaking** when he had worked only two days and had not seen it before it was used at time of injury. Shirk v. Chicago & E. I. R. Co., 235 Ill. 315, 85 NE 262. Risk of injury by flying sliver or **chip from chisel** not assumed by employe not using it, but working near, who had not seen it. Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730. When one stick of timber was placed on top of another to increase leverage in prying, danger of second **timber slipping** was not so obvious to one not having seen it slip before, and not familiar with its use, that he assumed risk as matter of law. Robertson v. Hersey, 198 Mass. 528, 84 NE 843. Jury may find that **common laborer** put to work in connection with **machinery** did not appreciate danger therefrom when not warned. Bartley v. Boston & N. St. R. Co., 198 Mass. 163, 83 NE 1093. General warning to engineer to run carefully, owing to condition of track after storm, held not to cause him to assume risk of particular defect. **Culvert washed out.** Jennett v. Louisville & N. R. Co., 162 F 392. **Ordinary carpenter** employed to pump on barge from which coal was being loaded on vessel did not assume risk of **unseaworthiness of barge** of which he had no knowledge. Oregon Round Lumber Co. v. Portland & A. S. S. Co., 162 F 912. Foreman in mill did not assume risk of **falling into pit** when he did not know that planks which usually covered it had been removed. Knox v. American Rolling Mill Corp., 236 Ill. 437, 86 NE 90. In the absence of notice or warning, employes riding on cars in performance of duties do not assume risk of injury from **structures maintained so close to the track** as not to be reasonably safe. Clay v. Chicago, etc., R. Co., 104 Minn. 1, 115 NW 949. Common **miner** shoveling on floor of stope **injured by rock** rolling down upon him. Stratton Cripple Creek Min. & Developing Co. v. Ellison, 42 Colo. 498, 94 P 303. Employe installing electric equipment did not assume risk of injury from nearby **live wire** when he did not know wire was charged and was relying on assurance that current would be turned off. Latimer v. General Elec. Co. [S. C.] 62 SE 438. Plaintiff did not assume risk of **pile of ties falling** when he had no reason to suppose another would be thrown upon pile by orders of foreman. Sambos v. Cleveland, etc., R. Co. [Mo. App.] 114 SW 567. Complaint held not to show that plaintiff knew and appreciated danger arising from **change in machine** made by foreman. Flowers v. Louisville & N. R. Co. [Fla.] 46 S 718. Employe not chargeable with notice of **defect in shaft** not visible when shaft was revolving. Whitworth v. South Arkansas Lumber Co., 121 La. 894, 46 S 912. Employe did not assume **risk of belt breaking** at place where it had been improperly repaired where he did not know of its condition. Starnes v. Pine Woods Lumber Co. [La.] 47 S 607. Plaintiff held not chargeable with knowledge of **incompetency of helper;** hence he did not assume risk of injury thereby. Kansas City Consol. Smelting & Refining Co. v. Taylor [Tex. Civ. App.] 107 SW 889. **Brakeman** not chargeable with knowledge of **defect in turntable** when used to turn unusually heavy engine. Currie v. Missouri K. & T. R. Co. [Tex.] 108 SW 1167. Inexperienced **section hand** did not assume risk involved in dangerous mode in which he was directed to **unload gravel** from cars, resulting in his being buried in gravel as it suddenly gave way. Gulf, etc., R. Co. v. Jackson [Tex. Civ. App.] 109 SW 478. Inexperienced boy did not assume risk of injury from **revolving knives** of planer which projected beyond guard. Owensboro Stave & Barrel Co. v. Daugherty [Ky.] 33 Ky. L. R. 328, 110 SW 319. **Car repairer** did not assume risk of car **doors falling** on him. Texas & N. O. R. Co. v. Barwick [Tex. Civ. App.] 110 SW 953. Boy of 15 did not as matter of law assume risk of **getting hand caught in machine** while trying to extricate board from it as he had been told to do. Czernicke v. Ehrlich, 212 Mo. 386, 111 SW 14. **Fireman** killed by reason of engine and tender pulling apart, **coupling apparatus** being defective. Missouri K. & T. R. Co. v. Snow [Tex. Civ. App.] 115 SW 631. Plaintiff did not assume risk incident to **dissolving zinc chloride,** having no knowledge of its dangerous character, some of it having been splashed into his eye. Elliff v. Oregon R. & N. Co. [Or.] 99 P 76. Evidence held not to show assumption of risk where plaintiff was injured by **improperly constructed vent in mould** for casting iron, defect of which was not patent. The Sargent Co. v. Shukair, 138 Ill. App. 380.

within the meaning of these rules, is ordinarily a question of fact [13] to be deter-

**13. Whether Risk Assumed Held Question for Jury. Miscellaneous illustrations: Brick wall** in course of construction **fell** on employe at work near it. Nelson Vitrified Brick Co. v. Mussulman [Kan.] 99 P 236. Whether plaintiff, domestic, assumed risk of going through **hole in porch floor** covered with thin boards. Fearon v. Mullins [Mont.] 98 P 650. Whether plaintiff assumed risk of being **struck by cable** used to haul logs. Howland v. Standard Milling & Logging Co. [Wash.] 96 P 686. Whether driver assumed risk of **breaking of chain** used to hitch team to cable. Martin v. Gould, 103 Minn. 467, 115 NW 276. Whether common laborer wheeling supplies for masons at work in building assumed risk of defective construction of **passageway** used by him. Johnson v. Lindahl [Minn.] 118 NW 1009. Mill employe sent to repair pump in engine room held not to have assumed risk of **falling into excavation in floor** as matter of law. Sparling v. U. S. Sugar Co., 136 Wis. 509, 117 NW 1055. Common laborer injured by **sudden flow of cement through conduit** into bin, produced by use of stick by him, no other means being provided. Vaughn v. Glens Falls Portland Cement Co., 59 Misc. 230, 112 NYS 240. Where minor employe knew or ought to have known and appreciated danger of **falling into pit** where engine was, which was improperly guarded, there being only narrow passage between pit and other machinery. Lunde v. Cudahy Packing Co. [Iowa] 117 NW 1063. Whether plumber's helper was bound to know that inch of **muriatic acid** and piece of **zinc** in beer bottle would cause **explosion.** Buckley v. Garden City Co., 111 NYS 23. Whether plaintiff, injured by reason of defects in **windmill platform** on which he was required to stand in oiling machinery, knew its condition. Miller v. Chicago, etc., R. Co., 103 Minn. 443, 115 NW 269. Whether boy of 13 assumed risk of falling over **defective platform** in dark place where he worked. Haggblom v. Winslow Bros. & Smith Co., 198 Mass. 114, 84 NE 301. Plaintiff dug under concrete "manhole" to lower it into hole according to instructions. Part of concrete **structure fell** upon him. Ward v. Edison Elec. Illuminating Co., 124 App. Div. 22, 108 NYS 608. Whether boy of 14, considering his age, intelligence and experience, assumed risk of being **struck by piece of cloth** which was being run through several machines in process of finishing, he being employed to watch cloth as it fell in boxes. Lane v. Manchester Mills [N. H.] 71 A 629. In hurrying along **passageway,** usually clear, employe caught foot in cloth, several rolls of which blocked way. Perrier v. Dunn Worsted Mills [R. I.] 71 A 796. Whether danger of going upon **pile of lumber** which was knocked down by car was obvious. Bryant Lumber Co. v. Stastney [Ark.] 112 SW 740. Servant injured in dark tunnel, the elevator striking him when he fell into **elevator pit.** Hanreddy v. Palilinnas, 139 Ill. App. 148. **Breaking of hook** which **spilled hot iron** on deceased. Illinois Steel Co. v. Paige, 136 Ill. App. 410. Person hired as **car washer ordered to roll wheels,** whereby he was injured. Pullman Co. v. Przybla, 136 Ill. App. 303. Where servant engaged in wheeling ashes up an incline continued his work although an **engine** was standing in close proximity, and **was caused to fall** by confusion resulting from the escape of steam from the engine. Chicago, etc., R. Co. v. Cukravony, 132 Ill. App. 367. Plaintiff, "trouble shooter" for telephone company, had been sent night before to tie down wire to prevent contact with wire of another company. Next morning he went past place to do work nearby and was **injured by shock** caused by contact with another wire. Texarkana Tel. Co. v. Pemberton [Ark.] 111 SW 257. Whether employe knew or ought to have known that **telephone pole** which he had to climb was rotten and unsafe. Jackson Fibre Co. v. Meadows [C. C. A.] 159 F 110. Whether telephone lineman assumed risk of injury from **wire of lighting company maintained near telephone wires.** Drown v. New England Tel. & T. Co. [Vt.] 70 A 599. Whether telegraph lineman ought to have known that light wires on pole where he was testing telegraph **wires were charged.** Ambre v. Postal Tel. Cable Co. [Ind. App.] 86 NE 871. Whether man shoveling coal into hoist knew and assumed risk of **incompetency of men** who controlled hoist. Bartley v. Boston & N. R. Co., 198 Mass. 163, 83 NE 1093. Whether miner assumed risk of **incompetency** and drunkenness of watchman, and whether fire was proximately caused by his drunkenness. Alder Co. v. Fleming [C. C. A.] 159 F 593. Whether logger knew and assumed risk of **incompetency** of engineer in charge of donkey engine. Seewald v. Harding Lumber Co. [Wash.] 96 P 221.

**Injuries in mines, excavations, etc.:** Miner injured by **fall of rock in mine.** Norton Coal Co. v. Murphy, 108 Va. 528, 62 SE 268. Deceased servant sent to work in **excavation,** where earth fell on him. Helgar v. Walla Walla [Wash.] 97 P 498. Whether man sent to do dangerous work in mine, **setting timbers** to start new drift, assumed risk. Kastrzeba v. Hobart Iron Co., 103 Minn. 337, 114 NW 949. Whether miner assumed risk of using defective, **slow burning fuse** in blasting. Nustrom v. Shenango Furnace Co., 105 Minn. 140, 117 NW 480. Miner engaged in dangerous work of **timbering entry** to cross drift injured by fall of roof caused by a blast which was shot off without warning. Jacobson v. Hobart Iron Co., 103 Minn. 319, 114 NW 951. Whether workman sent to work in trench not properly braced assumed **risk of cave-in.** McCoy v. Northern Heating & Elec. Co., 104 Minn. 234, 116 NW 488. Whether **miner** assumed risk of **premature explosion** of dynamite due to use of defective fuse. Wiita v. Interstate Iron Co., 103 Minn. 303, 115 NW 169. Whether common laborer **digging tunnel** for sewer assumed risk of cave-in. Millen v. Pacific Bridge Co. [Or.] 95 P 196. Plaintiff did not as matter of law assume risk of **sudden starting of machine** he was repairing due to latent defects in pulleys or belts. Cochrell v. Langley Mfg. Co. [Ga. App.] 63 SE 244.

**Injuries by machines and appliances:** Whether millwright assumed risk of getting caught by **set screws** on shaft while oiling pulley. Ramm v. Hewitt-Lea Lumber Co. [Wash.] 94 P 1081. Whether risk of using **gasoline engine,** known to be defective, was

mined by reference to the age, capacity, intelligence and experience of the employe.[14]

assumed. Meshishnek v. Seattle Sand & Gravel Co. [Wash.] 99 P 9. Whether operator of **crosscut saw** assumed risk of being struck by block thrown by saw which was **unguarded.** O'Connell v. Smith [Iowa] 118 NW 266. Whether boy of 18 assumed risk of getting fingers cut off by **ripsaw** when cleaning out sawdust under saw with hands under direction of defendant. Mastey v. Villaume Box & Lumber Co., 104 Minn. 186, 116 NW 207. Whether boy of 15 assumed risk of trying to shift belt in dangerous manner in which he had seen others do it, he having had no warning or instruction and **shifting of belt** being a part of his work. Lehto v. Atlantic Min. Co., 152 Mich. 412, 15 Det. Leg. N. 242, 116 NW 405. Evidence did not show as matter of law that servant knew **boiler** unsafe. Hollis v. U. S. Glass Co., 220 Pa. 49, 69 A 55. Whether **elevator** operator knew or ought to have known danger of operating after one of two cables had broken without safety device. Wilson v. Escanaba Woodenware Co., 152 Mich. 540, 15 Det. Leg. N. 216, 116 NW 198. Ordinary workman held not as matter of law to have assumed risk of injury from **fall of derrick** of faulty construction and defective equipment. Smith v. Kenyon & Co. [R. I.] 68 A 725. Plaintiff held not to have assumed as matter of law risk of patent **ladder scaffold** tipping over. Schmitt v. Rohn, 110 NYS 1086. Boy under 15 sat down to rest on part of machine and when he got up was injured by **unguarded saw.** Jacobson v. Merrill & Ring Mill Co. [Minn.] 119 NW 510. **Jointer machine** "kicked" back board, and threw plaintiff's hand upon knives. Bigum v. St. Paul Sash, Door & Lumber Co. [Minn.] 119 NW 481. Plaintiff was working on **mast of derrick supported by rope and pulley,** and rope parted, allowing him to fall. Westin v. Anderson [Minn.] 119 NW 486. Whether plaintiff assumed risk of defective condition of **delivery wagon** used by him. De Grief v. Northwestern Knitting Co. [Minn.] 118 NW 558. **Operator of heading machine** in box factory had his hand drawn on saw by reason of defect in machine. He knew machine was defective in that boards sometimes hit spreader and caused his hand to jump. Lynch v. Lynn Box Co., 200 Mass. 340, 86 NE 659. Mill employe caught on **shaft** while trying to adjust belt. Seely v. Tenant, 104 Minn. 354, 116 NW 648. Whether employe knew or ought to have known that **chisel** was defective and liable to send off chips when struck. Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730. Whether deceased servant knew that **elevator** which fell with him was out of repair. Herlihy v. Little, 200 Mass. 284, 86 NE 294. Whether uninstructed boy of 16 knew and appreciated danger of **operating** wood shaping **machine,** and whether danger was obvious to him. Marklewitz v. Olds Motor Works, 152 Mich. 113, 15 Det. Leg. N. 125, 115 NW 999. Operator of **unguarded** lath bolting **machine** injured by board thrown by saw. Callopy v. Atwood, 105 Minn. 80, 117 NW 238. Operator of sole molding machine, boy 15 years old, got **fingers caught.** Saller v. Friedman Bros. Shoe Co., 130 Mo. App. 712, 109 SW 794. Whether continuing work with **complicated machine** known to be defective was negligence for jury though facts were undisputed. Marcum v. Three States Lumber Co. [Ark.] 113 SW 357.

**Injuries to railroad employes:** Whether brakeman assumed risk of **defective track** at point where engine tender left track. Laughy v. Bird & Wells Lumber Co., 136 Wis. 301, 117 NW 796. Whether brakeman knew or ought to have known of **hole between ties on spur track** in which his foot was caught. Roenfranz v. Chicago, etc., R. Co. [Iowa] 116 NW 714. Employe on logging train killed while **standing on running board of tender** between it and loaded car. Gauthier v. Wood [Wash.] 94 P 654. Whether plaintiff, inexperienced as brakeman, assumed risk of **derailment of train** of 10 loaded cars which was sent down grade of logging road without locomotive in charge of four brakemen. Barrow v. B. R. Lewis Lumber Co., 14 Idaho, 698, 95 P 682. Whether freight handler assumed risk of injury owing to **insufficient lighting of station.** Carlson v. Great Northern R. Co. [Minn.] 118 NW 832. Whether motorman assumed risk of car slipping on **slippery rails** of incline. Mayer v. Detroit, etc., R. Co., 152 Mich. 276, 15 Det. Leg. N. 231, 116 NW 429. Freight conductor caught between buffers while coupling, company having failed to provide lever for **coupling.** Hall v. Northwestern R. Co. [S. C.] 62 SE 848. Whether brakeman **struck by freight platform** while riding on side of car had notice of danger or assumed risk. Clay v. Chicago, etc., R. Co., 104 Minn. 1, 115 NW 949. Whether brakeman **killed while trying to couple cars** assumed risk of falling because of loose gravel of track which was in process of construction. Tibbitts v. Mason City & Ft. D. R. Co. [Iowa] 115 NW 1021. Switch tender or electric tram road in mines slipped through **opening in footboard** on motor as car struck projecting rails of side track. Sundvall v. Interstate Iron Co., 104 Minn. 499, 116 NW 1118. Whether brakeman assumed risk of being caught by **unblocked switch.** Matthews v. New Orleans & N. E. R. Co. [Miss.] 47 S 657. Brakeman caught by **unblocked guardrail** while between cars trying to adjust defective coupler. Hynson v. St. Louis S. W. R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 755, 107 SW 625. In **moving dead engine on turntable with rope** passing through snatch block, rope being attached to live engine, rope struck and broke handle of turntable, injuring plaintiff. Galveston, etc., R. Co. v. Janert [Tex. Civ. App.] 107 SW 963. Whether brakeman assumed risk arising from defects in "bull nose" **coupling apparatus on engine** and from use of it while engine was moving. Kansas City So. R. Co. v. Williams [Tex. Civ. App.] 111 SW 196. Whether method of **loading wheels on car** with skid was so obviously dangerous that plaintiff should have refused to use it. Meily v. St. Louis & S. F. R. Co. [Mo.] 114 SW 1013. Brakeman injured while **boarding moving train** in course of duties. Galveston, etc., R. Co. v. Sullivan [Tex. Civ. App.] 115 SW 615.

**14.** Age, intelligence, experience and knowledge of particular situation are to be considered by jury in determining whether servant appreciated danger of using certain tool for certain purpose. Disalets v. International Paper Co., 74 N. H. 440, 69 A 263. Whether plaintiff was mentally deficient, or was merely counterfeiting stupidity when

and the facts and circumstances of the case. But mere knowledge of a defective condition will not alone charge the servant with the assumption of a risk. It must also appear that he knew and appreciated the danger arising from the defect.[15] Where the danger is obvious, knowledge and appreciation of it will be presumed.[16]

on stand, held for jury. Doolan v. Pocasset Mfg. Co., 200 Mass. 200, 85 NE 1055. Whether plaintiff assumed risk of buckets of ditching machine falling upon him held to depend on whether he was employed as expert to keep machine in repair or merely as assistant in operation of it whose duty it was to make repairs when needed. Engler v. La Crosse Dredging Co., 105 Minn. 74, 117 NW 242. Children over 14 presumed to have capacity to comprehend obvious dangers. As to children between 14 and 7 there is disputable presumption of incapacity, and burden is on him asserting capacity to prove it. Goodwin v. Columbia Mills Co. of Columbia [S. C.] 61 SE 390.

15. Pennsylvania R. Co. v. Forstall [C. C. A.] 159 F 893; Flowers v. Louisville & N. R. Co. [Fla.] 46 S 718; Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 NE 730; Herlihy v. Little, 200 Mass. 284, 86 NE 294; Elms v. Southern Power Co., 79 S. C. 502, 60 SE 1110; Missouri, K. & T. R. Co. v. Adams, 42 Tex. Civ. App. 274, 114 SW 453. Servant assumed risk of working in trench while loaded blast was being taken out only if he knew and appreciated the danger or ought to have done so. Polo v. Palisade Const. Co. [N. J. Err. & App.] 70 A 161. Only such dangers are assumed as are appreciated or ought reasonably to be appreciated by employe under circumstances. Kroeger v. Marsh Bridge Co. [Iowa] 116 NW 125. Mere knowledge that elevator did not work properly did not charge operator with assumption of risk of its falling. Bryne v. Marshall Field & Co., 237 Ill. 384, 86 NE 748. Servant does not assume risk where he knows premises are defective but does not know of danger and danger is not apparent. Marshall v. St. Louis S. W. R. Co. [Tex. Civ. App.] 107 SW 883. Employe does not assume risk of working with defective appliances unless he appreciates danger or it is obvious. Bush v. Wood [Cal. App.] 97 P 709. Mere knowledge of condition will not charge servant with assumption of risk unless he appreciates danger or by reason of his capacity and experience ought to appreciate it. Kerker v. Bettendorf Metal Wheel Co. [Iowa] 118 NW 306. Common laborer excavating tunnel for sewer did not assume risk of cave-in unless he appreciated the danger, even though physical conditions were apparent. Millen v. Pacific Bridge Co. [Or.] 95 P 196. Mere knowledge that heading machine was in some way defective in that boards sometimes hit spreader and caused his (operator's) hand to jump did not as matter of law charge him with risk of having his hand drawn upon the saw. Lynch v. Lynn Box Co., 200 Mass. 340, 86 NE 659. Operator of cross-cut saw, unguarded, did not assume risk of being struck by block thrown by saw unless he appreciated danger. O'Connell v. Smith [Iowa] 118 NW 266. Equal knowledge with master of defective condition will not charge servant with assumption of risk unless he appreciated danger. Hollingsworth v. Davis-Daly Estates Copper Co. [Mont.] 99 P 142. Plaintiff's knowledge of incompetency or bad habits of "boss repairer" would not defeat recovery for injury caused by him unless he knew or ought to have known that danger was to be apprehended therefrom. El Paso & S. W. R. Co. v. Smith [Tex. Civ. App.] 108 SW 988. Plaintiff, at work 40 feet from emery wheel, did not assume risk of operators running it without guard required by statute, wheel having broken and a piece of it having struck plaintiff. Davidson v. Flour City Ornamental Iron Works [Minn.] 119 NW 483. Carpenter unaccustomed to operating saws did not assume risk of injury by boards getting caught in rip saw on work bench unless he knew and appreciated the danger, or unless it was obvious so that he ought to have appreciated it in the exercise of ordinary care. Harney v. Chicago, etc., R. Co. [Iowa] 115 NW 886. Absence of statutory warning device on elevator trap door not assumed risk by employe, apparently mentally deficient, who had worked only two days, defect not being at once observable. Doolan v. Pocasset Mfg. Co., 200 Mass. 200, 85 NE 1055.

Whether **inexperienced** operator of metal stamping machine ought to have appreciated danger of operating it as directed, for jury. Clemens v. Gem Fibre Package Co. [Mich.] 15 Det. Leg. N. 574, 117 NW 187. Mere fact that inexperienced operator of metal stamping press knew that hand would be crushed if he put it under die when he put his foot on treadle did not show that he assumed risk of operating it as directed. Id. Inexperienced man who did not understand English did not assume, as matter of law, risk of pole which was being erected falling on him. Di Bari v. J. W. Bishop Co., 199 Mass. 254, 85 NE 89. Danger of getting caught in belt of thresher engine not obvious to plaintiff who had not had previous experience. Maxson v. J. I. Case Threshing Mach. Co. [Neb.] 116 NW 281.

**Children** do not assume risks incidental to operating machines unless they understand them or have been warned or instructed. Saller v. Friedman Bros. Shoe Co., 130 Mo. App. 712, 109 SW 794. Though minor knew of defect in floor, he did not assume risk of "buggy" being overturned on account of it, unless he appreciated that this danger might result. American Sheet & Tin Plate Co. v. Urbanski [C. C. A.] 162 F 91. Boy of 16, not very bright, did not as matter of law assume risk of arm being caught in gear of machine, though he could see that it was not covered. Goodale v. York, 74 N. H. 454, 69 A 525. Youth and inexperience of servant, so far as shown by evidence, to be considered in determining whether he assumed risk. Galloway v. Chicago, etc., R. Co., 234 Ill. 474, 84 NE 1067. Finding that girl of 16 did not assume risk of operating machine without safety roller at which she had been put to work half hour before injury, without instruction, warranted. Travis v. Haan, 112 NYS 463. Boy of 16 without previous experience or knowledge of danger was set to work expanding boiler tubes with defect-

*Reliance on care of master.* See 10 C. L. 759—In the absence of knowledge to the contrary, the servant has a right to rely upon the assumption that the master has properly performed the various duties imposed upon him by law,[17] and need not make an independent inspection or examination of his appliances or place of work.[18] In other words, negligence of the master or of his representatives is not one of the

ive sledge and burred prosser pins. He did not assume risk of chip from pin flying into his eye. Pelow v. Oil Well Supply Co. [N. Y.] 68 NE 812. Girl 14½ years of age did not as matter of law assume risk of working in factory without fire escapes as required by statute, especially where she denied any knowledge of lack of such escapes. Arnold v. National Starch Co. [N. Y.] 86 NE 815. Girl of 16 did not as matter of law assume risk of operating mangle with defective guard. Mansell v. Conrad, 125 App. Div. 634, 109 NYS 1079.

16. Knox v. American Rolling Mill Corp., 236 Ill. 437, 86 NE 90. Employe assumes risk of incidental obvious dangers and will not be heard to say he did not appreciate the danger which must have been apparent to one of his intelligence. Schmitt v. Hamilton Mfg. Co., 135 Wis. 117, 115 NW 353. Servant cannot be heard to say that he did not appreciate or realize a danger when defect is obvious or readily observable and danger apparent. Lake v. Shenango Furnace Co. [C. C. A.] 160 F 887. Boy of 16 held to have capacity and experience sufficient to appreciate danger of slipping or stumbling on pieces of rock or slag and falling off platform. Cook v. U. S. Smelting Co. [Utah] 97 P 28. Workman tripped on uneven floor and fell through unguarded opening through which hoist was operated. If he knew the condition of the floor and opening he assumed the risk; hence an instruction requiring jury to find also that he must have appreciated the danger was error. Rooney v. Brogan Const. Co. [N. Y.] 86 NE 814.

17. Houston, etc., R. Co. v. Patrick [Tex. Civ. App.] 109 SW 1097. Servant may assume exercise of due care by master. Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910; Kotera v. American Smelting & Refining Co. [Neb.] 114 NW 945. Employe may assume that master has supplied reasonably safe appliances. Rush v. Oregon Power Co. [Or.] 95 P 193. Servant may rely on assumption that master has performed his duty in furnishing safe place and appliances. Southern Pac. Co. v. Godfrey [Tex. Civ. App.] 107 SW 1135. Employes may rely on assumption that master will employ reasonably competent employes. Beers v. Prouty & Co., 200 Mass. 19, 85 NE 864. Brakeman has right to assume place of work, on cars, reasonably safe. McDuffee's Adm'x v. Boston, etc., R. Co. [Vt.] 69 A 124. Inexperienced employe told to hold chain, by which logs were hauled into mill, while plate beneath was readjusted had right to assume that chain would be moved without notice to him. Johnson v. Motor Shingle Co. [Wash.] 96 P 962. Miner had right to assume that overseer had performed statutory duty of protecting overhead rock from falling. Barrett v. Dessy [Kan.] 97 P 786. Where servant was sent to work in excavation, he could rely on implied assurance that it was reasonably safe, and did not assume the risk unless danger of earth falling was obvious. Hilgar v. Walla Walla [Wash.] 97 P 498. Servant sent to load machinery on mine skip had right to assume that sufficient help had been provided and that proper rules had been made for conduct of men in control of skip. Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910. Servant assumes risks ordinarily incident to employment, which are obvious and known to him or would necessarily be known in the exercise of ordinary care in the discharge of his duties, and he may assume exercise of ordinary care by master until he knows or ought to know the contrary. Cunningham v. Neal [Tex. Civ. App.] 109 SW 455. Fireman did not assume risk of running into open switch, unlighted, though he knew his engine had only oil burner headlight, since he could assume that company used sufficient headlight and would so light switches that they could be seen and danger of entering open switches avoided. Missouri, etc., R. Co. v. McDuffey [Tex. Civ. App.] 109 SW 1104. Employe required to use freight elevator but not to inspect could assume its reasonable safety. Kentucky Wagon Mfg. Co. v. Guganics [Ky.] 113 SW 128.

18. Primarily, servant may assume that master has exercised reasonable care to provide reasonably safe appliances, and does not assume risk of injury from breach of that duty. Missouri, etc., R. Co. v. Wilhoit [C. C. A.] 160 F 440. Servant may assume master has provided reasonably safe place and need not exercise care to discover defects but assumes known or patent dangers only. Norfolk & W. R. Co. v. Beckett [C. C. A.] 163 F 479. Instructions erroneous because charging servant with assumption not only of ordinary risks but also of such as arose from master's negligence, discoverable only by inspection. Kroeger v. Marsh Bridge Co. [Iowa] 116 NW 125. Mine employe may assume place of work reasonably safe; need not exercise care to discover dangers which are not patent. Bolen-Darnall Coal Co. v. Williams [C. C. A.] 164 F 665. Switchman could assume car step reasonably safe; not bound to inspect it before using it. El Paso, etc., R. Co. v. O'Keefe [Tex. Civ. App.] 110 SW 1002. Plaintiff, engaged in chipping casting, had right to assume that defendant had furnished suitable sledge to helper with which to pound chisel held by plaintiff, and was not bound to inspect it. Missouri, etc., R. Co. v. Quinlan, 77 Kan. 126, 93 P 632. He did not assume risk of chip from sledge striking his eye. Id. Domestic servant under no duty to take up trap door and examine under side to see how it was kept in place, and where defect, which caused it to tip up when stepped on, was not obvious, she did not assume risk. Burnside v. Peterson, 43 Colo. 382, 96 P 256.

ordinary risks which a servant assumes;[19] ordinary or incidental risks being only those which due care on the part of the master would not obviate.[20] But this rule is usually limited in its application to breaches of the master's duty unknown to the servant.[21] If a neglect of duty by the master and the danger arising therefrom is

**19.** Pettus v. Kerr [Ark.] 112 SW 886; Louisville & N. R. Co. v. Carter [Ky.] 112 SW 904. Negligence of master or of vice-principal not assumed. Sambos v. Cleveland, etc., R. Co. [Mo. App.] 114 SW 567. Risk arising from violation of master's duties with reference to appliances is not assumed. San Francisco & P. S. S. Co. v. Carlson [C. C. A.] 161 F 851. Extra hazards arising from negligent failure of master to provide proper rules and regulations are not assumed. Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910. Servant assumes ordinary risks in tearing down buildings, but not extra hazards caused by negligence of his superior. American Window Glass Co. v. Noe [C. C. A.] 158 F 777. Servant does not assume risks arising from master's negligence; thus, dangers in blasting due to want of precautions to make the work reasonably safe, in view of its nature, were not assumed. Knight v. Donnelly Bros., 131 Mo. App. 152, 110 SW 687. Quarryman did not assume risk of foreman's failure to remove unexploded charges of dynamite. Kansas Buff Brick & Mfg. Co. v. Bentley, 77 Kan. 780, 95 P 1134. Negligence of mine owner in failing to provide for warnings to be given of blasting not assumed by miner engaged in timbering. Jacobson v. Hobart Iron Co., 103 Minn. 319, 114 NW 951. Negligence of company in respect to track held not ordinary risk assumed by freight brakeman. Atlanta, etc., R. Co. v. Tilson [Ga.] 62 SE 281. Switchman assumed ordinary risks but not those arising from negligence of company or engineer. Texas & P. R. Co. v. Jowers [Tex. Civ. App.] 110 SW 946. Evidence held to show that lineman injured by live wire, current of which was turned on while he was at work, did not assume the risk. Commonwealth Elec. Co. v. Rooney, 138 Ill. App. 275. Danger to brakeman of being struck by post too near track, not incidental to work, not assumed. Wilson v. New York, etc., R. Co. [R. I.] 69 A 364. Employe did not as matter of law assume risk of injury by pulling out of hook and rope from locomotive, it having been fastened by his superintendent. Brosnan v. New York, etc., R. Co., 200 Mass. 221, 85 NE 1050. Operator of machine did not assume risk of danger from defective belt, having been assured there was no danger. Schow v. McCloskey [Tex. Civ. App.] 109 SW 886. If railroad company knew of and acquiesced in negligent manner of switching, it was guilty of negligence and brakeman would not assume risk arising therefrom, though he continued in service with knowledge thereof. McGuire v. Quincy, etc., R. Co., 128 Mo. App. 677, 107 SW 411. Miner did not assume risk of rock falling on him in mine entry where he was sent to work. Mammoth Vein Coal Co. v. Looper [Ark.] 112 SW 890. If foreman was negligent in method employed to load cable on wagon, servant did not assume risk. Kennedy v. Laclede Gaslight Co. [Mo.] 115 SW 407. Plaintiff while loading car in regular course of his employment was injured in consequence of the master backing a train violently against car. Held not an assumed risk. Crane Co. v. Hogan, 131 Ill. App. 314. Motorman injured in head-on collision did not assume risk arising from inability of other motorman to stop car owing to defective condition of its brakes. Garner v. Metropolitan St. R. Co., 128 Mo. App. 401, 107 SW 427. Motorman, killed in collision with another car because of inability to stop, did not assume risk of slippery condition of track caused by weeds allowed to grow there which were crushed on rails, the place not being the usual meeting place of cars. Mann v. Illinois Cent. Trac. Co., 236 Ill. 30, 86 NE 161. Motorman held not to have assumed risk of injury in collision caused by failure of company to notify operatives of preceding regular car that plaintiff's car would follow and was to meet it at certain switch Graham v. Mattoon City R. Co., 234 Ill. 483, 84 NE 1070.

**20.** Servant only assumes such risks as remain after master has performed his duties with respect to appliances and place. Yongue v. St. Louis, etc., R. Co. [Mo. App.] 112 SW 985. Incidental risks are assumed but not those growing out of master's negligence. Huston v. Quincy, etc., R. Co., 129 Mo. App. 576, 107 SW 1045; Goodale v. York, 74 N. H. 454, 69 A 525; Howland v. Standard Mill. & Logging Co. [Wash.] 96 P 686. Employe is charged with assumption only of those risks which ordinary care on part of master will not obviate, and may assume that master's duties have been performed in absence of knowledge to contrary. Norton Coal Co. v. Murphy, 108 Va. 528, 62 SE 268. It is only such injuries as arise after the master has used reasonable care to make the place reasonably safe in which he desires the servant to work, of which the servant impliedly agrees to assume the risk and for which the master is not liable. Spring Valley Coal Co. v. McCarthy, 136 Ill. App. 473. Under Laws 1902, p. 1750, c. 600, § 3, employe assumes only necessary risks remaining after master has exercised due care for his safety. Evans v. Pearson, 125 App. Div. 666, 110 NYS 69. Servant does not assume as ordinary risks those which master could by exercise of ordinary care discover and remove. Klofski v. Railroad Supply Co., 235 Ill. 146, 85 NE 274. Risk of danger from negligent handling of planks on overhead platform was not assumed by plaintiff, when such risk was greatly increased by negligent construction of platform by master. Kroeger v. Marsh Bridge Co. [Iowa] 116 NW 125. Brakeman injured between engine and car of logs assumed obvious risk of pushing logs back with engine, but not risk arising from defects in engine. Rudquist v. Empire Lumber Co., 104 Minn. 505, 116 NW 1019.

**21.** Chicago, etc., R. Co. v. Donovan [C. C. A.] 160 F 826; Flowers v. Louisville & N. R. Co. [Fla.] 46 S 718. Dangers arising from master's negligence not assumed unless obvious or known. St. Louis, etc., R. Co. v. Cleland [Tex. Civ. App.] 110 SW 122. Servant does not assume risk of defects arising

actually known [22] or obvious,[23] and he continues in the employment without complaint, he assumes the risk of so doing, notwithstanding the want of due care by the master,[24] unless he was justified in believing that he could continue with safety by the exercise of due care by himself,[25] the danger not being so obvious and imminent that an ordinarily prudent person would not have encountered it.[26]

*Reliance on observance of rules and customs.* See 10 C. L. 762—The servant may also assume that work will be done in the customary manner,[27] that rules will be ob-

after he enters service if he has no knowledge of them. St. Louis, etc., R. Co. v. Mangan [Ark.] 112 SW 168. Risks arising from master's negligence are not ordinary risks and are not assumed unless known and dangers appreciated. American Sheet & Tin Plate Co. v. Urbanski [C. C. A.] 162 F 91. Freight conductor did not assume risk of injury from standpipe placed too close to track, when he was not familiar with locality but knew in a general way the location of the standpipe. Norfolk & W. R. Co. v. Beckett [C. C. A.] 163 F 479. Where workman was called by foreman to stand on plank and hold block and fall which was being fastened, he did not assume risk of injury, being unfamiliar with appliance which proved to be defective. Kennedy v. Swift & Co., 234 Ill. 606, 85 NE 287. Risk of injury arising from negligent practice of "staking" cars over crossing without warnings not assumed by brakeman who did not know of it and was not chargeable with knowledge, not having been in yard before. Chicago, etc., R. Co. v. Donovan [C. C. A.] 160 F 826. Plaintiff struck in eye by steel sliver from hammer or chisel while holding rail which was being cut. Texas Mexican R. Co. v. Trijerina [Tex. Civ. App.] 111 SW 239.

22. Where brakeman knew coupling device was out of order, he assumed risk of going between cars to manipulate it. Shaw v. Delaware, etc., R. Co., 110 NYS 362.

23. The true test, in respect of risks arising out of master's negligence, is not whether servant exercised care to discover dangers but whether they were known to him, or so patent as to be readily observable. Chicago G. W. R. Co. v. McDonough [C. C. A.] 161 F 657; Lake v. Shenango Furnace Co. [C. C. A.] 160 F 887. Servant assumes risks arising from master's negligence if he knows them or ought to have known in exercise of ordinary care. Kansas City S. R. Co. v. Williams [Tex. Civ. App.] 111 SW 196. Rule that known or obvious risks are assumed applies, at common law, even to risks arising from negligence of master. Pearsall v. New York Cent., etc., R. Co., 128 App. Div. 397, 112 NYS 872. Risk of using unsafe machinery not assumed unless danger so obvious that reasonably prudent person would not use it. Brands v. St. Louis Car Co., 213 Mo. 698, 112 SW 511. Risks of dangers resulting from master's negligence, existence of which servant knows or would have known by the exercise of that degree of circumspection or attention which a prudent man would have used in the particular employment, are assumed. Western Union Tel. Co. v. Burton [Tex. Civ. App.] 115 SW 364. Employe not entitled to rely on assumption that place of work, in coal mine, had been made reasonably safe, if he had notice of facts or circumstances which would indicate to any reasonably intelligent man that the presumption was unjustifiable. Norton Coal Co. v. Hanks' Adm'r, 108 Va. 521, 62 SE 335. Where an appliance provided is defective, and its condition is known to the servant or so patent as to be readily observable, he cannot continue to use it without objection without assuming the risk of injury incident thereto. Missouri, etc., R. Co. v. Wilhoit [C. C. A.] 160 F 440. Instruction permitting absolute reliance on master's care, without exception, erroneous. Id. Instruction that servant assumed risk if he "could have discovered" defect, erroneous; defect must have been so patent as to be readily observable. Id. Evidence as to whether conductor on motor car assumed risk of being struck by inclining trolley pole, and whether he was acting with due care for his own safety, examined and held sufficient to sustain verdict for plaintiff. East St. Louis & S. R. Co. v. Kath, 133 Ill. App. 107. Whether hole in freight elevator was discoverable by use of ordinary care by servant using it who stepped into hole. Kentucky Wagon Mfg. Co. v. Duganics [Ky.] 113 SW 128.

24. Knox v. American Rolling Mill Corp., 236 Ill. 437, 86 NE 90. Though risks arise from omissions of master, they are assumed if known and appreciated. Cook v. U. S. Smelting Co. [Utah] 97 P 28. Negligence of master whether committed directly or through fellow-servant may be assumed. St. Louis, etc., R. Co. v. Hawkins [Ark.] 115 SW 175. Dangers known to the servant are assumed by voluntarily entering or continuing in employment, though, they arise from master's negligence. Klofski v. Railroad Supply Co., 235 Ill. 146, 85 NE 274.

25. Risk arising from master's negligence not assumed, though defect known, if servant is warranted in continuing use of defective appliance by using due care. Meshishnek v. Seattle Sand & Gravel Co. [Wash.] 99 P 9.

26. Railroad employe who goes into place of unusual peril when ordered by conductor assumes risk if danger was so obvious and imminent that no person reasonably cautious or prudent would have done so. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761. To relieve master from liability on account of servant's disregard of his own safety by working in the place, the dangers from the defective surroundings must be imminent and the defects shown to be the proximate cause of the injuries. Openings in "dust catcher" held to be indirect or remote cause only. Illinois Steel Co. v. Jenco, 136 Ill. App. 555.

27. Switch foreman did not assume risk arising from failure of crew to observe usual rules and custom of not moving cars without signals. Cunningham v. Neal [Tex. Civ. App.] 109 SW 455.

served,[28] and that customary or promised signals or warnings will be given and observed.[29]

*Reliance on orders or assurances of safety.* See 10 C. L. 762—A servant may rely to a reasonable extent upon the superior knowledge of the master or a superior, and may assume that he will not be exposed to unusual or unnecessary danger.[30] Hence, he does not assume the risk of executing an order of a superior,[31] or of continuing his work after an assurance of safety by a superior,[32] unless the danger is known and

28. Car repairer did not assume risk of being struck by cars, flying switch being made contrary to rules. Galveston, etc., R. Co. v. Conuteson [Tex. Civ. App.] 111 SW 187. Where shoveler in cinder pit complained of hostler's violation of rules by running engines into pit without signals and compiaint was duly reported, he did not as matter of law assume risk of injury by violation of rule next day. St. Louis, etc., R. Co. v. Hawkins [Ark.] 115 SW 175.

29. City employe sent to make measurements on bridge told employes in charge of moving it that they were not to raise it until he signaled them which they agreed not to do. He did not assume risk of injury from their raising it prematurely and without notice. Gathman v. Chicago, 236 Ill. 9, 86 NE 152. Engineer taking measurement of bridge had gotten promise from tender not to raise bridge until signaled by him. City of Chicago v. Gathman, 139 Ill. App. 253.

30. A servant ordered by the foreman of a master to perform a particular work has the right to assume that he will not be exposed to unnecessary perils and to rest upon the implied assurance that there is no danger. Marshall v. St. Louis S. W. R. Co. [Tex. Civ. App.] 107 SW 883. Inexperienced workman did not assume risk of rock ledge in gravel pit falling on him where he did not know of danger and had been directed to work there by foreman, who was chargeable with notice of danger. Id. If employe relies upon assurances of safety, and danger is discoverable only by inspection, and superior giving assurance has superior knowledge of situation, employe does not assume risk as matter of law. Halloway v. Johns-Manville Co., 135 Wis. 629, 116 NW 635. Servant directed to do certain work in certain way may rely on assumption that it can be done safely in that way and that instrumentalities are reasonably safe. Hobbs v. Small [Ga. App.] 62 SE 91. Assurance by master that belts of sewing machines were not dangerous by reason of being fastened together with hooks did not render him liable or relieve operator of assumption of risk where she got her hair caught on shaft while stooping down to adjust belt, since she did not rely on such assurance. Nelson-Bethel Clothing Co. v. Pitts [Ky.] 114 SW 331.

31. Unskilled workman did not assume risk of injury while adjusting belts in customary way under foreman's orders. Mathews v. Kerlin [La.] 48 S 123. Servant under protest, on master's command, removed cap from molds and was burned. Illinois Steel Co. v. Brenshall, 141 Ill. App. 36. In considering whether brakeman assumed risk of going between engine and car of logs in attempt to push log back with engine, using long draw bar, fact that he was ordered to do so by conductor was to be considered, though general rules prohibited act. Rudquist v. Empire Lumber Co., 104 Minn. 505, 116 NW 1019. Where foreman sent servant into a bin to shake down caked corn and latter injured by cavity formed beneath, jury could properly find that servant was not chargeable with knowledge of formation of cavity. Glucose Sugar Refining Co. v. McConnell, 132 Ill. App. 386. Where servant was ordered to work at a joiner and fell by reason of slippery floor covered with sawdust and was injured, he did not as a matter of law assume risk of this employment. Acme Harvester Co. v. Chittick, 132 Ill. App. 611. Workman injured while raising boiler with crow bar in accordance with direct order of superior held not to have assumed risk. Heywood & Morrill Rattan Co. v. Jacobson, 140 Ill. App. 319. Where servant was ordered to use rope to help load pilings on flat car on direct order of foreman, and was injured by breaking of main cable, he could recover. Shirk v. Chicago & E. I. R. Co., 140 Ill. App. 22. Where servant was ordered to clean flues with steam hose and nozzle in spite of protests that nozzle was loose, evidence that he exercised ordinary care held sufficient to authorize finding in his favor. Corn Product Refining Co. v. Cherry, 140 Ill. App. 1. Injury to servant who in obedience to foreman's order in conjunction with other workmen attempted to rig block and tackle without using smaller block and tackle ordinarily employed, chargeable to master. Kennedy v. Swift & Co., 140 Ill. App. 141. Plaintiff did not assume risk of handling beam which was being moved in manner directed by superintendent; had right to rely to reasonable extent on assumption that injury would not follow obedience to orders. Connolly v. Booth, 198 Mass. 577, 84 NE 799.

32. Car repairer did not assume risk of going to work on train when his superior promised to watch and give warning if necessary. Missouri, etc., R. Co. v. Walker [Kan.] 99 P 269. Risk of frozen crest of sand pile falling on plaintiff not assumed as matter of law where superintendent assured plaintiff it was safe and ordered him to work. Brown v. Lennane [Mich.] 15 Det. Leg. N. 852, 118 NW 581. Motorman entitled to rely on superintendent's assurance that car could be safely operated over "greasy" rails, where he had had no previous trouble. Mayer v. Detroit, etc., R. Co., 152 Mich. 276, 15 Det. Leg. N. 231, 116 NW 429. Where foreman assured servant that he could safely work near an overhanging sandbank, the servant being inexperienced in the work, he could recover for injuries sustained by caving in of bank. Village of Montgomery v. Robertson, 132 Ill. App. 862. Jury warranted in finding that plaintiff, carpenter, employed to shore up walls of cellar as excavation proceeded, did not assume risk of old wall of another building falling upon

appreciated by the servant,[33] or is obvious and imminent and such that an ordinarily prudent person would not have encountered it under the circumstances.[34]

*Reliance on promise to repair, after complaint.* See 10 C. L. 762—Where the servant has complained of a defective condition, and the master or his representative has promised to make repairs, the servant may continue in the employment without assuming the risk [35] for such length of time as is reasonably necessary for the making

him, when he asked foreman about it and latter said it was all right. Berube v. Horton, 199 Mass. 421, 85 NE 474. Employes may rely to reasonable extent upon exercise of due care by master and upon directions and assurances of safety and do not assume risk unless danger is known or obvious; fact of having such assurances from superior may be considered by jury. Anderson v. Pitt Iron Min. Co., 103 Minn. 252, 114 NW 953. Employe did not as matter of law assume risk of bringing hand in contact with knives of wood shaping machine when foreman misled him by saying there was no danger, that knives were below surface of board on which he worked. Jury's verdict for plaintiff not disturbed. Schmitt v. Hamilton Mfg. Co., 135 Wis. 117, 115 NW 353. Employe was ordered by superior to go to work cleaning out boiler, and was assured it was safe, i. e., cold. Its condition was discoverable only by testing it. Employe turned on water and was scalded by steam formed by heated part of boiler. Held he did not assume risk. Holloway v. Johns-Manville Co., 135 Wis. 629, 116 NW 635.

**33.** Where employe voluntarily enters upon performance of duties obviously dangerous, he assumes the risk, regardless of assurances of safety. Holloway v. Johns-Manville Co., 135 Wis. 629, 116 NW 635. Operator of machine, who knew it was out or order, assumed risk of continuing to use it, though foreman assured him it was safe. Evans v. Eastman Kodak Co., 113 NYS 986. An experienced employe who undertakes work with full knowledge of defect and danger, with time for deliberation, assumes risk, notwithstanding master's orders or assurances of safety or his own protests. Gilmartin v. Kilgore [Tex. Civ. App.] 114 SW 398. Experienced scaffold builder objected to scaffold as not strong enough for intended use, but, nevertheless, on master's saying it was sufficient, remained, saying "if it falls, it falls," and it fell. Held, he assumed risk. Gilmartin v. Kilgore [Tex. Civ. App.] 114 SW 398.

**34.** Servant does not assume risk of obedience to order which exposes him to unusual or unnecessary danger unless the danger is so imminent that a man of ordinary prudence would not have incurred it. Yarber v. Chicago & A. R. Co., 235 Ill. 589, 85 NE 928. One at work under orders of superior does not assume risk unless danger is so imminent that person of ordinary prudence would not undertake it. Illinois Cent. R. Co. v. Edmonds, 33 Ky. L. R. 933, 111 SW 331. The rule that a servant does not assume risk of obedience to specific order or direction unless danger is glaring and imminent does not apply where the servant receives only general orders to proceed with certain work, the manner of doing it, and the order of taking up parts of it, not being specified. Mellette v. Indianapolis Northern Trac. Co. [Ind. App.] 86 NE 432. Miner sent up to throw down timbers from top of set twisted by explosion did not assume risk of their falling unless danger was glaring and imminent. Swearingen v. Consolidated Troup Min. Co., 212 Mo. 524, 111 SW 545. Employe was ordered by foreman to go between two cars, one of which was merely supported by jacks, to place support. Held under evidence that jury was justified in finding that danger was not such that ordinarily prudent man would not have incurred it. Chicago & A. R. Co. v. Yarber, 137 Ill. App. 486. Where lineman engaged in erecting telephone line was ordered by foreman to stand on limb of a tree and did so under protest, the jury might properly consider whether danger was so imminent that no ordinarily prudent man with his opportunity for observation would incur it. Conklin Const. Co. v. Walsh, 131 Ill. App. 609.

**Question for jury:** Miner injured in attempting to repair timbering in dangerous place, being assured by boss that place was all right. Tomazin v. Shenango Furnace Co., 103 Minn. 334, 114 NW 1128. Mine captain had prevented timber men from putting in sets until an unusually large room had been made, and then, after "sounding," told men to go ahead, that it was all right. Whether plaintiff, injured by fall of ore while putting in set, assumed risk, for jury. Anderson v. Pitt Iron Min. Co., 103 Minn. 252, 114 NW 953. Plaintiff was picking on gravel ledge under orders of foreman, who told him he would warn of danger, and gravel fell upon him. Illinois Cent. R. Co. v. Edmonds, 33 Ky. L. R. 933, 111 SW 331. Workman complained of wrench and foreman told him it was all right and to go ahead. It had slipped several times but plaintiff had saved himself from injury. Whether danger was obvious for jury. Rogers v. South Covington & C. St. R. Co., 33 Ky. L. R. 1067, 112 SW 630.

**35.** St. Louis & S. F. R. Co. v. Mealman [Kan.] 97 P 381. Where master promises to remedy a defect in an appliance, he assumes risk of accident from it for reasonable time thereafter. Brown v. Musser-Sauntry Land, Logging & Mfg. Co., 104 Minn. 156, 116 NW 218. Servant did not assume risk where he complained of defect, was assured it would be removed, and continued to work in reliance on assurance. Hollis v. Widener, 221 Pa. 72, 70 A 287. Where plaintiff had obtained promise to repair defect, and did not know whether promise had been fulfilled at time of injury, having just returned to work after absence, he did not assume the risk. Pennsylvania R. Co. v. Forstall [C. C. A.] 159 F 893. Where foreman promised to have hooks used in moving logs repaired, subsequent use of them by employes would be no defense where injury resulted. Allen v. Standard Box & Lumber Co. [Or.] 96 P 1109. Recovery sustained where employe was injured while attempting to adjust de-

of the required repairs,[36] unless the appreciated danger is so imminent that a man of ordinary prudence would refuse to encounter it.[37] To bring a case within the operation of this rule, it must appear that the complaint was based on apprehension of injury,[38] that a definite promise to repair was made[39] by one who had authority to

fective belt which master, through foreman, had promised to repair, where servant was acting under superior's orders at time. Tuckers' Mfg. & Supply Co. v. White, 108 Va. 147, 60 SE 630. Bottle wrapper, injured by bursting of bottle, did not as matter of law assume risk of working without mask where he had complained of danger, and foreman told him to go to work, that it would be fixed, and accident occurred few minutes later. Labasco v. Moxie Nerve Food Co., 111 NYS 1007. Defendant promised to repair track of logging road when foreman returned, and engineer continued to work and was injured by derailment before foreman returned and before repairs were made. Held, engineer could recover, master having assumed risk during period fixed by him. Morgan v. Rainier Beach Lumber Co. [Wash.] 98 P 1120. Servant may rely on master's promise to shorten reach extending from wagon which servant was loading from adjacent sand hank, and which prevented his escape when bank caved in. Village of Montgomery v. Robertson, 132 Ill. App. 362. Where evidence clearly shows that machine at which plaintiff was employed was not working properly, and that an effort was made to fix it, and plaintiff was then told it was all right, judgment in his favor for injuries thereafter received and due to defect in machine will not be set aside if supported by sufficient evidence. Dayton Folding Box Co. v. Daniel Ruehlman, 11 Ohio C. C. (N. S.) 493.

**36.** St. Louis, etc., R. Co. v. Mangan [Ark.] 112 SW 168; Cook v. Pittock & L. Lumber Co. [Wash.] 98 P 1130. Promise to repair may relieve servant who continues to work in reliance upon it for a reasonable time from assumption of risk. Freeman v. Savannah Elec. Co., 130 Ga. 449, 60 SE 1042. After promise to repair, servant does not assume risk until after expiration of time in which person of ordinary care and prudence would expect promise to be kept. Miller v. White Bronze Monument Co. [Iowa] 118 NW 518. Servant induced by promise of master to repair to begin or continue work with defective appliances may use them for such time as he may reasonably expect the promise to be kept without assuming risk, unless danger is obvious, imminent, and immediate. Sapp v. Christie Bros., 79 Neb. 701, 115 NW 319. Where a servant makes complaint, and the master makes an unconditional promise to repair defect, risk is cast upon the master until such time as would preclude all reasonable expectation that promise might be kept. Morgan v. Rainier Beach Lumber Co. [Wash.] 98 P 1120.

**37.** Harris v. Bottum [Vt.] 70 A 560; Morgan v. Rainier Beach Lumber Co. [Wash.] 98 P 1120. Promise to repair does not relieve servant if danger is imminent and such that person of ordinary prudence would not encounter it. Miller v. White Bronze Monument Co. [Iowa] 118 NW 518. Whether servant has right to rely on promise in particular case depends upon whether danger is so imminent that one of ordinary prudence would not encounter it; that is, upon whether servant was guilty of contributory negligence in continuing to use defective appliance. Brown v. Musser-Sauntry Land, Logging & Mfg. Co., 104 Minn. 156, 116 NW 218. Switchman did not as matter of law assume risk of defective roadbed where, after complaint by him, his foreman promised to repair it as soon as possible, danger not being glaring and imminent. St. Louis, etc., R. Co. v. Mangan [Ark.] 112 SW 168. Danger of remaining in charge of engine with defective governor not so great as to throw risk of remaining on man in charge, his superior having told him it was safe. Crosby v. Cuba R. Co., 158 F 144.

**Whether risk assumed held for jury:** Plaintiff injured in operating defective "joiner and rip saw" of which he had complained. Ong Chair Co. v. Cook, 85 Ark. 390, 108 SW 203. Servant injured by defective steam log skidder within reasonable time after promise to repair and request that he continue. Marcum v. Three States Lumber Co. [Ark.] 113 SW 357. Whether danger from running logging train was so imminent that engineer assumed risk of derailment, after promise to repair. Morgan v. Rainier Beach Lumber Co. [Wash.] 98 P 1120. Where plaintiff, having complained of defect in floor of place of work, and received a promise of repairs, assumed risk of injury three or four days later. Miller v. White Bronze Monument Co. [Iowa] 118 NW 518. Engineer complained of water gauge after several had exploded, and superintendent promised to substitute a different kind; gauge exploded, injuring plaintiff, engineer. Nicholas v. Albert Lea Light & Power Co. [Minn.] 119 NW 503. Where miner entered coal mine with knowledge that appliance used to supply fresh air was defective, and objected and was promised that defect would be remedied, his continuance in employment in well grounded belief that repairs would be made in reasonable time did not charge him with negligence as matter of law. Sons Bois Coal Co. v. Janeway [Okl.] 99 P 153. Whether man engaged in unloading logs, by knocking out hooks with short handled ax, was negligent in continuing to use such ax after having asked for long handled one which defendant had promised to supply him with. Brown v. Musser-Sauntry Land, Logging & Mfg. Co., 104 Minn. 156, 116 NW 218.

**38.** Section hand complained of brakes, not because he thought them dangerous, but because they were inconvenient, and he continued to work after they said they would repair it, but would use it as it was for present. Held section hand did not continue in reliance on this promise but assumed the risk. St. Louis & S. F. R. Co. v. Mealman [Kan.] 97 P 381.

**39.** Where promise was to change refuse chute in mill as soon as it could be done in course of affairs while mill was in operation, promise was sufficiently definite. Cook v. Pittock & Leadbetter Lumber Co. [Wash.] 98 P 1130. Master assumes risk, whether

make it,[40] that the servant relied upon the promise and was induced by it to remain,[41] and that he was injured within a reasonable time thereafter.[42] While he himself was exercising due care for his own safety.[43] A promise to supply a new instrumentality, after complaint has the same effect as a promise to repair.[44] A promise to repair is held not to relieve the servant from the assumption of risk where it relates to simple tools.[45]

*Risks created by servant.* See 10 C. L. 764—A servant who unnecessarily adopts a dangerous method of doing work,[46] or who voluntarily undertakes work outside the

time fixed for making of repairs is definite or indefinite; as where promise is to repair when foreman returns. Morgan v. Rainier Beach Lumber Co. [Wash.] 98 P 1120.

40. Servant must show that promise to repair was made by master or one duly authorized to make it. Cicalese v. Lehigh Valley R. Co. [N. J. Err. & App.] 69 A 166. Foreman of gang engaged in laying and repairing tracks, working with them, is fellow-servant; no power to promise to repair hand car. Id. Immaterial that promise is conveyed to servant through third person. St. Louis, etc., R. Co. v. Mangan [Ark.] 112 SW 168.

41. Where declaration did not allege that servant was induced to continue in operation of machine with unguarded rollers by promise to guard, it did not show shifting of assumption of risk from her to master. Harris v. Bottum [Vt.] 70 A 560. Evidence sufficient to support finding that operator of shingle machine complained of defective construction, that defendant promised to remedy it by "filling in," that plaintiff continued to work in reliance on such promise, and was injured by such defect soon after. Duskey v. Green Lake Shingle Co. [Wash.] 98 P 99.

42. Operator of buffing machine complained of loose driving belt at 10 o'clock and superintendent promised to repair it at noon but did not; operator complained again at 2 o'clock and was ordered back to work with promise that it would be fixed in a little while; he was injured by it at 3 o'clock. He **did not assume risk** as matter of law. Krohn v. Smith & Co., 151 Mich. 247, 14 Det. Leg. N. 893, 114 NW 1017. Servant, operating planing machine defective in that it might start up automatically, obtained promise to repair by Sunday, and was injured on Tuesday. Held not to have assumed the risk by relying on promise an unreasonable time. Chicago, etc., R. Co. v. Clark, 134 Ill. App. 161. Where it would only take 2 days to repair a defective machine, and plaintiff operated it for two months after promise to repair, he **assumed the risk.** Balkwill v. Becker, 131 Ill. App. 221. Elevator operator continued to work for 3 weeks after promise following complaint to superintendent that his work was rendered dangerous by others using elevator. Held precluded from recovery. Samuel Cupples Woodenware Co. v. Walins, 140 Ill. App. 624. Where on servant's complaint that passage in mine was too low the master immediately set to work to remedy it but had not reached the particular place where injury occurred, question of **whether servant assumed risk was for jury.** Marquette Third Vein Coal Co. v. Allison, 132 Ill. App. 221. Whether an unreasonable length of time had elapsed since promise was made to change chute in mill which carried off refuse, at time plaintiff was injured, held for jury. Cook v. Pittock & Leadbetter Lumber Co. [Wash.] 98 P 1130.

43. Promise to remedy or remove defects or dangers does not relieve servant from duty of ordinary care for his own safety until change is made. Williams Cooperage Co. v. Headrick [C. C. A.] 159 F 680. Notwithstanding promise to repair, servant is required to exercise due care, and, if danger is obvious and imminent, he cannot recover for injury resulting therefrom. Freeman v. Savannah Elec. Co., 130 Ga. 449, 60 SE 1042. Motorman complained of defective brake, received promise of new car, and continued to use defective one 3½ hours, being required to use all his strength and throw all his weight on brake to stop car. As result he became afflicted with hernia. Held he had no cause of action on such facts. Id.

44. McGill v. Cleveland & S. W. Trac. Co., 7 Ohio N. P. (N. S.) 489.

45. In case of simple tools and portable appliances (such as stepladder), where obvious defects are as perfectly understood by servant as master, risk from their further use is assumed, and promise to repair or replace such defective tool or appliance, as distinguished from intricate machinery, use of which requires great skill and care, does not shift assumption of risk from servant to master. McGill v. Cleveland & S. W. Trac. Co., 7 Ohio N. P. (N. S.) 489; McGill v. Cleveland & S. W. Trac. Co. [Ohio] 86 NE 989. Promise to repair or remedy defect does not suspend servant's assumption of risk if appliance in question is simple and its nature fully known. Kistner v. American Steel Foundries, 233 Ill. 35, 84 NE 44. Promise to fix board which employe stood on to fix machine did not place risk on master, employe testifying that he knew the condition of the board and danger of using it. Id. Under Illinois law, risk of particles of steel flying from head of hammer when struck is assumed by employe using it, though he complained of it, and was promised that it would be replaced, danger being obvious. Rahm v. Chicago, etc., R. Co., 129 Mo. App. 679, 108 SW 570.

46. Employe assumes risk when he voluntarily selects obviously dangerous way of doing work. Big Five Tunnel Ore Reduction & Transp. Co. v. Johnson [Colo.] 99 P 63. Raising safe by tackle and block when he knew the method was dangerous. Royal Trust Co. v. National Provision Co., 139 Ill. App. 136. Plaintiff unnecessarily moved stone suspended over car on which it was being loaded, and it slipped from supporting tongs and fell upon him. Solt v. Canney [C. C. A.] 162 F 660. Where servant undertakes

scope of his own duties,[47] or who disregards rules [48] or orders,[49] assumes the risk involved.

(§ 3) *G. Contributory negligence. Nature of defense.* See 10 C. L. 785—The distinctions between this defense and that of assumption of risk have already been referred to.[50] Contributory negligence is a want of ordinary care on the part of the servant injured which, concurring and combining with negligence of the master, produced the injury as a proximate cause without which the injury would not have occurred.[51] When found to exist it bars recovery in most jurisdictions,[52] even though

to perform duties in manner more hazardous than that required or expected, he assumes the risk. Brakeman assumed risk of trying to uncouple moving cars. Day v. Louisiana Western R. Co., 121 La. 180, 46 S 203. Brakeman who undertakes to uncouple cars in dangerous way assumes risk, safer way being available. Taylor v. Rock Island, etc., R. Co., 121 La. 543, 46 S 621. Where brakeman could have stopped train, when he found coupler would not work, but chose instead to go in between cars, he assumed risk of getting foot caught by guard rail while trying to adjust coupler. St. Louis S. W. R. Co. v. Hynson [Tex.] 109 SW 929, rvg. [Tex. Civ. App.] 20 Tex. Ct. Rep. 755, 107 SW 625. Engineer assumed risk of crossing railroad yards to reach train by dangerous route, wherein he fell into ash pit, when there was a safe way which he could have taken. St. Louis & S. F. R. Co. v. Mathis [Tex.] 20 Tex. Ct. Rep. 481, 107 SW 530. Employe assumed risk of putting his hand under guard to remove obstruction from revolving cylinder with teeth when machine was to be stopped by his orders and he could have waited. Hutchison v. Cohankus Mfg. Co. [Ky.] 112 SW 899. Plaintiff, engaged in placing "riffles" in chute during loading of vessel, assumed risk, where instead of standing on another chute to place "riffles" used a ladder, so that a sack of wheat coming down chute struck the ladder and caused it to fall. Stewart v. Balfour [Wash.] 98 P 103.

47. One injured outside the scope of duties for which he was employed, being there without authority, cannot recover. National Fire Proofing Co. v. Andrews [C. C. A.] 158 F 294. Where a servant undertakes labor outside the scope of his employment, he assumes the incidental risks when they are equally apparent to himself and the master. Where painter undertook to remove scaffolding erected for carpenters, he assumed the risk. Weinand v. Marshall Field & Co., 131 Ill. App. 166. Employe engaged in operating ripsaw assumed risk of voluntarily attempting to operate joiner, in doing which board he was working on kicked up, causing his hand to come in contact with knives. Stodden v. Anderson & W. Mfg. Co. [Iowa] 116 NW 116. Apprentice lineman should work under orders and directions of superiors and experienced men. If he attempts to do work without orders, and selects his own way or materials or tools, he assumes risk. Maitrejean v. New Orleans R. & L. Co., 120 La. 1056, 46 S 21. Servant directed by "inside superintendent" to whose orders he was subject to assist in adjusting belt was **not volunteer** and did not assume risk of injury from set screw on shaft. National Fire Proofing Co. v. Andrews [C. C. A.] 158 F 294.

48. Engineer assumed risk of collision when he violated rule requiring him to run train into station 10 minutes behind preceding train, and under full control. International & G. N. R. Co. v. Brice [Tex. Civ. App.] 111 SW 1094.

49. Where master orders servant away from place where he is at work, and gives as reason therefor that he is afraid wall will fall on him, and servant disregards order and continues his work without changing his position, and wall falls and he is killed, an action for damages against the master because of his death should be taken from jury on ground that risk was assumed. Iliff v. Cavey, 11 Ohio C. C. (N. S.) 334.

50. See ante, § 3F.

51. Webster v. Atlantic Coast Line R. Co. [S. C.] 61 SE 1080; James v. Fountain Inn Mfg. Co. [S. C.] 61 SE 391; Hoseth v. Preston Mill Co. [Wash.] 96 P 423; Cincinnati, etc., R. Co. v. Fortner [Ky.] 113 SW 847. Contributory negligence must be at least concurring proximate cause of injury. Reaves v. Anniston Knitting Mills [Ala.] 45 S 702. Taking risks voluntarily bars recovery only when contributing to cause injury. Kiley v. Rutland R. Co., 80 Vt. 536, 68 A 713. Negligence of employe will bar recovery only if it contributed to cause injury. Buchman v. Jeffery, 135 Wis. 448, 115 NW 372. Negligence of conductor in trying to couple car on down grade without putting on brakes, and then getting on car and trying to stop it after it had started, was **not proximate cause** of his death where car was derailed by defective track, causing him to jump. Dortch v. Atlantic Coast Line R. Co. [N. C.] 62 SE 616. Conductor stood at middle of car on footboard, instead of on rear platform as required by rules, when struck by other car. Bennett v. Chicago City R. Co., 141 Ill. App. 560. Disobedience of orders not contributory negligence, when it did not contribute to cause of injury. Cavanaugh v. Windsor Cut Stone Corp., 80 Conn. 585, 69 A 345. Manner used by plaintiff to latch turntable held not to have contributed to his injury by fall of lumber upon him from car. Western Steel Car & Foundry Co. v. Cunningham [Ala.] 48 S 109. Brakeman injured while adjusting coupler between two cars could not be held guilty of contributory negligence by reason of working on side where engineer could not see him, where injury was not caused by engineer but by two cars allowed by foreman to "drift" down against those he was between. McGuire v. Quincy, etc., R. Co., 128 Mo. App. 677, 107 SW 411. Train was being moved back and forth to thaw out pipes, and brakeman was sent back to place torpedoes on rails to warn approaching trains, and on returning was struck by rear of train. **No recovery,** since failure to have watchman on rear of train would not have prevented accident unless brakeman himself has used due care. Wood

the action is based on a violation of a statutory duty;[53] but the defense is not available under some statutes.[54] Under some statutes only a reckless exposure to danger will bar recovery.[55]

*Degree of care required of servant.* See 10 C. L. 766—Only ordinary care is required,[56] that is, such care as ordinarily prudent persons would exercise under like circumstances.[57] Whether that degree of care was exercised in a particular instance

v. Central New England R. Co., 111 NYS 91. Plaintiff's negligence in operating corn grinder held cause of his hand getting caught in rollers. Jackson v. Gulf Elevator Co., 209 Mo. 506, 108 SW 44.

**52.** Whippen v. Stone, 197 Mass. 519, 83 NE 989; Bowen v. Pennsylvania R. Co., 219 Pa. 405, 68 A 963; Hillsboro Cotton Mills v. King [Tex. Civ. App.] 109 SW 484; Hall v. Northwestern R. Co. [S. C.] 62 SE 848; Chesapeake & O. R. Co. v. Hoffman [Va. App.] 63 SE 432. Where minor servant has been instructed as to dangers, defenses of contributory negligence and assumption of risk are available as they would be against adults. Mitchell v. Comanche Cotton Oil Co. [Tex. Civ. App.] 113 SW 158. No recovery for death of employe by caving in of curbing of sewer when he himself had charge of work for city. Winkleman v. Adrian, 151 Mich. 519, 15 Det. Leg. N. 9, 115 NW 461.

**53.** Contributory negligence is almost uniformly held to be defense against action based on violation of statutory duty. Johnson v. Mammoth Vein Coal Co. [Ark.] 114 SW 722. It is defense where Kirby's Dig. § 5352, requiring delivery of props to miners, is violated. Id. Contributory negligence is defense though action is based on violation of statutory duty to guard machinery. Huss v. Heydt Bakery Co., 210 Mo. 44, 108 SW 63. Contributory negligence is defense in action based on violation of factory act, but must be affirmatively established by defendant. Kansas Buff Brick & Mfg. Co. v. Stark, 77 Kan. 648, 95 P 1047. Section 8 of the Federal Statute, providing that any employe of a common carrier who may be injured by any locomotive, car or train in use contrary to the provisions of the act, shall not be deemed thereby to have assumed the risk occasioned thereby, does not abrogate the well settled rule that an act or omission on the part of the servant amounting to a want of ordinary care which, concurring with the negligent act of the master, is the proximate cause of the injury to the servant, will bar a recovery by the servant. Cleveland, etc., R. Co. v. Curtis, 134 Ill. App. 565. Sanborn's St. Sup. 1906, § 1636jj, giving right of action for injuries caused by failure to guard machinery, abolishes defense of assumption of risk but not of contributory negligence. Klotz v. Power & Min. Machinery Co., 136 Wis. 107, 116 NW 770. Contributory negligence is defense to action based on Burns' Ann. St. 1901i (guarding machinery). Robbins v. Fort Wayne Iron & Steel Co., 41 Ind. App. 557, 84 NE 514. Liability act of 1902 gives right of action only where employe was in exercise of due care. Kennedy v. New York Tel. Co., 125 App. Div. 846, 110 NYS 887. Question of contributory negligence for jury under statute where plaintiff, wheeling hand truck, slipped on defective floor and fell. Knezevich v. Bush Terminal Co., 111 NYS 255.

**54.** Contributory negligence is no defense to an action for injury to a minor employed in violation of the **Child Labor Act.** Frorer v. Baker, 137 Ill. App. 588. Contributory negligence on part of miner will not defeat right of recovery for injury caused by **willful violation of mines and mining act** either by an act of omission or commission on the part of the owner, operator or manager of the mine. Mertens v. Southern Coal & Min. Co., 235 Ill. 540, 85 NE 743. Contributory negligence of miner in going into room with actual knowledge of dangerous condition of roof will not defeat recovery for willful violation of mines act by employer. Id. Mere fact that injured employe used negligent method of firing shots in mine would not exempt mine operator from liability for consequences of explosion of dust, due to failure to perform statutory duty to keep mine free from dust, though employe's negligence contributed to cause explosion. Davis v. Illinois Collieries Co., 232 Ill. 284, 83 NE 836. Where the act required roadways in mine to be sprayed, the negligence of servant in firing shots in direction of air currents, thus aggravating by accumulated dust the explosion which injured him, is no defense where the master had neglected to keep dust down by spraying mine. Maplewood Coal Co. v. Graham, 134 Ill. App. 277.

**55.** Code 1906, § 4056, providing that knowledge by **railroad employe** of defects in ways or appliances shall not bar recovery for injuries caused thereby does not exclude the defense of contributory negligence, but requires, to constitute such defense, reckless exposure to danger with knowledge. Yazoo & M. V. R. Co. v. Scott [Miss.] 48 S 239. Switchman held not guilty of such reckless conduct as to bar recovery where he went between loaded car and engine to couple them, under orders of superior, and took customary position, and was injured by lumber from car falling upon him. Id. Under Code 1906, § 4046, making railroad companies liable for **injuries caused by "kicking switches,"** regardless of mere contributory negligence, nothing short of reckless, deliberate, voluntary exposure to danger by brakeman will defeat recovery for injury so caused. Driver v. Southern R. Co. [Miss.] 46 S 824.

**56.** It is the duty of an employe to use ordinary and reasonable care for his own safety. Miller v. White Bronze Monument Co. [Iowa] 118 NW 518; Cincinnati, etc., R. Co. v. Fortner [Ky.] 113 SW 847; Flowers v. Louisville & N. R. Co. [Fla.] 46 S 718; Tuckers' Mfg. & Supply Co. v. White, 108 Va. 147, 60 SE 630; Larsen v. Leonardt [Cal. App.] 96 P 395. Master has right to assume that servants will use ordinary care for their own safety. Fairbanks, Morse & Co. v. Walker [C. C. A.] 160 F 896.

**57.** German-American Lumber Co. v. Brock [Fla.] 46 S 740. Duty of engineer of a train to exercise ordinary care for his own safety when running trains after rain storms—

is ordinarily a question of fact for the jury,[58] to be determined with reference to all

instructions. Jennett v. Louisville & N. R. Co., 162 F 392. Servant can be declared negligent as matter of law only when he incurs danger which no prudent person would encounter. Hill v. Saugestad [Or.] 98 P 524. Continuing to work in place obviously dangerous and such that person of ordinary prudence would not continue there is contributory negligence. Huss v. Heydt Bakery Co., 210 Mo. 44, 108 SW 63. It is the duty of the servant to exercise care proportionate to the danger of his situation as he understands it, and if he fails to do so, the fault is his and not his master's. John Maher & Sons v. Martewicz, 139 Ill. App. 173. Brakeman was not negligent in mode adopted by him to adjust coupler unless he ought to have realized danger of remaining between cars as long as he did. McGuire v. Quincy, etc., R. Co., 128 Mo. App. 677, 107 SW 411. An employe, acting in line of duty, may be justified in doing what would be negligent if done by a stranger. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761. Where plaintiff was injured by reason of another employe disobeying or not having heard an order given him, instruction that plaintiff was negligent if he went ahead without knowing whether his order had been heard was erroneous, since plaintiff was only bound to use ordinary care under the circumstances. Balderson v. Cudahy Packing Co. [Iowa] 117 NW 986. Charge on contributory negligence construed and held to require, correctly, the degree of care which might be reasonably expected of an ordinarily prudent person under the circumstances. Baltimore & O. R. Co. v. Kangas [C. C. A.] 162 F 143. Instruction requiring of plaintiff only care of "ordinarily prudent man" erroneous; this suggests too low degree of care. Drown v. New England Tel. & T. Co. [Vt.] 70 A 599. Instruction erroneous because omitting reference to duty of employe to take care proportionate to circumstances. Wilson v. New York, etc., R. Co. [R. I.] 69 A 364.

58. **Evidence held to warrant or require submission of question of contributory negligence to jury:** Employe injured by fall of **freight elevator** on ship. San Francisco & P. S. S. Co. v. Carlson [C. C. A.] 161 F 851. Member of grading crew struck by **elevator on grading machine** under which he was standing when chain broke allowing it to fall; some evidence of warning. Jones v. Herrick [Iowa] 118 NW 444. **Air hoist** went up instead of down, causing load to fall, plaintiff having pulled wrong rope, owing to change of which he had no notice. Waligora v. St. Paul Foundry Co. [Minn.] 119 NW 395. Elevator operator fell into **unguarded shaft.** Roth v. Buettel Bros. Co. [Iowa] 119 NW 166. Servant killed by fall of **derrick boom,** while standing under it. Miroslawski v. Ferguson & Lange Foundry Co., 232 Ill. 630, 83 NE 1086. Operator of **press** injured by automatic fall of hammer. Staskowski v. Standard Oil Co., 111 NYS 58. Where employe got **arm caught between joist and car,** while trying to get car under hopper to be filled with dirt. Booth v. McLean Contracting Co. [Md.] 70 A 104. Employe engaged in shifting **belt** got caught in loose, unused, rope pulley. Trombley v. McAfee, 152 Mich. 494, 15 Det. Leg. N. 269, 116 NW 191. Mill employe caught on **shaft** while trying to adjust belt. Seely v. Tenant, 104 Minn. 354, 116 NW 648. Employe adjusting belt on pulley caught by revolving **set screw.** Little v. Bousfield & Co. [Mich.] 15 Det. Leg. N. 763, 117 NW 903. Employe got sleeve caught in **exposed gearing** and was drawn in. Klotz v. Power & Min. Mach. Co., 136 Wis. 107, 116 NW 770. Workman in sawmill injured by exposed gearing. Hoffman v. Rib Lake Lumber Co., 136 Wis. 388, 117 NW 789. Whether plaintiff was negligent for jury where in course of his duties he reached over **unguarded saw** to pour water on boxing to prevent its heating and got arm caught on saw. Hill v. Saugestad [Or.] 98 P 524. Servant fell and came in contact with unguarded gang saw. Evansville Hoop & Stave Co. v. Bailey [Ind. App.] 84 NE 549. Operator of unguarded cross-cut saw struck by block thrown by saw. O'Connell v. F. Smith & Co. [Iowa] 118 NW 266. **Saw held in place by defective rope,** fell on plaintiff, who was operating it. Ogilvie v. Conway Lumber Co. [S. C.] 61 SE 200. Whether uninstructed, inexperienced employe was negligent in **attempting to oil machinery.** Wankowski v. Crivitz Pulp & Paper Co. [Wis.] 118 NW 643. Material furnished for **scaffold** by master broke, and plaintiff fell, plaintiff and another having put it up. Warren v. Post, 128 App. Div. 572, 112 NYS 960. Whether plaintiff negligent in using patent ladder scaffold, new to him, which fell. Schmitt v. Rohn, 110 NYS 1086. Car painter fell from scaffold because car on which he was working was negligently moved by switch crew. Koerner v. St. Louis Car Co., 209 Mo. 141, 107 SW 481. Warehouse employe injured by **fall of pile of sacks** of flour. Weinert v. Merchants' & Shippers' Warehouse Co., 112 NYS 123. Whether teamster, unloading ice from car with **hole in floor** in which he slipped, was negligent. Borchardt v. People's Ice Co. [Minn.] 118 NW 359. Employe sent to repair pump in engine room of mill fell into excavation in floor. Sparling v. U. S. Sugar Co., 136 Wis. 509, 117 NW 1055. Whether plaintiff domestic was negligent in stepping through hole in porch floor, covered with thin boards. Fearon v. Mullins [Mont.] 98 P 650. Plaintiff fell through **uncovered hay chute** in barn. Moellman v. Gieze-Henselmeier Lumber Co. [Mo. App.] 114 SW 1023. Whether deck hand was negligent who fell through **hole in platform** barge at night having been ordered there for first time, and having no previous knowledge of its condition. Monongahela River Consol. Coal & Coke Co. v. Coleman, 32 Ky. L. R. 1347, 108 SW 850. Employe not negligent in using **passageway** in saw mill, used by foreman and others, as matter of law. Gustafson v. A. J. West Lumber Co. [Wash.] 97 P 1094. Employe hurrying through passage between machine got foot caught in cloth, several rolls of which blocked way. Perrier v. Dunn Worsted Mills [R. I.] 71 A 796. Deceased servant put to work in **excavation;** earth fell on him. Hilgar v. Walla Walla [Wash.] 97 P 498. Whether plaintiff ought to have known that **ladder** which fell with him was too short and was not fastened. Missouri, etc., R. Co. v. Steele

[Tex. Civ. App.] 110 SW 171. Whether servant used reasonable care in getting out of **telephone booth** where he was imprisoned. Georgetown Water, Gas, Elec. & Power Co. v. Forwood [Ky.] 113 SW 112. Plaintiff riding on dummy engine injured in **collision** with bucket car in yards of manufacturing plant. Mattson v. American Steel & Wire Co., 200 Mass. 360, 86 NE 896. Hammer of **pile driver** fell on plaintiff's hand on top of spile. Huston v. Quincy, etc., R. Co., 129 Mo. App. 576, 107 SW 1045. Plaintiff injured in operating **defective "joiner and ripsaw"** of which he had complained. Ong Chair Co. v. Cook, 85 Ark. 390, 108 SW 203. Foreman in mill fell into **pit** from which planks had been removed. Whether he was negligent in not using torch. Knox v. American Rolling Mill Corp., 236 Ill. 437, 86 NE 90. Whether driver was negligent in using **chain** which broke, causing cable to strike him. Martin v. Gould, 103 Minn. 467, 115 NW 276. Roller cleaner, working on **pulp machine,** slipped and fell on machine; whether he was negligent in continuing to work with knowledge of conditions. Zajdak v. Lisbon Falls Fiber Co., 111 NYS 50. Switch tender on electric tramroad in mine slipped through **opening in footboard** on motor as car struck projecting rails of side track and had leg injured. He mounted car in customary way. Sundvall v. Interstate Iron Co., 104 Minn. 499, 116 NW 1118. Whether operator of **metal stamping machine,** inexperienced, was negligent in operating in way he did under instructions. Clemens v. Gem Fibre Package Co. [Mich.] 15 Det. Leg. N. 574, 117 NW 187. Operator of unguarded **lath bolting machine** injured by board thrown by saw against him. Callopy v. Atwood, 105 Minn. 80, 117 NW 238. Whether employe was negligent in turning water into **boiler,** to clean it, being assured that it had been tested and was cool, and injured by steam generated by hot part of boiler. Holloway v. H. W. Johns-Manville Co., 135 Wis. 629, 116 NW 635. Employe engaged in erection of gas holder killed by **falling side plate.** Devine v. Hayward, 113 NYS 898. Cable attached to ditching machine was being moved sideways and chain and hook were attached and horses hitched thereto. **Hook straightened out,** and chain flew back and struck plaintiff, who was driving. Whether he was negligent in using chain or occupying position he did. Patterson v. Melchior [Minn.] 119 NW 402. Plaintiff, logger, injured by breaking of **handle of cant hook** being used by him. Longpre v. Big Blackfoot Milling Co. [Mont.] 99 P 131. **Brick wall** in course of construction fell on employe at work near it. Nelson Vitrified Brick Co. v. Mussulman [Kan.] 99 P 236. Whether plaintiff, **loading wheels on car** with skid, negligently let go and ceased pushing before men on car had secured them. Meily v. St. Louis, etc., R. Co. [Mo.] 114 SW 1013. Where **failure to look and listen** as he crossed tracks and was struck by cars was want of ordinary care. Missouri, etc., R. Co. v. Balliet [Tex. Civ. App.] 107 SW 906. **Guy rope** broke allowing gin pole to fall, injuring plaintiff. Reeder v. Crystal Carbonate Lime Co., 129 Mo. App. 107, 107 SW 1016. Whether **failure to take light** was contributory negligence where he fell over rope in dark coal bin. Chicago, etc., R. Co. v. Jackson [Tex. Civ. App.] 108 SW 483. Whether servant was negligent in continuing work of connecting residence with **gas main** with knowledge that foreman was negligent in failing to put in stop box to stop flow of gas while making connection. Wiley v. St. Joseph Gas Co., 132 Mo. App. 380, 111 SW 1185. Servant injured by fall of **smokestack** which he was assisting in moving. Binyon v. Smith [Tex. Civ. App.] 112 SW 138. Whether employe engaged in repairing **carding machine** knew of defects causing it to start suddenly and was negligent in working as he did. Cochrell v. Langley Mfg. Co. [Ga. App.] 63 SE 244. Evidence as to whether plaintiff was guilty of contributory negligence in **riding on platform** of electric repair car instead of in cab, held properly submitted to jury. East, etc., R. Co. v. Hill, 133 Ill. App. 14. Inexperienced man injured by **cotton picker** (machine) soon after being put to work, without instructions. Shaw v. Arkwright Mills [S. C.] 61 SE 1018. Though employe knew location of box containing **hot water and acid,** he was not negligent as matter of law in striking it with his foot, knocking cover off and falling in, where he did not know cover was loose, and men habitually passed over box. Cincinnati, etc., R. Co. v. Fortner [Ky.] 113 SW 847. Employe injured by **live wire** was not negligent as matter of law where he did not know it was charged and relied on assurance that current would be turned off. Latimer v. General Elec. Co. [S. C.] 62 SE 438. Telephone lineman injured by live wire of lighting company, maintained near pole on which he worked, he knowing wire was there. Drown v. New England Tel. & T. Co. [Vt.] 70 A 599. Method of lineman in stringing wires over others—whether it was more dangerous than another method. DeKallands v. Washtenaw Home Tel. Co [Mich.] 15 Det. Leg. N. 337, 116 NW 564. Motorman injured in head-on **street car collision.** Latsha v. Shamokin & E. Elec. R. Co. [Pa.] 70 A 1002. Where motorman was following orders when he collided with other car and did what he could to stop, after seeing other car. Graham v. Mattoon City R. Co., 234 Ill. 483, 84 NE 1070. Whether miner engaged in **blasting** was negligent in manner in which he lit and placed fuse, which caused premature explosion, by reason of its defective condition. Wilte v. Interstate Iron Co., 103 Minn. 303, 115 NW 169. Miner injured by explosion belated because of defective fuse, of which he had complained. Nustrom v. Shenango Furnace Co., 105 Minn. 140, 117 NW 480. Plaintiff injured by **fall of rock** in mine, having made examination of roof at point where he heard "dripping" and where injured some distance from that place. Norton Coal Co. v. Murphy, 108 Va. 528, 62 SE 268. Where engineer fell into **unlighted shaft** of mine on dark night, it could not be presumed that danger of walking through open gate into shaft was obvious so that person of ordinary prudence would not encounter it. Moseley's Adm'r v. Black Diamond Coal & Min. Co., 33 Ky. L. R. 110, 109 SW 306. Whether miner who continued to work though **props had not been delivered** to him after three requests from him (Kirby's Dig. § 5352 being violated) was guilty of contributory negligence

the facts and circumstances of the case,[59] including the age, experience and capacity

held for jury. Johnson v. Mammoth Vein Coal Co. [Ark.] 114 SW 722.

**Injuries to railroad employes:** Brakeman injured by **grab iron** giving way. St. Louis, etc., R. Co. v. Holmes [Ark.] 114 SW 221. Whether brakeman was negligent in using **handhold** on engine tender which he supposed had been repaired, and which had been negligently repaired, so that it came off, causing him to fall. Beach v. Bird & Wells Lumber Co., 135 Wis. 550, 116 NW 245. In moving dead **engine** on turntable, rope attached to live engine and passing round snatch block struck handle of turntable and broke it, injuring plaintiff. Galveston, etc., R. Co. v. Janert [Tex. Civ. App.] 107 SW 963. Engineer got hand caught between defective parts of engine which he was attempting to repair. James v. Fountain Inn Mfg. Co. [S. C.] 61 SE 391. Going between cars in **coupling** them is not negligence per se where cars are not equipped with automatic couplers in good condition. Kansas City S. R. Co. v. Henrie [Ark.] 112 SW 967. Freight conductor went between cars to couple them, and was caught between buffers, no lever for coupling having been provided. Hall v. Northwestern R. Co. [S. C.] 62 SE 848. Brakeman, killed while trying to couple cars, held not negligent as matter of law, having fallen by reason of depression or loose gravel on track. Tibbitts v. Mason City, etc., R. Co. [Iowa] 115 NW 1021. Switchman got foot caught in unblocked frog while between cars trying to uncouple them, coupler being defective. Donegan v. Baltimore & N. Y. R. Co. [C. C. A.] 165 F 869. Brakeman, between cars trying to adjust defective coupler, caught by unblocked guard rail. Hynson v. St. Louis S. W. R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 755, 107 SW 625. Brakeman killed while uncoupling cars not equipped with automatic couplers. York v. St. Louis, etc., R. Co. [Ark.] 110 SW 803. Brakeman **boarded moving train** in course of his duties. Galveston, etc., R. Co. v. Sullivan [Tex. Civ. App.] 115 SW 615. Freight conductor boarded moving train and fell owing to round of ladder giving way. Kiley v. Rutland R. Co., 80 Vt. 536, 68 A 713. Employe on logging train killed while **standing on footboard** of tender. Gauthier v. Wood [Wash.] 94 P 654. Brakeman, 16 years old, thrown from pilot of engine, where he was riding. El Dorado & B. R. Co. v. Whattey [Ark.] 114 SW 234. Brakeman **jumped to escape injury** from derailment due to defective track, while engaged in making "drop" switch. Laughy v. Bird & Wells Lumber Co., 136 Wis. 301, 117 NW 796. Brakeman struck by car while **crossing track** to get to caboose of his own train. Chicago, etc., R. Co. v. Donovan [C. C. A.] 160 F 826. Brakeman looking in opposite direction from that in which train was going struck by **water spout.** McDuffee's Adm'x v. Boston & M. R. Co. [Vt.] 69 A 124. Member of crew of track men **stepped on track** in front of express train. La Placa v. Lake Shore, etc., R. Co., 111 NYS 797. Brakeman, adjusting **crane of water tank,** struck by **train backing** on another track. Louisville & N. R. Co. v. Schroader [Ky.] 113 SW 874. Whether engineer knowingly ran train round curve at **dangerous speed.** Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 20 Tex. Ct. Rep. 772, 107 SW 958. Whether engineer operated logging train which was derailed, causing his injuries, in negligent manner, or contrary to rules or orders. Morgan v. Rainier Beach Lumber Co. [Wash.] 98 P 1120. Whether section hand riding in "caboose" in freight train on way to work was guilty of negligence in **standing in car,** being knocked down by sudden jar caused by car kicked down against caboose. St. Louis, etc., R. Co. v. Harman, 85 Ark. 503, 109 SW 295. Whether section foreman, struck by train while **removing handcar from track,** was violating rules of company, or was guilty of contributory negligence. Houston & T. C. R. Co. v. Burnet [Tex. Civ. App.] 108 SW 404. Whether train **inspector,** injured by reason of cars being switched against train he was inspecting should have put out light or given warning. Goess v. Chicago, etc., R. Co., 104 Minn. 495, 116 NW 1115. **Fireman** at work in stooping position on running board of engine not negligent as matter of law in **failing to hold on** or to grasp handrail above him when engine was suddenly jarred by violent and unexpected coupling. Galveston, etc., R. Co. v. Mitchell [Tex. Civ. App.] 107 SW 374.

**59. Evidence held to warrant finding of contributory negligence:** Power house superintendent guilty of contributory negligence in climbing upon joists, knowing presence of certain **high voltage wires,** though he did not know of smaller wires—lightning arresters—which were there, since he ought to have known. Woelflen v. Lewiston-Clarkston Co. [Wash.] 95 P 493. Operator of **tin-stamping press** negligent in allowing fingers to get caught. Steinberg v. Philip J. Bender & Sons, 125 App. Div. 564, 109 NYS 1034. No recovery when employe thrust his hand into **revolving cylinder,** without waiting to see if machine was still moving, in effort to unchoke machine, on previous occasion superintendent had fixed it. Washington Mills v. Cox [C. C. A.] 157 F 634. Plaintiff, sent aloft on **pile driving apparatus** to put ring on pile, guilty of negligence in attempting to grab ring which had fallen off, after he had signaled that it was on, his hand being caught by hammer. Mugford v. Atlantic, etc., R. Co., 7 Cal. App. 672, 95 P 674. Employe 22 years of age, with year's experience in **blasting** with dynamite and powder, was negligent in pouring powder into hole in which several sticks of dynamite, covered with paper, and ignited by cotton fuse, had been shot off few minutes before, danger of sparks in hole igniting powder being obvious. Hardy v. Chicago, etc., R. Co. [Iowa] 115 NW 8. **Drop hammer** fell on hand of employe as he was removing article from anvil with his hands. Buchman v. Jeffery, 135 Wis. 448, 115 NW 372. Employe working near machine thoughtlessly put his hand behind him and fingers got caught in **cogs.** Harper v. Illinois Cent. R. Co. [Ky. App.] 115 SW 198. Teamster with 40 years' experience, and knowledge of defect in **fastening of doubletrees,** was injured by fastening giving way at time when he was standing on

load with lines wrapped around hands, causing him to pitch forward to road. Meyers v. O'Bear-Nestor Glass Co., 129 Mo. App. 556, 107 SW 1041. "Lugs" of **jainer and ripsaw** out of repair and bed-plates out of place, and plaintiff was directed to use it in that conditlon. Ong Chair Co. v. Cook, 85 Ark. 390, 108 SW 203. Decedent negligent in removing sacks of coffee from leaning pile of **sacks which fell** upon him. Bradley v. James H. Forbes Tea & Coffee Co., 213 Mo. 320, 111 SW 919. Driver's injury being caused by his own negligence in releasing the **wagon brake,** he could not recover on ground that brake was defective. Sands v. Pabst Brewing Co., 131 Mo. App. 413, 111 SW 593. Plaintiff was member of crew engaged in unloading ties, and his duties were to straighten those on ground which did not fall right. He signaled to men to stop **throwing off ties,** and went near car to straighten tie without waiting to see if signal was seen and was struck by tie. Glatio v. St. Louis & S. F. R. Co., 132 Mo. App. 363, 111 SW 1183. Evidence held to warrant finding that plaintiff injured by falling down **elevator shaft** failed to exercise due care for his own safety. Swift & Co. v. Stolze, 140 Ill. App. 103. No recovery for injuries caused by falling of **cellar doors** when plaintiff stood under them knowing they were not fastened, and wind was blowing against them. Bowman v. Woolworth, 220 Pa. 527, 69 A 990. Carpenter of extended experience attempted to use a dismantled **scaffold.** Swift & Co. v. Larson, 136 Ill. App. 93. Injury to **motorman** caused by his own negligence in **running at high speed** and disregarding notice for slower speed, car having left track. Munns v. Pittsburg Rys. Co. [Pa.] 71 A 545. No recovery for death of motorman in mine where he was **"backpoling" car,** and trolly pole slipped off and knocked down timbers, causing rock to fall, this manner of running motor being obviously dangerous, and proper way being to turn pole around so as to have it trail. Williams' Adm'r v. Norton Coal Co., 108 Va. 608, 62 SE 342.

**Brakeman** struck by pole in alighting from car, knowing danger and location of pole, and having warned others. Bowmen v. Pennsylvania R. Co., 219 Pa. 405, 68 A 963. No recovery by brakeman who, knowing **automatic coupler** to be defective and knowing that cars were being rapidly backed down upon him, kicked drawhead and knuckle just as other car came up, and thus had his foot mashed between the two; immaterial that engineer violated signal, brakeman knowing it. Nix v. Southern R. Co. [Ga. App.] 61 SE 292. Facts held identical with Nix v. Southern R. Co., supra, that case held controlling. Adams v. Nashville, etc., R. Co. [Ga. App.] 61 SE 736. Brakeman guilty of negligence where, when off duty and on way home, he attempted to **board rapidly moving train** and was thrown under it by sudden jerk. Whitfield v. Atlantic Coast Line R. Co., 147 N. C. 236, 60 SE 1126. Brakeman negligent in using part of standard on flat car as **handhold.** Chicago, etc., R. Co. v. Murray, 85 Ark. 600, 109 SW 549. Brakeman negligent, where in **passing between posts,** he failed to take any care to prevent injury from boxes on side of cars being pushed against him. knowing the danger. Lyon v. Coleman, 123 App. Div. 703, 108 NYS 378. Brakeman **rode backwards on side of car,** moving slowly, and knew of obstruction which struck him, and could have avoided it had he looked sooner. Flansberg v. Heywood Bros. & Wakefield Co., 199 Mass. 410, 85 NE 537. **Flagman** sent out to flag train and place torpedoes on track, put flag on track, and **sat down on track** some distance away, and was struck and killed by train. No recovery for his death, unless on proof of subsequent negligence by trainmen after discovering his peril. Alabama Great So. R. Co. v. McWhorter [Ala.] 47 S 84. Experienced **railroad man struck by train** which he could have seen 200 feet away, and could have avoided. Brady v. New York Cent., etc., R. Co., 111 NYS 507. No recovery where plaintiff was struck by train when walking on track without looking for train, knowing method of operation. Republic Iron & Steel Co. v. Tobin [C. C. A.] 164 F 38.

**Evidence held to warrant finding that servant was free from contributory negligence:** Employe, **wrapping bottles** and injured by bursting of one, could not be held negligent, not having touched bottle which burst. Lobasco v. Moxie Nerve Food Co., 111 NYS 1007. Common laborer not negligent as matter of law in catching at **live wire,** poorly insulated, negligently maintained near roof on which he was working and from which he slipped, owing to its wet and slippery condition. Colusa Parrott Min. & Smelting Co. v. Monahan [C. C. A.] 162 F 276. Workman hauling concrete under overhead platform from which it was dumped not conclusively negligent in looking out for concrete but not for **falling planks.** Kroeger v. Marsh Bridge Co. [Iowa] 116 NW 125. Employe assisting in **hoisting heavy casting,** under supervision of experienced foreman, injured by casting swinging against him. Bowie v. Coffin Valve Co., 200 Mass. 571, 86 NE 914. Plaintiff not negligent in causing **explosion of dynamite** or trying to prevent it. Anderson v. Smith, 104 Minn. 40, 115 NW 743. Workman in another department could not be held negligent where he was killed by an **explosion** caused by plumber allowing water to run out of pipes on **calcium carbide** stored nearby, even though deceased knew that repairs were to be made. Charron v. Union Carbide Co., 151 Mich. 687, 15 Det. Leg. N. 154, 115 NW 718. Common laborer injured by sudden flow of **cement** through conduit into bin, produced by use of stick by him, no other means being provided. Vaughn v. Glens Falls Portland Cement Co., 59 Misc. 230, 112 NYS 240. Plaintiff, assisting in operation of **ditching machine,** not conclusively negligent in taking position under buckets of machine, which fell on him. Engler v. La Crosse Dredging Co., 105 Minn. 74, 117 NW 242. Plaintiff, stooping down to place tie under orders of foreman, was struck by **pile of ties** which was caused to fall by tie thrown upon it by orders of foreman. Sambos v. Cleveland, etc., R. Co. [Mo. App.] 114 SW 567. Employe injured while **loading car** not negligence as matter of law in handling several bundles of steel at once to hasten work. Briscoe v. Chicago, etc., R. Co., 130 Mo. App. 513, 109 SW 93. Operator of **machine,** inexperienced and assured that

of the servant.[60] Failure to use the senses and the means at hand to discover [61] and

it was safe, was not negligent in operating it, being injured because of defective belt. P. E. Schow & Bros. v. McCloskey [Tex. Civ. App.] 109 SW 386. Plaintiff not negligent in going outside of mill in course of his duty of looking after machinery, some of which was outside, not being in place where there was any reason to suppose **staves** would be **thrown,** stave pile being some distance from him. Swann-Day Lumber Co. v. Thomas [Ky.] 112 SW 907. Operator of **planer** slipped, fell and got hand caught in knives. Cole v. North American Lead Co., 130 Mo. App. 253, 112 SW 753. Shield had been removed from knives of buzz planer by foreman against plaintiff's protest, and plaintiff's hand slipped and went into knives. Bennett v. Carolina Mfg. Co., 147 N. C. 620, 61 SE 463. Plaintiff, at work 40 feet from **emery wheel** required by statute to be guarded, could not be held guilty of contributory negligence where operator of wheel left off guard and wheel broke and a piece of it struck plaintiff. Davidson v. Flour City Ornamental Iron Works [Minn.] 119 NW 483. Employe in performance of duties slipped and got caught on defective **shaft.** Whitworth v. South Arkansas Lumber Co., 121 La. 894, 46 S 912. Plaintiff injured by **hot water** turned into pipe which he was repairing without notice. Ferringer v. Crowley Oil & Mineral Co. [La.] 47 S 763. Waitress who stepped into **elevator** that had already started held under evidence not guilty of contributory negligence. Cullen v. Higgins, 138 Ill. App. 168. Night foreman in rolling mill, injured by stepping into **opening left over belt-pit** in the dark, without carrying torch, held not guilty of contributory negligence, although he knew that repairs were liable to be made at that time. American Rolling Mill Corp. v. Knox, 140 Ill. App. 359. **Motorman** not negligent where he stopped his car on seeing another car coming, and other car could not be stopped owing to defective brakes, plaintiff having complied with company's rules in running his car. Garner v. Metropolitan St. R. Co., 128 Mo. App. 401, 107 SW 427. Common **miner,** shoveling on floor of stope, injured by rock rolling down upon him. Stratton Cripple Creek Min. & Dev. Co. v. Ellison, 42 Colo. 498, 94 P 303. Employe killed in collision of cars in mine. Big Five Tunnel Ore Reduction & Transp. Co. v. Johnson [Colo.] 99 P 63. **Lineman** injured by shock while making measurements on pole with tape containing copper wires not negligent as matter of law where he did not know character of tape. Murphy v. Hudson River Tel. Co., 112 NYS 149.

**Injuries to railroad employes:** Plaintiff, injured while sitting or about to sit in caboose, by **violent coupling,** held not negligent. Ft. Worth & R. G. R. Co. v. Finley [Tex. Civ. App.] 110 SW 531. Plaintiff injured by car negligently released by foreman while plaintiff was **propping turntable** to allow it to pass over. Missouri, etc., R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601. Brakeman about to board caboose struck by sack of **ice thrown off** by fellow brakeman. Galveston, etc., R. Co. v. Henefy [Tex. Civ. App.] 115 SW 57. Brakeman held not negligent as matter of law in **coupling** car to engine in way he did. Rhodes v. Des Moines, etc., R. Co. [Iowa] 115 NW 503. Brakeman not negligent as matter of law in going between cars, believing switching crew had finished their work, so as to bar recovery for injuries caused by reckless or unusual manner of work of switching crew. Allen v. Wisconsin Cent. R. Co. [Minn.] 119 NW 423. Flagman injured by violent coupling held not guilty of contributory negligence. Meacham v. Southern R. Co. [N. C.] 62 SE 879. Where brakeman was killed by **bridge,** and **telltale was defective** and duties required him to watch rear cars as well as engine, he could be found free from negligence. Harrison v. New York, etc., R. Co., 111 NYS 812. Brakeman being injured by the giving away of side **handrail** on car when attempting to board it. El Paso & S. W. R. Co. v. Vizard, 29 S. Ct. 210. Switchman knocked down by engine caught hold of footboard and was dragged until foot caught in **unblocked frog.** Cooper v. Baltimore & O. R. Co. [C. C. A.] 159 F 82. Fireman killed by reason of engine and tender pulling apart, **coupling apparatus being defective.** Missouri, etc., R. Co. v. Snow [Tex. Civ. App.] 115 SW 631. Fireman injured by **explosion of boiler.** Taylor v. White [Tex. Civ. App.] 113 SW 554. Car repairer injured by certain **car doors falling** on him not negligent when he did not know that other employes were working near them. Texas & N. O. R. Co. v. Barwick [Tex. Civ. App.] 110 SW 953.

**60.** Age, experience, intelligence and knowledge of minor are to be considered on issue of contributory negligence. Force v. Standard Silk Co., 160 F 992. Boy of 18 expected to exercise ordinary and reasonable care which ought to be expected of one of his age, knowledge, experience and capacity. St. Louis S. W. R. Co. v. Johnson [Tex. Civ. App.] 109 SW 486. Boy of 15 not negligent as matter of law when he got hand caught in **machine** from which he was trying to extricate board as directed. Czernicke v. Ehrlich, 212 Mo. 386, 111 SW 14. Girl of 13 not negligent as matter of law where she assisted in **overloading dummy,** causing it to fall, and then putting her head into shaft, where she was struck by falling weight from above. Winkle v. George B. Peck Dry Goods Co., 132 Mo. App. 656, 112 SW 1026. What is due care in a young boy must be determined within the limitations of his actual knowledge of the dangers of the position in which he is placed and of the existence of which he had not been informed. Boy 14 years old hurt in **wringer.** Swift & Co. v. Miller, 139 Ill. App. 192. A boy 19 years old who for three months had been using **wire spacer** in operation of which injured, and had been engaged in similar work for 2 years, presumed to possess ordinary discretion, and his responsibility is the same as though he were an adult. Allen v. Western Elec. Co., 131 Ill. App. 118. Person of sufficient age to be capable in law of exercising ordinary care is barred from a recovery for personal injury where at the time the injury was received he himself was not in the exercise of **ordinary care** for his safety. Excelsior Foundry Co. v. Rogers, 136 Ill.

prevent injury[62] is usually held to constitute negligence, and there can be no recovery for injuries caused by failure of the employe to perform a duty entrusted to him or expected of him by the master.[63] Temporary or momentary forgetfulness of

App. 36. Girl whose hand was injured by sudden starting of **machine** by foreman, without warning, not negligent in having hand where it was, as matter of law. Fitzgerald v. International Flax Twine Co., 104 Minn. 138, 116 NW 475. Boy of 16 not negligent as matter of law in brushing shavings from **uncovered gear** of machine. Goodale v. York, 74 N. H. 454, 69 A 525. Boy of 18 cleaning sawdust from under **saw** had fingers cut off. Mastey v. Villaume Box & Lumber Co., 104 Minn. 186, 116 NW 207. Boy sat down on part of machine and when he got up was injured by **unguarded saw.** Jacobson v. Merrill & Ring Mill Co. [Minn.] 119 NW 510. Boy of 15 operating sole **molding machine** got fingers caught. Saller v. Friedman Bros. Shoe Co., 130 Mo. App. 712, 109 SW 794. Whether boy of 16 appreciated danger of operating wood working machine and was negligent. Marklewitz v. Olds Motor Works, 152 Mich. 113, 15 Det. Leg. N. 125, 115 NW 999. Boy of 13 fell over **defective platform,** in dark place, and got hand caught in machine. Haggblom v. Winslow Bros. & Smith Co., 198 Mass. 114, 84 NE 301. Boy of 17 killed by **fly wheel** or other machinery in place where narrow passage, not properly guarded, separated engine pit and other machines. Lunde v. Cudahy Packing Co. [Iowa] 117 NW 1063.

**61.** Failure of trackman **to look out for extra street cars.** Wallace's Adm'r v. Fox [Vt.] 69 A 665. Failure of mail carrier for defendant **to watch for trains** held to bar recovery for his death caused by train striking him as he crossed tracks. Skinner v. Boston & M. R. Co., 200 Mass. 422, 86 NE 772. Where plaintiff's intestate knew the custom of running trains through the yards, but failed to watch in direction from which switch engine might come, held guilty of negligence directly contributing to his death. Chicago & W. I. R. Co. v. Mills, 131 Ill. App. 625. Member of track crew struck by train as he was walking alongside track, train coming from behind him. He could have seen it or could have walked farther from track. Dangelo v. Lake Shore & M. S. R. Co., 111 NYS 800. Inexperience or ignorance cannot be relied on where employe puts his hand on **revolving cylinder** with sharp teeth. Hutchison v. Cohankus Mfg. Co. [Ky.] 112 SW 899. Plaintiff knew that **elevator shaft** was often kept open, and was so the last time he had seen it, yet did not use care to see if shaft was open at time of injury. Singer v. Boyce Paper Mills Co., 141 Ill. App. 316. Cook in defendant's family, employed 2 days, fell into elevator shaft by opening door in dark which she supposed was storeroom door. No recovery. She should have investigated more carefully. Kehoe v. Stern, 114 NYS 14.

**62.** No recovery by foundry employe for injury by **fall of casting,** where he knew conditions and could have prevented accident. Van Pelt v. Straight Line Engine Co., 112 NYS 116. Apprentice lineman voluntarily undertook to carry a **guy wire** up a pole in his bare hand and received shock from which he died. No recovery for his death, since company provided safety appliances which he did not use and he was not under orders at time. Maitrejean v. New Orleans R. & Light Co., 120 La. 1056, 46 S 21. Section man negligent who failed to get out of way of **train which he saw coming.** Sissel v. St. Louis & S. F. R. Co. [Mo.] 113 SW 1104. Motorman, injured in collision with car ahead, negligent when he failed to use reverse, **knew his brakes were not working** properly, and failed to apply for another car, and ran too close to car ahead. Foley v. Boston & N. St. R. Co., 198 Mass. 532, 84 NE 846. Car repairer, injured by engine moving car he was working on, negligent where he **failed to use warning flag** or to have lookout on watch. Jacoby v. Chicago & N. W. R. Co. [Wis.] 118 NW 635. Where injury was caused by **overexertion,** plaintiff could not recover if he overestimated his strength. Jones v. Pioneer Cooperage Co. [Mo. App.] 114 SW 94. Where employe could have prevented injury by having hand drawn into block by **steel wire rope** had he been attentive to his duties, he could not recover. Johnson v. A. F. Coates Logging Co. [Wash.] 97 P 801.

**63.** Where it was coal miner's duty **to order props** and prop up the roof when it became dangerous after removal of coal, and roof fell because not propped, his own neglect was cause. Smith's Adm'r v. North Jellico Coal Co. [Ky.] 114 SW 785. **If it** was employe's duty **to keep floor clean** and he failed to do so, and its condition caused him to slip and fall upon unguarded machinery, he would be guilty of contributory negligence, and instruction to that effect was proper. Huss v. Heydt Bakery Co., 210 Mo. 44, 108 SW 63. Employe, part of whose work was **to see that everything about sawmill was kept in order,** could not complain that lantern used by him was smoky and gave dim light, this being result of his own negligence. Ramsey v. Tremont Lumber Co., 121 La. 506, 46 S 608. It is duty of lineman to use reasonable care **to inspect cross-arm** on electric wire pole before going out on it to work, and court should so charge and not leave it to jury to say whether he was under such duty. Johnston v. Syracuse Lighting Co. [N. Y.] 86 NE 539. Lineman, warned of danger from wires of another company, and charged with duty of **inspection of poles and wires,** was guilty of negligence in failing to inspect and in coming in contact with charged iron brace. Memphis Consol. Gas. & Elec. Co. v. Simpson [Tenn.] 109 SW 1155. No recovery for death of lineman by fall of old pole which was rotten where work was moving wires from old to new poles and men were instructed to inspect poles and not to climb those which were rotten and condition of pole which fell would have been disclosed by inspection. Eigenbrod v. Cumberland Tel. & T. Co., 121 La. 228, 46 S 219. Where it was servant's duty **to open and close windows** each day, it was his duty to use reasonable care to see that they were in good and safe condition. Stewart & Co. v. Harmon [Md.] 70 A 333. Evidence held not to show that plaintiff was

a known danger may in some cases be excusable,[64] but is usually held to constitute negligence.[65] An act is not excusable because customary, though the fact that it is customary is to be considered.[66]

*Choice of methods.* See 10 C. L. 771—Needless exposure to a known danger is negligence;[67] hence, a voluntary choice[68] of a known or obviously dangerous way of doing work,[69] when a reasonably safe way is available,[70] is negligence.

required **to repair hole** in floor by which he was injured, it appearing that carpenter was employed to make repairs. Miller v. White Bronze Monument Co. [Iowa] 118 NW 518.

**64.** Brett v. S. H. Frank & Co., 153 Cal. 267, 94 P 1051. Mere knowledge by brakeman of unsafe condition of low bridge over cars would not alone charge him with contributory negligence, though the fact of his knowledge could be considered by jury with other facts. Chesapeake & O. R. Co. v. Rowsey's Adm'r, 108 Va. 632, 62 SE 363. Code 1904, § 1294K, provides that knowledge alone shall not bar recovery. Id. Under all facts, jury warranted in finding there was no contributory negligence. Id.

**65.** Temporary forgetfulness may excuse an employe in cases of abnormal danger or emergencies, but ordinarily is inconsistent with exercise of due care. Brett v. S. H. Frank & Co., 153 Cal. 267, 94 P 1051. Employe guilty of negligence who walked backwards into **hole in floor,** existence of which he was familiar with but which he forgot. Id. Where servant knew of existence of hole in floor but forgot and stepped into it, he was held negligent and could not recover. Miller v. White Bronze Monument Co. [Iowa] 118 NW 518. Where lineman knew danger of touching iron brace in contact with **heavily charged uninsulated wire,** the fact that he momentarily forgot would not excuse him for charge of negligence or make master responsible. Memphis Consol. Gas & Elec. Co. v. Simpson [Tenn.] 109 SW 1155.

**66.** Proof that plaintiff's, conductor, act in **getting off moving train** at station was customary among defendant's conductors, admissible. Missouri, etc., R. Co. v. Kennedy [Tex. Civ. App.] 112 SW 339. Brakeman not necessarily negligent where, finding coupler defective, he adopted customary method of making **uncoupling.** Rush v. Oregon Power Co. [Or.] 95 P 193. No contributory negligence on part of unskilled employe injured while trying to adjust **belts** in customary way. Mathews v. Kerlin [La.] 48 S 123. That rule prohibiting employes from **riding on pilot of engine** was habitually violated by others would not excuse plaintiff's act, if negligent, though custom could be considered on issue of negligence. El Dorado & B. R. Co. v. Whatley [Ark.] 114 SW 234. Where member of construction crew **rode on tool car** instead of in diner of work train, general custom sanctioned by company or foreman of allowing men to ride in that way would not be decisive of question of plaintiff's negligence where he was thrown from car by shock. Gibler v. Quincy, etc., R. Co., 129 Mo. App. 93, 107 SW 1021. Where plaintiff directed helper to **hold curved wheel guard under power drill** in customary way it not being practicable to hold such pieces with clamps, he was not guilty of negligence as matter of law in method of work employed. Kansas City Consol. Smelt. & Refining Co. v. Taylor [Tex. Civ. App.] 107 SW 889.

**67.** Servant is usually held negligent if he continues in service where danger is imminent. St. Louis, etc., R. Co. v. Mangan [Ark.] 112 SW 168.

**68.** Servant not negligent unless choice voluntary. Ramm v. Hewitt-Lea Lumber Co. [Wash.] 94 P 1081; Harris v. Washington Portland Cement Co. [Wash.] 95 P 84. The rule that the servant must choose the safer of two courses open to him does not apply where it would entail leaving place where his ordinary duty places him. Fireman injured by locomotive dropping through bridge was not guilty of contributory negligence because he stayed on engine and did not avail himself of engineer's permission to go back upon train. McCabe & Steen Const. Co. v. Wilson, 209 U. S. 275, 52 Law. Ed. 788.

**69.** Where two courses are **equally safe,** under normal conditions, choice of one rather than other is not negligence. Swann-Day Lumber Co. v. Thomas [Ky.] 112 SW 907. Where servant voluntarily chooses **most hazardous** of two available methods, he does so at his own risk. Lima Elec. R. & Light Co. v. Hicks, 77 Ohio St. 606, 84 NE 1129. Servant not required to select "safest" way, where there may be others **reasonably safe.** Condie v. Rio Grande W. R. Co. [Utah] 97 P 120. Servant not negligent in adopting one mode of feeding machine rather than another **unless he knew** the one he used was the more dangerous. Whiteley Malleable Castings Co. v. Wishon [Ind. App.] 85 NE 832. Choice of more dangerous method not negligence per se, if no rules or orders are violated, and ordinarily prudent person **might adopt either** under circumstances. Brady v. Florence, etc., R. Co. [Colo.] 98 P 321. Where "trouble man" for telegraph man **climbed pole to test wires,** he was not negligent as matter of law in carrying up bare ground wire to make the test rather than to test wires in cable box, unless he knew that electric light wires, also strung on pole, were live at that time of day, he having received shock from such wires. Ambre v. Postal Tel. Cable Co. [Ind. App.] 86 NE 871. Employe who went to throw off **belt** took usual course, which he was told to take, and stepped over shaft, defective collar on which caught him and caused his injury. Miller v. Kimberly & Clark Co. [Wis.] 118 NW 536. Doctrine that one who adopts unsafe course or method, when safe way is available, cannot recover, held not applicable; contributory negligence for jury. Id. No recovery where employe passed under belt where he was struck by bolts attached, when he could have chosen safe route. Perkins v. Oxford Paper Co. [Me.] 71 A 476. Plaintiff, in adjusting belt, put his hand on rail above to steady himself,

and crane which ran on rail ran over his hand. He testified that he had not noticed crane, though it was in motion great deal of time. Court should have instructed that he could not recover if he knew about the crane. Browne v. Pratt & Letchworth Co., 111 NYS 863. Where experienced engineer knew of **defect in engine,** he could not recover for injuries resulting from derailment while going round curve at high speed, derailment being caused by such defect. Adams v. New York, etc., R. Co., 199 Mass. 476, 85 NE 585. Fireman, whose duty it was to clean out locomotive engine, could do it in his own way and when he saw fit. He **got under engine** just after switching was done at station and train had been made up. Same member of crew connected air and piston rod came down on fireman's leg which was unnecessarily exposed to danger. No recovery. Wilkinson v. Minneapolis & St. L. R. Co., 105 Minn. 300, 117 NW 611. Street car conductor injured by **striking telephone pole** with his head while on passing car, pole being where he must have observed it and known danger. Moore v. Chattanooga Elec. Co. [Tenn.] 109 SW 497. No recovery by employer injured by putting hand in **rollers of grist mill.** Whitmore v. H. K. Webster Co., 200 Mass. 281, 86 NE 305. **Quarryman** negligent where he voluntarily went to work in dangerous place after warning and rock fell on him. Alabama Consol. Coal & Iron Co. v. Hammond [Ala.] 47 S 248. Plaintiff unnecessarily moved **stone suspended over car** on which it was being loaded, causing it to slip from tongs and fall upon him; he had assisted in fastening tongs, and had seen it slip before. Salt v. Canney [C. C. A.] 162 F 660. When an employe willfully encounters danger known to him, or patent and open to be seen and known, he cannot recover for injuries received therefrom. Servant pushing car stepped into **hole in platform** of which he had been notified. Priddy v. Black Betsey Coal & Min. Co. [W. Va.] 61 SE 163. Greater degree of care required in operation of **unguarded machine** when operator knew the danger. Harris v. Bottum [Vt.] 70 A 560. No recovery by employe who **removed guard** from cylinder and put his hand in to remove obstruction when he could have waited until machine stopped. Hutchison v. Cohankus Mfg. Co. [Ky.] 112 SW 899. Ordinarily **jumping off or on moving car** is held contributory negligence. Dortch v. Atlantic Coast Line R. Co. [N. C.] 62 SE 616. Where brakeman attempted to board slowly moving train by placing right hand on end sill of box car and left hand on end sill of coal car in its rear, and swinging his feet to the bumpers of the coal car, disregarding ladders and stirrups, held, as a matter of law, guilty of negligence which was proximate cause of his injury. Cleveland, etc., R. Co. v. Curtes, 134 Ill. App. 565. Servant hired to operate **ripsaw** was negligent in voluntarily attempting to operate joiner, this not being his duty, without instructions, or without properly adjusting it, if he knew how to run it. Stodden v. Anderson & Winter Mfg. Co. [Iowa] 116 NW 116. No recovery for death of railroad employe who in **crossing tracks** needlessly exposed himself to danger from passing trains. Boyle v. New York, etc., R. Co., 58 Misc. 50, 110 NYS 19. Railroad employe guilty of contributory negligence where he was crushed **between car and freight platform,** danger of so doing being obvious, and where he could as well have done his work on other side of track. Haring v. Great Northern R. Co. [Wis.] 119 NW 325. Act of brakeman in **going between cars** to uncouple air hose from inside of curve of track rather than outside was not negligence per se, where manner of his death was not shown. Whether he was negligent was for jury. Brady v. Florence, etc., R. Co. [Colo.] 98 P 321. Employe negligent in attempting to cross track between two chained cars, when he could have walked around by going 70 to 90 feet. Beck v. Southern R. Co. [N. C.] 62 SE 883. Freight conductor, after giving engineer signal to detach engine, went between cars, knowing engine would be backed to give slack for uncoupling, and adopted dangerous way to couple air hose, which was not his duty. He knew usual safe way. No recovery for his death, crushed by cars. Dermid v. Southern R. Co. [N. C.] 61 SE 657. No recovery where brakeman takes dangerous way to **uncouple cars,** instead of safe way. Taylor v. Rock Island, A. & L. R. Co., 121 La. 543, 46 S 621. No recovery by switchman who, contrary to rule not to attempt to uncouple moving cars, signaled engineer to move while he was between car, and got his foot caught between guard and other rail, space not being blocked, and was injured. Day v. Louisiana W. R. Co., 121 La. 180, 46 S 203. Switchman, discovering coupler defective, should have crossed to other side of cars to use lever, instead of going between cars to do work by hand. Union Pac. R. Co. v. Brady [C. C. A.] 161 F 719. No recovery for death of switchman who unnecessarily went between cars to uncouple them by hand, and got foot caught in frog. Powell v. Wisconsin Cent. R. Co. [C. C. A.] 159 F 864. No recovery for death of brakeman who, instead of using automatic coupler apparatus, went between cars and rode on brake beam while making flying switch. Atchison, etc., R. Co. v. Rudolph [Kan.] 99 P 224. Employe warned by his foreman of danger of standing beneath heavy timber being raised by **derrick** and told to take different position while timber was being raised, or who knew of his own knowledge that it was dangerous to stand in different position, and injured by timber falling upon him, guilty of contributory negligence. Wallace v. Spellacy, 8 Ohio N. P. (N. S.) 41. Shoveler in **ash pit** was supposed to work in pit beside track. He took dangerous position behind engine, and put hand on rail waiting for engine to move. Driver of engine could not see him, and moved engine backward over his hand. No recovery. Dorgan v. Northern Pac. R. Co. [Wash.] 97 P 229. **Raising safe** by a means which he knew was perilous. Royal Trust Co. v. National Provision Co., 139 Ill. App. 136. Man at work on **pile driver** left place of duty beside the leads, which was safe, and went out in front of appliance, where pile fell on him; he had been warned of danger. Kirkpatrick v. St. Louis & S. F. R. Co. [C. C. A.] 159 F 855. Boy who used **elevator** walked into shaft backward without looking to see if elevator was there. Taylor v. Hennessey, 200 Mass. 263, 86 NE 318. No recovery where employe **took dangerous route** and stepped into hole and was injured by saw, there being safe way. H. D. Williams Cooperage Co. v. Headrick [C. C. A.] 159 F 680. Servant left his

*Reliance on master's care.*[See 10 C. L. 773]—A servant is not negligent in relying to a reasonable extent on the assumption that the master has or will perform his duties with respect to the safety of his employes,[71] unless he has actual or implied knowledge to the contrary.[72] He may also reasonably rely on an assurance of safety by a superior,[73] and may assume that the execution of an order given by a superior will

place of work, while machines were at rest, and in returning took dangerous route and was caught in cogs. Schmonske v. Asphalt Ready Roofing Co., 114 NYS 87. No recovery for death of skilled steel construction worker who chose dangerous way to get to desired place. Gunderson v. Roebling Const. Co. [N. Y.] 86 NE 807. Where plaintiff, while engaged in operating a **planing machine,** choose to insert his fingers between the feed-rollers to remove a knot, instead of availing himself of one of several safe ways, his injury was held to be brought about by his own negligence. McNeilly v. N. O. Nelson Mfg. Co., 140 Ill. App. 34. Where servant undertook to oil planer without stopping knives, which he could easily have done, he was held guilty of contributory negligence. Boehne v. Illinois Cent. R. Co., 140 Ill. App. 66. Brakeman selected his own appliance with which to **push car on side track** with engine on main track, and stood on engine pilot to do work. Appliance proved too short, and he was crushed as engine moved against car. He could have stood on ground. No recovery. St. Louis, etc., R. Co. v. Fuller [Ark.] 109 SW 1160. No recovery for death of employe drawing off water from locomotive **boiler,** caused by defect in blow-off pipe, defect being obvious, and proper and safe pipes being available, which it was his duty to use. Atchison, etc., R. Co. v. Stone, 77 Kan. 642, 95 P 1049. No recovery where operator of power press attempted to remove card board **without stopping machine,** as he might have done. Whippen v. Stone, 197 Mass. 519, 83 NE 989.

**70.** Employe cannot be held negligent in selecting a method of work unless he knew of a safer way. Ramm v. Hewitt-Lea Lumber Co. [Wash.] 94 P 1081; Harris v. Washington Portland Cement Co. [Wash.] 95 P 84. Brakeman, finding he could not remove **angle cock** by reaching under draw bar, not negligent for reaching over it. McGuire v. Chicago, etc., R. Co. [Iowa] 116 NW 801.

**71. Employe held not negligent:** Brakeman attempting to use **drop brake** on flat car without examining it, though he had never used such a brake before. Reed v. Norfolk & W. R. Co., 162 F 750. Brakeman killed by stepping into **trench beside track** while in performance of duties. Southern R. Co. v. Newton's Adm'r, 108 Va. 114, 60 SE 625. Conductor injured because of **misplaced rail** of which he was not chargeable with notice. Chicago, etc., R. Co. v. Pittman, 135 Ill. App. 481. Employe killed by **fall of roof in mine,** when he was doing his work in way he had been instructed. Lanne v. U. S. Gypsum Co., 110 NYS 496. Not negligence for driver in mine to rely on inspection of roof by examiner and to look only for notices of danger, roof having fallen on him. McCarthy v. Spring Valley Coal Co., 232 Ill. 473, 83 NE 957. Miner not precluded from recovering for injury caused by **rock falling** in room he had excavated unless he knew of defect, or was negligent. Barrett v. Dessey [Kan.] 97 P 786. Plaintiff struck in eye by flying steel **sliver from hammer** or chisel while holding rail which was being cut. Texas Mexican R. Co. v. Trijerina [Tex. Civ. App.] 111 SW 239. Plaintiff, struck by chip from defective sledge wielded by helper was not negligent as matter of law in failing to discover its defective condition, since he had right to assume that it was reasonably safe. Missouri, K. & T. R. Co. v. Quinlan, 77 Kan. 126, 93 P 632. Boy of 16, without previous experience, set to work on boiler tubes and given **defective sledge** and burred prosser pins, not negligent as matter of law in using such tools, chip from pin striking his eye. Pelow v. Oil Well Supply Co. [N. Y.] 86 NE 812. Fireman engaged in blowing out boiler was not bound to anticipate negligence of engineer, who knew where he was in **moving engine.** Galveston, etc., R. Co. v. Mitchell [Tex. Civ. App.] 107 SW 374. Common laborer entitled to rely on soundness of **guy ropes** in absence of obvious defects. Cleveland, etc., R. Co. v. Beale [Ind. App.] 86 NE 431. Servant sent to work in **excavation** could rely on assumption that place was reasonably safe or that he would be warned if it was not. Hilgar v. Walla Walla [Wash.] 97 P 498. Plaintiff not negligent in failing to anticipate unusual danger of **plank falling** on him, caused by foreman's negligence. Cook v. Chehalis River Lumber Co., 48 Wash. 619, 94 P 189. Workman assisting in **loading logs** on truck held not negligent in trying to swing log into place, having no reason to anticipate order to lower log, and that it would rebound and strike him when lowered. Gould Const. Co. v. Childers' Adm'r, 33 Ky. L. R. 1069, 112 SW 622. **Car repairer** not conclusively negligent in **reaching arm over rail** to feel for hot box on car which he was directed to find, having no reason to believe car would be moved. Jelinek v. St. Paul City R. Co., 104 Minn. 249, 116 NW 480. Servant who had nothing to do with building **scaffold,** but was sent to work on it, could assume its reasonable safety and was not negligent for not making more than casual inspection. Barkley v. South Atlantic Waste Co., 147 N. C. 585, 61 SE 565.

**72.** Foreman in mill could not recover where injured while **using pinch bar** to move heavy saw logs down incline where by reason of his knowledge and experience he must have known the great danger, though master knew that "bull-wheel," by which work was usually done, was out of order. Bush v. Wood [Cal. App.] 97 P 709.

**73.** Miner not negligent in obeying orders to go up on twisted **timbers in mine,** relying on assurance of safety by foreman, timbers having fallen with him. Swearingen v. Consolidated Troup. Min. Co., 212 Mo. 524, 111 SW 545. Whether miners were guilty of contributory negligence in using certain timbers depended to some extent on superintendent's directions and assurances on which they could reasonably rely. Haidukovich v. Shenango Furnace Co. [Minn.] 118 NW

not expose him to any unusual danger,[74] unless he has knowledge of the danger involved,[75] and such known danger is one which an ordinarily prudent person would not have encountered under the circumstances.[76] Similarly, the servant may rely to a reasonable extent on the assumption that work will be done in the customary man-

1017. Miner went into new shaft, after assurance that "air" was all right, and commenced to remove material and water, whereby **powder gas** imprisoned there was liberated and overcame him. Held not negligent. Sales v. Whitney, 130 Mo. App. 412, 110 SW 55.

**74.** Employe who receives specific order may rely upon assumption that he will not be ordered into danger. Chicago, etc., R. Co. v. Sanders [Ind. App.] 86 NE 430. Evidence warranted finding for plaintiff where he obeyed orders of his immediate superior in **oiling machine,** and was inexperienced and was injured while doing work with only available appliance and in customary way. Avery v. West Lumber Co., 146 N. C. 592, 60 SE 646. Whether servant is negligent in obeying **supervisor's orders,** even though in so doing he undertakes an extra hazard, is in every case a question for the jury. Southern R. Co. v. Rutledge [Ga. App.] 60 SE 1011. Whether **train dispatcher** was justified in believing that order of assistant train master was authorized or whether he was negligent in following it and allowing train to proceed before preceding one was clear of block, for jury. Salmons v. Norfolk & W. R. Co., 162 F 722. That work is done pursuant to **direct command** of master may be considered on issue of servant's conduct. Hobbs v. Small [Ga. App.] 62 SE 91. Employe not negligent where he relied on superior knowledge of **superintendent,** under whose directions he worked. Brosnan v. New York, etc., R. Co., 200 Mass. 221, 85 NE 1050. It is servant's duty to **obey orders** of his superior unless in doing so he exposes himself to manifest hazard or places himself in obviously dangerous position. Southern R. Co. v. Rutledge [Ga. App.] 60 SE 1011. Jury could consider that foreman had directed car repairer to find hot journal of car in determining whether he was negligent in **putting arm over rail** to feel of one, where car ran over it. Jelinek v. St. Paul City R. Co., 104 Minn. 249, 116 NW 480. That conductor ordered brakeman to **go between car and engine** to do certain work was to be considered on question of his contributory negligence, though order was inconsistent with general rules. Rudquist v. Empire Lumber Co., 104 Minn. 505, 116 NW 1019. Deck hand ordered for first time **to go upon platform** on barge, at night, could rely on assumption that it was reasonably safe and, having no actual prior knowledge of its condition, was chargeable only with notice of obvious conditions. Monongahela River Consol. Coal & Coke Co. v. Coleman, 32 Ky. L. R. 1347, 108 SW 850. Plaintiff not negligent where injured while digging in **manhole** according to instructions, part of unbraced concrete wall of manhole having fallen on him. Ward v. Edison Electric Illumination Co., 124 App. Div. 22, 108 NYS 608. Where foreman devised method used to **load cable on wagon,** and ordered plaintiff to assist, latter was not negligent in working in face of obvious danger. Kennedy v. Laclede Gaslight Co. [Mo.] 115 SW 407. **Collision** of electric car on which plaintiff was motorman, running under special orders, with another car whose crew had not been notified of plaintiff's approach; recovery sustained. Mattoon City R. Co. v. Graham, 138 Ill. App. 70. Member of defendant's fire department was told to go over certain fire route, and superintendent indicated certain door through which he was to pass. Plaintiff passed through door and stepped into **vat of boiling water.** Held, he was not negligent. Jennings v. Swift & Co., 130 Mo. App. 391, 110 SW 21. Permission by conductor to engineer in charge of dead engine which was being taken to repair shop "to look over the engine" did not include permission to **crawl under engine** and make repairs, and for engineer to do so without notifying conductor or engineer of train was negligence barring recovery for injuries caused by train starting. Crow v. Houck's Missouri & A. R. Co., 212 Mo. 589, 111 SW 583. **Brakeman knocked off pilot of engine** by sudden jerk caused by defect in track or negligence of engineer, while acting under orders of conductor. Atlanta, K. & N. R. Co. v. Tilson [Ga.] 62 SE 281.

**75.** Failure of **minor** to use his own senses and use ordinary care for his own safety will bar recovery though he had right to rely to some extent on superior's judgment. Indian Head Coal Co. v. Miller, 33 Ky. L. R. 650, 110 SW 313. Where **section foreman** ordered men to get off moving train finding that foreman was negligent in giving order is inconsistent with finding that injured employe was not negligent, both knowing facts and seeing danger. Chicago, etc., R. Co. v. Sanders [Ind. App.] 86 NE 430.

**76.** Servant acting **under orders** of superior may properly obey his orders unless danger is so imminent that person of ordinary prudence would not encounter it. Owensboro Stave & Barrel Co. v. Daugherty, 33 Ky. L. R. 328, 110 SW 319. Whether workman was negligent in doing certain work under orders of foreman, for jury. Kennedy v. Swift & Co., 234 Ill. 606, 85 NE 287. The servant may recover if injured while working under the direction of his employer, unless the work is inevitably or imminently perilous. Gerding v. Standard Presesd Steel Co., 220 Pa. 229, 69 A 672. Assurance by master that **sewing machine and shaft** were not dangerous held not to relieve operator of duty of ordinary care for her own safety. Nelson-Bethel Clothing Co. v. Pitts [Ky.] 114 SW 331. Locomotive fireman who did not discover defect in **apron between engine and tender** until trip had commenced was not bound to abandon his post unless danger was so apparent as to make it negligence to remain. Missouri, etc., R. Co. v. Adams, 42 Tex. Civ. App. 274, 114 SW 453. **Miner injured by fall of earth** while attempting to repair timbering in dangerous place, being assured by mine boss that place was all right. Tomazin v. Shenango Furnace Co., 103 Minn. 334, 114 NW 1128.

ner[77] that customary signals will be given and observed,[78] that usual or promised warnings will be given,[79] and the rules observed.[80]

*Disobedience of orders and violations of rules.*[See 10 C. L. 775]—Violation of a reasonable rule of the master, known to the servant,[81] or which ought to have been known to him,[82] and applicable to the situation in question,[83] while not negligence

77. Plaintiff, injured while transferring **truck of baggage** with elevator was not negligent in not seeing that truck was properly loaded, it being customary to rely on other baggage man for loading. Turner v. Terminal R. Ass'n, 132 Mo. App. 38, 111 SW 841.

78. Switchman not negligent where **cars were moved without signal** by engineer. Penney v. St. Joseph Stockyards Co., 212 Mo. 309, 111 SW 79. Brakeman in performance of duties may rely on assumption that **signal to stop** will be obeyed. Roenfranz v. Chicago, etc., R. Co. [Iowa] 116 NW 714. Brakeman engaged in switching operations, got foot caught between ties, and engineer backed car over it. He was not negligent as matter of law since he had right to assume that engineer would obey his signal to stop, and would be on lookout for it. Id.

79. Servant, especially minor, engrossed in work, has right to rely upon giving of customary signals or warning before being placed in place of danger. Fitzgerald v. International Flax Twine Co., 104 Minn. 138, 116 NW 475. When plaintiff's intestate was struck by switch **engine** which came upon him **without usual warnings** by bell, he was not negligent as matter of law in relying solely on customary warning, and not taking further precautions for his own safety. Hines v. Stanley-G. I. Elec. Mfg. Co., 199 Mass. 522, 85 NE 851. Track employe, engaged in duties, not negligent as matter of law in failing to discover approach of train in time, where watchman was employed to give warning, and failed to do so promptly. Schradin v. New York Cent., etc., R. Co., 124 App. Div. 705, 109 NYS 428. Plaintiff not negligent in going between cars to effect coupling, as directed, being unfamiliar with work, and injured by reason of another car being pushed against those he was coupling, without warning. Pecard v. Menominee River Sugar Co. [Mich.] 15 Det. Leg. N. 846, 116 NW 532. Whether plasterer working in **elevator shaft**, after foreman had promised to tell him when elevator would start running, was negligent in not observing, on going to work, that elevator had ascended, being injured by it, when it came down, he not having been warned, for jury. Larson v. Haglin, 103 Minn. 257, 114 NW 958. Employe, in part of building where warning, if given, of starting of machinery, could not have been heard, had **no right to rely upon such warning.** McKenna v. Gould Wire Cord Co., 197 Mass. 406, 83 NE 1113.

80. Brakeman, **going between cars** to uncouple air hose, had right to rely on assumption that engineer would observe rules and await customary signals before backing into train. Brady v. Florence, etc., R. Co. [Colo.] 98 P 321. Not negligence for switch foreman to pass between car and post where he had right to assume, under rules, that cars would not be moved without signals. Cunningham v. Neal [Tex. Civ. App.] 109 SW 455. Car repairer, struck by cars, not negligent in failing to look and listen, where he saw engine coming, and was getting out of the way of it, and had no reason to expect cars, since rules of company prohibited flying switch such as was being made. Galveston, etc., R. Co. v. Conuteson [Tex. Civ. App.] 111 SW 187. Section hand justified when he saw freight train ahead, in relying on observance of rule requiring **flagman to be out with torpedo,** and not seeing flagman, was not obliged to look for torpedo on track. Galveston H. & N. R. Co. v. Murphy [Tex. Civ. App.] 114 SW 443.

81. Employe is not bound by a rule not brought to his attention. St. Louis, etc., R. Co. v. Puckett [Ark.] 114 SW 224. Brakeman not negligent as matter of law in failing to comply with rule requiring **brakemen to see that cars were inspected** when there was no evidence that he knew of rule. St. Louis, etc., R. Co. v. Holmes [Ark.] 114 SW 221. Whether there was rule prohibiting switchman from **going between cars** and whether plaintiff had notice of it, for jury. Hynson v. St. Louis, S. W. R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 755, 107 SW 625 Rule forbidding employes from going between moving cars had been commonly disregarded and deceased brakeman had never been required to read it. Whether he knew of it held for jury. Matthews v. New Orleans & N. E. R. Co. [Miss.] 47 S 657.

82. Employe who continues in employment with knowledge of rules impliedly agrees to obey and enforce them. International & G. N. R. Co. v. Brice [Tex. Civ. App.] 111 SW 1094. Failure to read **rules of street car company,** negligence on part of motorman, where he had had two weeks in which to read them and only excuse was lack of time; they could be read in half an hour. Foley v. Boston, etc., R. Co., 198 Mass. 532, 84 NE 846.

83. Railroad rules construed as prohibiting employes from **riding on side of cars next to obstructions** such as sheds, etc., which plaintiff violated. Collins v. Mineral Point & N. R. Co., 136 Wis. 421, 117 NW 1014. Evidence held not to show rule prohibiting riding on cars on side of track where there were buildings or obstructions impracticable. Id. Rules of railway company held not to have been violated by brakeman, injured by being struck by freight platform while riding on car. Clay v. Chicago, etc., R. Co., 104 Minn. 1, 115 NW 949. Rule requiring **flagman** to go certain distance to rear of trains stopped at unusual places etc., applies only to trains on main tracks; held not applicable where engine left train on siding to go to distant water station. Meacham v. Southern R. Co. [N. C.] 62 SE 879. Rule prohibiting employes from **going between cars** to which engine was attached, except for purpose of coupling air hose, included permission to go between them to

per se,[84] is prima facie evidence of negligence,[85] unless the rule has been abrogated by its customary violation,[86] with the knowledge and acquiescence of the master.[87]

uncouple air hose. Southern R. Co. v. Shumate, 32 Ky. L. R. 1027, 107 SW 737. Railroad rule, construed as whole, held not to prohibit brakeman from going between stationary cars to couple them when engine was not attached to train. Driver v. Southern R. Co. [Miss.] 46 S. 824. Whether rule violated by switchman who went between cars to uncouple them had been abrogated by habitual violation by employes, and whether it was applicable to deceased, for jury. Austin v. Central of Georgia, R. Co., 3 Ga. App. 775, 61 SE 998. Switch engineer not negligent in going forward onto main track on signal from switchman who had gone ahead, though switchman had not yet turned switch, collision resulting, though rule provided trains should not proceed to terminals, junctions, crossings, etc., unless **tracks were seen to be clear and lights right.** Dwyer v. Northern Pac. R. Co. [Minn.] 118 NW 1020. That general officers of defendant company forbade plaintiff's running motor would not defeat recovery if he was **acting pursuant to his foreman's orders.** Mitchell v. Boston & M., etc., Min. Co., 37 Mont. 575, 97 P 1033. Employe not bound to observe general rules of superintendent in preference to **orders of foreman who is present.** Wiley v. St. Joseph Gas Co., 132 Mo. App. 380, 111 SW 1185. **If rules or instructions are ambiguous** or equivocal, and capable of more than one reasonable and practical interpretation, they should be construed most strongly against the master and in favor of the employe. Railroad rules for flagging trains and conductor's orders. Georgia, etc., R. Co. v. Sasser [Ga. App.] 61 SE 505.

**84.** Violation of train rules is element of contributory negligence, and question may be for jury in view of all the facts and master's duties. Yongue v. St. Louis & S. F. R. Co. [Mo. App.] 112 SW 985. Violation of rule prohibiting employes **going between cars** is not negligence in all cases. Texas & N. O. R. Co. v. Jackson [Tex. Civ. App.] 113 SW 628. Whether brakeman, crushed between cars, was negligent in going between them, though he violated rule (if it had not been abrogated) in so doing, for jury. St. Louis S. W. R. Co. v. Shipp [Tex. Civ. App.] 109 SW 286. Engineer killed while **running engine backward at excessive speed** in violation of rule. Whether rule had been abrogated by habitual violation of it, whether deceased knew this, whether track was defective and whether running engine at such speed or condition of track caused accident, held for jury. Hampton v. Chicago & A. R. Co., 236 Ill. 249, 86 NE 243.

**85.** Violation of reasonable rules bars recovery. Yongue v. St. Louis & S. F. R. Co. [Mo. App.] 112 SW 985. If employe violates rules or instructions which are clear and unambiguous, and his action in so doing contributes to his injury, he cannot recover. Georgia F. & A. R. Co. v. Sasser [Ga. App.] 61 SE 505. Violation of rules or orders which are being enforced by master constitutes contributory negligence. Smith v. Atlantic & C. Air Line R. Co., 147 N. C. 603, 61 SE 575. No recovery warranted for injuries to signal man caused by his failure to observe rule as to placing of **torpedoes and flag** and station taken by himself. International & G. N. R. Co. v. Rieden [Tex. Civ. App.] 20 Tex. Ct. Rep. 930, 107 SW 661. Where plaintiff went into **pit in mine** under cage without notifying engineer, thereby violating rule of company, he could not recover for injury received by cage descending on him, though he thought and had been informed that engineer was absent. Dallas Coal Co. v. Rotenberry, 85 Ark. 237, 107 SW 997. Assistant operator of **metal press** negligent if he replaced hands between dies after withdrawing them, in violation of rules, and with knowledge of danger. Ladiew v. Sherwood Metal Working Co., 125 App. Div. 65, 109 NYS 477. Conductor of freight train, injured in rear end **collision,** could not recover, where, knowing his train was late, he failed to observe company's rules providing for steps to protect train under such circumstances. Boucher v. Oregon R. & Nav. Co. [Wash.] 97 P 661. Motorman negligent in allowing car to collide with car ahead, where he knew brakes were defective and failed to follow instructions and rules of company, though inspector had tried brakes and told him they were all right if carefully used. Foley v. Boston, etc., R. Co., 198 Mass. 532, 84 NE 846. No recovery for injuries to motorman by reason of **dernilment of car,** where he ran at usual speed over defective rail joint, in violation of rule to run slowly, and knowing the danger of running as he did. Lanen v. Haverhill, etc., R. Co., 200 Mass. 337, 86 NE 776. No recovery where servant violated rules and admonition of foreman and attempted to make **repairs on machine while it was in motion.** Action based on statute —guarding machinery. Robbins v. Fort Wayne Iron & Steel Co., 41 Ind. App. 557, 84 NE 514. Engineer who violated rule to run train into station **10 minutes behind preceding train,** and under full control, was prima facie negligent, collision resulting. International & G. N. R. Co. v. Brice [Tex. Civ. App.] 111 SW 1094. No recovery for death of car repairer, killed by car on which he was working, when he knew cars were being shunted down track, but failed to get permission to **set out warning flag** indicating repair work, as required by rules. Elliott v. Canadian Pac. R. Co. [C. C. A.] 161 F 250.

**86.** If rules or orders having effect of rules are customarily violated with knowledge or implied knowledge of master, failure of employe to observe them is not necessarily negligence. Smith v. Atlantic, etc., R. Co., 147 N. C. 603, 61 SE 575. Employe, injured by caustic soda, not negligent in not **wearing goggles,** rules requiring them to be worn being habitually violated, no goggles being obtainable at time, and foreman who directed him to open pipe, knowing he had none on. Haley v. Solvay Process Co., 112 NYS 25. Where evidence showed customary violation of rule prohibiting brakeman from **going between cars,** act of plaintiff in going between two cars to see what was matter with coupler which would not work was not negligence as matter of law. Sprague v. Wis-

Violation of orders or disregard of instructions or warnings is usually held to constitute negligence.[88]

*Emergencies.*[See 10 C. L. 777]—A servant suddenly confronted with an emergency or with an unexpected danger is not required to act with the same deliberation and foresight that might be expected of him under ordinary circumstances.[89]

consin Cent. R. Co., 104 Minn. 58, 116 NW 104.

**87.** Rule habitually violated by employes with knowledge and tacit consent of master or representatives is abrogated or waived. Austin v. Central of Georgia R. Co., 3 Ga. App. 775, 61 SE 998. **Notice of violation** of rule may be constructive or presumed. Id. Notice to yardmaster of habitual violation by yard employes of rule prohibiting employes from going between cars and requiring coupling and uncoupling to be done with stick would be notice to company. Id. **Evidence held not to show waiver** of railroad rule. Collins v. Mineral Point & N. R. Co., 136 Wis. 421, 117 NW 1014. **Violation** of a company's rules **by employes of another company** will not work an implied abrogation of the rules. Id. Whether rule forbidding employes from going between moving cars had been abandoned by habitual violation asquiesced in, **for jury.** Matthews v. New Orleans & N. E. R. Co. [Miss.] 47 S 657.

**88.** No recovery by operator of **machine** who was, at time of injury, disregarding repeated warnings and instructions as to mode of operating it. Morelli v. Noera Mfg. Co. [Conn.] 71 A 353. No recovery for death of **fireman** caused by his disobedience of order read to engineer in his presence and hearing by conductor. Sinclair's Adm'r v. Illinois Cent. R. Co. [Ky.] 112 SW 910. Boy killed while assisting in adjusting **belt,** guilty of contributory negligence, where he had been specifically ordered away from such work. Lindquist v. King's Crown Plaster Co. [Iowa] 117 NW 46. No recovery for death of miner caused by fall of **mine roof** where he had been warned of danger and told not to work there. Mascot Coal Co. v. Garrett [Ala.] 47 S 149. It is not as matter of law want of due care to refuse to heed the **suggestion** of one who knows nothing about the subject as to which he undertakes to give advice. Herlihy v. Little, 200 Mass. 284, 86 NE 294. If plaintiff disobeyed orders and violated rules in failing to **timber room to within 9 feet of coal,** and this was proximate cause of his injury by fall of slate upon him, he could not recover. Indian Head Coal Co. v. Miller, 33 Ky. L. R. 650, 110 SW 813. Men who attempted to measure **height of pole,** carrying electric wires of power company, heavily charged by throwing **tape over wires,** without investigating tape, which contained wires, and who had been ordered not to proceed as they were until power was turned off, and were warned of danger, were negligent, no recovery for death caused by shock. Donahue v. Northwestern Tel. Exch. Co., 103 Minn. 432, 115 NW 279. Master not liable for death of bricklayer by **falling of wall** in course of construction due to violation by men, of instructions given by foreman as to mode of construction. Ripp v. Fuchs, 113 NYS 361. Employe guilty of negligence where he **jumped on elevator** while in motion, contrary to instructions, and without giving customary signal to stop. Bowers v. Norwich Pharmacal Co., 124 App. Div. 31, 108 NYS 958. Disobedience of orders to stand in certain place **not negligence,** where place actually occupied was not unsafe, had appliance been safe; order was not based on condition of safety, but on convenience of work. Cavanaugh v. Windsor Cut Stone Corp., 80 Conn. 585, 69 A 345. Whether switchman who jumped on front of switch engine, and fell because of absence of grab iron, had right to assume that previous directions not to get on engine in that way were not intended to be observed, held **for jury,** and verdict for plaintiff sustained. Smith v. Atlantic, etc., R. Co., 147 N. C. 603, 61 SE 575.

**89.** All that the law requires of a servant acting in an emergency is that he act with ordinary and **reasonable care** in the light of circumstances as they appear to him at the time. That he did not take the safest or best course will not defeat recovery. Murphy v. Chicago G. W. R. Co. [Iowa] 118 NW 390. That servant, suddenly confronted with great danger, took way out which resulted in his death did not make him guilty of contributory negligence as matter of law, though another man escaped safely by another way. Paige v. Illinois Steel Co., 233 Ill. 313, 84 NE 239. One is not negligent as matter of law for failing to find best method of escape from sudden and imminent peril. Di Bari v. J. W. Bishop Co., 199 Mass. 254, 85 NE 89. Freight conductor who in emergency created by company **went between cars** to couple them owing to want of lever, could not be charged with contributory negligence as matter of law. Hall v. Northwestern R. Co. [S. C.] 62 SE 848. Act of conductor in **jumping from train** no defense to company if he had been placed in danger by negligence of company in allowing track to become defective. Yongue v. St. Louis & S. F. R. Co. [Mo. App.] 112 SW 985. Flagman not negligent in attempting to jump from caboose of train when collision was about to occur. Illinois Cent. R. Co. v. Vaughn, 33 Ky. L. R. 906, 111 SW 707. Plaintiff, iron moulder, was carrying **ladle of molten iron** with two helpers, when one was called away by foreman, the other became overbalanced, and iron suddenly splashed on plaintiff. Held that an emergency existed and question of contributory negligence was for jury. Brown v. Rome Mach. & Foundry Co. [Ga. App.] 62 SE 720; Illinois Steel Co. v. Paige, 136 Ill. App. 410. **Engine wiper** not negligent as matter of law in trying to get out from under engine he was working on between wheels when another locomotive ran into one he was under. Condie v. Rio Grande W. R. Co. [Utah] 97 P 120. Exposure to danger in **effort to save life** is not negligence provided person is in imminent danger and rescuer is not reckless. Wilson v. New York, etc., R. Co. [R. I.] 69 A 364. Brakeman went down ladder on end of car, facing

*Discovery of servant's peril; intervening negligence.*[See 10 C. L. 777]—There may be a recovery notwithstanding contributory negligence if subsequent thereto defendant negligently failed to prevent injury after discovery of the servant's danger,[90] provided the servant was himself free from negligence after becoming conscious of danger.[91] There can be no recovery if the employe was guilty of negligence concurrent with the subsequent negligence of defendant.[92]

(§ 3) *H. Actions.* 1. *In general.*[See 10 C. L. 788]—Only questions peculiar to actions to recover for personal injuries to servants are here treated.[93]

*Conditions precedent; notice.*[See 10 C. L. 778]—Under some statutes the giving of a notice stating the time, place and cause of injury is a condition precedent to the maintenance of an action based on the statute.[94] Decisions as to the sufficiency of

backwards, to scare children who were hanging on side of car, and was struck by post. Children not being in imminent danger, and brakeman not aiming to rescue them but to frighten them away, his conduct was not excusable. Id. Act done in an emergency **to save employer's property** is not negligent as matter of law. Kansas City Consol. Smelting & Refining Co. v. Taylor [Tex. Civ. App.] 107 SW 889. Not contributory negligence for man in charge of engine to try to stop it when it was "running away," governor being defective. Crosby v. Cuba R. Co., 158 F 144. Plaintiff not negligent as matter of law where he was scalded by steam from valve which he thought it necessary to close to protect master's property, believing that promised repairs on valve had been made so that he could safely use his hands, place being dark with steam at time. Keaveny v. Narragansett Brew. Co. [R. I.] 69 A 506. Where conductor got on heavily loaded moving car to try to stop and save it, and **brakes failed** to hold, and car was derailed by defect in track, he was not guilty of negligence in jumping from the car to escape danger with which he was suddenly confronted, though he would have escaped injury had he remained on car. Dortch v. Atlantic Coast Line R. Co. [N. C.] 62 SE 616. The employe owes his employer the duty of ordinary care to preserve the latter's property, and in putting forth efforts to that and he **is not a mere volunteer.** United States Cement Co. v. Koch [Ind. App.] 85 NE 490. But he is bound by the same rules as govern him in the performance of his ordinary duties. Thus he assumes incidental risks. Id.

**90.** Contributory negligence does not affect right of recovery for negligent injury after discovery of plaintiff's peril. International & G. N. R. Co. v. Aleman [Tex. Civ. App.] 115 SW 73. Evidence warranted charge on discovered peril where section foreman was struck by train while removing hand car from track. Houston & T. C. R. Co. v. Burnet [Tex. Civ. App.] 108 SW 404. Fact that flagman was boarding car instead of at his station when he was injured by negligent coupling would not defeat recovery when it was admitted that coupling was made with knowledge of his position. Meacham v. Southern R. Co. [N. C.] 62 SE 879. Negligence of employe resulting in his falling from car held not to bar recovery for his death caused by superintendent's negligence, who caused car to run over employe, knowing his dangerous position. American Car & Foundry Co. v. Inzer [Ind. App.] 86 NE 444. Whether engineer was negligent in failing to stop train in time after discovery of flagman, or after he should have discovered him, held for jury. Alabama G. S. R. Co. v. McWhorter [Ala.] 47 S 84. Submission of issue of negligence of hostler in charge of engine in causing it to move after he knew plaintiff had crawled under it, error, there being no evidence to support such finding. Douda v. Chicago, etc., R. Co. [Iowa] 119 NW 272.

**91.** If unconscious of danger, employe will not be held negligent. Alabama, G. S. R. Co. v. McWhorter [Ala.] 47 S 84. Whether flagman was negligent or conscious of danger after engineer discovered him on track held for jury. Id. If section foreman failed to use ordinary care for his own safety in removing car from track, company would not be liable, though train operators were negligent in allowing train to strike him. Houston & T. C. R. Co. v. Burnet [Tex. Civ. App.] 108 SW 404. "Discovered peril" doctrine inapplicable where section man saw and heard train coming and failed to get out of way, since trainmen had right to assume that section hands would get off track and were not bound to give warning when approach of train was known. Sisel v. St. Louis & S. F. R. Co. [Mo.] 113 SW 1104. Flagman at crossing, struck by a passing train, held negligent. No recovery though train crew exceeded speed limit. McDoel v. Heuermann, 141 Ill. App. 113. Instruction held not to impose on deceased more than ordinary care to avoid injury after discovery of danger, in view of his age and experience, and hence not prejudicial to plaintiff. Jones' Adm'r v. Louisville & N. R. Co., 32 Ky. L. R. 1371, 108 SW 865.

**92.** Alabama G. S. R. Co. v. McWhorter [Ala.] 47 S 84. **Falling from crane** with which he was familiar while helping pips fitter. Mohr v. Martewicz, 139 Ill. App. 173.

**93.** For procedure in general, see such subjects as Evidence, 11 C. L. 1346; Pleading, 10 C. L. 1783; Instructions, 12 C. L. 218; Limitation of Actions, 12 C. L. 609.

**94.** The giving of a sufficient statutory notice is a condition precedent to recovery under the employer's liability act. Herlihy v. Little, 200 Mass. 284, 86 NE 294. New Mexico statute requiring notice to person responsible for injuries within 90 days as condition precedent to maintenance of action is valid. Act since repealed. El Paso & N. E. R. Co. v. Gutierrez [Tex. Civ. App.]

such notice, under the statutes of Massachusetts [95] and New York,[96] are given in the notes. A provision of the contract of employment requiring notice of an injury may be waived.[97] Such a waiver need not rest upon a consideration, nor does it depend upon technical estoppel.[98]

(§ 3H) 2. *Parties.*[99]—Plaintiff need not join as defendants all the members of the partnership which employed him,[1] but judgment in a separate suit will bar a subsequent action.[2]

(§ 3H) 3. *Pleading and issues. The complaint or petition* See 10 C. L. 799 must show the existence of the relation of master and servant,[3] that the servant was acting within the scope of his employment when injured,[4] and the existence and breach of

111 SW 159. The amendment to the Kansas railroad employe's liability act (Laws 1903, c. 393), requiring notice of injuries within 90 days, does not require notice to be given by the administrator of an employer of an injury causing death. Missouri Pac. R. Co. v. Larussi [C. C. A.] 161 F 66.

**95.** Where there is evidence that injured servant died without having been for 10 days at any time after injury of sufficient capacity to give notice required by Rev. Laws, c. 106, § 75, it is sufficient if it appears that such notice was given at any time before action was brought. Finneran v. Graham, 198 Mass. 385, 84 NE 473. It may be given on same day that writ is sued out, but plaintiff must then show that it was in fact given before the writ was sued out. No recovery where this showing was not made. Id. The purpose of the notice is to give the employer information as to the time, place and cause of the injury, and not to advise him specifically of its details or defects. Unnecessary amplification which turns out to be incorrect will not invalidate a notice containing required facts. Herlihy v. Little, 200 Mass. 284, 86 NE 294. Description of injury is not required. Notice not to be construed wth technical refinement. Id. Notice under Rev. Laws, c. 106, § 71, charging defendant with negligence, is broad enough to cover and admit proof of negligence of a superintendent. Berube v. Herton, 199 Mass. 421, 85 NE 474.

**96.** Whether notice was served within 10 days after plaintiff recovered from disability held question for jury. Trotto v. Bellew & Merritt Co., 111 NYS 533. If notice under statute is insufficient, common-law rules prevail. Kennedy v. New York Tel. Co., 125 App. Div. 846, 110 NYS 887. The statutory notice of injury need not state facts with the same degree of accuracy and definiteness required in a pleading. O'Donnell v. John H. Parker Co., 125 App. Div. 475, 109 NYS 875. Notice of injury **sufficient.** Eddington v. Union R. Co., 109 NYS 819. Notice giving time, place and cause of injury, sufficient. Lobasco v. Moxie Nerve Food Co,, 111 NYS 1007. Notice of injury by reason of failure to furnish safe scaffold held sufficient. O'Donnell v. John H. Parker Co., 125 App. Div. 475, 109 NYS 875. Statement of time, place and cause, sufficient (two justices concurring in result, but holding notice insufficient). Matrusciello v. Milliken Bros., 114 NYS 223. Notice **insufficient** which did not specify act or omission of master or tell nature of servant's injuries. Palmieri v. Pearson, 112 NYS 684. Under liability act, notice that cause of injury "was your negligence and that of your superintendents and agents and the negligent and defective erection and maintenance of the ways, works and machinery used," etc., was held insufficient. Glynn v. New York Cent. & H. R. R. Co., 125 App. Div. 186, 109 NYS 103. Notice stating as cause that injury was "due to your negligence in not providing him with a safe and proper place to work in, and your negligence in omitting to furnish safe and proper appliances and implements," is too general. Kennedy v. New York Tel. Co., 125 App. Div. 846, 110 NYS 887. Under statute, **mere inaccuracy** in the notice may be cured by proof that there was no intention to mislead. Notice curable by proof where it contained general statements but also one more or less specific charge of negligence. Young v. Bradley, 114 NYS 264. But a mere general statement is not an inaccuracy within this provision. Id. Informality in notice as to designation of place held immaterial in view of defendant's actual notice. Dson v. McClintock-Marshall Const. Co., 114 NYS 28. The employer has the right to rely on absolute compliance with the statutory requirement as to notice, and a defective notice cannot be cured or aided by showing knowledge of the employer gained from other sources. Palmieri v. Pearson, 112 NYS 684.

**97.** Contract provision for notice of injury within 30 days waived by railroad company which within 30 days began negotiations with employe for settlement of claim and stated that company would do what was right. Missouri, K. & T. R. Co. v. Hendricks [Tex. Civ. App.] 108 SW 745.

**98.** Missouri, K. & T. R. Co. v. Walker [Kan.] 99 P 269.

**99.** See 10 C. L. 779. See, also, in general, article on Parties, 10 C. L. 1081.

**1.** May sue one if he elects. Gawne v. Bicknell, 162 F 587.

**2.** Gawne v. Bicknell, 162 F 587.

**3.** Plaintiff must allege existence of relation of master and servant, but need not allege contract between them. Duties arise by operation of law, not from contract. Gawne v. Bicknell, 162 F 587. Where plaintiff alleged facts showing that he was an employe at time of injury, and that it was caused by defects in car furnished by defendant, the petition was not made demurrable by an allegation that he was a passenger. Southern R. Co. v. West [Ga. App.] 62 SE 141.

**4.** Petition alleging injuries received by falling down hay chute in barn held to show sufficiently that plaintiff was in per-

some duty owed by the master to the servant at the time of the injury.[5] A mere allegation of duty is insufficient; facts showing a duty to exist must be alleged.[6]

formance of duties at time. Moellman v. Gieze-Henselmeier Lumber Co. [Mo. App.] 114 SW 1023. Complaint held not to allege sufficiently that brakeman struck by coal shed near track was in performance of his duties at the time. Cleveland, etc., R. Co. v. Perkins [Ind.] 86 NE 405. Mere allegation that plaintiff was required to be where he was when injured not enough; facts or rules showing his duty to be there should be alleged. Chicago, etc., R. Co. v. Hamilton [Ind. App.] 85 NE 1044.

5. Complaint must by direct averment state facts showing duty by master to protect servant against injury complained of, breach of that duty, and injury as proximate result of breach. United States Cement Co. v. Koch [Ind. App.] 85 NE 490. Petition **held to state cause of action** for injuries caused by scaffold falling on plaintiff as he was passing under it. General Supply & Const. Co. v. Lawton [Ga.] 62 SE 293. Complaint for injury to miner held to state cause of action for negligence of corporation defendant as well as against its superintendent. Stratton Cripple Creek Min. & Development Co. v. Ellison, 42 Colo. 498, 94 P 303. Declaration for death of employe by fall of skip in mine, where he was loading machinery, held to allege sufficiently breach of duty to furnish reasonably safe place. Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910. Breach of duty by master shown where count alleged that employe was ordered to load machinery on mine skip, that master failed to provide sufficient number of men to do work at engine house, and to provide rules for work, as consequence of which engineer left his post and skip fell. Id. Declaration alleging that employe was ordered to work in dangerous place outside his regular employment, and that no warning or instruction was given him, held to show negligence of master, and not objectionable as not setting out dangers, though it did not state ways in which work could properly be done. Johnson v. Desmond Chemical Co., 152 Mich. 84, 15 Det. Leg. N. 138, 115 NW 1043. In action for injuries caused by fall of mine skip, declaration held to state sufficient facts to show master's duty to make proper rules for running of skip. Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910. Complaint alleging that servant was ordered to do certain work by defendant's chief engineer, in charge of all its engines and machinery, whose orders servant was bound to obey, held sufficiently specific as to relation between servant and engineer, facts being within knowledge of defendant. Knickerbocker Ice Co. v. Gray [Ind.] 84 NE 341. Such allegations did not bring cause of action within statute, but made common-law cause of action. Id. Complaint alleging that plaintiff was ordered by chief engineer to do certain work in engine room, floor of which sloped and was slippery, and engine in which was dangerous because of its reverse movement, and that these defects and dangers were unknown to plaintiff, and known to, or ought to have been known to, defendant, held sufficient. Id. Pleading held to show that negligent act of section man in kicking bar from car was done while in course of his employment, operating car. Landers v. Quincy, etc., R. Co. [Mo. App.] 114 SW 543. Declaration held to show relation between plaintiff and defendant, duty owed plaintiff by defendant, and his failure to discharge it, and resulting injury to plaintiff. Held, that cause of action was sufficiently stated. Seal v. Virginia Portland Cement Co., 108 Va. 806, 62 SE 795. Complaint for death of flagman held to warrant recovery on proof of negligence, subsequent to his contributory negligence in sitting or lying on track. Alabama G. S. R. Co. v. McWhorter [Ala.] 47 S 84. Petition alleging that it was master's, not servant's, duty to prop up slate in mine, and that master failed to do so, and servant was injured, held to state cause of action, though generally mine owner is required only to furnish timbers for miner's use. Jackson's Adm'x v. Richardson Coal Co., 33 Ky. L. R. 289, 109 SW 902. Petition held to charge negligence of foreman in ordering tie to be thrown on pile causing it to fall on plaintiff. Sambos v. Cleveland, etc., R. Co. [Mo. App.] 114 SW 567. That defendant negligently, knowingly, etc., employed and permitted a careless, unskilled and incompetent servant to manage, propel and operate the said motor car, held sufficient. Lake St. El. R. Co. v. Fitzgerald, 136 Ill. App. 281. Complaint for injuries sustained by reason of team running away held not to show that defendant owed plaintiff any duty with reference to such team, or that defendant had violated any duty owed to plaintiff. Phillips v. International Harvester Co. [S. D.] 117 NW 146.

**Complaint held not sufficient** to raise issue of negligence in failing to warn and instruct boy, necessity for instructions not appearing. Forquer v. Slater Brick Co., 37 Mont. 426, 97 P 843. Complaint alleging that structure was maintained so close to track as to come within a few inches of passing box cars held insufficient, it not being alleged that it was so negligently maintained, nor that it was dangerous to plaintiff in performance of his duties. Cleveland, etc., R. Co. v. Perkins [Ind.] 86 NE 405. Complaint setting out defective condition of caboose by reason of presence of chain on platform insufficient which did not show how the chain came where it was; no breach of master's duty shown. Chicago & E. I. R. Co. v. Hamilton [Ind. App.] 85 NE 1044.

6. Mere allegation that it was duty of particular servant to do certain acts is insufficient; facts showing existence of such duty should be set out. Indiana Union Trac. Co. v. Pring, 41 Ind. App. 247, 83 NE 733. It is not enough to state that plaintiff was injured and that injury resulted from careless and negligent conduct of defendant; facts relied on to establish negligence must be stated with reasonable certainty. Clinchfield Coal Co. v. Wheeler's Adm'r, 108 Va. 448, 62 SE 269. Allegation of failure to warn, but no allegation of fact raising duty to give such warning, insufficient. Duffy v. Jacobson, 135 Ill. App. 472. Statement that plaintiff was conductor on a motor car,

Allegations of negligence must be sufficiently certain and specific to inform defendant of the nature of plaintiff's claim,[7] but a general allegation of negligence is usually held sufficient as against a demurrer [8] if the facts alleged show a legal duty and a violation thereof. Evidentiary facts need not be pleaded,[9] nor is it necessary to plead nonissuable facts constituting mere conditions.[10] Knowledge by the master, actual or constructive, of the alleged defective or dangerous condition must be made to appear,[11] but where it appears from the complaint that the defect is one of construction,

motive power of which was electricity, held sufficient, as in law it raised duty upon master to so control electricity that it would not injure plaintiff while in due care, although the particular respect in which defendant had failed in this duty is not set out. Miller v. Chicago & Oak Park El. R. Co., 132 Ill. App. 41. Duties of defendant to plaintiff, alleged to have been violated, must be distinctly alleged, but if the duties sufficiently appear from the allegations of the breach thereof the declaration will be held good on demurrer, allegations of duty being in such case superfluous. Squilache v. Tidewater Coal & Coke Co. [W. Va.] 62 SE 446.

7. Petition **held sufficient** to state negligence in loading of car with lumber which slipped and pushed plaintiff, brakeman, off. Southern Pac. Co. v. Godfrey [Tex. Civ. App.] 107 SW 1135. Count held to allege unsafety of machine provided to unload steel billets with sufficient certainty. Louisville & N. R. Co. v. Lile [Ala.] 45 S 699. Petition alleging that platform through which plaintiff fell was unsafe and negligently constructed, that it did not completely cover excavation, held to point out defect sufficiently. Louisville & N. R. Co. v. Carter [Ky.] 112 SW 904. Count based on employment of incompetent employe held sufficient to show his inefficiency. Louisville & N. R. Co. v. Lile [Ala.] 45 S 699. Complaint alleging that "said belt broke and a piece thereof flew off and struck plaintiff in the right eye" held to describe accident sufficiently. Dittman v. Edison Elec. Illuminating Co., 125 App. Div. 691, 110 NYS 87. Allegation of defects and negligence sufficiently specific where action was for death of servant due to fall of skip in mine. Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910. Negligence relied on must be charged in terms, or facts must be alleged which will compel the inference of such negligence as will constitute the proximate cause of the injuries sustained. Cleveland, etc., R. Co. v. Perkins [Ind.] 86 NE 405. Complaint in action for death of brakeman struck by low bridge, held to point out sufficiently negligence relied on. Maintenance of bridge too close to tops of cars. Chesapeake & O. R. Co. v. Rowsey's Adm'r, 108 Va. 632, 62 SE 363. Allegation that "defendant knew of defective condition of condenser, on account of the fact that for several days previous to the explosion the engine had not been properly working, and had by its actions given full warning that it was in a dangerous and defective condition," **held subject to special demurrer** because not setting out in what respect it was not working properly and what its actions were. Green v. Babcock Bros. Lumber Co., 130 Ga. 469, 60 SE 1062. **Defendant entitled to bill of particulars** where complaint simply alleged, in substance, that defendants, their servants, agents or employes so negligently conducted themselves in respect to wagon driven by plaintiff that it collapsed. Kinsella v. Riesenberg, 124 App. Div. 322, 108 NYS 876. **General allegation of negligence sufficient after verdict.** Averment that defendant negligently provided a dangerous and unsafe place, without averring specific negligence relied on, is sufficient. Commonwealth Elec. Co. v. Rooney, 138 Ill. App. 275.

8. Declaration for injuries to employe assisting in adjusting guide which controlled width of sawed material held sufficient as against general demurrer. Delano v. Holly-Matthews Mfg. Co. [Miss.] 47 S 475. Allegation of negligence in leaving switch open held sufficient as against demurrer. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761. Complaint held sufficient as against general demurrer, though allegations of defendant's duty and fact of employment of plaintiff were only generally stated, reasonable and fair intendments from facts stated being indulged. Vukelis v. Virginia Lumber Co. [Minn.] 119 NW 509. Declaration need not set out facts constituting negligence; allegation of acts causing injury, with allegation that they were negligently done, is sufficient. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761.

9. Evidentiary facts need not be pleaded. Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910.

10. Where facts constituting negligence relied on are set out. Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910.

11. Complaint **held sufficient** to show notice of dangerous condition of ground near top of shaft into which employe fell. Hollingsworth v. Davis-Daly Estates Copper Co. [Mont.] 99 P 142. Complaint alleging that defendant knew of unsafe and defective condition of mine embraced constructive as well as actual knowledge. Zeller, McClellan & Co. v. Vinardi [Ind. App.] 85 NE 378. Complaint held to show knowledge by defendant of danger of plaintiff's work, and of plaintiff's inexperience; without express averment. Simeoli v. Derby Rubber Co. [Conn.] 71 A 546. Allegation in action by quarry employe that rock which fell on him was loose and liable to fall, to employer's knowledge, and that employer permitted employe to work so near it that if it fell it would injure him, held to charge negligence. Mitchell Lime Co. v. Nickless [Ind. App.] 85 NE 728. Action for injuries by fall of elevator in which plaintiff was being taken from one floor to another; petition not open to general demurrer which alleged that fall of elevator was due to defects in mechanism rendering it unsafe to operate same, and that said defects were known to defendant, or had existed for so long a time as to charge it with notice. Eagle & Phoenix Mills v. Johnson [Ga.] 61 SE 990. But such petition was sub-

an allegation of the employer's knowledge of it is not essential.[12] It must also appear that the negligence or wrongful act alleged was the proximate cause of the injury.[13] The servant's want of knowledge should be made to appear,[14] and a mere allegation is insufficient without the averment of facts showing lack of knowledge,[15]

ject to special demurrer directed to failure to allege that defects were not latent or that they might have been discovered by exercise of ordinary care in matter of inspection. Id. Where injury was alleged to have been caused by brakeman stumbling on lantern bracket on run way of car, failure of declaration to allege that defendant had placed it there, or that it had been there long enough to charge company with notice, rendered it **demurrable.** Grover v. New York S. & W. R. Co. [N. J. Law] 69 A 1082. In action against railroad company and engineer, petition alleged that engineer suddenly, unnecessarily and in unusual manner, slackened speed of train on coming into station, thereby causing plaintiff to be thrown, without his fault, from top of caboose to ground, he being on caboose in performance of duties. Held demurrable as against engineer for failure to allege knowledge by him, actual or implied from facts and circumstances, of position of plaintiff. Southern R. Co. v. Cash [Ga.] 62 SE 823.

12. Complaint held to show defect in new construction over old mining shaft. Hollingsworth v. Davis-Daly Estates Copper Co. [Mont.] 99 P 142.

13. Facts alleged held to show master's negligence as proximate cause of plaintiff's injury, though fact of causal connection was not expressly stated. Seal v. Virginia Portland Cement Co., 108 Va. 806, 62 SE 795. Count held to show that alleged negligence of master was cause of fall of mine skip. Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910. Since plaintiff must prove the cause of injury alleged, he nced not negative all other possible causes. Id. Complaint in action by domestic servant for injuries received in stepping through hole in porch floor, boarded over with thin boards, held to show sufficiently that place was dangerous, and that defendant's negligence in reference thereto was proximate cause of injury. Fearon v. Mullins [Mont.] 98 P 650. Complaint setting out injury by falling and coming into contact with unguarded saw, which could have been guarded, etc., held to show that failure to properly guard saw was proximate cause of injury, though allegation that "injury was caused solely by negligence of defendant," was not good formal averment thereof. Evansville Hoop & Stave Co. v. Bailey [Ind. App.] 84 NE 549. Complaint alleging injuries to workman by falling into elevator shaft held not demurrable for failure to show violations of statute as proximate cause of injuries. Weeks v. Fletcher [R. I.] 69 A 294. In action for death of brakeman engaged in switching, count of complaint held sufficient to allege negligence in use of engine with pilot and without footboard in switching engine, as cause of death. Bryant v. Alabama G. S. R. Co. [Ala.] 46 S 484. Declaration held sufficient as against general demurrer to show negligence of defendant in furnishing unsafe saw and failing to warn plaintiff, and that such negligence was proximate cause of injury by being struck by saw log. German-American Lumber Co. v. Brock [Fla.] 46 S 740. Complaint **insufficient** because not showing wrongful discharge from hospital as cause of alleged damages. Wabash R. Co. v. Reynolds, 41 Ind. App. 678, 84 NE 992. Complaint by parent to recover for loss of services of child under 10, employed in factory in violation of statute, held demmurrable because not showing wrong to be proximate cause of injury. Reaves v. Anniston Knitting Mills [Ala.] 45 S 702. Petition held to show that petitioner's own negligence in manner of placing iron under car wheel was cause of injuries, not negligence of company in method of scotching cars. Ayers v. Louisville & N. R. Co. [Ga. App.] 63 SE 530.

14. Allegation that plaintiff, quarryman, did not know that rock was loose and liable to fall held sufficient negation of assumption of risk. Mitchell Lime Co. v. Nickless [Ind. App.] 85 NE 728. Allegation of engineer's ignorance of telegraph operator's incompetency held sufficient. Mahoney's Adm'r v. Rutland R. Co. [Vt.] 69 A 652. Petition alleged that defect in platform was unknown to plaintiff, and pointing out defect, held to negative knowledge and contributory negligence though it did not allege that plaintiff did not have equal knowledge with master and could not have known by exercise of reasonable care. Louisville & N. R. Co. v. Carter [Ky.] 112 SW 904. Declaration not demurrable for failure to allege want of knowledge of defect, if it does allege that plaintiff was without fault. Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910. Lack of knowledge by brakeman of dangerous proximity of coal shed to track not properly alleged. Cleveland, etc., R. Co. v. Perkins [Ind.] 86 NE 405. Declaration demurrable for failure to allege want of knowledge of obvious defect which was alleged as cause of injury—bracket on runway of car on which brakeman stumbled. Grover v. New York S. & W. R. Co. [N. J. Law] 69 A 1082. Declaration demurrable which claimed damages for injuries by "butting saw" but which did not allege want of knowledge of danger by injured servant, and facts alleged showed that it must have been obvious, even though he was given an assurance of safety. Burg v. Hilton & Dodge Lumber Co., 130 Ga. 523, 61 SE 120.

15. Pleading that servant had no knowledge of conditions causing the injury does not negative the assumption of the risk. Gould v. Aurora, E. & C. R. Co., 141 Ill. App. 344. In an action for injuries caused by dangerous condition of place of work, a mere allegation that plaintiff did not know of it, could not have known of it by the exercise of ordinary care, and did not have equal means of knowing with the master, is insufficient as against special demurrer, where no facts were alleged relieving plaintiff from implication of knowledge. Taylor v. Virginia-Carolina Chemical Co. [Ga. App.] 62 SE 470.

and is unavailing where facts alleged show that danger was obvious.[16] A complaint is demurrable if it shows on its face, conclusively and as a matter of law, that the servant assumed the risk,[17] or was guilty of contributory negligence.[18, 19] There is a conflict of authority as to whether the complaint must show affirmatively that the injury was not due to the act or negligence of a fellow-servant,[20] and that the servant was in the exercise of due care,[21] and did not assume the risk.[22] Where negligence of a superior servant is relied upon, facts should be alleged showing that he was a vice-principal.[23] All facts material and necessary to the cause of action must be directly alleged, and not merely by way of recital [24] or conclusions of the pleader.[25]

**16.** Allegation that servant did not know place was unsafe mere conclusion and unavailing as against demurrer when facts show that danger was obvious. Berry v. Kansas City, 128 Mo. App. 374, 107 SW 415. Knowledge of danger by employe should not be inferred, so as to impeach an allegation of freedom from fault, unless such inference is necessary from facts alleged. Green v. Babcock Bros. Lumber Co., 130 Ga. 469, 60 SE 1062.

**17.** Petition for death of employe properly dismissed where its allegations show that employe knew or ought to have known the danger incident to the use of the defective appliances, as well as the defects. Bolden v. Central of Georgia R. Co., 130 Ga. 456, 60 SE 1047. Where complaint alleging injuries from fall of skip in mine set up failure of master to provide suitable rules, so that engineer would be required to remain at his post, and did not show knowledge by plaintiff of want of such rules, it was **not demurrable** for failure to negative assumption of risk. Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910. Complaint held not to show that plaintiff knew of trap door in warehouse through which he fell. Taylor v. Palmer & Co., 121 La. 710, 46 S 703.

**18, 19.** If complaint shows contributory negligence on its face it is bad on demurrer, though contributory negligence is matter of defense. Pein v. Miznerr, 170 Ind. 659, 84 NE 981. Where complaint for injuries caused in mangle with unguarded rollers alleged that plaintiff's hand was "inadvertently" caught in rollers, it was demurrable because disclosing contributory negligence on its face. Id. Declaration alleging that flagman or brakeman went on top of car or cab to give signals to engineer, being ordered so to do by conductor, and that he was injured by defendant's negligence while so engaged, does not show contributory negligence as matter of law. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761. Declaration alleging injury by being struck by saw log owing to providing unsafe saw and failing to warn held not to show contributory negligence. German-American Lumber Co. v. Brock [Fla.] 46 S 740. Complaint for death of miner caused by failure to prop roof held not defective for failure to allege whether he was killed in his room or in an entry, on theory that it was his own duty to prop roof of room. Mascot Coal Co. v. Garrett [Ala.] 47 S 149. Declaration alleging that employe was sent to do work outside scope of regular duties, without warning or instructions as to danger, and that he was in the exercise of due care when injured, and ignorant of danger, held not demurrable as showing assumption of risk or contributory negligence. Johnson v. Desmond Chemical Co., 152 Mich. 84, 15 Det. Leg. N. 138, 115 NW 1043.

**20.** The complaint must show affirmatively that the injury was not due to the negligence of a fellow-servant. Allegation that plaintiff was servant of defendants, and that he was injured by negligence of other servants, defective. Duffy v. Jacobson, 135 Ill. App. 472. A complaint must state that the negligent servant and the plaintiff were not fellow-servants or facts from which that conclusion must follow, or averments which raise that question when a plea of not guilty is entered. A street car conductor alleged he was injured by negligence of crew of another of defendant's cars. Bennett v. Chicago City R. Co., 141 Ill. App. 560. Failure to negative that the negligent servant is a fellow-servant or to state facts from which such fact will be concluded is not cured by verdict. Id. Complaint bad which did not show that condition complained of was not due to negligence of plaintiff or a fellow-servant. United States Cement Co. v. Koch [Ind. App.] 85 NE 490.

**21.** Contributory negligence is matter of defense and should be pleaded as such; it need not be negatived by plaintiff. Meily v. St. Louis & S. F. R. Co. [Mo.] 114 SW 1013; German-American Lumber Co. v. Brock [Fla.] 46 S 740. Where complaint alleged directly that injury was caused by defendant's negligence, a separate averment that plaintiff was in exercise of due care, and that his negligence did not contribute to his injury was unnecessary. Simeoli v. Derby Rubber Co. [Conn.] 71 A 546.

**22.** Plaintiff need not negative assumption of risk. Pennsylvania R. Co. v. Forstall [C. C. A.] 159 F 893. Petition alleging negligence in allowing tree in dangerous condition to remain too close to logging road, tree having fallen over track where train collided with it, held demurrable, because not alleging or showing that plaintiff did not have notice of position of tree and risk arising therefrom. Roland v. Tift [Ga.] 63 SE 133.

**23.** Where petition alleged that plaintiff was at time of injury performing duties "by direction of said agent or foreman" previously referred to, but failed to state his name or the duties which he was called on to perform, so that it did not appear whether he was plaintiff's superior or fellow-servant, petition was subject to special demurrer. General Supply & Const. Co. v. Lawton [Ga.] 62 SE 293. Petition alleging that foreman was "also a vice-principal" held insufficient, as against special exception, without alleging facts showing relation of negligent servant to plaintiff. Suderman v. Kriger

*Pleading statutory causes of action.* See 10 C. L. 783—Where violation of a statutory duty is relied upon, facts must be alleged which bring the case within the terms of the statute.[26] If the facts pleaded show breach of a statutory duty, specific reference to the statute is unnecessary,[27] since the court will take judicial notice of the statute.[28] Decisions as to pleadings in actions based on various statutes are given in the note.[29]

[Tex. Civ. App.] 109 SW 373. Counts based on negligence of fireman in failing to keep proper lookout for brakeman, engaged in switching on same engine, held demurrable on ground that they showed fireman to be brakeman's fellow-servant, and on other grounds. Bryant v. Alabama G. S. R. Co. [Ala.] 46 S 484.

**24.** Cleveland, etc., R. Co. v. Perkins [Ind.] 86 NE 405. Where the common-law fellow-servant doctrine of another state is relied upon as showing that deceased servant and negligent employes were not fellow-servants, this law must be directly alleged as fact; mere recital or conclusion of pleader held demurrable. Wabash R. Co. v. Hassett, 170 Ind. 370, 83 NE 705.

**25.** Mere allegation that it was duty of plaintiff to do such work as was required did not show that duty required certain act when hand was caught in knives of planer. Vigo Cooperage Co. v. Kennedy [Ind. App.] 85 NE 986.

**26.** Where the cause of action is penal in nature, plaintiff, relying thereon, must allege specifically every fact necessary to bring it within the terms of the act. Lagler v. Bye [Ind. App.] 85 NE 36. Count alleged negligence in furnishing of unsafe machine for work, combined with negligence in employment of incompetent servant to assist in its operation. Held to state common-law cause of action and not one based on Code 1896, § 1749. Louisville & N. R. Co. v. Lile [Ala.] 45 S 699.

**27.** If facts pleaded show cause of action under Laws 1903, c. 356 (guarding of elevators), specific reference to statute is unnecessary. Fowler Packing Co. v. Enzenperger, 77 Kan. 406, 94 P 995. Recovery may be had under Laws 1906, p. 1682, c. 657, making certain railroad employes vice-principals, though statute is not specifically pleaded, if facts alleged show cause of action thereunder. Schradin v. New York, etc., R. Co., 124 App. Div. 705, 109 NYS 428. Demand for bill of particulars is remedy if greater certainty desired. Id.

**28.** Squilache v. Tidewater Coal & Coke Co. [W. Va.] 62 SE 446.

**29. Alabama:** Complaint based on Code 1896, § 1749, alleging that injuries were caused by one in defendant's employment who had superintendence entrusted to him, whilst in the exercise of such superintendence, held sufficient. Western Steel Car & Foundry Co. v. Cunningham [Ala.] 48 S 109. Count alleging furnishing of unsafe machine to do work, based on Code 1896, § 1749, subd. 1, making master liable for injuries caused by defects in ways, works, machinery and plant, held not defective because not stating name of servant charged with furnishing machine. Louisville & N. R. Co. v. Lile [Ala.] 45 S 699.

**Connecticut:** Direction by superintendent sufficiently alleged though his exact words, as proved, were not alleged. Simeoli v. Derby Rubber Co. [Conn.] 71 A 546.

**Indiana:** Complaint based on statute regulating operation of mines held defective because not alleging that more than 10 men were employed, and that alleged omissions, bracing of roof, could have been supplied without interfering with practical working of mine. Zedler McClellan & Co. v. Vinardi [Ind. App.] 85 NE 378. Where complaint showed that friction wheels were dangerous when in motion, and that they could as well be operated with guards as without, it sufficiently showed that appliance could be properly guarded without rendering it useless. Whitley Malleable Castings Co. v. Wishon [Ind. App.] 85 NE 832. Complaint merely alleging that plaintiff, brakeman, was ordered and directed to act as such on train consisting of locomotive engine, tender and caboose on a trip which would require 16 hours, when plaintiff had not had a full period of rest, etc., held not to state cause of action under Acts 1903, c. 66, because not sufficiently alleging that such continuous service was not "in case of accident, wreck or unavoidable cause," allegation being that there was no necessity for such continuous duty on account of any accident, wreck or unavoidable cause. Chicago, etc., R. Co. v. Hamilton [Ind. App.] 85 NE 1044.

**Massachusetts:** The provision in the Massachusetts act, requiring action to be brought within one year after the accident causing the injury, is not a mere limitation but a condition precedent (McRae v. New York, etc., R. Co., 199 Mass. 418, 85 NE 425), compliance with which must be alleged (Id.). Rev. Laws, c. 106, § 71. Id. Failure to bring the action within one year after the accident causing the injury, as required by Massachusetts statute, is available as a defense under a general denial. Bringing action within that time is condition precedent under Rev. Laws, c. 600, § 71. Id.

**Mississippi:** Injured railroad employe may not join in one count common-law cause based on unsafe ways and appliances, and statutory cause based on negligence of fellow-servants under Const. § 193, the two being inconsistent. Yazoo & M. V. R. Co. v. Wallace, 90 Miss. 609, 43 S 469.

**Missouri:** Petition held to state cause of action within Rev. St. 1899, § 6434, prohibiting employment of minors, though it did not state the kind of establishment where plaintiff was employed nor designate kind of power used to operate machinery. Peters v. Gille [Mo. App.] 113 SW 706.

**Wisconsin:** Complaint held sufficient to state cause of action under Sanborn's Supp. 1906, § 1816, where it alleged defective brakes and couplings, and incompetency of engineer, and also that engineer moved cars upon decedent brakeman without warning or notice while in discharge of his duties. Longhenry v. Mineral Point & N. R. Co., 135 Wis. 139, 115 NW 335.

*Defenses; the answer.*[See 10 C. L. 784]—It is usually held that the defenses of contributory negligence,[30] assumption of risk,[31] and negligence of fellow-servant,[32] are affirmative in character and not available to defendant unless specially pleaded, or unless they are affirmatively shown by plaintiff's pleadings or evidence.[33] To raise either of these defenses, facts must be alleged; mere conclusions are insufficient.[34]

*Issues, proof, and variance.*[See 10 C. L. 784]—Negligence must be proved substantially as alleged,[35] and there can be no recovery on grounds not alleged,[36] though proof

**30.** Recovery can be defeated only by contributory negligence which is pleaded. Alabama G. S. R. Co. v. WcWhorter [Ala.] 47 S 84. Defense that plaintiff violated rules and thus caused his injury must be pleaded. Texas & N. O. R. Co. v. Powell [Tex. Civ. App.] 112 SW 697.

**31.** Assumption of risk must be specially pleaded. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761. The defense of assumption of risk is affirmative in character and must be specially pleaded. Longpre v. Big Blackfoot Mill. Co. [Mont.] 99 P 131. Assumption of special risks not among ordinary incidental risks cannot be relied upon unless specially pleaded. Maxson v. Case Threshing Mach. Co. [Neb.] 116 NW 281. Plea setting up contributory negligence held not to require charge on assumption of risk, which defense was not pleaded. Ogilvie v. Conway Lumber Co. [S. C.] 61 SE 200.

**32.** Defense that injury resulted from negligence of fellow-servant must be specially pleaded. Longpre v. Big Blackfoot Mill. Co. [Mont.] 99 P 131. Defense that injury was result of negligence of fellow-servant is affirmative; not available unless pleaded. Millen v. Pacific Bridge Co. [Or.] 95 P 196.

**33.** If contributory negligence, negligence of fellow-servant, or assumption of risk, appear in plaintiff's pleading or evidence, the defense is available to defendant though not specially pleaded. Longpre v. Big Blackfoot Mill. Co. [Mont.] 99 P 131. If plaintiff's own evidence conclusively shows that employe was guilty of contributory negligence, court should grant nonsuit even though contributory negligence be not pleaded in answer. Sissel v. St. Louis & S. F. R. Co. [Mo.] 113 SW 1104.

**34. Plea of contributory negligence bad** for failure to show breach of duty resting on miner killed by fall of roof. Mascot Coal Co. v. Garrett [Ala.] 47 S 149. Plea bad because not alleging miner's knowledge of danger of roof falling. Id. Plea alleging that plaintiff left place of safety and went near pulley and negligently allowed himself or his clothing to come in contact therewith held bad because not setting out facts constituting contributory negligence. Alabama Chemical Co. v. Niles [Ala.] 47 S 239. Where count alleged negligence in failing to prevent injury after discovery of brakeman's dangerous position, a plea of contributory negligence was insufficient which failed to show negligence of employe injured subsequent to alleged negligence of those causing injury. Bryant v. Alabama G. S. R. Co. [Ala.] 46 S 484. Plea stating that servant voluntarily and knowingly placed himself on the track in front of a train and remained there until struck by it, when by the exercise of ordinary care he could have stepped aside and escaped injury, etc., held not mere conclusion but **sufficient plea of contributory negligence.** Sissel v. St. Louis & S. F. R. Co. [Mo.] 113 SW 1104. Plea to count alleging negligence in use of switch engine with pilot and without footboard, resulting in brakeman's death, **held sufficient to raise assumption of risk** by continuing in service with knowledge of danger and of negligence. Bryant v. Alabama G. S. R. Co. [Ala.] 46 S 484.

**35.** Plaintiff must prove substantially facts alleged in complaint, but **slight variance will not defeat recovery.** Poczerwinski v. Smith Lumber Co., 105 Minn. 305, 117 NW 486. Variance as to particular occurrence which caused brakeman to fall immaterial, negligence charged being proved. Kansas City S. R. Co. v. Williams [Tex. Civ. App.] 111 SW 196. Where declaration alleged that plaintiff was injured while removing pig-iron from a pile, and proof showed that injury occurred while removing iron from a heap nearby, the variance was not fatal. Union Wire Mattrese Co. v. Wiegref, 133 Ill. App. 506. In action for injuries caused by dust explosion in mine, due to failure to spray, sprinkle or clean entries and roadways, as required by Hurd's Rev. St. 1905, c. 93, § 20, cl. "g," an allegation that explosion was caused by dust in the air was sufficiently sustained by proof that firing of one shot generated gas, which exploded, thus causing dust explosion, the variance not being objected to below. Davis v. Illinois Collieries Co., 232 Ill. 284, 83 NE 836. Where essence of negligence charged was running work train at high rate of speed whereby it became uncoupled, proof that two cars became uncoupled was not materially variant from allegation that engines became uncoupled. Gibler v. Quincy, etc., R. Co., 129 Mo. App. 93, 107 SW 1021. Where petition alleged that turntable was defective in that it would stop suddenly, and that ends where tracks joined were too long, this was supported by testimony that table was in this condition when a heavy engine was placed on it. Currie v. Missouri, etc., R. Co. [Tex.] 108 SW 1167. Negligence alleged being that belt was defective and broke and struck plaintiff when he used idler to shift it, a promise to repair belt, made on complaint that it would start machine without use of idler, was immaterial. Waight v. Lake Washington Mill Co., 48 Wash. 402, 93 P 1069.

**Variance fatal:** Where declaration stated that in compliance with vice-principal's order, on which negligence was based, plaintiff had removed spring on lathe, and proof showed that plaintiff had disobeyed this order and used spring. Balkwill v. Becker, 131 Ill. App. 221. Variance fatal where negligence alleged was that defendant's superintendent directed plaintiff to go to work on pile of lumber, and evidence showed only negligence of defendant in failing to floor skids on which lumber was moved. Bryant

of any one of several grounds alleged is sufficient.[37] If a cause of action alleged is proved, it is immaterial that other causes, not alleged, are also proved.[38] Where negligence is specifically alleged, proof of subsequent negligence, after discovery of plaintiff's peril, is not admissible unless alleged,[39] though general allegations of negligence, without specifying particular acts, would include subsequent negligence.[40]

(§ 3H) 4. *Evidence, burden of proof, presumptions.*[See 10 C. L. 785]—The burden is upon the plaintiff to prove negligence of the master as alleged [41] and that such

Lumber Co. v. Clifton, 85 Ark. 322, 108 SW 216. Where complaint alleged that flagman was engaged in duty of flagging train when struck and killed by it, there could be no recovery on proof that he had set his flag on the track and was sitting or lying down on track when struck. Alabama G. S. R. Co. v. MoWhorter [Ala.] 47 S 84.

36. Louisville & N. R. Co. v. Lowe [Ala.] 48 S 99; Calhoun v. Holland Laundry, 220 Pa. 281, 69 A 756. Subsequent negligence of defendant not ground for recovery when not pleaded. Donahue v. Northwestern Tel. Exch. Co., 103 Minn. 432, 115 NW 279. No recovery where it was alleged that decedent was pulled off wharf and drowned by being entangled in hawser, and proof showed he simply lost his balance and fell while handling it. Merchants' & Miners' Transp. Co. v. State [Md.] 70 A 413. Where negligence alleged was in requiring decedent to handle hawser alone, and that he was entangled in it and pulled off wharf, there could be no recovery for negligence after decedent had fallen in failing to rescue him. Id. Plaintiff, alleging careless operation of hoisting apparatus, cannot recover on proof of defects in bucket used. Schultz v. Barber Asphalt Paving Co., 111 NYS 281. No recovery where only negligence proved was that of foreman and this was not alleged. Bertolami v. United Engineering & Const Co., 125 App. Div. 584, 109 NYS 1006. Where plaintiff was injured while engaged in loading rails on cars, complaint held to charge negligence of superintendent of gang and of servants engaged in operating and moving engine only, and not of members of crew; hence error to submit question of negligence of crew. Hostetter v. Illinois Cent. R. Co., 104 Minn. 25, 115 NW 748. Where complaint alleged failure to guard rollers of machine as negligence which caused injury, there could be no recovery for failure to warn of currents of electricity or air which might cause materials to be drawn into rollers, though complaint negatived knowledge of dangers of work. Scott v. International Paper Co., 125 App. Div. 318, 109 NYS 423. Where death of locomotive fireman was caused by his jumping from runaway logging train, and negligence alleged was use of defective equipment, there could be no recovery on proof that cars were too heavily loaded considering wet condition of track. Cavaness v. Morgan Lumber Co. [Wash.] 96 P 1084. Under the rule that a master can be held liable only for acts negligently done or omitted and so alleged, it is necessary to aver that the appliance used was negligently selected, or that there was a failure to warn the servant of the danger connected with its use. The Herancourt Brew. Co. v. Frank, 11 Ohio C. C. (N. S.) 505. Instruction erroneous which did not confine plaintiff and jury to acts of negligence alleged in petition. Clinchfield Coal Co. v. Wheeler's Adm'r, 108 Va. 448, 62 SE 269. Proximate cause of injury being plaintiff's stumbling when in act of placing bolt on stack, he could not recover on ground that scaffold should have been provided. Jones v. Pioneer Cooperage Co. [Mo. App.] 114 SW 94. Where plaintiff claimed he was struck by timber projecting from passing car, defendant was entitled to charge that he could not recover if he attempted to catch on the car and lost his hold, this claim of defendant being supported by evidence and being wholly different from plaintiff's theory. De Hoyos v. Galveston, etc., R. Co. [Tex. Civ. App.] 115 SW 75. Where proof did not support allegations that machinery was out of plumb and belt too short, nonsuit was proper, though evidence showed breaking of belt as cause of injury, no negligence in this respect being alleged. Waight v. Lake Washington Mill Co., 48 Wash. 402, 93 P 1069.

37. Recovery is warranted if any ground of negligence alleged is proved. Bull v. Atlanta & C. Air Line R. Co. [N. C.] 63 SE 126. Where negligence alleged in action for injuries by fall of freight elevator was absence of safety device, negligent inspection, resulting in running elevator with only one defective cable, and providing defective cables, and eny one cause would have been sufficient to cause the injury, the finding of either by jury would warrant recovery. Wilson v. Escanaba Woodenware Co., 152 Mich. 540, 15 Det. Leg. N. 216, 116 NW 198.

38. Simeoli v. Derby Rubber Co. [Conn.] 71 A 546. Proof that proximity of post to track caused injury would not bar recovery, though not pleaded, unless it was sole proximate cause; if negligence of fellow-employes, under statute, which was pleaded contributed, plaintiff could recover. Cunningham v. Neal [Tex. Civ. App.] 109 SW 455.

39. Error to submit subsequent negligence when not alleged. Louisville & N. R. Co. v. Lowe [Ala.] 46 S 99.

40. Louisville & N. R. Co. v. Lowe [Ala.] 48 S 99.

41. Burke v. International Paper Co., 112 NYS 893. No presumption of negligence. Plaintiff has burden of proving it. Kiley v. Rutland R. Co., 90 Vt. 536, 68 A 713. There must be affirmative and preponderating, proof of defendant's negligence. Clinchfield Coal Co. v. Wheeler's Adm'r, 108 Va. 448, 62 SE 269. To prove post too near track. Brakeman killed by it. Wilson v. New York, etc., R. Co. [R. I.] 69 A 364. Burden is upon plaintiff to show particular act or omission claimed to constitute negligence. Toppi v. McDonald, 128 App. Div. 443, 112 NYS 821. Instruction erroneous because permitting finding of negligence on evidence evenly balanced. Burden should be placed on plaintiff. Blankavag v. Badger Box & Lumber

negligence was the proximate cause of the injury.[42] A preponderance of the evidence only is required [43] and circumstantial evidence may suffice.[44] The burden of proof on the issue of negligence does not shift.[45] It is presumed that the employer has employed competent workmen,[46] and the burden is upon plaintiff to prove alleged incompetency of a servant [47] unless the employe in question is a minor under fourteen years of age.[48] As a general rule the fact of knowledge of a servant's incompetency, or that it would have been discovered by reasonable inquiry, must be shown by evidence independent of that showing the servant's incompetency.[49] But the incompetency of a servant at the time of his employment may be such that proof of it will be

Co., 136 Wis. 380, 117 NW 852. Instruction erroneous because placing on defendant burden of showing method used to move derrick reasonably safe. Ryan v. Farley & Loetscher Mfg. Co. [Iowa] 119 NW 86. Burden is upon plaintiff to show negligence in furnishing defective tools, and knowledge by master of defects. Manning v. Portland Steel Ship Bldg. Co. [Or.] 96 P 545. Plaintiff, suing defendant for injuries, had burden of proving that man who employed and controlled him was vice-principal of defendant, and not independent contractor. Kipp v. Oyster [Mo. App.] 114 SW 538. Evidence held insufficient to authorize submission of case to jury. Plaintiff injured during epileptic fit. Lauth v. Harrison-Switzer Milling Co., 140 Ill. App. 199. Servant seeking to recover for injuries alleged to have been caused by an unsafe place must prove that master knew, or ought, in exercise of ordinary care, to have known, that place was unsafe, and that he did not know it and had not equal means of knowing, in exercise by him of ordinary care. Holland v. Durham Coal & Coke Co. [Ga.] 63 SE 290. Mere proof that defendant assured wife of plaintiff that he, plaintiff, was not at fault, and that defendant gave her assistance and made some payments after the accident, insufficient to warrant finding of liability, no specific negligence being shown. Common laborer injured by fall in building under construction. Binewicz v. Haglin, 103 Minn. 297, 115 NW 271. To recover for injuries caused by defective turntable, plaintiff has burden to prove defective construction of turntable, and that it was proximate cause of injury, that employer knew or ought to have known of defect and danger, and that plaintiff did not know of it and did not have equal opportunity to learn of it. Galloway v. Chicago, etc., R. Co., 234 Ill. 474, 84 NE 1067.

**42.** Pleas of contributory negligence on part of deceased servant did not relieve plaintiff from burden of showing negligence of defendant as proximate cause of death. Steele's Adm'r v. Hillman Land & Iron Co. [Ky.] 114 SW 311. To recover for injuries caused by appliances, plaintiff must show (1) that appliance was defective; (2) that master ought to have known it; (3) that defect was proximate cause of injury. Cotton v. North Carolina R. Co. [N. C.] 62 SE 1093. Evidence sufficient to show death of girl caused by weight falling down shaft of dummy elevator and striking her on head. Winkle v. George B. Peck Dry Goods Co., 132 Mo. App. 656, 112 SW 1026. Evidence held insufficient to show negligence of master responsible for injury resulting from slippery gang plank. William Grace Co. v. Gallagher, 137 Ill. App. 217.

**43.** Servant seeking to recover for injuries due to violation of statute need prove case only by preponderance of evidence, though "clear" preponderance would be necessary to enforce penalty under same statute. Davis v. Illinois Collieries Co., 232 Ill. 284, 83 NE 836.

**44.** Negligence of defendant may be shown by circumstantial evidence. Wilson v. New York Cont. Co., 113 NYS 349. Negligence and the fact that it was proximate cause of injury may be established by circumstantial evidence. Manning v. Portland Steel Ship Bldg. Co. [Or.] 96 P 545. Eyewitnesses not necessary to prove that miner going up ladder was killed by rock falling on him from above. Circumstantial evidence sufficient. Hotchkiss Mt. Min. & Reduction Co. v. Bruner, 42 Colo. 305, 94 P 331.

**45.** Burden of proving negligence rests on plaintiff throughout and does not shift, but where his evidence shows defects or negligence, defendant must meet this evidence. Firment v. Berwind-White Coal Min. Co., 162 F 758. Burden of proof rests throughout on plaintiff to show negligence of defendant as cause of injury. Lipsky v. C. Reiss Coal Co., 136 Wis. 307, 117 NW 803. Proof of inspection may rebut inference of negligence, but is not conclusive. Id. In action for injuries to employe by derailment of train, instruction that proof of derailment raised presumption of negligence of defendant, and shifts burden on defendant to show that it did not occur on account of its negligence, and that plaintiff cannot recover if defendant's evidence preponderates over presumption so raised, held erroneous as placing too great burden on defendant. Winslow v. Norfolk Hardwood Co., 147 N. C. 275, 60 SE 1130.

**46.** Still v. San Francisco, etc., R. Co. [Cal.] 98 P 672.

**47.** Still v. San Francisco, etc., R. Co. [Cal.] 98 P 672. Juries cannot presume boys over 14 incompetent by reason of minority alone. Wilkinson v. Kanawha & Hocking Coal & Coke Co. [W. Va.] 61 SE 875. Jury is not authorized to decide a minor unfit for his employment on account of what they see or think they see in his face or manner while testifying. Id.

**48.** If boys are over 14 burden is on plaintiff to prove incompetency; if under 14, burden is on defendant to show competency. Wilkinson v. Kanawha & Hocking Coal & Coke Co. [W. Va.] 61 SE 875.

**49.** Still v. San Francisco, etc., R. Co. [Cal.] 98 P 672.

legally sufficient to rebut the presumption of the exercise of due care by the master and make the question one for the jury.[50]

It is generally held that mere proof of the occurrence of an accident does not alone raise a presumption of negligence on the part of the master[51] and that the doctrine *res ipsa loquitur* does not apply as between master and servant.[52] But neg-

50. On theory that incompetency was of such nature that reasonable investigation would have disclosed it. Still v. San Francisco, etc., R. Co. [Cal.] 98 P 672.

51. Bryant Lumber Co. v. Stastney [Ark.] 112 SW 740; Jefferys v. Nebraska Bridge Supply & Lumber Co., 157 F 932. Plaintiff must show not only happening of accident, but negligence of master as cause thereof. Stewart & Co. v. Harman [Md.] 70 A 333. While circumstantial evidence may be sufficient, there must be facts from which defendant's conduct can be ascertained and judged. Mere proof of accident is not enough. Finn v. Oregon Water Power & R. Co. [Or.] 93 P 690. Servant must show that injury was due to risk not assumed by his contract of employment. Byers v. Carnegie Steel Co. [C. C. A.] 159 F 347. If the proof shows that the accident might have happened from some cause other than negligence of defendant, no presumption arises. Robinson v. Consolidated Gas Co. [N. Y.] 86 NE 805. Hammer controlled by treadle came down, injuring plaintiff. **Res ipsa loquitur doctrine inapplicable.** American Bicycle Co. v. Oulnd, 139 Ill. App. 101. Mere fact that skid used in loading ice on wagon slipped and injured plaintiff did not show negligence of master. Lone Star Brew Co. v. Willie [Tex. Civ. App.] 114 SW 186. Evidence held insufficient to show actionable negligence in erecting **scaffolds** through alleged defective condition of which plaintiff was injured. Schneider v. American Bridge Co., 31 App. D. C. 420. Alleged negligence in placing in train without inspection cars with **defective brakes** is not sustained by mere proof of happening of accident in which brakeman was injured while uncoupling cars. Rush v. Oregon Power Co. [Or.] 95 P 193. Mere fact that **rope** used in hoisting lumber from hold of vessel **broke** does not show negligence. Feingold v. Ocean S. S. Co., 113 NYS 1018. Fact that **boards slipped** or were jerked from load being carried by **derrick** to hold of ship did not alone show negligence, no such previous occurrence being shown. Without proof of negligence, plaintiff could not recover. Fredenthal v. Brown [Or.] 95 P 1114. **Collapse of "bridge"** used in presentation of opera, proper in design, furnished some evidence of defect in construction, but did not give rise to presumption of negligence chargeable to master. Hahn v. Conried Metropolitan Opera Co., 111 NYS 161. Where plaintiff was injured by **sudden starting of elevator,** no cause being shown, and it appearing that there were men about, not servants of defendant, who might have started it, the res ipsa loquitur doctrine was inapplicable. Keenan v. McAdams & C. Elevator Co., 113 NYS 343. Proof that while plaintiff was pulling rope over drum of winch the **winch reversed,** pulling rope opposite way and throwing plaintiff over winch, did not establish negligence of master. Hanson v. Hogan, 112 NYS 1103. Doctrine res ipsa loquitur inapplicable where men at work on platform, supported on one side only by brace between two piers, pushed upward in course of their work and **platform fell.** Accident may have been caused by acts of men. Negligence of master not presumed. Robinson v. Consolidated Gas Co. [N. Y.] 86 NE 805. Mere happening of accident by **"buckling" of train and explosion of explosives** in one car held not to raise presumption of negligence. Lewis v. Pennsylvania R. Co., 220 Pa. 317, 69 A 821. Proof of accident, **brakeman caught between cars** trying to couple them by hand, not proof of negligence, of which there must be affirmative and preponderating evidence. Southern R. Co. v. Moore, 108 Va. 388. 61 SE 747. Mere fact that **grab iron gave way** would not prove negligence unless evidence was such as to show that reasonable inspection would have disclosed defect. St. Louis, etc., R. Co. v. Holmes [Ark.] 114 SW 221. Proof **of explosion of locomotive boiler,** injuring fireman, held not to raise presumption of negligence. No recovery where no other proof. Galveston, etc., R. Co. v. Garven [Tex. Civ. App.] 109 SW 426. Proof of **explosion of powder stored in mine,** near electric wires, not shown defective, was not proof of negligence, especially where it also appeared that men were in habit of gathering around powder can smoking. Western Coal & Min. Co. v. Garner [Ark.] 112 SW 392. Mere fact that **stop cock blew out** of whitewashing machine, not shown to be defective, raised no presumption of negligence. Clark v. Garrison Foundry Co., 219 Pa. 426, 68 A 974. Nonsuit proper where operator's hand was caught in machine, it being alleged and shown only that **machine started suddenly,** no defect or negligence by master being alleged or shown. Hemscher v. Dobson, 220 Pa. 222, 69 A 669. Where **window glass fell out** when servant closed window, and he was injured, but no defect in window appeared, negligence of master could not be presumed. Stewart & Co. v. Harman [Md.] 70 A 333. Proof that **chain broke,** insufficient, there being no proof of any defect and no evidence as to how it was being used. Finn v. Oregon Water Power & R. Co. [Or.] 93 P 690. No recovery where **boiler exploded,** no defect being shown and proper inspection being proved. Cavanaugh v. Avoca Coal Co. [Pa.] 70 A 997. Mere fact that **clevis broke** when engine was being moved by cable attached to clevis raised no presumption of negligence in furnishing it. McDonald v. California Timber Co., 7 Cal. App. 375, 94 P 376.

52. Eagle Brew. Co. v. Luckowitz, 138 Ill. App. 131. Doctrine res ipsa loquitur rarely applicable. Evidence must make prima facie case of negligence of master or verdict cannot be sustained. Lane v. New York Cont. Co., 125 App. Div. 808, 110 NYS 91. The res ipsa loquitur doctrine is inapplicable except when circumstances are such that accident would not have occurred but for negligence of the master. Feingold v. Ocean S. S. Co.,

ligence may, as in other case, be inferred from the fact of injury or accident, taken in connection with all the facts and circumstances.[53] Thus a prima facie case of negligence may be made without proof of the particular defect or act which caused the injury,[54] where the facts proved warrant the inference that the injury would not have resulted had the master exercised due care.[55] Where such facts appear, the bur-

118 NYS 1018. Proof of circumstances of accident alone insufficient unless they show negligence of defendant. Moriarity v. Schwarzschild & Sulzberger Co., 132 Mo. App. 650, 112 SW 1034. Doctrine res ipsa loquitur is not applicable unless instrumentality is under exclusive control of master and is of such character that an accident would not have occurred unless it was defective. If accident might have been caused by some causes other than negligence of master, doctrine has no application. Lehman v. Dwyer Plumbing & Heating Co., 104 Minn. 190, 116 NW 352. There are really no exceptions to rule that mere happening of accident is not proof of negligence in an action by a servant against a master, though in some cases circumstances in proof show that accident would not have happened had due care been used. Galveston, etc., R. Co. v. Garven [Tex. Civ. App.] 109 SW 426; Lone Star Brew. Co. v. Willie [Tex. Civ. App.] 114 SW 186.

53. Though the res ipsa loquitur doctrine does not apply, a servant may prove negligence by circumstantial evidence. Reed v. Norfolk & W. R. Co., 162 F 750. Res ipsa loquitur means that plaintiff has on the proof, without direct evidence of negligence, made out a prima facie case. Western Steel Car & Foundry Co. v. Cunningham [Ala.] 48 S 109. The application of the "res ipsa loquitur" doctrine does not ordinarily depend upon the relation between the parties, except indirectly, so far as that relation defines the measure of duty imposed on defendant. Under certain circumstances it may apply in an action brought by a servant against the master. Jenkins v. St. Paul City R. Co., 105 Minn. 504, 117 NW 928. The doctrine res ipsa loquitur is applicable in proper cases as between master and servant, as where it is shown that an instrumentality being properly used by the servant gives way and causes injury and freedom from contributory negligence and want of negligence of fellow-servants appears. La Bee v. Sultan Logging Co. [Wash.] 97 P 1104. In such cases it is not unjust to require master to show that instrumentality was not defective, or that he did not know of the defect and could not have discovered it by ordinary care. Id. **Cause of falling of heavy steel plate** could be shown by circumstances. Direct evidence not essential. Riley v. Cudahy Packing Co. [Neb.] 117 NW 765. Where servant engaged in usual employment as mule driver in mine was injured by **explosion of compressed air** tank by alleged reason of accumulation of oil and water, it was held that doctrine of res ipsa loquitur applied. Elvis v. Lumaghi Coal Co., 140 Ill. App. 112.

**Effect of statutes:** Collision of trains resulting in death of employe being carried home from work held to raise presumption **of negligence** where action was based on Gen. St. Kan. 1889, § 1251, which exempts railroad employes from assumption of risk of negligence of fellow-servants. Missouri Pac. R. Co. v. Larussi [C. C. A.] 161 F 66. Proof that car repairer was crushed between cars when looking for washers on track under orders of foreman made prima facie case under Kirby's Dig. § 6773, making railroads liable for injuries caused by running of trains. St. Louis, etc., R. Co. v. Puckett [Ark.] 114 SW 224. Code 1906, § 1985, provides that in actions against railroad companies proof of injury inflicted by running of locomotive or cars shall be prima facie evidence of negligence of employes, and that this shall apply to passengers and employes. Held, section man walking beside track and killed by derailed car from passing train was entitled to presumption. Mobile, etc., R. Co. v. Hicks, 91 Miss. 273, 45 S 360.

54. If plaintiff proves that **machine** started from some latent defect and injured him, the nature of the defect need not be proved by him. St. Jean v. Lippitt Woolen Co. [R. I.] 69 A 604. The mere starting of machine, without the intervention of any human agency, when it should have remained at rest, is of itself evidence of some defective condition. Ryan v. Fall River Iron Works Co., 200 Mass. 188, 86 NE 810. Where pile of **lumber** loaded on car **fell** on plaintiff, and evidence showed that superintendent was in charge, and showed circumstances and manner of loading, plaintiff made a prima facie case for the jury on issue of superintendent's negligence. Western Steel Car & Foundry Co. v. Cunningham [Ala.] 48 S 109. Where character and accompanying circumstances of accident point strongly to **abnormal and dangerous condition,** and such long continuance of it as to charge master with knowledge of it, and it appears that employe had no knowledge of it, and was not negligent, and such condition was proximate cause of injury, negligence of master may be inferred from such circumstances though no specific defect or act is shown by positive testimony. Byers v. Carnegie Steel Co. [C. C. A.] 159 F 347. Rule applied where **hydraulic elevator suddenly rose** and circumstances tended to show defective valve as cause. Id.

55. Proof of **collision of trains on same track** near city limits is proof of negligence. Illinois Cent. R. Co. v. Vaughn, 33 Ky. L. R. 906, 111 SW 707. Where locomotive engineer was running train under orders when he suddenly collided with cars standing on track, prima facie case of negligence was shown. Murray's Adm'x v. Louisville & N. R. Co., 83 Ky. L. R. 545, 110 SW 334. Plaintiff refused to work near defective **machine** unless it was stopped and repaired. It was stopped, and plaintiff started to repair it, when it **suddenly started,** injuring him. Held, prima facie case of negligence shown. Keenan v. McAdams & Cartwright Elevator Co., 58 Misc. 371, 108 NYS 952. **Elevator** was under exclusive control of defendant. Showing that chain which was part of it **fell** upon plaintiff, who was free from negli-

den is upon defendant to show that the injury resulted from a cause for which he is not responsible.[56] Where an injury may have resulted from any one of several causes, the burden is upon plaintiff to show that it resulted from a cause for which the master would be responsible.[57] If the cause of the injury is left a matter of conjec-

gence, sufficient to make prima facie case of negligence against defendant. Konigsberg v. Davis, 57 Misc. 630, 108 NYS 595. Fact that **engine in charge of hostler moved** without apparent cause some evidence of negligence on part of hostler. Douda v. Chicago, etc., R. Co. [Iowa] 119 NW 272. Whether negligence of defendant, in failure to give proper instructions or to provide safe place, caused death of boy of 17, for jury, where no one saw his death, but circumstances showed he was **killed by getting caught in machinery** at place where improperly guarded narrow passage separated engine pit and other machines. Lunde v. Cudahy Packing Co. [Iowa] 117 NW 1063. In action for injuries to employe engaged in repairing carding **machine,** caused by its **suddenly starting,** evidence sufficient to go to jury to show cause was some defect in belts and pulleys alleged in petition. Cochrell v. Langley Mfg. Co. [Ga. App.] 63 SE 244. Engineer in charge of engine and hoisting machinery was killed by **falling into shaft,** gate to which was open. Held, though there was no direct evidence as to how he fell, the inference was warranted that he walked through gate which in violation of statute could not be closed. Moseley's Adm'r v. Black Diamond Coal & Min. Co., 33 Ky. L. R. 110, 109 SW 306. Where engineer was injured by steam, hot oil and water being blown into his face by **valve** when he removed cap to oil it, there was evidence to show valve defective in that it must have been leaky. Hubbard v. Macon R. & L. Co. [Ga. App.] 62 SE 1018. Where train, freight and passenger, was being run over new unballasted road at excessive speed, and some **cars were derailed** and one fell upon and killed section boss, held, occurrence sufficient to show incompetency of engineer as cause of accident. Mobile, etc., R. Co. v. Hicks, 91 Miss. 273, 46 S 360. Unexploded **dynamite,** left in mass of stone to be moved by deceased, **exploded.** Negligence presumed. Stephen v. Duffy, 136 Ill. App. 572. Where **heavy brace of timbers of coal dock fell** upon plaintiff, its fall alone, under the circumstances, was sufficient to raise inference of negligence. Lipsky v. C. Reiss Coal Co., 136 Wis. 307, 117 NW 803. Where **loom started** of itself and there was proof of its having been out of repair and fixed and that shaft had been repaired in certain way, evidence was sufficient to sustain finding of negligence. Ryan v. Fall River Iron Works Co., 200 Mass. 188, 86 NE 310. Where loom started automatically, it was not necessary to show that master had previous notice of a particular defect. It is enough if such circumstances appear as to render it likely that the harmful event would not have happened except for some act or omission amounting to want of ordinary care. Ryan v. Fall River Iron Works Co., 200 Mass. 188, 86 NE 810. Where an accident happens which without negligence on the part of some one could not happen, the burden is upon the party bound to exercise due care to disprove negligence on his part. **Explosion of soft steel** mould not sufficiently cooled. Illinois Steel Co. v. Swiercz, 135 Ill. App. 141. **Piece of belt flew off** and struck plaintiff in eye while engaged in duties of oiling and cleaning machinery. Circumstances warranted finding of negligence, though mere fact of accident would not. Dittman v. Edison Elec. Illuminating Co., 125 App. Div. 691, 110 NYS 87. Where complaint stated cause of action, but plaintiff's counsel stated he had no eye witnesses but would have to rely on circumstantial evidence, defendant was not entitled to dismissal on opening statement, but plaintiff was entitled to elicit what evidence she could regardless of opening statement. Darton v. Interborough Rapid Transit Co., 125 App. Div. 836, 110 NYS 171.

56. Where train intended to run on main track ran onto side track, collided with engine and killed engineer, proof of these facts made prima facie case of negligence of defendant, and burden was on it to show accident due to some cause for which it was not responsible. Van Suwegen v. Erie R. Co., 110 NYS 959. If the ree, or entire occurrence as proved, could not have happened without negligence of some kind, negligence is presumed without showing the kind, and the burden of explanation is placed on defendant. Robinson v. Consolidated Gas Co. [N. Y.] 86 NE 805. Presumption of negligence arising from proof of accident and attendant circumstances is one of fact which must be overcome by evidence. Lipsky v. C. Reiss Coal Co., 136 Wis. 307, 117 NW 803. The **presumption** at best is but a **rebuttable** presumption of fact which does not necessarily continue through the case so as to make a case for the jury. Jenkins v. St. Paul City R. Co., 105 Minn. 504, 117 NW 928. Motorman received shock through controller, became temporarily paralyzed, and could not control car, which was derailed and turned over at sharp loop, and motorman injured. Held, presumption of negligence of company rebutted by proof, inter alia, of safe condition of car before and after accident, so that no case for jury was made. Id.

57. Preponderance of evidence must show injury due to some fault or defect for which master is responsible, though this need not be shown beyond all doubt. Rowell v. Gifford, 200 Mass. 546, 86 NE 901. Injury caused by sputtering of molten metal poured into mold, plaintiff's theory being that piece of mold was taken out, cooled and replaced. Evidence held insufficient to sustain his theory. Evansville Metal Bed Co. v. Loge [Ind. App.] 85 NE 979. No case for jury where manner in which servant met death was not shown. Mere proof that it might have been caused in some manner by his coming in contact with saw which was suspended in frame low enough to have touched him not enough to charge master. Whitehouse v. Bryant Lumber & Shingle Mill Co. [Wash.] 97 P 751. In action for death of switchman, verdict was properly directed for defendant where evidence made claims of plaintiff and defendant as to manner of his death equally

ture, there can be no recovery [58] unless the master would be responsible for all the possible causes shown.[59]

Contributory negligence [60] and assumption of risk [61] are usually held to be

reasonable and probable, and was equally consistent with existence and nonexistence of negligence of master. Watson's Adm'r v. Louisville & N. R. Co. [Ky.] 114 SW 292.

58. Jury cannot be left to conjecture or draw inferences not sustained by evidence. Evidence must be such as to render inference of negligence of master more reasonable than any other conclusion which would be consistent with absence of negligence by defendant. Lehman v. Dwyer Plumbing & Heating Co., 104 Minn. 190, 116 NW 352. Case should not be submitted to jury if cause of injury is left to conjecture. Manning v. Portland Steel Ship Building Co. [Or.] 96 P 545. Plaintiff must show injury due to cause for which master is responsible, and if this matter is left in doubt or is conjectural there is no case for jury. Winkle v. George B. Peck Dry Goods Co., 132 Mo. App. 656, 112 SW 1026. Mere happening of accident is not proof of negligence. If other circumstances leave cause open to conjecture, plaintiff cannot recover. Ryan v. Fall River Iron Works Co., 200 Mass. 188, 86 NE 310. Jury is not left to speculate as to cause of injury where there is evidence to support two theories. Florala Sawmill Co. v. Smith [Fla.] 46 S 332. No recovery where cause of **brakeman's death** was not shown to have occurred as claimed. Cincinnati, etc., R. Co. v. Johnica's Adm'r [Ky.] 113 SW 844. **Fireman found under trestle** unconscious and burned about face with steam. Evidence did not show whether he had been made unconscious by burning steam in engine or had gone out and fallen. No recovery warranted. Black's Adm'r v. Southern R. Co., 30 Ky. L. R. 1345, 108 SW 856. Train of work cars after standing two hours suddenly broke away and collided with another train, **killing engineer.** No recovery, cause of accident not being shown. Lane v. New York Contracting Co., 125 App. Div. 808, 110 NYS 91. Evidence insufficient to warrant recovery where it appeared that plaintiff was ordered to go out in skiff, in connection with rafting work, at dangerous place owing to current, but manner of his **death** was not shown. Steele's Adm'r v. Hillman Land & Iron Co. [Ky.] 114 SW 311. Where there was no eyewitness of servant's **death,** and evidence left cause conjectural, there could be no recovery on account of alleged defect in appliance. Olmstead v. Hastings Shingle Mfg. Co., 48 Wash. 657, 94 P 474. Evidence insufficient to show **operator of ripsaw** was **killed,** there being no eyewitness. Petersen v. Union Iron Works, 48 Wash. 505, 93 P 1077. Where plumber's furnace was taken from room where only those in good condition were supposed to be kept and given employes in morning, and air cock leaked slightly in afternoon when used and **explosion** resulted, but cause of leakage was not shown, there could be no recovery. Lehman v. Dwyer Plumbing & Heating Co., 104 Minn. 190, 116 NW 352. Plaintiff **fell from tramcar** and his arm was run over. Cause not shown, no defect in brake being proved. No recovery. Micari v. Monroe Stone Co. [Mich.] 15 Det. Leg. N. 771, 117 NW 939. No recovery where cause **of machines sudden starting** was not shown, but was left to conjecture. Rhobovsky v. New Jersey Worsted Spinning Co. [N. J. Err. & App.] 70 A 170. No recovery where cause of **"bucking" of train** and explosion of materials in car did not appear, but was left conjectural. Lewis v. Pennsylvania R. Co., 220 Pa. 317, 69 A 821. Where **brakeman** was **killed between cars** which he was trying to couple, and evidence did not show cause of accident, but left it open to conjecture whether it was due to loose gravel or depression or some other cause, verdict was properly directed for defendant. Tibbitts v. Mason City, etc., R. Co. [Iowa] 115 NW 1021.

59. Where the injury may have been the result of any one of several causes, for all of which the master would be liable, it is immaterial that it does not appear clearly which cause produced the injury. Explosion of molten iron in mould due to defective vent, which defect might have been caused in various ways, but for which defendant was responsible. The Sargent Co. v. Shukair, 138 Ill. App. 380.

60. Burden of showing contributory negligence rests on defendant. Big Five Tunnel Ore Reduction & Transp. Co. v. Johnson [Colo.] 99 P 63; Britt v. Carolina Northern R. Co. [N. C.] 61 SE 601; Hoff v. Japanese American F. & F. Co., 48 Wash. 581, 94 P 109; Gauthier v. Wood [Wash.] 94 P 654; Blankavag v. Badger Box & Lumber Co., 136 Wis. 380, 117 NW 852. Contributory negligence is affirmative defense. Knight v. Donnelly Bros., 131 Mo. App. 152, 110 SW 687. Burden is on defendant to show contributory negligence where plaintiff's testimony does not show it. Chesapeake & O. R. Co. v. Rowsey's Adm'r, 108 Va. 632, 62 SE 368. While plaintiff must not by his own evidence show that he failed to use due care, yet if defendant relies on contributory negligence or any affirmative defense the burden is on him to prove it. Bernheimer Bros. v. Bager [Md.] 70 A 91. Where evidence was such that existence of contributory negligence was not necessary inference, error to nonsuit plaintiff, some of his witnesses testifying to facts showing him negligent, but he denying such facts. Carlin v. William Butler Co., 220 Pa. 194, 69 A 552. Burden on defendant to show contributory negligence of car repairer who was struck by cars which were being switched by flying switch contrary to rules of company, injured man being in act of crossing tracks in usual manner. Galveston, etc., R. Co. v. Conuteson [Tex. Civ. App.] 111 SW 187. Burden is ordinarily on defendant to show contributory negligence. It is only when plaintiff's allegations or evidence show prima facie negligence on his part that it devolves on him to show facts from which the jury may on the whole case find him free from negligence. Galveston, etc., R. Co. v. Conuteson [Tex. Civ. App.] 111 SW 187.

61. Assumption of risk must be affirmatively pleaded and proved by defendant. German-American Lumber Co. v. Brock [Fla.] 46 S 740. Assumption of risk affirmative defense which must be established by preponderance of evidence. Hoff v. Japanese American F. & F. Co., 48 Wash. 581, 94 P 109; Gauthier v. Wood [Wash.] 94 P 654; Blanka-

affirmative defenses which must be sustained by defendant by a preponderance [62] of all the evidence.[63] In some jurisdictions, however, plaintiff must show freedom from contributory negligence as a part of his case.[64] The presumption of due care for one's own safety, arising from the instinct of self-preservation, prevails where the conduct of the servant at the time of his injury or death is not susceptible of direct proof.[65] If plaintiff's own evidence discloses, prima facie, contributory negligence, the burden is upon him to show that he used due care.[66] Ordinary risks are presumed to have been assumed,[67] and, as to such, want of knowledge by the servant must be proved by plaintiff.[68]

*Admissibility in general.* See 10 C. L. 791—Only holdings peculiar to the subject un-

vag v. Badger Box & Lumber Co., 136 Wis. 380, 117 NW 852. Burden is on master to show assumption by servant of unusual risk arising from former's negligence. Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910. Burden is on defendant to show assumption of risk by employe where it arises from machinery left unguarded as required by statute. Graves v. Gustave Stickley Co., 125 App. Div. 132, 109 NYS 256. Knowledge and assumption of extraordinary risks arising from negligence of master must be pleaded and proved by defendant. Manning v. Portland Steel Ship Building Co. [Or.] 96 P 545. The assumption of a risk by continuing to work in an unsafe place with knowledge and appreciation of the dangers incident thereto arising out of the master's negligence is matter of defense. Master must show that servant ought to have appreciated danger. Kroeger v. Marsh Bridge Co. [Iowa] 116 NW 125.

**62.** Error to instruct that defendant must show contributory negligence to "satisfaction" of jury by preponderance of evidence. Baltimore & O. R. Co. v. Linn, 77 Ohio St. 615, 84 NE 1125.

**63.** Instruction held to state principle correctly that contributory negligence must be proved by preponderance of all the evidence, and not to exclude consideration of plaintiff's evidence. Missouri, K. & T. R. Co. v. Wilhoit [C. C. A.] 160 F 440.

**64.** Plaintiff has burden of proving freedom from contributory negligence. Lunde v. Cudahy Packing Co. [Iowa] 117 NW 1063. No recovery where plaintiff failed to prove freedom from contributory negligence. Lyon v. Coleman, 123 App. Div. 703, 108 NYS 378. Plaintiff failed to show freedom from contributory negligence where he knew how work was being done under foreman claimed to be incompetent. Carroda v. Foundation & Cont. Co., 112 NYS 1082. Evidence insufficient to show that painter, injured by fall from ladder, was exercising due care. Kennedy v. New York Tel. Co., 125 App. Div. 846, 110 NYS 887. Mere proof that employe was killed during her work by being caught in moving cogwheels held not to warrant recovery without any showing as to freedom from contributory negligence. Lester v. Crabtree, 125 App. Div. 617, 110 NYS 55.

**65.** Presumption arising from instinct of self-preservation and known disposition of men to avoid injury to themselves constitute prima facie inference that servant exercised ordinary care, and places on defendant burden of proving contributory negligence. German-American Lumber Co. v. Brock [Fla.] 46 S 740. Where fact is not susceptible of direct proof, the presumption of law must be that a person does not voluntarily incur danger or the risk of death, but is in the exercise of due care. Chicago Terminal Transfer R. Co. v. Reddick, 131 Ill. App. 515. Plaintiff, in action for death of minor servant, entitled to presumption that he did not recklessly and needlessly expose himself to danger. Lunde v. Cudahy Packing Co. [Iowa] 117 NW 1063. Where there are no eyewitnesses to servant's death, natural instinct of self-preservation is held sufficient ground for presumption that deceased did not negligently expose himself to danger in the absence of proof of facts negativing such inference. Id. But the indulgence of this presumption does not relieve plaintiff from operation of rule requiring proof of freedom from contributory negligence. Id. In action for death of employe, administrator need not prove that employe did not know, and could not have discovered by use of ordinary care, that premises were dangerous. Moseley's Adm'r v. Black Diamond Coal & Min. Co., 33 Ky. L. R. 110, 109 SW 306. Presumption being that car repairer killed under car by cars switched against it was in exercise of due care included inference that he would not have gone under car within 5 minutes after having been warned that switching was to be done. Porter v. St. Joseph Stockyards Co., 213 Mo. 372, 111 SW 1136.

**66.** If plaintiff's own evidence shows him negligent, burden shifts to him to show he used due care. Wallace v. Spellacy, 8 Ohio N. P. (N. S.) 41. If plaintiff's evidence establishes a prima facie case of contributory negligence, the burden is upon him to show facts from which jury may upon the whole case find him free from such negligence. International, etc., R. Co. v. Brice [Tex. Civ. App.] 111 SW 1094.

**67.** Manning v. Portland Steel Ship Bldg. Co. [Or.] 96 P 545.

**68.** To take a case out of the operation of the doctrine of assumed risk incident to his employment, plaintiff must show that he was ignorant of the peril and of the means of avoiding it. Harrington Mfg. Co. v. Arendell, 135 Ill. App. 406. Burden on plaintiff to show that her intestate, brakeman, did not know of danger of being struck by water spout of tank, while on car. McDuffee's Adm'x v. Boston & M. R. Co. [Vt.] 69 A 124. Where a servant was working with a defective machine or tool, the burden of proof is upon the plaintiff to show that he did not know of the defect. Deceased switch foreman killed because the engine had an ordinary lantern instead of regular headlight. Chicago, etc., R. Co. v. Ross, 136 Ill. App. 518.

der discussion are here given.[69] Evidence must be relevant to the issues raised by the pleadings.[70] Holdings as to the relevancy of evidence on the issues of negligence of the master,[71] contributory negligence of employe,[72] and assumption of risk,[73] are given

69. See article Evidence, for general principles, such as expert and opinion evidence, res gestae rule, etc.

70. **Held admissible:** Where petition alleged that employe was incompetent and grossly negligent, proof of incompetency was not limited to proof of drunkenness, though that was also alleged. El Paso & S. W. R. Co. v. Smith [Tex. Civ. App.] 108 SW 988. Proof of plaintiff's mental deficiency is admissible though such deficiency is not specially alleged. Doolan v. Pocasset Mfg. Co., 200 Mass. 200, 85 NE 1055. Where declaration showed nature of work in which plaintiff was engaged when injured, details of method employed could be proved though not pleaded. Chesapeake & O. R. Co. v. Hoffman [Va. App.] 63 SE 432. Proof of ordinance prohibiting employment of unlicensed elevator operators and of its violation admissible, though ordinance and fact that negligent servant did not have license were not pleaded, negligence relied on being negligent selection of incompetent elevator operator. Cragg v. Los Angeles Trust Co. [Cal.] 98 P 1063. Where defendant introduced proof of assumption of risk, plaintiff could prove promise to repair, though he had not pleaded it. Pennsylvania R. Co. v. Forstall [C. C. A.] 159 F 893. Conditions under which two companies operated, power and control of defendant's agents, over plaintiff, etc., admissible to show whether plaintiff was at time servant of defendant. Crow v. Houck's M. & A. R. Co., 212 Mo. 589, 111 SW 583. Where brakeman was caught between engine and car, he was properly allowed to show condition of buffer of car though he had not pleaded it specially, since he could show conditions at time of injury. McGuire v. Chicago, B. & Q. R. Co. [Iowa] 116 NW 801. Where bill of particulars is asked and given and no objection made to generality of complaint, evidence of facts within bill of particulars is admissible. Devine v. Alphons Custodis Chimney Const. Co., 110 NYS 119. Where loose condition of dirt around top of shaft was alleged as cause of cave in which resulted in death of employe crossing over shaft on boards placed there, proof that steam from exhaust pipe passed into shaft was admissible, as defect might have been so caused. Hollingsworth v. Davis-Daly Estates Copper Co. [Mont.] 99 P 142. Plaintiff was ordered up on timbers which had been twisted by explosion in mine and they fell with him. Held that evidence that foreman had stopped work on timbers before they had been properly wedged was within issues made by complaint. Swearingen v. Consolidated Troup Min. Co., 212 Mo. 524, 111 SW 545. Pleading setting up contributory negligence of engineer in running train at excessive speed held to warrant receiving evidence tending to show running of train round curve at dangerous speed knowingly. Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 20 Tex. Ct. Rep. 772, 107 SW 958.

**Held inadmissible:** Plaintiff not entitled to make proof that a reasonably safe method of working had been changed to a dangerous one without warning, in absence of allegation to that effect. Allen v. Western Elec. Co., 131 Ill. App. 118. No negligence as to instructions on use of machine being alleged, proof that machine was such that instruction was necessary was properly excluded. Clark v. Garrison Foundry Co., 219 Pa. 426, 68 A 974. In absence of averment that defendant was guilty of negligence in not switching by means of rope, evidence that rule was in force forbidding flying switches where rope could be used held not admissible. Chicago & E. I. R. Co. v. Walker, 137 Ill. App. 428. Where evidence did not show how operator of ripsaw was killed, or whether he was operating saw at time, proof of defect in saw table was inadmissible as too remote. Peterson v. Union Iron Works, 48 Wash. 505, 93 P 1077. In action for death of miner by fall of rock from roof, complaint containing no charge of negligence in manner of work, admission of testimony of ex-superintendent that mode of blasting was more dangerous than that used by him was reversible error. Ianne v. U. S. Gypsum Co. [N. Y.] 86 NE 809.

71. **Held admissible:** Proper working order of alleged defective appliance. Carr v. American Locomotive Co. [R. I.] 70 A 196. Mine inspector's reports showing dangerous condition of mine prior to injury by explosion. Black Diamond Coal & Min. Co. v. Price [Ky.] 108 SW 345. Evidence that superintendent did not examine rope sling which broke before using it. Doherty v. Booth, 200 Mass. 522, 86 NE 945. Where brakeman was struck by ore bin near track, evidence that it could have been placed farther away. Collins v. Mineral Point & N. R. Co., 136 Wis. 421, 117 NW 1014. Question to manager of mine as to what he had found as a result of his investigation of servant's complaint regarding incompetency of driver held proper. Lamb v. Kerrens-Donnewald Coal Co., 140 Ill. App. 195. Number of burners used could be shown on issue of care in supplying and changing them when needed. Carr v. American Locomotive Co. [R. I.] 70 A 196. Evidence that deceased was suffering from stricture which would render physical strain dangerous admissible under general issue and plea of contributory negligence, as it might show cause of injury other than defendant's negligence. Wade v. Galveston, etc., R. Co. [Tex. Civ. App.] 110 SW 84. Plaintiff, injured while oiling machine, may show platform on which he had to stand was not such as was ordinarily used and had no guards, and that master knew it was unsafe. Hollis v. Widener, 221 Pa. 72, 70 A 287. Where rock fell on miner proof that foreman had ordered another miner to have rock removed was admissible to show foreman's knowledge. Stratton Cripple Creek Min. & Development Co. v. Ellison, 42 Colo. 498, 94 P 303. Where plaintiff claimed machine by which he was injured was defective, defendant's manager was entitled to testify that machine was known as "Defiance," was considered safe, and was of highest grade. Wells v. Royal Wheel Co. [Ky.] 114 SW 737. Evidence that if shield, which had been removed from knives of machine, had been in place, plaintiff would not have been hurt by knives, and that he would have used shield had he had one, admissible

in the notes. On the issue of negligence, proof of ordinary usage or general custom is admissible,[74] except as to matters controlled by statute[75] or rules,[76] but proof of

to show absence of shield as cause of injury. Bennett v. Carolina Mfg. Co., 147 N. C. 620, 61 SE 463. Proper to prove that it was duty of mine boss to warn employes of dangerous places in mine of which he had actual or implied knowledge. Norton Coal Co. v. Hanks' Adm'r, 108 Va. 521, 62 SE 335 Conversation between section foreman and roadmaster as to condition of hand car admissible to show notice of defects by company. Landers v. Quincy, etc., R. Co. [Mo. App.] 114 SW 543. **Rules of railway company** as to duties of brakemen admissible, in action for death of brakeman while trying to frighten children off and away from oars. Wilson v. New York, etc., R. Co. [R. I.] 69 A 364. Other rules, inapplicable to facts shown, inadmissible. Id. Rule of railroad company declaring effect of sudden application or release of air brakes admissible to prove allegation that train was suddenly stopped by application of brakes, though rule was not pleaded. Galveston, etc., R. Co. v. Harper [Tex. Civ. App.] 114 SW 1168.

**Held inadmissible:** Proof of talk by men about condition of appliance. Carr v. American Locomotive Co. [R. I.] 70 A 196. Responsibility for accident question of law; immaterial who was present who "might have reason to feel any responsibility." Id. Proof that covers had been prepared for vats, into one of which plaintiff fell, immaterial, where it did not appear that vat would have been covered at time anyway. McTiernan v. American Woolen Co., 197 Mass. 238, 83 NE 673. That two men were "generally reputed" to be chief engineer and superintendent respectively of defendant's plant, incompetent; such facts were susceptible of direct proof. Knickerbocker Ice Co. v. Gray [Ind.] 84 NE 341. Proof that car inspector employed by defendant was negligent and in the habit of using intoxicants in excess inadmissible in absence of proof that he had inspected cars in question or that they had been in yards where he worked. Rio Grande So. R. Co. v. Campbell [Colo.] 96 P 986. Whether other appliances were used immaterial, conditions not being shown similar. Wyman v. Lehigh Valley R. Co. [C. C. A.] 158 F 957. Where switchman was killed when between cars to uncouple them by hand, contrary to rules, proof that an employe of little experience had seen others do the same was inadmissible without proof that company knew of and acquiesced in such acts. Powell v. Wisconsin Cent. R. Co. [C. C. A.] 159 F 864. Servant killed by electricity while trimming lamp with alleged defective hood. Proof that other hoods were defective inadmissible. Gardner v. Schenectady R. Co., 112 NYS 369.

**72. Held admissible:** Plaintiff may show abandonment of rules by habitual violation. Clay v. Chicago, etc., R. Co., 104 Minn. 1, 115 NW 949. Where conductor was injured while setting brake, proof that other brakes were out of order was admissible to show necessity for using the one he did use. Southern R. Co. v. Hardin [C. C. A.] 157 F 645. Plaintiff injured by fall of timber being carried by him and others could testify that he did not cause it to fall. Rushing v. Seaboard Air Line R. Co. [N. C.] 62 SE 890. Proof of careful habits admissible, where manner of death could not be shown by eyewitnesses. Chicago, etc., R. Co. v. Ross, 136 Ill. App. 518. Rule of company requiring employes to unite in efforts to save endangered property admissible, where brakeman was injured while trying to catch and stop runaway cars. St. Louis S.W. R. Co. v. Cleland [Tex. Civ. App.] 110 SW 122. In action for injuries to motorman caused by sliding of car on track, alleged negligence being failure to supply sand, plaintiff was properly allowed to testify whether he had ever been instructed as to necessity for having sand in pail or box on the car. Mayer v. Detroit, etc., R. Co., 152 Mich. 276, 15 Det. Leg. N. 231, 116 NW 429. The local yard custom among brakeman, upon discovering that a car coupler would not couple, as to giving the usual signal and stepping between the cars to adjust the coupler, is admissible to meet a charge of contributory negligence against a brakeman injured by stepping between a car and locomotive tender to adjust the coupling device. Schwartz v. The Lake Shore & M. So. R. Co., 11 Ohio C. C. (N. S.) 65.

**Held admissible:** Evidence of instructions to do work a certain way, given to employes other than plaintiff. Buchman v. Jeffery, 135 Wis. 448, 115 NW 372. In an action for wrongful death it is error to permit evidence to go to the jury which embodies an admission by the decedent of his own negligence. Baltimore & O. R. Co. v. Collins 10 Ohio C. C. (N. S.) 486.

**73.** Proper to ask plaintiff as to his previous knowledge of condition of appliance alleged to be defective. Carr v. American Locomotive Co. [R. I.] 70 A 196. Proof that other machines had been unloaded with cranes admissible to show that servant, killed by overturning of one he was assisting in unloading without crane, did not appreciate danger. Hamann v. Milwaukee Bridge Co., 136 Wis. 39, 116 NW 854.

**74.** Evidence of ordinary usage or custom by ordinarily prudent and intelligent persons under same circumstances is admissible where act is not per se clearly negligent or free from negligence. Chicago G. W. R. Co. v. Egan [C. C. A.] 159 F 40. Proof of usual custom of doing certain work held admissible, not to show that there was a safer way, but on issue whether danger was ordinary and assumed risk. Kennedy v. Swift & Co., 234 Ill. 606, 85 NE 287. Proof of ordinary practice and uniform custom, if any, of persons of ordinary intelligence and prudence under the same circumstances, is competent on the issue of negligence. Lake v. Shenango Furnace Co. [C. C. A.] 160 F 887. Proof that machine is of kind ordinarily used by persons engaged in same business is admissible; but proof that boys of plaintiff's age, experience and capacity are commonly employed to operate them inadmissible. Saller v. Friedman Bros. Shoe Co., 130 Mo. App. 712, 109 SW 794. Character of appliances furnished and character of those in general use in similar work may be shown. Louisville Veneer Mills Co. v. Clemonts, 33 Ky. L. R. 106, 109 SW 308.

practice by others, not shown to be general, is inadmissible.[77] All the circumstances of the injury may usually be shown,[78] and conditions existing before or after the time of accident may be shown if they throw light on the conditions at the time in question.[79] Proof of repairs or precautions taken, after an injury, to prevent other

Practice of another **railroad company with respect to testing and inspection of boilers** admissible on issue of reasonable care in what was done by defendant. Chicago G. W. R. Co. v. McDonough [C. C. A.] 161 F 657. Though custom of other companies **in constructing tracks** would not excuse negligence of defendant, proof of customary construction was admissible on issue of negligence in the particular case. Hall v. Chicago, etc., R. Co. [Iowa] 116 NW 113. Evidence of customary usage of well managed railroad companies relative to **maintenance of right of way** admissible (brakeman on side of car struck by post), but not conclusive on question of due care. Wilson v. New York, etc., R. Co. [R. I.] 69 A 364. Testimony by car inspector of 25 years as to proper and customary way of making such **inspection** admissible. Missouri K. & T. R. Co. v. Blachley [Tex. Civ. App.] 109 SW 995. Evidence admissible to show general custom to make no **inspection** of trolley poles other than that made by linemen and repair crew. Lynch v. Saginaw Valley Trac. Co. [Mich.] 15 Det. Leg. N. 444, 116 NW 983. Evidence of number of men customarily employed **to unload timber** from cars, such as was being unloaded when plaintiff was injured, admissible. Alabama Great So. R. Co. v. Vail [Ala.] 46 S 587. Evidence that it was customary **to turn on electric current** only after all **construction work** was completed is admissible. Commonwealth Elec. Co. v. Rooney, 138 Ill. App. 275. Proof of custom **to guard stairway openings in buildings in course of construction** admissible. Leine v. Kellerman Cont. Co. [Mo. App.] 114 SW 1147. Proof that it was customary to use short handled axes in **unloading logs** was admissible but not conclusive on issue whether it was negligence to require such ax to be used on occasion in question. Brown v. Musser-Sauntry Land, Logging & Mfg. Co., 104 Minn. 156, 116 NW 218. Method commonly used in community **to sustain dirt and rock around mouth of abandoned shaft** admissible. Hollingsworth v. Davis-Daly Estates Copper Co. [Mont.] 99 P 142. Evidence of other methods used **to load trucks** on cars, and that they were safer than that used by defendant, admissible. Robinson v. St. Louis & S. F. R. Co. [Mo. App.] 112 SW 730. Proof of **proper way to timber upraise in mine** to make it reasonably safe admissible, where evidence showed that master had knowledge of unsafe condition, rock having previously fallen and places having been retimbered. Hotchkiss Mt. Min. & Reduction Co. v. Bruner, 42 Colo. 305, 94 P 331.

**75.** Where injury caused by girl's hair being caught on shaft occurred in Connecticut, evidence as to custom of guarding such shafts in New York City, where matter was controlled by statute, was inadmissible. Civetti v. American Hatters' & Furriers' Corp., 124 App. Div. 345, 108 NYS 663.

**76.** Where rules of company denied to freight conductors power to employ help, proof of custom of other roads to contrary was inadmissible in action by one hired by conductor to assist in unloading freight. Taylor v. Baltimore & O. R. Co., 108 Va. 817, 62 SE 798.

**77.** Proof of how some other company operated traction or sprocket motors inadmissible on issue of negligent operation by defendant; proof should be of general custom. Clinchfield Coal Co. v. Wheeler's Adm'r, 108 Va. 448, 62 SE 269. Proof of general custom of handling rails would be admissible; how a certain company handled them inadmissible. Texas Cent. R. Co. v. Waldie [Tex. Civ. App.] 18 Tex. Ct. Rep. 60, 101 SW 517.

**78.** Plaintiff injured while cleaning out chute in sawmill could show surrounding conditions. Cook v. Pittock & Leadbetter Lumber Co. [Wash.] 98 P 1130. All circumstances surrounding brakeman when injured while trying to catch and stop runaway cars could be shown. St. Louis S. W. R. Co. v. Cleland [Tex. Civ. App.] 110 SW 122. Fireman killed by train running into open switch. Proof that headlight was oil burner, that there was no proper switch light, and of relative brightness of electric and oil headlights, etc., admissible. Missouri K. & T. R. Co. v. McDuffey [Tex. Civ. App.] 109 SW 1104. That several miners were killed by explosion that killed plaintiff's intestate admissible. Sterns Coal Co. v. Evans' Adm'r, 33 Ky. L. R. 755, 111 SW 308. Proof that another miner was found dead near intestate, for whose death by suffocation in mine action was brought, was admissible. Alabama Consol. Coal & Iron Co. v. Heald [Ala.] 45 S 686. Where servant was killed by rock thrown by blast, proof that missiles were thrown against buildings and into streets was admissible on issue of negligence of master and conduct of employe. Knight v. Donnelly Bros., 131 Mo. App. 152, 110 SW 687.

**79.** Evidence as to condition of alleged defective machine should be confined to time of injury. Wells v. Royer Wheel Co. [Ky.] 114 SW 737. Condition of appliance before accident may be shown on issue of negligence in not repairing it. Carr v. American Locomotive Co. [R. I.] 70 A 196. Evidence of condition of track in November admissible where accident occurred in June, evidene showing no change had been made. Sprague v. Wisconsin Cent. R. Co., 104 Minn. 58, 116 NW 104. Evidence as to condition of machine which injured plaintiff, two months after accident, admissible, it appearing that repairs made had not changed its operation. Clemens v. Gem Fibre Package Co. [Mich.] 15 Det. Leg. N. 574, 117 NW 187. Reversible error in action by employe who entered door and fell down elevator shaft to exclude evidence of conditions as to light near place at later time, conditions being substantially same as at time of injury, on issue of contributory negligence. Larrabee v. McGuinness [C. C. A.] 165 F 169. Conditions existing about machine at time of injury may be shown. Whiteley Malleable Castings Co. v. Wishon [Ind. App.] 85 NE 832. Where foreman in mine testified to

accidents, is incompetent to show negligence,[80] but evidence of this kind is sometimes admitted on other issues.[81] Proof of the occurrence of previous similar accidents is admissible to charge the master with notice,[82] conditions being substantially the same.[83] Proof of subsequent accidents is usually inadmissible.[84] There is a conflict as to the admissibility of evidence that no similar accident had previously occurred.[85] Evidence to show that an appliance could have been guarded is admissible.[86]

having inspected stake, other miners were properly allowed to state that they had seen about the same time, a crack behind the rock which fell on plaintiff. Stratton Cripple Creek Min. & Development Co. v. Ellison, 42 Colo. 498, 94 P 303. Proof of actual condition of boiler tubes or flues after explosion admissible though it incidentally showed the removal of the tubes, the court having limited the evidence by its charge to the condition of the flues. Chicago G. W. R. Co. v. McDonough [C. C. A.] 161 F 657. Proof that alleged defective appliances were used two or three days after accident in same condition and under same circumstances, and that they worked perfectly, admissible. Hoseth v. Preston Mill Co. [Wash.] 96 P 423. Where defendant denied that place where plaintiff was hurt was passageway, proof that after accident it was made wider and better was admissible, not to show negligence but to prove that it was a passageway. Gustafson v. A. J. West Lumber Co. [Wash.] 97 P 1094. Where mine driver was injured by fall of rock from roof, proof of condition of roof for 3 or 4 days before was proper, though rock had fallen on day previous; such proof tendered to show dangerous condition at time. McCarthy v. Spring Valley Coal Co., 232 Ill. 473, 83 NE 957. Proper to show condition of spikes on railway track where plaintiff was hurt morning after accident by tripping on spike. Louisville & N. R. Co. v. Lowe [Ala.] 48 S 99. Photographs of appliance after change was made **inadmissible.** Carr v. American Locomotive Co. [R. I.] 70 A 196. Proof of conditions and method of work in mine under prior superintendent inadmissible without showing that conditions were same at time of accident. Ianne v. U. S. Gypsum Co., 110 NYS 496.

**80.** Proof that, after accident, master repaired machinery, changed method, or used more men, inadmissible, because to receive such evidence would deter master from improving machinery or methods. Lake v. Shenango Furnace Co. [C. C. A.] 160 F 887. Making of repairs or alterations immediately after accident inadmissible. Lay v. Elk Ridge Coal & Coke Co. [W. Va.] 61 SE 156. Where window was broken, and plaintiff injured, proof that thereafter new beading of different kind was put on to hold glass was inadmissible to show negligence. Stewart & Co. v. Harman [Md.] 70 A 333. Proof of repairs on hand car before and after accident inadmissible. Landers v. Quincy, etc., R. Co. [Mo. App.] 114 SW 543. Admission of proof of repairs just after accident reversible error. Schultz v. Barber Asphalt Paving Co., 111 NYS 281. Admission of evidence that tipple on hoisting apparatus was put in plumb 3 weeks after injury was not cured by instruction that there could be no recovery unless tipple was out of plumb at time of injury. Stonington Coal Co. v. Young, 137 Ill. App. 462. Proof that water pipes were placed in mine after death of miner inadmissible. Alabama Consol. Coal & Iron Co. v. Heald [Ala.] 45 S 686.

**81.** That shaft was smoothed off after injury caused by cloth getting caught on its burred end held admissible to show condition at time of injury (by divided court). Plunkett v. Clearwater Bleachery & Mfg. Co. [S. C.] 61 SE 431. After photographe, taken after shaft had been changed, had been introduced, evidence to show shaft in different condition from what it was at time of injury was admissible. Id. Directions given by superintendent as to mode of work, after an accident, admissible in so far as descriptive of method in use at time. Bartley v. Boston & N. St. R. Co., 198 Mass. 163, 83 NE 1093.

**82.** Evidence that dummy elevator and weights had fallen down shaft on prior occasions admissible. Winkle v. George B. Peck Dry Goods Co., 132 Mo. App. 656, 112 SW 1026. Proof of previous bursting of boiler tubes or flues admissible to show notice to master of length of time they could be used with reasonable safety, and to show necessity of inspection and repairs. Chicago G. W. R. Co. v. McDonough [C. C. A.] 161 F 657. Proof that electric fan outside mine used to ventilate was frequently out of order prior to time of explosion of coal dust in mine admissible to show knowledge by company of defect and dangerous condition of mine. Sterns Coal Co. v. Evans' Adm'r, 33 Ky. L. R. 755, 111 SW 308. Proof of similar accident shortly before one in question admissible to show knowledge of conditions in mine by defendant. Hotchkiss Mt. Min. & Reduction Co. v. Bruner, 42 Colo. 305, 94 P 331.

**83.** Proof of previous accidents is admissible to show the actual condition of the instrumentality when conditions are substantially similar to those in issue. Exact similarity not essential. Chicago G. W. R. Co. v. McDonough [C. C. A.] 161 F 657.

**84.** In action for injuries caused by mine explosion, proof of explosions subsequent to time of injury was inadmissible. Black Diamond Coal & Min. Co. v. Price, 33 Ky. L. R. 334, 108 SW 345. Where derailment of train was alleged to have been caused by spike negligently left on rail by service crew, evidence of attempt to wreck a train at another point three weeks later inadmissible because throwing no light on cause of former wreck. Millen & S. W. R. Co. v. Allen, 130 Ga. 656, 61 SE 541.

**85.** Fact that no previous similar accident had ever occurred held entitled to great weight, where danger of accident which did occur was not obvious. King v. Reid, 124 App. Div. 121, 108 NYS 615. Evidence that experienced brick makers had never known of a similar previous accident occurring held inadmissible. Forquer v. Slater Brick Co., 37 Mont. 426, 97 P 843. Where defective hand-car was alleged as

To show incompetency of a servant, and knowledge of it by the master, the servant's physical condition,[87] prior incompetency,[88] his general reputation as careless and incompetent,[89] and prior specific acts tending to show incompetency,[90] may be shown. Proof of the reputation of a servant as careful and prudent is inadmissible where the action is based on a particular negligent act.[91] The fact that defendant carries casualty insurance is of course immaterial, and attempts to get the fact before the jury are usually held reversible error.[92]

*Questions of law and fact.*[93]—Negligence, contributory negligence, assumption of risk, and proximate cause, are usually questions of fact to be submitted to the jury [94]

cause of injury by being thrown off when it jumped the track, the fact that it had not jumped the track, and that no accident had occurred in several months' previous use, was to be considered by jury, but was not complete defense to action. Missouri, K. & T. R. Co. v. Wilhoit [C. C. A.] 160 F 440.

86. Where injuries were alleged to have been caused by unguarded saw, proof that another similar saw in mill was guarded was admissible. Poozerwinski v. C. A. Smith Lumber Co., 105 Minn. 305, 117 NW 486. Proper to allow witness, familiar with work, to testify how flap door could be placed over steam vat, though he had worked only 3 days. Dix v. Union Ice Co. [N. J. Law] 68 A 1101. Evidence to show practicability of guarding steam vats into which plaintiff fell admissible, factory being within statute. Id. Proof that other emery wheels in defendant's plant were guarded competent to show that wheel in question could have been guarded. Kerr v. National Fulton Brass Mfg. Co. [Mich.] 15 Det. Leg. N. 985, 118 NW 925.

87. Proof that servant suffered from epileptic fits was admissible on issue of his incompetency, since such disease would tend to weaken him mentally. Tucker v. Missouri & K. Tel. Co., 132 Mo. App. 418, 112 SW 6.

88. Proof of incompetency of servant year before admissible on issue of negligence in retaining him in service. El Paso & S. W. R. Co. v. Smith [Tex. Civ. App.] 108 SW 988.

89. Proof of general reputation of employe among his fellow workman as careless and incompetent man held admissible. Kansas City Consol. Smelting & Refining Co. v. Taylor [Tex. Civ. App.] 107 SW 889. A servant's general reputation of incompetency is admissible for the purpose of charging the master with knowledge of his incompetency in employing or retaining him. El Paso & S. W. R. Co. v. Smith [Tex. Civ. App.] 108 SW 988.

90. Prior specific acte of negligence by alleged incompetent servant may be proved. Tucker v. Missouri & K. Tel. Co., 132 Mo. App. 418, 112 SW 6. Former negligent acts of engineer provable to show notice to superintendent of incompetency of engineer. McCalls Ferry Power Co. v. Price [Md.] 69 A 832. Evidence of incompetency of servant as to particluar business requiring skill may be deduced from circumstance disconnected with cause of action. Where service to be performed is of same nature or requires like skill as that from absence of which it is claimed plaintiff was injured. Merchants' & Miners' Transp. Co. v. Corcoran [Ga. App.] 62 SE 130.

91. Where action was based on negligent act of engineer in making violent coupling proof of reputation of engineer as careful and prudent inadmissible. Ft. Worth & R. G. R. Co. v. Finley [Tex. Civ. App.] 110 SW 531.

92. Attempts to show directly or indirectly that defendant is insured in a casualty company will result in reversal. Lenahan v. Pittston Coal Min. Co., 221 Pa. 626, 70 A 884. Reversible error for counsel to inquire as to casualty insurance after objection had been once sustained. Kerr v. National Fulton Brass Mfg. Co. [Mich.] 15 Det. Leg. N. 985, 118 NW 925. Reversible error for counsel in argument to refer to fact that defendant carried insurance. Hollis v. U. S. Glass Co., 220 Pa. 49, 69 A 55. Reference to casualty insurance company as defending case calculated to be prejudicial to defendant. St. Jean v. Lippitt Woolen Co. [R. I.] 69 A 604. Improper to refer to attorney for defendant as attorney for certain insurance company in question to witness. McCarthy v. Spring Valley Coal Co., 232 Ill. 473, 83 NE 957.

93. See 10 C. L. 796. See, also, ante, §§ 3A to 3G.

94. Hoff v. Japanese American Fish & Fertilizer Co., 48 Wash. 581, 94 P 109. When different conditions may reasonably be drawn from evidence, **question of negligence** is for jury. Wilson v. New York Cont. Co., 113 NYS 349; Mahoning Ore & Steel Co. v. Blomfelt [C. C. A.] 163 F 827; O'Connor v. Armour Packing Co. [C. C. A.] 158 F 241. Negligence is not for court but for jury where facts, though undisputed, admit of more than one reasonable conclusion. Sans Bois Coal Co. v. Janeway [Okl.] 99 P 153; Worth Bros. Co. v. Kallas [C. C. A.] 162 F 306; Carlson v. Cucamonga Water Co., 7 Cal. App. 382, 94 P 399. Only question for court is whether there is evidence tending to show negligence as proximate cause of injury; sufficiency of evidence is for jury. Manning v. Portland Steel Ship Bldg. Co. [Or.] 96 P 545. **Assumption of risk** for jury unless facts undisputed and admit of but one reasonable conclusion. St. Louis, etc., R. Co. v. Hawkins [Ark.] 115 SW 175. **Contributory negligence** is question for jury and cannot arise where court has decided as matter of law that plaintiff assumed the risk. St. Louis & S. F. R. Co. v. Mathis [Tex.] 20 Tex. Ct. Rep. 481, 107 SW 530. The question of **proximate cause** is for jury if facts are disputed and of such character that more than one reasonable conclusion could be drawn therefrom; it is for court if facts are not in dispute and are such as to admit of but one conclusion. Teis v. Smuggler Min. Co. [C. C. A.] 158 F 260.

**Case for jury** where evidence did not conclusively show contributory negligence or assumption of risk. Rippy v. Southern R.

whose finding is conclusive,[illegible] unless the evidence is conclusive or the facts undisputed and such as to permit but one reasonable conclusion to be drawn therefrom.[illegible] Some statutes expressly provide that contributory negligence and assumption of risk shall be questions of fact.[illegible] Such a statute does not change the rule that the legal sufficiency of evidence is for the court.[illegible]

§ 3H. 1. *Instructions.* See [illegible]—Only a few illustrative holdings are here given, the general rules as to instructions being fully treated elsewhere.[illegible] The instructions should submit all issues raised by the pleadings and evidence,[illegible] but not [illegible]

[illegible] Whether servant was negligent or assumed risk while working in trench while loaded blast was being taken out being killed by explosion. [illegible] Contributory negligence assumption of risk for jury where [illegible] operating saw was struck [illegible] American Lumber Co. v. [illegible] Error to direct verdict for defendant on ground that servant knew defect in appliance which broke when evidence was conflicting as to which of two appliances broke and caused the injury. [illegible] Delaware L. & W. R. Co. [illegible] When plaintiff's evidence tends to prove a complete prima facie case it is error to direct a verdict for defendant. [illegible] Chicago [illegible] Whether cable used in quarry was defective whether inspection was proper and whether plaintiff knew its condition. Williams v. Norton Bros. [illegible] Testimony conflicting negligence and contributory negligence for jury plaintiff injured by moving of crane on which he was working. Hamilton v. [illegible] The question of carelessness and incompetency of coemploye and the knowledge of same by employer whether place was a reasonably safe one and whether reasonably safe avenues of escape were provided questions for the jury. Illinois [illegible] Co. v. Paige [illegible] App. [illegible] Plaintiff injured by getting finger caught in cogs while oiling machinery. Held under evidence whether danger was obvious to one of plaintiff's capacity whether he used due care whether there was failure to properly guard machinery or to warn and instruct plaintiff were questions for jury. Higgins v. Peninsular Portland Cement Co. [illegible] Mich. [illegible] Det. Leg. N. [illegible]

[illegible] Whether defendant was negligent in particulars charged in declaration held purely question of fact dependent on evidence not reviewable on appeal. Luckowitz v. Eagle Brew. Co. [illegible] A verdict of the jury approved by the trial and appellate courts settled the disputed questions of fact. Brakeman falling in effort to get on watertank car the side-rod giving way. [illegible] Paso & S. W. R. Co. v. Vizard [illegible]

[illegible] Boehrens v. Brice [illegible] Chesapeake & O. R. Co. v. Hoffman [illegible] Assumption of risk and existence of fellow-servant relation are questions of law only when facts are conceded and such as to admit of but one reasonable conclusion. [illegible] Where facts are clear and susceptible of but one construction whether duty to warn existed is for court. Brownwood Co. Mill v. Stubblefield [illegible]

[illegible] Laws [illegible] § 2 specifically provides that whether servant assumed risk or was guilty of contributory negligence in remaining in employment shall be questions of fact for the jury subject to the usual power of the court to set aside verdicts as contrary to the evidence. Clark v. New York [illegible] Court had no power to set aside verdict on question of law on ground that decedent assumed risk of defective coupler and consequent [illegible] Laws [illegible] making railroad companies liable for defects in equipment and negligence of employes and providing that court shall submit to jury questions of negligence and contributory negligence is valid. Kiley v. Chicago [illegible] Co. [illegible]

[illegible] Laws [illegible] railroad employes liability act providing that questions of negligence and contributory negligence shall be submitted to the jury does not change rule that legal sufficiency of evidence is question of law for court and that there is no question for the jury until the court determines that evidence tends to raise such issues. Haring v. Great Northern R. Co. [illegible] Kiley v. Chicago [illegible]

[illegible] See Instructions [illegible]

1. Pleading held to warrant charge on contributory negligence. Kansas City Consol. Smelting & Refining Co. v. Taylor [illegible] Instructions warranting recovery for negligence of foreman and fellow-servant under statute and for unsafe appliances warranted by petition. [illegible] Evidence held to require submission of issue of contributory negligence where plaintiff was injured by slipping on scantling on which he was resting while oiling machine. Brownwood Co. Mill v. Stubblefield [illegible] Instructions on charge of negligence examined and held sufficient on point of due care on part of plaintiff negativing defense of assumed risk. Chicago [illegible] Co. v. Redfearn [illegible] Error to instruct that New York employers liability law had no application when complaint was expressly drawn under it and answer admitted giving of notice required by it. Wyman v. Lehigh Valley R. Co. [illegible] Where injury was caused by explosion of gas on launch and defendant pleaded contributory negligence and evidence raised the issue, it was error to fail to submit it to jury. Elder Dempster & Co. v. Mengo [illegible]

**Ignoring issues.** Instruction authorizing recovery without reference to contribu-

sues not so raised.[2] Instructions should be consistent,[3] clear,[4] and concrete.[5] They should be applicable to the evidence,[6] should not invade the province of the jury,[7] or

tory negligence or assumption of risk properly refused. Wade v. Galveston, etc., R. Co. [Tex. Civ. App.] 110 SW 84. Instruction warranting recovery without proof that plaintiff was defendant's employe, as alleged erroneous. Crow v. Houck's Missouri & A. R. Co., 212 Mo. 589, 111 SW 583; Gould v. Aurora, Elgin & Chicago R. Co., 141 Ill. App. 344. Instructions ignoring assumption of risk erroneous. Lake St. El. R. Co. v. Fitzgerald, 136 Ill. App. 281. In absence of averment that plaintiff had not assumed risk, it was error to give instruction authorizing recovery on ground of defendant's negligence, where there was evidence of assumption of risk. Chicago & Eastern Illinois R. Co. v. Walker, 137 Ill. App. 428. "If the jury find from the evidence that the plaintiff has made out his case by a preponderance of the evidence as alleged in his declaration that the jury should find the defendant guilty," held erroneous because ignoring assumption of risk. Pullman Co. v. Praybla, 136 Ill. App. 303. Instruction that if defendant negligently failed to furnish reasonably safe appliances or reasonably safe place to work, and if such negligence was primary cause of injury finding should be for plaintiff, held erroneous in omitting to state that plaintiff must not know of defect, or had no equal means of knowledge with defendant. Stonington Coal Co. v. Young, 137 Ill. App. 462. Instruction peremptorily charging jury to find for plaintiff if they should find defendant guilty of negligence as charged in the declaration is not erroneous as ignoring doctrine of assumed risk where declaration by implication negatives it. Corn Product Refining Co. v. Cherry, 140 Ill. App. 1. Where an action on behalf of a minor, brought on account of injuries received in a machine which he was feeding, is tried on the theory that the defendant failed to instruct the plaintiff as to the extra hazard arising from a change in the material which he was feeding into the machine, the charge of court is not erroneous because of the omission in the paragraph defining ordinary care to refer to the age of the plaintiff, if it appear from the charge taken as a whole that the jury were not misled thereby. Box & Label Co. v. Caine, 11 Ohio C. C. (N. S.) 81. The elimination in the charge to the jury of the acts of the operatives of the moving engine as the proximate cause of the accident was error, as was also failure to instruct on the rule with reference to the contemplation of consequences in determining the question of proximate cause. Harmon v. McGuire, 6 Ohio N. P. (N. S.) 597.

2. Charge submitting issues not made by evidence held erroneous. Davis' Adm'x v. Rutland R. Co. [Vt.] 71 A 724. Error to submit ground of negligence not sustained by evidence. Galveston, etc., R. Co. v. Garven [Tex. Civ. App.] 109 SW 436. Instruction held not objectionable as authorizing recovery on grounds not pleaded. Texas & N. O. R. Co. v. Davidson [Tex. Civ. App.] 30 Tex. Ct. Rep. 643, 107 SW 949. Unless there is evidence tending to support it, an instruction should be refused. Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 Law. Ed. 703. Instruction held not to submit competency of engineer but question whether he was exercising due care at time. Texas & P. R. Co. v. Jowers [Tex. Civ. App.] 110 SW 945. Evidence held not to raise question of insufficient number of men to do work but of negligence of foreman in giving untimely order. Wade v. Galveston, etc., R. Co. [Tex. Civ. App.] 110 SW 484. In an action for damages for personal injuries, where the defendant has disclaimed any defense of contributory negligence, a charge of court as to the burden of proving on the part of a plaintiff is misleading, and, taken in connection with a misstatement of the plaintiff's age as thirteen or fourteen, when he would have been sixteen on his next birthday, constitutes reversible error. Queen City Box Co. v. Duffy, 11 Ohio C. C. (N. S.) 69.

3. Judgment reversed for conflict in instructions as to rules, one being erroneous, and requested charge, which was correct, being refused. Van Alstine v. Standard L., H. & P. Co., 112 NYS 416.

4. In action for injuries to motorman, reference to passengers held not to make instructions misleading as to care owed motorman. Mayor v. Detroit, etc., R. Co., 152 Mich. 276, 15 Det. Leg. N. 231, 116 NW 429.

5. Charge erroneous which gave only abstract law and failed to submit fact or facts on which finding of negligence could be based. Clancy v. New York, etc., R. Co., 112 NYS 541.

6. Instruction held inapplicable to evidence. Ft. Worth & R. G. R. Co. v. Wilkinson [Tex. Civ. App.] 110 SW 470. Instructions properly refused as inapplicable to evidence. Riley v. Rutland R. Co., 80 Vt. 536, 68 A 713. Instruction on negligence of fellow-servant properly refused as inapplicable to evidence. El Paso & S. W. R. Co. v. Smith [Tex. Civ. App.] 108 SW 988. Instruction erroneous because not accurately submitting negligence relied on. Illinois Cent. R. Co. v. Tandy, 32 Ky. L. R. 962, 107 SW 715. Instruction erroneous which submitted to jury question whether plaintiff had been expressly forbidden to use machine, and requiring them to find specific direction to use it, to warrant finding of negligence in failing to warn him, the evidence not warranting such instructions. Marklewitz v. Olds Motor Works, 152 Mich. 113, 15 Det. Leg. N. 125, 115 NW 999. Instruction that "if jury believe from the evidence" that trainmen disregarded rules of company confines them to rules shown in evidence. Louisville & N. R. Co. v. Schroader [Ky.] 113 SW 874.

7. Instructions not applicable to facts, and infringing on province of jury properly refused. Alabama G. S. R. Co. v. McWhorter [Ala.] 47 S 84. Error to assume in charge that running train at certain speed was negligence. Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 30 Tex. Ct. Rep. 772, 107 SW 958. An instruction that assumes that certain facts therein recited did not constitute contributory negligence is erroneous. Conklin Const. Co. v. Walsh, 131 Ill. App. 609. Jury should consider all the circumstances in determining how accident occurred; error to instruct them to disregard certain evidence though it would not alone sustain charge of negligence. Mitchell v. Boston

assume as true facts which are controverted,[8] or omit reference to certain essential facts,[9] or unduly emphasize certain phases of the evidence.[10] Decisions as to particular instructions as to the duties of the master,[11] and as to the defenses of assumption of risk,[12] contributory negligence,[13] and the fellow-servant defense,[14] and the burden of proof,[15] are given in the note.

& M. Consol. Copper & Silver Min. Co., 37 Mont. 575, 97 P 1038.

8. Instruction assuming certain facts as to plaintiff's orders erroneous, evidence being conflicting. Southern R. Co. v. Limback [Ind.] 85 NE 354.

9. A charge which authorizes the jury to return a verdict for the plaintiff, in the event they find that certain facts are true, is erroneous when the essential fact constituting the negligence is omitted. The Herancourt Brewing Co. v. Frank, 11 Ohio C. C. (N. S.) 505.

10. Instructions, each singling out one branch of the case and stating that "if defendant was otherwise without fault," are objectionable as calculated to mislead. Village of Montgomery v. Robertson, 132 Ill. App. 362.

11. Instructions as to master's duty with reference to place and appliances and number of men approved. Trumbo's Adm'x v. Gaines & Co., 33 Ky. L. R. 415, 109 SW 1188. Instruction on duty to inspect cars not erroneous. St. Louis, etc., R. Co. v. Holmes [Ark.] 114 SW 221. Jury correctly charged with reference to duty of defendant to furnish lug hooks to carry lumber with. Rushing v. Seaboard Air Line R. Co. [N. C.] 62 SE 890. Instructions on master's duty with respect to place of work, platform, not erroneous. Louisville & N. R. Co. v. Carter [Ky.] 113 SW 904. Instruction held not objectionable as making it defendant's absolute duty to furnish fireman reasonably safe engine. Taylor v. White [Tex. Civ. App.] 113 SW 554. Instruction on care required of superintendent in selecting materials for scaffold erroneous because disregarding evidence that decedent supervised construction. Murch Bros. Const. Co. v. Hays [Ark.] 114 SW 697. Error to charge on law as to place of work and "ways, works and means," under statute, where accident was due to falling of brick wall in course of construction by injured employe. Ripp v. Fuchs, 113 NYS 861. Instruction that it was duty of master to "exercise ordinary care to furnish plaintiff with safe appliances," etc., held not erroneous for omission of "reasonably" before word "safe," effect being same. Rudquist v. Empire Lumber Co., 104 Minn. 505, 116 NW 1019. Instruction that it is "duty of master" to furnish reasonably safe place of work not erroneous; need not state that master must use ordinary care to furnish reasonably safe place; substance, not form, is important. Poczerwinski v. Smith Lumber Co., 105 Minn. 305, 117 NW 486. Negligence in mode of mining, and failure to timber stope, being relied on, instructions permitting defendant to establish a custom of mining which made timbering impossible were erroneous. Stratton Cripple Creek Min. & Development Co. v. Ellison, 42 Colo. 498, 94 P 303. Instruction on failure to warn child, operating dangerous machine, erroneous because not requiring such negligence to be found proximate cause of injury. Hillsboro Cotton Mills v. King [Tex. Civ. App.] 109 SW 484. Where pile of lumber fell with plaintiff, who followed foreman upon it, instruction that if foreman "exercise care of reasonably prudent man in ascertaining that lumber was improperly piled and acted as promptly as was demanded of reasonably prudent man in notifying plaintiff of danger," he was not negligent, should have been given. Bryant Lumber Co. v. Stastney [Ark.] 112 SW 740.

12. Charge approved. Missouri K. & T. R. Co. v. Romans [Tex. Civ. App.] 114 SW 157; Aga v. Harbach [Iowa] 117 NW 669. Instruction on assumption of risks by switchman, injured by defective car stirrup, approved. El Paso & S. W. R. Co. v. O'Keefe [Tex. Civ. App.] 110 SW 1002. Instructions on assumption of risk approved; those requested properly refused. Texas & N. O. R. Co. v. Barwick [Tex. Civ. App.] 110 SW 953. Instructions on assumption of risk of gas explosion by miner sufficient. Western Coal & Min. Co. v. Buchanan [Ark.] 114 SW 694. Instruction on assumption of risk by lineman of pole falling with him sufficient; request properly refused as placing on him too great burden of care in inspection. Southwestern Tel. & T. Co. v. Tucker [Tex. Civ. App.] 110 SW 481. Instruction held correct as substantially stating doctrine that negligence of master is not assumed unless risk is or ought to have been known. Atchison, etc., R. Co. v. Mills [Tex. Civ. App.] 108 SW 480. Assumption of risk arising from darkness of room where plaintiff was operating machine held properly submitted. Schow v. McCloskey [Tex.] 113 SW 739. Instruction held to sufficiently negative plaintiff's knowledge of defect by reference to special plea setting it up. Louisville & N. R. Co. v. Lile [Ala.] 45 S 699. Instruction on assumption of risk of danger from known condition held not erroneous. Hall v. Northwestern R. Co. [S. C.] 62 SE 848. Instruction on assumption of risk not erroneous. Mayer v. Detroit, etc., R. Co., 152 Mich. 276, 15 Det. Leg. N. 231, 116 NW 429. Instruction on assumption of risk criticised but held not reversible error when charge was considered as whole. Maxson v. Case Threshing Mach. Co. [Neb.] 116 NW 281. Instruction on assumption of risk, that master and servant are not on equal footing, etc., criticised but held not reversible error. Hoseth v. Preston Mill Co. [Wash.] 96 P 423. Instruction on assumption of risk by switchman erroneous. Texas & P. R. Co. v. Jowers [Tex. Civ. App.] 110 SW 946. Instruction on assumption of risk, ignoring fact that plaintiff was doing work in customary manner, properly refused. Kansas City Consol. Smelting & Refining Co. v. Taylor [Tex. Civ. App.] 107 SW 889.

13. Charge approved. Trumbo's Adm'x v. Gaines & Co., 33 Ky. L. R. 415, 109 SW 1188. Instruction on contributory negligence of section hand struck by train approved. International, etc., R. Co. v. Aleman [Tex. Civ. App.] 115 SW 73. Instruction on contributory negligence grouping facts set up and proved by defendant proper. Louisville & N. R. Co. v. King's Adm'r [Ky.] 115 SW 196.

(§ 3H) 6. *Verdicts and findings.* See 10 C. L. 803—A verdict against the master may be sustained though the jury finds in favor of a servant also charged with negligence.[16] A general verdict cannot be sustained unless special questions are also answered.[17] Special findings must be consistent.[18] In Wisconsin, where assumption of risk is held a species of contributory negligence, these questions need be separately submitted only when such submission is requested,[19] unless the jury could find different answers which would be consistent.[20] Otherwise they may be grouped by the charge under a question in the special verdict relative to contributory negligence.[21]

§ 4. *Liability for injuries to third persons. A. In general.* See 10 C. L. 803—The master is liable for acts of his servant within the scope of his employment, while engaged in the business of the master,[22] though the servant exceeds his actual authority [23]

Instruction on contributory negligence approved in case where inexperienced section hand was injured in unloading gravel from car in dangerous way under direction of foreman. Gulf, etc., R. Co. v. Jackson [Tex. Civ. App.] 109 SW 478. Instruction on contributory negligence approved in case where switchman was crushed between car and post. Cunningham v. Neal [Tex. Civ. App.] 109 SW 455. Instructions on contributory negligence approved in action by switchman for injuries. Texas & N. O. R. Co. v. Davidson [Tex. Civ. App.] 20 Tex. Ct. Rep. 643, 107 SW 949. Instruction on "ordinary care" required of employe held not erroneous. Atlanta, K. & N. R. Co. v. Tilson [Ga.] 62 SE 281. Instruction on contributory negligence as applied to facts approved. Avery v. West Lumber Co., 146 N. C. 592, 60 SE 646. An instruction that if the jury believed from the evidence that the plaintiff exercised ordinary care, as correctly defined in the instruction, they should so find, is not obnoxious. Commonwealth Elec. Co. v. Rooney, 138 Ill. App. 275. Instruction on contributory negligence not erroneous as omitting reference to necessity of its contributing to injury, in view of entire charge and question as submitted to jury. Buchman v. Jeffery, 135 Wis. 448, 115 NW 372. Instructions on contributory negligence criticised in case where brakeman was thrown from engine pilot where he was riding. El Dorado & B. R. Co. v. Whatter [Ark.] 114 SW 234. Error to refuse charge on contributory negligence grouping facts relating to plaintiff's conduct. Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 20 Tex. Ct. Rep. 772, 107 SW 958. Instruction on contributory negligence erroneous because unduly emphasizing certain facts and ignoring others. Gibler v. Quincy, etc., R. Co., 129 Mo. App. 93, 107 SW 1021. Instruction on contributory negligence erroneous because requiring defendant to prove such negligence as proximate cause of injury, since recovery would be defeated if plaintiff's negligence proximately contributed to injury. Hillsboro Cotton Mills v. King [Tex. Civ. App.] 109 SW 484. Instruction on "last clear chance" doctrine erroneous, being inapplicable to facts. Missouri Pac. R. Co. v. Bentley [Kan.] 96 P 800. Instruction on contributory negligence not erroneous in case where conductor was injured in stepping from moving train. Missouri K. & T. R. Co. v. Kennedy [Tex. Civ. App.] 112 SW 339.

**14.** Charge erroneous which authorized recovery for negligence of one conceded on trial to be plaintiff's fellow-servant. Boyle v. McNulty Bros., 113 NYS 240. Instruction on concurrent negligence of fellow-servant warranted where defendant brought out on cross-examination fact that fellow-servant came in contact with plaintiff at time of his injury. Ft. Worth & D. C. R. Co. v. Monell [Tex. Civ. App.] 110 SW 504. Instruction on assumption of risk of negligence of fellow-servants held not misleading. Cheek v. Seaboard Air Line R. Co. [S. C.] 62 SE 402.

**15.** Instruction on burden of proof not erroneous. Holland v. Durham Coal & Coke Co. [Ga.] 63 SE 290. Instruction on burden of proof on contributory negligence should make it clear that all the evidence, including plaintiff's, may be considered. Suderman & Dolson v. Kriger [Tex. Civ. App.] 109 SW 373. Instruction that "under law it is the duty of master to furnish and provide reasonably safe machinery, tools and appliances in and about the work to be performed by servant," held incorrect. Ragsdale v. Illinois Cent. R. Co., 140 Ill. App. 71. Plaintiff injured by reason of fall of derrick being moved. Instruction to find for defendant "if you find that three guy lines were sufficient to make the moving of the derrick reasonably safe, and you find that five men were sufficient," etc., erroneous as placing on defendant burden of showing method used reasonably safe. Ryan v. Farley & Loetscher Mfg. Co. [Iowa] 119 NW 86.

**16.** Where defendant, railroad conductor, was charged with negligence in failing to warn brakeman of proximity of freight platform, and company was charged with negligence in maintaining such platform, failure of jury to find against conductor did not entitle company to directed verdict. Clay v. Chicago, etc., R. Co., 104 Minn. 1, 115 NW 949.

**17.** General verdict could not be sustained where jury failed to answer special questions, favorable answers to which were necessary to recovery by plaintiff. Larsen v. Leonardt [Cal. App.] 96 P 395.

**18.** Special answers by jury, one finding that plaintiff appreciated danger, and another that he was not wanting in due care, held not inconsistent, where evidence made contributory negligence and assumption of risk separate issues. Comphure v. Standard Mfg. Co. [Wis.] 118 NW 633.

**19.** Compshure v. Standard Mfg. Co. [Wis.] 118 NW 633.

**20.** In such case they should be separately submitted. Compshure v. Standard Mfg. Co. [Wis.] 118 NW 633.

**21.** Compshure v. Standard Mfg. Co. [Wis.] 118 NW 633.

**22.** The master is liable for the torts of his servant, done in the course of his employment with a view to the furtherance of his

master's business and not for a purpose personal to himself. Kwiechen v. Holmes & Hallowell Co. [Minn.] 118 NW 668; Barrett v. Minneapolis, etc., R. Co. [Minn.] 117 NW 1047. Servant's act must be in performance of master's orders or work, and in pursuance of his duties as servant. Doran v. Thomsen [N. J. Err. & App.] 71 A 296. The test of a master's liability for acts of servants is not whether a given act was done during the existence of the servant's employment, but whether it was done in the prosecution of the master's business. **Assault.** Klugman v. Sanitary Laundry Co., 141 Ill. App. 422. Petition held to state cause of action for assault on plaintiff by defendant's servant, authorized by defendant. Boutwell v. Medlin Mill. Co. [Tex. Civ. App.] 108 SW 1025. Lessees of theatre liable where usher employed by them, who took plaintiff's ticket to seat him, assaulted him, had him arrested, charged with breach of the peace, and appeared in court against him, such assault and arrest being without justification. Epstein v. Gordon, 114 NYS 438. Carrier liable for **assault by brakeman** on passenger who was in freight car instead of in passenger car where he should have been. Keen v. St. Louis, etc., R. Co., 129 Mo. App. 301, 108 SW 1125. Brakeman held to have implied authority to keep trespassers off train, notwithstanding one rule requiring conductor's consent and presence and whether company was liable where brakeman ordered trespasser off moving train, trespasser being injured, was held question for jury. Barrett v. Minneapolis, etc., R. Co. [Minn.] 117 NW 1047. **Watchman guarding property** and entrusted with pistol was acting in course of employment when he shot trespasser who at time had left premises. Robards v. P. Bannon Sewer Pipe Co. [Ky.] 113 SW 429. **Railway watchman** owed to trespassers, whom he was conducting out of yards, duty to avoid injury to them by reckless or negligent use of revolver. Fact that he mistook person he shot for trespasser would not alter liability of company. Texas & N. O. R. Co. v. Parsons [Tex.] 113 SW 914. Policeman appointed by governor to protect railway property, being designated by company, arrested plaintiff for stealing property of defendant, and defendant's superintendent told policeman to turn him over to city police. Defendant liable for false imprisonment, policeman representing it in making the arrest. Baltimore C. & A. R. Co. v. Ennalls [Md.] 69 A 638. Where deputy sheriffs were appointed at railroad company's request to guard its property and were paid by it, and one of them was engaged in driving tramps off its premises having said he would not arrest them, and while so doing shot one of them, jury was warranted in finding that he was performing his duties as its employe at time. Texas & N. O. R. Co. v. Parsons [Tex. Civ. App.] 109 SW 240. Personal intentions of deputy employed by defendant to protect its property would be immaterial if deputy, when he shot trespasser, was engaged in his duties and was putting trespassers off company's property. Id. Whether deputy sheriff, appointed by sheriff but paid and controlled by railroad company whose property he guarded, was acting as servant or in his official capacity when he shot trespasser, must be determined from all the facts and circumstances. Id.

**Master is responsible for negligence of his servant** when engaged about the master's business and within the scope of his employment. Cunningham v. Castle, 111 NYS 1057. Master liable for negligence as well as deliberate acts of servant while acting within scope of authority. Biggins v. Gulf, etc., R. Co. [Tex. Civ. App.] 110 SW 561. Servant of fire escape company dropped drill on plaintiff rightfully working below; company liable. Enos Fire Escape Co. v. Langan, 136 Ill. App. 631. Evidence held to sustain verdict for plaintiff for injuries caused by negligent operation of elevator by defendant's servants, while plaintiff was working on building in elevator shaft. Anderson v. Standard Plunger Elevator Co., 113 NYS 593. Charge that city was negligent sustained by proof of negligence of its employes. Gathman v. Chicago, 236 Ill. 9, 86 NE 152. Master liable where driver suddenly drove round corner in front of lady, who, in trying to get out of danger, fell and was injured. Sandy v. Swift & Co., 159 F 271. Coal dealer liable for negligence of teamster in failing to properly guard coal hole used by him in delivery at instance of purchaser of coal. Wakefield v. Boston Coal Co., 197 Mass. 527, 83 NE 1116. Railway company liable for negligence of employes resulting in death of employe of another company in collision at crossing. El Paso & S. W. R. Co. v. Murtle [Tex. Civ. App.] 108 SW 998. Evidence warranted verdict against defendant where it appeared its driver in delivering ice had dropped a piece, breaking glass in ice box and rendering meat unsalable by reason of fine pieces of glass falling over it. Atlanta Ice & Coal Co. v. Walton [Ga. App.] 63 SE 513. Petition held to state cause of action which alleged that child was allowed to be brought into defendant's mill and allowed to wander about amid dangerous machinery by which she was injured, employe in charge having knowledge of these facts; immaterial that employe was child's father who was charged with parental duty of caring for her safety. Poteet v. Blossom Oil & Cotton Co. [Tex. Civ. App.] 115 SW 289. Evidence sustained verdict for plaintiff where saleswoman, servant of defendant, handled bundle carrier negligently so that rope attached flew up striking and injuring plaintiff, a customer in the store. McQuade v. The Golden Rule, 105 Minn. 326, 117 NW 484. Railroad company which obtains right to use another's track is liable for injuries to servants of the latter, caused by negligence of its employes in running trains; its servants being still under its control and in its employment. Hamble v. Atchison, etc., R. Co. [C. C. A.] 164 F 410. Known carelessness of **chauffeur** not legal cause of runaway caused by chauffeur while using machine on an errand of his own, and not in employer's business. Danforth v. Fisher [N. H.] 71 A 535. Adjustment and testing of automobile by chauffeur held within his duties as representative of seller who agreed to teach buyer to run the machine, and hence seller was liable to buyer for accident caused by negligence of chauffeur while testing the operation of the machine. Burnham v. Central Automobile Exch. [R. I.] 67 A 429.

**23.** Kwiechen v. Holmes & Hallowell Co. [Minn.] 118 NW 668; Barrett v. Minneapolis R. Co. [Minn.] 117 NW 1047. Test is whether servant was engaged at time in course of his employment and within scope of authority, not whether act was expressly authorized or in accord with instructions. Robards v. P. Bannon Sewer Pipe Co. [Ky.] 113 SW 429.

or violates express orders or instructions,[24] or is guilty of a willful tort.[25] The master is not liable for unauthorized acts outside the scope of the servant's employment.[26] Thus, for acts or negligence of the servant while engaged in the prosecution of some private purpose of his own, unconnected with the business of the master,[27] the latter is not responsible,[28] though the servant may have been using an

**24.** Barrett v. Minneapolis, etc., R. Co. [Minn.] 117 NW 1047; Kwiechen v. Holmes & Hallowell Co. [Minn.] 118 NW 668. That servant violates instructions or commits needless injury is immaterial if he was acting within scope of employment. Robards v. P. Bannon Sewer Pipe Co. [Ky.] 113 SW 429. Whether servant was acting within scope of employment at time is test; if he was, it is immaterial that he was not doing work in manner expected of him. Danforth v. Fisher [N. H.] 71 A 535.

**25.** Master liable whether act be negligent or willful, if within scope of agency. Barrett v. Minneapolis, etc., R. Co. [Minn.] 117 NW 1047; Kwiechen v. Holmes & Hallowell Co. [Minn.] 118 NW 668. A master is responsible for the acts of his servant within the general scope of his employment while engaged in his master's business and done with a view of the furtherance of that business and in the master's interest, even if such acts are done wantonly and willfully. Waaler v. Great Northern R. Co. [S. D.] 117 NW 140. Defendant liable where member of section crew employed by it, sent to build fence, assaulted plaintiff, servant of owner of land, who was endeavoring to prevent erection of the fence, even though assault was wanton and unnecessary. Id. Evidence sufficient to show that section man who assaulted plaintiff was employe of defendant. Id. If servant's act is within scope of his authority it is immaterial whether he acts negligently or wantonly. Illinois Cent. R. Co. v. Martin, 33 Ky. L. R. 666, 110 SW 815. Employer liable where watchman drove boy of 7, trespasser, of premises, beating him with stick and causing dog to bite him, this action being unnecessary. Bernadsky v. Erie R. Co. [N. J. Err. & App.] 70 A 189. Bar tender placed in charge of saloon in absence of defendants, his employers, poured alcohol on shoe of patron who was asleep, and set fire to it. Held, defendants liable for injury, since they were bound to conduct an orderly place, and bartender was their representative for that purpose. Bellke v. Carroll [Wash.] 98 P 1119. The master is liable to third parties injured by the willful acts of his servants while engaged upon his employment. Where stranger in helping to unload freight car at train crews' invitation was injured by brakeman letting box drop on him, evidence held not to warrant finding that brakeman's act was willfull. Toledo, etc., R. Co. v. Baker, 138 Ill. App. 83.

**26.** Before a master can be charged with the consequences of a negligent or wanton act by a servant, it must appear that the act was within the scope of the servant's authority. Harmon v. McGuire, 6 Ohio N. P. (N. S.) 597. The evidence in the case at bar does not show that either the fireman or the head brakeman was authorized to **open the cylinder cocks** of the engine which was at rest, permitting an escape of steam which blinded and frightened plaintiff and caused her to step in front of another engine which was moving, and by which she was run down. Id. Not within scope of assistant book-keeper's duties to direct employes to assist third person in **unloading truck.** Bassi v. Orth, 58 Misc. 372, 109 NYS 88. An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master. Railroad company not liable where section men, including foreman, **invited boy to ride on hand car** from which he fell. Daugherty v. Chicago, etc., R. Co., 137 Iowa, 257, 114 NW 902. Defendant not liable where one of his drivers willfully and maliciously **kicked horse** of plaintiff, as he was about to leave defendant's premises after delivering goods, causing horse to run and injuring plaintiff. Miller v. Wanamaker, 111 NYS 786. If sleeping car **porter stole passenger's jewelry,** this not being baggage, he was not acting in scope of employment, and company would not be liable. Bacon v. Pullman Co. [C. C. A.] 159 F 1. **Proprietor of restaurant** not liable for injuries received by plaintiff while going to closet in rear of premises on invitation or authorization of servant, who had no authority to extend such invitation. Macartney v. Colwell [R. I.] 68 A 719. Employer not liable for **assault** by detective. Kehoe v. Marshall, Field & Co., 141 Ill. App. 140. Street railway company would not be liable for assault on passenger by car or track greaser, who had nothing to do with operation of cars, unless he acted at express or implied order of conductor and to assist him in his duties. Mills v. Seattle R. & S. R. Co. [Wash.] 96 P 520. Railway **mail clerk,** injured while trying to alight from mail car, held to have no cause of action against another company for failure of its employe to warn him that train from which he was about to alight was about to start, employe having nothing to do with that train. Houston & T. C. R. Co. v. Keeling [Tex. Civ. App.] 112 SW 808.

**27.** Whether **driver,** who drove defendant's team into plaintiff, was at time acting as defendant's servant, or engaged in work for himself, held for jury. Connell v. Havey, 125 App. Div. 189, 109 NYS 260.

**28. Chauffeur using car for own pleasure;** master not liable for collision. Cunningham v. Castle, 111 NYS 1057. Owner of automobile not liable where chauffeur caused runaway while using machine on an errand of his own, and not going where owner had instructed him to go. Danforth v. Fisher [N. H.] 71 A 535. Owner of automobile not liable for runaway caused by chauffeur while using machine on an errand of his own, on theory of having placed dangerous instrumentality in his care. Id. Where girl of 19 was using her father's automobile for her own pleasure, driving about with friends without her father's permission, he was not liable for injuries caused by collision. Doran v. Thomsen [N. J. Err. & App.] 71 A 296. Instruction erroneous which permitted recovery for injuries inflicted by automobile driven by defendant's daughter on mere

instrumentality furnished by the master.[29] The master may become liable by ratification of a previously unauthorized act.[30] Doubt as to whether a servant was acting within the scope of his employment will be resolved against the master.[31] Where an employer has notice of a dangerous practice of his employes and fails to use reasonable care to suppress it, he is liable to a third person for injuries resulting therefrom,[32] though the act in question is malicious and beyond the scope of the employment.[33] Where the servant acts in obedience to an express order given by the master, the master is liable for the consequences of the servant's acts.[34]

The doctrine of respondeat superior is, of course, inapplicable unless the relation of master and servant existed at the time between defendant and the person charged with the wrongful act or omission,[35] and the test usually employed to determine

ground that he had bought it for use by her and family; she must have been using it in his service. Doran v. Thomsen [N. J. Err. & App.] 71 A 296. Killing of child by chauffeur using master's automobile in opposition to master's instructions, to take pleasure trip of his own, not chargeable to master. Sarver v. Mitchell, 35 Pa. Super. Ct. 69. Where **laundry driver** was responsible for work delivered with receiving payment, and called later to recover goods or get "his own money," company was not liable for acts done while on such errand. Steinman v. Baltimore Antiseptic Steam Laundry Co. [Md.] 71 A 517. **Man employed to deliver coal** had horse delivered to him at employer's premises, and to get it to his home, tied it behind sleigh with long rope and led it while making regular delivery of coal for defendant. Horse being led became excited and kicked girl on sidewalk. Held, injury arose out of act done for servant's personal benefit and not in master's work. Defendant not liable. Kwiechen v. Holmes & Hallowell Co. [Minn.] 118 NW 668. Defendant, livery stable keeper, not liable where his foreman and **driver,** negligently caused to be discharged a gun owned by himself (foreman) injuring plaintiff, the act not being done in course of his duties as defendant's servant. Smith v. Peach, 200 Mass. 504, 86 NE 908.

**29.** Sarver v. Mitchell, 35 Pa. Super. Ct. 69. Master not liable where chauffeur borrowed car for his own purpose, and ran into plaintiff. Cunningham v. Castle, 111 NYS 1057. Mere fact that injury was inflicted with instrumentality furnished by defendant does not make him liable, if servant was engaged in his own private business or pleasure. Doran v. Thomsen [N. J. Err. & App.] 71 A 296.

**30.** Action for mutilation of body of husband of plaintiff by trains after he had been killed, it appearing that several trains ran over body and scattered and dismembered it. Held, retention of employes concerned by company was ratification of their acts, and company could not be heard to say they were unauthorized. Kyles v. Southern R. Co., 147 N. C. 394, 61 SE 278. Laundry company did not ratify acts of driver while trying to collect money for work delivered by sending notice to plaintiff's husband to call for work and pay amount due. Steinman v. Baltimore Antiseptic Steam Laundry Co. [Md.] 71 A 517.

**31.** Since he sets in motion the servant who commits the wrong. Robards v. P. Bannon Sewer Pipe Co. [Ky.] 113 SW 429.

**32.** Factory employes were in habit of throwing iron scraps and missiles into adjoining yard, complaint of which had been made. Employer liable for injuries to woman struck by missile. Hogble v. H. H. Franklin Mfg. Co., 128 App. Div. 403, 112 NYS 881.

**33.** Hogle v. H. H. Franklin Mfg. Co., 128 App. Div. 403, 112 NYS 881.

**34.** Cannot contend that servant is acting outside scope of duties. Rimmer v. Wilson, 42 Colo. 180, 93 P 1110.

**35. Defendant held not liable:** Evidence held to show that corporation employed man by whose negligence plaintiff was injured, and that defendant was not his employer. Callahan v. Oltarsh, 109 NYS 753. Defendant not liable for injuries caused by his **automobile,** driven by his brother's chauffeur, car having been loaned to defendant's brother. Parsons v. Wisner, 113 NYS 922. Injuries received in collision with wagon, bearing defendant's name. Defendants proved **driver** not in their employ. No recovery. Collins v. West Jersey Exp. Co. [N. J. Err. & App.] 70 A 344. Railway company operating **trains on leased road** not liable for negligence of crossing watchman in employ of lessor company. Wills v. Atchison, etc., R. Co. [Mo. App.] 113 SW 713. Person "doing general **detective** work" in Marshall Field & Co.'s store, but subject to directions of a detective agency, not servant to former. Kehoe v. Marshall Field & Co., 141 Ill. App. 140. Railway company not liable for **arrest** of plaintiff by policeman on duty at station, one-half of whose salary was paid by company, but who was subject to orders of chief of police; employes directing him to take charge of plaintiff who was endeavoring to pass station gate. Chicago, etc., R. Co. v. Nelson [Ark.] 113 SW 44. Town marshal and deputy not agents of railway company though company had issued passes to them as inducement to give special attention to protection of railroad property, and company not liable for their act in ejecting plaintiff from train and shooting him. St. Louis, etc., R. Co. v. Morrow [Ark.] 115 SW 173. Where plaintiff was injured by alleged starting of **elevator,** evidence held insufficient to show that starting of elevator was due to any one under defendant's control. S. Cupples Woodenware Co. v. Walins, 140 Ill. App. 624.

**Defendant held liable:** Evidence held to show that deputy was acting as defendant's servant when he **shot trespasser.** Texas & N. O. R. Co. v. Parsons [Tex.] 113 SW 914. Railroad company requested sheriff for deputies to protect its property, and sheriff deputized two men who were thereafter paid by the company and spent all their time

whether this relation existed is whether such person was subject to the control and direction of defendant.[36] A master is not liable for negligence of his general servant if at the time he is the servant of another, and is engaged in that other's business and under his direction and control.[37] If a servant who is employed to do certain work employs another person to assist him, the master is liable for negligence of the assistant only when the servant has authority, express or implied, to employ him,[38] or when the employment is ratified by the master.[39] The retention of a servant with knowledge that he has done a negligent act for which the master was not liable will not render the latter liable.[40] Charitable corporations are liable for negligence of servants,[41] though not for torts of persons acting for such corporations in other capacities.[42]

guarding the company's property, the sheriff having no further control over them. Held, jury could find them to be company's servants. Texas & N. O. R. Co. v. Parsons [Tex. Civ. App.] 109 SW 240. Mere fact that they were deputies, and that they sometimes served papers gratuitously for sheriff, would not change their relation to company. Id. Defendant **rented hod elevator** to contractor and furnished engineer to run it, engineer being subject to its control. Held, engineer was defendant's servant, though he operated elevator in accordance with directions for contractor and his employes, and one of latter could recover for negligence of engineer from defendant. Henry v. Stanley Hod Elevator Co., 114 NYS 38. City park foreman selected **driver** of rubbish wagon, had power to remove him and directed his work, but driver, wagon, and team were all furnished and paid by third person, who was in turn paid by city. Held, driver was servant of city while engaged in work, and city was liable for injuries caused by his negligence. Silverman v. New York, 114 NYS 59. Defendant's son was running **automobile** with his instructor in the car with him, and struck plaintiff. Son had instructions from father to learn to run car. Evidence warranted finding that son was father's servant and was acting within scope of his authority, and that he was employe of vendor, the instructor. Hiroux v. Baum [Wis.] 118 NW 533.

**Question for jury:** Whether driver of **automobile,** alleged to have caused injury by reckless driving was defendants' chauffeur, held for jury, evidence being conflicting. Ottomeier v. Hornburg [Wash.] 97 P 235. Whether driver of **thresher engine** which started fire was an employe of seller of engine or of other defendants held for jury. Rogers v. Fowler, 151 Mich. 485, 15 Det. Leg. N. 62, 115 NW 469. Fact that person wore cap and uniform of **train employe** not conclusive that he was an employe, but evidence on the issue for the jury. De Vane v. Atlanta, B. & A. R. Co. [Ga. App.] 60 SE 1079. If stevedore's injury was caused by negligence of defendant's employes, defendant would be liable; if negligence was that of **stevedores** in failing to instruct servants, defendants not liable. Stewart v. Balfour [Wash.] 98 P 103.

**36.** Rule respondeat superior applies only where employer retains power of control over employe in doing of work. Kellogg v. Church Charity Foundation, 112 NYS 566. The responsibility of a master for tortious acts of his servants arises, grows out of, is measured by, and begins and ends with, his control over them. Defendant held to have no control over **detective,** hired by agency. Kehoe v. Marshall Field & Co., 141 Ill. App. 140. Defendant liable for injuries caused by **automobile** driven by person to whose care he had entrusted it, and who was running it for defendant, though such person was in employ and pay of another. Irwin v. Judge [Conn.] 71 A 572. Defendant sold automobile to one who agreed to run it for hire and pay for it out of his earnings. He was not defendant's employe, nor under defendant's control or direction. Held, defendant not liable for his negligence while driving machine. Braverman v. Hart, 105 NYS 107. Defendant's servants, assisting in **loading vessel,** who put sacks on chute, held not as matter of law "loaned to" and under control of stevedores, so as to become fellow-servants, for time being, of plaintiff, employed by stevedore on vessel. Stewart v. Balfour [Wash.] 98 P 103. One person is another's servant if he is subject to the latter's control and orders, and is liable to be discharged by him for disobedience of orders or misconduct. Man hired by city **bridge tender** held to be servant of city. City of Chicago v. Galtman, 139 Ill. App. 253.

**37.** Cunningham v. Castle, 111 NYS 1057. Defendant's employes, assisting **truck driver** to unload truck at his request and subject to his orders, become for time being his servants, and defendant was not liable for their negligence while so engaged. Bassi v. Orth, 58 Misc. 372, 109 NYS 88.

**38.** Cooper v. Lowery [Ga. App.] 60 SE 1015. Where defendant's servant asked **bystander** to help fix cart, and bystander's act, while rendering such assistance, caused injury to plaintiff, defendant was liable. Hollidge v. Duncan, 199 Mass. 121, 85 NE 186. Where city employed **bridge tender,** who with city's consent employed others to do his work, city was liable for negligence of latter, in line of their duty. Gathman v. Chicago, 236 Ill. 9, 86 NE 152. Where master's **teamster** induced a friend to take charge of master's wagon while he engaged in business of his own not connected with that of master, the master will not be liable for injury to a stranger occasioned by friend while using master's wagon. Hills v. Strong, 132 Ill. App. 174.

**39.** Cooper v. Lowery [Ga. App.] 60 SE 1015.

**40.** Kwiechen v. Holmes & Hallowell Co. [Minn.] 118 NW 668.

**41.** Charitable hospital corporation liable for negligence of ambulance driver resulting

An employer is not liable for the acts or negligence of an independent contractor,[43] that is, one who represents the employer only as to the result and not as to the means or manner of doing the work,[44] unless he reserves control over the doing of the work.[45]

*Damages.*[See 10 C. L. 807]—The master is liable for compensatory damages where the act of the servant is within the scope of his employment,[46] but is not liable for punitive damages unless the act is malicious [47] or wanton and reckless,[48] and unless the master shared or participated therein,[49] or unless the wrongful act is a part or in pursuance of a recognized business system adopted and authorized by the principal,[50] or is the act of an agent or manager who has charge of the general management of particular business in the course of which the act was committed.[51] Measure of damages is treated in another topic.[52]

*Liability of servant.*[See 10 C. L. 807]—Where a servant violates a duty owed to a

in injury to third person run into on street. Kellogg v. Church Charity Foundation, 112 NYS 566. Plaintiff being injured solely by negligence of servants of defendant, it was liable, though it was in the nature of a charitable corporation. Gartland v. New York Zoological Society, 113 NYS 1087.

**42.** See discussion and classification of authorities in Kellogg v. Church Charity Foundation, 112 NYS 566.

**43.** Owner of building not liable where sign, put up by independent contractor two weeks before, fell on plaintiff during storm. McNulty v. Ludwig & Co., 125 App. Div. 291, 109 NYS 703. Owner of land not liable for injury caused by negligence of independent contractor engaged in erecting building on land. Stubley v. Allison Realty Co., 124 App. Div. 162, 108 NYS 759.

**44.** When a question arises as to whether a person performing work or doing business for another is a contractor for whose negligence the employer is liable, or a servant for whose acts the master is responsible, the character of the contract, nature of employment, and all circumstances, are to be considered. Knicely v. West Virginia M. R. Co. [W. Va.] 61 SE 811. Independent contractor is one who represents will of employer only as to result of work and not as to means. McGrath v. St. Louis [Mo.] 114 SW 611. Independent contractor is one who is responsible to employer only as to result. Texas & N. O. R. Co. v. Parsons [Tex. Civ. App.] 109 SW 240. Person employed to clear lands held independent contractor. Young v. Fosburg Lumber Co., 147 N. C. 26, 60 SE 654. Company having contract to remove signs using its own tools, men, etc., held independent contractor. Employer not liable for injury to third person by employe of company. Press v. Penny [Mo. App.] 114 SW 74. That coal company hired man and wagon to deliver coal did not make him independent contractor, rather than agent or servant, for whose acts company would be liable. City of Newark v. East Side Coal Co., 74 N. J. Law, 68, 70 A 734. Licensed expressman, paid by week to deliver paint for defendant, using own horse and wagon, doing work in his own way, and personally or by his employes, held independent contractor, for whose negligence defendant was not liable. Burns v. Michigan Paint Co,. 152 Mich. 613, 15 Det. Leg. N. 201, 116 NW 182. One contracting to cut, haul, and deliver logs at certain price per 1,000 delivered, held independent contractor, employe having no control of means or manner of doing work. Gay v. Roanoke R. & Lumber Co. [N. C.] 62 SE 436.

**45.** If contractor is responsible only for result of work, master is not liable for means or manner employed in doing it; but if contract provides for means and manner, contractor being directed by employer in doing work, latter is liable for contractor's acts. Drennon v. Patton-Worsham Drug Co. [Tex. Civ. App.] 109 SW 218. Sales agent was furnished advertising matter in shapes of large horse blankets with lettering, and employer directed these to be placed on horses. Held, agent represented and was following directions of defendant in so using blankets, and latter would be liable for consequences, such as frightening other horses. Id. Where contractors furnished trucks and drivers to defendant, and defendant had sole control, and direction of trucks and drivers when in use, defendant was liable for negligence of truck driver. Cohen v. Western Elec. Co., 108 NYS 1007.

**46.** A master is liable in compensatory damages for the tortious acts of a servant in the course of his employment, though such act is wanton or malicious. Rose v. Imperial Engine Co., 112 NYS 8.

**47.** Error to instruct that smart money could be awarded, in case of false arrest, without requiring malice to be found. Magagnos v. Brooklyn Heights R. Co., 112 NYS 637.

**48.** Malice may be found from proof of wantonness or reckleesness. Magagnos v. Brooklyn Heights R. Co., 112 NYS 637.

**49.** Magagnos v. Brooklyn Heights R. Co., 112 NYS 637. A master or principal is not liable for punitive damages for the tortious act of a servant unless he participated therein or ratified it. Rose v. Imperial Engine Co., 112 NYS 8. Instruction authorizing recovery of exemplary damages for "unlawful and false imprisonment" of plaintiff by defendant's servants, without requiring finding of malice or wantonness, or participation or ratification by defendant, reversible error. Lewine v. Interborough Rapid Transit Co., 113 NYS 15.

**50.** Rose v. Imperial Engine Co., 112 NYS 8.

**51.** Whether libelous letter, written by employe as from corporation defendant, was authorized as part of his work, held for jury. Rose v. Imperial Engine Co., 112 NYS 8.

**52.** See Damages, 11 C. L. 958.

third person, he is personally liable therefor,[53] whether his wrong doing be regarded as nonfeasance or misfeasance, as between him and his master.[54] The liability of such servant is controlled by ordinary rules of negligence.[55]

(§ 4) *B. Procedure.*[See 10 C. L. 808]—The complaint must show that the person charged with wrongdoing was defendant's servant [56] and that he was acting at the time within the scope of his employment,[57] and the burden is upon plaintiff to prove these facts [58] and that the wrongful act alleged was the cause of the alleged injury.[59] Recovery must be upon the ground alleged, if at all.[60] Where the action is based solely on negligence of a servant on a particular occasion, proof that this or other servants have been negligent on former occasions is inadmissible.[61] Defendant may, under a general denial, prove that alleged damage was done by others for whose acts he was not responsible.[62]

§ 5. *Civil liability for interference with relation by third person.*[63]—An employer has a right to a free labor market, that is, the right to engage all persons willing to work for him at such prices as may be mutually agreed upon.[64] Picketing, argument or peaceful persuasion to induce men not to enter the employment of certain employers is legal [65] and will not be enjoined by a court of equity; [66] but ac-

53. Mine superintendent liable where he sent workman down into shaft known to be unsafe and injury resulting from cage sticking and then suddenly dropping. Hagerty v. Montana Ore Purchasing Co. [Mont.] 98 P 643. Where the servant is guilty of misfeasance, he, as well as the master, is liable for injuries resulting therefrom to third persons or to other servants. Inspectors charged with more than mere nonfeasance; hence they were personally liable. Ward v. Pullman Car Corp. [Ky.] 114 SW 754.

54. Distinctions discussed. Hagerty v. Montana Ore Purchasng Co. [Mont.] 98 P 643. There is a **conflict of authority** as to the personal liability of a servant guilty only of **nonfeasance,** and also as to what is nonfeasance. See Ward v. Pullman Car Corp. [Ky.] 114 SW 754, and cases there cited.

55. Thus concurring negligence of another would not relieve mine superintendent whose wrongful act caused injury to plaintiff. Hagerty v. Montana Ore Purchasing Co. [Mont.] 98 P 643.

56. Complaint alleging injuries resulting from carelessness and recklessness of chauffeur furnished plaintiff by defendant to repair and run automobile held to state cause of action, though it did not allege agreement to pay for chauffeur's services. Gresh v. Wanamaker, 221 Pa. 28, 69 A 1123.

57. Allegation that defendant did certain wrongful acts "by his servant" held sufficient to show servant was acting within the scope of his employment. Ploof v. Putnam [Vt.] 71 A 188. Complaint held to properly allege that servant was engaged in business of master when he negligently drove team into plaintiff. American Bolt Co. v. Fennell [Ala.] 48 S 97. In pleading, the plaintiff must allege that defendant committed the act, or allege facts from which the conclusion arises that the wrongful act of the servant of the defendant was an act within the scope of his employment and done in the prosecution of the business of the defendant. Klugman v. Sanitary Laundry Co., 141 Ill. App. 422. Petition alleging negligent driving of dray by defendant's servant, resulting in collision and injury to petitioner, held to state cause of action as against objection that it showed willful injury for which defendant would not be liable, under Civ. Code, § 3031. Toole Furniture Co. v. Ellis [Ga. App.] 63 SE 55.

58. Burden is upon plaintiff to show relation of master and servant between defendant and person alleged to have been guilty of negligence or wrongdoing. Burns v. Michigan Paint Co., 152 Mich. 613, 15 Det. Leg. N. 201, 116 NW 182. The burden is upon the plaintiff to show that act charged was within the scope of the employment. A judgment for defendant non obstante veredicto should be given where the only evidence of defendant's liability for killing of child by his chauffeur was that he owned the automobile. Sarver v. Mitchell, 35 Pa. Super. Ct. 69. Whether servant's act is within scope of his authority and in furtherance of master's business is not for jury unless evidence gives rise to some inference or permits such conclusion. Miller v. Wanamaker, 111 NYS 786. Where destruction of property by fire wrongfully set out by defendant is alleged, and evidence showed fire to have been set by an employe of defendant, it was error to exclude evidence that he was at time engaged in furtherance of defendant's business. Gibson v. Wood Lumber Co., 91 Miss. 702, 45 S 834.

59. Evidence sufficient to show negligence of defendant's servant in loading wagon cause of runaway which resulted in plaintiff's injuries. Johnson v. Stevens, 123 App. Div. 208, 108 NYS 407.

60. Where complaint alleged deliberate and intentional shooting of plaintiff by defendant's watchman, there could be no recovery on ground of negligent discharge of pistol. Biggins v. Gulf, etc., R. Co. [Tex. Civ. App.] 110 SW 561.

61. Robinson v. Denver City Tramway Co. [C. C. A.] 164 F 174.

62. Damage to boat. Kiers v. Rathjen, 111 NYS 599.

63. See 10 C. L. 809. See, also, Conspiracy, 11 C. L. 675; Trade Unions, 10 C. L. 1872; Combinations and Monopolies, 11 C. L. 633.

64. Willcutt & Sons Co. v. Bricklayers' Benevolent & Protective Union No. 3 [Mass.] 85 NE 897.

65. Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 F 500.

tion amounting to intimidation is unlawful,[67] and such conduct will be enjoined [68] though it constitutes a crime.[69] The imposition by a labor union of a coercive fine upon members for entering or remaining in the employment of a certain employer, or the threat to impose such fine, is held a violation of the employer's rights,[70] and the fact that the fine is imposed or threatened in accordance with rules of the union is no defense.[71] Third persons are answerable for keeping a man out of employment when the means employed are unlawful,[72] such as threats of violence,[73] threats of strikes of such character as to influence a person of reasonable firmness and prudence, and the exaction of fines from the employer.[74] The damages are generally what the employe would have earned had he been allowed to work,[75] and for willful and malicious acts damages may be recovered for mental suffering.[76] One who procures the discharge of an employe is liable in damages,[77] and exemplary damages are recoverable if the act is malicious.[78] There is a right of action for purposely and maliciously preventing performance of a contract,[79] but a complaint based on such cause must allege defendant's knowledge of the contract in question.[80] An allegation that the interference was malicious is not equivalent to an allegation of knowledge.[81] In some states, statutes provide for the recovery of penalties and damages for interference with employes of another.[82]

**66.** Equity will not enjoin employes who have quit the service of their employer from attempting to persuade, by proper argument, others from taking their places so long as they do not resort to intimidation or obstruct the public thoroughfares. Jones v. Van Winkle Gin & Mach. Works [Ga.] 62 SE 236.

**67.** Threats, violence, massing of large number of pickets where nonunion men must pass, held intimidation. Goldfield Consol. Mines Co. Goldfield Miners' Union No. 220, 159 F 500. It is unlawful for any person or association to interfere with the business of another by means of force, menaces, or intimidation so as to prevent others from entering or remaining in the employment of another. Jones v. Van Winkle Gin & Mach. Works [Ga.] 62 SE 236. An interference with employer's rights by intimidation or coercion produced by injury to person or property, or by threats of such injury, is unlawful. Willcutt & Sons Co. v. Bricklayers' Benevolent & Protective Union No. 3 [Mass.] 85 NE 897.

**68.** Maintenance of pickets enjoined when they resorted to threats and intimidation. Jones v. Van Winkle Gin & Mach. Works [Ga.] 62 SE 236. **Complaint alleging conspiracy** by members of labor union and interference with plaintiff's business held **too vague and general** to warrant issuance of temporary injunction against picketing, threatening workmen, etc. Badger Brass Mfg. Co. v. Daly [Wis.] 119 NW 328.

**69.** Pen. Code, § 123 et seq., make it a crime to attempt by threats, etc., to prevent any person from entering service or employing laborers. Jones v. Van Winkle Gin & Mach. Works [Ga.] 62 SE 236.

**70.** Strike was called for lawful purpose, higher wages and shorter day, and persons entering or remaining in plaintiff's employment were threatened with $100 fine. Injunction was granted restraining and enjoining defendants, their agents or servants from intimidating, by the imposition of a fine or by threat of such fine, any person or persons from entering into the employ of plaintiff or remaining therein, or from in any way being a party or privy to the imposition of any fine, or threat of such imposition upon any person desiring to enter into or remain in the employ of plaintiff. Willcutt & Sons Co. v. Bricklayers' Benevolent & Protective Union No. 3 [Mass.] 85 NE 897.

**71.** Willcutt & Sons Co. v. Bricklayers' Benevolent & Protective Union No. 3 [Mass.] 85 NE 897.

**72.** Carter v. Oster [Mo. App.] 112 SW 995.

**73.** Threats of personal violence unlawful under Rev. St. 1899, § 2155. Carter v. Oster [Mo. App.] 112 SW 995.

**74.** Union men liable for damages where they kept nonunion man out of work by threats against him and threats of strikes and imposition of fines on contractors employing him. Carter v. Oster [Mo. App.] 112 SW 995.

**75, 76.** Carter v. Oster [Mo. App.] 112 SW 995.

**77.** It is actionable for one company to procure the discharge of a former employe from another company because servant refuses to release a valid claim against it. Plaintiff injured in employ of Illinois Steel Co. When with Chi. L. S. & E. R. Co. was told to settle with former company or be fired. Illinois Steel Co. v. Brenshall, 141 Ill. App. 36. An employer's liability insurance company which has procured the discharge of an employe who has sued the insured employer for an injury is liable to such employe. Evidence examined and held sufficient to show that discharge was procured by defendant company. Fidelity & Casualty Co. v. Gibson, 135 Ill. App. 290.

**78.** Malicious action of employer's liability insurance company in obtaining discharge of servant of insured in order to obtain advantages to itself. Fidelity & Casualty Co. v. Gibson, 135 Ill. App. 290.

**79, 80, 81.** McGurk v. Cronenwett, 199 Mass. 457, 85 NE 576.

**82.** Code 1906, § 1146, provides for recovery of penalty and actual damages from one who willfully interferes with, entices away or

§ 6. *Crimes and penalties.*[See 10 C. L. 810]—It is unlawful for a third person to interfere with employes and induce them to leave their employer's service and not to return, or to induce them not to re-enter service which they have voluntarily left, for the sole purpose of exacting or extorting a sum of money from the employer,[83] and where several persons confederate for the accomplishment of such purpose they are guilty of conspiracy at common law.[84] It is not a common-law offense to threaten a person with intent, by intimidating him, to prevent him from working for another.[85] A charge of such conduct under a statute making it an offense must bring it within the statutory terms.[86] Under the Connecticut statute, actual intimidation need not be shown.[87] Decisions under the Alabama,[88] Florida [89] and Georgia [90] stat-

induces a laborer or tenant to leave his employment or premises before expiration of his contract without consent of employer or landlord. Held, where plaintiff contracted with one who was defendant's tenant in 1905 to work plaintiff's land in 1906, but such person refused to carry out contract or go on plaintiff's land, defendant was not liable for allowing such person to have a different piece of his land from what he had in 1905. Alford v. Pegues [Miss.] 46 S 76.

**83.** State v. Dalton [Mo. App.] 114 SW 1132.

**84.** Indictment held to charge an offense, overt acts being alleged, as required by Rev. St. 1899, § 2153. State v. Dalton [Mo. App.] 114 SW 1132.

**85, 86.** State v. McGee, 80 Conn. 614, 69 A 1059.

**87.** Under Gen. St. 1902, § 1296, it is sufficient if intimidation was intended and person threatened so understood. State v. McGee, 80 Conn. 614, 69 A 1059.

**88.** In prosecution under Cr. Code 1896, § 4730, as amended by Acts 1903, p. 345, for obtaining property under written contract for services, and refusal to perform services thereunder, contract was admissible as an entirety, though prosecution was for only portion of amount stated therein. Campbell v. State [Ala.] 46 S 520. Under this statute there can be no conviction without proof of fraudulent intent at time of making contract, regardless of such intent which might be thereafter formed. Id. To come within statute, sole consideration moving from employe to employer must be performance of personal services by him and none other, and when employe undertakes other things in addition to his own services to secure advances, such as having his wife move on employer's place and cultivate crop on shares, statute does not apply. Harris v. State [Ala.] 47 S 340.

**89.** Under Laws 1907, p. 182, c. 5678, § 1, making it crime to procure money or other thing of value by contracting to perform services with intent not to perform them, there must be an intent not to perform at time contract is made to sustain conviction. Thompson v. State [Fla.] 47 S 816.

**90.** Under Pen. Code 1895, § 122, one may be charged and convicted of an attempt to entice away the servant, cropper or farm laborer of another, though the attempt is not successful and the servant, cropper or laborer does not actually leave the service of his employer. Bright v. State [Ga. App.] 61 SE 289. One accused of enticing, persuading or decoying may also, where evidence warrants, be convicted of the attempt, under Pen. Code 1895, § 1035. Id. Evidence sufficient to sustain conviction. Id. Acts 1901, p. 63, as amended by Acts 1903, p. 91, prescribing penalties against one who shall employ the tenant, cropper or farm laborer of another, is drastic, in derogation of common law, and to be strictly construed. Orr v. Hardin [Ga. App.] 61 SE 518. Plaintiff in suit to recover penalty under this statute must, to authorize recovery, allege and prove a written contract or parol contract partly performed, made in the presence of one or more witnesses. Id. Verdict for defendant demanded where cropper contract proved did not specify year of performance, nor time of beginning or end of contract, nor the land to which it related. Id. Laws 1903, p. 90, which makes criminal the procurement of money upon a fraudulent contract to perform service, and the fraudulent abandonment of a contract after having so procured money, is not a violation of federal statutes prohibiting peonage. U. S. Rev. St. §§ 1990, 5526. Young v. State [Ga. App.] 62 SE 558. The purpose of the Georgia act is not to create a remedy for collection of debt, but to provide punishment for fraudulent and successful intent to cheat and defraud. Id. Accusation under Laws 1903, p. 90, may embrace in single count various sums of money fraudulently procured at different times, the various sums making up the aggregate sum charged to have been procured. Such count includes but one offense. Id. In prosecution under Acts 1903, p. 90, proof that one company furnished certain goods to defendant will not support an allegation that defendant procured from a certain other company valuable merchandise and supplies. Jackson v. State [Ga. App.] 61 SE 862. Where accusation alleges that defendant was laborer, he cannot be convicted by proof of contract showing a rental agreement. Id. Contraot construed as in nature of rental, and not contract of hire. Id. In prosecutions under Acts 1903, p. 90, which makes penal certain fraudulent practices in connection with contracts for labor, state must allege and prove that defendant, without good and sufficient cause, failed to perform his contract or repay advances obtained. Mobley v. State [Ga. App.] 60 SE 803. Evidence insufficient to sustain conviction which affirmatively showed that accused had no fraudulent intent. Thompson v. State [Ga. App.] 62 SE 568. Evidence sufficient to sustain conviction for fraudulently obtaining advances on contract for services as farm laborer and failing to perform work or return advances. Variance between contract as pleaded and proved, immaterial. Brawner v. State [Ga. App.] 63 SE 514. Contract providing that employe is to "work a month," but without any agreement as to when his

utes making it an offense to procure advances under a contract for services with intent to defraud, under the Arkansas act prohibiting interference with employes of another,[91] under the Indiana mine's act,[92] under the New York child labor law,[93] under the New Jersey factory inspection law,[94] under the Wyoming act prohibiting certain conduct of miners,[95] and in actions to recover penalties for violations of the federal safety appliance act,[96] are given in the note.

employment is to begin or end, is too vague and indefinite to form basis of prosecution, since term of employment may not have commenced and employe may still have right to repay advances. Starling v. State [Ga. App.] 62 SE 993. Allegation that defendant contracted to work as farm laborer for 10 days at 50 cents per day wages and his food is too vague and indefinite, no time of beginning or ending of service being shown. James v. State [Ga. App.] 63 SE 143. Contract made on Sunday is void and will not support prosecution unless there has been novation on secular day. Bendross v. State [Ga. App.] 62 SE 728.

**91.** Kirby's Dig. § 5030, as amended (Acts 1905, p. 726), making criminal act of enticing away servant employed by another, does not make punishable mere employment of one who has left prior service, and is valid. Tucker v. State [Ark.] 111 SW 275. Statute applies to interference with contract of minor under 15, though contract is not approved by guardian or parent as required by § 5023, since contract is voidable only by minor and stands so long as he remains in service. Id.

**92.** Acts 1907, p. 193, c. 121, § 1, requiring "owner, operator, lessee, superintendent or other person in charge" of coal mine or colliery, or place where conditions are similar, to provide wash houses when requested in writing by certain number of employes, imposes this duty upon the person in charge of the mine, whatever his title or office or relation to or interest in the mine. Hewitt v. State [Ind.] 86 NE 63. Affidavit charging violation of act held insufficient because not directly alleging that defendant was superintendent or person in charge. Essential facts must be directly alleged. Id.

**93.** In prosecution under Laws 1903, p. 437, c. 184, § 70, against factory superintendent for allowing child between 14 and 16 to be employed without employment certificate, fact that child was employed without defendant's knowledge or consent is no defense, statute imposing absolute duty. People v. Taylor, 124 App. Div. 434, 108 NYS 796.

**94.** Action for penalty for hindering and obstructing inspectors of labor department under Act 1904, § 26, P. L. 160. Evidence showed inspectors found office door locked, were told to go to gateman, went to him, showed authority, and were refused admittance. Held, gateman's act was prima facie that of his employer. Error to direct verdict for defendant. Bryant v. Graves Co. [N. J. Law] 71 A 60.

**95.** Under statute making it unlawful for coal miner to enter any place in mine against caution, or to disobey orders, or to do any act by which lives or health of persons or security of mine is endangered, intent to injure person or property is not essential to constitute the crime. Koppala v. State [Wyo.] 93 P 662. "Caution" as used in statute means to warn or give notice of danger. Id. Indictment charging miner with going to place in mine against caution, etc., sufficient, being in language of statute. Id.

**96.** Safety appliance acts are constitutional. United States v. Southern R. Co., 164 F 347. Acts apply to all railroads engaged in interstate business. Id. Acts of congress on subject, exclusive. Id. Under the federal automatic coupler act, a railroad company is liable to the penalty for using cars in interstate business which are not equipped with automatic couplers in good condition at both ends of each car. Good coupler at one end not enough. United States v. Philadelphia & R. R. Co., 160 F 696. Each car must be equipped with automatic couplers. Unites States v. Chicago G. W. R. Co., 162 F 775. Diligence in inspection is immaterial. Company is liable if couplers are defective and defects are not discovered before cars are used. United States v. Philadelphia & R. R. Co., 160 F 696. New trial in above case denied. Instructions proper. United States v. Pennsylvania R. Co., 162 F 408. The safety appliance act in the situations in which it is applicable imposes upon a railway company an absolute duty to maintain the prescribed coupling appliances in operative condition, and is not satisfied by the exercise of reasonable care to that end. United States v. Atchison, etc., R. Co. [C. C. A.] 163 F 517. Same holding. New trial denied. United States v. Lehigh Valley R. Co., 162 F 410. It is duty of railroad companies to know whether their cars or trains are properly equipped. If they are not, they are liable to penalties for each offense. United States v. Chicago G. W. R. Co., 162 F 775. Defects must be at once repaired when discovered or as soon as reasonably possible if means of repair are not at hand, and cars may be taken to nearest point for repairs. Id. Immaterial that cars hauled belong to another company if they are not equipped as required by the act. Id. In an action to enforce the penalty, the **government need not prove its case beyond a reasonable doubt,** but must make it out by evidence which is clear and satisfactory. United States v. Philadelphia & R. Co., 160 F 696. Government must prove its case clearly and satisfactorily by the greater weight of credible evidence. United States v. Chicago G. W. R. Co., 162 F 775. **Complaint** to recover penalty under safety appliance act for hauling cars with defective couplers, held not demurrable for failure to negative matter of exception created by proviso to § 6, amended by 32 Stat. 943; nor because it showed only one coupler to be defective and that it was so only because coupling chain was "kinked;" nor because it did not exercise reasonable care by company to keep couplers in operative condition; nor because it failed to show length of haul, or any actual use of coupler, though it alleged that car was hauled. United States v. Denver & R. G. R. Co. [C. C. A.] 163 F 519.

## MASTERS AND COMMISSIONERS.

§ 1. Office, Eligibility, Appointment, and Compensation, 809.
§ 2. Powers and Duties in General and Subjects of Reference, 819.
§ 3. Proceedings on Reference and Hearing by Master, 811.
§ 4. Report of Master, Exceptions and Objections, 812.
§ 5. Powers of Court and Proceedings on Review, 813.
§ 6. Re-reference, 815.

*The scope of this topic* is noted below.[97]

§ 1. *Office, eligibility, appointment, and compensation.*[98]—See 10 C. L. 812—The office of clerk and master of a chancery court is of a judicial character,[98a] and acts performed by the clerk in the capacity of master are those of a judicial officer;[99] hence, where the chancellor is disqualified in a case, the clerk as master, and his deputy acting in the chancellor's stead, are likewise disqualified.[1] Where the power to appoint a commissioner is vested in a court by the constitution, it is immaterial that the legislature has apparently attempted to take that power away.[2]

An order of reference should be definite,[3] and the appointment of a special master commissioner for the sale of specific property, together with the special reason or reasons why the sale should not be made by the sheriff of the county, should be embodied in and made part of the judgment, order or decree ordering the sale.[4]

A master is entitled to a fair and just remuneration for the time necessarily and properly spent,[5] but the fees are not necessarily to be determined in accordance with judicial salaries paid in the state, but should be reasonable in view of the services rendered,[6] and a wide discretion is vested in the court by statute in fixing them,[7] and its judgment in the premises should not be disturbed except where there has been a clear abuse of discretion.[8] The fees must be assessed against such parties as are designated by statute,[9] and a claim must show the time necessarily employed in the

97. This article includes all matter relating to masters in chancery and court commissioners. Analogous matter may be found in the titles Reference, 10 C. L. 1489; Restoring Instruments and Records, 10 C. L. 1526 (examiners of title under burnt record acts); Notice and Record of Title, 10 C. L. 1015 (referees under Torrens Act), and Partition, 10 C. L. 1089. Also, see Arbitration and Award, 11 C. L. 262, and Depositions, 11 C. L. 1069.

98. **Search Note:** See Court Commissioners, Cent. Dig. §§ 1-5, 9; Dec. Dig. §§ 1-2; 11 Cyc. 623, 625, 626; Equity, Cent. Dig. §§ 852, 853, 857-863; Dec. Dig. §§ 393, 394, 396-398; 16 Cyc. 430-432.

98a. Morrow v. Sneed [Tenn.] 114 SW 201.

99. Clerk while acting as master in entering and setting aside order pro confesso held to exercise a judicial function. Morrow v. Sneed [Tenn.] 114 SW 201.

1. Where chancellor was disqualified by reason of being defendant in case, master and deputy held disqualified from entering, order pro confesso on defendant's cross bill. Morrow v. Sneed [Tenn.] 114 SW 201.

2. Power to appoint commissioner vested in superior court of each county under Const. art. 4, § 23; legislative act limiting right of counties where there is no resident judge invalid. Howard v. Hanson, 49 Wash. 314, 95 P 265.

3. Order in which person named was called "court commissioner and later referred to as said court commissioner" held not void for indefiniteness as not showing whether reference was to person named as referee or as court commissioner. Howard v. Hanson, 49 Wash. 314, 95 P 265.

4. Augustus v. Lynd, 7 Ohio N. P. (N. S.) 473.

5. Manowsky v. Stephan, 233 Ill. 409, 84 NE 365. Under Hurd's Rev. St. 1905, c. 53, § 20, $50 held ample for hearing argument, preparing report, and passing on objections, where some 4 days were spent, but in reporting and overruling objections, more was done than law required in writing. Id. Fifteen cents per folio for taking 825 folios of testimony not exorbitant. Id.

6. Fees to be fixed in accordance with services, amount involved, and ability and standing of commissioner. Weltner v. Thurmond [Wyo.] 98 P 601. Rev. St. 1899, § 4541, allowing commissioner $5 a day for time taxed as cost, under § 4537, not applicable to compensation of master commissioner appointed in equity case to take evidence and report conclusions of fact and law, and whose compensation is taxable as costs under § 3335. Id. Five hundred dollars in case involving $36,000 held not excessive for taking testimony for two days and later writing an exhaustive opinion covering essential points of case. Id.

7. Rev. St. 1899, § 3335. Weltner v. Thurmond [Wyo.] 98 P 601.

8. Fee of $500 to commissioner appointed to take testimony and make findings of fact in case involving $36,000, who occupied 2 days in taking testimony and later wrote exhaustive opinion, held not excessive. Rev. St. 1899, § 3335. Id.

9. Under Mechanics' Lien Act of 1895, § 11,

examination of questions of law and fact, and in preparing report of findings and conclusions.[10] An order of dismissal "without costs" does not affect the master's right to his fees, even though the order be consented to by the defendants,[11] and no agreement of the parties to which the master did not assent, can affect the latter's right to enforce his claim for fees against such parties as are legally liable therefor.[12]

§ 2. *Powers and duties in general and subjects of reference.*[13] See 10 C. L. 812 Under statute in Maine, a disclosure commissioner for a particular county has jurisdiction when holding his court in any other than the shire town of his county over persons of such debtors only as reside in said town, or of debtors whose creditors or attorney's reside therein,[13a] and where such commissioner acts without his jurisdiction, he renders himself liable for all acts done without those limits and wholly outside of his powers and duties.[14]

Voluminous and complicated accounts may properly be referred to a master for statement,[15] and should be so referred,[16] unless for particular reasons a reference becomes unnecessary,[17] but where the matter of stating an account is not complicated, it is within the discretion of the chancellor to refuse the same.[18] Usually the legislature has power to confer upon court commissioners powers in addition to those specifically enumerated in the constitution,[18a] and a court by a proper order may authorize a master commissioner to institute proceedings to enforce a liability for refusal of a purchaser, of land sold to enforce a vendor's lien, to execute a bond for the amount bid,[19] but in the absence of such authority the commissioner has no such power.[20] Whether a particular issue is one for the master depends largely upon the facts in the case at hand.[21] Where there is conflict in the evidence as to the location

costs controlled by statute and not within discretion of court, hence order assessing half of master's fees on party whose interest was owner of right of dower and who had no beneficial interest in premises held erroneous. Strook v. Jamieson, 139 Ill. App. 339.

**10.** Claim for "hearing arguments and examining questions in issue and reporting conclusions thereon" held improperly allowed, not showing time necessarily employed. Wirbicky v. Danicki, 235 Ill. 106, 85 NE 396. Assurances in briefs that chancellor regarded charge as very reasonable held without significance. Id.

**11, 12.** Strook v. Jamieson, 139 Ill. App. 339.

**13. Search Note:** See Court Commissioners, Cent. Dig. §§ 2-10; Dec. Dig. §§ 3-6; 11 Cyc. 623-625; Equity, Cent. Dig. §§ 854-856, 864-879; Dec. Dig. §§ 395, 399-402; 16 Cyc. 430, 434-437.

**13a.** Statutes considered and commissioners held to be without jurisdiction over debtor's person, neither debtor, creditor, nor his attorney residing in Fairfield where court was held. Stuart v. Chapman [Me.] 70 A 1069.

**14.** Stuart v. Chapman [Me.] 70 A 1069. Commissioner, refusing debtor benefit of oath provided by Rev. St. 1903, c. 114, § 55, indorsing upon execution certificate required by § 38, and who annexes to execution capias required by § 38, whereupon debtor is arrested and committed to jail, held liable for false imprisonment. Id.

**15.** Where correctness of some items was impugned. Speakman v. Vest [Ala.] 45 S 667.

**16.** Laughlin v. Brauer, 138 Ill. App. 524.

**17.** In proceeding for settlement of partnership accounts where case was submitted on exceptions to certain depositions and for hearing and trial in chief, court without any argument between counsel could take up and pass upon controversy relating to certain items without referring them to a commission. Boreing v. Wilson, 33 Ky. L. R. 14, 108 SW 914.

**18.** Account not being complicated, not error to refuse to refer cause to master. Laughlin v. Brauer, 138 Ill. App. 524.

**18a.** Subject to restrictions that powers must be connected with administration of justice, legislature held authorized to add powers. Howard v. Hanson, 49 Wash. 314, 95 P 265. Court commissioners under Const. art. 4, § 23, and Ballinger's Ann. Codes & St. § 4729 (Pierce's Code, § 4390), held empowered to hear proceeding to determine whether judgment debtor had any property subject to execution, and to compel attendance of witnesses in hearing of matters. Id.

**19.** Brand v. Pryor [Ky.] 115 SW 180.

**20.** Where no such authority was given, held plaintiffs in original action were entitled to proceed either by amended petition, by rule or both. Brand v. Pryor [Ky.] 115 SW 180.

**21.** In suit to restrain action for renting of sawmill and compel specific performance of agreement to sell, whether defendant extended contract of renting by acquiescence so as to entitle plaintiff to purchase mill according to stipulation in contract held, under evidence, question for master. Felton v. Chillis [Vt.] 69 A 149. Auditor appointed to settle account of trustee of an estate and report distribution cannot pass on claim by an executor of one of distributees under a mortgage, against an assignee of a distribu-

and identity of monuments called for in a patent, the location of a disputed boundary line as a question of fact may properly be referred,[22] but issues should not be referred where the allegation of the complaint show that plaintiff has an adequate remedy at law,[23] nor can a suit in chancery properly be referred to a master for the purpose of taking testimony therein before all the issues are properly made up.[24] It is the master's duty to find the facts and not to determine whether any and what relief shall be given.[25] A master commissioner in the exercise of his sound discretion may resell land without reporting to the court the bid of an insolvent purchaser at a prior sale, who failed to execute a bond to secure his bid.[26] The issuance of a master's deed, pursuant to a certificate issued as a result of proceedings to foreclose a mortgage where appellants did not appear and answer, will not be restrained in the absence of a showing of a meritorious defense to the action in which the decree was rendered.[27]

§ 3. *Proceedings on reference and hearing by master.*[28]—See 10 C. L. 813—A master should arrive at his conclusions from his own investigation,[28a] but parties having invited another method which is adopted are not in a position to complain.[29] The time for the reception of evidence is largely within the discretion of the master,[30] as is also the question whether a case shall be reopened and additional evidence be introduced the next day after both parties have announced their conclusion of testimony.[31] He is at liberty to disbelieve testimony given before him,[32] but he cannot willfully or from mere caprice disregard the testimony of an unimpeached witness.[33] Where a master in an accounting complies with the decree, it is immaterial that he does not annex to his report and finding any account with items,[34] or that he makes a mistake in the net worth where such error is not prejudicial.[35] In proceeding on accounting between partners, the partnership ledgers kept by bookkeepers are competent original evidence.[36] A master upon petitioning that defendants be decreed to pay him his fees in the case where a suit is dismissed upon complainant's motion ceases to be merely an agency of the court and becomes an independent and interested party in the matter.[37] Since a writ of prohibition only lies to a court, and probably

tee's share, based on a right to recover another fund arising from the share assigned, and for a consideration covered by both claims, where validity of assignment is unquestioned and there is no dispute as to whether it was absolute. In re Ball's Estate, 220 Pa. 399, 69 A 817.

22. State v. King [W. Va.] 63 SE 468.

23. Error to refer all issues in action for recovery of land, complaint showing no obstacle to recovery but that he had adequate remedy at law. Central Nat. Bank v. Duncan, 77 S. C. 1, 57 SE 531.

24. Irregular and improper practice to refer cause to master where all interested persons had not been made parties to action. Sarasota Ice, Fish & Power Co. v. Lyle & Co., 53 Fla. 1069, 43 S 602.

25. Question of relief one for court. Adams v. Young, 200 Mass. 588, 86 NE 942.

26. Sale of land to enforce vendor's liens. Brand v. Pryor [Ky.] 115 SW 180. Fact that at second sale property was knocked down to an irresponsible bidder held not to effect commissioner's right to again sell property without reporting second sale to court. Id

27. Gross v. Parker, 137 Ill. App. 313.

28. **Search Note:** See Equity, Cent. Dig. §§ 880-892; Dec. Dig. §§ 404, 405; 16 Cyc. 438-443.

28a. Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 NE 132.

29. Parties having invited findings from suggestions filed with master not in position to complain. Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 NE 132.

30. Where counsel for defendant acquiesces in contention that certain averments in bill stand admitted, and at close of hearing repudiates the admission, it is proper to allow plaintiff to then prove them. Warren's Adm'r v. Bronson [Vt.] 69 A 655.

31. City Council of Greenville v. Earle [S. C.] 60 SE 1117.

32. Allen v. Wilbur, 199 Mass. 366, 85 NE 429. Report held to show that master drew inference that letter containing notices was actually received from evidence before him. Id.

33. Larson v. Glos, 235 Ill. 584, 85 NE 926.

34, 35. Schlicher v. Whyte [N. J. Err. & App.] 71 A 337.

36. Held not error for master to admit in evidence partnership ledgers without production of books of original entry. Schlicher v. Whyte [N. J. Err & App.] 71 A 337.

37. Strook v. Jamieson, 139 Ill. App. 339. Where master obtains order for certain fees earned in a proceeding which was dismissed, appeal will lie therefrom and is properly en-

in some exceptional cases to a judge at chambers, it will not run against a receiver, commissioners and master appointed by the court.[38]

§ 4. *Report of master, exceptions and objections.*[39]—See 10 C. L. 813—The law does not contemplate the preparation by the master of an opinion in the case,[39a] and reasons for findings are not properly a part of the report.[40] It is not material that the report does not appear to have been formally confirmed though that is the regular procedure.[41] An error in a master's report may be cured by acts before the decree approving the report is passed,[42] and if erroneous in the amount of costs paid, the party aggrieved should ask the court below for a retaxation.[43] Defect, if any, in the report, in that it does not contain all the documentary proofs, is cured by the introduction of such evidence in open court.[44] A master while a matter is still pending before him and before his report is signed may properly include in his report a statement to the effect that since the taking of the testimony and the drafting of his report a certain admission has been made by one of the parties to the litigation,[45] and the admission need not be reported in the exact words.[46] In passing upon objections after hearing argument and reaching a decision, a master need only make a brief, written statement that the objections are overruled.[47] Findings must not be inconsistent with recommendations,[48] but must correctly apply the law [49] and must be supported by the evidence.[50] Findings of conclusions of law may be harmless.[51] Under

titled with master named as appellee, he having become party. Id.

**38.** Dunbar v. Bourland [Ark.] 114 SW 467. Should officers proceed to discharge duties imposed upon them in void proceeding in which they were appointed, remedies of petitioner both for prevention and redress would be ample. Id.

**39. Search Note:** See Equity, Cent. Dig. §§ 893-919; Dec. Dig. §§ 406-410; 16 Cyc. 444-455.

**39a.** Manowsky v. Stephan, 233 Ill. 409, 84 NE 865. Report in length and manner of preparation subject to criticisms of report in Manowsky v. Stephan, 233 Ill. 409, 84 NE 365; Wirzbicky v. Dranicki, 235 Ill. 106, 85 NE 396. Report need only state (1) ultimate facts by reference to pleadings or otherwise; (2) conclusions upon questions of law in issue without discussion or argument; and (3) computation of amount due. Manowsky v. Stephan, 233 Ill. 409, 84 NE 365.

**40.** Manowsky v. Stephan, 233 Ill. 409, 84 NE 365.

**41.** American Circular Loan Co. v. Wilson, 198 Mass. 182, 84 NE 133. That it was accepted and acted upon by court with certain additions and corrections, materials for which were found in report itself, held a practical confirmation of report, especially when followed by final refusal to recommit report. Id. View confirmed by final decree reciting that it was made "upon master's report and exceptions of parties thereto and the master's supplementary report." Id. Findings of court that master proceeded in due form of law and in accordance with terms of decree sufficient to meet objections as to sufficiency and regularity of a certificate of publication in master's sale. Steele v. Wynn, 139 Ill. App. 428.

**42.** Where at time of making report mortgage was not discharged but discharged before decree approving decree was passed, held exception to report was unavailing on appeal. O'Brien v. McNeil, 199 Mass. 164, 85 NE 402.

**43, 44.** Steele v. Wynn, 139 Ill. App. 428.

**45.** Admission that chattel mortgage in question had been foreclosed properly included in report. Bush v. Caldwell, 136 Ill. App. 115. If admission was incompetent, court will be presumed to have ignored same, evidence otherwise being sufficient to sustain decree. Id.

**46.** Finding "that plaintiff concedes that, etc.," held not erroneous for failure to include that plaintiff qualified admission to a certain extent. City Council of Greenville v. Earle [S. C.] 60 SE 1117.

**47.** A lengthy report on objections not necessary. Manowsky v. Stephan, 233 Ill. 409, 84 NE 365.

**48.** In suit by equitable owner to charge purchaser as trustee of legal title where a third person to defraud equitable owner had placed title in name of grantor of purchaser, master's report that grantor had no "right or color of right" in property, and recommendation that purchaser should execute deed to equitable owner, held not inconsistent "right or color of right" referring to equitable right. Tye v. Manley, 7 Ind. T. 332, 104 SW 636.

**49.** Finding that plaintiff's liability depended on whether city altered grade without defendant's consent held to refer to defendant's consent as to an estoppel, and not that his consent was necessary to a change; hence exception to report properly overruled. City Council of Greenville v. Earle [S. C.] 60 SE 1117. Reporting gross of $319.93 to be awarded to wife not erroneous, Chancery Act, Revision 1902, § 60 (P. L. 531, 532), passed subsequent to marriage, being constitutional. Leach v. Leach [N. J. Eq.] 66 A 595.

**50.** Finding from partnership agreement that old accounts standing on books were ones referred to and were to be regarded as assets of new partnership and not property of old partners held correct. Schlicher v. Whyte [N. J. Err. & App.] 71 A 337. Evidence held to sustain findings that "fertilizer was up to guaranteed analysis," etc. Braxton v. Liddon [Fla.] 46 S 324.

**51.** Master's finding in suit to enforce mechanic's lien that, except claims for latent

statute in some states, exceptions may be allowed to a master's report where the master improperly admitted or excluded testimony, or for any other cause which may be adjudged by the court or where it is apparent from the report that injustice has been done,[52] and an exception to a master's ruling that the plaintiff was entitled to no relief is well taken being a conclusion of law,[53] but where all the facts are reported by the master, the exception to such ruling is immaterial.[54] Exceptions based upon the alleged state of the evidence are properly overruled where the evidence is not reported and the facts upon which they are respectively based are not set out in the report,[55] or where the evidence is irreconcilably conflicting and the party excepting had the burden of proof.[56] An exception to the report because of the reception of oral testimony to show the appointment of an administrator is without force where the report does not show that any objection was made to the testimony,[57] and where the master finds solely from the report of commissioners for the allowance of claims against an estate that there is due from the estate a certain amount on a note, an exception to the report because of the reception in evidence of the note itself and the indorsements thereon is without force,[58] and the fact that the findings do not show who made the endorsement is also without force since the allowance of the note by the commissioners was equivalent to a judgment and merged the original claim.[59] Where a special order was made in a case on notice in regard to the signing of testimony on reference to a master, and that order has not been appealed from exceptions to the testimony on the ground that it had not been read over or signed by the witnesses, will not be considered well founded on exceptions to the report.[60] Where the evidence excepted to refers only to immaterial issues, the failure to require the master to report the evidence is not error,[61] and where the exceptant was not aggrieved by the failure of the master to report on a matter as directed, his exceptions on that account will be overruled.[62] One having informed the master that he did not desire a finding upon a particular question is not in a position to complain because the master left the question undecided.[63] By failure to take exceptions, a party is deemed to have accepted a master's report,[64] and the master's finding is conclusive upon the parties as to all questions wherein the finding is not excepted to,[65] and although a party duly excepts to a report where the evidence is not reported, he is concluded by the master's findings of fact.[66]

§ 5. *Powers of court and proceedings on review.*[67]—See 10 C. L. 813—Aside from

defects, respondents were estopped to set up claims after suit not mentioned in notice of failure to comply with contract held harmless, where it did not appear that there were patent defects not covered by notice. Manowsky v. Stephan, 233 Ill. 409, 84 NE 365.

**52.** Mansf. Dig. § 5273 (Ind. T. Ann. St. 1899, § 3478). Guarantee Gold Bond Loan & Sav. Co. v. Edwards, 7 Ind. T. 297, 104 SW 624. Evidence held to support court's finding that instrument should be deemed a mortgage and not a deed, as held by master, hence, under statute, exception to finding was properly held not well taken. Id.

**53, 54.** Adams v. Young, 200 Mass. 588, 86 NE 942.

**55.** O'Brien v. McNeil, 199 Mass. 164, 85 NE 402. Error in account as stated by master in that plaintiff was improperly charged twice with part of interest on note involved. Id.

**56.** Wirzbicky v. Dranicki, 235 Ill. 106, 85 NE 396.

**57, 58.** Warren's Adm'r v. Bronson [Vt.] 69 A 655.

**59.** Were defendant relied on outlawry of note, burden on her to show it, claim being merged. Warren's Adm'r v. Bronson [Vt.] 69 A 655.

**60.** Leach v. Leach [N. J. Eq.] 66 A 595.

**61.** American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133.

**62.** Failure to fix value of use and occupancy of premises as required by order, where party was not aggrieved. Leach v. Leach [N. J. Eq.] 66 A 595.

**63.** Leaving question of right of drainage undecided, having been invited by plaintiff, not open to exception and appeal by him. Lipsky v. Heller, 199 Mass. 310, 85 NE 453.

**64.** Lipsky v. Heller, 199 Mass. 310, 85 NE 453.

**65.** Findings as to amount due conclusive, no exception having been filed. Haas Elec. & Mfg. Co. v. Springfield Amusement Park Co., 236 Ill. 452, 86 NE 248.

**66.** Lipsky v. Heller, 199 Mass. 310, 85 NE 453.

**67. Search Note:** See Equity, Cent. Dig. §§ 919, 927-931; Dec. Dig. §§ 411, 413, 414; 16 Cyc. 447-455, 459.

statutory provisions to the same effect,[67a] a master's findings of fact are only prima facie correct [68] and only advisory to the lower or appellate court where the evidence accompanies the report.[69] Although it has been held to the contrary,[70] they are not of the same dignity or binding force as are verdicts; [71] but although entitled to great weight,[72] the court, if dissatisfied, may set them aside on exception and adopt his conclusion as to what the evidence proves,[73] but they should be sustained unless the court is satisfied from the evidence that they are clearly erroneous,[74] since the legal presumption is in their favor [75] when made by the "consent" [76] of the parties and concurred in by the court,[77] and that the master in making them and reporting the testimony discharged his duty.[78] The court may make additional findings of fact from the master's reports of findings without hearing further evidence,[79] and where exceptions to the report raise inferences of fact to be drawn from the facts found by the master, the court which has to deal with those exceptions may draw inferences of fact from the facts found.[80] The rejection of a master's affirmative finding in a particular case may not affect the maker's report.[81] Findings of fact by a master will be affirmed as against general exceptions which do not point out any evidence to impeach the same,[82] and they will not be impeached in the absence from the record of his certificate or other competent proof either that the evidence presented is the entire evidence taken by him, or that it contains all the evidence which was before him relative to the specific findings challenged.[83]

**67a.** Under Mans. Dig. § 5272 (Ind. T. Ann. St. 1899, § 3477), master's findings only advisory to court which may reverse same where justice requires same. Guarantee Gold Bond Loan & Sav. Co. v. Edwards, 7 Ind. T. 297, 104 SW 624.

**68.** Guarantee Gold Bond Loan & Sav. Co. v. Edwards, 7 Ind. T. 297, 104 SW 624. Report not entitled to same effect as verdict of a jury in a case where parties have a right to have issues of fact determined by a jury. Larson v. Glos, 235 Ill. 584, 85 NE 926.

**69.** Guarantee Gold Bond Loan & Sav. Co. v. Edwards, 7 Ind. T. 297, 104 SW 624.

**70.** Master's finding of fact is not merely advisory but has force and effect of a special verdict of a jury. Town of Sapulpa v. Sapulpa Oil & Gas. Co. [Okl.] 97 P 1007.

**71.** State v. King [W. Va.] 63 SE 168. Where not made by consent of parties, they have not force of a special verdict. Hapgood v. Berry [C. C. A.] 157 F 807.

**72.** State v. King [W. Va.] 63 SE 468.

**73.** State v. King [W. Va.] 63 SE 468; Hapgood v. Berry [C. C. A.] 157 F 807. Evidence held to support master's finding that there was no fraud in sale of mill property. Felton v. Chellis [Vt.] 69 A 149.

**74.** State v. King [W. Va.] 63 SE 468. Under evidence held error to sustain exceptions to report. Town of Sapulpa v. Sapulpa Oil & Gas Co. [Okl.] 97 P 1007. Nothing found to impugn correctness of master's findings. Whitman v. McIntyre, 199 Mass. 436, 85 NE 426. Evidence held to show that master made mistake in finding a fact, and that deed was procured by fraud and was intended to be a mortgage. Guarantee Gold Bond Loan & Sav. Co. v. Edwards [C. C. A.] 164 F 809. Master's findings in making allowances sustained. Cimiotti Unhairing Co. v. American Fur Refining Co., 158 F 171. Even where appellate court is in doubt as to correctness of findings, it is not justified in disturbing decree on evidence, chancellor having approved of findings. Glos v. Larson, 138 Ill. App. 412.

**75.** Guarantee Gold Bond Loan & Sav. Co. v. Edwards [C. C. A.] 164 F 809; Cimiotti Unhairing Co. v. American Fur Refining Co., 158 F 171.

**76.** Consent of parties such as will render master's finding upon conflicting evidence unassailable cannot be inferred from mere failure to object to a general order of reference made before a suit is commenced. Guarantee Gold Bond Loan & Sav. Co. v. Edwards [C. C. A.] 164 F 809.

**77.** Hapgood v. Berry [C. C. A.] 157 F 807.

**78.** Where order required master to report all testimony, presumption that he did so when he returned testimony. Guarantee Gold Bond Loan & Sav. Co. v. Edwards [C. C. A.] 164 F 809; Id., 7 Ind. T. 297, 104 SW 624. Order of court that master report the evidence, and legal presumption that he discharged duty, held sufficient proof that master reported all testimony; hence no error in examining testimony reported by master to determine whether findings were sustained thereby. Id.

**79.** American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133.

**80.** Rosenberg v. Schaer, 200 Mass. 218, 86 NE 316.

**81.** In suit to restrain an action at law for rent, rejection of finding, that there was no fraud on owner's part in making contract renting mill held not to affect report, since presumption is that there was no fraud and burden was on party asserting same to prove it. Felton v. Chellis [Vt.] 69 A 149.

**82.** Findings as to amount of damages recoverable for infringement of a patent affirmed. H. C. Cook Co. v. Little River Mfg. Co., 164 F 1005.

**83.** Wheeler v. Abilene Nat. Bank. Bldg. Co. [C. C. A.] 159 F 391; Guarantee Gold Bond Loan & Sav. Co. v. Edwards [C. C. A.] 164 F 809.

§ 6. *Re-reference.*[84] See 10 C. L. 814—The recommittal of a master's report is within the discretion of the chancellor.[84a] Ordinarily, where on appeal it appears that certain corrections would be made in the account as reported, and there are not sufficient data for determining the errors, the case will be recommitted to the master to state the proper account,[85] but that will not be done where the plaintiff has failed to avail himself of the permission given him by the lower court and the defendant does not desire the same.[86]

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**Masters of Vessels,** see latest topical index.

**MECHANICS' LIENS.**


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Liens in general,[87] and matters relating to the interpretation and performance of building contracts,[88] are elsewhere treated.

§ 1. *Nature of lien and right to it in general.*[89] See 10 C. L. 814—A mechanics' lien is usually designated as a statutory privilege,[89a] though in some states the right is guaranteed by the constitution.[90] Lien laws are said to be in derogation of the common law requiring strict compliance with the statute in acquiring the lien,[91] though

**84. Search Note:** See Equity. Cent. Dig. §§ 924-926; Dec. Dig. § 412; 16 Cyc. 456.

**84a.** No error in exercise of discretion to refuse a recommittal. American Circular Loan Co. v. Wilson, 198 Mass. 182, 84 NE 133.

**85, 86.** Thurston v. Hamblin, 199 Mass. 151, 85 NE 82.

**87.** See Liens, 12 C. L. 606.

**88.** See Building and Construction Contracts, 11 C. L. 464.

**89. Search Note:** See notes in 13 L. R. A. 701; 38 Id. 410; 4 Ann. Cas. 620; 7 Id. 430; 10 Id. 374.

See, also, Mechanics' Liens, Cent. Dig. §§ 1-11; Dec. Dig. §§ 1-8; 27 Cyc. 17-24; 20 A. & E. Enc. L. (2ed.) 268, 311; 13 A. & E. Enc. P. & P. 939.

**89a.** Coffey v. Smith [Or.] 97 P 1079. Right purely statutory. Potter Mfg. Co. v. Meyer & Co. [Ind.] 86 NE 837; Tenth Nat. Bank v. Smith Const. Co., 218 Pa. 581, 67 A 872; Deichley's Estate, 35 Pa. Super. Ct. 442; Kountz v. Consolidated Ice Co., 36 Pa. Super. Ct. 639; Keely v. Jones, 35 Pa. Super. Ct. 642.

**90.** Mechanic's lien derived from two sources, statute and constitution. United States & Mexican Trust Co. v. Western Supply & Mfg. Co. [Tex. Civ. App.] 109 SW 377. Right of materialman to lien of constitutional creation (Los Angeles Pressed Brick Co. v. Los Angeles Pacific Boulevard & Development Co., 7 Cal. App. 460, 94 P 775), based upon theory that he has equitable right to payment for materials furnished owner (Id.), and mechanic's lien laws are merely legislative provisions to make right effective (Id.). Mechanic's lien law of code is statutory provisions for enforcement of the lien pursuant to constitutional mandate. Art. 20, § 15. Goldtree v. San Diego [Cal. App.] 97 P 216; Los Angeles Pressed Brick Co. v. Higgins [Cal. App.] 97 P 414. Lien law not general law as to contracts but means whereby constitutional right to enforce lien and must be so construed. Los Angeles Pressed Brick Co. v. Higgins [Cal. App.] 97 P 414.

**91.** Coffey v. Smith [Or.] 97 P 1079; Snitzler v. Filer, 135 Ill. App. 61. Compliance with statute requisite. Tenth Nat. Bank v. Smith Const. Co., 218 Pa. 581, 67 A 872; Deichley's Estate, 35 Pa. Super. Ct. 442; Keely v. Jones, 35 Pa. Super. Ct. 642; Kountz v. Consolidated Ice Co., 36 Pa. Super Ct. 639. Lein privilege not to be extended. Deeds v. Imperial Brick Co., 219 Pa. 579, 69 A 78. Substantial compliance with notice required sufficient. Day v. Pennsylvania R. Co., 35 Pa. Super. Ct. 586. **Substantial compliance sufficient.** Lien Law, § 22. Hurley v. Tucker, 128 App. Div. 580, 112 NYS 980; Waters v. Boldberg, 124 App. Div. 511,

it is likewise said that such statutes are remedial, to be liberally contrued in enforcement.[92] Mechanics' lien laws do not contemplate anything in the nature of a personal action,[93] and statutes extending the system by providing remedies in personam are invalid.[94]

§ 2. *Services, materials, and claims for which liens may be had.*[95] See 10 C. L. 815 Ordinarily the materialman must show that the labor performed and the materials furnished were used in the construction of the structure.[95a] A claim for damages [96]

108 NYS 992; Weiss v. Kenney, 59 Misc. 279, 112 NYS 287; Broxton Artificial Stone Works v. Jowers [Ga. App.] 60 SE 1012. Not disregard of statute. Hogan v. Bigler [Cal. App.] 96 P 97; Davis v. Treacy [Cal. App.] 97 P 78; Windfall Natural Gas, Min. & Oil Co. v. Roe, 41 Ind. App. 687, 84 NE 996; Id. [Ind. App.] 85 NE 722.

**92.** Tonopah Lumber Co. v. Nevada Amusement Co. [Nev.] 97 P 636; Baker v. Lake Land Canal & Irrigation Co., 7 Cal. App. 482, 94 P 773; Stepina v. Conklin Lumber Co., 134 Ill. App. 173. Where claimant brings himself within Burns' Ann. St. 1908, § 8295, authorizing such liens, statute will be liberally construed. Potter Mfg. Co. v. Meyer & Co. [Ind.] 86 NE 837. Lien Law, § 22 (Laws 1897, c. 418, p. 525), requires liberal construction. Hurley v. Tucker, 128 App. Div. 580, 112 NYS 980. Lien Law, § 22 (Laws 1897, p. 525, c. 418). Griffin v. Ernst, 124 App. Div. 289, 108 NYS 816; Waters v. Goldberg, 124 App. Div. 511, 108 NYS 992.

**93.** Vulcanite Portland Cement Co. v. Allison Co., 220 Pa. 382, 69 A 855. Property subject to mechanic's lien thought no personal indebtedness. Beach v. Huntsman [Ind. App.] 83 NE 1033; Id., 85 NE 523. An action to enforce a lien given for material is not a proceeding quasi in rem, debt being **personal liability** founded on contract. Rutherford v. Ray, 147 N. C. 253, 61 SE 57. Personal judgments may be rendered. See post § 10D, Judgments.

**94.** Act June 4, 1901, § 46 (P. L. 452), providing that in enforcement of mechanic's liens where property is essential to business of public service corporation, claimant shall have execution thereon as in cases of judgment against other corporations, provides for a remedy in personam (under special writ of fieri facias provided by Act Apr. 7, 1870, P. L. 58), and is special legislation and inoperative. Vulcanite Pav. Co. v. Philadelphia Rapid Transit Co., 220 Pa. 603, 69 A 1117. Ordinary process of enforcement of mechanic's lien by levari facias, in rem. Id. Method of enforcing being inoperative, lien must fail. Id. A statute giving right to pursue person indebted in attachment is invalid. Vulcanite Portland Cement Co. v. Allison Co., 220 Pa. 382, 69 A 855; Trexler v. Kuntz, 36 Pa. Super. Ct. 352. Provisions of Mechanic's Lien Law (Act June 4, 1901) § 28 (P. L. 445), giving subcontractor right to issue attachment execution against owner or other party indebted to contractor is special legislation, violative of Const. art. 3, § 7, forbidding General Assembly from passing law changing methods of collection of debts or enforcing of judgments. Vulcanite Portland Cement Co. v. Allison Co., 220 Pa. 382, 69 A 855.

**95. Search Note:** See notes in 4 C. L. 617; 16 L. R. A. 600; 18 Id. 305; 2 L. R. A. (N. S.) 288; 6 Id. 550; 15 Id. 509; 16 Id. 585; 4 Ann. Cas. 1015; 9 Id. 97, 309.

See, also, Mechanics' Liens, Cent. Dig. §§ 23-59, 112-124; Dec. Dig. §§ 22-54, 79-93; 27 Cyc. 31-49, 81-87; 20 A. & E. Enc. L. (2ed.) 304.

**95a.** Potter Mfg. Co. v. Meyer & Co. [Ind. App.] 85 NE 1048; Id. [Ind.] 86 NE 837. Claim for rental of scrapers neither "labor performed" or "materials furnished" within Ballinger's Ann. Codes & St. § 5902 (Pierce's Code, § 6104), giving lien for grading of street at owner's request. Hall v. Cowen [Wash.] 98 P 670. No lien per lumber used in construction of benches not part of building. Beck Coal & Lumber Co. v. Peterson Mfg. Co., 237 Ill. 250, 86 NE 715. No lien for plate rail never delivered on premises or used in construction of building. Ashford v. Iowa & Minnesota Lumber Co. [Neb.] 116 NW 272. Finding that certain materials not used in building sustained by evidence, though conflicting. Meyer v. Schmidt, 131 Mo. App. 53, 109 SW 833. Under Mechanic's Lien Law (Laws 1897, p. 515, c. 418, § 2), lien for **repairs** is authorized. Aetna Elevator Co. v. Deeves, 57 Misc. 632, 108 NYS 718. Under Act Mch. 2, 1899 (Sess. Laws 1899, p. 282) accepting provisions of "Carey Act" (Act Cong. June 11, 1896, c. 420, 29 Stat. 434, 6 Fed. St. Ann. p. 398 [U. S. Comp. St. 1891, p. 1556], supplementary to act Aug. 4, 1894, c. 208, 28 Stat. 226, 6 Fed. St. Ann. pp. 396-398 [U. S. Comp. St. 1901, p. 1552] Act Aug. 18, 1894, c. 301, 28 Stat. 422 [U. S. Comp. St. 1901, p. 1554]), lien is granted for construction of canals and **reclamation works for irrigation** of arid lands. Nelson Bennett Co. v. Twin Falls Land & Water Co., 14 Idaho, 5, 93 P 789.

**Labor performed:** Lien for services in superintendence held proper. Stearns-Roger Mfg. Co. v. Aytec Gold Min. & Mill Co. [N. M.] 93 P 706. Where men made improvements on mining claim at certain sum per day and board, cook was entitled to mechanic's lien for wages. Casaden v. Wimbish [C. C. A.] 161 F 241. Work done in cleaning up and washing gold is "labor done upon claim" within Alaska Civ. Code, § 262, giving laborer's lien. Id. Burns' Ann. St. 1908, § 8295, giving mechanic's lien for labor performed on structure, authorizes lien for value of labor performed in operating trench machine, including work done by machine. Potter Mfg. Co. v. Meyer & Co. [Ind.] 86 NE 837, afg. [Ind. App.] 85 NE 725, 85 NE 1048. Mere leasing of machine not performance of labor within statute. Potter Mfg. Co. v. Meyer & Co. [Ind.] 86 NE 837.

**Fixtures:** Machinery for which mechanic's lien given under Burns' Ann. St. 1908, § 8295, must be so attached to realty as to become fixture, must be fairly contemplated by contract and title pass to owner. Potter Mfg. Co. v. Meyer & Co. [Ind.] 86 NE 837, afg. [Ind. App.] 85 NE 725, 85 NE 1048. Use of trench machine or other tools, or of private railroad switch not basis for lien. Potter

or for money loaned [97] is excluded. The furnishing of materials necessarily involves the question of delivery [98] which some statutes require to be to the owner or his agent.[99]

§ 3. *Properties and estates therein which may be subjected to the lien.*[1]—See 10 C. L. 815—Property the subject of improvement should be charged with payment therefor,[1a] and a lien may not be had upon one structure for labor and materials entering into another structure,[2] although a joint lien may be had upon a number of structures.[3] Statutory provisions designate the area to which the lien attaches as a "lot,"[4] and generally the lien attaches to the extent of the statutory limit,[5] though

Mfg. Co. v. Meyer & Co. [Ind.] 86 NE 837. Under Burns' Ann. St. 1908, § 8295, mechanic's lien on waterworks system for brick buckets, blacksmithing work and charges for railroad switching privileges are not authorized. Potter Mfg. Co. v. Meyer & Co. [Ind. App.] 85 NE 725. Railroad switch not "machine" for construction of waterworks within statute giving liens to persons furnishing machinery. Potter Mfg. Co. v. Meyer & Co. [Ind. App.] 85 NE 1048. Under Mechanic's Lien Law, § 1, as amended in 1903 (Hurd's Rev. St. 1905, c. 82, § 15), giving lien to person who shall "furnish materials, fixtures, apparatus or machinery," etc., and § 7 (§ 21) providing that no lien be defeated for lack of proof that material was used in improvement, "fixtures, apparatus and machinery" must be shown to be used in such manner to be attached to or form part of real estate. R. Haas Elec. & Mfg. Co. v. Springfield Amusement Park Co., 236 Ill. 452, 86 NE 248. Item for street car tickets and meals for superintendent improperly included in amount of lien. Id. Item of carboys to be returned improperly included in amount of lien. Id. Under Mechanic's Lien Law (Laws 1897, p. 516, c. 418, § 3), giving lien for improvements to real estate, § 2 (p. 515), defining improvement, and § 22 (p. 525), authorizing liberal construction, machinery used for fitting up empty building as manufacturing establishment, though largely secondhand, entitled contractor to lien, the machinery having been bought for that purpose and by labor empty building was changed to manufactory. Griffin v. Ernst, 124 App. Div. 289, 108 NYS 816. Under Lien Law (Laws 1897, pp. 518, 520, 522, §§ 9, 12, 17), a lien upon real estate for materials not yet furnished is authorized. Goss v. Williams Engineering Co., 57 Misc. 78, 108 NYS 862. Cases, shelves, lockers, etc., without which building could not be used for library purposes, improvement of realty protected by lien. Rieser v. Commeau, 114 NYS 154. Insertion of electric wires in building so as to indicate intention to make them fixtures makes them subject of lien. B. & C. Comp. § 5640. Rowen v. Alladio [Or.] 93 P 929.

**96.** Lien can only embrace labor and materials furnished. Deeds v. Imperial Brick Co., 219 Pa. 579, 69 A 78. Where plaintiffs were to receive 10 per cent. for superintendence based on cost of plant being erected and were dismissed before completion, instruction that if plaintiffs were dismissed without justification they were entitled to verdict for full amount was erroneous. Id.

**97.** Uvalde Asphalt Pav. Co. v. New York, 191 N. Y. 244, 84 NE 83. Item for money advanced contractor by virtue of friendship not protected by lien. Lunsford v. Wren [W. Va.] 63 SE 308. Where plaintiff purchased lumber from employer for wages and cash and furnished to defendants for building house, he was entitled to lien, evidence being insufficient to show transaction a loan. Poplella v. Zolawenski [Wash.] 97 P 972.

**98.** Lien not invalid because materials delivered f. o. b. in another state, since furnishing of materials for building entitles contractor to lien. Stearns-Roger Mfg. Co. v. Aztec Gold Min. & Mill. Co. [N. M.] 93 P 706. Finding of delivery to contractor before abandonment of work sustained by evidence. Pine Bluff Lodge of Elks No. 149 v. Sanders [Ark.] 111 SW 255. Evidence sufficient to show delivery and use of material. Barnes v. Colorado Springs, etc., R. Co., 42 Colo. 461, 94 P 570.

**99.** Under Mechanic's Lien Law 1903, p. 233, § 7, unloading lumber at or near premises is not sufficient delivery since the delivery must be "to the owner or his agent." Francis Beidler & Co. v. Hutchinson, 233 Ill. 192, 84 NE 228. Where lumber rejected as not properly dressed and subsequently left at premises but not inspected or accepted by contractor, delivery was insufficient. Id.; rvg. Hutchinson v. Francis Beidler & Co., 135 Ill. App. 328.

**1. Search Note:** See notes in 35 L. R. A. 141; 62 Id. 369; 6 L. R. A. (N. S.) 485; 15 Id. 1159; 65 A. S. R. 165; 83 Id. 517; 2 Ann. Cas. 685, 689, 812; 3 Id. 1096; 7 Id. 269; 11 Id. 87, 1082.

See, also, Mechanics' Liens, Cent. Dig. §§ 12-22, 309-335; Dec. Dig. §§ 9-21, 180-193; 27 Cyc. 25-31, 220-230, 1444; 20 A. & E. Enc. L. (2ed.) 278, 527.

**1a.** Under theory of Lien System (Civ. Code 1896, c. 71, art. 1), subject of improvement shall be charged with payment therefor to extent in interest and area defined by § 2723. Crawford v. Sterling [Ala.] 46 S 849. In improvement of real estate there are as many separate liens as there are separate lots in area described in statute, except where building as unit rests on two lots. Id. Lien acquired on whole lot, though subsequently divided, where labor and materials expended on building under contract. Davidson v. Stewart, 200 Mass. 393, 86 NE 779.

**2.** Windfall Natural Gas, Min. & Oil Co. v. Roe [Ind. App.] 85 NE 722.

**3.** When built or repaired under single contract. Windfall Natural Gas, Min. & Oil Co. v. Roe [Ind. App.] 85 NE 722.

**4.** Under Comp. Laws, § 10,710, as amended by Pub. Acts 1903, p. 21, No. 17, limiting area to which mechanic's lien attaches to "lot" etc., term "lot or lots" refers to surveyed lots conforming to plat. Adams v. Central City Granite Brick & Block Co. [Mich.] 15 Det. Leg. N. 795, 117 NW 932.

whether the lien shall attach to all or part of the land within the maximum quantity is a question of fact.[6] Elsewhere, the area of land subject to lien may depend upon the character of the improvement.[7] The entire title or interest of an employer in the construction of reclamation works of arid lands may be subject to the lien,[8] as well as the property of a married woman [9] or a railroad,[10] but a mechanics' lien cannot be asserted against a church building,[11] or the property of an infant.[12] In some states the fund due a public contractor is subject to a lien for labor and materials furnished him,[13] but generally a lien for materials for a municipality,[14] state,[15] school district,[16] or a fund for the construction of school buildings,[17] is not author-

5. Claimant need aver and prove only quantity of land within limit. Adams v. Central City Granite Brick & Block Co. [Mich.] 15 Det. Leg. N. 795, 117 NW 932.

6. Adams v. Central City Granite Brick & Block Co. [Mich.] 15 Det. Leg. N. 795, 117 NW 932. Where owner seeks to have smaller quantity of land held subject to lien, he must present facts and reasons supporting it (Id.), and if seeking an apparent enlargement of statutory quantity of land, he should by averments and proof advance reasons and facts in support of his demand (Id.). Under Comp. Laws § 10, 710, as amended by Pub. Acts 1903, p. 21, No. 17, giving lien on tract or lot where structure erected, liens for material and labor used in constructing factory on city lots do not extend to lots not covered or partly covered by building, though covered by mineral deposit suitable for manufacturing purposes, it not appearing that lots as distinguished from deposit were ever treated as part of plant. Id. Evidence that agent told materialmen that corporation owned 91 or 92 lots does not show attempt to fix quantity of land to which lien for material should extend. Id.

7. Under Comp. Laws 1897, § 2219, trial court may determine amount of improvement. Stearns-Roger Mfg. Co. v. Aztec Gold Min. & Mill. Co. [N. M.] 93 P 706. Lien properly held to extend to mine and mill site when title in same parties, use dependent upon each other and both bound together for common purpose. Id.

8. Under act March 2, 1899 (Sess. Laws 1899, p. 282) accepting provisions of federal "Carey Act" and acts supplemental thereto, lien given in construction of reclamation works of arid lands extends to all lands which may be irrigated, to full extent of price per acre for which employer agrees to sell water rights and lienors under such employer are entitled to benefit of lien laws to secure payment to full extent of title or interest of employer having contract from state. Nelson Bennett Co. v. Twin Falls Land & Water Co., 14 Idaho, 5, 93 P 789. Property rights in reclamation are real estate. Id. Claim must be commensurate with but cannot exceed rights of employer. Id.

9. Must conform to statute. Luigart v. Lexington Turf Club [Ky.] 113 SW 814. Petition held insufficient to charge real estate with lien when lessor married woman and no allegation that debt contracted on "account of necessaries" or "evidenced by writing signed by her." Gen. St. 1888, c. 52, art. 11, § 2. Id. Under Local & Private Acts 1871, p. 4, c. 1073, applicable to Fayette County alone, mechanics' lien is given where material furnished pursuant to contract with married woman, but such law inapplicable where furnished pursuant to contract with lessee of married woman. Id.

10. Sayles' Ann. Civ. St. 1897, § 3294, amended to specifically include railroads, but lien statutory and must be secured in manner provided for. United States & Mexican Trust Co. v. Western Supply & Mfg. Co. [Tex. Civ. App.] 109 SW 377. Lien against railroad expressly predicated upon compliance with statute. Id.

11. Eureka Stone Co. v. First Christian Church [Ark.] 110 SW 1042.

12. Logan Planing Mill Co. v. Aldridge, 63 W. Va. 660, 60 SE 783. Use of lumber in construction of house on infant's land gives no lien enforcible in equity. Id. Where court authorized guardian to build house on land of infant from proceeds of sale of infant's other land in suit brought by guardian under Code 1889, c. 83, § 7 (Code 1906, § 3234), such order would not authorize mechanic's lien on land where house built for lumber furnished. Id.

13. Code Civ. Proc. § 1184, as to remedy. Goldtree v. San Diego [Cal. App.] 97 P 216. Mechanics' Lien Act 1895, § 24, prescribes steps necessary in lien for public improvements. County of Coles v. Haynes & Lyons, 134 Ill. App. 320, afd. 234 Ill. 137, 84 NE 747. Mechanic's Lien Act June 4, 1901 (P. L. 434) § 6, as amended by Act Apr. 22, 1903 (P. L. 255), protects subcontractor for material furnished on improvement for purely public purpose. Tenth Nat. Bank v. Smith Const. Co., 218 Pa. 581, 67 A 872. See, also, post, § 5A, Public Works and Improvements, 10 C. L. 1307.

14. Under Lien Law (Laws 1897, pp. 518, 520, 522, §§ 9, 12, 17), lien is not authorized for materials to be furnished municipality. Goss v. Williams Engineering Co., 57 Misc. 78, 108 NYS 862. Order extending lien for six months for price of materials to be furnished municipal corporation vacated on motion. Id.

15. Mechanic's liens against state buildings not justified by statute. Rathbun v. State [Idaho] 97 P 335.

16. No right to mechanic's lien upon property of school district. R. Connor Co. v. Aetna Indemnity Co., 136 Wis. 13, 115 NW 811. Lien under Mechanic's Lien Law, c. 71, art. 1 (Civ. Code 1896, §§ 2723-2752), against a building erected by a city for a school, is unenforcible. Scruggs v. Decatur [Ala.] 46 S 989. Exempt from execution. Civ. Code 1896, § 2040. Id.

17. Mechanic's lien against school erected by city unenforcible against fund set apart by city for construction of school building. Civ. Code 1896, § 2040, exempting property of municipality from levy and sale. Scruggs v. Decatur [Ala.] 46 S 989.

ized. A lien upon homestead property in excess of the exemption is permitted.[18] Lien for labor may attach and be enforced against a leasehold estate,[19] but the availability of a lessor's or vendor's interest usually involves the question of consent.[20]

§ 4. *The contract supporting the lien and the privity of the landowner therein. A. In general.*[21]—See 10 C. L. 817—A mechanics' lien is a creation of law, rather than contract,[21a] and while a contract is usually essential,[22] it does not generally need to be written.[23] In California, contracts in excess of a specified amount must be written and recorded and disregard of the provisions renders the contract void, all labor done and materials furnished being considered as done at the personal instance of the owner, thus giving the materialmen a lien.[24] In Illinois the time of the performance [25] and payment [26] must be specified. The property is generally subjected to a lien by the owner,[27] but the rule does not require the contract to be with the owner of the legal title.[28] In some states the owner must post a notice to avoid a mechanics' lien.[29] Under the statutes, a partnership has been construed as an original contrac-

**18.** Under Pub. Acts 1891, p. 228, Act No. 179, as amended by Pub. Acts 1897, p. 171, No. 143 (Comp. Laws, § 10,711), where improvements are made on land, title to which is in husband, under contract in which wife did not join and property was occupied as homestead, value in excess of $1500 (homestead exemption) is subject to lien. Scott v. Kseth, 152 Mich. 547, 15 Det. Leg. N. 206, 116 NW 183.

**19.** Owen v. Casey, 48 Wash. 673, 94 P 473.

**20.** See post, § 4B, Contracts By Vendors, etc.

**21. Search Note:** See notes in 10 C. L. 87; 11 L. R. A. (N. S.) 764; 4 Ann. Cas. 836.

See, also, Mechanics' Liens, Cent. Dig. §§ 60-111; Dec. Dig. §§ 55-78; 27 Cyc. 50-80; 20 A. & E. Enc. L. (2ed.) 349.

**21a.** Beach v. Huntsman [Ind. App.] 83 NE 1033; Id. [Ind. App.] 85 NE 523. Law determines character, extent and number of liens capable of enforcement. Crawford v. Sterling [Ala.] 46 S 849.

**22.** Express or implied contract with owner of property or agent thereof requisite to lien. Beach v. Huntsman [Ind. App.] 83 NE 1033; Id. [Ind. App.] 85 NE 523. Lien for work and labor must be actual labor and work and under contract. Care taker of property pursuant to resolution of corporation not entitled to lien where use of property given in consideration of payment of taxes. Bruce v. Carolina Queen Consol. Min. Co., 147 N. C. 642, 61 SE 579.

**23.** In absence of statute, contract may be written or oral. Beach v. Huntsman [Ind. App.] 83 NE 1033; Id. [Ind. App.] 85 NE 523. Written contract unnecessary and use of materials may be shown by parol. Stearns-Roger Mfg. Co. v. Aztec Gold Min. & Mill. Co. [N. M.] 93 P 706. Under Mechanic's Lien Act of 1903, no distinction is made between oral and written contracts giving right to lien. Stepina v. Conklin Lumber Co., 134 Ill. App. 173.

**24.** Code Civ. Proc. § 1183, providing that failure to file building contract in county recorder's office shall render it "wholly void," is penal in nature. Los Angeles pressed Brick Co. v. Higgins [Cal. App.] 97 P 414. Penal clause of Code Civ. Proc. § 1183, to be construed in connection with rest of section as well as Const. art. 20, § 15, granting mechanic's liens. Id. Penal clause an arbitrary provision not to be extended, and penalty only enforced where substantial failure to comply with statute. Id. Unrecorded contract when over certain amaunt (Code Civ. Proc. § 1183) determinee substantial rights and remains measure of contractor's right of recovery. Id. Failure of lien relegates parties to legal rights. Id. Under Code Civ. Proc. § 1183, failure to record does not affect contract rights or amount of recovery, but only finds from which payments may be paid after lien established. Id. Upon failure to record, obligation of owner is not limited by contract price and penalty is exercise of lien coextensive with value of property. Id. Where failure to conform to Code Civ. Proc. § 1183, materialmen are deemed to have furnished labor and materials at request of owners and entitled to lien. Burnett v. Glas [Cal.] 97 P 423; Los Angeles Pressed Brick Co. v. Higgins [Cal. App.] 97 P 414. Plans, drawings, and specifications essential part of written building contract and must be filed. Burnett v. Glas [Cal.] 97 P 423. Code Civ. Proc. § 1183, requiring written contract for improvements costing over $1000, inapplicable where carpenter undertook employment at $3.50 per day for indefinite period although total sum exceeded $1000. Farnham v. California Safe Deposit & Trust Co. [Cal. App.] 96 P 788. Finding that specifications were attached to contract when filed sustained on appeal, evidence being conflicting. Hoffman-Marks Co. v. Spires [Cal.] 97 P 152.

**25.** Contract susceptible of interpretation as to time that "contract be completed on or before one year from date," though not entirely unambiguous. Snitzler v. Filer, 135 Ill. App. 61.

**26.** Under Mechanic's Lien Act 1895, omission from contract of stipulation as to time for completion, or time for payment, is conclusive against right to lien. Snitzler v. Filer, 135 Ill. App. 61. Evidence insufficient to show that written contract did not contain all of agreement and findings of chancellor affirmed. Vandevoir v. Davidson, 137 Ill. App. 543.

**27.** Builder construed as part owner of property rendering same subject to lien. Liggett v. Stoops, 132 Mo. App. 218, 111 SW 881.

**28.** Rev. St. § 4203 (Ann. St. 1906, p. 2277), giving lien, does not require contract to be with owner of legal title, but either legal or equitable owner. Westport Lumber Co. v. Harris, 131 Mo. App. 94, 110 SW 609.

**29.** Mortgagee of mortgage or trustee and cestui que trust of trust deed in nature of

tor and hence entitled to a lien,[30] and the right to a lien has been held not to depend upon the material being ordered by the contractor.[31]

*Payments and offsets.*[32]—In California statutory provisions govern the payment and reservation of a portion of the contract price,[33] and in Arkansas no payments to a contractor are permitted until the labor and material is paid.[34] A partnership is not deprived of a mechanics' lien from the fact that a member of the firm is surety on the building contractor's bond.[35]

(§ 4) *B. Contracts by vendors, purchasers, lessors, and lessees.*[36]—See 10 C. L. 818 Many jurisdictions provide for a mechanics' lien where property is improved with the consent of the lessor[36a] or his agent,[37] but in some states such consent must be

mortgage have no such interest in real estate upon which mechanics' lien claimed as to compel them to post notice required by Comp. Laws § 2226, where instrument given and duly recorded as provided by law prior to time of work or furnishment of materials. Stearns-Roger Mfg. Co. v. Aztec Gold Min. & Mill. Co. [N. M.] 93 P 706.

**30.** Partnership original contractor within Gen. St. 1902, §§ 4135, 4137, giving lien for materials furnished under contract with owner, though but one contractor present when contract made. Soule v. Borelli, 80 Conn. 392, 68 A 979.

**31.** Los Angeles Pressed Brick Co. v. Los Angeles Pacific Boulevard & Development Co., 7 Cal. App. 460, 94 P 775. Right to lien under Code Civ. Proc. § 1183, depends upon material being used in construction of building whether furnished at instance of owner, agent, etc., or other person having charge of building. Id.

**32.** See 10 C. L. 817. The matter of payments largely involves the amount of the lien (see post, § 6), and offsets refer to waiver or loss of the lien (see post, § 8).

**33.** Under Code Civ. Proc. § 1184, where substantial departure from provisions of payment and reservation of at least 25 per cent of contract price for 35 days, materialmen are entitled to liens as if labor furnished at personal request of owner and no contract. Burnett v. Glas [Cal.] 97 P 423. Upon notice given as provided by Code Civ. Proc. § 1184, it is duty of owner to withhold sufficient money due or that may become due to such contractor * * * to answer such claim, etc. Los Angeles Pressed Brick Co. v. Los Angeles Pacific Boulevard & Development Co., 7 Cal. App. 460, 94 P 775.

**34.** Under Kirby's Dig. 4975, providing that no payment be made to contractor until labor and material paid, owner in action to enforce lien may show payments to contractor wers used to pay for labor and materials. Cost v. Newport Builders' Supply & Hardware Co., 85 Ark. 407, 108 SW 509. Statute not to be construed literally but manifestly to prohibit payments directly to contractor for his own use. Id.

**35.** Unless bond signed on behalf of, with consent or ratification by partnership. Burnett v. Glas [Cal.] 97 P 423.

**36. Search Note:** See Mechanics' Liens, Cent. Dig. §§ 60-111; Dec. Dig. §§ 55-78; 27 Cyc. 50-80; 20 A. & E. Enc. L. (2ed.) 349.

**36a.** Consent is to performance of work, not amount to be charged. Rev. Laws, c. 197, § 1. Brown v. Haddock, 199 Mass. 480, 85 NE 573. Finding as to consent warranted under report of auditor, testimony of owner and other evidence. Id. Where a lease does not authorize the lessee to construct improvements, estate of lessor is not liable to mechanics' liens unless lessor consents or agrees to improvements. Sorg v. Crandall, 233 Ill. 79, 84 NE 181. Under Mechanics' Lien Law, § 1, as amended in 1903 (Hurd's Rev. St. 1905, c. 82, § 15), where owner in subletting gave written consent for improvements without limitation, interest of owner was subject to lien for improvement by sublessee. Haas Elec. & Mfg. Co. v. Springfield Amusement Park Co., 236 Ill. 452, 86 NE 248. Under Rev. St. c. 93, material must be furnished pursuant to contract or with consent of owner, and lien may be prevented by written notice that owner will not be responsible. York v. Mathis, 103 Me. 67, 68 A 746. Where owner has knowledge that repairs are necessary and makes no provision for them but is present when they are made by tenant and gives notice that he will not be responsible, consent may be inferred. Id. Consent required by statute to constitute foundation of lien must be something more than mere acquiescence in act of tenant making temporary erections and additions. Id. Under Code Alaska, §§ 262, 263, 265, labor lien extends to and binds interest of owner of mining claim for improvements made thereon under direction of lessee with owner's knowledge, in absence of disclaimer of responsibility. Cascaden v. Wimbish [C. C. A.] 161 F 241. Facts insufficient to show consent of landlord to repairs within Mechanic's Lien Law, § 3 (Laws 1897, p. 516, c. 418). Aetna Elevator Co. v. Deeves, 57 Misc. 632, 108 NYS 718. A mere general consent or requirement on the part of the owner that the lessee make repairs on the premises does not constitute consent within the lien law. Aetna Elevator Co. v. Deeves, 125 App. Div. 842, 110 NYS 124. Requirement that plans and specifications be submitted to landlord before consent to improvements in lease is substantial, and complaint failing to allege approval insufficient. Mitchell v. Dunmore Realty Co., 111 NYS 322. No consent of landlord within Laws 1897, p. 516, c. 418, § 3, to render premises subject to lien, where tenant agreed to make repairs in consideration of reduced rent and landlord introduced laborer, and no proof of benefit to premises. Hedlund v. Payne, 60 Misc. 603, 113 NYS 841. Judgment foreclosing lien and directing sale erroneous when no finding that person sought to be charged had any interest in land or authority to locate gas well thereon, or that owner had knowledge of well so located. Windfall Natural Gas, Min. & Oil Co. v. Roe, 41 Ind. App. 687, 84 NE 996. Evidence held to show that owner of building and immediate agent authorized tenant to select lighting fixtures, under-

written,[38] or it may be expressed in the lease.[39] Substantial performance of the contract is necessary where the owner is to be held by virtue of consent.[40] Generally a vendee cannot subject the land to a lien as against his vendor [41] in the absence of authority [42] or the existence of agency,[43] though the latter is imformed of the improvement.[44] In some states the lien which has attached to property will follow the land upon the rescission of the executory contract.[45] Where an owner of land is neither vendor nor lessor and not a party to the building contract, the title is not subject to a lien,[46] but in such case the interest of the builder may be subjected to a lien.[47]

(§ 4) *C. Subcontractors and materialmen.*[48]—See 10 C. L. 613—Mechanics' liens are generally extended by statute to subcontractors [48a] with the limitation that the

standing that if they exceeded amount contractor was liable for owner would be responsible for balance. Electric Supply Co. v. Purslow [Iowa] 117 NW 28.

**37.** Evidence held to show agency and, therefore, lien attaches to property for materials furnished. Beach v. Huntsman [Ind. App.] 83 NE 1033, rvg. [Ind. App.] 85 NE 523. Provision of lease giving tenant right to make improvements and providing for deduction of repairs from rent does not convert lease into building contract and constitute tenant agent of lessor, though property improved. Construing Act. Cong. July 2, 1884, §§ 1, 4 (23 Stat. at L. 64 ch. 143). Langley v. D'Audigne, 31 App. D. C. 409. Board of directors may by mutual understanding establish that one of their number be active agent whose implied consent will establish liability of corporation owner to lien by inference. York v. Mathis, 103 Me. 67, 68 A 746.

**38.** Under Gen. St. 1888, c. 70, art. 1, § 1, giving lien where material furnished under contract or with "written" consent of owner, materialman has no lien for work done under contract with lessee with knowledge or verbal consent of owner. Luigart v. Lexington Turf Club [Ky.] 113 SW 814.

**39.** Statute requires that particular repairs be specifically provided for on lease, or that owner expressly consent to or request repairs, or that, with knowledge of employment and purpose, he acquiesces therein. Aetna Elevator Co. v. Deeves, 57 Misc. 632, 108 NYS 718. General covenant by tenant to repair does not constitute consent on part of landlord required by lien law. Id.

**40.** Mitchell v. Dunmore Realty Co., 111 NYS 322. Rule of substantial performance inapplicable where failure to perform willful. Id. Upon willful refusal to proceed with work, difference between substantial and literal performance is bounded by de minimis. Id. De minimis inapplicable where work undone exceeds $1,200. Id.

**41.** Where material delivered to vendee for improvement of land, vendor's interest would not become chargeable with lien from fact that plaintiff changed account to include both parties. Belnap v. Condon [Utah] 97 P 111. Where vendor stipulates with vendee for improvement at latter's cost, and contract leases improvement optional, vendor is not bound. Westport Lumber Co. v. Harris, 131 Mo. App. 94, 110 SW 609.

**42.** Interest of vendor of land in possession of vendee not subject to mechanics' lien unless vendee had express or implied authority to bind vendor or improvement was ratified. Under Comp. Laws 1907, § 1372, giving liens. Belnap v. Condon [Utah] 97 P 111.

**43.** Where contract requires vendee to improve, he becomes agent of vendor, capable of subjecting whole title to mechanics' liens. Westport Lumber Co. v. Harris, 131 Mo. App. 94, 110 SW 609. Relation of principal and agent may be established by parol evidence. Belnap v. Condon [Utah] 97 P 111.

**44.** Mere expectation, permission or knowledge and acquiescence in an improvement is insufficient to charge a vendor's interest in land for material furnished the vendee. Under Comp. Laws 1907, § 1372. Belnap v. Condon [Utah] 97 P 111.

**45.** Under Gen. St. 1880, c. 70, art. 1, § 2, providing for lien which has attached to property to follow land on rescission of executory contract, where petition alleged ownership of land by lessee under contract of purchase, but elsewhere alleged ownership by lessor and her children living at death, and it did not appear that children were parties to sale, no lien was acquired. Luigart v. Lexington Turf Club [Ky.] 113 SW 814.

**46.** Where owner of land gave children permission to erect building at their own expense and then sell entire property, repaying her for lot, children were neither vendees nor lessees, and since owner was not party to building contract, or did not authorize children's contract on her credit, her title to lot was not subject to lien. Westport Lumber Co. v. Harris, 131 Mo. App. 94, 110 SW 609.

**47.** Where defendant erected building on mother's land, agreeing to sell same on completion and pay mother portion of proceeds, though he was neither vendee, lessee, nor strictly an equitable vendee, he nevertheless had such equitable interest in the property as to be subject to lien. Westport Lumber Co. v. Harris, 131 Mo. App. 94, 110 SW 609.

**48. Search Note:** See notes in 16 L. R. A. 335; 20 Id. 560; 14 L. R. A. (N. S.) 1036; 19 A. S. R. 699.

See, also, Mechanics' Liens, Cent. Dig. §§ 126-159; Dec. Dig. §§ 94-115; 27 Cyc. 88-106; 20 A. & E. Enc. L. (2ed.) 349.

**48a.** Statute giving lien "to all persons performing labor or furnishing * * * machinery" includes one who contracts with contractor. Potter Mfg. Co. v. Meyer & Co. [Ind. App.] 85 NE 1048. Under Mechanic's Lien Act 1895, § 24, subcontractor need not have contract with contractor to have lien, but sufficient if subcontractor furnished material for public improvement involved. County of Coles v. Haynes, 134 Ill. App. 320. To entitle materialman to lien on building erected by contractor for owner, claimant must furnish material pursuant to contract between latter and owner for use in building

amount of such liens in the aggregate do not exceed the contract price,[49] though under other statutes the subcontractor's lien is not dependent upon whether a sum is due the principal contractor.[50] The owner has been held to bear a quasi contractual relation to the subcontractor.[51] A stipulation against liens by the principal contractor is not binding on a subcontractor having no actual notice thereof,[52] and the rights of a subcontractor are not affected by the reception of dividends from the bankrupt original contractor's estate.[53]

§ 5. *Acts and proceedings necessary to acquire lien. A. Notice and demand, statement to acquire lien.*[54]—See 10 C. L. 819—In the acquirement of a mechanic's lien, substantial compliance with the statutory provisions is required.[54a] Generally a preliminary notice of the intention of the subcontractor to file a lien is required [55] for the protection of the owner.[56] In some states a mechanic's lien is considered as arising out of the circumstances under which the work is done and the materials are furnished,[57] and, the office of the statement being merely to preserve the lien,[58] it is sufficient if the owner is not misled by the facts stated.[59] It follows that the state-

and must be so used. Rev. St. 1899, § 4203 (Ann. St. 1906, p. 2277). Riverside Lumber Co. v. Schmidt, 130 Mo. App. 227, 109 SW 71.

**49.** See, also, post, § 6, Amount. Under Kirby's Dig. §§ 4970, 4975, statute gives independent lien to classes named under sole limitation that aggregate shall not exceed contract amount agreed upon between owner and contractor, and no person named can be precluded from lien without consent. Cost v. Newport Builders' Supply & Hardware Co., 85 Ark. 407, 108 SW 509.

**50.** Subcontractor's lien not dependent upon principal contractor obtaining an architect's certificate. Rieser v. Commeau, 114 NYS 154.

**51.** Under Lien Law (Laws 1903, p. 241), § 28 (Hurd's Rev. St. 1908, c. 82, § 42), owner is under quasi contractual obligation to subcontractor for pro rata share of amount due contractor. Harty Bros. & Harty Co. v. Polakow, 237 Ill. 559, 86 NE 1085, rvg. 141 Ill. App. 570. Enforcible in assumpsit. Id.

**52.** Cost v. Newport Builders' Supply & Hardware Co., 85 Ark. 407, 108 SW 509.

**53.** Rights of subcontractor under Mechanic's Lien Act of 1895, § 24, not affected by fact that he filed claim against bankrupt original contractor and received dividends, subcontractor not being "secured creditor" within National Bankruptcy Act, § 1, and dividends operating to reduce claim. County of Coles v. Haynes, 134 Ill. App. 320.

**54. Search Note:** See note in 17 L. R. A. 314.

See, also, Mechanics' Liens, Cent. Dig. §§ 161-173, 208-278; Dec. Dig. §§ 117-126, 133-154, 157, 158, 160; 27 Cyc. 111-120, 123, 152-210; 20 A. & E. Enc. L. (2ed.) 372.

**54a.** See, also, ante, § 1. Notice sufficient where owner may ascertain nature of claim, amount and date. Day v. Pennsylvania R. Co., 35 Pa. Super. Ct. 586. Lien can only be obtained by filing notice in statutory way. Windfall Natural Gas, Min. & Oil Co. v. Roe [Ind. App.] 85 NE 722; Id., 41 Ind. App. 687, 84 NE 996. Immaterial to whose fault insufficiency is attributable, unless affected by party sought to be charged. Windfall Natural Gas. & Min. Co., 41 Ind. App. 687, 84 NE 996. Innocent mistake in notice does not invalidate. Felgenhauer v. Haas, 123 App. Div. 75, 108 NYS 476. Question of validity of notice turns upon substantial compliance with provisions of statute. Waters v. Goldberg, 124 App. Div. 511, 108 NYS 992.

**55.** Act June 4, 1901, § 6, P. L. 434. Tenth Nat. Bank v. Smith Const. Co., 218 Pa. 681, 67 A 872. So that owner may require payment of contractor, or in default thereof withhold contract price. Day v. Pennsylvania R. Co., 35 Pa. Super. Ct. 586. Act June 4, 1901, § 8, P. L. 431, requiring subcontractor to give owner 30 days' notice of intention to file lien, is imperative. Keely v. Jones, 35 Pa. Super. Ct. 642. Failure to comply with Act June 4, 1901, P. L. 431, § 8, renders lien invalid. Id. Language of Act June 4, 1901, P. L. 431, § 8, as to requirement of notice of subcontractor's intention to file lien, so plain and imperative as to avoid interpretation. Id.

**56.** Chandler Lumber Co. v. Fehlau [Wis.] 117 NW 1057. Compliance by subcontractor with St. 1898, § 3315, requiring materialman to give written notice to owner of materials furnished and amount due from contractor, is condition precedent to subcontractor's right to lien. Id.

**57.** Devine v. Clark, 198 Mass. 56, 84 NE 309.

**58.** Lien continues 29 days after work completed without filing of any statement. Rev. Laws, c. 197, § 6. Devine v. Clark, 198 Mass. 56, 84 NE 309.

**59.** Under Pub. St. 1882, c. 191, § 6, as amended by St. 1892, p. 168, c. 191, statement of claim applies to lien actually existing when it was filed, and where petitioner seeks afterward to enforce such lien, if it contains enough to preserve lien, it is sufficient. Devine v. Clark, 198 Mass. 56, 84 NE 309. Where lienor in good faith claimed lien for both labor and material, when in fact he had only one for labor and did not state therein number of days' labor and its value, statement was nevertheless sufficient, where no intention to mislead and no one entitled to notice was misled (Pub. St. 1882, c. 191, § 6, as amended by St. 1892, p. 168, c. 191, construed in light of previous enactment). Id. Inaccuracy of certificate not cause for complaint where owner not misled and agreed statement of facts submitted. Brown v. Haddock, 199 Mass. 480, 85 NE 573.

ment may be amended,[60] and in some states amendments are permitted by statute.[61] The notice or statement is usually prescribed by statute [62] and generally includes a statement of the amount of the claim,[63] including the nature of the items [64] and

**60.** Claim for labor and materials when in fact only labor performed. Devine v. Clark, 198 Mass. 56, 84 NE 309.

**61.** Under Act of June 4, 1901, P. L. 431, an amendment is permissible, though after verdict, setting forth specifications which were thought material. Day v. Pennsylvania R. Co., 35 Pa. Super. Ct. 586. Lien cannot be rendered valid by amendment as to when date of last material furnished, such requirement being specified as necessary. Delchley's Estate, 35 Pa. Super. Ct. 442.

**62.** Under Burns' Ann. St. 1901, § 7257, notice is sufficient if it states amount to whom, by whom, and for what, due, and describes premises so that owner may know property intended to be charged. Windfall Natural Gas, Min. & Oil Co. v. Roe, 41 Ind. App. 687, 84 NE 996; Id. [Ind. App.] 85 NE 722. Notice insufficient when shown by averments of complaint to have been erroneous in every particular except as to amount. Windfall Natural Gas, Min. & Oil Co. v. Roe, 41 Ind. App. 687, 84 NE 996. Lien Law, Laws 1897, p. 518, c. 418, § 9, subds. 4, 5, complied with where notice states whole amount of contract, agreed price, proportion performed and to be performed, sum paid, and amount due and unpaid when notice filed and amount which will be due when contract wholly fulfilled. Harley v. Tucker, 128 App. Div. 580, 112 NYS 980. Notice of claim for lien for materials and labor to be used and which were used in alteration and repair of electric wiring and making connections in and about building construed to aver alteration, repair and connections in and about building and, therefore, prima facie case of lien. B. & C. Comp. St. § 5644. Rowen v. Alladio [Or.] 93 P 929.

**Public improvement:** Where the steps necessary to establish a lien are prescribed in a section of the statute, the requirements of other sections relating to other liens are not applicable. County of Coles v. Haynes, 134 Ill. App. 320. Under Mechanics' Lien Act of 1895, § 24, where public improvement is involved, service of notice upon clerk and treasurer of county in question is sufficient, being substantial compliance with statute and it appearing that notice was brought to attention of supervisors. Id. Notice served under § 24, Mechanic's Lien Act of 1895, where public improvements involved, not too late though county orders issued where such orders are invalid and do not constitute payment. Id. Notice by subcontractor upon city before lawful delivery of bonds or warrants to contractor in payment is in time. First Nat. Bank v. Elgin, 136 Ill. App. 453. Only city can raise question that notice is not served within statutory time pursuant to Lien Law of 1903, § 23, since provision for city's benefit. Id. Method provided by Code Civ. Proc. § 1184, where improvement on public work by giving notice of claim of lien to holder of fund earned by claimant's labor, and § 1183, by recording against property, not applicable. Goldtree v. San Diego [Cal. App.] 97 P 216. Lien against public building or improvement by recording against such building not enforcible for reasons of public policy. Id.

**63.** Amount due cannot be supplied by inference but must be expressly stated. Chandler Lumber Co. v. Fehlau [Wis.] 117 NW 1057. Recital in materialman's notice of materials furnished contractor that materialman had furnished such materials pursuant to employment to amount and value of $1,100, etc., not sufficient as to amount. Id. Subcontractor's notice under Act of 1903 sufficient when reciting amount due on specified day for material furnished. Hutchinson v. Francis Beidler & Co., 135 Ill. App. 328. Notice fatally defective when not correctly stating for what lien claimed or from whom amount due. Windfall Natural Gas, Min. & Oil Co. v. Roe [Ind. App.] 85 NE 722. Claimant not entitled to have notice reformed and foreclosed when notice did not correctly state for what lien claimed or from whom due, though mistake claimed to be due to lawyer who prepared same. Id. Notice held not indefinite as stating how much material furnished and to be furnished. Felgenhauer v. Haas, 123 App. Div. 75, 108 NYS 476. Notice reciting that agreed price or value of labor performed and materials furnished was $1,175 is insufficient because in disjunctive. Alexander v. Costello, 59 Misc. 491, 110 NYS 1033. Under lien law (Laws 1897, c. 418, p. 518, § 9), notice must state whole value of labor and materials and amount remaining unpaid. Mitchell v. Dunmore Realty Co., 111 NYS 322. Requirement imperative and notice insufficient when referring to work done as $42,878.31, while complaint showed $111,771.65. Id. Notice of amount claimed, furnished and to be furnished in alternative fatally defective. Weiss v. Kenney, 59 Misc. 279, 112 NYS 287. Lien invalid where value or agreed price of labor performed or to be performed is not inferable from reading notice. Spring v. Collins Bldg. & Const. Co., 113 NYS 29. Notice for lien "for principal and interest of value and agreed price of labor performed" is invalid. Id. **Presumption** that items were furnished pursuant to separate contract where over 60 days intervene between two items. Ashford v. Iowa & Minnesota Lumber Co. [Neb.] 116 NW 272.

**Errors:** Overstatement through mistake or clerical error, being unintentional, does not invalidate lien pursuant to Gen. St. 1902, §§ 4135-4137. Soule v. Borelli, 80 Conn. 392, 68 A 979. Notice stating larger amount than actually due does not invalidate lien if in good faith. Strandell v. Moran, 49 Wash. 533, 95 P 1106. Statement of $2,893.90 instead of $2,284.79, not fatal. Lien Law, Laws 1897, p. 525, c. 418, § 22. Hall v. Thomas, 111 NYS 979. Lien not invalid because of obvious clerical error in amount not calculated to and which did not in fact mislead. Hurley v. Tucker, 128 App. Div. 580, 112 NYS 980. Mathematical calculation to ascertain amount of lien in case of error allowable. Id.

**64.** Claim for lien not invalid because made partly for articles not subject to lien when not willful. Barnes v. Colorado Springs, etc., R. Co., 42 Colo. 461, 94 P 570.

**Itemizing:** General statements of materials furnished sufficient. Chandler Lumber Co. v. Fehlau [Wis.] 117 NW 1057. Materialman's notice, "Materials furnished—Lumber and mill work to value of $1100," sufficient.

where furnished,[65] the terms of the contract,[66] a description of the property,[67] the name of the owner,[68] debtor[69] and claimant,[70] and verification.[71] A reference to

Id. Notice need not separately state value of materials furnished and labor performed. Felgenhauer v. Haas, 123 App. Div. 75, 108 NYS 476. Where article was patented device composed of iron, wood, etc., subcontractor need not set out in notice an itemized statement of different materials of device as whole. Day v. Pennsylvania R. Co., 35 Pa. Super. Ct. 586. Under Code 1904, § 2476, account filed which omitted to show prices for items was entire failure to comply with statute. Brown v. Cornwell, 108 Va. 129, 60 SE 623. Account stating "am't of est. $450," insufficient, as word "estimate" indicates value of goods in seller's mind rather than contract price. Id. No evidence that materials contracted for at gross sum. Id. Where building contract provides for monthly payments to contractor on vouchers approved by architect, gross sums paid for labor at stated periods under general designation of "pay roll" will not be treated as "lumping sums" not protected by statute. Lunsford v. Wren [W. Va.] 63 SE 308. Statement must be itemized in reasonable manner and to reasonable extent to enable those interested to know if claim is enforcible. Sorg v. Crandall, 233 Ill. 79, 84 NE 181. Work done by person for several days preceding may be charged on day of payment. Id. Omission of ditto marks where several items in claim follow item having date in margin is in accordance with custom of many bookkeepers and will not invalidate claim. Id. Indication of dates in claim for mechanic's lien by figures in date column at left of page, thus, 2-4, 2-6, under heading "Chicago, Feb. 15, 1893," is sufficient, meaning of figures used being well understood. Id. Where statement showed work as done between two dates and affidavit verified statement, it was sufficient, since entire contract was single item. (Act 1874, § 4, as amended by Laws 1887, p. 219, Hurd's Rev. St. 1893, c. 82, § 4), Id. Where contract entire, statement may properly include all work and material as one item. Id.

**65.** Notice that first time item furnished on or about May 9, 1895, sufficient compliance with Lien Law, Laws 1897, p. 518, c. 418, § 9, subd. 6, since only certainty required as would individuate transaction. Hurley v. Tucker, 128 App. Div. 580, 112 NYS 980. Under Hurd's Rev. St. 1905, c. 82, § 38, notice need not state **when payment is due.** Beck Coal & Lumber Co. v. Peterson Mfg. Co., 237 Ill. 250, 86 NE 715. Requirement that lien set forth when first and last materials were furnished must be complied with. Under Act June 4, 1901, P. L. 431, where lien does not set forth when last material furnished, claim is invalid. Deichley's Estate, 35 Pa. Super. Ct. 442. Defect cannot be supplied by extrinsic evidence. Id. Where material was furnished Aug. 7, and statement read Sept. 7, the fact that an item was furnished Sept. 27 was requisite to sustain the lien as being filed in time. Id.

**66.** Where written notice of intention to file lien has attached copy of contract between contractor and subcontractor, the fact that specifications were not appended is immaterial where an amendment was permitted and it appeared that such specifications were in possession of the owner. Day v. Pennsylvania R. Co., 35 Pa. Super. Ct. 586. Where notice (Civ. Code 1896, § 2731) and statement filed in probate office (Civ. Code 1896, § 2727) attempted to embrace lien on two separate contracts, it is unenforcible. Crawford v. Sterling [Ala.] 46 S 849.

**67.** Description identifying property by reference to facts sufficient. Patten & Davies Lumber Co. v. Gibson [Cal. App.] 98 P 37. Description so that party familiar with premises could identify is sufficient. Hurley v. Tucker, 128 App. Div. 580, 112 NYS 980. Notice not invalidated because of obvious clerical error in superfluous clause of description. Id. Distinction between descriptions incurably defective and those which may be made certain by references. Windfall Natural Gas, Min. & Oil Co. v. Roe, 41 Ind. App. 687, 84 NE 996. Error of dimension of lot in notice does not invalidate lien. Lien Law, § 9, subd. 7, § 22 (Laws 1897, p. 518, c. 418). Hall v. Thomas, 111 NYS 979. Where property sought to be charged with lien is described merely as certain tract of ground without limitation, claim is applicable to whole fee. Sorg v. Crandall, 233 Ill. 79, 84 NE 181. Description as stable located on lots in New York City, borough of Manhattan, known as Nos. 166-172 Perry St., sufficient. Hurley v. Tucker, 128 App. Div. 580, 112 NYS 980. Premises and real estate upon which lien claimed sufficiently described as follows: One two-room stone building on railroad avenue in the city of Broxton now occupied by the Broxton Meat Market. Broxton Artificial Stone Works v. Jowers [Ga. App.] 60 SE 1012. **Evidence** of exact dimensions admissible to enable proper decree to be drawn. Hurley v. Tucker, 128 App. Div. 580, 112 NYS 980. Description in notice of lien cannot be supplied by oral evidence, but ambiguity may be explained and premises identified. Windfall Natural Gas, Min. & Oil Co. v. Roe, 41 Ind. App. 687, 84 NE 996.

**68.** Under Act 1874, § 4, as amended by Laws 1887, p. 219 (Hurd's Rev. St. 1893, c. 82, § 4), and § 53, statement need not set forth name of owner in fee. Sorg v. Crandall, 233 Ill. 79, 84 NE 181. "The owner," as used in Act 1874 (Hurd's Rev. St. 1893, c. 82), means owner of any interest in land. Sorg v. Crandall, 233 Ill. 79, 84 NE 181. Statute does not require contractor to investigate title. Id. Where person has contracted with owner of land, i. e., any one having interest therein, to furnish labor and materials, if claim for lien sets forth name of owner contracted with and description of property sought to be charged, it is sufficient to reach interests of all owners. Id. Lien Law, Laws 1897, pp. 515, 518, 519, c. 418, § 2, § 9, subd. 2 and § 10, requiring notice to state name of owner, complied with where claimants claimed no benefit under trust deed for benefit of creditors, declined to accept same and named grantor as true owner. Hall v. Thomas, 111 NYS 979. Notice to general manager of corporation owning or claiming interest in lands to be improved sufficient to subject to lien in absence of posting of notice required by Comp. Laws 1897, § 2226. Stearns-Roger Mfg. Co. v. Aztec Gold Min. & Mill. Co. [N. M.] 93 P 706. Notice of intention to claim lien to former owner who had acquired different interest under mortgage not necessary. Brown v. Haddock, 199 Mass. 480, 85 NE 573.

the statute under which the lien is claimed is unnecessary.[72] A suit for a subcontractor's lien begun within four months prior to the filing of a petition in bankruptcy against the contractor does not give a lien in favor of the plaintiff.[73]

(§ 5) *B. Filing and recording claim, and statement thereof.*[74] See 10 C. L. 821 Invariably the time limit within which the notice or statement must be filed is prescribed by the statute.[74a] Claim prematurely filed cannot be enforced,[75] and the time usually commences when the materials are furnished[76] or the building com-

69. Notice constitutes an equitable garnishment of funds in hands of owner and need not be served on contractor. Los Angeles Pressed Brick Co. v. Los Angeles Pacific Boulevard & Development Co., 7 Cal. App. 460, 94 P 775. Notice only to be given to reputed owner, though materials furnished to contractor or other person acting by authority of reputed owner. Code Civ. Proc. § 1184. Id. Omission of name of person to whom materials furnished, as provided by Code Civ. Proc. § 1187, in claim of lien, is fatal. Hogan v. Bigler [Cal. App.] 96 P 97.

70. Where disagreement arose between contractor and lessee as to work done and two arbitrators were appointed, and such arbitrators received notice in writing from contractor to furnish labor and material, their claim was properly filed jointly, neither lessee nor contractors being concerned with distribution of sum due. Sorg v. Crandall, 233 Ill. 79, 84 NE 181. Notice not bad for failure to allege partnership where filed by all members who stated they had lien, thus giving notice of joint claim. Waters v. Goldberg, 124 App. Div. 511, 108 NYS 992. Notice describing lienor as Wright-Easton Townsend Co., a corporation with its principal office in New York at given street number, sufficient compliance with Lien Law, Laws 1897, p. 518, c. 418, § 9, subd. 1, requiring corporation lienor to state address and principal place of business. Hurley v. Tucker, 128 App. Div. 580, 112 NYS 980. Terms "principal office" and "principal place of business" synonymous in respect to New York corporations. Id. Defect in signature not having misled bondsmen or city to their injury, sufficient compliance with statute. Plaintiff doing business as "A. S. Agent" signed as "A. S." without "agent." Strandell v. Moran, 49 Wash. 533, 95 P 1106. Where claim of lien by Broxton Artificial Stone Works, words "C. A. Taylor, agent," and signature "C. A. Taylor," were surplusage. Broxton Artificial Stone Works v. Jowers [Ga. App.] 60 SE 1012.

71. Purpose of verification is assurance of validity of lien and good faith of lienor under penalty of perjury. Waters v. Goldberg, 124 App. Div. 511, 109 NYS 992. Verification of claim by one lienor sufficient where made as one of two lienors who gave notice of joint claim. Id.

72. Reference to statute of 1899 (Laws 1889, p. 313, c. 200) as basis of claim of lien arising under Rev. Laws 1905, § 5538, which was incorporated and carried forward in revision and formally repealed thereby, is not fatal but mere surplusage. Barndt v. Parks, 103 Minn. 360, 115 NW 197.

73. Though owner summoned as garnishee. Fairlamb v. Smedley Const. Co., 36 Pa. Super. Ct. 17. Suit under Act June 4, 1901, § 28, P. L. 431, by subcontractor against contractor with owner as garnishee, is legal proceeding within meaning of National Bankruptcy Act of 1898. Id.

74. **Search Note:** See notes in 12 L. R. A. (N. S.) 864; 15 Id. 299; 43 A. S. R. 778; 7 Ann. Cas. 947.

See, also, Mechanics' Liens, Cent. Dig. §§ 174-207; Dec. Dig. §§ 127-132, 155, 156, 159; 27 Cyc. 124, 131-134, 136-151, 210; 20 A. & E. Enc. L. (2ed.) 384.

74a. Hurd's Rev. St. 1887, c. 82, §§ 4, 28, provides that claim for lien be filed within 4 months after last payment due. Kelley v. Springer, 235 Ill. 493, 85 NE 593. Lien not enforcible against purchaser of leasehold, within meaning of Hurd's Rev. St. 1887, c. 82, § 28, unless filed as provided by § 4. Id. Lien for improvements on real estate under Mechanic's Lien Law 1895, p. 229, not enforcible, unless claim for lien filed or suit begun within 4 months after last payment due as required by § 7. Id. Where work completed Feb. 16, and notes given maturing in 120 days, claim for lien filed July 29, 1893, was filed in time, being less than 4 months after 120 days from Feb. 16. Sorg v. Crandall, 233 Ill. 79, 84 NE 181. Statement required four months from time when work completed or payment due. Mechanic's Lien Act 1895, § 7. Snitzler v. Filer, 135 Ill. App. 61. Subcontractors must give written notice of furnishment of materials and intention to claim lien, "after commencing and not later than 60 days after ceasing," to furnish supplies. Gen. St. 1902, § 4137. A. W. Burritt Co. v. Negry [Conn.] 71 A 570. Delay of notice until 20 days after ceasing to furnish materials clearly within rights. Id. Party furnishing materials for building, an original contractor within Rev. St. 1899, § 4207 (Ann. St. 1906, p. 2290), requiring filing of lien account within 6 months after indebtedness has accrued. E. R. Darlington Lumber Co. v. James T. Smith Bldg. Co. [Mo. App.] 114 SW 77. Substantial evidence in support of finding that lien filed within four months from date of last item. Meyer v. Schmidt, 131 Mo. App. 53, 109 SW 833. Filing within 50 days after completion of work, sufficient compliance with Comp. Laws, §§ 3881, 3889, giving lien and act 1903, p. 51, c. 32, as to time of filing. Tonopah Lumber Co. v. Nevada Amusement Co. [Nev.] 97 P 636.

75. Filing before completion of structure premature. Baker v. Lake Land Canal & Irr. Co., 7 Cal. App. 482, 94 P 773.

76. Where contract of supply company for furnishing material for construction of railroad provided for delivery f. o. b. at certain place, such delivery was to construction company and period of time for filing lien commenced at such day. United States & Mexican Trust Co. v. Western Supply & Mfg. Co. [Tex. Civ. App.] 109 SW 377. Finding as to when last item delivered though based on conflicting evidence, sustained. Rasmussen v. Liming [Wash.] 96 P 1044.

pleted.[77] The time cannot be extended, either by furnishing additional material,[78] delay,[79] subsequent agreement,[80] or other method.[81] The matter of completion involves the question of whether the items were furnished as part of one continuing transaction.[82] A lien claimant's rights are unaffected by a mistake of the clerk in docketing the statement.[83]

§ 6. *Amount of lien and priority thereof.*[84]—See 10 C. L. 822—It may be stated generally that the amount of a lien is limited by the value of the materials rendered,[84a] and in many states by the contract price which the owner has agreed to pay.[85] Thus,

77. Under Rev. St. 1899, § 4207 (Ann. St. 1906, p. 2290), indebtedness for material accrues when completed by furnishing of last material for building. Darlington Lumber Co. v. James T. Smith Bldg. Co. [Mo. App.] 114 SW 77. Contract must be completed or deemed completed before right to file claim of lien accrues. Baker v. Lake Land Canal & Irr. Co., 7 Cal. App. 482, 94 P 773. Under Code Civ. Proc. § 1187, providing that occupation and use of building, etc., and cessation from labor for 30 days on any contract to be deemed equivalent to completion, both occupation and cessation for 30 days must exist before structure or contract is complete for purposes of lien. Baker v. Lake Land Canal & Irr. Co., 7 Cal. App. 482, 94 P 773; Farnham v. California Safe Deposit & Trust Co. [Cal. App.] 96 P 788. Where owner fails to file notice of completion of improvements, filing 90 days from actual completion may be made. Code Civ. Proc. § 1187. Farnham v. California Safe Deposit & Trust Co. [Cal. App.] 96 P 788. Occupation of building while work in active progress and half finished does not start running of time for filing of liens under Code Civ. Proc. § 1187. Id. Liberal construction but not disregard of statute. Baker v. Lake Land Canal & Irr. Co., 7 Cal. App. 482, 94 P 773.

78. Lien cannot be revised or kept alive by furnishing small quantity of material for that purpose. Coffey v. Smith [Or.] 97 P 1079. Donating or substituting material for defective lumber furnished. Ashford v. Iowa & Minnesota Lumber Co. [Neb.] 116 NW 272. Sending new material to replace defective, which new material was rejected as unsuitable. Snitzler v. Filer, 135 Ill. App. 61. Materialman who furnishes material for erection of building under two contracts with knowledge of such contracts cannot tack one contract to other one to render filing of lien in time. Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho, 662, 93 P 765. Some evidence of notice by materialman of two contracts but not preponderance and lien held filed in time. Id. Small amount of labor or material furnished after acceptance of structure under circumstances indicating bad faith on part of materialman will not support mechanic's lien. Ashford v. Iowa & Minnesota Lumber Co. [Neb.] 116 NW 272. Where partnership engaged in constucting building dissolved, and materialman refused further delivery except small quantity for immediate use, notice of lien filed within 90 days after delivery of small quantity was in time. Silleck v. Robinson, 60 Misc. 481, 113 NYS 832. Waiver of personal claim against partner would not affect plaintiff's right to treat last item as portion of lumber furnished pursuant to contract. Id.

79. No evidence that delay in completion of building was by connivance for purpose of extending lien. Farnham v. California Safe Deposit & Trust Co. [Cal. App.] 96 P 788.

80. Time not to be extended by subsequent agreement. Snitzler v. Filer, 135 Ill. App. 61.

81. Act of plumbing inspector in delaying issuance of certificate insufficient to extend time of filing from completion of building. Coffey v. Smith [Or.] 97 P 1079. **Appointment of receiver** for railroad not interference with and no excuse for failure to comply with statute in securing lien. United States & Mexican Trust Co. v. Western Supply & Mfg. Co. [Tex. Civ. App.] 109 SW 377. **Filing of suit** to enforce lien on railroad within time provided for fixing and securing lien does not dispense with latter provisions. Id.

82. Where parties intend items to be included in one account and settlement, entire account will be treated as continuing transaction and lien limitation will run from last item of account, though large period of time between concluding items. Darlington Lumber Co. v. James T. Smith Bldg. Co. [Mo. App.] 114 SW 77; Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho, 662, 93 P 765. Where materials furnished from time to time upon running account and materialman has reasonable grounds for expecting continuing orders until completion of building, material deemed to have been furnished under entire and continuing contract. Tonopah Lumber Co. v. Nevada Amusement Co. [Nev.] 97 P 636. Work held as furnished under continuing contract, though interrupted by strike and stringency of money market. Id. Matter of making alterations considered as one contract though done in somewhat fragmentary fashion and occupying two years time. Farnham v. California Safe Deposit & Trust Co. [Cal. App.] 96 P 788.

83. Claimant's duty performed by filing. Hurley v. Tucker, 128 App. Div. 580, 112 NYS 980.

84. **Search Note:** See notes in 14 L. R. A. 305; 2 L. R. A. (N. S.) 1013; 7 Ann. Cas. 624.

See, also, Mechanics' Liens, Cent. Dig. §§ 280-308, 336-374; Dec. Dig. §§ 161-179, 194-201; 27 Cyc. 210-218, 230-255; 20 A. & E. Enc. L. (2ed.) 444, 473.

84a. Mechanics' lien can only be had for value actually received. Fact that no labor was performed during part of time for which payment for use of machine in constructing waterworks is sought to be recovered must be considered in determining amount. Potter Mfg. Co. v. Meyer & Co. [Ind. App.] 85 NE 1048.

85. Materialmen entitled to lien on equal footing to amount not exceeding contract price. Sternberg v. Ft. Smith Refrigerator Works [Ark.] 112 SW 174. Amount recoverable measured by amount due under contract. Stelty v. Armory Co. [Idaho] 99 P 98.

when a contractor abandons a structure, the owner is entitled to credit for the sum expended in completing it,[88] and in some states the owner's liability, upon abandonment, is expressly limited to the work done.[87] Generally the lien cannot extend to a greater amount than the balance due at the time of notice, provided the payments previously made are in good faith,[88] but the owner is liable when disregarding a notice to stop payments,[89] though a claimant cannot attack a payment after the expiration of the time for filing his notice.[90] In many states an owner is liable to the materialman to the full extent of his claim, regardless of payments made to the contractor,[91] or when he disregards statutory provisions for his protection such as secur-

The general constitutional principle underlying lien statutes is that the liability of an owner who has complied with his contract be limited to the agreed price. Hoffman-Marks Co. v. Spires [Cal.] 97 P 152. Provision that architect might supply materials or workmen on failure of contractor to supply enough expense thereof to be deducted from contract did not authorize architect to bind owner or create lien beyond original contract price. Sternberg v. Ft. Smith Refrigerator Works [Ark.] 112 SW 174.

**86.** Where contract abandoned and owner in completing incurs expenses in excess of contract price, he should be allowed credit in settlement with lien holders claiming under contract for sums paid independently of contractor's debts, and after deduction of aggregate of these sums from contract price, residue should be prorated to lienors. Pine Bluff Lodge of Elks No. 149 v. Sanders [Ark.] 111 SW 255; Sternberg v. Ft. Smith Refrigerator Works [Ark.] 112 SW 174.

**87.** Hoffman-Marks Co. v. Spires [Cal.] 97 P 152. Claimants not entitled to lien where under Code Civ. Proc. § 1200, payments at time of abandonment exceed value of work and materials furnished. Hoffman-Marks Co. v. Spires [Cal.] 97 P 152; Scheerer & Co. v. Deming [Cal.] 97 P 155; McCue v. Jackman, 7 Cal. App. 703, 95 P 673. Where contractor abandons contract, portion of contract price applicable to liens is fixed by deducting from value of work and materials furnished the payments due and paid under the contract, and the remainder shall be applicable to liens. Hoffman-Marks Co. v. Spires [Cal.] 97 P 152. Where $46 excess materialman entitled to lien for that sum only, not 25 per cent. of value of materials. Duffy Lumber Co. v. Stanton [Cal. App.] 98 P. 38. Method of computation under § 1200, properly arrived at by considering value of work at abandonment and amount left undone comparing with contract price. Hoffman-Marks Co. v. Spires [Cal.] 97 P 152. In determining value, evidence of reasonable cost of completion proper. Hoffman-Marks Co. v. Spires [Cal.] 97 P 152; Scheerer & Co. v. Deming [Cal.] 97 P 155. Findings as to value of work at time of abandonment sustained by evidence. Hoffman-Marks Co. v. Spires [Cal.] 97 P 152. Rights fixed by statute at time of abandonment and amount subsequently expended does not impair rights. Scheerer & Co. v. Deming [Cal.] 97 P 155. Code Civ. Proc. § 1184, requiring at least 25 per cent of contract price to be paid 35 days after completion of contract, sets apart a sum for lien claimants, but such section is not applicable where the contractor abandons the work; § 1200 being applicable. Hoffman-Marks Co. v. Spires [Cal.] 97 P 152. Code Civ. Proc. § 1200, not violative of state constitution recognizing right to mechanic's liens. Scheerer & Co. v. Deming [Cal.] 97 P 155. Materialman who abandoned work must allege and prove that value of work done and materials furnished at abandonment exceeded amount due and paid contractor, since if no excess no sum applicable to claim. McCue v. Jackman, 7 Cal. App. 703, 95 P 673.

**88.** Under Gen. St. 1902, § 4138, lien of subcontractor could in no case attach for greater amount than owner had agreed to pay original contractor, and where amount had been reduced by payments in good faith before notice of lien, lien could not attach for greater amount than balance due. A. W. Burritt Co. v. Negry [Conn.] 71 A 570. Under § 4138, payments in advance of time specified in contract without notice of intention being given to subcontractors furnishing material with knowledge of owner, though made before notice of lien filed, could not be allowed owner since otherwise last provision of § 4138, would be abrogated. Id. Where owner paid subcontractor partly in cash and partly by note, before notice of defendant's lien, and owner only received memorandum showing credit for cash paid and amount of note, account not being closed until defendant filed written notice of lien and brought suit to foreclose, note was not payment of first subcontractor's claim so that owner could charge it against contractor and destroy second subcontractor's lien. Id. On notice to owner as provided by Rev. 1905, § 2021, causing retention of sum then due contractor, only pro rata share was available to plaintiff where several claimants. Hildebrand v. Vanderbilt, 147 N. C. 639, 61 SE 620. Under Rev. 1905, § 2021, requiring owner to "retain from the money then due" contractor, etc., where on notice $780 was due and after completion of building $1500 was due, only former sum was available to materialman in personal suit. Id.

**89.** Where materialman furnishing materials to contractor entitled to $200 on portion of work done, and $600 on completion, served stop notice [as provided by Mechanics' Lien Law § 3 (P. L. 1898, p. 538)] before owner paid any part of contract price, and subsequently consented to payment of $200, and owner made further payments amounting to $300, judgment for materialman for $300 was proper. Crane Carriage Hardware Co. v. Belfatto [N. J. Law] 69 A 1085.

**90.** Although owner does not show payment altogether made after 90 days had expired and before lien filed. First Nat. Bank v. Hilliboe [N. D.] 114 NW 1085. Payments before 90 days does not prejudice subcontractor where last payment more than sufficient to protect lien if filed in time. Id.

**91.** Owner neglected to indemnify. Bruce

ing a statement of the materialmen.[92] A statute limiting a laborer's lien to work performed at the request or consent of the owner logically limits the lien to a sum not greater than that earned and unpaid at the time of filing the notice of lien.[93]

A mechanic's lien is usually superior to any other lien attaching subsequently to the commencement of work on the improvement,[94] but is inferior to a prior mortgage,[95] though in some states a distinction as to precedence is made when a building is repaired,[96] and in others the question of notice is involved.[97] Thus purchasers for valuable consideration without notice secure priority.[98] A mortgage securing a building loan is ordinarily superior to a mechanic's lien,[99] but the doctrine of equi-

Edgerton Lumber Co. v. Bigelow [Iowa] 117 NW 955.

**92.** Under Comp. Laws, § 10713, requiring statement where payments made to original contractor, where contractor failed to complete buildings, subcontractor was entitled to proportion of claim as contract price bore to entire cost of building and in computing cost court might consider payments made contrary to § 10713, they being evidence of cost. Godfrey Lumber Co. v. Cole, 151 Mich. 280, 14 Det. Leg. N. 883, 114 NW 1018. Owner of property cannot waive compliance with Comp. Laws, § 10713, requiring contractor when payments are due, etc., to furnish statement of materialmen so as to affect of rights of mortgagee under mortgage after improvement and before contractor files notice of lien. Adams v. Central City Granite Brick & Block Co. [Mich.] 15 Det. Leg. N. 795, 117 NW 932. Payments by owner to contractor not prejudicial to subcontractor's lien where no statement containing names of materialmen was furnished owner. Lien Act of 1903, §§ 5, 22, 32. Hutchinson v. Francis Beidler & Co., 135 Ill. App. 328.

**93.** Under lien law (Laws 1897, p. 516, c. 418, § 3), giving laborer lien, the claim is limited to sum not greater than amount unpaid at time of filing notice, and sum subsequently earned thereon (§ 4). Polstein v. Lax, 111 NYS 721. Filing of lien by employes of contractor before contractor abandoned work, and before contract price exhausted, did not give workmen lien for sum in excess of balance due on contract after payment by owner of cost of completing contract, since in absence of agreement work not to be paid for before finished, and hence nothing earned by contractor at time of filing notice. Id. Nothing earned subsequently on excess of difference between contract price and cost of completion added to sum paid contractor. Id.

**94.** Lien takes precedence of incumbrance originating after contractor begins to furnish materials. Gen. St. 1902, § 4135. Soule v. Borelli, 80 Conn. 392, 68 A 979. Mechanic's lien not postponed to lien of mortgage from fact that material and labor were furnished after mortgage was given, value of which exceeded amount due on completion of work; or that payments to contractor exceeded amount on books at or subsequent to date of mortgage; or that proceeds of mortgage may have been paid to contractor which when credited on books exceeded in amount aggregate charged therein; or that contractor knew money paid to him was proceeds of mortgage. Id. Under Code Civ. Proc. § 1186, where no valid contract priority of liens determined by time work completed. Lienor prior to subsequent mortgage. Burnett v. Glas [Cal.] 97 P 423. Under Code Civ. Proc. § 1187, lien of deed of trust given year after commencement of work and furnishing of materials is inferior to mechanic's lien. Farnham v. California Safe Deposit & Trust Co. [Cal. App.] 96 P 788. Where plaintiffs agreed with contractors to furnish labor and materials for city improvement as joint enterprise under direction of third party who had interest in contract, and certain materialmen furnished materials to plaintiffs with knowledge and approval of third party, materialmen's liens were superior to plaintiff's lien. Di Menna v. New York, 109 NYS 1032.

**95.** Davidson v. Stewart, 200 Mass. 393, 86 NE 779.

**96.** Elliott & Barry Engineering Co. v. Baker [Mo. App.] 114 SW 71. Where materials furnished in completion of building, mechanic's lien entitled to priority, since security of mortgagee unimpaired. Id. Where materials furnished in repair of building, mortgagee entitled to priority, since otherwise he might be deprived of security without consent. Id. "Repairs" signifies articles used to replace worn out or unsatisfactory articles as well as repairs in sense of patchwork, on decayed or worn part of building. Id. Lien for installation of hot water plant, not prior to liens of previous deeds of trust under Rev. St. 1899, §§ 4204, 4205 (Ann. St. 1906, pp. 2287, 2288). Id. Hot water heating plant integral part of building, and not separate structure, though removable. Id. Lien for installation of heating plant attaches to property not apparatus itself. Id.

**97.** Under Ballinger's Ann. Codes & St. § 5903 (Pierce's Code, § 6105), as to priority of mechanic's lien, lien for labor performed upon traction engine not preferred to prior mortgage filed and indexed so as to give constructive notice. A. H. Averhill Machinery Co. v. Allbritton [Wash.] 97 P 1082.

**98.** Building erected by tenant not subject to mechanic's lien as against subsequent purchaser for valuable consideration without notice of lien or tenant's claim to building. Denison Lumber Co. v. Milburn [Tex. Civ. App.] 107 SW 1161. Purchaser of real estate taking as absolute owner of fee, without notice of an unfiled mechanic's lien, is not subject thereto, as such purchaser not within Code 1896, § 2724, giving priority to mechanic's lien. Martin v. Clark [Ala.] 46 S 232.

**99.** Where written contract for building loan filed pursuant to Mechanics' Lien Law (Laws 1897, p. 525, c. 418), § 21, as am'd by Laws 1900, p. 145, c. 78, § 1, provided that the mortgage securing building loan be for mortgage and there was no obligation to advance any sum until existing mortgage was satisfied, oral agreement that existing mortgage be paid out of building loan was not

table estoppel may be applied to secure the sum due a materialman, when his lien, because of advances made under a deed of trust, is worthless.[1] Upon the release of land from a prior mortgage, the lien attaches,[2] unless the seisin is instantaneous.[3] A mortgage is entitled to priority, though judgment has been rendered where the mechanic's claim is invalid.[4] Colaborers and materialmen in equal degree have priority according to the time of filing their liens.[5] Subcontractor's liens are superior to those of equitable assignees of a portion of the contract price due the contractor.[6] The priority of a materialman's lien is lost where he becomes an independent contractor.[7] A materialman having no lien has no equitable interest entitling him to priority within a statute as to priorities where a railroad is insolvent.[8] An instrument, at most a trust deed, in the nature of a mortgage for the benefit of creditors is inferior to a subsequent mechanic's lien.[9]

§ 7. *Assignment and transfer of lien.*[10]—See 10 C. L. 823—Laborers' liens are assignable,[10a] and a perfected mechanic's lien passes as an incident with the assignment of the demand for which it stands as security.[11]

§ 8. *Waiver, loss, or forfeiture of lien, or right to acquire it.*[12]—See 10 C. L. 823—A covenant against liens procured by fraud will not be enforced.[12a] The question of waiver is to be inferred from the intention of the parties.[13] The misappropriation of special security may abrogate a waiver,[14] or the waiver may be canceled,[15] but the

material modification of written contract which would subject mortgage to mechanic's lien. Pennsylvania Steel Co. v. Title Guarantee & Trust Co. [N. Y.] 85 NE 820.

1. Where deed of trust for building loan and loans made as work progresses, materialman relying on such loans inasmuch as liens are practically worthless, being subordinate to trust deed, doctrine of equitable estoppel is applicable to charge sum due building owner by lender with constructive trust in favor of materialmen. France v. Coleman, 29 App. D. C. 286. Equitable estoppel applicable, though lender under no direct promise to pay contractors or see they were paid. Id. Lender entitled to credit for interest due on loan in determining amount due. Id.

2. Release of part of land. Davidson v. Stewart, 200 Mass. 393, 86 NE 779.

3. Where owner of land deeded to another and took second mortgage in return, but before mortgage took effect, mortgagor contracted with holder of first mortgage exchanging rights in property, deed and second mortgage were not part of single transaction that would render seisin instantaneous and prevent mechanic's lien from attaching prior to mortgage. Brown v. Haddock, 199 Mass. 480, 85 NE 573.

4. Prudential Trust Co. v. Hildebrand, 34 Pa. Super. Ct. 249. Where lien of mortgage is prior in date to judgment entered upon scire facias sur mechanic's lien, but is subsequent to date at which work upon building was commenced, mortgagee may attack judgment. Id.

5. Lien Law, Laws 1897, p. 520, c. 418, §§ 3, 13. Hall v. Thomas, 111 NYS 979.

6. Where county refused to pay orders assigned to third parties, which orders were subsequently adjudged void, and county was indebted for contract price, subcontractor's liens were entitled to priority. Haynes v. Coles County, 234 Ill. 137, 84 NE 747, afg. 134 Ill. App. 320.

7. Under Lien Law, Laws 1897, p. 515, c. 418, § 2, defining materialmen, persons who contract with owner directly, though solely to furnish materials, are original independent contractors and not entitled to preference of § 13. Hall v. Thomas, 111 NYS 979.

8. Where railroad contracted for building of road, payment to construction company being in bonds and to supply company in cash and old material, and supply company had no statutory lien, it had no equitable claim under Rev. St. 1895, arts. 1472, 1490, entitling it, on railroads insolvency, to priority. United States & Mexican Trust Co. v. Western Supply & Mfg. Co. [Tex. Civ. App.] 109 SW 377.

9. Subsequent lienors have priority to surplus money at mortgage foreclosure. Hall v. Thomas, 111 NYS 979.

10. **Search Note:** See note in 49 A. S. R. 530.

See, also, Mechanics' Liens, Cent. Dig. §§ 375-380; Dec. Dig. §§ 202-206; 27 Cyc. 255-261; 20 A. & E. Enc. L. (2ed.) 470.

10a. Tampa & J. R. Co. v. Harrison [Fla.] 46 S 592.

11. Soule v. Borelli, 80 Conn. 392, 68 A. 979. No formal assignment necessary to transfer mechanic's lien from partnership to individual members upon dissolution, since equitable and legal titles merge. Id.

12. **Search Note:** See notes in 50 L. R. A. 714; 41 A. S. R. 761; 43 Id. 900; 1 Ann. Cas. 954.

See, also, Mechanics' Liens, Cent. Dig. §§ 381-403; Dec. Dig. §§ 207-217; 27 Cyc. 261-276; 20 A. & E. Enc. L. (2ed.) 493.

12a. Vansciver v. Churchill, 35 Pa. Super. Ct. 212. Where owner falsely represented to contractor that there was only one mortgage on property, when in fact two, and that he could set aside as security three properties which in fact he did not own. Id. Fraud not waived because contractor received payments due, after discovering frauds. Id.

13. Specific waiver on contract. Sprague v. Provident Savings & Trust Co. [C. C. A.] 163 F 449.

14. Provision of building contract expressly waiving right to mechanic's lien as against holders of bonds issued by owner

alteration of a contract is ineffective to accomplish this result.[16] A materialman supplying articles for several improvements may waive his lien by applying a credit of money as on a general account.[17] A subcontractor is bound by the provisions of an original agreement where the contractor waives all liens.[18] The right of a lien has been held unaffected because the contractor had associates;[19] and the right is not presumed to be abandoned from the acceptance of notes in payment.[20] A materialman's lien is unaffected by the fact that the contractor failed to protect himself from misappropriation of funds by his agent, the subcontractor.[21] A lien may be lost by willful, gross exaggeration in the notice;[22] by the unjustifiable abandonment of the work;[23] by the failure to complete the structure within the contract time;[24] by defective construction;[25] or where the amount claimed is less than the amount to be charged for defects;[26] and by counterclaim for an existing indebtedness[27] or proof of payment;[28] but it is ordinarily no defense that the owner has paid the contract price before notice of the lien;[29] that different material was used than called for by the specifications,[30] or that the building is defective when it has been

and secured by mortgage held effective and not abrogated by misappropriation. Sprague v. Provident Savings & Trust Co. [C. C. A.] 163 F 449.

15. Where building contract providing for waiver of contractor's right to file lien, after change in ownership of building, was canceled and oral contract was substituted whereby contractor agreed to finish building without waiving lien, such contract was enforcible though third person, not party to proceedings, had insured completion of building relying on waiver. Pagnacco v. Faber, 221 Pa. 326, 70 A 754.

16. Sprague v. Provident Savings & Trust Co. [C. C. A. ] 163 F 449.

17. Incumbent upon materialman to keep separate accounts and render proper credits. Williams v. Willingham-Tift Lumber Co. [Ga. App.] 63 SE 584.

**Contra:** Materialman furnishing glass to contractor for several jobs is not deprived of lien, because of failure, when payments are made, to ascertain where money is from and to correctly apply same. Campbell Glass & Paint Co. v. Davis-Page Planing Mill Co., 130 Mo. App. 474, 110 SW 24.

18. Where contract of subcontractor expressly recognized provisions of original contract. W. W. Brown Const. Co. v. Central Illinois Const. Co., 234 Ill. 397, 84 NE 1038, afg. 137 Ill. App. 532. Terms of contract waiving lien held to include inchoate lien which exists before notice is filed. Id.

19. Mechanic's Lien Act of 1895, § 23. County of Coles v. Haynes, 134 Ill. App. 320.

20. In absence of express agreement. American Car & Foundry Co. v. Alexandria Water Co., 221 Pa. 529, 70 A 867; A. W. Burritt Co. v. Negry [Conn.] 71 A 570. Contractor not deprived of lien because of provision of contract for payment in part by notes. Davidson v. Stewart, 200 Mass. 393, 86 NE 779. Where three notes given to contractor for work performed, and one not paid but taken up by contractor who returned to owner and changed entry in books to show two notes paid, unpaid note returned was not accepted in absolute payment. Id.

21. Los Angeles Pressed Brick Co. v. Los Angeles Pacific Boulevard & Development Co., 7 Cal. App. 460, 94 P 775.

22. So as to cause enforcement of fictitious demand. Felgenhauer v. Hass, 123 App. Div. 75, 108 NYS 476.

23. Mitchell v. Dunmore Realty Co., 111 NYS 322. Where work performed under contract with tenant, relying on consent of landlord, abandonment of work shows no right of lien against landlord, unless lienor prevented from completing same. Mitchell v. Dunmore Realty Co., 111 NYS 322. Breach of contract by tenant insufficient. Id. Foreclosure of lien for work performed granted where plaintiff refused permission to complete building. Spring v. Collins Bldg. & Const. Co., 113 NYS 29.

24. No excuse for nonperformance of work worth $250. Paturzo v. Shuldiner, 125 App. Div. 636, 110 NYS 137.

25. Damages recoverable as offset. Lien Laws § 6 (Sess. Laws 1899, p. 148), applied. Steltz v. Armory Co. [Idaho] 99 P 98.

26. In action to set aside claims for mechanic's liens as cloud upon title, evidence held to show balance claimed as due by certain contractors less than amount to be charged for defects and therefore nothing due. Sorg v. Crandall, 233 Ill. 79, 84 NE 181.

27. Evidence held to show indebtedness of lien claimant to corporation owner. Bruce v. Carolina Queen Consol. Min. Co., 147 N. C. 642, 61 SE 579. Owner of building may set off antecedent debt due to him from contractor who erected building against amount remaining due on contract to exclusion of claims by subcontractors and materialmen, notwithstanding contract did not provide payment should be made in advance or make any statement of amount due owner from contractor at time of entering into contract. Lane v. Bailey, 7 Ohio N. P. (N. S.) 198.

28. Evidence insufficient to sustain defense of payment. Flexner University School v. Strassel Gans Paint Co. [Ky.] 112 SW 686.

29. Meyer v. Schmidt, 130 Mo. App. 333, 109 SW 832.

No defense that owner had paid out more than contract price for material to complete building in absence of showing that building was completed according to original plans. Cost v. Newport Builders' Supply & Hardware Co., 85 Ark. 407, 108 SW 509.

30. Owner might reject. Meyer v. Schmidt, 130 Mo. App. 333, 109 SW 832.

accepted.[31] An owner cannot assert damages against a subcontractor to prevent a lien unless the same have been established in an action.[32] A materialman who is treasurer of the owner's building committee is not estopped from asserting a lien,[33] but the doctrine of estoppel may be applicable to prevent the defeat of a lien by a wife, who was the true owner of the land.[34] A city cannot set off against the claim of subcontractors, the amount of a loss suffered by reason of the abandonment of the work by the contractor, where it has compromised the liability upon the bond given by the contractor,[35] and a city cannot charge against the subcontractors an amount expended in completing an improvement where it failed to comply with the law as to reletting the work.[36] The provisions of a building contract requiring proof that the building was free from liens would not affect the contractor's right to his lien,[37] and a lien is not terminated by the owner's death.[38] A surety upon a contractor's bond is ordinarily estopped from claiming a lien,[39] but where there is no privity of contract between the owner and materialmen, the fact that they are sureties on the contractor's bond to a guaranty company does not estop them to assert a lien for the materials furnished.[40]

§ 9. *Discharge and satisfaction.*[41]—See 10 C. L. 824.—A lien may be discharged by the filing of an undertaking,[41a] and such undertaking cannot be canceled though the time to bring action expires.[42]

§ 10. *Remedies and procedure to enforce lien. A. Remedies.*[43]—See 10 C. L. 824.—Usually the lien is considered as distinct from the debt created by furnishing the materials,[43a] though in some states the enforcement of the lien is provided for the pay-

**31.** Contractor not liable for quality of brick inspected by owner's president. Beck Coal & Lumber Co. v. Peterson Mfg. Co., 237 Ill. 250, 86 NE 715. Taking possession of building with latent defect sufficient to prevent owner from denying completion in action of foreclosure. Lien Laws, § 6 (Sess. Laws 1899, p. 148). Steltz v. Armory Co. [Idaho] 99 P 98.

**32.** Owner cannot as between himself and the subcontractor reserve any of balance owing to general contractor after proof of completion of work, without having damages fixed as between him and the general contractor. Phoenix Iron Co. v. Metropole Const. Co., 125 App. Div. 479, 109 NYS 858. Owner had no standing to assert damages where instead of counterclaiming for delay against general contractor and introducing contract as basis for proving damage, counterclaim was brought against subcontractor, and contract not introduced in evidence. Id.

**33.** Materials furnished with consent of other members of committee. Pine Bluff Lodge of Elks No. 149 v. Sanders [Ark.] 111 SW 255.

**34.** Harris v. Graham [Ark.] 111 SW 984.

**35, 36.** City of Centralia v. Norton & Co., 140 Ill. App. 46.

**37.** Provision of building contract requiring certificate from recorder of liens, showing that property was free from liens chargeable to contractor, would not effect contractor's right to lien. Morrison Co. v. Williams, 200 Mass. 406, 86 NE 888. Provision of building contract postponing final settlement 40 days to determine if liens were filed would not prevent proceedings by contractor for partial payments then due, since, in determining amount due, claims for labor and material could be considered and deducted. Id.

**38.** Under Pub. St. c. 141, §§ 10, 16, giving lien for labor furnished for 90 days after work is completed, owner's death does not terminate. Russell v. Howell, 74 N. H. 550, 69 A 886.

**39.** Subcontractor cannot enforce a surety. Leach v. Thompson, 138 Ill. App. 85; Eureka Stone Co. v. First Christian Church of Ft. Smith [Ark.] 110 SW 1042.

**40.** Pine Bluff Lodge of Elks No. 149 v. Sanders [Ark.] 111 SW 255.

**41. Search Note:** See note in 14 L. R. A. (N. S.) 918.

See, also, Mechanics' Liens, Cent. Dig. §§ 404-426; Dec. Dig. §§ 218-244; 27 Cyc. 278-304; 20 A. & E. Enc. L. (2ed.) 511; 13 A. & E. Enc. P. & P. 1020.

**41a.** Lien Law, Laws 1897, p. 523, c. 418, § 18, subd. 4. In re Hurwitz, 58 Misc. 379, 110 NYS 1105. Undertaking is substituted for lien and lienor has one year to bring action to recover judgment on claim in notice of lien. Id.

**42.** Undertaking pursuant to Lien Law (Laws 1897, p. 523, c. 418), § 18, subd. 4, cannot be canceled, though time within which action to recover judgment against property on claim contained in notice of lien has expired. In re Greines, 60 Misc. 542, 112 NYS 640. After entry of order canceling lien, it ceases to exist, and ex parte order continuing lien for one year and ordering same to be redocketed will be vacated on motion. In re Hurwitz, 58 Misc. 379, 110 NYS 1105.

**43. Search Note:** See note in 3 Ann. Cas. 1100.

See, also, Mechanics' Liens, Cent. Dig. §§ 427-468, 487-493; Dec. Dig. §§ 245-260, 265-268; 27 Cyc. 317-321, 323-345, 362-367; 20 A. & E. Enc. L. (2ed.) 519; 13 A. & E. Enc. P. & P. 943, 1011, 1014, 1022.

**43a.** Los Angeles Pressed Brick Co. v. Higgins [Cal. App.] 97 P 414.

ment of the judgment obtained on the debt.[44] The remedy under the statutes is merely cumulative[45] and does not deprive the claimant of his personal remedy against the debtor,[46] which is maintainable where the lien has lapsed.[47] The owner's quasi contractual obligation to the subcontractor is enforcible in assumpsit.[48] Additional special remedies, such as the giving of a bond, are merely cumulative.[49] The general procedure of foreclosure is usually applicable.[50] Such procedure is not violative of a constitutional right to a jury trial[51] and does not render the action one to recover on contract,[52] though it is also held that the gist of the action is breach of contract.[53]

*Jurisdiction and venue.*[See 10 C. L. 824]—A mechanic's lien is of equitable cognizance,[54] but to enable a court of equity to enforce a mechanic's lien, the lien must have legal validity.[55] The proceeding to enforce being considered essentially in rem, the subject-matter is local.[56] Municipal courts are given limited jurisdiction to foreclose,[57] and the provisions of a municipal court act as to service of process are applicable rather than the code rules.[58]

*The time of bringing action*[See 10 C. L. 824] is a matter of statutory regulation.[59]

**44.** Rutherford v. Ray, 147 N. C. 253, 61 SE 57. Materialman cannot maintain separate action against landowner until he secures judgment against contractor, suit against contractor in personam and against owner in rem. Buck v. Tifton Mfg. Co. [Ga. App.] 62 SE 107.

**45.** Remedy merely cumulative and not affected by submission to arbitrators except as to amount to be collected where arbitration is legal. Sorg v. Crandall, 233 Ill. 79, 84 NE 181.

**46.** Under Mechanic's Lien Act of 1903, § 28, prescribing remedies, lien may be enforced by action against land or action at law against contractor and owner. Harty Bros. & Harty Co. v. Polakow, 141 Ill. App. 570. Rev. Laws, 1902, c. 197, § 33, provide for maintenance of action of contract and that plaintiff may have benefit of enforcement of lien, and therefore plaintiff may pursue both remedies until he secures one satisfaction, provided that proceedings do not conflict. Morrison Co. v. Williams, 200 Mass. 406, 86 NE 888.

**47.** Where lien lapses due to failure to enforce in statutory period, claimant may sue owner personally under Rev. 1905, § 2021, providing for retention of moneys due contractor to be paid materialman when itemized statement furnished, etc. Hildebrant v. Vanderbilt, 147 N. C. 639, 61 SE 620.

**48.** Under Lien Law (Laws 1903, p. 241), § 28 (Hurd's Rev. St. 1908, c. 82, § 42). Harty Bros. & Harty Co. v. Polakow, 237 Ill. 559, 86 NE 1085, rvg. 141 Ill. App. 570.

**49.** Bond Act 1897 (Laws 1897, p. 201, c. 140) does not exclude constitutional mechanic's lien but provides cumulative remedy for securing payment of lien. Goldtree v. San Diego [Cal. App.] 97 P 216.

**50.** Under Code Civ. Proc. § 1198, general procedure for enforcement of liens by foreclosure is applicable. Los Angeles Pressed Brick Co. v. Higgins [Cal. App.] 97 P 414. A foreclosure of mechanic's lien similar to suit for foreclosure of mortgage procedure conformable thereto. Valett v. Baker, 114 NYS 214.

**51.** Mills v. Britt [Fla.] 47 S 799.

**52.** Though labor and material furnished in accordance with contract. Mills v. Britt [Fla.] 47 S 799.

**53.** Burke v. Dittus [Cal. App.] 96 P 330.

**54.** Goldtree v. San Diego [Cal. App.] 97 P 216. Power to adjudicate laborer's liens may be conferred upon courts of equity. Tampa & J. R. Co. v. Harrison [Fla.] 46 S 592. While suit to foreclose has been termed suit in equity, and may be statutory proceeding of equitable nature, equity itself gives no mechanic's lien. Los Angeles Pressed Brick Co. v. Higgins [Cal. App.] 97 P 414.

**55.** Logan Planing Mill Co. v. Aldredge, 63 W. Va. 660, 60 SE 783.

**56.** Comp. Laws, § 434. Prather Engineering Co. v. Detroit, F. & S. R. Co., 152 Mich. 582, 15 Det. Leg. N. 280, 116 NW 376. Under Comp. Laws, §§ 10714, 10719, proper to bring suit in county where preliminary statement filed. Id. In action to foreclose mortgage where lien claimant made defendant, subsequent suit by lien claimant in another county, in which receiver appointed by first court was not party defendant because of court's refusal to grant leave should be dismissed, first court having jurisdiction and not assumption that lien claimant would be deprived of remedy. Id.

**57.** Schumer v. Kohn, 111 NYS 728. Under Hurd's Rev. St. 1908, c. 37, § 265, giving municipal court of Chicago jurisdiction of actions of contract exceeding $1,000, such court has jurisdiction of action by subcontractor for personal judgment against owner of building on latter's quasi contractual obligation for pro rata share of owner's liability to contractor. Harty Bros. & Harty Co. v. Polakow, 237 Ill. 559, 86 NE 1085, rvg. 141 Ill. App. 570.

**58.** In action in municipal court to establish mechanic's lien. Municipal Court Act, Laws 1902, p. 1502, c. 580, § 37, rather than Code Civ. Proc. § 3404, is applicable and the return day of summons must not be more than 12 days from its date and same must be served at least six days before time of appearance, except where order of arrest is issued. Bogopoler Realty Co. v. Schwartzman, 59 Misc. 495, 110 NYS 853. Practice of municipal court act to be followed by court having jurisdiction unless act clearly indicates by reference that code provision is to to adopted. Id.

**59.** Lien lost if action not commenced

(§ 10) *B. Parties.*[60]—See 10 C. L. 825—After the dissolution of a partnership the individuals may sue to enforce the lien.[60a] The necessary parties are largely determined by the nature of the action, as where a joinder is allowed,[61] but usually the necessary parties include the contractor,[62] and a trustee in prior deed of trust as well as trust creditor.[63] Other claimants are necessary;[64] although some states hold that where a third person does not become a claimant and intervene, his rights are unenforcible.[65] In a suit against the owner of property to establish a lien for work done at the instance of the lessees, such lessees are not necessary parties;[66] and in a suit against the trustees of a church, the corporate church was held unnecessary.[67] Where the original contractors are partners, only one of them is a necessary party defendant.[68] Where the owner is dead, the heirs are the proper parties,[69] and where the land is needed to pay debts, the administrator is properly cited to defend,[70] but the rights of the owner's widow are unaffected.[71] The substitution of representatives when a party dies pending action is provided for by statute.[72]

within 6 months. Rev. 1905, §§ 2027, 2033. Hildebrand v. Vanderbilt, 147 N. C. 639, 61 SE 620. Under law of 1895, § 9 (Laws 1895, p. 230), being Hurd's Rev. St. 1895, c. 82, par. 23, suit must be commenced within two years after completion of contract. Kelley v. Springer, 235 Ill. 493, 85 NE 593. Proceeding to enforce brought on June 5 in proper time as within 4 months of expiration of term of credit, when material delivered Jan. 8 on 30 days time, which expired Feb. 7. Beck Coal & Lumber Co. v. Peterson Mfg. Co., 237 Ill. 250, 86 NE 715. Action to foreclose after 8 calendar months from filing claim too late. Rees v. Wilson [Wash.] 97 P 245. Where action to foreclosure brought against partners and after 8 months corporation made party defendant, lienor cannot have structure deemed partnership property, it appearing that corporation was legal, in possession of property at time of improvement, and described in contract as corporation, and, therefore, entire lien unenforcible. Id. Lien expires at end of five years from filing unless revived by scire facias as provided in case of judgments. Act June 16, 1836, P. L. 695, § 34. Kountz v. Consolidated Ice Co., 36 Pa. Super. Ct. 639. Under latter provision, judgment must be obtained on scire facias within five years from the issuing of writ. Id. Time required to prosecute appeal from judgment erroneously directed against plaintiff upon scire facias our mechanic's lien is not to be excluded in computing and applying 5 years' limitation provided by Act June 16, 1836, P. L. 695, § 24. Id. In fixing time it is presumed that legislature took into consideration delays incident to prosecution of suits and delays in appeal. Id.

**60. Search Note:** See Mechanics' Liens, Cent. Dig. §§ 469-486; Dec. Dig. §§ 261-264; 27 Cyc. 344-362; 13 A. & E. Enc. P. & P. 949.

**60a.** Individuals had legal title and by merger acquire equitable interest. Soule v. Borcili, 80 Conn. 392, 68 A 979.

**61.** In an action for goods sold and delivered against contractor and wife, joined with action to establish lien against owner, wife and mortgagee parties named were proper defendants. Rasmussen v. Liming [Wash.] 96 P 1044.

**62.** Contractor necessary party defendant, since lien claimant whose lien is declared invalid may obtain personal judgment. Los Angeles Pressed Brick Co. v. Higgins [Cal. App.] 97 P 414.

**63.** Lunsford v. Wren [W. Va.] 63 SE 308.

**64.** In action against owner to recover on personal liability, where retention of money pursuant to Rev. 1905, § 2021, other claimants were necessary parties and finding as to amount due contractor not binding until rights and pro rata recovery of others determined. Hildebrand v. Vanderbilt, 147 N. C. 639, 61 SE 620.

**65.** Where contractor waived lien and third person insured completion, and subsequently on change of ownership waiver was withdrawn, such lien was enforcible. Pagnacco v. Faber, 221 Pa. 326, 70 A 754.

**66.** Work on mining claim. Cascaden v. Wimbish [C. C. A.] 161 F 241. Discretionary with court to refuse to permit filing of amended answer setting up lessee's nonjoinder as defense, after case set for trial and lessees had left jurisdiction. Id.

**67.** In suit by contractor against trustees of church, church corporation is not necessary party though building contract signed in name of church by "president of board of trustees," where such church is not corporation, being incompetent by Const. art. 6, § 47 (Code 1906, p. lxiii), and Code 1906, § 2293. Lunsford v. Wren [W. Va.] 63 SE 308.

**68.** Barnes v. Colorado Springs, etc., R. Co., 42 Colo. 461, 94 P 570. Upon request of owner, court may in discretion, if within jurisdiction, have both partners brought in. Id.

**69.** Land vests in heirs and they are proper parties in proceeding to enforce lien under Pub. St. c. 141, § 10. Russell v. Howell, 74 N. H. 550, 69 A 886.

**70.** Proceeding to enforce under Pub. St. c. 141, § 10. Russell v. Howell, 74 N. H. 550, 69 A 886.

**71.** In proceeding to enforce mechanic's lien against decedent's land under Pub. St. c. 141, § 10, widow stands as if lien had been foreclosed in decedent's lifetime. Russell v. Howell, 74 N. H. 550, 69 A 886.

**72.** Under Act 1874, § 26, Hurd's Rev. St. 1893, c. 82, § 26, providing that representatives of party to proceeding to perfect mechanic's lien, who dies pending action, may be made parties, representatives of party to cross bill petitioning for mechanic's lien, in action to remove cloud on title, may be

(§ 10) *C. Pleading, practice and evidence. Pleading.*[73]—See 10 C. L. 825—Generally the bill should allege all the facts necessary to show the existence of a valid lien[73a] showing substantial compliance with the statute.[74] It follows that essential matters, such as filing,[75] the furnishment of labor and materials,[76] nonpayment,[77] the performance of the contract,[78] or that the owner consented to the improvements,[79] or that an abandonment was justifiable,[80] should be alleged; but allegations which are properly matters of defense, such as the time of bringing the action,[81] or certain terms of the building contract as to payments,[82] are unnecessary. Conclusions should not be pleaded.[83] Errors in stating the terms of a contract may be treated as surplusage where a copy of the contract is exhibited with the bill.[84] Where an entire contract is set forth, the plaintiff's right of recovery depends upon full performance.[85] The granting of bills of particulars is discretionary,[86] and a complaint that a mechanic's lien is bad because a bill of particulars is not attached should be made by motion to strike.[87] In case of contract with an owner, no bill of particulars need be attached to the mechanic's lien.[88] The action being in equity, amendments

substituted. Sorg v. Crandall, 233 Ill. 79, 84 NE 181.

**73. Search Note:** See note in 9 Ann. Cas. 228.

See, also, Mechanics' Liens, Cent. Dig. §§ 432-468, 494-594; Dec. Dig. §§ 247-260, 269-290; 27 Cyc. 317-319, 323-345, 367-428; 13 A. & E. Enc. P. & P. 968, 1023, 1024.

**73a.** Lunsford v. Wren [W. Va.] 63 SE 308. Should allege contract and terms; that work done pursuant to contract; filing of account within proper time, with proper officer, together with description of property; name of owner where work performed or finished, that suit brought within proper time; existence of debt at time of suit; and when suit by subcontractor, that articles furnished to contractor to be used in construction of house in pursuance with contract with such contractor. Id.

**74.** Davis v. Treacy [Cal. App.] 97 P 78; Coffey v. Smith [Or.] 97 P 1079.

**75.** Complaint averring filing of claim for lien 60 days "after completion of building" insufficient to show filing 60 days after "completion of contract," under B. & C. Comp. § 5644. Coffey v. Smith [Or.] 97 P 1079. Where bill fails to allege filing of account within 60 days, defect is not supplied by certified copy from record of mechanic's lien exhibited therewith. Bill fatally defective on demurrer. Lunsford v. Wren [W. Va.] 63 SE 308. Code Civ. Proc. § 1187, requiring filing of claim with county recorder and what claim shall contain, is not complied with where complaint shows filing but nothing whatever of what claim contained save description. Davis v. Treacy [Cal. App.] 97 P 78.

**76.** No cause of action where no allegation that work and material necessary to first payment had been done and furnished. Paturzo v. Shuldiner, 125 App. Div. 636, 110 NYS 137.

**77.** Gist of action breach of contract, and in absence of allegation of nonpayment complaint demurrable. Burke v. Dittus [Cal. App.] 96 P 330. Entire failure to aver nonpayment renders complaint insufficient to state cause of action. Id. Special demurrer necessary to attack defective averment of nonpayment. Id.

**78.** Contractor cannot establish right to lien in absence of proof of substantial performance of contract. Harris v. Graham [Ark.] 111 SW 984. Petition held sufficient to show materialman's right to lien. Riverside Lumber Co. v. Schmidt, 130 Mo. App. 227, 109 SW 71. Averment of sale on "credit of building" unnecessary. Id.

**79.** Allegation sufficient to charge defendants with knowledge of improvements, construing statute liberally. Tonopah Lumber Co. v. Nevada Amusement Co. [Nev.] 97 P 636.

**80.** Complaint insufficient when alleging abandonment before completion of work and failing to show justification. Mitchell v. Dunmore Realty Co., 111 NYS 322; Id., 60 Misc. 563, 112 NYS 659.

**81.** Allegation that action was begun 90 days after filing of notice of lien unnecessary. Romeo v. Chiangone, 110 NYS 724. No issue can be raised on unnecessary allegation, and denial of answer fails to put in issue commencement of suit 90 days after notice. Romeo v. Chiangone, 110 NYS 724.

**82.** Where building contract provides for periodical payments conditioned on architect's certificate of approval, allegations of such provisions or compliance therewith are unnecessary. Lunsford v. Wren [W. Va.] 63 SE 308. Where building contract provides for periodical payments conditioned on architect's certificate of approval, failure to comply with such provisions is matter of defense. Id. Lien begins when work commenced and material furnished under contract. Id.

**83.** Allegation of failure of tenant to pay sum due for work without statement of facts mere conclusion. Mitchell & Dunmore Realty Co., 111 NYS 322; Stearn v. Miller, 111 NYS 659.

**84.** Lunsford v. Wren [W. Va.] 63 SE 308.

**85.** Deeds v. Imperial Brick Co., 219 Pa. 579, 69 A 78.

**86.** Refusal of bill of particulars requiring plaintiff to state amount claimed for given number of cubic feet of dirt removed in reclamation of arid land, at given station upon works, not error where granting of such bill discretionary, there being no statute. Nelson Bennett Co. v. Twin Falls Land & Water Co., 14 Idaho, 5, 93 P 789.

**87.** Vansciver v. Churchill, 35 Pa. Super. Ct. 212. Too late after security and lien discharged under Act 1901, P. L. 431. Id.

**88.** Vansciver v. Churchill, 35 Pa. Super. Ct. 212. Act Apr. 17, 1905, P. L. 172, requir-

are discretionary [89] and may be permitted after the expiration of the time of bringing action.[90] A contractor's right of recovery for additional payments is not barred where no plea of abatement is entered.[91] A petition may be attacked for uncertainty [92] or because of defect as to parties.[93] In an action to foreclose a lien against an owner and a trustee in a deed of trust, either defendant might resist the lien and the demurrer of one inures to benefit of both.[94] In Pennsylvania the issues are defined through affidavit and counter-affidavit,[95] and may arise in proceedings for the discharge of a lien by entering security.[96] Upon the failure to file the contract required by the California lien law, the contractor must allege and prove the reasonable value of his work,[97] but the fact of recording may be admitted by the pleadings.[98]

*Evidence and burden of proof.* See 10 C. L. 826—The burden of proving defenses, such as payment [99] or a special contract,[1] failure to file in time,[2] rests on the defendant, but the plaintiff must establish the contract pleaded when disputed,[3] or that

ing bill of particulars, not applicable where contract made before passage of act. Id.

**89.** Uvalde Asphalt Paving Co. v. New York, 191 N. Y. 244, 84 NE 83. Amendment to conform to proof showing that contractors agreed to assign contract to plaintiff if latter would make advances in addition to supplying materials proper. Id. Amendment could not cure infirmity of lien notice in so far as claim for moneys loaned was sought. Id. Amendment of prayer for personal judgment proper, where facts alleged supported action ex contractu, since such amendment incidental to action and authorized by statute. Code Civ. Proc. § 3412. Zide v. Schelnberg, 114 NYS 41. Amendment within power of justice under Municipal Court Act (Laws 1902, p. 1542, c. 580), § 166. Id. Where petition alleged that contractor erected building under contract, that material sold by plaintiffs and used in building, it was not error to permit amendment so as to charge that materials were furnished "for" defendant, after evidence was in or even after judgment. Meyer v. Schmidt, 131 Mo. App. 53, 109 SW 833. Amendment proper where petition not attacked and evidence introduced. Id., 130 Mo. App. 333, 109 SW 832.

**90.** Objection that bill is not verified may be met by amendment after expiration of year. Prather Engineering Co. v. Detroit, F. & S. R. Co., 152 Mich. 582, 15 Det. Leg. N. 280, 116 NW 376. Under Comp. Laws, §§ 10718, 10719, providing for enforcement of lien within one year and requiring all persons having rights in property to be made parties, if bill is filed in season, amendment bringing in proper party may be made after year has expired. Id.

**91.** Recovery of judgment by contractor for amount due before last payment due under contract does not estop him in proceedings to perfect lien from claiming whole account was not due at date of bringing first suit, there being no plea of abatement and consequently no estoppel. Sorg v. Crandall, 233 Ill. 79, 84 NE 181.

**92.** Complaint stating nature of cause of action, number of cubic yards of dirt removed in reclamation of arid lands for which plaintiff claims compensation, classification to which same belongs, and specific contract which is basis of work, not demurrable for uncertainty. Nelson Bennett Co. v. Twin Falls Land & Water Co., 14 Idaho, 5, 93 P 789. Bill alleging furnishing of labor and material used in house upon designated land and nonpayment is not so indefinite as to dispense with answer. Mills v. Britt [Fla.] 47 S 799.

**93.** Objection that receiver is party without leave of court may be made by demurrer. Prather Engineering Co. v. Detroit, F. & S. R. Co., 152 Mich. 582, 15 Det. Leg. N. 280, 116 NW 376. Objection to bill which does not implead necessary parties may be taken in answer or at hearing. Id.

**94.** Brown v. Cornwell, 108 Va. 129, 60 SE 623.

**95.** Deeds v. Imperial Brick Co., 219 Pa. 579, 69 A 78.

**96.** In proceedings under Act of June 4, 1901, § 25, P. L. 431, providing for discharge of lien upon entering security, the issue to be tried is made by the lien and the defense set up in the petition to enter security. Vansciver v. Churchill, 35 Pa. Super. Ct. 212. In such case lien stands in place of scire facias, as no writ can issue after discharge of lien. Id. In proceedings under Act June 4, 1901, § 25, P. L. 431, formal **amendment** which does not change cause of action or increase liability of surety may be allowed. Id.

**97.** Where contract not filed as required by lien law, contractor's action on contract is barred unless allegation and proof of reasonable value of work. Los Angeles Pressed Brick Co. v. Higgins [Cal.] 97 P 420. Allegation sufficient. Id. Separate action of debt maintainable. Code Civ. Proc. § 1179. Id.

**98.** Where contractor's complaint in consolidated actions by contractors, materialmen, etc., against owner, alleged contracts as recorder, which fact was averred by answer, fact was admitted by pleadings. Los Angeles Pressed Brick Co. v. Higgins [Cal.] 97 P 420. Admission not destroyed by finding to contrary. Id. Consolidation of actions did not change issues in respective cases or render admissions ineffectual. Id.

**99.** Flexner University School v. Strassel Gans Paint Co. [Ky.] 112 SW 686.

**1.** Burden of proving material to be furnished with knowledge of two contracts and that, therefore, lienor's claim not filed in time, rests on defendant. Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho, 662, 93 P 765.

**2.** Burden of proof rests on defendant where special contract pleaded by answer differed from contract declared on. Herbert v. Lloyd [Iowa] 116 NW 718.

**3.** Herbert v. Lloyd [Iowa] 116 NW 718.

the completion of a building was not unnecessarily delayed.[4] The evidence introduced must conform to the pleadings[5] and be competent to establish the issues made.[6] The statements in a lien are not evidence.[7] Where both lienable and nonlienable articles are included in a claim, the plaintiff may by proof separate them and the court will declare a lien on the former.[8]

*Practice.*See 10 C. L. 826—Joinder of actions is permissible.[9] The party instituting a mechanic's lien proceeding has no vested right to dismiss his bill without prejudice.[10] The instructions should be authorized by the evidence[11] or pleadings.[12] Findings of fact are liberally construed to support the judgment.[13] Where the evidence as to the respective liability of the two defendants is incomplete and unsatisfactory, a new trial will be granted.[14]

*Questions of law and fact.*See 10 C. L. 827—Questions of fact are presented where the time of completion of the work is disputed,[15] where it is doubtful as to whether the last item was furnished as part of a continuing account,[16] or where the description is claimed to be insufficient.[17]

4. Coffey v. Smith [Or.] 97 P 1079.

5. Evidence that number of wooden patterns were damaged while improvement made held admissible, being authorized by pleadings. Neal v. Davis Foundry & Mach. Works [Ga.] 63 SE 221. Unless **variance** is palpable and material, it is not fatal, since mechanic's lien act must be liberally construed as remedial. Stepina v. Conklin Lumber Co., 134 Ill. App. 173. No fatal variance where pleading charged written contract and proof showed partly written and partly oral contract. Id. No fatal variance where pleading charged an entire contract to furnish certain merchandise and proof showed contract to furnish at market price all goods ordered. Id. No fatal variance where complaint to foreclose did not aver written contract as proved. Beach v. Huntsman [Ind. App.] 83 NE 1033; Id., 85 NE 523. Discrepancy of 5 days between statement in claim for mechanic's lien and contractor's testimony taken two years after filing claim not substantial variance. Sorg v. Crandall, 233 Ill. 79, 84 NE 181. No variance where petition averred that petitioner made estimate with prices which was accepted and copy of estimate attached as exhibit, and that payments were impliedly to be paid on first of month succeeding where exhibit stated terms at 30 days, since acceptance of proposition fixed terms, and allegation that impliedly payments were to be at different time was mere conclusion to be disregarded. Beck Coal & Lumber Co. v. Peterson Mfg. Co., 237 Ill. 250, 86 NE 715. No ground for denial of lien where notice states claim on contract and proof on quantum meruit. Milton M. Schnaier Co. v. Grigsby, 59 Misc. 595, 112 NYS 505.

6. Evidence as to whether complainant was licensed builder was immaterial, not being in issue. Manowsky v. Stephen, 233 Ill. 409, 84 NE 365. In foreclosing lien where owner showed furnace as not supplying heat agreed upon, evidence of capacity of furnace in rebuttal was competent. Beach v. Huntsman [Ind. App.] 83 NE 1033; Id., 85 NE 523.

7. Statements in lien as to contract, time and amount, are averments only. Deichley's Estate, 35 Pa. Super. Ct. 442. Record of mechanics' lien not competent evidence of time when labor and material furnished. Sabin v. Cameron [Neb.] 117 NW 95. Record of lien not competent evidence that labor and material were used upon building therein described. Id.

8. Barnes v. Colorado Springs, etc., R. Co., 42 Colo. 461, 94 P 570. Separation of portion of materials used by subcontractor not necessary where claimants not seeking to hold principal contractor personally liable, and owner and principal contractor could make adjustment between themselves. Id. Mills' Ann. St. Rev. Supp. § 2869, gives lien upon entire structure, and, in lien for railroad, allegations and proof upon what portion of railroad material used are unnecessary. Id.

9. Mechanic's Lien Act 1895, § 9, provides for joinder where two or more persons have liens on same property. Bill not objectionable as multifarious. County of Coles v. Haynes, 134 Ill. App. 320. Action for goods sold and delivered against contractor and wife not improperly joined with cause against owner, wife and mortgagee to establish lien. Rasmussen v. Liming [Wash.] 96 P 1044.

10. Lien Act 1905, § 11, prohibits voluntary dismissal without due notice to all parties and for good cause shown on terms. Menke v. Barnhart, 137 Ill. App. 59.

11. Instruction on issue of estoppel of lien properly refused as unsupported by evidence. Cost v. Newport Builders' Supply & Hardware Co., 85 Ark. 407, 108 SW 509.

12. Instructions as to damage to property while improvements made held authorized by pleadings. Neal v. Davis Foundry & Mach. Works [Ga.] 63 SE 221.

13. Findings of fact need not conform to rules governing pleadings which go to form issues. Nelson Bennett Co. v. Twin Falls Land & Water Co., 14 Idaho, 5, 93 P 789. Findings as to measurements and amount of work done sufficient to sustain judgment. Id.

14. Leonard G. Kirk Co. v. Albert, 113 NYS 1.

15. Day v. Pennsylvania R. Co. 35 Pa. Super. Ct. 586.

16. Darlington Lumber Co. v. James T. Smith Bldg. Co. [Mo. App.] 114 SW 77. To justify directed verdict because lien not filed in time, there must be entire want of substantial evidence to show that last item was furnished as parcel of continuing account for materials furnished under original contract. Id.

17. Patten & Davies Lumber Co. v. Gibson

(§ 10) *D. Judgment, costs, and attorneys' fees.*[18]—See 10 C. L. 827—A judgment against a fund in the possession of a municipality may be rendered,[18a] and an award of a lien to a subcontractor and a denial to the contractor is not inconsistent.[19] The decree may properly direct a sale of the property in fee and the application of the proceeds according to priority of the various liens,[20] and while it is irregular to direct the owner to pay the sum into court,[21] such sum, if received, is properly applied first to the payment of valid liens and costs and second to the payment of a personal judgment.[22] A judgment foreclosing a lien on a tract of land is erroneous when differing from the tract described in the lien notice and that in the petition.[23] After the application of the proceeds upon foreclosure to discharge the lien, a judgment may be rendered for the deficiency due.[24] In many states the rendition of personal judgments is permitted,[25] and while privity with the owner giving a personal liability is usually essential,[26] a personal judgment may also be rendered under the general equitable power to carry a suit to complete adjudication,[27] or where an action of contract is joined.[28] The right to a personal judgment may be lost by disclaimer during the trial,[29] and a personal judgment is improperly rendered for

[Cal. App.] 98 P 37. Finding as matter of law that notice insufficient because of misstatement in description, error. Patten & Davies Lumber Co. v. Gibson [Cal. App.] 98 P 37. Sufficiency of description not in issue. Patten & Davies Lumber Co. v. Gibson [Cal. App.] 98 P 37.

**18. Search Note:** See note in 11 Ann. Cas. 714.

See, also, Mechanics' Liens, Cent. Dig. §§ 599-654; Dec. Dig. §§ 291-310; 27 Cyc. 428-462; 13 A. & E. Enc. P. & P. 1023, 1029, 1047.

**18a.** Regardless of Const. art. 20, § 6, as to rendering judgment against state, where judgment on foreclosure directed against fund in possession of municipality. Goldtree v. San Diego [Cal. App.] 97 P 216.

**19.** Since former entitled to lien and waiver by latter. Sprague v. Provident Sav. & T. Co. [C. C. A.] 163 F 449.

**20.** Burnett v. Glas [Cal.] 97 P 423.

**21.** Execution, not contempt proceedings, issue if not paid. Hildebrand v. Vanderbilt, 147 N. C. 639, 61 SE 620.

**22.** Los Angeles Pressed Brick Co. v. Higgins [Cal. App.] 97 P 414.

**23.** Windfall Natural Gas, Min. & Oil Co. v. Roe, 41 Ind. App. 687, 84 NE 996.

**24.** Code Civ. Proc. § 3416, manner of payment as in deficiency judgments in foreclosure cases. Valett v. Baker, 114 NYS 214.

**25.** Plaintiff upon failure to establish lien is entitled under Code Civ. Proc. § 3412, to recover personal judgment for the sums due by any party to the action. Spring v. Collins Bldg. & Const. Co., 113 NYS 29; Freidenrich v. Condict, 124 App. Div. 807, 109 NYS 526. In suit by subcontractors to enforce lien, where contractors were parties defendant but filed no lien, they were not entitled to personal judgment against owner, since latter entitled to jury trial and since personal judgment only given where lien filed but not established. Freidenrich v. Condict, 124 App. Div. 807, 109 NYS 526. On action by subcontractors where original contractors and assignees were parties and lien against owners was dismissed there being nothing due contractor, subcontractors were entitled to personal judgment against contractors and assignees. Id. Failure to establish valid statutory lien as to portion of claim does not preclude personal judgment. Uvalde Asphalt Paving Co. v. New York, 191 N. Y. 244, 84 NE 83. Where contractor failed to assign contract for advances made and materials furnished, as agreed, and in action to foreclose mechanic's lien claimed, such foreclosure was prohibited since lien could not cover advances made, plaintiff was entitled to personal judgment. Id. Personal judgment may be obtained by lien claimant where lien is invalid. Los Angeles Pressed Brick Co. v. Higgins [Cal. App.] 97 P 414.

**26.** Under Code Civ. Proc. § 3412, lienor is entitled to personal judgment upon failing to establish lien when sum due is established which might be recovered at contract. Weiss v. Kenney, 59 Misc. 279, 112 NYS 287; Zide v. Scheinberg, 114 NYS 41; Zimmerman v. Loft, 125 App. Div. 725, 110 NYS 499; Alexander v. Costello, 59 Misc. 491, 110 NYS 1033. Personal judgment dependent upon contract. Los Angeles Pressed Brick Co. v. Higgins [Cal. App.] 97 P 414. Personal judgment in addition to foreclosure proper where materials furnished directly to owner who agreed to pay therefor. Farnham v. California Safe Deposit & Trust Co. [Cal. App.] 96 P 788. Owner not under obligation to pay materialmen for material furnished contractor. Los Angeles Pressed Brick Co. v. Higgins [Cal. App.] 97 P 414. Laborer doing work for subcontractor not entitled to personal judgment against contractor. Goldtree v. San Diego [Cal. App.] 97 P 216.

**27.** Right to personal judgment not dependent on lien. Johnston & Grommett Bros. v. Bunn, 108 Va. 490, 62 SE 341. Equity may appoint commissioner to take evidence and determine right to lien after which personal decree can be rendered. Id.

**28.** Decree foreclosing lien and personal judgment against contractor proper where action of foreclosure joined with action for goods sold against contractor. Rasmusson v. Liming [Wash.] 96 P 1044.

**29.** In action of foreclosure against trustees of church, where attorney during trial disclaimed any purpose to obtain personal judgment, it was proper to refuse to render such personal judgment. Owens v. Caraway [Tex. Civ. App.] 110 SW 474.

a breach of contract not in issue.[30] An allowance of an execution to collect the money decree is proper.[31] A judgment is not binding as to necessary parties not joined,[32] and a purchaser on an execution sale is junior to a mortgage when the parties to the latter incumbrance were not parties to the action, unless the title related back to the filing of such liens prior to the mortgage.[33] Claims secured by mechanic's liens are entitled to draw interest as other debts.[34] The procedure on appeal from a justice court is governed by statute.[35]

*Costs and attorneys' fees.* See 10 C. L. 827—Under the various statutes, if constitutional,[36] reasonable costs and attorney's fees are usually allowable.[37]

§ 11. *Indemnification against liens.*[38] See 10 C. L. 828—Indemnity bond are frequently required by public corporations [38a] and are often construed to be for the benefit of the materialmen,[39] and such bonds are not affected by the fact that the par-

**30.** Paturzo v. Shuldiner, 123 App. Div. 636, 110 NYS 137.

**31.** Scott v. Keeth, 152 Mich. 547, 15 Det. Leg. N. 206, 116 NW 183.

**32.** Judgment on foreclosure of mechanic's lien on mortgaged premises, where one mortgagor and mortgagee not parties, not binding as to such parties though reciting lien prior to mortgage. Curie v. Wright [Iowa] 119 NW 74.

**33.** Curie v. Wright [Iowa] 119 NW 74. Where person foreclosed separate liens on two parcels of land in one action and took judgment in lump sum, it was necessary to sell each parcel under special execution for separate lien in order to preserve liens so they would relate back to time of filing. Id. Where lienor elected to treat judgment as general for entire sum and bought both parcels at sale, judgment became lien on both parcels together when rendered and did not relate back to filing. Id.

**34.** The right to interest, computation and like matters are treated in an appropriate topic (see Interest, 12 C. L. 317).

**35.** Where justice's judgment in action of foreclosure appealed from, case is triable de novo in circuit court. Rev. St. 1899, § 4071, (Ann. St. 1906, p. 2214). Fabien v. Graboe [Mo. App.] 114 SW 80. Judgment appealable though for a sum less than $50. Strebin v. Myers [Ind. App.] 85 NE 784. Act Mch. 9, 1903 (Acts 1903, p. 280, c. 156), has reference to civil actions within jurisdiction of justice of the peace except as provided in § 8 (Acts 1901, p. 566, c. 247), and does not include action to enforce mechanic's lien, and, therefore, such act does not control right of appeal. Id. A decree by a single justice pursuant to an advisory verdict that plaintiffs are entitled to a lien will be affirmed on appeal unless shown to be clearly erroneous. York v. Mathies, 103 Me. 67, 68 A 746.

**36.** Civ. Code Alaska, § 270, authorizing reasonable attorney's fee on foreclosure of lien, is constitutional. Cascaden v. Wimbish [C. C. A.] 161 F 241. Lien Laws 1899, p. 150, § 12, constitutional. Nelson Bennett Co. v. Twin Falls Land & Water Co., 14 Idaho, 5, 93 P 789. Mechanic's Lien Law, § 17 (Hurd's Rev. St. 1905, c. 82, § 31), authorizing recovery of attorney's fees by lienholder, is unconstitutional as special legislation violating Const. art. 4, § 22. Does not apply to other lienholders. Manowsky v. Stephan, 233 Ill. 409, 84 NE 365. Attorney's fee improper, statute being unconstitutional. Burnett v. Glas [Cal.] 97 P 423; Los Angeles Pressed Brick Co. v. Higgins [Cal. App.] 97 P 414; Farnham v. California Safe Deposit & Trust Co. [Cal. App.] 96 P 788; Hill v. Clark, 7 Cal. App. 609, 95 P 382; Los Angeles Pressed Brick Co. v. Los Angeles Pacific Boulevard & Development Co., 7 Cal. App. 460, 94 P 775.

**37.** Where expenses of foreclosure were due mainly to resistance of contractor, court of equity had right to impose costs upon him. Rieser v. Commeau, 114 NYS 154. Under Mechanic's Lien Act of 1903, § 17, court shall equitably apportion costs. First Nat. Bank v. Elgin, 136 Ill. App. 453. Under Comp. Laws 1897, §§ 10,721, 10,730, 10,736, complainant is entitled to actual disbursements and reasonable attorney's fees. Wisniewski v. Nawrocki [Mich.] 15 Det. Leg. N. 491, 116 NW 1065. Rev. Laws 1905, § 3517, authorizing trial court to allow lienholder reasonable costs, and in fixing amount may include in discretion reasonable attorney's fees. Schmoll v. Lucht [Minn.] 118 NW 555. May prove reasonable attorney's fee. Burns' Ann. St. 1901, § 7267. Beach v. Huntsman [Ind. App.] 83 NE 1033. Foreclosure and cancellation construed as one action, i. e., to foreclose lien, and plaintiff entitled to prove attorney's fee. Id. Allowance of $10,000 attorney's fees under Lien Laws 1899, p. 150, § 12, allowing reasonable attorney's fees, not excessive. Nelson Bennett Co. v. Twin Falls Land & Water Co., 14 Idaho, 5, 93 P 789. Counsel fees not exceeding 10 per cent of recovery greater than $1 allowed by Gen. St. 1906, § 2218. Mills v. Britt [Fla.] 47 S 799.

**38. Search Note:** See Mechanics' Liens, Cent. Dig. §§ 655-659; Dec. Dig. §§ 312-317; 27 Cyc. 305-317; 20 A. & E. Enc. L. (2ed.) 489; 13 A. & E. Enc. P. & P. 1021.

**38a.** Bonds by contractor just and equitable between parties securing protection of public interests and of persons whose property and labor are applied to public uses. Connor Co. v. Aetna Indemnity Co., 136 Wis. 13, 115 NW 811. School district having power to erect buildings and provide for payment has authority to contract for protection of materialmen. Id. County. United States Gypsum Co. v. Gleason, 135 Wis. 539, 116 NW 238. Board of trustees of Indiana State Norman School established by Burns' Ann. St. 1901, § 6034, had authority to make contract and take bond conditioned for payment to laborers and materialmen. Acts 1903, p. 373, c. 208, § 2. National Surety Co. v. Foster Lumber Co. [Ind. App.] 85 NE 489.

**39.** Whether intention that materialmen be paid by contractors and whether inten-

ties were induced to enter into the agreement through mistake of law.[40] A provision of a contract with a state authorizing the retention of money to indemnify against liens has been held not to authorize the state to pay such sum to materialmen unless responsible by contract.[41] An indemnity bond to a private person may also be for the benefit of a materialman,[42] but no benefit accrues to a laborer where the bond is purely to indemnify against breach of contract.[43] A surety is not released by the failure of the owner to withhold payments due.[44] In an action on the bond the allegations should be specific and certain [45] alleging the breach of the bond;[46] evidence of the amount of claims for materials is proper;[47] and attorneys' fees and costs which were the result of the breach of covenant in failing to release the building free from liens are recoverable.[48] Want of consideration for the indemnity bond must be specially pleaded to be available as a defense.[49] The question of assignment of contract without the surety's knowledge so as to release the latter is for the jury when the evidence is conflicting.[50]

## MEDICINE AND SURGERY.

§ 1. Public Regulation of the Business of Treating Disease, 840.
§ 2. Malpractice, 843.
§ 3. Recovery of Compensation, 844.
§ 4. Negligent Homicide by Physician, 846.
§ 5. Regulation of the Keeping and Sale of Drugs and Medicines, 846.
§ 6. Tort Liability of Druggists, 847.

tion that bond be surety in case of default must be determined from agreement. Connor Co. v. Aetna Indemnity Co., 136 Wis. 13, 115 NW 811. Bond construed as for protection of materialmen when express agreement harmonizing with intent of parties. Connor Co. v. Aetna Indemnity Co., 136 Wis. 13, 115 NW 811; United States Gypsum Co. v. Gleason, 135 Wis. 539, 116 NW 238. Bond unambiguous as to liability of sureties and parol evidence inadmissible. United States Gypsum Co. v. Gleason, 135 Wis. 539, 116 NW 238. Materialman may enforce when informed of existence, though not aware of existence when contract made. Connor Co. v. Aetna Indemnity Co., 136 Wis. 13, 115 NW 811; United States Gypsum Co. v. Gleason, 135 Wis. 539, 116 NW 238. Bond construed for benefit of materialmen. National Surety Co. v. Foster Lumber Co. [Ind. App.] 85 NE 489. In suit on contractor's bond under Comp. Laws 1897, §§ 10743, 10745, evidence held to show relators as materialmen, not subcontractors, and therefore entitled to benefits of bond. People v. Title Guaranty & Trust Co. [Mich.] 15 Det. Leg. N. 904, 118 NW 586.

**40.** Connor Co. v. Aetna Indemnity Co., 136 Wis. 13, 115 NW 811.

**41.** Rathbun v. State [Idaho] 97 P 335. State cannot withhold on theory that if work were for private individual same would be lienable. Id. State justified in withholding sum for which it might become legally liable, where materialman could obtain recommendatory judgment. Id.

**42.** Bond for dwelling house construed. Demurrer overruled. Gwinn v. Wright [Ind. App.] 86 NE 453. Bond construed as indemnity for church, not for benefit of materialmen, and latter's recovery, or church's recovery for benefit of latter, not maintainable. Eureka Stone Co. v. First Christian Church of Ft. Smith [Ark.] 110 SW 1042.

**43.** Pine Bluff Lodge of Elks No. 149 v. Sanders [Ark.] 111 SW 255. Where contractor's bond not given to secure payment of materials but to secure from breach of contract, it was error on foreclosure of liens to charge owner with amount received on settlement with contractor's surety, in determining amount of distribution to lien claimants. Id.

**44.** A surety upon a contractor's bond is not released by the act of the owner in failing to withhold payments due by virtue of the work performed and materials furnished by the contractor. Leach v. Thompson, 138 Ill. App. 85.

**45.** Complaint in action on bond held sufficient on general demurrer; allegation of payment though ambiguous and uncertain, being sufficient to justify admission of evidence, and no special demurrer interposed and other allegations sufficient. Klokke v. Raphael [Cal. App.] 96 P 392.

**46.** In petition in action on indemnity bond alleging facts showing breach of covenant, breach of bond was alleged though no specific allegation of failure to reimburse for damages and outlay on account of mechanics' liens, since construed liberally on demurrer and fact inferable. Nowell v. Mode, 132 Mo. App. 232, 111 SW 641.

**47.** Evidence admissible though claimant, a party defendant, did not appear by answer. Exposition Amusement Co. v. Empire State Surety Co., 49 Wash. 637, 96 P 158. **Judgments** establishing mechanic's liens competent evidence against surety. Nowell v. Mode, 132 Mo. App. 232, 111 SW 641.

**48.** Klokke v. Raphael [Cal. App.] 96 P 392. Where contractors defaulted and suits to foreclose liens instituted, which by Code Civ. Proc. § 1193, must be defended by contractors at own expense. Id. Costs improperly included in verdict in suit on bond where complaint only claimed attorney's fees and not costs. Klokke v. Raphael [Cal. App.] 96 P 392.

**49.** Gwinn v. Wright [Ind. App.] 86 NE 453.

**50.** Strandlil v. Moran, 49 Wash. 533, 95 P 1106.

§ 1. *Public regulation of the business of treating disease.*[51] See 10 C. L. 828—The state may, in the exercise of its police power, require a license for the practice of medicine [51a] or dentistry,[52] subject, of course, to such rules as the requirement of singleness of titles of statutes.[53] Municipalities may impose police regulations not inconsistent with the statutes.[54] Specific qualification by graduation or previous practice is usually required as a condition to the right to be examined for admission to practice.[55] Statutes initiating a license system usually exempt those practicing at the time of their passage but such exception is held to apply only to residents [56] who have practiced continuously [57] and legally [58] for the required time next preceding the passage of the act.[59] Physicians registering before a certain date are often permitted to practice without examination.[60]

Natural persons alone are permitted to practice medicine, except in the case of hospitals, dispensaries and infirmaries, created under special statute, which are permitted to practice through their licensed physicians.[61] Statutory provisions for registration are mandatory,[62] but regulatory statutes are not and should not be construed so strictly as to defeat the obvious intentions of the legislature.[63] Though graduation from certain institutions may by statute give a right to license without examination,[64] a graduate from such an institution cannot practice without license though a license is unwarrantably denied him by the licensing board.[65] Though under the Texas statute evidence of authority to practice must be filed with a public official at the place of the physician's residence,[66] such filing gives authority to practice in every county in the state.[67] The state may prescribe what constitutes the practice of medicine.[68] To be a physician [69] and practice medicine, it is not ordinar-

**51. Search Note:** See notes in 4 C. L. 636; 6 Id. 623; 14 L. R. A. 579; 1 L. R. A. (N. S.) 811; 3 Id. 762; 4 Id. 1023; 8 Id. 585; 11 Id. 557; 12 Id. 1094; 23 A. S. R. 25; 98 Id. 742, 752; 1 Ann. Cas. 18, 51; 2 Id. 150, 904; 5 Id. 1005; 7 Id. 157, 377, 752; 9 Id. 127, 203; 10 Id. 399.

See, also, Physicians and Surgeons, Cent. Dig. §§ 1-15; Dec. Dig. §§ 1-11; 10 A. & E. Enc. L. (2ed.) 266; 22 Id. 778, 780; 16 A. & E. Enc. P. & P. 524, 535.

**51a.** Commonwealth v. Jewelle, 199 Mass. 558, 85 NE 858, following Commonwealth v. Parn, 196 Mass. 326, 82 NE 31.

**52.** State v. Thompson, 48 Wash. 683, 94 P 667.

**53.** An act to insure the better education of practitioners of dental surgery, to regulate the practice of dentistry, providing penalties for violation thereof, and to repeal a former dentistry act, not bad. Cal. St. 1901, p. 564, c. 175. Ex parte Hornef [Cal.] 97 P 891.

**54.** Ordinance prohibiting employment of solicitors sustained. Burrow v. Hot Springs, 85 Ark. 396, 108 SW 823.

**55.** Webster v. State Board of Health [Ky.] 113 SW 415.

**56.** State v. Miller [Iowa] 115 NW 493.

**57.** Application does not state continued practice; certificate denied. Webster v. State Board of Health [Ky.] 113 SW 415.

**58.** Illegal practice at time of passage held to give no rights. Ex parte Hornef [Cal.] 97 P 891; State v. Miller [Iowa] 115 NW 493. Under Iowa Code § 2579, allowing practice of medicine to nongraduates who have practiced continuously for 5 years in this state, does not entitle physician or surgeon to certificate if 3 of the 5 years have been wrongful practice. State v. Taylor [Iowa] 118 NW 301.

**59.** Practice in years past but not at passage held to give no rights under statute. State v. Miller [Iowa] 115 NW 493.

**60.** Kerbs v. State Veterinary Board [Mich] 15 Det. Leg. N. 804, 118 NW 4.

**61.** People v. John Woodbury Dermatological Institute, 192 N. Y. 454, 85 NE 697.

**62.** Physician coming within exception cannot file affidavit and recommendations, which would entitle him to certificate after the date set by statute. Kerbs v. State Veterinary Board [Mich.] 15 Det. Leg. N. 804, 118 NW 4.

**63.** Under veterinary statute requiring application for license, record kept of licenses issued and that no one shall practice without displaying license in his office, any one practicing without license is guilty although the act itself does not in express terms prohibit such practice. District of Columbia v. Dewalt, 31 App. D. C. 326.

**64, 65.** State v. McCleary, 130 Mo. App. 527, 109 SW 638.

**66.** Texas Pen. Code 1895, art. 440. Person v. State, 53 Tex. Cr. App. 334, 109 SW 935.

**67.** Person v. State, 53 Tex. Cr. App. 334, 109 SW 935.

**68.** "A person practices medicine within the meaning of this act, except as hereinafter stated, who holds himself out as being able to diagnose, treat, operate, or prescribe for any human disease, pain, injury, deformity, or physical condition." New York Laws 1907, p. 636, c. 344, § 1, subd. 7. Bandel v. Department of Health [N. Y.] 85 NE 1067, afg. 111 NYS 431. Practice of medicine consists either in opening an office for practice; or in announcing to the public a general desire, willingness or readiness to treat the sick or afflicted, or investigate or diag-

ily necessary to prescribe and administer medicinal substances,[70] and osteopaths [71] are within the statutes [72] though under the Georgia statute the contrary is held.[73] Actual treatment or prescription for the sick, without previous opening of an office or announcement of practice, provided it be for pay, is practicing medicine,[74] but receipt of a fee or gift is not the criterion by which to decide whether or not a certain treatment constitutes the practice of medicine.[75] The use of designations indicative of the medical profession by unlicensed persons is prohibited by most statutes [76] and using qualifying or limiting words is no defense.[77] Dentistry is included in the term "practice of medicine and surgery," [78] but now usually governed by separate statutes [79] requiring license distinct from the practice of medicine.[80] Veterinarians are also governed by special statutes.[81]

*Revocation of license or professional status.* See 10 C. L. 830—Unprofessional conduct [82] or "gross immorality" justifies the medical board in revoking the license.[83] Procuring or aiding or abetting in criminal abortion is such unprofessional and grossly immoral conduct,[84] and destruction of gestation is sufficient to constitute the offense.[85] An assistant in such cases is equally guilty with the principal.[86] Authority to practice medicine is a property right which cannot be taken away without due process of law.[87] Hearing before board of medical examiners, after sufficient notice [88] and service of a complaint informing of the nature and instance of the offense [89] is due process of law.[90] Conviction by a competent court on the charge

nose the ailments of such; or to suggest, recommend, practice or direct for the use of any specified person any drug, medicine, appliance or other agency for the cure of mind or body, after having received, or with intent to receive therefor, any bonus, gift or compensation. New Mexico Laws 1903, p. 61, c. 40. Territory v. Lotspeich [N. M.] 94 P 1025.

69. The word physician shall include every person who practices about the cure of the sick or injured, or who has the charge of, or professionally prescribes for, any person sick, injured or diseased. Sanitary Code City of New York Section 5. Bandel v. Department of Health [N. Y.] 85 NE 1067.

70. The science of medicine which relates to the prevention, cure or alleviation of disease, is not limited to that which relates to the administration of medicinal substances. Commonwealth v. Jewelle, 199 Mass. 558, 85 NE 858.

71. Osteopaths may be registered as physicians and as such issue certificates of death. Bandel v. Department of Health [N. Y.] 85 NE 1067.

72. One who treats his patients personally by hypnotism and massage, without prescribing remedies, is within the statute for practicing medicine without license. State v. Lawson [Del.] 69 A 1066.

73. The practice of medicine confined to prescription and use of drugs, medicines, appliances, apparatus or other agency. Bennet v. Ware [Ga.] 61 SE 546. "Magic healing" not practicing medicine. Id.

74. Territory v. Lotspeich [N. M.] 94 P 1025.

75. Bennet v. Ware [Ga.] 61 SE 546. No defense that no charge was made. State v. Thompson, 48 Wash. 683, 94 P 667.

76. Use of "Dr.," "M. D.," "Physician and Surgeon," in connection with one's name or on office signs, is unlawful. State v. Pollman [Wash.] 98 P 88.

77. "Osteopathic and magnetic" and "drugless" added on signs, etc. State v. Pollman [Wash.] 98 P 88.

78. State v. Taylor [Minn.] 118 NW 1012.

79. A person shall be deemed to be practicing dentistry within the meaning of this article who shall perform operations or parts of operations of any kind, or treat diseases or lesions of the human teeth or jaw or correct malpositions thereof. Rev. Pol. Code, art. 10, c. 4, S. Dak. State v. Carlisle [S. D.] 118 NW 1033.

80. Extracting two teeth and taking wax impress of mouth and sending away for false teeth by physician held to be in violation of dental statute. State v. Taylor [Minn.] 118 NW 1012; State v. Thompson, 48 Wash. 683, 94 P 667.

81. District of Columbia v. Dewalt, 31 App. D. C. 326.

82. Munk v. Frink [Neb.] 116 NW 525.

83. Rose v. Baxter, 7 Ohio N. P. (N. S.) 132. A statute giving the board power to revoke license for "gross immorality" is not so indefinite as to be void for want of definiteness. Id. Physician maintaining two offices under two names. Id.

84. Munk v. Frink [Neb.] 116 NW 525.

85. The moment womb is instinct with embryo life and gestation has begun, the crime may be perpetrated. Munk v. Frink [Neb.] 116 NW 525. The complaint need not charge the destruction of a vitalized human foetus. Id.

86. Walker v. McMahon [Neb.] 116 NW 528.

87. Smith v. State Board of Medical Examiners [Iowa] 117 NW 1116; Mathews v. Hedlund [Neb.] 119 NW 17.

88. Board in its ministerial capacity decides the character of notice and the method of procedure without violation of article 3 of constitution. Smith v. State Board of Medical Examiners [Iowa] 117 NW 1116.

89. Munk v. Fink [Neb.] 116 NW 525.

90. Smith v. State Board of Medical Examiners [Iowa] 117 NW 1116. Not repugnant to Nebraska Const. art. 3, § 10, or 14th

preferred by the board is not a requirement for revocation of a license,[91] nor is a trial and acquittal by such court a bar to proceedings for revoking the license.[92] Technical procedure[93] and rules of evidence obtaining in courts need not be followed in proceedings before the board[94] nor is a trial by jury required.[95] The proceedings of the board are subject to review by the courts,[96] but the judgment of the board should be affirmed in the court, if not beyond its jurisdiction,[97] and unless clearly unsupported by evidence.[98] Alleged interest in the prosecution or misconduct of the secretaries of the board is no ground for reversal, the complainant having power to establish his right by application to the board.[99] Judgments reviewing the proceedings of medical boards are subject to the general rules.[1]

*Expulsion from society.*See 8 C. L. 975

*Prosecution for violation of regulative acts.*See 10 C. L. 880—Statutes imposing a penalty must so clearly define the acts to be done that no ordinary person can fail to understand his duty,[2] and to make a failure to comply with the exact terms of the statute criminal when an attempt to comply has been made, evil intent or legal malice must be shown.[3] Failure to procure license is the gist of the offense and this should be charged in indictment.[4] A complaint describing the acts of the accused without stating the gist of the offense is insufficient.[5] An exception or proviso in a statute which neither prescribes nor defines the offense need not be negatived in a complaint for a violation of the act.[6] Failure to state in the information any one of the essential elements necessary to constitute an offense renders it defective.[7] The indictment or information is usually sufficient if couched in the language of the statutes,[8] and where there are several distinct provisions in the statute constituting the offense, only one need be alleged.[9] Where one of the elements of the offense is the acceptance of compensation, evidence may be admitted of direct or indirect payment.[10] The proof of the offense may be established by facts and circumstances which imply his guilt beyond a reasonable doubt.[11] The court may instruct the jury that persons who stand by, aid or assist, advise or encourage, the perpetration of a crime are equally guilty with the perpetrator of the act, as an aid in determining the credibility of the witnesses.[12]

amendment to United States Constitution. Mathews v. Hedlund [Neb.] 119 NW 17.

**91.** Mathews v. Hedlund [Neb.] 119 NW 17.

**92.** Had been acquitted in court. Munk v. Frink [Neb.] 116 NW 525.

**93.** Munk v. Frink [Neb.] 116 NW 525.

**94.** Admission of affidavit of patient as evidence not error. Mathews v. Hedlund [Neb.] 119 NW 17.

**95.** Not inconsistent with constitutional right of trial by jury. Munk v. Frink [Neb.] 116 NW 525.

**96.** Where revocation of license for cause first found and ascertained by board for that purpose, right of review preserved. Munk v. Frink [Neb.] 116 NW 525. Nebraska Code provides for review by courts. Nebraska Code of Civil Procedure, § 580. Mathews v. Hedlund [Neb.] 119 NW 17.

**97.** Mathews v. Hedlund [Neb.] 119 NW 17.

**98.** Munk v. Frink [Neb.] 116 NW 525.

**99.** Refusal by secretary to issue subpoena. Mathews v. Hedlund [Neb.] 119 NW 17.

**1.** Arguments in action revoking physician's license made on election day not fatal. Stewart v. State Board of Medical Examiners, 48 Wash. 655, 94 P 472.

**2.** Failure to register before Oct 1st, 1907, under Wis. Laws, chap. 469, p. 654, was no offense where there was nothing to show where might register before that date. Brown v. State [Wis.] 119 NW 338.

**3.** Reporting birth on old blank and to old register. Brown v. State [Wis.] 119 NW 338.

**4.** State v. Carlisle [S. D.] 118 NW 1033.

**5.** "Unlawfully treating the sick by practicing the system or mode known as 'Chiropractic' without having a certificate" held insufficient under Cal. St. 1907, p. 252, c. 212. Ex parte Greenall, 153 Cal. 767, 96 P 804.

**6.** Excepting from dentistry statute those entitled to practice at its enactment. Cal. St. 1903, p. 326, c. 244. Ex parte Horner [Cal.] 97 P 891.

**7.** Under statute requiring certificate to be filed in the county of residence, information failed to show county of residence and that it had not been filed in the county of residence. Person v. State, 53 Tex. Cr. App. 334, 109 SW 935.

**8.** Under Arkansas statute against employing solicitors, coffers, or drummers, it was held not necessary to state name of party alleged to have been hired. Burrow v. Hot Springs, 85 Ark. 396, 108 SW 823.

**9.** Territory v. Lotsfeich [N. M.] 94 P 1025.

**10.** Payment made by third party for services rendered to patient. Territory v. Lotsfeich [N. M.] 94 P 1025.

**11.** Absolute proof of hiring drummer, etc., held not to be required. Burrow v. Hot Springs, 85 Ark. 396, 108 SW 823.

**12.** Evidence tended to show several of the

§ 2. *Malpractice.*[13]—See 10 C. L. 831—A physician in accepting a patient does not contract to cure[13a] but by implication represents that he possesses and will exercise reasonable skill and diligence.[14] Treatment is not malpractice merely because it resulted injuriously to the patient;[15] it must be shown to be improper.[16] The test of proper treatment is that of ordinary skill, such as physicians and surgeons in the same general neighborhood, in the same general line of practice, ordinarily have and exercise in like cases.[17] Medical treatment includes reasonable care after operation,[18] and proper manner of discharge from hospital.[19] It is negligence on the part of the principal to fail to select skilled and competent agents and assistants,[20] and he is responsible for their negligence.[21] Physician cannot substitute any other person to take his place in treating patient without his consent.[22] In action for malpractice, the burden of proof is upon the plaintiff to show the want of ordinary skill and diligence, and that the injury alleged resulted from a failure to exercise these requisites.[23] Whenever there can be reasonable doubt as to whether or not there was malpractice, it is a question for the jury.[24] The principal is liable for the negligence of his authorized agents,[25] and the partnership for the malpractice of any one of the partners.[26] The negligence of a third party contributing to the injury is no defense to the negligence of the defendant.[27]

*Negligence by nurses.*See 8 C. L. 977—The physician is liable for the negligence of a nurse whom he employs.[28]

*Damages.*See 10 C. L. 831—Except under statute [29] no recovery can be had for the death of a person, wrongfully caused by another, whether in contract or in tort,[30] but the law gives damages for the breach of the contract.[31] The fact that the pa-

witnesses guilty of aiding the accused physician in getting patients. Burrow v. Hot Springs, 85 Ark. 396, 108 SW 823.

**13. Search Note:** See notes in 14 L. R. A. 429; 37 Id. 830; 45 Id. 541; 51 Id. 298; 1 L. R. A. (N. S.) 439; 7 Id. 609, 612; 12 Id. 752; 15 Id. 161, 416; 98 A. S. R. 657; 1 Ann. Cas. 21, 306; 2 Id. 605; 5 Id. 306; 8 Id. 196, 199.

See, also, Physicians and Surgeons, Cent. Dig. §§ 21-49, Dec. Dig. §§ 14-19; 22 A. & E. Enc. L. (2ed.) 798; 16 A. & E. Enc. P. & P. 527.

**13a.** That diagnosis proved erroneous, no defense to suit for compensation. Tyson v. Baizley, 35 Pa. Super. Ct. 320.

**14.** Robertson v. Wenger, 131 Mo. App. 224, 110 SW 663.

**15.** Wilkins v. Brock [Vt.] 70 A 572.

**16.** Injurious treatment not shown to be the result of a lack of care and skill is insufficient evidence of malpractice. Wilkins v. Brock [Vt.] 70 A 572.

**17.** Willard v. Norcross [Vt.] 69 A 942; Robertson v. Wenger, 131 Mo. App. 224, 110 SW 663; Goodman v. Bigler, 133 Ill. App. 301. Failure to diagnose and reduce that which, on the part of another physician from the same neighborhood, was later diagnosed and successfully treated as a dislocation of the shoulder, held to be malpractice. Burton v. Neill [Iowa] 118 NW 302. Instruction requiring skill of physicians "in like circumstances and conditions" held to cover the rule that skill of physicians in the "locality" is the criterion. Ghere v. Zey, 128 Mo. App. 362, 107 SW 418.

**18.** Physician is liable for injury in removing from operating room. Haase v. Morton [Iowa] 115 NW 921.

**19.** Insane patient allowed to leave hospital alone, when head physician knew of his condition. Defendant held liable for his death. Phillips v. St. Louis & S. F. R. Co., 211 Mo. 419, 111 SW 109.

**20.** Action against railroad company for malpractice in railroad hospital. Illinois Cent. R. Co. v. Buchanan, 31 Ky. L. R. 722, 103 SW 272.

**21.** Negligence in railroad hospital which is held to be a part of railroad system even if separate corporation. Phillips v. St. Louis & S. F. R. Co., 211 Mo. 419, 111 SW 109.

**22.** Physician left to take a trip. Ghere v. Zey, 128 Mo. App. 362, 107 SW 418.

**23.** Deformity of double fractured leg held not malpractice. Goodman v. Bigler, 133 Ill. App. 301.

**24.** Reynolds v. McManus [Iowa] 117 NW 667. Motion for nonsuit properly denied, there being conflicting evidence. Sauers v. Smits, 49 Wash. 557, 95 P 1097.

**25.** Defendant liable for negligence by Railroad Hospital Association, which it controls, even if separate corporation. Phillips v. St. Louis & S. F. R. Co., 211 Mo. 419, 111 SW 109.

**26.** One partner allowed patient to fall into elevator shaft. Haase v. Morton [Iowa] 115 NW 921.

**27.** Negligence of nurse assisting defendant in removing patient from operating room, no defense where patient fell into elevator shaft. Haase v. Morton [Iowa] 115 NW 921.

**28.** Nurse, assisting physician in removing patient from operating room, allows him to fall into elevator shaft. Haase v. Morton [Iowa] 115 NW 921.

**29.** Rev. Laws, c. 171, § 2, amended by St. 1907, p. 324, c. 375. Massachusetts. Sherlag v. Kelley, 200 Mass. 232, 86 NE 293.

**30.** Sherlag v. Kelley, 200 Mass. 232, 86 NE 293.

**31.** Recovery for additional expenses for

tient failed to take further treatment thereby augmenting an injury caused by the negligence of the physician does not relieve the physician from responsibility for the negligence,[32] nor does subsequent negligence by the patient aggravating the injury relieve against liability, but may be shown in mitigation of damages.[33]

*Malpractice by nonmedical practitioners.*[See 8 C. L. 978]—In an action against an osteopath for malpractice, the correctness of treatment given must be tested by the principles and practices of the osteopathic school.[34]

*Remedies and procedure.*[See 10 C. L. 831]—Nonsuit should not be granted unless a sufficient cause of injury aside from negligence charged is conceded or conclusively proved.[35] To establish malpractice, absolute proof of negligence is not necessary,[36] but the condition of the patient may be shown to be the natural and probable, though not the necessary, result of the treatment.[37] Physicians and surgeons of practice and experience are experts.[38] Evidence of conversations of the parties and of their general conduct toward each other is admissible to establish the relation of physician and patient, and the negligence of the former.[39] In damages suits it is competent to admit evidence bearing upon character and extent of injury.[40] Statements of past pain and suffering when such information is necessary to a correct diagnosis may be testified to as forming part of the basis of the physician's opinion;[41] but is not evidence of fact of such pain.[42] The court should receive statement of hospital surgeon as admissions against defendant railroad.[43] Controverting opinion of others by expert for plaintiff on exhibit of the defendant is not bringing in new issues but is purely rebuttal.[44] Immaterial and irrelevant testimony from which prejudicial inferences may be drawn are inadmissible.[45] The weight to be given the testimony of experts,[46] and what inferences are to be drawn from the failure to obtain available proof, are for the jury.[47] It is error to assume in instructions that there would have been no permanent injury had the treatment been proper.[48]

§ 3. *Recovery of compensation.*[49]—[See 10 C. L. 832]A physician is entitled to compensation for actual and purely medical services only and not for any incidents

nursing, care and treatment of deceased patient. Sherlag v. Kelley, 200 Mass. 232, 86 NE 293.

**23.** X-ray burns on foot. Sauers v. Smits, 49 Wash. 557, 95 P 1097.

**33.** Failure to follow physician's directions. Sauers v. Smits, 49 Wash. 557, 95 P 1097.

**34.** Wilkins v. Brock [Vt.] 70 A 572.

**35.** Possibility of death from other cause than chloroform shown. Boucher v. Larochelle, 74 N. H. 433, 68 A 870.

**36.** Death of child under influence of chloroform. Boucher v. Larochelle, 74 N. H. 433, 68 A 870.

**37.** Allowing patient to fall into elevator shaft. Haase v. Morton [Iowa] 115 NW 921.

**38.** Opinions of physicians and surgeons are admissible in evidence upon questions that are strictly and legitimately embraced in their profession and practice. Whether the defendant's treatment was good surgery or proper treatment, whatever the nature of the injury, was a question upon which the witness was competent to testify. Willard v. Norcross [Vt.] 69 A 942.

**39.** Frivolous answers to inquiries of patient as well as arrangements made for her treatment received in evidence. Willard v. Norcross [Vt.] 69 A 942.

**40.** Evidence of condition of hand first night after injury admissible to show character and extent of injury, even where her condition could not be laid to defendant. Testimony of what occurred after the accident and before defendant saw her and that she complained of pain in her wrists could not properly have been excluded. Willard v. Norcross [Vt.] 69 A 942.

**41.** Recital of past pain made to physician is not hearsay in such cases. Wilkins v. Brock [Vt.] 70 A 572.

**42.** Wilkins v. Brock [Vt.] 70 A 572.

**43.** Hospital surgeon knew condition of insane patient who was accidentally killed. Phillips v. St. Louis & S. F. R. Co., 211 Mo. 419, 111 SW 109.

**44.** What X-ray photograph showed. Willard v. Norcross [Vt.] 69 A 942.

**45.** Evidence of physician's failure to render bill on request held prejudicial. McIlwain v. Gaebe, 137 Ill. App. 25.

**46.** Burton v. Neill [Iowa] 118 NW 302.

**47.** Neither party called for autopsy on death of child under influence of chloroform. Boucher v. Larochelle, 74 N. H. 432, 68 A 870.

**48.** Instruction that in estimating damages jury may consider any permanent injury plaintiff has sustained held erroneous. McIlwain v. Gaebe, 137 Ill. App. 25.

**49. Search Note:** See notes in 8 L. R. A. (N. S.) 1238; 9 Id. 1234; 12 Id. 613, 1090; 16 Id. 1081; 11 Ann. Cas. 655.

which might follow such services.[49a] Compensation for both value of the services and the loss to his business cannot be recovered unless the contract will allow of no other construction.[50] Claim for such compensation must be based on direct or express promise to pay,[51] or on circumstances under which the law would imply such promise to pay what the services are reasonably worth.[52] The right to recover for medical services rendered to a third person must rest on express contract, or on facts from which an intention to pay may be inferred.[53] The employer is not required to provide medical attendance for his employes unless he has agreed so to do,[54] although in some cases he is held liable for the emergency call.[55] The liability of the defendant to patient for injuries in no way affects his liability to the physician.[56] A complaint alleging that medical services were rendered to patient at the special instance and request of the defendants is not demurrable as not based on express contract.[57] Where the question of a license or qualification of a physician arises collaterally in a civil action, the license of due qualifications under the statute will be presumed.[58] In actions on contract for medical services, the fees to be the usual ones, it is competent for either side to give evidence of value.[59] In case of continuous attendance, plaintiff's former income may be given in evidence to be considered in estimating compensation for the time when absent from his office, but the falling off, which may be due to other causes, cannot be admitted.[60] Experts in testifying as to the value of the services rendered should base their opinions on the assumption that the treatment was proper,[61] and such experts may be cross-examined as to bias against the defendant.[62] It is proper to show that part of time charged for may not have been spent in a professional capacity.[63] Evidence of proper treatment should go to the jury awarding compensation for such medical services.[64] The introduction of evidence that the defendant did not know where his daughter was being cared for, intending to show lack of affection and carelessness, is not re-

See, also, Physicians and Surgeons, Cent. Dig. §§ 16-20, 50-62; Dec. Dig. §§ 12, 13, 20-24; 22 A. & E. Enc. L. (2ed.) 789.

**49a.** Error to audit evidence that physician helped to bring about settlement in injury case; that physician might have been called as witness. Henderson v. Hall [Ark.] 112 SW 171.

**50.** Patient claimed to have agreed to pay for loss of business due to absence from office. Evidence insufficient. Burke v. Mulgrew, 111 NYS 899.

**51.** White v. Bystrom, 109 NYS 820. Relations of friendship will not relieve from pecuniary liability. Nims v. Cunningham [Cal. App.] 96 P 785. Unless services were unrequested and rendered purely in relation of friendship. Physician helping in preparation for funeral without request could not recover. White v. Bystrom, 109 NYS 820.

**52.** Patient consenting to calling of consulting physician and acquiescing in examination by him. Tyson v. Baizley, 35 Pa. Super. Ct. 320.

**53.** Physician called by hospital attendant, with whom defendant railroad had an arrangement to pay hospital bill, cannot collect from defendant. Voorhees v. New York, etc., R. Co., 114 NYS 242. Representations of patient cannot bind employer for the services. McEwen v. Hoffman [Ind. App.] 85 NE 364. A simple request to perform services for another to whom there exists no obligation of any kind to furnish the services does not create an implied obligation to pay for such services by the person making the request. Defendant, in presence of son-in-law and husband of patient, asked plaintiff to attend her daughter. Held not liable. MacGuire v. Hughes, 111 NYS 153.

**54.** Voorhees v. New York, etc., R. Co., 114 NYS 242; Norton v. Rourke, 130 Ga. 600, 61 SE 478.

**55.** Evidence sufficient for emergency call alone. Leonard v. Clark [Minn.] 119 NW 485.

**56.** Fact of settlement with injured brakeman does not show liability to physician. Voorhees v. New York, etc., R. Co., 114 NYS 242.

**57.** McEwen v. Hoffman [Ind. App.] 85 NE 364.

**58.** Failure to hold license interposed as defense to notes given for services. Brunswick v. Hurley, 131 Ill. App. 235.

**59.** Henderson v. Hall [Ark.] 112 SW 171.

**60.** Continuous attendance upon a patient under contract for liberal and sufficient compensation. Burke v. Mulgrew, 111 NYS 899.

**61.** Burke v. Mulgrew, 111 NYS 899.

**62.** Expert, testifying that plaintiff's bill was reasonable, had failed to recover from defendant. MacGuire v. Hughes, 111 NYS 153.

**63.** Relation of families tended to show visits of social nature. Burke v. Mulgrew, 111 NYS 899.

**64.** Admission of decedent tended to show satisfactory treatment. Burke v. Mulgrew, 111 NYS 899.

versible error, where he has made sufficient provision for proper care.[65] To allow witness to state what impression he wishes to leave is not error.[66]

§ 4. *Negligent homicide by physician.*[67]—See 4 C. L. 639

§ 5. *Regulation of the keeping and sale of drugs and medicines.*[68]—See 10 C. L. 833

The legislature has power to regulate the sale of drugs and require a license therefor.[68a] Regulatory statutes must conform to the rule of singleness of title.[69] A nonregistered pharmacist unlawfully selling drugs cannot object to the constitutionality of a law, giving all power of prosecution to the board of pharmacy, for his rights are not affected thereby.[70] Where the law explicitly specifies who are entitled to a license, mandamus will lie to compel the board to issue license to one within such requirements.[71] Commission of a statutory misdemeanor does not warrant revocation of license.[72] Strict observance of regulatory act is imperative and, where a penalty is exacted for a violation, the statute must be strictly construed.[73] Proprietors of drug stores are liable for the authorized unlawful sales by their clerks.[74] The indictment or information must usually state the exact offense and show that the act does not come within one of the exceptions to the statute.[75] Particulars which do not constitute the gist of the offense need not be alleged in such information,[76] and exceptions must be negatived only where it is so closely interwoven with the section defining the criminal act as to be a material part thereof.[77] Complaints of sales of drugs not of standard strength and purity according to the United States pharmacopoeia must also allege that it was not compounded according to the formula therein given.[78] Actual sale of drugs is not essential to the offense of operating a pharmacy without a license.[79] Evidence of previous sales is admissible to show clerk's authority,[80] and to increase the penalty,[81] but inadmissible where not shown to be unlawful, or to show intent.[82] Where the contents of

**65.** Entire care of patient was entrusted to the plaintiff physician. Nims v. Cunningham [Cal. App.] 96 P 785.

**66.** Witness testified that at inquest room was in better condition than at previous visit, but did not want to leave impression it was for effect. Nims v. Cunningham [Cal. App.] 96 P 785.

**67. Search Note:** See notes in 4 C. L. 640; 61 L. R. A. 287.

See, also, Homicide, Cent. Dig.; Dec. Dig.; 21 Cyc. 646-1100; Physicians and Surgeons, Cent. Dig. §§ 18-48; Dec. Dig. §§ 14-18.

**68: Search Note:** See notes in 4 Ann. Cas. 519; 10 Id. 399.

See, also, Druggists, Cent. Dig. §§ 1-6; Dec. Dig. §§ 1-6; 14 Cyc. 1079-1084; 10 A. & E. Enc. L. (2ed.) 267; 7 A. & E. Enc. P. & P. 226.

**68a.** State v. Hamlett, 212 Mo. 80, 110 SW 1082; Bertram v. Com., 108 Va. 902, 62 SE 969.

**69.** Mo. Rev. St. 1899, § 3045, punishing false registration of pharmacists and sale of drugs by nonpharmacist, held not to violate that rule. State v. Hamlett, 212 Mo. 80, 110 SW 1082.

**70.** Betram v. Com., 108 Va. 902, 62 SE 969.

**71.** Board refused license to graduate of a college generally held to be reputable, on grounds of not giving a long enough term of study, where law granted license to its graduates. State v. Matthews [S. C.] 62 SE 695.

**72.** Selling liquor contrary to law. Fort v. Brinkley [Ark.] 112 SW 1084.

**73.** State Board v. Bronson, 113 NYS 490. Failure to put down street number of a purchaser of liquor. Long v. Joder [Iowa] 116 NW 1063.

**74.** People v. Zito, 237 Ill. 434, 86 NE 1041, afg. 140 Ill. App. 611.

**75.** Complaint alleging "sale of borax not of standard strength, quality and purity" insufficient. State Board v. Davey, 56 Misc. 568, 107 NYS 46. Failure to negative exceptions. State v. Hamlett, 129 Mo. App. 70, 107 SW 1012. "Keeping and storing" without alleging sale not within exceptions insufficient. Town of Selina v. Brewer [Cal. App.] 98 P 61.

**76.** Name of purchaser of drug and fact that sale was made by clerk not mentioned, yet sufficient. People v. Zito, 237 Ill. 434, 86 NE 1041, afg. People v. Zito, 140 Ill. App. 611.

**77.** Sections 3036-3445, Mo. Rev. St. 1899. State v. Hamlett, 129 Mo. App. 70, 107 SW 1012.

**78.** Camphor of less than 20% strength sold. State Board v. Bonson, 113 NYS 490.

**79.** Evidence that one not employing licensed pharmacist displayed sign "Drug Store" and kept a stock of medicines, etc., held sufficient. State v. Hamlett, 212 Mo. 80, 110 SW 1082. Proof of "house to house canvass," "taking orders to deliver and receive payment," and "advertising to meet people and discuss Vanderhoof remedies" sufficient. State v. Stewart [Iowa] 116 NW 693.

**80.** People v. Zito, 237 Ill. 434. 86 NE 1041.

**81.** Statute increasing penalty for second offense. People v. Zito, 237 Ill. 434, 86 NE 1041.

**82.** Time or unlawfulness of sale not shown. People v. Sanlogata, 114 NYS 321.

any compound alleged to be illegally sold is in question and sought to be proved by chemical analysis, the chemist is an expert witness and should be rigidly cross-examined.[83] When the statute makes no exception in favor of proprietary medicines, it is not permissible to show that the drug sold was such medicine in the original package.[84]

§ 6. *Tort liability of druggists.*[85]—See 10 C. L. 834—Where a druggist sells a drug to be used for a particular purpose, he impliedly represents it to be suitable for that purpose,[85a] and becomes liable for any injury sustained through its use for that purpose.[86] His failure to label the drug is no defense to action for damages, where it was declared to be suitable for the purpose used.[87]

### MERCANTILE AGENCIES.[88]

**Merger in Judgment; Merger of Contract; Merger of Estates,** see latest topical index.

### MILITARY AND NAVAL LAW.

**§ 1. Military and Naval Organization, Maintenance and Enlistment, 847.**
A. Regular Army and Navy and Marine Corps, 847.
B. Militia, 848.
**§ 2. Orders, Regulations, and Discipline; Promotion and Discharge, 848.**
**§ 3. Military and Naval Tribunals, 848.**
**§ 4. Civil Status, Rights and Liabilities of the Military and Navy and of Military and Naval Reservations, 849.**
**§ 5. Soldiers' Homes and Indigent Soldiers, 850.**
**§ 6. Martial Law, 851.**

*The scope of this topic* is noted below.[89]

§ 1. *Military and naval organization, maintenance, and enlistment. A. Regular army and navy and marine corps.*[90]—See 10 C. L. 834—The contract of a soldier of the United States made by his enlistment and oath to serve for a definite term "unless sooner discharged by proper authority" is one terminable by the government at will.[90a] As the enlistment in the army by a minor without his parent's consent is valid as to the minor,[91] although voidable under statute on the application of the parent,[92] any military offense committed by such minor after, or in connection with, his enlistment may be punished,[93] and a proceeding brought by his parents to procure his discharge will not bar his prosecution and punishment by military law.[94] The crime of fraudulent enlistment is exclusively a military or naval offense triable

**83.** Question of contents of proprietary medicines. People v. Zito, 141 Ill. App. 534.

**84.** Unlawful sale of cocaine contained in proprietary remedy. People v. Zito, 237 Ill. 434, 86 NE 1041.

**85. Search Note:** See notes in 6 C. L. 628; 21 L. R. A. 139; 13 L. R. A. (N. S.) 646; 55 A. S. R. 255; 8 Ann. Cas. 896.

See, also, Druggists, Cent. Dig. §§ 7-11; Dec. Dig. §§ 7-12; 14 Cyc. 1082-1087; 10 A. & E. Enc. L. (2ed) 268.

**85a.** Corrosive sublimate "to apply to body to kill lice" should have been so prepared as not to injure body. Goldberg v. Hegeman & Co., 111 NYS 679.

**86.** Goldberg v. Hegeman & Co., 111 NYS 679.

**87.** No label placed on corrosive sublimate. Goldberg v. Hegeman & Co., 111 NYS 679.

**88.** No cases have been found for this subject since the last article. See 2 C. L. 890.

**89.** Pensions (see Pensions, 10 C. L. 1161) and matters relating to a state of public war (see War, 8 C. L. 2257) are excluded.

**90. Search Note:** See notes in 15 L. R. A. 116; 23 Id. 510; 45 Id. 587; 12 L. R. A. (N. S.) 979.

See, also, Army and Navy, Cent. Dig. §§ 1-76; Dec. Dig. §§ 1-29; 3 Cyc. 812; 20 A. & E. Enc. L. (2ed.) 619.

**90a.** Reid v. U. S., 161 F 469.

**91.** Ex parte Lewkowitz, 163 F 646. Where over 18 years of age. Dillingham v. Booker [C. C. A.] 163 F 696.

**92.** U. S. Rev. St. § 1117. Ex parte Lewkowitz, 163 F 646.

**93.** Ex parte Lewkowitz, 163 F 646.

**94.** Minor subject to prosecution and punishment by military law, even though writ of habeas corpus was issued before charges of fraudulent enlistment and receipt of allowances thereunder were made. Ex parte Lewkowitz, 163 F 646. While fact of parents' consent will necessitate the minor's discharge from service, it will not absolve him from punishment for crimes committed when in the service. Dillingham v. Booker [C. C. A.] 163 F 696.

and punishable only by court martial,[95] and civil courts should not interfere by habeas corpus to discharge a minor under eighteen years of age who has been enlisted in either the military or naval service without the consent of his parents, if at the time of presentation of the petition for the writ such minor is under arrest and held under any charge cognizable by either a military or naval court.[96]

(§ 1) *B. Militia.*[97]—See 10 C. L. 836—To fasten liability upon a city for expenditures in the maintenance of an armory building, the provisions of the Military Code which imposes it must be strictly complied with.[97a] Where the legislature has delegated to the state military board, acting as an armory board, the power and duty to regulate and control the use of armory buildings, courts will not assume to exercise such duties unless the necessity therefor is clearly apparent,[98] for the courts will not assume that the uses to which they are put are inconsistent with the general purposes for which they were intended,[99] and although the purposes for which armories are primarily intended are military purposes, yet the term "military purposes" comprehends all such uses as may be said to be incidental to the general purpose to conserve the military needs of the regimental organization.[1] Such buildings cannot properly be devoted to a purely commercial use in disregard of military needs.[2] The use of an armory building for amusement purposes is lawful when it can reasonably be said that the amusements are essential to the esprit de corps of the regiment and not injurious to the property itself,[3] and where the uses come within the contemplated uses for which the building was erected,[4] equity will not interfere.[5]

§ 2. *Orders, regulations, and discipline; promotion and discharge.*[6]—See 10 C. L. 837—Authority to discharge a soldier upon discretionary terms [6a] is conferred and recognized by statute as existing in the president of the United States.[7] A discharge is not reviewable in the courts.[8]

§ 3. *Military and naval tribunals.*[9]—See 10 C. L. 837—A court martial has neither original nor general jurisdiction and whatever authority it possesses is derived solely

**95.** Dillingham v. Booker [C. C. A.] 163 F 696.

**96.** Desertion and fraudulent enlistment by minor. Dillingham v. Booker [C. C. A.] 163 F 696.

**97. Search Note:** See notes in 14 L. R. A. 476; 1 Ann. Cas. 128.

See, also, Militia, Cent. Dig.; Dec. Dig.; 27 Cyc. 490; 20 A. & E. Enc. L. (2ed.) 668.

**97a.** Evidence insufficient to show that repairs to armories were ordered in manner required by Military Code even where it is assumed that repairs were of an emergent character which could have been ordered without competition. Moriarity v. New York, 59 Misc. 204. 110 NYS 842.

**98.** Power delegated to board by militia act. P. L. 1906, p. 842, § 114. Hamill v. Dungan [N. J. Eq.] 68 A 1096.

**99.** Under affidavits, use for lawful purpose being assumed temporary, injunction to restrain use of armory for dancing and roller skating denied. Hamill v. Dungan [N. J. Eq.] 68 A 1096.

**1.** Hamill v. Dungan [N. J. Eq.] 68 A 1096.

**2.** Dancing and roller skating held not commercial use. McCarter v. Dungan [N. J. Eq.] 71 A 537. Bill held to state cause of action, same charging that officers were conducting private business in armory for commercial purposes, etc. Hamill v. Dungan [N. J. Eq.] 68 A 1096.

**3.** McCarter v. Dungan [N. J. Eq.] 71 A 537.

**4.** Where it can be reasonably said that uses are necessary to maintain the interests of members of guard and tend to aid in procurement of re-enlistment or procuring new enlistment, etc., uses proper; dancing and roller skating. McCarter v. Dungan [N. J. Eq.] 71 A 537. Fact that amusement was such that members of militia could not participate therein, except as spectators, held not to show improper use where single and primary purpose was to supply necessary amusements for members as distinguished from a commercial use and where use of building for drilling purposes was not interfered with. Id.

**5.** McCarter v. Dungan [N. J. Eq.] 71 A 537.

**6. Search Note:** See note in 4 C. L. 646.

See, also, Army and Navy, Cent. Dig. §§ 7-14, 76-79; Dec. Dig. §§ 6-12, 32-39; 3 Cyc. 812; 20 A. & E. Enc. L. (2 ed.) 619, 669.

**6a.** Since terms of a discharge are not prescribed by statute, terms of same are discretionary. Discharge "without honor." Reid v. U. S., 161 F 469.

**7.** Rev. St. § 1342 [U. S. Comp. St. 1901, p. 945]. Reid v. U. S., 161 F 469

**8.** Discharge "without honor." Reid v. U. S., 161 F 469.

**9. Search Note:** See Army and Navy, 2 Cent. Dig. §§ 99-97; Dec. Dig. §§ 42-49; 3 Cyc. 812; 20 A. & E. Enc. L. (2ed.) 645.

**9a.** Under Military Code, § 95, court martial without authority to prosecute for

from the lawmaking power as expressed in the military code.[9a] In the absence of statute, the proceedings of courts martial are controlled by the usages and customs of the military service and not by the common-law rules applicable to civil proceedings,[10] and by such practice and army regulations sentences to imprisonment imposed upon a "soldier" [11] are cumulative and to be executed consecutively, one upon the expiration of the other in the order of their imposition.[12]

§ 4. *Civil status, rights and liabilities of the military and navy, and of military and naval reservation.*[13]—See 10 C. L. 838.—A militiaman may without the intervention of a grand jury be held to answer for a felony by the tribunal having jurisdiction to try him for the grade of crime he has committed,[13a] but a citizen who becomes a citizen soldier is not thereby relieved from liability to the people for violation of their laws even though in his military capacity he assumes additional liability for the same violation.[14] While inferior officers and soldiers bound to obey orders are protected in so doing both against civil and criminal prosecutions, except where such orders show on their face their own illegality or want of authority,[15] superior officers are answerable for all acts within their fair scope of the orders given by him.[16] A commanding officer of a camp may not act arbitrarily and suppress a lawful and harmless business carried on by a citizen on his own land outside of the encampment where the same kind of business is authorized within the limits of the camp grounds.[17] The line referred to by act of congrses as the east line of the Presido military reservation "as established by the United States authorities" is the line of the old fence,[18] and, as the legal line of the reservation was some distance east of the line of the fence, the commandant of the reservation could fix the line of his occupation at any point within the limits of the reservation,[19] and, although his superior officers might countermand his orders and compel him to change his line, no private individual occupying lands within the legal lines of the reservation could dispute his authority in establishing the line where the fence was located.[20] Militia districts may be abolished, or their limits changed in the manner prescribed by statute,[21] and in reaching conclusions as to the necessity and expediency of a pro-

crimes against society; grand larceny. People v. Wendel, 59 Misc. 354, 112 NYS 301.

10. Kirkman v. McClaughry [C. C. A.] 160 F 436.

11. In Army Regulations, par. 981, "soldier" used in popular sense embraces officers as well as enlisted men. Kirman v. McLaughry [C. C. A.] 160 F 436.

12. Shorter term not served by having served the longer. Kirkman v. McClaughry [C. C. A.] 160 F 436. Army Regulations, pars. 977, 978, held not to relate to different sentences aganist same offender, nor intended to regulate dates from which confinement under a second sentence should be computed. Id. Theory of construction confirmed by par. 981, declaring in terms that second sentence will be executed upon expiration of the first. Id.

13. **Search Note:** See note in 10 C. L. 838.

See, also, Army and Navy, Cent. Dig. §§ 76½-78; Dec. Dig. §§ 32-34; 3 Cyc. 812; 20 A. & E. Enc. L. (2ed.) 661, 672.

13a. Const. § 6, art. 1, and Cr. Code Proc. § 4, subd. 3, held not to prohibit same. People v. Wendel, 59 Misc. 354, 112 NYS 301.

14. Conviction by court martial of a commissioned officer of conduct unbecoming an officer and gentleman, of conduct to prejudice of good order and military discipline, and of making false certificate of account and sentence of dismissal, held not a former conviction so as to bar an indictment for grand larceny founded on same transactions. People v. Wendel, 59 Misc. 358, 112 NYS 301.

15. O'Shee v. Stafford [La.] 47 S 764.

16. Laws 1904, Act No. 181, p. 371, § 21, held not to exempt officer from damage suits in civil courts. O'Shee v. Stafford [La.] 47 S 764.

17. Act 1904, p. 408, No. 181, § 101, held not to authorize suppression of sales except for sake of proper discipline or military necessity. O'Shee v. Stafford [La.] 47 S 764.

18. Line referred to by Act of Cong. May 9, 1876, c. 93, 19 Stat. 52, relinquishing to City of San Francisco as a street certain tract. Rudolph Herman Co. v. San Francisco [Cal.] 99 P 169. Dedication of part of reservation for street under act held valid making property inalienable by city. Id.

19. Immaterial that such line was not on legal line as to persons whose rights were not dependent upon accuracy of true boundary. Rudolph Herman Co. v. San Francisco [Cal.] 99 P 169.

20. Rudolph Herman Co. v. San Francisco [Cal.] 99 P 169.

21. Board or roads and revenue of Floyd county, under Pol. Code 1895, §§ 333-336, and amendment Act Dec. 14, 1899 (Act 1899, p. 23) authorized to abolish militia district and change limits of adjoining district so as to include territory of abolished district where-

posed change, a county board of commissioners may act on the report of a special commissioner appointed by them under statute,[22] and the approval of such report is a matter entirely in the discretion of the board unless there has been fraud or a willful abuse of discretion its action is final.[23] When territory is added to a district, it becomes part of the district and subject to all local laws in force in such district.[24]

§ 5. *Soldiers' homes and indigent soldiers.*[25]—See 10 C. L. 838—Under statute making all persons admitted to the Soldiers' Home subject to the same rules and articles of war in the same manner as soldiers in the army, the governor of the home has charge of the inmates in like manner as an officer of the army has charge of the men in his command.[25a] It is his duty to maintain such discipline as will secure and preserve good order and promote the well being of those under his control and in so doing he may make such special orders as are deemed proper to secure such ends,[26] and the making and enforcement of such orders by the governor is not actionable unless the orders are false in substance and promulgated and enforced with knowledege of their falsity and with malice.[27] In Nebraska the board of public lands has authority to establish such rules and regulations with reference to the conduct of the affairs of the home as are reasonable when considered in connection with the object and purposes of the institution and which are not inconsistent with the laws establishing the same.[28] By virtue of statute the Home of the Woman's Relief Corps' Home Association was made a state institution under the exclusive management and control of the state,[29] hence an appropriation for the support of the inmates thereof may lawfully be made.[30]

ever deemed necessary and expedient. Dew v. Smith, 130 Ga. 564, 61 SE 232.

22. Pol. Code, 1895, § 333. Dew v. Smith, 130 Ga. 564, 61 SE 232.

23. Acts 1880-81, p. 508. Dew v. Smith, 130 Ga. 564, 61 SE 232. Order making changes in district lines held not void on ground of willful abuse of discretion because applicants for order recited in application that they desired change in order to secure benefits of stock law in force in adjoining district, proceedings being otherwise in conformity with statute and order reciting necessity for, and expediency of, changes. Id. Only remedy to persons affected by and dissatisfied is to appear before successors of present commissioners who can restore lines if they deem same necessary and expedient. Dew v. Smith, 130 Ga. 564, 61 SE 232.

24. Where lines were changed, territory added because subject to system of fences or stock laws which prevailed in district. Dew v. Smith, 130 Ga. 564, 61 SE 232. Not necessary to erect fences along lines of added territory in order to extend stock law prevailing in district. Id.

25. **Search Note:** See Army and Navy, Cent. Dig. §§ 98-102; Dec. Dig. §§ 50-53; 3 A. & E. Enc. L. (2ed.) 167.

25a. Rev. St. U. S. §§ 4824, 4835 (U. S. Comp. St. 1901, pp. 3333, 3350. Rowan v. Butler [Ind.] 85 NE 714.

26. Governor of home authorized to promulgate order to forbid inmates to frequent a public house where they are permitted to obtain liquor, afforded degrading amusements or exposed to improper temptations. Rowan v. Butler [Ind.] 85 NE 714.

27. Where members were prohibited from entering complainant's restaurant which in order was described as a "saloon." Rowan v. Butler [Ind.] 85 NE 714.

28. Howell v. Sheldon [Neb.] 117 NW 109. Under statutes considered enactment of rule which requires all present and future members of Soldiers' and Sailors' Home who receive pensions in excess of $12 per month to pay a percentage of pension money for benefit of home, held within discretionary power of board in management of home and not such abuse of official discretion as warrants judicial interference. Id. Rule made under statute that "board shall prescribe rules of admission to home in accordance with provisions and objects of act." Id. Contention that rule of uniformity of taxation was violated not well made, plaintiff not alleging he was a taxpayer. Id. Legislature held not to have intended that no money should be taken from an inmate unless voluntarily given. Id.

29. St. 1897, p. 447, c. 274, held to make home a state institution within Const. Cal. art. 4, § 22. Board of Directors of Woman's Relief Corps v. Nye [Cal. App.] 97 P 208.

30. Appropriation for support of veteran soldiers and their dependent relatives of home held not unconstitutional as special legislation. Const. art. 4, § 25, subd. 33. Board of Directors of Woman's Relief Corps [Cal. App.] 97 P 208. Act making appropriation providing that no inmate for whose support there is paid, independent of state aid, $12.50 per month or more, shall be entitled to aid under act and that where less than that amount is paid state aid may be had to raise amount to that sum, held not a gift in violation of Const. art. 4, § 31, state being bound to support citizens unable to support themselves. Id.

§ 6. *Martial law.*[31] —See 10 C. L. 838.—So long as arrests are made in good faith and in an honest belief that they are needed to avert an insurrection, the governor is final judge[31a] and cannot be subjected to an action after the expiration of his term on the ground that he had not reasonable ground for his belief.[32] Such arrest and imprisonment by the governor in the exercise of his power to call upon the military arm of the government to suppress an insurrection does not deprive the prisoner of his liberty without due process of law,[33] nor is an action against the governor and officers for such an imprisonment within the original jurisdiction of the federal circuit court as a suit authorized by law to be brought to redress the deprivation of any rights secured by the constitution of the United States.[34]

**Militia,** see latest topical index.

## MILLS.[35]

*The scope of this topic* is noted below.[36]

In some states the right of eminent domain for the purpose of improving and enlarging "public mills" [37] is conferred by statute.[38]

## MINES AND MINERALS.


**§ 1. General Common-Law Principles, 852.**
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**31. Search Note:** See note in 65 L. R. A. 193; 98 A. S. R. 772.

See, also, War, Cent. Dig. §§ 211-214; Dec. Dig.; 20 A. & E. Enc. L. (2ed.) 1.

**31a.** Moyer v. Peabody, 29 S. Ct. 235.

**NOTE. Power of military authorities to arrest and detain insurgents without reference to civil authorities:** While it seems to be laid down in Ela v. Smith, 5 Gray [Mass.] 121, 66 Am. Dec. 356, and State v. Coit, 8 Ohio S. & C. P. Dec. 62, that the military power, being called in simply and purely to aid the civil authorities, is not clothed with authority to direct what shall be done to the end for which its aid was solicited. There seems to be a tendency to adopt the view that until order is restored the military supersedes the civil authorities. In re Moyer, 35 Colo. 159, 85 P 190, 117 Am. St. Rep. 189, 12 L. R. A. (N. S.) 979; Re Boyle, 6 Idaho, 609, 57 P 706, 96 Am. St. Rep. 286, 45 L. R. A. 832; Moyer v. Peabody, 148 F 870. Thus it is held in the early cases of Ex parte Moore, 64 N. C. 802, and Ex parte Kerr, 64 N. C. 816, that while the governor's proclamation of martial law does not suspend the writ of habeas corpus, where the governor chooses to disregard the writ, the power of the court is exhausted. And in Druecker v. Solomon, 21 Wis. 621, 94 Am. Dec. 571, and Luther v. Borden, 7 How. (U. S.) 1, 12 Law. Ed. 581, arrests and detentions unauthorized by civil law are held proper exercise of the military power of the governor to suppress insurrection, and in Commonwealth v. Shortall, 206 Pa. 165, 55 A 952, 98 Am. St. Rep. 759, 65 L. R. A. 193, it is held that the acts of a soldier in quelling an insurrection under the authority of a governor are to be judged by the standards of actual war.—Adapted from 12 L. R. A. (N. S.) 979.

**32.** Arrest for two and one-half months. Moyer v. Peabody, 29 S. Ct. 235.

**33.** Imprisonment for two and one-half months. Moyer v. Peabody, 29 S. Ct. 235.

**34.** No cause of action under U. S. Rev. St. § 629, U. S. Comp. St. 1901, p. 506. Moyer v. Peabody, 29 S. Ct. 235.

**35.** See 6 C. L. 643.

**Search Note:** See Manufactures, Cent. Dig.; Dec. Dig.; 26 Cyc. 518-534; 14 A. & E. Enc. P. & P. 1.

**36.** It excludes mill dams and water powers (see Waters and Water Supply, 10 C. L. 1996.)

**37.** Provisions of Gen. St. 1901, c. 65, held not applicable to mills used merely for purpose of manufacturing flour and feed for sale, so as to make such mills "public mills:" applicable only to old-fashioned grist mill operated for accommodation of the public. Howard Mills Co. v. Schwartz Lumber & Coal Co., 77 Kan. 699, 95 P 659.

**38.** Gen. St. 1901, § 1366, held not to confer right upon mill merely engaged in manufacture of flour and feed for sale by use of

*The scope of this topic* is noted below.[39]

§ 1. *General common-law principles. A. Public ownership.*[40]—See 8 C. L. 989

(§ 1) *B. Private ownership; rights of freehold tenants of less than fee.*[41]—See 10 C. L. 839—A mining right may properly be deemed a right to excavate in the earth for the purpose of obtaining minerals or other useful products.[41a] Such a right is property.[42] The term "minerals" is not confined to metallic substances.[42a] There is no property in natural gas until it is taken.[43] The right of surface owners to take natural gas is subject only to the limitation that it must be for a lawful purpose and a reasonable manner.[44] The business of mining for the benefit of the miner is a private enterprise and the power of eminent domain cannot be invoked to aid it,[45] but owners of gas wells may be given the power of eminent domain for the purpose of piping their product to market.[46] In order that a mineral right may be lost[47] or acquired by adverse possession or laches, the elements of such method of acquisition must exist.[48]

§ 2. *Acquisition of mining rights in public lands. A. What lands may be located.*[49]—See 10 C. L. 839—Under the federal statutes reserving from sale land valuable for minerals.[49a] mineral deposits must exist to such an extent as to justify exploitation.[50] Only unappropriated lands are subject to location,[51] but lands once located

steam power, such use not being a public use. Howard Mills Co. v. Schwartz Lumber & Coal Co., 77 Kan. 599, 95 P 559.

**39. It includes** the principles of law applicable to the acquisition and ownership of mines and minerals, including natural gas and estates therein. It also includes the principles applicable peculiarly to the operation of mines. It includes remedies and procedure only so far as they apply peculiarly to mines and minerals. **It excludes** the general principles of liability for negligence (see Negligence, 10 C. L. 922) and the principles arising out of the relation of master and servant (see Master and Servant, 12 C L. 691). It also excludes taxation of mines and minerals (see Taxes, 10 C. L. 1776).

**40. Search Notes:** See Mines and Minerals Cent. Dig. §§ 1-8; Dec. Dig. §§ 1-8; 20 A. & E. Enc. L. (2ed.) 687, 766.

**41. Search Note:** See note in 91 A. S. R. 851.

See, also, Mines and Minerals, Cent. Dig. §§ 133-146; Dec. Dig. §§ 47-52.

**41a.** People v. Bell, 237 Ill. 332, 86 NE 593. A mine is an excavation in the earth for the purpose of obtaining minerals; an excavation properly underground for the purpose of taking out some useful product. Id.

**42.** Right to drill for oil and gas in consideration of a fixed royalty should be taxed. People v. Bell, 237 Ill. 332, 86 NE 593. Right of lessee to mine for oil and gas is a mining right and separately taxable under Hurd's Rev. St. 1905, p. 1399, c. 94, §§ 6, 7. Id.

**42a.** Includes oil and gas. Poe v. Ulrey, 238 Ill. 56, 84 NE 46.

**43.** Until then it is fugitive and belongs in common to surface owners. Louisville Gas Co. v. Kentucky Heating Co., 33 Ky. L. R. 912, 111 SW 374.

**44.** Louisville Gas Co. v. Kentucky Heating Co., 33 Ky. L. R. 912, 111 SW 374.

**45.** Sutter County v. Nichols, 152 Cal. 688, 93 P 872.

**46.** Ky. St. 1903, § 3766a, is constitutional. Calor Oil & Gas Co. v. Franyell, 33 Ky. L. R. 98, 109 SW 328.

**47.** Where an owner of mineral rights took no steps to quiet title thereto for 21 years after another acquired title by commissioner's deed to the entire property, but he had no notice until within one year that such owner claimed title to the minerals, and delay had not changed the status of the parties, held not barred by laches. Steinman v. Jessee, 108 Va. 567, 62 SE 275. Where one purchased entire title to land by commissioner's deed with knowledge that another had a right to the minerals, held he could not set up laches against the owner of the mineral rights. Id.

**48.** Evidence insufficient to show that one acquired title to coal under land with notice of another's rights thereto. Crane's Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co., 108 Va. 862, 62 SE 954.

**49. Search Note:** See notes in 50 L. R. A. 209, 289; 53 Id. 491, 793; 9 L. R. A. (N. S.) 1136.

See, also, Mines and Minerals, Cent. Dig. §§ 9-13; Dec. Dig. § 9; 20 A. & E. Enc. L. (2ed.) 688.

**49a. Gypsum is a mineral** and lands containing it are within the federal statute. Madison v. Octave Oil Co. [Cal.] 99 P 176.

**50.** Under Rev. St. U. S. §§ 2318, 2319, reserving from sale lands valuable for minerals and opening for exploration valuable mineral deposits, there must be minerals in such quantity as to justify expenditure in effort to extract them; the vien must have a prospective or present commercial value. Madison v. Octave Oil Co. v. [Cal.] 99 P 176. Evidence sufficient to show that lands were mineral lands. Id.

**51.** Possession and improvement alone give no value to a claim, but raise a presumption that possession is rightful, and prevent the land being subject to original location. Ware v. White, 81 Ark. 220, 108 SW 831.

may become subject to relocation if the prior location is abandoned.[52] If a lode or vein within the limits of a placer claim is excepted from the placer patent, such lode or vein and twenty-five feet on either side thereof is open to location and exploitation.[53]

(§ 2) *B. Who may locate.*[54]—See 10 C. L. 88—The prohibition against more than one entry of coal lands by any person invalidates an entry by a qualified person in his own name but in fact as agent of one who has made a previous entry.[54a] An association location made under an agreement whereby a person other than the locators should have an interest therein is fraudulent as to the United States.[55]

§ 3. *Mode of locating and acquiring patent. A. Making and perfecting location.*[56]—See 10 C. L. 839—A discovery of minerals within the limits of a claim is essential to a valid location whether it be lode or placer claim,[56a] but such discovery need not, in the absence of intervening rights, precede other acts of location.[57] When more than twenty acres is located as an association claim, one discovery is sufficient for the entire claim,[58] and this rule applies where a portion of the claim is sold under an agreement that a discovery by the grantee shall inure to the benefit of the associates,[59] but not in the absence of such agreement.[60] A discovery is sufficient though the shaft bisects the boundary line of the claim.[61] A valid location

52. Complaint in an action to quiet title alleging that defendant never discovered any mineral on the land, and never made a valid location thereof, and that land covered by a pretended claim was vacant and unappropriated mineral land subject to location, held to show that land was unoccupied mineral land. Phillips v. Smith [Ariz.] 95 P 91. Complaint to quiet title alleging that plaintiff entered on ground within limits of claim of defendant "in a peaceable manner and explored and found gold" is sufficient as against objection that it shows forcible and clandestine entry on its face since, if defendant was not in actual possession, plaintiff had a right to explore. Id. Actual abandonment before the expiration of the time for performing annual labor throws the land open to location, Farrell v. Lockhart, 210 U. S. 142, 52 Law. Ed. 994. Acquiescence by judgment debtor in an invalid judicial sale of a mining claim is not an abandonment of the claim. Crary v. Dye, 208 U. S. 515, 52 Law. Ed. 595.

53. Noyes v. Clifford, 37 Mont. 138, 94 P 842. Where one claimed a lode location within the limits of a placer location, he was entitled to question, without proof of location, the prima facie title of placer claimant's patent by showing that the lode was known to exist at time application for placer patent was made, and justify his intrusion. Id.

54. **Search Note:** See note in 11 C. L. 91.

See, also, Mines and Minerals, Cent. Dig. §§ 14-17; Dec. Dig. §§ 11, 12; 20 A. & E. Enc. L. (2ed.) 701.

54a. U. S. Rev. St. § 2350. United States v. Keitel, 29 S. Ct. 123. A preferential right of entry on coal lands cannot be exercised in the entryman's name as agent for another who has made a previous entry. United States v. Forrester, 29 S. Ct. 132.

55. Under Rev. St. §§ 2330, 2331, providing for joint entry of placer claims, not exceeding 160 acres but that such location shall not include more than 20 acres for each claimant, a location of 160 acres by 8 persons is fraudulent and void as to the United States where made under agreement that a person, not one of the locators, should have a one-third interest. Cooke v. Klonos [C. C. A.] 164 F 529.

56. **Search Note:** See notes in 68 L. R. A. 333; 3 L. R. A. (N. S.) 993; 4 Id. 1126; 7 Id. 763.

See, also, Mines and Minerals, Cent. Dig. §§ 18-50, 64, 65; Dec. Dig. §§ 14-22, 27; 20 A. & E. Enc. L. (2ed.) 693, 703.

56a. Whiting v. Straup [Wyo.] 95 P 849. Where one sunk a discovery shaft on his own claim six months before he attempted to extend the boundaries to include another's claim, such discovery had relation to the original boundaries of his own claim and not to the extended boundaries so as to confer any rights in the overlap on which the latter subsequently made the first discovery. Biglow v. Conradt [C. C. A.] 159 F 868. Or an issue as to whether there had been a sufficient discovery of mineral to meet statutory requirement and support a location where gold had actually been found, the locator may supplement such proof by evidence of the character, value and mineralogical condition of adjacent claims, and by opinions of miners that the discovery was sufficient to justify a prudent man in expending labor and money in developing the property. Cascaden v. Bortolis [C. C. A.] 162 F 267.

57. If made prior to intervening rights though subsequent to marking the boundaries, it will be validated from date of discovery. Whiting v. Straup [Wyo.] 95 P 849.

58. Whiting v. Straup [Wyo.] 95 P 849.

59. Merced Oil Min. Co. v. Patterson, 153 Cal. 624, 96 P 90.

60. Where an association conveys a part of the association claim before discovery

is essential to vest a right of possession,[62] but possession without location is good as against a mere intruder [63] but not against a location peaceably made.[64] Location need not be made in person but may be made by an agent,[65] and this rule applies even though there is no knowledge of the principal, if there is a local rule authorizing it or a subsequent ratification.[66] The fact that an agent who located and made discovery on a claim for his principal had previously located and sold the same land does not bring them into privity with him so as to estop them [67] nor does the fact that the agent was a stockholder in the company of the principal estop it.[68] It is generally required that location be made with reference to natural objects [69] either on or off the ground located,[70] and that the location be good when made.[71] A location must be perfected in the manner prescribed by statute relative to markings of boundaries on the ground,[72] posting of notice of location,[73] and filing the certificate

without other agreement, the conveyance severs such tract and a discovery thereon does not inure to the benefit of the associates. Merced Oil Min. Co. v. Patterson, 153 Cal. 624, 96 P 90.

**61.** Sufficient showing of a discovery within the limits of a placer oil claim. Phillips v. Brill [Wyo.] 95 P 856.

**62.** Whiting v. Straup [Wyo.] 95 P 849. Where one acquired a claim by purchase but did no actual work except to dig a hole for purpose of erecting a drilling machine, which was not taken onto the premises for more than a year, he was not in such actual possession as to entitle him to claim against one who entered and made a valid location and discovery. Id.

**63.** Whiting v. Straup [Wyo.] 95 P 849. One who enters and does all acts necessary to location except discovery will be protected against fraudulent or clandestine entry while exploring the land with reasonable diligence and delay in taking possession would not affect his rights if no other rights had intervened. Not deprived of his rights because another sunk a discovery shaft on the boundry line. Phillips v. Brill [Wyo.] 95 P 856. Where, prior to time plaintiffs had set out stakes of their mining claim, they had no possession of any part of defendant's claim, of which defendant was in possession, a working entry by plaintiff for the purpose of setting out extension stakes was a mere interruption. Biglow v. Conradt [C. C. A.] 159 F 868.

**64.** Prospector who enters and seeks in good faith to make a location. Whiting v. Straup [Wyo.] 95 P 849. If one's location of a placer mining claim gave him no right, after an absence to procure supplies, during which absence another had made due location and taken possession, the remedy of the latter was to protect his possession but not having done so and both parties being in possession by common consent, it became a race of diligence to discover gold and he who first discovered it had the prior right. His discovery did not relate back to date of location but location was made valid by discovery and took effect from that date. Johanson v. White [C. C. A.] 160 F 901.

**65.** Whiting v. Straup [Wyo.] 95 P 849.

**66.** Where one had located a placer claim and before discovery sold a part of it and abandoned the other part, and thereafter entered the same land as agent for another, the fact of prior location and sale did not affect his principal's rights. Whiting v. Straup [Wyo.] 95 P 849.

**67,68.** Whiting v. Straup [Wyo.] 95 P 849.

**69.** The object of the law requiring location to be made with reference to some natural object is for the purpose of directing attention in a general way, to the vicinity or locality. Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 P 14.

**70.** The natural objects or permanent monuments may be on the ground located, or off, as the case may be. Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 P 14.

**71.** As a general rule a location must be good when made. Cannot be initiated by trespass. Phillips v. Brill [Wyo.] 95 P 856.

**72.** In suit to quiet title to association placer claim, evidence of location, marking of boundaries, recording of notice, sinking two shafts to bed rock and discovery of gold at 72 feet, and no evidence of other excavations except a hole a foot deep, held sufficient to show that land was unappropriated, its mineral character being admitted though there were other stakes and notices within the limits of the claim, a discovery being essential to any prior location. Cook v. Klonos [C. C. A.] 164 F 529. Disconnected markings of a claim unaccompanied by work and without actual possession do not constitute location. Ware v. White, 81 Ark. 220, 108 SW 831. Rev. St. U. S. § 2324, requiring location to be distinctly marked on ground and notice to contain a discription of the property by which it can be identified, is mandatory. Id. Rev. St. U. S., § 2324, requires a location to be distinctly marked on the ground so that its boundaries can be readily traced, and a complaint to quiet title to a claim alleging that they were not so marked held sufficient as against demurrer. Phillips v. Smith [Ariz] 95 P 91.

**73.** Rev. St. Idaho 1887, § 3102, and Rev. St. U. S. § 2324, requiring notices of location to contain such description of locality by reference to natural land marks as to render the situation reasonably certain, held complied with by description of the Jesse James and Little Grant mining claims. Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 P 14. Evidence sufficient to make prima facie case of posting of location notices. Id.

or statement thereof,[74] and doing the proper assessment work.[75] The location notice or certificate when recorded is prima facie evidence of all the facts which the statutes require it to contain and which are set forth therein,[76] and the affidavit of the locator attached to the notice is prima facie evidence of the facts required by the statute to be stated and which are stated therein.[77] The object and purpose of location notices is to give notice to subsequent locators,[78] and they should be liberally construed to the end of upholding location made in good faith.[79] A mistake in such notice may be corrected by oral evidence.[80] Amended locations relate back to the date of the original location in the absence of intervening rights,[81] but they create no new rights.[82] The fact that a placer mining claim exceeds the legal limit in area renders it void only as to the excess,[83] and an owner in possession may elect what portion he will relinquish within a reasonable time after he discovers that his claim overruns.[84] But he cannot be forced to surrender any particular portion to another, before he knows of the excess.[85]

(§ 3) *B. Maintaining location; forfeiture, loss or abandonment.*[86]—See 10 C. L. 840—In order to hold a mining claim, the locator must do the required amount of assessment work thereon,[86a] and such work must be of a character which improves the claim.[87] "Improvement" means such an artificial change in the physical condition

**74.** Comp. Laws Nev. 1900, § 210, providing for recording of certificates of location, is directory only and where doing of acts required to make a valid location is otherwise proved, location is not void for failure to comply with such statute. Wailes v. Davies, 158 F 667.

**75.** See, also, post, §3B, as to nature of work required. Affidavits of labor, showing annual assessment work, held sufficient to make prima facie showing on that question. Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 P 14.

**76.** Bismark Mountain Gold Min. Co. v. Sunbeam Gold Co., 14 Idaho, 516, 95 P 14.

**77.** That the ground was unappropriated mineral land. Bismark Mountain Gold Min. Co. v. Sunbeam Gold Co., 14 Idaho, 516, 95 P 14.

**78.** If such subsequent locator has actual notice, a defect in the notice is immaterial. Bismark Mountain Gold Min. Co. v. Sunbeam Gold Co., 14 Idaho, 516, 95 P 14.

**79.** Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 P 14. It is policy of the law in allowing amended locations not to avoid a location for defect in notice, but to give the locator opportunity to correct his notice. Id. One who has actual possession of a claim and has done assessment work may amend his location if there are no intervening rights. Ware v. White, 81 Ark. 220, 108 SW 831. Where requisite assessment work has been done under a defective notice, such notice may be amended where there are no intervening rights. Id. Where it appears that a location is made in good faith, the court will not hold the locator to a strict compliance with the law relative to the notice. If by reasonable construction in view of surrounding circumstances the notice will impart notice to subsequent locators, it is sufficient. Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 P 14.

**80.** The fact that work was done being main question and not its method of proof. Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 P 14.

**81.** Under Laws 1899, p. 238, providing for amended locations, such amended locations where they do not interfere with existing rights relate back to date of original location. Bismark Mountain Gold Min. Co. v. Sunbeam Gold Co., 14 Idaho, 516, 95 P 14.

**82.** Filing of amended declaratory statement as authorized by Laws 1901, p. 56, does not create any right claimed under the first location which did not exist prior to filing the amended declaratory statement. Milwaukee Gold Extraction Co. v. Gordon, 37 Mont. 209, 95 P 995.

**83, 84, 85.** Zimmerman v. Funchion [C. C. A.] 161 F 859.

**86. Search Note:** See notes in 10 C. L. 841; 87 A. S. R. 403.

See, also, Mines and Minerals, Cent. Dig. §§ 51-60; Dec. Dig. §§ 23-25; 20 A. & E. Enc. L. (2ed.) 733.

**86a.** Evidence insufficient to show that requisite assessment work had been done. Ware v. White, 81 Ark. 220, 108 SW 831. Evidence sufficient to show sufficient improvement on claim. Fredricks v. Klauser [Or.] 96 P 679.

**87.** Rev. St. § 2324, requiring $100 worth of work to be done each year, does not specify the kind of labor, and **labor expended in extracting ore** is within the requirement. It is only when labor is performed without the boundaries of the claim that its character becomes material, and in such case it must tend to development of the claim. Wailes v. Davies, 158 F 661. Cutlery, dishes, tinware, groceries, tobacco, etc., are not counted but candles used at tunnel may be. Fredricks v. Klauser [Or.] 96 P 679. Price of tools used in development work is not to be counted but reasonable compensation for their use is. Id. Worth of rails laid on ties in tunnel is counted but payment for rails will be disregarded. Id. Value of meals furnished men who received board in addition to wages is, but not cost of trans-

of the earth in, on, or so reasonably near the claim as to evidence a design to discover mineral thereon, or to facilitate its extraction, and the alteration must be reasonably permanent.[88] In the development of a claim, the rule that equity regards that as done what was intended does not apply.[89] Work may be done outside the limits of a claim if beneficial thereto.[90] A stockholder in a mining corporation has such a beneficial interest in the claim that work done by him must be counted as representation work.[91] Where several adjacent claims are held by one,[92] or are held in common, representation work may be done on one for the benefit of all,[93] if done under a general plan or scheme of development,[94] but not otherwise.[95] Work done by one partner on a claim held individually cannot be counted as work done on a partnership claim.[96] Mere failure to do representation work does not determine the rights of the locator in the absence of an intervening location,[97] and a temporary suspension in work is not such a break in possession as entitles another to enter and locate,[98] and one who enters on a claim during the year within which representation work may be done cannot object that the locator has not done his work.[99] The fee for recording affidavits of proof of work is prescribed by statute.[1]

*A forfeiture.*[See 10 C. L. 841]—One who seeks to establish forfeiture has the burden to show by clear and convincing proof that the owner has failed to comply with the law.[2] A co-owner's interest may be forfeited to other co-owners if he refuses to do his share of assessment work.[3]

*Abandonment.*[See 10 C. L. 841]—On abandonment of a prior location, conflict territory properly belonging to it reverts to the public domain.[4]

portating supplies. Id. Value of fuse, powder, candles, etc., is. Id. Value of rails used on claim held properly estimated. Id. Compensation for services of horses is to be counted but cost of horses is not. Id. Credit should be allowed for actual work of an employe expended in an honest effort to discover mineral, but not for services of a watchman when there was no machinery or fixtures on the claim. Id.

88. As used in Rev. St. U. S. § 2324. Fredricks v. Klauser [Or.] 96 P 679.

89. Material taken to a mine but not used cannot be counted. Fredricks v. Klauser [Or.] 96 P 679.

90. Though there are several claims for which credit is asked. Hawgood v. Emery [S. D.] 119 NW 177.

91. Wailes v. Davies, 158 F 667; Id. [C. C. A.] 164 F 397.

92. Hawgood v. Emery [S. D.] 119 NW 177.

93. Under the federal statute requiring improvement work to be done on each claim each year, except where claims are held in common, work may be done on any one claim; expenditures may be made on one claim only where contiguous claims are held in common. Rev. St. U. S. § 2324. Fredricks v. Klauser [Or.] 96 P 679.

94. If done under a general scheme for the development of the several claims. Hawgood v. Emery [S. D.] 119 NW 177.

95. One of two partners in two claims cannot prevent forfeiture of his right by copartner by showing work done on adjacent claims not under agreement or general plan of improvement of all claims. Hawgood v. Emery [S. D.] 119 NW 177.

96. Hawgood v. Emery [S. D.] 119 NW 177.

97. Under Rev. St. U. S., § 2324, providing that on failure to do location work land shall be open to relocation, etc., mere failure to do the work does not terminate the right of the locator, but it only throws the land open to relocation and in the absence of another location the original locator may hold his claim and resume work. Madison v. Octave Oil Co. [Cal.] 99 P 176.

98. Where a placer claim had been duly located and its boundaries marked and locators had commenced to sink a shaft which was subsequently completed to bed rock and mineral discovered, a temporary suspension in work for the purpose of obtaining supplies did not constitute a break in actual possession entitling another to enter though at the time of such entry discovery had not been made. Hanson v. Craig [C. C. A.] 161 F 861.

99. Madison v. Octave Oil Co. [Cal.] 99 P 176.

1. Under Rev. St. 1897, § 3101, amended by Laws 1899, p. 237, and Laws 1899, p. 440, the fee for recording affidavit of proof of labor is 50 cents for each claim named in the affidavit. Empire Copper Co. v. Henderson [Idaho] 99 P 127.

2. Wailes v. Davies, 158 F 667.

3. Evidence as to performing of assessment work for the interest of a co-owner, sufficient to prevent forfeiture of his interest to co-owners under Rev. St. § 2324, in case of failure or refusal of co-owner to perform such work after notice, held for jury. Knickerbocker v. Halla [C. C. A.] 162 F 318.

4. Where one located A claim and on same day located B claim overlapping A claim and performed acts requisite to valid location on A claim and afterwards on B, A claim was prior location and conflict territory belonged to it and upon abandonment of A, it did not become a part of B, but reverted to the public domain and was sub-

(§ 3) *C. Relocation.*[5] See 10 C. L. 841—For the purpose of relocation, the land must be subject to location.[5a] One who bases a relocation on the existence of a forfeiture of an original location because of failure to make the required improvement has the burden to establish such forfeiture.[6]

(§ 3) *D. Proceedings to obtain patents; adverse claims.*[7] See 10 C. L. 842—A third locator may show against the second a first location in force at the time of the second location.[7a]

*Suits to determine adverse claims.* See 10 C. L. 842—In an adverse suit to determine rights to a mining claim, the parties must stand on their own rights and recover on the strength of their own claims.[8] The plaintiff must establish in addition to other requirements of the law that the ground was not covered by a prior location, or, if it was, that it had been forfeited or abandoned.[9] While the hearing of defendant's case is ex parte, after plaintiff has failed to establish a prima facie case it is presumed that proceedings were regular and judgment for defendant correct.[10] A suit under the federal statute praying ejectment is a law action where no equitable issue is presented.[11]

§ 4. *Ownership or estate obtained by claim, location and patent; apex and extralateral rights.*[12] See 10 C. L. 844—It is provided by federal statutes that a placer claim shall not include a known vein or lode within its limits and not included in the location papers.[12a] Whether a vein or lode is a known or an unknown one may be a question for the jury,[13] and on such question expert testimony[14] and evidence as to

ject to relocation. Moorhead v. Erie Min. & Mill. Co., 43 Colo. 408, 96 P 253.

**5. Search Note:** See Mines and Minerals, Cent. Dig. §§ 61-63; Dec. Dig. § 26; 20 A. & E. Enc. L. (2ed.) 740.

**5a.** Can be no relocation where claim is in actual possession of one who has done assessmont work under defective notice. Ware v. White, 81 Ark. 220, 108 SW 831. Where after judgment against a mining company and levy on unpatented claims the principal stockholder relocated the claims on the ground that they had been forfeited but in fact sufficient representative work had been done, held such relocation was a fraudulent conveyance. Walles v. Davies [C. C. A.] 164 F 397.

**6.** Fredricks v. Klauser [Or.] 96 P 679. This burden is met by proof that no work was done on the claim during a specified year. Id.

**7. Search Note:** See Mines and Minerals, Cent. Dig. §§ 114-132; Dec. Dig. §§ 39-46; 20 A. & E. Enc. L. (2ed.) 742.

**7a.** Farrell v. Lockhart, 210 U. S. 142; 52 Law. Ed. 994.

**8.** Phillips v. Brill [Wyo.] 95 P 856. Where an adverse claimant fails to show any right to the ground, he cannot complain that claimants are not entitled to a patent because of insufficiency of their declaratory statement. Milwaukee Gold Extraction Co. v. Gordon, 37 Mont. 209, 95 P 995.

**9.** If he fails to do so he is properly nonsuited, and thereafter has no right to participate in determination of defendant's claim. Lozar v. Neill, 37 Mont. 287, 96 P 343.

**10.** Lozar v. Neill, 37 Mont. 287, 96 P 343.

**11.** Adverse suit under Rev. St. U. S. § 2326, to determining right of possession to mining claim and praying ejectment, the answer presenting no equitable defense, is a law action. Ware v. White, 81 Ark. 220, 108 SW 831. Action held one in ejectment and not in equity. Id.

**12. Search Note:** See notes in 6 C. L. 655, 11 Id. 1081; 50 L. R. A. 184; 8 L. R. A. (N. S.) 422; 16 Id. 162; 58 A. S. R. 263, 272; 83 Id. 41.

See, also, Mines and Minerals, Cent. Dig. §§ 66-132; Dec. Dig. §§ 28-46; 27 Cyc. 549, 555, 558, 559, 561, 563, 570, 580-585, 587, 588, 602-670, 677, 722; 20 A. & E. Enc. L. (2ed.) 4, 722, 768.

**12a.** Under Rev. St. U. S. § 2320, declaring that claims on "veins or lode" shall be governed by laws in force at date of location and § 2333 providing that placer claim shall not include known vein or lode not included in application but does include unknown lode or vein, held terms "vein" and "lode" are synonymous. Noyes v. Clifford, 37 Mont. 138, 94 P 842. "Vein or lode" means a body of mineral or mineral bearing rock within defined boundaries in a general mass of the mountain and "known vein or lode" is one clearly ascertained and of such extent as to render the land more valuable and justify its exploitation. Id.

**13.** Evidence as to whether vein or lode within limits of a placer claim was excepted from the patent, and whether it was a known vein, and subject to location by another, held for the jury. Noyes v. Clifford, 37 Mont. 138, 94 P 842.

**14.** On issue as to whether lode or vein within limits of a placer claim was of sufficient value to justify its exploitation, so as to except it from placer patent, expert testimony based on observation of local conditions that prospects of the vein were good held admissible. Noyes v. Clifford, 37 Mont. 138, 94 P 842.

the extent or value of the vein or lode is admissible.[15] Evidence of development work done is admissible on the question of good faith.[16]

§ 5. *Right to mine on private land thrown open to the public.*[17] See 10 C. L. 997

§ 6. *Private conveyances or grants of mineral rights in land.*[18] See 10 C. L. 844

Mineral rights may be sold separately and apart from the land itself.[18a] There is a clear distinction between a grant of a right for a term to take minerals from land and an outright grant of the minerals in place.[19] A right, of unlimited duration, to occupy land for the purpose of prospecting is a freehold interest but being vested for a specific purpose becomes extinct when the purpose is accomplished or work abandoned.[19a] A grant of oil and gas on certain land is a grant of so much as the grantee may find there, but vests him with no estate therein until it is found.[20] A description in a deed of mineral rights may be rendered sufficiently accurate by reference to other records.[21] Technical terms used will be given their usual interpretation.[22] The word "minerals" is not confined to metalic substances and where used in a conveyance without qualification it includes gas and oil.[23] Terms used to identify the grant will not be construed as a limitation thereon.[24] A reservation is to be construed according to the plain meaning of the terms employed.[25] An apparent reservation may be construed as a limitation, after a long lapse of time where no rights have been asserted by the grantor.[26] Contracts for the sale of mineral rights

**15.** Where one claimed a lode location within limits of a placer location on ground that it was excepted from the placer patent, evidence of the extent and value of the vein at any time before or after patent proceedings for the placer was competent to show whether it was a "known vein." Noyes v. Clifford, 37 Mont. 138, 94 P 842.

**16.** Where one claimed right to a lode location within limits of a placer claim, as excepted from the placer patent, affidavits of representation work done on the lode claim were admissible to show good faith and belief that same warranted expenditures to develop it. Noyes v. Clifford, 37 Mont. 138, 94 P 842.

**17. Search Note:** See Mines and Minerals, Cent. Dig. §§ 166-215; Dec. Dig. §§ 56-85; 27 Cyc. 689-745.

**18. Search Note:** See notes in 2 L. R. A. (N. S.) 1115; 4 Id. 207; 10 Id. 822; 16 Id. 851; 24 A. S. R. 554; 2 Ann. Cas. 639.

See, also, Mines and Minerals, Cent. Dig. §§ 147-165; 242-247; Dec. Dig. §§ 53-55, 120-125; 27 Cyc. 671-689, 784-791; 20 A. & E. Enc. L. (2ed.) 775.

**18a.** The owner of a fee may lease or sell the mineral right in the property absolutely while retaining the fee in himself. A court may also exercise this power in settling an estate. Baker v. Royal Lead & Spar Co., 32 Ky. L. R. 982, 107 SW 704.

**19.** The latter conveys an interest in the land. Board of Sup'rs of Hancock County v. Imperial Naval Stores Co. [Miss.] 47 S 177.

**19a.** Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 NE 53, citing 1 C. L. 900.

**20.** On account of its wandering nature, it may escape and be withdrawn on other land and is not subject to absolute ownership. Poe v. Ulrey, 233 Ill. 56, 84 NE 46. Oil and gas while in the earth is not subject to ownership distinct from the soil and a grant thereof is not a grant of oil in the ground but only of so much as the grantee may find and passes nothing which can be made the subject of a real action. Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 NE 53.

**21.** A description in a deed conveying to one seams of coal which is by itself inaccurate but by reference to recorded deeds is made certain and his grantor was in possession under a deed purporting to convey the fee, held such deed first mentioned was prima facie evidence of title in him of the coal. McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 NE 174.

**22.** Description in a deed of all that certain "coal bed" means "coal vein" and passed the entire bed or vein of coal and not a parcel thereof. Delaware, etc., R. Co. v. Gleason [C. C. A.] 159 F 383.

**23.** A reservation in a deed of "the right to all minerals in and under" the land, where unlimited and unqualified, reserves not only solid minerals but oil and gas. Suit v. Hochstetter Oil Co., 63 W. Va. 317, 61 SE 307.

**24.** In a description in deed of all that certain coal bed on Lackawanna creek on lot No. 1 now occupied by W., the phrase "all that certain coal bed" indicates an entirety, the other parts of the description being used merely to identify the thing and not to define or divide it. Delaware, etc., R. Co. v. Gleason [C. C. A.] 159 F 383.

**25.** Where owners of land executed an oil and gas lease for 20 years and thereafter agreed to extend it for 10 years and subsequently deeded the land to another reserving to themselves the oil and gas until expiration of the leases and also the right to execute a new lease for 10 years after their expiration, held the reservation was for the purpose of reserving rights of the grantors in the existing lease and to extend the same for 10 years. Collins v. South Penn Oil Co. [Pa.] 71 A 319.

**26.** Deed reciting that title and right to surface, except mining privileges thereof, were warranted by grantors held no claim to mining privileges having been made by successors of grantor for 50 years, and gran-

and amendments thereto are to be construed as one instrument.[27] They are to be construed to convey the estates or rights intended by the parties,[28] and are to be given effect according to their terms,[29] and conditions will not be held to have been met unless substantially fulfilled.[30] The practical construction placed thereon by the parties will be given effect.[31] A purchaser is not absolved from his contract duty to promptly make certain improvements, because of a defect in the vendor's title, unknown to him,[32] nor because of failure of the vendee to meet a requirement, when in no manner affected the making of the improvement,[33] nor by other facts not within the vendor's control.[34]

Conditions of a contract for the sale of mining rights will not be specifically enforced where there is an adequate remedy at law,[35] nor where the right to such remedy does not clearly appear,[36] and, where the contract provides the remedy for its breach, such remedy must be resorted to.[37] One who claims under a patent is not

tor and grantee being dead, such provision would be construed as a limitation and not a reservation of mining rights. Towns v. Brown [Ky.] 114 SW 773.

27. Agreement of sale of mining claims and amendments thereto must be construed as one instrument, and a provision in an amendment requiring buyer to give seller employment held not without consideration. Mallory v. Globe-Boston Copper Min. Co. [Ariz.] 94 P 1116.

28. Contract by which owner agreed to sell mineral rights, and permit purchaser pending delivery of deed to remove minerals and in event of the owner's failure to procure a release of a mortgage to lease the land, held to confer on the purchaser an interest in the land and not a mere license. National Light & Thorium Co. v. Alexander [S. C.] 61 SE 214. Contract binding owners to sell an interest in mines in consideration of $500 cash and $14,500 within one year, purchaser to pay all taxes during "life of this option," held a contract of purchase and not a mere option. Chenoweth v. Butterfield [Ariz.] 94 P 1131.

29. Under a contract giving one the right to explore mineral land, the contractor agreeing, in case of success to pay the owner a certain price for the land, he was not bound to drill for commercial substances but was only bound to buy the land in case of success in finding them. Anse La Butte (Le Danois) Oil & Mineral Co. v. Babb [La.] 47 S 754. Contract for sale of mining claims construed and held not to entitle sellers to exchange stock received by them in purchasing company for stock in a company formed which acquired the claims. Mallory v. Globe-Boston Copper Min. Co. [Ariz.] 94 P 1116.

30. Where a contract permitted plaintiff's assignor to explore oil land and provided for sale to him for specified price if paid within 90 days after success on the land, the finding of oil in less than paying quantities was not a success in finding commercial substances within the contract. Anse La Butte (Le Danois) Oil & Mineral Co. v. Babb [La.] 47 S 754.

31. Contract for sale of coal lands construed, together with circumstances and construction placed thereon by the parties and held to show that the parties had construed it to mean that a survey was to be made after execution of deed and any deficiency accounted for. Pittsburg Coal Co. v. Cook, 219 Pa. 539, 69 A 85. Under contract for sale of mining property providing for payment in instalments, the purchaser agreeing to do developement work, proceeds of ore to be equally divided, except that in case of consummation of purchase the portion paid was to be credited on purchase price and in case of default in payment of any instalment it should be treated as forfeited and sums paid treated as rent, on default all vendor's acts were held consistent with an election to forfeit and the purchaser was held not entitled to reimbursement of sums paid on theory of mutual rescission. Oursler v. Thacher, 152 Cal. 739, 93 P 1007.

32. Under contract to sell mine where a large part of the price was to be paid in profits, and requiring vendee to promptly install a reduction plant, he was not excused from doing so by the fact that the vendor's title to a small fraction of the mine was defective which fact was unknown to the vendee. Brown v. Gordon-Tiger Min. & Reduction Co. [Colo.] 97 P 1042.

33. Where contract for sale of mine required vendee to promptly install a reduction plant, and purchase price to apply on liens against the property, failure of vendor to furnish a schedule of liens, at most only extended time to pay them and did not excuse delay in constructing reduction plant. Brown v. Gordon-Tiger Min. & Reduction Co. [Colo.] 97 P 1042.

34. Where garnishment against vendors, temporarily attached a part of the purchase price which was to be applied in paying off liens, was ultimately discharged, the fact of its existence nor the opinion of vendee's engineer did not justify willful refusal to promptly construct a reduction plant as required. Brown v. Gordon-Tiger Min. & Reduction Co. [Colo.] 97 P 1042.

35. Condition that purchaser should give seller employment at the mines. Mallory v. Globe-Boston Copper Min. Co. [Ariz.] 94 P 1116.

36. Conditions in sale of mining claims relative to running cross cuts, shafts and drifts will not be specifically enforced, where no time within which to do the work is specified, and there is no allegation of damage because of failure to do it, and specific performance is not directly asked. Mallory v. Globe-Boston Copper Min. Co. [Ariz.] 94 P 1116.

37. Contract for sale of mining claims pro-

estopped to sue for specific performance of a contract for a conveyance of the claim because he did not adverse an application for the patent.[38] In Louisiana a contract right to explore land is assignable.[39]

*Rights as between surface and subterranean owners.* See 10 C. L. 845—A grantor who reserves the minerals has a right to sink a shaft through the surface.[40] As a general rule, where the ownership of the surface and underlying minerals has been severed the owner of the surface has an absolute right to subjacent support,[41] and such right is waived only by express words or clear implication,[42] but such right may not be enforced in equity where there is an adequate remedy at law.[43] Where minerals have been severed from the surface by conveyance, the owner of the surface cannot hold adversely to the owner of the minerals unless he disseises him.[44]

§ 7. *Leases.*[45] *Estate or interest created.* See 10 C. L. 846—Oil leases stand on an entirely different basis from other leases.[45a] As a general rule an oil and gas lease vests no estate in the lessee but confers a mere right of exploration [46] until the minerals are found,[47] and until then vests the lessee with no title to minerals in place,[48] but it gives him a right of action for damages against one who invades his rights.[49] In some states, however, it is considered to pass an estate for some purposes,[50] and in others it is such a conveyance as must be executed in the manner prescribed by statutes.[51] A lease granting certain rights to the lessee but not binding him to perform

viding for forfeiture of machinery and appliances as liquidated damages for breach by purchaser excludes remedy by rescission of sale or specific performance. Mallory v. Globe-Boston Copper Min. Co. [Ariz.] 94 P 1116.

38. His claim not being adverse to the patent but under it. Noweil v. McBride [C. C. A.] 162 F 432.

39. Under Civ. Code, art. 2448. Anse La Butte (Le Danois) Oil & Mineral Co. v. Babb [La.] 47 S 754.

40. Baker v. Pittsburg, etc., R. Co., 219 Pa. 398, 68 A 1014.

41. Where an owner sells the surface and reserves the minerals in general terms, there is an implied covenant to so mine as not to injure the surface. Collins v. Gleason Coal Co. [Iowa] 115 NW 497. If the owner of minerals removes them and injury results to the surface by subsidence, he is liable no matter how skillfully he conducted his operations. Collins v. Gleason Coal Co. [Iowa] 115 NW 497.

42. Collins v. Gleason Coal Co. [Iowa] 115 NW 497.

43. Where an owner of coal land conveyed the minerals without reserving right to surface support or waiving any right he might have to such support, held the grantee of the minerals would not be enjoined from removing the coal so as to threaten sinking of surface where injury was not irreparable and no buildings or improvements were endangered and sinking of surface was improbable. Berkey v. Berwind-White Coal Min. Co., 220 Pa. 65, 69 A 329.

44. Yellow Poplar Lumber Co. v. Thompson's Heirs, 108 Va. 612, 62 SE 358.

45. **Search Note:** See notes in 18 L. R. A. 492; 31 Id. 673; 34 Id. 62; 11 L. R. A. (N. S.) 417; 2 Ann. Cas. 446; 9 Id. 524.

See, also, Mines and Minerals, Cent. Dig. §§ 166-215; Dec. Dig. §§ 56-85; 27 Cyc. 689-745; 20 A. & E. Enc. L. (2ed.) 776.

45a. Work to be done thereunder is ordinarily experimental and speculative, and if no mineral is found no estate vests. Conkling v. Krandusky, 112 NYS 13.

46. Oil and gas lease, giving the right to prospect in consideration of a portion of oil found, if produced in paying quantities, and an annual rental on gas wells vests no estate in lessee prior to discovery, but confers a mere right of exploration. Richlands Oil Co. v. Morriss, 108 Va. 288, 61 SE 762. Ordinary oil and gas lease does not convey an interest in land nor a present interest to minerals in the premises. Beardsley v. Kansas Natural Gas Co. [Kan.] 96 P 859.

47. Oil lease construed and held to vest in the lessee no present title to a stratum of land in place but left title to the oil in the landowner until it was brought to the surface and gave the lessee an estate for years to prospect and extract oil which constitutes a servitude and not a chattel real. Graciosa Oil Co. v. Santa Barbara County [Cal.] 99 P 483.

48. An oil lease in ordinary form, giving the exclusive right to explore for produce and sell oil on payment of a royalty, does not vest the lessee with title to the oil in place. Backer v. Penn Lubricating Co. [C. C. A.] 162 F 627.

49. One who goes upon the land, drills wells and removes and sells oil. Backer v. Penn Lubricating Co. [C. C. A.] 162 F 627.

50. Rights of an oil lessee is a claim to possession of land and taxable as such. Graciosa Oil Co. v. Santa Barbara County [Cal.] 99 P 483. Is an estate in land. Id.

51. Lease of unlimited duration to enter land occupied as a homestead and prospect for oil and gas, erect necessary structures, etc., is such a conveyance as is void unless executed and acknowledged as required by Hurd's Rev. St. 1905, c. 52, § 4. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219. An oil and gas lease of unlimited duration granting the right to enter and prospect, drill and operate, lay pipes for transporta-

any obligation creates a mere option which the lessor may terminate at any time before the lessee becomes bound.[52] Where a leased mine is flooded by nelgigence of a third person, the lessee can only recover from him for loss of personal property and severed coal.[53]

*Interpretation and effect in general.* See 10 C. L. 846—As in construing other witten contracts,[54] a mining lease is to be construed so as to effectuate the intention of the parties.[55] The construction placed on a lease by the parties will be adopted unless at variance with the correct legal interpretation,[56] and where it is ambiguous, parol evidence may be resorted to to explain it.[57] As a general rule such leases are held to contain an implied covenant to prosecute work of development with reasonable diligence,[58] and to protect the property by sinking as many offset wells as are reasonably necessary.[59] A provision for extension though optional in form will not be construed to authorize the lessee to avoid his obligations.[60] Where a lessee participates in partition of the land and recognizes the several ownership, the character of its holding is changed from that of lessee from joint owners to lessee from each owner.[61]

*Essentials and validity.* See 10 C. L. 845—A lease by one cotenant is void as to other cotenants,[62] but is valid as between the parties so long as the land remains unparti-

tion, etc., is a conveyance of an interest in a homestead and requires a release of homestead rights as prescribed by the homestead statute. Poe v. Ulrey, 233 Ill. 56, 84 NE 46.

52. An oil and gas lease granting the right to mine for oil and gas, so long as the same are produced and royalties paid, but not binding the lessee to perform any obligation, is a mere option which the lessor may withdraw at any time before the lessee does any thing to bind himself. Cortelyou v. Barnsdall, 236 Ill. 138, 86 NE 200. Revocation of such option by the lessor is withdrawal of an offer which the lessee had not accepted. Id.

53. Ulrey v. Poe, 134 Ill. App. 298.

54. See Contracts, 11 C. L. 729; Deed of Conveyance, 11 C. L. 1051, and like topics.

55. Lease and option construed and held the lessee had an option to purchase during the third year but was not bound to purchase. Pollard v. Sayre [Colo.] 98 P 816. Provision in oil and gas lease requiring completion of test well within specified time and well drilled to completion within 12 months or a certain rental paid held complied with where well was drilled on adjoining land and gas struck but there was no market for the product, and, on failure to complete a well on the premises within the period prescribed, the lessee paid the rental stipulated. Poe v. Ulrey, 233 Ill. 56, 84 NE 46. Lease by which lessee agreed to develop oil land for a certain royalty and subsequent modification thereof providing for limited operation of the only well on the premises because of low market and poor storage facilities construed and held the modification applied to entire property though referring to but one well, and lessor waived her right to have a larger amount of oil produced. J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co. [Tex. Civ. App.] 107 SW 609.

56. Oil and gas lease as construed by the parties held to show that it has been construed so as to entitle the lessor to $15 per year rental. Scott v. Lafayette Gas Co. [Ind. App.] 86 NE 495.

57. Mining lease giving the right to mine on land for a specified royalty and providing that lessees could take 20 tons of ore free from royalty as compensation for making roads, bridges, etc., also costs of surveys, held ambiguous and parol evidence was admissible to show who should pay expense of certain surveys. Codman v. Adamson, 114 NYS 408.

58. Oil and gas lease for 10 years and so long as oil and gas were found in paying quantities construed and held to contain implied covenant to prosecute work of development with reasonable diligence, but the lessee was not to continue it without intermission, and that there was no lack of good faith or diligence. Phillips v. Hamilton [Wyo.] 95 P 846. Where sole compensation is a share of the product, there is an implied covenant to operate diligently. National Light & Thorium Co. v. Alexander [S. C.] 61 SE 214.

59. Though an oil lease does not specify the number of wells to be sunk, and does not require sinking of offset wells to protect the land from damage, an implied obligation rests on the lessee to sink as many wells as are reasonably necessary to protect the property. J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co. [Tex. Civ. App.] 107 SW 609.

60. Where oil and gas lease required one well to be drilled within two years and also to drill a second well unless the first should become useless, and if wells were not drilled on payment of a stipulated rental the agreement should continue as though wells had been drilled, the latter clause, though optional in form, did not authorize the lessee to refuse to drill wells or pay rent and thus avoid the contract, but on failure to drill wells he was liable for rent. Scott v. Lafayette Gas Co. [Ind. App.] 86 NE 495.

61. J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co. [Tex. Civ. App.] 107 SW 609.

62. Oil and gas lease made by one coten-

tioned.[68] The false representations which will invalidate a lease must be as to a material matter [64] and must be relied upon.[65] Nonpayment of the nominal consideration recited does not unvalidate a lease.[66] The fact that a lease absolves the lessee from liability does not render it void for want of mutuality.[67]

*Rights, duties and liabilities of the parties* See 10 C. L. 847 are generally to be found in the terms of the lease [68] as construed.[69] Where a lease gives the lessee a right to surrender at any time and avoid all subsequent liability, it cannot be specifically enforced.[70] The damages for breach of a lease being necessarily uncertain, it is competent for the parties to fix a liquidated sum.[71] Where a lease impliedly authorizes removal of buildings and improvements, but gives the lessor a lien thereon for royalty, such lien is the only interest the lessor has.[72] A lessor who holds proceeds of ore as trustee for the lessee cannot retain them as offset for breach of the lease.[73]

ant. Zeigler v. Brenneman, 237 Ill. 15, 86 NE 597.

**63.** Zeigler v. Brenneman, 237 Ill. 15, 86 NE 597.

**64.** Where owner executed an oil and gas lease with object of having his land prospected, false statement by lessee that he was a producer of oil was not a material representation. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219.

**65.** Where there is no proof that a lessor relied on false representations of the lessee, equity would not cancel the lease for fraud. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219.

**66.** Where real consideration of a lease was the exploitation of the mineral resources of the land and not the recited consideration of $1, nonpayment of the $1 did not invalidate the lease. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219.

**67.** Surrender clause in oil and gas lease, giving lessee option to surrender before expiration on payment of one dollar, but not giving lessor right to compel surrender, did not create tenancy at will and was not void for want of mutuality. Poe v. Ulrey, 233 Ill. 56, 84 NE 46.

**68.** Provision in oil lease that the lessee should "stand all expense of any lawsuit that may occur in defending his lease" requires him to defend against a prior lease or show that such prior lease was valid, in order to recover consideration for the lease. Conkling v. Krandusky, 112 NYS 13. Where oil and gas lease provided that lessee might cancel it on giving notice, paying rent due and five dollars, and canceling lease of record, a complaint for rent alleging that lessee had tendered $5 sued for but had failed to give notice, or to pay accrued rent, held insufficient. It not being alleged that lessee had canceled the lease and the fact that he was in arrears in rent did not obligate him to cancel it and become liable for the collection fee. Scott v. Lafayette Gas Co. [Ind. App.] 86 NE 495. Where one of the lessees of oil lands sold his interest and purchased a quarter interest in other land, and the original lessor contracted with him and that when he, the owner, acquired the three-fourths interest in the land heretofore mentioned, he would extend the original lease to the owner of the quarter interest on surrender of a certain interest in oil produced. Held such agreement referred only to the fourth interest in the land purchased and not to land covered by the original lease in which the lessee had no further interest. Collins v. South Penn. Oil Co. [Pa.] 71 A 319.

**69.** Lease for 3 years and as much longer as gas or oil was found in paying quantities, "provided wells were completed during term," construed and held that unless other wells than test well was completed during term lessee was **not entitled to an extention.** Hazel Green Oil & Gas Co. v. Collier, 33 Ky. L. R. 495, 110 SW 343.

**70.** Oil and gas lease for five years and as much longer as minerals should be found in paying quantities but giving lessee right to surrender on payment of $1, and avoid all subsequent liabilities, cannot be specifically enforced by the lessor. Ulrey v. Keith, 237 Ill. 284, 86 NE 696. Such provision also deprives lessee of the right to enjoin violation of the lease by the lessor. Id. Where one cotenant gave an oil and gas lease on the premises with an option to the lessee to surrender at any time and thereafter the cotenants granted oil and gas rights to another, held that the option of the lessee deprived him of the right to specific performance until he had placed himself in a position where he could be compelled to perform and he could not compel partition of the oil and gas apart from the land or of the land itself. Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 NE 53. An oil and gas lease which gives the lessee an option to surrender is not void for want of mutuality but deprives the lessee of specific performance since if such relief were granted the lessee could nullify the decree by exercising his option. Id.

**71.** Breach of a provision in an oil and gas lease binding the lessee to drill a well to a certain depth within a specified time. Blodget v. Columbia Live Stock Co. [C. C. A.] 164 F 305.

**72.** Under mining lease requiring lessees to pay taxes on improvements which were not to be removed until royalty was paid and that lessors should have lien therefor, held machinery, buildings, etc., were not fixtures. Cherokee Const. Co. v. Bishop [Ark.] 112 SW 189.

**73.** Lessor in mining lease who has possession of trust funds belonging to lessee as proceeds of ore mined cannot retain such funds in order to offset damages due him for violation of the lease. Florence-Goldfield Min. Co. v. First Judicial Dist. Ct. of Nev. [Nev.] 97 P 49.

The fact that an assignee of an oil lease knew that it could not be assigned without the owner's consent does not render him a purchaser at his peril where the assignment contains a covenant of authority to sell.[74] An assignee who takes the lease subject to all its conditions may be proceeded against directly by the lessor.[75] The terms of payment for the sale of an interest in a lease are to be found in the contract of sale.[76] An assignee of a prior lease cannot eject a subsequent lessee,[77] and a lessee of one cotenant cannot maintain partition against a lessee of all the cotenants.[78] Lessors are not necessary parties to a suit to partition rights of lessees.[79]

*Rents and royalties.* See 10 C. L. 847—Oil and gas leases generally condition the payment of rental or royalties on the production of minerals in paying quantities.[80] The basis of production on which royalties are compared depends on the terms of the contract.[81] A provision requiring development of the property or payment of rent does not require payment in advance.[82] Where a lease provides for the payment of royalties on coal which passes through a certain mesh, the lessee is liable for the royalty though the coal is given a different name.[83] The gas pressure basis upon which one semi-annual instalment of rent is paid is presumed to continue until the next instalment falls due.[84] A disclaimer by one co-owner of an interest in royalty advanced is not a disclaimer as to future royalties.[85] The sufficiency of a complaint to recover rentals is governed by the general rules of pleadings.[86]

74. Shannon v. Mastin [Mo. App.] 108 SW 1116.

75. Under stipulation in assignment of lease that assignee took subject to all conditions therein, assignee took place of lessee and lessor could proceed against him directly for breach. McGoodwin v. Lusterine Min. & Polishing Co., 33 Ky. L. R. 521, 110 SW 409.

76. Contract by which lessee sold a two-thirds interest in lease to be paid for out of "first net profits" means first excess of current receipts for ore above current expenses. Crocker v. Barteau, 212 Mo. 359, 110 SW 1062.

77. Assignee of an oil and gas lease with the right to enter the premises and mine for oil and gas cannot eject the lessee on a subsequent lease. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219.

78. Where one cotenant executed an oil and gas lease and thereafter all cotenants gave a like lease to a different person, neither lessee could maintain partition to secure his interest. Zeigler v. Brenneman, 237 Ill. 15, 86 NE 597. Nor could either operate without consent of the other. Id.

79. Beardsley v. Kansas Natural Gas Co. [Kan.] 96 P 859.

80. In an oil and gas lease providing for a certain rental per well, if gas were found in sufficient quantities to market and be piped to market, gas is found in such quantities whenever it exists in wells to such extent that considering opportunity to sell and cost and expense of selling it could be reasonably sold at a profit to the lessee and a charge to such effect is not bad as leaving out of consideration the required rental if the gas were marketed. Indiana Natural Gas & Oil Co. v. Wilhelm [Ind. App.] 86 NE 86. In action for rentals under a gas lease providing for rent if gas were produced in sufficient quantities to make it marketable, where wells were in operation and producing oil in marketable quantities, the original cost of drilling was not to be considered in determining whether gas produced could be marketed profitably, the only expense to be considered would be operating and selling expense and rental. Id.

81. Mining lease held to require payment of royalties on screenings. Cantrall Co-Op. Coal Co. v. Level, 139 Ill. App. 104. Evidence as to quantity of coal mined held to sustain verdict in action for royalties. Missouri & I. Coal Co. v. Reichert, 133 Ill. App. 123.

82. Where oil and gas lease required drilling of test well within one year or payment of annual rental counting from expiration of said year, held rent was not required to be paid in advance on failure to drill the test well and the lessee had all of the second year within which to pay. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219.

83. Under lease defining "pea" coal as coal which passes with dirt through a three quarter inch mesh, a lessee cannot avoid payment of royalties on coal which passes through such mesh though it is known as "Barley" "rice" or "buckwheat" coal. Glick v. Lehigh Valley Coal Co., 221 Pa. 428, 70 A 810.

84. Under oil and gas lease providing for payment of a certain sum per pound for each pound registered on casing at the well, where first semi-annual instalment of rent is paid after pressure is ascertained, is presumed in suit for second instalment that pressure remained the same. Moore v. Ohio Valley Gas Co., 63 W. Va. 455, 60 SE 401.

85. Where several owners joined in execution of a mining lease reserving a royalty and one of them disclaimed interest in royalty advanced. Hatfield v. Followay [Ky.] 113 SW 853.

86. See Pleading, 10 C. L. 1173. Complaint to recover rent under oil and gas lease, alleging that defendant paid rents to a certain date, that for certain periods rent in specified sums became due and that plaintiff was owner of the premises, sufficiently alleged that rent was due and unpaid when complaint was filed. Scott v. Lafayette Gas Co. [Ind. App.] 86 NE 495.

*Forfeitures, rescission, cancellation and abandonment.* See 10 C. L. 848—A lease may be terminated by express surrender or by a surrender in law affected by abandonment by the lessee and resumption of possession by the lessor.[87] Abandonment is the surrender or relinquishment of rights or property by one person to another, and includes both intention to abandon and the act of abandonment.[88] While it it said that mining leases stand upon an entirely different basis from other contracts, and that the rule that forfeiture or abandonment is not looked upon with favor does not apply,[89] yet equity will not cancel a lease for mere delay in paying rent or commutation money,[90] nor for failure to commence operations within the time stipulated, if it appears that the lessee is ready and willing to perform those covenants,[91] or when it appears that there is no market for the product;[92] and equity will relieve a lessee from a mere technical forfeiture, on his performance of all the covenants of the lease, where rights of third persons have not intervened.[93] But where there is clear failure to perform the conditions, the rights of the lessee may be forfeited,[94] or the lease may be considered as abandoned by him on his failure for a long period of time to prosecute work of development,[95] and it may be canceled where minerals can

87. Oil and gas lease. Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 SE 307. Surrender in law held shown where well was abandoned as exhausted and more than three years later the lessor executed a new lease. Id.

88. Held no abandonment of an oil and gas lease where lessee within one year drilled a well and within seven months returned with his outfit to drill another. Phillips v. Hamilton [Wyo.] 95 P 846.

89. Conkling v. Krandusky, 112 NYS 13.

90. Pheasant v. Hanna, 63 W. Va. 613, 60 SE 618. Where lessor in oil and gas lease repudiated the lease by releasing before the expiration of the year in which the first lessee had the right to pay rent, and before the expiration of the year the first lessee sued to set aside the second lease and tendered performance of all conditions of his lease, held a sufficient tender of the rent called for. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219. Where lessor in oil and gas lease when notified that rent had been left at a bank for him but refused to accept it on the ground that the lease was void, he waived any duty of the lessee to make a legal tender of the rent. Id.

91. Pheasant v. Hanna, 63 W. Va. 613, 60 SE 618. Where lessee in oil and gas lease executed June 15th for five years served notice on September 15th of following year that he intended to comply with requirement to dig a test well within one year, and tendered the $100 rental required if no well was completed within one year. On September 15th no work had been done under a subsequent lease, but on October 14th when the lessee went onto the land to drill he found a well in operation dug by a subsequent lessee. Held his rights were not forfeited. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219.

92. Oil and gas lease will not be forfeited for breach of implied covenant to drill wells where there were no means by which the product of wells could be marketed. The remedy of the lessor is an action for damages. Poe v. Ulrey, 233 Ill. 56, 84 NE 46.

93. Pheasant v. Hanna, 63 W. Va. 613, 60 SE 618.

94. Under coal lease requiring operation of mine with due diligence and that it should not be idle for more than 30 consecutive days, held, where it remained idle for 10 months in one year and three or four months in another, it was forfeitable at option of owner. Cherokee Const. Co. v. Bishop [Ark.] 112 SW 189. Where one agreed to transfer a mining lease and property to a company to be organized by another who promised to contribute a certain sum as capital after organization, the agreement being made for the purpose of raising working capital, the promise of the latter to contribute to the stock was a condition subsequent and failure to perform justified the former in rescinding the transfer. Schneider v. Miller, 113 NYS 399. Where in order to obtain money to continue business one agreed to convey a lease of asphalt land and his interest in the business to a company which was to be organized by another who agreed to contribute a certain sum to its capital but failed to do so, held that since the principal purpose of the contract was to secure money to carry on the business failure of the latter to contribute was an abandonment and entitled the former to rescind the transfer to the company. Id. The obligation of the lessee in respect to development is strict and failure to perform warrants rescission. Oil and gas lease. Gillespie v. Fulton Oil & Gas Co., 140 Ill. App. 147.

95. Oil and gas lease for 20 years construed and held to contemplate an early exploration and operation and failure of the lessee to do anything for seven years was equivalent to a surrender, and gave the lessor the right to treat it as abandoned. Mills v. Hartz, 77 Kan. 218, 94 P 142. Where an owner gave an oil and gas lease in 1893 for 15 years or so long as oil and gas should be found in paying quantities and the lessee in 1894 drilled a well but found no oil and removed his drilling appliances leaving only the casing in the well and did nothing further until 1905, after the owner had given another lease, held to show an abandonment of the lease. Conkling v. Krandusky, 112 NYS 13. Where an oil lease is executed for 15 years or as long as oil is found in paying quanti-

be no longer produced in paying quantities.[96] A lease will not be forfeited for reasons not stipulated as grounds for forfeiture,[97] and grounds for forfeiture not stipulated will not be implied.[98] In forfeiting a lease, forfeiture of other property of great value will not be required.[99] Right of the lessor to forfeit may be waived.[1]

§ 8. *Working contracts.*[2]—See 10 C. L. 851—The rights of parties to contracts for the development of lands rest in the terms of such contracts,[2a] and whether such contracts have been violated may be a question of fact.[3] Under a contract allowing one to relinquish mining rights on 30 days' written notice the owner may waive such notice.[4] Such a contract is not a grant or a lease, and all rights thereunder are extinguished by abandonment.[5] Under a contract granting the right to take sufficient rock from a quarry to complete a certain dam, sufficient rock to complete the dam may be taken though it exceeds the estimated quantity.[6]

§ 9. *Mining partnerships and corporations.*[7]—See 10 C. L. 851—A mining partnership is not founded on the delectus personae of the members and the powers of the members are limited to such acts as are necessary to the transaction of its business.[7a]

ties, and the lessee after drilling a well and finding no oil removes his machinery and appliances and does nothing for 11 years, the granting of another lease by the owner is a declaration that he regards the first lease as terminated. Id. Under lease requiring lessee to commence operations within specified time or pay $10 per month rental, with option to at any time surrender, where he failed to commence operations and paid first month's rent, and then ceased to pay for two months, held time was the controlling factor and by failure to commence work or pay the rental he abandoned the lease. Id.

**96.** Oil lease properly canceled where it appeared that oil could be no longer produced in paying quantities. Dixie Development Co. v. Smith, 77 Kan. 832, 93 P 1132.

**97.** Oil and gas lease construed and held not to provide for forfeiture for nonpayment of royalties. Davis v. Chautauqua Oil & Gas Co. [Kan.] 96 P 47.

**98.** Where oil and gas lease provided for forfeiture in case a test well was not completed by a certain date and also for a stipulated rental in such case, grounds of forfeiture not stipulated would not be implied as the ground stated would imply exclusion of all others and agreement for rental excluded a forfeiture not stipulated for. Poe v. Ulrey, 233 Ill. 56, 84 NE 46.

**99.** In forfeiting oil and gas lease for breach of conditions. Work v. Fidelity Oil & Gas Co. [Kan.] 98 P 801.

**1.** Where an assignment of a permit to drill an oil well is made at time when the owner has a right to but has not forfeited the permit, it cannot be said that the assignment is without consideration since the owner may waive the forfeiture. Shannon v. Maston [Mo. App.] 108 SW 1116.

**2. Search Note:** See Mines and Minerals, Cent. Dig. §§ 212-215; Dec. Dig. §§ 82-85, 109; 27 Cyc. 743-746.

**2a.** Under contract for drilling coal land for certain price per foot to a given depth if coal was not reached before, and for same price if it was necessary to go lower, contractor's right to recover was not dependent on striking coal, payment having been made for work done as though striking coal was not a condition precedent. Western Fuel Co. v. Fuller [Ark.] 113 SW 1021. Complaint for breach of contract by which one was to remove coal from a mine alleging that plaintiff was to have a certain price per ton for removing the coal and after hardest portion had been removed the owner refused to permit removal of remainder held to state cause of action. Sagamore Coal Co. v. Clark, 33 Ky. L. R. 134, 109 SW 349.

**3.** Evidence held for the jury in an action for breach of a contract for removal of coal from a mine. Sagamore Coal Co. v. Clark, 33 Ky. L. R. 134, 109 SW 349. Evidence examined and held not to show that one who had a contract to take rock from a quarry operated the quarry improperly and in such a manner as to violate their agreement to develop it. Rudiger v. Coleman, 114 NYS 689.

**4.** Contract allowing one to mine certain minerals. Payne v. Neuval [Cal.] 99 P 476.

**5.** Contract in consideration of one dollar and royalty granting one the right to mine certain minerals and giving the grantee right to relinquish on 30 day's notice. Payne v. Neuval [Cal.] 99 P 476.

**6.** Where owner of granite quarry agreed to convey it to another who had a contract for construction of a dam, the latter to pay a cash consideration and form a corporation, the owners to have 40 and the contractors 6 per cent of the stock, and the contractors to take only so much rock as was needed to complete the dam, held they were entitled to take sufficient rock to complete the dam though in excess of the approximate amount and alterations in plans necessitating an additional amount. Rudiger v. Coleman, 114 NYS 689.

**7. Search Note:** See notes in 24 L. R. A. 322; 28 A. S. R. 488; 91 Id. 851.

See, also, Mines and Minerals, Cent. Dig. § 222-232; Dec. Dig. §§ 96-108; 27 Cyc. 755-768; 20 A. & E. Enc. L. (2ed.) 787; 22 Id. 226.

**7a.** One may not borrow money, employ counsel, execute notes, etc., on behalf of the partnership. Bentley v. Brossard, 33 Utah, 396, 94 P 736. One partner may bind the firm by a contract employing men to develop the property. Id. Evidence held to show that a member of a firm directed working of mines for the benefit of the firm and not for his individual benefit. Id.

A mining partnership may exist, though all the partners may not have an interest in the property if they have an interest in the working of it,[8] and it is not essential that there be an express agreement to become partners,[9] or an express agreement to share in the profits and losses.[10] The distinctions between a mining and a trading partnership are that a member of the former may assign his interest without the consent of his copartner,[11] and neither the assignment of one partner's interest nor the death of a partner works a dissolution of the firm,[12] and one member of the firm has not power to bind his associates to the same extent as in a trading partnership.[13] Mining partners have a lien on the social property for advances or balances due them for payment of debts,[14] but having divided the product by division orders, giving each his share, no such lien exists on the divided product but remains on the social property used in operating the mines.[15] Claims discovered after dissolution of a partnership belong to the individuals making the discovery.[16] The powers of directors of mining corporations are fixed by statute.[17]

§ 10. *Public mining regulations.*[18]—See 10 C. L. 852—In the exercise of the police power, laws may be enacted requiring precautions in hydraulic mining to prevent injury to others by the discharge of debris into navigable streams, and to ascertain the best means to be adapted to that end.[18a] But the law cannot declare that observance of such precautions shall exonerate the mine owner from liability for injuries to the property of third persons.[19] In New York statutes have been enacted looking to the preservation of liquid minerals.[20] Under a statute making it a crime for a miner

**8.** Bentley v. Brossard, 33 Utah, 396, 94 P 736. Written agreement between owner and another by the latter was to furnish labor and develop mines, profits to be divided and the latter to have a right to purchase an interest, held to create a partnership. Id.

**9.** Bentley v. Brossard, 33 Utah, 396, 94 P 736. A mining partnership exists where several owners of a mine co-operate in working it. Walker v. Bruce [Colo.] 97 P 250. Where two parties obtained a lease of a mine and a bond for a conveyance and each paid one-half the consideration and agreed to work the property jointly and each bear one-half the expense, held equal partners. Id. Where stockholders of a mining corporation, after the treasury was depleted and stock sold, without formal action by the company put up operating expenses, **held not to constitute a partnership,** but voluntary loans to the corporation. Dodge v. Chambers, 43 Colo. 366, 96 P 178.

**10.** Such being an incident to the prosecution of the business. Bentley v. Brossard, 33 Utah, 396, 94 P 736.

**11.** The assignee becomes a partner without the consent of the other partners. Bentley v. Brossard, 33 Utah, 396, 94 P 736. Contract between lessee of a mine and others by which the latter agreed to contribute certain sums of money to operate the mine held as between themselves to be an equitable assignment of part of the lessee's interest, and it was immaterial that his agreement with the owner prohibited assignment without notice. Id.

**12.** Bentley v. Brossard, 33 Utah, 396, 94 P 736. Whether retiring partner is liable for subsequent indebtedness depends on the facts. As to employes who do not know of the change he is liable for wages, but not if they have notice. Kelley v. McNamee [C. C. A.] 164 F 369.

**13.** Bentley v. Brossard, 33 Utah, 396, 94 P 786.

**14, 15.** Greenlee v. Steelsmith [W. Va.] 62 SE 459.

**16.** Mining claims discovered and located by members of a partnership formed for purpose of locating and prospecting claims in a different locality, but after object of partnership had been accomplished, held not to belong to the partnership but to members thereof who discovered them. McGahey v. Oregon King Min. Co., 165 F 86.

**17.** Under Laws 1880, p. 131, amended by Laws 1897, p. 96, prohibiting directors of mining corporation from purchasing additional mining ground unless the act is ratified by two-thirds of the stockholders, such ratification is only required as to additional mining ground, and its character must be shown. Greve v. Echo Oil Co. [Cal. App.] 96 P 904.

**18. Search Note:** See notes in 25 L. R. A. 848; 4 Ann. Cas. 213; 11 Id. 74.

See, also, Mines and Minerals, Cent. Dig. §§ 216-221; Dec. Dig. §§ 86-95; 27 Cyc. 747-753; 20 A. & E. Enc. L. (2ed.) 789.

**18a.** Sutter County v. Nichols, 152 Cal. 688, 93 P 872.

**19.** Sutter County v. Nichols, 152 Cal. 688, 93 P 872. Act Cong. March 1, 1893, c. 183, 27 Stat. 507, providing for appointment of California debris commission, and regulating method of disposing of debris from hydraulic mines, held the purpose of such act was to prevent injury by debris but it was not intended to exonerate the mine owner from liability nor limit the power of the state courts to protect private property. Id. Provisions of the act requiring notice and hearing of all persons interested was not intended to conclude owners of lower lands with respect to injuries that might be inflicted, but to enable the commission to obtain all aid it could from suggestions of interested persons. Id.

**20.** Act N. Y. May 20, 1908, for protection of natural mineral springs of state and pro-

to enter a mine against caution or disobey orders or do any other act endangering lives or health of persons in a mine, intent to endanger life or property is not an element.[21] "Caution" as used in such statute means to give notice of or warn of or against danger.[22]

§ 11. *Statutory liens and charges.*[23]—See 10 C. L. 852—As a general rule any labor expended in developing a mine is entitled to a lien thereon,[23a] and in Alaska such lien extends to the owner's interest where the work is done with his knowledge,[24] and the court may allow an attorney's fee on foreclosure.[25] In New Mexico the court determines upon what the lien attaches.[26]

§ 12. *Mining torts.*[27]—See 10 C. L. 852—A mine owner is liable in damages for injuries caused by removal of subjacent support,[27a] or for injuries to lower owners caused by discharge of tailings or debris into a stream.[28] The measure of damages for removal of subjacent support is the depreciated value of the property,[29] and for knowingly mining coal of another, the value of the coal at the mouth of the pit, less

hibiting pumping of mineral waters from wells drilled into the rock, etc., is not so clearly beyond the police power as to justify a federal court in enjoining its enforcement. Lindsley v. Natural Carbonic Gas Co., 162 F 954. Laws 1908, p. 1221, c. 429, § 1, is a valid exercise of the police power. Hathorn v. Natural Carbonic Gas Co., 112 NYS 374. Not void as depriving the owner of his property without due process. Id. Nor as an unreasonable invasion of property rights. Id. Nor does it deny equal protection of the law. Id.

**21.** Intentional doing of an act with knowledge that life or property will be endangered is the gist of the offense. Koppala v. State [Wyo.] 93 P 662.

**22.** Koppala v. State [Wyo.] 93 P 662. Indictment under such statute alleging that a miner went into a specified mine entry in disobedience of the orders of the mining boss and thereby endangered lives of miners and machinery of a corporation held sufficient. Id.

**23. Search Note:** See Mines and Minerals, Cent. Dig. §§ 233-239; Dec. Dig. §§ 111-117; 27 Cyc. 769-783; 20 A. & E. Enc. L. (2ed.) 790.

**23a.** Work done in cleaning up and washing gold is "labor done on a mine" for which a lien may be had under Civ. Code Alaska, § 262. Cascaden v. Wimbish [C. C. A.] 161 F 241. Where men are hired to work at making improvements on a mine, one who devotes his time to cooking is entitled to a lien. Id.

**24.** Under Civ. Code Alaska, §§ 262, 263, 265, the lien given extends to the owner's interest where work is done at the instance of a lessee with the owner's knowledge and he has made no disclaimer of liability. Cascaden v. Wimbish [C. C. A.] 161 F 241. In suit against owner to establish a lien for work done at instance of lessees, such lessees are not necessary parties, and it was not an abuse of discretion for the court to refuse an amendment joining them when case was ready for trial and they had left the jurisdiction. Id.

**25.** Civ. Code Alaska, § 270, authorizing court to allow attorney's fee in foreclosing a lien is valid. Cascaden v. Wimbish [C. C. A.] 161 F 241.

**26.** Under the statute of New Mexico making it the duty of the court to determine upon what amount of land a lien attaches, held it did not err in holding that a mechanic's lien attached to a mine as well as a mill site where both were inseparably connected. Stearns-Roger Mfg. Co. v. Aztec Gold Min. & Mill. Co. [N. M.] 93 P 706.

**27. Search Note:** See notes in 10 C. L. 852; 2 Ann. Cas. 966; 4 Id. 357; 8 Id. 43.

See, also, Mines and Minerals, Cent. Dig. §§ 136-141, 240-247; Dec. Dig. §§ 50, 51, 118-125; 27 Cyc. 630, 641-649, 783-791; 20 A. & E. Enc. L. (2ed.) 792.

**27a.** Evidence that cracks and fissures, occuring in land when water in well disappeared, were caused by underlying coal mines being insufficiently timbered, shows that injury to the well was caused by the mine owner's negligence in timbering. Sloss-Sheffield Steel & Iron Co. v. House [Ala.] 47 S 572. In an action for injury to a well caused by negligent operation of coal mines, as to who owned the land surrounding plaintiffs was material, and deed offered to show defendant's ownership was admissible. Id. Where absolute right to subjacent support is alleged in a complaint for injuries based on negligence in mining, charge authorizing recovery regardless of negligence is within the issues and not inconsistent with charge authorizing recovery on ground of negligence. Collins v. Gleason Coal Co. [Iowa] 115 NW 497. In an action for damages for injury to surface of one holding title by deed reserving the minerals, evidence held insufficient to show that defendant caused the injury. Knipe v. Anaconda Copper Min. Co., 37 Mont. 161, 95 P 129.

**28.** Discharge of tailings and debris into rivers, filling up beds thereof, and causing overflow of adjacent lands and washing away of bridges, is a nuisance. Sutter County v. Nicols, 152 Cal. 688, 93 P 872. In an action for damages to land fronting on a creek, caused by an adjoining owners' mining operations, by which land was flooded or washed away, instructions held not outside the issues. Salstrom v. Orleans Bar Gold Min. Co., 153 Cal. 551, 96 P 292. Held not argumentative or confusing. Id.

**29.** Charge that measure of damages for removal of subjacent support of land by mining is the depreciated value of the land, etc., held not misleading. Collins v. Gleason Coal Co. [Iowa] 115 NW 497.

the cost of conveying there.[80] An owner who has control of a mine and upon whom is imposed the duty of inspection and keeping it safe is liable to one who comes into the mine by invitation.[81] The extent of the mine owner's duty relative to inspecting the mine for the benefit of licensees depends on the character of the work required.[82]

§ 13. *Remedies and procedure peculiar to mining rights.*[83] See 10 C. L. 653. Pleadings in actions relative to mining rights must conform to the general rules,[83a] and are governed by the general rules of construction,[84] and the general rules apply as to parties litigant.[85] In a suit to quiet title to mineral rights, the complaint should show excuse for long delay in seeking relief.[86] An owner of a gas well may maintain action against the owner of other wells in the same district for illegitimate waste, but not for exhaustion resulting from legitimate use of the gas.[87] Equity may enjoin waste and irreparable injury at the suit of an assignee of an oil and gas lease against a subsequent adverse lessee,[88] and may also enjoin the taking of coal from the land of another.[89] Under the statutes of Alaska, a claim for damages for the unlawful detention of mining property does not affect the right to an injunction to preserve the property from further depletion pendente lite,[90] and an application for such injunction need not show the defendants to be insolvent if the injury is irreparable.[91] The scope of the restraining order rests in its terms.[92] As a general rule mining property is not susceptible of partition in specie,[93] but it may be so partitioned if

**30.** Which is the cost of loading and hauling the coal to the foot of the shaft, hoisting it to the top, and as between owner and wrongdoer general expenses of operating the mine must be charged to mining and not to transportation. McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 NE 174.

**31.** Tennessee Coal, Iron & R. Co. v. Burgess [Ala.] 47 S 1029.

**32.** Frequency of inspection is generally for the jury. Tennessee Coal, Iron & R. Co. v. Burgess [Ala.] 47 S 1029. In an action for injuries to a licensee caused by negligence in operating the mine, plea setting up assumed risk held insufficient. Id. Plea setting up operation by a third person held insufficient, where it did not show that the owner had parted with control of the mine. Id.

**33. Search Note:** See Mines and Minerals, Cent. Dig. §§ 87½-113, 116-119, 132, 136-146; Dec. Dig. §§ 38, 41, 45, 46, 50-52; 27 Cyc. 604-614, 622, 623, 630-670; 14 A. & E. Enc. P. & P. 16.

**33a.** Allegation of breach of contract of sale of mining claims binding the purchaser to prosecute development work diligently and to an extent consistent with good mining and within its resources, that he had not prosecuted such work within his means is, at best, a mere conclusion. Mallory v. Globe Boston Copper Min. Co. [Ariz.] 94 P 1116.

**34.** Complaint to quiet title alleging that plaintiff in fixing and marking his boundaries selected same monuments that had been fixed as corners by defendant and that boundaries of two claims were identical, was not an admission that defendant had marked and monumented his claim and did not nullify a prior allegation that defendant's claim was never marked or monumented. Phillips v. Smith [Ariz.] 96 P 91.

**35.** Where one agreed to transfer a mining lease and property to a company to be organized by another who was to contribute capital to the company, the former could not sue the latter on his failure to contribute since his promise was to pay the company. Sobneider v. Miller, 113 NYS 399.

**36.** Complaint to quiet title to mineral rights alleging that 21 years had passed since cause acorued but that he had no notice that the owner of the surface was claiming title to minerals until within one year, etc., held to sufficiently plead excuse for delay. Steinman v. Jessee, 108 Va. 667, 62 SE 276.

**37.** Calor Oil & Gas Co. v. Franzell, 33 Ky. L. R. 98, 109 SW 328.

**38.** Gillespie v. Fulton Oil & Gas Co., 238 Ill. 188, 86 NE 219.

**39.** Where one wrongfully drove entries through coal of another, in enjoining him from taking coal the court properly enjoined him from going into or using such entries. McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 NE 174.

**40.** Waskey v. McNaught [C. C. A.] 163 F 929. Under Civ. Code Alaska § 386, providing for injunction against threatened injury and § 1 abolishing distinction between actions at law and suits in equity, held in ejectment to recover mining property plaintiff could enjoin mining operations on the land in controversy on a showing that it was chiefly valuable for placer mining and that irreparable injury was threatened. Id.

**41.** Waskey v. McNaught [C. C. A.] 163 F 929.

**42.** An injunction restraining the rocking and sluicing or in any manner the working of the premises did not prevent working of dirt taken from the ground and removing it to other property. Waskey v. McNaught [C. C. A.] 163 F 929. But dirt dug from the ground and hoisted to the surface was still a part of the realty and was covered by the injunction. Id.

**43.** Manley v. Boone [C. C. A.] 159 F 633.

practicable without great injury to the owners.[44] In Alaska the mode of partition is prescribed by statute.[45] A mining license cannot maintain action for unlawful detainer but may enjoin trespass upon his possession.[46]

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**Ministers of State; Minutes; Misjoinder,** see latest topical index.

## MISTAKE AND ACCIDENT.

§ 1. Definition; Elements, 869.
§ 2. Effect of Mistake and Relief Against, 869.
§ 3. Procedure to Obtain Relief or Make Defense, 877.

*The scope of this topic* is noted below.[47]

§ 1. *Definition; elements.*[48] See 10 C. L. 853—Mistake has been defined as some intentional act, omission or error arising from unconsciousness, ignorance, forgetfulnesss, imposition or misplaced confidence.[48a] Accident is an unforeseen occurrence affecting a person injuriously and not due to his own negligence.[49] Whether a case falls under the head of accident or mistake is of no practical importance since equity relieves from both.[50]

§ 2. *Effect of mistake and relief against.*[51] See 10 C. L. 854—Where on account of mistake there is no meeting of the minds as to all the essential elements of a contract, there is no binding obligation.[51a] In case of mutual mistake, equitable relief is granted by rescission [52] or reformation [53] and relief is usually allowed in case

44. Under Alaska Code p. 4, § 404, it must be so partitioned if poasible without great prejudice to the owners. Manley v. Boone [C. C. A.] 159 F 633. Evidence sufficient to justify partition of unpatented mining claims held in common. Leggat v. Blomberg [Idaho] 98 P 723.

45. Under Alaska Codes pt. 4, §§ 405, 409, prescribing how partition shall be affected, the court may not make a division of the property except in the indirect mode of confirming the report of referees appointed to carry out the order of partition. Manley v. Boone [C. C. A.] 159 F 633. Personalty connected with mining property cannot be subject of partition in action to partition such property unless it constitutes part of the realty and it is improper to appoint a receiver to take charge of it. Id.

46. Integrity Min. & Mill. Co. v. Moore, 130 Mo. App. 627, 109 SW 1057.

47. **It includes** the constitnents of mistake, its general effect on contracts, and the manner and sufficiency of proof. The remedies by way of cancellation (see Cancellation of Instruments, 11 C. L. 493), or reformation (see Reformation of Instruments, 10 C. L. 1496), the implied obligation to repay money paid under mistake (see Implied Contracts, 11 C. L. 1876) are more fully treated elsewhere. It also excludes accident and surprise as ground for new trial (see New Trial and Arrest of Judgment, 10 C. L. 999). The related topic of Fraud and Undue Influence, 11 C. L. 1583, should also be consulted.

48. **Search Note:** See notes in 55 A. S. R. 496.

See, also, Cancellation of Instruments, Cent. Dig. §§ 1-48; Dec. Dig §§ 1-31; 6 Cyc. 285-319; Equity, §§ 13-20; Dec. Dig. §§ 4-9; 16 Cyc. 66-75; Reformation of Instruments, Cent. Dig. §§ 1-116; Dec. Dig. §§ 1-29; Specific Performance, Cent. Dig. §§ 155-159; Dec. Dig. § 52; 1 A. & E. Enc. L. (2ed.) 277; 20 Id. 807; 27 Id. 548.

48a. Taylor v. Godfrey, 62 W. Va. 677, 59 SE 631. **Mistake of fact** is an unconscious ignorance or forgetfulness of the existence or nonexistence of a fact past or present material to the contract. Kansas City Packing Box Co. v. Spies [Tex. Civ. App.] 109 SW 432. Mistake takes place when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist; one not caused by neglect of legal duty on part of the person making the mistake, an unconscious ignorance or forgetfulness of a fact past or present material to the contract, etc. Lowe v. Wells Fargo & Co. Exp. [Kan.] 96 P 74.

49. Engler v. Knoblaugh, 131 Mo. App. 481, 110 SW 16. Entry of judgment by error of clerk and attorney rather accident than mistake. Id.

50. Engler v. Knoblaugh, 131 Mo. App. 481, 110 SW 16.

51. **Search Note:** See notes in 4 C. L. 675, 676, 679; 6 L. R. A. (N. S.) 943; 10 Id. 114; 15 Id. 1038; 117 A. S. R. 227.

See, also, Cancellation of Instruments, Cent. Dig. §§ 1-48; Dec. Dig. §§ 1-31; 6 Cyc. 285-319; 7 Equity, Cent. Dig. §§ 13-20; Dec. Dig. §§ 4-9; 16 Cyc. 66-75; Reformation of Instruments, Cent. Dig. §§ 1-116; Dec. Dig. §§ 1-29; Specific Performance, Cent. Dig. §§ 155-159; Dec. Dig. § 52; 1 A. & E. Enc. L. (2ed.) 279; 20 Id. 809; 27 Id. 549.

51a. Where seller by mistake names grossly disproportionate price for goods and purchaser seizes advantage, contract is unenforcible. Cunningham Mfg. Co. v. Rotograph Co., 30 App. D. C. 524.

52. Mistake mutual where both parties have same knowledge and believe themselves acting within their rights. Lewis v. Mote [Iowa] 119 NW 152. **Release** no defense to

personal injury action when induced by mutual mistake of fact predicated on physician's medical opinion as to employe's condition. St. Louis, etc., R. Co. v. Hambright [Ark.] 113 SW 803. Equity will grant relief against **sheriff's deed** on ground of mistake, preventing redemption from execution within statutory time. Thorp v. Kerr [Iowa] 119 NW 267.

**Rescission allowed:** Where plaintiff paid certain amounts as alimony pending suit and in final settlement erroneously included interest upon amounts previously paid, such interest recoverable. Hill v. Hill, 121 La. 578, 46 S 657. Mistake must be mutual one of fact. Weissenfels v. Cable, 208 Mo. 515, 106 SW 1028. Extrinsic evidence of mistake in **signing guaranty** held sufficient to support judgment for defendant. First Nat. Bank of Redlands v. Bowers, 153 Cal. 95, 94 P 422. Where broker by mistake sold certain **stock** of name similar to that ordered to be sold, and gave check for the higher priced stock, he was entitled to have such check canceled. Thompson v. National Bank of Commerce, 132 Mo. App. 225, 110 SW 681. Where mortgagor's grantee paid off **mortgage** under mistaken belief that it was due and also paid mortgagee's attorneys fees, he could recover same, such claims being payable only in case the mortgage was properly collected by suit. Kelsey v. Collins [Tex. Civ. App.] 108 SW 793. Evidence held to show mutual mistake as to quality and value of land in Nebraska to be given by plaintiff in **exchange** for lands in Iowa, entitling defendant to rescind. McDonald v. Benge, 138 Iowa, 591, 116 NW 602. Cancellation granted where grantor believed **conveyance** to be 50 acres when in fact 200 acres, and element of fraud immaterial. Allen v. Tuckett [Miss.] 48 S 186. Where defendant agreed to **purchase** certain land if plaintiff secured right of way for railroad to same and plaintiff secured right of way for tram road immediately after which plaintiff signed deed and secured one-half of purchase money, believing proper right of way had been obtained, on defendant then refusing to pay balance of purchase price, or to condemn for railroad, or to allow its name to be used for such condemnation, equity would grant the necessary relief. Norton Iron Works v. Moreland [Ky.] 113 SW 481. Evidence conflicting but held to show mutual mistake in **sale of timber** where cruiser erroneously estimated amount at 300,000 feet but by mistake of boundary larger amount included. Northcraft v. Blumauer, 49 Wash. 588, 96 P 1118. Where vendor represented **mine** as containing 50,000 tons of mineral and representation based on report of expert inducing purchaser after which mathematical error in expert's calculation discovered, so that mine only contained 5,000 tons, mistake was mutual, entitled to be relieved from. Johnson v. Withers [Cal. App.] 98 P 42.

**Rescission denied:** Evidence insufficient to show omission of parol stipulations in contract by mistake, and terms held conclusive. Kansas City Packing Box Co. v. Spies [Tex. Civ. App.] 109 SW 432. Decree rescinding **deed** at instance of grantee, though predicated on a finding of fact, will be reversed if the contract as expressed in the deed gives the grantee all the grantor could consistently convey, and the oral evidence as to his intention to convey more does not preponderate either way. Isner v. Nydegger, 63 W. Va. 671, 60 SE 793. Where certain defendants **contracted to purchase timber** from third person (party defendant), expecting to sell to plaintiff for exorbitant price by misrepresenting tract, and plaintiff gave check to conspirators to be delivered to third person on execution of bill of sale, which was accomplished, third person retaining his price and giving conspirators balance, such third person was not liable to plaintiffs for money received as paid by mistake. Deering v. Terry's Ex'rs [Ky.] 114 SW 759. Where defendant gave plaintiff **option on land** forgetting previous conveyance of portion of same tract to wife, defendant was not excused from performance because of mutual mistake, such mistake on his own part and no mistake as to identity or existence of subject-matter of contract. Boyden v. Hill, 198 Mass. 477, 85 NE 413. Where defendant gave option on land forgetting previous conveyance of portion of same land, good faith of defendant's forgetfulness is no defense. Evidence of impaired memory properly excluded, there being no issue as to unsoundness of mind. Id. Where husband did not show that a mistaken belief by him that he would inherit certain property caused him to make a certain **settlement** with his wife, he was not entitled to cancellation of a deed by him on the ground of such mistake. Powe v. Culver [Conn.] 69 A 1050. Answer insufficient to show mutual mistake, only kind which would justify rescission of **insurance policy.** Fidelity & Causualty Co. v. Dierks Lumber & Coal Co., 133 Mo. App. 637, 114 SW 55.

**53. Reformation granted:** Where an instrument by mistake of draftsman, either as to fact or law, does not fulfill the intention of the parties, equity will correct the mistake so as to produce a conformity with the instrument intended. Gailey v. New Castle Elastic Pulp Plaster Co., 34 Pa. Super. Ct. 533; Taylor v. Godfrey, 62 W. Va. 677, 59 SE 631. Mere **neglect** or omission to read or know the contents of a written instrument before execution is not necessarily a bar to cancellation thereof. Relief in such case is proper if the instrument, through mistake, fails to accomplish the purpose intended. Taylor v. Godfrey, 62 W. Va. 677, 59 SE 631. Equity will reform where **mutual** mistake. Western Loan & Savings Co. v. Thibodeau [C. C. A.] 159 F 370; Chelsea Nat. Bank v. Smith [N. J. Eq.] 69 A 533; Coppes v. Keystone Paint & Filler Co., 36 Pa. Super. Ct. 38. Reformation more delicate than rescission. Coppes v. Keystone Paint & Filler Co., 36 Pa. Super. Ct. 38. Power of reformation extends to practically every kind of written instrument. **Insurance policy.** Sykes v. Life Ins. Co. of Virginia, 148 N. C. 13, 61 SE 610. Terms and conditions of sale not merged in **deed** so as to bar grantor from alleging true consideration and fact that various covenants were omitted by mistake. Townsend v. Lacock [Pa.] 71 A 187. Relief granted where material mutual error in deed. Allen v. Luckett [Miss.] 48 S 186. Description by metes and bounds does not preclude reformation to express true intent of parties. Home & Farm Co. v. Freitas, 153 Cal. 680, 96 P 308. Evidence held to show mutual mistake in description of deed and more land than contemplated conveyed. Id. Refor-

of unilateral mistake [54] induced by fraud.[55] A prerequisite is freedom from negli-

mation of deed conveying 11 feet of lot when only 9 feet were intended. Clark v. Basso, 152 Mich. 674, 15 Det. Leg. N. 387, 116 NW 531. Reformation of deed proper where containing different tract of land, if transaction treated as mistake. Morgan v. Combs, 32 Ky. L. R. 1205, 108 SW 272. Modified for benefit of bona fide purchaser. Id. 33 Ky. L. R. 817, 111 SW 294. Where plaintiff entered into contract with reciever of railroad for **delivery of coal** and railroad was later sold to defendant, evidence held to show mutual mistake of fact, parties believing themselves to be acting under contract with receiver and deliveries consequently made at inadequate price to defendant. Sloss Iron & Steel Co. v. South Carolina & G. R. Co., 162 F 542. Results of mutual mistake of fact corrected, prices reformed, settlements opened for that purpose and allowances made to party injured. Id.

**Reformation denied:** No mistake. Moran Bolt & Nut Mfg. Co. v. St. Louis Car Co., 210 Mo. 715, 109 SW 47. Mistake as to reservation of land in **deed** not mutual and relief denied. Hope v. Bourland [Okl.] 98 P 580. Where in answer to offer, grantor submitted different deed and offer was accepted. Coppes v. Keystone Paint & Filler Co., 36 Pa. Super. Ct. 38. Evidence insufficient to warrant finding that deed incorrectly described lines intended at execution and reformation denied. Hapeman v. McNeal, 48 Wash. 527, 93 P 1076. Reformation of deed unnecessary when construed to effectuate intention of parties and where words of limitation in habendum clause rather than premises were afterwards wrongfully clipped from deed, aiding establishment of intent. Condon v. Secrest [N. C.] 62 SE 921. Evidence insufficient to show mutual mistake of terms of **agreement** as to persons liable thereon. Smith v. Interior Warehouse Co. [Or.] 95 P 499. No evidence of mistake in giving **note** for sheriff's deed so as to entitle plaintiff to cancellation of judgment on note and reconveyance. Miller v. Pratt, 33 Pa. Super. Ct. 547. Where there was a mistake as to the meaning of the contents of a **deed** at the time of its signature but full knowledge was had before acknowledgment, the **acknowledgment related back** to the signing and rendered it as effectual as if full knowledge were had at that time. Where married woman thought on signing deed of timber land that it conveyed only the **timber.** Johnson Lumber Co. v. Leonard, 145 N. C. 339, 59 SE 134. Evidence held insufficient to show an intent to include after acquired property that it was omitted by mutual mistake from **mortgage.** White Co. v. Carroll, 147 N. C. 330, 61 SE 196. Where plaintiff and defendant had been **partners** and latter purchased former's interest, specifically including rights to indemnity against defalcations of certain bookkeeper and there was no examination of account books, though it was also agreed that cash on hand and in bank should be equally divided, and subsequently defendant discovered defalcations and recovered $4500 as indemnity, plaintiff was not entitled to one-half of such indemnity, there being no mutual mistake. Cohen v. Haberman, 126 App. Div. 710, 111 NYS 67. Reformation of **insurance** policy denied where effect would be to allow insured to receive additional insurance and repudiate obligation at his convenience. Fidelity & Casualty Co. v. Dierks Lumber & Coal Co., 133 Mo. App. 637, 114 SW 55.

**54.** In case of unilateral mistake, remedy is by rescission. Chelsea Nat. Bank v. Smith [N. J. Eq.] 69 A 533.

**55. Rescission:** Equity will not relieve vendor by quitclaim deed because estate larger than vendor supposed. Faxon v. Baldwin, 136 Iowa, 519, 114 NW 40. Where defendant with knowledge that certain person was entitled to one-half of land but believed herself entitled to one-third, secured conveyance from such person based on her mistaken belief, he was guilty of fraud and conveyance set aside. Id. Where vendor points out several tracts as making up farm, vendee may rely on misrepresentation unless put on inquiry. Selby v. Watson, 137 Iowa, 97, 114 NW 609. Where oral agreement for purchase of certain land and other land substituted in written contract, vendee may rescind. Id. Relief on ground of mistake without proof of knowledge on part of vendor in misrepresentation. Id. Where different land substituted in written agreement and vendee elected to rescind value immaterial. Id. Representation of fact for purpose of declaring fraud, also fact when considered in connection with mistake to justify rescission. Johnson v. Withers [Cal. App.] 98 P 42.

**Reformation:** Contract will be reformed in case of unilateral mistake accompanied by fraud. Western Loan & Savings Co. v. Thibodeau [C. C. A.] 159 F 370; Chelsea Nat. Bank v. Smith [N. J. Eq.] 69 A 533; Sykes v. Life Ins. Co., 148 N. C. 13, 61 SE 610. Evidence held to show signing of **lease** by mistake and that defendant by silence secured terms less than those agreed upon. Chelsea Nat. Bank v. Smith [N. J. Eq.] 69 A 533. Where person by mistake induced by defendant's agent contracted for **insurance** policy believing that they provided for life insurance for term of years and subsequent repayment of premiums with interest, where in fact no substantial benefits except in case of death, and contract carried out to extent of furnishing insurance for stipulated term, policy would be reformed and specifically enforced. Sykes v. Life Ins. Co., 148 N. C. 13, 61 SE 610. Where illiterate person's ability to read affected by pain and influence of opiates to relieve pain, and in such condition induced to sign **accord and satisfaction** by fraud, instrument would be reformed. Dannelly v. Cuthbert Oil Co. [Ga.] 63 SE 257. Evidence held to show execution of note and **mortgage** in good faith under honest mistake without negligence coupled with fraud on part of lender in securing excessive interest. Western Loan & Savings Co. v. Thibodeau [C. C. A.] 159 F 370.

**Relief denied:** No evidence of fraud if unilateral mistake in failing to reserve portion of land in deed, Hope v. Bourland [Okl.] 98 P 580. Evidence insufficient to show mistake and fraud in execution of deed as to omission of clause withholding right to mortgage, or clause as to reversion. Elliott v. Elliott [Tex. Civ. App.] 109 SW 215; Id. [Tex. Civ. App.] 109 SW 1142.

gence [56] and rescission is generally withheld where the parties cannot be placed in statu quo.[57] Where a deed misnames a grantee, the error is not corrected by a subsequent deed to the supposed grantee [58] and a suit against the grantor's administrator which is not a proceeding in rem is also ineffectual.[59] A mutual mistake in a deed may prevent a subsequent bona fide purchaser to oust the grantee.[60] Where one obtains title to land by mistake, he may be treated in equity as a trustee of the legal title for the equitable owner, irrespective of whether the latter ever had the legal title.[61] To bind a corporation by ratification of a preliminary agreement omitted by mutual mistake, the corporation must have full knowledge of the facts and that it would be bound by ratification.[62] An administrator's suit for damages because of a sale of land by decedent at an inadequate price is defeated by showing a mistake in the deed preventing the passing of title,[63] and a grantee in a deed has no standing in equity to have a deed corrected for mistake, though the consideration is paid where the grantor was of unsound mind.[64] Relief may be barred by estoppel.[65] For a mistake of law there is generally no relief,[66] but there are exceptions as where

**56.** Ordinary diligence required. Galley v. New Castle Elastic Pulp Plaster Co., 34 Pa. Super. Ct. 533. No equitable elements of mistake when due to plaintiff's "neglect and oversight." Id. Evidence insufficient to warrant reformation of deed where answer denies omission, mistake ignored for several years and admitted by plaintiff to be due to carelessness. Id. Party refusing to read instrument, or who, being unable to read, neglects to have instrument read or explained, guilty of negligence and unprotected. Coppes v. Keystone Paint & Filler Co., 36 Pa. Super. Ct. 38. Reformation of deed by striking building restriction denied where grantee accepted instrument without reading. Coppes v. Keystone Paint & Filler Co., 36 Pa. Super. Ct. 38; Kansas City Packing Box Co. v. Sples [Tex. Civ. App.] 109 SW 432. Person signing written instrument with full knowledge or opportunity of ascertaining its contents cannot avoid for mistake, in the absence of fraud. No relief for mistake due to plaintiff's negligence, information being available and no fraud practiced. National Union Fire Ins. Co. v. John Spry Lumber Co., 235 Ill. 98, 85 NE 256. Must appear that mistake not due to negligence of plaintiff. Benting v. Bell, 137 Ill. App. 600. No reformation because of mistake where defendants signed contract without reading or having it read and were not misled as to contents. Weltner v. Thurmond [Wyo.] 98 P 590. Specific performance cannot be defeated where omission of terms due to negligence. Krah v. Wassmer [N. J. Eq.] 71 A 404. Negligence will not bar relief on the ground of mistake if the other party has not been prejudiced. Taylor v. Godfrey, 62 W. Va. 677, 59 SE 631.

**57.** Gailey v. New Castle Elastic Pulp Plaster Co., 34 Pa. Super. Ct. 533. Relief where parties cannot be placed in statu quo, only granted where clearest and strongest equity imperatively demands it. Id. No offer to place in statu quo. Hope v. Bourland [Okl.] 98 P 580. Under Rev. Civ. Code § 2354, providing that rescission cannot be adjudged for mistake unless defendant can be restored to substantially same condition as when contract was made, court may order return of cash value of horse which has been disposed of. Wolfinger v. Thomas [S. D.] 115 NW 100. Party claiming equitable relief against sheriff's deed on execution because of mistake preventing redemption must give prompt notice to holder of deed and tender redemption money, and relief will be denied where no averments of such notice and tender. Tharp v. Kerr [Iowa] 119 NW 267.

**58.** Where deed misnamed grantee, mistake could not be corrected by subsequent deed by grantor to person alleged to have been grantee, intended in original deed and reciting that such subsequent deed was to correct error. Walters v. Mitchell, 6 Cal. App. 410, 92 P 315.

**59.** Where deed alleged to misname grantee, suit by subsequent grantee together with person alleged to be grantee intended against grantor's administrator to correct mistake, was not proceeding in rem, and decree of reformation was ineffective to correct mistake. Walters v. Mitchell, 6 Cal. App. 610, 92 P 315.

**60.** Where mutual mistake in description of deed followed by possession of grantees, subsequent purchaser from owner bound to take notice of grantee's rights and could not become bona fide purchaser entitled to hold against such grantees. Garard v. Weaver [Ind. App.] 84 NE 1092.

**61.** Lamb v. Schiefner, 114 NYS 34. Where agent received instructions to prepare deeds for certain land to plaintiff and included same land in deed to himself, both deeds being executed and delivered, the land included in the agent's deed was held to be so included by mistake, and the grantee (defendant) held same as trustee for the grantor and plaintiff, having received his conveyance became the equitable owner entitled to sue to enforce the trust. Id.

**62.** Gailey v. New Castle Elastic Pulp Plaster Co., 34 Pa. Super. Ct. 533.

**63, 64.** Kreiger v. De Mass, 41 Ind. App. 252, 83 NE 734.

**65.** Insurance company having kept policies several months without objection cannot seek reformation because of mistake, the property having been destroyed. National Union Fire Ins. Co. v. John Spry Lumber Co., 235 Ill. 98, 85 NE 256.

**66.** Carpenter v. Southworth [C. C. A.] 165 F 428. Money paid under mistake of law without knowledge of facts, deceit or un-

due influence not recoverable. Scott v. Ford [Or.] 97 P 99. Voluntary payment with full knowledge of facts cannot be recovered if transaction is unaffected by fraud, trust, confidence or like merely because payor is ignorant of legal rights. Thorsen v. Harper, 50 Or. 497, 93 P 361. Bond to indemnify against mechanic's liens. Not rendered ineffectual because entered into by parties under mistake of law. R. Connor Co. v. Aetna Indemnity Co., 136 Wis. 13, 115 NW 811. Money paid under mistake of law for sick benefit insurance, where plaintiff expected return of premiums minus benefits at expiration of ten years, which contract was ultra vires, not recoverable. Southern Mut. Aid Ass'n v. Watson [Ala.] 45 S 649. No ground for relief where defendant acted under counsel's erroneous view of law that certain certificate of stock could be delivered 30 days after remittitur of court of appeals had been filed in supreme court when in fact to be delivered within 30 days after affirmance by court of appeals. Treadwell v. Clark, 124 App. Div. 260, 108 NYS 733. Where testator domiciled in sister state added codicil to will bequeathing share of daughter to five children, daughter having died subsequent to execution of will, and daughter had six children one of whom died before execution of will leaving infant survivor and executors paid share to such infant under belief that she was entitled to same, held that in absence of proof of laws of sister state common law presumed in force and infant not entitled to share rendering payment under mistake of law and not recoverable. Scott v. Ford [Or.] 97 P 99. On new trial petition amended and statute of sister state pleaded showing payment under mistake of fact and hence recoverable. Id.

**NOTE. Equitable jurisdiction of unilateral error of law:** It has been stated that the jurisdiction of chancery to relieve from error of law is "a recognized and highly beneficial branch of remedial justice." Story, Eq. Jur., 12th ed., Redfield's note, § 138a, et seq.; id. 13th ed., Bigelow's note, 112 et seq. That logically and as a matter of policy such relief should be granted, 7 Columbia L. R. 279, is neither reason nor excuse for a misstatement of the present status of the law. Eight criteria of relief from unilateral error (to which this discussion is confined) have been advanced. The theory of Lord Westbury that ignorantia juris non excusat has reference only to general law as distinguished from private right and interest, Cooper v. Phibbs (1867) L. R. 2 Eng. & Ir. App. 149, apart from an obvious difficulty of application, is supported only by dicta. In a quite different sense, the suggestion has a proper use, special as distinguished from general legislative acts being without the operation of the maxim. King v. Doolittle 1 Head [Tenn.] 77. Lord King's attempt to relegate the rule to criminal jurisprudence solely. Lansdown v. Lansdown (1730) Mos. 364; Wyche v. Greene, 16 Ga. 49, 57, is likewise irreconcilable with authority. Rankin v. Mortimer, 7 Watts [Pa.] 372; Goltra v. Sanasack, 53 Ill. 456. A mistake concerning an unquestioned, unequivocal legal rule has been held relievable; otherwise where the mistake concerns a doubtful or unsettled rule. Snell, Equity, 371. Whether true or not where compromises are concerned, Naylor v. Winch (1874) 1 Sim. & Stu. 555; cf. Faust's Adm'x v. Birner, 30 Mo. 414, so far is this test from being universal that some jurisdictions hold exactly the reverse, giving relief "where the law is confessedly doubtful and * * * ignorance may well exist." McKay v. Smith, 27 Wash. 442, 67 P 982; Bispham, Eq., 5th ed., 275. Neither distinction seems theoretically intelligible or of practical expediency. Good v. Herr, 7 Watts & S. [Pa.] 253. Where relief seems given for error of settled law, Lansdown v. Lansdown, supra, the error is not per se the foundation of jurisdiction but rather a medium to establish some other proper ground of relief. Hunt v. Rhodes, 1 Pet. [U. S.] 1, 15, 16, 7 Law Ed. 33. Adopting a dictum that "ignorance is not mistake" (Fletcher v. Tollet (1799) 5 Ves. 14), a few Southern jurisdictions maintain that confusion has arisen from failure to differentiate the former which is passive and incapable of proof, hence never relievable from the latter (Lawrence v. Beaubien, 2 Bailey [S. C.] 623, 23 Am. Dec. 155; Culbreath v. Culbreath, 7 Ga. 64, 50 Am. Dec. 375; State v. Paup, 13 Ark. 129, 56 Am. Dec. 303). The overwhelming weight of authority, indicating that "this savors of hair-splitting" (Griffith v. Sebastian County, 49 Ark. 24), and that the result of the two is identical (Bouvier, Law Dict., tit. Ignorance), rejects the distinction (Schlesinger v. U. S., 1 Ct. of Cl. 16; Gwynn v. Hamilton's Adm'r, 29 Ala. 233). In accordance with an equitable tendency, error of law, admittedly not a ground for affirmative relief, has been held a good defense. Sullivan v. Jennings, 44 N. J. Eq. 11, 14 A 104. Obviously, the mistake when combined with other elements which practically invariably appear, infra, where relief is granted, is more effective from the negative than from the affirmative aspect. But to assert a general rule as stated would be not only to ignore authority but to overlook the true, if not always the confessed ratio decidendi. See Peters v. Florence, 38 Pa. 194. Arguing that a person may err as to his own antecedent legal rights which are to be affected, although he fully understands the effect of the transaction itself, or may be correct as to his existing rights and in error with respect to legal effect, it has been ingeniously suggested that error of law of the first, "analgous to, if not identical with, a mistake of fact," is relievable, while error of the second type is not. Pomeroy, Eq. Jur., § 849. In deciding "hard" cases, some jurisdictions have willingly fallen into this mistake. Toland v. Corey, 6 Utah, 392, 24 P 190; Alabama, etc., R. Co. v. Jones, 73 Miss. 110, 19 S 105, 55 Am. St. Rep. 488; Gross v. Leber, 47 Pa. 520. However, the principal of ignorantio juris non excusat was unquestionably derived from the civil law (1 Spence, Eq. Jur. 632), in which the typical case of unrelievable error of law undeniably falls within the first class. Dig., XXII tit. VI, 1, 9. Logically, also, the maxim not merely charges the individual with knowledge of effect, but also with knowledge of his legal rights. Evans v. Hughes County, 3 S. D. 244, 52 NW 1062; Jordan v. Stevens, 51 Me. 78, 81 Am. Dec. 556. Strong authority supports this position. Weed v. Weed, 94 N. Y. 243; Haviland v. Willets, 141 N. Y. 35, 35 NE 958; Gwynn v. Hamilton's Adm'r, supra; Bintley v. Whittemore, 18 N. J. Eq. 366; Peters v. Florence, supra;

Norris v. Crowe, 206 Pa. 438, 55 A 1125, 98 Am. St. Rep. 783; Stafford v. Stafford, 1 De Gex. & J. 193, 202; Zollman v. Moore, 21 Grat. [Va.] 313. If, on the other hand, the error is admitted, for argument's sake, as one of fact, the emptiness of the proposed criterion of unilateral error of law becomes manifest.

The reason for the failure of the tests thus for considered to explain the exercise of the relief oftentimes granted in cases of either type indicated, appears to lie in the assumption that for pure error of law of some sort or another, equity will interfere. The decided weight of authority, however, demonstrates that astute as Chancery is to furnish a remedy where there is error of law (Hemphill v. Moody, 64 Ala. 467), a mere naked error is not relievable (Midland, etc., R. Co. v. Johnson, 4 Jur. N. S. 643); but where relief is granted some other and special equity is also present as a controlling factor (Bank v. Daniel, 12 Pet. [U. S.] 32, 9 Law. Ed. 989; Hollingsworth v. Stone, 90 Ind. 244). Thus, any trace of constructive fraud, or of inequitable conduct, as where one party knew and took advantage of an error of law by the other which he did not correct (Haviland v. Willets, supra), will turn the scale. A fortiori, relief is justified by evidence of misrepresentation (The Chestnut-Hill etc., Co. v. Chase, 14 Conn. 123; Hardigree v. Mitchum, 51 Ala. 151), even though innocent (Wilson v. Maryland, etc., Co., 60 Md. 150), undue influence (Sands v. Sands, 112 Ill. 225), surprise (Evans v. Llewellyn, 1 Cox Eq. Cas. 332), imbecility (Nelson v. Betts, 21 Mo. App. 219), misplaced confidence (Hall v. Otterson, 52 N. J. Eq. 522, 28 A 907), deception (Toland v. Corey, supra), ignorance of the facts (Lumber Exch. Bank v. Miller, 18 Misc. [N. Y.] 127, 40 NYS 1073), a fiduciary relation (Ludington v. Patton, 111 Wis. 208, 86 NW 571), or gross disparity in position (Alabama, etc., Co. v. Jones, supra). A few jurisdictions add the further qualification that if a decree would result in an unconscionable advantage, the hardship plus the error suffices. Wilson v. Ott, 173 Pa. 253, 34 A 23, 51 Am. St. Rep. 767; Griswold v. Hazard (1890) 141 U. S. 260, 35 Law Ed. 678. Contra, Champin v. Layton, 18 Wend. [N. Y.] 407; Weed v. Weed, supra; Lancaster v. Flowers, 208 Pa. 199. The conclusion necessarily follows that the vast majority of decisions relied on to sustain the doctrine of remedy for unilateral error of law falls short of that position. Willard, Eq. Jur. (2d Ed.) 61. A recent Iowa decision is in full harmony with this theory. The plaintiff, though aware of the facts, was ignorant of the quantum of her interest, that is of her antecedent rights, the case falling accordingly within the first group above discussed, where relief for naked error of law is said to be allowed. It appeared, however, that although the defendant knew of the plaintiff's mistake, he made no endeavor to rectify it. Rescission of a conveyance was, therefore, properly granted. Faxon v. Baldwin, 136 Iowa, 519, 114 NW 40. The error of law, combined with the constructive fraud of the defendant, made out a perfect case for equitable relief under the authorities.

**Equitable jurisdiction of mutual error of law:** Courts are in substantial accord upon two aspects of this subject. First, mutual mistake of foreign law is relievable. Such error while almost universally regarded as pure error of fact (Kerr, Fraud and Mistake, (2nd Ed.) 466; Imperial etc. of Trieste v. Funder 21 Week. R. 116), is as genuine mistake of law as mistake of the lex fori. The true basis—that the ignorance concerns that which the individual is excusable for failure to know— has apparently been over looked. Second, in compromises the existence of mistake, properly so-called is manifestly impossible. Both parties have done just as intended, namely, to assume the contingency of gaining or losing by the arrangement according as the law should prove. Hall v. Wheeler, 37 Minn. 522, 35 NW 377. Family settlements, in so far as they involve this element, proceed upon the same principle. Burnes v. Burnes, 132 F 485. It has been suggested, without attempt at definition of the language employed, that when both parties to the compromise mistake a "plain and settled principal of law" relief should be granted. Sir John Leach in Naylor v. Winch, (1824) 1 Sim. & Stu. 555, 564. This distinction, it is submitted, is not only unsupported by authority, cf. Faust's Adm'x v. Birner, 30 Mo. 414, but logically unsound, for the error is less excusable and pari passu more reprehensible than where a dubious and disputed rule is in question. Cf. Good v. Herr, 7 Watts & S. [Pa.] 253, 42 Am. Dec. 230. The substantial recognition of these principles, unsettled as they still are in some respects, is in striking contrast with the numerous conflicting views of the proper jurisdictional test for error of law in general.

Where the written instrument, from error as to the legal effect of the language used, fails to express the intention of the parties, for example, where a scrivener misuses technical terminology (Hunt v. Rousmanier, 8 Wheat [U. S.] 174, 5 Law Ed. 589; 1 Pet. [U. S.] 1, 7 Law. Ed. 27), or errs in the legal force of a description (Pitcher v. Hennessey, 48 N. Y. 415), and the parties accept the document under the belief that it sets forth their bargain, the weight of judicial authority and the majority of text writers (Pomeroy, Eq. Jur., §§ 843, 845; Story, Eq. Jur., § 114), insists that "equity will grant relief * * * and it matters not whether such mistake be called one of law or fact" (Beach, Mod. Eq. Jur., 540; cf. Canedy v. Marcy, 13 Gray, 373). In a recent Massachusetts case of this character the mistake was regarded as "pure error of fact." Enstis Mfg. Co. v. Saco Brick Co., 198 Mass. 212, 84 NE 449. If the mistake be one of fact, reformation may, of course, as in all bilateral error of fact, be granted. But, whether the legal force of the words employed be mistaken by the parties themselves or by their agent, the mistake seems clearly error of law as to the nature of the agreement adopted. Fowler v. Black, 136 Ill. 363, 26 NE 596, 11 L. R. A. 670. The distinction between such cases and cases in which the parties mistake the legal effect of an instrument —which practically all authorities (Eldridge v. Dexter, etc., R. Co., 88 Me. 191, 33 A 974; Dupre v. Thompson, 4 Barb. [N. Y.] 279; Proctor v. Thrall, 22 Vt. 262), including the authors above cited (Pomeroy, Eq. Jur. § 843; Story, Eq. Jur. §§ 112, 113), join in declaring unrelievable—is trifling, if indeed, discoverable at all, from any logical standpoint.

there is a total failure of consideration[67] in the case of payments to trustees in bankruptcy or other court officers;[68] and the doctrine has been held not to apply to mistakes of persons as to their own private legal rights,[69] such as a mistake as to ownership,[70] or a mistake in drawing a deed.[71] Mistake of law is never a good foun-

The parties agree upon the writing as stating their contract in the one instance as fully as in the other. 5 Columbia L. R. 376. The significance of the desire to find the nonexistent element of error of fact and thereby explain the relief granted in this class of cases is very manifest.

A recent Virginia case (Burton v. Haden, 108 Va. 51, 60 SE 736), in effect overruling an earlier decision (Zollman v. Moore [Va.] 21 Gratt. 313), illustrates the tendency to regard error of antecedent and existing private rights—whether mutual or unilateral—as relievable, in contradistinction to error of law with respect to the legal effect of an instrument. Pomeroy, Eq. Jur. § 849. On the ground that both parties were laboring under the erroneous impression that the grantor was entitled under a deed to a lesser estate than the deed actually conveyed. Chancery set aside a conveyance of the "entire interest." The court regarded the error "as analogous to, if not identical with, a mistake of fact." That the mistake logically, under the authorities, and from the standpoint of the Civil Law, whence the maxim Ingorantia juris non excusat was derived, is mistake of law and logically indistinguishable from error as to the legal effect of an instrument, concededly unrelievable, supra, was indicated in 8 Columbia L. R. 211, in a discussion of unilateral error. However erroneous and unsound it may be to regard the mistake as one of fact, that position is nevertheless at least intelligible, when compared with the view which regards the mistake as partaking of both and yet in toto of neither (Goff v. Gott [Tenn.] 5 Sneed, 562; Gerdine v. Menage, 41 Minn. 417, 43 NW 91), and which not only unnecessarily creates a veritable terram incognitam, but fails to note that in every statement or misstatement of law, a fact—the condition of the law—is necessarily stated. See Purvines v. Harrison, 151 Ill. 219, 37 NE 705.

In a note to Story, Eq. Jur. (13th Ed.) 115 et. seq., Prof. Bigelow suggests that where the parties have deliberated on the law and then have chosen a course of action equity should never relieve; vice versa, if there was unconscious ignorance of the existence of any question of law. Mr. Woodward, in 5 Columbia L. R., 377 et. seq., modifies this by submitting "the test of choice, with or without deliberation." Apart from any question of the premium seemingly placed upon ignorance as distinguished from intelligent activity, not only does the enforcement of either proposed rule present serious practical difficulty, but the authorities fail even to intimate its existence, or to extend judicial favor to it, even where the subject is res nova. While its sponsors express "no doubt that a large number of cases may be brought into line with it," this contention is gravely open to doubt. In New York, for example, the test fails completely. Maher v. Hibernia Ins. Co., 67 N. Y. 283; Marsh v. McNair, 48 Hun [N. Y.] 117; Dupre v. Thompson, supra. See also Ottenheimer v. Cook, Heisk [Tenn.] 309; Stedwell v. Anderson, 21 Conn. 139; Easter v. Severin, 78 Ind. 540; Eldridge v. R. R. Co., supra.

While in numerous cases other and possibly controlling equities are present (Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co., 118 Mich. 109, 76 NW 395, 128), it must be conceded that in numerous cases, chancery has granted relief on one theory or another. The weight of authority to-day, however, is still in accordance with ths rule Ignorantia juris non excusat, which, a high authority notwithstanding, Scott, Cases on Quasi-Contracts, 406, Note 1. has been recognized from the earliest periods of equity jurisdiction. Doctor and Student, Dial. 1, ch. 26; Dial. 2, ch, 46; Irnham v. Child, 1 Bro. Ch. 92. The unsound basis of ths maxim in principle as applied to civil cases, its contrariety to Continental thought, 7 Columbia L. R. 476, and the lack of reason, from the standpoint of natural justice, for allowing relief for mutual ignorance of fact, yet denying it for mutual ignorance of law, explain the illogical and increasing exceptions, of which the two principal cases are characteristic. It is submitted that the true remedy for the unfortunate situation can be found only in legislative action, and the newer and more progressive jurisdictions, alive at once to the strength of stare decisis in modern equity, 5 Columbia L. R. 25, and to the necessity for relief, have not been slow to adopt this solution. N. Dak. Civ. Code § 3854; Cal. Civ. Code § 1578; S. Dak. Civ. Code § 1207; Oklahoma Revised Statutes, Ch. 15, § 20.—Adapted from 8 Columbia L. R. 211; Id., 484.

67. Immaterial whether mistake of law or fact when total failure of consideration. Southern Mut. Aid Ass'n v. Watson [Ala.] 45 S 649.

68. Carpenter v. Southworth [C. C. A.] 165 F 428.

69. Burton v. Haden, 108 Va. 51, 60 SE 736. Where a person is ignorant or mistaken as to his private legal rights and enters into a transaction, misunderstanding its legal scope and operation, for the purpose of affecting such assumed rights, equity will grant relief, treating the mistake as analogous if not identical with mistake of fact. Burton v. Haden, 108 Va. 51, 60 SE 736.

70. Equity will set asids a conveyance which conveys the entire interest where both parties believed the grantor owned only one-third interest when as a matter of fact she owned the fee simple. Burton v. Haden, 108 Va. 51, 60 SE 736. Where person believed himself heir to certain land by adoption and conveyed his interest in premises, when in fact not adopted and having no interest, equity will correct mistake as to ownership. Lewis v. Mote [Iowa] 119 NW 152. Where a purchaser is wronged by a mistake of the grantor as to his interest, the deed will be treated as an executory contract to convey and a rescission may be decreed. Lewis v. Mote [Iowa] 119 NW 152. Where in rescission of deed grantor had no

dation for acquiring property.[72] Money paid under mistake of fact may be recovered,[73] unless the other party has so changed his position that a return would be unjust,[74] where the facts are such that the payee in good conscience should retain the sum,[75] or the payment is deemed voluntary,[76] or a rule of negotiable instruments is involved.[77] An account stated may be impeached for mistake.[78] A mistake of fact resulting in the recovery of a judgment may be ground for the interposition of equity in setting aside such judgment.[79]

title, deed should be cancelled. Lewis v. Mote [Iowa] 119 NW 152.

**71.** Where parties in drawing deed to convey life estate placed words of limitation in habendum instead of premises under impression that place was immaterial, error was mistake of law which could be corrected to effectuate intention of parties. Condor v. Secrest [N. C.] 62 SE 921. Placing of words of limitation in deed in habendum clause rather than premises held mistake of law of scrivener and parties, rather than mistake of fact of scrivener. Id.

**72.** Doctrine of 10 year prescription inapplicable to acquire certain property which purchaser knew seller had no right to sell except in manner provided by law, and belief of purchaser as to validity of title mistake of law. Leury v. Mayer [La.] 47 S 839.

**73.** Scott v. Ford [Or.] 97 P 99; Thorsen v. Hooper, 50 Or. 497, 93 P 361. Though negligently made. Trust Company of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84; Moran v. Brown, 113 NYS 1038. In action to recover excessive commissions paid for selling realty under mistake as to customary commissions, evidence held to sustain finding that usual rate was as claimed by plaintiff. Id. Where express messenger was thought to have lost package of money and father believing same lost paid amount, and subsequently it was discovered that package had been delivered to office, boy neglecting to receive receipt, and it appeared that same had been stolen by another employe, all employes being under bond, the sum paid by the father was recoverable as paid by mistake of fact. Lowe v. Wells Fargo & Co. Exp. [Kan.] 96 P 74. Where lost money repaid and company gave receipt agreeing to refund same, the receipt, if construed by acceptance as a contract, could be avoided by mistake of fact under which it was made. Lowe v. Wells Fargo & Co. Exp. [Kan.] 96 P 74. Where sheriff notified administrator that he had order from court ordering payment of judgment out of funds of estate, when in fact no such order had been made, and administrator paid claim on advice of his attorney who was, without his knowledge, acting for defendant. Thorsen v. Hooper, 50 Or. 497, 93 P 361. Payment was made on mistake of fact and was recoverable. Where plaintiff believed deed of parents to be inforceable and paid $800 for relief from nonperformance, such sum was recoverable, deed being actually unenforceable and sum recovered by vendees either by mistake or fraud. Tucker v. Denton, 32 Ky. L. R. 521, 106 SW 280. Where plaintiff paid sum under mistake to release parents from conveyance, latter's moral obligation to convey not sufficient consideration. Id.

**74.** Moran v. Brown, 113 NYS 1038.

**75.** Action equitable. Carpenter v. Southworth [C. C. A.] 165 F 428.

**76.** Payment of claim by administrator with full knowledge of all surrounding circumstances, including insolvency of estate, deemed voluntary and no recovery. Scott v. Morris, 131 Ill. App. 605. Plaintiff not volunteer to preclude recovery where sum paid to release parents from conveyance under mistake of fact. Tucker v. Denton, 32 Ky. L. R. 521, 106 SW 280.

**77.** Negotiable Instruments, 10 C. L. 962. Payment of forged bill of exchange not recoverable. Trust Co. of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84. Payment of note, held for collection, by mistake extinguished debt, and note being surrendered to plaintiff subsequent endorsement by agent for collection was ineffectual to render payor purchaser so as to sue maker. Charnock v. Jones [S. D.] 115 NW 1072.

**78.** Boyce v. Walker, 114 NYS 166. Relief denied where account settled with knowledge of mistake as to weighing articles and no showing that plaintiff misled. Johnson v. Gallatin Valley Mill. Co. [Mont.] 98 P 883. Evidence held not to show grain delivered as incorrectly weighed or that plaintiff was not credited with full amount delivered so as to entitle plaintiff to correction of account stated. Id. In action to foreclose mortgage given in settlement of balance claimed by plaintiff as shown by an account stated, it was error to exclude evidence showing no consideration for mortgage, that account was erroneous in that more lumber had been furnished plaintiff than credited, that no defective lumber was delivered, and that the mistake in the account was not discovered until after the settlement. Boyce v. Walker, 114 NYS 16.

**79.** Hilt v. Heimberger, 235 Ill. 235, 85 NE 304. Evidence held to show that defendant did not understand that summons was being read to him and that he was not legally served with summons authorizing setting aside of judgment. Id. Procedure lies to restrain judgment for mistake and such procedure direct attack. Engler v. Knoblaugh, 131 Mo. App. 481, 110 SW 16. Equity will grant relief against misprisions and mistakes in court proceedings not of a judicial character and even against judicial mistakes, where the court has been misled as to a fact and has pronounced a judgment which would otherwise not have been given. Engler v. Knoblaugh, 131 Mo. App. 481, 110 SW 16. Freedom from negligence essential condition of relief for erroneous entry of judgment. Id. Relief against enforcement of apparent judgment never rendered, but entered of record through mistake of clerk may be invoked as defense as well as in suit to restrain. Id. Equitable relief against

§ 3. *Procedure to obtain relief or make defense.*[80]—See 10 C. L. 854—Equitable relief for mistake should be sought within a reasonable time after discovering the error.[80a] A tender of the erroneous instrument as a prerequisite to the action,[81] or a demand for reformation,[82] is not always necessary. Mistake is not cognizable by the courts unless pleaded,[83] but an amendment of a pleading of fraud to conform to the proof of mistake is proper.[84] The pleading should contain the material allegations[85] in a direct and specific manner,[86] avoiding conclusions.[87] The petitioner has the burden of proving mistake[88] by clear and satisfactory evidence,[89] and a mere

enforcement of judgment granted where attorney erroneously prepared form of entry omitting provision and clerk entered same thus depriving plaintiff for damages as to erection of fence and only giving plaintiff award of $50 for opening of road. Id. Where clerk is entering judgment on report of commissioners appointed to assess damages in proceeding to establish road, erroneously inserted recital that commissioners had considered and included item of expense of $50 for erection of fence, such irregularity would not be corrected in separate suit. Id.

**80. Search Note:** See notes in 5 Ann. Cas. 214; 11 Id. 1164.

See, also, Cancellation of Instruments, Cent. Dig. §§ 49-131; Dec. Dig. §§ 32-63; 6 Cyc. 319-345; Equity, Cent. Dig.; Dec. Dig.; 16 Cyc. 1-534; Reformation of Instruments, Cent. Dig. §§ 117-202; Dec. Dig. §§ 30-51; A. & E. Enc. L. (2ed.) 278; 14 A. & E. Enc. P & P. 32.

**80a.** Rule of limitations same in fraud and mistake. Isaacks v. Wright [Tex. Civ. App.] 110 SW 970. Statute of limitations begins to run from time mistake is discovered unless laches is shown and in such case statute begins to run when but for such laches plaintiff would have discovered the mistake. Id. Fact that party had opportunity to investigate not negligence unless coupled with suspicion or notice to cause prudent man to investigate. Id. Where deed by mistake described lands other than those conveyed, grantor held not negligent as matter of law in not discovering mistake for four years and action not barred by limitations. Id. Limitations not barred where action brought 10 years from execution of deed, five years from discovery of mistake, and discovery could not have been made sooner. Morgan v. Combs, 32 Ky. L. R. 1205, 108 SW 272, modified on other grounds Id. 33 Ky. L. R. 817, 111 SW 294.

**81.** Where mortgage and note paid by mistake, tender of instruments was not condition precedent to recovery of sum paid. Kelsey v. Collins [Tex. Civ. App.] 108 SW 793. Tender of deed reconveying supposed interest not condition precedent to rescission of deed, when ordinarily conceded that defendant had no title and was also minor unable to convey except through representative. Lewis v. Mote [Iowa] 119 NW 152.

**82.** Demand for reformation not necessary before suit to reform where defendant refused to reconvey claiming no mistake. Home & Farm Co. v. Freitas, 153 Cal. 680. 96 P 308.

**83.** Money paid by mistake. Farmers' & Merchants' Irr. Co. v. Brumbaugh [Neb.] 116 NW 512. Mutual mistake must be pleaded. Miller v. Pratt, 33 Pa. Super. Ct., 547. Settlement of accounts a contract and to be attacked for mistake must be alleged. Johnson v. Gallatin Valley Mill. Co. [Mont.] 98 P 883.

**84.** Moran v. Brown, 113 NYS 1038. Where complaint sought rescission on ground of fraud, allowance of amendment demanding same relief on ground of mutual mistake, to conform to evidence was proper. Rev. Code Civ. Proc. §§ 146, 147, 150. Wolfinger v. Thomas [S. D.] 115 NW 100.

**85.** Complaint against trustee in bankruptcy to recover money paid by mistake, alleging that under prior decision of court he was liable for same, does not state cause of action, there being no allegation that mistake was material, that payment was due to mistake as to decision, or that plaintiff had any defense to a plenary action for the recovery of such money. Carpenter v. Southworth [C. C. A.] 165 F 428. Mistake as ground for equitable relief against execution sale preventing redemption not sufficiently presented where no averment of mistake as to another sale at later date and no offer to redeem before issuance of sheriff's deed. Tharp v. Kerr [Iowa] 119 NW 267. Answer construed to prevent defense of omission of parol stipulations from contract. Kansas City Packing Box Co. v. Spies [Tex. Civ. App.] 109 SW 432. No allegation of diligence to prevent alleged mistake, or to carry out intention in premises. Benting v. Bell, 137 Ill. App. 600. Presumption that appellant in appeal bond knew description of land affected by order of county court and that he carried out intention with reference to perfecting appeal from such order. Id.

**86.** Averments to show mistake without fault of plaintiff in execution deed and that such mistake precluded redemption so lacking in directness and specific statement as to present doubtful question of relief. Tharp v. Kerr [Iowa] 119 NW 267.

**87.** Allegation that by mistake of scrivener portion of land was omitted from appeal bond mere conclusion. Benting v. Bell, 137 Ill. App. 600. General allegation that money sought to be recovered rightfully belongs to plaintiff mere conclusion and insufficient. Carpenter v. Southworth [C. C. A.] 165 F 428.

**88.** Moran Bolt & Nut Mfg. Co. v. St. Louis Car Co., 210 Mo. 715, 109 SW 47. Party seeking to impeach account stated for error has burden of proof. Boyce v. Walker, 114 NYS 166.

**89.** Fosler v. Miller, 132 Ill. App. 464; Johnson v. Conner, 48 Wash. 431, 93 P 914; Hapeman v. McNeal, 48 Wash. 527, 93 P 1076; Hope v. Bourland [Okl.] 98 P 580; Isner v. Nydegger, 63 W. Va. 677, 60 SE 793; Moran Bolt & Nut Mfg. Co. v. St. Louis Car Co., 210 Mo. 715, 109 SW 47; Western Loan & Savings Co. v. Thibodeau [C. C. A.] 159 F 370; Gailey v.

preponderance is not sufficient.[90] But mistake may be proved by circumstances as well as direct proof,[91] and competent evidence should not be excluded.[92] The parol evidence rule does not exclude proof of that nature.[93] Mistake may be a jury question.[94]

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**Mistrial; Money Counts; Money Lent; Money Paid; Money Received; Monopolies; Mortality Tables,** see latest topical index.

## MORTGAGES.

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*The scope of this topic* is noted below.[95]

§ 1. *Nature and elements of mortgages.*[96]—See 10 C. L. 855—A mortgage[96a] is a conveyance as security[97] for the payment of a debt[98] and defeasible by such pay-

New Castle Elastic Pulp Plaster Co., 34 Pa. Super. Ct. 533. Account stated. Johnson v. Gallatin Valley Mill Co. [Mont.] 98 P 883. Mere conflict of testimony does not necessitate denial. Home & Farm Co. v. Freitas, 153 Cal. 680, 96 P 308. Acreage as to which court directed reformation in erroneous deed clearly shown by pleadings and evidence. Id. Insufficient evidence that after-acquired goods were omitted in description of mortgage. White Co. v. Carroll, 147 N. C. 330, 61 SE 196. Very clear proof required in seeking to impeach justice's acknowledgment to land contract in due form and supported by evidence. Johnson Lumber Co. v. Leonard, 145 N. C. 339, 59 SE 134. Relief denied where evidence of subsequent conduct inconsistent with theory of mistake. Weltner v. Thurmond [Wyo.] 98 P 590. **Evidence not clear** and convincing to authorize reformation of contract for failing to limit time of continuance of provision entitling plaintiff to proceeds in excess of sale of land. Id. Evidence insufficient to show contract with corporation conditional on organization. Kennedy v. Fulton Mercantile Co., 33 Ky. L. R. 60, 108 SW 948. Evidence insufficient where witness refused to state positively that mistake in contract occurred, and merely stated what he believed effect to be. Moran Bolt & Mut. Mfg. Co. v. St. Louis Car Co., 210 Mo. 715, 109 SW 47.

**90.** Fosler v. Miller, 132 Ill. App. 464. Mistake as to extent of land in deed. Id.

**91.** Mistake in description of deed. Garard v. Weaver [Ind. App.] 84 NE 1092. Relief when mistake proved or implied. Taylor v. Godfrey, 62 W. Va. 677, 59 SE 631.

**92.** Contradictory evidence showing no mistake in signing deed and that plaintiff knew same to be for land rather than timber as contended, erroneously excluded. Johnson Lumber Co. v. Leonard, 145 N. C. 339, 59 SE 134. Evidence to excuse laches proper. Isaacks v. Wright [Tex. Civ. App.] 110 SW 970. Evidence as to laches refused where action not barred. Id.

**93.** Oral evidence incompetent to contradict or vary mortgage but competent in equity to correct and reform instrument. White Co. v. Carroll, 147 N. C. 330, 61 SE 196. Parol proof admissible. Sykes v. Life Ins. Co., 148 N. C. 13, 61 SE 610. Parol evidence admissible to correct judgment. Engler v. Knoblaugh, 131 Mo. App. 481, 110 SW 16.

**94.** Whether married woman thought signature to deed was merely for timber and not for land, a question for jury and instructions erroneously refused. Johnson Lumber Co v. Leonard, 145 N. C. 339, 59 SE 134.

**95.** This article is devoted to the mortgage as an instrument and the substantive rights growing from it. The procedure by which mortgages are foreclosed (see Foreclosure of Mortgages on Land, 11 C. L. 1487), has been fully treated in an earlier topic. The doctrine of notice and the operation of the recording acts (see Notice and Record of Title, 10 C. L. 1015), the application of the statute of frauds (see Frauds, Statute of, 11 C. L. 1609), the effect of a mortgage as an incumbrance (see Covenants for Title, 11 C. L. 931; Vendors and Purchasers, 10 C. L. 1942), and the purchase of land subject to mortgage (see Vendors and Purchasers, 10 C. L. 1942) are elsewhere treated. Mortgage within this topic means only those of land or interests therein (see Chattel Mortgages, 11 C. L. 611; railroad mortgages, see Railroads, 10 C. L. 1365).

**96. Search Note:** See note in 7 A. S. R. 32. See, also, Mortgages, Cent. Dig. §§ 1-113; Dec. Dig. §§ 1-39; 27 Cyc. 957-1077. 11 A. & E. Enc. L. (2ed.) 122; 20 Id. 897; 23 Id. 466.

**96a. Definitions:** A conveyance or transfer of property as security to pay a debt or in discharge of some other obligation. Williams v. Davis [Ala.] 45 S 908. Mortgage creates a lien to secure payment of debt, and subsists until the debt is paid. Hughes v. Mt. Vernon Bank [Ga. App.] 60 SE 809. Conveyance by debtor to his creditor, or some one in trust for him as security for debt. Wilson v. Fisher, 148 N. C. 535, 62 SE 622. Conveyance by way of pledge for security of debt and to become void on payment of it. Johnson v. Hataway [Ala.] 46 S 760.

**97.** Evidence showed only relation of ten-

ment.[99] The mortgage is an incident to the debt [1] and is personal property.[2] The reservation of a lien on the face of the deed or notes has the effect of a mortgage and makes the transaction executory.[3] It is a maxim of law that an instrument once a mortgage is always a mortgage.[4]

§ 2. *General requisites and validity.*[5]—See 10 C. L. 856—The general requisites of deeds [5a] and the operation of the statute of frauds [6] are elsewhere treated. An oral agreement to make a mortgage is at most in equity a verbal mortgage and void by statute.[7] A mortgage stating the amount secured is valid though it does not describe the notes or state their several amounts.[8]

*Property subject of mortgage.*See 10 C. L. 856—As a general rule any property subject to sale or conveyance may also be mortgaged or conveyed in trust to secure a debt.[9] Interests in expectancy may be mortgaged,[10] in the absence of statute.[11] Husband and wife may mortgage a homestead owned by them,[12] and a married woman conforming to statute requirements has the right to make a mortgage of her real estate which is not held to her separate use though the debt secured is her husband's.[13] Where a feme sole has made a deed of marriage settlement of her property to a trustee for her sole and separate use, her power of disposition is limited and if she and her husband seek to join in a mortgage of her property it is void if without the consent of the trustee and contrary to the trust deed.[14]

*Description.*See 10 C. L. 857—If there be that in the description of property conveyed which is false, without which the description would be sufficient to identify the subject-matter of the deed, the false part will be rejected and effect given to what remains.[15]

*Consideration.*See 10 C. L. 857—A mortgage must be supported by a consideration,[16] although the consideration need not move from the payeee of the mortgage

ant and landlord not mortgagor and mortgagee. Lewis v. Cooley [S. C.] 62 SE 868.

**98.** A debt either pre-existing or created at the time or contracted to be created is an essential requisite to a mortgage. Weltner v. Thurmond [Wyo.] 98 P 590; Thomas v. Livingstone [Ala.] 46 S 851.

**99.** By the performance of the condition, the title of the mortgagee is defeated and the mortgagor is in his former estate. Hayhurst v. Morin [Me.] 71 A 707.

**1.** Pettus v. Gault [Conn.] 71 A 509. Invalidity of the mortgage does not affect the notes secured. Foddrell v. Dooley [Ga.] 63 SE 350.

**2.** Haines v. Perkins [Mich.] 15 Det. Leg. N. 1070, 119 NW 439. A note and mortgage are personal property in the hands of the transferee of the note and mortgage. Pettus v. Gault [Conn.] 71 A 509. A debt by a husband to his wife secured by a mortgage is a personal asset passing to the administrator upon wife's death. Sharpe v. Miller [Ala.] 47 S 701. Descends as personalty upon death of mortgagee. Strout v. Lord, 103 Me. 410, 69 A 694.

**3.** Notes recited, for purchase money of a livery stable, etc., with two lots of land, etc. Honaker v. Jones [Tex.] 113 SW 748.

**4.** Jones v. Gillett [Iowa] 118 NW 314; Conover v. Palmer, 123 App. Div. 817, 108 NYS 480.

**5. Search Note:** See notes in 4 C. L. 679; 6 Id. 683; 21 L. R. A. 347; 28 Id. 95, 134; 33 Id. 305, 6 L. R. A. (N. S.) 934; 12 Id. 1190; 49 A. S. R. 207; 109 Id. 510.

See, also, Mortgages, Cent. Dig. §§ 1-207; Dec. Dig. §§ 1-96; 27 Cyc. 957-1132, 1155-1161; 20 A. & E. Enc. L. (2ed.) 903.

**5a.** See Deeds of Conveyance, 11 C. L. 1051.

**6.** See Frauds, Statute of, 11 C. L. 1609.

**7.** Williams v. Davis [Ala.] 45 S 908.

**8.** Parol evidence admissible to identify notes. Dunn v. Burke, 139 Ill. App. 12.

**9.** Bourn v. Robinson [Tex. Civ. App.] 107 SW 873.

**10.** A prospective heir may sell or mortgage his expectancy in the estate of his ancestor during his lifetime. Bourn v. Robinson [Tex. Civ. App] 107 SW 873. A mere expectancy or possibility while void at law is good in equity as a contract to mortgage after-acquired property. Bacot v. Varnado, 91 Miss. 825, 47 S 113. Mortgage held under the Code to pass title to after-acquired property. Hall v. Slaughter [Ala.] 47 S 103. Valid mortgage to pass after-acquired property may be executed. Husband and wife may mortgage a homestead subsequently to be acquired. Bacot v. Varnado, 91 Miss. 825, 47 S 113. May mortgage school lands before occupancy is complete. Bourn v. Robinson [Tex. Civ. App.] 107 SW 873.

**11.** Claimant of federal lands may not mortgage before issue of patent. Hall v. Slaughter [Ala.] 47 S 103.

**12.** Bacot v. Varnado, 91 Miss. 825, 47 S 113.

**13.** Bell v. Bell, 133 Mo. App. 570, 113 SW 667.

**14.** Dunlap v. Hill, 145 N. C. 312, 59 SE 112.

**15.** Land described as certain lots in a subdivision made by "A," a plat of which is on record in Book H, page 240, Waller County Records. The page number was wrong and it was proper to reject this. Pinckney v. Young [Tex. Civ. App.] 107 SW 622.

**16.** The surrender of one equitable mort-

debt to the mortgagor.[17] A mortgage given to secure a pre-existing debt of another is invalid unless supported by a new consideration,[18] but if the mortgagee increases his risk in some manner, this will render the mortgagee a purchaser for value.[19] Upon failure of consideration for a mortgage, the mortgagor is entitled to cancellation.[20] Failure or want of consideration as between the parties to a mortgage, cannot be set up as a defense by a purchaser of the lands subject to the mortgage, which is in fact part of the consideration, whether he has expressly assumed the mortgage as part of the purchase money or not.[21] If there was an actual consideration, it need not be stated.[22] In New York the seal is only presumptive evidence of consideration, which may be rebutted.[23] The burden of proof is on the person seeking to recover payment made on mortgages on the ground of no consideration to show not only lack of consideration but also that payment was not made to a holder of the mortgages who was entitled to rely on them as an admission of indebtedness.[24] A mortgage given to secure a note procured by fraud is only valid to the amount of the note above the amount of damages sustained because of fraud.[25]

*Execution.* See 10 C. L. 857—The informality of a mortgage according to the requirements of statute will not invalidate it between parties in equity,[26] and mortgagor having accepted a mortgage deed not complying with statutory requirements is estopped to deny his obligation under the mortgage.[27] A mortgage by a married woman in which her husband did not join as grantor is void although signed and acknowledged by him.[28] Under the Code requirements for signatures of deeds by one unable to writ, it is not necessary to add the words "his mark" to a mark where a mortgage was executed under the mortgagor's direction and at his request.[29] Delivery once made is sufficient although the instrument is subsequently allowed to remain in the possession of the mortgagor.[30]

gage is an adequate consideration for an equitable mortgage on another tract. Richardson v. Wren [Ariz.] 95 P 124. Agreement to pay interest in advance quarterly and the implied consideration that the mortgagors would by the mortgage secure the debt constituted a new and sufficient consideration for the giving of the mortgage to secure the debt. First Nat. Bank v. Farmers' & Merchants' Nat. Bank [Ind.] 86 NE 417. A mortgage deed given in consideration of an indebtedness and an agreement to extend time of payment for one year providing for a quarterly payment of interest in advance and that the amount shall become due upon any default is based on a new and sufficient consideration. First Nat. Bank v. Farmers' & Merchants' Nat. Bank of Wabash [Ind.] 84 NE 1077. Evidence held not to show lack of consideration. Sternberg v. L. Sternberg & Co. [N. J. Eq.] 69 A 492. Facts held to show sufficient consideration for an extension. Hall v. Parsons, 105 Minn. 96, 117 NW 240. The assumption by a purchaser of an incumbrance is sufficient consideration for an extension. Huene v. Cribb [Cal. App.] 98 P 78. Where land is conveyed conditioned to secure the grantor's support, the relation of mortgagor and mortgagee arises and the support is the consideration. Davis v. Davis [Vt.] 69 A 876. Where a bank in good faith loans money to a bona fide assignee of a mortgage made by a corporation subsequently pays the mortgage, it cannot later recover back the money paid to the bank on the ground that it received no money for the mortgages. Sternberg v. L. Sternberg & Co. [N. J. Eq.] 69 A 492.

17. It is sufficient consideration for a mortgage to secure the liability of a third party that the mortgagee extends the liability of such party by taking a new note. First Nat. Bank v. Keller, 127 App. Div. 435, 111 NYS 729.

18. Mortgage by a wife to secure pre-existing debt of husband held without consideration. Bell v. Bell, 133 Mo. App. 570, 113 SW 667; Richardson v. Wren [Ariz.] 95 P 124.

19. Furnishing further goods to a debtor on promise of a mortgage. Richardson v. Wren [Ariz.] 95 P 124.

20. Note given to an attorney to secure a contingent fee and deed of land to a third person to secure note. Case was lost and client entitled to cancellation. Muir v. Hamilton, 152 Cal. 634, 93 P 857. Where the assignment of patents was the consideration for a certain mortgage, facts did not show such misrepresentation in regard to the same as would avoid the mortgage. Waymire v. Shipley [Or.] 97 P 807.

21. Patten v. Pepper Hotel Co., 153 Cal. 460, 96 P 296.

22. First Nat. Bank v. Keller, 127 App. Div. 435, 111 NYS 729.

23. First Nat. Bank v. Keller, 127 App. Div. 435, 111 NYS 729.

24. Sternberg v. L. Sternberg & Co. [N. J. Eq.] 69 A 492.

25. Whittle v. Jones, 79 S. C. 205, 60 SE 522.

26, 27. Spedden v. Sykes [Wash.] 98 P 752.

28. Dietrich v. Deavitt [Vt.] 69 A 661.

29. Harwell v. Zimmerman [Ala.] 47 S 722.

30. Clymer v. Groff, 220 Pa. 580, 69 A 1119.

*Recordation* See 10 C. L. 858 is not necessary as between the parties.[31] The effect of record as notice is elsewhere treated.[32]

§ 3. *Absolute deed.*[33]—See 10 C. L. 858—A conveyance absolute in form will be deemed a mortgage if intent that it shall operate only as security appears[33a] either by a contemporaneous written defeasance[34] or by parol,[35] but in the latter case the proof must be by clear, positive and convincing evidence.[36] Some courts state that

**31.** Claridge v. Evans, 137 Wis. 218, 118 NW 198; Evans v. Claridge, 137 Wis. 218, 118 NW 803.

**32.** See Notice and Record of Title, 10 C. L. 1015.

**33. Search Note:** See notes in 1 L. R. A. (N. S.) 405; 2 Id. 628; 5 Id. 387; 11 Id. 209, 825; 13 Id. 725.

See, also, Mortgages, Cent. Dig. §§ 60-113; Dec. Dig. §§ 31-39; 27 Cyc. 991-1033; 20 A. & E. Enc. L. (2ed.) 935.

**33a.** Conover v. Palmer, 123 App. Div. 817, 108 NYS 480; Thornton v. Pinckard [Ala.] 47 S 289; Wiswell v. Simmons, 77 Kan. 622, 95 P 407; Chesney v. Chesney, 33 Utah, 503, 94 P 989. Even where there is no personal obligation to repay, the mortgagee looking solely to his mortgage, the instrument will be deemed a mortgage if intended as security. Conover v. Palmer, 123 App. Div. 817, 108 NYS 480. Intention of parties and not form of deed governs. Hall v. O'Connell [Or.] 95 P 717; Elliott v. Bozorth [Or.] 97 P 632.

**34.** Fuson v. Chestnut, 33 Ky. L. R. 249, 109 SW 1192. Deed of reconveyance made simultaneously. Calhoun v. Anderson [Kan.] 98 P 274. Quitclaim deed and deed to reconvey bearing same date not to be held a mortgage but upon further showing of facts held a mortgage. Wiswell v. Simmons, 77 Kan. 622, 95 P 407.

**35.** Equity intention of parties may be shown by parol. Duerden v. Solomon, 33 Utah, 468, 94 P 978; Thornton v. Pinckard [Ala.] 47 S 289; Harrison v. Maury [Ala.] 47 S 724; Rogers v. Burt [Ala.] 47 S 226; Elliott v. Bozorth [Or.] 97 P 632; Hall v. O'Connell [Or.] 95 P 717; Jones v. Gillett [Iowa] 118 NW 314; Rushton v. McIllvene [Ark.] 114 SW 709; Thompson v. Burns [Idaho] 99 P 111; Blackstock v. Robertson, 42 Colo. 472, 94 P 336; Eames v. Woodson, 120 La. 1031, 46 S 13; Johnson v. Hataway [Ala.] 46 S 760; Moore v. Kirby [Tex. Civ. App.] 115 SW 632. Despite fact that there is written collateral agreement regarding transaction. Blackstock v. Robertson, 42 Colo. 472, 94 P 336.

**36.** Presumption is that the deed is what it purports to be and expresses intention of parties. Elliott v. Bozorth [Or.] 97 P 632; Guarantee Gold Bond Loan & Savings Co. v. Edwards [C. C. A.] 164 F 809; Rushton v. McIllvene [Ark.] 114 SW 709; Sears v. Gilman, 199 Mass. 384, 85 NE 466; Barnes v. Johnson, 33 Ky. L. R. 803, 111 SW 372; Lake v. Weaver [N. J. Eq.] 70 A 81. Where the owner of real estate, uninfluenced by fraud or error, vests the title thereto in another, such title can be divested as simulated, only upon the production of a counter letter, or upon the basis of answers elicited from the apparent owners to interrogations on facts and articles. Maskrey v. Johnson [La.] 48 S 266. More than a bare preponderance necessary. Rogers v. Burt [Ala.] 47 S 226. Clear and conclusive evidence beyond reasonable doubt. Bascombe v. Marshall, 113 NYS 991.

**Evidence insufficient.** Thornton v. Pinckard [Ala.] 47 S 289; Harrison v. Maury [Ala.] 47 S 724; Elliott v. Bozorth [Or.] 97 P 632; Graham v. Fischer [Ky.] 110 SW 386; Rushton v. McIllvene [Ark.] 114 SW 709. Evidence insufficient to show that the grant of land in payment of debts smaller than the value of the land was a mortgage. Rathbone v. Maltz [Mich.] 15 Det. Leg. N. 1023, 118 NW 991. Where an instrument purporting to be a sale with a right to retransfer in case of payment of a certain sum and a deed of the same premises were the only evidence of the transaction, it was insufficient to show that the deed was intended as a mortgage. Middleton v. Johnston [Tex. Civ. App.] 110 SW 789. Where grantor already had two mortgages on grantee's property, the evidence was held not sufficient to prove a deed absolute on its face to be a mortgage. Barnes v. Johnson, 33 Ky. L. R. 803, 111 SW 372. Facts did not show deed to be a mortgage where grantee advanced necessary funds to pay balance of price agreeing that grantors might remain thereon during remainder of their lives. Gustin v. Crockett [Wash.] 97 P 1091.

**Evidence sufficient.** Duerden v. Solomon, 33 Utah, 468, 94 P 978; Griffin v. Welch [Ark.] 114 SW 710; Kahn v. Metz [Ark.] 114 SW 911; Guarantee Gold Bond Loan & Savings Co. v. Edwards [C. C. A.] 164 F 809; Duerden v. Solomon, 33 Utah, 477, 94 P 980; Winsor v. Winsor [Kan.] 95 P 1135; Couts v. Winston, 153 Cal. 686, 96 P 357. The execution of a lease, from the holder of title to the claimant of the equity, does not necessarily disprove the fact of equitable ownership. Jones v. Gillett [Iowa] 118 NW 314. Where the son of a former master of an ex slave took title to property formerly belonging to the negro, evidence held sufficient to show that he held as mortgagee to secure the amount advanced to redeem from foreclosure of a former mortgage. Frazier v. Frazier, 32 Ky. L. R. 1339, 108 SW 889. Deed to plaintiff for $800. Both parties agreed in writing that if plaintiff disposed of land the real consideration should be what was paid and defendant receive credit therefor on his debt to the plaintiff. Held a mortgage. Horn v. Bates [Ky.] 114 SW 763. Where property worth $1,000 is conveyed by a deed, the consideration for which is $200, the vendor remaining in possession, the contract is one of security. Eames v. Woodson, 120 La. 1031, 46 S 13. Where the owner of two lots worth from $100 to $300 borrowed $31.50 from A who refused to take a mortgage but took an absolute deed stating that upon repayment of the loan any time before the borrower's death he might have the land deeded back, otherwise the deed to become absolute, and no note was given and the borrower lived on the land until shortly before his death, the transaction created an indebtedness due upon the borrower's death and the deed was in the nature of a mortgage as security. Halbert v. Turner, 233 Ill. 531, 84 NE 704. A

in case of doubt, whether an instrument is a deed or mortgage, it will be treated as a mortgage.[37] A continuing antecedent or contemporaneous liability is essential to the creation of a mortgage and is a test to determine whether a conveyance is a sale or mortgage.[38]

*Mortgage or conditional sale.*[See 10 C. L. 859]—A mortgage is distinguished from a conditional sale by the fact that a mortgage is a security while a conditional sale is a deed accompanied by an agreement to resell upon terms.[39] Intention furnishes the only true test to determine if a deed is a mortgage or conditional sale.[40] Where the instrument is intended as security for a debt and the relation of debtor and creditor exists between the parties, the legal inference is that a mortgage and not a conditional sale was intended,[41] some courts going so far as to hold that the instrument is conclusively presumed to be a mortgage and no stipulation of the parties can make it otherwise.[42] To avoid the harshness of a forfeiture for failure to comply strictly with the terms of a contract of conditional sale, the courts incline to treat such transaction as a mortgage, if justified by the evidence,[43] and in doubtful cases the court will construe as a mortgage.[44]

*Rights of the parties.*[See 10 C. L. 860]—If a mortgage is executed between the parties or their acts construed to constitute a mortgage, no agreement or stipulation between the parties can cut off the mortgagor's right of redemption, the rule being once a mortgage, always a mortgage.[45]

*The proceeding to establish a mortgage is equitable* [See 10 C. L. 860] and hence pe-

son owning real estate conveyed a half interest to his father to secure a debt. Later both joined in a deed to A who agreed to transfer back to the son upon payment of a specified sum within a specified time, the son to remain in possession of the premises. The purpose of the transfer was to allow a creditor of the son to obtain possession without the expense of a foreclosure. Held prior to the time for payment the title was in the son. People v. Andrs [Mich.] 15 Det. Leg. N. 503, 117 NW 55. Where defendant did at plaintiff's request acquire title to land, paying therefor with the agreement that the amount paid should be considered as a loan to the plaintiff, the legal title being held by defendant as security, the plaintiff is entitled to redeem. Jones v. Gillett [Iowa] 118 NW 314. Where a deed of land is made and the transaction is called a loan of money and the grantor remains in possession and further ths grantee at one time offered a deed back upon payment of money, the transaction is a mortgage. Froidevaux v. Jordan [W. Va.] 62 SE 686. Where one loans money to another for the purchase of land taking title in his own name, he holds a double relation to the real purchaser, and he is trustee of the legal title and mortgagee for the purchase money loaned. Hall v. O'Connell [Or.] 95 P 717. Evidences held to show a loan of purchase price secured by taking title. Id.

**37.** Duerden v. Solomon, 33 Utah, 468, 94 P 978; Elliott v. Bozorth [Or.] 97 P 632.

**38.** Where a note and mortgage deed were turned over to the grantor and no evidence of a continuing liability was given, transaction held not to be a mortgage. Rogers v. Burt [Ala.] 47 S 226. The existence and continuance of a debt is the final test. Rushton v. McIllvene [Ark.] 114 SW 709; Wiswell v. Simmons, 77 Kan. 622, 95 P 407. Evidence connecting loan with the transfer of land too vague. Bascombe v. Marshall, 113 NYS 991.

**39.** Beidleman v. Koch [Ind. App.] 85 NE 977. If the transaction is a sale with a right of repurchase at the grantor's option, it is a conditional sale. Froidevaux v. Jordan [W. Va.] 62 SE 686.

**40.** Beidleman v. Koch [Ind. App.] 85 NE 977. Where two instruments executed contemporaneously constitute on their face a conditional sale to convert such into a mortgage, the intent of the parties to create a mortgage must appear. The intent of one party is not sufficient. Thomas v. Livingston [Ala.] 46 S 851.

**41.** Tucker v. Witherbee [Ky.] 113 SW 123.

**42.** Where the grantee agrees to reconvey on payment by the grantor of a valid debt, the transaction is conclusively presumed to be a mortgage and no stipulation of parties can make it otherwise. Beidleman v. Koch [Ind. App.] 85 NE 977. A deed conveying premises on account of loan stipulating that if a certain amount was paid within a fixed time the deed would be void and cutting off the right of redemption by payment or a fixed sum, was a mortgage. Wilson v. Fisher, 148 N. C. 535, 62 SE 622.

**43.** Jones v. Gillett [Iowa] 118 NW 314.

**44.** Deed of land made to secure payment of price of a horse providing for a retransfer to grantor in case of payment of a certain sum on a certain date. Tucker v. Witherbee [Ky.] 113 SW 123. In case of doubt a mortgage and not a conditional sale. Conover v. Palmer, 123 App. Div. 817, 108 NYS 480; Thomas v. Livingston [Ala.] 46 S 851.

**45.** An agreement in a deed absolute on its face but given as a mortgage, that if an indebtedness was not paid at a certain tims the deed should be absolute, is inoperative, as the transaction being in reality a mortgage is subject to relating to redemption of mortgages. If debt not paid before borrower's death, deed to become absolute. Halbert v. Turner, 233 Ill. 531, 84 NE 704.

titioner must be willing to do equity.[45] By statute in Pennsylvania unless the grantor requires a defeasance or reservation in his favor, no trust can be enforced.[47]

§ 4. *Equitable mortgages.*[48] See 10 C. L. 882—It is a well settled principle of equity that where it is the clear intention of parties to give security for a debt, but there is a failure to carry out such intention in the contract, a court of equity will declare an equitable mortgage to exist and by its decree enforce the same as against such property in satisfaction of such debt.[48a] Thus an equitable mortgage arises where further credit is extended upon the promise to give a mortgage as security.[49] Where security has been advanced but the intended mortgage fails of legal effect because of some defect, equity will impress upon the property intended to be mortgaged a lien in favor of the creditor advancing sceurity.[50]

§ 5. *Nature and incidents of trust deeds as mortgages.*[51] See 10 C. L. 882—A trust deed without any power in the trustees to sell in case of a default is under the South Dakota Code, a mortgage constituting only a line.[52] The trustee of a trust deed made to secure notes may release the lien created thereby so as to revest title in the grantor even without the consent of the holder of the indebtedness which the trust deed was given to secure.[53] In equity, however, an unauthorized release will have no effect upon the trust deed as between the original parties or as to subsequent parties with notice.[54]

§ 6. *Construction and effect of mortgages in general.*[55] See 10 C. L. 862—The law of the state, where the mortgaged land is located, the parties reside, and the contract is to be performed, governs.[56] Parol evidence is not admissible to vary the plain terms of a mortgage,[57] but is admissible to explain ambiguities,[58] or to show

**46.** The aid of equity cannot be invoked by a grantor claiming that an absolute grant was only a mortgage unless the grantor recognizes the indebtedness as an existing lien on the land, though the debt is barred by the statute of limitations. Lake v. Weaver [N. J. Eq.] 70 A 81.

**47.** Mortgagor upon default of interest transferred to mortgagee on the oral understanding that if mortgagor paid mortgage debt and interest within a year mortgagee would transfer back to mortgagor. Wingenroth v. Dellenbach, 219 Pa. 536, 69 A 84.

**48. Search Note:** See notes in 6 C. L. 687; 16 L. R. A. (N. S.) 1006; 4 A. S. R. 696.

See, also, Mortgages, Cent. Dig. §§ 43-113; Dec. Dig. §§ 26-39; 27 Cyc. 976-1033; 11 A. & E. Enc. L. (2ed.) 123.

**48a.** Edwards v. Scruggs [Ala.] 46 S 850. Where one sold, assigned and transferred to another his right, title and interest in land, providing also that the grantor should have six months from a certain date to reimburse the grantee and in case of failure the title to become vested in the grantee, an equitable mortgage was created. Patrono v. Patrono, 127 App. Div. 29, 111 NYS 268. In an action to enforce a lien against land purchased from defendant with money advanced by plaintiff under defendant's agreement to give plaintiff a mortgage, which he refused to do, plaintiff was entitled to judgment enforcing an equitable lien. Poole v. Tannis [Wis.] 118 NW 864. Evidence tended to show that in consideration of money advanced to a husband by a wife there was a verbal agreement to the effect that the land should stand as security for the sums advanced, thereby creating an equitable mortgage. Miller v. Wroton [S. C.] 63 SE 62.

**49.** More goods furnished on promise to mortgage a certain tract of land. Richardson v. Wren [Ariz.] 95 P 124.

**50.** Mortgage failed of legal effect because of obscurity in the name of the mortgagee. Stark v. Kirkley, 129 Mo. App. 353, 108 SW 625.

**51. Search Note:** See notes in 14 L. R. A. 55; 10 L. R. A. (N. S.) 679.

See, also, Mortgages, Cent. Dig.; Dec. Dig.; 27 Cyc. 916-1867; 28 A. & E. Enc. L. (2ed.) 757.

**52.** Driskill v. Rebbe [S. D.] 117 NW 135.

**53.** Vogel v. Troy, 232 Ill. 481, 83 NE 960.

**54.** Vogel v. Troy, 232 Ill. 481, 83 NE 960.

**55. Search Note:** See notes in 4 C. L. 689; 1 L. R. A. (N. S.) 1036, 1079; 109 A. S. R. 510.

See, also, Mortgages, Cent. Dig. §§ 208-289; Dec. Dig. §§ 97-144; 27 Cyc. 1041-1048, 1056-1077, 1133-1153; 20 A. & E. Enc. L. (2ed.) 957.

**56.** Hutchinson v. Ward, 192 N. Y. 375, 85 NE 390. See, also, Conflict of Laws, 11 C. L. 665.

**57.** Oral agreement for payment of money in lieu of certain deliveries of goods stipulated for. Walker v. Venters, 148 N. C. 388, 62 SE 510. Parol evidence inadmissible to show agreement for release of part of land when part payment was made. Cotulla v. Barlow [Tex. Civ. App.] 115 SW 294.

**58.** Declarations of the parties at the time of executing the mortgage. Jones v. Norris, 147 N. C. 84, 60 SE 714. Parol evidence held admissible to show the intention of the parties that a certain mortgage was given to secure a note where the note recited that it was secured by securities stated on the back. Armstrong v. Wilson [Tex. Civ. App.] 109 SW 955. To show what notes were secured only amount of indebtedness being stated. Dunn v. Burke, 139 Ill. App. 12.

that a deed absolute on its face is a mortgage.[59] Contemporaneous agreements which are part of the same transaction may be read into the instrument.[60]

*Property and interests conveyed.*[See 10 C. L. 863]—The question of what property is covered depends on an interpretation of the terms of the mortgage.[61] A mortgage on land ordinarily includes emblements and fixtures.[62]

*Debt secured.*[See 10 C. L. 863]—The debts secured by a particular mortgage are to be determined from its terms.[63]

§ 7. *Title and rights of the parties.*[64]—[See 10 C. L. 863]—The relation of mortgagor and mortgagee is a trust relation.[65] At common law the mortgagee was regarded as being the legal owner.[66] In equity, however, the rights of the mortgagee passed to his personal representatives, the mortgagor being regarded as the real owner.[67] The equitable view granting the equity of redemption grew in favor and was vigorously invoked until finally courts of law came to recognize it,[68] and it is now settled in most jurisdictions that the mortgagee has but a lien to secure his debt.[69] In a few states, however, the common-law rule obtains.[70] Where one takes

**59.** See ante, § 3.

**60.** An agreement bearing same date and referred to in a mortgage whose performance is made a condition of the mortgage by the express language of the mortgage is a part of the condition of the mortgage. Phelps v. Lowell Institution for Sav., 198 Mass. 179, 83 NE 989. Bond of railroad property and as an addenda mortgage of the earnings. Louisville & N. R. Co. v. Schmidt, 33 Ky. L. R. 346, 107 SW 745. The reference in a mortgage to a mortgage note is sufficient to incorporate the terms of the note into the mortgage. Kingsley v. Anderson, 103 Minn. 510, 115 NW 642.

**61.** A mortgage of the share to which each mortgagor might have become entitled under trust deeds and as "beneficial owner" covered the beneficial interest reserved in the settlor of a certain trust. Newton v. Hunt, 59 Misc. 633, 112 NYS 573. Where a railroad executed a trust deed of its right of way, depots, etc., and all property to be thereafter acquired for the purpose of the railroad, it did not include property to which railroad subsequently acquired a half interest for such property could not be utilized by the railroad for any purpose. Chicago, etc., R. Co. v. Tice, 232 Ill. 232, 83 NE 818. Where there was no covenant of seisin or for title in the mortgage deed and no intention that an outstanding fourth interest should ultimately fall within the mortgage, the mortgage lien given by owners of the three-fourths interest in property did not cover the fourth interest when it ultimately was deed to the owners of the other third interest. Shreve v. Harvey [N. J. Eq.] 70 A 671.

**62.** Includes growing timber. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176. Where a farm was mortgaged to secure part of purchase price, held that mules, feed and implements and whatever was used to replenish the same were included in the mortgage. Borah v. O'Neill, 121 La. 733, 46 S 788.

**63.** A mortgage covering a homestead construed and held that the stipulation that it should cover future advances was intended to include only those payments made to protect the security of the mortgage and expenses resulting from foreclosure. Hendricks v. Webster [C. C. A.] 159 F 927. A mortgage reciting that it was to secure payment of a certain bond, and collateral for a certain other mortgage and that payments on the latter mortgage and all interest paid thereon should be credited to such former mortgage and that on payment by mortgagor of a certain sum, less than the mortgage debt, with interest, the holder of such former mortgage would discharge it, was not security for the entire debt, but only for the amount required to be paid for its discharge. Abert v. Kornfeld, 128 App. Div. 547, 112 NYS 884. That coupon notes for the amount of interest run in part to the mortgagee and in part to a third person, or bearer, does not destroy the lien of the mortgage for the total interest secured. Kingsley v. Anderson, 103 Minn. 510, 115 NW 642.

**64. Search Note:** See notes in 6 C. L. 694; 68 L. R. A. 323; 4 A. S. R. 69; 7 Id. 31; 13 Id. 153; 27 Id. 793; 43 Id. 432; 72 Id. 74; 109 Id. 430; 118 Id. 968; 11 Ann. Cas. 936.

See, also, Mortgages, Cent. Dig. §§ 456-585; Dec. Dig. §§ 187-218; 27 Cyc. 1229-1277; 20 A. & E. Enc. L. (2ed.) 793, 1004.

**65.** Cannot buy in or by any other method acquire title to the property and hold it against the mortgagor. Dunn v. Ottinger Bros. 148 N. C. 276, 61 SE 679.

**66.** Devisable and descended to his heirs. Barson v. Mulligan, 191 N. Y. 306, 84 NE 75; Jackson v. Tribble [Ala.] 47 S 310.

**67, 68.** Barson v. Mulligan, 191 N. Y. 306, 84 NE 75.

**69.** Barson v. Mulligan, 191 N. Y. 306, 84 NE 75. Provisions of a code defining the term "conveyance" in a recording act as any instrument by which an interest in real property is mortgaged applies to the recording act only and does not make a mortgage a conveyance in any other sense of any title. Booker v. Castillo [Cal.] 98 P 1067. Under New York statutes, contrary to common law, a mortgage creates no estate in the land, but is merely a lien on the mortgaged premises. Cannot recover by ejectment on default. Becker v. McCrea, 193 N. Y. 423, 86 NE 463. A mortgage back of land conveyed to secure the purchase price vests no title or interest in the land in the mortgagees. Castro v. Adams, 153 Cal. 382, 95 P 1027. A mortgage upon property does not violate a clause requiring a fee simple in the insured. Standard Leather Co. v. Mercantile Town Mut. Ins. Co., 131 Mo. App. 701, 111 SW 631.

**70.** Defendant went into possession under

a mortgage upon premises without knowledge or notice of any infirmities in the decree granting the mortgagor title, the mortgage is a valid lien capable of being enforced.[71] A mortgage on real estate continues as a lien thereon for only ten years from the maturity of the debt.[72]

*Taxes.*[See 10 C. L. 864]—A mortgagor cannot by neglecting to discharge taxes which he has covenanted to pay acquire title at a tax sale and set it up thereafter to defeat his mortgage.[73] The mortgagee may pay taxes and have an additional lien therefor, although no provision as to taxes appears in the mortgage.[74] Prior to sale the mortgagee may pay the taxes and thereby acquire by a species of subrogation a lien for the amount so paid which in respect of priority occupies the same position as the tax lien.[75] A grantee of real estate who pays a tax assessed against the interest of the mortgagee cannot recover of the mortgagee the sum so paid.[76]

*Insurance.*[See 10 C. L. 864]—Mortgages usually provide that the mortgagor shall insure the premises in a company satisfactory to the mortgagee,[77] and the mortgagee is entitled to be allowed for necessary insurance taken out by him.[78] The mortgagor is usually entitled to settle the insurance loss.[79]

*Possession, rents and profits.*[See 10 C. L. 865]—The mortgagor is entitled to possession until default,[80] and in most states until after foreclosure.[81] The surrender of possession to the mortgagee by the mortgagor confers no title on the mortgagee,[82] and his subsequent possession is in no sense in hostility to the title of mortgagor.[83] A mortgage carries with it in equity a right to accruing rents when there has been a default and the security is inadequate and the debtor insolvent.[84] When a mortgagor is allowed to remain in possession after default, he is entitled to the rents and profits,[85] but after demand by the mortgagee for possession or rents and profits then the mortgagee is entitled to the same,[86] and to an allowance for the enhanced value of the land owing to improvements.[87] In ejectment against a mortgagee by the mortgagor, rents collected by the mortgagee cannot be applied to the payment of the mortgage since such receipts are in the nature of equitable set-off to the amount due and must be settled on an accounting in equity.[88] In California a mortgage cannot maintain ejectment against a mortgagee in possession until the debt is paid.[89]

deed from mortgagee in possession and hence took under color of title and where held for seven years acquired title by adverse possession. Stewart v. Lowdermilk, 147 N. C. 583, 61 SE 523. Under Georgia code providing for deeds to secure indebtedness with a bond to reconvey upon payment of the debt, the debtor has no leviable interest. Buchan v. Williamson [Ga.] 62 SE 815.

**71.** Tax sale proceedings conveying title held void. Kieffer v. Victor Land Co. [Or.] 98 P 877.

**72.** Herbage v. McKee [Neb.] 117 NW 706.

**73.** Pitman v. Boner [Neb.] 116 NW 778.

**74.** Sanborn Co. v. Alston, 153 Mich. 463, 15 Det. Leg. N. 703, 117 NW 625.

**75.** Farmer v. Ward [N. J. Eq.] 71 A 401.

**76.** William Ede Co. v. Heywood, 153 Cal. 615, 96 P 81.

**77.** Mortgagee held to have accepted the insurer and insurance upon mortgaged premises despite the fact that its rules required insurance in a designated company. Heal v. Richmond County Sav. Bank, 127 App. Div. 428, 111 NYS 602.

**78.** A mortgagee in possession should be allowed for expense of insurance. Lynch v. Ryan, 137 Wis. 13, 118 NW 174.

**79.** Where a mortgagee settled an insurance loss without the consent of the mortgagor, but the preponderance of evidence indicated that the amount allowed was reasonable and that the mortgagor did not make a bona fide effort to carry out the arbitration, the mortgagee was not liable to account for the difference between the amount of settlement and the amount claimed by the mortgagor. Jacob Tome Institute v. Whitcomb [C. C. A.] 160 F 835.

**80.** Baker v. Baker [Md.] 70 A 418.

**81.** The mortgagee can only obtain possession by consent of the mortgagor or by foreclosure of his mortgage. Barson v. Mulligan, 191 N. Y. 306, 84 NE 75. By statute no right of ejectment until after foreclosure (Union Trust Co. v. Charlotte General Elec. Co., 152 Mich. 568, 15 Det. Leg. N. 263, 116 NW 379), and an agreement that the mortgagee may be entitled to the rents and profits upon default is an attempt to avoid the statute and is void (Id.).

**82, 83.** Becker v. McCrea, 193 N. Y. 423, 86 NE 463.

**84.** Court will appoint a receiver to hold the rents. Strain v. Palmer [C. C. A.] 159 F 628.

**85, 86.** Baker v. Baker [Md.] 70 A 418.

**87.** Not for cost of improvements. Halbert v. Turner, 233 Ill. 531, 84 NE 704.

**88, 89.** Green v. Thornton [Cal. App.] 96 P 382.

The mortgagee in possession is under no obligation to make long term leases as his occupancy is contingent.[90] A mortgagee in possession under a deed of the equity of redemption from the mortgagor is not liable as mortgagee in possession to account to junior lien-holders for rents and profits received after the time he took possession under the deed.[91] A mortgagee in possession is generally entitled to be reimbursed by the holder of the equity for his reasonable expenses in preserving the property,[92] and to such reasonable outlays in making improvements as such holder approves and consents to,[93] and where possession is under agreement and the improvements are necessary to the judicious and proper management of the property,[94] but is not entitled to compensation for supervision of the property.[95] Under an absolute deed intended as a mortgage, the grantee is at law entitled to recover rents to the exclusion of the grantor.[96] Ordinarily in equity a mortgagee in possession under a formal mortgage is bound to account for what he has, or without fraud or willful default might have received from the time of taking possession;[97] but where an absolute deed in fact a mortgage is given, the grantee is made the agent of the grantor, or mortgagor, for the collection of rents and is only chargeable for rents on the grounds as an agent would be.[98]

*Rights and liabilities of mortgagor's sureties.* See 10 C. L. 866

§ 8. *Lien and priorities.*[99] See 10 C. L. 866—The priority of liens is ordinarily governed by the dates of acquisition [1] in the absence of agreement [2] or estoppel [3] except as affected by the recording acts.[4] A mortgage being a legal contract, lien prevails, however, over an equitable lien prior in time.[5] As between a mortgage and a statutory lien, priority in time usually controls.[6] If the holder of a mortgage

**90.** Lessee offered to take a ten year lease on the basis of improvements not justified under a leasing from year to year. Eldredge v. Hoefer [Or.] 96 P 1105.

**91.** Anglo-California Bank v. Field [Cal.] 98 P 267.

**92.** Taxes, repairs and the like. Lynch v. Ryan, 137 Wis. 13, 118 NW 174.

**93, 94, 95.** Lynch v. Ryan, 137 Wis. 13, 118 NW 174.

**96, 97.** Griffen v. Cooper [N. J. Eq.] 68 A 1095.

**98.** Where the grantor informed tenants not to pay rents to grantee, he could not hold the grantee responsible for rents. Griffen v. Cooper [N. J. Eq.] 68 A 1095.

**99. Search Note:** See notes in 15 L. R. A. (N. S.) 590, 1025; 4 Ann. Cas. 316; 7 Id. 1065. See, also, Mortgages, Cent. Dig. §§ 290-455; Dec. Dig. §§ 145-186; 27 Cyc. 1161-1229; 20 A. & E. Enc. L. (2ed.) 959, 1047; 23 Id. 467.

**1.** The first in time being the first in right. Hughes v. Mt. Vernon Bank [Ga. App.] 60 SE 809.

**2.** Under the circumstances held a mortgage made under an agreement that it should be subsequent and subordinate to advances made by A, under a mortgage to secure advances, was subordinate and A was entitled to the surplus after foreclosure of certain mortgages. Velleman v. Rohrig, 127 App. Div. 692, 111 NYS 736. Where one mortgage contained no reference to another executed simultaneously with it while the latter was expressly declared to be not only collateral to the bond secured but to the former mortgage, such former mortgage was the primary security. Abert v. Kornfeld, 128 App. Div. 547, 112 NYS 884. Where there was an agreement to subordinate the purchase money mortgage in case of a desire to borrow for building purposes, it was held that the execution of a further subordination agreement was not necessary to make the subordination effective. Londner v. Perlman, 113 NYS 420.

**3.** Under the facts judgment creditors were estopped to claim superiority to the mortgage. Smith v. Munger [Miss.] 47 S 676.

**4.** See Notice and Record of Title, 10 C. L. 1015.

**5.** A vendor's lien must yield to a superior equity such as a mortgage without notice of the lien. Welch v. Farmers' L. & T. Co. [C. C. A.] 165 F 561.

**6.** A **mechanics' lien** for labor and material is subject to a prior mortgage. Davidson v. Stewart, 200 Mass. 393, 86 NE 779. The test of priority between a mortgage and mechanic's lien is whether the work is a new and distinct structure or repair and improvement of one already standing. Heating apparatus held to give a lien on whole property subject, however to the prior incumbrance on the premises. Elliott & Barry Engineering Co. v. Baker [Mo. App.] 114 SW 71. Under the terms of California code, the lien of a deed of trust given a year after commencement of building operations and furnishing materials is inferior to a mechanics' lien for work and materials. Farnham v. California Safe Deposit & Trust Co. [Cal. App.] 96 P 788. A materialman's lien is superior to a prior purchase-money mortgage of which the material man had no actual notice. Baisden & Co. v. Holmes-Hartsfield Co. [Ga. App.] 60 SE 1031. Under the statute in Connecticut upon the letting of a contract for construction work upon premises, a lien arises for such work and material made necessary by virtue of the contract which takes precedence over a mort-

take a new mortgage as a substitute without any knowledge of an intervening lien, equity will restore the lien of the first mortgage and give it its priority.[7] A purchase-money mortgage whether given back to the grantor or to a third party if all part of the one transaciton excludes any claim or lien arising through the mortgagor.[8] In the absence of lis pendens,[9] a mortgage taken pendente lite is superior to the judgment,[10] and a fortiori as to a mortgage taken by one who knows that litigation is probable.[11] A mortgagee is a privy in estate with the mortgagor as to actions begun before the mortgage is executed, but he is not bound by the judgment against the mortgagor, in a suit begun after the mortgage is given.[12] Whether a reserved right of a grantor to forfeit is superior to a mortgage by the grantee before forfeiture depends on the circumstances.[13] A lien for taxes paid by the mortgagee occupies in respect to priority the same position as the tax lein.[14] A mortgagee does not lose his lien by suing and recovering judgment or attaching property of the mortgagor in an action on the mortgage debt.[15] The effect of a levy by a junior lienor is to seize the equity of redemption only.[16]

§ 9. *Assignments of mortgage.*[17]—See 10 C. L. 868—The assignment of the mortgage debt carries with it the mortgage securing the same.[18] Mortgages not being assignable in law but only in equity,[19] the assignee takes subject to the same rights[20] and subject to the same defenses as between the original parties,[21] unless the mort-

gage placed upon the premises while the work is going on. Facts did not postpone the lien for material and labor to the lien of the mortgage. Soule v. Borelli, 80 Conn. 392, 68 A 979. Where the owner of land deeded it to another taking a second mortgage back, but before the mortgage took effect the mortgagor had contracted with the first mortgagee exchanging rights in the property, the deed and second mortgage were not part of a single transaction rendering the mortgagor's seisin only instantaneous and preventing a mechanic's lien from attaching to the mortgage. Brown v. Haddock, 199 Mass. 480, 85 NE 573.

**7.** Issue of bonds defaulted a second issue put out to take their place. Bondholders making the exchange protected against an intervening attachment creditor. Griffin v. International Trust Co. [C. C. A.] 161 F 48. The failure of a mortgagee of property in Alaska to ascertain the fact of an attachment lien thereon before taking a renewal mortgage was not such laches as to bar it from the right to relief by a reinstatement of the original mortgage as against such lien where no prejudice resulted to the holder. Id.

**8.** Lien of a judgment against the purchaser does not attach. Protestant Episcopal Church of the Diocese v. Lowe Co. [Ga.] 63 SE 136.

**9.** See Lis Pendens, 12 C. L. 633.

**10.** Curle v. Wright [Iowa] 119 NW 74.

**11.** A party, although knowing that a husband and wife are living inharmoniously and that a divorce is imminent, may loan money to the husband and take a mortgage on his property as security, and his lien is not subordinate to any interest which the wife may subsequently secure on obtaining divorce. Du Bois v. First Nat. Bank, 43 Colo. 400, 96 P 169

**12.** Moody v. Vondereau [Ga.] 62 SE 821.

**13.** Where there was a right of forfeiture of title to property for failure to perform a condition subsequent, there was no equity in favor of mortgagees who loaned trust funds recklessly thereon, prior to a recording of the deed of grant of the land. Fowler v. Coates, 128 App. Div. 381, 112 NYS 849. Where a contract of sale of premises was made, the same to be void if certain deferred payments were not made, and A took a mortgage from the vendor knowing of the contract, and B took an assignment of the notes of the vendee given for the deferred payments, and later the payments were defaulted and the vendor mortgaged to B, this mortgage to B, who was assignee of the defaulted notes, did not constitute him a lienor prior to A. Carhart v. Allen [Fla.] 48 S 47.

**14.** Farmer v. Ward [N. J. Eq.] 71 A 401.

**15, 16.** Hughes v. Mt. Vernon Bank [Ga. App.] 60 SE 809.

**17. Search Note: See** notes in 16 L. R. A. 85; 25 Id. 257; 4 L. R. A. (N. S.) 666; 8 Id. 404.

See, also, Mortgages, Cent. Dig. §§ 586-710; Dec. Dig. §§ 219-269; 27 Cyc. 1278-1833; 20 A. & E. Enc. L. (2ed.) 1024.

**18.** Release by mortgagee invalid. Morrison v. Roehl [Mo.] 114 SW 981. Under statute dispensing with the necessity of the word heirs to convey the fee, a mortgage which is merely a lien for the debt will pass to an assignee by mere assignment of the debt. Bartlett Estate Co. v. Fairhaven Land Co., 49 Wash. 58, 94 P 900. Trust deeds given as security for the payment of notes are accessory thereto and pass with the notes without formal assignment. Roach v. Sanborn Land Co., 135 Wis. 354, 115 NW 1102.

**19.** Bartholf v. Bensley, 234 Ill. 336, 84 NE 928.

**20.** Assignee takes subject to all defenses. Bensley v. Bartholf, 137 Ill. App. 420. The transfer to a bona fide indorsee of a note with a mortgage on real estate by which the note is secured confers upon the indorsee a lien upon the real estate free from all latent equities in favor of persons who are strangers to the title. First Nat. Bank of Wapakoneta v. Brotherton, 78 Ohio St. 162, 84 NE 794.

**21.** Bartholf v. Bensley, 234 Ill. 336, 84 NE 928. An assignee of a mortgagee can occupy

gagor is estopped to assert such defense.[22] A mortgagee by quit-claiming his interest in land thereby assigns a mortgage thereon to the grantee.[23] The assignee of a mortgage for collateral security is a joint owner with the mortgagee in equity.[24] There is an implied warranty by the assignor to his assignee of the validity of the mortgage,[25] despite the fact that the mortgage and note are assigned "without recourse."[26] An assignment must describe the mortgage with certainty.[27]

§ 10. *Transfer of title of mortgagor and assumption of the debt.*[28]—See 10 C. L. 868—In some states it is held that when a purchaser with notice of the mortgage acquires an interest in mortgaged property he succeeds to the estate and occupies the position of his grantor,[28a] and in others that there must be a distinct assumption[29] for a consideration,[30] and that the mere taking of title by a deed stating that the land is subject to a mortgage does not import a promise to pay on the part of the purchaser.[31] One who assumes a mortgage in his deed and goes into possession is under some decisions primarily liable, the grantor becoming his surety,[32] and the land being the primary fund out of which payment is to be made,[33] and the mortgagor being subrogated to the rights of the mortgagee upon payment of the debt,[34] while according to others the purchase money reserved by the grantee is the primary fund.[35] A valid agreement between the mortgagee and the purchaser of the equity to extend the time of payment opreates to release the mortgagor only so far as

no better position than the mortgagee. Barson v. Mulligan, 191 N. Y. 306, 84 NE 75.

**22.** Oral statement of mortgagor at time of assignment that he had no defense held estoppel. Nixon v. Haslett [N. J. Eq.] 70 A 987.

**23.** Gottlieb v. New York, 112 NYS 545.

**24.** Cresco Realty Co. v. Clark, 112 NYS 550.

**25.** The implied warranty to the first assignee of a mortgage by the mortgagee does not apply to a second assignee. Action to set mortgage aside as procured by fraud. Wright v. Day, 59 Misc. 76, 111 NYS 1105. The fact that a mortgagee who has assigned his interest makes statements regarding the nature of the mortgage to a prospective purchaser does not bind the assignee of whom no inquiry is made. That mortgage was given for same debt as secured by two judgments. Shannon v. McHenry, 219 Pa. 267, 68 A 734.

**26.** Hall v. Latimer [S. C.] 61 SE 1057.

**27.** An assignment of a mortgage which merely describes the instrument as a mortgage executed by A and his wife to B, and recorded in Book F of Mortgages, pages 556-558, in the registry of deeds, is too indefinite to vest the legal and record title in the assignee entitling him to foreclose a mortgage recorded in Book 15. Hebden v. Bina [N. D.] 116 NW 85.

**28. Search Note:** See note in 55 A. S. R. 100.

See, also, Mortgages, Cent. Dig. §§ 711-805; Dec. Dig. §§ 271-292; 27 Cyc. 1333-1373; 20 A. E. Enc. L. (2ed.) 984, 1024.

**28a.** The mortgagor may by a payment on account of the debt suspend the running of the statute in favor of one acquiring an interest. Du Bois v. First Nat. Bank, 43 Colo. 400, 96 P 169.

**29.** Facts held to show that an assumption of mortgage clause in a deed was not inserted by mistake. Hartsuff v. Parrott [Neb.] 115 NW 569.

**30.** The transfer of the mortgagor's interest for a nominal sum and possession of the land are sufficient consideration for grantee's agreement to assume the mortgage. Kenney v. Streeter [Ark.] 114 SW 923.

**31.** The taking of a deed to premises, reciting that the premises are subject to a mortgage, does not import a promise on the part of the purchaser to pay the mortgage debt. Capitol Nat. Bank v. Holmes, 43 Colo. 154, 95 P 314.

**32.** Perry v. Ward [Vt.] 71 A 721. Upon conveyance of premises subject to mortgage, the mortgagor becomes in a sense surety for the purchaser. North End Sav. Bank v. Snow, 197 Mass. 339, 83 NE 1099. The acceptance of a deed containing a clause that the grantee assumes an outstanding mortgage note binds the grantee as principal debtor, and the maker becomes his surety. Priddy v. Miners' & Merchants' Bank, 132 Mo. App. 279, 111 SW 865. Where grantees take subject to indebtedness secured by mortgage, payment by them inures to the benefit of the signers of the bond secured thereby. Wiener v. Boehm, 126 App. Div. 703, 111 NYS 126.

**33.** Perry v. Ward [Vt.] 71 A 721. By an assumption of the mortgage, the grantee simply covenants to save harmless his grantor from any deficiency judgment in foreclosure. Land the principal debtor, mortgagor the surety. Bonhoff v. Wiehorst, 57 Misc. 466, 108 NYS 444. A purchaser of land subject to a mortgage which he assumes is entitled to have the land subjected to the payment of the mortgage first. Pease v. Warner, 153 Mich. 140, 15 Det. Leg. N. 419, 116 NW 994.

**34.** North End Sav. Bank v. Snow, 197 Mass. 339, 83 NE 1099. A mortgagor who, having disposed of his equity, satisfies the mortgage and discharges his personal liability, has no claim against his grantee except to enforce in equity under his right of subrogation the satisfaction of the mortgage out of the property. Bradley v. Hufferd, 138 Iowa, 611, 116 NW 814.

**35.** Perry v. Ward [Vt.] 71 A 721.

the security falls short of the indebtedness by reason of such extension.[36] If the grantor of mortgaged land is personally liable to pay the debt, the mortgagee or his grantee may maintain an action against the assuming grantee,[37] but when the immediate grantor is not liable, and owes no duty or obligation to the owner of the mortgage in respect to the subject-matter, no cause of action arises in favor of the owner of the mortgage.[38] One who has assumed and agreed to pay a mortgage incumbrance is estopped to deny the validity of the same,[39] but where the grantee takes subject to incumbrances, he is not bound to pay a mortgage thereon which did not constitute part of the consideration of his purchase and which was not made in good faith for a real indebtedness.[40] A parol agreement by a grantee at the time of transfer to assume an outstanding mortgage as part of the consideration may be enforced in equity.[41] Though the assumption of a mortgage debt by a subsequent purchaser is absolute and unqualified in the deed of conveyance to him, it will be controlled by a collateral contract between him and the grantor not embodied in the original deed and the mortgagee cannot enforce the contract of assumption appearing in the deed unless the grantor could.[42] Mortgage is an incident to the debt and a grantee taking subject to the mortgage is bound by and may take advantage of prior arrangements as to the debt, but, if the agreement is subsequent, the grantee is bound only by the contract existing at time of purchase.[43] A provision in a deed whereby a grantee assumes and agrees to pay an existing mortgage does not create a covenant which runs with the land, although inserted in connection with the covenants of seisin and against incumbrances.[44] Where a third party never knew of a mortgage on land transferred to him and the mortgagee subsequently discharged the mortgage and declared the third party's title good, he is not liable to the mortgagee.[45] Where a mortgage note is secured by personalty and realty both and a grantee takes the realty agreeing as part consideration to pay the mortgage note but the same is later satisfied out of the personal property, the mortgage on the realty is discharged and it is immaterial that he has procured the land without payment of the purchase price.[46] A mere purchaser of the equity of redemption of mortgaged lands is given all the protection designed by the Nebraska statute if he is permitted to deal safely with one who appears by the record to be the owner of the mortgage securing a non-negotiable debt.[47] The acquiring of a

**36.** North End Sav. Bank v. Snow, 197 Mass. 339, 83 NE 1099.

**37.** Clement v. Willett, 105 Minn. 267, 117 NW 491. The mortgagee may sue the grantee, covenantor, who has assumed the mortgage on granted premises. Curry v. La Fon, 133 Mo. App. 163, 113 SW 246.

**38.** Clement v. Willett, 105 Minn. 267, 117 NW 491. A grantee of mortgaged premises whose deed recites that the land is conveyed subject to a mortgage which grantee assumes and agrees to pay as part consideration is not liable for a deficiency on foreclosure in case the grantor was not personally liable for payment of the mortgage. Bonhoff v. Wiehorst, 57 Misc. 456, 108 NYS 437; Clement v. Willett, 105 Minn. 267, 117 NW 491, citing Marble Sav. Bank v. Mesarvey, 101 Iowa, 285, 70 NW 198.

**39.** Sherman v. Goodwin [Ariz.] 95 P 121. One who assumes a mortgage by covenant in the deed of transfer as part of the purchase price cannot defend against the mortgage debt on the ground that it is without consideration (Curry v. La Fon, 133 Mo. App. 163, 113 SW 246), or invalid for any other reason (Id.).

**40.** Sherman v. Goodwin [Ariz.] 95 P 121.

**41.** It does not come within the statute of frauds for the debt becomes his own debt. Herrin v. Abbe [Fla.] 46 S 183. Where a conveyance of land is made and the grantee assumes as part consideration a mortgage debt due from the grantor, the debt thus assumed to be paid is not the debt of a third person within the statute of frauds, but becomes the debt of the grantee and he is liable whether his contract is in writing or oral. Southern Indiana L. & Sav. Inst. v. Roberts [Ind. App.] 86 NE 490.

**42.** Klemmer v. Kerns [N. J. Err. & App.] 71 A 332.

**43.** Agreement for extension of time of payment. Kelsey v. Collins [Tex. Civ. App.] 108 SW 793.

**44.** Clement v. Willett, 105 Minn. 267, 117 NW 491.

**45.** Messmore v. Maerz, 149 Mich. 331, 14 Det. Leg. N. 438, 112 NW 980.

**46.** Priddy v. Miner's & Merchants' Bank, 132 Mo. App. 279, 111 SW 865.

**47.** Bettle v. Tiedgen, 77 Neb. 795, 116 NW 959.

tax title by one contemplating the purchase of mortgaged land does not, upon purchase of the land subject to incumbrances, wipe out the mortgage.[48]

§ 11. *Transfer of premises to mortgagee and merger.*[49] See 10 C. L. 868—A mortgagor may sell his equity of redemption to the mortgagee,[50] but the transaction is viewed with distrust and must be free from fraud or inadequacy of consideration.[51] But such a transfer the equity ordinarily merges with legal title and the lien is extinguished.[52] Merger is essentially a matter of intention,[53] and where it is the intent of the parties and justice requires that the interest be kept separate, equity will prevent a merger.[54] The purchase of the land by a junior mortgagee merges his lien in the superior title,[55] but whenever an advantage could accrue to the mortgagee by preserving his lien for the purpose of using it as a screen to protect him from an intermediate title, such as a junior mortgage or other subsequent lien, the purchaser is entitled to keep his lien alive for such purpose.[56]

§ 12. *Renewal, payment, release, or satisfaction.*[57] See 10 C. L. 869—The question as to what constitutes such a default of payment as will warrant foreclosure is elsewhere treated.[58] After a mortgage has become extinct, it may be revived,[59] but after actual extinguishment of the debt, the mortgage cannot be revived by an oral agreement to keep it in force to secure a new and independent debt.[60] The revival

48. State Mut. Bldg. & Loan Ass'n v. Millville Imp. Co. [N. J. Eq.] 70 A 300.

49. **Search Note:** See notes in 6 C. L. 698; 23 L. R. A. 120; 58 Id. 788; 14 L. R. A. (N. S.) 479; 99 A. S. R. 160; 3 Ann. Cas. 395.

See, also, Mortgages, Cent. Dig. §§ 806-835; Dec. Dig. §§ 293-297; 27 Cyc. 1373-1386; 20 A. & E. Enc. L. (2ed.) 1050.

50. Thornton v. Pinckard [Ala.] 47 S 289.

51. Thornton v. Pinckard [Ala.] 47 S 289. Any subsequent arrangement by which the mortgagor's equity of redemption is sought to be transferred to the mortgagee will be viewed with distrust and their original relation continued unless it appears that such arrangement was perfectly fair to the debtor and no advantage was taken of him because of his indebtedness. Gassert v. Strong [Mont.] 98 P 497. Payment of so much of the debt as was secured by the mortgage is a good consideration for the surrender of complainant's equity of redemption. Sears v. Gilman, 199 Mass. 384, 85 NE 466.

52. When the holder of a mortgage subsequently acquires the property upon which it rests, the lien is thereby extinguished. Kline v. Miller's Adm'r, 107 Va. 453, 59 SE 386. Under ordinary circumstances, the mortgage interest is merged in the fee where the mortgagee acquires the estate of the mortgagor. Anglo-Californian Bank v. Field [Cal.] 98 P 267. One of the conditions under which merger will operate upon estates is that the two estates, the greater and the lesser, are in the same person at the same time (Shreve v. Harvey [N. J. Eq.] 70 A 671), without an intervening right operating to prevent a merger (Curry v. La Fon, 133 Mo. App. 163, 113 SW 246). A and B held the equity, the land was incumbered by a mortgage deed of trust by which the legal title was invested in S, hence his title intervened to prevent a merger of estates in A by virtue of his holding the notes given by him. Id.

53. Facts did not show merger. Sherve v. Harvey [N. J. Eq.] 70 A 671. The question of merger is governed by the intention of the parties where the owner of fee pays off mortgage. Capitol Nat. Bank v. Holmes, 43 Colo. 154, 95 P 314.

54. Agreement between A and B that B should bid in property for A's benefit at foreclosure did not cut off A's second mortgage. Behrendt v. Burns, 134 Wis. 479, 115 NW 146. Where the mortgagor's interest is transferred to the mortgagee and there is an agreement that the two interests shall not merge, the effect is to make the land a primary fund for the debt as between the parties. Eagan v. Engeman. 125 App. Div. 743. 110 NYS 366. No merger under the facts. Shreve v. Harvey [N. J. Eq.] 70 A 671. Where there is an intervening lien on the property which it is to the interest of the purchaser to keep alive and where it does not expressly appear as the intention to extinguish the first mortgage and hold subject only to the second. Anglo-California Bank v. Fiel [Cal.] 98 P 267. The legal title and first mortgage lien will be considered as separate interests whenever necessary for the protection of the rights of the purchaser (Id.), if the court finds it to the interest of the mortgagor that a merger should not occur, it will keep both alive (Kline v. Miller's Adm'r, 107 Va. 453, 59 SE 386).

55. Horr v. Herrington [Olk.] 98 P 443.

56. No reason for such rule in case at bar. Horr v. Herrington [Okl.] 98 P 443.

57. **Search Note:** See notes in 2 L. R. A. (N. S.) 628; 5 A. S. R. 703, 705; 88 Id. 359; 95 Id. 664; 3 Ann. Cas. 1132; 6 Id. 550; 8 Id. 363; 9 Id. 66, 259.

See, also, Mortgages, Cent. Dig. §§ 836-961; Dec. Dig. §§ 298-319; 27 Cyc. 1386-1438; 20 A. & E. Enc. L. (2ed.) 1055.

58. See Foreclosure of Mortgages on Land, 11 C. L. 1487.

59. State Mut. Bldg. & Loan Ass'n v. Millville Imp. Co. [N. J. Eq.] 70 A 300.

60. Hayhurst v. Morin [Me.] 71 A 707.

of the debt by the stopping of the statute of limitations revives a mortgage given to secure its payment.[61] Payment may be made by a substituted note and mortgage.[62] Payment may be shown by proof of facts and circumstances relating to the dealing with the property by the parties.[63] The mere fact of possession of the mortgage deed by the mortgagor does not show a presumption of payment,[64] but production by the mortgagor of the mortgage note does [65] although it is not conclusive,[66] nor is the possession of the note by the mortgagor conclusive of payment.[67] Evidence of an oral agreement cancelling a mortgage must be clear and convincing.[68] Where the party whose duty it is to pay a mortgage and cancel it makes such payment, any writing given is a release even though it purport to be an assignment.[69] No mere change in the form of indebtedness without actual payment is deemed sufficient to entitle mortgagor to a release.[70] The laws favor settlements and courts will not disturb them except for cogent reason.[71] Where a mortgagor without notice of an assignment by the mortgagee of his interest makes payments to the mortgagee, he is entitled to credit therefor,[72] but not where an assignment to a third party has been duly recorded and the original mortgagee fails to pay over such money to the record holder.[73] Where a mortgage in the form of an absolute deed with a separate bond of defeasance is sought to be made an absolute deed, this can be done by a cancellation of the bond.[74] Tender to discharge a mortgage must be of the exact amount due.[75] If the mortgagee having notice of successive alienation of parts of the premises releases a part primarily liable for the debt, the remaining parts cannot be charged with it without first deducting the value of the part released;[76] if the value of the part released equals the entire debt, then all subsequent parcels are entirely released.[77] When money is paid to release the mortgage lien from a part of the premises, which part is conveyed in fee to a purchaser, the law applies the

**61.** Senninger v. Rowley, 138 Iowa, 617, 116 NW 695.

**62.** Evidence sufficient to show payment by a substituted note and mortgage. Citizens' Sav. Bank v. Leigh, 33 Ky. L. R. 1061, 112 SW 628. Where second and third mortgages were given upon the express agreement that they should operate to extinguish and pay the first mortgage, the mortgagors were entitled to a return of the note and to a discharge of the mortgage. Macomber v. Bremer, 198 Mass. 20, 84 NE 328. A tract being incumbered by three mortgages, facts held to show payment of the original first and second mortgages by certain transactions and that the property was cleared of the liens when the A mortgage to replace the third original mortgage was executed. Behrendt v. Burns, 134 Wis. 479, 115 NW 146. Transaction held to be a renewal and not a payment of a note so that it was still secured by the mortgage. Greist v. Gowdy [Conn.] 71 A 555.

**63.** Held under all the circumstances among which the facts that the mortgagors have for more than 20 years been in full and exclusive possession without admitting title in the mortgagee or paying interest, further, that the mortgagors have erected buildings, paid taxes, etc., that the mortgage was no longer a lien. Shreve v. Harvey [N. J. Eq.] 70 A 671.

**64.** Mortgagor executed mortgage to his attorney who assigned to mortgagor's wife who sent it for record and it was mailed back to mortgagors and found with his papers at death. Clymer v. Groff, 220 Pa. 580, 69 A 1119.

**65.** Clymer v. Groff, 220 Pa. 580, 69 A 1119.

**66.** Evidence held sufficient to show payment where mortgagee still held note. Parsons v. Ramsey [Fla.] 45 S 991; Clymer v. Groff, 220 Pa. 580, 69 A 1119.

**67.** Evidence showed purchase of notes by mortgagor's widow and not payment by her. Morrison v. Roehl [Mo.] 114 SW 981.

**68.** Hungerford v. Snow, 114 NYS 127.

**69.** Mortgage debt paid by A who had an assignment made out to his children which was transferred later to plaintiff who sought to foreclose. Lydon v. Campbell, 198 Mass. 29, 84 NE 305.

**70.** Hayhurst v. Morin [Me.] 71 A 707. The mortgage is not discharged by a change in the form of indebtedness. Indorser of a note who is secured by a mortgage indorses a renewal note for the same debt or part thereof and is compelled to pay the renewal note. He is protected by the mortgage. Greist v. Gowdy [Conn.] 71 A 555.

**71.** Kahn v. Metz [Ark.] 114 SW 911.

**72.** People's Trust Co. v. Gomolka, 113 NYS 49; Bensley v. Barthoif, 137 Ill. App. 420.

**73.** Bettle v. Tiedgen, 77 Neb. 795, 116 NW 959.

**74.** Sears v. Gilman, 199 Mass. 384, 85 NE 466.

**75.** Kingsley v. Anderson, 103 Minn. 510, 115 NW 642.

**76, 77.** Schaad v. Robinson [Wash.] 97 P 104.

payment in the absence of agreement to the reduction of the mortgage debt pro tanto.[78] Where under a deed absolute in form there exists an equity in parol, this equity may be discharged by a subsequent parol agreement leaving the title absolute in accordance with the terms of the deed.[79] By statute in California the lien of a recorded mortgage may be satisfied by an indorsement upon the margin of the record.[80]

*Penalties for failure to release.* See 10 C. L. 871

§ 13. *Redemption.*[81]—See 10 C. L. 871—This section treats only of redemption from the mortgage as distinct from redemption from foreclosure.[82] The maxim being "once a mortgage always a mortgage" the right of redemption is not cut off by a contemporaneous limitation therein,[83] nor by continued default in payments,[84] nor by mere expiration of the time for redemption.[85] To entitle a judgment creditor to redeem mortgaged land, it must appear that he has a lien upon the land described in the bill.[86] In redemption proceedings the maxim, he who seeks equity must do equity, applies.[87] In an action to redeem where the mortgagee has been in possession, there may be an accounting.[88] As a general rule in an action against a mortgagee in possession to redeem and for an accounting the defendant should recover costs despite the fact that the plaintiff prevails,[89] but if the defendant is at fault, rendering expensive litigation necessary to establish plaintiff's right to redeem, the

78. State Mut. Bldg & Loan Ass'n v. Millville Imp. Co. [N. J. Eq.] 70 A 300.

79. Sears v. Gilman, 199 Mass. 384, 85 NE 466.

80. Roberts v. True, 7 Cal. App. 379, 94 P 392.

81. **Search Note:** See note in 8 L. R. A. (N. S.) 559.

See, also, Mortgages, Cent. Dig. §§ 1693-1888; Dec. Dig. §§ 591-624; 27 Cyc. 1799-1867; 28 A. & E. Enc. L. (2ed.) 844.

82. See Foreclosure of Mortgages on Land, 11 C. L. 1487.

83. Covenant that it would not be claimed after a limited period held ineffectual. Jones v. Gillett [Iowa] 118 NW 314. Where there is an agreement which is for a loan to be repaid at a certain time and an absolute deed is given, but really as security, the borrower cannot deprive himself of the right to redeem from the mortgage given as security even by an express agreement for the purpose. Griffen v. Cooper [N. J. Eq.] 68 A 1095. If the transaction be in fact a mortgage, no agreement made at the time can deprive the debtor of his right to redeem. Agreement that if mortgagor did not pay the debt he would sell his equity of redemption for $50. Wilson v. Fisher, 148 N. C. 535, 62 SE 622. Where a deed absolute in form was given to A as security, A at the same time giving back a defeasance agreement, the subsequent surrender for a consideration of such agreement and its cancellation is ineffectual to make absolute the deed and cut off the right of redemption. Conover v. Palmer, 111 NYS 1074. Agreement that mortgagee have rents upon default. Union Trust Co. v. Charlotte General Elec. Co., 152 Mich. 568, 15 Det. Leg. N. 263, 116 NW 379.

84. Continued default of payments under a deed absolute on its face would not make the conveyance absolute where it was in fact a mortgage. Winsor v. Winsor [Kan.] 95 P 1135.

85. Rion v. Reeves [La.] 48 S 138.

86. Judgments operate as a lien only upon land in county where judgment is recorded. Greenwood v. Trigg, Dobbs & Co.. [Ala.] 46 S 227.

87. Potter v. Schaffer, 209 Mo. 586, 108 SW 60. If a mortgagor for a new consideration makes an oral agreement that the mortgage shall be continued as security for the new loan and advances are made on the faith thereof, equity will refuse to relieve the mortgagor from such agreement in a bill to redeem on the principle of he who seeks equity must do equity. Hayhurst v. Morin [Me.] 71 A 707. Such an oral agreement could not be set up against a subsequent mortgagee or attaching creditor, nor could it be invoked against the mortgagor himself or his assignee in an action at law by the mortgagee to foreclose the mortgage. Id. Mortgagee cannot be compelled to rely upon a portion of the mortgaged premises, although ample as security, and hence he is entitled to hold a homestead interest until the entire premises are redeemed. Davis v. Davis [Vt.] 69 A 876. In an action to redeem after foreclosure proceedings begun, evidence sufficient to show a tender of interest and expenses of foreclosure proceedings to date. Potter v. Schaffer, 209 Mo. 586, 108 SW 60. An agreement by a mortgagor that a mortgage shall stand as against future advances is binding, and equity will not allow redemption after such advances until performance of such agreement made originally to secure a simple money bond made later a security for payment of a loan from and for interest, dues, premiums and fines due to a loan association. State Mut. Bldg. & Loan Ass'n v. Millville Imp. Co. [N. J. Eq.] 70 A 300.

88. Lynch v. Ryan, 137 Wis. 13, 118 NW 174.

89. Lynch v. Ryan, 137 Wis. 13, 118 NW 174. But see Griffen v. Cooper [N. J. Eq.] 68 A 1095.

plaintiff may in the court's discretion be allowed costs.[90] On redemption by a judgment creditor the title still remains in the mortgagors as owners.[91] A mortgagee seeking to set aside a redemption must tender back the sum paid to redeem.[92]

§ 14. *Subrogation.*[93]—See 10 C. L. 872—Subrogation is allowed to enable one secondarily liable who has paid the debt to gain the benefit of the mortgage security.[94]

*Second mortgagor* is subrogated to the rights of the first mortgagor upon payment to him of the amount due.[95] It is essential that the payor be under some obligation to pay the debt or have some interest to protect by the payment,[96] and an oral promise of the mortgagee that one loaning money to the mortgagor may be substituted for the mortgagee and have a lien is not sufficient to create a lien.[97]

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**Motor Vehicles,** see latest topical index.

## MOTIONS AND ORDERS.

**§ 1. The Motion, 893.** **§ 2. The Order, 895.**

*The scope of this topic* is noted below.[98]

§ 1. *The motion. Making, submitting, and filing.*[99]—See 10 C. L. 873—A motion is a request to the court to grant the maker some right which he claims. Any written words which convey the idea that the supposed right is insisted on are enough.[1] A motion will not be granted on mere unverified assertion; a legal foundation for the order must be laid,[2] containing all the facts essential to the relief desired.[3]

**90.** Lynch v. Ryan, 137 Wis. 13, 118 NW 174.

**91.** Luken v. Fickle [Ind. App.] 84 NE 561.

**92.** Where after a finding that certain conveyances were mortgages of the tracts of land involved, they were redeemed by payments made and the mortgagee subsequently discovered an error in the description of some of the tracts in the findings which were, however, properly described in the decree, the trial court properly refused an order to show cause where mortgagee did not tender back money paid to redeem. Stitt v. Rat Portage Lumber Co., 102 Minn. 337, 113 NW 901.

**93. Search Note:** See Subrogation, Cent. Dig.; Dec. Dig.; 20 A. & E. Enc. L. (2ed.) 1047.

**94.** Plaintiff paid $400 to a mortgagor to pay off a bank mortgage and took a deed of land believing mortgagor had title. Later it developed that she did not have and plaintiff was obliged to purchase an outstanding two-thirds interest and was entitled to subrogation to the mortgagee's rights as against owners of the two-thirds interest. Paton v. Robinson [Conn.] 71 A 730. **Purchaser** paying off a mortgage is entitled to subrogation. Overturf v. Martin, 170 Ind. 308, 84 NE 531; Moring v. Privott, 146 N. C. 558, 60 SE 509.

**95.** Boocock v. Wood, 113 NYS 46.

**96.** Davis v. Davis [Vt.] 69 A 876. When the owner of the fee title pays off a prior incumbrance without actual notice of a junior judgment lien, it will be presumed that he paid the same for his own benefit and the protection of his own interests, and equity will treat him as the assignee of the original incumbrance and will revive and enforce it for his benefit. Purchaser paid off mortgage in ignorance of a judgment lien, although it was on record was subrogated to rights of mortgagee. Capitol Nat. Bank v. Holmes, 43 Colo. 154, 95 P 314. Even where the deed recites that the purchaser shall pay off the mortgage as part of the purchase price, he is entitled to subrogation. Id. **One loaning money** to pay off a vendor's lien is not substituted thereby to the rights of the vendor, and acquires no lien. Sureties to vendee's note upon payment do not acquire a lien to rights of obligee. Lane v. Lloyd, 33 Ky. L. R. 570, 110 SW 401.

**97.** Lane v. Lloyd, 33 Ky. L. R. 570, 110 SW 401.

**98.** This topic includes only matters common to all motions, questions relating to particular motions being treated in such topics as New Trial and Arrest of Judgment, 10 C. L. 999; Continuance and Postponement, 11 C. L. 725, and the like. See, also, Appeal and Review, 11 C. L. 113 as to review of orders made on motion. The necessity of making particular motions to save the right of review is treated in Saving Questions for Review, 10 C. L. 1572.

**99. Search Note:** See note in 4 C. L. 704.

See, also, Motions, Cent. Dig. §§ 1-58; Dec. Dig. §§ 1-45; 20 A. & E. Enc. L. (2ed.) 1076; 14 A. & E. Enc. P. & P. 70.

**1.** Form, "In the above entitled cause, appellants move that the same be assigned for jury trial," is sufficient under sec. 799, Court and Practice Act 1905, securing a jury trial of controverted matters of fact to any party who makes known his desire in writing at proper time and place. Arnold v. Regan. [R. I.] 69 A 292.

**2.** Order for inspection of documents erroneously granted where it did not appear in

Where the statute requires a motion to be made in writing, it must be so made.[4] Although the court rules provide for a daily motion list and prescribe the manner of placing motions thereon, and the notices to be given, the court is not precluded from hearing motions not on the list.[5] Motions must be made seasonably, and in conformity with the rules of pleading,[6] although the trial court may at its discretion, entertain them when the limitation of time for filing is but a provision of its rules.[7] A statute limiting the time in which a judgment must be entered does not extend to decisions on motions.[8] A motion in the cause, as distinguished from one for an ancillary remedy, must be made in the county where the action is pending.[9]

*Notice.*[See 10 C. L. 873]—The manner of service of notice of motion is immaterial when in fact it procures the presence of the opposing counsel and he argues the merits thereon,[10] but when the statute provides for a notice of motion it must be complied with.[11] The party insisting that notice of motion is not served in time has the burden of proving that fact.[12] Service by mail on non-resident counsel is usually authorized.[13]

*Hearing, rehearing and relief.*[See 10 C. L. 873]—A motion will be denied when the moving papers fail to show any real or meritorious ground therefore,[14] and, if based upon matters dehors the record, must be supported by evidence aliunde.[15] On the motion for a new trial on the minutes, the court may take into consideration the entire case, including evidence not transcribed.[16] Strict practice requires the judge

a manner allowing judicial determination, that they existed and were under defendant's control. Atchison, etc., R. Co. v. Burks [Kan.] 96 P 950.

3. On motion for an order avowing inspection of documents, not sufficient to say that documents contained material evidence, showing should be such that the court can pass upon materiality. Atchison, etc., R. Co. v. Burks [Kan.] 96 P 950.

4. Acts 1903, p. 339, c. 193, § 2, requiring motions to insert new matter in pleadings to be made in writing and to set out words of matter sought so to be inserted is mandatory. Nichols v. Central Trust Co. [Ind. App.] 86 NE 878.

5. Plaintiff gave one day's notice of motion for entry of judgment on default, but failed to place motion on list, or give notice in compliance with rule 74 of the superior court. Held court had jurisdiction to hear motion. Worster v. Yeaton, 198 Mass. 335, 84 NE 461.

6. Plaintiff was entitled as a matter of right to have motion to dismiss writ in ejectment overruled, when not filed in time allowed for dilatory pleas, since failure to raise objection at earliest opportunity was a waiver of the defect. Wade v. Wade's Adm'r [Vt.] 69 A 826.

7. Motion to dismiss writ in ejectment on ground of no service not filed within time allowed for dilatory pleas. Wade v. Wade's Adm'r [Vt.] 69 A 826.

8. Where new trial had been granted upon payment of taxable costs, a motion for judgment absolute not yet decided, but held in reserve to determine whether costs had been paid, furnished no ground for a writ of mandamus compelling justice to decide motion by entering judgment, § 230 of the Municipal Court Act (Laws 1902, p. 1557, c. 580), referring only to the time in which judgments must be entered, and having no reference to motions. Rogers v. Walsh, 114 NYS 185.

9. Motion for order and sale of property in hands of receiver made in another county before court had convened. Atlantic Nat. Bank v. Peregoy-Jenkins Co., 147 N. C. 293, 61 SE 68.

10. Motion to vacate an order of dismissal. Silver Springs & W. R. Co. v. Koonce [Fla.] 47 S 390.

11. Where statute required 4 days' notice and plaintiff obtained order of resettlement on 1 day's notice, court should have dismissed motion. Feist v. Weingarten Bros., 111 NYS 848.

12. Notice of motion for new trial. Objecting party must show that he served notice of entry of judgment in order that limitation of time under § 6796, Rev. Codes, may begin to run. State v. Second Judicial Dist. Ct. [Mont.] 99 P 139.

13. Service held good. Bonney v. McClelland, 138 Ill. App. 449.

14. On a default judgment allowing recovery for professional services as expert alienist, default will not be opened where defendant falls to aver that plaintiff's employment was not authorized. Affidavit of merits not sufficient. Dana v. Thaw, 109 NYS 826. In a criminal case where court allowed a motion to substitute a copy for the original transcript on appeal, a motion to strike this copy out will be denied where the only ground upon which made was that there were irregularities in the proof of correctness and of distruction of the original. People v. Garnett [Cal. App.] 98 P 247.

15. That no copy of assignment of errors was served on defendants, held, on motion to strike bill of exceptions, not self-supporting. Thomas v. Price [Fla.] 48 S 17.

16. Notice of intention to move for a new trial on the minutes of the court under

to find the facts on a motion to set aside a judgment for excusable mistake.[17] Where the facts are complicated and it is manifest that the truth cannot be ascertained with reasonable certainty without an examination of the witnesses, the court may, in its discretion, order a reference.[18] A hearing on motion for order allowing inspection of documents is not conclusive as to the materiality of the documents.[19] As the only mode of judicially determining a motion is by the entry of an order of determination,[20] a party is entitled to a formal order on the decision of his motion from which he may appeal.[21]

*Renewals.* See 10 C. L. 873—The granting of a motion after the same has once been denied is a matter of discretion, and it will be presumed to have been properly exercised.[22]

§ 2. *The order.*[23] See 10 C. L. 874—Objections to the motion should be incorporated in the order allowing it.[24] The court may refer to judgment rolls in its custody and insert them in the order where it appears that they were referred to on the argument as having a material bearing on the question to be decided.[25] An order for the sale of property in the hands of a receiver must be made in the county where the cause is pending, and at the term of court.[26] Orders denying motions to postpone will be made only when the case is actually reached for trial.[27]

*Operation, effect and conclusiveness.* See 10 C. L. 874—An order of a court of record in due form imports verity,[28] but a mere recital that an order is a court order does not make it so, when signed by the judge as judge.[29] A statement in the caption

§ 6795, Rev. Codes, allows trial court to take into consideration entire case in order to determine motion, and it is not necessary that stenographer's notes be transcribed, if court can remember the evidence sufficiently to decide the motion, since statute contemplates that such a motion shall be made immediately after trial. State v. Second Judicial Dist. Ct. [Mont.] 99 P 139.

17. Facts held sufficient to show judgment, properly set aside for absence caused by excusable mistake, although court did not formally find facts, but decided the motion by exercise of its discretion. Smith v. Holmes Bros., 148 N. C. 210, 61 SE 631.

18. Reference not necessary on motion to remove trustees interested in reorganization of company whose stock they hold, where beneficaries under trust ask for their retention. Warren v. Burnham, 125 App. Div. 169, 109 NYS 202.

19. Atchison, etc., R. Co. v. Burks [Kan.] 96 P 950.

20. An order staying proceedings until determination of motion incorporated in an order to show cause why a bill of particulars should not be furnished was not violated by the entry of judgment after the order to show cause was determined, as this was a final order of determination. Tuska v. Jarvis, 113 NYS 767.

21. On application for mandamus to compel justice to enter order denying motion to adjourn, held that such a motion need not be finally decided until case actually reached for trial. Rubenstein v. Schmuck, 113 NYS 554.

22. Where an order was made denying allowance of attorney's fees in a suit for probate of will and before a new trial, it was made during the pendency of the suit, and liberty to renew the application having been granted, the order did not preclude a later application. In re Riviere's Estate [Cal. App.] 98 P 46.

23. **Search Note:** See note in 51 A. S. R. 822.

See, also, Motions, Cent. Dig. §§ 59-91; Dec. Dig. §§ 46-66; 17 A. & E. Enc. L. (2ed.) 763; 15 A. & E. Enc. P. & P. 315.

24. Where an order allowing an inspection of documents did not recite defendant's preliminary objections, a motion for resettlement on that ground will be granted in order that on appeal it may appear that defendant's objections were timely. Societe Anonyme Des Glaces Nationales Belges v. Kahn, 126 App. Div. 834, 110 NYS 980.

25. On question as to whom money in hands of receiver should be paid, judgment rolls in original action where defendant was a party referred to. Conlon v. Kelley, 126 App. Div. 624, 110 NYS 1070.

26. Order permitting receiver to sell property was made at chambers in another county, without notice to the parties and at a time when court was in session. Atlantic Nat. Bank v. Peregoy-Jenkins Co., 147 N. C. 293, 61 SE 68.

27. No error in refusal to sign order denying postponment for absence of plaintiffs on preliminary call of the calendar, since plaintiffs might arrive before case was reached. Rubenstein v. Schmuck, 113 NYS 554.

28. Order continuing a motion to vacate an order of dismissal made on last day of term is binding on parties and cannot be overcome by affidavits or pleadings in the cause. Townsend v. Gregory, 132 Ill. App. 192.

29. Where the statute provided that "probate judge" should order an election under local option act, petition was addressed to "judge of the probate court;" order recited that it was "ordered, adjudged and decreed

that it was made at chambers cannot be disproved in a collateral proceeding.[30] The validity of a chambers order in a matter properly considered as a court matter will be tested by the power of the judge to act on such matter at chambers, and not by the general powers of the court.[31] A party in default, but of whom the court has acquired jurisdiction, is chargeable with notice of all orders made in the cause until the end of the term at which final judgment was rendered against him.[32]

*Nunc pro tunc orders.*[See 10 C. L. 874]—An order may be amended nunc pro tunc to make the record conform to the truth,[33] but an order is not a nunc pro tunc order merely because it adds the minutes of the judge to the record.[34]

*Amendment and vacation.*[See 10 C. L. 874]—Orders made and entered during the progress of proceedings are subject to revocation by the court for good cause during term time,[35] but not later.[36] A void order may be set aside at any time,[37] and on the court's own motion when the order is void ab initio.[38] A resettled order abrogates the former order,[39] but an order vacating an order of *vacatur* operates as a revival of the original order.[40] A judge cannot review orders of another judge of coordinate powers.[41]

*Review.*[42]—[See 10 C. L. 874]

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**Multifariousness; Multiplicity; Municipal Aids and Reliefs,** see latest topical index.

by this court, etc.," and was signed by "judge of probate," held to be made by the "judge." Richter v. State [Ala.] 47 S 163.

**30.** Parol evidence offered to show that order was given in open court, although caption recited that it was made at chambers. Morehead v. Allen [Ga.] 63 SE 507. Where an order contained a statement in the heading that it was made at chambers, fact that proceedings were entered by clerk on record and that words "at chambers" were left out, did not show a court order. Id.

**31.** Order made during session and stated in the heading to have been made at chambers, authorizing sale of real estate of minor, invalid since such matters are to be considered in open court. Morehead v. Allen [Ga.] 63 SE 507.

**32.** An order of amendment. Boynton v. Alwart, 137 Ill. App. 227.

**33.** Where default order against defendant on action on judgment was entered without reference to the clerk for assessment of damages, court properly amended it nunc pro tunc so as to provide for an assessment of damages by the court where 7 months had elapsed and no steps had been taken by **defendant.** Goebel Brew. Co. v. Medbury, 153 Mich. 49, 15 Det. Leg N. 335, 116 NW 543.

**34.** On motion for nunc pro tunc order to correct record so as to extend time for filing bill of exceptions, court amended record so as to make it show that minutes of the judge gave extension of time "for 30 days," while record of the clerk added words "from this date." Held not a nunc pro tunc order. Weeks Hardware Co. v. Weeks [Mo. App.] 115 SW 490.

**35.** Decision overruling a demurrer is not a judgment but an order, and allowance of an amended demurrer revoked that order. Dent v. Los Angeles County Super. Ct., 7 Cal. App. 683, 95 P 672. Order in creditor's suit fixing amount of creditor's claim held interlocutory and subject to be opened during the term. Standard Savings & Loan Ass'n v. Aldrich [C. C. A.] 163 F 216.

**36.** Vacation after term of order allowing amendment of pleading held erroneous but harmless. Albamy Phosphate Co. v. Hugger Bros., 4 Ga. App. 771, 62 SE 533.

**37.** An order appointing curator, void because no service on parent, may be set aside after expiration of term of court during which it was made. Wortham v. John [Okl.] 98 P 347. Trial court had made an order extending time for preparing a statement, and thereafter by a further order again extending the time, but this order was not made until time limited in first order had expired and when statement was presented for settlement it was stricken on motion of adverse party on ground of untimeliness and that court had lost jurisdiction, held correct. Bank of Commerce v. Baldwin, 14 Idaho, 75, 93 P 504.

**38.** Order after final judgment requiring one not a party to deliver property in his possession to the sheriff for plaintiff's benefit. Persing v. Reno Stock Brokerage Co. [Nev.] 96 P 1054.

**39.** A final order was made in favor of a landlord in summary proceedings for nonpayment of rent; subsequently an order opening defendant's default was made, but later resettled. Defendant appealed from final order and order opening default, but not from resettled order. Held appeal should have been from the latter. Pepe v. Curti 114 NYS 415.

**40.** Order dismissed an appeal from justice court; order of dismissal vacated and cause reinstated and motion to set aside said order continued. The court entered an order that order vacating dismissal order be vacated, thereby reviving dismissal order. Bromberg v. People, 136 Ill. App. 602.

**41.** Where a motion was denied by a special term held by one justice, an application made to another special term held by another justice amounts to an appeal from one

## MUNICIPAL BONDS.

§ 1. Power to Issue, 897.
§ 2. Conditions Precedent; Submission to Vote; Provision for Payment, 899.
§ 3. Execution, 902.
§ 4. Form and Requisites, 902.
§ 5. Issue and Sale, 902.
§ 6. Rights and Liabilities Arising Out of Illegal Issue, 903.
§ 7. Transfer, 903.
§ 8. Payment, 903.
§ 9. Scaling Overissue, 904.
§ 10. Enforcement of Bonds, 905.

*The scope of this topic* is noted below.[43]

§ 1. *Power to issue.*[44]—See 10 C. L. 875—There must be express legislative authority for the issue of bonds, and the power cannot be implied from the power to borrow money.[45] In granting the power, constitutional requirements as to the title of the act,[46] and the inhibition of special legislation,[47] should be observed. An authorization will not be viewed hypercritically,[48] unless circumstances of unfairness or excessiveness so dictate.[49] A legislative grant of power to issue may supersede charter limitations.[50] It is a universal restriction that the bonds be for a public purpose.[51] Bonds may be authorized for purposes for which the revenues of a city are ordinarily expended, such as highways and boulevards,[52] or a county may be au-

special term to another. Sloan v. Beard, 125 App. Div. 625, 110 NYS 1.

**42.** See Appeal and Review, 11 C. L. 113.

**43.** "Municipal bonds" includes bonds issued by every public corporation or department of government and not alone those of cities and villages. There are many collateral questions pertaining to the topics dealing with the particular class of public corporations which issues the bonds. These topics may be consulted (see Municipal Corporations, 10 C. L. 881; Counties, 11 C. L. 908; Sewers and Drains, 10 C. L. 1631; Schools and Education, 10 C. L. 1597; Towns; Townships, 10 C. L. 1863; Waters and Water Supply, 10 C. L. 1996). They also treat of warrants for payment of public moneys.

**44. Search Note:** See Counties, Cent. Dig. §§ 261-267, 275, 276; Dec. Dig. §§ 172-175; 11 Cyc. 550-562; Municipal Corporations, Cent. Dig. §§ 1897-1912; Dec. Dig. §§ 909-916; 28 Cyc. 1577-1583; Schools and School Districts, Cent. Dig. §§ 224, 225; Dec. Dig. § 97 (1-3); Towns, Cent. Dig. §§ 90-92; Dec. Dig. § 52; 21 A. & E. Enc. L. (2ed.) 13, 16, 31, 32.

**45.** Muskingum County Com'rs v. State, 78 Ohio St. 287, 85 NE 562; State v. Salt Lake City [Utah] 99 P 255. Purposes, amount and manner of issuance provided by statute. State v. Salt Lake City [Utah] 99 P 255.

**46.** Where Loc. Acts 1907, p. 133, No. 411, was entitled as an act for issuance of bonds for paving certain street, and such act contained a provision (§ 4) creating an entirely new board for directing local improvements, contrary to Acts 1903, p. 366, No. 231, the provision not being indicated in the title rendered the act unconstitutional (Const. Art. 4, § 20). McDonald v. Springwells, 152 Mich. 28, 15 Det. Leg. N. 86, 115 NW 1066. Entire act invalid. Id.

**47.** Laws 1907, p. 94, c. 72, providing for bonds to erect and remove bridges across Republican river in Cloud county, repugnant to Const. art. 2, § 17, as special legislation and void. Anderson v. Cloud County Com'rs, 77 Kan. 721, 95 P 583.

**48.** State v. Wilder, 211 Mo. 305, 109 SW 574. Statute authorizing bonds for public improvements should be construed so as not to defeat manifest object of enactment. City of Cheyenne v. State [Wyo.] 96 P 244.

**49.** Bond issue of $40,000 in small city indebted over $18,000. State v. Wilder, 211 Mo. 305, 109 SW 574.

**50.** Limitations of charter of Town of East Lake inoperative since Acts 1903, p. 59, as to issuance of bonds is new power conferred according to Const. of 1901 which by § 225 fixes limitation on such power. Howard v. East Lake [Ala.] 46 S 754. East Lake Town charter § 29, prohibiting expenditures, only refers to ordinary municipal transactions, not issuance of bonds, or it would be in conflict with § 15 as to bonds. Id.

**51.** Issuance of county bonds to aid in establishment of training school for teachers in accordance with Acts 1907, p. 1165, c. 820. Acts 1907, p. 733, c. 493, is for "public purpose" not violative of constitution. Cox v. Pitt County Com'rs, 146 N. C. 584, 60 SE 516. Issue of bonds to purchase grounds and erect school buildings a "corporate purpose" within Const. 1868, art. 9, § 8. Jordan v. Greenville, 79 S. C. 436, 60 SE 973. Laws 1905, p. 1621, c. 646, authorizing bonds for sanitary trunk sewer by Westchester county does not violate Const. art. 8, § 10, **prohibiting indebtedness,** since considering inadequate sewage outlet, proposed trunk sewer is for benefit of majority of county's inhabitants. Horton v. Andrus, 191 N. Y. 231, 83 NE 1120.

**52.** St. 1901, p. 27, c. 32, does not authorize issuance of bonds except for the purposes for which ordinary revenues of a city might be expended. City of San Diego v. Potter, 153 Cal. 288, 95 P 146. Highways and boulevards proper object. Id. Building and construction of streets, highways and boulevards, object for which city may expend revenues (Vrooman Act. § 26, St. 1885, p. 161, c. 153, as am'd by St. 1891, p. 206, c. 147), and bonds may be issued under act of 1901, notwithstanding Park and Boulevard Act Mch. 19, 1889, St. 1889, p. 361, c. 248. Id. St. 1901, p. 27, c. 32, authorizes submission of proposition for acquiring public park. Id. Propositions to acquire lands for roads, boulevards, etc., authorized by charter of San Diego, St. 1889, p. 70, c. 76; § 22, p. 76; and St. 1903, p. 386, c. 268, § 36, properly submitted under St. 1901, p. 27, c. 32, authorizing indebtedness, etc., notwithstanding St. 1889, p. 361, c. 248 (Park and Boulevard Act). Id. Not necessary that ordinance designate that bonds were to be issued under St. 1901, p. 27, c. 32, rather than Park and

thorized to issue bonds for like purposes.[53] Where county commissioners are authorized and determine that county courthouse be erected, the determination of whether a tax be levied or bonds issued is matter solely for such commissioners.[54]

*Refunding bonds* See 10 C. L. 876 may be authorized,[55] but an authorization to exchange for bonds does not permit an exchange for promissory notes or other evidences of indebtedness.[56]

*Railroad aid bonds.* See 10 C. L. 878—Townships can by observing constitutional requirements issue bonds to aid the construction of railroads.[57] The statutory authority to county commissioners to subscribe for railroad stock will not permit a township to be subjected to railroad aid bonds.[58]

*Limitation of indebtedness* See 10 C. L. 878 may be based on population,[59] or the amount of tax levy.[60] Constitutional provisions may also permit an excessive debt where the purchase of public utilities is involved.[61] A statutory limitation is inapplicable where an issue of bonds is expressly authorized,[62] and a charter limitation has been held not to render an issue illegal where the constitutional limitation was not exceeded.[63] Bond proposed to be issued in excess of a tax levy may be en-

Boulevard Act 1889, St. 1889, p. 361, c. 248, since provisions of former act were literally complied with. Id.

53. Under Pol. Code § 4088, issuance of bonds of Sacramento county for constructing roads, bridges and highways is authorized. Johnson v. Williams, 153 Cal. 368, 95 P 655. Issuance of bonds for repairing bridges authorized by portion of Pol. Code, § 4088, which authorizes issuance for any purpose for which board might expend funds. Construing § 2712. Johnson v. Williams, 153 Cal. 368, 95 P 655. Rev. St. 1887, § 3604, amended by Acts Feb. 7, 1899, and Mch. 14, 1899 (L. 1899, pp. 136, 443), authorizes board of county commissioners to bond county for construction and repair of bridge when indebtedness thereby created exceeds revenue for year, provided that such bonds be authorized by vote of two-thirds of qualified electors. No petition necessary to confer jurisdiction to construct bridge since repeal of Rev. St. 1887, § 1762. Gilbert v. Canyon County, 14 Idaho, 429, 94 P 1027.

54. Llewellen v. McKenney, 130 Ga. 356, 60 SE 1000.

55. Under Rev. St. 1906, § 2834a, county commissioners are authorized to issue and exchange new bonds for outstanding one. Muskingum County Com'rs v. State, 78 Ohio St. 287, 85 NE 562.

56. Under Rev. St. 1906, § 2834a, county commissioners not authorized to exchange for promissory notes. Muskingum County Com'rs v. State, 78 Ohio St. 287, 85 NE 562.

57. Wittkowsky v. Jackson County Com'rs [N. C.] 63 SE 275. Term "county" in Const. art. 2, § 14, prescribing method of passing laws authorizing counties, etc., to issue bonds, includes all political or legislative subdivisions such as townships. Id.

58. Wittkowsky v. Jackson County Com'rs [N. C.[ 63 SE 275.

59. Limitation of indebtedness based on population (Const. 1901, art. 12, § 225), does not require that preceding decennial federal census show population of 6,000 before bonds issued, but sufficient if city have 6,000 population at time of indebtedness. Ryan v. Tuscaloosa [Ala.] 46 S 638. Census insufficient to sustain bond issue under constitutional limitation as to cities of 2,000 or more, though city in issuing dramshop licenses acted on theory of 2,000 inhabitants, where only valid census (federal) showed less than required number. State v. Wilder, 211 Mo. 305, 109 SW 574.

60. No levy in excess of constitutional limitation even though bonds for necessary purpose (Const. art. 7, § 7), without special permission of General Assembly, or for other than necessary purposes except by vote of people. Commissioners of Pitt County v. MacDonald, McKay & Co., 148 N. C. 125, 61 SE 643.

61. Const. art. 10, § 27, a self-executing grant to qualified property taxpayers to become indebted in excess of amount specified in Const, art. 10. § 26, when purchase of public utilities is involved. State v. Millar [Okl.] 96 P 747. "Public utility" synonymous with "public use" meaning public usefulness, utility, advantage or what is productive of general benefit. Id. Sewer a public utility. Id. Convention hall to be owned, controlled and used exclusively by city to accommodate public gatherings and for other public uses is "public utility" within meaning of term used in Const. art. 10, § 27 (Burns' Ed. § 293). State v. Barnes [Okl.] 97 P 997. Tax levy 30 cents on $100 to create sinking fund and pay interest on issued bonds in addition to levy of 50 cents for general city purposes not in contravention of Rev. St. 1899, § 5968 (Ann. St. 1906, p. 3015), as to power and extent of incurring indebtedness. State v. Payne, 211 Mo. 64, 109 SW 728.

62. Rev. 1905, § 2977, limiting town bond issues to 10 per cent of assessed valuation inapplicable where $100,000 issue by town of Lenoir authorized by Priv. L. 1907, p. 246, ç, 83, and approved by voters. Cottrell v. Lenoir, 148 N. C. 137, 61 SE 599.

63. Issue of $30,000 bonds by town of Lancaster authorized by 8 per cent limitation of Const. art. 8, § 7, and art. 10, § 5, without regard to 15 per cent charter limitation. Town of Lancaster v. First Nat. Bank, 80 S. C. 547, 61 SE 1025.

joined,[64] but where an issue conforms to the requirements of law, and there is no proof, it will not be assumed that the tax levy is unconstitutional.[65]

*Curative acts.* See 10 C. L. 877—An issue of bonds in excess of the statutory limitation as to indebtedness may be rendered valid by a curative act.[66] Special legislation must be avoided.[67]

§ 2. *Conditions precedent; submission to vote; provision for payment.*[68]—See 10 C. L. 877—An authorization by voters for bonds may be dependent upon conditions precedent.[69] Such conditions precedent are presumed to have been performed when the bonds are issued by the proper officer.[70]

*Assent of voters or taxpayers* See 10 C. L. 877 is usually prerequisite,[71] though it is often dispensed with in case of refunding bonds,[72] and, in some jurisdictions, in case of bonds for necessary municipal expenses,[73] though this latter exception is not universal.[74] Counties may be classified for legislation as to increase of indebtedness without vote.[75] The legislative authorization upon consent of voters may require a new registration,[76] or submit the proposition only to legal electors who are

64. Injunction as to issuance of bonds made perpetual where tax levied had been held illegal, because in excess of 20 cents on $100. Snyder v. Baird Independent School Dist. [Tex.] 113 SW 521. Former opinion. Snyder v. Baird Independent School Dist. [Tex.] 111 SW 723.

65. In any event bonds to limit of tax levy might be sold. Tipton v. Shelbyville, 32 Ky. L. R. 1123, 107 SW 810.

66. Wharton v. Greensboro [N. C.] 62 SE 740.

67. Where Acts Feb. 15, 1907 (Acts 1907, p. 739), authorized bonds of school district to specified amount and Acts Feb. 19, 1907 (Acts 1907, p. 522), limits amount of school bonds, since legislature in enacting latter act could have exempted any district, Acts Feb. 25, 1908 (Acts 1908, p. 1333), validating bonds issued by school district in excess of limited amount was valid and not in violation of Const. art. 3, § 34, subds. 11, 12, forbidding special legislation, but permitting special provisions in general laws. Hodge v. Clarendon County Trustees, 80 S. C. 518, 61 SE 1009.

68. **Search Note:** See Counties, Cent. Dig. §§ 268-274; Dec. Dig. §§ 176-181; 11 Cyc. 553-558; Municipal Corporations, Cent. Dig. §§ 1913-1923, 1926-1929; Dec. Dig. §§ 917-919; 28 Cyc. 1585-1595; Schools and School Districts, Cent. Dig. § 226; Dec. Dig. § 97 (4); Towns, Cent. Dig. §§ 90-92; Dec. Dig. § 52 (5); 21 A. & E. Enc. L. (2ed.) 45.

69. That bonds be not issued until county exonerated from prior subscription to stock. Green County v. Quinlan, 29 S. Ct. 162. Word "condition" not conclusive. Id. Provision in vote authorizing railroad bonds by county "upon condition" that railroad be constructed within one mile of town and that amount be expended in county, not deemed condition to destroy obligation, since such bonds would then be unsalable. Id.

70. Presumption not rebutted. Green County v. Quinlan, 29 S. Ct. 162.

71. Before issuance of bonds authority to be obtained from taxpayers by means of election. State v. Salt Lake City [Utah] 99 P 255.

72. Under Const. 1895, art. 8, § 7, and Civ. Code 1902, § 2015, city may issue bonds to refund bonded indebtedness in existence at adoption of constitution, without submitting question to popular vote. Jordan v. Greenville, 79 S. C. 436, 60 SE 973. County authorized to issue railroad bonds may, under Acts Feb. 19, 1907. (25 Stat. at Large, pp. 794, 830), and Civ. Code 1902, §§ 2015, 2016, 2020, issue bonds to refund outstanding matured original bonds or refunding bonds issued, as authorized by Acts Dec. 22, 1886 (19 Stat. at Large, p. 503), though no record of election. Thackston v. Goodwin, 79 S. C. 396, 60 SE 969.

73. Const. art. 7, § 7. Commissioners of Hendersonville v. Webb & Co., 148 N. C. 120, 61 SE 670. Const. art. 7, § 7; construing also Priv. L. 1905, p. 576, c. 201, § 49, § 52, p. 577, and § 28, p. 571, as to taxation. Swinson v. Mt. Olive, 147 N. C. 611, 61 SE 569. Market house necessary expense for town. Id. Maintenance of streets necessary expense within Const. art. 7, § 7. Commissioners of Hendersonville v. Webb & Co., 148 N. C. 120, 61 SE 670; Town of Hendersonville v. Jordan [N. C.] 63 SE 167. Issue of bonds by trustees of specified school district under Priv. Acts 1908, p. 38, c. 31, held invalid under Const. art. 7, § 7, prohibiting debt without authority from voters, though excepting necessary expenses. Hollowell v. Borden, 148 N. C. 255, 61 SE 638. Fact that special tax to pay such bonds was unnecessary, immaterial. Id. Building school building not necessary municipal expense. Id.

74. Though no constitutional inhibition and expense necessary within Const. art. 7, § 7. Commissioners of Hendersonville v. Webb & Co., 148 N. C. 120, 61 SE 670. Where Hendersonville Town Charter, § 9 (Laws 1901, p. 220, c. 97), provided for submission to voters of question as to pavement of streets and § 6 provided for pavement of sidewalks by owners or by city at owner's expense, the commissioners could only pave sidewalks from current expenses and a general scheme for pavement of sidewalks of town by issuing bonds must be submitted to voters. Id. "Streets" may include sidewalks and driveways. Id.

75. Financial condition of counties as shown by relation between bonded indebtedness and assessed valuation of property, a proper basis for classification. Wall v. St. Louis County, 105 Minn. 403, 117 NW 611. Gen. Laws 1907, p. 143, c. 130, not unconstitutional as special legislation. Id.

76. Laws 1907, p. 733, c. 493, providing is-

also taxpayers.[77] An election may be ordered by resolution.[78] Polling places,[79] officers [80] and forms of ballots,[81] are prescribed by election laws and charters,[82] and statutes also determine the majority requisite,[83] or who may canvass returns.[84] The ballot should inform the voter of the nature of the improvement and the character of the indebtedness to be assumed.[85] Where several propositions are submitted,[86] provision should be made for a separate vote as to each issue.[87] A bond issue authorized under misapprehension of facts will be held invalid.[88] An election is not invalid because an unauthorized proposition is submitted,[89] because an issue of bonds is submitted before a contract for the purchase of a public utility,[90] where the illegal votes received or the legal votes tendered would not in the aggregate

suance of county bonds on consent of voters and authorizing (§ 4, p. 733), new registration of voters not unconstitutional, since power to provide for registration of voters is legislative. Cox v. Pitt County Com'rs., 146 N. C. 584, 60 SE 516.

77. State v. Millar [Okl.] 96 P 747.

78. Action of city council in ordering election on issuance of bonds for waterworks system (Acts 1903, p. 59), need not be by ordinance but may be by resolution. Ryan v. Tuscaloosa [Ala.] 46 S 638.

79. Under Rev. 1905, § 2946, polling places may be fixed by governing authorities where town not divided into wards. Town of Hendersonville v. Jordan [N. C.] 63 SE 167.

80. Under Rev. 1905, § 2958, as to appointment of judges, only two judges required. Town of Hendersonville v. Jordan [N. C.] 63 SE 167. Though statute required registrar to be freeholder, disregard mere irregularity not affecting result unless prejudicial. Id.

81. Const. 1901, § 222, prescribing form of ballot mandatory; failure to use such form rendered election invalid. Coleman v. Eutaw [Ala.] 47 S 703. Where Const. 1901, § 222, provided ballot with words "For ..... bond issue," etc., the character of the bond to be shown in such blank space, a ballot containing caption of general purpose of election on two separate lines, with marginal extension on each line "for bond issue," etc., with description below did not comply with constitution and rendered election invalid. Coleman v. Eutaw [Ala.] 47 S 703. Election as to incurring indebtedness not invalid where ballots printed to left of question voted on and under square words "yes" and "no" instead of placing squares under questions with words "yes" and "no" to left according to Wilson's Rev. & Ann. St. 1903, § 2963. State v. Millar [Okl.] 96 P 747.

82. Rev. 1905, §§ 2944-2967, tit. 7, "Elections" etc., and charter of Hendersonville (Priv. Laws, 1901, p. 216, c. 97), when not inconsistent with former general law control elections. Town of Hendersonville v. Jordan [N. C.] 63 SE 167.

83. Under Charter of Hendersonville (Priv. Laws 1901, p. 216, c. 97), issue of bonds to be determined by majority of voters rather than majority of qualified electors. Town of Hendersonville v. Jordan [N. C.] 63 SE 167.

84. County school superintendent has power to canvass returns and decide vote on school election for issuance of school bonds. McGinnis v. Bardstown School Trustees, 32 Ky. L. R. 1289, 108 SW 289.

85. Term, "for the construction of waterworks in said city, to be owned and operated by said city," sufficiently comprehensive to include work such as re-equipping and making extensions to existing waterworks system. State v. Millar [Okl.] 96 P 747.

86. St. 1901, p. 27, c. 32, held to authorize submission of several propositions at elections. City of San Diego v. Potter, 153 Cal. 288, 95 P 146. Submission of question of issuing bonds to cover costs of superintending construction of bridge, as well as contract price for bridge, authorized. Gilbert v. Canyon County, 14 Idaho, 429, 94 P 1027. Submission of whether bonds be issued to purchase or construct, or both, a waterworks system, valid since Const. 1901, art. 12, § 222, and related act, Acts 1903, p. 60, § 1, require "issue" of bonds to be submitted and course to be pursued in application of proceeds designated by such acts is in control and discretion of council. Ryan v. Tuscaloosa [Ala.] 46 S 638.

87. Cannot be combined and submitted as single question. Rea v. La Fayette, 130 Ga. 771, 61 SE 707. Submission of several issues of bonds for different purposes, at same time and place proper, separate ballots being provided for each set of bonds. Coleman v. Eutair [Ala.] 47 S 703. Submission of bond issue to purchase waterworks and electric light plant not objectionable as submission of double purpose. Id. In submission of amendment of § 108, of charter of Eugene (Sp. Laws Or. 1905, p. 274), as to whether municipal indebtedness be augmented by striking authorization as to lighting bonds and increasing water bonds; and including in proposal an alteration of § 112, which was construed not to apply to sewer bonds, and remaining propositions being germane to § 108, so that affirmative vote for § 108 necessitated ballot for § 112, such submission was proper, though two or more separate propositions cannot be united when referred to electors. City of Eugene v. Willamette Valley Co. [Or.] 97 P 817.

88. Bond issue for macadamizing road by county under Acts 1906, p. 105, c. 107, held invalid where town of Culpeper exempt from road tax and poll for voters of town directed and it also appeared that votes were cast on supposition that property was liable to taxation for payment of such bonds. Eggborn v. Culpeper County Sup'rs [Va.] 63 SE 424.

89. City of San Diego v. Potter, 153 Cal. 288, 95 P 146.

90. Proceedings for issuance of bonds not invalid because of Sess. Laws Okla. 1905, p. 115, c. 8, art. 9, in that no contract for purchase of waterworks was submitted before submission of issue of bonds. State v. Millar [Okl.] 96 P 747.

change the result,[91] or because of an error in the appointment of officers.[92] An issue of bonds based on an invalid election may be enjoined,[93] and the continual submission of a proposition by a school board may be enjoined as an abuse of discretion.[94] In an election contest, courts will presume that all electors failing to vote assented to the affirmative vote shown by the returns.[95]

*Notice of election* See 10 C. L. 878 required by statute [96] should be in substantial compliance therewith,[97] and publication [98] of notice of time and place [99] of the election is ordinarily essential. Error or inadvertence of clerk in improperly designating his official title,[1] or the fact that the registrar's books were kept open for a period before the election,[2] has been held not to effect the validity of an election.

*Providing for payment of bonds.* See 10 C. L. 878—Constitutional or statutory provisions require provisions as to payment before an indebtedness is incurred such as a sinking fund,[3] or that the proposition submitted state the rate of interest,[4] or sum to be raised.[5] Where the authorizing statute provides the manner of payment, it should be substantially complied with,[6] and in such case errors in the proposition submitted are harmful only when the voters are misled.[7]

**91.** Town of Hendersonville v. Jordan [N. C.] 63 SE 167.

**92.** Election under Acts 1903, p. 60, § 1, for issuance of waterworks bonds, not void because managers appointed by mayor instead of council. Officers de facto and no fraud or misdemeanor imported. Ryan v. Tuscaloosa [Ala.] 46 S 638.

**93.** Though Acts 1903, p. 59, etc., provides for election contest § 7 (p. 61). Coleman v. Eutaw [Ala.] 47 S 703.

**94.** Proposition for erection of schoolhouse submitted three times and voted down. McAlexander v. Haviland School District, 7 Ohio N. P. (N. S.) 591.

**95.** Treat v. De Jean [S. D.] 118 NW 709. Municipal taxpayer may not show that by registry list or witnesses, certain qualified electors failed to vote, thus seeking to avoid election. Id. Result not subject to collateral attack for insufficiency of majority, in absence of affirmative showing of insufficiency by admission of parties, or result of vote on other propositions. Id.

**96.** Form of notice for issuance of bonds by school district to erect school prescribed by act of 1889, art IX, § 4 (Hurd's St. 1905, c. 122, § 218, p. 1826. People v. La Salle County School Directors, 139 Ill. App. 620.

**97.** City of Cheyenne v. State [Wyo.] 96 P 244. Literal compliance not essential. State v. Salt Lake City [Utah] 99 P 255.

**98.** Under Code 1906, § 333, publication of exact copies of orders of board of supervisors, signed by clerk, sufficient compliance with law as to publication of notice of purpose to issue bonds. Turner v. Leflore County [Miss.] 46-S 258. Publication of notice of election authorized by Comp. Laws, 1907, §§ 308-310, as to improvement bonds, for four weeks, in newspapers is jurisdictional. State v. Salt Lake City [Utah] 99 P 255.

**99.** State v. Salt Lake City [Utah] 99 P 255. Notice in compliance with statute when giving date of election, stating place as city and declaring election should be conducted according to laws of state; the publication being pursuant to Comp. Laws 1907, § 309, polling places designated by council (§ 890), and notice posted (§ 792). Id. Notice referred to in Comp. Laws 1907, § 309, need not state particular polling places of several districts. Id. Fixing of polling places essential part of election and they should be established and fully advertised. Town of Hendersonville v. Jordan [N. C.] 63 SE 167.

**1.** Signature of city clerk as "city recorder." Lodgord v. East Grand Forks, 105 Minn. 180, 117 NW 341.

**2.** Bond issue under Priv. Laws, 1907, p. 246, c. 83, not invalid where books kept open 20 days before election, it being evident that purpose of act was to require election pursuant to charter with additional requirement of notice by registrar. Cottrell v. Lenoir, 148 N. C. 137, 61 SE 599.

**3.** Constitutional provision for a twenty-five year sinking fund clearly contemplates term of bonds. Const. art. 10, § 27. State v. Millar [Okl.] 96 P 747. City ordinances providing continual annual tax and sinking fund, sufficiently comply with Const. art. 10, § 27, as to providing funds to pay bonds issued in constructing public utilities. Id. Where village issued bonds for local improvement maturing in 30 years and provided for payment of 90 per cent of cost by assessments in five annual installments, proceeds of such assessments should be invested in sinking fund to retire bonds on maturity and no annual tax for improvements except to pay 10 per cent share of village was permitted as long as moneys from local assessment fund were available. Use of assessment fund except to retire bonds restrained. In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008.

**4.** Under Rev. St. 1899, §§ 1704, 1705, 1708, 1712, ordinance directing issuance of bonds and notice of special election submitting proposition that bonds were to "bear interest at a rate not exceeding 5 per cent per annum" sufficiently specific to render bonds issued at 5 per cent valid. City of Cheyenne v. State [Wyo.] 96 P 244.

**5.** Under General Municipal Law, Laws 1892, p. 1734, c. 685, § 5, proposition submitting improvement of streets at cost of $18,400 to be borrowed on bonds, a sum to be raised annually by levying tax, sufficient to pay principal and interest of said bonds as they become due, was not fatally defective as failing to specify the sum to be raised to pay such principal and interest. Village of Bronxville v. Seymour, 122 App. Div. 377, 106 NYS 834.

**6.** Manner of payment and issuance provided by ordinance sufficient compliance

§ 3. *Execution.*[8]—See 8 C. L. 1051—The corporate seal is not required where a statute authorizes bonds by township commissioners "under their hands and seals respectively." [9]

§ 4. *Form and requisites.*[10]—See 10 C. L. 879—In a broad sense a bond comprises a negotiable promissory note under seal.[11] A bond takes effect from delivery and carries interest from the date of issue.[12]

*Validation proceedings* See 10 C. L. 879 provided in some jurisdictions have been held constitutional,[13] and a judgment of validation pursuant to statute is conclusive upon citizens as to the validity of an issue of bonds.[14]

§ 5. *Issue and sale.*[15]—See 10 C. L. 879—The issuance of bonds may be compelled by mandamus upon a sufficient petition,[16] or restrained when unauthorized.[17] A

with St. 1901, p. 27, c. 32, where 119 bonds to be issued and commencing with smallest number, three to be paid every year leaving two for 40th year. City of San Diego v. Potter, 153 Cal. 288, 95 P 146. Issuance of bonds under Pol. Code, § 4088, containing provisions like Const. art. 11, § 18, held to be in substantial compliance with such statutes, providing tax sufficient to pay interest and principal falling due, and to make necessary sinking fund, to be collected and levied annually. Deferring payment of interest for short time pending collection of tax already levied or that payment of first instalment might be deferred until general tax and collection not guarded by constitution. Johnson v. Williams, 153 Cal. 368, 95 P 655.

**7.** State v. Salt Lake City [Utah] 99 P 255. Question of payment governed by statute and not by taxpayers. Id. Election under Comp. Laws 1907, §§ 308-310, containing statement that interest and principal be paid from revenues of water system not invalid since payment a matter of statute, and if misrepresentation at all, taxpayers were chargeable with notice of council's power. Id. Order for election which failed to state term and interest of bonds unobjectionable, since such matter prescribed by statute. McGinnis v. Bardstown School Trustees, 32 Ky. L. R. 1289, 108 SW 289.

**8. Search Note:** See Counties, Cent. Dig. § 281; Dec. Dig. § 183; 11 Cyc. 563-569; Mandamus, Cent. Dig. §§ 220-222; Dec. Dig. § 103; 26 Cyc. 304; Municipal Corporations, Cent. Dig. § 1940; Dec. Dig. § 927; 28 Cyc. 1599, 1600; Schools and School Districts, Cent. Dig. § 228; Dec. Dig. § 97 (6); Towns, Cent. Dig. § 90; Dec. Dig. § 52(6); 21 A. & E. Enc. L. (2ed.) 18, 31, 50.

**9.** Act N. J. Apr. 9, 1868 (P. L. p. 915), authorizing railroad aid bonds. Smythe v. New Providence, 158 F 213.

**10. Search Note:** See note in 5 Ann. Cas. 858.

See, also, Counties, Cent. Dig. §§ 275-288; Dec. Dig. § 183, 184; 11 Cyc. 563-569; Municipal Corporations, Cent. Dig. §§ 1924, 1925, 1936-1939; Dec. Dig. §§ 922-926; 28 Cyc. 1598, 1599; Schools and School Districts, Cent. Dig. § 228-230; Dec. Dig. § 97(6-8); Towns, Cent. Dig. §§ 90-92; Dec. Dig. § 52(6); 21 A. & E. Enc. L. (2ed.) 18, 31, 53.

**11.** Promissory note not bond. Muskingum County Com'rs v. State, 78 Ohio St. 287, 85 NE 562.

**Definition:** By term municipal bonds is meant evidence of indebtedness, issued by cities and other public corporate bodies, negotiable in form, payable at designated future time, bearing interest annually or semi-annually and usually having coupons attached evidencing the several instalments of interest. Muskingum County Com'rs v. State, 78 Ohio St. 287, 85 NE 562.

**12.** State Nat. Bank v. New Orleans Com'rs, 121 La. 269, 46 S 307. Where board sold bonds and coupons, there was a delivery so that obligator could not revoke instrument. Id. Date of issue is date of bond, not when convenient to sell. Id. Where bonds advertised and sold with coupons attached, they bore interest from date of issue, Sept. 1st, though not signed until March 1, next year. Id. Where bonds and coupons bore date of statute under which issued, which statute provided plan, maturity was fixed from date of bond. Id.

**13.** Acts 1897, p. 82, construed to provide method of judicial investigation and determination of whether compliance with law to render bonds valid and therefore not violative of Const. art. 7, § 7, par. 1 (Civ. Code 1895, § 5893), as seeking to confer power of incurring indebtedness without consent of voters. Lippitt v. Albany [Ga.] 63 SE 33. Acts 1897, p. 82, not unconstitutional because making no provision for trial by jury (Lippitt v. Albany [Ga.] 63 SE 33), because of deprivation of property without due process of law, by excluding future investigation as to validity of bonds (Id.). Entire act not destroyed if § 8 contains subject-matter beyond purview of caption. Id.

**14.** Injunction on ground of insufficiency as to election, etc., refused. Lippitt v. Albany [Ga.] 63 SE 33. Pleadings in proceedings to validate bonds not lacking in essential jurisdictional allegations under Acts 1897, p. 82, so as to render proceedings void. Id.

**15. Search Note:** See Counties, Cent. Dig. §§ 275-285; Dec. Dig. §§ 182-185; 11 Cyc. 563-570; Municipal Corporations, Cent. Dig. §§ 1930-1935, 1942-1954; Dec. Dig. §§ 920, 921, 928-937; 28 Cyc. 1595-1598, 1600-1609; Schools and School Districts, Cent. Dig. §§ 227, 228; Dec. Dig. § 97(5, 6); Towns, Cent. Dig. § 90; Dec. Dig. § 52; 21 A. & E. Enc. L. (2ed.) 18, 31, 53.

**16.** Petition insufficient when failing to allege amount of bonds voted to be issued and that amount was not in excess of constitutional limit. People v. La Salle School Directors, 139 Ill. App. 620.

**17.** Public improvement bonds not restrained where estoppel applicable to plaintiff. Lawton v. Racine [Wis.] 119 NW 331. Petition alleging issue of bonds as not authorized defective in failing to specify how

money judgment may be rendered in a suit to restrain delivery where delivery was found to have taken place.[18]

§ 6. *Rights and liabilities arising out of illegal issue.*[10]—See 10 C. L. 879—The validity of bonds issued and negotiated cannot be put in issue in litigation to which the bondholders are not parties.[20]

§ 7. *Transfer.*[21]—See 10 C. L. 880—A purchaser of municipal bonds from a prior bona fide purchaser for value before maturity takes the rights and standing of his vendor.[22] In the absence of proof the holder of bonds is presumed to be a bona fide purchaser.[23]

*Recitals.*See 10 C. L. 880—Where bonds showed on their face as being issued under a legislative enactment and examination of the journals would have disclosed disregard of a constitutional provision, the purchaser was charged with notice.[24]

*Estoppel.*See 8 C. L. 1053—A bona fide purchaser is entitled to accept recitals fairly importing a compliance with the statute authorizing the bond issue as true.[25]

§ 8. *Payment.*[26]—See 10 C. L. 880—Only the district benefited may be taxed to provide for payment.[27] Where the bonds are valid, taxes to pay the interest as it falls due and the principal at maturity may be levied up to the constitutional limitation,[28] and such levy may be compelled by mandamus.[29] A tax levied for payment

issue is not authorized. Jordan v. Greenville, 79 S. C. 436, 60 SE 973.

**18.** In suit by taxpayers versus county commissioners and party to whom bonds delivered without authority of law, to enjoin delivery of bonds, court may render money judgment against such party as for money had and received, or conversion, it appearing that bonds had already been issued, delivered and transferred to bona fide holder, a fact unknown to plaintiff at institution of suit. Muskingum County Com'rs v. State, 78 Ohio St. 287, 85 NE 562.

**19. Search Note:** See Counties, Cent. Dig. §§ 275-284, 308; Dec. Dig. §§ 183, 196; 11 Cyc. 563-569, 583, 584; Injunction, Cent. Dig. § 159; 22 Cyc. 964; Mandamus, Cent. Dig. §§ 220-222; Dec. Dig. § 103; 26 Cyc. 304; Municipal Corporations, Cent. Dig. §§ 1944-1951, 1991-1994; 2147-2172, 2198; Dec. Dig. §§ 931-935; 949, 987-1000; 28 Cyc.. 1601-1608, 1636-1640, 1732-1748; Schools and School Districts, Cent. Dig. §§ 229, 230-232, 265-268; Dec. Dig. §§ 97, 111; Towns, Cent. Dig. §§ 90-92, 104; Dec. Dig. §§ 52, 61; 21 A. & E. Enc. L. (2ed.) 20, 60.

**20.** Issued by school board. Brockway v. Louisa County Sup'rs, 133 Iowa, 293, 110 NW 844. A purchaser of bonds pending suit on coupons is not affected by judgment rendered. Not being party, though invalidity of bonds incidentally involved where coupons adjudged void. County of Presidio v. Noel-Young Bond & Stock Co., 29 S. Ct. 237.

**21. Search Note:** See notes in 6 C. L. 711; 5 Ann. Cas. 196.

See, also, Counties, Cent. Dig. §§ 289-292; Dec. Dig. § 186; Municipal Corporations, Cent. Dig. §§ 1955-1994; Dec. Dig. §§ 938-949; 28 Cyc. 1610-1640, 1647-1653; Schools and School Districts, Cent. Dig. § 231; Dec. Dig. § 97; Towns, Cent. Dig. §§ 90-92; Dec. Dig. § 52; 21 A. & E. Enc. L. (2ed.) 26, 62.

**22.** Town of Fletcher v. Hickman [C. C. A.] 165 F 403. Evidence held to show defendants as purchasers in good faith without notice of invalidity of certain bonds. Village of Frankfort v. Schmid [Mich.] 15 Det. Leg. N. 1008, 118 NW 961.

**23.** For value before maturity without notice of defects. County of Presidio v. Noel-Young Bond & Stock Co., 29 S. Ct. 237.

**24.** Const. art. 2, § 14, disregarded. Whittkowsky v. Jackson County Com'rs [N. C.] 63 SE 275.

**25.** County cannot allege contrary. County of Presidio v. Noel-Young Bond & Stock Co., 29 S. Ct. 237. Purchaser of county bonds not charged with knowledge that court exceeded its power in issuing bonds purchased by him, because of numbers of such bonds where statutes recited in such bonds merely forbid issue of larger number than ten year tax will liquidate, and nothing in court's order requiring bonds to be numbered consecutively from one upward. Id. County of Presidio estopped by recitals to deny issuance of bond conformably to statute, as against legal holder. Id.

**26. Search Note:** See Counties, Cent. Dig. §§ 293-295; Dec. Dig. § 187; 11 Cyc. 570-572; Municipal Corporations, Cent. Dig. §§ 1999-2001; Dec. Dig. §§ 952-954; 28 Cyc. 1643-1645; Schools and School Districts, Cent. Dig. §§ 232; Dec. Dig. § 97(9); Towns, Cent. Dig. § 93; Dec. Dig. § 152(8); 21 A. & E. Enc. L. (2ed.) 21, 79; 14 A. & E. Enc. P. & P. 255.

**27.** Priv. Acts 1907, p. 1267, ch. 482, construed and word "town" § 50, p. 1277, held to be used with reference to election, which election is required to be held in district not town, wherefore no tax levy on residents not benefited. McLeod v. Carthage Com'rs, 148 N. C. 77, 61 SE 605. Issuance of bonds payable from taxes levied on all county property, for construction of roads outside municipalities, is authorized. Johnson v. Williams, 153 Cal. 368, 95 P 655.

**28.** Commissioners of Pitt County v. MacDonald, McKoy & Co., 148 N. C. 125, 61 SE 643. As to county bonds not issued for necessary purposes, authority to issue carries authority to levy taxes for payment of interest. Const. art. 7, § 7. Not beyond limitation unless provided by act and voted by people. Id.

**29.** Commissioners of Pitt County v. MacDonald, McKoy & Co., 148 N. C. 125, 61 SE 643.

of interest on bonds, in excess of the amount required, cannot be applied to general expenses.[30] The place of payment may be outside of the state.[31] The statutes contain provisions as to the retirement of bonds from the sinking fund,[32] provide for the payment of interest annually,[33] or that payment of certificates of indebtedness be subject to a county court.[34] A city given statutory authority to borrow money for the erection of public buildings and issue bonds therefor has not the right to use its current revenues for that purpose, as against a judgment creditor whose judgment is payable only from the surplus of such revenues above current expenses.[35] The Alabama statute for refunding the indebtedness of Mobile provides for payment by only two methods, sale or rental of certain property, and a tax to be levied by the act.[36]

*Payment from special fund or tax.* See 8 C. L. 1055—Charter provisions where a public utility is purchased may provide for a special fund to pay such bonds and interest.[37] A fund raised from water rents is not a trust fund, and the city may by ordinance provide for payment of taxes raised in this manner into the general fund.[38]

§ 9. *Scaling overissue.*[39]—See 6 C. L. 713

**30.** Southern R. Co. v. Buncombe County Com'rs, 148 N. C. 248, 61 SE 700.

**31.** Issue of bonds at 5 per cent payable semi-annually at place out of state proper where statute merely prescribed that interest not exceed 6 per cent, and no restriction as to place of payment. Town of Lancaster. Town of Lancaster v. First Nat. Bank, 80 S. C. 547, 61 SE 1025.

**32.** Under Ky. St. 1903, § 4482, as to sinking fund, trustees of school district were authorized to provide for redemption of bonds at rate of two each year from sinking fund, instead of investing such fund at interest. McGinnis v. Bardstown School Trustees, 32 Ky. L. R. 1289, 108 SW 289. Under Wis. St. 1898, § 1114, providing for county's assumption of city's delinquent taxes, and credit to city for same, and considering charter of city of Superior § 129, constituting county treasurer a statutory trustee for holder of improvement certificates, there being no provision relative to improvement bonds, bondholder must look to sinking fund in hands of city treasurer, upon which bond is lien, and bill in equity for accounting against county is not maintainable. Olmstead v. Superior, 155 F 172.

**33.** Under § 75, charter of Lewiston, city issuing sewer district warrants or bonds at 6 per cent interest could make interest payable annually. McGilvery v. Lewiston, 13 Idaho, 338, 90 P 348.

**34.** Under Laws 1892, p. 1158, c. 603, §§ 11, 13, authorizing commissioners to issue certificates of indebtedness for construction of sewer, and Laws 1904, p. 1467, c. 620, § 2, providing that city treasurer deliver to county treasurer assessment rolls, etc., received from commissioners arising from assessments, § 4 providing such moneys be deemed county funds as to custody, that statement be filed with county court, etc., county treasurer cannot be compelled by mandamus to pay portion of fund in liquidation of indebtedness until application to county court and order that payment be made. People v. Monroe County Treasurer, 121 App. Div. 84, 105 NYS 576.

**35.** Cunningham v. Cleveland [C. C. A.] 152 F 907.

**36.** Ex parte City of Mobile [Ala.] 46 S 766.

**37.** Where Eugene City Charter (Sp. Laws 1905, p. 275), § 112 as amended, provided that water bonds in addition to being "general" obligation of city, should be first lien on water plant so as to be secured with money derived from sale of water bonds, and also provided for payment out of special fund, word "general" in qualifying "obligation" meant municipal debt for payment of which provision must be made by devoting funds raised by taxation, and entire section construed together provided for special fund for payment of water bonds and interest, providing that shortage in funds provided be paid out of general fund. City of Eugene v. Willamette Valley Co. [Or.] 97 P 817.

**38.** Under St. 1871, p. 514, c. 133, § 15, authorizing water bonds and § 17 authorizing regulation of price for payment of debt, the fund raised by prescribed water rates was not trust fund, but merely a direction to raise, as far as practicable, a sum sufficient to pay debt. Sinclair v. Brightman, 198 Mass. 248, 84 NE 453. Ordinance under St. 1871, p. 514, c. 133, § 17, creating special fund from water rents, not exhaustion of council's power and council might amend to require payment of water rents into general fund with special appropriations to pay expenses, principal and interest of waterworks. Id. Such ordinance not contrary to public policy of commonwealth as displayed in constitution and legislation. Id. Such ordinance not objectionable as impairing contract, since neither legislation or ordinances constituted contract. Id. Ordinance not objectionable as creating disproportionate burden of taxation, since users of water do so voluntarily. Id. St. 1902, p. 310, c. 393, § 23, cl. 15, that Fall River water department be under Watuppa Water Board, held not to take away council's power to make appropriations for expenses of board and to dispose of income. Id. Mandamus proper to enforce recognition of valid ordinance as to payment of water rents into city's general fund, and such action maintainable by majority of city council as taxpayers versus mayor and other officials. Id.

**39. Search Note:** See Counties, Cent. Dig. § 276; Dec. Dig. § 183; 11 Cyc. 563-569; Municipal Corporations, Cent. Dig. § 1912; Dec. Dig. §§ 914-916; 28 Cyc. 1581-1583; Schools

§ 10. *Enforcement of bonds. In general.*[40]—See 10 C. L. 880—Equitable relief will be granted where a city, which is a statutory trustee, diverts the assessments collected.[41] The bill should not be multifarious[42] and relief may be barred by laches.[43] In a suit on railroad bonds, the declaration may be demurrable if the sealing should not be sufficiently averred.[44] The undivided interests of the joint owners and holders of bonds and coupons on which suit is brought may be united for the purpose of securing federal jurisdiction.[45]

**MUNICIPAL CORPORATIONS.**


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*The scope of this topic* is noted below.[46]

and School Districts, Cent. Dig. § 225; Dec. Dig. § 97; Towns, Cent. Dig. §§ 90-92; Dec. Dig. § 52; 21 A. & E. Enc. L. (2ed.) 82.

**40. Search Note:** See Municipal Corporations, Cent. Dig. §§ 902-910; Dec. Dig. § 950; 21 A. & E. Enc. L. (2ed.) 28, 80.

**41.** Bill in equity by holder of improvement bonds alleging that by statute city is trustee to levy and collect special assessments on property benefited by improvement and apply proceeds in payment of bonds, that it has diverted such proceeds and threatens to continue so doing, states cause of action for equitable relief which court of law could not afford. Olmstead v. Superior, 155 F 172.

**42.** Where supreme court held that state statute created general liability of city for payment of certain issue of bonds in addition to making city statutory trustee for collection of special assessment, bill in equity seeking to make city primary debtor as well as statutory trustee by praying money judgment was not multifarious. Olmsted v. Superior, 155 F 172.

**43.** Bill to charge municipality as voluntary trustee under legislative act for payment of certain bonds, showing refusal of defendant twenty-five years before to perform required acts, showing no payment of interest, that bonds matured eight years before suit and failing to show excuse for delay, presents laches and is demurrable. Eddy v. San Francisco [C. C. A.] 162 F 441.

**44.** Where declaration alleges bonds made by and under hands and seals of commissioners of township, such declaration is not demurrable because instruments sued on are not sealed, although declaration also averred that there was no formal scroll or seal on the bonds, but that they contained recitals of sealing on special date, that township might not have seal, that seal of commissioners had no legal efficacy, etc. Smythe v. New Providence, 158 F 213. Averment of sealing of bonds not destroyed by other averments, conclusions. Id. Averments that individual seals of commissioners had no legal efficacy, mere conclusion. Id.

**45.** Finding held to support jurisdiction of court. Green County v. Thomas' Executor, 29 S. Ct. 168.

**46.** This article is designed to treat, as strictly as may be the law of municipalities as distinguished from that of streets and other public ways (see Highways and Streets, 11 C. L. 1720), parks and public grounds (see Parks and Public Grounds, 10 C. L. 1079), bridges (see Bridges, 11 C. L. 441), public utilities, works and improvements (see Public Works and Improvements, 10 C. L. 1307), health and sanitation (see Health, 11 C. L. 1717), buildings and injuries

§ 1. *Nature, attributes and elements.*[47] See 10 C. L. 881—The term "municipal corporations" as ordinarily applied includes all corporations created for the local exercise of delegated governmental functions.[48] They are auxiliaries or instrumentalities of the general government of the state for the purpose of municipal rule.[49] The powers of a municipality are wholly delegated,[50] but in the exercise of powers so conferred, it is subject only to constitutional restrictions.[51] The distinctions between its governmental and private functions are chiefly important in determining liability for tort.[52]

§ 2. *Creation and corporate existence. A. Creation and organization.*[53] See 10 C. L. 882—The creation of municipal corporations by special act is prohibited by the constitutions of most states.[54] An enactment authorizing the organization of a municipality at once, though the statute does not become effective until a future date, is not invalid as a delegation of legislative power.[55] An enactment as to the time of notice before an election has been held to be merely directory.[56] The inclusion of farm lands in an incorporated municipality may operate to render the incorporation void,[57] or at most a de facto municipality,[58] but in determining such question

therein and public regulations (see Buildings and Building Restrictions, 11 C. L. 479), the local taxing power (see Taxes, 10 C. L. 1776), local and special assessments (see Public Works and Improvements, 10 C. L. 1307), licenses and licensing (see Licenses, 10 C. L. 622), the granting of franchises (see Franchises, 11 C. L. 1560), and the law of public officers generally (see Officers and Public Employes, 10 C. L. 1043). The particular applications of the general law of municipalities to these several enumerated subjects should be sought in the titles cited. The body of laws relating to each of these largely involves powers and duties of counties, towns, and of the public generally, as well as powers of municipalities. All this has been brought together into titles relating to the subject-matter of such powers and duties.

**47. Search Note:** See notes in 8 C. L. 1057; 1 L. R. A. (N. S.) 512; 35 A. S. R. 529.

See, also, Municipal Corporations, Cent. Dig. §§ 1, 1½; Dec. Dig. §§ 1, 2; 28 Cyc. 124-132; 20 A. & E. Enc. L. (2ed.) 1130; 21 Id. 8, 943; 24 Id. 721.

See, also, Abbott, Mun. Corp. §§ 1-8.

**48.** Municipalities governed under their own delegated power and distinct from parishes. Town of Winifield v. Long [La.] 48 S 155. Cities and towns in sense different from counties having powers, functions, duties and liabilities conferred by charter though in restricted sense governmental agencies. Wittowsky v. Jackson County Com'rs [N. C.] 63 SE 275. County though body corporate, also subdivision of state, created for administrative and other public purpose and subject to legislative control and change. McSurely v. McGraw [Iowa] 118 NW 415. Townships and other taxing districts sometimes called quasi municipal corporations are but territorial sections of counties upon which power is conferred to perform local governmental functions. Wittowsky v. Jackson County Com'rs [N. C.] 63 SE 275. Though poor district created by Act June 4, 1879 (P. L. 78), coterminous with county poor district quasi municipal corporation. Commonwealth v. U. S. Fidelity & Guar. Co., 220 Pa. 148, 69 A 550. School district a municipal corporation. Hollowell v. Borden, 148 N. C. 255, 61 SE 638.

**49.** Subordinate governmental entities (State v. Tampa Waterworks Co. [Fla.] 47 S 358; Hardee v. Brown [Fla.] 47 S 834), instrumentality of state (Ware v. Fitchburg, 200 Mass. 61, 85 NE 951) with local functions subject to state's power (O'Haver v. Montgomery [Tenn.] 111 SW 449), with powers, rights, duties and privileges as conferred by statute (People v. Earl, 42 Colo. 238, 94 P 294), constitute part of civil government of state (Southern Bell Tel. & T. Co. v. Mobile, 162 F 523), public in their nature (Cox v. Pitt County Com'rs, 146 N. C. 584, 60 SE 516), created as convenient agencies for exercising governmental powers as state may intrust (People v. Metz, 193 N. Y. 148, 85 NE 1070; Schigley v. Waseca [Minn.] 118 NW 259; City of Burlington v. Central Vermont R. Co. [Vt.] 71 A 826), have constitutional right of self-government (Davidson v. Hine, 151 Mich. 294, 14 Det. Leg. N. 957, 115 NW 246; Summit Tp. v. Jackson [Mich.] 15 Det. Leg. N. 679, 117 NW 545), partly agent of state to assist in civil government but chiefly to administer local affairs (People v. Earl, 42 Colo. 238, 94 P 294), in absence of constitutional restrictions, are subject to legislative control, object being common good (Lutterlot v. Fayetteville [N. C.] 62 SE 758; People v. Earl, 42 Colo. 238, 94 P 294). Legislature may establish municipality to exercise certain governmental powers of state within territorial limits. State v. Cederaski, 80 Conn. 478, 69 A 19.

**50.** See post, § 7.

**51.** See post, §§ 7, 9, 10.

**52.** See post, § 14.

**53. Search Note:** See notes in 25 L. R. A. 755; 4 Ann. Cas. 794.

See, also, Municipal Corporations, Cent. Dig. §§ 2-51; Dec. Dig. §§ 2-22; 28 Cyc. 128-145, 148-179; 4 A. & E. Enc. L. (2ed.) 722; 20 Id. 1132, 1218.

**54.** See post, § 3.

**55.** Act Aug. 13, 1907 (Laws 1907, p. 892), effective Sept. 1908, but providing (§ 199) for incorporation by cities at once. Ward v. State [Ala.] 45 S 655.

**56.** St. 1898, § 862, held not to provide absolute limit of 60 days. In re Clark, 135 Wis. 437, 115 NW 387.

**57.** Inclusion of section of land where only forty acres occupied as village. State v. Small, 131 Mo. App. 470, 109 SW 1079.

**58.** Where municipality incorporated con-

the character of the district as a whole must be considered.[59] Though the organization of municipalities including the extent of their territory is exclusively legislative,[60] a court or other official body may be authorized to determine the existence of requisites fixed by the legislature.[61] The determination is subject to review,[62] but judgments of such courts, if within jurisdiction, can only be attacked upon allegations of fraud or excess of jurisdiction.[63] The Oklahoma statute as to incorporation of cities of the first class has been held inapplicable to those cities that became cities of the first class upon the admission of the state.[64] A town may be recognized as such, though no map showing its subdivisions is recorded.[65]

(§ 2) *B. Consolidation, succession and dissolution.*[66]—See 10 C. L. 882—Consolidation is sometimes provided for by statute.[67] Incidental to consolidation, the legislative enactment usually provides for the vesting of property and rights and the

tained 4 square miles including agricultural lands, city was de facto corporation, though Rev. St. 1895, art. 386a, limited territory to 2 square miles. City of Carthage v. Burton [Tex. Civ. App.] 111 SW 440.

**59.** Tracts of farming lands surrounded by lands used for town purposes may necessarily be included. State v. Small, 131 Mo. App. 470, 109 SW 1079. Under Rev. St. 1889, § 1666 (Rev. St. 1899, § 6004, 3 Ann. St. 1906, p. 3032), authorizing incorporation of "towns, villages and their commons," "commons" means public grounds belonging to or appurtenant to town or village, not farm lands. Id. Where two tracts of land platted for two different towns and wedge shaped piece of land of 39 acres between was used for farm land, on petition for incorporation, county court did not exceed jurisdiction in including such portion as part. State v. Bellflower, 129 Mo. App. 138, 108 SW 117. In absence of statute unplatted outlots and lands used for agricultural purposes may, within reasonable restrictions and limitations, be included in the corporate limits. But such lands should be contiguous to some portion of town. Harris v. Martindale [Ind. App.] 86 NE 494. Inclusion of land in incorporation of town shown to be unnecessary and merely to tax objectors. Id.

**60.** Not to be referred to courts. Brenke v. Belle Plaine, 105 Minn. 84, 117 NW 157.

**61.** Act March 27, 1907 (St. 1907, p. 241, c. 125) relating to incorporation of cities, § 2 providing for petition by majority of voters, and § 3, p. 242, authorizing district court to determine whether majority of electors have made application sufficiently describing territory to be embraced, etc., not unconstitutional as allegation of legislative powers to judicial department. State v. Second Judicial Dist. Ct. [Nev.] 94 P 70.

**62.** Acts of county judge in passing on petition of incorporation of city ordering an election, etc., are subject to review as to validity of incorporation and limit of boundaries. Spurlin v. State [Tex. Civ. App.] 115 SW 128.

**63.** State v. Bellflower, 129 Mo. App. 138, 108 SW 117. Judgment of incorporation of county court void and subject to collateral attack when in **excess of jurisdiction.** Id. Inclusive of farm land. Id. Where two towns incorporated and county court included over 600 acres of farm land, such act was in excess of jurisdiction. Id.

**64.** Amendatory Act of Legislature, Feb. 20, 1908 (Sess. Laws 1907-8, p. 183, c. 12), as to incorporation of cities of first class, inapplicable to cities that continued or became cities of first class upon admission of state by § 10, schedule to constitution. State v. Ledbetter [Okl.] 97 P 834. City of second class in Indian Territory having population of over 2,500, became upon admission of state a city of first class by virtue of schedule to constitution, § 10. Estate v. Ledbetter [Okl.] 97 P 834; State v. Chestnutt [Okl.] 98 P 435; State v. Walrond [Okl.] 98 P 435; Ryan v. Casaver [Okl.] 98 P 928.

**65.** Ayres v. Patton [Tex. Civ. App.] 111 SW 1079.

**66. Search Note:** See notes in 4 C. L. 722; 3 Ann. Cas. 499.

See, also, Municipal Corporations, Cent. Dig. §§ 45-48, 63-111, 138-140; Dec. Dig. §§ 19, 26-39, 50, 51; 28 Cyc. 175-177, 183-229, 250-257; 20 A. & E. Enc. L. (2ed.) 1235.

See, also, Abbott, Mun. Corp. §§ 33, 34.

**67.** Act Apr. 28, 1903, P. L. 332, for annexation of city, borough, etc., to contiguous city, etc., not violative of Const. art. III, § 7, prohibiting local or special laws. Sheraden Borough, 34 Pa. Super. Ct. 639. Act May 10, 1871, P. L. 718, to authorize consolidation of territory adjacent to Pittsburgh, not expressly or by implication repealed by Act Apr. 28, 1903, P. L. 332, as to annexation of city borough, etc., to contiguous city, etc. Id. Acts not repugnant and proceedings under either proper. Id. Existence of county to which act by reason of previous special legislation would not apply, no argument against general character of act. Id. In proceedings to annex under Act Apr. 28, 1903, P. L. 332, court will take judicial notice of fact that borough is contiguous to city, and proceedings not invalid, because such fact not verified in affidavit. Id. Under Act. Apr. 28, 1903, P. L. 332, court does not abuse discretion in fixing ten days as sufficient notice to public as to hearing objections to annexation. Id. Order in proceedings under Act Apr. 28, 1903, P. L. 332, directing publication of notice in "Pittsburg Gazette," substantially complied with when published in "Pittsburgh Gazette-Times," there being no other paper of former appellation. Id. Certificate of judges of common pleas constituting returning board of special election in annexation proceedings under Act Apr. 28, 1903, P. L. 332, imports verity, being conclusive of facts stated. Id. Constitutionality of Act Apr. 28, 1903, P. L. 332, not to be determined on case stated as to whether real estate annexed to city was liable for township school district taxes during year of annexation, where no showing that annexa-

apportionment of indebtedness.[68] Dissolution does not occur from the failure of a town incorporated by special act to elect officers.[69] Legislative enactments may provide for a receiver and a tax levy to discharge debts, where a de facto corporation is dissolved.[70]

(§ 2) *C. Classes and classification.*[71]—See 10 C. L. 883—Municipalities may be classified for purposes of legislation provided such classification is reasonable and based on real and substantial differences of population or situation.[72]

(§ 2) *D. Attack on corporate existence; quo warranto.*[73]—See 10 C. L. 883—The validity of the organization and existence of a municipal corporation can only be questioned in a direct proceeding,[74] at the instance of the state,[75] on the relation of tax payers[76] against the officers of the municipality.[77] The proceeding is improperly joined with an action to enjoin a tax levy,[78] and is subject to limitations[79] or laches.[80] The failure of officers to exercise their conferred powers is justified when prevented by the remonstrants.[81] Where a legislative enactment authorized county courts to exclude farm lands from villages, such act was held not to deprive the relators of relief by appeal on quo warranto.[82]

§ 3. *The charter; adoption, amendment, repeal and abrogation.*[83]—See 10 C. L. 883—The enactment of municipal charters is subject to constitutional restrictions relative to the title of the act.[84] Special charters are prohibited by the constitutions of a majority of the states,[85] and the same restriction is applicable to amend-

tion under Act of 1903 and decree of annexation unreversed and unappealed from. Higgins v. Price, 36 Pa. Super. Ct. 215.

68. Under Rev. St. 1899, § 6399 (Ann. St. 1906, p. 3197) where city of Westport absorbed by Kansas City, providing that property and "rights" be vested in city making extension, which should also be liable for debts, etc., word "right" was not limited to property rights, but included powers and privileges. Barber Asphalt Pav. Co. v. Field [Mo. App.] 111 SW 907. Kansas city empowered to issue valid tax bill in lieu of void one. Id.

69. Cofield v. Britton [Tex. Civ. App.] 109 SW 493.

70. Under Acts 1905, p. 325, c. 134. City of Carthage v. Burton [Tex. Civ. App.] 111 SW 440.

71. **Search Note:** See Municipal Corporations, Cent. Dig. § 9, Dec. Dig. § 22; 28 Cyc. 143-145.

See, also, Abbott, Mun. Corp. § 94.

72. See Statutes, 10 C. L. 1705. Hurd's Rev. St. 1905, c. 38, § 256a, to indemnify property owners from **injuries in case of riots,** not special act because remedy provided against county and city, but denied against village and town, there being rational basis of classification in difference. Dawson Soap Co. v. Chicago, 234 Ill. 314, 84 NE 920.

73. **Search Note:** See notes in 13 L. R. A. (N. S.) 533; 15 Id. 105; 3 Ann. Cas. 242; 11 Id. 1060.

See, also, Municipal Corporations, Cent. Dig. §§ 41-44; Dec. Dig. § 18; 28 Cyc. 172-175; Quo Warranto, Cent. Dig.; Dec. Dig.

See, also, Abbott, Mun. Corp. §§ 32, 34.

74. City of Carthage v. Burton [Tex. Civ. App.] 111 SW 440. Not to be collaterally assailed if acting under color of law and recognized by state. Id.

75. City of Carthage v. Burton [Tex. Civ. App.] 111 SW 440. Private person cannot use name of state. State v. Shufford, 77 Kan. 263, 94 P 137. Must be brought by officer authorized to represent interests of public. Id. By prosecuting attorney of county including town or by attorney general. State v. Bellflower, 129 Mo. App. 138, 108 SW 117.

76. State v. Small, 131 Mo. App. 470, 109 SW 1079.

77. Municipality not party as thereby existence would be implied, where in fact denied. State v. Small, 131 Mo. App. 470, 109 SW 1079.

78. State v. Shufford, 77 Kan. 263, 94 P 137.

79. Proceedings for vacation of incorporation governed by Sanborn's Supp. St. 1906, § 853b, providing limitation of three months in bringing action, and petition properly dismissed. In re Clark, 135 Wis. 437, 115 NW 387.

80. Judgment of ouster refused where city organized under color of law at least, exercising functions for 16 years and recognized by legislature in several acts. State v. Pell City [Ala.] 47 S 246. Where order incorporating village in 1897, but no attempt to organize until 1902, and no levy of taxes until 1905, action instituted in 1906 was not barred by laches. State v. Small, 131 Mo. App. 470, 109 SW 1079.

81. Where remonstrants used every legal weapon to prevent action, etc. In re Clark, 135 Wis. 437, 115 NW 387.

82. Relators entitled to have order of incorporation adjudged void from first and Laws 1907, p. 109, not retroactive to affect appeal when judgment of lower court rendered before act passed. State v. Small, 131 Mo. App. 470, 109 SW 1079.

83. **Search Note:** See Municipal Corporations, §§ 14-39, 122-140; Dec. Dig. §§ 8-14, 44-51; 28 Cyc. 153-172; 235-257; 20 A. & E. Enc. L. (2ed.) 1136.

See, also, Abbott, Mun. Corp. §§ 22, 31.

84. Charter not invalid as to title because providing that city be also independent school district. Orrick v. Fort Worth [Tex. Civ. App.] 114 SW 677. Though provisions relative to school district might be invalid, they were severable and would not invalidate charter. Id.

85. Const. art. 4, § 13, as to classification

ments.[86] The legislature in granting a charter to a city of a required population will be presumed to have ascertained the population.[87] The repeal of a provision of a city charter must be effected by express enactment,[88] or charter provisions may be repealed where a city adopts the provisions of a general law.[89] The California constitutional guaranty preventing the repeal of statutes of organization has been held to extend only to municipalities organized before the adoption of the Constitution.[90]

*Home-rule charters.*—A provision that a charter be effective if accepted by a majority of the inhabitants is not unconstitutional as a delegation of legislative power.[91] A municipality in framing a charter or organic law has only such power as is delegated by the constitution or legislature.[92] A charter adopted pursuant to an express constitutional grant has the force of a legislative act with respect to municipal matters.[93]

*Initiative and referendum; commission governments.*—In Oregon by amendment to the constitution, the power to amend, enact or repeal municipal charters has

of cities, prevents grant of special charters to cities and requires classification of all cities and for code of laws for government of all cities of same class. People v. Earl, 42 Colo. 238, 94 P 294. In Const. art. 14, § 13, "powers" and "restrictions" are manifestly such powers and restrictions as relate to subjects pertaining to local self-government rather than subjects involving relation of citizens or cities to state. Id. Reasonable classification proper, such as population. McGarvey v. Swan [Wyo.] 96 P 697.

**86.** Act Oct. 28, 1907 (P. L. p. 705), entitled "An act concerning government of cities of first class" not violative of Const. N. J. art. 4, § 7, par. 11, prohibiting special legislation regulating the internal affairs of cities since office of police justice and city collector created by charter. McCarthy v. Queen [N. J. Law] 69 A 30. Under Const. art. 3, § 27, municipal charter cannot be amended by local or special law. McGarvey v. Swan [Wyo.] 96 P 697. Laws 1903, p. 9, c. 7, authorizing cities "hereinbefore" incorporated with less than 10,000 inhabitants, having power to make assessments for sewers, to make assessments in specified manner, not "local" or special law. Id. Act not local or special when limited to city of 10,000 inhabitants as determined by "last preceding United States Census" on theory that phrase limits act to cities having required population at last census before act passed, since phrase relates to census last preceding any date material in ascertaining of city within statute. Id. Act not local or special because restricted to cities incorporated under special charter having 10,000 inhabitants. Id. Act not local or special because limited to cities "having power to make special assessments to construct sewers" though only one city so situated. Id.

**87.** Where Const. art. 11, §§ 4, 5, authorized charters to towns of more than 10,000 inhabitants. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

**88.** Not implied. City of Jamestown v. Home Tel. Co., 125 App. Div. 1, 109 NYS 297. Charter of Jamestown (Laws 1886, p. 140, c. 84, tit. 111, § 9, subd. 46) as to regulation of telephone poles and wires, not repealed by "Transportation Corporation Law" (Laws 1890, p. 1136, c. 566, as amended Laws 1892, p. 1170, c. 617). Id.

**89.** Adoption of provisions of general law as to street improvements repeal of Fond du Lac charter (Laws 1885, p. 1162, c. 299), and city could assess cost of repaving to abutting owners. Carstens v. Fond du Lac [Wis.] 119 NW 117. Passage of ordinance by city of Fond du Lac pursuant to St. 1898, § 926, repealed charter (P. & L. Laws 1883, p. 435, c. 152, subs. 18, § 1), as to improvement of sidewalk and property owners are not liable for defect. Willmer v. Goebel [Wis.] 119 NW 115. Effect of organization and incorporation of Chicago under general law was to substitute such law for city's former special charter and to repeal all provisions inconsistent with the general law. Bullis v. Chicago, 235 Ill. 472, 85 NE 614.

**90.** Does not prevent legislation where corporation created but not organized before adoption. McConnell v. Los Angeles County Sup'rs, 7 Cal. App. 385, 94 P 391. Question of organization properly one of fact to be determined by board of supervisors on petition under general law. McConnell v. Los Angeles County Sup'rs, 7 Cal. App. 385, 94 P 391. Where determination of supervisors is that of no organization under repealed law and board is considered as judicial body, on appeal, intendments will presuppose taking of testimony as to organization. Id.

**91.** Orrick v. Fort Worth [Tex. Civ. App.] 114 SW 677. Fort Worth charter construed to take effect immediately but cease in case of unfavorable vote. Id. Election in accordance with charter valid, general election law being inapplicable. Id.

**92.** State v. Scales [Okl.] 97 P 584. Const. art. 18, § 3 (Bunn's Ed. §§ 413, 414) as to charters and amendments, etc., is self-executing, and susceptible of execution without additional legislation. Id. Board of freeholders elected pursuant to Const. art. 18, § 3 (Burn's Ed. §§ 413, 414), to prepare charter have no authority to adopt ordinance for nomination and election of elective officers provided for in charter framed, independent of reserved right of people to ratify or reject acts of said board. Id. Election ordinance for election of officers at same election as charter is voted on will not be in force until such ordinance is ratified by qualified electors. Id.

**93.** Including special assessments for local improvements. Fruin-Bambrick Const. Co. v. St. Louis Shovel Co., 211 Mo. 524, 111 SW 86.

been vested in the people [94] and carried into effect by a legislative enactment whereby amendments might be proposed by a city council with or without initiative petition.[95] The initiative and referendum powers were also reserved to the people with respect to legislation.[96] The power to amend as delegated by the legislature of Washington is subject to the control of general laws.[97] The government of municipalities being a legislative matter,[98] different forms of government may be established, subject only to constitutional restrictions,[99] and different methods of election of officers provided.[1]

§ 4. *The territory.*[2]—See 10 C. L. 884—The legislature may change the boundaries

**94.** Under amendments to Const. art. 4, §§ 1, 1a, and art. 11, § 2, manifest purpose was to take away from legislature and vest in people the power to amend municipal charters. Farrell v. Port of Portland [Or.] 98 P 145. Under amendment to Const. art. 11, § 2 (adopted June 4, 1906), legislature was deprived of power to amend, enact or repeal charters and such powers conferred on voters of municipalities subject to limitation of improvement of vested rights. City of Eugene v. Willamette Valley Co. [Or.] 97 P 817. Under Sp. Laws Or. 1905, p. 274 (Eugene City Charter) § 108, authorizing issuance of improvement bonds, where municipal indebtedness authorized in respect to sewer bonds was not increased or diminished by amendment, such law was not amendment of charter but re-enactment thereof. Id. Amendment to Const. art. 11, § 2, (adopted June 4, 1906) empowering voters to amend charters, etc., not self-executing and did not alter charter enacted Feb. 7, 1905 (Sp. L. 1905, p. 989). Hall v. Dunn [Or.] 97 P 811. Prior to amendment of Const. art. 11, § 2 (June 4, 1906), prohibiting amendment or repeal of municipal charters, legislature could alter city's charter and take territory out of local option law (Gen. Laws 1905, p. 41). Id. Medford City Charter (Sp. Laws 1905, p. 996, c. 4) § 25, subd. 19, authorizing licenses for saloons, etc., and containing repealing clause, repeals local option law (Gen. Laws 1905, p. 41), in so far as applicable to city. Id.

**95.** McKenna v. Portland [Or.] 96 P 552. Where no legislation by city regulating manner of submitting amendments, conflicting with general law, latter applicable. Id. Right of voters to enact or amend charter not necessarily an initiative power. Id. Exists by virtue of Const. art. 11, § 2, as amended in 1906, and not by iniative and referendum amendments adopted at same election. Construing Const. art. 11, § 2, and amendment, art. 4, with new section, § 1a, Laws 1907, p. 405, § 10; Laws 1907, p. 406, § 12, since no method of submission of amendments is provided Law of 1907 is applicable. Id. Initiative and referendum law (Laws 1907 p. 398, c. 226), according to Const. art., 4, §§ 1, 1a, and art. 11, § 2, a **general law** within Const. art. 4, § 1a. Applicable to port of Portland not city or town. Farrell v. Port of Portland [Ore.] 98 P 145. Where original incorporation of port of Portland was "to promote maritime, shipping and commercial interests," amendment adopted by voters whereby powers were extended to maintain towage and pilotage service to operate tugboats, etc., and issue bonds therefor, was an extension of powers germane to the original purpose of incorporation and not new legislation. Id.

**96.** See post, § 8A.

**97.** Benton v. Seattle Elec. Co. [Wash.] 96 P 1033. Direct amendment statute (Laws 1903, p. 393, c. 186) cannot override statute giving legislative authority to grant use of streets for construction of railways (Laws 1903, p. 364, c. 176, as amended by Laws 1907, p. 192, c. 99). Id.

**98.** Eckerson v. Des Moines, 137 Iowa, 452, 115 NW 177.

**99.** Under Const. Amend. art. 2, and considering Declaration of Rights, art. 9, pt. 1, giving inhabitants of commonwealth right to elect officers for public employments, different cities may be established with different kinds of government officers and modes of election. Graham v. Roberts, 200 Mass. 152, 85 NE 1009. In considering St. 1908, p. 542, c. 574, amending charter of Haverhill by providing radically different method of government, court will only consider if act within power of legislature, not if statute adapted to conditions of city. Graham v. Roberts, 200 Mass. 152, 86 NE 1009. Adoption of amended city charter providing different manner of government and election, purely matter of local concern. Id. Provision that St. 1908, p. 542, c. 574, amending charter of Haverhill, be ineffective until adoption by voters, proper. Id. Will only be interfered with in case of flagrant violations of sense of constitution. Eckerson v. Des Moines, 137 Iowa, 452, 115 NW 177. Acts 32d Gen. Assem. p. 38, c. 48, providing "commission" form of government held constitutional. Id. U. S. Const. art. 4, § 4, guaranteeing republican form of government is inapplicable to systems of local government provided by states for regulation of municipalities or other subdivisions. Id. Const. art. 3, § 1, providing that government of Iowa be divided into three departments, legislative, executive and judicial, is inapplicable to the government of municipalities. Id. State constitution being practically silent as to local self-government, legislature may select agencies appropriate for the purpose, and clothe such agencies with powers to be exercised as prescribed therefor. Id. Unrestricted authority to organize includes authority to prescribe powers within constitutional limits, and to designate officials to carry powers into execution. Id. Form of government provided held not local or special legislation. Id. Const. art. 1, § 6, as to uniform operation of laws of general nature not violated. Id. Plan of local government as embodied in legislative act may be submitted to voters of municipality. Id.

**1.** See post, § 5.

**2. Search Note:** See notes in 27 L. R. A. 737; 3 L. R. A. (N. S.) 822.

See, also, Municipal Corporations, Cent. Dig. §§ 11-13, 52-121; Dec. Dig. §§ 7, 23-43; 28

of a city [3] without apportioning its indebtedness and providing for the enforcement of its liability therefor.[4] Boundaries acquiesced in by the public and the legislature cannot be subsequently overthrown without the consent of the legislature, though a departure from the limits specified in the charter is evident.[5]

*Annexations* See 10 C. L. 885 are authorized by legislative enactments [6] or the power may be conferred upon the voters of a municipality.[7] The extent and manner of annexation is a question of legislative discretion [8] not to be interfered with by the courts [9] except in equity [10] pursuant to statute,[11] and appeals are also provided by statute.[12] If, however, property rights are unduly impaired, the statute is invalid.[13]

Cyc. 149-152, 179-232; 4 A. & E. Enc. L. (2ed.) 724; 20 Id. 1148.

See, also, Abbott, Mun. Corp. §§ 35-51, 55-65.

**3.** Contention as to invalidity of act because of defective description not considered becauss not presented at trial court. Adams v. Rome [Ga.] 63 SE 289. Acts 1908, p. 910, as to withdrawal of lands of city of Rome, held not to exclude plaintiff's land from corporate limits. Id.

**4.** Eugiere v. Tracy, 104 Minn. 378, 116 NW 922.

**5.** Marshal v Richland County, 81 S. C. 135, 62 SE 4.

**6.** Priv. Laws 1907, p. 1292, c. 489, § 1, enlarging corporate limits and stating boundaries not uncertain and void. Lutterloh v. Fayetteville [N. C.] 62 SE 758. Priv. Laws 1907, p. 1292, c. 489, construed and held to provide that qualified voters in both old and annexed territory were entitled to vote in **election** ratifying annexing act. Id. Under St. 1889, p. 358, c. 247, as amended by St. 1905, p. 551, c. 411, ballots cast at election when stamped in line bearing phrase "for annexation" were not invalid though not stamped in voting square as required by general election law. Haskell v. Long Beach, 153 Cal. 543, 96 P 92. Under Ann. Code 1892, §§ 2926, 3018, 3020, 3748, 3771, authorizing **tax levy** on property acquired before February 1st., city may not tax territory annexed in April, that year. City of Gulfport v. Todd [Miss.] 46 S 541.

**7.** Under Act March 19, 1889 (St. 1889, p. 358, c. 247), power conferred with no limitation as to extent or form of territory to be annexed. People v. Los Angeles [Cal.] 97 P 311. Legislative authority to provide for annexation conferred by Const. art. 11, § 6, authorizing provisions by general laws for incorporation of cities. Id. No objection that territory is mads contiguous to other cities [St. 1889, p. 360, c. 247] (Id.); that annexation will in future compel consolidation with smaller cities since under statute consent of such smaller cities is requisite (Id.); that annexation prevents expansion of another city in that direction (Id.). Disregard of ordinance as to publication of election immaterial in annexation proceedings since Act March 19, 1889 (St. 1889, p. 358, c. 247), providing generally for annexation, is superior to charter provisions except in "municipal affairs" and annexation is in no sense a municipal affair within constitution. People v. Los Angeles [Cal.] 97 P 311. Notice of annexation election pursuant to act March 19, 1889 (St. 1889, p. 358, c. 247), not void as to provisions of Pol. Code § 1094 in regard to registration since latter law makes no provision for any particular election. Id.

**8.** Lutterloh v. Fayetteville [N. C.] 62 SE 758.

**9.** Lutterloh v. Fayettsville [N. C.] 62 SE 758; People v. Los Angeles [Cal.] 97 P 311. **Interference** only where substantial provision of law violated or fraud perpetrated. People v. Los Angeles [Cal.] 97 P 311. Not open to **collateral attack.** Pavey v. Braddock, 170 Ind. 178, 84 NE 5. Annexation in effect reorganization. Chavez v. Atchison, 77 Kan. 176, 93 P 624. Can only be questioned by state, by proper officers. Id.

**10.** Since Act of Apr. 22, 1903, (P. L. 247), remedy of aggrieved party is bill in equity in common pleas for relief from extension of borough. Clairton Borough, 34 Pa. Super. Ct. 74; Beaver Borough, 34 Pa. Super. Ct. 467. Injunction proper remedy to prevent collection of illegal taxes from annexed territory. Lutterloh v. Fayetteville [N. C.] 62 SE 758.

**11.** County commissioners exercise judicial function in acting upon application for annexation of territory to municipality, where application is granted merely because of passage of ordinance authorizing annexation, commissioners misinterpret and fail to properly exercise their judicial functions, and injunction will lie to prevent recording of an annexation thus affected; and especially is this true if the ordinance was passed at suggestion of commissioners for purpose of throwing on council responsibility for project to which they were themselves opposed. Shipbaugh v. Kimball, 7 Ohio N. P. (N. S.) 514. Requirement of Rev. St. § 1590 (1536-32) et seq., with reference to filing with municipal clerk transcript of proceedings by county commissioners upon application by citizens for annexation of territory to municipality, apply under section 1599 (1536-41) to annexation of territory upon application of corporation itself, and injunction will lie to prevent county recorder, to whom such proceedings have been certified, from making record thereof. Id. Granting of injunction to restrain recording of annexation of territory to municipality, because of failure of county commissioners to give judicial consideration to questions and interests involved, does not have effect under section 1592 (1536-34) of barring further proceedings with reference thereto. Id.

**12.** Under Kirby's Dig. §§ 5519, 5574, 5575, 5576, as to annexation proceedings with provision for 30 days delay, such delay is to allow persons contesting proceeding an opportunity to appeal and protest, though stating no reasons for attack was sufficient to entitle persons to appeal, when filed within 30 day period. Barnwell v. Gravette [Ark.] 112 SW 973. Act Apr. 22, 1903 (P. L. 247), relating to annexation of adjacent territory repeals Act June 2, 1871 (P. L. 283, § 4), giving right

*Severances.*[See 10 C. L. 885]—In some states courts are authorized by statute to disconnect territory from cities after judicial investigation upon petition of a majority of the owners [14] and such statutes are generally held constitutional.[15] A municipality may be estopped by long acquiescence to question a detachment of territory.[16]

*Plats.*[See 8 C. L. 1060]—The sale of land before being properly platted may by statute be a misdemeanor.[17]

§ 5. *Officers and employes.*[18]—[See 10 C. L. 886]—This subject is fully treated in another topic, only a few holdings of peculiar application to municipalities being retained.[19] The state having power to create municipal corporations, it may designate the various municipal officers,[20] and fix their compenation.[21] The office may

of appeal to quarter sessions. Clairton Borough, 34 Pa. Super. Ct. 74; Beaver Borough, 34 Pa. Super. Ct. 467. Where record of annexation proceedings filed in court of quarter sessions pursuant to Act Apr. 22, 1903 (P. L. 247), court may only pass upon irregularity in record itself, and may not question whether council acted on good grounds, after consideration of facts involved, etc. Clairton Borough, 34 Pa. Super. Ct. 74; Beaver Borough, 34 Pa. Super. Ct. 467.

**13.** Where annexation of territory pursuant to Hurd's Rev. St. 1905, p. 322, c. 24, § 195, included toll road which by Hurd's Rev. St. 1905, p. 1996, c. 138, § 12, could not exist in city. City of Belleville v. St. Clair County Turnpike Co., 234 Ill. 428, 84 NE 1049.

**14.** Under Law 1907, p. 294, c. 221, providing for separation of unplatted agricultural land from cities of 10,000 or less inhabitants, primary use of land must be for agricultural purposes. Eugiere v. Tracy, 104 Minn. 378, 116 NW 922. Use of portion for purposes incidental to primary use does not exclude. Id. If purpose of retention is revenue, land should be relieved from taxation. Wilson v. Waterloo, 138 Iowa, 628, 116 NW 734. Under Cobbey's St. 1907, § 8978, it is no defense that city is indebted upon its bonds or otherwise. Bisenius v. Randolph [Neb.] 118 NW 127. **Trial** of petition to sever territory is by statute less technical than ordinary trials. Wilson v. Waterloo, 138 Iowa, 628, 116 NW 734. Result not disturbed unless abuse of discretion. Id. Statute provides for jury on demand. Peek v. Waterloo, 138 Iowa, 650, 116 NW 735. Proceeding for severance governed by ordinary rules as to admission of **evidence.** Id. Evidence may be submitted by affidavits in support of or against petition. Id. Under Code §§ 622-627, evidence of higher rate of assessment by city than township was inadmissible to show depreciation of market value by being included in city. Peek v. Waterloo, 138 Iowa, 650, 116 NW 735; Wilson v. Waterloo, 138 Iowa, 628, 116 NW 734. Motive of original annexation immaterial. Id. Presumption that severance granted on other grounds where jury instructed that severance would not be granted from mere increase of taxation. Wilson v. Waterloo, 138 Iowa, 628, 116 NW 734. No **new trial** after adjudication of severance from mere fact that portion of premises because of amusement park would necessarily require police protection, and should therefor be retained. Johnson v. Waterloo [Iowa] 119 NW 70.

**15.** Cobbey's St. 1907, § 8978, as to severance, not invalid as delegation of legislative authority to courts, and not violative of Const. art. 3, § 1, or art. 2. Bisenius v. Randolph [Neb.] 118 NW 127. Laws 1907, p. 294, c. 221, providing for separation of unplatted agricultural land from cities of 10,000 or less, is not unconstitutional, as to expression of act in subject of title, though § 4 excludes home-rule cities because not applying equally to all cities, since exclusion of home-rule cities is proper; as to discrimination in favor of agricultural lands since ordinarily such lands derive no benefit from city, while others may; as to classification in discrimination against owners of lands of less than forty acres; as to delegation of legislative powers to court since language used though permissive in form is in effect mandatory. Euziere v. Tracy, 104 Minn. 378, 116 NW 922. Laws 1907, p. 294, c. 221, does not include boroughs. Inapplicable to borough of Belle Plaine. Brenke v. Belle Plaine, 105 Minn. 84, 117 NW 157. Laws 1905, p. 408, c. 273, authorizing detachment of agricultural land from villages void as attempted delegation of legisative power and discretion to district courts. Id.

**16.** City of Minot estopped to question method of council in attempting to segregate certain territory. State v. Willis [N. D.] 118 NW 820.

**17.** Under St. 1893, p. 96, c. 80, as amended by St. 1901, p. 288, c. 124, as to platting of lots and providing that sale before plat is "made out, acknowledged and filed," is misdemeanor where proprietor made out and acknowledged plat, deposited with city engineer and received it after reference to council and then handed to recorder with fee and then made sale, though plat was referred to city surveyor for corrections, such sale was not in violation of statute, "filing" by proprietor, not recorder, being requisite. Bentley v. Hurlburt, 153 Cal. 796, 96 P 890.

**18. Search Note:** See notes in 14 L. R. A. 646; 9 L. R. A. (N. S.) 572.

See, also, Municipal Corporations, Cent. Dig. §§ 290-608; Dec. Dig. §§ 123-220; 28 Cyc. 399-604; 20 A. & E. Enc. L. (2ed.) 1217.

See, also, Abbott, Mun. Corp. §§ 596-716.

**19.** See Officers and Public Employes, 10 C. L. 1043.

**20.** Legislature may alter city government, change offices, mode of election, etc., at discretion. Ware v. Fitchburg, 200 Mass. 61, 85 NE 951. Has plenary power as to creation and manner of filling municipal offices either by appointment or election. People v. Earl, 42 Colo. 238, 94 P 294. Const. art. 12, § 1, giving legislature power to pro-

be filled by election [22] or appointment.[23] The state's power is manifest in the provisions for the so-called "commission" form of governments [24] with "recall" pro-

vide by general laws for incorporation, etc., includes power to designate officers, manner of election and duties. Vineyard v. Grangeville City Council [Idaho] 98 P 422. Method of appointing official and term of office are part of machinery and structure of government. McCarthy v. Queen [N. J. Law] 69 A 30. Creation of office by legislative branch of city of St. Louis requires action by both houses. State v. Dierkes, 214 Mo. 578, 113 SW 1077. Office of deputy receiver of taxes of Trenton fixed by law and coterminous with term of receiver whose deputy he is. Sperry v. Barber [N. J. Law] 71 A 64. Where legislative act providing for police judge was modified by provision that council might provide by ordinance for office to be held ex-officio by city clerk and ordinance so passed, election of police judge was unnecessary. Vineyard v. Grangeville City Council [Idaho] 98 P 422. Memphis ordinance creating office of paymaster not invalid as creating new office, duties of register being comprehended by Acts 1905, pp. 115, 116, c. 52, §§ 55-60, and paymaster being in effect assistant. Henniger v. Memphis [Tenn.] 111 SW 1115. Where Municipal Code Act (Act Aug. 13, 1907, Laws 1907, p. 790) was adopted prior to September 1908 (when law became effective) in accordance with § 199, governing body was required to elect president of city council who would hold office until Sept. 1908. Ward v. State [Ala.] 45 S. 655.

**21.** Ordinance allowing delinquent tax collector 7 per cent of collections construed and in accordance with statute evident intention was allowance of commissions after term, for one year, on proceedings which he instituted. City of Covington v. Zeisz, 32 Ky. L. R. 1320, 108 SW 349. Greater New York Charter (Laws 1901, p. 32, c. 466) § 56, as to salaries of officers applies only to city officers. Not applicable to sewerage commission. People v. Metz, 113 NYS 1007. Under Village Law (Laws 1897, p. 389, c. 414, § 85), and Town Law (Laws 1890, p. 1236, c. 669, § 178) trustees and clerk of village acting as inspectors of election are entitled only to $2.00 per day compensation until supervisors of county fix higher rate. In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008. Village officers acting as assessors held under Village Law, § 85, and Town Law, § 178, to be entitled to $3.00 per day compensation. Id. Under General Municipal Corporation Act (Gen. Laws 1906, pp. 895, 896, 910) §§ 851, 852, 855, 880, vesting government of cities in trustees and officers including marshal, with power in trustees to determine compensation, such power is **not reviewable by courts** except where the salary is so low as to nullify office since no competent person would accept. De Merritt v. Weldon [Cal.] 98 P 537. Village clerk entitled to compensation for **extra service** not incident to office. In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008. Where city engineer agreed with standing committee of council to do additional work relative to construction of new waterworks upon assurance of future increase of salary and such increase later awarded to take effect at beginning of extra services, mayor was not justified in refusing to sign warrant therefor. Mandamus issued. Crane v. Shoenthal [N. J. Law] 69 A 972.

**22.** Where charter required order for election of officers to be made by quorum of intendant and wardens, or wardens to fill vacancy, meeting of portion of electors without notice cannot fill such vacancy. State v. Stickley, 80 S. C. 64, 61 SE 211. Election of aldermen provided by statute. City of Earlville v. Radley, 237 Ill. 242, 86 NE 624, rvg. 141 Ill. App. 359. Where Code § 645, providing for two councilmen from each ward, and § 646, par. 2, declaring election in alternate years, was absolutely repealed by Acts 32d. Gen. Assem. (Laws 1907, p. 20) c. 26, providing for two councilmen at large and one from each ward, etc., it was held that though the latter act became effective on publication in March 1907, certain portions, nevertheless, continued in force, and that in 1910 would council for first time be elected in accordance with act. State v. Payton [Iowa] 117 NW 43. Election of mayor and councilmen in even numbered years to be held in 1908, as provided by § 646, Code. Id.

**23.** Act Oct. 28, 1907 (P. L. p. 705, as to appointment of officers by mayor, applies to police justice. McCarthy v. Queen [N. J. Law] 69 A 30. Act whereby officers of board of control of port of Portland are made appointive and self-perpetuating rather than elective not unconstitutional since such officers are in the nature of agents. The George W. Elder, 159 F 1005. Where vacancy in common council of city of third class, after primary election, and at so short a period before the annual election that the office cannot be "duly filled" at such election, according to P. L. p. 26 (Act March 1, 1905), vacancy may be filled by council. Stewart v. Jones [N. J. Law] 71 A 151. Under charter of Ansonia, Sp. Laws 1901, p. 1051, § 75, p. 1055, § 85; p. 1038, § 15, corporation counsel represents city in all actions and is subject only to aldermen; and upon such counsel's determination of no defense in suit, mayor cannot appoint council to supersede his power by § 15 being limited to authorizing expenditure for city counsel's assistance. Nichols v. Ansonia [Conn.] 70 A 636. Under general act of incorporation, mayor may nominate and council confirm appointments. President and trustees in village. McKean v. Gauthier, 132 Ill. App. 376. Appointment to village office by proper authority not effected by mere irregularity in procedure. McKean v. Gauthier, 132 Ill. App. 376. Where city adopting general charter (St. 1898, c. 40a) fails to elect police justice, mayor may appoint (§§ 925-31). Premature appointment renders de facto. Olson v. Hawkins, 135 Wis. 394, 116 NW 18. Board of estimates not unconstitutional because appointed by council rather than elected by voters of city (Const. art. 15, § 14). Bay City Trac. & Elec. Co. v. Bay City [Mich.] 15 Det. Leg. N. 1039, 119 NW 440. Under Laws 1907, p. 1521, c. 661, § 1, as to board of public works and providing for "appointment" by mayor subject to consent of council, word "appointed" is used in sense of "nominated." People v. Raymond, 114 NYS 865.

**24.** In absence of constitutional restriction, legislature may clothe officer with functions involving legislative, executive and judicial powers. Eckerson v. Des Moines, 137

visions.[25] Where municipalities have a constitutional right of self-government, it is an invasion of that right for the state to appoint officers to perform functions of a local governmental character.[26] Upon the admission of Oklahoma as a state, municipal officers held their positions by virtue of the schedule to constitution.[27]

The character of his duties may render an officer a state official.[28] Members of city councils occupy positions of trust,[29] and usually statutes prohibit contracts with such officials.[30] Generally persons dealing with municipal officers must ascer-

Iowa, 452, 115 NW 177. Acts 32d Gen. Assem. p. 39, c. 48, § 5, as to election of officers under special plan of goverment, held not to curtail right to vote. Id. Acts 32d Gen. Assem. p. 32, c. 42, as to city park commissioners, does not repeal by implication Acts 32d. Gen. Assem. p. 38, c. 48, providing form of government. Chapter 42 relates to cities generally and chapter 48 to park boards on cities under act. Id. St. 1908, p. 542, c. 574, providing radically different method of government, gives all voters of city equal rights to elect others to offices and to be elected themselves in accordance with governmental system established for all alike and does not conflict with Declaration of Rights art. 9, pt. 1. Graham v. Roberts, 200 Mass. 152, 85 NE 1009. St. 1908, p. 542, c. 574, amending charter of Haverhill, provides methods of preliminary and final election of officers and regulations in respect thereto which are constitutional, not conflicting with Declaration of Rights art. 9, pt. 1. Id. No constitutional restriction on power of general court to fix qualifications of city officers. Id. No limitation on election that is invalid since space for writing names on ballot, etc. Id. Regulations that two names appear on official ballot adopted; prohibition of names adopted by political caucus; prohibition of statement of candidate's political party or principal; regulation that person on ballot affirm in writing that he is candidate; that 25 voters request party to be candidate, etc. Id. Question of adoption of Australian ballot may be referred to voters of town. Id.

**25.** "Recall" provision, Acts 32d. Gen. Assem. p. 38, c. 48, §§ 19, 20, valid. Eckerson v. Des Moines, 137 Iowa, 452, 115 NW 177. Legislature in absence of constitutional limitations may shorten the term or abolish the office of an incumbent. Graham v. Roberts, 200 Mass. 152, 85 NE 1009.

**26.** Davidson v. Hine, 151 Mich. 294, 14 Det. Leg. N. 957, 115 NW 246. Loc. Acts 1907, p. 1090, No. 570, providing bureau of public safety to control police and fire departments of cities is invalid, such departments being local for benefit of local communities and act infringed municipality's right of local self-government. Davidson v. Hine, 151 Mich. 294, 14 Det. Leg. N. 957, 115 NW 246. Entire act invalid. Id.

**27.** State v. Bridges [Okl.] 94 P 1065. Schedule of Constitution, § 10 (Burns' Const. of Olk., § 459) makes officers of municipalities in Indian Territory continue in such offices after admission of state. Id. Under Schedule to Constitution § 10, successors to officers of municipalities of first class are to be elected on first Tuesday in April, 1909. Id. Under section 10, Schedule to Constitution, legislature may provide date earlier or later than state laws for succession of officers of cities of first class, which officers retained office after admission as state. Time not changed by certain statutes relative to organization and incorporation of cities. Id.

**28.** People v. Metz, 113 NYS 1007. Metropolitan Sewage Commission created under Laws 1906, p. 1646, c. 639, as amended by Laws 1908, p. 1208, c. 422, is state and not city commission. Id. Members of board of public works city officers since duties, as defined by Laws 1907, p. 1521, c. 661, relate to city matters in distinction from state. People v. Raymond, 114 NYS 365.

**29.** Bound by same measure of good faith as trustee to cestui que trust. Woods v. Potter [Cal. App.] 95 P 1125. Member acting as such in regard to matter in which he is interested vitiates transaction. Woods v. Potter [Cal. App.] 95 P 1125. Under charter, members of common council were unauthorized to create salaries for members. Id.

**30.** Contract with school district by trustee where latter pecuniarily interested void by Sess. Laws 1899, p. 105, § 82, as amended Sess. Laws 1905, p. 71. Independent School Dist. No. 5 v. Collins [Idaho] 98 P 857. Under Ky. St. § 2768, and considering § 2822, as to contracts by ordinance, former section by prohibiting "contracts" between city and councilmen, refer to case where city buys daily supplies. Bradley & Gilbert Co. v. Jacques, 33 Ky. L. R. 618, 110 SW 836. Ky. St. 1903, § 2768, as to qualifications of councilmen, and prohibiting contracts, not mere declaration of eligibility, but renders contract by city and member of council void. Bradley & Gilbert Co. v. Jacques, 33 Ky. L. R. 618, 110 SW 836. Contract by village with corporation of which village treasurer was president not void within Village Law (Laws 1897, p. 451, c. 414) § 313, prohibiting contracts with officers of village, since such statute does not contemplate all officers and treasurer one of those exempt. In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008. Where statute makes it crime or misdemeanor for officer to do certain act, contract in violation thereof is void as against public policy. Under Burns' Ann. St. 1901, § 2136, providing fine where trustee becomes interested in town contract, contracts for sale of coal and hauling by such person were void. McNay v. Lowell, 41 Ind. App. 627, 84 NE 778. No title passed to money paid and sums recoverable. Id. Sales of coal in violation of Burns' Ann. St. 1901, § 2136, not excusable on theory of emergency when over 50 sales aggregating 990,810 pounds. Id. Duty of trustees to be informed as to supply of coal preventing purchase in violation of statute. Id. Trustee not entitled to retain value of coal on quantum valebat. Id. No defense that price was so low as to prevent profit. Id. Act March 31, 1860 (P. L. 400) § 66, preventing profits by members of borough council, etc., inapplicable where borough council authorizes loan from bank and member of council as member of banking

tain the nature and extent of their authority.[31] An ultra vires act cannot be ratified,[32] but a change of the grade of a street by the officers of a borough may be subsequently ratified.[33] A city council may not pronounce contracts void as against public policy.[34] The action of a council, in determining a contested election of a councilman, is of a judicial nature.[35] Boards or departments may be created and endowed with certain rights, but the recognition of such board by a city does not constitute the same a legal entity.[36] A board of public works, though an agent of a city, may be authorized to sue for delinquent light and water rates.[37]

§ 6. *Municipal records and their custody and examination.*[38]—See 4 C. L. 728

§ 7. *Authority and powers of municipality.*[39]—See 10 C. L. 888—The powers of a municipality being wholly derivative,[40] they are only such as are expressly granted or necessarily implied.[41] Any fair, reasonable doubt concerning the existence of

association. Long v. Lemoyne Borough [Pa.] 71 A 211.

**31.** Implied authority may be shown. Roberts v. St. Marys [Kan.] 98 P 211. Where municipality's officers' mode of contracting is limited by statute, implied contract cannot be raised. Niland v. Bowron, 193 N. Y. 180, 85 NE 1012. Can only bind to extent of powers authorized by law. Martindale v. Rochester [Ind.] 86 NE 321; Marth v. Kingfisher [Okl.] 98 P 436; J. Burton Co. v. Chicago, 236, Ill. 383, 86 NE 83, rvg. 140 Ill. App. 344. Mayor has no power to bind municipality unless authorized by governing body or state. Coleman v. Hartford [Ala.] 47 S 594. City not estopped to deny validity of permit issued by commissioner of public works in violation of ordinance though bond and compensation accepted and cancellation of permit would cause plaintiff great expense including change of plans for projected building. J. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93, rvg. 140 Ill. App. 344.

**32.** Niland v. Bowron, 193 N. Y. 180, 85 NE 1012. Where laborer injured while repairing city windmill, employment implied. Acts of marshal in repairing, if not authorized, ratified. Roberts v. St. Marys [Kan.] 98 P 211.

**33.** Deer v. Sheraden Borough, 220 Pa. 307, 69 A 814.

**34.** Eastern Wisconsin R. & L. Co. v. Hackett, 135 Wis. 464, 115 NW 376.

**35.** Rollins v. Connor, 74 N. H. 456, 69 A 777. Council's determination of question of fact as to election of councilman not revisable by court. Id. Personal disqualification of member of council acting judicially renders judgment void and liable to be set aside on certiorari. Id.

**36.** Act March 7, 1907 (Laws 1907, p. 94) §§ 1, 3, to establish museum of art in St. Louis with board of control, etc., does not constitute board legal entity or corporate body of St. Louis, distinct from Washington university. State v. St. Louis [Mo.] 115 SW 534. Ordinance of St. Louis as to erection of building for art institute construed not to change board of control of department of university into public municipal institution of city. Id. Ordinance of Washington university ineffective to create public corporation of department of arts in St. Louis, such university having no power to so create. Id.

**37.** Comp. Laws, § 3275, authorizes contracts by board in their own name as to such matters. Niles Board of Public Works v. Pinch, 152 Mich. 517, 15 Det. Leg. N. 289, 116 NW 408. Board of public works, agents or trustees of city, but statute authorizes suit. Id. Suit against guarantor of delinquent proper. Id. Words "on the common counts" in statute merely permissive. Id.

**38. Search Note:** See note in 64 L. R. A. 418.

See, also, Municipal Corporations, Cent. Dig. §§ 213-218; Dec. Dig. § 100; 28 Cyc. 343-346; Officers, Cent. Dig. § 125; Dec. Dig. § 85; 29 Cyc. 1419, 1420.

See, also, Abbott, Mun. Corp. §§ 591-595.

**39. Search Note:** See notes in 10 C. L. 889; 14 L. R. A. 268; 61 Id. 33; 2 L. R. A. (N. S.) 152; 4 Id. 746; 5 Id. 434; 15 Id. 711; 30 A. S. R. 225; 7 Ann. Cas. 521; 10 Id. 132.

See, also, Municipal Corporations, Cent. Dig. §§ 141-155, 1378, 1379; Dec. Dig. §§ 52-63; 28 Cyc. 257-281; 4 A. & E. Enc. L. (2ed.) 726; 20 Id. 1139, 1229.

See, also, Abbott, Mun. Corp. §§ 108-114.

**40.** Municipalities exercise only such powers as are granted by legislature. City of Earlville v. Radley, 237 Ill. 242, 86 NE 624, rvg. 141 Ill. App. 359; People v. Earl, 42 Colo. 238, 94 P 294. Number, nature and duration of powers conferred and territory over which to be exercised rests in discretion of state. People v. Metz, 193 N. Y. 148, 85 NE 1070. Powers **subject** to change, modification or **abrogation.** People v. McBride, 234 Ill. 146, 84 NE 865. Matters subject to legislativs regulation and control. Schigly v. Waseca [Minn.] 118 NW 259. Within constitutional limits. Cox v. Pitt County Com'rs, 146 N. C. 584, 60 SE 516. Legislature cannot under guise of legislative control deprive citizen of rights against municipality. McSurely v. McGrew [Iowa] 118 NW 415. Municipality cannot complain of act diminishing revenues, amending charter, or dissolving it entirely. Id. Not protected by federal constitution as to impairment of contracts. Mannie v. Hatfield [S. D.] 118 NW 817. Federal constitution inapplicable. People v. Metz, 193 N. Y. 148, 85 NE 1070.

**41.** Hardee v. Brown [Fla.] 47 S 834; Landberg v. Chicago, 237 Ill. 112, 86 NE 638; Phillips Village Corp. v. Phillips Water Co. [Me.] 71 A 474; Meushaw v. State [Md.] 71 A 457; Dunkin v. Blust [Neb.] 119 NW 8; City of Paris v. Sturgeon [Tex. Civ. App.] 110 SW 459; Village of Swanton v. Highgate [Vt.] 69 A 667. "Municipal corporations possess and exercise only the following powers: those granted in express words; those necessarily or fairly implied or incident to the powers expressly granted; and those absolutely indispensible to the declared objects and purposes of the corporation." Posey v. North

power is resolved by the courts against the corporation,[42] and this is especially true of the taxing power,[43] but this rule does not preclude a grant of power in general terms.[44] The power to contract,[45] to legislate with reference to street and sidewalks,[46] and subjects within the police power,[47] are hereinafter referred to. Cities are usually authorized to provide for public utilities,[48] such as water,[49] gas [50] and

Birmingham [Ala.] 45 S 663; Galindo v. Walter [Cal. App.] 96 P 505; State v. Lewis [Fla.] 46 S 630; State v. Tampa Waterworks Co. [Fla.] 47 S 358; In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008; Marth v. Kingfisher [Okl.] 98 P 436. Courts will not imply powers unless cognate to purpose of corporation. Blades v. Hawkins, 133 Mo. App. 328, 112 SW 979. Powers authorized may include those necessary to maintenance of local government charged with duty of preserving order, protecting property, morals and health of its inhabitants, and may include powers in executive and legislative branches of municipal government devoted to accomplishment of these ends. State v. Cederaski, 80 Conn. 478, 69 A 19. Power to compel abutting owners to construct **sidewalks** conferred by charter. O'Haver v. Montgomery [Tenn.] 111 SW 449. Power to build **jail** necessarily implied from power to enforce ordinances by fine and imprisonment. Dunkin v. Blust [Neb.] 119 NW 8. No express or implied power to pass ordinance for compulsory **road work** and such ordinances are void. Town of Winnfield v. Long [La.] 48 S 155.

**42.** Posey v. North Birmingham [Ala.] 45 S 663; State v. Lewis [Fla.] 46 S 630; State v. Tampa Waterworks Co. [Fla.] 47 S 358; Crittenden v. Booneville [Miss.] 45 S 723; In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008. Strictly construed. City of Paris v. Sturgeon [Tex. Civ. App.] 110 SW 459; In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008. Existence of authority not assumed. Hardee v. Brown [Fla.] 47 S 834. Resolved in favor of public. Meushaw v. State [Md.] 71 A 457. No power implied to interfere with private property which fair meaning of statute does not express. Masonic Fraternity Temple Ass'n v. Chicago, 131 Ill. App. 1. Power to make retroactive legislation not to be inferred when words may be used to refer to prospective regulation. Id. Action will be held strictly within limits (In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008), but if within limits will be favored, and not defeated by harsh construction (In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008), to enable proper performance of functions (State v. Tampa Waterworks Co. [Fla.] 47 S 358). Law does not expressly grant powers and impliedly grant other conflicting powers. State v. Tampa Waterworks Co. [Fla.] 47 S 358.

**43.** Tax strictly construed. Town of Wytheville v. Johnson's Ex'r, 108 Va. 589, 62 SE 328. In case of reasonable doubt construed against the municipality. Ex parte Unger [Okl.] 98 P 999. Words presumed used in their known and accepted signification. Id. Acts beyond taxing power void. Id. Power to levy collateral inheritance tax not delegated by statutes or charter, as construed. Must be expressly granted. Town of Wytheville v. Johnson's Ex'r, 108 Va. 589, 62 SE 328. License tax on express companies in excess of $25 not by express terms or implication authorized. State v. Lewis [Fla.] 46 S 630. Under new charter of Baltimore § 6, city may impose tax for privilege of **selling in city market**, and such tax for revenue, not regulation. Meushaw v. State [Md.] 71 A 457. $200 per year tax not unreasonable for privilege of using city market upon which city had expended large sums. Id.

**44.** Difficulty of making specific enumerations renders delegation of some powers in general terms necessary. State v. Tampa Waterworks Co. [Fla.] 47 S 358. General terms refer to other powers than specifically mentioned. Id. General powers should be construed with reference to the purposes of incorporation. Id. Where particular power is expressly conferred and there is also general grant, latter by intendment includes all powers fairly within terms of grant, essential to purposes of municipality and not in conflict with particular powers. Id. Limitations of taxing and bonding powers, as contained in charter and statutes, held not to preclude grant of privileges in streets, or contracts to procure adequate water supply. Id. Authority "to make and sink wells, erect pumps, dig drains," etc., distinct from express power "to pass all laws necessary to guard against fire" or charter power "to provide for establishment of waterworks," and does not limit powers given by general clauses. Id.

**45.** See post, § 12.

**46.** See post, § 10E.

**47.** See post, § 10.

**48.** Public utilities are regarded as essential governmental agencies and important aids to the police power. Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855. A municipality may erect and maintain plants and use public streets for furnishing public and municipality with public utilities. Id. Power to provide for public utilities may be discharged by others upon terms and manner prescribed by law. Id.

**49.** Provisions for water supply usual and necessary power. May be given in general terms where nothing in enumerated powers conflicting. State v. Tampa Waterworks Co. [Fla.] 47 S 358. Under "general welfare" clause, cities of Georgia may contract for water supply for inhabitants and for fire protection. Mercantile Trust & Deposit Co. v. Columbus, 161 F 135. Statute expressly confers **power to contract** for supplying inhabitants with water. Brummitt v. Ogden Waterworks Co., 33 Utah, 285, 93 P 828. Method of securing supply of water discretionary when no particular method prescribed. State v. Tampa Waterworks Co. [Fla.] 47 S 358. City of Tampa may contract for supply of water. Id. Contracts for public services will be sustained where authorized, and terms considered with controlling law are not clearly violative of some principle of law. Id. Provisions of law applicable to subject-matter are parts of contracts whether referred to or not. Regulation of service, portion of contract for water supply. Id. Where provisions of contract for public service contain unreasonable unenforcible provisions, regulation as provided by law, which is part of contract, is

electric lighting,[51] for the benefit of the inhabitants,[52] and also, to construct sewers.[53] In addition a city may be authorized to maintain a public wharf,[54] or dry

available to relieve apparent unreasonableness. Id. Tampa municipal ordinance contract construed and elimination of invalid portions held not to effect. Id. Ordinance granting rights to water company for fifty years, not being prohibited by statute or preventing others from receiving the right to supply inhabitants, and at most granting monopoly for that period, may not be enjoined by taxpayers who have no personal interest therein. Brummitt v. Ogden Waterworks Co., 33 Utah, 285, 93 P 828. Contract granting right to construct water works not unreasonable so as to prevent specific performance, because city reserved right of purchase without corresponding right of company to enforce sale. City of Eau Claire v. Eau Claire Water Co. [Wis.] 119 NW 555. City of Tampa not authorized to grant **exclusive** privilege of use of streets for water supply. State v. Tampa Waterworks Co. [Fla.] 47 S 358. No objection to contract that city gave water company exclusive franchise and was thus precluded from entering into competition with such company for erection of waterworks. Mercantile Trust & Deposit Co. v. Columbus, 161 F 135. Statutes held to authorize city of Omaha **to acquire waterworks company,** though such property continued into several adjoining municipalities. Omaha Water Co. v. Omaha [C. C. A.] 162 F 225. Where city elected to purchase waterworks pursuant to statute, it could not require company to keep outlying distribution systems and sell main system. Id. St. 1892, p. 164, c. 185, provide for taking of water under power of **eminent domain,** authorizing additional water supply for city of Pittsfield. Bryant v. Pittsfield, 199 Mass. 530, 85 NE 739. City has no power to contract to furnish inhabitant **outside territory** with water. Not conferred. City of Paris v. Sturgeon [Tex. Civ. App.] 110 SW 459. City may contract to furnish another city with water. City of Colorado Springs v. Colorado City, 42 Colo. 75, 94 P 316. Municipalities have the power and it is the duty of officers to apply surplus power and use of public utilities for benefit of citizens, provided such application does not materially impair usefulness of such facilities. Id. City furnishing water to another city after being granted right of way through latter's streets, agreement being acquiesced in thirty years, will be estopped to repudiate contract as illegally made. Id. City supplying water may prescribe character of **meter** to be used. Anderson v. Berwyn, 135 Ill. App. 8. Provisions in ordinance as to **rates** in contract for water supply to be construed as referring to expressed design for adequate water supply, and to governmental authority when rights affect public. State v. Tampa Waterworks Co. [Fla.] 47 S 358. Regulation of water rates governmental function which cannot be surrendered or suspended by city council. Brummitt v. Ogden Waterworks Co. 33 Utah, 285, 93 P 828. Municipalities cannot enter into binding contract regarding rates for services rendered to the public. Right not to be surrendered in absence of constitutional or statutory authority. Id. Ordinance readjusting rates with water company and providing for payment for water used on school lawns cannot be enjoined by taxpayer, because such water was previously supplied free. Not matter for judicial review. Id. Exemption from water rates of educational and like institutions, proper. Property owned in quasi private capacity. City of Chicago v. University of Chicago, 131 Ill. App. 361. Ordinance exempting educational and like institutions from payment of water rates held to include dormitories and commons for use and enjoyment of which fees were charged by such institution. City of Chicago v. University of Chicago, 131 Ill. App. 361.

**50. Power to prescribe rates** for gas necessary to safeguard rights of inhabitants. Boerth v. Detroit City Gas Co., 152 Mich. 654, 15 Det. Leg. N. 347, 116 NW 628. City of Detroit impliedly authorized to contract with **gas company for rates to be charged.** Id. Not prohibited by statute from prescribing rates. Id. Ordinance construed as giving gas company authority to charge 80 cents per 1,000 feet for fuel gas. Id. Power to regulate price at which gas shall be furnished must be exercised in good faith; and bad faith on part of council in fixing inadequate price or in making unreasonable and arbitrary regulations is proper subject of inquiry, when put in issue. City of Akron v. East Ohio Gas Co., 7 Ohio N. P. (N. S.) 553.

**51.** Contract for lighting streets within power of village trustees. Laws 1891, c. 139, p. 310; Laws 1888, p. 743, c. 452; Village Laws (Becker & Howe [3rd Ed.] § 240, p. 206). Not repealed by transportation. Wakefield v. Theresa, 125 App. Div. 38, 109 NYS 414. Under Bay City Consolidated Charter (Loc. Acts 1903, p. 720, No. 514), §§ 166, 167, city council had no power to provide for city electric lighting plant where it did not first adopt resolution determining expediency of purpose by two-thirds vote of aldermen. Bay City Trac. & Elec. Co. v. Bay City [Mich.] 15 Det. Leg. N. 1039, 119 NW 440. Passage of resolution of expediency after letting contracts ineffective, being mere attempt to supply preliminary power. Id. Express **authority not shown** by statutes to operate electric lighting plant. Posey v. North Birmingham [Ala.] 45 S 663. Electric lighting plant not indispensible, or fairly implied. Id. Swanton village charter, Acts 1888, p. 268, No. 252, § 31, as amended by Acts 1890, p. 132, No. 93, and § 32; p. 269, as amended by Acts 1894, p. 251, No. 193, § 2, held to confer neither express or implied power to furnish inhabitants with electric light for private use. Village of Swanton v. Highgate [Vt.] 69 A 667.

**52.** Power to own and operate utilities for persons situated beyond corporate limits must be clearly conferred. City of Paris v. Sturgeon [Tex. Civ. App.] 110 SW 459. General incorporation act, Sayles Ann. Civ. St. 1897, art. 418, does not authorize city to furnish water to persons not inhabitants. Id.

**53.** Construction of sewer within charter and a familiar and necessary part of function of government. Bell v. Kirkland, 102 Minn. 213, 113 NW 271. Power vested by statute. Googin v. Lewiston, 103 Me. 119, 68 A 694. P. L. 1902, p. 371, authorizing system of sewers applies to any town incorporated at time proceedings under act are begun. Frelinghuysen v. Morristown [N. J. Law] 70 A 77. P. L. 1902, p. 371, c. 124, not invalid because power given to erect sewage disposal works within

dock,[55] or to subscribe for the stock of a corporation.[56] The power of eminent domain may be delegated.[57] Unless restrained by statute, a municipality has discretion in the method of exercising governmental or other public powers,[58] but all acts beyond the scope of the powers granted are void.[59] Where the mode of exercise of a conferred power is prescribed, such mode must be pursued.[60] The exercise of assumed and unwarranted corporate powers may be ousted by quo warranto.[61] Public powers conferred upon a municipal coporation and its officers cannot be surrendered or delegated.[62]

*Judicial control over exercise of powers.* See 10 C. L. 891—The acts of municipal officers in the exercise of administrative or legislative discretion [63] are not subject to judicial review,[64] where there is no abuse of discretion,[65] or fraud,[66] but when authorized the action taken is presumed to be correct.[67]

bounds of another municipality. Id. Under P L. 1902, p. 371; Id. 1907, p. 707, municipality need not secure consent of another municipality to erection of sewage disposal works within territorial limits of latter. Id. Action of sewerage board under P. L. 1902, p. 371, c. 124, only preliminary to legislative action by governing body of town, and voters at special election. Determination of sewerage board fixing site for disposal works, land on which member interested, not voidable in absence of fraud. Id.

**54.** State may authorize cities and towns on navigable rivers to build and operate public wharves. City of Burlington v. Central Vermont R. Co. [Vt.] 71 A 826. Acts 1906, p. 356, No. 262, authorizing city of Burlington to construct and maintain public wharf, and to borrow money for that purpose, are valid. Id. Acts 1906, p. 356, No. 262, authorizing city of Burlington to condemn land for public wharf, with power of council to award damages and allowing appeal, are not unconsitutional as denying due process of law. Id.

**55.** Statute of Oregon authorizing Portland (Laws 1901, p. 417) to maintain dry dock not in violation of constitution as to title of act. The George W. Elder, 159 F 1005. Statute of Oregon as amended by Laws 1901, p. 417, authorizing maintenance of dry dock by city of Portland, not unconstitutional because of levy of taxes, such levy being for public purpose. Id.

**56.** Water company. Town of Southington v. Southington Water Co., 80 Conn. 646, 69 A 1023. Corporation accepting town as associate, and accepting subscription, is chargeable with notice of town's powers, charter and limitations. Id.

**57.** Legislature has constitutional right to delegate power of eminent domain to cities to condemn property for parks for health and pleasure of people. Brunn v. Kansas City [Mo.] 115 SW 446. Where power of eminent domain delegated, city may, in charter, frame code of procedure for exercising right. Id. Special charter procedure in condemnation proceedings, if not inimical to general scope of constitution and laws, governs as against general law, such provisions being exceptions read into general law. Id.

**58.** Limitations, good faith and reasonableness, not perfection. State v. Tampa Waterworks Co. [Fla.] 47 S 358.

**59.** Posey v. North Birmingham [Ala.] 45 S 663. Fourth of July celebration. Marth v. Kingfisher [Okl.] 98 P 436.

**60.** McGillic v. Corby, 37 Mont. 249, 95 P 1063.

**61.** Where city permitted gambling houses and saloons giving immunity from prosecution on payment of simulated fines and forfeitures. State v. Coffeyville [Kan.] 97 P 372.

**62.** Benton v. Seattle Elec. Co. [Wash.] 96 P 1033. Municipality cannot absolutely alienate and abdicate its power to supply water. Rogers Park Water Co. v. Chicago, 131 Ill. App. 35. Franchise ordinance granting "exclusive" right held not to preclude municipality from supplying water. Id.

**63.** Not reviewable when question is one within competency of legislative tribunal to determine. Pittsburgh, etc., R. Co. v. Hartford City, 170 Ind. 674, 85 NE 362. Court slow to review judgment of council imposing tax for use of privileges of city market. Meushaw v. State [Ind.] 71 A 457. Removal of trees from street. Rosenthal v. Goldsboro [N. C.] 62 SE 905. Designation of streets to be occupied by street railway. Wagner v. Bristol Belt Line R. Co., 108 Va. 594, 62 SE 391. Conclusion of council as to salary of officer not interfered with. De Merritt v. Weldon [Cal.] 98 P 537. Adoption of plans for elevation of tracks. People v. Grand Trunk, etc., R. Co., 232 Ill. 292, 83 NE 839. Taxpayer cannot enjoin ordinance relinquishing city's right to purchase water plant, since question of purchase discretionary with council and not subject to judicial review. Brummitt v. Ogden Waterworks Co., 33 Utah, 285, 93 P 828.

**64.** Strict construction of municipal powers not applicable to method of carrying power granted into effect. Henniger v. Memphis [Tenn.] 111 SW 1115. Where statute vests city with power to do specified act, validity of action does not always depend on strict observance of statute. Fullerton v. Des Moines [Iowa] 115 NW 607.

**65.** Rosenthal v. Goldsboro [N. C.] 62 SE 905; Southern R. Co. v. Mecklenburg County Com'rs, 148 N. C. 220, 61 SE 690. Will not restrain or control action because unwise or erroneous. People v. Grand Trunk, etc., R. Co., 232 Ill. 292, 83 NE 839. Doubts as to propriety of means resolved in favor of municipality. State v. Tampa Waterworks Co. [Fla.] 47 S 358.

**66.** Ex parte Yung, 7 Cal. App. 440, 94 P 594; De Merritt v. Weldon [Cal.] 98 P 537; People v. Grand Trunk etc., R. Co., 232 Ill. 292, 83 NE 839; Rosenthal v. Goldsboro [N. C.] 62 SE 905.

**67.** Hardee v. Brown [Fla.] 47 S 834. When specially authorized, courts will declare ordinance void only when in conflict with constitution. Landberg v. Chicago, 237

§ 8. *Legislative functions of municipalities and their exercise. A. Nature and extent of legislative power.*[68]—See 10 C. L. 891—Municipalities may only exercise the legislative powers expressly or impliedly conferred.[69] In practice the legislative power is confined chiefly to the enactment of police regulation,[70] the functions of the legislative department in the initiation of public contracts and improvements,[71] and in the fiscal management of the municipality,[72] being largely of an administrative character. The legislative power is usually vested in a mayor and a council.[73] Legislative functions cannot be delegated,[74] but an ordinance may be made operative upon the happening of a contingency,[75] the municipality may delegate authority as to the execution of an ordinance,[76] and the legislature may provide that popular vote be resorted to in the enactment of municipal ordinances.[77]

Ill. 112, 86 NE 638. Such action would be substitution of judicial judgment. Id. Where general power granted courts assume that power authorized be exercised in reasonable manner. Id.

**68. Search Note:** See notes 20 L. R. A. 653, 721; 1 L. R. A. (N. S.) 382, 940; 15 Id. 62; 3 Ann. Cas. 88, 986; 6 Id. 259, 601; 8 Id. 622; 9 Id. 1172.

See, also, Municipal Corporations, Cent. Dig. §§ 141-183, 188; Dec. Dig. §§ 52-79, 85; 28 Cyc. 257-281, 322; 4 A. & E. Enc. L. (2ed.) 727; 20 Id. 1209.

See, also, Abbott, Mun. Corp. §§ 109, 110; Id. §§ 496-567.

**69.** No inherent power. State v. Scales [Okl.] 97 P 584; Marth v. Kingfisher [Okl.] 98 P 436; Ex parte Unger [Okl.] 98 P 999. Legislature may regulate municipal administration in such way as it sees fit. Googin v. Lewiston, 103 Me. 119, 68 A 694. City council can legislate only because authorized by state. City of Earlville v. Radley, 237 Ill. 242, 86 NE 624, rvg. 141 Ill. App. 359. Ordinance passed without authority, void. Goar v. Rosenberg [Tex. Civ. App.] 115 SW 653. Sufficient if power exercised is conferred by necessary implication. State v. Cederaski, 80 Conn. 478, 69 A 19.

**70.** See post, § 10.

**71.** See post, § 12. See, also, Public Contracts, 10 C. L. 1285; Public Works and Improvements, 10 C. L. 1307.

**72.** See post, § 13.

**73.** Grumbach v. Lelande [Cal.] 98 P 1059. The "legislative authority" of a city means the mayor and city council. Expression as used in Const. art. 11, § 10; 1 Ballinger's Ann. Codes & St. § 740 (Pierce's Code § 3733). Benton v. Seattle Elec. Co. [Wash.] 96 P 1033.

**74.** City of Spokane v. Camp [Wash.] 97 P 770. Submission of ordinance as to construction of street railway unauthorized. Benton v. Seattle Elec. Co. [Wash.] 96 P 1033. Legislative power conferred exclusively by San Jose Charter (St. 1897, pp. 600-603, c. 15), art. 3, cc. 1, 2, without referendum provision, not to be delegated to voters. Galindo v. Walter [Cal. App.] 96 P 505. Under San Jose Charter (St. 1897, p. 601, c. 15), art. 3, c. 2, § 1, ordinance submitting question of sale of intoxicating liquors to voters is unauthorized. Id. May delegate discretion as to execution of law. People v. Grand Trunk, etc., R. Co., 232 Ill. 292, 83 NE 839. May make provision that law be effective on ascertainment of facts by administrative officers. Village of Little Chute v. Van Camp, 136 Wis. 526, 117 NW 1012. Ordinance requiring saloons to close at 11 o'clock except by permission of village president, void as delegation of legislative power. Id. Ordinance regulating kind of meters not subject to objection as delegation of legislative powers to administrative officers. Anderson v. Berwyn, 135 Ill. App. 8. While common council cannot delegate power to authorize public improvements, it may delegate performance of ministerial duties. Martindale v. Rochester [Ind.] 86 NE 321.

**75.** City of Spokane v. Camp [Wash.] 97 P 770.

**76.** Railroad track elevation ordinance not invalid though delegating power of locating foundations and walls of subways. People v. Grand Trunk, etc., R. Co., 232 Ill. 292, 83 NE 839.

**77.** Const. art. 3, § 1, not applicable. Eckerson v. Des Moines, 137 Iowa, 452, 115 NW 177. **Initiative and referendum** provisions of Const. (art. 5, §§ 1, 2, 3, 4, 5, and art. 18, §§ 4, 5), not conflicting with Const. U. S. art. 4, § 4, guarantying republican form of government. Ex parte Wagner [Okl.] 95 P 435. Provision of St. 1908, p. 542, c. 574, amending charter of Haverhill providing for initiative and referendum as to ordinances not unconstitutional, since constitution forbidding referendum applies to legislature, not subjects of local concern. Graham v. Roberts, 200 Mass. 152, 85 NE 1009. Initiative and referendum provisions of constitution (art 5, §§ 1, 2, 3, 4, 5, and art. 18, §§ 4, 5), not self-executing. Made effective by act of legislature approved Apr. 16, 1908. Ex parte Wagner [Okl.] 95 P 435. Petition for referendum not effective until provided for by legislation. Id. Const. art. 4, § 1a, reserving initiative and referendum to voters of municipalities as to legislation not self-executing. Long v. Portland [Or.] 98 P 149, afd. on rehearing [Or.] 98 P 1111. Act Feb. 25, 1907 (Laws 1907, p. 398), to carry into effect initiative and referendum powers reserved by Const. art. 4, § 1a, not amendment to charter prohibited by Const. art. 11, § 2. Id. Referendum power reserved by Const. art. 4, § 1a, not dependent upon anything except provision of general law as to exercise. Id. Under Const. art. 4, § 1a, the only acts of council subject to referendum are those within the term "municipal legislation." "Legislation" used in sense of general laws, permanent, uniform, universal. Id. Right of referendum reserved by Const. art. 4, § 1a, superior to charter. An amendment to charter subject only to provision of law to make available. Long v. Portland [Or.] 98 P 149. Ordinance of city on which

(§ 8) *B. Meetings, votes, rules and procedure.*[78]—See 10 C. L. 892—Statutes provide for the calling of special meetings after notice,[79] or fix the place of meetings.[80] An adjourned regular meeting is but a continuation of a regular meeting,[81] and in the absence of statute, the legislative body when lawfully in session with a quorum present has inherent power to adjourn by majority vote to a future date,[82] but where the method and time of holding meetings is prescribed by statute, it must be strictly followed.[83] A statute requiring the city council to sit with open doors applies where the council sits as a committee of the whole.[84] Where the legislative branch of a city is composed of two houses, either may appoint a committee to investigate matters properly before it.[85]

(§ 8) *C. Records and journals.*[86]—See 10 C. L. 892—Statutory provisions relative to the recording of ordinances are generally held to be merely directory.[87] The language of a record is to be construed favorably to the validity of the action of a legislative body.[88] Special meetings may be required to be fully entered on the journal.[89]

(§ 8) *D. Titles and ordaining clauses.*[90]—See 10 C. L. 893—Constitutional provisions relative to the title of legislative acts have no application to ordinances,[91] and unless required by legislative enactments,[92] the misrecital of an ordinance as to

referendum invoked takes effect from proclamation of mayor as provided by Act Feb. 25, 1907 (Laws 1907, p. 398), §§ 9, 10, pursuant to amendment to Const. art. 4, § 1a. Id.

**78. Search Note:** See Municipal Corporations, Cent. Dig. §§ 184-220; Dec. Dig. §§ 80-104; 28 Cyc. 315-398; 20 A. & E. Enc. L. (2ed.) 1211; 23 Id. 589.

See, also, Abbott, Mun. Corp. §§ 496-567.

**79.** Under Act Feb. 10, 1899 (Sess. Laws 1899, p. 193), § 13, mayor or three councilmen may call special meetings, purpose of which must be submitted in writing. Gale v. Moscow [Idaho] 97 P 828. Where special meeting called and two councilmen absent, one having presented excuse and other being at such distance that notification was impossible, mayor and other members constituting quorum are authorized to transact business. Id. "Called meeting" valid though notice required by statute might not have been given, no written notice being required. Ryan v. Tuscaloosa [Ala.] 46 S 638.

**80.** Where ordinance fixed place of meeting as mayor's office or place to be selected by special order, later ordinance was not void where it did not affirmatively appear that board met at place other than fixed by ordinance under law. City of Greenwood v. Jones, 91 Miss. 728, 46 S 161.

**81.** Members presumed to have knowledge of time of regular meetings. City of Earlville v. Radley, 237 Ill. 242, 86 NE 624, rvd. 141 Ill. App. 359.

**82.** Rackliffe v. Duncan, 130 Mo. App. 695, 108 SW 1110.

**83.** Under Laws 1903, pp. 70, 71 (Ann. St. 1906, §§ 5490, 5501), where at regular meeting councilmen were excused so that minority remaining being less than quorum adjourned until special date, meeting at latter date was valid. Rackliffe v. Duncan, 130 Mo. App. 695, 108 SW 1110. Presumption of good excuse for withdrawal of councilmen in absence of contrary showing. Id.

**84.** Rev. St. 1898, § 202. Acord v. Booth, 33 Utah, 279, 93 P 734.

**85.** State v. Dierkes, 214 Mo. 578, 113 SW 1077. House of delegates has power to make special investigation of returns of property made for taxation, and designate committee for that purpose. State v. Dierkes, 214 Mo. 578, 113 SW 1077.

**86. Search Note:** See note in 13 A. S. R. 550.

See Municipal Corporations, Cent. Dig. §§ 213-218, 237, 238; Dec. Dig. §§ 100, 109; 28 Cyc. 343-346, 358, 359; 21 A. & E. Enc. L. (2ed.) 8.

See, also, Abbott, Mun. Corp. §§ 496-567.

**87.** Recording is essential to validity only when so provided by charter or statute. Marth v. Kingfisher [Okl.] 98 P 436. Code 1906, § 3407, requiring ordinances in "Book of Ordinances" merely directory and ordinance not transcribed is not invalid. City of Greenwood v. Jones, 91 Miss. 728, 46 S 161. Wilson's Rev. & Ann. St. Okl. 1903, §§ 418, 464, merely directory and failure of clerk to record council proceedings upon journal and to record ordinance in "Ordinance Book" does not invalidate. Marth v. Kingfisher [Okl.] 98 P 436.

**88.** If fairly susceptible of such construction. Bryant v. Pittsfield, 199 Mass. 530, 85 NE 739. Reasonable presumption to be made in favor of action of legislative body. Id. Records of aldermen and common council showing that St. 1892, p. 164, c. 185, providing for additional water supply was adopted "by two-thirds aye vote," held sufficient to show adoption, though not as specific as they should be. Id.

**89.** Call, object and disposition required. Gale v. Moscow [Idaho] 97 P 828. Record by city clerk upon journal at special meeting stating call, object and action taken sufficient compliance with Act Feb. 10, 1899, (Sess. Laws 1899, p. 193), § 13. Gale v. Moscow [Idaho] 97 P 828.

**90. Search Note:** See Municipal Corporations Cent. Dig. §§ 258-262; Dec. Dig. § 112; 28 Cyc. 378, 379; 21 A. & E. Enc. L. (2ed.) 975.

**91.** Ex parte Yung, 7 Cal. App. 440, 94 P 594.

**92.** Reason of enactment need not be set out unless legislative or constitutional authority expressly requires it. Ex parte

the source of power to enact does not affect its validity.[93] A title is sufficient where all the provisions of the ordinance are germane to the single subject.[94]

(§ 8) *E. Passage, adoption, amendment, and repeal of ordinances and resolutions.*[95]—See 10 C. L. 898—The acts of a municipality of a permanent or general character are by ordinance,[96] while those temporary or restrictive in their operation may be by resolution.[97] A resolution passed by a city council with all the formalities of an ordinance becomes a legislative act.[98] Statutory limitations or requirements that a grant be by ordinance must be followed.[99] The penal statutes of a state may be incorporated as the ordinances of a city, if within the municipal power.[1] Generally, statutory requirements relating merely to form in the passage of ordinances are only directory,[2] but where the mayor is an integral part of the law making power, his concurrence in legislative action is essential to the validity of an ordinance.[3] Signi-

Yung, 7 Cal. App. 440, 94 P 594. Municipal ordinance adopted without title in violation of Code 1906, § 3406, **invalid** since requirement of expression of subject-matter in title mandatory. Sample v. Verona [Miss.] 48 S 2.

**93.** Ex parte Yung, 7 Cal. App. 440, 94 P 594. Not essential to validity of ordinance that it state or indicate power in execution of which it was passed. Id. Where county board authorized to adopt ordinance and formalities incident to passage observed, pursuant to County Government Act (Laws 1897, p. 467, c. 277), § 26, fact that recital stated adoption pursuant to § 13 (p. 454), which section had been declared unconstitutional, would not void such ordinance, but might be treated as surplusage. Id.

**94.** New Castle v. Cummings, 36 Pa. Super. Ct. 443. Title "An ordinance prohibiting under penalty the desecration of the Sabbath, or the Lord's day, commonly called Sunday" sufficient indication of prohibition of sale of merchandise, etc., on Sunday. Id.

**95. Search Note:** See notes in 3 Ann. Cas. 654; 6 Id. 471.

See, also, Municipal Corporations, Cent. Dig. §§ 221-244, 263-273; Dec. Dig. §§ 106-110, 113-119; 28 Cyc. 352-369, 380-388; 21 A. & E. Enc. L. (2ed) 946.

**96.** Long v. Portland [Or.] 98 P 1111; Anderson v. Berwyn, 135 Ill. App. 8; Potter v. Calumet Elec. St. R. Co., 158 F 521. General ordinances are those of a general nature having an obligatory force on the community and upon the administration of the municipal government. Amending ordinance extending time for furnishing light and heat by natural gas "general and permanent" within Mansf. Dig. Ark. § 924 (Ind. T. Ann. St. 1899, § 694). Town of Sapulpa v. Sapulpa Oil & Gas Co. [Okl.] 97 P 1007. Under Ill. Const. 1870, art. 11, § 4, license for use of streets by railroad must be by ordinance. Potter v. Calumet Elec. St. R. Co., 158 F 521. **Term "by-law"** is almost equivalent to "ordinance" meaning the by-laws adopted by municipalities. Town of Sapulpa v. Sapulpa Oil & Gas Co. [Okl.] 97 P 1007. Fundamental and well recognized distinction as to resolutions and ordinances. State v. Duis [N. D.] 116 NW 751.

**97.** Long v. Portland [Or.] 98 P 1111; Anderson v. Berwyn, 135 Ill. App. 8. Bond issue election may be by resolution. Ryan v. Tuscalloosa [Ala.] 46 S 638. Resolution executive in character merely step in execution of ordinance, valid. Anderson v. Berwyn, 135 Ill. App. 8.

**98.** Whether called ordinance or resolution. Steenerson v. Fontaine [Minn.] 119 NW 400.

**99.** Under Act April 21, 1896, requiring grant by ordinance, etc., resolution authorizing street railway to construct turnouts, adopted without required notice, hearing and consent is invalid. Specht v. Central Passenger R. Co. [N. J. Law] 68 A 785. Under Act April 21, 1896 (P. L. 1896, p. 329), council may not grant permission by resolution without property owner's consent to street railway to construct turnouts, where previous ordinance as to construction fixed with precision the location of tracts, turnouts, etc., and did not include turnouts covered by resolution and it also appeared that membership of council was changed between ordinance and resolution. Id. City council bound by limitation of Act Apr. 21, 1896, P. L. 1896, p. 329, that permission to construct street railways be granted on consent of owners of one-half of property fronting streets to be used. Id. Appointment of policeman by resolution ineffective, when statute required ordinance. Bullis v. Chicago, 235 Ill. 472, 85 NE 614. Under general municipal law, council had no authority to declare policemen officers of city. Id.

**1.** Operates to incorporate into city ordinances all offenses against state of grade of misdemeanors. Smothers v. Jackson [Miss.] 45 S 982. Prospective in operation and includes offenses of the grade named which may subsequently be passed by the legislature. Id. Where Kirby's Dig. § 5463, authorized prohibition and punishment of act made misdemeanor by state, action of city council incorporating §§ 5137, 5140-5146, prohibiting "blind tigers," was valid and made such statutes valid ordinances of city. City of Searcy v. Turner [Ark.] 114 SW 472.

**2.** Unless statute expressly or impliedly declares ordinance void if prescribed form be not pursued. State v. Wilder, 211 Mo. 305, 109 SW 574. Ordinance directing street improvement valid though passed at only one meeting of council where all members voted for ordinance. Huesman v. Dersch, 33 Ky. L. R. 77, 109 SW 319.

**3.** State v. Wilder, 211 Mo. 305, 109 SW 574. Failure of record to show presentation to or signature of mayor, fatal. Id. Signature to minutes not effective as signature to ordinance. Id. Domestic census nullity where ordinance passed in disregard of Rev. St. 1899, § 6300 (Ann. St. 1906, p. 3147), requiring mayor's signature, etc. Id. Signature of mayor by third person when under imme-

ing may, however, be a ministerial act.[4] The veto power of the mayor, or similar official[5] extends to legislative resolutions as distinguished from administrative.[6] The mayor's approval of an annexation ordinance is invalid, where he has considerable financial interest in the proposed territory.[7] Disregard of legal formalities or orderly mode of procedure does not render a resolution illegal.[8] The council being a continuous body, a resolution may be passed over the mayor's veto, though an election intervenes.[9] The mayor's right to vote in the case of tie vote of the council is dependent upon statute.[10] Constitutional provisions as to the reading of bills in the legislature do not apply to proceedings in municipalities,[11] but similar rules may be required by statute,[12] and by-laws requiring advertisement between readings may be adopted.[13] When an ordinance recommended by the board of improvements is passed by the council, the act is that of the latter body.[14] A resolution with provisions that the same shall be void unless accepted by a majority of the legal voters does not become operative where a town fails to accept.[15] A taxpayer has no beneficial interest to secure a writ of mandate compelling a council to submit to the vote of the people the construction of a pier by a railroad pursuant to grant.[16]

diate direction of mayor, and authenticated by city clerk, under seal sufficient. Porter v. R. J. Boyd Pav. & Const Co., 214 Mo. 1, 112 SW 235. Under Act May 23, 1893, P. L. 113, requiring approval of chief burgess to every resolution, where resolution authorized borrowing of money and giving of judgment note and was not approved, it was invalid and judgment would be stricken off. Long v. Lemoyne Borough [Pa.] 71 A 211. Implied approval insufficient where signature of chief burgess required. Act May 23, 1893, P. L. 113. Id.

**4.** Act of president of board of trustees of city of fifth class in signing ordinance under Act March 13, 1883, (St. 1883, p. 93, c. 49), preliminary to publication, ministerial and subject to mandamus. City of San Buenaventura v. McGuire [Cal. App.] 97 P 526. In mandamus to compel signature to ordinance before publication, though city and members of board of trustees are not all necessary parties, they are proper parties. City of San Buenaventura v. McGuire [Cal. App.] 97 P 526.

**5.** General municipal act Mch. 13, 1883, (St. 1883, p. 93, c. 49), and Act Mch. 27, 1897 (St. 1897, p. 190, c. 129), § 1; § 4, p. 191, construed, and to prevent absurdity words "mayor" in § 1, held to mean all executive officers similarly situated in various classes of cities, thus preventing construction whereby veto power given to president of trustees in fifth and sixth classes, and denied to mayor of fourth class. City of San Buenaventura v. McGuire [Cal. App.] 97 P 526.

**6.** State v. Duis [N. D.] 116 NW 751. Under Rev. Code 1905, § 2658, as to veto power of mayor, resolution for pavement of certain avenues is of legislative character and subject to veto. State v. Duis [N. D.] 116 NW 751. Decision as to public improvements legislative in character. Id.

**7.** Under section 125 of the municipal code of 1902, clothing mayors with the impartial and disinterested legislative function of approving or vetoing ordinances, approval is clearly against public policy. Shipbaugh v. Kimball, 7 Ohio N. P. (N. S.) 514.

**8.** Farley v. Lockport, 113 NYS 702.

**9.** Resolution for street paving passed by required vote of council, though election intervened and new members set. People v. Buffalo, 123 App. Div. 141, 108 NYS 331. Under charter of Buffalo, (Laws 1891, p. 139, c. 105, etc.) § 18, as to passage of ordinance after veto of mayor, such ordinance need not be acted upon at meeting when returned for reconsideration. Id.

**10.** Mayor in city of second class held to have right to cast deciding vote in contest over liquor license, construing statutes. In re Hastings Brew. Co. [Neb.] 119 NW 27. President of council in city of second class not member and his vote not to be counted in determining whether ordinance passed by majority vote. Laws 1903, p. 69, §§ 2, 5. Merriam v. Chicago, R. I. & P. R. Co., 132 Mo. App. 247, 111 SW 876.

**11.** Cumberland Tel. & T. Co. v. Hickman, 33 Ky. L. R. 730, 111 SW 311.

**12.** General ordinance void when advance from first to third reading on same day without two-thirds vote of council contrary to Mansf. Dig. Ark. § 924 (Ind. T. Ann. St. 1899, § 694). Town of Sapulpa v. Sapulpa Oil & Gas Co. [Okl.] 97 P 1007. Ordinance extending street railway grant not of general or permanent nature and not rendered invalid by reason of failure to read on three different days or to suspend rules. State v. Oakwood Street R. Co., 11 Ohio C. C. (N. S.) 263.

**13.** By-law adopted by board of street and water commissioners of Newark requiring advertisement between first and second reading of ordinance not based on notice of intention cannot be suspended to permit passage of ordinance at same meeting. Eggers v. Newark [N. J. Law] 71 A 665.

**14.** City of Chicago v. Hulbert, 234 Ill. 321, 84 NE 922.

**15.** Town of Southington v. Southington Water Co., 80 Conn. 646, 69 A 1023. Resolution requiring question to be decided only requires majority of votes cast rather than majority entitled to vote. Id.

**16.** Where railway granted right to construct pier in San Diego Bay by state board of harbor commissioners, and council refused to pass ordinance or submit vote to people as required by charter. Webster v. San Diego Common Council [Cal. App.] 97 P 92.

An ordinance cannot be amended, suspended or repealed by resolution,[17] but an amendment to a resolution previously adopted is permissible in any deliberative body.[18] Repeals by implication are not favored.[19] The repeal of an ordinance will not operate to disturb private rights vested under it,[20] and a repeal pending prosecution does not relieve a defendant unless so provided by the repealing act.[21]

*Publication* See 10 C. L. 894 as a requisite to the validity of ordinances is required by some statutes.[22]

(§ 8) *F. Construction and operation of ordinances.*[23]—See 10 C. L. 894—Ordinances must be uniform,[24] definite and certain,[25] reasonable,[26] impartial[27] and within the conferred powers.[28] They should not conflict with fundamental laws for

17. Steenerson v. Fontaine [Minn.] 119 NW 400. Illinois rule. Potter v. Calumet Elec. St. R. Co., 158 F 521. Informal resolution not restoration of highway vacated by ordinance by repealing. Steenerson v. Fontaine [Minn.] 119 NW 400. Contract whereby railway agreed to pay $50,000 to mayor on behalf of people, for signature to ordinance ineffective as amendment of ordinance. Potter v. Calumet Elec. St. R. Co., 158 F 521. Where statute required appointment of policemen to be provided for by ordinance, city could not modify such act by resolution. Bullis v. Chicago, 235 Ill. 472, 85 NE 614.

18. Simpson v. Berkowitz, 59 Misc. 160, 110 NYS 485. Inhibition of city code as to amendment or repeal of ordinances inapplicable where action by resolution. Ryan v. Tuscaloosa [Ala.] 46 S 638. By reasonable implication Greater New York Charter (Laws 1901, p. 91, c. 466), § 226, authorizes amendment of resolution at subsequent meeting. Simpson v. Berkowitz, 59 Misc. 160, 110 NYS 485.

19. Suell v. Jones, 49 Wash. 582, 96 P 4; City of St. Louis v. Klausmeier, 213 Mo. 119, 112 SW 516. Ordinance requiring vehicles to keep on side of street is not repealed by implication upon passage of ordinance prescribing common rules of road traffic in passing vehicles. Suell v. Jones, 49 Wash. 582, 96 P 4. Ordinance not repealed by implication when another ordinance not inconsistent therewith and not covering the same field is subsequently passed. Town of Montclair v. Scola [N. J. Law] 69 A 451. Ordinance inconsistent with state law, which was invalid because of title being insufficient, was not repealed by implication. City of St. Louis v. Wortman, 213 Mo. 131, 112 SW 520. Portion of ordinance repealed when conflicting with statute, but remainder not repealed, though prescribing lower standard of dairy products than statute required. City of St. Louis v. Klausmeier, 213 Mo. 119, 112 SW 516.

20. Steenerson v. Fontaine [Minn.] 119 NW 400.

21. Repeal of ordinance by statute. City of St. Louis v. Wortman, 213 Mo. 131, 112 SW 520. Saving clause not to be supplied by ordinance. Id. Repeal of ordinance after sentence does not relieve accused from punishment. Intoxicating liquors sold. City of Wichita v. Murphy [Kan.] 99 P 272.

22. Where revised ordinances of city of first class published in book by authority of city, and ordinance therein to be effective upon publication, such ordinance takes effect when 50 copies of book are issued. Statutes construed. City of Topeka v. Crawford [Kan.] 96 P 862. Ordinance as to assessment held not within certain statutes and consequently to take effect upon passage unless otherwise provided. Expressly provided to be effective upon publication and lapse of two months proper. Village of Downers Grove v. Findlay, 237 Ill. 368, 86 NE 732.

23. **Search Note:** See notes in 18 L. R. A. 367; 4 Ann. Cas. 2; 6 Id. 749, 1015.

See, also, Municipal Corporations, Cent. Dig. §§ 274-280; Dec. Dig. § 120; 28 Cyc. 388-392; 21 A. & E. Enc. L. (2ed) 996.

24. Must be general in application. City of Spokane v. Macho [Wash.] 98 P 755. Municipal ordinance regulating use of space under sidewalks not objectionable because of nonuniformity, since operating alike on persons similarly situated, except where previous contract rights intervened. J. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93, rvg. 140 Ill. App. 344.

25. State v. Cederaski, 80 Conn. 478, 69 A 19. Milk ordinance not uncertain. Ex parte Hoffman [Cal.] 99 P 517. Ordinance as to location of livery barns in residence sections held unambiguous. City of Spokane v. Camp [Wash.] 97 P 770. Railroad track elevation ordinance and supplemental ordinance for subways not so uncertain as to be void. People v. Grand Trunk, etc., R. Co., 232 Ill. 292, 83 NE 839. Ordinance prohibiting poultry or pigeons in block in city having 75 per cent of territory improved without consent of 75 per cent. of residents within radius of 100 feet from premises where such fowls are to be kept, held void for indefinitness, not stating whether distance be measured entirely within block or fixing definite point from which measurement was to be made. District of Columbia v. Keen, 31 App. D. C. 541.

26. People v. Grand Trunk, etc., R. Co., 232 Ill. 292, 83 NE 839; Eastern Wisconsin R. & L. Co. v. Hackett, 135 Wis. 464, 115 NW 376; City of Spokane v. Macho [Wash.] 98 P 755; Hardee v. Brown [Fla.] 47 S 834; Crittenden v. Booneville [Miss.] 45 S 723. Ordinances based on general powers must be reasonable. City of Savannah v. Cooper [Ga.] 63 SE 138. Tending to accomplish object of power given. State v. Cederaski, 80 Conn. 478, 69 A 19. Ordinance merely exercising conferred power not unreasonable. O'Haver v. Montgomery [Tenn.] 111 SW 449. The requirement of reasonableness is mostly involved in connection with the exercise of the police power. See post § 10.

27. City of Spokane v. Macho [Wash.] 98 P 755.

28. Based upon proper classification. Hardee v. Brown [Fla.] 47 S 834

the protection of rights of person or property,[29] with provisions of the federal constitution,[30] such as interstate commerce,[31] with the general laws of the state,[32] or other ordinances.[33] An ordinance void in part may be valid as to the remainder,[34] unless the void portion is an inducement to the enactment.[35] An ordinance void at enactment is void for all time.[36]

Municipal ordinances are presumptively valid,[37] and courts should endeavor to

29. State v. Cederaski, 80 Conn. 478, 69 A 19. Exercise of authority to enact ordinances subject to all limitations placed upon exercise of legislative power. Id.

30. City ordinance exacting wharfage from boats landing at public wharf, to be estimated upon tonnage of such boats and exempting boats when landing on portions of wharf where no money expended, does not exact duty on tonnage within U. S. Const. art. 1, § 10, cl. 3, but plainly pertains to wharfage. City of St. Louis v. Eagle Packet Co., 214 Mo. 638, 114 SW 21.

31. Interstate shipments of dairy products governed by congress and not subject to city ordinance prohibiting foreign substances therein. City of St. Louis v. Wortman, 213 Mo. 131, 112 SW 520. Where original packages changed, commerce became intrastate, subject to regulation. Id.

32. In re Desanta [Cal. App.] 96 P 1027; Hardee v. Brown [Fla.] 47 S 834; City of St. Louis v. Klausmeier, 213 Mo. 119, 112 SW 516. Power to enact ordinances limited to those not inconsistent with charter or state laws. People v. Buffalo Assessors, 193 N. Y. 248, 86 NE 466, rvg. as to other matter, 127 App. Div. 851, 111 NYS 924, 109 NYS 991; McGillic v. Corby, 37 Mont. 249, 95 P 1063. No implied power can authorize by-law conflicting with statutes. McGillic v. Corby, 37 Mont. 249, 95 P 1063. Where no conflict, both will be upheld. Ex parte Hoffman [Cal.] 99 P 517. Ordinance valid at adoption becomes ipso facto void when identical offense is made crime by statute. Callaway v. Mims [Ga. App.] 62 SE 654. Where an ordinance prohibits placing of any foreign substance in milk and statute prohibits placing of injurious substances in milk, there is conflict, and ordinance would be invalid provided statute were constitutional (Acts 1905, p. 135, § 5 [Ann. St. 1906, § 4761-5] unconstitutional). City of St. Louis v. Wortman, 213 Mo. 131, 112 SW 520. Rule not applicable unless state law is intended to apply. Robinson v. Galveston [Tex. Civ. App.] 111 SW 1076. Laws 1897, p. 236, c. 163 (Sayles' Ann. Civ. St. arts. 617h-617m), though general, inapplicable to city of Galveston which may create board of examining plumbers. No plumbing board could be created pursuant to statute where Galveston had no health board. Id.

**Not conflicting:** Where requirements fell short of requirements of statute. City of St. Louis v. Klausmeier, 213 Mo. 119, 112 SW 516. Additional requirements of ordinances as to purity of dairy products. Id. Sale of milk. Ex parte Hoffman [Cal.] 99 P 517. Ordinance making it misdemeanor for physician to employ drummer and providing fine of $25 to $200 valid, being similar to Gantt Law (Kirby's Dig. §§ 5246, 5250). Burrow v. Hot Springs, 85 Ark. 396, 108 SW 823. Prior statute (§ 5438 as to regulation of drummers) expressly repealed. Id. Ordinance prohibiting minors from visiting billiard rooms where Pen. Code §§ 273, 397b, prohibits minors from visiting saloons and gambling houses. Ex parte Meyers, 7 Cal. App. 528, 94 P 870. Ordinance prohibiting "blind tiger" where statute prohibits sale of keeping of liquor. Callaway v. Mims [Ga. App.] 62 SE 654. New York City Ordinances § 388, prohibiting sale of goods except at true measure not conflicting with Laws 1900, p. 713, c. 327, § 150. City of New York v. Marco, 58 Misc. 225, 109 NYS 58. Ordinance pursuant to charter (Acts 29th Leg. 1, Sp. L. 1905, p. 435, c. 49, § 104), specifying territory for saloons not in conflict with Baskin-McGregor Act (Acts 30th Leg., L. 1907, p. 260, c. 138, § 10), general law as to liquor licenses. Andreas v. Beaumont [Tex. Civ. App.] 113 SW 614.

**Void:** Ordinance fixing standard of solids for skimmed milk. City of St. Louis v. Klausmeier, 213 Mo. 119, 112 SW 516. Ordinance prohibiting any foreign substance in milk where Acts 1907, p. 239, § 4, cl. 5, prohibit injurious substances. City of St. Louis v. Wortman, 213 Mo. 131, 112 SW 520. San Francisco ordinance as to sale of adulterated milk in conflict with Act Mch. 15, 1907 (St. 1907, p. 265, c. 216). In re Desanta [Cal. App.] 96 P 1027. Ordinance as to salary of mayor omitting limitation of statute that acting incumbent perform duties 60 days. McGillic v. Corby, 37 Mont, 249, 95 P 1063. City and village act (Hurd's Rev. St. 1908, c. 24, §§ 35, 36), art. 3, §§ 7, 8, gives limited power to city council to punish members for disorderly conduct and minority may compel attendance of absentees, but ordinance imposing penalty for neglect of duties is not within such act and is invalid. City of Earlville v. Radley, 237 Ill. 242, 86 NE 624, rvg. 141 Ill. App. 359. No power in city council to impose penalties for failures or omissions of duty by elective officers. Id.

33. Track elevation ordinance and street paving ordinance not conflicting though latter changed grade City of Chicago v. Hulbert, 234 Ill. 321, 84 NE 922.

34. Valid portion may be enforced. Commonwealth v. Jackson, 34 Pa. Super. Ct. 174; Hastings Exp. Co. v. Chicago, 135 Ill. App. 268; McPhee & McGinnity Co. v. Union Pac. R. Co. [C. C. A.] 158 F 5. Where elimination of illegal portions does not cause results not intended, or effect valid expressed portions. State v. Tampa Waterworks Co. [Fla.] 47 S 358.

35. McPhee & McGinnity Co. v. Union Pac. R. Co. [C. C. A.] 158 F 5. Where ordinance provided for closing of saloons at certain houre "unless by permission of the president" of the village, invalid clause was evidently material inducement to otherwise valid portion and could not be stricken. Village of Little Chute v. Van Camp, 136 Wis 526, 117 NW 1012.

36. Though power changed by later statute. McGillic v. Corby, 37 Mont. 249, 95 P 1063.

37. People v. Grand Trunk, etc., R. Co., 232 Ill. 292, 83 NE 839; Fifth Ave. Coach Co. v. New York, 194 N. Y. 19 86 NE 824, afg. 58

sustain them, if possible.[38] In determining validity, the court will treat the question as one of law,[39] and an ordinance must be judged from its purport and effect,[40] the motive of enactment being immaterial.[41] A court cannot presume that a city adopting an ordinance belonged to the authorized class when the only evidence within judicial knowledge shows the contrary.[42] The question of whether an ordinance conflicts with a general law cannot be determined by a fixed rule.[43] The words of ordinances are construed the same as statutes.[44] The rule that the practical construction of administrative officers will be followed by the court is inapplicable where the case is not doubtful.[45] A city ordinance to a street railway granting privileges is to be strictly construed,[46] and in a civil action to which a city is not a party, where a breach of ordinance is invoked to avoid a contract, the ordinance will be strictly construed.[47] Courts of equity will not interfere or reform ordinances for mutual mistake.[48]

Municipal ordinances are necessarily local,[49] but an ordinance passed pursuant to legislative authority has the force and effect of a law within the corporate limits.[50] An ordinance is affective within the town limits regardless of the regulations of the county.[51]

Misc. 401, 111 NYS 759; Pittsburg, etc., R. Co. v. Hartford City, 170 Ind. 674, 85 NE 362. Procedure. City of Greenwood v. Jones, 91 Miss. 728, 46 S 161.

**38.** Chicago City R. Co. v. Martincic, 138 Ill. App. 575; City of Helena v. Miller [Ark.] 114 SW 237. Valid construction will be adopted. Village of Donovan v. Donovan, 236 Ill. 636, 86 NE 575; City of St. Louis v. Eagle Packet Co., 214 Mo. 638, 114 SW 21. If conflicting with general law, conflict should be reconciled. In re Desanta [Cal. App.] 96 P 1027.

**39.** Resort to extrinsic considerations only to extent that facts are or may become matter of judicial knowledge. Pittsburg, etc., R. Co. v. Hartford City, 170 Ind. 674, 85 NE 362.

**40.** City of Helena v. Miller [Ark.] 114 SW 237. Purpose proper subject for judicial inquiry. People v. Wieboldt, 138 Ill. App. 200.

**41.** City of Helena v. Miller [Ark.] 114 SW 237. Legislative motives not subject to judicial inquiry unless apparent from enactments or inferable from effect. De Merritt v. Weldon [Cal.] 98 P 537. Considered light of matters of which judicial notice may be taken. Id. Intention in passing ordinance first looked to in interpretation of terms. King v. Dayton, 6 Ohio N. P. (N. S.) 369.

**42.** Where legislature makes running at large of hogs in cities of 5000 inhabitants unlawful, and authorizes necessary ordinances. Jones v. Hines [Ala.] 47 S 739.

**43.** Duty of courts to examine ordinance, general law, subject-matter, evils to be remedied and then apply principles of common sense to each case. In re Desanta [Cal.] 96 P 1027.

**44.** J. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93, rvg. 140 Ill. App. 344. Words of resolution presumed to be used in accustomed and approved sense. Town of Southington v. Southington Water Co., 80 Conn. 646, 69 A 1023. Same words occuring in different parts of ordinance to be given same meaning, unless context requires different meaning. J. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93, rvg. 140 Ill. App. 344.

**Ordinances construed:** Track elevation ordinance with provision that streets be restored to their former condition manifestly does not require paving. City of Chicago v. Hulbert, 234 Ill. 321, 84 NE 922. Ordinance prohibiting advertising wagons in borough held to apply not merely to wagons used exclusively for advertising. Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 86 NE 824, afg. 58 Misc. 401, 111 NYS 759. Vehicles on four wheels propelled by motors for carriage of passengers are "wagons" within ordinance prohibiting advertising wagons in borough. Id. Ordinance construed not to authorize use of space under alley for vault after permit, but held to apply to use of space under sidewalks. J. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93, rvg. 140 Ill. App. 344.

**45.** J. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93, rvg. 140 Ill. App. 344.

**46.** Doubtful provisions in favor of city. Columbus St. R. & L. Co. v. Columbus [Ind. App.] 86 NE 83.

**47.** Manker v. Tough [Kan.] 98 P 792.

**48.** People v. Grand Trunk, etc., R. Co., 232 Ill. 292, 83 NE 839.

**49.** Not presumed to operate beyond territorial limits. La Fitte v. Ft. Collins, 43 Colo. 299, 95 P 927. Ordinance against storing intoxicating liquors not void for failing to limit sale to territorial limits of city. Id. City ordinance as to running at large of hogs only effectual within city limits. Jones v. Hines [Ala.] 47 S 739. **Police powers** may sometimes be given for a limited space around city limits, for special purposes, but otherwise a city has no jurisdiction beyond its limits. Id.

**50.** City of New York v. Marco, 58 Misc. 225, 109 NYS 58; People v. Reicherter, 112 NYS 936; City of Chicago v. J. Burton Co., 236 Ill. 383, 86 NE 93, rvg. 140 Ill. App. 344; Southwestern Tel. & T. Co. v. Myans [Ark.] 111 SW 987; City of Paola v. Wentz [Kan.] 98 P 775. By statute. State v. Cederaski, 80 Conn. 478, 69 A 19. Equivalent to act of legislature. Pittsburgh, etc., R. Co. v. Hartford City, 170 Ind. 674, 85 NE 362.

**51.** Prohibition of cattle from running at large. Geer v. Thompson, 4 Ga. App. 756, 62 SE 500.

(§ 8) *G. Pleading and proving ordinances and proceedings.*[52] See 10 C. L. 895 Judicial notice cannot be taken of city ordinances.[53] Statutes usually provide that the legally issued book of ordinances of a municipality be prima facie proof of the existence, passage or publication of an ordinance,[54] but such method is not exclusive.[55] The omission of enacting clause in a compilation of ordinances is not fatal,[56] but an inference of no publication follows from the omission of a note in the ordinance book as required by statute.[57] The record of a village board showing the time of passing an ordinance is sufficient proof.[58] As to whether publication of an ordinance must be proved, there is a conflict of authority.[59] The location of streets in a public improvement ordinance, when misnamed, may be shown by parol.[60] An objection to the manner of proving an ordinance must be specific.[61]

(§ 8) *H. The remedy against invalid legislation.*[62] See 10 C. L. 895—While the courts are without power to review the exercise of legislative discretion,[63] certiorari will lie for total invalidity,[64] and injunction is available in the case of an invasion

**52. Search Note:** See Municipal Corporations, Cent. Dig. §§ 281-289; Dec. Dig. § 122; 28 Cyc. 393-398; 21 A. & E. Enc. L. (2ed.) 1004; 15 A. & E. Enc. P. & P. 409.

**53.** People v. Ahearn, 124 App. Div. 840, 109 NYS 294. Must be pleaded in negligence action. Robinson v. Denver City Tramway Co. [C. C. A.] 164 F 174. Not public statute, but mere regulation. Id.

**54.** Under Mills Ann. St. Colo. 1891, § 4443, providing that book of ordinances be prima facie evidence of publication, etc., such presumption may only be overcome by substantial proof of irregularity. Town of Fletcher v. Hickman [C. C. A.] 165 F 403. Book of ordinances signed by town clerk pursuant to P. L. 1895, p. 228, § 27, prima facie proof of existence of ordinance. By P. L. 1907, § 443, § 1, copy is legal proof of ordinance as ordering, publishing, etc. Town of Montclair v. Scola [N. J. Law] 69 A 451. Under Rev. St. 1895, art. 558, and charter of Greenville, art. 10, § 7, printed book of ordinances purporting to be compiled by authority of city council was proper evidence without further proof. St. Louis S. W. R. Co. v. Garber [Tex. Civ. App.] 111 SW 227. Parol evidence that book contained ordinances, etc., harmless. Id. Book of ordinances kept by municipal corporation containing particular ordinance, prima facie proof of passage. Stone v. Tallulah Falls [Ga.] 62 SE 592. Book produced after notice (pursuant to Code 1895, § 5243), rendered further identification unnecessary Id. Ordinance sufficiently established by being read to jury from legally authorized publication. Ballinger's Ann. Codes & St. §§ 1299, 4937, 6851. City of Spokane v. Griffith, 49 Wash. 293, 95 P 84. Book prima facie proof. City of Earlville v. Radley, 141 Ill. App. 359, jt. rvd. 237 Ill. 242, 86 NE 624. Other matter. City of Chicago v. Bullis, 138 Ill. App. 297. May be proved by pamphlet published by authority, though such pamphlet contains prima facie proof not overcome by introduction of recorded copy of ordinance. Illinois Cent. R. Co. v. Collison, 134 Ill. App. 443. Words of title page alleging book as published by authority of village fills measure of proof required by statute. Illinois Cent. R. Co. v. Warriner 132 Ill. App. 301.

**55.** Proof of ordinance by showing record of meeting, and publication, by showing newspaper wherein published, proper since Mills Ann. St. 4443, not sole method of proof. La Fitte v. Fort Collins, 42 Colo. 293, 93 P 1098. Prima facie established by certificate of clerk of village under seal of corporation. Illinois Cent. R. Co. v. Collison, 134 Ill. App. 443.

**56.** Where nothing to show that clause was omitted from ordinances when originally adopted. St. Louis S. W. R. Co. v. Garber [Tex. Civ. App.] 111 SW 227.

**57.** Gen. St. 1901, § 1095, requiring entry of ordinance in "Ordinance Book" by city clerk with note of publication. Atchison T. & S. F. R. Co. v. Baker [Kan.] 98 P 804.

**58.** Village of Donovan v. Donovan, 236 Ill. 636, 86 NE 575.

**59.** In absence of proof, publication is presumed. State v. Oakwood St. R. Co., 11 Ohio C. C. (N. S.) 263. Duty of publishing an ordinance rests upon city, and in an action brought by the city solicitor to oust a street railway company from its franchise, it is incumbent upon the city to establish such an omission. State v. Oakwood St. R. Co., 11 Ohio C. C. (N. S.) 263.

**60.** Village of Donovan v. Donovan, 236 Ill. 636, 86 NE 575.

**61.** City of Chicago v. Bullis, 138 Ill. App. 297.

**62. Search Note:** See note in 118 A. S. R. 372.

See, also, Municipal Corporations, Cent. Dig. §§ 257, 266; Dec. Dig. §§ 113, 121; 28 Cyc. 377, 382-387; 21 A. & E. Enc. L. (2ed.) 998.

See, also, Abbott, Mun. Corp. § 560.

**63.** See ante, § 7. Judicial Control Over Exercise of Powers.

**64.** Benefit of certiorari not denied where resolution adopted the 18th, construction work commenced that day and completed the next and the writ issued the 21st. Specht v. Central Passenger R. Co. [N. J. Law] 68 A 785. Certiorari when employed to review municipal proceedings is prerogative writ etc., and adjudication setting aside proceedings operates in rem to nullify what has been unlawfully done to obliterate record thereof and to deprive all parties of any justification afforded by record. Id. In this respect, parties are state on one hand and municipality or custodian of record on the other. Id. Where parties other than municipality have interest in sustaining record, supreme court may in discretion notify such parties that they may have day in court. When notified parties bound by adjudication, as if in personam, in which respect parties are state on one hand and notified party on

of property rights.[65] Validity may also be tested in habeas corpus proceedings,[66] and in exceptional cases prohibition is available.[67] A taxpayer cannot question the validity of a proposed ordinance granting rights to a gas company on the ground that vested rights of another company will be violated.[68]

§ 9. *Administrative functions, their scope and exercise.*[69]—See 10 C. L. 896.—The organization of bureaus being an administrative function, it may be conferred upon the president of a borough.[70]

§ 10. *Police power and public regulations.*[71]—See 10 C. L. 896.—This section deals only with matters peculiar to municipal police power, general rules as to the extent and exercise of police power being treated in topics descriptive of the subjects thereof.[72]

(§ 10) *A. In general.*[73]—See 10 C. L. 896.—The police power[74] is ordinarily delegated to municipalities[75] and may extend over territory immediately adjacent to a municipality.[76] Such power may be exercised through the agency of boards or inspectors.[77] In the exercise of the police power, monopolies may be created,[78] and

other. Id. Private prosecutor must ordinarily show some interest. Interest of abutting property owners sufficient. Id.

**65.** Bryan v. Birmingham [Ala.] 45 S 922; Goar v. City of Rosenberg [Tex. Civ. App.] 115 SW 653. Under Const. art. 16, § 13, citizen may maintain bill in equity to prevent illegal exactions under void ordinance. Dreyfus v. Boone [Ark.] 114 SW 718. Not available where property rights unaffected. remedy at law being adequate. Robinson v. Galveston [Tex. Civ. App.] 111 SW 1076. Where enforcement of void ordinance would prevent plumbers from securing journeymen plumbers and injure business, injunction will lie. Id. Courts will not enjoin ordinance, but will enjoin enforcement. Lee v. McCook [Neb.] 116 NW 955. Where invalidity dependent upon facts, party asserting invalidity has burden of proof. Bryan v. Birmingham [Ala.] 45 S 922. Enforcement may be enjoined by one whose interests are injuriously affected. Buffalo Fertilizer Co. v. Cheektowaga, 113 NYS 901. Taxpayer may not enjoin unless rights are affected. Brummitt v. Ogden Waterworks Co., 33 Utah, 285, 93 P 828.

**66.** By person in custody under sentence. Hardee v. Brown [Fla.] 47 S 834. One convicted of violating ordinance and sentenced to workhouse may test right to relief by habeas corpus. O'Haver v. Montgomery [Tenn.] 111 SW 449.

**67.** Not available where appeal or writ of error. State v. Shannon, 130 Mo. App. 90, 108 SW 1097. Ordinance forbidding smokestacks less than 50 feet high, not so obviously invalid as to authorize prohibition. Id.

**68.** Morris v. Municipal Gas Co., 121 La. 1016, 46 S 1001. No standing as property owner until danger real. Id.

**69. Search Note:** See note in 1 Ann. Cas. 958.
See, also, Municipal Corporations, Cent. Dig. §§ 375-574, 1545-1564; Dec. Dig. §§ 166-213, 723-743; 28 Cyc. 463-585.
See, also, Abbott, Mun. Corp. §§ 568-581.

**70.** People v. Ahearn, 193 N. Y. 441, 86 NE 474, rvg. 124 App. Div. 939, 109 NYS 1141. Organization of bureaus "matter of administration" within charter of New York 1901 (Laws 1901, p. 166, c. 466) and devolving upon president of borough same as commissioner of highways. Id.

**71. Search Note:** See Municipal Corporations, Cent. Dig. §§ 1308-1544; Dec. Dig. §§ 589-722; 28 Cyc. 692-830, 831-939.
See, also, Abbott Mun. Corp. §§ 115-139.

**72.** See Buildings and Building Restrictions, 11 C. L. 479; Exhibitions and Shows, 11 C. L. 1447; Health, 11 C. L. 1717; Intoxicating Liquors, 12 C. L. 332; Licenses, 12 C. L. 593, and like topics.

**73. Search Note.** See notes in 16 L. R. A. 49; 24 Id. 768; 2 L. R. A. (N. S.) 796; 11 Id. 736.
See, also, Municipal Corporations, Cent. Dig. §§ 1308-1320, 1327-1329, 1361-1384; Dec. Dig. §§ 589-594, 620-629; 28 Cyc. 692-703, 745, 750, 753-760, 762-772; 4 A. & E. Enc. L. (2ed.) 730.

**74.** Police power is inherent plenary power of state to prohibit things hurtful to welfare and safety of society. City of Bellville v. St. Clair County Turnpike Co., 234 Ill. 428, 84 NE 1049. An attribute of sovereignty existing without any reservation in constitution and founded on duty of state to protect citizens. City of Chicago v. Bowman Dairy Co., 234 Ill. 294, 84 NE 913. Inherent in every sovereignty. Cochran v. Preston [Md.] 70 A 113. Incapable of exact definition or limitation but must be passed upon by court as occasion arises. Masonic Fraternity Temple Ass'n v. Chicago, 131 Ill. App. 1. Labor law (Laws 1906, p. 1395, c. 506, § 3), limiting work for municipal corporations to eight hours and prohibiting payment in violation thereof, not sustainable under police power of state, not relating to public health, safety or morals. People v. Metz, 193 N. Y. 148, 85 NE 1070. Acts 1904, p. 63, c. 42, regulating height of buildings in Baltimore, valid police power of state. Cochran v. Preston [Md.] 70 A 113.

**75.** Subject to delegation in absence of constitutional restrictions. City of Chicago v. Bowman Dairy Co., 234 Ill. 294, 84 NE 913. While there is distinction between police power of state and that delegated to municipality and hence strictly construed as against private rights, police powers of city are broad. Masonic Fraternity Temple Ass'n v. Chicago, 131 Ill. App. 1. Clear enunciation in organic law requisite to lead to conclusion that portion of legislative power, such as police power, was not granted, since such power granted to all cities (Const. art. 11, § 11). Grumbach v. Lelande [Cal.] 98 P 1059.

**76.** Intoxicating liquors. Town of Gower v. Agee, 128 Mo. App. 427, 107 SW 999. May impose license though effect of causing two fees. Id.

**77.** City of New Orleans v. Charouleau, 121 La. 890, 46 S 911.

**78.** Where regulation valid exercise of po-

pursuant to the two well known maxims [79] property may be destroyed without compensation.[80] All contracts are subject to the police power,[81] and a corporation must exercise its charter and franchise rights subject to reasonable police regulations.[82] The power is, however, subject to constitutional restrictions [83] and the general requirement of reasonableness,[84] but the restriction of reasonableness is inapplicable where an ordinance is passed pursuant to a specific power.[85] The reasonableness of an ordinance is for the court,[86] but the exercise of the power is presumed valid [87] and the burden of showing unreasonableness rests upon the attacking party.[88]

lice power, and business necessarily incident to enforcement may be safely intrusted to one person, ordinance is not invalid as creation of monopoly. Dreyfus v. Boone [Ark.] 114 SW 718. Possession and enjoyment of rights subject to regulations of governing power in exercise of police power. Id. Grant of monopoly having no ligitimate relation to purpose to be accomplished by an ordinance is offensive and renders it unreasonable. Landberg v. Chicago, 237 Ill. 112, 86 NE 638. Ordinance granting exclusive right to ship manure from city from designated stations. Id.

**79.** In exercise of police power, command "so use your own property as not to injure others" and maxim "the safety of the people is the supreme law" are to be given effect. Sings v. Joliet, 237 Ill. 300, 86 NE 663. Use as to not endanger others. O'Bryan v. Highland Apartment Co., 33 Ky. L. R. 349, 108 SW 257.

**80.** May be summarily declared nuisance without notice to owner. Sings v. Joliet, 237 Ill. 300, 86 NE 663. Cows killed. City of New Orleans v. Charouleau, 121 La. 890, 46 S 911. Milk dealers deprived of stock of bottles on hand by ordinance that same have capacity indicated. City of Chicago v. Bowman Dairy Co., 234 Ill. 294, 84 NE 913.

**81.** Where pre-existing private rights are restrained or limited, restraint is damnum absque injuria. City of Seattle v. Hurst [Wash.] 97 P 454. Railway company unable to enter into contract granting privilege of entering depot to solicit patronage where ordinance generally prohibited soliciting at railway stations by hack drivers. Id.

**82.** If contract or charter abridges police power, that portion is void. City of Carthage v. Garner, 209 Mo. 688, 108 SW 521.

**83.** People v. Murphy, 113 NYS 855, rvg. 60 Misc. 536, 113 NYS 854. Laws must affect interest of public generally as distinguished from particular class. Id. Ordinance valid if operating equally upon subjects within class for which rule applied. Levi v. Anniston [Ala.] 46 S 237. Ordinances which unnecessarily restrain trade or operate oppressively on individuals will not be sustained. Commonwealth v. Jackson, 34 Pa. Super. Ct. 178. Rights of property not to be invaded under guise of police regulation. City of Bellville v. St. Clair County Turnpike Co., 234 Ill. 428, 84 NE 1049. Cannot infringe liberty of individuals, prevent following of profession or making contracts with reference thereto, or unduly restrict lawful occupations. People v. Murphy, 113 NYS 855, rvg. 60 Misc. 536, 113 NYS 854. Police regulations may not curtail corporate rights and franchises. City of Bellville v. St. Clair County Turnpike Co., 234 Ill. 428, 84 NE 1049. Possession of toll road by city after statutory annexation not justified under police power [illegible] had authority to construct streets across road or lay water pipes or sewer therein. Id. Taking of such property without compensation prohibited. Id. Taking of toll road by city after annexation not justified by necessity and means arbitrary and unreasonable. Id. Ordinance controlling use of property so as not to injure neighbor not "taking without compensation, depriving of property without due process of law. Atlantic City v. France, 75 N. J. Law, 910, 70 A 163.

**84.** Landberg v. Chicago, 237 Ill. 112, 86 NE 638; O'Bryan v. Highland Apartment Co., 33 Ky. L. R. 349, 108 SW 257; People v. Murphy, 113 NYS 855, rvg. judgment, 60 Misc. 536, 113 NYS 854; Commonwealth v. Jackson, 34 Pa. Super. Ct. 178. When interfering with private rights. Masonic Fraternity Temple Ass'n v. Chicago, 131 Ill. App. 1. Where powers generally conferred, courts may determine if ordinance is reasonable. Landberg v. Chicago, 237 Ill. 112, 86 NE 638. Exigency for exercise is for legislature. City of Bellville v. St. Clair County Turnpike Co., 234 Ill. 428, 84 NE 1049; O'Bryan v. Highland Apartment Co., 33 Ky. L. R. 349, 108 SW 257. Court may pronounce plainly unreasonable ordinance invalid. City of Dixon v. Messer, 136 Ill. App. 488. Ordinance prohibiting advertising wagons in borough reasonable. Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 86 NE 824, afg. 58 Misc. 401, 111 NYS 759. Ordinance requiring consent of property owners within 200 feet for livery barn unreasonable as vesting in private individuals power to determine how owner may use real estate in pursuit of occupation. Coon v. San Francisco Board of Public Works, 7 Cal. App. 760, 95 P 913. Resolution passed preventing connections of street railway by prohibiting switches after completion of new bridge, which resolution operated to abrogate contract, confiscate property, etc., unreasonable. Eastern Wisconsin R. & L. Co. v. Hackett, 135 Wis. 464, 115 NW 376. For additional specific instances of unreasonableness, see post, §§ 10B, 10C, etc.

**85.** Landberg v. Chicago, 237 Ill. 112, 86 NE 638. Can only declare void if unconstitutional. Id.

**86.** Jury to find facts disputed. Small v. Edenton, 146 N. C. 527, 60 SE 413. To be determined from facts of each case. Johnson v. Philadelphia [Miss.] 47 S 526. Determined with regard to all existing circumstances and conditions. Endelman v. Bloomington, 137 Ill. App. 483; Commonwealth v. Jackson, 34 Pa. Super. Ct. 178. May consider what may be done as well as what was done. People v. Murphy, 113 NYS 855.

**87.** Presumption in favor of reasonableness. Johnson Exp. Co. v. Chicago, 136 Ill. App. 368. Ordinances enacted pursuant to exercise of police power presumed reasonable. Kung v. Oregon R. & Nav. Co. [Or.] 94 P 504. Ordinance to be void for unreasonableness must be clearly so, with weight of evidence that it was enacted by mistake or

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**MUNICIPAL CORPORATIONS—Cont'd.**

(§ 10) *B. For public protection.*[89]—See 10 C. L. 897—A municipality in pursuance to its delegated power may enact reasonable ordinances relative to the sale of intoxicating liquors[90] or the conduct of billiard and pool rooms,[91] and may prohibit the shortage of weights and measures[92] as in the sale of milk.[93] Also fire limits may be provided,[94] and the erection of buildings,[95] theaters,[96] or other structures,[97] regulated.

in spirit of fraud or wantonness. City of Seattle v. Hurst [Wash.] 97 P 454. Courts will only interfere in clear case. Dreyfus v. Boone [Ark.] 114 SW 718. Ordinance for public safety. Illinois Cent. R. Co. v. Scheevers, 134 Ill. App. 514. Ordinance of sanitary nature. In re Desanta [Cal. App.] 96 P 1027. Will not sustain abuse of powers. Commonwealth v. Jackson, 34 Pa. Super. Ct. 178.

**88.** Bryan v. Birmingham [Ala.] 45 S 922. **Averment** that milk from Holstein cows was below standard fixed by ordinance insufficient to present issue of unreasonableness. Ex parte Hoffman [Cal.] 99 P 517.

**89. Search Note:** See notes in 12 L. R. A. 150; 41 Id. 422; 47 Id. 303; 70 Id. 850; 3 L. R. A. (N. S.) 140; 11 Id. 700; 16 Id. 914; 104 A. S. R. 636.

See, also, Municipal Corporations, Cent. Dig. §§ 1321-1334; Dec. Dig. §§ 595-603; 28 Cyc. 705-712, 736-738, 741-743.

**90.** Ordinance prohibiting "blind tigers." Callaway v. Mims [Ga. App.] 62 SE 654. Ordinance making drunkenness in public street misdemeanor proper under Kirby's Dig. § 5438. Brooke v. Morrilton [Ark.] 111 SW 471. Ordinance forbidding licensed saloonkeepers from permitting females to resort to saloons for purpose of drinking valid. People v. Case, 153 Mich. 98, 15 Det. Leg. N. 363, 116 NW 558. Not discrimination or infringement of equal rights under constitution. Id. Ordinance not illegal as discriminating between minors having written permission and others. Fitch v. Lewistown, 137 Ill. App. 570. Ordinance fixing saloon limits not invalid because of subsequent amendment imposing higher license fee within saloon territory, since, if any inequality of taxation, it affected legality of amendment. Andreas v. Beaumont [Tex. Civ. App.] 113 SW 614. Municipality may regulate or exclude business from portions of city, such as liquor business. Grumbach v. Lelande [Cal.] 98 P 1059. Under Const. art. 11, § 11, city may suppress retail sale of intoxicating liquors. Town of Selma v. Brewer [Cal. App.] 98 P 61. Ordinance to suppress with penalty not revenue measure but valid exercise of police power. Id. License subject to power of city to prohibit. Gale v. Moscow [Idaho] 97 P 828. Under Const. art. 12, § 2; Act Feb. 10, 1899 (Sess. Laws 1899, p. 203), § 73, subd. 8, as amended by Act March 15, 1907 (Sess. Laws 1907, p. 518), cities and villages have power to prohibit sale and giving away of intoxicating liquors and may pass ordinances to that effect. Id. Ordinance prohibiting dramshops in certain prescribed territory but excepting one lot containing dramshop discriminatory. Moore v. Danville, 232 Ill. 307, 83 NE 845. Ordinance fixing saloon limits with provision for continuation of business by licensees until expiration of license not discriminating though licenses expired at various times. Andreas v. Beaumont [Tex. Civ. App.] 113 SW 614. Ordinance requiring closing of saloons at 11 o'clock, unless by special permission of the president of village council, invalid as conferring arbitrary power upon executive officer. Village of Little Chute v. Van Camp, 136 Wis. 526, 117 NW 1012.

**91.** Not per se nuisance but may become such by environment or circumstances. Ex parte Murphy [Cal. App.] 97 P 199. Properly within police power. City of Corinth v. Crittenden [Miss.] 47 S 525; Ex parte Meyers, 7 Cal. App. 528, 94 P 870; Crittenden v. Booneville [Miss.] 45 S 723. Where business not useful and city may prohibit, arbitrary power to grant permits may be vested in board of trustees. Ex parte Murphy [Cal. App.] 97 P 199. Ordinance prohibiting pool rooms except for use of guests of hotels having over 25 rooms not invalid as class legislation. Ex parte Murphy [Cal. App.] 97 P 199. May be considered not uniform and still be valid since business not useful and may be prohibited, wherefore city may impose conditions it pleases. Ex parte Murphy [Cal. App.] 97 P 199. Legalized by legislature. City of Corinth v. Crittenden [Miss.] 47 S 525. City may not prohibit unless nuisance. Crittenden v. Booneville [Miss.] 45 S 723. Prohibitive ordinance void as destruction of property rights. Crittenden v. Booneville [Miss.] 45 S 723. City held to have power to prohibit pool rooms even against one having state license, where express power granted by Corinth special charter (Acts 1884, p. 547, c. 403) and power unaffected by later statutes. City of Corinth v. Crittenden [Miss.] 47 S 525.

**92.** City of New York v. Marco, 58 Misc. 225, 109 NYS 58.

**93.** Ordinance prescribing that milk bottles have capacity permanently indicated on them and prescribing penalty when bottles have less than indicated quantity valid. City of Chicago v. Bowman Dairy Co., 234 Ill. 294, 84 NE 913. Ordinance applying to milk not special legislation because inapplicable to other vendors of liquids. Id.

**94.** Ordinance establishing fire limits legal exercise of powers conferred. Town of Montclair v. Amend [N. J. Law] 68 A 1067. Lunch wagon moved within fire limits upon city lot, connected with gas, telephone and electricity for business purposes, is structure within ordinance. Id. Prohibition of frame buildings in fire limits and permit requisite otherwise not unreasonable. O'Bryan v. Highland Apartment Co., 33 Ky. L. R. 349, 108 SW 257. Various sections of fire ordinance construed together and regulations held reasonable. Id. Landowner cannot be deprived of property by establishment of building line save in due course of law, after notice. Northrop v. Waterbury [Conn.] 70 A 1024. Building line not established where property owner not notified. Northrop v. Waterbury [Conn.] 70 A 1024.

**95.** Building ordinance valid exercise of

(§ 10) *C. Health and sanitation.*[98]—See 10 C. L. 898—The municipality's power to preserve the public health is often exercised in the regulation of cemeteries,[99] slaughterhouses [1] and livery stables,[2] and in provisions relative to the sale of food.[3] Also stagnant water may be removed [4] and the emission of dense smoke prohibited.[5] The quarantining of persons affected with a contagious disease is proper,[6] but an ordinance providing for vaccination as a condition precedent to admission to public schools has been held unreasonable.[7] Buildings infected with disease may be de-

conferred legislative power. Town of Montclair v. Amend [N. J. Law] 68 A 1067. Borough has no power to enact ordinance relative to entire borough, undertaking to specify uniform construction of buildings, etc., where no legislative authority. Commonwealth v. Corson, 36 Pa. Super. Ct. 7. Building ordinance ultra vires and void since Gen. Laws 1896, c. 40, § 21, as to general power of municipality, held not to authorize. State v. Crepeau [R. I.] 71 A 449. Restrictive building ordinance operating to make enjoyment of property depends upon arbitrary will of council and failing to furnish uniform rule of action held unconstitutional and void. Id.

**96.** Erection of buildings for resort of larger number of people subject to police power. McGee v. Kennedy [Ky.] 114 SW 298. Ordinance requiring fire exits from main floor of theatre, with specifications as to width, etc., not unreasonable. Id. Where ordinance prescribing exits of theater was mandatory, another ordinance could not be construed to authorize board of public safety to waive such requirements, since ordinance would be violative of charter and constitution. Id. Permit issued mere license and violative of ordinance subject to prosecution, though building partially constructed and permit not withdrawn. Id.

**97.** State may regulate individual's use of property so that public health and safety be best conserved (State v. Whitlock [N. C.] 63 SE 123), but secure structure on private property not as nuisance cannot be made so by ordinance and then prohibited (Id.). Ordinance requiring billboards to be two feet more than height of board from outer edge of sidewalk unreasonable. Id. Ordinance absolutely prohibiting sky signs over 9 feet high, taking of property without compensation. People v. Murphy, 113 NYS 855, rvg. 60 Misc. 536, 113 NYS 854. Ordinance regulating partition fences held invalid, not being sustained by danger to public life, that such fences were nuisance, etc. City of Dixon v. Messer, 136 Ill. App. 488.

**98. Search Note:** See notes in 24 L. R. A. 584; 26 Id. 727; 9 L. R. A. (N. S.) 1197; 47 A. S. R. 541; 120 Id. 372; 2 Ann. Cas. 496, 582; 4 Id. 281; 8 Id. 818; 9 Id. 179.

See, also, Municipal Corporations, Cent. Dig. §§ 1335-1343; Dec. Dig. §§ 604-609; 28 Cyc. 715, 719-720, 739-740, 752.

**99.** Establishment, discontinuation or regulation of cemeteries, proper legislative power which may be delegated to municipality. Bryan v. Birmingham [Ala.] 45 S 922. Control must be primarily to protect health and well being of people. Id. Evidence insufficient to show that cemetery ordinance was unreasonable and discriminatory. Id. Prohibition of cemetery if nuisance proper but not where cemetery is to be located in sparsely settled portion of city unless burials will impair public health. Id.

1. Right to regulate or prohibit rests on consideration of public health, to prevent public nuisance. Zimmerman v. Gritzmacher [Or.] 98 P 875. Criminal prosecution barred when house authorized by unrepealed statute. Id.

2. Livery stable ordinance providing for consent of property owners in residence section of city not invalid as delegation of legislative powers, such ordinance being in reality prohibitive. City of Spokane v. Camp [Wash.] 97 P 770.

3. Ordinance prohibiting sale of stale meat, fowls placed in cold storage prior to removal of entrails, etc. People v. Reicherter, 128 App. Div. 675, 112 NYS 936. Not unreasonable as applying to newly-killed fowl rather than when such fowl becomes unwholesome. Id. Ordinance merely transfers duty from buyer to seller without placing limitation upon increased price for such duty. Id. Authority to enact ordinances in addition to state laws as to purity of dairy products conferred by charter. City of St. Louis v. Klausmeier, 213 Mo. 119, 112 SW 516; City of St. Louis v. Wortman, 213 Mo. 131, 112 SW 520. Inspection of cows and regulation of dairies authorized. City of New Orleans v. Charouleau, 121 La. 890, 46 S 911. Destruction of cows affected with tuberculosis, without compensation, proper. Id. Where charter permitted urgent ordinances for preservation of health to become effective immediately upon two-thirds vote of council, an ordinance that milk contain small additional percentage of fats and solids was not within such provision as to urgency. Ex parte Hoffman [Cal.] 99 P 517. **Invalid emergency clause** does not render ordinance void but postpones operation. Id. Nature of ordinance is determinative of urgency not the declaration. Statement of facts constituting urgency proper after declaration. Id.

4. Bradbury v. Vandalia Levee & Drainage Dist., 236 Ill. 86, 86 NE 163. Drainage district for agricultural purposes and not within police power to be exempt from damage caused by levee. Id.

5. Test of validity is reasonableness. City of Cincinnati v. Burkhardt, 10 Ohio C. C. (N. S.) 495. Smoke ordinance is proper, but application must be limited to smoke of such character to invade rights of persons and property. Atlantic City v. France, 75 N. J. Law, 910, 70 A 163. Ordinance must be aimed at emission of smoke containing soot or other substances so as to constitute nuisance. Id. Whether in given case soot is invasion of personal or property rights or injurious to health can only be determined by court. Id.

6. Evans v. Kankakee, 132 Ill. App. 488.

7. People v. Board of Education, 234 Ill. 422, 84 NE 1046. Bue see note 11 C. L. 1718.

stroyed.[8] The regulation of the transportation of garbage is proper,[9] and the exclusive right to remove such matter may be granted to one person.[10] A municipality which purchased lands outside the city limits has been held to have no power to bring diseased patients into the township unles the township officers consented.[11]

(§ 10) *D. Regulation and inspection of business.*[12]—See 10 C. L. 899—The exercise of the police power over nonuseful callings is much broader than otherwise,[13] and an ordinance restricting a useful occupation will be strictly construed.[14] The city's power to regulate will authorize ordinances prohibiting drumming by agents of doctors,[15] or forbidding business on Sunday.[16] A proper exercise of the police power is by the imposition of reasonable license fees for the better control of certain callings or occupations.[17] Licenses for revenue may be authorized.[18]

**8.** Municipality not liable for destruction of private property in interest of public health to prevent spread of contagion. Perry v. Oregon, 139 Ill. App. 606. City may declare building public nuisance and have it destroyed, if only method of preventing contagion. Sings v. Joliet, 237 Ill. 300, 86 NE 663. Decision of council not final and question may be adjudicated in action for damages. Id.

**9.** Buffalo Fertilizer Co. v. Cheektowaga, 118 NYS 901. Ordinance prohibiting transportation of garbage without consent of commissioner of highways an illegal attempt to license. Id. Not conferred by Laws 1906, p. 714, c. 306. Id. Ordinance void as giving commissioner of highways arbitrary power to consent to license transportation. Id.

**10.** Ordinance must be reasonable and directed solely to regulation. Dreyfus v. Boone [Ark.] 114 SW 718. Ordinance requiring removal of deposits from unsevered privies at proper intervals, by certain persons at compensation to be fixed by city and paid by owner, proper. Id. Invalid where city became sharer in revenue. Id. Garbage ordinance held reasonable when removal by licensed officer of night soil and other matter was only limited after same became nuisance, and providing further for removal in water-tight vessels, etc. Anderson v. State, 53 Tex. Cr. App. 243, 109 SW 193. Collection and sale of manure legitimate business, but may be conducted so as to be injurious to health. Landberg v. Chicago, 237 Ill. 112, 86 NE 638. Monopoly as to removal of manure unreasonable when having no legitimate relation to purpose to be accomplished. Id.

**11.** Summit Tp. v. Jackson [Mich.] 15 Det. Leg. N. 679, 117 NW 545. Charter of Jackson as revised by Act No. 399, Loc. Acts 1905, p. 188, § 4, tit. 9, authorizing purchase of lands for hospitals, considered in connection with general laws as to public health (Comp. Laws §§ 4436, 4437, 4471, 4459), and established constitutional doctrine of local self-government. Id. Cities and townships within their respective limits, in execution of laws relative to public health, exercise governmental function or agency. Id.

**12. Search Note:** See notes in 32 L. R. A. 116; 8 L. R. A. (N. S.) 304; 9 Id. 659; 11 Ann. Cas. 60.

See, also, Municipal Corporations, Cent. Dig. §§ 1344-1384; Dec. Dig. §§ 610-628; 28 Cyc. 720-734, 745-750, 753-760, 762-772.

**13.** May be prohibited. Ex parte Murphy [Cal. App.] 97 P 199. Where business useful, city may regulate, and reasonableness of regulation may be questioned by judicial inquiry. Id. **Skating rink** lawful business to be regulated in reasonable way and only suppressed when nuisance. Johnson v. Philadelphia [Misc.] 46 S 526. Authorization by state law evidence that business is lawful. Id. Skating rink not nuisance per se. Id. Requiring skating rinks to be closed from 6 o'clock p. m. until 6 o'clock a. m. unreasonable. Pool and billiard rooms; liquor business (see ante, § 10B).

**14.** Citizen has right to labor at any honest employment. Felton v. Atlanta, 4 Ga. App. 183, 61 SE 27. Business of plumbing related to public health and subject to regulation. Id. Plumbing ordinances construed as inapplicable to apprentices or helpers working under licensed masters or journeymen plumbers, they not being specifically named. Id.

**15.** Burrow v. Hot Springs, 85 Ark. 396, 108 SW 823.

**16.** Under act May 23, 1889, art. V, § 3, cl. 28, city of third class may enact ordinance forbidding sale of fruits, merchandise, etc., on Sunday and by cl. 20, impose penalty. New Castle v. Cummings, 36 Pa. Super. Ct. 443. Sales of soda water and ice cream within meaning of Sunday ordinance, though served in glasses, and plates and consumed on defendant's premises. Id.

**17. The subject of licenses is more fully treated** in a separate topic (see Licenses, 12 C. L. 593). Regulation by license recognized exercise of police power. Gettysburg Borough v. Gettysburg Transit Co., 36 Pa. Super Ct. 598. Power not to be used for revenue. Waters-Pierce Oil Co. v. Hot Springs, 85 Ark. 509, 109 SW 203. Ordinance imposing license presumed lawful. Gettysburg Borough v. Gettysburg Transit Co., 36 Pa. Super. Ct. 598. License fee treated as regulation rather than taxation. State v. Cederaski, 80 Conn. 478, 69 A 19. Where ordinance-police regulation tending to accomplish object sought, under power to regulate, ordinance must be sustained though no authority in charter to license. Commonwealth v. Jackson, 34 Pa. Super. Ct. 178. Courts will not declare ordinance void because of unreasonableness of fee, unless abuse of discretion. Gettysburg Borough v. Gettysburg Transit Co., 36 Pa. Super. Ct. 598. Where license annual tax under guise of police regulation, municipality must show express legislative authority. Commonwealth v. Jackson, 34 Pa. Super Ct. 178. License fee for **distribution of advertisements** must be reasonable, not with view of revenue or prohibition. Id. License fee of $5 per day equivalent to $1500 per year for distribution of advertisements in **borough of 5000 population,**

unreasonable. Id. Distribution of advertisements, see post, § 10E. Ordinance void when no distinction as to amount of license fee for **itinerant merchant** whether business engaged in one or a number of days. City of Dixon v. Messer, 136 Ill. App. 488. Buffalo Charter Laws 1891, p. 137, c. 105, § 17, subd. 6, as amended, Laws 1904, p. 83, c. 31, authorizing **automobile** license or tax repealed by Motor Vehicle Act, Laws 1904, p. 1316, c. 538, § 4, subd. 3. City of Buffalo v. Lewis, 123 App. Div. 163, 108 NYS 450. Under general welfare clause (Act 1887, art. VII, § 2, cl. 47; and Act 1889, art. V; § 3, cl. 46), **billposters** might be regulated, subject to police powers of city. Titusville v. Gahan, 34 Pa. Super. Ct. 613. Under Act 1887, art. VII, § 2, cl. 4, and Act of 1889, art. V, § 3, cl. 4, municipality may not collect tax from **theaters** for general revenue, but under Act 1887, art. VII, § 2, cl. 26, and Act 1889, art. V, § 3, cl. 25, power delegated to municipality is that of regulation by virtue of police power. Id. Ordinance imposing license tax on theatres and billboards construed as revenue, not police measure and declared invalid. Id.

**Vehicles:** Ordinance imposing license fee on wagons and vehicles, to be used in repairing streets, valid. Harder's Fireproof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 NE 245. Such tax valid though owner also pays ad valorem tax on vehicles as property since legislature in effect has declared use of streets privilege. Id. Where Hurd's Rev. St. c. 24, art. 5, § 1, provides that city council in cities and trustees in villages have following powers, etc., and cl. 96, authorizes license tax on vehicles, such clause is applicable to both cities and villages. Id. Power not limited by Const. art. 9, §§ 1, 2, limiting taxing power. Id. Power not limited by Const. art. 9, § 9, as to limitation of taxes since such section applies to taxation of property, not taxation of privilege as use of streets. Id. City council may require public carts to obtain license. Hastings Exp. Co. v. Chicago, 135 Ill. App. 268. Ordinance as to licensing of public carts not invalid as illegally discriminating. Johnson Exp. Co. v. Chicago, 136 Ill. App. 368. Must be some other reason for classification than use of vehicle, unless use of itself affords grounds for distinction. Waters-Pierce Oil Co. v. Hot Springs, 85 Ark. 509, 109 SW 293. Requiring fee of $50 for coal wagon unreasonable and discriminatory where other vehicles only taxed $10. Id. Ordinance regulating **hackmen** not void because conferring discretion on authorities as to who should have permits. Kissinger v. Hay [Tex. Civ. App.] 113 SW 1005. Where ordinance regulating hackmen was alleged to be unreasonable, petitioner should allege facts showing unreasonableness or wherein city exceeded powers. Id. City authorized to prevent incumbering of streets by regulating use of public vehicles for hire, fix stands for same and prevent use of streets for stands. Id.

**Soliciting by hackmen:** City authorized to regulate occupations affecting good order or public peace (Pierce's Code § 3732, subds. 34, 86 [Ballinger's Ann. Codes & St. § 3732]) may prohibit soliciting of hack drivers at railway station. City of Seattle v. Hurst [Wash.] 97 P 454. Not restriction of private contract or property rights. Id.

**Hotels:** Power conferred by Kirby's Dig. § 5454, to regulate hotels includes power to license as means of regulation. City of Helena v. Miller [Ark.] 114 SW 237. Fee for license to cover expense of issuance and inspection or superintendence proper. Id. License fee of $25 not unreasonable though no additional policemen or sanitary officers employed for inspection. Id.

**Peddling:** Ordinance against peddlers held to apply to residents and nonresidents and valid. Allport v. Murphy, 153 Mich. 486, 15 Det. Leg. N. 496, 116 NW 1070. Regulation of hawkers and peddlers by means of license valid, as long as provisions within limitations of legislative power. State v. Cederaski, 80 Conn. 478, 69 A 19. Ordinance prohibiting peddling of provisions by others than producers not invalid because peddlers had license from state, since such license would not authorize disregard of ordinance and peddlers might vend other goods. Dulton v. Knoxville [Tenn.] 113 SW 381. Not discriminatory, since hawkers are persons who would engage in "forestalling" and "regrating" practices city was authorized to prevent. Id. "Forestalling" consists of buying victuals on their way to market with intent to resell at higher price. Id. "Regrating" is buying of corn or other dead victual in any market and selling again, thus enhancing price since successive sellers must have profit. Id.

**Junk dealers:** Ordinance not void for discrimination as excepting manufacturers of brass goods, pig iron, belting, etc. Levi v. Anniston [Ala.] 46 S 237.

**Employment agencies.** City of Spokane v. Macho [Wash.] 98 P 755.

**18.** Charter of Miami authorizes license tax upon privileges, occupations, etc., and taxes not controlled by general law as to amount. Hardee v. Brown [Fla.] 47 S 834. $100 license tax upon express companies not violative of United States constitution expressed as limitation. Id. Limitation would be implied if not expressed. Id. Occupation tax on agents of packing houses authorized by charter. City of Savannah v. Cooper [Ga.] 63 ES 138. Tax on occupation of agents of packing houses not void on ground that state had previously licensed. Id. Classification proper if not arbitrary. Classifying agents of packing house on basis of those who sell fresh meat in city and those who do not, not arbitrary. Id. Ordinance en agents of packing houses held unreasonable, when imposing tax of $400 on agent earning $1800. Id. Power granted to levy occupation tax on "contractors" not sufficiently generic to cover "persons doing contract work," and license on latter class void. Ex parte Unger [Okl.] 98 P 999. Attempt of city to extend taxing power granted by defining word "contractors" as "persons doing contract work," futile. Id. "Contractor" one who contracts to perform work on large scale, at certain price or rate, as in building houses or making railroads. Id. Where express power to license for revenue and regulation, and ordinance imposes license on business which is not subject to regulation, presumption is measure for revenue, though no language indicative of such purpose. Ex parte Diehl [Cal. App.] 96 P 98. License for revenue authorized by Freeholder's Charter St. 1903, p. 697, c. 31, since "business" includes all manner of occupations and means of livelihood. Id. Horseshoeing business which cannot be regulated. Id. Pol. Code of 1901, § 3366 restricting licenses inapplicable to municipalities governed by Freeholder's Charter St. 1903,

(§ 10) *E. Control of streets and public places.*[19]—See 10 C. L. 900—Paramount authority over municipal streets resides in the state, which may delegate such powers as it sees fit.[20] Under its delegated authority a municipality may regulate traffic,[21] the speed of vehicles,[22] or trains,[23] require precaution in the operation of street cars,[24] or locomotives,[25] prohibit cattle from running at large,[26] require the removal of trees,[27] or stationary awnings,[28] prohibit advertising wagons,[29] and prevent the distribution of advertising matter.[30] The city's power to regulate the use of streets does not authorize an interference with the personal liberty of citizens.[31] In the exercise of its police power, a municipality may supervise and control the introduction and maintenance of the various appliances which subserve the several urban uses of streets,[32] such as the placing of telegraph and telephone lines,[33] and gas mains,[34] and the operation of street railways.[35]

p. 697, c. 31, authorizing license of business for revenue, when considered in connection with Const. art. 11, § 6, as amended in 1896 (St. 1895, p. 450, c. 23), declaring charters of cities subject to general law "except in municipal affairs." Id. Charter of Baltimore authorizes tax for revenue for use of **city market** and license not considered as regulation. Meushaw v. State [Md.] 71 A 457.

**19. Search Notes:** See notes in 19 L. R. A. 858; 4 L. R. A. (N. S.) 571; 9 Id. 1045; 10 Id. 854; 11 Id. 1080; 12 Id. 1164; 15 Id. 269, 715, 973; 23 A. S. R. 581; 2 Ann. Cas. 897; 5 Id. 423, 997.

See, also Municipal Corporations, Cent. Dig. §§ 1419-1544; Dec. Dig. §§ 646-722; 28 Cyc. 832-939; 19 A. & E. Enc. L. (2ed.) 1147.

**20.** Economic Power & Const. Co. v. Buffalo, 59 Misc. 571, 111 NYS 443; Harder's Fireproof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 NE 245. No inherent or independent authority. Economic Power & Const. Co. v. Buffalo, 59 Misc. 571, 111 NYS 443.

**21.** Fifth Ave. Coach Co. v. New York, 126 App. Div. 657, 110 NYS 1037. Ordinance prescribing course of stream of travel. State v. Larrabee, 104 Minn. 37, 115 NW 948. Presence of vehicles not temporary obstruction exempting defendant from ordinance as to course of stream of travel. Id.

**22.** Ordinance limiting speed of vehicles to six miles an hour held to apply to fire marshal driving to fire. Illinois Cent. R. Co. v. Shreevers, 134 Ill. App. 514.

**23.** City may regulate speed of trains to reasonable limit. Kunz v. Oregon R. & Nav. Co., [Or.] 94 P 504.

**24.** Regulation requiring warning of approach of street cars at crossings proper. Denver City Tramway Co. v. Martin [Colo.] 98 P 836.

**25.** Ordinance requiring ringing of bell on locomotive held not applicable to manufacturer operating such engine in his private yards for his own convenience. Western Steel Car & Foundry Co. v. Nowalaniak, 135 Ill. App. 137.

**26.** Proper under general welfare clause. Geer v. Thompson, 4 Ga. App. 756, 62 SE 500. Hogs. Stone v. Tallulah Falls [Ga.] 62 SE 592. Sheep. Southwestern Sheep Co. v. Thompson [Ga. App.] 62 SE 1002.

**27.** Removal of trees authorized though purpose was preservation of city sewerage. Rosenthal v. Goldsboro [N. C.] 62 SE 905. Removal of shade trees to make way for sidewalk unauthorized, where placing of sidewalk would be in position different from that prescribed by ordinance. City of Paola v. Wentz [Kan.] 98 P 775. Where removal assumed to be authorized and question therefore not subject to judicial review nevertheless if determination of city is made arbitrarily under circumstances indicative of bad faith, an abuse of discretion is presented. City of Paola v. Wentz [Kan.] 98 P 775.

**28.** Small v. Edenton, 146 N. C. 527, 60 SE 413. Whether posts were just inside or just outside edge of sidewalk did not affect application. Id.

**29.** Ordinance valid. Fifth Avenue Coach Co. v. New York, 58 Misc. 401, 111 NYS 759, afd. 194 N. Y. 19, 86 NE 824. Ordinance barring advertising on trucks, wagons, etc., but permitting business notices, does not prevent stage company from displaying signs on coaches. Fifth Ave. Coach Co. v. New York, 126 App. Div. 657, 110 NYS 1037. Stage company cannot enjoin city from interfering with advertising on coaches when no authority to use coaches for advertising. Id.

**30.** Ordinance preventing distribution of handbills, cards, papers, etc., within police power. International Text Book Co. v. Auburn, 163 F 543. Valid under legislative grant to boroughs. Commonwealth v. Jackson, 34 Pa. Super. Ct. 174. Placing advertisements in vestibules may be prohibited. Id. Ordinance must be reasonable and for common benefit. Id. Ordinance absolutely prohibiting distribution of advertisements, invalid, being in restraint of trade, going far beyond necessity of object, etc. Id. Ordinance prohibiting distribution of advertising not enjoined as interference with interstate commerce, etc.; no discrimination being charged. International Text Book Co. v. Auburn, 163 F 543. See, also, ante, § 10D.

**31.** City of St. Louis v. Gloner, 210 Mo. 502, 109 SW 30. Ordinance prohibiting lounging, standing or loafing at street corners or public places, held invalid as infringement of constitutional right of personal liberty. Id.

**32.** Power to make reasonable police regulations independent to power to grant consent to use of streets. Pittsburg v. Consolidated Gas Co., 34 Pa. Super. Ct. 374. Right not limited to surface but extends to soil beneath. Id. Undoubted police power over exercise of right to enter but may not prevent entry itself. Economic Power & Const. Co. v. Buffalo, 59 Misc. 571, 111 NYS 443. Where use of street granted by legislature to plaintiff and city failed to exercise power of regulation, city could not prevent use

(§ 10) *F. Definition of offenses and regulation of criminal procedure.*[36]—See 10 C. L. 902—Incident to the power to make police regulations is the power to punish their breach,[37] and in the exercise of such power, acts made penal by statute may be punished,[38] or a municipality may be authorized to impose new and superadded penalties.[39] Power to declare and define what constitutes offenses may be granted by the legislature,[40] though a departure from the settled meaning of words is not permissible.[41] Charter provisions or statutes authorize the extent of punishment.[42]

of streets by such company. Id. Electric lighting and heating. Id.

**33.** Telephone company must comply with reasonable regulations and exercise right of entry conferred by state subject to such regulations. Village of Jonesville v. Southern Michigan Tel. Co. [Mich.] 16 Det. Leg. N. 968, 118 NW 736. Village held to have power to exclude poles and wires from main business block, unless thereby company was prevented from communicating with or serving customers. Id. Fact that route designated by village involved larger expenditure by telephone company, immaterial. Id. Telephone company bound by agreement to pay percentage of gross earnings for permission to install system where city had power of regulation. City of Jamestown v. Home Tel. Co., 125 App. Div. 1, 109 NYS 297. Permits for erection of telephone poles. Merritt v. Kinloch Tel. Co. [Mo.] 115 SW 19. Permit to dig in street. City of Carthage v. Garner, 209 Mo. 688, 108 SW 521. Requiring permit not repugnant to legislative policy of state. Id. Ordinance not delegation of legislative power since issuance of permit by clerk ministerial. Id. Under Rev. St. 1899, § 5837 (Ann. St. 1906, p. 2951), council of cities of third class may regulate erection of telephone poles, etc. Id. Injunction granted to restrain city's interference with telephone poles where right granted pursuant to implied powers and no judicial determination that poles were nuisance. Southern Bell Tel. & T. Co. v. Mobile, 162 F 523.

**34.** Right of private corporation to use highways in exercise of franchise, subject to municipal regulations. Pittsburg v. Consolidated Gas Co., 34 Pa. Super. Ct. 374. Location of pipes in particular part of street subject to future regulations in interests of public health and welfare. Id. Constitutional provision as to compensation for property taken, injured or destroyed in exercise of power of eminent domain, inapplicable where gas pipe removed pursuant to police power. Id. Gas pipe removed where water main placed. Id.

**35.** In granting streets to street railway, a village may require company to pave its right of way, at time and with material designated. Village of Madison v. Alton, G. & St. L. Trac. Co., 235 Ill. 346, 85 NE 596. Under charter, and St. 1898, § 1862, authorizing reasonable regulations, resolution of city prohibiting construction of street railway switches on city bridge or approaches, were not ultra vires. Eastern Wisconsin R. & L. Co. v. Hackett, 135 Wis. 464, 115 NW 376. Ordinances must not prejudice private rights or interests. Id.

**36.** Procedure on summary trials, see Indictment and Prosecution, 12 C. L. 1.

**Search Note:** See notes in 78 A. S. R. 271; 110 Id. 149; 5 Ann. Cas. 289; 6 Id. 566.

See, also, Municipal Corporations, Cent. Dig. §§ 1375-1377, 1385-1418; Dec. Dig. §§ 624, 630-645; 28 Cyc. 759, 760, 775-830.

**37.** Power conferred by Charter of New Britain (14 Sp. Laws 1905, p. 915), to license peddlers, necessarily implies power of prescribing amount of license and enforcing payment. State v. Cederaski, 80 Conn. 478, 69 A 19.

**38.** Offense against city may be offense against state and both jurisdictions may punish. O'Haver v. Montgomery [Tenn.] 111 SW 449. Rules of state law applicable when prosecution thereunder, and those of ordinance when action thereunder. Ex parte Hoffman [Cal.] 99 P 571; City of St. Louis v. Klausmeier, 213 Mo. 119, 112 SW 516. City may adopt legislative act making drunkenness misdemeanor, but is not compelled to do so to secure valid ordinance. Brooke v. Morrilton [Ark.] 111 SW 471. Where general assembly brings particular subject within police power, municipalites may deal with same subject under general welfare clause, subject to rule that they cannot deal with act purely violative of criminal statute. Callaway v. Mims [Ga. App.] 62 SE 654. Cannot without express authority punish offense against criminal laws. Id. In deciding conflict, courts may consider actual case of conviction and also both statute and ordinance to determine if gist of offense is same. Id.

**39.** City of New York v. Marco, 68 Misc. 225, 109 NYS 58; State v. Second Judicial Dist. Ct., 37 Mont. 202, 95 P 841.

**40.** Either expressly or impliedly. O'Haver v. Montgomery [Tenn.] 111 SW 449. Subject to limitation that there be no conflict with powers granted, or that ordinance be not unreasonable. Id. "Misdemeanor" in statutes conferring power on municipal corporations is not synonymous with term used at common law or in statutes defining offenses, but is used in more restricted sense and is limited to offenses against local government. Id. Statutes construed and city of Butte held to have express authority to define and punish vagrancy, police court having exclusive jurisdiction of violation of such ordinance, and prosecutions to be conducted in name of city. State v. Second Judicial Dist. Ct., 37 Mont. 202, 95 P 841. Under Pol. Code 1895, § 4800, par. 34, as amended Laws 1897, p. 206, city council may define vagrancy. Id.

**41.** Common council has no power to prescribe new definitions. Allport v. Murphy, 153 Mich. 486, 15 Det. Leg. N. 496, 116 NW 1070. Ordinance providing that person who goes from house to house or place to place to sell article for present or future delivery be deemed hawker or peddler not attempt to prescribe new definition for term "peddler," but proper exercise of charter power (Loc. Acts 1895, p. 843, No. 469). Allport v. Murphy, 153 Mich. 486, 153 Det. Leg. N. 496, 116 NW 1070. Ordinance making it

The arrest of offenders in adjacent territory may be authorized.[43] Prosecutions for the violation of a city ordinance will not be restrained,[44] but a writ of prohibition may issue,[45] and habeas corpus will lie to discharge a person convicted under a void ordinance.[46]

§ 11. *Property and public places.*[47]—See 10 C. L. 903—The law upon this subject is fully treated elsewhere,[48] only a few cases based on the peculiar status of municipalities being here treated. A municipality holding property for the purposes of government is merely a governmental agency,[49] and such property is held in trust for the public use and benefit,[50] though property may be acquired in a private capacity.[51] Whether a municipality in acquiring land exceeds its power is a question between it and the state.[52] A corporation may be created by statute to administer a

unlawful for person keeping employment office to make willful misrepresentation and accept fee for such employment is invalid, as making act of one particular business criminal, and same act of different business lawful. City of Spokane v. Macho [Wash.] 98 P 755.

**42.** Power to imprison must be expressly conferred. Must be judicial ascertainment of offense. O'Haver v. Montgomery [Tenn.] 111 SW 449. Memphis Charter (Acts 1879, p. 16, c. 11, § 3; p. 98, c. 84, § 1, and amendments), confers power to establish workhouses, punish violations of ordinances, etc. Id. Punishment of hard labor authorized by Acts 1894-95, p. 1062, § 19. Harrison v. Anniston [Ala.] 46 S 980. Intoxicating liquor ordinance pursuant to Gen. St. 1901, § 2499, not void for nonuniformity because providing for imprisonment in city jail. City of Wichita v. Murphy [Kan.] 99 P 272. Penal clause of ordinance imposing license not imprisonment for debt, since fine imposed for refusal to obey ordinance as punishment. Ex parte Diehl [Cal. App.] 96 P 98. Where amendment to Macon charter (acts 1907, p. 786), punished violation of liquor ordinance with fine of $500, confinement for 60 days, or labor on public works not exceeding three months, or alternative sentence of labor in default of fine, punishments could not be imposed cumulatively. Callaway v. Mims [Ga. App.] 62 SE 654. Where extent of punishment limited to fine of $100 or imprisonment not to exceed three months and Duluth city charter (Sp. Laws 1887, p. 96, c. 2, subd. 8, § 6, as amended by Sp. Laws 1891, p. 637, c. 55, § 29), authorized ordinance inflicting fine and imprisonment, such ordinance was void. State v. Bates, 105 Minn. 440, 117 NW 844. Costs not significant. Id. Invalid legislation not made affective by home rule charter. Id. Where sentence is imprisonment in default of payment of fine, commitment to carry judgment into effect is proper. Olson v. Hawkins, 135 Wis. 394, 116 NW 18.

**43.** Police power delegated over adjoining county. Town of Gower v. Agee, 128 Mo. App. 427, 107 SW 999.

**44.** See ante, § 8H. Bryan v. Birmingham [Ala.] 45 S 922; Dreyfus v. Boone [Ark.] 114 SW 718. Injunction will not lie to prevent enforcement of ordinance regulating hackman, which ordinance is enforcible only by criminal prosecution. Kissinger v. Hay [Tex. Civ. App.] 113 SW 1005.

**45.** Unauthorized prosecution under void ordinance. Crittenden v. Booneville [Miss.] 45 S 723. Pool room ordinance. Id.

**46.** Ex parte Unger [Okl.] 98 P 999.

**47. Search Note:** See Municipal Corporations. Cent. Dig. §§ 609-643, 1419-1544; Dec. Dig. §§ 221-225, 646-722; 28 Cyc. 604-633, 832-939; 19 A. & E. Enc. L. (2ed.) 1139, 1145; 20 Id. 1184.

See, also, Abbott, Mun. Corp. §§ 717, 834.

**48.** See Parks and Public Grounds, 10 C. L. 1079. See, also, Highways and Streets, 12 C. L. 1720.

**49.** Potter v. Calumet Elec. St. R. Co., 158 F 521. Legislature may confer agency upon another governmental instrumentality. City of Victoria v. Victoria County, 100 Tex. 438, 18 Tex. Ct. Rep. 16, 101 SW 190. Various statutes in history of town of Victoria construed and town held to have title to certain lands for benefit of citizens. Id. Title to public square in town of Victoria by Act Dec. 10, 1841 (2 Gammel's Laws, p. 687). City of Victoria v. Victoria County [Tex. Civ. App.] 115 SW 67. Where government of Coahuila and Texas granted four leagues of land for colonization in 1824, and town was established as seat of government, congress of Texas was authorized to place title to unsold portion in town for benefit of citizens. City of Victoria v. Victoria County, 100 Tex. 438, 18 Tex. Ct. Rep. 16, 101 SW 190. Where municipality of Liberty granted four leagues of land by government of Coahuila and Texas, and patents issued to town trustees in 1840, acts of congress of Texas in recognizing incorporation, directing patent, established town's right to four leagues. Vasser v. Liberty [Tex. Civ. App.] 110 SW 119.

**50.** Municipality holds fee to streets as trustee for public use of people, and not as corporate property. Economic Power & Const. Co. v. Buffalo, 59 Misc. 571, 111 NYS 443. Duty to improve and control for public use. Village of Madison v. Alton, G. & St. L. Trac. Co., 235 Ill. 346, 85 NE 596. City cannot make contract to relieve itself from duty to control and improve. Id. City cannot grant exclusive use to corporation. Id.

**51.** Pioneer Inv. & T. Co. v. Salt Lake City Board of Education [Utah] 99 P 150. Constitutional guaranties securing private property. Rights of town in purchasing stock cannot be destroyed by subsequent legislative act. Town of Southington v. Southington Water Co., 80 Conn. 646, 69 A 1023. Rule applies only to property reduced to possession or held in trust for inhabitants of territory as distinguished from people as whole. McSurely v. McGrew [Iowa] 118 NW 415. Rule inapplicable to executory contracts or provisions concerning funds or revenues. Id.

**52.** City of Pocatello v. Bass [Idaho] 96 P 120. Ownership of land for park pur-

charitable trust bequeathed to a city.[53] Generally adverse possession does not run against property held by the city for the public use.[54]

Pursuant to its delegated authority a municipality may authorize the use of streets for telephones,[55] electric lighting,[56] street railways [57] or railroads.[58] A portion of ground may be dedicated to a county for a courthouse or jail.[59] No use of streets, alleys [60] or public places inconsistent with the public easement therein can be

poses, though outside city limits, cannot be attacked by defendant who does not claim portion of such lands. Id.

53. Title of city to bequeathed property not interfered with. Ware v. Fitchburg, 200 Mass. 61, 85 NE 951. St. 1890, p. 385, c. 422, valid as to selection of officers who were agents of city. Id. St. 1890, p. 385, c. 422, not invalid after acceptance though operating to deprive city of vested property since such city cannot complain of taking of property to which it has assented. Id. Testator presumed to be familiar with power of city in which he resided when making bequest. Id.

54. See Adverse Possession, 11 C. L. 41.

55. Authority to grant use primarily in state may be delegated to municipality. Southern Bell Tel. & T. Co. v. Mobile, 162 F 523. Power may be implied from grant of general control. Id. Charter of Mobile held to give implied power to authorize telephone company to occupy streets. Id. Streets of city are highways and Code Ala. § 2490, giving right of way to telephone company on highways, authorized construction of line in city streets. Id. Use of streets by telephone company to be lawful must be consented to by state or municipality pursuant to delegated power. Id. Where Ill. Const. 1870. art. 11, § 4, required consent of "local authorities," and 2 Starr. & C. Ann. St. 1896, p. 2110, c. 66, § 3 (street railway act) required consent of "corporate authorities" to construction of street railway, terms were synonymous. Potter v. Calumet Elec. St. R. Co., 158 F 521. "Corporate authorities" of municipality are those representatives who are either directly elected by the people or appointed in some mode to which they have given their assent. Id. Grant to telephone company to construct system not violative of Const. art. II, § 14. or art. IV, § 22. City of Rock Island v. Central Union Tel. Co., 132 Ill. App. 248. Council has power to make a grant binding upon successors. City of Rock Island v. Central Union Tel. Co., 132 Ill. App. 248. Grant not exclusive. Id. Ordinance charging board of public works with duty of advertising and selling telephone franchise provided for within power of council. Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855. Const. S. D. art. 10, § 3, providing for local consent to erection of telephone line, limits legislative power but does not grant legislative power to local authorities. City has no power to impose additional conditions or regulations than those permitted by legislature. Missouri River Tel. Co. v. Mitchell [S. D.] 116 NW 67. Where consent given, right to control telephone company results from statute, not action of local authorities by which consent is manifested. Id. Consent of city irrevocable. Id. Where city by ordinance and acquiescence permitted construction of telephone line, by company having franchise from state, the city "consented" to such line within Const. S. D. art. 10, § 3, and the right of the company was not affected by a ten-year limitation in the granting ordinance. Dakota Cent. Tel. Co. v. Huron, 165 F 226. City may be estopped to deny validity of ordinance which it has led others to believe was legally adopted. Missouri River Tel. Co. v. Mitchell [S. D.] 116 NW 67. Ordinance though illegal accepted by telephone company and line maintained several years estopping city. Id.

56. Grant of use of streets for electric lighting within Village Laws of New York (Becker & Howe [3d. Ed.] § 240, p. 206); Laws 1888, p. 743, c. 452; Law 1891, p. 310, c. 139. Wakefield v. Theresa, 125 App. Div. 38, 109 NYS 414.

57. Village of Madison v. Alton, G. & St. L. Trac. Co., 235 Ill. 346, 85 NE 596. Right to construct street railway comes from state as franchise and from city as license, or of contract of right. Potter v. Calumet Elec. St. R. Co., 158 F 521.

58. Under statutes of New York railroad may not build trestle over highway without consent of city though no interference with use of street. Delaware, L. & W. R. Co. v. Syracuse, 157 F 700. Where consent to building trestle over street to be obtained from city council, such consent is not given by ordinance generally to construct switches or tracks across street. Id. Statutes of Pennsylvania in view of construction of state supreme court held to authorize grant of portion of public grounds by city of Allegheny for erection of railroad passenger station. Larkin v. Allegheny [C. C. A.] 162 F 611. City of Denver prohibited from granting franchise without approving vote of qualified taxpayers. Const. of Colo. art. 20. McPhee & McGinnity Co. v. Union Pac. R. Co. [C. C. A.] 158 F 5. Charter of Denver adopted pursuant to art 20, Const. empowered council to grant revocable license to use of street or public place. Id. Ordinance construed as grant of revocable license and held valid. Id.

59. By virtue of incorporation and authority to provide county jail, trustees of town of Liberty might provide tract from public lands and dedicate to county. Vasser v. Liberty [Tex. Civ. App.] 110 SW 119. Dedication. City of Victoria v. Victoria County [Tex. Civ. App.] 115 SW 67. Town authorities of Victoria by various statutes and the practical construction adopted by them held to have authority to dedicate portion of public square to county for court house, etc. City of Victoria v. Victoria County, 100 Tex. 438, 18 Tex. Ct. Rep. 16, 101 SW 190.

60. Jurisdiction of city over public streets and alleys identical. J. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93, rvg. 140 Ill. App. 344. Words "streets and alleys" constantly used in collocation and legislation and imply no difference except as to width. Id.

authorized.[61] The police power will authorize the summary opening of streets,[62] and a city is not estopped[63] or barred by limitations[64] from removing encroachments. The city may not remove lawful structures,[65] and the authorization of a court if used only for that purpose,[66] an areaway,[67] or an encroachment on an alley,[68] is proper. An ordinance vacating a street[69] to serve a purely private interest is void,[70] but the rule is inapplicable when the subservience of such interest is only incidental.[71] A wrongful conveyance[72] may be saved by a confirmatory act.[73] Where additional burdens were imposed upon streets by the legislature, and the fee remained in the abutting owners, such owners might seek redress, but the city is not a trustee to enforce such rights.[74]

§ 12. *Contracts.*[75]—See 10 C. L. 904—Contracts by public governmental bodies are fully treated in a separate article.[76] Practically the only questions arising upon such contracts which are peculiar to municipalities and proper to be treated here are those relating to unauthorized contracts and the implications and estoppels resulting therefrom. It results necessarily from the limited and delegated character of mu-

**61.** May grant use for public purposes not inconsistent with public easement. Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 86 NE 824, afg. 58 Misc. 401, 111 NYS 759. Use of street for vending wares as unlawful encroachment which cannot be authorized by aldermen under City Charter (Laws 1901, p. 28, c. 466, § 50). Tolkon v. Otto E. Reimer Co., 125 App. Div. 695, 110 NYS 129. Municipality may not license or permit obstruction in street or alley. People v. Wieboldt, 138 Ill. App. 200. Maintenance of peddler's stand 17 years creates no right in sidewalk nor relieves municipality from clearing sidewalk of obstruction. United Cigar Stores Co. v. Von Bargen, 7 Ohio N. P. (N. S.) 420. Fact that structure is maintained under agreement with property owner does not create any right for such occupancy of sidewalk as against rights of general public. Id. Relator need not show special injury in mandamus to compel public officials to remove obstruction from street. People v. Ahern, 124 App. Div. 840, 109 NYS 249.

**62.** Handlin v. New Orleans, 121 La. 565, 46 S 652; Perry v. Ball [Tex. Civ. App.] 113 SW 588. Street narrowed to alley, subject to same control as other alleys. Fralinger v. Cooke [Md.] 71 A 529. City not authorized to prevent removal of gravel bank from river when portion of accretion within city limits where removal did not interfere with city streets or create nuisance. Goar v. Rosenberg [Tex. Civ. App.] 115 SW 653.

**63.** City of Paragould v. Lawson [Ark.] 115 SW 379.

**64.** Kirby's Dig. § 5593. City of Paragould v. Lawson [Ark.] 115 SW 379.

**65.** Erected pursuant to valid contract. City of Rock Island v. Central Union Tel. Co., 132 Ill. App. 248. City may be restrained from interference with telephone company conducting system pursuant to ordinance. Id. Injunction lies to restrain city's interference with private party using space under public alley when right to use same lawfully obtained. City of Chicago v. Burton Co., 140 Ill. App. 344, rvg. 236 Ill. 383, 86 NE 93. Not lawfully obtained since use of space under roadway prohibited (ordinance construed). Id.

**66.** Ordinance granting privilege of enclosing court on Fifth Avenue, New York, held not to authorize boiler, engines, etc., for restaurant, and construction of platform slightly above sidewalk. People v. Ahearn, 124 App. Div. 840, 109 NYS 249.

**67.** Property owner may, under legislative authority, be authorized to construct areaway for light or access to basement, such being proper use of building. People v. Ahearn, 124 App. Div. 840, 109 NYS 249.

**68.** City may permit encroachments on alley and injury damnum absque injuria. Fralinger v. Cooke [Md.] 71 A 529. Notice to adjoining owner required when city authorizes encroachment on alley. Baltimore Charter (Laws 1898, p. 241, c. 123, as amended Laws 1900, p. 117, c. 109). Id.

**69.** Municipality has power to vacate alley. People v. Wieboldt, 138 Ill. App. 200. Mandamus held not to lie to compel city to remove obstructions from alley formally vacated by ordinance. People v. Wieboldt, 138 Ill. App. 200.

**70.** City of Amboy v. Illinois Cent. R. Co., 236 Ill. 236, 86 NE 238. Parol evidence of motive immaterial. Id.

**71.** Ordinance passed after due consideration of public benefits. City of Amboy v. Illinois Cent. R. Co., 236 Ill. 236, 86 NE 238.

**72.** City of Savannah nevessary party to application to cancel deed conveying public street. Kehoe v. Rourke [Ga.] 62 SE 185.

**73.** Where municipality had fee title to streets and mayor and aldermen conveyed portion used as dock for other land to be used as streets, want of original authority was saved by confirmatory act of Aug. 23, 1905 (Acts 1905, p. 595) and grantee acquired title to demised premises. Kehoe v. Rourke [Ga.] 62 SE 185. Act of 1905 (Acts 1905, p. 595), confirming conveyance of public street, not unconstitutional as failing to provide for assessment of damages to abutting owners, general provisions being applicable. Kehoe v. Rourke [Ga.] 62 SE 185.

**74.** Economic Power & Const. Co. v. Buffalo, 59 Misc. 571, 111 NYS 443.

**75. Search Note:** See notes in 19 L. R. A. 619; 27 Id. 696; 3 L. R. A. (N. S.) 849; 16 Id. 651; 1 Ann. Cas. 326.

See, also, Municipal Corporations, Cent. Dig. §§ 644-701; Dec. Dig. §§ 226-255; 28 Cyc. 633-687; 20 A. & E. Enc. L. (2ed.) 1156.

See, also, Abbott, Mun. Corp. §§ 246, 299.

**76.** See Public Contracts, 10 C. L. 1285.

nicipal authority, that a municipality can only contract to the extent and in the manner expressly authorized,[77] and contracts for an unauthorized purpose[78] or not executed in the prescribed manner[79] are invalid. Unauthorized contracts may, however, be legalized.[80] The doctrine of estoppel in pais applies to municipal corporations[81] and has been invoked in behalf of municipalities.[82] Persons dealing with municipal-

77. In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008. Under Village Law (Laws 1897, p. 392, c. 414, § 88, subd. 11), board of trustees may employ attorney at reasonable compensation. Trustees may determine reasonableness of fee. Id. Contract for employment of expert accountant to audit various books not authorized under Village Law (Laws 1897, p. 391, c. 414) § 88, subd. 1, unless where finances could not be managed without assistance. Id. Agreement for elevation and depression of railroads at certain streets with share of cost to be paid by city, intra vires under P. L. 1901, p. 116. Morris & E. R. Co. v. Newark [N. J. Err. & App.] 70 A 194. Under charter of city of Detroit, considering § 241, which provides that contracts in excess of $200 be let to lowest bidder, city had no power to pass ordinance limiting hours of labor by employes of city contractors, etc., which ordinance operated to increase bids. Bird v. Detroit, 153 Mich. 625, 15 Det. Leg. N. 502, 116 NW 1065. Rev. St. 1899, § 6759 (Ann. St. 1906, p. 3327), prohibiting contracts not within scope of powers or expressly authorized, declaratory of common law. Blades v. Hawkins, 133 Mo. App. 328, 112 SW 979. Election by city pursuant to ordinances and statute, to exercise option and purchase waterworks, which election is accepted by company, creates binding contract. Cannot be impaired subsequently by city or legislature. Omaha Water Co. v. Omaha [C. C. A.] 162 F 225. Where city pursuant to implied power grants right to telephone company to construct line, contract is created which cannot be impaired. Southern Bell Tel. & T. Co. v. Mobile, 162 F 523. Contract of municipal corporation for purchase of real estate, as authorized by Deerings' Gen. Laws 1906, p. 898, § 862, subd. 2, construed by same laws as private contracts. Statute of frauds avoided upon possession and payment. Brown v. Sebastopol, 153 Cal. 704, 96 P 363. City's liability for expenditures in maintenance of armory to be imposed only where Military Code strictly complied with. Moriarty v. New York, 59 Misc. 204, 110 NYS 842. Maintenance of armory not duty of municipality. Id. Though courts do not favor defenses of irregularity, a city is not liable for a contract in absolute defiance of the statute. Id. Different question where defense of irregularity goes to power of city. Id.

78. Contract for purchase of waterworks held ultra vires. Phillips Village Corp. v. Phillips Water Co. [Me.] 71 A 474. Under Wilson's Rev. & Ann. St. 1903, c. 12, city of first class has no power to conduct or contract for Fourth of July celebration. Marth v. Kingfisher [Okl.] 98 P 436. Ordinance granting franchise to electric light company for period exceeding 21 years void under Gen. St. 1901, § 1000. Provision for purchase at expiration of 21 years void, as indirect attempt to evade statute. City of Clay Center v. Clay Center L. & P. Co. [Kan.] 97 P 377. A contract by which a municipality undertakes to give control of litigation to an individual is void as against public policy. City of Carbondale v. Brush, 133 Ill. App. 236.

79. Publication of notice for public improvement before ordinance became effective, unauthorized and contract and tax bills issued were void. Cushing v. Russell [Mo. App.] 114 SW 555. Acceptance of new bid privately after rejection of public bids according to charter, a private contract which was prohibited. Attorney General v. Public Lighting Commission [Mich.] 15 Det. Leg. N. 958, 118 NW 935. Acts Pa. March 7, 1901, p. 29, as to form of contracts, merely directory, relating to assumption of pecuniary liability by city, and where city granted rights in public ground, the fact that the form of contract had not been approved by city solicitor and signed by head of proper department pursuant to such statute was no ground for enjoining execution by taxpayer. Larkin v. Allegheny [C. C. A.] 162 F 611.

80. Issue of bonds. Wharton v. Greensboro [N. C.] 62 SE 740. Where contract for purchase of waterworks ultra vires, but retrospective legislation permitted such purchase, terms of act must be complied with and it appearing that vote of inhabitants was prerequisite to acquisition, company could not compel appraisal. Phillips Village Corp. v. Phillips Water Co. [Me.] 71 A 474.

81. City of Colorado Springs v. Colorado City, 42 Colo. 75, 94 P 316; Beadles v. Smyser, 209 U. S. 393, 52 Law. Ed. 849. City having obtained benefit of contract for street improvement, estopped from pleading ultra vires. Peterson v. Ionia, 152 Mich. 678, 15 Det. Leg. N. 389, 116 NW 562. City having accepted benefit and received consideration of contract with another city cannot complain that council acted illegally. City of Colorado Springs v. Colorado City, 42 Colo. 75, 94 P 316. Municipality estopped to assert dormancy of judgments for failure to issue execution within five years, where during such period municipality was carrying out contract to pay judgments in order of rendition, thus preventing action by judgment creditors. Beadles v. Smyser, 209 U. S. 393, 52 Law. Ed. 849. Municipality estopped to forfeit franchise of gas company because of consolidation where franchise to another company authorized such consolidation. Theis v. Spokane Falls Gaslight Co., 49 Wash. 477, 95 P 1074. Validity of contract unaffected by failure of ministerial officer to countersign. Griffin v. Tacoma, 49 Wash. 524, 95 P 1107.

82. May be invoked in behalf of or against municipality. Brown v. Sebastopol, 153 Cal. 704, 96 P 363. Parties estopped to refuse performance of contract to convey land to town where latter was induced to make valuable improvements and received possession and former relieved from assessments. Id. Where street railway agreed to pay city $50,000 in instalments for rights granted under franchise, and constructed road pursuant to such franchise and contract, they were estopped to deny that contract was valid. Potter v. Calumet Elec. St. R. Co., 158 F 521.

ities are charged with notice of the power and authority to contract.[83] Money paid by a municipal corporation upon a void contract may be recovered.[84]

§ 13. *Fiscal affairs and management.*[85]—See 10 C. L. 906—Municipal bonds, including questions relative to the consent of electors to an indebtedness and like matters, are separately treated.[86] Municipal funds and revenues are subject to legislative control.[87] To safeguard against official improvidence, it is frequently provided that no indebtedness be incurred unless provision for its payment be then made,[88] or constitutional provisions may forbid the creation of a debt, except for necessary purposes, without the vote of the people.[89] The state may recognize and order payment of moral obligations.[90] A legislative act providing for the refunding of unearned license fees in the creation of anti-saloon territory is not invalid as compelling a debt by a municipality.[91] In the absence of a statute prescribing the method of adjusting township rights and liabilities, where a new town is organized out of territory of the old, the two corporations may apportion payment of outstanding indebtedness according to their own sense of justice.[92] The property of citizens of a de facto corporation which is dissolved may be made liable for corporate debts incurred.[93] A municipality authorized to levy a tax to create a judgment fund may agree with the judgment creditors to pay the amounts due in the order of their ren-

**83.** Martindale v. Rochester [Ind.] 86 NE 321; Bell v. Kirkland, 102 Minn. 213, 113 NW 271. Cannot complain or failure to comply with contract to serve water outside limits. City of Paris v. Sturgeon [Tex. Civ. App.] 110 SW 459. Only bound to extent of such power. Martindale v. Rochester [Ind.] 86 NE 321. Lack of power of trustees to delegate authority as to determination of fulfillment of contract does not render same entirely void. Id. Where board of trustees had no power to delegate to town engineer authority to conclusively determine fulfillment of contract, parties interested were bound to take notice that delegation was unlawful. Id.

**84.** Independent School Dist. No. 52 v. Collins [Idaho] 98 P 857. Sess. Laws 1899, p. 105, § 82, as amended by Sess. Laws 1905, p. 71, prohibiting contract between school district and trustees with penalty of forfeiture of action on such contracts does not prevent recovery of money paid by municipality. Id.

**85. Search Note:** See notes in 14 L. R. A. 474; 23 Id. 402; 59 Id. 604; 3 L. R. A. (N. S.) 684; 12 Id. 433; 44 A. S. R. 229; 2 Ann. Cas. 986; 3 Id. 435; 5 Id. 858; 6 Id. 760; 7 Id. 150; 10 Id. 209; 11 Id. 976.

See, also, Municipal Corporations, Cent. Dig. §§ 1813-2172; Dec. Dig. §§ 858-1000; 28 Cyc. 1533-1748.

See, also, Abbott, Mun. Corp. §§ 410-495.

**86.** See Municipal Bonds, 12 C. L. 897.

**87.** McSurely v. McGrew [Iowa] 118 NW 415. Revenues of county may be changed, diverted or taken away by legislature, since no one can complain that interest has been affected or contract rights destroyed. Id. Legislature may permit deposit of county funds in banks, and absolve officials from liability, since neither county or inhabitants has vested right in such funds. Id. Legislature may relieve county treasurer of liability under bond. Id.

**88.** Under Bay City Consolidated Charter (Soc. Acts 1907, p. 860, No. 636), §§ 165b, 165c, where expenditures for city contract for lighting plant had not been approved by board of estimates and funds provided, action of council was invalid. Bay City Trac. & Elec. Co. v. Bay City [Mich.] 15 Det. Leg. N. 1039, 119 NW 440. Where charter of St. Louis required certificate of comptroller that sufficient unappropriated funds were on hand in certain fund, certificate appended to ordinance which in effect stated that if council directed transfer from general revenue to street improvement, sufficient sum would be on hand, was sufficient. City of St. Louis v. Termina] R. Ass'n, 211 Mo. 364, 109 SW 641. General Municipal Law (Laws 1892, p. 1734, c. 685, § 5), as to creation of funded debt inapplicable to resolution adopted by taxpayers for purchase of waterworks system, since provision for tax can only be made when debt is certain and definite. Village of Waverly v. Waverly Water Co., 127 App. Div. 440, 111 NYS 541. Burns' law, requiring that clerk or auditor certify that funds sufficient to meet proposed expenditure are in treasury, not applicable to appropriation proceeding in advance of any knowledge as to what the property will cost. Pansing v. Miamisburg, 11 Ohio C. C. (N. S.) 511.

**89.** Swinson v. Mt. Olive, 147 N. C. 611, 61 SE 569. Maintenance of streets necessary expense within Const. art. 7, § 7. Hendersonville Com'rs v. Webb & Co., 148 N. C. 120, 61 SE 670; Town of Hendersonville v. Jordan [N. C.] 63 SE 167.

**90.** Not within Const. art. 1, §§ 19, 20, as to donation. Morris & E. R. Co. v. Newark [N. J. Err. & App.] 70 A 194.

**91.** Laws 1907, p. 297. People v. McBride, 234 Ill. 146, 84 NE 865.

**92.** Agreement binding upon town, at least after performance by one, though perhaps not as to holders of indebtedness. Town of Partridge v. Dennie, 105 Minn. 66, 117 NW 234. Burden of showing that payment of orders was not in discharge of legal obligation of town rests on plaintiff. Id. Settlement by towns and issuance of orders in consummation not shown to be illegal; payment of orders by town treasurer not illegal disbursement of funds. Id.

**93.** Under Act Apr. 13, 1891 (Laws 22d. Leg. p. 95, c. 77). City of Carthage v. Burton [Tex. Civ. App.] 111 SW 440.

dition.[94] Money loaned to a borough under an invalid resolution and used by it may be recovered in an action for money had and received.[95] The borrowing of money is allowable only on clear statutory authority,[96] and the preliminaries prescribed by statute must be complied with.[97] A municipality is not liable for the failure of officers to handle the funds of a sewerage district properly when the city is merely an agent,[98] and restrictions are usually thrown around the investment of public moneys.[99] Proceedings for an examination into fiscal affairs are sometimes provided.[1]

*Funds and appropriations.* See 10 C. L. 907—Public funds can be devoted only to public purposes,[2] and must be expended and accounted for according to law.[3] Where a particular mode of discharging obligations is provided by law, it is exclusive and must be followed,[4] but in the absence of express legislation details of expenditure may be regulated by city authorities.[5] The mode of expenditure is usually governed by charter,[6] and statutory or charter provisions ordinarily require appropriations to

94. Beadles v. Smyser, 209 U. S. 393, 52 Law. Ed. 849.

95. Though note given therefore invalid. Long v. Lemoyne Borough [Pa.] 71 A 211.

96. Comp. Laws, § 2893, does not authorize borrowing of money for maintenance of waterworks. Richardi v. Bellaire 153 Mich. 560, 16 Det. Leg. N. 534, 116 NW 1066.

97. Failure to adopt estimate of cost held fatal to borrowing of money for public improvement. Richardi v. Bellaire, 153 Mich. 560, 15 Det. Leg. N. 534, 116 NW 1066.

98. Broad v. Moscow [Idaho] 99 P 101. Where sewerage district created by Laws 1903, p. 26, indebtedness is against property of district not an obligation of municipality and latter is not liable. Id.

99. Laws 1905, p. 925, c. 396, §§ 1, 2, authorizing investment of moneys received by towns from city of New York as damages for highways or bridges taken, is permissive only, and under Laws 1891, p. 346, c. 164, supervisors of town might devote fund to improvement of highways of town. McConnell v. Allen, 193 N. Y. 318, 85 NE 1082.

1. Proceeding to investigate financial condition of village as authorized by General Municipal Law (Laws 1892, p. 1733, c. 685, § 3), not proceeding against village but individuals constituting board of trustees who must bear expense of defense. In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008. Under General Municipal Law (Laws 1892, p. 1733, c. 685, § 3), as to investigation of financial affairs of village, court will not determine political questions but will merely investigate financial affairs and restrain illegal expenditures. Id.

2. Establishment of training school for teachers, public purpose. Cox v. Pitt County Com'rs, 146 N. C. 584, 60 SE 516. Board of trustees of village has no power to pay premium on official bonds of officers in absence of legislative authority. In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008. Municipal corporation has no power to devote public funds to public entertainments without express legislative direction. Id. Village Law (Laws 1897, p. 393, c. 414), § 88, subd. 22, providing for annual parade of fire department at expense of public does not authorize appropriation for parade outside village limits. Id. Act March 7, 1907 (Laws 1907, p. 94), which requires donation of art museum tax to existing museum, is unconstitutional. Const. art. 10, § 3, providing taxes for public purposes only; § 10, prohibiting tax on cities; art. 4, § 46, prohibiting grant of public money to individuals; art. 4, § 47, prohibiting authorization of city to grant to individuals; art. 9, § 6, prohibiting cities to grant moneys to institutions. State v. St. Louis [Mo.] 116 SW 534.

3. Making and publication of estimates prerequisite to appropriation for village purposes. Comp. St. 1907, § 1842. Dunkin v. Blust [Neb.] 119 NW 8. Under Act 1900 (P. L. p. 321, authorizing $100,000 hospital, board of health could not bind city to pay for plans for $200,000 hospital which plans were valueless in estimating cost of building at $100,000 or less. Ely v. Newark [N. J. Err. & App.] 70 A 159. Sinking fund trustees not allowed to pay condemnation judgment. Ballard v. Harrison, 11 Ohio C. C. (N. S.) 503.

4. City of Pueblo v. Dye [Colo.] 96 P 969.

5. Griffin v. Tacoma, 49 Wash. 524, 95 P 1107. Vote of people to authorize pledge of water receipts to special fund for furthering general plan of utilizing water sources unnecessary. Id. Pierce's Code, § 3644, subd. b. (Ballinger's Ann. Codes & St. § 1077), prescribes procedure when actual indebtedness against city is created, and is inapplicable to pledge water receipts creating no indebtedness. Id.

6. Under charter of city of Rutland, § 31, making treasurer sole custodian of moneys appropriated for schools and disbursing officers thereof on warrants of commissioners, such commissioners cannot draw warrant in aggregate for claims allowed payable to one of their number and thus receive money to pay claims. Harrison v. Davis [Vt.] 70 A 567. Under charter of city of Rutland, § 13, making overseer of poor disbursing officer of bills contracted, such officer may receive sum in aggregate from treasurer. Id. San Francisco charter (art. 3, c. 1, § 1), requiring boards to send estimate of expenditures to supervisors on first Monday in April merely directory and board of public works not negligent in failing to secure appropriation to repair sidewalk, when estimate submitted in June was refused. Taylor v. Manson [Cal. App.] 99 P 410. San Francisco charter, c. 1, art. 3, § 1, requiring written estimate of expenditures, does not require particular defects in various streets to be stated, but general estimate for sidewalk repairs is sufficient. Id. Ordinance creating paymaster not infringement of charter as to payments being expended upon warrants of two of the fire and police commissioners since ordinance

be by ordinance.[7] A city may provide for the management of its internal affairs by directing estimates of expenditures by finance committee whereby the city may make appropriations.[8] Though a statute authorizes the submission of expenditures of a school board, a city council is not deprived of discretion as to the amount to be appropriated.[9] Money in the general fund may be temporarily loaned to other funds.[10] Payment for water supply is a legitimate city purpose, for which the general fund may be used in the absence of charter provisions.[11] A city council has no authority to divert funds appropriated in the annual budget, until the expenditures provided for are paid.[12] The misapplication of city funds may be restrained by a taxpayer.[13] The statutory mode of expenditures may render vouchers a condition precedent to an action.[14] Where a borough council authorizes the payment of a legal debt due, the borough president may be compelled to sign the order, being a mere ministerial act,[15] and mandamus is proper, by the majority of a common council, where the mayor and other officials refused to recognize a valid ordinance as to the payment of water rents into a city's general fund.[16] Where city treasurer paid life insurance premiums with city checks the insurance company was chargeable with notice of the receipt of city funds for an individual debt and city might recover such amount.[17] An

merely provides different method of disbursement. Henniger v. Memphis [Tenn.] 111 SW 1115. Ordinance creating paymaster not violative of Acts 1905, p. 107, c. 54, § 26, prohibiting council from controlling expenditure of appropriations, since ordinance does not control expenditures. Id.

7. Where Charter of St. Louis, art. 5, § 14 (Ann. St. 1906, p. 4839), provided that expenditures be by ordinance, specific and definite, an appropriation for "publishing proceedings, printing, stationery," etc. and "other expenses" could not by latter term include expenses of committee to investigate tax returns. State v. Dierkes, 214 Mo. 578, 113 SW 1077. Consent of borough to location of cemetery, exempting from taxation such lands, upon application accompanied by offer to pay cash and grant other concessions, is an action involving management and control of finances within Borough Act (P. L. 1897, p. 296, § 28) and must be by ordinance. Schinkel v. Fairview Borough [N. J. Law] 69 A 313.

8. Sinclair v. Brightman, 198 Mass. 248, 84 NE 453. City council may provide by ordinance that water appropriations for expenses of that department be recommended by finance committee before being approved. Id. Ordinance prescribing course of procedure as to payment of water expenses mere formal procedure and subject to waiver. Where officials fail to act. Id.

9. As to amount. State v. New Orleans, 121 La. 762, 46 S 798.

10. City should exercise business sense and not imperil general fund. Griffin v. Tacoma, 49 Wash. 524, 95 P 1107. Rev. Charter of Tacoma, § 96, pp. 79, 80, preventing "diversion" of funds without consent of people, does not prevent temporary transfer of general fund to another fund of assured income to expedite business. Id.

11. City of Eau Claire v. Eau Claire Water Co. [Wis.] 119 NW 555.

12. State v. Kennedy, 121 La. 757, 46 S 796.

13. Carstens v. Fond du Lac [Wis.] 119 NW 117; Jordan v. Logansport [Ind.] 86 NE 47. Authorized by Laws 1892, p. 620, c. 301. Steele v. Glen Park, 193 N. Y. 341, 86 NE 26. Resident taxpayer of village having no solicitor may maintain action for himself and village. Pierce v. Hagans [Ohio] 86 NE 519. When officers refuse to act. Independent School Dist. No. 5 v. Collins [Idaho] 98 P 857. Taxpayer may sue in absence of statute requiring particular officer. Brummitt v. Ogden Waterworks Co., 33 Utah, 285, 93 P 828. Cannot arrest extravagant acts when municipality acting within authorized powers. Id. Ordinance enacted regulating relations with water company and providing excessive rates for water used by municipality may be enjoined by taxpayer as waste of public funds, though taxes of others are proportionally raised. Id. Expenditure of village board without publication of estimates pursuant to Comp. St. 1907, art. 1, c. 14, § 1842, may be restrained upon timely action by taxpayer. Dunkin v. Blust [Neb.] 119 NW 8.

14. Where Sess. Laws 1897, p. 275, c. 77, provided for method of expenditures by park board, remedy of person whose claim had been approved but voucher not issued was to compel issuance of voucher and if claim had not been legally adjudged, action against board to ascertain amount due was first step. City of Pueblo v. Dye [Colo.] 96 P 969.

15. Breslin v. Earley, 36 Pa. Super. Ct. 49. Payment of debts of borough lawfully incurred, purely ministerial and ordinarily involves no executive action. Devolves upon council and treasurer. Id.

16. Sinclair v. Brightman, 198 Mass. 248, 84 NE 453.

17. City of Newburyport v. Fidelity Mut. Life Ins. Co., 197 Mass. 596, 84 NE 111. Negligence of auditing officers in failing to discover misappropriations of city treasurer no defense in action for such sums. Id. Offer of proof that inquiry into checks received was practical impossibility properly excluded. Id. Disbursement by insurance company of sums received from misappropriations by city treasurer no defense in action for such sums. Id.

appropriation of money to a debt, placed with a proper officer so as to be available to the debtor, is a tender effective to stop interest.[18]

*Liens* See 10 C. L. 908 to secure moneys due a municipality usually arise in connection with taxes[19] or assessments for public improvements.[20]

*Warrants.* See 10 C. L. 908—A warrant issued by the proper authorities of a city in consideration of a valid indebtedness against it is a written acknowledgment of such indebtedness and promise to pay it.[21] Special assessment warrants for local improvements are not obligations of a city.[22] Warrants issued in excess of the limitation of indebtedness are void,[23] but warrants are not invalidated by a recital of payment from a fund which a city is not authorized to create,[24] or from a fund which was authorized but due to negligence was not created.[25] Charter provision may require that a claim for an official's compensation be presented and audited before a warrant issue.[26] A custodian of municipal warrants is without authority to sell them before funds are raised by the municipality for redemption.[27] The warrants of a de facto corporation constitute a debt evidenced in writing, in regard to the statute of limitations,[28] and the statute does not run against warrants payable from a special fund until such fund is created and contains a sum sufficient to pay the warrants.[29] A city is liable in damages for the wrongful diversion of a special assessment fund without paying outstanding warrants.[30] Presentation and demand for payment is prerequisite to a suit.[31] Where charter provisions as to the issuance of warrants were disregarded, mandamus would not lie to compel such issue.[32]

*Limitation of indebtedness.*[33] See 10 C. L. 908—Legislative[34] or constitutional limitations of indebtedness are usually based upon a percentage of the assessed valuation.[35] It is sometimes provided that the general limit may be extended when the purchase of public utilities is involved.[36] Otherwise the limitation is absolute[37] and

18. City of Eau Claire v. Eau Claire Water Co. [Wis.] 119 NW 555.

19. See Taxes, 10 C. L. 1776.

20. See Public Works and Improvements, 10 C. L. 1307.

21. Rogers v. Omaha [Neb.] 117 NW 119.

22. Holders must look to special fund for payment. Jurey v. Seattle [Wash.] 97 P 107.

23. Issued prior to assessment. Ray v. School Dist. No. 9 [Okl.] 95 P 480.

24, 25. Rogers v. Omaha [Neb.] 117 NW 119.

26. If member of council of San Diego be presumed entitled to compensation, claim must be presented and allowed by auditing committee before warrant could issue charter (St. 1889, pp. 643-729, c. 22), art. 6, c. 2, §§ 1, 2. Woods v. Potter [Cal. App.] 95 P 1125.

27. Technical violation of duty, there being no statute, and measure of damages need not include interest. State v. Kelley [Kan.] 96 P 40.

28. Not barred by two year's limitation. City of Carthage v. Burton [Tex. Civ. App.] 111 SW 440.

29. Rogers v. Omaha [Neb.] 117 NW 119.

30. Jurey v. Seattle [Wash.] 97 P 107.

31. Suit on warrants not maintainable where no allegation and proof of presentation to city treasurer with demand for payment, or facts excusing such presentation. Farmers' Bank of Wickliffe v. Wickliffe [Ky.] 112 SW 835.

32. Charter provisions of city as to contract, provisions that money be in treasury, that controller certify money to be in treasury, etc., disregarded. Garner v. Doremus [Mich.] 15 Det. Leg. N. 735, 117 NW 743.

33. See, also, Municipal Bonds, 12 C. L. 897.

34. Limitation of indebtedness legislative, subject to repeal in toto or exception in case of particular indebtedness. Wharton v. Greensboro [N. C.] 62 SE 740.

35. Constitutional limitation of indebtedness (art. 18) forbids additional debt in excess of 2 per cent. of taxable property unless payable from current revenues not appropriated to another purpose. City of Logansport v. Jordan [Ind.] 85 NE 959.

36. Const. art. 10, § 27, self-executing grant of excess of indebtedness provided by art. 10, § 26, when purchaser or construction of public utility involved. State v. Millar [Okl.] 96 P 747. Sewer a public utility. Id. Convention hall, to be owned, controlled and used by city for public uses, a "public utility" within Const. art. 10, § 27 (Burns' Ed. § 293). State v. Barnes [Okl.] 97 P 997.

37. Limitation operates upon indebtedness without regard to necessity or form thereof. City of Logansport v. Jordan [Ind.] 85 NE 959. Officers cannot be required to levy tax to pay excessive debt. City of Bardwell v. Southern Engine & Boiler Works [Ky.] 113 SW 97. Where sewer not built on installment plan, total assessment could not be paid in annual assessments to avoid limitation of indebtedness. City of Logansport v. Jordan [Ind.] 85 NE 959. Obligation held to arise when sewer completed and accepted. Id.; Jordan v. Logansport [Ind.] 86 NE 47.

an excessive tax levy may be enjoined.[39] A recent case illustrates the determination of whether the purchase of a waterworks company would necessitate the incurring of an excessive indebtedness.[39] An indebtedness existing prior to the first assessment is valid if within the constitutional limitation,[40] and the limitation has been held inapplicable where a statute provided for the return of unearned license fees [41] where a city contracted for a water supply,[42] or to the pledge of water receipts as a special fund.[43] Where a city purchased a park in excess of the limitation, but the taxpayers paid the assessments, the city recorder could not refuse an order for the payment of interest on the ground of illegality.[44] A city which purchased an engine in excess of the limitation was not entitled to retain such engine, giving the seller only the option to rescind, but such seller might enforce his lien by sale.[45]

§ 14. *Torts and crimes.*[46]—See 10 C. L. 900—A municipality exercises functions of two classes, private and governmental.[47] In respect to matters of the former class, it is liable for the negligent acts of its officers and employes in the due course of duty to the same extent as a private corporation.[48] In the exercise of its governmental functions, the municipality possesses the attributes of sovereignty and is not liable in tort in the absence of statute imposing such liability.[49] Under this rule a municipality is not liable for damage due to the operation of its fire [50] or health departments [51] in maintaining workhouses,[52] for the passage and attempted enforcement of void ordinances,[53] or the failure to exercise governmental power,[54] but a municipality may

**38.** City of Logansport v. Jordan [Ind.] 85 NE 959. Taxpayer may enjoin without showing special interest or damage. Jordan v. Logansport [Ind.] 86 NE 47. Pleadings held not to show right to restraining order for building of bridge whereby indebtedness in excess of limitation would be created. Watters v. Mankato [Minn.] 118 NW 358.

**39.** Held not to necessitate. City of Eau Claire v. Eau Claire Water Co. [Wis.] 119 NW 555. Special assessment certificates issued for public improvement offset against existing indebtedness in determining limitation. Id. Money in general fund offset against city's indebtedness. Id. Sinking fund offset for bonds to payment of which it is pledged. Id. Improvement bonds in place of assessment certificate in light of charter not indebtedness of city. Id.

**40.** Indebtedness existing by virtue of organic act (Act May 2, 1890, c. 182, 26 Stat. 81) valid if within 4 per cent limitation as ascertained by such assessment. Ray v. School Dist. No. 9 [Okl.] 95 P 480.

**41.** As creating debt when territory created anti saloon by vote. People v. McBride, 234 Ill. 146, 84 NE 865.

**42.** Contract with water company which was granted franchise for use of streets, whereby city agreed to pay for water used for fire purposes held not to create debt in violation of constitution. Mercantile Trust & Deposit Co. v. Columbus, 161 F 135.

**43. Special fund by city** does not create debt within limitation. Griffin v. Tacoma, 49 Wash. 524, 95 P 1107.

**44.** State v. Hodapp, 104 Minn. 309, 116 NW 589. City recorders' duties ministerial. Id.

**45.** City of Bardwell v. Southern Engine & Boiler Works [Ky.] 113 SW 97.

**46. Search Note:** See notes in 4 C. L. 748; 15 L. R. A. 781, 783; 19 Id. 452; 24 Id. 592; 27 Id. 728; 44 Id. 795; 47 Id. 593; 59 Id. 853; 1 L. R. A. (N. S.) 124, 127, 665, 952; 2 Id. 95, 147, 910; 4 Id. 629; 5 Id. 536, 831, 1005; 6 Id. 1013, 1090, 1094; 9 Id. 146; 10 Id. 785, 925; 12 Id. 537, 638, 696; 13 Id. 1190; 12 A. S. R. 753; 15 Id. 845; 30 Id. 376; 34 Id. 25; 4 Ann. Cas. 516, 624; 6 Id. 268, 437, 823; 7 Id. 807; 8 Id. 465; 9 Id. 851; 11 Id. 185.

See, also, Municipal Corporations, Cent. Dig. §§ 1545-1812, 1215-1217; Dec. Dig. §§ 723-857, 1041-1043; 28 Cyc. 1257-1266, 1775-1777; 20 A. & E. Enc. L. (2ed.) 1191, 1231.

See, also, Abbott Mun. Corp. §§ 950, 1066.

**47.** Hedge v. Des Moines [Iowa] 119 NW 276.

**48.** Bond v. Royston, 130 Ga. 646, 61 SE 491. Municipality acting within charter powers, operating electric lighting plant is liable for negligence of servants as other persons. Posey v. North Birmingham [Ala.] 45 S 663.

**49.** Heape v. Berkeley County, 80 S. C. 32, 61 SE 203; Valentine v. Englewood [N. J. Err. & App.] 71 A 344; Bond v. Royston, 130 Ga. 646, 61 SE 491; Judson v. Winsted, 80 Conn. 384, 68 A 999. Action will not lie in behalf of individual who has sustained special damage from neglect of public corporation performing public duty. Kehoe v. Rutherford, 74 N. J. Law, 659, 65 A 1046.

**50.** Whether manipulation of hydrant was for fire protection purposes held for jury. Judson v. Winsted, 80 Conn. 384, 68 A 999.

**51.** Municipality not liable for contraction of loathsome disease by reason of negligence of city's servants. Evans v. Kankakee. 132 Ill. App. 488.

**52.** Injuries received by workhouse guard resulting from an explosion while acting as workhouse official. Bell v. Cincinnati, 7 Ohio N. P. (N. S.) 35. In putting some prisoners in workhouse, to labor in quarry, and selling some work obtained by them, city is not conducting private corporate enterprise, but is exercising delegated state function, in furtherance of upholding the public peace. Bell v. Cincinnati, 7 Ohio N. P. (N. S.) 35.

**53.** Adoption of unconstitutional and void ordinance and attempted enforcement by levy of tax fi. fa. to collect license does not render city liable. Bond v. Royston, 130 Ga. 646, 61 SE 491. Municipality not liable in

be liable for the destruction of property as a nuisance where in fact not so,[55] or for the failure to abate nuisances.[56] The liability for property injured by mobs is statutory.[57] A municipal corporation is liable for the acts of its officers, servants or agents done within the scope of their authority.[58] A city is not liable for the acts of an independent contractor engaged in the construction of a public work,[59] unless there

tort for mistaken action of city council in attempting to revoke liquor license. Claussen v. Luverne, 103 Minn. 491, 115 NW 643. Not liable for torts of officers save in definitely excepted cases. Exemption based on sovereign character and absence of obligation. Id. Not liable for exercise in good faith of discretionary powers of public, legislative or judicial character. Id. Not generally liable for trespasses of officers in enforcing void enactments in attempted exercise of police powers. Hall v. Dunn [Or.] 97 P 811.

**54.** Failure to enact or enforce ordinance prohibiting horse racing in streets. Marth v. Kingfisher [Okl.] 98 P 436. City's failure to abate nuisance i. e. a building rendering street unsafe for travel, does not render city liable for persons injured in collapse of building when working therein. Stubley v. Allison Realty Co., 124 App. Div. 162, 108 NYS 759.

**55.** Sings v. Joliet, 237 Ill. 300, 86 NE 663. Ultra vires not available as defense. Id. Municipality prima facie liable for unlawful demolition of private building under direction of board of trustees. Faucheux v. St. Martinville, 120 La. 764, 45 S 600. Municipality has burden of proving acts of agents ultra vires. Id.

**56.** Liability of emission of smoke from city's pumping plant not effected by question whether property located within limits. Gordon v. Silver Creek, Sup., 127 App. Div. 888, 112 NYS 64. Cannot avoid liability by plea that pumping plant is maintained in exercise of governmental functions. Id. Under Buffalo City Charter § 395, requiring city to abate nuisancee and Laws 1906, p. 1439, c. 527, § 1, giving city full power in premises and also declaring periodic overflow of Buffalo river to be nuisance, city is liable for refusal to abate such nuisance caused by such periodic overflow. White v. Buffalo, 60 Misc. 611, 112 NYS 485.

**57.** Statutes imposing liability on cities for destruction by mobs are enacted by virtue of police power of state, not on theory of negligence of city in failing to disperse mobs. Sturges v. Chicago, 237 Ill. 46, 86 NE 683. Laws 1887, p. 237, § 1, providing liability of city when property is destroyed by mobs is not unconstitutional as imposing liability for mob assembling beyond its borders, as to so construe statute would be unreasonable. Sturges v. Chicago, 237 Ill. 46, 86 NE 683. Powers are granted by legislature and in return certain duties are exacted, such as that of preserving public peace. Implied contract to preserve peace. Id. Statute as to indemnification of property owners from riots not special legislation. Dawson Soap Co. v. Chicago, 234 Ill. 314, 84 NE 920.

**58.** Doctrine of respondeat superior applies to municipalities only in their corporate capacity. Evans v. Kankakee, 132 Ill. App. 488. City liable for negligent act of employe in swinging bridge against vessel. Lehigh Valley Trans. Co. v. Chicago, 141 Ill. App. 618. Liability of city as to bridge same as street. Id. Municipality liable for wrongful acts of officers expressly authorized or ratified, if not wholly ultra vires. Faucheux v. St. Martinville, 120 La. 764, 45 S 600. Municipality liable for wrongful act by street commissioner while improving street, work being ministerial function and relating to corporate interests. Barree v. Cape Girardeau, 132 Mo. App. 182, 112 SW 724. Instructions failing to recognize doctrine of municipal exemption where in exercise of governmental function, but rather to be based on theory of negligent act incident to defendant's water service, erroneous. Judson v. Winsted, 80 Conn. 384, 68 A 999. Where borough engaged, through employe in exercise of powers granted to it as special privilege of benefit of corporation or inhabitants, rule of respondeat superior applies. Id. City not liable for unauthorized acts of contractor in making change of grade. McQuarter v. St. Joseph [Mo. App.] 114 SW 1140. Acts of agents outside limits of corporate duty to municipality not act of city. Valentine v. Englewood [N. J. Err. & App.] 71 A 344. Wrongful threats of repeated prosecutions made by officers. Butler v. Moberly, 131 Mo. App. 172, 110 SW 682. Officers' refusal to issue peddler's license. Id. Unauthorized acts of inspector in commanding contractor to excavate on land outside alley being paved and graded. McGrath v. St. Louis [Mo.] 114 SW 611. Nothing in contract for grading and paving public alley which required contractor to trespass and injure property, so as to render city joint tort feasor. Id. Municipality not liable for acts of board of health created by public statute for public benefit though members appointed by municipal authorities. Valentine v. Englewood [N. J. Err. & App.] 71 A 344. Appointment does not make them agents. Id. Board of health. Agent of public not city. Prime v. Yonkers, 192 N. Y. 105, 84 NE 571. Where city placed structure in stream which did not affect flow of water until removal of dam by board of health and several years later owner sued for injury to property, no request having been made for removal of abutment, but which city then did remove and built wall to prevent further injury, it was held not to appear as matter of law that city failed to exercise reasonable care. Id. City's duty to change waterway not absolute but merely to exercise reasonable care. Id. In action for false arrest, it is necessary, in order to render village liable, to aver not only that those who made the arrest were officers of village, but also that they were acting at time in their official capacity. Shank v. St. Louisville, 5 Ohio N. P. (N. S.) 510.

**59.** McGrath v. St. Louis [Mo.] 114 SW 611. Failure of street cleaners to turn off hydrant flooding bowling alley. Frank v. Rome, 125 App. Div. 141, 109 NYS 247. Where in grading and paving alley contract specified that improvement be made wholly within alley, fact that wall of adjacent house cracked and fell would not alone authorize

is a duty owing to the public.[60] Where a permit is given for the storing of a specified quantity of explosives and a much larger amount is stored, the city is not liable for the injury caused by the explosion.[61] With respect to facilities designed for the use and benefit of the public, the municipality is not liable for any matter growing out of the plan of the work,[62] but is liable for failure to keep such facilities in repair,[63] or for negligence in the actual execution or construction of its public works.[64] A city's liability may attach in regard to street lighting,[65] and the maintenance of gutters, drains and sewers.[66] Dangerous places in grounds or ways for public use

recovery against city. McGrath v. St. Louis [Mo.] 114 SW 611. No negligence in plan requiring excavation wholly within public alley, to be carried to lower level than foundation of adjacent building, as matter of law. Id. City not liable for injury from collapse of building though city building department approved defective plans. Stubley v. Allison Realty Co., 124 App. Div. 162, 108 NYS 759. Building department not administrative department. Id.

**60.** City liable for defect in street though work of repair in hands of independent contractor. Newman v. New York, 57 Misc. 636, 108 NYS 676.

**61.** New York city not liable for injury caused by explosion of 200 pounds of dynamite stored in street by subcontractor in constructing subway, though city fire commissioner gave permit for storage of 50 pounds. Murphy v. New York, 128 App. Div. 463, 112 NYS 807.

**62.** City in governmental capacity may maintain streets with center elevated and with gutters at side and is not liable for danger inherent in plan adopted. Gallagher v. Tipton, 133 Mo. App. 557, 113 SW 674. City not liable for failure to improve a street. May leave in condition it was. Harney v. Lexington [Ky.] 113 SW 115. Ceasing to maintain gutters after grading school lots not cause for city's liability when no duty to maintain on first instance. O'Neill v. St. Paul, 104 Minn. 491, 116 NW 1114. Trespass not maintainable against borough for injuries to abutting owner resulting from change of grade, there being no actual taking of property. Deer v. Sheraden Borough, 220 Pa. 307, 69 A. 814.

**63.** City liable for negligent construction or maintenance of plan of streets, as to gutters or cross walks. Gallagher v. Tipton, 133 Mo. App. 557, 113 SW 674. Municipality not insurer against damage from construction works but obligation measured by exercise of reasonable care and liability only predicated upon neglect. Ettlinger v. New York, 58 Misc. 229, 109 NYS 44. In action for consequential injury to property by city's act in leaving abutment in stream, where individual could not question authority of city to so do, city was only liable for negligence in construction. Prime v. Yonkars, 192 N. Y. 105, 84 NE 571. City liable in damage for faulty construction of street and gutter in front of abutting owner's premises or failing to keep in repair, if notified of defect, and no contributory negligence. Edwards v. Williamsport, 36 Pa. Super. Ct. 43.

**64.** Municipality not insurer for works under construction but liability measured by reasonable care, based on neglect. Silverberg v. New York, 59 Misc. 492, 110 NYS 992. In lawful improvement of alley where owner of adjacent house knew that excavation would be lower than foundation, such knowledge dispensed with any formal notice by city of work. McGrath v. St. Louis [Mo.] 114 SW 611.

**65.** Liable for negligence in the maintenance of public ways. Town of Newcastle v. Grubbs [Ind.] 86 NE 757. Municipality exercises quasi judicial function in establishing street lights. Andrews v. Elmira, 128 App. Div. 699, 113 NYS 711. Error in exercising function of establishing street lights not negligence. Id. Failure to light highway may be negligence. Id. Cities and towns not liable when under no statutory duty to light highways. Town of Spencer v. Mayfield [Ind. App.] 85 NE 23. Municipality not liable for discretionary acts. Town of Spencer v. Mayfield [Ind. App.] 85 NE 23.

**66.** Municipality liable for damages caused by careless construction of gutters, drains, sewers. Edwards v. Williamsport, 36 Pa. Super. Ct. 43. Liable for discharge of sewer into open ditch near residence causing obnoxious odors. Phillips v. Armada [Mich.] 15 Det. Leg. N. 983, 118 NW 941. Liable for collection of sewage and discharge into stream to injury of riparian owner. Kellogg v. Kirksville, 132 Mo. App. 519, 112 SW 296. Municipality has no right to divert surface water by artificial drains and injure land otherwise not subject to such water. Kehoe v. Rutherford, 74 N. J. Law, 659, 65 A 1046. Exemption of municipality does not extend to actions where injury is result of active wrong doing chargeable to corporation. Id. Liable for discharging in direction where it would not naturally flow on private property. Prime v. Yonkers, 192 N. Y. 105, 84 NE 571. City not under obligation to provide system of sewerage to carry off surface water. Id. City sued for pollution of stream may not deduct sum representing injury inflicted if without sewers, where no evidence to determine allowance. Doremus v. Paterson [N. J. Eq.] 69 A 225. City may not collect water from large area and cast on lands where it would not otherwise flow, to injury of owner without compensation. Id. Responsible for street wash diverted into sewers emptying in stream by artificial means. Id. Not responsible for street wash going into stream though in time of rain and on account of paved surface more will pass into stream. Id. Evidence insufficient to show city's right by prescription to pollute stream. Id. Not invasion of riparian owners' rights until city poured more sewage than stream could take care of. Id. City not liable for flooding of cellar from obstruction of water course where plaintiff wrongfully without city's knowledge connected cellar by drain with such water course and such water course was not

must be guarded with reasonable prudence.[67] Actual or constructive notice is prerequisite to a municipality's liability for the defective condition of public places or facilities.[68]

§ 15. *Claims and demands.*[69] See 10 C. L. 912—Statutes usually require that notice be given to municipalities within a limited time of demands for injuries re-

ueed as sewer. Levasseur v. Berlin [N. H.] 71 A 628. Liable when in **repairing** sewer pipe of one who has lawfully connected therewith is stopped up and bursts. Googin v. Lewiston, 103 Me. 119, 68 A 694. Under Priv. and Sp. Laws 1903, p. 415, c. 263, giving board of public works care and control of sewers, city is nevertheless liable for defective repairing the same as if council or other municipal agency was charged with duty. Id. City required by charter to promptly repair sewers not liable for obstruction not caused by negligence. Katzenstein v. Hartford, 80 Conn. 663, 70 A 23. Damages for failure to remove obstruction in sewer only recoverable if negligence in failure to make repairs after notice. Id. No liability for **diversion of surface waters when incident to improvement.** Construction of retaining wall in grading school lots. O'Neill v. St. Paul, 104 Minn. 491, 116 NW 1114. Not liable for discharge of surface water resulting solely from grading streets pursuant to legislative authority. Prime v. Yonkers, 192 N. Y. 105, 84 NE 571. No action for drainage of public road causing diversion of surface water. Heape v. Berkeley County, 80 S. C. 32, 61 SE 203. City not liable for injury caused by drain where no allegation that city made drain or acted as to it, and petition permitted conclusion that drain was natural until filled with debris. Harney v. Lexington [Ky.] 113 SW 115. Drainage district organized pursuant to Laws 1879, p. 120, and amendments is liable for damage resulting from construction of levee whereby flow of river obstructed and water diverted upon other lands. Bradbury v. Vandalia Levee & Drainage Dist., 236 Ill. 36, 86 NE 163. Public involuntary quasi corporation, being mere political subdivison of state to aid in administration of government, not liable for negligence of agents. Id. Drainage district not created for political purpose or administration of civil government. Id. Where town permitted defect in sidewalk, and abutting owner with knowledge of such defect collected surface water and discharged same on sidewalk, occasioning an injury, either was liable. Field v. Gowdy, 199 Mass. 568, 85 NE 884.

**67.** Hungerford v. Waverly, 125 App. Div. 311, 109 NYS 438; Town of Spencer v. Mayfield [Ind. App.] 85 NE 23. City not insurer. Kawiecka v. Superior, 136 Wis. 613, 118 NW 192; Romanowski v. Tonawanda, 127 App. Div. 814, 112 NYS 105; Town of Spencer v. Mayfield [Ind. App.] 85 NE 23. Liability because of failure to keep streets in repair arises from the fact that a city has exclusive control of streets and power to provide for safe condition. Schigley v. Waseca [Minn.] 118 NW 259. Liability may be imposed by implication from authority and resources given city as well as by specific terms of statute. Ruth v. Omaha [Neb.] 118 NW 1084. City liable for obstruction in street by contractor where notice to superintendent and no abatement of nuisance, or means to warn public. Stockton Automobile Co. v. Confer [Cal.] 97 P 881. Negligence of city in excavating street and failing to maintain light and barriers. Village of Odin v. Nichols, 133 Ill. App. 306. City operating drawbridge as part of street acts in private rather than governmental capacity and is liable for negligence. Lehigh Valley Transp. Co. v. Chicago, 237 Ill. 581, 86 NE 1093. City liable for injuries from operation of bridge left forming part of public street and under city's control, in same manner as to streets. Gathman v. Chicago, 236 Ill. 9, 86 NE 152, afg. 139 Ill. App. 253. Liable for negligence of employes of city bridge tender, when such employes performed work with knowledge of city, though not paid by city. Id. City liable for use of wall belonging to abutting owner, for support of street, pavement and gutter and where by negligence such wall destroyed, owner being free from negligence. Edwards v. Williamsport, 36 Pa. Super. Ct. 43. Horse race not defect of highway or dangerous condition rendering city liable to traveler injured. Marth v. Kingfisher [Okl.] 98 P 436. Municipality not liable where proximate cause of injury duè to fellow-passenger. Hinckley v. Danbury [Conn.] 70 A 590.

**68.** City liable for defective sidewalk only in case of notice, so that defect could be repaired. Edwards v. Cedar Rapids, 138 Iowa, 421, 116 NW 323. Notice to officers or street commissioners, not notice to city. Id. Issuance of permit for replacing telephone pole charges city with knowledge of depression of earth following setting of new pole. Merritt v. Kinlock Tel. Co. [Mo.] 115 SW 19. Proof of notice of defect in cinder sidewalk unnecessary where defect apparent when city built same. City of Covington v. Webster, 33 Ky. L. R. 649, 110 SW 878. Existence of defect in sidewalk for less than hour at night not negligence to charge municipality. Ferguson v. Waverly, 128 App. Div. 697, 112 NYS 891. Where sewer built of wood which city knew would decay, knowledge of existence of defect was at least for jury. City council of Montgomery v. Comer [Ala.] 46 S 761. Evidence of defect in water main causing overflow of water which continued five hours after notice sufficient to establish prima facie case of negligence. Ettlinger v. New York, 58 Misc. 229, 109 NYS 44. Constructive notice where defect exists long time. Edwards v. Williamsport, 36 Pa. Super. Ct. 43. No such condition as to charge city with constructive notice of defective sidewalk. Romanowski v. Tonawanda, 127 App. Div. 814, 112 NYS 105. Evidence insufficient to show constructive notice to city or stone in street. Orser v. New York, 193 N. Y. 537, 86 NE 523, rvg. 127 App. Div. 335, 111 NYS 670. Notice to authorities that street light was out of repair question of mixed law and fact. Town of New Castle v. Grubbs [Ind.] 86 NE 757.

**69. Search Note:** See notes in 10 C. L. 913; 55 A. S. R. 203.

See, also, Municipal Corporations, Cent. Dig. §§ 2173-2188; Dec. Dig. §§ 1001-1015; 28

ceived by reason of defective streets, sidewalks, or otherwise.[70] These notices must be sufficient in point of form [71] and contents,[72] though a substantial compliance is ordinarily sufficient [73] and defects may be waived.[74] Injunction lies at the instance of a taxpayer to prevent the payment of an illegal claim.[75] A city council may exercise reasonable discretion in the settlement of claims,[76] but the surrender of a valuable claim when there is no room for substantial controversy is prohibited.[77] A

Cyc. 1748-1754; 20 A. & E. Enc. L. (2ed.) 1231.

See, also, Abbott, Mun. Corp. §§ 484-495.

**70.** See Highways and Streets, 11 C. L. 1720, for rulings under statutes relating wholly to streets. Sess. Laws 1903, p. 457, c. 175, § 1, requiree notice of time, place and cause of injury due to city's negligence within 90 days. City of Colorado Springs v. Neville, 42 Colo. 219, 93 P 1096. Charter of city of Grand Rapids construed and §§ 485, 486, held to provide for two notices, one, as preliminary, to state briefly location of defect and general character, and the other as specific notice in detail of plaintiff's claim. Moulter v. Grand Rapids [Mich.] 15 Det. Leg. N. 970, 118 NW 919. Rev. St. § 2326, as to filing of claims restricted to subject-matter of legislation, or street improvements, and does not include damages for nuisance created and maintained by city. City of Ironton v. Wiehle, 78 Ohio St. 41, 84 NE 425. Hurd's Rev. St. 1905, § 2, par. 7, requires six months' notice in case of personal injury. City of Waukegan v. Sharafinski, 135 Ill. App. 436. Both notice of injury for which city of second class is liable, as required by Laws of 1898, p. 438, c. 182, § 461, as amended Laws 1904, p. 1270, c. 504, and notice of intent to sue as required by Laws 1886, p. 801, c. 572, are prerequisite. Higgins v. Albamy, 114 NYS 516. Statute mandatory. Smith v. Chicago Heights, 141 Ill. App. 588. Nonaction of council not waiver of notice. Ridgeway v. Escanaba [Mich.] 15 Det. Leg. N. 623, 117 NW 550. Object of notice to enable city to prepare for trial if no settlement. Hase v. Seattle [Wash.] 98 P 370. Enable municipal authorities to determine place and time of accident. Purdy v. New York, 193 N. Y. 521, 86 NE 560, rvg. 126 App. Div. 320, 110 NYS 822. Fact that suit brought without statutory notice does not preclude dismissal of suit, giving of required notice, and institution of new suit. Village of Odin v. Nichols, 133 Ill. App. 306. Provisions requiring notice will be upheld only when reasonable aiding in administration of justice. Hase v. Seattle [Wash.] 98 P 370. Provision of ordinance requiring residence of claimant for one year prior to injury unreasonable, especially where another provision prohibited action on claims after 60 days from presentation. Id.

**71.** Under charter of Salem, § 13 (Laws 1899, p. 932), itemizing and verification of claim against city is condition precedent to liability. Richardson v. Salem [Or.] 94 P 34. Claim for services defective on demurrer. Id. Charter provision requiring claims to be verified and in writing mandatory. Farley v. Lockport, 113 NYS 702. Action barred until required claim vertified as required and filed. Id. City council may waiver charter provision as to writing and verifying claim as to investigation, but filing requisite before payment. Id. Claim for personal injury to married woman, community property and verification by husband, alone sufficient. Matthews v. Spokane [Wash.] 96 P 827. Claims subject to **amendment** after filing. Hanrahan v. Janesville, 137 Wis. 1, 118 NW 194. Mere ambiguity as to ownership not jurisdictional defect on appeal from disallowance on merits, and amendment proper. Id.

**72.** Under Comp. St. Neb. 1901, c. 12a. § 22, notice need not include statement of nature and extent of both accident and injury, but reference to either with full particulars as to nature and extent thereof sufficient. Bemis v. Omaha [Neb.] 116 NW 31. No objection that notice also contains claim for damages for injury. Carson v. Hastings [Neb.] 116 NW 673. Notice of injury by falling on crosswalk at intersection of two streets, though ambiguous as not claim entitled, "City of Janesville to Hanrahan and Lindquist, Attorneys for M. J. Benson," ambiguous as to ownership. Hanrahan v. Janesville, 137 Wis. 1, 118 NW 194. Indicating which crosswalk is sufficient within Code § 1051. Buchmeier v. Davenport, 138 Iowa, 623, 116 NW 695. Under Laws 1886, p. 801, c. 572, § 1, as to notice, statement that plaintiff was injured "whilst walking along the sidewalk of M. street, borough of Brooklyn," is insufficient, such street being a mile long. Purdy v. New York, 193 N. Y. 521, 86 NE 560, rvg. 126 App. Div. 320, 110 NYS 822. Notice of injury of claimant stating that "during the time herein mentioned, and long prior thereto, she was a resident of Seattle, King county, Wash.," sufficient compliance with ordinance requiring place of residence for year prior to accident. Jones v. Seattle [Wash.] 98 P 743.

**73.** Statutes to be liberally construed. Bemis v. Omaha [Neb.] 116 NW 31; Ridgeway v. Escanaba [Mich.] 15 Det. Leg. N. 623, 117 NW 550; Ruth v. Omaha [Neb.] 118 NW 1084; Buchmeier v. Davenport, 138 Iowa, 623, 116 NW 695; Hanrahan v. Janesville, 137 Wis. 1, 118 NW 194. Notices to be construed as liberally as pleadings. Hase v. Seattle [Wash.] 98 P 370. Not with technical niceties of legal pleading. Smith v. Elberton [Ga. App.] 63 SE 48. Sufficiency to be determined not only from wording but in light of extraneous evidence of situation and surroundings. Carson v. Hastings [Neb.] 116 NW 673; Buchmeier v. Davenport, 138 Iowa, 623, 116 NW 695.

**74.** Failing to return notice not waiver of defects. Purdy v. New York, 193 N. Y. 521, 86 NE 560, rvg. 126 App. Div. 320, 110 NYS 822.

**75.** Allowance of unfounded claim not adjudication estopping taxpayer's action. Fullerton v. Des Moines [Iowa] 115 NW 607.

**76.** Fullerton v. Des Moines [Iowa] 115 NW 607.

**77.** Farnesworth v. Wilbur, 49 Wash. 416, 95 P 642. Gifts to private individuals beyond power of town. Id.

committee of aldermen to report as to a city's liability on claims are not agents for the purpose of making admissions.[78] A city taking over a waterworks and lighting plant is liable for purchases for maintenance and operation.[79] In the absence of statute, claims against municipalities must generally be presented and payment demanded before interest is allowable.[80] Cities are not entitled to priority over other creditors of a defaulting public officer in the collection of claims on his bond.[81]

§ 16. *Actions by and against.*[82]—See 10 C. L. 914—A constitutional provision for suits against the state is inapplicable to municipalities,[83] but ordinarily a city in exercising its corporate powers may sue and be sued.[84] Actions against a municipality must be brought in the county where it is situated.[85] A municipality alone may not maintain a bill to abate an obstruction of a city street.[86] A person selling goods to a city can only recover the market value of the same.[87] A county appropriating a portion of a road tax which should be paid to a city or village is liable for such sum.[88] Substantial compliance with the statutes requiring presentation of claims must be alleged,[89] and the payment of claims cannot be enforced by mandamus in some states.[90] A bill to charge a municipality as voluntary trustee under a

78. Walker v. Waterbury [Conn.] 69 A 1021. Where order for payment of claim passed over mayor's veto by two-thirds vote including vote of alderman who was claimant and which vote was necessary to pass, such record is not admissible to prove city's liability on claim. Walker v. Waterbury [Conn.] 69 A 1021.

79. Taking authorized by Kirby's Dig. § 5675. Wynne Improvement Dist. No. 1. v. Brown [Ark.] 109 SW 1010.

80. Appleton Waterworks Co. v. Appleton, 136 Wis. 395, 117 NW 816. Demand necessary in view of provision of city charter requiring presentation of claim before action. Id.

81. United States Fidelity & Guar. Co. v. Rainey [Tenn.] 113 SW 397.

82. **Search Note:** See notes in 2 C. L. 987; 4 Id. 753; 4 L. R. A. (N. S.) 782; 5 Id. 187; 10 Id. 478; 13 Id. 157; 14 Id. 298; 2 A. S. R. 92; 3 Ann. Cas. 749; 4 Id. 426.

See, also, Municipal Corporations, Cent. Dig. §§ 2189-2214; Dec. Dig. §§ 1016-1040; 28 Cyc. 1755-1774; 20 A. & E. Enc. L. (2ed) 1231; 14 A. & E. Enc. P. & P. 221.

See, also, Abbott, Mun. Corp. §§ 1107-1168.

83. Goldtree v. San Diego [Cal. App.] 97 P 216.

84. Municipality sued for damages resulting from broken sewer, a duty assumed. Cairns v. Chester City, 34 Pa. Super. Ct. 51. Village may enjoin removal of lateral support from street. Village of Haverstraw v. Eckerson, 124 App. Div. 18, 108 NYS 506. Village a municipal corporation (Laws 1892, p. 1801, c. 687, § 3, General Corporation Law), and may sue and be sued by Const. Art. 8, § 3, providing that all corporations shall have the "right to sue and shall be subject to be sued in all courts in like cases as natural persons." Id. "Like" means "having same or nearly same appearance, qualities, or characteristics; resembling; similar to; equal in quantity, quality or degree." Id. Rev. St. (1st ed.) p. 349, p. 1, c. 11, tit. 4, art. 1, § 5, as amended by Laws 1866, p. 1146, c. 534, and title 5, § 1, is repealed by Town Law (Laws 1890, p. 1243, c. 569, § 240), but latter law by § 182 authorizes suit by town against former officers for accounting. Town of Pelham v. Shinn, 113 NYS 98. Section 182 rather crude but intention manifest. Id. Injunction against city to restrain cutting off of water supply denied where no irreparable injury. Anderson v. Berwyn, 135 Ill. App. 8.

85. Legislature has conferred attribute of residence in counties. Maisch v. New York, 193 N. Y. 460, 86 NE 458, afg. 127 App. Div. 424, 111 NYS 645. Under Const. art. 6, § 14, and Code Civ. Proc. §§ 340, 341, as to jurisdiction of county courts when considered in connection with Laws 1897, p. 1, c. 378, § 1; Laws 1901, p. 1, c. 446, § 1, whereby city of New York is domestic corporation; such city is not resident. Principal place of residence is where chief governmental functions are exercised. Id. Of Kings County. Id. County court of Kings county has no jurisdiction of city of New York in county of New York. Id.

86. State proper party. Alabama Western R. Co. v. State [Ala.] 46 S 468.

87. Burke v. New York, 108 NYS 650.

88. May be proceeded against directly and fact that county treasurer and bondsman are liable is immaterial. City of Chadron v. Dawes County [Neb.] 118 NW 469.

89. Declaration failing to allege notice defective. Smith v. Chicago Heights, 141 Ill. App. 588. Where charter provided for filing of claim for damages within 30 days, and complaint for diversion of special assessment fund without paying warrants failed to allege such filing, it was insufficient. Jurey v. Seattle [Wash.] 97 P 107. Where complaint alleged filing of notice of intention to sue as required by Laws 1886, p. 801, c. 572, which allegation was not denied, filing of such notice was not in issue. Bogart v. New York, 112 NYS 549. Where action against city complaint alleged filing of notice of intent to sue, city would be presumed to have knowledge of filing and denial of knowledge or information sufficient to form belief as to such allegation is frivolous. Id. Where original petition alleged notice as given to officers, and copy appended to petition as exhibit showing substantial compliance with statute, amendment specifically setting out damages presents no variance. Smith v. Elberton [Ga. App.] 63 SE 48.

90. Under Act No. 5, p. 10, § 1, of 1870 (Extra Session), payment of claims from city

legislative act for the payment of bonds may be barred by laches.[91] In an action or warrants where the petition avers a lien on funds collected and prays judgment for the debt with collections to be applied in payment, the lien on the general fund is not waived.[92] Under proper circumstances and where not forbidden by statute, mandamus will lie to compel a levy of taxes to pay a judgment against a county.[93] Ordinarily, taxpayers may enjoin acts injurious to property, unauthorized contracts, unlawful disposition of funds and similar acts resulting in the squandering of taxpayers' property.[94] The award of an execution against a city [95] or costs [96] may be error. A mechanics' lien judgment against a city fund may be authorized.[97]

**Municipal Courts; Murder; Mutual Accounts; Mutual Insurance,** see latest topical index.

## NAMES, SIGNATURES AND SEALS.

§ 1. Names, 950.
§ 2. Signatures, 956.
§ 3. Seals, 958.

*The scope of this topic* is noted below.[98]

treasury cannot be enforced by mandamus and, though city diverted funds, mandamus will not lie. State v. Kennedy, 121 La. 757, 46 S 796.

**91.** When refusal to pay interest 25 years before and bonds matured 8 years before. Eddy v. San Francisco [C. C. A.] 162 F 441.

**92.** City of San Antonio v. Alamo Nat. Bank [Tex. Civ. App.] 114 SW 909. Petition to recover sum due on warrants, though showing uncollected sum on back tax rolls sufficient to pay plaintiff's claim, is sufficient without alleging diversion of same or denying plaintiff's right to receive payment of warrants from current fund of that year. City of San Antonio v. Alamo Nat. Bank [Tex. Civ. App.] 114 SW 909.

**93.** Lake County Com'rs v. Schradsky, 43 Colo. 84, 95 P 312. Funding bond act of 1899 (3 Mills' Ann. St. Rev. Supp. § 780a, et seq.), provides additional means for payment of judgment against county, but does not forbid mandamus. Lake County Com'rs v. Schradsky, 43 Colo. 84, 95 P 312. No abuse in grant of mandamus to pay judgment against county though debt large. Id.

**94.** See, also, previous sections. Carstens v. Fond du Lac [Wis.] 119 NW 117; Jordan v. Logansport [Ind.] 86 NE 47; Larkin v. Allegheny [C. C. A.] 162 F 611. Taxpaying freeman entitled to be heard in suit against city which may involve execution against his property. Nichols v. Ansonia [Conn.] 70 A 636. Cannot enjoin acts purely legislative or discretionary. Brummitt v. Ogden Waterworks Co., 33 Utah, 285, 93 P 828. Taxpayer may sue on behalf of a municipality to recover money paid on void contract where proper officials refuse to act. Independent School Dist. No. 5 v. Collins [Idaho] 98 P 857. Injunction by taxpayer when expenditure in disregard of statutory method. Dunkin v. Blust [Neb.] 119 NW 8. Where Ky. St. 1903, § 3175, provided for recovery of taxes collected and expended, under ordinance not specifying purpose of tax, by city solicitor, or if he failed for six months "any person" might institute action, petition by citizen without allegations showing him in fact to be taxpayer was sufficient. Duncan v. Combs [Ky.] 115 SW 222. Taxpayers' act (Laws 1881, p. 709, c. 531, as amended Laws 1892, p. 620, c. 301), designs to prevent illegal usurpation of powers by public officials and to restrain illegal acts, and taxpayers may enjoin only when acts are without power or when fraud is charged. Farley v. Lockport, 113 NYS 702. Laws 1892, p. 620, c. 301, providing that officers or agents of municipality may be restrained from illegal acts or committing waste and be compelled to restore funds unlawfully appropriated, not repealed by implication. Steele v. Glen Park, 193 N. Y. 341, 86 NE 26. Village proper party defendant. Id. Under Laws 1892, p. 620, c. 301, authorizing taxpayer's action in case of illegal acts of officers, unlawful appropriations, etc., plaintiff need not be resident. Steele v. Glen Park, 193 N. Y. 341, 86 NE 26.

**95.** Award of execution improper. Wicker v. Alton, 140 Ill. App. 135; City of Pueblo v. Dye [Colo.] 96 P 969. Judgment erroneously awarding execution against city may be modified by striking. Id.

**96.** Error to render judgment against city for costs. City of Carbondale v. Brush, 133 Ill. App. 236; Town of Meacham v. Lacey, 133 Ill. App. 208.

**97.** Goldtree v. San Diego [Cal. App.] 97 P 316.

**98.** This topic treats of names only in a general way; for a more specific treatment see special titles as Corporations, 11 C. L. 810; Partnership, 10 C. L. 1100; Trade Marks and Trade Names, 10 C. L. 1865. See Acknowledgments, 11 C. L. 25, as to seal of notary as to effect of seal as proof of official character; Agency, 11 C. L. 60, as to power of agent to execute instrument under seal; Arbitration and Award, 11 C. L. 262, as to necessity that submission to arbitration should be under seal; Attachment, 11 C. L. 315, for necessity of seal in attachment affidavit; Corporations, 11 C. L. 810, as to necessity of affixing corporate seal; Estoppel, 11 C. L. 1326, as to estoppel by agreement under seal; Frauds, Statute of, 11 C. L. 1609, as to necessity of seal to satisfy requirement of statute of frauds;

§ 1. *Names.*[99]—See 10 C. L. 915—As a general rule the common law recognizes but one Christian name [1] and takes no account of middle names or initials,[2] but this rule is ordinarily applied as excusing only their omission and not their misstatement.[3] While it is a general rule that initials cannot be substituted for Christian names in judicial proceedings,[4] this rule has been greatly relaxed and the use of initials [5] or contractions [6] is frequently sanctioned where identity of person is clear.[7] Parol evidence is admissible to show such identity.[8] Except where it may be cured by amendment,[9] material variance of name is fatal in judicial proceedings,[10] but to be material the variance must be such as to mislead the opposite party to his prejudice.[11] The suffixes "Jr." and "Sr." are not part of a name,[12] but the word "trustee" inserted after the name of the grantee in a deed is not merely descriptio per-

Justices of the Peace, 12 C. L. 496, as to necessity of official seal to process issued by justice; Municipal Corporations, 10 C. L. 881, as to effect of seal of city as evidence of passage of ordinance; Appeal and Review, 11 C. L. 113, as to necessity for sealing bill of exceptions.

**99. Search Note:** See notes in 14 L. R. A. 690; 17 Id. 824; 39 Id. 423; 2 L. R. A. (N. S.) 1089; 12 Id. 600; 15 Id. 129; 16 Id. 550; 100 A. S. R. 322; 5 Ann. Cas. 894.

See also, Names, Cent. Dig.; Dec. Dig.; 29 Cyc. 260-278; 21 A. & E. Enc. L. (2ed.) 805; 14 A. & E. Enc. P. & P. 270.

1. Carney v. Bigham [Wash.] 99 P 21; D'Autremont v. Anderson Iron Co., 104 Minn. 165, 116 NW 357.

2. Carney v. Bigham [Wash.] 99 P 21; D'Autremont v. Anderson Iron Co., 104 Minn. 165, 116 NW 357.

3. Insertion of wrong initial in service by publication held fatal. D'Autremont v. Anderson Iron Co., 104 Minn. 165, 116 NW 357. Insertion of wrong initial in name of true owner of property in foreclosure proceedings. Carney v. Bigham [Wash.] 99 P 21.

4. Affidavit on which attachment was based held bad and not amendable, defendant debtor's Christian name not being given in a legal sense, initials being insufficient. McGrew v. Steiner [N. J. Law] 71 A 1122.

5. In Georgia action may properly be instituted by employing initials instead of full Christian name of defendant, men being frequently known by initials of their Christian names. Minchew v. Nahunter Lumber Co. [Ga. App.] 62 SE 716. "W. B. Priest" proper in indictment of "Wm. B. Priest." State v. Priest [Mo.] 114 SW 949. Where notice to take a deposition gave Christian names of a witness by initials, witness appeared and gave material testimony in action, fact that he subscribed deposition by full Christian names, first letters thereof being the same as initials given in notice, held not to require extrinsic evidence to show that witness testifying was same person as witness named in notice. Walters v. Rock [N. D.] 115 NW 511. Indorsement by initials on envelope sufficient to identify party if additional identification were necessary. Id. Evidence, in connection with Rev. St. 1899, § 3150 (Ann St. 1906, p. 1788), held to sustain finding that Lewis named as defendant in tax suit was owner even though first two initials of defendant therein were "J. W." while initials of grantee were "W. J." Id.

6. "Jno." is generally and correctly used as an abbreviation, abridgment or contraction of the Christian proper name "John," hence indictment by name of "Jno. M." and conviction by name of "John M." proper. McDonald v. State [Fla.] 46 S 176.

7. Abstract of title not vitiated by improper change from contraction to names in full where evidence was sufficient to show that patentees to land, S. Durley and G. T. Gorham, were same as subsequent grantors, Samuel Durley and Gardner T. Gorham. White v. Bates, 234 Ill. 276, 84 NE 906.

8. D'Autremont v. Anderson Iron Co., 104 Minn. 165, 116 NW 357. Whether or not the "Lewis" named as grantee was person who was grantor under name of "Leus" or "Luis" held question of fact there being sufficient evidence from which question could be determined. Einstin v. Holladay-Klotz Land & Lumber Co., 132 Mo. App. 82, 111 SW 859.

9. Rev. Laws 1905, § 4157. D'Autremont v. Anderson Iron Co., 104 Minn. 165, 116 NW 357. Mistakes in names may be corrected as a matter of course where a party appears in court. Simon v. Underwood, 115 NYS 65.

10. Variance, indictment charging "C. Wiltis" proof showing "C. Willis," fatal. Carnes v. State, 53 Tex. Cr. App. 490, 110 SW 750. Indictment alleging deceased's name to be "Frederico Tersero," proof showing name to be "Fredrico Tersero," that in Spanish the two names sound alike, deceased went by both names and that letter "r" was silent in pronunciation of name in Mexican, variance held not fatal. Hernandez v. State, 53 Tex. Cr. App. 468, 110 SW 753. Indictment for bigamy name of defendant's first wife "Rosa Nevill," license showing "Rosa Nevitt"; variance immaterial, proof showing that clerk inadvertently wrote two "t's" instead of two "l's" and that defendant knew that names applied to same person then living in same county. Rice v. Com., 31 Ky. L. R. 1354, 105 SW 123.

11. Kelly v. Kuhnhausen [Wash.] 98 P 603.

12. Property assessed to "Peter Peterson, Jr." redemption expiration notice addressed to "Peter Peterson," held sufficient, "Jr." and "Sr." not being part of a name. Peterson v. Wallace [Iowa] 118 NW 87.

sonae.[13] A presumption of identity of person arises from identity[14] or close similarity in names.[15]

One may sue another by the name by which he is known and by which he contracts[16] and where a person uses two names proceedings may be instituted against him by either,[17] where in fact known by two names it is immaterial that he is not equally known by both.[18] At common law a man may change his name at will and sue and be sued in any name in which he is known and recognized.[19] So, also, may he adopt any name in which to prosecute his business[20] and sue, and be sued, in such name.[21] A change in a woman's surname is presumptively brought about by marriage.[22] A fictitious name cannot be used for the defendant except where his true name is unknown,[23] and where a fictitious name is used, the proceedings must be amended to set forth the true name as soon as such name is discovered.[24]

*Idem sonans.*[See 10 C. L. 916]—The rule is that absolute accuracy in spelling names is not required in legal documents or proceedings, and that the name, though incorrectly spelled, if it conveys to the ear when pronounced a sound practically identical with the sound of the correct name, is sufficient.[25] Names are idem sonans if the attentive ear finds difficulty in distinguishing the names when pronounced, or if common and long-continued usage has by corruption or abbreviation made them identical in pronunciation.[26] Whether one name is idem sonans[27] with another is a ques-

**13.** Use of word "trustee" in recorded deed sufficient to put judgment creditor on notice and inquiry as to status of real property. H. B. Claflin Co. v. King [Fla.] 48 S 37.

**14.** Western Union Tel. Co. v. Hankins [Tex. Civ. App.] 110 SW 539; Napa State Hospital v. Dasso, 153 Cal. 698, 96 P 355. Presumed that surety on appeal bond was plaintiff in suit, name being identical. Pearce v. Haas [La.] 47 S 687. Presumption of identity where name of grantee in one conveyance was same as grantor in subsequent conveyance. Einstein v. Holladay-Klotz Land & Lumber Co., 132 Mo. App. 82, 111 SW 859.

**15.** W. B. Priest and Wm. B. Priest prima facie same person; judgment read in evidence against Wm. B. Priest, prima facie against person indicted under name of "W. B. Priest." State v. Priest [Mo.] 114 SW 949. Presumption of identity. "Clody" Welcome, and "Claude" E. Welcome. McAuliff v. Hughes, 128 App. Div. 355, 112 NYS 486.

**16.** Gallais v. Trinidad Asphalt Mfg. Co., 127 Mo. App. 338, 105 SW 693. A judgment obtained against married woman sued as a feme sole in her maiden name, held valid, and particularly since recovered upon contract executed by her in such name. Emery v. Kipp [Cal.] 97 P. 17. Contract and complaint in name "S. Gallais" true name "John B. S. Gallais." Gallais v. Trinidad Asphalt Mfg. Co., 127 Mo. App. 338, 105 SW 693.

**17.** Proceedings under either permissible, and record in either name regular. Simon v. Underwood, 115 NYS 65. From similarity in names of "Clody" Welcome and "Claude" E. Welcome, and from proceedings in partition, court assumed that party was called by both names and that he was named and served in partition action by former name. McAuliffe v. Hughes, 128 App. Div. 355, 112 NYS 486. Name of alleged wife "Ida Amacher," proof "Eda Amacher," is sufficient, she being known by both. Nickelson v. State, 53 Tex. Cr. App. 631, 111 SW 414.

**18.** Defendant in civil action was sued as "William Clarke Jewell," notice given to plaintiff that "Clarke Jewell, defendant," desired poor debtor's oath; notice, held sufficient defendant being frequently called by latter name. Young v. Jewell, 201 Mass. 385, 87 NE 604.

**19.** Emery v. Kipp [Cal.] 97 P 17.

**20.** Emery v. Kipp [Cal.] 97 P. 17. Deed in an assumed name conveys as good title as if property were in true name, hence, right of purchaser to rely upon false certificate not defeated because title of vendor stood in assumed name, title passing notwithstanding fact. Homan v. Wayer [Cal. App.] 98 P 80.

**21.** Emery v. Kipp [Cal.] 97 P. 17. Where one chooses to take title to real estate in a name other than his true name, far as the property is concerned, he has assumed the name under which he takes title as his true name, and in suits affecting the property he may be sued by such designation. Id.

**22.** Haney v. Gastin [Tex. Civ. App.] 113 SW 166.

**23, 24.** Simon v. Underwood, 115 NYS 65.

**25.** Kelly v. Kuhnhausen [Wash.] 98 P 603; Napa State Hospital v. Dasso, 153 Cal. 698, 96 P. 355; People v. Spoor, 235 Ill. 230, 85 NE 207. In certificate of acknowledgment "Lutica" instead of "Lutitia," not fatal where no issue as to identity. Taylor v. Sillman [Tex. Civ. App.] 108 SW 1011.

**26.** Kelly v. Kuhnhausen [Wash.] 98 P 603.

**27. Held idem sonans:** "Tasso" and "Dasso." Napa State Hospital v. Dasso, 153 Cal. 698, 96 P. 355. In prosecution for bigamy held immaterial that indictment gave defendant's first wife's name as "Staunton" instead of, as evidence showed, "Stanton." People v. Spoor, 235 Ill. 230, 85 NE 207.

"Schutz" and "Schultz": certificate of acknowledgment of deed not vitiated by having improperly inserted letter "l" in grantor's name. Veit v. Schwob, 127 App. Div. 171, 111 NYS 286. "Minnie E. Tilter" used in summons for true name "Minnie E. Tiller." Kelly v. Kuhnhausen [Wash.] 98 P 603. "Holenville" and "Holdenville" held so similar as to give notice under doctrine to telegraph company that telegram addressed to "Holenville" was intended for "Holdenville." Western Union Tel. Co. v. Hankins [Tex. Civ. App.] 110 SW 539. "Georgia Holland" and "Georgia Harland" and discrepancy in executive warrant held not to warrant release on habeas corpus. Holland v. State, 53 Tex. Cr. App. 301, 108 SW 1181.

**Not idem sonans:** "Boulden" with "Bourland." McCormick v. Jester [Tex. Civ. App.] 115 SW 278. "Steinman" and "Stinman." Steinman v. Jessee, 108 Va. 567, 62 SE 275. "Philip McArdle" and "Peter McArdle;" same person. Berkey v. Tipton L. H. & P. Co. [Ind. App.] 85 NE 724.

**NOTE. Alphabetical List of Names Held Idem Sonans or The Reverse.**

**Names held idem sonans:** Abbotsan-Abbatsan, Cotton's Case, Cro. Eliz. 258; Adamson-Adanson, James v. State, 7 Blackf. [Ind.] 327; Adderson's Island-Anderson's Island, held immaterial variance, Van Pelt v. Pugh, 1 Dev. & B. Law [N. C.] 210; Allen-Allaine, Chiniquy v. Catholic Bishop, 41 Ill. 148; Allen-Allain, Guertin v. Mombleau, 144 Ill. 32, 33 NE 49; Alwin-Alvin, Jockisch v. Hardtke, 50 Ill. App. 204; Amel-Amiel, People v. Gosch, 82 Mich. 22, 46 NW 101; Anna-Anne, held immaterial variance where party appeared, Kerr v. Swallow, 33 Ill. 380; Anne-Anny, State v. Upton, 1 Dev. Law [N. C.] 513; Anthron-Anthrum, State v. Scurry, 3 Rich. [S. C.] 68; Antoine-Otaine, Chiniquy v. Catholic Bishop, 41 Ill. 148; Armstead-Almstead-Olmstead, Armstead v. Jones, 71 Kan. 142, 80 P 56; Arnall-Arnold, Arnall v. Newcomb, 29 Tex. Civ. App. 521, 69 SW 92; Augustine-Augustina, Commonwealth v. Desmarteau, 16 Gray [Mass.] 15; Bagwell-Bagswell, Case v. Bartholow, 21 Kan. 300; Barbara-Barbra, State v. Haist, 52 Kan. 35, 34 P 453; Barnstein-Burnstein, Springer v. Hutchinson, 67 Ill. App. 80; Battles-Battels, Leath v. State, 132 Ala. 26, 31 S 108; Beckwith-Beckworth, Stewart v. State, 4 Blackf. [Ind.] 171, 29 Am. Dec. 364; Belton-Beton, Belton v. Fisher, 44 Ill. 32; Benedetto-Beniditto, Ahitbol v. Beniditto, 2 Taunt. 401; Beneux-Bennaux, Beneux v. State, 20 Ark. 97; Bernhart-Banhart, State v. Witt, 34 Kan. 488, 8 P 769 (but there was evidence that the name was distinctly pronounced both ways); Berry-Barry, Ratteree v. State, 53 Ga. 570; Bert-Burt, State v. Johnson, 70 Kan. 861, 79 P 732; Bert Samrud-Bernt Sannerud, State v. Sannerud, 38 Minn. 229, 36 NW 447; Bettie-Beattie, Gross v. Village of Grossdale, 177 Ill. 248, 52 NE 372; Beulah-Berlah, Lane v. Innes, 43 Minn. 137, 45 NW 4; Biglow v. Bigelow, in Bigelow v. Chatterton, 51 F 614; Blackenship-Blankenship, State v. Blankenship, 21 Mo. 504; Boge-Bogue, Bogue v. Bigelow, 29 Vt. 179; Edmond Bolden-Ed. Bolen, Pitsnogle v. Com., 91 Va. 808, 22 SE 351, 50 Am. St. Rep. 867; Booth-Boothe, Jackson v. State, 74 Ala. 26; Boudet-Boredet-Burdet, Aaron v. State, 37 Ala. 106; Braddy-Brady, Dickerson v. Brady, 23 Ga. 161; Brearly-Brailey, People v. Gosch, 82 Mich. 22, 46 NW 101; Bubb-Bobb, Myer v. Fegaly, 39 Pa. 429, 80 Am. Dec. 534; Busse-Bosse, Ogden v. Bosse, 86 Tex. 336, 24 SW 798; Joseph Calvert-F. Joseph Calvitt, Day Land, etc., Co. v. New York, etc., Co. [Tex. Civ. App.] 25 SW 1089; Carney-Karney, McCash v. Penrod, 131 Iowa 631, 109 NW 180; Chambless-Chambles, Ward v. State, 28 Ala. 53; Charleston-Charlestown, Alvord v. Moffat, 10 Ind. 366; Che-gaw-go-quay-Che-gaw-ge-quay, Brown v. Quinland, 75 Mich. 289, 42 NW 940; Chicopee-Chickopee, Commonwealth v. Desmarteau, 16 Gray [Mass.] 16; Clark-Clarke, Altschul v. Casey, 45 Or. 182, 76 P 1083; Coburn-Colburn, Colburn v. Bancroft, 23 Pick. [Mass.] 57; Cocks-Cox, Waters v. State [Tex. Cr. App.] 31 SW 642; Colin-Collin, Collin v. Farmers' Alliance, etc., 18 Colo. App. 170, 70 P. 698; Colster-Colsten, Luna v. State [Tex. Cr. App.] 70 SW 89; Conaway-Conovay, Conaway v. Hays, 7 Blackf. [Ind.] 159; Conklan-Conklin, Cutting v. Conklin, 28 Ill. 306; Conly-Conolly, Fletcher v. Conly, 2 Greene [Iowa] 88; Corn-Conn, Moore v. Anderson, 8 Ind. 18; Corrigan-Corgan, Prince v. McLean, 17 U. C. Q. B. 463; Crusius-Crushes, People v. James, 110 Cal. 155, 42 P 479; Cuffy-Cuffee-Cuff, State, v. Farr, 12 Rich. [S. C.] 24; Dauden-Darden, immaterial variance, State v. Turner, 25 La. Ann. 573; Danner-Dannaher, Gahan v. People, 58 Ill. 160; Deadama-Diadema, State v. Patterson, 2 Ired. [24 N. C.] 346, 38 Am. Dec. 699; De Hust-De Hurst, Cotton's Case, 1 Cro. Eliz. [Eng.] 258; Dillahunty-Dillaunty-Dillahinty, Dillahunty v. Davis, 74 Tex. 344, 12 S. W. 55; Dixon-Dickson, Reading v. Waterman, 46 Mich. 107, 8 NW 691; Doerges-Dierges-Dierkes, Gorman v. Dierkes, 37 Mo. 576; Domick-Domeck, in Olive v. Commonwealth, 5 Bush [Ky.] 376; Donly-Donnelly, Donnelly v. State, 78 Ala. 454; Dorgan-Dungan, O'Donnell v. People, 224 Ill. 218, 79 NE 639; Doorley-Dooley, New York, etc., Co. v. Dooley, 33 Tex. Civ. App. 636, 77 SW 1030; Dugal McInnis-Dugald McGinnis, Barnes v. People, 8 Peck [Ill.] 52, 65 Am. Dec. 699; Dowing-Downing were said to be idem sonans, but the decision was based on the fact that it was not misleading in the case at bar. O'Brien v. Krockinski, 50 Ill. App. 456; Droun-Drown, Commonwealth v. Woods, 10 Gray [Mass.] 482; Dyre-Dyer, Niblo v. Dyer [Tex. Civ. App.] 56 SW 216; Edmundson-Edmindson, Edmundson v. State, 17 Ala. 180, 52 Am. Dec. 169; Edward-Edwin, Mann v. Birchard, 40 Vt. 326, 94 Am. Dec. 398; but not entirely on ground of idem sonans; Elbertson-Elberson, Elberson v. Richards, 42 N. J. Law, 70; Ellett-Elliott, Robertson v. Winchester, 85 Tenn. 171, 1 SW 781; Emerly-Emley, Galveston, etc., R. v. Daniels, 1 Tex. Civ. App. 695, 20 SW 955; Emonds-Emmens-Emmons, Lyon v. Kain, 36 Ill. 368; Fain-Fanes, State v. Hare, 95 N. C. 682; words "false" and "fauls," Gaines v. Gaines, 109 Ill. App. 226; Farelly-Farley, Leonard v. Wilson, 2 Chomp. & M. [Eng.] 589; Fauntleroy-Fontleroy, Wilks v. State, 27 Tex. App. 381, 11 SW 415; Faust-Foust, Faust v. U. S., 163 U. S. 452, 41 Law. Ed. 224; Fenn-Finn, Alexander v. State [Tex. Cr. App.] 25 SW 127; Finnegan-Finegan, People v. Mayworm, 5 Mich. 148, Flory-Florez, used in a verdict, were said to be idem sonans, though their recital was held surplusage, State v. Florez, 5 La. Ann. 429;

Foley-Fooley, Underwood v. State, 72 Ala. 220; Forest-Fourai, State v. Timmins, 4 Minn. 247; Forris-Farris, Lyne v. Sanford, 82 Tex. 63, 27 Am. St. Rep. 852, 19 SW 847; Forshee-Foshee, Taylor v. State, 72 Ark. 613, 82 SW 495; Foster-Faster, Foster v. State, 1 Tex. App. 532; Foster-Forster, Bedford v. Forster, Cro. Jac. 77; Gardiner-Gardner, Rector v. Taylor, 12 Ark. 128; George-Georg, Hall v. State, 32 Tex. Cr. App. 594, 25 SW 292; Gersman-Gersmann, Gersman v. Levy, 57 Misc. 156, 58 Misc. 174, 108 NYS 1107; Geussler-Geissler, Cleaveland v. State, 20 Ind. 444; Giboney-Gibney, Fleming v. Giboney, 81 Tex. 422, 17 SW 13; Giddings-Gidings, State v. Lincoln, 17 Wis. 598; Gigger-Jiger-Jigr, Commonwealth v. Jennings, 121 Mass. 47, 23 Am. Rep. 249; Girous-Geroux, Girous v. State, 29 Ind. 94; Gordon-Gorden, White v. State, 136 Ala. 58, 34 S 177; Gottleib-Gottlieb, Gottlieb v. Alton Grain Co., 87 App. Div. 380, 84 NYS 413; Guadlupe County-Guadalupe County, Reys v. State [Tex. Civ. App.] 76 SW 457; "guilty"-"gilty," Walker v. State, 13 Tex. App. 641; Hanaford-Hanoford, Hanaford v. Morton, 22 Tex. Civ. App. 587, 55 SW 987; Hanley-Hanly, Irwin v. Sebastian, 6 Ark. 33; Harman-Herman, Kahn v. Herman, 3 Ga. 266; Havely-Haverly, State v. Havely, 21 Mo. 502; Hearn-Hearne, Coster v. Thomason, 19 Ala. 719; Heckman-Hackman, Appeal of Bergman, 88 Pa. 120; Henning-Herring, Felker v. New Whatcom, 16 Wash. 178, 47 P 505; Herriman-Harriman, State v. Bean, 19 Vt. 530; Herring-Herron, Herron v. State, 93 Ga. 554, 19 SE 243; Heptum-Hepburn, Hall v. Rice, 64 Cal. 443, 1 P 891, 2 P 889; Hieronymus-Heronymus, Tevis v. Collier, 84 Tex. 638, 19 SW 801; Hilmer-Hillmer-Helmer, Cline v. State, 34 Tex. Cr. App. 415, 31 SW 175; Hinsdall-Hinsdale, Meredith v. Hinsdale, 2 Caines [N. Y.] 362; Hix Nowels-Hicks Nowells, Spoonemore v. State, 25 Tex. App. 358, 8 SW 280; Horlck-Horrick, Evans v. State, 150 Ind. 651, 50 NE 820; Hutcheson-Hutchinson, State v. Stedeman, 7 Port. [Ala.] 501; Hutson-Hudson, Chapman v. State, 18 Ga. 736; Cato v. Hutson, 7 Mo. 147; State v. Hutson, 15 Mo. 512; Ichman-Eichman, Eichman v. State, 22 Tex. App. 137, 2 SW 538; Irvin-Erwin, Williams v. Hitzie, 83 Ind. 307; Isah-Isaiah, Ellis v. Merriman, 5 B. Mon. [Ky.] 296; Isreal-Israel, Boren v. State, 32 Tex. Cr. 643, 25 SW 775; Jacob-Jaacob, Jacob Aboab's Case, 1 Mod. 107; January-Janury, Hutto v. State, 7 Tex. App. 46; Japheth-Japhath, Morton v. McClure, 22 Ill. 257; Jarrett-Jarvett, Jarrett v. City Elec. Co., 120 Ga. 472, 47 SE 927; Jefferds-Jeffards, Commonwealth v. Brigham, 147 Mass. 414, 18 NE 167; Jeffries-Jeffers, Jeffries v. Bartlett, 75 Ga. 232; Jiger-Jigr-Gigger, Commonwealth v. Jennings, 121 Mass. 42; Johnson-Johnston, Miltonvale State Bank v. Kuhnle, 50 Kan. 423, 31 P 1057, 34 Am. St. Rep. 129; State v. Jones, 55 Minn. 329, 56 NW 1068; Truslow v. State, 95 Tenn. 187, 31 SW 987; Johnson-Johnsen, Paul v. Johnson, 9 Phila. [Pa.] 32; Josiah-Josier, Schooler v. Asherst, 1 Litt. [Ky.] 216; 13 Am. Dec. 232; Juli-Julee, Point v. State, 37 Ala. 148; July-Julia, Dickson v. State, 34 Tex. Cr. 1, 28 SW 815, 30 SW 807, 53 Am. St. Rep. 694; Karney-Carney, McCash v. Penrod, 131 Iowa, 631, 109 NW 180; Kealiher-Keoliher-Kelliher-Kellier-Keolhier-Kelhier, Millett v. Blake, 81 Me. 531, 18 A. 293, 10 Am. St. Rep. 275; Key-Kay, Dickinson v. Bowers, 16 East, 110; Keeland-Kneeland, Doe v. Roe, Dudley [Ga.] 177; Keen-Keene, Commonwealth v. Riley, Thach. C. C. [Mass.] 67; Kennedy McCutchen-Canada McCutchen, State v. White, 34 S. C. 59, 12 SE 661, 27 Am. St. Rep. 783; Kenny-Kinney, Kinney v. Harrett, 46 Mich. 90, 8 NW 708; Kiah-Currier, Tibbets v. Kiah, 2 N. H. 557; Kimberling-Kamberling, Houston v. State, 4 Greene [Iowa] 437; Kreitz-Krietz-Kritz-Critz, Kreitz v. Behrensmeyer, 125 Ill. 141, 17 NE 232, 8 Am. St. Rep. 349; Krowder-Krower, Alexis v. U. S. (C. C. A.) 129 F 60; Kuhns-Coons, Kuhn v. Kilmer, 16 Neb. 703, 21 NW 443; Langford-Lankford, State v. Mahan, 12 Tex. 283; Larson-Larsen, Gustavenson v. State, 10 Wyo. 300, 68 P 1006; Lawrence-Lawrance, Webb v. Lawrence, 1 Cromp. & M. 806; Lebrun-Lebring-Lebering, Ketland v. Lebering, 2 Wash. C. C. 201, Fed. Cas. No. 7744, upon a showing of identity; Leola-Leolar, Miller v. State, 110 Ala. 69, 20 S 392; Lewis-Louis, Block v. State, 66 Ala. 493; Marr v. Wetzel, 3 Colo. 5; Girous v. State, 29 Ind. 94; Lindsay-Lindsey-Lindsy, but neither are idem sonans with Lindly. Roberts v. State 2 Tex. App. 6; Lincoln-Lington are so similar that when considered in connection with fact that Lincoln is only town with similar name in county, it will be admissible when used in a deed. Armstrong v. Colby, 47 Vt. 366; Littlemore-Lidmore, Parker v. People, 97 Ill. 32; Little-Lytle, Lytle v. People, 47 Ill. 424; Lossene-Lawson, State v. Pullens, 81 Mo. 392; McDonald-McDonnell, McDonald v. People, 47 Ill. 534; McGilligan-Megilligan, Pope v. Kirchner, 77 Cal. 152, 19 P 264; McGloflin-McLaughlin, McLaughlin v. State, 52 Ind. 476; Dougal McInnis-Dugald McGinnis, Barnes v. People, 18 Ill. 52, 65 Am. Dec. 699; McKay-Macke, International, etc., R. Co. v. Kindred, 57 Tex. 500; M'Nicoll-M'Nicole, Regina v. Wilson, 2 Car. & K. 527; Marres-Mars, by the jury, Commonwealth v. Stone, 103 Mass. 421; Mary Etta-Marietta, Goode v. State, 2 Tex. App. 524; Meetz-Metz, Metz v. McAvoy Brew. Co., 98 Ill. App. 592; Meyer-Meyers-Mayer, Smurr v. State, 88 Ind. 507; Michael-Michaels was held immaterial variance in State v. Houser, 44 N. C. [Busb.] 410, but in that case the issue as to whether the prosecuting witness was known as well by either name was submitted to the jury; Mikel-Mikil, Mikel v. State, 43 Tex. Cr. App. 615, 68 SW 512; Minner-Miner, Jackson v. Boneham, 15 Johns. [N. Y.] 227; Morris-Maurice, Thompson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 175, 97 SW 316; Ashahel Morse-Ashahel Moss, Litchfield v. Farmington, 7 Conn. 108; Mozer-Mousner-Mosuser-Mouseur, Ruddell v. Mozer, 1 Ark. 503; Newton-Nuton-Newten, Newton v. Newell, 26 Minn. 529, 6 NW 346; Noland-Nolen, Burks v. State [Tex. Cr. App.] 35 SW 173; Noberto-Norberto, Salinas v. State, 39 Tex. Cr. 319, 45 SW 900; Nowels-Nowells, Spoonemore v. State, 25 Tex. App. 358, 8 SW 280; O'Mara-O'Meara, O'Meara v. North American Min. Co., 2 Nev. 121; Ogilbee-Ogilsbee, Hamilton v. Langley, 1 McMull [S. C.] 498; Olmstead-Armstead-Almstead, Armstead v. Jones, 71 Kan. 142, 80 P 56; Charles Oleson-Charley Olson held an immaterial variance in Olson v. Peabody, 121 Wis. 675, 99 NW 458; Otaine-Antoine, Chiniquy v. Catholic Bishop, 41 Ill. 148; Owen D. Haverly-Owens D. Havely, State v. Havely, 21 Mo. 502; Patterson-Petterson, Jackson v. Cody, 9 Cow.

[N. Y.] 147; Penryn-Pennyrine, Elliott's Lessee v. Knott, 14 Md. 121, 74 Am. Dec. 519; Peregrane-Peregrine, Dunn v. Clements, 7 Jones [N. C.]60; Peter Peterson-Peder Pederson, Pederson v. Lease, 48 Wash. 253, 93 P 439; Petris-Petrie, Petrie v. Woodworth, 3 Caines [N. Y.] 219; Pettes-Pettis, Hutto v. State, 7 Tex. App. 46; Philip-Pilip, Taylor v. Rogers, 1 Minor [Ala.] 197; Pillsby-Pillsbury, Pillsbury's Lessee v. Dugan, 9 Ohio, 117, 34 Am. Dec. 427; Prior-Preyer-Pryor, Page v. State, 61 Ala. 16; Ray-Wray, Sparks v. Sparks, 51 Kan. 195, 32 P 892; Ravier-Revear, Howard v. State, 151 Ala. 22, 44 S 95; Rigley-Rigby, State v. Pointoexter, 117 La. 380, 41 S 688; Roland-Rawlin, Roland v. State, 127 Ga. 401, 56 SE 412; Robinson-Robison by the jury, People v. Cooke, 6 Park. Cr. [N. Y.] 45; Rooks-Rux, Rooks v. State, 83 Ala. 79, 3 S 720; Rosa Kilfoy-Rose Kilfoy, Galliano v. Kilfoy, 94 Cal. 86, 29 P 416; Saffe-Saffell, Hoffman v. Bircher, 22 W. Va. 541; Bert Samrud-Bernt Sannerud, State v. Sannerud, 38 Minn. 229, 36 NW 447; Samul-Samuel, Fenn v. Alston, 11 Mod. 284; Sarmine-Sarmin, Cull v. Sarmin, 3 Lev. 66; Sawyer-Sawyers, Ex parte Sawyers [Tex. Cr. App.] 48 SW 512; Schmitt & Brother Co.-Schmidt & Brother Co., Schmidt, etc., Co. v. Mahoney, 60 Neb. 20, 82 NW 99; Seaver-Seavers, Seaver v. Fitzgerald, 23 Cal. 93; Seden-Soden, Wyatt v. Barwell, 19 Ves. Jr. 435; Segrave-Seagrave, Williams v. Ogle, 2 Strange 889; Selia-Celia, Galveston, etc., R. Co. v. Sanchez [Tex. Civ. App.] 65 SW 893; Shacraft-Shacroft, Denner v. Shacroft, 1 Cro. Eliz. [Eng.] 258; Sibert-Seibert, Green v. Meyers, 98 Mo. App. 438, 72 SW 128; Shaffer-Shafer, Rowe v. Palmer, 29 Kan. 339; Shuter-Shutter, State v. Johnson, 36 Wash. 294, 78 P 903; Sinclair-St. Clair, Rivard v. Gardner, 39 Ill. 126; Steinburg and Steenburg, in Carrall v. State, 53 Neb. 431, 73 NW 939; Steven-Stevens, Stevens v. Stebbins, 3 Scam. [Ill.] 25; Stirr-Stier, City of New Albany v. Stier, 34 Ind. App. 615, 72 NE 275; Stormer-Stermer, Sample v. Robb, 16 Pa. 319; Stafford-Stratford, Wilson v. Stafford, 18 Eng. C. L. 365; Stores-Storrs, People v. Sutherland, 81 N. Y. 12; Robert Rodger Strang-Robert Roger Strong, In re Ann. Smith, 10 Com. B. (N. S.) 344 [100 End. C. L. 344]; Susan-Susannah were said to be idem sonans in State v. Johnson, 67 N. C. 57, though the decision appears to have been based more on the theory that the party was known by both names; Symonds-Simons, Western Union Tel. Co. v. Drake, 14 Tex. Civ. App. 601, 38 SW 632; Thonpson-Thompson, State v. Wheeler, 35 Vt. 263; Thweatt-Threet, Gooden v. State, 55 Ala. 178; Tinmarsh-Tidmarsh, Hornan v. Tidmarsh, 11 Moody 231; Tougaw-Tugaw, Girous v. State, 29 Ind. 94; Townsend-Tounsen, Townsend v. Ratcliff, 50 Tex. 152; Trowbridge-Trobridge, Buhl v. Trowbridge, 42 Mich. 44, 3 NW 245; Usrey-Usury, Gresham v. Walker, 10 Ala. 374; Van Nortrick-Van Nortwick, Maliory v. Riggs, 76 Iowa, 748, 39 NW 886; Vass-Vase, State v. Collins, 115 N. C. 716, 20 SE 452; Veike-Vieke, Selby v. State, 161 Ind. 667, 69 NE 463; Vister-Vester, Garther v. Com., 28 Ky. L. R. 1345, 91 SW 1124; Wanser-Wanzer, Wanzer v. Barker, 4 How. [Miss.] 369; Wash-pans-Was-pans, Lynch v. Wilson, 4 Blackf. [Ind.] 288; Watford-Wadford, Hayes v. State, 58 Ga. 35; Watkins-Wadkins, Bennett v. State, 62 Ark. 516, 36 SW 947; Welch-Welsh, Donohoe-Kelly Banking Co. v. Southern Pac. Co., 138 Cal. 183, 94 Am. St. Rep. 28, 71 P 93; Westley-Wesley, Proudfoot v. Lount, 9 Grant Ch. 70; Weston-Wason, Symmers v. Wason, 1 B. & P. 105; Whatson-Watson by the jury, Toole v. Peterson, 9 Ired. [N. C.] 180; Whiteman-Whitman, Henry v. State, 7 Tex. App. 392; Wilkerson-Wilkinson, Wilkerson v. State, 13 Mo. 91, 53 Am. Dec. 137; William-Williams, Williams v. State, 5 Tex. App. 231; Winyard-Winnyard-Whyneard, Rex v. Foster, 1 Russ. & R. C. C. 412; Witt and Wid, Veal v. State, 116 Ga. 589, 42 SE 705; Woolley-Wolley, Power v. Woolley, 21 Ark. 462; Wray-Ray, Sparks v. Sparks, 51 Kan. 195, 32 P 892; Yarbery-Yarbro, Russell v. Oliver, 78 Tex. 16, 14 SW 264; Zermeriah-Zimri, Ames v. Snider, 55 Ill. 498; Zereldday-Seralda-Serelda, held similar names, Cartright v. McGown, 121 Ill. 388, 12 NE 737, 2 Am. St. Rep. 105, but the evidence showed identity of person.

**Names held not idem sonans:** Aaron-Lamon, Barnes v. Simms, 5 Ired. Eq. [N. C.] 392, 49 Am. Dec. 435; Abie-Avie, Burgamy v. State, 4 Tex. App. 572; Able-Ebling, Weber v. Ebling, 2 Mo. App. 16; Ammon-Amann, Amann v. People, 76 Ill. 188; Asher B.-Ashley B., Bates v. State Bank, 7 Ark. 394, 46 Am. Dec. 293; Barent-Barnard, Ducommun v. Hysinger, 14 Ill. 249; Barnep-Barnap, Reg. v. Carter, 6 Mod. 168; Barnham-Barham, Kirk v. Suttle, 6 Ala. 681; Boppes-Bappels, Leath v. State, 132 Ala. 26, 31 S 108; Behrensmeyer-Dehbsumeyer, Kreitz v. Behrensmeyer, 125 Ill. 141, 8 Am. St. Rep. 349, 17 NE 232; Bernard-Berend, Wilks v. Lorck, 2 Taunt. 399; Bill-Bull, Bull v. Traynham, 3 Rich. [S. C.] 433; Colin Bland-Colin De Blond, Leland v. Eckert, 81 Tex. 226, 14 SW 897; Bolling v. Bowling, Carr v. Kearns, 1 Va. Cas. 109; Brimford-Binford, Eutrekin v. Chambers, 11 Kan. 377; Brison-Prison, State v. Huffman, Add. [Pa.] 141; Bronson-Brunson, Sioux Valley State Bank v. Drovers' Nat. Bank, 58 Ill. App. 396; Brown-Brow, Brown v. Marqueze, 30 Tex. 77; Bryan-Bryant, Weidemeyer v. Bryan, 21 Tex. Civ. App. 428, 53 SW 353; "burglary"-"burgerally," Haney v. State, 2 Tex. App. 504; Burkhead-Bankhead, Anthony v. Taylor, 68 Tex. 403, 4 SW 531; Burks-Banks, Collins v. Ball, 82 Tex. 259, 27 Am. St. Rep. 877, 17 SW 614; Burral-Burrill, Commonwealth v. Gillespie, [Pa.] 7 Serg. & R. 469, 10 Am. Dec. 475; Carhart-Cawhart, Carhart v. Britt, 3 Wils. Civ. Cas. [Tex.] sec. 373; Catherine-Ratherine, Swails v. State, [Ind.] 7 Blackf. 324; Chas. Lundine-Claes. Lundine, Bedwell v. Ashton, 87 Ill. App. 272; Clendinen-Clendenard, Oates v. Clendenard, 87 Ala. 734, 6 S 859, Cobb-Cobbs, Jacobs v. State, 61 Ala. 448; Cocker-Cocken, Finch v. Cocken, 2 Cromp. M. & R. 196; Comyns-Cummins, Cruikshank v. Comyns, 24 Ill. 602; Conrad Furniash-Coonrod Fernash, Shields v. Hunt, 45 Tex. 427; Cordeviolle-Cordoviatti, New Orleans v. Cordeviolle, 10 La. Ann. 727; Couch-Crouch, Whitwell v. Bennett, 3 B. & P. 559; Cunnington-Cunningham, Ex Parte Cheatham, 6 Ark. 531, 44 Am. Dec. 525; Dallam-Dillon, Dallam v. Wilson, 4 T. B. Mon. [Ky.] 108; David-Davids, Davids v. People, 192 Ill. 176, 61 NE 537; Davidson-Davison, Mead v. State, 26 Ohio St. 505; Dellia-Della, Vance v. State, 65 Ind. 460; Donald-Donnel, Donnel v. United States, 1 Morris [Iowa] 141, 39 Am. Dec. 457; Dunlan-Dunbar, Breyfogle v. Beckley, 16 Serg. & R. [Pa.] 264; Ebenezer-Edward, Slasson v. Brown, 20 Pick. [Mass.] 436; Ebling v. Able, Weber v. Ebling, 2 Mo. App. 15; Edith-Edie, Waters v.

State [Tex. Cr. App.] 31 SW 642; Edward-Edmund, Flood v. Randall, 72 Me. 439; Elirere Lowtrheiser-Ezra Loutzenheiser, Abbott v. State, 59 Ind. 70; Elisha-Elijah, Mead v. State, 26 Ohio St. 505; Craig v. Brown, Pet. [C. C.] 139, Fed. Cas. No. 3326; Emeline-Evelina, Scott v. Ely, 4 Wend. [N. Y.] 557; Emma-Emily, Burge v. Burge, 94 Mo. App. 15, 67 SW 703; Falleck-Falk, Calkins v. Falk, 1 Abb. App. Dec. [N. Y.] 291; Farrow-Farrar, Farrar v. Fairbanks, 53 Me. 143; Faver-Favers, Faver v. Robinson, 46 Tex. 204; Ferdinand N.-Fernando W., Cleveland, etc., R. Co. v. Peirce, 34 Ind. App. 188, 72 NE 604; Fitz Patrick-Fitzpatrick, Moynahan v. People, 3 Colo. 367; Frank-Franks, Parchman v. State, 2 Tex. App. 241, 27 Am. St. Rep. 435; Freeman-Furman, Howe v. Thayer, 49 Iowa, 154; Goodnight-Goodright, Cherry v. Fergeson, 2 McMull [S. C.] 15; Grautis-Gerardus, Mann v. Carley, 4 Cow. [N. Y.] 156; Griffin v. Griffith, Henderson v. Cargill, 31 Miss. 416; Griffie-Griffin, State v. Griffie, 118 Mo. 188, 23 SW 878; Grimanda-Grimalda, Hayney v. State, 5 Ark. 72, 39 Am. Dec. 363; Gratz-Grolts, State v. Brown, 119 Mo. 537, 24 SW 1027, 25 SW 200; Hairholser-Hairholts, Mitchell v. State, 63 Ind. 276, 574; Hall-Wall, Henderson v. State, 37 Tex. Cr. App. 79, 38 SW 617; Han-Hanly, Hanly v. Campbell, 4 Ark. 562; Haynes-Haygens, Black v. State, 46 Tex. Cr. App. 109, 79 SW 808; Helen Desney-Ellen Desney, Thomas v. Desney, 57 Iowa, 58, 10 NW 315; Henry-Harry, Garrison v. People, 21 Ill. 538; Hesse-Hessen, Aetna Life Ins. Co. v. Hesser, 77 Iowa, 381, 42 NW 325, 14 Am. St. Rep. 297, 4 L. R. A. 122; Hilburn-Holbein-Holburn, Simpson v. Johnson [Tex. Civ. App.] 44 SW 1076; Hodnett-Hadnett, Nutt v. State, 53 Ala. 184; Hollen-Hahn-Halin, Miller v. Frey, 49 Neb. 472, 68 NW 630; Hudgins-Hudgsire-Hudgson, in McClellan v. State, 32 Ark. 611; Humphrey-Humphreys, Humphrey v. Whitten, 17 Ala. 30; Hunting-Huntington, State v. Mims, 39 S. C. 557, 17 SE 850; Hyde-Hite, State v. Williams, 68 Ark. 241, 57 SW 792, 82 Am. St. Rep. 288; Israel-Isaac, Greenberg v. Angerman, 84 N. Y. S. 244; Jeffery-Jeffries, Marshall v. Jeffries, Hemp. [U. S.] 299, Fed. Cas. No. 9128a; Joest-Yoest, Heil and Lauer's Appeal, 40 Pa. 453, 80 Am. Dec. 590; Jonathan McCarver-John McCravey, McCravey v. Cox, 24 Ark. 574; Jonathan-John also in Moore v. Graham, 58 Mich. 25, 24 NW 670; Josias-Josiah, Johnson v. Cooper, 5 Moody, 472; Josua-Joshua, Boren v. State Bank, 8 Ark. 500; Keisel-Keesel, Hubner v. Reickhoff, 103 Iowa, 368, 72 NW 540, 64 Am. St. Rep. 191; Kritler-Kladder, Brotherline v. Hammond, 69 Pa. 133; Krug-Kraig, McClaskey v. Barr, 45 F 151; La Barron-Labern, Lanesborough v. New Ashford, 5 Pick. [Mass.] 190; Lamon-Aaron, Barnes v. Simms, 5 Ired. Eq. [N. C.] 392, 49 Am. Dec. 435; Landers-Landis, Atwood v. Landis, 22 Minn. 559; Leane-Lane, in the absence of evidence of similar pronunciation. Geer v. Missouri Lumber, etc., Co., 134 Mo. 85, 34 SW 1099, 56 Am. St. Rep. 480, 5 Am. Rep. 655; Lemuel-Samuel, Jennings v. Wood, 20 Ohio St. 261; Lindsley-Lindsey, Selman v. Orr, 75 Tex. 528, 12 SW 697; Lymour-Seymour, Porter v. State, 15 Ind. 433; Lyons-Lynes, Lynes v. State, 5 Port. [Ala.] 241, 30 Am. Dec. 557; McCann-McCarn, Rex v. Tannet, R. & R. C. C. 351; McDevro-McDero, McDevro v. State, 23 Tex. App. 429, 5 SW 133; Jonathan McCarver-John McCravey, McCravey v. Cox, 24 Ark. 574; McCoskey-McKaskey-McKlaskey-McKloskey, Black v. State, 57 Ind. 111; McKee-McRee, McRee v. Brown, 45 Tex. 507; McGlenn-Glenn, Martin v. State, 16 Tex. 240; Manter-Menter, as a matter of law, but held to be a question for the jury: State v. Perkins, 70 N. H. 330, 47 A 268; Mathews-Mather, Robson v. Thomas, 55 Mo 581; May-Mary, Kennedy v. Merriam, 70 Ill. 230; Max-Matt, Vincendeau v. People, 219 Ill. 474, 76 NE 675; Moys-Maze, State v. Sullivan, 9 Mont. 490, 24 P 23; Mena-Minnie, Grober v. Clements, 71 Ark. 558, 76 SW 555, 100 Am. St. Rep. 91; Metzzer-Metzger, Mattfield v. Cotton, 19 Tex. Civ. App. 595, 47 SW 549; Meyer-Meyers, Gonzalia v. Bartelsman, 143 Ill. 634, 32 NE 532; Miller-Millen, Chamberlain v. Blodgett, 96 Mo. 482, 10 SW 44; Mincher-Minshen, Adams v. State, 67 Ala. 89; Mohr-Moores, State v. Mohr, 55 Mo. App. 327; Mulette-Merlette, Merlette v. State, 100 Ala. 42, 14 S 562; Munkers-Moncus, Munkers v. State, 87 Ala. 94, 6 S 357; Nellie Raglin-Nelly Ragsley, Mindex v. State [Tex. Civ. App.] 38 SW 995; Newton-New-Newt-Newto-Newn-Neto, Newton v. Newell, 26 Minn. 529, 6 NW 346; Nuckols-Nichols, Dodge v. Phelan, 2 Tex. Civ. App. 441, 21 SW 309; Noble-Nobles, Noble v. State, 139 Ala. 90, 36 S 19; O'Shea-Shea, Clary v. O'Shea, 72 Minn. 105, 75 NW 115, 71 Am. St. Rep. 465; Ovie-Abie-Avie, Burgamy v. State, 4 Tex. App. 572; Pike-Pite, Barnes v. Simms, 40 N. C. 392, 49 Am. Dec. 435; Quartus-Gerardus, Mann v. Carley, 4 Cow. [N. Y.] 156; Mara-Maria, Berger v. Tracy, 135 Iowa, 597, 113 NW 465; Nellie Raglin-Nelly Ragsley, Mindex v. State [Tex. Cr. App.] 38 SW 995; Ray-Roy, though variance held immaterial in case at bar on other grounds, Buchanan v. Roy, 2 Ohio St. 265; Redmond-Redman, Peckham v. Stewart, 97 Cal. 147, 31 P 928; Rex-Rock, State v. Lee, 33 Mont. 203, 83 P 223; Rodger-Rodgers, McDonald v. Rodger, 9 Grant Ch. 75; Rufus-Russell, Pitts v. Brown, 49 Vt. 86, 24 Am. Rep. 114; Samuel-Lemuel, Jennings v. Wood, 20 Ohio St. 261; Saunders-Launders, Jenne v. Jenne, 7 Mass. 94; Sayres-Saeyrs-Saeyvs, Sayres v. State, 30 Ala. 19; Schoonhoven-Schoonover, Schoonhoven v. Gott, 20 Ill. 46, 71 Am. Dec. 247; Sedbetter-Ledbetter, Zellers v. State, 7 Ind. 659; Semon-Semons, Semon v. Hill, 7 Ark. 73; Service-Servoss, Shinkell v. Letcher, 40 Ill. 48; Sensenderfer-Sensenderf, Commonwealth v. Bowers, 3 Brewst. [Pa.] 354; Seymour-Seigmund, Scholes v. Ackerland, 13 Ill. 650; Shakespear-Shakespeare, Rex v. Shakespeare, 10 East, 83; Shea-O'Shea, Clary v. O'Shea, 72 Minn. 105, 75 NW 115, 71 Am. St. Rep. 465; Siemson-Simonson, Simonson v. Dolan, 114 Mo. 176, 21 SW 510; Smith & Weston-Smith Wesson, Morgan v. State, 61 Ind. 448; Spintz-Sprinz, United States v. Spintz, 18 F 377; Stephens-Stephenson, Ellis v. State, 3 Tex. Civ. App. 170, 21 SW 66, 24 SW 660; Sunderland-Sandland, Sandland v. Adams, 2 How. Pr. [N. Y.] 98; Tapley-Tarpley, in Tarpley v. State, 79 Ala. 274; Tarbart-Tabart, Bingham v. Dickie, 5 Taunt. [Eng.] 814; Taussing, Livingston & Co.-Taussig, Livingston & Co., Taussig v. Glenn, 51 F 413; Tragar-Troyer, Troyer v. Wood, 96 Mo. 478, 10 SW 42, 9 Am. St. Rep. 367; Trius-Darius are not as matter of law, though they may be in the Dorset dialect: Regina v. Davis, 5 Cox C. C. 237; Waldimar-Waltimore, in Moore v. Allen, 26 Colo.

tion of pronunciation, not of spelling,[28] and where letters may be considered interchangeable after hearing the pronunciation of the names, it is a question for the court to determine whether or not the rule applies.[29] The doctrine is unavailable to cure variations in the spelling of a name, unless the combination of letters and sylables produce the same sound as the true name.[30]

*Business and corporate names.*[31]—See 10 C. L. 916—Individuals may adopt or assume as their trade or business name any name they desire, except as prohibited by statute,[32] and in such name sue and be sued,[33] but in some states it is a penal offense to carry on, conduct or transact business under an assumed name unless a certificate showing the same is filed with the county clerk.[34] If the name in which a suit is brought is not in fact the plaintiff's trade name, the question should be raised by a plea in abatement setting up the misnomer.[35]

§ 2. *Signatures.*[38]—See 10 C. L. 916—No particular form of "signature" [37] is required provided it is adopted as the signature of the person intended.[38] Generally, when a document is required by the common law or by statute to be "signed" by any person, a signature of his name in his own proper personal hand writing is not required,[39] and, where a sealed instrument is in fact signed by another in one's presence and immediate parol direction,[40] it becomes his valid act though the other's authority for executing it is not under seal.[41] A signature may be made by a

197, 57 P 698, 77 Am. St. Rep. 255; Wall-Hall, Henderson v. State, 37 Tex. Cr. App. 79, 38 SW 617; Wheler-Whelen, Whelen v. Weaver, 93 Mo. 430, 6 SW 220; Wilhelmina-Minnie, Grober v. Clements, 71 Ark. 568, 76 SW 555, 100 Am. St. Rep. 91; Wilkin-Wilkins, Brown v. State, 28 Tex. App. 65, 11 SW 1022; William-Wilhelm, Becker v. German Mut., etc., Co., 68 Ill. 412; Willis-Williams, Thornity v. Prentice, 121 Iowa, 89, 96 NW 728, 100 Am. St. Rep. 317; Williston-Willison, Bull v. Franklin, 2 Speers [S. C.] 46; Wood-Woods, Neiderluck v. State, 21 Tex. App. 320, 17 SW 467; Wortman-Workman, Lafayette v. Wortman, 107 Ind. 404, 8 NE 277; Yoest-Joest, Heil & Lauer's Appeal, 40 Pa. 453, 80 Am. Dec. 590; Zachariah-Zachary, Lawrence v. State, 59 Ala. 61. The rules applicable to the determination of idem sonans are discussed in 100 Am. St. Rep. 322, from which many of the above citations were adapted to this note.—[Ed.]

**28.** Napa State Hospital v. Dasso, 153 Cal. 698, 96 P 355.

**29.** Whether "Dasso" and "Tasso" were idem sonans for court, "T" and "D" being considered interchangeable. Napa State Hospital v. Dasso, 153 Cal. 698, 96 P 355.

**30.** "A. J. Steinman" in caption of published notice "Steinman" and in warning part "Stinman," initials being correct, held not idem sonans. Steinman v. Jessee, 108 Va. 567, 62 SE 275.

**31.** For trade names see Trade Marks and Trade Names, 10 C. L. 1865; and for Corporate names, see Corporations, 11 C. L. 810.

**32.** Civ. Code 1895, § 2636. Charles v. Valdosta Foundry & Mach. Co., 4 Ga. App. 733, 62 SE 493. May adopt any name in which to prosecute business. Emery v. Kipp [Cal.] 97 P 17.

**33.** Charles v. Valdosta Foundry & Mach. Co., 74 Ga. App. 733, 62 SE 493.

**34.** In re Kaffenburgh, 115 App. Div. 346, 101 NYS 507. Pen. Code, § 363b, held not to authorize any person to carry on any business upon filing of certificate nor to be applicable to person engaged in practice of law under an assumed name. Id.

**35.** General demurrer or motion to dismiss held to admit being sued by real party plaintiff. Charles v. Valdosta Foundry & Mach. Co., 4 Ga. App. 733, 62 SE 493.

**36. Search Note:** See notes in 22 L. R. A. 297, 370; 35 Id. 321; 44 Id. 142; 7 L. R. A. (N. S.) 1193.

See, also, Signatures, Cent. Dig.; Dec. Dig.; 25 A. & E. Enc. L. (2ed.) 1064.

**37.** To "sign" in primary sense of expression means to make a mark, and "signature" as sign made; but by usage "signature" has come ordinarily to be understood to mean name of person attached to something by himself and therefore to be nearly synonymous with "autograph." Cummings v. Landes [Iowa] 117 NW 22.

**38.** Under statute requiring original notice to be "signed," written signature held not exacted, sufficient that name was printed on same, writing, printing or lithographing being all that statute exacts. Cummings v. Landes [Iowa] 117 NW 22.

**39.** Under Rev. St. 1899, § 4160, cl. 7 (Ann. St. 1906, p. 2253), and city charter providing that an ordinance if approved by the mayor shall be signed by him, ordinance signed by third person under immediate direction of mayor and by his authority held valid. Porter v. R. J. Boyd Paving & Const. Co., 214 Mo. 1, 112 SW 235. Non est factum not available on bond alleged to have been executed by defendant's intestate who could not write, son having signed and intestate having acknowledged instrument and made payments thereon. Moose v. Crowell, 147 N. C. 551, 61 SE 524.

**40.** Evidence held sufficient to show that son, though without sealed authority, signed sealed contract in plaintiff's presence and at his immediate direction. Mariner v. Wiens [Wis.] 119 NW 340.

**41.** Mariner v. Wiens [Wis.] 119 NW 340.

rubber stamp [42] and be valid though nothing but a mark,[43] and though not attested where attestation is not required by statute.[44] Under statute requiring that "when the signature is required he must write it or make his mark" where there is no doubt as to the identity of the person having made the mark, it is immaterial that the scrivener in writing the name makes a mistake in spelling such party's name.[45] Addition of words "secretary" "treasurer," etc., to signatures to indicate offices in a voluntary association in no wise affects the individual liability of the members having signed an association note,[46] but although the pronoun "we" is used in the body of a note it is prima facie a corporate obligation if signed by the corporation acting by its officer or officers.[47]

*Evidence and proof.*—A standard of hand writing need not be proved by the testimony of a person who saw the signature offered written,[48] nor can it be proved by the opinions of witnesses;[49] but the same may be proved by any evidence direct or circumstantial independent of opinions,[50] and a witness, although not an expert, may state his own knowledge as to whose handwriting a signature is.[51] One asserting that a deed is a forgery has the burden to establish the fact by a preponderance of the testimony,[52] but where, pending an action to recover land, affidavits alleging the forgery of the deed under which defendant claims are filed by the plaintiff, the burden of proving genuineness rests on the party asserting the same.[53] In trespass to try title involving the identity of a person to whom a patent was granted, evidence that a person with the same name under which plaintiff claimed was within the state at the time the certificate issued is relevant,[54] and it is competent to prove the fact by family history.[55] A partial identity in name in the absence of controverting evidence is sufficient to show that the person to whom land is devised is the same person as the one who signed a deed of the land,[56] and a recital of identity of person

**42.** Custom of agent to use rubber stamp in affixing his signature admissible as going to show authenticity of documents bearing signature affixed in such manner. Union Cent. Life Ins. Co. v. Washburn [Ala.] 48 S 475.

**43.** McGowan v. Collins [Ala.] 46 S 228. At common law a note may be signed by mark and person may adopt mark as his signature. Jackson v. Tribble [Ala.] 47 S 310. Code 1896, § 982, providing that if grantor is unable to sign his name, name must be written for him with words "his mark" written against name or "over it," does not require that words "his mark" appear where a conveyance is executed under and by grantors or on direction and presence. Code 1896, § 982. Harwell v. Zimmerman [Ala.] 47 S 722.

**44.** Jackson v. Tribble [Ala.] 47 S 310. Note by illiterate promisor by mark, name of witness who also could not write, written by payee, held valid. McGowan v. Collins [Ala.] 46 S 228. Objection to validity of note signed by mark without attesting witness to signature untenable where at time of objection there was no proof that alleged maker could not write. Jackson v. Tribble [Ala.] 47 S 310. Civ Code 1896, § 1, defining "signature" or "subscription" inapplicable to execution of promissory notes. McGowan v. Collins [Ala.] 46 S 228; Jackson v. Tribble [Ala.] 47 S 310.

**45.** Divorce decree valid, signature of libelant being Mary Jane Farrar, instead of Mary Jane Mears, identity not being in doubt. Inhabitants of Wellington v. Corinna [Me.] 71 A 889.

**46.** Intention regarding liability immaterial. Evans v. M. C. Lilly & Co. [Miss.] 48 S 612.

**47.** Note, "We promise to pay to order of," signed Northeastern Coal Company, Commodore P. Frye, Secretary, Goodman Wallem, President Northeastern Coal Company, held corporate obligation. Northeastern Coal Co. v. Tyrrell, 133 Ill. App. 472.

**48, 49, 50.** Newton Centre Trust Co. v. Stuart, 201 Mass. 288, 87 NE 630.

**51.** "If you know, state in whose handwriting the signatures are," held not objectionable. Parkersburg Nat. Bank v. Hannaman, 63 W. Va. 358, 60 SE 242.

**52.** Evidence held insufficient to show that deed was forged. Blackburn v. Cherry [Ark.] 113 SW 25.

**53.** Burden still on same party though issue was tried together with other by consent of parties. Sapp v. Cline [Ga.] 62 SE 529.

**54.** Keck v. Woodward [Tex. Civ. App.] 116 SW 75. Evidence held sufficient to sustain finding that the Francis Smith, under whom plaintiffs claimed, was the person to whom land was granted. Id.

**55.** Keck v. Woodward [Tex. Civ. App.] 116 SW 75.

**56.** Where land was devised to Mary E. Newlin, and deed of same was signed by Mary E. Kurtz. Haney v. Gartin [Tex. Civ. App.] 113 SW 166.

in such case is competent evidence on that issue.[57] Where undisputed signatures can be procured, it is within the discretionary power of the judge to refuse to receive evidence as to signatures which are in litigation or in dispute,[58] but the judge has no such discretion where the case at hand is not an extraordinary one.[59] The admission of the genuineness of certain signatures does not estop one from denying similar signatures on other instruments sued on.[60] Agency can be proved only by evidence tending to show authority to sign.[61] Under statute, where the person against whom an instrument is offered denies his signature, he is barred from every other defense.[62]

§ 3. *Seals.*[63]—See 10 C. L. 917—By attaching one's signature to an instrument containing a printed "seal" at the place provided for the signature, the instrument in law becomes sealed.[64] Where a contract need not be under seal, the fact that an agent executes such contract under seal does not affect its validity,[65] and in Missouri the use of private seals in written or other instruments is abolished, and a seal if used does not affect the force, validity or character of the instrument or in any way change its significance or construction.[66] A seal imports consideration,[67] but in some states by virtue of statute it is only presumptive evidence thereof.[68] Under statute oyer may be craved of all instruments declared on whether sealed or unsealed.[69]

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**National Banks; Natural Gas; Naturalization,** see latest topical index.

## NAVIGABLE WATERS.

**§ 1. What are Navigable, 959.**
**§ 2. Relative, Public and Private Rights, 960.**
**§ 3. Regulation and Control, 963.**
**§ 4. Remedies for Injuries Relating to, 964.**

**57, 58.** Haney v. Gartin [Tex. Civ. App.] 113 SW 166.

**59.** Signatures could not be refused where they were all disputed and party had used a signature different from her ordinary signature for certain transactions including those in question. Newton Centre Trust Co. v. Stuart, 201 Mass. 288, 87 NE 630.

**60.** Where admission was not intended by admitting party, to be acted upon by plaintiff in buying notes sued on. Newton Centre Trust Co. v. Stuart, 201 Mass. 288, 87 NE 630.

**61.** Evidence to show that defendant's husband signed notes as agent, properly excluded where it did not tend to show that husband had authority to sign. Newton Centre Trust Co. v. Stuart, 201 Mass. 288, 87 NE 630. Authority in husband cannot be shown by evidence of transactions by husband of which wife had no knowledge. Id.

**62.** Where signature under evidence was proved, held proper to render judgment against party denying it. Code of Practice art. 324, 325, 326. Smith v. Union Sawmill Co., 120 La. 599, 45 S 519. Evidence held to prove genuineness of signature. Id.

**63. Search Note:** See notes in 85 L. R. A. 605; 11 Ann. Cas. 250, 1110.

See, also, Seals, Cent. Dig.; Dec. Dig.; 25 A. & E. Enc. L. (2 ed.) 73.

**64.** Under Rev. St. c. 29, § 1, not necessary that impression be made of wax or that "scrawl" be actually written by person signing. Jackson v. Security Mutual Life Ins. Co., 135 Ill. App. 86. Word "seal" attached opposite signature of person executing release, though without scrawl, stamp impression, or mark, held sufficient to constitute release of instrument under seal, under Hurd's Rev. St. 1905, c. 29, § 1, giving scrawl effect of seal. Id.

**65.** Forth-coming bond. Civ. Code 1895, § 3035. United States Fidelity & Guaranty Co. v. Murphy, 4 Ga. App. 13, 60 SE 836.

**66.** Rev. St. Mo. 1899, § 893 [Ann. St. 1906, p. 829]. Release, though not under seal, may be reformed, enforced, or rescinded in equity. Pacific Mut. Life Ins. Co. of California v. Webb [C. C. A.] 157 F 155.

**67.** Moose v. Crowell, 147 N. C. 551, 61 SE 524. Option unenforcible not being supported by valuable consideration nor sealed. Johnson v. Virginia-Carolina Lumber Co. [C. C. A.] 163 F 249. Defense of fraud not available in action at law on sealed instrument; relief must be sought in equity, seal importing consideration. Jackson v. Security Mutual Life Ins. Co., 135 Ill. App. 86. Want of consideration no defense to action upon sealed instrument. Clymer v. Groff, 220 Pa. 580, 69 A 1119.

**68.** Presumptive, Code Civ. Proc. § 840. First Nat. Bank v. Keller, 127 App. Div. 435, 111 NYS 729. Instrument under seal may be attacked at law for fraud in consideration and execution, seal being only prima facie evidence of consideration. B. & C. Comp., §§ 765, 767, 686. Olston v. Oregon Water Power & R. Co., 96 P 1095. Under statute abolishing distinction between sealed and unsealed instruments, fraud is not exclusively an equitable defense. Id.

**69.** Statute relating to practice, § 20, c. 110. National Council of the Knights & Ladies of Security v. Hibernian Banking Ass'n, 137 Ill. App. 175.

*The scope of this topic* is noted below.[70]

§ 1. *What are navigable.*[71]—See 10 C. L. 918—Navigable waters[72] are such as in their natural state[73] are navigable in fact[74] either continuously or periodically[75] for the ordinary purposes of commerce.[76] Streams not navigable, within the general definition, are in some jurisdictions held navigable for a particular purpose[77] or subject to an easement for navigation[78] not inconsistent with private ownership.[79] The navigability of water does not depend upon its actual use for navigation but on its capacity for such use.[80] A legislative declaration of navigability[81] or non-naviga-

**70.** Includes the definition and nature of navigable waters, the general rights of navigation and of access thereto, and the regulation and control of such rights. **Excludes** all matters with regard to riparian rights, accretion, reliction, subaqueous and tide lands (see Riparian Owners, 10 C. L. 1528; Waters and Water Supply, 10 C. L. 1996), bridges (see Bridges, 11 C. L. 441), ferries, (see Ferries, 11 C. L. 1467), wharves and wharfingers (see Wharves, 10 C. L. 2034), fishing rights (see Fish and Game Law, 11 C. L. 1471), and rights to consumptive use, reclamation, pollution and political jurisdiction (see Water and Water Supply, 10 C. L. 1996), except as affecting or affected by navigability. Excludes, also, methods of navigation and the rights and liabilities incident thereto as distinguished from the general right of navigation (see Shipping & Water Traffic, 10 C. L. 1655), and matters relating to the jurisdiction of courts of admiralty and practice and procedure therein (see Admiralty, 11 C. L. 33).

**71. Search Note:** See notes in 42 L. R. A. 305; 16 L. R. A. (N. S.) 420; 19 A. S. R. 227.

See, also, Navigable Waters, Cent. Dig. §§5-16; Dec. Dig. § 1; 29 Cyc. 289-293; 21 A. & E. Enc. L. (2 ed) 424, 425.

**72. Defined:** Water is navigable when in its ordinary state it forms by itself or by its connection with other waters a continuous highway over which commerce is or may be carried in customary mode in which such commerce is conducted by water. State v. Columbia Water Power Co. [S. C.] 63 SE 884. In its natural state, stream must, to be navigable, be capable of use by public, either at all times or periodically during the year for times long enough to make it susceptible of beneficial use to public for transportation. Orange Lumber Co. v. Thompson [Tex. Civ. App.] 113 SW 563. Navigable stream is one capable of bearing upon its bosom, either for whole or part of the year, boats loaded with freight in regular course of trade. Mere rafting of timber or transportation of wood in small boats does not make stream navigable. Seaboard Air Line R. Co. v. Sikes, 4 Ga. App. 7, 60 SE 868.

**73.** The great rivers of the state which are navigable by nature are public highways by common law. Commonwealth v. Foster, 36 Pa. Super. Ct. 433. Under present accepted definition, a stream not naturally navigable is not legally navigable though by improvement it is navigable in fact. State v. Columbia Water Power Co. [S. C.] 63 SE 884.

**74.** At English common law only tidal waters were navigable, but in United States those which are navigable in fact. McGilvra v. Ross, 161 F 398. Instruction, that "such waters as are navigable in fact are navigable waters," while not erroneous fails to inform jury as to what waters the law considers navigable in fact. Orange Lumber Co. v. Thompson [Tex. Civ. App.] 113 SW 563.

**75.** Channel may be navigable in law although it is not in fact navigable at low tide. Judson v. Tidewater Lumber Co. [Wash.] 98 P 377.

**76. Held navigable:** Rock River to T. 14 R. 15. In re Horicon Drainage Dist., 136 Wis. 227, 116 NW 12. Willamette river. State v. Portland General Elec. Co. [Or.] 98 P 160. Missouri river. Heiberger v. Missouri & Kansas Tel. Co., 133 Mo. App. 452, 113 SW 730. Stream that has been successfully used for 20 years for floating logs past point in question is navigable at that point. Trullinger v. Howe [Or.] 97 P 548. Lake of 905 acres, 499 of which are 25 feet deep and previously used for navigation of boats and logs. Brace & Hergert Mill Co. v. State, 49 Wash. 326, 95 P 278.

**Not navigable:** Canoochee river. Seaboard Air Line R. Co. v. Sikes, 4 Ga. App. 7, 60 SE 868. Smoky Hill river. Kregar v. Fogarty [Kan.] 96 P 845. Stream across which man can step at ordinary stages of water and which is not more than four feet deep at high water. Asher v. McKnight [Ky.] 112 SW 647.

**77.** Rockcastle river is navigable for logs but not for boats. Ireland v. Bowman & Cockrell [Ky.] 113 SW 56. St. 1898, §§ 3374-3406, regulating millidams on navigable waters does not necessarily apply to a stream navigable for logs. Allaby v. Mauston Elec. Service Co., 135 Wis., 345, 116 NW 4.

**78.** All streams capable of floating logs or boats. Johnson v. Johnson, 14 Idaho, 561, 95 P 499. Public easement in non-navigable water was the same at common law. Id. Legislation declaring small stream a public highway grants no rights the public did not previously possess. Commonwealth v. Foster, 36 Pa. Super. Ct. 433.

**79.** Fact of easement is not inconsistent with private ownership. Johnson v. Johnson, 14 Idaho, 561, 95 P 499. Rev. St. U. S., § 2476, not inconsistent with private ownership. Id. Though subject to public easement for navigation, state cannot grant fishing rights. Commonwealth v. Foster, 36 Pa. Super. Ct. 423.

**80.** Failure to keep lock in repair does not destroy right to navigate canal which is in legally navigable water. State v. Columbia Water Power Co. [S. C.] 63 SE 884. Lake may be navigable though little used for navigation. Brace & Hergert Mill Co. v. State, 49 Wash. 326, 95 P 278. Fact of little use

bility [82] will control subsequent legislation not unequivocally inconsistent therewith; [83] but neither legislative declaration [84] nor meanders [85] or other government surveys [86] are conclusive as to the navigability of a stream or other body of water, although the absence of such indicia has been held prima facie evidence of non-navigability.[87] The modern judicial tendency is to hold water to be navigable which is of general use for pleasure boating though not useful for commercial purposes.[88] A canal constructed to improve the navigation of navigable rivers is navigable water.[89]

§ 2. *Relative, public and private rights.*[90]—See 10 C. L. 918—Navigable water is a public highway of which the public is entitled to make reasonable use for the purposes of travel either for business or pleasure [91] or for any other lawful purpose not inconsistent with the rights of the riparian owners.[92] The title to subaqueous lands is held subject to the public's paramount right of navigation.[93] Between individuals the right is equal and concurrent [94] and the navigator must conduct his operations with due regard to the rights of others.[95] The public has a right to assume that

raises no presumption of non-navigability. Id.

**81.** Declaration of public highway is declaration of navigability. In re Horicon Drainage Dist., 136 Wis. 227, 116 NW 12.

**82.** Authorizing a dam with no provisions as to navigation is a declaration of non-navigability. Allaby v. Mauston Elec. Service Co., 135 Wis. 345, 116 NW 4.

**83.** In the absence of express authority in in Drainage Law 1905, § 18, c. 419, drainage commission cannot impair waters previously declared navigable. In re Horicon Drainage Dist., 136 Wis. 227, 116 NW 12.

**84.** Commonwealth v. Foster, 36 Pa. Super. Ct. 433. Act 1864, p. 180, c. 97, not conclusive. Kregar v. Fogarty [Kan.] 96 P 845. Lackawaxen creek, declared by Act Mch., 26, 1814, 6 Sm. L. 187, to be public highway for passage of rafts, boats and vessels, not in fact navigable for such craft and is not a stream in which public fishing is permitted under Act May 29, 1901, P. L. 302. Commonwealth v. Foster, 36 Pa. Super. Ct. 433.

**85.** Kregar v. Fogarty [Kan.] 96 P 845.

**86.** Protraction of section lines over navigable waters does not change their status. State v. Gerbing [Fla.] 47 S 353.

**87.** Affords implication that it was so considered. Kregar v. Fogarty [Kan.] 96 P 845. A stream neither meandered nor declared navigable by the legislature is prima facie non-navigable. Allaby v. Mauston Elec. Service Co., 135 Wis. 345, 116 NW 4.

**88.** State v. Columbia Water Power Co. [S. C.] 63 SE 884.

**89.** State v. Columbia Water Power Co. [S. C.] 63 SE 884. To be regarded as part of the stream. Id.

**90. Search Note:** See notes in 6 C. L. 744; 39 L. R. A. 491; 40 Id. 593; 41 Id. 268, 371; 42 Id. 161; 45 Id. 227; 59 Id. 33, 77, 817, 862; 4 L. R. A. (N. S.) 872; 8 Id. 1047; 53 A. S. R. 289.

See, also, Navigable Waters, Cent. Dig. §§ 1-4, 17-179; Dec. Dig. § 2-35; 29 Cyc. 293-322; 21 A. & E. Enc. L (2ed.) 430.

**91.** State v. Columbia Water Power Co. [S. C.] 63 SE 884. As much for pleasure as for any other purpose. Id. Common-law right to use from bank to bank. Seaboard Air Line R. Co. v. Sikes, 4 Ga. App. 7, 60 SE 868.

**92.** Reasonable use. Whitman v. Muskegon Log Lifting & Operating Co., 152 Mich. 645, 15 Det. Leg. N. 383; 116 SW 614. May raise sunken logs but cannot use banks for storage. Id. Must use care in driving logs to not injure riparian owner. Mandery v. Mississippi & Rum River Boom Co., 105 Minn. 3, 116 NW 1027.

**93.** See infra, § 3, Regulation and Control.

**94.** No damage for delay caused by another's reasonable use, but where other uses the stream for storage, right of action for delay arises. Orange Lumber Co. v. Thompson [Tex. Civ. App.] 113 SW 563.

**95. NOTE. Liability for injuries caused by floating logs:** The fact that there exists a common right to run logs in a navigable stream gives no immunity to individuals for injuries committed while using it. United States v. Mississippi & R. R. B. Co., 1 McCrary 601, 3 F 548. While land on navigable streams is subject to the danger incident to the right of navigation (Field v. Apple River Log Driving Co., 67 Wis. 569, 31 NW 17), and the owner of logs floating on a navigable stream is not an insurer of the riparian owner against damage thereby (Coyne v. Mississippi & R. R. B. Co., 72 Minn. 533, 75 NW 748, 71 Am. St. Rep. 508, 41 L. R. A. 494), still he must exercise ordinary care (Coyne v. Mississippi & R. R. B. Co., 72 Minn. 533, 75 NW 748, 71 Am. St. Rep. 508, 41 L. R. A. 494; Gulf Red Cedar Co. v. Walker, 132 Ala. 553, 31 S 374) irrespective of the magnitude of his operations (Sewall's Falls Bridge v. Fisk, 23 N. H. 171), to avoid injury to riparian rights, or to bridges (Cue v. Breeland, 78 Miss. 864, 29 S 850; Thurlow Twp v. Bogart, 15 U. C. C. P. 9; Sewall's Falls Br. Co. v. Fisk, 23 N. H. 171; Ward v. Grenville Twp., 32 Can. S. C. 510; Wellington Co. v. Wilson, 16 U. C. C. P. 124), mill dams (James v. Carter, 96 Ky. 378, 29 SW 19; Koopman v. Blodgett, 70 Mich. 610, 38 NW 649, 14 Am. St. Rep. 527; Buchanan v. Grand River & G. L. R. Co., 48 Mich. 364, 12 NW 490), or to other persons concurrently navigating said waters (Bellows v. Crane Lumber Co., 126 Mich. 476, 85 NW 1103), and the logger is entitled to claim from others a due observance of the fundamental rules of navigation in the concurrent use of the stream (The Athabasca, 45 F 651). The fact that a mill dam exists

there are no unlawful obstructions,[96] however, a navigator is not authorized to unnecessarily and negligently run into an unlawful obstruction to navigation,[97] although, such obstructions being a public nuisance, proper steps may be taken to abate the same.[98] The improvement of a navigable stream is sufficient consideration to the public for the exaction of a toll and such exaction is not a violation of the statutory or constitutional promise that all navigable water shall be free,[99] and collection of such tolls does not affect the legal navigability of the stream.[1] At common law and in many jurisdictions there exists an easement for public travel over waters not technically navigable,[2] but the right of the public to use water courses as a public highway is restricted in some states,[3] although the public may acquire such a right by prescription and lose it by nonuser.[4] The right of the public acquired by prescription in non-navigable streams is not exclusive but concurrent with that of the owner.[5] A bridge is subject to a public easement for navigation[6] even when the stream is non-navigable, if it might reasonably be anticipated that the stream would become navigable through artificial means.[7] A railroad is not required to

without authority does not excuse willful or neligent injury thereto (Watts v. Norfolk & W. R. Co., 39 W. Va. 196, 19 SE 521, 45 Am. St. Rep. 894, 23 L. R. A. 674), but the logger may use reasonable means for passing the obstruction (Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Dwinel v. Veazie, 44 Me. 167, 69 Am. Dec. 94; Crookston Waterworks, P. & L. Co. v. Sprague, 91 Minn. 461, 98 NW 347, 99 NW 420, 103 Am. St. Rep. 525, 64 L. R. A. 977). While incidental delays to concurrent navigators are justifiable, the logger is liable for unreasonable delay or obstruction of others entitled to make use of the streams (McPheters v. Moose River Log Driving Co., 78 Me. 329, 5 A 270; Crandall v. Mooney, 23 U. C. C. P. 212; Cockburn v. Imperial L. C., 30 Can. S. C. 80), but not where such obstruction is primarily caused by another (Gifford v. McArthur, 55 Mich. 535, 22 NW 28). The use of splash dams and the consequent sudden flooding of the stream is not a lawful use of a navigable stream and the logger is liable in damages for injuries occasioned thereby (Brewster v. J. & J. Rogers Co., 169 NY 73, 62 NE 164, 58 L. R. A. 495; Kentucky Lbr. Co. v. Miracle, 101 Ky. 364, 41 SW 25; Ford Lbr. & Mfg. Co. v. Clark, 24 Ky. L. R. 818, 68 SW 443), or by withholding the water from a person lower down the stream (O'Brien v. Northwestern Improvement & Boom Co., 82 Minn. 136, 84 NW 735), but the fact that such splash dams are maintained does not render the owner liable for damage occasioned by the acts of another logger (Bauman v. Pere Marquette Boom Co., 66 Mich. 544, 33 NW 538), or an independent contractor (Carter v. Berlin M. Co., 58 N. H. 52, 42 Am. Rep. 572), unless such damage is the necessary result of the contract (Carlson v. Stocking, 91 Wis. 432, 65 NW 58). The logger is liable for lands flooded by jams which he negligently allows to form (Hopkins v. Butte & M. Commercial Co., 16 Mont. 356, 40 P 865; Alabama Lumber Co. v. Keel, 125 Ala. 603, 28 S 204, 82 Am. St. Rep. 265), or for raising the water by allowing additional logs to enter a jam already formed (Bauman v. Pere Marquette Boom Co., 66 Mich. 544, 33 NW 538), and has no right to flood the stream to the full extent of the most extraordinary freshets (Witheral v. Muskegon Booming Co., 68 Mich. 48, 35 NW 758, 13 Am. St. Rep. 325). The gist of an action for injury, consequent upon improper use of the stream, is negligence. Hunter v. Grande Ronde Lumber Co., 39 Or. 448, 65 P 598.—Adapted from 64 L. R. A. 983.

**96.** Telephone company maintaining a wire across navigable stream, while not an insurer of travelers thereon from injury by fallen wires, owes duty to public to build line at such a height as to permit free passage of boats and to exercise at least reasonable care that they do not become a menace to navigation. Heiberger v. Missouri & Kansas Tel. Co., 133 Mo. App. 452, 113 SW 730.

**97.** Tug boat run into marine railway of which captain well knew and which was not in tug's proper course. Ives v. Gring [N. C.] 63 SE 609.

**98.** Log raft, jammed on the pier of railroad bridge, is public nuisance and menace to navigation which railway may remove for its own protection, using ordinary care to do no unnecessary injury to owner. Louisville & N. R. Co. v. Yarbrough [Fla.] 48 S 634. After vain efforts by railway employes and raft owner for eighteen hours to remove raft without breaking up, cutting the raft held proper procedure to abate nuisance, although navigation was not wholly obstructed. Id.

**99.** State v. Columbia Water Power Co. [S. C.] 63 SE 884.

**1.** State v. Columbia Water Power Co. [S. C.] 63 SE 884.

**2.** See supra, this section.

**3.** Seaboard Air Line R. Co. v. Sikes, 4 Ga. App. 7, 60 SE 868. Individual has no right to float logs and staves down non-navigable stream without the consent of owner, although great loss will be occasioned by failure to secure such consent. Asher v. McKnight [Ky.] 112 SW 647. Must take legal steps to condemn right of way. Id.

**4.** Seaboard Air Line R. Co. v. Sikes, 4 Ga. App. 7, 60 SE 868.

**5.** A railway company, having acquired from owner right to bridge stream, has equal rights with public easement to float logs. Fair adjustment of relative rights is for jury. Seaboard Air Line R. Co. v. Sikes, 4 Ga. App. 7, 60 SE 868.

**6, 7.** United States v. Monongahela Bridge Co., 100 F 712.

keep the space under its drawbridges free from obstructions which are present without its fault but it has a duty to prevent the accumulation of wreckage around its piers which would obstruct navigation.[8] A riparian owner may lawfully maintain a milldam across a navigable stream if it does not unreasonably obstruct navigation.[9] The right to maintain an obstruction in a navigable stream may be acquired by prescription as against private persons, although a public nuisance,[10] but there must be an assertion of prescriptive right in order to start the running of the period of limitations,[11] and the fact that such prescriptive right has been acquired gives no right to increase the obstruction.[12] The policy of the courts of Wisconsin is to scrupulously protect the navigable waters of the state from impairment.[13]

*Right of access.*[See 10 C. L. 919]—Riparian owners have the right of access to the navigable waters opposite their respective holdings[14] whether on surf-beaten shores or other navigable waters,[15] subject to state or congressional regulation[16] or withdrawal,[17] and it is the duty of navigators to conduct their operations with due regard to such rights.[18] At the common law the title of the littoral owner did not extend beyond highwater mark,[19] and the public has the right over the beach between high and low water,[20] subject to the riparian owner's right of access.[21] Although the common law has been, by federal statute, extended to Alaska, this rule does not apply to tide lands claimed by littoral owners at the time the statute went into effect.[22] The riparian owner, although not entitled to wharf rights, may maintain action to prevent wharfage interfering with his right of access[23] but there is a presumption that a wharf aids rather than impedes such access.[24] The adoption of the common law in this country did not, however, always include the rigid rules as to littoral rights not adaptable to our political and geographical conditions.[25] The littoral owner may divest the property of a right of access to the navigable water[26] and does so by dedicating the foreshore as a public highway,[27] but the right

8. Louisville & N. R. Co. v. Yarbrough [Fla.] 48 S 634.

9. Trullinger v. Howe [Or.] 97 P 548. Although one may be entitled to maintain a dam for purpose of improving navigation, he cannot thereby interfere with rights of others by retarding natural flow or by depositing debris to the injury of another's property. No general rule as to what will constitute injury. Each case must be decided on its merits. Trullinger v. Howe [Or.] 99 P 880. Dam so constructed that water must be raised to float logs over is an illegal obstruction. Trullinger v. Howe [Or.] 97 P 548. Not unlawful per se but may become so if built too high. Id.

10. Right of lower owners to complain of mill dam held extinguished by limitations. Ireland v. Bowman [Ky.] 113 SW 56.

11. Trullinger v. Howe [Or.] 97 P 548.

12. To raise dam Ireland v. Bowman [Ky.] 113 SW 56.

13. In re Horicon Drainage Dist., 136 Wis. 227, 116 NW 12.

14. Shore owners on great lakes. Stuart v. Greenyea [Mich.] 15 Det. Leg. N. 689, 117 NW 655. Does not extend beyond access to navigable waters. Id.

15. Barnes v. Midland R. Terminal Co., 193 N. Y. 378, 85 NE 1093.

16. Barnes v. Midland R. Terminal Co., 193 N. Y. 378, 85 NE 1093, rvg. 126 App. Div. 435, 110 NYS 545.

17. Littoral owner may be deprived of access in the exercise of sovereign power. McGilvra v. Ross, 161 F 398.

18. Johnson v. Johnson, 14 Idaho, 561, 95 P 499.

19. Decker v. Pacific Coast S. S. Co. [C. C. A.] 164 F 974.

20. Barnes v. Midland R. Terminal Co., 193 N. Y. 378, 85 NE 1093.

21. McCloskey v. Pacific Coast Co. [C. C. A.] 160 F 794; Barnes v. Midland R. Terminal Co., 193 N. Y. 378, 85 NE 1093, reversing 126 App. Div. 435, 110 NYS 545.

22. Actually in use or possession at time of enactment of Act May 17, 1884. McCloskey v. Pacific Coast Co. [C. C. A.] 160 F 794; Columbia Canning Co. v. Hampton [C. C. A.] 161 F 60.

23. McKloskey v. Pacific Coast Co. [C. C. A.] 160 F 794.

24. Decker v. Pacific Coast S. S. Co. [C. C. A.] 164 F 974.

25. Barnes v. Midland R. Terminal Co., 193 N. Y. 378, 85 NE 1093, rvg. 126 App. Div. 435, 110 NYS 545. The jus privatum of the crown devolved upon the people in its sovereign capacity but has largely been abandoned to the littoral owners and thus becomes a common right to them. Id.

26. Subsequent owner cannot assert the right. Decker v. Pacific Coast S. S. Co. [C. C. A.] 164 F 974.

27. Right becomes merged in that of the public. McCloskey v. Pacific Coast Co. [C. C. A.] 160 F 794.

of a riparian owner to have the stream flow past his property in a natural way has been held to be inseparably annexed to the soil.[28]

*Right of wharfage and reclamation.* See 10 C. L. 920—A riparian owner may have the right erect wharves, piers and booms in the shoal water opposite his land, in aid of, and not obstructing, navigation.[29] This is a riparian right, not dependent upon ownership of the bed of the stream but of the bank.[30] It may be prohibited or regulated by the state but in the absence of such qualification is a private right derived from implied license.[31] It is an incorporeal hereditament[32] and may be the subject of a separate grant,[33] and the grantee does not hold adversely to the public, at least until notice of such adverse holding is brought home to the state.[34] The general rule is that frontage on navigable waters for wharfage purposes is proportionate to the shore frontage.[35] The right of the riparian owner to use the navigable water opposite his land is not exclusive[36] and he must use the same with due regard to the concurrent rights of the public;[37] but, where the rights of the public are released or extinguished, such rights at once become vested in the riparian owners.[38]

§ 3. *Regulation and control.*[39]—See 10 C. L. 920—In the exercise of its supervisory power over the navigable waters of the United States, congress has power to order the removal of obstructions thereto,[40] and authority to determine what are unreasonable obstructions and to order their removal may be delegated to an executive department[41] which determination by proper authority is conclusive.[42] The removal of a structure so condemned is not an exercise of eminent domain.[43] The title to lands under navigable waters is in the state or the United States, in trust for the public,[44] including lands between high and low-water mark[45] and lands underlying navigable fresh water,[46] and the state or national government alone has power to regulate, control[47] or improve the same.[48] Such control, however, can-

28. Judson v. Tide Water Lumber Co. [Wash.] 98 P 377.

29. Coquille Mill & Mercantile Co. v. Johnson [Or.] 98 P 132; Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n [Fla.] 48 S 643. Littoral owner has only those rights necessary to a reasonable use of the upland. Only to that extent can he obstruct public use of the beach. Barnes v. Midland R. Terminal Co., 193 N. Y. 378, 85 NE 1093, reversing 126 App. Div. 435, 110 NYS 545.

30. Coquille Mill & Mercantile Co. v. Johnson [Or.] 98 P 132.

31. A franchise as distinguished from an appropriation. Coquille Mill & Mercantile Co. v. Johnson [Or.] 98 P 132.

32. Ejectment will not lie. Coquille Mill & Mercantile Co. v. Johnson [Or.] 98 P. 132.

33. Not a personal right. Coquille Mill & Mercantile Co. v. Johnson [Or.] 98 P 132.

34. Coquille Mill & Mercantile Co. v. Johnson [Or.] 98 P 132.

35. Stuart v. Greanyea [Mich.] 15 Det. Leg. N. 689, 117 NW 655.

36. Cannot impede or monopolize navigation. Ferry Pass Inspectors & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n [Fla.] 48 S 643.

37. Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n [Fla.] 48 S 643.

38. Bardes v. Herman, 114 NYS 1098.

39. **Search Note:** See notes in 33 L. R. A. 180; 27 A. S. R. 554; 36 Id. 336.
See, also, Navigable Waters, Cent. Dig. §§ 1-4, 17-179; Dec. Dig. §§ 2-35; 29 Cyc. 293-332; 21 A. & E. Enc. L. (2ed.) 432.

40. United States v. Monongahela Bridge Co., 160 F 712. No defense that bridge was adopted and recognized by the executive department of the government as an integral part of the national pike and post route over which mails were carried. Id.

41. Act March 3, 1899, c. 425, § 18, 30 Stat. p. 1153. United States v. Monongahela Bridge Co., 160 F 712.

42. Jury cannot consider fact of obstruction. United States v. Monongahela Bridge Co., 160 F 712.

43. United States v. Monongahela Bridge Co., 160 F 712.

44. State v. Gerbing [Fla.] 47 S 353; State v. Portland General Elec. Co. [Or.] 98 P 160. Court will judicially notice. State v. Portland General Elec. Co. [Or.] 95 P 722.

45. State v. Portland General Elec. Co. [Or.] 95 P 722; C. Beck Co. v. Milwaukee [Wis.] 120 NW 293; Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n [Fla.] 48 S 643.

46. McGilvra v. Ross, 161 F 398. Constitutional assertion of title by state is valid. Id.

47. Regulations under Laws 1904, c. 734, as amended Laws 1906, c. 418, are valid. State Water Supply Commission v. Curtis, 192 N. Y. 319, 85 NE 148. May regulate lands between high and low water. State v. Gerbing [Fla.] 47 S 353.

48. State has right to improve navigable

not extend beyond the international boundary.[49] The control [50] or improvement [51] of such waters may, however, be delegated as may the right to take toll in consideration of such improvements,[52] and the right of the state to retain a percentage of such tolls is not affected by an illegal legislative disposition of the proceeds.[53] Subaqueous lands held by individuals are subject to a public easement for navigation,[54] and the government may, without compensation, appropriate the same for the purpose of improving navigation,[55] but the appropriation of shore lands in connection with such public works is an act of eminent domain.[56] Although a vested right has been acquired to maintain a fixed bridge over a navigable stream, the state may require that in rebuilding it must be converted into a drawbridge.[57]

§ 4. *Remedies for injuries relating to.*[58]—See 10 C. L. 921—The obstruction of a navigable stream is a public nuisance and remedy is ordinarily by indictment,[59] but injunction will lie, at the suit of the state [60] or of one specially damaged,[61] to prevent the obstruction [62] or to restore the status quo; [63] but, where immediate removal

stream for purpose of navigation. State v. Portland General Elec. Co. [Or.] 98 P 160. Company cannot, by filing articles of incorporation, acquire right to improve a navigable stream and charge tolls. Id. Sovereign alone can confer right. Id.

**49.** Cannot control traffic on international waters under a state law. Boom Law 1889, c. 221, as amended Laws 1905, c. 89. Rainy Lake River Boom Corp. v. Rainy River Lumber Co. [C. C. A.] 162 F 287.

**50.** Legislature may confer upon city right to protect harbor, and ordinances under such authority and conformable to such purpose are valid. Ordinance of Milwaukee prohibiting removal of sand and rock from beach is valid under charter. C. Beck Co. v. Milwaukee [Wis.] 120 NW 293. Acts 1841, p. 14, No. 8, § 10 (Comp. Law 1897, § 2448), grant concurrent jurisdiction to certain counties over all waters of lake Michigan within state. People v. Coffey [Mich.] 15 Det. Leg. N. 947, 118 NW 732.

**51.** State may delegate its authority to improve navigable stream. State v. Portland General Elec. Co. [Or.] 98 P 160.

**52.** Grant of such a franchise is not creation of corporation by general law as forbidden by constitution. State v. Portland General Elec. Co. [Or.] 98 P 160.

**53.** State v. Portland General Elec. Co. [Or.] 98 P 160.

**54.** Jus publicum paramount to jus privatum. Bardes v. Herman, 114 NYS 1098. Royal charter vested jus privatum only in individual. Jus publicum remained in crown and passed to public on revolution. Id. Lewis Blue Point Oyster Cultivation Co. v. Briggs, 129 App. Div. 574, 114 NYS 313, afg. 58 Misc. 55, 110 NYS 37. A sale of tide lands by the state is subject to the public's paramount right in the navigable waters thereof and confers no right to obstruct navigation. Judson v. Tide Water Lumber Co. [Wash.] 98 P 377. State may make limited disposition of lands under navigable waters where the rights of navigation are not impaired but cannot abdicate general control, for such would be inconsistent with its implied legal duty to control the same for public use. State v. Gerbing [Fla.] 47 S 353.

**55.** Dredging channel through oyster bed. Lewis Bluepoint Oyster Cultivation Co. v. Briggs, 58 Misc. 55, 110 NYS 37, afd. in 129 App. Div. 574, 114 NYS 313.

**56.** Laws 1904, p. 1872, c. 734, as amended Laws 1906, p. 1016, c. 418, must be construed as authorizing granting due compensation for lands so taken in order to be constitutional. State Water Supply Commission v. Curtis, 192 N. Y. 319, 85 NE 148.

**57.** City of Buffalo v. Delaware L. & W. R. Co., 60 Misc. 584, 112 NYS 690.

**58. Search Note:** See notes in 6 C. L. 747; 57 A. S. R. 693; 69 Id. 271.

See, also, Navigable Waters, Cent. Dig. §§ 133-171; Dec. Dig. §§ 26, 27; 29 Cyc. 322-330; 21 A. & E. Enc. L. (2ed.) 443, 742.

**59.** McMeekin v. Central Carolina Power Co., 80 S. C. 512, 61 SE 1020. Unless party can show special damage. Id. Injunction will not lie to restrain erection of obstruction which, if completed, could not be challenged by the petitioner in civil action. Id. Individual cannot maintain action. Allaby v. Mauston Electric Service Co., 135 Wis. 345, 116 NW 4.

**60.** State v. Columbia Water Power Co. [S. C.] 63 SE 884. Indictment neither exclusive nor adequate. Id. Where the right and the violation thereof are clear, the court cannot refuse to enjoin. Id. Indictment not adequate remedy; not being available until nuisance is established, it cannot prevent the wrong and, further, it is unjust to require one whose rights are invaded to prove his case beyond reasonable doubt. Id.

**61.** Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n [Fla.] 48 S 643. Owners of logs held up by dam held to be specially damaged. Ireland v. Bowman [Ky.] 113 SW 56. Adjoining owners specially damaged by obstruction of public easement in beach. Barnes v. Midland R. Terminal Co., 193 N. Y. 378, 85 NE 1093. **Action not maintainable** by one divested of his littoral rights. McCloskey v. Pacific Coast Co. [C. C. A.] 160 F 794. Where right of access is not impaired. Columbia Canning Co. v. Hampton. [C. C. A.] 161 F 60; Decker v. Pacific Coast S. S. [C. C. A.] 164 F 974.

**62.** The right of the state to secure injunction against the erection of a nuisance extends to the case of threatened obstructions to navigation. State v. Columbia Water Power Co. [S. C.] 63 SE 884.

**63.** Judson v. Tide Water Lumber Co. [Wash.] 98 P 377. To remove obstruction and restore channel to original course. Id.

would work great hardships, the final order may be deferred pending solution of the engineering problem.[64] Nonuser by the public is no defense to such an action.[65] Failure to comply with an executive order to remove an obstruction is punishable by fine and each month's delay is a new offense.[66] Damages by reason of the obstruction of a navigable stream may be recovered against the party maintaining the nuisance [67] unless barred by limitations,[68] but a party who did not erect the obstruction is liable for its maintenance only after notice to remove.[69] Upon the question of damages, a qualified person may testify as to the deterioration of value in consequence thereof.[70] Where a milldam is an illegal obstruction, the remedy is by legal proceedings to abate the nuisance and not by damming the river up stream to provide a sudden flow for the passage of logs.[71]

### NE EXEAT.[72]

This topic includes only matters relating to the writs of ne exeat.

The extraordinary writ of ne exeat will not issue pending an appeal in the absence of a sufficient showing that the appellant is about to leave the jurisdiction, and that the applicant is not otherwise secured;[73] but where defendant has expressed an intention of leaving the jurisdiction and the evidence discloses such conditions as would naturally impel him to go away, a writ will not be discharged though the defendant denies even having expressed a purpose to leave the state,[74] although if the restraint of the writ should be found to interfere with the freedom of defendant's movements in meeting pressing business engagements out of the state, a motion for the substitution of a bond to answer the decree will be entertained.[75] The writ is a civil proceeding and the bond required to be given to exempt a defendant from incarceration and detention in the county jail thereunder is a bail in a civil case,[76] and under statute a recovery upon the bond will not be sustained in the absence of the issuance of a capias ad satisfaciendum and a return thereon non est inventus.[77] While a bond given to procure the release of one arrested under a writ of ne exeat regno differs from an ordinary bail bond in requiring the constant presence of the principal within the jurisdiction, yet the chief object of the two obligations is to obtain security that the principal shall abide any decree which the court may render

64. Main water-supply pipe of city obstructing canal. State v. Columbia Water Power Co. [S. C.] 63 SE 884.

65. State v. Columbia Water Power Co. [S. C.] 63 SE 884.

66. Question for jury is violation of the order; jury not authorized to go into the fact of obstruction. United States v. Monongahela Bridge Co., 160 F 712.

67. City liable for injuries to vessel caused by the negligence of its employe in swinging drawbridge. Lehigh Valley Trans. Co. v. Chicago, 141 Ill. App. 618. Personal injuries in the overturning of a launch occasioned by telephone wire obstructing navigable stream. Heiberger v. Missouri & Kansas Tel. Co., 133 Mo. App. 452, 113 SW 730. Damages for deterioration by reason of delay and for additional labor and expense rendered necessary. Ireland v. Bowman [Ky.] 114 SW 338.

68, 69. Ireland v. Bowman [Ky.] 114 SW 338.

70. Mandery v. Mississippi & Rum River Boom Co., 105 Minn. 3, 116 NW 1027.

71. Trullinger v. Howe [Or.] 97 P 548.

72. See 10 C. L. 1090.

**Search Note:** See notes in 11 C. L. 105; 118 A. S. R. 988.

See, also, Ne Exeat, Cent. Dig.; Dec. Dig.; 29 Cyc. 383-397; 14 A. & E. Enc. P. & P. 318.

73. Where considerable portion of property was real estate which defendant in divorce case could not pass without difficulty without applicant's consent, stay bond had been filed and no sufficient proof of threatened leaving of state, writ denied. Holcomb v. Holcomb, 49 Wash. 498, 95 P 1091.

74. Evidence on question held to preponderate for complainant. Chew v. Chew [N. J. Eq.] 69 A 1079.

75. Chew v. Chew [N. J. Eq.] 69 A 1079.

76. Ne exeat statute (Rev. St. c. 97, §§ 8, 9). Cochran v. People, 140 Ill. App. 596.

77. Rev. St., § 20, c. 16. Cochran v. People, 140 Ill. App. 596.

against him.[78] The bond to secure the release of a bankrupt when arrested under such writ should receive its grammatical construction[79] and is broken when the bankrupt goes into parts beyond the jurisdiction without leave of the court of bankruptcy, although he is present to abide the judgment of the court when rendered.[80] Acting either upon the analogy of a court of equity or of the power possessed by courts of the United States in actions at law, a court of bankruptcy has power to cancel the bond.[81] The writ of ne exeat has been abolished in South Carolina.[82]

## NEGLIGENCE.


§ 1. Definitions, 966.
§ 2. Acts or Omissions Constituting Negligence, 970.
A. Personal Conduct in General, 970. Act of God and Unavoidable Accident, 976. Joint and Several Liability, 977.
B. Use of Property in General, 978. Dangerous Machinery and Substances, 978. Liability of Manufacturers, 979.
C. Use of Lands, Buildings and Other Structures, 979. Liability to Trespassers and Licensees, 981. Liability for Injuries to Children, 983.
§ 3. Proximate Cause, 985.
§ 4. Contributory Negligence, 991. Children, 995. Comparative Negligence, 996. The Last Clear Chance Doctrine, 997. Imputed Negligence, 998.
§ 5. Actions, 999.


*The scope of this topic* is noted below.[83]

§ 1. *Definitions.*[84] See 10 C. L. 922—Broadly speaking, negligence may be said to be a breach [85] of duty,[86] consisting either of action or nonaction.[87] The definition commonly given, however, is that negligence is the failure to exercise ordinary care,[88]

78, 79, 80, 81. In re Appel [C. C. A.] 163 F 1002.

82. Code Civ. Proc. 1902, § 199, providing that "no person shall be arrested in a civil action except as prescribed by this Code of Procedure; but the same shall not apply to proceedings for contempt, etc.," abolishes writ. Messervy v. Messervy [S. C.] 61 SE 445.

83. This article treats the subject of negligence in a general way without attempting a specific application of principles. Such application is reserved for the topics devoted to the particular relation or subject-matter, as Animals, 11 C. L. 109; Bridges, 11 C. L. 441; Carriers, 11 C. L. 499; Corporations, 11 C. L. 810; Counties, 11 C. L. 908; Electricity, 11 C. L. 1185; Explosives and Inflammables, 11 C. L. 1450; False Imprisonment, 11 C. L. 1456; Fires, 11 C. L. 1470; Gas, 11 C. L. 1645; Highways and Streets, 11 C. L. 1720; Independent Contractors, 11 C. L. 1896; Inns, Restaurants and Lodging Houses, 12 C. L. 201; Intoxicating Liquors, 12 C. L. 332; Landlord and Tenant, 12 C. L. 528; Master and Servant, 12 C. L. 665; Medicine and Surgery, 12 C. L. 840; Mines and Minerals, 12 C. L. 851; Municipal Corporations, 12 C. L. 905; Nuisance, 10 C. L. 1031; Party Walls, 10 C. L. 1124; Railroads, 10 C. L. 1365; Shipping and Water Traffic, 10 C. L. 1655; Street Railways, 10 C. L. 1730; Telegraphs and Telephones, 10 C. L. 1841.

84. This section defines negligence, including willful or wanton negligence, merely in its abstract and relative sense and discusses degrees of negligence only where the comparative negligence of the parties is not questioned. Definitions of the various phases and elements of, and defenses to, negligence, are treated in following sections deemed appropriate therefor.

**Search Note:** See note in 100 A. S. R. 192. See, also, Negligence, Cent. Dig. §§ 1, 5, 6, 13, 15; Dec. Dig. §§ 1, 3, 4, 11, 13; 29 Cyc. 419-424, 426-430, 435; 21 A. & E. Enc. L. (2ed.) 455, 457; 29 Id. 32.

85. Applied to parent's duty to their children. Harrington v. Butte A. & P. R. Co., 37 Mont. 169, 95 P 8. There can be no negligence where there is no breach of duty. Roanoke R. & Elec. Co. v. Sterrett, 108 Va. 533, 62 SE 385. To constitute simple negligence, there must be a failure to perform a duty. Birmingham L. R. Co. v. Kendrick [Ala.] 46 S 588. Failure of carrier to discover hidden defect in bridge not breach of duty to passengers. Roanoke R. & Elec. Co. v. Sterrett, 108 Va. 533, 62 S 385.

86. Where there is no duty, there can be no negligence. Cincinnati, etc., R. Co. v. Harrod's Adm'r [Ky.] 115 SW 699.

87. Act of omission may be negligence as well as one of commission. Atchison, T. & S. F. R. Co. v. Mills [Tex. Civ. App.] 108 SW 480. Failure of engineer to prevent engine from moving while fireman was under it. Id. Negligence is the failure to discharge a duty which may be the omission of a duty, or doing that which is contrary to a duty. Cincinnati, etc., R. Co. v. Harrod's Adm'r [Ky.] 115 SW 699.

88. Adkisson's Adm'r v. Louisville H. & St. L. R. Co., 33 Ky. L. R. 204, 110 SW 284; Cincinnati, etc., R. Co. v. Evans, 33 Ky. L. R. 596, 110 SW 844; Cross v. Illinois Cent. R. Co., 33 Ky. L. R. 432, 110 SW 290; Louisville R. Co. v. Boutellier, 33 Ky. L. R. 484, 110 SW 357; Louisville & N. R. Co. v. Roth [Ky.] 114 SW 264; Eberson v. Continental Inv. Co., 130 Mo. App. 296, 109 SW 62; Smith's Adm'r v. Norfolk & P. Trac. Co. [Va.] 63 SE 1005. As a general rule, in all cases grounded upon negligence, the law imposes the duty of ordinary care which must be exercised by both

which is such care as an ordinarily prudent person would exercise under the same or similar circumstances.[89] But since the terms negligence[90] and ordinary care[91] or reasonable prudence[92] have only a relative significance, no particular conduct in the abstract can be said to be negligent,[93] but necessarily depends upon the circumstances and dangers surrounding the parties and their situation at the time.[94] To this rule there is the single exception that the violation of a rule of conduct prescribed by law is always negligence.[95] Actionable negligence, like negligence which

the one causing the injury and the one sustaining it. Wilkinson v. Oregon Short Line R. Co. [Utah] 99 P 466.

**89.** Cleveland, etc., R. Co. v. Kelley, 138 Ill. App. 109; Adkisson's Adm'r v. Louisville, H. & St. L. R. Co., 33 Ky. L. R. 204, 110 SW 284; Cincinnati, etc., R. Co. v. Evans, 33 Ky. L. R. 596, 110 SW 844; Cross v. Illinois Cent. R. Co., 33 Ky. L. R. 432, 110 SW 290; Mitchell v. Chicago & A. R. Co., 132 Mo. App. 143, 112 SW 291; Wilkinson v. Oregon Short Line R. Co. [Utah] 99 P 466. One's conduct is to be judged by the standard of an ordinarily prudent man. Hebeler v. Metropolitan St. R. Co., 132 Mo. App. 551, 112 SW 34; Robinson v. Cowan [Ala.] 47 S 1018. Definition of simple negligence as the failure to do what an ordinarily prudent person would have done under the circumstances, or the doing of that which an ordinarily prudent person would not have done, preferred over the definition that it "is the doing of an act, or the omission to act, which results in damage, but without intent to do wrong or cause damage," which was said to be inaccurate and too broad. Alabama City G. & A. R. Co. v. Bullard [Ala.] 47 S 578. That ordinary care is the care which an ordinarily careful and prudent person would exercise under the same or similar circumstances, and that negligence is the failure to exercise ordinary care, is a **"maxim"** needing no proof, argument or discourse. Felver v. Central Elec. R. Co. [Mo.] 115 SW 980.

**90.** Negligence is a relative term, and what is negligence in one case may not be in another. Gallagher v. City of Tipton, 133 Mo. App. 557, 113 SW 674; Cordray v. Savannah Elec. Co. [Ga. App.] 63 SE 710.

**91.** The expression "ordinary care" is a relative term rather than a fixed and unvarying one. What would be ordinary care under one state of facts would be "gross negligence" under other conditions; and so what would amount to the "highest and utmost care" in one situation would only be "ordinary care" in another; and therefore when the term "ordinary care" is used, such care is meant as is proportionate to the danger to be avoided or the risk to be incurred, judged by the standard of common prudence and the surrounding facts and circumstances. Anderson v. Great Northern R. Co. [Idaho] 99 P 91. What is "ordinary care" must be gauged and determined by the danger which its exercise requires to be overcome, for what would be ordinary care under certain conditions, might, under other conditions, be gross negligence. Galveston, H. & T. A. R. Co. v. Thompson [Tex. Civ. App.] 116 SW 106. What is ordinary care depends upon the circumstances of each case, and when the circumstances are such that an ordinarily prudent person would take greater precautions for his own safety than under less threatening circumstances, the greater degree of caution would be ordinary care. Dickson v. Swift & Co., 238 Ill. 62, 87 NE 59. Due care is care according to time and circumstances, hence, what is due care in one case might be negligence in another, and its gauge rises as the danger increases. Riggs v. Metropolitan St. R. Co. [Mo.] 115 SW 969. Though the foreman of a section gang might not have been negligent in suddenly stopping a hand car, had the injured person been standing squarely upon it and facing the direction in which it was going, the evidence was sufficient to show his negligence when the injured party was in an insecure position and riding backwards, such position being usual in the performance of his duties. Doss v. Missouri, K & T. R. Co. [Mo. App.] 116 SW 458.

**92.** The terms "ordinary care" and "reasonable prudence," as applied to the ordinary conduct and affairs of men, have a relative significance and cannot be arbitrarily defined. What may be ordinary care in one case may, under different surroundings and circumstances, be gross negligence. Swift & Co. v. Sandy [C. C. A.] 165 F 622.

**93.** There is no such thing as negligence at large, it being, in its essence, always concrete. Wyckoff v. Birch [N. J. Err. & App.] 71 A 243. The mere presence or absence of certain evidentiary facts will not always determine the question of negligence without reference to other facts appearing in particular cases. Stearns v. Boston & M. R. A. Co. [N. H.] 71 A 213. Conduct of the parties resulting in injury to one is to be judged not by fact that injury resulted from the course pursued but in the light of the circumstances known or discoverable by the use of ordinary care. Id.

**94.** Willson v. Logan, 139 Ill. App. 204. Although the standard raised by the law for the measurement of damages is that of an ordinarily prudent person only, the degree of care required is always to be exercised in view of the circumstances and dangers attending the parties and their situation at the time. Doss v. Missouri, K. & T. R. Co. [Mo. App.] 116 SW 458. "Negligence" is the failure to observe for the protection of another's interests such care and precaution as the circumstances justly demand. Florida R. Co. v. Sturkey [Fla.] 48 S 34. Negligence consists of a failure, under the circumstances, to use ordinary care. Smith's Adm'r v. Norfolk & P. Trac. Co. [Va.] 63 SE 1005.

**95.** Where the law prescribes the duty and also defines what constitutes ordinary care in discharging it, neither party may rely upon the care of the other, but must comply with the duty which the law imposes. Wilkinson v. Oregon Short Line R. Co. [Utah] 99 P 466. Duty of traveler upon highway

is nonactionable, must be predicated upon a breach [96] of duty [97] in the commission or omission of an act [98] without wrongful intent; [99] but, in addition, such breach of duty, which is merely a failure to exercise ordinary care,[1] must proximately [2] result [3] in actual [4] injury [5] to the person to whom the duty is owed.[6] Use of the phrases customarily found in the definitions may not be essential [7] and some have even been criticised as inaccurate [8] and of but little practical value.[9] The modern tendency

and trainmen approaching railroad crossing. Id. See, also, § 2, post.

**96.** Must be breach of duty. City of Laporte v. Osborn [Ind. App.] 86 NE 995; Kelly v. Benae [Mo.] 116 SW 557; Pullman Co. v. Cavinere [Tex. Civ. App.] 116 SW 410; Herndon v. Salt Lake City, 34 Utah, 65, 95 P 646; Smalley v. Rio Grande W. R. Co., 34 Utah, 423, 98 P 311. Actionable negligence consists of a failure of duty, the omission of something which ought to have been done, or the doing of something which ought not to have been done. Toppi v. McDonald, 128 App. Div. 443, 112 NYS 821. A person cannot be held liable for negligence, unless he owed some duty to the plaintiff and that duty was not performed. McGhee v. Norfolk & S. R. Co., 147 N. C. 142, 60 SE 912. Must be breach of duty. Richmond v. Missouri Pac. R. Co., 133 Mo. App. 463, 113 SW 708.

**97.** Must be a duty. City of Laporte v. Osborn [Ind. App.] 86 NE 995. Must be duty to use due care. Smalley v. Rio Grande W. R. Co., 34 Utah, 423, 98 P 311; Pullman Co. v. Caviness [Tex. Civ. App.] 116 SW 410. The expression "duty" properly imports a determinate person to whom the obligation is owing, as well as the one who owes the obligation; there must be two determinate parties before the relationship of obligor and obligee of a duty can exist. McGhee v. Norfolk & S. R. Co., 147 N. C. 142, 60 SE 912. Where plaintiff standing in highway shot into shanty containing dynamite located on defendant's premises, held that there was no duty owed by the latter to the former. Id. Railroad under no duty to use care in handling of cars in its yards in anticipation of unauthorized intrusions. Smalley v. Rio Grande W. R. Co., 34 Utah, 423, 98 P 311.

**98.** A wrongful omission is as actionable as a wrongful commission. Hagerty v. Montana Ore Purchasing Co. [Mont.] 98 P 643.

**99.** Richmond v. Missouri Pac. R. Co., 113 Mo. App. 463, 113 SW 708; Pullman Co. v. Caviness [Tex. Civ. App.] 116 SW 410. Wantonness or willfulness are not elements of simple negligence. Heinzle v. Metropolitan St. R. Co., 213 Mo. 102, 111 SW 536.

**1.** Richmond v. Missouri Pac. R. Co., 133 Mo. App. 463, 113 SW 708; Smalley v. Rio Grande W. R. Co., 34 Utah, 423, 98 P 311; Pullman Co. v. Caviness [Tex. Civ. App.] 116 SW 410. The test of actionable negligence is whether the degree of care which persons of ordinary prudence and intelligence commonly exercise under the same circumstances was exercised in the case at bar. Lake v. Shenango Furnace Co. [C. C. A.] 160 F 887. If the care exercised rises to this standard, there is no right of action; if it does not, there is. Id.

**2.** See § 3, post.

**3.** A failure to do a futile act cannot be made the basis of negligence. Lissel v. St. Louis & S. F. R. Co., 214 Mo. 515, 113 SW 1104; Stearns v. Boston & M. R. Co. [N. H.] 71 A 21; Slaughter v. Huntington [W. Va.] 61 SE 155.

**4.** Where recovery is sought for negligent injury, an actual injury must be shown. Philadelphia, B. & W. R. Co. v. Mitchell, 107 Md. 600, 69 A 422. Visible external wounds are not essential, hence internal injuries, of which there are no external evidences, are sufficient. Id. Negligence causing **fright not resulting in personal injury** is not actionable. Reed v. Ford, 33 Ky. L. R. 1029, 112 SW 600; Miller v. Baltimore & O. S. W. R. Co., 78 Ohio St. 309, 85 NE 499. Where one was injured while attempting to escape imminent danger, accompanying fright, held irrelevant to the issue of negligence. Swift & Co. v. Sandy [C. C. A.] 165 F 622. Negligence causing **fright resulting in personal injury** is actionable. Sandy v. Swift & Co., 159 F 271.

**5.** Injury must result. Smalley v. Rio Grande W. R. Co., 34 Utah, 423, 98 P 311; Nichols v. Chicago B. & Q. R. Co. [Colo.] 98 P 808; City of Laporte v. Osborn [Ind. App.] 86 NE 995; Hughes v. Chicago, B. & Q. R. Co. [Iowa] 119 NW 924. Negligence of carrier towards passenger is not actionable unless it results in injury. Sullivan v. Old Colony St. R. Co., 200 Mass. 303, 86 NE 511.

**6.** There is no liability to one to whom no duty is owed. Hone v. Presque Isle Water Co. [Me.] 71 A 769. An act or omission may be negligent as to one and innocuous as to another, since a duty may be owed to one and not to another. Cincinnati, etc., R. Co. v. Harrod's Adm'r [Ky.] 115 SW 699. Water company not liable to individuals for negligent failure to supply water adequate to extinguishment of fires in accordance with its contract with municipality. Hone v. Presque Isle Water Co. [Me.] 71 A 769.

**7.** Care ordinarily exercised by the great mass of persons under like circumstances used rather than that of the **"ordinarily prudent man."** Bandekow v. Chicago, B. & Q. R. Co., 136 Wis. 341, 117 NW 812. Expression "ordinary care" in portion of charge instead of **"ordinary care and diligence"** will not require a new trial where the meaning of "ordinary care" is clearly defined, and it is shown that no peculiar or restricted meaning was attached to it. Atlanta, K. & N. R. Co. v. Tilson [Ga.] 62 SE 281. Objection to instruction on ground that negligence must have **"caused"** injury rather than **"occasioned"** it held not tenable. Roanoke R. & Elec. Co. v. Sterrett, 108 Va. 533, 62 SE 385. "Ordinary care" and "ordinary diligence" **synonymous term** when applied to same conduct. Atlanta, K. & N. R. Co. v. Tilson [Ga.] 62 SE 281.

**8.** The care that an **"ordinarily prudent man"** would exercise when used as the standard upon which to determine the existence or nonexistence of contributory negligence

is to disregard degrees of care and negligence,[10] but qualifying adjectives are still frequently used[11] though principally for the purpose of showing the variable quantity of the terms negligence and ordinary care.[12] Gross negligence, in particular, is recognized[13] and has been defined to be the failure to exercise slight care.[14] The term "negligence" without any qualification usually means ordinary negligence.[15]

*Willfulness and wantonness.*[See 10 C. L. 923]—These terms[16] and others of similar import,[17] which may[18] or may not[19] be equivalent, always imply something more than simple negligence.[20] To constitute wanton[21] negligence there must be

suggests mediocrity of care, if not carelessness, and held too low when applied to telephone lineman. Drown v. New England Tel. & T. Co. [Vt.] 70 A 599.

**9. Note:** For a dicta discussion of the meaning and value of the terms "ordinarily prudent man", "ordinary care" and like terms as used to define the standard of care upon which the question of the existence or nonexistence of neligence in a particular case is to be determined, see Hainlin v. Budge [Fla.] 47 S 825.—[Ed.]

**10.** See, also, § 4, subdivision **"comparative negligence,"** post. Instruction qualifying terms "care" and "negligence" by the use of the adjectives **"slight"** and **"ordinary"** is error. Cleveland, etc., R. Co. v. Kelley, 138 Ill. App. 109. The terms **"light" and "heavy"** as applied to negligence unwarranted in action against electric light company for injury caused by live wire when no evidence that defendant maintained a common nuisance or was guilty of wanton negligence. Weir v. Haverford Elec. Light Co., 221 Pa. 611, 70 A 874. **Gross negligence** need not be shown under Ky. St. 1903, § 6, giving a cause of action for death by another's negligence. Cincinnati, etc., R. Co. v. Evan, 33 Ky. L. R. 596, 110 SW 844.

**11.** Highest degrees of care required of electric light companies. Weir v. Haverford Elec. Light Co., 221 Pa. 611, 70 A 874. Highest degree of care commensurate with the dangers required of electric light companies. Electric light company. Walter v. Baltimore Elec. Co. [Md.] 71 A 953. **Slightest neglect** held sufficient to create liability of carrier for injury to passenger. Roanoke R. & Elec. Co. v. Sterrett, 108 Va. 533, 62 SE 385. Common laborer chargeable with lesser **degree of intelligence** than employer. Vaugh v. Glen Falls Portland Cement Co., 59 Misc. 230, 112 NYS 240.

**12.** Gross neligence under one state of facts, ordinary care under another. Swift & Co. v. Sandy [C. C. A.] 165 F 622; Cordray v. Savannah Elec. Co. [Ga. App.] 63 SE 710; Galveston, H. & S. A. R. Co. v. Thompson [Tex. Civ. App.] 116 SW 106. Highest degree of care required in some cases, yet this is but ordinary care under the facts. Anderson v. Great Northern R. Co. [Idaho] 99 P 91.

**13.** When one stationed at crossing gates leaves them open and permits team to cross while train is approaching, there is gross negligence. Louisville & N. R. Co. v. Roth [Ky.] 114 SW 264. Decedent held grossly negligent in not avoiding being run over by train. Holland v. Missouri Pac. R. Co., 210 Mo. 338, 109 SW 19. Engineer held grossly negligent in approaching crossing without keeping proper lookout. Alten v. Metropolitan St. R. Co., 133 Mo. App. 425, 113 SW 691. Gross neligence in running train faster than limit permitted by ordinance. Neary v. Northern Pac. R. Co., 37 Mont. 461, 97 P 944.

**14.** Louisville & N. R. Co. v. Roth [Ky.] 114 SW 264.

**15.** Chicago, R. I. & P. R. Co. v. Lacy [Kan.] 97 P 1025.

**16.** Term "wanton negligence" always implies something more than negligent act. Bailey v. North Carolina R. Co. [N. C.] 62 SE 912. Proof of simple negligence will not support a charge of willful and wanton misconduct. Jackson Elec. R. L. & P. Co. v. Carnahan [Miss.] 48 S 617; Robinson v. Helena Light & R. Co. [Mont.] 99 P 837. Instruction permitting recovery in such case erroneous. Jackson Elec. R. L. & P. Co. v. Carnahan [Miss.] 48 S 617.

**17. "Recklessness"** and "wantonness" are stronger terms than mere or ordinary negligence. No testimony to show wanton negligence. Chicago, R. I. & P. R. Co. v. Lacy [Kan.] 97 P 1025. The word "recklessly" when used conjunctively with "wantonly" always means something more than negligently and can never import less than willful misconduct and intentional wrong. Bailey v. North Carolina R. Co. [N. C.] 62 SE 912. Proof of simple negligence will not support a charge of reckless and wanton misconduct. Id.

**18.** An allegation of "willful," "unlawful" and "reckless" conduct does not charge negligence, but charges willfulness, since "unlawful" assigns no specific character to the acts alleged, and since the word "reckless" is equivalent to "willful." Crosby v. Seaboard Air Line R. Co., 81 S. C. 24, 61 SE 1064. Reckless disregard of security, wantonness or other equivalent of bad faith, and the willful or malicious disposition to injure, all involve something else than negligence. Missouri Pac. R. Co. v. Walters [Kan.] 96 P 346.

**19.** "Reckless" means heedless, careless, rash indifference to consequences, but does not imply willfulness. Robinson v. Helena Light & R. Co. [Mont.] 99 P 837.

**20.** Negligent injuries are to be distinguished from intentional ones. Cunningham v. Pease House Furnishing Co., 74 N. H. 435, 69 A 120.

**21.** Wantonness is the conscious failure of one charged with a duty to exercise due care and diligence to prevent an injury after the discovery of the peril, or under circumstances where he is charged with a knowledge of such peril and being conscious of the inevitable or probable results of such failure. Birmingham R. L. & P. Co. v. Williams [Ala.] 48 S 93. Held open to the jury to infer wantonness. Id. Complaint held not to charge wanton misconduct in starting car

knowledge,[22] actual or constructive,[23] of the imminence of danger [24] and a failure to use reasonable effort to prevent it.[25] To constitute willful negligence [26] there must, in addition to the element of knowledge,[27] be a design, purpose or intent to do wrong or to cause the injury,[28] though recklessness amounting to an utter disregard of consequences will be held to supply the place of specific intent.[29] Mere forgetfulness, however grievous the consequences, does not constitute a willful or wanton neglect of duty.[30]

§ 2. *Acts or omissions constituting negligence. A. Personal conduct in general.*[31]—See 10 C. L. 923—As seen in the preceding section, negligence must be predicated upon a legal duty.[32] This duty may be created by statute [33] or ordinance,[34]

while passenger was alighting. Selma St. & S. R. Co. v. Campbell [Ala.] 48 S 378. No evidence of wantonness. Birmingham R. L. & P. Co. v. Haggard [Ala.] 46 S 519. No evidence of wanton misconduct by defendant to one riding on engine. Bailey v. North Carolina R. Co. [N. C.] 62 SE 912.

**22.** That ordinary diligence would render the danger apparent is insufficient since it constitutes simple negligence. Atchison, T. & S. F. R. Co. v. Baker [Kan.] 98 P 804.

**23.** Constructive knowledge. Atchison, T. & S. F. R. Co. v. Baker [Kan.] 98 P 804; Birmingham, S. R. Co. v. Kendrick [Ala.] 46 S 588. To constitute constructive knowledge, the probability of accident must be so great, its obviousness so insistent, that its happening is to be expected. Atchison, T. & S. F. R. Co. v. Baker [Kan.] 98 P 804.

**24.** Atchison, T. & S. F. R. Co. v. Baker, [Kan.] 98 P 804.

**25.** Atchison, T. & S. F. R. Co. v. Baker [Kan.] 98 P 804. Where after discovery of peril it is impossible to avoid it, there is no wanton or subsequent negligence. Western Steel Car & Foundry Co. v. Cunningham [Ala.] 48 S 109. Failure of motorman to stop car, if he can, after notice of plaintiff's peril, is wanton negligence. Jackson Elec. R. L. & P. Co. v. Carnahan [Miss.] 48 S 617.

**26.** Evidence held not to show wilful negligence of carrier causing injury to passenger. McLean v. Atlantic Coast Line R. Co., 81 S. C. 100, 61 SE 900; Crosby v. Seaboard Air Line R. Co., 81 S. C. 24, 61 SE 1064. Held no evidence of willful misconduct leading to injury of one riding on engine without invitation. Bailey v. North Carolina R. Co. [N. C.] 62 SE 912. Failure of motorman to stop car after notice of plaintiff's peril, provided he is able to do so is willful negligence. Jackson Elec. R. L. & P. Co. v. Carnahan [Miss.] 48 S 617. No evidence of willful misconduct. Birmingham R. L. & P. Co. v. Haggard [Ala.] 46 S 519.

**27.** There must be knowledge or a duty to know of the imminence of danger. Birmingham S. R. Co. v. Kendrick [Ala.] 46 S 588. Complaint held not to charge such knowledge or duty. Id.

**28.** Chicago, R. I. & P. R. Co. v. Lacy [Kan.] 97 P. 1025.

**29.** And carries with it the same liability as willfulness. Chicago, R. I. & P. R. Co. v. Lacy [Kan.] 97 P 1025.

**30.** Bailey v. North Carolina R. Co. [N. C.] 62 SE 912.

**31. Search Note:** See notes in 10 C. L. 925; 19 L. R. A. 725; 21 Id. 723; 47 Id. 295; 69 Id. 513; 4 L. R. A. (N. S.) 1130; 7 Id. 335; 9 Id. 339; 10 Id. 845; 14 Id. 251; 16 A. S. R. 250; 25 Id. 44; 77 Id. 26; 1 Ann. Cas. 755; 9 Id. 427.

See, also, Negligence, Cent. Dig. §§ 1-18; Dec. Dig. §§ 1-15; 29 Cyc. 419-441; 8 A. & E. Enc. L. (2ed.) 2; 21 Id. 460.

**32.** Evidence held to show **physician** owed patient duty to remove her from operating room to lower floor after operation, and hence he was liable for negligent injury to her while she was being so moved. Haase v. Morton, 138 Iowa, 205, 115 NW 921. **Independent contractor** owes duty to occupants of building which he is repairing to adopt most approved expedients to protect them from injury. Eberson v. Continental Inv. Co., 130 Mo. App. 296, 109 SW 62. **One employed by a contractor to do a certain portion of a work** owes to the servants of the latter the duty to use reasonable care, in the operation of his work, not to injure them. Genovesia v. Pelham Operating Co., 114 NYS 646. Duty of city in **construction and maintenance of streets** discussed. Herndon v. Salt Lake City, 34 Utah, 65, 95 P 646. Where a plumber was sent to work in defendant's building, the latter owed him no duty to furnish him proper **scaffolding** to get his ladders, etc., to the place of work, and was not liable because he fell from loose planks put up by another workman for his own use. Hordern v. Salvation Army, 124 App. Div. 674, 109 NYS 131.

**33. Held negligence: Employment of minor** without requiring production of age and school certificate gives right of action for injury resulting from employment. Forer v. Baker, 137 Ill. App. 588. Negligence per se. Burnett v. Ft. Worth L. & P. Co. [Tex.] 112 SW 1040. Violation of Pub. Acts 1901, p. 157, No. 113, as amended by Pub. Acts 1905, p. 239, No. 171, prohibiting employment of child under 14 in manufacturing establishments. Syneszewski v. Schmidt, 153 Mich. 438, 15 Det. Leg. N. 509, 116 NW 1107. Violation of Acts 1899, p. 231, c. 142 (Burn's Ann. St. 1918, § 8021) prohibiting employment of minors under 16 years of age for more than a certain number of hours per day and week, held negligence per se where injury resulted indirectly from such violation. Inland Steel Co. v. Yedinak [Ind.] 87 NE 229. Violation of statute **prohibiting railroad company from obstructing street.** Houren v. Chicago, etc., R. Co., 236 Ill. 620, 86 NE 611. Violation of Kirby's Dig. § 5352, **requiring mine operator to keep timber for props** and deliver props when required, is negligence per se. Johnson v. Mammoth Vein Coal Co. [Ark.] 114 SW 722. Failure of **Union Station Ass'n** to

though this will not by implication abrogate correlative duties existing at common law.[35] Where a duty exists it cannot be delegated.[36] Ordinarily, negligence does not arise from a breach of contract,[37] but there are cases when it may.[38] While a custom [39] may not be a test of due care,[40] it may be sufficient to refute an inference.[41] Negligence cannot be based upon injuries arising from dangers incident to a lawful occupation,[42] mere errors of judgment,[43] the mere fact that the injury might have been avoided,[44] the failure to perform futile acts,[45] or knowledge of similar acci-

obey statutory requirements. Parker v. Union Station Ass'n [Mich.] 15 Det. Leg. N. 909, 118 NW 733. Sale of **impure food** in violation of Pure Food Law. Meshbesher v. Channellem Oil & Mfg. Co. [Minn.] 119 NW 428.

**Held evidence of negligence:** Violation of Labor Law (Laws 1897, p. 477, c. 415) 370, prohibiting **employment of minors** under 14 years of age, is per se evidence of negligence. Koester v. Rochester Candy Works [N. Y.] 87 NE 77. Negligence being the gist of a civil action in such cases, the master cannot be held liable if he exercised due care in the premises. Id. Employment of child under 16 to work about dangerous machinery without certificate required by Laws 1907, p. 576, c. 408, prima facie evidence of negligence. Fitzgerald v. International Flax Twine Co., 104 Minn. 138, 116 NW 475. Employment in factory of child under 14 years of age in violation of Labor Law (Laws 1897, p. 477, c. 415, § 70), is of itself sufficient to warrant recovery for injury results. Danaher v. American Mfg. Co., 126 App. Div. 385, 110 NYS 617. **Automobilist's failure to sound horn** or gong, as required by statute, held evidence for the jury on the issue of his negligence in frightening horse, thereby causing runaway. Shaffer v. Coleman, 35 Pa. Super. Ct. 386. Fact that street car was running at an **unlawful rate of speed** at time of collision is sufficient to take the question of negligence to the jury. Kern v. Des Moines City R. Co. [Iowa] 118 NW 451.

**34. Held negligence:** Violation of ordinance regulating **speed of trains** negligence as a matter of law. Chicago, B. & Q. R. Co. v. Sack, 136 Ill. App. 425; St. Louis & S. F. R. Co. v. Summers [Tex. Civ. App.] 111 SW 211; Pittsburgh, etc., Co. v. Rogers [Ind. App.] 87 NE 28. Backing engine through city streets at speed in excess of that limited by ordinance and without warnings. Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808. Employment of **unlicensed elevator operator** negligence per se. Cragg v. Los Angeles Trust Co. [Cal.] 93 P 1063.

**Evidence of negligence:** Evidence of negligence but not conclusive. Davis v. John L. Whiting & Son Co., 201 Mass. 91, 87 NE 199. Hence evidence in explanation of the unlawful conduct and tending to diminish its effect as evidence of negligence may be shown. Davis v. John L. Whiting & Son Co., 201 Mass. 91, 87 NE 199. Violation of ordinance limiting rate of **speed of trains** prima facie negligence. Guthenann Transfer Co. v. McGuire, 138 Ill. App. 162.

**35.** Statute requiring automobilists to stop upon signal does not relieve them from the duty of stopping without signal when the necessity therefor is apparent. Walkup v. Beebe [Iowa] 116 NW 321.

**36.** One cannot escape liability by devolving a duty upon an independent contractor. Press v. Penny [Mo. App.] 114 SW 74.

**37.** Glenn v. Hill, 210 Mo. 291, 109 SW 27. Landlord's breach of promise to repair. Glenn v. Hill, 210 Mo. 291, 109 SW 27. When defendant contracted to construct electric light plant for city in workmanlike, etc., manner, and one was killed because of defective insulation of wires and judgment therefor recovered against city, latter's action to recover amount thereof from contractor sounded in contract and not in tort for negligence. City of Owensboro v. Westinghouse, Church, Kerr & Co. [C. C. A.] 165 F 385.

**38. University athletic association** impliedly contracts that its stands are safe for occupancy of its patrons, except for defects not discoverable by reasonable means. It is not enough that stands were well built, of good material, and pronounced safe upon inspection. Scott v. University of Michigan Athletic Ass'n, 152 Mich. 684, 15 Det. Leg. N. 392, 116 NW 624.

**39.** As to the admissibility of a custom in evidence, see § 5, post.

**40.** The test of the exercise of reasonable care is what a reasonably prudent person would ordinarily have done in a like situation and not what has been the practice of others. Chicago, etc., R. Co. v. Moore [C. C. A.] 166 F 663. Practice of others as to conduct of similar business. Chicago Great Western R. Co. v. McDonough [C. C. A.] 161 F 657.

**41.** Proof that the conduct of a defendant coincided with the customary method of doing the business employed by others under like circumstances excludes the inference of negligence. Bandekou v. Chicago, B. & Q. R. Co., 136 Wis. 341, 117 NW 812. Carrying a bucket attached to a car, but which extends out from the tracks no further than certain types of cars in common use, is not negligence. Id.

**42.** Persons engaged in a necessary and lawful work are not negligent on account of dangers or defective conditions caused thereby. Fitzgerald v. Degnon Cont. Co., 126 App. Div. 363, 110 NYS 857. Removal of flag in sidewalk to put cinders under it. Id.

**43.** Error of judgment not negligence. Wyman v. Lehigh Valley R. Co. [C. C. A.] 158 F 957.

**44.** The test is, rather, was there negligence in doing the particular thing which was done in view of the circumstances and conditions existing at the time. Carscallen v. Coeur D'Alene & St. Joe Transp. Co. [Idaho] 98 P 622. Applied to collision of vessels. Id. A discovery of peril raises only a duty of using the means then practicable to prevent the injury. Morgan v.

dents.[46] Among the matters unsuccessfully invoked to refute negligence are concurring acts of third parties,[47] contracts with third parties,[48] loss of life in an effort to prevent the injury,[49] ignorance of physical infirmities of the person injured,[50] and the fact that such infirmities increased the injury.[51] The standards of care raised by law, as already defined, is that of ordinary care, or the care of an ordinarily prudent person.[52] In the application of this standard, the circumstances [53] of each particular case, which may include the relation [54] and relative rights [55] of the parties,

Missouri, K. & T. R. Co. [Tex. Civ. App.] 110 SW 978. Instructions held to impose too high a degree of care. Id.

**45. When plaintiff knew of excavation,** failure to place lights around it was not negligence. Slaughter v. Huntington [W. Va.] 61 SE 155. **When plaintiff knew that train was approaching,** failure to sound warnings was not negligence. Sissel v. St. Louis & S. F. R. Co., 214 Mo. 515, 113 SW 1104; Stearns v. Boston & M. R. Co. [N. H.] 71 A 21; Heise v. Chicago Great Western R. Co. [Iowa] 119 NW 371.

**46.** Hence fact that explosion of asphalt tank was so unusual as to be unknown to experienced men no defense, since due care might have been exercised in all other cases. Dulligan v. Barber Asphalt Paving Co., 201 Mass. 227, 87 NE 567.

**47.** See, also, § 8 post. The concurring act of another will not relieve defendant from liability for his negligence without which the injury would not have happened. Flanagan v. Wells Bros. Co., 237 Ill. 82, 86 NE 609. Failure of policemen to uncouple cars across street and thereby permit fire department to pass did not excuse railroad company's negligence, in obstructing street. Houren v. Chicago, etc., R. Co., 236 Ill. 620, 86 NE 611. Driver of automobile liable to passengers for colliding with street car when collision would not have occurred in absence of his negligence, though it might also have been avoided but for breaking of brake-rod on automobile owing to latent defect. Johnson v. Coey, 237 Ill. 88, 86 NE 678. Negligence of motorman would not defeat conductor's right to recover for negligence of wagon driver in colliding with car. Ford v. Hine Bros. Co., 237 Ill. 463, 86 NE 1051.

**48.** Municipality not excused for negligent maintenance of streets because traction company has agreed to keep them in proper condition. City of Chicago v. Kubler, 133 Ill. App. 520.

**49.** The fact that one loses his own life in accident is no proof that it was not caused by his negligence. Toppi v. McDonald, 128 App. Div. 443, 112 NYS 821.

**50.** Fact that defendant was ignorant of pregnant condition of woman does not lessen his liability for negligently injuring her. Prescott v. Robinson, 74 N. H. 460, 69 A 522.

**51.** One is liable for injuries negligently inflicted, though the result would have been less disastrous had the injured person been in good health at the time of the accident. Miehlke v. Nassau Elec. R. Co., 129 App. Div. 438, 114 NYS 90.

**52.** See § 1, ante, for authorities holding this to be the standard, and discussions as to its practical value.

**53.** Care required of **street railways** toward pedestrians. Liutz v. Denver City Tramway Co., 43 Colo. 58, 95 P 600. Care required of **pedestrian crossing street car tracks** such as a reasonably prudent man would have exercised. Evidence held to require submission of question of engineer's negligence in **backing engine into cars** thereby killing brakeman. Mahoning Ore & Steel Co. v. Blomfelt [C. C. A.] 163 F 827. Carrier not required to keep **station platform** free from snow and ice nor to sprinkle ashes, sawdust, etc., during storm. Strong v. Long Island R. Co., 129 App. Div. 361, 113 NYS 828. City's failure to prevent public from using **bridge** under its control which was insufficiently lighted and without switchman held to justify finding of negligence. City of Chicago v. Thomas, 141 Ill. App. 122. Care required of **automobilists.** Sapp v. Hunter [Mo. App.] 115 SW 463. In the absence of a law requiring it, **vessel's failure to display a light** is not negligence per se, but the necessity is a question of fact to be determined in view of the existing circumstances and conditions. Carscallen v. Coeur D'Alene & St. Joe Transp. Co. [Idaho] 98 P 622. Defendant's act in **letting go of rope holding scaffold** on which plaintiff was painting was not excused by belief that plaintiff called to him to let go, unless in the exercise of that belief he acted with the prudence which the situation demanded. Irregang v. Ott [Cal. App.] 99 P 528. Care required of **one rightfully starting a fire** is that which a reasonably prudent man would have exercised under the circumstances. Robinson v. Cowan [Ala.] 47 S 1018. Not required to anticipate arising of unusual wind. Id. Finding of negligence, in view of all the conditions and circumstances, not disturbed however. Robinson v. Cowan [Ala.] 47 S 1018.

**Rate of speed of vehicle:** Ordinance prescribing maximum rate of speed does not necessarily permit such speed to be maintained at all times and under all circumstances. Irwin v. Judge [Conn.] 71 A 572. The fact that one was driving slowly at the time of a collision may be some proof of due care while fast driving may of itself be negligence, both propositions being dependent upon time, place, and other circumstances. Armour & Co. v. Kollmeyer [C. C. A.] 161 F 78. A "high rate of speed" as an element of negligence is an unreasonable one, considering time and place and one which prevents the driver from exercising such control as will avoid collisions. Irwin v. Judge [Conn.] 71 A 572. Driving an automobile at a high rate of speed through city streets held negligence under the circumstances. Id.

**54.** Negligence of a **bailee** for destruction of, or injury to, the property bailed, is actionable both under the common and civil law. Sea Ins. Co. of Liverpool, Eng. v. Vicksburg S. & P. R. Co. [C. C. A.] 159 F 676.

**55.** Due care may be dependent upon the right to do a thing, but such right cannot excuse the doing of a thing negligently.

the actions [56] and age [57] of the person injured, knowledge,[58] actual or constructive,[59] of the danger, or a duty to acquire it,[60] imminence of other dangers,[61] appreciation of the work,[62] and the duty to anticipate results,[63] must necessarily be considered,

Riedel v. Wheeling Trac. Co., 63 W. Va. 522, 61 SE 821. Crossing tracks when danger was obvious. Id. Since **pedestrians and street car companies** both have a right to use public street, each must exercise ordinary care, one to avoid injury and the other to avoid inflicting injury. Luity v. Denver City Tramway Co., 43 Colo. 58, 95 P 600. Rights and duties of **railroads and those crossing tracks** on highways. Nichols, B. & O. R. Co. [Colo.] 98 P 808; Riedel v. Wheeling Trac. Co., 63 W. Va. 522, 61 SE 821. **Persons engaged in the construction of a building** owe to each other the duty of working in such manner as not to negligently cause injury. Flanagan v. Wells Bros. Co., 237 Ill. 82, 86 NE 609. **Third parties rightfully upon premises** owes the duty of exercising reasonable care for the safety of the other. Servants of different contractors working on same building. Langan v. Enos Fire Escape Co., 233 Ill. 308, 84 NE 267.

**56.** Motorman not negligent though he might have been had not decedent signaled her intention of boarding. Luitz v. Denver City Tramway Co., 43 Colo. 58, 95 P 600.

**57.** The fact that children act upon childish instincts and impulses is an element to be considered in determining whether due care was exercised toward them. Force v. Standard Silk Co., 160 F 992.

**58. Knowledge by defendant:** When injury resulted by negligent **blasting** and defendant knew or should have known that plaintiff was working nearby, there was a violation by defendant of a duty he owed plaintiff constituting actionable negligence. Sloss-Sheffield Steel & Iron Co. v. Salser [Ala.] 48 S 374. Those **repairing sidewalks** owe a duty to guard all defects occasioned thereby, since it is a matter of common knowledge that sidewalks will be used. Kampmann v. Rothwell [Tex.] 109 SW 1089. Owner's knowledge of **animal's disease** and negligence in manner of keeping it essential to liability for communication of disease. Eshleman v. Union Stockyards Co. [Pa.] 70 A 899. Railway company not liable in absence of knowledge of **defect in tracks** causing injury, and negligent failure to repair. Miller v. United Rys. & Elec. Co. [Md.] 69 A 636. In action against engineer by fellow-employe allegation that defendant suddenly and negligently stopped train thereby throwing plaintiff from caboose, subject to demurrer in absence of allegation of facts showing **knowledge of plaintiff's position.** Southern R. Co. v. Cash [Ga.] 62 SE 823.

**Knowledge by plaintiff:** Failure to signal **approach of train** of which plaintiff had knowledge not negligence. Sissel v. St. Louis & S. F. R. Co., 214 Mo. 515, 113 SW 1104; Heise v. Chicago Great Western R. Co. [Iowa] 119 NW 371. Failure to place lights around **excavation** of which plaintiff had knowledge not negligence. Slaughter v. Huntington [W. Va.] 61 SE 155.

**Seasonableness of knowledge:** In order that defendant's knowledge of a defective condition may constitute an element of negligence, it must have existed for a sufficient length of time to have enabled defendant to remedy the defect. Gay v. Milwaukee Elec. R. & Light Co. [Wis.] 120 NW 283. Finding merely that defendant had, or ought to have had, knowledge not finding of negligence. Id. But insufficient time to make repairs is no defense **when defective condition is created by defendant.** Newman v. New York, 57 Misc. 636, 108 NYS 676. Where **temporary filling in break in asphalt pavement** was put in under supervision of city inspector, city liable for injuries regardless of length of time in which to make repairs. Id.

**59.** The rule of constructive notice of structural defects which are patent has no application to a **latent defect** which defendant is justified in believing does not exist. Sack v. Ralston, 220 Pa. 216, 69 A 621. Not applicable where injury was caused by latent defect in bolt made and placed by experienced men and the elevator having been duly inspected and pronounced safe. Id. Whether such a length of time had elapsed since the construction **of a wooden sewer** as to impute notice of its defective condition to the city held for the jury. City council of Montgomery v. Comer [Ala.] 46 S 761. Knowledge of **defects in appliances** imputed to master because of lapse of time though caused by fellow-servant, and used intermittently. Kolodrianski v. American Locomotive Co. [R. I.] 69 A 505.

**60.** Where injury was caused by **explosion of asphalt tank,** it was held that the jury might find that if defendant was compounding a substance at a considerable heat and was applying the chemical processes thereby set in motion to asphalt and petroleum product in the tank, it ought to have known that dangerous gases were liable to be generated and that due care required precautions to prevent their accumulation in dangerous quantities. Dulligan v. Barber Asphalt Paving Co., 201 Mass. 227, 87 NE 567. One who knew that a building had a plate glass front including the door was negligent in not ascertaining where the door was and **in attempting an exit where there was no door,** though he was somewhat blinded by the sun. Clardy v. Hudspeth [Ark.] 115 SW 1134. Whether injury resulted from **defective condition of belt,** which could not have been discovered by reasonable inspection, held for jury. Dittman v. Edison Elec. Illuminating Co., 125 App. Div. 691, 110 NYS 87. **False representations** which the maker should have known to be false, though he in fact believed them true, when made for the purpose of inducing another to change his position, constitute actionable negligence. Cunningham v. Pease Home Furnishing Co., 74 N. H. 435, 69 A 120. Assurances of safety of stove polish to induce sale. Id.

**61.** Danger to one child near track not **so** imminent as a matter of law as to excuse motorman from seeing dangerous situation of another child. Davis v. Westmoreland County R. Co. [Pa.] 71 A 538.

**NOTE:** This element as a refutation of contributory negligence is treated in § 4, post.

**62.** Where the risk is abnormal and the master appreciates it while the servant does

since ordinary care must be commensurate with the dangers [64] which its exercise is

not, the former must use ordinary care to enable the latter to avoid injury. Goodale v. York, 74 N. H. 454, 69 A 525. In such case the question for the court is not whether it can be found, but whether it must be held that plaintiff appreciated the risk. Id.

**63.** When the facts disclose a situation, dangerous to life or limb, into which, from its very nature, it is practically certain every prudent man may be induced to enter, and it is practicable to remove such danger, a rule of law will be adopted which prevents injury rather than one which invites or even permits it. Cameron v. Lewiston, B. & B. St. R. Co., 103 Me. 482, 70 A 534. Whether an act is negligent depends upon whether, by the exercise of due care and foresight, the result was to be anticipated. Karcher v. Fiss, Doerr & Carroll Horse Co., 127 App. Div. 203, 111 NYS 54. Where ordinary prudence would suggest that the act or omission would probably result in injury, it is sufficient to support the charge of negligence. Haase v. Morton, 138 Iowa, 205, 115 NW 921. **Where injury could reasonably have been anticipated** as the natural or connected result of the negligence charged, it is sufficient to create liability therefor. Illinois Cent. R. Co. v. Siler, 133 Ill. App. 2. Employe **throwing boards out of window** should have anticipated that plaintiff would be underneath and his failure to look was negligence. Schmelzer v. Central Furniture Co. [Mo. App.] 114 SW 1043. Street railway company **maintaining pole close to tracks** should have anticipated that person on running board of car would be struck thereby. Cameron v. Lewiston, B. & B. St. R. Co., 103 Me. 482, 70 A 534. **Where master failed to warn** young and inexperienced servant of danger of employing a certain method of work which other servants used and instructed him to follow, negligent though he did not anticipate injury. Godroe v. Dodge Clothespin Co. [N. H.] 70 A 1073. Consequences of an act **need not be forseen;** it is enough if the result is natural, though not necessary or inevitable. Haase v. Morton, 138 Iowa, 205, 115 NW 921. **Leaving invalid's chair facing open elevator shaft,** the chair being so constructed that it started very easily, was the natural and probable result of its moving forward into the shaft and injuring occupant. Haase v. Morton, 138 Iowa, 205, 115 NW 921. Negligence of **physician** in charge of patient though not with her when she was left alone by attendant held for jury. Id. Where defendant should have anticipated an accident, the fact that the **precise manner of its occurrence** was unforeseeable is immaterial. Holliday v. Duncan, 199 Mass. 121, 85 NE 186. It is not necessary that defendant should have contemplated the **particular consequences** of his act; it is sufficient if, by the exercise of reasonable care, he might have forseen that some injury would be likely to result. Mobile, etc., R. Co. v. Hicks, 91 Miss. 273, 46 S 360. **Running train at high rate of speed over newly-ballasted track** held negligence, though fact that some one would be walking on track and be injured by derailment of train might not have been foreseeable. Mobile, etc., R. Co. v. Hicks, 91 Miss. 273, 46 S 360. One must guard against the **equal and likely consequences** of his act. Chicago & E. R. Co. v. Dinius, 170 Ind. 222, 84 NE 9. **Exceptions likely to occur** must be anticipated, though due care does not ordinarily require one to base his conduct upon exceptions. Karcher v. Fiss, Doerr & Carroll Horse Co., 127 App. Div. 203, 111 NYS 54. **Cutting horse with whip,** when he was in such position that by kicking he struck bidders in the horse market, could be found to be negligence, though horse which will kick when struck was said to be an exception. Karcher v. Fiss, Doerr & Carroll Horse Co., 127 App. Div. 203, 111 NYS 54. Not bound to guard against slightly **or remotely probable consequences.** Chicago & E. R. Co. v. Dinius, 170 Ind. 222, 84 NE 9. **Improbabilities** need not be anticipated. Chicago City R. Co. v. Soszynski, 134 Ill. App. 149. Dangers not to be anticipated in **operation of train.** Chicago City R. Co. v. Soszynski, 134 Ill. App. 149. Instructions held applicable to evidence in this regard. Id. Held that injury from **defect in highway** could not have been reasonably anticipated by municipality. Town of Spencer v. Mayfield [Ind. App.] 85 NE 23. **Where temporary filling in asphalt pavement was left unguarded during rain,** fact that rain would wash it out should have been foreseen. Newman v. New York, 57 Misc. 636, 108 NYS 676. **Injury from board protruding from fence** not in contemplation of defendant as a matter of law, when it turned over control of fence to subcontractor. Moret v. George Fuller Co., 195 Mass. 118, 80 NE 789. One **assaulting another thereby frightening a third person** whose presence is unknown to him is not guilty of negligence toward said person, since such a consequence could not have been anticipated. Reed v. Ford, 33 Ky. L. R. 1029, 112 SW 600. That a **piece of rack falling from a car** would cause plantiff to slip and fall was improbable. Cook v. U. S. Smelting Co., 34 Utah, 190, 97 P 28. Law does not require anticipation of **unusual or extraordinary conduct,** hence motorman not required to anticipate accident caused thereby. Wilson v. Chicago City R. Co., 133 Ill. App. 433. **Fright and disability** resulting from an act not probable or foreseeable result. Miller v. Baltimore, etc., Co., 78 Ohio St. 309, 85 NE 499.

**64.** Klotz v. Power & Min. Mach. Co., 136 Wis. 107, 116 NW 770. Commensurate with present apparent danger which may arise. Distasio v. United Trac. Co., 35 Pa. Super. Ct. 406. The care must be proportionate to the danger or the peculiar risks in each case, and this care must be reciprocal. Apperson v. Lozro [Ind. App.] 87 NE 97; Lake Shore & M. S. R. Co. v. Brown, 41 Ind. App. 435, 84 NE 25. Care required of **travelers on highway.** Currie v. Consolidated R. Co. [Conn.] 71 A 356. Rule applied to relation of **automobile driver and passengers.** Johnson v. Coey, 237 Ill. 88, 86 NE 678. Rule applied to **automobilist and pedestrian.** Apperson v. Lazro [Ind. App.] 87 NE 97. Care required of **railroad company on travelers of highway at crossings.** Lake Shore & M. S. R. Co. v. Brown, 41 Ind. App. 435, 84 NE 25; Vandalia R. Co. v. McMains [Ind. App.] 85 NE 1038. Care required of train operators at crossing defined. Clemons v. Chicago, etc., R. Co., 137 Wis. 387, 119 NW 102; Southern R. Co. v.

required to overcome. It follows that exigent demands of human safety override mere property rights.[65]

It may be held that a certain act is not negligence per se,[66] since this goes only to the bare act itself and not to its quality as affected by the circumstances which may, or might, surround it; and the existence [67] or nonexistence [68] of negligence is

Fisk [C. C. A.] 159 F 373. Care required highway travelers at railroad crossings. Pittsburgh, etc., R. Co. v. Lynch [Ind. App.] 87 NE 40. Duty of one knowingly approaching railway crossing. Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808. Care required of railroad company to render **extraordinary dangerous crossing** safe. Delaware & H. Co. v. Lamard [C. C. A.] 161 F 520. Care required when **running trains through city** defined. Pittsburgh, etc., R. Co. v. Lynch [Ind. App.] 87 NE 40. Care required of railroads in cities, towns, and villages. Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689. Care required in **operation of street car.** Currie v. Consolidated R. Co. [Conn.] 71 A 356. Sufficiency of headlight on street car. Id. Greater degree of care required of motorman when approaching street intersections than when running in middle of blocks. Chicago City R. Co. v. Kastrzewa. 141 Ill. App. 10. Negligence to run street car so fast at street intersections that it is not under ready control. Id. Rule applied to motorman approaching street crossing as well as when he sees children about to enter upon the tracks. Distasio v. United Trac. Co., 35 Pa. Super. Ct. 406. Duty of motorman toward persons on track. Morse v. Consolidated R. Co. [Conn.] 71 A 553; McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459. Duty of motorman in crossing double tracked, narrow and much traveled bridge. Chadbourne v. Springfield St. R. Co., 199 Mass. 574, 85 NE 737. Duty of **electric light company maintaining wires along highway.** Walter v. Baltimore Elec. Co. [Md.] 71 A 953. Reasonable care must be exercised to avoid **injury by fire to property railroad lines** by having engines properly constructed and in good condition. Sims v. American Ice Co. [Md.] 71 A 522. Instruction held correct. Id. **Dangerous method of work** held to require warning. Charrier v. Boston & M. R. R. Co. [N. H.] 70 A 1078.

**65.** Hence electric company was not excused for failure to remove dangerous wires because in order to do so it would have been necessary to cut down poles belonging to railroad company. Brown v. Consolidated L. P. & Ice Co. [Mo. App.] 109 SW 1032.

**66. Brakeman going between cars** to see why a coupler does not work. Sprague v. Wisconsin Cent. R. Co., 104 Minn. 58, 116 NW 104. **Hitting horse** with a whip to stir him up. Karcher v. Fiss, Doerr & Carroll Horse Co., 127 App. Div. 203, 111 NYS 54. The **violation of rule** customarily broken with knowledge of its promulgation. Sprague v. Wisconsin Cent. R. Co., 104 Minn. 58, 116 NW 104. **Driver's failure to have hold of lines or bridle when train starts,** he being nearby. Southern Hardware & Supply Co. v. Standard Equipment Co. [Ala.] 48 S 357.

**67.** Defendant negligent as a matter of law in his **driving** whereby he caused a collision. Armour & Co. Kollmeyer [C. C. A.] 161 F 78. Driving over foot of one sitting on bench in park. Silverman v. New York, 114 NYS 59. **Turning sharply** into the left side of an intersecting street. Irwin v. Judge [Conn.] 71 A 572. Where a driver of load projecting out behind wagon turned sharply so that the "overhang" struck and injured plaintiff's horse, he was held negligent though he signaled plaintiff's driver to stop. Callahan v. David M. Oltarsh Iron Works, 112 NYS 1102. Negligence of servant in turning team suddenly into street in front of woman rendered master liable for injury to woman through her fright, though she was not struck by horses or wagon. Sandy v. Swift & Co., 159 F 271. **Leaving team of horses unhitched** and unattended on a public street. Corona Coal & Iron Co. v. White [Ala.] 48 S 362. **Leaving wagon in close proximity to car tracks** so that shaft struck passenger on running board of street car. United States Exp. Co. v. Kraft [C. C. A.] 161 F 300. Municipality is guilty of negligence in knowingly **permitting a nuisance to obstruct street** and is liable for injuries caused by runaway horse running into it. McDowell v. Preston, 104 Minn. 263, 116 NW 470. Municipality is negligent as a matter of law where it maintains a **sidewalk terminating several feet above the ground without barriers.** Dunn v. Oelwein [Iowa] 118 NW 764. **Motorman crossing street upon which other cars were passing,** notwithstanding slippery condition of track. Bennett v. Chicago City R. Co., 141 Ill. App. 560. **Failure of motorman to sound warning** when approaching busy street intersections is negligence regardless of speed of car. Chicago City R. Co. v. Kastrzewa, 141 Ill. App. 10. **Starting train suddenly** after stopping to let team pass. St. Louis Southwestern R. Co. v. Moore [Tex. Civ. App.] 107 SW 658. **Blowing off steam** from a locomotive in an unnecessary unusual manner, thereby frightening horses, is negligence. Vandalia R. Co. v. McMains [Ind. App.] 85 NE 1038. Railroad held negligent in **placing torpedo on track** without warning sectionmen approaching on hand car. Galveston, H. & N. R. Co. v. Murphy [Tex. Civ. App.] 114 SW 443. **Crossing tracks** in front of approaching train. Cleveland, etc., R. Co. v. Houghland [Ind. App.] 85 NE 369. Employer held negligent in **maintaining bins** which did not permit the contents to flow down without poking, which was a dangerous operation, the employers having full knowledge of defects and dangers. Vaughn v. Glens Falls Portland Cement Co., 59 Misc. 230, 112 NYS 240.

**68.** Held no negligence in **operation of street car.** Wilson v. Chicago R. Co., 133 Ill. App. 433. Motorman not negligent in failing to foresee that car wheel would slide upon track. Hebeler v. Metropolitan St. R. Co., 132 Mo. App. 551, 112 SW 34. **Rate of speed** of street car held not to show negligence. Wilson v. Chicago R. Co., 133 Ill. App. 433. Evidence held to show that dispatcher was not negligent in **sending out car in crippled**

often determined as a matter of law,[69] as distinguished from a finding of negligence per se,[70] but here the surrounding circumstances are always considered by the court and hence in neither case is there an exception to the rule that negligence depends upon the circumstances.[71]

*Act of God and unavoidable accident.*[See 10 C. L. 925]—There is, of course, no liability for an act of God[72] or an unavoidable accident[73] since the essential element of legal duty is wanting.[74] These elements do not afford immunity, however, unless they proximately cause[75] the injury sought to be redressed.[76] The primary question involved in this connection is whether a particular occurrence is in fact an act of God[77] or an unavoidable accident,[78] which calls for an application of the various definitions[79] of such elements to the facts of the case in hand. An unforeseeable

**condition and ordering another car to follow,** the only negligence, if any, being the inspection of the crippled car. Welch v. Jackson & B. C. Trac. Co. [Mich.] 15 Det. Leg. N. 767, 117 NW 898. Failure to prevent **railroad accident.** Chicago Terminal Transfer R. Co. v. Berkowitz, 137 Ill. App. 95. Engineer not negligent in **running down trespasser on track.** Beach v. Southern R. Co., 148 N. C. 153, 61 SE 664. Evidence held to show no negligence on part of defendant in regard to injury caused by **defective coupler.** Southern R. Co. v. Moore, 108 Va. 388, 61 SE 747. Evidence held not to show negligence of **motorcyclist** in frightening horse. Long v. Warlick, 148 N. C. 32, 61 SE 617. **Where automobilist run into rear of loaded truck** in attempting to pass, there was no negligence on part of truck driver, even though truck was standing still and accident happened in the dark. Lorenz v. Tisdale, 127 App. Div. 433, 111 NYS 173. In action to recover for injuries sustained by **child run over by automobile,** evidence held to show due care of driver, the child having run in front of the machine when it was in full view on proper side of street, and driver having done his best to stop in time after seeing the danger. Jordan v. American Sightseeing Coach Co., 129 App. Div. 313, 113 NYS 786. No negligence in **guarding excavation.** Tagge v. Roslyn [Wash.] 98 P 668. Evidence held not to show negligence in **instalation of gas lights.** Torrans v. Texarkana Gas & Elec. Co. [Ark.] 115 SW 389. No negligence of telephone company **where employe was injured by climbing rotten telephone pole,** it being his duty to inspect pole before climbing it. Eigenbrod v. Cumberland Tel. & T. Co., 121 La. 228, 46 S 219.

**69.** See post § 5, subd. Questions of law and fact.

**70.** There may be negligence as a matter of law as distinguished from negligence per se. Cotter v. Chicago City R. Co., 141 Ill. App. 101. A **failure to look,** when looking would disclose the danger, is negligence and in such case, unless there is evidence of conditions or circumstances which would excuse looking, a jury is not warranted in finding that such failure to look did not constitute negligence. Id. Failure of motorman who had seen another car approaching his track to look again after starting his car, in absence of an excuse therefor, was negligence in fact, though not in law negligence per se. Id.

**71. NOTE:** That the violation of a rule of conduct prescribed by law is negligence regardless of surrounding circumstances discussed generally in § 1, and specifically in this section, ante, is ths only exception to such rule noted in this article. [Ed.]

**72.** Eagan v. Central Vt. R. Co. [Vt.] 69 A 732.

**73.** McFeat v. Philadelphia, W. & B. R. Co. [Del.] 69 A 744.

**74.** Cannot, therefore, be a case of negligence. Roanoke R. & Elec. Co. v. Sterrett, 108 Va. 533, 62 SE 385.

**75.** In this connection see § 3, post. As to when and where not proximate cause, see § 3, post.

**76.** Where negligence is proximate cause of injury, fact that act of God concurs therewith to produce result is no defense. City of Richmond v. Wood [Va.] 63 SE 449. If defective condition of culvert was proximate cause of damage, fact that injury would not have occurred but for extraordinary and unforeseeable flood, no defense. Id. Where a cover for growing plants was burned through the negligence of defendant, the resulting injury to the plants by cold and frost is not such an act of God as will relieve defendant from liability. Benedict Pineapple Co. v. Atlantic C. L. R. Co. [Fla.] 46 S 732.

**77.** Injury by coming in contact with electric wires during severe storm held due to an act of God, and not to negligence in maintaining uninsulated or unguarded wires. Southwestern Tel. & T. Co. v. Keys [Tex. Civ. App.] 110 SW 767. Extraordinary flood which culvert was unable to carry away held act of God. Eagan v. Central Vt. R. Co. [Vt.] 69 A 732. Extraordinary flood known to occur every six or seven years is not an act of God. Kuhnis v. Lewis River Boom & Logging Co. [Wash.] 98 P 655.

**78.** A pure accident comes under the head of unavoidable accidents. McFeat v. Philadelphia, W. & B. R. Co. [Del.] 69 A 744. Where stick of wood thrown from car rebounds and strikes a man sitting on the car, the injury is a pure accident. Ultima Thule, A. & M. R. Co. v. Benton [Ark.] 110 SW 1037. Servant's injuries held attributable to a pure accident. Jones v. Pioneer Cooperage Co. [Mo. App.] 114 SW 94. Breaking of bridge because of undiscoverable defect, an inevitable accident. Roanoke R. & Elec. Co. v. Sterrett, 108 Va. 533, 62 SE 385.

**79. Act of God:** Any accident due directly and exclusively to a neutral cause without human intervention, which by no human foresight, pains or care reasonably to have been expected, could have been prevented, is

injury is ordinarily in the category of unavoidable accidents [80] for which there is no liability,[81] though the fact that the particular occurrence of the injury was unforeseeable will not render it such.[82] Unusual operations of the forces of nature known to occur with more or less regularity are not acts of God [83] and require the exercise of due care to guard against injury likely to be caused thereby,[84] but an occurrence may be an act of God though it is not the first of its nature within the memory of a generation.[85]

*Joint and several liability.* See 10 C. L. 926—Joint negligence gives rise to a joint and several liability [86] though, if all are severally sued, the actions will usually be consolidated,[87] and the several liability of a tort feasor is not affected by the fact that the negligence of another concurred.[88] The liability must rest on breach of duty [89] but the authorities are in conflict as to whether a joint duty is prerequisite to a joint liability.[90]

caused by an "act of God." Briggs v. Durham Trac. Co., 147 N. C. 389, 61 SE 373. For numerous definitions of "Act of God" see Kuhnis v. Lewis River Boom & Logging Co. [Wash.] 98 P 655.

**Inevitable accident:** Accident is inevitable if the person by whom it occurs neither has, nor is legally bound to have, sufficient power to avoid it, or prevent its injuring another. Roanoke R. & Elec. Co. v. Sterrett, 108 Va. 533, 62 SE 385.

80. Texas & N. O. R. Co. v. Barwick [Tex. Civ. App.] 110 SW 953.

81. No liability arises from an accident which defendant could not have foreseen and for which he was not responsible. Donk Bros. Coal & Coke Co. v. DeLaney, 133 Ill. App. 135. Fall of loose rock which was not due to negligence not to be anticipated. Id.

82. Texas & N. O. R. Co. v. Barwick [Tex. Civ. App.] 110 SW 953.

83. Extraordinary flood known to occur every six or seven years. Kuhnis v. Lewis River Boom & Logging Co. [Wash.] 98 P 655.

84. Protection against an ordinary flood which occurs every year is not an exercise of due care to protect against an extraordinary flood known to occur every six or seven years, since the latter is not an act of God. Kuhnis v. Lewis River Boom & Logging Co. [Wash.] 98 P 655.

85. Fact, that as large a flood had occurred thirty years before and that original culvert carried that away, did not take the occurrence out of the category of acts of God nor create liability. Eagan v. Central Vt. R. Co. [Vt.] 69 A 732.

86. Fulwider v. Trenton Gas. L. & P. Co. [Mo.] 116 SW 508. Declaration is not demurrable as to one because it alleges the negligence of the other. Tetreault v. Smedley Co. [Conn.] 71 A 786. **Motorman and driver of ice wagon** jointly liable to man on rear of ice wagon for injuries sustained in collision. Paducah Trac. Co. v. Sine, 33 Ky. L. R. 792, 111 SW 356.

87. When the duty broken is joint, the liability for resulting injuries is joint, and separate actions against the joint tort-feasors are properly consolidated. Martin v. Seaboard Air Line R. Co., 148 N. C. 259, 61 SE 625. Collision between train and street car, resulting from failure to establish rules regarding crossings. Id.

88. Byerly v. Consolidated L. P. & I. Co., 130 Mo. App. 593, 109 SW 1065; Goldstein v. Tunick, 59 Misc. 516, 110 NYS 905. **Obstruction of street** not excused by failure of city to remove it. Smith v. Preston [Me.] 71 A 653. Abutting owner, who by erection of structure on his land causes obstruction of street by discharge of water thereon, is guilty of negligence. Id. Where the **negligence of a bailee** and a third person concur to destroy the bailed property, the bailor may sue either or both. Neither can interpose the negligence of the other as a defense. Sea Ins. Co. of Liverpool v. Vicksburg, S. & P. R. Co. [C. C. A.] 159 F 676.

89. But one, having no control over, or interest in, the act or omission constituting the negligence complained of, is not liable therefor. Independent contractor not liable for injuries caused by railway company while engaged in a work independent of that of the contractor. Gurdon & Ft. Smith R. Co. v. Calhoun [Ark.] 109 SW 1017. Landlord and not tenant liable for obstruction of street caused by defect of building over which former had control. Smith v. Preston [Me.] 71 A 653.

90. While several may be guilty of several distinct negligent acts, yet, if their concurrent effect is to produce an actionable injury, they are all liable therefor, the action being not to recover for the act or acts but to recover damages for the injury which they produce. Clinger's Adm'x v. Chesapeake & O. R. Co., 83 Ky. L. R. 86, 109 SW 315. Where the negligence of two parties produces a single and indivisible injury, they are joint tort-feasors though acting independently of each other. Walton v. Miller's Adm'x [Va.] 63 SE 458. In order to render persons jointly liable for a tort, it must appear in some way that it was the result of their joint action or joint neglect of duty. A brewing company which merely held the city license for running a saloon which is owned and conducted wholly by another is not liable for injuries caused by a trick stairway therein. Mead v. Ph. Zang Brew. Co., 43 Colo. 1, 95 P 284. No joint liability between logging company and railway hauling its logs for injury to latter's brakeman, caused by log falling from car. Stephens v. Louisiana Long Leaf Lumber Co. [La.] 47 S 887.

(§ 2) *B. Use of property in general.*[91]—See 10 C. L. 926—The owner[92] of property owes to all persons rightfully thereon[93] the duty of using reasonable care[94] to keep the premises in reasonably safe condition[95] and to obviate known defects[96] within a reasonable time,[97] and a like duty is owed as to instrumentalities and appliances furnished for the use of others.[98]

*Dangerous machinery and substances.*See 10 C. L. 927—In the use of inherently dangerous articles, care commensurate with their dangerous character must be exercised,[99] and one is bound to anticipate perils resulting therefrom.[1] A vendor of dangerous articles who gives a false assurance of safety[2] or fails to give proper warn-

**91. Search Note:** See notes in 6 C. L. 752; 8 Id. 1094, 1095; 10 Id. 927; 14 L. R. A. 675; 15 Id. 818; 21 Id. 255; 1 L. R. A. (N. S.) 1178; 3 Id. 330; 4 Id. 1119; 5 Id. 1103; 13 Id. 382; 15 Id. 535; 49 A. S. R. 416.

See, also, Negligence, Cent. Dig. §§ 19-40; Dec. Dig. §§ 16-27; 29 Cyc. 459-475; 21 A. & E. Enc. L. (2ed.) 467.

**92.** Trustees of property are liable for its negligent maintenance where their duties in regard to it are the same as those of an owner. Everett v. Foley, 132 Ill. App. 438.

**93.** See post, § 2C. Fact, that trains of one company, in charge of its own employes run over tracks of another under contract that they shall be subject to orders of train dispatchers of latter, does not relieve former from liability for negligent injuries to third persons. Hamble v. Atchison, etc., R. Co. [C. C. A.] 164 F 410.

**94.** Owner not bound at his peril to see that sign in front of building was safe. McNulty v. Ludwig & Co., 125 App. Div. 291, 109 NYS 703.

**95.** Defendant held negligent toward contractor, on premises to supervise work, in failing to give warning that a tank, normally covered, was at the time uncovered when plaintiff had reason to believe it covered and defendant knew that it was not. Ward v. Hill, 125 App. Div. 587, 110 NYS 106. Negligence cannot be predicated upon the mere leaving of a horse unattended for the time being on the street, while it is eating. Corcoran v. Kelly, 61 Misc. 323, 113 NYS 686.

**96.** Knowledge of vicious propensity of horse necessary to a recovery for a bite. Corcoran v. Kelly, 61 Misc. 323, 113 NYS 686. Defendant's **knowledge is not essential,** where a duty exists to keep in a safe condition. Knowledge of telephone company of proximity of lighting company's wires to its poles unnecessary, it being the former's duty to see that wires were a safe distance from poles. Drown v. New England Tel. & T. Co. [Vt.] 70 A 599. Knowledge of an immaterial element of the defect causing the injury is not essential. Sag of lighting wires which was not shown to materially increase the danger. Drown v. New England Tel. & T. Co. [Vt.] 70 A 599.

**97.** The owner of property is entitled to a reasonable time to remedy defects after notice thereof. Brown v. Consolidated L. P. & I. Co. [Mo. App.] 109 SW 1032.

**98.** A person undertaking to furnish appliances for the use of others assumes the duty to furnish reasonably safe ones and is liable for negligence in that regard resulting in injury, regardless of any contract relation between the parties. Dougherty v. Weeks, 126 App. Div. 786, 111 NYS 218. Yet to hold one guilty of negligence in not discovering and remedying a common defect in a simple appliance of good material and well constructed, it must appear that such defect had existed for so long that defendant ought to have known of it, and therefore was as responsible, as, knowing the defect, he had failed to remedy it. Loose rung in ladder insufficient proof of negligence. Id.

**99.** Eagle Hose Co. v. Electric Light Co., 33 Pa. Super. Ct. 581. **Electric companies** must use every care to properly insulate and maintain wires. Von Trebra v. Laclede Gaslight Co., 209 Mo. 648, 108 SW 559. Required of electric companies in using streets. Brown v. Consolidated L. P. & I. Co. [Mo. App.] 109 SW 1032; Byerly v. Consolidated L. P. & I. Co., 130 Mo. App. 593, 109 SW 1065. Evidence of negligence in failing to test electric wires after storm sufficient to entitle plaintiff to go to jury. Brown v. Consolidated L. P. & I. Co. [Mo. App.] 109 SW 1032. Evidence sufficient to show negligence in maintaining uninsulated wire. Luehrmann v. Laclede Gaslight Co., 127 Mo. App. 213, 104 SW 1128. Highest degree of care required of electric light companies toward persons lawfully near wires. Weir v. Haverford Elec. Light Co., 221 Pa. 661, 70 A 874. An electric company using poles in common with a telegraph company is not required to give notice to anyone working on the poles that it is using a strong current, or is about to do so. South Shore Gas & Elec. Co. v. Ambre [Ind. App.] 87 NE 246. Electric lighting company using public streets is required to exercise highest degree of care and employ the best appliances known to science for the protection of the public, though it is not an insurer. Held liable for injury to one rightfully on streets caused by shock from contract with guy wire heavily charged with electricity. Shawnee L. & P. Co. v. Sears [Okl.] 95 P 449. Electric companies held to highest degree of care. Younie v. Blackfoot Light & Water Co. [Idaho] 96 P 193.

**1.** Drown v. New England Tel. & T. Co. [Vt.] 70 A 599. Owner held bound to anticipate danger incident to use of machinery. Standard Steel Car Co. v. McGuire [C. C. A.] 161 F 527. The rule, that those operating dangerous instrumentalities must guard against such dangers as could or ought reasonably to be apprehended by the exercise of reasonable care and prudence, has no application to third parties having nothing to do with such operation. Elevators. Anderson v. Pelham Hod Elevating Co., 113 NYS 989.

**2.** One selling dangerous substances with assurances of safety is liable for resulting injuries to third persons, where liability

ings [8] is liable even to one to whom he sustains no contract relation; [4] a fortiori if the danger results from a known violation of law.[5]

*Liability of manufacturers.* See 10 C. L. 928—A manufacturer, selling a defective article, is liable for resulting injuries [6] but not for injuries resulting from its being allowed to fall into disrepair by the user.[7]

(§ 2) *C. Use of lands, buildings and other structures.*[8]—See 10 C. L. 930—While negligence cannot be predicated on the lawful and ordinary use by one of his own premises,[9] he must so use his own property as not to wrongfully injure that of others,[10] and must use reasonable care [11] to render his premises reasonably safe [12]

would exist had the injuries been to the purchaser. One not the purchaser allowed to recover for injuries caused by explosive stove blacking. Cunningham v. Pease House Furnishing Co., 74 N. H. 435, 69 A 120.

**3.** If one sells a dangerous article to a child whom he knows to be, by reason of his use and inexperience, unfit to be trusted with it and who probably might innocently and ignorantly play with it to his own injury, and injury does in fact result, he is liable in damages therefor. Negligence of storekeeper in selling small quantity of gunpowder to boy of twelve years held for jury. McEldon v. Drew, 138 Iowa, 390, 116 NW 147.

**4.** A vendor of inherently dangerous articles may be liable to one injured thereby though there is no contract relation between. Explosion of siphon bottles of aerated water. Torgesen v. Schultz, 192 N. Y. 156, 84 NE 956. A wholesaler is liable for injury sustained by a customer of its vendee by the use of an article sold as coal in the starting of a fire, where the wholesaler, knowing that such article contained gasoline, sold it in violation of statute and where neither the retailer nor customer knew of the presence of gasoline, and the use of coal oil to start fires was customary. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 Law Ed.—.

**5.** Sale by company to retailer of coal oil, containing gasoline, as pure coal oil in violation of statute and with knowledge of the facts, held proximate cause of injury resulting from explosion caused by use of such article to start fire, since such consequence should have been expected. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 Law Ed.—.

**6.** Standard on threshing machine fastened merely by nails driven through from the bottom and not clinched. Pierce v. Bidwell Thresher Co., 153 Mich. 323, 15 Det. Leg. N. 477, 116 NW 1104. Whether such construction was such as to make machine imminently dangerous properly submitted to jury. Id. Whether defendant knew of or appreciated the dangerous character of the machine held properly submitted to the jury under the evidence. Id. A manufacturer, who so negligently constructs an article for market that it is imminently dangerous to life and limb, is liable for injuries resulting from its use for the purpose to which it is adapted regardless of any contract relation with the person injured or fraud or deceit in its sale. Steam boiler. Statler v. Ray Mfg. Co., 109 NYS 172.

**7.** A manufacturer of machinery who leases it is not liable for injuries to a servant of the lessee, caused by having fallen into disrepair while in the lessee's possession, and the fact that the manufacturer voluntarily and without consideration agrees to keep the machinery in repair does not alter the rule. McClaren v. United Shoe Mach. Co. [C. C. A.] 166 F 712. For an elaborate exposition on this question, see Savings Bank v. Ward, 100 U. S. 195, 202, 25 Law Ed. 621, et seq. and note to Standard Oil Co. v. Murray, 57 C. C. A. 1, 119 F 572.

**8. Search Note:** See notes in 8 C. L. 1097; 10 Id. 933; 7 L. R. A. 33; 14 Id. 781; 52 Id. 293; 1 L. R. A. (N. S.) 427; 3 Id. 149; 4 Id. 80; 6 Id. 243; 7 Id. 293; 12 Id. 721; 13 Id. 442, 1126; 14 Id. 1118; 15 Id. 547; 16 Id. 1129; 31 A. S. R. 524; 1 Ann. Cas. 209; 2 Id. 650; 7 Id. 200; 8 Id. 982; 9 Id. 1123; 11 Id. 990.

See, also, Negligene, Cent. Dig. §§ 19-68; Dec. Dig. §§ 16-55; 29 Cyc. 442-487; 21 A. & E. Enc. L. (2ed.) 467, 469; 29 Id. 32.

**9.** An owner is **not bound to keep his premises attractive** for the delectation of his neighbor, nor is he compelled to refrain from making them unattractive lest he might offend his neighbor's asthetic senses. So long as his use of the premises does not interfere with the use by others of their premises, there is no actionable damage. Heilbron v St. Louis S. W. R. Co. [Tex. Civ. App.] 113 SW 610. Whether maintenance of **exhaust pipe near highway** was negligence held for jury. Ft. Wayne Cooperage Co. v. Page, 170 Ind. 585, 84 NE 145. Owner may **build on hillside** and so arrange entrances as to meet the varying grade. Hoyt v. Woodbury, 200 Mass. 343, 86 NE 772. One **may burn brush** or rubbish on his own land if he exercise that prudence in starting the fire and in the management of it after it is started which the rules of ordinary care demand. Evidence sufficient to go to the jury on the issue of negligence in starting fire and in its management thereafter. Miller v. Neale, 137 Wis. 426, 119 NW 94. One has a right to build a fire on his own premises and is liable only for failure to exercise ordinary care in starting it to prevent its spreading to other premises. Evidence held not to show negligence. Pfeiffer v. Aue [Tex. Civ. App.] 115 SW 300. Where a **road located on a railroad's right of way** is not a public highway, the railroad may destroy it for its own purposes if it acts in a lawful manner in so doing. Heilbron v. St. Louis S. W. R. Co. [Tex. Civ. App.] 113 SW 610.

**10.** Charlie's Transfer Co. v. Malone [Ala.] 48 S 705.

**11.** For jury. Schneider v. Schmidt [N. J. Eq.] 70 A 731; Huff v. Wells Fargo & Co., 141 Ill. App. 434. An owner's duty to one upon his premises on business and by invitation is to exercise reasonable prudence and care to protect him from unreasonable and unnecessary danger. Miller v. Twiname, 114 NYS

for persons thereon by express or implied invitation,[13] and to warn such persons of hidden or latent perils.[14] The liability of the owner must be based on actual

151; Ft. Worth & R. C. R. Co. v. Eddleman [Tex. Civ. App.] 114 SW 425. The standard of care in the use of property is that which an ordinarily prudent man would exercise under the circumstances. Fowle v. Atlantic Coast Line R. Co., 174 N. C. 491, 61 SE 262. When plaintiff was on defendant's premises on business and ran into highway to escape danger from a **blast of rock** on said premises, where he was struck by flying stone, complaint was held to state cause of action for negligence in use of premises rather than one in trespass for injury to a traveler along highway, and hence evidence as to the care exercised for plaintiff's safety was admissible. Id.

**12.** Smith v. Delaware River Amusement Co. [N. J. Law] 69 A 970. The mere maintenance of a defective structure is not necessarily negligence if constructed by competent person, of good material, and not negligently permitted to become defective. Fowle v. Atlantic Coast Line R. Co., 147 N. C. 491, 61 SE 262. Applied to customer in store injured by falling down **unguarded cellarway** of which he had no knowledge, where owner was standing by and had notice of plaintiff's presence. Montague v. Hanson [Mont.] 99 P 1063. The use of an open and unguarded cellarway in a store for business purposes is not negligence per se, though it might be considered a trap, but requires the exercise of ordinary care to prevent customers being injured thereby. Montague v. Hanson [Mont.] 99 P 1063. Refusal of instruction that maintenance of such stairway was not negligence per se, while it might properly have been given, was not error where jury was instructed that only ordinary care was required to prevent injury therefrom. Id. Held negligent in construction of **staging** over machinery. Vaisbord v. Nashua Mfg. Co., 74 N. H. 470, 69 A 520. When plumber sent to work in defendant's building fell from planks, put up by another workman for his own use, while using them to get his ladders, etc., to place of work, no negligence on defendant's part was shown, plaintiff neither being invited nor obliged to use such planks. Hordern v. Salvation Army, 124 App. Div. 674, 109 NYS 131. Facts held not to constitute negligence, negligence alleged being **misplacement of steps.** Stevenson v. Smith Cont. Co., 220 Pa. 220, 69 A 676. Customer injured by **inequality in passageway** of department store. Bloomer v. Snellenburg, 221 Pa. 25, 69 A 1124. Customer injured by falling down **hatchway** which she took for entrance to department store. Ayers v. Wanamaker, 220 Pa. 313, 69 A 759. An owner who builds a stone foundation on his land and thereafter employs one to erect a brick wall thereon is liable for injuries occasioned to the latter by reason of **defects in foundation.** Hagen v. Lehtenter, 236 Ill. 467, 86 NE 112. Defendant liable for **defects in yards** of which it ought to have known, when plaintiff was injured thereon while in the pursuit of the business for which the yards were maintained. Perrine v. Union Stockyards Co. of Omaha [Neb.] 116 NW 776. Owner of a **swimming pool** who invites the public thereto must make reasonable provision to guard against those accidents which common knowledge and experience teach are liable to occur. Decatur Amusement Park Co. v. Porter, 137 Ill. App. 448. Owner of **amusement park** held negligent in permitting ball to be played in an unusual place by guests at park, the usual grounds being occupied, guests having a right to assume that dangerous sports will be confined to places set apart for them. Blakeley v. White Star Line [Mich.] 13 Det. Leg. N. 835, 118 NW 482. Duty to keep sufficient number of watchmen or guards to protect guests at amusement parks. Id. Liable for injury to guest at amusement park caused by being hit by ball thrown by another guest. Id. Owner of shop liable to customer for injuries sustained by tripping over a large **spike projecting from stair landing.** Roth v. G. A. Feld Co., 59 Misc. 214, 110 NYS 427. Contractor operating car tracks along streets not free from negligence as matter of law where it left **cars on crossing** with no one there in charge to give warning. Batchelor v. Degnon Realty & Terminal Imp. Co., 115 NYS 93. It is negligence to maintain a **guy wire** from a telephone pole to the ground twenty-five feet distant from the pole and across the line of travel from a street to a railroad station without anything to warn or protect travelers from running into it. Grant v. Sunset Tel. & Trac. Co., 7 Cal. App. 267, 94 P 368. Violation of mine owner of duty imposed by St. 1903, § 2731, to guard **mouth of shafts** with safety gates, is negligence. Moseley's Adm'r v. Black Diamond Coal & Min. Co., 33 Ky. L. R. 110, 109 SW 306. Leaving **gate to pen in stockyards open** in close proximity to passing trains held negligence. Crawford v. Kansas City Stockyards Co. [Mo.] 114 SW 1057. Where plaintiff drove on premises to unload at invitation of owner and was **directed to unload at an unsafe place** by defendant's servant who had knowledge of the danger, the owner was liable for resulting injury. Hobart Lee Tie Co. v. Keck [Ark.] 116 SW 183. Finding that owner of building in state of repair was not negligent because a workman **stumbled against a cornice** and caused it to fall upon a pedestrian below held warranted. Chute v. Moeser, 77 Kan. 706, 95 P 398. Not duty of owners as a matter of law to anticipate that a workman would stumble against a green cornice and cause it to fall to sidewalk. Id. An owner maintaining an **awning over a sidewalk** is bound to exercise ordinary care to have it so secured as to withstand such storms as are likely to occur. McCrorey v. Thomas [Va.] 63 SE 1011. Contractor is liable for injury caused by falling of awning before completion of work of putting it up, while owner is liable thereafter. Id.

**13.** See post, this section.

**14.** Operators of a **"scenic railway"** not negligent in failing to warn passenger to hang on where she knew of the danger and rode for the purpose of enjoying the sensations caused thereby, and the accident was caused by the usual jerks and swaying of the car in making the trip. Lumsden v. Thompson Scenic R. Co., 114 NYS 421. Defendant held negligent in not warning employe of

or imputed notice of the danger,[15] and negligence of a third party in the use of property is not to be imputed to the owner merely because of ownership.[16] An owner is not responsible for the acts of independent contractors, unless he is guilty of some active negligence.[17]

*Liability to trespassers and licensees.* See 10 C. L. 931—The only duty owed to trespassers and bare licensees [18] is to refrain from wanton injury to them,[19] and ac-

dangers in stepping on **pile of seed** covering moving machinery. Brinkman v. St. Landry Cotton Oil Co., 118 La. 835, 43 S 458. Failure to warn employe of **defective staging** over her machine. Vaisbord v. Nashua Mfg. Co., 74 N. H. 470, 69 A 520.

**15.** Fact that owner of premises has no knowledge of defects is no defense if, in the exercise of ordinary care, he ought to have had such knowledge. Roth v. G. A. Feld Co., 59 Misc. 214, 110 NYS 427. Knowledge of defective construction of staging imputed from lapse of time and held to amount to a ratification. Vaisbord v. Nashua Mfg. Co., 74 N. H. 470, 69 A 520.

**16.** Owner not liable for acts of driver outside of scope of employment in instructions. Danforth v. Fisher [N. H.] 71 A 535. One cannot be charged with liability for defects in premises over which he has neither possession nor control. Complaint insufficient to show possession or control by defendant. Martin v. Louisville & J. Bridge Co., 41 Ind. App. 493, 84 NE 360.

**17.** No inference of such negligence could be drawn from the evidence. Silverman v. Binder, 115 NYS 54.

**18.** Where one enters upon the premises of another with his consent, but without an invitation, he is a bare licensee. Shults v. Chicago, B. & Q. R. Co. [Neb.] 119 NW 463. One using an apparently public alley as a highway is not a trespasser because he steps over the technical boundary. Everett v. Foley, 132 Ill. App. 438. Though one is "lawfully" upon premises, he may still be a mere licensee. Stern v. Miller, 111 NYS 659. Evidence held to show that child on railroad track was a trespasser. Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 97 P 689. It being a misdemeanor for a drunken man to take charge of a locomotive, one upon premises in such condition and for such purpose is not there as an employe but as a trespasser. Seaboard Air Line R. v. Chapman, 4 Ga. App. 706, 52 SE 488. One entering private alleyway held trespasser. Briscoe v. Henderson L. & P. Co., 148 N. C. 396, 62 SE 600. One who boarded locomotive in violation of rules was trespasser. Bailey v. North Carolina R. Co. [N. C.] 62 SE 912. One walking beside street car tracks in street is not a trespasser, since company has no exclusive right to portion of street occupied by its tracks. Birmingham R. L. & P. Co. v. Williams [Ala.] 48 S 93. Child carried onto premises by mother to carry lunch to father who was in charge was without free agency and not a trespasser. Poteet v. Blossom Oil & Cotton Co. [Tex. Civ. App.] 115 SW 289. When a child is carried on to premises by its mother and then left to wander about alone with the knowledge of the owner, the rule relative to the care required toward incapacitated persons received on premises accompanied by an attendant does not apply. Id. Evidence held to show plaintiff a bare licensee though on premises by permission. Jacobs v. Michel, 137 Ill. App. 221. A policeman who accompanies one going upon the premises of another on business, he himself having no business with the owner, but being present merely to afford protection from strikers, yet being under no duty to enter the owner's buildings, is a mere licensee in so doing, there being no invitation from the owner. Casey v. Adams, 137 Ill. App. 404. One following railroad track as a path used by public with company's acquiescence was there by sufferance merely and not by implied invitation. Holmes v. Delaware & Hudson Co., 112 NYS 421.

**19.** Bowler v. Pacific Mills, 200 Mass. 364, 86 NE 767; Minneapolis General Elec. Co. v. Cronon [C. C. A.] 166 F 651; Shults v. Chicago, B. & Q. R. Co. [Neb.] 119 NW 463; Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689; Holmes v. Delaware & Hudson Co., 112 NYS 421; Casey v. Adams, 137 Ill. App. 404; Briscoe v. Henderson L. & P. Co., 148 N. C. 396, 62 SE 600; Muse v. Seaboard Air Line R. Co. [N. C.] 63 SE 102; Montague v. Hanson [Mont.] 99 P 1063; Chaves v. Torlina [N. M.] 99 P 690; Southern R. Co. v. Fisk [C. C. A.] 159 F 373; Derrickson's Adm'r v. Swann-Day Lumber Co. [Ky.] 115 SW 191. The only duty a railroad company owes a trespasser is to use ordinary care to avoid injuring him after discovering his peril. Burton's Adm'r v. Cincinnati, etc., R. Co. [Ky.] 113 SW 442. After one discovers another's peril it is his duty to use every means in his power to avoid injury to him. Applied to trainmen seeing person on track. Parham v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 113 SW 154; Tatarewicz v. United Trac. Co., 220 Pa. 560, 69 A 995; Ling v. Great Northern R. Co., 165 F 813; Southern R. Co. v. Forrister [Ala.] 48 S 69. Discovery of peril alone is not sufficient to fix liability upon defendant; there must also exist the present ability to avoid injury. Ft. Worth & D. C. R. Co. v. Cushman [Tex. Civ. App.] 113 SW 198. When insane father held two small children on track in front of approaching train, engineer was not negligent in failing to anticipate that they would not move in time to avoid injury. Parnham v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 113 SW 154. Evidence held to show that defendant did not know of peril of volunteer on freight train. Derrickson's Adm'r v. Swann-Day Lumber Co. [Ky.] 115 SW 191. A railroad company owes to men, permissive licensees crossing its tracks at place other than public crossings, only the duty to exercise reasonable care to avoid injuring them after becoming aware of their peril, and is not required to give the statutory warning of train's approach to crossing. Birmingham S. R. Co. v. Kendrick [Ala.] 46 S 588. Railway company under no duty to keep active lookout for trespassing children. Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689. Where one on

cordingly no negligence,[20] even though gross [21] or involving violation of statute,[22] will warrant recovery, there being ordinarily no distinction in this respect between trespassers and bare licensees,[23] though in some cases a distinction is made based on the probability of the presence of such persons and the resultant duty to anticipate it.[24] Where, however, one enters not by sufferance but upon invitation, ex-

railroad track merely by sufferance was injured by explosion of torpedo used for train signal, company was not liable. Holmes v. Delaware & Hudson Co., 112 NYS 421.

**20.** Without legal duty there cannot be actionable negligence; hence the rule relative to trespassers. Swartwood's Guardian v. Louisville & N. R. Co., 33 Ky. L. R. 785, 111 SW 305; Louthian v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 111 SW 665; Berry v. St. Louis, M. & S. E. R. Co., 214 Mo. 593, 114 SW 27; Kelly v. Benas [Mo.] 116 SW 557; Alabama G. S. R. Co. v. Godfrey [Ala.] 47 S 185; Mahoney v. Murtfeldt Co., 198 Mass. 471, 84 NE 798; Ling v. Great Northern R. Co., 165 F 813; Breach v. Southern R. Co., 148 N. C. 153, 61 SE 664. Railway company not liable for death caused by trespasser riding on engine unless willfully or wantonly negligent. Bailey v. North Carolina R. Co. [N. C.] 62 SE 912. One standing in highway and shooting into private premises is a technical trespasser thereon and cannot recover for injuries from unlawfully stored dynamite exploded by the shot. McGehee v. Norfolk & S. R. Co., 147 N. C. 142, 60 SE 912. While, as a rule, a party will not be deemed to anticipate the commission of a willful wrong, yet, when under the circumstances a technical trespass may reasonably be anticipated, he will be liable for a failure to take reasonable precautions to prevent injury to such trespassers. Held that one storing dynamite in shanty on his premises could not reasonably have anticipated that another would stand in highway and shoot into shanty, thereby causing explosion. Id. A mill hand's child who fell into a trench under a path from mill to tenement houses for employes held a trespasser. Davis v. Joslin Mfg. Co. [R. I.] 69 A 65. The absence of intentional injury no liability except for active intervention. Hobbs v. Blanchard & Sons Co. [N. H.] 70 A 1082. A person injured, although an infant, by falling down an elevator shaft in a wholesale grocery, which was left unguarded, in order to recover must show that the owner of the premises was under obligation to protect him from the injury (Faurot v. Oklahoma Wholesale Grocery Co. [Okl.] 95 P 463), and the owner of such premises is liable for an injury occurring therein through his negligence only when the injured person comes upon them by invitation, express or implied, of the owner (Id.). Child going upon premises in behalf of a third person without knowledge or consent of owner is not invited, though his visit partakes of a business nature. Faurot v. Oklahoma Wholesale Grocery Co. [Okl.] 95 P 463. Rule applicable to servant of independent contractor who fell into excavation existing at the time of entrance upon premises. Breen v. Gill, 125 App. Div. 642, 110 NYS 64. Dangerous work in plain sight is notice to a licensee. Id. Degree of care required and liability under various conditions and relations of the parties, which might have existed, discussed. Id. Policeman accompanying expressman to afford protection from strikers, the expressman being ordered by defendant's tenant, was a mere trespasser or licensee in entering defendant's building. Casey v. Adams, 234 Ill. 350, 84 NE 933.

**21.** Instruction that trespasser might recover for gross negligence erroneous, since liability to a trespasser is based on injuries wantonly, as distinguished from negligently, inflicted. Southern R. Co. v. Fisk [C. C. A.] 159 F 373.

**22.** A trespasser acquires no greater right from negligence arising from the breach of a statute or ordinance than from common-law negligence. Burnett v. Ft. Worth L. & P. Co. [Tex.] 112 SW 1040.

**23.** A bare licensee is only relieved from the liability for being a trespasser, and takes upon himself all ordinary risks attached to the premises and the business carried on there. Harlow's Adm'r v. Chesapeake & O. R. Co., 108 Va. 691, 62 SE 941; Joseph v. Philip Henrici Co., 137 Ill. App. 171; Burden v. Illinois Cent. R. Co. [Ky.] 112 SW 867; Chares v. Torlina [N. M.] 99 P 690; Eckels v. Maher, 137 Ill. App. 45. One upon premises "not with a view of transacting any business with the owner is a mere licensee and the owner owes him no higher duty to protect him from injury than he would if he were a trespasser;" but, on the other hand, "the duty of the owner to one who comes there by the owner's invitation to transact business in which the parties are mutually interested is to exercise reasonable care for his safety while on that portion of the premises required for the purpose of the visit," and "under such circumstances the party is said to be upon the premises by implied invitation of the owner." Huff v. Wells Fargo & Co., 141 Ill. App. 434, quoting from and following Pauckner v. Wakem, 231 Ill. 276, 83 NE 202. Where the owner of premises laid out a street thereon for use in connection with its business, and posted notices that it was a private way, its use by the public was permissive only, it being impracticable to entirely exclude them. Bowler v. Pacific Mills, 200 Mass. 364, 86 NE 767.

**24.** Where people are constantly entering on railroad track with acquiescence of company, latter is liable for failure to reasonably lookout, if by so doing injury could have been avoided, especially where injury is caused by backing train. Florida R. Co. v. Stuckey [Fla.] 48 S 34; Burton's Adm'r v. Cincinnati, etc., R. Co. [Ky.] 113 SW 442; Missouri, K. & T. R. Co. v. Wall [Tex. Civ. App.] 110 SW 453; Missouri K. & T. R. Co. v. Williams [Tex. Civ. App.] 109 SW 1126; St. Louis, etc., R. Co. v. Hudson [Ark.] 110 SW 590; St. Louis, etc., R. Co. v. Lavendusky [Ark.] 113 SW 204; Missouri, K. & T. R. Co. v. Malone [Tex.] 115 SW 1158; Anderson v. Great Northern R. Co. [Idaho] 99 P 91; Lear v. C. H. & D. R. Co., 11 Ohio C. C. (N. S.) 61. Child crossing

press or implied,[25] he is more than a bare licensee and a duty of due care is owing to him,[26] but the obligation does not extend to any use beyond the scope of the invitation.[27]

*Liability for injuries to children.* See 10 C. L. 932—There is ordinarily no greater duty owed to a trespassing infant than to an adult under the same circumstances,[28]

railroad tracks on wagon of his employer, at a point used as a crossing for years, is not a tresspasser. Conger v. Baltimore & Ohio R. Co., 31 App. D. C. 139. Evidence as to customary use of stockyards by shippers admissible where shipper was injured while caring for his stock located in stockyards. Franey v. Union Stockyard & Transit Co., 235 Ill. 522, 85 NE 750, afg. 138 Ill. App. 215.

**25.** The rule that one entering premises by invitation may assume that they are reasonably safe does not apply to one entering without knowledge of such invitation. Such person is negligent in assuming the safety of conditions of which he is ignorant, especially at night. Alabama G. S. R. Co. v. Godfrey [Ala.] 47 S 185. The term "invitation" within the rule that the owner of the property who has held out any invitation, allurement or inducement for others to come upon the property, must keep his premises in a safe condition, imports that the person injured did not act merely for his own convenience and pleasure and from motives from which no act or design of the owner contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors and that such use was not only acquiesced in by the owner, but that it was in accordance with the intention and design with which the place was adapted, prepared to be so used. Id. **Open door of elevator** may be an invitation to enter, and therefore operate to throw plaintiff off his guard. Beal-Doyle Dry Goods Co. v. Carr, 85 Ark. 479, 108 SW 1053. **Contra.** Kaplan v. Lyons Building & Operating Co., 61 Misc. 315, 113 NYS 516. **Open gates** at railroad crossing implied invitation to traveler of highway to enter upon crossing. Delaware & H. Co. v. Larnard [C. C. A.] 161 F 520. Boy riding on top of elevator with knowledge and implied **consent of operator** is not a trespasser, and hence ordinary care must be exercised for his safety. Davis Adm'r v. Ohio Valley Banking & Trust Co., 32 Ky. L. R. 627, 106 SW 843. **One assisting train crew** with their knowledge and consent held volunteer and not a trespasser. Clarke v. Louisville & N. R. Co., 33 Ky. L. R. 797, 111 SW 344. A mere **passive acquiescence** by the owner in the use of his premises by others involves no liability. Alabama & G. S. R. Co. v. Godfrey [Ala.] 47 S 185; Briscoe v. Henderson L. & P. Co., 148 N. C. 396, 62 SE 600; Harlow's Adm'r v. Chesapeake & O. R. Co., 108 Va. 691, 62 SE 941; Muse v. Seaboard Air Line R. Co. [N. C.] 63 SE 102; Curtis v. Southern R. Co., 130 Ga. 675, 61 SE 539. But if he directly, or by implication, induces persons to enter his premises, he thereby assumes an obligation that they are in a safe condition. Alabama G. S. R. Co. v. Godfrey [Ala.] 47 S 185. Where **customer of meat market** was struck by refrigerator door, evidence held to warrant finding of negligence, regardless of testimony that customer was warned. McDermott v. Sallaway, 198 Mass. 517, 85 NE 422. A **subcontractor working on a building** is there as a matter of right by invitation and is neither a trespasser nor a licensee. Dougherty v. Weeks, 126 App. Div. 786, 111 NYS 218.

**26.** Ferguson & Palmer Co. v. Ferguson's Adm'r [Ky.] 114 SW 297; Poteet v. Blossom Oil & Cotton Co. [Tex. Civ. App.] 115 SW 289; Crawford v. Kansas City Stockyards Co. [Mo.] 114 SW 1057; Kelly v. Benas [Mo.] 116 SW 557; Delaware & H. Co. v. Larnard [C. C. A.] 161 F 520. The owner or occupant of land is liable to those entering thereon, with due care, at his invitation or inducement, express or implied, on any business to be transacted or permitted by him for an injury occasioned by the unsafe condition of the land or access thereto which is known to him and not to them and which he has negligently suffered to exist and given them no notice of. Union Stockyard & Transit Co. v. Franey, 138 Ill. App. 215. Where premises are used for the storage of live stock for hire, one thereon caring for his stock is not a mere licensee but is deemed to be there at the invitation of the owner. Id. When tenant walked through open door of elevator and fell down shaft because the elevator had been moved to the top, landlord was held negligent, though one who had moved the elevator was not at the time in defendant's employ. Fact that door was open and that elevator boy stood by as usual when elevator was in readiness for passengers was such an implied invitation to enter that defendant became an insurer against accident. Jolliffe v. Miller, 126 App. Div. 763, 111 NYS 406. Owner liable for injuries caused by stepping into hole in floor of building into which plaintiff was impliedly invited. Stern v. Miller, 111 NYS 659. Hole in floor held a defect in the nature of a snare which a person invited had the right to assume did not exist. Id. Servant of independent contractor held to be on premises by express permission of owner and not to be a trespasser. Standard Steel Car Co. v. McGuire [C. C. A.] 161 F 527.

**27.** Where plaintiff was invited to load wood at a certain place, he could not recover for injury received while loading at another. Ferguson & Palmer Co. v. Ferguson's Adm'r [Ky.] 114 SW 297. Workman leaving building through an exit which he had no invitation to use took the risk incident to unfinished condition of building. Burke v. Cowen & Co., 114 NYS 505.

**28.** Operators of train owe no duty to trespassers on track except to use reasonable diligence to prevent injury to him after discovery of his peril and the fact

but, when their presence is discovered, greater vigilance is required to avoid injury to them on account of their incapacity for self-preservation,[29] and this is particularly true where there is an implied or permissive invitation.[30] Under the rule commonly known as the turntable doctrine, the owner of premises must anticipate the propensity of children to play with attractive and dangerous appliances.[31]

that such trespasser is a small child does not increase the duty. O'Bannion's Adm'r v. Southern R. Co., 33 Ky. L. R. 315, 436, 110 SW 329. Children trespassing upon premises take the risks thereof, unless they are allured thereon, by something of peculiar attractiveness to children. Mayfield Water & Light Co. v. Webb's Adm'r, 33 Ky. L. R. 909, 111 SW 712. Not negligence for defendant to fail to anticipate that child would find her way to stringers across canal, they not being for public use. Blum v. Weatherford, 121 La. 298, 46 S 317. Standard of duty is the same whether the person injured is an adult or a child. Girl of 8 years. Walsh v. Pittsburg R. W., 221 Pa. 463, 70 A 826. Though a child because of his age cannot be a trespasser or charged with contributory negligence, this does not render another liable for his injuries. Smalley v. Rio Grande W. R. Co., 34 Utah, 423, 98 P 311. Inability of children to care for themselves does not cast upon the owner of lands, upon which they trespass, the duty of protection. The duty rests primarily upon the parents and is not shifted by their negligence. Davis v. Joslin Mfg. Co. [R. I.] 69 A 65.

**29.** Where children of tender age are invited by the owner of dangerous machinery to go about the same or where their presence there is discovered, a duty arises to exercise ordinary care for their protection, where they are of insufficient age and intelligence to appreciate the danger to which they may be exposed, or into which from childish curiosity they may go. This doctrine is distinguished from that of the turntable cases, it being based largely on the doctrine of discovered peril. St. Louis S. W. R. Co. v. Davis [Tex. Civ. App.] 110 SW 939. A discovery of the presence of a 25 months old child on a railroad track by trainmen is a discovery of its peril, since they have no right to assume that it will move off. Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787. Duty of owner not to knowingly permit child 4½ years old to remain unattended in seedroom containing dangerous machinery. Poteet v. Blossom Oil & Cotton Co. [Tex. Civ. App.] 115 SW 289. Care required may depend on knowledge of danger. Knowledge of danger to child from starting motor held for jury. Walsh v. Pittsburg R. Co., 221 Pa. 463, 70 A 866. Where a child of tender years or of immature judgment, although a trespasser, is discovered upon premises, the owner or occupier may not, as in the case of an adult, act upon the assumption that it will take care of itself, but a further duty is imposed to exercise care commensurate with the circumstances to avoid injuring it. Smalley v. Rio Grande W. R. Co., 34 Utah, 423, 98 P 311. Railway company held not negligent in failing to anticipate return of children to yards after they had been driven off. Id. Ordinary care requires locomotive engineer who sees small child on track in front of him to exercise highest degree of care to avoid collision. Anderson v. Great Northern R. Co. [Idaho] 99 P 91.

**30.** Children held not invited to use lumber yard as playground, though they were not always driven away by the watchman. Kelly v. Benas [Mo.] 116 SW 557. Evidence of permission given by railroad employe to child to play on turntable, admissible. Dampf v. Yazoo & M. V. R. Co. [Miss.] 48 S 612.

**31.** Kelly v. Benas [Mo.] 116 SW 557. Where premises are attractive to children, the owner owes a higher degree of care for their safety than for the safety of adults. Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689. The "turntable" doctrine is that a railroad turntable is a dangerous machine created by the act of its owner, peculiarly attractive to the childish instincts of children as a merry-go-round, and, if left unlocked (when it might be easily locked) and when exposed in a public place where children resort to it with the knowledge and tacit acquiescence of its owner to play on it, becomes an attractive nuisance and operates as an inducement, an implied invitation to them, and therefore, when injured thereon, they are not treated strictly as voluntary trespassers but as tolled into a hidden pitfall or trap. Kelly v. Benas [Mo.] 116 SW 557. What are attractive nuisances is ordinarily for the determination of the jury. Linnberg v. Rock Island, 136 Ill. App. 495. The doctrine of the "turntable cases" is founded upon the principal that when one sets a temptation before young children, under circumstances which in law is equivalent to the holding out of an inducement to enter his premises, he must use ordinary care to protect them from harm. Smalley v. Rio Grande W. R. Co., 34 Utah, 423, 98 P 311.

**Doctrine applied:** Rule applied to **pond in street** upon which floated boards, planks, and parts of sidewalk tempting children to ride thereon. Linnberg v. Rock Island, 136 Ill. App. 495. Railroad, which leaves **turntable** unguarded and unfastened in a locality where children are likely to play and permits them to play on the turntable, impliedly invites them to so play and is liable for resulting injuries. Berry v. St. Louis M. & S. E. R. Co., 214 Mo. 593, 114 SW 27. Complaint, alleging negligence of railroad company in leaving turntable unguarded and unfastened whereby child of tender years was injured in attempting to play with it, not demurrable. Lewis v. Cleveland, etc., R. Co. [Ind. App.] 84 NE 23. Railroad companies are not to be deprived of the use of structures or appliances necessary for the carrying on of their business because they are attractive and may result in injuries to children by reason of their

To the application of this doctrine, it is essential that the attractive and dangerous character of the appliance be known to the owner,[32] that the injured child be so young as to lack discretion,[33] and that the injury result from the appliance in question.[34]

§ 3. *Proximate cause.*[35]—See 10 C. L. 934—Negligence is not actionable unless it is the proximate cause of the injury complained of,[36] and this rule applies

want of judgment, but where with but little pecuniary expense such properties may be made reasonably safe, an obligation rests upon such companies to take the measures necessary therefor. Id. Evidence held sufficient to go to jury on question of whether **car** was peculiarly and especially attractive to children. Gates v. Northern Pac. R. Co., 37 Mont. 103, 94 P 751. Doctrine of "turntable cases" applied to injury from pushing a car left in place frequented by children. Cahill v. Stone & Co., 153 Cal. 571, 96 P 84.

**Doctrine held inapplicable:** "Turntable cases" doctrine not applied to injury caused by child's entering private premises to "see into" **theater.** Briscoe v. Henderson L. & P. Co., 148 N. C. 396, 62 SE 600. A **depot** is not a place which allures children of tender years nor does the company hold out to them an implied invitation or special attraction to visit it. Ling v. Great Northern R. Co., 165 F 813. **Lumber piles** held not an attractive nuisance as defined in the turntable cases. Kelly v. Benas [Mo.] 116 SW 557. **Railroad trains** are not to be classed with turntables, and there is no duty to guard them from the intrusion of children. St. Louis S. R. Co. v. Davis [Tex. Civ. App.] 110 SW 939. **Electric wire** which can be reached only by the climbing of the poles to which it is fastened is not peculiarly attractive to children within turntable cases, and that children will climb the poles and come in contact with the wire is not to be reasonably anticipated. Mayfield Water & Light Co. v. Webb's Adm'r, 33 Ky. L. R. 909, 111 SW 712. **Stringers across canal** held not an attractive place for children. Blum v. Weatherford, 121 La. 298, 46 S 317. Not applied to **railroad yards,** where children were repeatedly ordered out, but rather to a thing at rest and left unguarded. Smalley v. Rio Grande W. R. Co., 34 Utah, 423, 98 P 311. Hence it is not generally applied to the **conduct of a business,** for here the implied invitation is lacking. Id. A **railroad track** in the open country is not attractive or alluring to children within the doctrine of the "turntable cases." Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689.

**Doctrine repudiated.** Conrad v. Baltimore & O. R. Co. [W. Va.] 61 SE 44. Held that the law imposes no liability upon railroad companies in favor of children for maintaining unfastened and unguarded turntable even in thickly settled community. Id.

**32.** Owner held under no obligation to anticipate that child would enter private alley to look into back windows of theater, and hence owed no duty to guard dangerous agencies in such alley. Briscoe v. Henderson L. & P. Co., 148 N. C. 396, 62 SE 600. Where the owner has no knowledge of the danger of an instrumentality which causes injury to trespassing children, he is not liable, though he allows them on the premises and gives no warning of danger. Corn bin in distillery. Kisler's Adm'r v. Kentucky Distilleries & Warehouse Co. [Ky.] 112 SW 913. Fact that children occasionally had gone into bin in presence of miller did not charge owner with knowledge that they would go into it on other occasions under different conditions. Id. To bring a case within the doctrine of the "turntable cases," defendants must be shown to have known of the attractiveness of the instrumentality in question to children. Gates v. Northern Pac. R. Co., 37 Mont. 103, 94 P 751.

**33.** Whether child of 10 was of sufficient age and intelligence to exclude him from the benefit of the rule held for the jury. Linnberg v. Rock Island, 136 Ill. App. 495. Where a child is prima facie a trespasser, the plaintiff has the burden of proving that he was incapable of exercising the degree of care necessary for his safety. Gates v. Northern Pac. R. Co., 37 Mont. 103, 94 P 751.

**34.** Sudden excitement occasioned by danger of another child, causing deceased to jump from his raft, held one of the events which was liable to happen and not to relieve defendant from liability. Linnberg v. Rock Island, 136 Ill. App. 495. Sandpile which attracted child to railroad yards had no connection with his injury by jumping on and off trains. Swartwood's Guardian v. Louisville & N. R. Co., 33 Ky. L. R. 785, 111 SW 305.

**35. Search Note:** See notes in 10 C. L. 934, 935; 17 L. R. A. 33; 19 Id. 594; 21 Id. 259; 26 Id. 267; 11 L. R. A. (N. S.) 684; 13 Id. 1219; 14 Id. 586, 956; 15 Id. 819; 36 A. S. R. 807, 809; 1 Ann. Cas. 230.

See, also, Negligence, Cent. Dig. §§ 69-82; Dec. Dig. §§ 56-64; 29 Cyc. 488-504.

**36.** Atlanta & B. Air Line R. Co. v. Wheeler [Ala.] 46 S 262; Malcomb v. Louisville & N. R. Co. [Ala.] 46 S 768; Pittsburg Reduction Co. v. Horton [Ark.] 113 SW 647; Teis v. Smuggler Min. Co. [C. C. A.] 158 F 260; United States Express Co. v. Kraft [C. C. A.] 161 F 300; Williams v. Atlantic C. L. R. Co. [Fla.] 48 S 209; Willson v. Logan, 139 Ill. App. 204; Yongue v. St. Louis & S. F. R. Co., 133 Mo. App. 141, 112 SW 985; Fulwider v. Trenton Gas, L. & P. Co. [Mo.] 116 SW 508; Batton v. Public Service Corp., 75 N. J. Law, 857, 69 A 164; Miller v. Baltimore, etc., R. Co., 782 Ohio St. 309, 85 NE 499; Kansas City S. R. Co. v. Williams [Tex. Civ. App.] 111 SW 196; Pullman Co. v. Caviness [Tex. Civ. App.] 116 SW 410; Kujawa v. Chicago, etc., R. Co., 135 Wis. 562, 116 NW 249. **Where the evidence leaves the proximate cause a matter of conjecture,** there can be no recovery. Western Steel

equally where the negligence charged consists in the violation of a statute or ordinance.[37] The general rule is that a proximate cause is one from which a result follows as a natural consequence[38] without the intervention of any inde-

Car & Foundry Co. v. Cunningham [Ala.] 48 S 109; Torrans v. Texarkana Gas & Elec. Co. [Ark.] 115 SW 389; Louisville & N. R. Co. v. Scalf, 33 Ky. L. R. 721, 110 SW 862; Casper v. New Orleans R. & L. Co., 121 La. 603, 46 S 666; Sims v. American Ice Co. [Md.] 71 A 522; Micari v. Monroe Stone Co. [Mich.] 15 Det. Leg. N. 771, 117 NW 939; Parker v. Union Station Ass'n [Mich.] 15 Det. Leg. N. 909, 118 NW 733; Stumpf v. Delaware, L. & W. R. Co. [N. J. Law] 69 A 207; Coady v. Brooklyn Heights R. Co., 128 App. Div. 856, 113 NYS 100; Ott v. Boggs, 219 Pa. 614, 69 A 61; Johns v. Ash [Wash.] 97 P 748. Facts held as consistent with defendant's theory as with plaintiff's and hence the cause of the accident being still a matter of conjecture, a verdict was properly directed for defendant. Tibbits v. Mason City Ft. D. R. Co., 138 Iowa, 178, 115 NW 1021.

**37.** Because an ordinance is violated does not authorize a recovery when a person is injured by acts of his own, which, if known, could not have been prevented by defendant had it complied with ordinance. King v. Wabash R. Co., 211 Mo. 1, 109 SW 671. Unlawful employment of a minor under 16 years of age in violation of Burn's Ann. St. 1908, § 8021, required defendant to anticipate injury resulting from his exhaustion. Inland Steel Co. v. Yedinak [Ind.] 87 NE 229. Railroad's obstruction of street in violation of law held proximate cause of destruction of building by fire, where fire department was destroyed by such obstruction, since such a result should have been anticipated. Houren v. Chicago, etc., R. Co., 236 Ill. 620, 86 NE 611. Violation of Rev. St. 1905, § 3362, prohibiting employment of children under the age of 12 years in certain cases is negligence per se. Starnes v. Albion Mfg. Co., 147 N. C. 556, 61 SE 525. Violation of Rev. St. 1905, §3362, prohibiting employment of children in certain case, held proximate cause of injury to child, though engaged at the time of the injury in work outside the scope of his employment. Id. Sale of impure food to retailer in violation of statute was proximate cause of sickness of consumer resulting from its use. Meshbesher v. Channellene Oil & Mfg. Co. [Minn.] 119 NW 428. Evidence sufficient to go to jury on question whether sale of gunpowder to child of 12 was proximate cause of latter's injury by its explosion. McEldon v. Drew, 138 Iowa, 390, 116 NW 147. Violation of Act Cong. March 2, 1893, c. 196, §§ 2, 8; 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), requiring automatic couplers, proximate cause of injury to brakeman while making coupling. York v. St. Louis, etc., R. Co. [Ark.] 110 SW 803. The unlawful employment of a minor may be regarded as the proximate cause of his injury arising from such employment. Frorer v. Baker, 137 Ill. App. 588. Violation of statute forbidding placing of baggage car behind passenger car held not proximate cause of injury. Pittsburg, etc., R. Co. v. Schepman [Ind.] 84 NE 988. That plaintiff was working without permit as required by ordinance not proximate cause of injury as matter of law. McCarthy v. Morse, 197 Mass. 332, 83 NE 1109. Failure to comply with Labor Law (Laws 1897, p. 468, c. 415) § 20, amended by Laws 1899, p. 350, c. 192, requiring elevator shafts in buildings in course of construction to be enclosed, not cause of injury of employe who was thrown off elevator into cellar caused by its sudden descent and stoppage. Genovesia v. Pelham Operating Co., 114 NYS 646.

**38. Proximate cause defined:** Proximate cause is the efficient cause or that which originates and sets in motion the dominating agency that necessarily proceeds through other as mere instruments or vehicles in the natural lines of causation to the result in controversy. Chicago & E. R. Co. v. Dinius, 170 Ind. 222, 84 NE 9. The proximate cause is to be defined generally as the cause which led to, or might naturally be expected to produce, the result. Elliff v. Oregon R. & Nav. Co. [Or.] 99 P 76. The proximate cause of an injury is the natural and continuing sequence unbroken by an intervening cause producing the injury, and without which it would not have happened. Hull v. Thomson Transfer Co. [Mo. App.] 115 SW 1054. The "proximate cause" of an accident is the immediate cause, or that without which it would not have happened. It is not the remote cause or occasion of the accident, and where the original wrong only becomes injurious because of the intervention of some distinct wrongful act of another, the injury is imputed to the last wrong as the proximate cause. Louisville & N. R. Co. v. Keiffer [Ky.] 113 SW 433. "Proximate cause" is that which naturally leads to, or produces, or contributes directly to produce, a result such as might be expected by any reasonable and prudent man as likely to directly and naturally follow or flow out of the performance or nonperformance of any act. Williams v. Atlantic C. L. R. Co. [Fla.] 48 S 209. The proximate cause is the direct and immediate, efficient cause of the injury. Malcomb v. Louisville & N. R. Co. [Ala.] 46 S 768. The requisites of proximate cause are first, the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the injury, and second, that such act or omission did produce it. Wilson v. Southern R. Co., 108 Va. 822, 62 SE 972. Proximate cause is that cause which, in natural and continued sequence unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred. Town of Lyons v. Watt, 43 Colo. 238, 95 P 949. Negligence cannot be the proximate cause of an injury unless it can be said that, but for such negligence, the injury would not have happened. Tibbitts v. Mason City, etc., R. Co., 138 Iowa, 178, 115 NW 1021. Where a flood was caused by open faucet in upper story in sole pos-

session of defendants, testimony of one, that he had turned it on but found no water running but that he was "quite sure" he turned it off, raised presumption of negligence which was not rebutted. Baker v. Schwartz, 113 NYS 727. Negligence, if any, in leaving horse unattended for the time being on the street while it was eating, was not the proximate cause of its biting a passerby, but its vicious propensity was. Corcoran v. Kelly, 61 Misc. 323, 113 NYS 686. Negligence having no connection with the injury cannot be the proximate cause thereof. Negligence, if any, in original placement of a box, not proximate cause of injury from its falling after replacement. Williams v. Citizens' Steamboat Co., 128 App. Div. 827, 113 NYS 616. One, who while walking along railroad track picked up torpedo and struck it to open it, was guilty of negligence proximately causing his injury resulting from the torpedo's explosion, even though company was negligent in placing it there. Holmes v. Delaware & Hudson Co., 112 NYS 421. Defect in bridge held proximate cause of injury, though it might not have happened but for breaking of buggy tongue and irritation of restlessness of horse. Hubbard v. Montgomery County [Iowa] 118 NW 912. Where one switchman, riding in front of engine being run by the engineer at an excessive rate of speed, saw his danger of being crushed because of a probable failure of the engine to couple with the car in front owing to nonalignment of coupling bars, and being unable to jump sought to align said bars and was injured thereby, the negligence of the engineer was the proximate cause. Murphy v. Chicago G. W. R. Co. [Iowa] 118 NW 390. Defect in coupler held proximate cause of injury to brakeman who went between cars to ascertain why it did not work. Sprague v. Wisconsin Cent. R. Co., 104 Minn. 58, 116 NW 104.

**Illustrations: Failure to signal** having induced plaintiff to approach so near track that his view was obstructed was held proximate cause of collision at crossing. Kujawa v. Chicago, etc., R. Co., 135 Wis. 562, 116 NW 249. Failure of train to sound crossing signals not proximate cause of accident. Chesapeake & O. R. Co. v. Hall's Adm'r [Va.] 63 SE 1007. Fact that street car was running at an excessive rate of **speed** did not of itself show that it was the proximate cause of injury to child on track. Morse v. Consolidated R. Co. [Conn.] 71 A 553. Where at the time of collision a train is running at a proper rate of speed, fact that just prior thereto it had been running at a rate exceeding that limited by ordinance is not proximate cause thereof. Holland v. Missouri Pac. R. Co., 210 Mo. 338, 109 SW 19. Speed of train held not shown to have contributed to accident. McDoel v. Heuermann, 141 Ill. App. 113. Rapid rate of speed of street car at street intersections held proximate cause of injury. Chicago City R. Co. v. Kastrzewa, 141 Ill. App. 10. Purchaser of **diseased cattle** after disease has been communicated to them has no right of action for the negligence to which the disease is due. Eshleman v. Union Stockyards Co. [Pa.] 70 A 899. To start a **vessel on voyage without inspection** is such gross negligence as to be the proximate cause of injury because it leaked. Bell v. Mutual Mach. Co. [N. C.] 63 SE 680. Negligent delay in **delivery of telegram** informing plaintiff of the death of his mother whereby he missed two trains was proximate cause of his failure to get to the funeral, though after receiving telegram he caught a train which would have carried him through in time but for a defect in the track, where such defect would not have affected the passage of the trains which he missed. Sutton v. Western Union Tel. Co., 33 Ky. L. R. 577, 110 SW 874. Where horses were injured by coming in contact with an **electric wire blown down by storm,** proximate cause of injury was the storm, an act of God, and not negligence of defendant in maintaining uninsulated and unguarded wires. Southwestern Tel. & T. Co. v. Keys [Tex. Civ. App.] 110 SW 767. Proximate cause of injury to sectionman on hand car caused by **explosion of torpedo** on track was defendant's failure to warn him that torpedo was there. Galveston H. & N. R. Co. v. Murphy [Tex. Civ. App.] 114 SW 443. Where boy who had picked up **dynamite cap** on defendant's premises was allowed to retain it by parents and some time afterward traded it to another boy, the parents' negligence broke the casual connection between the defendant's negligence in leaving the cap where it did and the injury, hence defendant's negligence was not the proximate cause. Pittsburg Reduction Co. v. Horton [Ark.] 113 SW 647. Where glass was broken by explosion of **dynamite** for purpose of stopping spread of fire, the fire, and not the explosion of dynamite, was the proximate cause. Frisbie v. Fidelity & Casualty Co., 133 Mo. App. 30, 112 SW 1024. Neglect of defendant in failing to inform owner to whom **gun** was returned that it contained an **unexploded shell** not actionable, the efficient cause of the injury, resulting from its explosion, being the owner's negligence in taking the gun apart without ascertaining whether it was in same condition as when lent. Smith v. Peach, 200 Mass. 504, 86 NE 908. Plaintiff's **fright** held not proximate cause of injury. Swift & Co. v. Sandy [C. C. A.] 165 F 622. Defendant's negligence in turning suddenly into street in front of a woman held proximate cause of injury and not her sudden fright. Sandy v. Swift & Co., 159 F 271. Plaintiff's fright and not defendant's negligence held proximate cause of railroad crossing accident. Baltimore, etc., R. Co. v. Abegglen, 41 Ind. App. 603, 84 NE 566. Negligence of defendant rather than physical condition of person injured held proximate cause of injury, resulting from fright occasioned by sudden closing of train after person had passed through. St. Louis S. W. R. Co. v. Murdock [Tex. Civ. App.] 116 SW 139. Owner's fault in knowingly employing **careless chauffeur** not proximate cause of collision, where latter stole machine to use for his own purposes. Danforth v. Fisher [N. H.] 71 A 535. **Giving of chloroform** in operating on injury rather than injury itself held proximate cause of death. Mella v. Northern S. S. Co., 162 F 499. Where negligence of fellow traveler is the proximate cause of the injury, there can be

pendent, efficient cause,[39] the result being such that it ought to have been antici-

no recovery against municipality under the statute rendering them liable for injuries caused by **defective highways.** Hinckley v. Danbury [Conn.] 70 A 590. Motorman's failure to warn conductor of **obstacle near track** not proximate cause of passenger's injury thereby. Id. **Failing of hammer** which struck plaintiff's umbrella causing her to suddenly twist her body thereby producing the injury held proximate cause, actual physical impact being unnecessary. Philadelphia, B. & W. R. Co. v. Mitchell, 107 Md. 600, 69 A 422. Failure to properly construct **staging** over machinery held proximate cause of servant's injury rather than negligence of fellow-servant in running into horse supporting staging. Vaisbord v. Nashua Mfg. Co., 74 N. H. 470, 69 A 520. Destruction of trunk by fire not the natural and probable result of **delay in forwarding** it. French v. Merchants' & Miners' Transp. Co., 199 Mass. 433, 85 NE 424. Held under the evidence that court could properly find **defective condition of wagon** was due to defendant's negligence and was proximate cause of injury rather than act of bystander pulling out blanket caught between different parts of wagon. Hollidge v. Duncan, 199 Mass. 121, 85 NE 186. **Conductor's position on car** held but the occasion and not the cause of the injury. Bennett v. Chicago City R. Co., 141 Ill. App. 560. Negligence of elevator boy in **leaving elevator alone** and in the condition shown held proximate cause of passenger's injury, since under the circumstances it was to be expected that latter would return to car in former's absence. Toohy v. McLean, 119 Mass. 466, 85 NE 578. Evidence held to warrant finding that **defective wheelborrow** was proximate cause of injury. O'Toole v. Pruyn, 201 Mass. 126, 87 NE 608. Where plaintiff who had hold of one end of beam had hand crushed because other workmen let go of their end, their letting go, and not **foreman's order** to plaintiff to raise beam by his hands rather than by cross-bar, was proximate cause of injury. Carlsen v. McKee, 114 NYS 280. Execution of order by servant held proximate act, but giving of order by foreman was proximate cause of injury. Deon v. McClintic-Marshall Const. Co., 114 NYS 28. Decedent's negligence in **stopping on track** in front of approaching car held proximate cause of her injury. Liutz v. Denver City Tramway Co., 43 Colo. 58, 95 P 600. **Switching of car** held not proximate cause of injury to child who was struck by it, but rather the attempt of the child to ride upon it. Smalley v. Rio Grande W. R. Co., 34 Utah, 423, 98 P 311. Defective condition of machinery held proximate cause of **explosion of gasoline engine.** Meshishnek v. Seattle Sand and Gravel Co. [Wash.] 99 P 9. Proximate cause of an explosion was not defendant's act in storing it on his premises but plaintiff's act in shooting into it. McGhee v. Norfolk & S. R. Co., 147 N. C. 142, 60 SE 912. Where injury was caused by trespassing boys throwing hog wire across **electric wires** at an uninsulated spot, thereby causing plaintiff who came in contact with hog wire to receive shock, negligence of company in maintaining uninsulated wires was not proximate cause of injury. Luehrmann v. Laclede Gaslight Co., 127 Mo. App. 213, 104 SW 1128. In action for injury to marine railway struck by tug, proximate cause of injury was **negligence of tug** in not proceeding in its course. Ives v. Gring [N. C.] 63 SE 609. No casual connection between **failure to have lookout on cars** and injury, where motorman himself saw plaintiff near track. Downey v. Baton Rouge Elec. & Gas Co. [La.] 47 S 837. **Negligence of engineer,** if any, held not to proximately contribute to his injury received in collision, the proximate cause being negligence of train dispatcher. Yazoo & M. V. R. Co. v. Farr [Miss.] 48 S 520.

**39.** Where a new and independent cause intervenes between the wrong and the injury, the connecting chain is broken and the wrongful act cannot be said to be the proximate cause. Alabama G. S. R. Co. v. Vail [Ala.] 46 S 587; Mella v. Northern S. S. Co., 162 F 499; Benedict Pineapple Co. v. Atlantic C. L. R. Co. [Fla.] 46 S 732; Brubaker v. Kansas City Elec. L. Co., 130 Mo. App. 439, 110 SW 12; Ostrander v. Orange County Trac. Co., 125 App. Div. 603, 110 NYS 15. Ordinary conditions and forces of nature are not generally independent intervening causes, since those who are negligent are held to have had them in contemplation. Benedict Pineapple Co. v. Atlantic C. L. R. Co. [Fla.] 46 S 732. An act, which does not break the chain of causation between prior negligence and the injury or isolate the two, cannot be said to be the active and efficient cause of the injury. Hagerty v. Montana Ore Purchasing Co. [Mont.] 98 P 643.

**Illustrations:** Negligence in leaving excavation unguarded not actionable where injury therefrom would not have occurred but for plaintiff's negligence in mistaking the lot, where it was located, for another. Town of Lyons v. Watt, 43 Colo. 238, 95 P 949. Though an accident would not have happened but for the giving of a signal, foreman's act in ordering elevator raised in response thereto was an intervening act proximately causing plaintiff's injury. Boyle v. McNulty Bros., 129 App. Div. 412, 113 NYS 240. Furnishing lineman improper measuring tape held proximate cause of his receiving an electric shock where the accident could not have happened had the tape been a proper one, though lineman contributed to the cause by whipping the tape against the wires (Murphy v. Hudson River Tel. Co., 127 App. Div. 450, 112 NYS 149), but it cannot be attributed to a cause unless without its operation the accident would not have happened (Id.). Fact, that another street car passenger was struck by passing team, thereby throwing plaintiff to street, held not an independent intervening cause where such passenger would not have been struck but for company's negligence. Lockwood v. Boston El. R. Co., 200 Mass. 537, 86 NE 934. Defendant's negligence held proximate cause of premature birth and death of child conceived after injury, since perpetuation of the human race is not a

pated in the exercise of reasonable foresight.[40] Negligence is actionable when the injury resulting therefrom is the probable result thereof, it not being necessary that such result could have been foreseen.[41] The test of proximate cause is whether there was an unbroken connection between the wrongful act and the injury.[42] It need not be the sole cause [43] or the direct cause [44] or the last in point of time.[45]

voluntary act and hence conception of the child was not an intervening agency relieving defendant of liability. Sullivan v. Old Colony St. R. Co., 197 Mass. 512, 83 NE 1091.

**40.** Farrier v. Colorado Springs, etc., R. Co., 42 Colo. 331, 95 P 294; Benedict Pineapple Co. v. Atlantic C. L. R. Co. [Fla.] 46 S 732; Brubaker v. Kansas City Elec. L. Co., 130 Mo. App. 439, 110 SW 12; Luehrmann v. Laclede Gaslight Co., 127 Mo. App. 213, 104 SW 1128; Cox v. Pennsylvania R. Co. [N. J. Err. & App.] 71 A 250; Muse v. Seaboard Air Line R. Co. [N. C.] 63 SE 102. Held no evidence that defendant ought to have anticipated that removal of boxing from drum would cause brake to be released and bucket to be precipitated down mining shaft. Reino v. Montana Mineral. Land & Development Co. [Mont.] 99 P 853. Foreman should have seen that sudden stopping of hand car would throw off section hand standing thereon in an insecure position. Doss v. Missouri, K. & T. R. Co. [Mo. App.] 116 SW 458. Though leaving stock yards' gate open in close proximity to passing cars was negligence, there was no liability for injury to stock attendant hanging on side of car unless defendant should have anticipated that he might occupy such position. Crawford v. Kansas City Stockyards Co. [Mo.] 114 SW 1057. Evidence held to show that defendant bad reason to anticipate that stock attendant in performing his duties might be hanging on the side of a train passing through the yards, this being a common custom, and hence the leaving open of a pen gate so that it swung in close proximity to the tracks was actionable negligence. Id. Held, as a matter of law, that leaky engine, necessitating running of double header, was not proximate cause of an injury resulting from engine running into train from rear while it was standing still to permit the repair of a broken knuckle. Louisville & N. R. Co. v. Keiffer [Ky.] 113 SW 433. Held that injury caused by negligence in making coupling was not proximate cause of injury to one going to freight depot on business, since his presence at the place of injury was not to be reasonably anticipated. Louthian v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 111 SW 665. The rebound of a stick of wood, thrown from a car in such a way as to strike the legs of a man sitting on the car, is not such a consequence as ought to have been foreseen to result from permitting wood to be so thrown. Ultima Thule, A. & M. R. Co. v. Benton [Ark.] 110 SW 1037. Was a consequence which might have been foreseen, and required submission of the question of proximate cause to the jury. Phillips v. St. Louis & S. F. R. Co., 211 Mo. 419, 111 SW 109. Failure of defendant to construct its line properly and to repair defect in wires not proximate cause of injury by coming in contact with a wire thrown over defendant's wires by a third person. Brubaker v. Kansas City Elec. L. Co., 130 Mo. App. 439, 110 SW 12. Defective repairing of boat held not proximate cause of injury from leakage and water coming in contact with lime on board, thereby setting fire to vessel, where defendant had no notice that lime was to be carried. Bell v. Mutual Mach. Co. [N. C.] 63 SE 680. Where a shock and injury from a collision was to be reasonably anticipated, the fact that its extent was not to be anticipated and indeterminable was no bar to a recovery for the actual pecuniary lose sustained. Armour & Co. v. Kollmeyer [C. C. A.] 161 F 78. Where an employe in a mine was overcome by explosion of gas and while being carried to the surface was injured by carelessness of fellow-servants in placing him on elevator, such injury was not proximately caused by the explosion. Teis v. Smuggler Min. Co. [C. C. A.] 158 F 260.

**41.** Murphy v. Chicago G. W. R. Co. [Iowa] 118 NW 390. In order to make a negligent act the proximate cause of an injury, it is not necessary that the particular injury and the particular manner of its occurrence could reasonably have been foreseen. Ford v. Hine Bros. Co., 237 Ill. 463, 86 NE 1051. If the consequences follow in an unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if, at the time of the negligence, the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence. Id.

**42.** Defendant's negligence in starting fire, and not decedent's attempt to put it out, was proximate cause of death from burns. Illinois Cent. R. Co. v. Siler, 133 Ill. App. 2. The chain of proximate cause will be extended to its natural limit in each particular case. Recovery for death by fire spreading from railroad right of way. Id. The primary fault and not the duty raised thereby is the proximate cause of resulting injury. Starting of fire, and not attempt to extinguish it, proximate cause of death from burns. Id. The test of proximate cause is whether the facts constitute a continuous succession of events so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent; and the final result cannot be said to be the natural and probable consequences of the primary cause, the negligence of the defendant. Eagle Hose Co. v. Electric Light Co., 33 Pa. Super. Ct. 581. But negligence may be the proximate cause of an injury of which it is not the sole or immediate cause. Id. If the defendant's negligence concurs with some other event, not due to the plaintiff's fault, to produce the injury so that it clearly appears that but for such negligence the injury would not have happened, the defendant is responsible though his negligent act

was not the nearest cause in the order of time. Id. Electric light company is liable for injuries caused by falling of defectively fastened street lamp, though immediate occasion of its fall is an unavoidable fire with which defendant has no connection, the fire being treated as an intervening agency bringing defendant's negligence into dangerous prominence and combining with it to cause the injuries. Id. One who violates a duty imposed by common law is liable to every person who is injured as a natural and probable consequence. Pittsburg Reduction Co. v. Horton [Ark.] 113 SW 647.

**43.** San Antonio & A. P. R. Co. v. McBride [Tex. Civ. App.] 116 SW 638; Missouri, K. & T. R. Co. v. Lasater [Tex. Civ. App.] 115 SW 103. Instruction, erroneous as ignoring defendant's liability of its negligence, was a concurring cause proximately contributing to the injury. St. Louis S. W. R. Co. v. Garber [Tex. Civ. App.] 111 SW 227. The fact that other acts concur with the negligence proximately causing the injury is no defense. Ft. Worth & D. C. R. Co. v. Monell [Tex. Civ. App.] 110 SW 504. One is not relieved of liability for his own negligence which proximately caused an injury because some natural force or the activity of a third person exerted an influence in causing the injury. Fleddermann v. St. Louis Transit Co. [Mo. App.] 113 SW 1143. Fact that gas pipes in street were started rolling by children does not relieve gas company of liability for negligently leaving them in the street insufficiently blocked. O'Hara v. Laclede Gaslight Co., 131 Mo. App. 428, 110 SW 642. One is liable for injuries resulting from his negligence, though they probably would not have happened but for an intervening or concurring cause for which neither party is responsible. City liable for defective street though injury probably would not have happened but for fact that horse became frightened. McLemore v. West End [Ala.] 48 S 663. Where a shipper provided a cover for growing plants which was negligently burned by defendant under such circumstances as must have imputed knowledge to him that the cover was necessary for the plants' preservation, he was liable for resulting damage. Benedict Pineapple Co. v. Atlantic C. L. R. Co. [Fla.] 46 S 732. The defendant's negligence may be the proximate cause of an injury though other circumstances and conditions may have contributed thereto. Alabama G. S. R. Co. v. Vail [Ala.] 46 S 587. Icy condition of ground where employes were working. Id. A person injured by the fault of another, without which fault the injury could not have occurred, is not to be deprived of his remedy because the fault of a stranger, not in privity with him, also contributed to the injury, for the original negligence still remains as the culpable and direct cause of the injury, and the intervening events and agencies, which may contribute to it, not to be regarded. Elliff v. Oregon R. & Nav. Co. [Or.] 99 P 76. Uninsulated wire could not be said, as a matter of law, not to be proximate cause of injury to lineman, where there was evidence tending to show that defendant failed to furnish properly insulated wires, though negligence of fellow-servant contributed to injury. De Kallans v. Washtenaw Home Tel. Co., 153 Mich. 25, 15 Det. Leg. N. 337, 116 NW 564. Where several concurring acts or conditions of things, one of them a wrongful act or omission, produce an injury, such wrongful act or omission is to be regarded as the proximate cause of the injury if it be one which might reasonably have been anticipated therefrom and would not have occurred without it. It is immaterial that it could not reasonably have been anticipated in the particular way in which it did in fact happen. Evidence held to warrant finding that city's negligence in permitting obstruction in streets was proximate cause of injuries resulting from a runaway horse running into it. McDowell v. Preston, 104 Minn. 263, 116 NW 470. The concurrent negligence of a third person operating to produce the injury does not relieve defendant of liability. Negligence of nurse and hospital attendants did not relieve physician, though they were not in his employ or under his control. Haase v. Morton, 138 Iowa, 205, 115 NW 921. Where the injury is the result of the defendant and that of a third person, or of the defendant and an inevitable accident, or where an inanimate thing has contributed with defendant's negligence to cause the injury, the plaintiff may recover if the negligence of the defendant was an efficient cause of the injury. Wells Bros. Co. v. Flanagan, 139 Ill. App. 237. The negligence of two independent persons resulting in injury to a third, where neither is sufficient within itself, both are to be treated in combination as the proximate cause of the injury. Id.

**44.** Defining it as "direct cause" held error, but harmless where defendant's negligence, if the cause at all, must have been the direct cause. Wheeler v. Milner, 137 Wis. 26, 118 NW 187. Instruction, excluding necessary fact that negligence must have been the direct cause of the injury, erroneous. Lichtenstein v. Hudepohl Brew. Co., 11 Ohio C. C. (N. S.) 441. One is responsible for all the consequences which naturally and reasonably flow from his negligent conduct, though the result is not immediately connected with the cause. Louisville & N. R. Co. v. Daugherty, 32 Ky. L. R. 1392, 108 SW 336.

**45.** The fact that the negligence of a third person contributed to the injury does not profit defendant if his negligence was a concurring cause. Hagerty v. Montana Ore Purchasing Co. [Mont.] 98 P 643. The proximate cause need not be the last act or the nearest to the injury. San Antonio & A. P. R. Co. v. McBride [Tex. Civ. App.] 116 SW 638. Proximate cause is not always the last act of cause or nearest act to the injury, but it is such act as actively aided in producing the injury as direct and concurring, such as might reasonably have been contemplated as involving the result under the attending circumstances. Texas & N. O. R. Co. v. Bellar [Tex. Civ. App.] 112 SW 323. Though blood poisoning was the direct and immediate cause of intestate's death, it was in the chain of causations originating in burns received and sued for. Birmingham R. L. & P. Co. v. Hinton [Ala.] 48 S 546. By "proximate cause" is not meant the last cause, nor the sole cause, but any act that aided in producing the

§ 4. *Contributory negligence.*[46]—See 10 C. L. 938—The doctrine of contributory negligence is to be distinguished from that of assumption of risk.[47] Contributory negligence proximately contributing to the injury [48] bars recovery for negligence,[49] though the negligence consists in violation of statute [50] but not for willful injury.[51]

result. Negligence in failing to have ticket office open and negligence in starting train before passengers could procure ticket were concurring causes, constituting the proximate cause. San Antonio & A. P. R. Co. v. Trigo [Tex. Civ. App.] 108 SW 1193. Proximate cause as a rule is for the jury. Proximate cause for the jury, though the immediate cause was not defendant's negligence. Wells Bros. Co. v. Flanagan, 139 Ill. App. 237.

**46. Search Note:** See notes in 4 C. L. 774, 777, 778; 6 Id. 767; 8 Id. 1106; 14 L. R. A. 733; 21 Id. 76; 22 Id. 460; 40 Id. 131; 49 Id. 715; 55 Id. 418; 3 L. R. A. (N. S.) 1092; 7 Id. 132; 8 Id. 597; 9 Id. 342, 972; 11 Id. 166; 18 Id. 461; 8 A. S. R. 849; 14 Id. 590; 25 Id. 39, 110 Id. 278; 1 Ann. Cas. 216, 895; 3 Id. 48, 703; 4 Id. 216, 513, 928; 5 Id. 76, 163; 7 Id. 244; 9 Id. 408, 939; 10 Id. 4; 11 Id. 686.

See, also, Negligence, Cent. Dig. §§ 83-167; Dec. Dig. §§ 65-101; 29 Cyc. 505-561; 6 A. & E. Enc. L. (2ed.) 360; 7 Id. 370.

**47.** Where want of proper care on the part of a person brings about his injury, the doctrine of "contributory negligence" is applied to his act; when a servant is injured from one of the well known dangers ordinarily incident to his service, then his injury is ascribed to one of the ordinary risks of employment which he assumed in entering upon the service. Louisiana & F. Lumber Co. v. Brown [Tex. Civ. App.] 109 SW 950. Contributory negligence is an act or omission on plaintiff's part proximately causing his injury, and is a defense notwithstanding defendant's negligence while assumed risk rests upon a contract, generally implied, that the servant will assume the ordinary risks of his employment. Johnson v. Mammoth Vein Coal Co. [Ark.] 114 SW 722. See, also, Master and Servant, 12 C. L. 665.

**48.** Inadvertent omission of word "proximate" before word "cause" held not to require reversal, however, in view of the evidence. Texas Cent. R. Co. v. Johnson [Tex. Civ. App.] 111 SW 1098. Instruction ignoring the necessity of plaintiff's negligence being proximate cause in order to bar recovery erroneous. Bivis v. Vanceburg Tel. Co. [Ky.] 113 SW 811; St. Louis S. R. Co. v. Shelton [Tex. Civ. App.] 115 SW 877; Vertrees v. Gage County [Neb.] 115 NW 863; Fitzgerald v. International Flax Twine Co., 104 Minn. 138, 116 NW 475; Zelenka v. Union Stockyards Co. [Neb.] 118 NW 103; Atlanta & B. Air Line R. v. Wheeler [Ala.] 46 S 262. "Proximately contributing" distinguished from "materially contributing." Chicago City R. Co. v. Donnelly, 136 Ill. App. 204. Route selected by shipper in attempting to reach and care for stock in defendant's yards immaterial where injury would have resulted from the selection of any other route. Franey v. Union Stockyard & Transit Co., 235 Ill. 522, 85 NE 750, afg. 138 Ill. App. 215. Negligence of employe in failing under cars no defense to negligence in backing them to release him. American Car & Foundry Co. v. Inzer [Ind. App.] 86 NE 444. Negligence on the part of plaintiff proximately causing the injury is contributory negligence. Ives v. Gring [N. C.] 63 SE 609; Riedel v. Wheeling Trac. Co., 63 W. Va. 522, 61 SE 821. When the act and the injury are not known by common experience to be actually and usually in sequence, and the injury does not, according to the ordinary course of events and affairs, follow from the act, whether negligent position assumed by servant at machine was proximate cause of injury, held at least for the jury. Fact that patient did not follow physician's directions and discontinued treatment too soon no bar to recovery for injuries caused by malpractice. Sauers v. Smits, 49 Wash. 557, 95 P 1097.

**49.** Haralson v. San Antonio Trac. Co. [Tex. Civ. App.] 115 SW 876. Negligence of the person injured proximately contributory to the injury precludes recovery at common law. Apperson v. Lazro [Ind. App.] 87 NE 97; Louisville R. Co. v. Boutellier, 33 Ky. L. R. 484, 110 SW 357; Cincinnati, etc. R. Co. v. Fortner, [Ky.] 113 SW 847; Oliver v. Ft. Smith L. & Trac. Co. [Ark.] 116 SW 204; Feher v. Central Elec. R. Co. [Mo.] 115 SW 980; Chesapeake & O. R. Co. v. Hall's Adm'r [Va.] 63 SE 1007; McLean v. Atlantic Coast Line R. Co., 81 S. C. 100, 61 SE 900; Schlemmer v. Buffalo, R. & P. R. Co. [Pa.] 71 A 1053; Chicago, etc., R. Co. v. Baldwin [C. C. A.] 164 F 826. Charge that injury was caused by failure of street car operators to keep proper lookout charged simple negligence and not wanton or willful misconduct, hence plea of contributory negligence was not demurrable. Mobile Light & R. Co. v. Baker [Ala.] 48 S 119.

**50.** Whether miner was guilty of contributory negligence in working without props required by Kirby's Dig. § 5352, depended upon the obviousness of their necessity and was a question for the jury. Johnson v. Mammoth Vein Coal Co. [Ark.] 114 SW 722; Burnett v. Ft. Worth L. & P. Co. [Tex.] 112 SW 1040. Speed of trains. Holland v. Missouri Pac. R. Co., 210 Mo. 338, 109 SW 19. Fact that plaintiff immediately before being run into by street car had been driving faster than allowed by ordinance did not preclude his recovery unless such conduct contributed to his injury. Mullane v. St. Paul City R. Co., 104 Minn. 153, 116 NW 354. Whether such conduct contributed to injury question for jury. Id. Violation of 1 Ann. St. 1906, § 1102, requiring trains to sound signals of approach to crossings. Turner v. St. Louis & H. R. Co. [Mo. App.] 114 SW 1026. Failure of train to sound crossing signals as required by law where plaintiff, by exercise of ordinary care, should have heard and seen train. Chesapeake & O. R. Co. v. Hall's Adm'r [Va.] 63 SE 1007.

**Contra:** No defense to violation of § 11, Child Labor act. Frorer v. Baker, 137 Ill. App. 588. Laws 1907, p. 491, c. 595, abrogating contributory negligence as a defense in certain cases, held not to apply to

Plaintiff's duty is measured by the same standards as that of defendant,[52] he being required to exercise ordinary care [53] under the circumstances [54] commensurate with the danger to be apprehended,[55] and his condition [56] and capacity.[57] Among the common cases of contributory negligence are failure to exercise due care after

crossing accident which happened before its passage. Clemons v. Chicago, etc., R. Co., 137 Wis. 387, 119 NW 102. Employment of minor under 14 years of age in violation of Laws 1897, p. 90, § 1 (Hurd's Rev. St. 1908, c. 48, § 33). Strafford v. Republic Iron & Steel Co., 238 Ill. 371, 87 NE 358. Employment of minor under 16 years of age for more than certain number of hours per day and week in violation of Acts 1899, p. 231, c. 142 (Burns' Ann. St. 1908, § 8021). Inland Steel Co. v. Yedinak [Ind.] 87 NE 229.

51. Cunningham v. Pease House Furnishing Co., 74 N. H. 435, 69 A 120; Birmingham R. L. & P. Co. v. Haggard [Ala.] 46 S 519; Central of Georgia R. Co. v. Moore [Ga. App.] 63 SE 642. Held that evidence tended to show misconduct of such nature, hence question was for jury regardless of plaintiff's conceded negligence. Jackson Elec. R. L. & P. Co. v. Carnahan [Miss.] 48 S 617. Hence, where certain counts allege wanton negligence, pleas of contributory negligence are insufficient answers thereto. Kelly v. Louisville & N. R. Co. [Ala.] 45 S 906.

52. There is no distinction between negligence on the plaintiff's part and negligence on defendant's part, except that the former is called "contributory negligence." Smith's Adm'r v. Norfolk & P. Trac. Co. [Va.] 63 SE 1005. Contributory negligence is no more than a case of negligence, and not dependent upon any different rule of law, though presupposing the limitation of the issue of negligence to an inquiry as to which of two persons its final impulsion is to be attributed. Fitzgerald v. International Flax Twine Co., 104 Minn. 138, 116 NW 475.

53. Louisville & N. R. Co. v. Roth [Ky.] 114 SW 264; Goodale v. York, 74 N. H. 454, 69 A 525. Instruction that if conductor could have performed his duties and still have avoided being struck by car imposed too high a degree of care since it required more than an exercise of reasonable care. Smith's Adm'r v. Norfolk & P. Trac. Co. [Va.] 63 SE 1005. Unless it can be said that the danger was so apparent that no prudent man would incur it, plaintiff cannot be held guilty of contributory negligence. Goodale v. York, 74 N. H. 454, 69 A 525. Plaintiff held not negligent. Id. Instruction that "ordinary care is such care as a prudent man of the requisite skill will take under the circumstances of the particular case," and "such care as ordinarily prudent men exercise in matters affecting their own interests," held erroneous. Reffke v. Patten Paper Co., 136 Wis. 535, 117 NW 1004. "Ordinary care" is that care which ordinarily prudent persons use in their business or such care as the great mass of mankind observe in the transactions of human life. Grimm v. Milwaukee Elec. R. & Light Co. [Wis.] 119 NW 833.

54. The care required depends to a considerable degree upon the exigency in which one acts and what ought then to have been foreseen and not so much upon what the event shows to have been the real danger. McCarthy v. Morse, 197 Mass. 332, 83 NE 1109. If what is done in an emergency is no more than might have been expected from an ordinarily prudent person placed under like circumstances, then due care is not wanting. Burger v. Omaha, etc., R. Co. [Iowa] 117 NW 35.

55. One who in an effort to escape immediate danger places himself in other peril, there being no time for clear thought or reflection, will not be held contributorily negligent, but if he needlessly places himself in such other peril or fails to exercise due care under the circumstances he is guilty. McFeat v. Philadelphia W. & B. R. Co. [Del.] 69 A 744. One approaching railroad crossings must give that attention to sights and sounds of warning that a man of ordinary prudence would give. Id. The inherent danger of the instrumentality does not relieve one from the consequences of contributory negligence. Electric light wires. Weir v. Hoverford Elec. Light Co., 221 Pa. 611, 70 A 874. The care required of one going into a perilous situation is to be determined in view of the circumstances and conditions at the time of entry and not afterwards when the danger has become so imminent as to prevent the exercise of sound judgment. Louisiana & A. R. Co. v. Ratcliffe [Ark.] 115 SW 396.

56. **Voluntary intoxication** does not excuse a failure to exercise the degree of care required of a sober person. Kresban v. Elgin, Aurora & S. Trac. Co., 132 Ill. App. 416. The mere fact of intoxication does not show contributory negligence, nor relieve defendant of liability for its negligence. Kansas City, M. & O. R. Co. v. Young [Tex. Civ. App.] 111 SW 764. A theory that partial intoxication of plaintiff caused the injury is covered by an instruction that if plaintiff's state of intoxication, if any, caused him to fail to exercise the care that a reasonably prudent man would have exercised and his injury was caused thereby, then he could not recover. El Paso Elec. R. Co. v. Ryan [Tex. Civ. App.] 114 SW 906. An intoxicated person is required to act with the same degree of care as if he were sober. Seaboard Air Line R. Co. v. Chapman, 4 Ga. App. 706, 62 SE 488.

57. **Blind man** traveling streets need exercise only ordinary care, and the fact that he is blind as well as all other facts and circumstances are to be considered in determining what is ordinary care in such case. Apperson v. Lazro [Ind. App.] 87 NE 97. The fact that a person who is nearly blind travels the streets unattended does not show contributory negligence. Id. The standard of care required of a **woman** is the same as that required of a man, but in determining the question of her negligence, as in the case of children, the jury should be instructed to consider her sex, age, knowledge, experience and capacity. Hainlin v. Budge [Fla.] 47 S 825.

discovery of peril,[58] failure to use one's senses to ascertain danger,[59] failure to use safeguards provided,[60] commission of obviously dangerous acts,[61] and needless exposure to a known danger.[62] Contributory negligence ordinarily involves some knowledge of the peril,[63] one being ordinarily entitled to anticipate that reasonable care will be exercised by others;[64] but lack of vigilance or a negli-

**58.** Waddell v. Metropolitan St. R. Co., 213 Mo. 8, 111 SW 542.

**59.** One driving along the track of an electric car line, with the expectation that a car will come behind him, and an opportunity to turn off the track, and in the full possession of his faculties, is without excuse if he is overtaken by a car and his wagon is wrecked and he is himself injured. Cincinnati Trac. Co. v. Kroeger, 11 Ohio C. C. (N. S.) 123.

**60.** Failure to keep hold of hand rail in descending icy steps with a knowledge of danger and means of protection held negligence, reasons for not using rail being insufficient. Stevenson v. Pittsburg, etc., R. Co., 219 Pa. 626, 69 A 45.

**61. Entering elevator with no one in charge** held negligence, though door was open. Kaplan v. Lyons B. & Operating Co., 61 Misc. 315, 113 NYS 516. Whether, under these circumstances, it was plaintiff's duty to stop and investigate conditions before entering elevator held for jury. Beal-Doyle Dry Goods Co. v. Carr, 85 Ark. 479, 108 SW 1053. Passenger on freight train not negligent as a matter of law in **seating himself on trunk near door,** though he knew there was some danger in such a position. Mitchell v. Chicago & A. R. Co., 132 Mo. App. 143, 112 SW 291. Position of **sectionman on hand car.** Doss v. Missouri, K. & T. R. Co. [Mo. App.] 116 SW 458. Contributory negligence to walk on **deck of ship** when vision is obscured, knowing of existence of a hatchway, but not knowing whether it was open or closed. The Lehigh Valley Transp. Co. v. Cook, 138 Ill. App. 405. Placing one's self **dangerously near tracks** on which trains are liable to pass without keeping careful watch held negligence. McDoel v. Heuermann, 141 Ill. App. 113. Contributory negligence of plaintiff in **lacing a belt** while on the pulleys for the jury where he was injured by a wrongful starting of the machinery, there being evidence that he was doing the work in the ordinary manner, and that it was practicably impossible to do it in any other way. Silverman v. Carr, 200 Mass. 396, 86 NE 898. Failure to equip tight and loose pulleys in such case not conclusive evidence of contributory negligence. Id. Child who ran in front of plainly visible **automobile** to get ball in street held guilty of contributory negligence. Fay v. Brooklyn Heights R. Co., 129 App. Div. 375, 113 NYS 689.

**62.** Going from station onto dark platform where injury was caused by falling into a hole. Tuten v. Atlantic Coast Line R. Co., 4 Ga. App. 353, 61 SE 511. It is one's duty to avoid knowingly placing himself in danger. United States Exp. Co. v. Kraft [C. C. A.] 161 F 300.

**63.** Pedestrian ignorant of defect in street until injured thereby held not negligent. City of San Antonio v. Wildenstein [Tex. Civ. App.] 109 SW 231. Rear man on ice wagon whose view was obscured by its cover was not negligent in failing to avoid collision with street car. Paducah Trac. Co. v. Sine, 33 Ky. L. R. 792, 111 SW 356. Stock attendant climbing down car not negligent in failing to see open gate to stock pen in close proximity to car where its being open was unusual and due to negligence. Crawford v. Kansas City Stockyards Co. [Mo.] 114 SW 1057. One going from lighted station onto dark platform where she stepped off the edge not within rule since she ought to have foreseen such a consequence. Tuten v. Atlantic Coast Line R. Co., 4 Ga. App. 353, 61 SE 511. Knowledge of danger alone may not be sufficient to impute contributory negligence, there must also be an appreciation of the risk. Hollingsworth v. Davis-Daly Estates Copper Co. [Mont.] 99 P 142; Frost v. McCarthy, 200 Mass. 445, 86 NE 918; City of Lafayette v. West [Ind.] 87 NE 550. Defense not made out in action by servant for injury received while operating machinery where plaintiff was not employed to operate the machinery, was not a machinist, and did not appreciate the danger. McCreery v. Union Roofing & Mfg. Co. [Iowa] 119 NW 738. Intelligent appreciation of the risk cannot necessarily be predicated upon a mere knowledge of some danger. McCarthy v. Morse, 197 Mass. 332, 83 NE 1109. A lineman measuring distances between wires with a tape containing a metal wire of which he had no knowledge was not guilty of negligence contributing to an electric shock caused by the metal coming into contact with the wires. Murphy v. Hudson River Tel. Co., 127 App. Div. 450, 112 NYS 149. In absence of showing that plaintiff appreciated risk, he was not negligent in crossing street from side which was obstructed to side which was not, but where ladder and staging were above him. Davis v. Whiting & Son Co., 201 Mass. 91, 87 NE 199. Knowledge of workman in trench that his footing was slippery did not require him, as a matter of law, to anticipate that grabbing car rail to save himself from falling would cause his hand to be run over. Hanley v. Boston El. R. Co., 201 Mass. 55, 87 NE 197. Plaintiff was not negligent in running into guy wire stretched from telephone pole to ground and across line of travel, when he had no knowledge or warning of its existence, though it had been maintained there for 18 months. Grant v. Sunset Tel. & T. Co., 7 Cal. App. 267, 94 P 368.

**64.** One traveling a public street may assume that horses thereon are under the control of their drivers, and is not negligent in failing to look and listen for runaways, nor is the hearing of a team coming notice that it is running away. Corona Coal & Iron Co. v. White [Ala.] 48 S 362. A person invited upon premises is not negligent in failing to keep a constant watch for dangers because he may assume that the

gent failure to act may constitute contributory negligence as well as negligent action.[65] Mere inattention or temporary forgetfulness is not necessarily negligence,[66] but carelessness resulting from long familiarity with the danger is.[67] Neither haste nor mental preoccupation will excuse the exercise of due care.[68] While failure to use one's senses, when such use would have rendered an injury avoidable, is ordinarily contributory negligence,[69] errors of judgment by one in a position of peril are not,[70] though one in such situation must act as an ordinarily prudent man would under like conditions,[71] and one who unnecessarily and negligently places himself in a position of danger cannot invoke the benefit of the doctrine of sudden peril.[72] Some relaxation of the rules of care is also made in

owner has performed his duty to keep them safe. Montague v. Hanson [Mont.] 99 P 1063. Care required dependent upon implied assurances of safety. Though tenant walked through door to elevator without looking to see whether or not elevator was there, fact that door was open and that elevator boy stood by it as was customary when waiting for passengers held such an assurance of safety as to make the question of contributory negligence one for the jury. Joliffe v. Miller, 126 App. Div. 763, 111 NYS 406. Not negligence per se for guest at hotel to assume such position in elevator as its construction invites. Fraser v. Harper House Co., 141 Ill. App. 390. Contributory negligence cannot be imputed to one for failure to anticipate a violation of law. Violation of speed ordinance by railroad company. Dukeman v. Cleveland, etc., R. Co., 237 Ill. 104, 86 NE 712. No contributory negligence under the circumstances in passengers re-entering elevator in absence of operator. Toohy v. McLean, 199 Mass. 466, 85 NE 578. One is justified in relying on the presumption that others will act lawfully. One crossing tracks in front of approaching street car justified in believing that car will not run faster than the rate of speed fixed by ordinance. Kern v. Des Moines City R. Co. [Iowa] 118 NW 451. One rightfully sitting on bench in park not negligent in failing to maintain lookout for wagons which might run over his feet. Silverman v. New York, 114 NYS 59.

65. Instruction held not misleading. Douglass v. Southern R. Co. [S. C.] 63 SE 5. Mere passive negligence may be the proximate cause of an injury, if it directly contributed thereto. Not necessary to show active, affirmative negligence in all cases. McLean v. Atlantic Coast Line R. Co., 81 S. C. 100, 61 SE 900.

66. Plaintiff not negligent as matter of law in falling over cake of ice on walk, though he could and would have seen it had his attention not been diverted. Merchants' Ice & Cold Storage Co. v. Bargholt, 33 Ky. L. R. 488, 110 SW 364. Fact that one knows of defect in sewer under walk does not of itself show that he failed to exercise that care which a reasonably prudent man would have exercised in passing along the sidewalk. City Council of Montgomery v. Comer [Ala.] 46 S 761. Momentary forgetfulness of a known danger is no excuse where, under the circumstances, one ought to use due care to remember it. Miller v. White Bronze Monument Co. [Iowa] 118 NW 518.

67. Negligence in unnecessarily incurring obvious danger not relieved by custom. Perkins v. Oxford Paper Co. [Me.] 71 A 476.

68. Pedestrian crossing street car tracks. Riedel v. Wheeling Trac. Co., 63 W. Va. 522, 61 SE 821.

69. Such failure being shown a verdict for defendant should be directed. Chicago, etc., R. Co. v. Baldwin [C. C. A.] 164 F 826.

70. One placed in a position of peril by another's negligence is not chargeable with contributory negligence if he acts in a way that seems prudent to him under the circumstances. Ft. Worth & R. G. Co. v. Eddleman [Tex. Civ. App.] 114 SW 425; Hull v. Thompson Transfer Co. [Mo. App.] 115 SW 1054; Hainlin v. Budge [Fla.] 47 S 825; Chesapeake & O. R. Co. v. Hall's Adm'r [Va.] 63 SE 1007; Walton v. Miller's Adm'x [Va.] 63 SE 458; Poor v. Madison River Power Co. [Mont.] 99 P 947; Braly v. Fresno City R. Co. [Cal. App.] 99 P 400; Stearns v. Boston & M. R. R. Co. [N. H.] 71 A 21; Sandy v. Swift & Co., 159 F 271; New York Transp. Co. v. O'Donnell [C. C. A.] 159 F 659; American Car & Foundry Co. v. Inzer [Ind. App.] 86 NE 444; Murphy v. Chicago Great Western R. Co. [Iowa] 118 NW 390; Kern v. Des Moines City R. Co. [Iowa] 118 NW 451; Leonard v. Joline, 61 Misc. 336, 113 NYS 682. Rash or negligent conduct on the part of the plaintiff in attempting to escape from a peril in which defendant's negligence has placed her, and for which she is not responsible because of her fright, is not contributory negligence. Hainlin v. Budge [Fla.] 47 S 825. Refusal of instructions embodying this rule error. Id. Instruction that danger must actually exist where requested instruction embodying general rule was refused held clearly erroneous. Id.

71. Davis v. Chicago, etc., R. Co. [C. C. A.] 159 F 10. Though one working under the high tension of emergency may not be negligent because he has forgotten other dangers, yet he must exercise his faculties for his own protection, and when clearly negligent recovery is barred as in other cases. One who in wheeling a truck ran into an obstacle and while attempting to get around it stepped backward into a hole, the existence of which he well knew, was negligent as a matter of law. Brett v. Frank & Co., 153 Cal. 267, 94 P 1051.

72. Person unnecessarily walking so fast that he could not stop when he saw car approaching. Rundgren v. Boston & N. St. R. Co., 201 Mass. 156, 87 NE 189. A person cannot voluntarily and recklessly place himself in danger and then shift the re-

case of persons endeavoring to save life [73] or property.[74] The fact that plaintiff was engaged in the performance of an unlawful act when injured is not negligence per se.[75]

*Children.*[See 10 C. L. 942]—A child is required to exercise only such care as may reasonably be expected from one of its age, understanding and experience,[76] the determination of whether such care was exercised by the child in particular cases being ordinarily for the jury.[77] A presumption of capacity is usually indulged as

sponsibility after an injury has been received. Master not liable for furnishing defective appliances, the danger of using which is perfectly obvious and known, or such as ought to be known by the servant. Atchison, etc., R. Co. v. Stone, 77 Kan. 642, 95 P 1049.

**73.** Exposure to danger in order to save human life is justified only when the method employed is neither rash nor reckless in the judgment of prudent persons and the danger to the one sought to be saved is imminent. Effort of brakeman to frighten away children who were hanging on to train held unwarranted. Wilson v. New York, etc., R. Co. [R. I.] 69 A 364.

**74.** It is not contributory negligence per se to attempt to save property from destruction by the negligent act of another. Fire. Illinois Cent. R. Co. v. Siler, 133 Ill. App. 2.

**75.** Working without permit required by ordinance. McCarthy v. Morse, 197 Mass. 332, 83 NE 1109. Though such fact may be considered by the jury. Id.

**76.** Moeller v. United Rys. Co. of St. Louis, 133 Mo. App. 68, 112 SW 714; McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33; Texas & P. R. Co. v. Crump [Tex.] 115 SW 26; Force v. Standard Silk Co., 160 F 992; Excelsior Foundry Co. v. Rogers, 136 Ill. App. 36; Glynn v. New York City R. Co., 110 NYS 836; Cook v. U. S. Smelting Co., 34 Utah, 190, 97 P 28. Applied to boy of 14. Erie R. Co. v. Welnstein [C. C. A.] 166 F 271; Adkisson's Adm'r v. Louisville, etc., R. Co., 33 Ky. L. R. 204, 110 SW 284. Instruction that ordinary care "means that care which a person of his age and condition would have used under similar circumstances" held good as against objection "that the person should be described as one of ordinary prudence," whether an adult or not. Texas & P. R. Co. v. Crump [Tex. Civ. App.] 110 SW 1013. Instruction on contributory negligence of twelve-year old boy alleged to be erroneous for failure to mention "experience" of boy held cured, if erroneous, by reference to "like circumstances and like surroundings." Chicago & Eastern Illinois R. Co. v. Fowler, 138 Ill. App. 352. A boy of 17 years is not to be held to the degree of care to be exercised by a person of ordinary prudence without regard to his age. Chicago, etc., R. Co. v. Johnson [Tex. Civ. App.] 111 SW 758. Whether child was of sufficient age and intelligence to be chargeable with negligence was for the jury. Gulf, etc., R. Co. v. Coleman [Tex. Civ. App.] 112 SW 690. Age alone is not the criterion by which a child's capacity is to be determined, but should be submitted to the jury to decide in view of all the circumstances of the case. Instruction fixing standard as "average capacity of children of his age" held erroneous. Norfolk R. & Light Co. v. Higgins, 108 Va. 324, 61 SE 766. Instruction should permit jury to determine due care under this rule and not state the degree of knowledge required of child. Akin v. Bradley Engineering & Mach. Co. [Wash.] 99 P 1038. Court did not err in refusing to tell jury what degree of knowledge was required. Id. Though a child is sui juris, he is not held to the same degree of care as an adult, and hence his age and discretion are proper subjects of inquiry by the jury. Child of 10. Colehour v. Rockford & Interurban R. Co., 132 Ill. App. 558. Instruction erroneous in not correctly stating degree of care required. Decatur Amusement Park Co. v. Porter, 137 Ill. App. 448. To justify an instruction embodying this rule it is not necessary for plaintiff to prove the extent of these qualities. McGuire v. Richard Guthmann Transfer Co., 234 Ill. 125, 84 NE 723. The word "capacity" means ability to learn by experience and does not include experience itself. Fowler v. Chicago & E. I. R. Co., 234 Ill. 619, 85 NE 298. In action against storekeeper for sale of gun powder to boy of twelve, the latter's negligence held for the jury. McEldon v. Drew, 138 Iowa, 390, 116 NW 147.

**77.** It must be a strong case to justify a court in holding, as a matter of law, that a child of 12 years of age is guilty of contributory negligence. McEldon v. Drew, 138 Iowa, 390, 116 NW 147. Child of 4½ years old not guilty of contributory negligence as matter of law in wandering around seed room containing dangerous machinery. Poteet v. Blossom Oil & Cotton Co. [Tex. Civ. App.] 115 SW 289. Child of 4 years injured on turntable where he was taken by other children, as a matter of law, was not guilty of contributory negligence. Berry v. St. Louis, etc., R. Co., 214 Mo. 593, 114 SW 27. Bright boy of 13 years negligent as matter of law in attempting to cross track in front of approaching train. McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33. Child under 25 months old not guilty of contributory negligence as a matter of law in going and remaining on railroad track though train is approaching. Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787. Fact that parents warned child of danger of playing around gas pipes beside street but that child was in middle of street when struck by pipe started rolling by other children refutes charge of contributory negligence. O'Hara v. Laclede Gaslight Co., 131 Mo. App. 428, 110 SW 642. Whether child was guilty of contributory negligence in coming in contact with loose wire suspended from electric wires held, under the evidence, for the jury. Bourbaker v. Kansas City Elec. Light Co., 130 Mo. App. 439,

to children above a certain age,[78] and below such age the presumption is of incapacity,[79] and as to infants below the age of seven this presumption is sometimes absolute,[80] though in some states this presumption is not recognized.[81]

*Comparative negligence.*[See 10 C. L. 943]—In some few jurisdictions degrees of negligence are recognized and the negligence of the parties will be compared,[82] but

110 SW 12; Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787. Child of 4 years not guilty of contributory negligence in going upon railroad track. Anderson v. Great Northern R. Co. [Idaho] 99 P 91. Whether child of 8 years was sui juris or non sui juris was a question of fact to be determined by the evidence under the existing circumstances, and court erred in holding, under the evidence, that child was sui juris as a matter of law. Corsale v. Facini, 111 NYS 779. Where child's injury from dynamite explosion might have been caused by his intentionally striking it or by coming in contact with it accidentally, the probabilities being equal, a verdict should be directed for defendant unless plaintiff may recover on either view of the facts. It must be assumed in such case that the child intentionally struck the dynamite, but this does not include an assumption that he intentionally exploded it or that he knew he ought to let it alone. Hobbs v. Blanchard & Sons Co. [N. H.] 70 A 1082. Care required of child of seven years in crossing tracks on the evidence as to intelligence and ability to care for itself, and under the particular circumstances, held for jury. Simkoff v. Lehigh Valley R. Co., 190 N. Y. 256, 83 NE 15. Under no view of the evidence was a lack of contributory negligence shown where child 9 years old was struck by horse. Russo v. Charles S. Brown Co., 198 Mass. 473, 84 NE 840. Contributory negligence held for jury in injury at railroad crossing, where train came from unexpected direction, though evidence did not show that plaintiff looked in that direction before crossing. Fowler v. Chicago & E. I. R. Co., 234 Ill. 619, 85 NE 298. Evidence held to show children killed at crossing were negligent as a matter of law, train being visible for long distance and ample opportunity to turn from road traveled. Clemons v. Chicago, etc., R. Co., 137 Wis. 387, 114 NW 102. Where plaintiff, a child of about four years of age, playing ball on sidewalk, went into street to get a ball which had rolled there, his contributory negligence to an injury received by being run over while so doing was for the jury. Grotzky v. Rosary Flower Co., 61 Misc. 99, 113 NYS 117. Negligence of child of seven injured by being run over held for jury. Guthmann Transfer Co. v. McGuire, 138 Ill. App. 162. Child of 8 years and 10 months old held negligent in attempting to pass in front of approaching train. Downey v. Baton Rouge Elec. & Gas Co. [La.] 47 S 837.

78. An infant, after reaching the age of 14 years, is presumed to have sufficient discretion and understanding to be responsible for his wrongs, to be sensible of his danger and to avoid it. Wilkinson v. Kanawha & Hocking Coal & Coke Co. [W. Va.] 61 SE 875. The burden of proving the incapacity of a child over 14 years of age is upon the party alleging it. Id. There is no precise age at which a child is to be held accountable for all his actions to the same extent as one of full age. There is no conclusive presumption that a boy of 12 years is able to foresee and avoid dangers. Cahill v. Stone & Co., 153 Cal. 571, 96 P 84.

79. A child between 7 and 14 years of age is presumed to be incapable of contributory negligence, but this presumption may be overcome by the evidence and circumstances of the case tending to prove his maturity and capacity. Jury should be so instructed. Norfolk R. & Light Co. v. Higgins, 108 Va. 324, 61 SE 766. Children sui juris are capable of contributory negligence. Child of 10 is sui juris. Colehour v. Rockford & Interurban R. Co., 132 Ill. App. 558. There is a rebuttable presumption of incapacity of children between 7 and 14 years of age to appreciate obvious dangers. Goodwin v. Columbia Mills Co., 80 S. C. 349, 61 SE 390.

80. A child under the age of seven cannot be charged with contributory negligence. Schneider v. Winkler, 74 N. J. Law, 71, 70 A 731. Contributory negligence cannot be imputed to a child less than 7 years old. Hackett v. Chicago City R. Co., 235 Ill. 116, 85 NE 320. Though a child may be incapable of contributory negligence, it may be necessary for plaintiff to show its situation and conduct as bearing on the issue of negligence. 4 year old child injured by street car. Morse v. Consolidated R. Co. [Conn.] 71 A 553.

81. An infant, whether sui juris or non sui juris, must exercise such reasonable care in avoiding the injury of which he complains as can fairly be expected of a child of his age, natural capacity, intelligence, physical condition, training, experience, habits of life and surroundings. Infant of 4½ years not relieved of all duty of exercising care on his own account. Ardolino v. Reinhardt, 114 NYS 508. The age at which a child becomes sui juris is not fixed in years, in New York, even as a presumption of fact capable of being rebutted by evidence, but is variable and generally for the jury. Error to hold turning point at twelve years of age as matter of law. Batchelor v. Degnon Realty Ter. Imp. Co., 115 NYS 93.

82. Where the doctrine of comparative negligence prevails, plaintiff can recover only where his negligence is less than that of the defendant. Civ. Code of 1895, § 2322, interpreted. Macon R. & L. Co. v. Carger, 4 Ga. App. 477, 61 SE 882. Under this doctrine plaintiff's negligence is material not only on the question of diminution of damages but on the right to recover on all, since, if his negligence is as great as defendant's, recovery is barred. Id. Plaintiff may recover where his negligence is only slight or remote. Missouri Pac. R. Co. v. Walters [Kan.] 96 P 346. Mere fact that plaintiff deviated from the highway in crossing tracks, when his purpose to cross was not thereby

in most states this doctrine is repudiated,[88] degrees of negligence being ordinarily measured only by the exigencies of each particular case.[84]

*The last clear chance doctrine* See 10 C. L. 948 is merely a phase of proximate cause [85] in which the negligence of him who fails to avail himself of a last clear chance to avoid an injury by the exercise of ordinary care is deemed the proximate cause of the injury,[86] the most frequent application being to charge with negligence one who, having discovered the peril in which another has negligently placed himself, fails to exercise ordinary care to avert injury,[87] knowledge of the peril or

obscured, did not absolve railroad company from liability for its negligence. Southern R. Co. v. Fisk [C. C. A.] 159 F 373. Where both the parties are at fault, **damages are to be apportioned** according to the degree. Florida R. Co. v. Sturkey [Fla.] 48 S 34.

83. Weir v. Haverford Elec. L. Co., 221 Pa. 611, 70 A 874; Missouri Pac. R. Co. v. Walters [Kan.] 96 P 346; Atlanta & B. Air Line R. Co. v. Wheeler [Ala.] 46 S 262; McLean v. Atlantic Coast Line R. Co., 81 S. C. 100, 61 SE 900; Miller v. Chicago, etc., R. Co., 135 Wis. 247, 115 NW 794; Atchison, etc., R. Co. v. Mills [Tex. Civ. App.] 108 SW 480; Felver v. Central Elec. R. Co. [Mo.] 115 SW 980. Negligence of plaintiff contributing proximately to his injury will bar recovery, though defendant's negligence was much greater. Memphis, Consol. Gas & Elec. Co. v. Simpson [Tenn.] 109 SW 1155. At common law, if plaintiff's negligence materially contributed to the injury, his action is absolutely barred, irrespective of the defendant's negligence. Tuten v. Atlantic Coast Line R. Co., 4 Ga. App. 353, 61 SE 511. The doctrine of comparative negligence and consequent apportionment of damages was adopted from admiralty law, and is embodied in Civ. Code 1895, §§ 2322, 3830, but injury having been received in a common-law state, common-law rule prevailed. Id.

84. Even degrees of care are now abolished, the question always being, has the care demanded by the peculiar circumstances been exercised in the particular case; if so there is no negligence, if not there is negligence. Missouri Pac. R. Co. v. Walters [Kan.] 96 P 346.

85. See ante, § 3.

86. Where, by the exercise of ordinary care, defendant might have avoided the injury notwithstanding plaintiff's precedent negligence, such negligence does not exculpate the defendant from liability. Child of four years injured by train on railroad track. Anderson v. Great Northern R. Co. [Idaho] 99 P 91. Contributory negligence is no defense against a case of discovered peril. St. Louis, B. & M. R. Co. v. Droddy [Tex. Civ. App.] 114 SW 902; International & G. N. R. Co. v. Alleman [Tex. Civ. App.] 115 SW 73. By basing his action upon the humanitarian doctrine, plaintiff admits contributory negligence. The humanitarian theory raises the question whether defendant could, by the exercise of ordinary care, have seen plaintiff in time to have avoided injury to him, regardless of contributory negligence. Felver v. Central Elec. R. Co. [Mo.] 115 SW 980. Negligence which is not the proximate cause of the injury will not bar a recovery, since it is not contributory negligence but merely a condition which the other party must, in the exercise of due care, observe. Fact that one was on street car track when killed did not of itself render him contributorily negligent. Pilmer v. Boise Trac. Co., 14 Idaho, 327, 94 P 432. Fact that plaintiff attempted to cross street car tracks in city without looking or listening did not bar recovery for motorman's subsequent negligence. Id. Refusal to charge that negligence of decedent in going on track barred recovery unless defendant negligently failed to avoid injuring him after seeing his peril held error. Gregg v. Northern Pac. R. Co., 49 Wash. 183, 94 P 911. Applied to railroad company after seeing peril of one negligently on track. Atchison, etc., R. Co. v. Baker [Okl.] 95 P 433. The foundation of the humanitarian doctrine is that no person has a right knowingly and negligently to injure another, when he knows, or should know, if he is reasonably careful, that his fellow is in danger of injury at his hands and he possesses the means of removing that danger. Ross v. Metropolitan St. R. Co., 132 Mo. App. 472, 112 SW 9.

87. Defendant liable if motorman could have avoided collision with ice wagon after seeing the danger thereof, notwithstanding negligence of driver. Paducah Trac. Co. v. Sine, 33 Ky. L. R. 792, 111 SW 356. The humanitarian rule or last clear chance doctrine applies where plaintiff has negligently placed himself in a position of peril, which defendant discovered, or by the exercise of ordinary care would have discovered, in time to avoid injury. McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33. Rule as to discovered peril does not apply to section hand who remains on track after all his companions have gotten off, since trainmen may assume that he will get off also before train reaches him. Sissel v. St. Louis & S. F. R. Co., 214 Mo. 515, 113 SW 1104. Contributory negligence does not bar recovery for railroad accident where, after discovery of peril of person injured trainmen could, by any means within their power consistent with safety of train, have avoided the injury. Missouri, K. & T. Co. v. Reynolds [Tex. Civ. App.] 115 SW 340. Motorman must exercise due care toward person he sees on track regardless of their negligence. Felver v. Central Elec. R. Co. [Mo.] 115 SW 980. Doctrine not applicable under the evidence where child was run over by street car. Norfolk R. & L. Co. v. Higgins, 108 Va. 324, 61 SE 766. Duty of engineer, when he sees one on track and has notice of his inability to save himself, to use every effort to avoid injuring him. Beach v. Southern R. Co., 148 N. C. 153, 61 SE 664. Where plaintiff's passage across street car track was prevented by congested traffic, and the conditions did not permit of with-

reasonable ground to apprehend it being necessary to charge one with such subsequent negligence.[88] The doctrine applies to exclude contributory negligence only when defendant's negligence is subsequent to plaintiff's[89] or at least where no subsequent negligence of plaintiff precluded defendant's opportunity to avert the injury.[90]

*Imputed negligence.* See 10 C. L. 944—Except where the relation of master and servant exists,[91] the negligence of the driver of a vehicle cannot be imputed to pas-

drawing from the danger, motorman who saw her danger should have used every reasonable effort to avoid collision. Bladecka v. Bay City Trac. & Elec. Co. [Mich.] 15 Det. Leg. N. 965, 118 NW 963. Evidence held to show that motorman was negligent in running into plaintiff. Id. The rule that one who, through his own negligence, places himself in a position of danger, is precluded from recovery for injuries inflicted by another, is subject to the exception that where his peril and inability or lack of effort to escape therefrom are discovered, or should be discovered, by defendant, the duty becomes imperative for the defendant to use reasonable care to avoid the injury, and if this is not done he becomes liable notwithstanding the negligence of the injured party. Whether engineer could have avoided injury held for the jury. Neary v. Northern Pac. R. Co., 37 Mont. 461, 97 P 944. Where defendant, after becoming aware of the peril in which plaintiff has negligently placed himself, fails to use ordinary care to avoid injuring him and such failure is the proximate cause of the injury, plaintiff's negligence is no defense. Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808. Contributory negligence is no bar to an action where the party injured is, or by the exercise of ordinary care could have been, found in a place of danger in time to have prevented the accident by the exercise of ordinary care. King v. Wabash R. Co., 211 Mo. 1, 109 SW 671. Contributory negligence in placing oneself in a position of peril is no defense to charge of failure on defendant's part to use ordinary care to avoid injury after discovery of the peril. St. Louis & S. E. R. Co. v. Summers [Tex. Civ. App.] 111 SW 211. Facts held to establish discovered peril. Id. Contributory negligence in incurring danger does not bar recovery for an injury where the peril is discovered by defendant in time to avoid injury by the exercise of ordinary care. Morgan v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 110 SW 978.

88. Complaint insufficient to bring case within the "last clear chance" doctrine, where it did not show that defendant knew of plaintiff's danger in time to avoid accident. Lake Erie & W. R. Co. v. Bray [Ind. App.] 84 NE 1004. Peril which is "apparent" or "reasonably apparent" is known peril. As related to discovery of trainmen of peril of one on track. Missouri, K. & T. R. Co. v. Reynolds [Tex. Civ. App.] 115 SW 340. Where the plaintiff is guilty of contributory negligence, he must, in order to recover, show that defendant saw, or by the exercise of ordinary care could have seen, his danger and avoided injury to him. Trigg v. Water, Light & Transit Co. [Mo.] 114 SW 972. Arises where the circumstances are such that an ordinarily prudent person would have reason to apprehend the existence of such negligence. Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808. The doctrine is not limited to those cases where plaintiff's peril is known but extends to those where, by the exercise of ordinary care, it should have been known. Id. Last clear chance doctrine not applicable where trainmen had right to assume that one would not attempt to cross tracks in front of rapidly approaching train, and where peril was realized it was too late to avoid it. Chesapeake & O. R. Co. v. Hall's Adm'r [Va.] 63 SE 1007.

89. Defendant's negligence before plaintiff has created the danger by his own negligence cannot be held a failure to save the latter from his own want of care. Stearns v. Boston & M. R. Co. [N. H.] 71 A 21. One who drives across car tracks immediately in front of car with full realization of danger cannot invoke the doctrine. Kinlen v. Metropolitan St. R. Co. [Mo.] 115 SW 523. Negligence of decedent in attempting to cross track in front of approaching train held proximate cause of injury even though trainmen were guilty of prior negligence. Sutton v. Lee Logging Co., 121 La. 557, 46 S 649. Where the negligence of both parties continues up to the last moment, no element of the last clear chance doctrine is presented. Muse v. Seaboard Air Line R. Co. [N. C.] 63 SE 102.

90. The fact that plaintiff's negligence continued to the moment of injury and is coincident with the negligence of defendant does not preclude a recovery for defendant's failure to perform a humanitarian duty arising from the fact that the plaintiff has placed himself in a position of peril. Cole v. Metropolitan St. R. Co., 133 Mo. App. 440, 113 SW 684.

91. There can be no such thing as imputable negligence except in such cases where such a relation exists as that of master and servant or of principal and agent; they must stand in such relation of privity that the maxim "Qui facit per alium facit per se" directly applies. Nonn v. Chicago City R. Co., 232 Ill. 378, 83 NE 924. The negligence of one party will not be imputed to another unless they sustain such relation to each other in regard to the matter in hand that, upon the principal of agency or co-operation in a common enterprise, the negligence of one is that of both. Nothing in the relation of lessor and lessee to preclude recovery by the latter for injuries occasioned by excavations by a third party, though the lessor may have contributed to the injury. Contos v. Jamison, 81 S. C. 488, 62 SE 867. The negligence of one party will not be imputed to another who neither authorized it, nor participated therein, nor had the right or power to control it. Id. Where owner of cotton delivered it to compress company, its destruc-

sengers therein,[92] though one may be negligent in entrusting his safety to the driver if he have equal opportunity to observe the peril.[93] In most jurisdictions the negligence of a parent is not imputed to a child in an action for the latter's benefit,[94] nor is the negligence of a husband imputable to his wife.[95] In an action for the parent's benefit, his negligence may be imputed to a child.[96] Negligence of a bailee cannot ordinarily be imputed to the owner.[97] The question of imputed negligence is ordinarily one of fact, [98, 99] unless there has been a voluntary noncontractual surrender of all care by one party to the other. The doctrine of contributory negligence of a fellow-servant cannot be invoked by a stranger against an injured party.[1]

§ 5. *Actions.*[2]—See 19 C. L. 945 *Pleading.—The declaration or complaint* See 19 C. L. 945 must state all facts constituting the cause of action,[3] including defend-

tion caused by negligence of company was not imputable to owner since neither the relation of master and servant nor principal and agent existed between them. Sea Ins. Co. of Liverpool v. Vicksburg S. & P. R. Co. [C. C. A.] 159 F 676. Negligence of bailee not imputed to bailor where relation of agency or master and servant does not exist. Id. Negligence of driver not imputable to person riding with him, since the facts brought case within above rule. Chicago City R. Co. v. Nonn, 133 Ill. App. 365. Negligence may be imputed where one is injured through the contributory negligence of another while that other is acting either under his direction or with his consent and approval, or where by his own act he directs or controls the other. Id.

92. Negligence of driver of ice wagon in driving on street car tracks not imputable to man on rear of wagon, they being fellow-servants with no control over each other's acts. Paducah Trac. Co. v. Sine, 33 Ky. L. R. 792, 111 SW 356. Plaintiff riding with driver of truck held not chargeable with negligence of driver in crossing street car track. Caminez v. Brooklyn, etc., R. Co., 127 App. Div. 138, 111 NYS 384. Negligence of automobile driver not imputable to passenger. Chadbourne v. Springfield St. R. Co., 199 Mass. 574, 85 NE 737. Negligence of automobile driver in running into excavation in street could not be imputed to passenger, provided jury found accident would not have happened but for city's negligence. Mayor, etc., of Baltimore v. Maryland [C. C. A.] 166 F 641.

93. Negligence of driver in going upon railroad track held imputable to passenger who sat beside him and made no objection. Davis v. Chicago, etc., R. Co. [C. C. A.] 159 F 10.

94. Poteet v. Blossom Oil & Cotton Co. [Tex. Civ. App.] 115 SW 289; St. Louis, etc., R. Co. v. Flinn [Ark.] 115 SW 142. Negligence of custodian of child of twelve years not imputable to child in action by his administrator. Congee v. Baltimore & O. R. Co., 31 App. D. C. 139. Contributory negligence of the parents of a child fifteen months old killed by being run over by a train will not be imputed to the child. Southern R. Co. v. Forrister [Ala.] 48 S 69. In an action by an infant in its own right, the negligence of the parents cannot be imputed to it. Neff v. Cameron, 213 Mo. 350, 111 SW 1139. See this case for discussion of the doctrine. Id. Where an infant sues in its own right, its parents' negligence is not imputable to it. Berry v. St. Louis, etc., R. Co., 214 Mo. 593, 114 SW 27.

95. Hence the fact that his negligence concurs with that of a third person to cause her injury does not bar her recovery. Louisville R. Co. v. McCarthy [Ky.] 112 SW 925. Negligence of husband in driving on tracks not imputable to wife riding with him. Bohlen v. Chicago City R. Co., 141 Ill. App. 261.

96. Berry v. St. Louis, etc., R. Co., 214 Mo. 593, 114 SW 27.

97. Not where liveryman hired out horse and wagon to employe and injury resulted from collision with street car. Currie v. Consolidated R. Co. [Conn.] 71 A 356.

98, 99. Peabody v. Haverhill, etc., R. Co., 200 Mass. 277, 85 NE 1051.

1. Where plaintiff was without negligence, negligence of driver of vehicle whom he was assisting in delivery of goods cannot be availed of as negligence of fellow-servant by street railway injuring plaintiff. Nonn v. Chicago City R. Co., 232 Ill. 378, 83 NE 924.

**2. Search Note:** See notes in 10 C. L. 951; 11 Id. 486; 15 L. R. A. 33; 16 Id. 261; 59 Id. 209; 69 Id. 601; 2 L. R. A. (N. S.) 764, 836; 6 Id. 800; 12 Id. 760; 16 Id. 395; 6 A. S. R. 792; 18 Id. 307; 20 Id. 490; 30 Id. 736; 113 Id. 986; 3 Ann. Cas. 161; 5 Id. 1014.

See, also, Negligence, Cent. Dig. §§ 168-409; Dec. Dig. §§ 102-144; 29 Cyc. 424, 562-659; 21 A. & E. Enc. L. (2ed.) 498; 5 A. & E. Enc. P. & P. 1; 14 Id. 329.

3. The complaint must show the duty its breach and injury proximately caused thereby. Poteet v. Blossom Oil & Cotton Co. [Tex. Civ. App.] 115 SW 289; Greinke v. Chicago City R. Co., 234 Ill. 564, 85 NE 327; German-American Lumber Co. v. Brock [Fla.] 46 S 740; Benedict Pineapple Co. v. Atlantic, etc., R. Co. [Fla.] 46 S 732; Town of Newcastle v. Grubbs [Ind.] 86 NE 767; City of Lafayette v. West [Ind.] 87 NE 550. Where cause of action was for the frightening of a horse by negligently leaving hand car in street, complaint was bad for failure to allege that hand car was calculated to frighten horses. Louisville & N. R. Co. v. Vansant [Ala.] 48 S 389. In action against electric light company for injuries caused by glass falling from street lamp broken by slipping trolley pole on street car, declaration should allege slipping of pole was not due to railway company's negligence, simple averment that pole slipped "accidentally" being insufficient. Nelson v. Narragansett Elec. L. Co. [R. I.] 69 A 1001. Declaration in action against theatre proprietor for injury caused by bi-

ant's duty,[4] his violation thereof,[5] and injury proximately resulting therefrom.[6] When the action is based upon the violation of an ordinance, the complaint should set out its due enactment, present effect and substance.[7] Though it is often said that negligence may be pleaded generally,[8] specific averment of facts is ordinarily

cycle rider's running off stage into audience, which avers a duty to provide "protection" for the audience, is not demurrable on the ground that no duty existed to "erect barriers which would prevent the audience from seeing the performance," since such means were not necessary to afford protection. Brown v. Batchellor [R. I.] 69 A 295. Where the gravamen of an action is the alleged nonfeasance or misfeasance of another, as a general rule it is sufficient if the complaint avers the facts out of which the duty arises, and the failure in its performance. It is not necessary to specify the particular acts of diligence which should have been exercised in the performance of such duty. Louisville & N. R. Co. v. Church [Ala.] 46 S 457. It must in every case show the existence of a duty, a failure in its performance, and resulting injury to plaintiff. Wabash R. Co. v. Reynolds, 41 Ind. App. 678, 84 NE 992. Certain counts sufficiently charged negligence in failure to provide suitable protection against drowning in swimming pool kept by defendant, while other counts were defective. Decatur Amusement Park Co. v. Porter, 137 Ill. App. 448.

4. Hone v. Presque Isle Water Co. [Me.] 71 A 769; Flanagan v. Wells Bros. Co., 237 Ill. 82, 86 NE 609. The complaint must allege facts sufficient to fix responsibility upon defendant. In action for injuries occasioned by defective premises, allegation that defendant had leased a "portion or all" thereof held merely an averment that it had leased a portion, and the accident not being shown to have occurred on such portion was insufficient. Martin v. Louisville & J. Bridge Co., 41 Ind. App. 493, 84 NE 360. Averment of lack of due care sufficient, it being construed to mean no care or slight care and not the highest degree of care, since it does not import the latter. Lay v. Elk Ridge Coal & Coke Co [W. Va.] 61 SE 156. Averment that place of injury was a public street and that plaintiff was a traveler thereon sufficiently showed city's duty to plaintiff. City of Laporte v. Osborn [Ind. App.] 86 NE 995. Where negligence is based upon **defendant's knowledge** of a dangerous defect in his premises and a failure to repair them, facts showing a knowledge of the need of repairs or facts from which such knowledge may be inferred must be alleged. Cumberland Tel. & T. Co. v. Pierson, 170 Ind. 543, 84 NE 1088. Complaint good as against objection that it failed to allege defendant's knowledge of plaintiff's presence near blasting operations, where it alleged failure to give notice of the setting off of a blast. Sloss Sheffield Steel & Iron Co. v. Salser [Ala.] 48 S 374. Failure to negative fact that **plaintiff was trespasser** immaterial, since negligent injury even to trespasser would render defendant liable. Louisville & N. R. Co. v. Dalton [Ky.] 113 SW 842. If injury to pedestrian on railroad track occurred where no lookout was required and trainmen did not discover plaintiff's peril in time to avoid injuring him, this was a matter of defense which plaintiff was not required to negative. Id. Under the rule that pleadings are to be liberally construed on demurrer, an allegation that plaintiff was **"lawfully" upon premises** was held to allege that she was there by invitation, though a mere licensee might be lawfully upon premises. Stern v. Miller, 111 NYS 659.

5. Must state time of negligence. Brown v. Consolidated L. P. & Ice Co. [Mo. App.] 109 SW 1032. Allegation that building material was left in street "without" guards sufficiently positive negation of existence of guards. City of Laporte v. Osborn [Ind. App.] 86 NE 995.

6. Leynes v. Tampa Foundry & Mach. Co. [Fla.] 47 S 918. A petition which, though it alleges acts of negligence, shows that the injury did not proximately result from the acts of negligence specified, is bad on demurrer. Ayers v. Louisville & N. R. Co. [Ga. App.] 63 SE 530. Held insufficient as not showing that being caught by loose telephone wire was cause of being thrown from wagon. Cumberland Tel. & T. Co. v. Pierson, 170 Ind. 543, 84 NE 1088. Complaint held to sufficiently charge that excessive rate of speed of locomotive and absence of signals and warning was proximate cause of injury. Cleveland, etc., R. Co. v. Houghland [Ind. App.] 65 NE 369. Where injury was caused by falling blind, a simple allegation that it fell by reason of defendant's negligence in failing to have it securely fastened to the building was all that was necessary, yet in this case a more lengthy averment fell short of this essential allegation. Lawless v. August, 125 App. Div. 708, 110 NYS 86. Held sufficient in action for injuries sustained by horse becoming frightened at hand car negligently left in street. Louisville & N. R. Co. v. Vansant [Ala.] 48 S 389. Petition held to sufficiently allege that negligence complained of was proximate cause of injury. Sambos v. Cleveland, etc., R. Co. [Mo. App.] 114 SW 567. Complaint in action by passenger against carrier held to show that defendant's negligence was proximate cause of injury. Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315. That master's negligence in regard to place of work was proximate cause of servant's injury held sufficiently alleged as against demurrer. Fearon v. Mullins [Mont.] 98 P 650.

7. A declaration must either set out the manner in which the alleged acts of negligence caused the injury with sufficient particularity to advise the defendant of the case she has to meet or to charge in terms that defendant's negligence was the cause of the injury. Cumberland Tel. & T. Co. v. Pierson, 170 Ind. 543, 84 NE 1088. A complaint which avers that a train was run at thirty miles per hour in violation of an ordinance adopted by the city limiting the speed to six miles per hour, that the ordinance was in force at the time and setting it forth, directly avers that such ordinance was in force. Pittsburgh, etc., R. Co. v. Rogers [Ind. App.] 87 NE 28.

8. Murray v. Chesapeake & O. R. Co. [Ky.]

requisite,[9] and specific averments following general will be taken as specifications thereon.[10] It is sometimes said that the acts relied on must be specifically characterized as negligence.[11] The pleading must clearly show whether it seeks to recover for negligence or willful injury.[12] As in other cases, neither evidentiary facts[13] nor conclusions[14] should be pleaded. Several distinct acts of negligence

115 SW 821; Chicago City R. Co. v. Ratner, 133 Ill. App. 628; Birmingham, R. L. & P. Co. v. Haggard [Ala.] 46 S 519; Crane v. Congleton [Ky.] 116 SW 341. The specific acts constituting the negligence need not be alleged. Louisville & N. R. Co. v. Dalton [Ky.] 113 SW 842. In pleading negligence, it is sufficient as against a demurrer for want of facts to characterize the act which caused the injury as having been negligently done. Lake Erie & W. R. Co. v. Bray [Ind. App.] 84 NE 1004. But it is necessary to directly and plainly allege facts showing a legal duty owing by the alleged wrongdoer to the party injured. Id. The violation of that duty is that act which may be characterized as negligently performed or omitted. Id.; Lexington R. Co. v. Britton [Ky.] 114 SW 295. A general allegation of negligence is sufficient to withstand a demurrer for want of facts. Apperson v. Lazro [Ind. App.] 87 NE 97. As a rule negligence may be pleaded generally, it being an ultimate fact and not a conclusion of law. Allegation of negligence in constructing, putting in, operating and maintaining defective system of wires admitted proof of negligent operation consisting of specific acts, in absence of a special demurrer. Younie v. Blackfoot Light & Water Co. [Idaho] 96 P 193. Where the mere happening of an accident calls for an explanation, specific allegations of its cause are not required. As where bicycle rider in theatre rode off the stage into audience. Brown v. Batchellor [R. I.] 69 A 295.

**9.** Complaint by parents for loss of services of child through injuries held to sufficiently itemize injuries. Birmingham R. L. & P. Co. v. Chastain [Ala.] 48 S 85. In common-law actions the negligence relied on must be averred in direct and positive terms, or such facts must be stated as to compel the presumption that the injury sued for was caused by defendant's negligence. Complaint insufficient in action against carrier. Pittsburgh, etc., R. Co. v. Schepman [Ind.] 84 NE 988. Necessary to aver specific acts of negligence. Inman & Co. v. Seaboard Air Line R. Co., 159 F 960. The negligence relied on must be directly and specifically charged, or facts must be alleged which force an inference of negligence proximately causing the injury. Cleveland, etc., R. Co. v. Perkins [Ind.] 86 NE 405. Positive and direct averment that night was dark unnecessary when the facts show that the accident occurred in the night time. City of Laporte v. Osborn [Ind. App.] 86 NE 995. The manner in which the injury was received must be stated with sufficient accuracy. Allegation that belt broke and a piece thereof flew off and struck plaintiff in the right eye held sufficient. Dittman v. Edison Elec. Illuminating Co., 125 App. Div. 691, 110 NYS 87. The complaint must aver in direct terms the acts or omissions of the defendant that are relied on as constituting negligence. It is not sufficient that they appear by way of recital or unnecessary inference. Baltimore & O. S. W. R. Co. v. Abegglen, 41 Ind. App. 603, 84 NE 566. Theory that plaintiff's lose of presence of mind was defendant's negligence insufficiently pleaded. Id.

**10.** Where a general charge of negligence is followed by specifications of particular acts, the specifications are deemed explanatory of the general charge. Hence plaintiff is confined to proof of the acts specified. Thompson v. Keyes-Marshall Bros. Livery Co., 214 Mo. 487, 113 SW 1128. The real inquiry in construing such a pleading is: What must defendant have understood by it? Id. General allegation merged in specific except where action originates in justice court. Under a general charge of negligence, followed by allegations of specific acts, evidence of negligence not specified was admissible under the general charge, since no formality of pleading is required in justice court where action originated. Dalton v. United R. Co. [Mo. App.] 114 SW 561. Where a general charge of negligence is followed by allegation of specific acts, the proof is limited to such acts. Missouri Valley Bridge & Iron Co. v. Ballard [Tex. Civ. App.] 116 SW 93. Specific allegations control general ones. As to happening of accident and negligence imputed to defendant. Chicago & E. R. Co. v. Dinius, 170 Ind. 222, 84 NE 9. Declaration held to show that slipping of plaintiff's foot whereby he was caught by car was proximate cause of injury, and no negligence being specifically charged as having caused his foot to slip, demurrer was good. Chicago & E. R. Co. v. Dinius, 170 Ind. 222, 84 NE 9.

**11.** The doctrine of res ipsa loquitur is not raised by averments of specific acts of negligence, there being no averment of negligence generally. Crawford v. Chicago Union Trac. Co., 137 Ill. App. 163.

**12.** Complaint held to charge simple negligence as distinguished from wanton or willful misconduct. Hobdy v. Manistee Mili Co. [Ala.] 47 S 69. Petition construed as based not on negligence but on willful and wanton acts. Central of Georgia R. Co. v. Moore [Ga. App.] 63 SE 642. Complaint held to sufficiently charge willful and wanton misconduct. Birmingham, R. L. & P. Co. v. Hoggard [Ala.] 46 S 519. Allegations insufficient to show a willful injury. Wabash R. Co. v. Reynolds, 41 Ind. App. 678, 84 NE 992. An allegation of gross and wanton negligence permits a recovery upon proof of ordinary negligence. Gorton v. Hannon, 152 Mich. 473, 15 Det. Leg. N. 250, 116 NW 443.

**13.** Declaration held to plead evidence. Elgin A. & S. R. Trac. Co. v. Wilcox, 132 Ill. App. 446.

**14.** Averment held mere conclusion of law. Chicago & E. I. R. Co. v. Hamilton [Ind. App.] 85 NE 1044. Mere conclusion that injury resulted from negligent conduct of defendant is insufficient. Clinchfield Coal Co. v. Wheeler's Adm'r, 108 Va. 448, 62 SE 269.

may be counted on[15] if not repugnant.[16] An action for common-law negligence and an action for breach of a city ordinance cannot be joined.[17] Contributory negligence need not ordinarily be negatived,[18] and allegations to that end are surplusage,[19] but if the facts alleged show that plaintiff was negligent, the declaration is demurrable,[20] and statutes sometimes provide for a general denial by plaintiff of his negligence.[21] An ambiguous complaint will be construed in the light most favorable to plaintiff.[22] Defects in pleading may be cured as in other cases by verdict and judgment.[23]

*Answer.* See 10 C. L. 947—While contributory negligence may be availed of without plea if it appears by plaintiff's evidence[24] or was proved without objection,[25]

Allegations as to duty of telephone company under ordinance held conclusive. Cumberland Tel. & T. Co. v. Pierson, 170 Ind. 543, 84 NE 1088. Averment that plaintiff was thrown from car platform because trains were not vestibuled as advertised held conclusive. Pittsburgh, etc., R. Co. v. Lehepenan [Ind.] 84 NE 988.

15. Plaintiff is not limited as to the acts of negligence, but may plead in the same count several acts not inconsistent with each other, either of which, or all of which together, might have produced the result complained of. This is not stating more than one cause of action. Thompson v. Keyes-Marshall Bros. Livery Co., 214 Mo. 487, 113 SW 1128. It is therefore competent to include in one count an act or acts constituting negligence at common law, and an act or acts of negligence arising under a statute or ordinance, all pointing to the same result. Id. As many acts of negligence may be charged as relate to the injury complained of. Master and servant case. Crane v. Congleton [Ky.] 116 SW 341.

16. Acts specified held consistent. Heinzle v. Metropolitan St. R. Co., 213 Mo. 102, 111 SW 536. Allegations that injury was caused by sudden starting of cars, and also that it was caused by sudden stopping of car after starting, held consistent. Alten v. Metropolitan St. R. Co., 133 Mo. App. 425, 113 SW 691. Repugnancy between counts is not fatal to the declaration, it being good practice to vary the statements in different counts to meet the various phases of the testimony. Seal v. Virginia Portland Cement Co., 108 Va. 86, 62 SE 795. Declaration averring decedent's due care, and also that he was so drunk that he was unable to care for himself, bad for repugnancy. Keeshan v. Elgin, A. & S. Trac. Co., 132 Ill. App. 416.

17. Advantage of such misjoinder should be taken by demurrer. Wills v. Atchison, T. & S. F. R. Co., 133 Mo. App. 625, 113 SW 713.

18. Baltimore, etc., R. Co. v. Abegglen, 41 Ind. App. 603, 84 NE 566; Simeoli v. Derby Rubber Co. [Conn.] 71 A 546; Smith v. Delaware River Amusement Co. [N. J. Law] 69 A 970; Louisiana & T. Lumber Co. v. Brown [Tex. Civ. App.] 109 SW 950; Davis Adm'r v. Ohio Valley Banking & Trust Co., 32 Ky. L. R. 627, 106 SW 843; Inland Steel Co. v. Yedinak [Ind.] 81 NE 229; Murray v. Chesapeake & O. R. Co. [Ky.] 115 SW 821. Mere failure to explain plaintiff's purpose in leaving seat in car and going upon platform does not show negligence as a matter of law. Kansas City, M. & O. R. Co. v. Young [Tex. Civ. App.] 111 SW 764. The burden of showing contributory negligence being on defendant by Burns' Ann. St. 1908, § 362. A complaint is good against a demurrer on that ground unless it alleges facts which overthrow the presumption against contributory negligence. City of Lafayette v. West [Ind.] 87 NE 550. Complaint held not to overthrow presumption against contributory negligence. Id.

19. Hainlin v. Budge [Fla.] 47 S 825. Conclusion that plaintiff was without fault not fatal, since contributory negligence is a matter of defense. Charleston & W. C. R. Co. v. Lyons [Ga. App.] 63 SE 862.

20. Smith v. Southern R. Co., 80 S. C. 1, 61 SE 205. Petition held to negative fact that plaintiff was trespasser and not to show that he was guilty of contributory negligence, so as to place the burden upon him of showing by other facts that he was not negligent. El Paso Electric R. Co. v. Ryan [Tex. Civ. App.] 114 SW 906.

21. Under Acts 1899, p. 58, c. 41, an averment in the complaint that there was no contributory negligence entitled plaintiff to a submission of that issue to the jury, unless the facts stated compel the legal conclusion that there was contributory negligence. Cleveland, etc., R. Co. v. Lynn [Ind.] 85 NE 999.

22. Use of word willful in last paragraph of complaint held to render it ambiguous at most, and where the complaint otherwise stated a cause of action for simple negligence, which was supported by the proof, such paragraph was dropped from consideration. Robinson v. Helena L. & R. Co. [Mont.] 99 P 837.

23. Averments of contributory negligence, if insufficiently specific, held cured. Kirkpatrick v. St. Louis & S. F. R. Co. [C. C. A.] 159 F 855. Failure to allege due care of parents in action for death of child held cured by verdict. Illinois Cent. R. Co. v. Warriner, 132 Ill. App. 301.

24. But if plaintiff's evidence shows such negligence, the court may take the case from the jury on demurrer to the evidence, though it was not pleaded. Sissell v. St. Louis & S. F. R. Co., 214 Mo. 515, 113 SW 1104; Longpre v. Big Blackfoot Mill. Co. [Mont.] 99 P 131.

25. While contributory negligence must ordinarily be pleaded to be available as a defense, yet where both parties introduce evidence on that issue and the court proceeds upon the assumption that it was pleaded, and no attention is called to its absence until the last argument is being made, it is not error to instruct on the law

it cannot be affirmatively shown unless pleaded.[26] The plea is in the nature of a plea of confession and avoidance,[27] but, when joined with the general issue, does not admit defendant's negligence.[28] It is subject to the same rules as the pleading of actionable negligence.[29]

*Reply.*—The plea of contributory negligence must be traversed.[30]

*Issues and variance.*[See 10 C. L. 949]—Where negligence is specifically alleged, material variance is fatal,[31] but where it is alleged generally, any specific acts within

of contributory negligence. Webster v. Atlantic Coast Line R. Co., 81 S. C. 46, 61 SE 1080.

**26.** American Bolt Co. v. Fennell [Ala.] 48 S 97; Collins v. Fillingham, 129 Mo. App. 340, 108 SW 616; Hebeler v. Metropolitan St. R. Co., 132 Mo. App. 551, 112 SW 34; Knight v. Donnelly Bros., 131 Mo. App. 152, 110 SW 687; Sissell v. St. Louis & S. F. R. Co., 214 Mo. 515, 113 SW 1104; Von Trebra v. Laclede Gaslight Co., 209 Mo. 648, 108 SW 559. Hence a general denial to a complaint which alleges an absence of contributory negligence does not put that allegation in issue. Atchison, etc., R. Co. v. Peck [Kan.] 100 P 54; Kenny v. Kennedy [Cal. App.] 99 P 384; O'Brien Co. v. Omaha Water Co. [Neb.] 118 NW 1110. Disapproving Chicago, B. & Q. R. Co. v. Kellogg, 55 Neb. 748, 76 NW 462, and Chicago, etc., R. Co. v. Lagerkrans, 65 Neb. 566, 91 NW 358, 95 NW 2; Meily v. St. Louis & S. F. R. Co. [Mo.] 114 SW 1013; Longpre v. Big Blackfoot Mill. Co. [Mont.] 99 P 131. Evidence of contributory negligence is admissible **under a general denial.** Pittsburgh, etc., R. Co. v. Rogers [Ind. App.] 87 NE 28.

**27.** Answer held to directly negative the cause of action where it alleged that plaintiff's negligence was sole cause of injury, and hence did not plead contributory negligence. Ramp v. Metropolitan St. R. Co., 133 Mo. App. 700, 114 SW 59. The question of negligence is not in issue, where defendant prays for a directed verdict because of plaintiff's contributory negligence. Booth v. McLean Const. Co. [Md.] 70 A 104.

**28.** Birmingham R. L. P. Co. v. Haggard [Ala.] 46 S 519. Contributory negligence is not inconsistent with general denial. Litchtenstein v. Hudepohl Brew. Co., 11 Ohio C. C. (N. S.) 441.

**29.** Answer held to sufficiently plead contributory negligence as against objection that it set forth merely a legal conclusion. Sissel v. St. Louis & S. F. R. Co., 214 Mo. 515, 113 SW 1104. A failure to aver that plaintiff's knowledge or means of knowledge of danger was equal to that of defendant is not necessarily fatal. Absence of such averment immaterial, when inexperienced employe was working on dangerous machinery without adequate instructions. Simioli v. Derby Rubber Co. [Conn.] 71 A 546. An answer in personal injury case, which sets forth an act or omission of plaintiff, characterizes it as negligent, and alleges that it caused or contributed to injury complained of, is sufficient to tender affirmative issue of contributory negligence. Lincoln Trac. Co. v. Brookover, 77 Neb. 217, 111 NW 357. Plea held sufficient to admit evidence that plaintiff, though warned, knowingly encountered danger of running train at high rate of speed around a curve. Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 20 Tex. Ct. Rep. 772, 107 SW 958.

**30.** Otherwise a verdict for defendant should be directed on the pleadings. Smith v. Louisville & N. R. Co. [Ky.] 112 SW 874.

**31.** Recovery must be had, of it all, upon the breach of duty charged. South Shore Gas & Elec. Co. v. Ambre [Ind.] 87 NE 246; Jones v. St. Louis, etc., R. Co. [Mo. App.] 116 SW 4. Plaintiff may not plead one cause of action and recover on another, for charging specific acts of negligence is equivalent to admitting that there were no other acts on defendant's part which caused or contributed to the injury. Beave v. St. Louis Transit Co., 212 Mo. 331, 111 SW 52. Where negligence is alleged specifically, no recovery can be had for negligence not alleged. St. Louis, B. & M. R. Co. v. Droddy [Tex. Civ. App.] 114 SW 902; Louisville & N. R. Co. v. Lowe [Ala.] 48 S 99; Hackett v. Chicago City R. Co., 235 Ill. 116, 85 NE 320; Chicago & Eastern Ill. R. Co. v. Walker, 137 Ill. App. 428; Hagen v. Schlenter, 236 Ill. 467, 86 NE 112; St. Jean v. Lippitt Woolen Co. [R. I.] 69 A 604; City of San Antonio v. Wildenstein [Tex. Civ. App.] 109 SW 231; Lexington R. Co. v. Britton [Ky.] 114 SW 295; Crane v. Congleton [Ky.] 116 SW 341; Murray v. Chesapeake & O. R. Co. [Ky.] 115 SW 821; Miller v. Kenosha Elec. R. Co., 135 Wis. 68, 115 NW 355; St. Louis & S. F. R. Co. v. Elrod [Kan.] 98 P 215. No variance is material unless it actually misleads. Crawford v. Kansas City Stockyards [Mo.] 114 SW 1057; Knicely v. West Virginia M. R. Co. [W. Va.] 61 SE 811. No material variance between allegation that plaintiff was injured while climbing down side of car and proof that injury occurred while he was climbing down a ladder at the rear with his hand extended around to a hook on the side. Crawford v. Kansas City Stockyards Co. [Mo.] 114 SW 1057. Allegation that passenger was injured by sudden starting of car does not admit proof of injury received while stepping from a moving car. Haralson v. San Antonio Trac. Co. [Tex. Civ. App.] 115 SW 876. Negligence in failing to rescue employe after injury not in issue when the only negligence alleged was that causing the injury. Merchants' & Miners' Transp. Co. v. State [Md.] 70 A 413. Proof that an accident happened from an unknown cause will not support averments specifying the cause. Where count alleged negligence in suffering street car to be out of condition, but there was no evidence thereof, request that there was no evidence warranting a verdict for plaintiff on such count should have been given. James v. Boston El. R. Co., 201 Mass. 263, 87 NE 474. Doctrine of the "turntable" cases will not be applied where the petition and proof proceed upon

the averment will suffice,[32] and where several acts of negligence are averred, proof of one will support a recovery.[33] Immaterial allegations need not be proved.[34]

*Admissibility of evidence.* See 10 C. L. 948—The admissibility of expert and opinion evidence frequently arises in negligence cases, but is governed by general rules.[35] The general character of a party as to care [36] or his habits as to intoxication [37] are not admissible. Evidence of plaintiff's intoxication at the time of the injury is admissible on the issues of contributory negligence.[38] Evidence of prior and subsequent conditions is admissible if not too remote,[39] particularly to show notice,[40] and conduct of defendant immediately after the accident is usually admissible [41] as are other matters part of the res gestae.[42] Evidence of prior similar occurrences is sometimes admitted.[43] Evidence of the surrounding circumstances and conditions is admissible.[44] Evidence of subsequent repairs is usually excluded.[45] Custom

a different theory. Marcheck v. Klute, 133 Mo. App. 280, 113 SW 654.

32. Louisville & N. R. Co. v. Lowe [Ala.] 48 S 99. Where negligence is alleged generally, specific acts of negligence may be put in issue. Texarkana, etc., R. Co. v. Anderson [Tex. Civ. App.] 111 SW 173. The rule that plaintiff shall not state one cause of action and recover on another has no application where the specific negligence proved is within the scope of negligence generally pleaded. Knight v. Donnelly Bros., 131 Mo. App. 152, 110 SW 687. Where the proof establishes the negligence charged, it is immaterial the particular occurrence which occasioned the injury is shown to be other than that alleged. Kansas City Southern R. Co. v. Williams [Tex. Civ. App.] 111 SW 196.

33. Louisville, etc., Trac. Co. v. Worrell [Ind. App.] 86 NE 78; Alten v. Metropolitan St. R. Co., 133 Mo. App. 425, 113 SW 691. Complaint charging negligent starting and negligent stopping of car whereby passenger was injured held supported by proof of negligent starting. Millar v. St. Louis Transit Co. [Mo. App.] 114 SW 945. Proof of any one act entitling plaintiff to recover is sufficient, the others thereupon becoming immaterial. Bull v. Atlanta & C. Air Line R. Co. [N. C.] 63 SE 126.

34. In action against automobilist for frightening horses, size of automobile need not be proved. Brinkman v. Pacholke, 41 Ind. App. 662, 84 NE 762.

35. See Evidence, 11 C. L. 1346.

36. The defendant's character for care and caution is ordinarily incompetent, since the question of negligence must be determined by the act or omission complained of. Ft. Worth, etc., R. Co. v. Finley [Tex. Civ. App.] 110 SW 531.

37. Plaintiff's intoxication on occasions previous and subsequent to the time of the accident is inadmissible as evidence in chief on the issue of contributory negligence. Kansas City M. & O. R. Co. v. Young [Tex. Civ. App.] 111 SW 764.

38. Pittsburg, etc., R. Co. v. O'Conner [Ind.] 85 NE 969.

39. The admissibility of evidence of conditions prior to the accident is not dependent upon the time of their existence, but upon its relevancy to the issues. Maryland, D. & V. R. Co. v. Brown [Md.] 71 A 1005; Willson v. Logan, 139 Ill. App. 204. Evidence of condition of instrumentality causing accident immediately after its occurrence is admissible to show condition at time thereof or just prior thereto, where there has been no intervening change. Chicago G. W. R. Co. v. McDonough [C. C. A.] 161 F 657.

40. Evidence of prior knowledge of dangerous conditions is competent to prove actual knowledge at the time of the injury. Williams v. Granite City, 140 Ill. App. 288.

41. In action against automobilist for frightening horse, evidence that after defendant had passed the place of accident plaintiff heard some one calling to defendant to stop was admissible as tending to show that he had not attempted to stop his machine. Walkup v. Beebe [Iowa] 116 NW 321.

42. In action to recover for injuries caused by negligently starting and maintaining fire, testimony of defendant's neighbor that defendant asked him if fire would harm his buildings and that he said it would not was admissible as a part of the res gestae as tending to disprove negligence. Miller v. Neale, 137 Wis. 426, 119 NW 94.

43. Where gravamen of action is negligent failure to maintain boiler in safe condition, evidence of prior explosions admissible to show their tendency to become impaired by the particular use, defendant's knowledge of such tendency, and precautions which should have been taken. Chicago G. W. R. Co. v. McDonough [C. C. A.] 161 F 657. Evidence of previous accidents are admissible to show defendant's knowledge of dangerous conditions. Hotchkiss Mt. Min. & Reduction Co. v. Bruner, 42 Colo. 305, 94 P 331.

44. Evidence as to absence of lights on vehicle admissible, though not alleged as negligence is relied on, and though no ordinance requiring lights was introduced. Livingston v. Blind, 138 Ill. App. 494.

45. Instruction that in order to find for plaintiff it must be found that machinery was out of repair at time of injury held not to cure error in admission. Stonington Coal Co. v. Young, 137 Ill. App. 462. Antecedent negligence may not ordinarily be shown by evidence of repairs made after the accident. Place v. Grand Trunk R. Co. in Canada [Vt.] 71 A 836; Pribbeno v. Chicago, etc., R. Co. [Neb.] 116 NW 494; Davenport v. Matthews, 114 NYS 715; Lay v. Elk Ridge Coal & Coke Co. [W. Va.] 61 SE 156.

may be admissible in evidence on the issue of negligence,[46] but is usually deemed irrelevant.[47] Violation of rules may be some evidence of negligence.[48] The parent's circumstances in life may be admissible on the issue of their negligence in permitting their children to go outdoors unaccompanied by grown attendants.[49] Ordinances which are alleged to have been violated may be admissible.[50]

*The sufficiency of evidence* either involves the consideration of the province of court and jury [51] or the sufficiency of facts to constitute negligence, in which latter case it is treated with the substantive holdings thereon.

*Presumptions and burden of proof.* See 10 C. L. 950—By the doctrine of res ipsa loquitur, negligence will be presumed from an occurrence which in the ordinary course of affairs could not otherwise have happened.[52] The doctrine cannot be ap-

**46.** To raise an implication of knowledge on defendant's part of the situation and danger, where knowledge is an element of negligence. American Car & Foundry Co. v. Draper, 136 Ill. App. 12. May be admissible as bearing upon plaintiff's negligence in following the custom. Id. The practice of others though not prevailing in general is some evidence of what should have been done Chicago G. W. R. Co. v. McDonough [C. C. A.] 161 F 657. While admissible to show due care of railroad company in maintaining post near track, it is not conclusive and witnesses may be cross-examined to show the safety of customs established by their testimony. Wilson v. New York, etc., R. Co. [R. I.] 69 A 364. Custom of not exploding charges until after men have left mine admissible, though not pleaded. Donk Bros. Coal & Coke Co. v. Thil, 128 Ill. App. 249. Where the act resulting in injury is not negligence per se, it is competent to show that other persons experienced in the same business, under similar circumstances, pursued the same course. Neary v. Northern Pac. R. Co., 37 Mont. 461, 97 P 944. Evidence of precautions taken in daytime admissible to show precautions which might reasonably be expected in night time. City of Chicago v. Thomas, 141 Ill. App. 122.

**47.** Evidence which goes only to the custom of defendant, which may be either negligent or careful, is inadmissible. Maryland, D. & V. R. Co. v. Brown [Md.] 71 A 1005. Evidence as to the degree of care commonly exercised by ordinarily prudent men under circumstances like those in the case at bar is ordinarily admissible to show whether the standard of care required was exercised. Lake v. Shenango Furnace Co. [C. C. A.] 160 F 887. The fact that the act complained of was done in the usual and customary way does not disprove negligence, since such way may be negligent. Admission of evidence as to custom held erroneous. Union Wire Mattress Co. v. Wiegref, 133 Ill. App. 506.

**48.** Rule forbidding operation of two cars at same time on double tracked narrow bridge. Chadbourne v. Springfield St. R. Co., 199 Mass. 574, 85 NE 737.

**49.** To show their ability or inability to procure such attendants. Distasio v. United Trac. Co., 35 Pa. Super. Ct. 406. Situation of parents, manner of living, health of children and all attendant circumstances may be considered by the jury. Murray v. Scranton R. Co., 36 Pa. Super. Ct. 576.

**50.** Safety ordinances directed at railroads. Nichols v. Chicago, etc., R. Co. [Colo.] 98 P 808. Requiring street car operators to give warning of approach to crossing. Denver City Tramway Co. v. Martin [Colo.] 98 P 836.

**51.** See post this section.

**52.** Western Steel Car & Foundry Co. v. Cunningham [Ala.] 48 S 109. Doctrine a rule of circumstantial evidence. Cochrell v. Langley Mfg. Co. [Ga. App.] 63 SE 244. The mere happening of an accident is, of itself, no evidence of negligence. Southern R. Co. v. Moore, 108 Va. 388, 61 SE 747; Robinson v. Cowan [Ala.] 47 S 1018; Feingold v. Ocean S. S. Co., 61 Misc. 638, 113 NYS 1018; Union Wire Mattress Co. v. Wiegref, 133 Ill. App. 506. Under the doctrine of res ipsa loquitur, the plaintiff may ordinarily go to the jury upon evidence of injury and negligence without proof of the particular cause of the injury, where such cause is not within his reasonable knowledge. Paducah Trac. Co. v. Baker [Ky.] 113 SW 449. Where it is as probable that the injury resulted proximately from some other cause as that it was caused by defendant's negligence, the doctrine does not apply. Moriarty v. Schwarzschild & Sulzberger Co., 132 Mo. App. 650, 112 SW 1034. Doctrine has no application unless the thing causing the injury is under defendant's control and the accident is such as does not ordinarily occur if due care is used. Paris & G. N. R. Co. v. Robinson [Texas Civ. App.] 114 SW 658. The application of the maxim res ipsa loquitur renders proof of the accident alone reasonable proof of negligence. Houston, etc., R. Co. v. Roach [Tex. Civ. App.] 114 SW 418. The doctrine of res ipsa loquitur is not confined to cases where the person sought to be held is an insurer of the person injured. La Bee v. Sultan Logging Co. [Wash.] 97 P 1104. The doctrine of res ipsa loquitur can only be applied where there are actually shown such facts and circumstances in the nature of the defendant's undertaking, and of the accident itself from which the jury are able, if not compelled, to draw the inference of negligence. Keenan v. McAdams & Cartwright Elevator Co., 129 App. Div. 117, 113 NYS 343. Application of rule error where no specific acts of negligence were proved, and cause of accident was left wholly to conjecture. Id. It is not sufficient to show that an accident happened and an injury ensued. The evidence must point out that the negligence of the defendant was the

direct cause. Minneapolis General Elec. Co. v. Cronon [C. C. A.] 166 F 651. Under such circumstances it is for the jury to find whether the accident was owing to negligence on the part of the defendant, or to some cause for which the defendant was not responsible. Robinson v. Consolidated Gas Co., 194 N. Y. 37, 86 NE 805. If, however, proof of the occurrence shows that the accident might have happened from some cause other than negligence of the defendant, the presumption does not arise and the doctrine cannot be applied. Id. If the res, or the entire occurrence as proved, could not have happened without negligence of some kind, negligence is presumed without showing what kind, and the burden of the explanation is thrown upon the defendant. Id. It is applied when the inference of negligence is required by the nature of the occurrence. Id. If proof of the occurrence shows that the accident was such as could not have happened in the ordinary course of events, the doctrine is applied, even if the precise omission or act of negligence is not specified, and even when it does not appear whether the accident was owing to some act done or to some act not done. Id. The doctrine does not permit a recovery without some proof of negligence, but it regulates the degree of proof required. Id. The "res" in the maxim res ipsa loquitur is not simply an accident resulting in injury, but the accident and surrounding circumstances necessarily shown by proving how the accident occurred. Id. Proof of an injury occurring as the proximate result of an act which, under ordinary circumstances, would not, if done with due care, have injured anyone, is enough to make out a presumption of negligence. Drake Standard Mach. Works v. Brossman, 135 Ill. App. 209. The presumption of negligence does not arise except out of the fact that there is no other way to account for the occurrence in the absence of explanation, in which case such explanation must be given by defendant. Elliott v. Brooklyn Heights R. Co., 127 App. Div. 800, 111 NYS 358. The doctrine of res ipsa loquitur does not apply to an accident simply because it is unusual and unexplained. Yet circumstancee held to warrant inference of negligence. Dittman v. Edison Elec. Illuminating Co., 125 App. Div. 691, 110 NYS 87. Under the doctrine of res ipsa loquitur, negligence may be inferred, not from the accident alone but from the accident and the attending circumstances (Eaton v. New York Cent., etc., R. Co., 125 App. Div. 54, 109 NYS 419), and the question whether such accident and circumstances are sufficient to authorize such inference for the determination of the court in each particular case (Id.). Negligence held properly referred to jury. Id. Res ipsa loquitur applies upon proof that the instrumentality causing injury was under defendant's control and that plaintiff was in the exercise of due care. Proof of cause of accident not essential to prima facie case in action by passenger against carrier. Greinke v. Chicago City R. Co., 234 Ill. 564, 85 NE 327. But when the thing is shown to be under the management of defendant, and the accident is such as in the ordinary course of events does not happen if it is managed with due care, a presumption arises, in the absence of explanation by the defendant, that the accident arose from want of care. Drake Standard Mach. Works v. Brossman, 135 Ill. App. 209; Whitehouse v. Pittsburg R. Co., 36 Pa. Super. Ct. 581. In such case the inference of negligence remains until overcome by countervailing proof. Whitehouse v. Pittsburgh, 36 Pa. Super. Ct. 581. Where, after plaintiff has shown the circumstances under which the accident happened, the question is raised as to whether, under the circumstances, defendant was negligent, the doctrine does not apply. Dentz v. Pennsylvania R. Co., 75 N. J. Law, 893, 70 A 164. The doctrine of res ipsa loquitur cannot be applied where the proof does not negative the fact that the injury might have been caused by agencies not under defendant's control. Cass v. Sanger [N. J. Law] 71 A 1126. The proof of the occurrence and the surrounding circumstances, the "res," makes a prima facie case, the legal presumption arising from such proof establishing prima facie the defendant's negligence. Moglia v. Nassau Elec. R. Co., 127 App. Div. 243, 111 NYS 70. Prima facie case must prevail, in the absence of evidence to rebut it. Id. Proof that plaintiff received an electric shock in a public place from a pole belonging to, and in the control of, defendant, raises a presumption of negligence. Moglia v. Nassau Elec. R. Co., 127 App. Div. 243, 111 NYS 70. The doctrine of "res ipsa loquitur" simply calls upon the defendant, after proof of the accident, to give such proof as will exonerate him, and relieve the plaintiff from the burden of proving the nonexistence of an adequate explanation or excuse. Id. Where the doctrine of res ipsa loquitur applies, defendant must meet the presumption by showing that the accident was not due to its negligence. Proof insufficient. Van Inwegen v. Erie R. Co., 126 App. Div. 297, 110 NYS 959. City must meet presumption of negligence arising from leakage in its waterpipes. Proof insufficient. Silverberg v. New York, 59 Misc. 492, 110 NYS 992; Rothblatt v. Solomon, 59 Misc. 519, 110 NYS 1039. Where the doctrine of res ipsa loquitur is applicable, the burden is on defendant to explain the cause of the accident. Eaton v. New York Cent., etc., R. Co., 155 App. Div. 54, 109 NYS 419.

**Held applicable:** Applied where one was killed by being **run over by train.** Ellenberg v. Southern R. Co. [Ga. App.] 63 SE 240. Doctrine applicable where **"tie-jack" fell from car,** where it could not fall if used with ordinary care in the usual manner. Gurdon, etc., R. Co. v. Calhoun [Ark.] 109 SW 1017. Applied to injury caused by **explosion of dynamite** in well, there being explanatory evidence of due care or that injury was due to accident or unforeseen cause. Chapman v. Warden [Tex. Civ. App.] 110 SW 588. Servant injured by master's use of dynamite in work outside scope of employment. Stephen v. Duffy, 136 Ill. App. 572. Applicable where **street car was stopped in middle of street** and passenger was injured by collision with hose wagon on way to fire. Williamson v. St. Louis & M. R. R. Co., 133 Mo. App. 875, 113 SW 239. **Collision of boat with submerged telegraph wire** in navigable stream. Heiberger v.

Missouri & Kan. Tel. Co., 133 Mo. App. 452, 113 SW 730. Doctrine applied where servant was injured by **bale of cotton falling** on him from a loaded car when he opened car door. Chamberlain v. Southern R. Co. [Ala.] 48 S 703. Doctrine applicable where passenger was injured by **explosion of drum** connected with heating apparatus of car, and instruction predicated on the rule was proper. Houston, etc., Ry. Co. v. Roach [Tex. Civ. App.] 114 SW 418. Proof of the **explosion of street car controller** establishes prima facie negligence (Gay v. Milwaukee Elec. R. & L. Co. [Wis.] 120 NW 283), but this is met by proof that controllers may explode without negligence (Id.). Applies to **derailment accident.** Houston & T. C. R. Co. v. Cheatham [Tex. Civ. App.] 113 SW 777; Galveston, etc., R. Co. v. Thompson [Tex. Civ. App.] 116 SW 106. Doctrine applied when section hand was killed by derailment of first train over newly-ballasted track, the speed of which much exceeded that scheduled. Mobile, etc., R. Co. v. Hicks, 91 Miss. 273, 46 S 360. Res ipsa loquitur held to apply to accident caused by train running off its regular track and colliding with engine, throwing it over on to plaintiff. Van Inwegen v. Erie R. Co., 126 App. Div. 297, 110 NYS 959. Did not apply to cause derailment and overturning of freight car. Henson v. Lehigh Valley R. Co. [N. Y.] 87 NE 85. Applied to **explosion of controllers in street car** where there was nothing to show that it might have been expected to happen if proper care was used. Beattie v. Boston El. R. Co., 201 Mass. 3, 86 NE 920. Applied to injury caused by improper **insulation of electric lighting appliances.** Shawnee L. & P. Co. v. Sears [Okl.] 95 P 449. Applied to injury from contact with **live wire.** Walter v. Baltimore Elec. Co. [Md.] 71 A 953. Applied where person not a servant of defendant was injured by **unsafe appliances** used in moving timbers. Jeffreys v. Nebraska Bridge Supply & Lumber Co., 157 F 932. Would not have applied had the relation of master and servant existed. Id. The presumption of negligence does not arise against a railway company for damages done to person or property until it appears that a proximate cause of the injury was occasioned through the operation of its **"locomotives, cars or other machinery,"** or by the act or misfeasance of some person in its service. Smith v. Atlantic Coast Line R. Co. [Ga. App.] 62 SE 1020. **Falling of awning** raises presumption of negligence. McCrorey v. Thomas [Va.] 63 SE 1011. In **passenger and carrier** case, influence of negligence overcome by defendant's testimony, there being no direct proof of negligence. Christensen v. Oregon Short Line R. Co. [Utah] 99 P 676. Res ipsa loquitur held to apply where passenger was injured while carefully leaving car because frightened by explosion of controllers. Louisville & S. I. Trac. Co. v. Worrell [Ind. App.] 86 NE 78. Burden upon carrier to show due care where passenger sues for injury by derailment of train. Chicago, etc., R. Co. v. Brandon, 77 Kan. 612, 95 P 573. Applied to injury of passenger by derailment of train. Id. Proof that **colliding wagon** bore defendants, together with admission in answer that defendant operated wagons in and about the place of the accident, established prima facie ownership. Gershel v. White's Exp. Co., 113 NYS 919. Res ipsa loquitur applied to **fall of passenger elevator** in store. Steiskal v. Marshall Field & Co., 238 Ill. 92, 87 NE 117. **Machinery started without apparent cause,** and would not have done so except from defect or careless handling. Silverman v. Carr, 200 Mass. 396, 86 NE 898. Where **dye in defendant's vats leaked** through floor, flooding plaintiff's stock, evidence held to establish a prima facie case. Love v. Globe Hat Mfg. Co., 114 NYS 52. In action for damages caused by **leakage from floor above,** proof that defendant was in exclusive possession of such floor made a prima facie case. Rothblatt v. Solomon, 59 Misc. 519, 110 NYS 1039. Res ipsa loquitur applied to leakage in water pipes controlled by city. Silverberg v. New York, 59 Misc. 492, 110 NYS 992. Doctrine of res ipsa loquitur applicable where plaintiff admittedly in the exercise of due care and **machinery** causing injury was under control of defendant. Elvis v. Lumaghi Coal Co., 140 Ill. App. 112. The fact that a **team runs away** raises a presumption of negligence in its management. In absence of explanation, owner is liable for injuries caused thereby. Kokoll v. Brohm & Buhl Lumber Co. [N. J. Law] 71 A 120. Res ipsa loquitur where **sign over entrance to building fell** and injured passerby. McNulty v. Ludwig & Co., 125 App. Div. 291, 109 NYS 703. Presumption of negligence of owner from fall of sign over entrance to his building could be overcome by proof that it had been hung by competent workman upon whom he relied, the thing itself not being inherently dangerous. Id.

**Held not applicable:** Doctrine inapplicable where employe was injured by **slipping of a skid** placed on a wagon and adjusted to an ice chute. Lone Star Brew. Co. v. Willie [Tex. Civ. App.] 114 SW 186. Not applicable to injury caused by **spread of fire** rightfully started by defendant on his own premises. Pfeiffer v. Aue [Tex. Civ. App.] 115 SW 300. Not applicable to injury caused by **fall of pile of sacks** piled in customary manner. Arkansas Cotton Oil Co. v. Carr [Ark.] 115 SW 925. Not applicable to injury caused by **logs falling** from load which plaintiff was driving, though logs were loaded by defendant, considering the relation of the parties and all the circumstances. Hogg v. Standard Lumber Co. [Wash.] 100 P 151. Res ipsa loquitur held not to apply to injury caused by **bucket falling down mining shaft.** Reino v. Montana Mineral Land & Development Co. [Mont.] 99 P 853. Doctrine applied where a **basket from an overhead carrier system,** of standard make and in general use, fell on a customer. Anderson v. McCarthy Dry Goods Co., 49 Wash. 398, 95 P 325. Mere **starting of machine** without intervention of human agency is evidence of its defective condition. Ryan v. Fall River Iron Works Co., 200 Mass. 188, 86 NE 310. Where workmen are engaged in **tearing down wall,** fact that it finally falls is not of itself evidence of negligence. Henahan v. Lyons, 201 Mass. 269, 87 NE 602. Can have no application where accident is due to **defective appliance under management of plaintiff,** or where the accident may be attributable to any of several causes for some of which defendant is not responsible.

plied when specific acts of negligence are charged, and in such case plaintiff can make out a case only by proof by direct or circumstantial evidence that the negligence charged was the proximate cause of the injury,[53] but an unsuccessful attempt to prove by direct evidence the precise cause of an action does not bar the application of the doctrine of res ipsa loquitur.[54] The presumption raised by the application of the doctrine of res ipsa loquitur is rebuttable.[55] Since due care and proper performance of duty are presumed,[56] except as rule of res ipsa loquitur is applicable, plaintiff must prove the negligence charged [57] and that it was the proximate cause of the injury

Peters v. Lynchburg, L. & Trac. Co. [Va.] 61 SE 745. Has no application to action for **breach of warranty** that rope was strong enough for purpose for which it was purchased. Oregon Auto-Dispatch v. Portland Cordage Co. [Or.] 95 P 498. Not applicable when place where injury occurred was in **exclusive control of another than defendant** and where defect in instrumentality causing injury was not due to defendant's fault. Minneapolis General Elec. Co. v. Cronon [C. C. A.] 166 F 651.

**Rule applied to plaintiff's negligence:** Applies to crossing accident when the facts indicate that had deceased used due care the accident would not have happened. Clemons v. Chicago, etc., R. Co., 137 Wis. 387, 119 NW 102. Doctrine of res ipsa loquitur inapplicable where **horse fell into trench** and cause thereof was alleged to be its negligent filling. Neiderman v. People's Gaslight & Coke Co., 140 Ill. App. 524. No presumption of negligence from mere fact of **collision of boats,** where plaintiff shows several acts of defendant, all of which might have tended to the result without requiring an inference of negligence. Dentz v. Pennsylvania R. Co., 75 N. J. Law, 893, 70 A 164. Held not to apply where a **child standing on platform** while car was in motion preparatory to alighting was thrown off by reason of the cars turning into a turn-out while running at a moderate rate of speed. Pascell v. North Jersey St. R. Co., 75 N. J. Law, 836, 69 A 171. Does not apply in the case of injury from **falling objects** where the source and place from which the object came and the cause of its precipitation are left in doubt, but where these matters are clear it does apply. Stumpf v. Delaware, L. & W. R. Co. [N. J. Law] 69 A 207. **Explosion** caused by fire alleged to be due to defendant's negligence, where origin of fire was unexplained. Stewart v. De Noon, 220 Pa. 154, 69 A 587. Inapplicable where **wheels of plaintiff's buggy fell into cable slot** maintained by defendant railway company. Miller v. United R. & Elec. Co. [Md.] 69 A 636. Held not to apply where employe of independent contractor **fell down elevator shaft** where he had full control of the appliances which caused the accident. Connolly v. Union League, 221 Pa. 21, 69 A 1125. Inapplicable to establish defect in construction of window or failure to repair it from mere fact of **glass falling therefrom,** where negligence cannot be fairly inferred from the circumstances themselves. Stewart & Co. v. Harman [Md.] 70 A 333. Where **collision** by horse happened through negligence of another company than defendant, doctrine did not apply. Elliott v. Brooklyn Heights R. Co., 127 App. Div. 300, 111 NYS 358.

53. Lone Star Brew. Co. v. Willie [Tex. Civ. App.] 114 SW 186.

54. Louisville & S. I. Trac. Co. v. Worrell [Ind. App.] 86 NE 78.

55. Paducah Trac. Co. v. Baker [Ky.] 113 SW 449. The doctrine of res ipsa loquitur is merely a rule of evidence to be used by the jury for their guidance in arriving at the truth. Inference of negligent construction of building may be drawn from unaccountable fall of window, which might be rebutted by the fact that approved appliances were used to fasten windows, both questions being for the jury. Monahan v. National Realty Co., 4 Ga. App. 680, 62 SE 127. Though the mere happening of an accident may make out such a case of prima facie negligence as alone entitles plaintiff to go to the jury, it does not ordinarily create an irrebutable presumption of negligence. Briggs v. Durham Trac. Co., 147 N. C. 389, 61 SE 373. It only requires defendant to meet the presumption by showing that the accident could not have been avoided by the exercise of reasonable care. Id. Defendant's proof insufficient to rebut presumption of negligence arising from bolt falling from elevated structure. Sturza v. Interborough Rapid Transit Co., 113 NYS 974. Presumption of negligence arising from injury held not to have been overcome. Elvis v. Lumaghi Coal Co., 140 Ill. App. 112.

56. In action against stockyards company for communication of disease to cattle, plaintiff must show the why and the wherefore, since company is presumed to have performed its duty. Eshleman v. Union Stockyard Co. [Pa.] 70 A 899. Presumed that engineer exercises due care in approaching crossing and that after discovery of one's presence on the track he does not purposely run him down. Davis v. Chicago, etc., R. Co. [C. C. A.] 159 F 10.

57. Fay v. Hartford & S. St. R. Co. [Conn.] 71 A 364; Morse v. Consolidated R. Co. [Conn.] 71 A 553; Galloway v. Chicago, etc., R. Co., 234 Ill. 474, 84 NE 1067; Wilson v. Chicago City R. Co., 133 Ill. App. 433; Lehigh Valley Transp. Co. v. Cook, 138 Ill. App. 405; Casper v. New Orleans R. & L. Co., 121 La. 603, 46 S 666; Baltimore Refrigerating & Heating Co. v. Kreiner [Md.] 71 A 1066; Kinlen v. Metropolitan St. R. Co. [Mo.] 115 SW 523; Reino v. Montana Mineral Land & Development Co. [Mont.] 99 P 853; Stumpf v. Delaware, L. & W. R. Co. [N. J. Law] 69 A 207; Dentz v. Pennsylvania R. Co., 75 N. J. Law, 893, 70 A 164; Wilson v. New York, N. H. & H. R. Co. [R. I.] 69 A 364; McCrorey v. Thomas [Va.] 63 SE 1011. To show negligence in starting and preventing spread of fire. Pheiffer v. Aue [Tex. Civ. App.] 115 SW 300. The burden is upon plaintiff to

complained of.[58] Proof of a violation of an ordinance may constitute prima facie negligence,[59] but leaves the burden upon plaintiff to show that such negligence was the proximate cause of the injury.[60] The rule that the burden of proving specific acts of negligence is assumed by alleging them does not apply where all specific acts are embraced in a general allegation, and in such case plaintiff is not precluded from invoking presumption of negligence arising from the accident.[61] The burden is usually held to be on defendant to prove contributory negligence[62] by a

show the duty owed, its nonperformance, and that such dereliction of duty was the proximate cause of the injury. Cook v. U. S. Smelting Co., 34 Utah 190, 97 P 28. Plaintiff must show the particular negligence which caused the injury. Where showed running away of cars but not what caused them to run away, he failed to make out a case. Lane v. New York Cont. Co., 125 App. Div. 808, 110 NYS 91. Existence of negligence cannot be left to conjecture. Id. The burden is upon plaintiff to show the particular act or omission which constitutes the negligence charged. Toppi v. McDonald, 128 App. Div. 443, 112 NYS 821.

**58.** Moscarello v. Haines, 114 NYS 519; Baltimore Refrigerating & Heating Co. v. Kreiner [Md.] 71 A 1066; Morse v. Consolidated R. Co. [Conn.] 71 A 553. Casual connection between excessive speed of train and failure to keep lookout and the killing of an animal on track was left wholly to conjecture. Chicago, etc., R. Co. v. Latham [Tex. Civ. App.] 115 SW 890. Evidence that injury was caused by coming in contact with electric wires insufficient to go to the jury, where it was equally probable that it was caused otherwise. Byerly v. Consolidated L. P. & I. Co., 130 Mo. App. 593, 109 SW 1065. Plaintiff must show by direct or circumstantial evidence that the negligence complained of caused the injury. McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33. Evidence insufficient where it failed to show how death was caused or to connect it with dangerous condition charged. Steele's Adm'r v. Hillman Land & Iron Co. [Ky.] 114 SW 311. Burden of proving that negligence complained of was proximate cause of injury on plaintiff. Where negligence alleged was defect in sidewalk. Taylor v. Manson [Cal. App.] 99 P 410. Charge of negligence in stringing uninsulated conduit wires across a building not sustained by the proof. Lewis v. Water & L. Co. [Neb.] 118 NW 560. The burden of showing that the negligent act of stranger was not the sole cause of the injury is upon plaintiff. Where defendant railroad introduced evidence that injury to passenger was caused by wrongful backing of wagon into car. City of Chicago R. Co. v. Ratner, 133 Ill. App. 628; Wilson v. Chicago City R. Co., 133 Ill. App. 433. The burden is upon the plaintiff to show that defendant's negligence was the proximate cause of the injury. Stumpf v. Delaware, L. & W. R. Co. [N. J. Law] 69 A 207. A plea that decedent's death was caused by his own negligence does not relieve plaintiff of the burden of proving that it was the proximate result of the negligence charged. Steele's Adm'r v. Hillman Land & Iron Co. [Ky.] 114 SW 311. Where the cause of the injury is left in doubt, verdict should be directed for defendant. Cupp v. Elmira, 126 App. Div. 539, 110 NYS 742.

**59.** Ordinance regulating speed of motor vehicles. Hartje v. Moxley, 235 Ill. 164, 85 NE 216. Introduction of ordinance regulating speed of trains, proof of its violation, death resulting therefrom, and due care upon the decedent's part, makes prima facie case. Chicago, B. & Q. R. Co. v. Sack, 136 Ill. App. 425.

**60.** Hartje v. Moxley, 235 Ill. 164, 85 NE 216.

**61.** Heiberger v. Missouri & Kansas Tel. Co., 133 Mo. App. 452, 113 SW 730.

**62.** Cahill v. Stone & Co., 153 Cal. 571, 96 P 84; Braly v. Fresno City R. Co. [Cal. App.] 99 P 400; Kenny v. Kennedy [Cal. App.] 99 P 384; Big Five Tunnel Ore Reduction & Transp. Co. v. Johnson [Colo.] 99 P 63; Erie R. Co. v. Weinsteive [C. C. A.] 166 F 271; Hainlin v. Budge [Fla.] 47 S 825; Charleston & W. C. R. Co. v. Lyons [Ga. App.] 63 SE 862; Pilmer v. Boise Trac. Co., 14 Idaho, 327, 94 P 432; Lehigh Valley Transp. Co. v. Cook, 138 Ill. App. 405; City of Lafayette v. West [Ind.] 87 NE 550; Pittsburgh, etc., R. Co. v. Rogers [Ind. App.] 87 NE 28; Bevis v. Vanceburg Tel. Co. [Ky.] 113 SW 811; Von Trebra v. Laclede Gaslight Co., 209 Mo. 648, 108 SW 559; McKenzie v. United R. Co. [Mo.] 115 SW 13; Lattimore v. Union Elec. L. & P. Co., 128 Mo. App. 37, 106 SW 543; Harrington v. Butte, A. & P. R. Co., 37 Mont. 169, 95 P 8; Vertrees v. Gage County [Neb.] 115 NW 863; Smith v. Delaware River Amusement Co. [N. J. Law] 69 A 970; Wagner v. Atlantic Coast Line R. Co., 147 N. C. 315, 61 SE 171; Ives v. Gring [N. C.] 63 SE 609; Houston & T. C. R. Co. v. Davenport [Tex. Civ. App.] 110 SW 150; San Antonio Trac. Co. v. Levyson [Tex. Civ. App.] 113 SW 569; Houston & T. C. R. Co. v. Pollock [Tex. Civ. App.] 115 SW 843; Grimm v. Milwaukee Elec. R. & L. Co. [Wis.] 119 NW 833. In absence of evidence it will be presumed that pedestrian injured on track used due care to look and listen to avoid injury. Missouri, K. & T. R. Co. v. Wall [Tex. Civ. App.] 110 SW 453. Where negligence on part of carrier is established, it has the burden of proving contributory negligence on part of passenger. St. Louis, etc., R. Co. v. Gilbreath [Ark.] 113 SW 200. In a hearing in damages after default in an action for injuries caused by alleged negligence, the defendant has the burden of proving contributory negligence. Cutler v. Putnam L. & P. Co., 80 Conn. 470, 68 A 1006. Where injuries are received in a collision at a crossing, burden is upon railroad company under Acts

preponderance of the evidence,[63] except where the evidence adduced by plaintiff makes out a prima facie case of contributory negligence,[64] though the contrary is held in a few states.[65] The burden of disproving contributory negligence is on children as well as adults, varying only in degree, which depends upon natural capacity, physical capacity, training, habits of life, surroundings, and the like.[66] A child under fourteen years of age is presumed to be unable to appreciate dangers,[67] and this presumption must be conclusively overcome to justify the court in holding as a matter of law that he is guilty of contributory negligence.[68] The unexplained presence of a child non sui juris in a place of danger and unattended is prima facie

1899, p. 58, c. 41 (Cleveland, etc., R. Co. v. Lynn [Ind.] 85 NE 999), and such negligence must be established by evidence and not by presumption (Id.). The presumption which arises from the known instincts of self-preservation may constitute a prima facie inference against contributory negligence. German-American Lumber Co. v. Brock [Fla.] 46 S 740.

63. Where the evidence is evenly balanced, contributory negligence is not established, and upon this issue the verdict must be for plaintiff. Hainlin v. Budge [Fla.] 47 S 825. Presumptions may be overcome by counter presumptions. Failure of traveler on highway to look and listen raises a presumption of negligence which overthrows the presumption of due care. Clemons v. Chicago, etc., R. Co., 137 Wis. 337, 119 NW 102.

64. Braly v. Fresno City R. Co. [Cal. App.] 99 P 400; Harrington v. Butte, A. & P. R. Co., 37 Mont. 169, 95 P 8. Where defendant pleads contributory negligence and adduces evidence in support thereof, it cannot complain of an instruction that it has the burden of proving such issue, though such negligence appears from plaintiff's own evidence. Tinkle v. St. Louis & S. F. R. Co., 212 Mo. 445, 110 SW 1086. It is only in cases where plaintiff's allegations or evidence show prima facie negligence on his part that it devolves upon him to show facts from which the jury upon the whole case may find him free from negligence. Case at bar not within this exception to rule that burden of showing contributory negligence is on defendant. Galveston, etc., R. Co. v. Conuteson [Tex. Civ. App.] 111 SW 187. A bare admission by a passenger that he was standing up when injured does not show prima facie negligence on his part. St. Louis, etc., R. Co. v. Gilbreath [Ark.] 113 SW 200. Although plaintiff is not required to show want of contributory negligence, yet if such negligence be disclosed by his case it will defeat recovery, since the burden resting upon defendant is thus dispensed with. Instruction embodying the above rule held proper where there was no other testimony than that contained in "plaintiff's case." Pereira v. Star Sand Co. [Or.] 94 P 835. Plaintiff's failure to explain her actions does not show contributory negligence where the circumstances are such that she could not be expected to act with deliberation. Beattie v. Boston El. R. Co., 201 Mass. 3, 86 NE 920. Presumption of due care in the absence of eye-witnesses not applicable where evidence shows what plaintiff did and how the accident happened. Casey v. Adams, 137 Ill. App. 404. Though defendant has the burden of showing contributory negligence, this burden need not be discharged by defendant's evidence alone. General charge placing burden upon defendant erroneous as pretermitting jury from considering all the evidence in the case on such issue. Suderman v. Kriger [Tex. Civ. App.] 109 SW 373.

65. Wilson v. Chicago City R. Co., 133 Ill. App. 433; Casey v. Adams, 137 Ill. App. 404; Ralph v. Cambridge Elec. L. Co., 200 Mass. 566, 86 NE 922; Fay v. Hartford & S. St. R. Co. [Conn.] 71 A 364; Bell v. Mutual Mach. Co. [N. C.] 63 SE 680; Popke v. New York, etc., R. Co. [Conn.] 71 A 1098; Shum's Adm'x v. Rutland R. Co. [Vt.] 69 A 945. No presumption that deaf person crossing tracks exercised due care. Shum's Adm'x v. Rutland R. Co. [Vt.] 69 A 945. The plaintiff must bar out by a preponderance of the evidence the casual connection with his injury of all other facts than defendant's negligence. Childs v. American Exp. Co., 197 Mass. 337, 84 NE 128. Evidence insufficient as leaving cause of injury wholly to conjecture. Where plaintiff was injured by giving way of trunk handle while helping expressman carry it, at latter's request, he could not recover of express company in absence of evidence that handle was worn or defective, and that its condition might have been discovered by reasonable inspection. Id. Must be some evidence, direct or circumstantial, of the exercise of ordinary care. City of Chicago v. Carlin, 141 Ill. App. 118. Held no evidence of exercise of ordinary care, but merely a presumption based upon a presumption which the law does not tolerate. Id.

66. Ardolino v. Reinhardt, 114 NYS 508. Where the circumstances will not justify a recovery by an infant plaintiff unless such infant is non sui juris, the burden is upon plaintiff to prove this fact. Corsale v. Facini, 111 NYS 779. Where defendant contends that a higher degree of care than that reasonably to have been expected should have been exercised in a particular case, he has the burden of proving the special facts or circumstances calling therefor. Where plaintiff was a child of seven years. McGuire v. Guthman Transfer Co., 234 Ill. 125, 84 NE 723.

67. Dangers incident to railroad crossings. Davis v. Pennsylvania R. Co., 34 Pa. Super. Ct. 388.

68. Contributory negligence held properly submitted to the jury. Davis v. Pennsylvania R. Co., 34 Pa. Super. Ct. 388. The burden of proving that a child was non sui juris is on its plaintiff. Injury at railroad crossing. Child seven years of age. Simkoff v. Lehigh Valley R. Co., 190 N. Y. 256, 83 NE 15.

evidence, though not conclusive, of contributory negligence on the parent's part.[69] While plaintiff has the burden and must at least introduce evidence from which negligence may be inferred, he need not prove the specific acts of negligence.[70] If the plaintiff makes out a prima facie case, and the defendant, instead of introducing evidence to negative the facts which plaintiff's evidence tends to establish, proposes to show a distinct proposition which avoids the effect of the plaintiff's evidence, there the burden is said to shift[71] and rests upon defendant; if evidence is adduced to prove this proposition, then the onus is again cast upon the plaintiff to show that the defendant is nevertheless liable because his proof does not excuse him,[72] but the burden of proof proper never shifts but rests upon plaintiff to the end,[73] even where the doctrine of res ipsa loquitur applies.[74]

*Questions of law and fact.*[See 10 C. L. 952]—Negligence is ordinarily a mixed question of law and fact,[75] and unless the evidence is such that reasonable men could not differ in the inference to be drawn therefrom[76] and particularly where it is

**69.** Presence held unexplained and prima facie case made out. Harrington v. Butte, A. & P. R. Co., 37 Mont. 169, 95 P 8.

**70.** Action against warehouseman for negligent injury to stored poultry. Baltimore Refrigerating & Heating Co. v. Kreiner [Md.] 71 A 1066.

**71.** Whether there is sufficient evidence to shift the burden of proof is ordinarily a question for the jury. Baltimore Refrigerating & Heating Co. v. Kreiner [Md.] 71 A 1066. After establishment of prima facie case, defendant must rebut the presumption of negligence. Walter v. Baltimore Elec. Co. [Md.] 71 A 953.

**72.** Baltimore Refrigerating & Heating Co. v. Kreiner [Md.] 71 A 1066.

**73.** Everett v. Foley, 132 Ill. App. 438.

**74.** The burden of establishing the ultimate fact of negligence abides with the plaintiff to the end of the case, and the sole function of the doctrine (of res ipsa loquitur) is to raise a prima facie presumption of negligence from a given state of facts which will become conclusive if not rebutted. Where the evidence of both parties disproves the allegation of negligence, the court should declare as a matter of law that plaintiff's burden is not sustained (Brown v. Consolidated L. P. & I. Co. [Mo. App.] 109 SW 1032), and the burden of proof is not shifted by raising a presumption in favor of plaintiff on the evidence which is submitted to the jury for the purpose of allowing it to draw an inference antagonistic thereto (Dentz v. Pennsylvania R. Co., 75 N. J. Law, 893, 70 A 164). Where the doctrine of res ipsa loquitur is applicable, the burden of explaining the negligence is upon defendant, yet this does not mean that the burden shifts to defendant (Everett v. Foley, 132 Ill. App. 438), but only that he must rebut the presumption arising from the proven facts (Id.). The doctrine of res ipsa loquitur requires defendant to exculpate itself by proving performance of its legal duty. Where injury was caused by catching of wagon wheel in switch device and consequent throwing of plaintiff to the ground, proof that switch was of standard make, properly installed, and in general use showed performance of duty. Alcott v. Public Service Corp. [N. J. Law] 71 A 45.

**75.** Cleveland, etc., R. Co. v. Houghland [Ind. App.] 85 NE 369.

**76.** Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808; Swift & Co. v. Sandy [C. C. A.] 165 F 622; Chicago, B. & Q. R. Co. v. Sack, 136 Ill. App. 425; Casey v. Adams, 137 Ill. App. 404; Crawford v. Chicago Union Trac. Co., 137 Ill. App. 163; Cincinnati, etc., R. Co. v. Harrod's Adm'r [Ky.] 115 SW 699; Combs v. Kirksville [Mo. App.] 114 SW 1153; Neary v. Northern Pac. R. Co., 37 Mont. 461, 97 P 944; Toppi v. McDonald, 128 App. Div. 443, 112 NYS 821; Wagner v. Atlantic Coast Line R. Co., 147 N. C. 315, 61 SE 171; Missouri K. & T. R. Co. v. Shepherd, 20 Okl. 626, 95 P 243; Sans Bois Coal Co. v. Janeway [Okl.] 99 P 153; Gerding v. Standard Pressed Steel Co., 220 Pa. 229, 69 A 672; Weir v. Haverford Elec. Light Co., 221 Pa. 611, 70 A 874; Lone Star Brew. Co. v. Willie [Tex. Civ. App.] 114 SW 186; Missouri, K. & T. R. Co. v. Wall [Tex. Civ. App.] 110 SW 453; Texas & P. R. Co. v. Stoker [Tex. Civ. App.] 115 SW 910; Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689; Roanoke R. & Elec. Co. v. Young, 108 Va. 783, 62 SE 961; Gregg v. Northern Pac. R. Co., 49 Wash. 183, 94 P 911; Grimm v. Milwaukee Elec. R. & Light Co. [Wis.] 119 NW 833. It is only where no fact is left in doubt, and no deduction or influence other than negligence can be drawn by the jury from the evidence, that the court can say, as a matter of law, that negligence is established. Johnson v. Southern Pac. R. Co. [Cal.] 97 P 520. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury. Id. It is for the court to determine whether any facts have been established from which negligence may be reasonably inferred, but it is the province of the jury to say whether from those facts negligence ought to be inferred. Evidence sufficient to go to jury on proper construction of storage plant. Baltimore Refrigerating & Heating Co. v. Kreiner [Md.] 71 A 1066. Where contributory negligence is so conclusively proven that a verdict for plaintiff, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. United States Exp. Co. v. Kraft [C. C. A.] 161

conflicting,[77] negligence[78] and contributory negligence[79] are questions of fact, as

F 300. But the rule generally applicable is that as the question of negligence on the part of the defendant is one of fact for the jury to determine under all the circumstances of the case, and under proper instructions from the court, so, also, is the question whether there was negligence on the part of the plaintiff. Armour & Co. v. Kollmeyer [C. C. A.] 161 F 78. Rule applied where plaintiff, riding on running board of street car was injured by wagon standing in street. Id. Where under the undisputed facts a negligent act of plaintiff proximately contributed to the injury, the question of proximate cause should not be submitted to the jury. Birge-Forbes Co. v. St. Louis & S. F. R. Co. [Tex. Civ. App.] 115 SW 333. Where either an inference for or against the existence of negligence would be justified, the question is for the jury. Samboa v. Cleveland, etc., R. Co. [Mo. App.] 114 SW 567.

77. Hamilton v. Niles-Bement-Pond Co., 192 N. Y. 179, 84 NE 801; Davis v. Pennsylvania R. Co., 34 Pa. Super Ct. 388; Webb v. Heintz [Or.] 97 P 753. Where facts are disputed, contributory negligence is for the jury. Ford v. Hine Bros. Co., 237 Ill. 463, 86 NE 1051. Negligence for the jury on conflicting evidence, regardless of improbabilities therein. Chicago City R. Co. v. Donnelly, 136 Ill. App. 204. **Mere scintilla of evidence** will not justify leaving the case to the jury. Merchants' & Miners' Transp. Co. v. State [Md.] 70 A 413.

78. Hobdy v. Manistee Mill Co. [Ala.] 47 S 69; Conger v. Baltimore & Ohio R. Co., 81 App. D. C. 139; Wiley v. McNab [Cal. App.] 96 P 332; O'Connor v. Armour Packing Co. [C. C. A.] 158 F 241; German-American Lumber Co. v. Brock [Fla.] 46 S 740; Cordray v. Savannah Elec. Co. [Ga. App.] 63 SE 710; Berkowitz v. Chicago Terminal Transfer R. Co., 234 Ill. 450, 84 NE 1058; McGuire v. Richard Guthmann Transfer Co., 234 Ill. 125, 84 NE 723; Lake Street El. R. R. Co. v. Sandy, 137 Ill. App. 244; Chicago & Eastern Ill. R. Co. v. Fowler, 138 Ill. App. 352; Livingston v. Blind, 138 Ill. App. 494; Richmond St. & I. R. Co. v. Beverley [Ind. App.] 85 NE 721; McDevitt v. Des Moines City R. Co. [Iowa] 118 NW 459; Hanley v. Boston El. R. Co., 201 Mass. 55, 87 NE 197; May v. Hill, 152 Mich. 158, 15 Det. Leg. N. 132, 115 NW 1064; Parker v. Union Station Ass'n [Mich.] 15 Det. Leg. N. 909, 118 NW 733; Perrine v. Union Stockyards Co. [Neb.] 116 NW 776; Zelenka v. Union Stockyards Co. [Neb.] 118 NW 103; Crouter v. New York, 114 NYS 353; Wade v. McLean Cont. Co. [N. C.] 62 SE 919; Lear v. Cincinnati, etc., R. Co., 11 Ohio C. C. (N. S.) 61; Missouri, K. & T. R. Co. v. Briscoe [Tex. Civ. App.] 109 SW 453; Northern Texas Trac. Co. v. Moberly [Tex. Civ. App.] 109 SW 483; Missouri, K. & T. R. Co. v. Wall [Tex. Civ. App.] 110 SW 453; Boehrens v. Brice [Tex. Civ. App.] 113 SW 782; Smalley v. Rio Grande Western R. Co., 34 Utah, 423, 98 P 311; Wilkinson v. Oregon Short Line Co. [Utah] 99 P 466; Walton v. Miller's Adm'x [Va.] 63 SE 458; Klotz v. Power & Min. Mach. Co., 136 Wis. 107, 116 NW 770. Evidence sufficient to support verdict based on defendant's negligence in letting go of rope holding scaffold on which plaintiff was painting. Irrgang v. Ott [Cal. App.] 99 P 528. Negligence for jury where child was injured by dynamite explosion. Hobbs v. Blanchard & Sons Co. [N. H.] 70 A 1082. Evidence sufficient to show that, after knowledge of presence of child, dynamite was placed so that he could come in contact with it. Id. Whether action of boy in "shooing" mare to make her go back to stable after drinking, whereupon in turning she broke her leg, was negligence held question of fact. Poncelier v. Palace Livery Co. [Ala.] 47 S 702. The facts which constitute the degree of care required are for the jury to gather from the evidence and not of law for the determination of the court. City of Chicago v. Kubler, 133 Ill. App. 520. Though the primary facts are undisputed, the ultimate fact, the existence or nonexistence of negligence, is to be deduced from the former and the making of such deduction is peculiarly within the province of the jury. Swift & Co. v. Sandy [C. C. A.] 165 F 622. Negligence for the jury though facts are undisputed where reasonable men might draw different conclusions therefrom. North Bros. Co. v. Kallas [C. C. A.] 162 F 306; Swift & Co. v. Sandy [C. C. A.] 165 F 622. Storekeeper's exercise of due care for the safety of customers while making repairs, there being evidence to warrant a finding of knowledge, or duty to know, of the particular conditions causing injury, held for the jury. Frost v. McCarthy, 200 Mass. 445, 86 NE 918. Whether the owner of premises to which the public is invited exercises the required degree of care for their safety is a question of fact, since the law has no fixed standard by which the duty can be measured. Ayres v. Wanamaker, 220 Pa. 313, 69 A 759. Open hatchway in a booth which is apparently an entrance to department store, and manifestly a dangerous place. Id. Where defendant knows or ought to know of the danger incident to the condition of his premises in time to remove the danger or give warning thereof, and plaintiff neither knows nor ought to know of such danger, the liability for resulting injury is for the jury. Petrus v. Berlin Mills Co. [N. H.] 71 A 213. Question as to whose negligence caused collision between automobile and bicycle held for jury. Campbell v. Dreher, 33 Ky. L. R. 444, 110 SW 353. Evidence of negligence in failing to take proper precautions to prevent explosion of siphon bottles of aerated water held sufficient for the jury. Torgesen v. Schultz, 192 N. Y. 156, 84 NE 956. Evidence sufficient to show defect causing sudden rise of elevator resulting in injury and defendant's knowledge of such defect, and hence to justify an inference of negligence under the doctrine of res ipsa loquitur. Byers v. Carnegie Steel Co. [C. C. A.] 159 F 347. Due care of defendant to protect travelers from contact with live wire for jury. Miller v. Kenosha Elec. R. Co., 135 Wis. 68, 115 NW 355. Evidence sufficient to warrant finding that defendant negligently detached waterpipes from back of kitchen stove whereby steam generated causing an explosion. Scott v. Shaw, 104 Minn. 530, 116 NW 1135. Evidence sufficient to go to jury on questions of negligence where cus-

are the particular shares thereof such as proximate cause,[80] knowledge and means of knowledge,[81] the application of the last clear chance doctrine,[82] invitation of plaintiff to the premises,[83] the capacity and care of children [84] and the imputed neg-

tomer in store was injured by falling down unguarded cellarway. Montague v. Hanson [Mont.] 99 P 1063. Cannot be said as a matter of law that one was not negligent in making assurances as to the safety of using a certain stove polish, thereby inducing its sale. Cunningham v. Pease House Furnishing Co., 74 N. H. 435, 69 A 120. Where injury resulted from collision of boat with submerged telephone wire, negligence of defendant was for the jury. Heiberger v. Missouri & Kansas Tel. Co., 133 Mo. App. 452, 113 SW 730.

**79.** Town of New Castle v. Grubbs [Ind.] 86 NE 757; Sambos v. Cleveland, etc., R. Co. [Mo. App.] 114 SW 567; Perrine v. Union Stockyards Co. [Neb.] 116 NW 776; Devine v. Hayward, 128 App. Div. 705, 113 NYS 898; St. Louis S. W. R. Co. v. Shelton [Tex. Civ. App.] 115 SW 877; Place v. Grand Trunk R. Co. [Vt.] 71 A 836. Where the complaint avers the absence of contributory negligence, plaintiff is entitled to go to the jury on that issue unless the facts stated compel the legal inference that it was present (Acts 1899, p. 58, c. 41). Cleveland, etc., R. Co. v. Lynn [Ind.] 85 NE 999. Plaintiff's negligence in being at the place where he was injured held for the jury. Harding v. Tory, 135 Ill. App. 458. Contributory negligence in entering and leaving store held for the jury under the evidence. Frost v. McCarthy, 200 Mass. 445, 86 NE 918. Where injury resulted from collision of boat with bridge, contributory negligence of navigator of boat held for jury. Anderson v. Pennsylvania R. Co. [N. J. Err. & App.] 71 A 333. Contributory negligence in drawing water from end of tank car held for the jury. Louisiana & T. Lumber Co. v. Brown, [Tex. Civ. App.] 109 SW 950. Evidence sufficient to warrant finding of lack of contributory negligence in manner of poking into bins to make contents flow down. Vaughn v. Glens Falls Portland Cement Co., 59 Misc. 230, 112 NYS 240. Evidence sufficient to show contributory negligence in coming in contact with live wire. Weir v. Haverford Elec. Light Co., 221 Pa. 611, 70 A 874. **Whether plaintiff was drunk** when injured held for jury. Tagge v. Roslyn [Wash.] 98 P 668.

**80.** Steele's Adm'r v. Hillman Land & Iron Co. [Ky.] 114 SW 311; San Francisco & P. S. S. Co. v. Carlson [C. C. A.] 161 F 851. Whether cause of injury was wet and slippery boards or broken plank held for jury. Pennsylvania R. Co. v. Forstall [C. C. A.] 159 F 893; Town of New Castle v. Grubbs [Ind.] 86 NE 757; Clingan v. Dixon County [Neb.] 118 NW 1082; Dodsoe v. Dodge Clothespin Co. [N. H.] 70 A 1073; Stern v. Metropolitan St. R. Co., 193 N. Y. 328, 85 NE 1089. Where the cause of an accident is unexplained, and is as consistent with defendant's exercise of due care as with his negligence, a verdict for defendant should be directed. Ryan v. Fall River Iron Works Co., 200 Mass. 188, 86 NE 310. Where reasonable men might differ as to what was the proximate cause, such issue is for the jury; but, where there is no room for a difference of opinion, the question where the facts are undisputed is for the court. Louisville & N. R. Co. v. Kriffer [Ky.] 113 SW 433; Donegan v. Baltimore & N. Y. R. Co. [C. C. A.] 165 F 869. Proximate cause need not be established beyond a reasonable doubt and may be shown by circumstantial evidence, though such evidence must establish a logical basis for an inference as to the cause. Morse v. Consolidated R. Co. [Conn.] 71 A 553.

**81.** Knowledge of plaintiff of proximity of lighting company's wires to those of telephone company for which he was working held for jury. Drown v. New England Tel. & T. Co. [Vt.] 70 A 599. What should have been reasonably anticipated a question of fact. Illinois Cent. R. Co. v. Siler, 133 Ill. App. 2. Whether injury should have been expected and provided against held for jury. Baltimore Refrigerating & Heating Co. v. Kreiner [Md.] 71 A 1066. Evidence insufficient to show that one working in between cars in factory knew of approach of engine. Shall v. Detroit & M. R. Co., 152 Mich. 463, 15 Det. Leg. N. 295, 116 NW 432.

**82.** Whether motorman could, by the exercise of ordinary care, have discovered plaintiff's peril and avoided accident, held for jury. Felver v. Central Elec. R. Co. [Mo.] 115 SW 980.

**83.** Evidence held sufficient to support the verdict for plaintiff, whether he was a trespasser or licensee, or guilty of such contributory negligence as was sufficient to reduce the damages, though not sufficient, in connection with the greater negligence of defendant, to defeat his recovery. Central of Georgia R. Co. v. Barfield [Ga. App.] 63 SE 514. Finding that plaintiff was personally invited upon premises held against the weight of the evidence. Silverman v. Binder, 115 NYS 54. Evidence insufficient to show an implied invitation to child of mill hand to use a path from the mill to tenement houses for employes. Davis v. Joslin Mfg. Co. [R. I.] 69 A 65. Evidence sufficient to sustain finding of implied invitation to enter premises where child was injured by explosion of dynamite. Hobbs v. Blanchard & Sons Co. [N. H.] 70 A 1082.

**84.** McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33. But he may have arrived at such a degree of maturity in age and judgment that the court might say as a matter of law he could be guilty of contributory negligence. Berry v. St. Louis, etc., R. Co., 214 Mo. 593, 114 SW 27. And, on the other hand, he may be so tender in age and judgment that the court, as a matter of law, might rule he could not be guilty thereof under the circumstances of a given case. Child four years old injured on turntable where he was taken by other children within this class. Id.; McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33. Bright boy of thirteen years attempting to cross railroad track in front of approaching train. McGee v. Wabash R. Co., 214 Mo. 530, 114

ligence of parents.[85] Inferences of fact from proven facts and circumstances are peculiarly within the province of the jury.[86]

*Instructions.*[See 10 C. L. 958]—The questions most frequently arising as to instructions in negligence cases are the definition of negligence[87] and contributory negli-

SW 33. Whether or not a child has exercised due care should in every case be left to the jury to determine with regard to the child's age, maturity and intelligence. Batchelor v. Degnon Realty & Terminal Improvement Co., 115 NYS 93. Contributory negligence for jury where boy of fifteen was injured by fall of machine at which he was working. Gerding v. Standard Pressed Steel Co., 220 Pa. 229, 69 A 672. Contributory negligence of child for the jury under the evidence. McGuire v. Richard Guttemann Transfer Co., 234 Ill. 125, 84 NE 723. Contributory negligence of child of six, who fell and was injured on street car track while attempting to climb snowbank in its immediate neighborhood, held for jury. Fogarty v. Jersey City, etc., R. Co. [N. J. Law] 69 A 964. Where boy of fifteen was injured by falling of machine at which he was at work, truth of testimony establishing negligence held for jury. Gerding v. Standard Pressed Steel Co., 220 Pa. 229, 69 A 672. Where child entered premises upon implied invitation, his contributory negligence in exploding dynamite held for jury. Hobbs v. Blanchard & Sons Co. [N. H.] 70 A 1082. As a general rule the question of a child's contributory negligence is for the jury. Berry v. St. Louis, etc., R. Co., 214 Mo. 593, 114 SW 27.

**85.** The question of parent's negligence in permitting young children to play out doors unattended by grown people is ordinarily one of fact for the jury. This may depend, however, upon parent's circumstances in life. Murray v. Scranton R. Co., 36 Pa. Super. Ct. 576; Distasio v. United Trac. Co., 35 Pa. Super. Ct. 406. Where evidence showed that child twenty-five months old was obedient and bright for its age and had been intrusted to the care of a boy of eleven years, the issue of its mother's negligence was not raised. Galveston, etc., R. Co. v. Olds [Tex. Civ. App.] 112 SW 787.

**86.** In arriving at a verdict, the jury, from the facts proven and sometimes from the absence of counter evidence, may infer the existence of other facts reasonably and logically consequent upon those proved. Cochrell v. Langley Mfg. Co. [Ga. App.] 63 SE 244. Held that from facts proved jury would have been authorized to infer one or more of the specific acts of negligence alleged, hence nonsuit was improper. Id. The jury may infer negligence from the facts proved but may not infer the existence of facts which constitute negligence. Vandalia R. Co. v. McMains [Ind. App.] 85 NE 1038. Negligence may exist as an inference justly deducible from all the facts in evidence, and such inference may be considered by the jury with as much propriety as the facts out of which it arises. Negligence need not rest on direct testimony. Shaffer v. Coleman, 35 Pa. Super. Ct. 386. Natural instinct of self-preservation may be considered. City of Chicago v. Thomas, 141 Ill. App. 122.

**87.** Refusal to instruct that failure to look before crossing track was negligence held error, though train came from unusual direction, and though instructions of general character as to due care were given. Fowler v. Chicago & E. I. R. Co., 234 Ill. 619, 85 NE 298. Instructions that jury must determine whether defendant was exercising the degree of care required, "and if you find he was not, then you will find that he was in the exercise of ordinary care," held not misleading though inadvertent insertion of the word "not" changed the intended meaning. Hiroux v. Baum, 137 Wis. 197, 118 NW 533. In action for injuries sustained in collision with automobile, charge held good, when viewed as a whole, as against contention that it singled out plaintiff as an object of care. Erks v. Ewers [Iowa] 119 NW 603. Instruction held not to authorize the jury to find for plaintiff in the absence of defendant's negligence. Harding v. Tory, 135 Ill. App. 458. Instructions as to automobilist's duty in regard to avoiding collision, use of highway and burden of proof held good under this rule. Irwin v. Judge [Conn.] 71 A 572. Instruction on duty of train operators when approaching crossing good when construed in connection with other instructions. Pittsburgh, etc., R. Co. v. Lynch [Ind. App.] 87 NE 40. Where the duty varies with conditions, a **general statement** of the law in regard to the duty is sufficient. Herndon v. Salt Lake City, 34 Utah, 65, 95 P 646. Where the **degree of care** is correctly charged, there is no error in failing to define such degree in the absence of timely written requests therefor. Savannah Elec. Co. v. Bennett, 130 Ga. 597, 61 SE 529. Instruction that the care required was that which a discreet and cautious individual would or ought to have used held in effect to state the correct rule that the care required was that which an ordinarily prudent man would have exercised under all the circumstances of the case. American Locomotive Co. v. Hoffman, 108 Va. 363, 61 SE 759. An instruction fully instructing as to degree of care required of defendant, and submitting fairly questions of negligence of defendant and assumed risks by plaintiff, does not assume way unsafe, in instructing that if defendant knew, or by exercise of ordinary care could have known, certain conditions existed, then it is liable. Hotchkiss Mountain Mining & Reduction Co. v. Bruner, 42 Colo. 305, 94 P 331. Instruction imposed too high a degree of care upon carrier toward one not a passenger. Elgin A. & S. Trac. Co. v. Wilcox, 132 Ill. App. 446. Not misleading as to degree of care required in management of street car when viewed as a whole. City of Chicago v. Ratner, 133 Ill. App. 628. Instruction as to degree of care required in management of street car held not erroneous. Id. Where the issues involved defendant's liability under the **last clear chance doctrine,** an instruction that contributory negligence barred recovery was not cured by an instruction that it was no defense. McDivitt v. Des Moines City R. Co.

gence,[88] the relation of the parties,[89] burden of proof,[90] and proximate cause.[91]

[Iowa] 118 NW 459. **Definitions of negligence** are to be considered with what the court says upon those subjects in other portions of the charge. Smith v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 1055, 119 NW 640. An instruction defining "ordinary care" as that degree of care, precaution, or diligence which may properly be expected or required, having regard to the nature of the act or duty, and to the attending circumstances, was not such error as called for reversal yet the usual definition would have been preferable. Houston & T. C. R. Co. v. Roberts [Tex. Civ. App.] 109 SW 982. Where the court defined negligence of a railroad company to be a failure to use such care as an ordinarily prudent person would have exercised under the circumstances, a refusal to qualify it by instructing the jury to take into consideration all the circumstances and not to view the accident from a retrospective point of view was not erroneous. Galveston H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787. Requested instructions on ordinary care and the effect of its exercise held substantially covered. Bohlen v. Chicago City R. Co., 141 Ill. App. 261. Instruction on **standard of care** and practice of others held correct, though permitting a finding of negligence even though conduct was in accordance with prevailing practice. Chicago G. W. R. Co. v. McDonough [C. C. A.] 161 F 657. Instruction on **wanton and willful negligence** held not erroneous in view of other instructions correctly stating the degree of care required, though those elements were not in the case. Wheeler v. Milner, 137 Wis. 26, 118 NW 187.

**88.** Instruction as to contributory negligence of one riding on running board of street car who was hit by standing wagon held fair. United States Exp. Co. v. Kraft [C. C. A.] 161 F 300. Instruction on due care of one killed by live wire not erroneous as a whole. Prince v. Lowell Elec. L. Corp., 201 Mass. 276, 87 NE 558. Where court instructed that to be a bar plaintiff's negligence must have contributed to his injury, the omission of this qualification in other parts of the charge was not error. Buchman v. Jeffery, 135 Wis. 448, 115 NW 372. An instruction that to find for plaintiff the jury must find that the accident occurred without any fault on his part is sufficiently favorable to defendant in the absence of a request for a correct instruction on contributory negligence. Carscallen v. Coeur D'Alene, etc., Transp. Co. [Idaho] 98 P 622. Instruction on relative negligence of plaintiff and defendant fully and accurately submitted to jury. Central of Georgia R. Co. v. Barfield [Ga. App.] 63 SE 514. Where contributory negligence is in issue, a refusal to define it and apply the doctrine to the facts may be error. Northern Texas Trac. Co. v. Moberly [Tex. Civ. App.] 109 SW 483. Definition of contributory negligence as "where the plaintiff does some negligent act or omits to perform some act which, co-operating with some negligent act or omission on the part of the defendant, contributes to, and is the proximate cause of the injury," held proper. Texas Cent. R. Co. v. Johnson [Tex. Civ. App.] 111 SW 1098. Where instruction authorized verdict for defendant if it proved contributory negligence alleged, it should also have authorized verdict for plaintiff if it failed in such proof. Chicago, etc., R. Co. v. Johnson [Tex. Civ. App.] 111 SW 758. There is no material difference between the words "apparent" and "reasonably apparent" peril and "realized his peril" as used in a charge on discovered peril. Missouri, K. & T. R. Co. v. Reynolds [Tex. Civ. App.] 115 SW 340. To modify an instruction that "if plaintiff could have seen the danger" he could not recover, by saying that "if by the exercise of ordinary care he could have seen the danger," is not error. Crawford v. Kansas City Stockyards Co. [Mo.] 114 SW 1057. Instruction predicating contributory negligence on child's age and realization of danger alone was misleading and an instruction that jury should consider all the facts and circumstances bearing on such issue was proper. Ft. Worth & D. C. R. Co. v. Poteet [Tex. Civ. App.] 115 SW 883. Where contributory negligence is dependent upon plaintiff's knowledge of the danger, the instruction should submit to the jury not only the question of actual knowledge, but also the duty to know. Where under the circumstances such duty might be inferred. Place v. Grand Trunk R. Co. [Vt.] 71 A 836. Instruction that if before crossing street car tracks plaintiff looked the distance she thought sufficient, erroneous. Detroit United R. Co. v. Nichols [C. C. A.] 165 F 289. Omitting certain elements of contributory negligence, and failure to define due care, not objectionable in view of the whole charge. Brinkman v. Pacholke, 41 Ind. App. 662, 84 NE 762. Instruction erroneous as permitting jury to infer that presence of watch tower at railroad crossing excused plaintiff from failure to see approaching train. Cleveland, etc., R. Co. v. Lynn [Ind.] 85 NE 999. Presumption that error was prejudicial in such case. Id. Instruction as to effect of plaintiff's knowledge of defect in street causing injury properly refused as obscure and misleading. Town of Newcastle v. Grubbs [Ind.] 86 NE 757.

**89.** Instruction as to whether plaintiff was a trespasser fully and accurately submitted to the jury. Central of Georgia R. Co. v. Barfield [Ga. App.] 63 SE 514. Instruction as to whether plaintiff was a licensee fully and accurately submitted to the jury. Id.

**90.** Held good on burden of proof where passenger was injured by derailment of train. Chicago, etc., R. Co. v. Brandon, 77 Kan. 612, 95 P 573. Instruction that no presumption arose that fire which arose shortly after passing of train was caused by sparks from engine, though correct in the abstract was misleading and properly refused, where evidence showed that engine emitted large quantity of sparks. Birmingham R. L. & P. Co. v. Hinton [Ark.] 48 S 546. Instruction held not erroneous as leading others to believe that defendant must show contributory negligence by his own evidence where plaintiff's evidence added nothing to defendant's on such issue. El Paso Elec. R. Co. v. Ryan [Tex. Civ. App.] 114 SW 906. Instruction on presumption and burden of proof

All issues, theories and defenses must be submitted [92] and no material evidence eliminated,[93] and the charge must be restricted to the issues and evidence.[94] The

held confusing. Hainlin v. Budge [Fla.] 47 S 825. Repetition of instructions that burden of proving negligence is on plaintiff not ground for reversal. Beatty v. Metropolitan, etc., R. Co., 141 Ill. App. 92. An instruction to find for defendant "if you are in doubt as to the preponderance of the evidence" is erroneous and is correctly charged to "if you are unable to determine as to its preponderance." Illinois Steel Co. v. Koshinski, 135 Ill. App. 587. Instruction placing burden of proving contributory negligence on defendant under his plea thereof not ground for reversal where jury was also instructed that question was to be determined from the whole evidence. Missouri K. & T. R. Co. v. Wilhoit [C. C. A.] 160 F 440.

91. Instruction that, "in order for plaintiff's injuries to be direct and proximate result of protruding tie, if any there was remaining in track, evidence must show that plaintiff caught foot under or against same in crossing track in performance of duty, and was thereby caused to fall," does not assume existence of sliver on tie. St. Louis S. W. R. Co. v. Cleland [Tex. Civ. App.] 110 SW 122. Instruction held to sufficiently charge that contributory negligence, to bar recovery, must have directly and proximately contributed to the injury. Morgan v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 110 SW 978.

92. Any instruction conditioning plaintiff's right to recover upon his exercise of due care, and leaving the jury to determine whether such care was exercised, submits the issue of contributory negligence. Clingan v. Dixon County [Neb.] 118 NW 1082. Instruction held to erroneously submit such issue, there being no evidence from which contributory negligence could be inferred. Id. Where a general instruction on contributory negligence is given, it is unnecessary to refer to every item of evidence tending to show specific acts of contributory negligence. Hubbard v. Montgomery County [Iowa] 118 NW 912. Where injury was caused by falling down open and unguarded elevator shaft, the requirement of St. 1898, § 1636j, that all elevators be securely guarded, was sufficient by charging that the burden was on plaintiff to show the failure to guard the entrance and submitting to the jury the question whether defendant negligently failed to reasonably guard it at the time of the accident. Anderson v. Horlick's Malted Milk Co., 137 Wis. 569, 119 NW 342. When the case turns solely upon the question of willful or wanton injury, such issue should be presented to the jury unconfused with any other question. Central of Georgia R. Co. v. Moore [Ga. App.] 63 SE 642. Instruction remitting the jury to the pleas to determine what negligence was alleged held confusing. Atlanta & B. Air Line R. Co. v. Wheeler [Ala.] 46 S 262. Defendant is entitled to an instruction grouping the facts relied on to show contributory negligence, even though the plea is not as specific as the testimony relating thereto. Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 20 Tex. Ct. Rep. 772, 107 SW 958. That injury was caused by defective construction of sidewalk, or from a defect therein which defendant should have discovered. City of Covington v. Webster, 33 Ky. L. R. 649, 110 SW 878. Defense of contributory negligence of sectionman struck by train held sufficiently presented. International & G. N. R. Co. v. Alleman [Tex. Civ. App.] 115 SW 73. As to disregard of contract requiring stock attendants to ride in caboose and custom of such attendants to climb in and out of cars. Crawford v. Kansas City Stockyards Co. [Mo.] 114 SW 1057. The jury should be permitted to consider them. Id. Where contributory negligence is pleaded generally, defendant is entitled to have any facts in evidence which raise that issue grouped and affirmatively presented to the jury. Was not confined to negligence of partially blind man in walking along embankment near excavation in street in night time, but might go to negligence in walking on such street at all under the circumstances. St. Louis S. W. R. Co. v. Samuel [Tex. Civ. App.] 116 SW 133. Instruction stating elements to be considered on the issue of contributory negligence erroneous as omitting the elements of experience. Fowler v. Chicago & E. I. R. Co., 234 Ill. 619, 85 NE 298. Instruction properly refused because ignoring issues. Maryland, D. & V. R. Co. v. Brown [Md.] 71 A 1005. Instruction to effect that imminent, sudden danger rendered doctrine of contributory negligence inapplicable erroneous for failure to instruct that fault in getting into the place of danger might render it applicable. New York Transp. Co. v. O'Donnell [C. C. A.] 159 F 659. Error not cured by instruction in other parts of charge dealing with negligence. Id. Where defense was plaintiff's knowledge, refusal to direct that if plaintiff had knowledge he could not recover held error. Hamilton v. Niles-Bement-Pond Co., 192 N. Y. 179, 84 NE 801. Negligence of plaintiff with reference to harness where horse was frightened by automobile. Brinkman v. Pacholke, 41 Ind. App. 662, 84 NE 762. Evidence held to require a charge on discovered peril. Missouri, K. & T. R. Co. v. Reynolds [Tex. Civ. App.] 115 SW 340. Where there was evidence that cable company placed proper signals to warn trainmen of obstacle on track, a charge that if company left obstacle on track it was negligent was erroneous as pretermitting the question of due care as to warnings that obstacles were on track. Chute v. Moeser, 77 Kan. 706, 95 P 398.

93. Evidence as to capacity of child (Norfolk R. & L. Co. v. Higgins, 108 Va. 324, 61 SE 766), or take from the jury theories which the evidence tends to support (Id.). Theory of defense of contributory negligence. Id. Instruction properly refused on this ground, Maryland, D. & V. R. Co. v. Brown [Md.] 71 A 1005.

94. Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 20 Tex. Ct. Rep. 772, 107 SW 958. Instructions must conform to the issues. Where case was tried on theory of negligence and not of wanton injury, refusal to

province of the jury[95] must not be invaded,[96] nor should disputed facts be assumed.[97]

*Verdicts and findings.* See 10 C. L. 961—Separate verdicts for different amounts may be awarded against joint tort feasors.[98] Interrogatories should not be in the alternative.[99] Verdicts will be construed in accordance with the instructions given,[1] and must be responsive to the issues.[2] Where several grounds of negligence are

charge specifically and in the abstract on "wanton injury" was proper. Weitzmann v. Barber Asphalt Co., 129 App. Div. 443, 114 NYS 158. Instruction as a whole held to properly submit the issues, where action depended on whether defendant owned and controlled premises where injury was inflicted. Id. Instruction should not submit issues not raised. Ramp v. Metropolitan St. R. Co., 133 Mo. App. 700, 114 SW 59. Hence, under a general charge of negligence, jury need not be told what facts, which the evidence tends to prove, would constitute the negligence complained of. Moore v. Missouri Pac. R. Co. [Mo. App.] 116 SW 440. Instruction that willful negligence on defendant's part would render it liable regardless of contributory negligence erroneous where there was no allegation of willful negligence. Atchison, etc., R. Co. v. Baker [Okl.] 95 P 433. Where there is no evidence of contributory negligence, such issue should not be submitted to the jury. D. J. O'Brien Co. v. Omaha Water Co. [Neb.] 118 NW 1110; Clingan v. Dixon County [Neb.] 118 NW 1082. Issues raised by the pleadings alone and unsupported by the evidence should not be submitted to the jury. Brown v. Consolidated L. P. & I. Co. [Mo. App.] 109 SW 1032.

**95.** See ante this section.

**96.** Instruction properly refused as invading province of jury to determine what certain evidence did or did not establish. Louisville & S. I. Trac. Co. v. Worrell [Ind. App.] 86 NE 78. Instruction as to plaintiff's knowledge of danger and effect thereof held properly refused as invading province of jury. Town of Newcastle v. Grubbs [Ind.] 86 NE 757. By statute the trial judge is prohibited from expressing or intimating his opinion that certain facts do or do not constitute negligence. Instruction held to violate statute. Lay v. Nashville, etc., R. Co. [Ga.] 62 SE 189. Refusal to charge that certain facts would constitute the proximate cause held proper. Ives v. Gring [N. C.] 63 SE 609. May assume negligence in failure to keep watchman at a crossing in a populous neighborhood. St. Louis S. W. R. Co. v. Moore [Tex. Civ. App.] 107 SW 658. It is error to assume that it is contributory negligence for plaintiff to look in another direction than that in which he was walking. Lattimore v. Union Elec. L. & P. Co., 128 Mo. App. 37, 106 SW 543. Cannot assume negligence in running train at rate of fifty or sixty miles per hour, unless, perhaps, undisputed evidence shows it so. Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 20 Tex. Ct. Rep. 772, 107 SW 958. Instruction that if jury believe, from evidence, that plaintiff was injured by negligence of defendant, as charged in declaration, does not assume that defendant was negligent. Pronskevitch v. Chicago & A. R. Co., 232 Ill. 136, 83 NE 545. Where the facts are disputed, it is error to instruct that a certain state of facts would constitute negligence per se. Northern Texas Trac. Co. v. Moberly [Tex. Civ. App.] 109 SW 483. The court should not submit the legal conclusion arising from the facts. Ft. Worth & R. G. R. Co. v. Eddleman [Tex. Civ. App.] 114 SW 425. Instruction that there is no evidence that plaintiff was or is permanently injured. Western Steel Car & Foundry Co. v. Cunningham [Ala.] 48 S 109.

**97.** Instructions in personal injury action, claimed to assume that failure to construct barriers was negligence, thus taking question from jury, when construed as a whole, although argumentative and disjointed, held harmless. Village of Oden v. Nichols, 133 Ill. App. 306. The term "if he did so" can have no other effect than to leave to jury question whether or not act was done. Frankfort & V. Trac. Co. v. Hulette, 32 Ky. L. R. 732, 106 SW 1193. Charge that if plaintiff's negligence proximately contributed to his injury, they must find for defendant, even though defendant was guilty of negligence, assumes plaintiff's negligence. Western Steel Car & Foundry Co. v. Cunningham [Ala.] 48 S 109. Charge erroneous which assumes that horse and wagon were left unattended in street and that driver was guilty of negligence. Southern Hardware & Supply Co. v. Standard Equipment Co. [Ala.] 48 S 357. Requested instruction properly refused on this ground. Maryland, D. & V. R. Co. v. Brown [Md.] 71 A 1005.

**98.** Louisville & N. R. Co. v. Roth [Ky.] 114 SW 264.

**99.** "Did defendant company have knowledge of defective condition of controller or ought it to have known of such defective condition" held objectionable. Gay v. Milwaukee Elec. R. & L. Co. [Wis.] 120 NW 283.

**1.** Where jury were instructed that plaintiff could not recover if accident was result of defective operation of boiler and did not result from defective construction, a verdict for plaintiff will be construed as finding that injury was caused by defective construction. Statler v. Ray Mfg. Co., 109 NYS 172. Under instructions which permit a finding that the negligence was that of a vice-principal, a fellow-servant, or the combined negligence of both, a finding that it was that of a fellow-servant excludes other negligence and negatives a right to recover, it not being a mere conclusion. Wichita Gas, Elec. L. & P. Co. v. Crist [Kan.] 97 P 1134.

**2.** Findings that spikes were loose in ties, and that soft wood insufficient to hold spikes was failure to use best method of keeping roadbed in proper condition, supported allegation of negligence in action by

charged and a certain defense is available to some, but not to others, a special verdict for plaintiff which fails to state the grounds on which it is based is fatally defective.[3] If a general verdict is inconsistent with the answers to interrogatories, the latter must prevail.[4] Inconsistent answers to interrogatories annul each other.[5]

NEGOTIABLE INSTRUMENTS.


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*The scope of this topic* is noted below.[6]

passenger for derailment of train. Chicago, etc., R. Co. v. Brandon, 77 Kan. 612, 95 P 573.

3. Reffke v. Patten Paper Co., 136 Wis. 535, 117 NW 1004.

4. Special verdict held not inconsistent with general verdict necessarily finding existence of negligence in maintainance of steam exhaust near highway and nonexistence of contributory negligence. Ft. Wayne Cooperage Co. v. Page, 170 Ind. 585, 84 NE 145. Where complaint alleged rate of speed at which train approached crossing and special verdict neither found the rate of speed nor that warning given might not have been in time to permit plaintiff to avoid the collision, the general verdict for plaintiff was not overcome, for it could not be presumed, as against it, that plaintiff heard or could have heard the warnings. Cleveland, etc., R. Co. v. Lynn [Ind.] 85 NE 999. Where answers to interrogatories exclude every conclusion authorizing recovery for plaintiff, judgment non obstante veridicto should be rendered for defendant. Apperson v. Lazro [Ind. App.] 87 NE 97. Rule not applicable to either defendant where complaint alleges that both were in possession and control of instrumentality causing injury, which fact was not contradicted by the interrogatories. Id. In action against automobilist for frightening horse, finding that he did not run at an unlawful rate of speed did not negative other provisions of the statute on negligence and hence was not inconsistent with general verdict for plaintiff. Walkup v. Beebe [Iowa] 116 NW 321. Findings held inconsistent with each other but not with general verdict for plaintiff. Louisville & S. I. Trac. Co. v. Worrell [Ind. App.] 86 NE 78.

5. South Shore Gas & Elec. Co. v. Ambre [Ind. App.] 87 NE 246.

6. This topic treats of negotiable instruments as a special class of contracts, the general law of contracts being retained only so far as is absolutely essential to the proper treatment of the subject in hand. See generally such topics as Contracts, 11 C. L. 729; Fraud and Undue Influence, 11 C. L. 1583; Frauds, Statute of, 11 C. L. 1609; Usury, 10 C. L. 1937. Conflict of laws as to negotiable instruments is treated elsewhere (see Conflict of Laws, 11 C. L. 665), as is also the laws of banking (see Banking and Finance, 11 C. L. 370). As to pledge of

§ 1. *Definition and indicia. Definition.*[7]—See 10 C. L. 962—Written evidence of a debt, though in the form of a promise, is not necessarily a promissory note,[8] and even when it constitutes a promissory note it is not necessarily negotiable.[9] The negotiability of an instrument depends upon its terms,[10] with reference to certain elements fixed by law as the indicia of negotiability.[11] When a negotiable instrument is defined by statute, negotiability must, of course, be determined with reference to such definition,[12] and sometimes it becomes necessary to determine negotiability with reference to some particular statute not dealing primarily with negotiable instruments.[13] A bank check is an instrument by which a depositor seeks to withdraw funds from a bank, and as between the drawer and the payee it is not only evidence of indebtedness,[14] but is also, legally and commercially, equivalent to the drawer's promise to pay.[15] It is, furthermore, a bill of exchange payable on demand [16] and is negotiable.[17] A bill of exchange or draft is distinguished from a note [18] and also from a chattel.[19] Non-negotiable paper does not become a bill of exchange merely

negotiable instruments as collateral, see Pledges, 10 C. L. 1253. As to transfer of bills of lading as transfer of goods, see Carriers, 11 C. L. 499. As to negotiable instruments as a medium of payment, see Payment and Tender, 10 C. L. 1147. The law of suretyship and guaranty are herein treated only in its peculiar relation to the subject in hand, the general principles of such law being treated in appropriate topics. See Suretyship, 10 C. L. 1768; Guaranty, 11 C. L. 1663. Alteration of instruments is also treated herein in its peculiar application to negotiable instruments, but as to the general principles thereof, see Alteration of Instruments, 11 C. L. 106. See, also, generally, Assignments, 11 C. L. 291; with reference to particular kinds of instruments which may or may not be negotiable, according to their terms, but in which negotiability is only an incidental feature, see such topics as Carriers, 11 C. L. 499; Bonds, 11 C. L. 424; Municipal Bonds, 10 C. L. 875; Corporations, 11 C. L. 810; Receivers, 10 C. L. 1465; Warehousing and Deposits, 10 C. L. 1994.

**7. Search Note:** See notes in 4 C. L. 788, 789; 6 Id. 778; 8 Id. 1124; 20 L. R. A. 481; 23 Id. 173; 27 Id. 222; 31 Id. 234; 35 Id. 586, 605, 647, 678; 38 Id. 823; 43 Id. 277; 61 Id. 193; 1 L. R. A. (N. S.) 188, 1120; 8 Id. 231; 16 Id. 878; 91 A. S. R. 718, 733; 1 Ann. Cas. 385; 4 Id. 263.

See, also, Bills and Notes, Cent. Dig. §§ 360-366, 368, 369, 371-374, 379, 380, 387-392, 393-399, 400-407, 410, 411, 415-420; Dec. Dig. §§ 144-175; 1 Cyc. 520; 4 A. & E. Enc. L. (2ed.) 76, 81.

**8.** Writing in following terms, "I do hereby promise to pay Mary G. Russell $1,000—one thousand dollars—or leave that sum to be paid to her at my death, for services rendered me by her as housekeeper and companion and nurse, for the past four years and until my death, besides her weekly wages which I pay her quarterly," held not a promissory note and hence valid and binding, though not delivered during lifetime of maker. Russell v. Close's Estate [Neb.] 119 NW 515.

**9.** Boyd v. Beebe [W. Va.] 61 SE 304.

**10. Promissory note** becomes a negotiable note when it contains the necessary elements of negotiability. Boyd v. Beebe [W. Va.] 61 SE 304. **Certificate of shares** in cemetery association, by its terms "transferable only on the books of the cemetery association upon surrender of the certificate," is on its face non-negotiable. American Exch. Nat. Bank v. Woodlawn Cemetery [N. Y.] 87 NE 107. **Bill of lading** is negotiable. Acts 1898, No. 150, p. 193. Schenermann v. Monarch Fruit Co. [La.] 48 S 647. Accepted sight **draft with bill of lading attached,** indorsed and negotiated by the payee is governed by commercial law. Bank of Guntersville v. Jones Cotton Co. [Ala.] 46 S 971. **Special assessment vouchers** or bonds are not negotiable instruments. First Nat. Bank of Chicago v. Elgin, 136 Ill. App. 453. **Receiver's certificate** is neither negotiable nor quasi negotiable. McCarthy v. Crawford, 141 Ill. App. 276. Receiver's certificate is not a negotiable instrument, though issued under an order in terms authorizing issue of negotiable certificates. Bernard v. Union Trust Co. [C. C. A.] 159 F 620.

**11.** See post, this section, subdivision Elements of Negotiability.

**12.** "A negotiable promissory note * * * is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer." Laws 1897, p. 755, c. 612, § 320. Edelman v. Rams, 58 Misc. 561, 109 NYS 816.

**13.** Within meaning of garnishment statute, overdue promissory note held "negotiable." Caldale Mfg. Co. v. Clarke [R. I.] 69 A 681.

**14, 15.** Camas Prairie State Bank v. Newman [Idaho] 99 P 833.

**16.** Laws 1897, p. 756, c. 612, § 321. Cassel v. Regierer, 114 NYS 601. Rev. St. § 3177z. Blake v. Hamilton Dime Sav. Bank Co. [Ohio] 87 NE 73.

**17.** At common law. Purcell v. Armour Packing Co., 4 Ga. App. 253, 61 SE 138.

**18.** Instrument directing certain party to pay to maker or drawer, at certain time, certain sum, to be charged to account of maker or drawer, is bill of exchange and not note. Johnson County Sav. Bank v. Kramer [Ind. App.] 86 NE 84.

**19.** Express order upon foreign bank to pay to certain person a certain sum in local currency "on presentation of this check, out of our balance," held not a chattel, the de-

by endorsement by the payee,[20] but such an indorser will be held liable as the maker of a bill where the evidence shows that the indorsement was made with such intention.[21]

*Elements of negotiability.* See 10 C. L. 992—The promise constituting the obligation of the maker of a negotiable instrument must be unconditional.[22] The promise must usually be for the payment of money,[23] though this rule is not of universal application.[24] A recital will not destroy negotiability unless it in some way qualifies the promise or renders it uncertain,[25] and so also with regard to collateral stipulations.[26]

The time of performance of the obligation evidenced by the instrument must be certain.[27] The date of payment is not rendered indefinite by a provision giving the holder an option to extend the time of payment, where the note is expressly payable on or before a certain date.[29] Negotiability is not destroyed by a stipulation waiving presentment, protest and notice.[29]

§ 2. *Contractual elements, requisites and validity. A. Of the instrument itself. In general.*[30] See 10 C. L. 994—The creation and validity of a negotiable instrument is controlled by the principles applicable to contract generally,[31] and hence it must be properly and sufficiently executed [32] by one having proper mental capacity [33] and due

livery of which would terminate drawer's liability. Moy Sie Tighe v. Fargo, 61 Misc. 181, 112 NYS 927.

**20.** Smith Sons Gin & Mach. Co. v. Badham, 81 S. C. 63, 61 SE 1031.

**21.** Smith Sons Gin & Mach. Co. v. Badham, 81 S. C. 63, 61 SE 1031. Payments by endorser after making such endorsement tend to show obligation created by the endorsement. Id.

**22.** National Council K. & L. of S. v. Hibernian Banking Ass'n, 137 Ill. App. 175. Draft payable "on presentation of certificate No. 32,004, issued by Knights and Ladies of Security to James Kane, properly released," held not negotiable. Id.

**23.** Title retaining note given as purchase price of machinery held non-negotiable under Sess. Laws 1903, pp. 380, 381, providing that note containing promise to do an act in addition to payment of money is not negotiable. Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 94 P 1039.

**24.** Bill of lading is negotiable under Acts 1898, No. 150, p. 193. Scheuermann v. Monarch Fruit Co. [La.] 48 S 647. See Carriers, 11 C. L. 499, 516.

**25.** Negotiability not destroyed by **recital of security** by way of mortgage. Zollman v. Jackson Trust & Sav. Bank, 238 Ill. 290, 87 NE 297, afg. 141 Ill. App. 265; Farmer v. First Nat. Bank [Ark.] 115 SW 1141. **Description of medium of payment** as current funds does not destroy negotiability. McCormick v. Kampmann [Tex. Civ. App.] 109 SW 492. **Expression of consideration** does not destroy negotiability. Simmons v. Council [Ga. App.] 63 SE 238.

**26.** Negotiability not destroyed by **stipulation for security** by way of insurance. Farmer v. First Nat. Bank [Ark.] 115 SW 1141. Instrument in form of promissory note, but which constituted part of paper containing memorandum of sale of goods and **warranty** thereof, held not negotiable. Harvey v. Dimon, 36 Pa. Super. Ct. 82. Negotiable character is not affected by provision which authorizes **sale of collateral** securities if instrument be not paid at maturity. Gravert v. Goothard [Neb.] 115 NW 559. Negotiability destroyed by stipulation that note was **subject to conditions of contract for purchase** of property for which note was given. Rieck v. Daigle [N. D.] 117 NW 346. Negotiability destroyed by agreement to pay undefined expenses of suit or "reasonable" **attorney's fees.** Smith Sons Gin & Mach. Co. v. Badham, 81 S. C. 63, 61 SE 1031. Note rendered non-negotiable by provision for payment of attorney's fees in case of suit. Clowers v. Snowden [Okl.] 96 P 596.

**27.** Sess. Laws 1903, p. 380, § 5. Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 94 P 1039. Title retaining note giving seller right to take possession of property sold at any time, even before maturity of note, that he deemed himself insecure, held not negotiable. Id.

**28.** First Nat. Bank v. Buttery [N. D.] 116 NW 341. Note with such provision is negotiable under terms of Rev. Codes 1905, §§ 6486, 6309, 6422, since, if such provision destroys the effect of the expressed date of payment, the note becomes payable on demand and is negotiable under § 6309, or if, on other hand, it does express time of payment, it is negotiable under § 486. Id.

**29.** Such waiver being expressly authorized by statute. First Nat. Bank v. Buttery [N. D.] 116 NW 341.

**30. Search Note:** See notes in 4 C. L. 802; 12 L. R. A. 140; 15 Id. 850; 22 Id. 686; 23 Id. 711; 36 Id. 92, 539; 39 Id. 423; 50 Id. 75; 2 L. R. A. (N. S.) 217, 879; 3 Id. 212; 55 A. S. R. 438; 1 Ann. Cas. 611; 2 Id. 430; 4 Id. 539; 7 Id. 804.

See, also, Bills and Notes, Cent. Dig. §§ 1, 2, 4-22, 25-33, 35, 37-39, 41-51, 53, 54, 56 105, 108, 109, 163-166, 212-247, 1372-1376; Dec. Dig. §§ 1-65, 90-115; 7 Cyc. 520, 690; 4 A. & E. Enc. L. (2ed.) 81.

**31.** See Contracts, 11 C. L. 729.

**32.** Execution by mark without attestation held **sufficient.** Jackson v. Tribble [Ala.] 47 S 310. Execution by mark held sufficient without attestation where maker and witness

authority in the premises,[34] and must be delivered [35] by proper authority.[36] Paper executed and delivered conditionally becomes effective as between the parties thereto only upon the performance of the conditions,[37] and where a note intended to be delivered in escrow is wrongfully delivered to the payee, the delivery is ineffectual.[38]

A negotiable instrument imports a consideration,[39] except, of course, where a contrary rule is prescribed by statute,[40] especially where value received is recited,[41] or where the instrument is under seal.[42] The actual consideration, however, may be inquired into,[43] and aside from the effect of negotiation,[44] it is no less essential than in the case of other contracts that there be a consideration [45] that is legal [46] and

both signed by mark; the payee writing in their names. Civ. Code 1896, § 1, held inapplicable to notes. McGowan v. Collins [Ala.] 46 S 228.

**33.** Bade v. Feay, 63 W. Va. 166, 61 SE 348.

**34.** Note in name of corporation. Schwartz v. Horn Michaels Co., 113 NYS 611.

**35.** Growler Copper Co. v. Teti, 221 Pa. 36, 69 A 1124. Note does not become operative until delivered. Mee v. Carlson [S. D.] 117 NW 1033.

**36.** Wife's note delivered by husband. Swearingen's Executor & Trustee v. Tyler [Ky.] 116 SW 331.

**37.** Zimbleman v. Finnegan [Iowa] 118 NW 312. Conditions of delivery may be shown, aside from effect of negotiation. Great Northern Moulding Co. v. Bonewur, 128 App. Div. 831, 113 NYS 60. It is competent to prove that a note was not delivered with the intent that it should not become a complete contract in praesenti, but that it was to take effect only upon certain conditions. Paulson v. Boyd, 137 Wis. 241, 118 NW 841. As where note was delivered under agreement that it was to be renewed for eighteen months, at expiration of which time maker was to have election to take certain mining stock or, on other hand, to have note canceled. Id. Oral agreement to such effect did not contradict written agreement evidenced by note. Id. Where defendant gave plaintiff check as deposit on conditional contract for purchase of fixtures from plaintiff, with distinct understanding that if certain brewing company furnished fixtures to defendant there was to be no contract with plaintiff and check was to be returned, and thereafter defendant notified plaintiff that brewing company had furnished fixtures, plaintiff could not recover on check. Shulman v. Damico, 115 NYS 90. **Understanding as to securing other signatures** must be based upon an agreement of the parties. Zimbleman v. Finnegan [Iowa] 118 NW 312. Persons signing note as sureties on condition that signature of another would be procured, failure to procure such other signature absolves such persons from liability. Bank of Benson v. Jones, 147 N. C. 419, 61 SE 193.

**38.** Where note delivered to treasurer of corporation payee to be delivered to third person in escrow was delivered to corporation. Growler Copper Co. v. Teti, 221 Pa. 36, 69 A 1124.

**39.** Culbertson v. Salinger [Iowa] 117 NW 6; Arnett v. Pinson, 33 Ky. L. R. 36, 108 SW 852. Laws 1897, p. 727, c. 612, § 50. Joveshof v. Rockey, 58 Misc. 559, 109 NYS 818. Rule at common law. Purcell v. Armour Packing Co., 4 Ga. App. 253, 61 SE 138. Instrument itself is prima facie evidence of consideration. Gilpin v. Savage, 60 Misc. 605, 112 NYS 802; Bing v. Bank of Kingston [Ga. App.] 63 SE 652. Promissory note imports consideration. Zimbleman v. Finnegan [Iowa] 118 NW 312. The **words "value received"** import a consideration. Mussey v. Dempsey, 113 NYS 271. A **check** imports ite own consideration in the sense that a consideration will be presumed until the contrary appears, regardless of whether it is a specialty under Civ. Code 1895, § 3634 et seq. Purcell v. Armour Packing Co., 4 Ga. App. 253, 61 SE 138.

**40.** Acts 1891, p. 296, c. 162 (Kirby's Dig. §§ 513, 514), making notes given for patent right on patented articles void unless they show such consideration on their face, held not unconstitutional. Columbia County Bank v. Emerson [Ark.] 110 SW 214.

**41, 42.** Bing v. Bank of Kingston [Ga. App.] 63 SE 652.

**43.** Great Northern Moulding Co. v. Bonewur, 128 App. Div. 831, 113 NYS 60.

**44.** See post, § 5B.

**45.** Duggan v. Monk [Ga. App.] 62 SE 1017; Dewey v. Bobbitt [Kan.] 100 P 77; Tucker v. Michaels, 112 NYS 1044; Baldwin v. Self [Tex. Civ. App.] 114 SW 427; Iowa Nat. Bank of Ottumwa v. Sherman [S. D.] 119 NW 1010. As between original parties, a check must be supported by a consideration. Purcell v. Armour Packing Co., 4 Ga. App. 253, 61 SE 138.

**Partial failure of consideration** is a defense pro tanto. City Deposit Bank of Columbus v. Green, 138 Iowa, 156, 115 NW 893.

**46.** Purchase of futures held not legal consideration. See Ann. Codes 1892, § 2117. Gray v. Robinson [Miss.] 48 S 226. Defense that notes were executed to procure immunity from prosecution for receiving stolen goods held not sustained where there was neither allegation nor proof that, at the time the notes were given, any criminal prosecution was pending against the maker, or that he was, in fact, guilty of any offense. Rueping Leather Co. v. Watke, 135 Wis. 616, 116 NW 174. Knowledge acquired after cashing check that money was intended to be used for gaming purposes held not to render check invalid. Camas Prairie State Bank v. Newman [Idaho] 99 P 833.

**Partial illegality** of consideration invalidates whole note. First Nat. Bank of El Paso v. Miller, 235 Ill. 135, 85 NE 312. Il-

sufficient.[47] Lack or failure of consideration is distinguished from breach of the contract evidenced by the note,[48] or of the contract pursuant to which the note is given,[49] but it is held that failure of consideration may consist in a breach of condi-

legality of $400 of consideration for promissory note of $1,000 held fatal to whole. Id. Note given in part for pre-existing debt and part to secure discontinuance of criminal prosecution held invalid. Stanard v. Sampson [Okl.] 99 P 796.

47. In suit between maker and payee, on purchase-money note, maker may defeat or limit amount of recovery thereon by proving in one case a total unexecuted nonperformance on the part of the vendor of his contract to deliver the property, or loss, on part of vendee of the benefit of the contract, occasioned by want of title in vendor, and in other case refusal of vendee to accept property and notice of his intention not to do so given before title passed; all on the theory of failure of consideration in whole or in part. Acme Food Co. v. Older [W. Va.] 61 SE 235.

**Held insufficient:** Where agent of seller receives commission of latter, a note executed by buyer representing additional bonus or commission on sales is, unless expressly agreed to, without consideration and voidable. Shelton Implement Co. v. Schieck [Neb.] 116 NW 951. **Subscription to stock** before company is incorporated is not a valid consideration. Avon Springs Sanitarium Co. v. Kellogg, 125 App. Div. 51, 109 NYS 153. **Indebtedness of maker to payee principal** held no consideration for note payable to agent personally, principal not having directed making of note in such manner and the indebtedness to principal not having been satisfied by the note. Roberts v. Feringer [Tex. Civ. App.] 113 SW 149. Note given in consideration of **assignment of mortgage** held without consideration in that mortgage was comparatively valueless. Mussey v. Dempsey, 113 NYS 271.

**Held sufficient:** Evidence held to show consideration for note executed by depositor to bank, such note being held not a mere voucher for deposit withdrawn. Boothe v. Farmers' & Traders' Nat. Bank [Or.] 98 P 509. Note given by one of several purchasers of interest in patent right to copurchaser held given in consideration of money advanced by latter to pay former's part of purchase price and not merely as evidence of interest of parties in prospective proceeds of sale of interest purchased. Mann v. Urquhart [Ark.] 116 SW 219. **Where deed is ineffectual to pass title,** legal or equitable title, because witnessed by interested party, yet grantee sued on note for deferred payment does not show total failure of consideration by showing such facts, it being presumed that warranty deed was sufficient memorandum of sale to satisfy statute of frauds, so that specific performance could be had, no right of innocent third parties appearing. Andersen v. Young, 74 N. H. 428, 69 A 122. **Obligation within statute of frauds** held sufficient to support note given in settlement thereof. Mohr v. Rickgauer [Neb.] 117 NW 950. **Difference between solvent and insolvent signer of note** constitutes valuable consideration to another who signs, relying on financial responsibility of those who join as makers. City Deposit Bank of Columbus v. Green, 138 Iowa, 156, 115 NW 893. **Subscription for stock** in existing corporation. Avon Springs Sanitarium Co. v. Kellogg, 125 App. Div. 51, 109 NYS 153. **Delivery of merchandise to third person** in exchange for check under arrangement with maker held sufficient consideration. Purcell v. Armour Packing Co., 4 Ga. App. 253, 61 SE 138. **Cancellation of mortgage** and note secured thereby held valuable consideration for execution of new note by owner of mortgaged property, who had assumed payment of mortgage note, and by others who had become associated with him in the ownership of such property. Kettner v. Shippy [Cal. App.] 96 P 912. Notes executed in **settlement of claim** against maker for purchase of stolen property held based upon sufficient consideration. Rueping Leather Co. v. Watke, 135 Wis. 616, 116 NW 174. **Compromise** of disputed claim. Williams v. First Nat. Bank, 20 Okl. 274, 95 P 457. Notes given by lessee of part of building to lessee of other part to prevent latter from making a certain sublease held supported by valid consideration, without regard to first lessee's right to accomplish the same thing by enforcing restrictions contained in his lease. Rosenblum v. Blaser, 115 NYS 219. Consideration held sufficient waiver of legal right. **Withdrawal of objection to widow's allowance** held sufficient consideration for widow's promise to pay creditor's claim if not paid by estate. Golding v. McCall [Ga. App.] 63 SE 706. **Abandonment of land allotment contest** before commission to the Five Civilized Tribes of Indians. Williams v. First Nat. Bank, 20 Okl. 274, 95 P 457. No failure on ground that payee had no interest in premises conveyed and for which note was given, where conveyance was a mere **quitclaim** purporting to convey only such right as payee might have. Id. Conditions assumed on the part of the party to whom it is delivered. Note given to trade union in earnest for maker's observance of agreement with union held supported by **conditions assumed** by union. Simers v. Halpern, 114 NYS 163. **Antecedent debt.** Acts 1904, p. 220, c. 102, § 26. Hermann's Ex'r v. Gregory [Ky.] 115 SW 809. Where note was executed to one who had paid off debt of maker, it was executed for value. Id. Notes given for pre-existing indebtedness on consideration that maker, a commercial firm, be allowed to sell its stock to pay creditors and that the payee furnish it new stock held for valuable consideration. Richardson v. Wren [Ariz.] 95 P 124. Receipt of note as security for debt or forbearance to sue upon a present claim or debt, or the giving of an extension of time to an imputed debtor, is a sufficient consideration. Zimbleman v. Finnegan [Iowa] 118 NW 312.

48. Failure to keep promise constituting consideration for note held not failure of consideration. Clarke v. Newton, 235 Ill. 530, 85 NE 747, afg. 138 Ill. App. 196.

49. Where note is given for purchase

tions.[50] A promissory note cannot operate as a gift, for, as such, it would be unexecuted and incomplete, amounting only to a promise to give,[51] but a note in the nature of a testamentary disposition of property will not be declared invalid by reason of disparity between the amount thereof and the value of the consideration.[52] Where the maker seeks to avoid liability on the ground of failure of consideration, he must return the consideration if possible,[53] unless such consideration is totally worthless.[54] The defense of lack or failure of consideration is available to sureties,[55] but defenses based upon the legality or sufficiency of the consideration between the maker and the payee are not available to an indorser as against an indorsee.[56]

As in the case of other contracts, a negotiable instrument is vitiated by fraud [57] or duress [58] in its inception, the distinction between negotiable instruments and other contracts in this connection being of peculiar importance only with reference to the effect of negotiation,[59] and in the latter connection the distinction between fraud and in the inducement and fraud in the factum also becomes important.[60] Fraud may be perpetrated in connection with the execution of a negotiable instrument with reference to the signatures of coparties,[61] the nature of the instrument executed,[61a] or the consideration.[62] As in other cases, the elements of fraud legally cognizable must exist, and one who signs a note cannot set up a defense that he did not read the fine print on its face,[63] nor can fraud generally be predicated upon a promise inducing the

money of property, the contract constitutes valuable consideration for note, and action may be maintained on note, even though property was never delivered and title thereto never passed. Acme Food Co. v. Older [W. Va.] 61 SE 235.

**50.** Consideration of note given to university in consideration of certain scholarship held not to have failed by reason of consolidation of university with college. Miller v. Central University [Ky.] 112 SW 669. Where payee of note given for patent-right territory procured it to be executed by stipulating with maker that he, the payee, would furnish experienced men to canvass for maker and sell enough territory to pay off note, held breach of such stipulation constituting failure of consideration. Wilson v. Carter, 4 Ga. App. 349, 61 SE 494. Plea alleging that check was given to plaintiff by defendant without any present consideration, but with understanding that if third person would turn certain money over to defendant at future time check would be paid out of such money, and that such money had never been turned over to defendant, held to state a good defense. Purcell v. Armour Packing Co., 4 Ga. App. 253, 61 SE 138.

**51.** Bade v. Feay, 63 W. Va. 166, 61 SE 348.

**52.** Note given to near relative by person in declining years, by way of compensation or reward for services rendered and to be rendered. Bade v. Feay, 63 W. Va. 166, 61 SE 348. That such a note so given calls for a larger sum than the services were probably worth does not invalidate it on the ground of failure of consideration. Id.

**53, 54.** Iowa Nat. Bank of Ottumwa v. Sherman [S. D.] 119 NW 1010.

**55.** Duggan v. Monk [Ga. App.] 62 SE 1017. Available to accommodation indorser. Osborne v. Fridrich [Mo. App.] 114 SW 1045. See post, this subsection, subdivision Accommodation Paper.

**56.** See post, this section, subsection C., subdivision Consideration.

**57.** Iowa Nat. Bank of Ottumwa v. Sherman [S. D.] 119 NW 1010; City Nat. Bank of Columbus v. Jordan [Iowa] 117 NW 758. Fraud inducing giving of check for note. Marietta Fertilizer Co. v. Beckwith, 4 Ga. App. 245, 61 SE 149. **Facts held to show fraud** in inception of note given in aid of construction of railroad. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785.

**58.** Siegel v. Oehl, 110 NYS 916. Notes voluntarily executed by one in settlement of a claim against him as purchaser of stolen property held not executed under duress. Rueping Leather Co. v. Watke, 135 Wis. 616, 116 NW 174.

**59, 60.** See post, § 5B, As to Equities and Defenses.

**61.** Misrepresentation as to parties who sign notes and substituting therefor insolvent parties. City Deposit Bank of Columbus v. Green, 138 Iowa, 156, 115 NW 893. Securing signature upon representation that others signing would be equally bound, etc., whereas in fact there was secret arrangement whereby some of signers were released. Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068. Collusion between payee and one of makers whereby latter was released and not held liable for his portion of obligation evidenced by note. Cox v. Cline [Iowa] 117 NW 48.

**61a.** Trick, contrivance or artifice, whereby one is induced to sign in one capacity when intends to sign in another. Barco v. Taylor [Ga. App.] 63 SE 224.

**62.** Representations as to horse for which note was given. City Nat. Bank of Columbus v. Jordan [Iowa] 117 NW 758. Execution and delivery of note in consideration of assignment of mortgage held induced by fraud with reference to value of mortgage. Mussey v. Dempsey, 113 NYS 271.

**63.** Bank of Morgan City v. Herwig, 121 La. 513, 46 S 611.

execution of a note,[64] though it may be considered upon an issue of fraud,[65] and the promise itself may be fraudulent by reason of a coexisting intent not to fulfill it.[66] An instrument having its inception in fraud may be validated by ratification, waiver or estoppel.[67] So, also, infirmities arising out of fraud in the inception of a note are cured by a reissue of the note by the maker for a valid consideration, before maturity and with knowledge of the facts.[68] Return of the consideration, if possible, is usually essential to a rescission for fraud.[69] The defense of fraud is available to a surety as well as to the principal,[70] but fraud in the inception of the paper is not available to an indorser as against his indorsee.[71]

A note is not necessarily invalid because its execution involves a penal offense,[72] or because a mortgage given to secure it is invalid.[73]

*Instruments executed in blank.*[See 10 C. L. 968]—At common law, where one signs a blank note and delivers it to another for the purpose of enabling the latter to raise money thereon, the latter may insert whatever sum he pleases in the note,[74] but implied authority to fill in blanks goes no further than to authorize the insertion of that which is necessary to make the obligation speak according to its intended purpose and use,[75] and where the maker of a check does not designate a payee no one else has authority to complete the instrument by writing in the name of a payee, unless it is issued by the payee in such incomplete form.[76] By statute in some states the blank instrument must be filled up in conformity with the authority given by the signer.[77]

*Instruments payable to maker or drawer.*[See 10 C. L. 964]—An instrument payable

64. That officer of plaintiff bank told defendant to buy certain land, and that the bank would buy the purchase-money notes and allow him to pay same from proceeds of resale of land. State Bank of Iowa Falls v. Brown [Iowa] 119 NW 81.

65. State Bank of Iowa Falls v. Brown [Iowa] 119 NW 81.

66. Note secured by promise which payee does not intend to fulfill. Walters v. Rock [N. D.] 115 NW 511.

67. Renewal note given to collection agent personally upon his false representation that he held original note for collection held validated by principal's ratification of agent's acts. Billingsley v. Benefield [Ark.] 112 SW 188. **Payment** without knowledge of one's legal rights and while under same influences which induced execution of paper does not operate as waiver, estoppel or ratification of note so as to preclude defense of fraud and lack of consideration. Slaughter v. Ditto, 33 Ky. L. R. 5, 108 SW 882. Where maker renews note in hands of purchaser, he is estopped to assert fraud in inception of original note. Odbert v. Marquet, 163 F 892.

68. Where comaker of note given for purchase of land arranged with vendor for secret profit to such comaker, under which arrangement part of joint notes were transferred to such comaker, and other maker thereafter purchased his comaker's equity in the land, assuming payment of all purchase-money notes as consideration of such purchase. Curry v. Lafon, 133 Mo. App. 163, 113 SW 246. In such case the doctrine that illegality of consideration of original contract invalidates all subsequent renewals thereof does not apply. Id.

69. Iowa Nat. Bank of Ottumwa v. Sherman [S. D.] 119 NW 1010.

70. City Nat. Bank of Columbus v. Jordan [Iowa] 117 NW 758.

71. See post, this section, subsection C, subdivision, Fraud and Forgery.

72. Note executed in assumed corporate name is valid, notwithstanding Cr. Code, § 220, penalizing such an assumption. First Nat. Bank of Litchfield v. Cox, 140 Ill. App. 98.

73. Mortgage invalid because description of property was insufficient. Foddrell v. Dooley [Ga.] 63 SE 350.

74. Hermann's Ex'r v. Gregory [Ky.] 115 SW 809.

75. First Nat. Bank of Wilkes-Barre v. Barnum, 160 F 245. Does not authorize erasure of written or printed part and insertion of something else, though when signed instrument is mere skeleton of note. Id. Where one indorsed printed form of note in which date, amount and time of payment were all blank, maker was not authorized to change place of payment as printed in form. Id.

76. Reed v. Mattapan Deposit & Trust Co., 198 Mass. 306, 84 NE 469.

77. Note executed in blank to enable person to whom it was delivered to borrow money held filled out and used in conformity with authority conferred by signer, as required by Acts 1904, p. 217, § 102, in order to bind persons becoming parties prior to completion, where it was filled up and made payable to one who had paid debt of person for whose accommodation note was signed in blank, such payment having been made under agreement that such person would secure the note in question as

to the maker or drawer has no legal existence until indorsed by him [78] and negotiated.[79]

*Accommodation paper.*[See 10 C. L. 979]—With reference to its requisites and validity, accommodation paper is in most respects within the category of ordinary commercial paper,[80] but ex vi termini no consideration to the accommodation party is necessary,[81] and hence the holder's knowledge of the accommodation character of the paper does not affect the liability of the accommodation party.[82] On the other hand it follows from the absence of consideration to the accommodation party that no contract is created by his mere execution of the paper and its delivery to the party accommodated,[83] and the accommodation party may cancel his socalled obligation at any time before value has been parted with on the credit of his name [84] or may avail himself of the absence of consideration in any action brought by the party accommodated,[85] and as between such parties the same rule applies to renewals of such a note.[86] There must, however, be a consideration between the party accommodated and the party receiving the paper.[87] Where there is such a consideration, the accommodation party is bound.[88] Aside from the effect of negotiation, accommodation paper becomes effective to bind the accommodation party only where used for the purpose intended by the accommodation party.[89] An accommodation indorsement

security. Hermann's Ex'r v. Gregory [Ky.] 115 SW 809.

**78.** Murphy v. Schock, 135 Ill. App. 550.

**79.** Roach v. Sanborn Land Co., 135 Wis. 354, 115 NW 1102. Instrument in form of bill of exchange payable to order of drawer does not come into existence as such until it is delivered, as well as indorsed, by payee. Stouffer v. Curtis, 198 Mass. 560, 85 NE 180.

**80.** Notes indorsed as accommodation and accepted by payee to secure debt. Bank of Morgan City v. Herwig, 121 La. 513, 46 S 611.

**81.** Consideration between the person accommodated and the person taking the note is sufficient. Marling v. Jones [Wis.] 119 NW 931.

**82.** Hamiter v. Brown [Ark.] 113 SW 1014.

**83.** Macaulay v. Holsten, 114 NYS 611. See post, § 4.

**84.** Queen City Sav. Bank & Trust Co. v. Reyburn, 163 F 597.

**85.** Conrad v. Clarke, 106 Minn. 430, 119 NW 214, rehearing denied, 106 Minn. 430, 119 NW 482. Accommodation maker is not liable to the party accommodated. Asher v. Howard, 33 Ky. L. R. 696, 110 SW 895.

**86.** Conrad v. Clarke, 106 Minn. 430, 119 NW 214, rehearing denied, 106 Minn. 430, 119 NW 482.

**87.** Osborne v. Fridrich [Mo. App.] 114 SW 1045. Accommodation paper has no legal inception until it is negotiated for value. Macauley v. Holsten, 114 NYS 611. Consideration between maker and payee essential to bind accommodation indorser. Osborne v. Fridrich [Mo. App.] 114 SW 1045. Under Laws 1897, p. 727, c. 612, § 54, making absence of consideration a defense as against one not a bona fide holder for value without notice, answer, alleging that paper sued on was made for accommodation of payee, and that plaintiff's indorser secured it from payee by fraud and duress, and that plaintiff received it from such indorser after dishonor, without consideration and with full notice of all the facts, held sufficient as against a motion to strike for priority, though it appeared that there was no diversion of the paper. Weiss v. Rieser, 114 NYS 983.

**88.** Credit given maker of note is sufficient consideration to bind accommodation indorser. Bank of Morgan City v. Herwig, 121 La. 513, 46 S 611. If one elects to make and deliver his promissory notes to another, to be used to pay debts of latter, and they are so used, former cannot defend on ground that he has received no consideration. Central Typesetting Co. v. Ober, 36 Pa. Super. Ct. 291. Debt due from third person is sufficient consideration for note from maker to creditor, provided there be either an express or implied agreement for an extension of time or cancellation of the debtor's liability, and an agreement to extend will be implied if debt is then due and note is made payable at future day. Zimbleman v. Finnegan [Iowa] 118 NW 312. Accommodation indorsement upon strength of which note is accepted by maker's creditor is supported by sufficient consideration. Bowler v. Osborne, 75 N. J. Law, 903, 70 A 149, distinguishing Hayden v. Weldon, 43 N. J. Law, 128, 39 Am. Rep. 551, on ground that in that case note had been delivered to payee and was in his hands when additional indorsement was made. Taking of such paper as conditional payment or as collateral security for antecedent indebtedness constitutes taking for value, provided no restrictions imposed by the accommodation party are violated thereby. Macaulay v. Holsten, 114 NYS 611. Where consideration amounts to diversion of paper, it is insufficient. Id.

**Statute of frauds** is inapplicable. Zimbleman v. Finnegan [Iowa] 118 NW 312.

**89.** Macaulay v. Holsten, 114 NYS 611; Harris v. Fowler, 59 Misc. 523, 110 NYS 987. Fraud of agent in negotiating note and appropriating proceeds or in turning notes over to another party without authority is available as defense to accommodation indorser as against parties not protected under doctrine of bona fide purchasers. Demelman v. Brazier, 198 Mass. 458, 84 NE 856.

secured by the fraud of the payee creates no liability in favor of parties not bona fide purchasers,[90] and so, also, where the consideration for the indorsement is illegal,[91] and the latter defect is not cured by a subsequent waiver of defenses upon giving a renewal.[92] The right of the indorser to defend on the ground of fraud by which the indorsement was induced is not dependent upon a rescission of the contract between the principal parties or upon a return of the consideration therefor.[93]

*Collateral stipulations and agreements.* See 10 C. L. 964—Aside from the question of usury, stipulations for attorney's fees are sustained in some states and held invalid in others.[94] An agreement to extend the time of payment must be based upon a sufficient consideration,[95] and in this connection the rule that reciprocal promises are a sufficient consideration, the one for the other, applies.[96] Such an agreement may be oral.[97] In some instances, a collateral agreement and the note in connection with which it is made are so inseparably connected in their execution that one cannot be impeached without impeaching the other.[98]

(§ 2) *B. Of acceptance.*[99]—See 10 C. L. 973—A draft may be presented by the holder's agent,[1] and even when presented by one not authorized, an acceptance inures to the benefit of the holder.[2] Though when a bill is made payable at a fixed time

**90.** Failure of payee to disclose insolvency of prior indorser in reliance upon whose name the endorsement in question was made. In re Lawrence [C. C. A.] 166 F 239. Indorser of note, given for price of goods sold to maker, held not bound as against seller where indorsement was induced by fraud of latter. Roessle v. Lancaster, 114 NYS 387.

**91.** Compounding felony. In re Lawrence [C. C. A.] 166 F 239.

**92.** In re Lawrence [C. C. A.] 166 F 239.

**93.** Roessle v. Lancaster, 114 NYS 387.

**94.** See Chestertown Bank of Maryland v. Walker [C. C. A.] 163 F 510. Valid in Mississippi. Bank of Duncan v. Brittan [Miss.] 46 S 163. Valid in Maryland. Chestertown Bank of Maryland v. Walker [C. C. A.] 163 F 510.

**Note:** "It is undoubtedly true that in a number of states it is held legal for creditor and debtor to contract that in case the debtor fail to pay upon maturity that then the creditor may recover, in addition to his debt, interest and costs, a reasonable sum for attorney's fees for collection, and this has been held to be the law in Maryland. Bowie v. Hall, 69 Md. 434, 16 A 64, 9 Am. St. Rep. 433, 1 L. R. A. 546; Gaither v. Tolson, 84 Md. 638, 36 A 449. It is also true that in other states such contracts are held void, and in no state where usury laws are in effect are they permitted to be enforced, if such charges are either unreasonable or made a subterfuge, for usurious exactions. A creditor would not, for instance, under the law of Maryland, under such a contract, be permitted to exact a commission of $500 for collecting a $100 debt. Nor would it be permitted to collect a commission of $1,400 'for collecting' a debt of $28,000 which the debtor came forward, an hour after it was due, to pay and before any attorney had been employed to collect it, for, as said in Bowie v. Hall, supra, the purpose of such a provision 'is clearly not to put money above the legal rate of interest into the pocket of the lender, but merely to enable him to get back his money with legal interest, and nothing more.' And this statement of the law is quoted and approved in Gaither v. Tolson, supra. Very interesting discussions touching the validity and effect of this kind of contracts, pro and con, can be found in Wilson Sewing Mach. Co. v. Moreno, 7 F 806, and Merchants' Nat. Bank v. Sevier, 14 F 662, and note; also, note Bowie v. Hall, 69 Md. 434, 16 A 64, 9 Am. St. Rep. 433, 1 L. R. A. 546, and note to Wright v. Traver, 73 Mich. 493, 41 NW 517, 3 L. R. A. 50. Recognizing that the law in Virginia and West Virginia, two other states in this circuit, as set forth in Toole v. Stephen, 4 Leigh [Va.] 581, in regard to this question, is squarely the opposite to that in Maryland, we here distinctly disclaim any purpose to determine the question as an original proposition, because we are not required to do so by the conditions of this case."—From Chestertown Bank of Maryland v. Walker [C. C. A.] 163 F 510.

**95.** Agreement to pay rate of interest specified by past due note is not sufficient consideration to support agreement to extend time until such indefinite time as the defendant could pay note out of his business. First State Bank of Montgomery v. Schatz, 104 Minn. 425, 116 NW 917.

**96.** So held where agreement was to keep money a definite time and pay interest on it. Lahn v. Koep [Iowa] 115 NW 877.

**97.** Lahn v. Koep [Iowa] 115 NW 877.

**98.** In action upon note payable to a corporation, evidence of collateral agreement, made by person purporting to act for corporation in transaction in which note was given, held admissible without proof of the authority of such person to act for the corporation, since if such person had no authority, note as well as collateral agreement was invalid. Penfield Inv. Co. v. Bruce, 132 Mo. App. 257, 111 SW 888.

**99. Search Note:** See notes in 26 L. R. A. 620; 8 Ann. Cas. 612; 11 Id. 284.

See, also, Bills and Notes, Cent. Dig. §§ 106, 107, 110-122, 124; Dec. Dig. §§ 66-72; 7 Cyc. 763; 4 A. & E. Enc. L. (2ed.) 207.

**1, 2.** Mimo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

after its date, presentment for acceptance before that time is not necessary in order to charge the drawer or indorsers, it may be presented for acceptance at any time.[3] Mere delivery to the drawer is not equivalent to an acceptance, though he has sufficient funds of the drawer to pay the bill;[4] but no particular form of acceptance is necessary, and where the holder is assured by the acts and words of the drawee that the paper is good, there is an acceptance.[5] A verbal acceptance is sufficient[6] even though it is made without consideration,[7] but in some states a written acceptance may be required.[8] An acceptance imports consideration to the acceptor[9] and is not dependent upon the acceptor having funds of the drawee,[10] even though the holder knows that the acceptor has no such funds.[11] As against remote parties, such as the payee or indorsee, a failure of consideration involves not merely what the defendant received for his liability but also what plaintiff gave for his title.[12] No consideration from the holder to the acceptor is necessary.[13] The certification of a check operates as an acceptance.[14] An acceptance may be conditional so as to become operative only upon certain contingencies.[15] A promise to accept made by the drawee to the drawer does not amount to an acceptance where it is not acted upon by the holder,[16] even though the promise is in writing,[17] unless the writing is upon the paper itself.[18] An agreement to honor the drafts of a partnership is binding upon the acceptor even after dissolution of the partnership as against persons purchasing or discounting such drafts upon the faith of such promise and without notice of such dissolution,[19] especially where the acceptor knows of the dissolution and fails to notify the party to whom the promise to honor was made.[20] Money paid upon a mistaken acceptance may usually be recovered,[21] but it is incumbent upon the drawee of a bill to be satisfied that the signature of the drawer is genuine, as he is presumed to know the drawer's handwriting, and if the drawee accepts or pays the bill to which the drawer's name has been forged he can neither repudiate the acceptance nor re-

**3.** National Park Bank v. Saitta, 127 App. Div. 624, 111 NYS 927.

**4.** Austin v. Papanti, 197 Mass. 584, 83 NE 1088.

**5.** Where bank stamped draft as paid when presented by payee's agent, and delivered it to such agent to be indorsed by payee, and when such agent inquired as to meaning of draft being stamped as paid bank's officer assured him that it had been credited to payee, it was held that there was an acceptance both verbal and written. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

**6.** Hines Lumber Co. v. Anderson, 141 Ill. App. 527; Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

**7.** Hines Lumber Co. v. Anderson, 141 Ill. App. 527. Not within **statute of frauds.** Id.

**8.** Laws 1897, p. 727, c. 6, 12, § 221, authorizing holder to require drawee to accept in writing on bill, is not confined to sight bills, but seems to be applicable to all bills of exchange. National Park Bank v. Saitta, 127 App. Div. 624, 111 NYS 927.

**9.** See Laws 1897, p. 727, c. 612, § 50. National Park Bank v. Saitta, 127 App. Div. 624, 111 NYS 927.

**10.** Huston v. Newgass, 234 Ill. 285, 84 NE 910, rvg. 135 Ill. App. 117.

**11.** Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

**12.** There is no failure of consideration unless there is a failure in both of these respects. National Park Bank v. Saitta, 127 App. Div. 624, 111 NYS 927.

**13.** National Park Bank v. Saitta, 127 App. Div. 624, 111 NYS 927.

**14.** Blake v. Hamilton Dime Sav. Bank Co. [Ohio] 87 NE 73.

**15.** Fisher v. Frank [Cal. App.] 97 P 95.

**16.** Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

**17.** Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

**NOTE:** In England the reliance of the holder upon a written acceptance is held to be material, but the view generally adopted in the United States is that unless the holder takes the bill in reliance upon the drawee's promise such promise does not constitute an acceptance. Coolidge v. Payson, 15 U. S. (2 Wheat.) 66, 4 Law. Ed. 185; Sckimmelpennick v. Bayard, 26 U. S. 264, 7 Law. Ed. 138; Boyce v. Edwards, 29 U. S. 711, 7 Law. Ed. 799; Bank v. Rice, 98 Mass. 288, 107 Mass. 37, 9 Am. Rep. 1.—From Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

**18.** Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

**19, 20.** Huston v. Newgass, 234 Ill. 285, 84 NE 910, rvg. 135 Ill. App. 117.

**21.** Where payee telegraphed acceptor to know if latter would accept drawer's draft "for cattle," and acceptor replied yes, acceptor could recover such part of money paid under such acceptance as represented a forfeiture for drawer's failure to complete contract for purchase of cattle from payee in future. First State Bank v. Larned, Kan. v. McGaughey [Tex. Civ. App.] 108 SW 475.

cover the money paid [22] even from the person to whom it was paid,[23] and even though the position of the parties has not been changed.[24] In such case drawee can acquire no rights as against the person to whom payment was made or any person interested in sustaining the payment as valid,[25] nor be subrogated to the right of any such party.[26]

(§ 2) *C. Of negotiation or transfer and contracts incidental thereto.*[27]—See 10 C. L. 973, 974

*Authority and capacity to negotiate, transfer or indorse.*See 10 C. L. 973, 974—The agency of the person accommodated to negotiate the paper does not necessarily expire at the maturity of the paper.[28] A valid transfer or indorsement can be made only by one duly authorized in the premises,[29] but an unauthorized indorsement may become effective by reason of ratification.[30] The maker by executing the instrument admits the capacity of the payee to endorse and is estopped to deny it.[31]

*Intent of parties.*See 10 C. L. 973, 974—There must be a concensus of the minds of the transferor and the transferee to effect a transfer,[32] but the expressed intent of the transferor to sell is not essential.[33]

*Necessity of indorsement.*See 10 C. L. 973—The payee's indorsement is usually essential to a transfer,[34] unless, of course, it is otherwise provided by statute.[35] Indorsement is not essential, however, to the negotiation of an instrument payable to bearer,[36] and within this rule paper indorsed in blank becomes payable to bearer,[37] and so, also, where the name of the payee is left blank, the instrument passes by de-

**22.** See Banking and Finance, 11 C. L. 370. Title, Guarantee & Trust Co. v. Haven, 126 App. Div. 802, 111 NYS 305; Trust Company of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84.

**23, 24, 25, 26.** Title, Guarantee & Trust Co. v. Haven, 126 App. Div. 802, 111 NYS 305.

**27. Search Note:** See notes in 27 L. R. A. 404; 29 A. S. R. 297; 72 Id. 676; 1 Ann. Cas. 275.

See, also, Bills and Notes, Cent. Dig. §§ 422-434, 437-493, 495-505, 510, 512, 513, 515-523; Dec. Dig. §§ 176-222; 7 Cyc. 783; 4 A. & E. Enc. L. (2ed.) 246.

**28.** Hence purchaser for value after maturity may enforce note against maker in absence of restrictions upon authority of person accommodated to use the paper after maturity. Marling v. Jones [Wis.] 119 NW 931.

**29.** Treasurer held to have had authority to make indorsement in question for corporation. Van Norden Trust Co. v. Rosenberg, 114 NYS 1025. Bank authorized to deal in commercial paper is bound by its indorsement or guaranty by their executive officers. State v. Corning State Sav. Bank [Iowa] 115 NW 937. Assistant cashier held to have had authority to transfer bank's title to note in settlement of balance due another bank on the day's clearing, though settlement was made after banking hours and was contrary to usual method of making such settlements in that payment was made in bills of exchange owned by bank instead of by draft upon a correspondent. Forbes v. First Nat. Bank [Okl.] 95 P 785.

**30.** Commercial L. & T. Co. v. Mallers, 141 Ill. App. 460. Where corporation ratifies indorsement made by officer, it cannot thereafter repudiate same. Van Norden Trust Co. v. Rosenberg, 114 NYS 1025. Forgery cannot be predicated upon indorsement by one partner of name of copartner where partnership thereafter indorses paper in partnership name and negotiates it. Richards v. Street, 31 App. D. C. 427. Under negotiable instrument law generally and under express provision of Laws 1905, p. 250, § 60 [Ann. St. 1906, § 463-60], maker is estopped to deny capacity of payee to indorse. Young v. Gaus [Mo. App.] 113 SW 735.

**31.** Both under negotiable instrument law generally and under express provision of Laws 1905, p. 250, § 60 (Ann. St. 1906, § 463-60). Young v. Gaus [Mo. App.] 113 SW 735. Estopped to deny capacity of foreign corporation, to which note was payable, to assign it, though corporation had not complied with conditions essential to its right to do business in the state. Id.

**32.** Prather v. Hairgrove, 214 Mo. 142, 112 SW 552.

**33.** Acceptance of amount of note by agent authorized to collect or to sell, and transfer of note, indorsed by payee, to person making the payment, held a sale of the note. note. Prather v. Hairgrave, 214 Mo. 142, 112 SW 552.

**34.** Check. Hellerman v. Schantz, 112 NYS 1094. Paper payable to maker must be indorsed by him. Murphy v. Schoch, 135 Ill. App. 550.

**35.** By statute assignee may sue in own name on unindorsed paper. Hall v. First Nat. Bank [Tex. Civ. App.] 115 SW 293, afd. 116 SW 47.

**36.** Trust Co. of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84.

**37.** South v. People's Nat. Bank, 4 Ga. App. 92, 60 SE 1087; Sill v. Pate, 133 Ill. App. 423; Prather v. Hairgrove, 214 Mo. 142, 112 SW 552; Roach v. Sanborn Land Co., 135 Wis. 354, 115 NW 1102; Voss v. Chamberlain [Iowa] 117 NW 269.

livery,[38] and any bona fide purchaser has authority to fill in his own name.[39] When an instrument is knowingly made payable to a fictitious person, it is payable to bearer and passes by delivery without indorsement,[40] and within this rule a person whose name is used as a mere pretense, without any intention that he shall receive either the paper or the proceeds thereof, is a fictitious person.[41] The rule at common law and under the statutes of the various states is that the maker's or drawer's knowledge of the fiction is essential to render the paper payable to the bearer as such,[42] and in this respect it differs from the rule under the English Bills of Exchange Act, under which the sole test is the fictitiousness of the payee, though the test as to what constitutes a fictitious payee is the same under both rules.[43] Where the instrument passes by delivery, the sufficiency of an indorsement to pass title is immaterial.[44]

**38, 39.** People v. Gorham [Cal. App.] 99 P 391.

**40.** See Laws 1897, p. 724, c. 612, § 28. Seaboard Nat. Bank v. Bank of America [N. Y.] 85 NE 829; Trust Company of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84. Rev. Laws, c. 73, § 26. Boles v. Harding, 201 Mass. 103. 87 NE 481. P. L. 1901, 194. Snyder v. Corn Exch. Nat. Bank, 221 Pa. 599, 70 A 876.

**41.** Trust Co. of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84; Boles v. Harding, 201 Mass. 103, 87 NE 481; Snyder v. Corn Exch. Nat. Bank, 221 Pa. 599, 70 A 876.

**42.** Boles v. Harding, 201 Mass. 103, 87 NE 481; Seaboard Nat. Bank v. Bank of America [N. Y.] 85 NE 829. Such paper is not payable to bearer where it is payable to real person whom maker or drawer intends to be real as well as the formal payee, though person receiving paper as purported representative of payee does not intend that latter shall receive paper or proceeds thereof, as where one purporting to act as agent for firm secured with forged check of such firm a bank draft payable to another firm, indorsed name of latter on draft and had it collected to his own credit. Seaboard Nat. Bank v. Bank of America [N. Y.] 85 NE 829.

**43.** Boles v. Harding, 201 Mass. 103, 87 NE 481.

**NOTE:** At common law and under the statutes of the various states the maker's or drawer's knowledge of the fiction is essential to authorize a recovery by the bearer as such. Boles v. Harding, 201 Mass. 103, 87 NE 481; Seaboard Nat. Bank v. Bank of America [N. Y.] 85 NE 829; Gibson v. Hunter, 2 H. Bl. 187; Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 35 NE 982, 37 Am. St. Rep. 596, 23 L. R. A. 584; Shipman v. Bank of State, 126 N. Y. 318, 27 NE 371, 22 Am. St. Rep. 821, 12 L. R. A. 791; Armstrong v. Pomeroy Nat. Bank, 46 Ohio St. 512, 22 NE 866, 15 Am. St. Rep. 655, 6 L. R. A. 625. Selover on Negotiable Instruments, p. 70. The basis of this phase of the rule is that without knowledge the maker or drawer is not estopped. Boles v. Harding, 201 Mass. 103, 87 NE 481. The element of knowledge was dispensed with by the English Bills of Exchange Act 1882, § 7, subd. 3; Bank of England v. Vagliano Bros. [1891] App. Cas. 107; Clulten v. Altenborough [1897] App. Cas. 90; Boles v. Harding, 201 Mass. 103, 87 NE 481; Trust Co. of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84. But even under this act which for most intents and purposes makes maker's or drawer's intention immaterial an instrument made to an actual person whose name is used as a mere pretense and without any intention that he shall receive either the paper or the proceeds thereof is payable to bearer and passes by delivery without indorsement. Bank of England v. Vagliano Bros. [1891] App. Cas. 107; Clulten v. Altenborough [1897] App. Cas. 90; Boles v. Harding, 201 Mass. 103, 87 NE 481; Snyder v. Corn Exch. Bank, 221 Pa. 599, 70 A 876; Trust Co. v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84; Coggill v. American Exch. Bank, 1 N. Y. 113, 49 Am. Dec. 310; Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 35 NE 982, 37 Am. St. Rep. 596, 23 L. R. A. 584; Shipman v. Bank of State, 126 N. Y. 318, 27 NE 371, 22 Am. St. Rep. 821, 12 L. R. A. 791. Sometimes cited to the contrary of the last above stated doctrine, is readily distinguished on the ground that the maker was imposed upon and thought that the payees would really receive the paper or the proceeds thereof as intended by the maker. See Snyder v. Corn Exch. Nat. Bank, 221 Pa. 599, 70 A 876; Trust Co. v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84. To same effect as the Shipman Case and distinguishable on the same ground, see Seaboard Nat. Bank v. Bank of America [N. Y.] 85 NE 829.—[Ed.]

**44.** Drawer who paid draft to holder could not recover money back on ground that payee's indorsement was a forgery, where the draft was payable to bearer, since in such case the holder derived title by delivery and not through the forged indorsement. Trust Co. of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84. Title held to have passed by delivery without regard to sufficiency of corporation's indorsement without seal. Hall v. First Nat. Bank [Tex. Civ. App.] 115 SW 293. Where one becomes the holder of note by delivery under indorsement in blank by payee, he is entitled to strike out subsequent indorsement under which he does not claim title, and it is immaterial whether such indorsement is restrictive or not. Jerman v. Edwards, 29 App. D. C. 535. **Statute** authorizing holder to strike out any indorsement which is not necessary to his title is declaratory of law as it existed prior to enactment of statute. Id. Effect of prior blank in-

*Form and sufficiency of indorsement.* See 10 C. L. 973, 974—An indorsement may be sufficient to pass title though containing no formal words of transfer [45] or expressed intent to sell.[46] The fact that an endorser enlarges his liability by a guaranty does not prevent the instrument from passing as a negotiable one,[47] nor will such an indorsement nullify a prior blank indorsement.[48] Actual ownership of paper payable to another party is essential to sustain an indorsement of the payee's name by the holder.[49] The form of an indorsement is immaterial where it is apparent that the indorser intended to be bound thereby,[50] especially where the indorser receives the benefit thereof with full knowledge.[51] Whether an indorsement is that of a corporation or individuals depends upon both form and intent.[52]

*Delivery.* See 10 C. L. 973,974—An indorsement by the holder is ineffective to pass the title from him so long as he retains the paper in his own right.[53]

*Consideration.* See 10 C. L. 973, 974—A consideration is not essential to the transfer of legal title.[54] Ordinarily a failure of the consideration subsequently to the purchase does not constitute in legal conception a failure of the consideration.[55] An indorser's liability is not dependent upon the consideration between the maker and the payee [56] except where the indorsement is for accommodation, which has already been considered.[57]

*Fraud and forgery.* See 10 C. L. 973, 974—As between the immediate parties and all parties with notice, negotiation fraudulently effected is ineffective to put a note into circulation [58] and where, therefore, fraud is shown a prior indorser may show that his indorsement was merely for accommodation.[59] The validity and effect of accommodation indorsements secured by fraud have already been considered.[60] The maker cannot plead fraud or duress whereby the payee was induced to transfer the

dorsement is not affected by subsequent indorsement whereby subsequent indorsee enlarges his liability. Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068.

45. Indorsement of guaranty accompanied by physical delivery of paper pledged by payee as collateral held sufficient. Lowry Nat. Bank v. Maddox, 4 Ga. App. 329, 61 SE 296.

46. Prather v. Hairgrove, 214 Mo. 142, 112 SW 552.

47, 48. Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068.

49. Person purporting to act for another in securing issue of draft to latter could not pass title thereto by indorsing latter's name, his real intention being fraudulent. Seaboard Nat. Bank v. Bank of America [N. Y.] 85 NE 829.

50. Indorsement of corporation. Van Norden Trust Co. v. Rosenberg, 114 NYS 1025. That **name of corporate agent or officer** making the indorsement is not added thereto is immaterial. Id. Where agent or officer does add his name, the indorsement is not invalidated by failure to give his official designation, provided he is in fact authorized to make the indorsement. Id. **Variance as to name** in that indorsement was "Louis Rosenberg, Inc.," whereas name was "L. Rosenberg, Incorporated," held immaterial. Id.

51. Van Norden Trust Co. v. Rosenberg, 114 NYS 1025.

52. Where S. and S. owned corporation named S. & S., the mere facts that a note of the corporation was indorsed S-S., and was sent to plaintiff by corporation's bookkeeper in letter written by him and stating that S. and S. indorsed individually, held insufficient to prove individual indorsement. Reedy Elevator Co. v. Silberstein, 114 NYS 785.

53. Rodriguez v. Merriman, 133 Ill. App. 372.

54. As against an accommodation indorser. Gilpin v. Savage, 60 Misc. 605, 112 NYS 802.

55. Where one was induced to purchase notes from holder thereof upon undertaking of promisor's contract to perform labor, and promisor died without performing such labor, there being no stipulation for abatement of purchase price in case of such death. Potts v. Riddle [Ga. App.] 63 SE 253.

56. Roessle v. Lancaster, 114 NYS 387. Indorser cannot plead usury between maker and payee. Horowitz v. Wollowitz, 59 Misc. 520, 110 NYS 972.

57. See ante, § 2A, subd. Accommodation Paper.

58. Where note was delivered to agent to get it discounted and to account for the proceeds, it was for jury to say whether act of agent in procuring discount and appropriating proceeds was pursuant to prior fraudulent intent, thus rendering the negotiation fraudulent, or was merely an embezzlement of proceeds after having secured the discount as intended by his principal. Demelman v. Brazier, 198 Mass. 458, 84 NE 856.

59. Demelman v. Brazier, 198 Mass. 458, 84 NE 856.

60. See ante, § 2A, subd. Accommodation Paper.

paper to the holder.[61] On the other hand an indorser for value, as distinguished from an accommodation indorser,[62] cannot plead fraud between the maker and the payee.[63] A forged indorsement passes no title,[64] and no rights can be acquired thereunder,[65] except as between parties guilty of negligence and innocent parties suffering therefrom.[66] Where, however, an indorser guarantees a prior forged indorsement he thereby becomes liable to anyone thereafter purchasing the paper upon the strength of such indorsement.[67] Where the instrument passes by delivery a forged indorsement may be disregarded, since in such case the holder does not derive his claim of title through the forgery.[68] The validity of an indorsement and the contract thereby created is not affected by the fact that the note itself is a forgery,[69] the reason being that the indorser's contract is separate and distinct from that of the maker.[70]

§ 3. *Interpretation, nature and scope of contracts. A. In general.*[71]—See 10 C. L. 964—A note ordinarily takes effect on delivery,[72] but the contrary may be shown.[73] So, also, an undated indorsement is presumptively of the same or about the same date as the execution of the note,[74] or at least of a date prior to maturity.[75] A note payable at once is payable within reasonable time.[76] A memorandum or indorsement written on the back of a promissory note at the time of its execution which limits its consideration, affects its operation and is intended to be a part of the contract, must be regarded as a substantive part of the note.[77] A check is presumptively given in payment of an existing debt or for money paid for it at the time.[78]

The extent of liability for expenses of collection under a stipulation therefor is,

**61.** Weiss v. Rieser, 114 NYS 983.

**62.** See ante this section, subsection A, subdivision Accommodation Paper.

**63.** Elliott v. Brady, 192 N. Y. 221, 85 NE 69. Indorsing renewal notes after notice of fraud is **waiver of fraud.** Id.

**64.** Laws 1897, p. 727, c. 612, § 42. Seaboard Nat. Bank v. Bank of America [N. Y.] 85 NE 829. Acceptor may depend on ground of forgery of payee's name. Trust Co. of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84. Hence bank that has collected draft to which payee's indorsement has been forged cannot retain money. Seaboard Nat. Bank v. Bank of America [N. Y.] 85 NE 829.

**65.** Seaboard Nat. Bank v. Bank of America [N. Y.] 85 NE 829; Trust Co. of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84.

**66.** See post, § 5B1.

**67.** Bank discounted for holder a note payable to order of maker, giving holder check payable to maker of note. Holder forged payee's indorsement to check, and delivered it to defendant bank which indorsed it, expressly guaranteeing prior indorsement, and presented it to first bank, which paid it. Held that as first bank could not claim to be bona fide holder for value of note by reason of payment of its own check upon forged indorsement, it had suffered loss to extent of amount of such check, and could recover such amount from bank upon the strength of whose guarantee check had been paid. Boardman v. Hanna, 164 F 527.

**68.** See ante, § 2C1, subd. Necessity of Indorsement.

**69.** Jennings v. Law, 199 Mass. 124, 85 NE 157; State v. Corning State Sav. Bank [Iowa] 115 NW 937.

**70.** See post, § 6C, subd. Indorser.

**71. Search Note:** See notes in 2 L. R. A. (N. S.) 83; 15 Id. 612; 5 Ann. Cas. 149.

See, also, Bills and Notes, Cent. Dig. §§ 248-332; Dec. Dig. §§ 116-135; 7 Cyc. 542; 4 A. & E. Enc. L. (2ed.) 81.

**72.** International Bank v. Enderle, 133 Mo. App. 222, 113 SW 262.

**73.** As where it is understood and agreed that note shall not become operative until performance of some condition. International Bank v. Enderle, 133 Mo. App. 222, 113 SW 262. Fact that note payable to bank was not discounted by bank until date subsequent to delivery and after indorsement by third party, held **evidence** that note was not to take until date of discount. Id.

**74.** McCormick v. Kampmann [Tex. Civ. App.] 109 SW 492; Rodriguez v. Merriman, 133 Ill. App. 372. Rule applied to note payable to the order of the maker. Roach v. Sanborn Land Co., 135 Wis. 354, 115 NW 1102. Where note payable to maker and secured by trust deed on land was dated in 1893, and in 1895 maker conveyed land by quitclaim to claimant, maker's indorsement was presumed to have been made prior to quitclaim, and hence holder's rights under mortgage were superior to those of claimant. Id.

**75.** Baskins v. Valdosta Bank & Trust Co. [Ga. App.] 63 SE 648. See post, § 5B1, subd. Before Maturity.

**76.** Rivers v. Campbell [Tex. Civ. App.] 111 SW 190.

**77.** Burth v. Famers' & Merchants' State Bank, 77 Kan. 475, 94 P 798.

**78.** Primarily it is a receipt to the drawer, when properly indorsed and paid, of the payment to the payee of the amount denominated thereby. Kinahan v. Butler, 133 Ill. App. 459.

of course, a matter of interpretation of the particular stipulation,[79] but it is very generally held that under a stipulation for attorney's fees only such fees can be recovered as have actually been paid or for which the party claiming the recovery has actually obligated himself.[80] In other words, while attorney's fees stipulated for become a part of the principal debt when the contingency specified in the stipulation occurs,[81] such a stipulation is a contract for indemnity and not a liquidation of damages,[82] and hence liability thereunder cannot exceed the liability of the holder to the attorney in connection with the collection of the paper,[83] and the stipulated amount operates as a maximum limit of such indemnity.[84] It follows also that a recovery can be had only for fees necessarily incurred.[85] The fact that notes held as collateral are not due is not conclusive of the necessity of placing them in the hands of an attorney for collection,[86] nor is the liability for attorney's fees in such case affected by the fact that the debt secured is evidenced by a note which also stipulates for attorney's fees;[87] but fees cannot be allowed for collection the expense of which has otherwise been paid.[88] Where the contingency contemplated by the stipulation for fees is postponed upon certain conditions, such conditions must be substantially complied with in order to prevent accrual of liability for fees.[89]

(§ 3) *B. Contracts created by particular signatures and acts.*[90]—See 10 C. L. 964, 968—*Signature as maker* See 10 C. L. 964, 968 presumptively creates a primary contract, that is, the party so signing is presumed to be a maker and liable as such,[91] but the presumption is only prima facie.[92] So, also, the person whose name first appears on a

**79.** Where executor executed collateral note with provision that proceeds of collateral should be applied to payment of note "and all necessary expenses and charges," and thereafter such executor was discharged and an administrator d. b. n. appointed, expense of defending unsuccessful suit by latter to enjoin sale of collateral on ground that executor had no authority to execute note could not be deducted from proceeds of collateral. Allen v. Williamsport Nat. Bank, 36 Pa. Super. Ct. 73.

**80.** Chestertown Bank v. Walker [C. C. A.] 163 F 510.

**81.** If placed in hands of attorney. First Nat. Bank v. J. T. Campbell Co. [Tex. Civ. App.] 114 SW 887. Tender not including attorney's fees held insufficient. Honaker v. Jones [Tex. Civ. App.] 115 SW 649.

**82, 83, 84.** First Nat. Bank v. J. I. Campbell Co. [Tex. Civ. App.] 114 SW 887.

**85.** Where holder, though requested by maker's administrators so to do, refused to present note, which was not due on ground that he had year in which to present same, and thereafter placed it in hands of his attorney, who presented same, attorney's fees could not be recovered. Adoue v. Kirby [Tex. Civ. App.] 114 SW 163. Where defendant made effort to pay note at maturity but could not do so on account of plaintiff's absence, and defendant tendered principal and interest as soon as he learned of plaintiff's return, and made same tender on appearance day, he was not liable for attorney's fees. Haynes v. Halverton [Tex. Civ. App.] 111 SW 166. Attorney's fees held recoverable where notes were placed in hands of attorneys who elected to proceed by sale under trust deed securing note instead of by suit and note was paid after advertisement but before sale. Bank of Duncan v. Brittain [Miss.] 46 S 163.

**86.** Notes held as collateral for note of corporation held properly placed in hands of attorney, together with note secured, upon failure of corporation and appointment of receiver therefor, though some of collateral notes were not due. First Nat. Bank v. J. I. Campbell Co. [Tex. Civ. App.] 114 SW 887.

**87.** First Nat. Bank v. J. I. Campbell Co. [Tex. Civ. App.] 114 SW 887.

**88.** Where note is secured by trust deed, attorney's fees are allowable in collections made by attorney and through his efforts, but not on sums collected by trustee for which trustee charges are made. Turberville v. Simpson [Miss.] 47 S 784.

**89.** Where payee agreed not to place note in hands of attorney if maker notified him by certain hour that money to pay note was ready, personal notice was necessary to put the payee in default of such agreement, mere effort to reach him by telephone being sufficient. Honaker v. Jones [Tex. Civ. App.] 115 SW 649. Payee not put in default upon such agreement by notice at twelve o'clock when he agreed to wait only until eleven o'clock. Id.

**90. Search Note:** See notes in 14 L. R. A. (N. S.) 842.

See, also, Bills and Notes, Cent. Dig. §§ 255-267; Dec. Dig. §§ 118-123; 7 Cyc. 642; 4 A. & E. Enc. L. (2ed.) 81.

**91.** All comakers are presumptively principals. Reynolds v. Schade, 131 Mo. App. 1, 109 SW 629.

**92.** Swearingen's Executor & Trustee v. Tyler [Ky.] 116 SW 331; Reynolds v. Schade, 131 Mo. App. 1, 109 SW 629. Signers may show as against payee that they signed merely as sureties. Duggan v. Monk [Ga. App.] 62 SE 1017.

note is presumed to be a principal,[93] but the order of arrangement is not conclusive, and the first signer may show that he signed only as surety,[94] unless the payee in accepting the paper relied upon the credit of such person as a principal.[95]

*Signature as indorser* See 10 C. L. 963, 974 is ordinarily unaffected by the belief of the person so signing as to the capacity in which he signs, where such belief is not shared by or communicated to the payee,[96] nor is the contract created by a signature as indorser affected by the secret purpose of the party so signing,[97] but a signature as indorser may be characterized by the circumstances under which it is made.[98] There is so much conflict, however, as to the presumption that arises from particular circumstances attending indorsement that no rule of universal application can be stated. Thus, in Missouri, one indorsing otherwise than as payee or indorsee is presumptively a maker,[99] and this presumption continues until overthrown by clear and convincing proof,[1] but where the indorsement appears to have been made before delivery, the indorser is liable as such in the absence of a contrary intention clearly indicated.[2] In Michigan it seems that an indorsement by one not the payee on the back of a note prima facie imports suretyship,[3] but if the indorsement is made before delivery, the indorser becomes prima facie liable as a maker.[4] In Wisconsin a person not the payee signing a note on the back thereof before delivery is deemed an indorser.[5] In North Carolina one indorsing a note in blank before delivery is deemed an indorser unless he clearly indicates in appropriate words a contrary intent.[6] In West Virginia a stranger who indorses negotiable paper at the time it is made is prima facie an original promisor or a guarantor, as the payee at any time may elect.[7] In Tennessee a person indorsing before delivery is deemed an indorser,[8] but this presumption, though statutory, may, as between the original parties, be rebutted.[9] In New York, prior to the enactment of the negotiable instrument law, a person who placed his name on the back of a bill or note before delivery was presumptively a second indorser and not liable to the payee,[10] but this rule was changed by the negotiable instrument law, and now the presumptive capacity in which such a signature is made is controlled by the express language of the statute.[11] The presump-

**93, 94.** Swearingen's Executor & Trustee v. Tyler [Ky.] 116 SW 331.

**95.** Wife who signed note as joint maker in form with her husband could not show that she signed as surety so as to escape liability to payee who relied on her contract as maker. Swearingen's Executor & Trustee v. Tyler [Ky.] 116 SW 331.

**96.** Oexner v. Loehr, 133 Mo. App. 211, 113 SW 727.

**97, 98.** Hackley Nat. Bank v. Barry [Wis.] 120 NW 275.

**99, 1.** International Bank v. Enderle, 133 Mo. App. 222, 113 SW 262.

**2.** Laws 1905, p. 251, § 63 (Ann. St. 1906, § 463). Walker v. Dunham [Mo. App.] 115 SW 1086. **Renewal** note executed after enactment of statute abrogating rule that indorsers before delivery are deemed makers is controlled by such statute, especially where some of the indorsers on the renewal are new. Id. Such statute is not unconstitutional in its application to note given in renewal of note executed prior to statute, where renewal note extinguishes original. Id.

**3, 4, 5.** See Hackley Nat. Bank v. Barry [Wis.] 120 NW 275.

**6.** Revisal 1905, § 2212. J. W. Perry Co. v. Taylor, 148 N. C. 362, 62 SE 423.

**7.** Quesenberry v. Wood [W. Va.] 60 SE 881.

**8.** Laws 1899, p. 159, c. 94, §§ 63, 64. Mercantile Bank v. Busby [Tenn.] 113 SW 390.

**9.** Mercantile Bank v. Busby [Tenn.] 113 SW 390. Intent to be bound otherwise than as maker need not be expressed. Id.

**10.** Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 NE 682.

**11.** Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 NE 682. Under Laws 1897, p. 734, c. 612, § 114, one indorsing before delivery a note payable to a third person is liable to payee. Id. Under Laws 1897, p. 734, c. 612, § 113, defining indorser as one who signs otherwise than as maker, drawer or acceptor, one who indorses in blank before delivery in order to give credit to maker or acceptor is liable as an indorser. Id. Under Laws 1897, c. 612, p. 719, § 113, providing that one signing instrument otherwise than as maker, drawer or acceptor, unless clearly and expressly otherwise stated, and § 114, providing that one not otherwise a party to an instrument who indorses same in blank before delivery is liable as an indorser where the instrument is payable to a third party, one making blank indorsement of note given by lessee of hotel to owner of furniture as part of

tion arising from indorsement after delivery[12] may be rebutted by showing that the paper did not become operative until after delivery,[13] and the payee is not necessarily estopped to make such showing by erroneous book entries dealing with the note as operative from its date,[14] or by entries referring to such indorser as an indorser instead of as a maker.[15]

*Indorsement with guaranty.*—Adding a guaranty subsequent to one's indorsement does not change or affect the character of the latter.[16]

*Reissue of drafts, bills or checks.*[See 10 C. L. 964]—Where the holder of a check has it certified and negotiates it, he becomes a new drawer and is liable as such to subsequent holders.[17]

(§ 3) *C. Contracts of particular parties.*[18]—[See 10 C. L. 964, 969]—*Maker.*[See 10 C. L. 964, 969]—What constitutes a person a maker has already been considered.[19] The maker by executing the instrument admits the existence and capacity of the payee.[20] Joint makers are equally liable in all respects.[21] The liability of the maker to an indorser who has paid the note is upon the note and not for money paid to the maker's use,[22] and where a debt is extinguished by a note,[23] the maker's liability to an indorser who has paid the note is upon the note and not upon the original debt.[24] In other words the maker's failure to pay and the indorser's payment merely restores the note to the indorser as the holder and owner thereof.[25] The contract of an accommodation maker is considered elsewhere.[26]

*Indorser.*[See 10 C. L. 974]—What constitutes a contract of indorsement has already been considered,[27] as has also the contractual elements and validity thereof.[28] A contract of indorsement is neither primary nor absolute but is secondary and conditional,[29] liability thereon being dependent upon certain contingencies inherent ex

price of such furniture which lessor had agreed to purchase and sell to lessee held an indorser as distinguished from a principal obligor, though the indorsement was made in order to comply with an express condition in the arrangement between the lessor and the owner of the furniture that latter would not accept note unless so indorsed. Roessle v. Lancaster, 114 NYS 387.

12. Indorsement after delivery presumptively creates contract of indorsement only, see International Bank v. Enderle, 133 Mo. App. 222, 113 SW 262.

13. International Bank v. Enderle, 133 Mo. App. 222, 113 SW 262. Fact that note was not discounted by bank to which it was payable until date subsequent to date of delivery and after note had been indorsed by third party held evidence that note was not to take effect until after such indorsement. Id.

14. Bank held not estopped by entries of clerk calculating interest from date of note. International Bank v. Enderle, 133 Mo. App. 222, 113 SW 262.

15. International Bank v. Enderle, 133 Mo. App. 222, 113 SW 262.

16. Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068. Signing of guaranty of payment combined with waiver of demand, notice and protest constitutes signers of such indorsement, who are payees of note, indorsers and not guarantors. Voss v. Chamberlain [Iowa] 117 NW 269.

17. Blake v. Hamilton Dime Sav. Bank Co. [Ohio] 87 NE 73.

18. **Search Note:** See notes in 4 C. L. 791; 6 Id. 783, 784, 785; 18 L. R. A. 33; 23 Id. 836; 36 Id. 117, 232; 49 Id. 315; 10 L. R. A. (N. S.) 260, 510; 16 Id. 775; 1 A. S. R. 135; 7 Id. 366; 17 Id. 807; 81 Id. 745; 64 Id. 393; 5 Ann. Cas. 160.

See, also, Bills and Notes, Cent. Dig. §§ 524-630, 632, 634-636, 638, 640-737, 742, 746, 750, 787; Dec. Dig. §§ 223-326; 7 Cyc. 642, 783; 4 A. & E. Enc. L. (2ed.) 258.

19. See ante, this section, subsection B.

20. Both under negotiable instrument law generally and by express provision of Laws 1905, p. 250, § 60 (Ann. St. 1906, § 463-60). Young v. Gaus [Mo. App.] 113 SW 735. Note payable to foreign corporation which had not complied with conditions of right to do business in state, Id.

21. Medlock v. Wood, 4 Ga. App. 368, 61 SE 516. Judgment against maker and indorser as joint principals held erroneous in that attorney's fees were allowed against indorser but not against maker. Clements v. National Bank, 4 Ga. App. 270, 61 SE 146. Notice to one maker of claim for attorney's fees is ineffectual unless served upon his co-obligors. Medlock v. Wood, 4 Ga. App. 368, 61 SE 516.

22. Keys v. Keys' Estate [Mo.] 116 SW 537.

23. See Payment and Tender, 10 C. L. 1147.

24, 25. Keys v. Keys' Estate [Mo.] 116 SW 537.

26. See post, this section and subsec. subd., Accommodation Parties.

27. See ante this section, subsec. B.

28. See ante, § 2C.

29. Link v. Bergdoll, 35 Pa. Super. Ct. 155; Abramowitz v. Abramowitz, 113 NYS 798; Vogel v. Starr, 132 Mo. App. 480, 112 SW 27; Guttman v. Abbott, 110 NYS 376. Indorser being secondarily liable cannot be

lege in the instrument, though not expressed therein;[30] but though secondary and conditional it is otherwise entirely independent,[31] the indorser being bound not by way of assumption of the maker's undertakings but by operation of law whereby the indorser's obligations are clearly defined.[32] Such obligations cannot be extended beyond the limits fixed by law,[33] and do not include collateral undertakings and stipulations of the maker forming no part of the obligation of the instrument as such.[34] The indorser warrants the genuineness of the signature of all prior parties,[35] that the instrument is a valid and subsisting obligation,[36] that payment will be made by the primary party upon presentment at maturity,[37] and that the indorser has title to the paper and the right to transfer it.[38] Indorsement "without recourse" does not avoid the warranty of genuineness and title.[39] An unrestricted indorsement is presumptively a guarantee of payment,[40] but the presumption is only prima facie,[41] and express guaranty of previous indorsements does not necessarily guarantee the payment of the note but only the genuineness of previous indorsements.[42] In the absence of an agreement to the contrary, successive indorsers are liable as between themselves in the order of their indorsement.[43] An agreement between indorsers as to who shall be liable is not binding upon strangers.[44]

The conditions upon which an indorser's liability depends, being likewise the conditions of other kinds of secondary and conditional liability, are treated in a separate subsection.[45] Rights and liabilities under a contract of accommodation indorsement are treated in a subsequent subdivision of this subsection.[46]

*Drawer.* See 10 C. L. 988—The drawer's liability is not terminated by the delivery of a draft as would be the case upon delivery of a chattel.[47] He becomes seconda-

held liable by maker on **note executed for indorser's accommodation**, though latter is also the holder. Abramowitz v. Abramowitz, 113 NYS 798. **A blank indorsement** cannot be filled out so as to make the indorser primarily liable. Clymer v. Terry [Tex. Civ. App.] 109 SW 1129.

30. Link v. Bergdoll, 35 Pa. Super. Ct. 155; Kennedy v. Grover [Tex. Civ. App.] 110 SW 136. By this conditional character indorsement is **distinguished from guaranty.** Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068. Whether guaranty of note stipulates that maker will pay, or whether it stipulates that guarantor will pay, the undertaking is absolute, whether maker is solvent or not, and guarantor must pay or see that it is paid. Id. See Guaranty, 11 C. L. 1663.

31. Keys v. Keys' Estate [Mo.] 116 SW 537; Scarbrough v. City Nat. Bank [Ala.] 48 S 62; Horowitz v. Wollowitz, 59 Misc. 520, 110 NYS 972. **Action on indorsement** is not brought on instrument itself. State v. Corning State Sav. Bank [Iowa] 115 NW 937. By its independent character the contract of indorsement is **distinguished from contract of suretyship.** Keys v. Keys' Estate [Mo.] 116 SW 537.

32. Scarbrough v. City Nat. Bank [Ala.] 48 S 62.

33. Abramowitz v. Abramowitz, 113 NYS 798.

34. Scarbrough v. City Nat. Bank [Ala.] 48 S 62. Waiver of exemption in note, though expressly purporting to be made by maker and indorsers, held not a waiver in writing by one who indorsed note in blank. Id.

35. Scarbrough v. City Nat. Bank [Ala.] 48 S 62. Maker's signature. Jennings v. Law, 199 Mass. 124, 85 NE 157; State v. Corning State Sav. Bank [Iowa] 115 NW 937.

36. Horowitz v. Wollowitz, 59 Misc. 520, 110 NYS 972; Scarbrough v. City Nat. Bank [Ala.] 48 S 62. Indorsement warrants maker's signature as against defense of **fraud** in obtaining such signature. Elliott v. Brady, 192 N. Y. 221, 85 NE 69. **Competency of parties** to contract is warranted. Scarbrough v. City Nat. Bank [Ala.] 48 S 62. **Validity of consideration** is warranted as against defense of usury therein. Horowitz v. Wollowitz, 59 Misc. 520, 110 NYS 972.

37, 38. Scarbrough v. City Nat. Bank [Ala.] 48 S 62.

39. Code Supp. 1902, § 3060-a65. State v. Corning State Sav. Bank [Iowa] 115 NW 937.

40, 41, 42. Johnston v. Schnabaum [Ark.] 109 SW 1163.

43. Bamford v. Boynton, 200 Mass. 560, 86 NE 900.

44. Holder not bound by agreement between defendant and his partner that latter should pay note executed by him individually and indorsed in partnership name. Feiganspan v. McDonnell, 201 Mass. 341, 87 NE 624.

45. See post, this section, subsec. D.

46. See post, this subsec. subd. Accommodation Parties.

47. Moy Sie Tighe v. Fargo, 61 Misc. 131, 112 NYS 927.

rily liable upon acceptance by the drawee,[48] but is not discharged thereby.[49] Where the drawer of a check delivers it to a person representing himself to be the payee, he impliedly represents that such person is the payee.[50]

*Acceptor.*See 10 C. L. 973, 969—Acceptance of a bill or draft is not a collateral but an original and direct undertaking on the part of the acceptor,[51] whereby he guarantees or admits the genuineness of the drawer's signature,[52] admits the possession of funds of the drawer with which to pay the bill or draft,[53] and becomes primarily liable thereon.[54] The acceptor does not guarantee the payee's indorsement.[55] A conditional acceptance becomes absolute upon performance of the conditions.[56] Acceptance for accommodation is considered in the next subdivision of this subsection.

*Accommodation parties.*See 10 C. L. 979—On account of the absence of consideration, the accommodation party is under no contractual obligation to the party accommodated.[57] As between such parties the accommodation party is in effect a surety,[58] and his right of recourse against the party accommodated is, aside from any collateral agreement, that of a surety against his principal,[59] though, of course, the party accommodated may enter into a special agreement to save the accommodation party harmless,[60] but, as an indorser's liability is secondary to that of the maker, when an accommodation maker acquires the paper as a holder he cannot hold the indorser whom he has accommodated liable thereon.[61] As to holders other than the accommodated party, the accommodation party's liability is generally that of a similar party, that is a maker, acceptor or indorser, who receives value.[62] As to parties with notice, an accommodation party is not bound where the paper is diverted from the use for which it was intended.[63] In the absence of an agreement

48. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345; Huston v. Newgass, 234 Ill. 285, 84 NE 910, rvg. 135 Ill. App. 117; Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 NE 682.

49. See post, § 4B, Particular Matters of Discharge.

50. Gallo v. Brooklyn Sav. Bank, 114 NYS 78. See post, § 5B1.

51. Though in effect payment by acceptor pays debt of drawer. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

52. Trust Company of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84; Title, Guarantee & Trust Co. v. Haven, 126 App. Div. 802, 111 NYS 305.

53. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345. See ante, § 2B, Acceptance.

54. Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 NE 682; Huston v. Newgass, 234 Ill. 285, 84 NE 910, rvg. jt. 135 Ill. App. 117; Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345. Upon **certification of check** bank becomes primarily liable. Blake v. Hamilton Dime Sav. Bank Co. [Ohio] 87 NE 73. After delivery of such check drawer cannot stop payment thereon. Id. Acceptor of draft drawn by creditor upon debtor is liable for **interest** from the date of the acceptance. Dalhoff Const. Co. v. Maurice [Ark.] 110 SW 218.

55. Trust Co. of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84.

56. Acceptance conditional upon delivery of goods sold by drawer to drawee. Fisher v. Frank [Cal. App.] 97 P 95. Where acceptance was conditional upon delivery of prunes raised by certain party and represented by certain receipts, acceptor's liability became absolute upon delivery of prunes represented by such receipts, regardless of disposition by raiser of balance of his crop, and hence failure to find as to latter question, though put in issue by answer, was immaterial. Id.

57. See ante, § 2A, subd., Accommodation Paper.

58. Morehead v. Citizens' Deposit Bank [Ky.] 113 SW 501. Accommodation indorser. Osborne v. Fridrich [Mo. App.] 114 SW 1045.

59. Morehead v. Citizens' Deposit Bank [Ky.] 113 SW 501. See Suretyship, 10 C. L. 1768.

60. Estate of decedent payee of accommodation note held bound to reimburse maker where decedent's personal representative paid note to bank which had discounted it, but, instead of canceling it and thus redeeming decedent's promise to protect maker, renegotiated it and maker thereafter paid holder. Klein v. Runk, 114 NYS 1062.

61. Abramowitz v. Abramowitz, 113 NYS 798. See post, § 6, Remedies.

62. Morehead v. Citizens' Deposit Bank [Ky.] 113 SW 501. Accommodation maker is primarily liable, under Laws 1899, c. 83, defining primary liability as absolute liability, and making accommodation maker or acceptor absolutely liable, regardless of holder's knowledge of accommodation character of paper. Wolstenholme v. Smith, 34 Utah, 300, 97 P 329. Accommodation acceptor is primarily liable. Huston v. Newgass, 234 Ill. 285, 84 NE 910, rvg. 135 Ill. App. 117.

63. See ante, § 2A, subd., Accommodation Paper.

to the contrary, where several persons indorse for the accommodation of the maker, they are liable as between themselves as successive indorsers and not as joint sureties.[64]

(§ 3) *D. Conditions of secondary liability.*[65]—See 10 C. L. 975, 976, 978

*In general.* See 10 C. L. 975, 976, 978—The conditions inherent ex lege in the contract of an indorser or drawer apply only where such contract is confined to the limits fixed by law, and not where the contract is extended by special stipulation or guaranty,[66] nor do they apply where the contract, though secondary in form, is primary in fact.[67]

*Presentment and demand.* See 10 C. L. 976—Demand or exhaustion of the principal debtor is not essential to fix liability under a contract of absolute guaranty,[68] but presentment for and demand of payment are ex lege a condition precedent, inherent in the contract itself, to liability under a contract of indorsement as such.[69] Presentment and demand are always prima facie necessary to bind the secondary party,[70] and absolutely necessary when so required by statute,[71] unless waived, and when not required by statute as an absolute condition the circumstances may be such as to dispense with the necessity of presentment and demand.[72] Unreasonable delay in presenting a check will operate as a discharge when it causes injury,[73] but not otherwise.[74] The considerations upon which the holder of a check may excuse failure to forward in due course, as against the drawer, are not applicable as against an indorser.[75]

A demand note must be presented within a reasonable time,[76] and the same rule applies to a check.[77] Where the drawer and the payee of a check both reside

**64.** Liable in order of indorsement. Bamford v. Boynton, 200 Mass. 560, 86 NE 900.

**65. Search Note:** See notes in 4 C. L. 800; 8 Id. 1139; 36 L. R. A. 703; 61 Id. 900; 68 Id. 482; 3 L. R. A. (N. S.) 1079; 4 Id. 132; 13 Id. 303; 14 Id. 616; 30 A. S. R. 158; 5 Ann. Cas. 478; 6 Id.. 281; 10 Id. 1121.

See, also, Bills and Notes, Cent. Dig. §§ 996-1232, 1276-1285; Dec. Dig. §§ 385-424; 7 Cyc. 959, 1051; 4 A. & E. Enc. L. (2ed.) 348.

**66.** Where guaranty of note is absolute, no demand or exhaustion of the maker is required nor any notice required of acceptance or default. Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068.

**67.** Indorser before delivery held a comaker and not entitled to notice. Mercantile Bank of Memphis v. Busby [Tenn.] 113 SW 390. Stockholder who indorsed note of corporation in order to raise money for himself and other stockholders held under Laws 1899, p. 159, c. 94, § 115, dispensing with necessity of notice to endorsers of instruments made for their own accommodation, not entitled to notice. Id. Presentment and notice of dishonor is dispensed with by statute so far as concerns a party accommodated who has no right to expect payment upon presentment. P. L. Pa. 1901, 206, 209, §§ 80, 115. Luckenbach v. McDonald, 164 F 296.

**68.** Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068.

**69.** Guttman v. Abbott, 110 NYS 376; Link v. Bergdoll, 35 Pa. Super. Ct. 155; Kennedy v. Groves [Tex. Civ. App.] 110 SW 136.

**70.** J. W. O'Bannon Co. v. Curran, 113 NYS 359. Presentment and demand essential to bind **indorser of check** unless it appears that at time of indorsement he knew there were no funds in bank to meet it. Start v. Tupper [Vt.] 69 A 151.

**71.** Laws 1897, p. 719, c. 612. J. W. O'Bannon Co. v. Curran, 113 NYS 359.

**72.** See post, this subsection, subdivision, Waiver and Excuse for Nonperformance of Conditions.

**73.** Drawer discharged when injured. Kramer v. Grant, 111 NYS 709; State Bank of Gothenburg v. Carroll [Neb.] 116 NW 276. So held where instead of depositing check for collection holder indorsed and negotiated it. Kramer v. Grant, 111 NYS 709.

**74.** Mere delay on part of holder in presenting it for payment to the bank on which it is drawn will not release drawer and indorser of check from liability, unless such delay caused a loss. State Bank of Gothenburg v. Carroll [Neb.] 116 NW 276. Delay, if any, held not proximate cause of loss. Id.

**75.** Drawer presumed to know of insufficiency of funds, while indorser is entitled to rely on sufficiency. Start v. Tupper [Vt.] 69 A 151.

**76.** Where it was agreed between maker and payee of demand note that same would be presented when payee needed money, a demand eleven months after date was held within reasonable time so as to bind sureties who indorsed note. Becker v. Horowitz, 114 NYS 161.

**77.** Kramer v. Grant, 111 NYS 709; State Bank of Gothenburg v. Carroll [Neb.] 116 NW 276

in the place where the drawee bank is located, the general rule is that a reasonable time for the presentment of the check expires with the expiration of the next day after the date of the check.[78] Under this rule where the check is not received on the day of its date, the time for presentation is extended only to the expiration of the next day after its receipt.[79] As between the drawer and payee, the time is not extended by the latter's indorsement of the check to a third party.[80]

Presentation and demand must be made at the place designated by the parties or the law for that purpose,[81] but the weight of authority seems to be that the law is not over-exacting as to the mode or method of presentation, so long as an opportunity is given to pay or refuse to pay.[82] So far as relates to the necessity of making a personal demand, presentment may be made over the telephone,[83] and such a demand also constitutes presentment at the place where the person upon whom such demand is made receives the telephone message.[84] When a note is made payable at a branch bank located at a certain place, presentment at the office of the principle bank located at another place is insufficient.[85] Actual exhibition of the

**78, 79, 80.** Dehoust v. Lewis, 112 NYS 559.

**81.** Link v. Bergdoll, 35 Pa. Super. Ct. 155.

**82.** See Gilpin v. Savage, 60 Misc. 605, 112 NYS 802.

**NOTE. Mode of presentment and demand:** "Actual and formal presentation of notes has been held unnecessary to charge the indorser under many varying circumstances, as where the maker dies before the maturity of the note and no representative of his estate has been appointed (Daniel on Commercial Instruments, § 1111), or where the maker has absconded (Id. § 1125), or where the maker has removed from the state and taken up his domicile in another state or country (Id. § 1145; Foster v. Julien, 24 N. Y. 28, 80 Am. Dec. 320; Eaton v. McMahon, 42 Wis. 487; Whitely v. Allen, 56 Iowa, 224, 9 NW 190, 41 Am. Rep. 99; McGruder v. Bank of Washington, 22 U. S. [9 Wheat.] 598, 6 Law Ed. 170). It has been held a sufficient demand and refusal, to constitute a dishonor of a note, if the maker, on the day it is due, calls on the holder where the note is and declares his inability to pay, and desires the holder to give notice to the indorser. Gilbert v. Dennis, 44 Mass. [3 Metc.] 495, 38 Am. Dec. 329. So, too, in an action against an indorser, it appeared the holder met the maker of a note on the street, and was refused payment, making no objection to the place of demand, and the court said:

'If demand be made upon the maker elsewhere than the place appointed, and no objection be made at the time, it will be deemed a waiver of any future demand.' King v. Crowell, 61 Me. 244, 14 Am. Rep. 560.

In the case of Tredick v. Wendell, 1 N. H. 80, the note was at the bank. The maker lived within a few rods of the bank, and a letter was sent him, stating that note was at the bank, and requesting payment. Held a sufficient demand to charge the indorser."—From Gilpin v. Savage, 60 Misc. 605, 112 NYS 802.

**83.** Gilpin v. Savage, 60 Misc. 605, 112 NYS 802.

**NOTE. Presentment by telephone:** The holder of the note on the day of maturity, by telephone, "called up" the maker at the place of the presentment, informing him that the note was held for collection. The maker, admitting his liability, refused to pay. Notice of nonpayment was given the indorser. Held, this was a sufficient presentment for payment, exhibition of the instrument being waived and the indorser was liable. Gilpin v. Savage, 60 Misc. 605, 112 NYS 802.

Exhibition of the instrument at presentment for payment may be dispensed with by a refusal to pay on other grounds (Porter v. Thom, 40 App. Div. 34, 57 NYS 479; afd. 167 N. Y. 584, 60 NE 1119), or impossibility (Thackerey v. Blackedt, 3 Camp. 164). At the time of presentment, however, opportunity for payment must be afforded (Parker v. Stroudt, 98 N. Y. 379, 50 Am. Rep. 685; Simpson v. Pacific, etc., Co., 44 Cal. 139), and clearly the telephone gives no such opportunity. While the reasoning of the principal case does not commend itself, the result is supportable. The formal demand itself is not always required, the essential facts to be established as a proper basis for the notice to the indorser, being the certainty of a refusal occurring at the time and place of maturity. Accordingly, the absconding of the maker (Lehman v. Jones, 1 Watts & S. [Pa.] 126), or his death with no administration at the day of maturity (Haslett v. Kunhart, Rice [S. C.] 189; cf. also Hale v. Burr, 12 Mass. 86), are held to make a presentment unnecessary; but the known insolvency of the one primarily liable has not the same effect (Bassenhorst v. Wilby, 45 Ohio St. 340). Telephone conversations, the identity of the parties being known, are admissible as evidence (Galt v. Woliver, 103 Ill. App. 71; see, also, 8 Columbia L. R. 587), and, there being no question of identity in the principal case, the ultimate non-payment of the note, at the time and place of maturity was definitely established and presentment itself was excused.—From 9 Columbia L. R. 185.

**84.** Gilpin v. Savage, 60 Misc. 605, 112 NYS 802.

**85.** "Place of payment" specified by instrument, as used in Laws 1897, p. 736, c. 612, § 133, does not refer to an individual or a corporation or an institution, but to a

paper is for the benefit of the party primarily bound, and may be waived by him.[86] Such exhibition is waived by failure to demand it and refusal to pay on other grounds.[87]

*Default of primary party.*[See 10 C. L. 876]—Liability under a contract of indorsement is conditional upon the default of the party primarily bound,[88] and hence an indorser for whose accommodation the paper is executed cannot be held liable thereon to the accommodation maker, though the latter is also the holder.[89]

*Protest.*[See 10 C. L. 978]—Protest is essential to bind an indorser as such.[90] The term "protest" includes in a popular sense all steps necessary to fix the liability of a drawer or indorser upon the dishonor of commercial paper, and to which he is a party, or accurately speaking, it is the solemn declaration on the part of the holder against any loss to be sustained by him by reason of the nonacceptance or even nonpayment as the case may be, of the bill in question.[91] At common law no formal protest was necessary[92] and this rule still obtains in some of the states,[93] it being sufficient if proper presentment and demand be made and the party secondarily bound be notified of the dishonor.[94] Hence, where such facts are shown, a certificate of formal protest is not essential.[95]

*Notice.*[See 10 C. L. 978]—As a general rule notice of dishonor and protest is essential to bind an indorser or drawer.[96] In the absence of an express waiver,[97] such notice is always prima facie necessary,[98] and is absolutely necessary where it is made by statute an absolute condition of secondary liability.[99] Otherwise it is not necessary under some circumstances.[1]

Verbal notice of dishonor is sufficient,[2] though given to agent of the indorser instead of to the latter himself.[3] The owner of a note who has placed it with another for collection is not obliged either himself to notify the indorser of dishonor of the note or to make inquires as to whether the indorser receives his mail,[4] but having the right to employ an agent for this purpose, he may leave to the agent the execution of the duty thus delegated to the latter, and, aside from the duty of communicating to the agent any information he may have in regard to the matter, he

locality. Ironclad Mfg. Co. v. Sackin, 129 App. Div. 555, 114 NYS 42, rvg. 59 Misc. 281, 110 NYS 161.

86. Gilpin v. Savage, 60 Misc. 605, 112 NYS 802. Though required by statute, Laws 1897, p. 736, c. 612, § 134. Id.

87. Gilpin v. Savage, 60 Misc. 605, 112 NYS 802. Where party upon whom demand was made by telephone refused to pay on ground that he had agreement for renewal. Id.

88. Link v. Bergdoll, 35 Pa. Super. Ct. 155; Vogel v. Starr, 132 Mo. App. 430, 112 SW 27; Guttman v. Abbott, 110 NYS 376.

89. Abramowitz v. Abramowitz, 113 NYS 798. See post, § 6, Remedies.

90. Guttman v. Abbott, 110 NYS 376; Kennedy v. Groves [Tex. Civ. App.] 110 SW 136.

91. Sherman v. Ecker, 59 Misc. 216, 110 NYS 265, rvg. 58 Misc. 456, 109 NYS 678.

92. Demelman v. Brazier, 198 Mass. 458, 84 NE 856.

93. Scarbrough v. City Nat. Bank [Ala.] 48 S 62. Rev. Laws, c. 73, §§ 83, 87. Demelman v. Brazier, 198 Mass. 458, 84 NE 856.

94. Demelman v. Brazier, 198 Mass. 458, 84 NE 856. Sufficient if party sought to be charged is apprised of dishonor and that he is looked to for payment. Scarbrough v. City Nat. Bank [Ala.] 48 S 62.

95. Hence no error can be predicated upon its admission in evidence or upon the allowance of amendments thereto. Demelman v. Brazier, 198 Mass. 458, 84 NE 856.

96. Indorser. Link v. Bergdoll, 35 Pa. Super. Ct. 155; J. W. Perry Co. v. Taylor Bros., 148 N. C. 362, 62 SE 423. Necessary to bind indorser. Kennedy v. Groves [Tex. Civ. App.] 110 SW 136.

97. See post this subsection, subdivision, Waiver of, and Excuse for, Nonperformance of Conditions.

98. J. W. O'Bannon Co. v. Curran, 113 NYS 359.

99. So required by Laws 1897, p. 719, c. 612. J. W. O'Bannon Co. v. Curran, 113 NYS 359; Bacigalupo v. Parrilli, 112 NYS 1040. Rule applied to check. Bacigalupo v. Parrilli, 112 NYS 1040. Under Laws 1897, pp. 739, 741, c. 612, §§ 160, 174, notice of dishonor is essential to bind drawer of check, except, as provided by section 185, when he has no funds at bank to meet check. Cassell v. Regierer, 114 NYS 601. Action cannot be sustained on a check by the payee thereof against the maker without proof of notice of dishonor. Laws 1897, p. 739, c. 612, § 160. Kuflick v. Glasser, 114 NYS 870; Guttman v. Abbott, 110 NYS 376.

1. See post this subsection, subdivision Waiver and Excuse for Nonperformance of Conditions.

2, 3. Scarbrough v. City Nat. Bank [Ala.] 48 S 62.

is bound himself to perform none of the delegated duties.[5] Personal service on an indorser of notice of dishonor is not required, but constructive service will suffice where reasonable diligence is exercised to make it in the manner best adapted to convey actual notice.[6] Notice properly addressed and deposited in post-office is deemed due notice.[7] When the indorser lives in the country and his post-office address is not known to the holder, it is the duty of the latter to make reasonable inquiries, in town or city where the bill is payable, and, in default of more specific information, to address the notice to the nearest post-office.[8] The holder is not justified in all cases, however, in sending the notice to the nearest post-office, but must act in good faith always and with reasonable diligence to learn the place where the indorser receives his mail, and learning it must send the notice there, regardless of whether it be the nearest post-office.[10] The usual rules as to notice to partnerships apply.[11]

*Waiver and excuse for nonperformance of conditions.* See 10 C. L. 979—Present, demand, protest and notice may be waived by the express provisions of the instrument,[12] or the indorsement thereof,[13] or by subsequent conduct.[14] Where not absolutely required by statute, performance of such conditions will not be required when it would be useless,[15] and in some states the necessity thereof is by statute dispensed with in certain cases.[16] Insolvency of the maker is not alone an excuse for failure to give notice of dishonor to an indorser.[17] It seems that a waiver or excuse may be predicated upon the secondary party's receipt of security or indemnity,[18] but a several waiver cannot be predicated upon the receipt of such security

**4, 5, 6.** Vogel v. Starr, 132 Mo. App. 430, 112 SW 27.

**7.** Rev. Laws 1902, c. 73, § 122. Feigenspan v. McDonnell, 201 Mass. 341, 87 NE 624. Notice deemed deposited in post-office when deposited in branch office or letter box. Rev. Laws 1902, c. 73, § 122. Id.

**8, 9.** Vogel v. Starr, 132 Mo. App. 430, 112 SW 27.

**10.** Vogel v. Starr, 132 Mo. App. 430, 112 SW 27. Where notary made inquiries of several persons, etc., and sent notice to wrong town, held notice was sufficient. Id.

**11.** Under Rev. Laws 1902, c. 73, § 116, providing that notice to partner is notice to firm, notice to partner is notice to firm though partnership has been dissolved and defendant has not been informed by his copartner of the protest. Feigenspan v. McDonnell, 201 Mass. 341, 87 NE 624.

**12.** First National Bank v. Buttery [N. D.] 116 NW 341.

**13.** Telegraphed authority "to indorse," what might be termed a renewal note, held to include authority to waive demand, etc., the indorsement on the first note containing such a waiver. State Bank & Trust Co. of Los Angeles v. Evans, 198 Mass. 11, 84 NE 329.

**14.** President of corporation who indorsed corporation's note and thereafter took part in having corporation adjudicated a bankrupt held to have waived presentment, demand, protest and notice, notwithstanding requirement of Laws 1897, p. 736, c. 612, §§ 130, 160, that presentment shall be made and notice given in order to charge indorser. J. W. O'Bannon Co. v. Curran, 113 NYS 359.

**15.** J. W. O'Bannon Co. v. Curran, 113 NYS 359. Prior to Laws 1897, p. 719, c. 612, indorser or drawer could be held liable notwithstanding failure to perform such conditions, where such failure could not possibly operate injuriously. Id.

**16.** Not essential to bind party accommodated. P. L. Pa. 1901, 206, 209, §§ 80, 115. Luckenbach v. McDonald, 164 F 296. Officers and stockholders of corporation which, to their knowledge, had no liquidatable assets, held not entitled to benefit of presentment as to note executed by them in behalf of corporation and indorsed by them individually in order to enable corporation to complete certain contracts. Id.

**17.** Grimes v. Tait [Okl.] 99 P 810.

**18.** See Jordan v. Reed [N. J. Err. & App.] 71 A 280.

**Note:** Defendant in error rested his case upon the doctrine that when an indorser has received full security or indemnity for the amount of a note or bill, or has received money or property for the very purpose of taking up such note or bill at maturity, the holder of the paper is excused from the duty of presenting it for payment, and of giving notice to such indorser of the dishonor. Story on Prom. Notes §§ 281, 282, 357; Story on Bills (4th ed.) §§ 316, 374; Chitty on Bills (9th Lond. ed.) 440, 449, 506, notes. This principle, thus broadly stated, although approved by some eminent authors, such as Story and Kent, and having the countenance of a dictum in Perry v. Green, 19 N. J. Law, 61, 63, 38 Am. Dec. 536, is doubted or denied by other writers (see 2 Dan. on Neg. Inst. (5th ed.) §§ 1129-1134). The stronger cases which apply the principle base the excuse upon the facts that the indorser himself has received enough or all (if not enough) of the maker's property for the purpose of securing the former against his liability, or for the purpose of

or indemnity jointly by several secondary parties and their joint assumption of primary liability.[19]

§ 4. *Discharge. A. In general.*[20]—See 10 C. L. 969, 972—This section is confined to discharge of the obligation of the instrument itself and of contracts growing out of its indorsement, acceptance, etc., as distinguished from discharge of the obligation for which the instrument was given,[21] and to the discharge of the obligations of valid, subsisting contracts, as distinguished from so-called contracts, which are invalid or incomplete,[22] it being a matter of course that a party may cancel an obligation which has not become binding.[23] Discharge as here used must, furthermore, not be confused with release from secondary liability by reason of nonperformance of the conditions prerequisite thereto.[24]

Matters of discharge or abeyance of the original note may be pleaded against the enforcement of a renewal note.[25] An accommodation party is so far a surety as to holders with notice of his accommodation character that he will be discharged by arrangements to his prejudice and without his knowledge with the principal debtor.[26] The fact that a bona fide holder of negotiable paper did not know at the time he took it that one of the apparent makers was merely a surety will not prevent a discharge by acts prejudicial to the surety committed by the holder after he acquires such knowledge.[27]

(§ 4) *B. Particular matters of discharge. Payment.*[28]—See 10 C. L. 969, 972, 974—On the maturity of a note the maker has an absolute right to pay and thus relieve himself from the payment of further interest, and if, without further agreement, he neglects to pay it when due, he still has the right to pay it at any subsequent time.[29] Payment as such operates as a discharge,[30] though it is made by a stranger by mistake.[31] It is essential in this connection, however,

meeting the obligations which he has incurred on behalf of the latter. Corney v. DaCosta, 1 Esp. N. P. 302, 303, approved, arguendo, in Brown v. Maffey, 15 East, 216, 222; Bond v. Farnham, 5 Mass. 170, 171, 173, 4 Am. Dec. 47; Barton v. Baker, 1 Serg. & R. [Pa.] 334, 336, 7 Am. Dec. 620; Mechanics' Bank v. Griswold, 7 Wend. [N. Y.] 165, 166, 167, 170. * * * Acts, admissions or promises after maturity, in order to be evidential of a waiver of presentment and notice, or of an excuse for the want of presentment and notice, must be done or made with full knowledge of the discharge from liability upon the contract of indorsement and must, in form and effect, be unequivocal and unconditional. Barkalow v. Johnson, 16 N. J. Law, 397, 398, 400; Sussex Bank v. Baldwin, 17 N. J. Law, 487, 495, 496; Harrison v. Bailey, 99 Mass. 620, 621, 97 Am. Dec. 63; Thornton v. Wynn, 25 U. S. 183, 187, 189, 6 Law. Ed. 595; Sigerson v. Mathews, 61 U. S. 496, 499, 500, 15 Law. Ed. 989; Woods v. Dean, 32 L. J. K. B. 1, 3, a case better reported here than in 3 Best & Smith. Adapted from Jordan v. Reed [N. J. Err. & App.] 71 A 280.

**19.** Jordan v. Reed [N. J. Err. & App.] 71 A 280. Evidence that defendant and others received property of maker on agreement to take care of note at maturity, or evidence that after maturity a defendant admitted responsibility upon note in common with others, will not support action against such defendant alone as indorser as to whom presentment and notice of dishonor was not necessary. Id.

**20. Search Note:** See notes in 16 L. R. A. (N. S.) 1043.

See, also, Bills and Notes, Cent. Dig. §§ 1276-1285; Dec. Dig. § 425; 7 Cyc. 1005, 1044; 4 A. & E. Enc. L. (2ed.) 495.

**21.** See Payment and Tender, 10 C. L. 1147.

**22.** See ante, § 2, Contractual Elements, Requisites and Validity.

**23.** Accommodation maker may cancel his obligation at any time before value has been parted with upon the credit of his name. Queen City Sav. Bank & Trust Co. v. Reyburn, 163 F 597.

**24.** See ante, § 3D, Conditions of Secondary Liability.

**25.** Holder of note taken by him in renewal of another note secured by mortgage cannot sue on such renewal note while a decree of foreclosure of such mortgage and sale thereunder are in full force and effect. Gibson v. Gutru [Neb.] 120 NW 201.

**26.** Morehead v. Citizens' Deposit Bank [Ky.] 113 SW 501.

**27.** Smith v. First Nat. Bank [Ga. App.] 62 SE 826.

**28. Search Note:** See notes in 22 L. R. A. 785; 8 L. R. A. (N. S.) 944; 9 Id. 581, 698; 10 Id. 129, 734; 13 Id. 204; 14 Id. 376; 5 Ann. Cas. 298, 871; 7 Id. 1007.

See, also, Bills and Notes, Cent. Dig. §§ 1223-1285; Dec. Dig. §§ 426-440; 7 Cyc. 1005; 4 A. & E. Enc. L. (2ed.) 495.

**29.** Lahn v. Koep [Iowa] 115 NW 877.

**30.** Payment at maturity. Charnock v. Jones [S. D.] 115 NW 1072.

**31.** Payment to collecting bank by one

to bear in mind the distinction between payment as such, as when the instrument is paid by a party primarily bound, in which case the obligation of the instrument and all obligations dependent thereon are discharged as a matter of law,[32] and payment so-called, which does not discharge the obligation of the instrument unless it is so intended,[33] as when the so-called payment is made by a stranger, in which case the transaction is presumptively a purchase,[34] or where the so-called payment is made by a party secondarily bound, in which case the transaction operates merely to restore to such party the title to the note and the right to the possession thereof,[35] or where the so-called payment is made by a surety.[36] Payment by the drawer of a dishonored draft extinguishes the instruments.[37] Payment to an agent is the same as payment to the principal and any loss resulting from the agent's fraud must be borne by the principal;[38] but the holder is not bound by a payment to which he is not a privy either originally or by ratification,[39] and as in other cases knowledge is essential to ratification.[40] The protection of a law exonerating the drawee upon payment to the wrong person in good faith and in due course of business can be invoked by the drawer only when the payment was in fact in good faith and in due course.[41] Payment may be made without the payee's indorsement.[42] Arrangements for the security of one discounting commercial paper are directly available only to the parties to such arrangement.[43]

Ordinarily payment must be made in money,[44] but payment may be effected otherwise by agreement of the parties.[45]

The indorsement of a note as paid and the delivery thereof to the maker does not discharge the obligation where the maker fails to perform a condition upon

who thought note was his own obligation. Charnock v. Jones [S. D.] 115 NW 1072.

32. Jacobs v. Pierce, 132 Ill. App. 547; Bank of Latham v. Milligan [Iowa] 118 NW 404. Payment by **comaker** extinguishes debt. Reynolds v. Schade, 131 Mo. App. 1, 109 SW 629. Obligation is discharged by payment **by one who has assumed maker's contract.** Sutherland v. Pallister [Wash.] 97 P 745. **Accommodation maker discharged** by payment by payee, who was one accommodated. Jacobs v. Pierce, 132 Ill. App. 547.

33. Obligation extinguished by payment only when made by person primarily bound. Prather v. Hairgrove, 214 Mo. 142, 112 SW 552.

34. Johnston v. Schnabaum [Ark.] 109 SW 1163. Transaction whereby attorney for owner of property covered by mortgage given to secure note took up note from agent of owner of note, held purchase by attorney and not payment made in behalf of his client. Prather v. Hairgrove, 214 Mo. 142, 112 SW 552.

35. Jacobs v. Pierce, 132 Ill. App. 547.

36. No discharge where the party making the payment is in reality a surety, though in form maker. Reynolds v. Schade, 131 Mo. App. 1, 109 SW 629.

37. Scheuermann v. Monarch Fruit Co. [La.] 48 S 647.

38. Jolly v. Huebler, 132 Mo. App. 675, 112 SW 1013.

39. Citizens' Sav. Bank v. Marr, 129 Mo. App. 26, 107 SW 1009. In suit on note in which payments were voluntary as between ownership, evidence of payments of costs and attorney's fees in the main action, which payments were voluntary as between defendant and intervener, held inadmissible as against intervener. Hannan v. Hannan [Colo.] 96 P 780.

40. Where two banks held notes of same maker payable to same person, and one of such banks gave its notes to payee to collect or secure, and maker accepted deed to property in payment of all the notes, the acceptance by other bank, together with bank whose notes were canceled of deed to such property from payee with understanding that it was to be sold and proceeds applied to notes, did not constitute ratification of agreement between payee and maker as to cancellation of notes. Citizens' Sav. Bank v. Marr, 129 Mo. App. 26, 107 SW 1009.

41. Express company that issued money order on Hong Kong bank claimed protection of Hong Kong banking law. Moy Sie Tighe v. Fargo, 61 Misc. 181, 112 NYS 927.

42. Where note unindorsed by payee was paid to payee's agent. Jolly v. Huebler, 132 Mo. App. 675, 112 SW 1013.

43. Accommodation maker not party to arrangement whereby reserve deposit was created out of proceeds of paper to secure bank discounting same could not insist upon application of such reserve to payment of paper. Queen City Sav. Bank & Trust Co. v. Reyburn, 163 F 597. Quere whether maker would have right to subrogation against reserve deposit after payment of paper by him. Id.

44. See Payment and Tender, 10 C. L. 1147. See, also, post, this subsection, subdivision, Renewal.

45. Acceptance of note of third party. Polk Print. Co. v. Smedley [Mich.] 15 Det. Leg. N. 988, 118 NW 981. Payment in services. Star Loan Co. v. Duffy Van & Storage Co., 43 Colo. 441, 96 P 184.

which such indorsement and delivery was predicated.[46] The payee of a bank check may look to the drawer thereof for its payment, and is not required to apply thereto money in his hands on deposit in the name of an indorser.[47]

Failure to pay a note at maturity and its production by the holder raises a presumption of continuous nonpayment.

Payment of renewals is treated in a subsequent subdivision of this subsection.[48]

*Counterclaim and set-off.* See 10 C. L. 969, 972, 975—Counterclaims and set-offs in favor of a comaker may be set off in full against the amount he might have to pay on the judgment,[49] and a counterclaim allowed in favor of the maker as a set-off against the note operates as a discharge pro tanto of the obligation of the note regardless of the findings as to counterclaims pleaded by other defendants.[50]

*Renewal.* See 10 C. L. 969, 972, 975—Renewal does not per se discharge the obligation of the paper renewed,[51] even when the security is given with the new note,[52] but the old note will be discharged when such is the intention of the parties.[53] A fortiori, the old note is not discharged where such is not the intent of the parties and the renewal is invalid for any reason not chargeable to the holder.[54] In such case the renewal does not operate to discharge either indorsers [55] or sureties,[56] and where the indorser of an original note repudiates his indorsement of a renewal, his liability upon his original indorsement is revived,[57] unless he has surrendered valuable security upon faith of the cancellation of the original note.[58] A renewal may, however, in certain cases, operate to discharge sureties and secondary parties.[59] Where the renewal refers to the paper renewed, liability for attorney's fees under a stipulation in the latter is not discharged by failure to include any such stipulation in the renewal,[60] especially where the action is upon the original.[61] Payment of a renewal cancels both the renewal and the original,[62] and payments made on

46. Where bank having note for collection as payee's agent accepted check from maker for amount of note, indorsed note as paid and delivered it to maker, and then delivered to maker a draft to be applied by him to a mortgage of the payee, which application the maker failed to make. Falsken v. Farington [Neb.] 118 NW 1087.

47. Camas Prairie State Bank v. Newman [Idaho] 99 P 833.

48. See post, subdivision, Renewal.

49. Piotrowski v. Czerwinski [Wis.] 120 NW 268.

50. Where statute of limitations was pleaded by plaintiff against counterclaims, except in so far as they, if sustained, would be applied as set-off against note sued on, and counterclaim in favor of one defendant was sustained to extent of amount of note, while counterclaim set up by another defendant was not sustained, the note was satisfied by the counterclaim allowed, and judgment for costs against plaintiff was proper. Bank of Latham v. Milligan [Iowa] 118 NW 404.

51. Honaker v. Jones [Tex. Civ. App.] 115 SW 649.

52. Reynolds v. Schade, 131 Mo. App. 1, 109 SW 629.

53. Where old note was surrendered by holder to maker upon delivery of the new, the old note was discharged. Walker v. Dunham [Mo. App.] 115 SW 1086. Held new contract discharging old, where note with indorsements as security was renewed by note with additional indorsements. Id.

54. Maker not discharged. Farmers' Sav. Bank v. Arispe Mercantile Co. [Iowa] 117 NW 672.

55. Where indorsement on renewal is forged. Farmers' Sav. Bank v. Arispe Mercantile Co. [Iowa] 117 NW 672.

56. Note secured by signature of personal surety held not discharged by acceptance of new note, including amount of original note and signed by maker in name of surety, when such signature was unauthorized. Corydon Deposit Bank v. McClure, 33 Ky. L. R. 679, 110 SW 856. Where renewal note was invalid because signature of sureties was obtained upon condition that other sureties would sign, which condition was not complied with, the sureties on old note were not discharged. Bank of Benson v. Jones, 147 N. C. 419, 61 SE 193.

57. Notwithstanding cancellation of original note. Commercial L. & T. Co. v. Mallers, 141 Ill. App. 460.

58. Commercial L. & T. Co. v. Mallers, 141 Ill. App. 460.

59. See post, this subsection, subdivision, Extension of Time of Payment.

60, 61. Honaker v. Jones [Tex. Civ. App.] 115 SW 649.

62. Renewal executed by purchaser of property covered by mortgage securing original. Westbrook v. Potter's Sons' Trustee, 33 Ky. L. R. 1071, 112 SW 635.

an invalid renewal must be credited on the original.[63] Acceptance of the note of a third party will operate as a discharge when so intended.[64]

*Release.*[See 10 C. L. 969, 972, 975]—In South Dakota a release of one joint obligor does not release the others or affect the right of contribution.[65] A verbal promise to release, without consideration, does not discharge a comaker.[66]

*Collateral stipulations and agreements.*[See 10 C. L. 969, 972, 975]—Whether there has been a discharge by virtue of a collateral agreement is often merely a matter of construction of such agreement.[67] Breach of warranty operates as a discharge of liability upon a purchase-money note.[68] Such defense is available to the maker of a note executed as collateral security for the purchase-money note,[69] but such maker is not necessarily released by exchange of property purchased for other property covered by a new warranty,[70] though where the collateral note is retained as security for the payment of the price of such other property, he may avail himself of a breach of the new warranty.[71]

*Laches.*[See 10 C. L. 969, 972, 975]—The liability of the acceptor, being original and primary,[72] is not affected by delay, short of the statutory period of limitation, in presenting the draft for payment.[73] Failure to sue on a note is not ground for release of the maker on the indorser who are not prejudiced by delay.[74] An accommodation comaker is not discharged by his urgent request that the payee proceed against principal maker who is solvent, but should pay the note and bring suit himself.[75]

*Extension of time of payment.*[See 10 C. L. 972, 975]—Right to extend the time of payment may be reserved by the terms of the note.[76] Extension of time by virtue of an invalid renewal does not discharge parties secondarily liable.[77] It is held that an accommodation maker is so far a surety as to be discharged by an extension without his consent,[78] but it is also held that where such a maker is declared by statute to be primarily liable, he comes within the rule applicable to primary parties generally, and is not discharged by an extension without his consent.[79]

63. State v. Allen, 132 Mo. App. 98, 111 SW 622.

64. See ante, this subsection, subdivision, Payment.

65. Rev. Civ. Code, § 1187. Central Banking & Trust Co. v. Pusey [S. D.] 116 NW 1126.

66. Edmondston v. Ascough, 43 Colo. 55, 95 P 313.

67. Where it was agreed that maker of note given for license fees advanced should have to pay a certain sum per week so long as he continued in business and purchased beer from plaintiff, and plaintiff's collector, with whom the arrangement was made, informed the maker, prior to execution of the note, that if he discontinued business he would not have to pay any more license, this did not amount to an agreement that upon the maker's discontinuance of business the note should be deemed paid. Ferdinand Munch Brewery v. De Matteis, 128 App. Div. 830, 112 NYS 1042.

68, 69. Northwest Thresher Co. v. Hulburt, 103 Minn. 276, 115 NW 159.

70. Under evidence, maker of note executed as collateral security for payment of note executed by purchaser of engine in payment therefor held not released by exchange of engine for another engine and execution of new note by purchaser for difference in price of two machines, the collateral note being retained by seller as security for price of second engine. Northwest Thresher Co. v. Hulburt, 103 Minn. 276, 115 NW 159.

71. Northwest Thresher Co. v. Hulburt, 103 Minn. 276, 115 NW 159.

72. See ante, § 3C, Contracts of Particular Parties.

73. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

74. Bank of Morgan City v. Herwig, 121 La. 513, 46 S 611.

75. Edmondston v. Ascough, 43 Colo. 55, 95 P 313.

76. First Nat. Bank v. Buttery [N. D.] 116 NW 341. See Rev. Codes 1905, § 6422, par. 6. Id.

77. Corydon Deposit Bank v. McClure, 33 Ky. L. R. 679, 110 SW 856.

78. Accommodation maker of note held as collateral held released when holder, who knew of accommodation character of paper, accepted, without knowledge of maker, a reversal from principal debtor upon condition of payment of interest in advance, thus deferring right to sue principal, especially where principal became insolvent after such renewal. Morehead v. Citizens' Deposit Bank [Ky.] 113 SW 501.

79. Accommodation maker held primarily liable under Laws 1899, c. 83, §§ 29, 60, 63, 119, 12, 192. Wolstenholme v. Smith, 34 Utah 300, 97 P 329.

*Acceptance of drafts and certification of checks.*[See 10 C. L. 973]—An acceptance of a draft or check, as distinguished from a certification,[80] does not discharge the drawer,[81] but where the holder of a check has it certified by the drawer, the drawer and the indorsers are thereby discharged.[82]

*Alterations.*[See 10 C. L. 969]—A material alteration,[83] if unauthorized, invalidates the instrument [84] even in the hands of an innocent purchaser, unless it is otherwise provided by statute,[85] but it seems that authority to alter may be implied.[88] An indorser is not discharged by an alteration made prior to delivery of the paper and with his consent.[87]

(§ 4) *C. Reissue of instruments after discharge.*[88]—When a note has been paid the maker may reissue it before maturity for a valid consideration,[89] but a discharged note is not revived merely by indorsement and reissue by the party who effected the discharge,[90] nor is such party paying entitled to subrogation to the rights of the payee.[91] The holder of a check may have it certified, thus discharging the drawer and indorsers,[92] and may then reissue it, thus constituting himself a new drawer.[93]

§ 5. *Effect of negotiation or transfer. A. As to transfer of title.*[94]—[See 10 C. L. 973]—A transfer by indorsement vests the legal title in the indorsee,[95] and in such case the equitable title is material only as affecting the right to assert defenses against the owner thereof.[98] A pledge of a note as collateral vests the legal title in the pledgee.[97]

(§ 5) *B. As to equities and defenses.* 1. *Doctrine stated.*[98]—[See 10 C. L. 980, 981, 984]—Except as to persons who come within the definition of bona fide holders here-

**80.** Where holder of bank draft unindorsed by payee was assured by drawer that it would be paid when properly indorsed by payee, but nothing was received by holder in lieu of payment, the transaction was an acceptance and not a certification. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

**81.** Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

**82.** Same as if check were cashed and money deposited with drawer. Blake v. Hamilton Dime Sav. Bank Co. [Ohio] 87 NE 73.

**83.** Erasure of name of one of joint makers of note is a material alteration. Citizens' Sav. Bank v. Halstead [Ind. App.] 84 NE 1098. Where one indorsed blank note payable, according to printed form, at certain bank, a change of bank at which note was payable was a material alteration, under P. L. Pa. 1901, 211, § 125a. First Nat. Bank v. Barnum, 160 F 245. Alterations lessening indorsements of payment held material. Kurth v. Farmers' & Merchants' State Bank, 77 Kan. 475, 94 P 798.

**84.** First Nat. Bank v. Barnum, 160 F 245; Citizens' Sav. Bank v. Holstead [Ind. App.] 84 NE 1098; Martin v. Richardson, 134 Ill. App. 252.

**85.** See post, § 5B1.

**86.** First Nat. Bank v. Barnum, 160 F 245.

**87.** Luckenbach v. McDonald, 164 F 296.

**88. Search Note:** See Bills and Notes, Cent. Dig. §§ 1223-1232; Dec. Dig. § 440; 4 A. & E. Enc. L. (2ed.) 499.

**89.** In such case he will be bound as effectually as in the first instance. Curry v. Lafon, 133 Mo. App. 163, 113 SW 246. Where part of joint notes given for purchase money of land were secretly transferred by vendor to one of makers, the subsequent assumption of payment of the purchase-money notes by other maker by covenant in deed from co-maker to his interest in land and as part consideration for such conveyance operated to record the obligation of the covenantee upon the joint notes transferred to his co-maker. Id.

**90.** Where bank holding note for collection indorsed it to stranger who had paid it by mistake, latter could not revive it by indorsement and reissue. Charnock v. Jones [S. D.] 115 NW 1072.

**91.** Charnock v. Jones [S. D.] 115 NW 1072. See Subrogation, 10 C. L. 1760.

**92.** See preceding subsection, subdivision, Acceptance of Drafts and Certification of Checks.

**93.** Blake v. Hamilton Dime Sav. Bank Co. [Ohio] 87 NE 73.

**94. Search Note:** See notes in 7 Ann. Cas. 746.

See, also, Bills and Notes, Cent. Dig. §§ 464-490; Dec. Dig. §§ 194-202; 7 Cyc. 816; 4 A. & E. Enc. L. (2ed.) 469.

**95.** Haggard v. Bothwell [Tex. Civ. App.] 113 SW 965. Where note payable to corporation but really owned by third party was indorsed by corporation's receiver to one who had purchased it from real owner, such purchaser acquired legal as well as equitable title. Gibson v. Gutru [Neb.] 120 NW 201.

**96.** Haggard v. Bothwell [Tex. Civ. App.] 113 SW 965.

**97.** Packard v. Abell, 113 NYS 1005.

**98. Search Note:** See notes in 16 L. R. A. 45; 23 Id. 325; 27 Id. 519; 35 Id. 161, 464; 36

after given,[99] the negotiation or transfer of a negotiable instrument does not cut off or affect defenses thereto.[1] As against such bona fide holders, the general rule is that defenses which do not negative the existence or legality of the contract sued on or the title to the insrument are cut off,[2] but not defenses of the latter character.[3] This rule, however, is not without exceptions and modifications, for the defense of lack or failure of consideration is cut off, regardless of any question of the effect of such defect as between the original parties,[4] and the rule that fraud in the factum

Id. 434; 54 Id. 451, 673; 2 L. R. A. (N. S) 767; 4 Id. 1042; 5 Id. 628; 10 Id. 842; 13 Id. 426, 490.

See, also, Bills and Notes, Cent. Dig. §§ 751, 792, 794-804, 937-943, 944-995; Dec. Dig. §§ 314-330, 362-384; 7 Cyc. 816, 924; 4 A. & E. Enc. L. (2ed.) 282.

99, See post, this subsection, subdivision 2. Who are Bona Fide Holders.

1. Dewey v. Babbitt [Kan.] 100 P 77; Wilson v. Carter, 4 Ga. App. 349, 61 SE 494. Laws 1897, p. 732, c. 612, § 97. Weiss v. Rieser, 114 NYS 983. Equitable set-offs and counterclaims available under St. 1898, § 2656, subd. 31, in action by nonresident. Piotrowski v. Czerwinski [Wis.] 120 NW 268. That note was indorsed to bank merely for collection. Johnston v. Schnabaum [Ark.] 109 SW 1163. Duress in inception of note. Siegel v. Oehl, 110 NYS 916. Note executed in name of partnership by one partner not acting within scope of authority. King v. Mecklenburg, 43 Colo. 316, 95 P 951. Fraud and failure of consideration. Iowa Nat. Bank of Ottumwa v. Sherman [S. D.] 119 NW 1010. Back of consideration. Tucker v. Michaels, 112 NYS 1044.

2. Howell v. Merchants' Trust & Security Co., 134 Ill. App. 467; Hall v. First Nat. Bank [Tex.] 116 SW 47, afg. [Tex. Civ. App.] 115 SW 293; Sill v. Pate, 133 Ill. App. 423. Rev. Laws, c. 73, § 69. Buzzell v. Tobin, 201 Mass. 1, 86 NE 923. Defenses between drawer and acceptor of draft not available against bona fide holder. Stouffer v. Erwin, 81 S. C. 541, 62 SE 843. **Payment** before transfer. Farmer v. First Nat. Bank [Ark.] 115 SW 1141; Lander v. Meekler [Tex. Civ. App.] 111 SW 752. Seems that where administrator of payee of accommodation note pays note and takes it from bank which has discounted it, and then negotiates it, purchaser gets good title and may enforce note against maker. Klein v. Runk, 114 NYS 1062. Where subtenant pays rent to principal tenant in notes, he takes risk of negotiation of notes and consequent liability both on notes and to owner in event of principal tenant's failure to pay rent. Simmons v. Council [Ga. App.] 63 SE 238. **Composition** between drawer and payee. Robertson v. Fowler, 136 Ill. App. 320. That payee, who was creditor of maker, failed to surrender notes of maker pursuant to agreement for composition with **creditors** pursuant to which note in suit was given. Mindlin v. Applebaum, 114 NYS 908. Collateral claim against bank cannot be **set off** against note in hands of bank's transferee. Powers v. Wolfolk, 132 Mo. App. 354, 111 SW 1187. **Fraud** in inducement. Sinnickson v. Richter, 140 Ill. App. 212. Alleged fraud of attorney in securing notes for fees for services rendered to maker. Hames v. Stroud [Tex. Civ. App.] 112 SW 775. Fraud inducing payee to indorse and transfer note. Graham v. Smith [Mich.] 15 Det. Leg. N. 933, 118 NW 726. Fraud between drawer and drawee evidencing acceptance of bill of exchange. National Park Bank v. Saitta, 127 App. Div. 624, 111 NYS 927. Where drawer of check delivers it to person representing himself to be payee, there is implied representation that such person is payee, and drawer cannot assert contrary as against innocent holder. Gallo v. Brooklyn Sav. Bank, 114 NYS 78. Where check was issued and delivered to imposter who falsely claimed to represent an association of "freight handlers" to which drawer wished to make a donation. Boles v. Harding, 201 Mass. 103, 87 NE 481. Misrepresentation of president of corporation whereby he secured resolution of board of directors authorizing issue of corporation's note to him, such note, being in corporation's name by secretary alone and not showing that payee was corporation's president, held no defense against bona fide purchaser, though it did not appear that any officer or officers of corporation had authority to issue negotiable notes in its name, the note being prima facie the obligation of the corporation. Second Nat. Bank of Monmouth v. Suoqualmie Trust Co. [Neb.] 120 NW 182. One appearing on note as maker is liable to bona fide holder, regardless of **irregularity in indorsement** through which plaintiff derived title. Johnston v. Schnabaum [Ark.] 109 SW 1163. **Secret limitations upon power of partner** to issue and indorse firm notes. Feigenspan v. McDonnell, 201 Mass. 341, 87 NE 624.

3. Instrument invalidated even in hands of bona fide holder by **material alteration.** Citizens' Sav. Bank of Columbus, Ohio v. Halstead [Ind. App.] 84 NE 1098; Mastin v. Richardson, 134 Ill. App. 252. Alteration of completed note is not within rule applicable to filling out of blanks in note delivered in incomplete condition. Mastin v. Richardson, 134 Ill. App. 252. Note given for purchase of futures is invalid for **illegality** under Ann. Code 1892, § 2117, even in hands of bona fide purchaser. Gray v. Robinson [Miss.] 48 S 226. Defense of **incapacity,** such as coverture of maker, is not cut off. T. G. Northwall Co. v. Osgood, 80 Neb. 764, 115 NW 308.

4. Bank of Guntersville v. Jones Cotton Co. [Ala.] 46 S 971; Pennebaker Bros. v. Bell City Mfg. Co. [Ky.] 113 SW 829; Buzzell v. Tobin, 201 Mass. 1, 86 NE 923; Gibson v. Gutru [Neb.] 120 NW 201; Rosenblum v. Blaser, 115 NYS 219; McCormick v. Kampman [Tex. Civ. App.] 109 SW 492; Johnson County Sav. Bank v. Kemp Mercantile Co. [Tex. Civ. App.] 114 SW 402; Cole Banking Co. v. Sinclair, 34 Utah, 454, 98 P 411. Failure of payee to perform promise constituting consideration of note. Zollman v. Jackson Trust & Sav. Bank, 141 Ill. App. 265, afd. 87 NE 297. Failure of **consideration between acceptor and drawer** is no defense in action by purchaser against

invalidates the contract even as against a bona fide holder [5] is subject to the qualification that as against an innocent party one guilty of negligence must suffer the consequences thereof, notwithstanding that fraud may have been practiced upon him,[6] but this qualification is itself subject to the qualification that the innocent party is not entitled to protection unless he was induced to act by the negligence complained of.[7] A fortiori the maker cannot set up his own fraud or wrong in executing the note as against an innocent holder.[8] Where paper is payable to bearer, title thereto may be acquired even from one having no title,[9] and it is held in Georgia that a purchaser for value of commercial paper from the apparent owner acquires a good title [10] even as against the true owner.[11] A rule often applied in deciding a controversy between a holder of negotiable paper and a party who has given it apparent validity in the hands of one transferring it without right is that, when one of two innocent persons must suffer by reason of the wrongful act of a third party, the one must bear the loss who made it possible for the third party to

acceptor. Stouffer v. Erwin, 81 S. C. 541, 62 SE 843; National Park Bank v. Saitta, 127 App. Div. 624, 111 NYS 927. Indorsee of draft, drawn by seller of goods to self or order and accepted by purchaser of such goods, held not affected by failure of consideration as between drawer and acceptor. Johnson County Sav. Bank v. Kramer [Ind. App.] 86 NE 84. Where drawer authorized to draw for price of car of oranges included other fruit in shipment but billed whole car as oranges, an innocent purchaser of draft with bill of lading attached took same free from defense of fraud or excess of authority on part of drawer. First Nat. Bank v. Nigro & Co. [Tex. Civ. App.] 110 SW 536.

5. Where maker did not intend to execute instrument actually executed, is not cut off. Sinnickson v. Rickter, 140 Ill. App. 212. See Rev. Laws 1905, § 2747, relative to signature under erroneous belief or to nature of instrument. Sibley County Bank v. Schaus, 104 Minn. 438, 116 NW 928. Signature and indorsement of payee was either forged or obtained by fraud whereby payee was led to believe that she was signing a paper other than note in suit. Murphy v. Schoch, 135 Ill. App. 550. Acceptor of bill may take advantage of **forgery** as against holder claiming thereunder. Trust Co. of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84.

6. To render fraud or circumvention a good defense as against a holder in due course, the maker must have exercised reasonable diligence and due care on his part, and this is not done where he relies solely upon the reading, explanation or statements of the party procuring the execution of the note, unless reasonable excuse be shown. Commercial State Bank v. Judy, 133 Ill. App. 35. Negligence in signing instrument under erroneous belief as to its nature. See First State Bank of Pleasant Dale v. Borchers [Neb.] 120 NW 142; Sibley County Bank v. Schaus, 104 Minn. 438, 116 NW 928. Negligence in indorsing instrument under erroneous belief as to its nature. Murphy v. Schock, 135 Ill. App. 550. As between drawer and innocent purchaser, former must suffer any loss resulting from his own negligence in issuing the bill issued to an imposter check. Central Nat. Bank of Washington City v. National Metropolitan Bank, 31 App. D. C. 391. Maker held guilty of negligence in signing without having instrument read to him, he himself not being able to read but having abundant chance to have paper read to him. First Nat. Bank v. Hall, 129 Mo. App. 286, 108 SW 633. Where bank issued check on savings deposit payable to its own teller, and latter delivered it to person claiming to be the depositor, but who did not answer to description of depositor on bank's books and did not answer test questions, the bank was liable to one who cashed the check after having used due diligence to ascertain his identity and who thereafter was compelled to remunerate a subsequent indorsee, the check having orlginally been delivered to the wrong person. Gallo v. Brooklyn Sav Bank, 114 NYS 786.

**Where drawee remunerates drawer,** the former merely takes the place of the latter as against such purchaser. Where drawee bank repays to depositor money paid to another bank upon check negligently issued by depositor to imposter and cashed by such other bank. Central Nat. Bank of Washington City v. National Metropolitan Bank, 31 App. D. C. 391.

7. Where bank issued draft in exchange for forged check and recipient of draft forged payee's indorsement thereto and sold it to another bank, which collected from drawee, negligence of drawer in issuing draft for forged check was immaterial as between drawer and purchasing bank where latter was not induced to purchase by reason of any act or representation of drawer. Seaboard Nat. Bank v. Bank of America [N. Y.] 85 NE 829.

8. Note, executed by officers and stockholders to foreign corporation which had not complied with conditions necessary to give it right to do business in state, sustained in hands of innocent purchaser. Young v. Gaus [Mo. App.] 113 SW 735.

9. Voss v. Chamberlain [Iowa] 117 NW 269.

10. Bona fide purchaser for value without notice may acquire good title from one whose title is defective. Walden v. Downing Co., 4 Ga. App. 534, 61 SE 1127.

11. Where bank holding husband's note accepts in payment from husband the check of cashier of another bank, such check being payable to husband though purchased with wife's money. Third Nat. Bank of Columbus v. Poe [Ga. App.] 62 SE 826.

commit the wrong.[12] In Pennsylvania the defense of material alteration is unavailable against a bona fide holder,[13] and in Massachusetts delivery of the instrument is conclusively presumed in his favor.[14] Defects cured by way of ratification and defenses rendered unavailable by estoppel as between the original parties are, of course, unavailable against subsequent parties.[15]

The fact that a note is secured by a mortgage does not affect the rights of a bona fide purchaser,[16] though the existence of the mortgage is recited by the note,[17] but a transfer of assets in consideration of the assumption of liabilities saves all defenses against a note thus acquired by the transferee.[18] One purchasing from a bona fide holder stands in the shoes of the latter, regardless of his own independent status.[19] As against a holder, a guarantor's liability is coextensive with that of his principal.[20]

Defenses arising between the maker and payee after assignment and notice thereof to the maker are unavailable against the assignee,[21] nor are payments to the payee after the assignment binding upon the assignee,[22] even though the transfer is after maturity.[23] So, also, one making payments without requiring the production of the paper or other evidence that the party receiving payment still holds the paper does so at his own risk,[24] and the place of payment does not affect the maker's duty to see that the person to whom he makes payment has possession of the paper.[25]

(§ 5B) 2. *Who are bona fide holders.*[26]—See 10 C. L. 981

*In general.*See 10 C. L. 981—In order to invoke the doctrine applicable to bona fide holders,[27] the holder must have received the paper before its maturity,[28] in due course of business,[29] in exchange for a valuable consideration,[30] and in good faith,[31] without notice of defenses.[32]

**12.** Voss v. Chamberlain [Iowa] 117 NW 269.

**13.** See P. L. Pa. 1901, p. 211, § 125. First Nat. Bank of Wilkes-Barre v. Barnum, 160 F 245.

**14.** Rev. Laws, c. 73, § 33. Buzzell v. Tobin, 201 Mass. 1, 86 NE 923.

**15.** See ante, § 2. Contractual Elements, Requisites and Validity.

**16.** Rights upon note and upon mortgage are independent. Zollman v. Jackson Trust & Sav. Bank, 238 Ill. 290, 87 NE 297, afd. 141 Ill. App. 265.

**17.** Zollman v. Jackson Trust & Sav. Bank, 238 Ill. 290, 87 NE 297, afd. 141 Ill. App. 265.

**18.** Where incorporated bank assumed liabilities of private bank in consideration of transfer of assets of latter, note thus acquired by incorporated bank was subject to defense that it was delivered subject to a condition which was never performed. Paulson v. Boyd, 137 Wis. 241, 118 NW 841.

**19.** Town of Fletcher v. Hickman [C. C. A.] 165 F 403; Rodriquez v. Merriman, 133 Ill. App. 372.

**20.** Guarantor of payment of draft held liable to innocent purchaser regardless of defenses between drawer and drawee. First Nat. Bank v. Nigro & Co. [Tex. Civ. App.] 110 SW 536.

**21.** Carlton v. Smith, 33 Ky. L. R. 647, 110 SW 873.

**22.** Powers v. Woolfolk, 132 Mo. App. 354, 111 SW 1187.

**23.** Powers v. Woolfolk, 132 Mo. App. 354, 111 SW 1187. Rev. St. 1899, § 4488 (Ann. St. 1906, p. 2459), is inapplicable to negotiable paper even where past due. Id.

**24.** Becker v. Hart, 129 App. Div. 511, 113 NYS 1053.

**25.** Fact that note was payable at certain bank did not render payment to the bank effective as against transferee of note. Powers v. Woolfolk, 132 Mo. App. 354, 111 SW 1187.

**26. Search Note:** See notes in 6 C. L. 792; 10 Id. 985; 46 L. R. A. 753; 11 A. S. R. 309; 37 Id. 458; 4 Ann. Cas. 353; 5 Id. 583; 8 Id. 186, 626; 9 Id. 340; 11 Id. 197, 206, 1181.

See, also, Bills and Notes, Cent. Dig. §§ 793, 805-936; Dec. Dig. §§ 331-361; 7 Cyc. 924; 4 A. & E. Enc. L. (2ed.) 282.

**27.** See ante, this subsection, subdivision 1. Doctrine Stated.

**28.** King v. Mecklenburg, 43 Colo. 316, 95 P 951; Buzzell v. Tobin, 201 Mass. 1, 86 NE 923. Sayles' Ann. Civ. St. 1897, art. 307. Norwood v. Leeves [Tex. Civ. App.] 115 SW 53; McCormick v. Kampmann [Tex.] 115 SW 24. Indorsee after maturity acquires only such rights as the indorser had, and where such indorser is payee, it follows that the indorsee acquires only rights of payee. Cominsky v. Coleman, 114 NYS 875. Counterclaims and set-offs authorized by St. 1898, § 2656, subd. 3, in action by nonresident, are available against purchaser after maturity. Piotrowski v. Czerwinski [Wis.] 120 NW 268. Purchaser after maturity not protected against lack of consideration. Tucker v. Michaels, 112 NYS 1044; Dewey v. Bobbitt [Kan.] 100 P 77. Duress in obtaining note available against purchaser after maturity. Siegel v. Oehl, 110 NYS 916.

**29.** Kipp v. Smith, 137 Wis. 234, 118 NW 848; Weiss v. Rieser, 114 NYS 983. Duress in

The holder is prima facie presumed to be a bona fide holder within the definition given above.[33] This presumption, however, may be overcome by the circumstances under which the instrument was executed or indorsed,[34] as where the instrument has its inception in fraud [35] or duress,[36] or where it is executed without due authority,[37] or where its negotiation or transfer is tainted with fraud,[38] but such is not the effect of mere lack of consideration,[39] or of defects of indorsements subsequent to the indorsement by which title is vested in the holder.[40]

*Title and possession.* See 10 C. L. 981—Formal indorsement of a note payable to order is essential to constitute the purchaser such a holder as to protect him from defenses already accrued to the maker against the payee.[41] Where the action is by the holder of the legal but not the equitable title, all defenses against the latter are available.[42] Delivery of the paper to an agent for a specific purpose does not

obtaining note available as defense against one not receiving paper in due course. Siegel v. Oehl, 110 NYS 916.

30. Buzzell v. Tobin, 201 Mass. 1, 86 NE 923; Iowa Nat. Bank of Ottumwa v. Sherman [S. D.] 119 NW 1010. Only purchasers for full value protected against defense of duress in obtaining note. Siegel v. Oehl, 110 NYS 916. Where **check** unsupported by consideration is delivered to third party as a loan, such party is not a holder in due course. Rosenthal v. Parsont, 110 NYS 223.

31. Duress in obtaining note available as defense against one not receiving paper in good faith. Siegel v. Oehl, 110 NYS 916.

32. Buzzell v. Tobin, 201 Mass. 1, 86 NE 923. Notice of defense before transfer of note renders such defense as available as it would be against the payee. Dewey v. Bobbitt [Kan.] 100 P 77. Holder takes subject to defense of which he had notice at time of taking. Wilson v. Carter, 4 Ga. App. 349, 61 SE 494; Buse v. First State Bank of Red Lake Falls, 105 Minn. 323, 117 NW 490. One taking with notice that note was indorsed to bank merely for collection acquires no other rights than those of transferee. Johnston v. Schnabaum [Ark.] 109 SW 1163. Equitable **counterclaims** and set-offs authorized by St. 1898, § 2656, subd. 3, in action by nonresident, are available against purchaser with notice. Piotrowski v. Czerwinski [Wis.] 120 NW 268. **Duress** in obtaining note available against one taking with notice. Siegel v. Oehl, 110 NYS 918. **Fraud** available to maker against indorsee who is not a bona fide purchaser for value and without notice. Iowa Nat. Bank of Ottumwa v. Sherman [S. D.] 119 NW 1010. Failure of **consideration.** Id. P. L. Pa. 1901, p. 211, § 124, authorizing bona fide holder to enforce note according to original tenor notwithstanding alterations to which he was not a party, does not apply where the holder takes with notice of such **alterations.** First Nat. Bank of Wilkes-Barre v. Barnum, 160 F 245. One taking **note purporting to be executed by partnership,** knowing that it was executed by one of the partners outside of scope of his agency and of partnership business, cannot recover against the partnership or nonsigning partners. King v. Mecklenburg, 43 Colo. 316, 95 P 951.

33. Cox v. Cline [Iowa] 117 NW 48; South v. People's Nat. Bank, 4 Ga. App. 92, 60 SE 1087; Northeastern Coal Co. v. Tyrrell, 133 Ill. App. 472; County of Presidio v. Noel-Young Bond & Stock Co., 212 U. S. 58, 53 Law. Ed. —. Comp. Laws 1907, § 1611. Cole Banking Co. v. Sinclair, 134 Utah, 454, 98 P 411; Bank of Morehead v. Hermig, 220 Pa. 224, 69 A 679.

34. Custand v. Hodges [Mich.] 15 Det. Leg. N. 1067, 119 NW 583.

35. Penfield Inv. Co. v. Bruce, 132 Mo. App. 257, 111 SW 888; City Nat. Bank of Columbus, Ohio v. Jordan [Iowa] 117 NW 758; Cox v. Cline [Iowa] 117 NW 48; City Deposit Bank v. Green, 138 Iowa, 156, 115 NW 893; American Nat. Bank v. Fountain, 148 N. C. 590, 62 SE 738; Forbes v. First Nat. Bank [Okl.] 95 P 785; Royal Bank of New York v. German-American Ins. Co., 58 Misc. 563, 109 NYS 822; Packard v. Figlinolo, 114 NYS 753; Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068; Mee v. Carlson [S. D.] 117 NW 1033; Rockford v. Barrett [S. D.] 115 NW 522; Walters v. Rock [N. D.] 115 NW 511; Johnson County Sav. Bank v. Kemp Mercantile Co. [Tex. Civ. App.] 114 SW 402; In re Hopper-Morgan Co., 158 F 351.

36. Siegel v. Oehl, 110 NYS 916.

37. Partnership note executed without authority by partner for own benefit. Feigenspan v. McDonnell, 201 Mass. 341, 87 NE 624.

38. Cox v. Cline [Iowa] 117 NW 48; Demelman v. Brazier, 198 Mass. 458, 84 NE 856; American Nat. Bank v. Fountain, 148 N. C. 590, 62 SE 738; Forbes v. First Nat. Bank [Okl.] 95 P 785; Walden v. Downing Co., 4 Ga. App. 534, 61 SE 1127.

39. Cole Banking Co. v. Sinclair, 34 Utah, 454, 98 P 411; McCormick v. Kampman [Tex. Civ. App.] 109 SW 492; Joveshof v. Rockey, 58 Misc. 559, 109 NYS 818; Gillespie v. First Nat. Bank, 20 Okl. 768, 95 P 220.

40. Where note is indorsed in blank, no presumption arising from circumstances of subsequent indorsements can be invoked against holder. Voss v. Chamberlain [Iowa] 117 NW 269. See ante, § 2C, subd. Necessity of Indorsement.

41. Lowry Nat. Bank of Atlanta v. Maddox, 4 Ga. App. 329, 61 SE 296. Guaranty, even though it be sufficient to pass title, is insufficient to protect purchaser where it contains no proper words of assignment or transfer. Id.

42. Fraud and partial failure of consideration available as defense where payee was equitable owner. Haggard v. Bothwell [Tex. Civ. App.] 113 SW 965.

ordinarily constitute surrender of possession as a holder.[43] The holder of paper showing no defect in its negotiation as transfer is presumptively the owner,[44] but such presumption is rebuttable,[45] and is overcome by proof that the instrument was stolen or otherwise appropriated in fraud of the owner's rights.[46] Possession of unindorsed paper payable to another raises no presumption of ownership.[47] Nor does such presumption dispense with the necessity of proving the genuineness of an indorsement when the same is properly put in issue.[48]

*Before maturity.* See 10 C. L. 983—An undated indorsement[49] is presumptively of a date prior to the maturity of the instrument,[50] and while such presumption is rebuttable,[51] it is not rebutted by any presumption of continuance of ownership by the payee.[52] Where paper is payable in instalments, a purchase after some of the instalments have become due is a purchase after maturity.[53]

*In due course.* See 10 C. L. 983—Due course is sometimes defined as including all the other elements of bona fide holdership[54] as defined above.[55] More narrowly defined, it means usual course of business.[56]

*For value.* See 10 C. L. 983—Value is any consideration sufficient to support a simple contract.[57] In other words the purchaser is deemed to pay value where he gives money, goods or credit at the time of receiving the instrument, or on account thereof sustains loss or incurs liability.[58] Where a purchaser of a negotiable instrument gives the holder an ordinary bank draft therefor, payment is complete as soon as the draft passes beyond the buyer's control.[59] It is sometimes broadly held that receipt of commercial paper as collateral security for an antecedent debt is a taking for value.[60] Holdings to such effect, however, are usually expressly based upon statutory provisions,[61] and the general rule seems to be otherwise in the absence of such provision.[62] Under this rule there must be some further consideration, such as a cancellation of the previous debt,[63] or an extension of the time of payment thereof.[64] It is generally held that there is a taking for value where the paper

43. Voss v. Chamberlain [Iowa] 117 NW 269.

44. Rodriquez v. Merriman, 133 Ill. App. 372; Northeastern Coal Co. v. Tyrrell, 133 Ill. App. 472; Corson v. Smith [S. D.] 118 NW 705. Security negotiable by delivery. Walden v. Downing Co., 4 Ga. App. 534, 61 SE 1127. Note indorsed in blank. Gillespie v. First Nat. Bank, 20 Okl. 768, 95 P 220.

45. May be shown that bank holds draft, with bill of lading attached, for collection. National Bank of Commerce of Minneapolis v. Rotan Grocery Co. [Tex. Civ. App.] 108 SW 1192.

46. Walden v. Downing Co., 4 Ga. App. 534, 61 SE 1127. See ante this section, subsection and subdivision, In General.

47. Jolly v. Huebler, 132 Mo. App. 675, 112 SW 1013.

48. See post, § 6D, subd. Burden of Proof.

49. See ante, § 3A.

50. McCormick v. Kampmann [Tex. Civ. App.] 109 SW 492; Baskins v. Valdosta Bank & Trust Co. [Ga. App.] 63 SE 648; Rodriguez v. Merriman, 133 Ill. App. 372.

51. Rodriguez v. Merriman, 133 Ill. App. 372.

52. Baskins v. Valdosta Bank & Trust Co. [Ga. App.] 63 SE 648.

53. Norwood v. Leeves [Tex. Civ. App.] 115 SW 53.

54. Holder in due course is one who acts in good faith and without notice of any infirmity. Feigenspan v. McDonnell, 201 Mass. 341, 87 NE 624. Due course means for value, before maturity and good faith. Walters v. Rock [N. D.] 115 NW 511.

55. See ante this subsection and subdivision, In General.

56. Kipp v. Smith, 137 Wis. 234, 118 NW 848. General surety for payee and guarantor of note redeeming note from transferee in pursuance to his general suretyship held not purchaser in usual course of business. Rockefeller v. Ringle, 77 Kan. 515, 94 P 810.

57. Acts 1899, § 25, Negotiable Instrument Law. Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068. Acts 1904, No. 64, p. 152, § 24. Scheuermann v. Monarch Fruit Co. [La.] 48 S 647.

58. Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068.

59. First State Bank of Pleasant Dale v. Borchers [Neb.] 120 NW 142.

60. Walden v. Downing Co., 4 Ga. App. 534, 61 SE 1127.

61. See Acts 1904, No. 64, p. 152, § 24. Scheuermann v. Monarch Fruit Co. [La.] 48 S 647. See Pub. Acts 1905, p. 389, No. 265, § 27, declaring a pre-existing debt to constitute value, and providing that holder having lien on instrument shall be deemed to be a holder for value. Graham v. Smith [Mich.] 15 Det. Leg. N. 933, 118 NW 726.

62. Walker v. Harris' Ex'rs [Ky.] 114 SW 775.

63. Harris v. Fowler, 59 Misc. 523, 110 NYS 987.

64. Harris v. Fowler, 59 Misc. 523, 110 NYS 987. Acceptance of note payable one day

is received in payment of or as a payment upon an antecedent debt,[65] or when the time of payment of such debt is extended,[66] or when other security is surrendered upon receipt of the paper.[67] Merely crediting a depositor with the proceeds of a note discounted does not constitute the bank a holder for value,[68] but it is otherwise where the proceeds so credited are subsequently actually paid to the depositor or his order,[69] or where the credit to the depositor of the note is given by the purchaser, not on its own books but in a different, solvent bank,[70] or where a bank receives a certified check for deposit.[71] It is held that where a bank discounts a draft for the drawer and credits him with the face value thereof the bank acquires the paper by purchase.[72]

The holder is prima facie presumed to be a holder for value.[73]

*In good faith and without notice.* See 10 C. L. 981—A distinction is sometimes made between notice which makes the purchaser a party to fraud and notice which merely brings home to him knowledge of prior equities and defenses.[74] Failure to regard this distinction has led to considerable confusion in the past,[75] and may be responsible for the present lack of unanimity on the subject of bad faith and notice, which is almost as pronounced as it was under the early English and American cases.[76] The tendency to disregard such distinction is so universal, however, that it is now of small practical value, and the cases must be grouped under two more or less conflicting doctrines. Under the minority doctrine a purchaser having knowledge of facts sufficient to put an ordinarily prudent man upon inquiry is charged with knowledge of all the facts which an inquiry would have revealed,[77] and it is even held

after date is not such an extension of time by creditor as will constitute consideration for paper delivered as collateral to secure such note, a note payable one day after date being in practical effect payable presently. Walker v. Harris' Ex'rs [Ky.] 114 SW 775.

**65.** Hamiter v. Brown [Ark.] 113 SW 1014; Second Nat. Bank of Monmouth, Ill. v. Snoqualmie Trust Co. [Neb.] 120 NW 182. See Laws 1897, p. 727, c. 612, § 51. Mindlin v. Applebaum, 114 NYS 908.

**66.** Where note is assigned to bank as security for debt in excess of amount of note, in consideration of extension of time on such debt. Farmer v. First Nat. Bank [Ark.] 115 SW 1141.

**67.** Zollman v. Jackson Trust & Sav. Bank, 238 Ill. 290, 87 NE 297, afg. 141 Ill. App. 265. Transferee taking collateral by way of substitution for other collateral surrendered becomee holder for value. Voss v. Chamberlain [Iowa] 117 NW 269. Where holder of note accepts curtailment and takes new note with indorsement thereon, he is holder for value. Van Norden Trust Co. v. Rosenberg, 114 NYS 1025. Where creditor had already in effect released one of two joint debtors and was looking to one alone for payment, the formal releaee of the former did not constitute consideration for paper delivered as collateral for the joint debt. Walker v. Harris' Ex'rs [Ky.] 114 SW 775. Under Rev. Laws, c. 73, § 42, providing that antecedent debt constitutes value, release of indorser on a forged instrument constitutes "value." Jennings v. Law, 199 Mass. 124, 85 NE 157.

**68.** Alabama Grocery Co. v. First Nat. Bank [Ala.] 48 S 340; Queen City Sav. Bank & Trust Co. v. Reyburn, 163 F 597; Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068, citing Selover on Neg. Inst., p. 217. Reason being that proceeds of discount may be credited to bank by making change of entries on its own books. Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068.

**69.** Richards v. Street, 31 App. D. C. 427. Bank is purchaser for value to extent that such proceeds are paid out upon depositor's checks. Queen City Sav. Bank & Trust Co. v. Reyburn, 163 F 597.

**70.** Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068. Mere unexplained fact that credit was secured by the discounting bank for the indorser in another bank is insufficient to sustain the burden as to value, though it would be sufficient if such credit were shown to be real and substantial. Id.

**71.** Blake v. Hamilton Dime Sav. Bank Co. [Ohio] 87 NE 73. See ante, § 3C, subd. Acceptor. See, also, ante, § 4B, subd. Acceptance of Drafts and Certified Checks.

**72.** Only liability of drawer in such case is liability as drawer as such. Scheuermann v. Monarch Fruit Co. [La.] 48 S 647.

**73.** Rev. Laws, c. 73, § 41. Jennings v. Law, 199 Mass. 124, 85 NE 157. Laws 1897, p. 727, c. 612, § 50. National Park Bank v. Saitta, 127 App. Div. 624, 111 NYS 927.

**74, 75, 76.** See Jonee v. Jackson [Ark.] 110 SW 215.

**77.** Mee v. Carlson [S. D.] 117 NW 1088. Rev. Civ. Code, § 2452. Rochford v. Barrett [S. D.] 115 NW 522; Royal Bank v. German-American Ins. Co., 58 Misc. 563, 109 NYS 822. Use of check payable to corporation to pay individual debt of officer held to put transferee on inquiry as to whether such use was authorized. Ward v. City Trust Co., 192 N. Y. 61, 84 NE 585, rvg. 117 App. Div. 130, 102 NYS 50. Knowledge of maker's denial of liability, together with circumstances indicating fraud, held notice. Jones v. Jackson [Ark.]

by very respectable authority that failure to make inquiry in such case is a badge of fraud [78] and itself constitutes bad faith where an inquiry would have discovered the real situation.[79] A fortiori a purchaser cannot successfully claim to be an innocent purchaser where he purposely refrains from making an inquiry suggested by the circumstances.[80] The object of the inquiry, however, is not to discover negative facts, or such as would arouse suspicion, but positive facts which would allay the suspicion already aroused,[81] and if no inquiry is in fact made to dispel the presumption raised by circumstances, but reasonable inquiry would have led to the discovery of facts which have dispelled it, the purchaser of the paper is entitled to the benefit thereof the same as if he had learned them by proper investigation,[82] the correlative of this benefit being the burden of responsibility for such unfavorable facts as reasonable inquiry would have discovered in relation to the defect that made inquiry necessary.[83] On the other hand, the majority doctrine, which prevails in many of the states and into the statutes of some of which it has been carried, is that notice or bad faith cannot be predicated upon suspicious circumstances,[84] negligence,[85] or even gross negligence [86] actual knowledge or circumstance so cogent as to make the taking itself an act of bad faith being essential to defeat the holder's claim of bona fide holdership without notice,[87] and circumstances short of this being merely evidence to be considered in the determination of the issue.[88] Under this rule, ordinarily, where commercial paper is offered in the usual course of business, the purchaser need not make inquiry as to its ownership when the transac-

110 SW 215. Fact that indorsee selling note to individual was stranger and nonresident of state, that there were a number of banks in the vicinity, and that indorser indorsed "without recourse," held sufficient to put indorsee on his guard. Mee v. Carlson [S. D.] 117 NW 1033. Purchaser held to have had actual notice of such facts as to charge him with constructive notice, under Rev. Civ. Code, §§ 2451, 2452. Id. Mere fact of failure to inquire as to consideration that passed between maker and payee and purchase of note from payee at less than its face value is not alone sufficient to charge purchaser with notice. Rosenblum v. Blaser, 115 NYS 219.

**78.** Bank taking as collateral for individual debt of partner a note indorsed by him with partnership name, without inquiry as to such partner's authority to make such indorsement or any reason to believe that he had such authority, held charged with notice of lack of authority. United States Exch. Bank v. Zimmerman, 113 NYS 33.

**79.** Ward v. City Trust Co., 192 N. Y. 61, 84 NE 585, rvg. 117 App. Div. 130; 102 NYS 50.

**80.** Walters v. Rock [N. D.] 115 NW 511.

**81, 82, 83.** Ward v. City Trust Co., 192 N. Y. 61, 84 NE 585, rvg. 117 App. Div. 130, 102 NYS 50.

**84.** Custard v. Hodges [Mich.] 15 Det. Leg. N. 1067, 119 NW 583; Norlin v. Becker, 138 Ill. App. 488; Howell v. Merchants' Trust & Sav. Co., 134 Ill. App. 467; Forbes v. First Nat. Bank [Okl.] 95 P 785; Third Nat. Bank of Columbus v. Poe [Ga. App.] 62 SE 826; Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068; First State Bank of Pleasant Dale v. Borchers [Neb.] 120 NW 142; Reilly v. McKinnon [C. C. A.] 159 F 78. See P. L. 1902, p. 593. Rice v. Barrington, 75 N. J. Law, 806, 70 A 169. Evidence of prior purchase of another note from same party which had its inception in fraud and that holder had found this out before purchasing note in suit held inadmissible. Id. Purchaser of note from bank held not charged with notice that bank held note merely for collection. Forbes v. First Nat. Bank [Okl.] 95 P 785. Where bank accepting from husband check payable to his order had cause to suspect that wife was in some way instrumental in procuring same for him did not render bank liable to wife with whose money check was purchased. Third Nat. Bank of Columbus v. Poe [Ga. App.] 62 SE 826.

**Male fides** consists in notice, actual or constructive, of fact that paper is not property of person who offers it, and a privity with or participation in a fraud upon the true owner. Walden v. Downing Co., 4 Ga. App. 534, 61 SE 1127.

**85.** Walden v. Downing Co., 4 Ga. App. 534, 61 SE 1127.

**86.** Howell v. Merchants' Trust & Sec. Co., 134 Ill. App. 467; First Nat. Bank of Litchfield v. Cox, 140 Ill. App. 98; Walden v. Downing Co., 4 Ga. App. 534, 61 SE 1127; Kipp v. Smith, 137 Wis. 234, 118 NW 848. Custard v. Hodges [Mich.] 15 Det. Leg. N. 1067, 119 NW 583; Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068; Reilly v. McKinnon [C. C. A.] 159 F 78.

**87.** First State Bank of Pleasant Dale v. Borchers [Neb.] 120 NW 142; Forbes v. First Nat. Bank [Okl.] 95 P 785; Rice v. Barrington, 75 N. J. Law, 806, 70 A 169; Custard v. Hodges [Mich.] 15 Det. Leg. N. 1067, 119 NW 583; Feigenspan v. McDonnell, 201 Mass. 341, 87 NE 624.

**88.** Custard v. Hodges [Mich.] 15 Det. Leg. N. 1067, 119 NW 583; Reilly v. McKinnon [C. C. A.] 159 F 78.

tion appears on its face to be regular,[89] but if the purchaser knows or has reasonable cause to believe that the apparent owner is not the true owner, and enters into privity or participation in the fraud upon the true owner, the purchaser's title is defeasible.[90] No imputation of notice or bad faith can be predicated upon facts consistent with regularity of the paper and the transfer thereof.[91] The purchaser is charged with notice of matters appearing upon the paper itself,[92] but the inference to be drawn from the fact of such notice depends, of course, upon the nature of the matter upon which the inference is sought to be based.[93] Paper showing on its face that it is issued pursuant to a certain statute carries with it notice as to the invalidity of such statute so far as such invalidity will be disclosed by examination of the legislative records,[94] but the purchaser need not ordinarily inquire as to whether general, statutory limitations as to amount have been exceeded in the issue of the paper.[95]

Notice to an agent is notice to the principal.[96] Notice to a corporation is not notice to a stockholder personally,[97] but notice to officers as such is notice to the corporation.[98]

**89.** Third Nat. Bank of Columbus v. Poe [Ga. App.] 62 SE 826.

**90.** Third Nat. Bank of Columbus v. Poe [Ga. App.] 62 SE 826.

**Reasonable cause to believe** is not, however, synonymous with reasonable cause to suspect. Third Nat. Bank of Columbus v. Poe [Ga. App.] 62 SE 826.

**91.** Fact that note was executed by partners individually and indorsed by him first individually and then in partnership name raised no conclusive presumption that indorsement was for accommodation of maker or that money received was for his private use. Feigenspan v. McDonnell, 201 Mass. 341, 87 NE 624. Notice that note was given for building loan on building in course of construction held not notice that money had not been or would not be paid over. Zollman v. Jackson Trust & Sav. Bank, 141 Ill. App. 265, afd. 238 Ill. 290, 87 NE 297. Fact that purchaser of notes given for corporate stock purchased from agent of corporation's president was director of corporation and member of its executive committee which placed matter of stock sales in hands of president held not inconsistent with purchaser's ignorance of fraudulent representations inducing purchase of stock. Reilly v. McKinnon [C. C. A.] 159 F 78. Bank purchasing from the president of another bank acting in his official capacity notes drawn to the president in his individual capacity as payee, and indorsed by both bank and president, had a right to assume that title to notes was in bank, since president acted within the scope of his duties, and fact that notes were drawn in his name was consistent with bank's ownership. State v. Corning State Sav. Bank [Iowa] 115 NW 937. Irregularity in numbers and similarity in signatures or notes held not sufficient to put purchaser on inquiry. Id.

**92.** One taking a note on which place of payment has been changed cannot avoid defense that change was unauthorized. First Nat. Bank of Wilkes-Barre v. Barnum, 160 F 245. It is no defense to material alterations in printed portions of the notes to say that they are in the handwriting of the maker, the same as the rest of the written parts, dispelling suspicion and thereby doing away with the necessity of inquiry. Id.

**93.** Fact that **consideration** is set forth on face of paper does not carry with it notice of failure of the consideration, nor does it ipso facto put purchaser upon inquiry. Simmons v. Council [Ga. App.] 63 SE 238. Only exception is where note is given for patent rights, and this exception is based on statute. Id. An **indorsement "to any bank or banker"** imports an indorsement for collection only. Johnston v. Schnabaum [Ark.] 109 SW 1163. Under Acts 1899, p. 148, c. 94, § 38, providing that **indorsement without recourse** does not destroy negotiability, and also aside from effect of such act, fact of such an indorsement does not put purchaser upon inquiry. Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068. Fact that member of partnership to whom partnership note had been transferred in settlement of partnership affairs indorsed same to purchaser without recourse did not charge such purchaser's indorsee with notice of agreement between partners that as between themselves each was to be liable for only a proportionate share thereof. Laschinsky v. Margolis, 129 App. Div. 529, 114 NYS 296. **Where note is blank** as to amount, date and maturity, purchaser has notice of defects or irregularities in this regard. Hunter v. Allen, 127 App. Div. 572, 111 NYS 820. Purchaser is not charged with notice of any irregularity by the fact that name of the payee is left blank. People v. Gorham [Cal. App.] 99 P 391. **Agreement on back of note** that it, with a certain check, was given by maker in consideration of assignment of all claims of payee against maker, did not charge purchaser with notice that such assignment might be intended to include outstanding notes of maker. Mindlin v. Applebaum, 114 NYS 908.

**94.** Municipal bonds issued under act invalid under Const. art. 2, § 14. Wittkowsky v. Jackson County Com'rs [N. C.] 63 SE 275.

**95.** Purchaser of county bonds fair and legal on their face held not required to investigate as to whether amount authorized by law had been excluded, where statute authorizing the issue did not place specific limit thereon, but merely provided that amount should be in certain proportion to taxes. County of Presidio v. Noel-Young Bond & Stock Co., 212 U. S. 58, 53 Law. Ed.—

**96.** In re Hopper-Morgan Co., 158 F 351.

The notice which defeats a claim of bona fide holdership is notice prior to or at the time of the purchase,[99] but within this rule the purchase is not deemed complete until payment for the note has been made.[1] Notice to an indorser will not be imputed to his indorsee,[2] but the indorsee succeeds to the title and rights of the indorser regardless of his own knowledge.[3]

A purchase is presumed to be in good faith and without notice,[4] but the presumption is merely prima facie [5] and may be rebutted,[6] but no presumption of notice prior to purchase can be indulged from the mere fact of notice without reference to the time when such notice was had,[7] and the fact that the purchaser does not expressly state that he purchased in good faith does not necessarily negative good faith,[8] but is a fact to be considered in connection with other circumstances.[9] Where the paper is shown to have had its inception in fraud, the presumption of lack of notice fails.[10]

(§ 5B) 3. *Rights of holder of accommodation paper.*[11] See 10 C. L. 979, 984. Where the instrument is valid between the maker and the holder, it is binding on accommodation indorser,[12] and an accommodation party is liable to the holder regardless of the latter's knowledge that the former is merely an accommodation party.[13] Ignorance of the accommodation character of the paper cuts off any defense based upon the nature of the paper,[14] and where a note is indorsed in blank for accommodation and delivered to the party accommodated, as between the indorser and a bona fide purchaser the former is liable upon the note as filled out by the party accommodated, regardless of any excess of authority upon the part of such person,[15] but this rule does not apply where the paper has been materially altered.[16] As in other cases, the holder must pay value for the paper [17] and acquire the same before maturity.[18]

**97.** Where stockholder purchased note payable to corporation, he is not charged with notice of payment to corporation. Landa v. Mechler [Tex. Civ. App.] 111 SW 752.

**98.** Notice to cashier of bank notice to bank. Hunter v. Allen, 127 App. Div. 572, 111 NYS 820. Where corporation organized to succeed to business of another corporation has same officers as old corporation, knowledge of such officers, acquired in conduct of business of old corporation, as to note acquired from such corporation, is imputable to new corporation. Knowledge that defunct bank had received payments on note and had not credited thereon. Buse v. First State Bank, 105 Minn. 323, 117 NW 490.

**99.** Purchaser not affected by subsequent notice of fraud of seller in securing check. Blake v. Hamilton Dime Sav. Bank Co. [Ohio] 87 NE 73.

**1.** Knowledge of defense before payment for note will defeat claim of good faith, though note indorsed and delivered before such knowledge is acquired. Walters v. Rock [N. D.] 115 NW 511.

**2.** Heinbach v. Doubleday, Page & Co., 114 NYS 278; Laschinsky v. Margolis, 129 App. Div. 529, 114 NYS 296.

**3.** See ante, this subsection and subdivision, In General.

**4.** Johnson County Sav. Bank v. Kemp Mercantile Co. [Tex. Civ. App.] 114 SW 402. See ante, this subsection and subdivision, In General.

**5, 6.** Walters v. Rock [N. D.] 115 NW 511.

**7.** Where it appeared that plaintiff had no knowledge of other suits upon acceptances similar to the one sued on until after the institution of the suit, and it did not appear when such other suits were instituted, there could be no presumption of knowledge of such suits prior to purchase of acceptance sued on. Johnson County Sav. Bank v. Walker, 80 Conn. 509, 69 A 15.

**8, 9, 10.** Walters v. Rock [N. D.] 115 NW 511.

**11. Search Note:** See notes in 2 L. R. A. (N. S.) 525; 11 Id. 1034; 2 Ann. Cas. 256.

See, also, Bills and Notes, Cent. Dig. § 964; Dec. Dig. § 371; 7 Cyc. 947; 4 A. & E. Enc. L. (2ed.) 299.

**12.** Bank of Morgan City v. Hering, 121 La. 513, 46 S 611.

**13.** Hamilter v. Brown [Ark.] 113 SW 1014.

**14.** Accommodation indorsement. Ott v. Seward, 221 Pa. 630, 70 A 882.

**15.** Code, § 1318. Richards v. Street, 81 App. D. C. 427.

**16.** P. L. Pa. 1901, p. 261, § 124, does not apply in such case. First Nat. Bank v. Barnum, 160 F 245.

**17.** In order that antecedent debt may constitute value, which will support action against accommodation maker of check which has been fraudulently diverted, antecedent debt must have been canceled and discharged on the acceptance of check, or time of payment extended. Harris v. Fowler, 59 Misc. 523, 110 NYS 987. That recovery on check might extinguish the claim is not sufficient, there being nothing to show that in case of failure to recover the debt would still be extinguished. Id.

**18.** One receiving accommodation paper from payee after maturity acquires no rights

(§ 5B) 4. *Extent of recovery by holder.*[19]—See 10 C. L. 984—The fact that the purchaser pays full value for the note does not entitle him to collect the full value where he purchased with notice of payments not credited.[20] An innocent purchaser who has suffered by reason of the negligence of the maker in issuing the paper cannot recover the expense of an unjustifiable defense of a suit against him by a subsequent indorsee.[21] The extent of recovery by the holder is sometimes limited by statute in certain cases.[22]

§ 6. *Remedies and procedure. A. Remedies.*[23]—See 10 C. L. 987

*What remedies are available.*See 10 C. L. 987—Where a debt is extinguished by a note,[24] the remedy of a payee, who has been compelled to take up the note from an indorsee thereof, against the maker, is on the note and not on the original debt.[25] Since an indorser is liable only in the event of default of the maker, etc,[26] a holder who is also a maker cannot maintain an action on the note against an indorser,[27] although the note was made for the accommodation of the indorser.[28] The remedy of an accommodation party who has paid the note is by action for money paid to the use of the party accommodated.[29] An action will lie for the wrongful negotiation of negotiable paper.[30] Aside from the rights of bona fide holders, the drawer of a check may stop payment thereon.[31] The payee of a check may sue the drawer thereon as upon a promissory note,[32] or he may sue upon the debt evidenced by the check [33] where the drawer refuses to honor the check. The jurisdiction of equity to establish test instruments may be invoked with reference to negotiable instruments.[34]

*Statutory limitations.*See 10 C. L. 988—Limitation begins to run against the remedy of an accommodation indorser against the maker from the time of payment by the indorser, and not from the date of maturity of the note.[35] Special limitations are imposed in some states.[36]

*Indemnification in suit on lost instrument.*See 10 C. L. 998—In a suit on a lost instrument, indemnity will be required unless it appears with certainty that no loss can result.[37]

against the maker. Dominsky v. Coleman, 114 NYS 875.

**19. Search Note:** See Bills and Notes, Cent. Dig. §§ 790, 791; Dec. Dig. § 363; 8 Cyc. 300; 4 A. & E. Enc. L. (2ed.) 345.

**20.** Buse v. First State Bank, 105 Minn. 323, 117 NW 490. Where bank applied payments to illegal interest, another bank succeeding to its business could apply collateral, securing note only to payment of balance legally due, such note having been acquired with notice of prior payments. Id.

**21.** Gallo v. Brooklyn Sav. Bank, 114 NYS 78.

**22.** Under Code, § 3070, providing a bona fide holder for value may not recover of the maker a greater sum than he paid for it if procured by fraud on the maker, has reference only to recovery on instruments as to which the maker has a defense Not applicable to suits against indorsers. See N. I. Act Code 1907, § 3060-a57. Voss v. Chamberlain [Iowa] 117 NW 269.

**23. Search Note:** See notes in 13 L. R. A. (N. S.) 211; 5 Ann. Cas. 308; 7 Id. 693.

See, also, Bills and Notes, Cent. Dig. §§ 1286-1329, 1377-1423; Dec. Dig. §§ 441-448; 8 Cyc. 17; 14 A. & E. Enc. P. & P. 369.

**24.** See Payment and Tender, 10 C. L. 1147.

**25.** Keys v. Keys' Estate [Mo.] 116 SW 537.

**26.** See ante, § 3, subsecs. D, C.

**27.** Abramowitz v. Abramowitz, 113 NYS 798.

**28.** Maker's remedy is by action for money paid, wherein he may show that he made the note for the indorser's accommodation. Abramowitz v. Abramowitz, 113 NYS 798.

**29.** Indorser. Blanchard v. Blanchard, 61 Misc. 497, 113 NYS 882. Maker. Abramowitz v. Abramowitz, 113 NYS 798.

**30.** Where notes given subject to fulfillment of certain conditions are negotiated without such fulfillment, maker may recover of payee amount former is compelled to pay on the notes. Hughes v. Crooker, 148 N. C. 318, 62 SE 429.

**31.** Marietta Fertilizer Co. v. Beckwith, 4 Ga. App. 245, 61 SE 149.

**32, 33.** Camos Prairie State Bank v. Newman [Idaho] 99 P 833.

**34.** In re Ellard, 114 NYS 827.

**35.** Blanchard v. Blanchard, 61 Misc. 497, 113 NYS 882.

**36.** Suit against indorser must be instituted before lapse of two terms of court after maturity of note. Kennedy v. Grover [Tex. Civ. App.] 110 SW 136.

**37.** Suit in equity to restore instrument. In re Ellard, 114 NYS 827. Where plaintiff claimed that check was never received, he could not recover amount thereof from drawee without execution of agreement to indemnify, though drawee had stopped payment on lost check. Barclay v. Lehigh Coal & Nav. Co., 33 Pa. Super. Ct. 214.

(§ 6) *B. Parties.*[38]—See 10 C. L. 988

*Plaintiff.*See 10 C. L. 988—At common law a chose in action could not be transferred or assigned so that the transferee or assignee could maintain an action thereon in his own name, but by the law merchant or the customs of merchants a transferee of negotiable paper may sue thereon in his own name.[39] Accordingly, where the instrument shows an assignment by indorsement, it is improper to sue in the name of the payee for the use of the assignee.[40] The holder of the legal title may sue in his own name [41] without regard to the equitable title exept as affecting the right to assert defenses against the owner thereof,[42] and without regard to indorsements through which he does not derive title.[43] By statute in some states the real party in interest may sue,[44] but such statutes do not, it seems, preclude a suit by the holder of the legal title.[45]

*Defendant.*See 10 C. L. 988—Parties primarily liable may be sued contemporaneously with parties secondarily liable,[46] but, in the absence of statutory authority, not jointly,[47] even though the secondary party is sought to be held as a principal party.[48] A joint suit may, of course, be authorized by statute,[49] or such a joinder may even be required.[50] The holder cannot join the maker and one who received payment from the maker after the assignment to the holder.[51] In an action by an assignee of a note against the maker, the defendant cannot recover on a counterclaim against the plaintiff's assignor any sum greater than the amount of the notes sued on with interest, the plaintiff's assignee not being a party.[52] In an action on a negotiable instrument by a trustee, the beneficiaries are necessary parties.[53] The nonjoinder of the de-

**38. Search Note:** See notes in 1 Ann. Cas. 833.

See, also, Bills and Notes, Cent. Dig. §§ 1377-1443; Dec. Dig. §§ 456-460; 8 Cyc. 66; 14 A. & E. Enc. P. & P. 380, 445.

**39.** Oakdale Mfg. Co. v. Clarke [R. I.] 69 A 681.

**40.** Where a note shows by indorsement an assignment thereof, it is improper to sue thereon in the name of payee for use of assignee. King v. Tyler [Del.] 69 A 1065.

**41.** Haggard v. Bothwell [Tex. Civ. App.] 113 SW 965. One holding note as collateral may sue thereon. Packard v. Abell, 113 NYS 1005. Where the plaintiff shows such a title that a judgment thereon when satisfied will protect the defendant and such that all defenses are open to the defendant, the consideration paid by the plaintiff is immaterial. Kettner v. Shippy [Cal. App.] 96 P 912.

**42.** Haggard v. Bothwell [Tex. Civ. App.] 113 SW 965.

**43.** Any holder of note, though he may have written thereon an indorsement or assignment, may sue thereon in his own name, and may strike out such indorsement or assignment before offering instrument in evidence. Rodriguez v. Merriman, 133 Ill. App. 372. Where the payee or assignee of a note is under the necessity of taking up the note, he may sue thereon without showing any retransfer. Jacobs v. Pierce, 132 Ill. App. 547. In such case an indorsement of payment made at time of such payment may be erased. Id.

**44.** Holder of unindorsed note payable to another or order is real party in interest within Rev. Code 1905, § 6807, where consideration for note passed solely between holder and maker, note having been given to such other person solely for holder's benefit. American Soda Fountain Co. v. Hogue [N. D.] 116 NW 339. Assignee of negotiable paper may sue in his own name though there is no written assignment indorsed upon the paper, and hence fact that indorsement of corporate payee was not under seal was immaterial. Hall v. First Nat. Bank [Tex. Civ. App. 115 SW 293, afd. 116 SW 47.

**45.** See Comp. Laws 1897, § 2685, subsecs. 2, 3. Eagle Min. & Imp. Co. v. Lund [N. M.] 94 P 949.

**46.** Payee may sue maker and indorser simultaneously in separate actions. Scarbrough v. City Nat. Bank [Ala.] 48 S 62.

**47.** Joint suit not maintainable against maker and indorser. Scarbrough v. City Nat. Bank [Ala.] 48 S 62. **Amendment** striking out maker as party where suit was improperly brought against maker and indorser jointly held proper under Code 1896, § 3331 (Code 1907, § 5367). Id.

**48.** Though indorser is sought to be held as joint debtor with maker. Scarbrough v. City Nat. Bank [Ala.] 48 S 62.

**49.** Under Rev. St. 1895, art. 1203, the acceptor of a bill or any other principal obligor may be joined with anyone else liable on the same contract. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

**50.** It would seem from Rev. St. 1895, art. 1203, that acceptor is necessary party in suit against drawer unless certain conditions therein named exist. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

**51.** Since suit against maker in such case is repudiation of act of other party in recovering payment. Landa v. Mechler [Tex. Civ. App.] 111 SW 752.

**52.** Price v. Gatliffs Ex'rs, 33 Ky. L. R. 324, 110 SW 332.

**53.** Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

fendant's copromisor in a suit on a contract of indorsement can be taken advantage of only by an answer in abatement.[54]

(§ 6) *C. Pleading.*[55]—See 10 C. L. 988

*In general.*See 10 C. L. 988—Nonconformity of a note to the agreement of the parties as to what it should contain is properly pleaded by setting out the note in haec verba and then pleading the real intent.[56]

*Declaration or complaint.*See 10 C. L. 989—The instrument sued on must be properly alleged or described,[57] and a recovery can be had only upon the instrument alleged,[58] though the defendant admits liability on some other instrument.[59] Where the paper is alleged according to its substance and effect, a verbal variance is not necessarily fatal.[60] A negotiable note may be declared on as a promissory note where it is fully described so as to show its negotiability.[61] Where a declaration is on the common counts and does not refer to the note, the latter is no part of the declaration though a copy thereof is annexed as a bill of particulars.[62] The plaintiff may declare in one count upon a renewal note, and in another count upon the original note,[63] and where but one recovery is sought no election is required.[64] Considerable discretion is vested in the court with reference to amendments as to the description of the instrument.[65]

A certain amount due from the defendant to the plaintiff must be alleged,[66] but a promise to pay need not be alleged specifically.[67] The allegation of the promise may follow the allegation of the instrument and be connected therewith by the word "whereby." [68] Nonpayment need not be alleged specifically.[69] The consideration of the paper need not be alleged.[70] In an action by the payee of a note, the plaintiff's

54. Not available as defense at trial on merits. Feigenspan v. McDonnell, 201 Mass. 341, 87 NE 624.

55. **Search Note:** See Bills and Notes, Cent. Dig. §§ 1444-1642; Dec. Dig. §§ 461-489; 8 Cyc. 96; 14 A. & E. Enc. P. & P. 462-686.

56. Note was set out in full, and then it was alleged that certain stipulations should have been erased. Drake v. Pueblo Nat. Bank [Colo.] 96 P 999.

57. In action on note, a copy thereof must be stated. Keys v. Keys' Estate [Mo.] 116 SW 537.

58. Cleveland v. Taylor [Tex. Civ. App.] 108 SW 1037. Where plaintiff declares upon instrument as payable to order and properly indorsed, he cannot recover upon theory that instrument was knowingly made payable to fictitious payee and as such was negotiable without indorsement. Boles v. Harding, 201 Mass. 103, 87 NE 481.

59. Plaintiff declared upon $1,000 check and defendant'e answer admitted a $600 check, and there was nothing to show the two checks to be the same. Cleveland v. Taylor [Tex. Civ. App.] 108 SW 1037.

60. Plaintiff alleged that his name was J. W. M., that note was payable to him and bore 6 per cent. interest. Held that note payable to John W. M., and which did not specify rate of interest, was admissible, 6 per cent. being legal rate. Taylor v. McFatter [Tex. Civ. App.] 109 SW 395.

61. Boyd v. Beebe [W. Va.] 61 SE 304. In action of debt on a negotiable note, declaration alleging that 'the defendant made and signed his certain promissory note in writing,' setting out a full description of note, including place of payment, held no variance. Id.

62. Mayer v. Roche [N. J. Law] 69 A 246.

63, 64. Farmers' Sav. Bank v. Arispe Mercantile Co. [Iowa] 117 NW 672.

65. Within discretion of court to allow complaint alleging a joint and several liability to be amended so as to allege a joint liability only. Central Banking & Trust Co. v. Pusey [S. D.] 116 NW 1126.

66. In action on note a complaint drawn under Code Civ. Proc. § 534, which fails to allege that there is due from defendant to plaintiff a specified sum, is fatally defective. Elkan v. Edwards, 112 NYS 1107.

67. Where facts showing liability on part of defendant are fully stated, an express promise to pay need not be alleged. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345. Allegation that promissory note was executed and delivered necessarily implies a promise to pay, and an allegation of execution and delivery to a named person implies a promise to pay such person. Bick v. Clark [Mo. App.] 114 SW 1144.

68. The clause "whereby he promised and agreed, for a valuable consideration * * * to pay," etc., in a declaration in assumpsit on a promissory note, is a sufficient averment of a promise, and is not merely descriptive of the note. Acme Food Co. v. Older [W. Va.] 61 SE 235.

69. Sufficient if facts are averred from which it may be inferred that the note is due and unpaid. Scott v. Lafayette Gas Co. [Ind. App.] 86 NE 495.

70. Zimbleman v. Finnegan [Iowa] 118 NW 312.

ownership of the paper need not be alleged specifically,[71] and so, also, in any action against the maker, the character of the indorsement is immaterial, provided it be sufficient to transfer title to the plaintiff.[72] In suing on an accepted draft, it is unnecessary to allege that the acceptor had funds belonging to the drawer[73] or that the holder was induced to buy the draft from the drawer by any act of the drawee.[74]

One sued in a secondary capacity cannot be held liable in a primary capacity,[75] or in any capacity other than that alleged.[76] In such an action the contract sued on must be sufficiently alleged,[77] and also performance of the conditions of secondary liability,[78] or facts excusing such performance.[79] Protest fees are recoverable in a suit on a promissory note on the common counts.[80] In an action upon a contract of indorsement, the indorsement must be alleged.[81] It is not necessary in a suit by the holder or payee against the maker and an irregular indorser to render the latter liable as a maker, to allege either that such indorsement was prior to delivery of the paper,[82] or that the plaintiff has elected to treat the indorser as a maker.[83] In declaring against indorsers, whose names are found on the back of the paper upon its delivery to the payee, as original promisors, a promise to pay must be alleged.[84]

No recovery can be had upon a collateral agreement unless the same is specifically alleged,[85] and in order to recover upon a stipulation for the payment of attorney's fees upon certain contingencies, the happening of such contingencies must be alleged.[86]

71. Suffices, as to title, to aver that defendant by the note promised to pay plaintiff amount named in note, no indorsement thereof being disclosed. Duty v. Sprinkle [W. Va.] 60 SE 882; Boyd v. Beebe [W. Va.] 61 SE 304; Quesenberry v. Wood [W. Va.] 60 SE 881.

72. Under Practice Book 1908, p. 245, § 149, providing that immaterial variances must be disregarded. E. L. Cleveland Co. v. Chittenden [Conn.] 71 A 935. Allegation of transfer does not necessarily import special indorsement by transferror, especially where note, indorsed in blank, is annexed to and made part of complaint. Id.

73, 74. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

75. Indorser sued as such cannot be held primarily liable by reason of assumption of debt. Jordan v. Reed [N. J. Err & App.] 71 A 280. Complaint upon a contract of indorsement excludes all issues as to liability of defendant as maker. Roessle v. Lancaster, 114 NYS 387.

76. Where plaintiff declares upon contract of indorsement expressly rendering defendant liable to pay note on demand, defendant cannot be held as guarantor. Clymer v. Terry [Tex. Civ. App.] 109 SW 1129.

77. Mistake in declaration as to order of indorsements held cured by particulars of demand which showed defendant to be first indorser. Richards v. Street, 31 App. D. C. 427.

78. One seeking to recover upon contract of indorsement must aver the facts upon which the indorser's liability depends. Link v. Bergdoll, 35 Pa. Super. Ct. 155. Must allege **protest and notice.** Grimes v. Tait [Okl.] 99 P 810. Allegation that notice of dishonor was served on endorser's employe at former's place of business, held sufficient allegation of service upon agent authorized to receive service. Scarbrough v. City Nat. Bank [Ala.] 48 S 62. Complaint against indorser alleging that note was "duly protested and due notice of protest given" held sufficient on demurrer. Sherman v. Ecker, 59 Misc. 216, 110 NYS 265, rvg. 58 Misc. 456, 109 NYS 678. An averment of notice of protest is not equivalent to an averment of presentment, demand and dishonor. Sherman v. Ecker, 58 Misc. 456, 109 NYS 678. Allegation that check was properly and duly presented to certain bank upon which it was drawn, but that before such presentment on the following Monday morning, check having been given on Saturday afternoon after banking hours, defendant wrongfully, improperly and without authority, had stopped payment by said bank, held sufficient allegation of demand and refusal. Purcell v. Armour Packing Co., 4 Ga. App. 253, 61 SE 138.

79. Grimes v. Tait [Okl.] 99 P 810.

80. First Nat. Bank v. Miller, 235 Ill. 135, 85 NE 312.

81. Complaint in action on note payable to maker must allege its indorsement by him. Laws 1897, p. 755, c. 612, § 320; Edelman v. Rams, 58 Misc. 561, 109 NYS 816.

82. Kidd v. Beckley [W. Va.] 60 SE 1089.

83. Kidd v. Beckley [W. Va.] 60 SE 1089. Fact that maker and an irregular indorser are sued jointly in an action of debt is sufficient to show an election to hold the indorser as an original promisor. Quesenberry v. Wood [W. Va.] 60 SE 881.

84. Complaint held bad on demurrer. Quesenberry v. Wood [W. Va.] 60 SE 881.

85. Complaint upon a bill or note which does not allege collateral agreement between parties to instrument, and yet seeks a recovery upon basis of liability other than that which is prima facie presumed from terms of instrument, is demurrable. Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 NE 682.

86. Attorney's fees to be paid if note

In view of the presumption in favor of the holder,[87] allegation that the plaintiff is a bona fide holder would seem to be unnecessary, but the practice seems to be otherwise.[88] A complaint against the drawer showing that the bill was paid by the drawee to the wrong person, after the expiration of a period which ordinarily would constitute due course, and under circumstances calculated to excite suspicion, sufficiently presents an issue of fact as to payment in good faith and in due course.[89]

*Plea or answer.* See 10 C. L. 990—As a general rule statutory defenses must be specially pleaded,[90] as must also all collateral agreements or stipulations not sued on,[91] fraud,[92] mistake,[93] or payment.[94] Failure of consideration must usually be pleaded specially,[95] but this rule is not of universal application,[96] and is subject to more or less restricted exceptions in some states.[97] The consideration is not put in issue by a mere denial of indebtedness upon the instrument sued on [98] or by an allegation of incapacity to execute the paper.[99] A plea of total failure of consideration or total want of consideration fails where the evidence shows any consideration

should be placed in hands of attorneys. Smith v. Childs [Tex. Civ. App.] 115 SW 598.

87. See ante § 5B2, Who are Bona Fide Holders.

88. Uniform practice in suits by indorsee against maker to aver that plaintiff took note before maturity and is bona fide holder for value. Bank of Morehead v. Nerning, 220 Pa. 224, 69 A 679. In absence of such allegation, an answer averring that note was taken after notice of the payee's defective title, and that little or no consideration passed, is sufficient to put plaintiff on proof of bona fide transaction. Id. This is common-law rule and obtains under act. Id.

89. Allegation that express company in New York issued money order to Tong Sing Wo Kee on bank at Hong Kong, that same was sent by registered mail to him but did not reach him, and that payment was made to another person upon indorsement of Tong Sing Wo Kee, sixty days after date of instrument and when same was in battered condition, held sufficient on demurrer for insufficiency. Moy Sie Tighe v. Fargo, 61 Misc. 181, 112 NYS 927.

90. Failure to list note for taxation under Revisal 1905, § 5219, subd. 11, and Acts 1907, p. 339, c. 258, § 32. Martin v. Knight, 147 N. C. 564, 61 SE 447.

91. Where defendant, maker of note sued on, pleaded that he was not bound, either as principal or surety, and there was nothing to show that he was married or possessed of community property, he could not invoke the laws applicable to community property and suretyships in order to let in evidence of a fraud, collateral agreement limiting his liability. Anderson v. Mitchell [Wash.] 98 P 751. Answer alleging **agreement to extend time of payment** until such time as defendant could pay out of his business must allege facts showing that such time has not arrived. First State Bank v. Schatz, 104 Minn. 425, 116 NW 917. **Division of accommodation paper** must be pleaded. Macauley v. Holsten, 114 NYS 611.

92. No issue of fraudulent representations raised by allegation of misapprehension of terms of note. Winn v. Neville [Kan.] 98 P 272.

93. Dolvin v. American Harrow Co. [Ga.] 62 SE 198. Plea that paper is not what it plainly purports to be will be stricken. Id.

94. Plea alleging that note sued on was merely evidence of a debt which was also represented by series of similar notes, and that a definitely stated number of the smaller notes had been paid, held good as a plea of partial payment, the dates, maturity, amount and nature of the smaller notes being stated and it being also alleged that they were paid to the holder according to their terms, such terms being stated. Jones v. Taylor [Ga. App.] 62 SE 992. Answer alleging that note sued on was given as security for performance of obligation by third person and that such person had always been ready and willing to perform such obligation states a good defense as against a general demurrer, notwithstanding failure to allege expressly plaintiff's refusal to accept performance by person whose obligation was secured by note sued on. Landrum v. Stewart [Tex. Civ. App.] 111 SW 769. Plea alleging that defendant is an accommodation maker and **that paper has been paid by party accommodated** states only one defense, that of payment, and is not open to objection that it pleads inconsistent defenses of lack of consideration and payment. Jacobs v. Pierce, 132 Ill. App. 547.

95. Baldwin v. Self [Tex. Civ. App.] 114 SW 427; Scott v. Rawls [Ala.] 48 S 710. Plea held sufficient. Baldwin v. Self [Tex. Civ. App.] 114 NYS 427.

96. Where a note is introduced **under common counts,** defendant may show lack of consideration without any special plea to that effect. Clarke v. Newton, 235 Ill. 530, 85 NE 747. **Where note is pleaded as set off,** and its execution to defendant is alleged, thus giving rise under B. & C. Comp., § 788, subd. 21 to a rebuttable presumption of consideration, a general denial of consideration raises issue of lack of consideration. Boothe v. Farmers' & Traders' Nat. Bank [Or.] 98 P 509.

97. Under plea of general issue only complete failure of consideration is available as defense. Andersen v. Young, 74 N. H. 428, 69 A 122.

98. Farmers' Sav. Bank v. Arispe Mercantile Co. [Iowa] 117 NW 672.

99. Incapacity of drawer. Camas Prairie State Bank v. Newman [Idaho] 99 P 833.

at all,[1] and there is a fatal variance where a plea alleges failure of a common consideration for several notes sued on and the proof shows that the consideration for one of the notes was other than that so alleged.[2] The maturity of a debt assumed by the payee in consideration of the note need not be alleged in order to render his failure to pay such debt available as a defense.[3] A plea of lack of consideration is insufficient to present an issue of diversion.[4] Set-offs and counterclaims are pleadable according to statutory authority,[5] but must be specifically pleaded.[6]

In pleading defenses between the maker and payee against an assignee, it must be alleged that such defenses arose prior to the assignment or notice thereof to the assignee.[7] In order to avail himself of the defense that a bank is not a holder for value in that it merely credited its depositor with the proceeds of the paper,[8] the defendant must allege that at the time of the bank's notice of the defects in the paper or defense thereto the proceeds thereof still remained in the bank to the credit of the depositor.[9] As against a bona fide holder, a plea of fraud in the inception of a note must negative negligence on the part of the maker.[10] Failure to deny a specific allegation of nonpayment and of a specific amount due admits such allegation and nullifies a denial of transfer before maturity and ownership of the notes.[11] A plea denying the status of the plaintiff as a bona fide purchaser is insufficient where plaintiff alleges purchase from a bona fide holder.[12]

A verified denial is often required by statute in order to put in issue the execution of the instrument sued on [13] or its indorsement [14] or transfer,[15] but under such statutes verification is not essential to raise an issue of discharge [16] or as to notice of dishonor.[17] A verified denial puts in issue the question of alterations of credits indorsed on the instrument contemporaneously with its execution and before delivery.[18] An admission of the execution of the note sued on admits its execution in the very

1. Iowa Nat. Bank v. Sherman [S. D.] 119 NW 1010.

2. Emmett v. Hooper [Ala.] 47 S 1006.

3. Baldwin v. Self [Tex. Civ. App.] 114 SW 427.

4. Plea of lack of consideration for note given to trade union in earnest of performance of agreement with union did not raise issue as to whether maker had violated such agreement. Simers v. Halpern, 114 NYS 163.

5. Under Rev. Code Civ. Proc. § 127, defendant in suit on note secured by mortgage on machinery may counterclaim for conversion of machinery by illegal foreclosure of mortgage. Northwestern Port Huron Co. v. Iverson [S. D.] 117 NW 372.

6. Partial failure of consideration. Haggard v. Bothwell [Tex. Civ. App.] 113 SW 965.

7. Carlton v. Smith, 33 Ky. L. R. 647, 110 SW 873.

8. See ante, § 5B2, Who are Bona Fide Holders.

9. Richards v. Street, 31 App. D. C. 427.

10. Commercial State Bank v. Judy, 133 Ill. App. 35.

11. Kafka v. Wardwell, 112 NYS 1114.

12. Rodriguez v. Merriman, 133 Ill. App. 372. See ante, § 5B1, Doctrine Stated.

13. Newton v. Clarke, 235 Ill. 530, 85 NE 747, afg. 138 Ill. App. 196. In absence of verified denial, note is admissible under common counts without proof of signature of maker. Id. Under Rev. St. 1899, § 746 (Ann. St. 1906, p. 731), denial of one garnisheed as maker's debtor **held insufficient**, maker's own denial being required. People's Sav. Bank v. Hoppe, 132 Mo. App. 449, 111 SW 1190.

14. South v. People's Nat. Bank, 4 Ga. App. 92, 60 SE 1087.

15. Under Code 1896, §§ 1801, 1802, if assignment of note alleged, it cannot be denied except by verified plea. International Harvester Co. v. Gladney [Ala.] 47 S 733. Under Code 1906, § 3860, providing that where a pleading alleges a writing no proof of handwriting is required unless denied under oath where a bill on a note simply states that the note was assigned to plaintiff by the payee, without alleging a written assignment, and the answer denies an assignment, the plaintiff must prove it, though the answer is unsworn. Horner v. Amick [W. Va.] 61 SE 40.

16. Execution of note need not be denied under oath in order to admit defense of payment and release and notice thereof by plaintiff at time of his purchase. Custard v. Hodger [Mich.] 15 Det. Leg. N. 1067, 119 NW 583.

17. Failure of defendant to verify answer does not relieve plaintiff from necessity of proving notice of dishonor. Grimes v. Tait [Okl.] 99 P 810.

18. Under Gen. St. 1901, § 4542, Code § 108, construed. Kurth v. Farmers' & Merchants' State Bank, 77 Kan. 475, 94 P 798.

form in which it is pleaded.[19] Where an allegation is denied of record by virtue of statute, no pleaded denial is necessary.[20]

Reference in a plea to an exhibit as being referred to in the declaration is unavailing where the declaration makes no such reference.[21] Matters relating to amendment of the defendant's pleadings are, as in other cases, largely within the discretion of the court.[22]

Affidavits of defense partake of the nature of pleadings and are interpreted as such.[23]

*Reply.*—A plea of payment needs no reply.[24] In response to a plea of no consideration, the plaintiff is not bound to allege the consideration.[25] Where the plaintiff declares as the payee of a bill of exchange, a replication alleging purchase after acceptance constitutes a departure.[26] Where a negotiable instrument is pleaded by the defendant as set-off, the plaintiff's reply is in the nature of a plea or answer.[27]

(§ 6) *D. Province of court and jury.*[28]—See 10 C. L. 890—As in other cases,[29] questions of law are for the court and questions of fact for the jury,[30] and within this rule a question of law only is presented where the facts are established beyond dispute and only one reasonable inference can be drawn therefrom,[31] but where there is a conflict in the evidence or in the inferences deducible from the facts proved, a question of fact is presented to be determined by the jury.[32]

19. Where plaintiff attaches to his petition a copy of the note sued on, and defendant admits its execution, defendant cannot, on introduction of evidence, be heard to say that note was changed after its execution. White v. Smith [Kan.] 98 P 766.

20. Invalidity of note under laws of another state. Arnett v. Pinson, 33 Ky. L. R. 36, 108 SW 852.

21. Where declaration on common counts made no reference to copy of note, special plea that when "note referred to in the declaration * * * was signed by this defendant she was and is now a married woman" held demurrable. Mayer v. Roche [N. J. Law] 69 A 246.

22. Refusal of continuance to permit amendment of answer by pleading defect of parties. Central Banking & Trust Co. v. Pusey [S. D.] 116 NW 1126.

23. Allegation of misrepresentations inducing execution of note for corporate stock held insufficient. Growler Copper Co. v. Teti, 221 Pa. 36, 69 A 1124. Allegation that defendant delivered note to plaintiff corporation's treasurer to be delivered by him in escrow to third person, and that such treasurer delivered it to plaintiff, held sufficient allegation of nondelivery. Id. Allegation that "no notice of the dishonor or protest of said note was given to this deponent by the plaintiffs in this case, or the notary who is alleged to have protested the same or any one on the occurrence of such dishonor or protest or at any time until the bringing of this suit," held sufficient to raise an issue of fact for jury. Link v. Bergdoll, 35 Pa. Super. Ct. 155.

24. Carlton v. Smith, 33 Ky. L. R. 647, 110 SW 873.

25. Zimbleman v. Finnegan [Iowa] 118 NW 312.

26. Alabama Grocery Co. v. First Nat. Bank [Ala.] 48 S 340.

27. See law preceding subdivision, Plea or Answer.

28. **Search Note:** See Bills and Notes, Cent. Dig. §§ 1862-1894; Dec. Dig. § 537; 8 Cyc. 286.

29. See Questions of Law and Fact, 10 C. L. 1346.

30. What constitutes bona fide holdership is question of law, but the sufficiency of evidence to show facts upon which court's conclusion is predicated is for jury. Arnd v. Heckert [Md.] 70 A 416. What constitutes due diligence in giving notice to indorser is question of law. Vogel v. Starr, 132 Mo. App. 430, 112 SW 27.

31. There being nothing to discredit or contradict plaintiff's evidence showing it to be a **bona fide purchaser** for value without notice, directed verdict for it was proper. Second Nat. Bank v. Snoqualmie Trust Co. [Neb.] 120 NW 182. Direction of verdict for plaintiff on issue of notice of defenses at time of purchase held proper, evidence adduced by defendant to show such notice being insufficient. Hall v. First Nat. Bank [Tex. Civ. App.] 116 SW 47, afg. 115 SW 293. Evidence held to show plainly that purchase was before maturity and directed verdict held proper. Id. Evidence held insufficient to sustain finding of notice. Heinbach v. Doubleday, Page & Co., 114 NYS 278. There being no controversy over the material facts, the question whether a notary exercised reasonable **diligence in giving notice** to an indorser is a question of law. Vogel v. Starr, 132 Mo. App. 430, 112 SW 27. Finding that transaction was **payment** and not purchase held not sustained by evidence. Prather v. Hairgrove, 214 Mo. 142, 112 SW 552. Finding of chancellor that certain payment was in discharge of obligations other than that of note sued on held not sustained. Westbrook v. Potter's Sons' Trustee, 33 Ky. L. R. 1071, 112 SW 635.

32. **Held for jury:** Whether amount of note included debt of third party without defendant's knowledge or consent. McAdoo v. Connor & Co. [Ark.] 111 SW 810. **Character of,**

(§ 6) *E. Evidence.*[33] See 10 C. L. 986, 994

*Burden of proof.* See 10 C. L. 986, 994—The burden of sustaining affirmative allegations is usually upon the party making them.[34] Accordingly, where such matters are properly put in issue,[35] the plaintiff usually has the burden of proving the execution of the instrument[36] by one authorized in the premises,[37] or its ratification by the

**signature** with reference to whether one of two joint makers in form was really surety for other. Cotton v. Cotton's Ex'x [Ky.] 115 SW 783. Whether defendant was accommodation maker. Asher v. Howard, 33 Ky. L. R. 696, 110 SW 895. Whether there had been **alteration** of note by erasure of one of joint maker's names. Citizens' Sav. Bank v. Haistead [Ind. App.] 84 NE 1098. **Notice** is usually a question of fact for jury. Demelman v. Brazier, 198 Mass. 458, 84 NE 856. **Negligence in signing note** without reading it, or having it read to him, held question of fact for jury where defendant could not read English. First State Bank v. Borchers [Neb.] 120 NW 142. Finding for plaintiff on issue of **payment** held sustained by evidence. McAdoo v. Connor & Co. [Ark.] 111 SW 810. Evidence of payment held sufficient to take the case to the jury. Bailey v. Robison, 233 Ill. 614, 84 NE 660. Held error under the evidence not to submit to jury question whether plaintiff had accepted note of another party in lieu of note sued on which was guaranteed by defendants. Polk Print. Co. v. Smedley [Mich.] 15 Det. Leg. N. 988, 118 NW 981. **Good faith of drawee in making payment** is for jury. Moy Sie Tighe v. Fargo, 61 Misc. 181, 112 NYS 927. Character of **delivery** with reference to whether bank received paper for collection or by way of discount or purchase. Bank of Latham v. Milligan [Iowa] 118 NW 404. Whether defendant indorsed note merely to pass title. Dye v. Peacock [Ga. App.] 63 SE 520. Whether irregular indorsement prior to negotiable instrument act was for accommodation of maker. Bowler v. Osborne, 75 N. J. Law, 903, 70 A 149. Fraud in inception of instrument. Cox v. Cline [Iowa] 117 NW 48; Johnson County Sav. Bank v. Kemp Mercantile Co. [Tex. Civ. App.] 114 SW 402; Sibley County Bank v. Schaus, 104 Minn. 438, 116 NW 928. Fraud of agent employed to discount note, in turning note over to another party without authority, held for the jury. Demelman v. Brazier, 198 Mass. 458, 84 NE 856. **Negligence** of maker in executing note in such manner as to facilitate perpetration of fraud. Sibley County Bank v. Schaus, 104 Minn. 438, 116 NW 928. **Bona fide holdership** without notice of fraud in inception. Penfield Inv. Co. v. Bruce, 132 Mo. App. 257, 111 SW 888. Good faith. American Nat. Bank v. Fountain, 148 N. C. 590, 62 SE 738; Walters v. Rock [N. D.] 115 NW 511. Whether holder was purchaser for value without notice. Laschinsky v. Margolis, 129 App. Div. 529, 114 NYS 296. Whether holder was bona fide purchaser. Arnd v. Heckert [Md.] 70 A 416. Whether note was purchased after maturity. McCormick v. Kampmann [Tex.] 115 SW 24. Whether presumption, arising from indorsement, that transfer was contemporaneous with execution of note, and hence before maturity. McCormick v. Kampmann [Tex. Civ. App.] 109 SW 492. Whether person notified of payment was president of plaintiff bank. Olson v. Houston Nat. Bank [Kan.] 96 P 853. On issue of good faith, court should instruct for defendant only where the uncontradicted evidence shows that plaintiff had notice of the defect in note or establishes facts from which the only reasonable inference to be drawn is that he had such notice or took paper under such circumstances as show bad faith or dishonest purpose on his part. Gibon v. Gutru [Neb.] 120 NW 201. Suspicious circumstances being evidence of notice of bad faith, where such circumstances are shown, question of good or bad faith should be submitted to jury. Custard v. Hodges [Mich.] 15 Det. Leg. N. 1067, 119 NW 583. Evidence that plaintiff had considerable knowledge of the business of the original payee and of the circumstances under which the note was given held sufficient to take case to jury on question whether plaintiff was holder in due course. Kipp v. Smith, 137 Wis. 234, 118 NW 848. For jury to say whether grant of exclusive right to sell nonpatented article in certain territory is a valuable **consideration.** Id.

**33. Search Note:** See Bills and Notes, Cent. Dig. §§ 1643-1855; Dec. Dig. §§ 490-527; 8 Cyc. 216.

**34.** Error to give judgment for defendant where evidence left question of **payment** in doubt. Plaut v. Straub, 115 NYS 148. Burden of showing **bad faith** is upon party asserting it. Howell v. Merchants' Trust & Sec. Co., 134 Ill. App. 467. Burden of sustaining issue as to **validity of note under laws of another state** is upon the party asserting such invalidity. Arnett v. Pinson, 33 Ky. L. R. 36, 108 SW 852. Burden of proving **want of consideration** on party asserting it. Cuibertson v. Salinger [Iowa] 117 NW 6.

**35.** See ante, this section, subsection C, Pleading.

**36.** In action against maker, burden under plea of non est factum is upon plaintiff. Himes Supply Co. v. Parker [Ala.] 47 S 794. Where bill alleges that person made promissory note, and an answer, verified by affidavit, denies that such person made the note, plaintiff must prove signature and execution of note. Horner v. Amick [W. Va.] 61 SE 40. Where one is sued as maker, and there is a general denial and an allegation that he is not maker but indorser, the burden is still on the plaintiff to make out his case. Oexner v. Loehr, 133 Mo. App. 211, 113 SW 727. Having burden of proof in such case, plaintiff has right to open and close. Id. **Where defendant admits execution** of instrument and assumes burden of proof, he cannot thereafter object to admission of instrument on rebuttal without testimony of attesting witnesses. Ford v. Parker [Ga.] 62 SE 526.

**37.** Authority to execute note in the name of a corporation must be proved. Schwartz v. Horn Michael Co., 113 NYS 611.

party sought to be charged,[38] and so also the plaintiff must prove an indorsement upon which his right to recover depends [39] and all the facts upon which the indorser's liability depends.[40] Under the same rule the defendant has the burden of proving affirmative defenses, such as payment or discharge,[41] lack or failure of consideration,[42] fraud [43] or undue influence.[44] So, also, by reason of the presumption in favor of the holder,[45] the defendant usually has the burden of proving bad faith and notice on the part of the holder,[46] or transfer after maturity,[47] but according to the great weight of authority, influenced to a considerable extent by statutory enactments, where fraud is shown the plaintiff has the burden of proving bona fide holdership,[48] in all of its elements,[49] as defined in a previous section.[50] A distinction

**38.** Burden on holder to prove ratification by one partner of act of copartner in indorsing note in partnership name for his own benefit. Feigenspan v. McDonnell, 201 Mass. 341, 87 NE 624.

**39.** Where answer aptly raises the issue, there can be no recovery by an alleged bona fide holder without proof of the genuineness of indorsement by payee. Boles v. Harding, 201 Mass. 103, 87 NE 481. Denial of indorsement sued on is plea of non est factum, and burden of proof on issue thereby raised is upon plaintiff as distinguished from case upon issue raised by special plea of non est factum alleging alteration. Clymer v. Terry [Tex. Civ. App.] 109 SW 1129. In action by payee of note of S. & S., a corporation, indorsed S.—S., burden was on plaintiff to show that S. and S indorsed individually. Reedy Elevator Co. v. Silberstein, 114 NYS 785.

**40.** Where one sought to be charged as indorser denies any one or more of facts upon which his liability depends, plaintiff is put to his proofs before jury. Link v. Bergdoll, 35 Pa. Super. Ct. 155.

**41.** Bank of Benson v. Jones, 147 N. C. 419, 61 SE 193. Payment. Lynch v. Lyons, 115 NYS 227; Austin v. Papanti, 197 Mass. 584, 83 NE 1088; Demelman v. Brazier, 198 Mass. 458, 84 NE 856; Jennings v. Roberts, 130 Mo. App. 493, 109 SW 84; First Nat. Bank v. Brown [Neb.] 116 NW 685; Carlton v. Smith, 33 Ky. L. R. 647, 110 SW 873. Payment in property. Hill v. Waight [Iowa] 118 NW 877. Payment of draft, duplicate to one sued on, is a matter of affirmative defense. Kesseler v. Armstrong Cork Co. [C. C. A.] 158 F 744. Burden is on defendant to overcome **presumption of continuous nonpayment** arising from nonpayment at maturity and production of note by holder. Gilpin v. Savage, 60 Misc. 605, 112 NYS 802.

**42.** McCormick v. Kampmann [Tex. Civ. App.] 109 SW 492; Arnett v. Pinson, 33 Ky. L. R. 36, 108 SW 852; Joveshof v. Rockey, 58 Misc. 559, 109 NYS 818.

**43.** Arnett v. Pinson, 33 Ky. L. R. 36, 108 SW 852.

**44.** One who assails note as having been procured by undue influence has burden of proving both undue influence and mental weakness where both are relied upon. Bade v. Feay, 63 W. Va. 166, 61 SE 348.

**45.** See ante, § 5B1, Doctrine Stated. See, also, ante, § 5B2, Who Are Bona Fide Holders.

**46. Notice of collateral agreement** note was payable out of particular, contingent fund. Norlin v. Becker, 138 Ill. App. 488. **Notice of failure of consideration.** McCormick v. Kampman [Tex. Civ. App.] 109 SW 492; Johnson County Sav. Bank v. Kemp Mercantile Co. [Tex. Civ. App.] 114 SW 402; Gillespie v. First Nat. Bank, 20 Okl. 768, 95 P 220; Joveshof v. Rockey, 58 Misc. 559, 109 NYS 818. Want of consideration is not a defect of title under the statutory rule placing the burden upon the holder where the title of any one negotiating instrument is defective. See Comp. Laws 1907, § 1607. Cole Banking Co. v. Sinclair, 34 Utah, 454, 98 P 411.

**47.** Proof that instrument was in hands of original payee a few days before maturity does not relieve maker of burden of proving transfer after maturity where the indorsement is undated. Baskins v. Valdosta Bank & Trust Co. [Ga. App.] 63 SE 648.

**48.** Burden of showing good faith held shifted to plaintiff by case made out by defendant showing circumstances under which note was executed, indorsed and transferred. Custard v. Hodges [Mich.] 15 Det. Leg. N. 1067, 119 NW 583. Where instrument is procured by **duress.** Siegel v. Oehl, 110 NYS 916. Burden on holder to show lack of notice that **indorsement by member of partnership of individual note** in partnership name for his own benefit. Feigenspan v. McDonnell, 201 Mass. 341, 87 NE 624.

**When fraud in inception is shown:** Holder has burden of showing **payment of value.** Elgin City Banking Co. v. Hall [Tenn.] 108 SW 1068. Holder must show purchase **without notice.** Walters v. Rock [N. D.] 115 NW 511. Holder must prove **good faith.** Code Supp. 1907, §§ 3060a55, 3060a59. Cox v. Cline [Iowa] 117 NW 48. Holder must prove **good faith and value.** Rochford v. Barrett [S. D.] 115 NW 522. Holder must prove purchase **for value and without notice.** Johnson County Sav. Bank v. Kemp Mercantile Co. [Tex. Civ. App.] 114 SW 402. Holder must prove **good faith and payment of value.** In re Hopper-Morgan Co., 158 F 351. Holder must show purchase in **good faith, for value and without notice.** Royal Bank v. German-American Ins. Co., 58 Misc. 563, 109 NYS 322, Penfield Inv. Co. v. Bruce, 132 Mo. App. 257, 111 SW 888. Holder must show purchase in **good faith, for value and before maturity.** Walters v. Rock [N. D.] 115 NW 511. Holder must show purchase **in due course.** Cox v. Cline [Iowa] 117 NW 48; City Deposit Bank v. Green, 138 Iowa, 156, 115 NW 893. Laws 1897, p. 732, 733, c. 612, §§ 94, 98. Packard v. Figliuolo, 114 NYS 753. Holder must show purchase **in due course and without notice.** City Nat. Bank v. Jordan [Iowa] 117 NW 758. Holder must show purchase in **good faith, for value, in due course and without notice.** Mee v. Carlson [S. D.] 117 NW 1033.

**Where fraud in negotiation is shown** or

is sometimes made, however, as to the burden of proving notice or lack thereof.[51] A distinction is also sometimes seemingly made between the burden of proof and the burden of adducing evidence.[52] The title of a bona fide holder of an instrument indorsed in blank does not depend on the title of the transferor,[53] and hence the defendant cannot overcome the presumption that the holder is ever in due course by showing such a subsequent defect, but the burden still remains on him to show that the holder is not a holder in due course.[54] In an action on a check not presented in due time, the burden is upon the plaintiff to negative any loss to the defendant by reason of the delay,[55] as distinguished from the case where the action is upon the original obligation for which the check was given such a case being predicated upon matter of discharge of the original debt[56] as distinguished from the performance of a condition precedent to the drawee's liability upon the check.

*Admissibility.* See 10 C. L. 992, 978—The admissibility of evidence in an action on a negotiable instrument is tested by the usual rules as to relevancy and materiality,[57] and competency of evidence[58] and of witnesses.[59] Fraud may be proved by the con-

fraud in placing note in circulation, subsequent holder has burden of proving his own **good faith.** Demelman v. Brazier, 198 Mass. 458, 84 NE 856; Cox v. Cline [Iowa] 117 NW 48. Note being fraudulently put in circulation, the burden is on the holder to show that he is a holder in **due course,** the question being for the jury. Demelman v. Brazier, 198 Mass. 458, 84 NE 856.

**49.** Where fraud in inception of instrument is shown. Penfield Inv. Co. v. Bruce, 132 Mo. App. 257, 111 SW 888. Revisal 1905, §§ 2201, 2208. American Nat. Bank v. Fountain, 148 N. C. 590, 62 SE 738. Where note is fraudulently put into circulation. Id.

**50.** See ante, § 5B2, Who Are Bona Fide Holders.

**51.** Where maker or indorser proves that execution or indorsement of paper was procured by fraud, he prima facie establishes defense which must be overcome by evidence of holder that he is a bona fide purchaser for value, and when he has done this burden of proving notice of fraud is upon defendant. Forbes v. First Nat. Bank [Okl.] 95 P 785.

**52.** In Walden v. Downing Co., 4 Ga. App. 534, 61 SE 1127, it is held that when security is proved to have been stolen or otherwise appropriated in fraud of rights of owner, onus is upon possessor to show that he took it bona fide and for value, and upon such showing being made, owner must show bad faith, that is, that possessor had notice of title of true owner.

**53.** See ante, § 2C, subd. Necessity of Indorsement.

**54.** Voss v. Chamberlain [Iowa] 117 NW 269.

**55.** Dehoust v. Lewis, 112 NYS 559.

**56.** See Payment and Tender, 10 C. L. 1147.

**57.** There being no issue of forgery, held error to admit evidence of other signatures of indorser. Flaum v. Sturtz, 110 NYS 377. Especially where plaintiff was not allowed an opportunity to cross-examine the indorser as to the alleged signature. Id. On **an issue of forgery** of note sued on, evidence of prior suit by plaintiff in which he was defeated on ground of payment held inadmissible as introducing collateral issue. Hyman v. Kirt, 153 Mich. 113, 15 Det. Leg. N. 357, 116 NW 536. Since Revisal 1905, §§ 5216-5219, require listing of credits only to extent that they exceed debts, that taxpayer listed no solvent credits is inadmissible in an action by him on a note and due bill, **on issue of title and ownership.** Martin v. Knight, 147 N. C. 564, 61 SE 447. On issue of failure of consideration by reason of alleged worthlessness of property for which note was given, plaintiff could show that defendant, while still in possession of property, claiming same as his own, accepted insurance loss on property upon a claimed valuation in excess of amount of note. Iowa Nat. Bank v. Sherman [S. D.] 119 NW 1010. **On issue as to collateral agreement** not to look to defendant for payment, held not error to exclude, as too remote, evidence of similar agreement made over a year prior to agreement in issue and with reference to another note of which note in suit was not shown to be a renewal. Barnard v. Bates, 201 Mass. 234, 87 NE 472.

**58. Declarations** of attorney of drawee of draft drawn to order of maker held not admissible against holder on issue of bona fides of transfer from maker to such holder. Stouffer v. Erwin, 81 S. C. 541, 62 SE 843. Upon an issue as to the capacity in which the defendant indorsed, conversations between him and the maker, in the absence of the payee and not communicated to or acquiesced in by him, are not admissible against him. Oexner v. Loehr, 133 Mo. App. 211, 113 SW 727. Where statement of party presenting bank draft was agreed to by bank's cashier, it was admissible as **admission** of bank and to contradict cashier's testimony. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345. **Letter from drawer to drawee** held admissible, not to show acceptance, but as corroborative of statements of party presenting draft, such letter having been written after such alleged presentation. Id. As mere fact of protest is not conclusive of **dishonor and notice,** these questions are for the jury and other evidence upon them is competent. Demelman v. Brazier, 198 Mass. 458, 84 NE 856.

**59.** A **payee** of a note is competent to testify to execution of note by living payor. Jackson v. Tribbel [Ala.] 47 S 310. In ac-

duct of the parties and the circumstances attending the execution of the instrument.[60] Where the plaintiff's title is in issue, evidence tending to impeach the same is admissible, though he does not claim the rights of a bona fide holder.[61] Evidence of transactions between the maker and an indorser is inadmissible as against a subsequent purchaser without notice.[62] Evidence of defenses between the original parties is not admissible against a holder until evidence impeaching his status has been adduced.[63] While a signature or indorsement may be characterized by the circumstances under which it is made and must be interpreted in the light of such circumstances, thus rendering them admissible in evidence,[64] such circumstances do not include statements of the parties before or at the time of the signature or indorsement,[65] or the secret purpose of the party in making his signature or indorsement.[66] This is but an application of the parol evidence rule, which applies to negotiable instruments as well as to other contracts.[67] This rule does not, however, exclude parol evidence of fraud in the inception of the instrument,[68] or to show lack or failure of consideration.[69] Parol evidence is also admissible as between the immediate parties to determine their relative liability.[70] As against bona fide holders, the nature of the

tion by heirs of payee, defendant could not testify as to payments to deceased. Jennings v. Roberts, 130 Mo. App. 493, 109 SW 84.

60. That persons representing themselves as agents for sale of machine absconded after appointing agents, securing their notes and indorsing them to plaintiff, without carrying out any part of their agreement. Rochford v. Barrett [S. D.] 115 NW 522.

61. Lord v. Rumrill, 114 NYS 488.

62. That maker's agent procured defendant's indorsement upon representation that it was for accommodation. Ott v. Seward, 221 Pa. 630, 70 A 882.

63. Stouffer v. Erwin, 81 S. C. 541, 62 SE 843.

64. Hackley Nat. Bank v. Barry [Wis.] 120 NW 275. In action against indorsees, indorsements placed on renewal note by agent authorized so to do by telegraph, first note and indorsements thereon being a part of the circumstances showing the situation when the telegram authorizing the indorsement was sent, held admissible to interpret it. State Bank & Trust Co. of Los Angeles v. Evans, 198 Mass. 11, 84 NE 329. The attendant facts and circumstances may be shown to show the capacity in which corporate officers signed a note, that is, whether they signed for the corporation or individually. Northeastern Coal Co. v. Tyrrell, 133 Ill. App. 472.

65. Parol statement or agreement as to purpose of one not payee in indorsing note on back before delivery. Hackley Nat. Bank v. Barry [Wis.] 120 NW 275. Nature of married woman's signature is not to be determined either by her own declarations as to her intentions or understanding or by the declarations of the payee. McDaniel v. Akridge [Ga. App.] 62 SE 1010.

66. Secret purpose of one not payee in indorsing note on back before delivery. Hackley Nat. Bank v. Barry [Wis.] 120 NW 275.

67. Inadmissible to contradict or vary contract. Dolvin v. American Harrow Co. [Ga.] 62 SE 198. Parol agreement that maker of note given for license fees advanced to him that he was to pay only a certain amount per week so long as he remained in business and purchased beer from plaintiff. Ferdinand Munch Brewery v. De Matteis, 128 App. Div. 830, 112 NYS 1042. Parol evidence to prove agreement between maker and payee of note that former should not be required to pay it is inadmissible. Duty v. Sprinkle [W. Va.] 60 SE 882. Maker cannot either as against payee or subsequent holder set up independent, collateral parol agreement limiting his liability. Anderson v. Mitchell [Wash.] 98 P 751. **Maturity of note** cannot be extended by terms of alleged parol agreement made contemporaneously with note antecedently thereto. Jones v. Taylor [Ga. App.] 62 SE 992.

68. Rochford v. Barrett [S. D.] 115 NW 522; White v. Smith [Kan.] 98 P 766. That one who signed apparently as party was merely witness, where signature in capacity as party was obtained by fraud. Barco v. Taylor [Ga. App.] 63 SE 224.

69. Purcell v. Armour Packing Co., 4 Ga. App. 253, 61 SE 138. That note was executed upon condition that another party would sign it and that such other party did not sign. White v. Smith [Kan.] 98 P 766.

70. Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 NE 682. Statutory provisions enlarge rather than restrict this rule. Id. Parol evidence admissible to show that an **unrestricted indorsement** was for collection only. Johnston v. Schnabaum [Ark.] 109 SW 1163. To rebut prima facie presumption under Laws 1897, c. 612, § 114, that **indorser before delivery** of note or bill payable to maker or drawer is liable only to parties subsequent to maker or drawer. Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 NE 682. Aside from rights of bona fide holders, **signature as maker** may be shown to have been intended to bind signer merely as surety. Smith v. First Nat. Bank [Ga. App.] 62 SE 826. That comakers as between themselves are principal and surety. Reynolds v. Schade, 131 Mo. App. 1, 109 SW 629. As between **parties secondarily liable,** parol evidence is admissible to show their relative liability. Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 NE 682. Upon acceptance the drawer becomes secondarily liable within this rule.

obligation cannot be contradicted by parol for the purpose of invalidating it,[71] but the character of the obligation may be shown by parol in order to lay a foundation for a discharge by prejudicial acts committed after notice of the real character of the obligation.[72]

A note and a written agreement as to the mode in which it shall be paid must be construed together.[73]

*Sufficiency.* See 10 C. L. 992, 986—With reference to the sufficiency of the evidence upon particular issues, each case must necessarily be determined upon its own evidence.[74] Proof of delivery of the instrument as an independent obligation makes a

Id. Admissible to show that party indorsing draft payable to drawer did so for **accommodation** of acceptor. Id. Laws 1897, c. 612, § 114, subd. 3, making one indorsing for accommodation of payee liable to all parties subsequent to payee, renders parol evidence necessary to show whether indorsement was for accommodation of payee. Id. Fact that § 114 does not expressly state that if indorsement was for benefit of acceptor the indorser is liable to all parties subsequent to acceptor does not prevent application of rule where parol evidence is admissible to show liability of parties inter se. Id. As between maker and payee, former may show that he made the note for accommodation of latter. Conrad v. Clarke, 106 Minn. 430, 119 NW 214, rehearing denied, 106 Minn. 430, 119 NW 482. Accommodation character of signer may be shown by parol. Lebanon Nat. Bank v. Long, 220 Pa. 556, 69 A 1033.

71. Cannot show that principal was surety in order to defeat obligation under Civ. Code, § 2488, prohibiting married women from binding separate estate by contract of suretyship. Smith v. First Nat. Bank [Ga. App.] 62 SE 826.

72. Smith v. First Nat. Bank [Ga. App.] 62 SE 826. In an action for the wrongful negotiation of negotiable paper, parol evidence is admissible to show a collateral agreement limiting the right to negotiate. Agreement that transaction in which notes for patent rights were given should remain incomplete until defendant had trained plaintiff's sons in selling the patented articles. Hughes v. Crooker, 148 N. C. 318, 62 SE 429.

73. Toledo Computing Scale Co. v. Tyden, 141 Ill. App. 21.

74. Evidence held insufficient to sustain defense of **nonexecution.** Fishburne v. Robinson, 49 Wash. 271, 95 P 80. Mere infirmity of mind and body is insufficient to overcome legal presumption of mental capacity in one who has executed a note. Bade v. Feay, 63 W. Va. 166, 61 SE 348. Where only evidence on issue of delivery was uncontradicted testimony of the holder, **delivery** was proved. Flaum v. Sturtz, 110 NYS 377. Evidence held not to show delivery of instrument payable to order of drawer. Stouffer v. Curtis, 198 Mass. 560, 85 NE 180. Evidence held to show that husband was agent for wife in delivering note executed by her and in receiving consideration therefor. Swearingen's Executor & Trustee v. Tyler [Ky.] 116 SW 331. On issue as to **character of signature,** evidence held sufficient to sustain finding that one of two joint makers in form was really a surety for the other. Cotton v. Cotton's Ex'x [Ky.] 115 SW 783. Evidence held to sustain finding that defendant was accommodation maker for accommodation of plaintiff. Asher v. Howard, 33 Ky. L. R. 696, 110 SW 895. Married woman held to have signed as surety for husband. McDaniel v. Akridge [Ga. App.] 62 SE 1010. Where only evidence on issue of **indorsement** was holder's testimony that indorsement was made in his presence by indorsee, fact of indorsement by such indorsee was proved. Flaum v. Sturtz, 110 NYS 377. Verdict for plaintiff on issue as to whether defendant indorsed merely to pass title to plaintiff held sustained by evidence. Dye v. Peacock [Ga. App.] 63 SE 520. Evidence held to sustain finding that irregular indorsement prior to negotiable instrument act was for accommodation of maker. Bowler v. Osborne, 75 N. J. Law, 903, 70 A 149. Evidence held to tend to sustain finding of **fraud** in inception of instrument. Cox v. Cline [Iowa] 117 NW 48; Johnson County Sav. Bank v. Kemp Mercantile Co. [Tex. Civ. App.] 114 SW 402. Evidence held to show that note was fraudulently procured from maker by agent of payee. Mee v. Carlson [S. D.] 117 NW 1033. Evidence held sufficient to sustain finding of fraud. Sibley County Bank v. Schaus, 104 Minn. 438, 116 NW 928. Evidence held insufficient to show fraud in inception. In re Hopper-Morgan Co., 158 F 351. Evidence held sufficient to sustain defense of fraud inducing indorsement. Roessle v. Lancaster, 114 NYS 387. Evidence held to show that holder of negotiable bonds was **bona fide purchaser** without notice. Village of Frankfort v. Schmid [Mich.] 15 Det. Leg. N. 1008, 118 NW 961. Finding that holder was purchaser for value without notice held sustained. Laschinsky v. Margolis, 129 App. Div. 529, 114 NYS 296. Burden of proving that plaintiff did not have notice of agreement between maker and payee held sustained where plaintiff denied such notice and only evidence to contrary was that he paid $25 less than face value of note, which was for over $1,000, that he was brother-in-law of payee's indorsee who was plaintiff's indorser, and that he had never sought payment from either of such parties. Heinbach v. Doubleday, Page & Co., 114 NYS 278. Evidence held sufficient to sustain verdict that plaintiff did not purchase in good faith. Walters v. Rock [N. D.] 115 NW 511. Evidence held to warrant finding that person notified not to purchase note because it was paid was president of plaintiff bank. Olson v. Houston Nat. Bank [Kan.] 96 P 853. Evidence held insufficient to show purchase one for value. Elgin City Banking Co. v. Hall

prima facie case,[75] and where the plaintiff has possession of the instrument, produces it upon the trial, and it is received in evidence, such facts make a prima facie case of delivery thereof and title thereto.[76] Accordingly, the production of an instrument negotiable by delivery makes a prima facie case against parties primarily bound,[77, 78] and proof of the execution of the instrument, taken together with the prima facie presumption of ownership arising from possession, is sufficient to authorize entry of judgment.[79] A certificate of protest is prima facie evidence of dishonor, protest and notice,[80] but the mere fact of protest is not conclusive of dishonor and notice.[81] Duplicate drafts are in law regarded as one, and when the plaintiff produces the duplicates duly protested, with notice of demand given, he makes out a prima facie case.[82] In any case where parol evidence is admitted to change the prima facie contract evidenced by the written instrument, it must be clear and convincing.[83]

(§ 6) *F. Instructions.*[84]—See 10 C. L. 997—Instructions must conform to the general rules[85] relative to the submission of issues,[86] conformity to evidence,[87] and province of court and jury,[88] and as in other cases must be construed together.[89]

[Tenn.] 108 SW 1068. Evidence held not to show extinguishment of debt upon receipt of accommodation paper, and hence holder was not for value. Harris v. Fowler, 59 Misc. 523, 110 NYS 987. Insufficient to show bona fide holdership. Mee v. Carlson [S. D.] 117 NW 1033; Royal Bank v. German-American Ins. Co., 58 Misc. 563, 109 NYS 822. Evidence held to sustain finding for plaintiff on issue of payment. McAdoo v. Conner & Co. [Ark.] 111 SW 810. Insufficient to show payment as distinguished from purchaser. Prather v. Hairgrove, 214 Mo. 142, 112 SW 552. Insufficient to show that certain payment was in discharge of obligations other than that of note sued on. Westbrook v. Potter's Sons' Trustee, 33 Ky. L. R. 1071, 112 SW 635. Evidence held to show payment in services according to agreement. Star Loan Co. v. Duffy Van & Storage Co., 43 Colo. 441, 96 P 184. Evidence held to show payment by one who assumed maker's contract and obligations thereunder, including note sued on. Sutherland v. Pallister [Wash.] 97 P 745. Evidence held sufficient to show payment. Gravert v. Goothard [Neb.] 115 NW 559. Evidence held insufficient to show payment in property. Hill v. Waight [Iowa] 118 NW 877. Evidence held insufficient to show payment. First Nat. Bank v. Brown [Neb.] 116 NW 685. Evidence held to sustain finding for plaintiff on issue as to whether **amount of note** included debt of third party without defendant's knowledge or consent. McAdoo v. Connor & Co. [Ark.] 111 SW 810. Evidence held sufficient to show **ownership** in corporation plaintiff of note given by defendant for corporate stock. Nonrefillable Bottle Co. v. Robertson [Cal. App.] 96 P 324. Evidence held not to show **prejudice to indorser** by reason of acceptance of invalid renewal. Commercial L. & T. Co. v. Mallers, 141 Ill. App. 460. Evidence held insufficient to show **agreement to renew note** and accept renewal note. Lebanon Nat. Bank v. Long, 220 Pa. 556, 69 A 1033. Evidence held insufficient to show alteration. Fishburne v. Robinson, 49 Wash. 271, 95 P 80. Evidence held insufficient to sustain burden as to lack of **consideration.** Culbertson v. Salinger [Iowa] 117 NW 6. Evidence held to show a prima facie case of failure of consideration. Valley Dew Distilling Co. v. Ritzmann, 110 NYS 917.

75. Zimbleman v. Finnegan [Iowa] 118 NW 312.

76. Delivery. Gandy v. Bissell's Estate [Neb.] 115 NW 571. Prima facie proof of delivery to holder and his ownership thereof. Northeastern Coal Co. v. Tyrrell, 133 Ill. App. 472. Possession alone of security negotiable by delivery is presumptive evidence of title thereto. Walden v. Downing Co., 4 Ga. App. 534, 61 SE 1127.

77. Note indorsed in blank. Norlin v. Becker, 138 Ill. App. 488.

78. Clarke v. Newton, 235 Ill. 530, 85 NE 747, afg. 138 Ill. App. 196; Gillespie v. First Nat. Bank, 20 Okl. 768, 95 P 220.

79. Corson v. Smith [S. D.] 118 NW 705.

80. See Rev. Laws 1902, c. 73, §§ 13, 122, 123. Feigenspan v. McDonnell, 201 Mass. 341, 87 NE 624.

81. Demelman v. Brazier, 198 Mass. 458, 84 NE 856.

82. Need not account for originals. Kessler v. Armstrong Cork Co. [C. C. A.] 158 F 744.

83. Accommodation character of signer resting upon oral agreement contemporaneous with executing of instruments and forming an inducement to the execution thereof may be shown by parol, but rule must be carefully applied so as not to defeat purpose and effect of written instruments, and such parol contract must be established by clear, precise and indubitable evidence. Lebanon Nat. Bank v. Long, 220 Pa. 556, 69 A 1033. Evidence of agreement between comaker and bank that former's signature was taken only as a matter of form to comply with the national banking laws held insufficient. Lebanon Nat. Bank v. Long, 220 Pa. 556, 69 A 1033.

84. **Search Note:** See Bills and Notes, Cent. Dig. §§ 1895-1910; Dec. Dig. § 538; 8 Cyc. 295; 14 A. & E. Enc. P. & P. 697.

85. See Instructions, 12 C. L. 152.

86. Held error not to submit of acceptance of note of third party, in lieu of note sued on. Polk Print. Co. v. Smedley [Mich.] 15 Det. Leg. N. 988, 118 NW 981. Issues arising out of plaintiff's claim that he was a surety and defendant a maker, and defendant's claim that he was maker for plaintiff's ac-

(§ 6) *G. Trial and judgment.*[90]—See 10 C. L. 998—In Illinois, where the maker and an indorser are sued jointly, and the indorser defaults, but no judgment is entered against him, the jury should be sworn not only to try the issues against the maker but also to assess damages against the indorser.[91] Protest fees cannot be recovered where the note sued on is held void.[92] The payee is not concluded as against the drawer of a bill by a judgment in a suit between the drawee and an indorsee to which neither the payee nor the drawer was a party.[93]

**Neutrality; New Promise,** see latest topical index.

## NEWSPAPERS.[94]

*The scope of this topic* is noted below.[95]

A "newspaper," in the popular acceptance of the word, is a publication issued

commodation, held properly presented by instructions given. Asher v. Howard, 35 Ky. L. R. 696, 110 SW 895. Defense held sufficiently presented by instruction. Zimbleman v. Finnegan [Iowa] 118 NW 312.

**87.** Instruction ignoring evidence of intent that note should not take effect until date subsequent to its delivery held properly refused in action seeking to hold indorser as maker. International Bank v. Enderle, 133 Mo. App. 222, 113 SW 262.

**88.** Instruction leaving question as to what constitutes due course to jury held erroneous. Arnd v. Heckert [Md.] 70 A 416. Instruction in action seeking to hold indorser as maker held properly refused as commenting on evidence. International Bank v. Enderle, 133 Mo. App. 262, 113 SW 262. Instruction held to invade jury's province in matter of deciding on conflicting evidence whether husband acted as special or as general agent of wife in disposing of notes payable to and indorsed by her or whether he was authorized under the facts to dispose of the notes as his own. Garbutt Lumber Co. v. Prescott [Ga.] 62 SE 228.

**89.** Instructions relative to defense of conditional execution of note sued on held not misleading when taken together. Key v. Usher, 33 Ky. L. R. 575, 110 SW 415. Requested instruction as to effect of payee treating defendant as indorser as distinguished from maker held covered by instruction given. International Bank v. Enderle, 133 Mo. App. 222, 113 SW 262.

**90. Search Note:** See Bills and Notes, Cent. Dig. §§ 1856-1913, 1918-1934; Dec. Dig. §§ 535, 536, 539, 540; 8 Cyc. 285, 296; 14 A. & E. Enc. P. & P. 699.

**91.** See Hurd's Rev. St. 1905, p. 1407, c. 98, § 7b. First Nat. Bank of El Paso v. Miller, 235 Ill. 135, 85 NE 312, afg. 139 Ill. App. 608.

**92.** First Nat. Bank v. Miller, 139 Ill. App. 608, afd. 235 Ill. 135, 85 NE 312.

**93.** Kessler v. Armstrong Cork Co. [C. C. A.] 158 F 744.

**Note:** "Defense of payment cannot be proved by the judgment in favor of the drawee in the action between it and Hijos de G. Matas, because neither Kessler & Co. nor the Cork Company were parties or privies to the judgment. There are a number of authorities to the contrary as may be seen cited in 23 Cyc. 1266; Levi v. McCraney, Morris [Iowa] 124; Durham v. Giles, 52 Me. 206; Hackleman v. Harrison, 50 Ind. 156; Leslie v. Bante, 130 Ill. 498, 22 NE 594, 6 L. R. A. 62. They proceed largely on the theory that it would be very unreasonable to expose the principal debtor after he had been discharged in a suit by one holder to successive suits by all prior holders on the same grounds, which might result in different judgments in different actions. However, the law of the federal courts, which is binding upon us, is very clearly stated in Railroad Co. v. National Bank, 102 U. S. 14, 26 Law. Ed. 61. In that case the railroad company had issued a note for $5,000 payable to its own order and indorsed by Palmer & Co., as accommodation indorsers, which finally came, through Hutchinson & Ingersoll, into the hands of the bank as collateral security for a prior indebtedness of Hutchinson & Ingersoll. The bank sued Palmer & Co. in the Supreme Court of New York, where judgment was rendered in favor of the bank for $601, apparently an amount due from the Railroad Company to Hutchinson & Ingersoll. Subsequently, the Bank brought suit in the Circuit Court of the United States against the Railroad Company, and recovered judgment for the full amount of the note less what it had recovered from Hutchinson & Ingersoll. The difference between these two judgments was due to the difference between the law of New York under Coddington v. Bay, 20 Johns [N. Y.] 637, 11 Am. Dec. 342, and of the Federal Courts under Swift v. Tyson, 41 U. S. [16 Pet.] 1, 10 Law. Ed. 865, the former holding a pre-existing debt not to be a sufficient consideration to enable a holder to recover on a note not valid between the parties, whereas the latter regarded a pre-existing debt to be as effective a consideration as a new payment in excluding all equities of prior parties."—From Kessler v. Armstrong Cork Co. [C. C. A.] 158 F 744.

**94.** See 10 C. L. 998.

**Search Note:** See notes in 14 L. R. A. 64; 93 A. S. R. 905.

See, also, Newspapers, Cent. Dig.; Dec. Dig.; 29 Cyc. 692-706; 21 A. & E. Enc. L. (2 ed.) 533; 23 Id. 307; 17 A. & E. Enc. P. & P. 26.

**95.** This topic treats only of the designation and compensation of official newspapers, the necessity and sufficiency of publication of process, and other legal notices being excluded (see Process, 10 C. L. 1262, and like topics) as are advertising contracts (see

at regular intervals, containing, among other things, the current news, or the news of the day.[96]

*Definition.*[97]—The term "daily," as applied to the publication of newspapers, is relative and does not have the exclusive meaning of every day of the week, month or year,[98] and the word "general," as applied to the circulation of a paper, is equivalent to extensive and its meaning must be determined by a process of inclusion and exclusion.[99] Since under the constitution every citizen may publish his sentiments on all subjects, being answerable for the abuse of such rights, the fact that a newspaper publishes reckless and scurrilous matter consisting of unjustifiable criticisms does not warrant the suppression of its future publication,[1] and equity will interfere against a suppression which is in its nature a continuous trespass.[2]

*Designation of official papers.* See 10 C. L. 999—Such papers as the statute calls for must be designated [3] and designated in the manner prescribed by statute,[4] but under statute requiring the board of supervisors to select newspapers, having the largest number of subscribers within the county for county printing, the filed list of subscribers is not conclusive when the circulation of a paper is contested, and the paper found from other evidence to have the largest number of bona fide subscribers, is entitled to selection is one of the official papers,[5] and where a statute does not require publication in a daily newspaper publication in a weekly newspaper is as valid as in a daily one.[6] Where the statute prescribes that one publication shall be made in a daily edition and two in a weekly edition, where the resolution names the daily, no further direction on that subject is necessary in a resolution.[7] Where an improper

Contracts, 11 C. L. 729) and liability for improper publication (see Contempt, 11 C. L. 715; Libel and Slander, 12 C. L. 576).

96. Times Printing Co. v. Star Pub. Co. [Wash.] 99 P 1040.

97. Daily noon publication, an 8-page paper, 18 by 23 inches in size with 8 columns to page, containing telegraphic, sporting, political and theatrical news, and advertisements, and an editorial column, having no regular subscription list but about 1,000 copies were sold daily on streets by newsboys and at time of trial had subscription list of 360 and an average daily circulation of 1,083, held a "newspaper" within Seattle City Charter, art. 4, § 31, though it sometimes contained news published day before in evening issue. Times Print. Co. v. Star Pub. Co. [Wash.] 99 P 1040.

98. Morning Reveille published every day of week except Sundays and Mondays held a "daily paper" within city charter, requiring legal advertising in a daily paper. Fairhaven Pub. Co. v. Bellingham [Wash.] 98 P 97.

99. Where 1,000 copies were sold on street when bid was accepted, city had population of 275,000, paper had no subscription list, no circulation in residence districts and was rarely seen in business houses or offices of professional men, held Noon Star was not one of a "general circulation" under Seattle City Charter, art. 4, § 31. Times Print. Co. v. Star Pub. Co. [Wash.] 99 P 1040.

1. Const. art. 1, § 8. Ulster Square Dealer v. Fowler, 58 Misc. 325, 111 NYS 16.

2. Injunction restraining defendants from entering upon premises for purpose of seizing and carrying away future issues, etc. Ulster Square Dealer v. Fowler, 58 Misc. 325, 111 NYS 16.

3. "Bismark Weekly Tribune," published by same parties as published daily "Bismarck Daily Tribune," composed of matter printed in daily edition and set out from day to day for weekly edition, held a weekly edition of the Bismarck Daily edition under Rev. Codes 1899, § 1259 (§ 1574 Rev. Codes 1905). Griffin v. Denison Land Co. [N. D.] 119 NW 1041. Const., art. 19, § 2, requires that notices of proposed amendments to constitution shall be published in not more than one newspaper of general circulation in each county. Russell v. Courier Print. & Pub. Co., 43 Colo. 321, 95 P 936.

4. Under County Laws (Laws 1892, p. 1749, c. 686, § 19) amended Laws 1898, p. 1013, c. 349 (Laws 1900, p. 932, c. 400), and Laws 1905, p. 1156, c. 496, one paper cannot be designated to publish Session Laws and another to publish resolutions; "paper or papers" in sentence making provision in case of failure "to make a designation of a paper or papers," etc., having in view power of each political party to designate a paper. People v. Ford, 127 App. Div. 444, 112 NYS 130.

5. Stone v. Quigley, 138 Iowa, 491, 116 NW 603. Under Code, § 441, paper having largest number of subscribers after deducting a number of names appearing in verified statement filed, entitled to selection. Id. Slight variance from statutory requirements through error or mistake not fatal to claim of paper in fact having largest number of bona fide yearly subscribers. Id.

6. Notice of mortgage foreclosure sale properly published in weekly newspaper of legal and business information, publication daily paper not being required by statute. Hoock v. Sloman [Mich.] 15 Det. Leg. N. 845, 118 NW 489.

7. Griffin v. Denison Land Co. [N. D.] 119

designation is made, the proprietors of a paper eligible for designation have a sufficient interest as citizens to review the void designation even though their paper is not entitled to make the publications.[8] The refusal, by the sheriff, of a request of the judgment creditor to insert the notice of sale in a particular newspaper is not a ground for the appointment of a special master commissioner to make the sale.[9] In the absence of language evincing a contrary intent, publications required by statute must be made in the English language.[10]

*Compensation for official publications* See 10 C. L. 999 fixed by statute for legal advertising,[11] or for publishing legal notices governs where no express rate is agreed upon.[12]

## NEW TRIAL AND ARREST OF JUDGMENT.


**§ 1. Nature of the Remedy by New Trial and Right to It in General, 1071.**
**§ 2. Grounds, 1072.**
A. In General, 1072.
B. Misconduct of Parties, Counsel, or Witnesses, 1073.
C. Rulings and Instructions at the Trial, 1073.
D. Misconduct of or Affecting Jury, 1074.
E. Irregularities or Defects in Verdict or Findings, 1076.
F. Verdict or Findings Contrary to Law or Evidence, 1076.
G. Surprise, Accident, or Mistake, 1080.
H. Newly-Discovered Evidence, 1082.
I. As a Matter of Right in Ejectment, 1086.
**§ 3. Proceedings to Procure New Trial, 1087.** Affidavits, 1091. Evidence in Support of Motion, 1092. Order Granting or Refusing New Trial, 1092.
**§ 4. Proceedings at New Trial, 1094.**
**§ 5. Arrest of Judgment, 1095.**
A. Nature and Grounds, 1095.
B. Motions and Proceedings Thereon, 1096.
C. Effect, 1096.


*The scope of this topic* is noted below.[13]

NW 1041. Under Rev. Codes 1899, § 1259 (Rev. Codes 1905, § 1574), resolution directing publication of delinquent tax list and notice in Bismark Daily Tribune list and notice published in one issue of Bismark Daily Tribune and two issues of Bismark Weekly Tribune, resolution and publication held in compliance with statute. Id.

**8.** People v. Ford, 127 App. Div. 444, 112 NYS 130.

**9.** Augustus v. Lynd, 7 Ohio N. P. (N. S.) 473.

**10.** Under Sanborn's St. Supp. 1906, § 674a, and St. 1898, § 675, county board not authorized to print report of its proceedings in German language in German newspaper, last census of county not showing the requisite number of adult Germans not speaking English to authorize same. Hyman v. Susemihl, 137 Wis. 296, 118 NW 837.

**NOTE. Newspaper published in foreign language:** While it is generally held that in the absence of statutory authority to the contrary, a legal newspaper publication must be made in the English language and a majority of the recent decisions hold that such publication must be in a newspaper published in the English language (Schloenbach v. State, 53 Ohio St. 345, 41 NE 441; City of Cincinnati v. Bickett, 26 Ohio St. 49; Schaale v. Wasey, 70 Mich. 414, 38 NW 317; Turner v. Hutchinson, 113 Mich. 245, 71 NW 514; Bennett v. Baltimore, 106 Md. 484, 68 A 14; Goebel v. Chamberlain, 99 Wis. 503, 75 NW 62, 40 L. R. A. 843; Graham v. King, 50 Mo. 22, 11 Am. Rep. 401), there is some authority to the effect that an English publication in a newspaper otherwise published in a foreign language is a valid legal publication (Richardson v. Tobin, 45 Cal. 30), and some cases frequently cited to the contrary do not in fact go so far. Thus the case of Chicago v. McCoy, 136 Ill. 344, 26 NE 363, 11 L. R. A. 413, involves a construction of the constitution of Illinois and is without value as an authority generally, while in Road in Upper Hanover, 44 Pa. St. [8 Wright] 277, the language of the court seems to indicate that had the publication been in English the fact that it was published in a German paper might not have affected its validity. It has been held that publication in a foreign language is valid where statute requires publication in three daily papers of a municipality and but two papers are published in that municipality in the English language. John v. Connell, 71 Neb. 10, 98 NW 457. Two Wisconsin cases hold that a valid legal publication may be made in English in a paper published in another language but one of them was decided under the specific provisions of a city charter (Kellogg v. Oshkosh, 14 Wis. 623), while the other merely holds that such a publication of a summons may be made at the discretion of the officer ordering its publication (Wakeley v. Nicholas, 16 Wis. 588), and their effect is neutralized by the general holding in Goebel v. Chamberlain (supra). The cases of Tyler v. Bowen, 1 Pittsb. [Pa.] 225, and Kratz's Appeal, 2 Pittsb. [Pa.] 452, are cited as supporting the general doctrine.—[Ed.]

**11.** Where Laws 1901, p. 179, c. 78, fix rate of compensation for legal advertising in newspapers as so much for each insertion. Russell v. Courier Print. & Pub. Co., 43 Colo. 321, 95 P 936.

**12.** Code Civ. Proc. § 3317, controlling no express agreement. Star Co. v. Moore, 114 NYS 753.

**13.** This topic is designed to treat only the grounds for which judgment will be arrested or a new trial granted in the trial court. The grant of new trials by reviewing courts

§ 1. *Nature of the remedy by new trial and right to it in general.*[14] See 10 C. L. 999—A new trial has been defined as a re-examination of an issue of fact in the court of first trial,[15] and has been held to include any motion to set aside a verdict based on matters not appearing on the face of the record.[16] In states where a distinction lies between a venire de novo and a new trial, the former does not apply to special verdicts or findings unless so uncertain, ambiguous, or otherwise defective that no judgment can be rendered thereon.[17] The power of the court to award a new trial is as much an incident of the trial as the admission and exclusion of evidence,[18] and the allowance rests in the sound discretion of the trial court,[19] particularly where allowed for the first time,[20] though allowances after the first are sometimes limited [21] or prohibited.[22] The court may also in its discretion ordinarily impose the payment of costs as a condition to the allowance of a new trial,[23] or require a reduction of the

(see Appeal and Review, 11 C. L. 118), the modification and vacation of judgments without resort to a new trial (see Judgments, 12 C. L. 408), the erroneous (see such topics as Argument and Conduct of Counsel, 11 C. L. 268; Evidence, 11 C. L. 1346; Examination of Witnesses, 11 C. L. 1420; Instructions, 12 C. L. 218; Trial, 10 C. L. 1896), or prejudicial (see Harmless and Prejudicial Error, 11 C. L. 1690), character of particular rulings, the necessity of objections and exceptions to save rulings for motion for new trial and the necessity of motion for new trial to save questions for the reviewing court (see Saving Questions for Review, 10 C. L. 1572), are elsewhere treated.

**14. Search Note:** See notes in 68 L. R. A. 126.

See, also, New Trial, Cent. Dig. §§ 1-17; Dec. Dig. §§ 1-12; 29 Cyc. 720-734; 21 A. & E. Enc. L. (2ed.) 534; 14 A. & E. Enc. P. & P. 707.

**15.** California Code. Quist v. Hill [Cal.] 99 P 204.

**16.** Georgia R. & Elec. Co. v. Hamer, 1 Ga. App. 673, 58 SE 54.

**17.** Leimgruber v. Leimgruber [Ind.] 86 NE 73. Omission to find certain facts in terms being equivalent to finding against party having burden of proof, motion for venire de novo seasonably made should be overruled. Divorce proceeding where there had been adjudication on same pleadings and facts in another court gave neither party right to decree in this court. Yeager v. Yeager [Ind.] 87 NE 144.

**18.** Ingalls v. Oliver, 198 Mass. 345, 84 NE 462. Judge of superior court has power to set aside verdict of jury and order new trial in regard to issues framed in supreme court and sent to superior court to be tried. Id.

**19.** Wirsing v. Smith [Pa.] 70 A 906; Woodroof v. Hall [Ala.] 47 S 570; Jones v. Jacksonville Elec. Co. [Fla.] 47 S 1; Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038; Missouri K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601. Denial of motion for new trial presents no question which appellate court can consider. Reader v. Haggin [C. C. A.] 160 F 909. Judge who did not sit at trial is not so free to use his discretion as if he had been sitting. Ford v. Harris, 4 Ga. App. 467, 61 SE 881. Jury case. Magness v. Modern Woodmen of America [Iowa] 118 NW 386. Great latitude of discretion is allowed trial court. Joseph v. New York City R. Co., 61 Misc. 440, 115 NYS 101. Granting of request for withdrawal of juror rests in sound discretion of court. During examination of physician for plaintiff latter's attorney asked: "Do you know whether that physician, Dr. Keuntzer, was physician for accident company in case?" Held not to be ground for withdrawal of juror and no abuse of discretion of court. Adler v. Lesser, 110 NYS 196.

**20.** Discretion as to mere matters of fact where evidence would fully authorize finding for either party is limited to first grant of a new trial. E. E. Lowe Co. v. Teasley & Co., 4 Ga. App. 155, 60 SE 1077. First grant of new trial will never be interfered with where it plainly appears that trial court in granting new trial corrected manifest error of law prejudicial to rights of one of parties to cause. Erroneous admission of evidence. Parol evidence rule. Id. Discretion upon first grant will not be interfered with where new trial was granted because trial judge was not satisfied with verdict rendered upon evidence submitted. Id. Where there was conflict in evidence as to alleged sale or offer of sale between landlord and tenant. Goodman v. Spurlin [Ga.] 62 SE 1029.

**21.** Judgment granting nonsuit having been reversed, discretion of trial court was exhausted by first grant of new trial, and granting of second new trial on discretionary grounds would be error. Merchants' & Miners' Transp. Co. v. Corcoran, 4 Ga. App. 654, 62 SE 130.

**22.** It is settled practice that when there have been **three verdicts** upon substantially same evidence for same party, third verdict will not be disturbed upon sole ground that it is not by, or is clearly against, weight of evidence. Verdicts $10,000, $6,000, $11,500, when court thought verdict should be for defendant. Louisville & N. R. Co. v. Daniel [Ky.] 115 SW 804. Where three successive verdicts have been given for plaintiff, court should not set it aside and order new trial. Ridgely v. Taylor & Co., 126 App. Div. 303, 110 NYS 665. There having been three trials but **jury disagreeing in one** of them, latter will not be considered as one of verdicts within meaning of Code. Louisville & N. R. Co. v. Daniel [Ky.] 115 SW 804.

**23.** When verdict is not in accordance with facts, costs need not be imposed. Joseph v. New York City R. Co., 61 Misc. 440, 115 NYS 101

amount of the verdict as a condition to its denial.[24] The trial court, however, is without authority to reduce a verdict and render judgment for the reduced amount unless plaintiff consents,[25] nor can it require defendant to forego his appeal by the terms of an order for new trial.[26] A new trial is authorized only in the class of cases contemplated by the statute.[27]

§ 2. *Grounds. A. In general.*[28] See 10 C. L. 1001—Statutory grounds for a new trial are usually exclusive,[29] and ordinarily include, among other grounds,[30] that a full,[31] fair and impartial trial was not had,[32] that justice was not done,[33] and that the complaint fails to state a cause of action,[34] and excludes such grounds as misjoinder or excess of parties,[35] conduct of the reporter,[36] rejection of amendments,[37] unpre-

**24.** When verdict is excessive, court may refuse new trial on condition that plaintiff remit certain part of verdict within specified time. Hall v. Northwestern R. Co., 81 S. C. 522, 62 SE 848: White v. Reitz, 129 Mo. App. 307, 108 SW 601; Prye v. Kalbaugh, 34 Utah, 306, 97 P 331; McIntyre v. Smyth, 108 Va. 738, 62 SE 930. If there is plain proof as to correct sum which should be awarded, McIntyre v. Smyth, 108 Va. 738, 62 SE 930. Verdict of $12,500 for injuries to 75 year old lady in street car accident. Montgomery Trac. Co. v. Knabe [Ala.] 48 S 501. Remittitur of property erroneously awarded plaintiff in replevin held proper. Dunning v. Crofutt [Conn.] 70 A 630. Remittiturs in ex delicto cases may be allowed either by trial or appellate courts. Allowance by trial court is no ground for reversal. Sandy v. Lake St. El. R. Co., 235 Ill. 194, 85 NE 300. Remittitur of all but $225 of $3,600 verdict required. State v. Second Judicial Dist. Ct. [Mont.] 99 P 139. Plaintiff to accept $125 instead of $250 or stand new trial. Dunning v. Reid [N. J. Law.] 69 A 1013. Defendant granted new trial unless plaintiff agreed to take verdict of $35,000 within ten days. Wirsing v. Smith [Pa.] 70 A 906. Option of verdict of $9,000 or new trial imposed on defendant and of $5,000 or new trial on plaintiff. Beach v. Bird & Wells Lumber Co., 135 Wis. 550, 116 NW 245.

**25.** Court held without authority to reduce verdict and render judgment, where plaintiff did not remit. Atchison, etc., R. Co. v. Cogswell [Okl.] 99 P 923. Where plaintiff has **in writing** waived excessive amount of verdict, court can properly deny motion for new trial. Bentley v. Hurlburt, 153 Cal. 796, 96 P 890.

**26.** Held error to order that defendant tender $10,000 on verdict of $15,000 within 30 days or lose his right to appeal. Hall v. Northwestern R. Co., 81 S. C. 522, 62 SE 848.

**27.** Under Illinois practice in **cases tried by court** without jury, new trial is neither required nor authorized by law. Climax Tag Co. v. American Tag Co., 234 Ill. 179, 84 NE 873. In California motion for new trial does not lie under Code, §§ 1465, 1466, **in probate** to set apart homestead, or exempt personal property, or for family allowance. In re Heywood's Estate [Cal.] 97 P 825. Appeal from **nonsuit** held proper course. Jones v. New York Cent. & H. R. Co., 61 Misc. 139, 114 NYS 756. No motion lies after **default.** Snow v. Merriam, 133 Ill. App. 641. Action on note where defendant defaulted. Rooker v. Bruce [Ind.] 85 NE 351. Motion for new trial is not proper proceeding to review action of court in giving judgment in case where there is no issue of fact tried. Default case. Younger v. Moore [Cal. App.] 96 P 1093.

**28. Search Note:** See notes in **2 L. R. A.** (N. S.) 1000.

See, also, New Trial, Cent. Dig. §§ 18-229, 342-367; Dec. Dig. §§ 13-108; 176-188; 29 Cyc. 759-918; 14 A. & E. Enc. P. & P. 718.

**29.** No such cause as "Judgment is contrary to evidence" is given in Burns' Ann. St. 1901, § 568. Wise v. Larkin, 41 Ind. App. 433, 84 NE 25.

**30.** See subsections following.

**31.** Where movent has not had opportunity to fully submit her cause, new trial should be granted. Judge stopped cause, reserving judgment for week, and did not allow defendant to put in all her evidence. Galowitz v. Blyn, 110 NYS 948. Fact that party has without fault lost right to try material issue and that if tried issue may be decided in his favor authorizes finding that justice requires further trial. St. Pierre v. Foster & Co. [N. H.] 70 A 289.

**32.** To render trial not full, fair and impartial trial under Rhode Island statute, there must be something more than mere error on part of court which would form subject of exception. Campbell v. Campbell [R. I.] 71 A 1058. Motion for new trial on ground that movent did not have full, fair and impartial trial will be denied where not based on reasonable evidence. Hannan v. Caproni [R. I.] 71 A 593.

**33.** Trial judges have very wide discretion in granting new trials in order to accomplish justice, and their orders will not be reversed unless abuse of discretion plainly appears. Parker v. Britton, 133 Mo. App. 270, 113 SW 259. Where court is under impression that justice was not done by verdict, it should order new trial and in so doing does not invade province of jury. Mullen v. Butte, 37 Mont. 183, 95 P 597.

**34.** Action on contract to sell land whereby plaintiff was to get excess over $20 per acre received for land if he got buyer, where he found no buyer and land was sold for less than $20. Fulton v. Cretian [N. D.] 117 NW 344.

**35.** Husband and wife joined in personal injury against railroad company. Choctaw, O. & G. R. Co. v. Burgess [Okl.] 97 P 271.

**36.** Conduct of reporter, or his failure or inability to furnish transcript, is not irregularity of court within meaning of statutes in new trials. Reporter resigned and could not furnish transcript of proceedings. Peterson v. Lundquist, 106 Minn. 339, 119 NW 50.

paredness for trial,[38] negligent failure to be represented by counsel,[39] unexcused failure to appear at the time set for trial,[40] exceptions to a decree,[41] and questions raised or which might have been raised before a verdict,[42] review of such questions being ordinarily provided for by other means.

(§ 2) *B. Misconduct of parties, counsel, or witnesses.*[43]—See 10 C. L. 1002—Misconduct of plaintiff in the presence of the jury,[44] and fraud and sharp practice on the part of counsel, are grounds for new trial [45] when prejudicial; [46] but failure of defendant's counsel to disclose his defense under a general plea is not such misconduct as will justify a new trial.[47]

(§ 2) *C. Rulings and instructions at the trial.*[48]—See 10 C. L. 1002—Rulings upon the pleadings,[49] evidence,[50] and other matters of trial,[51] are grounds for new trial when erroneous and prejudicial, and not otherwise cured.[52]

**37.** Turner v. Barber [Ga.] 62 SE 587.

**38.** Where continuance was not moved for. Hannan v. Caproni [R. I.] 71 A 593.

**39.** Balfour v. Tuck [Tex. Civ. App.] 115 SW 847.

**40.** Where court considered excuses to be pretenses. Cannon v. Dean, 80 S. C. 557, 61 SE 1012.

**41.** Darsey v. Darsey [Ga.] 62 SE 20. Claim that findings do not support judgment is not available on motion for new trial. Black v. Harrison Home Co. [Cal.] 99 P 494.

**42.** Loveland v. Rand, 200 Mass. 142, 85 NE 948. Motion for **change of venue** filed after foreclosure trial and while cause was under advisement could not be applicable to that trial, and denial of application could not be a ground for new trial of issues there decided. **Luken v. Fickle** [Ind. App.] 84 NE 561.

**43. Search Note:** See notes in 9 A. S. R. 559, 599; 100 Id. 689, 690; 4 Ann. Cas. 1023; 6 Id. 57.

See, also, New Trial, Cent. Dig. §§ 42-47; Dec. Dig. §§ 28-32; 29 Cyc. 773-777; 14 A. & E. Enc. P. & P. 721.

**44.** Outcry and fainting is not ground for new trial unless simulated. Illinois Cent. R. Co. v. Rothschild, 134 Ill. App. 504. Plaintiff in personal injury case is not guilty of misconduct because, near close or argument for defendant, she burst out crying and trembling, and was suddenly taken out of room by her attendants in view of jury where trial was long, and plaintiff nervous as result of injuries, argument having been in progress for an hour and may have involved criticism of her to such an extent that as nervous woman she was unavoidably overcome. Connell v. Seattle R. & S. R. Co., 47 Wash. 510, 92 P 377.

**45.** Where by conversation attorney for plaintiff implied that he would not call up motion but leave that to defendant's attorney, but when latter could not be there called up and got default judgment. Wallace v. Wallace [Iowa] 119 NW 752.

**46.** Misconduct of counsel which cannot possibly have been prejudicial is not ground. Feoron v. Mullines [Mont.] 98 P 650. Misconduct of counsel which is not prejudicial is not ground for new trial. Offensively asking questions already ruled out on objection. Schwitters v. Springer, 236 Ill. 271, 86 NE 102.

**47.** Daugherty v. Templeton [Tex. Civ. App.] 110 NYS 553.

**48. Search Note:** See New Trial, Cent. Dig. §§ 48-71; Dec. Dig. §§ 33-41; 29 Cyc. 778-794; 14 A. & E. Enc. P. & P. 719, 827.

**49.** Overruling demurrer. Bone v. Hayes [Cal.] 99 P 172. Proper to allow amendment to pleadings after evidence is in but before arguments to jury. Reed v. Light, 170 Ind. 550, 85 NE 9.

**50.** It is within discretion of trial court to grant new trial on ground of introduction of immaterial evidence. Geissendoerfer v. Western Horseshoe Co., 131 Mo. App. 534, 110 SW 640.

**Admission held error.** Horton v. Fulton, 130 Ga. 466, 60 SE 1059; Dyson v. Knight, 130 Ga. 573, 61 SE 468; Illinois Cent. R. Co. v. Rothschild, 134 Ill. App. 504; King v. Chicago, etc., R. Co., 138 Iowa, 625, 116 NW 719; Geissendoerfer v. Western Horseshoe Co., 131 Mo. App. 534, 110 SW 640; Power v. Turner, 37 Mont. 521, 97 P 950.

**Admission held not error.** Lee v. Winkles [Ga.] 62 SE 820; Green v. Terminal R. Ass'n, 211 Mo. 18, 109 SW 715; Cooley v. Bergstrom, 3 Ga. 496, 60 SE 220; Chandler v. Mutual Life & Industrial Ass'n of Ga. [Ga.] 61 SE 1036; Eastwood v. Klamm [Neb.] 120 NW 149; Atlantic C. L. R. Co. v. Williams [Ga. App.] 63 SE 671; Daugherty v. Templeton [Tex. Civ. App.] 110 SW 553.

**Exclusion held erroneous.** Mullins v. Columbia County Bank [Ark.] 113 SW 206; Chlanda v. St. Louis Transit Co., 213 Mo. 244, 112 SW 249; Kellogg v. Finn [S. D.] 119 NW 545.

**Exclusion held not error.** Morris Storage & Transfer Co. v. Wilkes, 1 Ga. App. 751, 58 SE 232; Lee v. Winkles [Ga.] 62 SE 820; Schwitters v. Springer, 236 Ill. 271, 86 NE 102; Hanor v. Housel, 128 App. Div. 801, 113 NYS 163.

**51.** Where mental condition of party is under investigation, it is not error requiring new trial to permit witness to give his opinion on subject and thereafter give facts upon which it is based, instead of requiring witness first to state facts upon which he bases his opinion. Sims v. Sims [Ga.] 62 SE 192. Where counsel stated that city denied it was of third class, and court merely said: "Answer is in evidence," held to be error. Neff v. Cameron, 213 Mo. 350, 111 SW 1139. Motion for **mistrial** should not be granted unless prejudicial error has been committed. Where objection to question of plaintiff's counsel whether juror was insured against accident was sustained, court stating

*Instructions.*—The refusal of the court to submit the cause,[53] or particular questions of fact to the jury,[54] rulings on peremptory instructions,[55] and the prejudicial giving or refusing of instructions,[56] may be ground for new trial.

(§ 2) *D. Misconduct of or affecting jury.*[57]—See 10 C. L. 1002—Misconduct of party,[58] counsel,[59] court,[60] or others toward the jury, may be ground for new trial if

that he might ask if stockholder, or interested in accident company, but matter was not pursued, defendant is not entitled to new trial. Banner v. O'Meara, 110 NYS 947. **Sustaining challenges to competent jurors** is not ground for new trial as a party is not entitled to a trial by any particular jury. Held not to be error to sustain challenge to competent juror where party objecting had not exhausted all his challenges. Johnson v. Waterloo [Iowa] 119 NW 70. Refusal to grant a **continuance** is not ground. Reed v. Light, 170 Ind. 550, 85 NE 9. Conduct of court in requiring case to be continued after regular time for adjournment for day without witness or with limited number, including those named in morning, is not such denial of impartial trial as entitles party to new trial. Court and Practice Act 1905, § 472, of Rhode Island. Campbell v. Campbell [R. I.] 71 A 1058.

**52.** Where second ruling fails to counteract effects of former erroneous ruling, court may in its discretion grant new trial. Admitting advertisement of mineral water which is said to cure rheumatism, etc., was not cured by ruling it out. King v. Chicago, etc., R. Co., 138 Iowa, 625, 116 NW 719.

**53.** Watt v. Barnes, 41 Ind. App. 466, 84 NE 158. Where cause has count in law and one in equity, it is not ground for new trial that court refused to submit it to jury. Id.

**54.** Court refused to submit a number of questions as to the contract between the parties. Refusal not error. Prye v. Kalbaugh, 34 Utah, 306, 97 P 331. Where title to certain property has been decided in previous trial and there is no evidence in second trial to change such title, it is not prejudicial to instruct to leave it out of consideration in deciding title of other property. Young v. Chandler [Me.] 71 A 652.

**55. Ruling held not erroneous:** It is not ground for new trial where court in its discretion refused to direct verdict. Ewing v. Lunn [S. D.] 115 NW 527.

**Ruling held erroneous.** Lynch v. Snead Architectural Iron Works [Ky.] 116 SW 693; San Antonio Mach. & Supply Co. v. Campbell [Tex. Civ. App.] 110 SW 770. Where peremptory instruction for plaintiff is given in absence of counsel for defense and before opportunity to present additional proof is given, new trial will be granted if evidence presented in support of motion is material and likely to change result. Evans v. Lilly & Co. [Miss.] 48 S 612.

**56.** Hensley v. Davidson Bros. [Iowa] 120 NW 95; State v. Robb-Lawrence Co. [N. D.] 115 NW 846.

**Held prejudicial.** Wilson v. Wilson, 130 Ga. 677, 61 SE 530; Lay v. Nashville, etc., R. Co. [Ga.] 62 SE 189; Livingston v. Taylor [Ga.] 63 SE 694; Decatur Amusement Park Co. v. Porter, 137 Ill. App. 448; Schwitters v. Springer, 236 Ill. 271, 86 NE 102; Hamill v. Schlitz Brew. Co., 138 Iowa, 138, 115 NW 943; International Harvester Co. v. Walker, 138 Iowa, 638, 116 NW 706; Lynch v. Snead Architectural Iron Works [Ky.] 116 SW 693; Smith v. Brigham, 106 Minn. 91, 118 NW 150; White v. Reitz, 129 Mo. App. 307, 108 SW 601; Flowers v. Smith, 214 Mo. 98, 112 SW 499; Rosenbaum Grain Co. v. Pond Creek Mill & Elevator Co. [Okl.] 98 P 331; Massillon Sign & Poster Co. v. Buffalo Lick Springs Co., 81 S. C. 114, 61 SE 1098; Lane v. Delta County [Tex. Civ. App.] 109 SW 866; San Antonio Mach. & Supply Co. v. Campbell [Tex. Civ. App.] 110 SW 770.

**Held not prejudicial.** Louisville & N. R. Co. v. Church [Ala.] 46 S 457; International Coal Min. Co. v. Pennsylvania R. Co., 162 F 996; Jefferis v. Merritt & Co., 166 F 936; Chandler v. Mutual Life & Industrial Ass'n of Ga. [Ga.] 61 SE 1036; Sims v. Sims [Ga.] 62 SE 192; Atlanta, K. & N. R. Co. v. Tilson [Ga.] 62 SE 281; Georgia So. & P. R. Co. v. Ransom [Ga. App.] 63 SE 525; Atlantic C. L. R. Co. v. Williams [Ga. App.] 63 SE 671; Livingston v. Taylor [Ga.] 63 SE 694; City of Chicago v. Sullivan, 139 Ill. App. 675; Settles v. Threlkeld, 140 Ill. App. 275; Young v. Chandler [Me.] 71 A 652; Cannon v. Dean, 80 S. C. 557, 61 SE 1012; Texas Cent. R. Co. v. Wheeler [Tex. Civ. App.] 116 SW 83. Where verdict is based on correct instruction covering material point in controversy, court need not rule on correctness of other instruction which under finding of jury could not change verdict and need not grant new trial. Where contract called for arbitration, jury found that plaintiff had failed to try to arbitrate, hence had no cause of action. Held other instructions, correct or not, could in no way change verdict. Patterson & Co. v. Robinson Bros., 159 F 303. Erroneous instruction is not ground for new trial if testimony offered by losing party did not meet proper legal burden imposed upon it. Instruction given which imposed it upon defendant railroad company to show injury resulted from "unavoidable accident." Illinois Cent. R. Co. v. Rothschild, 134 Ill. App. 504. Statement by court that action started against two defendants was now against one, other having defaulted, is no ground for new trial. Crowley v. Taylor, 49 Wash. 511, 95 P 1016.

**57. Search Note:** See notes in 18 L. R. A. 473; 103 A. S. R. 155; 1 Ann. Cas. 287; 4 Id. 272; 6 Id. 290, 352, 931; 7 Id. 420; 8 Id. 652; 10 Id. 889.

See, also, New Trial, Cent. Dig. §§ 72-119; Dec. Dig. §§ 42-56; 29 Cyc. 796-813; 14 A. & E. Enc. P. & P. 721.

**58.** Misconduct of party to induce jury to decide in his favor is dealt with more strictly by court in its refusal to allow retention of benefits under verdict so obtained than similar misconduct of third party or juror without knowledge of either party. Where juror was bribed to set aside will. Crocker v. Crocker, 198 Mass. 401, 84 NE 476. Improper conduct of one of parties toward jury may be ground for new trial and reversal, regardless of whether verdict was

prejudicial.[61] The misconduct, however, must have reached the jury or some of them and probably have affected their action,[62] and the proof of misconduct should be clear and convincing and not merely conjectural.[63] Similarly, false statements by the juror during examination,[64] or misconduct of the jury itself, such as independent investigation by jurymen,[65] the rendition of a gambling,[66] or otherwise improper ver-

affected thereby. Scott v. Tubbs, 43 Colo. 221, 95 P 540.

**Treating jurors:** Where respondent in condemnation proceedings after inspection of property by jurors went with four jurors apart from officer into saloon and treated them, though they made affidavit that verdict was unaffected thereby. Scott v. Tubbs, 43 Colo. 221, 95 P 540. Where defendant's claim and other agents treated jurors to liquor and theatre during trial though nothing was said about case. Callahan v. Chicago, M. & St. P. R. Co., 158 F 988. Improper for litigant to supply jury with meals and luxury not taxable as costs. State v. Reid, 120 La. 200, 45 S 103. Acceptance of favors and refreshments from either of parties by jury is misconduct justifying new trial. Jury to pass on drain had cigars and dinner from one of petitioners and woman said in their presence: "Way to man's heart is through stomach," and inquired whether any one wanted stagnant water near their homes. Held misconduct. Harrington v. Hamm, 153 Mich. 660, 15 Det. Leg. N. 556, 117 NW 62. Any gratuity to jurors by either party is misconduct for which new trial will be granted. Where jurors were legally entitled to only 25 cents in lunacy proceedings and attorney for petitioner paid them daily $1 and did so for twelve days, jurors knowing whence the fee came, held to be misconduct for which new trial should be granted. In re Vanderbilt, 127 App. Div. 408, 111 NYS 558.

59. Plaintiff's attorney **treated** to peanuts and defendant treated to cigar to jurors at their request when going to view some land. Held not prejudicial. Oakwood Drainage Com'rs v. Knox, 237 Ill. 148, 86 NE 686. Fact that **counsel walked to court house** with one of jury during trial of case is not ground for new trial. Alpena Tp. v. Mainville, 153 Mich. 732, 15 Det. Leg. N. 605, 117 NW 338. Least intermeddling with jurors by attorneys conducting trial is grounds for granting new trial. Attorney had **played cards** with several of jurors on evening after closing evidence and arguments begun. Held ground for new trial. Austin v. Langlois [Vt.] 69 A 739.

60. Comment on nature of case is no ground for new trial based on comment upon testimony. "This is action to recover money lost at gambling" was held not to be comment on evidence assuming that money was lost. Crowley v. Taylor, 49 Wash. 511, 96 P 1016. Court on overruling motion to direct verdict said he was inclined to favor plaintiff but still had some doubts. This was reported in paper but defendant stopped court from giving instruction to jury not to read papers, saying they would take their chances. Jury was instructed to disregard such statements and articles in paper. Held that defendant could not ask for new trial on account of misconduct affecting jury. Spreckels v. Brown, 212 U. S. 208, 53 Law. Ed. —. **Acts of court in communicating with jury** before sealed verdict is read is ground for new trial. After verdict had been sealed foreman communicated with court and then refused to ratify one part of verdict. Held to be ground for new trial. Dralle v. Reedsburg, 135 Wis. 293, 115 NW 819.

61. **Bribery** by third person is sufficient to set aside verdict when such motion is properly made. Crocker v. Crocker, 198 Mass. 401, 84 NE 476. **Arrest of party for perjury** during trial is not ground for new trial as matter of law. Kelley v. Boston, 201 Mass. 86, 87 NE 494.

62. President of defendant street car was also president of Mormon church. Alleged that he had made statement at church meeting that grafters were getting verdicts against corporations and regretted that members on juries had given verdicts against corporations. Not shown that jurors in question knew of this. Held not to be grounds for a new trial. Paul v. Salt Lake City R. Co., 34 Utah, 1, 95 P 363.

63. Dittman v. New York, 58 Misc. 52, 110 NYS 40. Mere fact that jury noticed acts that made them suspect that plaintiff was arrested on ground of perjury does not make it duty of judge to set aside verdict but in his discretion may do so. Kelley v. Boston, 201 Mass. 86, 87 NE 494.

64. Juror in his examination stated that he had no bias or prejudice in cases of this nature. Upon examination of next case, which also was personal injury case, he stated that he was biased and prejudiced in such cases. Was not considered sufficient to vitiate former verdict. Lunde v. Cudahy Packing Co. [Iowa] 117 NW 1063. Evidence that juror in his voir dire falsely stated that he had not formed nor expressed an opinion concerning the merits of case is ground for new trial. Appellant learned after juror had signed and returned verdict and jury had been discharged that he had formed and expressed opinion. Held to be ground for new trial. Stein v. Chesapeake & O. R. Co. [Ky.] 116 SW 733.

65. **Held not prejudicial:** Affidavit by one juror that another had investigated for himself held insufficient for new trial. Chicago City R. Co. v. Wyckoff, 136 Ill. App. 342. One of jurors asked stranger about which way sewer ran and one juryman made measurements at manhole and another dug in earth with knife, saying he had struck gravel. Held not cause for new trial. City of Emporia v. Juengling [Kan.] 96 P 850. It is not error to deny motion for new trial because two jurors who were experienced engineers talked to other jurors about their conclusions from such experience, when it is not shown that parties were prejudiced nor what conclusions were. Lillard v. Chicago, etc., R. Co. [Kan.] 98 P 213. Juror's visit to scene of accident and reporting same to other jurors not ground for new trial where it was not considered in finding verdict. Dittman v. New York, 58 Misc. 52, 110 NYS 40.

66. Where jury agreed each to give sum as

dict, is also ground for new trial, if prejudicial;[67] but incompetency of a juror which was not discovered at the time of impanelling is not such ground.[68] That the conduct of the jury may be cause for a new trial, it must affirmatively appear that neither the complaining party nor his counsel knew of such misconduct before verdict,[69] but the fact that counsel of the respondent did not object to the conduct does not amount to a waiver, if he in no way sanctioned it.[70] Under Texas statute, on motion for new trial on ground of misconduct of jury, it is competent for juryman to testify in open court as to conduct in jury room,[71] but Texas seems to stand alone in this respect.[72] In Illinois allegations of misconduct on part of defendant and one of the jurors are sufficiently negatived by affidavits of both that they had no acquaintance and did not talk about the case.[73]

(§ 2) *E. Irregularities or defects in verdict or findings.*[74]—See 10 C. L. 1003—Failure of a general verdict to specify the plea upon which it rests is not ground for new trial where it has been returned, published and recorded without objection.[75] Entering judgment before the time set therefor is ground for new trial.[76]

(§ 2) *F. Verdict or findings contrary to law or evidence.*[77]—See 10 C. L. 1004—

damages, to add them together and divide by twelve and that to be verdict, it must be set aside, but where such sum was to serve simply as basis to work from and verdict not agreed to until later, it will be sustained. Missouri K. & T. R. Co. v. Hawkins [Tex. Civ. App.] 109 SW 221. Where evidence tended to show that jury took average of their undivided verdicts simply as basis of their common verdict, court did not abuse its discretion in overruling motion for new trial. Id. Some evidence to show that verdict was obtained by adding individual verdicts by number of jurors. Held that, in face of evidence that it was arrived at independent of quotient method, court did not abuse its discretion in refusing new trial. Chicago, etc. R. Co. v. Trippett [Tex. Civ. App.] 111 SW 761. Evidence by one juror that they had agreed that party who got largest vote on first ballot should win case was not sufficient to impeach verdict when such evidence was contradicted by another juror. Kalteyer v. Mitchell [Tex. Civ. App.] 110 SW 462.

**67.** Evidence that one of jurors received information of serious illness of his mother-in-law when in jury room, and that he was so worried as not to be able to give all his attention to case, and that he agreed to verdict for plaintiff although before receiving information had been for defendant, also that another juror sympathizing with former thought he had been influenced to agree to verdict thereby, was held not to be misconduct and not ground for new trial. Texas & N. O. R. Co. v. Bellar [Tex. Civ. App.] 112 SW 323.

**68.** Juror found to be past 65 years of age, which is beyond age limit of statute, held not to be ground for new trial. Blair v. Paterson, 131 Mo. App. 122, 110 SW 615. Where disqualification of juror relied on for new trial might have been discovered by exercise of ordinary care, it affords no excuse for failing to make objection in due season, since party should not be permitted to take advantage of his own negligence. Motion for new trial on grounds that juror was related to adverse party in sixth degree denied. Blassingame v. Laurens, 80 S. C. 38, 61 SE 96.

**69.** No ground where jury took state reports with them and counsel knew of it when jury was discharged. Brooks v. Camak, 130 Ga. 213, 60 SE 456. One juryman was intoxicated to knowledge of appellant's attorney. Ewing v. Lunn [S. D.] 115 NW 527. Counsel by agreeing to further deliberation by jury did not waive his right to new trial on grounds of misconduct where such misconduct was unknown to him when making such agreement. Attorney agreed to further deliberation, not knowing foreman had communicated to other juryman what he purported to be further instructions from court. Dralle v. Reedsburg, 135 Wis. 293, 115 NW 819.

**70.** Attorney saw that jury was treated and entertained by petitioner. Harrington v. Hamm, 153 Mich. 660, 15 Det. Leg. N. 556, 117 NW 62.

**71.** Texas & N. O. R. Co. v. Bellar [Tex. Civ. App.] 112 SW 323.

**72.** Declarations of juror in civil action made after verdict is rendered and after juror had gone on street cannot be used on motion for new trial to impeach verdict where testimony proposed involved no fraud, corruption or misconduct. Evidence of three jurors talking and joking with plaintiff's son and one of plaintiff's attorneys right after trial, with nothing to show fraud or corruption, is not misconduct calling for new trial. Montgomery Trac. Co. v. Knabe [Ala.] 48 S 501.

**73.** Allegation that defendant and one juror were seen conversing during trial of case. Oakwood Drainage Com'rs v. Knox, 237 Ill. 148, 86 NE 636.

**74. Search Note:** See New Trial, Cent. Dig. §§ 120-129; Dec. Dig. §§ 57-64; 29 Cyc. 815-817; 14 A. & E. Enc. P. & P. 786.

**75.** Livingston v. Taylor [Ga.] 63 SE 694.

**76.** Where in action for price of suit court asked plaintiff to make suit fit and reserved decision for week but entered it before that time, new trial should be granted. Galowitz v. Blyn, 110 NYS 948.

**77. Search Note:** See notes in 47 L. R. A. 33; 2 Ann. Cas. 762; 3 Id. 401.

See, also, Cent. Dig. §§ 130-166; Dec. Dig. §§ 65-81; 29 Cyc. 818-850; 14 A. & E. Enc. P. & P. 755.

The court may grant a new trial in its discretion, when the verdict is the result of mistake,[78] passion or prejudice,[79] or contrary to the evidence,[80] particularly where the

78. Schleifenbaum v. Rundbaken [Conn.] 71 A 899. Where jury seems to have labored under mistaken impression, new trial should be granted. In injury by electricity jury thought defendant owed duty to give notice of current in its wires, while there is no such duty shown. Held to be ground for new trial. South Shore Gas & Elec. Co. v. Ambre [Ind.] 87 NE 246.

79. Schleifenbaum v. Rundbaken [Conn.] 71 A 899; Choctaw O. & G. R. Co. v. Burgess [Okl.] 97 P 271. Where there has been such plain disregard of instructions of court or evidence in case by jury as to satisfy court that verdict was rendered under misapprehension of such instructions, or under influence of passion or prejudice, new trial should be ordered. Where tenant was in default for rent and, after three days' notice to pay or vacate, action was brought and verdict was rendered for defendant, court held justified in ordering new trial. Occidental Real Estate Co. v. Gantner, 7 Cal. App. 727, 95 P 1042. In action by wife and children against three saloonkeepers for damages for loss of support occasioned by sale of intoxicating liquor to husband and father of plaintiffs, that jury returns verdict against two of defendants and not against third is not proof of partiality or prejudice such as to be ground for setting aside verdict if evidence is sufficient to sustain verdict rendered. Eastwood v. Klamm [Neb.] 120 NW 149.

80. Verdict is not against evidence when prejudicial error, either in admission of evidence or in rulings of court, was not committed during progress of trial. Lynch v. Snead Architectural Iron Works [Ky.] 116 SW 693. Whether evidence sustains verdict is within sound discretion of court. Hamill v. Schlitz Brew. Co., 138 Iowa, 138, 115 NW 943; Stetzler v. Metropolitan St. R. Co., 210 Mo. 704, 109 SW 666. Where court is in doubt as to weight of evidence, it is no ground for new trial. Kursheedt v. Standard Bleachery Co. [N. J. Law] 71 A 39. Where there is some doubt as to preponderance, coupled with affidavit of newly-discovered evidence, court should grant new trial. Clark v. Hemmingson, 132 Ill. App. 619. Whenever it appears to trial court that jury have failed to respond truly to real merits of controversy, they have failed to do their duty and verdict should be set aside and new trial granted. Wilcox v. Rhode Island Co. [R. I.] 70 A 913. Where evidence is not manifestly and palpably in favor of verdict, it may be set aside and new trial granted. Powers-Simpson Co. v. Delehunt, 105 Minn. 334, 117 NW 503. Law and facts not demanding verdict, there is no abuse of discretion to grant new trial for first time. Goodman v. Spurlin [Ga.] 62 SE 1029; Singleton v. Close, 130 Ga. 716, 61 SE 722.

**That verdict is contrary to evidence.** Montgomery Trac. Co. v. Knabe [Ala.] 48 S 501; Woodroof v. Hall [Ala.] 47 S 570; Bone v. Hayes [Cal.] 99 P 172; Jones v. Smith, 158 F 911; Burke v. Wood, 162 F 533; Livingston v. Taylor [Ga.] 63 SE 694; Strange v. Huntington Light & Fuel Co. [Ind. App.] 84 NE 355; Peterson v. Chicago G. W. R. Co., 106 Minn. 245, 118 NW 1016; Crawford v. Kansas City Stockyards Co. [Mo.] 114 SW 1057; Quagliana v. Jersey City, etc., R. Co. [N. J. Law] 71 A 43; Schuster v. Arscott, 110 NYS 1107; Lynch v. Rhode Island Co. [R. I.] 69 A 765; Austin v. Langlois [Vt.] 69 A 739. Discretion of trial judge upon first grant of new trial will not be interfered with where it is manifest that new trial was granted because trial judge may not have been satisfied with verdict rendered upon evidence submitted. E. E. Lowe Co. v. Teasley & Co., 4 Ga. App. 155, 60 SE 1077. State of facts held not sufficient ground for new trial. Karl v. Diamond [N. J. Law] 71 A 46. Evidence held such as to warrant order of new trial though there had been two previous trials. Brink v. North Jersey St. R. Co. [N. J. Law] 71 A 1120. Where evidence tends to show that plaintiff was guilty of contributory negligence and same is not negative, new trial should be ordered. Banner v. O'Meara, 110 NYS 947. Where the jury has passed on evidence, verdict should not be set aside unless against preponderance of evidence. Action for injuries due to breaking of scaffold. Convey v. Finn, 114 NYS 864. Preponderance of evidence against verdict is no ground for new trial. In action for injury in collision, street car company had more witnesses than plaintiff. Bowell v. Public Service Corp. [N. J. Law] 71 A 119. Where motion for new trial is made on ground that verdict is contrary to weight of evidence, it is improper for court to sustain verdict because there is some evidence to support it, court being required to weigh evidence and grant new trial if verdict is contrary to preponderance thereof. Vaulx v. Tennessee Cent. R. Co. [Tenn.] 108 SW 1142. Where evidence offered in favor of motion for new trial shows defendant not liable, court should grant new trial. Varney v. Hutchinson Lumber & Mfg. Co. [W. Va.] 63 SE 203.

**That evidence is insufficient to sustain verdict.** Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 P 1029; Burke v. Wood, 162 F 533; Ketron v. Sutton, 130 Ga. 539, 61 SE 113; Garner v. Garner [Ga.] 62 SE 81; Merchants' & Miners' Transp. Co. v. Corcoran, 4 Ga. App. 654, 62 SE 130; Rodriguez v. Merriman, 133 Ill. App. 372; American Home Circle v. Schneider, 134 Ill. App. 600; Cassidy v. Johnson, 41 Ind. App. 696, 84 NE 835; Iowa Life Ins. Co. v. Haughton [Ind. App.] 85 NE 127; City of Lafayette v. West [Ind.] 87 NE 550; Lorts & Frey Planing Mill Co. v. Weil [Ky.] 113 SW 474; Hanson v. Lee, 104 Minn. 232, 116 NW 482; Seely v. Tenant, 104 Minn. 354, 116 NW 648; Garwood v. Corbett [Mont.] 99 P 958; Plesser v. Appel, 113 NYS 1034; Abrashkov v. Ryan, 114 NYS 973; Lozier Motor Co. v. Ziegler, 115 NYS 134; Lane v. Delta County [Tex. Civ. App.] 109 SW 866; Best v. Seattle [Wash.] 97 P 772; Miller v. Kenosha Elec. R. Co., 135 Wis. 68, 115 NW 355. **Where agreed statement of facts constitutes findings** of court, it cannot be claimed that findings are not supported by evidence and new

evidence is conflicting.[81] This rule applies to directed verdicts[82] and findings of

trial granted, neither that decision is contrary to law as that can only be raised on appeal. Quist v. Hill [Cal.] 99 P 204. Power of trial court to set aside verdict which is against evidence and to grant new trial is **not limited to cases where entire verdict is against evidence.** In replevin case, part of property held to belong to plaintiff and part to defendant. Dunning v. Crofutt [Conn.] 70 A 630. Trial court should not grant new trial on ground that verdict is not supported by evidence, unless weight of testimony so clearly preponderates against verdict found as to require its annulment in order to meet demands of justice. Jones v. Jacksonville Elec. Co. [Fla.] 47 S 1. Held that verdict giving value of furniture could not be said to be against evidence where evidence of purchase price of value of "forced sale" and amount it would take to replace was before jury upon whom devolved duty of placing value. Morris Storage & Transfer Co. v. Wilkes, 1 Ga. App. 751, 58 SE 232. New trial should be granted where there is no evidence tending to show liability of any but one of three joint defendants. Suit for personal injuries against receivers of lessor street railway, lessee street railway, and receivers of latter who were operating car causing injury and who alone were liable therefor. Eckels v. Henning, 139 Ill. App. 660. Verdict on insurance policy where evidence would indicate that insured was working fraud on company, knowing himself in poor physical condition. Iowa Life Ins. Co. v. Haughton [Ind. App.] 85 NE 127. Motion for new trial because evidence does not support verdict will not lie where there is sufficient evidence to go to jury. Held in action for commission for sale of real estate that there was enough evidence of contract to go to jury. Robbins v. Bosserman, 133 Iowa, 318, 110 NW 587. Where in action against two defendants in which court instructed that if jury found against one defendant they must also find against other, verdict against first was not supported by evidence, verdict against second defendant would be set aside, irrespective of whether or not jury could find against him on any proper ground. Davis v. Whiting & Son Co., 201 Mass. 91, 87 NE 199. Where demurrer to evidence should have been sustained, new trial will lie. Evidence showed plaintiff to be servant of contractor only and not of defendant, hence no action could lie. Kipp v. Oyster, 133 Mo. App. 711, 114 SW 538. In personal injury case against city, where plaintiff's case was supported only by one witness who materially contradicted himself, court rightfully granted new trial. Mullen v. Butte, 37 Mont. 183, 95 P 597. Evidence of father's demand for wages of infant son was supported by evidence. Kraus v. Clark [Neb.] 116 NW 164. To be ground for new trial on grounds of insufficiency of evidence, contention of losing party should be supported by preponderance of evidence determined by weight of testimony and credibility of witnesses. Bowell v. Public Service Corp. [N. J. Law] 71 A 119. Where evidence which in all probability is false has been admitted to prejudice defendant, new trial should be granted even though defendant was not in court. Exaggerating injury. Zettel v. Taylor, 114 NYS 467. Where verdict was formed on inadmissible evidence, new trial should be granted. Evidence of misconduct of defendant's manager tending to show that defendant was innocent victim of rascality of his agents; hence prejudicial to the plaintiff. Massillon Sign & Poster Co. v. Buffalo Lick Springs Co., 81 S. C. 114, 61 SE 1098.

**Where evidence authorized verdict.** Schleifenbaum v. Rundbaken [Conn.] 71 A 899; Cooley v. Bergstrom, 3 Ga. 496, 60 SE 220; Hutcherson v. Ladson, 130 Ga. 427, 60 SE 1000; Meinhard, Schaul & Co. v. Bedingfield Mercantile Co., 4 Ga. App. 176, 61 SE 34; Maxwell v. Hood, 130 Ga. 542, 61 SE 116; Macon R. & L. Co. v. Lewis, 4 Ga. App. 318, 61 SE 290; Taylor v. Futch, 4 Ga. App. 322, 61 SE 292; McHan v. Malsby & Co., 130 Ga. 756, 61 SE 731; Ford v. Harris, 4 Ga. App. 467, 61 SE 881; Merchants' & Miners' Transp. Co. v. Corcoran, 4 Ga. App. 654, 62 SE 130; Turner v. Barber [Ga.] 62 SE 587; Lee v. Winkles [Ga.] 62 SE 820; Dodge v. Cowart [Ga.] 62 SE 987; Clark v. State [Ga.] 63 SE 132; Thompson v. Shelverton [Ga.] 63 SE 220; Morrow v. Bank of Southwestern Georgia [Ga.] 63 SE 627; Kelly v. Malone [Ga. App.] 63 SE 639; Atlantic Coast Line R. Co. v. Williams [Ga. App.] 63 SE 671; Camas Prairie State Bank v. Newman [Idaho] 99 P 833; Mitchell v. Emmons [Me.] 71 A 321; Fearon v. Mullins [Mont.] 98 P 650; Bates v. Davis Co., 57 Misc. 557, 109 NYS 1094; Schwartz v. Joline, 111 NYS 726; Choctaw O. & G. R. Co. v. Burgess [Okl.] 97 P 271; Rosenbaum Grain Co. v. Pond Creek Mill & Elevator Co. [Okl.] 98 P 331; Wood v. Pacolet Mfg. Co., 80 S. C. 47, 61 SE 96; Ogilvie v. Conway Lumber Co., 80 S. C. 7, 61 SE 200; Dorwin v. Hagerty, 137 Wis. 161, 118 NW 799. A verdict which is supported by one witness is not a compromise verdict and is not ground for a new trial. Alexander v. Mud Lake Lumber Co., 163 Mich. 70, 15 Det. Leg. N. 367, 116 NW 539. Automobile driver while going on wrong side of street hit street sweeper. Verdict for plaintiff, court disapproving yet verdict sustained. Suell v. Jones, 49 Wash. 582, 96 P 4. Evidence held to support claim against street car company for injuries received on getting off. Hagenes v. Tacoma R. & P. Co., 49 Wash. 590, 96 P 6.

81. Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 P 1029; Schleifenbaum v. Rundbaken [Conn.] 71 A 899; Denham v. Addison, 130 Ga. 764, 61 SE 720; Conrad v. Hausen [Ind.] 85 NE 710; Sheker v. Machovec [Iowa] 116 NW 1042; Lunde v. Cudahy Packing Co. [Iowa] 117 NW 1063; Phinney Land Co. v. Corey [Minn.] 119 NW 1134; Garwood v. Corbett [Mont.] 99 P 968; St. Pierre v. Foster & Co. [N. H.] 70 A 289; Kenway v. Hoffman [Wash.] 98 P 98; Farrell Co. v. Ihrig [Wash.] 97 P 52; Angus v. Wamba [Wash.] 97 P 246. Where evidence is fairly conflicting and verdict supported by jury after three trials, even if in opinion of court too harsh, must be accepted and motion for new trial refused. Jones v. Bush, 158 F 1023. Evidence conflicting as to whether or not defendant had notice of lien on machinery. Clary v. Isom [Fla.] 45 S 994. Grant of new trial upon conflict of

the court upon the facts,[83] but does not warrant the court in setting aside the verdicts until one happens to agree with its opinion,[84] nor should the verdict be set aside where the issues are peculiarly within the province of the jury,[85] or for the admission of evidence giving the movant a new line of defense or raising an objection for the first time which according to former defense it could not logically raise.[86] Similarly, the trial court may set aside a verdict where it is inadequate,[87] excessive,[88]

evidence and compromise verdict will not be disturbed, even though affidavit upon ground of newly-discovered evidence does not come up to rule. Chancey v. Williams [Fla.] 47 S 811. Discretion of trial court as to mere matters of fact, where evidence in case would fully authorize finding for either party, is limited to first grant of new trial. E. E. Lowe Co. v. Teasley & Co., 4 Ga. App. 155, 60 SE 1077. Where jury under instructions and evidence can find either for plaintiff or defendant, it cannot be said that verdict is contrary to law and is ground for new trial. Fearon v. Mullins [Mont.] 98 P 650. Conflict as to knowledge and honesty of plaintiffs in making false statements of financial standing to commercial bureau. Galvin v. Tibbs, Hutchins & Co. [N. D.] 119 NW 39. Rule that appellate courts will not grant new trial on conflicting evidence does not bind trial court which should grant new trial whenever verdict fails to do substantial justice. Wilcox v. Rhode Island Co. [R. I.] 70 A 913. Mere conflicting or contradictory statements of witnesses for plaintiff is not sufficient ground for setting aside verdict in his favor. South Texas Tel. Co. v. Tabb [Tex. Civ. App.] 114 SW 448.

82. Floody v. Great Northern R. Co., 104 Minn. 517, 116 NW 932.

83. Scott v. Ford [Or.] 97 P 99.

84. Under Const. art. 1, § 2, there is no justification for setting aside three successive verdicts in same case. Ridgely v. Taylor, 126 App. Div. 303, 110 NYS 665. Fact that opinion of court as to weight of evidence on merits differs from that of jury is not finding that plaintiff's claim is iniquitous or that order of judgment for defendant is so clearly just that it would be inequitable to reopen case. St. Pierre v. Foster & Co. [N. H.] 70 A 289.

85. Title to personal property. Young v. Chandler [Me.] 71 A 652.

86. In action for goods against common carrier, defendant asks new trial to show that no proof had been given that defendant had not delivered to carrier at terminal. Held not ground for new trial. Einstein v. Clyde S. S. Co., 58 Misc. 369, 110 NYS 1095.

87. Servant of defendant went with constable to levy on furniture. When plaintiff struck constable defendant's servant interfered, and this action is brought for damage, which jury assessed at one cent. Held properly set aside for inadequacy. Hardeman v. Williams [Ala.] 48 S 108. Where it equals only one-half of what evidence supports. Anderson v. Lewis [W. Va.] 61 SE 160.

88. Whether new trial be granted on ground of excessiveness is matter within sound discretion of court (Wirsing v. Smith [Pa.] 70 A 906; Hall v. Northwestern R. Co., 81 S. C. 522, 62 SE 848; Hageness v. Tacoma R. & P. Co., 49 Wash. 590, 96 P 6), unless it appears to be result of prejudice, partiality, or misapprehension (Macon R. & L. Co. v. Lewis, 4 Ga. App. 313, 61 SE 290; Merchants' & Miners' Transp. Co. v. Corcoran, 4 Ga. App. 654, 62 SE 130; Waechter v. Walters, 41 Ind. App. 408, 84 NE 22; Nolan's Adm'r v. Standard Sanitary Mfg. Co., 33 Ky. L. R. 745, 111 SW 290; Louisville & N. R. Co. v. Daniel [Ky.] 115 SW 804; Chlanda v. St. Louis Transit Co., 213 Mo. 244, 112 SW 249; Ogilvie v. Conway Lumber Co., 80 S. C. 7, 61 SE 200; Missouri K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601). New trial should not be granted merely because judge would have found less amount than that found by jury, unless opinion of judge amounts to clear and fixed conviction that injustice has been done by excessive verdict. Hall v. Northwestern R. Co., 81 S. C. 522, 62 SE 848. Where by actual computation verdict is greater than highest estimate of claim made of value of property, new trial should be granted. Verdict $100 higher than highest estimate. Galvin v. Tibbs, Hutchins & Co. [N. D.] 119 NW 39. In motion for new trial, excessiveness of damages must be attacked because not warranted by evidence. Judgment showed damages beyond pleadings but supported in evidence. Helms v. Appleton [Ind. App.] 85 NE 733. Where it is within discretion of jury to award exemplary damages, verdict cannot be said to be excessive. Stowers Furniture Co. v. Brake [Ala.] 48 S 89. Court cannot modify verdict and substitute it for that of jury, but if excessive must set it aside and order a new trial. Keniston v. Todd [Iowa] 117 NW 674. Action on notes with verdict of $440.37 and costs for plaintiff. Court entered judgment for costs only. Held court could not do so but must order new trial if verdict is not just. Id.

**New trial refused:** Officers acting under void writ in favor of defendant wrongfully took furniture from plaintiff and committed assault in doing so. Verdict of $1,500 held not excessive. Stowers Furniture Co. v. Brake [Ala.] 48 S 89. $5,000 for injury to thigh held not excessive. Chicago City R. Co. v. Wycoff, 136 Ill. App. 342. Amount of damages in condemnation proceedings not excessive. Oakwood Drainage Com'rs v. Knox, 237 Ill. 148, 86 NE 636. Verdict of $1,085 granted for injury by molten iron to plaintiff's leg held not excessive. Nolan's Adm'r v. Standard Sanitary Mfg. Co., 33 Ky. L. R. 745, 111 SW 290. $40,000 awarded for death of man earning $8,000 to $10,000 a year for his family held not to be excessive. Cunningham v. Mutual Reserve Life Ins. Co., 125 App. Div. 688, 109 NYS 1070. Verdict of $45,000 damages for shooting and injuring son-in-law not so excessive as to render it necessary to grant new trial. Wirsing v. Smith [Pa.] 70 A 906. Verdict of $1,500 for injury in groin disabling him for 18 months

or contrary to law,[89] but in the latter case it is not a matter of absolute discretion of the trial court whether or not it shall be granted.[90]

(§ 2) *G. Surprise, accident or mistake.*[91]—See 10 C. L. 1005—Accident,[92] fraud,[93]

not excessive. Ogilvie v. Conway Lumber Co., 80 S. C. 7, 61 SE 200. Verdict of $11,490 held not excessive for death of man 63 years old who was good "provider," even if widow was willed small fortune. Chicago, etc., R. Co. v. Trippett [Tex. Civ. App.] 111 SW 761. Verdict of $20,000 for injury through defective turntable causing injury to limbs resulting in paralysis held not to be excessive. Missouri, K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601.

**New trial granted:** Verdict of $25,000 for injuries in railroad wreck. Illinois Cent. R. Co. v. Rothschild, 134 Ill. App. 504. Verdict of $3,000 for services rendered to foster-mother where there was no express contract. Waechter v. Walters, 41 Ind. App. 408, 84 NE 22. $9,125 for injured hand. Ewing v. Stickney [Minn.] 119 NW 802. Held error for judge not to grant a new trial when he considered the verdict so excessive that three-fourths of damages ought to be remitted. Mississippi E. R. Co. v. Wymond Cooperage Co. [Miss.] 46 S 557. Verdict of $10,000 for injury to knee of 2 year old child which became tubercular is held excessive and ground for new trial. Neff v. Cameron, 213 Mo. 350, 111 SW 1139. Verdict of $1,800 to lady injured in street car accident, no bones being broken but nervousness shown and loss of free use of lower limbs, held so excessive as to be ground for new trial. Chlanda v. St. Louis Transit Co., 213 Mo. 244, 112 SW 249. Where under evidence it was not entirely clear that plaintiff was entitled to verdict but jury had awarded him double amount he under any circumstances could be entitled to, it was not error for court to grant a new trial instead of granting it on condition that plaintiff did not remit excess. Garwood v. Corbett [Mont.] 99 P 958. Verdict of $20,000 awarded a brakeman for injury to foot held excessive. Beach v. Bird & Wells Lumber Co., 135 Wis. 550, 116 NW 245.

89. Fulton v. Cretian [N. D.] 117 NW 344. Failure of trial court to make finding of fact on material issue renders decision one against law, and motion for new trial will be on that ground unless some finding has already made it unnecessary to find on particular facts. Held that findings could not change the result. Black v. Harrison Home Co. [Cal.] 99 P 494. Where material issues are presented by answer which are supported by evidence, and court fails to make findings thereon, new trial should be granted. Answer in foreclosure suit showed that third party held interests which should have been part of judgment. Held failure of court to make such parties to suit is ground for new trial. Wilson v. Dahler [Cal. App.] 99 P 723. Where judgment is based upon findings which do not determine all material issues of fact, it is decision against law and motion for new trial will lie, but not where facts are substantially covered by findings. In action for attorney's fees, all material facts were not in findings but were substantially included, and new trial was denied. Aydelotte v. Billing [Cal. App.] 97 P 698. In replevin case jury found three colts belonged to plaintiff and dam to defendant. Court set it aside, as according to general rule colts belonged to owner of dam. Dunning v. Crofutt [Conn.] 70 A 630. In servant's action for injuries where jury properly found issue of negligence and contributory negligence for plaintiff, and were bound to return verdict for her under instructions, verdict was not contrary to law so as to require new trial. Fearson v. Mullins [Mont.] 98 P 650. Verdict is not contrary to law if it is in accordance with instructions given by court. Cowperthwait v. Brown [Neb.] 117 NW 709. Where court has submitted case to jury instead of directing verdict for defendant, and jury found for plaintiff, court could not then dismiss complaint on its merits, but must set verdict aside and grant new trial. Brown v. Grossman, 128 App. Div. 496, 112 NYS 827.

**Disregard of instructions.** Brettel v. Connelly [Ala.] 47 S 298; Occidental Real Estate Co. v. Gantner, 7 Cal. App. 727, 95 P 1042; Burke v. Wood, 162 F 533; Lynch v. Snead Architectural Iron Works [Ky.] 116 SW 693; Myers v. Fear [Okl.] 96 P 642; Massillon Sign Poster Co. v. Buffalo Lick Springs Co., 81 S. C. 114, 61 SE 1098; Bentley v. Brossard, 33 Utah, 396, 94 P 736.

90. Action by real estate firm for commission on abandoned contract of sale. Ordinance requiring license of real estate men withdrawn, and this lower court concluded was error and granted new trial. Held that withdrawal of ordinance was right as a matter of law and order of new trial was error. Manker v. Tough [Kan.] 98 P 792.

91. **Search Note:** See notes in 8 L. R. A. (N. S.) 144.

See, also, Cent. Dig. §§ 167-200; Dec. Dig. §§ 82-98; 29 Cyc. 850-880; 14 A. & E. Enc. P. & P. 722.

92. Affidavits showing illness of plaintiff, not known to attorney, which prevented his presence at trial and also showed that he could give testimony which may materially change result, held ground for new trial. Dinwiddie v. Tims [Tex. Civ. App.] 114 SW 400.

93. Code § 3796, providing for new trial within two years after judgment, where notice was served by publication only, does not apply to divorce suits. Tollefson v. Tollefson, 137 Iowa, 151, 114 NW 631. Remedy under Code § 4091, providing for new trial within one year when fraud was practiced in obtaining judgment, is not exclusive when fraud is not discovered within year and courts of equity may relieve. Id. Fraud which will authorize granting new trial under this rule must be extrinsic or collateral to matter involved in original case. Tollefson v. Tollefson, 137 Iowa, 151, 114 NW 631. Extrinsic or collateral fraud within meaning of this rule may consist of acts or promises lulling defrauded party into false security or preventing him from making defense, and many other acts. Id. Showing that husband sent wife and minor child to Norway promising to join them, re-

mistake,[94] and surprise, may be ground for new trial,[95] where due diligence was exercised by the surprised party before [96] and after the act constituting the surprise.[97]

iterated promises for several years and joined promises with acts and conduct apparently in line with promise, but that husband obtained divorce, held sufficient. Id.

**94. Honest mistake of law** may in some cases be ground for new trial. Varney v. Hutchinson Lumber & Mfg. Co. [W. Va.] 63 SE 203. Where counsel intending to make defense and appearing to have good defense found that under 1906 statute term of court was in October but failed to look in 1907 statute not yet published to learn that term had been changed. Id. Neither ignorance, misapprehension nor **blunders of counsel** not occasioned by other party are grounds for new trial. Plaintiff's attorney in suit for commission for selling land failed to put in evidence amount land sold for, hence failed to give basis for commission. Court held new trial should not be granted. Parker v. Britton, 133 Mo. App. 270, 113 SW 259. Where attorneys for defendant failed to put into the answer certain valid defenses under mistaken belief that it was not necessary nor good pleading, their act did not constitute such accident or mistake as are made grounds for new trial. In answer to suit on insurance policy, attorney fails to plead use of gasoline torch contrary to terms of policy. Held not to entitle to new trial on ground of accident or mistake. Sun Ins. Office of London v. Heiderer [Colo.] 99 P 39. **If one be led into misunderstanding** such as clearly evidenced excusable neglect and thereby is in default, court may on reasonable terms grant new trial. Sheriff in serving summons in two cases handed them copies of one summons only, whereby they defaulted. Held excusable and case opened and new trial granted. Hilt v. Heimberger, 140 Ill. App. 129.

**95. Held to constitute surprise:** Verdict in personal injury action will be set aside on ground of surprise where evidence as to certain injury was introduced after understanding that it would not be introduced and defendant was unprepared to answer it. Clarkson v. Rhode Island Co. [R. I.] 67 A 448.

**Held not to constitute surprise:** Doctrine of surprise as ground for new trial does not apply to testimony of witnesses of opposite party nor to evidence introduced by such party, where same tends to support issues joined, and is such as might reasonably have been anticipated. Plumlee v. St. Louis S. W. R. Co., 85 Ark. 488, 109 SW 515. Being misled by rulings of court as to admissibility of evidence is not such surprise as to entitle to new trial. Held admission of testimony, with statement that equivalent article was not necessarily same thing, could not be construed into meaning that would justify buyer in believing that court regarded evidence as other than one link in chain of proof of value of lathe ordered by contract. Connell v. Harron, 7 Cal. App. 745, 95 P 916. Willfully false testimony by defendant does not necessarily amount to surprise, which is ground for new trial. Action against surety on note where defendant pleads action of payee in extending time. Horner v. Schinstock, 77 Kan. 663, 96 P 143. Under plea that tendons, ligaments, and muscles of his limbs have been permanently weakened and their strength impaired, it is not such surprise as to call for new trial that party testifies that he has "flatfoot", especially so where they knew of claim before trial and did not ask for continuance. Lorts & Frey Planing Mill Co. v. Weil [Ky.] 113 SW 474. Fact that principal witness for defendant surprised his counsel is no ground for new trial, especially so where counsel was permitted to cross-examine him at length. Defendant's main witness changed his testimony so as to be favorable to plaintiff. Cunningham v. Mutual Reserve Life Ins. Co., 125 App. Div. 688, 109 NYS 1070. Where defendants in answer set up claim to land in question, it is not ground for new trial for surprise that **oral evidence of mistake** in description in deed is admitted. Moore v. Loggins [Tex. Civ. App.] 114 SW 183. In action for money loaned where set-off for board is pleaded, evidence by plaintiff that he furnished money to a brother of defendant at her request as favor to show accommodations exchanged, such testimony of money advanced is not such surprise as to be grounds for new trial. Hendelman v. Kahan [Wash.] 97 P 109.

**96. Diligence held insufficient:** Defendant cannot plead surprise as ground for new trial where only question was amount of work done on claim because of false swearing as he should have had witness there to prove to contrary. Question whether or not $200 worth of work had been done on mineral claim held not to be ground for surprise. Miller v. Scoble [Cal. App.] 97 P 93. Though counsel for defendant foreign corporation did not know that corporation had designated person whom process could be served, as required by statute, and did not learn of it until evidence was in, only defense being statute of limitations, and requirement of statute as to such designation being absolute, it was within trial court's discretion to refuse to open case after decision to permit defendant to show that it had filed statutory designation. O'Brien v. Big Casino Gold Min. Co. [Cal. App.] 99 P 209. New trial will not be granted for surprise in absence of witness, where party fails to exercise due diligence and where prevailing party is not guilty of improper conduct. Witness subpoenaed came intoxicated, was told to come again tomorrow, but not subpoenaed and did not come. Quagliana v. Jersey City, etc., R. Co. [N. J. Law] 71 A 43. Surprise is no ground for new trial, where evidence could reasonably have been anticipated. Estoppel pleaded in land title case in which plaintiff's grantor said to defendant he made no claim to property and defendant bought on strength of statement. Plaintiff got deed later. Held that plaintiff could have learned from grantor before what he knew of the title. Daugherty v. Templeton [Tex. Civ. App.] 110 SW 553. In action on title in which defendant relies on adverse possession, plaintiff was not entitled to a new trial on the ground of surprise as to boundaries of defendant's claim,

(§ 2) *H. Newly-discovered evidence.*[98]—See 10 C. L. 1008—The granting of a new trial on the ground of newly-discovered evidence[99] is discretionary with the court.[1] It will not ordinarily be granted, if the evidence is merely cumulative[2] or impeach-

where plat was in evidence locating land and plaintiff made no effort to meet evidence. Moore v. Loggins [Tex. Civ. App.] 114 SW 183.

**97. Request for continuance:** Where evidence is introduced at trial which is surprise to either party, he should move for continuance to obtain evidence to meet it. If such continuance is not asked, it cannot be made ground for new trial. It was surprise that permanent injury was claimed as not in pleadings until court allowed complaint to stand as amended. Held not ground for new trial. Hobart Lee Tie Co. v. Keck [Ark.] 118 SW 183. Failure to ask continuance on ground of surprise cannot be excused by belief that judge would visit disputed territory. Miller v. Scoble [Cal. App.] 97 P 93. New trial will not be granted on grounds of surprise on account of testimony given by witness unless party asks for continuance and time to meet such evidence. Where in action for commission in selling land it is alleged that party did not testify same on last trial as on first. Monarch v. Cowherd [Ky.] 114 SW 276. Materiality of evidence being discovered during trial and continuance not being asked, such evidence is not ground for new trial. Daugherty v. Templeton [Tex. Civ. App.] 110 SW 553. Surprise cannot be pleaded where it is shown that pleader had witnesses to meet evidence if they only had asked for continuance until witness could be in court. Id. Party who learns that witness will not testify as stated must move at once for continuance and cannot wait until plaintiff has virtually developed his case. Motion held too late where just as trial was beginning defendant learned that witness would not testify as stated, but did not move for continuance until in afternoon. Texas & P. R. Co. v. Crump [Tex.] 115 SW 26. Plaintiff learned of eyewitness during trial but even with diligence failed to find him until after trial. Held that failure to ask for continuance is proper ground for refusal of motion for new trial. De Hoyos v. Galveston, etc., R. Co. [Tex. Civ. App.] 115 SW 75. Party not asking for continuance when surprised is not entitled to new trial on evidence to meet such evidence causing surprise, especially so where such witness could have been had before. Ayers v. Missouri K. & T. R. Co. [Tex. Civ. App.] 116 SW 612. Where plaintiff did not make **motion to withdraw a juror,** not indicate his surprise, but took part in proceedings of case, there is no ground for new trial based on surprise. Replevin action by mortgagee against sheriff who attached goods on action against mortgagor. Pennington County Bank v. Bauman [Neb.] 116 NW 669.

**98. Search Note:** See notes in 14 L. R. A. 609.

See, also, Cent. Dig. §§ 201-229; Dec. Dig. §§ 99-108; 29 Cyc. 881-918; 7 A. & E. Enc. L. (2ed.) 462; 14 A. & E. Enc. P. & P. 790.

**99.** Evidence of what by law is indispensably necessary to establishment of defense cannot be newly-discovered evidence entitling to new trial. Evidence that defendant had filed statement on whom process could be served held not to be newly-discovered evidence. O'Brien v. Big Casino Gold Min. Co. [Cal. App.] 99 P 209. Unanswered telegram is not competent newly-discovered evidence showing liability of associate of main defendant, entitling to new trial. Action for alleged breach of contract to buy railroad stock. Lynch v. McCabe, 126 App. Div. 744, 111 NYS 291.

1. Lindstrom v. Fitzpatrick, 105 Minn. 331, 117 NW 441; Stern v. Volz [Or.] 98 P 148; Palmer v. Schurz [S. D.] 117 NW 150; Goodrich v. Kimble, 49 Wash. 516, 95 P 1084. Subject to careful scrutiny and rests on sound discretion. In re Dolbeer's Estate, 153 Cal. 652, 96 P 266. Within discretion of court to reopen case to admit additional testimony, especially where party does not produce witnesses when asking for reopening. Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729. Wide discretion and will not be disturbed unless abused. Hall v. Wilson [Ky.] 116 SW 244. In action by attorney general to restrain corporation from holding certain corporate stock in violation of law after return of rescript from full court ordering decree for plaintiff, defendant alleged that it had parted with stock mentioned in information and moved that it be allowed to prove fact on hearing of any motion for final decree. Held that motion was addressed to discretion of court and that denial thereof was not abuse of such discretion. Attorney General v. New York, etc., R. Co., 201 Mass. 370, 87 NE 621. No abuse to deny motion where alleged newly-discovered evidence is strongly opposed by affidavits. Lindstrom v. Fitzpatrick, 105 Minn. 331, 117 NW 441. Where evidence is immaterial or defendant's due diligence is clearly question of fact, it is not abuse of discretion to deny such motion. Evidence that party left on 9th of Nov. instead of 10th presents question of diligence and besides under law is immaterial. Jaenicke v. Fountain City Drill Co., 106 Minn. 442, 119 NW 60. Where granting of new trial on grounds of newly-discovered evidence would further justice, it should be granted. Discovery of receipt of payment. Prinzi v. Cataldo, 110 NYS 1054. Largely matter of discretion with trial court, so long as discretion is not abused and it does not appear that it has not been exercised according to established rules of law and principles of adjudged cases. Houston & T. C. R. Co. v. Davenport [Tex. Civ. App.] 110 SW 150. May in its discretion overrule motion. Affidavit of five different persons of plaintiff telling how he was injured does not entitle to new trial. Ayers v. Missouri, K & T. R. Co. [Tex. Civ. App.] 116 SW 612. Where conflicting affidavits are filed, it is discretionary with court to grant it. Kenway v. Hoffman [Wash.] 98 P 98.

2. Plumlee v. St. Louis S. W. R. Co., 85 Ark. 488, 109 SW 515; Miller v. Scoble [Cal. App.] 97 P 93; Colorado Springs & Interur

ing,[3] except where it would be likely to change the result,[4] or where it merely goes to

ban R. Co. v. Fogelsong, 42 Colo. 341, 94 P 356; Witt v. Latimer [Iowa] 117 NW 680; Barnes v. Loomis, 199 Mass. 578, 85 NE 862; Parker-Washington Co. v. St. Louis Transit Co., 131 Mo. App. 508, 109 SW 1073; Myatt v. Myatt [N. C.] 62 SE 887; Kursheedt v. Standard Bleachery Co. [N. J. Law] 71 A 39; Texas & N. O. R. Co. v. Scarbrough [Tex.] 108 SW 804. Evidence discovered since trial tending to show that claim of injury was false and fraudulent held to be cumulative and not ground for new trial. Flannelly v. Delaware & H. Co., 165 F 350. Where newly-discovered evidence is cumulative and not of such nature as to satisfy trial judge that new trial would likely further ends of justice, new trial will not be granted. De Vane v. Atlanta, B. & A. R. Co., 4 Ga. App. 136, 60 SE 1079. Where newly-discovered evidence could only be effective in reducing evidence and is cumulative, it is no ground for new trial. Settles v. Threlkeld, 140 Ill. App. 275. Where flood after trial showed damages as contended at trial in throwing rubbish upon land. Cassidy v. Johnson, 41 Ind. App. 696, 84 NE 835. Plaintiff sues defendant on promissory note on which he was surety, pleading as defense extension of time. Stranger hearing conversation can give only cumulative evidence, hence new trial denied. Horner v. Schinstock, 77 Kan. 663, 96 P 143. Evidence as to a breach of warranty. Mitchell v. Emmons [Me.] 71 A 321. In suit on insurance policy, question was as to value of stock just before fire. A commercial agent at store estimated it at $4,000. Held to be cumulative, hence within discretion of court to refuse new trial. Blake v. Royal Ins. Co., 133 Mo. App. 16, 112 SW 1000. Witness corroborating evidence of conversation. Kraus v. Clark [Neb.] 116 NW 164. Affidavit showing two witnesses that would testify to defendant's presence in a certain place on May 14, where he already had had witness to that effect, held cumulative. Stern v. Volz [Or.] 98 P 148. Affidavits of newly-discovered evidence, which contribute rather to volume of testimony than add to weight, are not grounds for new trial. Affidavit showing change of mind by one affiant. Vester v. Rhode Island Co. [R. I.] 71 A 4. Evidence simply tending to confirm residence of particular party at particular time. Keck v. Woodward [Tex. Civ. App.] 116 SW 75. Evidence cumulative of uncontradicted evidence. City of Richmond v. Poore [Va.] 63 SE 1014. Evidence merely cumulative and corroborative. Id. Newly-discovered evidence of fact assumed by both sides to exist. Sparling v. U. S. Sugar Co., 136 Wis. 509, 117 NW 1055.

3. Colorado Springs & Interurban R. Co. v. Fogelsong, 42 Colo. 341, 94 P 356; Witt v. Latimer [Iowa] 117 NW 680; Freudenheim v. London, 113 NYS 532; Palmer v. Schurz [S. D.] 117 NW 150; El Paso & S. W. R. Co. v. Murtle [Tex. Civ. App.] 108 SW 998; Crowley v. Taylor, 49 Wash. 511, 95 P 1016. Evidence contradicting speed of car as given by one witness. Plumlee v. St. Louis S. W. R. Co., 85 Ark. 488, 109 SW 515. Tending to show pecuniary loss not as heavy as claimed. Atlanta, K. & N. R. Co. v. Tilson [Ga.] 62 SE 281. Story told by child's mother that he was trying to walk plank when he fell, in impeachment of testimony of only eyewitness that child stumbled over end of plank and fell from walk, held no ground for new trial. City of Chicago v. Reid, 141 Ill. App. 514. Affidavit stating facts of occurrence, which plaintiff denied by affidavit, held not ground for new trial. Pace v. Webster City, 138 Iowa, 107, 115 NW 888. Alleged newly-discovered evidence which would tend only to impeach testimony of witness at former trial and which counsel had failed to bring out by cross-examination when forewarned of it is not ground for a new trial. Neff v. Cameron, 213 Mo. 350, 111 SW 1139. Motion for new trial on grounds of newly-discovered evidence based on fact that witness introduced by him, testifying as to disposition of property by vendor after purchaser had rejected title, gave false testimony, cannot be sustained. Solomon v. Alexander, 128 App. Div. 441, 112 NYS 779. Evidence offered in support of motion for new trial which is inconsistent with former evidence and seems improbable and unworthy of credence is not ground for new trial. Caseri v. Wogelsong, 114 NYS 882. Where wife sues saloonkeeper in damage for death of husband who committed suicide, evidence tending to show hard feeling between deceased and plaintiff is not sufficient for new trial. Palmer v. Schurz [S. D.] 117 NW 150.

4. Colorado Springs & Interurban R. Co. v. Fogelsong, 42 Colo. 341, 94 P 356; Kenny v. Kennedy [Cal. App.] 99 P 384; Kraus v. Clark [Neb.] 116 NW 164; Keck v. Woodward [Tex. Civ. App.] 116 SW 75. Whether affidavits of cumulative newly-discovered evidence were of such character as to change result is within sound discretion of trial court. Kenney v. Kennedy [Cal. App.] 99 P 384. Such nature as to satisfy judge that new trial would further ends of justice. De Vane v. Atlanta, B. & A. R. Co., 4 Ga. App. 136, 60 SE 1079. Newly-discovered evidence, on motion for new trial, must be clearly conclusive in its character to require court to grant new trial. Additional evidence tending to prove deceased committed suicide. American Home Circle v. Schneider, 134 Ill. App. 600. To entitle party to new trial on grounds of newly-discovered evidence, when point upon which it is sought was in issue in former trial, evidence must be of such permanent and unerring character as to preponderate greatly, or have decisive influence upon evidence to be overturned by it. Action for cabbage spoiled in cold storage. Plaintiff testified that it was in good condition when placed there. Now wants to show that it was in spoiled condition. Held that this was a point in evidence and evidence on it should have been produced, hence not ground for new trial. Paducah Ice Co. v. Hall & Co. [Ky.] 113 SW 104. Impeaching evidence original and relevant to important issue may be ground. Testimony that plaintiff had been earning $10 per day when in fact it was only $2.50. Ewing v. Stickney [Minn.] 119 NW 802. Newly-discovered evidence tending strongly to show letter impeaching plaintiff's witness was written by witness although he had denied writing same, and

change the issues,[5] or unless due diligence has been shown,[6] and the evidence is ma-

which supports defendant's claim, is ground for new trial especially so where such letter had been used prejudicially to defendant. Bankers' Money Order Ass'n v. Machod, 128 App. Div. 307, 112 NYS 740. Question in dispute was location of quarter section corner. The surveyor who made original survey had returned from Alaska and his testimony would be apt to change result. Held grounds for new trial. Kellogg v. Finn [S. D.] 119 NW 545.

5. Case had been tried on statement that order for money had been addressed before signature attached, new trial being asked for on discovery of power of attorney giving power to fill in blanks; refused. Dugane v. Hvezda Pokroku No. 4 [Iowa] 119 NW 141. Architect's insanity three years after he had given certificate when in actual business with parties to suit is not newly-discovered evidence on competency of architect. Neidlinger v. Onward Const. Co., 124 App. Div. 26, 109 NYS 717. Plaintiff by affidavit was attempting to show criminal conversation by newly-discovered evidence. Held to be going outside complaint for alienation of affection. Hanor v. Housel, 128 App. Div. 801, 113 NYS 163.

6. Colorado Springs & Interurban R. Co. v. Fogelsong, 42 Colo. 341, 94 P 356; Barens v. Loomis, 199 Mass. 578, 85 NE 862; Texas & N. O. R. Co. v. Scarborough [Tex.] 108 SW 804; City of Richmond v. Poore [Va.] 63 SE 1014.

**Diligence held sufficient:** Plaintiff had a leg crushed by counterweights in elevator of which he swore he had no knowledge. Two persons now made affidavit that he had been carried up and down while standing on counterweights and that affiants had refused to disclose this to litigants or their attorneys before trial. Gould v. Aurora, El. & R. Co., 141 Ill. App. 344. Movant asked for new trial on grounds of newly-discovered evidence, a terrible storm and flood having brought to light consequences of building of dam not previously known. Cassidy v. Johnson, 41 Ind. App. 696, 84 NE 835. Verdict ought not to be set aside where failure to discover evidence in time for use at trial is to be ascribed to inattention or other fault of losing party. Held, however, that in case against car company for injury by collision to steam roller, that fact that plaintiff did not own roller was case which could not be held attributable to fault of loser, hence ground for new trial. Parker-Washington Co. v. St. Louis Transit Co., 131 Mo. App. 508, 109 SW 1073.

**Diligence held insufficient:** Where, by diligence, movant could have discovered alleged newly-discovered evidence, before trial, it is not ground for new trial. Where defendant, knowing or it being within their power to know who treated plaintiff's injury, made no effort to learn what physician would testify to, they were not entitled to new trial. Louisville & N. R. Co. v. Church [Ala.] 46 S 457. Evidence of a fortune teller advanced as newly-discovered, but shown to have been known before trial. In re Dolbeer's Estate, 153 Cal. 652, 96 P 266. Number of stumps on area, and description of lot not obtained until after suit and five years after it was commenced. White v. Avery [Conn.] 70 A 1065. In action against storage company for furniture which it had allowed to be taken out, new trial is asked for because it is shown that party taking furniture had title on conditional sale contract. Held that due to close relation of this company and defendant it showed lack of diligence not to offer that at trial. Morris Storage & Transfer Co. v. Wilkes, 1 Ga. App. 751, 58 SE 232. Evidence offered is that deed was forged or altered and wants to bring in official record which could have been inspected at any time. Held no error to refuse new trial. Dodge v. Cowart [Ga.] 62 SE 987. Where witness advanced is next door neighbor and friends who was sworn at trial, and other sister of deceased who is living with plaintiff, held that with diligence this could have been discovered before trial. Chandler v. Mutual Life & Industrial Ass'n [Ga.] 61 SE 1036. Evidence presented was in hands of parties at time of former trial, hence not ground for new trial. Camas Prairie State Bank v. Newman [Idaho] 99 P 833. Affidavit of evidence with nothing to show due diligence in obtaining him at former trial. Barker v. Ronk, 134 Ill. App. 499. Evidence to come within rule of newly-discovered evidence upon which to grant new trial must not be discovered before close of trial. Evidence was discovered during trial. Held no ground for new trial as party could have moved for a continuance of case. Settles v. Threlkeld, 140 Ill. App. 275. Nothing to show that effort had been made to procure evidence until evidence was closed. Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729. Where sufficiency of screen in smokestack of engine is vital question in case, expert testimony in that question is not such newly-discovered evidence as to give new trial. Lillard v. Chicago, etc., R. Co. [Kan.] 98 P. 213. Where no sufficient reason is shown for not calling certain material witness, his testimony cannot be made ground for a new trial. When plaintiff's attorney interviewed him, he did not tell all he knew because he did not wish to get "mixed up." Held no excuse for failure to call him. Storch v. Rose, 152 Mich. 521, 15 Det. Leg. N. 312, 116 NW 402. Where client had information which should put him upon inquiry, his failure to discover information and to inform his attorney is not sufficient excuse for bringing in newly-discovered evidence and obtaining new trial. Ejectment action where power of attorney was recorded but not placed on abstract and hence misled attorney. Gragg v. Empey, 105 Minn. 229, 117 NW 421. Failure to introduce corporate charter in defense of note signed by members of club. Evans v. Lilly & Co. [Miss.] 48 S 612. Evidence that certain party was not present at time of accident. Held that counsel should have asked his witness who were present, hence new trial denied. Porter v. St. Joseph Stockyards Co., 213 Mo. 372, 111 SW 1136. In action for destroying fish in pond by discharging sewerage, oil, etc., into it, defendant could not obtain new trial on grounds of newly-discovered evidence of existence of live and wholesome fish at time of trial, as damages were not necessarily based on destruction of all fish and since evidence should and could have been obtained before trial.

terial to the issues[7] and likely to change the result.[8] A new trial will not be

Fischer v. Missouri Pac. R. Co. [Mo. App.] 115 SW 477. Party knowing of facts which were not communicated to counsel until after trial is not excuse and new trial should not be granted. Blair v. Paterson, 131 Mo. App. 122, 110 SW 615. Impeaching testimony not brought out by cross-examination when forewarned. Neff v. Cameron, 213 Mo. 360, 111 SW 1139. Party forgot presence of third party when conversation was had, and now moved for new trial. Denied. Kraus v. Clark [Neb.] 116 NW 164. Architect's clerk now willing to testify that "architects left more or less to inspection of assistants." Held not ground for new trial. Neidlinger v. Onword Const. Co., 124 App. Div. 26, 109 NYS 717. Telegram sent to associate in business is not ground for new trial for newly-discovered evidence, where action has been dismissed and time for appeal has expired. Action for alleged breach of contract to buy railroad stock. Lynch v. McCabe, 126 App. Div. 744, 111 NYS 291. Expert testimony as to genuineness of signature held to have been available before trial. Reilly v. Haseltine, 127 App. Div. 64, 111 NYS 457. After trial evidence that hotel belongs to wife instead of defendant shows negligence in case and inexcusable delay in offering defense and inconsistent with former defense. Caseri v. Wogelsong, 114 NYS 882. Witnesses present at time incident happened but not called at trial. Id. Newly-discovered evidence is not ground for new trial where plaintiff has newly-discovered desirability of producing it. Boyd v. Boyd, 114 NYS 361. Affidavit shows no particular acts of diligence, statement that "he made every effort" held not to be sufficient. Stern v. Volz [Or.] 98 P 148. Defendant asserts that he went to trial unprepared and made no move of continuance. Hannan v. Caproni [R. I.] 71 A 593. Plaintiff in personal injury action learned name of eyewitness on January 2nd, went to trial in month without asking for continuance. Held not to be entitled to new trial to make use of such witness. De Hoyos v. Galveston, etc., R. Co. [Tex. Civ. App.] 115 SW 75. Newly-discovered evidence offered from ambulance driver as to admissions of injured boy. Claim agent had interviewed him before and there is nothing to show that defendant did not know of this witness and what he could testify to before the trial. Motion for new trial was denied without error. Texas & P. R. Co. v. Crump [Tex.] 115 SW 26. Defense of forgery to deed was offered by affidavit in April, 1903. Trial took place in September, 1907. Motion for newly-discovered evidence filed on October 8 and amended on October 24 stating that witness had been searched for but not found until after trial. Term ended October 25th. Held that it was not error to deny motion for new trial. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662. Party should not only be diligent in discovering testimony, but also diligent in making use of it when discovered. Party did not file amendment to motion showing his evidence until last day of term and ten days after trial, when evidence was discovered immediately after trial. Texas & N. O. R. Co. v. Scarborough [Tex.] 108 SW 804. Affidavits of several witnesses that engineer and firemen were asleep shortly before explosion of engine. All these witnesses had been at trial and interviewed by the claim agent. Held that with proper diligence evidence could have been obtained before trial, hence new trial denied. Houston & T. C. R. Co. v. Davenport [Tex. Civ. App.] 110 SW 150. Plaintiff had failed to interview his grantor living in county to learn everything regarding question of title. Held to show lack of diligence. Daugherty v. Templeton [Tex. Civ. App.] 110 SW 553. Party injured causing paralysis of lower limbs. Verdict for plaintiff. Defendant now offers to show that plaintiff 15 years back has suffered from cerebro spinal meningitis, had been confined in insane asylum. Held that in face of testimony showing complete recovery thus not affecting this case, defendant was negligent in not getting this evidence before. Missouri, K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601. In suit for architect's fee, affidavits of experts that plans were defective is not newly-discovered evidence since these experts were witnesses at former trial. Kenway v. Hoffman [Wash.] 98 P 98. New trial will not be granted on newly-discovered evidence where witnesses depended on were examined at previous trial and no reason is shown why they were not questioned at that time. Sparling v. U. S. Sugar Co., 136 Wis. 509, 117 NW 1055.

7. Colorado Springs & Interurban R. Co. v. Fogelsong, 42 Colo. 341, 94 P 356; Kursheedt v. Standard Bleachery Co. [N. J. Law] 71 A 39. Newly-discovered evidence which is merely expression of opinion is not ground for new trial. City of Richmond v. Poore [Va.] 63 SE 1014. Newly-discovered immaterial evidence is not ground for a new trial. Id.

8. Miller v. Scoble [Cal. App.] 97 P 93; Kurshudt v. Standard Bleaching Co. [N. J. Law.] 71 A 39; Palmer v. Schurz [S. D.] 117 NW 150; Texas N. & O. R. Co. v. Scarborough [Tex.] 108 SW 804.

**New trial granted:** Affidavits were introduced showing plaintiff had been treated by affiants for ailments now claimed to be result of injury; also affidavits showing plaintiff's disability was simulated. Held grounds for new trial. Colorado Springs & Interurban R. Co. v. Fogelsong, 42 Colo. 341, 94 P 356. Plaintiff, woman, claims that through harsh language used to her by conductor she became ill, sued company and recovered $700. Evidence now discovered showing nervousness previous night and at other times tending to show that her condition was not due to treatment of conductor. Held ground for new trial. Georgia Southern & F. R. Co. v. Ransom [Ga. App.] 63 SE 525. Newly-discovered evidence of itself possibly not ground, but when coupled with a doubtful support of the verdict by the evidence should be grounds for a new trial. Clark v. Hemmingson, 132 Ill. App. 619. In action on note defense to which is fraud, plaintiff should be granted new trial on discovery of letter from defendant showing indebtedness and which probably will change result. Sympson v. Bell [Ky.] 112 SW 1133. Before new trial should be granted on ground of newly-discovered evidence, it should be of such permanent and unerring character as to preponderate

granted, however, where the newly-discovered evidence depended on occurred subsequent to the trial.[9]

(§ 2) *I. As a matter of right in ejectment.*[10]—See 10 C. L. 1008—The allowance of a new trial as a matter of right in ejectment is purely statutory.[11] The Minnesota statute does not apply to suits over waterpower,[12] and under that statute the second trial extends to all issues pertinent to title, and if successful entitles the winning

greatly, or have a decisive influence upon the evidence to be overturned by it. Monarch v. Cowherd [Ky.] 114 SW 276. Action for lumber cut by defendant. Plaintiff took mortgage on land, defendant stating he had deeded same to F. He denied deed and two witnesses were found who swore to deed and also that one of them was asked to stay out of state by defendant. Held ground for a new trial. Hall v. Wilson [Ky.] 116 SW 244. Where newly-discovered evidence taken together with evidence in case will probably change result, new trial should be granted. Mitchell v. Emmons [Me.] 71 A 321. In action for injury to steam roller by car running into it, defendants discover that roller is not the property of plaintiff. Held ground for new trial. Parker-Washington Co. v. St. Louis Transit Co., 131 Mo. App. 508, 109 SW 1073. Action on contract for definite time, where newly-discovered evidence shows that plaintiff was otherwise employed during time than contrary to his testimony. Held to be ground for a new trial. Chaet v. Goldberg, 110 NYS 817. Motion for new trial on grounds of newly-discovered evidence, where it is shown that successful party endeavored to evade responsibility for goods sold to them, should be granted. Costello v. Seidenberg, 110 NYS 926. Discovery of letters which if genuine show that there had been improper relations between plaintiff and man named held to be ground for new trial where defense depended on unchastity and bad repute of plaintiff. Raymond v. King, 112 NYS 1. On appeal from decree allowing administrator's account, appellant claimed that because of omission from account of statements of gain or loss on inventory and of investments made, administrator was not entitled to compensation; evidence as to loans made by administrator discovered after hearing of appeal and not discoverable before is material as affecting appellant's right to new trial. Stillman v. Moore, 28 R. I. 548, 68 A 726.

**New trial denied:** Four affidavits introduced that plaintiff had "flat foot" before injury complained of. This opposed by four affidavits. No abuse of discretion to deny motion for new trial. Sorts & Frey Planing Mill Co. v. Weil [Ky.] 113 SW 474. Where newly-discovered evidence cannot affect rights of plaintiff and defendant in case no new trial should be granted. Defendant as agent would not be affected by padding of scale, where that question is in adjudication between principal and purchaser. Graves v. Bonness, 104 Minn., 135, 116 NW 209. Conductor missing his train called to brakeman to signal to stop. Brakeman fell from train and it is alleged conductor was careless in obtaining treatment for him. Suit for damages against company. Newly-discovered evidence insufficient. Shaw v. Chicago, etc., R. Co., 105 Minn. 393, 117 NW 465. Three years after trial defendant wants to prove that architect's certificate was obtained on fraud, architect being incompetent, he being now in insane asylum. Neidlinger v. Onward Const. Co., 124 App. Div. 26, 109 NYS 717. Record of an abstract of judgment against the property offered as newly-discovered evidence. Property was homestead until day of sale, hence judgment was no lien against it and introduction of abstract could not change the result. Savage v. Cowan [Tex. Civ. App.] 113 SW 319. Where the newly-discovered evidence does not meet evidence which in law can prove the wrong complained of, a new trial should not be granted. Wilkins v. Brock [Vt.] 70 A 572. Where there is nothing left to which newly-discovered evidence can apply, there is no ground on which to consider its sufficiency. Fact that osteopathic treatment, which hurt patient, does not in law constitute malpractice, will render it of no avail to introduce evidence of injury by other cause. Id. Motion for new trial on grounds of newly-discovered evidence should not be granted where such evidence does not include necessary evidence to change verdict. Action for injury and newly-discovered evidence tended to show incompetency on part of fellow employe but failed to show that same was known to defendant or could have been discovered by exercise of reasonable care. McKenna v. Curran [R. I.] 71 A 513.

9. In action to sever certain territory from city, it happened that after it had been severed company established amusement park there. Not ground for new trial. Johnson v. Waterloo [Iowa] 119 NW 70.

10. **Search Note:** See Cent. Dig. §§ 342-367; Dec. Dig. §§ 176-188; 29 Cyc. 1034-1043; 14 A. & E. Enc. P. & P. 837.

11. Under Minnesota statute, Rev. Laws 1905, § 4430, party paying judgment and costs of first can obtain new trial. Case of ejectment where ejected party asks for new trial. Sammons v. Pike, 105 Minn. 106, 117 NW 244. Under Oklahoma statute, in action for recovery of real property, party against whom judgment is rendered may at any time during term demand another trial and action will be tried next term. Action as to ownership of quarter section where one party claimed under homestead law and other under townsite law. Second trial granted. Hammer v. Rogers [Okl.] 96 P 611.

12. Action by one dam-owner against lower owner for back water. Judgment for defendant. Plaintiff paid costs per statute and demanded new trial. Held not within statute. Tew v. Webster, 106 Minn. 185, 118 NW 554.

party to a restitution of property, damages, and costs paid.[13] In Oklahoma the fact that other counts are joined is no bar to second trial as to the title;[14] and under the South Dakota statute the court may extend the time beyond the statutory period for the motion for a new trial when an appeal has been taken and evidence has been discovered.[15]

§ 3. *Proceedings to procure new trial.*[16]—See 10 C. L. 1008

*Motion.*See 10 C. L. 1008—In the absence of fraud or collusion between the parties,[17] the court has no power to order a new trial of its own motion,[18] but the application for a new trial must be made by motion [19] or petition [20] addressed to the proper court.[21] The application must be in writing when required,[22] must be made within the time limited by statute,[23] unless further time is granted by the court,[24] except in the

13. Sammons v. Pike, 105 Minn. 106, 117 NW 244.

14. Counts for rents, profits, etc. Hammer v. Rogers [Okl.] 96 P 611.

15. A quitclaim deed affecting the property was found after the appeal had been taken and the statutory period expired. Fuller & Johnson Mfg. Co. v. Child [S. D.] 117 NW 523.

16. Search Note: See notes in 8 C. L. 1165.

See, also, Cent. Dig. §§ 230-335; Dec. Dig. §§ 109-168; 29 Cyc. 921-1030; 14 A. & E. Enc. P. & P. 716, 837.

17. Court found for defendant, who then filed motion for judgment. Court granted new trial on its own motion, which was held erroneous. Scott v. Ford [Or.] 97 P 99.

18. Kaslow v. Chamberlain [N. D.] 117 NW 529.

19. Conversation between attorney and court immediately after verdict, where attorney calls court's attention to its power to set aside verdict, is not sufficient to constitute motion by such attorney. Occidental Real Estate Co. v. Gantner, 7 Cal. App. 727, 95 P 1042. It is not error to refuse to grant new trial, where application therefor was not made by motion under § 5307, or by petition under § 5309. Miller v. McLean, 11 Ohio C. C. (N. S.) 424. Motion by defeated party to strike out part of court's findings does not give court power to set aside its findings and grant new trial. Scott v. Ford [Or.] 97 P 99.

20. Where petition to set aside judgment for temporary alimony and to enjoin levy made thereunder did not pray for new trial, it could not be regarded as application for new trial and to set aside order as authorized by Code, §§ 4092, 4098. Mengel v. Mengel [Iowa] 120 NW 72. Application not made by petition as required by § 5309 held properly refused. Miller v. McLean, 11 Ohio C. C. (N. S.) 424.

21. Motion for new trial must be made before judge who tried cause. City of Aurora v. Schoeberlein, 230 Ill. 496, 82 NE 860. Motion under Maine statute to set aside verdict on grounds of newly-discovered evidence must be made before court in session and reported by justice. Motion made before justice and evidence taken before certain stenographer and reported by her not sufficient. Mitchell v. Emmons [Me.] 71 A 321. Motion for new trial must be made in court where case is then pending. Held that motion for new trial on ground of newly-discovered evidence could be entertained in supreme court, but after certified down to lower court motion must then be made. Smith v. Moore [N. C.] 63 SE 735.

22. No points are waived by failure to file written motion unless required so to do by opposing counsel. Illinois Valley R. Co. v. Haremski, 132 Ill. App. 423. All grounds which might have been specified in oral motion for new trial can be relied upon and argued as ground for a new trial. Id. Oral motion for new trial which is denied and exception taken is valid motion for new trial. Vogelsang v. Fredkyn, 133 Ill. App. 356. Statutes requiring motions for new trial to be in writing are directory, unless called upon to do so by court or by opposing party. Hurd's Rev. St. 1905, c. 110, § 78. Yarber v. Chicago & A. R. Co., 235 Ill. 589, 85 NE 928.

23. Venire de novo should be made before judgment is rendered. Yeager v. Yeager [Ind. App.] 87 NE 144. Under Kansas statute, motion for new trial on all grounds except that of newly-discovered evidence must be made within three days after decision is rendered. Brown v. Dann [Kan.] 97 P 862. Motion to set aside judgment on sole ground of irregularity in conduct of court must be denied where not filed within three days. Id. Judgment of court given on 9th and motion not filed until 15th held too late. Cantwell's Adm'x v. Cassville, 130 Mo. App. 102, 108 SW 1084. Motion for new trial on ground that verdict is contrary to law as ruled by trial judge is not within code section prescribing time limit for motions for new trial. Code Civ. Proc. § 1002 sets time limit for motions for new trial founded upon allegations of error in finding of fact or ruling on law made by judge upon trial. Brown v. Grossman, 59 Misc. 153, 110 NYS 262. Motion for new trial and setting aside of judgment of city court of New York in case tried by court must be made at special term as provided by Code Civ. Proc. § 1002. Koch v. Cohen, 113 NYS 1035. Under Oklahoma statutes, motion for new trial, except for newly-discovered evidence which he with reasonable diligence could not have found, must be made within three days after verdict or decision was rendered. Decision of case on 17th and motion filed 21st. Struck from files and upheld. Pottawatomie County Com'rs v. Grace [Okl.] 99 P 653. Amendment to motion for new trial not filed until last day of term, which was ten days after trial, and plaintiff knew immediately after trial what their

case of newly-discovered evidence found pending an appeal from the judgment.[25] It should be granted only after due and proper notice,[26] unless such notice be waived [27] or otherwise obviated,[28] must sufficiently specify the errors for which a new trial is demanded,[29] should either be complete in itself or rendered so by exhibit to motion,[30]

evidence would be, held filed too late. Texas & N. O. R. Co. v. Scarborough [Tex.] 108 SW 804. Motion for new trial will not be entertained after adjournment of term at which case was tried, unless original proceeding is instituted for that purpose and sufficient cause is shown. Carter v. Kieran [Tex. Civ. App.] 115 SW 272. In justice court motions for new trial must be made and acted upon during term in which case is tried. Motion not filed until four days after term adjournment could not be acted upon. Gulf, etc., R. Co. v. Scott [Tex. Civ. App.] 115 SW 870. Under United States statute, giving new trial on motion in behalf of United States within two years of final disposition of case, refers to time of filing of motion and not decision of court on said motion. Indian depredation claim decided against United States on October 11, 1892. On August 23, 1894, attorney general filed motion for new trial and same acted on April 13, 1896. Contended that decision should have been made before October 11, 1894. Held that if motion filed within two years complies with statute. Sanderson v. U. S., 210 U. S. 168, 52 Law Ed. 1007.

24. Statutes relating to time when motion for new trial must be made and passed upon are directory so far as judge is concerned and mandatory applied to movant, unless further time is granted by order of court. Held that where order of court had extended time beyond 10 days for hearing of motion, it was error to dismiss on account of 10 days' limit in statute. Hudson v. Williams [Ga. App.] 62 SE 1011.

25. Motion in such case may be deferred until after appeal is determined. Raymond v. Ring, 112 NYS 1.

26. Where party intending to move for new trial must serve notice of such intention within 10 days of notice of decision, adverse party must serve on attorney for such party written notice of decision in order to start 10 days' running. In re Richards' Estate [Cal.] 98 P 528. Under statute requiring notice to be given of motion for new trial within 10 days after entry of judgment, giving notice of intention is premature and of no effect if given before entry of judgment. Power v. Turner [Mont.] 97 P 950. Unless contrary appears it will be presumed that notice of motion for new trial was filed within 10 days after receipt of notice of entry of judgment and burden is upon adverse party to show that it was not so filed. State v. Second Judicial Dist. Ct. [Mont.] 99 P 139. Under code giving 10 days after notice of entry of judgment in which to file notice of motion for new trial, must serve such notice in legal way, even if adverse party should happen to know or learn of such entry by other means. Serving such notice of entry of judgment by mail where not so authorized not considered such notice, even if attorney admitted receiving such letter. Id. Motion for new trial is properly denied where notice of such motion required by statute is insufficient. Appellant failed to state grounds he intended to base motion on. State v. Robb Lawrence Co. [N. D.] 115 NW 846. Notice that motion for new trial will be given on certain day goes down if not heard on that day or as soon thereafter as counsel can be heard. Judge was not present on day specified in notice. Nothing done for a year. Held that it could not be presented later. Kaslow v. Chamberlin [N. D.] 117 NW 529. In South Dakota notice of intention to move for new trial must be served stating grounds upon which it will be made and whether it will be made upon affidavits minutes of court, bill of exceptions, or statement of case. Notice of motion on grounds: (1) Errors of law occurring at trial and only excepted to; (2) That decision is against law and giving notice that motion would be given on bill of exceptions thereafter to be settled. Bill later filed. Held notice to be sufficient. Gilman v. Carpenter [S. D.] 115 NW 659. Under South Dakota code, notice of motion for new trial must state in what particulars evidence is insufficient to support verdict or what errors of law were committed. Notice of motion on ground of insufficiency of evidence and error of law and that it will be made up in bill of exceptions held insufficient for consideration. McNish v. Wolven [S. D.] 119 NW 999. Notice of motion for new trial cannot be amended after expiration of time allowed by statute by adding ground not germane to anything contained in the original notice. Original notice of motion for new trial filed before April 18th, last day for it set by court on grounds of insufficiency of evidence, errors in law occurring at trial. On May 14th filed amended notice setting up newly-discovered evidence as ground. Denied. Blue Creek Land & Live Stock Co. v. Anderson [Utah] 99 P 444.

27. Rule that statutory requirement of written notice of decision essential to fix time within which notice of intention to move for new trial must be served may be waived does not apply where written notice has in fact been given. In re Richard's Estate [Cal.] 98 P 528. Application by party for stay of execution, made on day but subsequent to service of written notice of decision on his attorney, does not amount to waiver of such notice so as to affect time within which notice of his intention to move for new trial must be served. Notice served on attorney 150 miles away, which gave him 16 days in which to file notice of motion. If party appearing in person amounted to a waiver only 10 days would be allowed. Latter held not to be waiver. Id.

28. Motion for new trial having been made at same term and before entry of judgment, it is clearly within power of court to vacate and set aside judgment and grant new trial without notice. Frost v. Meyer, 137 Wis. 255, 118 NW 811.

29. Motion for new trial on ground of refusal of instructions offered in bulk will

not lie where even one of instructions is bad. Stowers Furniture Co. v. Brake [Ala.] 48 S 89. Motion for error in oral instructions will not lie where error is not specifically pointed out. Id. Exception to ruling and motion for new trial, in excluding Exhibit C of deposition stating "that evidence excluded was admission by plaintiff which could not be withdrawn and became part of the evidence of case when filed," was sufficiently specific to include as ground court's ruling in excluding all portion of deposition not admitted. Mullins v. Columbia County Bank [Ark.] 113 SW 206. Under Colorado code, motion for new trial on ground of irregularity of findings must state wherein they are not within order of reference and each error must be specified in particular. Motion "that said referee's findings and report are not in accordance with said order of court appointing referee in this case and that his findings and report are against order of said court and not in compliance with order appointing referee" was held insufficient. Alexander v. Wellington [Colo.] 98 P 631. Where number of witnesses testified upon each side of case, assignment of error complaining of admission or rejection of specified testimony of witness is not valid, when it nowhere appears in such assignment of whose testimony complaint is made. Sims v. Sims [Ga.] 62 SE 192. Where motion for new trial on ground of admission of certain documentary evidence does not disclose objection made, and fails to show contents of document, it should be denied. Ketron v. Sutton, 130 Ga. 539, 61 SE 113. Assignment should state that verdict is not sustained by evidence. Hamrick v. Hoover, 41 Ind. App. 411, 84 NE 28. That certain enumerated findings are not sustained by sufficient evidence is not proper assignment. Id. Where motions go only to part of action as finally determined and included in judgment, there is no error in refusing to sustain motion. Luken v. Fickle [Ind. App.] 84 NE 561. Motion on grounds that finding and judgment are not supported by sufficient evidence and are contrary to law is insufficient. Under Burn's Ann. St. 1908, § 585, subd. 6, authorizing new trial where verdict or decision is not sustained by evidence or is contrary to law. Hall v. McDonald [Ind.] 85 NE 707. Causes must be assigned with clearness, certainty, precision, and particularity. Motion which does not name document by which, or witness by whom, appellants offered to prove matters alleged therein, or whether evidence excluded was oral or documentary, is insufficient. Conrad v. Hausen [Ind.] 85 NE 710. Motion stating that verdict is not supported by evidence and that plaintiff has not proved herself free from negligence does not state sufficient cause for new trial. Pace v. Webster City, 138 Iowa, 107, 115 NW 888. Under statute providing that exceptions to instructions in motion shall specify part of charge or instruction objected to and ground of objection, motion stating "that court erred in instructions numbers one to ——, both inclusive and in each of them, which were all excepted by defendant at time," is insufficient. Knopp v. Chicago, etc., R. Co. [Iowa] 117 NW 970. In motion, where thing is otherwise sufficiently identified, false description by clerical error will be rejected as surplusage. At trial four instructions 1-2-"A"-"K" given the defendant offering "A." Defendant excepts to instructions 1-2-"A" when in fact objecting to "K." Held that court from arguments, knowing defendant objected to "K," would not consider clerical error in such way as to injure defendant, plaintiff not being prejudiced thereby. Warden v. Addington [Ky.] 115 SW 241. Insufficiency of evidence not given as ground could not be considered. Storch v. Rose, 152 Mich. 521, 15 Det. Leg. N. 312, 116 NW 402. Motion on account of error in instructions must state error in particular and error in each instruction. Alleging error in instructions one to five without stating particulars held to be of no avail. Blair v. Paterson, 131 Mo. App. 122, 110 SW 615. Motion on ground of newly-discovered evidence must show that evidence first came to his knowledge after trial, that due diligence had been exercised, that it is so material as probably to change result, that it is not merely cumulative or impeaching, and must be accompanied by affidavit of witness or its absence accounted for. Witness was subpoenaed but not called because he did not state what he would testify. After trial said he would have testified favorably to defendant. Held insufficient on which to grant new trial. Carlton v. Monroe [Mo. App.] 115 SW 1057. No motion on ground of errors in instructions given shall be granted by district court unless such errors were specifically pointed out and excepted to at settlement of instructions. Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038. Assignment in motion that group of instructions is erroneous is bad if any one of them was properly given. In motion for new trial stated that "court erred in giving first, second, third and fourth paragraphs" given by "court on own motion." Held if one of instructions is good assignment of error is bad. Cowperthwait v. Brown [Neb.] 117 NW 709. Under North Dakota statute it is duty of party moving to particularly specify wherein evidence is insufficient. Lund v. Upham [N. D.] 116 NW 88. Where sufficiency of evidence to sustain verdict is not properly before court, it is error to grant new trial. Motion for new trial did not state particularly wherein evidence was insufficient as required by North Dakota statute. Id. Party moving upon ground of misconduct of jury must state and affirmatively show that he and his counsel were ignorant of misconduct alleged until after trial. Ewing v. Lunn [S. D.] 115 NW 527. On hearing of motion for new trial, testimony of juror tending to show misconduct of part of jury is properly disregarded by court where motion for new trial contains no allegation as to such misconduct. Texas & N. O. R. Co. v. Bellar [Tex. Civ. App.] 112 SW 323. Where statutory motion is made, it should state grounds upon which motion is based, at least as specifically as they are mentioned in statute. Beebe v. Minneapolis, etc., R. Co., 137 Wis. 269, 118 NW 808. Motion on ground of excessive damages must specifically assign that ground. Motion for new trial specifying that verdict is contrary to evidence and law does not raise question of

and state grounds sufficient to constitute a defense.[31] The motion must in some cases be based upon a proper and sufficient bill of exceptions,[32] or a properly settled case and exceptions,[33] and in others a sufficient brief of the evidence must be filed [34] within due time,[35] unless such time has been properly extended.[36] Whether or not a party

excessive damages, it not being specifically stated. Duffy v. Radke [Wis.] 119 NW 811.

**30.** Assignment of error, "three law books purporting to be reports of supreme court of Alabama, and to introduce in evidence three cases reported therein, to wit, * * *," was not well made. Lay v. Nashville, etc., R. Co. [Ga.] 62 SE 189.

**31.** Vogelsang v. Fredkyn, 133 Ill. App. 356. Motion for new trial on ground of surprise must show that there was real surprise, that ordinary prudence on his part would not have guarded against it, and that claim of surprise was promptly made known to court and continuance asked for. Alleged surprise that defendants should claim that signature to freight bills was made by his wife, since agents had admitted that it did not appear like her usual signature of his name. Held that he did not inform court of surprise by asking for a continuance and also that he knew that it was a vital issue which prudence would have guarded against. Jensen v. Spokane Falls & N. R. Co. [Wash.] 98 P 1124. Application for new trial should show due diligence in discovering evidence.. Two deeds found after trial. Records had been searched before but not found. New indexes helped locate the deed but there is nothing to show that these were not perfected before the trial. Keck v. Woodward [Tex. Civ. App.] 116 SW 76. Assignment complaining that counsel were not given notice of hearing and opportunity to argue is not ground for new trial because evidence could be presented to show this which has not been done. Hammond v. A. Vitsburg Co. [Fla.] 48 S 419.

**32.** Montana Code Civ. Proc. 1895, § 1172, authorizing motion for new trial to be made on statement of case or on bill of exceptions, superseded by Laws 1907, p. 90, § 4, on bill of exceptions only. Robinson v. Helena Light & R. Co. [Mont.] 99 P 937. Bill of exceptions prepared in conformity with statutes, allowed, settled and signed as and for time and correct copy of proceedings of trial, is not invalidated by erroneously being named "statement on motion for new trial." Id. Failure to settle statement of exceptions, where due diligence is not shown, is ground for denying motion. Smith v. American Falls Canal & Power Co. [Idaho] 95 P 1059. Under Montana code, motion need not contain statement, but is made upon affidavits or minutes of court or upon settled bill of exceptions which is not required to contain any specifications of error. Motion for new trial on grounds of admission of evidence to prove corporate existence of foreign corporation in not allowing proof of de facto existence. Milwaukee Gold Extraction Co. v. Gordon, 37 Mont. 209, 95 P 995. Motion may be on minutes of trial. Held not necessary to have reporter's notes transcribed. State v. Second Judicial Dist. Ct. [Mont.] 99 P 139.

**33.** Proposed case on which motion is made, being returned by opposite party, should be submitted for settlement to trial justice. Brown v. Grossman, 109 NYS 670. Court has no authority to entertain application for newly-discovered evidence, based solely on affidavits, until after case and exceptions have been made and settled. Solomon v. Alexander, 128 App. Div. 441, 112 NYS 779.

**34.** Where no brief of evidence was filed in accordance with order of court and movant's counsel did not appear on account of illness, it was no abuse of discretion not to allow a continuance even if counsel had not had sufficient notice of time and place of hearing. Brewer v. New England Mortg. Sec. Co., 130 Ga. 761, 61 SE 712. Where movant has been guilty of laches in presenting brief of evidence to presiding judge on order that same may be done in vacation or in term, court may dismiss motion for new trial. Judge presiding at trial went out of office before hearing on motion and new judge held that he could not pass on correctness of brief of evidence. Gentry v. McBride [Ga.] 62 SE 81. Evidence on completeness and correctness of brief of evidence being in conflict, court may refuse to approve same. Judge was new incumbent in office and did not hear case. Id. Assignment of error in motion, complaining of admission or rejection of evidence, is not valid when such evidence is not literally or in substance set forth in such motion, or attached thereto as exhibit. Sims v. Sims [Ga.] 62 SE 192; Fullbright v. Neely [Ga.] 62 SE 188. Where brief of evidence is not submitted and filed as provided by order of court, court may dismiss motion. Order that hearing might be had in term or vacation, that brief of evidence be filed within 10 days of such hearing, and must be submitted to other side and filed for approval 40 days after this order, court properly dismissed motion for new trial because not so filed. Fulford v. Fountain [Ga.] 62 SE 526. There being no complaint that court abused his discretion in refusing to dismiss motion because of failure to file brief, if evidence in strict conformity with term order, judgment is affirmed. Patten v. Stoner [Ga.] 63 SE 827.

**35.** Statutory requirements respecting time to file motions and brief of evidence must be met. Under Georgia statute requiring brief of evidence on motion to be filed within 30 days or order obtained extending time, it was error not to dismiss motion for noncompliance. Taliaferro v. Columbus R. Co., 130 Ga. 670, 61 SE 228. Where party has not filed his brief of evidence on motion within proper time, no subsequent order of court can remedy default. Id. Where brief of evidence is not presented in due time, under motion as required by statute or order of court, court may dismiss motion for new trial. Brewer v. New England Mortg. Sec. Co., 130 Ga. 761, 61 SE 712.

**36.** Where court by order gave movant ten days after hearing of motion to file

has complied with the conditions for obtaining a new trial is a question for the court.[37] The motion must be diligently prosecuted or the court may dismiss it,[38] but the mere failure to argue a motion for a new trial does not constitute abandonment of it.[39] A motion for a new trial on the grounds of newly-discovered evidence may be made after a motion on other grounds has been denied.[40] The withdrawal of the motion for a new trial in order to interpose the motion for a judgment non obstante veredicto is no bar to a second motion for a new trial.[41] A motion before the supreme court for a new trial on the ground of newly-discovered evidence is a matter for the full court, like other motions.[42] The order must be set for hearing in term time.[43]

*Affidavits.*[See 10 C. L. 1012]—A petition for a new trial on the grounds of surprise and newly-discovered evidence must be accompanied by the affidavit of the petitioner, his attorney,[44] and the proposed witness, or its absence accounted for,[45] must show what new evidence consists of,[46] why the evidence could not be secured in time for the final hearing,[47] and due diligence.[48] An affidavit alleging misconduct of the

brief of evidence, it was proper to overrule motion to dismiss motion for new trial because brief of evidence was not filed with motion for new trial. United States Fidelity & Guar. Co. v. Thaggard, 130 Ga. 701, 61 SE 726. Stipulations in writing by attorneys for parties with consent of court may be made to allow filing of brief of evidence after time limit fixed by statute. Statute allowed 30 days after filing of motion in which to file brief of evidence. After 30 days had elapsed attorneys agreed on a date for hearing of motion and that brief of evidence could then be filed. Held error to dismiss motion because not filed within statutory time as he had waived his rights. City of Brunswick v. Davenport [Ga.] 62 SE 584. Court may in its discretion by order in term or in vacation extend time for presenting brief of evidence and set new date for hearing of motion for new trial. Hearing set for December 7th in vacation. On December 5th court granted another extension until December 21. Plaintiff insists that motion be dismissed because brief of evidence not presented in time. Held that defendant had until the last date set in which to file brief of evidence. Owens v. Hansen [Ga.] 63 SE 346.

37. Writ of mandamus to compel the entry of judgment for plaintiff because he alleges that defendant has not paid costs necessary to entitle to new trial. Held mandamus will not lie. Rogers v. Walsh, 129 App. Div. 506, 114 NYS 185.

38. Under power to dismiss motion on grounds that it has not been prosecuted, determination as to whether there has been due diligence is largely within discretion of trial court. Movant had done nothing in four months to bring matter to hearing, so motion was dismissed. Dorcy v. Brodis, 153 Cal. 673, 96 P 278. Where by reason of delay party has right to move to dismiss motion, fact that court of its own motion fixed day in which to settle settlement, or that mover, by ex parte application, secured fixing of such date, cannot affect right to dismiss. Id. Where there is nothing in record to show that consent had been given to delay, statement of movant denied by respondent is no ground to refuse dismissal. Id. Where movant fails to bring motion to trial within reasonable time without justifiable excuse, motion should be dismissed. Smith v. American Falls Canal & Power Co. [Idaho] 95 P 1059. Under Idaho code, where appeal has been taken from order denying new trial, after expiration of one year from date of judgment and proper diligence is not shown in prosecuting such appeal, same will be dismissed upon proper motion. Id.

39. City of Chicago v. Sullivan, 139 Ill. App. 675. If motion for new trial was otherwise properly made and its denial excepted to, fact that it was submitted without argument is immaterial. Hartford Fire Ins. Co. v. Northern Trust Co., 127 Ill. App. 355.

40. Fuller & Johnson Mfg. Co. v. Child [S. D.] 117 NW 523.

41. Rodriguez v. Merriman, 133 Ill. App. 372.

42. Smith v. Moore [N. C.] 63 SE 735.

43. Motion for new trial set to be heard in term on certain date, postponed until certain date in vacation on order of court without consulting counsel, and heard in vacation over objection of respondent, is still pending in court and stands for hearing at next regular term of that court. Wells v. Mill-Haven Co. [Ga. App.] 63 SE 26.

44. Taft v. Taft [Vt.] 71 A 831.

45. Carlton v. Monroe [Mo. App.] 115 SW 1057.

46. Affidavit that attending physician can be obtained for new trial, and x-ray expert can also be obtained, but which fails to show what they will testify to, is insufficient. Hobart Lee Tie Co. v. Keck [Ark.] 116 SW 183. New trial on ground of alleged arbitrary action of court in giving peremptory instruction in absence of counsel and before opportunity was given to present additional and important proof as to corporate character of association, where movant failed to make any satisfactory showing as to character and effect of his new evidence in his motion, held properly refused. Evans v. Lilly & Co. [Miss.] 48 S 612.

47. Boreing v. Wilson, 33 Ky. L. R. 14, 108 SW 914.

48. Goodrich v. Kimble, 49 Wash. 516, 95 P 1084.

jury must set up the information regarding the misconduct alleged in full and whence it came.[49]

*Evidence in support of motion.*[See 10 C. L. 1012]—The affidavit of a juror is ordinarily inadmissible to impeach a verdict,[50] but may be read to sustain it[51] and to show communications with jurymen in committee room.[52] A motion to dismiss a petition because of insufficient affidavit is in the nature of a plea in abatement, after which petitioner is not entitled to leave to amend the petition.[53] A motion for a new trial should not be considered and determined on the strength of a verbal stipulation claimed by respondent and denied by appellant,[54] nor should the motion on the ground of newly-discovered evidence be denied because plaintiff denies that the evidence if material and admissible should go to jury.[55] Witnesses on the question of diligence should be called in some cases.[56] On motions for new trials on the grounds that the findings are not supported by the evidence, where it does not appear to the contrary, it will be presumed that they are fully supported by the evidence.[57] Under the Michigan statute where the party moving for a new trial desires to raise issues, he must make application to frame issues of fact to be tried by the court, as the adverse party is entitled to have them defined, so as to prepare to meet them.[58]

*Order granting or refusing new trial.*[See 10 C. L. 1013]—In some states the order granting or refusing a new trial must specify the grounds upon which the motion was made and the ground upon which it was granted,[59] while in others the reasons for granting the new trial need not be stated,[60] the order being good if supported by any of the grounds assigned in the motion.[61] If the order is properly awarded on any ground appearing in the record, it will not be disturbed because an incorrect reason was assigned,[62] but the reasons assigned should be consistent.[63] A new

**49.** Affidavit that juror had been on scene and by relating his observation had changed jurors, without showing whence information came, held insufficient. Green v. Terminal R. Ass'n, 211 Mo. 18, 109 SW 715.

**50.** Green v. Terminal R. Ass'n, 211 Mo. 18, 109 SW 715. Affidavit or admission of juror cannot be received to show irregularity or misconduct on his own part or that of his fellows. Affidavit by juror who heard others read article in paper regarding case held inadmissible. Hanor v. Housel, 128 App. Div. 801, 113 NYS 163. Affidavits of two jurymen as to intoxication of a third refused. Ewing v. Lunn [S. D.] 115 NW 527.

**51.** Affidavit that each jury based his verdict solely on evidence and instructions received. Dittman v. New York, 58 Misc. 52, 110 NYS 40.

**52.** Affidavits of deliberations and communication with judge after verdict was sealed, and which one juror on being polled refused to acknowledge, admitted. Dralle v. Reedsburg, 135 Wis. 293, 115 NW 819.

**53.** Petition unaccompanied by petitioner's affidavit or that of his attorney. Taft v. Taft [Vt.] 71 A 831.

**54.** Motion not presented on day noticed; claim that attorney for respondent promised not to take any advantage of the absence of judge. Held oral stipulations should not be considered by court. Kaelow v. Chamberlin [N. D.] 117 NW 529.

**55.** Genuineness of letters tending to establish defendant's defense denied by plaintiff. Raymond v. King, 112 NYS 1.

**56.** It is not error to overrule motion for new trial filed after term, based on newly-discovered evidence which could not with reasonable diligence have been discovered before, where no witness is called to prove due diligence in ascertaining facts. Cincinnati Gas & Elec. Co. v. Coffelder, 11 Ohio C. C. (N. S.) 289.

**57.** Peterson v. Lundquist, 106 Minn. 339, 119 NW 50.

**58.** Caille Bros. Co. v. Gage [Mich.] 15 Del. Leg. N. 1123, 120 NW 6.

**59.** Solomon v. Alexander, 128 App. Div. 441, 112 NYS 779. Under statute permitting new trial for mistake of law, defendant moved for new trial on ground that verdict was against law. Motion was granted on ground "of misdirection in law" in charge. Held that reason in order was within statement of reason contained in motion. Loveland v. Rand, 200 Mass. 142, 85 NE 948.

**60.** Statement, "Verdict of jury in my opinion was contrary to such weight of evidence. If I had not set aside verdict on question of liability, I consider verdict excessive....," and should have set it aside on that ground. In re Boyd, 199 Mass. 262, 85 NE 464. Plaintiff asked court to modify order for new trial by setting forth and stating therein particular grounds upon which new trial was granted. Denied and affirmed. Best v. Seattle [Wash.] 97 P 772. Where motion for new trial is made on several grounds, it is within discretion of court to grant it generally without assigning specific reasons. Id.

**61.** Angus v. Wamba [Wash.] 97 P 246.

**62.** Green v. Terminal R. Ass'n, 211 Mo. 18, 109 SW 715. Order for new trial is good if supported by any of grounds named in motion, whatever is ground named by

trial may also be awarded on grounds not assigned therefor.[64] A general verdict must be reversed in its entirety and not in part only.[65] A court cannot vacate a previous order granting or refusing a new trial for mere error of law, but may relieve a party against an order taken against him through mistake, inadvertence, surprise, or excusable neglect.[66] An order setting aside the verdict as contrary to the evidence must set down the case for trial at a specified time.[67] Proper [68] conditions may be imposed upon the granting of the order,[69] and where conditions are not imposed, it must be presumed that it was granted for errors not requiring the imposition of terms.[70] Costs need not be imposed where not required by statute.[71]

The granting of a motion for a new hearing, filed at the term at which a judgment was rendered, ipso facto vacates the judgment, prevents the decree from becoming final on the adjournment for that term, and opens the cause for a rehearing,[72] but it is the order and not the reasons stated therein which vacates the verdict.[73] An order granting a new trial given after case has been remanded for a reform of a previous order for new trial renders the previous order not binding.[74] A clerical

court. Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 P 1029.

**63.** Grounds, specified in an order granting a new trial, that a demurrer to the evidence should have been sustained, and that the verdict was not supported by the evidence, are contradictory if the second ground meant that the evidence was not sufficient in weight and evidence to support the verdict, since a demurrer to the evidence is sustained only where there is not evidence tending to support the action. Crawford v. Kansas City Stockyards Co. [Mo.] 114 SW 1057.

**64.** Parker v. Britton, 133 Mo. App. 270, 113 SW 259.

**65.** Contention made that where only error was one of measure of damages, new trial should consider damages alone, overruled. Cerney v. Paxton & Gallagher Co. [Neb.] 119 NW 14. There is no provision for division of verdict by judge in such way that it shall stand in that part which is satisfactory to him and shall be canceled in that part with which he is dissatisfied. Timpany v. Handrahan, 198 Mass. 575, 85 NE 183. It is not error that specific findings of jury were set aside as setting aside of general verdict covered them. Welsh v. Milton Water Co., 200 Mass. 409, 86 NE 779. Both defendants sued as tort feasors. Verdict was general against both, hence could not be set aside against one and not other. Joseph v. New York City R. Co., 61 Misc. 440, 115 NYS 101. Verdict must be treated as an entirety and trial court has no authority to render judgment contrary thereto, and if any part of verdict is unsatisfactory to court, he should set aside entire verdict and grant new trial. Held error for court to set aside several items of injury for failure to send telegram and to deliver another promptly, and entered judgment for other items in same verdict. Rich v. Western Union Tel. Co. [Tex.] 108 SW 1152.

**66.** Nonsuit granted and new trial moved but could not get a hearing before the trial judge. Defendant then without knowledge of plaintiff obtained order denying new trial. Later this was vacated. The court then vacated the latter. Held that court could not reverse itself except for mistake, surprise, inadvertence or excusable neglect. Little Bill v. Dyslin [Wash.] 99 P 1026.

**67.** Murphy v. Joline, 115 NYS 108.

**68.** Order granting new trial because of excessiveness of verdict, which imposes condition that defendant shall pay within specified time specified sum, is erroneous and must be modified so as to give defendant new trial unless plaintiff will remit amount found excessive. Court ordered defendant to tender $1,000 on $1,500 verdict within 30 days or stand new trial. Held erroneous. Jackson v. Southern Cotton Oil Co., 81 S. C. 564, 62 SE 854.

**69.** Order for new trial on condition that movant "pay costs of trial already had and disbursements to date of order" is intended to reimburse successful party at trial for disbursements and services performed which were rendered futile by order setting aside verdict. It was error to allow as costs for such motion $15 costs before notice of trial and $40 for term fees. Myers v. Fox, 129 App. Div. 31, 113 NYS 116. Circuit judge in granting new trial because verdict is excessive may provide that defendant shall do things necessary to preserve rights of plaintiff as condition of new trial, and he may require defendant to secure reduced amount of verdict if it should stand. Hall v. Northwestern R. Co., 81 S. C. 522, 62 SE 848.

**70.** Frost v. Meyer, 137 Wis. 255, 118 NW 811.

**71.** In Wisconsin ejectment statute granting new trial is not exclusive and does not require payment of costs and execution of undertaking, where new trial is granted under general statute. No terms required for a new trial in an ejectment case. Frost v. Meyer, 137 Wis. 255, 118 NW 811.

**72.** Langhorst v. Rogers [Ark.] 114 SW 915.

**73.** Reasons for order, whether oral or written and filed in case, are of no effect. Welsh v. Milton Water Co., 200 Mass. 409, 86 NE 779.

**74.** Appellant wanted to appeal as from original order. Held to be from second order. Powers-Simpson Co. v. Delehunt, 105 Minn. 334, 117 NW 503.

error in the entry of an order for a new trial may be corrected at a subsequent term or an omission inserted.[75] Under the New York statutes an order on a motion is not required to be rendered within the time required in case of judgments,[76] and an order entered upon the record which is not correct upon its face should not be granted and will be reversed.[77] In Utah a copy of the remittitur need not be served on losing party in meeting condition of court in refusing new trial.[78]

*Appeal.*—In Illinois the order granting a new trial is not reviewable;[79] while in California, on an appeal from an order denying a new trial, the appellate court may consider only such matters as are made grounds upon which the superior court is authorized to grant or deny the motion.[80] Where party files written motion for new trial, specifying therein the grounds or reasons for such motion, he will be restricted in a court of review to the grounds or reasons specified in such written motion, and will be deemed to have waived all other grounds for a new trial.[81] Where the court on appeal decides that the granting of a new trial on the ground stated by the trial court was proper, no appeal lies from the refusal of the court to sustain other grounds for a new trial.[82] On writ of error, where the only question arises on denial of motion to set aside the verdict as contrary to the evidence, the evidence is to be regarded as on demurrer thereto.[83]

§ 4. *Proceedings at new trial.*[84]—See 10 C. L. 1013—When a motion for a new trial has been granted, the issues stand as though they had never been tried and it is the duty of the court to proceed as in the first instance.[85] Thus, where a motion for a change of venue has been made before the case is set for retrial, it is incumbent upon the judge to grant the change.[86] A witness who did not testify on first trial may do so on second,[87] and the court should refuse to allow the testimony given at the former trial to be read to the jury where the witness is present at the trial,[88] but where the right to contest the validity of an order has been waived, the party is bound thereby whether right or wrong, and the following trial may be confined to the one question involved in the exception.[89] While the admission of evidence which is wholly immaterial would not necessarily require the granting of a new trial, such

75. In entering order "and a new trial is granted herein" was omitted by clerk and inserted in subsequent term and upheld. Frost v. Meyer, 137 Wis. 255, 118 NW 811.

76. Motion for new trial was not decided before 14 days' limit in case of judgment had expired. Held that motion not governed by statute. Rogers v. Walsh, 129 App. Div. 506, 114 NYS 185.

77. Order entered that motion was made at "trial term" when in fact not made until term had been terminated. Held should be reversed. Hattendorf v. New York City R. Co., 114 NYS 1113.

78. Motion to have original order for new trial made absolute because copy of remittitur not served on defendant was properly denied. Prye v. Kalbaugh, 34 Utah, 306, 97 P 331,

79. Yarber v. Chicago & A. R. Co., 235 Ill. 589, 85 NE 928. Under the common law no exception to overruling of motion for new trial was authorized. Id.

80. Bone v. Hayes [Cal.] 99 P 172. Court on appeal from order ordering new trial "on ground that motion for nonsuit should have been granted and order denied on all other grounds" is not limited to consideration of question whether motion for nonsuit should have been granted. Brett v. Frank & Co., 153 Cal. 267, 94 P 1051.

81. Certain instructions alleged to be erroneous not included in written motion. Galesburg Elec. Motor & P. Co. v. Williams, 132 Ill. App. 598.

82. Defendant gave 17 grounds. Court granted new trial on the last ground. The defendant appeals because motion for new trial was not granted on other grounds also. Appeal dismissed. Milbourne v. Robison, 132 Mo. App. 198, 110 SW 598.

83. Gardner v. Montague, 108 Va. 192, 60 SE 870.

84. **Search Note:** See Cent. Dig. §§ 336-341; Dec. Dig. §§ 169-175; 29 Cyc. 1032-1034; 14 A. & E. Enc. P. & P. 991, 1118.

85, 86. Compton v. Benham [Ind. App.] 85 NE 365.

87. Providing testimony is confined to issues. Plumlee v. St. Louis S. W. R. Co., 85 Ark. 488, 109 SW 515.

88. Plumlee v. St. Louis S. W. R. Co., 85 Ark. 488, 109 SW 515.

89. Plaintiff alleged exceptions to an order setting aside a verdict in a former trial on the question of liability only, but made no attempt to establish the exceptions, which were finally waived. Such order became the law of the case on a new trial, which was properly confined to the question of liability. Blackburn v. Boston & St. R. Co., 201 Mass. 186, 87 NE 579.

evidence should be excluded upon the next trial of the case, a new trial having been granted on other grounds.[90] The verdict obtained in the former trial cannot be substituted for that obtained in latter.[91]

§ 5. *Arrest of judgment. A. Nature and grounds.*[92]—See 10 C. L. 1019—A motion for arrest of judgment is not a motion for a rehearing,[93] but on the contrary its office is said to be to call the court's attention to error patent in the record. The error must be intrinsic to the record and not dehors the record, and must be matter of substance as distinguished from matter of form.[94] The motion reaches illegal verdicts [95] and raises the question whether the petition states a cause of action on its face, but not whether the judgment is correct on the merits.[96] It does not reach errors reached by motion [97] or exception,[98] or which may be cured by amendment,[99] verdict [1] or proof.[2] Neither does the motion lie to the question of the liability of the party if not raised by the pleadings or at the trial,[3] nor to the amount of damages assessed by the jury where the amount within the amounts laid in both the writ and the declaration,[4] nor to matters which have been waived.[5] There is a

**90.** Introduction of a memorandum which is immaterial and could not injure plaintiff is no ground for new trial. Dyson v. Knight, 130 Ga. 573, 61 SE 468.

**91.** New trial granted on newly-discovered evidence involving liability alone. Second verdict smaller than first. First could not be substituted. More-Jonas Glass Co. v. West Jersey & S. S. R. Co. [N. J. Law] 69 A 491.

**92. Search Note:** See Cent. Dig. §§ 457-500; Dec. Dig. §§ 259-269; 23 Cyc. 824-835; 2 A. & E. Enc. P. & P. 793.

**93.** Stid v. Missouri Pac. R. Co., 211 Mo. 411, 109 SW 663.

**94.** Stid v. Missouri Pac. R. Co., 211 Mo. 411, 109 SW 663. Motion in arrest of judgment, like general demurrer, reaches only matters of substance. Default on action on contract for benefit of third party. Snow v. Merriam, 133 Ill. App. 641.

**95.** Malicious prosecution against two defendants, verdict for $300 "to be equally divided between them," was held illegal and this not cured by writing off one-half of finding and entering judgment for other jointly against both. Glore v. Atkin [Ga.] 62 SE 580.

**96.** Shearer v. Guardian Trust Co. [Mo. App.] 116 SW 456. Motion in arrest of judgment after verdict reaches declaration stating defective cause of action or none at all. Eckels v. Henning, 139 Ill. App. 660. Reaches declarations so defective that they will not sustain a judgment. Henning v. Sampsell, 236 Ill. 375, 86 NE 274. Held that complaint against railroad company, its lessee and against two receivers, could not be against all. Id. Allegations in complaint that plaintiff was in store of defendant to seek employment, entered elevator on invitation which was in general use for all who came to store, sufficiently established relation of passenger and carrier to resist motion in arrest of judgment. Steiskal v. Marshall Field & Co., 238 Ill. 92, 87 NE 117. Where all facts necessary to support were proved at trial, it was only necessary that general terms and scope of complaint were sufficient to admit proof to withstand motion in arrest of judgment. City of Lafayette v. West [Ind.] 87 NE 550. In case of action for injuries on account of defective walk, omission of appellant to repair was characterized by general allegation of negligence, which negligence caused injury. Held complaint was sufficient to withstand motion to arrest judgment. Id.

**97.** Variance in name of defendant and clerical error in making return are curable on motion and not grounds for setting aside judgment. Varney v. Hutchinson Lumber & Mfg. Co. [W. Va.] 63 SE 203.

**98.** Motion in arrest of judgment on account of any exception that can be taken on argument of demurrer to that count cannot be granted. Langan v. Enos Fire Escape Co., 233 Ill. 308, 84 NE 267.

**99.** Where complaint prayed for injunction but not for damages, although it showed purpose to recover damages, it was amendable defect which was also curable by verdict, and is not cause for arrest of judgment entered in favor of plaintiff. Fitzpatrick v. Paulding [Ga.] 63 SE 213.

**1.** Insufficiency in cross petition when cured by verdict is no ground for arrest of judgment. Cross petition did not describe form and averred damages for probable interference with other drain. Oakwood Drainage Com'rs v. Knox, 237 Ill. 148, 86 NE 636.

**2.** Where complaint is sufficient to bar another action for same cause and defects are such as might be supplied by proof, motion in arrest of judgment will not lie. In action against electric company using same poles with telegraph poles for injuries by current to employe of telegraph company. Complaint alleged not to show duty to insulate nor failure to insulate. Held sufficient. South Shore Gas & Elec. Co. v. Ambre [Ind.] 87 NE 246.

**3.** Motion to arrest alleging that wife was not jointly liable for dsath of deceased due to alcohol given to him by defendant and wife, she being coerced. Held motion would not lie. Peterson v. Brackey [Iowa] 119 NW 967.

**4.** Varney v. Hutchinson Lumber & Mfg. Co. [W. Va.] 63 SE 203.

**5.** Party may bar himself from moving in arrest of judgment for any reason raised by demurrer. Decatur Amusement Park Co. v. Porter, 137 Ill. App. 448. Admissions of matters of fact which might have been

conflict of holdings as to whether misjoinder of parties is ground for the motion,[6] and as to the effect of a general verdict upon several counts or causes of action, one or more of which is bad.[7]

(§ 5) *B. Motions and proceedings thereon.*[8]—See 8 C. L. 1167—A motion in arrest of judgment is based on the record proper and in its consideration the court does not look into the evidence.[9]

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proved do not waive questions raised in record so as to bar motion in arrest of judgment. Henning v. Sampsell, 236 Ill. 375, 86 NE 274. Motion in arrest of judgment will not lie on ground that counterclaim did not state cause of action where trial was allowed to go on as if there was no variance, waiver being presumed. Allegation that counterclaim did not state cause of action because did not allege acceptance of plaintiff's varying confirmations of defendant's orders. Held to have waived the variance. Holliday-Klotz Land & Lumber Co. v. Beekman Lumber Co. [Mo. App.] 116 SW 436.

**6. Misjoinder held not ground.** Choctaw, O. & G. R. Co. v. Burgess [Okl.] 97 P 271.

**Misjoinder held ground:** Motions in arrest of judgment should be granted where defendants cannot have been jointly liable for tort alleged, and could not be properly joined in a judgment at law of any kind, inasmuch as such judgment must be enforcible in different methods. Judgment against receivers of lessor street railway, lessee street railway, and receivers of latter who operated car causing injury and who alone were liable. Eckels v. Henning, 139 Ill. App. 660.

**7.** Eighteen causes of action united in one count, only five of which were good. Verdict held to be bad as to all. Flowers v. Smith, 214 Mo. 98, 112 SW 499. Where petition contains several causes of action stated in separate counts, if one count be bad for insufficiency in statement, general verdict for plaintiff on all of counts will not be sustained. Id. Motion overruled where one count is good. Varn v. Pelot [Fla.] 45 S 1015; Langan v. Enos Fire Escape Co., 233 Ill. 308, 84 NE 267; Decatur Amusement Park Co. v. Porter, 137 Ill. App. 448. Motion in arrest of judgment cannot be sustained on ground that some of counts of declaration are defective when there are other counts sufficient to sustain judgment. Klofski v. Railroad Supply Co., 235 Ill. 146, 85 NE 274. Under Iowa code, motion in arrest of judgment can be obtained only if facts stated by petition do not entitle plaintiff to any relief whatever. Held that if petition of one count contains two inconsistent contracts or causes, if either was established by the evidence so that a cause of action was made out, a motion in arrest of judgment should be overruled. Robbins v. Bosserman, 133 Iowa, 318, 110 NW 587. Where part of complaint states cause of action, motion in arrest of judgment will not lie. Prye v. Kalbaugh, 34 Utah, 306, 97 P 331.

**8. Search Note:** See Cent. Dig. §§ 488-499; Dec. Dig. §§ 267, 268; 23 Cyc. 833-835; 2 A. & E. Enc. P. & P. 815.

**9.** Henning v. Sampsell, 236 Ill. 375, 86 NE 274. Matters developed by evidence on trial are not available on motion in arrest of judgment on ground that declaration is insufficient to sustain it. Declaration did not show facts which were brought out by the evidence. Langan v. Enos Fire Escape Co., 233 Ill. 308, 84 NE 267.

**10. Search Note:** See Cent. Dig. § 500; Dec. Dig. § 269; 23 Cyc. 835; 14 A. & E. Enc. P. & P. 820.

**11.** See 10 C. L. 1014.

**Search Note:** See notes in 4 C. L. 828; 97 A. S. R. 985.

See, also, Bills and Notes, Cent. Dig. §§ 360-421; Dec. Dig. §§ 149-175; 7 Cyc. 520-641; 21 A. & E. Enc. L. (2ed.) 545.

**12.** The term "non-negotiable paper," as here used comprehends those contracts for the payment of money which possess the form and other essentials of bills and notes, but lack the elements of negotiability, the indicia of negotiability and the characteristics which destroy it being treated elsewhere (see Negotiable Instruments, 12 C. L. 1018), and as many of the principles applicable to negotiable instruments are also applicable to non-negotiable paper, the former topic should be referred therefor. The topic in hand is, furthermore, confined to the treatment of non-negotiable instruments as a class of contracts, as distinguished from contracts generally (see Contracts, 11 C. L. 729), the general law of contracts being treated herein only in an incidental way. As to particular kinds of instruments which, according to their terms, may come within the term non-negotiable instruments, but which are characterized by specific relation to particular subjects, see such topics as Bonds, 11 C. L. 424; Corporations, 11 C. L. 810; Chattel Mortgages, 11 C. L. 611; Mortgages. 12 C. L. 878; Municipal Bonds, 12 C. L. 897; Public Works and Improvements, 10 C. L. 1307; Railroads, 10 C. L. 1365; Receivers, 10 C. L. 1465; Subscriptions, 10 C. L. 1762.

**13.** Bradshaw v. Farnsworth [W. Va.] 63 SE 755.

**14.** Recital of personal indebtedness in

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## NON-NEGOTIABLE PAPER.[11]

*The scope of this topic* is noted below.[12]

Non-negotiable paper must, like other contracts, be supported by a consideration,[13] and a statement of consideration may be contradicted.[14] Where the instru-

ment imports a consideration,[15] the burden of proving lack thereof is upon the person alleging such defect,[16] and parol evidence of the circumstances attending the execution of the instrument are admissible in this connection.[17] The term "writing obligatory," does not include an unsealed note.[18] Where the time of payment is not definitely fixed, the paper is usually construed as being payable within a reasonable time.[19] A promise to pay under restriction that note shall not be payable to any other person executor, trustee or assignee, will be discharged by the payee's death.[20] The maker may show that he was induced to sign by certain representatives of the payee's agent, and that pursuant to such representations he subsequently rescinded the note.[21] So, also, a note and a collateral memorandum made contemporaneously therewith must be construed together,[22] but the maker is not bound by memorandum which he neither signs nor agrees to,[23] but the maker is not bound by stipulations and agreements to which he is not a party.[24] One who

note sued on held not to give rise to conclusive presumption of settlement of trust alleged by defendant to have been held by him in favor of plaintiff so as to negative allegation of lack of consideration for note. Benton v. Benton [Kan.] 97 P 378.

15. By virtue of statute, a note imports a consideration. South Dakota Cent. R. Co. v. Smith [S. D.] 116 NW 1120.

16, 17. South Dakota Cent. R. Co. v. Smith [S. D.] 116 NW 1120.

18. Kidd v. Beckley [W. Va.] 60 SE 1089.

19. Written instrument, by which maker acknowledged indebtedness and agreed to pay as soon as he could, held promissory note payable within reasonable time. Benton v. Benton [Kan.] 97 P 378.

20. Bedford's Ex'r v. Chandler [Vt.] 69 A 874. Such a restriction is not nullified by the payee's forbearance, without consideration, to enforce the note at maturity. Id. Transaction held not invalid as attempt to dispose of property (of payee given in exchange for note) after death without required formalities or as an informal and incomplete gift inter vivos. Id.

21. Harvey v. Dimon, 36 Pa. Super. Ct. 82.

22. Memorandum of warranty of goods for which note was given. Harvey v. Dimon, 36 Pa. Super. Ct. 82.

23. Memorandum by salesman that no other agreement should be recognized unless in writing on same paper with note. Harvey v. Dimon, 36 Pa. Super. Ct. 82.

24. Where note is indorsed on condition that maker secure other indorsements, and left in the hands of the maker to secure such indorsements, payee taking note without notice of such agreement is not bound or affected thereby. Kidd v. Beckley [W. Va.] 60 SE 1089.

**NOTE. Status of holder of paper delivered upon conditions not fulfilled:** In Kidd v. Beckley [W. Va.] 60 SE 1089, counsel for defendant contended that as the note was non-negotiable the question of notice to plaintiff of conditions of delivery was immaterial, and that as the note was indorsed by defendant and delivered to maker upon condition that it should not become effective until indorsed by others and as such condition was not fulfilled, the note never became that of defendant, though plaintiff may have received it without notice of such condition, and in support of this proposition the following cases were cited: Perry v. Patterson, 5 Humph. [Tenn.] 133, 42 Am. Dec. 424; Bibb v. Reid, 3 Ala. 88; Carter v. McClintock, 29 Mo. 464; Goff v. Miller, 41 W. Va. 683, 24 SE 643, 56 Am. St. Rep. 889; Pawling v. U. S., 8 U. S. [4 Cranch] 219, 2 Law. Ed. 601; Ayers v. Milroy, 53 Mo. 516, 14 Am. Rep. 465; United States v. Leffler, 36 U. S. [11 Pet.] 86, 9 Law. Ed. 642; Daniels v. Gower, 54 Iowa, 319, 3 NW 424, 6 NW 525; Peeper v. Bostwick, 32 N. Y. 445; Cutter v. Whittemore, 10 Mass. 442. Of these cases Goff v. Miller is distinguished on ground that it simply affirmed the general proposition that one dealing in non-negotiable paper acquires it subject to all equities in the maker and the right of recourse as against remote assignors subject to equities of such assignors, whereas the case at bar involved equities arising prior to delivery and hence could not be said to be equities between maker and payee or holder. Pawling v. United States is distinguished on the ground that the bond there involved gave notice on its face that some of the intended makers had not executed it. Some of the other cases are also distinguished on the ground that the holder had notice, while others, particularly Ayers v. Milroy, supra, and Daniels v. Gower, supra, the court seemingly support counsel's contention, the latter case being cited approvingly in Joyce on Defenses to Commercial Paper, § 316. In the earlier case of Dair v. U. S., 83 U. S. [16 Wall.] 1, 21 Law. Ed. 491, the rule of Pawling v. United States was held inapplicable where the obligee in a bond is without notice and there is nothing to put him upon inquiry. See Rose's Notes to this case for application of this principle in many state and federal cases. To the same effect is Benton County Sav. Bank v. Boddicker, 105 Iowa, 548, 75 NW 632, 67 Am. St. Rep. 310, 45 L. R. A. 321, where in an extensive note the cases are collected, including the leading case of Ward v. Churn, 18 Scott [Va.] 801, 98 Am. Dec. 749, and Nash v. Fugate, 24 Grat. [Va.] 202, 18 Am. Rep. 640; Nash v. Fugate, 32 Grat. [Va.] 595, 34 Am. Rep. 780, also including Legeth v. Cozad, 21 W. Va. 183. The annotation in the aforesaid note, on the authority of Daniels v. Gower, supra; Ayers v. Milroy (supra); Campbell Print. Press & Mfg. Co. v. Powell, 78 Tex. 53, 14 SW 245, and Majors v. McNeilly, 7 Heisk [Tenn.] 294 says: "So far as the rules differ, non-negotiable instruments

writes his name upon the back of a non-negotiable note to give it credit is a guarantor,[25] and is prima facie liable upon the default of his principal without any previous notice or demand.[26] The presumption that a bill outstanding in the hands of the original payee is a subsisting undischarged obligation, while very strong, is not conclusive,[27] and, where it is met by opposing presumptions arising out of the facts of the case, the question of payment becomes one of fact.[28]

Non-negotiable paper is assignable,[29] and by such assignment the assignee is substituted to the rights of the assignor,[30] and is entitled to invoke appropriate remedies to enforce such rights,[31] but the assignment does not cut off any of the equities or defenses which may exist between the original parties,[32] unless, of course, it is otherwise provided by statute.[33] At common law non-negotiable paper was not assignable by indorsement,[34] but under the rule now prevailing in many states, indorsement and delivery passes title,[35] but mere possession of non-negotiable paper

are governed by the rule applicable to bonds rather than that applicable to negotiable instruments," but the cases cited seem to apply a different rule. There is no good reason, however, for such distinction, and the rule applicable to bonds and other non-negotiable instruments should apply to non-negotiable notes, one of such rules being that no understanding between the parties making or indorsing a note that the indorser shall be liable in a different capacity or upon same contingency to be fulfilled, will avail against the payee, unless before delivery he knows of such understanding. See Joyce v. Cockrill, 35 C. C. A. 38, 92 F 838; Jordan v. Jordan, 78 Tenn. 124, 43 Am. Rep. 294.—Adopted from Kidd v. Beckley [W. Va.] 60 SE 1089.

25. Tilden v. Goldy Mach. Co. [Cal. App.] 98 P 39.

26. Tilden v. Goldy Mach. Co. [Cal. App.] 98 P 39. Corporation held **estopped to repudiate indorsement** where it received benefit of loan secured thereby. Id.

27. In re McMichan's Estate, 220 Pa. 187, 69 A 596. Presumption held rebutted where subsequent to its date the payee had in his hands the means of payment which he paid over without deduction. Id.

28. In re McMichan's Estate, 220 Pa. 187, 69 A 596.

29. Receiver's certificates of indebtedness. McCarthy v. Crawford, 238 Ill. 38, 86 NE 750. In absence of defenses, maker of non-negotiable paper is bound to equitable assignee thereof. Shock v. Colorado County [Tex. Civ. App.] 115 SW 61. Instrument acknowledging receipt of certain personal property and containing promise by maker to pay certain sum in stated instalments, but reserving title in vendor until payments were fully made, held assignable under Civ. Code 1895, § 3682, though it contained no words of negotiability. Walker v. Carpenter [Ga. App.] 63 SE 576.

30. Assignee of certificate of indebtedness issued by receiver of corporation succeeds to assignor's right to share in distribution of corporate assets. McCarthy v. Crawford, 238 Ill. 38, 86 NE 750.

31. Assignee of certificate of indebtedness issued by receiver of corporation may compel registration of the assignment. McCarthy v. Crawford, 238 Ill. 38, 86 NE 750.

32. Harvey v. Dimon, 36 Pa. Super. Ct. 82; Rieck v. Daigle [N. D.] 117 NW 346; Citizens' Bank of Wakita v. Garnett [Okl.] 95 P 755; Clowers v. Snowden [Okl.] 96 P 596; Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 94 P 1039; American Exch. Nat. Bank v. Woodlawn Cemetery [N. Y.] 87 NE 107; McCarthy v. Crawford, 238 Ill. 38, 86 NE 750. Lack of consideration. Bradshaw v. Farnsworth [W. Va.] 63 SE 755. Set-off for damages based on breach of contract subject to conditions of which note was given held not sustained by evidence. Rieck v. Daigle [N. D.] 117 NW 346. Defense of payment prior to action by assignee held not supported by evidence. Id. Assessment certificates, vouchers, or bonds, issued to contractor for paving, held issued contrary to statutory provisions and defective upon their face, and unenforcible even in hands of holder other than contractor. First Nat. Bank of Chicago v. Elgin, 136 Ill. App. 453. Assignee of note constituting part of order for goods held to take same in entirety and subject under P. L. 1901, 194, § 196, to rules of law merchant, and to be in no better position than original holder would have been. Harvey v. Dimon, 36 Pa. Super. Ct. 82. Assignee of note constituting part of order for goods held precluded by cancellation of order pursuant to agreement with seller's agent. Id.

33. Under Rev. St. 1895, § 314, providing that defendant may plead lack or failure of consideration as against payee or obligee or as against purchasers with notice, a bona fide purchaser without notice of non-negotiable paper is protected against such defenses. McCormick v. Kampmann [Tex.] 115 SW 24.

34. Larson v. Glos, 235 Ill. 584, 85 NE 926. **Mode of assignment generally,** see Assignments, 11 C. L. 291.

35. MacKeown v. Lacey, 200 Mass. 437, 86 NE 799. Indorsement by payee in blank and delivery to assignee. Swedish-American Nat. Bank of Minneapolis v. Koebernick, 136 Wis. 473, 117 NW 1020. Where note was indorsed in name of business **corporation payee** "by" its secretary, holder was not bound to prove authority of secretary. Id. Under Hurd's Rev. St. 1905, c. 120, § 207, **tax sale certificate** is assignable by indorsement. Larson v. Glos, 235 Ill. 584, 85 NE 926.

does not carry with it any presumption of ownership.[36] Where the paper is assignable by indorsement, the assignee may fill in a blank indorsement with words of formal assignments.[37] The words "without recourse to the assignor" have no fixed legal significance in connection with an assignment of non-negotiable instruments,[38] and must be interpreted in the light of all the circumstances.[39]

In the absence of statutory authority, the assignee of non-negotiable paper cannot sue thereon in his own name,[40] but he is quite commonly authorized by statute so to do.[41] The effect of some of the statutes is to render an assignor by indorsement liable to suit in the same action with the maker.[42] The payee of a non-negotiable draft may sue thereon in his own name.[43] The fulfillment of all conditions upon which the promise to pay is predicated must be alleged,[44] provided, of course, the conditions are recognized as such by the law in its interpretation of the contract.[45] Where promissory notes given in payment for property sold under contract of warranty have passed out of the control of the payee, the maker may elect to treat them as valid obligations, though they are non-negotiable [46] and his failure to interpose his defense in a suit by the holder of such notes will not preclude him from maintaining an action for breach of the warranty against the payee,[47] and where the payee makes no offer to return the paper, the maker may, in such a suit, recover the value of the paper.[48] Equity will not enforce security given to secure an invalid note.[49]

**Nonresidence; Nonsuit,** see latest topical index.

### NOTARIES AND COMMISSIONERS OF DEEDS.[50]

*The scope of this topic* is noted below.[51]

A notary public is not a commissioner.[52] Under statute "no notary" is authorized to take acknowledgments, administer oaths, certify papers, or perform any official acts in connection with matters in which he is employed as counsel, attorney or agent, or in which he may be in any way interested before the department of the United States government.[53] In Nebraska the seal of a notary which contains the

**36.** In re Perry, 114 NYS 246.

**37.** Larson v. Glos, 235 Ill. 584, 85 NE 926.

**38, 39.** Koch v. Hinkle, 35 Pa. Super. Ct. 421.

**40.** National Council K. & L. of S. v. Hibernian Banking Ass'n, 137 Ill. App. 175.

**41.** Rev. Laws, c. 173, § 4. MacKeown v. Lacey, 200 Mass. 437, 86 NE 799.

**42.** Payee of instrument assignable under Rev. Code 1895, § 3682, who made indorsement on back thereof which he "transfers, sells and assigns" the same and the property for the purchase price of which it was given, held liable as indorser in same action with maker. Walker v. Carpenter [Ga. App.] 63 SE 576.

**43.** Though he has no beneficial interest therein. See Comp. Laws 1897, § 2685, subsecs. 2, 3. Eagle Min. & Imp. Co. v. Lund [N. M.] 94 P 949.

**44.** Guardian's note providing that amount therein promised is to be paid out of ward's estate in hands of guardian when available. Teasley v. Brenau Ass'n, 4 Ga. App. 243, 61 SE 141.

**45.** In suing on paper whereby maker promises to pay as soon as he can, it is not necessary to allege maker's ability to pay, such paper being construed to be payable within reasonable time. Benton v. Benton [Kan.] 97 P 378.

**46, 47.** Delaney v. Great Bend Implement Co. [Kan.] 98 P 781.

**48.** Burgess v. Alcorn, 75 Kan. 735, 90 P 239.

**49.** Note invalid for lack of consideration. Bradshaw v. Farnsworth [W. Va.] 63 SE 755. See Pledges, 10 C. L. 1253.

**50.** See 10 C. L. 1014.

**Search Note:** See notes in 33 L. R. A. 92; 36 Id. 822; 38 Id. 214; 5 L. R. A. (N. S.) 415; 82 A. S. R. 380; 1 Ann. Cas. 544; 6 Id. 37, 285.

See, also, Acknowledgment, Cent. Dig.; Dec. Dig.; 1 Cyc. 364, 506-629; Affidavits, Cent. Dig.; Dec. Dig.; 2 Cyc. 1-37; Notaries, Cent. Dig.; Dec. Dig.; 29 Cyc. 1068, 1107; 21 A. & E. Enc. L. (2ed.) 552.

**51.** As to particular duties and powers, see Acknowledgments, 11 C. L. 25; Depositions, 11 C. L. 1069, and Negotiable Instruments, 12 C. L. 1018.

**52.** Improper to tax commissioner's fees for taking depositions, testimony being taken by stenographers present and notary merely administering oaths, notary being in no sense a commissioner. Valk v. Erie R. Co., 128 App. Div. 470, 112 NYS 792.

**53.** Proviso of § 558, D. C. Code, 31 Stat.

words "notarial seal," the name of the county for which the notary was appointed, and the word "Nebraska," is sufficient, for the authentication of his official acts,[54] and the notary's failure to write under his official signature the date when his commission will expire as directed by statute does not render his certificate void where in fact he had power to act.[55] In Illinois it is only where a notary certifies under his official seal that he has authority to administer oaths under the statute of the state under which he holds his commission that the certificate is prima facie evidence of his statutory authority to do so.[56] Under statute making a notary liable for his official misconduct to those injured thereby, a notary is liable to one sustaining loss through his violation of a statute prohibiting the taking of acknowledgments unless the acknowledging person is identified to him as prescribed.[57] Notaries are entitled to reasonable compensation for the services performed.[58]

**Notes of Issue; Notice,** see latest topical index.

## NOTICE AND RECORD OF TITLE.


**§ 1. Bona Fide Purchaser and Doctrine of Notice, 1100.** Requisites of a Bona Fide Purchaser, 1103. A Valuable Consideration, 1103. Good Faith, 1103. Notice or Knowledge, 1103.

**§ 2. Statutory Records or Filings as Constructive Notice, 1107.**

A. In General, 1107.

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H. Discharge of Record, 1117.

**§ 3. Registration and Certification of Land Titles Under the Torrens System, 1117.**


*The scope of this topic* is noted below.[59]

§ 1. *Bona fide purchaser and doctrine of notice.*[60]—See 10 C. L. 1015—It is the policy of the law to protect one who acquires an interest in property in good faith for value and without notice of outstanding interests,[61] but the doctrine of bona

at L. 1279, c. 854, not confined in its application to notaries public of the District of Columbia. Hall's Safe Co. v. Herring-Hall-Marvin Safe Co., 31 App. D. C. 498. Under proviso, notary appointed in one state not authorized to certify in official capacity to instrument filed by him as attorney for party to whom he administered oath, and which was to be used before patent department. Id.

54. Under Comp. St. § 5, c. 61, name or initials of name of notary is permissive only. Sheridan County v. McKinney, 79 Neb. 220, 115 NW 548.

55. Comp. St. 1903, § 5, c. 61, as amended in 1893. Sheridan County v. McKinney, 79 Neb. 220, 115 NW 548.

56. Rev. St. § 6, c. 101. No evidence in record that notary was officer authorized to administer oath in place where affidavit was made as required by Chancery Act, § 14. Wellington v. Wellington, 137 Ill. App. 394.

57. Notary liable under Pol. Code, § 801, for violation of Civ. Code 1185, person acknowledging not being personally known nor identified by witness known to notary. Homan v. Wayer [Cal. App.] 98 P 80. No privity between the parties is necessary to recovery. Id. Liability for making false certificate to an acknowledgment not dependent upon whether acts of others contributed to injury where party defrauded relied upon notary's false certificate. Id.

58. Under Code Civ. Proc. § 3256, $23.20 unreasonable for administering oaths to witnesses, even though notary be considered a commissioner. Valk v. Erie R. Co., 128 App. Div. 470, 112 NYS 792.

59. It includes all matters relating to notice actual or constructive to purchasers and incumbrancers as to previous claims and equities except the doctrines of bona fides under occupying claimants acts (see Accession and Confusion of Property, 11 C. L. 11), caveat emptor in judicial sales (see Judicial Sales, 12 C. L. 452), notice from judgment dockets (see Judgments, 12 C. L. 408), lis pendens (see Lis Pendens, 12 C. L. 633), and bona fide purchaser of negotiable paper (see Negotiable Instruments, 12 C. L. 1018). The treatment on recording, filing and registration includes the filing or recording of chattel mortgages and conditional sales and **registration of land titles** under the Torrens system.

60. **Search Note:** See notes in 7 L. R. A. (N. S.) 1020; 8 Id. 418, 804; 13 Id. 49; 1 A. S. R. 247; 17 Id. 288; 24 Id. 228; 34 Id. 399; 82 Id. 513; 104 Id. 331.

See, also, Chattel Mortgages, Cent. Dig. §§ 237-271; Dec. Dig. §§ 139-156; 6 Cyc. 1070-1079; 7 Id. 41; Mortgages, Cent. Dig. §§ 344-367; Dec. Dig. §§ 152-157; 27 Cyc. 1183-1192; Sales, Cent. Dig. §§ 657-703, 1366-1402; Dec. Dig. §§ 234-245, 471-474; Vendor and Purchaser, Cent. Dig. §§ 461-612; Dec. Dig. §§ 220-245; 24 A. & E. Enc. L. (2ed.) 73.

61. See, also, post, this section, partic-

fide purchase is inapplicable in cases where a grantor either does not have the title

larly subd., Notice or Knowledge, and § 2. Bona fide purchaser takes free from secret equities and good title descends to his heirs. Hendricks v. Calloway, 211 Mo. 536, 111 SW 60. Where purchaser paid full value, took warranty deed, went into possession, and made improvements without notice of facts exciting inquiry, he took free from unrecorded equity. Id. Real Property Law, § 160, giving to purchasers for valuable consideration claiming under defective execution of a power same relief as purchasers claiming under defective conveyance, held applicable for protection of bona fide purchasers. Doscher v. Wyckoff, 113 NYS 655. Evidence held to sustain finding that purchaser paid price when he bought and had no notice of prior administrator's sale. Holland v. Nance [Tex.] 114 SW 346. Question of bona fide purchase held not involved, it not appearing subsequent deed embraced land conveyed by prior unrecorded deed. Davidson v. Jenkins [Ky.] 113 SW 901.

**Prior agreements in general:** Purchaser without knowledge of **agreement fixing boundary line** at variance with original survey held protected. Louisiana & T. Lumber Co. v. Dupuy [Tex. Civ. App.] 113 SW 973. Innocent purchasers held protected as against **claims of attorneys for services** in litigation involving the land. Hodnett v. Stewart [Ga.] 61 SE 1124; Lewright v. Davis [Tex. Civ. App.] 115 SW 599; Bendheim v. Pickford, 31 App. D. C. 488. Trustee and bondholders if bona fide purchasers for value held prior in rights to one claiming under prior agreement by mortgagor **as to manner of paying for property.** Ingram v. Cincinnati, etc., R. Co., 32 Ky. L. R. 849, 107 SW 239. Where land sold under execution was purchased by sureties on stay bond of owner, who also took quitclaim from owner, sureties' grantee held not subject to secret equities of owner based on agreement that **land should be reconveyed** by sureties, such grantee being without notice. Brown v. Nelms [Ark.] 112 SW 373.

**Earlier conveyances:** Bona fide purchaser held protected as against **prior purchaser of timber.** Ohio Pail Co. v. Cook & Co. [Pa.] 71 A 1051. Where purchaser had neither actual nor constructive notice of **prior contract of sale,** prior purchaser had no lien on the land. Fowles v. Bentley [Mo. App.] 115 SW 1090. That mortgagees without notice of prior unrecorded deed would be protected in their liens held not to affect **grantee's right** to retain her title **as against grantor's legatees and executor.** Maxwell v. Harper [Wash.] 98 P 756.

**Debts, mortgages and other liens:** Bona fide purchasers from a corporation may acquire its assets free of **corporate debts.** Luedecke v. Des Moines Cabinet Co. [Iowa] 118 NW 456. Creditors without actual notice held protected as against holder of chattel **mortgage of future earnings** of threshing machine, men and teams, within certain townships, no contracts for threshing having been made when mortgage was given. Dyer v. Schneider, 106 Minn. 271, 118 NW 1011. Innocent purchasers held to take free **from outstanding note and** entitled to rely on recital in deed that **lien to secure same** had been discharged. **Templeman v. McFerrin** [Tex. Civ. App.] 113 SW 333. One purchasing land without actual notice of **judgment** against vendor, rendered and enrolled in wrong name by mistake, held bona fide purchaser and protected. Allen West Commission Co. v. Millstead [Miss.] 46 S 256. Judgment held not correctable as to him. Id.

**Claims of heirs:** Good faith purchaser from record owner held protected against **claim of forced heirs** of vendor of record owner. Vital v. Andrus, 121 La. 221, 46 S 217.

**Trusts:** Implied trusts will not be enforced against bona fide purchaser of legal title from original trustee for value and without notice of outstanding equity. Eureka Knitting Co. v. Snyder, 36 Pa. Super. Ct. 336. Equitable interests of cestui que trust held not assertable against bona fide **purchaser of note and mortgage.** Macomber v Bremer, 198 Mass. 20, 84 NE 328. Bona fide purchaser for value from trustee authorized by court to sell land conveyed to him by deed not referring to any will held to take free from **secret testamentary trust provisions.** Peavy v. Dure [Ga.] 62 SE 47.

**Fraud:** Evidence of fraud **affecting note and mortgage** held admissible against payee and mortgagee, though not against an intervenor who claimed as bona fide assignee. Owen v. Mulkey, 84 Ark. 623, 106 SW 937. Where equitable mortgage on land was exchanged for legal mortgage before mortgagee had notice of **defects in mortgagor's title** by reason of fraud practiced in obtaining it, mortgagee's rights were superior to those of person defrauded. Richardson v. Wren [Ariz.] 95 P 124. Complaint to set aside **deeds** for fraud held insufficient as against subsequent grantees not alleged to have had knowledge or to have participated in the fraud. Denike v. Santa Clara Valley Agricultural Soc. [Cal. App.] 98 P 687. Bona fide mortgagee for value without notice of **fraudulent conveyance** to mortgagor whose grantor retained possession held protected as against grantor's creditors. Speidel Grocery Co. v. Stark & Co., 62 W. Va. 512, 59 SE 498. Bona fide purchaser not affected by **improper conduct** of grantor **in procuring tax title** while acting as agent of original owner. St. Louis & Arkansas Lumber & Mfg. Co. v. Godwin, 85 Ark. 372, 108 SW 516. Innocent purchasers protected as against one who had entrusted his agent with deeds **blank as to grantee** with **instructions to deposit in escrow.** Creveling v. Banta, 138 Iowa, 47, 115 NW 598. Innocent **assignee of bank deposit** held not affected by fraud of third person who represented that amount of assignment was smaller and that assignment was made for a different purpose. Radovsky v. Fall River Sav. Bank, 196 Mass. 557, 82 NE 693.

**Miscellaneous equities:** Mortgagee without notice of **latent infirmity in decree** under which mortgagor claimed held to have valid and enforceable lien on the land. Kieffer v. Victor Land Co. [Or.] 98 P 877. Money paid in satisfaction of mortgages held not recoverable from bona fide assignee on ground of **lack of consideration.** Sternberg v. Sternberg & Co. [N. J. Eq.] 69 A 492. Burden on complainant to show not

he assumes to convey [62] or is totally incapacitated,[63] and a purchaser of only an equitable interest takes subject to such equities as existed against it in the hands of his vendor.[64]

The authorities are inharmonious on the burden of proof.[65] A claimant of a mere equity must show that the taker of the legal title was not a bona fide pur-

only lack of consideration but that defendants were not entitled to rely on mortgages as admissions of indebtedness. Id. Purchaser without notice or knowledge of **prior recovery** against railroad company **of all damages** present and future due to company's maintenance of an embankment which did not create a permanent nuisance in law, and without notice of prior owner's **full release** of all future damages, held not precluded from recovering against company for subsequent overflows of water due to insufficient culverts and sluiceways. St. Louis S. W. R. Co. v. Long [Tex. Civ. App.] 113 SW 316.

**Held not bona fide purchasers:** Purchaser with knowledge that others than grantors were in possession and exercised acts of ownership and who gave no consideration except a mortgage on the property. Morris v. Blunt [Utah] 99 P 686. **Corporation purchasing assets of another corporation** and issuing its stock to owner of all stock of selling corporation held not a bona fide purchaser as against creditors of selling corporation. Luedecke v. Des Moines Cabinet Co. [Iowa] 118 NW 456. Where conveyance from husband to wife was bona fide and valid, husband's judgment **creditor purchasing at execution** sale held not innocent purchaser though by mistake deed from husband to wife stated consideration to be love and affection. Jones v. Anderson [Ky.] 116 SW 253. Where verbal agreement pledging land was made before enactment of statute requiring record of certain instruments within 40 days after execution in order to affect subsequent creditors, and plaintiffs were either only **simple contract creditors** or holders of **judgments recovered after notice of deed** given pursuant to such agreement, plaintiffs were not subsequent creditors of mortgagor for value and without notice. Miller v. Wroton [S. C.] 63 SE 62. **Trustees and executors** loaning large sum of trust funds and taking mortgage either recklessly without knowledge of title of mortgagor which had been donated to him on condition, or else improvidently relying on mortgagor's ability to carry out condition, held without equity as against subscribers to fund for purchase and donation who sued for re-entry and removal of mortgage as a cloud. Fowler v. Coates, 128 App. Div. 381, 112 NYS 849.

**62.** Lack of notice of **rights of remaindermen** held not to affect assertion of such rights, after death of life tenant, against grantees who had made improvements and paid taxes. Willhite v. Berry, 232 Ill. 331, 83 NE 852. One who held property under a **mere contract for purchase** could not confer title on subsequent purchaser, though latter was without notice of rights of title holder. Taylor v. Applebaum [Mich.] 15 Det. Leg. N. 928, 118 NW 492. Good faith or notice of subsequent grantee held immaterial where earlier **deed was forged.** Sapp v. Cline [Ga.] 62 SE 529. Where one wrongfully obtained **possession of an escrow** and procured grantee therein to quitclaim to a third person, subsequent grantees under quitclaim deed were not innocent purchasers, on theory that principal must suffer for fault of agent. Seibel v. Higham [Mo.] 115 SW 987.

**63.** Since deed by one not entirely without understanding, though of unsound mind, made before judicial determination of incapacity, is merely voidable, not void, and passes title, bona fide mortgagee of grantee obtains valid lien. Maas v. Dummyer [Okl.] 96 P 591.

**64.** Only purchaser of title perfect on its face takes free of unknown equities. La Belle Coke Co. v. Smith, 221 Pa. 642, 70 A 894. That interest purchased from an heir was but an equity and not legal title, held not to preclude purchaser from defending against lien for widow's support. Paton v. Robinson [Conn.] 71 A 730.

**65. Burden on equity holder:** Burden of proving notice to purchaser for value is on party alleging it. Crane's Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co., 108 Va. 862, 62 SE 954. Person claiming under prior unrecorded conveyance has burden of showing notice to subsequent purchasers or creditors, all presumptions being in favor of bona fides of subsequent purchaser or lien creditor. Feinberg v. Stearns [Fla.] 47 S 797; West Coast Lumber Co. v. Griffin [Fla.] 48 S 36. Must show that junior grantee took with notice or without consideration. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662. Where contract was not recorded as required by Comp. Laws, § 6336, conditional vendor of railroad apparatus or his assignee held unable to recover price without proof that subsequent buyer was not bona fide purchaser for value and without notice. Hogan v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 830, 118 NW 140.

**Burden on purchaser or creditor:** Burden on subsequent mortgagee to show he was without notice of **unrecorded conditional sale.** Zacharia v. M. C. Cohen Co. [Iowa] 119 NW 136. Burden on purchasers to plead and prove that they were innocent purchasers for value and without notice of **chattel mortgage not properly recorded.** Ayre v. Hixson [Or.] 98 P 515. Burden on subsequent mortgagee to show lack of knowledge of **prior deed not recorded.** Hibernia Savings & Loan Soc. v. Farnham, 153 Cal. 578, 96 P 9. While one seeking to postpone prior unregistered deed must show he paid price of land without actual notice of prior deed (Holland v. Nance [Tex.] 114 SW 346), such fact may be established by circumstances (Id.). Code 1887, § 2465 (Va. Code 1904, p. 1223), provides that unrecorded deed is void as to subsequent purchasers for valuable consideration without notice, and plaintiff bringing ejectment by virtue of such statute must prove receipt of conveyance and pay-

chaser,[66] and where fraudulent intent on the part of a grantor is shown, the purchaser must establish good faith on his part.[67]

*Requisites of a bona fide purchaser.* See 8 C. L. 1170

*A valuable consideration* See 10 C. L. 1017 is essential,[68] but a consideration to be valuable need not be adequate in point of fact.[69] A pre-existing debt is not sufficient.[70]

*Good faith.* See 10 C. L. 1018—Inadequacy of consideration is evidence on the issue of good faith.[71]

*Notice or knowledge.* See 10 C. L. 1018—One must not have had actual or constructive notice of outstanding equities,[72] except where he takes from a bona fide pur-

ment of purchase price before notice of prior deed. Bugg v. Seay, 107 Va. 648, 60 SE 89.

**66.** Middleton v. Johnston [Tex. Civ. App.] 110 SW 789; Thomason v. Berwick [Tex. Civ. App.] 113 SW 567. One holding equitable title derived from heirs of wife of holder of legal title. Davidson v. Renfro [Tex. Civ. App.] 114 SW 449. Burden on land owner to show that purchaser from adjoining owner had notice of agreement fixing boundary line where such line was not same as original line. Louisiana & T. Lumber Co. v. Dupuy [Tex. Civ. App.] 113 SW 973. Where under bill charging purchaser with notice of outstanding equities and participation in fraud on plaintiff, and under answer denying these charges and pleading good faith, plaintiff introduced no evidence of notice and defendants produced as much evidence in support of answer as nature of case permitted, finding of bona fide purchase was proper. Hendricks v. Calloway, 211 Mo. 536, 111 SW 60.

**67.** Purchaser from vendor who intended to defraud creditors has burden of proving good faith. Crawford v. Lininger & Metcalf Co. [Kan.] 95 P 1134. Where a conveyance is fraudulent, person attacking same need only show fraudulent intent on part of grantor, and grantee who pleads bona fide purchase has burden of proof. Barnhart v. Anderson [S. D.] 118 NW 31; Brooks v. Garner [Okl.] 97 P 995, and cases cited.

**68.** To protection of second grantee as against prior deed. Conway v. Rock [Iowa] 117 NW 273. Creditor allowing debtors to sell goods to pay other creditors and agreeing to furnish additional stock in consideration of a mortgage on farm belonging to some of debtors held equitable mortgagee for value. Richardson v. Wren [Ariz.] 95 P 124. Also mortgagee for value of land taken in exchange for that mortgaged pursuant to agreement letting other land go free of incumbrance. Id. Rule that a vendee is not bona fide purchaser until he has actually paid purchase price or become irrevocably bound therefor cannot be invoked against one who has **promised to give a consideration,** unless transfer will hinder or delay creditors. Everitt v. Farmers' & Merchants' Bank [Neb.] 117 NW 401. **Extension of time** for payment of overdue paper on condition makers would pay interest in advance held sufficient consideration for mortgage. First Nat. Bank v. Farmers' & Merchants' Nat. Bank [Ind.] 86 NE 417. **Mere go-betweens** for purpose of vesting title to homestead property in defendant in violation of rights of children held not innocent purchasers. Burel v. Baker [Ark.] 116 SW 181.

**Evidence** held to show that defendant's grantor paid cash consideration. Eastham v. Hunter [Tex. Civ. App.] 109 SW 237. Insufficient to show that plaintiff in ejectment claiming title under statute postponing prior unrecorded conveyances had paid a valuable consideration for the land. Bugg v. Seay, 107 Va. 648, 60 SE 89. Insufficient to show that grantee paid no consideration or had notice of prior unrecorded conveyance. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662.

**69.** Ennis v. Tucker [Kan.] 96 P 140. One who pays less than market value may be bona fide purchaser though amount paid may be considered on question of whether only a chance of title was bought. Eastham v. Hunter [Tex.] 114 SW 97. Inadequacy of consideration is evidence on issue of good faith. Pelham v. Chattahoochee Grocery Co. [Ala.] 47 S 172. One paying $10 for quitclaim deed to property worth $20,000 held not "purchaser for value" within registration laws. Abernathy v. South & W. R. Co. [N. C.] 63 SE 180.

**70.** One who takes bill of sale to secure pre-existing debt or pre-existing contingent liability is not incumbrancer for value and in good faith. Hicks v. Farrell [Wash.] 96 P 515.

**71.** Pelham v. Chattahoochee Grocery Co. [Ala.] 47 S 172.

**72. Existing mortgages or other liens:** Purchaser with actual or constructive notice of existing mortgages occupies position of grantor and takes subject to incumbrance. DuBois v. First Nat. Bank, 43 Colo. 400, 96 P 169. Where as between mortgagor and mortgagee a debt of former had been paid by latter so that mortgage became operative to secure repayment, purchaser of mortgaged property having notice of mortgage and of mortgagor's liability to mortgagee held to occupy shoes of mortgagor, so that he could not claim debt had been paid by mortgagor. Holtzclaw v. Crayner Smith Lumber Co. [Ky.] 114 SW 271. Recital in mortgage of a piano that there was no incumbrance "except $115 now due piano company" held insufficient as notice. North State Piano Co. v. Spruill [N. C.] 63 SE 723. Purchaser with actual notice of **existing chattel mortgage** held not "purchaser in good faith" within recording statute. Ayre v. Hixson [Or.] 98 P 515. Evidence held to show that purchaser of personalty had actual notice of mortgages so as to put them

on inquiry. Id. Where mortgagor commingled mortgaged chattels with chattels not mortgaged, purchaser with notice of mortgage was in same position as mortgagor and mortgagee could take all property necessary to satisfy the debt. Id. Assignee of trust deed held without actual or constructive notice of prior outstanding, **equitable mortgage.** Rohde v. Rohn, 232 Ill. 180, 83 NE 465. Deed reciting existence of a mortgage held not notice of **unrecorded mortgage for different amount** and dated after date from which mortgage recited bore interest, where recited mortgage appeared of record. Volk v. Eaton, 219 Pa. 649, 69 A 91. Where grantee knew land had been paid for partly with money of a lunatic of whom grantor was committee, she took subject to **lien in favor of lunatic.** Haring v. Murphy, 113 NYS 452. Mortgage trustee's statement, "Yes, and when we took our trust deed we thought we were getting a good title and would only be subject to judgments of record," made in answer to suggestion as to his knowledge of attachment proceedings, held insufficient to show notice of **attachment lien.** First Nat. Bank of Peoria v. Farmers' & Merchants' Nat. Bank [Ind.] 86 NE 417. A party to litigation is charged with notice that attorney for opposite party will have **attorney's lien** on property recovered for professional services (Hodnett v. Stewart [Ga.] 61 SE 1124), but is not charged with notice of agreement that attorney is to have part of the property (Id.).

**Fraud:** Instructions ignoring tendency of testimony to show notice to defendant of fraud of his transferror **in acquiring title to goods** purchased held properly refused. Pelham v. Chattahoochee Grocery Co. [Ala.] 47 S 172. Evidence held to sustain finding that after a certain date one dealing with another who had certain deeds in his possession had notice that **deeds** had been **obtained by fraud.** Creveling v. Banta, 138 Iowa, 47, 115 NW 598. One acquiring property from a **fraudulent purchaser,** under circumstances preventing him from being purchaser in good faith for valuable consideration, is in no better position than fraudulent vendee. Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 P 1029. Subject to same remedies as defrauded party might exercise against fraudulent vendee. Id. Notice to an agent or trustee of a prior unrecorded mortgage is notice to the principal. Schoolfield v. Cogdell [Tenn.] 113 SW 375.

**Prior sales:** Deed taken subject to **previous deeds** held inferior to a previous deed recorded when made. Raley v. Magendie [Tex. Civ. App.] 116 SW 174. Purchaser from one who held bond for deed held to take subject to rights of assignee of part interest in bond of which rights he had actual and constructive notice. Wolfe v. Childs, 42 Colo. 121, 94 P 292. Second deed after grantees had knowledge of prior conveyance to plaintiffs' grantor held to add nothing to grantees' rights as alleged innocent purchasers. Cunningham v. Buckingham [Tex. Civ. App.] 111 SW 766. Provision in deed of junior grantee binding grantor to return purchase money if record should show that land was in any way incumbered to prejudice of sale held not evidence that grantor knew when he took **his** deed that his grantor had already conveyed to another. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662. Subsequent mortgagee held without notice of prior unrecorded conveyance. Hibernia Sav. & Loan Soc. v. Farnham, 153 Cal. 578, 96 P 9. Bystander's declaration to purchasers: "Remember, even though I haven't it now, I have a hold there yet," held not notice that declarant held deed. Hilts v. Stroh, 112 NYS 30. Persons taking deed with full knowledge of **prior contract of sale** and subject to purchaser's rights thereunder stands in shoes of vendor and will be compelled to perform accordingly. Van Dyke v. Cole [Vt.] 70 A 593. Vendees with knowledge that vendor's agent had contracted to sell to plaintiff held not in position to complain of specific performance of plaintiff's contract. Jasper v. Wilson [N. M.] 94 P 951. Subsequent purchasers with knowledge of previous attempted purchase by plaintiff held to take subject to plaintiff's lien for amount paid. Lowe v. Maynard [Ky.] 115 SW 214. Evidence held to show that defendant acquired title to realty with actual notice of plaintiff's rights therein under agreement by which land should have been conveyed to plaintiff. Chadwick v. Arnold, 34 Utah, 48, 95 P 527. Purchaser with notice that vendor held title in trust held in no better position than vendor to assert title. Id. Purchasers held bound to respect existing contract of **sale of timber** of which they had knowledge. Acree v. Rozzell, 32 Ky. L. R. 1342, 108 SW 846. Evidence held to justify finding of actual notice to purchaser of prior sale of trees, though deed thereof insufficiently described trees and land for purpose of record notice. Asher v. Ford Lumber & Mfg. Co., 33 Ky. L. R. 222, 109 SW 899.

**Trusts:** Grantee in deed showing by recital that land was properly held in trust for individuals not made parties to litigation involving same held to hold in trust for beneficiaries. Turner v. Edmonston, 210 Mo. 411, 109 SW 33. Decree in action in which defendant was party establishing trust **in favor of children** held notice to defendant who subsequently took title whether decree was valid or not. Burel v. Baker [Ark.] 116 SW 181. Party to agreement that widow should acquire title to homestead property held charged with notice of rights of children. Id.

**Miscellaneous:** Evidence held to sustain finding that bank purchasing notes had notice of facts entitling makers to credit thereon to extent land purchased by them might be taken to satisfy a vendor's lien. Watson v. Vansickle [Tex. Civ. App.] 114 SW 1160. Actual knowledge of bill to redeem property sold under chattel mortgage and for accounting held insufficient as notice to subsequent mortgagee of other property in part payment for which first mentioned property was transferred that complainant had thus any equity therein. Schneider v. Schmidt [N. J. Eq.] 70 A 688. Purchaser with notice of **facts avoiding vendor's title** takes risk of having title defeated. McLean v. Stith [Tex. Civ. App.] 112 SW 355. Vendee's title held voidable where he knew vendor had obtained title by unauthorized foreclosure of lien owned

chaser.[73] Registration or record,[74] or other constructive notice,[75] such as that imputed by participation in judicial proceedings,[76] or knowledge of facts sufficient to put an ordinarily prudent person on inquiry,[77] is equivalent to actual knowledge.

by insane person. Id. Evidence held to show that defendant's grantor took title with knowledge that his grantor did not pay a present consideration and with knowledge of defect in title. Eastham v. Hunter [Tex. Civ. App.] 109 SW 237. Evidence insufficient to show notice of plaintiff's **rights in coal under land.** Crane's Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co., 108 Va. 862, 62 SE 954. **Building restrictions** subject to which conveyances were made held binding on purchaser though some appeared in complete form only in minute book of a corporation imposing them. Newbery v. Barkalow [N. J. Eq.] 71 A 752. One buying land with full knowledge of **rights of tenant** held not a good faith purchaser. Remm v. Landon [Ind. App.] 86 NE 973. Reformation lies as against subsequent purchaser with notice of **mistake in lease.** Id. Evidence held to sustain finding that purchaser of grain from a tenant was without notice of **landlord's equitable lien for rent.** Shelley v. Tuckerman [Neb.] 119 NW 663. Mortgage **assignment** showing on face it was **made by executor** held to notify assignee of assignor's capacity and give information of estate to which mortgage belonged. Alexander v. Fidelity & Deposit Co. [Md.] 70 A 209. Where estate of one who resided and died outside of state was administered within state, probate proceedings were not notice to purchaser from heirs of **administrator's sale** of land located in another county. Holland v. Nance [Tex.] 114 SW 346. Record in partition proceedings held notice **that guardian purchased ward's land** so that persons claiming under guardian could not be bona fide purchasers. Kazebeer v. Nunemaker [Neb.] 118 NW 646. Purchasers after grantor's discharge in bankruptcy held charged with **notice of bankruptcy,** there being nothing to show they relied on any title attempted to be conferred by prior unrecorded deed. Vary v. Sensabaugh [Ala.] 47 S 196. Plaintiffs held not bona fide purchasers where complaint showed record of transcript of a **judgment** before purchase by them from judgment debtor. Curry v. Lehman [Fla.] 47 S 18. Purchaser with constructive notice of **foreclosure judgment** held to take subject to title of purchaser at foreclosure, though he had no actual notice of proceedings. Young v. Davis [Wash.] 97 P 506. That purchaser from mortgagor took possession and made improvements held immaterial. Id. Recital in deed that grantee took subject to pending suit in equity held insufficient to charge grantee with notice of existence of **contract giving** grantor's **attorneys an interest** in the land for services in the suit. Bendheim v. Pickford, 31 App. D. C. 488. Party to litigation is not charged with notice of agreement by which attorney for opposite party is to have part of property recovered. Hodnett v. Stewart [Ga.] 61 SE 1124.

**73.** Purchaser from bona fide purchaser succeeds to latter's rights though he had notice. Thomason v. Berwick [Tex. Civ. App.] 113 SW 567. Secret equities under will creating trust. Peavy v. Dure [Ga.] 62 SE 47. Where grantee but not grantor had knowledge of prior contract of sale. Fowles v. Bentley [Mo. App.] 115 SW 1090. Assignee of judgment from judgment creditor who had no notice of unrecorded deed when judgment was rendered held protected though he had notice. Feinberg v. Stearns [Fla.] 47 S 797. Purchaser at judgment sale, though having notice, will be protected where judgment creditor was without notice when judgment was rendered. Id.

**74.** See post, § 2.

**75.** Recording is not the only way in which constructive notice may be imputed. West Lumber Co. v. Lyon [Tex. Civ. App.] 116 SW 652. The mere docketing of a judgment against a vendor whose deed has been placed in escrow to await payment of the purchase price is not constructive notice to the vendee. Vendee is entitled to benefit of all payments made to vendor until actual notice of lien. May v. Emerson [Or.] 96 P 454.

**76.** Doctrine charging parties to judicial proceedings with notice of orders and judgments therein is distinct from doctrine of lis pendens. J. M. West Lumber Co. v. Lyon [Tex. Civ. App.] 116 SW 652. One who had proved a claim in bankruptcy and thus became party to the proceeding before foreclosure sale therein at instance of another held charged with notice of sale, notice of application for sale having been mailed to all creditors. Id.

**77.** Facts sufficient to put purchaser on inquiry is equivalent to notice. Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co., 63 W. Va. 685, 60 SE 890. **Reservation of timber** previously sold to another. Id. Notice may be imparted by that which if **looked at** or **listened to and** then **followed up** by inquiry suggested by ordinary prudence would result in obtaining knowledge. Warden v. Addington [Ky.] 115 SW 241. **Trees** and **fence** showing agreed boundary line, or actual adverse **possession.** Id. Evidence held to sustain finding that lessee of **shooting and fishing privileges** had notice sufficient to excite inquiry as to rights of defendant acquired from lessee's grantors. St. Helen Shooting Club v. Barber, 150 Mich. 571, 14 Det. Leg. N. 797, 114 NW 399. Purchaser who has **information from one instrument** is ordinarily chargeable with notice of contents of other instruments affecting same estate to which examination of first instrument would naturally have led them. Croasdale v. Hill [Kan.] 96 P 37. Facts sufficient to arouse inquiry held sufficient to charge purchaser from one who sold for purpose of **defrauding creditors.** Crawford v. Lininger & Metcalf Co. [Kan.] 95 P 1134. **Circumstances which are merely equivocal** will not charge a purchaser or incumbrancer with the duty of making inquiry. First Nat. Bank of Peoria v. Farmers' & Merchants' Nat. Bank [Ind.] 86 NE 417. Circumstances held not sufficient to charge mortgagee with notice of **prior attachment proceedings.** Id. **Spur track** on land bought held to put purchaser on inquiry as to **rights of a railroad com-**

Hence possession [78] or visible user [79] is notice, and one who acquires an interest in property is bound to take notice of all facts disclosed by the direct chain of conveyances terminating with himself.[80] One may also have notice by reason of some

**pany.** Illinois Cent. R. Co. v. Sanders [Miss.] 46 S 241. That one had used wall on land of adjoining proprietor for **support of his building** prior to destruction by fire held not sufficient to charge purchaser of land on which wall was situated with knowledge of unrecorded contract giving right to continued support. Bowhay v. Richards [Neb.] 116 NW 677. Where subsequent mortgagee was told by mortgagor of existence of mortgage to plaintiff, he was not relieved by **merely searching record** but should have inquired of plaintiff. Wattles v. Slater [Mich.] 15 Det. Leg. N. 864, 118 NW 486. Where line had been drawn through record of acknowledgment of a deed, but subsequent purchaser though not seeing record relied on **abstract** containing facts calling for examination of title, which examination would have revealed **prior deed,** he was chargeable with notice thereof. Williams v. Butterfield, 214 Mo. 412, 114 SW 13. Evidence insufficient to charge purchaser with **equity of putative wife** of grantor in land conveyed. Middleton v. Johnston [Tex. Civ. App.] 110 SW 789. Assignee of note and mortgage showing they were **property of a minor** held bound to inquire into authority of guardian to transfer same. Gentry v. Bearss [Neb.] 118 NW 1077. Deed of all title and interest "as heir of V deceased" held notice of **relationship** between grantor and V suggesting **community property.** Veatch v. Gilmer [Tex. Civ. App.] 111 SW 746.

**78.** Is notice. Warden v. Addington [Ky.] 115 SW 241. Possession and deed good as between parties held notice to world of ownership of grantee. Burton-Whayne Co. v. Farmers' & Drovers' Bank [Ky.] 113 SW 445. Vendee's actual possession of realty is notice of **equitable rights.** Pasquay v. Keithley, 139 Ill. App. 548. Possession though **under deed with erroneous description** held notice to subsequent purchasers. Garard v. Weaver [Ind. App.] 84 NE 1092. Subsequent vendee held charged with notice of rights of prior vendee in actual possession **up to plainly marked boundary line.** Seberg v. Iowa Trust & Sav. Bank [Iowa] 119 NW 378. Actual possession held **notice to judgment creditor** of vendor. Allen West Commission Co. v. Millstead [Miss.] 46 S 256. Rule same whether judgment was by federal or state court. Id. Possession **of part only of tract** embraced within possessor's paper title in notice of his rights in entire tract. Terrell v. McLean, 130 Ga. 633, 61 SE 485. **Purchaser** of grain **from person in possession** held not justified in paying price to one who claimed under chattel mortgage. Gaertner v. Western Elevator Co., 104 Minn. 467, 116 NW 945. Purchaser chargeable with rights of **tenant in possession.** Ogden v. Garrison [Neb.] 117 NW 714. Possession of **cotenant** after foreclosure sale of her interest held not, under the circumstances, notice to purchasers who subsequently took deed from the other cotenant that first cotenant claimed under deed from second cotenant. Hilts v. Stroh, 112 NYS 30. Continued occupancy by tenants in possession when unrecorded deed was given will not constitute notice of grantee's rights. Feinberg v. Stearns [Fla.] 47 S 797. Possession **by one who is not life tenant** is not notice that remaindermen have parted with their interest, the life tenant being still living. Possession of grantee from remainderman and record of a certain mortgage executed by such grantee held not notice to judgment creditor of remainderman. Ex parte City of Anderson [S. C.] 62 SE 513. Possession **must be open, exclusive and unequivocal.** Paris Grocer Co. v. Burks [Tex.] 19 Tex. Ct. Rep. 769, 105 SW 174. Possession of large tract of which tract conveyed was part held insufficient as against grantor's creditors where tract conveyed was fenced off and unoccupied except for **pasture and hay.** Id. **Operation on land** under timber agreement held not notice of rights under subsequent agreement. Ohio Pail Co. v. Cook & Co. [Pa.] 71 A 1051. Sale of **newspaper and presses,** etc., held insufficient as against execution creditor of vendor, not having been followed by removal of property or notice by **advertising** of placing of **signs.** Reyer v. Rice, 36 Pa. Super. Ct. 178. Where prior to bankruptcy an owner had conveyed by unrecorded deed placing purchaser in possession, but at time of plaintiff's purchase under bankruptcy decree property was in possession of defendants who claimed **under deed from bankrupt** executed after his discharge in bankruptcy, and after mere delivery of possession by first grantee to bankrupt after latter's discharge, defendant's possession was not notice to plaintiff of unrecorded deed executed before bankruptcy, and hence plaintiff took title under bankruptcy decree. Vary v. Sensabaugh [Ala.] 47 S 196.

**79.** Existence and use of spur track on land bought held notice of contract rights of railroad company. Illinois Cent. R. Co. v. Sanders [Miss.] 46 S 241. Operation of railroad within 200 foot strip of land held not notice of company's contract rights in land outside the strip, railway company being by statute permitted to condemn only 200 feet. Chicago, etc., R. Co. v. Welch [Neb.] 118 NW 1116; Id. [Neb.] 118 NW 1117. Purchaser of adjacent property held chargeable with notice of existence of **cement walk** in front of certain lots and purpose thereof, he having walked up street before buying. Rollo v. Nelson, 34 Utah, 116, 96 P 263. Drainage **ditch** through land purchased held itself evidence of easement in favor of adjacent owners charging purchaser, regardless of actual knowledge. Brown v. Honeyfield [Iowa] 116 NW 731.

**80.** Purchasers are charged with notice of defects, restrictions or covenants appearing in recorded chain of title. Reservation of right to sue for damages to easements of light, air and access. Maurer v. Friedman, 125 App. Div. 754, 110 NYS 320. Recital in patent that it was issued on certificate "in favor of A, widow of J.," held not to charge persons claiming under patent that conveyance was to A as widow, or by virtue of her rights as widow. Thompson v. Bowen [Ark.] 113 SW 26. Deed reciting existence

relation in which he may stand.[81] There is a conflict as to whether a quitclaim grantee is a bona fide purchaser.[82] If one is a bona fide purchaser, he will not be affected by the fact that his grantor had notice,[83] and if he conveys to another, the fact that he takes a reconveyance after the appearance of record of a deed executed before he took his first deed cannot affect his rights.[84] While notice to a purchaser for value may be inferred from circumstances,[85] the proof must be such as to affect his conscience and show mala fides.[86]

§ 2. *Statutory records or filings as constructive notice. A. In general.*[87]—See 8 C. L. 1174

(§ 2) *B. Eligibility to record.*[88]—See 10 C. L. 1022—That its record may give constructive notice, an instrument must be properly executed and acknowledged,[89]

of a mortgage for $594 bearing interest from July 13 held not notice of another mortgage for different amount and dated after July 13, where $594 mortgage appeared released of record. Volk v. Eaton, 219 Pa. 649, 69 A 91. Recitals in chain of title held notice to defendants of existence of an early deed. McDonald v. Hanks [Tex. Civ. App.] 113 SW 604.

**81.** Purchaser as successor to option holder who had notice held to stand in latter's shoes so that he could not be innocent. Seibel v. Higham [Mo.] 115 SW 987. Wife taking deed pending action concerning property held not bona fide purchaser within lis pendens statute, where husband who was real purchaser had notice of the facts. City of Middlesboro v. Coal & Iron Bank, 33 Ky. L. R. 469, 110 SW 355. Where a mortgage is taken with notice of a trust in favor of one who contributed to consideration for conveyance to mortgagor, mortgage is subject to trust so that any title to contributor's interest acquired by mortgagee's administratrix under foreclosure will be held in trust for contributor or his grantee, though administratrix had no notice of the trust (Moultrie v. Wright [Cal.] 98 P 257), but if both mortgagee and personal representative are without notice, latter takes as innocent purchaser free from trust (Id.).

**82.** Quitclaim deed by its terms puts grantee upon notice he is getting a doubtful title. Abernathy v. South & W. R. Co. [N. C.] 63 SE 180. Quitclaim in chain of title held insufficient as notice of defects or equities. Brown v. Nelms [Ark.] 112 SW 373. No implication of defect in title can be drawn from use of quitclaim deed so as to make grantee in chain of title thereunder purchaser with notice. Coombs v. Aborn [R. I.] 68 A 817. Quitclaim grantee takes subject to record notice and, in addition, to such interest and equities as he could have discovered by exercise of reasonable diligence. Ennis v. Tucker [Kan.] 96 P 140. Held not to take subject to prior unrecorded quitclaim deed so concealed that it was not discoverable by exercise of reasonable diligence. Id. If quitclaim grantee acts in good faith, pays a valuable consideration, and has no actual notice of outstanding equities or unrecorded instruments, he takes subject to only those rights which are discoverable through investigation of records and by exercise of reasonable inquiries. Eger v. Brown, 77 Kan. 510, 94 P 803. Not necessary he should catechise vendor respecting latter's estate in the land when vendor on face of record appears to have an interest or estate to convey. Id. Quitclaim deed held superior to prior unrecorded conveyances. Id. Quitclaim grantee for value without notice holds fee of prior unrecorded deed and recordable equities (Hendricks v. Calloway, 211 Mo. 536, 111 SW 60), but his deed does not cover outstanding equities not subject of record (Id.).

**83.** Clark v. Hoover [Tex. Civ. App.] 110 SW 792; Combs v. Aborn [R. I.] 68 A 817.

**84.** Clark v. Hoover [Tex. Civ. App.] 110 SW 792.

**85, 86.** Crane's Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co., 108 Va. 862, 62 SE 954.

**87. Search Note:** See notes in 24 L. R. A. 543; 7 L. R. A. (N. S.) 415; 5 Ann. Cas. 258.

See, also, Chattel Mortgages, Cent. Dig. §§ 237-271; Dec. Dig. §§ 139-156; 6 Cyc. 1070-1079; 7 Id. 41; Mortgages, Cent. Dig. §§ 344-367; Dec. Dig. §§ 152-157; 27 Cyc. 1183-1192; Sales, Cent. Dig. §§ 657-703, 1366-1402; Dec. Dig. §§ 234-245, 471-474; Vendor and Purchaser, Cent. Dig. §§ 461-612; Dec. Dig. §§ 220-245; 24 A. & E. Enc. L. (2ed.) 90.

**88. Search Note:** See notes in 12 L. R. A. (N. S.) 240; 15 Id. 1129; 16 Id. 1072; 15 A. S. R. 294; 21 Id. 282.

See, also, Sales, Cent. Dig. § 684; Dec. Dig. § 235 (4); Vendor and Purchaser, Cent. Dig. § 529; Dec. Dig. § 231 (13-15); 24 A. & E. Enc. L. (2ed.) 77, 100, 114.

**89. Held not constructive notice though recorded:** Recorded mortgage assignment made by a corporation but not attested by its secretary as required by statute. Randall Co. v. Glendenning, 19 Okl. 475, 92 P 158. **Unacknowledged chattel mortgage.** Oakford v. Hill, 135 Ill. App. 511. **Unacknowledged deed.** Williams v. Butterfield, 214 Mo. 412, 114 SW 13. Laws 1887, p. 183 (Rev. St. 1899, § 3118 [Ann. St. 1906, p. 1778]), did not cure record of such deed not made a year before act was passed. Id. Evience held to sustain finding that deed had been duly acknowledged. Id. **Deed insufficiently acknowledged** held not color of title under act Feb. 13, 1895, requiring deeds to be registered before they can be color of title. Breckenridge Cannel Coal Co. v. Scott [Tenn.] 114 SW 930. Where probate, acknowledgment or order of registration of deed of land does not satisfy statute, registration is void. Johnson v. Eversole Lumber Co., 147 N. C. 249, 60 SE 1129.

**Acknowledgment sufficient:** Recital that one known "to be the person whose name is 'assigned' to the above contract," etc., held not to render acknowledgment insuffi-

and the record of instruments of a class not recordable is ineffective.[90] Under some statutes, chattel mortgages must be accompanied by a sufficient affidavit of consideration.[91] Probate for registration is required in some jurisdictions.[92]

(§ 2) *C. Necessity and effect of recording.*[93]—See 10 C. L. 1022—As to such instruments or claims as the law requires to be recorded or filed,[94] record or filing is

cient for record. Stark v. Kirkley, 129 Mo. App. 353, 108 SW 625.

**90.** That assignment of a claim was recorded held not notice to debtor in absence of statute authorizing or requiring such assignments to be recorded. Dial v. Inland Logging Co. [Wash.] 100 P 157. In absence of statute, fact that a bill of sale is recorded will not cure failure of purchaser to take possession of property under statute rendering sales fraudulent where vendor retains possession. Love v. Hill [Okl.] 96 P 623. Act April 3, 1905 (Sess. Laws, Hawaii 1905) No. 23, requiring registrar of conveyances to file plans of land and prescribing requisites of such plans, does not apply to maps or plans attached to and made integral parts of judgments or conveyances which do not refer to plats on file in registrar's office, and which were previously recordable under Rev. Laws 1905, §§ 506, 2380, relating respectively to recording of condemnation judgments and deeds. United States v. Merriam [C. C. A.] 161 F 303. Contract in name of holder of legal title to land but authorized only by equitable owner giving a law firm part of land for recovering same held not constructive notice though recorded. Lewright v. Davis [Tex. Civ. App.] 115 SW 599. Registration statute does not apply to **wills** and registration of a will is not notice. Harris v. Dudley Lumber Co., 147 N. C. 631, 61 SE 604. Under Comp. Laws 1907, §§ 1975, 1999, 2000, 3409, **patents are recordable,** and records thereof are admissible in evidence in place of originals on proof accounting for originals. Tate v. Rose [Utah] 99 P 1003.

**91.** Statutory affidavit of consideration should be liberally construed where chattel mortgage is bona fide. Howell v. Stone [N. J. Err. & App.] 71 A 914. Statement that consideration was "goods and chattels, a great variety of goods used on or about the farm" of mortgagor, held sufficient. Id. Affidavit under chattel mortgage act, § 4, (P. L. 1902, p. 487), stating consideration to be property, held not invalid on ground it should have stated that it was the "price" of the property. American Soda Fountain Co. v. Stolzenbach, 75 N. J. Law, 721, 68 A 1078. Affidavit may be made in behalf of corporate holder by officer thereof having authority and requisite knowledge and such affidavit is **affidavit of corporation** and not of agent or attorney, so that allegation of specific authority is not necessary. Id. That affidavit was made **by vice-president** held prima facie evidence he had authority. Id. Recitals held sufficient to show he had requisite knowledge. Id. Affidavit held not defective because not correctly stating **purpose** for which **advance of money** was made, misstatement being important only on issue of bona fides. Schneider v. Schmidt [N. J. Eq.] 70 A 688. Evidence held to establish truth of statement that advance was to partners jointly. Id. Record containing **false affidavit** of consideration held not notice to subsequent chattel mortgagee. Vanaman v. Fliehr [N. J. Eq.] 71 A 692. Affidavit showing merely assignment of another mortgage and bond to affiant **held not to show consideration** for mortgage in question. Simpson v. Anderson [N. J. Eq.] 70 A 696. Held bad, also, for stating facts by **recital only,** by frequent use of word "whereas." Id. Held bad for **failure to describe notes** on which affiant had become indorser, except by giving dates and amounts thereof. Id. Statement that consideration was "$1,500 due on said bond and mortgage," and certain other sums, and that **amount due** was $1,844 the aggregate of the sums, held insufficient, since statute requires statement of both consideration and amount due. Id.

**92.** Registration of deed is void if probate, acknowledgment, or order of registration, does not satisfy statute. Johnson v. Eversole Lumber Co., 147 N. C. 249, 60 SE 1129. Rev. Code c. 37, § 5, did not require probating officer to adjudge that certificate of acknowledgment of commissioner of deeds was in due form. Id. Registration of deed without authority from clerk held invalid. Cozad v. McAden, 148 N. C. 10, 61 SE 633. Indorsement "foregoing deed came to hand 30 Sept. 1869 and was then duly registered," held insufficient. Id. Adjudication that deed and certificate were correct held sufficient compliance with Code 1883, c. 27, § 1250, requiring adjudication that deed is duly acknowledged or proved. Cozad v. McAden [N. C.] 63 SE 944, rvg. 148 N. C. 10, 61 SE 633.

**93. Search Note:** See notes in 5 Ann. Cas. 339; 7 Id. 367; 8 Id. 104, 1095.

See, also, Sales, Cent. Dig. § 684; Dec. Dig. § 234(4); Vendor and Purchaser, Cent. Dig. §§ 513-539; Dec. Dig. § 231; 24 A. & E. Enc. L. (2ed.) 94.

**94.** Recording statute applies to **only recordable instruments.** Paris Grocer Co. v. Burks [Tex.] 105 SW 174. Rights of which law requires no evidence to be recorded such as vendor's liens, certain **trusts, etc.,** are not postponed to creditors for want of record. Id. Grantee's oral agreement to reconvey in a certain event held not to give grantor a **vendor's lien** good against grantee's creditors. Id.

**Record not necessary:** 1898 amendment of Civ. Code 1893, § 1968, requiring record of certain instruments within 40 days after execution, held not applicable to agreements previously made. Miller v. Wroton [S. C.] 63 SE 62. Paper reciting that owner of certain chattels turned same over to be held for and delivered to a bank to cover certain checks **held sale and not mortgage** so that registration was not necessary. Leak v. Bank of Wadesboro [N. C.] 62 SE 733. **Lease** stipulating that erections placed on land by lessee should belong to lessor if the lease should terminate before a speci-

essential for the protection of the holders against the claims of subsequent creditors or bona fide purchasers [95] whose deeds or other instruments are first duly recorded;[96]

fied time held not in nature of a chattel mortgage, but enforceable against lessee's trustee in bankruptcy though unfiled. Niagara Falls H. P. & Mfg. Co. v. Schermerhorn, 111 NYS 576. **Assignment of** three year realty **lease** held not required to be recorded as against assignor's creditors. Speidel Grocery Co. v. Stark & Co., 62 W. Va. 512, 59 SE 498. **Contract** binding plaintiff **to construct building** to exceed $1,000 in cost on certain commission held a mere authorization in writing by which plaintiff was to act as defendant's agent, and not required to be recorded. Needham v. Chandler [Cal. App.] 96 P 325. Transaction by which machines are placed on trial with prospective buyers with **option to buy** but with no agreement to pay rent is not conditional sale or lease required by Comp. St. 1907, § 26, c. 32, to be recorded. Singer Sewing Mach. Co. v. Omaha Umbrella Mfg. Co. [Neb.] 119 NW 958. Agreement by life cestui que trust that if property was sold his interest should be applied on certain obligations held not a "conveyance of an equitable interest in real property," required by Rev. Laws, c. 127, § 4, and c. 117, § 3, to be recorded, but a **mere assignment of proceeds of sale** when made, and valid against creditors though not recorded. Cashman v. Bangs, 200 Mass. 498, 86 NE 932. Recordation acts do not apply to **dower,** inchoate or consummate. Smith v. Fuller, 138 Iowa, 91, 115 NW 912.

**95. Unrecorded deeds:** Held void as against **subsequent purchasers.** West Coast Lumber Co. v. Griffin [Fla.] 48 S 36; Rushing v. Lanier [Tex. Civ. App.] 111 SW 1089. From heirs. Clark v. Hoover [Tex. Civ. App.] 110 SW 792. At execution. Files v. Law [Ark.] 115 SW 373. Where prior purchaser's possession of adjacent land was not sufficient notice of his rights. Chicago, etc., R. Co. v. Welch [Neb.] 118 NW 1116; Id. [Neb.] 118 NW 1117. As against subsequent **purchasers and creditors** acquiring liens by judgment or otherwise without notice. Feinberg v. Stearns [Fla.] 47 S 797. **Execution creditor** equally with subsequent purchaser will be protected unless it is shown that he had notice at time of rendition of judgment. Id. Execution creditor held not affected by prior unknown attempted conveyance by prospective heir. First Nat. Bank of Durand v. Phillpotts [Mich.] 15 Det. Leg. N. 1027, 119 NW 1. **Attachment lien** prevails over unrecorded deed of which creditor was without notice. Paris Grocer Co. v. Burks [Tex.] 19 Tex. Ct. Rep. 769, 105 SW 174. Immaterial whether or not creditor has examined records as to debtor's title. Id. Where **United States** condemned land in Hawaii and afterwards took deed from owners, registration of both **deed and judgment in condemnation** was essential to protection as against subsequent purchasers, under Rev. Laws Hawaii 1905, § 506, requiring filing and recording of judgments in condemnation before title shall vest in plaintiff, and § 2380 avoiding unrecorded deeds as to subsequent purchasers without notice. United States v. Merriam [C. C. A.] 161 F 303.

**Unrecorded mortgages and assignments:** Deed held prior to existing mortgage not recorded when deed was made. Brown v. Nelms [Ark.] 112 SW 373. Unrecorded **chattel mortgage** void as against creditors and purchasers. Cummings v. Badger Lumber Co., 130 Mo. App. 557, 109 SW 68. Under Rev. St. 1895, art. 3328, a chattel mortgage must be registered in order to be valid against subsequent purchasers, creditors, and lienholders in good faith. First Nat. Bank of Portales, N. M. v. McElroy [Tex. Civ. App.] 112 SW 801. Chattel mortgage withheld from record by agreement held void under Idaho Statute and **contestable in bankruptcy.** In re Hickerson, 162 F 345. **Judgment** held superior to previously foreclosed but unrecorded chattel mortgage. Barkley v. May, 3 Ga. App. 101, 59 SE 440. **Assignee of subsequent chattel mortgage** as well as subsequent mortgagee is **"purchaser,"** within Code 1897, § 2906, providing that no unrecorded chattel mortgage is valid against existing creditors or subsequent creditors. Central Trust Co. of Illinois v. Stepanek, 138 Iowa, 131, 115 NW 891. **"Mortgagees in good faith"** in P. L. 1902, p. 487, § 4, includes mortgagee secured as to **pre-existing indebtedness.** Vanaman v. Fliehr [N. J. Eq.] 71 A 692. "Subsequent chattel mortgagee in good faith" is one who takes mortgage without knowledge of existence of prior mortgage. Id. Chattel mortgage taken for full value, but with knowledge mortgagor was insolvent, and not filed until 12 days before filing of bankruptcy petition, held void under New York law as against **creditors both prior and subsequent.** In re Shiebler, 165 F 363. Chattel mortgage not filed as required by New York Lien Law, § 90 (Laws 1897, p. 536, c. 418), is void as against **general creditors,** though they cannot attack it until in position to seize property by virtue of judgment, attachment, or otherwise. In re Gerstman [C. C. A.] 157 F 549. Trustee **in bankruptcy** could attack mortgage though there were no judgments against bankrupt at time of adjudication. Id. Grantee taking deed and satisfaction of mortgage on the land from grantor who was record owner of mortgage held protected against assignee of note and mortgage who **had not recorded assignment,** he having no knowledge of such assignment. Marling v. Jones [Wis.] 119 NW 931. Not bound to insist on production of note and mortgage. Id. That deed excepted mortgage from covenant against incumbrances did not place grantee in position of debtor paying mortgage debt, he being charged only with notice of existence of mortgage and name of record mortgagee. Id.

**Unrecorded conditional sale contracts:** Repeal of Laws 1897, p. 541, c. 418, § 115, exempting contracts for conditional sale of pianos from requirements of § 112, requiring filing, made failure to file an existing contract void as to subsequent purchasers, mortgagees, etc. Vinciguerra v. Fagan, 57 Misc. 224, 109 NYS 317. Not unconstitutional if so construed. Id. Lien Law § 112, et seq., requiring filing of conditional sale contracts contemplates making and filing of an agreement for each sale made and not an **omnibus agreement** in advance of all of fu-

but recording does not affect the validity of an instrument as such,[97] and hence an unfiled or unrecorded instrument is valid as between the parties[98] and as against

ture sales. Scherl v. Flam, 129 App. Div. 561, 114 NYS 86. Unrecorded reservation of title held invalid **against purchaser** of an interest in property without notice, though entitled to priority over **subsequent** unrecorded chattel **mortgage.** Code Ga. 1895, § 2777. In re Emerson Min. Co., 165 F 547. Subsequent mortgage held superior to unrecorded conditional sale contract of which mortgagee had no notice **though mortgage might be voidable** by trustee in **bankruptcy** as a preference. In re Hager, 166 F 972. Not superior as to property sold after mortgage was given. Id. Under P. L. 1898, p. 670, rendering void unrecorded conditional sale contracts as against subsequent mortgagees, etc., without notice, subsequent real estate mortgagee held not entitled to claim machinery sold under unrecorded conditional sale contract, he being able to hold only such property as belonged to buyer and had become permanently affixed to realty. Falaenau v. Reliance Steel Foundry R. Co. [N. J. Eq.] 69 A 1098. Unrecorded conditional sale contract is ineffective against **mortgage with after-acquired property clause,** personalty having been attached to realty. Revisal N. C. 1905. Union Trust Co. v. Southern Sawmills & Lumber Co. [C. C. A.] 166 F 193. Rule different as to loose personalty such as live stock. Id. Receiver or general creditors of insolvent corporation held not **"judgment creditors"** within P. L. 1898, pp. 699, 700, §§ 71, 72, relating to conditional sales, and protecting only judgment-creditors, subsequent purchasers, and mortgagees, without notice. Smith v. Hotel Ritz Co. [N. J. Eq.] 70 A 137. Lien Law § 112, et seq., requiring filing of conditional sale contracts does not apply to judgment creditors, but only to "subsequent purchasers, pledgees, and mortgagees." Scherl v. Flam, 129 App. Div. 561, 114 NYS 86. Property held under unrecorded contract of conditional sale passes to vendee's **trustee in bankruptcy.** In re Perkins, 155 F 237. Agreement between seller and purchaser of goods, whether regarded as conditional sale or chattel mortgage, held void as against purchaser's estate in bankruptcy, same not having been filed. Pontiac Buggy Co. v. Skinner, 158 F 858. Immaterial goods were not in existence when contract was made, since seller should have filed contract when goods were delivered. Id.

**Miscellaneous:** Purchaser taking title in fee held to take free of **unfiled mechanic's lien,** he being without notice, and not being within Code 1896, § 2724, declaring mechanics' lien superior to "liens, mortgages and incumbrances." Martin v. Clark [Ala.] 46 S 232. Sale under trust deed by substituted trustee is void, **substitution of trustee** not having been recorded. Polk v. Dale [Miss.] 47 S 386. Purchaser held unaffected by unrecorded **party wall agreement.** Bowhay v. Richards [Neb.] 116 NW 677. Neither Idaho statute nor Ballinger's Ann. Codes & St § 4578, requiring filing or possession in **sales of personalty** as against "existing creditors" or innocent purchasers, held applicable where sale was made before indebtedness was created and before property was removed into Idaho. Greenwood v. Corbin, 48 Wash. 357, 93 P 433.

**96.** Of contracts for sale of land, that which is first registered is superior under Revisal 1905, § 980. Combes v. Adams [N. C.] 63 SE 186. Priority between purchasers depends on priority of record, though deed first recorded was given to defraud subsequent purchaser. McDonald v. Sullivan, 135 Wis. 361, 116 NW 10. Subsequent record will not avail second purchaser, his remedy being action to set aside fraudulent deed. Id. **Subsequent recorded deed prevails** over prior unrecorded one. Einstein v. Holliday-Klotz Land & Lumber Co., 132 Mo. App. 82, 111 SW 859. Over prior undelivered and unrecorded deed. Davis v. Robinson, 34 Super. Ct. 371. Over prior unrecorded deed for ditch and right of way. Swank v. Sweetwater Irr. & P. Co. [Idaho] 98 P 297. Extent of **adverse possession** by first grantee held not determinable by calls of unrecorded conveyance. Id. That **consideration** for second deed first recorded is **not fully paid** when first deed is recorded does not affect title of second grantee. Lowden v. Wilson, 233 Ill. 340, 84 NE 245. Prior **unrecorded deed** to good faith purchaser for value takes precedence of **attachment or judgment** if recorded before any deed based on such attachment or judgment. Mahoney v. Salsbury [Neb.] 120 NW 144. Grantee held good faith purchaser. Id. **Mechanic's lien** held inferior to **mortgage** recorded before filing of lien notice. Trust Co. of America v. Casey [Ky.] 115 SW 780.

**97.** Though recording of a deed makes record or certified copy presumptive evidence of execution, and of recitals therein as between parties, either party may show deed to be void for any sufficient reason. Blount v. Blount [Ala.] 48 S 581. Record of conditional sale contract or delivery of duplicate under § 115 of lien law where it relates to household goods, does not affect validity or existence of bill of sale one way or the other on its merits, but merely saves it from invalidity as against subsequent purchasers. Barasch v. Kramer, 115 NYS 176.

**98.** Unregistered **contract for sale of land** valid between parties. Freeman v. Bell [N. C.] 63 SE 682. Failure to record **deed or mortgage** does not invalidate same in absence of fraud on creditors. Clark v. Lewis [Mo.] 114 SW 604. Unrecorded **chattel mortgage** valid as between parties. Cummings v. Badger Lumber Co., 130 Mo. App. 557, 109 SW 68. Unrecorded and unrecordable chattel mortgage held valid as between parties, and against receiver of one purchasing property subject to mortgage in absence of showing that there were creditors of purchaser who acquired lien because of insolvency proceedings. Fidelity Trust Co. v. Staten Island Clay Co., 70 N. J. Eq. 550, 67 A 1078. For opinion on rehearing see Id., 70 N. J. Eq. 558, 62 A 441. **Bill of sale** given as security is valid as between parties though not accompanied by affidavit of good faith required by Ballinger's Ann. Codes & St. § 4558 (Pierce's Code, § 6531). Hicks v. Farrell [Wash.] 96 P 515.

**Unrecorded conditional sale contract** is

prior creditors and persons who have notice thereof [99] either actual or constructive,[1] or who for any other reason are not bona fide purchasers.[2] To be a purchaser one

valid as between parties and as to persons with notice. Zacharia v. Cohen Co. [Iowa] 119 NW 136. Good as between vendor and **vendee's trustee in bankruptcy.** In re Hager, 166 F 972. Reservation of title to sawed timber to secure monthly payments as cut held governed by Code Ga. 1895, §§ 2776, 2777, under which reservation is good as between parties and general creditors of purchaser unless they extended credit after possession taken by purchaser and in reliance on apparent ownership (In re Pickens Mfg. Co., 166 F 585), but invalid as against intervening liens or conveyances (Id.), and therefore good as against purchaser's trustee in bankruptcy, in absence of showing there were creditors of such preferred classes (Id.). **Vendee's receiver** in insolvency cannot attack conditional sale under P. L. 1898, p. 670, rendering such sales void against judgment creditors, subsequent purchasers and mortgagees without notice unless conditions are expressed in recorded writing, where he does not represent judgment creditors. Falaeneau v. Reliance Steel Foundry R. Co. [N. J. Eq.] 69 A 1098.

**99.** On issue of priority of unrecorded mortgage, held necessary in bankruptcy to ascertain when claims of other creditors arose. Teague v. Anderson Hardware Co., 161 F 765. Under Code § 2906, invalidating as against **existing creditors** without notice sales **where vendor retains possession** unless instrument of conveyance is filed for record, burden is on defendants to show that judgment creditor had notice of the transfer, where latter sues to subject property to payment of his claim. Rankin v. Schultz [Iowa] 118 NW 383. In suit to subject property to payment of a judgment, fact that no execution was levied on property before plaintiff had notice of fraudulent transfer thereof held immaterial since suit itself was equivalent to equitable levy rendering applicable Code § 2906. Id. Seller or assignee held entitled to recover against subsequent vendee having notice of nonpayment of balance under **unrecorded conditional sale contract.** Hogan v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 830, 118 NW 140. Unrecorded conditional sale contract is valid between parties and as against persons with notice. Zacharia v. Cohen Co. [Iowa] 119 NW 136. Seller's lien held prior to mortgage taken with notice of unrecorded conditional sale and nonpayment of price. Id. Evidence held to show notice. Id. Recital in deed held insufficient to charge grantee with notice of **unrecorded mortgage** at variance with recital, where record showed release of mortgage corresponding to recital. Volk v. Eaton, 219 Pa. 649, 69 A 91. Subsequent chattel mortgagee by conversation at time mortgage was given and recital in mortgage held chargeable with knowledge of prior outstanding unrecorded mortgage, and not justified in believing reference was to another void mortgage appearing of record. Gaertner v. Western Elevator Co., 104 Minn. 467, 116 NW 945. Purchaser of mortgaged property from holder of unrecorded mortgage who had obtained possession held not justified in paying proceeds to holder of subsequent mortgage, though subsequent mortgage was recorded. Id. Actual notice to creditors of existence of **unrecorded deed** is as effective as record notice. Clark v. Lewis [Mo.] 114 SW 604. Operation of railroad on regular 200 foot strip railway companies could condemn in the state held not notice of company's unrecorded deed embracing land outside of such strip. Chicago, etc., R. Co. v. Welch [Neb.] 118 NW 1116; Id., 118 NW 1117. Recital "subject to easement of said railway" held insufficient as notice. Chicago, etc., R. Co. v. Welch [Neb.] 118 NW 1117. Title under subsequent deed first recorded will not be defeated on ground of notice of prior deed unless proof is so positive as to leave no reasonable doubt that subsequent deed was an act of bad faith toward first purchaser. Lowden v. Wilson, 233 Ill. 340, 84 NE 245. Burden on first purchaser to show bad faith and want of consideration. Id. Evidence insufficient to show notice of prior unrecorded deed. Id. That second grantee had paid $700 or $800 on outstanding incumbrances held evidence of good faith in procuring quitclaim deed. Id. Knowledge of enjoyment of party wall easement before destruction of buildings by fire held not to charge purchaser of land on which wall was situated with notice of existence of **unrecorded party wall agreement.** Bowhay v. Richards [Neb.] 116 NW 677.

**Notice held immaterial:** Notice to subsequent chattel mortgagee will not supply place of registration. North State Piano Co. v. Spruill [N. C.] 63 SE 723. Recital in mortgage showing an incumbrance held not waiver of registration of incumbrance. Id. Where defendant's grantor was record owner, fact that defendant knew that his grantor's father had devised the land to another son before deeding to defendant's grantor held not to affect defendant's title, it being held that no notice however full can supply place of registration. Harris v. Dudley Lumber Co., 147 N. C. 631, 61 SE 604.

**1.** Failure to record a senior deed will not in all cases protect a junior purchaser without actual notice (West Lumber Co. v. Lyon [Tex. Civ. App.] 116 SW 652), since constructive notice may be imputed by reason of other matters. See ante § 1, subd. Notice or Knowledge.

**2.** Unrecorded **deed** vests title from time of delivery as against grantor and all others except creditors, and purchasers for value. Warren v. Williford, 148 N. C. 474, 62 SE 697. One purchasing for nominal consideration and being in possession of map showing ownership in plaintiff held not bona fide purchaser within St. 1898, § 2241, giving precedence to subsequent conveyances first recorded. Wisconsin River Land Co. v. Selover, 135 Wis. 594, 116 NW 265. Purpose of statute is to protect one who believes he is getting good title and pays substantial price, not one whose ignorance of title is deliberate and who pays only nominal sum. Id. Sufficiency of **mortgage** record held immaterial, it not appearing defendants were bona fide purchasers. Stark v. Kirkley, 129 Mo. App. 353, 108 SW 625. Unrecorded mortgage to secure future advances held valid between

must have acquired some apparent or real interest in the property involved.[3] Statutes requiring mortgages to be recorded contemplate the recording of assignments thereof also though they do not expressly so provide.[4] Of two unrecorded conveyances, the older prevails.[5] A purchaser from an heir may avail himself of the benefits of the recording [6] laws.

Recording is usually timely if it precedes subsequent purchasers or liens,[7] but sometimes only a reasonable time is allowed [8] or a statutory period.[9] An instrument duly filed in the proper office is presumed to have remained there until such time as it may be elsewhere found.[10]

(§ 2) *D. Sufficiency, operation, and effect of record.*[11]—See 10 C. L. 1025—Statutory provisions relative to recording or filing must be at least substantially com-

parties and as to all the world except subsequent purchasers or mortgagees in good faith and for value. Claridge v. Evans, 137 Wis. 218, 118 NW 198. St. 1898, § 2313, avoiding unfiled chattel mortgages "against any other person than parties thereto," does not preclude holder of an unfiled chattel mortgage from recovering from a mere trespasser. James Music Co. v. Hankwitz, 137 Wis. 302, 118 NW 806. Under Code Ga. 1895, §§ 2776, 2777, where contract is oral, **reservation of title** is void even against judgments or liens antedating sale, but if reservation of title is written though not properly executed and recorded, it is good between parties and against general creditors and pre-existing liens, and subject only to claims due to reliance on buyer's apparent ownership. In re Atlanta News Pub. Co., 160 F 519. Sale pursuant to certain correspondence held written contract of conditional sale valid against bankrupt, general creditors and those who had not given credit on faith of ownership. Id.

**3.** Execution purchaser after debtor had been divested of all legal and equitable interest held not protected under Code § 2925. Witmer v. Shreves [Iowa] 120 NW 86. Mere levy of attachment or execution does not entitle one to protection as "subsequent purchaser." Albia State Bank v. Smith [Iowa] 119 NW 608. Judgment creditor claiming as purchaser under act on recording of instruments affecting realty must have purchased at execution sale. Id.

**4.** Where the mortgage was recorded but not its assignment and the assignor subsequently cancelled such record and took a new mortgage, rights of the assignee were subject to those of assignee of second mortgage under Code 1897, § 2906, though such statute does not expressly refer to assignments. Central Trust Co. of Illinois v. Stepanek, 138 Iowa, 131, 115 NW 891. Rule applicable to chattel as well as to realty mortgages. Id.

**5.** Where equitable owner first conveyed timber and then assigned his contract of purchase and neither instrument was recorded. McGregor v. Putney [N. H.] 71 A 226. Where equitable owner's sale of timber violated his contract with vendor, assignee was limited to recovery for timber cut after notice of assignment. Id. Subsequent unrecorded chattel mortgage held inferior to unrecorded conditional sale contract. Ga. Code. In re Emerson Min. Co., 165 F 547.

**6.** First Nat. Bank v. Phillpotts [Mich.] 15 Det. Leg. N. 1027, 119 NW 1.

**7. Mortgage** recorded before prior creditors obtain a lien on the mortgaged property is valid as against them. Brunswick-Balke-Collender Co. v. Krause, 132 Mo. App. 328, 112 SW 20. Verbal agreement between lessor and lessee for substitution of chattels on which there was lien for rent held not to give lien on substituted chattels as against mortgage thereafter recorded. Id. Where vendor of personalty delivered same to vendee before recording mortgage taken to secure price, rights of subsequent purchaser were superior to those of mortgagee though latter used due diligence in recording mortgage. Taylor v. Mills, 148 N. C. 415, 62 SE 556. Registration in 1893, of **deeds** executed prior to June 1, 1886, held authorized, Laws 1885, p. 233, c. 147 (Revisal 1905, § 980), containing no limitation as to time where conveyances shall be registered, but merely providing they shall not be valid as against creditors or purchasers for value except from time of registration. Cozad v. McAden, 148 N. C. 10, 61 SE 633. Deed in settlement of lien on property is inferior to recorded prior deed to another though recorded prior deed is inferior to the lien. Hodnett v. Stewart [Ga.] 61 SE 1124. Record of **attorney's lien** held ineffective as against one who had already purchased in ignorance thereof. Bendheim v. Pickford, 31 App. D. C. 488.

**8.** Though statute requiring record of chattel mortgage did not specify time, recording must be within a reasonable time. Brunswick-Balke-Collender Co. v. Kraus, 132 Mo. App. 328, 112 SW 20. Unexplained delay for five days as to mortgage executed at county seat held unreasonable. Id.

**9.** Under 1 Stanton's Rev. St. c. 24, §§ 15, 23, deed by man and wife not filed for record within eight months was void as to wife. Burton-Whayne Co. v. Farmers' & Drovers' Bank [Ky.] 113 SW 445.

**10.** Unexplained appearance of chattel mortgage in possession of mortgagee held not to have retroactive effect. Murray v. Geiser Mfg. Co. [Kan.] 99 P 589. Presumed that at all times prior to such appearance mortgage was in custody of register of deeds. Id.

**11. Search Note:** See notes in 15 A. S. R. 294; 96 Id. 397; 7 Ann. Cas. 356.

See, also, Sales, Cent. Dig. § 684; Dec. Dig. § 234 (4); Vendor and Purchaser, Cent. Dig. §§ 519-531; Dec. Dig. § 231 (16-17); 24 A. & E. Enc. L. (2ed.) 105.

plied with[12] including provisions making indexing a part of the recording,[13] and the instrument must be recorded in the proper office[14] and county;[15] but one who has duly deposited a valid recordable instrument with the proper officer for record will be protected notwithstanding failure of duty on the part of the officer,[16] and curative acts are common.[17] Unauthorized or careless destruction or mutilation of a record leaves it still constructive notice.[18]

**12.** Filing and indexing of chattel mortgage is sufficient under Sess. Laws 1899, p. 158, c. 98, § 2, without copying mortgage at length on record, as in case of realty mortgages. Averill Mach. Co. v. Allbritton [Wash.] 97 P 1082. Filing of renewal affidavit does not validate filing of mortgage not made in compliance with § 4750, Mansfield's Dig. St. Ark. (Ind. Ter. Ann. St. 1899, § 3061), requiring indorsement "this mortgage to be filed but not recorded," properly signed by mortgagee, his agent or attorney. Fritz v. Brown, 20 Okl. 263, 95 P 437. Doctrine of notice held not applicable where trust deed as recorded had on its face no pertinency to foreclosure sale attacked as invalid on ground of insufficient record of substitution of trustee referring to such trust deed. Provine v. Thornton [Miss.] 46 S 950. Substitution held not sufficiently recorded. Id.

**13.** Mortgage covering both realty and personalty and recorded in realty records but not indexed in general index of chattel mortgages, as provided by B. & C. Comp. § 5631, dispensing with recording of such mortgages in personalty records when same is so indexed, held not constructive notice to subsequent purchasers of personalty. Ayre v. Hixson [Or.] 98 P 515.

**14.** Filing land contract or certificate of survey in general land office instead of with county clerk held not constructive notice. Clark v. Hoover [Tex. Civ. App.] 110 SW 792.

**15.** Chattel mortgage should be recorded in county of owner's residence. Miller Supply Co. v. Louisa Water Co.'s Assignees, 33 Ky. L. R. 388, 108 SW 870. Code 1896, § 999, requiring chattel mortgages to be recorded in county of mortgagor's residence and "also in county where property is at date of mortgage," record in county of residence of mortgagor is sufficient though property kept at such residence was temporarily in another county when mortgage was executed. Davis & Co. v. Thomas [Ala.] 45 S 897. Evidence sufficient to show record of chattel mortgage in proper county. Charleston Live Stock Co. v. Collins, 79 S. C. 383, 60 SE 944. Record of deed in old county wherein land was situated, prior to election of officers for new county embracing such land, and before its political and official organization, held lawful. Sapp v. Cline [Ga.] 62 SE 529. Rev. St. 1893, § 1968, requires deeds, etc., to be recorded in county where land is situated, and record in another county is a nullity as against subsequent creditors and purchasers without notice. Cole v. Ward, 79 S. C. 573, 61 SE 108.

**Unorganized counties:** Legislature may provide for registration of deeds and mortgages of property situated in unorganized counties and designate place for registering such instruments. First Nat. Bank v. McElroy [Tex. Civ. App.] 112 SW 801. Registration of chattel mortgage covering property in an unorganized county in county to which such county was attached for judicial purposes held not notice where unorganized county was attached to another county for registration purposes. Id. That mortgagor residing in unorganized county was qualified for jury service in county to which his county was attached for judicial purposes held not to make him resident of latter county so as to authorize registration therein. Id. Rev. Laws 1895, art. 4641, providing for record in county to which unorganized county is attached for judicial purposes, held not applicable to chattel mortgages. Id. Acts 1876, p. 242, c. 144, § 6, attaching unorganized county to parent county for judicial, surveying "and all other purposes of county government," held to authorize registration in parent county of instruments affecting land or personalty in unorganized county. Id. Not repealed as to such registration by Acts 1881, p. 12, c. 18; Acts 1883, p. 40, c. 52; Id., p. 63, c. 67; Acts 1887, p. 80, c. 98; Acts 1891, p. 36, c. 34; Acts 1893, p. 166, c. 110; Acts 1897, p. 85, c. 71; Acts 1901, p. 54, c. 39; or Acts 1903, p. 92, c. 67. Id.

**16.** Mortgage is filed within recording statute when received by recording officer for purpose of being recorded. **Neglect or mistake** of officer in recording instrument does not affect mortgagee. Covington v. Fisher [Okl.] 97 P 615. Register's **failure to properly index** realty mortgage held not to release land therefrom in favor of subsequent purchaser. Eureka Lumber Co. v. Satchwell, 148 N. C. 316, 62 SE 310. Lease duly recorded held to impart notice though filing was not properly indexed by register of deeds. Kansas Natural Gas Co. v. Harris [Kan.] 100 P 72. If a mortgage entitled to be recorded is left with proper officer for that purpose and fees are paid, and mortgage is not withdrawn until after indorsement thereon of recorder's certificate stating date of entry of record and volume and page of mortgage book, and there is nothing to show why mortgagee should not rely on certificate, his lien will be protected against subsequent purchaser without actual notice, though by mistake of recorder or clerk **name of mortgagor** is not correctly transcribed in mortgage book nor in mortgage book index. Prouty v. Marshall, 36 Pa. Super. Ct. 527, reviewing previous Pennsylvania cases. Validity of mortgage given by a corporation held not impaired by failure of register to record **corporate seal.** Edwards v. Snow Hill Supply Co. [N. C.] 63 SE 740. Under Gen. St. 1901, § 1222, by which notice begins from time of filing, oil and gas lease imparted notice from such time though register in recording **omitted** words which left part of lease meaningless. Zeiner v. Edgar Zinc Co. [Kan.] 99 P 614.

**17.** Under Rev. St. 1899, § 3118 (Ann. St. 1906, p. 1779), providing that as to unacknowledged or unproved instruments affect-

It is ordinarily the duty of a purchaser or incumbrancer to examine the records as to instruments in his chain of title,[19] and whether one does so or not he is affected with notice of every fact the knowledge of which might have been obtained from the record,[20] or to which the facts there appearing would have led him;[21] but

ing realty records thereof made one year before the act took effect should be notice, and that thereafter when any "such instrument" shall have been recorded one year same should be notice, held, record of unacknowledged contract executed after act took effect was not notice. Fowler v. Bentley [Mo. App.] 115 SW 1090.

**18.** Line drawn through acknowledgment on record. Williams v. Butterfield, 214 Mo. 412, 114 SW 13. That deed was duly acknowledged and recorded may be established by parol. Id.

**19.** Purchaser is charged with notice of all facts disclosed by any recorded deed or other instrument in chain of title. Thompson v. Bowen [Ark.] 113 SW 26; Williams v. Butterfield, 214 Mo. 412, 114 SW 13; Teague v. Sowder [Tenn.] 114 SW 484. If record disclosed clerical error by recorder, purchaser would be put on inquiry. Teague v. Sowder [Tenn.] 114 SW 484. Recitals in recorded chain of title held notice of early deed. McDonald v. Hanks [Tex. Civ. App.] 113 SW 604. **Trust deed outside chain of title** held not constructive notice to subsequent mortgagee. Rohde v. Rohn, 232 Ill. 180, 83 NE 465. Civ. Code, § 1213, making recorded conveyances constructive notice, has no application to deeds by strangers to record title. Bothin v. California Title Ins. Trust Co., 153 Cal. 718, 96 P 500. Certificate of entry issued prior to grant of patent to another person is not in line of title of persons holding under patent. Thompson v. Bowen [Ark.] 113 SW 26. A grantee who takes a deed directly from his grantor's grantor is **chargeable with notice** from the record of incumbrances placed on the property by his grantor, he being warned of the necessity of examining the records for such incumbrances, by his grantor's relation to the property. Masters v. Clark [Ark.] 116 SW 186. Under Rev. Pol. Code, §§ 868-871, requiring register of deeds to keep numerical indexes of deeds, mortgages, etc., in addition to grantors' and grantees' indexes, purchaser is charged with constructive notice of recorded mortgage given by one not in chain of title and exciting inquiry as to mortgagor's interest. Fullerton Lumber Co. v. Tinker [S. D.] 118 NW 700. Presumed register kept statutory indexes. Id.

**20.** Where record showed that maker of note and trust deed had no title to land and that prior trust deed was of record unreleased. Rohde v. Rohn, 232 Ill. 186, 83 NE 465. One cannot plead ignorance of public records to which he has access and which affords all means of information necessary to obtain positive knowledge. Sumpter v. Burnham [Wash.] 99 P 752. Charge that record binds if party sought to be bound "has actual notice of record" held properly refused, record being notice without actual knowledge. McElwaney v. McDiarmid [Ga.] 62 SE 20. Purchaser at sale by husband's administrator held not purchaser in good faith, records showing land was part of wife's estate. Vivion v. Nicholson [Tex. Civ. App.] 116 SW 386. Registration of deed apparently referring to N. league held constructive notice, it not appearing that there was any other land like that described, owned or claimed by N. Houston Oil Co. v. Kimball [Tex. Civ. App.] 115 SW 662. Instruction ignoring constructive notice from record held properly refused. Id. A grantee has constructive notice of **prior conveyance** whereby grantor purported to convey the fee, though he had no title at the time and that after-acquired title passed to first grantee. Tilton v. Flormann [S. D.] 117 NW 377. Grantee who had duly recorded deed held not bound to look up persons intending to purchase from her grantor or to make improvements, but held entitled to rely on record as giving constructive notice. Waits v. Moore [Ark.] 115 SW 931. Where in trespass to try title deeds offered by defendant had been duly recorded, they were not inadmissible on ground plaintiffs had no notice or knowledge thereof. Millwee v. Phelps [Tex. Civ. App.] 115 SW 891. Subsequent purchaser charged with notice of recorded **title bond.** Martin v. Turner [Ky.] 115 SW 833. Landlord who receives his tenant's crop for purpose of discharging a lien held by him against tenant is chargeable with notice of **record of a mortgage** inferior to the lien and bound to account to mortgagee for any surplus instead of turning it over to tenant. Peoples v. Hayley, Beine & Co. [Ark.] 116 SW 197. Record of mortgage professing on its face to relate exclusively to a wife's property but apparently by mistake including property of husband held not to operate as a mortgage on his land as against third persons. W. F. Taylor Co. v. Sample [La.] 48 S 439. In action to enforce equitable mortgages, proof that contracts sued on had been signed, acknowledged and recorded before defendants' purchase held to show that defendants had knowledge of plaintiffs' rights. Stark v. Kirkley, 129 Mo. App. 353, 108 SW 625. Subsequent mechanic's lien held inferior to mortgage properly filed and indexed. Averill Mach. Co. v. Allbritton [Wash.] 97 P 1082. Recorded **trust deed** of leasehold held constructive notice to creditors of remote grantor who was still in possession. Speidel Grocery Co. v. Stark & Co., 62 W. Va. 512, 59 SE 498. Purchaser of mortgaged land is given all protection statute was designed to afford if he is permitted to deal with safety with one appearing by record to be owner of mortgage securing a non-negotiable debt (Bettle v. Tiedgen, 77 Neb. 795, 116 NW 959), and pays at his peril original mortgagee after due record of **assignment of mortgage** (Id.). Answer held insufficient as plea of agency or estoppel. Id. Recorded transcript of **judgment** held notice to purchasers. Curry v. Lehman [Fla.] 47 S 18. Grantee held bound by **covenant** in deed to his grantor requiring maintenance of certain structures, deed being of record. Illinois Cent. R. Co. v. Davidson [Ky.] 115 SW 770. Record of deed containing restrictions as to use of premises held notice of **restric-**

as between a principal and his agent, the former need not search the records for evidence of fraud on the part of the latter,[22] and record of a deed is not constructive notice to a prior vendee in possession subject to whose rights the deed was made.[23] Registration is notice alike to residents and nonresidents,[24] and a chattel mortgage recorded in the proper county is notice to persons dealing in the property any where in the state.[25] A duly filed lease with chattel mortgage clause continues constructive notice after assignment thereof by the lessee, as against third persons dealing with the assignee.[26]

Subsequent vendees or lientakers may ordinarily rely on the record,[27] but the record of a deed, though constructive notice of the existence and contents of the conveyance, does not supersede adverse possession or other extrinsic matter on the land suggesting notice of facts inconsistent with the record.[28]

(§ 2) *E. Possession under chattel mortgages; refiling and renewal.*[29]—See 10 C. L. 1028—Timely taking of possession will ordinarily protect a chattel mortgagee though his mortgage be not registered,[30] if the possession is open and unequivocal.[31]

**tions** to defendant who purchased from grantee, though deed to him did not mention them. Semple v. Schwartz, 130 Mo. App. 65, 109 SW 633. Purchaser held chargeable with notice of **reservation** by earlier grantor of right to sue for damages from construction of elevated railway. Maurer v. Friedman, 125 App. Div. 754, 110 NYS 320.

**21.** Where record would have led to knowledge of **unreleased trust deed** in hands of person who assigned a second trust deed. Rohde v. Rohn, 232 Ill. 180, 83 NE 465. Purchaser of land subject to mortgage, record of which does not definitely show due date of mortgage debt or amount required in satisfaction thereof, but shows that under certain contingencies amount named in mortgage may be increased, and refers to note from which **extent of debt and lien** may be ascertained, is chargeable with notice of facts discoverable by examination of note and diligent inquiry. Croasdale v. Hill [Kan.] 96 P 37. Buyer of chattels covered by recorded mortgage referring to notes secured held charged with notice of provisions in notes for payment of **attorney's fees.** Turberville v. Simpson [Miss.] 47 S 784. **Description** in recorded mortgage held sufficient to put creditors on inquiry though opening clause was indefinite as to starting point. Albia State Bank v. Smith [Iowa] 119 NW 608. Creditors held charged with notice of second of three recorded mortgages, first two of which were indefinite but last of which referred to them and corrected description in first. Id. Where purchaser was required by recording law to search numerical index which would have disclosed **mortgage outside chain of title,** he was bound to make reasonable inquiries as to mortgagor's interest in the land. Fullerton Lumber Co. v. Tinker [S. D.] 118 NW 700. Grantee held bound to inquire as to **identity of land previously conveyed** before grantor had title. Tilton v. Flormann [S. D.] 117 NW 377. The mere record of subsequent conveyances or liens affecting mortgaged lands is not sufficient of itself to charge the prior mortgagee with notice of the existence of equities in favor of such subsequent holders but the mortgagee must have actual notice thereof. Schaad v. Robinson [Wash.] 97 P 104. Record of deeds to "W. S. Trustee," and to him **as trustee** for M. P. and W. W. in another deed," held notice to judgment creditor that W. S. was not owner. H. B. Claflin Co. v. King [Fla.] 48 S 37. Person examining record of lease which showed **omission of words** rendering other language meaningless held charged with notice that record was not correct. Zeiner v. Edgar Zinc Co. [Kan.] 99 P 614.

**22.** Record of deeds to promoters of a corporation held not notice to corporation of price paid by promoters so as to preclude recovery by corporation of secret profits from sale to it at advanced price. Chaffee v. Berkley [Iowa] 118 NW 267.

**23.** Van Dyke v. Cole [Vt.] 70 A 593.

**24.** Of fraudulent conveyance. Van Ingen v. Duffin [Ala.] 48 S 507.

**25.** Charleston Live Stock Co. v. Collins, 79 S. C. 383, 60 SE 944.

**26.** Assignment with lessor's consent held not new lease or mortgage required to be indexed for purpose of notice to subsequent chattel mortgagee. Stees v. Lind, 106 Minn. 485, 119 NW 67. Evidence that lessor when he consented to assignment of lease was told assignee had purchased the personalty held properly excluded. Id.

**27.** Where a widow appears on face of succession records and records de hors succession as legal owner of land and no equities in favor of children appear in any way, innocent purchasers will be protected from claim of children. Warner v. Hall & Legan Lumber Co., 121 La. 81, 46 S 108. Purchaser in good faith from owner of record is protected against action in declaration of simulation brought by forced heirs of vendor of record owner. Vital v. Andrus, 121 La. 221, 46 S 217. Declarations by remote grantor and subsequent deeds by him to his grantee held inadmissible to show mistake in his first deed placed on record, subsequent purchasers being entitled to rely on record. Teague v. Sowder [Tenn.] 114 SW 484.

**28.** Boundary marks and adverse possession. Warden v. Addington [Ky.] 115 SW 241.

**29. Search Note:** See Chattel Mortgages, Cent. Dig. §§ 426-449; Dec. Dig. §§ 192-198; 24 A. & E. Enc. L. (2ed.) 112.

**30.** Rights of chattel mortgagee in possession under unregistered mortgage are supe-

Failure to take possession is not excused by the fact that the mortgage cannot be recorded.[32]

Renewal affidavits are required to be filed in some jurisdictions.[33]

(§ 2) *F. Wills and their probate and administrative proceedings.*[34] See 10 C. L. 1028

(§ 2) *G. Recording officers and administration of the acts.*[35] See 10 C. L. 1028 The duties of a recording officer are ministerial rather than judicial.[36] Compensation is statutory.[37] Recorder's offices are usually maintained at public expense,[38] and the recorder should be reimbursed for necessary outlays in connection therewith.[39] A conveyancer who takes a deed under instructions to immediately place it on record cannot refuse to do so as a means of enforcing payment for his services respecting the land.[40]

rior to mortgages recorded after he took possession, but inferior to those of bona fide purchaser before he took possession, and those of mortgagees under mortgages registered after first mortgage was given but before possession was taken thereunder. First Nat. Bank v. McElroy [Tex. Civ. App.] 112 SW 801. Subsequent taking of possession by mortgagee for condition broken, and before levy of execution by another creditor, held to protect mortgagee as against such creditor, though Wilson's St. 1903, § 3578, does not mention possession. Frick Co. v. Oats, 20 Okl. 473, 94 P 682, overruling Greenville Nat. Bank v. Evans-Snyder-Buel Co., 9 Okl. 353, 60 P 249. Chattel mortgage good only as between parties because not filed is, after condition broken and delivery of chattels to mortgagee, good as to all others. Garrison v. Street & Harper Furniture & Carpet Co. [Okl.] 97 P 978. Second chattel mortgage taken without notice of prior unfiled mortgage but not filed until four hours after first mortgagee took possession for condition broken held inferior to first mortgage. Id.

**NOTE:** The rule that possession by the first mortgagee renders his lien superior to a subsequent mortgage seems to be based on the ground that after change of possession the second mortgagee has notice. It is obvious that this rule should not apply in cases where possession is not taken by the first mortgagee until after the second mortgagee has been misled into taking his security, especially under a statute which does not in terms require subsequent mortgages to be first recorded. See Bank of Farmington v. Ellis, 30 Minn. 270, 15 NW 243; and Decourcey v. Collins, 21 N. J. Eq. 357.—[Ed.]

**31.** Possession necessary to give validity to chattel mortgage as against creditors must be open, unequivocal and exclusive, and accompanied by indicia of ownership. Entry into mortgagor's place of business by officers with mere statement that they took possession without physically doing so held insufficient. St. 1898, §§ 2310, 2313. Walter Brew. Co. v. Lockery, 134 Wis. 81, 114 NW 120.

**32.** Where there was no adjoining town or organized plantation for record of mortgage given by resident of unorganized place. Rev. St. 1903, c. 93, § 1. Peaks v. Smith [Me.] 71 A 884.

**33.** Act Cong. Feb. 19, 1903, c. 707, 32 St. 841, did not repeal Mansfield's Dig. § 4751, requiring filing of renewal affidavit before expiration of one year, stating mortgagee's interest and amount yet due and unpaid. Fritz v. Brown, 20 Okl. 263, 95 P 437. Affidavit not appearing to have been made by mortgagee or his agent and merely stating that mortgage was to secure $191 "and all other indebtedness," mortgage in fact securing no other indebtedness, and further stating there was yet due $81, held insufficient under Mansfield's Dig. § 4751. Id. Not necessary that affidavit be indorsed "to be filed but not recorded," Mansfield's Dig. c. 110, § 4750, merely requiring that mortgage be so indorsed. Id.

**34. Search Note:** See Vendor and Purchaser, Cent. Dig. §§ 513-539; Dec. Dig. § 231.

**35. Search Note:** See notes in 95 A. S. R. 85; 4 Ann. Cas. 561.

See, also, Registers of Deeds, Cent. Dig.; Dec. Dig.

**36.** Registration of mortgage held not within statute attaching unorganized county to an organized county for "judicial purposes." First Nat. Bank v. McElroy [Tex. Civ. App.] 112 SW 801.

**37.** Chapter 247, p. 418, Laws 1903, in so far as it affects salary and deputy hire of register of deeds of Labette county, was legally enacted and is valid. Stephens v. Labette County Com'rs [Kan.] 98 P 790. Not invalid as special legislation. Id. Constitutional amendment held not retroactive. Id. Under Rev. St. 1887, § 3101, Act Feb. 14, 1899 (Laws 1899, p. 237), and Act March 13, 1899 (Laws 1899, p. 440), fee for recording affidavit of labor on mining claims is 50 cents for each claim, though more than one claim is named in a single affidavit. Empire Copper Co. v. Henderson [Idaho] 99 P 127.

**38.** County held bound to provide janitor service and postage stamps. Ewing v. Vernon County [Mo.] 116 SW 518.

**39.** On failure of county court to provide janitor service, recorder could pay for same and enforce reimbursement. Ewing v. Vernon County [Mo.] 116 SW 518. Statutes held to entitle recorder to reimbursement from county for stamps used in his official business. Id.

**40.** Conveyancer instructed to procure deed from vendors and immediately place it on record held not entitled to refuse to record until its bill as conveyancer and title insurer was paid. Mack v. Schuylkill Trust Co., 33 Pa. Super. Ct. 128.

(§ 2) *H. Discharge of record.*[41]—See 10 C. L. 1020—Penalties are provided in some states for failure of a lienor to discharge the lien of record or enter partial payments.[42]

§ 3. *Registration and certification of land titles under the Torrens system.*[43]—See 10 C. L. 1029—Failure to appear or assist in the registration of particular land does not work an estoppel as against another and subsequent petitioner for the registration of other land.[44] A prima facie title having been established by applicant, the burden is on defendants to establish their claims.[45] General principles and the particular statute involved determine other questions relating to pleading,[46] evidence,[47] the examiner's report,[48] the decree of the court,[49] and the right of review.[50]

**Notice of Claim or Demand; Notices,** see latest topical index.

## NOVATION.[51]

*Definition and elements.*See 10 C. L. 1030—A novation is the making of a new contract, and its elements are essentially the same as in the first contract, which are

**41. Search Note:** See Chattel Mortgages, Cent. Dig. §§ 508-514; Dec. Dig. §§ 245-247; Mortgages, Cent. Dig. §§ 913-961; Dec. Dig. §§ 311-319; Records, Dec. Dig. § 11; Vendor and Purchaser, Dec. Dig. § 231 (8).

**42.** Code 1896, § 1065, prescribing penalty for mortgagee's failure to enter partial payments and date thereof on mortgage record "after written request by mortgagor," is penal and must be strictly construed. Ayers v. Butler [Ala.] 47 S 138. Request signed "Clark Ruller" and "M. E. Rutler," respecting mortgage by "Clark Butler" and "Mary E. Butler," held insufficient. Id.

**43. Search Note:** See notes in 4 C. L. 837.

See, also, Records, Dec. Dig. § 9; 28 A. & E. Enc. L. (2ed.) 251.

**44.** That one's engineers refused to furnish data for location of a boulevard in first proceeding did not estop him in subsequent proceeding from insisting on its establishment at true location. Pollard v. Burchard, 199 Mass. 376, 85 NE 444.

**45.** Applicant not required in first instance to prove invalidity of tax deeds held by defendants. McMahon v. Rowley, 238 Ill. 31, 87 NE 66.

**46.** Under Rev. Laws 1902, c. 128, land court cannot allow amendment by which petitioner becomes respondent and vice versa. Respondent must file petition of his own or cross petition if he desires to become petitioner. Foss v. Atkins, 201 Mass. 158, 87 NE 189.

**47.** Portion of Registration Act, § 18, as amended May 24, 1907, authorizing the introduction of abstracts, not having been in force when evidence was taken in a certain proceeding in which abstracts were introduced, and it not being contended evidence outside of such abstracts was insufficient to establish petitioner's title, defendants could not question constitutionality of the section, especially where abstracts were not used until after proof of loss or destruction of original documents. McMahon v. Rowley, 238 Ill. 31, 87 NE 66. Presumption is that examiner considered only competent evidence in making his findings, if his report contains sufficient competent testimony to support such findings. Id.

**48.** Registration act (Hurd's Rev. St. 1898, c. 30, §§ 61-154) does not require examiner to report to court more than substance of proof taken before him except on request of some party to proceeding. McMahon v. Rowley, 238 Ill. 31, 87 NE 66. Defendants could not complain on appeal of examiner's failure to return evidence, remedy under statute being to ask trial judge for rule on examiner to report and file same. Id. Where re-reference was made by court because of erroneous exclusion of a certain declaration by applicant bearing on his title and second examiner merely reported evidence of character of such declaration and findings therefrom, chancellor properly based his conclusions on first examiner's report. Id. Court could approve report of examiner after examiner's death where conclusions therein were supported by evidence returned and where report was before court before examiner died. Id.

**49.** Decree that since it appeared that land involved was affected of record "by a possible reservation by virtue of following clause in the grant: * * * It is now determined that said clause did not create a valid condition affecting said land," held to mean that "language" of grant was insufficient to create any reservation, and not that reservation was invalid in light of facts in pais. Brown v. Sudbury, 201 Mass. 149, 87 NE 483.

**50.** Where, after land court had found boundary between parties, petitioner's appeal from finding to superior court was dismissed for failure to frame issues in land court, and dismissal affirmed, only remaining question was what decree should be entered as matter of law, and hence further appeal to superior court for jury trial of facts on second decree of land court adjudging ownership and proceedings thereon were void. Foss v. Atkins, 201 Mass. 158, 87 NE 189.

**51.** See 10 C. L. 1030.

**Search Note:** See notes in 4 C. L. 838; 12 L. R. A. (N. S.) 1134; 39 A. S. R. 531.

See, also, Novation, Cent. Dig. §§ 1-13; Dec. Dig. §§ 1-13; 29 Cyc. 1130-1140; Payment, Cent. Dig. § 20; 21 A. & E. Enc. L. (2ed.) 659.

parties, a meeting of the minds,[52] and a sufficient consideration.[53] To constitute a complete novation, the original debtor must be discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor by order of original creditor,[54] with the assent of the parties either express or implied,[55] that the new obligation shall be accepted in discharge of the old one.[56] Its requisites are, a valid prior obligation to be displaced, the consent of all the parties to the substitution, the extinction of the old obligation, and the creation of a valid new one.[57]

*Novation by change of parties or agreement.* See 10 C. L. 1030—It may arise where one obligation is substituted for another by either change of parties or of agreement.[58]

*Pleading and proof.* See 10 C. L. 1030—The extinction of the old debt being a question of intention, it is a question of fact to be determined from the entire contract[59] upon either inferential or direct evidence.[60]

## NUISANCE.

§ 1. Distinction Between Private and Public Nuisance, 1118.
§ 2. What Constitutes a Nuisance, 1119.
§ 3. Right to Maintain; Defenses, 1121.
§ 4. Remedies Against Nuisances, 1123.
A. Abatement and Injunction, 1123.
B. Criminal Prosecution, 1125.
C. Action for Damages, 1126.
D. Rights of Private Persons in Respect to Public Nuisances, 1128.

§ 1. *Distinction between private and public nuisance.*[61] See 10 C. L. 1031—A private nuisance is one that effects a single individual, or a determinate number of persons, in the enjoyment of some private right in contradistinction to the public.[62, 63] That which annoys, injures or endangers the comforts, repose, health and safety, or in any way renders at the same time an entire community or neighborhood, or any considerable number of persons insecure in life or in the use of their property, is a public nuisance.[64]

52. Daviess County Bank & Trust Co. v. Wright, 33 Ky. L. R. 45, 110 SW 361.

53. Daviess County Bank & Trust Co. v. Wright, 33 Ky. L. R. 45, 110 SW 361. A mere verbal promise to pay another's note at maturity is void for want of consideration. Bank of St. James v. Walker, 132 Mo. App. 117, 111 SW 829.

54. Barre Granite & Quarry Co. v. Fraser [Vt.] 71 A 828. Assignment of non-negotiable chose in action held not a novation entitling plaintiff to recover unpaid price of article delivered to defendant. Id.

55. Illinois Life Ins. Co. v. Benner [Kan.] 97 P 438.

56. In re Straub, 158 F 375.

57. In re Straub, 158 F 375. Novation does not arise where a bankrupt conveys incumbered land to his father, the latter not assuming the incumbrances, and who subsequently devised same to said bankrupt and his sister. Id.

58. Illinois Life Ins. Co. v. Benner [Kan.] 97 P 438. Substitution may be in the debt or contract, in the debtor or in the creditor. In re Straub, 158 F 375. Where a corporation agreed with an undividual to transfer the latter's note due the corporation to an open account between them, it was held to constitute novation. Illinois Life Ins. Co. v. Benner [Kan.] 97 P 438.

59. Hargadine-McKittrick Dry Goods Co. v. Goodman [Fla.] 45 S 995. In an action by original creditor against retired member of original firm of debtors, the issue whether novation was agreed to was merely a matter of intention. Id.

60. Illinois Life Ins. Co. v. Benner [Kan.] 97 P 438. Where admissions respecting assumption of a certain note were alleged to have been made, but denied by defendant, the weight of the evidence is for the jury. Naylor v. Davis, 114 NYS 248.

61. **Search Note:** See note in 107 A. S. R. 195.

See, also, Nuisance, Cent. Dig. §§ 135, 136; Dec. Dig. §§ 1, 59; 29 Cyc. 1152-1154; 21 A. & E. Enc. L. (2ed.) 679, 682.

62, 63. Merchants' Mut. Tel. Co. v. Hirschman [Ind. App.] 87 NE 238.

64. Combination wholly controlling supply of lumber, fuel and grain of entire community, and charging exorbitant prices, held a public nuisance. Territory v. Long Bell Lumber Co. [Okl.] 99 P 911.

**Held to be public nuisances:** Steam exhaust pipe near highway. Ft. Wayne Cooperage Co. v. Page, 170 Ind. 585, 84 NE 145. Obstruction of highway. Stricker v. Hillis [Idaho] 99 P 831. Obstruction of street by railway station. Bremer v. Manhattan R. Co., 191 N. Y. 333, 84 NE 59. Railroad track and switching apparatus making public street impassable. Stein v. Chesapeako & O. R. Co. [Ky.] 116 SW 733. Driveway obstructing sidewalk. Oehler v. Levy, 139 Ill.

§ 2. *What constitutes a nuisance.*[65]—See 10 C. L. 1031—Anything creating physical discomfort to persons of ordinary sensibilities,[66] or the natural tendency of which is to create danger and inflict injury upon person or property, is a nuisance.[67] Except in cases of nuisances per se, the law is usually one of degree and depends on the question of fact whether the use is reasonable under all the circumstances.[68] The nature of the locality,[69] priority of occupancy,[70] degree,[71] and manner of operation, are to be considered.[72]

*Illustrations.*See 10 C. L. 1032—The discharge of impure air or air charged with offensive smells,[73] noxious gases, smoke and fumes,[74] percolation of sewage,[75] collec-

App. 294. Telephone pole in street. Merchants' Mut. Tel. Co. v. Hirschman [Ind. App.] 87 NE 238. Unsafe building. Pearson v. Birmingham [Ala.] 47 S 80. Accumulation of ice on sidewalk. Smith v. Preston [Me.] 71 A 653; Duffy v. New York, 128 App. Div. 837, 113 NYS 118. Drainage into public stream. Barrow v. Gaillardanne [La.] 47 S 891. Mill dam causing water to stagnate and emit offensives odors. Boyd v. Schreiner [Tex. Civ. App.] 116 SW 100. Base ball park so operated as to attract large numbere of disorderly persons. Alexander v. Tebeau [Ky.] 116 SW 356. Gambling house and pool room. Respass v. Com. [Ky.] 115 SW 1131. Bawdy house is a public nuisance although situated in restricted district and tolerated by authorities. Seifert v. Dillon [Neb.] 119 NW 686. Indecent exposure. State v. Waymire [Or.] 97 P 46. Glaring signs on public coaches **held not to be public nuisance.** Fifth Ave. Coach Co. v. New York, 58 Misc. 401, 111 NYS 759. Nuisance **may be both public and private.** Barrow v. Gaillardanne [La.] 47 S 891.

**65. Search Note:** See notes in 11 C. L. 111; 59 L. R. A. 90; 62 Id. 133; 65 Id. 280; 2 L. R. A. (N. S.) 92; 7 Id. 349; 9 Id. 695; 10 Id. 992; 13 Id. 465; 16 Id. 621; 30 A. S. R. 551; 47 Id. 544; 69 Id. 271; 120 Id. 372; 4 Ann. Cas. 378; 8 Id. 567; 10 Id. 67.

See, also, Nuisance, Cent. Dig. §§ 4, 5, 9-34, 142-157; Dec. Dig. §§ 3, 4, 61-63; 29 Cyc. 1156-1201; 21 A. & E. Enc. L. (2ed.) 686.

**66.** Must be measured by habits and feelings of ordinary people, not by standard of persons of delicate sensibilities and fastidious habits. Wente v. Com. Fuel Co., 232 Ill. 526, 83 NE 1049. Signs in glaring colors on public coaches, advertising cigarettes and tobacco, but offensive only to aesthetic taste, do not constitute a public nuisance. Fifth Ave. Coach Co. v. New York, 58 Misc. 401, 111 NYS 759.

**67.** Miller v. Twiname, 114 NYS 151. Maintenance by gas company of pipes, meters and regulators on plaintiff's premises not a nuisance although used in supplying a dangerous agent. Marshall Window Glass Co. v. Cameron Oil & Gas Co., 63 W. Va. 202, 59 SE 959.

**68.** Gordon v. Silver Creek, 127 App. Div. 888, 112 NYS 54; Reilly v. Curley [N. J. Eq.] 71 A 700. Lawful business or erection is never a nuisance per se, but may become a nuisance by reason of extraneous circumstances, such as being located in inappropriate place or kept in improper manner. Diocese of Trenton v. Toman [N. J. Eq.] 70 A 606. Use of waters of stream so as to impair its quality by damming stream, causing it to stagnate and emit offensive odors rendering vicinity unhealthy, held an unreasonable use. Boyd v. Schreiner [Tex. Civ. App.] 116 SW 100.

**69.** Maintaining large stable in close proximity to apartment houses in residence district. Oehler v. Levy, 234 Ill. 595, 85 NE 271. Smelters emitting destructive fumes located in agricultural district. American Smelting & Refining Co. v. Godfrey [C. C. A.] 158 F 225. Erection of automobile garage in neighborhood ceasing to be strictly residence district. Siegel v. Donovan [Mich.] 15 Det. Leg. N. 1035, 119 NW 645.

**70.** Principle allowing injunction in favor of one who came with a residence to nuisance in locality where highest and most profitable use of land was for residences would not justify such injunction in favor of one who undertook to build residence and demand such injunction in locality where highest and most profitable economic use for the land was for trades and callings which were necessarily nuisances. Oehler v. Levy, 139 Ill. App. 294. Right of landowner to restrain adjoining property owner from using his property as bawdy house is a right belonging to the land, and fact that premises were so used before plaintiff purchased his property constitutes no defense. Seifert v. Dillon [Neb.] 119 NW 686.

**71.** Reilly v. Gurley [N. J. Eq.] 71 A 700. Amount of dust created by cotton gin not sufficient to constitute nuisance. Hamm v. Gunn [Tex. Civ. App.] 113 SW 304.

**72.** See post, § 4A.

**73.** Pollution of air by **tallow plant.** Labasse v. Piat, 121 La. 601, 46 S 665. Noise and offensive odors from stable adjacent to complainant's apartment house, habitually disturbing comfort and sleep of occupants, held a continuing nuisance. Oehler v. Levy, 139 Ill. App. 294, afg. 234 Ill. 595, 85 NE 271. Livery stable next door to plaintiff's residence held under evidence not to be so constructed and operated as to constitute a nuisance subject to abatement. Durfrey v. Thalheimer, 85 Ark. 544, 109 SW 519.

**74.** Distinction between nuisances which affect air and light merely by way of noise, gases and obstruction of light, and those directly affecting land itself or structures upon it, is one of degree, a much greater degree being required in the former class of cases than in the latter. Reilly v. Curley [N. J. Eq.] 71 A 700. Use of **soft coal** by village waterworks plant creating dense smoke held unreasonable under all the circumstances. Gordon v. Silver Creek, 127 App. Div. 888, 112 NYS 854. Operation of quarry and **stone crusher** in heart of large city, injuring surrounding dwellings by reason of rock thrown upon them from blast-

tion of explosive substances,[76] noise,[77] vibrations,[78] blasting,[79] interference with light,[80] obstructing or rendering unsafe street,[81] sidewalk,[82] navigable stream,[83] the

ing operations, lime dust from crusher and vibration and noise from use of dynamite, held a nuisance. Blackford v. Heman Const. Co., 132 Mo. App. 157, 112 SW 287. To operate a stave factory equipped with a 7 inch **steam exhaust pipe** standing upright 8 feet from highway, so as to frighten horses. Ft. Wayne Cooperage Co. v. Page, 170 Ind. 585, 84 NE 145. **Smelters** emitting fumes of arsenic and sulphur dioxide destructive to vegetation and a menace to health. American Smelting & Refining Co. v. Godfrey [C. C. A.] 158 F 225. **Brick factory** so operated as to allow escape of smoke and fumes injuring fruit trees and garden. Hinmon v. Somers Brick Co., 75 N. J. Law, 869, 70 A 166. Smoke, soot and noise from **electric light plant.** Sherman Gas & Elec. Co. v. Belden [Tex. Civ. App.] 115 SW 897. Emission of dense smoke from **gas plant** in quantities so great as so necessitate keeping windows closed in neighboring residences. McGill v. Pintsch Compressing Co. [Iowa] 118 NW 786.

**Held not to be nuisance: Dust** created by removal of building, it not being possible to prevent all dust, and defendant having used all means to lessen it. Sommers Mercantile Co. v. Rheinfrank House Wrecking Co., 113 NYS 402. Operation of **cotton gin** discharging small quantities of dust. Hamm v. Gunn [Tex. Civ. App.] 113 SW 304. Evidence held to show that noise, smoke and cinders from **planing mill** in close proximity to dwelling houses was insufficient to constitute nuisance. Terrell v. Wright [Ark.] 112 SW 211. **Garage** using alleyway for passage of automobiles, causing noise and smoke, evidence held not to show such misuse as to constitute nuisance. Diocese of Trenton v. Toman [N. J. Eq.] 70 A 606.

**75.** Sewage percolating through wall into plaintiff's cellar from toilets on defendant's premises and making plaintiff's premises unsanitary. Groening v. Wolff, 115 NYS 158.

**76.** Storage of large quantities of dynamite liable to explode, on an island in a public waterway, is a nuisance. Henderson v. Sullivan [C. C. A.] 159 F 46. Dynamite stored by railway company in shanty on its right of way, with open doors, so that sign on boxes could easily be seen, held not to constitute nuisance as against trespasser injured by explosion resulting from shooting into shanty. Fanning v. White & Co., 148 N. C. 541, 62 SE 734.

**77. Noise alone** from operation of engine and cable in unloading stone so great as to make conversation in adjacent houses impossible. Reilly v. Curley [N. J. Eq.] 71 A 700. **Unavoidable noise** resulting from operation of ice plant not a nuisance. Le Blanc v. Orleans Ice Mfg. Co., 121 La. 249, 46 S 226. **Increase in number of trains** with heavier engines and more smoke and noise is incident to use of road and not nuisance. Staton v. Atlantic Coast Line R. Co., 147 N. C. 428, 61 SE 455.

**78.** Injunction granted restraining defendant from causing vibrations of plaintiff's dwelling house by blasting operations in neighboring quarry shaking down brick and plaster. Blackford v. Heman Const. Co., 132 Mo. App. 157, 112 SW 287.

**79.** Whether rock thrown upon highway lawfully occupied by defendant for repair purposes by reason of use of explosives in his adjacent quarry constituted a nuisance held question for jury. Miller v. Twiname, 114 NYS 751.

**80.** Twelve-foot fence on line of lot held unnecessarily high. Healey v. Spaulding [Me.] 71 A 472.

**81. Railway track** built on private street in such manner as to prevent plaintiff's access to property. Buteau v. Morgan's Louisiana & T. R. S. S. Co., 121 La. 807, 46 S 813. Use of street by railroad company for yard purposes without legal sanction, causing damage and disturbance by noise and jarring to guests in plaintiff's hotel, held to constitute a nuisance. Galveston, etc., R. Co. v. De Groff [Tex. Civ. App.] 110 SW 1006. **Railway station** extending into street not covered by franchise is a public nuisance as to part so extending. Bremer v. Manhattan R. Co., 191 N. Y. 333, 84 NE 59. **Building** erected in street and occupied temporarily as store held a nuisance, although sufficient space was left for safe passage of vehicles. McDowell v. Preston, 104 Minn. 263, 116 NW 470. Where heavy wooden **tables** standing **in street** against defendant's wall caused injury, evidence improperly excluded as to identity and ownership and purpose for which used. Wells v. Interborough Rapid Transit Co., 124 App. Div. 631, 109 NYS 231.

**82. Unsafe building** liable to fall and dangerous to pedestrians in street. Pearson v. Birmingham [Ala.] 47 S 80. **Driveway** from stable to street obstructing sidewalk. Oehler v. Levy, 139 Ill. App. 294. **Accumulation of ice** on sidewalk caused by water coming from defective gutter on defendant's building held a nuisance at common law as well as by statute. Smith v. Preston [Me.] 71 A 653. Broken leader on house casting water on sidewalk, which froze there, causing continual alternation of freezing and thawing for more than a year. Duffy v. New York, 128 App. Div. 837, 113 NYS 118. **Excavation of lot** in such manner as to cause street to cave in, question as to whether excavation was so close to line of highway as to endanger its safety. Adlin v. Excelsior Brick Co., 113 NYS 1017. Evidence held insufficient to show that open, unguarded **cellarway** in sidewalk on leased premises was a nuisance, it not appearing to have been in violation of any law or ordinance. Donovan v. Gillies Coffee Co., 111 NYS 707.

**83.** Unlawful obstruction of navigable stream by erection of **dam** is a nuisance. Ireland v. Bowman [Ky.] 114 SW 338. To allow slops from **sugar mill** to drain into private canal used for public navigation making water unfit for steam or drinking purposes and killing fish held a public nuisance. Barrow v. Gaillardanne [La.] 47 S 891. A **pier** located between high and low water mark but not interfering with navigation or with the use by the public, for any authorized purpose, of the waters of

obstruction or pollution of a watercourse,[84] unlocked turntable,[85] combinations in restraint of trade,[86] billiard hall,[87] and acts which openly outrage public decency and are injurious to goods morals,[88] have been held to be public nuisances. A lawful business or erection properly operated is never a nuisance per se.[89] The legislature may impress certain property with the character of a nuisance and authorize its summary seizure and forfeiture,[90] but a town board of health cannot, without giving the notice provided for by statute, declare a nuisance upon private property so as to charge the expense of its abatement upon the community.[91] The power to declare what shall constitute a nuisance is legislative in nature,[92] but where a business is not a nuisance per se, no ordinance declaring it to be a nuisance, without reference to fact whether it is or not, can make it so.[93]

§ 3. *Right to maintain; defenses.*[94]—See 10 C. L. 1035—That the acts complained

the bay, is not a nuisance. Barnes v. Midland R. Terminal Co., 126 App. Div. 435, 110 NYS 545.

84. To allow slops from sugar mill to drain into private canal open to public navigation rendering water unfit for use in boilers and causing levee board to threaten to close canal held a private nuisance. Barrow v. Gaillardanne [La.] 47 S 891.

85. Unlocked turntable unguarded in place easily accessible to children constitutee an "attractive nuisance" as to them. Berry v. St. Louis, etc., R. Co., 214 Mo. 593, 114 SW 27.

86. Monopoly of lumber, fuel and grain supply of entire community. Territory v. Long Bell Lumber Co. [Okl.] 99 P 911.

87. Billiard hall not a nuisance per se but may, by reason of its environment or conditions existing in some communities, become a menace to morals and well being of citizens thereof, and is therefore a subject of municipal regulation. Ex parte Murphy [Cal. App.] 97 P 199.

88. Where defendants laid plot to get prosecuting witness into indecent and compromising situation with one of defendants in a public place and to direct attention of a number of citizens to them, thereby making a public exposure of indecent and compromising attitude, held within statute providing for punishment of indictable nuisance at common law. State v. Waymire [Or.] 97 P 46. Gambling house attracting large numbers of dissolute persons. Respass v. Com. [Ky.] 115 SW 1131. Bawdy house a nuisance per se. Barnett v. Tedescki [Ala.] 45 S 904. Dancing and drinking accompanied by swearing, drunkenness, making loud noises and other misconduct, held nuisance. Commonwealth v. Cincinnati, etc., R. Co., 33 Ky. L. R. 1056, 112 SW 613. Evidence held to show that breeding stable in village was not conducted in manner to create nuisance. Thatcher v. Dueser [Neb.] 116 NW 45. No nuisance established by mere showing of repeated trespasses on complainant's land and use of offensive and insulting language to him and his wife. Randall v. Freed [Cal.] 97 P 669.

89. **Cotton gin.** Hamm v. Gunn [Tex. Civ. App.] 113 SW 304. **Auction store.** Gilly v. Hirsh [La.] 48 S 422. **Emission of smoke** from smoke stack or chimney. McGill v. Pintsch Compressing Co. [Iowa] 118 NW 786. **Livery stable.** Coon v. San Francisco Board of Public Works, 7 Cal. App. 760, 95 P 913. **Billiard hall.** Ex parte Murphy [Cal. App.] 97 P 199. **Skating rink.** Johnson v. Philadelphia [Miss.] 47 S 526. County **jail.** Pritchett v. Knox County Com'rs [Ind. App.] 85 NE 32. Village jail. Dunkin v. Blust [Neb.] 119 NW 8.

90. Sections 10, 11 and 12, 3 Gen. St. 1895, authorizing seizure and sale with forfeiture of proceeds of articles bartered within 3 miles of any place of religious worship during meeting for worship held unconstitutional in falling to provide for hearing before competent tribunal. Berry v. De Maris [N. J. Law] 70 A 337.

91. Board of health without authority or compliance with statute declared ponds belonging to private corporation and into which sewage was drained to be a nuisance and authorized plaintiff to abate nuisance, held on certiorari to reverse action of board of audit, that abatement was not authorized. People v. Painter, 112 NYS 473.

92. Ordinance declaring house contaminated with smallpox to be nuisance and providing for abatement held sufficiently formal and not open to objection that ordinance must be general. Sings v. Joliet, 237 Ill. 300, 86 NE 663. An ordinance providing that a permit to erect a livery stable would be granted only upon presentation of written consent of owners of property within 200 feet held invalid since it rests in private individuals arbitrary power to determine whether owner of real property may use it in a lawful occupation, it not being a nuisance per se. Coon v. San Francisco Board of Public Works, 7 Cal. App. 760, 95 P 913

93. Ordinance closing skating rink at 6 p. m. as nuisance was unreasonable and void. Johnson v. Philadelphia [Miss.] 47 S 526 Act of city council in paseing ordinance declaring house contaminated by smallpox to be nuisance and destroying same held not concluesive as to whether nuisance in fact or not. Sings v. Joliet, 237 Ill. 300, 86 NE 663. Under statute giving city council power to declare what shall be a nuisance and to abate the same, house contaminated by smallpox may properly be declared a nuisance and abated, if so located that city could not prevent citizens from going into, or approaching near enough to be in danger of contagion. Id.

94. **Search Note:** See 36 L. R. A. 609; 53 Id. 891; 70 Id. 579; 1 L. R. A. (N. S.) 49; 30 A. S. R. 556; 84 Id. 916; 1 Ann. Cas. 625.

See, also, Nuisance, Cent. Dig. §§ 2, 6-8,

of are done under governmental authorization is usually a defense.[95] That which is authorized by the legislature within the strict scope of its constitutional powers cannot be a public nuisance,[96] but it may be a private nuisance, and as against damages resulting therefrom the grant is no defense.[97] A legislative grant to do that which is not of itself a nuisance is no protection where the authority or thing so granted is so used as to constitute a public nuisance, since it will not be presumed that the creation of a nuisance was intended, unless it be a natural and necessary result.[98] The mere fact that the defendant is exercising a government function delegated to it by the state is not a defense as against unreasonable use.[99] The defense of legislative sanction must be pleaded.[1] A binding agreement that a private nuisance may be maintained is a complete defense as between the parties.[2] It is no defense that a business constituting a nuisance is located at a place convenient for carrying on the business, that it is properly conducted and employs the latest devises where it still results in damage to property and injury to health,[3] that it is temporary,[4] or necessary to the business of the owner,[5] that injunction would work larger damage to defendant than is sustained by plaintiff by reason of the nuisance,[6]

35-48, 137-162, 170, 171; Dec. Dig. §§ 2, 5-10, 60, 63-70; 29 Cyc. 1154, 1155, 1159-1163, 1179, 1180, 1196, 1197, 1201-1203, 1207; 21 A. & E. Enc. L. (2ed.) 733.

95. Mill dam constructed under power of statute and which caused complainant's lands to be flooded cannot be enjoined or abated, but complainant must be left to his remedy for damages under statute. Allaby v. Manston Elec. Service Co., 135 Wis. 345, 116 NW 4. One who has complied with provisions of Mulct Law (Code, §§ 2447, 2448) cannot be enjoined from conducting business as liquor dealer. Campbell v. Jackman Bros. [Iowa] 118 NW 755. Where erection of slaughterhouse was authorized, state cannot prosecute owner for doing what it had expressly sanctioned. Zimmerman v. Gritzmacher [Or.] 98 P 875.

96. Viaduct over street. Crofford v. Atlanta, B. & A. R. Co. [Ala.] 48 S 366.

97. Although established under charter prior to adoption of Constitution of 1890, before which time no liability existed for property merely damaged and not actually taken, railway company was liable for damages and destruction of plaintiff's property by smoke, soot and noise from operation of its yards and trains. Alabama & V. R. Co. v. King [Miss.] 47 S 857.

98. City enjoined from draining sewage into dry ravine close to town cannot defend on ground that legislature authorized it to drain sewage into ravines, since legislature will not be held to intend that a nuisance shall be created. State v. Concordia [Kan.] 96 P 487. Neither a city nor its officers could grant right to a telephone company to place its poles in such manner as to interfere with enjoyment of private property by obstructing doorways thereon. Merchants' Mut. Tel. Co. v. Hirschman [Ind. App.] 87 NE 238.

99. Operation of waterworks system so as to injure plaintiff's premises by smoke is a destruction of private property which the law will compensate by giving damages. Gordon v. Village of Silver Creek, 127 App. Div. 888, 112 NYS 54. Statutes chartering street railway company held not to confer authority to maintain nuisance of smoke, noise and vibration from its power plant in opposition to city ordinance. McArdle v. Chicago City R. Co., 141 Ill. App. 59.

1. Court will not take judicial notice of acts affecting incorporation of street railway company. McArdle v. Chicago City R. Co., 141 Ill. App. 59.

2. Agreement whereby plaintiff allowed sewage from creamery to be drained upon his land. Ruthven v. Farmers' Co-Op. Creamery Co. [Iowa] 118 NW 915. One who, on laying out road, moved back his fence according to legal requirements, and made no objection to use of road by public, could not thereafter obstruct same by encroachment on claim that true section line had not been followed. Curless v. State [Ind.] 87 NE 129.

3. Smelters emitting fumes of arsenic and sulphur dioxide conveniently located with reference to mines and railroads. American Smelting & Refining Co. v. Godfrey [C. C. A.] 158 F 225. Where statute provides that on indictment for violating statute in regard to smoke nuisance it shall be a defense to show that there is no known appliance or method by which emission of smoke can be prevented, held not to apply where heater was of a kind to which no such devise could be attached, it being defendant's duty to install one to which such appliance could be attached. State v. Dower [Mo. App.] 114 SW 1104.

4. That use of lot for storage of stone was temporary not a defense where nuisance was created. Reilly v. Curley [N. J. Eq.] 71 A 700.

5. That maintenance of mill dam constituting nuisance was necessary to business of owner no defense. Boyd v. Schreiner [Tex. Civ. App.] 116 SW 100. Evidence as to interruption of company's business by removal of telephone pole constituting nuisance properly excluded. Merchants' Mut. Tel. Co. v. Hirschman [Ind. App.] 87 NE 238.

6. That damage to owners of land injured was small in comparison to damages which would result to defendants in enjoining operation of smelters not a defense. American Smelting & Refining Co. v. Godfrey [C. C. A.] 158 F 225.

that it was not a nuisance when erected,[7] nor that it was conferred by devise to trustees.[8] Acquiescence in the nuisance for a long period of time may be a defense.[9] The right to maintain public nuisance cannot be acquired by prescription or user,[10] but in Kentucky, as between two individuals, the right to maintain a public nuisance may be so acquired.[11] In Louisiana the prescription of one year is not a defense in a suit for abatement where the nuisance is a continuing one.[12]

§ 4. *Remedies against nuisances. A. Abatement and injunction.*[13]—See 10 C. L. 1036—Where there is a plain, speedy and adequate remedy at law, equity will not enjoin a nuisance.[14] Where the complainant's legal right, and the unlawful use by defendant of his property to complainant's actual damage are established, equity will give relief[15] without requiring the issues to be first passed upon in an action at law,[16] but otherwise if the facts are disputed.[17] Injunction will be granted to protect established rights, although the injury be small and the interests to be ef-

7. Stable for large number of horses existing before district became residence section. Oehler v. Levy, 139 Ill. App. 294.

8. Trustees under will are answerable for damages resulting from maintenance of nuisance. Ireland v. Bowman [Ky.] 113 SW 56.

9. Acquiescence in use of track and spur in street by abutting owner for 17 years precludes him from relief. Staton v. Atlantic Coast Line R. Co., 147 N. C. 428, 61 SE 455. Toleration of operation of quarry in close proximity to plaintiff's dwelling for 10 years held not such acquiescence as would preclude relief. Blackford v. Heman Const. Co., 132 Mo. App. 157, 112 SW 287. Plaintiff who bought premises, doorway of which was obstructed by telephone pole in street erected prior to purchase, held to have waived his rights by acquiescence, it not having continued for 20 years. Merchants' Mut. Tel. Co. v. Hirschman [Ind. App.] 87 NE 238. Prescription held not to run against right of one specially damaged to restrain house of prostitution by injunction. Seifert v. Dillon [Neb.] 119 NW 686.

10. Continued occupation of public street by plaintiff's house was but continuance of a nuisance, which might be abated by board of public works under state law. Nerio v. Maestretti [Cal.] 98 P 860. Held that while right to maintain mill dam might be acquired by prescription, it did not follow that right to maintain it in such manner as to constitute a nuisance was thereby acquired. Boyd v. Schreiner [Tex. Civ. App.] 116 SW 100. That railway station extending into street on which the company had no franchise has been maintained for more than 20 years held no justification even as against a private person. Bremer v. Manhattan R. Co., 191 N. Y. 333, 84 NE 59.

11. Where defendants had maintained dam in navigable stream continuously for over 15 years, they had acquired a right to do so by prescription as against plaintiff, although nuisance was public. Ireland v. Bowman [Ky.] 113 SW 56.

12. Barrow v. Gaillardanne [La.] 47 S 891.

13. **Search Note:** See notes in 4 C. L. 846; 6 Id. 834; 11 Id. 1109; 23 L. R. A. 301; 35 Id. 593; 38 Id. 161, 305, 640; 39 Id. 520, 551, 609, 649; 40 Id. 465; 41 Id. 321; 42 Id. 814; 44 Id. 565; 51 Id. 657; 15 L. R. A. (N. S.) 747; 69 A. S. R. 271; 1 Ann. Cas. 272, 345; 2 Id. 250; 5 Id. 136; 10 Id. 184.

See, also, Nuisance, Cent. Dig. §§ 49-134, 163-218; Dec. Dig. §§ 18-57, 71-96; 29 Cyc. 1208-1289; 21 A. & E. Enc. L. (2ed.) 703; 14 A. & E. Enc. P. & P. 1091.

14. Where only nuisance alleged was repeated trespasses and abusive language, complainant must be left to his remedies at law. Randall v. Freed [Cal.] 97 P 669. Unsanitary conditions of stable in close proximity to apartment house will not be restrained by injunction where it appears that city ordinances and police regulations are ample to remedy conditions. Bonaparte v. Denmead [Md.] 69 A 697. Indictment for criminal offense not an adequate remedy for gambling house constituting nuisance where continued in spite of repeated fines. Respass v. Com. [Ky.] 115 SW 1131.

15. Injunction properly granted to restrain defendant from draining oil and sewage into plaintiff's artificial lake, causing fish to be killed and ruining ice. Fisher v. Missouri Pac. R. Co. [Mo. App.] 115 SW 477. Injunction to restrain village from draining into steam passing over plaintiff's land refused where it appeared that drains only carried surface water which by natural conformation of land would flow into stream if drains had not been constructed. Crane v. Roselle, 236 Ill. 97, 86 NE 181.

16. Operation of coal hopper throwing coal dust upon complainant's property enjoined. Wente v. Com. Fuel Co., 232 Ill. 526, 83 NE 1049. Injunction granted to restrain offensive use of stable close to dwelling house. Oehler v. Levy, 234 Ill. 595, 85 NE 271. Evidence as to nuisance and injury resulting from operation of stable held to bring case within rule. Oehler v. Levy, 139 Ill. App. 294.

17. Where complainant alleged that water was discharged on her land by act of adjoining owner and by construction of township ditch, injunction will not be granted in absence of proof of interference with natural drain. Woodroffe v. Hagerty, 35 Pa. Super. Ct. 576. Where alleged nuisance consisted of erecting fence over highway, equity will not intervene where legality of highway is in question. Van Buskirk v. Bond [Or.] 96 P 1103. On injunction against city for draining water and sewage into stream passing over plaintiff's land, evidence held not to establish nuisance with sufficient clearness to warrant interference by court of equity. Crane v. Roselle, 236 Ill. 97, 86 NE 181.

fected by the injunction are large.[18] Equity will grant injunction to restrain a nuisance where proceedings at law would lead to multiplicity of suits,[19] or where it appears that damages cannot be accurately estimated.[20] Injunction may issue to prevent the establishment of a business which may be so conducted as to become injurious to the health of adjoining proprietors,[21] but where such business can be lawfully operated without affecting the rights of others, it will not be restrained because of a mere possibility that it might become a nuisance.[22] A business lawful in itself which is a nuisance because of the manner in which conducted may be enjoined so as to prevent its being a nuisance but not so as to prevent its existence.[23] Where nuisance is created by neglect of defendant to comply with a duty imposed by law, no injunction will issue unless such law is valid.[24] In abatement, notice to

**18.** Where tract of land containing 9,000 acres was damaged by poisonous fumes from smelting plants, fact that damage of each owner of land was small in comparison to damages which would result to defendants on enjoining operation of smelters held not to be defense. American Smelting & Refining Co. v. Godfrey [C. C. A.] 158 F 225. Evidence properly excluded as to expense of constructing coal hopper sought to be enjoined. Wente v. Com. Fuel Co., 232 Ill. 526, 83 NE 1049.

**19.** Where 400 complainants sought to enjoin four independent companies each operating smelters, commingled fumes from which caused damage to complainant's property, held that remedy at law was impracticable because of impossibility of determining proportion of damages against each of defendants. American Smelting & Refining Co. v. Godfrey [C. C. A.] 158 F 225.

**20.** State had authority in relation of attorney general to grant injunction restraining construction of aqueduct across navigable canal which would result in obstruction of navigation. State v. Columbia Water Power Co. [S. C.] 63 SE 884.

**21.** Rule that equity will not interfere with establishment of business which may or may not become a nuisance, according to the manner in which conducted, applies only where apprehended injury is threatened by reason of some industrial enterprise affecting comfort and convenience rather than health of adjacent residents. Cherry v. Williams, 147 N. C. 452, 61 SE 267. Erection of sanitarium for treatment of tuberculosis and other contagious diseases in close proximity to dwelling houses restrained to final hearing. Id.

**22.** Erection of automobile garage will not be enjoined. Siegel v. Donovan [Mich.] 15 Det. Leg. N. 1035, 119 NW 645.

**23.** Decree enjoining owner of feed yard from **keeping large numbers of cattle and hogs,** or for a long time, was erroneous in absence of showing that feed yard could not be used without becoming nuisance. Francisco v. Furry [Neb.] 118 NW 1102. Although **livery stable** next door to plaintiff's residence was held not to be such a nuisance as would be abated, owner was enjoined to make wall next to plaintiff, windows in which were merely sealed, as solid as the other wall. Durfey v. Malheimer, 85 Ark. 544, 109 SW 519. Stable in residence district will not be absolutely enjoined but injunction was granted restraining stabling of such number of horses or in such manner as to produce sufficient noise to habitually disturb comfort of complainants, or so as to produce gases and odors deleterious to health. Oehler v. Levy, 139 Ill. App. 294. Injunction granted to restrain **storage of dynamite** on island in public waterway in sufficient quantities to injure riparian owners in case of explosion. Henderson v. Sullivan [C. C. A.] 159 F 46. Where **quarry** in heart of large city was so operated as to injure neighboring dwelling houses by reason of rock thrown upon them by blasting, fine dust from crusher and noise caused by use of dynamite, injunction was granted restraining continuance of objectionable features. Blackford v. Heman Const. Co., 132 Mo. App. 157, 112 SW 287. Where defendant drained **slops from sugar mill** into canal connecting with canal belonging to plaintiff, injunction that defendant construct levees to cause slops to drain into neighboring swamp and to become diluted before reaching canal held proper. Barrow v. Gaillardanne [La.] 47 S 891. Injunction may be granted to compel **jail windows overlooking dwelling house,** residents of which were exposed to offensive sights and sounds, to be kept closed. Pritchett v. Knox County Com'rs [Ind. App.] 85 NE 32. **Deposit of coal dust** from coal-hopper on complainant's premises may be enjoined. Wente v. Com. Fuel Co., 232 Ill. 526, 83 NE 1049. Where unlawful **use of street by railway company for yard purposes** caused special damage to owner of adjacent hotel, injunction was issued at his instance restraining use of street for good purposes but allowing trains to run through on main line. Galveston, etc., R. Co. v. De Groff [Tex. Civ. App.] 110 SW 1006. Where **baseball park** is operated so as to attract disorderly and noisy persons daily to whom proprietor sells intoxicants and crowd becomes disorderly to such degree that house of adjoining owner is rendered practically uninhabitable and rental value greatly diminished, it is a public nuisance and may be enjoined so as to stop objectionable features. Alexander v. Tebeau [Ky.] 116 SW 356.

**24.** Where city passed an ordinance requiring abutting owners to construct cement sidewalks, mandatory injunction would not issue to compel one who failed to construct such sidewalk to abate nuisance produced by old sidewalk being higher than new cement walks, on showing that ordinance was invalid, thereby creating no duty on de-

grantee or lessee coming into possession of land with existing nuisance is not necessary.[25] A nuisance on a public street may be abated on a bill filed by the municipality[26] or by the state.[27] An injured party may himself abate a nuisance,[28] and where danger is imminent a city may declare and destroy a nuisance without notice or hearing.[29] The right to relief may be lost by acquiescence.[30] An injunction should be definite, clear and precise in terms.[31] The bill must set out the essential facts,[32] and any doubt as to its sufficiency will be resolved against it.[33]

(§ 4) *B. Criminal prosecution.*[34]—See 10 C. L. 1033—Indictment is the proper remedy to abate a public nuisance.[35] In prosecution for maintaining a nuisance, criminal intent must be shown.[36] An indictment for permitting a nuisance must charge a duty broken, or facts from which such duty would necessarily flow.[37] The

fendant's part to abate nuisance. City of Owensboro v. Hope, 33 Ky. L. R. 426, 110 SW 272.

25. One having dominant heritage may abate levee on lands of another occupied by lessee, being servient heritage which results in flooding, without notice or demand. Buck v. McIntosh, 140 Ill. App. 9.

26. Unsafe building, liable to fall and dangerous to passersby on sidewalk, abated. Pearson v. Birmingham [Ala.] 47 S 80. In abating nuisances the public does not exercise power of eminent domain but police power. Louisiana County v. Yancey's Trustee [Va.] 63 SE 452.

27. Where town refused to compel defendant to remove his barn from highway which it was obstructing, the state may properly exercise its visitorial powers and compel defendant to abate. State v. Franklin, 133 Mo. App. 486, 113 SW 652. Gambling house may be enjoined on suit brought by attorney general. Respass v. Com. [Ky.] 115 SW 1131. Right of municipality not exclusive. Alabama Western R. Co. v. State [Ala.] 46 S 468.

28. One whose lands were flooded by reason of levee on another's land may summarily abate nuisance when his heritage is dominant. Buck v. McIntosh, 140 Ill. App. 9.

29. House contaminated by smallpox. Sings v. Joliet, 237 Ill. 300, 86 NE 663. A municipal council summarily and without notice declared plaintiff's business of carrying on sale of tobacco, soft drinks and lunches to negroes to be a nuisance and revoked his license. Held under state law, in cities of 20,000 or more, jurisdiction to abate nuisance in summary manner resides in police court alone, unless the nuisance is one per se, or from its nature indisputably such. Peginis v. Atlanta [Ga.] 63 SE 857.

30. Acquiescence in use of track and spur track in street in front of property of abutting owner for 17 years precludes him from asking an injunction. Staton v. Atlantic Coast Line R. Co., 147 N. C. 428, 61 SE 455. Toleration of operation of quarry in close proximity to plaintiff's residence for 10 years held not such acquiescence as would preclude relief. Blackford v. Heman Const. Co., 132 Mo. App. 157, 112 SW 287.

31. Decree that defendant and his servants be enjoined from talking or shouting on their own premises so loudly as to disturb adjoining residents, and prohibited from conducting stable in any manner creating unsanitary conditions in complainant's building beyond what is absolutely necessary, held so indefinite and vague as to necessitate reversal. Oehler v. Levy, 139 Ill. App. 294.

32. Complaint alleging that defendant maintains a bowling alley, that bowling is being done, that it causes much noise which materially impairs the enjoyment by plaintiff of his dwelling house, held sufficient on demurrer to state a cause of action in equity. Pape v. Pratt Institute, 127 App. Div. 147, 111 NYS 354. Averment that defendants are about to erect in violation of city ordinance livery stable for 60 horses which would damage homes within 200 feet by noxious gases and odors, insects and spread of disease, sufficient after judgment to sustain injunction. Mason v. Deitering, 132 Mo. App. 26, 111 SW 862. Petition to restrain keeping of bawdy house sufficiently described same by stating that it was located on north side of certain street in locality designated by name under which commonly known. Lane v. Bell [Tex. Civ. App.] 115 SW 918. Allegation of complaint held to state cause of action for issuance of injunction restraining operation of baseball park. Alexander v. Tebeau [Ky.] 116 SW 356.

33. Bill held sufficiently to aver that proposed livery stable would become a nuisance and dangerous to health. Mason v. Deitering, 132 Mo. App. 26, 111 SW 862.

34. **Search Note:** See Nuisance, Cent. Dig. §§ 203-218; Dec. Dig. §§ 89-96; 29 Cyc. 1278-1289; 1 A. & E. Enc. L. (2ed.) 63; 21 Id. 711; 14 A. & E. Enc. P. & P. 1096.

35. McMeekin v. Central Carolina Power Co., 80 S. C. 512, 61 SE 1020. For obstruction of public highway. Gray v. Charleston & W. C. R. Co., 81 S. C. 370, 62 SE 442. Not on part of defendants bringing about indecent and compromising situation and calling attention of public thereto held within statute providing for punishment of indictable nuisances at common law. State v. Waymire [Or.] 97 P 46.

36. Where defendant built dams across bayous for purpose of draining his land, causing incidental rise of water on lands of others which upon receding would leave offensive odor, held not guilty, the result being merely an incident to erection of dam and not done with criminal intent. Stacy v. State [Tex. Civ. App.] 114 SW 807.

37. Indictment charging defendant with suffering its bridge over its right of way to become out of repair, but charging defendant with no duty in respect thereto, held not to state an offense. Louisville & N. R.

indictment should describe premises where nuisance is located with sufficient particularity to enable the sheriff to find the place.[38]

(§ 4) *C. Action for damages.*[39]—See 10 C. L. 1089—The court having acquired jurisdiction for the purpose of abating a nuisance will extend such jurisdiction to the ascertainment and determination of damages.[40] One responsible for the creation or maintenance of a nuisance is liable in damages to the injured party,[41] but the damage must be the proximate result of such nuisance.[42] He who creates obstruction in public street is not relieved from liability to travelers for injuries resulting therefrom, notwithstanding some other person has neglected his duty to remove such obstruction.[43] If the duty to abate a nuisance be judicial in its nature, as calling for the exercise of judgment, no liability rests upon the municipality for nonperformance, but if it be of a ministerial nature, neglect to perform it will render the municipality responsible to one injured thereby.[44] There can be no recovery against a county for property destroyed as a nuisance by board of health.[45] One who acquires title to land upon which there is a nuisance created by the former owner, and continues it, is liable for damages resulting from its maintenance from the time of purchase,[46] or after notice to abate, but not for its construction.[47] One

Co. v. Com. [Ky.] 113 SW 517. Indictment charging defendant with permitting a common nuisance merely states a conclusion of law and is insufficient if not supported by allegation of fact. Id. Indictment charging corporation with bringing together large number of people and quartering them near public highway when they engaged in dancing, drinking, swearing and other disorderly conduct held sufficient to charge a nuisance. Commonwealth v. Cincinnati, etc., R. Co., 33 Ky. L. R. 1056, 112 SW 613. Indictment charging maintenance of a common nuisance by suffering sale of liquors in defendant's house contrary to provisions of local option law, and by permitting persons to congregate there and become boisterous and disorderly, is sufficient without a charge that there was such disorder as to disturb peace of neighborhood. Miller v. Com. [Ky.] 113 SW 518.

**38.** Indictment for maintaining public nuisance by running poolroom held to sufficiently describe location. Ehrlick v. Com., 33 Ky. L. R. 979, 112 SW 565.

**39. Search Note:** See notes in 15 L. R. A. 689; 58 Id. 735; 3 L. R. A. (N. S.) 1060, 1119; 15 A. S. R. 845; 30 Id. 395; 76 Id. 399; 86 Id. 508; 118 Id. 868; 1 Ann. Cas. 964; 6 Id. 150; 11 Id. 134.

See, also, Nuisance, Cent. Dig. §§ 98-134; Dec. Dig. §§ 41-58; 29 Cyc. 1254-1278; 21 A. & E. Enc. L. (2ed.) 712; 14 A. & E. Enc. P. & P. 1105.

**40.** Barnett v. Tedescki [Ala.] 45 S 904.

**41.** Where plaintiff's lands were overflowed by reason of construction of levee by defendant, he may recover damages for its maintenance if it appears that levee was unlawful. Beauchamp v. Taylor, 132 Mo. App. 92, 111 SW 609. Where spur track in street in front of abutting owner's residence was allowed to become littered with rubbish and materials, cars and engines, evidence held to show that such use was unreasonable and unnecessary and that plaintiff was entitled to damages. Staton v. Atlantic C. L. R. Co., 147 N. C. 428, 61 SE 455.

**42.** Injury to trespasser from explosion of dynamite stored in house close to highway held not proximate result of nuisance where explosion was caused by shooting at house with pistol. McGhee v. Norfolk & S. R. Co., 147 N. C. 142, 60 SE 912. One injured by workman falling upon him from ladder set on sidewalk cannot recover on theory that his injury resulted from the erection of a nuisance on public street, where such obstruction was not inherently dangerous and did not greatly interfere with use of walk, and where injury was not caused by collision with ladder. Press v. Penny [Mo. App.] 114 SW 74.

**43.** Landlord held responsible for injury caused by accumulated ice on sidewalk from defective gutter in building, notwithstanding building was let to tenants. Smith v. Preston [Me.] 71 A 653. Where market company allowed trucksters to occupy sidewalk with their wares to knowledge of the District of Columbia and pedestrian was injured because of refuse left by them on sidewalk, district was guilty of negligence in not suppressing nuisance, and therefore equally responsible with market company. O'Dwyer v. Northern Market Co., 30 App. D. C. 244.

**44.** Where statute expressly declares overflow of river a nuisance and gives city full power to abate same, allegation of these facts, of injury to property, that abatement is practicable and that city refuses to do so, held to state cause of action for damages. White v. Buffalo, 60 Misc. 611, 112 NYS 485.

**45.** No recovery could be had against county for property destroyed because contaminated with smallpox. Louisa County v. Yancey's Trustee [Va.] 63 SE 452.

**46.** Corporation which bought property upon which was a dam that caused water to overflow plaintiff's land held not liable, since damage accruing before purchase not apportioned between it and codefendants, who had constructed dam, and in absence of proof of assumption of liability. Karns v. Allen, 135 Wis. 48, 115 NW 357. Where one constructs a nuisance upon his property and subsequently sells it to a corporation of which he is an officer, he remains liable for its maintenance after sale. Id.

**47.** Instruction holding defendant liable

who buys land subject to damage by reason of a nuisance cannot recover for its construction but may recover for its unlawful maintenance.[48] Where the nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage may be fully compensated at once, and the statute of limitations begins to run upon the construction of the nuisance,[49] but where the nuisance is not, from its very nature, permanent, successive actions may be brought for the injuries as they occur.[50] A cause of action for abatement by several plaintiffs jointly affected cannot be joined to cause of action for damages where the several plaintiffs have no joint or common interest in the damages sustained.[51] In a complaint for damage to property by vapors and gases, it is not necessary to allege that such vapors and gases were noxious, when they were so in fact,[52] and this may be shown under an allegation of negligence.[53] Damages must be specifically alleged,[54] and those accruing subsequently to the commencement of the action may be set out in a supplemental complaint,[55] but where injury is of a temporary character, the diminution of rental value is recoverable without special allegation thereof.[56] The court may instruct the jury that they may return a verdict for damages caused by the operation of the nuisance without defining the exact manner in which it arises.[57]

*Damages.* See 10 C. L. 1041—If the improvement or structure that produces the injury or nuisance complained of is permanent, the measure of damage is the depreciation in the market value of the property;[58] if the nuisance is temporary in character

for both construction and maintenance of pools of stagnant water held error where defendant's predecessor had constructed nuisance. Graves v. St. Louis, etc., R. Co., 133 Mo. App. 91, 112 SW 736. Purchaser of unlawful mill dam liable only for damages from its maintenance after notice to abate. Ireland v. Bowman [Ky.] 114 SW 338. Where railroad company's predecessor had constructed solid embankment which damaged plaintiff because of damming water course, company held liable because lack of allegation and proof of notice not raised on trial. Nickey v. St. Louis, etc., R. Co. [Mo. App.] 116 SW 477.

48. Land purchased subject to damage by reason of levee, damages recoverable only for maintenance. Beauchamp v. Taylor, 132 Mo. App. 92, 111 SW 609

49. Construction of ditch to straighten meandering creek causing plaintiff's lands to be flooded held to be obviously injurious and consequently barred by statute. Turner v. Overton [Ark.] 111 SW 270. Damage by noise and smoke from operation of electric light plant held permanent continuing one for which there could be but one recovery. Sherman Gas & Elec. Co. v. Belden [Tex. Civ. App.] 115 SW 897

50. Damages to growing crop by water percolating through land on account of alleged negligent construction by railway company of ditch along its right of way recoverable as they occurred. International & G. N. R. Co. v. Slusher [Tex. Civ. App.] 115 SW 673.

51. Where several plaintiffs whose lands were commonly affected by flooding caused by defendant's ditch, but having separate and distinct claims for damages, joined their cause of action for abatement with their cause of action for damages, held demurrable. Nahate v. Hansen, 106 Minn. 365, 119 NW 55.

52. Use of word "noxious" in instruction, where not alleged in complaint for damages to property by vapors, not error, where such damage actually shown. Johnson v. Northport Smelting & Refining Co. [Wash.] 97 P 746.

53. Allegation that plaintiff was injured by negligent operation of brick factory is sufficient substitute for allegation that foul odors were wrongfully and injuriously allowed to escape. Hinmon v. Somers Brick Co., 75 N. J. Law, 869, 70 A 166.

54. Declaration in damages for nuisance caused by smoke and jars from power plant held sufficient on demurrer. McArdle v. Chicago City R. Co., 141 Ill. App. 59.

55. Where original complaint alleged that defendants threaten to continue blasting and removing earth from certain land which would destroy lateral support of plaintiff's premises, a supplemental complaint that by reason of blasting done subsequent to filing of original complaint dwelling house and furniture was cracked and damaged was properly allowed. Melvin v. E. B. & A. L. Stone Co., 7 Cal. App. 327, 94 P 390.

56. Damages from telephone pole in front of doorway. Merchants' Mut. Tel. Co. v. Hirschman [Ind. App.] 87 NE 238.

57. Charge authorizing recovery for damage caused by construction, operation and maintenance of electric light plant in manner in which jury may find from evidence that same is constructed, operated and maintained, held correct. Sherman Gas & Elec. Co. v. Belden [Tex. Civ. App.] 115 SW 897.

58. Instruction that measure of damages for injury to real estate caused by erection of permanent dam was depreciation in rental value held error. Fidelity Trust Co. v. Shelbyville Water & Light Co., 33 Ky. L. R. 202, 110 SW 239. Test is permanency

and may be readily abated, the measure of damage is the depreciation of the rental value, if rented, or damage to use and occupation if occupied by the owner.[59] The depreciation in rental value must be caused by interference with the comfortable enjoyment of the premises and not from the mere prejudice against the property on account of its proximity to the alleged nuisance.[60] The measure of damage for injury to residence must be based upon use of premises as residence and not upon market value for other purposes.[61] In assessing damages, personal discomfort[62] and actual loss and expense resulting from the nuisance are elements properly considered.[63] Where the entire claim of damages is predicated upon anticipated injuries, no cause of action arises.[64] A court of equity will not award punitive damages for the maintenance of a nuisance.[65] Where the nuisance is a continuing one, damages occurring within the period covered by the statute of limitation only can be recovered.[66] Damages resulting from a nuisance need not be itemized, but may be stated in general terms.[67] In Alabama allowance of attorney's fees is not authorized in a proceeding for the abatement of a public nuisance.[68] Recovery may be had for damages occurring up to time of trial.[69] The award must not be excessive.[70]

(§ 4) *D. Rights of private persons in respect to public nuisances.*[71]—See 10 C. L.

of construction, regardless of whether flooding is continuous or occasional.

**59.** Measure of damage to property by reason of accumulated filth, odors and flies from feeding yard is diminution in value of use. Kentucky Distilleries & Warehouse Co. v. Barrett [Ky.] 112 SW 643. Pool for holding surface water and which it was alleged would breed mosquitoes was abatable and not permanent nuisance. Sanders v. Miller [Tex. Civ. App.] 113 SW 996.

**60.** Where emission of smoke and soot did not diminish rental value, only nominal damages were allowed. McGill v. Pintsch Compressing Co. [Iowa] 118 NW 786. Mere fact that plaintiff's land had depreciated in value on account of location of pool on defendant's land not sufficient basis for damages in absence of proof of substantial invasion of plaintiff's legal rights. Sanders v. Miller [Tex. Civ. App.] 113 SW 996.

**61.** In suit for damages on account of operation of power plant, instruction that measure of damages was difference between market value of property for use as residence just before erection of plant and market value for such purposes after its erection held correct. Sherman Gas & Elec. Co. v. Belden [Tex. Civ. App.] 115 SW 897.

**62.** Personal discomfort from operation of tallow plant held primary consideration in allowing damages, although not susceptable of arithmetical computation. Labasse v. Piat, 121 La. 601, 46 S 665.

**63.** Where timber was destroyed by flooding, damages may be recovered, although ownership is in another and plaintiff only has a right to cut it under stipulated rent for term of years. Woodstock Hardwood & Spool Mfg. Co. v. Charleston L. & W. Co. [S. C.] 63 SE 548. Loss occasioned through sickness of employes by flooding of land. Id. Evidence as to damage to use of plaintiff's property by reason of proximity of cattle in distillery yard examined and held sufficient to show actual damage. Kentucky Distilleries & Warehouse Co. v. Barrett [Ky.] 112 SW 643. Where defendant caused oil and water from its shops to be drained into plaintiff's artificial lake, ruining ice and killing fish, measure of damages was cost of restoring property to its original condition, loss in fishing privileges, and of restocking lake with fish. Fischer v. Missouri Pac. R. Co. [Mo. App.] 115 SW 477. Where dam in navigable river obstructed passage of logs, recovery could be had for their deterioration and for any expense incurred in getting logs through. Ireland v. Bowman [Ky.] 114 SW 338. Where dam had existed for 15 years but raised in height during that time, no damage could be recovered for deterioration of detained logs or labor necessary to get them over dam, that would have been necessary if dam had been maintained at original height, but recovery might be had for diminution in value of use of property by reason of raising of dam. Id.

**64.** Empty pool for holding surface water which it was alleged would breed mosquitoes. Sanders v. Miller [Tex. Civ. App.] 113 SW 996.

**65.** By electing to sue in equity, complainant waived his right to exemplary damages. Karns v. Allen, 135 Wis. 48, 115 NW 357.

**66.** Unlawful dam in navigable river a basis of action for damages occurring within 5 years preceeding commencement of suit. Ireland v. Bowman [Ky] 114 SW 338.

**67.** Damages by flooding. Woodstock Hardwood & Spool Mfg. Co. v. Charleston L. & W. Co. [S. C.] 63 SE 548.

**68.** Barnett v. Tedescki [Ala.] 45 S 904.

**69.** Dam flooding plaintiff's lands. Karns v. Allen, 135 Wis. 48, 115 NW 357.

**70.** Evidence examined and held to show damages for flooding land excessive. Karns v. Allen, 135 Wis. 48, 115 NW 357. Discomfort and annoyance from operation of tallow plant assessed at $100 not excessive. Labasse v. Piat, 121 La. 601, 46 S 665.

**71. Search Note:** See notes in 23 L. R.

[1042]—To entitle a private person to redress against a public nuisance, he must show that he sustained damages of a personal and peculiar nature, such as are not sustained by the rest of the community.[72] An individual suffering peculiar injury may abate a public nuisance in cases of urgency requiring a more speedy remedy than can be had by ordinary judicial proceedings.[73] Mandamus will issue at the suit of one who has not been specially damaged to compel public officials to perform their duty of abating a public nuisance.[74]

A. 301; 3 L. R. A. (N. S.) 448, 1126; 8 Id. 227; 11 Id. 1060; 1 Ann. Cas. 38; 11 Id. 287.

See, also, Nuisance, Cent. Dig. §§ 163-188; Dec. Dig. §§ 71-76; 29 Cyc. 1208-1213.

72. Boyd v. Schreiner [Tex. Civ. App.] 116 SW 100.

**Held specially damaged:** That obstruction of highway deprived plaintiff of his only means of ingress and egress to residence held to be special injury. Stricker v. Hillis [Idaho] 99 P 831. Telephone pole 20 inches in diameter, 6 feet from doorway, and directly in front thereof, occasioned special damage to plaintiff by obstruction of view and ingress and egress. Merchants' Mut. Tel. Co. v. Hirschman [Ind. App.] 87 NE 238. Erection of coaling chute so as to completely obstruct street and prevent access to plaintiff's property shows special damages. Gray v. Charleston & W. C. R. Co. 81 S. C. 370, 62 SE 442. Where plaintiff's buildings are so located that there was no other way for use of same, obstruction of highway was a special injury. Stricker v. Hillis [Idaho] 99 P 831. Obstruction of highway which required plaintiff to build new ditches and laterals held to damage plaintiff specially. Id. Where obstruction of highway would require plaintiff to move his buildings in order to use them, it was a special injury. Id. That obstruction of highway would deprive plaintiff of use of his orchard was a special injury. Id. Where house of prostitution was located opposite plaintiff's store, his loss of patronage, and annoyance therefrom, held special damage as to him. Seifert v. Dillon [Neb.] 119 NW 686. Where defendant erected buildings encroaching upon public highway on showing that special damages in loss of patronage at plaintiff's summer resort had been incurred, an injunction was properly granted. Barnes v. Midland R. Terminal Co., 126 App. Div. 435, 110 NYS 545. Noise and jar caused by railway company using street in close proximity to plaintiff's hotel for switch yard, whereby hotel lost patronage, held to constitute special damage to plaintiff aside from that sustained by general public. Galveston, etc., R. Co. v. DeGroff [Tex. Civ. App.] 110 SW 1006. Where plaintiffs were obliged to go to great trouble to bring logs over defendant's dam in navigable stream to their mill which was below, or to let them rot, they sustain special damages. Ireland v. Bowman [Ky.] 113 SW 56. One who slipped and was injured by reason of accumulation of ice on sidewalk caused by defective gutter on defendant's building held to have sustained special injury. Smith v. Preston [Me.] 71 A 653. Allegations in bill praying injunction against maintenance of bawdy house in same block that complainant's dwelling house was situated held to show special damages distinct from those suffered by general public and sufficient to entitle him to relief by abatement. Barnett v. Tedescki [Ala.] 45 S 904.

**Held not specially damaged:** No special damage shown to plaintiff by fact that defendant's show window extended one foot over building line into street. Close v. Witbeck, 126 App. Div. 544, 110 NYS 717. Inconvenience to plaintiff in taking his stock to water on account of obstruction of highway held injury differing in degree and not in kind from that suffered by general public. Stoutemeyer v. Sharp [Ark.] 116 SW 189. Where plaintiff sought to enjoin construction of street railway in front of residence, it was not sufficient to show that she would be injured by noise, or that she used that particular street more than public generally. Ayers v. Citizens' R. Co. [Neb.] 118 NW 1066. Injunction at suit of private individual to remove driveway leading from stable across sidewalk refused. Oehler v. Levy, 234 Ill. 595, 85 NE 271. Complainant could not enjoin structure used for wharfage purposes along seashore, and which obstructed his access to navigable waters, where he had been divested of his littoral rights. McCloskey v. Pacific Coast Co. [C. C. A.] 160 F 794. Defendant stored dynamite in uninhabited house on its right of way. A trespasser shooting at house exploded dynamite. Held that defendant was not liable because it owed no duty to plaintiff which had been violated. McGhee v. Norfolk & S. R. Co., 147 N. C. 142, 60 SE 912. That plaintiffs have lost use of the most feasible routes to market by reason of closing of public highway not sufficient showing of special injuries. Van Buskirk v. Bond [Or.] 96 P 1103. A private individual will not be granted injunction for obstructing navigable stream by building dam which caused lands to be flooded, where no special damages are shown. McMeekin v. Central Carolina Power Co., 80 S. C. 512, 61 SE 1020.

73. Where defendants to drain their own lands cleared an obstructed but unfinished ditch opening from lake, with result that plaintiff's lands were flooded, held defendants were not entitled to abate nuisance. Felt v. Elmquist, 104 Minn. 33, 115 NW 746.

74. Mandamus granted to compel city officials to remove portico in front of restaurant abutting into street and constituting unlawful appropriation thereof for private purposes. People v. Ahearn, 124 App. Div. 840, 109 NYS 249.

### OATHS.[75]

*The scope of this topic* is noted below.[76]

In the absence of statute an officer cannot administer an oath to himself.[77] Election managers may take a valid official oath by signing it in the presence of each other, although only one purports to attest it, its legal effect being that each administers the oath to the other and that not any one of them administers it to himself.[78] An affirmation is binding if made as required by statute.[79] An oath of office, if taken with reference to a particular office and properly filed, is sufficient although it does not designate the particular office with reference to which it is taken.[80]

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**Obscenity,** see latest topical index.

### OBSTRUCTING JUSTICE.[81]

*The scope of this topic* is noted below.[82]

Mere remarks,[83] or threats alone, unaccompanied by any effort or apparent intention to execute them, are not sufficient to constitute the offense of resisting an officer in the execution of lawful process.[84] An information for resisting an officer while attempting to serve a lawful process must disclose his official character, the nature of the process,[85] and that it was a legal one.[86] An information based upon a statute prohibiting resistance to peace officers must allege whether the arrest was made under warrant or not, and if the latter, sufficient facts must be alleged to show that the offense was one for which an arrest could be made without a warrant.[87] It is a defense to the charge of resisting an officer in levying an execution that the judgment was void and that the officer knew it.[88]

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**Occupation Taxes; Offer and Acceptance; Offer of Judgment; Office Judgments,** see latest topical index.

**75.** See 8 C. L. 1191.

**Search Note:** See notes in 5 Ann. Cas. 723. See, also, Oath, Cent. Dig.; Dec. Dig.; 29 Cyc. 1297-1306; 21 A. & E. Enc. L. (2ed.) 743; 1 A. & E. Enc. P. & P. 377.

**76.** It includes only matters relating to the form, sufficiency and administration of oaths. See the topics Affidavits, 11 C. L. 58, and Perjury, 10 C. L. 1162.

**77.** Indictment for false swearing charging that defendant administered oath to himself as election manager along with two others is demurrable. Phillips v. State [Ga. App.] 63 SE 667.

**78.** Phillips v. State [Ga. App.] 63 SE 667.

**79.** That witness, on application to register title upon making affirmation, stated that he had no special objection to its form, did not invalidate it nor entitle adverse party to examine him as to what he meant. McMahon v. Rowley, 238 Ill. 31, 87 NE 66.

**80.** Oath of office of clerk of school district. State v. Ladeen, 104 Minn. 252, 116 NW 486.

**81.** See 10 C. L. 1043.

**Search Note:** See, also, Obstructing Justice, Cent. Dig.; Dec. Dig.; 29 Cyc. 1326-1339; 21 A. & E. Enc. L. (2ed.) 764; 15 A. & E. Enc. P. & P. 1.

**82.** It includes only the criminal offense of obstructing justice. The related offenses of bribery (see Bribery, 11 C. L. 440) and Embracery (see Embracery, 11 C. L. 1198), and obstruction of justice as contempt (see Contempt, 11 C. L. 715), are excluded.

**83.** Mere remarks by bystander not an interference with officer making arrest. City of Chicago v. Brod, 141 Ill. App. 500.

**84.** Under Pen. Code 1895, § 306. Allen v. State [Ga. App.] 62 SE 1003.

**85.** Accusation held insufficient. Hunter v. State, 4 Ga. App. 579, 61 SE 1130.

**86.** Information based upon Ballinger's Ann. Codes and St., § 7208, for resisting sheriff in levying execution, not averring process a legal one and not setting out facts describing it, held demurrable. State v. Knopf [Wash.] 96 P 1076.

**87.** Information averring that defendant was drunk in public place in presence of deputy sheriff insufficient under Pen. Code 1895, art. 236. Harless v. State, 53 Tex. Cr. App. 319, 109 SW 934.

**88.** Error to exclude evidence as to infirmity of judgment and officer's knowledge thereof. State v. Knopf [Wash.] 96 P 1076.

## OFFICERS AND PUBLIC EMPLOYES.


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*The scope of this topic* is noted below.[89]

§ 1. *Definition and distinctions.*[90]—See 10 C. L. 1044.—An office is a public charge or employment, the right to exercise a private or public employment and to take the fees and emoluments belonging thereto,[91] and he who performs the duties of an office is an officer.[92] A usurper is one who intrudes himself into an office which is vacant, or ousts the incumbent without any color of title.[93] A deputy is one who acts officially for another.[94] Officers may be classified with reference to the public

**89.** This topic deals with the general law of officers, excluding the law of elections (see Elections, 11 C. L. 1169), of quo warranto (see Quo Warranto, 10 C. L. 1356), and that pertaining to particular officers (see Sheriffs and Constables, 10 C. L. 1648; Judges, 12 C. L. 396, and like topics) or particularly applicable to particular governmental bodies (see United States, 10 C. L. 1935; States, 10 C. L. 1702; Counties, 11 C. L. 908, and Municipal Corporations, 12 C. L. 905).

**90. Search Note:** See notes in 15 L. R. A. (N. S.) 93; 63 A. S. R. 181.

See, also, Officers, Cent. Dig. §§ 1, 2, 4, 61-68½; Dec. Dig. §§ 1, 2, 39-48; 29 Cyc. 1361-1364, 1368, 1389-1393, 1395; 2 A. & E. Enc. L. (2ed.) 310; 8 Id. 781; 14 Id. 1095; 23 Id. 322.

**91.** Implies authority to exercise portion of sovereign powers of state either in making, administering or executing laws. Commonwealth v. Bush [Ky.] 115 SW 249. Power and jurisdiction of office inseparable and constitute office. Id. True test of public office seems to be that it is part of administration of government, civil or military. Id. An office has been defined as a special trust or charge created by competent authority, the oath, bond, liability to account, and tenure being indicia of office. Gracey v. St. Louis, 213 Mo. 384, 111 SW 1159.

**92.** Commonwealth v. Bush [Ky.] 115 SW 249. A public officer is one who has some duty to perform concerning the public. Yerger v. State, 91 Miss. 802, 45 S 849. Officers elected under city charters to perform duties of surveyor of highways are in legal contemplation such officers whatever their designation. Smith v. Gloucester, 201 Mass. 329, 87 NE 626.

**Held officers:** Justice of peace. State v. Albright [Ala.] 46 S 470. County clerk, public officers Law § 2 (Laws 1892, p. 1656, c. 681). Wadsworth v. Livingston County Sup'rs, 115 NYS 8. Supervisors. Id. Board of Commissioners of Soldiers' Home of United States acting as agents in management of public establishment of special character, not officers of corporation or trustees of independent trust. Speir v. United States to the Use of the Tradesmen's Trust Co., 31 App. D. C. 476. Deputy inspectors of boilers and elevators public officers within charter of St. Louis being parcel of administration of government. Gracey v. St. Louis, 213 Mo. 384, 111 SW 1159. Register of probate not agent of judge of probate but duties prescribed by law. No presumption that letter addressed to register is given to judge. Cole v. New England Trust Co., 200 Mass. 594, 86 NE 902.

**Not officers:** Position of city surveyor not strictly an office, since no salary. People v. Ahearn, 125 App. Div. 795, 110 NYS 306. Members of South Carolina Dispensary Commission, created by Sess. Laws 1907, p. 835, No. 402, with power to wind up state dispensary, are not "officers of the state" within common meaning of term. Fleischman Co. v. Murray, 161 F 152. If officers at all, are officers appointed solely for performance of specific duties. Id.

**93.** Commonwealth v. Bush [Ky.] 115 SW 249. Assumes to exercise functions without color of right. Johnson v. Sanders [Ky.] 115 SW 772.

**94.** Sperry v. Barber [N. J. Law] 71 A 64;

body for which their services are performed as federal,[95] state,[96] county,[97] or municipal,[98] or with reference to their duties as executive, legislative, judicial or ministerial.[99]

*A de facto officer* See 10 C. L. 1044 is one who is in possession of an office discharging his duties under color of authority.[1] The rule that there cannot be a de facto officer where there is no de jure office [2] is not always adhered to.[3] A usurper cannot be a de facto officer,[4] but may become such if his assumption of office is acquiesced in.[5] That a person is an officer de facto cannot be proved by the statement of a witness that it was generally known that he was acting as an officer.[6]

State of Ohio v. Houck, 11 Ohio C. C. (N. S.) 414. Substitute of officer, usually ministerial. State of Ohio v. Houck, 11 Ohio C. C. (N. S.) 414. Use of word "deputy" in statute not necessarily controlling. Id. Deputy coroner appointed under Rev. St. § 1209a, not an officer. Id. Under Ballinger's Ann. Codes & St. § 1564 (Pierce's Code, § 4006); § 1595 (§ 4037) and Acts 1907, p. 352, c. 160, § 6, county engineer may have deputy, where duties require it. State v. Clarke County Super. Ct., 49 Wash. 392, 95 P 488. Deputy has power of chief and report of proceedings to establish road signed by his own name is sufficient as if made by county engineer. Id. State v. Clarke County Super. Ct., 49 Wash. 392, 95 P 488. Where report of deputy county engineer in highway proceedings accepted and acted upon by county commissioners, act amounted to ratification of appointment. Id.

**95.** See United States, 10 C. L. 1935.

**96.** See States, 10 C. L. 1702. Policemen not servants of municipality, though appointed by such corporation, but rather state officers. City of Chicago v. Bullis, 138 Ill. App. 297. Policeman not strictly state officer in same sense as attorney general, but rather public officer. State v. Edwards [Mont.] 99 P 940. S. C. dispensary commission created under Sess. Laws 1907, p. 835, No. 402, to wind up state dispensary, not officers of state. Fleischman Co. v. Murray, 161 F 152. If officers at all, merely appointed for performance of specific duties. Id. Whether officers of a department are state or municipal officers depends on duties to be performed. Metropolitan sewerage commission a state commission. People v. Metz, 61 Misc. 363, 113 NYS 1007.

**97.** See Counties, 11 C. L. 908.

**98.** See Municipal Corporations, 12 C. L. 905. Members of board of public works city officers since duties defined by Laws 1907, p. 1521, c. 661, affect municipality. People v. Raymond, 129 App. Div. 477, 114 NYS 365. Policeman not within Const. Art. 16, § 6, limiting term of office of municipal officers to two years. State v. Edwards [Mont.] 99 P 940. Municipal officers in Const. Art. 16, § 6, means city officers. "Municipal" may refer to either town or city, and word has origin in idea of free town or city, popularly applied to cities, though in general meaning applied to idea of local self-government as distinguished from centralized government. Id.

**99.** See, also, topics Certiorari, 11 C. L. 591; Prohibition, Writ of, 10 C. L. 1277; Appeal and Review, 11 C. L. 118, where the reviewableness of an order depends on its judicial character. Health commissioner of Chicago purely ministerial officer performing duties authorized by valid law and ordinance. People v. Board of Education, 234 Ill. 422, 84 NE 1046.

**1.** "Color of authority" as applied to a de facto officer means authority derived from an election or appointment however irregular or informal. In re Krickbaum's Contested Election, 221 Pa. 521, 70 A 852. Irregularities in qualification or appointment will not prevent person being de facto officer. Bedingfield v. First Nat. Bank, 4 Ga. App. 197, 61 SE 30. Premature appointment. St. George v. Hardie, 147 N. C. 88, 60 SE 920. Must appear that officer was ineligible, defect in election or some fact showing he was not legally elected. Commonwealth v. Wotton, 201 Mass. 81, 87 NE 202. Must be facts, or conditions to lead others to recognize person and treat him as lawful incumbent. Bedingfield v. First Nat. Bank. 4 Ga. App. 197, 61 SE 30. An officer de facto is one who has the reputation of being the officer he assumes to be and yet is not a good officer in law. Id. Two persons cannot, at same time, be de facto officers of an office for which one incumbent only is provided by law. Davies v. State, 11 Ohio C. C. (N. S.) 209.

**Held de facto officers:** Election judge acting as such under mistaken idea that he was appointed for year. In re Krickbaum's Contested Election, 221 Pa. 521, 70 A 852. Postmaster appointed to incompatible office of school trustee who qualified and assumed to exercise office with acquiescence of public and appointing power. Johnson v. Sanders [Ky.] 115 SW 772. Members of board of election commissioners contended to be ineligible as not selected from certain political party. Independence League v. Taylor [Cal.] 97 P 303. Patrolman promoted to detective service, followed by actual service. Hansen v. Van Winkle [N. J. Law] 69 A 1011. Assessor and treasurer of adjoining town acting under St. 1908, § 1152, where town elects no officers. Offices existed by law and were vacant by default of electors, and assessor and treasurer were persons claiming right under statute and actually performing functions. Strange v. Oconto Land Co., 136 Wis. 516, 117 NW 1023.

**2.** Office corresponding to that which de facto officer holds must exist. Bedingfield v. First Nat. Bank, 4 Ga. App. 197, 61 SE 30. Judge pro hac vice as de facto officer cannot exist, being no office. Id. Selected for special occasion and cannot therefore acquire reputation of being judge. Id.

**3.** May be de facto officer, though no de jure office exists as in de facto municipal corporations or de facto courts. State v. Bailey, 106 Minn. 138, 118 NW 676.

**4.** Not officer at all. Commonwealth v. Bush [Ky.] 115 SW 249.

*Officer and employe distinguished.* See 10 C. L. 1044—Officers are distinguished from employes, chiefly by the nature of their duties.[7]

*Office and government contract distinguished.* See 10 C. L. 1044

§ 2. *Creation and change of offices.*[8] See 10 C. L. 1045—Unless provided by the constitution,[9] the legislature may create and provide for the filling of offices[10] or abolish the same.[11] Certain offices may be created by municipalities, pursuant to delegated authority.[12] Where a city organizes under the general law, its offices are abolished.[13] The power of selection of officers of a commonwealth resides orig-

**5.** Johnson v. Sanders [Ky.] 115 SW 772.

**6.** Williams v. Finch [Ala.] 46 S 645.

**7.** Public officers subject to legislative control, not mere employes. Combs v. Bonnell, 33 Ky. L. R. 219, 109 SW 898. Patrolman of Chicago, officer, not employe. City of Chicago v. Bullis, 138 Ill. App. 297. Clerk of penitentiary board public officer, though heading of chapter creating officer (Code, § 3598) entitled "Employes of Penitentiary." Yerger v. State, 91 Miss. 802, 45 S 849.

**Held employes:** Visiting chaplain in department of public charities with duty of visiting Jewish patients and administering religious consolation. Blum v. New York, 61 Misc. 104, 112 NYS 1071. Foreman of yard of health department of city, duty being labor service. Garvey v. Lowell, 199 Mass. 47, 85 NE 182.

**8. Search Note:** See notes in 8 Ann. Cas. 1102.

See, also, Officers, Cent. Dig. §§ 3, 5; Dec. Dig. §§ 3, 4; 29 Cyc. 1368; 23 A. & E. Enc. L. (2ed.) 328.

**9.** State v. St. Louis [Mo.] 115 SW 534. Under Schedule to Constitution, § 10, city of second class having population over 2,500 became, on admission of state, city of first class and officers held positions by virtue of constitution. State v. Ledbetter [Okl.] 98 P 834; Ryan v. Casaver [Okl.] 98 P 928; State v. Bridges, 20 Okl. 533, 94 P 1065. Act of state legislature (Sess. Laws 1907-8, p. 183, c. 12) as to incorporation of cities inapplicable to cities that continue to be cities of first class under Schedule to Const. § 10. State v. Ledbetter [Okl.] 97 P 834; Ryan v. Casaver [Okl.] 98 P. 928; State v. Bridges, 20 Okl. 533, 94 P 1065. Person elected as marshal under act of incorporation only officer de facto and officer holding position by Schedule to Const. § 10 de jure entitled to office. State v. Ledbetter [Ok.] 97 P 834. Under Wilson's Rev. & Ann. St. § 956, vacancies might be filled by appointment on admission of state, whereby cities of 2,500 became cities of first class Id. Under schedule to Const. § 10, successors to officers in cities of first class who are voted for by entire city are to be elected on first Tuesday in April, 1909. State v. Bridges, 20 Okl. 533, 94 P 1065. Legislature may provide for election at date earlier or later than laws in force in state. Id.

**10.** State v. St. Louis [Mo.] 115 SW 534. Legislature may designate officers of municipality, Const. Art. 12, § 1. Vineyard v. Grangeville City Council [Idaho] 98 P 422. Where legislative act providing for police judge modified and permission given city clerk to act as ex-officio police judge, pursuant to which council passed ordinance declaring that after next election city clerk be ex-officio police judge it was unnecessary to elect such officer. Id. Sess. Laws 1907, p. 170, c. 36, with cognate acts c. 33, 38, evidence legislative plan to create office of county comptroller. Chapter 37, p. 173, Laws 1907, not inducement for enacting c. 36. Allen v. Kennard [Neb.] 116 NW 63. Not special legislation. Id. Validity or invalidity of c. 37, not bearing upon c. 36. Id.

**11.** May abolish nonconstitutional office. State v. Goldthait [Ind.] 87 NE 133. Common councilman. Id.

**12.** Under General Municipal Corp. Act (Gen. Laws 1906, p. 910) § 880, trustees might create officer to exercise duties of police officer with limitation that such officer could not collect license fees and taxes, a duty imposed on marshal. DeMerritt v. Weldon [Cal.] 98 P 537. Ordinance appointing constable void since authority (City and Village Act, Art. XI, §§ 11, 12) unconstitutional (violating Const. Art. VI, § 21). Cook v. Marseilles, 139 Ill. App. 536. Ordinance creating paymaster not invalid as creating new office, duties being comprehended by Acts 1905, pp. 115, 116. c. 52, §§ 55, 60, creating office of register, and so called paymaster being in effect assistant register. Henniger v. Memphis [Tenn.] 111 SW 1115. President of borough of Manhattan has power to organize bureau of highways and appoint head therefor (Construing charter and statutes). People v. Ahearn, 193 N. Y. 441, 86 NE 474. Power to organize bureaus administrative and subject to delegation to president of borough. Id. Office of policeman of Chicago created by statute. City of Chicago v. Bullis, 138 Ill. App. 297. Unknown to common law. Bullis v. Chicago, 235 Ill. 472, 85 NE 614. Under general municipal law, council had no power to declare individuals in employ policemen when city surrendered charter and adopted general law. Id. General law requires appointment by mayor or election. Id. Rev. Code of Chicago, § 1477, as to police department, declaring that department consist of as many policemen as "prescribed by ordinance" does not create office of patrolman. Word "prescribed" equivalent to established. Id. Classification of officers and places of employment by civil service commission did not establish office of patrolman which did not previously exist. Id. Where office of patrolman not legally created by statute or ordinance, it could not be established by an ordinance appropriating salary to such person. Id. Provision for appointment of officers by resolution ineffective when charter required ordinance. Id.

**13.** Office of policeman abolished eo instanti when city organized under general law and charter was thus repealed, since policeman was not named as officer under

inally in the people,[14] and the election of nonconstitutional officers, in certain contingencies by a senate in conjunction with the governor, may be auththorized.[15] A board of freeholders elected pursuant to a constitution to frame a charter have no authority to adopt an ordinance for the nomination and election of officers prescribed by such charter.[16]

§ 3. *Eligibility and qualifications. A. In general.*[17] See 10 C. L. 1045—The right to hold office is a political privilege, not a constitutional or inherent right,[18] and constitutional or statutory provisions impose the qualifications of public offices.[19] A common qualification is that of residence,[20] and in a few jurisdictions it is required that members of city councils be freeholders.[21] Conviction of crime, as polygamy, is a disqualification,[22] and interest may render a candidate ineligible, as where the compensation incident to office is increased by legislators.[23] Very often the disqualification involves the particular office to be filled.[24] Incompati-

general law. Bullis v. Chicago, 235 Ill. 472, 85 NE 614. Office not in existence until city provided for appointment of such officers as authorized. Id.

**14.** May provide how power be exercised. In re Decision of Justices [R. I.] 69 A 555. Power of appointment, or selection to office, a function of either executive, legislative or judicial branch only when made so by law. Id.

**15.** People authorized to delegate election of nonconstitutional officers to grand committee, had authority to authorize Pub. Laws 1901, p. 148, c. 809, §§ 62, 63, providing for election of such officers by senate in conjunction with governor. In re Decision of Justices [R. I.] 69 A 555. Under Const. Art. 11, § 3, and amendments, providing for election of certain stated officers in certain contingencies and omitting declaration in art. 8, § 3, making it duty of two houses at request of either to join in grand committee to "elect other officers," it was intention to place two houses separately and grand committee on same footing with respect to capacity to elect officers. Id. Not specially designated to be chosen by either. Id.

**16.** Board of freeholders elected by Const. art. 18, § 3, subd "a" and "b" (Burn's Ed. §§ 413, 414). State v. Scales [Okl.] 97 P 584. Election ordinance not in force till ratified by qualified electors. Id.

**17. Search Note:** See notes in 6 C. L. 844; 55 A. S. R. 369; 1 Ann. Cas. 291, 295; 9 Id. 1049; 10 Id. 930; 11 Id. 950.

See, also, Officers, Cent. Dig. §§ 22-60; Dec. Dig. §§ 18-38; 29 Cyc. 1375-1388; 14 A. & E. Enc. L. (2ed.) 1095; 23 Id. 330.

**18.** State v. Goldthait [Ind.] 87 NE 133.

**19.** Where constitution creates offices and prescribes qualifications, there can be no additional qualification imposed by legislature (State v. Goldthait [Ind.] 87 NE 133), but reasonable qualifications in addition to those generally imposed by constitutions are proper where offices created by legislature (Id.). Office of county councilman subject to additional qualifications (Id.), or conditions may be changed (Id.). County assessor nonconstitutional officer. Id. No constitutional restriction on power of general court to fix qualifications of city officers. Graham v. Roberts, 200 Mass. 152, 85 NE 1009.

**20.** Detachment of school district rendering office ipso facto vacant. School Dist. No. 116 v. Wolf [Kan.] 98 P 237. Evidence held to show that officer had ceased to reside in county and had therefore vacated his office. State v. Hays, 105 Minn. 399, 117 NW 615.

**21.** Charter of Bluefield, § 10, requiring as qualifications to membership in city council that person be owner of freehold in city for year prior to election, and that oath be taken as to qualification prescribed, not violative of Const. art. 4, §§ 1, 4, 5, 8 (Code 1906, pp. LII-LIV). Kahle v. Peters [W. Va.] 62 SE 691.

**22.** Person within inhibitions of "suffrage and elections" article of state constitution, § 3, cannot hold civil office. Toncray v. Budge, 14 Idaho, 621, 95 P 26. Member of Mormon church, which teaches that marriages performed by its duly authorized officers remain in force for this life and eternity, while others are only for life, is not disqualified from office. Id. Where such church does not teach or countenance bigamy. Id. "Celestial" or "patriarchal" marriage within constitutional inhibition must be bigamous. Id.

**23.** Under Const. art. 4, § 7, legislature may increase compensation of members to take effect at next ensuing term. State v. Scott, 105 Minn. 513, 117 NW 1044. Power not curtailed by Const. art. 4, § 9, which prohibits senators and representatives from holding any office under state or federal government, except postmaster, where salary has been increased. Id. Words "an office under the state" refers to other than legislative offices of senator and representative. Id. Laws 1907, p. 307, c. 229, increasing salary of legislative members, does not disqualify representative from being eligible as candidate for succeeding term. Id. Whether senators and representatives are disqualified by law increasing compensation is properly tested in proceeding by petition and order to show cause under Rev. Laws 1905, § 202. Id. Interest of relator as candidate at primary election sufficient to maintain proceeding to determine if member of legislature disqualified by act increasing salary effective next term. Id.

**24. Attorney:** Where constitution enacted subsequently to Pol. Code, § 927 1-2, use of "attorney" meant duly licensed attorney, and disbarred lawyer was not qualified. Danforth v. Egan [S. D.] 119 NW 1021. Disbarred attorney subsequently elected state's attorney is not qualified for office.

bility of offices does not depend upon the physical ability of one person to discharge the duties of both offices,[25] but the test is the character and relation of the offices; whether the functions of both are inherently inconsistent and repugnant.[26] Incompatible offices are determined by the various statutes and constitutions,[27] and the usual effect is to render the election to the second office void.[28] Removal from office does not disqualify a person from holding such office again unless clearly expressed by the statute.[29] The duty of determining qualifications may be imposed upon the appointing power,[30] and mandatory statutes in some states require a qualified veteran to be accepted in preference to others.[31] The receipt of a majority of

Action in allowing name to go on ballot a fraud on people. Id. Cannot qualify where duties, by laws of state, consist chiefly in appearing in courts. Id. Fact that duties might be done by deputy does not qualify. Id. Attorney disbarred for violation of legal ethics not "learned in the law" within constitutional qualification of state's attorney. Violation presumed from ignorance not willfulness. Id.

**Fiscal officers:** A fiscal officer is one who officially is the custodian of the public treasury. Dorlan v. Walters [Ky.] 116 SW 313. City treasurer, as created by Ky. St. § 3132, a fiscal officer, and under Const. § 160, not eligible to succeed himself. Id. Phrase "elected under Constitution" in § 160 applies to all fiscal officers of first and second class cities, whether offices created by constitution or statute. Id. City officer who collects and receives money, though he does not hold it, is fiscal officer within Const. § 160. Id. Requirement as to depositing funds in designated depositary does not change character of officer. Id. Where Laws 1907, p. 449, fixes term of county treasurers at four years commencing with election of 1908 and makes one ineligible to succeed himself, which act amends Rev. St. 1899, § 6764 (Ann. St. 1906, p. 3330), making terms two years and providing that one is ineligible after four years, an incumbent at the time of act of 1907 is eligible for reelection in 1908. State v. Cloud, 212 Mo. 481, 111 SW 8. Under Const. art. 182, sheriff and ex officio **tax collector** is not eligible for office to which he is re-elected until he secures a discharge for collections made. State v. Reid [La.] 47 S 912. Tax collector having been acquitted of embezzlement and having discharged sureties held eligible on re-election. Id. Where tax collector had discharged state and sureties, receipts were binding and he was eligible to the office to which he was re-elected. Discharge not to be attacked collaterally. Id. Discharge not void because portion of sureties accepted less than full amount due. Id.

**School officers:** Under statutes of Indiana it is essential to eligibility of county superintendent of schools at election that he hold at least one of four prescribed "licenses" to teach. State v. Bradt, 170 Ind. 480, 84 NE 1084. Post-graduate diploma granted pursuant to act Mch. 5, 1873 (Acts 1873, p. 199, c. 86; Burn's Ann. St. 1906, § 6049) to state normal graduate not life license within act Mch. 7, 1905 (Acts 1905, p. 492, c. 163, § 1; Burn's Ann. St. 1905, § 5902a). Id.

**25, 26.** State v. Hays, 105 Minn. 399, 117 NW 615.

**27.** Offices of postmaster and school trustee incompatible. Johnson v. Sanders [Ky.] 115 SW 772. Persons holding state office, except justices of peace or militia officers, ineligible to membership in general assembly. Const. art. 3, § 4, par. 7 (Civ. Code 1895, § 5754). McWilliams v. Neal, 130 Ga. 733, 61 SE 721. Const. art. 4, § 18, forbidding person elected to legislature from receiving civil appointments during term for which elected, etc., does not preclude member of legislature from being candidate to local office of county auditor existing under art. 10, § 10, charged with duties of adjusting claims against county. Lodge v. Farrell [Mich.] 15 Det. Leg. N. 1036, 119 NW 573. Const. art. 4, § 6, providing that no person holding office under United States, state or county, except notaries etc., shall be eligible to seat in legislature does not preclude one chosen to legislature from being candidate to county office. Id. Under Greater New York Charter (Laws 1901, p. 639, c. 466), § 1549, prohibiting holding of two city or county offices, visiting chaplain of department of public charities who was held an employe is not disqualified from serving as chaplain of city hospitals. Blum v. New York, 61 Misc. 104, 112 NYS 107.

**28.** Lodge v. Farrell [Mich.] 15 Det. Leg. N. 1036, 119 NW 573. Right to first office remains unaffected. McWilliams v. Neal, 130 Ga. 733, 61 SE 721.

**29.** Office of president of borough filled by aldermen in full requirement with law, and appointee, previously removed by governor, held qualified. People v. Ahearn, 60 Misc. 616, 113 NYS 876.

**30.** Under Comp. Laws 1897, § 2990, giving appointment of city attorney to mayor, mayor has duty of determining qualifications. Patterson v. Boron, 153 Mich. 313, 15 Det. Leg. N. 395, 116 NW 1083. Appointment in good faith after fair investigation on evidence of applicant and personal knowledge of appointing officer is final. State v. Addison [Kan.] 96 P. 66. "Competent" a comparative word and degree of competency required necessarily discretionary, but should include qualities essential to prompt, efficient and honest performance of duties. Id. Power to appoint involves presumption that appointing officer has knowledge of service and requirements. Id.

**31.** Ex-soldiers preference law, Laws 1907, p. 541, c. 374, mandatory when applicant possesses required qualifications, but efficient service need not be sacrificed. State v. Addison [Kan.] 96 P 66. Evidence held to show good faith of mayor in rejecting ex-soldier and after fair investigation appointing another as city engineer.

votes confers no right to a person ineligible to an office.[32] Disqualification is ordinarily a judicial question,[33] though constitutional provisions may render a state senate the sole judge of qualifications of its members.[34] Though a city council be the exclusive judge of the qualifications of its members,[35] the determination of whether in law the facts constitute disqualification is proper on quo warranto.[36]

(§ 3) *B. Civil service.*[37]—See 10 C. L. 1047—The primary purpose of civil service laws is to promote the good of the public service,[38] and such acts must be strictly complied with as to appointments,[39] the legislature having power to legislate on the subject.[40] The classification of positions, as to whether examinations are to be held, involves a construction of the civil service statutes.[41] A civil service examination cannot be restrained as an unlawful use of public moneys, where it appears that no additional expense is imposed.[42]

Id. Appointment of city physician final, though perhaps higher standard of efficiency adopted than previously required. Id. Under Comp. Laws, 1897, § 2990, giving appointment of city attorney to mayor, mayor has duty of determining qualifications and might refuse to appoint honorably discharged union soldier, since Pub. Acts 1907, p. 476, No. 329, § 1, only prevented refusal to disqualify such union soldiers who were incapacitated by loss of limb, etc., and required that they possess other requisite qualifications. Patterson v. Boron, 153 Mich. 313, 15 Det. Leg. N. 395, 116 NW 1083. In quo warranto for denying an appointment under the veteran's preference act, charges of fraud, bad faith or disregard of law must be proved by evidence of facts inconsistent with official probity. Presumption of duty in good faith. Ray v. Miller [Kan.] 98 P 239. Suspicion and innuendo insufficient to overcome presumption. Id. Evidence insufficient to show fraud in violation of veteran's preference act in appointing county assessor. Id.

**32.** Incumbent ineligible for re-election. Dorian v. Walters [Ky.] 116 SW 313.

**33.** Officer with duty to administer the oath of office and accept official bond has no jurisdiction to inquire into the eligibility of person presenting himself for qualification. Dorian v. Walters [Ky.] 116 SW 313. Possession of certificate of election does not raise any presumption as to eligibility of person elected. As canvassing board merely tabulates returns and cannot pass on eligibility. Id. Right of county auditor to office does not depend upon issuance of commission to him. Russell v. State [Ind.] 87 NE 13.

**34.** Under Const. art. 4, § 9, supreme court can neither determine basis for senate's decision or review it. Attorney General v. Seventh Senatorial Dist. Bd. of Canvassers [Mich.] 15 Det. Leg. N. 923, 118 NW 584. Under Const. art. 4, § 9, board of canvassers cannot reject majority of votes cast for senator on ground that such person is ineligible. Id.

**35.** Holbrock v. Smedley [Ohio] 87 NE 269. Provisions of Rev. St. 1908, § 1536-205, that councilmen have no interest in expenditure of corporation moneys, not qualification of which council was judge by Rev. St. 1908, § 1536-212. Id.

**36.** Holbrock v. Smedley [Ohio] 87 NE 269.

**37. Search Note:** See Officers, Cent. Dig. § 31; Dec. Dig. § 26; 29 Cyc. 1378-1380; 6 A. & E. Enc. L. (2ed.) 88.

**38.** Not to be construed technically. Dalton v. Darlington, 123 App. Div. 855, 108 NYS 626. Probationary periods to determine if permanent appointment desirable. Id.

**39.** Civil service act Mch. 5, 1906 (P. L. 83), must be strictly complied with as to appointments. Truitt v. Philadelphia, 221 Pa. 331, 70 A 757.

**40.** Truitt v. Philadelphia, 221 Pa. 331, 70 A 757. Laws as to appointment subject to amendment or repeal; within constitutional limitations. People v. Bingham, 114 NYS 702.

**41.** Where civil service law, Laws 1899, p. 802, c. 370, § 12, exempts certain positions from competitive class, such as "deputies of principal officers authorized to act generally in place of principals," and Laws 1901, p. 1749, c. 705, § 2, providing assistants for sheriff's office in Kings county, permitted eight deputy sheriffs and eight assistant deputy sheriffs, latter class were not exempt but to be appointed under civil service law. People v. Milliken, 127 App. Div. 468, 111 NYS 551. Cashier of county clerk's office entrusted with collection of taxes and personally responsible to clerk is properly classified by civil service commission as "cashier mortgage tax bureau" in exempt class. Position confidential and competitive examination impracticable to fill it. In re Gilfillan, 58 Misc. 273, 109 NYS 376, afd. 127 App. Div. 846, 111 NYS 808. Office of chief smoke inspector of Chicago created in 1907, being head of department, is not included in classified service, since civil service act (Act Mch. 20, 1895, p. 85; Hurd's Rev. St. 1905, c. 24, p. 393) exclude heads of department and is not to be given retroactive effect so as to apply only to heads of departments in existence at time of adoption. People v. Lower, 236 Ill. 608, 86 NE 577. Hurd's Rev. St. 1905, c. 24, p. 305, par. 73, authorizes city council to provide for appointment of officers. Id.

**42.** Bill to enjoin civil service commission from holding examinations for position under District of Columbia, on ground that public moneys were unlawfully used, etc., held insufficient where it appeared that no expense was imposed on district. Harrison v. Black, 31 App. D. C. 417. Demurrer. Commissioners of district had authority to

§ 4. *Choice or employment. A. How chosen or employed.*[43] See 10 C. L. 1047 Public offices are conferred either by appointment or election.[44] Appointments [45] are intrinsically executive acts.[46] The authority of the legislature to provide for public offices is often limited by constitutional provisions,[47] noticeable among which is the restriction that local officers be elected by local residents.[48] Providing by what body of local magistracy the power of appointment is to be exercised is proper,[49] but conferring the power of appointment of nonjudicial officers upon a court has been held unconstitutional.[50] The power of appointment may involve the construction of statutes,[51] especially in regard to municipalities,[52] and the same is true of the mode

conduct competitive examinations, and securing assistance of civil service commission was no concern of petitioners. Id.

**43. Search Note:** See notes in 13 A. S. R. 125; 79 Id. 560.

See, also, Officers, Cent. Dig. §§ 6, 7, 10-21, 85-87; Dec. Dig. §§ 5, 6, 8-17, 56-58; 29 Cyc. 1369-1375, 1401-1403; 23 A. & E. Enc. L. (2ed.) 339.

**44.** Election of public officers by popular vote is treated elsewhere. See Elections, 11 C. L. 1169.

**45.** An "appointment" is used in the sense of designation to or selection for public office, not only as meaning the office or service to which one is appointed, but denoting the right or privilege conferred by an appointment, and the subject of a term of office is fairly included in a broad signification of the word. State v. Peake [N. D.] 120 NW 47.

**46.** State v. St. Louis [Mo.] 115 SW 534; State v. Neble [Neb.] 117 NW 723.

**47.** Under Const. art. 9, § 14 (Ann. St. 1906, § 264), authorizing general assembly to provide for officers, etc., assembly was not authorized to appoint same. State v. St. Louis [Mo.] 115 SW 534. Under Const. art. 15, § 14, providing that judicial officers be elected and other officers be elected or appointed as legislature directs, city board of estimates is not unconstitutional because appointed by common council instead of being elected. Bay City Trac. & Elec. Co. v. Bay City [Mich.] 15 Det. Leg. N. 1039, 119 NW 440.

**48.** Public Health Law (Laws 1893, p. 1501, c. 661), § 20, as am'd Laws 1907, p. 427, c. 225, conferring power of appointment of local health officers upon state commissioner of health, is violative of const. art. 10, § 2, and right of appointment rests wholly in local authorities. Towne v. Porter, 128 App. Div. 717, 113 NYS 758. Clauses of public health law as to competency and qualifications of applicants to enable state commissioner of health to properly exercise power of appointment void, since power to appoint unconstitutional. Id. St. 1908, § 1152, making temporary provision for emergency where otherwise there would be entire suspension of functions of public office, does not violate Const. art. 13, § 9, providing that town offices be elected by voters of town. Strange v. Oconto Land Co., 136 Wis. 516, 117 NW 1023. Where town neglects and refuses to elect officers, it cannot have town authorities, and in such emergency other residents of county in adjoining town can be authorized to act to collect state and county taxes, even on assumption that town officers must be residents of town in which they hold office. Id.

**49.** Though regulation of internal local affairs, such as employment of firemen or other city employes, is inherent in municipality as an incident of character as private corporation. Combs v. Bonnell, 33 Ky. L. R. 219, 109 SW 898. Police Commission Law (Laws 1907, p. 344, c. 136) not violative of Const. art. 5, § 36, providing that legislature may not delegate power to supervise or interfere with municipal functions to a special commission. State v. Edwards [Mont.] 99 P 940.

**50.** Charter of cities of metropolitan class (Comp. St. 1907, c. 12a) construed in connection with Const. art. 2, § 1, dividing powers of state as executive, judicial and legislative, and § 55, as to appointment of park commissioners by judges of district court, held unconstitutional, appointing power being properly with mayor and council. State v. Neble [Neb.] 117 NW 723. Appointment of park commissioners by judges of district court not to be sustained in order that judicial functions may be freely exercised, since duties of such officers do not call for judicial functions. Id. Park commissioners of city of metropolitan class clearly executive or administrative officers. Id.

**51.** Const. § 160, authorizing general assembly to provide for filling vacancies; Act May 6, 1893 (Laws 1893, p. 887, c. 196), § 20, authorizing trustees to fill vacant elective office; Act Feb. 10, 1894 (Laws 1894, p. 11, c. 8; Ky. St. 1903, § 3758), providing for filling vacancy in office of police judge by governor; and Act Mch. 16, 1894 (Laws 1894, p. 187, c. 81), and Act. Mch. 19, 1894 (Laws 1894, p. 213, c. 96; Ky. St. 1903, § 3692)), adding clause as to filling vacancy of trustees, construed; and Act Feb. 10, 1894 (Laws 1894, p. 11, c. 8; Ky. St. 1903, § 3758), repealed Act of May 16, 1893 (Laws 1893, p. 887, c. 196), in so far as inconsistent therewith, but was not affected by Act Mch. 16, 1894 (Laws 1894, p. 187, c. 881), and Act Mch. 19, 1894 (Laws 1894, p. 213, c. 96; Ky. St. 1903, § 3692), since relating to a different subject, though required to be reprinted in full in amendatory acts by constitution, wherefore power to fill vacancy of police judge was in governor, not board of trustees. Willson v. Hahn [Ky.] 115 SW 231.

**52.** In addition to elective and appointive officers provided by law in Kansas City, officers provided for by ordinance may be appointed by mayor. Laws 1905, p. 162, c. 114, § 1. State v. Addison [Kan.] 96 P 66.

of appointment.[53] Statutory provisions as to the time of appointment have been held merely directory,[54] and generally an appointment by the proper authorities is not affected by mere irregularity of procedure.[55] The appointing power may properly make appointments prior to the expiration of the term of an appointee.[56] A constitutional provision prohibiting the extension of a term of office does not prevent the reappointment of officers as original applicants.[57]

(§ 4) *B. Filling vacancies and promotions.*[58]—See 10 C. L. 1048—The power of appointment may be exercised pursuant to statute in filling vacancies,[59] as where an elected officer proves to be ineligible,[60] in the case of resignation, abandonment or removal of an incumbent,[61] upon the termination of a term,[62] or the death of an elected

Under Laws 1907, p. 1521, c. 661, § 1, providing that board of public works be "appointed" by mayor subject to vote of aldermen, word "appointed" is used in sense of "nominated." People v. Raymond, 129 App. Div. 477, 114 NYS 365. President and board of trustees of villages organized under general act have power of appointment to appointive offices. McKean v. Gauthier, 132 Ill. App. 376. Under San Diego Charter, c. 5, art. 3, § 2, council has no power to appoint special prosecutor to prosecute criminal violation of ordinances. "Litigation of city" in charter means civil actions. Dadmun v. San Diego [Cal. App.] 99 P 983. Under Village Law, Laws 1897, p. 392, c. 414, § 88, village attorney may be employed by board of trustees. In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008. Under Village Law, Laws 1897, p. 391, c. 414, § 88, subd. 1, board of trustees have no power to employ expert accountant to examine books of treasurer, etc. unless finances of village cannot be controlled as well without assistance. Id. Ky. St. 1903, § 3118, prescribing powers and duties of superintendent of public works, construed, and though superintendent had no power to make appointments until authorized by council, an appointment of an employe pursuant to ordinance was valid. Board of Alderman v. Covington, 33 Ky. L. R. 880, 111 SW 1007. Council could not elect person to hold position of overseer of street cleaning created by them. Id.

**53.** Where Johnstown Charter, § 11, required appointments to be made at joint session of council and board of water commissioners appointment by majority is valid, though majority of commissioners withdrew or refused to vote. In re Bogaskie, 58 Misc. 243, 109 NYS 598. Notice of meeting immaterial where council and board of water commissioners empowered to act jointly were present. Id.

**54.** Acts 1902, p. 181, c. 127, § 150a, fixing time of appointment of city treasurer merely directory. Appointment at subsequent date valid. State v. Fahey [Md.] 70 A 218. Pub. Laws 1907, p. 903, c. 625, § 1, creating navigation commissioners, etc., held directory as to time of appointment. Where commission created Mch. 6, with term of office to begin Apr. 15, and directing appointment before Apr. 15, appointment Mch. 13 was valid. St. George v. Hardie, 147 N. C. 88, 60 SE 920. De facto officers even if prematurely appointed. Id. Johnston City Charter, § 11, providing that appointments be made by common council and board of water commissioners on certain date, does not limit power of appointment to time fixed. Power of appointment paramount object of provisions and may be exercised subsequently. In re Bogaskie, 58 Misc. 243, 109 NYS 598.

**55.** Village officer. McKean v. Gauthier, 132 Ill. App. 376.

**56.** Where appointing power of body will expire and rest in successors before beginning of appointee's term, such body cannot forestall right of successors to make appointments. Yerger v. State, 91 Miss. 802, 45 S 849. Under Code 1906, § 3598, where office of clerk of penitentiary board would expire while board of trustees were in office, they had authority to select a successor. Need not wait till expiration of term. Id. Appointment of health officer for new term of no effect when new board comes into existence and has power of nominating for new term. Towne v. Porter, 128 App. Div. 717, 113 NYS 758.

**57.** Const. art. 5, § 31, prohibiting extension of term of public officer, increase or decrease of salary, etc., inapplicable to Police Commission Law (Laws 1907, p. 344, c. 136), in so far as permitting reappointment of former officers only after probationary term, examination, and new appointment in same manner as original applicants. State v. Edwards [Mont.] 99 P 940.

**58. Search Note:** See Officers, Cent. Dig. §§ 85-87; Dec. Dig. §§ 56-58; 29 Cyc. 1401-1403; 23 A. & E. Enc. L. (2ed.) 348.

**59.** Under act to regulate elections, P. L. 1898, p. 238, § 6, and § 139, county clerks shall be elected at general election once every five years, and vacancies supplied at general election unless vacancy happens within 15 days of such election. Kirby v. Lee [N. J. Law] 71 A 122. Provision respecting filling of vacancies not in contravention of Const. art. 7, § 2, par. 6, and art 5, par. 12, as to term of office of county clerks, and providing for filling of vacancy by governor until successor is elected. Id. Exercise of governor's power in no way impairs right to elect at ensuing election. Id. Vacancy in common council of city of third class occurring after primary election, so late that nominations could not be made except by petition, occurs at so short a period before the annual election that the office cannot be "duly filled" and may be filled by the council pursuant to Act of 1905 (P. L. p. 26). Stewart v. Jones [N. J. Law] 71 A 151. "Duly filled" means filled by election from nominations of parties, etc., as well as petitions. Id.

**60.** See ante, § 3.

**61.** See post, § 8.

**62.** Where term of city clerk expired and he held over as authorized by charter, va-

officer before entering into office,[68] and like circumstances. The legislature may specify what constitutes a vacancy.[64] Where a town authorized to fill vacancies voted not to fill the office of assessor, the acts of the remaining assessors were valid.[65]

Civil service laws as to promotions are subject to amendment or repeal within constitutional limitations.[66] Discretionary power may be vested in a commission as to when to provide promotional examinations.[67] The amount of salary incident to an office is an appropriate test in determining the respective ranks of offices.[68] Officers are also often classified according to the length of service.[69] Civil service regulations as to promotions have the force of statutes and are subject to same rules of construction.[70] Detailing an officer to perform the duties of a higher salaried office is not a promotion.[71]

§ 5. *Right to office and remedies to enforce same. A. Indicia and evidence of right.*[72]—See 10 C. L. 1050—Evidence of performance of duties by a public officer raises the presumption that he is an occupant de jure, not de facto.[73]

(§ 5) *B. What remedy.*[74]—See 10 C. L. 1050—Quo warranto [75] and not certiorari,[76]

cancy existed and successor might be appointed. In re Bogaskie, 58 Misc. 243, 109 NYS 598.

**63.** By apparent weight of authority, where person elected to office dies after he has qualified and before commencement of his term, vacancy is created in new term to be filled as provided by law, and previous incumbent is not entitled to hold over (Ballantyne v. Bower [Wyo.] 99 P 869), but question may involve a consideration of constitutional or statutory provisions (Id.). Under Rev. St. 1899, § 381, subd. 1, providing that elective office becomes vacant on death of incumbent, where elected justice of peace qualified, which act did not take effect until term commenced, and then died, person holding office was "incumbent" within meaning of statute, and death did not create vacancy. Id. "Incumbent" is person last elected to office with duty of qualifying and giving bond. § 381, subd. 1. Id. Approval of bond after commencement of term not operative to effect qualification before death so as to cause vacancy. Rev. St. 1899, § 4318, construed. Id. Under Pol. Code, §§ 996, 1001, as to filling vacancies, where controller elected for succeeding term dies before expiration of first term, a vacancy is created at beginning of succeeding term which governor must fill. People v. Nye [Cal.] 98 P 241. Appointee held only for balance of unexpired term, with right to hold over, as provided by § 879, until successor qualified. Id. Where governor reappointed officer, such appointee was entitled to office though new governor installed two days later. Id.

**64.** Pol. Code, §§ 996, 1001, declaring manner in which office shall be vacant, and providing for filling certain offices by governor, within legislative power and valid. People v. Nye [Cal.] 98 P 241. Under Const. art. 5, § 8, providing that where office is vacant and and no mode of filling is provided "by Constitution and law" governor shall fill it, legislature may specify what constitutes vacancy, and in absence of constitutional provision may prescribe method of filling. Id. Though by Constitution, art. 1, § 22 provisions are mandatory. Phrase "Constitution and law" obviously means "Constitution or law." Id.

**65.** St. 1898, c. 548, § 351, authorized town to fill vacancies and to hold otherwise would render filling of office compulsory when optional by statute. Cooke v. Scituate, 201 Mass. 107, 87 NE 207.

**66.** People v. Bingham, 114 NYS 702.

**67.** Not reviewable by courts. Errant v. People, 133 Ill. App. 563.

**68.** By civil service commission. Errant v. People, 133 Ill. App. 563.

**69.** Under Act Congress June 8, 1906 (34 Stat. at L. 221, c. 3056), amending Act Feb. 28, 1901 (31 Stat. at L. 819, c. 623) classifying police officers according to length of service, appointee as private in class 1 became entitled after three years' service with good record to be enrolled in class 2, though duties changed by commissioners several times and pay reduced once. MacFarland v. U. S., 31 App. D. C. 321. Change of duties not new appointments. Id.

**70.** Police department. People v. Neville, 58 Misc. 279, 109 NYS 640. Civil service rules as to notice of examination construed, and five days' notice required by rule 7 held applicable to examinations for promotions by virtue of reference in rule 28 to rule 13. Even if rule 7 inapplicable, rule 28, subd. 5, required reasonable notice. Id. Notice at 7 P. M. of examination at 7 P. M. next day, where relator on duty from 6 P. M. to 5 P. M., unreasonable. Id.

**71.** Leonard v. Fagen [N. J. Law] 69 A. 980. Not entitled to higher salary. Id. Revised Charter of New York (Laws 1901, p. 118, c. 466), § 276, as amended, giving telegraph operators rank of sergeant and finally lieutenant of police, not intended to apply to patrolmen temporarily assigned duty in telegraph bureau. People v. Bingham, 114 NYS 702.

**72. Search Note:** See notes in 6 L. R. A. (N. S.) 843; 8 Id. 1107; 36 A. S. R. 523; 2 Ann. Cas. 485; 11 Id. 118.

See, also, Elections, Cent. Dig. §§ 240-244; Dec. Dig. §§ 264-268; 15 Cyc. 386-388; 8 A. & E. Enc. L. (2ed.) 802; 23 Id. 351.

**73.** Commonwealth v. Wotton, 201 Mass. 81, 87 NE 202.

**74.** See, also, topics, Certiorari, 11 C. L. 591; Mandamus, 12 C. L. 642; Quo Warranto, 10 C. L. 1356; Prohibition, Writ of, 10 C. L. 1277.

**Search Note:** See notes in 4 C. L. 862; 13 L. R. A. (N. S.) 661.

injunction [77] or mandamus,[78] is the proper remedy to try title to public office; and the right cannot be determined on petition to place an appointee's commission on record [79] in an action for salary [80] or where the title would be questioned collaterally.[81] Quo warranto will only lie to determine the title of a public office as distinguished from an employment.[82] The title of de facto officers is not to be questioned collaterally,[83] and injunction is the proper remedy by a de facto officer to prevent his being disturbed in the performance of the duties of the office until the legal title has been determined.[84] Since a judgment of quo warranto compels admission to office, mandamus will lie to compel consideration of the official bond tendered.[85] A contestant for office cannot maintain certiorari to review the discharge of a prisoner guilty of contempt in refusing to produce ballots before justices appointed to take depositions in the contestant's behalf.[86] The Seneca Indians are a corporation and may maintain injunction to restrain one from usurping the functions of office of president of the nation.[87]

See, also, Mandamus, Cent. Dig. §§ 161-169; Dec. Dig. § 77; 26 Cyc. 251; Officers, Cent. Dig. §§ 111-129; Dec. Dig. § 80-89, 29 Cyc. 1416-1422; Quo Warranto, Cent. Dig.; Dec. Dig.; 23 A. & E. Enc. L. (2ed.) 351.

**75.** In re Newark School Board [N. J. Law] 70 A 881; School Dist. No. 116 v. Wolf [Kan.] 98 P 237; State v. Patton, 131 Mo. App. 628, 110 SW 636. Action under Code c. 27 to try title to public office in nature of quo warranto at common law is exclusive method of investigating usurpations. State Railroad Commission v. People [Colo.] 98 P 7; People v. Sheehan, 128 App. Div. 743, 113 NYS 230. Only remedy where one in possession of office under color of right. Id. Title to public office can only be determined in action under Code Civ. Proc. § 1948. Seneca Nation of Indians v. Jimeson, 114 NYS 401.

**76.** Where real interest of applicants for certiorari to review proceedings under which school board was appointed is their individual interest to retain their offices, the reasons must be cogent to induce court to exercise its discretion in their favor. In re Newark School Board [N. J. Law] 70 A 881.

**77.** School Dist. No. 116 v. Wolf [Kan.] 98 P 237; Holbrock v. Smedley [Ohio] 87 NE 269. Where council by statute judge of election and qualifications of members, person elected, but refused recognition on ground of disqualification, is not in possession of office. Not entitled to injunction to exercise functions. Holbrock v. Smedley [Ohio] 87 NE 269.

**78.** State v. Bessemer City Com'rs, 148 N. C. 46, 61 SE 609; McKean v. Gauthier, 132 Ill. App. 376. Title of office not object of mandamus where petition by occupant performing duties to compel issuance of warrant for salary. McKean v. Gauthier, 132 Ill. App. 376. One wrongfully removed from position in fire department cannot by mandamus compel board of fire commissioners to restore him to position or one of similar grade unless he shows such position to be vacant. People v. Sheehan, 128 App. Div. 743, 113 NYS 230.

**79.** Ex parte Denham, 33 Ky. L. R. 592, 110 SW 822. Should institute proper action and create issues of law and fact so that court may judicially pass upon legal rights. Id.

**80.** To be determined only where incumbent is party. Walden v. Headland [Ala.] 47 S 79.

**81.** Title of deputy county engineer not to be collaterally questioned. Action to invalidate proceedings establishing county road. State v. Clarke County Super. Ct., 49 Wash. 392, 95 P 488. Defect of title to office of city treasurer, because official bond does not conform to statutes, cannot be inquired into in action by state for use of city on official bond of predecessor in office failing to pay over money in possession. State v. Fahey [Md.] 70 A 218.

**82.** Code 1906, § 4017, applicable to clerk of penitentiary, an office created by statute. Yerger v. State, 91 Miss. 802, 45 S 849. Office within Quo Warranto Act, § 1, is office created either directly by legislature or by ordinance pursuant to delegation of power. People v. Hedrick, 132 Ill. App. 154. Chief sanitary inspector not officer within Quo Warranto Act. § 1. Id. Deputy coroner, appointed under the provisions of Rev. St. § 1209a, not an officer. State of Ohio v. Houck, 11 Ohio C. C. (N. S.) 414.

**83.** St. George v. Hardie, 147 N. C. 88, 60 SE 920. Cannot be questioned collaterally upon habeas corpus or other indirect method. State v. Bailey, 106 Minn. 138, 118 NW 676. Cannot be collaterally attacked in an action to which officer is not party (State v. Fahey [Md.] 70 A 218) nor in action in which he is party but has no personal interest, merely prosecuting or defending in official capacity (Id.).

**84.** Not mandamus. Davies v. State, 11 Ohio C. C. (N. S.) 209. Candidate for president of Seneca Nation, who apparently received majority of votes and was recognized as elected, at least de facto officer and may restrain predecessor from assuming to act as president until title determined under Code Civ. Proc. § 1948. Seneca Nation of Indians v. Jimeson, 114 NYS 401.

**85.** Not acceptance. State v. Bessemer City Com'rs, 148 N. C. 46, 61 SE 609.

**86.** Not party to habeas corpus. Ex parte Boles [Ark.] 114 SW 918.

**87.** Indian Law (Law 1892, p. 1592, c. 679) § 74, providing attorney for Seneca Indians, does not prohibit nation from retaining other counsel. Seneca Nation of Indians v. Jimeson, 114 NYS 401.

(§ 5) *C. Procedure and practice in particular remedies.*[88]—See 10 C. L. 1051—The procedure and practice in particular remedies is fully treated in the specific topics dealing therewith.[89] One who sues to recover a public office must show the right in himself and has the burden of proving every fact essential to the right.[90] In a proceeding under the New York statute to require the surrender of books,[91] the application must show a prima facie right to the office.[92]

§ 6. *Induction into office.*[93]—See 10 C. L. 1052—In addition to other qualifications,[94] an officer may be required to take oath [95] and give a bond [96] within a specified period,[97] and the failure of an officer to qualify within such period may be deemed a refusal to accept the office.[98]

§ 7. *Nature of tenure and duration of term.*[99]—See 10 C. L. 1052—The words "term of office" may indicate the statutory period for which an officer is elected.[1] A term of office need not be fixed and definite,[2] and within constitutional limitations, the

**88. Search Note:** See notes in 42 A. S. R. 236.

See, also, Mandamus, Cent. Dig. §§ 276-443; Dec. Dig. §§ 141-190; 26 Cyc. 387-513; Officers, Cent. Dig. §§ 111-129; Dec. Dig. §§ 80-89; 29 Cyc. 1416-1422; Quo Warranto, Cent. Dig. §§ 28-75; Dec. Dig. §§ 26-64; 17 A. & E. Enc. P. & P. 139.

**89.** See Injunction, 12 C. L. 152; Mandamus, 12 C. L. 642; Prohibition, Writ of, 10 C. L. 1277; Quo Warranto, 10 C. L. 1356.

**90.** Must recover on strength of his own title; not weakness of adversary. Dorian v. Walters [Ky.] 116 SW 313. No presumption of eligibility in direct proceeding for office. Id. To recover office of city treasurer, plaintiff must allege and prove eligibility as well as election (Id.), since the law will not lend its aid to one usurper to oust another (Id.). Matters of disqualification by conviction of felony, disfranchisement and the like, are exceptions which need not be anticipated in the petition. Id.

**91.** Proceeding under Code Civ. Proc. § 2471a not proceeding to test title. Court will go into proceedings sufficiently to determine whether or not applicant has right to immediate possession of books. In re Bogaskie, 58 Misc. 243, 109 NYS 598.

**92.** Under Code Civ. Proc. § 2471a. In re Bogaskie, 58 Misc. 243, 109 NYS 598. Free from reasonable doubt. In re Bogaskie, 59 Misc. 541, 111 NYS 922. Application denied where decided conflict in affidavits as to whether applicant's certificate of appointment was signed by officer presiding at joint session of council and water commissioner as required by Johnstown Charter, par. 17. Id. Where Johnstown Charter, par. 17, provided that appointments be evidenced by certificate of presiding officer and clerk, applicant for books of clerk's office, pursuant to Code Civ. Proc. § 2471a, must present such certificate. No presumption that clerk being adverse party would not perform duty of attesting certificate. In re Bogaskie, 58 Misc. 243, 109 NYS 598. Copy of minutes insufficient as certificate required. Id.

**93. Search Note:** See notes in 24 L. R. A. 492.

See, also, Officers, Cent. Dig. §§ 51-53; Dec. Dig. §§ 35-36; 29 Cyc. 1336; 23 A. & E. Enc. L. (2ed.) 352.

**94.** See ante, § 3a, Eligibility and Qualifications.

**95.** Tax collector legally elected entitled to office as soon as he took oath of office and qualified. Graves v. Butten [Tex. Civ. App.] 115 SW 1177. Oath within 10 days required by P. L. 1901, p. 240. Anderson v. Myers [N. J. Law] 71 A 139. Oath of office in language of Const. art. 5, § 8, taken by person elected to public office with reference to duties and for purpose of qualifying, filed in proper office, is valid and sufficient, though particular office be not specially designated therein. State v. Ladeen, 104 Minn. 252, 116 NW 486.

**96.** Under Rev. St. 1899, §§ 1223, 4318, bond of justice of peace must be given before entering upon duties of office. Requirement for qualifying. Ballantyne v. Bower [Wyo.] 99 P 869.

**97.** Justices of peace "county officers" within statute as to date of qualification and commencement of term. Rev. St. 1899, § 1224. Ballantyne v. Bower [Wyo.] 99 P 869. Under Rev. St. 1899, §§ 1224, 4328, 1223, person elected justice of peace must qualify at or after commencement of term. Performance of necessary qualifying acts before, renders them uneffective until commencement of term. Id.

**98.** Assessor's office ipso facto vacant. Davies v. State, 11 Ohio C. C. (N. S.) 209. P. L. 1901, p. 240, providing that failure of person appointed to be member of board of excise commissioners to qualify in 10 days shall cause vacancy, refers to all appointments, original or otherwise. Omission to, cannot be cured by later qualification. Anderson v. Myers [N. J. Law] 71 A 139. Person who fails to qualify acquires no title against person appointed, who legally qualifies, and can assert right to office in same suit. Id.

**99. Search Note:** See notes in 6 C. L. 851; 3 L. R. A. (N. S.) 887; 2 Ann. Cas. 378, 380; 10 Id. 697, 1140.

See, also, Officers, Cent. Dig. §§ 69-88; Dec. Dig. §§ 49-59; 29 Cyc. 1395-1401; 14 A. & E. Enc. L. (2ed.) 1098; 23 Id. 404.

**1.** May also mean shorter period, where terminated by impeachment, resignation or death. Board of Chosen Freeholders Atlantic County v. Lee [N. J. Law] 70 A 925

**2.** Under charter of Bridgeport, tenure of office of policemen is substantially during their good behavior. Sullivan v. Bridgeport [Conn.] 71 A 906. **Recall provision** (St. 1908, p. 542, c. 574, amending charter of Haverhill), requiring officers to accept of-

legislature may fix,[3] alter,[4] or abolish [5] a term. The duration of a deputy's term is limited by that of the officer whose deputy he is.[6] When fixed by statute, a term begins from that date,[7] and where the duration, but not the commencement or ending, is fixed by statute, a term commences from the date of appointment.[8] The commencement of a term may involve a construction of constitutional provisions.[9] A statute fixing a time for making appointments necessarily implies a fixed tenure for the appointee.[10] A term fixed by statute is not shortened where an appointment omitted defining a term, and the bond recited a shorter period.[11] Usually it is provided that an incumbent may hold office until the successor qualifies.[12]

§ 8. *Resignation, abandonment, removal and reinstatement. A. Resignation.*[13] See 10 C. L. 1054.—To constitute a complete and operative resignation of a public office, there must be an intention to relinquish a part of the term, accompanied by the act of relinquishment.[14] In the absence of statute,[15] a resignation is not complete until

fice of uncertain tenure, etc., not unconstitutional. Graham v. Roberts, 200 Mass. 152, 85 NE 1009.

3. Russell v. State [Ind.] 87 NE 13. Statutes and constitutional provisions construed and while legislature might fix commencement of term of office, voters were entitled to elect at election next preceding expiration of term so that Acts 1901, p. 411, c. 182, which would prevent election of auditor every four years (if defendant's term not abridged) by extending commencement of term to Jan. 1. 1905, and postponing election of successor from 1906 to 1908 was invalid as applied to this case. Id. Term of office relates to office itself, and is not enlarged by changing date of election to fill such office. Id. Where county auditor entitled to office for four years from March 28, 1904, fact that predecessor did not surrender office until July did not extend term of office. Id. Laws 1905, p. 244, c. 136, § 2, as to appointment of officers of state militia to departmental offices, and fixing term at two years is constitutional as to title of act. State v. Peake [N. D.] 120 NW 47.

4. May shorten. Graham v. Roberts, 200 Mass. 152, 85 NE 1009. Can neither abridge or lengthen term of constitutional office. Russell v. State [Ind.] 87 NE 13. May change term, if not extended over four years, of nonconstitutional office. State v. Goldthait [Ind.] 87 NE 133. County councilman. Id.

5. Graham v. Roberts, 200 Mass. 152, 85 NE 1009.

6. Deputy receiver of taxes. Sperry v. Barber [N. J. Law] 71 A 64.

7. Not date of appointment. Bruce v. Matlock [Ark.] 111 SW 990. Terms of members of board of trustees for charitable institutions held to begin with approval of act creating it April 5, 1893 (Acts 1893, p. 223). Id.

8. Code 1906, § 3598, providing for clerk of penitentiary board with term of one year to be elected by trustees, fixed no time for commencement or ending. Yerger v. State, 91 Miss. 802, 45 S 849.

9. Under Const. art. 5, §§ 2, 17, providing that governor and other officers hold office "from and after" first Monday after first day of January subsequent to election, and art. 20, § 20, providing that terms commence "on" first Monday, etc., meaning of latter section is correct. People v. Nye [Cal.] 98 P 241. Phrase "from and after" held equivalent to "on and after," though usually such phrase requires exclusion of first day. Id. Installation on first Monday after first day of January when shown to have taken place on that date for nearly 30 years since adoption of constitution, of great weight in interpreting constitution. Id.

10. Statutes as to board of trustees of state charitable institutions construed and use of word "bienially" as to time of appointment held to imply fixed term. Bruce v. Matlock [Ark.] 111 SW 990.

11. Term of office of deputy inspector of boilers and elevators fixed at four years. McQuillin's Mun. Code St. Louis, § 2199. Gracey v. St. Louis, 213 Mo. 384, 111 SW 1159.

12. Justice of peace civil officer within constitutional provision (Const. art. 6, subd "Elections" § 4), and entitled to hold office until successor qualifies. Ballantyne v. Bower [Wyo.] 99 P 869. Word "successor" in constitutional provision (Const. art. 6, subd. "Election," § 4) providing for exercise of duties of office by incumbent until successor chosen means successor legally chosen. Id. Ineligible person re-elected permitted by constitution to hold office until successor qualifies. Dorian v. Walters [Ky.] 116 SW 313.

13. **Search Note:** See notes in 12 L. R. A. (N. S.) 1010; 16 Id. 1058; 36 A. S. R. 524; 86 Id. 578; 113 Id. 516; 5 Ann. Cas. 689; 6 Id. 688.

See, also, Cent. Dig. §§ 89-108; Dec. Dig. §§ 60-76; 29 Cyc. 1403-1414; 14 A. & E. Enc. L. (2ed.) 1107; 23 Id. 421.

14. State v. Ladeen, 104 Minn. 252, 116 NW 486. State v. Huff [Ind.] 87 NE 141. To resign is to give back, to give up in a formal manner, an office. State v. Huff [Ind.] 87 NE 141. Any act of an officer by which he declines his office and renounces the further right to its use. Id. Not effective though successor appointed, if transmitted without officer's consent. Id. Written resignation delivered to proper board or officer authorized to receive it is prima facie but not conclusive evidence of intention to relinquish. State v. Ladeen, 104 Minn. 252, 116 NW 486.

15. Under Comp. Laws §§ 1814, 1816, as to resignations, an acceptance is not necessary to effect a resignation. State v. Murphy

accepted,[16] and hence subject to withdrawal.[17] A conditional resignation cannot be accepted except on the terms made by it.[18] An officer may attach as a condition the appointment of a certain other person.[19] A resignation obtained by coercion and duress is at least voidable and may be repudiated.[20]

(§ 8) *B. Abandonment.*[21]—See 8 C. L. 1203—To constitute an abandonment of an office, it must be total and under such circumstances as to clearly indicate an absolute relinquishment.[22] The failure of an illegally removed public officer to bring mandamus, quo warranto, or to sue successor for salary, does not constitute an abandonment of office.[23]

(§ 8) *C. Removal.*[24]—*The power to remove* See 10 C. L. 1054 or discharge officials or employes is usually conferred by statute upon superior officers or official boards[25] such as the mayor,[26] but is not always incident to the power of appointment.[27] The right does not inhere in the chief executive of a state,[28] but a municipality may have inherent power to remove city officials for just cause.[29] An employe may be deprived

[Nev.] 97 P 391. Public officer should not be permitted to vacate an office and assume it again at will. Id.

16. State v. Stickley, 80 S. C. 64, 61 SE 211. At common law resignation was not complete as far as public was concerned, until accepted by proper authorities. State v. Murphy [Nev.] 97 P 391.

17. State v. Huff [Ind.] 87 NE 141; State v. Stickley, 80 S. C. 64, 61 SE 211. Resignation withdrawn before acceptance, valid, though officer did not secure possession of resignation paper. State v. Stickley, 80 S. C. 64, 61 SE 211. Where portion of electors of a town had no authority to accept resignation of warden, officer might subsequently withdraw and continue to hold office, though successor elected. Id.

18. State v. Huff [Ind.] 87 NE 141. Sheriff's resignation to take effect at future day subject to withdrawal though accepted being conditional and hence no vacancy until contingency happened. State v. Murphy [Nev.] 97 P 391.

19. In absence of corrupt bargain. State v. Huff [Ind.] 87 NE 141. Under Burn's Ann. St. 1908, § 9141, subds. 4, 5, requiring resignations to be to appointing power, or power authorized to call elections, and by §§ 10, 251, making auditor appointing power, where assessor resigned on condition that certain person be successor, addressing communication to county commissioners, who did as requested, and such person being ineligible, auditor appointed another, resignation was conditional and not being addressed to appointing power, was void. Id.

20. State v. Ladeen, 104 Minn. 252, 116 NW 486. Evidence held to show resignation procured by coercion. Id. Where resignation voidable, conduct of defendant in insisting upon retaining office, refusing to turn over books, etc., sufficient repudiation. Id.

21. **Search Note:** See notes in 113 A. S. R. 516.

See, also, Officers, Cent. Dig. § 94; Dec. Dig. § 63; 29 Cyc. 1404, 1405; 23 A. & E. Enc. L. (2ed.) 424.

22. State v. Huff [Ind.] 87 NE 141. Evidence insufficient to show abandonment of township assessor's office. Id. Ex parte judgment of auditor that vacancy existed does not create vacancy. Id.

23. To prevent recovery of salary. Gracey v. St. Louis, 213 Mo. 384, 111 SW 1159.

24. **Search Note:** See notes in 6 C. L. 856; 9 L. R. A. (N. S.) 572; 10 Ann. Cas. 886.

See, also, Officers, Cent. Dig. §§ 8, 9; 96-107; Dec. Dig. §§ 7, 66-75; 29 Cyc. 1370-1371; 1405-1414; 2 A. & E. Enc. L. (2ed.) 310; 8 Id. 823; 15 Id. 1061; 23 Id. 428; 17 A. & E. Enc. P. & P. 209.

25. Power of suspension or removal of policemen as held by mayor (Pol. Code 1895, § 478, subd. 2 [Rev. Codes, § 3250]) taken away by police commission act (Laws 1907, p. 344, c. 136, § 14). State v. Edwards [Mont.] 99 P 940. Rev. Codes, § 3220, authorizing city council to abridge offices, not applicable to policemen appointed under police commission act (Laws 1907, p. 344, c. 136). Id. Power to convict and punish policeman vested solely in police commission. People v. McAdoo, 125 App. Div. 673, 110 NYS 140.

26. Quincy city charter (St. 1888, p. 281, c. 347), giving mayor power of removal of city officers, including members of board of assessors, not repealed by St. 1900, p. 154, c. 216, changing board. Johnson v. Quincy, 198 Mass. 411, 84 NE 606. St. Louis Charter, art. 4, §§ 5, 15, 16, 47 (Ann. St. 1906, pp. 4823, 4825, 4835), and ordinances adopted pursuant thereto authorizing mayor to remove officials after notice and hearing, not expressly or impliedly repealed by Act Apr. 23, 1877, p. 346 (Rev. St. 1899 §§ 8853-8856 [Ann. St. 1906, pp. 4113, 4114]), as to removal of public officers, state and municipal. State v. Wells, 210 Mo. 601, 109 SW 758.

27. Governor authorized merely to appoint and no power of removal. Bruce v. Matlock [Ark.] 111 SW 990. County commissioners have no power to remove county superintendent of schools, but governor of state has power to remove for cause. Rev. Laws 1905, §§ 425, 2668. State v. Hays, 105 Minn. 399, 117 NW 615. County commissioners may fill offices of county superintendent after vacated by judicial proceedings or act of incumbent. Id.

28. Under constitution and statutes, governor exercises only powers conferred. Bruce v. Matlock [Ark.] 111 SW 990. Governor not authorized to remove members of board of trustees of state charitable institutions at will since policy of legislature to give such members fixed tenure. Id.

29. No legislative limitation as to power of City of New Rochelle. People v. Ray-

of a position where it is in good faith abolished, due to motives of economy,[30] but in such cases statutory provisions often provide positions for veterans [31] or veteran volunteer firemen.[32]

*What constitutes a removal.* See 10 C. L. 1055

*Grounds of removal.* See 10 C. L. 1055—Officers with a fixed tenure are ordinarily not subject to removal except for just cause.[33] The grounds of removal may be briefly stated as nonperformance of duties,[34] malfeasance,[35] or some misconduct in-

mond, 129 App. Div. 477, 114 NYS 365. Cannot be removed at the pleasure of appointive power. Id. Members of board of public works of New Rochelle are city officers subject to removal as such. Duties defined by Laws 1907, p. 1521, c. 661. Id. Under Laws 1907, p. 1521, c. 661, creating board of public works, etc., common council does not appoint members of such board within meaning of charter provision as to removal of "appointed" officers. Id.

**30.** City of Chicago v. People, 136 Ill. App. 296. Evidence held to show good faith in laying off employe, not evasion of civil service act. Id.

**31.** Where civil service position abolished, and incumbent not to be discharged, being veteran of war and also ineligible to position in competitive class, only recourse under Civil Service Law (Laws 1899, p. 795, c. 37) was that appointing officer furnish name to commission to be placed on list of suspended employes as provided by § 21, (page 809). In re Gilfillan, 58 Misc. 273, 109 NYS 376, afd. 127 App. Div. 846, 111 NYS 808. Where Civil Service Law, Laws 1899, p. 809, c. 370, § 21, provides that veteran of Spanish War be not removed except for misconduct, etc., but that section does not apply to certain positions as deputy of any official or department, and § 12 (p. 801) provides that deputy in exempt class be deputy of principal executive officer authorized to act generally in place of principal, a veteran holding the position of mortgage tax deputy authorized by Laws 1905, p. 2080, c. 729, § 311, allowing county clerk assistants, which position was classified by civil service commission, is not deputy within § 12, but clerk within § 21 entitled to preference. In re Gilfillan, 52 Misc. 273, 109 NYS 376. Statutory position of clerk or assistant not to be changed by state civil service commission in calling him deputy so as to deprive officer of legal rights. In re Gilfillan, 52 Misc. 273, 109 NYS 376, afd. 127 App. Div. 846, 111 NYS 808. Veteran discharged from abolished clerkship could not be transferred to position exempt from civil service law, such as cashier of mortgage tax bureau. Id. May not be transferred to position in competitive class, where he has never taken competitive examination and is not on eligible list. In re Gilfillan, 52 Misc. 273, 109 NYS 376. Assuming relator not deputy where mortgage tax system changed and clerk's allowance for assistants reduced, county clerk might change department without keeping relator's position and was not required to remove cashier and appoint relator. In re Gilfillan, 127 App. Div. 846, 111 NYS 808, afg. 58 Misc. 273, 109 NYS 376.

**32.** Where office of gas inspector abolished, Laws 1907, p. 930, c. 429, and duties transferred to public service commission (Id. § 82), relators, who were gas meter inspectors, were deprived of their office by statute, and were only entitled to preference in employment under civil service law and rules. People v. Willcox, 112 NYS 341. Under Civil Service Law, Laws 1899, p. 795, c. 370, as amended, public service commission were not bound to take notice that gas inspector had been volunteer fireman of Long Island, but were justified in awaiting proof of such fact. Id. Right recognized by resolution of commission that secretary accept transfer to similar position. Id. To obtain protection of Civil Service Law (Laws 1899, p. 809, c. 370), § 21, preventing removal of veteran volunteer fireman except after hearing on written charges, employe on learning of contemplated removal must inform superior that he is such fireman with particulars to verify statement. People v. Dooling, 61 Misc. 358, 113 NYS 246 Mere statement that he cannot be removed without hearing on charges insufficient. Id.

**33.** Yerger v. State, 91 Miss. 802, 45 S 849. Not trivial reason but of serious nature. People v. Raymond, 129 App. Div. 477, 114 NYS 365. Appointed officer removable at will. State v. Jenkins, 148 N. C. 25, 61 SE 608. Deputy inspector of boilers and elevators, public officer only removable for just cause. Gracey v. St. Louis, 213 Mo. 384, 111 SW 1159. Act No. 417, p. 406 (Loc. Acts 190, § 4), as to removal of commissioner of parks of Detroit by two-thirds vote of council upon written charges, etc., requires showing of legal cause, sufficiency of which is question for court. Bolger v. Detroit Common Council, 153 Mich. 540, 15 Det. Leg. N. 516, 117 NW 171. Under Code 1906, § 3598, fixing term of penitentiary employes at one year, and § 3619, giving board of trustees power to investigate and suspend employes and officials, an incoming board had no power to dismiss employe because board deemed it to interest of public service to so dismiss. Yerger v. State, 91 Miss. 802, 45 S 849.

**34.** Unreasonable delay of sewer commissioners to levy assessments for sewers as expressly required by St. 1904, p. 336, c. 384, § 3, constitutes ground for removal. Dunn v. Crossman, 200 Mass. 252, 86 NE 313. Under St. 1904, p. 336, c. 384, § 3, sewer commissioners may not delay levy of general sewer assessments until completion of system, but assessments must be levied as soon as reasonable. Dunn v. Crossman, 200 Mass. 252, 86 NE 313.

**35.** Malfeasance or gross misconduct as a ground for removal from office need not be proved to be criminal to warrant removal. Law v. Smith, 34 Utah, 394, 98 P 300. Malfeasance means evil doing, ill conduct, act positively unlawful. Law v. Smith, 34 Utah, 394, 98 P 300. To justify removal under Code 1907, § 4565, officer need not be found

volving the duties of an office.[36] Another ground for removal is disability, where an officer is allowed a pension,[37] and in some states an incumbent may be ousted for the

guilty of crime but necessary that act of officer be positively unlawful, involving wrongdoing, known to him. Law v. Smith, 34 Utah, 394, 98 P 300. Proof of presentation of fraudulent claims against county, and receipt of payment, shows malfeasance to justify removal. Law v. Smith, 34 Utah, 394, 98 P 300. Under Comp. Law 1907, § 4056, providing that omission to specify ground of forfeiture in code should not effect such forfeiture, and § 4066, that conviction of felony involves forfeiture of office, an officer found guilty of false presentation of claims under § 4083 would be removed without further action. Law v. Smith, 34 Utah, 394, 98 P 300.

**36.** Discharge justified where sidewalk inspector clearly shown to be guilty of misconduct in acting for private corporations. Sullivan v. Lower, 234 Ill. 21, 84 NE 622. Evidence insufficient to sustain removal of policeman for misconduct in keeping pocketbook of person arrested. People v. Bingham, 127 App. Div. 3, 111 NYS 14. Evidence insufficient to sustain finding that police officer was guilty of misconduct in representing himself to ticket chopper at subway station as detective sergeant for purpose of unlawfully procuring transportation. People v. Bingham, 126 App. Div. 350, 110 NYS 414. Record barren of conscious and voluntary violation of rules to warrant dismissal. Id. Evidence held to authorize finding of deputy fire commissioner that defendant introduced fireman to one Smith in order that latter might use influence for such fireman to secure promotion. People v. O'Brien, 125 App. Div. 202, 109 NYS 64. Smith previously convicted of receiving $1,000 to secure promotion. Id. Evidence held to support charge of **intoxication** resulting in dismissal of police officer. People v. Bell, 125 App. Div. 205, 109 NYS 90. Person appointed in noncompetitive civil service as water tender in department of docks and ferries subject to discharge for **absence without leave,** under Greater New York charter (Laws 1901, p. 636, c. 466), § 1543. Civil service rule 19 relates merely to selections from certified list and has no relation to probationary appointment entitling relator to secure tenure. People v. Bensel, 115 NYS 214.

**Disobedience:** Under Rev. 1905, § 2917, providing that corporate powers be exercised by board of commissioners, and under charter of Bessemer (Prov. Laws, p. 577, c. 377), board might remove treasurer after notice and opportunities to be heard, where such officer disregarded order forbidding payment of claim and then refused to refund amount. State v. Jenkins, 148 N. C. 25, 61 SE 608. Evidence insufficient to sustain removal of New York fireman for violation of rules on grounds of deception and evasion in failing to truthfully answer superior officer at investigation. People v. Hayes, 127 App. Div. 6, 111 NYS 270. **Rules for police officers** promulgated under tenure of office act (2 Gen. St. 1895, p. 1534) not presumed to apply to deportment in private life when excused from duty. Winters v. Jersey City Com'rs [N. J. Law] 71 A 50. Rule does not clearly express such purpose. Id. Police board may formulate rule for conduct of officers not on duty but intent must be clearly manifest. Winters v. Jersey City Com'rs [N. J. Law] 71 A 50. Officer discovered with married woman. Winters v. Jersey City Com'rs [N. J. Law] 71 A 50.

**Neglect of duty:** Neglect of duty with corrupt intent may authorize removal from office. Rev. 1905, § 3592. State v. Leeper, 146 N. C. 655, 61 SE 585. Police sergeant guilty of neglect of duty warranting reduction to rank of patrolman. People v. Bingham, 114 NYS 110. Gross neglect of duty by commissioner of parks. Bolger v. Detroit Common Council, 153 Mich. 540, 15 Det. Leg. N. 516, 117 NW 171. Where common council satisfied that commissioners performance of duties was grossly negligent so as to be menace to public, removal was proper, though no financial loss be sustained. Loss of use of boulevards by public an element of loss equivalent to financial loss. Bolger v. Detroit Common Council, 153 Mich. 540, 15 Det. Leg. N. 516, 117 NW 171. Evidence insufficient to sustain findings of neglect of duty by constable. Larue v. Davies [Cal. App.] 97 P 903. Evidence held not to show neglect of duty or irregularity to justify removal of members of city board of public works. People v. Raymond, 129 App. Div. 477, 114 NYS 365. Evidence insufficient to sustain charges that police lieutenant was absent from desk duty negligently and that he failed to make an entry in desk blotter of absence of certain sergeants from patrol and presence in station. People v. Bingham, 127 App. Div. 49, 111 NYS 92.

**Exacting illegal fees:** Presentation of claim for expenses by sheriff where no compensation except salary fixed by Comp. Laws 1907, § 2057, not charge for illegal fees within § 4580, providing for removal of officer guilty of corruptly collecting illegal fees. Law v. Smith, 34 Utah, 394, 98 P 300. Officer in good faith failing to enter a charge for fees earned, though responsible on bond, not subject to removal. Law v. Smith, 34 Utah, 394, 98 P. 300.

**37.** See, also, Pensions, 10 C. L. 1161. Certificate of police surgeon that officer was permanently disabled and stating cause as defect of vision held sufficient under Greater New York Charter. Laws 1901, p. 154, c. 466, § 355, and § 357 (p. 157). Reynolds v. Bingham, 126 App. Div. 289, 110 NYS 520. Under Greater New York Charter (Laws 1901, p. 153, c. 466), § 354, a surgeon's certificate that a policeman is unable to perform "full police duty" instead of being "unfit for duty" is sufficient to authorize removal and placing of name on pension roll. Hodgins v. Bingham, 112 NYS 543. "Unfit for duty" certificate required for restricted cases of § 355. Id. § 357 prevents removal for disability except on certificate stating nature and extent and such section qualifies action under § 354. Hodgins v. Bingham, 112 NYS 543. Where police officer removed for disability on initiative of police commissioner pursuant to Greater New York Charter (Laws 1901, p. 154, c. 466), § 354, subd. 4, he is entitled only to pension of not

disregard of a statute preventing the secret hire of a newspaper to advocate a candidate.[38] An officer cannot be removed for mere defect of title,[39] or because he has been guilty of misconduct in another office.[40]

*Defenses.*[See 10 C. L. 1050]—A removing officer has no power to dismiss a civil service employe who can satisfactorily answer the charges preferred.[41]

*Mode of proceeding.*[See 10 C. L. 1056]—Usually an officer cannot be removed except after notice and an opportunity to defend,[42] and written charges are generally required.[43] Such prerequisites apply to de facto officers,[44] or to the reduction of an

less than one-fourth or more than one-half salary, and commissioner cannot be compelled to increase pension of $336 to $500 or one-half. Beal v. Bingham, 60 Misc. 539, 112 NYS 465. Under § 355, where policeman voluntarily retires, he is entitled to one-half of salary as pension. Beal v. Bingham, 60 Misc. 539, 112 NYS 465.

**38.** Publication of photograph by candidate in newspaper under words "Paid Advertisement," and followed by announcement "Candidate for nomination for Lieutenant Governor," not violation of Laws 1907, p. 472, c. 209, § 28, so that officer be ousted. State v. Hay [Wash.] 99 P 748.

**39.** State v. Patton, 131 Mo. App. 638, 110 SW 636. Ineligibility at time of promotion not warrant for reduction in rank. Hansen v. Van Winkle [N. J. Law] 69 A 1011. Rev. St. 1899, § 5775 (Ann. St. 1906, p. 2934), providing that person in arrears in city office be disqualified from other offices, involves right to office and is not cause for removal under Rev. St. 1899, § 5761 (Ann. St. 1906, p. 2931), providing for removal on just cause. State v. Patton, 131 Mo. App. 638, 110 SW 636.

**40.** In absence of statute, misconduct as ground for removal must be with respect to particular office from which incumbent is sought to be ousted. Must constitute legal cause for removal and affect administration of such office. State v. Patton, 131 Mo. App. 628, 110 SW 636. Under Rev. St. 1899, § 5761 (Ann. St. 1906, p. 2931), providing for removal of officer for just cause, a defalcation in the office of collector was not sufficient to oust incumbent who was elected and occupied office of city treasurer. State v. Patton, 131 Mo. App. 628, 110 SW 636.

**41.** Under Civil Service Act, Mch. 5, 1906 (P. L. 83). Truitt v. Philadelphia, 221 Pa. 331, 70 A 757.

**42.** Officer with fixed term. Yerger v. State, 91 Miss. 802, 45 S 849; Gracey v. St. Louis, 213 Mo. 384, 111 SW 1159. Appointed officer removable without cause at will. State v. Jenkins, 148 N. C. 25, 61 SE 608. Relator appointed head of bureau of highways entitled to protection of charter, § 1543, of New York, as to removal, allowing opportunity of explanation. People v. Ahearn, 193 N. Y. 441, 86 NE 474. Writ of mandamus held to contain sufficient averments as to appointment of relator to head of bureau of highways, and his removal in violation of charter of New York, § 1543. People v. Ahearn, 193 N. Y. 441, 86 NE 474. Ky. St. 1903, § 3138, gives board of police and fire commissioners control over fire departments, and under rules pursuant thereto fireman could not be discharged without hearing. Combs v. Bonnell, 33 Ky. L. R. 219, 109 SW 898. Discharge of entire fire department and reappointment of all but few intended to be removed not effective. Combs v. Bonnell, 33 Ky. L. R. 219, 109 SW 898.

**43.** Written charges, etc., as to removal of commissioner of parks. Act No. 417, p. 406 (Loc. Act 190, § 4). Bolger v. Detroit Common Council, 153 Mich. 540, 15 Det. Leg. N. 516, 117 NW 171. Tenure of office act (2 Gen. St. 1895, p. 1534) provides for removal of officers only for incapacity, etc., upon written charges after fair trial, defense, etc. Winters v. Jersey City Com'rs [N. J. Law] 71 A 50. Benefit of tenure of office act of 1899 (P. L. p. 26) inapplicable where officer appointed in case of emergency or for part of year under § 1, and such officer subject to discharge without having charges preferred or hearing. Freas v. Cape May [N. J. Law] 71 A 52. Presumption of regular appointment inapplicable to "summer policeman" in Cape May, whose term is recognized as indefinite and was limited by resolution. Freas v. Cape May [N. J. Law] 71 A 52. Civil service Act Mch. 5, 1906 (P. L. 83), mandatory, and officer's failure to observe provision requiring written statement of cause of dismissal renders removal nugatory as though no cause assigned. Truitt v. Philadelphia, 221 Pa. 331, 70 A 757. Under Civil Service Act Mch. 5, 1906 (P. L. 83), employe can only be removed for reason personal to him rendering him unfit for position occupied independent of religious or political reasons. Truitt v. Philadelphia, 221 Pa. 331, 70 A 757. Note stating that officer was dismissed "for the betterment of the service" not sufficient compliance with Act Mch. 5, 1906 (P. L. 83), requiring written statement of reasons. Truitt v. Philadelphia, 221 Pa. 331, 70 A 757. Proceeding for removal quasi judicial and charges must be specific but not same formality as action. Bolger v. Detroit Common Council, 153 Mich. 540, 15 Det. Leg. N 516, 117 NW 171. Charges showing gross negligence of commissioner of parks and boulevards held legally sufficient to authorize removal. Bolger v. Detroit Common Council, 153 Mich. 540, 15 Det. Leg. N. 516, 117 NW 171. Under Pen. Code, § 772, providing for the removal of officers neglecting duties by summary proceedings, an accusation stating that persons willfully and unlawfully disturbed the peace by fighting and that defendant refused to prevent them etc., was sufficient. Larue v. Davies [Cal App.] 97 P 903. Under Penal Code, § 415, whereby person maliciously fighting is guilty of misdemeanor, and Pol. Code § 4176, subds. 1, 23 and § 4315, imposing duty on sheriffs and constables to prevent

officer who was ineligible to promotion at the time of appoinmtent.[45] A probationary appointee is not entitled to trial before discharge,[46] though he may be entitled to notice of discharge at the expiration of the probationary period.[47] A suspension with or without pay pending an investigation is sometimes proper.[48] Statutory provisions determine before whom the hearing shall be had,[49] by whom,[50] and to whom the discharge shall be certified,[51] authority as to witnesses,[52] and the like. Questions of fact are presented on charges of malfeasance[53] or misconduct in office,[54] though

breach of peace. Larue v. Davies [Cal. App.] 97 P 903. Under Pen. Code, § 7, subd. 4, "maliciously" imports an intent to do wrongful act, wherefore averment sufficiently indicated intent. Larue v. Davies [Cal. App.] 97 P 903.

**44.** Tenure of office act applicable to de facto officer promoted without recommendation of superior for merit as required by P. L. 1902, p. 186. Hansen v. Van Winkle [N. J. Law] 69 A 1011.

**45.** Under tenure of office act (P. L. 1899, p. 27, § 3) as to removal of officers upon just cause after trial, etc., a patrolman could not be reduced in rank without notice and his pay reduced, though he was ineligible to the first position. Hansen v. Van Winkle [N. J. Law] 69 A 1011.

**46.** Probationary appointee under civil service act not entitled to trial before discharge. Kenyon v. Chicago, 135 Ill. App. 227. Informality in discharge sustained where serious dereliction of duty. Kenyon v. Chicago, 135 Ill. App. 227.

**47.** Where probationary period expired on 15th of month and whereabouts of probationer unknown, service of notice on 18th was reasonable compliance with rule 11 of civil service commission as to notice of discharge. Dalton v. Darlington, 123 App. Div. 855, 108 NYS 626. Notice of discharge to probationer delayed because whereabouts unknown, not construed as permanent appointment. Dalton v. Darlington, 123 App. Div. 855, 108 NYS 626. If appointment permanent because of failure to give probationer notice of discharge, he could be removed by formal charges and hearing. Dalton v. Darlington, 123 App. Div. 855, 108 NS 626.

**48.** Where mayor vested with power of appointment, removal, discipline, control and supervision of police force, he may suspend policemen with or without pay pending an investigation of conduct. Evidence held to show suspension with pay. Rees v. Minneapolis, 105 Minn. 246, 117 NW 432. Evidence held to show discharge of policeman where names stricken from rolls on installation of new mayor. Fact that insignia of office not called for until nearly three months later not conclusive indication of intent of mayor to recognize policemen as hold-over appointees. Rees v. Minneapolis, 105 Minn. 246, 119 NW 432. Under Greater New York Charter, Laws 1897, pp. 100, 105, c. 378, §§ 292, 300, police commission cannot suspend policeman without pay unless written charges have been preferred and are pending. People v. Bingham, 57 Misc. 677, 109 NYS 1111.

**49.** Hearing by deputy with dismissal by police commissioner. People v. McAdoo, 125 App. Div. 673, 110 NYS 140.

**50.** Dismissal by police commissioner on report of deputy without passing on evidence improper. People v. McAdoo, 125 App. Div. 673, 110 NYS 140. Evidence at trial need not be read by commission before acting on recommendation of board. Not required to review evidence, etc., and presumption of investigation as required by law unless contrary shown. People v. Chicago, 234 Ill. 416, 84 NE 1044.

**51.** Where sidewalk inspector transferred from street department to board of local improvements, order of discharge of commission was properly certified to the board (Local Improvement Act, § 6 [Hurd's Rev. St. 1905, c. 24, § 405], creating board, and § 12 [Hurd's Rev. St. 1905, c. 24, § 457], declaring enforcement of order of discharge by appointing officer). Sullivan v. Lower, 234 Ill. 21, 84 NE 622.

**52.** Under tenure of office act (Gen. St. 1895, p. 1534), §§ 5, 9, board may compel appearance of witnesses without confines of Jersey City. Winters v. Jersey City Com'rs [N. J. Law] 71 A 50.

**53.** As general rule it cannot be said as matter of law that particular act is wrongful and malfeasance in office, simply because unauthorized by law. Law v. Smith, 34 Utah, 394, 98 P 300. Presentation of claim, unauthorized by law not necessarily crime or malfeasance in office but jury must find beyond reasonable doubt that officer knew himself not to be entitled to money. Law v. Smith, 34 Utah, 394, 98 P 300. By direct evidence or inference. Id. In proceeding under Comp. Laws 1907, § 4565, evidence held to require submission to jury on question whether officer knowingly presented false claim for payment. Law v. Smith, 34 Utah, 394, 98 P 300. Presumption that officer knew law and knew whether claim presented was authorized. Law v. Smith, 34 Utah, 394, 98 P 300.

**54.** In proceedings under Comp. Laws 1907, § 4565, for failure to collect fees and keep records of same under Comp. Laws 1907, §§ 1015, 1016, 1023, 1027, question of willful neglect to justify removal for jury. Law v. Smith, 34 Utah, 394, 98 P 300. Where Comp. Laws 1907, § 1016, require fees to be paid in advance, court may presume collection. Law v. Smith, 34 Utah, 394, 98 P 300. Omissions in statements as to fees collected subject to explanation. Law v. Smith, 34 Utah, 394, 98 P 300. Whether reliance of park commissioner upon reports of subordinates was gross negligence held for council within Act No. 417, p. 406 (Loc. Acts 1901, § 4). Bolger v. Detroit Common Council, 153 Mich. 540, 15 Det. Leg. N. 516, 117 NW 171. Commissioner of parks might rely to large extent on reports of employes or agents, but need not rely wholly upon them. Bolger v. Detroit Common Council, 153 Mich., 540, 15 Det. Leg. N. 516, 117 NW 171.

it is also held that trial by jury is not necessary in amotion from office.[55] The rule requiring proof beyond a reasonable doubt is not applicable to sustain a conviction for malfeasance.[56] In investigating the duties of a park commissioner, a council might examine the work to better understand the evidence.[57] A record that an employe has been discharged for motives of economy is not conclusive.[58] An appointee under a civil service act cannot collaterally attack a discharge,[59] and a delay of two years in disputing the validitty of a discharge constitutes laches.[60] A removal is not invalid because a mayor acted as prosecutor and judge.[61]

*Nature of proceeding.* See 10 C. L. 1058—The removal of an officer is considered a quasi judicial function,[62] and statutes authorizing removals are not unconstitutional as delegating judicial power.[63]

*Appeal and review of proceeding.* See 10 C. L. 1058—The action of a tribunal as to removal may be considered final [64] as not open to review, unless in the case of an arbitrary exercise of power.[65] Where the proceedings are of a judicial or quasi judicial nature, they may be reviewed by certiorari,[66] mandamus,[67] or quo warranto.[68] To be reviewable by certiorari, the judgment must be final,[69] and the review is neces-

Gross neglect of duty though commissioner intended to make final inspection, since duty to inspect as work proceeded. Bolger v. Detroit Common Council, 153 Mich. 540, 15 Det Leg. N. 516, 117 NW 171. Fact that municipality protected by bond of commissioner not inconsistent with finding of gross neglect of duty, since bond merely provided additional remedy. Bolger v. Detroit Common Council, 153 Mich 540, 15 Det Leg. N. 516, 117 NW 171. Contractor's agreement to remedy defects not inconsistent, since additional remedy. Bolger v. Detroit Common Council, 153 Mich. 540, 15 Det. Leg. N. 516, 117 NW 171.

**55.** State v. Jenkins, 148 N. C. 46, 61 SE 608.

**56.** Law v. Smith, 34 Utah, 394, 98 P 300.

**57.** Especially since examination in presence of commissioner's counsel and without objection. Bolger v. Detroit Common Council, 153 Mich. 540, 15 Det. Leg. N. 516, 117 NW 171.

**58.** St. 1904, p. 266, c. 314, § 1, as to removal from office for just cause, etc., cannot be avoided by health board. Evidence admissible to show discharge of employe in violation of statute, though false recital in record stated reason for discharge as economy. Garvey v. Lowell, 199 Mass. 47, 85 NE 182.

**59.** Right must be settled in direct proceeding as mandamus or certiorari. Kenyon v. Chicago, 135 Ill. App. 227. Assumpsit for salary. Kenyon v. Chicago, 135 Ill. App. 227.

**60.** Kenyon v. Chicago, 135 Ill. App. 227.

**61.** Charges preferred by secretary of mayor. State v. Wells, 210 Mo. 601, 109 SW 758. Charter imposed duty on mayor to enforce laws and presumption of performance of duty. State v. Wells, 210 Mo. 601, 109 SW 758.

**62.** People v. Raymond, 129 App. Div. 477, 114 NYS 365; State v. Wells, 210 Mo. 601, 109 SW 758. Not exercise of judicial power as there is no such thing as title or property in public office. People v. Chicago, 234 Ill. 416, 84 NE 1044.

**63.** Civil Service Act, § 12 (Hurd's Rev. St. 1905, c. 24, § 457), as to removal, not unconstitutional as delegating judicial power to commission. People v. Chicago, 234 Ill. 416, 84 NE 1044. Clauses of St. Louis charter as to removal of officers (St. Louis Charter, art. 4, §§ 5, 15, 16, 47 [Ann. St. 1906, pp. 4823, 4825, 4835] do not render mayor judicial officer within Const. art. 3 (Ann. St. 1906, p. 172), and art. 6, § 1 (Ann. St. 1906, p. 212), distributing powers of government, etc., so as to render charter provisions unconstitutional. State v. Wells, 210 Mo. 601, 109 SW 758.

**64.** Action of civil service commission after trial by board final and not reviewable. Mandamus will not lie as to discretionary acts. People v. Chicago, 234 Ill. 416, 84 NE 1044. Errors as to rulings of law, or in application of law to facts by civil service commission acting within jurisdiction, not open to review on certiorari. Sullivan v. Lower, 234 Ill. 21, 84 NE 622.

**65.** Removal of sewer commissioners under St. 1895, p. 222, c. 219, § 4, re-enacted in St. 1904, p. 339, c. 384, § 9, not open to review on facts unless arbitrary exercise of power and cause of removal unreasonable and illegally sufficient. Dunn v. Crossman, 200 Mass. 252, 86 NE 313.

**66.** Determination of removal of city officers subject to review by certiorari. People v. Raymond, 129 App. Div. 477, 114 NYS 365.

**67.** Civil service law (Laws 1899, p. 809, c. 370, am'd by Laws 1904, p. 1694, c. 697), § 21, provides for mandamus where rights prejudiced by removal, and certiorari where trial required and had. People v. Harvey, 127 App. Div. 211, 111 NYS 167.

**68.** Where a motion is allowable only for cause, soundness of cause is reviewable on quo warranto. State v. Jenkins, 148 N. C. 25, 61 SE 608.

**69.** Under Rev. St. 1899, § 5761 (Ann. St. 1906, p. 2931), authorizing removal of city officers by mayor and council, etc., where on impeachment of police judge such body recited profound regret at judge's action and considered such official as not appreciating gravity of his wrongful action, wherefore they would let matter rest, such findings

sarily limited.[70] A proceeding by certiorari to review the dismissal of a patrolman is instituted when the petition is presented to the court, not when the writ is served,[71] and amendments are proper.[72] A trial will not be reversed for errors which prove to be harmless,[73] but in proceedings for removal for malfeasance, a new trial may be granted for errors in instructions.[74] To be reviewable, an objection should be properly saved.[75] Where a council on resolution declared certain charges true, whereby a commissioner was removed, it will be presumed on appeal that the councilmen passed on each of the charges and the question of removal.[76]

*Effect of illegal removal.*[See 10 C. L. 1050]—The unlawful discharge of an employe in disregard of veteran acts may subject the official to liability for damages.[77] An illegal removal does not prevent the recovery of compensation during the period of nonperformance of duties.[78]

(§ 8) *D. Reinstatement.*[79]—[See 10 C. L. 1059]—In an appropriate case an officer may be restored to his position by mandamus,[80] but the remedy may be lost by laches.[81] Reinstatement will not be denied where an answer enumerates sufficient causes for removal, but is demurred to.[82]

were not final judgment reviewable by certiorari. State v. Selby, 133 Mo. App. 552, 113 SW 682.

70. Where reasons for removal of assistant matron of county jail by sheriff under Laws 1899, p. 809, c. 370, § 21, as am'd Laws 1904, p. 1694, c. 697, were on their face sufficient, court cannot go beyond that and etermine whether reasons had existence as matter of fact or consider explanation of person removed as sufficient on certiorari. People v. Harvey, 127 App. Div. 211, 111 NYS 167. Removal not disturbed on certiorari under Code Civ. Proc. § 2140, where determination sustained by competent proof and no such preponderance of proof that determination if considered as based on verdict of jury could be set aside as against weight of evidence. People v. Heins, 112 NYS 139.

71. Under Greater New York Charter, Laws 1901, p. 129, c. 466, § 302, requiring institution of proceedings to review within four months. People v. McAdoo, 125 App. Div. 673, 110 NYS 140.

72. Amendment to certiorari allowed two years and three months after original writ, which states in detail particulars on which averments based, does not change cause of action, and being made before respondent's return was proper. People v. McAdoo, 125 App. Div. 673, 110 NYS 140. Objection to amendment by motion to quash. Not by averments in return. People v. McAdoo, 125 App. Div. 673, 110 NYS 140.

73. Statement in order of discharge that defendant was found guilty on two charges and dismissed harmless where one charge dismissed and defendant found guilty as to other. People v. O'Brien, 125 App. Div. 202, 109 NYS 64. Trial conducted with formalities requisite for tribunal to observe and sufficient to secure fair trial. Winters v. Jersey City Com'r [N. J. Law] 71 A 50. Evidence held to support charges of gross neglect of duty by commissioner of parks as found by council, especially since circuit court of county on certiorari had unanimously reached same conclusion. Bolger v. Detroit Common Council, 153 Mich. 540, 15 Det. Leg. N. 516, 117 NW 171.

74. Under Comp. Laws 1907, § 4565. Law v. Smith, 34 Utah, 394, 98 P 300.

75. Where no objection to sufficiency of specifications on trial before civil service commission, objection could not be raised on writ of error to review order quashing certiorari to review. Sullivan v. Lower, 234 Ill. 21, 84 NE 622.

76. Contention that separate vote be made on each charge and question of removal not sustained. Bolger v. Detroit Common Council, 153 Mich. 540, 15 Det. Leg. N. 516, 117 NW 171.

77. O'Donnell v. New York, 112 NYS 760

78. See post, § 13.

79. **Search Note:** See Officers, Cent. Dig. § 108; Dec. Dig. § 76; 29 Cyc. 1405.

80. Where police commissioner retired patrolman pursuant to Greater New York Charter (Laws 1901, p. 154, c. 466, § 355), providing for placing patrolmen on pension roll after 20 years' service, on surgeon's certificate that member was permanently disabled, such member cannot attack commissioner's action by attacking truthfulness of surgeon's certificate and by mandamus compel reinstatement. People v. Bingham, 125 App. Div. 722, 110 NYS 136.

81. Mandamus for reinstatement denied where gas meter inspectors, though entitled to preference, were guilty of laches in waiting 11 months before asserting rights. People v. Willcox, 112 NYS 341. Duty to promptly assert rights. Id.

82. On mandamus for reinstatement because petitioner was not furnished with statement of reasons pursuant to Civil Service Act March 5, 1906 (P. L. 83), where answer neither admitted or denied plaintiff's averments, but alleged causes for removal, petitioner by demurring to answer did not admit truth of charges therein. Truitt v. Philadelphia, 221 Pa. 331, 70 A 757. Court could not refuse reinstatement since reasons stated in answer to mandamus proceedings would be passed upon by removing officer (as required by Civil Service Act. March 5, 1906, P. L. 83), and it would be assumed that such officer would remove after fair investigation. Id.

§ 9. *Powers and duties*[83]—See 10 C. L. 1080 of public officers are generally prescribed by constitutional or statutory provisions.[84] A person performing a statutory duty which does not involve the exercise of any judicial functions is a ministerial officer.[85] The acceptance of every office is upon an implied contract that the acceptor will perform its duties with integrity, diligence and skill,[86] and the presumption is that official duties are properly performed.[87] When the judgment or discretion of

**83. Search Note:** See notes in 6 C. L. 863; 3 L. R. A. (N. S.) 849; 106 A. S. R. 825; 2 Ann. Cas. 81; 3 Id. 391; 7 Id. 1114; 11 Id. 620.

See, also, Officers, Cent. Dig. §§ 163-184; Dec. Dig. §§ 102-111; 29 Cyc. 1393, 1395; 1431-1437; 8 A. & E. Enc. L. (2ed.) 806; 14 Id. 1099; 23 Id. 363.

**84.** Power that creates office and defines duties thereof may also fix terms upon which such duties shall be exercised. Harrison Tp. Advisory Board v. State, 170 Ind. 439, 85 NE 18. Officer accepts office with positive duties affixed and subject to additional duties which may be imposed. Kerr v. Regester [Ind. App.] 85 NE 790. Powers of **governor** defined by constitution. State v. Huston [Okl.] 97 P 982. May institute suit in name of state under Const. art. 6, § 8, providing that laws be faithfully executed. Id. **Private secretary** of governor authorized to assist in office (Acts 1906, p. 260, c. 30), not authorized to discharge duties of governor in his absence. Hager v. Sidebottom [Ky.] 113 SW 870. Under Rev. St. 1887, § 452, **secretary of state** must keep office open from 10 a. m. until 4 p. m. except holidays. If office open after 4 p. m. such officer must receive business presented. Grant v. Lansdon [Idaho] 97 P 960. Cannot refuse certificate of nomination for election on ground that law only requires office to remain open till 4 p. m. Id. Under common law and statutes, **attorney general** has general duty of enforcing statutes. Ex parte Young, 209 U. S. 123, 52 Law Ed. 714. Can only direct affirmative action in case of ministerial duty. Id. Under Wilson's Rev. & Ann. St. 1903, § 6567, attorney general has no power to bring suit in name of state, unless requested by governor or legislature. Power not extended by § 4440. State v. Huston [Okl.] 97 P 982. Under Ky. St. 1903, § 931, prescribing duty, **treasurer** is ministerial officer and must pay out funds of county on orders of fiscal court. Harrison v. Logan County, 33 Ky. L. R. 465, 110 SW 377. In absence of statute **clerk of supreme court** need not furnish without charge authenticated carbon copies of opinions of courts to state boards, commissions or departments. Ex parte Fitzpatrick [Ind.] 86 NE 964. Duty of **auditors** is to "audit, settle and adjust" the accounts of respective county officers. Commonwealth v. U. S. Fidelity & Guar. Co., 220 Pa. 148, 69 A 550. Duties appertain to county affairs only. Kerr v. Regester [Ind. App.] 85 NE 790. Under Burn's Ann. St. 1908, § 9218, auditor is accounting officer of state and has no right to collect moneys, except fees for official services for state without express statutory authority. Dailey v. State [Ind.] 87 NE 4. Court must take judicial notice that he is without authority to collect current undefaulted insurance taxes on behalf of state either officially or as individual. Id. Approval of official bonds of assessors and of appointment of assistant assessors require exercise of judgment and are not within legal powers of deputy county auditor. Davies v. State, 11 Ohio C. C. (N. S.) 209. In absence of statute, duty of collecting city taxes on **city officers.** Kerr v. Regester [Ind. App.] 85 NE 790. Duty of mayor and aldermen to submit question of increase of taxation to electors, Code 1906, § 3430. State v. Glennen [Miss.] 47 S 550. Comptroller of city, sole treasurer of board of education, is only fiscal officer of board. Within statute as to notice as condition for costs. Eagan v. Board of Education, 115 NYS 167. Under Greater New York Charter (Laws 1901, p. 124, c. 466) §§ 292, 324, commissioner is vested with discretionary authority as to detailing patrolmen to duty. People v. Bingham, 114 NYS 702. Act Aug. 20, 1906 (Acts 1906, p. 176), creating city court of Buford, construed and no duty of mayor and council to audit accounts for costs due solicitor in criminal cases terminated by acquittal, nolle prosequi, etc., or to order treasurer to pay same. Allen v. Pool [Ga.] 62 SE 31. Mandamus denied. Id. Act creating **Road board** of Bibb County (Acts 1871-72, p. 221, and amendment (Acts 1873, p. 221) or state road laws (Pol. Code 1895, §§ 516-519 inc.) does not authorize board to employ counsel at county's expense, to defend mandamus brought to compel opening of road. Ross v. Bibb County, 130 Ga. 585, 61 SE 465. Board of **supervisors** without power to appropriate county funds to aid in construction of high school. Loc. Acts 1898-99, p. 30 conferring powers as county commissioners on board of revenue; Code 1907, § 133, authorizing buildings; §§ 134, 138, as to tax levies; § 158, as to bonds and Act Aug. 7, 1907 (Gen. Acts 1907, p. 728, § 3) as to high schools, construed. Kumpe v. Bynum [Ala.] 48 S 55. See, also, topics dealing with particular officers as Sheriffs and Constables, 10 C. L. 1648, or of matters on which a duty is predicated as Taxes, 10 C. L. 1776.

**85.** Hall v. O'Connell [Or.] 94 P 564. Statutes construed and sheriff's return and record of tax deed could not be amended to give correct block number, thus directing title of grantee from original owner who purchased lots affected by tax sale without notice. Id. Power of amendment excluded on common-law principle. Id. City clerk ministerial officer with limited powers and duties (Ky. St. § 3136). Dorian v. Walters [Ky.] 116 SW 313.

**86.** Danforth v. Egan [S. D.] 119 NW 1021. Officer a public servant and must perform duties with due care. Taylor v. Manson [Cal. App.] 99 P 410. Board of public works. Id.

**87.** McLean v. Farmers' Highline Canal & Reservoir Co. [Colo.] 98 P 16. Presumption

an executive officer has been completely exercised in the performance of a specific duty, the act is beyond his review or recall, unless power to that extent has been conferred.[88] Statutes relating to the manner in which power or jurisdiction of an officer is to be exercised are construed to be directory.[89] A public officer in performing an act within the general scope of his authority, who commits an error or even abuses the confidence which the law reposes in him, is still acting virtute officii.[90] A public officer or agent of the state who receives money belonging to it, cannot refuse to pay it over because illegally exacted.[91] An unauthorized contract by a city official cannot be ratified by the mayor.[92]

*Effect of personal interest.*[See 10 C. L. 1061]—Contracts by municipalities or other public institutions, in which public officials are directly or indirectly interested, are forbidden.[93]

*Acts of a de facto officer* [See 10 C. L. 1061] are valid as to the public and third persons,[94] but the acts of a mere usurper are absolutely void for all purposes.[95]

*Delegation of powers.*[See 10 C. L. 1062]—Acts requiring the exercise of discretion and judgment must be performed by the officer himself.[96]

of conformity with statute as to claims paid by auditor in absence of contrary showing. Barron v. Kaufman [Ky.] 115 SW 787. Seizure of intoxicating liquors by marshal. Hines v. Stahl [Kan.] 99 P 273. In action for fees of corporation paid under protest where no allegation to whom fees paid, presumption is payment according to law to secretary of state, and thence to state treasury as provided by Kirby's Dig. §§ 3447, 3449. London & Lancashire Fire Ins. Co. v. Ludwig [Ark.] 112 SW 197. Official certificate of reward for apprehension of criminal prima facie valid. Hager v. Sidebottom [Ky.] 113 SW 870.

88. Garfield v. U. S. 30 App. D. C. 177.

89. Designation of time directory unless nature of act or phraseology of statute be limitation on officers' power. Hudson v. Williams [Ga. App.] 62 SE 1011.

90. Conley v. Carney, 126 App. Div. 337, 110 NYS 528.

91. Yamhill County v. Foster [Or.] 99 P 286. Where park purchased in excess of constitutional limitation of indebtedness but money paid by taxpayers voluntarily into treasury, city recorder could not set up defense of such illegality when refusing to pay interest after order by council. State v. Hodapp, 104 Minn. 309, 116 NW 589. Recorder's duties ministerial. Id.

92. Purchase of material by superintendent of streets unauthorized by charter. Bartlett v. Lowell, 201 Mass., 151, 87 NE 195.

93. Charter of San Diego prohibits contracts in which members directly or indirectly interested. Woods v. Potter [Cal. App.] 95 P 1125. Presumption of self-interest preventing protection of public rights. Id. Councilman acting as such in connection with matter in which he is interested vitiates transaction. Id. Evidence held to show contract by county tax assessor for certified copy of assessment roll not to be for benefit of city, but that assessor was personally interested in same. Alameda County v. Dalton [Cal. App.] 98 P 85. Act March 31, 1860 (P. L. 400) § 66, preventing contract where member of borough council profits, held inapplicable where loan from bank authorized and member of council, also member of banking association. Long v. Lemoyne Borough [Pa.] 71 A 211. Act March 31, 1860 (P. L. 400) § 66, penal and strictly construed. Id. Contract for public work between village and corporation of which village treasurer is president not void. In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008. Treasurer of village not officer within Village Law (Laws 1897, p. 451, c. 414, § 313), prohibiting contracts in which officer is interested. Id. Under Village Law § 81 (p. 388) village treasurer not member of board of trustees and not authorized to contract on behalf of village. Id. Under Cobbey's Ann. St. 1907, § 4469, preventing contracts with officers when pecuniarily interested, county surveyor was not deprived of compensation where county was engaged in litigation and county attorney called in such surveyor, he being a competent person to examine work and check claims as authorized by resolution. Pethoud v. Gage County [Neb.] 120 NW 154. County surveyor not "county officer" within Cobbey's Ann. St. 1907, § 4469, as to contracts in which county officers are interested. Id. See, also, Public Contracts, 10 C. L. 1285.

94. Johnson v. Sanders [Ky.] 115 SW 772; Bedingfield v. First Nat. Bank, 4 Ga. App. 197, 61 SE 30. Valid until removed. Commonwealth v. Wotton, 201 Mass. 81, 87 NE 202. Sustained on public grounds. Anderson v. Myers [N. J. Law] 71 A 139; Cardoza v. Baird, 30 App. D. C. 86. Acts for officer's own benefit void. Johnson v. Sanders [Ky.] 115 SW 772. Acts not subject to collateral attack. State v. Bailey, 106 Minn. 138, 118 NW 676; State v. Fahey [Md.] 70 A 218. Acts of election judge. In re Krickbaum's Contested Election, 221 Pa. 521, 70 A 852. Jury commissioner's acts valid. Pol. Code 1895, § 242. Rosenblatt v. State, 2 Ga. App. 649, 58 SE 1107. Assessor and treasurer of adjoining town collecting state and county taxes, where town refuses to elect officers, under St. 1908, § 1152, need not be classified as state, county or town officers, but acts are valid as officers de facto. Strange v. Oconto Land Co., 136 Wis. 516, 117 NW 1023.

95. Commonwealth v. Bush [Ky.] 115 SW 249; Johnson v. Sanders [Ky.] 115 SW 772.

96. Delegated authority not to be delegated. Hager v. Sidebottom [Ky.] 113 SW

*Mode of official action.*[See 10 C. L. 1062]—Action by a majority of officials is usually valid,[97] and has been upheld where the majority of a board consisted of a de facto and a de jure officer.[98]

*Judicial control or review.*[See 10 C. L. 1062]—Generally, courts will not interfere with the discretion vested by statute in administrative officials.[99] The performance of existing duties may be compelled by mandamus,[1] but the writ will not issue to control discretion [2] and the applicant must show a clear legal right to the performance of the

870. Reward for apprehension of criminal discretionary, not to be delegated to governor's secretary. Id. Duty of board of supervisors of county to pass upon and audit claims and order payment not subject to delegation to county auditor. People v. Neff, 191 N. Y. 210, 83 NE 970. Under County Government Act 1897 (St. 1897, p. 504, c. 277), § 160, subd. 7, as to preparing copies of assessment rolls, such work is part of official duty of assessor and not subject to delegation. Alameda County v. Dalton [Cal. App.] 98 P 85.

97. Where St. 1898, c. 548, § 331, provides for three or more assessors, § 351 authorizes town to fill vacancies, Pub. St. 1882, c. 3, § 3, cl. 5 (Rev. Laws 1902, c. 8, § 4, cl. 5), provides for exercise of joint authority of public officers by majority; where a town voted not to fill a vacancy caused by death, the remaining two assessors could make a valid assessment. Cooke v. Scituate, 201 Mass. 107, 87 NE 207.

98. Contract of employment with school teacher. Johnson v. Sanders [Ky.] 115 SW 772.

99. In absence of convincing proof of improper conduct, or unless powers conferred are clearly transgressed. Holly v. New York, 128 App. Div. 499, 112 NYS 797; DeMerritt v. Weldon [Cal.] 98 P 537; Board of Education v. Cherokee County Com'rs [N. C.] 63 SE 724. Rebuilding of schoolhouse and changing of school site discretionary. Venable v. Pilot Mountain School Committee [N. C.] 62 SE 902.

1. Ministerial duties. People v. Busse, 141 Ill. App. 218; Adams v. Clarksdale [Miss.] 48 S 242; Board of Trustees of Firemen's Pension Fund v. McCrory [Ky.] 116 SW 326. Issuance of license. Griffin v. U. S., 30 App. D. C. 291. Peddler's license. Butler v. Moberly, 131 Mo. App. 172, 110 SW 682. Promotion to higher class of police service after specified length of time. McFarland v. U. S., 31 App. D. C. 321. Payment of interest on bonds for park by city recorder. State v. Hodapp, 104 Minn. 309, 116 NW 589. Mandamus proper where duty is peremptory and explicit. Board of Education v. Cherokee County Com'rs [N. C.] 63 SE 724; Trinity Life & Annuity Soc. v. Love [Tex.] 115 SW 26. Duty resulting from office. State v. Holgate [Minn.] 119 NW 792. Proper to require county treasurer to pay draft properly drawn by state auditor for taxes collected for state. Id. No objection that respondents' predecessor and not respondent was one who failed in performance of duty. Id. Will not lie to compel act which officer has no legal power to perform. McGill v. Osborne [Ga.] 62 SE 811. Under Act 1907, p. 467, incorporating town of Boynton, county school commissioner not required to pay portion of school fund to trustees until estimate passed upon by county board of education. Id. Under election law (Acts 1898, No. 152, p. 281, § 55, as am'd Act 1900, No. 132, p. 201, secretary of state cannot be compelled to receive nominating papers after objections made to same and mandamus cannot compel the unauthorized act. State v. Michel [La.] 47 S 460. Where officers of state land office in good faith interpreted mandate of Acts 1890, p. 63, No. 79, and Act 1892, p. 50, No. 46, and pursuant thereto made conveyance to Red River Commissioners of certain land, which was sold and resold, and such acts apparently were acquiesced in by state, a writ of mandate to compel a conveyance of the same lands to the state would not be granted. State v. Capdevielle [La.] 48 S 126. Where board of public works failed to levy and collect bonds as required by Act April 1, 1872 (St. 1871-72, p. 911, c. 726), authorizing street improvements in San Francisco, injured person's remedy was to compel performance of duty. Union Trust Co. v. State [Cal.] 99 P 183.

2. Board of Trustees Firemen's Pension Fund v. McCrory [Ky.] 116 SW 326; Griffin v. U. S., 30 App. D. C. 291; Ex parte Young, 209 U. S. 123, 52 Law. Ed. 714; People v. Busse, 141 Ill. App. 218; Brown v. Ansel [S. C.] 63 SE 449. Not granted. Board of Education v. Cherokee County Com'rs [N. C.] 63 SE 724. In cases involving the exercise of discretion, order of mandamus is always restricted to compelling act. Id. McFall v. State Board of Education [Tex.] 110 SW 739. Mandamus cannot require officers to "accept and approve" bond but only to compel action. State v. Bessemer City Com'rs, 148 N. C. 46, 61 SE 609. Decision of trustees of firemen's pension fund conclusive as to award of pension (Act Feb. 19, 1902, Acts 1902, p. 3, c. 2; Ky. St. 1909 § 2896a, subsec. 22), and not reviewable by mandamus. Board of Trustees of Firemen's Pension Fund v. McCrory [Ky.] 116 SW 326. S. C. Dispensary Commission created under Sess. Laws 1907, p. 835, No. 402, to wind up state dispensary, has no discretion as to allowance of claims. Fleischman Co. v. Murray, 161 F 152. Duty of county commissioners to levy tax (Rev. 1905, § 4112) peremptory, but involving exercise of judgment and discretion as to amount to be levied not affected by estimates of board of education, and mandamus would not lie to compel tax levy in accordance with estimate. Board of Education v. Cherokee County Com'rs [N. C.] 63 SE 724. Rule subject to qualification that equity has power to prevent abuse of discretion by state board and require board's power to be exercised according to law so as not to injure property rights. Fleischman Co. v. Murray, 161 F 152; Griffin v. U. S., 30 App. D. C. 291. Eras-

duties.[8] Where mandamus is authorized by statute against state officers, except the governor, the writ will not issue against a board of which he is a member.[4] Illegal official acts may be enjoined by taxpayers,[5] and courts are astute to impeach and invalidate transactions where officials have any personal interest in the matter decided.[6] An attorney general of a state may be enjoined by a federal court from enforcing a statute violating the federal constitution.[7] A mayor who disregards his duties and obligations may properly be ousted from office on quo warranto.[8]

§ 10. *Liabilities of public officers. A. Civil liability* [9]—See 10 C. L. 1063 cannot be predicated upon the lawful discharge of duties, in good faith by public officials;[10] but

ure of name of enrolled Indian, where land to be distributed in severality, an act beyond power of secretary of interior, and undoing of act may be affected by mandamus. Garfield v. U. S., 30 App. D. C. 177.

3. Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855. Equity will not take jurisdiction at instance of mere taxpayer to govern administration of public officers and offices in routine detail. Chicago Title & Trust Co. v. Danforth, 137 Ill. App. 338. Mandamus will not be awarded at instance of private citizen to compel mayor of city to enforce Sunday closing law. People v. Busse, 141 Ill. App. 218. Application to compel sale of telephone franchise directed by ordinance, averring applicants as taxpayers and would be purchasers, held insufficient to show private right to writ, being no showing of injury by refusal to sell, etc. Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855. Enforcement of sale of telephone franchise involves enforcement of public duty, and private individual a resident interested in execution of law is proper relator in mandamus when city attorney or other officials fail to act. Id.

4. Rev. St. 1895, art. 946. State Board of Education. McFall v. State Board of Education [Tex.] 110 SW 739.

5. Long v. Shepherd [Ala.] 48 S 675. Contracts to defraud the public or for the personal interest of the contracting officials or third parties may be enjoined. Id. Mere mistake of judgment or negligence of official routine in absence of fraud will not authorize an injunction. Id. County commissioners having authority to contract for construction of building, they could not be restrained from carrying out same, though perhaps inexpedient or not so good as others might make. Id. Taxpayers could not enjoin payment of claims under contract with county commissioners providing that no change be made in contract except on order of commissioner's court. Provision for benefit of contracting parties. Id. Misappropriation of county funds by county officers. Kumpe v. Bynum [Ala.] 48 S 55. Taxpayers' act (Laws 1881, p. 709, c. 531, as am'd Laws 1892, p. 620, c. 301) to prevent illegal official action not designed to authorize restraint of every wrongful action irrespective of waste of property or violation of rights of public. Farley v. Lockport, 61 Misc., 417, 113 NYS 702. Object to prevent usurpation of powers and restrain illegal acts productive of public mischief. Id. Disregard of formalities in enactment of resolution not illegal within statute. Id. Abstract books and records not property of county which taxpayer may by injunction restrain recorder from permitting being copied in abstract business, though thereby competing line of business from which county derives benefit is created. Chicago Title & Trust Co. v. Danforth, 137 Ill. App. 338. Party seeking relief must allege the facts which constitute the illegality. Complaint as to distribution of water superintendent of irrigation insufficient and not aided by conclusions. McLean v. Farmers Highline Canal & Reservoir Co. [Colo.] 98 P 16. Under Ky. St. 1903, § 3175, permitting suit by citizen and taxpayer when solicitor fails to act, to prosecute action for recovery of taxes collected and expended under an ordinance not specifying purpose of tax, petition held sufficient though allegation of taxpayer be considered conclusion. Duncan v. Combs [Ky.] 115 SW 222.

6. That brothers of member of school committee contributed to purchase of new school site does not per se invalidate action of board in changing site. Venable v. Pilot Mountain School Committee [N. C.] 62 SE 902.

7. Suit not prohibited by provision as to maintenance of action against state. Ex parte Young, 209 U. S. 123, 52 Law Ed. 714. Discretion of attorney general as to enforcement of laws not interfered with by injunction restraining enforcement of unconstitutional enactment. Id. Injunction not prevented by fact that suit to enforce statute involves resort to mandamus, a state proceeding. Since statute violates constitution, act in attempting to enforce in name of state is illegal, and official is stripped of official character, wherefore proceeding does not affect state in governmental capacity. Id. Duty imposed upon attorney general as to enforcement of statutes renders him proper party in suit to enjoin such enforcement. Id. See States, 10 C. L. 1702.

8. Mayor failing to notify county attorney of violations of liquor law, making no attempt to enforce laws but permitting traffic under system of fines as means of public revenue. State v. Wilcox [Kan.] 97 P 372.

9. **Search Note:** See notes in 6 C. L. 865; 15 L. R. A. 456; 51 Id. 193; 5 L. R. A. (N. S.) 463; 7 Id. 525; 11 Id. 501; 13 Id. 233; 25 A. S. R. 256; 95 Id. 72; 105 Id. 204; 108 Id. 830; 4 Ann. Cas. 942; 7 Id. 773; 8 Id. 391.

See, also, Officers, Cent. Dig. §§ 185-216; Dec. Dig. §§ 112-122; 29 Cyc. 1393, 1395, 1437-1451; 8 A. & E. Enc. L. (2ed.) 806; 28 Id. 372.

10. Members of **board of health** acting for public benefit to prevent spread of contagious diseases not personally liable in

an officer who performs an unlawful or tortious act under the pretense of performing a duty,[11] who performs a ministerial duty in a wrongful or negligent manner,[12] or who corruptly, willfully or negligently fails to perform a mandatory duty,[13] is liable. Thus liability results from the misappropriation of county funds,[14] or the unauthorized investment of public moneys,[15] and a custodian of municipal warrants,

civil action for damages arising out of act in establishing quarantine, when acting in good faith. Valentine v. Englewood [N. J. Err. & App.] 71 A 344. Board of health Act, § 15 (Gen. St. 1895, p. 1638), gives action against board in effect upon facts as set forth, but question of reasonable cause of board to act in such suits is for court. Id. Board of Health Act (Gen. St. 1895, p. 1638), § 15, forbidding suits unless board acted without reasonable and proper cause, does not infringe constitutional provisions protecting private property and individual liberty. Id. Under Ky. St. 1903, §§ 3127-3130, prescribing duties of city **auditors**, he is not liable for allowing and directing payment of warrants for claims for compensation of council members when claims are not illegal upon their face, have been properly audited and certified and appropriations made. Barron v. Kaufman [Ky.] 115 SW 787. County **treasurer** paying just claims in good faith will not be required to repay sums because orders were irregular. Harrison v. Logan County, 33 Ky. L. R. 465, 110 SW 377. Where treasurer ministerial officer with duty of paying out funds on orders of fiscal court, he is not liable to county for payments made. If money paid to persons not entitled to it, remedy is against such persons. Id. Where fiscal court in its discretionary power as to payments for road work (Ky. St. 1903, § 4311) places sum in hands of treasurer, subject to vouchers of clerk of court, treasurer was not liable for payments made on such orders, since presumption that court did duty. Id. Ky. St. 1903, § 3175, requiring ordinance levying **taxes** to specify purpose, etc., construed, and no liability imposed on officials for applying taxes collected under valid ordinance to governmental purpose. Purpose of act to prevent collection under void ordinance. Duncan v. Combs [Ky.] 115 SW 222.

**11.** Lienemann v. Costa, 140 Ill. App. 167. In action against officer for money taken from prisoner arrested for larceny, it was **error to sustain demurrer** to such officer's answer which alleged ownership in a co-defendant. Common defense. Gunnells v. Latta [Ark.] 111 SW 273.

**12.** Lienemann v. Costa, 140 Ill. App. 167. Not liable for discretionary act. Taylor v. Manson [Cal. App.] 99 P 410. Liable for plain duty negligently performed. Id.; Payne v. Baehr, 153 Cal. 441, 95 P 895. Pol. Code, § 4332 (County Government Act, St. 1897, p. 574, c. 277, § 222), providing for liability on official bond of officer refusing to perform duty when fees tendered, gives injured party remedy independent of mandamus. Payne v. Baehr, 153 Cal. 441, 95 P 895.

**13.** Lienemann v. Costa, 140 Ill. App. 167; Taylor v. Manson [Cal. App.] 99 P 410. Auditor liable to creditor for damages in refusing to perform official ministerial duty required by Code Civ. Proc. § 710, as to drawing warrant for money owing judgment creditor. Payne v. Baehr, 153 Cal. 441, 95 P 895. Superintendent of highways of city personally liable for laying pipe across private land to connect catch basin in street with ditch on plaintiff's land. Smith v. Gloucester, 201 Mass. 329, 87 NE 626. Under General Street Law (Vrooman Act, St. 1885, pp. 160, 161, §§ 22, 23), officer who neglectfully permits defect in streets after notice, is liable for injury occasioned. Law imposes obligation of supplying guards and lights to prevent injury. Stockton Automobile Co. v. Confer [Cal.] 97 P 881. Where owner not compelled to repair certain triangular piece of sidewalk at intersection of two streets, board of public works not negligent in failing to compel such repair. Taylor v. Manson [Cal. App.] 99 P 410. No penalty for neglect of duty by aldermen by statute except where fine and removal from office for palpable omission of duty. Hurd's Rev. St. 1905, c. 38, § 208. City of Earlville v. Radley, 237 Ill. 242, 86 NE 624, rvg. 141 Ill. App. 359. City council held to have neither express nor implied power to impose penalty on aldermen for failure to attend council meeting. Id.

**14.** Where 1 Rev. St. (1st ed.) p. 349, pt. 1, c. 11, tit. 4, art. 1, § 5, as am'd by Laws 1866 p. 1146, c. 534, authorizing suit by town against former officers for accounting, and tit. 5, § 1, authorizing trial at law or equity in cases between town and individual, was repealed by the codification of statutes relating to towns (Laws 1890, p. 1243, c. 569, § 240), but a general provision (§ 182) authorized suits by town, such general provision also perpetuated, though not in affirmative terms, the right of accounting against former officers. Town of Pelham v. Shinn, 129 App. Div. 20, 113 NYS 98. Object of town law to codify not change. Id. Laws 1892, p. 620, c. 301, providing that officers of municipalities be prevented from doing illegal acts, committing waste, etc., and may be compelled to restore funds unlawfully paid out or appropriated by **taxpayer's action** not repealed by implication. Steele v. Glen Park, 193 N. Y. 341, 86 NE 26. Taxpayer need not be resident of municipality. Id. Action by taxpayer against county treasures, custodian and surety of treasurer for misappropriation of county funds is at law. Suit in equity for accounting will not lie. Gray v. Back, 59 Misc. 563, 111 NYS 718.

**15.** County treasurer and sureties liable for unauthorized investment of money deposited by court to credit of infants and lunatics, where loss results. Erie County v. Diehl, 114 NYS 80. Treasurer and sureties not relieved from liability from fact that successor in office without authority released large part of mortgaged premises from lien. Id. Treasurer and sureties not

who sells them without authority before the municipality raises funds for redemption, is liable for conversion.[16] The nonperformance of a duty may be excused by lack of funds,[17] and an officer should not be held liable for the wrongful act of a deputy.[18] Public state officials engaged in governmental duties are not liable for the wrongdoing of one acting under them who by negligence inflicts injury on another,[19] and public officers are not individually responsible on official contracts, unless such liability was clearly intended.[20] The rule that a public officer is not responsible for a judicial determination, however erroneous and malicious, is applicable only where the judge had jurisdiction.[21] Though contracts between third persons may depend upon the act of a public officer, such officer would not be liable in damages to such third persons.[22] Where a public officer is involved in litigation in his official capacity, the expiration of his term does not require a substitution of his successor.[23] A federal enactment provides relief for funds lost by disbursing officers without negligence.[24]

(§ 10) *B. Criminal liability.*[25]—See 10 C. L. 1063—Aside from crimes in which the official character of the criminal does not inhere, statutory enactments provide punishment for misconduct in office.[26] A police officer may be guilty of the crime of op-

liable where treasurer's successor paid infants in full with funds realized from investment of other moneys deposited by order of court in same securities. Id. Provisions of code imposing penalty for failure of treasurer to turn over books, papers, and emoluments of office, inapplicable where loss results from unauthorized act of treasurer in investing funds. Id.

**16.** Measure of damages does not necessarily include interest until time of payment. State v. Kelly [Kan.] 96 P 40. Where no allegation that value of warrants at time of sale was greater than amounts received, petition must be held to show affirmatively that injury to state was fully offset by payment into treasury, leaving custodian only liable for nominal damages. Id. Lack of allegation not supplied by averment that some time after sale warrant was paid with interest. Id.

**17.** San Francisco Charter, art. 1, § 5, imposing liability on officers for unrepaired streets, imposes no liability where such officers have no means to repair. Tayler v. Manson [Cal. App.] 99 P 410. Discretion in expending repair funds not to cause liability for streets which must remain unrepaired. Id. Board of supervisors not negligent in keeping funds to properly repair streets. Delay of two months in submission of estimates, but charter provisions held directory and evident that application would have been refused. Id.

**18.** When a deputy sheriff shoots a person, in attempted arrest without warrant. Brown v. Wallis [Tex. Civ. App.] 17 Tex. Ct. Rep. 679, 101 SW 1068.

**19.** Ketterer's Adm'r v. State Board of Control 115 SW 200. Public officer not responsible for defaults of subordinates, though selected by him and subject to his control. Board of control and superintendent of insane asylum not liable for acts of employes causing death of inmate. Id.

**20.** Evidence insufficient to support finding that city board of education in contracting for plans for schoolhouse intended to bind themselves personally or that architect so understood. Lawrence v. Tootaker [N. H.] 71 A 534. Express guaranty necessary to render officers personally liable. Question of authority being one of law which other contracting party may investigate. Id. No recovery from members where both parties believed board had requisite authority, no guaranty of their authority and no intention to bind personally. Id.

**21.** Ray v. Dodd, 132 Mo. App. 444, 112 SW 2.

**22.** Though loss occasioned by his wrongful act or default. McPhee v. U. S. Fidelity & Guar. Co. [Wash.] 100 P 174.

**23.** Public real litigant. Hines v. Stahl [Kan.] 99 P 273.

**24.** Disbursing Officers' Act (Rev. St. §§ 1059, 1062), providing relief for funds lost, not limited to time of war. Penrose v. U. S. 42 Ct. Cl. 29. Under Disbursing Officer's Act (Rev. St. §§ 1059, 1062), court has jurisdiction of every loss without fault or negligence of officer. Has jurisdiction of loss caused by embezzlement of quartermaster's clerk. Id. Disbursing officer not free from negligence when accepting clerk of predecessor without inquiry and allowing him to use combination of safe for official funds. Id. Where clerk embezzled public money and transmitted to treasury to make good account of another quartermaster (his father), successor was not entitled to decree crediting him with such amount, since no proof of identity of funds, and also another person, not before court, received credit and was discharged from liability. Id.

**25. Search Note:** See notes in 6 C. L. 867; 40 A. S. R. 712.

See, also, Officers, Cent. Dig. §§ 207-216; Dec. Dig. §§ 120-122; 29 Cyc. 1449-1451; 23 A. & E. Enc. L. (2ed.) 382; 17 A. & E. Enc. P. & P. 236.

**26.** Evidence insufficient to show violation of Rev. St. 1899, § 2119 (Ann. St. 1906, p. 1370), prohibiting clerks of court from buying fees taxed as costs in court at less than par value. State v. Wilson, 130 Mo. App. 151, 108 SW 1086. Indictment under Rev. 1903, §§ 3592, 3590, making willful **neglect of duty** misdemeanor, and § 3254, as to form of indictments, where county commissioners were required to erect and re-

pression,[27] and usurpation of office may be a crime.[28] The federal statutes forbid the solicitation of political contributions from federal officers.[29]

§ 11. *Liability of public for acts of public officers.*[30]—See 10 C. L. 1064—A state,[31] county,[32] or city,[33] in the absence of statute, will not be held liable for the tortious

pair county buildings (§ 1318, subsec. 26), held sufficient, not being duplications in charging neglect to repair and neglect to erect. State v. Leeper, 146 N. C. 655, 61 SE 585. Corrupt intent need not be shown. Id. Under Code 1906, § 1302, providing fine and imprisonment for willful neglect of duty, etc., where mayor and aldermen failed to submit question of increase of taxation as required by § 3430, they were subject to indictment. State v. Gleunen [Miss.] 47 S 550. Under Comp. Laws 1907, §§ 1015, 1016, 1023, 1027, as to record of fees, an officer is guilty of misdemeanor only when he willfully refuses to keep fee book. Not guilty of inadvertence in failing to charge fees, though bond responsible for such omissions so as to justify removal. Law v. Smith, 34 Utah, 394, 98 P 300. Accusation for removal under Comp. Laws § 4565, alleging fraudulent presentation of false claims, held to state facts to authorize conviction under § 4083. Id. Under Comp. Laws § 4083, punishing offender as felon, offense consists in presenting for allowance and payment a false claim, one not genuine in fact. In what respect false, or manner of presentation, immaterial, but gist is if claim was in fact false or with intent to defraud. Id. Fact that claim is unauthorized and that board or officer cannot legally pay it immaterial. Id. "Genuine" in § 4083 refers to real claim as distinguished from counterfeit. Id. Indictment under Code 1906, § 1305, providing that public **officer interested in contract** with county, etc., be guilty of misdemeanor, held insufficient. Charge that member of board of supervisors was employed as inspector of court house, with no charge of knowledge of order, that he in any way procured it to be made, that he in any way accepted it as placed on minutes, or received benefit. Treen v. State [Miss.] 46 S 252. Immaterial that § 3430 provided penalty, to wit, suspension from office, etc. State v. Glennen [Miss.] 47 S 550. Under Ballinger's Ann. Codes & St. § 7218 (Pierce's Code, § 1730), **extortion** is the corrupt exaction of greater fees for official services than are allowed by law, or the taking under color of office of a promise, securing payment of excessive fees. State v. Wainwright [Wash.] 97 P 51. Rev. St. §§ 3625, 3627 (Comp. St. 1901, p. 2418), providing for distress warrant against **defaulting officer** who receives public moneys and his sureties, with provision for imprisonment, is only applicable to persons holding office under government at time of issuance of writ. Defaulting officer released from imprisonment where government service terminated prior to issuance of writ. Ex parte Dillin, 160 F 751.

**27.** Essential elements defined by Penal Code, § 556. People v. Flynn, 58 Misc. 621, 111 NYS 1065. Police officer guilty of oppression in raid of billiard hall for gambling where person who had gone there to collect bill was arrested and on attempting to explain presence was struck and taken before magistrate for disorderly conduct, though magistrate discharged him. Id. Police officer guilty of oppression under Pen. Code, § 556, when entering saloon and without provocation pointing revolver at woman, calling her vile names and detaining her against her will. People v. Flynn, 58 Misc. 624, 111 NYS 1067.

**28.** To be usurper as denounced by statute, person must assume not only to exercise functions of officer but to do so as an officer. Commonwealth v. Bush [Ky.] 115 SW 249. Holding over after expiration of term and after successor has been elected and has qualified virtually usurpation. Id. Collection of taxes by sheriff (ex officio tax collector), giving receipt as ex-sheriff not usurpation of office within Ky. St. 1903, § 1364. No assumption to exercise function or to discharge duties of office. Id.

**29.** Under Act Jan. 16, 1883, c. 27, § 12, 22 Stat, 407 (U. S. Comp. St. 1901, p. 1223), forbidding soliciting of political contributions in public office, the personal delivery to a postmaster in his office of a sealed letter containing a request for contributions to a political campaign is a criminal offense. United States v. Smith, 163 F 926. Soliciting by letter intended to be received by post office employe in post office building embraced by Civil Service Act Jan. 16, 1883 (22 Stat. at L. 403, 407, c. 27, U. S. Comp. St. 1901, pp. 1217, 1223), § 12. United States v. Thayer, 209 U. S. 39, 52 Law Ed. 673.

**30.** See, also, Counties, 11 C. L. 908; Municipal Corporations, 12 C. L. 905; States, 10 C. L. 1702; Towns, Townships, 10 C. L. 1863; United States, 10 C. L. 1935.

**Search Note:** See notes in 4 L. R. A. (N. S.) 629; 6 A. S. R. 130.

See, also, Counties, Cent. Dig. §§ 174-180, 212; Dec. Dig. §§ 113, 114, 146; 11 Cyc. 467-476, 498-500; Municipal Corporations, Cent. Dig. §§ 651-665; 1565-1586; Dec. Dig. §§ 228-232, 744-754; 28 Cyc. 643, 657, 1269-1279; Officers, Cent. Dig. §§ 163-184; Dec. Dig. §§ 102-110; 29 Cyc. 1393, 1395, 1431-1437; Schools and School Districts, Cent. Dig. §§ 188-191; Dec. Dig. § 79; States, Cent. Dig. §§ 89-92, 111; Dec. Dig. §§ 91-95, 112; Towns, Cent. Dig. §§ 70, 71, 79, 80; Dec. Dig. §§ 37, 45; United States, Cent. Dig. §§ 43, 45, 62; Dec. Dig. §§ 60, 61, 78; 23 A. & E. Enc. L. (2ed.) 384.

**31.** State not liable for negligent act of employe causing loss of life of insane person in asylum. Ketterer's Adm'r v. State Board of Control [Ky.] 115 SW 200.

**32.** County not liable for tortious acts of officers or agents, even when engaged in performance of duty, unless right of action by statute. Talbott v. St. Joseph County Com'rs [Ind. App.] 85 NE 376. Contractual liability not conflicting with rule. Id. Where bridge constructed and contractors led to believe that river bed was gravel and hard pan, when in fact covered with large masses of rock necessitating extra expense. Id. County not liable for unlawful act of supervisors in extending drain beyond boundar-

acts of officers, and a city is not liable for the acts of a board of health created by statute for the public benefit.[34] Neither is a public body bound by contracts beyond an officer's authority.[35] No estoppel can grow out of dealings with public officers of limited powers.[36] Where a city treasurer paid life insurance premiums with city checks, the insurance company was chargeable with notice of receiving city funds for an individual debt and the same were recoverable.[37]

§ 12. *Official bonds and liabilities thereon.*[38]—Ses 10 C. L. 1064—An official bond failing to conform to the statute may be valid as a common-law bond.[39] The board of

ies and injuring land outside district. Wenck v. Carroll County [Iowa] 118 NW 900. County not liable for torts of supervisors or other officers. Remedy against such officers. Id.

**33.** Municipality bound by acts of officers only when within charter or scope of powers and acts outside powers are void and corporation is not liable. Marth v. Kingfisher [Okl.] 98 P 436. Wrongful refusal to issue peddler's license. Butler v. Moberly, 131 Mo. App. 172, 110 SW 682. Threats of repeated prosecutions by officers. Complaint held insufficient. Id. Negligence of superintendent of highways failing to keep ditch free from obstructions. Smith v. Gloucester, 201 Mass. 329, 87 NE 626. Where regularly appointed city bridge tender employed others to do work with city's knowledge, negligence of such others was that of regularly appointed tender. Cathman v. Chicago, 236 Ill. 9, 86 NE 152. Liable for acts of street commissioner while improving a street. Barrie v. Cape Girardeau, 132 Mo. App. 182, 112 SW 724.

**34.** Not agents of city, though appointed by municipal authorities. Valentine v. Englewood [N. J. Err. & App.] 71 A 344.

**35.** J. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93. Person dealing with public officer must take notice of scope and limtation of authority. Burgard v. State, 61 Misc. 23, 114 NYS 550; Niland v. Bowron, 193 N. Y. 180, 85 NE 1012; Bartlett v. Lowell, 201 Mass. 151, 87 NE 195. County officer cannot in absence of legislative authority make contract binding on county. Powers defined by law. Pol. Code 1895, § 268. Ross v. Bibb County, 130 Ga. 585, 61 SE 465. Tax collector has no authority to agree with taxpayer to substitute responsibility. Graves v. Bullen [Tex. Civ. App.] 115 SW 1177. Highway commissioners have no general authority to bind towns by their contracts or undertakings. Can only bind for construction of roads when direct statutory authority. Niland v. Bowron, 193 N. Y. 180, 85 NE 1012. City not liable for reasonable value of gravel sold to city officer with no power to contract for same where gravel used to repair streets. Bartlett v. Lowell, 201 Mass. 151, 87 NE 195. Subordinate employe cannot bind state by variation of contract. Division engineer of road cannot reject material and accept higher grade, thus binding state. Burgard v. State, 61 Misc. 23, 114 NYS 550. Person contracting to collect taxes, which contract void, presumed to know illegality and that performance of services is against public policy, wherefore recovery on quantum meruit barred. State v. Dickinson County Com'rs, 77 Kan. 540, 95 P 392. Existence of authority may be presumed by course of conduct inducing reliance thereupon. Roberts v. Marys [Kan.] 98 P 211. Employment of individual riparian windmill implied. Id. See, also, Public Contracts, 10 C. L. 1285; Municipal Corporations, 12 C. L. 905.

**36.** County not estopped to deny relator's claim to compensation under invalid tax ferret contract executed in advance of appropriation by fact that county had received and retained funds by virtue of relator's services. State v. Goldthait [Ind.] 87 NE 133. City not estopped by inaction of officers from widening street to full length as dedicated. No power to vacate and could not do so indirectly. City of Paragould v. Lawson [Ark.] 115 SW 379. City not estopped to deny validity of permit by commissioner of public works for use of space under alley; when issued on violation of ordinances, though plaintiff subjected to great expense thereby. J. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93. State not estopped from asserting rights because of negligence or illegal conduct of officers. Debt. Booth v. State [Ga.] 63 SE 502.

**37.** City entitled to recover amount of checks. City of Newburyport v. Fidelity Mut. Life Ins. Co., 197 Mass. 596, 84 NE 111. Notice to agent notice to principal, and Rev. Laws, c. 73, § 73, as to notice not available. Id. Evidence of constructive notice properly excluded, there being actual notice. Id. Negligence of auditing officers in not discovering defalcation not available as defense. Id. Distribution of premiums among policyholders and lack of funds of insurance company no defense to city's demand. Id. Offer of proof that inquiry into all checks received was practically impossible properly excluded. Id. Liable for interest, there being duty of insurance company to refund amount of checks on demand. Id.

**38. Search Note:** See notes in 21 L. R. A. 738; 22 Id. 449; 35 Id. 88; 11 L. R. A. (N. S.) 758; 3 A. S. R. 749; 10 Id. 843, 849; 40 Id. 51; 78 Id. 420; 90 Id. 188; 91 Id. 497; 103 Id. 932.

See, also, Officers, Cent. Dig. §§ 54-59, 217-259; Dec. Dig. § 37, 123-143; 29 Cyc. 1386-1388, 1451-1470; 8 A. & E. Enc. L. (2ed.) 807; 15 A. & E. Enc. P. & P. 83.

**39.** Common law and statutory bonds to be distinguished, since latter conform to statute while former do not, though so intended. City of Mt. Vernon v. Brett, 193 N. Y. 276, 86 NE 6. Voluntary bond of guaranty company binding, though not statutory bond, prescribed conditions being omitted and others inserted. United States Fidelity & Guaranty Co. v. Rainey [Tenn.] 113 SW 397. Guaranty company liable for full penalty of

trustees of a village has no power to pay the premiums on official bonds of officers in absence of legislative authority.[40] Where an ordinance did not specify who should approve a bond, it was presumed that the council had reserved such power to itself.[41] The liability to the public or other persons[42] depends upon the conditions of the bond,[43] including the statutory conditions which are a part thereof.[44] A bond is not a lien on the promissor's property unless made so by statute.[45] No liability is imposed on an official bond of county commissioners where a report surcharging them contained merely expressions of opinion.[46] A surety upon an official bond is only

bond of clerk of court on common-law bond. Id. Where banker executed bond as county depositary pursuant to Code § 1457, anticipating appointment, but was not so appointed, and county treasurer deposited funds which were stolen, bond could not be construed as common-law bond, since liabilities of surety would thereby be increased. Kuhl v. Chamberlain [Iowa] 118 NW 776.

**40.** In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008.

**41.** Dorian v. Watlers [Ky.] 116 SW 313.

**42.** Deputy county auditor authorized by law to act in name of principal, and auditor and bondsmen responsible not only to county but to any person injured by "misconduct in office." Gen. St. Minn. 1894, §§ 5951, 710. National Surety Co. v. State S. Bank, 156 F 21. Where deputy county auditor procured spurious refund orders on county treasurer to fictitious payee, caused orders to be authenticated and forged assignments, selling to bank, proximate cause of loss by bank was individual acts in forging, not official misconduct in issuing same. Id. Pol. Code Mont. 1895, § 1064 (Rev. Codes, § 391), providing that bonds be for use and benefit of persons aggrieved, must be read in connection with conditions of bond, and refers only to liabilities as arise within fair intendment and meaning of obligation. McPhee v. U. S. Fidelity & Guaranty Co. [Wash.] 100 P 174.

**43.** Cannot be charged except for breach of specific condition. Kuhl v. Chamberlain [Iowa] 118 NW 776. Liability cannot be enlarged beyond specific conditions. Id.; McPhee v. U. S. Fidelity & Guaranty Co. [Wash.] 100 P 174. Condition of bond as to faithful performance of duty furnishes guaranty of personal honesty of officer and provides indemnification against defalcations. United States Fidelity & Guaranty Co. v. Rainey [Tenn.] 113 SW 397. Bond of marshal in penal sum for faithful performance of duties broad enough to cover unlawful arrest or illegal punishment by him. Special demurrer improperly sustained. Commonwealth v. Teel, 33 Ky. L. R. 741, 111 SW 340. Collection and disbursement of street assessments not statutory duty of village clerk or duty pertaining to his office, and where such service is performed by him under authority of an ordinance his sureties are not liable for his failure to account for such collections, when condition of bond is that he will "faithfully perform the duties of the office of clerk of said village during his continuance in said office for said term." Sauer v. Madisonville, 11 Ohio C. C. (N. S.) 369. County commissioner, in absence of bad faith or corrupt motives, not liable individually or upon official bond for failure of board of commissioners of which he is member to keep highways and bridges in proper repair. State v. Collins, 8 Ohio N. P. (N. S.) 65.

**44.** U. S. Fidelity & Guaranty Co. v. Milstead, 33 Ky. L. R. 186, 109 SW 875. Under Ky. St. 1903, § 3497, requiring bond for $1,000 for unlawful conduct or assault by policeman, and § 3752, providing that recovery on bond be not limited by penalty, judgment against sureties on bond for amount in excess of penalty is authorized. Id. County treasurer's bond, while contract, is entered into between dependent government and an officer thereof whose duties are prescribed by statute, not by bond. McSurely v. McGrew [Iowa] 118 NW 415. Law prescribing duties may be charged after suit on official bond. No vested right to particular decision. Id. Under County Law, § 147, imposing penalty for failure to turn over books and moneys to successor, sureties as well as treasurer are liable. Erie County v. Baltz, 125 App. Div. 144, 109 NYS 304. Statement interjected in pleading that county treasurer failed to report not separate cause of action under County Law, § 148, providing forfeit. Id. Action for penalty for failure to report under County Law, § 148, must be brought by district attorney. Id. Action under County Law, § 147, for penalty for failure of county treasurer to turn over books and moneys to successor, is brought by successor on name of county, being authorized and directed by state comptroller. Id.

**45.** City of Mt. Vernon v. Brett, 193 N. Y. 276, 86 NE 6. Statute making official bond lien on land, though neither filed or recorded, to be strictly construed. Id. Public Officers Law, Laws 1892, p. 1656, c. 681, as am'd Laws 1894, p. 841, c. 403, validating defective bonds. Not extended to make lien on land. Id. Laws 1892, p. 360, c. 182, § 27, requiring bond of receiver of taxes, § 44 making bond lien on surety's land, and Public Officer's Law (Laws 1892, p. 1656, c. 681), §§ 11, 12, construed and bond filed according to § 27 held not lien on surety's land, since failing to conform to § 44. Id. Where two sections of statute of equal force provide for bond, and provisions are at variance, language of bond must determine under which section it was given. Id.

**46.** No form for report of county commissioners prescribed by law. Commonwealth v. U. S. Fidelity & Guaranty Co., 220 Pa. 148, 69 A 550. But if county officer whose accounts are to be audited is to be surcharged, it must appear that surcharge is result of auditing, settling and adjusting accounts. Id. Under Acts June 4, 1879 (P. L. 78), creating poor districts coterminous with

liable for the loss of money received in the official capacity,[47] and the legislature may relieve an officer from liability [48] or delegate power to release such officer [49] within constitutional limits.[50] The sureties of a re-elected officer are concluded by a report showing certain funds on hand and may not seek equitable relief on the theory that such report was false and that defalcations occurred in the previous term.[51] A defense of death of a surety before an officer's default is not well taken where the liability was binding on the sureties and personal representatives.[52] The surety may be entitled to subrogation,[53] and in an action on the bond of a police officer for the negligent shooting of a third person in making an arrest, the sureties are only liable for compensatory damages.[54] The state is entitled to priority over other creditors of a defaulting officer in the collection of its delinquent revenue on his bond.[55] The action on a bond may be barred by limitations.[56] The penal part of a bond alone constitutes, prima facie, a right of action.[57] The allegations may depend upon statutory provisions,[58] and a petition on a bond has been held not defective for failing to al-

county, where county commissioners are overseers of poor, a certificate of county auditors that they audited county commissioner's accounts, with no reference to poor district except that commissioners had made illegal payments, and surcharging them, is insufficient to impose liability on surety of commissioners for amount of surcharge. Id. Liability resulting from report of county auditors is statutory and requirements must be followed. Id. Commissioners and surety were entitled to know extent of illegal items. Id.

47. Constable's bond. Title Guaranty & Trust Co. of Scranton v. People, 139 Ill. App. 642. Evidence insufficient to show receipt of money in official capacity. Id. Where banker gave bond as depositary anticipating appointment which was never made and county treasurer deposited funds which banker absconded with, sureties were not liable since bond only contemplated official acts and could not be enlarged. Kuhl v. Chamberlain [Iowa] 118 NW 776.

48. Liability of county treasurer for loss of funds deposited in bank without his fault is created by legislature, not common law, and legislature may relieve from such liability. McSurely v. McGrew [Iowa] 118 NW 415. Plenary power of legislature may permit deposit of county funds in banks and absolve county officers from liability from such deposits. Id.

49. County treasurer. McSurely v. McGrew [Iowa] 118 NW 415.

50. Curative act legalizing release of county treasurer for loss of funds by supervisors not invalid as special legislation. Not invalid as appropriation to private individual. McSurely v. McGrew [Iowa] 118 NW 415. Acts 32d Gen. Assem. (Laws 1907, p. 257, c. 255), § 1, legalizing release of treasurer, not repeal of Code, § 1457, providing that treasurer shall not be relieved of liability for deposit of funds in approved bank so as to require general law. Id. Increase of burden on taxpayers not controlling as to validity of act. Id. Act not grant of special immunity within constitutional prohibition. Id. Where Acts 32d Gen. Assem. (Laws 1907, p. 257, c. 255), § 2, providing that action by citizen of county on bond of treasurer be void and without jurisdiction, went into effect after citizen had commenced action on bond, it was unconstitutional as usurping functions of judiciary. Id.

51. Township treasurer. Cowden v. Trustees of Schools, 235 Ill. 604, 85 NE 924.

52. County treasurer. Erie County v. Baltz, 125 App. Div. 144, 109 NYS 304.

53. Surety of auditor having paid debt due to official misconduct was entitled to subrogation to, right of recovery against bank, which purchased non-negotiable, spurious refund orders. National Surety Co. v. State Sav. Bank [C. C. A.] 156 F 21.

54. Not punitive. Action under Ky. St. 1903, § 3752, authorizing recovery against sureties in excess of penalty of bond. U. S. Fidelity & Guaranty Co. v. Milstead, 33 Ky. L. R. 186, 109 SW 875. Of marshal. Commonwealth v. Teel, 33 Ky. L. R. 741, 111 SW 340.

55. United States Fidelity & Guaranty Co. v. Rainey [Tenn.] 113 SW 397. Priority does not extend to counties (Id.) or municipalities (Id.)

56. Act Apr. 4, 1998, § 4 (3 Sm. L. 331), providing seven year limitation as to actions on bonds, a bar to action against surety on official bond of recorder who failed to properly index mortgage, such action being brought by subsequent mortgagee over 12 years after expiration of recorder's term, 14 years after negligent act but within seven years after taking and recording of second mortgage. Commonwealth v. Donnelly, 36 Pa. Super. Ct. 619. In suit on bond of judge to recover fees illegally collected in criminal cases dismissed without trial, four year statute of limitations, not two years, applicable. Lane v. Delta County [Tex. Civ. App.] 109 SW 866.

57. Breach, nonpayment. Inhabitants of York v. Stewart, 103 Me. 474, 70 A 207. In action upon official bond of town treasurer, it is sufficient to declare in writ only upon the penal part of the bond and allege breach by nonpayment thereof. Id. In debt on bond plaintiff need only count upon penal part of instrument, leaving conditions to be pleaded by defendant, if a defense. Id.

58. Since Ky. St. 1903, § 3752, provides that recovery on official bonds be not limited by penalty named, petition need not allege that

lege approval of the bond by the city council.[59] A pleading should not contain two causes of action.[60] Demand is not a condition precedent to an action on a bond to recover fees of a county auditor not accounted for,[61] and the receipt of such fees may be established by circumstantial evidence as any other fact.[62] The books of a banker receiving county funds have been held admissible against sureties to make a prima facie case,[63] and in an action where a county assessor disregarded a statute and contracted with a deputy for making an assessment roll, the county might prove the cost and amount paid for such services.[64] A verdict unsupported by the evidence will be set aside.[65]

§ 13. *Compensation.*[66]—See 10 C. L. 1066.—Fees are compensation for particular services rendered at irregular periods, payable when such services are rendered.[67] A salary is a fixed compensation for regular work.[68] There is no implied obligaton to pay an officer for services rendered,[69] and where no compensation is provided by law, the services are gratuitous.[70] Salary is a personal compensation [71] but does not prevent an allowance for clerk hire.[72] Since a public officer with fixed compensation is bound to perform his duties for the compensation provided by law,[73] compensation in addition to salary must be expressly provided for,[74] and an agreement to pay for services

city council had fixed penal sum named in bond of marshal. Commonwealth v. Teel. 33 Ky. L. R. 741, 111 SW 340.

59. Commonwealth v. Teel, 33 Ky. L. R. 741, 111 SW 340.

60. Pleading construed and but one cause of action held to be stated in each of ten separate statements of facts, viz., failure of county treasurer to pay over to successor money and property held in trust and to recover value with interest, and penalty as provided by County Law, § 147 (Laws 1892, p. 1777, c. 686, as am'd by Laws 1901, p. 290, c. 112). Erie County v. Baltz, 125 App. Div. 144, 109 NYS 304.

61. Boyd v. State [Ind. App.] 84 NE 350. Money withdrawn by county officer on warrants issued pursuant to allowances of board of county commissioners, but which officer was not entitled to, becomes due when received without demand. Id. In action on county auditor's bond, finding as to receipt of moneys by auditor as clerk of turnpike directors held outside issues. Id. Where county auditor induced assessors to file claims in excess of sums due, wrong consisted in such inducement, not in receiving money for services he was not entitled to, and auditor's act will not support finding of receipt of money for services in making assessor's books. Id.

62. Boyd v. State [Ind. App.] 84 NE 350. Circumstances of performances of services for which fees are required sufficient to warrant inference of receipt of same. Id.

63. Kuhl v. Chamberlain [Iowa] 118 NW 776.

64. Disregard of County Government Act (Laws 1897, p. 504, c. 277), § 160, subd. 7. Alameda County v. Dalton [Cal. App.] 98 P 85.

65. In suit by county against judge to collect fees illegally collected in criminal cases dismissed without trial, verdict against defendant and sureties is improper where bond was not introduced in evidence and no testimony of execution. Lane v. Delta County [Tex. Civ. App.] 109 SW 866.

66. **Search Note:** See, notes, in 54 L. R. A. 566; 1 L. R. A. (N. S.) 588; 11 Id. 1170; 12 Id. 612; 16 Id. 631, 794; 10 A. S. R. 284; 96 Id. 443; 2 Ann. Cas. 390; 4 Id. 673; 7 Id. 737; 10 Id. 1093.

See, also, Officers, Cent. Dig. §§ 132-162; Dec. Dig. §§ 93-101; 29 Cyc. 1395-1430; 8 A. & E. Enc. L. (2ed) 808; 14 Id. 1099; 23 Id. 385; 17 A. & E. Enc. P. & P. 162.

67. Board of Com'rs v. Trowbridge, 42 Colo. 449, 95 P 554. "Fees" signifies compensation for particular acts or services rendered by public officers in line of their duties, to be paid by parties obtaining benefit of services or at whose instance they were performed. State v. Carey [Ind. App.] 84 NE 761.

68. Board of Com'rs of Teller County v. Trowbridge, 42 Colo. 449, 95 P 554. Act Apr. 20, 1891, p. 223, § 1, par. 5, limiting annual compensation of district attorneys, including salary paid by state, to $4,000, held unconstitutional as to title of act, since amending General Statutes, c. 38, § 7, relates only to fees, while amending statute relates only to salaries. Id. Act Apr. 6, 1891, § 2, not repealed, and district attorney entitled only to salary of $3,000. Id.

69. No contractual relations arise by reason of election or appointment of officer. Woods v. Potter [Cal. App.] 95 P 1125. Right of public officer to compensation does not rest upon contract. McGillic v. Corby, 37 Mont. 249, 95 P 1063. Unless public officer is entitled to compensation by law, he is not entitled to payment upon quantum meruit. Id.

70. No recovery. Cook v. Marseilles, 139 Ill. App. 536.

71. Provided to be paid for officer's own services. State v. Dunbar [Or.] 98 P 878.

72. State v. Dunbar [Or.] 98 P 878. B. & C. Comp. § 2390, providing allowance for clerk hire of secretary of state not within Const. art. 13, fixing salary of such officer and prohibiting fees. Id.

73. If duties become too onerous he must secure lawful increase, resign or submit. In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008; Crane v. Shoenthal [N. J. Law] 69 A 972.

74. Where Rev. St. § 1029, does not expressly so provide, county auditors are not

imposed by law is invalid as against public policy.[75] The legislature may compensate an officer by salary and require the fees to be collected for the state's benefit.[76] Fees allowed by law to an officer as compensation for services rendered are the officer's property,[77] and if collected without authority may be recovered by the person from whom they are exacted.[78] The compensation of public officers and employes is usually fixed by law,[79] but may also involve a construction of the contract of employment.[80]

entitled to additional compensation for services in furnishing blanks to assessors. State of Ohio v. Tinlin, 11 Ohio C. C. (N. S.) 305. No statute either expressly or impliedly requires district attorney to incur on public account expenses of office rent, clerical or other expenses. Not entitled to deduct such expenses from fees received. Board of Com'rs of Teller County v. Trowbridge, 42 Colo. 449, 95 P 554. No compensation to county clerk for making new indexes of records by statute. Wadsworth v. Livingston County Sup'rs, 115 NYS 8. County clerk in preparing indexes entitled to expenditures incurred for material and services (County Law, Laws 1892, p. 1793, c. 686, §§ 265, 230, subd. 9). Id. Under Gen. St. 1901, § 7046, requiring chaplain of penitentiary to devote whole time to official duties, he cannot receive additional compensation for other services. Payment of services of chaplain in superintending prison night school, pursuant to direction of warden and board of directors, when refused by state auditor, not to be enforced by mandamus. McBrian v. Nation [Kan.] 97 P 798. Statute requiring chaplain to devote "whole time" to duties strictly construed and held to mean "all time." Id.

**75.** Kerr v. Regester [Ind. App.] 85 NE 790. Under Code Civ. Proc. § 3280, and Const. art. 3, § 28, agreement to pay county clerk, a public officer, for services imposed by law, is invalid. Wadsworth v. Livingston County Supr's, 115 NYS 8. County clerk being public officer can receive no compensation for personal services rendered. Id. Where city engineer at stated salary agreed with standing committee of council to undertake additional work upon assurance of endeavor on part of committee to secure increase of salary for such work, such obligation, though not binding, was valid consideration for resolution of council increasing such salary. Crane v. Shoenthal [N. J. Law] 69 A 972. Mandamus to compel warrant of mayor. Id.

**76.** State v. Dunbar [Or.] 98 P 878. Fees of clerk of supreme court property of state under Burn's Ann. St. 1908, § 9389. Ex parte Fitzpatrick [Ind.] 86 NE 964. Under fee and salary law, fees for services performed by county officers, as authorized by statute, are property of county unless stated to belong to officer. State v. Carey [Ind. App.] 84 NE 761. Fees received by clerk in making transcript, either on appeal or change of venue, belong to county, being an official service. Id. Construing Act Mch. 11, 1895 (Acts 1895, p. 334, c. 145, § 114; Burn's Ann. St. 1901, §§ 417, 661). Id. P. L. 1906, p. 76, as to salary of county clerks construed in connection with Const. art. 7, § 2, par. 6, and predecessor's term held to expire on death, so that successor entitled to salary, not perquisites, fees, etc. Board of Chosen Freeholders v. Lee [N. J. Law] 70 A 925. Where Const. art. 13 provided salary of secretary of state at $1,500 with no fees or perquisites, and other statutes as to fees were repealed but no statute enacted providing for collection of fees for state's benefit, state could not recover fees unlawfully collected. State v. Dunbar [Or.] 98 P 878. Member of state constabulary cannot collect fee for serving criminal warrant from county for use of commonwealth when subrogation inapplicable, and salaried officer not entitled to fee also. Walsh v. Luzerne County, 36 Pa. Super. Ct. 425. Cannot demand and collect such fee for use of commonwealth. Id.

**77.** State v. Dunbar [Or.] 98 P 878.

**78.** Unless otherwise barred. State v. Dunbar [Or.] 98 P 878. Where fees cannot be exacted by an officer for the purposes prescribed in the statute authorizing them, they cannot be exacted at all. Id. Unauthorized exaction of fees cannot operate to give state or county title to money so received. Id.

**79.** Where Ky. St. 1903, § 3145, fixed compensation of **jailors** from $1,500 to $2,500, and § 1730 allowed certain fees for keeping prisoners, etc., with provision for fees by United States statutes for keeping United States prisoners, an ordinance of a city fixing jailor's salary at $1,800 and allowing fees for keeping state and federal prisoners at 25 cents per day, but requiring jailer to account to city 20 cents per day for each prisoner so kept, was partially invalid as to latter provision. City of Newport v. Ebert, 33 Ky. L. R. 820, 111 SW 330. City might provide that salary be $1,500 and that jailer look for remaining $300 to fees. Id. Appropriation for heat and light of jail and jailer's residence properly denied by fiscal court as indirect increase of compensation. Frizzell v. Holmes [Ky.] 115 SW 246. Appropriation to keep public buildings in clean condition would be increase of salary and was properly denied. Id. Where statute makes it duty of **stenographer** to furnish transcript at certain price, he is entitled to fees upon performance of such duty, regardless of custom of courts that preparation of statement of facts be rendered as part of legal services of attorney appealing. Jones & Co. v. Smith [Tex. Civ. App.] 109 SW 1111. Overstatement of number of words in transcript not bar to recovery of fees, though Pen. Code 1895, art. 256, prohibited demand for fees to which officer was not entitled, since original petition was wholly superseded by amended petition and petition on which case tried disclosed no illegal demand. Id. Under Const. § 249, limiting **employes of senate** to those enumerated, and Ky. St. 1903, § 342, providing for payment of contingent expenses of general assembly on vouchers of clerks of respective houses,

The assignment of a police officer to perform the services of a higher rank does not entitle him to the pay of that rank.[81] Statutes as to compensation must comply with constitutional provisions,[82] and a city in pursuance to its delegated power may not

person employed by chief clerk of senate to copy bills is not entitled on voucher of chief clerk to payment from state treasury as contingent expense, though services necessary. James v. Cromwell, 33 Ky. L. R. 1024, 112 SW 611. Laws 1903, p. 418, c. 247, in so far as affecting salary and **deputy hire of register of deeds** of Labette County, Kansas, held valid as to passage. Stephens v. Labette County Com'rs [Kan.] 98 P 790. **County judge** not entitled to receive sums for criminal cases dismissed without trial. Allowance and payment of fees in such cases by commissioner's court without authority and ineffective. Lane v. Delta County [Tex. Civ. App.] 109 SW 866. County Government Act 1897 (St. 1897, p. 504, c. 277), § 160, subd. 7, as to copies of assessment rolls, does not contemplate extra work by **assessor** in preparing such rolls at his own expense. Alameda County v. Dalton [Cal. App.] 98 P 85. Greater New York Charter (Laws 1901, p. 32, c. 466), § 56, requiring salaries to be paid out of city treasury, with certain exceptions to be fixed by aldermen, includes only **city officers.** Metropolitan sewerage commission a state commission and salaries of employes not governed by charter. People v. Metz, 61 Misc. 363, 113 NYS 1007. Where Comp. St. 1887, div. 5, c. 22, § 368, authorized salary to be paid to acting **mayor** occupying position over 60 days, an ordinance in pursuance to Act which omitted limitation as to length of service was void. McGillic v. Corby, 37 Mont. 249, 95 P 1063. Ordinances void though later statute (Pol. Code 1895, § 4783) changed law, even if such statute be considered curative. Id. Allowance by council for services rendered mere gift without authority. Id. Ky. St. 1903, § 3043, construed, and held to entitle **member of council** to $3 for meeting, but if absent without statutory excuse to be liable to forfeit of double pay. Barron v. Kaufman [Ky.] 115 SW 787. Freeholder's Charter of San Diego construed (St. 1889, pp. 643-729, c. 22), and council held to have no power to create salaries for its members. Woods v. Potter [Cal. App.] 95 P 1125. Councilmen of municipality are not entitled to receive compensation for services until same is authorized by ordinance, and money received by them prior to passage of such ordinance may be recovered back in a proper action. Walker v. Dillonville, 11 Ohio C. C. (N. S.) 385. Where no statute providing for recovering back money so paid, suit in equity may be prosecuted for that purpose by taxpayer on behalf of municipality or on behalf of himself and other taxpayers, and in such suit all councilmen so illegally receiving money may be joined in one action to prevent multiplicity of suits. Id. Under General Incorporation Act (Gen. Laws 1906, pp. 895, 896, 910), §§ 851, 852, 855, 880, vesting government of cities of sixth class in board of trustees, etc., power of trustees to fix salary of **marshal** is absolute and free from judicial interference. Unless so low that competent person cannot be found to perform duties. De Merritt v. Weldon [Cal.] 98 P 537. Where Town Law, (Laws 1890, p. 1236, c. 569, § 178, as am'd Law's 1904, p. 836, c 312) fixed compensation of **town clerk** at $2 for day devoted to services of town, and § 160 (p. 1233) made clerk member of town board, and Laws 1893, p. 685, c. 344, § 3, allowed clerk same compensation when attending meetings of board as other members, in addition to other compensation, in towns of 20,000 or over, the latter law did not make it duty of clerk to attend other boards than town board, and clerk could not charge for attending board of assessors, auditors and highway commissioners. Wilson v. Bleloch, 125 App. Div. 191, 109 NYS 340. **Assessors** only entitled to per diem compensation allowed by Town Law, Laws 1890, 1236, c. 569, § 178, as am'd Laws 1904, p. 836, c. 312, for services to town. Not entitled to additional compensation for same days in making list of jurors in conjunction with supervisor and town clerk as required by Code Civ. Proc. § 1035. Id. **Supervisor** can only charge per diem compensation fixed by Town Law, Laws 1890, p. 1236, c. 569, § 178, as am'd by Laws 1904, p. 836, c. 312, for days devoted to service of town. Not entitled to additional compensation for same days when attending boards of town of which he is member, or is required to attend as supervisor. Id. Under Village Law, Laws 1897, p. 389, c. 414, § 85, and Town Law, Laws 1890, p. 1236, c. 569, § 178, **trustees of village** in town where assessors entitled to $3 per day are entitled to that compensation for each day necessarily spent in making assessment. In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008. Under Village Law, Laws 1897, p. 389, c. 414, § 85, and Town Law, Laws 1890, p. 1236, c. 569, § 178, trustees and clerk of village acting as inspectors of election are entitled only to compensation at rate of $2 per day until supervisors establish higher rate. Id. **Clerk of village** not entitled to additional allowance for work when not shown to be outside duties as prescribed by Village Law, Laws 1897, p. 389, c. 414, § 82. Id. Board of trustees may determine whether statement of services rendered by **village attorney** is reasonable. Subject to legal review. Id. Compensation of village attorney appointed pursuant to Village Law, § 88, subd. 11, cannot be assailed unless excessive. Id.

**80.** Contract of employment for superintendence of waterworks and services rendered in estimating plant and preparing plans for extensions construed, and employe held entitled to sum paid for services but not for certain work rejected. Witmer v. Jamestown, 125 App. Div. 43, 109 NYS 269.

**81.** In the absence of legal contract or enabling statute, does not entitle to any extra pay for increased services. McDevitt v. Jersey City [N. J. Law] 71 A 1121.

**82.** Under Const. (Burn's Ed. § 129) art. 5, § 56, before appropriations can be made for compensation of state officer, office must have been created and salary fixed or employment authorized and compensation provided for therein, or in separate bill. Bryan v. Menefee [Okl.] 95 P 471. An appropriation by separate bill with one subject providing

fix compensation at such a small amount as to render competent officials unavailable.[83] Constitutional or statutory enactments often provide that compensation be not increased or decreased during an official's term of office.[84] Sums paid pursuant to an unauthorized increase may be recovered.[85] The legal right to a public office carries the right to salary,[86] and a person wrongfully discharged from an office is entitled to

for contingent expense of state officer is valid. Warrant properly drawn against such contingent fund for clerical assistance is valid. Id. An appropriation to cover compensation of estate employes not prior to that time authorized by law, and compensation fixed, can only be enacted as separate appropriation bill with one subject. Const. art. 5, § 56. Id.

**83.** Ordinance fixing salary of marshal at $10 per month not invalid on ground that salary was so small that competent official could not be found to fill place, since city only of 1,800 inhabitants, and no statutory requirement to devote whole time to office or to warrant inference that official duties would interfere with other business. De Merritt v. Weldon [Cal.] 98 P 537.

**84.** Amendment to Const. 1879, art. 5, § 19, ratified in 1908, providing that certain state officers receive specified salary, that compensation be not increased or diminished during term of office, and that legislature may diminish after term of office, operative from date or ratification and officer elected in 1906 for four years entitled to salary as fixed in amendment. Kingsbury v. Nye [Cal. App.] 99 P 985. Laws 1907, p. 329, increasing fees of state's attorney to $15 on each count of indictment for which conviction had, cannot operate to increase fees of attorney who at time of entering office was only entitled to $5. People v. Williams, 232 Ill. 519, 83 NE 1047. Const. art. 10, § 10, prohibiting increase of compensation during term of office, and art. 9, § 11, applying to municipal officers, held applicable. Id. County board without jurisdiction to increase salary of officer after commencement of term. Moffett v. People, 134 Ill. App. 550. Where compensation of county officer fixed at one sum and office expenses, clerk hire, etc., separate, latter may be changed during term. People v. Fuller, 141 Ill. App. 374. Where compensation of county officer and his clerk hire and expenses fixed in one gross sum before he takes office, allowance cannot be changed during term of such officer. Id. Compensation of statutory officers not specially protected by the constitution may be increased or decreased by the legislature. People v. Ahearn, 125 App. Div. 795, 110 NYS 306. City surveyor not strictly officer, yet appointed and required to take oath by law, and compensation at specified rates fixed by local law, which is assessed upon property, wherefore amount of compensation depends upon law when service rendered. Ordinances construed and relator held entitled to additional compensation for extra copies of damage maps in surveys for street openings. Id. Under Act 1889 (P. L. 199, § 21), providing that police board do not increase pay of members beyond that authorized by law, such increase cannot be effected by creating an office of "acting" captain, inspector, etc. Leonard v. Fagen [N. J. Law] 69 A 980. Superintendent of schools not "contractor" within Const. art. 4, § 21, prohibiting extra compensation. Bird v. Detroit Board of Education [Mich.] 15 Det. Leg. N. 902, 118 NW 606. Increase of salary of superintendent of schools looked to future, not past, and therefore did not violate Const. art. 4, § 21, prohibiting extra compensation for services rendered. Id. Charter construed and provision prohibiting increase of salaries held to apply to officers appointed for definite term, and where policemen held offices until removed for cause, salaries could be increased during continuance of their appointment to service. Sullivan v. Bridgeport [Conn.] 71 A 906. Ordinance increasing salary of patrolmen effective the succeeding fiscal year not within Const. amend. art. 24, prohibiting gratuitous compensation to public officers. Id. Loc. Acts 1903, p. 266, No. 392, § 7, as am'd by Loc. Acts 1907, p. 127, No. 406, construed and amendment held new grant of power removing limitation as to salary, and under provision making same effective at once, board of education could increase salary of superintendent though appointed under previous statute limiting compensation. Bird v. Detroit Board of Education [Mich.] 15 Det. Leg. N. 902, 118 NW 606. "Term of office" in Const. art. 11, § 9, prohibiting increase of salaries, applies only to officers having fixed and definite term. Harrold v. Barnum [Cal.] 96 P 104. Not applicable to appointive officers holding office at will of appointing power. St. 1907, p. 447, c. 10, amending Pol. Code, § 4236 (County Government Act, St. 1905, p. 435 et seq., c. 364, par. 12), and increasing salary of deputy surveyor, not violative of constitution (Const. art. 11, § 9), since such officer holds at pleasure of appointing power. Id. Const. art. 7, creating office of justice of supreme court, fixing term and providing for filling same, is a unit, including, so far as article is concerned periods within full term of incumbency by appointment or election to fill vacancy. State v. Frear [Wis.] 120 NW 216. Generally a constitutional prohibition as to increase or decrease of salary refers to the full term of an incumbent as fixed by fundamental or other law. Id. Person appointed or elected to fill vacancy takes part of full term and receives salary as incident. Does not have term of office in constitutional sense. Id. Language "term of office" in constitutional provision creating legislative disability to change compensation of public officers under some circumstances is ambiguous. Construed according to practical construction adopted for 50 years. Id.

**85.** Salary increased by county board. Not paid under mistake of law. Moffett v. People, 134 Ill. App. 550.

**86.** Gracey v. St. Louis, 213 Mo. 384, 111 SW 1159. Salary incident to office. Bullis v. Chicago, 235 Ill. 472, 85 NE 614; O'Donnell v. New York, 112 NYS 760; McGillic v.

compensation,[87] regardless of sums earned otherwise while illegally suspended.[88] An exception to the rule is generally recognized, where a de facto officer acted and received the compensation,[89] but a de jure officer may recover fees received by a de facto officer intruding into his office.[90] An officer's compensation ends at the expiration of his term.[91] An assignment or sale of a public officer's salary is contrary to public policy and void,[92] but an officer of a municipality may compel the payment of his salary by mandamus though he has assigned the same.[93] In order to recover compensation an officer must show his right to the office.[94] The refusal of a board of apportionment and taxation of a city to appropriate sufficient funds to pay salaries of policemen as increased by an ordinance would not prevent the recovery of such increased salary,[95] and the acceptance of salary until the time of removal by an illegally

Corby, 37 Mont. 249, 95 P 1063. Commissions or fees incident to office of tax collector. Graves v. Bullen [Tex. Civ. App.] 115 SW 1177.

87. Officer having passed necessary competitive civil service examination and appointed to position is entitled on summary removal to salary lost thereby. Sutliffe v. New York, 61 Misc. 514, 115 NYS 186. Where discharge quashed in certiorari. City of Chicago v. Fitzmaurice, 138 Ill. App. 239. Notwithstanding pending of new charges on basis of original discharge, since original discharge quashed for error in proceeding. City of Chicago v. Bullis, 138 Ill. App. 297. Patrolman improperly suspended entitled to entire salary where duties not performed by another. Bullis v. Chicago, 235 Ill. 472, 85 NE 614. Attempted removal without hearing does not deprive officer of salary for balance of term. Gracey v. St. Louis, 213 Mo. 384, 111 SW 1159. Where **employe** unlawfully discharged, compensation ceases. O'Donnell v. New York, 112 NYS 760. Distinction between office and employment as to compensation is that, under former, recovery of compensation may be had, regardless of earnings when illegally deprived of office. City of Chicago v. Bullis, 138 Ill. App. 297.

88. Patrolman. Bullis v. Chicago, 235 Ill. 472, 85 NE 614. Acceptance of temporary position by illegally removed officer not incompatible with office of deputy inspector of boilers so as to bar recovery of salary for balance of official term. Gracey v. St. Louis, 213 Mo. 384, 111 SW 1159.

89. Doctrine that right to compensation is incident to title to office not always recognized. Hansen v. Jersey City [N. J. Law] 71 A 1116. Officer de jure need not be paid for period when officer de facto acted and received compensation. Board of Com'rs of El Paso County v. Rohde, 41 Colo. 258, 95 P 551. Town officer cannot recover salary after unwarranted removal when paid to successor, a de facto officer. Walden v. Headland [Ala.] 47 S 79. Disbursing officer of town has right to act on one's apparent authority to office in payment of salaries. Need not determine rights of contestants. Id. Where a member of a police force serves in a position to which he has been assigned and accepts the compensation incident to the new position, he is, if illegally transferred, at least only entitled to so much compensation incident to the office from which he has been removed as would equal the difference between the respective salaries of the two positions. Hansen v. Jersey City [N. J. Law] 71 A 1116.

90. Sandoval v. Albright [N. M.] 94 P 947.

91. Whether it occur by expiration of time, death, resignation, or abolishment by law. Graves v. Bullen [Tex. Civ. App.] 115 SW 1177.

92. Granger v. French, 152 Mich. 356, 15 Det. Leg. N. 210, 116 NW 181; Cooley Credit Co. v. Townsend, 132 Mo. App. 390, 111 SW 894. Action of damages for violation of contract tantamount to action to enforce assignment and therefore not maintainable. Cooley Credit Co. v. Townsend, 132 Mo. App. 390, 111 SW 894.

93. Granger v. French, 152 Mich. 356, 15 Det. Leg. N. 210, 116 NW 181.

94. Officer must show right by law to compensation to recover. Woods v. Potter [Cal. App.] 95 P 1125. Official must first allege and prove valid appointment. Cook v. Marseilles, 139 Ill. App. 536. De facto, proof not sufficient. City of Chicago v. Bullis, 138 Ill. App. 297. Burden of proving contract for increased pay rests on plaintiff. McDevitt v. Jersey City [N. J. Law] 71 A 1121. In suit for salary of policeman, plaintiff has burden of showing legal existence of office and legal right to hold it. Bullis v. Chicago, 235 Ill. 472, 85 NE 614. Where **no such office in existence** at time of filing charges against policeman, but plaintiff accorded hearing, such hearing did not estop city to deny existence of office. Id. In order that charter officer be entitled to compensation for services, he has burden of showing that either charter or legislative or constitutional authority under which charter was framed attached right of compensation to office. Woods v. Potter [Cal. App.] 95 P 1125. Carrying plaintiff's name on pay rolls as patrolman, or certification of pay rolls by civil service commission not **evidence** of legal existence to office. Bullis v. Chicago, 235 Ill. 472, 85 NE 614. Only competent evidence of rules of civil service commission are original or copy proved to be correct. City of Chicago v. Fitzmaurice, 138 Ill. App. 239. Judgment in certiorari proceeding res judicata as to existence of office and appointment of plaintiff. Id. **Variance** fatal where action of assumpsit for salary and proof showed that plaintiff was mere probationary appointee when allegations in effect avers he was not probationer. Kenyon v. Chicago, 135 Ill. App. 227.

95. Sullivan v. Bridgeport [Conn.] 71 A 906. No showing that an insufficient amount

removed officer does not constitute a settlement to bar recovery.[96] An action for salary was not premature when not brought until the quashal of charges and reinstatement.[97] In an action for compensation of an employe unlawfully discharged, reinstatement is immaterial.[98] Mandamus lies to enforce the payment by municipal corporations of a fixed salary of an official.[99] Compensation illegally paid by a county may be recovered.[1] To recover fees illegally retained by an officer, the petition should allege the receipt of sums in excess of what such officer was entitled to retain.[2]

*Pensions, reliefs and benefits.*—According to the public or private nature of these funds, they may be regarded as pensions[3] or fraternal mutual benefit insurance,[4] and consequently are treated elsewhere.

**Official Bonds; Opening and Closing; Opening Judgments; Opinions of Court; Options; Order of Proof; Orders for Payment; Orders of Court; Ordinances; Oysters and Clams,** see latest topical index.
**Open Lewdness,** see 11 C. L. 1891, n. 6.

## PARDONS AND PAROLES.[5]

To be valid a pardon must be delivered and accepted.[6] It may be conditional.[7] A condition that upon a subsequent conviction for felony the person pardoned shall serve the remainder of the unexpired sentence is binding, although the time when such sentence would expire by law has passed.[8] Violation of a condition subsequent renders a pardon void,[9] and a court of competent jurisdiction may so declare it, although the pardon recites that the governor of the pardoning board has the power to avoid it in an ex parte showing.[10] A discharge from imprisonment is not the equivalent of a pardon.[11] To avail in mitigation for a second offense, a conditional pardon

was left unexpended to pay increased salary. Id. Funds might be made available by reducing other expenses. Id. City council might reduce number of patrolmen or make special appropriation. Id.

**96.** Gracey v. St. Louis, 213 Mo. 384, 111 SW 1159. Fire department clerk when legally entitled to $1,500 a year salary did not estop himself from recovering difference by accepting monthly payments at old rate of $1,350 per year. McGrade v. New York, 126 App. Div. 362, 110 NYS 517.

**97.** Though charges again refiled. Bullis v. Chicago, 235 Ill. 472, 85 NE 614.

**98.** O'Donnell v. New York, 112 NYS 760. That discharged employe has right to be reinstated when removed without formality required by veteran acts does not establish proposition that city is liable for compensation while employe absent. Id.

**99.** Granger v. French, 152 Mich. 356, 15 Det. Leg. N. 210, 116 NW 181.

**1.** Compensation illegally paid county auditor for extending city taxes on tax duplicates may be recovered, though paid voluntarily in good faith with full knowledge of all the facts under mistake of law. Kerr v. Regester [Ind. App.] 85 NE 790. Demand not prerequisite action by city taxpayer to recover compensation illegally received by county auditor in violation of Burn's Ann. St. 1901, §§ 2105, 6548. Id. Where findings show conversion. Id. County auditor not entitled to receive compensation from city for entering and extending taxes levied by it. Burn's Ann. St. 1901, §§ 6426, 6479, 4249. Id.

**2.** Petition under Act of 1877 (Laws 1877, p. 215; Comp. St. 1907, c. 28, § 42 et seq.). Held not to show facts sufficient to constitute cause of action. Saunders County v. Slama [Neb.] 118 NW 573.

**3.** See Pensions, 10 C. L. 1161.

**4.** See Fraternal Mutual Benefit Associations, 11 C. L. 1564.

**5.** See 10 C. L. 1071.

**Search Note:** See notes in 6 C. L. 876; 14 L. R. A. 285; 15 Id. 395; 34 Id. 251, 402; 5 L. R. A. (N. S.) 1064; 16 Id. 304; 111 A. S. R. 108; 3 Ann. Cas. 646; 7 Id. 92; 10 Id. 203. See, also, Pardon, Cent. Dig.; Dec. Dig.; 29 Cyc. 1559-1574; 24 A. & E. Enc. L. (2ed.) 547; 15 A. & E. Enc. P. & P. 447.

**6.** Delivery to prisoner's attorney is sufficient. Ex parte Williams [N. C.] 63 SE 108.

**7.** Under Const. art. 3, § 6, governor may grant pardon on condition that prisoner shall pay all costs and remain of good behavior, sober and industrious. Ex parte Williams [N. C.] 63 SE 108. When the petitioner has complied with conditions precedent and the pardon has been delivered to him, it is irrevocable. Id.

**8.** Ex parte Kelly [Cal.] 99 P 368.

**9.** Pardon granted on condition that defendant lead a law abiding life rendered void by subsequent conviction for larceny and subjected him to rearrest. Henderson v. State [Fla.] 46 S 151.

**10.** Henderson v. State [Fla.] 46 S 151.

**11.** Act for management of reformatory (P. L. 1901, p. 231) does not interfere with pardoning power because it authorizes com-

must be proved at the trial.[12] A pardon granted an attorney convicted of forgery is no defense to disbarment proceedings against him brought on account of the conviction.[13] A pardon does not release the liability for damages imposed for an unsuccessful appeal in a suit wherein the state is a party, where there exists a constitutional provision confining the power of the governor to the remission of fines and forfeitures.[14]

## PARENT AND CHILD.

§ 1. Custody and Control of Child, 1166.
§ 2. Support and Necessaries, 1169.
§ 3. Services, Earnings, and Injuries to Child, 1170.
§ 4. Property Rights and Dealings Between Parent and Child, 1172.
§ 5. Liability for Child's Torts, 1172.

*The scope of this topic* is noted below.[15]

§ 1. *Custody and control of child.*[16] See 10 C. L. 1072—This section does not deal with the rights of parties to divorce actions,[17] general matters of guardianship,[18] or general questions relating to the custody of infants,[19] but deals with the custody and control of the child only when the rights of the parents, as such, enter the dispute. When a child's custody is in dispute, its welfare takes precedence of all other considerations,[20] even though this may deprive the parents of their natural right to the custody and control of their offspring.[21] But where the child's welfare is secure, the

missioners to discharge prisoners before expiration of maximum term. Ex parte Marlow, 75 N. J. Law, 400, 68 A 171.

**12.** Cannot be set up for first time on motion for new trial. Henderson v. State [Fla.] 46 S 151.

**13.** Nelson v. Com., 33 Ky. L. R. 143, 109 SW 337.

**14.** Commonwealth v. French [Ky.] 114 SW 255.

**15. It includes** all rights of liabilities growing generally out of the relation. **It excludes** parentage by adoption (see Adoption of Children, 11 C. L. 35), rights and liabilities of parents of illegitimate children (see Bastards, 11 C. L. 413), presumptions of fraud and undue influence growing out of the relationship (see Fraud and Undue Influence, 11 C. L. 1583; Fraudulent Conveyances, 11 C. L. 1620), rights and liabilities of infants generally (see Infants, 12 C. L. 140), rights of inheritance (see Descent and Distribution, 11 C. L. 1078), and rights in respect to testamentary disposition (see Wills, 10 C. L. 2035). **Cnstody** is treated slightly in this topic, but more fully in Infants, 12 C. L. 140, and as to procedure on habeas corpus to determine custody, the topic Habeas Corpus (and Replegiando), 11 C. L. 1682, should be consulted. Award of custody on grant of divorce is specifically treated in the topic Divorce, 11 C. L. 1111.

**16. Search Note:** See notes in 8 C. L. 1226; 27 L. R. A. 56; 2 A. S. R. 183; 88 Id. 866; 1 Ann. Cas. 131; 5 Id. 117; 6 Id. 939; 7 Id. 450; 11 Id. 217.

See, also, Parent and Child, Cent. Dig. §§ 1-32, 152-164, 182-188; Dec. Dig. §§ 1, 2, 14, 15, 18; 29 Cyc. 1583-1604, 1667-1672, 1679-1682; 21 A. & E. Enc. L. (2ed.) 1034, 1035.

**17.** See Divorce, 11 C. L. 1111.

**18.** See Guardianship, 11 C. L. 1671.

**19.** See Infants, 12 C. L. 140.

**20.** Steele v. Hohenadel, 141 Ill. App. 201, afd. 237 Ill. 229, 86 NE 717. When scales are equally balanced or court is in doubt about abstract right of control, interests of child are paramount and will control. Smidt v. Benenga [Iowa] 118 NW 439. Child held properly awarded to mother temporarily, where she was permanent invalid likely to die, where neither parent was better able to support child than other, but mother intended to live with her parents who had always lived near boy and with whom boy's relations were much closer than they were with persons with whom father intended to place him. Wallace v. Wallace [Miss.] 46 S 398. Decree awarding custody of two year old boy in part to such parent held improper and custody awarded mother where shown that she lived with parents of large means and best interests of child would be subserved by giving him to his mother. Turner v. Turner [Miss.] 46 S 413. Where neither parent was better fitted than other, held proper for chancellor to award custody of child of 18 months to mother for probationary period of six months to determine her ability and fitness to rear it, though father was possessed of much greater financial ability. O'Neal v. O'Neal [Miss.] 48 S 623. Custody of child of seven taken from mother at father's petition where mother without cause separated from father, had no means to support child and evidence showed that child should be removed from present surroundings. In re Tierney, 128 App. Div. 835, 112 NYS 1039.

**21.** Courts in interest of minor children may take them from their parents and place them elsewhere, even in custody of strangers. Swarens v. Swarens [Kan.] 97 P 968. Interests of child held best promoted by leaving him with foster parents who cared for him during ten years of early life, where father did nothing for child and visited him rarely before child came into grandmother's property and became old enough to do some work, particularly where child desires to remain where he is. Smidt v. Benenga [Iowa] 118 NW 439. Parent has legal right to control her minor child providing such control does not in-

right of the parent, as natural guardian, to the custody of the child is before that of all others.[22] The parent, however, may forfeit his natural right by his misconduct, unfitness, neglect, or abandonment,[23] or relinquish it by contract clear and definite

terfere with child's present and future welfare, and court will not give custody of child even to parent if change is likely to be to disadvantage of child. People v. Phelps, 58 Misc. 625, 109 NYS 943. Best interests of child held to require that she be left with foster parents who cared for her over ten of her eleven years, where mother for last six years neither visited her nor contributed anything to her support, and during first five years visited her but three times, contributed only $50, and child with much feeling, on hearing, insists on being left with foster parents. Id. Where, by reason of mother's death, child is too young to be properly cared for by father and it is entrusted to others to be reared, still notwithstanding fact that father cannot delegate his authority to control child as general rule, yet if best interests of child require that it remain either permanently or for certain time with its foster parents, father will be denied custody of child. Peese v. Gellerman [Tex. Civ. App.] 110 SW 196. Held proper to allege and consider, in determining custody of child, that father after eight years of failure to show any great affection for child married woman of twenty who had illegitimate child and had lived with father several months before marriage, since allegations were pertinent to question whether child's interest would be subserved by change. Id.

22. Prima facie before that of all others. Steele v. Hohenadel, 141 Ill. App. 201, afd. 237 Ill. 229, 86 NE 717. Entitled to care, custody, and control of their minor children. Smidt v. Benenga [Iowa] 118 NW 439. Hurd's Rev. St. 1905, c. 64, § 4, provides that parents of minor if living, and in case of death of either, surviving parent, they being competent to transact their own business and fit persons, shall be entitled to custody and direction of minor's education. Wohlford v. Burckhardt, 141 Ill. App. 321. Law regards surviving parent as rightful custodian of his child as against claims of all others, and rights of parents must be considered in any dispute concerning custody of children. Swarens v. Swarens [Kan.] 97 P 968. Child may not be taken from its parent merely because home superior in some particulars is offered by another. Id. Where father and second wife were well to do, educated and without bad habits, they are entitled to custody of former's eight year old daughter, although she had lived with grandparents for seven years and strong mutual attachment had sprung up. Id. Fact that child of seven is happy where placed, shows greater present affection for grandmother than for mother, does not warrant refusal to recognize mother's rights where this is the only reason advanced. State v. Steel, 121 La. 215, 46 S 215. Where court granting divorce, without finding father unfit, temporarily awards custody of minor children to mother, such decree does not deprive father of natural rights to custody against any person except mother, and upon her death such right ceases to be affected by such decree. Ex parte Clarke [Neb.] 118 NW 472. Under Domestic Relations Law, § 51 (Laws 1896, p. 223, c. 272), providing that married woman is joint guardian of her children with her husband, with equal powers, rights and duties in regard to them, and that upon death of either parent survivor may dispose of custody of unmarried infant during its minority or any less time, right of surviving parent to custody of child is absolute provided parent be fit person, and dying parent cannot dispose of child to deprivation of survivor's rights under statute. People v. Beaudoin, 126 App. Div. 505, 110 NYS 592. Mother shown to be willing, able, and competent to care for child alleged to have been left by dying father with others, and to be woman of good reputation living with her father, mother, and sisters. Held fit and entitled to child's custody under Domestic Relations Law, § 51 (Laws 1896, p. 223, c. 272). Id.

23. Father held fit custodian for child where shown to have home wherein his mother and sister resided. Steele v. Hohenadel, 141 Ill. App. 201, afd. 237 Ill. 229, 86 NE 717. Father may be deprived of child only when evidence discloses that child on his account is destitute, abandoned, or dependent, or that father is living immoral life, or is in vicious or disreputable surroundings, or that he neglects, mistreats child, or may do so, or is illy adapted on account of mental or physical defects to care for child. Wohlford v. Burckhardt, 141 Ill. App. 321. Where father pendente lite in divorce action writes child and tells him that he must look to mother for all aid, such action warrants court in awarding mother custody and requiring father to pay her allowance therefor. Low v. Low, 133 Ill. App. 613. Where parent has neglected to assert right for many years and child does not know him and has formed other attachments almost as sacred as natural ones, and in effect quite as strong, courts are reluctant to make any change. Smidt v. Benenga [Iowa] 118 NW 439. Parent's right to custody of his children may be forfeited by conduct showing that he is manifestly unfit to have the custody and care. Swarens v. Swarens [Kan.] 97 P 968. Widow in necessitous circumstances who places child in care and custody of paternal grandfather for several years does not thereby forfeit right to reclaim child when she comes into better circumstances, since her act in so leaving child does not under circumstances imply promise on her part not to retake him. Particularly is this so where mother paid for care of child until acceptance of such pay was refused. State v. Steel, 121 La. 215, 46 S 215. While attempted gift of child standing alone is invalid, still fact of gift having been made is properly alleged and considered in connection with other facts in determining where custody of child should be placed, since it places parent in attitude of invoking powers of court of equity in re-

in its terms,[24] but he may not dispose of it by will in some states.[25] The unfitness which deprives a parent of the right to the custody of his children must be positive and not comparative,[26] and the degree of fitness must be considered in relation to the attending circumstances,[27] which home is best for the child being a question of fact to be determined primarily by the trial court.[28]

A decree respecting the custody of a child is exceptional in that it is always regarded as temporary and subject to change upon the occurrence of any material change affecting the child's welfare,[29] and is not conclusive against the parent's right unless he had notice of the proceedings and his competency and suitability were adjudicated,[30] The parent's power extends to their children only during their minority;[31] they may recover damages for a physical invasion of the possession of the child,[32] the measure of damages recoverable in the latter case being treated elsewhere,[33] but they cannot sue to annul the marriage of a minor child.[34]

To sustain a conviction for assault and battery inflicted while a parent was punishing his child, it is sufficient to show that the punishment was cruel and unreasonably severe.[35]

gaining possession of child. Peese v. Gellerman [Tex. Civ. App.] 110 SW 196. Where parent voluntarily surrendered control of child for first seven or eight years of its life to another and did very little for it, and made no demand for it until it reached age when it might become useful, parent will be required to show that child's interest will be subserved by the change. Id. No basis for presumption that promptings of parental affection will cause father to tenderly care for his child in future when he has failed to so act in past. Id.

24. Custody of child in grandfather will not be disturbed where grandfather is suitable and fit, child had been with him six years and father had originally relinquished child to grandfather by contract clear and definite in its terms. Gay v. Thompson [Ga.] 63 SE 133. Evidence on subject of releasing parental control of child by father to grandmother held not to require ruling by judge that such contract had been made, and considering evidence in its entirety, child held properly awarded to father. Perkins v. Moon [Ga.] 63 SE 133. Parent cannot absolve himself trom parental duties by agreement, but he may by agreement surrender portion of his rights as parent. Hohenadel v. Steele, 237 Ill. 229, 86 NE 717. Consent decree whereby parent and grandparent were to share care and custody of child held, in effect, to be agreement by parent to relinquish portion of his rights. Id. Parents may deprive themselves of natural right by contract. Smidt v. Benenga [Iowa] 118 NW 439.

25. Under Domestic Relations Law, § 51 (Laws 1896, p. 223, c. 272), providing that mother is joint guardian of children with father, with equal powers, rights and duties with respect to them, and that upon death of either survivor may dispose of custody of unmarried minor during minority or any less time, dying parent cannot dispose of child contrary to rights of survivor under statute. People v. Beaudoin, 126 App. Div. 505, 110 NYS 592.

26. Mere fact that children would be better nurtured or cared for by stranger is not sufficient to deprive parent of his right to their custody. Ex parte Clarke [Neb.] 118 NW 472. Unless evidence is clear that parent is unfit, he should have child's custody, regardless of fact that other relatives might give better care and spend more time and money on child. Wohlford v. Burckhardt, 141 Ill. App. 321. Evidence held insufficient to show that father was unfit where father offered home with child with his parents, with whom his two grown sisters lived. Id.

27. Such as concern he has shown for child in past, suitability of his domestic surroundings to receive it, and question of its general welfare. Ex parte Clarke [Neb.] 118 NW 472. Father who, while children were living with mother after divorce, failed to show any interest in them, who remarried, indulged in intoxicants, and was defendant in second divorce action, held unfit as compared with mother's half sister to whom dying mother entrusted care of children. Id.

28. Peese v. Gellerman [Tex. Civ. App.] 110 SW 196.

29. Hohenadel v. Steele, 237 Ill. 229, 86 NE 717, afg. 141 Ill. App. 201.

30. Appointment of guardian by county court is not conclusive as against parent's right to custody of his children, unless it appears that he had notice of the proceeding and that the question of his competency and suitability was adjudicated. Ex parte Clarks [Neb.] 118 NW 472.

31. Appeal of Woodward [Conn.] 70 A 453.

32. Error to dismiss petition asking damages against one who has willfully decoyed and carried away child of another where plainly alleged that plaintiff is entitled to custody, control, and society of child as its parent, and has been deprived of each and all of these by wrongful or criminal act of defendant. Selman v. Barnett, 4 Ga. App. 375, 61 SE 501.

33. See Damages, 11 C. L. 958.

34. Under Ballingers' Ann. Codes & St. § 4477 (Pierce's Code, § 6262), permitting annulment of marriage under certain circumstances, right is available only to party to marriage sought to be annulled. Ex parte Hollopeter [Wash.] 100 P 159.

35. Unnecessary to show that child waa

§ 2. *Support and necessaries.*[36]—See 10 C. L. 1074—This section deals only with the liability for each other's support of parent and child as such, the liability in all other cases being treated elsewhere.[37] The parent is obliged to maintain his child,[38] educate it to an extent consistent with its station in life,[39] and cannot by contract relieve himself of this obligation.[40] This duty and obligation of a parent does not necessarily terminate when the child arives at age or becomes an adult, nor is it limited to infants or children of tender years.[41] But while the parent is presumably so bound

permanently injured or disfigured. People v. Green, [Mich.] 119 NW 1087. Evidence held to sustain conviction for assault where father compelled adopted daughter to disrobe, tied her hands behind her back and whipped her with small riding whip, covering her body with cuts. People v. Green [Mich.] 15 Det. Leg. N. 1090, 119 NW 1087.

**36. Search Note:** See notes in 6 C. L. 880; 11 Id. 1124; 57 L. R. A. 728; 4 L. R. A. [N. S.) 1159; 9 Id. 411; 47 A. S. R. 314; 114 Id. 700; 117 Id. 128; 4 Ann. Cas. 1188; 7 Id. 903; 9 Id. 1019.

See, also, Parent and Child, Cent. Dig. §§ 33-69; 141-144, 165-181; Dec. Dig. §§ 3, 4, 12, 16, 17; 29 Cyc. 1605-1622, 1664, 1665, 1672-1679; 21 A. & E. Enc. L. (2ed.) 1049.

**37.** See Infants, 12 C. L. 140, and Guardianship, 11 C. L. 1671.

**38.** In re Putney, 61 Misc. 1, 114 NYS 556; First Nat. Bank of Owenton v. Greene [Ky.] 114 SW 322,

**NOTE. Parent's duty to support adult helpless child:** In an action to distribute the parent's estate, an attempt was made to charge idiot with the value of his support since majority. Held the parent's legal duty to support a helpless adult child prevented such a charge. Crain v. Mallone [Ky.] 113 SW 67. Whether a parent is under a common-law obligation to maintain a minor child is disputed. Many American jurisdictions have held that such a duty exists. Dennis v. Clark, 2 Cush. [Mass.] 347, 48 Am. Dec. 671; Pretzinger v. Pretzinger, 45 Ohio St. 452, 4 Am. St. Rep. 542; Van Valkenburg v. Watson, 13 Johns. [N. Y.] 480, 7 Am. Dec. 395; but see Raymond v. Loyl, 10 Barb. [N. Y.] 483. This view has been justified by text-writers because the parent's criminal liability for failure to support evidences a legal duty. Tiffany, Persons and Domestic Relations, 230. England and a minority of American jurisdictions have not deemed this consideration controlling, and unite in denying that the moral duty to support raises a legal obligation. Mortimer v. Wright, 6 Mees. & W. 482; Bazeley v. Forder (1858) L. R. 3 Q. B. 559; Kelly v. Davis, 49 N. H. 187, 6 Am. Rep. 499; Gordon v. Potter, 17 Vt. 348. Missouri, anomalously, denies the existence of such an obligation, and yet allows a quasi-contractual action against a parent by a stranger furnishing the infant with necessaries. Huke v. Huke, 44 Mo. App. 308; St. Ferdinand Loretta Academy v. Bobb, 52 Mo. 357. Among jurisdictions where the legal duty is recognized, a difference exists as to the effect of emancipation. Furman v. Van Sise, 56 N. Y. 435, 15 Am. Rep. 441; Porter v. Powell, 79 Iowa, 151, 18 Am. St. Rep. 353; 7 L. R. A. 176; Angel v. McLellan, 16 Mass. 28, 8 Am. Dec. 118. An insane person, however, does not become emancipated, even after majority (Brown v. Ramsay, 5 Dutch. [N. J.] 117; King v. Inhabitants, 2 Barn. & Adol. 861); and Kentucky recognizes the duty to support (Hedges v. Hedges, 24 Ky. L. R. 2220, 73 SW 1112). —From 9 Columbia L. R. 185.

**39.** In re Putney, 61 Misc. 1, 114 NYS 556.

**40.** Parents cannot forfeit or abandon claims of children upon them by stipulation in divorce action. Evans v. Evans [Cal.] 98 P 1044. Parent's right in respect to his children are not absolute, and while they may be forfeited by his conduct, modified or suspended against his will by action of court, or transferred to another to a certain extent by agreement, they cannot be destroyed as between himself and child except by statute. Appeal of Woodward [Conn.] 70 A 453. Parents cannot by contract entered into between themselves put one or other beyond all responsibility for support and maintenance of their children. Slattery v. Slattery [Iowa] 116 NW 608. Children have rights which parents must respect and which courts in interest of children and public will enforce when necessary; hence where custody is provided by contract, court may set same aside and decree in lieu thereof such provisions as welfare of children demand. Id. Stipulation to parties to divorce action providing for settlement of property and care of children. Id. Evidence held to show such change in conditions as to require father to contribute to support of children, regardless of stipulation in divorce action to contrary, where mother was shown to have become sick and unable to support children, to have invested everything received from father in home. Id. Parents cannot by contract between themselves, nor can court by any order it may make in divorce suit, irrevocably determine amount of money father shall contribute for support and education of his children, so as to deprive that court of power upon proper showing and notice, to alter said decree in interest of justice and for benefit of said children. Connett v. Connett [Neb.] 116 NW 658. Conditions held to have changed so as to warrant requirement that father earning $200 per week contributed $30 monthly to support of children. Id.

**41.** Adult child may from accident or disease be as helpless and incapable of making his support as an infant, and there is no difference between the duty imposed upon the parent to support the infant and the obligation to care for the adult who is equally if not more dependent upon the parent. In either case the parent is legally and naturally bound to support the child if financially able to do so. Crain v. Mal-

to support his infant children yet if the estate of the children is more able to justly bear the expense of their maintenance and education the parent may recover from their estate for supporting them.[42] In the case of the parent on the other hand, the common law does not require a child to maintain an infirm, aged, and destitute parent.[43] To support a warrant of seizure under the New York practice, the parent must have received notice of the proceeding,[44] and the offense with which he is charged must have occurred in the state.[45] One of two persons, each of whom sustains the relation of parent to a child, cannot assert the liability of the other for the maintenance of the child unless there is an express promise to pay.[46]

The liability for his child's necessaries attaches primarily to the father,[47] but he is not liable for necessaries furnished his minor child without his consent in the absence of proof that he neglected to supply the child with such necessaries as were proper for his condition in life.[48]

§ 3. *Services, earnings, and injuries to child.*[49]—See 10 C. L. 1075—An unemancipated minor can make no contract with a third person which will bar his parent to the right to his wages,[50] but the parent may be estopped to assert his right.[51] The law never implies that either parent or child contemplated payment to each other for support or services,[52] and consequently, to support a cause of action for such services,

lone [Ky.] 113 SW 67. Estate inherited by child from parent not chargeable with sum expended by parent for its support after majority as advancement, where child was of unsound mind and unable to care for himself. Id.

**42.** Where mother was of very limited means and scarcely able to sustain herself. Funk's Guardian v. Funk [Ky.] 113 SW 419. Parents are legally bound to provide for support of their children during their infancy, and this liability also continues even though children have estates of their own. There are, however, some exceptions to this rule when parents have no means or their estate is limited and when children have estate, income of which is ample for their support. First Nat. Bank of Owenton v. Greene [Ky.] 114 SW 322.

**43.** Schwerdt v. Schwerdt, 141 Ill. App. 386, afd. 235 Ill. 386, 85 NE 613. Under Hurd's Rev. St. 1905, c. 107, § 1, requiring children to support infirm and indigent parents, right of action does not accrue to parent but only to county to indemnify it for maintenance of such parent. Id.

**44.** Warrant of seizure under Code Cr. Proc. § 921, cannot be supported where father charged with abandoning children received no notice of proceedings, did not voluntarily appear, and no process was ever issued to bring him into court. People v. Clairmont, 58 Misc. 517, 111 NYS 613.

**45.** Under Code Cr. Proc. § 921, warrant of seizure against parent abandoning children cannot be issued where abandonment occurred in another state and he is not resident of New York. People v. Clairmont, 58 Misc. 517, 111 NYS 613.

**46.** Natural father cannot recover from adopted father for care and support of child while in former's own home after adoption. McNemar v. McNemar, 137 Ill. App. 504.
erly payable to mother. Royal v. Grant mother authorized daughter to buy neces- 137 Ill. App. 504. Services rendered aged father. Leake v. King Dry Goods Co. [Ga. App.] 62 SE 729.

**48.** Evidence held to show that child had all clothing necessary. Loucks v. Dutcher, 111 NYS 269. Promise of father to pay for goods furnished son, already sufficiently provided therewith, conditional upon son remaining in school, is not enforcible where son does not so remain. Id.

**49.** For infant's rights to his own services and earnings and his general contract rights, see Infants, 12 C. L. 140.

**Search Note:** See notes in 1 L. R. A. (N. S.) 205, 362, 1161; 7 Id. 518; 16 Id. 199; 49 A. S. R. 408, 415; 6 Ann. Cas. 512; 7 Id. 61; 9 Id. 512.

See, also, Parent and Child, Cent. Dig. §§ 70-99, 165-175; Dec. Dig. §§ 5-7, 16; 29 Cyc. 1623-1653; 1672-1676; 21 A. & E. Enc. L. (2ed.) 1039, 1059; 15 A. & E. Enc. P. & P. 450.

**50.** Contract with correspondence school whereby unemancipated minor agreed to pay certain sums to correspondence school held no bar to mother's right to wages. Greider v. Chicago & E. Ill. R. Co., 140 Ill. App. 246. Unless parental power has been lost or relinquished, parent is entitled to value of service of his minor child, whether contract for his services was made by parant or minor. Royal v. Grant [Ga. App.] 63 SE 708.

**51.** Where minor asserts rights to foreclose laborer's lien upon his own contract. or if made by his mother asserts that she acted as his agent and not as his mother, and she is joined not as plaintiff but as his guardian ad litem, neither plaintiff nor his mother may assert that any payments which were actually made by defendant to
plaintiff were void because they were prop-

**52.** Law presumes from intimate relation of parent and child that what is done is done gratuitously. McNemar v. McNemar, [Ga. App.] 63 SE 708.

**47.** Where there is no evidence that saries, liability for them would attach to

it must be alleged and proved that there was a direct, positive, and unequivocal promise to pay therefor.[53]

A parent, or one standing in loco parentis,[54] suing in the proper manner,[55] may, upon a proper showing of injury,[56] recover for the injuries sustained by him as the result of the injury of his child,[57] provided he has not been guilty of contributory negligence,[58] such as by consenting to the employment of the child at the work [59] or otherwise consenting to the doing of the act whereby the child is injured.[60] In Vir-

stepmother presumed gratuitous. Satterly v. Dewick, 114 NYS 354.

53. Recovery for value of services to aged father during declining years refused. Baugh v. Baugh's Adm'r, 33 Ky. L. R. 148, 109 SW 345. Burden is on child to make out prima facie case that services rendered by her for parent were not gratuitous. Cole v. Fitzgerald, 132 Mo. App. 17, 111 SW 628. It is not incumbent upon child seeking to collect for services rendered parent, to establish contract to pay her by direct evidence, such as some writing or testimony of witnesses who heard parties come to agreement, but it is sufficient for her to adduce evidence from which jury might find that parties understood that services were to be paid for. Id. When courts say express contract must be shown, they only mean the law will not imply contract if family relation existed and do not mean contract must be proved by direct testimony. Id. Evidence held sufficient to show arrangement between parent and child to pay latter for services to former where child left home of her own and went to care for parent and attend to drudgery of boarding house, and where parent was amply able to pay for same and frequently expressed to third persons his intention to do so. Id.

54. One standing in loco parentis may sue under statute for injuries occasioned by sale of intoxicating liquor to child toward whom relation of parent is had. Person standing in loco parentis is one aggrieved under Sayle's Ann. Civ. St. art. 3380. Saunders v. Alvido [Tex. Civ. App.] 113 SW 992.

55. Since, in Texas, damages sustained by parent as result of injuries to children are community property, and since husband during marriage is sole manager of that property, he alone may sue for it unless wife shows herself to be within some exception to rule. Married woman held to have no right to sue for injuries to child without joining husband. Hillsboro Cotton Mills v. King [Tex. Civ. App.] 112 SW 132.

56. Mere relationship of parent to child held sufficient, without allegation or evidence, to show parent was aggrieved by one permitting child to enter and remain in saloon. Markus v. Thompson [Tex. Civ. App.] 111 SW 1074.

57. Unemancipated infant cannot recover for loss of time during his minority occasioned by injury. Broosch v. Michigan Stove Co., 153 Mich. 652, 15 Det. Leg. N. 748, 118 NW 366. Parent is entitled to recover value of his own services necessarily rendered in care of his injured child. Gorman v. New York, etc., R. Co., 128 App. Div. 414, 113 NYS 219.

58. Contributory negligence of parent bars right to recover injuries suffered by him as result of child's injury. Berry v. St. Louis, etc., R. Co., 214 Mo. 593, 114 SW 27. Parents owe duty to care for their children, and in caring for them are bound to exercise such degree of care and prudence to promote their safety as under all circumstances is reasonable, and this degree of care is proportionate to age and intelligence of such children and known dangers, or dangers which might be known by exercise of due care. Harrington v. Butte, A. & P. R. Co., 37 Mont. 169, 95 P 8. Mere unexplained presence of child non sui juris, unattended in place of known danger, is prima facie evidence of contributory negligence on parent's part. Id. Situation of parents, character of home, weather, health of children, their manner of living, and all attending surroundings, are to be considered in question whether mother properly safeguarded her children. Murray v. Scranton R. Co., 36 Pa. Super. Ct. 576. Mother whose duties required her personal attention in humble home held not guilty of contributory negligence in allowing child of three to be taken into yard or street to play in care of sister of eight. Id. Evidence held insufficient to show proper care to have been taken of child by parents living 200 feet from railroad. Harrington v. Butte, A. & P. R. Co., 37 Mont. 169, 95 P 8.

59. It is immaterial that consent of parent is wanting at commencement if such consent be subsequently given during performance of employment and before any injury to minor occurs. Parent held to have consented to minor's employment in dangerous place where, after being notified of fact, he cautioned son and warned him of danger. Warrior Mfg. Co. v. Jones [Ala.] 46 S 456. Consent given by parent to employment of child in certain work is not consent to his employment at a more dangerous work, and such original consent is no defense to a recovery for injuries resulting in diminished capacity to earn money during minority. Hillsboro Cotton Mills v. King [Tex. Civ. App.] 112 SW 132. Declaration of parent seeking to recover for loss of services of deceased son held insufficient where it does not allege that son was hired against father's will in wrongful violation of his prohibition, but simply says it was "unlawful and without consent" of father; does not say father did not acquiesce in employment after hiring, nor that that parent was not paid for services rendered by son. Stevenson v. Ritter Lumber Co., 108 Va. 575, 68 SE 351.

60. Father cannot recover on liquor dealer's bond for permitting his child to enter and remain in saloon where he has consented to act, but consent given to other

ginia it has been held that the statute does not give the parent any right to recover for loss of services resulting from the child's death except such as were lost between the child's injury and death.[61] The child's right to recover for his injuries as distinct from the parent's right to recover for loss of services is treated elsewhere.[62]

*Emancipation.*[See 10 C. L. 1077]—The general rights and liabilities of emancipated infants are treated elsewhere.[63] The emancipation of a child by his parents may be proved by competent circumstantial evidence [64] or inferred from the circumstances.[65] An emancipated minor may recover for time lost as the result of injuries.[66]

§ 4. *Property rights and dealings between parent and child.*[67]—[See 10 C. L. 1078]—Although a donation from parent to child raises no presumption of undue influence, the contrary may be shown to be the case.[68] One lending money to a parent on the security of the child's property must use reasonable care to ascertain whether the father acted bona fide and whether the child was actuated only by her own free will.[69]

§ 5. *Liability for child's torts.*[70]—[See 10 C. L. 1078]—The parent is not liable for his son's torts merely because of the relationship,[71] nor for such torts committed without his knowledge or consent, and not in the course of his employment nor under his directions.[72] The liability for the torts of an infant in other cases is treated elsewhere.[73]

dealers is no defense to one to which consent it was not given. Markus v. Thompson [Tex. Civ. App.] 111 SW 1074.

**61.** Code 1904, § 2902, giving right of action for death where deceased might have recovered had he not died, does not give parent right to recover for loss of services of minor child between death and majority, nor does it affect parent's common-law right to recover for loss of services between date of injury and death. Stevenson v. Ritter Lumber Co., 108 Va. 575, 62 SE 351.

**62, 63.** See Infant's, 12 C. L. 140.

**64.** Adams & Burke Co. v. Cook [Neb.] 118 NW 662. Fact of emancipation must be proved by competent evidence and it is insufficient for the witness to testify to the conclusion. Id. Evidence held insufficient where only facts tending to show emancipation were in answer to leading question, properly objected to and were insufficient in any case. Id.

**65.** Fact that minor did not live at home, contracted for his services, and was nearly of age, held sufficient to warrant instruction that minor was emancipated. Donk Bros. Coal & Coke Co. v. Retzloff, 133 Ill. App. 277. **Finding of trial court** held conclusive on question of emancipation where evidence was conflicting. Greider v. Chicago & E. Ill. R. Co., 140 Ill. App. 246.

**66.** Donk Bros. Coal & Coke Co. v. Retzloff, 133 Ill. App. 277.

**67.** For contract liability of infants in general, see Infants, 12 C. L. 140.

**Search Note:** See notes in 3 Ann. Cas. 3. See, also, Parent and Child, Cent. Dig. §§ 100-144; Dec. Dig. §§ 8-12; 29 Cyc. 1580, 1654-1658, 1663-1665; 21 A. & E. Enc. L. (2ed.) 1043, 1059.

**68.** Widow of 65, who had trusted son for twenty years, doing what he requested without inquiry or hesitancy, and who signed deed at son's request making son grantee for insignificant consideration but without knowledge that she had done so, which deed son withheld from record for 16 years, and after its execution had mother sign mortgages borrowing money thereon, held not bound by deed. Neal v. Neal [Ala.] 47 S 66. Testimony held not sufficiently clear and convincing to establish agreement between step-mother and step-son by which she was to convey him premises in consideration of his paying taxes and insurance. Satterly v. Dewich, 114 NYS 354. Testimony held insufficient to show that deed from parent to child was obtained by undue influence, where on trial grantor admitted she knew what she was doing and executed same in consideration of her support for life. Carter v. McNeal [Ark.] 110 SW 222.

**69.** Lane v. Reserve Trust Co., 10 Ohio C. C. (N. S.) 512. Where bank lending father money upon security of child's property by exercise of reasonable care would have discovered undue parental influence under which mortgage was issued, it is no defense that notary's certificate cannot be varied by parol (since both deed and acknowledgement are directly assailed for fraud), nor that requirements of business should relieve banks from hazard and burden of rule. Id.

**70. Search Note:** See notes in 10 L. R. A. (N. S.) 933; 74 A. S. R. 801; 11 Ann. Cas. 367. See, also, Parent and Child, Cent. Dig. §§ 145-151; Dec. Dig. § 13; 29 Cyc. 1665-1667; 21 A. & E. Enc. L. (2ed.) 1052.

**71.** Bassett v. Riley, 131 Mo. App. 676, 111 SW 596.

**72.** Evidence held insufficient to show that father knew child was firing air gun at any time prior to accident. Dick v. Swenson, 137 Ill. App. 68. Father held not liable for son's tort in killing dog where son was not engaged in father's service, and father did not afterwards sanction or approve of act and had no prior knowledge of son's intention. Bassett v. Riley, 131 Mo. App. 676, 111 SW 596.

**73.** See Guardianship, 11 C. L. 1671. See also, Infants, 12 C. L. 140.

## PARKS AND PUBLIC GROUNDS.[74]

*The scope of this topic* is noted below.[75]

A park is a piece of ground set apart to be used by the public as a place for rest, recreation, exercise, pleasure, amusement and enjoyment.[76] A park boulevard is not a street but forms a part of the park proper.[77]

*Acquisition and creation.*[See 10 C. L. 1079]—A city may frame its own code of procedure with regard to condemning land for park purposes free from legislative interference,[78] and may incorporate into its charter a provision that, pending appeal on the condemnation proceedings, no interest shall be allowed on the judgment of condemnation.[79] The doctrine of dedication is applicable to public parks and squares, and the fact of dedication may be established in the same manner as in the case of streets and highways.[80] The extent of the ground dedicated is a question of fact.[81] Where a city charter authorizes the formation of park districts, each to contain at least one park, and the assessment of real estate for the maintenance of such parks, a tax levied by special assessment is valid although the parks in such district have not been completed.[82]

*The public title.*[See 10 C. L. 1079]—A municipality may maintain a suit to settle the title of the general public in a public square dedicated to its use.[83] A city taking land for park purposes acquires the same rights as to easements and water rights as a private purchaser.[84] A mere stranger cannot attack the right of a city to acquire and

**74. Search Note:** See notes in 11 Ann. Cas. 468.

See, also, Adverse Possession, Cent. Dig. §§ 7-57; Dec. Dig. §§ 4-9, 12; 1 Cyc. 1084, 1085, 1111-1121; Common Lands, Cent. Dig.; Dec. Dig.; 8 Cyc. 342-364; Constitutional Law, Cent. Dig. § 113; Dec. Dig. § 63(4); 8 Cyc. 837-840; Counties, Cent. Dig. § 169; Dec. Dig. § 108; 11 Cyc. 463-466; Dedication, Cent. Dig.; Dec. Dig.; 13 Cyc. 434-503; Eminent Domain Cent. Dig. §§ 84, 86; Dec. Dig. §§ 39, 41; 15 Cyc. 601, 602; Municipal Corporations, Cent. Dig. §§ 170-174, 565, 566, 731, 1024, 1536-1544, 1807, 1808; Dec. Dig. §§ 70, 210, 276, 420, 721, 722, 851; 28 Cyc. 301-304, 557-577, 926, 935-939, 953, 1115, 1311; Public Lands, Cent. Dig. §§ 133-136; Dec. Dig. §§ 47-50; States, Dec. Dig. § 88; Towns, Cent. Dig. §§ 63-68; Dec. Dig. § 35; Woods and Forests, Dec. Dig. § 8; 21 A. & E. Enc. L. (2ed.) 1065; 23 Id. 310.

**75. It includes** only matters relating peculiarly to parks and similar public grounds. It excludes public ways (see Highways and Streets, 11 C. L. 1720), dedication (see Dedication, 11 C. L. 1044), and condemnation (see Eminent Domain, 11 C. L. 1198) of land for public use, and rights in and disposal of the public domain (see Public Lands, 10 C. L. 1296). **For exhaustive special article, see** 4 C. L. 876.

**76.** The full use and benefit of a park is not realized by the enjoyment only of open view and right of passage, but also includes right to advantages that ornamentation may afford. Northport Wesleyan Grove Campmeeting Ass'n v. Andrews [Me.] 71 A 1027. A public park is a "public utility" within the meaning of Const. art. 10, § 27. Barnes v. Hill [Okl.] 99 P 927.

**77.** Special tax assessed upon all real estate in specified park district for purpose of constructing and maintaining park boulevards is valid, although charter provides that streets may be constructed by assessments upon abutting property. Field v. Kansas City, 211 Mo. 662, 111 SW 129.

**78.** Brunn v. Kansas City [Mo.] 115 SW 446.

**79.** Held that such charter provision must be read into the general statutes allowing interest on judgments. Brunn v. Kansas City [Mo.] 115 SW 446.

**80.** Northport Wesleyan Grove Campmeeting Ass'n v. Andrews [Me.] 71 A 1027. Conveyance of lots by owner according to plat upon which word "park" is written is a dedication of such land for park purposes. Id.

**81.** Evidence held to warrant finding that entire square instead of part thereof was dedicated by town to county in which to build jail, clerk's office, and court house. City of Victoria v. Victoria County [Tex. Civ. App.] 115 SW 67. Conditions existing at time of dedication must govern as to extent of dedicated area. Id. Acts of town and county authorities were proper evidence as to how they construed their rights in area dedicated by town to county for public purposes. Id.

**82.** Injunction against sale of property for diliquent special taxes for maintenance of parks would not lie in absence of showing that city was not diligently prosecuting proceedings for establishment of such parks. Corrigan v. Kansas City, 211 Mo. 608, 111 SW 115.

**83.** On dedication, legal title vests in city for donated use as long as such use continues, and such use constitutes an interest in the land, title to which may be quieted. Oates v. Headland [Ala.] 45 S 910.

**84.** In suit brought by city to restrain interference with plaintiff city's water rights, evidence held to show that one who acquired lands and conveyed them to a city for park purposes had made a beneficial appropriation of certain water rights prior to defendant's

hold lands for park purposes.[85] Lands acquired by a county park commission for use as a county park are the property of the county for purposes of taxation within the meaning of the law providing for taxation of property belonging to one taxing district but situated in another.[86]

*Government, control, and officers of parks.* See 10 C. L. 1080—Commissioners appointed for the purpose of constructing, adorning and supervising public parks have wide discretion as to the exercise of their functions.[87] They may by law be empowered to make rules and regulations concerning the speed of automobiles driving in parks under their jurisdiction,[88] but they have no power to open a public highway through a public park.[89] A city has no implied authority to sell or to divert to other uses property held in trust by it for park purposes,[90] but may do so under legislative authority,[91] or if the right is reserved in the grant.[92] A city may issue bonds for the purpose of improving a public park by the construction of driveways and pavements.[93] Adjacent property owners have no vested right in the use of lands held in trust by the city for park purposes.[94] An adjoining lot owner has the right to cut the grass upon a lot dedicated for use as a public park for the sole purpose of improving it.[95]

*Injuries in parks.* See 10 C. L. 1080—The city owes to those who are rightfully using a park maintained by it and open to the public the duty not to injure them by the negligence of its servants engaged in maintaining such park in proper condition.[96] The owners of a park to which they invite the public are responsible for damages occasioned by allowing dangerous games to be played therein.[97]

## PARLIAMENTARY LAW.[98]

*The scope of this topic* is noted below.[99]

attempted appropriation. City of Pocatello v. Bass [Idaho] 96 P 120.

85. City of Pocatello v. Bass [Idaho] 96 P 120.

86. P. L. 1906, p. 273. Essex County Park Commission v. West Orange, 75 N. J. Law, 876, 67 A 1065.

87. Ordinance providing for special assessment to be used for "maintaining, adorning, constructing, repairing and otherwise improving parks and boulevards" in certain specified districts, held not open to objection of indefiniteness and uncertainty. Corrigan v. Kansas City, 211 Mo. 608, 111 SW 115.

88. Commonwealth v. Tyler, 199 Mass. 490, 85 NE 569.

89. Park co missioners allowed public to pass across parkway intersecting street, but later closed said road and turned parkway into racecourse. Held public could not object, the commissioners having no power to dedicate such strip to use of public highway. People v. Mosier, 112 NYS 307.

90. East Chicago Co. v. East Chicago [Ind.] 87 NE 17.

91. Under act of legislature giving municipality power to allow railway company to occupy public ground if found necessary, grant by city of right to occupy public park for purpose of building passenger station was valid. Larkin v. Allegheny [C. C. A.] 162 F 611.

92. Common council could authorize conveyance of park where city had acquired it subject to statute then in effect, providing for its sale upon petition of majority of voters. East Chicago Co. v. East Chicago [Ind.] 87 NE 17.

93. Mandamus held to lie against mayor and clerk of city to compel issuance of bonds to contractor according to contract made for improving park property. Barnes v. Hill [Okl.] 99 P 927.

94. No constitutional rights of owners of property adjacent to public park were violated by sale of such park under legislative authority. East Chicago Co. v. East Chicago [Ind.] 87 NE 17.

95. Trespass quare clausum would not lie by owner of land dedicated as public park against adjoining owner who for purpose of improving it cut grass thereon. Northport Wesleyan Grove Campmeeting Ass'n v. Andrews [Me.] 71 A 1027.

96. Plaintiff injured while seated on park bench, by wagon driven by servant of defendant city employed in maintaining park in proper condition, not guilty of contributory negligence for failure to look out for passing wagons. Silverman v. New York, 114 NYS 59.

97. Ankle broken by baseball used in game played outside space set apart therefor. Blakeley v. White Star Line [Mich.] 15 Det. Leg. N. 835, 118 NW 482. Light and insecure nature of railway on elevated platform used by spectators at amusement park held negligence. Mead v. Baum [N. J. Law] 69 A 962.

98. See 10 C. L. 1080.

**Search Note:** See Parliamentary Law, Cent. Dig.; Dec. Dig.; 29 Cyc. 1687-1692; 21 A. & E. Enc. L. (2ed.) 1075.

99. Procedure in the passage of ordinances (see Municipal Corporations, 12 C. L. 905) and statutes (see Statutes, 10 C. L. 1705) is elsewhere treated.

The power is inherent in every deliberative body to amend a resolution previously adopted.[1] An indefinite postponement of a question by a deliberative body means the suppression of the question and is equivalent to a negative vote.[2] A "committee of the whole" exists where a legislative body considers business under suspended rules.[3]

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**Parol Evidence,** see latest topical index.

**PARTIES.**


**§ 1. Definition and Classes, 1175.**
**§ 2. Who May or Must Sue, 1176.**
**§ 3. Who May or Must Be Sued, 1179.**
**§ 4. Designating and Describing Parties, 1183.**
**§ 5. Additional and Substituted Parties, 1184.**
**§ 6. Objections to Capacity and Defects of Parties, 1190.**


*The scope of this topic* is noted below.[4]

§ 1. *Definition and classes.*[5]—See 4 C. L. 888—In general, proper parties are all persons having an interest in the subject matter or result of the action and whose rights can be adjudicated therein.[6] Necessary or indispensable parties are persons having an interest in the controversy such that no final decree can be made without either affecting that interest or leaving the controversy in such condition that its

1. Simpson v. Berkowitz, 59 Misc. 160, 110 NYS 485.

2. Wood v. Milton, 197 Mass. 531, 84 NE 332.

3. Same body transacting business in informal manner. Acord v. Booth, 33 Utah, 279, 93 P 734. Where legislative body resolves itself into committee of the whole, debate and discussion is freer, clerk is relieved from recording motions, and such committee in modern times is almost a necessity. Id.

4. This topic is devoted to a general treatment of parties to civil actions, at common law and under the codes. As to parties in criminal prosecutions, see Indictment and Prosecution, 12 C. L. 1, as to parties in equity, see Equity, 11 C. L. 1235; as to parties in admiralty, see Admiralty, 11 C. L. 33. It excludes parties to particular actions (see Specific Performance, 10 C. L. 1674; Replevin, 10 C. L. 1514; Mandamus, 12 C. L. 642; Injunction, 12 C. L. 152; Forcible Entry and Unlawful Detainer, 11 C. L. 1484; Ejectment, (and Writ of Entry), 11 C. L. 1153; Divorce, 11 C. L. 1111; Deceit, 11 C. L. 1038; Creditors' Suit, 11 C. L. 936; Accounting, Action for, 11 C. L. 20, and similar titles dealing with particular forms and causes of action) and proceedings (see Appeal and Review, 11 C. L. 118; Arbitration and Award, 11 C. L. 262; Attachment, 11 C. L. 315; Bankruptcy, 11 C. L. 383; Certiorari, 11 C. L. 591; Extradition, 11 C. L. 1452; Garnishment, 11 C. L. 1637; Habeas Corpus [and Replegiando], 11 C. L. 1682; Insolvency, 12 C. L. 217; Interpleader, 12 C. L. 330; Licenses, 12 C. L. 593; Paupers, 10 C. L. 1145; Scire Facias, 10 C. L. 1618; Supplementary Proceedings, 10 C. L. 1765), parties as dependent on the subject-matter of the action. (see such titles as Copyrights, 11 C. L. 808; Death by Wrongful Act, 11 C. L. 1019; Libel and Slander, 12 C. L. 576; Negligence, 10 C. L. 922; Railroads, 10 C. L. 1365; Subscriptions, 10 C. L. 1762; Torts, 10 C. L. 1857), the relief sought (see such titles as Elections, 11 C. L. 1169; Eminent Domain, 11 C. L. 1198; Liens, 12 C. L. 606; Mechanics' Liens, 12 C. L. 815; Nuisance, 12 C. L. 1118; Patents, 10 C. L. 1127; Receivers, 10 C. L. 1465; Reformation of Instruments, 10 C. L. 1496; Cancellation of Instruments, 11 C. L. 493; Restoring Instruments and Records, 10 C. L. 1526; Wills, 10 C. L. 2035) or the relations of the parties (see such titles as Carriers, 11 C. L. 499; Contracts, 11 C. L. 729; Foreclosure of Mortgages on Land, 11 C. L. 1487; Chattel Mortgages, 11 C. L. 611; Guardianship, 11 C. L. 1671; Insurance, 12 C. L. 252; Landlord and Tenant, 12 C. L. 528; Master and Servant, 12 C. L. 665; Trusts, 10 C. L. 1907). It also excludes parties to actions by or against particular persons (see such titles as Associations and Societies, 11 C. L. 308; Corporations, 11 C. L. 810; Counties, 11 C. L. 908; Estates of Decedents, 11 C. L. 1275; Foreign Corporations, 11 C. L. 1508; Fraternal Mutual Benefit Associations, 11 C. L. 1564; Guardians Ad Litem and Next Friends, 11 C. L. 1668; Guardianship, 11 C. L. 1671; Husband and Wife, 11 C. L. 1838; Infants, 12 C. L. 140; Insane Persons, 12 C. L. 205; Joint Adventures, 12 C. L. 393; Joint Stock Companies, 12 C. L. 395; Municipal Corporations, 12 C. L. 905; Partnership, 10 C. L. 1100; Receivers, 10 C. L. 1465; Religious Societies, 10 C. L. 1503; Street Railways, 10 C. L. 1730; Taxes, 10 C. L. 1776; Tenants in Common and Joint Tenants, 10 C. L. 1850; Trusts, 10 C. L. 1907; States, 10 C. L. 1702; United States, 10 C. L. 1935), and parties as affecting jurisdiction (see Appearance, 11 C. L. 255; Jurisdiction, 12 C. L. 458; Judgments, 12 C. L. 408; Process, 10 C. L. 1262; Removal of Causes, 10 C. L. 1508) and venue (see Venue and Place of Trial, 10 C. L. 1965).

5. **Search Note:** See notes in 4 C. L. 889. See, also, Parties, Cent. Dig. §§ 1-12, 28-30; Dec. Dig. §§ 1-12, 21-23; 30 Cyc. 21-104; 15 A. & E. Enc. P. & P. 456.

6. In suit to construe deed of trust and quiet title, all parties interested in subject-matter are proper parties. Berger v. Butler [Ala.] 48 S 685.

final determination is inconsistent with equity and justice.[7] In some courts a distinction is made between necessary and indispensable parties.[8]

Persons cannot obtain relief in an action without becoming parties thereto.[9] Persons are not parties to litigation solely by reason of the fact that they are stockholders in a corporation which is a party.[10]

§ 2. *Who may or must sue.*[11]—See 10 C. L. 1081—Generally, any person of sound mind, of lawful age, and under no restraint or legal disability, has the legal capacity to sue.[12]

*Proper parties.*See 10 C. L. 1081—Some interest in the subject-matter is essential to the right to maintain an action,[13] and, ordinarily, the real party in interest is the proper person to sue.[14] Thus, one for whose benefit a contract is made may sue thereon though the contract is made in another's name[15] with or without joining

7. Disbrow v. Creamery Package Co., 104 104 Minn. 17, 115 NY 751; Caylor v. Cooper, 165 F 757. In chancery proceedings, all persons who are legally and equitably interested in subject-matter and result must be made parties, but this does not include those who have mere future contingent interest. Collins v. Crawford, 214 Mo. 167, 112 SW 538.

8. Persons whose presence in a suit as parties is essential to the granting of the relief sought, and whose absence would render impossible or nugatory any decree for such relief, are indispensable, in contradistinction to necessary parties. Distinction recognized in order to ascertain whether in some cases "necessary" parties may not be dispensed with, in order that relief may not wholly fail. Mathieson v. Craven, 164 F 471.

9. Where receiver of corporation has been appointed on petition, persons not parties to such petition may not file petition for removal of receiver, injunction, and appointment of another, without becoming parties to the litigation. Hearn v. Clare [Ga.] 62 SE 187. In suit against individual, proper for judge to refuse to receive plea offered by firm of which individual was member, when neither firm nor other member thereof was declared against or otherwise appropriately made a party. Bray v. Peace [Ga.] 62 SE 1025.

10. Hearn v. Clare [Ga.] 62 SE 187.

11. **Search Note:** See notes in 4 C. L. 889, 891; 64 L. R. A. 581; 1 L. R. A. (N. S.) 303; 2 Id. 961; 4 Id. 363; 13 Id. 209; 14 Id. 298.

See, also, Parties, Cent. Dig. §§ 1-27; Dec. Dig. §§ 1-20½; 30 Cyc. 21-98, 105-119; 15 A. & E. Enc. P. & P. 467.

12. Hunt v. Monroe, 32 Utah, 428, 91 P 269.

13. After assignment of note payee cannot sue thereon for use of assignee. King v. Taylor [Del.] 69 A 1065. Defendants gave plaintiff check in payment of debt, which was taken by bank, marked paid, and when presented to bank on which drawn refused for lack of funds. Held, in action on debt, bank which paid check was not proper or necessary party plaintiff. De Buhr v. Thompson [Mo. App.] 114 SW 557. Where one who brought suit as taxpayer of county and representative of his class removed to another county pending appeal from judgment against him, appeal was dismissed on motion, appellant having no further interest. Harney v. Fayette County Fiscal Ct. [Ky.] 113 SW 108. Agents authorized merely to sell goods for principal, all proceeds of sale becoming property of principal, could not maintain action against buyer for price, though they guaranteed payment, being neither legal nor equitable owners of claim nor trustee of express trust. Chapman & Co. v. McLawhorn [N. C.] 63 SE 721. Where survivor of community has filed bond, inventory and appraisement, which have been approved, he has no authority to go into court to procure a settlement of his trust by decree but he may procure ratification of an agreement with heirs in nature of peaceful partition. Cheek v. Hart [Tex. Civ. App.] 111 SW 775. School board not party or privy to contract between city and water company cannot sue thereon to recover for damages for breach thereof resulting in loss of school house by fire. City of Galena v. Galena Water Co., 132 Ill. App. 332.

14. Under Ga. Code 1895, § 4939, requiring **actions on contract** to be brought in name of party in whom legal interest is vested, either a general or special ownership in goods is sufficient "interest" to enable holder to sue carrier for damages. Inman & Co. v. Seaboard Air Line R. Co., 159 F 960. In suit to **cancel contract** giving an interest in land upon performance of condition precedent, on ground that condition had not been performed and no interest could pass under contract, vendees of former owners who made contract may sue alone without the former owners. Adams v. Guyandotte Valley R. Co. [W. Va.] 61 SE 341. Executor or any one claiming under **will** may maintain suit to have it **construed.** And under Code Civ. Proc. § 2624, even one claiming in hostility to it may maintain suit to determine its construction and validity as to personalty. St. John v. Andrews Institute for Girls, 192 N. Y. 382, 85 NE 143. Purchaser of property attached as property of his vendor interpleaded, after levy, and was adjudged owner, but had previously rescinded his purchase and agreed to prosecute interplea for benefit of his vendor. Held **vendor, as beneficial owner, could sue** in his own name **on attachment bond** property having been converted into money by plaintiff in main act. State v. Pitman, 131 Mo. App. 299, 111 SW 134.

15. Cole v. Utah Sugar Co. [Utah] 99 P 681. Holder of promissory note, payable to another or order and unindorsed, is real party in interest under Rev. Code 1905, § 6807, and may sue thereon where consider-

the trustee.[16] The beneficiary may sue alone in case of controversy with the trustee or refusal of the latter to bring suit.[17] Statutes, however, commonly authorize a trustee of an express trust to sue in his own name,[18] and one with whom or in whose name a contract is made for the benefit of another is usually held to be such a trustee.[19] Where public interests are involved, such as the preservation of natural products, the people, or any interested taxpayer, may maintain an action.[20] In the absence of constitutional restrictions, the legislature may authorize the people, or some person in their stead, to maintain an action though only private interests are involved.[21] Statutory authority to enforce by judicial proceedings the private rights of others should not be extended beyond the legislative intent as shown by the terms and purpose of the statute.[22]

An assignee of an assignable right should sue thereon in his own name as the real party in interest.[23] Where by statute a chose in action is not assignable, and the assignor must be a party, the assignee, suing in the name of the assignor, may control the litigation.[24] Where a contract, not under seal, is made with an agent in his own name for an indisclosed principal, either the agent or his principal may sue upon it.[25] If the principal sues, the defendant is entitled to be placed in the same position at the time of the disclosure of the principal as if the agent had been the real contracting party.[26] One suing in his own name for the use of several materialmen whose claims he seeks to enforce must allege and prove that he is trustee of an express trust;[27] mere authority to collect the debts due the materialmen does not constitute such a trustee.[28] Where written statements of materialmen's claims have been served on an owner, in accordance with statute, a direct obligation of the owner to the materialmen is created upon which the latter may sue in their own names.[29] A single heir or devisee may maintain an action against a trespasser to recover the whole of the property or the whole of the damages.[30] An ac-

ation passed to maker from holder, and note was given in terms to the other for the use and benefit of plaintiff. American Soda Fountain Co. v. Hogue [N. D.] 116 NW 339.

16. In suit in equity to enforce junior lien under trust deed (cotton crop), beneficiary could recover, though proper to join trustee. Peeples v. Hayley Beine & Co. [Ark.] 116 SW 197

17. Husband agreed to pay wife, through trustee, certain periodic sums. After his death wife was real party in interest entitled to maintain action to compel continuance of payments, her right to which was disputed, and trustee was party defendant. Barnes v. Klug, 129 App. Div. 92, 113 NYS 325. Where note payable to order of maker, secured by trust deed, was indorsed and transferred, and subsequently sold to plaintiff without indorsement, plaintiff, after refusal of trustee to bring suit, could, as sole plaintiff, maintain action to set aside tax deeds on land, to protect his security. Roach v. Sanborn Land Co., 135 Wis. 354, 115 NW 1102.

18. One to whom bill of sale ran could maintain intervention in attachment, though contracting company, which owned most of the shares, was beneficial owner. Burke v. Sharp [Ark.] 115 SW 145. Signers of subscription contract agreed to pay sums subscribed to bank. Held bank became trustee of express trust authorized to sue on contract for subscription. Los Angeles Nat. Bank v. Vance [Cal. App.] 98 P 58.

19. Under Code Civ. Proc. § 369. Tandy v. Waesch [Cal.] 97 P 69. One in whose name contract was made could sue for loss thereon without joining beneficiary. Cousar v. Heath, Witherspoon & Co., 80 S. C. 466, 61 SE 973.

20. Landowners allowed to maintain action to restrain waste of mineral products and gas by forcing water through springs. Hathorn v. Natural Carbonic Gas Co. [N. Y.] 87 NE 504.

21. Hathorn v. Natural Carbonic Gas Co. [N. Y.] 87 NE 504.

22. Railroad Com'rs v. Atlantic Coast Line R. Co. [Fla.] 47 S 870. Statute conferring power on railroad commissioners to compel restitution and enforce penalty for violation by carrier of rate, rule or regulation by commission, applies only where carrier violates public duties; it does not include power to enforce money payments to shippers. Id.

23. Kirby's Dig. § 5999. Boqua v. Marshall [Ark.] 114 SW 714.

24. Construing Kirby's Dig. §§ 509, 6000. Boque v. Marshall [Ark.] 114 SW 714.

25, 26. Anderson v. Stewart [Md.] 70 A 228.

27, 28, 29. Perry v. Swanner [N. C.] 63 SE 611.

30. Suit by heir. Richardson v. Posey, 120 La. 223, 45 S 111. Under Code Civ. Proc. §§ 1500, 1502, 1503, one of several devisees may alone maintain action for recovery of possession of real property and damages for

tion in the name of and for the benefit of a church, lodge, society, or other unincorporated association, may be brought by one or more members acting with the consent or under direction of the other members or a majority of them.[31] In action by the owners of property, insured against loss by fire, against defendant, whose negligence caused the fire, for the loss, defendant's cannot object that plaintiffs are not the real parties in interest,[32] since a judgment against defendant will be a bar to an action by the insurer for the same cause,[33] and defendant has no concern with equities between owners and insurer.[34] The receiver of an insolvent corporation cannot, in the absence of statutory authority, maintain an action to enforce stockholders' liability for benefit of creditors.[35]

*Necessary parties* usually include all joint obligees in the contract or covenant sued on,[36] and all those having a joint or common interest in the subject-matter and the relief demanded.[37] After the death of one of several joint obligees, all surviving obligees must join in a suit to enforce the obligation,[38] but the representative of the deceased obligee is not a necessary or proper party.[39] When two or more trustees hold property jointly, both or all are necessary and indispensable parties in any action concerning it.[40] If litigation is necessary, and one refuses to be a complainant, he may be made a party defendant and the action may proceed.[41] In suits by or against the trustee for the recovery of trust property, the beneficiary or cestui que trust is a necessary party.[42] Bondholders are not necessary parties to an action by a trustee to foreclose a corporation mortgage, being represented by the trustee.[43] One cotenant cannot in a separate action recover his share of the surplus of proceeds of a foreclosure sale under a mortgage given by both cotenants.[44] The general doctrine that all parties having an interest in the subject-matter of the litigation must be made parties does not have full application to suits for specific performance of contracts.[45] In such suits only parties to the contract are, as a rule, necessary.[46]

withholding same. Beyers v. Grande, 58 Misc. 398, 109 NYS 447. Receiver of insolvent corporation may not as representative of creditors enforce statutory liability of stockholders, under Burn's Ann. St. 1901, § 270, authorizing one of many persons united in interest to sue for benefit of all. Hammond v. Cline, 170 Ind. 452, 84 NE 827.

31. Payne v. McClure Lodge No. 539 [Ky.] 115 SW 764.

32, 33, 34. Illinois Cent. R. Co. v. Hicklin [Ky.] 115 SW 752.

35. Hammond v. Cline, 170 Ind. 452, 84 NE 827.

36. One of two joint obligees cannot sue on contract alone. Weinfeld v. Fr. Bergner & Co., 114 NYS 284. Wife who joined in deed to railway company was necessary party plaintiff in action for breach of covenant to build passway under track. Ellis v. Springfield S. W. R. Co., 130 Mo. App. 221, 109 SW 74.

37. Where reformation of contract was sought and damages for fraud, parties to the contract, who would be affected by relief asked, were necessary parties plaintiff. Disbrow v. Creamery Package Co., 104 Minn. 17, 115 NW 751. Obligors in bond, to indemnify themselves, created fund and deposited it with decedent who was to invest it, pay them income, and return balance after obligation was satisfied. In proceeding for allowance of claim for such fund against estate, all obligors were indispensable parties. Denison v. Jerome, 43 Colo. 456, 96 P 166. In suit for injunctive relief against collection of judgment against railway company and surety on appeal bond, railway company is indispensable party. Steele v. Culver, 211 U. S. 26, 53 Law. Ed. 74. In a suit by minor heirs against former guardian for an accounting and recovery of sums due, other heirs interested in such accounting were necessary parties. Talbott v. Curtis [W. Va.] 63 SE 877.

38. Negotiable bonds. Thomas v. Green County [C. C. A.] 159 F 339.

39. Thomas v. Green County [C. C. A.] 159 F 339. In action on judgment, surviving judgment creditors are only proper parties plaintiff; representative of deceased judgment creditor should not be joined. Lemon v. Daggett, 114 NYS 763.

40, 41. Caylor v. Cooper, 165 F 757.

42. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

43. Starr & C. Ann. St. 1896, c. 22, pars. 7, 43, does not change rule. Alton Water Co. v. Brown [C. C. A.] 166 F 840.

44. Both must join in suit. Halliday v. Manton [R. I.] 69 A 847.

45. State Nat. Bank of Springfield v. U. S. Life Ins. Co., 238 Ill. 148, 87 NE 396.

46. State Nat. Bank of Springfield v. U. S. Life Ins. Co., 238 Ill. 148, 87 NE 396. Where life insurance policy was assigned to bank as security for loan, and after its expiration insured and the bank applied for a renewal,

*Who may join.*[See 10 C. L. 1082]—All persons having common interests and demanding the same relief may join;[47] those having separate causes of action,[48] representing different rights,[49] may not join, and complaint is demurrable unless it states a cause of action in favor of all who join as plaintiffs.[50] All persons whose property is affected by a nuisance, though they own the property in severalty, may unite in an action to abate the nuisance;[51] but they cannot join with a cause of action for such relief their several claims for damages in which there is no joint or common interest.[52] Owners of property abutting on a public street have no such common pecuniary interest as would authorize them to unite in a suit to relieve the property from an illegal street improvement tax.[53] When several parties sue jointly, the petition may be amended by striking the name of one or more of them who are not proper parties.[54]

§ 3. *Who may or must be sued.*[55]—[See 10 C. L. 1082]—Persons having or claiming some interest which may properly be adjudicated in the action are proper parties,[56]

which was obtained, new policy being payable to bank, successors and assigns' assignors were not necessary parties to suit on policy, though they may have had an equity therein. Id.

**47.** No misjoinder where parties suing on contract alleged it was joint enterprise. German Ins. Bank v. Martin [Ky.] 114 SW 319. Husband of testatrix, interested in personalty, and sister interested as heir at law in realty, may maintain suit to test validity of will, under Code Civ. Proc. § 2653a. Wood v. Fagan, 126 App. Div. 581, 110 NYS 938. Parties interested in use and diversion of waters of stream could join as plaintiffs for protection of rights to water similarly affected by acts of defendants. Hough v. Porter [Or.] 95 P 732. Husband of testatrix, interested in personalty, and sister, interested as heir at law in realty, may join as plaintiffs in suit to test validity of will, both under equity rules of pleading, and under Code Civ. Proc. § 446, allowing joinder of persons interested in subject-matter. Wood v. Fagan, 126 App. Div. 581, 110 NYS 938. Several owner of lands assessed for repairs on drain could join in suit to restrain enforcement of assessment, having common interest, seeking same relief, and presenting only one issue, illegality of assessment. Burn's Ann. St. 1908, §§ 270, 263. Quick v. Templin [Ind.] 85 NE 121. Stockholders seeking to enjoin directors from issuing stock to others before allowing them to subscribe in proportion to their present holdings, and from voting or permitting any other to vote stock already issued in violation of their rights, may join in such bill. Snelling v. Richard, 166 F 635.

**48.** Persons having separate causes of action against the same person cannot join as plaintiffs. Vandalia Coal Co. v. Lawson [Ind. App.] 87 NE 47. Joint owners of patent, one of whom owns another patent, the two patents being used conjointly by both, cannot join in a suit for infringement of two patents by defendants who use them conjointly, but do not infringe the two patents in one device. Kaiser v. Bortel, 162 F 902.

**49.** In action by vendor against vendee who has defaulted, plaintiff cannot join with him the borough and county and recover unpaid assessments and taxes which vendee had assumed. Reis v. McDevitt, 219 Pa. 414, 68 A 1012.

**50.** Where township advisory board had no power to sue for injunction to restrain trustee from proceeding with construction of school house, fact that they also joined themselves as taxpayers did not make complaint good as against demurrer. Advisory Board of Coal Creek Tp. Montgomery County v. Levandowsky [Ind. App.] 86 NE 1024. Where several persons sue jointly, the complaint is demurrable unless it shows a joint cause of action in favor of all. Vandalia Coal Co. v. Lawson [Ind. App.] 87 NE 47.

**51, 52.** Nahate v. Hansen, 106 Minn. 365, 119 NW 55.

**53.** Carstens v. Fond du Lac, 137 Wis. 465, 119 NW 117.

**54.** Western & A. R. Co. v. Blackford [Ga.] 63 SE 289.

**55. Search Note:** See note in 3 L. R. A. (N. S.) 256.

See, also, Parties, Cent. Dig. §§ 28-55; Dec. Dig. §§ 21-35; 30 Cyc. 94-108, 120-132; 15 A. & E. Enc. P. & P. 367.

**56.** In ejectment, where both parties claim under county, and effect and validity of its contract is in issue, county is proper party. Waggoner v. Tinney [Tex.] 115 SW 1155. Corporation was proper but not indispensable party to proceeding for mandamus to compel reconvening of stockholders' meeting to elect directors. Bridgers v. Staten [N. C.] 63 SE 892. In action by assignee of mortgage to foreclose, mortgagor claimed that, without notice of assignment, he had made payments to mortgagee. Held, mortgagee was proper party to foreclosure, being accountable for payments. Peoples' Trust Co. v. Gomolka, 129 App. Div. 12, 113 NYS 49. In suit by administrator with will annexed for final accounting, a legatee of a deceased legatee under the will was properly made party defendant, deceased having died in another state and executors having there been appointed. Sheldon v. Whitehouse, 112 NYS 1079. City sued water company for loss of city property by fire due to lack of water, and on payment of insurance on property insurance companies intervened, claiming right of subrogation. City then bought out water company and assumed its liability as part of purchase price. Held, in suit by insurance company, city was

though, if the desired relief may be had without them, not indispensable parties.[57] All persons having an interest in the subject-matter whose rights will necessarily be affected by the decree are necessary parties.[58] Persons having no interest in the

proper though not necessary party defendant; issue between city and company could be settled in same suit. Hartford Fire Ins. Co. v. Houston [Tex. Civ. App.] 110 SW 973. In an equitable action, all persons materially interested in the subject-matter are proper parties to the end that there may be a complete decree binding upon all. Where plaintiff in such an action knows that a third person claims an interest in the subject-matter, but does not know the nature, extent, or merits of the claim, these facts may be stated and the claimant be made a party defendant and thus required to disclose his alleged interest. Mawhinney v. Bliss, 124 App. Div. 609, 109 NYS 332.

57. In suit by bondholders of corporation against directors to compel them to make good certain representations made in mortgage securing bonds alleged to have been fraudulently authorized, corporation is not an indispensable party defendant. Slater Trust Co. v. Randolph-Macon Coal Co., 166 F 171. Suit to enjoin sale of liquor on certain land under contract with lumber company which held timber contract from plaintiffs' grantors. Held lumber company not necessary party, no relief against it being sought. Paint Creek Co. v. Gallego Coal and Land Co. [C. C. A.] 166 F 62.

58. Necessary parties are all who have an interest in the subject and object of the action, and all persons against whom relief must be obtained in order to accomplish the object of the suit. McLean v. Farmers' Highline Canal & Reservoir Co. [Colo.] 98 P 16. **Mortgagees** necessary parties where plaintiffs sought relief hostile to their interests. United Sheet & Tin Plate Co. v. Hess [C. C. A.] 159 F 889. An **incompetent person** is a necessary party to an action for damages for acts done by him personally. Capen v. Delaney, 128 App. Div. 648, 113 NYS 50. In **action on joint guaranty** of payment, all joint guarantors must be joined as parties. Wood v. Farmer, 200 Mass. 209, 86 NE 297. All parties to original bill for partition are necessary parties to suit **to reform decree in partition.** Wells v. Gay [Miss.] 46 S 497. Wife of devisee is necessary party to suit for **construction of will** when her dower rights will be affected. Lumpkin v. Lumpkin [Md.] 70 A 238. Executors of will disposing of personal property are necessary parties to bill **to construe provisions of will** affecting personal property. Id. Proceeding to **settle estate of deceased** person is in nature of action in rem; all persons interested, in order to be bound, must be made parties. In re McNaughton's Will [Wis.] 118 NW 997. In suit to **set aside for fraud family settlement** between mother and children of first marriage, and title apparently founded thereon, and to avoid collaterally decrees of Porto Rican courts concerning same, mother's estate and children of second marriage were necessary parties defendant. Garzot v. Rios De Rubio, 209 U. S. 283, 52 Law. Ed. 794. Tenant's property was sold and proceeds deposited in bank to satisfy landlord's and other claims. In equitable proceeding by landlord **to enforce and satisfy claim out of deposit,** bank was necessary party, Kean v. Rogers [Iowa] 118 NW 515. Although one of three defendants against whom **joint action** for damages is brought is indemnified against loss by reason of any judgment that may be obtained by another defendant, he is nevertheless a substantial and not merely nominal or formal party. Choctaw, O. & G. R. Co. v. Hamilton [Okl.] 95 P 972. In suit **to enjoin irrigation officers** from closing plaintiff's headgates and diverting water to other consumers, other consumers were indispensable parties and should have been brought in under Mills' Ann. Code, § 16. McLean v. Farmers' Highline Canal & Reservoir Co. [Colo.] 98 P 16. In courts of equity all persons who have any substantial, legal or beneficial interests in the subject-matter of the litigation and who are to be materially affected by the decree which may be rendered should be made parties. Thickson v. Barry, 138 Ill. App. 100. This rule is inflexible, yielding only when the parties are very numerous and so scattered that their names or residences cannot be ascertained without great and extraordinary difficulty, and it is impracticable to bring them all before the court. Copartners of private telephone company, though numerous, held not within rule in absence of averments that they are scattered and their names and residences cannot be obtained, or facts stated from which such inferences may be drawn (Id.), or where the question is one of common or general interest, in which case one or more may sue or defend for the whole, or where parties form a voluntary association for public or private purposes, and those who sue or defend may be fairly presumed to represent the rights and interests of the whole (Id.). Rule held not applicable to copartners of private telephone company. Id.

59. Complaint in action to foreclose mechanic's lien demurrable as against a defendant named where it was not alleged that said defendant had any interest in premises or in controversy adverse to plaintiffs. Tobenkin v. Piermont, 114 NYS 948. In suit for wrongful diversion of proceeds of cattle, plaintiff's rights as against shipper having been settled by decree in insolvency proceedings, and plaintiff having no controversy with consignees, neither they nor shipper were necessary parties. Farmers' & Merchants' Bank of Ireton v. Wood Bros. & Co. [Iowa] 118 NW 282. In suit to set aside mortgage foreclosure or to redeem therefrom, heirs or devisees of mortgagee are necessary parties only if mortgage has in fact been foreclosed and time for redemption has expired. If unforeclosed they have no interest in property itself and are sufficiently represented by executor of mortgagee. Strout v. Lord, 103 Me. 410, 69 A 694. In action for possession of notes, defendant set up that third person, maker, had been her ward, that she had applied certain of his moneys on the notes made by him, that

controversy or subject-matter and against whom no relief is sought are neither necessary nor proper parties.[59] The general rule, in the absence of statute, is that a person whose interest in the subject-matter in litigation, and whose liability to respond to plaintiff's demand, or any part of it, is determinable wholly from his independent relation thereto, unaffected by the rights or interests of defendant named in the action, is not a necessary party and need not be joined either as plaintiff or defendant.[60] Unincorporated associations cannot be sued as such.[61] Members of such an association having a common interest, and too numerous to be made parties individually, may be brought before the court by joining as parties defendant persons who are alleged to be and are proper representatives of the class, the class to which the members belong being described.[62] Where an estate is vested in persons living, subject only to the contingent interest of persons who may be born, the living owners represent the estate for all purposes of litigation concerning it.[63] Thus, the rights of contingent remaindermen not in esse may be finally adjudged when the remaindermen in esse are made parties as representatives of the class.[64] While as a general rule an injunction will not lie against one not a party to the bill, the rule is subject to some exceptions,[65] one of which is that where the parties interested are so numerous that it is impossible to bring them all before the court, but the right involved being common to all, one or more, being made parties, are permitted to represent all, or where those impleaded stand in a representation or trust relation to the others, then the decree is binding upon all parties interested.[66] A judgment against the wrong party is, of course, a nullity.[67] Persons not parties are not affected by the decree,[68] and it is not proper for a decree to purport to grant relief against them.[69] The court cannot compel plaintiff to accept as defendant a person against whom no summons has been issued and against whom he may have no cause of action simply because such person was erroneously served with process.[70] Where

he had objected to her account as guardian, but did not allege that she had accounted to plaintiff for money so applied on notes. Held proper to refuse to bring in maker of notes as party, since he made no claim to notes. Gerth v. Gerth, 7 Cal. App. 735, 95 P 904.

60. Town of Kettle River v. Bruno, 106 Minn. 58, 118 NW 63.

61. Labor unions. Reynolds v. Davis, 198 Mass. 294, 84 NE 457.

62. Reynolds v. Davis, 198 Mass. 294, 84 NE 457.

63. Doscher v. Wyckoff, 113 NYS 655. Contingent remaindermen are not necessary parties defendant in an action to enforce a lien against trust property; it is sufficient if the life tenant is a party. Jallette v. Bell, 33 Ky. L. R. 159, 110 SW 298. Rule same where third person conveyed property to trustee upon trust and conditions imposed by will to which he was stranger; in suit to enforce his vendor's lien, it was sufficient to make trustee and life tenant parties. Id. In suit by life tenant to set aside conveyance of his interest, error to make his children, remaindermen, parties, but error was not cause for reversal; judgment modified so as to make defendant liable for additional costs caused by bringing them in. Barnes v. Johnson, 33 Ky. L. R. 803, 111 SW 372.

64. Hunt v. Gower, 80 S. C. 80, 61 SE 218.

65. San Francisco Gas & Elec. Co. v. San Francisco, 164 F 884.

66. In suit to enjoin enforcement of ordinance fixing gas rate, temporary restraining order held binding on all consumers, being represented in suit by city and its officers. San Francisco Gas & Elec. Co. v. San Francisco, 164 F 884.

67. Brother of defendant appeared and answered to merits, plaintiff's attorney accepting answer. Held judgment rendered should be set aside. Garvey v. Falk, 58 Misc. 367, 111 NYS 175. Judgment for plaintiff reversed and case dismissed where action was against certain stockholders personally and evidence showed order for goods by corporation. Samuels v. Bloom, 107 NYS 55.

68. Property was deeded in trust to secure note, and suit brought to foreclose lien in which trustee was not party. Trust deed had been recorded. Held purchaser from sheriff secured no interest, trustee not being affected by proceedings. Bowden v. Patterson [Tex. Civ. App.] 111 SW 182.

69. Plaintiff claimed an equitable interest in land, through trustee, as grantee of original occupant of land, entered by trustee under town site act, and sued to enjoin interference with the land by town. Held, trustee not being party, it was not necessary or proper to adjudge that plaintiff was entitled to exclusive possession. City of Globe v. Slack [Ariz.] 95 P 126.

70. Person wrongly served should move to set aside service. American Oilcloth Co. v. Slonov, 59 Misc. 218, 110 NYS 289.

one or more, but not all, of the defendants are served, the plaintiff may proceed to trial and judgment against those served.[71] Defendants not served may be proceeded against by scire facias and made parties to the judgment after judgment is entered against defendants served.[72]

*Joinder of parties defendant.* See 10 C. L. 1082—Persons only jointly liable must be joined.[73] Where liability is joint and several, as in the case of joint tort feasors,[74] or parties to joint contract made jointly and severally liable by statute,[75] all the persons liable may be sued jointly, or an action may be maintained against any one,[76] but not against an intermediate number,[77] but in actions ex delicto, judgment in a several action bars a subsequent joint action.[78] In general, all persons claiming adversely to the right or claim asserted by plaintiff,[79] or who are liable upon the cause of action asserted,[80] may be joined as defendants; but it is improper to join persons against whom different causes of action are asserted.[81] A creditor's bill to set aside fraudulent transfers may join two or more defendants alleged to be fraudulent grantees in different transfers and transactions.[82] It is held in Alabama that the maker and indorser of a promissory note cannot be sued jointly by the payee, though simultaneous separate suits may be maintained against them.[83] In

71. Failure to bring in principals of bond before proceeding to judgment against sureties. Purington v. U. S., 126 Ill. App. 323.

72. Purington v. U. S., 126 Ill. App. 323.

73. Firm debt is joint, not joint and several obligation. Where in suit on obligation incurred by one it appears by one that it was firm debt, all members of firm should be brought in and suit should be against firm. Erskine v. Russell, 43 Colo. 449, 96 P 249.

74. Joint tort feasors may be sued jointly. Gawne v. Bicknell, 162 F 587. Two car inspectors acted together in inspecting car in course of duties owed railroad company. Held injured servant could join as defendants inspectors and company. Ward v. Pullman Car Corporation [Ky.] 114 SW 754. Joint tort feasors jointly and severally liable; may be so sued. Fulevider v. Trenton Gas, L. & P. Co. [Mo.] 116 SW 508. Injured servant may sue one of partners who employed him. Gawne v. Bicknell, 162 F 587. Injured person may sue one or any or all of joint wrongdoers and defendant cannot object on ground of defect or misjoinder of parties. Tandrup v. Sampsell, 234 Ill. 526, 85 NE 331.

75. Under Rev. Laws 1905, § 4282, all parties to joint contract are jointly and severally liable and may be sued jointly or severally. Hence, where complaint alleges making of contract by one and proof shows making by more than one, variance is not fatal. Morgan v. Brach, 104 Minn. 247, 116 NW 490.

76. When the liability is joint and several, any joint defendant who is not necessarily a party may be dismissed. Practice Act, § 24. Kaspar v. People, 132 Ill. App. 1.

77. Under Hurd's Rev. St. c. 103, § 13, suit may be brought on a guardian's bond against one of several sureties only. Kaspar v. People, 132 Ill. App. 1. At common law on a joint and several obligation executed by more than two persons, one or all of surviving obligors may be sued, but not an intermediate number. People v. Jamison, 141 Ill. App. 406.

78. Gawne v. Bicknell, 162 F 587.

79. In suit involving rights to water of stream, all persons claiming rights therein adverse to plaintiff's claims could be joined as defendants, and general allegation that they claimed some right or interest adverse but inferior to plaintiffs, the exact nature of which was unknown, was sufficient. Hough v. Porter [Or.] 95 P 732.

80. Where cause of action grew out of one transaction in which defendants were jointly interested, they were properly joined in one action. Hanson v. Neal [Mo.] 114 SW 1073. No misjoinder of parties defendant where husband and wife were sued for board and lodging for which wife had expressly agreed to pay, both being liable. Edminston v. Smith, 13 Idaho, 645, 92 P 842. Suit for recovery of money and for cancellation of deed, based on deceit practiced by defendants in pursuance of conspiracy to defraud plaintiff, may be maintained against defendants jointly. Opperman v. Petry [Tex. Civ. App.] 115 SW 300. No misjoinder where partnership, and one partner individually, were sued on alleged sale to such partnership and individual jointly, since all parties to joint sale were necessary parties defendant. Redwood City Salt Co. v. Whitney, 153 Cal. 421, 95 P 885.

81. Demurrer sustained because complaint did not state cause of action against four of defendants, and because of misjoinder of causes against all. Wise v. Tube Bending Mach. Co. [N. Y.] 87 NE 430. Persons guilty of **separate torts** cannot be sued jointly. Exception of misjoinder sustained in action for trespass against two defendants where nothing in petition showed that they were joint trespassers. Breaux Bridge Lumber Co. v. Hebert, 121 La. 188, 46 S 206.

82. Exchange Nat. Bank of Montgomery v. Stewart [Ala.] 48 S 487.

83. Scarbrough v. City Nat. Bank [Ala.] 48 S 62.

Texas it is always proper to join the acceptor of any bill of exchange or any other principal obligor in any contract with any one else liable thereon.[84]

The names of parties improperly joined may be stricken,[85] and the joinder of an improper party defendant will not defeat recovery against the proper party defendant.[86] In an action against joint tort feasors, plaintiff may dismiss or discontinue as to one without affecting his rights against the other.[87]

Joinder of parties as affecting the jurisdiction of federal courts is elsewhere treated.[88]

§ 4. *Designating and describing parties.*[89]—See 10 C. L. 1084—The parties and the capacities in which they sue or are sued should, of course, be designated properly and clearly,[90] but amendments are freely allowed to correct mistakes[91] or to make the pleading more definite and certain,[92] especially where the parties have appeared.[93] One sought to be made a party in a representative capacity must be so designated,[94] though, in order to determine whether defendants are sued in a representative capacity, the title, allegations, and demand are to be considered as a whole.[95] One may sue and be sued in any name by which he is known and recognized.[96] A person may adopt any name in which to prosecute a business and sue and be sued in that name.[97] One who takes title to real property in a name other than his true name may, in suits affecting the property, be sued in such name.[98] A judgment is valid when

**84.** Rev. St. 1895, art. 1203. Milmo Nat. Bank v. Cobbs [Ter. Civ. App.] 115 SW 345.

**85.** Proper to allow complaint in action by payee against indorser and maker of note to be amended by striking out maker as party, he being improperly joined. Scarbrough v. City Nat. Bank [Ala.] 48 S 62.

**86.** Action in assumpsit for goods sold. Franz v. William Barr Dry Goods Co., 132 Mo. App. 8, 111 SW 636.

**87.** Walton v. Miller's Adm'x [Va.] 63 SE 458. Discontinuance or dismissal of a suit as to one of two joint tort feasors does not discharge or affect the liability of the other. Equitable Life Assur. Soc. of U. S. v. Lester [Tex. Civ. App.] 110 SW 499.

**88.** See Removal of Causes, 10 C. L. 1508.

**89. Search Note:** See, Parties, Cent. Dig. §§ 108-114; Dec. Dig. 66-74; 15 A. & E. Enc. P. & P. 478.

**90.** Plaintiff in action on account should sue in his full proper name, "A. L. Patrick" insufficient. Patrick v. Norfolk Lumber Co. [Neb.] 115 NW 780. Complaint held to show that defendant was sued (injuries to one engaged in painting house) in individual capacity, though it contained superfluous allegations that defendant was stockholder and president of company that hired plaintiff. Irrgang v. Ott [Cal. App.] 99 P 528.

**91.** Mistake in naming companies as "shoe" company instead of "stationary" and "drug" companies, respectively, curable, mistake appearing from pleading as whole. Orr Stationery Co. v. Dr. Bell & Lee Drug Co., 4 Ga. App. 702, 62 SE 471. Where first count set out that plaintiff was partnership, and gave names of members of firm, mistake in second count in alleging it was corporation could be corrected by amendment before trial. Acme Food Co. v. Howorton [Iowa] 119 NW 631. Where action for wrongful death was by mistake brought in name of administratrix, allowance of amendment to show action brought by next of kin was proper. Herlihy v. Little, 200 Mass, 284, 86 NE 294. Where suit was brought on contract in name defendant corporation then had, order to proceed against corporation in new name proper, being in effect amendment of summons and complaint. North Birmingham Lumber Co. v. Sims [Ala.] 48 S 84.

**92.** Where complaint did not show whether defendant was partnership or corporation, held proper to allow amendment to show it was corporation. Stowers Furniture Co. v. Brake [Ala.] 48 S 89.

**93.** If defendant appear and submit himself to jurisdiction of court, any mistake in his name may be corrected as a matter of course. Simon v. Underwood, 61 Misc. 369, 115 NYS 65. Where court allowed amendment striking out word "Limited" in name of corporation defendant, it was not error to refuse to allow continuance on ground of surprise; if proper defendant was before court, no continuance was necessary; if not, judgment would be void. Sterns Coal Co. v. Evans' Adm'r, 33 Ky. L. R. 755, 111 SW 308.

**94.** Under Burns' Ann. St. 1908, § 2925, in action to set aside final settlement and reopen estate and appoint administrator de bonis non, executor must be made party; making one a party as heir does not make her a party as executrix. Clark v. Schindler [Ind. App.] 87 NE 44.

**95.** Standard Audit Co. v. Robotham, 115 NYS 152.

**96.** Emery v. Kipp [Cal.] 97 P 17. Where a person uses two names, he may be sued by either and a record containing either would be regular. Simon v. Underwood, 61 Misc. 369, 115 NYS 65.

**97.** Emery v. Kipp [Cal.] 97 P 17. Proper to sue insurance company under name in which it issued policy and issue process in that name, though it was incorporated under slightly different name. Shuler v. American Benev. Ass'n, 132 Mo. App. 123, 111 SW 618.

**98, 99.** Emery v. Kipp [Cal.] 97 P 17.

obtained against a married woman sued as a feme sole and in her maiden name, particularly upon any contract which she has executed in that name.[99] If plaintiff is ignorant of the true name of defendant,[1] he may bring suit against him in a fictitious name, by alleging that his true name is unknown.[2] The true name of defendant should in such case be substituted by amendment when learned,[3] though failure to amend by substituting the true name of defendant is not cause for reversal where such defendant has appeared and answered.[4] Where a person has been sued by a fictitious name or by a name part of which is designated as fictitious, real name being unknown, and the person fails to appear, a judgment predicated thereon is irregular, unless the summons and judgment contain a description sufficient for the identification of the defendant, for the purpose of having execution against the property of the debtor thus described.[5] Where a defendant has been sued by a wrong name, judgment taken by default is a nullity.[6] In chancery suits it is sometimes immaterial whether such parties are made plaintiffs or defendants so long as they are before the court.[7]

§ 5. *Additional and substituted parties.*[8]—See 10 C. L. 1084—When it appears that a complete determination of the controversy cannot be had without the presence of other parties, they should be brought in,[9] and it is error to proceed without neces-

1. Plaintiff is not allowed to use a fictitious name at his discretion, but only when he is ignorant of the true name of defendant. Simon v. Underwood, 61 Misc. 369, 115 NYS 65.

2. Blackburn v. Bucksport & E. R. Co., 7 Cal. App. 649, 95 P 668.

3. Where the proper name of defendant or judgment debtor is known, judgment proceedings must be amended by inserting the proper names before further proceedings can be had, if objection be made. Simon v. Underwood, 61 Misc. 369, 115 NYS 65.

4. Judgment on appeal will direct amendment of complaint below as of date prior to judgment to support judgment. Blackburn v. Bucksport & E. R. Co., 7 Cal. App. 649, 95 P 668.

5. Such judgment is not void but irregular, and will not support execution or order for examination in supplementary proceedings. Simon v. Underwood, 61 Misc. 369, 115 NYS 65. An examination in supplementary proceedings may be had where the name of defendant is given as fictitious, providing there is added a description sufficient to identify the person intended, but where the true name is known, the proceedings must be amended. Id.

6. Simon v. Underwood, 61 Misc. 369, 115 NYS 65.

7. Berger v. Butler [Ala.] 48 S 685. Where second assignee of note and mortgage brought suit to foreclose, making first assignee, mortgagee and grantee of mortgagor defendants, grantee of mortgagor could not object that first assignee was not made plaintiff, where all parties were before the court, especially where first assignee subsequently filed cross complaint. Patten v. Pepper Hotel Co., 153 Cal. 460, 96 P 296. In equity, parties one in interest may be arrayed as plaintiffs or defendants nominally, but their true relations are taken into consideration throughout the entire proceeding. Taylor v. Leesnitzer, 31 App. D. C. 92.

8. **Search Note:** See notes in 68 L. R. A. 736; 3 Ann. Cas. 1091.

See, also, Parties, Cent. Dig. §§ 56-107; Dec. Dig. §§ 36-65; 11 A. & E. Enc. P. & P. 494; 20 Id. 1019.

9. In suit involving rights to water of stream, court had power to order other interested parties to be brought in in order that entire controversy might be settled and an effective decree made. Hough v. Porter [Or.] 95 P 732; Hough v. Porter [Or.] 98 P 1083. In partition, proper to order that certain owners of adjoining land who claimed same interest or easement in land to be partitioned or sold, should be made parties. Johnson v. Aleshire, 114 NYS 398. Where, in partition suit, it appears that there are part owners of property who have not been made parties, trial should be suspended until they are brought in. Hess v. Webb [Tex. Civ. App.] 113 SW 618. Civ. Code, § 16, is declaratory of general rule that all who are interested in subject-matter of action should be made parties thereto so that complete justice may be done and controversy finally determined. Denison v. Jerome, 43 Colo. 456, 96 P 166. Where plaintiff sued an alleged trustee to recover money left in trustee's hands by a decedent for plaintiff, and trustee had been ordered to pay over money to administratrix, latter was properly brought in as defendant in order that conflicting claims could be settled. Code, § 3462, authorized such action. Barto v. Harrison, 138 Iowa, 413, 116 NW 317. Where in ejectment answer alleges that defendant has only undivided interest, and that other heirs claim like interests, it is better practice to have all brought in and rights determined under Kirby's Dig. § 6011. Westmoreland v. Plant [Ark.] 116 SW 188. Demurrer to evidence should not be sustained on ground of defect of parties when objection has not been previously and properly raised. If judgment cannot be rendered without other parties, court should order them brought in. Larimore v. Miller [Kan.] 96 P 852. It is the duty of

sary parties though no obligation is made.[10] The power to require interested parties to be brought before the court includes the power essential to make such order effective.[11] Thus, where persons ordered to be brought in and served with process fail to appear or plead, judgment may be entered against them in favor of parties who appear.[12] Whether parties proper but not necessary should be brought in is a matter resting largely in the trial court's discretion,[13] and persons whose presence is not necessary need not be made parties.[14] An order to make parties should be definite and not too broad.[15]

Amendments to the pleadings, bringing in new parties plaintiff [16] or defendant,[17] are freely allowed when the additional parties thus brought in are necessary

an appellate court, observing the want of necessary parties, to order them brought in when complete justice cannot otherwise be done. Talbot v. Curtis [W. Va.] 63 SE 877.

10. Under Code Civ. Proc. § 452, where it appears that complete determination of controversy in an equitable action cannot be had without the presence of other parties, the court must direct them to be brought in. It is error to proceed without necessary parties though no objection has been made. Mawhinney v. Bliss, 124 App. Div. 609, 109 NYS 332.

11. Hough v. Porter [Or.] 98 P 1083.

12. Controversy over water rights. Hough v. Porter [Or.] 98 P 1083.

13. It is within court's discretion to eliminate one not an original nor a necessary party, though he was proper party. Carder v. Johnson [Tex. Civ. App.] 109 SW 944. Directing that an additional party be brought in is usually discretionary and not appealable, unless injury done is manifest. State v. McGuire, 147 N. C. 388, 61 SE 196.

14. In suit in federal court to set aside an arbitrator's award, such suit being ancillary to suit on award, court has no power to bring in third party, not necessary in adjusting claim which is sought to be avoided. Hecht v. Youghiogheny & Lehigh Coal Co., 162 F 812. In replevin by widow of deceased to recover chattels given her by her husband, held unnecessary to bring in administrator as party where he had asserted no claim against defendant, and facts did not warrant any claim, and defendant had instigated assertion of claim. Boskowitz v. Boskowitz, 124 App. Div. 849, 109 NYS 490. Plaintiff in replevin, in opposition to motion to bringing in third person as party defendant, conceded that third person owned part of property sued for. Held no necessity for bringing in third person; court should order complaint amended to omit such property. Id.

15. While it was proper in partition to order certain persons claiming some interest or easement in land to be brought in, an order that all persons having or claiming any interest or title, etc., be brought in, was too broad. Johnson v. Aleshire, 114 NYS 398.

16. Plaintiff may amend complaint any time before jury retires by adding name of coplaintiff. Civ. Code 1896, § 3331. Union Naval Stores Co. v. Pugh [Ala.] 47 S 48. An amendment adding new use plaintiff is allowable. Under Ala. Code 1907, § 5367. Southern R. Co. v. Blunt, 165 F 258. Petition in name of firm may be amended so as to make all members individually plaintiffs. Tyrrel v. Milliken [Mo. App.] 115 SW 512. Allowing complaint to be amended by adding beneficiary as party plaintiff in suit commenced by one in whose name contract was made not prejudicial to defendant. Cousar v. Heath, Witherspoon & Co., 80 S. C. 466, 61 SE 973. In action for wrongful death brought in name of father, proper to allow mother's name to be added as party plaintiff after reversal on appeal, case being called for second trial. Bracken v. Pennsylvania R. Co. [Pa.] 71 A 926. Father brought suit for death of son, mother also being alive. Proper to allow record to be amended to make mother also party plaintiff, though limitation period had passed, right of action being in both by statute. Holmes v. Pennsylvania R. Co., 220 Pa. 189, 69 A 597. Where a bill is filed by a complainant as an adult, and it is afterwards discovered that he was an infant at the time of filing the bill and continues so, he will be allowed to amend by inserting a next friend, even in the face of a motion to dismiss. Moore v. Moore [N. J. Eq.] 70 A 684. Court held to have properly permitted papers and pleadings to be amended after verdict and pending motion for new trial so as to add plaintiff's partner as party plaintiff. Practice Act, § 84. Price v. Goodrich, 141 Ill. App. 568.

17. Servant, suing for injuries, has right to bring in third person as defendant, where negligence of third person's employe appears; under Court & Prac. Act 1905, § 240, allowing parties to be joined where plaintiff is in doubt as to one liable and § 243, allowing new parties to be added. Taylor v. Lumb Knitting Co. [R. I.] 70 A 1008. In action against officer for money taken from prisoner, one who claimed the money, and to whom it had been delivered, was properly allowed to be made defendant, and it was error to dismiss without litigating his claim. Gunnells v. Latta [Ark.] 111 SW 273. In suit against one doing business in firm name, proper to allow plaintiff to amend by adding names of all partners when he discovered there were others. McIntyre v. Smyth, 108 Va. 738, 62 SE 930. Under Practice Act, §§ 23, 24, additional defendants may be brought in by amendment and all original defendants dismissed thereafter without loss of jurisdiction. Chicago Consol. Trac. Co. v. Kinane, 138 Ill. App. 636. In an action by a contractor against a railway company for damages for breach of contract, it is not error, where judgment has been obtained by the contractor, to per-

or proper,[18] but amendment will not be allowed which would work an entire change of parties plaintiff.[19] Upon obtaining leave to add new parties, the declaration should be amended so as to properly connect them with the suit.[20] The right to bring in new parties is not barred by limitations when the action was commenced in time.[21] One cannot by motion be made plaintiff in an action commenced by another,[22] but may be made defendant, and summons and complaint may be ordered amended accordingly.[23] As defendant, he may set up in his answer any claim against a codefendant in the manner provided by the code.[24] A defendant is not permitted to bring in third parties for the purpose of litigating with them matters in no way connected with the suit,[25] but may, in some states, bring in additional parties by filing a cross petition.[26] The filing of an amended petition adding a new defendant and omitting one of the original defendants operates as a dismissal of the suit as to such omitted defendant.[27] New parties brought in after commencement of the suit are bound by the judgment rendered.[28] One brought in by supplemental summons cannot object to delay in making him a party.[29] An amendment bringing in new parties plaintiff and alleging a new cause of action requires due service of process on defendant,[30] unless defendant waives service by answering the new demand.[31] A nonresident cannot be made a party by merely interlining his name in a bill.[32] When a judgment defendant appeals from a judgment of a justice to the circuit court where the trial is de novo, the judgment plaintiff can bring a new party into the case in the circuit court by amendment.[33]

*Intervention.* See 10 C. L. 1086—One is entitled to intervene in a suit between other parties when he has an interest in the subject-matter of litigation of such a direct

mit the railway company to make materialmen and others asserting claims against the contractor parties to the action for the purpose of distribution. Hazelgreen v. Cincinnati & I. W. R. Co., 11 Ohio C. C. (N. S.) 367.

18. Not error to refuse to allow, during trial, filing of second amended petition, making trustee party, where trust deed was not set out and no facts were shown entitling appellant to judgment against trustee. Globe Bank & Trust Co. v. Rigglesberger, 33 Ky. L. R. 96, 109 SW 333.

19. Where use plaintiff is by statute made sole plaintiff, amendment striking such use plaintiff is not allowable. Code Ala. 1907, § 2490. Southern R. Co. v. Blunt, 165 F 258. Proper to refuse to allow amendment in replevin suit which would have introduced surviving partners for plaintiff; entirely new parties. Anderson v. Stewart [Md.] 70 A 228.

20. Mere amendment by inserting names of new parties alone is insufficient where declaration unamended fails to allege their connection with suit. Tompkins v. Diamond, 140 Ill. App. 90. Abatement Act, § 11, providing for bringing heir into court, does not do away with necessity of connecting new defendants with suit. Id. Declaration held not to connect heirs, etc., with suit. Id.

21. Holmes v. Pennsylvania R. Co., 220 Pa. 189, 69 A 597. Where suit was commenced in time by trustee, proper to allow amendment by adding beneficiary as party after expiration of limitation period. Cousar v. Heath, Witherspoon & Co., 80 S. C. 466, 61 SE 973. Where suit to enforce mechanic's lien is brought within year limited by statute, an additional party may be brought in by amendment after the year. Prather Engineering Co. v. Detroit, F & S. R. Co., 152 Mich. 582, 15 Det. Leg. N. 280, 116 NW 376.

22. Since there cannot be two plaintiffs setting up separate claims. Guardian Trust Co. v. Straus, 61 Misc. 441, 115 NYS 247.

23, 24. Guardian Trust Co. v. Straus, 61 Misc. 441, 115 NYS 247.

25. Allen v. Chase [Conn.] 71 A 367.

26. Defendants, if they wish to bring in other parties, not necessary, should do so by filing cross petition and serving notice as required by Code, § 3574. Farmers' & Merchants' Bank v. Wood Bros. & Co. [Iowa] 118 NW 282.

27. Owens v. Caraway [Tex. Civ. App.] 110 SW 474.

28. Warrantor of title vouched in action of ejectment becomes bound by judgment as to right of plaintiff to recover. Taylor v. Allen [Ga.] 62 SE 291.

29. He is not prejudiced by this procedure since separate action might be brought. Bohnhoff v. Kennedy, 129 App. Div. 32, 113 NYS 133.

30. As where widow and child are brought in action for wrongful death. International & G. N. R. Co. v. Howell [Tex.] 111 SW 142.

31. International & G. N. R. Co. v. Howell [Tex.] 111 SW 142.

32. Merely interlining name of nonresident in bill to construe will did not make her a party. Lumpkin v. Lumpkin [Md.] 70 A 238.

33. Under Practice Act, § 23, allowing introduction of necessary new party as defendant at any time before final judgment in civil case. Merriam v. Martin, 132 Ill. App. 151.

and immediate character that he will gain or lose by the direct legal operation and effect of the judgment.[34] One interested merely in the thing in litigation and not in the rights or remedies involved, and who will not be prejudicially affected by the judgment, may not intervene,[35] though it is held that in a suit in rem all persons who have an interest in the res should be allowed to intervene and be heard in behalf of their interests.[36] That other issues of fact are presented by a petition in intervention will not defeat the intervention where the ultimate issue between the parties remains the same.[37] If a good reason for intervention is otherwise shown, an application will not be denied because the amount in issue is below the jurisdiction of the court.[38] Intervention should not be granted except to one who, at the beginning of the action, was competent to be a party thereto.[39] An intervention may be allowed in a mandamus proceeding.[40] In summary proceedings between landlord and tenant, a claim of right to possession is essential to the right to intervene;[41] a mere claim of ownership of the land is not enough.[42] In proceedings

**34.** Under Civ. Code (Mills), § 22, the purpose of which is to allow intervention of one really interested in order that entire controversy may be disposed of. Cache La Poudre Irr. Ditch Co. v. Hawley, 43 Colo. 32, 95 P 317. A court may, upon principles of manifest justice, in cases not provided for in the code, allow one not a party to intervene before or after judgment for the protection or advancement of some right with reference to the subject-matter. Gibson v. Ferrell, 77 Kan. 454, 94 P 783. One interested in estate should be allowed to intervene in action originally between testator and other partners which had been pending four years; since estate could not be closed up until action was terminated, though intervener was theoretically already represented by executor. Schlesinger v. Bear, 128 App. Div. 494, 112 NYS 826. In suit by reservoir company to compel water commissioner to recognize its right to divert certain appropriations of a ditch company, a third irrigation company, claiming rights to water of same stream, which would be affected by judgment, had right to intervene in order to protect its rights. Cache La Poudre Irr. Ditch Co. v. Hawley, 43 Colo. 32, 95 P 317. Wife, plaintiff in divorce suit, may intervene in action by third person against husband on debt, fraud and collusion being alleged, purpose being to sell attached property in order to defeat wife's claim for share of community property. Pittock v. Buck [Idaho] 96 P 212. Vendor of land has sufficient interest to give him standing as intervener in action, purpose of which is to discredit or nullify title conveyed by him. State v. Capdeveille [La.] 48 S 126. Under Comp. Laws 1897, § 3182, any person claiming an interest in land sought to be partitioned may intervene, whether the interest is claimed under the common title sought to be partitioned or under independent title. Baca v. Anaya [N. M.] 94 P 1017. Persons in possession, claiming under Spanish grant made in 1760, may intervene to quiet title in partition suit between cotenants claiming under Spanish grant in 1800. Id. One asserting paramount title to real estate is allowed to intervene in action between others concerning it. McCullough v. Connelly, 137 Iowa, 682, 114 NW 301. One who had assigned tax certificate to another, who had received tax deed, **could not intervene** in suit to set aside tax deed in order to claim money paid into court as condition precedent to having deed set aside. Brimson v. Arnold, 236 Ill. 495, 86 NE 254. In a suit in personam, a petition to intervene, presented by **one having no legal interest** in the subject-matter of the suit, should be refused, especially where such person seeks to be made defendant of his own motion and the plaintiff objects. Armour Car Lines v. Summermour [Ga. App.] 63 SE 667.

**35.** Junior mortgagee of chattels may not intervene in suit by senior mortgagee to foreclose, though one who converted chattels is also made party. Watkins v. Citizens' Nat. Bank of Rockwall [Tex. Civ. App.] 115 SW 304. One who has no judgment or lien on mortgaged property, but mere claim for damages against mortgagor (judgment having been reversed and new trial granted), cannot intervene in foreclosure action on ground that it was instituted to defeat collection of any judgment she might recover. Clinton v. South Shore Natural Gas & Fuel Co., 61 Misc. 339, 113 NYS 289. Mortgagee whose debt is not matured and whose mortgage is not called in question is without interest to intervene in controversy between mortgagor and third person regarding title to part of land, especially where remainder is amply sufficient to satisfy mortgage. Wells v. Blackman, 121 La. 394, 46 S 437.

**36.** Every such person has interest in controversy because of interest in res. Armour Car Lines v. Summerour [Ga. App.] 63 SE 667.

**37.** Cache La Poudre Irr. Ditch Co. v. Hawley, 43 Colo. 32, 95 P 317.

**38.** Watkins v. Citizens' Nat. Bank of Rockwall [Tex. Civ. App.] 115 SW 304.

**39.** One who had been a taxpayer only one year not allowed to intervene in suit by taxpayers commenced six years before. Coyne v. Yonkers, 57 Misc. 366, 109 NYS 625.

**40.** State v. Capdevielle [La.] 48 S 126.

**41.** In action by landlord to recover premises alleged to be held after default in payment of rent, under Code Civ. Proc. § 2244, one claiming possession has right to intervene; intervener need not show possession. Levy v. Winkler, 59 Misc. 482, 110 NYS 997.

against a solvent partnership in a state court for a receiver, a receiver subsequently appointed in bankruptcy proceedings has no right to intervene.[43] A minority stockholder cannot intervene in a suit for an accounting by his company against another merely because he is a stockholder, if he is being properly represented by the officers of the company.[44] But if stockholders can show fraud and collusion by which their rights are being sacrificed, they have a right to intervene, not to displace the directors and dominate the litigation, but for the protection of their rights as stockholders.[45] Bondholders may not intervene in a suit by the trustee to foreclose the mortgage, unless negligence, incompetency or improper conduct on the part of the trustee is shown,[46] but failure of the trustee to contest the validity of a prior mortgage is ground for such intervention.[47] The right of a defendant to vouch into court another, who is liable over to him, conferred by statute in Georgia, does not include the right of volunteering to become a defendant when no notice has been given by defendant, and when plaintiff has not requested that such a one be made a party.[48]

Whether intervention is by petition or by original bill in the nature of a cross bill, it must be initiated by leave of the court.[49] The application for leave to intervene must show diligence on the part of the intervenor to seek the aid of the court [50] as the right to intervene may be lost by laches.[51] Such application is addressed to the sound discretion of the court,[52] except in those cases where intervention is a matter of right.[53] In some jurisdictions an application for leave to intervene is first filed and passed upon; [54] in others, the application for leave should be accompanied by a proposed complaint in intervention.[55] In determining the sufficiency of a petition to intervene, the averments of the petition, so far as well pleaded, are to be taken as true.[56] An intervener takes the pleadings as he finds

One claiming rents under an assignment of lease by landlord cannot intervene in summary proceeding in municipal court by landlord for nonpayment of rent, since Code Civ. Proc. § 2244, permits intervention in such proceeding only by one having or claiming possession. Erkins v. Tucker, 115 NYS 256. Nor does Municipal Court Act, § 187, permitting substitution of claimant in action on contract or for recovery of chattels, apply to such summary proceeding. Id.

42. Alleged owner of land is not entitled to intervene in action of forcible detainer between landlord and tenant, since that action is not to try title but only right to possession. Atkinson v. Stansberry [Ky.] 114 SW 1196.

43. Southwell v. Church [Tex. Civ. App.] 111 SW 969.

44. Ex parte Gray [Ala.] 47 S 286.

45. Intervention refused; fraud not shown. Ex parte Gray [Ala.] 47 S 286.

46. Bowling Green Trust Co. v. Virginia Passenger & Power Co., 164 F 753.

47. Bowling Green Trust Co. v. Virginia Passenger & Power Co., 164 F 753.

48. No right to intervene under Civ. Code 1895, § 5234. Armour Car Lines v. Summermour [Ga. App.] 63 SE 667.

49. Ex parte Gray [Ala.] 47 S 286.

50. Gibson v. Ferrell, 77 Kan. 454, 94 P 783.

51. Flint v. Chaloupka [Neb.] 115 NW 535. Under Cobbey's Ann. St. 1903, § 1047, intervention must be before trial commences. One who failed to amend a defective petition in intervention, to which a demurrer was sustained, could not, after trial, intervene under § 901, since the latter provides remedy only where code fails to provide one. Id.

52. Gibson v. Ferrell, 77 Kan. 454, 94 P 783. A refusal to allow a party to intervene in a suit is discretionary, not final, not a determination of the merits of the claim, and is not appealable. Blaffer v. New Orleans Water Supply Co. [C. C. A.] 160 F 389.

53. Right to intervene in partition suit given by Comp. Laws 1897, § 3182, is a matter of right when seasonably asserted and court has no discretionary power to deny it. Baca v. Anaya [N. M.] 94 P 1017.

54. Steps are: (1) Application for leave to intervene, notice of which should be given parties; (2) refusal or granting of leave, determination being based on face of application; if leave granted, filing of petition and answer; (3) determination from pleadings, affidavits, etc., whether petitioner shall be allowed to become party. Ex parte Gray [Ala.] 47 S 286.

55. Application to allow certain attorney to appear for certain taxpayers not accompanied by any proposed complaint in intervention cannot be construed as petition to intervene. Schouweiler v. Allen [N. D.] 117 NW 866.

56. Cache La Poudre Irr. Ditch Co. v. Hawley, 43 Colo. 32, 95 P 317.

them, and where there has been a waiver of process by appearance and answer he cannot urge that there is no process or waiver of the same.[57] Application to intervene, after judgment, is too late,[58] and it is irregular to allow new parties to intervene after final judgment on the merits by an appellate court.[59] An intervention will not be permitted to retard the decision of the principal action,[60] and where an intervention is dismissed on exception, and an appeal allowed, such appeal can suspend nothing except the running of the delay within which the judgment appealed from would otherwise become unappealable.[61] An intervener becomes a party and is bound by the decree,[62] unless he withdraws his claim previous to the rendition of judgment.[63] A stockholder, intervening in an action by the corporation to protect individual rights as stockholder, is not entitled to an allowance for attorney's fees.[64]

*Substitution.*[See 10 C. L. 1087]—One who has succeeded to the rights of a litigant may be substituted as the real party in interest,[65] and usually such substitution is required in order that judgment may be rendered in accordance with the facts,[66] though provision is made in some jurisdictions for continuing the action in the name of the original party for the benefit of the assignee.[67] Failure to amend so as to show the name of the real party in interest as plaintiff is immaterial where the fact of transfer of interest is shown.[68] In an action to recover money, in which

57. Booth v. State [Ga.] 63 SE 502.

58. Schouweiler v. Allen [N. D.] 117 NW 866. After litigation has resulted in final judgment or decree, it is too late for third persons to be allowed to intervene, and this rule applies particularly to third persons whose claims or interests have accrued or originated subsequent to the rendition of such decree or judgment. Smith v. Elliott [Fla.] 47 S 387.

59. Where plaintiffs were not interested in intervener's controversy with defendant, new action should be brought, but cause allowed to proceed. Harrell v. Hagan [N. C.] 63 SE 952.

60. Filhiol v. Schmidt [La.] 48 S 157. An intervener is not entitled to delay the case but is entitled to come in at any time. State v. Capdevielle [La.] 48 S 126.

61. Mandamus will not lie to compel granting of suspensive appeal, nor will further proceedings be prohibited. Filhiol v. Schmidt [La.] 48 S 157.

62. One who intervenes in a suit before disposition of specific property in the custody of the court, after decree of sale and before sale and distribution of proceeds, and prays a lien thereon for payment of his claim from proceeds, becomes a party to the suit and is bound by decree and subsequent proceedings. Lang v. Choctaw, Oklahoma & Gulf R. Co. [C. C. A.] 160 F 355. In action for appointment of receiver of partnership, creditor intervened and asked that her petition in intervention be taken as her return to rule to show cause why receiver should not be appointed. She could not thereafter claim she was not party to receivership proceedings. Whilden v. Chapman, 80 S. C. 84, 61 SE 249.

63. An intervener may dismiss his intervention, and judgment thereafter entered in the action will not affect his interest in the subject-matter. Lincoln Upholstering Co. v. Baker [Neb.] 118 NW 321. An intervener who abandons his claim and withdraws from the action is not bound by a decree to which he is not a party. McCullough v. Connelly, 137 Iowa, 682, 114 NW 301.

64. Ex parte Gray [Ala.] 47 S 286.

65. State Bank of Gothenburg v. Carroll [Neb.] 116 NW 276. In action on securities by pledgor thereof, securities being absolutely assigned to pledgee pending suit, court properly allowed pledgee to be substituted as plaintiff by amendment. Code Civ. Proc. § 473, allows such amendment. Merced Bank v. Price [Cal.] 98 P 383.

66. In action by lessee to recover possession of property, brought, in reality, for benefit of lessor, it was proper to bring in lessor and thereafter to substitute one who succeeded to lessor's rights, lessee's rights having also terminated, since judgment must be according to fact, where right to possession changes during action under Code Civ. Proc. § 740. Cassin v. Nicholson [Cal.] 98 P 190. Defendant in mortgage foreclosure action died after filing exceptions to the master's report and before any decree had been entered. Held motion for order of sale would not be granted on mere notice to widow, neither she nor representative of deceased having been made a party. Pendleton v. Vigneauz, 166 F 935.

67. Under Code Civ. Proc. § 385, where securities sued on were assigned pending action, court could allow action to proceed in name of original party for benefit of assignee or substitute assignee. Merced Bank v. Price [Cal.] 98 P 383.

68. Landowner and tenant sued for damages for flooding land and props, and before trial tenants assigned cause of action to landowner, which fact was pleaded by amendment and proved. Held court warranted in treating landowner as sole plaintiff, though action proceeded under same title. Steber v. Chicago & G. W. R. Co. [Iowa] 117 NW 304.

property of the defendant is attached, one to whom the attached property is transferred subsequent to the levy has no right to be substituted for defendant,[69] even though judgment was rendered against the debtor on service by publication, the debtor being a nonresident.[70] The transfer of property attached to secure any judgment which might be recovered is not a transfer of any interest in the action or cause of action warranting substitution,[71] and the subsequent death of the transferor could add nothing to the rights of the transferee.[72] In a suit to enforce liability of stockholders of an insolvent corporation, it has been held proper to allow one creditor, suing for all, to be substituted for the receiver.[73] Where a public officer is involved in litigation in his official capacity, the expiration of his term does not require substitution of his successor.[74] The substitution of a new party plaintiff and the filing of an amended and substituted petition is not the commencement of a new action, and limitations is no defense if the original action was commenced in time.[75]

§ 6. *Objections to capacity, and defects of parties.*[76]—See 10 C. L. 1087—Defect of parties, apparent on the face of the complaint or petition, must be raised by demurrer;[77] if not so apparent, it should be raised by answer or plea in abatement,[78] and a demurrer will not raise the objection.[79] The objection must be specific[80]

**69, 70, 71.** Anderson v. Schloesser, 153 Cal. 219, 94 P 885.

**72.** Anderson v. Schloesser, 153 Cal. 219, 94 P 885.

**73.** Receiver of bank commenced suit. Buist v. Williams, 81 S. C. 495, 62 SE 859.

**74.** Public being real litigant. Hines v. Stahl [Kan.] 99 P 273.

**75.** State Bank of Gothenburg v. Carroll [Neb.] 116 NW 276. Where action on securities was commenced by pledgor before expiration of limitation period, action by substituted pledgee to whom securities were absolutely assigned pending suit was not barred. Merced Bank v. Price [Cal.] 98 P 383.

**76. Search Note:** See Parties, Cent. Dig. §§ 115-178; Dec. Dig.; §§ 75-97.; 30 Cyc. 140-144; 15 A. & E. Enc. P. & P. 475, 564, 681, 747.

**77.** Defect of parties plaintiff or defendant must be raised by demurrer or it is waived. Budds v. Frey, 104 Minn. 481, 117 NW 158; Disbrow v. Creamery Package Co., 104 Minn. 17, 115 NW 751; Bishop v. Huff [Neb.] 116 NW 665. Right of plaintiff to sue individually on joint demand properly raised by demurrer on ground of defect of parties. Weinfeld v. Fr. Bergner & Co., 114 NYS 284. If it appears on face of petition that action against individual is for partnership debt, objection may be taken by demurrer. Bray v. Peace [Ga.] 62 SE 1025. Both general and special demurrer held to raise question whether too many parties were joined. City of Galena v. Galena Water Co., 132 Ill. App. 332. Want of legal capacity to sue referred to in Rev. St. 1898, § 2962, as ground for demurrer, ordinarily means want of capacity to appear in court and maintain an action regardless of in whom is vested the right of action. Hunt v. Monroe, 32 Utah, 428, 91 P 269.

**78.** Nonjoinder of parties may be raised by plea in abatement. Clark v. Schindler [Ind. App.] 87 NE 44. Where a defect of parties is not apparent on the face of the bill, it may be brought before the court by plea, and a plea for want of proper parties is a plea in bar and goes to the whole bill. Moore v. Moore [N. J. Eq.] 70 A 684. Where petition showed right of action in plaintiff and did not disclose that that right depended on compliance with statute governing right of foreign corporations to sue, objection to capacity could be raised only by plea; not being so raised, was properly ignored by trial court. Huff v. Kinloch Paint Co. [Tex. Civ. App.] 110 SW 467. Where fact that individual is sued on firm debt does not appear on face of petition, objection must be raised by plea in abatement. Pleading held not sufficient to raise point. Bray v. Peace [Ga.] 62 SE 1025. General denial does not put in issue capacity of one suing as heir, such want of capacity must be specially pleaded in limine litis. Eames v. Woodson, 120 La. 1031, 46 S 13. Plea in abatement alleging that certain person was not joined as party in proceeding nor served with notice of summons, held sufficient as against demurrer. Clark v. Schindler [Ind. App.] 87 NE 44. Paper entitled "motion to dismiss and demurrer," stating that six other named persons are necessary parties defendant and that defendant should not be held to answer and that writ should be abated and action dismissed held answer in abatement, raising question of nonjoinder. Wood v. Farmer, 200 Mass. 209, 86 NE 297.

**79.** Complaint is demurrable for defect of parties only when such defect appears on its face. Code Civ. Proc. § 488. Complaint in suit regarding will not demurrable for defect of parties where it did not show there were other living interested parties. Curtis v. Curtis, 126 App. Div. 590, 110 NYS 658. A demurrer is available only when the want of necessary parties appears on the face of the bill. Stout v. Lord, 103 Me. 410, 69 A 694. In suit by mortgagor to set aside foreclosure or to redeem, brought against executor of mortgagee, special demurrer was held not available to raise want of heirs or devisees as parties where bill did not disclose

and must show what persons are omitted as parties, if the facts are not otherwise disclosed.[81] If the objection be not properly raised by demurrer or answer, it is waived,[82] and is not available as a defense in a trial on the merits.[83] But defect of parties is not so waived, where the situation is such that the court cannot proceed to judgment without the presence of others, who are not before the court.[84]

whether or not time to redeem had passed, or that heirs or devisees had acquired any interest in land. Id.

**80. General demurrer does not raise question** of defect of parties; this must be raised by special demurrer or answer or it cannot be raised on appeal. Choctaw, O. & G. R. Co. v. Burgess [Okl.] 97 P 271. Where proceeding for writ of mandamus was not brought in name of state on relation of proper party but by such party, and respondent defended by general demurrer, not raising defect of parties by special demurrer or otherwise, objection was waived. Davis v. Caruthers [Okl.] 97 P 581.

**81.** An objection that there is a defect of parties should state the names of necessary parties not before the court. Union Trust & Sav. Co. v. Marshall's Adm'rs [Ky.] 113 SW 73. A demurrer for defect of parties plaintiff is good when it specifies and correctly names the omitted parties. Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 NW 751.

**82.** Defect of parties waived by failure to raise objection by demurrer or answer or otherwise. Budlong v. Budlong, 48 Wash. 645, 94 P 478. Defect of parties waived by failure to demur on that ground as allowed by statute. Bridgers v. Staton [N. C.] 63 SE 892. Defect of parties plaintiff waived by failure to raise objection by demurrer or answer. Semon v. Daggett, 114 NYS 763. Defect of parties defendant waived if not taken advantage of by demurrer or answer. Cousar v. Heath, Witherspoon & Co., 80 S. C. 466, 61 SE 973. Failure to join trustee in equitable suit by beneficiary waived by failure to raise nonjoinder by demurrer or answer. Peeples v. Hayley Beine & Co. [Ark.] 116 SW 197. Failure to join two judgment debtors in action on judgment waived, where one sued did not raise objection by demurrer or answer. Jordan v. Muse [Ark.] 115 SW 162. Failure to join plaintiff's husband in action for injuries to plaintiff waived by failure to raise it by proper plea for several years during which suit was pending. City of San Antonio v. Wildenstein [Tex. Civ. App.] 109 SW 231. In action to recover on contract, defendant not having pleaded nonjoinder of another party to the contract, plaintiff was entitled to recover entire amount from defendant. Garvin v. Stone, 152 Mich. 594, 15 Det. Leg. N. 276, 116 NW 368. Variance between declaration in replevin by an individual and contract under which he claimed which was in partnership name, waived, by failure to plead in abatement and by pleading to merits. Anderson v. Stewart [Md.] 70 A 228. Where ward's residuary legatees brought suit as individuals against conservator for fraud, in sale of ward's land, and complaint alleged that one of plaintiffs was executor, and trial was had on merits, no objection being made until final argument, court was justified in disposing of case on merits, though executor should have brought suit as such. Appeal of Dunn [Conn.] 70 A 703. An objection to the nonjoinder of parties, first taken in the appellate court, will not be sustained unless it appears that failure to make the omitted person a party will deprive him of some substantial right. State Nat. Bank of Springfield v. U. S. Life Ins. Co., 238 Ill. 148, 87 NE 396. Want of capacity to sue is waived unless taken advantage of by special demurrer or answer. Civ. Code Prac. § 92. Louisville & N. R. Co. v. Herndon's Adm'r, 31 Ky. L. R. 1059, 104 SW 732. Defect of parties is waived unless taken advantage of by demurrer or answer. Civ. Code § 96. Nason v. Nason, 79 Neb. 582, 113 NW 139. Defect of parties is waived by failure to demur on that precise ground or to raise question by answer. St. 1898, § 2654. Milwaukee Trust Co. v. Van Valkenburgh, 132 Wis. 638, 112 NW 1083. An objection that an action is improperly brought against defendant as assignee for the benefit of creditors must be taken by plea in abatement or demurrer. Mayberry v. Sprague, 190 Mass. 301, 85 NE 440.

**83.** In an action at law on contract, declaration against defendant being general, nonjoinder of the parties is no bar to recovery in absence of plea in abatement, where evidence shows that defendant and another made contract declared on. Beasore v. Stevens [Mich.] 15 Det. Leg. N. 1063, 119 NW 431. Nonjoinder of defendant's copromisor, in action on indorsement on note, could be taken advantage of only by answer in abatement; not available as defense at trial on merits. Feigenspan v. McDonnell, 201 Mass. 341, 87 NE 624. Defendant, in suit on contract, could not, at close of evidence by motion for directed verdict, raise point that contract was made with firm of which plaintiff was member and not with plaintiff, and that plaintiff could not sue thereon, where plaintiff could have pleaded and proved assignment of contract and ratification by defendant had objection been timely. Hendrix v. Letourneau [Iowa] 116 NW 729. Admissions as to ownership, etc., of street railway held to waive all questions of misjoinder. Eckels v. Edison, 139 Ill. App. 75

**84.** McLean v. Farmers' Highline Canal & Reservoir Co. [Colo.] 98 P 16; Denison v. Jerome, 43 Colo. 456, 96 P 166. Defect of parties to petition to enforce mechanic's lien may be taken by answer or at the hearing. Prather Engineering Co. v. Detroit, F. & S. R. Co., 152 Mich. 582, 15 Det. Leg. N. 280, 116 NW 376. Where omitted parties are so connected with subject of suit that decree could not be made without affecting their interests, the objection may be raised by general demurrer or at the hearing or when the decree is made, or may be started by the court of its own motion. Strout v. Lord, 103 Me. 410, 69 A 694. Where it is impossible to make a proper decree until certain persons have been made de-

The objection that plaintiff is not the real party in interest or lacks capacity to sue should also be specially raised by demurrer,[85] answer or plea, and if not so raised is waived.[86] An answer to the merits, after demurrer overruled, is also a waiver of the objection.[87] But this rule does not apply where plaintiff has no interest, legal or equitable, in the claim or right to represent it,[88] nor does it apply where the complaint fails to state a cause of action in plaintiff.[89] Defendants have been held to be estopped by their conduct from objecting to plaintiff's capacity or right to sue.[90] There must be a general appearance to raise the objection of want of capacity to sue.[91]

Misjoinder of parties can, in some jurisdictions, be reached only by motion.[92]

fendants, and it is apparent from record that they are necessary and indispensable, the supreme court of its own motion will decline to act until such persons have been brought in, though the objection was not urged below. Gates v. Union Naval Stores Co. [Miss.] 45 S 979.

**85.** Right of receiver of insolvent corporation to maintain action to enforce statutory liability of stockholders may be tested by demurrer. Hammond v. Cline, 170 Ind. 452, 84 NE 827. Objection that receiver is made party to petition to enforce mechanic's lien without leave of court may be taken by demurrer. Prather Engineering Co. v. Detroit F. & S. R. Co., 152 Mich. 582, 15 Det. Leg. N. 280, 116 NW 376. Where it appears from face of complaint that right to maintain action is not in plaintiff but in another, defect may be raised by demurrer. Hunt v. Monroe, 32 Utah, 428, 91 P 269.

**86.** The proper method of questioning authority to sue is by **rule to show authority.** Motion to dismiss not proper means to question authority to sue in behalf county. Harrigan v. Peoria, 128 Ill. App. 651. Procedure to question the authority to institute and prosecute a suit must be timely. Comes too late after merits have been determined by the court. Id. **Objection that party suing is not real party in interest** is waived if not raised by demurrer or answer. Cole v. Utah Sugar Co. [Utah] 99 P 681. Where persons having substantial rights petitioned for writ of mandamus, and defendants answered to merits without objection, they waived objection that action should have been brought in name of people on relation of petitioners. Town of Scott v. Artman, 237 Ill. 394, 86 NE 595. Objection that executors had no right to sue to enforce trust in land because estate had been distributed waived when not raised by demurrer or answer, under Code Civ. Proc. § 434. Bollinger v. Bollinger [Cal.] 99 P 196.

**Want of capacity to sue,** if shown on face of petition is waived unless taken advantage of by demurrer. Gentry v. Bearss [Neb.] 118 NW 1077; Loucks v. Davies, 43 Colo. 490, 96 P 191. Capacity of contestants of local option election to maintain contest waived where no plea in abatement or other objection was made. McCormick v. Jester [Tex. Civ. App.] 115 SW 278. Objection to legal capacity of plaintiff to sue waived if not raised by demurrer or answer. Trimmier v. Atlanta, etc., R. Co., 81 S. C. 203, 62 SE 209. Where failure of plaintiff to pay its corporate license fee last due (Laws 1907, p. 140, p. 270) was not raised by demurrer or answer, the objection was waived, since only capacity to sue was affected. Rothchild Bros. v. Mahoney [Wash.] 99 P 1031.

**87.** Answer to merits, after demurrer, waived objection that highway commissioners had no power to sue in name of their respective towns. Town of Scott v. Artman, 237 Ill. 394, 86 NE 595.

**88.** Such objection not waived by failure to demur or plead it specially. Hilliard v. Wisconsin Life Ins. Co., 137 Wis. 208, 117 NW 999.

**89.** The objection that an administrator has no cause of action for the wrongful death of his intestate is not waived by failure to demur. Crohn v. Kansas City Home Tel. Co., 131 Mo. App. 313, 109 SW 1068.

**90.** Where plaintiff, in suit to foreclose chattel mortgage, alleged ownership in himself, and defendants pleaded payment to him and had recognized him as owner, and he had control of the notes and mortgage, defendants could not object that plaintiff was not real party in interest. Cain v. Vogt, 138 Iowa, 631, 116 NW 786.

Doctrine of estoppel inapplicable. That insurance company paid two policies to plaintiff would not preclude it from setting up want of capacity of plaintiff to sue on third, which was payable executors, administrators or assigns of assured. Patocka v. Prudential Ins. Co., 114 NYS 861.

**91.** Riley v. Southern R. Co., 81 S. C. 387, 62 SE 509.

**92.** Misjoinder can be reached only by motion, **not by demurrer or answer.** Steber v. Chicago & G. W. R. Co. [Iowa] 117 NW 304. **Demurrer does not lie** for misjoinder of parties. Marth v. Kingfisher [Okl.] 98 P 436. Demurrer does not lie for misjoinder of parties plaintiff. Kirkpatrick v. Kirkpatrick [Neb.] 119 NW 1118. Demurrer on ground of defect of parties lies only when there are too few parties, and does not lie in case of misjoinder. Tieman v. Sachs [Or.] 98 P 163. When a person is unnecessarily joined as party plaintiff, a misjoinder not a defect of parties, results, which must be taken advantage of by motion, not by demurrer, and will not be considered on appeal unless properly raised below. Choctaw O. & G. R. Co. v. Burgess [Okl.] 97 P 271. Demurrer for defect of parties will be sustained only where there is deficiency of parties necessary to determination of action, not where there is misjoinder. Wright v. Willoughby, 79 S. C. 438, 60 SE 971. Misjoinder of parties apparent on the record may be taken advantage of by motion in arrest of judgment. Though motion does not

In other jurisdictions, the objecton may be raised by demurrer, when apparent on the face of the pleading, or by an appropriate plea if it does not so appear.[93] The objection is waived by failure to raise it in the proper manner [94] or by a plea to the merits.[95]

Misnomer of plaintiff should be raised by plea in abatement.[96]

Objections for the purpose of saving questions for review by appellate courts are elsewhere discussed.[97]

## PARTITION.

§ 1. Nature, Right, and Propriety 1193. The Right, and Parties Entitled, 1193. Statutory Sale for Partition, 1195. What May be Partitioned, 1195. Partition of Estates of Decedents, 1196.
§ 2. Jurisdiction and Venue, 1197.
§ 3. Procedure to Obtain Partition, 1197.
§ 4. Scope of Relief in Partition, 1200.
§ 5. Commissioners or Referees and Their Proceedings, 1202.
§ 6. Mode of Partition and Distribution of Property or Proceeds, 1203.
§ 7. Sale and Subsequent Proceedings, 1203.
§ 8. Appeal and Review; Vacation of Sale, 1205.
§ 9. Voluntary Partition, 1206.

*The scope of this topic* is noted below.[98]

§ 1. *Nature, right, and propriety.*[99] See 10 C. L. 1089—The remedy ordinarily is equitable in its nature though regulated by statute,[1] but is sometimes regarded as a special proceeding [2] in rem.[3] The relative jurisdiction of law and equity is treated in another section.[4]

*The right, and parties entitled.* See 10 C. L. 1089—Partition when authorized is a matter of right.[5] At common law only coparceners deriving their title by the involuntary method of inheritance could compel partition by judicial process.[6] Ancient English statutes extended the right to joint tenants and tenants in common and eventually to all cotenants, whether of freehold or less estates in possession.[7] The

contain specific objection. Eckels v. Henning, 139 Ill. App. 660.

93. If misjoinder appears on face of petition, it must be raised by demurrer; can be raised by answer only when it does not so appear. Fulwider v. Trenton Gas L. & P. Co. [Mo.] 116 SW 508. Misjoinder of parties plaintiff or defect of parties defendant should not be raised on motion for preliminary injunction but by plea, answer or demurrer. Snelling v. Richard, 166 F 635.

94. Misjoinder of plaintiffs not being raised by demurrers, appellate court could not consider it. Hill v. Houk [Ala.] 46 S 562. Misjoinder of parties defendant waived by failure to demur on that ground. Lyon County v. Lien, 105 Mich. 55, 116 NW 1017. Misjoinder of defendants is not raised by contention that "no privity of interest appears in the different causes of action alleged against said two several defendants." Oppermann v. Petry [Tex. Civ. App.] 115 SW 300.

95. Where misjoinder appears on face of petition, attempt to raise objection by answer is waiver of it. Fulwider v. Trenton Gas, L. & P. Co. [Mo.] 116 SW 508. Defendants, having answered to merits without pleading misjoinder after demurrer on that ground had been overruled, waived objection. Carroll v. Woods, 132 Mo. App. 492, 111 SW 885. Where misjoinder, if any, appears on face of complaint, objection raised by motion cannot be preserved in answer to merits. Hanson v. Neal [Mo.] 114 SW 1073.

96. Objection that plaintiff did not set out his christian name must be taken by plea in abatement, cannot be raised by objection to evidence. Patrick v. Norfolk Lumber Co. [Neb.] 115 NW 780.

97. Saving Questions for Review, 10 C. L. 1572.

98. Includes all matters relative to the right to partition and the procedure for its enforcement. The topic Tenants in Common and Joint Tenants, 10 C. L. 1850, should also be consulted for holding as to substantive rights of co-owners.

99. **Search Note:** See Notes in 4 C. L. 898; 16 L. R. A. 220; 20 Id. 624; 26 Id. 284; 28 Id. 103; 4 L. R. A. (N. S.) 786; 8 Id. 67; 9 A. S. R. 884; 32 Id. 778; 41 Id. 140, 142; 113 Id. 55; 119 Id. 586; 9 Ann. Cas. 1029; 11 Id. 1040.

See, also, Descent and Destribution, Cent. Dig. §§ 311-317; Partition, Cent. Dig. §§ 33-87; Dec. Dig. §§ 10-33, 36; 30 Cyc. 169-322; 21 A. & E. Enc. L. (2ed.) 1126, 1145; 15 A. & E. Enc. P. & P. 769, 772, 783, 826.

1. Prior to revision of statutes in 1880, partition proceeding was special proceeding and not civil action, but now it is no longer such a proceeding but a civil action, probably equitable. McNeely v. Cincinnati, 7 Ohio N. P. (N. S.) 441.

2. Tell v. Senac [La.] 48 S 448.

3. A partition proceeding is a proceeding in rem. Bursey v. Lyon, 30 App. D. C. 597; Tell v. Senac [La.] 48 S 448.

4. See post, § 2.

5. Beardsley v. Kansas Natural Gas Co. [Kan.] 96 P 859; Rivers v. Atlantic Coast Lumber Corp., 81 S. C. 492, 62 SE 855.

6. Hobbs v. Frazier [Fla.] 47 S 929.

7. Hobbs v. Frazier [Fla.] 47 S 929. Since

scope of the remedy is now largely prescribed by statute,[8] but it may be stated generally that joint tenants and tenants in common having a legal estate may have partition,[9] but not while holding the common property under an unexpired lease from their ancestor.[10] Although since the statute of Henry VIII life tenants may have partition,[11] they are entitled to no relief against the remaindermen unless by statute.[12] The general rule seems to be that a cotenant cannot enforce partition of a part only of the common lands, leaving the rest undivided, but the entire property must be included in the partition,[13] but by the weight of authority this does not apply to severable tracts.[14] Assuming that all tracts held in common should be included, it does not follow, that a tract should be included, the legal title to which is in the plaintiff.[15] Parties entitled to share in the proceeds of the sale of lands upon the happening of certain contingencies cannot maintain partition.[16] Partition cannot be had of lands held adversely or the title to which is in dispute[17] as partition is not the proper proceeding in which to settle a disputed title,[18] but constructive possession is sufficient to

the statute of Henry VIII life tenants have been allowed to maintain an action to enforce partition of land held jointly. This does not entitle as to relief against the remaindermen. Eversole v. Combs [Ky.] 112 SW 1132.

8. Sections 1939 to 1946 of Gen. St. 1906 regulate partition proceeding in Florida. Dallam v. Sanche [Fla.] 47 S 871. Under the Florida statutes any one or more of several joint tenants, tenants in common, and coparceners, may compel partition. Hobbs v. Frazier [Fla.] 47 S 929. Under the statutes of New Mexico partition may be had when any lands, tenements or hereditaments shall be owned in joint tenancy, tenancy in common, or coparcenary, whether the right or title be derived by donation, grant, purchase, devise or descent. Thompson v. De Snyder [N. M.] 94 P 1014. The statutes of Florida do not contemplate partition except when required by the demands or the interests of beneficial owner, or when shown to be necessary to protect the rights of those beneficially interested. Hobbs v. Frazier [Fla.] 47 S 929. By Civil Code of Practice, § 499a, partition may be had of land held under a deed or will vesting a life estate in two or more, remainder as to each share to the life tenant's children. Eversole v. Combs [Ky.] 112 SW 1132. Under Gen. St. c. 63, art. 6, § 1, providing for a sale by one having a vested contingent interest or remainder and partition by one refusing to join in the sale, a person having a vested interest in the property may object to the sale and have his interest alloted in partition. Kalfus v. Davie, 33 Ky. L. R. 663, 110 SW 871. For a full discussion of Tennessee statutes relating to partition, see Holt v. Hamlin [Tenn.] 111 SW 241.

9. Tenant in common of realty is entitled to partition as a matter of right. Beardsley v. Kansas Natural Gas Co. [Kan.] 96 P 859.

10. Douglas v. Johnson, 130 Ga. 472, 60 SE 1041.

11. Eversole v. Combs [Ky.] 112 SW 1132. Where land was devised to the wife for life, remainder to the testator's children or their representatives for life, and then to their children in fee upon the death of the widow, the land may be partitioned among the life tenants so that each may have the use of his part during his life interest. Watkins v. Gilmore, 130 Ga. 797, 62 SE 32.

12. Eversole v. Combs [Ky.] 112 SW 1132. Life tenant cannot have partition against remainderman for purpose of division of proceeds. Homestead. McConnell v. Bell [Tenn.] 114 SW 203. After a full review of the Tennessee statutes relating to partition, it was held that an individual owner of a life estate could not maintain partition against remaindermen or a sale for division. Holt v. Hamlin [Tenn.] 111 SW 241; McKnight v. McKnight [Tenn.] 115 SW 134.

13. Koon v. Koon [Fla.] 46 S 633. Suit for partition should always embrace whole tract held by cotenancy. Dickson v. Dickson, 232 Ill. 577, 83 NE 1067.

14, 15. Dickson v. Dickson, 232 Ill. 577, 83 NE 1067.

16. Parties entitled to a share of the proceeds of the sale of one-half the lands to be made after the death of the life tenant, unless a power of disposal is not exercised, have no estate upon which they can maintain partition. McKnight v. McKnight [Tenn.] 115 SW 134.

17. Cannon v. Stevens [Ark.] 115 SW 388. Partition is the right to severance when there is rightful unity not only of title but of possession, and unless the title of both parties is clear there can be no partition. Land subject to a coal lease until coal exhausted, but which might be forfeited, cannot be partitioned between heirs until lease expires or is forfeited. Douglas v. Johnson, 130 Ga. 472, 60 SE 1041. A court will refuse partition where the plaintiff has no equitable title. Defendant was put in possession of land under a contract to receive title in return for the grantor's support. He did this and also made improvements. On a bill by another child for partition, bill dismissed. Felt v. Felt [Mich.] 15 Det. Leg. N. 994, 118 NW 953. Under the Florida statutes partition is authorized only among those having title to land. Dallam v. Sanchez [Fla.] 47 S 871. Where plaintiff's evidence fails to show what, if any, interest he had in the land in common with the defendants, there was no error in ordering a nonsuit. Tillman v. Griffin [Ga.] 62 SE 581.

18. Koon v. Koon [Fla.] 44 S 633; Dallam v. Sanchez [Fla.] 47 S 871.

justify a partition, and between cotenants the possession of one is the possession of all,[19] except there has been actual ouster or the possession be hostile to the rights of others.[20] A trustee with power to sell may not authorize partition,[21] but the holder of the legal estate may without interference on the part of his cestui que trust, or those having a contingent interest, for the better performance of his trust, have partition in order to have the interest set aside in severalty.[22] The statutory provisions for partition apply only to real estate in Kansas.[23]

*Statutory sale for partition.*[See 10 C. L. 1090]—The jurisdiction to order a sale is purely statutory,[24] and the proceedings are governed entirely by the statute.[25] In Kentucky parties having a vested interest in possession are entitled to a sale.[26] In Tennessee any one of the owners in remainder or reversion is entitled to a sale;[27] but it is not contemplated that the life tenant of the whole premises can maintain a bill against the reversioner or remainderman to effect a sale in order that the life tenant's estate may be valued and paid to him in money.[28]

*What may be partitioned.*[See 10 C. L. 1090]—It is no objection to partition that land is subject to an easement,[29] lien,[30] or lease.[31] Any property of a personal character owned in common may be partitioned where the nature of the property is such that its division in kind is possible and practical.[32] Partition will be refused a lessee with merely a right to enter and prospect for oil or gas which gives no title to the same when found;[33] and so a tenant with a revocable lease of lands for purpose of drilling for oil and gas cannot compel partition of the oil and gas apart from the land nor of the land itself,[34] and where different parties have different leases of oil and gas from different co-tenants, neither can have partition.[35] Mining property is not as a rule susceptible of division and partition thereof must generally result in a sale,[36] but in some jurisdictions must be divided unless it appears that it cannot be done without great prejudice to the owners.[37] While the homestead is occupied as a home for the family and its character as such is maintained, partition will not lie,[38] but it has been

See post, § 4, as to right to try title to land in partition.

19. Cannon v. Stevens [Ark.] 115 SW 388.

20. The answer of defendant stating that she was in adverse possession of the land states a good defense which if proved by the evidence defeats the jurisdiction of the court. Cannon v. Stevens [Ark.] 115 SW 388. At common law a tenant in common who had been disseised could not have the writ of partition. Roll v. Everitt [N. J. Err. & App.] 71 A 263.

21. Trustee in bankruptcy. Hobbs v. Frazier [Fla.] 47 S 929.

22. Kenyon v. Davis, 219 Pa. 585, 69 A 62.

23. Beardsley v. Kansas Natural Gas Co. [Kan.] 96 P 859.

24. McDaniel v. Louisville & N. R. Co. [Ala.] 46 S 981. Sale authorized by Civil Code of Practice, § 490, subd. § 2. Adams v. De Dominguez [Ky.] 112 SW 663. The statutory right of sale in Tennessee is somewhat broader than the right of partition. Holt v. Hamlin [Tenn.] 111 SW 241.

25. It is unnecessary to give bond to nonresident defendants. Adams v. De Dominguez [Ky.] 112 SW 663. Tennessee Acts 1907, p. 1371, c. 403, permitting a life tenant to sell lands without the consent of the remaindermen, is unconstitutional. McConnell v. Bell [Tenn.] 114 SW 203.

26. It is immaterial that one party is a life tenant. Walsh v. Parr's Ex'r, 33 Ky. L. R. 242, 110 SW 300.

27. Holt v. Hamlin [Tenn.] 111 SW 241.

28. Holt v. Hamlin [Tenn.] 111 SW 241; McKnight v. McKnight [Tenn.] 115 SW 134.

29. Thompson v. De Snyder [N. M.] 94 P 1014.

30. One tenant paid taxes and had a lien therefor on the land as against the others. Roll v. Everitt [N. J. Err. & App.] 71 A 263.

31. Coal lease. McMullen v. Blecker [W. Va.] 60 SE 1093. The lease being material only in determining whether partition should be by sale or in kind. Id.

32. Oil and gas lease. Beardsley v. Kansas Natural Gas Co. [Kan.] 96 P 859.

33. Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 NE 53.

34. Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 NE 53.

35. Lessors might have partition and grant their lessees to operate in their portion. Zeigler v. Brenneman, 237 Ill. 15, 86 NE 597.

36. Manley v. Boone [C. C. A.] 159 F 633.

37. Statutes of Alaska. Manley v. Boone [C. C. A.] 159 F 633.

38. Under the homestead statute of Oklahoma. Funk v. Baker [Okl.] 96 P 608. Under the Texas constitution providing for homestead and that it shall not be partitioned during the life of the surviving spouse, the heirs of a first wife may have partition of her interest in the property though a second wife be living. Clements v. Maury [Tex. Civ. App.] 110 SW 185.

held that land subject to a usufruct may be partitioned among the heirs,[39] but they cannot compel the usufructuary to participate and consent to a sale.[40] An estate by a husband and wife as tenants by entirety is not subject to partition.[41] Buildings, structures, etc., erected on realty, the subject of partition proceedings, can be dealt with only so far as they are part of the realty and to that extent they are subject to the same rule as govern the partition of the realty.[42] An estate in trees may exist independently of the estate in land and is subject to partition.[43] Where a telephone company was organized for the benefit and convenience of the joint owners but without any idea of profit and none were received, partition is the proper method under the statute of distributing the property.[44]

*Partition of estates of decedents.*[See 10 C. L. 1091]—Parties are entitled to seek and obtain partition of lands in which they have an inheritance as tenants in common,[45] and such partition will not change the title by which they hold the land.[46] Where the testator's will shows that he did not contemplate the partition of trust property, it will not be divided,[47] but a trustee may bring proceedings to divide the property in accordance with the wishes of the testator and the rights of the respective parties,[48] but only under the control of some court to which parties may appeal.[49] Where executors are given the power and duty to dispose of property for the purpose of distribution, partition will not be entertained as it would become of no effect by the act of the executors;[50] but if a trustee unreasonably or unnecessarily delays partition provided for in a will, the court may nullify its terms and grant statutory partition.[51] Where a will provides for an allotment of the residuary estate, the devisees are entitled to partition and sale on a showing that the share cannot be allotted by dividing the land without prejudice.[52] Where an estate is in course of administration in probate, there is no jurisdiction in partition.[53]

39. Smith v. Nelson, 121 La. 170, 46 S 200.

40. A husband owned an undivided half interest in land not subject to partition in kind and the other half interest as usufructuary. The owner of the naked title to the half so held cannot force the sale of either the naked or the perfect title to effect partition. Smith v. Nelson, 121 La. 170, 46 S 200.

41. And a wife cannot have partition of lumber cut from such estate by a purchaser of the timber from the husband. Jones v. Smith & Co. [N. C.] 62 SE 1092.

42. Cabins, dams, sluices, and ditches on mining property. Manley v. Boone [C. C. A.] 159 F 633.

43. Rivers v. Atlantic Coast Lumber Corp., 81 S. C. 492, 62 SE 855.

44. Meinhart v. Draper, 133 Mo. App. 50, 112 SW 709.

45. By statute. Manley v. Manley, 61 Misc. 183, 112 NYS 771. Administration pending upon a father's estate does not cut off the right of his heirs to partition land inherited from the mother. Clements v. Maury [Tex. Civ. App.] 110 SW 185. The mere fact that a daughter was granted land during the father's lifetime does not prevent her sharing in partition of his estate at his death in the absence of evidence that she took the deed in full of her claim or rights against the estate. Nelson v. Brown [Tex. Civ. App.] 111 SW 1106. The issue of deficiency of personal assets to pay decedent's debts raised in the surrogate's court is wholly irrelevant to a partition proceeding and will not be stayed to await the result of the partition. Ryan v. Benjamin, 112 NYS 441.

46. Trustees of Common School Dist. No. 31 v. Isaacs' Guardian [Ky.] 115 SW 724.

47. Where it appeared that it was a testator's intention that there should be one trust fund of his property until the death of the longest liver of his children and that before that time there should be no partition, this intention will be carried into effect, especially where some of the parties interested do not consent to partition. Dunn v. Dobson, 198 Mass. 142, 84 NE 327.

48. Where a testator created a trust, the property to be divided upon termination of various life estates, the trustee may bring partition proceedings to divide the property in accordance with the rights of the respective parties. Rackemann v. Tilton, 236 Ill. 49, 86 NE 168.

49. A trustee who is directed by a will to divide the property bequeathed upon the termination of life estates therein should not be permitted to partition and set off a separate parcel to each owner without the control of some court to which parties may appeal in case of a grievance. Rackemann v. Tilton, 236 Ill. 49, 86 NE 168.

50. McLaughlin v. Greene, 198 Mass. 153, 83 NE 1112.

51. No allegation of such delay, and hence judgment based thereon was unauthorized. Davis v. Davis [Tex. Civ. App.] 112 SW 948.

52. Manley v. Manley, 61 Misc. 183, 112 NYS 771.

53. Under Sayles' Ann. Civ. St. 1897, art.

§ 2. *Jurisdiction and venue.*[54] See 10 C. L. 1092—The jurisdiction was purely equitable at common law but jurisdiction has now been granted to the law courts by statute in most states,[55] but the statutory remedy is usually cumulative to the equitable [56] and law courts and the chancery courts have concurrent jurisdiction for the partition of real estate,[57] though where the remedy at law is adequate equity will not assume jurisdiction.[58] Where the United States circuit court has possession of the res sought to be partitioned, no other court can take jurisdiction of any action or claim affecting it and the court can determine all matters relating to the parties, regardless of the question of citizenship.[59] The power to make partition or division of personalty belongs exclusively to courts of equity.[60] Jurisdiction existing at the time the action was commenced cannot be lost by a subsequent act of a cotenant.[61] Where jurisdiction of partition proceedings is given an orphans' court only after four weeks' notice, the orphans' court acquires no jurisdiction after notice until the petition is presented.[62] In Alabama the probate court has no jurisdiction in partition where a bona fide adverse title or claim is asserted by any one.[63]

*Service of process.*See 8 C. L. 1249—An absentee who is joint owner of real property may be made a party in partition of the property by substituted service,[64] and the Texas statute provides for service by publication on unknown heirs.[65]

*Venue.*See 8 C. L. 909—The venue of a statutory proceeding for partition is in the county where the land lies.[66]

§ 3. *Procedure to obtain partition.*[67] See 10 C. L. 1092—The suit must be commenced within the period limited by law for the recovery of realty or the possession thereof,[68] but laches will not bar a suit unless prejudice has resulted.[69]

*Parties.*See 10 C. L. 1092—All the parties in interest must be before the court so as to be bound by its decree,[70] and any one so interested is entitled to intervene.[71] A

1887, and Sayles' Ann. Civ. Code 1897, arts. 1882, 2198, suit for partition will not lie in district court where estate is in process of administration in probate court, which under statutes above has exclusive jurisdiction. Wilkinson v. McCart [Tex. Civ. App.] 116 SW 400. Rule held to apply although all that remained to be done in probate court was to settle administrator's account. Id.

54. **Search Note:** See notes in 6 C. L. 900; 69 L. R. A. 692.

See, also, Partition, Cent. Dig. §§ 91-110; Dec. Dig. §§ 37-43; 30 Cyc. 169-174, 312-322; 21 A. & E. Enc. L. (2ed.) 1142; 15 A. & E. Enc. P. & P. 774, 824.

55. The district courts have jurisdiction in some states to try partition suits. Richardson v. Ruddy [Idaho] 98 P 842; Kazebeer v. Nunemaker [Neb.] 118 NW 646; Collins v. Crawford, 214 Mo. 167, 112 SW 538.

56. Dunbar v. Bourland [Ark.] 114 SW 467.

57. Circuit court. Dunbar v. Bourland [Ark.] 114 SW 467.

58. A bill in equity to partition property of tenants in common under a will does not lie. Moseley v. Bolster, 201 Mass. 135, 87 NE 606.

59. City of New Orleans v. Howard [C. C. A.] 160 F 393.

60. Beardsley v. Kansas Natural Gas Co. [Kan.] 96 P 859.

61. Cotenant's holding cannot be converted into an adverse one after action begun. Cannon v. Stevens [Ark.] 115 SW 388.

62. Notice given of partition in orphan's court, but before filing the petition proceedings were begun in the chancery court, held there was no pending cause in the orphans' court. Brown v. Gaskill [N. J. Eq.] 70 A 665.

63. Statute of Alabama Civ. Code 1896, § 3176, and 1907, § 5220, conferring jurisdiction on the probate court in partition, provides that no partition can be made when an adverse title or claim is asserted by any one, etc. Must be a bona fide assertion of an adverse claim. Layton v. Campbell [Ala.] 46 S 775.

64. Tell v. Senac [La.] 48 S 448.

65. Hess v. Webb [Tex. Civ. App.] 113 SW 618.

66. Code 1895, § 4786. Douglas v. Johnson, 130 Ga. 472, 60 SE 1041.

67. **Search Note:** See note in 114 A. S. R. 80.

See, also, Partition, Cent. Dig. §§ 88-456; Dec. Dig. §§ 34-117; 30 Cyc. 169-312; 21 A. & E. Enc. L. (2ed.) 1174; 15 A. & E. Enc. P. & P. 773, 797, 826.

68. A statute providing that a second action to recover land must be brought within two years of the discontinuance of the first one does not apply to partition suit. Foster v. Foster, 81 S. C. 307, 62 SE 320.

69. Where no disposition was made of the community property at the time of a divorce, the wife was not barred by laches from bringing partition proceedings thirteen years later, the husband having been in possession meantime but not having made any improvements and no part of the land being sold. Graves v. Graves, 48 Wash. 664, 94 P 481.

70. Kazebeer v. Nunemaker [Neb.] 118 NW 646.

**Necessary parties:** In an action for an ac-

judgment rendered without all the persons in interest being made parties is void.[72] Whenever it becomes apparent that there are part owners who are not parties, the trial should be suspended until they can be made.[73] An order should only require the joining of those who appear to be necessary, otherwise it is too broad.[74] A trustee may be appointed to represent unascertained parties,[75] and curator ad hoc may be appointed to represent the interests of an absentee.[76]

*Pleading and evidence.* See 10 C. L. 1093—The right to partition must be fully presented in the petition.[77] It is not necessary to pray for a sale in lieu of partition.[78] Either written evidence of the title should be filed or the petition must state facts which show title and these facts must be proved.[79] If property sought to be partitioned is not of a class for which partition is provided for by statute, then the petition must state facts showing sufficient reason for equitable interference.[80] A description of land in a petition which is sufficiently definite when supplemented by parol identification is not limited by a subsequent, more particular description.[81] An allegation

counting between partners and partition of land, one who had sold his partnership interests but still held title to the land was a necessary party. Moses v. Krauss, 90 Miss. 618, 44 S 162. The Missouri statute contemplates that those having a present or future, a vested or contingent interest, should be made parties. Donaldson v. Allen, 213 Mo. 293, 111 SW 1128. The trustee is the proper party to partition of realty held in trust. Kenyon v. Davis, 219 Pa. 585, 69 A 62. In order to sell the interest of remaindermen they must be made parties. Cramton v. Rutledge [Ala.] 47 S 214. It is proper to join as a party in partition an abuttor claiming an easement or title in a part of the land. Johnson v. Aleshire, 114 NYS 398.

**Parties held not necessary:** In an action by lessees for a partition of their interests, the lessors are not necessary parties. Oil and gas lease. Beardsley v. Kansas Natural Gas Co. [Kan.] 96 P 859. In a statutory action for a sale it was held that where the son holding a life estate in the undivided interest, and his children, and the testatrix's other children, were parties, it was unnecessary to make the testatrix's other children's issue parties, their interests being too remote. Waleh v. Parris Ex'r, 33 Ky. L. R. 242, 110 SW 300. The trustee is the proper party to partition proceedings of the real estate held in trust and it is unnecessary to join the cestui qui trust or appoint a trustee for subsequent unborn beneficiaries. Testator gave a portion of his estate in trust for benefit of one son to be paid over to his son's children. A daughter brought partition proceedings against entire estate and it was held that trustee was the proper party to be joined as a defendant. Kenyon v. Davis, 219 Pa. 585, 69 A 62. It is probably not necessary to join an incumbrancer, such as a mortgagee or judgment creditor having a lien on the interest of a cotenant. Jeter v. Knight, 81 S. C. 265, 62 SE 259.

71. Under the statutes of New Mexico, any one claiming a right in the land has a right to intervene in partition. Parties in possession under a Spanish grant in 1760 entitled to intervene in partition between parties holding under a Spanish grant of 1800. Baca v. Anaya [N. M.] 94 P 1017. Where a right in a part of the land has been granted to a stranger by some of the cotenants but not by all, such stranger is a proper party and entitled to intervene in partition proceedings. Right to flow part of land granted to A by B and C, but D the other owner, did not join. Partition brought by B, C, D, and it was sought to set off the land in which A had a right to flow to D. Held A had a right to intervene. Jeter v. Knight, 81 S. C. 265, 62 SE 259.

72. Hess v. Webb [Tex. Civ. App.] 113 SW 618.

73. Evidence did not show that the parties were the only heirs as there was evidence of others who were not shown to be dead. Hess v. Webb [Tex. Civ. App.] 113 SW 618.

74. An order requiring certain persons named and all persons having or claiming any interest to be joined is too broad as it does not appear that all such are necessary parties. Johnson v. Aleshire, 114 NYS 398.

75. Court may appoint trustee to protect rights of those not yet ascertained, and to satisfy such future interests as may arise. McNeely v. Cincinnati, 7 Ohio N. P. (N. S.) 441.

76. Code Prac. arts. 963, 964, 47, 62, 65, 68, 72, 73. Tell v. Senac [La.] 48 S 448.

77. Kazebeer v. Nunemaker [Neb.] 118 NW 646. Partition can only be based upon allegations in the petition, otherwise it is unauthorized and void. Davis v. Davis [Tex. Civ. App.] 112 SW 948. Petition which failed to allege existing trust held to be rather meagre but still sufficient under the circumstances. Collins v. Crawford, 214 Mo. 167, 112 SW 538.

78. Menard v. MacDonald [Tex. Civ. App.] 115 SW 63.

79. Civ. Code Prac. 499. The allegation that title was derived by inheritance is a conclusion of law only and renders this petition fatally defective if there are no facts stated and proved. Toler's Heirs v. Toler, 33 Ky. L. R. 594, 110 SW 388.

80. Personal property. Beardsley v. Kansas Natural Gas Co. [Kan.] 96 P 859.

81. A description of land as the "Hancock Place" was sufficiently definite without a more particular description, when supplemented by a parol identification, and hence, it was not under the general rule limited by a subsequent particular descrip-

of possession is not necessary by one having an interest in fee.[82] Where facts alleged in an answer clearly show a tenancy in common, a plea setting up a title superior to that of the complaint is bad.[83] As a general rule a cross bill in a partition suit is neither necessary nor proper.[84] The time for answering rests largely in discretion.[85] The burden of establishing the fact of failure of title in the plaintiff is on the defendant.[86] A cotenant commencing partition proceedings cannot withdraw the same without consent.[87] Under North Carolina statutes, where partition proceedings are begun before a clerk who transfers to the judge, the judge must dispose of it on the merits, regardless of any irregularities in the proceedings before the clerk.[88]

*Mode and time of trial.* See 10 C. L. 1094—On a partition bill, if title to land is in dispute and the question must be determined at law, the complainant will be required to establish the title at law before proceeding, but equity will in general retain the bill until this is done.[89] The share or interest of each claimant must be determined by court or jury, and thus the partition is made in accordance with such determination and commissioners are appointed to make the partition in compliance with the decree and the law,[90] for the jury has no authority to find how lands shall be divided much less to find they are incapable of division and determine what each one shall have in money for his interest.[91] The evidence on the question of whether or not the plaintiffs are all the surviving heirs is for the jury.[92] The judge need not view the premises before ordering partition.[93]

*Costs and attoney's fees.* See 10 C. L. 1094—Costs in partition are in the court's discretion,[94] and the ordinary rule that costs must be taxed in favor of the prevailing party is not necessarily binding on the chancellor.[95] Reasonable counsel fees[96] necessarily expended[97] should be allowed to the prevailing party,[98] but no allowance

tion consisting of government survey numbers. Sumner v. Hill [Ala.] 47 S 565.

82. A petition containing a full disclosure of the relationship of the parties is good although there is no allegation of possession. Manley v. Manley, 61 Misc. 183, 112 NYS 771.

83. Cramton v. Rutledge [Ala.] 47 S 214.

84. Koon v. Koon [Fla.] 46 S 633.

85. Fact that one interested in partition proceedings did not file answer until court had ascertained that property was not susceptible of division and must be sold, but filed it before there was any division of proceeds of sale, does not constitute laches where no prejudice has resulted. Young v. Young [Va.] 63 SE 748.

86. Defendant claimed widow not entitled to partition of land deeded him by her husband in which she did not join because the husband had failed to perform the conditions under which he took. Overturf v. Martin, 170 Ind. 308, 84 NE 531.

87. Where one of several heirs brings proceedings for partition of succession property, she cannot withdraw proceedings at pleasure as the proceedings give rise to existing rights in the coheirs. Succession of Platz [La.] 47 S 119.

88. Little v. Duncan [N. C.] 62 SE 770.

89. Country Homes Land Co. v. De Gray, 71 N. J. Eq. 283, 71 A 340. Where one of the alleged tenants claims title to the entire property, it is erroneous to order partition made without causing an issue to be made and tried by jury. Civ. Code 1895, § 4791. Douglas v. Johnson, 130 Ga. 472, 60 SE 1041.

90, 91. Kindlea v. Kosub [Tex. Civ. App.] 110 SW 79.

92. Hess v. Webb [Tex. Civ. App.] 113 SW 618.

93. Unless by statute. Parrott v. Barrett, 81 S. C. 255, 62 SE 241.

94. Ryan v. Benjamin, 112 NYS 441. No abuse of discretion. Nelson v. Brown [Tex. Civ. App.] 111 SW 1106. Costs are discretionary with the judge of the circuit court in equity cases. Cauthen v. Cauthen, 81 S. C. 313, 62 SE 319. Where the plaintiff willfully misstated the defendants' interest in the hope of misleading them to his own advantage, which was not discovered until after the decree, it is not unduly lenient to the defendants to allow their motion to correct the proceedings without costs; in fact they might properly have been made more onerous for the plaintiff. Beer v. Orthaus, 113 NYS 533. On appeal the trial judge will be presumed to know the value of legal services under the circumstances of the case and that it did not err in fixing the amount of the fee. Estate of $100,000 was sold, etc., fee of $5,000 not excessive. Donaldson v. Allen, 213 Mo. 293, 111 SW 1128.

95. Cauthen v. Cauthen, 81 S. C. 313, 62 SE 319.

96. Allowance of $1,000 as solicitor's fees held excessive. Fread v. Hoag, 132 Ill. App. 233. In a suit to establish an equitable conversion of land and for a division thereof, the court should under Gen. Acts 1903, p. 33, base the fee only upon the common fund after deducting the charge on the land therefrom. Flomerfelt v. Siglin [Ala.] 47 S 106.

97. Counsel fees should, however, be limited to the partition proper and not extended to payment for services on incidental issues heard. Donaldson v. Allen, 213 Mo. 293, 111

can be made to a party setting up no substantial claim,[98] nor can the allowance exceed the amount prayed.[1] A demurrer based on the plaintiff's request for counsel fees, but going to the whole bill, is properly overruled.[2]

§ 4. *Scope of relief in partition.*[3] See 10 C. L. 1095—At common law a suit in partition was merely a possessory proceeding and title could not be tried,[4] but many statutes give jurisdiction of all questions of law affecting the legal title which may arise in the proceedings,[5] and it has been held proper in bona fide partition proceedings to determine conflicting claims to the property to be partitioned,[6] and in many states all matters pertinent to the case may be determined.[7] The court if it is practicable should so order partition as to give the benefit of any improvements made on the premises to him who may have made them,[8] but there must be no impairment of the rights of cotenants,[9] and no allowance will be made for improvements by a tenant in possession without deducting the rental value for the period of possession.[10] On bills for partition in kind prior to statutes permitting sale, etc., equity could compensate for an inequality by a pecuniary compensation charged on the land by way of rent for servitude, direct an account of rents and profits, and award compensation for improvements,[11] and now under the statutory right of decreeing a sale in partition the court may allow a party for the value of the lands as enhanced by

SW 1128. Error in description of land sought to be partitioned, slight in effect as compared with total land involved and which complainant's solicitor knew and designed to correct, held to render it unnecessary for defendants to employ other solicitors and file answer and cross bill to make corrections, and hence held that they were not entitled to solicitor's fees under Partition Act, § 40. Fread v. Hoag, 132 Ill. App. 233.

98. Donaldson v. Allen, 213 Mo. 293, 111 SW 1128. Where a substantial contest in partition proceeding is decided in defendant's favor, he is improperly required to pay part of plaintiff's counsel fees. Smith v. Roath, 238 Ill. 247, 87 NE 414.

99. Court of chancery in partition proceeding, where defendant has no substantial defense and complainant's solicitors conduct proceedings fairly in interest of all parties, does not acquire authority to allow solicitor's fee to defendant by entertaining unnecessary cross bill. Fread v. Hoag, 132 Ill. App. 233. Court of chancery in partition proceeding without power to allow solicitor's fee to defendant who filed answer setting up no substantial defense. Id.

1. Although the statute may provide for the allowance of reasonable attorney's fees, the court cannot in the absence of an answer grant relief in excess of that demanded. Deputy v. Dollarhide [Ind. App.] 86 NE 344.

2. Layton v. Campbell [Ala.] 46 S 775.

3. **Search Note:** See notes in 4 C. L. 909; 14 L. R. A. (N. S.) 333; 81 A. S. R. 185; 82 Id. 863; 101 Id. 864.

See, also, Partition, Cent. Dig. §§ 196-250, 300-328, 440-449; Dec. Dig. §§ 73-90, 95-98, 114; 30 Cyc. 233-235, 237, 238, 242, 249-253, 260-263, 274, 287-289, 294-312; 21 A. & E. Enc. L. (2ed.) 1170, 1183; 15 A. & E. Enc. P. & P. 773, 809, 827.

4. Gillespie v. Pocahontas Coal & Coke Co., 162 F 742. Partition is not proper proceeding in which to settle disputed title. Koon v. Koon [Fla.] 46 S 633; Dallam v. Sanchez [Fla.] 47 S 871.

5. Gillespie v. Pocahontas Coal & Coke Co., 162 F 742; Baca v. Anaya [N. M.] 94 P 1017.

6. Johnson v. Aleshire, 114 NYS 398; Koon v. Koon [Fla.] 46 S 633; Dallam v. Sanchez [Fla.] 47 S 871. A court is not ousted from jurisdiction in a partition case by the filing of a petition denying title and setting up the statute of limitations, nor is it necessary that the case be held pending a determination of the questions of title in a court at law, but the court has full authority under its equity powers, where other special equitable relief is necessary, to itself determine the disputed questions of title. McNeely v. Cincinnati, 7 Ohio N. P. (N. S.) 441.

7. In partition of personal property as opposed to real property, equity will determine title as well as any other issue pertinent to the case. Laing v. Williams, 135 Wis. 253, 115 NW 821. The court may construe a will and settle the rights of parties thereunder. Kazebeer v. Nunemaker [Neb.] 118 NW 646. By statute in Missouri, issues of fact should be determined and the rights, titles and interest be declared and adverse claims be decided. Donaldson v. Allen, 213 Mo. 293, 111 SW 1128.

8. This is done by assigning to such part owner the portion of the estate on which such improvements are located. Layton v. Campbell [Ala.] 46 S 775. Where one tenant in common is in possession, supposing himself to be entitled to the whole premises and makes valuable improvements thereon, he will under some circumstances be entitled to an equitable partition so as to give him the benefit of the improvements. Adams v. Bristol, 126 App. Div. 660, 111 NYS 231. Accounting for waste, rents and improvements among cotenants is an incident to the right of partition (Vaughan v. Langford, 81 S. C. 282, 62 SE 316), and all these matters are adjusted in the suit for partition (Id.).

9. Layton v. Campbell [Ala.] 463 S 775.

10. Vaughan v. Langford, 81 S. C. 282, 62 SE 316.

11, 12. Layton v. Campbell [Ala.] 46 S 775.

improvements over and above their value as unimproved in addition to his share of the value as unimproved.[12] Where a tenant in common has burdened the common property, justice and equity demand that partition should be, if practicable, so made as to allot to such tenant that part of the land subject to the incumbrance.[13] Where one tenant in common conveys a specific portion entire of the whole tract, his vendee should be allowed the portion sold him in its entirety if this can be done without detriment to the rights of others.[14] Allowance cannot be made for increased value of land due to improvements by a tenant in possession, unless claimed in a cross complaint.[15] Partition is made subject to existing mortgages[16] and liens,[17] and a mortgagee is bound by partition proceedings;[18] and where in partition by heirs some of the nonresident defendants constructively summoned were not before the court on a cross petition of a mortgagee, this fact did not invalidate the sale, the court properly requiring a bond by the mortgagee before distributing the proceeds.[19] A judgment in favor of parties who have sold their interest cannot be given for the purchase money.[20]

*Operation and effect of decree.* See 10 C. L. 1096—A decree is not defective because of a failure to make general findings of facts upon which it is based.[21] The interlocutory decree determines the right to have partition.[22] The only effect of the final decree of the court under the Alaska statute is to confirm the report of the referees appointed to carry out the order of partition.[23] Where a partition decree

**13.** Right granted to flow land by all but one tenant. Subsequently partition brought and it was sought to set off this portion to tenant not joining in the grant for purpose of ousting grantee. Jeter v. Knight, 81 S. C. 265, 62 SE 259.

**14.** Moonshine Co. v. Dunman [Tex. Civ. App.] 111 SW 161.

**15.** Overturf v. Martin, 170 Ind. 308, 84 NE 531.

**16.** In an action for partition of mortgaged property, where it appears that the mortgage covers other property not included in the proceedings, the defendants in the absence of any demand by the mortgagee cannot set up by cross bill that the mortgage is a lien on both tracts of land and ask that the rights therein be determined. Dickson v. Dickson, 232 Ill. 577, 83 NE 1067.

**17.** Where there is in equity a lien upon property in favor of a third party, it is error to decree partition without impressing the lien thereon. Father deeded land to his children, the agreement being that he should have a certain sum of money secured by a lien on the property. Affell v. Affell, 235 Ill. 27, 85 NE 205. Under the Massachusetts statutes, on partition an attaching creditor's lien remains in full force after judgment of partition on the portion of the debtor, but this does not extend the time of the lien and it is discharged if the land is not seized within thirty days after judgment, and in case of sale the creditor may enforce his lien by a bill in equity brought within 30 days, but mere notice is insufficient. Whittemore v. Swain, 198 Mass. 37, 84 NE 307.

**18.** Tidball v. Schmeltz, 77 Kan. 440, 94 P 794.

**19.** Adams v. De Dominguez [Ky.] 112 SW 663.

**20.** Kindlea v. Kosub [Tex. Civ. App.] 110 SW 79. The court will so far as possible make partition in such manner as to preserve all equities without impairing the value of the property, thus where A purchased 10 acres of land of B which was part of a tract over which a suit by B was pending to quiet title, and A knew that C claimed a half interest in the property to whom such interest was later awarded on payment of half the purchase price, it was held in partition that C was entitled to half the land, A to 10 acres and B to the balance. Snowdon v. Anderson [Wash.] 98 P 610. Where a court erred in proceeding to decree partition without having all the parties before it, but the proof established that certain parties were entitled to designated shares and a defendant claiming title by adverse possession had no rights, the judgment giving such designated shares and against the claim of the defendant should stand. Hess v. Webb [Tex. Civ. App.] 113 SW 618. Where land over which two streams ran was partitioned and it appeared that a mill had been erected thereon and water was used from both streams to operate it, upon the allottment of the mill and the water power to one party he acquired an easement to use all water reasonably necessary to obtain full power. Moore v. Parker [N. C.] 62 SE 1083. Where a woman after marriage signs as surety a mortgage note secured by a mortgage executed by herself and husband jointly on land deeded to her by her husband before marriage upon partition of her husband's lands, she was properly relieved of any personal liability on the mortgage except as surety by making the mortgage a lien primarily on lands set apart to the heirs. Matheson v. Matheson [Iowa] 117 NW 755.

**21.** Rackemann v. Tilton, 236 Ill. 49, 86 NE 168.

**22.** Richardson v. Ruddy [Idaho] 98 P 842.

**23.** Manley v. Boone [C. C. A.] 159 F 633.

had been held to convey only an undivided half interest in a life estate because the deed contained no words of inheritance, a subsequent order modifying the decree declaring that the grantee took an undivided half of the fee subject to dower rights constituted a reformation of the deed entitling the grantee to a share of the proceeds of a sale proportioned to a fee interest instead of a life estate.[24] By statute in Virginia the decree vests the ancestor's title in the several co-owners without any conveyances,[25] and the statute is expressly made retroactive.[26] A decree of partition of land held by the decedent in fee passes a fee to the cotenants, although not so stating in terms.[27] Where partition of a decedent's land was brought and part of such land lay under water, the referee's deed of land along the water front carried title to the land under water, although not specifically mentioning or describing it.[28] Upon partition of land all easements appurtenant thereto pass without being mentioned in the decree in California.[29] One who under partition decree holds an enforcible contract for the sale of land is subject to taxation thereon.[30]

§ 5. *Commissioners or referees and their proceedings.*[31]—See 10 C. L. 1096.—The report of the referee merely presents the question as to whether the referee made the partition in accordance with the interlocutory decree[32] and may be confirmed, set aside or modified by the court.[33] Evidence directed to the question of whether the referee made partition in accordance with the decree should be given at the hearing of objections to the referee's report.[34] Under the Alaska statutes, the referees must make the division of land for the purpose of carrying out the order of partition.[35] In order to overthrow the valuation made by commissioners, it must be shown to be so grossly incorrect and unequal as to justify an inference of unfairness and improper motive.[36] A party dissatisfied with the rate at which land is recommended to be assigned to another party may shake the proposed assignment and bring the property to a sale by making and securing a bid materially in advance of that fixed by the commissioners.[37] Where there was a separate interest in timber on land in partition and it was deemed best to sell them together, it was proper to order a refer-

24. Harris v. Hibbard [N. J. Eq.] 71 A 737.

25. Wright v. Johnson, 108 Va. 855, 62 SE 948.

26. The retroactive effect cannot apply to vest in a husband title to lands allotted to him by partition but which belonged to his wife as heir. Wright v. Johnson, 108 Va. 855, 62 SE 948.

27. Where one of the parties in partition was granted an interest in land to which she held title under a deed void as to her but valid as to her husband, the decree could not be construed as intending to vest in her only the curtesy interest of her husband, but a title to an interest in the fee. Gillespie v. Pocahontas Coal & Coke Co., 162 F 742.

28. Especially as the intention of the heirs was made clear by the averment of the complaint that "the parties do not own any other land in common." Inter-City Realty Co. v. Newman, 112 NYS 481.

29. Rights in an irrigation ditch. Anaheim Union Water Co. v. Ashcroft, 153 Cal. 152, 94 P 613.

30. In re Boyd, 138 Iowa, 583, 116 NW 700.

31. **Search note:** See Partition, Cent. Dig. §§ 191, 192, 225-299; Dec. Dig. §§ 68, 69, 91-94; 30 Cyc. 247, 248, 267, 270-272, 276, 282, 317-320; 15 A. & E. Enc. P. & P. 815, 827.

32. Richardson v. Ruddy [Idaho] 98 P 842.

33. By statute. Richardson v. Ruddy [Idaho] 98 P 842.

34. Richardson v. Ruddy [Idaho] 98 P 842.

35. Under the Alaska statute as to partition providing for referees to make the division, the court cannot itself make the division of the property between the parties except in the indirect mode of confirming the report of the referees appointed for the purpose of carrying out the order of partition. Manley v. Boone [C. C. A.] 159 F 633.

36. Valuations sustained. Parrott v. Barrett, 81 S. C. 255, 62 SE 241. The return of commissioners cannot be set aside unless the valuation was so grossly incorrect and unequal as to justify an inference that the commissioners acted from an unfair and improper motive, and there must be a secured bid or offer to pay a higher price by a party in interest. Bowen v. True, 79 S. C. 394, 60 SE 943. A master's report advising sale of a waterworks plant in bulk held proper, as a waterworks plant can only be operated as a complete system. City of New Orleans v. Howard [C. C. A.] 160 F 393.

37. This does not apply where it is intended to partition in kind, and some of the parts may be assessed for the sake of equality. Parrott v. Barrett, 81 S. C. 255, 62 SE 241.

ence as to the relative value of land and timber.[38] Statutes usually regulate the fees of commissioners.[39]

§ 6. *Mode of partition and distribution of property or proceeds.*[40]—See 10 C. L. 1097 Partition in kind should be made where possible, giving due consideration to all interests,[41] but property which cannot be divided into metes and bounds without manifest injury to same may be sold and proceeds partitioned.[42] It is a mooted question whether in strict equity sale of real estate could be made in partition, but the universal practice has been to follow the statute and allow such sales in equitable partition.[43]

*Distribution.*See 10 C. L. 1097—If personal property is not susceptible of division in kind, then a distribution will be made which seems to be most nearly equivalent to possession in severalty.[44] This may be done by a sale and division of the proceeds [45] or by an actual division of the property or otherwise, as may be equitable.[46]

*Owelty.*See 8 C. L. 906

§ 7. *Sale and subsequent proceedings.*[47]—See 10 C. L. 1097—Where a sale is necessary, each cotenant is entitled as of right to have the property offered for sale upon such terms and conditions as will insure as nearly as may be the realization of its full value.[48] It is usually proper for a court to fix a minimum price in an order of sale,[49] but under the New York Code the court has no right to fix the minimum sale price without the consent of the parties.[50] A sale is not affected by the request for a dismissal of the action after sale by one who has acquired the interests of all the tenants.[51] Under the Kansas Code where one or more of the parties in partition elect to take the property at its appraisement the court may order the sheriff to give a deed to such parties upon payment to the others of their share of the appraised value; [52] or where none of the parties elect to take the property at the valuation, or where several elect to take the property at the valuation in opposition to each other, the court may direct the sheriff to sell as in sales of realty on execution.[53] Partition sale providing for payment of costs out of the proceeds is not a sale to satisfy costs, and void as against nonresident defendants cited by publication only.[54]

38. Rivers v. Atlantic Coast Lumber Corp., 81 S. C. 492, 62 SE 855.

39. Under Code 1904, § 3404, providing for compensation of commissioner of sale allowance of $200 attorney's fees to commissoners in addition to fees allowed by statute, for difficulties he overcame, service he rendered and increased price he obtained through vigilance, etc., held erroneous. Young v. Young [Va.] 53 SE 748.

40. **Search note:** See note in 8 Ann. Cas. 405.

See, also, Partition, Cent. Dig. §§ 211-225, 265, 273-328; Dec. Dig. §§ 76-79, 92-98; 30 Cyc. 233-235, 287, 238, 247, 248, 250-263, 270-272, 274, 276, 282, 287-289, 301-312; 21 A. & E. Enc. L. (2ed.) 1153, 1179, 1212; 15 A. & E. Enc. P. & P. 819.

41. Smith v. Stansel [Miss.] 46 S 538; Rivers v. Atlantic Coast Lumber Corp., 81 S. C. 492, 62 SE 855. A sale is only ordered where it will promote the interest of all parties better than a partition in kind. Where only two parties were interested and the land amounted to 100 acres, it was held erroneous to order a sale. Smith v. Stansel [Miss.] 46 S 538.

42. McNeeley v. Cincinnati, 7 Ohio N. P. (N. S.) 441. Under the facts it was held proper to order the sale of land and timber thereon in partition although one of the parties owned the timber separately. Rivers v. Atlantic Coast Lumber Corp., 81 S. C. 492, 62 SE 855. If property is incapable of division, commissioners should report that fact (Kindlea v. Kosub [Tex. Civ. App.] 110 SW 79), and, if court is satisfied with report, sale of property is ordered by court (Id).

43. Donaldson v. Allen, 213 Mo. 293, 111 SW 1128.

44, 45, 46. Beardsley v. Kansas Natural Gas Co. [Kan.] 95 P 859.

47. **Search note:** See note in 5 C. L. 908.

See, also, Partition, Cent. Dig. §§ 329-423; 450-456; Dec. Dig. §§ 99-112, 115-117; 30 Cyc. 237, 238, 257-312, 322; 21 A. & E. Enc. L. (2ed.) 1196; 15 A. & E. Enc. P. & P. 819.

48. Johnson v. Aleshire, 114 NYS 398.

49. City of New Orleans v. Howard [C. C. A.] 160 F 393.

50. Under the Code. Schmitt v. Weber, 113 NYS 449.

51. Stivers v. Stivers, 236 Ill. 160, 86 NE 209.

52, 53. Tidball v. Schmeltz, 77 Kan. 440, 94 P 794.

54. Menard v. MacDonald [Tex. Civ. App.] 115 SW 63.

*Notice.*[See 8 C. L. 1257]—Sale must be preceded by a notice required by statute [55] but personal notice is not always required.[56]

*Terms of sale of minor's interests.*[See 8 C. L. 1257]—The court may in its discretion appoint a guardian ad litem for a minor party to partition,[57] and where a partition sale is made of land, the share of an infant is not to be paid by the purchaser but remains a lien on the land till majority or until the infant's guardian gives bond to account for his share.[58]

*Conduct of sale.*[See 10 C. L. 1097]—Both plaintiff in a partition action and plaintiff's attorney may purchase at the sale. The latter, however, occupies a position of trust and confidence towards his client and cannot purchase against the latter's will.[59]

*Confirmation of sale.*[See 10 C. L. 1098]—A sale differs from an ordinary execution sale in that it must be reported to and confirmed by the court,[60] otherwise and until such confirmation neither the purchaser nor the estate is bound,[61] but upon confirmation is binding and conclusive upon the parties to the action.[62] The confirmation of a sale is discretionary with the court.[63]

*Rights and liabilities of purchasers or binders.*[See 10 C. L. 1098]—A suit in partition is lis pendens, and if the decree orders a sale the title of the purchaser is not affected by a transfer pendente lite.[64] Where the heirs are before the court, the fact that the will of the ancestor of one of the parties was improperly construed does not affect the title of a purchaser at partition sale.[65] A purchaser at partition sale acquires such an interest in the land as entitles him to be heard on a motion to set aside the sale,[66] but he cannot appeal from an interlocutory order setting aside the sale or failing to confirm it unless he was a party to the suit.[67] In Missouri partition sales stand on

55. Tidball v. Schmeltz, 77 Kan. 440, 94 P 794.

56. In partition sale under Ballinger's Ann. Codes & St., § 5583 (Pierce's Code, § 1228), personal notice of time and place of sale is unnecessary under Laws 1899, p. 88, c. 53, § 3. Graves v. Graves [Wash.] 100 P 164.

57. Adams v. Dominguez [Ky.] 112 SW 663.

58. Where the infant's share was paid into court and misappropriated by the commissioner, the statutory lien on the land still exists, and no right arises against the commissioners, for the payment into court was without authority despite the order of court. Commonwealth v. Catlin, 33 Ky. L. R. 1049, 112 SW 665.

59. Defendant cannot object to plaintiff's attorney becoming purchaser but plaintiff alone may do so, since there is no fiduciary relation between defendant and plaintiff's attorney. Graves v. Graves [Wash.] 100 P 164.

60. Thomas v. Elliott [Mo.] 114 SW 987; Brown v. Traul [Iowa] 119 NW 149.

61. Thomas v. Elliott [Mo.] 114 SW 987. Where in partition proceedings several minors were not represented and after sale all parties joined in admitting that they be made parties and requesting that the proceedings be ratified and confirmed against the objection of the guardian ad litem, held it was proper to set aside the sale under the Code. Brown v. Traul [Iowa] 119 NW 149.

62. By Code in New York. La Forge v. Latourette, 129 App. Div. 447, 114 NYS 146. Where many of records in partition proceedings have been lost, order of court ratifying commissioner's report showing latter's appointment to apportion estate among heirs, and report shows they divided estate among named persons as heirs who were parties referred to in decree, it being conceded that court had jurisdiction, proper parties will be presumed to have been before court and parties to whom estate was apportioned will be presumed to be legal heirs. Bursey v. Lyon, 30 App. D. C. 597.

63. La Forge v. Latourette, 129 App. Div. 447, 114 NYS 146. The chancellor is vested with a broad discretion in confirming sales of a minor's real estate but such discretion is still subject to review. Confirmation of the sale of a minor's interest in realty will not be refused, however, upon motion of those representing the minor on the ground of inadequacy of price alone, unless it clearly appears that a resale will realize for the minor a substantially larger sum. Stivers v. Stivers, 236 Ill. 160, 86 NE 209. A sale of real estate should be set aside where the interests of infants are involved, if the court can see that to refuse to do so will result in substantial injury to them. Id. Where a widow brought partition proceedings of realty left by her husband intestate and property worth $25,000 was purchased by her for $3,000, such sale was a constructive fraud on the minor children. Markley v. Camden Safe Deposit & Trust Co. [N. J. Eq.] 69 A 110.

64. Tidball v. Schmeltz, 77 Kan. 440, 94 P 794.

65. Adams v. De Dominguez [Ky.] 112 SW 663.

66, 67. Thomas v. Elliott [Mo.] 114 SW 987.

the same footing as execution sales; the purchaser buys at his peril.[68] If a purchaser refuses to take the property, it may be sold again and the first bidder is liable for any loss by summary proceedings without a jury.[69] Where a sale has been made under a partition judgment, it is not void under provisions of Nebraska Code although the judgment is reversed on appeal.[70] A purchaser cannot repudiate his bid for mere possibility of defect of title,[71] slight encroachment of adjoining buildings[72] nor other small defects susceptible of being adjusted by a pecuniary allowance.[73]

§ 8. *Appeal and review; vacation of sale.*[74]—See 10 C. L. 1098—A final decree in partition proceedings can be impeached only for fraud by the party who obtained it and not in a collateral proceeding.[75] That a better price may be obtained on resale is no ground for vacation,[76] and where a sale is made in accordance with the law properly advertised and regularly conducted, it will not be set aside because of the price realized.[77] Where no exception to a master's report advising sale is made, the report will not be reviewed.[78] Where parties have not been served with notice and are not in court, they waive nothing by failing to except to the report of the commissioners.[79] Where a court had jurisdiction to determine questions of title, it is conclusively presumed to have exercised its right to determine all such questions arising between the parties,[80] and its orders as to discretionary matters will not be interfered with.[81] Where parties consent to the decree upon which partition is made, the court will not set it aside on appeal by a consenting party.[82] The supreme court on appeal from the district court may direct the court as to the partition of lands.[83] A partition decree is not susceptible of correction without jurisdiction of all the parties to it.[84] The statutes of North Carolina provide that any party after con-

**68.** McNamee v. Cole [Mo. App.] 114 SW 46.

**69.** McNamee v. Cole [Mo. App.] 114 SW 46. Amount of liability of a purchaser failing to complete the sale is under the Missouri statute the difference between his bid and the bid at a subsequent sale, regardless of the different discription of the property. Id. A purchaser who fails to carry out his contract is not liable under the provisions of the Missouri statute if he was induced to bid by deceit on the part of the officer. Id.

**70.** Code, § 508. Kazebeer v. Nunemaker [Neb.] 118 NW 646.

**71.** A purchaser at partition sale cannot avoid his bid for land, title to which was derived more than 40 years previous by a deed of heirs, on the ground that there might have been an unknown insane or minority heir. Wanser v. De Nyse, 125 App. Div. 209, 109 NYS 310.

**72.** Removal after **sale.** Uebelacker v. Uebelacker, 112 NYS 527.

**73.** Land advertised as 102 ft. 5 inches deep, actually seven inches of such measure. Uebelacker v. Uebelacker, 112 NYS 527. Not because of a lien for taxes upon a part of the land for an allowance can be made for the part to which title fails. Id.

**74. Search note:** See Partition, Cent. Dig. §§ 362-374, 424-439; Dec. Dig. §§ 107, 113; 30 Cyc. 276-281, 324-333; 21 A. & E. Enc. L. (2ed) 1206.

**75.** Cannot be impeached in ejectment proceeding for alleged failure to show all of heirs interested were before court, etc. Bursey v. Lyon, 30 App. D. C. 597.

**76.** Under Ballinger's Ann. Codes & St., § 5583 (Pierce's Code, § 1228) and Laws 1899, p. 88, c. 53, subd. 2, § 6, fact that higher or better bid is submitted after sale is not statutory ground for setting aside or refusing confirmation of execution sale, but there must be some irregularity in the proceeding concerning the sale itself. Graves v. Graves [Wash.] 100 P 164.

**77.** Evidence of the conduct of a sale in which a less price was realized than at a prior sale considered and held not to warrant setting it aside as it was made in accordance with law, properly advertised and regularly conducted. Stivers v. Stivers, 236 Ill. 160, 86 NE 209.

**78.** City of New Orleans v. Howard [C. C. A.] 160 F 393.

**79.** Deputy v. Dollarhide [Ind. App.] 86 NE 344.

**80.** Gillespie v. Pocahontas Coal & Coke Co., 162 F 742.

**81.** Order by court to referees to sell for cash if possible to do so advantageously, otherwise forty per cent cash and mortgage back on balance, will not be disturbed on appeal particularly where matter is still in control of trial court and such further order as may be to parties' interest may be made. Brown v. North [Iowa] 119 NW 629.

**82.** Hiler v. Cox, 210 Mo. 696, 109 SW 679.

**83.** Formulate a scheme and not restricted to suggestion. Parrott v. Barrett, 81 S. C. 255, 62 SE 241.

**84.** Bill brought to reform commissioners deed. Complaints dismissed, on their own motion, three parties who were parties to the original partition. Well v. Gay [Miss.] 46 S 497.

firmation of partition shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion by "petition in the cause."[86] In Indiana any person not served with process may obtain a review of the judgment within one year after the confirmation of the judgment, and is not confined to the statutory remedy for the review of judgments generally.[86]

*Laches.* See 10 C. L. 1098

*Vacation of sale.* See 10 C. L. 1099

§ 9. *Voluntary partition.*[87] See 10 C. L. 1099—There may be a parol partition of lands provided there is sufficient performance to take the agreement out of the statute of frauds.[88] It is requisite to a valid parol partition that all the cotenants be parties to the agreement and to the act of partition [89] and the partitions must be clearly proven.[90, 91]

## PARTNERSHIP.


**§ 1. What Constitutes, 1206.** Essential Elements, 1207. Intent as Test, 1208. Illustrations, 1208. Formalities of Contract of Partnership, 1209. Stockholders in Illegal or Defective Corporations, 1210. Evidence, 1210. Partnership is a Mixed Question of Law and Fact, 1210. Partnerships as to Third Persons, 1211.
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F. Contribution and Indemnity, 1234.
**§ 8. Limited Partnerships, 1234.**


*The scope of this topic* is noted below.[92]

§ 1. *What constitutes.*[93] See 10 C. L. 1101—Partnership is a status resulting from contract.[94] To a limited extent and for certain specific purposes, a partnership is regarded as a legal entity with distinct powers and liabilities.[95] The relation may

**85.** Cannot bring an independent action to vacate on ground that made a party without knowledge or consent. Hargrove v. Wilson, 148 N. C. 489, 62 SE 520.

**86.** Remedy is not limited to provisions contained in Burns' Ann. St. 1908, § 646, but he may proceed under Id. § 1266. Deputy v. Dollarhide [Ind. App.] 86 NE 344.

**87. Search note:** See notes in 2 C. L. 1105; 57 L. R. A. 332; 3 L. R. A. (N. S.) 1082.

See, also, Partition, Cent. Dig. §§ 1-32; Dec. Dig. §§ 1-9; 30 Cyc. 153-169; 21 A. & E. Enc. L. (2ed.) 1131.

**88.** Mims v. Hair, 80 S. C. 460, 61 SE 968.

**89.** Elliott v. Delaney [Mo.] 116 SW 494.

**90, 91.** Evidence held insufficient to show parol partition. Elliott v. Delaney [Mo.] 116 SW 494.

**92.** This topic does not deal with matters peculiar to joint stock companies (see Joint Stock Companies, 12 C. L. 395), or joint adventures (see Joint Adventures, 12 C. L. 393). The effect of bankruptcy on the rights or liabilities of the partners is treated elsewhere (see Bankruptcy, 11 C. L. 383).

**93. Search note:** See notes in 6 C. L. 914; 10 Id. 1101; 16 L. R. A. 526; 17 Id. 549; 4 L. R. A. (N. S.) 427; 5 Id. 503; 22 A. S. R. 757; 80 Id. 828; 31 Id. 939; 34 Id. 839; 43 Id. 229; 48 Id. 62, 441; 115 Id. 400; 4 Ann. Cas. 267, 817; 10 Id. 135.

See, also Partnership, Cent. Dig. §§ 1-86; Dec. Dig. §§ 1-62; 30 Cyc. 349-767; 22 A. & E. Enc. L. (2ed.) 2, 13.

**94.** Baum v. Stephenson, 133 Mo. App. 187, 113 SW 225. Upon death of partner his heirs made statements to creditors and mercantile agencies that they were still connected with firm and liable for its debts. Held statements formed no new partnership between surviving partner and heirs, not amounting to formation of new contracts. It re Evans, 161 F 590.

**95.** A partnership under bankrupt act of

exist as to particular transactions although there is no general partnership.[96] A mining partnership may exist between persons although all of them may not have a direct or present interest in and to the properties themselves, if they have an interest in the working of the property or in carrying on the mining operations.[97]

*Essential elements.* See 10 C. L. 1103—The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit,[98] each contributing property or service,[99] and having a community of interest in the profits.[1] According to the modern conception of a partnership as a joint enterprise with a view to gain, it is not essential that there be an agreement to share losses, but such an agreement will be inferred from the agreement to share the profits.[2] While an agreement to share profits furnishes no test of partnership, the absence of such an agreement is conclusive as to the nonexistence of the relation.[3] Parties may engage in a joint enterprise without becoming partners, although each may receive a share in the profits;[4] there must be an interest in the profits as such, and not as a mere means of payment for labor or services performed,[5] or of money advanced.[6] Agency is not a test of partnership[7] nor is the fact that one party may bring suit in equity for an accounting.[8] No duration as to time need be specified in the agreement.[9] Voluntary associations owning property and conducted for the mere

1898 is a distinct entity and may be adjudged a bankrupt, irrespective of any adjudication against its individual members. Mills v. Fisher & Co. [C. C. A.] 159 F 897. A partnership may occupy position of servant or licensee and be barred thereby from maintaining forcible entry and unlawful detainer in same manner that an individual would be barred. Napier v. Spielmann, 127 App. Div. 567, 111 NYS 983.

96. Admission by defendant in action for accountinig that he was interested with plaintiff in particular transactions for purchase and sale of real estate, and division of profits, held sufficient to constitute partnership as to those transactions. Phillips v. Reynolds, 236 Ill. 119, 86 NE 193.

97. Parties to contract to obtain lease and work mining claims held to have interest in the business, although lease taken in name of only one of them. Bentley v. Brossard, 33 Utah, 396, 94 P 736.

98. Partnership indicates that parties are to engage in some definite business in which they are to share profits. Chappell v. Chappell, 125 App. Div. 127, 109 NYS 648.

99. Community of interest in partnership property an essential element. Cudahy Packing Co. v. Hibou [Miss.] 46 S 73.

1. Facts and circumstances held to show partnership. Ruggles v. Buckley [C. C. A.] 158 F 950. Contract whereby several persons united for purpose of raising funds to secure and work lease of mining claims and to share in profits if venture was successful, held to have all the characteristics of true partnership. Bentley v. Bossard, 33 Utah, 396, 94 P 736.

2. McAlpine v. Miller, 104 Minn. 289, 116 NW 583. Contract between several persons to secure and operate mining lease and to share in profits if successful, nothing said about losses, held prima facie to amount to agreement to share losses also. Bentley v. Brossard, 33 Utah, 396, 94 P 736.

3. Boreing v. Wilson, 33 Ky. L. R. 14, 108 SW 914. Profit sharinig is, however, strong evidence of partnership. Id.

4. That two persons were joint owners of patent on cigar tags and were jointly interested in manufacture and sale of a fixed number of such tags, and severally interested in subsequent sales, did not make them partners. Chicago Die & Elec. Co. v. Nathan, 141 Ill. App. 171.

5. That one party was to pasture stock furnished by another and so receive half the profits did not create partnership. Briggs v. Kohl, 132 Ill. App. 484. Where one furnished wagon and team and agreed to give defendant for his services one-half amount he could make with them in hauling sand, an agency merely was created. Butler v. State [Tex. Cr. App.] 111 SW 146.

6. Agreement whereby one advanced money to another to be used in hotel business and to be repaid by instalments, and thereafter profits to be equally shared, held not to constitute partnership. Cudahy Packing Co. v. Hibou [Miss.] 46 S 73. Defendant loaned money to partnership upon agreement whereby he was to receive certain percentages of profits as well as interest and to participate in management, but was expressly stated not to be partner. Held not liable as partner to credit of firm who had no knowledge of his interest. Russell v. Herick, 127 App. Div. 503, 111 NYS 974.

7. Boreing v. Wilson, 33 Ky. L. R. 14, 108 SW 914. Argument that relation of agency did not exist between managing partner and other partners, no authority having been given to employ labor, and that therefore no partnership existed, held to be without merit, since agency is the result and not the cause of partnership relation. Bentley v. Brossard, 33 Utah, 396, 94 P 736.

8. Since one who has a right to share in profits may bring suit for accounting, although not a partner. Cudahy Packing Co. v. Hibou [Miss.] 46 S 73.

9. If no time is specified, it is a partnership at will. Johnson v. Jackson [Ky.] 114 SW 260.

purpose of convenience or social relations, but not for the purpose of accumulating or sharing profits, are not partnerships.[10]

*Intent as test.* See 10 C. L. 1103—The intention of the parties is controlling on the question as to whether partnership exists.[11] This means that the parties must have intended to make such stipulations as in law constitute a partnership, and not that they intended the conclusion without regard to its necessary conditions;[12] if they have in fact stipulated for the rights of partners, an express agreement that they shall be partners is not necessary.[13] The intention is to be determined by the contract and the surrounding circumstances.[14]

*Illustrations* See 10 C. L. 1104 of the foregoing principles are cited in the appended note.[15]

**10.** Farmers' telephone company organized for convenience of owners without object of profit not partnership. Meinhart v. Draper, 133 Mo. App. 50, 112 SW 709. Combination of persons and corporations united for purpose of controlling live stock market, but which was not a combination of skill and capital embarked in definite business for mutual profit, nor could one member bind others, not a partnership. State v. Kansas City Live Stock Exch., 211 Mo. 181, 109 SW 675.

**11.** Evidence held to show that parties did not intend partnership in agreement to sell lands. Reed v. Engel, 237 Ill. 628, 86 NE 1110. Partnership is never created by implication or operation of law, apart from express or implied intention to constitute relation. Id. Agreement in form of lease whereby owner of land was to furnish use thereof and half necessary implements, the other to furnish other half and his services, gross returns to be shared equally, but owners of land retaining no control in management, held no partnership intended or created. Rogers v. Lawton, 162 F 203.

**12.** Error to permit jury to determine from all the evidence whether parties to agreement to secure and operate mining lease had intended to assume relation of partner. Bentley v. Brossard, 33 Utah, 396, 94 P 736.

**13.** Bentley v. Brossard, 33 Utah, 396, 94 P 736. Agreement to buy and sell land, whereby one was to furnish most of capital and take title in his name in trust, that before equal division of profits money advanced by each was to be returned with interest, such sums to be secured by lien on property purchased. Such arrangements were for purpose of buying several tracts of land and extended through a number of years. Held to create relation of partners. Boreing v. Wilson, 33 Ky. L. R. 14, 108 SW 914. Evidence as to participation in management, loss and profit held to show formation of partnership, although not intended and although member advancing money did not suppose himself liable for debts. Roberts v. Adams & Son Co., 33 Ky. L. R. 207, 110 SW 314.

**14.** Evidence admissible as to how parties themselves construed agreement whereby one, in consideration of a share in profits, procured credit for others to enable them to undertake a trading expedition to Alaska. Causten v. Barnette, 49 Wash. 659, 96 P 225. If agreement not in writing, intention of parties must be ascertained from their words and conduct. Briggs v. Kohl, 132 Ill. App. 484. Where it was sought by third party to have a certain agreement construed as forming partnership, provision therein that one party appointed the other "exclusive agents to sell" held entitled to weight as not showing intention to create partnership relation. Title Insurance & Trust Co. v. Grider, 152 Cal. 746, 94 P 601. Express statement in agreement to share profits, that participant was not partner nor to be so considered, held entitled to consideration on question whether partnership relation existed. Russell v. Herrick, 127 App. Div. 503, 111 NYS 974.

**15. Partnership created:** Evidence held to show partnership in merchandise business between judgment debtor and deceased. Feidler v. Bartleson [C. C. A.] 161 F 30. Contract where parties contemplated by joint efforts promotion of building dam for power purposes, each to use best efforts to secure means, each to have equal interest, and if one failed to raise sufficient money within one year he was to assign to the other, held partnership. Whitney v. Dewey [C. C. A.] 158 F 385. Where one deposited a certain sum of money with another to use in his business, and was to receive not below a certain percentage as profit, that principal was to be refunded at a fixed time, but nothing was said about sharing losses, held that a partnership as to profits existed. Clemens v. Crane, 234 Ill. 215, 84 NE 884. Project to collect money due Indians from federal government, whereby one was to obtain contracts, the other to press claims in congress, held a copartnership. Cowham v. Shipman, 151 Mich. 673, 15 Det. Leg. N. 150, 115 NW 991. Agreement whereby one was to manage real estate purchased by the other and to receive for such services one-half of net profits held to constitute a partnership agreement. McPherson v. Swift [S. D.] 116 NW 76. Agreement whereby certain persons associated for purpose of securing a patent held to be a partnership agreement. Gilbert v. Howard Automatic Mach. Co., 147 N. C. 308, 61 SE 176. Contract by terms of which defendants were to put into a dry goods business their services in selling goods and pay expenses, interpleader to furnish goods and share equally in profits, held to create partnership, although interpleader was to receive back cost of goods and was stated to have title thereto. Swofford Bros. Dry Goods Co. v. Diment, 132 Mo. App. 616, 111 SW 1196. Written contract to

*Formalities of contract of partnership.*[See 10 C. L. 1104]—A mere agreement to form a partnership does not in itself create a partnership; the parties must execute the contract before the relation arises.[16] Statutes providing for filing certificate containing the names of members of the partnership are to be strictly construed.[17]

form partnership in clothing business pending organization of corporation, one of parties to furnish capital and the others to give entire time for 3 years in consideration of fixed salary and share of profits and to be protected from liability by partner furnishing money, held not invalid for lack of consideration or mutuality. Doan v. Rogan [Ohio] 87 NE 263. Agreement that each partner should contribute an equal amount in cash, that net proceeds should be divided equally, that one of partners should be employed at fixed salary as manager, held to constitute partnership agreement. Fltzgerald v. Flynn [R. I.] 69 A 921. Where three persons united in an agreement to form a corporation and bought goods before corporation was organized, evidence held to show that they were partners. Meinhard, Schaul & Co. v. Bedingfield Mercantile Co., 4 Ga. App. 176, 61 SE 34. Evidence held to show that partnership was formed for operation of logging and lumber business. McAlpine v. Millen, 104 Minn. 289, 116 NW 583.

**No partnership created:** That land was purchased by several persons jointly but operated and held as by a partnership does not constitute a copartnership as to the land, parties being only tenants in common. Miller v. Ahrens, 163 F 870. Where partnership articles were signed by married woman and another already engaged in business with husband, but no contribution made, upon showing that transaction was intended to cover husband's interest, that no partnership of which she was a member was formed, the creditor of husband having knowledge of fact. Morreau Gas Fixture Co. v. Cox, 161 F 381. Where two persons entered into oral agreement to purchase certain real estate and one subsequently purchased it on his own account and took entire title in his own name held no partnership relation as to land had been formed. Mancuso v. Rosso [Neb.] 116 NW 679. Where telephone line was built for joint use of several parties, each building his own section, but no provision for profits being made, nor could one bind the others, relation of partners did not exist. Hancock v. Tharpe, 129 Ga. 812, 60 SE 168. Two persons agreed to purchase shares of stock in turnpike company with view of promoting electric road, each to pay for half the stock. They had themselves elected officers of turnpike company but failed in promotion plan, held that stock was not held as partners, nor did they carry on partnership business, all their acts with respect to stock being as officers of and for benefit of turnpike company. Baum v. Stephenson, 133 Mo. App. 187, 113 SW 225. Arrangement between real estate brokers residing in different counties, whereby brokers in E county were to get share of commissions for lands furnished by broker in H county and sold to E county parties, held not to be partnership as to deals made by H county broker with persons procured by him. Bass v. Tolbert [Tex. Civ. App.] 112 SW 1077. Syndicate organized for purpose of buying certain real estate, trustees to hold title, and shareholders to be subject to assessment, held that shareholders were tenants in common and not partners. Starkweather v. Dyer, 30 App. D. C. 146. Evidence held to show that partnership for purpose of operating sawmill was never consummated. Sheridan v. Reese [La.] 48 S 443. Where one party sold out entire business which he claimed had been abandoned by alleged partner, evidence held to show that no partnership relation existed but merely that of master and servant. Barbieri v. Messner, 106 Minn. 102, 118 NW 258. Where it was sought to hold defendant liable as member of partnership on note signed by one as "manager," evidence held insufficient to show that partnership existed. Garbarino v. Howard, 43 Colo. 530, 95 P 933. In an action by miners against mining corporation, finding that partnership relation existed between principal stockholders because they had voluntarily contributed funds for prosecuting mining operations, held error because not supported by evidence and in view of verified statement in original complaint that defendant was a corporation. Dodge v. Chambers, 43 Colo. 366, 96 P 178. Agreement whereby one is to manage hotel business under optional contract to purchase one-fourth interest, part of salary to be applied on purchase price, cannot be construed to be partnership agreement. Deitz v. Stephenson [Or.] 95 P 803. Complaint which merely alleges that parties became copartners in joint enterprise under an oral agreement, whereby parties were to contribute money to joint enterprise but fails to set out partnership enterprises, merely alleging purchase of notes, mortgages and real estate, held not sufficient to establish partnership. Chappell v. Chappell, 125 App. Div. 127, 109 NYS 648.

16. Agreement to enter into partnership in saloon business in pursuance of which one of parties advanced money to the other held not to have been executed so as to create partnership relation. State v. Brown [Mont.] 99 P 954. Where agreement between two persons stipulated that partnership contract should be in writing, this was a condition precedent to formation of partnership. Sheridan v. Reese [La.] 48 S 443. Partnership may be binding between parties in every respect, although no firm name is used and agreement secret. Ruggles v. Buckley [C. C. A.] 158 F 950.

17. Contracts made by partnership without complying with provisions for filing certificates not unlawful, unless legislative intent to make them void is clear and positive. Sutton & Co. v. Coast Trading Co., 49 Wash. 694, 96 P 428. Noncompliance with Laws 1907, p. 288, c. 145, providing for filing certificate setting forth true names of members of partnership, held not to render contract for purchase of merchandise made

*Stockholders in illegal or defective corporations.*[See 10 C. L. 1105]—Officers and stockholders in pretended corporations are liable to third parties dealing with them as partners.[18]

*Evidence.*[See 10 C. L. 1105]—Partnership may be shown from circumstances,[19] the conduct of the parties,[20] and by the contract.[21] Under proper circumstances secondary evidence of the contents of the partnership articles is admissible.[22] Admissions of a partner are competent as to the existence of the relation.[23] Statements made by one that another is his partner are admissible if made in the latter's presence.[24] Declarations of one party that another is his partner do not become admissible for the purpose of establishing the partnership even after prima facie evidence from other sources of its existence has been introduced.[25] Testimony by a member of a dissolved partnership as to conversions between the deceased partner and the surety on firm notes is competent in explanation of the partnership relation as against the surety.[26] A preponderance of evidence is sufficient to establish the relation.[27]

*Partnership is a mixed question of law and fact.*[See 10 C. L. 1105]—Whether partnership exists is a question of law to be determined from pleadings and proof.[28] When the facts are in dispute, the question is for the jury and their finding is conclusive.[29]

with partnership unenforcible against person dealing with partnership, such contract being made while no certificate yet filed. Id. Sections 1762 and 1764, Rev. Civ. Code, providing for filing certificate of names of members, are adopted from California where it is settled that no certificate is required where firm name is composed of surnames of all partners. Held that name "Bovee & Morfitt" is sufficient notice to all dealing with firm to easily ascertain identity, hence no filing necessary. Bovee v. De Jong [S. D.] 116 NW 83.

18. Mining corporation organized in Arizona for purpose of operating in Colorado held fraudulent as to both states, and officers liable as partners to creditors who printed prospectus. Journal Co. v. Nelson, 133 Mo. App. 482, 113 SW 690.

19. Advancement of money to be risked in the business with agreement to share profits raises presumption of partnership. Roberts v. Adams & Son Co., 33 Ky. L. R. 207, 110 SW 314.

20. Evidence that defendant paid money to enterprise, that he opened mail of the company, was to receive certain commissions on sales, that he endorsed checks in firm name by himself as treasurer, held sufficient to sustain finding that defendant was a member of the partnership. Diamond Rubber Co. v. Hans, 105 Minn. 249, 117 NW 504. Circumstances, such as making report to commercial agency in firm name, and entry in city directory as "Pender & Son," held sufficient to sustain finding that partnership existed. Bridgman v. Winsness, 34 Utah, 383, 98 P 186. On question of existence of partnership, contract of employment of servant signed by one party alone is competent evidence. Mansfield v. Mallory [Iowa] 118 NW 290. That parties themselves have referred to relation existing between them as being that of partnership is not decisive of the fact when not inferable from their agreements. Townsend v. Gregory, 132 Ill. App. 192.

21. Contract for railroad construction held to show joint interest in specified single enterprise and no partnership. Townsend v. Gregory, 132 Ill. App. 192. Instruction that best evidence of partnership is sharing between alleged partners of all the profits and losses held erroneous. Briggs v. Kohl, 132 Ill. App. 484.

22. Where existence of partnership between plaintiff's intestate and defendant was in issue, evidence of existence of partnership agreement in defendant's possession and secondary evidence of its contents was properly admitted, after defendant had testified that he did not have such agreement. Bertenshaw v. Laney, 77 Kan. 497, 94 P 806.

23. Oral admissions of defendant that partnership existed between himself and plaintiff's intestate were properly admitted on issue of existence of partnership in suit for accounting, although petition alleged that partnership agreement was in writing. Bertenshaw v. Laney, 77 Kan. 497, 94 P 805. Statement by member of firm to commercial agency signed by him, which referred to himself and son as "partners and officers," held admissible to show partnership between decedent and his son. Bridgman v. Winsness, 34 Utah, 383, 98 P 186.

24. Statement by one sought to be held as partner that partnership existed between himself and another held under evidence not to have been made in presence of latter so as to bind him by acquiescence. Bass v. Tolbert [Tex. Civ. App.] 112 SW 1077.

25. Refusal of instruction that declarations of party claiming to be partner could not establish partnership unless jury first found from other evidence that relation existed held error. Franklin v. Hoadley, 126 App. Div. 687, 111 NYS 300.

26. Culbertson v. Salinger [Iowa] 117 NW 6.

27. Briggs v. Kohl, 132 Ill. App. 484.

28. Allegation of partnership in stock speculation held to be merely conclusion of pleader. Baum v. Stephenson, 133 Mo. App. 187, 113 SW 225.

29. Mansfield v. Mallory [Iowa] 118 NW

*Partnerships as to third persons.* See 10 C. L. 1105—Where parties hold themselves out as partners, or permit others to do so, the person to whom they so represent themselves, if he is ignorant of their true relations,[30] may consider them so and hold them liable, regardless of whether the partnership relation in fact exists,[31] or of whether they intended it.[32] The rule is one of estoppel and applies only to the party who makes the representation or who benefits thereby.[33] A partnership as to third parties may be constituted by sharing in the profits.[34] Where a loan is made and is not to be repaid in any event, but is contingent upon the profits of the enterprise, the transaction will be construed as creating a partnership as against creditors.[35] One who has represented himself to be a partner under a mistake of fact may, by denying such representations, escape liability as a member of the firm for goods bought after such correction was made.[36] One dealing with an agent acting under an exhibited written authority cannot maintain an action against principals on ground of implied partnership.[37]

§ 2. *Firm name, trade mark, and good will.*[38] See 10 C. L. 1106—It is competent for the partners upon dissolution to agree that the firm name shall not be used by any of the members who may resume business for the purpose of identifying them with the former partnership.[39] A partner's interest in a trade mark used by the

290. Each case must depend upon its own circumstances and particular facts as to whether partnership exists or not. Butler v. State [Tex. Civ. App.] 111 SW 146.

30. Creditor cannot hold one liable on note as surviving partner when he knew that no partnership in fact existed, note being given under firm name but defendant specifically refusing to assume liability. Reiniger v. Barrie, 158 F 362.

31. Representation to bank cashier. Walker Bros. v. Skiliris, 34 Utah, 353, 98 P 114. Where three persons united for declared purpose of forming corporation and though one of their number bought goods before corporation was formed, held that by allowing him to buy goods and accepting them they held him out as a partner and were therefore liable as partners for goods so bought. Meinhard, Schaul & Co. v. Bedingfield Mercantile Co., 4 Ga. App. 176, 61 SE 34. Evidence that defendant was not a corporation and that titles of president, secretary and treasurer were merely assumed, that stationery and warehouse receipt sued on stated that defendant and deceased were proprietors, that they participated equally in management of warehouse, held prima facie to establish partnership relation as to third parties. Union Nat. Bank v. Griswold, 141 Ill. App. 464. Representations made by firm who advanced stock to another that latter was branch store and that they were interested in it held to constitute partnership as to latter's creditors, although there was no participation in profits. Townley Bros. v. Crickenberger [W. Va.] 63 SE 320.

32. Townley Bros. v. Crickenberger [W. Va.] 63 SE 220. Agreement that one advancing money should not be considered partner ineffectual. Buford v. Lewis [Ark.] 112 SW 963.

33. Statements by one that he is a partner with another, made out of latter's presence, inadmissible to charge latter as partner. Chicago Die & Elec. Co. v. Nathan, 141 Ill. App. 171.

34. One firm made a contract with another whereby it was to furnish goods for sale by latter and to share equally in the profits but to incur no liabilities. Held partnership as to creditors of the latter. Townley Bros. v. Crickenberger [W. Va.] 63 SE 320. Mere agreement that profit sharing association should be considered a corporation and represented as such did not prevent liability as partnership to one who had furnished goods to the association. Meinhard, Schaul & Co. v. Bedingfield Mercantile Co., 4 Ga. App. 176, 61 SE 34.

35. One advancing money toward sawmill enterprise in consideration of share of profits secured by mortgage on property held liable as partner, particularly as relation of agency was also found to exist between person advancing money and ostensible partner. Buford v. Lewis [Ark.] 112 SW 963. As against third persons, an express stipulation that one advancing money toward partnership purposes to be repaid by profits shall not be liable as a partner is ineffectual. Id.

36. One supposing himself member of defendant firm wrote letter to commercial agency stating he was a partner, but later notified them that he was not. Held not liable for goods bought by firm subsequent to notification to agency which was in this respect seller's agent. Rheinstein Dry Goods Co. v. McDougall [N. C.] 62 SE 1085.

37. Where plaintiff sold property to agent who exhibited written authority to act in favor of his principals, they were bound to deal with him as agent in accordance with written authority, regardless of whether he was a partner acting for firm or not. Taylor v. Sartorious, 130 Mo. App. 23, 108 SW 1089.

38. **Search Note:** See notes in 4 C. L. 912; 15 L. R. A. 462; 1 L. R. A. (N. S.) 722; 96 A. S. R. 610; 10 Ann. Cas. 812.

See, also, Partnership, Cent. Dig. §§ 87-94, 476, 477, 562, 563, 712; Dec. Dig. §§ 63-66, 228, 229, 256, 257, 310; 30 Cyc. 419-424, 606, 607, 641, 642, 697, 698; 22 A. & E. Enc. L. (2ed.) 75.

39. Upon dissolution of partnership under firm name "Slip Cover Company," it was

firm ceases upon his withdrawal and the exclusive right to its use remains in the continuing partner.[40] A sale of all the partnership effects by the surviving partner carries with it all rights to trade marks used by the firm.[41] The sale of the good will of a partnership binds all the members thereof.[42] After a sale of the good will, no one but the purchaser can lawfully use the firm name as an indication that his business is a continuance of the old firm.[43]

§ 3. *Firm capital and property.*[44] *In general.* See 10 C. L. 1106—The property of a partnership consists of all that is contributed to the common stock at the formation of the partnership and of all that is subsequently acquired thereby.[45] What is partnership property is usually a question of fact[46] and may be shown by competent evidence.[47] Although stock in trade of a partnership consists of real estate, it is as to the interest of the partners to be regarded as personal property.[48] Partnership rights do not attach to property or funds to be used in a contemplated enterprise until the agreement is executed.[49]

*How title is held.* See 10 C. L. 1107—The holders of the interest in a concern to which an option was executed may take as partners although the contract was made to them as a corporation.[50] A partnership may organize a corporation as a holding

agreed that none of parties should use this name in organizing a new business. Held use of name "New York Slip Cover Company" not a violation of such agreement. Woolf v. Seigenberg, 58 Misc. 322, 110 NYS 1087.

**40.** Continuing partner had exclusive right to employ trade mark used in manufacture of whisky. Bluthenthal v. Bigbie, 30 App. D. C. 118.

**41.** Bluthenthal v. Bigbie, 30 App. D. C. 118.

**42.** Where good will of partnership in laundry business was sold, individual partners could not engage in laundry business under a new organization within radius covered by contract. Southworth v. Davison, 106 Minn. 119, 118 NW 363. In action after dissolution to recover for good will of business, held that good will for which recovery could be had was such good will as might have been sold under judicial decree if business had been settled by a receiver. Moore v. Rawson, 199 Mass. 493, 85 NE 586. One who voluntarily sells his interest in a business, together with the good will, impliedly agrees that his relation to the business is ended, and cannot thereafter do anything to interfere directly with it as a property having a good will valuable to the purchaser. Id.

**43.** Moore v. Rawson, 199 Mass. 493, 85 NE 586.

**44. Search Note:** See notes in 27 L. R. A. 340, 449; 28 Id. 86, 129; 4 Ann. Cas. 604; 11 Id. 269.

See, also, Partnership, Cent. Dig. §§ 95-138; Dec. Dig. §§ 67-91; 30 Cyc. 424-453; 22 A. & E. Enc. L. (2ed.) 84.

**45.** McPherson v. Swift [S. D.] 116 NW 76. Trust deeds executed by firm to secure its indebtedness, conveying deeds and leaseholds owned by partnership during continuance of contract, held to cover only partnership property and not property owned by individual members. Wade v. Martin [Ala.] 47 S 340.

**46.** On formation of partnership by entry of new member, old firm was to contribute book accounts on their books "from" a certain date. Held in suit for accounting to mean old accounts which had accrued "prior to" such date. Schlicher v. Whyte [N. J. Err. & App.] 71 A 337. Fact that submerged lands could not be used in the wool business no evidence that partnership did not own them. In re Strang, 166 F 779. Where copartnership took lease of certain hotel property and thereafter incorporated and assigned the lease to the corporation, mechanic's lien claimant could not have lease declared firm property because there was no apparent change of possession, he not having been misled thereby. Rees v. Wilson [Wash.] 97 P 245. Where certain persons formed partnership for purpose of carrying on lumber business, and purchased a tract of land, taking title in one of members as trustee but making no attempt to carry on business, held partners owned land as tenants in common. Jones v. Way [Kan.] 97 P 437.

**47.** Memorandum in handwriting of deceased clerk of creditor of partnership as to what firm books contained is competent evidence as to what was partnership property, books being lost. In re Strang, 166 F 779. Character of ownership may be considered on question whether property is held in partnership. Chappell v. Chappell, 125 App. Div. 127, 109 NYS 648.

**48.** McPherson v. Swift [S. D.] 116 NW 76. Where copartnership carries on the business of purchasing real estate and building houses thereon with view of selling them, intention of the partners that there shall be a conversion of firm real estate into personal property for all purposes may fairly be implied, although such real estate be conveyed to them in individual interests. Rosenbaum v. New York, 59 Misc. 30, 109 NYS 775.

**49.** In trial for larceny of alleged partnership funds, held that property had not vested so as to protect defendant. State v. Brown [Mont.] 99 P 954.

**50.** Smith v. Texas & N. O. R. Co. [Tex.] 108 SW 819.

company for the partnership ventures.[51] Possession of one partner is the possession of all.[52] Payment to one partner for work done by the partnership is payment to the other partner.[53] Where partnership property is purchased in the name of one of the partners, he takes the title clothed with a trust for the partners.[54] The statute of limitations does not run against the recovery of funds held in trust by one partner for the firm until the trust is performed or is repudiated.[55] Money or property advanced to one in contemplation of the formation of a future partnership is held as a bailment and not as partnership property.[56]

*Partner's interest.* See 10 C. L. 1107—The interest of each member of a partnership in the property is his share of the surplus after payment of partnership debts and settlement of accounts between himself and the other partners.[57] A partner is not a creditor of the partnership for money invested by him as capital.[58]

§ 4. *Rights and liabilities as to third persons.*[59]—See 10 C. L. 1107—Each partner is individually liable for all the debts of the firm.[60] The general rule is that partnership debts are joint obligations;[61] but in Texas all partnership obligations are con-

**51.** Held that copartners associated for purpose of acting as brokers of mining claims might properly organize corporation to hold options to purchase property for sale of which copartnership was formed. Pearce v. Sutherland [C. C. A.] 164 F 609.

**52.** Where single partner recovers firm property from third person by replevin, his recovery is in the right of the firm and is the recovery of the firm. Anderson v. Stewart [Md.] 70 A 228.

**53.** On suit brought for services, defense that payment therefor had been made to copartners engaged in joint enterprise held good. Thacke v. Hernsheim, 115 NYS 216.

**54.** One of partners in power dam project had site conveyed to himself as an individual. Held he could not thereafter convey to a third party with notice so as to defeat partnership rights of copartner. Whitney v. Dewey [C. C. A.] 158 F 385. Where a party acquired water rights for irrigation purposes and interested two others in the project for purpose of raising funds, and conveyed his right to them in trust until they could be conveyed to a contemplated corporation, but one of members fraudulently acquired a lease in his own name, held that partnership relation existed and that rights were held in trust for originator of project. Beckwith v. Sheldon [Cal.] 97 P 867. Conveyance of land to partners in consideration of construction of railway held to be conveyance to partnership, members of which held title thereto in common as partnership property for use and benefit of firm. Mann v. Paddock, 108 Va. 827, 62 SE 951. Member of partnership gave $250 to a third person to use in paying firm debts, and also assigned to him a mortgage which was his individual property to be also used to pay such debt. Thereafter a settlement was made between parties whereby the third person released all demands as to the partner in consideration of such mortgage and a cash payment but did not pay firm debts with the $250. Held that so far as this agreement related to firm property it was made by partner as trustee for firm. Rosenberg v. Schraer, 200 Mass. 218, 86 NE 316.

**55.** Johnston v. Johnston [Minn.] 119 NW 652.

**56.** Where prosecuting witness advanced money to defendant to be used in contemplated partnership business, which latter converted to his own use, held guilty of larceny. State v. Brown [Mont.] 99 P 954.

**57.** Jones v. Way [Kan.] 97 P 437. Assignment of partner's interest in judgment in favor of firm, to procure which copartner had advanced money, carried only what remained after copartner was reimbursed for sums advanced by him. McManus v. Cash [Tex.] 108 SW 800. While trustee of a bankrupt partner may prove a claim for advancements made by such partner to the firm against the estate in bankruptcy of the partnership, such claim is not entitled to share with other partnership creditors in the estate, but only in the surplus, if any, remaining after their claims are paid in full. In re Rice, 164 F 509.

**58.** As against creditor of partnership, a member cannot claim any share of the property as capital invested by him as being a prior debt. Capital Food Co. v. Globe Coal Co. [Iowa] 116 NW 803. One partner who after dissolution furnished money to pay for boiler and engine bought by firm on instalments could not thereby deprive firm of any right or expectancy which would become partnership property, since relation of firm to property was the same as before and firm's liability to pay instalments was not thereby released. Eureka Knitting Co. v. Snyder, 36 Pa. Super. Ct. 336.

**59. Search Note:** See notes in 18 A. S. R. 601; 67 Id. 32.

See, also, Partnership, Cent. Dig. §§ 190-598, 624-678; Dec. Dig. §§ 125-258, 277-296; 30 Cyc. 477-650.

**60.** Where one partner paid half of firm note and creditor's receiver, who was also partner in firm, turned note over to partner who made the payment, held that agreement of receiver to settle his share from fees received by him in his official capacity did not amount to payment and individual liability for whole amount continued. Dodson v. Alphin [Ark.] 115 SW 371. Partner who makes contract of purchase in firm name through a broker is an undisclosed principal as to seller. Anderson v. Stewart [Md.] 70 A 228.

**61.** One sued for a partnership debt indi-

sidered as being joint and several.[62] In equity all partnership debts are to be deemed joint and several.[63] As to matters in which a member might bind the firm, if he contracts in his individual capacity, he alone is liable.[64] Where a partnership assumes a contract previously made by a partner, it cannot thereby affect the rights of the other party thereto.[65]

(§ 4) *A. Power of partner to bind firm.*[66] *In general; contracts.* See 10 C. L. 1107 The act of one partner binds the partnership if within the actual or apparent scope of his authority.[67] A partner may bind the firm by giving a warranty,[68] or by making an assignment of an account due the firm.[69] One holding partnership property as trustee for the partnership may bind the partnership by conveyance of the title.[70] The limitation that a partner cannot bind a dormant partner by acts outside the scope of the partnership does not apply as to third persons dealing with the ostensible members.[71] The power conferred by law on one partner to act as the agent for the firm may be limited by the other members.[72]

*Partnership bills and notes.* See 10 C. L. 1109—One partner may bind the firm by executing a note under seal without authority from the other partners, except such as comes from the relation of partners.[73] A firm note given without authority,[74] or for

vidually may defend on ground that copartner is not joined. Erskine v. Russell, 43 Colo. 449, 96 P 249.

62. Individual member of dissolved firm was properly sued severally for loss of goods which firm before dissolution agreed to transport. Webb v. Gregory [Tex. Civ. App.] 108 SW 478.

63. Bill charging that firm and individual members wholly failed to perform a contract with complainant alleges good cause of action against administrators of deceased partner. United States v. Hughes, 161 F 1021.

64. Evidence held to show that accountant who balanced partnership books was employed by partner individually and not by firm. Konheim v. Meryash, 115 NYS 96.

65. One who had a contract to deliver sand formed a partnership with another to carry it out but continued to deal with vendee as an individual on suit by firm for purchase price. Held that formation of partnership did not affect vendee's right to recoup for failure to deliver according to contract. Posey & Co. v. West Const. Co. [Miss.] 46 S 402.

66. **Search Note:** See notes in 6 C. L. 925; 41 L. R. A. 650; 51 Id. 463; 3 L. R. A. (N. S.) 221; 31 A. S. R. 754; 48 Id. 438; 58 Id. 90; 88 Id. 322; 6 Ann. Cas. 129.

See, also, Partnership, Cent. Dig. §§ 190-300; Dec. Dig. §§ 125-164; 30 Cyc. 477-533; 22 A. & E. Enc. L (2ed.) 135.

67. Evidence held to show that firm was bound for payment of board of both partners and their men by contract between one of partners and hotel keeper. Gessner v. Roeming, 135 Wis. 535, 116 NW 171. On suit by firm of osteopaths to recover for services, defendant pleaded set-off for money advanced to one of members to be repaid by professional services of firm. Held act of partner binding on firm. Winchell v. Powell, 43 Colo. 264, 95 P 957. Testimony that account against partnership was presented to one of members and that he acknowledged its correctness is prima facie proof of correctness of account, and in case of denial of account by partnership is sufficient to make an issue of fact for jury. Dolvin & Co. v. Hicks, 4 Ga. App. 653, 62 SE 95. Evidence that defendants were engaged in business of buying up claims against third party warrants conclusion that each partner had authority to bind firm by such purchase. Israel v. Finkelstein, 74 N. H. 604, 69 A 576.

68. In suit on warranty plaintiff alleged that he bought a jack under misrepresentations made by one of defendant partners. Held that other partner was equally responsible. Chestnut v. Ohler [Ky.] 112 SW 1101.

69. Kieselstein v. Shoebel, 110 NYS 907.

70. Where one partner held title to partnership real estate and authorized another partner to convey as attorney in fact the premises so held, her action was binding upon other partners, they having the right to an accounting for proceeds. Bond Realty Co. v. Pounds, 112 NYS 433.

71. Where ostensible partners in lumber firm signed builder's bond as surety, firm was liable thereon although their act was unauthorized as to dormant partner, the latter being estopped to repudiate their contract. Kneisley Lumber Co. v. Edward B. Stoddard Co., 131 Mo. App. 15, 109 SW 840.

72. Where alleged partner showed written authority from principals, one dealing with him could not rely upon any other authority than that shown by written instrument. Taylor v. Sartorious, 130 Mo. App. 23, 108 SW 1089.

73. Promissory note under seal executed by agent of partnership at instance of one of members held binding on firm although not expressly authorized by the other member of firm. Merchants' & Farmers' Bank v. Johnston, 130 Ga. 661, 61 SE 543.

74. Evidence that defendant in suit upon firm note issued by his partner without authority and for his own use engaged specifically to pay such note and subsequently included it as firm note in bankruptcy schedule held to show ratification. Feigenspan v. McDonnell, 201 Mass. 341, 87 NE 624.

purposes outside the scope of the partnership business, is binding on the members of the firm if they ratify its issuance.[75] Such a note will not bind the firm where the holder had notice that it was given without authority.[76] Even though there be private limitations to the authority of a member of a commercial firm to execute firm's notes, they cannot affect a holder who takes the notes without knowledge of them,[77] unless distinct notice is given that the firm will not be liable for such unauthorized acts.[78] But a creditor who takes partnership security in discharge of a claim against an individual partner cannot hold the firm liable thereon without showing that the partner had authority to give it.[79] When a partnership conducts business in the name of one partner, paper signed by such partner is equivocal, and prima facie is the individual obligation of the signer but may be proved to have been a partnership transaction.[80] A partnership note executed by one partner and not ratified by the other will not furnish the basis for an action as against the latter partner where he was induced to enter firm by fraudulent representations as to amount of indebtedness and note was given to secure such indebtedness.[81]

*Notice to partner is notice to firm.*[See 8 C. L. 1271]—Notice to one partner is notice to the other of any transaction occurring after formation of partnership.[82]

*Liability for torts and crimes.*[See 10 C. L. 1109]—Partners are jointly and severally liable for torts.[83] While false statements made by one partner render the other members of the firm pecuniarily liable therefor to third persons dealing with the firm, such false statements when made without the knowledge of a copartner will not

**75.** Whether accommodation paper given by partnership to cover overdraft was authorized by defendant held properly a question for jury. Hunter v. Allen, 127 App. Div. 572, 111 NYS 820.

**76.** Evidence held to show note was accommodation paper and that assignee knew it. King v. Mecklenburg, 43 Colo. 316, 95 P 951. Creditor who with knowledge that debt was an individual one took firm note as security could not maintain an action against the other partner. United States Exch. Bank v. Zimmerman, 113 NYS 33.

**77.** Firm liable for note executed by partner for his individual use without knowledge or authority of other partners, the creditor taking note in due course without notice. Feigenspan v. McDonnell, 201 Mass. 341, 87 NE 624. Money paid on check drawn by partner in firm name and used by him for gambling purposes, payment of which was refused by drawee, may be recovered where bank that cashed check did not know that partner had no authority to draw it or that it was drawn for purposes outside scope of firm business. Comas Prairie State Bank v. Newman [Idaho] 99 P 833.

**78.** In an equal partnership wherein one member was to furnish the funds, the other to carry on the business, and the latter so informed bank upon which firm drew, he was liable for firm notes drawn by partner without his knowledge to cover overdrafts, since notice not sufficient to notify bank that firm would not be liable therefore. Dodson v. Baskin [Ark.] 114 SW 922.

**79.** One partner pledged note as security for his individual debt and endorsed firm name thereto after dissolution. Held that creditor was estopped to recover against other partner by failure to make inquiry as to authority. United States Exch. Bank v. Zimmerman, 113 NYS 33.

**80.** Evidence of dormant partner as to notes signed by himself and deceased ostensible partner and paid after latter's death held incompetent, where dormant partner was administrator as to any transaction occurring prior to death of partner. Kempton v. People, 139 Ill. App. 563.

**81.** Since note was given for indebtedness existing prior to entry into firm and release would leave plaintiff on note in same position. Beene v. Rotan Grocery Co. [Tex. Civ. App.] 110 SW 162.

**82.** Evidence held insufficient to show that partnership existed at time alleged partner could have been made chargeable with notice of an unrecorded deed. Miller v. Jones, 33 Ky. L. R. 848, 111 SW 295. In action for damages to stock shipment handled by partnership composed of three railway companies, it was sufficient to file written statement of claim with either of partners. Texas Cent. R. Co. v. Pool [Tex. Civ. App.] 114 SW 685. Notice to partner of failure of consideration in promissory note given to firm. Baskins v. Valdosta Bank & Trust Co. [Ga. App.] 63 SE 648.

**83.** Where partnership existed between three railway companies for handling stock shipments, they were jointly and severally liable for negligent handling of such shipments, irrespective of where and upon which of defendant's lines negligence occurred, notwithstanding clause in shipping contract by which each sought to confine liability to its own line. Tex. Cent. R. Co. v. Pool [Tex. Civ. App.] 114 SW 685. Negligence of one of firm of physicians resulting in injury to unconscious patient upon removal from operating room imposed liability upon other partner also. Haase v. Morton, 138 Iowa, 205, 115 NW 921.

prevent the latter from obtaining a discharge in bankruptcy as against the objection of a third party who became a creditor through such statement.[84]

(§ 4) *B. Effect of note given by partner for firm debt.*[85]—See 10 C. L. 1110

(§ 4) *C. Commencement and termination of liability.*[86]—See 10 C. L. 1110—A retiring partner remains liable to creditors for debts incurred by the continuing partner after dissolution, unless proper notice of dissolution is given.[87] Creditors existing at the time of dissolution,[88] and former customers of the firm, must have actual notice.[89] Constructive notice is sufficient as to subsequent creditors [90] and customers who have had no previous dealings with the firm.[91] A firm cannot avoid liability as a firm for goods bought because they have become incorporated under state law, when seller had no actual notice of the change into a corporation and when there is no constructive notice by recordation of the charter.[92] A retiring member of a mining partnership remains liable for wages due miners while he was a member, and for wages accruing after his retirement where miner had no notice of change in partnership.[93] Whether the creditor has had notice of dissolution is a question of fact.[94] Actual notice of dissolution and that the business will continue in the name of one of the former partners is sufficient to put a creditor of the firm upon inquiry as to the party's assumption of firm debts without further notice of the exact terms of dissolution.[95]

*Novation.*See 10 C. L. 1111—An assumption of firm liabilities by the continuing partner will release the retiring partner only when the creditor accepts the former as his sole debtor.[96] If after notice of dissolution a third party extends credit, a con-

**84.** Hardie v. Swafford Bros. Dry Goods Co. [C. C. A.] 165 F 588.

**85. Search Note:** See notes in 4 L. R. A. 800; 14 L. R. A. (N. S.) 1231; 1 Ann. Cas. 401.

See, also, Partnership, Dec. Dig. § 173; 22 A. & E. Enc. L. (2ed.) 161.

**86. Search Note:** See notes in 4 C. L. 917; 23 L. R. A. 111; 25 Id. 645; 28 Id. 161; 29 Id. 681; 46 Id. 481; 1 L. R. A. (N. S.) 650; 2 Id. 256; 9 Ann. Cas. 243.

See, also, Partnership, Cent. Dig. §§ 348, 471-598, 624-678; Dec. Dig. §§ 224-258, 277-296; 30 Cyc. 603-650, 659-680; 22 A. & E. Enc. L. (2ed.) 173.

**87.** Straus, Gunst & Co. v. Sparrow & Co., 148 N. C. 309, 62 SE 308; Brewer v. Johnson [Ark.] 112 SW 364. Where after dissolution of the partnership one of the members drew in firm name upon brokers for horses shipped, which draft was cashed by plaintiff but was dishonored by drawees, held that since no notice of dissolution had been given except to drawees, the retiring partner would have remained liable if suit had been against him; consequently plaintiffs who cashed draft without notice could recover against drawees. Huston v. Newgass, 234 Ill. 285, 84 NE 910.

**88.** Batson v. Thompson Land & Lumber Co. [Miss.] 45 S 985.

**89.** Actual notice to plaintiff's salesman held sufficient. Straus, Gunst & Co. v. Sparrow & Co., 148 N. C. 309, 62 SE 308. Where creditor claimant has been customer of former firm, particularly where he resides at a distance, notice of dissolution by publication is not sufficient unless copy sent to him. Id.

**90.** Deed of conveyance of partnership property and its proper record in land books of county was proper evidence as circumstance to show notice, but was not conclusive in itself. Batson v. Thompson Land & Lumber Co. [Miss.] 45 S 985.

**91.** Straus, Gunst & Co. v. Sparrow & Co., 148 N. C. 309, 62 SE 308.

**92.** Where persons sued as members of partnership for goods bought, they were liable as partners up to time when notice of change into corporation was given to creditor. Rice v. Patterson [Miss.] 46 S 255.

**93.** Where retired partner in mining partnership was sued for wages assigned to plaintiff, held there could be no recovery as against him on claims of men who had commenced work after partner had retired from firm, but recovery allowed to men continuing work without notice of retirement. Kelley v. McNamee [C. C. A.] 164 F 369.

**94.** Where creditor sold logs to corporation operating sawmill, supposing that former partnership still existed, when in fact latter had conveyed its interest to corporation, held question for jury whether creditor had knowledge of conveyance. Batson v. Thompson Land & Lumber Co. [Miss.] 45 S 985.

**95.** Creditor of dissolved firm had notice that business would be continued in name of former partner, and thereupon gave him further credit as an individual. Held the other partner was liable as surety for amount owing before dissolution only. Bryant v. Settel, 113 NYS 947. Evidence held insufficient to show dissolution by agreement as against creditor where partners continued to carry on business without apparent change. Kelley v. Hanes, 238 Ill. 163, 87 NE 282.

**96.** Where continuing partner assumed firm debts in consideration of conveyance to him of partnership property, an action brought by a creditor on this agreement is

tract of assumption of the firm debts is binding as to him although without consideration.[97]

(§ 4) *D. Application of assets to liabilities.*[98]—See 10 C. L. 1111—The primary fund for the payment of firm debts is the firm property.[99] Partnership debts must be satisfied before a creditor of one of the partners can claim any part of the assets of the firm.[1] There is no lien in favor of partnership creditors as against individual creditors before the partnership property is placed in administration.[2] But where the partnership is secret, a creditor of the ostensible owner may satisfy his debt out of the firm property, regardless of the interest of the secret partner.[3] Partnership funds in the hands of a special partner are subject to the firm debts only when the firm creditors have exhausted the remedies against the general partners.[4] The equity of partnership creditors to partnership property must be worked out through the equity of the partners.[5]

§ 5. *Rights of partners inter se. Duty to observe good faith.*[6]—See 10 C. L. 1111—The first duty of one partner to the other is the exercise of perfect good faith.[7] The

sufficient to show acceptance. Mueller Lumber Co. v. McCaffrey [Iowa] 118 NW 903. Agreement subsequent to dissolution whereby partner who had issued unauthorized firm note agreed to pay the same not binding on creditor who was not a party thereto and had no knowledge of it. Felgenspan v. McDonnell, 201 Mass. 341, 87 NE 624.

**97.** The Scrantonian v. Brown, 36 Pa. Super. Ct. 170.

**98. Search Note:** See notes in 1 A. S. R. 593; 7 Id. 377; 43 Id. 364; 57 Id. 436; 3 Ann. Cas. 151.

See, also, Partnership, Cent. Dig. §§ 308-347; Dec. Dig. §§ 176-190; 30 Cyc. 536-555; 22 A. & E. Enc. L. (2ed.) 186.

**99.** Member of partnership gave $250 to third person for use in paying firm debts. He also assigned his individual mortgage for same purpose. Held the $250 should first have been applied to firm debts and only after that was exhausted should mortgage have been applied, and that balance belonged to partner and not to firm. Rosenberg v. Schraer, 200 Mass. 218, 86 NE 316. Creditor of partnership could follow partnership property converted by a partner, although as between the partners the latter would be entitled to the property so converted. Capital Food Co. v. Globe Coal Co. [Iowa] 116 NW 803.

**1.** Judgment against one member of firm could not be set off against judgment in favor of firm where such latter judgment had been assigned to third party in payment of partnership indebtedness. McManus v. Cash [Tex.] 108 SW 800; Sargent v. Blake [C. C. A.] 160 F 57. Individual creditors of members of an insolvent partnership received land taken in exchange for partnership stock. Held fraud on other creditors, transfer being made to pay personal instead of partnership debts. Clark-Jewell-Wells Co. v. Tolsma, 151 Mich. 561, 15 Det. Leg. N. 1000, 115 NW 688.

**2.** Insolvent partner assumed partnership debts in consideration of conveyance to him of all partnership property, and thereupon paid his individual creditors. Held such conveyance created no lien in favor of partnership creditors. Sargent v. Blake [C. C. A.] 160 F 57.

**3.** Secret contract of partnership by which silent partner furnished goods to defendant who was to sell them and share in profits held not to be a defense on attachment of goods by creditor of ostensible owner. Swofford Bros. Dry Goods Co. v. Diment, 132 Mo. App. 616, 111 SW 1196.

**4.** Where it was sought to hold both general and special partners for firm debt and special partner had after expiration of partnership withdrawn his share of capital, held action would not lie against special partner in absence of showing that remedies had been exhausted against general partner. Fuhrmann v. Von Pustau, 126 App. Div. 629, 111 NYS 34.

**5.** The equity of a partnership creditor to firm property depends on the right which each partner has to have the firm property applied to the payment of firm debts, and when such right is waived the equity of the firm creditor ceases. Crane Co. v. Dryer [Cal. App.] 98 P 1072. Where the members of partnership consented to have partnership property applied to the individual debt of one of members, a firm creditor could not object, there being no law forbidding preference. Id.

**6. Search Note:** See notes in 4 C. L. 919.

See, also, Partnership, Cent. Dig. §§ 114-189; Dec. Dig. §§ 70-124; 30 Cyc. 438-477; 22 A. & E. Enc. L. (2ed.) 110.

**7.** Secret purchase by one partner of power-dam site for promotion of which partnership was formed held willful fraud as to other partner. Whitney v. Dewey [C. C. A.] 158 F 385. S. and three others formed partnership to buy land, S. to buy the land with funds furnished by others and to pledge property so bought for benefit of firm. S. secretly bought the lands and then represented to the others that he had paid a greater price than was actually the case, thereby intending to keep difference for his own benefit, and also refused to pledge lands according to agreement. Held in suit for dissolution and settlement that other partners were entitled to decree of sale of such lands and to have money advanced repaid to them. Fouse v. Shelly [W. Va.] 63 SE 208. Defendant secured option on 1,600 acres of land and formed partnership with plaintiffs in order to procure

duty to oberve good faith between the partners applies as well to their negotiations in the formation of the partnership as to any subsequent transaction between them.[8] A settlement obtained by deception practiced by one partner upon his copartner does not bind the latter.[9] Copartners cannot, by manipulation, so change partnership deals as to deprive one member of his rights as a participant therein.[10] During the continuance of the relation one partner cannot engage in a competing business,[11] but in the absence of an agreement to the contrary one partner is not precluded from operating individually the same kind of business as that in which the firm is engaged and in the same territory.[12] A member of a partnership may avail himself of information obtained in the course of the partnership business without liability to account to the partnership, if he uses this information for purposes wholly without the scope of the partnership business.[13] A retiring partner cannot use trade secrets of which he acquired knowledge during his connection with the firm, for the purposes of competition.[14] Where both the firm and one of the partners are creditors of the same person, the partner must apply a general payment made to him upon the firm account.[15]

funds to close the deal, they to share equally in the land. He represented to them that there were only 850 acres and upon buying the land had vendor make two deeds, one for 845 acres to the firm, the other to himself individually. Held on suit by copartners that lands conveyed to defendant individually were held in trust for firm. Azbill v. Wathen [Ky.] 115 SW 756. Where one partner sold the partnership property but fraudulently represented to his partner that selling price was lower than was actually the fact and bought partner's interest in accordance with such misrepresented value, the measure of damages was difference between amount received from the partner and one half of amount paid by purchaser. Finn v. Young [Wash.] 97 P 741. Evidence held to show partnership books faithfully kept and honest accounting made. McAlpine v. Miller, 104 Minn. 289, 116 NW 583.

**8.** Partner, who in negotiation of agreement of partnership made fraudulent representations as to his financial standing and as to his willingness to pledge property to be bought for firm's benefit, held responsible to partners in accounting and contract so made ordered rescinded. Fouse v. Shelly [W. Va.] 63 SE 208.

**9.** Settlement of business and acceptance of profits, procured by false representations as to price paid for lands in which firm dealt, not binding. Phillips v. Reynolds, 236 Ill. 119, 86 NE 193. Where one is induced to buy an interest in a partnership and assume its debts by fraudulent representations as to amount of indebtedness, he may rescind upon discovery of the fraud. Beene v. Rotan Grocery Co. [Tex. Civ. App.] 110 SW 162.

**10.** Where plaintiff and others were partners in brokerage business, his rights to profits growing out of sale of stock were not lost because one member procured option in his own name and became himself the purchaser, he and his associates being still procuring cause of sale, and commission became due to all. Boqua v. Marshall [Ark.] 114 SW 714. Copartnership was formed to deal in mining claims and corporation was organized as holding company. One of partners acquired control of majority of latter's capital stock and proceeded to oust his copartners from participation in corporate affairs, repudiated partnership agreement, sold capital stock and procured corporation to acquire title to claims in question. Held complaint entitled to settlement and accounting. Pearce v. Sutherland [C. C. A.] 164 F 609.

**11.** Partnership was formed between two rival dry goods firms for purpose of eliminating competition. One of partners sold his interest to copartners to be paid by instalments but partnership relation to remain in force until all payments made, except as modified by the agreements of sale one of which was that selling partner need not give his time to firm business. Held that injunction would lie to restrain him from entering into competing business. Reber v. Pearson [Mich.] 15 Det. Leg. N. 1111, 119 NW 897.

**12.** One partner in telephone business constructed an individual exchange in competition to that operated by firm. Held in absence of contract forbidding it, not liable to other partner for damages to his individual lines. Bishop v. Riddle [Tex. Civ. App.] 113 SW 151.

**13.** Where defendant and several others entered into agreement to make two expeditions to prospect for mineral, they to share alike in case of success, defendant on the last expedition obtained information leading to discovery of valuable mine during a third expedition undertaken by himself and others who were not engaged in first expedition, held partnership limited to first two expeditions and discovery made during third expedition not partnership affair. McGahey v. Oregon King Min. Co., 165 F 86.

**14.** Injunction issued to restrain former member of partnership from disclosing formulae for cure of liquor habit, knowledge of which was acquired by defendant while member of firm. Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 NE 132.

**15.** Where partner who sold land held in trust by him for firm together with land

*Participation in management.*[See 10 C. L. 1112]—Each partner has the right to share in the management of the business[16] although he has not paid in all of his share of the capital,[17] and may, without consulting his copartner, bind him in all matters within its scope.[18] What is within the scope of the partnership business is usually a question of fact.[19] Because a mining partnership is not founded on the delectus personae, the powers of members of such a partnership are limited to the performance of such acts in the name of the partnership as may be necessary to the transaction of its business.[20] If a partner bind his copartner in matters not authorized by the partnership agreement, the remedy of the latter is in an action for an accounting.[21] Although one partner may be vested with the actual management of the business, where the other partners actively participate therein, they are equally responsible for results and in absence of fraud cannot hold the managing partner liable as trustee.[22] In the absence of express agreement, it is the duty of each partner to devote his time and ability to the firm so far as is reasonably necessary.[23] A partner may make a binding contract for the sale of his interest,[24] but he cannot thereby introduce a new

owned by him individually, his estate was required to apply partial payments first to firm account. Boreing v. Wilson, 33 Ky. L. R. 14, 108 SW 914.

16. In every mercantile partnership each partner has the right to buy and sell goods used by partnership in ordinary course of business. Meinhard, Schaul & Co. v. Bedingfield Mercantile Co., 4 Ga. App. 176, 61 SE 34.

17. Partnership agreement for securing patent provided that firm should be dissolved when patent was granted or refused. Certain of the partners sold the devise and refused to account for proceeds on ground that partners whose duty it was to construct model had failed to do so. Held that as they had paid in part of their share which had been used in the business, their partnership rights were not lost by their failure to construct model. Gilbert v. Howard Automobile Mach. Co., 147 N. C. 308, 61 SE 176.

18. Signing builder's bond by member of partnership not an act within objects of firm formed for purpose of dealing in lumber and was unauthorized as to member not ratifying it. Kneisley Lumber Co. v. E. B. Stoddard Co., 131 Mo. App. 15, 109 SW 840. Partner in charge of plantation held to have implied authority to contract and pay for plantation supplies although such transactions were unknown to copartner. Lowenberg v. Lewis-Herman Co. [Miss.] 48 S 517. A partner has implied authority to effect insurance on firm property and in case of loss to assign the adjusted claim therefor. Wasem v. Gray, 43 Colo. 140, 95 P 557.

19. Where one member of partnership engaged in hotel business purchased goods in firm name for her individual use, she being authorized to buy goods for firm use in firm name, it was a question for jury whether she was authorized to use goods for her individual benefit. Hoffmaster Sons Co. v. Hodges [Mich.] 15 Det. Leg. N. 926, 118 NW 484. Copartners signed note with others and had payment of their share endorsed thereon. Indorsement being found defective, one of copartners changed form of such indorsement without his partner's knowledge. Held such act not binding against copartner. Custard v. Hodges [Mich.] 15 Det. Leg. N. 1067, 119 NW 583.

20. Employment of engineer by one member of mining partnership held within implied powers and binding upon other members. Bentley v. Brossard, 33 Utah, 396, 94 P 736.

21. On action for specific performance of contract to convey real estate against one holding title in trust for partnership, held that other partners were bound by action of their trustee and were properly left to their remedy against the latter for an accounting. Bond Realty Co. v. Pounds, 112 NYS 433.

22. Partner who actively participated in the management of the firm held not entitled to call for accounting of the other as trustee. McAlpine v. Millen, 104 Minn. 289, 116 NW 583.

23. In absence of agreement, only recompense for time, skill and ability, is a share in profits. Rath v. Boies [Iowa] 115 NW 930.

24. Upon dissolution of partnership by death of member, evidence held to show that surviving partner became owner of partnership realty by way of purchase. Isbell v. Southworth [Tex. Civ. App.] 114 SW 689. Agreement whereby surviving partners were to buy share of deceased partner including good will in manner provided for by partnership articles, was binding on personal representatives of deceased partner although amount when computed in agreed manner was not as large as would have been case if division had been made otherwise. Kaufmann v. Kaufmann [Pa.] 70 A 956. Exercise of an option in will of deceased partner, whereby survivor might purchase testator's interest in partnership business, passed all right, title and interest to survivor free from all obligations to deceased partner's estate. In re Weir, 59 Misc. 320, 112 NYS 278. Partnership real estate was sold on foreclosure of mortgage made by firm for firm debt. Held that sale was conclusive and passed title as against estate of one of partners. Thompson v. Bender [Tex. Civ. App.] 111 SW 170. On action for breach of contract whereby one partner agreed to sell share in partnership business, held evidence sufficient to sustain

member into the firm without the consent of the other members.[25] The partners may stipulate for damages in case of sale of partner's interest.[26] A partner has no implied authority to sell any part of the partnership property,[27] and if he does so he is liable to the copartners in an action at law [28] although as to them it does not constitute conversion.[29] A member of a partnership as an individual may unite with the partnership in the purchase of property for the joint benefit of the partnership and himself personally,[30] and he may agree with his partners that services in the scope of the business shall not be partnership assets.[31] Partners with the consent of each of the others may transform the partnership property into the individual property of one of the partners or apply it or its proceeds to the payment of their individual debts in preference to those of the partnership.[32] On dissolution every partner is entitled to have the partnership property applied in payment of the firm debts [33] and to have the surplus applied in payment of what may be due the partners respectively.[34] A partner has a lien on the firm's assets for the repayment of his advances to the firm.[35] Where one partner furnishes all or more than his share of the capital in the business, he may contract for any rate of interest on the surplus so furnished, to be paid out of the

finding that sale was conditioned upon consent of his copartners to the sale. Gondolfo v. Garbarino [Cal. App.] 97 P 203.

25. In equity such purchaser acquires right to accounting and settlement. Jones v. Way [Kan.] 97 P 437.

26. Where partnership agreement provided for a certain sum as liquidated damages to be paid by any member who should sever his connection with firm within 3 years, held enforcible since damages were difficult to estimate and since evident and reasonable intent was that such amount of damages should follow breach. Doan v. Rogan [Ohio] 87 NE 263.

27. Officer of limited partnership could not sell stock in trade for services rendered by third person in negotiating transfer of patent rights to firm. Dickinson v. Matheson Motor Car Co., 161 F 874.

28. Where a partnership was formed for purpose of securing a patent, and certain members of partnership sold the device, they were liable to the other members in action at law. Gilbert v. Howard Automatic Mach. Co., 147 N. C. 308, 61 SE 176.

29. Sale of firm property and receipt of proceeds, not conversion as to copartner. Gross v. Gross, 128 App. Div. 429, 112 NYS 790.

30. Complaint for goods sold and delivered to a partnership and one of members thereof not demurrable on ground of improper joinder of causes of action or misjoinder of parties. Redwood City Salt Co. v. Whitney, 153 Cal. 421, 95 P 885.

31. One member of brokerage firm brought suit for services against client, and defendant objected on ground that claim was partnership one. Evidence held not to sustain defendant's contention. Weikel v. Clarke, 33 Ky. L. R. 290, 109 SW 894.

32. Sargent v. Blake [C. C. A.] 160 F 57. By mutual consent members of partnership may withdraw funds and give them away to their wives where such transactions are not fraudulent as to creditors. Eckhart v. Burrell Mfg. Co., 236 Ill. 134, 86 NE 199. Held that partners could separate a part of the firm property from the remainder and deal with it individually instead of in partnership character in such manner as to create liability of one to the other. Tieman v. Sachs [Or.] 98 P 163.

33. Crane Co. v. Dryer [Cal. App.] 98 P 1072. Where partners all owed money to a bank and deposited partnership proceeds therein, bank could not apply partnership funds to payment of individual debts of the partners, they not affirmatively consenting thereto. Caldwell Banking & Trust Co. v. Porter [Or.] 95 P 1.

34. Where two members advanced all the money used in partnership transaction, they were entitled to partners' lien for whole amount. Fouse v. Shelly [W. Va.] 63 SE 208.

35. Partnership contract, which provided that partner who advanced entire capital used for purchasing lands which were the subject of partnership business should be repaid in full such sum so advanced and for subsequent advances before profits were to be divided, construed as creating a lien on partnership property. Smith v. Rainey, 209 U. S. 53, 52 Law. Ed. 679. In every partnership there is an implied obligation on each partner to repay to each of his partners what may be justly owing by him on account of advances or money paid out for the firm. Sanders v. Herndon, 33 Ky. L. R. 669, 110 SW 862. Where an equal partnership is admitted and one partner had drawn funds in excess of the other, the law regardless of any express promise will imply an obligation on the party so overdrawing to pay an amount making the two equal. Maitland v. Purdy, 49 Wash. 575, 96 P 154. Where partnership affairs are wound up, there must be a return of the firm capital to the partners contributing it in order that there may be a distribution of the profits. Each partner's contribution is regarded as a firm debt to such partner which must be repaid before there are any profits to be divided. Where one has advanced capital in excess of the other, such amount is a preferred claim. Adams v. Hubbard, 221 Pa. 511, 70 A 835.

profits as preferred profits.[36] Where a partner claims his share of the fruits of a partnership venture, he must also bear his share of the losses.[37] The law presumes an equal division of profits although contributions to firm capital are unequal.[38] A partner who furnishes no capital, but contributes merely his skill, time and services, is not entitled on dissolution to any part of the firm capital.[39] One partner may use attachment to enforce his right to an amount due from his partner on a settlement.[40]

§ 6. *Actions. A. By firm or partner.*[41] *Right of action.* See 10 C. L. 1112—The partners may sue either jointly or severally for damages to the partnership by publication of a libel charging dishonesty in the conduct of the partnership business.[42] A copartnership may bring an action for specific performance of a contract to convey land,[43] or for the renewal of a lease, although its membership may have been changed since the contract was executed.[44]

*Parties.* See 10 C. L. 1112—At common law, a firm must sue in the names of the persons composing it,[45] but by statute in some states a partnership may sue in the firm name.[46] Copartners are not necessary parties to an action for fraud by one of them.[47] A judgment in favor of a partnership which sued in the firm name only, is valid as against collateral attack where objection is not taken at the trial, and where the defendants are personally served.[48]

*Statutory prerequisites to suit.* See 10 C. L. 1113—Statutory requirements as to filing partnership certificates must be complied with before the partnership can sue[49] but such statutes are penal and will be strictly construed.[50]

**36.** Ruggles v. Buckley [C. C. A.] 158 F 950.

**37.** Member of brokerage firm, who brought suit to recover his share of commission earned in a sale of stock, held chargeable with proportionate share of expenses and advances necessary to consummate sale. Boqua v. Marshall [Ark.] 114 SW 714.

**38.** Johnson v. Jackson [Ky.] 114 SW 260. Where partners in hotel business kept no accounts of receipts or disbursements and each took partnership funds for his individual use without accounting therefor, thus making an intelligent accounting impossible, held that after payment of firm debts the partners must share remainder equally. Teipner v. Teipner, 135 Wis. 380, 115 NW 1092.

**39.** Evidence held to show that partner in dissolved saloon business, who had not contributed to capital, was not entitled to share therein. Johnson v. Jackson [Ky.] 114 SW 260.

**40.** Civ. Code Pr., § 194, providing that plaintiff may take out attachment in action for recovery of money held broad enough to include action by one partner for amount due from another on settlement. Sanders v. Herndon, 33 Ky. L. R. 669, 110 SW 862.

**41. Search Note:** See notes in 6 L. R. A. (N. S.) 263; 8 Ann. Cas. 369.

See, also, Partnership, Cent. Dig. §§ 156-189, 349-470; Dec. Dig. §§ 102-124, 191-223; 30 Cyc. 461-477, 556-603; 15 A. & E. Enc. P. & P. 829; 15 Id. 854.

**42.** Weitershausen v. Croatian Print. & Pub. Co., 151 F 947.

**43.** Heenan v. Parmele, 80 Neb. 509, 118 NW 324.

**44.** Partnership composed of certain members entered into contract for lease and privilege of renewal when renewal was asked for in accordance with contract. Landlord refused to grant same on ground that partnership had been dissolved by certain assignments and reassignments, since contract was executed, and that partnership asking for renewal was not the same as the one with which contract was made. Held that evidence showed membership to be the same as at time of execution of contract, that landlord's security was therefore the same as that contemplated by original contract, that intermediate changes did not affect him, and that action to enforce contract was therefore maintainable. Gorder v. Pankonin [Neb.] 119 NW 449.

**45.** But objection to suit brought in firm name alone must be raised by plea in abatement or otherwise before judgment. Ives v. Muhlenburg, 135 Ill. App. 517.

**46.** Where title of case in petition was "H. & F., a copartnership, v. P.," and petition contained allegation that H & F was a copartnership composed of certain enumerated members organized for purpose of doing business in the state, held that action was brought by copartnership under statutory permission. Heenan v. Parmele, 80 Neb. 509, 118 NW 324.

**47.** Defense that other members of firm were necessary parties to action for obtaining goods by fraudulent pretenses, defendant himself being liable therefor. Maxwell v. Martin, 114 NYS 349.

**48.** Such judgment may be sued on and execution issued by proving who were members at time judgment was entered and that they still are members. Ives v. Muhlenburg, 135 Ill. App. 517.

**49.** Failure to comply with §1762, Revised Civil Code, providing for filing of certificate showing names of members in partnership whose firm name is fictitious or obscure, may be cured by compliance at any time

*Pleading.*[See 10 C. L. 1113]—It is permissible to amend a complaint in a suit brought by a partnership so as to bring in additional copartners as individual parties plaintiff.[51] Where a partnership brings suit, the names of the members composing it must be set out.[52]

(§ 6) *B. Against firm or partner.*[53] *Service of process.*[See 10 C. L. 1113]—Service of process on one partner alone is sufficient to authorize entry of judgment in form against the firm,[54] and gives the court jurisdiction over each member served and over the firm property.[55]

*Parties.*[See 10 C. L. 1114]—No decree affecting partnership matters can be made without making all partners parties to the suit.[56]

*Pleading.*[See 10 C. L. 1114]—The objection of nonjoinder can only be raised by demurrer or a plea in abatement.[57] A direct allegation of partnership is sufficient.[58] The firm cannot plead in an action against an individual member.[59] The defense of nonliability as a partnership must be specifically set forth.[60]

*Burden of proof, evidence and instructions.*[See 10 C. L. 1114]—The burden of proving

so as to remove disability to sue or be sued on both prior and subsequent transactions. Bovee v. De Jong [S. D.] 116 NW 83.

**50.** Where statute provides for filing of affidavit of copartnership (Sess. Laws 1897, p. 248, c. 65), and that for failure to file affidavit so provided for partnership should not be permitted to prosecute suits for collection of debts until statute complied with, it was held that such statute was penal, to be strictly construed, and would not embrace action of unlawful detainer. Wallbrecht v. Blush, 43 Colo. 329, 95 P 927.

**51.** Since such amendment merely cures defect in description of parties. Tyrell v. Milliken [Mo. App.] 115 SW 512. Where a partner succeeds to the interest of the copartnership by assignment, it was not error to allow petition to be amended so as to make assignee a party in his individual capacity. Heenan v. Parmele, 80 Neb. 509, 118 NW 324.

**52.** In a suit wherein a partnership was plaintiff, the names of the partners sufficiently appeared when given in full in the summons, and the complaint recited that plaintiff was "the partnership as aforesaid." Greer v. Lilpfert-Scales Co. [Ala.] 47 S 307.

**53. Search Note:** See notes in 4 C. L. 920. See, also, Partnership, Cent. Dig. §§ 349-470; Dec. Dig. §§ 191-223; 30 Cyc. 556-603; 15 A. & E. Enc. P. & P. 854.

**54.** Lutz v. Kalmus, 115 NYS 230. Return of service of summons reciting delivery of copy thereof to "within-named D. defendant" sufficient, it appearing that he was a member of firm and only person of that name mentioned in summons. Barnes v. Colorado Springs, etc., R. Co., 42 Colo. 461, 94 P 570. In foreclosure of lien for material, service upon copartnership, which was principal contractor, was made by substituted service on one of partners by leaving copy of summons and complaint at usual place of residence with member of family over 15 years of age. Held sufficient service. Barnes v. Colorado Springs, etc., R. Co., 42 Colo. 461, 94 P 570.

**55.** Under § 14, Code Civ. Proc., providing that associates may be sued under common name and summons shall be served upon one or more, held personal service upon two partners sufficient to give court jurisdiction over partnership interests. Barnes v. Colorado Springs, etc., R. Co, 42 Colo. 461, 94 P 570.

**56.** Partner alleged to have transferred title to partnership real estate in violation of rights of the other partner is a necessary party to suit for accounting brought by plaintiff partner against other partner's vendee. Moses v. Krauss, 90 Miss. 618, 44 S 162. Where one was sued in his individual capacity in action for rent on property leased in his name as trustee on defense that debt was partnership and not an individual debt, held error to discharge other member of firm who was brought in on defendant's application. Erskine v. Russell, 43 Colo. 449, 96 P 249.

**57.** One sued for purchase price of goods bought at administrator's sale raised objection not amounting to plea in abatement that he bought goods on behalf of firm and that copartner was not joined. Held plea not sufficiently formal to be a defense. Bray v. Peace [Ga.] 62 SE 1025.

**58.** Where two persons were sued on partnership debt, declaration by way of recital that they were heretofore partners held good without stating when partnership was dissolved. Ray v. Pollock [Fla.] 47 S 940. Allegation in complaint that defendant was a "corporation or a partnership" held not open to objection that it did not sufficiently designate the person against whom attachment in aid of suit should be issued. George Morris Co. v. S. H. Levin's Sons, 81 S. C. 36, 61 SE 1103.

**59.** Not error to refuse to entertain plea by firm when not a party. Bray v. Peace [Ga.] 62 SE 1025.

**60.** A plea alleging that the debt sued on was contracted by the successor of the firm, but which failed to exclude the idea that the defendants might be liable individually, was demurrable. Rice v. Patterson [Miss.] 46 S 255. In a suit against a partnership for goods sold, a plea alleging a change of the partnership into a corporation, but not stating whether the reorganization was made before or after the debt was contracted, is fatally defective. Id.

partnership is upon the party asserting its existence.[61] Defendants must call for proof of partnership when the issue is joined and cannot do so later.[62] As between parties to the action, partnership may be established by admission.[63] Variance as to

**61.** Plaintiff sued on express contract for feeding stock; defendant claimed feeding was done under partnership agreement. Held burden to prove partnership was on defendant. Briggs v. Kohl, 132 Ill. App. 484. Where two partnerships existed with identical names and it was sought to hold member of one liable for partnership debt, burden of proving him member of firm that had bought goods was not shifted upon defendant. Bristol & Sweet Co. v. Skapple [N. D.] 115 NW 841. Rev. St. 1899, § 746, Ann. St. 1906, p. 731, provides that unless allegation of partnership be denied under oath, when names of partners are given, same shall be taken as confessed, held general denial unverified, admitted partnership. Tyrrel v. Milliken [Mo. App.] 115 SW 512.

**62.** Stahle v. Poth, 220 Pa. 335, 69 A 864.

**63.** Where three railway companies were sued as partners in handling stock shipments, failure on their part to deny partnership establishes relation as between the parties. Texas Cent. R. Co. v. Pool [Tex. Civ. App.] 114 SW 685. Where rule of court provides that partnership should be considered admitted unless denied by affidavit, it was error to require proof of partnership on substitution of surviving partner as defendant where the action had been tried four times previously without requiring such proof. Stahle v. Poth, 220 Pa. 335, 69 A 864. On suit against a partnership answer denied allegation of partnership but made no formal plea of no partnership. Court instructed that on failure by plaintiff to prove allegation of partnership verdict should be for defendant. Held error. Crockett & Co. v. Garrard & Co., 4 Ga. App. 360, 61 SE 552. Although answer admits the partnership relation, evidence is proper to show the terms of the agreement and the proportion in which the results were to be shared, regardless of whether when such agreement is shown, a partnership is in fact found. Speakman v. Vest [Ala.] 45 S 667.

**NOTE. Admissions of a partner after firm dissolution:** It is uniformly held that the admissions of a partner concerning partnership affairs and in the ordinary course of business are receivable in evidence against the firm, if made during its continuance (Randall v. Knevals, 27 App. Div. 146, 50 NYS 748; afd. 161 N. Y. 632, 57 NE 1122; Western Assurance Co. v. Towle, 65 Wis. 247, 26 NW 104), upon the theory either that partners are mutual agents (Wigmore, Evid. § 1078; Bates, Partn. § 333; Webster v. Stearns, 44 N. H. 498), or parties in joint-interest (Munson v. Wickwire, 21 Conn. 513; Catt v. Howard, 3 Starkle, 3). But the rule as to admissions made after dissolution is much controverted. Parsons, Partn. (4th ed.) 161, n.; Wigmore, supra, § 1280, n. 7. The conflicting authorities are usually grouped under two opposed cases (see Burdick, Partn. (2nd ed.) 247; Bates, supra, 699:—Wood v. Braddick, 1 Taunt. 104), declaring competent as against A, partner B's admissions after dissolution, concerning an engagement entered before dissolution (Hackley v. Patrick, 3 Johns. [N. Y.] 536), in broad terms holding them incompetent. The latter view may fairly be termed the "New York rule" because of its origin and reiteration in that state. Baker v. Stackpole, 9 Cow. [N. Y.] 420, 18 Am. Dec. 508; Hart v. Woodruff, 24 Hun [N. Y.] 510; Pringle v. Leverich, 97 N. Y. 181, 49 Am. Dec. 522; Mackintosh v. Kimball, 101 App. Div. 494, 92 NYS 132.

Curiously, each group considers only one aspect of the partners' dual relation. The Wood v. Braddick group, supra, bases its rule upon joint-interest, regarding as unaffected by dissolution the partners' original joint-interest in the previously created rights and obligations. Parker v. Merrill, 6 Greenl. [Me.] 41, 43; Bispham v. Patterson, 2 McClean, 87, 89. But since, under any joint-relation, admissions of B cannot charge A, unless then joint-interest has already been established (Alcott v. Strong, 9 Cush. [Mass.] 323; Greenleaf, Evid. [16th ed.] § 177), the rule of Wood v. Braddick should only apply where the subject of the admission has first been aliunde proved a partnership affair (Cady v. Shepherd, 11 Pick. [Mass.] 400, 22 Am. Dec. 379; Pennoyer v. David, 8 Mich. 407). On this ground the result in Hackley v. Patrick, supra, might be justified. The force of the restriction becomes most apparent in actions where A pleads that the firm obligation alleged was really the individual contract of B, who made the admission. Cf. Willis v. Hill, 2 Dev. & B. L. [N. C.] 231. This limitation does not conflict with the other rule that B's declarations before dissolution at the time of procuring a loan, actually for himself, are competent to show that credit was given to the firm (Smith v. Collins, 115 Mass. 388; Trempet v. Conklin, 44 N. Y. 58); for borrowing money lies within the scope of a trading firm during its continuance (Burdick, supra, 188), and such statements must be regarded as inducement to a contract within the apparent authority of the declarant (Benninger v. Hess, 41 Ohio St. 64; cf. Union Nat. Bank v. Underhill, 102 N. Y. 336, 7 NE 293). Similar declarations subsequent to the transaction would not charge the firm. White v. Gibson, 11 Ired. Law [N. C.] 283; Klock v. Beekman, 18 Hun [N. Y.] 502 (dissenting opinion). A second restriction on the rule in Wood v. Braddick, supra, is that the admission must be made in the course of the winding-up; otherwise the scope of admissibility would be wider than under the accepted rule as to admissions made before dissolution. Supra; Boor v. Lowrey, 103 Ind. 468, 3 NE 151. This limitation seems logically inconsistent with the usual statement of the doctrine concerning admissions of parties in joint-interest (Walling v. Rosevelt, 16 N. J. Law, 41; Bank of U. S. v. Lyman, 20 Vt. 666, 671; Wigmore, supra, § 1077), but is reasonable and has been recognized in the present British Partnership Act (1890) § 15, which purports merely to declare Wood v. Braddick. Lindley, Partn. (7th ed.) 842, 148.

the members composing the firm is immaterial when not objected to.[64] Instructions must conform to the pleadings and the evidence.[65]

In New York, admissions of one party in joint-interest are receivable against another only when there exists mutual authority, express or implied. Walls v. Randall, 81 N. Y. 164. But even from the standpoint of agency —the sole aspect considered in the second group, supra—the New York rule, supra, it is submitted, is too broad. It wrongly assumes the agency of the partners totally ended by dissolution. Abundant authority is not wanting, even in New York, that no oomplete revocation occurs. Gates v. Beecher, 60 N. Y. 518, 524, 19 Am. Dec. 207. Disregarding situations peculiar to dissolution caused otherwise than by agreement,—though, broadly speaking, partners may after dissolution no longer bind the firm by new contracts, rights and obligations previously created persist. Thus, in the absence of contrary agreement, every member retains implied power to execute outstanding engagements (Western Stage Co. v. Walker, 2 Iowa, 504, 65 Am. Dec. 789), to adjust claims against the firm (Tutt v. Cloney, 62 Mo. 116), and to collect and receipt for money due (Gillilan v. Ins. Co., 41 N. Y. 376). So far are the partners from becoming mere strangers that a demand on one member of a dissolved firm of makers suffices to charge the indorser of a note. Gates v. Beecher, supra. Even, therefore, if partners be considered without power to bind each other unless as agents, the true rule, it is submitted, requires that such admissions, made after dissolution, be received against the firm as amount to words and acts fairly within the scope of the authority retained, and in the ordinary course of the windings-up. See Burdick, supra, 248; Parsons, supra, § 128. Since the partners' agency after dissolution is confined to operations normally essential to final settlement (Hall v. Lanning, 91 U. S. 160, 23 Law Ed. 271), the scope of admissibility under this rule would of course be narrow. Thus, there would still be excluded as against the partner not making the admission a disposition that a contract sued on by the firm had been satisfactorily performed (Iron Co. v. Cohen, 113 Ill. App. 30); admissions converting an account current into an account stated (Hart v. Woodruff, supra), since stating an account gives a new cause of action (see Bates, supra, 737, justly oriticising Buxton v. Edwards, 134 Mass. 567); loose declarations, years after dissolution, that certain goods had been delivered to the firm (Chardon v. Oliphant, 3 Brev. [S. C.] 183, 6 Am. Dec. 572); and acknowledgments of firm debts barred by the statute of limitations, since under the modern view of that statute, see Van Keuren v. Parmalee, 2 N. Y. 523, 51 Am. Dec. 322, the promise of payment implied, though based on the old consideration, is a new contract. Wilson v. Torbert, 3 Stew. [Ala.] 296, 21 Am. Dec. 632. Nevertheless, the rule would at least cover, for example, an acknowledgment of debt while engaged in adjusting the unsettled business (Feigley v. Whitaker, 22 Ohio St. 606, 10 Am. Rep. 778), and declarations contemporaneous with receiving payment of a firm credit (Kirk v. Hiatt, 2 Ind. 322 [semble]).

Tested by the foregoing principles, a recent West Virginia decision seems questionable. Burdett v. Greer, 63 W. Va. 515, 60 SE 497. In an action against A and B, partners (later abated as to A), for work performed under a contract aliunde proved to have been formed before dissolution. A's acknowledgment of the amount due, made during a settlement after dissolution, was held inadmissible. The court reasoned from the well-settled law that a partner may not after dissolution deliver a firm note (Abel v. Sutton, 3 Esp. 108; Gale v. Miller, 54 N. Y. 536), or even renew old paper (National Bank v. Norton, 1 Hill [N. Y.] 572; Hurst v. Hill, 8 Md. 399, 63 Am. Dec. 705). But the basis of this doctrine is not, as assumed, that such acts make new evidence (see Parker v. Merrill, supra), but that they create new contracts (Burdick, supra, 245). That the sum due in the principal case was wholly for work done since the dissolution seems immaterial, for the court conceded that the entire contract survived.

The validity of the suggested modification of the New York rule seems to have been recognized even in a relatively late dictum of the New York ct. of appeals (Nichols v. White, 85 N. Y. 531, 536), and it has been embodied in the proposed American Partnership Act, Reports of American Bar Ass'n, Pt. II, 440, §§ 14, 38, though the existing rule is probably sanctioned by the weight of American authority. 22 Am. & Eng. Enc. Law (2ed.) 217. The argument that any rule other than broad exclusion is dangerous because ill-feeling often follows partnership dissolution (cf. Gleason v. Clark, 9 Cow. [N. Y.] 57, 59), should go to the weight and not to the competence of such admissions (cf. Western Assurance Co. v. Towle, supra, 256; King v. Hardwick, 11 East, 578, 586). The present New York rule may be of easier application, but the consequent reduction of opportunity for reversible trial error hardly justifies divergence from principle.—From 8 Columbia L. R. 481.

64. Where the complaint in an action against a partnership alleges that the firm is composed of certain members and the evidence shows that the firm is composed of the members named and also others, such variance is immaterial where defendants proceed to trial without objection. Hambro Dist. & Distributing Co. v. Price & Co. [Iowa] 119 NW 541.

65. In an action to recover for building materials furnished alleged partners who were building two sets of houses, on question whether defendant was a partner as to one or both sets of houses, an instruction to find for defendant if partnership did not exist as to all the houses properly refused, since declaration set out separate cause of action as to each set of houses, and instruction if given would deprive jury of right to find partnership as to only one set of houses. Smith v. Ross, 31 App. D. C. 348.

*Judgment and execution.* See 10 C. L. 1115—Although only one member be served with process, judgment may be entered against the entire partnership, and is enforcible against the partner served and against the firm property.[66] Where partners are defendants, judgment may be entered against one and not the other.[67] If a partner has not been served with process a dismissal as to him is unnecessary,[68] but if he has been served, a dismissal releases both his individual and his partnership liability.[69] In Missouri no right of exemption is recognized in partnership property, either as to a firm creditor or as to a creditor of an individual partner.[70] Partnership property cannot be attached on the ground of nonresidence of the firm where one of the partners resides within the jurisdiction.[71] The judgment creditor of one partner for an individual debt may attach the latter's interest in the firm money.[72] An appeal from a judgment against the partnership alone must be taken by the firm and not by the members.[73]

(§ 6) *C. Between partners.*[74]—See 10 C. L. 1115—A partner cannot sue the firm of which he is a member.[75] A partner cannot maintain an action against his copartner for demands growing out of partnership business unless there has been a settlement and accounting[76] but where the cause of action is distinct from the partnership busi-

66. Gessner v. Roeming, 135 Wis. 535, 116 NW 171. Partner not served cannot question validity of judgment against the property of the partnership. Capital Food Co. v. Globe Coal Co. [Iowa] 116 NW 803. Title of action did not refer to defendants as copartners, but complaint contained usual allegations in actions against copartnerships, and copartnership in fact was established by evidence. Held order denying motion by copartner not served to vacate judgment was proper. Granit v. Abramowitz, 112 NYS 1081. If judgment be obtained against partnership for debt owed by it, judgment creditor is not first obliged to exhaust partnership assets before he can levy upon separate property of member of firm; he can elect which to levy upon. Webb v. Gregory [Tex. Civ. App.] 108 SW 478.

67. Woods-Evertz Stove Co. v. Grubbs & Co. [Mo. App.] 116 SW 5. Complaint for goods sold and delivered improperly dismissed where one partner admitted liability for amount sued for, although partnership not established by proof (Lapinsky v. Colish, 61 Misc. 319, 113 NYS 733), or against the firm alone (Id.). Where defendant was T. W. H., described as a firm composed of T. W. H. and J. H. B. H., and judgment was against them as a firm while prayer was against them as individuals, the judgment was against firm and a denial of relief against them as individuals. House v. Wells [Tex. Civ. App.] 112 SW 114.

68. Judgment may be entered against partner served without entering dismissal against another partner joined but not served, since it is not necessary to enter order of discontinuance against party not served. Greer v. Liipfert-Scales Co. [Ala.] 47 S 307.

69. As he was no longer in court, judgment against him in any capacity would be judgment without service and consequently void both as to him and as to the firm. McManus v. Cash [Tex.] 108 SW 800.

70. Partner's interest in firm property held subject to attachment for his individual debt as far as exemption therein was concerned. State v. U. S. Fidelity & Guaranty Co. [Mo. App.] 115 SW 1081.

71. Where property of partnership was attached on ground of nonresidence and evidence showed that one of partners resided in state and firm had branch office there, attachment held improper. Barney v. Moore-Haggerty Lumber Co. [Miss.] 48 S 232.

72. Evidence held to sustain finding that firm was indebted to partner and that such indebtedness was subject to attachment by partner's creditor. Speith v. Larrimore [Ky.] 116 SW 724.

73. Greenstein v. First Nat. Bank of Gadsden [Ala.] 47 S 1036.

74. **Search Note:** See notes in 1 Ann. Cas. 835; 6 Id. 109; 8 Id. 768.

See, also, Partnership, Cent. Dig. §§ 156-189; Dec. Dig. §§ 102-124; 30 Cyc. 461-477; 15 A. & E. Enc. P. & P. 1005.

75. Where plaintiff claimed damages against partnership for breach of express contract and proof showed that his only rights were those of copartner, he could not maintain his action against firm. Merrill v. Smith [Ala.] 48 S 495.

76. Merrill v. Smith [Ala.] 48 S 495. Reason for rule is found in inherent nature of partnership relation, and consists in fact that prior to accounting and settlement of partnership affairs no cause of action exists between partners solely upon partnership dealings. Simpson v. Miller [Or.] 94 P 567. In suit for money alleged to have been received by one as agent where defense was that parties were partners in real estate transaction out of which claim arose, held verdict for plaintiff properly directed where it did not appear that partnership affairs had been liquidated. Christopherson v. Olson, 104 Minn. 330, 116 NW 840. In an action by one partner against another, trustee process will not lie against third party for liability in damages for destruction of partnership property, there being no liability to defendant partner as individual. Martin v. Whitney, 74 N. H. 505, 69 A 888.

ness,[77] or is founded on a breach of a contract to convey a partner's interest,[78] or in fraud,[79] one partner may maintain an action at law against the other. The principle on which partners after dissolution can sue each other in relation to what has been partnership property is that, the joint interest as partners having ceased, a new contract had been made between the parties as individuals.[80] One partner cannot sue his copartner for conversion of firm property.[81] Partition will not lie as to partnership property.[82] An infant partner cannot be sued by his copartner without the appointment of a guardian ad litem.[83]

§ 7. *Dissolution, settlement, and accounting.*[84]—See 10 C. L. 1118—A suit for dissolution is properly brought in equity, and the court having acquired jurisdiction may proceed to wind up the partnership affairs and subject its property to the payment of the firm debts.[85] But where the partnership has already been dissolved, and the rights of the former partners are settled or easily ascertained, a member may recover his share of the profits in an action at law.[86] Suit for dissolution may be brought in

77. Whether defendant had expressly contracted with copartner to pay for feeding stock corn, under partnership agreement for merely pasturing, held question of fact. Briggs v. Kohl, 132 Ill. App. 484. One party sold two-thirds of his interest in a mine for a specified amount to be paid him out of first net profits under contemplated partnership arrangement. Upon suit brought by assignee of this claim, held that liability for payment of the two-thirds interest to assignor did not grow out of partnership arrangement and action at law would lie thereon. Crocker v. Barteau, 212 Mo. 359, 110 SW 1062. Sale by partner to copartner of his interest in firm, without warranty, does not estop him, on subsequently acquiring a patent covering articles of kind manufactured by firm, to maintain suit against former partner for infringement not committed during partnership term. Dull v. Reynolds Elec. Flasher Mfg. Co., 161 F 129.

78. Where one partner agreed to buy partnership property consisting of timber at price stated from his copartner, held latter could maintain action for price, although as to this particular property no accounting had been had. Simpson v. Miller [Or.] 94 P 567. Where plaintiff and defendant entered into a contract whereby plaintiff was to have a one-third interest in the partnership, but defendant refused to carry out this agreement and to admit him to the partnership, held, in an action by plaintiff for money advanced, that defendant was estopped to allege the partnership. Blodgett v. Miller, 33 Ky. L. R. 682, 110 SW 864.

79. Courts appear to isolate a transaction in which gross fraud or other wrong is perpetrated by one partner on his associates, and regard it as so far detached from general partnership affairs that it may be treated as if all partnership affairs, except a single item, had been adjusted. Gilliam v. Loeb, 131 Mo. App. 70, 109 SW 835. A number of persons formed partnership for purpose of buying a jack, delegating one of their number to negotiate purchase. He fraudulently misstated price paid, collecting for his own benefit excess over real price. Held that action for proportionate share of amount fraudulently obtained would lie by members. Id.

80. Held that two former partners could sue jointly their copartner for proportionate share of damages recovered from loss of merchandise upon his express promise to pay them jointly. Tieman v. Sachs [Or.] 98 P 163. Balance due after settlement cannot be recovered against copartner on complaint alleging express promise as distinguished from what he would be entitled to under law as profits. Merrill v. Smith [Ala.] 48 S 495.

81. Defendant bought 4,550 shares of stock and sold 3,000 of them to plaintiff's vendor, taking note in payment and held stock as collateral. He then entered into partnership agreement with plaintiff and others, purpose of which was to secure himself for original expenditure for stock and to divide remaining 4,550 shares equally. Plaintiff bought the 3,000 shares and on defendant's refusal to deliver sued him in conversion. Held that partnership property consisted only of the 4,550 shares and note for 3,000 shares, but that the 3,000 shares were not firm property and that plaintiff might under agreement properly take them up and maintain conversion against defendant for failure to deliver. McKee v. Bernheim, 114 NYS 1080.

82. Record held not to disclose that farmer's telephone company was partnership but was voluntary association and property subject to partition. Meinhart v. Draper, 133 Mo. App. 50, 112 SW 709.

83. Gross v. Gross, 128 App. Div. 429, 112 NYS 790.

84. **Search Note:** See Partnership, Cent. Dig. §§ 348, 471-822; Dec. Dig. §§ 224-348; 30 Cyc. 603-751.

85. May decree sale of real estate. Fouse v. Shelly [W. Va.] 63 SE 208.

86. Upon completion of partnership transaction for construction of certain railway lines where nothing remained to be done except to divide profits, held that one partner could recover his share, amount of which clearly appeared from partnership agreement in an action at law. Townsend v. Gregory, 132 Ill. App. 192. Averment that appellant "had demanded an accounting from S. partnership funds received by him" held not a sufficient averment of final settlement of firm accounts and property. Eureka Knitting Co. v. Snyder, 36 Pa. Super. Ct. 336.

the county where the partnership property is located, or in which one of the partners is found, although the parties may both be nonresidents.[87] A state circuit court has jurisdiction in winding up partnership to adjudicate a claim arising out of a maritime contract.[88]

(§ 7) *A. Dissolution by operation of law.*[89]—See 10 C. L. 1116—The partnership relation is dissolved by the death [90] or by the voluntary bankruptcy of a member,[91] but seizure of a partner's interest under executory process does not work a dissolution.[92]

(§ 7) *B. Dissolution by act of partners.*[93]—See 10 C. L. 1116—A partnership may be dissolved by mutual consent [94] or by one partner exercising his right to terminate the relation in accordance with the partnership agreement.[95] The retirement of a member,[96] or a sale of his interest to his partners, works a dissolution of the firm.[97] The admission of a new partner with the consent of all the members does not work a dissolution of the partnership where business is carried on under the original agreement.[98] A mining partnership is not dissolved by the retirement of a member,[99] nor by a sale of his interest without his copartner's consent.[1]

(§ 7) *C. Dissolution by order of court.*[2]—See 10 C. L. 1116

(§ 7) *D. Effect of dissolution.* 1. *In general.*[3]—See 10 C. L. 1110—Although a partnership is dissolved, if assets remain partnership creditors may consider the firm

87. Court acquired jurisdiction to wind up partnership operating steamboat in interstate commerce in county where steamboat and one of partners were found. Hulings v. Jones, 63 W. Va. 696, 60 SE 874.

88. Hulings v. Jones, 63 W. Va. 696, 60 SE 874.

89. **Search Note:** See notes in 5 L. R. A. (N. S.) 654.

See, also, Partnership, Cent. Dig. §§ 599-623; Dec. Dig. §§ 259-276; 30 Cyc. 650-658; 22 A. & E. Enc. L. (2ed.) 199.

90. In re Evans, 161 F 590.

91. Hardy v. Weyer [Ind. App.] 85 NE 731.

92. Where the interest of a member of a copartnership organized to cultivate plantation owned by partners jointly is seized under executory process at instance of another member to enforce payment of an individual debt and suspensive appeal is taken from order of seizure, such appeal operates to vacate the writ and seizure, and the seizure does not of itself dissolve the partnership. Borah v. O'Niell, 121 La. 733, 46 S. 788.

93. **Search Note:** See notes in 77 A. S. R. 319; 4 Ann. Cas. 460; 10 Id. 695.

See, also, Partnership, Cent. Dig. §§ 599-623; Dec. Dig. §§ 259-276; 30 Cyc. 650-658; 22 A. & E. Enc. L. (2ed.) 202.

94. In settlement of suit by one partner against the other, agreement was made whereby one conveyed to the other his interest, each to have half the book accounts and evidence of indebtedness growing out of sale of the merchandise, partner receiving firm property to settle certain specified claims, other debts to be paid in equal shares but no definite time was specified, held that purpose of settlement was to extinguish partnership, substituting therefor the new agreement as of the time agreement was made. Fritz v. Fritz [Iowa] 118 NW 769. Where partners agreed upon certain persons to make division of partnership property, who thereupon adjusted partnership accounts, paid firm debts, assigned all claims to one of partners and divided all of firm goods, held to be conclusive settlement of partnership. Adams v. Adkison [Ala.] 48 S 346. Partnership agreement held not superseded by later agreement whereby employes were to deposit certain sums of money with partnership, and were to be paid by percentage of net profits. Kaufmann v. Kaufmann [Pa.] 70 A 956.

95. Partnership agreement, providing that if progress not satisfactory at end of year delinquent partner should assign all his rights to continuing partner, held dissolved after 19 months by express verbal announcement by continuing partner that relation was terminated. Whitney v. Dewey [C. C. A.] 158 F 385.

96. Where partnership articles provided that member might retire at times specified, upon 10 days' notice to remaining partners who were thereupon to purchase his interest, held that such retirement worked dissolution and gave right to an accounting. Onstott v. Ogle, 234 Ill. 454, 84 NE 1059. Where partnership agreement was expressly made for term of 5 years but also contained provision that member might retire at times specified upon giving notice, held that such retirement before expiration of 5 year period worked dissolution, since 5 year limitation was to apply only in case none of partners withdrew in that time. Id.

97. Where complete partnership accounting had been had with exception of certain sawlogs, as to which one partner bought out interest of the other, held transaction ipso facto worked a dissolution of the partnership. Simpson v. Miller [Or.] 94 P 567.

98. Defendant could not avoid contract to renew lease to partnership on ground that partnership was dissolved by admission of new partner, since admission of new partner does not work dissolution. Gorder v. Pankonin [Neb.] 119 NW 449.

99. Kelley v. McNamee [C. C. A.] 164 F 369.

1. Bentley v. Brossard, 33 Utah, 396, 94 P 736.

2. **Search Note:** See notes in 69 A. S. R. 410.

See, also, Partnership, Cent. Dig. §§ 729-

as subsisting until their claims are satisfied.[4] As between the members, one partner cannot bind another after dissolution,[5] but if he attempts to do so and his act be ratified, it is binding.[6] After dissolution a firm debt cannot be set off against a debt owing to an individual member.[7]

(§ 7D) 2. *As to surviving partner and estate of deceased partner.*[8] See 10 C. L. 1117 Upon the death of a partner, the legal title to the firm property vests in the surviving member [9] in trust for the purpose of liquidating [10] and winding up the partnership affairs.[11] He is vested with the exclusive management of the partnership property and affairs [12] free from interference by the probate court [13] or the personal representatives of the deceased partner.[14] Firm property in the hands of a dormant partner who is the administrator of the deceased partner's estate may be liable for the widow's award and debts of the estate.[15] The surviving partner may continue the business so far as existing transactions are concerned [16] and use his best judgment in winding it up.[17] At common law he is individually liable for the firm debts,[18]

822; Dec. Dig. §§ 313-348; 30 Cyc. 710-751; 22 A. & E. Enc. L. (2ed.) 208.

3. **Search Note:** See notes in 10 C. L. 1117; 40 A. S. R. 561, 66 L. R. A. 821; 1 L. R. A. (N. S.) 643.

See, also, Partnership, Cent. Dig. §§ 624-678; Dec. Dig. §§ 277-296; 22 A. & E. Enc. L. (2ed.) 211.

4. In bankruptcy. Holmes v. Baker [C. C. A.] 160 F 922.

5. Where creditor of former copartnership brought suit to recover in severalty against members, one of them could not enter an appearance for the others so as to bring them before the court. Ballon v. Skidmore [Ky.] 113 SW 441.

6. After dissolution one of partners executed contract in partnership name for adjustment of losses under indemnity policy. Partner who did not join was bound thereby where he ratified the terms of the instrument by participating in the negotiations leading to its execution. Truitt-Silvey-Hat Co. v. Callaway, 130 Ga. 637, 61 SE 481.

7. Member of dissolved law firm sued for services performed by him individually after dissolution. Defendant sought to offset claims against firm accruing prior to its dissolution. Held such set-off not allowable even though defendant was ignorant of dissolution. Cahill v. Dellenback, 139 Ill. App. 320.

8. **Search Note:** See notes in 4 C. L. 923, 924; 79 A. S. R. 709; 112 Id. 843; 4 Ann. Cas. 180, 472; 5 Id. 664; 6 Id. 35; 10 Id. 956.

See, also, Partnership, Cent. Dig. §§ 509-598; Dec. Dig. §§ 243-258; 22 A. & E. Enc. L. (2ed.) 220, 224; 15 A. & E. Enc. P. & P. 1000.

9. In re Weir, 59 Misc. 320, 112 NYS 278; Clark v. Fleischmann [Neb.] 116 NW 290. Administratrix of deceased partner had no right as against surviving partner to possession of funds deposited in firm name. Wilson v. International Bank, 125 App. Div. 568, 109 NYS 1027.

10. On death of one partner surviving partner succeeds to all partnership property, whether real or personal, in trust for purpose of liquidation, even though deceased partner was appointed by agreement sole liquidator. McPherson v. Swift [S. D.] 116 NW 76.

11. Tillery v. Tillery [Ala.] 46 S 582. It becomes duty of survivor to collect assets, pay debts and wind up the concern. Cowham v. Shipman, 151 Mich. 673, 15 Det. Leg. N. 150, 115 NW 991.

12. So as against executor under deceased partner's will. Clark v. Fleischmann [Neb.] 116 NW 290.

13. Allowance for widow and children was asked for in bankruptcy proceeding against firm. Held that until firm debts were satisfied no allowance could be made by the probate court. In re Dobert, 165 F 749.

14. Where partnership funds were deposited in firm name in defendant bank, administratrix of deceased partner had no right as against survivor to acquire possession of such funds, the surviving partner having a reasonable time in which to liquidate partnership affairs. Wilson v. International Bank, 125 App. Div. 568, 109 NYS 1027.

15. Dormant partner who is administrator of estate of ostensible partner was properly charged with partnership property in his possession so far as was necessary to pay widow's award. Debts properly charged against decedent's estate and costs, remainder to go to administrator as surviving partner. Kempton v. People, 139 Ill. App. 563.

16. Where partnership was formed for purpose of collecting money due Indians on contingent basis secured by contract to partner to contiue efforts to collect after partnership held for surviving partner to continue efforts to collect after partnership dissolved. Cowham v. Shipman, 151 Mich. 673, 15 Det. Leg. N. 150, 115 NW 991. Partner of deceased could continue partnership business, and estate of deceased partner would not thereby be defeated. Gaskill v. Weeks [Mich.] 15 Det. Leg. N. 706, 117 NW 647. Where M furnished money to copartnership and latter evidenced its intention to be bound for return of same by giving M firm notes therefor, upon death of one of partners M released liability as to him and accepted individual notes of surviving partner for his share. Held latter notes binding upon survivor and not void for want of consideration. Culbertson v. Salinger [Iowa] 117 NW 6.

17. Surviving partner in venture to collect money due Indians was under no obligation to continue efforts to collect after expiration of contracts with Indians and after death

and in some states additional statutory liabilities are imposed upon him as administrator of the partnership estate.[19] He holds subject to an accounting to the personal representatives of the deceased partner,[20] but neither they nor the heirs are entitled to any part of the firm assets until the partnership debts are paid,[21] since the share of the deceased partner cannot be ascertained until the partnership affairs are finally wound up.[22] A creditor must exhaust his remedy against the surviving partner before he can proceed against the estate of the deceased partner, unless the former be insolvent.[23] Lapse of time without inquiry will not defeat action by surviving partner to recover funds entrusted to deceased partner.[24]

(§ 7D) 3. *As to continuing or liquidating partner.*[25]—See 10 C. L. 1119—Upon dissolution one partner may assume the firm liabilities[26] by a contract supported by adequate consideration.[27] A retiring partner who sells his interest and agrees to pay

of partner and when hope of success was ended. Cowham v. Shipman, 151 Mich. 673, 15 Det. Leg. N. 150, 115 NW 991.

**18.** Burgess v. American Bond & Trust Co., 103 Me. 378, 69 A 573.

**19.** Where it was sought to hold surviving partner liable on his bond for proper administration of partnership estate, declaration of complaint by creditors held not to aver with sufficient clearness that suit against him in statutory capacity was intended. Burgess v. American Bond & Trust Co., 103 Me. 378, 69 A 573. Judgment against surviving partner liable as an individual at common law and as administrator of partnership estate under statute, which omits to recite in which capacity he was found liable for firm debts, where record implies individual liability, could not be amended so as to meet statutory requirements without setting out a different cause of action. Id.

**20.** Before the liquidation of a partnership its effects are considered presonalty, although vested in land, and the personal representative and not the heirs of a deceased partner succeeds to his unliquidated interest therein. Clark v. Fleischmann [Neb.] 116 NW 290. Heir of deceased partner not entitled to bill requiring surviving partner to make return and settlement of partnership affairs, this being a right of the personal representative alone. Tillery v. Tillery [Ala.] 46 S 582. Where it was agreed that upon death of one partner his widow should assume all benefits belonging to her husband, held that title passed to surviving partner subject to accounting to representatives of deceased partner and that estate was not entitled to share in firm assets in specie. In re Weir, 59 Misc. 320, 112 NYS 278. Surviving partner who assumed entire partnership property as his own through unauthorized sale by deceased partner's administratrix held guilty of conversion as to deceased partner's heirs. Goldstein v. Susholtz [Tex. Civ. App.] 19 Tex. Ct. Rep. 804, 105 SW 219. Where partnership secured contracts from certain Indians to collect money due them from the federal government, upon dissolution of partnership by death of one of partners his estate had a right to share in whatever value these concontracts had. Cowham v. Shipman, 151 Mich. 673, 15 Det. Leg. N. 150, 115 NW 991.

**21.** In re Dobert, 165 F 749.

**22.** Upon death of partner his widow proceeded to administer estate and sold decedent's interest to surviving partner. Held sale unauthorized since surviving partner had the right to wind up estate and only thereafter could decedent's interest be ascertained. Goldstein v. Susholtz [Tex. Civ. App.] 19 Tex. Ct. Rep. 804, 105 SW 219.

**23.** Where creditor waited fourteen years from time surviving partner became insolvent before trying to recover against deceased partner's estate, held barred by statute of limitation which started running upon insolvency. In re Neher's Estate, 57 Misc. 527, 109 NYS 1090.

**24.** Where partner entrusted with firm funds for investment fraudulently represented to copartner's agent that he was financially unable to repay, held that failure to make inquiry for 15 years did not constitute such laches as would preclude recovery against estate. Johnston v. Johnston [Minn.] 119 NW 652.

**25. Search Note:** See notes in 79 A. S. R. 709; 1 Ann. Cas. 725; 11 Id. 1028.

See, also, Partnership, Cent. Dig. §§ 624-678; Dec. Dig. §§ 277-296; 22 A. & E. Enc. L. (2ed.) 217.

**26.** One who assumes partnership debts in consideration of a transfer to him of all the firm property is liable to a creditor upon such agreement. Mueller Lumber Co. v. McCaffrey [Iowa] 118 NW 903. Where one partner agrees to pay firm debts in consideration of conveyance to him of entire partnership property, consisting of leasehold in mine, he cannot assert on appeal from judgment against him by firm creditor that lease was forfeited at time of conveyance and that there was no consideration therefor, since forfeiture will not be presumed in absence of evidence thereof. Id. Where one partner assumed "all liabilitities" of a dissolved partnership, judgment over against him was proper in suit for injuries brought by firm employe, it appearing that such possible liability was contemplated by the partners. Binyon v. Smith [Tex. Civ. App.] 112 SW 138.

**27.** Detmer Woolen Co. v. Van Horn, 59 Misc. 163, 110 NYS 312. The covenant of an insolvent partner to assume firm debts supports a conveyance to him of the partnership property. Sargent v. Blake [C. C. A.] 160 F 57. See, also, § 4C, supra, Novation.

the firm indebtedness is liable to the buyer upon failure to pay such debts.[28] A retiring partner is surety for the payment of firm debts although the continuing partner has assumed them to the knowledge of the creditors.[29] A creditor suing upon contract of assumption of partnership debt is subject to equities between the original parties.[30] Upon the dissolution of a partnership it is competent for the parties to agree that the selling partner shall not engage in a competing business.[31]

(§ 7) *E. Accounting.*[32]—See 10 C. L. 1120—Upon the dissolution of a partnership a partner, or the personal representative of a deceased partner, is entitled to an accounting,[33] as is also the purchaser of a partner's interest, although his rights in the firm have not been recognized.[34] An action for accounting will lie at the instance of a partner against a copartner for mismanagement [35] or for fraud.[36] The right of action may be barred by the statute of limitations,[37] by laches,[38] by a prior sale of the partner's interest,[39] or because the partnership accounts are so incomplete that a correct accounting is impracticable.[40]

*Procedure, pleading and evidence.*See 10 C. L. 1120—All the members of the partnership must be made parties to a suit for dissolution and accounting.[41] The petition must state the facts necessary to constitute a cause of action in accordance with the usual rules of pleading,[42] and may be amended in the discretion of the court.[43] A

**28.** Where creditors of firm seized firm property, buyer was entitled to have notes given for purchase price canceled. Davis v. Sisk [Tex. Civ. App.] 108 SW 472.

**29.** Upon dissolution of partnership, members of which were indebted to plaintiff for merchandise, one partner assumed liability for this debt of which plaintiff was notified. Held the retiring partner was liable as surety for payment of debt. Schmitt v. Greenberg, 58 Misc. 570, 109 NYS 881.

**30.** Evidence of equities between one who purchased copartnership business and assumed its debts and the selling copartners, a suit by partnership creditor on such agreement of assumption. Detmer Woolen Co. v. Van Horn, 59 Misc. 163, 110 NYS 312.

**31.** Selling partner who agreed not to engage for two years in pawnbrokerage business in town where partnership had been located, or with partners, became manager of a business of the same kind at a salary. Held a violation of agreement which would be enjoined. Siegel v. Marcus [N. D.] 119 NW 358.

**32. Search Note:** See notes in 72 A. S. R. 80; 99 Id. 326.

See, also, Partnership, Cent. Dig. §§ 679-822; Dec. Dig. §§ 297-348; 30 Cyc. 681-751.

**33.** Rines v. Ferrell [Minn.] 119 NW 1055.

**34.** Accounting may be insisted on even after withdrawal of a tender of certain sum in consideration of recognition of rights in partnership property. McPherson v. Swift [S. D.] 116 NW 76.

**35.** Where a member of copartnership formed to operate farmers' telephone company attempted to charge fees for services as manager contrary to provisions of partnership agreement, to oust members from partnership and to have corporation of which he was member wrongfully acquire partnership property, held partners entitled to accounting as against him. Thickson v. Barry, 138 Ill. App. 100.

**36.** Complainant sought to have release to defendants on all partnership obligations set aside for fraud, and accounting and settlement had. Held not entitled to relief unless he returned consideration received for release. Staiger v. Klitz, 114 NYS 486.

**37.** When statute starts to run is a question of fact depending on circumstances; it does not, as a matter of law, begin at the dissolution of the firm. McPherson v. Swift [S. D.] 116 NW 76.

**38.** Failure to prosecute action for accounting for ten years after dissolution held not not such laches as to preclude recovery in absence of prejudice to defendant. McPherson v. Swift [S. D.] 116 NW 76.

**39.** In action by executrix of deceased partner for an accounting against survivor, evidence held to show that deceased had prior to his death sold all his interest to surviving partner and that therefore no action would lie. Rines v. Ferrell [Minn.] 119 NW 1055.

**40.** Evidence held to show that accounts of ship carpenters partnership were kept in so incomplete state that justice could not be done between parties in suit for accounting, and that bill was therefore properly dismissed. Donaldson v. Donaldson, 237 Ill. 318, 86 NE 604.

**41.** Bill brought by several members of copartnership in telephone company for themselves and others similarly situated demurrable because all partners not made parties. Thickson v. Barry, 138 Ill. App. 100.

**42.** Petition which averred that partnership owned certain property, and owed certain debts, including one to plaintiff, held sufficient to support judgment for accounting and settlement. Meeve v. Eberhardt [Tex. Civ. App.] 108 SW 1013.

**43.** In action for accounting where it was sought to amend complaint after all evidence was in so as to allege prior dissolution, held in view of subsequent participation in partnership management, and because amendment would bring cause of action within statute of limitation, such

judgment of dissolution entered on a cross bill improvidently allowed will be sustained in the absence of objection.[44] On accounting between partners, the partnership ledgers kept by bookkeepers are competent original evidence.[45] The books of a partnership to which all the partners have access are equally binding on all the partners and as between them they are presumed to be correct.[46] Equities between partners are properly settled on an accounting and the amount due from one partner to the other is to be determined by the final judgment, which may be enforced by execution.[47] The court may exercise its discretion as to whether the sale of partnership property after the debts are paid shall be ordered.[48] An injunction restraining interference with the partnership funds may properly be granted in a suit for an accounting.[49] In a suit for settlement of a partnership, the partner from whom the balance is found to be due pays the costs.[50]

*Receivers.*[See 10 C. L. 1120]—An ex parte order granting a receiver and an injunction dispossessing the managing member in a partnership of his property is an absolute nullity.[51] An order appointing a receiver may be amended nunc pro tunc to permit him to pay debts.[52] Such an order is appealable by the aggrieved party,[53] but is not subject to collateral attack.[54] A receiver of a partnership in a suit for an accounting should not be appointed unless the necessity therefor is clear,[55] and unless there is

amendment was properly refused. Teipner v. Teipner, 135 Wis. 380, 115 NW 1092.

**44.** Bill and cross bill on same issues will be treated as in one cause. Clinton v. Winnard, 135 Ill. App. 274, afd., 233 Ill. 320, 84 NE 261.

**45.** Since relation of agency existed, each entry made by party or his clerk constituted an admission by the partner against whom it was charged. Schlicher v. Whyte [N. J. Err. & App.] 71 A 337.

**46.** Rule held not to apply to loose sheets found in firm books which were not shown to to have been made during existence of partnership. Donaldson v. Donaldson, 237 Ill. 318, 86 NE 604. In an action for an accounting by one partner against another, exhibits taken from partnership day book and sales book were admissible against the partner who had made entries in question as written declarations. Alexander v. Wellington [Colo.] 98 P 631. Account drawn up by one partner on basis of book value only conclusive as to capital contributed but not as to items open to shrinkage. Adams v. Hubbard, 221 Pa. 511, 70 A 835.

**47.** Gross v. Gross, 128 App. Div. 429, 112 NYS 790.

**48.** Where property consisted of shares of stock of equal value, no abuse of discretion to order an equal division instead of a sale. Ruggles v. Buckley [C. C. A.] 158 F 950.

**49.** Circumstances held to sustain granting of injunction. Causter v. Barnette, 49 Wash. 659, 96 P 225.

**50.** Borah v. O'Niell, 121 La. 733, 46 S 788.

**51.** Goldman v. Manistee Circuit Judge [Mich.] 15 Det. Leg. N. 907, 118 NW 600.

**52.** Receiver appointed to collect partnership assets paid partnership debts without authority. Held interlocutory decree appointing him might be amended nunc pro tunc permitting payment of such debts. Kliger v. Rosenfeld, 114 NYS 1006. On motion for an order nunc pro tunc allowing payment of claims already made by receiver, validity of such claims could not be passed upon, but referee might be authorized to hear them on condition that receiver assumed burden of proving that claims so paid by him were valid. Id.

**53.** On appeal from interlocutory order appointing receiver in dissolution suit, held that defendant was an "aggrieved party" within meaning of § 1289, Burns' Ann. St. 1908, when complaint charged him as partner although he had not signed articles of partnership. Marshall v. Matson [Ind.] 86 NE 339.

**54.** In an action by receiver against third party, order of appointment may be attacked on ground of lack of jurisdiction. Title Insurance & Trust Co. v. Grider, 152 Cal. 746, 94 P 601.

**55.** Receiver of copartnership engaged in publication of book held improperly appointed where publication would stop because of lack of funds if appointment was made permanent. Smith v. Brown [Wash.] 96 P 1077. An allegation that one partner allowed a creditor to obtain a judgment against the firm by default on service of summons on himself alone, of which he gave no notice to his partner, establishes a prima facie case for appointment of receiver to prevent waste and mismanagement of firm property. Whilden v. Chapman, 80 S. C. 84, 61 SE 249. Appointment of receiver by firm creditor without notice and without showing insolvency of firm or partners or of firm creditor secured by deeds of trust of partnership property, who took charge of firm property held by creditor under trust deed, held improvident and improper. Lawrence Lumber Co. v. Lyon [Miss.] 47 S 849. Where partners operating steamboat rented from a third party were unable to pay rent and interest whereby owner threatened to resume possession and one partner sent out dissolution notices, held a receiver was properly appointed to take charge of property. Hulings v. Jones, 63 W. Va. 696, 60 SE 874. Ex parte appointment of receiver for partnership operating switchboard and telephone lines held not authorized on mere allegation

no adequate remedy at law.[56] A receiver of the property of a copartnership pending an accounting is entitled to all the firm property,[57] and payment to him affords full protection against any subsequent claim by the partners.[58] Defenses based upon partnership relation to an action between partners are not avoidable in a suit by the receiver appointed in such action against a third party.[59]

*Credits and charges.*See 10 C. L. 1121—By agreement the parties may except specified property from division and sell it jointly.[60] In determining the credits to which a partner is entitled and the charges for which he is liable, the partnership agreement and the surrounding circumstances must be considered.[61]

that property is deteriorating through mismanagement. Marshall v. Matson [Ind.] 86 NE 339

**56.** Insolvency of partnership and of copartners as individuals must be alleged and proven. Whilden v. Chapman, 80 S. C. 84, 61 SE 249.

**57.** An order providing for turning over property to receiver on pain of punishment for contempt was improperly granted where there was no evidence that partner against whom order was issued had possession thereof. Gross v. Gross, 128 App. Div. 429, 112 NYS 790. Fact that one partner has received and disposed of firm assets held not to justify order compelling repayment to receiver before final judgment in action for accounting. Id.

**58.** Title Insurance & Trust Co. v. Grider, 152 Cal. 746, 94 P 601.

**59.** In suit by receiver of partnership against third party, the latter could not set up that action between partners could not be maintained on ground that assets had not been exhausted. Title Insurance & Trust Co. v. Grider, 152 Cal. 746, 94 P 601.

**60.** Although no reference thereto in petition. Meeve v. Eberhardt [Tex. Civ. App.] 108 SW 1013.

**61. Held allowable:** A retiring partner who has not withdrawn all his capital from the buiness may elect to take the income of such capital instead of the interest, and in that case he is chargeable with an allowance for **skill and services** of the other members. Moore v. Rawson, 199 Mass. 493, 85 NE 586. In suit to wind up partnership formed to deal in real estate, by terms of which one was to furnish money, the other time and skill, latter to be recompensed by equal share of profits after deducting expenses, including compensation for his services, held that latter was entitled to reasonable value of his services when the other partner repudiated partnership relation, and having broken contract so that rule of compensation provided for by contract could not be applied. Harrison v. Clarke [C. C. A.] 164 F 539. Where one partner agreed with copartner to take care of partnership property, in absence of stipulation as to amount of compensation, held to be entitled to compensation usual for such services. Costen v. Price, 33 Ky. L. R. 553, 111 SW 390. **Breach of obligation** to construct machine and make certain advancements according to partnership agreement. Gilbert v. Howard Automatic Mach. Co., 147 N. C. 308, 61 SE 176. Evidence held to sustain finding that deceased partner's estate was **chargeable for land sold together with partnership land** at rate of $40 per acre, which was price fixed by decedent in letter to other partners. Boreing v. Wilson, 33 Ky. L. R. 14, 108 SW 914. In suit by executrix of deceased member of law partnership to recover entire amount of fees alleged to have been earned by decedent as attorney for another member of firm who was receiver for firm's client, held evidence showed partners so construed partnership agreement as to require equal division of such fees; consequently estate could only recover **proportionate share of fees unpaid** at time of member's death. Jones v. Gardner [Tex. Civ. App.] 112 SW 826. On accounting of partnership to prosecute claims against the United States, where both partners died pending prosecution of such claims, associates of partner who survived his copartner could not claim more than one-half of fees earned in prosecution of the claims after former's death as against estate of partner who died first. Consaul v. Cummings, 30 App. D. C. 540.

**Held not allowable:** A partnership is not chargeable with a **bill for auditing** the partnership accounts incurred for the benefit of a member. Winnard v. Clinton, 233 Ill. 320, 84 NE 261. Where no accounts were kept of partnership transactions, thus making accurate accounting impossible, no **allowance** could be made **for failure of one member to devote entire time** to partnership interests. Teipner v. Teipner, 135 Wis. 380, 115 NW 1092. On accounting of partnership formed to prosecute certain claims, surviving partner employed assistant counsel. Held that estate of deceased partner was entitled to one-half entire fee earned and that **compensation of assistant** must come out of survivor's share. Consaul v. Cummings, 30 App. D. C. 540. Partner who without suit pays with accrued interest note executed by his firm and containing stipulation for **attorney's fees** in case of suit has no right, in settlement of the partnership, though it be settled by suit, to recover such attorney's fees. Borah v. O'Niell, 121 La. 733, 46 S 788. After accounting and appointment of receiver, depreciation of property while under receiver's care, further damages for frauds, items paid from fund for services and expenses of administration of fund properly in court, could not be charged to one partner as **costs.** McIntosh v. Ward [C. C. A.] 159 F 66. **Depreciation of value of partnership property** was not proper charge against firm where it appeared that partnership agreement provided that defendant should receive one-half profits for use of firm property bought by him and that he

*Interest.*[See 10 C. L. 1122]—In the absence of agreement, interest will not be allowed on advances made, by a partner,[62] nor on funds held by him pending settlement.[63] Interest may be allowed on the balance due on a contested settlement.[64] Where the accounts between a deceased partner and the firm are mutual and of equal rank, it is proper to allow the same rate of interest on each.[65]

*Reference.*[See 10 C. L. 1122]—An order of reference is presumptively regular.[66] Where the accounts of an alleged partnership are voluminous and complicated, extending over many years, some of the items being contested, a reference is proper.[67] The referee need not state a formal, itemized account,[68] and his report is conclusive where the true state of the accounts cannot be gathered from the record.[69]

*Judgment and decree.*[See 10 C. L. 1123]—A judgment in an action for accounting is conclusive as to defenses which are not pleaded.[70] Where both partners participated in an accounting made upon motion of one of them without objection from the other, the account cannot subsequently be questioned as being made without jurisdiction.[71] A judgment given for an excessive amount and creating a lien therefor may be corrected by reformation.[72] It is within the discretion of the court to reopen a case of accounting for purpose of taking additional testimony.[73]

*Opening and correcting settlement.*[See 10 C. L. 1123]—A partnership settlement and accounting may be set aside for fraud[74] or for error and mistake.[75] The right

would sell half interest to complainant, the contract being construed not to intend any deduction from gross profits. Winnard v. Clinton, 233 Ill. 320, 84 NE 261. On accounting of partnership to prosecute claims against federal government, held that estate of deceased partner could claim share of fees earned by surviving partner up to time of latter's death, but not **fees earned by his administrators** in prosecution of same claim where evidence showed that such administrators were acting as claimant's attorneys rather than as representing deceased partner. Consaul v. Cummings, 30 App. D. C. 540.

**62.** Amounts due for advances, over drafts and undivided profits are mere items in a partnership account for which, in absence of special agreement, interest will not usually be allowed save upon and from a final liquidation and settlement. Borah v. O'Niell, 121 La. 733, 46 S 788.

**63.** Where surviving partner was administrator of deceased partner's estate, court ordered him to charge himself with interest on amount of firm funds in his hands. Held improper in absence of showing of unreasonable delay. Kempton v. People, 139 Ill. App. 563.

**64.** Where one partner was induced to make settlement by fraud of his copartner, on account of which fraud balance due was contested, he could recover interest on the balance found due in action for accounting from time fraudulent settlement was made. Phillips v. Reynolds, 236 Ill. 119, 86 NE 193.

**65.** Same rate properly allowed upon proceeds of sale of firm property made by deceased partner and upon advancements by him to firm. Boreing v. Wilson, 33 Ky. L. R. 14, 108 SW 914.

**66.** Where order of reference in suit for accounting was made by a judge in another division of judicial district than that in which action pending, it will be presumed that order was made at request of judge having jurisdiction over suit. Alexander v. Wellington [Colo.] 98 P 631.

**67.** Speakman v. Vest [Ala.] 45 S 667.

**68.** Report of what was due from each member held sufficient compliance with decree. Schlicher v. Whyte [N. J. Err. & App.] 71 A 337.

**69.** Report of commissioner appointed to make partnership accounting between surviving partner and estate was conclusive where it was impossible from the record to ascertain true state of accounts, although commissioner did not itemize his report nor give method by which he arrived at his result. Cotton v. Cotton's Ex'r [Ky.] 115 SW 783.

**70.** On suit for accounting and settlement, defendant, who did not set up defense that indebtedness to plaintiff should have been reduced, could not complain after judgment. Meeve v. Eberhardt [Tex. Civ. App.] 108 SW 1013.

**71.** Clinton v. Winnard, 135 Ill. App. 274, afd. 233 Ill. 320, 84 NE 261.

**72.** That judgment was given for creditor partner, in suit for accounting and settlement, for excessive amount, held not to require reversal since defect could be remedied by reformation. Meeve v. Eberhardt [Tex. Civ. App.] 108 SW 1013. Where by error judgment in favor of partner on settlement was made a lien for entire amount of indebtedness due him, judgment ordered reformed so as to provide that only one-half would be satisfied out of defendant's portion. Id.

**73.** Court properly refused to reopen judgment for accounting to permit additional evidence as to whether certain claims allowed were properly partnership matters. Consaul v. Cummings, 30 App. D. C. 540.

**74.** Where one partner who had been entrusted with partnership funds for investment purposes fraudulently represented himself unable to account for them and thereby induced copartner to make settlement for

to bring action for the correction of a partnership settlement may be barred by laches.[78] The statute of limitations does not begin to run against an action to set aside a partnership accounting on the ground of fraud until discovery of the fraud.[77]

(§ 7) *F. Contribution and indemnity.*[78]—See 8 C. L. 1284—A partner is entitled to indemnity from his copartners for torts committed by them if he has not himself been personally guilty.[79]

§ 8. *Limited partnerships.*[80]—See 10 C. L. 1123

### PARTY WALLS.[81]

*The scope of this topic* is noted below.[82]

A party wall is ordinarily one built partly on the land of one and partly on that of another for the common benefit of both,[83] but the wall if between two properties need not necessarily rest equally on both;[84] and since there is nothing to prevent the owner of a lot from erecting a wall upon his own premises, whether a wall so built is a party wall conferring upon the owner of the adjacent premises the right to use it as such is a question of fact largely dependent upon the intention of the builder.[85] While the presence or absence of windows is not an infallible test, their presence is a good indication that it is not a party wall.[86] and where there is no necessity for a

amount much smaller than was due, held settlement set aside and estate of such partner liable. Johnston v. Johnston [Minn.] 119 NW 652.

75. Stitzel v. Ehrman [Ky.] 114 SW 280. **Settlement corrected** as to error in interest on bills payable (Stitzel v. Ehrman [Ky.] 114 SW 280), as to error in understanding loss allowance on bills payable (Id.), as to error in statement of rents and expenses unpaid (Id.), for error in understating unpaid accounts (Id.), for error in understating storage and taxes (Id.), for error in charging firm both with goods sold and proceeds thereof (Id.).

76. Evidence held not to show plaintiff guilty of laches in bringing suit to correct settlement. Stitzel v. Ehrman [Ky.] 114 SW 280. In suit for injunction to restrain disclosure of trade secrets by former partner, held that latter could not claim ignorance of his rights as partner under dissolution of partnership or that he was unjustly forced out of same where he acquiesced in dissolution for 18 years. Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 NE 132.

77. Lapse of 15 years after fraud until discovery. Johnston v. Johnston [Minn.] 119 NW 652.

78. **Search Note:** See Partnership, Cent. Dig. §§ 132, 171, 733; Dec. Dig. §§ 84, 85, 109; 30 Cyc. 450, 451, 464.

79. Held that where no negligence was proven as to one of three railway companies forming partnership, but negligence was found against firm, member without fault was entitled to judgment over against codefendants. Texas Cent. R. Co. v. Pool [Tex. Civ. App.] 114 SW 685.

80. **Search Note:** See Partnership, Cent. Dig. §§ 823-865; Dec. Dig. §§ 349-376; 30 Cyc. 751-767; 15 A. & E. Enc. P. & P. 1114.

81. See 10 C. L. 1124.

**Search Note:** See notes in 4 C. L. 927; 6 Id. 952; 10 Id. 1125; 66 L. R. A. 673; 2 L. R. A. (N. S.) 87; 10 Id. 1191; 11 Id. 924; 16 Id. 434; 82 A. S. R. 679; 89 Id. 924, 925; 8 Ann. Cas. 292, 319; 11 Id. 627, 629.

See, also, Party Walls, Cent. Dig.; Dec. Dig.; 30 Cyc. 771-799; 22 A. & E. Enc. L. (2ed.) 236.

82. Includes matters relating to rights and liabilities growing out of joint use of division line walls. As to rights and liabilities of adjoining owners generally, see Adjoining Owners, 11 C. L. 31. As to municipal regulation, see Buildings and Building Restrictions, 11 C. L. 479.

83. Wall, erected as a dividing line between two buildings built at same time, for common benefit and convenience of both tenants, and erected under a contract and agreement between owners, flues being constructed to be used by both properties and openings being left for the insertion of joists and rafters on both sides, held a party wall possessing all party wall requisites. Kiefer v. Dickson, 41 Ind. App. 543, 84 NE 523. Wall built entirely on land of one owner, never used by adjacent owner, not built at joint expense, nor under contract between adjoining owners, containing windows and being without openings for joists or rafters, held not party wall. Id.

84. Mercantile Library Co. v. University of Pennsylvania, 220 Pa. 328, 69 A 861. It may be wholly on one of the two properties and still be a party wall, if it was so intended by the builder, or subsequently so recognized and treated by the owners of the adjacent properties. Id.

85. Mercantile Library Co. v. University of Pennsylvania, 220 Pa. 328, 69 A 861. Wall built entirely on lot of owner erecting same held not a party wall, no necessity for same, no intention nor any agreement therefore being shown, an alley 16 feet wide abutting on the line, and wall containing open spaces for doors. Id.

86. Kiefer v. Dickson, 41 Ind. App. 543, 84 NE 523.

party wall and apparently there will be none in the future, the presumption is strong that a party erecting a wall on his own premises did so with no intention that it should be a party wall.[87] Party walls may be created by contract, express or implied, between the parties, by prescription or by statute,[88] and under the common law the right to use and the manner of use of a party wall depends either on an agreement between the adjoining owners or by prescription.[89] Where two owners build a party wall for their common use, their rights in the wall do not depend upon prescription,[90] and where it is built on the dividing line of adjoining owners and is permitted to remain for time immemorial, it is presumed that the wall was constructed by agreement,[91] and in the absence of an express agreement the parties' rights will be dependent upon an implied agreement[92] that the wall shall be and remain a party wall for each of the lots,—that its use shall be as a wall to each of the buildings constituting a part and acting as a support thereof, and if one of the owners desires to remodel or reconstruct his building he may do so, being careful not to injure the other's building or unnecessarily interfere with its use.[93] Such implied agreement is not strictly in derogation of title, and when executed is not within the inhibition of the statutes of frauds and perjuries.[94] It will be construed according to the presumed intent.[95] The first builder is he who first elects to make a party wall and his right cannot be defeated by the act of another.[96] If a builder lay a foundation wall extending, as a party wall on his neighbor's lot, he cannot erect therein a wall wholly within his own line and prevent the erection from being a party wall.[97] That one sees fit to extend a party wall does not warrant a finding that the new wall is anything but a private wall.[98] After a party wall has been erected under a contract providing that the adjoining owner can use the same by paying the builder one-half of the value, at the time of the use, of the whole thickness of the part used, and appropriated and paid for by the person whose land adjoins that of the builder, each party is the owner in severalty of that part which is on his land, subject to easements both in the wall and the land in favor of the other party,[99] but until it is appropriated by the adjacent owner under the contract it is the property of builder, and so far as it stands on the land of his neighbor it is lawfully maintained there under a license which preserves to the builder all his rights of the property therein,[1] and a use of that property or any interference with it without the owner's consent is a violation of his right giving a cause of action in damages.[2] Where a wall is a strict party wall, neither of the

87. Mercantile Library Co. v. University of Pennsylvania, 220 Pa. 328, 69 A 328.

88. Creative elements necessary to either method held lacking in Stout and Tucker walls. Kiefer v. Dickson, 41 Ind. App. 543, 84 NE 523.

89. Bright v. Bacon [Ky.] 116 SW 268. Where one builds wall on his own lot but adjoining or near another's lot, and owner of latter, without express agreement, joins his building to wall and maintains it for a period sufficient to constitute a bar under the statute of limitation, he has a right by prescription. Id.

90, 91, 92, 93, 94, 95. Bright v. Bacon [Ky.] 116 SW 268.

96. Mercantile Library Co. v. University of Pennsylvania, 220 Pa. 328, 69 A 861. Owner of lot of ground in Philadelphia cannot be deprived of right to make a party wall between himself and his neighbor by his neighbor's building exclusively on his own land, either to the line or a short distance therefrom. Id.

97. Mercantile Library Co v. University of Pennsylvania, 220 Pa. 328, 69 A 861.

98. Where owner built wall entirely on his own land, extending a party wall, but wall was for hotel purposes and had windows in it, held not a party wall. Kiefer v. Dickson, 41 Ind. App. 543, 84 NE 523. Where court specifically found that wall was 8 inches from dividing line between adjacent premises according to a survey, and another finding pointed out difficulty of a correct survey, held survey was not discredited so that court could consider all walls to be on recognized dividing line of properties. Id.

99, 1. Berry v. Godfrey, 198 Mass. 228, 84 NE 304.

2. "Use" referred to in contract is use for erection or support of a building, and where no right was claimed under contract, owner was entitled to nominal damages against defendant for driving large nails in part of wall not paid for. Berry v. Godfrey, 198 Mass. 228, 84 NE 304.

adjoining owners has a right to maintain windows therein,[3] and equity will enjoin such maintenance and require the restoration of the wall to a solid wall.[4] Where a party wall is situated on both sides of a division line, each party has title to the soil to the line but his title is qualified by the easement which the other owner has of supporting his building by the common wall,[5] but one may acquire an easement in an adjacent wall by deed or by prescription which presumes a deed,[6] and such easement includes the right to repair or rebuild,[7] but a new or an additional servitude cannot be imposed [8] unless the owner upon whose land the wall is erected by his conduct is estopped from denying such right.[9] Where the wall is situated upon the property of one party, the right of the other to have support therefrom is in the nature of an easement only,[10] and the right ceases upon the destruction of the building by fire.[11] While prescription gives a right measured by the use actually made,[12] yet a right under an implied agreement implies the right to make alterations and changes in the use,[13] and each party has a right to build the wall higher so as to increase the height of the building but at his own cost.[14] An owner on whose boundary line is erected a party wall has an easement in so much of the adjacent lot as is occupied by the wall,[15] but this easement involves no more than the right to have the party wall maintained with all its uses as a party wall,[16] and when he alters his house by building another story, using the whole thickness of the party wall, the other owner if he desires to extend his house and use the wall as extended must contribute to the value of the extension.[17] Where one of the owners determines to build a new house or alter his own by adding a story or more to it, he does not abandon his easement in part of the wall nor the title to his own part.[18] Each party to a party wall agreement is entitled to the use of the whole of the party wall as a means of support of their respective buildings, having a fee to the center of the wall and an easement in the remaining part.[19] One using a party wall renders himself liable to contribution toward the cost of the same,[20] unless he is otherwise shown to be relieved therefrom.[21] A party wall to the construction of which the owner of premises has not consented is not an incumbrance on such premises but a burden imposed by law for the general public benefit and incident to the ownership of property.[22] Hence where an adjoining owner makes such use of a

**3, 4.** Kiefer v. Dickson, 41 Ind. App. 543, 84 NE 523.

**5.** Bowhay v. Richards [Neb.] 116 NW 677.

**6.** Evidence held to sustain claim to easement by prescription, wall being used for at least 25 years. Mann v. Reigler, 33 Ky. L. R. 774, 111 SW 300.

**7, 8.** Mann v. Reigler, 33 Ky. L. R. 774, 111 SW 30.

**9.** Adjoining owner not heard to claim compensation for old wall, having with full knowledge suffered partition wall to be extended for another story, extension not having damaged old wall or impaired use of same, and new wall was for his use also if desired. Mann v. Reigler, 33 Ky. L. R. 774, 111 SW 300.

**10.** Bowhay v. Richards [Neb.] 116 NW 677.

**11.** Bowhay v. Richards [Neb.] 116 NW 677. That owner of building used wall before his building was destroyed by fire held not notice to purchasers of property upon which wall was situated of stipulation in unrecorded written contract that owner of destroyed building might renew use of wall in case building should burn and be rebuilt so as to take case out of easement rule. Id.

**12.** Bright v. Bacon [Ky.] 116 SW 268.

**13.** Change of house, erection of additional story the full thickness of party wall all done without injury to party wall, held permissible, right to wall being acquired by implied agreement. Bright v. Bacon [Ky.] 116 SW 268.

**14.** Citizens' Fire Ins. Co. v. Lockridge [Ky.] 116 SW 303.

**15, 16, 17, 18.** Bright v. Bacon [Ky.] 116 SW 268.

**19.** Citizens' Fire Ins. Co. v. Lockridge [Ky.] 116 SW 303. Owner of injured building entitled to recover on insurance policy for damage by fire to party wall built astraddle boundary line, though he has fee only to center of wall. Id.

**20.** Defendant held liable for contribution to cost of wall, having used wall for his own purpose when he concluded to rebuild. Howze v. Whitehead [Miss.] 46 S 401.

**21.** Howze v. Whitehead [Miss.] 46 S 401. That one collected rent for plaintiff held not to show authority in him to relieve defendant from duty of contributing to cost of wall. Id.

**22.** Party wall under Code, §§ 2994-3003, not incumbrance for which lessee using wall may recover from lessor sum payable to adjoin-

party wall as to become bound to pay a share of the expense thereof, his liability to the owner erecting the wall is not a charge which his lessee would be bound to meet in the absence of notice of nonpayment of adjoining owner's share of wall.[23] Although one may by purchase have acquired the absolute title to a division wall, yet he may by his conduct and attitude toward the use of the wall by the grantor be estopped from denying the grantor's right to such use until the owner in good faith elects to destroy or alter the wall.[24] One who negligently uses a party wall is liable, not only for the damage done or accrued during such negligent use but also for damages that directly or proximately result from the injuries inflicted,[25] and the latter damages may be recovered even though they accrue after the institution of the suit.[26] Where a party wall is erected by agreement resting in part on the lands of two adjoining owners with a covenant that the owner erecting the wall shall have compensation for a portion of the expense from the other owner when the latter shall make use of the wall, the obligation to pay arises only when such use is made.[27] Such covenant runs with the land as against a grantee of the adjoining owner, and the grantee who first avails himself of the benefits of the wall becomes bound to pay his share under his grantor's covenant to the owner who has erected such wall,[28] and there is no liability on the part of the covenanting grantor, who has made no use of the wall, to pay the stipulated share of the expense either to the adjoining owner or to the grantee who first availed himself of the benefits of the wall.[29] On the subject of whether covenants in regard to the payment of the expense of construction of a party wall or for the use thereof run with the land, the decisions of the courts are by no means uniform,[30] but the weight of authority is to the effect that they can be made to run with the land if the parties so intend,[31] and that they do so run where they are binding on the heirs and assigns of the respective parties,[32] and where they do, the covenantor's immediate grantee whose conveyance is subject to the covenant and who uses the wall is neither a necessary nor a proper party to a suit on the covenant, after he no longer owns the land.[33]

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**Passengers,** see latest topical index.

## PATENTS.


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ing owner for share of wall. Percival v. Colonial Inv. Co. [Iowa] 115 NW 941.

23. Percival v. Colonial Inv. Co. [Iowa] 115 NW 941. Use by plaintiff's tenant held so slight in extent and temporary in character as not to justify assumption that plaintiff had paid for part of wall. Id.

24. Cherry v. Brizzolara [Ark.] 116 SW 668. Where after purchase defendant continuously for five years thereafter acquiesced in use, and immediately before institution of suit to reform deed agreed to lease to plaintiff use of wall for a nominal consideration per year. Id.

25. Cooper v. Sillers, 30 App. D. C. 567. Builder on party wall, thinking same was a 13 inch wall, but discovering in course of construction that it was a nine inch, held guilty of negligence and liable for damages naturally and proximately resulting. Id.

26. Cooper v. Sillers, 30 App. D. C. 567.

27, 28, 29. Percival v. Colonial Inv. Co. [Iowa] 115 NW 941.

30. Sandberg v. Rowland [Wash.] 97 P 1087.

31. Morris v. Burr, 59 Misc. 259, 112 NYS 243. Where party expressly bound "grantees" and agreed that covenants should run with land, held covenant was not personal only but ran with land and was enforcible against covenantor's subsequent grantees. Id.

32. Agreement, binding himself, heirs, executors, administrators and assigns, held to create covenant running with land, mak-

§ 1. *Necessity and kinds.*[34]—See 10 C. L. 1127—The right of an inventor to a monoply is purely a creature of the statute, not recognized at common law,[35] and the exclusive use for the full term is the only substantial property right obtainable under the patent law;[36] hence, no cause of action arises at law for infringement before a patent is granted irrespective of how the prior use may have been obtained.[37] No absolute right of property is conferred by the grant of a patent,[38] but the patentee is merely put in a position to assert his prima facie right in case of an infringement and have the same adjudicated in a court where extrinsic evidence may be heard.[39] The monopoly does not extend beyond the jurisdiction of the government granting the same,[40] and whatever effect a patent granted by one country has in another depends upon the status given to it by the laws of the latter,[41] and the burden of showing that under the law of Cuba, during the period of its military government by the United States, protection had been extended, rests upon the party claiming exemption under the Cuban law.[42] There are two classes of patents, one for simple elements, and another for a combination of elements,[43] but there is no such classification as simple and complicated inventions.[44] Letters patent, when issued, constitute a contract,[45] but the mere filing of an application for a patent does not constitute such a contract as would come within the constitutional provision that "no state shall make any law impairing the obligation of contracts," [46] and since the right to a patent is purely statutory it can be modified or taken away before rights under it have become vested.[47] Although valid letters patent when issued give the patentee a vested right in the invention for which the patent is issued, no such right is acquired under the preliminary proceedings leading up to its issuance,[48] and, since the proceedings requisite to the acquiring of a patent are analogous to the procedure in an action at law before final judgement, they may be changed or abolished unless the statute especially provides for the protection of pending cases.[48]

§ 2. *Patentability. Subjects of an invention.*[50]—See 10 C. L. 1128—The patent must involve actual invention [51] and disclose something new, practical and useful.[52]

ing purchaser of lot using wall liable for portion of wall. Sandberg v. Rowland [Wash.] 97 P 1087. No presumption that owner of adjacent lot on utilizing wall paid proportion of price to vendor of purchaser, where purchaser took possession and continued same. Id.

**33.** Where there was no express assumption of burden of covenant, and agreement was recorded giving subsequent grantees constructive notice. Morris v. Burr, 59 Misc. 259, 112 NYS 243.

**34. Search Note:** See notes in 20 L. R. A. 605; 28 Id. 423; 29 Id. 786; 39 Id. 73; 55 Id. 631; 2 L. R. A. (N. S.) 1094, 1173; 5 Id. 1177; 12 Id. 599; 14 Id. 274; 16 Id. 550.

See, also, Patent, Cent. Dig. §§ 257-269, 350-356; Dec. Dig. §§ 181-192; 220-225; 22 A. & E. Enc. L. (2ed.) 260; 22 Id. 270.

**35.** Avery v. Case Plow Works, 163 F 842.

**36.** Where patent though delayed issued for full time, inventor not in position to maintain action at law for damages against party causing delay. Avery v. Case Plow Works, 163 F 842.

**37.** Avery v. Case Plow Works, 163 F 842. Causing interference proceedings to be prosecuted in patent office, delaying issuance of patent to complainant for purpose of obtaining benefit and use of invention though malicious, not actionable at law for damages. Id.

**38, 39.** In re Heroult, 29 App. D. C. 42.

**40, 41.** Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., 164 F 869.

**42.** By virtue of Platt amendment, United States patent registered in Cuba during military occupancy acquired status of Cuban grant, hence suit for infringement not barred by decree in United States holding original patent invalid. Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., 164 F 869.

**43.** Yesbera v. Hardesty Mfg. Co. [C. C. A.] 166 F 120.

**44.** Automatic Weighing Mach. Co. v. Pneumatic Scale Corp. [C. C. A.] 166 F 288.

**45, 46.** De Ferranti v. Lyndmark, 30 App. D. C. 417.

**47.** Filing of application and taking steps up to issuance, mere matters of procedure vesting, not giving, vested rights. De Ferranti v. Lyndmark, 30 App. D. C. 417.

**48, 49.** De Ferranti v. Lyndmark, 30 App. D. C. 417.

**50. Search Note:** See Patents, Cent. Dig. §§ 1-112; Dec. Dig. §§ 1-87; 22 A. & E. Enc. L. (2ed.) 273.

**51.** Von Eberstein v. Chambliss, 166 F 463; Tubelt v. Friedman, 158 F 430. While the law deals liberally with inventors, yet courts will not grant a monopoly unless convinced that invention is involved. In re Milans, 31 App. D. C. 269. Nothing patentable in idea

of casting ends of crossbars into uprights. In re Sheldon, 31 App. D. C. 201. Adding to a book additional columns not involving invention. In re Taylor, 31 App. D. C. 529.

**ILLUSTRATIONS. Patents held to disclose invention:** One claim of each patent for improvements in turning lathes. In re Sheldon, 31 App. D. C. 201, Truffault, reissue No. 12,437 (original No. 695,508) frictional retarding means for spring vehicles, and No. 12,399 (original No. 743,995) anti-vibration device for vehicles. Hartford v. Hollander [C. C. A.] 163 F 948. Lichtenstein, No. 38,412, design for hat band. Lichtenstein v. Straus, 166 F 319. Dyer, No. 483,646, process of making artificial mica sheets for electrical insulation. Mica Insulator Co. v. Commercial Mica Co. [C. C. A.] 166 F 440. Stockhelm, No. 318,379, process of filtering beer. Loew Filter Co. v. German-American Filter Co. [C. C. A.] 164 F 855. Wightman, No. 411,947, rheostat for electric cars. Thomson-Houston Elec. Co. v. Traction Equipment Co., 164 F 425. Allens, No. 424,944, surgical pump. Truax v. Childs Adjustable Parlor Chair Co., 162 F 907. Mailloux, No. 430,868, for regulating system for electric circuit. Electric Storage Battery Co. v. Gould Storage Battery Co. [C. C. A.] 158 F 610. Leach, No. 433,686, locomotive track sander. Economy Locomotive Sander Co. v. American Locomotive Sander Co. [C. C. A.] 162 F 683. Aiken, No. 450,360, and No. 492,951, apparatus for conveying, cooling and straightening metal. National Tube Co. v. Aiken [C. C. A.] 163 F 254. Rhoades, No. 454,791, improvement in looms. Draper Co. v. American Loom Co. [C. C. A.] 161 F 728. Short, No. 459,794, rheostat for electric cars in manner of construction of pile and idea of making flues through same. Thomson-Houston Elec. Co. v. Traction Equipment Co., 164 F 425. Woodward, No. 493,461, thread controlling device for sewing machines. Maimen v. Union Special Mach. Co. [C. C. A.] 165 F 440. Staples, No. 474,536, spring supports for chair seats. Claims 1 and 3 by one of two devices. D'Arcy v. Staples & Hanford Co. [C. C. A.] 161 F 733. Lovell and Bredenberg, No. 490,877, book-trimming machine. Lovell v. Seybold Mach. 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Stiefel, No. 551,340, mechanism for making tubes from metalic ingots. Delaware Seamless Tube Co. v. Shelby Steel Tube Co. [C. C. A.] 160 F 928. Grant, No. 554, 675, rubber tired wheel. Consolidated Rubber Tire Co. v. Diamond Rubber Co. [C. C. A.] 162 F 892. Anderson, No. 555,893, improvement in centrifugal cream separators. Empire Cream Separator Co. v. Sears, Roebuck & Co. [C. C. A.] 160 F 668. Packham, No. 557,868, improvement in grain drills. Superior Drill Co. v. La Crosse Plow Co., 160 F 604. Cornell & Knapp, No. 561,656, improvement in can labeling machines, claims 2, 3, and 5. Knapp v. Atlantic Mach. Works, 163 F 531. Breuchaud, No. 563,130. improvements in construction of supports for walls, claims 1 and 2. Breuchaud v. Mutual Life Ins. Co. [C. C. A.] 166 F 753. Sinclair & Goltz, No. 566,874, electric distribution machine for operating flash signs. Dull v. Reynolds Elec. Flasher Mfg. Co., 161 F 129. Hurley, No. 572,679, improvement in circular knitting machines. Cooper v. Otis Co. [C. C. A.] 166 F 861. Nolans, No. 582,481, for fastening means for core-plates of electric machines, claims 2 and 4. Prudential Ins. Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 158 F 985. Campbell, No. 594,457, machine for forming nipples such as are employed in building wire spoke wheels. Manville Mach. Co. v. Excelsior Needle Co., 162 F 486. Laire, No. 600,429, isomerid of ionone and process for making same. Haarman-De Laire-Schaefer Co. v. Van Dyk & Co., 165 F 934. Bonsall, No. 604,346, claim 3, trunk adapted for hanging therein ladies' garments. Bonsall v. Peddie & Co., 161 F 564. Davies, No. 605,947, necktie. Good Form Mfg. Co. v. White [C. C. A.] 160 F 661. Phillips, No. 611,438, speed wagon. Phillips v. Faber Sulky Co., 160 F 966. Cornell, No. 612,825, can labeling machine, claim 1. Knapp v. Atlantic Mach. Works, 163 F 531. Donner, No. 620,541, method and mechanism for rolling black plate. Donner v. American Sheet & Tin Plate Co., 160 F 971. Donner, No. 620,541, mechanism for rolling black plate, claim 4. Id. Leavey, No. 622,190, saw guide for sawing material to make miter joints. Smith & Hemenway Co. v. Stearns & Co. [C. C. A.] 166 F 760. Wright and Aalborg, No. 633,772, claims 2 and 5, for automatic circuit breaker. Westinghouse Elec. & Mfg. Co. v. Condit Elec. Mfg. Co., 159 F 154. Arrott, No. 633,941, for dredger for pulverulent material. Mott Iron Works v. Standard Sanitary Mfg. Co. [C. C. A.] 159 F 135. Walker, No. 635,619, and 788,803, soil pipe drainage and venting fittings. Morton v. Llewellyn [C. C. A.] 164 F 693. Young, No. 638,540, combined abdominal pad and hose supporter. O'Brien v. Foster Hose Supporter Co. [C. C. A.] 159 F 710. Hewlett, No. 640,197, for pipe coupling consisting of so placing in novel combination one brass and two iron pieces that a rustless combination was perfected. Rainear v. Western Tube Co. [C. C. A.] 159 F 431. Richmond and Zeller, No. 641,546, for battery filler. National Carbon Co. v. Nungesser Elec. Battery Co., 159 F 157. No. 641,546, battery filler. Nungesser Elec. Battery Co. [C. C. A.] 160 F 1022. Bonsall, No. 642,075, improvements in garment receptacle, claim 5. Bonsall v. Peddie & Co., 161 F 564. Schoen, No. 647,907 hopperbottom car, claim 1. Morton Trust Co. v. American Car & Foundry Co., 161 F 546. Rapp, No. 653,400, for fire proof door. Rapp v. Central Fire-Proof Door & Sash Co., 158 F 440. Van Brunt, No. 659,881, improvement in grain drills. Superior Drill Co. v. La Crosse Plow Co., 160 F 504. Gaisman, No. 661,447, claim 6, for a

waist belt. Tubelt Co. v. Friedman, 158 F 430. Farrell, No. 663,069, process for bleaching nuts. Fullerton Walnut Growers Ass'n v. Anderson-Barn-Grover Mfg. Co. [C. C. A.] 166 F 443. Claude & Hess, No. 664,383, apparatus for storing acetylene gas. Commercial Acetylene Co. v. Avery Portable Lighting Co., 166 F 907. Clark, No. 674,757, bucking roll for attachment to a saddle. Clark v. George Lawrence Co., 160 F 512. Schrader, No. 682,390, machine for packing explosive gelatin. Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 F 47. Scott, No. 702,158, combined bustle and hip form. Scott v. Lazell [C. C. A.] 160 F 472. Yawman, No. 717,490, drawer for card indexes, claims 4, 5, 10, 11 and 12. Yawman & Erbe Mfg. Co. v. Vetter Desk Works [C. C. A.] 159 F 443. Benjamin, Nos. 721,774 and 721,777. Benjamin Elec. Mfg. Co. v. Dale Co. [C. C. A.] 158 F 617. Warren, No. 727,505, improvement in street pavements. Warren Bros. Co. v. Owosso [C. C. A.] 166 F 309. Cleveland, No. 727,909, can opener. Whittemore Bros. & Co. v. World Polish Mfg. Co., 159 F 480. Lewis, No. 731,695, claims 2, 4, 18, 19, 20. Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co., 163 F 950. Fisher, No. 737,916, mattress. American Mattress & Cushion Co. v. Springfield Mattress Co. [C. C. A.] 165 F 191. Blood, No. 743,231, claims 3 and 4, machine-knit seamless single-feed stocking. Kilbourn Knitting Mach. Co. v. Liveright, 159 F 494. Mueller, No. 746,355, wall register used with hot air furnaces. Mueller Furnace Co. v. Groeshel, 166 F 917. Hogan, No. 752,903, dredge for salt or pepper, having celluloid cap. Hogan v. Westmoreland Specialty Co., 163 F 289. Howard, No. 753,264, hub guards for wheels. Howard v. Grist, 165 F 211. Stafford and Hold, No. 759,928, improvement in circular-knitting machines. Stafford v. Morris, 161 F 113. Hobart, No. 765,240, tune sheet attachment for piano-players. Roth v. Harris, 162 F 160. Martin, No. 767,303, telegraph transmitter. Martin v. Wall [C. C. A.] 160 F 667. Joy, No. 780,664, printing telegraph receiver. Page Mach. Co. v. Dow, Jones & Co., 166 F 473. Critcher, No. 781,635, combined skirt and drawers. Leona Garment Co. v. Jenks, 160 F 693. Joy, No. 786,294, clutch mechanism. Page Mach. Co. v. Dow, Jones & Co., 166 F 473. Dunn, No. 800,431, computing cheese cutter. Dunn Mfg. Co. v. Standard Computing Scale Co. [C. C. A.] 163 F 521. Coffe, No. 812,183, improvement in telegraph keys. Bellows v. United Elec. Mfg. Co. [C. C. A.] 160 F 663. Ransome, No. 814,803, concrete mixing machinery. Ransome Concrete Mach. Co. v. United Concrete Mach. Co., 165 F 914. Cramer & Haak, No. 829,631, washing machine. Cramer v. 1900 Washer Co., 163 F 296. Karfiol, No. 835,189, process for making lace paper. Karfiol v. Rothner, 165 F 923.

**Patents held void for lack of invention:** Process of producing printed anilin-black designs upon vegetable textile fabric held nothing more than application of two patented processes of printing the selection of a combination of ingredients disclosed by another, hence not patentable invention. In re Chase, 31 App. D. C. 154. Edison, reissue No. 12,393 (original No. 444,530), leading-in wire for incandescent lamps. Edison Elec. Light Co. v. Novelty Incandescent Lamp Co., 161 F 549. Young, No. 27,115, design for sarcophagus monument. Crier v. Innes, 160 F 103. Williams, No. 31,838, design for insulating plug for electric line supports. Williams v. Syracuse & S. R. Co., 161 F 571.

**Patentability doubtful:** Tompkins design patent, No. 37,649, design for bedspring. J. E. Tompkins Co. v. New York Woven Wire Mattress Co. [C. C. A.] 159 F 133. Lowry, No. 412,963, for grass twine for use of harvesters to bind grain. American Grass Twine Co. v. Choate [C. C. A.] 159 F 140. Dick, No. 466,557, process of duplicating typewritten work. A. B. Dick Co. v. Henry, 160 F 690. Bownan, No. 468,780, blank book, claim 2. Slote & Co. v. C. A. Stratton Co., 159 F 485. Kelsey, No. 476,230, hot-air furnace. Dunsmore v. Kelsey Heating Co. [C. C. A.] 160 F 476. Kelsey, No. 476,230, claim 5, for hot-air furnace. Spear Stove & Heating Co. v. Kelsey Heating Co. [C. C. A.] 158 F 622. Hicks, No. 500,071, method and means for cash registering and account checking. Hotel Sec. Checking Co. v. Lorraine Co. [C. C. A.] 160 F 467. Moran, No. 500,149, air lock for caissons, claim 3. O'Rourke Engineering Const. Co. v. McMullen [C. C. A.] 160 F 933. Morrow, No. 504,401, armature for dynamo electric machines, claim 2. Bullock Elec. Mfg. Co. v. General Elec. Co. [C. C. A.] 162 F 28. Reist, No. 508,637, armature core. National Elec. Co. v. General Elec. Co. [C. C. A.] 159 F 934. Barr, No. 514,843, air lock for caissons claims 1, 3, 4, 6, and 8. O'Rourke Engineering Const. Co. v. McMullen [C. C. A.] 160 F 933. Furness, No. 527,961, for tile floor or wall, composed of tiles of yielding material with interlocking joints. New York Belting & Packing Co. v. Sierer [C. C. A.] 158 F 819. Moxham, No. 536,734, for railway switch structure, claim 1. Lorain Steel Co. v. White Mfg. Co., 158 F 413. Wiggins, No. 554,611, ball runway for alleys. Brounswick-Balke-Collender Co. v. Rosatto [C. C. A.] 165 F 56. Wiggins, No. 554,611, bowling alleys. Brunswick-Balke-Collender Co. v. Rosatto, 159 F 729. Merritt & Joy, No. 558,506, printing-telegraph machine, claim 6. Page Mach. Co. v. Dow, Jones & Co., 166 F 473. Powers, No. 558,610, heating and ventilating system. National Regulator Co. v. Powers Regulator Co. [C. C. A.] 160 F 460. Bates, No. 561,193, woven-wire fencing. American Steel & Wire Co. v. Denning Wire & Fence Co., 160 F 125. Bonsall, No. 604,346, trunk to hang ladies' dress skirts within, claims 4 and 5. Bonsall v. Peddie & Co., 161 F 564. Wiggins, No. 623,933, bowling alley. Brunswick-Balke-Collender Co. v. Rosatto [C. C. A.] 165 F 56. Wiggins, No. 623,933, ball runway for bowling alley. Brunswick-Balke Co. v. Rosatto, 159 F 729. Bonsall, No. 642,075, improvements in receptacle for garments, claims 3 and 4. Bonsall v. Peddie & Co., 161 F 564. Koeck, No. 646,123, for fabric. American Grass Twine Co. v. Choate [C. C. A.] 159 F 140. Locklin and Fox, No. 655,253, improvement in woven wire fabric. Locklin v. Buck [C. C. A.] 159 F 434. Hendrickson & Clamer, No. 655,402, alloy for ante-friction bearings. Brady Brass Co. v. Ajax Metal Co. [C. C. A.] 160 F 84. Richards, No. 665,033, pneumatic tool. Cleveland Pneumatitc Tool Co. v. Chicago Pneumatic Tool Co., 163 F 846. Taylor & White, Nos. 668,269 and 668,270, metal cutting tool and method of making same. Bethlehem Steel Co. v. Niles-Bement-Pond Co., 166 F 880.

The mere "function,"[53] principle or operations of a machine,[54] separate from the means or mechanical devices by which the result is accomplished,[55] as distinguished from a "process,"[56] is not patentable; nor is an anticipated invention,[57] or process,[58] an invention once abandoned,[59] a mere operative idea or principle,[60] an idea or conception amounting to nothing more than a mere abstraction,[61] the coupling without modification of a motor that will run any kind of machine to a machine that will run with any kind of motor,[62] the aggregation of old parts to make the structure of a new design,[63] or the aggregation of old parts acting independently and simultaneously without having any effect on each other or producing a new result,[64] although the combination may cheapen the cost of production.[65] But a combination if useful,

Eickemeyer, No. 677,308, alternating current motor. General Elec. Co. v. Corliss [C. C. A.] 160 F 672. Pieper, No. 704,099, electric motor regulator and No. 721,229, motor. Pieper v. Electro Dental Mfg. Co. [C. C. A.] 160 F 930. Force, No. 705,228, printing die. Kuhn v. Lock-Stub Check Co. [C. C. A.] 165 F 445. Searle, No. 707,361, railway car heating apparatus. Safety Car Heating & Lighting Co. v. Consolidated Car Heating Co. [C. C. A.] 160 F 476. Benjamin, No. 721,774, claim 32, and No. 721,777, claims 5 and 13. Benjamin Elec. Mfg. Co. v. Dale Co. [C. C. A.] 158 F 617. Tyssowski, No. 727,034, for pyrographic tool "comprising combined pyrographic point and scorcher." Tyssowski v. Thayer, 159 F 165. Merrell, No. 727,173, for mask with interlocking devices. Merrell Soule Co. v. Star Co. [C. C. A.] 159 F 142. Browning, No. 730,870, magazine firearm, claims, 37, 38, 39. Browning v. Funke, 164 F 197. Eggers, No. 737,375, amusement apparatus. Consolidated Loops Co. v. Barnum, 161 F 915. Claims 1 and 10 held invalid on rehearing. Id. Arrowsmith, No. 748,553, instep-support, claim 3. Arrowsmith Mfg. Co. v. Gilbert Mfg. Co. [C. C. A.] 166 F 118. Arrowsmith patent, No. 748,553, for instep-support, claims 3 and 4 held void for lack of patentable invention in view of former art. Arrowsmith Mfg. Co. v. Gilbert Mfg. Co., 158 F 307. Van Westrum, No. 752,487, method of sprinkling streets. Westrumite Co. v. Lincoln Park Com'rs, 164 F 989. Whitmore, No. 791,967, attachment for piano players. Roth v. Harris, 162 F 160. Eisenstein, No. 797,505, method for finishing canes by certain coating. Eisenstein v. Fibiger, 160 F 686. Weissenthanner, No. 801,281, sheet-metal closure for bottles, etc. Weissenthanner v. Dodge Metallic Cap Co. [C. C. A.] 161 F 915.

**52.** Von Eberstein v. Chambliss, 166 F 463; Tubelt Co. v. Friedman, 158 F 430. Donner, No. 620,541, method and mechanism for rolling black-plate held to disclose nothing new of utility. Donner v. American Sheet & Tin Plate Co. [C. C. A.] 165 F 199. Richards, No. 665,033, pneumatic tool void for lack of utility. Cleveland Pneumatic Tool Co. v. Chicago Pneumatic Tool Co., 163 F 846.

**53.** "Function" is that power or property of a machine of acting in the specific manner designed or intended by its construction, that which machine is designed to do as distinguished from the machine itself and from product of its action upon something external to itself. American Steel & Wire Co. v. Denning Wire & Fence Co., 160 F 108; In re White, 31 App. D. C. 607.

**54.** American Steel & Wire Co. v. Denning Wire & Fence Co., 160 F 108.

**55.** Palmer, Denmead & Baughman, No. 538,535, claims 1, 2, 3, 4, 23, 24, 26 and 30, not merely for functions but for specific means to accomplish defined functions or results, hence valid. Union Mach. Co. v. Diamond Match Co. [C. C. A.] 162 F 148. Bates, No. 577,639, machine for making fence of woven wire or mesh type not invalid as for mode of operation, principle or function of a machine. American Steel & Wire Co. v. Denning Wire & Fence Co., 160 F 108. Golding, No. 527,242, held not invalid because merely for function of machine. Expanded Metal Co. v. General Fireproofing Co. [C. C. A.] 164 F 849.

**56.** Putting previously invented combination into an ordinary type-writing machine, printing it there and then removing same, not a process but a function and not patentable. A. B. Dick Co. v. Henry, 160 F 690. Dick, No. 466,557, process of duplicating typewritten work, held void. Id.

**57.** Invention relating to burial caskets not patentable, being anticipated by Zarling, No. 712,030, only difference being in design. In re Williams, 30 App. D. C. 117.

**58.** Process for covering tennis or other playing ball held anticipated and unpatentable. In re Droop, 30 App. D. C. 334.

**59.** Dodge Needle Co. v. Jones [C. C. A.] 159 F 715.

**60.** Device confined to specific means designed to accomplish results in packing of explosive gelatin. Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 F 47.

**61.** Machine-knit, seamless, lace-front, single-feed stocking. Kilbourn Knitting Mach. Co. v. Liveright, 159 F 494.

**62.** National Regulator Co. v. Powers Regulator Co. [C. C. A.] 160 F 460.

**63.** Crier v. Innes, 160 F 103.

**64.** Safety Car Heating & Lighting Co. v. Consolidated Car Heating Co. [C. C. A.] 160 F 476. Mere combination of articles disclosed in former patents no invention unless it results in a new and useful article, not applied by those familiar in state of the art. In re Faber, 31 App. D. C. 531; National Tube Co. v. Aiken [C. C. A.] 163 F 254; American Steel & Wire Co. v. Denning Wire & Fence Co., 160 F 108. Morrow, No. 504,401, armature for dynamo electric machine, claim 2, void as mere aggregation. Bullock Elec. Mfg. Co. v. General Elec. Co. [C. C. A.] 162 F 28. Aggregation of old elements each performing old function independently, producing no new result although an improve-

novel and involving invention, is patentable,[66] and the one who first assembles old elements in a combination so as to supply a simple, efficient, durable, cheap and easily manipulated machine, is entitled to protection though the result is accomplished by a simple change;[67] and, if the adaptation of old elements so as to co-act with each other in an organization involves the exercise of more than the skill of an ordinary mechanic the result may be patentable if a more beneficial result is effected[68] or a new or useful product produced or an old product attained in a more efficient and economical way than by the separate operation of the parts,[69] and in such case, if a single, practical and beneficial result is produced, it is not necessary to patentability that the final result is produced by the simultaneous or successive action of the combined elements,[70] if the action of each is necessary and contributes to the general result.[71] That a machine shall produce an original result is not necessary to patentability,[72] for, if the new arrangement increases the effectiveness of the old by increased product or by lessening the expense, that fact affords evidence of invention.[73] Where an idea is old in art, it gains nothing by a combination.[74] In a new combination of old elements there must be not merely an improved result or a new result but a new mode of operation as well, and this must disclose more than the application of mere mechanical skill.[75] The law looks not at the elements or factors of an invention as a subject for a patent but only to the combination itself as a unit distinct from its parts, and in such case there can be no comparison of the patented and unpatented parts.[76] A mere difference in the proportions of the constituents of an alloy, however useful the result may be, does not entitle the originator to a patent, the difference being one of gradual improvement without there being any break or change per saltum in the artificial qualities of the alloy.[77] All improvements in devices or processes or means for producing a given result are not invention,[78] and a new

ment, held no patentable invention. James Spear Stove & Heating Co. v. Kelsey Heating Co. [C. C. A.] 158 F 622. Tyssowski, No. 727,034, for pyrographic tool "comprising combined pyrographic point and scorcher." Tyssowski v. Thayer, 159 F 165.

65. Putting together held nothing more than double use that would occur to anyone skilled in art, hence not invention. In re Mason, 31 App. D. C. 539.

66. Breuchaud v. Mutual Life Ins. Co. [C. C. A.] 166 F 753.

67. Yawman & Erbe Mfg. Co. v. Vetter Desk Works [C. C. A.] 159 F 443.

68. National Tube Co. v. Aiken [C. C. A.] 163 F 254; American Steel & Wire Co. v. Denning Wire & Fence Co., 160 F 108.

69. American Steel & Wire Co. v. Denning Wire & Fence Co., 160 F 108. If a new mode of operation with a new and improved result is perfected, a combination of old elements may be invention. American Laundry Mach. Mfg. Co. v. Adams Laundry Mach. Co., 161 F 556. Where a combination is new or if by a new mode of organization new or better results are obtained, a patent thereon may be sustained though the elements of each claim may be old. Dunn Mfg. Co. v. Standard Computing Scale Co. [C. C. A.] 163 F 521.

70. National Tube Co. v. Aiken [C. C. A.] 163 F 254.

71. Maimen v. Union Special Mach. Co. [C. C. A.] 165 F 440.

72, 73. National Tube Co. v. Aiken [C. C. A.] 163 F 254.

74. Ohl & Co. v. Falstrom & Tornquist Co., 166 F 898.

75. Stafford v. Morris, 161 F 113. Mere aggregation of old elements, even with an improved final result, not invention. Id. A substantial advance in the art must be shown and there must be in the new combination either a new or better result as well as a new mode of operation or a mode of operating answering in obedience to another law of mechanical movement. Westington Elec. & Mfg. Co. v. Condit Elec. Mfg. Co., 159 F 144.

76. Yesbera v. Hardesty Mfg. Co. [C. C. A.] 166 F 120.

77. Hendrickson & Clamer, patent No. 655,402, alloy "consisting of less than seven per cent tin, more than twenty per cent lead and balance copper." Result reached by continued experimentation by patentees and others all leading toward some proportions, product differing from those of prior art only in degree. Brady Brass Co. v. Ajax Metal Co. [C. C. A.] 160 F 84.

78. Stafford v. Morris, 161 F 113; Locklin v. Buck [C. C. A.] 159 F 434; Daniel Slate & Co. v. Charles A. Stratton Co., 159 F 485. A mere improvement in degree over prior art not invention. Kuhn v. Lock-Stub Check Co. [C. C. A.] 165 F 445. Mere improvement by substitution of equivalents not invention. Tubelt Co. v. Friedman, 158 F 430. Merely adding or taking away a gear not invention. Ohl & Co. v. Falstrow & Tormquist Co., 166 F 898. Change of form only or of place of attachment, even if a slightly better result is obtained, not invention. Daniel Slate & Co. v. Charles A. Stratton Co., 159 F 485.

and useful product of manufacture to be patentable must be differentiated from all other articles by something that is fundamental and radical [78] and to create them must involve the exercise of invention or discovery beyond what is necessary to construct the apparatus for its manufacture or production.[80] The mere novelty [81] and utility [82] or the enhancement of the attractiveness of an article [83] or the change from one to the other of two varieties of resistance which are old and well known equivalents of each other [84] does not involve invention. The mere recognition that a certain belief is erroneous is a mechanical truth and not an inventive act.[85] There may be invention in transferring an old element from one place to another if done to meet a new or novel exigency and to serve a new purpose in its new sphere of action,[88] but to apply an old device to a new use which involves no new change in the mode of application is not invention,[87] nor does simply taking that which is at hand, in general use, and applying it without change of function in place of another common form because of its supposed superiority for the purpose, involve invention,[88] but the taking of a device from one industry and its application to an entirely different purpose in another may constitute invention where the original device was not designed, adapted or actually used for the performance of such new functions.[89] The contribution to an important industry of a device that is labor-saving, effective, and which to a degree relieves labor under fierce heat conditions, constitutes invention.[90] The application of a device to a new use, if the new use is so nearly analogous to the old that the applicability would occur to a person of the ordinary mechanical skill, is only a case of double use and not invention.[91] There is no invention in making two parts of one thing or one of two, when by such change no different result is attained;[92] nor does the mere substitution of one material for another without change in the result, except of a minor character, disclose invention,[93] but the rule that substitution of material does not constitute invention is not without exception.[94] While at times it may be permissible to claim as an element of a combination "means" otherwise unspecified for effecting certain mechanical results,[95] yet, where the attempt is made to monopolize the

79. Kilbourn Knitting Mach. Co. v. Liverright [C. C. A.] 165 F 902. Blood, No. 743,231, machine-knit, seamless stocking void for lack of patentable difference between manufacture and those of prior art. Id.

80. Kilbourn Knitting Mach. Co. v. Liverright [C. C. A.] 165 F 902.

81. Novelty alone not invention. Pieper v. Electro Dental Mfg. Co. [C. C. A.] 160 F 930.

82. New or improved thing must be product of exercise of mental faculties or mental conception. Rapp v. Central Fire-Proof Door & Sash Co., 158 F 440.

83. Rapp, No. 653,400, fire-proof door void for lack of invention, only new feature being that both wood and metal was paneled, hence more attractive to the eye. Rapp v. Central Fire-Proof Door & Sash Co. [C. C. A.] 166 F 430.

84. Pieper v. Electro Dental Mfg. Co. [C. C. A.] 160 F 930.

85. Belief that expansion of copper would break glass in incandescent lamps. Edison Elec. Light Co. v. Novelty Incandescent Lamp Co., 161 F 549.

86. Stafford v. Morris, 161 F 113.

87. National Tube Co. v. Aiken [C. C. A.] 163 F 254.

88. Brunswick-Balke-Collender Co. v. Rosatto [C. C. A.] 165 F 56; Tubelt Co. v. Friedman, 158 F 430. An old structure adapted to new use without mental conception no invention. Consolidated Loops Co. v. Barnum, 161 F 915.

89. National Tube Co. v. Aiken [C. C. A.] 163 F 254.

90. Arrott, No. 633,941, for dredger for pulverulent material. J. L. Mott Iron Works v. Standard Sanitary Mfg. Co. [C. C. A.] 159 F 135.

91. Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co. [C. C. A.] 163 F 950.

92. D'Arcy v. Staples & Hanford Co. [C. C. A.] 161 F 733; Mueller Mfg. Co. v. McDonald & Morrison Mfg. Co., 164 F 991.

93. Marshall, No. 784,695, insulating lining for metallic shell of incandescent lamp socket, claims 5 and 9, void as merely substituting paper for fiber and only advantage being greater compressibility and resiliency. Marshall v. Pettingell-Andrews Co. [C. C. A.] 164 F 862.

94. Hogan, No. 752,903, dredge for salt or pepper, having celluloid cap held to disclose invention although only new feature was substitution of celluloid for other materials used in cap, it being proved that celluloid possesses property which prevents salt from becoming caked. Hogan v. Westmoreland Specialty Co., 163 F 289.

95, 96. Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 F 47.

abstract result sought to be obtained instead of the concrete mechanism devised for so doing, the claims are bad as the patenting of a principle or function.[96] A system of transacting business disconnected from the means for carrying out the system is not an "art,"[97] hence not patentable unless the means used are novel and disclose invention.[98] A design to be patentable must possess the quality of attractiveness to the eye.[99] A design patent is void if the article for which it is given is not a proper one for a design patent,[1] and the test as to invention, newness, and originality is, "do the two things present to the eyes of the ordinary observer, purchaser and user the same general appearance."[2] A discovery that one highly explosive gas used as a solvent for another makes a solution having none of the explosive properties of either substance singly, and which may be handled when embodied in a device for utilizing the same, is patentable.[3] So, also, is the discovery and utilization of a process of nature for a practical purpose.[4] Results, found by experimenting as others have previously done, though superior to what others may have produced, is neither invention nor evidence of invention.[5] No invention is required to "flange" an article by an ordinary method.[6] Invention cannot be claimed in the appropriation of an old device by reason of an unthought of and undisclosed function dormant in the old device,[7] nor will a second patent be granted to overlap a former one.[8] Except in inventions of the most primary character, new mechanical forms and appliances are not to be looked for, and patentable invention is shown by making use of those at hand in the same or kindred arts by so adapting and using them as to bring about new results,[9] and inventors are not held to the devising of new mechanical forms or new adaptation and application of those which are already at hand, but the question is whether having regard to what there has been in the past, new and beneficial results have been produced by means not before employed, amounting to inventive advance.[10] Where an

97. "Art" in the patent law not a mere abstraction. Hotel Security Checking Co. v. Lorraine Co. [C. C. A.] 160 F 467.

98. Hicks, patent No. 500,071, method or means cash registering and account checking void. Hotel Security Checking Co. v. Lorraine Co. [C. C. A.] 160 F 467.

99. Scofield v. Browne [C. C. A.] 158 F 305. Frenot design, patent No. 35,922, held to possess quality of attractiveness. Id.

1. Williams, No. 31,838, for insulating plug for electric line supports, void, article not being intended for display or ornament and when used covered up. Williams v. Syracuse & S. R. Co., 161 F 571.

2. Williams v. Syracuse & S. R. Co., 161 F 571.

3. Solution of acetone and acetylene gas. Commercial Acetylene Co. v. Avery Portable Lighting Co., 166 F 907.

4. Cameron, Commin and Martin, No. 634,423, process for treating sewage. Cameron Septic Tank Co. v. Saratoga Springs [C. C. A.] 159 F 453.

5. Bethlehem Steel Co. v. Niles-Bement-Pond Co., 166 F 880.

6. Flanging held a common operation. In re White, 31 App. D. C. 607.

7. Bullock Elec. Mfg. Co. v. General Elec. Co. [C. C. A.] 162 F 28.

8. Contention that though patent No. 757,762 was applied for more than two years after No. 736,999, and was allowed almost eight months afterwards, it constituted a generic patent, not tenable, possessor of generic idea having elected to apply for patent for a specific embodiment embodying essential idea of generic idea. Morse Chain Co. v. Link Belt Machinery [C. C. A.] 164 F 331. Decision of tribunals of patent office that invention claimed was same as that of patent affirmed, only difference between construction of application and that of patent being that in patent filling threads were double strands arranged in three horizontal planes, while in application filling threads were single strands in two horizontal planes, neither of distinctions being expressed in claims in patent or in appealed claim. In re Pearsall, 31 App. D. C. 265.

9. Cramer & Haak, No. 829,631, washing machine with oscillating tub adapted to be run by power instead of by hand. Cramer v. 1900 Washer Co., 163 F 296. One adapting old devices to a highly useful purpose is entitled to protection. Allen, No. 424,944, surgical pump for transfusion of blood. Truax v. Childs Adjustable Parlor Chair Co., 162 F 907. One who takes an old machine and by a few even inconsequential changes compels it to perform a new function and do important work which no one before dreamed it capable of performing, is an inventor. O'Rourke Engineering Const. Co. v. McMullen [C. C. A.] 160 F 933.

10. Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 F 47. Test not met by evidence that with the new light possessed old devices might possibly be made over to do same thing. Id.

inventor is entitled to the benefit of the doctrine of equivalents, it is not essential that the equivalent does the same work in precisely the same way.[11] The test of invention is mental conception,[12] but a mere conception not in some way demonstrated or communicated does not amount to an invention,[13] for an invention resting on a mere theory or a mere intellectual notion, or uncertain experiments, is not an invention under the patent laws.[14] A valid patent cannot be issued for an improvement which is simply a new application of knowledge already familiar to that skilled in the art,[15] or where the alleged invention is a mere modification of the principle involved in former inventions or discoveries.[16] Neither sales, popularity nor effectiveness of itself show patentable invention,[17] nor do all combined establish the same,[18] but all these are mere evidence of invention,[19] although sometimes alone persuasive.[20] Where the court has to deal with a device which has achieved undisputed success and accomplishes a result never attained before, which is new, useful and in large demand, it is generally safe to conclude that the man who made it is an inventor,[21] but these considerations cannot avail in a case where the court is clearly satisfied that the broad conception underlying the patent does not involve inventive thought.[22] Long existing, prior demand for a certain device is strong evidence of patentable invention.[23] A new combination of old elements, a new arrangement of parts, and a new and beneficial result, are not per se invention [24] but they are evidence thereof,[25] as is also the fact that the product of the new combination goes into quite general use and displaces others previously used for the same or analogous purposes;[26] and one who claims an improved combination producing far better results has the presumption of patentable invention in view of the prior art.[27] That a patent was duly and regularly issued and that the seller is the owner thereof is prima facie evidence of utility, to overcome which clear and strong evidence to the contrary is necessary,[28] and the burden of proving uselessness after the issuance is shown rests upon the party alleging it. An invention in order to be patentable must be reduced to practice,[29] but actual reduction to practice is not essential either before or after the grant of a

**11.** Sufficient that it accomplishes same result in substantially same way. Westinghouse Elec. & Mfg. Co. v. Condit Elec. Mfg. Co., 159 F 144.

**12.** American Laundry Mach. Mfg. Co. v. Adams Laundry Mach., 161 F 556; Rapp v. Central Fire-Proof Door & Sash Co., 158 F 440.

**13, 14.** Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 158 F 415.

**15, 16.** Claims of application for patent for surgical dressing held anticipated and denied. In re Faber, 31 App. D. C. 531.

**17.** Tubelt Co. v. Friedman, 158 F 430. Commercial success of article patented not alone enough to indicate invention. Locklin v. Buck [C. C. A.] 159 F 434.

**18.** Tubelt Co. v. Friedman, 158 F 430.

**19.** American Laundry Mach. Mfg. Co. v. Adams Laundry Mach. Co., 161 F 556.

**20.** Westinghouse Elec. & Mfg. Co. v. Condit Elec. Mfg. Co., 159 F 144. Utility, marketability and commercial success of the product constitute strong and persuasive evidence of invention. Stafford v. Morris, 161 F 113.

**21.** O'Rourke Engineering Const. Co. v. McMullen [C. C. A.] 160 F 933. Apart from the presumption of novelty that always attends the grant of a patent, where it is shown that a patented device has gone into general use and has superseded prior devices having the same purpose, it is sufficient evidence of invention in a doubtful case. Norton v. Llewellyn [C. C. A.] 164 F 693. Commercial success, large sales, benefits conferred on the public, etc., are evidence of invention and in close or doubtful cases usually turn the scale. Bonsall v. Peddie & Co., 161 F 564. That a device possesses advantages of utility and cheapness, and that it has nearly supplanted the market with its product, are entitled to great weight and frequently turn scale in cases where patentability is involved in more or less doubt. Marshall v. Pettingell-Andrews Co. [C. C. A.] 164 F 862.

**22.** Marshall v. Pettingell-Andrews Co. [C. C. A.] 164 F 862. Only where patent is otherwise in doubt is cheapening of cost of production of any weight. In re Mason, 31 App. D. C. 539.

**23.** Pieper v. Elec. Dental Mfg. Co. [C. C. A.] 160 F 930.

**24, 25, 26.** Stafford v. Morris, 161 F 113.

**27.** Westinghouse Elec. & Mfg. Co. v. Condit Elec. Mfg. Co., 159 F. 144.

**28.** Waymire v. Shipley [Or.] 97 P 807.

**29.** Automatic Weighing Mach. Co. v. Pneumatic Scale Corp. [C. C. A.] 166 F 288. Conception evidenced by disclosure, drawings, and even a model, confers no right upon an inventor unless followed by

patent,[30] for there is a stage when it is presumed as a matter of law that the inventor reduced his invention to practice;[31] and where two patents for the same invention have been issued to independent inventors, the dates of their respective inventions are, first, the dates of the patents; second, the dates of the applications, provided the application sufficiently describes the invention; third, the dates of actual reduction to practice; fourth, the dates of conception, with the qualification that, if either patentee seeks to carry the date of his invention back to the date of his conception, he must show reasonable diligence in adapting and perfecting his invention, either by actual reduction to practice or by filing his application.[32] On the question of whether one was reasonably diligent in adapting and perfecting his invention, a decision of the patent office tribunals and the court of appeals of the District of Columbia is entitled to great weight,[33] but a decision in interference proceedings is not conclusive on the question of priority of invention.[34] The date of a patented invention is at least as early as the date of the application, provided it sufficiently describes the invention so as to enable those skilled in the art to understand it the same,[35] and the filing of the application is conclusive evidence that the invention was made at least as early as the date thereof.[36] Although cases may arise in which the choice of location for a particular magnet would involve the faculty of invention, yet where all locations have been formerly suggested, it requires strong evidence to warrant the issuance of what would in effect be a pioneer patent.[37] A court cannot take judicial notice of the prior art on the question of the validity of a patent in suit unless the prior art is in evidence,[38] and except in a very clear case a patent will not be adjudged devoid of invention on its face on demurrer to a bill for its infringement.[39] It is presumed that the patent office found a patentable difference,[40] and where different patents are given on a similar machine, each patent is presumed valid.[41] A patent covering generally any and every means or method for producing a given result cannot be upheld,[42] but generally a patent is presumptive evidence of its own validity,[43] and to overcome the presumption the evidence must be clear and convincing.[44] The validity of a patent for a product of structure must be determined apart and separate from the mode or means by which the product of structure is made.[45]

*Novelty* See 10 C. L. 1130 is essential to patentability.[46] No one reference to the

some other act, such as actual reduction to practice or filing an application for a patent. Id.

**30.** Filing of allowable application constructive reduction to practice. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp. [C. C. A.] 166 F 288.

**31.** Stage reached when person has done all required to obtain a valid patent; when he has filed complete and allowable application. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp. [C. C. A.] 166 F 288.

**32, 33, 34, 35, 36.** Automatic Weighing Mach. Co. v. Pneumatic Scale Corp. [C. C. A.] 166 F 288.

**37.** Blades, No. 453,032, held not to cover all switch mechanism in which starter magnet is located on an independent shut-circuit. Cutler-Hammer Mfg. Co. v. Automatic Switch Co. of Baltimore [C. C. A.] 159 F 447.

**38.** Except as to matters of general knowledge. Stafford v. Morris, 161 F 113.

**39.** Johnson, No. 739,318, round record of disk type, held not so clearly devoid of invention on face as to justify being so adjudged on demurrer. Victor Talking Mach. Co. v. Leeds & Catlin Co., 165 F 931.

**40, 41.** Sieber & Trussell Mfg. Co. v. Saugerties Mfg. Co., 159 F 472.

**42.** Bates, No. 577,639, machine for making woven or mesh type wire fence, not void as being broad enough to include any and every machine for result. American Steel & Wire Co. of New Jersey v. Denning Wire & Fence Co., 160 F 108.

**43.** Leona Garment Co. v. Jenks, 160 F 693; Arrowsmith Mfg. Co. v. Gilbert Mfg. Co., 158 F 307; Howard v. Grist, 165 F 211; National Regulator Co. v. Powers Regulator Co. [C. C. A.] 160 F 460. Presumption that there was patentable invention as well as that the patentee was the first inventor goes with every patent issued. Stafford v. Morris, 161 F 113.

**44.** Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 F 47; Stafford v. Morris, 161 F 113.

**45.** American Steel & Wire Co. of New Jersey v. Denning Wire & Fence Co., 160 F 125. Validity not affected by whether made by hand or machine. Id.

**46.** Von Eberstein v. Chambliss, 166 F 463. Nothing novel in employment of a fifth wheel in a speed wagon. Phillips v. Faber Sulky Co., 160 F 966.

prior art is sufficient of itself to rebut the presumption of the novelty of the claims of a patent,[47] but proof showing that an article when made after a patented design has enhanced the salable value and demand for the trinkets it was intended to adorn is evidence that such article possesses the qualities which renders it patentable.[48]

*Anticipation* See 10 C. L. 1131 in a prior patent is fatal to the validity of a patent.[49]

**Patents possessing novelty:** Leach, No. 433,686, locomotive track sander. Economy Locomotive Sander Co. v. American Locomotive Sander Co. [C. C. A.] 162 F 683. Hurley, No. 572,679, improvements in circular knitting machines. Cooper v. Otis Co. [C. C. A.] 166 F 861. Bates, No. 577,639, machine for making fence. American Steel & Wire Co. v. Denning Wire & Fence Co., 160 F 108. Bonsall, No. 604,348, claim 3, trunk adapted for hanging therein ladies' garments. Bonsall v. Peddie & Co., 161 F 564. Donner, No. 620,541, mechanism for rolling black plate, claim 4. Donner v. American Sheet & Tin Plate Co., 160 F 971. Wiggins, No. 623,944, bowling alley. Brunswick-Balke-Collender Co. v. Rosatto, 159 F 729. Walker, Nos. 635,619, and 788,803, soil pipe drainage and venting fillings. Morton v. Llewellyn [C. C. A.] 164 F 693. Clark, No. 674,757, bucking roll for attaching to a saddle. Clark v. George Lawrence Co., 160 F 512. Critcher, No. 781,636, combination undergarment for women. Leona Garment Co. v. Jenks [C. C. A.] 164 F 188. Karfiol, No. 835,189, process for making lace paper. Karfiol v. Rothner, 165 F 923.

**Patents void for lack of novelty:** Alleged paper "Liner" for boxes. In re Warren, 30 App. D. C. 308. Hicks, No. 500,071, method of and means for cash registering and account checking. Hotel Security Checking Co. v. Lorraine Co. [C. C. A.] 160 F 467. Breuchand, No. 563,130, improvements in construction of supports for walls, claims 3 and 4. Breuchand v. Mutual Life Ins. Co. of New York [C. C. A.] 166 F 753. Nolan's, No. 582,481, for fastening means for coreplates of electric machines, claims 1 and 3. Westinghouse Elec. & Mfg. Co. v. Prudential Ins. Co. [C. C. A.] 158 F 987. Donner, No. 620,541, method and mechanism for rolling plack-plate, claim 4. Donner v. American Sheet & Tin Plate Co. [C. C. A.] 165 F 199. Apparatus claim of Cameron, Commin and Martin, Martin, No. 634,423. Cameron Septic Tank Co. v. Village of Saratoga Springs [C. C. A.] 159 F 453. Leach, No. 656,553, improvements in pneumatic track sanders. American Locomotive Sander Co. v. Economy Locomotive Sander Co. [C. C. A.] 162 F 684. Taylor and White, Nos. 668,269, and 668,270, metal cutting tool and method of making same. Bethlehem Steel Co. v. Niles-Bement-Pond Co., 166 F 880. Von Eberstein, No. 726,268, improvement in pile drivers. Von Eberstein v. Chambliss, 166 F 463. Of Lewis, No. 731,695, No. 731,696, and No. 746,853, claims 1, 3, 11 to 17 inclusive, 21 and 22 of first patent. Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co. [C. C. A.] 163 F 950. Eggers, No. 737,375, amusement apparatus. Consolidated Loops Co. v. Barnum & Bailey, 161 F 915. Claims 1 and 10 held invalid and rehearing. Id. Arrowsmith, patent No. 748,553, for an instep support, claims 3 and 4, held void for lack of novelty under former act. Arrowsmith Mfg. Co. v. E. T. Gilbert Mfg. Co., 158 F 307. Marshall, No. 784,695, insulating lining for metallic shell of an incandescent lamp socket, claims 5 and 9. Marshall v. Pettingell-Andrews Co. [C. C. A.] 164 F 862. Whitmore, No. 791,967, attachment for piano players. Roth v. Harris, 162 F 160.

47. American Grass Twine Co. v. Choate [C. C. A.] 159 F 429.

48. Trenot's design patent No. 35,922, held to disclose patentable novelty and attractiveness. Scofield v. Browne [C. C. A.] 158 F 305.

49. **Patents anticipated:** "Liner" for boxes. In re Warren, 30 App. D. C. 308. Evidence held to show use was an abandoned experiment which did not anticipate complainant's patent. Warren Bros. Co. v. Owosso [C. C. A.] 166 F 309. Williams, No. 31,838, design for insulating plug for electric line support. Williams v. Syracuse & S. R. Co., 161 F 571. Corbett, No. 38,581, design for ribbon void, patentee not being original inventor. Corbett Bros. Co. v. Reinhardt-Meding Co., 166 F 767. Stockheim, No. 378,379, process of filtering beer, claim 3. Loew Filter Co. v. German-American Filter Co. of New York [C. C. A.] 164 F 855. Begtrup's, No. 387,205, governor for steam engines, six claims. Ridgway Dynamo & Engine Co. v. Phoenix Iron Works, 163 F 527. Mueller, No. 513,272, stop and waste cock. Mueller Mfg. Co. v. A. Y. McDonaly & Morrison Mfg. Co., 164 F 991. Begtrup's, No. 636,637, governor, first six claims, by Riles, No. 534,579. Ridgway Dynamo & Engine Co. v. Phoenix Iron Works, 163 F 527. Hillard, No. 554,874, and 580,281, related improvements in typewriters. Hillard v. Remington Typewriter Co., 163 F 281. Roe, No. 595,837, improvement in underfeed stokers, claim 1. Underfeed Stoker Co. of America v. American Ship Windlass Co., 165 F 65. Cornell, No. 612,826, claim 6, expansible follower for labeling machine. Knapp v. Atlantic Mach. Works, 163 F 531. Donner, No. 620,541, method and mechanism for rolling black plate, claim 6. Donner v. American Sheet & Tin Plate Co., 160 F 971. Wever and Parmerter, No. 632,769, and Rand, No. 746,157, relating to account books and ledgers. Time-Saver Co. v. Stamford Trust Co., 165 F 348. Taylor and White, Nos. 668,269, and 668,270, metal cutting tool and method for making same. Bethlehem Steel Co. v. Niles-Bement-Pond Co., 166 F 880. Eickemeyer, No. 677,308, alternating current motor. General Elec. Co. v. Corliss [C. C. A.] 160 F 672. Conroy, No. 723,139, method of ornamenting glass. Penn Electrical & Mfg. Co. v. Conroy [C. C. A.] 159 F 943. Kennedy, No. 740,982, mechanism for driving dynamos on railway trucks. Consolidated R. Elec. Lighting & Equipment Co. v. Adams & Westlake Co. [C. C. A.] 161 F 343. Thomas, No. 766,004, for automatic weighing machine. Automatic Welghing Mach. Co. v. Pneumatic Scale Corp., 158 F 416. Joy, No. 780,664, claim 12. Page Mach. Co. v. Dow, Jones & Co., 166 F 473.

A process patent can only be anticipated by showing an earlier similar process,[50] and in design patents the test of anticipation is, "do the two things present to the eyes of

**Patents not anticipated:** Improvements in turning lathes. In re Sheldon, 31 App. D. C. 201. Diss, reissue No. 11,982, furniture caster. Universal Caster & Foundry Co. v. Schenck Co., 165 F 344. Dyer, No. 283,646, process of making artificial mica sheets for electrical insulation. Mica Insulator Co. v. Commercial Mica Co. [C. C. A.] 166 F 440. Stockheim, No. 378,379, process of filtering beer. Loew Filter Co. v. German-American Filter Co. of New York [C. C. A.] 164 F 855. Wightman, No. 411,947, rheostat for electric cars. Thomson-Houston Elec. Co. v. Traction Equipment Co., 164 F 425. Allens, No. 424,944, surgical pump. Truax v. Childs Adjustible Parlor Chair Co., 162 F 907. Garthright, No. 436,916, tabulating attachment for typewriters. Underwood Typewriter Co. v. Elliott-Fisher Co., 165 F 927. Aiken, No. 450,360, and 492,951, apparatus for conveying, cooling and straightening metal plates. National Tube Co. v. Aiken [C. C. A.] 163 F 254. Rhoades, No. 454,791, improvement in looms. Draper Co. v. American Loom Co. [C. C. A.] 161 F 728. Jones, No. 470,052, underfeed furnace. Underfeed Stoker Co. of America v. American Ship Windlass Co., 165 F 65. Woodward, No. 493,461, thread-controlling device for sewing machines. Malmen v. Union Special Mach. Co. [C. C. A.] 165 F 440; Union Special Mach. Co. v. Maimin, 161 F 748. Jeavons, No. 475,401, for oil burner, claim 1. American Stove Co. v. Cleveland Foundry Co. [C. C. A.] 158 F 978. Lovell and Bredenberg, No. 490,877, book-trimming machine. Lovell v. Seybold Mach. Co., 159 F 736. Whiting and Wheeler, No. 526,913, pumping machine. Warren Steam Pump Co. v. Blake & Knowles Steam Pump Works [C. C. A.] 163 F 263. Stiefel, No. 551,340, mechanism for making tubes from metallic ingots. Delaware Seamless Tube Co. v. Shelby Tube Co. [C. C. A.] 160 F 928. Grant, No. 554,675, rubber tired wheel. Consolidated Rubber Tire Co. v. Diamond Rubber Co. of New York [C. C. A.] 162 F 892. Anderson, No. 555,893, improvement in centrifugal cream separators. Empire Cream Separator Co. v. Sears, Roebuck & Co. [C. C. A.] 160 F 668. Packham, No. 557,868, improvement in grain drills. Superior Drill Co. v. La Crosse Plow Co., 160 F 504. Breuchaud, No. 563,130, improvements in construction of supports for walls, claims 1 and 2. Breuchaud v. Mutual Life Ins. Co. [C. C. A.] 166 F 753. Wenger, No. 569,903, finger nail clipper. Cook Co. v. Boettinger [C. C. A.] 166 F 762. Bates, No. 577,639, machine for making fence of woven wire or mesh type. American Steel & Wire Co. of New Jersey v. Denning Wire & Fence Co., 160 F 108. Hillard, No. 580,281, improvement in typewriter escapement. Hillard v. Fisher Book Typewriter Co. [C. C. A.] 159 F 439. Phillips, No. 611,438, speed wagon. Phillips v. Faber Sulky Co., 160 F 966. Donner, No. 620,541, method and mechanism for rolling black plate. Donner v. American Sheet & Tin Plate Co., 160 F 971. Seavey, No. 622,190, new guide for sawing material to make miter joints. Smith & Hemenway Co. v. Stearns & Co. [C. C. A.] 166 F 760. Young, No. 638,540, combined abdominal pad and hose supporter. O'Brien v. Foster Hose Supporter Co. [C. C. A.] 159 F 710. Hewlett, No. 640,197, for pipe coupling. Rainear v. Western Tube Co. [C. C. A.] 159 F 431. No. 641,546, battery filler. Nungesser Elec. Battery Co. v. National Carbon Co. [C. C. A.] 160 F 1022. Richmond and Zeller, No. 641,546, for battery filler. National Carbon Co. v. Nungesser Elec. Battery Co., 159 F 157. Schoen, No. 647,909, hopper-bottom car, claim 1. Morton Trust Co. v. American Car & Foundry Co., 161 F 546, Farrell, No. 663,069, process for bleaching nuts. Fullerton Walnut Growers' Ass'n. v. Anderson-Barn-Grover Mfg. Co. [C. C. A.] 166 F 443. Claude & Hess, No. 664,383, apparatus for storing acetylene gas. Commercial Acetylene Co. v. Avery Portable Lighting Co., 166 F 907. Clark, No. 674,757, bucking roll for attachment to a saddle. Clark v. George Lawrence Co., 160 F 512. Schrader, No. 682,390, machine for packing explosive gelatin. Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 F 47. Yawman, No. 717,490, drawer for card indexes, claims 4, 5, 10, 11 and 12. Yawman & Erbe Mfg. Co. v. Vetter Desk Works [C. C. A.] 159 F 443. Diss, No. 725,325, furniture caster, claim 2. Universal Caster & Foundry Co. v. Schenck Co., 165 F 344. Warrens, No. 727,505, improvement in street pavements. Warren Bros. Co. v. Owosso [C. C. A.] 166 F 309. Cleveland, No. 727,909, can opener. Whittemore Bros. & Co. v. World Polish Mfg. Co., 159 F 480. Conroy, No. 735,949, machine for ornamenting glass. Penn Electrical & Mfg. Co. v. Conroy [C. C. A.] 159 F 943. Fisher, No. 737,916, mattress. American Mattress & Cushion Co. v. Springfield Mattress Co. [C. C. A.] 165 F 191. Mueller, No. 746,355, wall register used with hot air furnaces. Mueller Furnace Co. v. Groeschel, 166 F 917. Hogan, No. 752,903, dredge for salt or pepper having celluloid cup. Hogan Westmoreland Specialty Co., 163 F 289. Howard, No. 753,264, hub guard for wheels. Howard v. Grist, 165 F 211. Roesch, No. 759,472, thermostat. Davis & Roesch Temperature Controlling Co. v. National Steam Specialty Co., 164 F 191. Stafford and Holt, No. 759,928, improvement in circular-knitting machines. Stafford v. Morris, 161 F 113. Hobart, No. 765,240, tune sheet attachment for piano players. Roth v. Harris, 162 F 160. Thomas, No. 766,004, improvement in weighing machine. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp. [C. C. A.] 166 F 288. Joy, No. 780,664, printing-telegraph receiver. Page Mach. Co. v. Dow, Jones & Co., 166 F 473. Joy, No. 786,294, clutch mechanism particularly intended for printing-telegraph machines. Id. Coffe, No. 812,183, improvement in telegraph keys. Bellows v. United Electrical Mfg. Co. [C. C. A.] 160 F 663. Ransome, No. 814,803, concrete mixing machinery. Ransome Concrete Mach. Co. v. United Concrete Mach. Co., 165 F 914. Cramer and Haak, No. 829,631, washing machine. Cramer v. 1900 Washer Co., 163 F 296. Karfiol, No. 835,189, process for making lace paper.

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the ordinary observer, purchaser, and user the same general appearance." [51] The fact that the method of a process patent may have been previously used by another by chance and without appreciating its merit or value does not interfere with the patentability or the validity of a patent,[52] nor does the fact that a particular composition was found useful for some particular purpose, necessarily anticipate a subsequent use of the same composition for an entirely different use,[53] but the fact that the device of a patent never came into commercial use,[54] that it was inferior to and produced a poorer result than a later one,[55] or that the patentee did not claim a particular device used in a later patent,[56] does not prevent such patent from being an anticipation of the later one. It is not essential to anticipation to find the precise process or structure in prior art; [57] it is sufficient if the path was open, made so clear that an ordinary mechanic skilled in the art would see, construct and apply.[58] To constitute anticipation the prior patent or publication relied upon must by descriptive words or drawings or by both contain and exhibit a substantial representation of the patented improvement in such full, clear and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct and practice, the invention.[59] Anticipations of patents must be proven by evidence so cogent as to leave no reasonable doubt in the mind of the court,[60] and a very high standard of proof is required to make out the defense of anticipation by prior use after a patent has once been adjudged valid.[61] Statements in prior application relied on to prove anticipation must be so clear and explicit that those skilled in the art will have no difficulty in ascertaining their meaning.[62] The grant of a patent makes a prima facie case of complete conception by the patentee as of the date of his appliction [63] and the right of the patentee carries the date back to the actual inventive act as against rival claimants.[64] Where patents are given to different parties and there is no pretense that one saw the other patent before it issued, there is no presumption that the other party had knowledge thereof,[65] and the one pleading anticipation is charged not only with the burden of proof upon that issue, but he must also clearly make out by well authenticated evidence priority of conception and reduction to practice,[66] but when such proof is made out the burden is shifted and the claimant must establish to the satisfaction of the

Karfiol v. Rothner, 165 F 923.

**50.** Loew Filter Co. v. German-American Filter Co. of New York [C. C. A.] 164 F 855.

**51.** Williams v. Syracuse & S. R. Co., 161 F 571.

**52.** Karfiol v. Rothner, 165 F 923.

**53.** Use of composition as water-proof lining for reservoir no anticipation of subsequent patent for street pavement of a similar composition. Warren Bros. Co. v. Owosso [C. C. A.] 166 F 309.

**54, 55.** Watrous Mfg. Co. v. American Hardware Mfg. Co., 161 F 362.

**56.** Where patentee had produced the mechanical means whereby result is secured. Watrous Mfg. Co. v. American Hardware Mfg. Co., 161 F 362.

**57.** Daniel Slote & Co. v. Charles A. Stratton Co., 159 F 485. Invention anticipated by patent showing same invention, difference being merely one of an unpatentable design. In re Williams, 30 App. D. C. 117.

**58.** Daniel Slote & Co. v. Charles A. Stratton Co., 159 F 485.

**59.** Underwood Typewriter Co. v. Elliott-Fisher Co., 165 F 927. To overthrow a patent by a foreign one of prior date, the description of the invention must be in such full, clear and exact terms as to enable one, acquainted with art to which it belongs to make, construct and practice the invention. Warren Bros. Co. v. Owosso [C. C. A.] 166 F 309.

**60.** Proof insufficient to show anticipation. Underwood Typewriter Co. v. Elliott-Fisher Co., 165 F 927; Howard v. Grist, 165 F 211.

**61.** Evidence insufficient. Queen & Co. v. Roentgen Mfg. Co., 165 F 453.

**62.** Hillard v. Fisher Book Typewriter Co. [C. C. A.] 159 F 439.

**63.** Consolidated R. Elec. Lighting & Equipment Co. v. Adams & Westlake Co. [C. C. A.] 161 F 343; Corbett Bros. Co. v. Reinhardt-Meding Co., 166 F 767.

**64.** Consolidated R. Elec. Lighting & Equipment Co. v. Adams & Westlake Co. [C. C. A.] 161 F 343.

**65.** Sieber & Trussell Mfg. Co. v. Saugerties Mfg. Co., 159 F 472.

**66.** Consolidated R. Elec. Lighting & Equipment Co. v. Adams & Westlake Co. [C. C. A.] 161 F 343.

court a still earlier invention by the patentee;[67] and in an action for the infringement of a design patent where it is shown that the design was in use anterior to the date of the application for the patent, it is incumbent on the plaintiff to show by clear and satisfactory evidence that the invention preceded the date of the use.[68] Although a new function may appear in a machine made under a patent, if that function was accidental, unrecognized by the patentee, and no disclosure was made to the public, it is not an anticipation of a subsequent patent.[69] A publication disclosing devices tending to guide the construction of an instrument but not fully accomplishing a desired end does not anticipate an invention which for the first time effectively meets all the requirements and accomplishes such end,[70] since a publication can be given effect as an anticipation only to the extent that it actually gives information to the public,[71] and since it is not competent to read into a publication information which it does not give, or by expert opinion explain an otherwise uninforming statement by evidence of some apparatus or article not itself competent as an anticipation.[72] Under the patent law he is the first inventor who, by his own thought, makes an article or material and first perfects and adapts his discovery to actual use, although some one may have previously made a similar article without putting it to practical use or giving his discovery to the public,[73] and the fact that a patentee believes himself to be the inventor of the article patented is presumed from his oath to that effect,[74] and this presumption stands until overcome by clear evidence.

*Prior public use.*[See 10 C. L. 1132]—Prior public use for a period exceeding two years renders a patent void;[75] but the "experimental" use of a machine though for a period of more than two years before the filing of an application for a patent does not invalidate the patent granted for such machine,[76] even though the product of the experimental use was sold.[77]

*Abandonment.*[See 10 C. L. 1132]—Abandonment of an invention in its experimental stage is a question of intention and may be shown by conduct, even within the two years allowed by statute,[78] but the use of an invention by the inventor for the purpose of testing its utility, which is not a public use, may continue indefinitely if for the purpose of perfecting, improving, or testing its utility.[79] Abandonment will not be lightly presumed but must be fully proved.[80]

**67.** Kennedy, No. 740,982, mechanism for driving dynamos on railway trucks held void, invention being conceived and reduced to practice by another before patentee's application was filed, patentee not proving conception at earlier date. Consolidated R. Elec. Lighting & Equipment Co. v. Adams & Westlake Co. [C. C. A.] 161 F 343.

**68.** Evidence of invention prior to use insufficient. Corbett Bros. Co. v. Reinhardt-Meding Co., 166 F 767.

**69.** Hillard v. Fisher Book Typewriter Co. [C. C. A.] 159 F 439.

**70.** Truax v. George F. Childs Adjustable Parlor Chair Co., 162 F 907.

**71, 72.** Loew Filter Co. v. German-American Filter Co. [C. C. A.] 164 F 855.

**73.** That some one had made same composition held not necessary to defeat one's patent on such composition. Warren Bros. Co. v. Owosso [C. C. A.] 166 F 309.

**74.** Warren Bros. Co. v. Owosso [C. C. A.] 166 F 309.

**75.** Scofield v. Browne [C. C. A.] 158 F 305.

**Void for prior use:** Taylor and White, Nos. 668,269, and 668,270, metal cutting tool and method for making same. Bethlehem Steel Co. v. Niles-Bement-Pond Co., 166 F 880.

**Valid as against defense:** Conroy, No. 735,949, machine for ornamenting glass. Penn Electrical & Mfg. Co. v. Conroy [C. C. A.] 159 F 943. Karfiol, No. 835,189, process for making paper lace. Karfiol v. Rothner, 165 F 923. Under evidence, Frenot design patent No. 35,922. Scofield v. Browne [C. C. A.] 158 F 305.

**76.** Use for more than two years in a room from which public was excluded, improvements being made from time to time, held experimental not public. Penn Electrical & Mfg. Co. v. Conroy [C. C. A.] 159 F 943.

**77.** Penn Electrical & Mfg. Co. v. Conroy [C. C. A.] 159 F 943.

**78.** Warren Bros. Co. v. Owosso [C. C. A.] 166 F 309.

**79.** Warren Bros. Co. v. Owosso [C. C. A.] 166 F 309. Mere reduction to practice without any public use or other act placing public in possession, no abandonment. Davis & Roesch Temperature Controlling Co. v. National Steam Specialty Co., 164 F 191.

**80.** Davis & Roesch Temperature Controlling Co. v. National Steam Specialty Co., 164 F 191.

**81. Search Note:** See notes in 10 Ann. Cas. 553.

§ 3. *Who may acquire patents.*[81] See 10 C. L. 1132—Though a patent can be issued only to the actual inventor,[82] yet, where a person who has discovered an improved principle in a machine or device employs others to assist him in carrying out the principle, he does not lose his right, as inventor to a patent therefor because such others may suggest minor features or improvements.[83]

§ 4. *Mode of obtaining and claiming patents.*[84] See 8 C. L. 1285—*Specification and description.* See 10 C. L. 1132—An inventor need not in his application elaborate the scientific theories underlying his invention,[85] but the principle of the machine or device and the mode of its operation must be set forth in the specifications,[86] and the specification for a process patent must be definite in description[87], although it is sufficient if it informs one skilled in the art so that he may use the invention.[88] While an inventor in describing a machine or apparatus which he has devised may make a claim for a process which his devise is capable of carrying out, yet to entitle him to do so the process must be one capable of being carried out by other means than by the operation of his machine, and unless such other means are known or within the reach of ordinary skill and judgment, the applicant is bound to point them out.[89] The inventor must describe what he has done in such full, clear, concise and exact terms as to enable persons skilled in the art to make and use the invention,[90] for a patent based upon claims that are so inaccurate, vague and indefinite as to be misleading and impracticable, is void.[91]

*The drawings* See 8 C. L. 1298 filed with an application as required by law, with the specifications, constitutes a part of the patent when issued.[92]

*The cancellation of claim.* See 8 C. L. 1286—The cancellation of claims may work an abandonment.[93]

*Interference.* See 10 C. L. 1132—In interference proceedings priority of invention is the sole question to be determined,[94] hence whether either party will ultimately have a right to a patent under a pending application [95] or whether a certain use amounts to a public use under the statute will not be considered.[96] The question of the right of a party to make a claim may sometimes be an ancillary question to be considered

See, also, Patents, Cent. Dig. §§ 113-129; Dec. Dig. §§ 89-96; 22 A. & E. Enc. L. (2ed.) 346.

**82.** If suggestions made by another go to make up a complete and perfect machine embracing the substance of all that is embodied in a patent subsequently issued to the party to whom the suggestions were made, the patent is invalid. Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 F 47.

**83.** Schrader, No. 682,390, held valid as against claim that patentee was not original inventor. Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 F 47.

**84. Search Note:** See Patents, Cent. Dig. §§ 130-167; Dec. Dig. §§ 97-114; 22 A. & E. Enc. L. (2ed.) 352; 16 A. & E. Enc. P. & P. 1.

**85.** Commercial Acetylene Co. v. Avery Portable Lighting Co., 166 F 907.

**86.** American Steel and Wire Co. v. Denning Wire & Fence Co., 160 F 108.

**87.** Golding, No. 527,242, method of making expanded sheet and metal by slitting and stretching sheet held not invalid for insufficiency of description. Expanded Metal Co. v. General Fireproofing Co. [C. C. A.] 164 F 849.

**88.** Farrell, No. 663,069, process for bleaching nuts not void for not specifying proportions of solutions where no particular proportions were essential to efficiency of mixture. Fullerton Walnut Grower's Ass'n v. Anderson-Barn-Grover Mfg. Co. [C. C. A.] 166 F 443.

**89.** If not pointed out, process is nothing more than operation of machine and not patentable. In re White, 31 App. D. C. 607.

**90.** Description vague and indefinite. James E. Tompkins Co. v. New York Woven Wire Mattress Co. [C. C. A.] 159 F 133.

**91.** Eisenstein, No. 797,505, for method of finishing canes void, claims being misleading and impracticable. Eisenstein v. Fibiger, 160 F 686.

**92.** Rev. St. §§ 4884, 4889, U. S. Comp. St. 1901, pp. 3381, 3383. Phillips v. Sensenich, 31 App. D. C. 159. Language of specifications and drawings held to have disclosed invention so as to authorize amendment to application. Id.

**93.** See post, § 7, Disclaimer and Abandonment.

**94.** Lewis v. Cronemeyer, 29 App. D. C. 174; Burson v. Vogel, 29 App. D. C. 388; Gueniffet v. Wictorsohn, 30 App. D. C. 432.

**95.** Gueniffet v. Wictorsohn, 30 App. D. C. 432.

**96.** Question as to use under U. S. Rev. St. § 4886, U. S. Comp. St. 1901, p. 3382, one for commissioner on final allowance of a patent. Burson v. Vogel, 29 App. D. C. 388.

in awarding priority of invention,[97] but to entitle one to make the claim in issue the claim must be sufficiently broad to cover the issue.[98] The claim of the issue of an interference should be interpreted in the light of the specifications of the party making the same[99] and be given the interpretation which it will support, and limitations should not be imported from specifications to meet the exigencies of the particular situation in which the claim may stand at a given time.[1] If an applicant desires the claims interpreted or limited otherwise than expressed by the plain and usual meaning of the words employed, he should draw his claims so as to convey the meaning intended.[2] Two valid patents based upon the same patentable invention cannot be issued to one party,[3] hence an application for a patent will be refused when its subject matter is the same as that of a former application of the same party, which has been finally rejected[4] and a change in the phraseology of the claims or any changes merely broadening the claims that have been once determined do not affect the conclusiveness of the former adjudication.[5] Where two foreign inventors both rely upon the dates of the filing of their respective applications here and abroad, the fact that a patent is issued to one while the application of the other is pending gives the patentee no superior rights but will be regarded purely as an interfering applicant.[6] Under a recent act of congress, the application by a foreign inventor relates back to the date of the filing of the foreign application and gives the foreigner priority of invention as of that date;[7] but the act does not operate retrospectively, hence the rights of an applicant whose application was pending when it was enacted are to be governed by a former act, and priority relates only from the date of the filing of the application here,[8] nor does the Act of March 3, 1903, extending the time from seven to twelve months within which an application must be filed after filing of a foreign application for the same invention, operate retrospectively.[9] Where a witness is a party to the proceedings, a wider range of cross-examination is allowable than where he is not,[10] but a party may refuse to answer questions clearly

**97.** Wickers v. McKee, 29 App. D. C. 4; Lindmark v. Hodgkinson, 31 App. D. C. 612.

**98.** In interference between applicant and patentee where patent was issued to latter after filing of former's application, applicant's claim held sufficiently broad to cover issue as to whether applicant had disclosed invention of issue. Miel v. Young, 29 App. D. C. 481. No merit in contention that one of parties was not entitled to make process claims because he heats his plate as a step of his treatment while such counts (5 and 6) are silent as to heating of plate, counts in application of other party omitting such step, and it appearing that heating is not more essential to process of one of parties than to that of the other. Wickers v. McKee, 29 App. D. C. 4.

**99.** Viele v. Cummings, 30 App. D. C. 455. Where resemblance of two devices was accidental rather than real, and each had in mind a different invention and limited claim to such invention, held reversing action of commissioner of patent that C was not entitled to make claim in issue. Id.

**1.** Miel v. Young, 29 App. D. C. 481. Decision of commissioner of patents that "the terms of the claim when given their ordinary meaning clearly read upon structure of both parties" affirmed, and priority awarded to senior applicant. Durkee v. Winquist, 31 App. D. C. 248. Presumption that inventor intends to protect his invention broadly, hence scope of a claim should not be restrictive beyond fair and ordinary meaning of words save for purpose of saving claim. Miel v. Young, 29 App. D. C. 481.

**2.** On question of right to make claims forming issue, contention that claims should be construed in light of specifications and limited in view of prior art, etc., held untenable where claims were not drawn so as to embody meaning intended and claims were applicable to structures of both parties. Lindmark v. Hodgkinson, 31 App. D. C. 612.

**3.** In re Wickers, 29 App. D. C. 71.

**4, 5.** In re Edison, 30 App. D. C. 321.

**6.** De Ferranti v. Lyndmark, 30 App. D. C. 417.

**7.** Act of Congress March 3, 1903 (32 St. at L. 1225, c. 1019, U. S. Comp. St. Supp. 1907, p. 1003). De Ferranti v. Lyndmark, 30 App. D. C. 417.

**8.** Under Act of Cong. of March 3, 1903 (32 St. at L. 1225, c. 1019, U. S. Comp. Stat. 1901, p. 1003) amending act of March 3, 1897 (29 St. at L. 692, c. 391, U. S. Comp. St. 1901, p. 3382). De Ferranti v. Lyndmark, 30 App. D. C. 417.

**9.** Gueniffet v. Wictorsohn, 30 App. D. C. 432. Evidence insufficient to support claim of junior party to interference that invention was introduced in this country prior to date of granting French patent to senior party. Id.

**10.** Questions as to whether other instalments of elevators had been made than those in certain buildings should have been answered, witness being a party. Jansson v. Larsson, 30 App. D. C. 203.

showing an intention to elicit information relating to his business and that of his assignee, not relevant to the questions at issue.[11] Any doubt as to whether a reissue is for the same invention described in the original patent should be resolved in favor of the inventor of a meritorious invention, especially where it is too late to file an independent application for a patent for the same.[12] The principle of estoppel by former adjudication is applicable to proceeding of a judicial nature in the patent office,[13] although difficulty in its application is increased by the peculiar character of the proceedings in the patent office,[14] and the unsuccessful party to an interference cannot, merely by broadening the scope of the former claims to the invention described, bring the subject-matter into litigation again.[15] The doctrine is not applicable so to estop an applicant from claiming as against a previously granted patent to an adversary, where the record shows that the patentee had no right to make the particular claims in issue.[16] Where the junior applicant after his original application becomes abandoned through oversight of his attorney files a new application with the same drawings and speculations and the same claims with an exception to avoid an objection raised in the patent office, and a patent is inadvertently issued to the senior party while the junior party's second application is pending, and the latter party brings interference proceedings and asserts certain claims of the patent, such junior party is not estopped to embody the claims of the senior party's patent.[17] Where an applicant dies pending his application, the authority of his solicitors ceases; and where his administrator carries on the proceeding and amends the specifications by inserting new matter of which there had been no previous suggestion, a supplemental oath to the amendment is essential[18] but such oath is not required to an amended application where the amendment is within the scope of the original application.[19] Where an invention is involved in several interferences and the evidence shows that one of the parties conceived of the invention and reduced same to practice prior to the dates alleged by the other parties, and where by abandonment one permits a judgment broad enough to comprehend any and all claims that could be read into the claims originally set forth to be entered in an interference, he is bound by such judgment;[20] so, also, where it is involved in several interferences, if the evidence shows that one of the parties conceived and reduced to practice prior to the dates alleged by the other parties,[21] that party is entitled to priority and the controversy between the other parties need not be reviewed.[22] Under the rule of the patent office prohibiting a patent to issue for two separate inventions where the invention of the issue was disclosed in a prior application to one of the parties but no specific claim was made until after the issue of a patent to the other party, the claims cannot be inserted by amendment;[23]

11. Jansson v. Larsson, 30 App. D. C. 203.
12. In re Heroult, 29 App. D. C. 42.
13. Horine v. Wende, 29 App. D. C. 415.
14. Proceedings discussed at length. Horine v. Wende, 29 App. D. C. 415.
15. Defeated party held estopped by former decision and not entitled to bring up subject-matter again by broadening scope of claims. Horine v. Wende, 29 App. D. C. 415.
16. Res Judicata not applicable record disclosing patentee had no right to claims. McKnight v. Pohle, 30 App. D. C. 92.
17. Jansson v. Larsson, 30 App. D. C. 203.
18. Under Rev. St. U. S. Comp. St. 1901, p. 3384. Phillips v. Sensenich, 31 App. D. C. 159.
19. Rev. St. U. S. Comp. St. 1901, p. 3384. Phillips v. Sensenich, 31 App. D. C. 159.
20. Carroll v. Hallwood, 31 App. D. C. 165. Judgment broad enough to comprehend all claims that could have been read into application held binding in second interference declared upon an amendment of his claims, where claims in both interferences were based upon same structure. Id.
21. Evidence held to show that one of three parties had established conception and reduction to practice prior to dates alleged by others. Rose v. Clifford, 31 App. D. C. 195.
22. Controversy between others not considered evidence showing that one of parties had conceived of invention and reduced to practice before dates claimed by others. Rose v. Clifford, 31 App. D. C. 195.
23. Under such conditions nothing can be done except to file an additional application or abandon that part of invention. Lotz v. Kenney, 31 App. D. C. 205.

but, when matter has been previously disclosed although not formally claimed and the making of the claim involves no material alteration of the specification, such matter may be included or a division made in a subsequent formal claim and it will take precedence of previous claims advanced by another applicant.[24] Where the subject-matter of an invention is contained in the application for a patent though not followed by a specific claim, the applicant may amend by setting up a new claim to the invention or a part thereof not before claimed,[25] and, if the conditions of the original applications require division instead of amendment merely to secure a patent embracing the additional claims, the rule is the same [26] and the new application dates back to the original one, securing to the applicant the benefit of a constructive reduction to practice as of that date.[27] A junior applicant is entitled to priority where he conceives and reduces his invention to practice prior to the filing of his adversary's application; [28] but, where it is clearly shown that the senior party conceived and disclosed the invention before a certain conversation with the junior applicant, it is unnecessary to determine whether the junior applicant had an independent conception and disclosed the same in such conversation,[29] and, although one may have been first to conceive where he was last to reduce to practice, the burden is on him to show diligence just before and subsequent to the date when his adversary entered the field, unless he is excused because of poverty or other extenuating circumstances.[30] Where one party is shown to have conceived the invention prior to the date when his adversary, who is a foreigner, introduced his invention into this country, and to have reduced same to practice a year before foreigner's filing date, he is entitled to the award of priority.[31] An allegation in a preliminary statement of one of the parties to an interference, that he had constructed an experimental machine on a given date, where not excepted to, nor followed by an allegation of a later date of actual reduction to practice, will entitle him to show that the making of the machine amounted to an actual reduction to practice as of the date of its construction,[32] but he cannot have the benefit of an earlier date than that alleged, irrespective of what the evidence may show.[33] The patentee's admissions and his failure to contradict or explain the admission that he was not the inventor often furnish evidence sufficient to overcome his sworn testimony to the contrary.[34] A disclosure to be effectual must be shown to have been full and clear as to all the essential elements of the invention,[35] but the specification of a patent is addressed to persons skilled in the art and a disclosure therein which is sufficient to enable such persons to make and use the same constitutes a compli-

**24.** Lotz v. Kenney, 31 App. D. C. 205.

**25.** U. S. Rev. St. § 4888, U. S. Comp. St. 1901, p. 3383, held not to prohibit such amendment. Lotz v. Kenney, 31 App. D. C. 205.

**26, 27.** Lotz v. Kenney, 31 App. D. C. 205.

**28.** Lotz v. Kenney, 31 App. D. C. 205. Evidence insufficient to show first conception, reduction to practice or due diligence so as to entitle later applicant to priority. Munster v. Ashworth, 29 App. D. C. 84. Evidence insufficient to show junior party's conception and disclosure prior to filing date of senior party. Steinmetz v. Thomas, 31 App. D. C. 574. Evidence insufficient to show that either party had conceived invention of issue until he filed application or reduced to practice, hence party first filing application entitled to priority. Sherwood v. Drewson, 29 App. D. C. 161.

**29.** Where evidence was decisive on question of priority, held unnecessary to consider whether junior party had conception of invention at time of interview. Onerdonk v. Parkes, 31 App. D. C. 214.

**30.** McArthur v. Mygatt, 31 App. D. C. 514. Evidence on financial embarrassment held insufficient to excuse lack of diligence. Id.

**31.** Lindmark v. Hodgkinson, 31 App. D. C. 612.

**32, 33.** Burson v. Vogel, 29 App. D. C. 388.

**34.** Evidence held sufficient to show that applicant and not patentee was inventor, patentee having made admissions and failed to testify in contradiction. Kempshall v. Royce, 29 App. D. C. 181.

**35.** Disclosure not shown, only part of combination of issue being disclosed even where part disclosed was only novel element, nothing showing that party or his witnesses knew what all elements should be combined or how combined with novel element. Kinsman v. Strohm, 31 App. D. C. 581.

ance with the statutory requirements;[36] and one having made such specification of the claims in issue may make such claims and, where first to conceive of invention disclosed, claim priority,[37] so, also, one who made full and complete drawings for the patent office prior to the earliest date fixed by the other party is entitled to an award of priority.[38] The jurisdiction of the commissioner attaches when he directs the declaration of an interference and he retains jurisdiction to award priority to the successful party after his adversary has been eliminated,[39] the remedy of the defeated party being by way of appeal and not by a prosecution of the claims of the issue in an ex parte case;[40] and, where the erroneous remedy is sought to be invoked, mandamus will lie at the instance of the successful party to compel the commissioner to vacate all proceedings subsequent to the dissolution of the interference,[41] and it is no answer to the mandamus proceeding that the commissioner deemed himself possessed of the authority he exercised in authorizing such remedy since he was acting beyond his authority and without warrant of law.[42] A party to an interference will not be heard to claim that a stranger to the interference is the real inventor of the issue and entitled to a patent,[43] and when the commissioner has declared an invention patentable a mere disinterested party cannot question his judgment.[44] The duty of the commissioner to determine whether an interference exists may be delegated to the primary examiner.[45] While the question as to whether an interference was properly declared or any interference in fact exists cannot be directly raised in an interference proceeding, it may be by a motion to dissolve the interference.[46] Rules of procedure in the patent office when not in conflict with any provision of law have the full force and effect of statutes,[47] and, where a rule of procedure is in force, it can only be repealed, modified or suspended by the commissioner with the approval of the secretary of the interior.[48] Under these rules the decision of the examiner of interferences on a declared interference is limited to priority of invention in time as between the parties,[49] and is not a direct decision that the defeated party is not entitled to a patent;[50] hence he may claim such right until the statutory time for an appeal from the final order rejecting the application has expired.[51] The rule which permits a divisional application to relate back to the filing date of the original, which also discloses its subject matter as long as it remains open in the patent office will not be extended to cases not clearly within the same,[52] and, where by amendment the original application is merged with the patent, the issue of a patent in the original application is not an action on the case within the statute so as to entitle the ap-

**36.** Rev. St. § 4888 (U. S. Comp. St. 1901, p. 3383). Hopkins v. Newman, 30 App. D. C. 402.

**37.** Specification held sufficient under Rev. St. § 4888 (U. S. Comp. St. 1901, p. 3383). Hopkins v. Newman, 30 App. D. C. 402.

**38.** Smith v. Smith, 31 App. D. C. 518.

**39, 40, 41, 42.** United States v. Moore, 30 App. D. C. 464.

**43.** Bossart v. Pohl, 31 App. D. C. 218; Dunbar v. Schellinger, 29 App. D. C. 129. Where senior party admits that junior was in possession of invention before he was, senior will not be heard to claim that a stranger was real inventor and entitled to priority. Bossart v. Pohl, 31 App. D. C. 218.

**44.** Mell v. Midgley, 31 App. D. C. 534.

**45.** Demands of U. S. Rev. St. § 4904, U. S. Comp. St. 1901, p. 3389, met when at some stage of proceedings personal opinion of commissioners may be invoked by either party. United States v. Moore, 30 App. D. C. 464.

**46.** Westinghouse v. Hien [C. C. A.] 159 F 936.

**47, 48.** Mell v. Midgley, 31 App. D. C. 534.

**49.** Rules of practice considered and construed. Westinghouse v. Hien [C. C. A.] 159 F 936.

**50.** Westinghouse v. Hien [C. C. A.] 159 F 936.

**51.** Westinghouse v. Hien [C. C. A.] 159 F 936. Time for appeal being one year, § 4896 (U. S. Comp. St. 1901, p. 3384), bill for injunction against defeated applicant filed during such year dismissed as prematurely brought. Id.

**52.** Rule not applicable, where applicant by amendment to application merged application in patent issued so that there was no application pending for division. In re Spitteler, 31 App. D. C. 271.

plicant to one year from the date thereof to further prosecute the application.[53] Statutory provisions relating to ex parte applications do not apply to inter partes actions, hence, when an appeal from the decision of the primary examiner is abandoned his decision becomes final and binding upon the parties.[54] There is no error in refusing to re-open a case for the introduction of newly-discovered evidence where the only effect of admitting the offered testimony would be to show that a third person was in fact the first inventor.[55] The question of whether a party is estopped to amend his application does not arise when the amendment was made before the other party filed his application.[56] The board of examiners in chief may, to the exclusion of other matters presented, raise and consider the question of res judicata.[57]

He who first arrives at a complete conception of the invention thought is entitled to recognition and reward unless and until the interest of the public is compromised by his lack of diligence in demonstrating that his invention is capable of useful operation,[58] but the inventor who first reduces his discovery to practical operation is prima facie the true inventor without regard to the date of his conception.[59] An earlier inventer may overcome this presumption on showing by competent evidence continuous diligence to perfect and utilize the invention,[60] and when one is first to conceive and to reduce to practice within the statutory time he is entitled to priority, although a junior inventor may anticipate him by an earlier application and may have secured letters patent.[61] Although one who first conceives an invention may lose his right to a patent therefor by failure to use reasonable diligence in following up his conception,[62] yet where he makes known his invention to another and exhibits drawings, such disclosure, when of sufficient fullness to enable one skilled in the art to construct the device, completes the invention under the patent law with the full effect as an anticipation.[63] The law encourages such delay as is required to test the thoroughness and utility of supposed inventions;[64] but while every presumption will be resolved in favor of the inventor who delays filing an application until he has perfected his invention,[65] yet the inventor must show due diligence in reducing his invention to practice,[66] and a long delay in making use of an invention

53. U. S. Rev. St. § 4894, U. S. Comp. St. 1901, p. 3384. In re Spitteler, 31 App. D. C. 271.

54. U. S. Rev. St. §§ 4909-4911, U. S. Comp. St. 1901, pp. 3390, 3391, held to apply only to ex parte cases where rejection following first consideration has not afforded applicant a hearing. United States v. Moore, 30 App. D. C. 464.

55. Dunbar v. Schellenger, 29 App. D. C. 129.

56. Phillips v. Sensenich, 31 App. D. C. 159.

57. Carroll v. Hallwood, 31 App. D. C. 165.

58, 59, 60. Laas v. Scott, 161 F 122.

61. Laas v. Scott, 161 F 122. Priority of invention of device covered by Laas & Sponenberg, No. 757,754, rail anchor or anti-creeper adjudged in John M. Scott, evidence showing that he first conceived and reduced invention to practice. Id.

62. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 158 F 415. Suffering long intervals of time to elapse between experiments and tests, although facilities were at hand for making them, held to show lack of diligence defeating right. Wickers v. McKee, 29 App. D. C. 4. McKee held entitled to prevail over Upham, Wickers and Furlong on account of lack of diligence of each of applicants and though Wickers and Furlong were first to conceive invention. Id; Wickers v. Upham, 29 App. D. C. 30; Wickers v. McKee, 29 App. D. C. 28; Id., 29 App. D. C. 21; Id., 29 App. D. C. 25. Wickers' and Furlong's failure to reduce to practice before Albert's application date and lack of diligence held to defeat their rights to priority. Wickers v. Albert, 29 App. D. C. 23. Delay of four years held to defeat right as against party having in meantime filed application. Kinsman v. Strohm, 31 App. D. C. 581. Lack of diligence on party first to conceive held to deprive him of right to priority. Jansson v. Larsson, 30 App. D. C. 203. Two years delay in filing application after test claimed as actual reduction to practice had been made, and after hearing of patent granted to adversary, held lack of diligence. Lewis v. Cronemeyer, 29 App. D. C. 174.

63. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 158 F 415.

64. Woods v. Poor, 29 App. D. C. 397; Id., 29 App. D. C. 404.

65. Kinsman v. Kintner, 31 App. D. C. 293.

66. Kinsman v. Kintner, 31 App. D. C. 293. Attempt by inventor to sell invention between date of conception and date of filing of application, a year and a half later, held not to show due diligence, entitling inventor

claimed to have been reduced to practice and in applying for a patent is a cogent circumstance tending to show that the alleged reduction to practice was nothing but an abandoned experiment.[67] The question of what is due diligence is a question of mixed law and fact,[68] and there is no arbitrary rule or standard by which diligence may be measured but each case must be considered and decided in the light of the circumstances of that case,[69] so that where it conclusively appears that the party against whom the rule of diligence is sought to be enforced was in fact the prior inventor, the facts and circumstances surrounding him at the time of his alleged lack of diligence will be carefuly considered before he will be deprived of the fruits of his discovery.[70] The nature of the invention, the situation of the inventor, the length of time intervening between conception and reduction to practice, the character and reasonableness of the inventor's testimony and that of his witness, are all important factors to be considered;[71] and where an invention is intended to apply in a business then beginning to develop, the inventor is entitled to a reasonable time to perfect his invention before asking for a patent.[72] Mere business considerations, and not circumstances of a compelling nature, will not excuse a lack of diligence,[73] nor is diligence excited by the knowedge that a rival has entered the field sufficient.[74] After reduction to practice of an invention, the mere delay of the inventor to apply for a patent, in the absence of concealment, abandonment, or suppression, will not prevent him from getting a patent based on priority of invention,[75] but concealment of invention after reduction to practice may subordinate the invention to a later discoverer;[76] and if there is concealment or suppression of an invention the field is open

to priority over one filing application before assignment. Howell v. Hess, 30 App. D. C. 194.

**67.** Where machine was used for several weeks, thrown aside and not used for three years, and another machine experimented with, held what was done was in nature of an abandoned experiment entitling later inventor to priority. Gordon v. Wentworth, 31 App. D. C. 150.

**68.** Mead v. Davis, 31 App. D. C. 590.

**69.** Woods v. Poor, 29 App. D. C. 397; Id., 29 App. D. C. 404. Under circumstances, evidence held not to show lack of diligence on part of junior party, only nine months elapsing between first drawing and filing date. Mead v. Davis, 31 App. D. C. 590. Unexcused delay for more than a year from date claimed as time of reduction to practice defeats one's right to priority as against another having in the meantime placed device on the market. Howard v. Bowes, 31 App. D. C. 619. Senior party entitled to priority, evidence showing that though certain experiments were made by junior party from five to seven years before filing of application, application was not filed until after he had seen a successful exhibition of adversary's invention, and that before filing date numerous other patents for other inventions were taken out. Moore v. Hewitt, 31 App. D. C. 577. Delay of ten years, during which experiments were made with other forms, several patents taken, and thousands of dollars expended in exploiting inventions, held such lack of diligence as to preclude award of priority to such less vigilant party as against rival, having in meantime filed application. Kinsman v. Kintner, 31 App. D. C. 293. Failure to use diligence not shown by proving failure to reduce complicated and difficult piece of mechanism in four months. Neth v. Ohmer, 30 App. D. C. 478.

**70.** Davis v. Horton, 31 App. D. C. 601. Where junior party was first to conceive, evidence held not to show lack of diligence on his part, experiments being conducted for three years, acts indicating desire and intention to give public benefit of discovery at earliest practicable moment, and that invention was disclosed before rival entered field, etc. Id.

**71.** Woods v. Poor, 29 App. D. C. 397; Id., 29 App. D. C. 404.

**72.** Evidence held not to show lack of diligence on part of junior party, only nine months elapsing between date of drawing and that of filing. Mead v. Davis, 31 App. D. C. 590.

**73.** Wickers v. McKee, 29 App. D. C. 4. Failure for three years after conception to reduce simple device to practice held not excused by want of time and money, evidence showing that party abandoned calling as plate glass salesman and engaged in another and different business with $3,000 borrowed money. Feinberg v. Cowan, 29 App. D. C. 80. Six years' delay on excuse of lack of means held to show lack of diligence, entitling senior party to award of priority. Bliss v. McElroy, 29 App. D. C. 120.

**74.** Wickers v. McKee, 29 App. D. C. 4.

**75.** Rose v. Clifford, 31 App. D. C. 195. Evidence held not to show concealment, abandonment, or suppression, but that during statutory period of two years invention was given to public and put into commercial use so as to entitle inventor to priority. Id.

**76.** Delay for two years held not to constitute concealment within rule, evidence showing that policy of applicant company

for a more diligent though later inventor who, when he has not only put the invention into public use but has also obtained a patent for it, cannot be divested of his right except upon proof, beyond a reasonable doubt that the earlier and more negligent inventor, has not gone back to an abandoned device or a device suppressed or cancelled in order to establish a prior right,[77] and the testimony of a witness that he did not see a certain device on given occasions is of less weight than that of another who says that he saw the device on such occasions,[78] but the negative testimony tends to lessen the conviction produced by the positive testimony.[79] The junior party to an interference has the burden of proving conception and disclosure of the invention in controversy earlier than his adversary's filing date, and either a reduction to practice prior to that date or due diligence in respect thereto at the date of constructive reduction to practice by his adversary,[80] and this burden is substantially increased where a patent has been issued to his adversary prior to the filing date of his application [81] or where there is successive adverse decisions against him in the patent office,[82] but the fact that a patent is granted to one while his adversary's application is pending gives the former no advantage over the latter; [83] although where two applications are concurrently pending and a patent is inadvertently granted to the junior party without declaring an interference, the patent office may properly impose upon the patentee the burden of proof,[84] and such inadvertent granting of the patent, and erroneous refusal to declare an interference between the patent and the senior party's divisional application, does not constitute a bar to the renewal of such divisional application and prevent an interference between the patent and the renewed application,[85] and if the renewed application is filed before the expiration of the statutory two years, and there is no evidence of intention of the applicant to abandon the invention, a delay in renewing the application will not work an abandonment.[86] The uncorroborated testi-

was not to patent machines used by it, and that later inventor did not apply for patent for a year after reduction to practice. Burson v. Vogel, 29 App. D. C. 388. Concealment and suppression for a period of more than two years is sufficient to defeat the right of the senior party to an award of priority over the junior party who during such time makes the same invention and places the same on the market. Gordon v. Wentworth, 31 App. D. C. 150.

**77, 78, 79.** Richards v. Burkholder, 29 App. D. C. 485.

**80.** Burden on later applicant to show first conception and reduction to practice or exercise of due diligence in prosecuting invention when rival entered field. Munster v. Ashworth, 29 App. D. C. 84; Braunstein v. Holmes, 30 App. D. C. 328; Goolman v. Hobart, 31 App. D. C. 286; Duff v. Latshaw, 31 App. D. C. 235. Junior party held properly awarded priority, senior party having taken no testimony and relied on filing date, and where junior party produced drawings showing construction of counts in issue, and satisfactorily showed that several machines corresponding to drawings were made and tested prior to filing date of adversary, although same were not produced. McCormick v. Hallwood, 30 App. D. C. 106. Evidence insufficient to explain fifteen months' delay after patent issued to senior party. McKillap v. Fetzer, 31 App. D. C. 586. Evidence held to show that senior party was not original inventor but derived knowledge from junior party who was entitled to priority. Smith v. Smith, 31 App. D. C. 518; Moore v. Hewitt, 31 App. D. C. 577. Decision of commissioner of patents affirmed evidence not showing conception or reduction to practice prior to rivals filing of application. Hansen v. Dean, 29 App. D. C. 112.

**81.** Weeks v. Dale, 30 App. D. C. 498; Lewis v. Cronemeyer, 29 App. D. C. 174. Burden of proving his case beyond a reasonable doubt is on the one whose application was not filed before the grant of a patent to his adversary. McKnight v. Pohle, 30 App. D. C. 92. On such case tests of devices by the applicant embodying the invention of the issue, claimed to have constituted reduction to practice must be shown to have been successful beyond a reasonable doubt. Lewis v. Cronemeyer, 29 App. D. C. 174.

**82.** The burden of proof upon a junior party to an interference is heavily increased by the unanimous decisions against him by the tribunals of the patent office. Johnson v. Mueser, 29 App. D. C. 61. Under evidence and patent office decisions, held bars made by junior party prior to date of conception by senior party failed to show invention in controversy. Id.

**83.** Where patentee was junior, burden is on him. Fenner v. Blake, 30 App. D. C. 507. Evidence insufficient to prove originality so as to overcome adversary's case made by showing assembling and construction in factory, junior applicant not having shown conception of means to accomplish desired result. Id; Jansson v. Larson, 30 App. D. C. 203.

**84, 85.** Cutler v. Leonard, 31 App. D. C. 297.

**86.** Renewal may be filed within two

mony of a junior party to an interference is insufficient to overcome the presumption attaching to the prior filing date of the senior party.[87] Where one is shown to have reduced an invention to practice, the burden is on the adversary not only to show conception prior to that date but reasonable diligence in reducing same to practice;[88] and where it appears that a model illustrating the invention of the issue was made by a workman under the direction of the senior party as superintendent, the junior party must overcome the presumption in favor of the senior party by showing that the latter was only carrying out instructions previously given him.[89] Where the application of one of the parties to an interference is a division of an earlier application filed before the filing date of his adversary, the burden of overcoming the earlier date is upon the latter,[90] and where a party whose application is involved in pending interference proceedings presents another application based upon the invention involved in the interference, a patent on the later application will be refused until the interference has terminated.[91]

Invention consists of the conception of the idea and of means for putting it in practice and producing the desired result,[92] and until the conception is complete and ready to be put in some practical form there is no available conception of invention within the meaning of the patent law.[93] Complete invention must amount to demonstration,[94] but a device constitutes reduction to practice where it demonstrates the entire practicability of the idea and leaves nothing more for invention,[95] and the one who first conceives a practical invention need not perfect it thereafter to such an extent that it is better than the invention of others who subsequently enter the field.[96] Reduction to practice must produce something of practical use coupled with knowledge, preferably by actual trial that the thing will work practically for the intended purpose.[97] Where the invention belongs to a class requiring actual use or thorough tests to demonstrate its practicability, there can be no reduction to practice until one or the other thing happens and is proved,[98] and the test of successful reduction

years under § 4897, U. S. Rev. St., U. S. Comp. c. 1901, p. 3386. Cutler v. Leonard, 31 App. D. C. 297.

87. Uncorroborated evidence on conception and reduction to practice held insufficient. Durkee v. Winquist, 31 App. D. C. 248; Duff v. Latshaw, 31 App. D. C. 235. He must be corroborated directly on all points necessary to establish priority. Corroborating evidence held to fail to meet requirements. Goolman v. Hobart, 31 App. D. C. 286.

88. Neth v. Ohmer, 30 App. D. C. 478.

89. Burden not overcome. Duff v. Latshaw, 31 App. D. C. 235.

90. Application of Howell filed Dec. 26, 1901, Hess's application June 30, 1903, a division of an earlier one filed Aug. 28, 1901, burden of overcoming earlier date on Howell. Howell v. Hess, 30 App. D. C. 194.

91. In re Wickers & Furlong, 29 App. D. C. 71.

92. Burson v. Vogel, 29 App. D. C. 388.

93. Burson v. Vogel, 29 App. D. C. 388. Experimental machine held not successfully reduced to practice, evidence showing that after experiment machine was dismantled and put aside, and although when produced as an exhibit it possessed all necessary elements, but important ones in controversy were replacements. Id.

94. Efforts must have passed beyond experiment, beyond reach of possible or probable failure, attained certainty by embodiment in intended form, and be capable of producing desired result. Wickers v. McKee, 29 App. D. C. 4. When it has not quite passed beyond experiment and has not attained certainty beyond all conjecture, and falls short of demonstration, the invention is still inchoate. Sherwood v. Drewson, 29 App. D. C. 161. The mere making of a model of a device intended to be used as part of a complicated machine, and the practical usefulness of which depends upon a test of that machine, is insufficient. Howell v. Hess, 30 App. D. C. 194.

95. Absence of a set-screw, a mere mechanical addition to device and obvious to any one skilled in art, held not to prevent test from constituting reduction to practice. Howard v. Bowes, 31 App. D. C. 619.

96. Law only requires that first conceiver shall use reasonable diligence in endeavoring to perfect and adapt his invention when his rival enters field. Woods v. Poor, 29 App. D. C. 397; Id., 29 App. D. C. 404. Where neither party reduced device to practice, junior party was first to conceive, latter party held entitled to priority, diligence shown, only four months having elapsed between conception and filing of application, device being drawn on blackboard and discussed, and party embarked in business for himself with very little capital. Id.

97. Sherwood v. Drewson, 29 App. D. C. 161.

98. Proofs produced held not evidence of printing qualities of plates. Wickers v. McKee, 29 App. D. C. 4

to practice may be operation under actual working conditions.[99] A machine may be crude in construction, but if it contains all the essential elements of the invention of the issue, and in its operation successfully demonstrates its practical efficacy and utility, reduction to practice is accomplished,[1] and the mere fact that mechanical improvements may have been suggested and made to a machine in the course of its operation that tended to perfect its operation and increase its practical efficiency, where the machine retains the essential elements of the invention which it puts in practice, does not impair the effect of the original demonstration of utility.[2] Satisfactory evidence of reduction to practice must embrace all the elements of the issue and must leave nothing to inference,[3] but the question of the sufficiency of actual reduction to practice by the senior party is immaterial where his conception of the invention and diligence between date of conception and the presentation of the application is shown.[4] It is not necessary to prolong the test of a machine until its commercial value has been established, since if it accomplishes the end desired it is a perfected invention, although it may prove of little or no commercial value,[5] but a total abandonment of experiments and neglect and loss of the physical things made, together with inaction by the alleged inventor and his assignee for two years, constitutes abandoned experiment and failure to successfully reduce to practice.[6] The reduction to practice must have been by the applicant himself or by his authorized agent.[7] Where one takes no testimony, the filing date of his application stands for his date of conception and constructive reduction to practice [8] of an invention and of every element thereof;[9] but where the application does not disclose the invention of the issue and is not the proper foundation for amendment, the patent is not proof of invention at the date of the application upon which it was granted, nor evidence that the invention was made by the patentee at any time, and where the patentee takes no testimony, another applicant takes priority if his application discloses invention.[10]

*Appeal and review.* See 8 C. L. 1302—On an appeal from the decision of the commissioner of patents, in an interference proceeding, the question at issue is merely one of priority.[11] The "reasons of appeal" in a patent appeal are in the nature of the ordinary assignments of error in actions at law or in equity,[12] and may in the court of appeals be amended so as to become more specific, or so as to remedy errors in their preparation if the amendment is made in due time and no injury is done to the opposing party.[13] Even if the allowance of the amended application without a supplemental oath were error, it does not justify the appellate court in awarding priority to the adversary on that account,[14] and where no substantial right of a party has been affected, the appellate court will not review the exercise of discretion by

**99.** Where object of invention was to produce a particular printing plate, test held to be printing test under actual working conditions. Wickers v. McKee, 29 App. D. C. 4.

**1, 2.** Burson v. Vogel, 29 App. D. C. 388.

**3.** Sherwood v. Drewson, 29 App. D. C. 161.

**4.** Where delay was not great, and financial condition, coupled with necessary occupation, caused delay, question of actual reduction to practice immaterial. Dunbar v. Schellenger, 29 App. D. C. 129.

**5.** Laas v. Scott, 161 F 122.

**6.** Richards v. Burkholder, 29 App. D. C. 485.

**7.** Howell v. Hess, 30 App. D. C. 194; Robinson v. McCormick, 29 App. D. C. 98. Company's use of invention after declining to purchase and return of model held not to be as inventor's agents, nor its subsequent purchase of invention affect rule so as to relieve applicant of consequence of lack of diligence reducing to practice. Howell v. Hess, 30 App. D. C. 194. Reduction to practice by original inventor cannot be taken as a reduction to practice by another merely because the ownership of the claims of both may afterwards become vested in the same person. Robinson v. McCormick, 29 App. D. C. 98.

**8.** McKnight v. Pohle, 30 App. D. C. 92.

**9.** Sherwood v. Drewson, 29 App. D. C. 161.

**10.** McKnight v. Pohle, 30 App. D. C. 92.

**11.** Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 158 F 415; Johnson v. Muesser, 29 App. D. C. 61.

**12, 13.** Horine v. Wende, 29 App. D. C. 415.

**14.** Phillips v. Sensenich, 31 App. D. C. 159.

the commissioner in regulating the practice of the patent office.[15] Refusing to suppress or exclude the deposition of a party because of his refusal to answer certain general questions on cross-examination is not reversible error where the relevancy of the testimony was not pointed out and where the case is otherwise plainly made out.[16] An assignment of error on an appeal from the examiner of interference to the board of examiners in chief in an interference that assails the decision of the examiner in awarding priority on the whole case to the appellee sufficiently raises the question of res judicata.[17] The objection that the adversary's application does not disclose invention of the issue cannot for the first time be raised on appeal,[18] but since the right of a party to make a claim goes to the foundation of an interference, the judgment of the primary examiner denying that right may be appealed and the appellate court will determine the question as an ancillary question to be considered in awarding priority of invention.[19] In the absence of abuse of discretion on the part of the commissioner in overruling a motion to strike the adversary's application from the files because its reinstatement after an abandonment for failure to prosecute was obtained by fraud, his action will not be reviewed on appeal,[20] but the exercise of discretion by the commissioner of patents, in refusing to reopen a case for the introduction of newly-discovered evidence may be the subject of review and correction when undoubtedly abused and productive of palpable injustice.[21] In interference proceedings, on the questions of whether there is an interference in fact [22] of priority of invention,[23] and patentability of the claims,[24] the appellate court usually follows the decisions of the tribunals of the patent office. The concurrent findings that an invention is a broad one, and infringed by a certain other machine will not be disturbed on certiorari in the federal supreme court unless clearly wrong,[25] and where the tribunals of the pa-

**15.** Allowance of amended application without supplemental oath, which is required under rule 48. Phillips v. Sensenich, 31 App. D. C. 159.

**16.** Jansson v. Larsson, 30 App. D. C. 203.

**17.** Where in former interference appellant recovered judgment of priority by reason of abandonment of invention by appellee, who thereafter amended application so as to raise second interference. Carroll v. Hallwood, 31 App. D. C. 165.

**18.** Rule 122 of patent office. Cutler v. Leonard, 31 App. D. C. 297. The patentability of an invention is a question to be determined by the patent office and not by the court of appeals upon appeal in interference proceedings. Mell v. Midgley, 31 App. D. C. 534. Junior party cannot on appeal be heard to complain that commissioner exceeded jurisdiction in granting petition to senior party setting aside decision of primary examiner, since it was junior party's appeal that was reinstated, and since senior party had a judgment, and hence junior party could not raise question of patentability any more than could a stranger or disinterested party. Id.

**19.** United States v. Moore, 30 App. D. C. 464.

**20.** No abuse. Kinsman v. Strohm, 31 App. D. C. 581.

**21.** Dunbar v. Schellenger, 29 App. D. C. 129. No error in refusal to reopen when only effect of admitting offered testimony would be to show that a third person was in fact first inventor. Id.

**22.** McArthur v. Mygatt, 31 App. D. C. 514.

**23.** Decisions not disturbed, evidence being sharply conflicting as to whether junior party disclosed invention to senior party. Bossart v. Pohl, 31 App. D. C. 218. Where all tribunals of patent office concurred, court of appeals will not disturb their finding unless manifest error was committed. Lindmark v. Hodgkinson, 31 App. D. C. 612; Ries v. Kirkegaard, 30 App. D. C. 199. Especially in a case which involves complicated construction about which the experts of the patent office are less liable to err than the appellate tribunal (Lindemark v. Hodgkinson, 31 App. D. C. 612), but any doubt may be settled by subsequent transactions of parties (Ries v. Kirkegaard, 30 App. D. C. 199). Contract entered into held acknowledgment by senior party of ownership by junior parties, and senior party being both inventor and patent attorney, his attempt to restrict or conceal meaning of contract viewed with disfavor. Id. Only in a clear case will the concurrent findings of all expert tribunals of patent office be disturbed. In re Wickers & Furlong, 29 App. D. C. 71.

**24.** Question of patentability of claims is settled by their allowance by the patent office and will not be reviewed on an appeal from an award of priority. Dunbar v. Schellenger, 29 App. D. C. 129. Patentability of the issue in an interference proceeding is not a jurisdictional fact without which there can be no determination of priority of invention, and in such proceeding the court of appeals will not review action of patent office in deciding that the issue is a patentable one. Johnson v. Mueser, 29 App. D. C. 61.

**25.** Concurrent findings on Liddell, No. 553,969, improvement in paper bag machines,

tent office all agree in deciding the same way on questions of fact, the court of appeals will not reverse such a decision unless it clearly appears that the decision was against the weight of the evidence,[26] but the decisions will be reversed where under the facts and circumstances in the evidence they appear to be clearly wrong,[27] and where the facts are admitted and a mere question of law involved, the court of appeals will not hesitate to reverse the judgment appealed from if convinced that an erroneous conclusion was reached.[28] Ordinarily, whether or not the application discloses the subject-matter of the interference, and therefore whether or not the interference is properly declared, is a question to be determined by the patent office,[29] but in extreme cases, where palpable error has been committed, the decision of the patent office finding identity of invention between the devices of the parties to the interference may be reversed.[30]

*Suit in equity to secure patent.* See 10 C. L. 1133—In a suit against an adjudged priority of invention in interference proceedings to compel the issuance of a patent, a cross bill by the defendant for infringement of his patent is not germane to the original bill.[31] In a suit under statute to establish the right to a patent which has been refused by the patent office and granted to defendant after interference proceedings, complainant cannot introduce evidence to prove that the patent is void for anticipation,[32] and to obtain the issuance of a patent to complainant, the evidence must be relevant to the issues made by the pleadings, which is such case can relate only to complainant's right to a patent.[33] A decision of the patent office and the court of appeals of the District of Columbia in interference proceedings, awarding priority to one of two claimants, is conclusive as to questions of fact between the parties in a subsequent suit to obtain the issuance of a patent, unless a showing to the contrary is such as to carry thorough conviction,[34] for such subsequent suit is not a trial de novo, as on appeal in some jurisdictions, nor is it to be removed from the other proceedings so that such other decisions can be cast aside as of no force,[35] but when new issues arise or it appears that the patent office has been imposed upon by fraud or perjury, the rule that a final decision rendered by the patent office can be overcome only by evidence so clear and convincing as to exclude every reasonable doubt is not applicable.[36]

held not so clearly erroneous as to warrant their disturbance. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 52 Law Ed. 1122.

**26.** Richards v. Burkholder, 29 App. D. C. 485; Wickers v. McKee, 29 App. D. C. 4. Decisions of expert tribunals of patent office upon inventor's sufficiency of disclosure is conclusive except in extreme cases where culpable error has been committed. Kilbourn v. Hirner, 29 App. D. C. 54. Unanimous adverse decisions of tribunals of patent office imposes upon the party against whom they are rendered burden of clearly showing error. Onerdonk v. Parkes, 31 App. D. C. 214; Dunbar v. Schellenger, 29 App. D. C. 129.

**27.** Concurring decisions reversed where question was one of originality in interference proceedings. Duff v. Latshaw, 31 App. D. C. 235.

**28.** Woods v. Poor, 29 App. D. C. 397; Id., 29 App. D. C. 404.

**29.** Finding of patent office in favor of senior party held conclusive. MacMulkin v. Bollee, 30 App. D. C. 112.

**30.** Case held not exceptional one, hence finding of patent office in favor of senior party conclusive on court. MacMulkin v. Bollee, 30 App. D. C. 112.

**31.** Suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392). Kilbourn v. Hirner, 163 F 539.

**32.** Under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), such issue could not have been tendered by bill without the latter being demurrable. Richards v. Meissner, 162 F 485.

**33.** In suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), complainant cannot introduce proof to show that neither complainant nor defendant has any right to a patent. Richards v. Meissner, 163 F 957.

**34.** Subsequent suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392). Richards v. Meissner, 163 F 957.

**35.** Suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392). Richards v. Meissner, 163 F 957.

**36.** Laas v. Scott, 161 F 122. In suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), patent office decision denying patent held only presumptively correct, presumption overcome by proof of false and perjured evidence in patent office. Id.

§ 5. *Letters patent.*[37] See 10 C. L. 1138—A patent is a contract[38] between the government and the patentee whereby the latter is granted the exclusive right to make, use, and vend his invention for a specified time, after which such right inures to the public.[39]

*Construction and limitation of claims.* See 10 C. L. 1138—Inventions are to be measured by their claims,[40] and a patentee must claim in his patent the exact invention,[41] for a patent is to be granted and sustained not for what the inventor may have done in fact but only for what he particularly points out and distinctly "claims" in his open letter.[42] The patent monopoly does not embrace a particular device which is constructed and operated and in which private rights are vested by state laws at the time the patent issues,[43] and a patentee is limited by his declarations in the specifications and the drawings,[44] and if he specifies any element as entering into a combination, he makes such element material thereto,[45] and any disclaimer or limitation of invention is likewise binding.[46] Courts are liberal in construing claims so as to secure to the patentee his real invention,[47] but in doing so they cannot disregard the form and language in which the inventor has chosen to make his claim.[48] The rule for the construction of contracts generally controls in the interpretation of a patent,[49] and when its terms are plain and the intention of the patentee clearly manifest therefrom, they must prevail,[50] but if its expressions are ambiguous, or its validity or any claim thereof is doubtful, that construction which will uphold the patent will be given.[51] A patent should be construed according to the fair and reasonable intention of the patentee,[52] and claims should be interpreted according to their own terms and

**37. Search Note:** See Patents, Cent. Dig. §§ 168-186, 229-256; Dec. Dig. §§ 115-129, 157-180; 22 A. & E. Enc. L. (2ed.) 380, 404.

**38.** De Ferranti v. Lyndmark, 30 App. D. C. 417.

**39.** American Steel & Wire Co. of New Jersey v. Denning Wire & Fence Co., 160 F 108.

**40.** Commercial Acetylene Co. v. Avery Portable Lighting Co., 166 F 907; Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 52 Law Ed. 1122. Patentees estopped to claim right to handle other kinds of gas in package, claim 5 having been allowed. Commercial Acetylene Co. v. Avery Portable Lighting Co., 166 F 907.

**41.** Bonsall v. Peddie & Co., 161 F 564. Claim 5 held too broad. In re Sheldon, 31 App. D. C. 201. Joy, No. 780,664, claim 12, held too broad. Page Mach. Co. v. Dow, Jones & Co., 166 F 473; In re Milans, 31 App. D. C. 269. In Cooper, No. 528,223, workman's time recorder, claim 1, void as too broad, and claim 4, as either too broad or as a duplication of claim 3. International Time Recording Co. v. Bundy Recording Co. [C. C. A.] 159 F 464. Schrader, No. 682,390, machine for packing explosive gelatin, claims 1, 2, 3, 4, and 16, void as to general and abstract. Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 F 47.

**42.** Harder v. U. S. Piling Co. [C. C. A.] 160 F 463.

**43.** User held protected under Rev. St. § 4899 (U. S. Comp. St. 1901, p. 3387), rights having vested before patent issued. Federal Const. Co. v. Park Imp. Co., 166 F 128.

**44.** Wilcox & Gibbs Sewing Mach. Co. v. Industrial Mfg. Co., 161 F 743.

**45.** Clark v. George Lawrence Co., 160 F 512; Brammer Mfg. Co. v. Witte Hardware Co. [C. C. A.] 159 F 726.

**46.** General Elec. Co. v. Duncan Elec. Mfg. Co. [C. C. A.] 163 F 839. Patents may not be broadened by what was rejected. Poole Bros. v. Marshall-Jackson Co., 161 F 752. In view of disclaimer and limitation, Duncan, No. 604,465, held not infringed by Duncan, No. 752,048. General Elec. Co. v. Duncan Elec. Mfg. Co. [C. C. A.] 163 F 839.

**47.** Fullerton Walnut Growers' Ass'n v. Anderson-Barn-Grover Mfg. Co. [C. C. A.] 166 F 443; Empire Cream Separator Co. v. Elec. Candy Mach. Co. [C. C. A.] 166 F 764. Such construction as will invalidate a patent will not be given unless courts are driven to do so. Blair v. Jeannette-McKee Glass Works, 161 F 355. Claims should not be so narrowly construed as to deprive a patentee of an improvement he has concededly made. Phillips v. Faber Sulky Co., 160 F 966.

**48.** Reference to drawings held to make several parts of vessel designated by letters essential subelements or features of candy machine. Empire Cream Separator Co. v. Elec. Candy Mach. Co. [C. C. A.] 166 F 764.

**49.** American Steel & Wire Co. of New Jersey v. Denning Wire & Fence Co., 160 F 108.

**50.** American Steel & Wire Co. of New Jersey v. Denning Wire & Fence Co., 160 F 108. When claim is explicit, courts cannot alter or enlarge same. Dey Time Register Co. v. Syracuse Time-Recorder Co. [C. C. A.] 161 F 111.

**51.** American Steel & Wire Co. of New Jersey v. Denning Wire & Fence Co., 160 F 108. Doubt to be resolved in favor of patent. Good Form Mfg. Co. v. White [C. C. A.] 160 F 661; Hartford v. Hollander [C. C. A.] 163 F 948.

**52.** "Lamented elementary scales" of mica held not necessarily to mean "ultimate"

not be controlled or limited by argument or representations made in the patent office by the applicant's attorney as to the scope of the invention, etc., where no amendments thereto were required or made,[53] but where a device belongs to a crowded art and claims are allowed only after repeated modifications, the language employed by the patentee should not be broadened,[54] for a patent when issued is not subject to denunciation because the applicant before the patent would issue trimmed away, modified and otherwise defined his specifications.[55] While a patentee is entitled to all the beneficial uses of his invention when the property or function is inherent in the invention or is described or claimed by him,[56] yet he cannot cover what was neither inherent in his invention nor specified or illustrated by him,[57] and where the change or function is neither described nor claimed, and especially where other changes are described and insisted on as essential and specially claimed, it is significant proof that the change which was not disclosed is not his invention.[58] Claims may be explained and illustrated by descriptions but they cannot be enlarged by them,[59] nor does the description necessarily limit the claims.[60] In interpreting claims of a patent, the natural import of the terms used, the context, and the specifications, should be duly regarded [61] and the terms be given their natural meaning,[62] and one claiming that they were otherwise intended has the burden of proving the fact,[63] but when the terms are defined in the patent they should not be construed altogether by reference to dictionary definitions,[64] nor are the words of controlling significance upon the question of what was the primary and leading idea of the inventor.[65] Where it is not necessary in order to save an invention to limit a claim to the particular construction shown in the drawings, reference to drawings may be regarded as simply generally descriptive.[66] As a general rule where two patents are granted to the same inventor, the patent first numbered takes precedence of the other,[67] but where the patentee has an application pending for the allowance of the later numbered patent at the time when the early numbered patent is issued and especially when through no fault of his the original application for a single patent is split up and a plurality of patents issued, an exception is made to the rule.[68] Patents which are not pioneer in character are entitled to a construction only as broad as the terms used will reasonably war-

scale as nature made mica, but elemental scale into which mica as mined can, considering elements of time and cost, be practically resolved as intended by patentee. Mica Insulator Co. v. Commercial Mica Co. [C. C. A.] 166 F 440. In case of doubt as to the meaning of a claim, it should be given the evident meaning intended by him who first made same. Viele v. Cummings, 30 App. D. C. 455.

**53.** Term "coincident immersion" given construction. Fullerton Walnut Growers' Ass'n v. Anderson-Barn-Grover Mfg. Co. [C. C. A.] 166 F 443.

**54.** Sieber & Trussell Mfg. Co. v. Saugerties Mfg. Co. [C. C. A.] 166 F 437. Applicant who in struggle to secure a patent trims away, modifies and otherwise defines his specifications and claims to meet the reference made by office will be deemed to have surrendered and disclaimed what he has conceded and to have imposed such definition upon language of patent as he attributed to it in order to secure the grant. American Stove Co. v. Cleveland Foundry Co. [C. C. A.] 158 F 978.

**55.** American Stove Co. v. Cleveland Foundry Co. [C. C. A.] 158 F 978.

**56, 57, 58.** Electric Storage Battery Co. v. Gould Storage Battery Co. [C. C. A.] 158 F 610.

**59, 60.** Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 52 Law Ed. 1122.

**61.** Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co. 163 F 950.

**62.** In Liberty, No. 629,696, lath-carrying device for paper-drying machines, claim 2, words "hoppers for feeding the said laths," construed, and patent limited to machine employing plurality of hoppers. Liberty v. Champion-International Co., 164 F 877.

**63.** Liberty Champion-International Co., 164 F 877.

**64.** Term "plasticity" construed as defined in patent. Blair v. Jeannette-McKee Glass Works, 161 F 355.

**65.** Words "of same size and form" not of controlling significance. Cooper v. Otis Co. [C. C. A.] 166 F 861.

**66.** Reference in claim to drawings showing a part composed of two pieces held not to limit patentee to two piece construction, such construction not being of essence of invention. Brunswick-Balke-Collender Co. v. Rosatto, 159 F 729.

**67, 68.** Benjamin Elec. Mfg. Co. v. Dale Co. [C. C. A.] 158 F 617.

rant;[69] they should be strictly limited to the claims[70] interpreted in the light of specifications describing the invention,[71] and in view of prior art and self-imposed limitations growing out of the action of the patent office;[72] and in a suit for infringement of a patent for an alleged invention of which no practical use has ever been made, the patent is not entitled to the same breadth of construction as if its usefulness were proved.[73] A patent for improvements upon existing machines is not entitled to a broad construction,[74] but an invention though not of a primary character, or a slight improvement on the prior art, if it possesses substantial patentable novelty, commands a reasonable range of equivalents,[75] and the patentee of an invention of a meritorious character is entitled to the benefits of the doctrine of equivalents,[76] for the "doctrine"[77] applies to a patent for a combination of old elements[78] and may be invoked for other than pioneer patents,[79] but the range of equivalents depends upon and varies with the degree of invention.[80] Whether or not one device is equivalent to another is usually a question of fact.[81] A patent of unusual merit, though not generic, is entitled to a liberal construction and a fair range of equivalents,[82] but one for a mere improvement is entitled only to a narrow construction and a limited range of equivalents,[83] and where an improvement is narrow in its character,

**69.** Ajax Forge Co. v. Morden Frog & Crossing Works [C. C. A.] 164 F 843. Elfborg, No. 640,456, adjustable switch-rod, not pioneer, not infringed by Lee and Moore, No. 679,153. Id. Not a pioneer limited to particular design of patent. Curtis v. Humphrey, 159 F 169. Not a pioneer limited to particular structure shown and described. Staples, No. 474,536, spring supports for chair, seats, etc., not pioneer, limited. D'Arcy v. Staples & Hanford Co. [C. C. A.] 161 F 733. Jeavons, No. 475,401, for oil burner, claim 1, not pioneer and must be limited to substantially means described. American Stove Co. v. Cleveland Foundry Co. [C. C. A.] 158 F 978. One combining old elements limited to combination described. Hennebique Const. Co. v. Armored Concrete Const. Co., 163 F 300.

**70.** Mueller Mfg. Co. v. McDonaly Morrison Mfg. Co., 164 F 991; Sieber & Trussell Mfg. Co. v. Saugerties Mfg. Co., 159 F 472; Westinghouse Elec. & Mfg. Co. v. Condit Electrical Mfg. Co., 159 F 144. Leadam, Nos. 621,423, and 621,424, for mere improvements, strictly construed. New Jersey Shoe Tree & Last Co. v. Baker Shoe Tree Mfg. Co., 166 F 322.

**71.** Mueller Mfg. Co. v. McDonaly & Morrison Mfg. Co., 164 F 991.

**72.** Sieber & Trussell Mfg. Co. v. Saugerties Mfg. Co., 159 F 472.

**73.** Schrader, No. 466,577, improvements in wheel tires, claim 2, construed and held not infringed. Boston Woven Hose & Rubber Co. v. Pennsylvania Rubber Co. [C. C. A.] 164 F 557.

**74.** Dey, No. 524,102, workman's time recorder entitled to narrow construction, not being a pioneer. Dey Time Register Co. v. Syracuse Time-Recorder Co. [C. C. A.] 161 F 111. Combination claim in an improvement patent cannot be construed to cover a structure which omits two of elements of combination. Id. Van Brunt, No. 659,881, improvement in grain drills, limited to combination shown. Superior Drill Co. v. La Crosse Plow Co., 160 F 504.

**75.** Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co. [C. C. A.] 163 F 950.

**76.** Bellows v. United Electrical Mfg. Co. [C. C. A.] 160 F 663.

**77.** Term "mechanical equivalents" used in law of patents means that each of ingredients comprising the invention covers every other ingredient which in the same arrangement of parts will perform the same function, if that was well known as a proper substitute for the one described in specification at time of the patent. American Steel & Wire Co. of New Jersey v. Denning Wire & Fence Co., 160 F 108.

**78.** American Steel & Wire Co. v. Denning Wire & Fence Co., 160 F 108.

**79.** Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 52 Law Ed. 1122; Commercial Acetylene Co. v. Avery Portable Lighting Co., 166 F 907. Mueller, No. 746,355, though secondary, entitled to fair range of equivalents. Mueller Furnace Co. v. Groeschel, 166 F 917.

**80.** Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 52 Law Ed. 1122. Every meritorious inventor entitled to benefit of doctrine according to amount of invention embodied in patent. Commercial Acetylene Co. v. Avery Portable Lighting Co., 166 F 907. A broader range of equivalents attend to primary or first invention where the patent relates to a new combination of old elements or an improvement. Clark v. George Lawrence Co., 160 F 512.

**81.** American Steel and Wire Co. of New Jersey v. Denning Wire and Fence Co., 160 F 108. Generally a weight is considered the mechanical equivalent of a spring. Mueller Furnace Co. v. Groeschel, 166 F 917.

**82.** Benbow-Brammer Mfg. Co. v. Straus [C. C. A.] 166 F 114; Hillard v. Fisher Book Typewriter Co. [C. C. A.] 159 F 439. Cole, No. 700,740, valve for hydraulic elevators, entitled to reasonably broad application of doctrine of equivalents, being of a sufficiently primary character. Plunger Elevator Co. v. Standard Plunger Elevator Co. [C. C. A.] 165 F 906.

**83.** Lovell v. Seybold Mach. Co., 159 F 736; Union Match Co. v. Diamond Match Co. [C. C. A.] 162 F 148; Sieber & Trussel Mfg. Co.

the inventor is ordinarily confined to his specific device and receives little aid from the doctrine of equivalents,[84] and the court may resort to strict and even harsh construction when the patentee has done nothing more than make a trivial improvement upon a well known structure which produces no new result;[85] but is should be correspondingly liberal when convinced that the patentee's improvement is so radical as to put the old methods out of action,[86] or where patent discloses invention of great merit and that covers a machine of great value and success in operation.[87] Where one claim of a patent specifically names two elements and another claim specifically names these two elements and in addition thereto a third element, it must be presumed that the patentee intended to limit the claims to the elements enumerated.[88] The failure of a patent to state certain merits in a patented structure which in fact contains a new mode of operation and produces new results does not prohibit the court from taking them into consideration in determining the question of patentable novelty, nor does it limit the scope of the invention,[89] for the patentee is entitled to all the benefits and advantages which the structure possess over prior structures intended to accomplish a similar purpose.[90] A patent for a process is not to be held to the strictness of specification required in a patent for a composition.[91] In a combination device consisting in combinations of well known mechanical appliances, no liberality of construction is accorded to create a monopoly,[92] but the patent will be limited to the combined apparatus as specified in the application,[93] and no great liberality to the doctrine of mechanical equivalents can be indulged in its favor.[94] A second patent granted to a patentee for a device for the same purpose, but different in form from

v. Saugerties Mfg. Co., 159 F 472. Lovell and Bredenberg, No. 490,877, an improvement merely, narrow construction and equivalents limited. Lovell v. Seybold Mach. Co., 159 F 736.

84. Liberman's Ex'rs v. Ruwell, 165 F 208. Cleveland, No. 727,905, for can opener. Whittemore Bros. & Co. v. Reinhardt [C. C. A.] 159 F 707. Patent for mere improvement in details of construction limited to precise combination shown and described without any range of equivalents. Smith & Hemenway Co. v. Stearns & Co., 160 F 494. Where no great invention is disclosed, no broad range is given, patent must be taken for what its terms stand. Whittemore Bros. & Co. v. World Polish Mfg. Co., 159 F 480. Lovell and Williamson, No. 734,907, book-trimming machine, claim 11, being for combination, limited to substantially means shown and described. Lovell v. Seybold Mach. Co., 159 F 736. Where one's inventive genius is displayed if at all in modifying, combining, and adapting old elements for a certain purpose, his patent must be limited to the particular form of adaptation shown. American Grass Twine Co. v. Choate [C. C. A.] 159 F 429. Where one depends upon a single limited feature, the doctrine will not ordinarily be supplied so as to cover a device in which that feature does not appear. Liberman, No. 668,921, combined cigar-rolling table and wrapper cutter not infringed by a similar combination machine having a different feature. Liberman's Ex'rs v. Ruwell, 165 F 208.

85, 86. O'Rourke Engineering Const. Co. v. McMullen [C. C. A.] 160 F 933.

87. Campbell, No. 594,457, machine for forming nipples used in wire spoke wheels entitled to liberal construction and fair range of equivalents. Manville Mach. Co. v. Excelsior Needle Co., 162 F 486. Jones, No. 470,052, underfeed furnace, patent of great merit entitled to broad construction. Underfeed Stoker Co. v. American Ship Windlass Co., 165 F 65. Ransome, No. 814,803, concrete mixing machinery not limited to precise device. Ransome Concrete Machinery Co. v. United Concrete Machinery Co., 165 F 914.

88. Words "substantially as described" held not by implication to include another element, for if so construed two claims would have been identical. Marshall v. Pettingell-Andrews Co. [C. C. A.] 164 F 862.

89. That patented pump was designed primarily for use as air pump and that it may be used for both air and water held not to deprive patentee of weight which should be given merits which attach to pump as an air pump. Warren Steam Pump Co. v. Blake & Knowles Steam Pump [C. C. A.] 163 F 263.

90. Warren Steam Pump Co. v. Blake & Knowles Steam Pump Works [C. C. A.] 163 F 263.

91. Specification for weak acid process where vinegar is specified as preferable acid held to show standard of strength meant and to cover use of dilute mineral acid. Fullerton Walnut Growers' Ass'n v. Anderson-Barn-Grover Mfg. Co. [C. C. A.] 166 F 443.

92. Portland Gold Min. Co. v. Hermann [C. C. A.] 160 F 91; Lovell v. Seybold Mach. Co., 159 F 736.

93. Portland Gold Min. Co. v. Hermann [C. C. A.] 160 F 91.

94. Portland Gold Min. Co. v. Hermann [C. C. A.] 160 F 91; United States Hog-Hoisting Mach. Co. v. North Packing & Provision Co. [C. C. A.] 158 F 818.

the one shown in an earlier patent, may be referred to in construing the earlier patent as affording a presumption that it did not broadly cover other than the described forms.[95] A patent which relates to an article characterized by its physical features and not by the method of its construction, is limited by the language of its claims and the proceedings in the patent office does not cover an article of different physical features;[96] and when a claimant contesting with others in the same field and at the same time, after repeated rejections, in order to obtain a patent, adopts and specifies as his invention a "peculiar organization of parts" and specifies and specifically names and locates, those several parts, he is held to the peculiar organization so particularized, specified and claimed,[97] and so also a patent for described means or mechanism to accomplish a desired end must be limited to the particular means described in the specification of their clear mechanical equivalents, and does not embrace or cover any other mechanical structure which is substantially different in its construction or operation,[98] and where the claims for a patent specify the elements of a combination but do not specify the means of their operation except by calling for "means" generally, and close with the words of reference "substantially as and for the purpose" described, set forth or specified, these words impart into the claims the specific means described, and the invention is limited accordingly.[99] Various constructions placed upon patents are stated in the notes.[1]

*Pioneer invention.* See 10 C. L. 1134—Pioneer patents [2] are entitled to a liberal construction,[3] and when an invention is a primary one and the inventor a pioneer in a given art, he is entitled to a wide range of mechanical equivalents.[4] One who in an improvement brings in a new element is as to such thing something of a pioneer,[5] and as such not limited to the precise details mentioned by him.[6]

§ 6. *Duration of patent right.*[7]—See 10 C. L. 1134—The duration of a United States patent is not limited by any lapse or forfeiture of any portion of the legal term of a foreign patent by means of a condition subsequent.[8] Where during the life of a monopoly created by a patent a name has become the identifying and generic name

**95.** D'Arcy v. Staples & Hanford Co. [C. C. A.] 161 F 733.

**96.** Currier, No. 743,152, for knitting machine needle. Dodge Needle Co. v. Jones [C. C. A.] 159 F 715.

**97.** Safety Car Heating & Lighting Co. v. Consolidated Car Heating Co. [C. C. A.] 160 F 476.

**98, 99.** Union Match Co. v. Diamond Match Co. [C. C. A.] 162 F 148.

**1.** Kress, No. 633,723, and Krauss, No. 555,171, for improvements in railway switches of tongue type, given narrow construction. Lorain Steel Co. v. Paige Iron Works, 158 F 636. Aiken, No. 450,360, apparatus for conveying and cooling metal plates, and No. 492,951, apparatus for straightening metal plates, not a mere aggregation of elements. National Tube Co. v. Aiken [C. C. A.] 163 F 254. Claims not a mere aggregation of parts but true combination. Maimen v. Union Special Mach. Co. [C. C. A.] 165 F 440. Stiefel, No. 551,340, for mechanism for making tubes from metallic ingots, not strictly limited to precise construction shown and described. Delaware Seamless Tube Co. v. Shelby Tube Co. [C. C. A.] 160 F 928. Amendment to claims in patent office held not to require application of the doctrine of estoppel. Page Mach. Co. v. Dow, Jones & Co., 166 F 473.

**2. Held pioneer:** Bonsall, No. 604,346, claim 3, trunk adapted for hanging therein ladies' garments. Bonsall v. Peddle & Co., 161 F 564. Bonsall, No. 64,075, improvement in garment receptacle, claim 5. Id.

**Not pioneer:** Dey, No. 524,102, workman's time recorder. Dey Time Register Co. v. Syracuse Time-Recorder Co. [C. C. A.] 161 F 111.

**3.** Bonsall, No. 642,075, improvements in garment receptacle, claim 5, in view of novelty, utility, and commercial success entitled to liberal construction as a pioneer. Bonsall v. Peddle & Co., 161 F 564.

**4.** Union Match Co. v. Diamond Match Co. [C. C. A.] 162 F 148.

**5.** Schroeder, No. 535,465, for means for operating washing machine, something of a pioneer invention. Benbow-Brammer Mfg. Co. v. Straus, 158 F 627.

**6.** Benbow-Brammer Mfg. Co. v. Straus, 158 F 627.

**7. Search Note:** See Patents, Cent. Dig. §§ 187-222; Dec. Dig. §§ 130-148; 22 A. & E. Enc. L. (2ed.) 382; 16 A. & E. Enc. P. & P. 29.

**8.** Nonpayment of second partial fee under Canadian act held a condition subsequent and not to affect term of foreign as far as United States Berliner patent No. 534,543, claims 5 and 35, is concerned; hence patent is valid. Victor Talking Mach. Co. v. Hoschka, 158 F 309.

of the thing patented, the name passes to the public with the cessation of the monopoly which the patent created,[9] and the patentee who has had the benefit of a patent during its full life will not be heard to assert its invalidity in support of his claim to a trade mark in which the manufactured article has become generally known.[10] Inventors have the right to extend their claims by a reissue when the invention remains the same and there is no material change in the drawings and specifications,[11] and where there is no unreasonable delay in making the application,[12] but claims in an application for a reissue will not be allowed where they are embraced in a subsequent application in interference, and the purpose of the applicant for reissue is apparently to gain an advantage over his opponent in the interference proceeding,[13] nor will claims of an application for a reissue be granted where, in order to give them the meaning claimed, it becomes necessary to give their language a strained, immaterial and improper interpretation, or if when given the construction claimed it covered new matter.[14] It is not an invariable rule that a patent for a machine will not sustain a reissue for a process,[15] but the deliberate cancellation of claims from an application for a patent precludes their assertion in a reissue.[16] After a patent has been declared invalid, one may apply for a reissue or continue the litigation, but he cannot do both,[17] and a just regard for the rights of the public demand that, if a patent is to be resuscitated in the form of a reissue, it be done immediately;[18] hence the owner of a patent which has been declared void by the circuit court of appeals cannot thereafter continue litigation thereon for years in other circuits, and when finally defeated apply for and obtain valid reissue,[19] and any delay in applying for a reissue of a patent for the purpose of curing the invalidity of the patent for double patenting, as declared by the highest court to which the question could be carried, is at the applicant's peril.[20] Applicants usually act through solicitors or attorneys and their inadvertence, accidents and mistakes, if such is the fact, are remediable under statute permitting the reissue when it is clear that there is no fraudulent or deceptive intent or attempt to destroy an intervening right.[21] Applications for reissue filed long after the date of the patent and having for their object the enlargement of its claims will be countenanced only in unusual and exceptional cases.[22] A void patent gains nothing by a reissue;[23] likewise, where particular claims of a patent have been declared void, the identical claims contained in a reissue must be affirmatively established to make the reissue valid.[24]

**9.** Buff-colored strip and name "elastic seam." Rice-Stix Dry Goods Co. v. J. A. Scriven Co. [C. C. A.] 165 F 639.

**10.** Rice-Stix Dry Goods Co. v. J. A. Scriven Co. [C. C. A.] 165 F 639.

**11.** Diss reissue No. 11,982 (original No. 654,956), furniture caster, held legitimate reissue. Universal Caster & Foundry Co. v. M. B. Schenck Co., 165 F 344.

**12.** In re Ams, 29 App. D. C. 91. Delay of five years knowing that patent was too narrow, but being advised by counsel that it was broad enough, held to justify refusal of reissue. Id.

**13, 14.** In re Lacroix, 30 App. D. C. 299.

**15.** In re Heroult, 29 App. D. C. 42. Foreigner held entitled to reissue for process and furnace where process was disclosed in original application, but specific claim was made only for furnace, no unnecessary delay in application being shown and description of process being copied verbatim, and affidavits showing that inventor supposed patent would cover whatever novelty was described. Id.

**16.** Claims abandoned properly disallowed. In re Lacroix, 30 App. D. C. 299.

**17, 18, 19.** Thomson-Houston Elec. Co. v. Western Elec. Co. [C. C. A.] 158 F 813.

**20.** Van Depoele reissue, No. 11,872 (original No. 495,443), void for laches in applying for reissue. Thomson-Houston Elec. Co. v. Western Elec. Co. [C. C. A.] 158 F 813.

**21.** Rev. St. § 4916 (U. S. Comp. St. 1901, p. 3393). In re Heroult, 29 App. D. C. 42.

**22.** In re Ams, 29 App. D. C. 91. Affidavit of applicant for reissue that he knew of no one using invention without his consent or who would be affected by a reissue held not to justify reversing decision of commissioner of patents adverse to applicant and granting of patent which might injure those of whom applicant had no knowledge. Id.

**23, 24.** Universal Adding Mach. Co. v. Comptograph Co., 161 F 36

§ 7. *Disclaimer and abandonment.*[25]—See 10 C. L. 1135—If an invention is perfected and abandoned, it goes to the public;[26] hence, when an inventor in compliance with statute particularly points out and distinctly claims a part improvement or combination which he claims as his discovery, he thereby disclaims and dedictates to the public all other improvements and combinations to perform the same function that are apparent from the specification and that are not evasions of the specific combination he claims as his own.[27] Delay of two years in filing an application for a reissue of a patent with broader claims will usually be treated as an abandonment to the public of everything not claimed in the original,[28] but the abandonment of an application for a product patent upon the finding of an examiner in interference proceedings, that the product had been in use more than two years previous to the application, does not conclusively admit that the process is old,[28] nor is it an abandonment within the meaning of the law of his process patent granted on an application simultaneously filed.[30] An applicant who, after another party has been adjudged priority as to certain of his claims in interference proceedings, cancels such claims acquires no right in the subject-matter thereof by subsequently defeating the issuance of a patent to the other applicant on the ground of prior public use, invention having been abandoned.[31]

§ 8. *Titles in patent rights and license, conveyance, or transfer thereof.*[32] *In general.*See 10 C. L. 1135—Where a patent issues to an applicant who has assigned his interest therein, the patent is valid, and by operation of law vests in the assignee,[33] and where a patent issues to one of two rival assignees, the title vests in the holder of the superior assignment.[34] The patentee has the exclusive monopoly on the right to manufacture, use and sell his patented device,[35] and these substantive rights may be granted together or separately and subject to such restrictions in each case as the patentee may see fit to impose,[36] but ownership of the physical structure covered by a patent does not necessarily include the incorporeal right to use the same,[37] nor can such incorporeal right be foreclosed by the operation of the state statutes.[38] The owner of a patent, or sole licensee from the United States, may grant licenses to others,[39] and limit the maximum price at which his licensee may sell at retail to the public,[40] and the sufficiency of a printed notice of reservation of right to control the price is immaterial in the case of a dealer who has actual notice of the reservation and the established price.[41] A sale or license, with a covenant not to compete, made as an ordinary incident to enhance the value of the thing conveyed, is not within the Sherman Anti-Trust Act,[42] but where it is the ordinary privilege of the owner of

25. **Search Note:** See Patents, Cent. Dig. §§ 105-112, 223-228; Dec. Dig. §§ 82-87, 149-156; 22 A. & E. Enc. L. (2ed.) 399.

26. Davis & Roesch Temperature Controlling Co. v. National Steam Specialty Co., 164 F 191. Diss reissue, No. 11,982, furniture caster, held not dedicated to public. Universal Caster & Foundry Co. v. M. B. Schenck Co., 165 F 344.

27. Rev. St. § 4888 (U. S. Comp. St. 1901, p. 3383). Brammer Mfg. Co. v. Witte Hardware Co. [C. C. A.] 159 F 726.

28. Rule based on analogy between reissue application and case where inventor fails to apply for patent within two years from date of its public use or sale, which statute makes conclusive evidence of abandonment. In re Ams, 29 App. D. C. 91.

29, 30. Mica Insulator Co. v. Commercial Mica Co. [C. C. A.] 166 F 440.

31. Dodge Needle Co. v. Jones [C. C. A.] 159 F 715.

32. **Search Note:** See notes in 4 C. L. 944; 8 Id. 1310; 1 Ann. Cas. 548; 5 Id. 426; 6 Id. 159; 7 Id. 392, 511; 8 Id. 140.

See, also, Patents, Cent. Dig. §§ 257-349; Dec. Dig. §§ 181-219; 22 A. & E. Enc. L. (2ed.) 414; 16 A. & E. Enc. P. & P. 155.

33. In re Pearsall, 31 App. D. C. 265.

34. If applicant is real owner of patent, he has his remedy by proceedings in equity. In re Pearsall, 31 App. D. C. 265.

35, 36. New Jersey Patent Co. v. Schaeffer, 159 F 171.

37, 38. Federal Const. Co. v. Park Imp. Co., 166 F 128.

39. Lefkowitz v. Foster Hose Supporter Co., 161 F 367.

40. New Jersey Patent Co. v. Schaeffer, 159 F 171; The Fair v. Dover Mfg. Co. [C. C. A.] 166 F 117.

41. The Fair v. Dover Mfg. Co. [C. C. A.] 166 F 117. So held though dealer merely intended to test sufficiency of notice. Id.

42. Act Cong. July 2, 1890, c. 647, 26 Stat.

patent rights to use or not use them [43] without question of motive,[44] yet the grant of letters patent confers upon the patentee no right not to use his invention, or make an agreement in restraint of trade in that article, save in connection with an assignment of the rights conferred by the letters patent.[45] An act making notes given in payment of patented articles or patent rights void unless showing on their face such consideration is not repugnant to the federal constitution.[46]

*Patent rights as between employer and employe.* See 8 C. L. 1309—An invention and the patent thereon belongs to the inventor to whom the patent has been issued unless he has made either an assignment of his right or a valid and enforcible agreement for such an assignment, even though it was his duty to use his skill and inventive ability to further the interests of his employer by devising improvements, generally in the appliances and machinery used in the employer's business,[47] and to enable an employer to claim the benefit of his employee's skill and achievement, the employer must show that he had an idea of the means to accomplish the particular result which he communicated to the employe in such detail as to enable the latter to embody the same in some practical form,[48] but if the employe in doing the work assigned him goes further than mechanical skill enables him to do and makes an actual invention, he is equally entitled to the benefit of his invention.[49] When an employer conceives the principle or plan of an invention and directs his employe to perfect the details and realize his conception, though the latter may make valuable improvements therein, such improved result belongs to the employer,[50] and the same rule applies to principal and assistant though they may be fellow employes,[51] and where one is an assistant and junior applicant, the burden is on him to establish that he possessed knowledge of invention independent of any suggestion from his fellow employe after the former was assigned to assist.[52]

*Royalties.* See 10 C. L. 1135—A patentee entitled under contract to a royalty on an invention and improvements thereon cannot recover royalties for similar but nonpatented articles sold embodying other and distinct improvements, though

209 (U. S. Comp. St. 1901, p. 3200). Blount Mfg. Co. v. Yale & Towne Mfg. Co., 166 F 555.

43. Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co. [C. C. A.] 163 F 950. One having a patent monopoly is under no obligation to place upon the market a device or machine embodying his invention. Id.

44. Blount Mfg. Co. v. Yale & Towne Mfg. Co., 166 F 555.

45. Contracts between manufacturers of liquid door checks under various patents by which each agreed to restrict its own trade in article of his own invention, etc., held in violation of Sherman anti-trust act. Blount Mfg. Co. v. Yale & Towne Mfg. Co., 166 F 555. Contracts not rendered valid because they authorized each of parties to use patented inventions belonging to the others. Id.

46. Act April 23, 1891 (Acts 1891, p. 296, c. 162 [Kirby's Dig. §§ 513, 514]), not in violation of Const. U. S., giving to congress power to promote progress of science, etc. Columbia County Bank v. Emerson [Ark.] 110 SW 214. Not repugnant to Const. U. S. amend. 14 as denying equal protection of laws, because § 516 exempts merchants and dealers who sell patented articles in usual course of business. Id.

47. American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133.

48. Not sufficient that employer had in mind a desired result and employed another to devise means for its accomplishment. Robinson v. McCormick, 29 App. D. C. 98.

49. Employe's construction held more than a mechanical improvement of idea communicated to him by employer; hence, former entitled to award of priority. Robinson v. McCormick, 29 App. D. C. 98.

50. McKillop v. Fetzer, 31 App. D. C. 586. Evidence held sufficient to entitle senior party to award of priority, he being shown to have imparted to junior not only broad idea embraced in invention but suggested various modifications and changes, and junior (employe) showing lack of diligence in filing application after issuance of patent to senior party. Id. Robinson v. McCormick, 29 App. D. C. 98; Braunstein v. Holmes, 30 App. D. C. 328. Where one conveys to his employes information and instructions to proceed to manufacture a piece of mechanism which, with the instruction imparted, can be constructed by the application of ordinary skill, instructor is entitled to the benefit of the skill and ingenuity of the employe in successfully completing device. Neth v. Ohmer, 30 App. D. C. 478.

51, 52. Braunstein v. Holmes, 30 App. D. C. 328.

the patentee as employe had invented and patented such improvements,[53] such distinct improvements made by employe and at employe's expense being the property of the latter.[54] One under contract to pay a royalty is relieved of his obligation where neither the invention nor any tool made under it or an improvement of it is ever used or sold by the defendant because the device is worthless and incapable of practical use,[55] and in an action to recover royalties, whether the articles sold were made in pursuance of plaintiff's invention and improvements thereunder is a question of fact,[56] to establish which the defendant may prove that the thing made did not contain the device protected by the patent, and for that purpose shows the particular point covered by the patent,[57] but if an article embodying in its mechanism plaintiff's invention was sold, it is no defense that the invention was impracticable and of no value, the defendant as licensee being estopped to deny value of invention through his use and sale under the license.[58] The terms of the contract govern as to the amount of royalty recoverable,[59] and where a royalty contract is not ambiguous,[60] there is no necessity for resorting to the acts of the parties to ascertain its meaning.[61] One entitled to a royalty, having elected to affirm a transfer of the patent by the grantee to another, cannot hold the former grantee as a guarantor for his grantee's performance of an implied obligation to manufacture the patented article during the patent's life.[62] An agreement to pay royalty on a certain article made is not necessarily contingent upon the issuance of a patent,[63] but a patentee's misconduct may defeat his right to royalties.[64] A plea in a former action averring a payment on account of royalties is not conclusive as between the same parties in an action for the same royalties as an admission of defendant's liability;[65] but a verified answer in an infringement suit brought by a third party against the defendant, pleading the contract under which plaintiff claims royalties, as a defense, and that under such contract he had a right to make the implements sold, is admissible, though not conclusive, to show that the defendant thought the product was covered by the contract,[66] and in such action, while evidence to prove "the state of the art" is competent, if it will serve to explain anything in the application or tellers patents that would otherwise be obscure, yet it is not competent to impeach the validity of the patents.[67] A person entitled to a royalty under a contract for the use of a patent has an adequate remedy at law for its breach[68] and

53. Meissner v. Standard R. Equipment Co., 211 Mo. 112, 109 SW 730.

54. Meissner v. Standard R. Equipment Co., 211 Mo. 112, 109 SW 730. Subsequent contract of employment, though varying from the written agreement clearly entitling him to such improvements. Id.

55, 56, 57, 58. Meissner v. Standard R. Equipment Co., 211 Mo. 112, 109 SW 730.

59. Where a specified royalty was agreed to be paid, royalty should average $200 a year, and if royalties for any year with those for previous years did not average $200, plaintiff could terminate contract unless average was made up. Held not to bind defendant absolutely to pay $200. Fairbanks, Morse & Co. v. Guilfoyle, 33 Ky. L. R. 408, 110 SW 233.

60. Contract held not ambiguous but to grant to defendant right to use invention and improvements thereof, but not right to plaintiff's future inventions or separate and distinct improvements. Meissner v. Standard R. Equipment Co., 211 Mo. 112, 109 SW 730.

61. Meissner v. Standard R. Equipment Co., 211 Mo. 112, 109 SW 730.

62. Where no agreement to manufacture any particular number nor any thing from which an agreement to retain title could be implied. Barnes v. American Brake-Beam Co., 238 Ill. 582, 87 NE 291.

63. Under agreement that royalty provision should be effective during life of letters patent, manufacture and sale held not contingent upon issuance of patent and limitation, not upon time when payment should begin. Boyer v. Metropolitan Sewing Mach. Co., 128 App. Div. 458, 112 NYS 817.

64. Patentee, in licensee's employment, by entering into negotiations with latter's business rival to whom he betrayed secrets of business by selling patents, and by rival instigated suit for infringement, held estopped to claim royalties though improvements were covered by contract. Meissner v. Standard R. Equipment Co., 211 Mo. 112, 109 SW 730.

65, 66, 67. Meissner v. Standard R. Equipment Co., 211 Mo. 112, 109 SW 730.

68. Barnes v. American Brake-Beam Co., 238 Ill. 582, 87 NE 291.

may recover royalties on all articles made and sold by the license shown to be substantially those of the patent,[69] but where the suit for a royalty is not based upon a contract but upon the fact that defendant took the patent with actual notice of plaintiff's claim and the nature of it, equity will entertain the suit.[70]

*Transfer.*[See 10 C. L. 1135]—By act of congress, patents or interests therein are assignable in law by an instrument in writing,[71] and, in the absence of statutory requirements, no particular form of assignment of letters patent is required, any written conveyance duly signed and sufficiently specific to identify the property being sufficient,[72] and it has even been held that an oral assignment of an interest in an invention expected to be patented is valid and enforcible,[73] and where such an agreement has been entered into, a subsequent wrongful transfer of such interest to another with knowledge of the previously vested rights is void.[74] As against others than subsequent purchasers or mortgagees, it is not essential that an assignment be eligible for record under the statute.[75] An inventor's personal contract to make inventions for his assignee is not assignable,[76] but an equitable interest in letters patent is assignable.[77] An assignment to satisfy judgment debts is not invalid because executed by the master as directed by the court instead of by the officer of a corporation debtor.[78] Where through an assignment the legal and equitable title to a patent merges, the assignee may make a conveyance of such part of the patent as he is the absolute owner of,[79] and an agreement to convey such part may be specifically enforced.[80] In an assignment of certain patents, including all "inventions of like nature * * * which may hereafter be completed by me," the verb "completed" should be given its ordinary meaning,[81] and the assignee of a subsequent invention not conceived by the inventor at the time when the contract was executed, though with actual knowledge of such previous assignment, is not chargeable with notice that its language should receive an extraordinary interpretation.[82] A transfer that is in general restraint of trade, unreasonable and against public policy, will not be enforced.[83] The sale by one copartner

69. Immaterial that goods purported not to have been made under patent, and claimed not covered thereby by defendant. Clifford v. Capeli [C. C. A.] 165 F 193.

70. Barnes v. American Brake-Beam Co., 238 Ill. 582, 87 NE 291.

71. Evidence held insufficient to assignment by instrument in writing. Moore v. U. S. One Stave Barrel Co., 141 Ill. App. 104.

72. No particular form prescribed by congress, written agreement held sufficient. American Tobacco Co. v. Ascot Tobacco Works, 165 F 207.

73, 74. McRae v. Smart [Tenn.] 114 SW 729.

75. Conveyance of all property, including "patents," held effective as assignment of patent as against alleged infringer, though assignment was eligible for record under Rev. St. § 4898 (U. S. Comp. St. 1901, p. 3387). Delaware Seamless Tube Co. v. Shelby Steel Tube Co. [C. C. A.] 160 F 928.

76. New York Phonograph Co. v. Davega, 127 App. Div. 222, 111 NYS 363.

77. American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133. Resolution of corporate stockholders that company assign all its assets to plaintiff and that the corporate officers execute all necessary papers for purpose, and a formal assignment of all assets of company, including "interests in letters patent, * * * inventions, * * * and choses in action," to plaintiff, held to pass equitable interest in letters in invention useful in business but which corporate president had purchased for himself. Id.

78. Underfeed Stoker Co. v. American Ship Windlass Co., 165 F 65.

79. Where patentee conveyed to S "his assignees and successors in trust," to have and hold in trust without power to sell, etc., for benefit of S and others. S assigned interest to D as trustee. Held D acquired title in trust for himself and others and could convey his interest as absolute owner. McDuffee v. Hestonville M. & F. Passenger R. Co., 158 F 827.

80. McDuffee v. Hestonville M. & F. Passenger R. Co., 158 F 827.

81. "Completed" not used in sense of "conceived" but held to mean finishing or perfection of things already commenced other than bringing into existence of a new thing not conceived at time of assignment. Davis & Roesch Temperature Controlling Co. v. Tagliabue [C. C. A.] 159 F 712.

82. Word "complete." Davis & Roesch Temperature Controlling Co. v. Tagliabue [C. C. A.] 159 F 712.

83. Stipulation in assignment of patents that assignor will not for 5 years patent and dispose of like device, in his business, and in event of a change in patents or devices in use conceived of by assignor he will submit same to assignee for acceptance, and if not accepted for an agreed price same shall be withdrawn, held void

to another does not estop the former on subsequently acquiring a patent on articles of the kind manufactured by the firm to maintain a suit against his former partner for infringement subsequent to the partnership term,[84] although it probably will bar a recovery for damages for acts done during the term.[85] A lease and royalty contract entered into, based upon a valuable consideration,[86] if fairly made,[87] cannot be rescinded except in accordance with their terms.[88] Mere puffing talk of a seller, mainly expressions of opinion in the nature of predictions as to what can be done in the market with an appliance, does not amount to a fraud.[89] The assignee of a patent does not, in the absence of express contract, assume any obligation to perform the contract of his assignor with the licensee,[90] nor is a purchaser of the assets of the assignee with notice of the license bound to fulfill such executory agreement for the licensee's benefit,[91] and incapacity on the part of an assignee of patent rights to perform its obligations to the inventor exonerates the latter as against both the purchaser and its assignees or licensees.[92] Persons subsequently contracting with the assignors of patent rights are affected only by such notice and knowledge of a former assignee's prior rights as the assignors had when they made the contract,[93] but for the purpose of notice an assignment of a patent is required to be recorded within three months,[94] and a certified copy of the record of an assignment of a patent with the acknowledgment thereto, although evidence where the original would be,[95] is not proof of the genuineness or due execution of the original assignment,[96] nor therefore is a certified copy of such record evidence thereof though it may be resorted to to trace the same.[97] No assignment of an unpatented invention being authorized or required to be recorded,—unless it be an assignment on which a patent is to directly issue, an agreement to assign a patent not yet obtained is not within the statute, and a record thereof is not notice to a subsequent assignee of the patent,[98] but while constructive notice may be effectively provided, inquiry is by no means excused, nor can the record alone be relied on to make out title.[99] The purchaser of a patented article from

and unenforcible. Jones Cold Store Door Co. v. Jones [Md.] 70 A 88.

84. In absence of fraud in nature of warranty. Dull v. Reynolds Elec. Flasher Mfg. Co., 161 F 129.

85. Dull v. Reynolds Elec. Mfg. Co., 161 F 129.

86. Contracts for territorial right for manufacture and for lease of molds held based on a valuable consideration. Lyons' Burial Vault Co. v. Taylor, 198 Mass. 63, 84 NE 320.

87. Evidence held to raise question for jury whether defendants were induced to sign contract by fraudulent representations. Lyons' Burial Vault Co. v. Taylor, 198 Mass. 63, 84 NE 320.

88. Lyons' Burial Vault Co. v. Taylor, 198 Mass. 63, 84 NE 320. Contract for sale of territorial rights for the manufacture of patent burial vaults held to bind party of the second part absolutely to manufacture 300 vaults before Jan. 1, 1904, and pay royalty on them. Id. In subsidiary agreement whereby molds were leased and delivered by plaintiff, providing that a cash sum be paid on delivery of molds, payment held not affected by subsequent cancellation of agreement on return of molds. Id.

89. Fairhanks, Morse & Co. v. Gulfoyle, 33 Ky. L. R. 408, 110 SW 233. Statements held mere opinions, patented article being before parties, and merits and demerits equally open to both, neither of which are experienced mechanics. Waymire v. Shipley [Or.] 97 P 807.

90, 91. New York Phonograph Co. v. Davega, 127 App. Div. 222, 111 NYS 363.

92. Inventor discharged from obligation to continue inventions, purchaser having become incapacitated through insolvency. New York Phonograph Co. v. Davega, 127 App. Div. 222, 111 NYS 363. Assignor not bound to make improvements or patent inventions for benefit of assignee or his licensee, assignee having through insolvency become unable to make payments required by contract. New York Phonograph Co. v. National Phonograph Co., 163 F 534.

93. Wire v. Tube Bending Mach. Co., 194 N. Y. 272, 87 NE 430.

94. Rev. St. § 4898 (U. S. Comp. St. 1901, p. 3387). Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 F 47.

95. Under Rev. St. § 892 (U. S. Comp. St. 1901, p. 673). Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 F 47.

96. Fact must be proved in usual way. Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 F 47. Rev. St. § 4898, amended by Act March 3, 1897, c. 391, § 5, 29 Stat. 692 (U. S. Comp. St. 1901, p. 3387), held not to give copy such effect. Id.

97, 98, 99. Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 F 47.

one who is authorized to sell becomes possessed of an absolute property therein which he may transfer, with the right of user to others,[1] but a sale of the parts of a dismantled machine as scrap iron does not pass title to a machine, nor the right to use it, in disregard of a patent.[2] The right to describe an article by the trade mark or patented name passes by implication to the purchaser of the article invented and to the general public after the expiration of the patent,[3] but an inventor who disposes of his patents does not lose the right to describe himself in connection with claimed improvements as the inventor of the original device,[4] nor does the mere assignment of patents for the manufacture of an article authorize the assignee to use the patentee's name in connection with the articles manufactured.[5] Construction of terms "carry" [6] and "all improvements thereon" and "thereon" [7] are shown in the notes.

*Licensees.* See 10 C. L. 1136—A license may be modified at any time by any subsequent arrangement between the licensor and licensee,[8] and where a subsequent licensee's arrangement is for the benefit of the owners of the patent, it is based upon a sufficient consideration, amounts to a modification of the license, and is a valid contract,[9] but since the right secured to the public by a license is to purchase the articles when manufactured and offered for sale, a modification regulating the sale of the commodity is objectionable as in restraint of trade,[10] although a license to manufacture and sell the patented articles which stipulates that it shall not be an exclusive license, but that the patentee may license others, does not create a monopoly nor is it void as against public policy.[11] Since a license implies that the licensee shall not be evicted from enjoyment, an eviction is a defense to a suit for royalties accruing after its occurrence,[12] and where a license is coupled with an express covenant on the part of the licensors to protect the exclusive right granted, the breach of such covenant is sufficient to defeat the right to recover stipulated royalties,[13] and under the California statutes the licenor's complaint in such case must allege performance or offer to perform such concurrent condition.[14] A licensee by rescinding and alleging and proving the necessary facts may recover damages from the patentee who fails to use reasonable means for the protection of the patent,[15] but where a license is breached by the

**1, 2.** Tindel-Morris Co. v. Chester (Forging & Engineering Co.), 163 F 304.

**3.** Use of Edison's name to truly and properly describe machines of his invention. Edison v. Mills-Edisonia [N. J. Eq.] 70 A 191.

**4.** Dr. A. Reed Cushion Shoe Co. v. Frew [C. C. A.] 162 F 887.

**5.** Assignment of patents for manufacture of shoes having cushioned insoles held not to authorize use of patentee's name in connection with shoes manufactured. Dr. A. Reed Cushion Shoe Co. v. Frew [C. C. A.] 162 F 887.

**6.** Ordinary meaning of term "carry," when used in a contract by which one of the parties to a contract for purchase of a patent agrees to carry interest of another party who is to have a part interest therein, means "advance" the money to pay his interest. Mann v. Urquhart [Ark.] 116 SW 219.

**7.** "All improvements thereon," in an assignment of letters patent for improvement in pulp-beating engines and "all improvements thereon," held to include all improvements on improvement in engines for which original letters patent were granted. Marshall Engine Co. v. New Marshall Engine Co., 199 Mass. 546, 85 NE 741.

**8.** Arrangement held a written modification of license. Goshen Rubber Works v. Single Tube Automobile & Bicycle Tire Co. [C. C. A.] 166 F 431. Amount charged as license fee at given time may be changed. Fox v. Knickerbocker Engraving Co., 158 F 422.

**9.** Arrangement held beneficial, and arrangement held valid written modification. Goshen Rubber Works v. Single Tube Automobile & Bicycle Tire Co. [C. C. A.] 166 F 431.

**10.** Modification held not objectionable as a restraint of trade in violation of Sherman anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Goshen Rubber Works v. Single Tube Automobile & Bicycle Tire Co. [C. C. A.] 166 F 431.

**11.** Alexander v. American Encaustic Tiling Co., 61 Misc. 190, 113 NYS 261.

**12, 13.** Wilfley v. New Standard Concentrator Co. [C. C. A.] 164 F 421.

**14.** Under Civ. Code Cal. § 1439, complaint failing to allege performance or offer to perform held not to state a cause of action. Wilfley v. New Standard Concentrator Co. [C. C. A.] 164 F 421.

**15.** Alexander v. American Encaustic Tiling Co., 61 Misc. 190, 113 NYS 261.

licensee, the licensor may terminate the agreement and make a license to a third party.[16] A licensee may by agreement estop himself from collaterally attacking the validity of a patent,[17] but although estopped to deny the validity he may nevertheless, in an action for royalties, show by a proper plea that he did not manufacture the patented article.[18] A licensee agreeing that the patentee shall not be responsible for any damage from an infringement, etc., takes the risk of infringements.[19] The grantor of an exclusive license under patents and his successor in privity are estopped as against the licensee to deny the validity of such patents or to assert their expiration before the term for which they were granted.[20] The original and subsequent contracts granting right to sell a patented device should be construed in their entirety to ascertian the intent of the parties.[21] One enjoined from violating a license agreement by selling articles under the patents will be held in contempt of court.[22] A contract for the manufacture and sale of patented structures may be canceled for all purposes without the action of a court of equity when its terms permit thereof,[23] and where a patentee in a license reserves the right to license others at his option, a subsequent license for a smaller royalty may be granted to others.[24] A contract licensing the use of a particular patent and providing a royalty cannot be forfeited except upon the strict limits of the authority conferred by the same,[25] and specific provisions of such contracts may be waived so as not to authorize a forfeiture.[26] Notice of forfeiture for breach must not be premature.[27]

§ 9. *Interference suits.*[28]—See 10 C. L. 1136—To make out a case for the cancellation of alleged interfering claims under statute, there must be actual conflict and not mere infringement,[29] and in determining whether there is an interference within the statute, the court cannot go beyond the claims as to which it is charged so as to consider the patent as a whole.[30] There is no "interference" between a design patent

16. Goshen Rubber Works v. Single Tube Automobile & Bicycle Tire Co. [C. C. A.] 166 F 431.

17. Agreement to recognize validity of patent and take no step impairing interest of patentee, etc. Alexander v. American Encaustic Tiling Co., 61 Misc. 190, 113 NYS 261.

18, 19. Alexander v. American Encaustic Tiling Co., 61 Misc. 190, 113 NYS 261.

20. New York Phonograph Co. v. National Phonograph Co., 163 F 534.

21. New York Phonograph Co. v. National Phonograph Co., 163 F 534. Exclusive license to sell phonographs, with right to such improvement patent as should be granted within 15 years, construed with reference to such patents and as covering only phonographs containing patented inventions and improvements which were owned by the licensor. Id. Provision of license prohibiting licensor from granting to others rights to use phonographs and supplies held limited to phonographs and supplies manufactured under patents and which were covered by license. Id. Instruments when construed as a whole held not an assignment of patent but a mere license; hence patentee could maintain action to restrain infringement. Hogan v. Westmoreland Specialty Co., 163 F 289.

22. Defendant, as successor to grantor, to complainant of exclusive license to sell and use articles embodying patents owned by licensor held in contempt for violating injunction. New York Phonograph Co. v. National Phonograph Co., 163 F 534.

23. Where right to terminate was reserved and plaintiff's discharge from employment constituted a total breach, contract terminated on plaintiff's election and notice to cancel. Schalkenbach v. National Ventilating Co., 129 App. Div. 389, 113 NYS 352.

24. Alexander v. Trent Tile Co., 61 Misc. 193, 113 NYS 264.

25. Contract held not forfeited, provision for submission of sworn statement having been waived. Crary v. Jones & Dommersnas Co., 138 Ill. App. 225, afd. Jones & Dommersnas Co. v. Crary, 234 Ill. 26, 84 NE 651.

26. Provision calling submission of sworn statements held waived by long continued acceptance of unsworn statements without objection. Crary v. Jones & Dommersnas Co., 138 Ill. App. 225.

27. Where there could not under contract be any thing due or to report under contract until a certain time, notice served before that time held premature. Jones & Dommersnas Co. v. Crary, 234 Ill. 26, 84 NE 651.

28. **Search Note:** See notes in 4 C. L. 948. See, also, Patents, Cent. Dig. §§ 146-149; Dec. Dig. § 106; 22 A. & E. Enc. L. (2ed.) 369; 16 A. & E. Enc. P. & P. 25.

29. Rev. St. § 4918 (U. S. Comp. St. 1901, p. 3394). No actual conflict shown, claims, though much alike, held to differ. Donner v. American Sheet & Tin Plate Co., 160 F 971.

30. Rev. St. § 4918 (U. S. Comp. St. 1901, p. 3394). Donner v. American Sheet & Tin Plate Co., 160 F 971.

for a design which is cylindrical in form and a patent for an article claimed useful that is nearly hemispherical in shape and having a rounded bottom.[31]

§ 10. *Infringement. A. What is.*[32]—See 10 C. L. 1136—A patent may be infringed by the unlawful making, by the unlawful selling, or by the unlawful using of a patented invention.[33] One who produces the same result by the use of devices operat-

**31.** Under Rev. St. § 4918 (U. S. Comp. St. 1901, p. 3394), no interference between Perky design patent No. 25,318, and Williams patent, No. 820,899. Natural Food Co. v. Williams [C. C. A.] 163 F 252.

**32. Search Note:** See notes in 3 Ann. Cas. 852, 5 Id. 672.

See, also, Patents, Cent. Dig. §§ 357-625; Dec. Dig. §§ 226-327; 22 A. & E. Enc. L. (2ed.) 449.

**33. ILLUSTRATIONS. Patents held infringed:** Lichtenstein v. Straus, 166 F 319. Diss, reissue No. 11,982, furniture caster, claims 1 and 2. Universal Caster & Foundry Co. v. M. B. Schenck Co., 165 F 344. Truffault, reissue No. 12,437, frictional retarding means for spring vehicles, and No. 12,399, anti-vibration device for vehicles. Hartford v. Hollander [C. C. A.] 163 F 948. Frenot design patent No. 35,922. Scofield v. Browne [C. C. A.] 158 F 305. Lichtenstein, No. 38,412, design for hatband. Lichtenstein v. Phipps, 161 F 578. Dyer, No. 283,646, process of making artificial mica sheets for electrical insulation. Mica Insulator Co. v. Commercial Mica Co. [C. C. A.] 166 F 440. Stockheim, No. 378,379, process of filtering beer, claims 1, 2, and 4. Loew Filter Co. v. German American Filter Co. of New York [C. C. A.] 164 F 855. Leach, No. 433,686, locomotive track sanders. Economy Locomotive Sander Co. v. American Locomotive Sander Co. [C. C. A.] 162 F 683. Gathright, No. 436,916, tabulating attachment for typewriters. Underwood Typewriter Co. v. Elliott-Fisher Co., 165 F 927. Aiken, No. 450,360 and No. 492,951, apparatus for conveying, cooling and straightening metal plates. National Tube Co. v. Aiken [C. C. A.] 163 F 254. Rhoades, No. 454,791, improvement in looms. Draper Co. v. American Loom Co. [C. C. A.] 161 F 728. Anderson, No. 457,331, claim 1 of Pierce & Poinsett, No. 623,423 and claim 1 of Holmes No. 538,914, by Scott patent, No. 819,605. Slocomb & Co. v. Turner, 158 F 987. Jones, No. 470,052, underfeed furnace claims 6 and 9. Underfeed Stoker Co. of America v. American Ship Windlass Co., 165 F 65. Woodward, No. 473,461, thread-controlling device for sewing machines. Maimen v. Union Special Mach. Co. [C. C. A.] 165 F 440. Staples, No. 474,536, spring supports for chair seats, claims 1 and 3, by one of two devices. D'Arcy v. Staples & Hanford Co. [C. C. A.] 161 F 733. No. 500,149, air lock for caissons claim 2. O'Rourke Engineering Const. Co. v. McMullen [C. C. A.] 160 F 933. Hall & Gage, No. 522,938, special valve movement for pumps. Warren Steam Pump Co. v. Blake & Knowles Steam Pump Works [C. C. A.] 163 F 263. Whiting & Wheeler, No. 526,913, pumping machine. Id. Cooper, No. 528,223, workman's time recorder, claims 5, 7, and 10. International Time Recording Co. v. Bundy Recording Co. [C. C. A.] 159 F 464. Schroeder, No. 535,465, for means of operating washing machines, nature of a pioneer, change mere colorable. Benbow-Brammer Mfg. Co. v. Straus, 158 F 627. Schroeder, No. 535,465, means for operating washing machines, claim 1. Benbow-Brammer Mfg. Co. v. Straus [C. C. A.] 166 F 114. Stiefel, No. 551,340, mechanism for making tubes from metallic ingots. Delaware Seamless Tube Co. v. Shelby Steel Tube Co. [C. C. A.] 160 F 928. Grant, No. 554,675, rubber tired wheel. Consolidated Rubber Tire Co. v. Diamond Rubber Co. [C. C. A.] 162 F 892. Anderson, No. 555,893, improvement in centrifugal cream separator by one device. Empire Cream Separator Co. v. Sears Roebuck Co. [C. C. A.] 160 F 668. Curtis, No. 557,192, device for regulating treatment of substances chronometrically, claims 1 and 4. Curtis v. Humphrey [C. C. A.] 164 F 847. Cornell & Knapp, No. 561,656, improvement in can labeling machines, claims 2 and 3. Knapp v. Atlantic Mach. Works, 163 F 531. Breuchaud, No. 563,130, improvements in construction of supports for walls, claims 1 and 2. Breuchaud v. Mutual Life Ins. Co. of New York [C. C. A.] 166 F 753. Roe, No. 566,871, improvement on underfeed stokes of Jones No. 470,052, claim 1. Underfeed Stoker Co. v. American Ship Windlass Co., 165 F 65. Sinclair & Goltz, No. 566,874, electric distribution machine for operating flash signs. Dull v. Reynolds Elec. Flasher Mfg. Co., 161 F 129. Wenger, No. 569,903, finger nail clipper. H. C. Cook Co. v. Boettinger [C. C. A.] 166 F 762. Hurley, No. 572,679, improvements in circular knitting machines, claim 4. Cooper v. Otis Co. [C. C. A.] 166 F 861. Bates, No. 577,639, machine for making wire or mesh type fence. American Steel & Wire Co. of New Jersey v. Denning Wire & Fence Co., 160 F 108. Hillard, No. 580,281, improvement in typewriter escapement, by Fisher, No. 573,868. Hillard v. Fisher Book Typewriter Co. [C. C. A.] 159 F 439. Nolan, No. 582,481, for fastening means for core-plates of electric machines, claims 2 and 4. Prudential Ins. Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 158 F 985. Campbell, No. 594,457, machine for forming nipples, all claims except 13 and 14. Manville Mach. Co. v. Excelsior Needle Co., 162 F 486. Laire, No. 600,429, isomerid of ionone and process for producing same. Haarmann-De Laire-Schaefer Co. v. Van Dyk & Co., 165 F 934. Bonsall, No. 604,346, trunk adapted for hanging therein ladies' garments. Bonsall v. Peddie & Co., 161 F 564. Davies, No. 605,947, necktie. Good Form Mfg. Co. v. White [C. C. A.] 160 F 661. Bradley, No. 609,928, thill coupling. Bradley v. Metal Stamping Co., 166 F 327. Phillips, No. 611,438, speed wagon, claims 1, 2, 3, 4, 7, 8, 10, and 11. Phillips v. Faber Sulky Co., 160 F 966. Cornell, No. 612,825, can labeling machine, claim 1. Knapp v. Atlantic Mach. Works, 163 F 531. Morrison and Wharton, No. 618,428, candy machine, claim 1. Electric Candy Mach. Co. v. Empire Cream Separator Co., 161 F 552. Donner, No. 620,541, mechanism for rolling black plate, claim 4. Donner v. American Sheet & Tin Plate Co., 160 F 971. Seavey, No.

622,190, saw guide for sawing material to make miter joints. Smith v. Hemenway Co. v. Stearns & Co. [C. C. A.] 166 F 760. Owens, No. 628,027, art of making glass articles. Blair v. Jeannette-McKee Glass Works, 161 F 355. Wright and Aalborg, No. 633,772, for automatic circuit breaker, claims 2 and 5. Westinghouse Elec. & Mfg. Co. v. Condit Electrical Mfg. Co., 159 F 144. Arrott, No. 633,941, for dredger for pulverulent material. J. L. Mott Iron Works v. Standard Sanitary Mfg. Co. [C. C. A.] 159 F 135. Cameron, Commin and Martin, No. 634,423, process of treating sewage. Cameron Septic Tank Co. v. Village of Saratoga Springs [C. C. A.] 159 F 453. Young, No. 638,540, combined abdominal pad and hose supporter. O'Brien v. Foster Hose Supporter Co. [C. C. A.] 159 F 710. Hewlett, No. 640,-197, for pipe coupling. Rainear v. Western Tube Co. [C. C. A.] 159 F 431. Richmond and Zeller, No. 641,546, for battery filler. National Carbon Co. v. Nungesser Elec. Battery Co., 159 F 157. Daley, No. 644,664, improvements on underfeed stoker of Jones, No. 470,052. Underfeed Stoker v. American Ship Windlass Co., 165 F 65. Schoen, No. 647,907, hopper bottom car, claim 1. Morton Trust Co. v. American Car & Foundry Co., 161 F 546. Farrell, No. 663,069, process for bleaching nuts. Fullerton Walnut Growers' Ass'n v. Anderson-Barn-Grover Mfg. Co. [C. C. A.] 166 F 443. Claude & Hess, No. 664,383, apparatus for storing acetylene gas, claims 1, 2, and 5. Commercial Acetylene Co. v. Avery Portable Lighting Co., 166 F 907. Clark, No. 674,757, bucking roll for attachment to a saddle. Clark v. George Lawrence Co., 160 F 512. Schrader, No. 682,390, machine for packing explosive gelatin, claims 5, 6, 7 and 8. Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 F 47. Cole, No. 700,740, valve mechanism for hydraulic elevators. Plunger Elevator Co. v. Standard Plunger Elevator Co. [C. C. A.] 165 F 906. Scott, No. 702,158, combined bustle and hip-form, claim 2. Scott v. Lazell [C. C. A.] 160 F 472. Yawman, No. 717,490, drawer for card indexes, claims 4, 5, 10, 11 and 12. Yawman & Erbe Mfg. Co. v. Vetter Desk Works [C. C. A.] 159 F 443. Claims 5 and 7 of Benjamin, No. 721,774. Benjamin Elec. Mfg. Co. v. Dale Co. [C. C. A.] 158 F 617. Diss, No. 725,325, furniture caster, claim 2. Universal Caster & Foundry Co. v. M. B. Schneck Co., 165 F 344. Warren, No. 727,505, improvement in street pavement. Warren Bros. Co. v. Owosso [C. C. A.] 166 F 309. Lewis, No. 731,695, claims 2, 4, 18, 19, 20. Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co. [C. C. A.] 163 F 950. Conroy, No. 735,949, machine for ornamenting glass, claim 1. Penn Electrical & Mfg. Co. v. Conroy [C. C. A.] 159 F 943. Fisher, No. 737,916, mattress. American Mattress & Cushion Co. v. Springfield Mattress Co. [C. C. A.] 165 F 191. Mueller, No. 746,355, wall register used with hot air furnaces. Mueller Furnaces Co. v. Groeschel, 166 F 917. Lewis, No. 746,853, claim 2. Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co., 163 F 950. Hogan, No. 752,903, dredge for salt or pepper having celluloid cap. Hogan v. Westmoreland Specialty Co., 163 F 289. Howard, No. 753,264, hub guard for wheels. Howard v. Grist, 165 F 211. Stafford and Holt, No. 759,928, improvement in circular knitting machine. Stafford v. Morris, 161 F 113. Hobart, No. 765,240, tune sheet attachment for piano players. Roth v. Harris, 162 F 160. Thomas, No. 766,004, improvements in automatic weighing machines. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp. [C. C. A.] 166 F 288. Martin, No. 767,303, telegraph transmitter, claims 1 and 2. Martin v. Wall [C. C. A.] 160 F 667. Paine, No. 774,490, metallic ring packing. Paine Metallic Packing Co. v. Blake, 161 F 134. Joy, No. 780,664, printing-telegraph receiver, all claims except 12 and 15. Page Mach. Co. v. Dow, Jones & Co., 166 F 473. Critcher, No. 781,635, combination under garment for women. Leona Garment Co. v. Jenks [C. C. A.] 164 F 188. Critcher, No. 781,655, combined skirt and drawers infringed by one style. Leona Garment Co. v. Jenks, 160 F 693. Joy, No. 786,-294, clutch mechanism. Page Mach. Co. v. Dow, Jones & Co., 166 F 473. Dunn, No. 800,431, computing cheese cutter. Dunn Mfg. Co. v. Standard Computing Scale Co. [C. C. A.] 163 F 521. Coffe, No. 812,183, improvement in telegraph keys, claim 11. Bellows v. United Electrical Mfg. Co. [C. C. A.] 160 F 663. Ransome, No. 814,803, Concrete mixing machinery. Ransome Concrete Machinery Co. v. United Concrete Machinery Co., 165 F 914. Cramer & Haak, No. 829,631, washing machine. Cramer & Haak v. 1900 Washer Co., 163 F 296. Karfiol, No. 835,189, process for making paper lace. Karfiol v. Rothner, 165 F 923. Karfiol, No. 835,-283, for a single unit. Id.

**Patents held not infringed:** Rapp, No. 653,400, claims 2 and 3 if conceded invention. Rapp v. Central Fire-Proof Door & Sash Co., 158 F 440. Nailloux, No. 430,868, regulating system for electric circuits. Electric Storage Battery Co. v. Gould Storage Battery Co. [C. C. A.] 158 F 610. Kress, No. 633,723 and Krauss, No. 555,171, for improvements in railway switches of tongue type. Lorain Steel Co. v. Paige Iron Works, 158 F 636. Mahoney, No. 441,311, for hog-hoisting machine. United States Hog-Hoisting Mach. Co. v. North Packing & Provision Co. [C. C. A.] 158 F 818. Jeavons, No. 475,401, for oil burner. American Stove Co. v. Cleveland Foundry Co. [C. C. A.] 158 F 978. Tompkins' design, No. 37,649, for spring bed. Tompkins Co. v. New York Woven Wire Mattress Co. [C. C. A.] 159 F 133. Boyer, No. 537,629, for pneumatic tool. Chicago Pneumatic Tool Co. v. Cleveland Pneumatic Tool Co. [C. C. A.] 159 F 143. Schroeder, No. 534,465, for means for operating washing machines not infringed by machine not having sliding cylinder. Benbow-Brammer Mfg. Co. v. Richmond Cedar Works, 159 F 161. Curtis, No. 557,192, for automatic egg boiler. Curtis v. Humphrey, 159 F 169. Neither Lowry, No. 524,423, for automatic feeder for twine making machines, nor Lowry, No. 654,991, for machine for making grass twine, by Monahan and Kieren, No. 785,070. American Grass Twine Co. v. Choate [C. C. A.] 159 F 429. Blades, No. 453,032, automatic electric-switch mechanism. Cutler-Hammer Mfg. Co. v. Automatic Switch Co. of Baltimore [C. C. A.] 159 F 447. Trussell, No. 743,114, temporary binder for holding loose sheets of paper, by Phoenix, No. 782,986. Sieber & Trussell Mfg. Co. v. Saugerties Mfg. Co., 159 F 472. Cleveland, No. 727,905, can opener. Whittemore Bros. & Co. v. World Polish Mfg. Co.,

159 F 480. Cleveland, No. 727,905, for can opener. Whittemore Bros. & Co. v. Reinhardt [C. C. A.] 159 F 707. No. 743,152, knitting machine needle. Dodge Needle Co. v. Jones [C. C. A.] 159 F 715. Plagman's, No. 608,220, issued Aug. 2, 1898, improved mechanical movements by Johnson, No. 740,868, issued Oct. 6, 1903. Brammer Mfg. Co. v. Witte Hardware Co. [C. C. A.] 159 F 726. Lovell and Williamson, No. 734,907, booktrimming machine, claim 11. Lovell v. Seybold Mach. Co., 159 F 736. Lovell and Bredenberg, No. 490,877, book-trimming machine. Id. Conroy, No. 731,667, machine for ornamenting glass. Penn Electrical & Mfg. Co. v. Conroy [C. C. A.] 159 F 943. Knight & Potter, No. 587,441, apparatus and No. 587,442, method for regulating electric driven mechanisms. General Elec. Co. v. Morgan-Gardner Elec. Co., 159 F 951. Stannard, No. 509,334, improvement in throttle valves, by Locke, No. 812,279. Consolidated Engine Stop Co. v. Landers [C. C. A.] 160 F 79. Herman, No. 719,942, apparatus for screening, washing and assorting ore, claim 4. Portland Gold Min. Co. v. Hermann [C. C. A.] 160 F 91. Harder, No. 771,-426, sectional sheet piling. Harder v. U. S. Piling Co. [C. C. A.] 160 F 463. Scott. No. 702,158, combined bustle and hip form, claim 1. Scott v. Lazell [C. C. A.] 160 F 472. Dixon, No. 457,706, car heating apparatus. Safety Car Heating & Lighting Co. v. Consolidated Car Heating Co. [C. C. A.] 160 F 476. Seavey, No. 622,190, saw-guide for sawing material for forming miter-joints, by Potter, No. 867,927. Smith & Hemenway Co. v. E. C. Stearns & Co. [C. C. A.] 160 F 494. Packham, No. 557,868, improvement in grain drills. Superior Drill Co. v. La Crosse Plow Co., 160 F 504. Van Brunt, No. 659,881, improvement in grain drills by Davis, Nos. 830,644 and 830,645. Id. Coffe, No. 812,183, improvement in telegraph keys, claims 12, 13, 16, 18, 19, 21, 23, 26, 27, and 28. Bellows v. United Electrical Mfg. Co. [C. C. A.] 160 F 663. Critcher, No. 781,-655, combined skirt and drawers not infringed by some certain styles. Leona Garment Co. v. Jenks, 160 F 693. Moran, No. 500,149, air lock for caissons, claim 3. O'Rourke Engineering Const. Co. v. McMullen [C. C. A.] 160 F 933. Pringle, No. 720,616, improvement in studs for separable buttons or fasteners. United States Fastener Co. v. Caesar [C. C. A.] 160 F 943. No. 641,546, battery filler by No. 809,526. Nungesser Elec. Battery Co. v. National Carbon Co. [C. C. A.] 160 F 1022. Dey, No. 524,102, workman's time recorder. Dey Time Register Co. v. Syracuse Time-Recorder Co. [C. C. A.] 161 F 111. Jeffrey, Nos. 454,115 and 558,957, improvements in rubber tires. Gormley & Jeffery Tire Co. v. Pennsylvania Rubber Co. [C. C. A.] 161 F 337. Murray, No. 692,535, spring seat. Murray v. D'Arcy [C. C. A.] 161 F 352. Nicholls, No. 672,455, square to facilitate cutting of rafters. Hardsocg v. Hibbard, Spencer, Bartlett & Co., 161 F 358. Bailey, No. 652,828, door check and closer. Watrous Mfg. Co. v. American Hardware Mfg. Co., 161 F 362. Williams, No. 31,838, design for insulating plug for electric line support. Williams v. Syracuse & S. R. Co., 161 F 571. Willcox & Borlon, No. 472,094, improvement in sewing machines, claim 1. Willcox & Gibbs Sewing Mach. Co. v. Industrial Mfg. Co., 161 F 743. Wilson, No. 585,944, memorandum calendar. Poole Bros. v. Marshall-Jackson Co., 161 F 752. Eggers, No. 737,375, amusement apparatus, claims 1 and 10. Consolidated Loops Co. v. Barnum, 161 F 915. Palmer, Denmead & Baughman, No. 538,535, machine for boxing matches, claims 1, 2, 3, 4, 23, 24, 26 and 30. Union Match Co. v. Diamond Match Co. [C. C. A.] 162 F 148. Finch, No. 666,928, improvement in eyeglasses. Jones v. Hardy & Co., 162 F 320. Norton, No. 470,-591, feed mechanism for screw-cutting lathes, by Newton, No. 787,537. Hendey Mach. Co. v. Prentice Bros. Co. [C. C. A.] 162 F 481. Allens, No. 424,944, surgical pump. Truax v. Childs Adjustible Parlor Chair Co., 162 F 907. Hennebique, No. 611,-907, cement joists or girder strengthened by iron rods or bars. Hennebique Const. Co. v. Armored Concrete Const. Co., 163 F 300. Cornell, No. 514,705, improvement in can labeling machine. Knapp v. Atlantic Mach. Works, 163 F 531. Duncan, No. 604,465, electric meter, by Duncan, No. 752,048. General Elec. Co. v. Duncan Elec. Mfg. Co. [C. C. A.] 163 F 839. Richards, No. 665,033, pneumatic tool. Cleveland Pneumatic Tool Co. v. Chicago Pneumatic Tool Co., 163 F 846. Lewis, No. 746,853, claims 8 and 9. Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co. [C. C. A.] 163 F 950. Lewis, No. 731,696, claims 1 and 2. Id. Browning, No. 580,925, magazine firearm, claim 14. Browning v. Funke, 164 F 197. Morse, Nos. 736,999 and 757,762, improvements in chain driving gear and drive chains. Morse Chain Co. v. Link Belt Machinery Co. [C. C. A.] 164 F 331. Wightman, No. 411,947, rheostat for electric cars, by Lundie, No. 687,569. Thomson-Houston Elec. Co. v. Trac. Equipment Co., 164 F 425. Short, No. 459,794, rheostat. Id. Schrader, No. 466,577, improvements in wheel tires, claim 2. Boston Woven Hose & Rubber Co. v. Pennsylvania Co. [C. C. A.] 164 F 557. Walker, No. 635,619 and No. 188,-803, soil pipe drainage and venting fillings. Morton v. Llewellyn [C. C. A.] 164 F 693. Elfborg, No. 640,456, adjustable switch-rod by Lee and Moore, No. 679,153. Ajax Forge Co. v. Morden Frog & Crossing Works [C. C. A.] 164 F 843. Golding, No. 527,242, method of making expanded sheet and metal. Expanded Metal Co. v. General Fireproofing Co. [C. C. A.] 164 F 849. Liberty, No. 629,696, lath-carrying device for paper drying machines, claim 2. Liberty v. Champion-International Co., 164 F 877. Liberman, No. 668,921, combined cigar rolling table and wrapper-cutter. Liberman's Ex'rs v. Ruwell, 165 F 208. Bradley, No. 609,928, thill coupling. Bradley v. Eccles, 165 F 447. Karfiol, No. 835,190, multiple machine for making paper lace. Karfiol v. Rothner, 165 F 923. Hagen, No. 738,434, improvements in amusement, by Nos. 783,812, 795,087, and 798,102. Consolidated Loops Co. v. Barnum, 166 F 326. Leadam, Nos. 621,423 and 621,424, improvements in shoe trees. New Jersey Shoe Tree & Last Co. v. Baker Shoe Tree Mfg. Co., 166 F 322. Trussell, No. 743,114, temporary binder, claims 1 to 6. Sieber & Trussell Mfg. Co. v. Saugerties Mfg. Co. [C. C. A.] 166 F 437. Joy, No. 780,664, claim 15. Page Mach. Co. v. Dow, Jones & Co., 166 F 473. Von Eberstein, No. 726,268, improvement in pile drivers, by machine shown to have been in use prior to application for patent. Von Eberstein v. Chambliss, 166 F

ing in substantially the same way is an infringer,[34] and it matters not that the devices may differ in form, in appearance and in the manner of operation, if they combine to do the same work in substantially the same way;[35] and one patented machine is infringed by another which incorporates in its structure and operation the substance of such invention.[36] A slight differentiation,[37] or mere changes in construction when the same mode of operation is retained and the same result obtained,[38] or where there is substantial identity,[39] are unavailing to escape infringement. In the field of improvement, each claimant must stand on the specific improvement disclosed in and covered by his claim.[40] If the improvements operate in the same way, produce the same results and contain the same elements, they are infringements,[41] but improvements subsequently made by another even in the same field of improvement where not described and claimed do not infringe unless they are colorable merely and consist of the substitution of well known equivalents or a mere change of form or interchange of parts.[42] A "machine" as distinguished from a "process," which is a mode of treatment of certain materials to produce a given result, is a thing, and the latter may be infringed though different machinery may be used in applying the same.[43] The use of a patent or device covered by patents contrary to a contract of assignment,[44] or the violation of a license by selling at a price lower than the maximum fixed by the patentee,[45] constitutes an infringement. Modifications and additions, though improvements and meritorious enough to secure a patent for them, will not negative infringement if defendant uses the broad invention which a prior patentee has described and covered by his claim.[46] Within certain bounds a patented article may be repaired without making the repairer an infringer,[47] and one rightfully using a device for a few weeks or months does not become an infringer solely because the machine during such use, and because of it, becomes slightly worn.[48] A difference of a mechanical equivalent only will not relieve infringement,[49] for the substitution of an equivalent of a thing is the same as the thing itself,[50] nor is infringement avoided by adding other elements[51] or by discarding nonessentials[52] or by mere

463. Morrison & Wharton, No. 618,428, candy machine. Empire Cream Separator Co. v. Elec. Candy Mach. Co. [C. C. A.] 166 F 764. White, No. 427,025, brake for cornice machines. Ohl & Co. v. Falstrom & Tornquist Co., 166 F 898. Ohl, No. 679,031, power press. Id.

34, 35. Hillard v. Fisher Book Typewriter Co. [C. C. A.] 159 F 439.

36. Lovell v. Seybold Mach. Co., 159 F 736.

37. Commercial Acetylene Co. v. Avery Portable Lighting Co., 166 F 907. Infringement not averted merely because machine alleged to infringe may be differentiated from patented machine, though invention embodied in latter be not primary. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 52 Law Ed. 1122.

38. Ransome Concrete Mach. Co. v. United Concrete Machinery Co., 165 F 914; Stafford v. Morris, 161 F 113.

39. Delaware Seamless Tube Co. v. Shelby Steel Tube Co. [C. C. A.] 160 F 928. Slight or immaterial change in construction does not avoid infringement. Howard v. Grist, 165 F 211.

40. Westinghouse Elec. & Mfg. Co. v. Condit Electrical Mfg. Co., 159 F 144. See ante, § 5, "Construction and limitation of claims."

41. Westinghouse Elec. & Mfg. Co. v. Condit Electrical Mfg. Co., 159 F 144. Spring substituted for pivot in patented combination where it permitted same movement and did same work held an equivalent and substitution did not avoid infringement. Id.

42. Westinghouse Elec. & Mfg. Co. v. Condit Electrical Mfg. Co., 159 F 144.

43. Eastern Extracting Co. v. Greater New York Extracting Co., 110 NYS 738.

44. Jones Cold Store Door Co. v. Jones [Md.] 70 A 88.

45. New Jersey Patent Co. v. Schaeffer, 159 F 171.

46. International Time Recording Co. v. Bundy Recording Co. [C. C. A.] 159 F 464.

47. Union Special Mach. Co. v. Maimin, 161 F 748.

48. Difference of 1-32 of an inch in width of groove and holding plate. Ohl & Co. v. Falstrom & Tornquist Co., 166 F 898.

49. Clark v. George Lawrence Co., 160 F 512; Lovell v. Seybold Mach. Co., 159 F 736.

50. American Steel & Wire Co. of New Jersey v. Denning Wire & Fence Co., 160 F 108.

51. Lovell v. Seybold Mach. Co., 159 F 736. Addition to a patented machine or manufacture does not enable one who makes, uses or sells the patented article with addition, to avoid a charge of infringement. American Laundry Machinery Mfg. Co. v. Adams Laundry Machinery Co., 161 F 556.

52. Lovell v. Seybold Mach. Co., 159 F 736;

changes of form or location of parts,[53] or in change of material;[54] and the fact that an improvement may be patentable does not relieve it from infringement if it contains the specific device which another has made and patented.[55] In design patents the test of sameness and of infringement is, "Do the two things present to the eyes of the ordinary observer, purchaser, and user, the same general appearance."[56] A mere inferiority of construction does not avoid infringement,[57] but the fact that the structural functions of different articles are the same is not sufficient to constitute an infringement;[58] and, since the scope of a patent must be determined from the state of the prior art, the fact that a structure is within the terms of a patent does not establish infringement.[59] Where a patentee has chosen to make a particular feature an element of his claim, another device not possessing such element nor its equivalent though it may accomplish the same purpose does not infringe,[60] even though such feature is not an essential element;[61] and where a patent must necessarily be definite to be valuable, the patentee cannot complain if one by use of different constituents or the same but differing widely in amount substantially differentiates his process from the one patented.[62] One may use an element of an invented combination in a combination of his own[63] provided it is used in a different combination,[64] and the absence from a combination that is alleged to infringe a single essential element of the patented combination is fatal to the claim of infringement;[65] but, where it is clear that one has infringed another's patented combination,[66] the fact that one element in the combination may be used in combination with articles bearing no resemblance to the other elements of the combination as patented cannot make any difference.[67] Articles

Electric Candy Mach. Co. v. Empire Cream Separator Co., 161 F 552. Leaving off some part easily added, when intention was to use machine for same purpose, held not to avoid infringement. Stafford v. Morris, 161 F 113.

**53.** Lovell v. Seybold Mach. Co., 159 F 736. Infringement not avoided by changing location of an element of a combination unless mode of operation is changed or far better results secured. Bonsall v. Peddie & Co., 161 F 564.

**54.** Lovell v. Seybold Mach. Co., 159 F 736.

**55.** Benjamin Elec. Mfg. Co. v. Dale Co. [C. C. A.] 158 F 617.

**56.** Williams v. Syracuse & S. R. Co., 161 F 571.

**57.** Bradley v. Eccles, 165 F 447.

**58.** In contempt proceedings for violating injunction restraining infringement of complainant's patent on a hot-air furnace an essential element of furnace consisting in placing rods tying bottom plate and crown sheet through vertical air flues, held no violation of injunction by furnace in which rods were outside of and removed from flues. Kelsey Heating Co. v. James Spear Stove & Heating Co., 158 F 414.

**59.** Page Mach. Co. v. Dow, Jones & Co., 166 F 473.

**60.** Consolidated Engine Stop Co. v. Landers [C. C. A.] 160 F 79. Patent lacking any one functional feature or its equivalent does not infringe. Empire Cream Separator Co. v. Elec. Candy Mach. Co. [C. C. A.] 166 F 764.

**61.** Portland Gold Min. Co. v. Hermann [C. C. A.] 160 F 91. Immaterial that element claimed was an unnecessary device. Brammer Mfg. Co. v. Witte [C. C. A.] 159 F 726.

**62.** Alexander reissue, No. 11,624 (original, No. 563,723) electrolytic bath for coating metals and process for galvanically coating metals, construed and held not infringed by bath substantially different and ingredients in different proportions. Potthoff v. Hanson & Van Winkle Co., 163 F 56.

**63.** Lovell v. Seybold Mach. Co., 159 F 736.

**64.** Ajax Forge Co. v. Morden Frog & Crossing Works [C. C. A.] 164 F 843.

**65.** Brammer Mfg. Co. v. Witte Hardware Co. [C. C. A.] 159 F 726; Union Match Co. v. Diamond Match Co. [C. C. A.] 162 F 148; Liberty v. Champion-International Co., 164 F 877; Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co. [C. C. A.] 163 F 950; United States Fastener Co. v. Caesar [C. C. A.] 160 F 943. In examining a question of infringement, the primary inquiry is whether every element of a claim is found in the device complained of. United States Fastener Co. v. Caesar [C. C. A.] 160 F 943. Combination not infringed unless all elements as they are claimed are used, whether they are essential or not. Portland Gold Min. Co. v. Hermann [C. C. A.] 160 F 91. No infringement of a combination claim unless the elements thereof are used in substantially the same mode of co-operation. Id.

**66.** Berliner, patent No. 534,543, for improvement in talking machines, claims 5 and 35, held infringed, defendant's machine being used in same way, with same disc, producing same effect by same means, notwithstanding a weak spring in defendant's machine. Victor Talking Mach. Co. v. Hoschka, 158 F 309.

**67.** Use of a spring in connection with talking machine. Victor Talking Mach. Co. v. Hoschka, 158 F 309.

manufactured under the terms of a patent are taken out of the limits of the monopoly and become part of the common property of the country,[68] and when sold by the patentee, or his licensee the royalty having been previously paid or secured, the patentee having once received his royalty cannot treat the user or seller as an infringer.[69] A final decree for the defendant in an infringement suit entitles the defendant to continue to make and sell the alleged infringed article free from all interference.[70] So, also, one owning or having legal possession of an invented article may lawfully use the same for the purpose for which it is adapted and advertise it in the name of the patentee.[71] One who purchases a patented device or machine or a machine containing patented devices for use from the inventor before he takes a patent in the territory where it is made and sold, or who purchased the same from one having the right to sell it, such right being derived from the patentee, has the right to use it anywhere,[72] for the right to the use stands on a different ground from the right to make and sell, and inheres in the nature of the contract of purchase which carries no implied limitation to the right to use within a given locality.[73]

*Contributory infringement.* See 10 C. L. 1139—Where an infringement of a patent is brought about by concert of action between others and a licensee, all engaged directly and intentionally in such action become joint infringers;[74] and where one without right constructs or disposes of an infringing machine, it affords no protection to another to have merely repaired the machine for the latter becomes to such extent a contributory infringer.[75] To charge the president of a corporation personally with liability for an infringement by corporation, it must be affirmatively shown that the officer was at the time cognizant of the charge of infringement against the corporation and that the officer acted beyond the scope of his office;[76] and under no principle of law or equity can an officer or stockholder be held liable as a contributory infringer by reason of his being guilty, after the infringement was completed and suit brought, of having aided in disposing of the property of the infringing company.[77]

(§ 10) *B. Defenses.*[78] See 10 C. L. 1139—The infringement of a patent initially by one person gives no sanction to another to repeat or continue the same,[79] nor does the fact that one is an employe of an infringer relieve him from the consequences of his act as an infringer.[80] A corporation may be an infringer of a process patent though

68, 69. Goshen Rubber Works v. Single Tube Automobile & Bicycle Tire Co. [C. C. A.] 166 F 431.

70. Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., 164 F 869.

71. Use of Edison machines for entertainment and advertising same as Edison machines cannot be enjoined. Edison v. Mills-Edisonia [N. J. Eq.] 70 A 191.

72. Daimler Mfg. Co. v. Conklin, 160 F 679. Citizen of United States who being in foreign country purchased, for personal use solely, article protected in United States by patent there granted to assignee of inventor, maker and seller in foreign country having right from inventor to make and sell, purchaser having right to sell and use so long as he remained abroad, held not an infringer of United States letters patent if on coming back to the United States he brings article with him and personally uses it, not for commercial purposes or profit. Id.

73. Daimler Mfg. Co. v. Conklin, 160 F 679.

74. New Jersey Patent Co. v. Schaeffer, 159 F 171.

75. Union Special Mach. Co. v. Maimin, 161 F 748.

76. To show that one was president of corporation insufficient to bind officer. Weston Elec. Instrument Co. v. Empire Elec. Instrument Co., 166 F 867. Actively defending a patent suit brought is not evidence that the party charged has been guilty of infringement prior thereto. Id. Signing letters held act as president within duty and not to render officer individually liable. Id.

77. Weston Elec. Instrument Co. v. Empire Elec. Instrument Co., 166 F 867.

78. **Search Note:** See Patents, Cent. Dig. §§ 406, 448-452; Dec. Dig. §§ 264-283; 22 A. & E. Enc. L. (2ed.) 489.

79. Union Special Mach. Co. v. Maimin, 161 F 748.

80. In suit for infringement against patentee who had assigned patents, plea setting up that defendant as superintendent had made no change in conduct of corporation business, but which admitted infringement by corporation, held insufficient. Underwood Typewriter Co. v. Manning, 165 F 451.

the commodity treated by the process be the individual property of the stockholders and though the profits derived from the infringement be distributed to them in the form of dividends.[81] That a defendant might have avoided infringement by varying his combination is no defense where he actually did infringe.[82] Where a design patented and sold is duly marked,[83] one who without a license applies the patented design to an article of manufacture for the purpose of sale is not relieved from infringement penalty by the fact that he had no actual knowledge of the patent.[84]

(§ 10) *C. Damages, profits, and penalties.*[85]—See 10 C. L. 1139—In a joint suit by a patent owner and licensee for an infringement interfering with sales and the granting of licenses by the licensee, the license fee established, charged and received by the licensee, may be taken as a basis for estimating damages,[86] and if the license fee is uniform for a considerable period of time and accepted and paid by those who take licenses during that time, it is sufficient under the uniformity rules even if during that period for some peculiar reason or special circumstances a lesser fee is accepted from a few persons;[87] and where a uniform license fee is charged, an infringer cannot claim the benefit of a subsequent reduction[88] except as to infringements committed, after the reduction was actually made.[89] In order that a royalty may be accepted as a measure of damages against an infringer who is a stranger to the license establishing the same, it must have been paid or secured before the infringement in the suit,[90] and, where the infringement extended both before and after the date of the license contracts, the measure is applicable only to the infringements committed afterward.[91] In a proper case a judge may at his discretion grant triple damages under the federal statute,[92] and the exercise will not be interfered with unless abuse is clearly shown.[93] The statute permits an increase in the damages only and has no application to the profits recoverable.[94] The actual damages sustained must be proved,[95] and to recover the statutory amount of $250 from an infringer, complainant must show that the infringer had knowledge of the fact that the article was patented.[96] In patent nomenclature what an infringer makes is "profits," and what the owner of the patent loses

**81.** Corporation liable for treating nuts furnished and owned by stockholders. Fullerton Walnut Growers' Ass'n v. Anderson-Barn-Grover Mfg. Co. [C. C. A.] 166 F 443.

**82.** Victor Talking Mach. Co. v. Hoschke, 158 F 309.

**83.** Notice of design patent for hat band by placing words "Pat. Jan. 15th, 1907," on lining of hats on which bands were used, held sufficient under Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388). Lichtenstein v. Phipps, 161 F 578.

**84.** Liability of $250 under Act Feb. 4, 1887, c. 105, § 1, 24 Stat. 387 (U. S. Comp. St. 1901, p. 3398). Lichtenstein v. Phipps, 161 F 578.

**85. Search Note:** See Patents, Cent. Dig. §§ 422-431, 566-587; Dec. Dig. §§ 275, 318-320; 22 A. & E. Enc. L. (2ed.) 495.

**86.** Where patent owner granted exclusive license authorizing licensee to grant licenses to others on terms deemed fit. Fox v. Knickerbocker Engraving Co., 158 F 422.

**87.** Held especially true in particular case where license fee charged was uniform at $15 per week except to newspapers, and only two of them. Fox v. Knickerbocker Engraving Co., 158 F 422. Evidence held to show uniform established license fees during time of infringement. Id.

**88.** Amount charged as license fee at a given time may be changed. Fox v. Knickerbocker Engraving Co., 158 F 422.

**89.** Fox v. Knickerbocker Engraving Co., 158 F 422.

**90, 91.** Diamond Stone-Sawing Mach. Co. v. Brown [C. C. A.] 166 F 306.

**92.** Where defendant willfully and knowingly kept on infringing after suit was brought, case held a proper one for awarding treble damages under Rev. St. § 4921 (U. S. Comp. St. 1901, p. 3395). Fox v. Knickerbocker Engraving Co., 158 F 422.

**93.** Under Rev. St. § 4921 (U. S. Comp. St. 1901, p. 3395), no abuse. Fox v. Knickerbocker Engraving Co. [C. C. A.] 165 F 442.

**94.** Yesbera v. Hardesty Mfg. Co. [C. C. A.] 166 F 120. Where plaintiff under evidence was entitled to no damages trebling provision of Rev. St. § 4921 (U. S. Comp. St. 1901, p. 3395), not applicable. McSherry Mfg. Co. v. Dowagiac Mfg. Co. [C. C. A.] 160 F 948.

**95.** Fox v. Knickerbocker Engraving Co., 158 F 422. Evidence considered and held insufficient to show damages sustained. McSherry Mfg. Co. v. Dowagiac Mfg. Co. [C. C. A.] 160 F 948.

**96.** No recovery under Act Feb. 4, 1887, c. 105, § 1, 24 Stat. 387 (U. S. Comp. St. 1901, p.

by the infringement is "damages." [97] The law does not permit duplicating the same elements of recovery upon both profits and damages, and where recovery has been allowed upon one ground, care should be exercised so as not to allow a recovery upon the other,[98] hence damages in addition to the profits made are not recoverable in the absence of a showing that but for the infringement the patentee could have sold his product to the same customers at a price higher than that received for the infringing article; [99] and to entitle the owner of a patent to recover, as damages, the profits he would have made on the same number of machines, he must prove both that he could have supplied the required number of machines in addition to those supplied and that but for the infringer he would have made the sales that were made by the latter [1] and on the latter issue there must be evidence tending to some degree at least to persuade.[2] The advantage which the defendant derives from the complainant's invention over what he could derive from using any other process or thing known to prior inventions constitutes the profits recoverable where the amount can be proximately ascertained,[3] and where there are definite figures from which to compute the profits, the law requires no more than a reasonable degree of certainty.[4] Where an infringement is deliberate and intentional, one cannot avoid liability for the entire profits made on the structure by so confusing the profits made on the patented and unpatented parts that the proportions cannot be definitely ascertained,[5] and as to the profits made every reasonable presumption is in favor of a master's report based on oral testimony, and the report will not be set aside or modified unless error or mistake is clearly shown.[6] Officers of a corporation who are made joint defendants with it for infringement are not liable for the profits realized by the corporation alone,[7] and where they are adjudged to have infringed but not otherwise than as corporate officers, they should be charged only with nominal damages; [8] so also, where a patent is comparatively new when an infringement suit is brought, there is no basis for other than nominal damages.[9] The measure of recovery is the profits actually made by the infringer by the sale of the patented device, irrespective of whether or not such sale would or would not have been made by the complainant; [10] and where one knowingly infringes the patent of another, makes profits in the business attributable to any construction of his own but mingles the same with the profits due to the owner of the infringed

3398), evidence not showing knowledge of patent by infringer. Lichtenstein v. Straus, 166 F 319.

**97.** Diamond Stone-Sawing Mach. Co. v. Brown [C. C. A.] 166 F 306.

**98.** Yesbera v. Hardesty Mfg. Co. [C. C. A.] 166 F 120.

**99.** Where infringed article sold at $2, infringing article at $1.70, no presumption that the $2 article could have been sold to same customers at full price so as to entitle patentee to damages in excess of profits. Yesbera v. Hardesty Mfg. Co. [C. C. A.] 166 F 120.

**1.** McSherry Mfg. Co. v. Dowagiac Mfg. Co. [C. C. A.] 160 F 948.

**2.** McSherry Mfg. Co. v. Dowagiac Mfg. Co. [C. C. A.] 160 F 948. Evidence held insufficient to show that complainants could have sold same number of drills or to furnish data from which amount of plaintiff's damages could be ascertained, hence only nominal damages recovered. Id.

**3.** Fullerton Walnut Growers' Ass'n v. Anderson-Barn-Grover Mfg. Co. [C. C. A.] 166 F 443.

**4.** Use of process, total crop being shown during infringement and market price ascertained. Fullerton Walnut Growers' Ass'n v. Anderson-Barn-Grover Mfg. Co. [C. C. A.] 166 F 443.

**5.** Where no other patented structure was shown to have contributed to profits of infringer. Dowagiac Mfg. Co. v. Superior Drill Co. [C. C. A.] 162 F 479.

**6.** Fullerton Walnut Growers' Ass'n v. Anderson-Barn-Grover Mfg. Co. [C. C. A.] 166 F 443. Finding of special master that profits were attributable solely to patented feature of device when approved by trial court will not be disturbed in absence of clear proof of mistake or error. McSherry Mfg. Co. v. Dowagiac Mfg. Co. [C. C. A.] 160 F 948.

**7.** McSherry Mfg. Co. v. Dowagiac Mfg. Co. [C. C. A.] 160 F 948.

**8.** Brennan & Co. v. Dowagiac Mfg. Co. [C. C. A.] 162 F 472.

**9.** Portland Gold Min. Co. v. Hermann [C. C. A.] 160 F 91.

**10.** Brennan & Co. v. Dowagiac Mfg. Co. [C. C. A.] 162 F 472.

patent, he is liable for the entire profits to the patentee.[11] The rule that to authorize the recovery of profits, the owner must separate or apportion the profits made by defendant between the patented and unpatented features does not apply to a combination patent,[12] hence where the patent is for a combination of elements, some of which are old, to accomplish an improved result, each element being essential to the invention, the liability of the infringer who has appropriated the combination as a whole extends to the profits made on the entire machine.[13] Where profits are made by the use of an article patented as an entirety, the infringer is responsible to the patentee for the whole of such profits unless he can show, burden being on him, that a portion of such profits is the result of some other thing used by him,[14] but where the patent is for an improvement and not for an entire new article or product the burden is on the patentee to show what portion of the infringer's profits is due to the particular patented feature,[15] otherwise "damages"[16] are not recoverable except for infringement after the suit is commenced.[17] If a patent covers a particular feature of an article sold by an infringer, the burden is on the infringer in a suit against him to recover the profits received from such sale, to show that they were not attributable solely to the patented feature thereof,[18] and it is only in case the infringer sustains the first burden that the second burden is on the patentee to apportion the profits, between such feature and the rest of the article.[19] In an accounting for profits made by an infringer of a patent for a process of treating a well known marketable commodity, the measure of recovery is the difference between the cost of the product and the price at which it was sold taking the well known commodity at its market value.[20]

(§ 10) *D. Remedies and procedure.*[21]—See 10 C. L. 1140—The infringement of a patent is a tort.[22] A suit therefore is none the less an infringement suit though it does not involve the validity of a patent,[23] and where the identical claims of a reissue have been held invalid in a prior suit between the same parties they cannot be reinvested with validity for any purpose by any change in the form of the suit even though put in issue by the pleadings.[24] A suit for infringement may be barred by laches.[25] An original bill in the nature of a supplemental bill by a party who has injured plain-

11. Where added improvements did not materially add to sale value. Brennan & Co. v. Dowagiac Mfg. Co. [C. C. A.] 162 F 472.

12. Yesbera v. Hardesty Mfg. Co. [C. C. A.] 166 F 120.

13. Hoyt, No. 446,230, grain drill held for a combination, infringer liable for profits on entire machine. Brennan & Co. v. Dowagiac Mfg. Co. [C. C. A.] 162 F 472.

14. Murray, No. 442,531, store service ladder held for an entire new article. Orr & Lockett Hardware Co. v. Murray [C. C. A.] 163 F 54.

15. Murray, No. 442,531, store service ladder held for entire new article, shifting burden of proof. Orr & Lockett Hardware Co. v. Murray [C. C. A.] 163 F 54.

16. "Damages" in Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388), means all sums to which plaintiff would be entitled to recover including profits. Westinghouse Elec. & Mfg. Co. v. Condit Elec. Mfg. Co., 159 F 154.

17. Westinghouse Elec. & Mfg. Co. v. Condit Elec. Mfg. Co., 159 F 154.

18, 19. McSherry Mfg. Co. v. Dowagiac Mfg. Co. [C. C. A.] 160 F 948.

20. Error to take raw material at cost of its manufacture where made by defendant. Hemolin Co. v. Harway Dyewood & Extract Mfg. Co. [C. C. A.] 166 F 434. Immaterial as to measure of damages that defendant made paste or nitrate from which infringing article was manufactured. Id.

21. **Search Note:** See, Patents, Cent. Dig. §§ 312-314, 339-349; 403-625; Dec. Dig. §§ 212, 219, 262-327; 22 A. & E. Enc. L. (2ed.) 472; 16 A. & E. Enc. P. & P. 59.

22. Avery v. McClure [Miss.] 47 S 901. There can be no recovery upon theory that damages are awarded for breach of an implied contract. Id.

23. New York Phonograph Co. v. Davega, 127 App. Div. 222, 111 NYS 363.

24. Universal Adding Mach. Co. v. Comptograph Co., 161 F 365.

25. Suit barred, defendant having commenced making, advertising and selling alleged infringing device more than 10 years before suit was commenced and patent issued and continued business. Safety Car Heating & Lighting Co. v. Consolidated Car Heating Co. [C. C. A.] 160 F 476.

tiff's title by transfer pendente lite is not the institution of a new suit;[26] hence an assignee may file such bill and test the defendant's liability.[27] Where the validity of a patent has once been established by the circuit court of appeals, that court need not examine the question de novo in a second case on the same evidence or on additional and cumulative evidence,[28] and where validity has thus been established and an interlocutory decree entered for an injunction and an accounting, the complainant by supplemental bill or petition may in the same case present the question of infringement by another device, and if the issue of infringement is determined in his favor, have it included in the decree and accounting.[29] Participation in the defense of a test suit makes the participating parties privies to the suit and testimony of their witnesses therein since deceased is admissible against them,[30] and one having taken up the vendee's defense in an infringement suit and conducted the case as his own is concluded by the decree rendered in respect to all questions of law or fact which were necessarily litigated and determine in such suit,[31] but such decree is not conclusive on the question of infringement by other devices than the ones involved when the decree was rendered,[32] nor is a decision of the court of appeals for the District of Columbia in an interference proceeding of controlling force in a subsequent suit for infringement of the successful patent in which its validity is attacked, the issues in each case not being the same.[33] Where a patentee who has assigned his patent establishes a corporation which is charged with infringement the corporation and the stockholders are estopped to deny the validity of the patent[34] or to invoke the prior art to limit its claim as made and allowed,[35] and extraneous evidence is admissible only to make clear what the applicant meant to claim and the government to allow.[36] One selling machines, guaranteeing that they do not infringe other patents, and who subsequently obtains a patent thereon, cannot maintain a suit in equity for infringement on account of use of a machine similarly constructed by defendant,[37] at least not until he has given actual notice of his patent[38] and proved violation of it after the notice.[39] That one of the assignors of a patent subsequently became associated with others and with them is jointly charged with infringement does not estop the others from denying the validity of the patent in the absence of a clear showing of identity with him.[40] An infringer is not an outlaw,[41] and where a patent is recently issued and generally infringed, his act should be viewed in the same light as if the patent had been adjudicated valid and a license fee established,[42] and where the court is convinced that the patent is invalid or that the alleged infringer is not infringing, the latter may use the machine subject to the risk of an injunction and an accounting.[43] Where a court has acquired jurisdiction by consent of a defend-

**26, 27.** George W. Jackson v. Friestedt Interlocking Channel Bar Co., 159 F 496.

**28.** Consolidated Rubber Tire Co. v. Diamond Rubber Co. [C. C. A.] 162 F 892.

**29.** Houghton v. Whitin Mach. Works, 161 F 581.

**30.** Rumford Chemical Works v. Hygienic Chemical Co. [C. C. A.] 159 F 436.

**31.** Decision on validity of claims involved and infringement by device in suit binding on party not of record, having complete charge and control of defense. D'Arcy v. Staples & Hanford Co. [C. C. A.] 161 F 733.

**32.** D'Arcy v. Staples & Hanford Co. [C. C. A.] 161 F 733.

**33.** In former case issue merely that of priority as between two inventors, but in latter case broader and involving whether patentee was original inventor as against the public. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 158 F 415.

**34.** National Recording Safe Co. v. International Safe Co., 158 F 824. Assignor not protected by hiding behind corporation. Id.

**35, 36.** National Recording Safe Co. v. International Safe Co., 158 F 824.

**37.** Miller v. Whitney Glass Works, 160 F 501.

**38.** Constructive notice insufficient. Miller v. Whitney Glass Works, 160 F 501.

**39.** Possession of machine under particular circumstances insufficient to prove use or threat to use. Miller v. Whitney Glass Works, 160 F 501.

**40.** St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co. [C. C. A.] 161 F 725.

**41, 42, 43.** Diamond Stone-Sawing Mach. Co. v. Brown [C. C. A.] 166 F 306.

ant corporation, it may subject the corporation's patent right to the payment of judgment debts[44] and order the execution of an assignment.[45] Whether a defendant shall be required to defend in a court other than the circuit court for the district of which he is an inhabitant is usually a question of privilege which he may insist upon or waive at pleasure.[46] The question of infringement in the district where the suit is brought when against a foreign corporation or resident of another state, though it goes to the jurisdiction, may be raised on a motion to dismiss made at the close of complainant's proofs.[47] In Massachusetts no regular fee is fixed as a daily allowance to a master in an accounting, but the normal rate, subject to increase or reduction to suit each particular case, will be allowed.[48]

To recover damages for infringements prior to the filing of a bill, the complainant must, where the issue is raised, affirmatively prove that the patented machine was marked as required by statute or that notice of infringement was given to the defendant,[49] for without notice, either direct or constructive, an infringement is presumptively innocent.[50] Where notice is once attached, due notice is given,[51] and the patentee is not required to follow the patented article and see to it that the words "or notice" are kept intact,[52] and although no proof is made that patented articles were marked or notice otherwise given, the bill itself is notice and complainants are entitled to an accounting for infringement after the bill was filed.[53] Notice being required only as a prerequisite to a recovery of damages,[54] it is not necessary where the object of action is merely to secure an injunction to restrain future infringement.[55] Under statute where a court in infringement proceedings finds that one claim sued upon is invalid though others may be valid, an infringed complainant is not entitled to a decree except on filing a disclaimer of the valid claim,[56] and it is proper to notice the disclaimer in the decree and require its filing before the decree is entered.[57] The issues of infringement are limited to infringements within the district where the suit is brought.[58] In an infringement suit against a corporation and its officers, objections as to the sufficiency of the proof to hold the officers personally liable should be raised at the hearing,[59] and in such case it is competent to reopen an interlocutory decree finding infringment by the corporation only at any time before the entry of a final decree and permit a retrial of the question of the liability of the officer on newly-discovered evidence.[60] A patent may be held infringed on a

44, 45. Underfeed Stoker Co. v. American Ship Windlass Co., 165 F 65.

46. American Mattress & Cushion Co. v. Springfield Mattress Co. [C. C. A.] 165 F 191.

47. Underwood Typewriter Co. v. Fox Typewriter Co., 158 F 476.

48. $35 denied and $25 allowed, latter sum being taken as normal rate. Houghton v. Whitin Mach. Works, 163 F 311.

49. Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388). American Caramel Co. v. Thomas Mills & Bro. [C. C. A.] 162 F 147; Lichtenstein v. Phipps, 161 F 578. Notice must be alleged and proved. Westinghouse Elec. Mfg. Co. v. Condit Electrical Mfg. Co., 159 F 154. Under Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388), allegation that defendant was informed or had knowledge of infringement held insufficient. Id. Immaterial that complainants neither licensed nor sold their machines but reserved benefit of patent for advantages of their own business. American Caramel Co. v. Mills [C. C. A.] 162 F 147.

50. American Caramel Co. v. Mills [C. C. A.] 162 F 147.

51. Notice of design patent for hat band by placing words "Pat. Jan. 15th, 1907," on lining of hats on which bands were used, held sufficient under Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388). Lichtenstein v. Phipps, 161 F 578.

52. Lichtenstein v. Phipps, 161 F 578.

53. Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 F 47. Rev. St. § 4900 (U. S. Comp. St. 1901) requires no particular form of notice. Maimen v. Union Special Mach. Co. [C. C. A.] 165 F 440.

54. Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388). Morton Trust Co. v. American Car & Foundry Co., 161 F 546.

55. Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388). Morton Trust Co. v. American Car & Foundry Co., 161 F 546.

56, 57. Rev. St. § 4922 (U. S. Comp. St. 1901, p. 3396). Suddard v. American Motor Co., 163 F 852.

58. Gray v. Grinberg [C. C. A.] 159 F 138.

59. Objection first raised in cross appeal. Brennan & Co. v. Dowagiac Mfg. Co. [C. C. A.] 162 F 472.

60. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 166 F 867.

motion for a preliminary injunction where the validity of the patent has been previously adjudged,[61] but so serious a claim as that the Selden patent is a pioneer and that all makers of gasoline automobiles of the usual types infringe the patent will not be upheld on a motion to punish for contempt for the violation of pro confesso injunction against infringement, unless the complainants either have established the validity of the patent in a contested litigation or have been ready to do so without delay when appointment has been offered.[62]

*Jurisdiction.* See 10 C. L. 1141—The courts of the United States have exclusive jurisdiction of all cases at law or equity arising under the patent laws of the United States,[63] and the issues of which depend upon the construction or administration of those statutes,[64] irrespective of the citizenship of the parties to the action,[65] but in the absence of diversity of citizenship, to come within the federal jurisdiction, the bill must disclose some right, title, or interest under the patent laws, or that some right or privilege will be defeated by one construction or sustained by the opposite construction of those laws.[66] If a case arises under the patent laws, the fact that it may also involve the construction of a contract does not give the state courts jurisdiction,[67] though if it arises under a contract and is to enforce a covenant, the fact that it may involve a question under the patent law does not give the federal courts exclusive jurisdiction,[68] and whenever the rights asserted depend upon contract obligation which courts of general equity jurisdiction may enforce, or for breach of which common-law courts will grant redress, the mere fact that a patent is incidentally or collaterally involved does not oust the state courts of jurisdiction.[69] A plea that an invention proved useless and impractical and that no article embodying the invention was ever used or sold does not assail the validity of the patent so as to divest the state court of jurisdiction.[70] While state courts have jurisdiction of a suit in equity to determine the ownership of letters patent and to award an accounting [71] and to determine what a certain contract is and in whom a patent is thereby vested,[72] and to restrain the fraudulent use of a secret process when not covered by any patent,[73] they

**61.** Bradley v. Metal Stamping Co., 166 F 327.

**62.** Motion denied, patent having been in existence for 13 years, never litigated on merits, although attacked in numerous suits settled before brought to trial. Electric Vehicle Co. v. D. E. Dietrich Import Co., 159 F 492.

**63.** Wise v. Tube Bending Mach. Co., 194 N. Y. 272, 87 NE 430. Plaintiff's right if any held to arise under patent laws, hence state court without jurisdiction. New York Phonograph Co. v. Davega, 127 App. Div. 222, 111 NYS 363.

**64.** Supreme court without jurisdiction of suit to enjoin infringement. Rev. St. U. S. § 629, subd. 9, and § 711, subd. 5 (U. S. Comp. St. 1901, pp. 504, 578). Wise v. Tube Bending Mach. Co., 194 N. Y. 272, 87 NE 430.

**65.** Rev. St. §§ 629, 711 (U. S. Comp. St. 1901, pp. 503, 577). St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co. [C. C. A.] 161 F 725.

**66.** No jurisdiction of bill to compel specific performance of contract to assign a patent and restrain alleged violation of license contract under a patent where no diversity of citizenship. St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co. [C. C. A.] 161 F 725. No jurisdiction, gravamen of suit being breach of license contract by refusal to renew and relief sought being reformation or renewal of contract, no federal question or diversity of citizenship being involved, and there being no allegation that patent was invalid or that decree was obtained by fraud, deceit or duress. Lefkowitz v. Foster Hose Supporter Co., 161 F 367.

**67, 68.** New York Phonograph Co. v. Davega, 127 App. Div. 222, 111 NYS 363.

**69.** Wise v. Tube Bending Mach. Co., 194 N. Y. 272, 87 NE 430. Suit on an assignment of an original patent for an improvement, etc., resulting in a decree directing defendants to assign to plaintiff a certain patent subsequently obtained and enjoining them from making, vending and otherwise dealing in machines covered by subsequent patents, held one on contract under Rev. St. U. S. § 711, cl. 5 (U. S. Comp. St. 1901, p. 578) exclusive under jurisdiction of federal courts. Marshall Engine Co. v. New Marshall Engine Co., 199 Mass. 546, 85 NE 741.

**70.** Meissner v. Standard R. Equipment Co., 211 Mo. 112, 109 SW 730.

**71.** American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133.

**72.** Jones Cold Store Door Co. v. Jones [Md.] 70 A 88.

**73.** Unpatented secret process held not covered by any patent, hence state court had jurisdiction to restrain fraudulent use of same. Eastern Extracting Co. v. Greater New York Extracting Co., 110 NYS 738.

have no right to enjoin one from using a patent or in any way pass upon any question arising as to its infringement.[74] Having taken cognizance of a case upon any ground on which jurisdiction is given, a court will proceed to dispose of the whole controversy between the parties, though there be certain phases of it which taken by themselves are outside the court's original jurisdiction.[75] An equity court has jurisdiction of a suit for infringement brought by the equitable owner against the legal holder of a patent,[76] but an award for profits and damages is usually incidental to some main equity which gives the patentee a standing in court, hence equity will not entertain a bill for a naked account of profits and damages against an infringement[77] after the expiration of a patent,[78] nor where there are no special circumstances calling for the exercise of equitable jurisdiction, and the time which the patent has to run when the bill is filed is so brief that the prayer for an injunction is a mere form to support the jurisdiction,[79] but where plaintiff's right to a preliminary injunction is clearly manifest and there is a clear and unequivocal charge of infringement, the court has jurisdiction to award an accounting for damages and profits, although no motion for a preliminary injunction was in fact made and the patent expired before defendant was required to plead.[80]

*Parties.* See 8 C. L. 1319—The owner of the whole or any undivided part of a monopoly is a necessary party to a suit in equity for the infringement of the patent,[81] but the patentee is neither a necessary nor a proper party to an action by the licensee against the owner who is not the patentee.[82] A mere licensee as distinguished from an assignee[83] cannot maintian a suit for infringement of the patent in his own name except where the infringer is the patentee himself,[84] nor is he a necessary party to an infringement,[85] but where an objection is seasonably made by the defendant, he is a proper party if his interests are to be affected by the decree and may be made a party at the discretion of the court.[86] Joint owners of one patent, one of whom is also sole owner of another patent, cannot join in a suit for the infringement of both patents where the bill does not allege that the defendants make, vend or use any single device which infringes,[87] and in such case a demurrer to the bill will be sustained

74. State court without jurisdiction to restrain breach by assignor of stipulation in contract by using devices covered by patents, infringement being involved. Jones Cold Store Door Co. v. Jones [Md.] 70 A 88. State courts have no jurisdiction of suit to enjoin unauthorized use of a patented process. Eastern Extracting Co. v. Greater New York Extracting Co., 110 NYS 738. Where decree is unnecessary to terminate a license, infringement after notice of cancellation exclusively under federal jurisdiction. Schalkenbach v. National Ventilating Co., 129 App. Div. 389, 113 NYS 352. Where question of infringement was not raised in evidence before master, there can be no question of infringement of which, under statute, federal courts have exclusive jurisdiction. Marshall Engine Co. v. New Marshall Engine Co., 199 Mass. 546, 85 NE 741.

75. Where court had jurisdiction of infringement suit because of subject-matter, although parties were citizens of the same state, relief against unfair competition granted. T. B. Woods Sons Co. v. Valley Iron Works, 166 F 770.

76. Prest-o-Lite Co. v. Avery Portable Lighting Co., 164 F 60.

77. Carnegie Steel Co. v. Colorado Fuel & Iron Co. [C. C. A.] 165 F 195; Diamond Stone-Sawing Mach. Co. of New York v. Seus, 159 F 497.

78. Diamond Stone-Sawing Mach. Co. of New York v. Seus, 159 F 497.

79. Equity without jurisdiction, bill being filed 13 days before expiration of patent. Diamond Stone-Sawing Mach. Co. of New York v. Seus, 159 F 497.

80. When bill was filed, filed patent had nearly three months left to run. Carnegie Steel Co. v. Colorado Fuel & Iron Co. [C. C. A.] 165 F 195.

81. Bowers v. Atlantic, Gulf & Pac. Co., 162 F 895.

82. Lefkowitz v. Foster Hose Supporter Co., 161 F 367.

83. Holder of sale and exclusive right to use, and to build for use, machines of patent, held a licensee. Bowers v. Atlantic, Gulf & Pac. Co., 162 F 895.

84. Bowers v. Atlantic, Gulf & Pac. Co., 162 F 895; New York Phonograph Co. v. Davega, 127 App. Div. 222, 111 NYS 363.

85. Bowers v. Atlantic, Gulf & Pac. Co., 162 F 895.

86. Objection to plea for want of proper party in that licensee was not joined sustained with right to amend. Bowers v. Atlantic, Gulf & Pac. Co., 162 F 895.

87. In such case immaterial that bill al-

subject to the right to amend.[88] Where a bill discloses that complainant had contracted to convey an interest in a patent by way of assignment or license, the court will regard such contract as having been carried out for the purpose of determining whether the assignee or licensee is a necessary complainant.[89]

*Questions of law and fact.* See 8 C. L. 1319

*Injunctions.* See 10 C. L. 1142—An injunction lies to restrain a licensee from selling a patented device at a lower price than that fixed by the patentee,[90] and where a judicial decree is necessary to cancel a license, equity may enjoin the manufacture or sale pendente lite, or until the license has been annulled by a court,[91] but if a state court has no jurisdiction to grant a permanent injunction to restrain an infringement in a suit to cancel a license, a temporary injunction pendente lite will issue only on a clear showing that plaintiff is entitled to such relief.[92] The nonuser of a patent in order to save the expense of changing or altering the old machines does not justify a court of equity in withholding injunctive relief against infringement,[93] nor, to maintain an injunction, is it a prerequisite that the complainant prove that the device invented had gone into commercial use.[94] Where by a final decree one is entitled to make and sell an alleged infringed article,[95] an injunction in personam lies to prevent the patentee from interfering with such business by bringing suits against customers based on the patent, either in this or in a foreign country,[96] and courts will restrain the illicit use of letters patent to maliciously injure the trade of competitors, whether the methods chosen are multiplicity of suits brought against users to inspire terror and divert trade, or circulars maliciously and persistently distributed among the trade threatening suit against all users of the alleged infringement for the purpose of terrifying the customers of the alleged infringer.[97] Injunction lies to restrain infringement of a patent where it is threatened, although no act of infringement has been completed when bill was filed,[98] and on a proper showing an injunction may issue in cases of interference pending a decision on the merit.[99] To entitle one to a preliminary injunction there must in every instance be an equitable necessity,[1] and the injunction will not issue unless the right alleged to be invaded or threatened is clearly shown,[2] if there is a reasonable doubt as to the validity of the patent,[3] or, except in the case

leged that devices of both were capable of conjoint use, were so used by complainants, and that defendants jointly infringed both patents. Kaiser v. Bortel, 162 F 902.

88. Kaiser v. Bortel, 162 F 902.

89. Bowers v. Atlantic, Gulf & Pac. Co., 162 F 895.

90. New Jersey Patent Co. v. Schaeffer, 159 F 171.

91. Schalkenbach v. National Ventilating Co., 129 App. Div. 389, 113 NYS 352.

92. Injunction denied, proof insufficient to show right or necessity therefor. Schalkenbach v. National Ventilating Co., 129 App. Div. 389, 113 NYS 352.

93. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 52 Law Ed. 1122.

94. Morton Trust Co. v. American Car & Foundry Co., 161 F 546.

95. See § 10A, Infringements.

96. Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., 164 F 869.

97. Dittgen v. Racine Paper Goods Co., 164 F 85. False and malicious representations and statements that another infringes certain patents, causing the alleged infringer to lose customers, may be enjoined and an accounting for damages had. Id.

98. Chester Forging & Engineering Co. v. Tindel-Morris Co. [C. C. A.] 165 F 899. Possession of parts of an infringing device being admitted unlawful and purpose to use machines not denied, a threatened infringement may be enjoined. Tindel-Morris Co. v. Chester Forging & Engineering Co., 163 F 804.

99. Injunction against plaintiff below from bringing further suit against purchasers or users of defendant's tanks for infringement of complainant's patents pendente lite. Commercial Acetylene Co. v. Avery Portable Lighting Co. [C. C. A.] 159 F 935.

1. Parsons Non-Skid Co. v. Victor Tire Grip Co., 164 F 617.

2. St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co. [C. C. A.] 161 F 725. Infringement of Fisk, No. 521,461, combined annunciator and spring jack for telephone switch boards, not sufficiently shown so as to warrant granting of preliminary injunction. Western Tel. Mfg. Co. v. Swedish-American Tel. Co., 163 F 308.

3. Injunction to restrain infringement of

of fraud,[4] unless the validity of the patent has not been adjudged,[5] but the injunction will be granted where the patent has once been adjudged valid,[6] and where validity and title has been adjudge by the United States supreme court and there is a clear and unequivocal change of infringement it will issue on complainant's motion quite as a matter of course.[7] The action of the patent office in awarding priority on interference does not ordinarily raise the presumption of validity required to warrant the granting of a preliminary injunction to restrain an infringement against the unsuccessful applicant,[8] and a preliminary injunction will not be granted except where the patent is supported by public acquiescence or prior adjudication or some other peculiar condition, unless the complainant's right is free from doubt,[9] and where a patent is a very recent one and its validity has never been adjudicated and sufficient time has not elapsed to present proof of general acquiescence and the validity and infringement are vigorously disputed, the injunction will not issue,[10] if the alleged infringer stipulates to file a sworn statement of sales of the alleged infringing articles,[11] nor will it issue to restrain an infringement where the patent alleged to have been infringed has but few weeks to run, and where on balancing the inconveniences it is plain that very great injustice would be done to the respondent if the application were granted.[12] On a bill filed pending an appeal from a decree enjoining the enforcement of the decree on the ground of fraud, the court is without power to set aside such decree upon any other ground.[13] In an action to enjoin an alleged infringement by a foreign corporation, the bill must allege the acts of infringement in the district where it is filed and that the defendant had a regular and established place of business there when the suit was brought,[14] but it need not show that the corporation had such business in that particular district when the alleged infringements were committed.[15]

Barnes, No. 684,776, clothes drier, doubt affecting construction and validity of patent being shown. American Laundry Mach. Mfg. Co. v. Adams Laundry Mach. Co., 161 F 556. Infringement of Fisher, No. 793,779, for portable savings bank, not sufficiently shown to warrant grant of preliminary injunction. National Recording Safe Co. v. International Safe Co., 158 F 824. A preliminary injunction will not be granted without a showing either that the patent charged to have been infringed had been admitted valid by defendant or held valid by a court of competent jurisdiction, or its validity generally acquiesced in by the public. St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co. [C. C. A.] 161 F 725.

4. Upon a sufficient showing of fraud in obtaining from patentee dismembered elements of patented machine, a preliminary injunction restraining use of a machine composed of reassembled parts will be granted, regardless of question of validity of patent. Tindel-Morris Co. v. Chester Forging & Engineering Co., 163 F 304. Where proof that defendants are guilty of the alleged fraud, and the fraud appears to be actual, palpable and inexcusable, absence of adjudication of patent is not a sufficient reason for denying injunction. Chester Forging & Engineering Co. v. Tindel-Morris Co. [C. C. A.] 165 F 899. "Formal defects" cured by amendments, in view of fraud, held insufficient to defeat application for preliminary injunction. Id.

5. Motion denied as to Bradley, No. 634,549, but granted as to No. 609,928, validity of latter having previously been adjudged. Bradley v. Metal Stamping Co., 166 F 327.

6. Preliminary injunction granted to restrain infringement of Sayen, No. 594,036, as against defense of anticipation. Queen & Co. v. Roentgen Mfg. Co., 165 F 453.

7. In absence of new evidence of controlling character. Carnegie Steel Co. v. Colorado Fuel & Iron Co. [C. C. A.] 165 F 195.

8. Turner Brass Works v. Appliance Mfg. Co., 164 F 195.

9. Parsons, No. 723,299, armor for pneumatic tires, validity of which had not formerly been adjudicated, held not so clearly valid or supported by public acquiescence as to warrant granting of preliminary injunction. Parsons Non-Skid Co. v. Victor Tire Grip Co., 164 F 617.

10. Both questions to be determined at final hearing. Hildreth v. Norton [C. C. A.] 159 F 428.

11. New York Vitak Co. v. Lagergren, 166 F 481.

12. Consideration of claimed right to perpetual injunction on ground that structures were built with knowledge of patent and that it had been sustained and were piratical, postponed until final hearing. American Sulphite Pulp Co. v. Great Northern Paper Co., 159 F 167. Where, if an injunction of any kind should issue, defendant would suffer loss out of proportion to value of transaction, court may at discretion permit defendant as an alternative to compensate plaintiff or secure compensation. Draper Co. v. American Loom Co. [C. C. A.] 161 F 728.

13. McSherry Mfg. Co. v. Dowagiac Mfg. Co. [C. C. A.] 160 F 948.

14. Underwood Typewriter Co. v. Fox Typewriter Co., 158 F 476.

15. Acts March 3, 1897, c. 395, 29 Stat.

One enjoined generally from infringing a patent must not only cease the infringement then practiced but also avoid other infringements or he will be guilty of contempt.[16]

*Pleading.* See 10 C. L. 1143—Relief can be administered only in accordance with the facts set out in the pleadings,[17] and a decree that an infringing machine be delivered up to be destroyed, although not an unwarranted one if the circumstances call for it, is rarely granted in an infringement suit.[18] By the weight of authority a bill for infringement must allege the facts which are by statute made essential to the validity of the patent sued on,[19] but a bill though somewhat vague and indefinite that makes profert of the patent is sufficient on demurrer though it gives only a general description of the device,[20] and failure to use the usual words "and elsewhere" in a bill will not prevent the consideration of evidence of infringement outside of a particular district where the defendant denies infringement in the district alleged "or elsewhere," and the pleadings are treated as presenting such issue.[21] Where profits claimed are based upon the existence of established royalties involving matters of accounting, the bill should be framed accordingly and contain the essential averments authorizing an inquiry for the ascertainment of profits.[22] The bill must not be multifarious,[23] but where complainants own several patents and defendant infringes all of them by the same act, the bill may properly charge infringement of all the patents by a single infringing machine.[24] Mere conclusions as to interference are not admitted by a demurrer.[25] The defendant must give notice in his answer of any defense by way of

695 (U. S. Comp. St. 1901, p. 589). Underwood Typewriter Co. v. Fox Typewriter Co., 158 F 476.

16. One pursuing practice in modified form held guilty of contempt. Blair v. Jeannette-McKee Glass Works, 161 F 355.

17. Regardless of the prayer. No facts alleged as basis for ascertainment of profits. Portland Gold Min. Co. v. Hermann [C. C. A.] 160 F 91. Cause of action in fraud to recover damages for infringement by procuring a patent in defendant's name for invention alleged to have been made by plaintiff held alleged, defendant by demurrer having admitted that changes in invention were immaterial. Le Brocq v. Childs, 158 F 412. Bill held not to state cause of action, though jurisdiction be conceded, failing to allege that defendant agreed as part of contract not to act under reservation in contract. Lefkowitz v. Foster Hose Supporter Co., 161 F 367.

18. American Caramel Co. v. Mills [C. C. A.] 162 F 147.

19. Bill demurrable, not alleging that no application for a foreign patent for invention was filed more than seven months before filing application in this country. Rev. St. § 4887, amended by Act March 3, 1897, c. 391, § 3, 29 Stat. 692 (U. S. Comp. St. 1901, p. 3382). Victor Talking Mach. Co. v. Leeds & Catlin Co., 165 F 931.

20. Hildreth v. Bee Candy Mfg. Co., 162 F 40.

21. O'Rourke Engineering Const. Co. v. McMullen [C. C. A.] 160 F 933.

22. Petition in action at law for infringement not insufficient as counting on recovery of profits instead of damages. Portland Gold Min. Co. v. Hermann [C. C. A.] 160 F 91.

23. Bill by equitable owner of a patent against holder of legal title not multifarious where it states two causes of action, one to compel transfer of the patent and another for infringement, equity proceeding as if transfer had actually taken place. Prest-o-Lite Co. v. Avery Portable Lighting Co., 164 F 60. Bill which proceeds at the same time for infringement of a patent and for unfair competition with respect to the article patented not open to charge of multifariousness where causes are based on same act. T. B. Woods Sons Co. v. Valley Iron Works, 166 F 770. Bill for infringement and for unfair competition in trade held not multifarious but to allege that defendants were selling devices which infringed patent and were copying complainant's circulars about patented device for unfair purpose. Weed v. Gay, 160 F 695. Plea stating but one ground, although setting out facts or details of evidence to support the ground, held not multifarious. Underwood Typewriter Co. v. Manning, 165 F 451. Complaint to enjoin interference with contract rights in patents held multifarious, joining matters apparently distinct and independent as against some defendants, and as against all defendants containing matters not legally connected. Wise v. Tube Bending Mach. Co., 194 N. Y. 272, 87 NE 430.

24. American Tobacco Co. v. Ascot Tobacco Works, 165 F 207. Joinder in one suit for infringement of two patents not improper where bill alleges that inventions are capable of conjoint use and are so used by defendant. Southern Plow Co. v. Atlanta-Agricultural Works, 165 F 214.

25. Allegations held mere conclusions and not admitted. Wise v. Tube Bending Mach. Co., 194 N. Y. 272, 87 NE 430.

prior patents, publications or public use, if he desires to prove any of such defenses to show want of novelty or invention in the patent sued on,[26] otherwise such defenses are receivable in evidence only to show the state of the art and to aid in the proper construction of the patent.[27] Pleas should not be allowed unless they reduce the controversy to a single point or issue,[28] except in very special cases,[29] and the defense of noninfringement cannot properly be presented by a plea where it involves a consideration of evidence extrinsic of the patent itself,[30] but the fact that a plea is bad in this respect is not a defect of form, however, to be taken advantage of by motion to strike off but one of substance to be disposed of by setting the plea down for argument.[31] Ordinarily the court should not attempt to dispose of a patent on demurrer,[32] yet, where in the light of general knowledge a patent appears void on its face,[33] that fact may be disposed of on such pleading,[34] and it becomes necessary for the complainant to plead and prove its validity,[35] but a decision upon such a demurrer upholding a patent is not conclusive on any defense which depends on extraneous proof.[36]

*Evidence.* See 10 C. L. 1144—A patent is presumptive evidence of invention,[37] novelty [38] and of its own validity,[39] and when valid on its face the burden is on the one challenging its validity to prove the contrary.[40] Presumptively, one having secured a patent is not an infringer,[41] but the presumption does not obtain where the alleged infringing acts were done for one who is an infringer.[42] An infringement must be clearly shown,[43] and the burden of proving it rests upon the complainants [44] even though the alleged infringer is a nonresident; [45] and when an attack is sought to be supported by oral testimony to be successful the proof must be clear, satisfactory and beyond a reasonable doubt.[46] Where an infringement is admitted in distinct and

**26, 27.** Morton v. Llewellyn [C. C. A.] 164 F 693.

**28.** Plea overruled, same tending to widen and scatter the litigation and cause unnecessary delays and expense. American Tobacco Co. v. Ascot Tobacco Works, 165 F 207. Questions of infringement should not be determined or tried on a plea. Underwood Typewriter Co. v. Fox Typewriter Co., 158 F 476.

**29.** Underwood Typewriter Co. v. Fox Typewriter Co., 158 F 476.

**30.** Should be by answer. American Sulphite Pulp Co. v. Bayless Pulp & Paper Co., 163 F 843.

**31.** American Sulphite Pulp Co. v. Bayless Pulp & Paper Co., 163 F 843.

**32.** Westrumite Co. v. Lincoln Park Com'rs, 164 F 989.

**33.** Van Westrum, No. 752,487, method of sprinkling streets, void on face, no invention or novelty being shown, nor method known or disclosed of combining "solution" of oil and water. Westrumite Co. v. Lincoln Park Com'rs, 164 F 989. Force, No. 705,228, printing die being void on face, for lack of invention, dismissing bill on demurrer proper. Kuhn v. Lock-Stub Check Co. [C. C. A.] 165 F 445.

**34.** Electric Vehicle Co. v. De Dietrich Import Co., 159 F 492; Kuhn v. Lock-Stub Check Co. [C. C. A.] 165 F 445.

**35.** Westrumite Co. v. Lincoln Park Com'rs, 164 F 989.

**36.** Prior decision held not conclusively to determine that patent was pioneer or valid. Electric Vehicle Co. v. De Dietrich Import Co., 159 F 492.

**37.** American Laundry Mach. Mfg. Co. v. Adams Laundry Machinery Co., 161 F 556; Southern Plow Co. v. Atlanta-Agricultural Works, 165 F 214.

**38.** American Steel & Wire Co. of New Jersey v. Denning Wire & Fence Co., 160 F 108; Clark v. George Lawrence Co., 160 F 512.

**39.** Superior Drill Co. v. La Crosse Plow Co., 160 F 504; Clark v. George Lawrence Co., 160 F 512; American Steel & Wire Co. of New Jersey v. Denning Wire & Fence Co., 160 F 108.

**40.** Fox, No. 675,272, photographic negative valid on face. Fox v. Knickerbocker Engraving Co. [C. C. A.] 165 F 442. Throws burden upon him who would overthrow or impeach the certified invention for want of novelty. Clark v. George Lawrence Co., 160 F 512.

**41, 42.** Union Match Co. v. Diamond Match Co. [C. C. A.] 162 F 148.

**43, 44.** Patthoff v. Hanson & Van Winkle Co., 163 F 56.

**45.** Where bill for infringement against a nonresident defendant alleges infringement within district where suit is brought and allegation is denied, burden still on plaintiff to prove that infringing acts were committed within district. Gray v. Grinberg [C. C. A.] 159 F 138. Evidence insufficient to show infringement by sale of infringing articles. Id.

**46.** Clark v. George Lawrence Co., 160 F 512.

positive terms by the pleadings, no further proof on that issue is required,[47] and where infringement has been made out as to the style of the infringing device used when the bill was filed, it is immaterial on the hearing whether a substituted style infringes or not;[48] and to maintain the action complainant need not show commercial use of the patented device if utility or patentability is otherwise established.[49] The question whether two patents are for the same invention is one of law to be disposed of by a comparison of the two patents,[50] but on demurrer to a bill for infringement of a patent for lack of novelty and invention the court cannot consider prior patents to ascertain the state of art;[51] if, however, the bill is answered and prior patents are set up as a part of the defense, the practice will be different.[52] Before a court will so declare on demurrer, it must clearly appear that the patented device lacks the elements of novelty and invention,[53] but, where an infringer withholds evidence in his control which would most certainly prove the extent of the infringement, every doubt is resolved against him and the court may act on less definite and certain evidence.[54] The province of an expert witness is to instruct,[55] and the practice of introducing a large number of expert witnesses is not to be commended.[56] Identity of result from the operation of two different machines, though some evidence of infringement, does not establish the same [57] nor is infringement established by the uncontradicted testimony that defendant made and sold an article in all essentials like the one alleged to infringe prior to the filing of an application for a patent.[58, 59] When a question involving the infringement of a design patent is presented, the court is entitled to have put before it exhibits to which the testimony of experts may be referred, and by means of which it may make its own comparison and deductions,[60] but the expression of the means of an alleged invention in a drawing or sketch may be accepted as satisfactory proof of the needful "representation in physical form" when fairly authenticated, definite and reasonable under all the circumstances.[61] On a rehearing on the question of the liability of an officer of a corporation on newly-discovered evidence, testimony taken on an accounting by the corporation cannot be considered against the officer except in so far as his own testimony may be treated as an admission out of court, the officer not having been a party

**47.** Fox v. Knickerbocker Engraving Co. [C. C. A.] 165 F 442.

**48.** Cramer v. 1900 Washer Co., 163 F 296.

**49.** Draper Co. v. American Loom Co. [C. C. A.] 161 F 728.

**50.** No extrinsic evidence necessary. Thomson-Houston Elec. Co. v. Western Elec. Co. [C. C. A.] 158 F 813.

**51.** Defendant not permitted to introduce patents antedating patents in suit, having demurred to bill. Southern Plow Co. v. Atlanta Agricultural Works, 165 F 214.

**52.** In such case complainant can submit evidence and go fully into question of patentability and reasons therefor. Southern Plow Co. v. Atlanta Agricultural Works, 165 F 214.

**53.** Southern Plow Co. v. Atlanta-Agricultural Works, 165 F 214.

**54.** Where infringer refuses to produce books, testimony of his employes, who can approximately state number of infringing articles, properly made basis for decree. Yesbera v. Hardesty Mfg. Co. [C. C. A.] 166 F 120.

**55.** American Stove Co. v. Cleveland Foundry Co. [C. C. A.] 158 F 978. Not province of witnesses to advocate the cause of party who calls him, pass upon the questions of law and facts presented, and to decide questions in issue. Id.

**56.** Usually testimony of one expert on each side is sufficient. American Stove Co. v. Cleveland Foundry Co. [C. C. A.] 158 F 978.

**57.** Lovell v. Seybold Mach. Co., 159 F 736. Patent being for combination, it must appear that the machines have same combination of elements operating in substantially same way and producing substantially same result unless complainant has a patent for one of the elements used and appropriated by defendant. Id.

**58, 59.** Tompkins, design patent No. 37,644, design spring held not infringed on such testimony. James E. Tompkins Co. v. New York Woven Wire Mattress Co. [C. C. A.] 159 F 133.

**60.** Gray v. Grinberg [C. C. A.] 159 F 138.

**61.** Exhibits not authenticated in date not acceptable. Consolidated R. Elec. Lighting & Equipment Co. v. Adams & Westlake Co. [C. C. A.] 161 F 343

to such proceeding and his liability not being then in issue.[62] The sufficiency of the evidence to establish contributory infringements is treated in the notes.[63]

*Prior decisions.* See 8 C. L. 1323—The doctrine of stare decisis will not be applied where the cases present different questions although the same patent may have been involved in the former case.[64] In a protracted litigation the claims of comity should be regarded,[65] but, while a former decision in favor of a patent in interference proceedings in the patent office as between the parties is very persuasive, yet, where the public is interested, the question of priority therein established is not res judicata in a suit for infringement of the patent[66] nor does it estop one from contesting the validity of the patent upon every question except on the ground of his own priority of invention.[67] As to the general topic of patentable invention, it is customary for some circuit courts to follow decisions of the circuit courts of appeals of other circuits,[68] but the rule is not a universal one and, as to the validity or construction of a patent, the judge is required to exercise his best judgment and give to such decisions only the weight that their reasoning is entitled to,[69] though in all cases he must follow the supreme court of the United States.[70] An infringement test case is controlling upon all questions decided, in a subsequent suit in the same court,[71] and, if there is doubt as to what those questions were, the court may take judicial notice of the records for the purpose of information;[72] but an interlocutory decree adjudging infringement having been appealed from is persuasive only, and not conclusive between the parties in another suit in a different court.[73] The obligation to follow the decision of other courts in patent cases increases in proportion to the number of courts which have passed upon the question, and the concurrance of opinion may have been so general as to become a controlling authority;[74] so, too, if a prior adjudication has followed a final hearing upon the pleadings and proofs, especially after protracted litigation, greater weight should be given to it than if it were made upon a motion for a preliminary injunction.[75]

*Variance.* See 8 C. L. 1323

*Stay.* See 8 C. L. 1323

*Saving questions for review.* See 8 C. L. 1324

*Accounting.* See 10 C. L. 1144

*Costs.* See 8 C. L. 1324—Under statute where a court in infringement proceedings finds that one claim sued upon is invalid though others may be valid and infringed, the complainant is not entitled to recover costs.[76]

62. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 166 F 867.

63. See, also, 10 C. L. § 10, "Contributory Infringement." In suit against the Hygienic Chemical Company of New York it appearing that defendant was a selling company only and a party privy to a test suit, while the Hygienic Chemical Company of New Jersey was a manufacturing company only, testimony of a witness that he purchased an infringing article from the "Hygienic Chemical Company" in New York held sufficient to make out a prima facie case of contributory infringement. Rumford Chemical Works v. Hygienic Chemical Co. [C. C. A.] 159 F 436.

64. Grier v. Innes, 160 F 103.

65. In suit for infringement, where questions involved had been subject to protracted litigation between same parties or representatives of same interests, decided adversely to complainants by two federal courts on principle of comity decisions followed. Brill v. Washington R. & Elec. Co., 30 App. D. C. 255.

66. Where public's rights had never been adjudicated. Davis & Roesch Temperature Controlling Co. v. National Steam Specialty Co., 164 F 191.

67. Turner Brass Works v. Appliance Mfg. Co., 164 F 195.

68. O'Brien v. Foster Hose Supporter Co. [C. C. A.] 159 F 710.

69, 70. Westinghouse Mfg. Co. v. Condit Electrical Mfg. Co., 159 F 144.

71, 72. Rumford Chemical Works v. Hygienic Chemical Co. [C. C. A.] 159 F 436.

73. Whittemore Bros. & Co. v. World Polish Mfg. Co., 159 F 480.

74, 75. Brill v. Washington R. & Elec. Co., 30 App. D. C. 255.

76. Rev. St. § 4922 (U. S. Comp. St. 1901, p. 3396). Suddard v. American Motor Co., 163 F 852.

*Judgment and decrees.*See 10 C. L. 1144—An injunction decree may properly provide that it shall not apply to a sale by defendant of articles made by defendant in another suit brought by complainant in another circuit in which the patent was adjudged void,[77] but it should not anticipate the future and provide for a contingency which may not arise.[78] Where plaintiff is entitled to an assignment of certain letters patent, the decree should show the amount to be paid therefor and order an assignment of each upon the payment of the price found.[79] A judgment for damages for infringement is not a "debt" within a statute making stockholders liable for corporate debts.[80] A final decree and an injunction issued pursuant to it should be effectively enforced,[81] and a decree pro confesso should be enforced just as effectively as any other decree.[82] The decision of the court of appeals of the District of Columbia on an appeal from the commissioner of patents which affirms the latter's decision and directs the clerk of the court to "certify his opinion and proceedings in this court in the premises to the commissioner of patents, according to law," is not "final" within act defining the appellate jurisdiction of the federal supreme court.[83]

*Appeals.*—An appeal will be dismissed where, while the appeal from a decree awarding a perpetual injunction against infringement is pending, the infringing patent expires.[84] An order of a circuit court, adjudging a contempt for violation of an injunction against infringement of a patent and imposing of fine to the United States and attorney fees and costs to complainants, is reviewable by the circuit court of appeals on writ of error,[85] but upon the writ only matters of law can be considered.[86] The basis of damages cannot be changed on appeal.[87]

## PAUPERS.[88]

**Definition and Status, 1295.**
**Settlement and Removal of Paupers, 1296.**
**Liability of Municipalities for Support and Aid, 1296.**
**Liability of Relatives, 1297.**
**Repayment by Indigent or Relatives, 1297.**
**Administration of Poor Laws; Officers and Districts, 1298.**

*The scope of this topic* is noted below.[89]

*Definition and status.*See 10 C. L. 1145—A person to come within the class mentioned as "poor" within the Iowa statute must be without property which can aid in his support or out of which funds may be realized for his maintenance,[90] but a sol-

**77, 78.** Consolidated Rubber Tire Co. v. Diamond Rubber Co. of New York [C. C. A.] 162 F 892.

**79.** So as to make it optional whether to take patents at price found. American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133.

**80.** Code 1906, § 909, §§ 923, 924. Avery v. McClure [Miss.] 47 S 901.

**81, 82.** Electric Vehicle Co. v. De Dietrich Import. Co., 159 F 492.

**83.** Decree not "final" within meaning of Act of February 9, 1893 (27 St. at L. 434,-436, c. 74, U. S. Comp. St. 1901, p. 573), § 8, since under U. S. Rev. St. §§ 4914, 4915 such decree does not preclude interested persons from contesting validity of patent in court and a remedy in equity given where patent is refused. Frasch v. Moore, 211 U. S. 1, 53 Law. Ed. 65.

**84.** Where complainants had waived right to an accounting, accounting was not ordered and case was under advisement by appellate court when patent expired. Chapin v. Friedberger-Aaron Mfg. Co. [C. C. A.] 158 F 409.

**85, 86.** Continental Gin Co. v. Murray Co. [C. C. A.] 162 F 873.

**87.** Claim in lower court for damages for loss of profits cannot be changed on appeal to one for royalties. McSherry Mfg. Co. v. Dowagiac Mfg. Co., 163 F 34.

**88.** See 10 C. L. 1145.

**Search Note:** See notes in 26 L. R. A. 729; 38 Id. 211; 53 Id. 358; 55 Id. 570; 1 Ann. Cas. 35; 10 Id. 32.

See, also, 22 A. & E. Enc. L. (2ed.) 944; 16 A. & E. Enc. P. & P. 656.

**89.** The related topics of Asylums and Hospitals, 11 C. L. 313; Costs, 11 C. L. 886 (suits in forma pauperis), and Health, 11 C. L. 1717, should be consulted.

**90.** Under Code § 2252, husband and wife unable to care for themselves, who are without property except the right to use a small house and two lots in a town, held poor persons. Hamilton County v. Hollis [Iowa] 119 NW 978.

dier and his wife in need of relief may be maintained at a poor farm where they need relief in excess of $2 each per week.[91]

*Settlement and removal of paupers.* See 10 C. L. 1145—In Connecticut no inhabitant of any town within the state can gain a legal settlement in any other town unless he resides for four years continuously in such other town and maintains himself and family during the whole of such period "without becoming chargeable to such town."[92] Maine has distinct and separate statutes concerning illegitimate children, one relating to their pauper settlement and another relating to their rights of inheritance,[93] and the statute declaring that when the parents of such illegitimate children intermarry, they are deemed legitimate and have the settlement of their father applies to the pauper settlement of illegitimate children of parents who lived together in a state of adultery at the time of the birth of such children.[94] While a town by the failure of its overseers to return an answer within two months after the receipt of a notice is estopped to deny that the settlement of the pauper is in any other than the plaintiff town, yet it is not by such fact precluded from showing that the settlement was in fact in the plaintiff town,[95] for it is not within the scope of the overseer's authority to create or change the settlement of paupers.[96]

*Liability of municipalities for support and aid.* See 10 C. L. 1145—There is no common-law liability nor are there any equities between towns in respect to caring for and supporting paupers,[97] all such liabilities resting wholly in statute,[98] and where the purpose of a statute is the relief and support of paupers, it cannot be extended so as to render one town liable to another for the expense of burying one of its paupers.[99] A mere expression of opinion by county auditors that the county commissioners had made illegal payments on account of a poor house is insufficient to impose a liability on the surety of the commissioners for the amount of the surcharge,[1] and much less is such opinion a judgment against them because not appealed from.[2] Statutes must not come within the prohibition of the constitution declaring that the legislature shall not pass any special law regulating the affairs of counties, cities, townships, etc.[3] Where a county after notice of the necessity therefor fails to care for poor

91. Under Code §§ 2230, 2231, authorizing relief not in excess of $2, and providing that no soldiers nor their families shall be sent to poor house when they can be relieved to that extent. Hamilton County v. Hollis [Iowa] 119 NW 978.

92. Condition "without becoming chargeable to such town" in Gen. St. 1902, § 2469, held not merely descriptive of pauper's condition but meant without subjecting the town to actual expense for his support. Town of Plainville v. Southington Water Co., 80 Conn. 659, 69 A 1049. Pauper and family held to have gained a legal settlement in Town of Plainville under Rev. St. 1902, § 2469, before they became chargeable to that town; hence town of Southington from where they had removed not liable for support furnished by plaintiff. Id.

93. Considerations of public policy not involved in construction of the former. Inhabitants of Wellington v. Corinna [Me.] 71 A 889.

94. Children born to parents living together in adultery at time of former's birth held legitimized and to have pauper settlement of father who intermarried. Rev. St. c. 27, § 1, par. 3. Inhabitants of Wellington v. Corinna [Me.] 71 A 889.

95. Failure under Rev. St. c. 27, § 40, to answer notice under § 39, representing that pauper named in notice had a legal settlement in defendant town. Inhabitants of Wellington v. Corinna [Me.] 71 A 889.

96. Inhabitants of Wellington v. Corinna [Me.] 71 A 889.

97, 98, 99. Town of Morristown v. Hardwick [Vt.] 69 A 152.

1. Commonwealth v. U. S. Fidelity & Guaranty Co., 220 Pa. 148, 69 A 550.

2. County commissioners and sureties entitled to know what items in payments made were illegal, and not bound to appeal from opinion. Commonwealth v. U. S. Fidelity & Guaranty Co., 220 Pa. 148, 69 A 550.

3. Act March 6, 1903 (P. L. 18), providing for relief of sick and indigent persons who have no legal settlement within state at expense of county where relief is required, held not within prohibition of Const. art. 3, § 7, because of diversity of method of accomplishing same result, necessitated by act of June 4, 1879 (P. L. 78) (Pulaski Tp. Poor Dist. v. Lawrence County [Pa.] 71 A 705), nor because it divides paupers into two classes, those without settlement within state or whose settlement is unknown and those who have a settlement and because it establishes a different rule as to the relief of each class (Id.).

persons as provided by statute, and a city does so, such city may recover from the county the amount expended by it for that purpose, if reasonable.[4] In case of an epidemic the investigation as to the financial status of those already affected need not be more diligent than what is reasonable and possible under the circumstances;[5] and where the county by acquiescence waives its right and power and permits a city to assume the duty and responsibility of caring for paupers, it will be estopped to deny liability on account of the unwarranted assumption of jurisdiction by the city.[6] Notice to one of the members of the board is sufficient,[7] and is in compliance with statute if it contains a sufficiently definite description of the persons whose distress has been relieved to enable the overseers receiving the same at least by reasonable inquiry to establish the identity of the person deserted;[8] but as the authorized agent of the town, the overseers of the poor may waive any objection arising from an informality or defect in the notice.[9] Failure of the record in a pauper matter to show that the overseers of the poor were elected by ballot or major vote is not a fatal defect, presumption being that the town proceeded in the usual and legal manner,[10] but even though such credit could not be extended to the record it is sufficient for the plaintiff town to prove that the pauper supplies were furnished by a majority of the acting overseers of the poor of the plaintiff town, and that the notice was given by one of them.[11] Payment for support, and admissions and declarations though evidential facts bearing upon the question of liability, are not conclusive.[12]

*Liability of relatives.* See 10 C. L. 1146

*Repayment by indigent or relatives.* See 10 C. L. 1146—Although the estate of a poor person is liable for such person's previous maintenance,[13] yet where a poor district sends an indigent insane person to a state hospital for the insane and agrees to pay and does pay fixed sum for his maintenance, and the hospital also receives a fixed sum from the state on account[14] of the patient, an action of assumpsit will not lie to recover the difference between what was paid by the poor district and the maximum charge for private cases,[15] even though it appears that on the lunatic's death he left an estate.[16] In Iowa a county expending any money for the relief of the poor may recover the same from the persons liable, and the fact that the money was expended for the relief or support of the poor farm or elsewhere does not take it out of the statutes,[17] nor does the provision that the inmates be required to perform work militate against this interpretation though it may have some bearing in ascertaining the amount expended in their behalf;[18] and the fact that some difficulty may be ex-

**4.** Evidence held to show that persons assisted were "poor," assistance necessary and apparently imperative and that expenditures were reasonable. City of Macomb v. County of McDonough, 134 Ill. App. 532.

**5.** Fact that some of persons afflicted were subsequently found to have some money held not to relieve liability to reimburse. City of Macomb v. County of McDonough, 134 Ill. App. 532.

**6, 7.** City of Macomb v. County of McDonough, 134 Ill. App. 532.

**8.** Notice stating that "Frank M. Moody and wife and children" have fallen into distress, etc., held insufficient as not giving names or number of children. City of Macomb v. County of McDonough, 134 Ill. App. 532.

**9.** Defect in notice to give a definite description held waived by majority of overseers accepting it as sufficient though they failed to make any reply within two months as required by Rev. St. c. 27, § 40. City of Macomb v. County of McDonough, 134 Ill. App. 532.

**10.** Notices admissible. Inhabitants of Wellington v. Corinna [Me.] 71 A 889.

**11.** Notices admissible though record failed to show that overseers were elected by ballot or by major vote. Inhabitants of Wellington v. Corinna [Me.] 71 A 889.

**12.** Inhabitants of Wellington v. Corinna [Me.] 71 A 889. Evidence insufficient to warrant verdict for defendant. Id.

**13, 14, 15.** State Hospital for Insane v. Danville & Mahoning Poor Dist., 36 Pa. Super. Ct. 77.

**16.** Where poor district agreed and paid $1.75, and hospital received from the state $2 per week and lunatic left an estate, held that poor district was not liable for difference between $4 per week and $1.75, lunatic being received as an indigent. State Hospital for Insane v. Danville & Mahoning Poor Dist., 36 Pa. Super. Ct. 77.

**17, 18, 19, 20, 21.** Hamilton County v. Hollis [Iowa] 119 NW 978.

perienced in ascertaining the portion expended for the support of each person does not justify the denial of relief to the county against the persons primarily liable,[19] for the county is presumed to have paid out the reasonable value of maintaining each person at the poor farm, and evidence of such reasonable value is admissible as tending to prove the money expended in their behalf.[20] Where the petition alleges the furnishing of food, clothing, medicine and medical attendance, and has attached to it an account for board, washing, care, medical attendance, etc., at a certain price per week, the account should be treated as merely making the averments more specific, and the action treated as for the amount expended rather than for the reasonable value of the support furnished.[21] It is not necessary to a recovery that the application for relief be made by the recipients of the public bounty,[22] nor is it necessary as against the persons liable for the support that their liability be first fixed.[23]

*Administration of poor laws; officers and districts.* See 10 C. L. 1147—In Illinois there is no overseer of the poor, but the duty of caring for the poor is made one of the duties to be performed by the supervisor by virtue of his office as supervisor,[24] and the statute providing for the relief of a supervisor, at his request, from the duties of overseer, does not contemplate a resignation of an office, but simply relief from certain duties,[25] hence asking to be relieved of the duties as overseer is not a resignation of any office;[26] but when he has been relieved for the full term as authorized by statute, the duties again devolve upon him on the expiration of such time,[27] and where a new board is organized it cannot upon the request of the old board appoint another person to perform such duties without the request for relief from the supervisor.[28] In Massachusetts the overseers of the poor may sue in the name of their town to compel one to contribute to his pauper kinsman's support.[29]

### PAWNBROKERS AND SECONDHAND DEALERS.[30]

*The scope of this topic* is noted below.[31]

Ordinances regulating the business of brokers engaged in making chattel mortgage or salary loans, if reasonable, will be upheld.[32] Regulation of junk dealers by ordinances is an exercise of the police power, and the ordinances are enacted because of the likelihood, grounded on experience, that junk may have been stolen or pilfered and for protection against such larcenies.[33] One who buys junk with the intention of selling it is a "dealer" within the meaning of statute prohibiting dealing in junk

**22.** Under Code § 2234, sufficient that a third person directed attention of trustees to condition of the poor and insisted that they be cared for. Hamilton County v. Hollis [Iowa] 119 NW 978.

**23.** Under Code § 2219. Hamilton County v. Hollis [Iowa] 119 NW 978.

**24.** People v. Smith, 236 Ill. 64, 86 NE 167.

**25.** Hurd's Rev. St. 1905, c. 107, § 18. People v. Smith, 236 Ill. 64, 86 NE 167.

**26, 27, 28.** People v. Smith, 236 Ill. 64, 86 NE 167.

**29.** Statute considered and power to thus sue given under Rev. Laws, c. 81, § 11. Inhabitants of Great Barrington v. Gibbons, 199 Mass. 527, 85 NE 737.

**30.** See 10 C. L. 1147.

**Search Note:** See notes in 32 L. R. A. 116. See, also, 22 A. & E. Enc. L. (2ed.) 508.

**31.** Includes only regulation of the occupation. Rights and liabilities growing out of the contract or subject generally (see Pledges, 10 C. L. 1253), and the offense of receiving stolen property (see Receiving Stolen Goods, 10 C. L. 1484), are elsewhere treated.

**32.** Ordinance requiring brokers engaged in making chattel mortgage or salary loans to secure a license as a condition precedent to doing business within the municipality not invalid because license fee is fixed at $250, or because brokers are required to keep records of name of each pledgor, amount of the loan, rate of interest charged, date when loan is payable, and a description of the articles pledged, which record shall be filed in the office of the city auditor and be open to inspection by the mayor and chief of police; provision requiring that if pledgor is a married man his wife must sign application for the loan invalid. William F. Chambers v. Cincinnati, 11 Ohio C. C. (N. S.) 273.

**33.** West Side Metal Refining Co. v. Chicago, 140 Ill. App. 599.

without a license;[34] but one having no dealings with peddlers, but who deals in old and new metals, buying in large quantities, refines and sells the same to foundries, is not a dealer in junk within the Chicago ordinance.[35] In New York a pawnbroker's license is revocable by the mayor "for cause,"[36] but it is not held wholly at the mayor's pleasure, nor can it be arbitrarily revoked;[37] and the conviction of a pawnbroker of petty larceny and of violating Greater New York charter by refusal to exhibit to a police officer any pawned property, etc., while seemingly prima facie a good cause for a revocation, does not necessarily and as a matter of law work a revocation.[38] The question of the suitableness of the applicant for a junk dealer's license in New Hampshire, is a question of fact for the determination of the selectmen, and their discretion upon the subject, if properly exercised, cannot be reviewed or reversed,[39] but the duty to determine the applicant's fitness must be performed by an impartial exercise of a reasonable discretion.[40] A pawnbroker who loans money to an unauthorized pledgor acquires no title or lien on the goods pledged but renders himself liable to the true owner for the value of the goods which he refuses to deliver,[41] or which he turns over without the true owner's consent.[42]

## PAYMENT AND TENDER.

§ 1. Mode and Sufficiency of Payment or Tender, 1300. To and By Whom, 1300. Time and Place of Payment or Tender, 1300. Sufficiency of Payment or Tender, 1300. Medium; Checks, Notes, Drafts, Bills of Exchange, etc., 1301.
§ 2. Application of payment, 1302.
§ 3. Effect of Payment or Tender and Waiver Thereof, 1303.
§ 4. Payment of Tender as an Issue, 1303.
A. Pleading, 1303.
B. Evidence, 1304.
C. Limitations, 1307.
D. Questions of Law and Fact, 1307.

*The scope of this topic* is noted below.[43]

**34.** One regularly buying junk in town of "A" and selling it in town of "B," being licensed in latter place, held a "dealer" in "A" under Pub. St. 1901, c. 124, § 4. State v. Silverman [N. H.] 70 A 1076.

**35.** Evidence insufficient to show that defendant was a dealer in junk under Rev. Municipal Code of Chicago, § 2040, prohibiting dealing in junk without a license. West Side Metal Refining Co. v. Chicago, 140 Ill. App. 599.

**36.** Laws 1883, p. 508, c. 339, § 2. People v. Rosenberg, 59 Misc. 342, 112 NYS 316.

**37.** People v. Rosenberg, 59 Misc. 342, 112 NYS 316.

**38.** Greater New York Charter, Laws 1901, p. 137, c. 466, § 317. People v. Rosenberg, 59 Misc. 342, 112 NYS 316. Since not necessarily a revocation, prosecution did not involve property rights so as to make reasonable prosecution of offences by indictment. Id. See Indictment and Prosecution, 12 C. L. 1.

**39.** Pub. St. 1901, c. 124, § 1, as amended by Laws of 1905, p. 484. Silverman v. Gagnon, 74 N. H. 502, 69 A 886.

**40.** Silverman v. Gagnon, 74 N. H. 502, 69 A 886. Pub. St. 1901, c. 124, § 1, amended by Laws 1905, p. 484, c. 76, held intended to protect public by providing facilities for detection of larceny; hence if a person's methods are such as to render such detection difficult it is no abuse to refuse a license on that ground, and a license may properly be refused to nonresident of town who does not intend to have any place of business in town. Id.

**41.** Pledge obtained from party having embezzled same. Schwartz v. Clark, 136 Ill. App. 150.

**42.** Pawnbroker liable for conversion to wife of pledgor for turning over wife's ring, same being pledged without wife's consent and turned over at direction of husband, in good faith, and without knowledge of wife's claim. Clay v. Sullivan [Ala.] 47 S 153. Objection to question which was not confined to consent to pledge for plaintiff and for her benefit properly sustained, pawning for own benefit even with wife's consent not being binding on wife.

**43.** Treats generally of payment and tender of money or its equivalent. Excludes payment into court (see Payment into Court, 10 C. L. 1158), payment of particular obligations (see such topics as Bonds, 11 C. L. 424; Counties, 11 C. L. 908; Eminent Domain, 11 C. L. 1198; Judgments, 12 C. L. 408; Mortgages, 10 C. L. 855; Municipal Bonds, 10 C. L. 875; Negotiable Instruments, 10 C. L. 962; Officers and Public Employes, 12 C. L. 1131; Public Works and Improvements, 10 C. L. 1307; Sheriffs and Constables, 10 C. L. 1648; Taxes, 10 C. L. 1776), discharge otherwise than by payment (see Novation, 12 C. L. 1117; Gifts, 11 C. L. 1649; Accord and Satisfaction, 11 C. L. 13; Releases, 10 C. L. 1502), recovery back of involuntary or mistaken payments (see Implied Contracts, 11 C. L. 1876), and tender of performance

§ 1. *Mode and sufficiency of payment or tender.*[44] *To and by whom.*[See 10 C. L. 1148]—Payment to a duly authorized attorney is binding upon his client.[45] So, also, a tender to a duly authorized officer of a corporation is binding upon the corporation.[46] Repayment by the government of moneys improperly collected by its officers inures to the benefit of the latter.[47]

*Time and place of payment or tender.*[See 10 C. L. 1149]—Payment must be seasonably made.[48] Where no time is fixed for payment of money due and owing, it is payable on demand.[49] As a general rule the debtor must find the creditor and pay him,[50] especially where both are in the same state,[51] and this he must do in person or by agent or check at his own risk.[52] A custom of presenting bills through a collector is ex gratia and may be abandoned at will on proper notice,[53] and payment thereafter be required to be made to the creditor in person.[54]

*Sufficiency of payment or tender.*[See 10 C. L. 1140]—Payment of less than the full amount of a debt, as distinguished from a compromise or an accord and satisfaction,[55] cannot operate as a discharge,[56] and so, also, an agreement, unsupported by any independent consideration, is unenforcible,[57] unless made in such manner as to dispense with the necessity of a consideration [58] or to raise a conclusive presumption thereof.[59] When a promise is made to pay a certain number of dollars in specific articles on a certain day, delivery must be made on the day agreed, otherwise the party promising will be bound to pay the amount stated in money.[60] An assignment of a claim by a creditor to the debtor is in legal effect a settlement and payment of the claim,[61] but an assumption by an agent of a debt due from a third party to the agent's principal, without authority from or ratification by the latter, does

other than payment (see Contracts, 11 C. L. 729; Vendors and Purchasers, 10 C. L. 1942; Specific Performance, 10 C. L. 1674).

**44. Search Note:** See notes in 4 C. L. 956; 33 L. R. A. 824; 35 Id. 489; 40 Id. 74; 53 Id. 372; 2 L. R. A. (N. S.) 529; 15 Id. 1019; 30 A. S. R. 460; 69 Id. 346; 100 Id. 393; 1 Ann. Cas. 630.

See, also, Payment, Cent. Dig. §§ 1-98; Dec. Dig. §§ 1-35; Tender, Cent. Dig. §§ 1-58; Dec. Dig. §§ 1-18; Banks and Banking, Cent. Dig. §§ 347, 348, 590; Contracts, Cent. Dig. §§ 758-760; 2 A. & E. Enc. L. (2ed.) 433; 22 Id. 513, 517; 28 Id. 116.

**45.** Where defendant communicated with plaintiff as to the debt and was informed that plaintiff had placed the matter in the hands of its attorney. Kramer v. Grant, 60 Misc. 109, 111 NYS 709.

**46.** Tender to officer of corporation acting in place of its treasurer. Louisville R. Co. v. Williams, 33 Ky. L. R. 168, 109 SW 874.

**47.** Repayment of customs duties improperly collected. Bidwell v. Preston [C. C. A.] 160 F 653.

**48.** Evidence held insufficient to show payment within time required by option. Rude v. Levy, 43 Colo. 482, 96 P 560. Tender of interest on mortgage debt is in time if made prior to exercise by creditor of election to treat principal as due by reason of default as to interest. Cresco Realty Co. v. Clark, 128 App. Div. 144, 112 NYS 550.

**49.** Dame v. Wood [N. H.] 70 A 1081.

**50.** Magruder v. Cumberland Tel. & T. Co. [Miss.] 46 S 404. This rule is without dissent anywhere and includes merchants, lawyers, doctors, landlords, express companies, telegraph and telephone companies, and all the trades. Id.

**51, 52.** Magruder v. Cumberland Tel. & T. Co. [Miss.] 46 S 404.

**53.** Telephone company after notice of abandoning custom of collecting bills held to have right to require payment of its office. Magruder v. Cumberland Tel. & T. Co. [Miss.] 46 S 404.

**54.** Telephone company held to have right to require payment at its office. Magruder v. Cumberland Tel. & T. Co. [Miss.] 46 S 404.

**55.** See Accord and Satisfaction, 11 C. L. 13.

Payment of whole debt due when made before it is payable and, much more, payment of sum greater than amount presently due, in anticipation that greater sum may become due in the future, when made and accepted in satisfaction of the larger sum, is regarded as the legal equivalent of sum sought to be satisfied, and not payment of less in lieu of greater sum. Williams v. Apothecaries Hall Co., 80 Conn. 503, 69 A 12.

**56.** Even though accepted by creditor as in full payment. Wheriey v. Rowe, 106 Minn. 494, 119 NW 222; Scott v. Rawls [Ala.] 48 S 710.

**57.** Gilman v. Cary, 198 Mass. 318, 84 NE 312.

**58.** See Gifts, 11 C. L. 1649.

**59.** See Releases, 10 C. L. 1502.

**60.** Evidence held to show that promise to deliver certain pictures was not fulfilled upon demand. McKinnie v. Lane, 133 Ill. App. 438.

**61.** Dial v. Inland Logging Co. [Wash.] 100 P 157.

not constitute payment.[62] To constitute a valid tender there must be a definite offer to pay [63] the full amount due [64] unconditionally.[65] Tender at any time on the day of maturity is sufficient as to time.[66] Where a tender is refused it must be kept good.[67]

*Medium; checks, notes, drafts, bills of exchange, etc.* See 10 C. L. 1151—In the absence of an agreement to such effect, payment is not effected by the delivery and acceptance of a note,[68] draft,[69] check,[70] order,[70a] or warrant.[71] Nor can a valid tender be made by tender of a note [72] or check.[73] When, however, it is so intended by the parties, the acceptance of such instruments or evidences of debt constitutes payment,[74] and such an intention may be implied from the circumstances.[75] The par-

**62.** Plano Mfg. Co. v. Doyle [N. D.] 116 NW 529.

**63.** Demand for correction of tax list, etc., so that taxpayer might know amount to be paid, etc., held insufficient to stop running of interest. State v. Several Parcels of Land [Neb.] 118 NW 465.

**64.** Wicks v. London & Lancashire Fire Ins. Co., 111 NYS 65; Campbell v. Abbott, 60 Misc. 93, 111 NYS 782. Tender of $8 where $12 was due for rent on a lease held insufficient. Ebersole v. Addington [Ala.] 46 S 849. To discharge by record a **mortgage,** the tender must be of exact amount due. Kingsley v. Anderson, 103 Minn. 510, 115 NW 642, rehearing and modification denied. Kingsley v. Anderson [Minn.] 116 NW 112. Where a tender in acceptance of an offer of compromise is refused because of insufficiency of amount, subsequent withdrawal of the offer is a **waiver of further tender.** Gilman v. Cary, 198 Mass. 318, 84 NE 312.

**65.** Tender of less than amount due on livery stable keeper's lien, with condition that it be accepted in full satisfaction thereof, held defective. Campbell v. Abbott, 60 Misc. 93, 111 NYS 782. A tender of $200, coupled with a demand for a receipt or acknowledgment showing payment of $300, held insufficient. Rude v. Levy, 43 Colo. 482, 96 P 560.

**66.** Gilman v. Cary, 198 Mass. 318, 84 NE 312.

**67.** Defendants subsequently destroyed check, treating it as their own, and left moneys in bank upon which it was drawn, subject to any other call of their business, and thus failed to keep tender good, even though the tender of the check was sufficient in the first instance. Rumpf v. Schiff, 109 NYS 51.

**68.** Acme Food Co. v. Older [W. Va.] 61 SE 235; Bluthenthal v. Green [Tex. Civ. App.] 109 SW 1133; Manser v. Sims [Ala.] 47 S 270; Lee v. Larkin, 125 App. Div. 302, 109 NYS 480; Atterbury v. Edwa, 61 Misc. 234, 113 NYS 614; North Penn. Iron Co. v. New Jersey Bridge Co., 35 Pa. Super Ct. 84. Promissory note given for purchase price of property. Acme Food Co. v. Older [W. Va.] 61 SE 235. Note given for initial premium on insurance policy. Batson v. Fidelity Mut. Life Ins. Co. [Ala.] 46 S 578 Individual note for debt of partner or joint debtor. Lee v. Larkin, 125 App. Div. 302, 109 NYS 480.

**69.** Acceptance of draft "for collection only" held not to prevent foreclosure of lien on furniture. Kennedy v. Groves [Tex. Civ. App.] 110 SW 136. Settlement as for collection made is not accomplished by forwarding draft, which on being presented within a reasonable time, as was this, is repudiated for want of funds. Brown v. Sheldon State Bank [Iowa] 117 NW 289.

**70.** Rumpf v. Schiff, 109 NYS 51. Tender of check for part of rent due not returned but not cashed held not payment pro tanto. Washington Real Estate Co. v. Wachenheimer Bros. [R. I.] 71 A 592.

**70a.** Freidenrich v. Condict, 124 App. Div. 807, 109 NYS 526.

**71.** Issuances of township warrant for amount of debt held not payment. Michelltree School Tp. v. Carnahan [Ind. App.] 84 NE 520.

**72.** Offer to surrender note of third person to be applied upon indebtedness is not lawful tender of amount due upon note. Price v. Jester, 137 Ill. App. 565.

**73.** Rumpf v. Schiff, 109 NYS 51.

**74.** Notes. Union Stove Works v. Robinson, 113 NYS 608; Lee v. Larkin, 125 App. Div. 302, 109 NYS 480. Candee v. Fordham Stone Renovating Co., 126 App. Div. 15, 110 NYS 355; Rosenbaum v. Paletz, 114 NYS 802; Keys v. Keys' Estate [Mo.] 116 SW 537; Walker v. Dunham [Mo. App.] 115 SW 1086; Comstock v. Taggart [Mich.] 16 Det. Leg. N. 14, 120 NW 29; Manser v. Sims [Ala.] 47 S 270. Where it is specially agreed that promissory note taken for contemporaneous consideration shall be accepted in payment of consideration, such agreement is binding and operates as payment. Sill v. Burgess, 134 Ill. App. 373. Acceptance of deposit in savings bank in lieu of judgment for alimony. Daly v. Daly, 80 Conn. 609, 69 A 1021. Where during progress of work under building contract owner gave contractor three notes which he entered on his books but one of them was not paid and contractor took it up and surrendered it to the owner and changed entry on his books to show only two notes received, it was held that note returned was not accepted as absolute payment. Davidson v. Stewart, 200 Mass. 393, 86 NE 779.

**75.** Manser v. Sims [Ala.] 47 S 270. Where creditor indorses and transfers check which he has received from debtor. Kramer v. Grant, 60 Misc. 109, 111 NYS 709. Where creditor indorses and transfers a negotiable note which he has received from debtor. Butt v. Story [Ga. App.] 63 SE 658. Acceptance and assignment of non-negotiable note held not to constitute payment. Id. Intention to accept notes of third party as payment held not implied from suit on notes. Roberts v. Rowe [N. H.] 70 A 1074. Indorsement of payment upon notes held not

ties may also agree that payment may be made in services [76] or property.[77] Objection to the medium of a tender is waived by a refusal of the tender upon other grounds,[78] or by an absolute refusal to accept anything at all.[79]

§ 2. *Application of payment.*[80]—See 10 C. L. 1152—The debtor has the right of election as to the application of payments made by him,[81] but in the absence of direction by the debtor the creditor has the right to apply payments as he may elect.[82] Where neither of the parties exercises his right of election in this regard, the law will apply the payments according to equity and justice [83] and in accordance with well established and recognized rules,[84] under which rules payments will ordinarily be applied to the oldest items or accounts in preference to later ones,[85] to interest rather than to principal,[86] and to unsecured claims rather than to those secured;[87]

conclusive to show purpose for which given. Taplin v. Marcey [Vt.] 71 A 72.

**76.** Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 94 P 1039.

**77.** Payment by conveyance of lots. Wood v. O'Hanlon [Tex. Civ. App.] 111 SW 178.

**78.** Refusal on account of insufficiency of amount. Boothroyd v. Larimer County Com'rs, 43 Colo. 428, 97 P 255. Where party objects to a tender of interest, that whole amount of mortgage is due for failure to pay interest, he cannot afterwards object to form of tender. Weinberg v. Naher [Wash.] 99 P 736.

**79.** Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219. Tender by certified check held sufficient in view of absolute refusal to accept anything. Germania Life Ins. Co. v. Potter, 124 App. Div. 814, 109 NYS 435.

**80. Search Note:** See notes in 4 C. L. 958; 15 L. R. A. 169; 96 A. S. R. 44.

See, also, Landlord and Tenant, Cent. Dig. §§ 857, 858; Payment, Cent. Dig. §§ 99-129; Dec. Dig. §§ 36-47; 2 A. & E. Enc. L. (2ed.) 433.

**81.** Hobbs v. Crawford, 4 Ga. App. 585, 62 SE 157. County warrant, which designated bridges and amount to be applied in part payment on each, held not applicable by contractor to another bridge account. Sparks v. Jasper County, 213 Mo. 218, 112 SW 265. Where two checks bore words "credit on note" and "on note," it was duty of creditor to credit amount of checks when paid on some note held by him against defendant. Jennings v. Roberts, 130 Mo. App. 493, 109 SW 84.

**82.** Hobbs v. Crawford, 4 Ga. App. 585, 62 SE 157; Sparks v. Jasper County, 213 Mo. 218, 112 SW 265. So held in action of trover for two diamond rings when creditor applied payments to other items of account. Hall v. Nix [Ala.] 47 S 335. In absence of any indication on part of debtor as to whether a payment shall be applied upon claim enforcible by action or **upon debt not enforcible by action,** creditor may make payment as he chooses. May apply payment by wife on debt of husband which she has assumed. Edminston v. Smith, 13 Idaho, 645, 92 P 842. Fact that defendant's wife was a surety upon mortgage debt and not **upon unsecured debt** did not deprive plaintiff of his right to apply payments received to latter in absence of any direction to credit them to former. Cain v. Vogt, 138 Iowa, 167, 116 NW 786. In absence of direction, creditor may apply payments **so as to avoid statute of limitations.** Hobbs v. Crawford, 4 Ga. App. 585, 62 SE 157. See. also, Watson v. Parker [Tex. Civ. App.] 111 SW 771.

**83.** Sparks v. Jasper County, 213 Mo. 218, 112 SW 265.

**84.** Fremont County v. Fremont County Bank, 138 Iowa, 167, 115 NW 925.

**85.** Stanwix v. Leonard, 125 App. Div. 299, 109 NYS 804. Payments may be applied **to oldest items rather than those secured.** Campbell Glass & Paint Co. v. Davis-Page Planing Mill Co., 130 Mo. App. 474, 110 SW 24. **Rule applied against sureties** on bond given to secure deposits of county treasurer. Fremont County v. Fremont County Bank, 138 Iowa, 167, 115 NW 925. When payments are made and credited generally upon account, they will, in action against surety, be applied upon indebtedness in order of the creation of the several items. Polk Print. Co. v. Smedley [Mich.] 15 Det. Leg. N. 1001, 118 NW 984. Will be applied to **items barred by limitations.** Watson v. Parker [Tex. Civ. App.] 111 SW 771; Jarvis v. Matson [Tex. Civ. App.] 113 SW 326.

**86.** Bower v. Walker, 220 Pa. 294, 69 A 984; Dunlap v. Kelly, 130 Mo. App. 522, 109 SW 793; Haffey v. Lynch [N. Y.] 85 NE 817. Dividend on pledged stock so applied where there was no agreement and such method had been pursued by the parties for years. Bower v. Walker, 220 Pa. 294, 69 A 984.

**87.** Equity requires debtor to pay all of his obligations and court will credit payment so as to give creditor best security for debt remaining unpaid. Haas Elec. & Mfg. Co. v. Springfield Amusement Park Co., 236 Ill. 452, 86 NE 248. Lien allowed where materialman did not know from which job money was received. Campbell Glass & Paint Co. v. Davis-Page Planing Mill Co., 130 Mo. App. 474, 110 SW 24. Equity will apply payment to unsecured claim rather than to claim secured by lien. County of Coles v. Haynes, 134 Ill. App. 320. Application of payment to unsecured claim held proper. Dye v. Peacock [Ga. App.] 63 SE 520. Payment to plaintiff who held a chattel mortgage applied to unsecured debt even though from proceeds of sales of mortgaged property. Cain v. Vogt, 138 Iowa, 631, 116 NW 786. Payment applied to unsecured notes past due and not to mortgage debt. Id.

but courts of equity will not so apply these rules as to cause manifest injustice.[88] The court will ordinarily follow rules of application indicated by the conduct of the parties.[89] Where interest is waived and the principal is accepted as payment in full, the rule as to application to interest rather than to principal does not apply.[90]

§ 3. *Effect of payment or tender and waiver thereof.*[91]—See 10 C. L. 1153—The acceptance of money due carries with it no obligation beyond that of giving proper credit for it, unless such obligation is made a condition attached to the tender.[92] A tender admits the debt to the extent of the amount tendered,[93] but no further.[94]

*Recovery back of payment.*See 10 C. L. 1154

*Necessity for tender.*See 10 C. L. 1154

*Payment is not excused.*See 10 C. L. 1154—A formal tender is unnecessary when it is manifest that it will be refused,[95] as where there has been an absolute refusal to accept any tender that might be made,[96] or where there has been a repudiation of the obligation dependent in the first instance upon the tender,[97] or a declared inability to perform such obligation;[98] and it is also held that tender is waived by the refusal of the creditor to receive anything less than an amount which is larger than that to which he is entitled.[99]

§ 4. *Payment or tender as an issue. A. Pleading.*[1]—See 10 C. L. 1154—Payment is an affirmative defense and must be specially pleaded in most jurisdictions,[2] though

88. Cain v. Voght, 138 Iowa, 631, 116 NW 786.

89. Where accounts were rendered showing application of payments in certain manner without objection for nine years, such rule of application of payments will be adhered to by court. Bower v. Walker, 220 Pa. 294, 69 A 984.

90. Where amount of principal of customs duties improperly collected was repaid, but interest was not paid because there was no appropriation therefor, and it appeared that claimant considered his claim as being made up of principal and interest and not a claim for a lump sum equal to such principal and interest, such payment was held in full, interest being waived. Bidwell v. Preston [C. C. A.] 160 F 653.

91. **Search Note:** See notes in 23 L. R. A. 120; 33 Id. 231; 13 Id. 624; 15 Id. 243, 1164; 94 A. S. R. 408; 2 Ann. Cas. 825; 7 Id. 97.

See, also, Interest, Cent. Dig. § 114; Dec. Dig. § 50; Payment, Cent. Dig. §§ 130-141; Dec. Dig. §§ 48-54; Tender, Cent. Dig. §§ 59-66; Dec. Dig. §§ 19-21; 22 A. & E. Enc. L. (2ed.) 608; 28 Id. 10, 38.

92. Williams v. Apothecaries' Hall Co., 80 Conn. 503, 69 A 12.

93. Antrim Lumber Co. v. Bolinger & Co., 121 La. 306, 46 S 337; Heller v. Katz, 62 Misc. 266, 114 NYS 806. Offer upon hearing of certain sum of money and note of third person to be applied to indebtedness is an admission of indebtedness to an amount equal to sum of cash tender and face value of note. Price v. Jester, 137 Ill. App. 565. Evidence introduced in support of a plea of tender held admission of defendant's liability on account or as a contracting party. Birmingham & A. R. Co. v. Maddox [Ala.] 46 S 780.

94. Antrim Lumber Co. v. Bolinger & Co., 121 La. 306, 46 S 337. Tender of part of amount claimed to be due under contract involving items which may be segregated is no more than admission of contract and that amount tendered is due thereon. Palmer v. La Rault [Wash.] 99 P 1036. Fact that defendant has made a tender, thereby admitting contract or duty and the right of plaintiff thereon to sum tendered, does not prevent defendant from opposing any claim by plaintiff consistent with an admission of the original contract or cause of action. Heller v. Katz, 62 Misc. 266, 114 NYS 806.

95. Weinberg v. Naher [Wash.] 99 P 736; Piazzek v. Harman [Kan.] 98 P 771. Waiver of tender of rent by indicating purpose not to receive any under a certain oil and gas lease. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219.

96. Unqualified refusal to accept before legal tender has been made excuses failure to again tender check according to terms of agreement. Gilman v. Cary, 198 Mass. 318, 84 NE 312. Tender to one who announces in advance that he will not accept it is unnecessary. Trenton St. R. Co. v. Lawlor [N. J. Err. & App.] 71 A 25[illegible] Ronaldson & Puckett Co. v. Bynum [La.] 48 S 152.

97. Lowe v. Yolo County Consol. Water Co. [Cal. App.] 96 P 379; Ronaldson & Puckett Co. v. Bynum [La.] 48 S 152.

98. Piazzek v. Harman [Kan.] 98 P 771.

99. Tender to purchaser at tax sale. Douglass v. Hayes County [Neb.] 118 NW 114.

1. **Search Note:** See Payment, Cent. Dig. §§ 142-252; Dec. Dig. §§ 55-79; Tender-Cent. Dig. §§ 67-101; Dec. Dig. §§ 22-31; 16 A. & E. Enc. P. & P. 164, 218; 21 Id. 542.

2. Harvey v. Denver & R. G. R. Co. [Colo.] 99 P 31; State v. Quillen [Tex. Civ. App.] 115 SW 660; Tilt-Kenney Shoe Co. v. Haggerty, 43 Tex. Civ. App. 335, 114 SW 386; Ariston Realty Co. v. Bernstein, 111 NYS 538; Portsmouth Sav. Bank v. Yeiser [Neb.] 116 NW 38; Scott v. Rawls [Ala.] 48 S 710. Practice Book 1908, p. 250, § 160. Stalker v. Hayes [Conn.] 71 A 1099. Where defendant, sued for services, filed general denial, but at outset of trial admitted the employment and virtually amended his plea

at common law evidence of payment might be given under the general issue either in assumpsit or debt on simple contract,[3] and this rule still obtains in New Jersey.[4] So, also, in California, payment may be proved under the general issue.[5] A plea of payment[6] must conform to the general rules of pleading[7] and must allege when, how, and to whom the payment was made;[8] but it is held that in a complaint to injoin the collection of taxes, a general allegation of payment is sufficient.[9] The whole plea is not rendered bad by the fact that some of the payments as alleged, are of a date prior to the making of the contract sued on.[10] When an allegation of payment is merely an affirmative denial of the plaintiff's allegation of nonpayment, no reply is necessary to put the question of payment in issue.[11] A tender, in order to be available, must be properly alleged,[12] unless a waiver is relied on, in which case the facts constituting such waiver must be alleged.[13]

(§ 4) *B. Evidence.*[14] *Presumptions.* See 10 C. L. 1155—Aside from the facts recited by a receipt, no presumption arises therefrom,[15] but a presumption of payment may arise from the debtor's possession of the evidence of the debt.[16] There is some conflict as to whether the delivery and acceptance of the debtor's note is presumptively a payment,[17] but, even where the presumption of payment is held to arise, it is also held to be only prima facie,[18] even though the note be executed to a third person,[19] and the presumption of payment will not be indulged where it will deprive the party accepting the note of collateral security or other substantial benefit.[20] Another rule obtaining in this connection in some jurisdictions is that the acceptance of the note of a third party for a debt contracted contemporaneously raises a prima

by alleging payment, this, with plaintiff's admission that he had been paid for all his services except those sued for, sufficiently raised the issue of payment. Wilson v. Du Vievier, 112 NYS 1108.

3. Axel v. Kraemer, 75 N. J. Law, 688, 70 A 367.

4. Not changed by Practice Act of 1874 (2 Gen. St. 1895). Axel v. Kraemer, 75 N. J. Law, 688, 70 A 367.

5. Brooks v. Ardizzone [Cal. App.] 98 P 393.

6. Allegation held sufficient to admit proof. Wiener v. Boehm, 126 App. Div. 703, 111 NYS 126. Facts alleged showing limitations have run on a mortgage held not to amount to allegation of payment. House v. Carr, 125 App. Div. 89, 109 NYS 245.

7. Plea held not double. Scott v. Rawls [Ala.] 48 S 710.

8. Groves v. Sexton [Ga. App.] 62 SE 731.

9. Held not necessary to allege date of payment of taxes or amount thereof or to whom paid. Keys v. Fink [Neb.] 116 NW 162.

10. Schroeter v. Bowdon [Tex. Civ. App.] 115 SW 331.

11. Carlton v. Smith, 33 Ky. L. R. 647, 110 SW 873.

12. Under Code Civ. Proc. § 2076, providing in substance that objections to tender must be made at time thereof or be deemed waived, an averment of tender in cash of specific sum in advance for payment of such waters as might be furnished at established rates held sufficient. Star Loan Co. v. Duffy Van & Storage Co., 43 Colo. 441, 96 P 184.

13. Where demand for payment of whole of existing indebtedness is relied upon as waiver of tender of smaller amount agreed to be accepted by corporation upon such debt, it must appear that demand was made by agent of corporation authorized to collect and empowered to demand payment and the literal contents of alleged demand must be sufficiently set out to enable court to determine exact nature and effect of demand relied upon. Jester v. Bainbridge State Bank, 4 Ga. App. 469, 61 SE 926.

14. **Search Note:** See notes in 6 C. L. 993; 18 A. S. R. 879; 4 Ann. Cas. 430; 7 Id. 733; 8 Id. 779; 11 Id. 110.

See, also, Payment, Cent. Dig. §§ 162-239; Dec. Dig. §§ 64-75; Tender, Cent. Dig. §§ 96-98; Dec. Dig. § 28; 22 A. & E. Enc. L. (2ed) 579; 28 Id. 42.

15. Turner v. National Cotton Oil Co. [Tex. Civ. App.] 109 SW 1112.

16. Production by mortgagor or those claiming under him of note secured by mortgage raises presumption of payment where, and only where, such possession can be accounted for upon no other theory. Clymer v. Groff, 220 Pa. 580, 69 A 1119.

17. Presumptively a payment. Breach v. Huntsman [Ind. App.] 85 NE 523; Taplin v. Marcy [Vt.] 71 A 72. Presumptively received only as collateral. Manser v. Sims [Ala.] 47 S 270. No presumption of payment. Atterbury v. Edwa, 61 Misc. 234, 113 NYS 614.

18. Beach v. Huntsman [Ind. App.] 85 NE 523; Taplin v. Marcy [Vt.] 71 A 72.

19. Beach v. Huntsman [Ind. App.] 85 NE 523.

20. Presumption of acceptance of notes as payment not allowed to defeat benefit of lien. Beach v. Huntsman [Ind. App.] 85 NE 523.

facie presumption of payment,[21] but where the note is accepted upon a pre-existing debt, a contrary presumption arises.[22] No presumption of payment arises from the acceptance of an instrument which of itself neither creates nor evidences any liability.[23] A presumption of payment arises at the end of twenty years,[24] and increases in strength with each succeeding year,[25] but this presumption cannot operate to divest title.[26] The presumption is that payments are made on account of existing debts,[27] even, it seems, without any showing that there were no other dealings between the parties upon which the payments might have been made,[28] but slight evidence is sufficient to rebut such presumption, and while a gift will not ordinarily be presumed,[29] such a presumption does sometimes arise by reason of the relationship of the parties[30] and may even overcome the presumption that payments are upon existing debts.[31]

*Burden of proof.* See 10 C. L. 1156—The burden of proving payment is upon the party alleging it,[32] except where there is a presumption of payment.[33] Under this rule the burden is usually upon the defendant,[34] but the plaintiff has the burden of proving nonpayment where it constitutes an element of his cause of action,[35] and he also has the burden of proving payments upon which his right to recover depends.[36] Where the acceptance of a note or bill gives rise to a presumption of payment,[37] the burden of rebutting such presumption is necessarily upon the party disputing such presumption,[38] but in the absence of such a presumption the burden is upon the party asserting payment to show that a note, bill or check was accepted as a payment,[39] or that the paper accepted was itself paid to the party accepting it,[40] or loss

**21.** Lee v. Larkin, 125 App. Div. 302, 109 NYS 480. See, also, Beach v. Huntsman [Ind. App.] 85 NE 523; Taplin v. Marcy [Vt.] 71 A 72.

**22.** Lee v. Larkin, 125 App. Div. 302, 109 NYS 480; Atterbury v. Edwa, 61 Misc. 234, 113 NYS 614.

**23.** Township warrant. Mitchelltree School Tp. v. Carnahan [Ind. App.] 84 NE 520.

**24.** Millwee v. Phelps [Tex. Civ. App.] 115 SW 891.

**25.** Mortgage debt. Richards v. Walp, 221 Pa. 412, 70 A 815.

**26.** Action of ejectment. Rankin v. Dean [Ala.] 47 S 1015

**27, 28, 29.** Lynch v. Lyons, 115 NYS 227.

**30.** Where husband has property conveyed to wife or expends money for improvements on her property. Hamby v. Brooks [Ark.] 111 SW 277. See Gifts, 11 C. L. 1649.

**31.** Where husband has property conveyed to wife or expends money upon her property, the presumption of gift precludes any presumption of payment of debt owed by him to her. Hamby v. Brooks [Ark.] 111 SW 277.

**32.** Wood v. O'Hanlon [Tex. Civ. App.] 111 SW 178; Carlton v. Smith, 33 Ky. L. R. 647, 110 SW 873; Black v. Robertson [Ark.] 112 SW 402; Plaut v. Straub, 115 NYS 148. See, also, Wilson v. Du Vievier, 112 NYS 1108.

**33.** See ante, this section and subsection, subd. Presumptions. Partridge v. Moynihan, 59 Misc. 234, 110 NYS 539.

**34.** Lynch v. Lyons, 115 NYS 227; Jennings v. Roberts, 130 Mo. App. 493, 109 SW 84; Bank of Benson v. Jones, 147 N. C. 419, 61 SE 193. By a preponderance of evidence. Hill v. Waight [Iowa] 118 NW 877. Defendants who agreed to pay debts up to certain amount held bound to show payments up to such amount on presentation of further claim. Regulus Cigar Co. v. Flannery, 109 NYS 720. Defense in replevin that property at first loaned was afterward sold to him in consideration of services, being practically defense of payment, above rule applies. Stewart v. Graham [Miss.] 46 S 245.

**35.** Where cause of action is founded upon breach of defendant's contract to pay on demand, nonpayment is constituent of right of recovery and plaintiff has burden of proof. Smith v. State Bank, 61 Misc. 647, 114 NYS 56. In such case affirmative allegation of payment serves only as a notice that the issue of nonpayment was actually raised. Id.

**36.** Burden is upon plaintiff to establish by clearly preponderating evidence part payments on account so as to take case out of statute of limitation. Holden v. Cooney, 110 NYS 1030.

**37.** See ante, this section and subsection, subd. Presumptions.

**38.** Burden is upon creditor to negative presumption of payment arising from acceptance of note of a third party for a debt contemporaneously contracted. Lee v. Larkin, 125 App. Div. 302, 109 NYS 480.

**39.** That debtor's note was accepted as payment. Atterbury v. Edwa, 61 Misc. 234, 113 NYS 614. That note of third party was accepted in payment of an antecedent debt. Lee v. Larkin, 125 App. Div. 302, 109 NYS 480; Atterbury v. Edwa, 61 Misc. 234, 113 NYS 614.

**40.** Check. Dowdall v. George Borgfeldt & Co., 113 NYS 1069.

to the debtor by reason of the creditor's default in the collection of the paper.[41] The burden of overcoming the presumption of payment arising at the end of twenty years is upon the party seeking to enforce payment.[42] The burden of explaining a receipt and showing that that there was a mistake in giving it is upon the receiptor.[43]

*Admissibility.* See 10 C. L. 1157—Evidence offered to show payment must, of course, be relevant to the issue.[44] The parol evidence rule does not exclude parol evidence to show that payments were applied to one contract rather than to another,[45] nor does it exclude parol evidence to explain the recitals of a receipt,[46] but when in addition to a receipt the paper also contains a contract of the party signing it, such contract stands on the same footing as other written contracts and it cannot be varied or modified by parol.[47] The attendant circumstances and the subsequent conduct of the parties may be looked to in determining whether or not a note was accepted as a payment.[48] The court has discretion to admit evidence of tender after the evidence has been closed.[49]

*Sufficiency.* See 10 C. L. 1156—Only a preponderance of the evidence is required to show payment.[50] Whether there is such a preponderance in a particular case must, of course, be determined with reference to the evidence adduced therein,[51] and so,

**41.** In an action upon a pre-existing debt for which a check is delivered, the defendant pleading payment must show delivery, acceptance and loss to him through laches in presentation of checks, as where bank closed its door twelve days after receipt of check. Dehoust v. Lewis, 128 App. Div. 131, 112 NYS 559.

**42.** Richards v. Walp, 221 Pa. 412, 70 A 815.

**43.** Long v. Long, 132 Ill. App. 409.

**44.** Evidence that defendant took money from safe and had a conversation relative to taking it to plaintiff held relevant. Dunham v. Cox [Conn.] 70 A 1033. Evidence as to identity of receipts held erroneously excluded. American Lithographic Co. v. Rickert, 111 NYS 25. There being no presumption that conveyance to wife procured by husband is by way of payment of debt from him to her, evidence of such a conveyance held inadmissible. Hamby v. Brooks [Ark.] 111 SW 277. It is not valid ground of objection to instrument in form of **receipt** tendered in evidence by defendants that it is irrelevant in that it does not refer to matter in controversy when answer of defendant alleges that there was a mistake in wording of such instrument and clearly shows purpose to prove that it was intended by parties to transaction in which it was given to refer to such matter. Austin v. Collier [Ga.] 62 SE 196.

**45.** Parol evidence held admissible to show that lease upon which payments were claimed was only a substitution for a prior lease between same parties, and that payments made after such substitution were upon the old lease. Erie Crawford Oil Co. v. Jones [Ind. App.] 86 NE 1027.

**46.** Receipt for initial premium on insurance policy. Batson v. Fidelity Mut. Life Ins. Co. [Ala.] 46 S 578.

**47.** Waters v. Phelps [Neb.] 116 NW 783.

**48.** Manser v. Sims [Ala.] 47 S 270.

**49.** Where attorney did not know issue had been made. Louisville R. Co. v. Williams, 33 Ky. L. R. 168, 109 SW 874.

**50.** Instructions that proof of payment or settlement is not sufficient where evidence may be said to leave question of payment or settlement in doubt held erroneous as requiring more than preponderance of evidence. Long v. Long, 132 Ill. App. 409.

**51. Evidence held sufficient:** To show payment. Wilson v. Du Vievier, 112 NYS 1108. To show payment of note. Lee v. Winkles [Ga.] 62 SE 820. Evidence held sufficient to show prima facie payment of several notes. Stanwix v. Leonard, 125 App. Div. 299, 109 NYS 804. Evidence held to show proceeds of crops applied as payment. Putnam v. Live Oak Mercantile Co. [La.] 47 S 846. Parties to an agreement may covenant that the giving of notes shall constitute payment, and they will be held to such agreement. Rosenbaum v. Paletz, 114 NYS 802. To show that individual note was accepted as payment of partnership debt. Union Stove Works v. Robinson, 113 NYS 608. To show arrangement for **payment in services.** Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 94 P 1039. To show payment **by conveyance** of lots. Wood v. O'Hanlon [Tex. Civ. App.] 111 SW 178.

**Evidence held insufficient:** To show payment of note. Prather v. Hairgrove, 214 Mo. 142, 112 SW 522; Morrison v. Roohl [Mo.] 114 SW 981; Van Norden Trust Co. v. Spar, 111 NYS 674. To show payment of mortgage note. Greist v. Gowdy [Conn.] 71 A 555. Where attorney obtained from his client possession of part of money paid on compromise for purpose of counting same, and thereupon said he would keep money and apply it on account, but on resistance and remonstrance on part of client handed it back to latter, such facts did not show payment to attorney. Pennsylvania Co. v. Thatcher, 78 Ohio St. 175, 85 NE 55. Evidence held insufficient **to rebut presumption** of payment arising at end of twenty years. Richards v. Walp, 221 Pa. 412, 70 A 815. To show **payment by notes.** Plaut v. Straub, 115 NYS 148.

also, as to other issues involving payments.[52] A receipt is prima facie evidence of the facts recited therein,[53] but though the case thus made is only prima facie,[54] it becomes conclusive when not rebutted.[55] A recital of payment in a deed is not conclusive.[56]

(§ 4) *C. Limitations.*[57]—See 10 C. L. 1157—Where partial payment suspends or tolls the statute of limitations,[58] it is usually upon the theory of an acknowledgment of the debt from which a promise to pay the remainder may be implied.[59] A tender removes the bar of limitations only to the extent of the amount tendered.[60]

(§ 4) *D. Questions of law and fact.*[61]—See 10 C. L. 1158—It is usually the province of the jury to pass upon the ultimate fact of payment,[62] and also probative facts involved in the determination of such ultimate fact.[63]

### PAYMENT INTO COURT.[64]

*The scope of this topic* is noted below.[65]

Money deposited with the clerk in an action of interpleader passes into the custody of the law[66] giving the court full authority over the same,[67] which authority can, however, be properly exercised only through the medium of proceedings in the pending cause,[68] and the clerk as officer and depositary of the court can recognize no other authority than that which placed the money in his hands, pending the adjudication and judgment of distribution.[69] So where the court in such action has directed a distribution, a resort to an independent action to determine the disposition of the fund is misdirected and irregular.[70] The application of money deposited in court must be in compliance with the tender and findings;[71] hence, when

**52.** Evidence held to show credit for all payments. Monarch v. First Nat. Bank of Greenville [Ky.] 115 SW 186.

**53.** Walters v. Phelps [Neb.] 116 NW 783. Recital of payment in full. Wherley v. Rowe, 106 Minn. 494, 119 NW 222.

**54.** Batson v. Fidelty Mut. Life Ins. Co. [Ala.] 46 S 578; Wherley v. Rowe, 106 Minn. 494, 119 NW 222; Walters v. Phelps [Neb.] 116 NW 783.

**55.** Wherley v. Rowe, 106 Minn. 494, 119 NW 222. Evidence held insufficient to overcome receipt reciting payment in full. Id.

**56.** Evidence held to negative payment. Donoven v. Travers [La.] 47 S 769; Rhodes v. Walker [Ky.] 115 SW 257.

**57. Search Note:** See Payment, Cent. Dig. §§ 176-188; Dec. Dig. § 66.

**58.** Has such effect in Missouri. State v. Allen, 132 Mo. App. 98, 111 SW 622.

**59.** State v. Allen, 132 Mo. App. 98, 111 SW 622. Payment on renewal note held not acknowledgment of liability on old note which is deemed by maker to be paid. Id.

**60.** Antrim Lumber Co. v. Bolinger & Co., 121 La. 306, 46 S 337.

**61. Search Note:** See Payment, Cent. Dig. §§ 240-248; Dec. Dig. § 76; Tender, Cent. Dig. § 100; Dec. Dig. § 29.

**62.** Sufficiency of evidence to show payment is a question of fact for jury. Greist v. Gowdy [Conn.] 71 A 555. Finding of jury on issue of payment sustained where evidence was conflicting. Fries v. Delchmann, 140 Ill. App. 121. Whether note was accepted as payment. State v. Lichtman-Goodman & Co., 131 Mo. App. 65, 109 SW 819 Whether check was payment on notes. Bailey v. Robison, 233 Ill. 614, 84 NE 660.

**63.** Whether words "in full to date" were on check when delivered to payee held for jury. McKinnie v. Lane, 133 Ill. App. 438.

**64.** See 10 C. L. 1158.

**Search Note:** See, Deposits in Court, Cent. Dig.; Dec. Dig.; Tender, Cent. Dig. §§ 76-95; Dec. Dig. §§ 23-27; 21 A. & E. Enc. P. & P. 571.

**65.** This topic treats of deposits in court of moneys tendered or in controversy. Judicial sequestration of property in controversy (see Receivers, 10 C. L. 1465; Sequestration, 10 C. L. 1622) is elsewhere treated.

**66, 67.** Shelton v. Wolthausen, 80 Conn. 599, 69 A 1030.

**68.** Jurisdiction not to be invaded by scire facias proceedings in a court of common pleas or any other court. Shelton v. Wolthausen, 80 Conn. 599, 69 A 1030. Disposition not to be controlled from without or through any other channel than those which the law provides as incidental to pending action. Id. Assignments, demands upon execution and scire facias proceedings, all unavailing. Id.

**69, 70.** Shelton v. Wolthausen, 80 Conn. 599, 69 A 1030.

**71.** In consolidated action to foreclose mechanic's liens where owner paid a sum claimed by contractors into court, tender reciting offer "to pay into court any sum found justly due contractors under contract for benefit of contractors and lien claimants," and finding recited payment into court to be applied in satisfaction of judgment, held tender and finding justified

money in the clerk's hands has been directed paid to a third person, it cannot be made the subject of foreign attachment with the usual consequence that the judgment be followed by scire facias proceedings to appropriate the fund,[72] and, where it has been directed paid to one and denied to another except by force of the former's duty to account to the latter after it is received, the latter acquires only an equitable interest therein.[73] A county treasurer has no authority to invest moneys deposited with him by order of court to the credit of infants and lunatics except upon the court's order.[74] Payment into court in discharge of a mechanic's lien does not change the nature of an action to foreclose the lien.[75] Money that passes into the registry of a federal court can be legally paid out only under the authority of the government by its officers and agents in the manner prescribed by statute and the rules and regulations made in pursuance thereof,[76] and unclaimed money paid into court in receivership proceedings becomes a trust fund for the benefit of the distributees and if not claimed by them subject to redistribution.[77] Money deposited in a federal court remaining unclaimed for a long period, if subject to escheat, belongs to the state and not to the federal government as parens patriae,[78] and an act of congress in so far as it requires money thus deposited and unclaimed for 10 years to be turned over to the United States is unconstitutional.[79] By virtue of statute where a fund in litigation is admitted by the pleadings to be held in trust, the court may upon motion order it paid into its custody,[80] and, where there is in effect an admission that the whole amount held, less some indefinite portion, belongs to the defendant, the admission is sufficient to give the court jurisdiction to make the order for payment;[81] but, where a judgment fixes the amount due and execution issues if the same is not paid, it is error to refuse payment into court of any sum.[82] Where an affidavit of a judgment debtor seeking to redeem from a sale under the judgment shows prima facie that the purchaser is not in the county, the judgment debtor may

payment of a personal judgment in favor of contractors on failure of their lien. Los Angeles Pressed Brick Co. v. Higgins [Cal. App.] 97 P 414. Fund held properly applied, first, to payment of the valid liens with costs to such claimants, and, second, to payment of personal judgment obtained by contractors on failure of their lien. Id.

72. Shelton v. Wolthausen, 80 Conn. 599, 69 A 1030.

73. Second party held to have only an equitable interest in fund, hence not an interest subject to a foreign attachment where not made so by statute. Shelton v. Wolthausen, 80 Conn. 599, 69 A 1030.

74. Investment must receive sanction of the court. Erie County v. Diehl, 114 NYS 80.

75. Suit one in equity to enforce a mechanic's lien even after payment into court. Valett v. Baker, 129 App. Div. 514, 114 NYS 214.

76. Action does not lie against clerk of federal court in his official capacity to recover money received by him as such and which has passed into registry of court. Hills v. Valentine [C. C. A.] 164 F 328.

77. Unclaimed money held trust fund for benefit of bond holders and, if unclaimed, subject to redistribution either to bondholders not paid in full, to creditors if any, or to holders of corporation stock. American Loan & Trust Co. v. Grand Rivers Co., 159 F 775.

78. American Loan & Trust Co. v. Grand Rivers Co., 159 F 775.

79. Rev. St. § 996 (U. S. Comp. St. 1901, p. 711) as amended by Act of Feb. 19, 1897, c. 265, § 329, St. 578 (U. S. Comp. St. 1901, p. 711) held unconstitutional as depriving owners thereof of their property without due process of law in violation of 5th amendment of federal constitution. American Loan & Trust Co. v. Grand Rivers Co., 159 F 775.

80. Under pleadings lessor held trustee for lessee and under Comp. Laws, § 3240, could be required to pay sum into court upon motion of lessee. Florence-Goldfield Min. Co. v. First Judicial Dist. Ct. [Nev.] 97 P 49. Plaintiff's claim to a set-off held not to affect power of court to direct payment into court of amount admitted held in trust. Id.

81. Admission though indefinite as to the amount claimed rightfully to belong to plaintiff held sufficient to confer jurisdiction under Comp. Laws, § 3240. Florence-Goldfield Min. Co. v. First Judicial Dist. Ct. District of Nevada [Nev.] 97 P 49.

82. Under Revisal 1905, § 2021, held error, in action against a contractor and owner of building to recover on personal liability of owner for material furnished, to require payment into court of any sum in advance of judgment for plaintiff. Hildebrand v. Vanderbilt, 147 N. C. 639, 61 SE 620.

pay the redemption money into court,[88] and where the clerk receipts in full it is presumed that the amount paid was the proper amount of the redemption money;[84] and the fact that the clerk accepts a check which is afterwards paid is immaterial.[85] Where one has sublet leased premises, the subtenant may properly be required to pay the accumulated rent into court under a bond to protect the defendant pending the adjudication of the leases involved,[86] and, where a judgment of cancellation is directed, the money may properly be ordered paid to plaintiffs.[87] Where the terms of a deposit are general, the deposit serves to save the depositor from costs and it must continue to remain in the custody of the court to abide the final judgment in the cause,[88] hence, it cannot be withdrawn pending appeal.[89] Under statute a tender and payment into court of a sum less than the amount claimed in an action upon a contract is a conclusive admission of the indebtedness to the extent of the tender, regardless of the final result of the action;[90] it vests title to the sum tendered in the plaintiff, although he does not accept or make any effort to secure the money,[91] and the court itself has no power to make an order or render a judgment in the same action which effects a re-transfer of the title;[92] but the plaintiff by proceeding after a tender and deposit runs the risk of paying defendant's costs if the recovery falls short of the amount tendered.[93] The tender and payment does not prevent the defendant from denying plaintiff's claim beyond the sum tendered upon any ground consistent with the admission of the original cause of action.[94]

## PEDDLING.

§ 1. Definition, 1309.
§ 2. Statutory or Municipal Regulation, 1310.
§ 3. Who May Become Licensees, 1310.
§ 4. Offenses and Prosecution, 1310.

*The scope of this topic* is noted below.[95]

§ 1. *Definition.*[96]—See 10 C. L. 1159—"Hawking" or "peddling" refers ordinarily to the business of an itinerant trader who delivers goods at the time of sale,[97] or whose goods are hawked about and offered and sold to any one who will buy,[98] as distinguished from one who sells them in a fixed place of business,[99] or makes periodic delivery pursuant to a previous arrangement.[1] A license to "peddle" gives no right to take, for any considerable length of time, permanent and exclusive possession of any part of the highway.[2]

**83.** Affidavit held to raise prima facie case authorizing payment of redemption money to clerk under Ky. St. 1903, § 2364. Hatcher v. Hackney, 33 Ky. L. R. 661, 110 SW 888.

**84.** Especially where debt was $110 and amount paid clerk $172. Hatcher v. Hackney, 33 Ky. L. R. 661, 110 SW 888.

**85.** Hatcher v. Hackney, 33 Ky. L. R. 661, 110 SW 888.

**86, 87.** Collins v. Seyfang, 49 Wash. 554, 95 P 1088.

**88.** Los Angeles Pressed Brick Co. v. Higgins [Cal. App.] 97 P 414.

**89.** No right to withdraw deducible from statutory provisions relating to appeals and stay of execution. Los Angeles Pressed Brick Co. v. Higgins [Cal. App.] 97 P 414.

**90, 91, 92, 93, 94.** Heller v. Katz, 114 NYS 806.

**95.** For the licensing and regulation of analogous occupations, as transient merchants, etc., see Licenses, 12 C. L. 593.

**96. Search Note:** See notes in 14 L. R. A. 97; 12 L. R. A. (N. S.) 616; 96 A. S. R. 844; 2 Ann. Cas. 830.

See, also, Hawkers and Peddlers, Cent. Dig. §§ 3-6; Dec. Dig. § 3; 15 A. & E. Enc. L. (2ed.) 291.

**97.** Allport v. Murphy, 153 Mich. 486, 15 Det. Leg. N. 496, 116 NW 1070.

**98.** Commonwealth v. Standard Oil Co. [Ky.] 112 SW 902. Where a company sells oil from its wagons to others than retail dealers, it constitutes "peddling" within § 4215, Ky. St. 1903. Id.

**99.** State v. Bayer, 34 Utah, 257, 97 P 129.

**1.** Filling oil tanks weekly for regular customers. Commonwealth v. Standard Oil Co. [Ky.] 112 SW 902.

**2.** One having regular peddlers' license held not authorized to arrange boxes in highway from which he might cry and hawk his goods for sale. Eggleston v. Scheibel, 60 Misc. 250, 112 NYS 114.

§ 2. *Statutory or municipal regulation.*[3]—See 10 C. L. 1159—It is within the discretionary power of the legislature to classify [4] and to regulate the business of hawking and peddling within its territory.[5] A municipality also has such power provided it does not exceed the limitations of the legislative power,[6] and a license regulation by a city is not invalid because it excludes persons licensed by the county.[7] The power to provide for the licensing and regulation of peddlers implies the power of prescribing the amount of the license and of enforcing its payment.[8] To avoid a regulation it must appear beyond a reasonable doubt that it contravenes the constitution.[9] A license is not a tax upon property but is a police regulation.[10] A license is no protection as to acts beyond its terms.[11]

§ 3. *Who may become licensees.*[12]—See 6 C. L. 996

§ 4. *Offenses and prosecution.*[13]—See 10 C. L. 1159

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**Pedigree,** see latest topical index.

**PENALTIES AND FORFEITURES.**

**§ 1. Definition and Elements, 1310.**
**§ 2. Rights and Liabilities to Penalties and Forfeitures, and the Policy of the Law, 1311.**
**§ 3. Remedies and Procedure, 1311.**

*The scope of this topic* is noted below.[14]

§ 1. *Definition and elements.*[15]—See 10 C. L. 1160—A forfeiture is the incurring of a liability to pay a definite sum of money as the consequence of violating the provisions of some statute or refusal to comply with some requirements of law [16] or contract.[17] It usually signifies loss of property by way of compensation for injury to the person to whom the property is forfeited.[18]

**3. Search Note:** See notes in 4 C. L. 963.

See, also, Hawkers and Peddlers, Cent. Dig. § 2; Dec. Dig. § 2; 15 A. & E. Enc. L. (2ed.) 295, 300.

**4.** State v. Webber, 214 Mo. 272, 113 SW 1054. A law classifying hawkers and peddlers with respect to nature and propelling power of vehicle used in that vocation held not to violate the rule prohibiting class legislation. Servonitz v. State, 133 Wis. 231, 113 NW 277. Exemption of persons selling pianos does not invalidate license statute. State v. Webber, 214 Mo. 272, 113 SW 1054. May continue vending of agricultural products to persons who have raised them. Dutton v. Knoxville [Tenn.] 113 SW 381.

**Held Invalid:** A statute which requires a license to canvass or sell by sample goods shipped into the state, and permits without license the canvassing or selling in such manner goods not shipped into the state, held unconstitutional. State v. Bayer, 34 Utah, 257, 97 P 129.

**5.** State v. Bayer, 34 Utah, 257, 97 P 129.

**6.** City ordinance imposing license fee of $2 a month held not unconstitutional. State v. Cederaski, 80 Conn. 478, 69 A 19.

**7.** Dutton v. Knoxville [Tenn.] 113 SW 381.

**8.** State v. Cederaski, 80 Conn. 478, 69 A 19.

**9, 10.** State v. Webber, 214 Mo. 272, 113 SW 1054.

**11.** License to peddle gives no right to occupy and obstruct street with boxes. Eggleston v. Scheibel, 60 Misc. 250, 112 NYS 114.

**12. Search Note:** See, Hawkers and Peddlers, Cent. Dig. §§ 7-9; Dec. Dig. § 4; 15 A. & E. Enc. L. (2ed.) 292, 299.

**13. Search Note:** See Hawkers and Peddlers, Cent. Dig. §§ 13-19; Dec. Dig. §§ 6, 7; 15 A. & E. Enc. L. (2ed.) 302; 10 A. & E. Enc. P. & P. 1.

**14.** It excludes punishment for violation of criminal laws (see Criminal Law, 11 C. L. 940) and penalties provided by contract for failure to comply with terms (see Building and Construction Contracts, 11 C. L. 464; Contracts, 11 C. L. 729; Public Contracts, 10 C. L. 1285; Damages, 11 C. L. 958). Topics dealing with subject-matter as to which penalties are awarded should also be consulted.

**15. Search Note:** See Damages, Cent. Dig. §§ 154-187; Dec. Dig. §§ 74-86; Forfeiture, Cent. Dig. § 1; Dec. Dig. §§ 1, 2; Penalties, Cent. Dig. §§ 1-4; Dec. Dig. §§ 1-4; 13 A. & E. Enc. L. (2ed.) 1073; 22 Id. 654.

**16.** A tax imposed by legislative enactment on unsuccessful party upon appeal as penalty for having delayed litigation is not a forfeiture within scope of governor's power to remit fines and forfeitures. Commonwealth v. French [Ky.] 114 SW 255.

**17.** Undated notes given to lithographers' union by member, to be dated and collected in event of member's noncompliance with association rules, held to be given as forfeit or penalty. Sackett & Wilhelms Lithographing & Print. Co. v. National Ass'n, 61 Misc. 150, 113 NYS 110.

**18.** Action to enforce conveyance under contract between partners, whereby one was to convey to the other if progress of

§ 2. *Rights and liabilities to penalties and forfeitures, and the policy of the law.*[19] See 10 C. L. 1160—Forfeitures are not favored by courts of equity.[20] Equity will not enforce a forfeiture [21] unless it is clearly contemplated by an existing contract that it shall do so,[22] or when it works equity and protects the rights of the parties.[23] Liability for a penalty imposed by statute may attach to the master because of the violation of such statute by his servant.[24]

*Statutory penalties.* See 10 C. L. 1160—Penal statutes are to be strictly construed.[25] A penalty will not be enforced for a mere technical violation of a penal statute.[26] An admitted violation of the public health law by a druggist makes it obligatory upon the court to render judgment for the board of pharmacy for the statutory penalty.[27]

§ 3. *Remedies and procedure.*[28] See 10 C. L. 1101—There can be no forfeiture of property unless the forfeiture be judicially determined.[29] A proceeding to collect a penalty is a civil suit and has all its ordinary incidents,[30] but a suit for the recovery of a penalty for violation of state penal laws is in substance a quasi criminal prosecution, although civil in form.[31] The action of debt is the appropriate remedy for

partnership business was unsatisfactory, held not an action to enforce a forfeiture. Whitney v. Dewey [C. C. A.] 158 F 385.

**19. Search Note:** See notes in 4 C. L. 967; 6 Id. 998; 24 L. R. A. 231; 32 Id. 469; 3 L. R. A. (N. S.) 785; 5 Id. 603; 11 Id. 667; 12 Id. 497; 15 Id. 646, 733, 983; 14 A. S. R. 352.

See, also, Forfeitures, Cent. Dig. §§ 1-13; Dec. Dig. §§ 1-11; Penalties, Cent. Dig. §§ 2-12; Dec. Dig. §§ 2-15.

**20.** Simple default in payment of instalments of rent held not to constitute wrong justifying forfeiture of lease when payment of amount due would be ample to make aggrieved party whole. Patterson v. Northern Trust Co., 132 Ill. App. 208.

**21.** Lessee brought suit for specific performance of covenant to furnish light. Lessor filed cross bill praying forfeiture because of lessee's violation of covenant to keep orderly place. Held cross bill properly dismissed. Launtz v. Vogt, 133 Ill. App. 255. Forfeiture of property of lessee of oil lands for breach of covenant as to developing oil fields held unconscionable and properly refused, although lease provided therefor. Work v. Fidelity Oil & Gas Co. [Kan.] 98 P 801.

**22.** Right of forfeiture under option to purchase mining lands waived by acceptance of mortgage. Spedden v. Sykes [Wash.] 98 P 752. Forfeiture of lease declared for breach of covenants as to subletting and specified use of premises, lease expressly providing therefor. Denecke v. Miller [Iowa] 119 NW 380.

**23.** Forfeiture of mining lease decreed for breach of covenants to operate continuously, to pay royalties and not to remove property, since forfeiture was necessary to protect lessors against injurious delays and to relieve land of burden of unprofitable lease. Cherokee Const. Co. v. Bishop [Ark.] 112 SW 189.

**24.** Where state labor inspectors were refused admission to defendant's factory by latter's gateman, direction of verdict for defendant was error. Bryant v. N. Z. Graves Co. [N. J. Law] 71 A 60.

**25.** Burden was upon plaintiff who sought to recover statutory penalty from railway company for failure to pay wages within 7 days after demand, to show that he had strictly complied with all requirements of such statute as to making proper demand. St. Louis, etc., R. Co. v. McClerkin [Ark.] 114 SW 240.

**26.** Evidence held to show that defendant was not subject to penalty provided by § 71 of Road and Bridge Act for obstructing highway when he acted under orders from highway commissioner. Town of Meacham v. Lacey, 133 Ill. App. 208.

**27.** State Board of Pharmacy v. Teitel, 113 NYS 69.

**28. Search Note:** See notes in 29 L. R. A. 813; 4 L. R. A. (N. S.) 321; 5 Id. 402; 14 Id. 1187; 50 A. S. R. 557; 86 Id. 48.

See, also, Forfeitures, Cent. Dig. §§ 4-8, 13; Dec. Dig. § 5, 11; Penalties, Cent. Dig. §§ 13-43; Dec. Dig. §§ 16-41; 16 A. & E. Enc. P. & P. 229.

**29.** Statute making it unlawful for any person to sell or dispose of any article of traffic within three miles of any meeting house of public worship while meeting was in progress, and providing in case of violation, that such articles of traffic, together with their receptacle, might be seized and sold without judicial determination and proceeds given to overseer of the poor, held unconstitutional. Berry v. DeMaris [N. J. Law] 70 A 337.

**30.** Suit to collect penalty for violation of federal law relating to time in which livestock may be kept in cars during transit. United States v. Baltimore, etc., R. Co. [C. C. A.] 159 F 33; United States v. Southern Pac. Co., 162 F 412. In action to recover penalty provided by 24 Stat. at L. p. 81, for failure to settle claim for goods lost in transit within 90 days, evidence showed that claim was seasonably filed and hence action would lie. Goldstein v. Southern R. Co., 80 S. C. 522, 61 SE 1007. Under Act of June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Sup. 1907, p. 918), limiting time in which livestock may be kept in car during transit, separate penalties may be recovered for separate consignments although all are shipped in same train. United States v. Baltimore, etc., R. Co. [C. C. A.] 159 F 33.

31. Violation of R. S. Ill. c. 91, pars. 32A

the collection of penalties prescribed for the violation of statutes[32] and must be brought by the aggrieved party.[33] Any agreement or act leading one to believe that a forfeiture will not be incurred is a waiver of the right to declare such forfeiture.[34] It is no defense to an action for a penalty imposed for noncompliance with a statute that prior to the commencement of the action the requirements of the statute had been fulfilled.[35] The burden is upon the party setting up forfeiture to show the existence of facts justifying it.[36] To recover a penalty for the violation of statute, the plaintiff must prove the facts by a preponderance of evidence; proof beyond a reasonable doubt is not required.[37] Where a penal statute provides for a minimum and a maximum penalty, it is within the discretion of the trial court to fix the amount of such penalty.[38]

### PENSIONS.[39]

*The scope of this topic* is noted below.[40]

Special examinations as to the merits of pension claims are authorized by federal statute,[41] and the subpoenaed witnesses are subject to direct and cross-examination.[42] At such proceedings the examiner has no authority to extort confessions of criminal violations of the pension laws from a witness.[43]

The federal statute exempting pension money is only for protection until the funds are received by the pensioner, after which it is liable for his debts.[44] Land purchased with pension money and occupied by husband and wife as a homestead is not exempt from execution on an indebtedness against both husband and wife antedating the acquisition of the homestead.[45]

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**Peonage; Performance,** see latest topical index.

and 32B, relating to sale of cocaine without prescription. Zito v. People, 140 Ill. App. 611. A judgment for a penalty for unlawful sale of cocaine may also provide for imprisonment until paid. Id.

**32.** United States v. Baltimore, etc., R. Co. [C. C. A.] 159 F 33.

**33.** Attorney who made trip on surface car for sole purpose of having his demand for transfer refused in order to obtain evidence to be used in litigation against company not an "aggrieved party" within meaning of Railroad Law, Laws 1892, p. 1406, c. 676, § 104. Bull v. New York City R. Co., 192 N. Y. 361, 85 NE 385.

**34.** Lessor who authorized his lessee to make journey for purpose of perfecting title to premises held to have waived right to declare forfeiture of lease. Pyle v. Henderson [W. Va.] 63 SE 762.

**35.** Violation of statute requiring foreign corporations to file copy of charter with secretary of state not purged by filing before commencement of action. State v. S. P. Pond Co. [Mo. App.] 115 SW 505.

**36.** In action on life insurance policy, payment on which was refused because of nonpayment of assessments, held that defendant failed to show that assessment was necessary and properly levied, which facts were under contract requisite to forfeiture of policy. King v. Hartford Life & Annuity Ins. Co., 133 Mo. App. 612, 114 SW 63.

**37.** Suit to recover penalty for violation of federal statute relating to time in which livestock may be kept in cars while in transit. United States v. Southern Pac. Co., 162 F 412.

**38.** For violation of Full Crew Act, March 25, 1907, Acts 30th Leg. p. 92, c. 41, providing for number of trainmen on passenger trains, court did not abuse its discretion by imposing maximum penalty. Missouri, K. & T. R. Co. v. State [Tex. Civ. App.] 109 SW 867. On judgment for penalty for violation of federal statute relating to feeding and resting livestock transported on trains, it is the duty of the trial court to fix the amount of the penalty within the legal limits. United States v. Southern Pac. Co., 162 F 412.

**39.** See 10 C. L. 1161.

**Search Note:** See notes in 19 L. R. A. 33; 8 Ann. Cas. 950.

See, also, Pensions, Cent. Dig.; Dec. Dig.; 22 A. & E. Enc. L. (2ed.) 657; 16 A. & E. Enc. P. & P. 309.

**40.** Includes not only pensions issued by the federal government for military and naval service, but those granted by states or municipalities to persons in the public service thereof.

**41.** Rev. St. §§ 184-186 (U. S. Comp. St. 1901, pp. 92, 93), and Act Cong. July 25, 1882, c. 349, § 3, 22 Stat. 175 (U. S. Comp. St. 1901, p. 3277). In re O'Shea, 166 F 180. Pension claimants entitled to notice. Id.

**42.** In re O'Shea, 166 F 180. Not secret proceeding and witness entitled to presence of attorney as long as he conducts himself properly and does not interfere with examination. Id.

**43.** Though no intention to prosecute witness. In re O'Shea, 166 F 180.

**44.** Pension funds in bankruptcy proceedings not exempt under Rev. St. § 4747 (U. S. Comp. St. 1901, p. 3279). In re Jones, 166 F 337.

**45.** Ratliff v. Elwell [Iowa] 119 NW 740.

## PERJURY.

§ 1. Elements of the Offense, 1313. | § 2. Prosecution and Punishment, 1314.

*The scope of this topic* is noted below.[46]

§ 1. *Elements of the offense.*[47]—See 10 C. L. 1162—Perjury may be assigned upon false statements[48] willfully and knowingly made,[49] under lawful oath[50] as to material matters[51] in a tribunal having jurisdiction of the proceedings,[52] or before a competent officer on occasions where an oath is required by law.[53] It is no defense to a prosecution for perjury alleged to have been committed during an investigation by the grand jury that an unauthorized person was present.[54] Perjury may be predi-

**46.** Includes all matters common to the crime of perjury. Excludes matters common to all crimes (see Criminal Law, 11 C. L. 940; Indictment and Prosecution, 12 C. L. 1).

**47. Search Note:** See notes in 4 C. L. 975; 54 L. R. A. 513; 9 L. R. A. (N. S.) 237; 1 Ann. 163; 3 Id. 870, 945; 8 Id. 881; 11 Id. 711.

See, also, Perjury, Cent. Dig. §§ 1-63; Dec. Dig. §§ 1-16; 22 A. & E. Enc. L. (2ed.) 680, 697.

**48.** Evidence held not sufficient to show that testimony in suit on note to effect that it was accommodation paper and that payee had given receipt to that effect was false, although note recited that it was given for valuable consideration. Baker v. State [Ark.] 113 SW 205. Sworn statement by president of insurance company to insurance commissioner that company had no collateral loans outstanding held not false although such loans had been transferred to third party to be by him returned for identical purpose of making affidavit. People v. Corrigan, 129 App. Div. 62, 113 NYS 504.

**49.** There is no perjury if alleged false statement be immediately followed by full and true explanation. People v. Gillette, 126 App. Div. 665, 111 NYS 133. Entryman on public lands who in affidavit stated that he entered land for individual use when in fact he intended to convey land under prexisting contract was guilty of perjury. Nickell v. U. S. [C. C. A.] 161 F 702.

**50.** An indictment alleging that defendant took oath as election manager before himself was demurrable. Phillips v. State [Ga. App.] 63 SE 667. Since one cannot be compelled to be witness against himself in a criminal case, an oath taken before grand jury in investigation against defendant will not support prosecution for perjury by him on such investigation. People v. Gillette, 126 App. Div. 665, 111 NYS 133. Perjury alleged to have been committed on investigation by superintendent of elections as to fraudulent registry. Defendant sworn by superintendent and testified as to others. Held he did not thereby become a witness against himself, and oath was therefore not invalid on that ground. People v. Cahill, 193 N. Y. 232, 86 NE 39.

**51.** Whether the perjured evidence is material is a question of law. Grissom v. State [Ark.] 113 SW 1011. Testimony may be assigned for perjury either where it directly tends to prove or disprove one side or the other of the main issue, or where under the established rules of evidence it indirectly tends to do so by corroborating or discrediting other evidence. Commonwealth v. DeCost, 35 Pa. Super. Ct. 88.

**Held material:** In grand jury investigation of illegal sale of whisky, statement that witness did not furnish money to buy whisky nor see anyone buy it was material. McLaren v. State, 4 Ga. App. 643, 62 SE 138. Statement in own behalf by defendant in prosecution for robbery that he had never been convicted of crime. State v. Moran [Mo.] 115 SW 1126. As to whether claimant had complied with law regarding homestead claim in proceedings to prove up before commissioner. Barnard v. U. S. [C. C. A.] 162 F 618. Amount of property sworn to in justification on liquor dealer's bond. Christy v. Rice, 152 Mich. 563, 15 Det. Leg. N. 202, 116 NW 200. False statement that defendant was not present and did not see homicide committed. State v. Hoel, 77 Kan. 334, 94 P 267. Testimony on arson prosecution that defendant saw a certain person set the fire. Grissom v. State [Ark.] 113 SW 1011. Testimony by drayman before grand jury investigating charge of illegal sale of intoxicating liquors that he had never hauled any beer for accused was material although evidence did not relate to actual illegal sale. State v. Ackerman, 214 Mo. 325, 113 SW 1087.

**Held not material:** Testimony in replevin suit by defendant that he had never signed a certain mortgage immaterial where defense of not having executed mortgage had been abandoned before testimony given. Reidhar v. State [Ark.] 111 SW 1127. Perjury cannot be assigned under § 5392, U. S. Comp. St. 1901, p. 3653, for making false returns under Oleomargarine Law, since such returns are not used for collection of taxes or settlement of claims, but merely for detection of violation of law, and hence not "material" under perjury statute. U. S. v. Lamson, 165 F 80.

**52.** Court trying prosecution for robbery during which alleged perjury was committed had jurisdiction although no preliminary examination had. State v. Moran [Mo.] 115 SW 1126.

**53.** Perjury may be assigned upon statements made by witness in proving up homestead claim of another before commissioner. Barnard v. U. S. [C. C. A.] 162 F 618. Perjury could not be predicated upon false voluntary statement made by defendant accused of murder before preliminary examination, although sworn to, since statute expressly provides that such statements shall not be sworn to. Biard v. State [Tex. Cr. App.] 113 SW 275.

**54.** That assistant attorney general was

cated upon a promissory oath.[55] One who knowingly makes a false verification to a complaint is guilty of perjury.[56] The authority of the officer to administer the oath is a question of law.[57]

*Subornation of perjury.* See 10 C. L. 1163—Where the crime of perjury is committed at the instigation or procurement of another, it is termed "subornation of perjury" in the party instigating it, and is an offense at common law.[58] It consists of two elements; the commission of perjury by the person suborned, and willfully procuring or inducing him to do so by the suborner.[59] An attempt to instigate or persuade a person to commit perjury is an offense at common law notwithstanding that perjury was not actually committed.[60]

§ 2. *Prosecution and punishment.*[61] *Indictment.* See 10 C. L. 1163—An indictment for perjury is sufficient if it sets forth the substance and effect of the testimony alleged to be false with sufficient clearness to make the meaning apparent.[62] The indictment must directly and specifically state wherein the matter in regard to which perjury is alleged was false,[63] and if such testimony was given before the grand jury, the matter under investigation must be specified.[64] The materiality of the false testimony need not be specifically alleged,[65] and the authority of the officer who administered the false oath may be alleged generally.[66] In negativing the defendant's

present before law authorizing his presence became effective. People v. Glasser, 60 Misc. 410, 112 NYS 323.

**55.** Where managers of primary election made false return of number of ballots cast for candidates, they were guilty of perjury for violation of their official oath although such oath was taken before any votes cast. Norton v. State [Ga. App.] 63 SE 662.

**56.** State v. Luper [Or.] 95 P 811.

**57.** Whether police judge had power to swear defendant on charge of gambling. Howell v. Com. [Ky.] 113 SW 881.

**58.** State v. Shaffner [Del.] 69 A 1004. Defendants who entered into conspiracy for purpose of procuring entrymen on public lands to make affidavits that they entered lands for their individual use when in fact they intended immediately to convey to defendants under pre-existing contract held guilty of subornation of perjury although they never intended to fulfill such contracts, but simply proposed to defraud entrymen out of their location fees. Nickell v. U. S. [C. C. A.] 161 F 702.

**59.** Bell v. State [Ga. App.] 63 SE 860.

**60.** To establish offense, matter in regard to which false oath was sought to be procured must have been known to be false by both the person attempting to persuade and the one persuaded. State v. Shaffner [Del.] 69 A 1004.

**61. Search Note:** See notes in 35 L. R. A. 576; 6 Ann. Cas. 812; 9 Id. 765.

See, also, Perjury, Cent. Dig. §§ 64-142; Dec. Dig. §§ 17-41; 22 A. & E. Enc. L. (2ed.) 691; 16 A. & E. Enc. P. & P. 314.

**62.** Commonwealth v. DeCost, 35 Pa. Super. Ct. 88. The elements to be alleged and proved are (1) a judicial proceeding or course of justice; (2) that defendant had been sworn to give evidence therein; (3) his testimony; (4) its falsity; (5) its materiality. People v. Tatum, 60 Misc. 311, 112 NYS 36. The exact words need not be proved providing the substance of the testimony is given. McLaren v. State, 4 Ga. App. 643, 62 SE 138. Statute simplifying form of indictment does not change constituent elements of offense. State v. Cline, 146 N. C. 640, 61 SE 522.

**Indictment sufficient:** Information for perjury in making false verification of complaint in divorce action sufficient although verification not set out verbatim, but sets out that defendant willfully and feloniously swore before notary public that all matters and facts set out were true. State v. Luper [Or.] 95 P 811. Indictment alleging that grand jury investigated gambling transactions that occurred at defendant's house which house was a common resort for gaming, that defendant testified before grand jury that no games had been played in his house to his knowledge, that games had been played there by certain parties named, sufficiently alleged perjury. Gonzales v. State [Tex. Cr. App.] 112 SW 941. Indictment charging that acts which defendant testified he did not see occurred in his immediate presence, that he witnessed and had full knowledge thereof, that his denial as a witness was false and by him then known to be false, held sufficient. State v. Hoel, 77 Kan. 334, 94 P 267.

**63.** Indictment merely stating conclusions of falsity held demurrable. People v. Tatum, 60 Misc. 311, 112 NYS 36.

**64.** Indictment bad as insufficiently stating scope of grand jury investigation. People v. Tatum, 60 Misc. 311, 112 NYS 36. Allegation that investigation was for purpose of "ascertaining whether officers or employes of any description of life insurance companies of this state have lately violated criminal laws of the state" held not sufficiently specific. People v. Gillette, 126 App. Div. 665, 111 NYS 133.

**65.** Indictment alleging that accused committed perjury on trial of action before justice wherein third person was plaintiff and accused defendant, stating false testimony, held sufficient although not alleged that false testimony was material. State v. Cline, 146 N. C. 640, 61 SE 522.

**66.** Indictment charging perjury before

oath where he was sworn only to his belief; the indictment should aver either that he did not believe what he swore, or that he believed and well knew the statements made by him under oath were false.[67] If two or more persons join in the same false affidavit, they may be jointly indicted.[68] If an indictment for false swearing charges an offense under any statute, it is sufficient although purporting to be drawn under another.[69] Where the indictment contains several distinct charges of perjury, proof of any one of them is sufficient.[70] Where several alleged false statements relate to the same subject-matter and are material to the same investigation, they may properly be joined in one count.[71] An indictment containing only one count cannot be in part eliminated as to a material portion and the accused tried upon the remainder.[72]

*Subornation of perjury.* See 10 C. L. 1104

*Variance.* See 10 C. L. 1164—If the proof of the testimony alleged to have been given substantially supports the narration of it in the indictment, there is no fatal variance.[73] When the state undertakes to particularize the offense, the proof must correspond with the allegation.[74]

*Admissibility of evidence.* See 10 C. L. 1164—The record of the case in which the alleged perjury was committed is admissible for the purpose of showing the jurisdiction of the court, the regularity of the proceedings, and the materiality of the testimony,[75] but it cannot be considered by the jury as proof of perjury.[76] Admissions,[77] declarations[78] and all facts tending to show that the defendant knew his testimony to be false, are admissible.[79] Where the perjury is assigned upon false oath as to belief and recollection, evidence of defendant's mental state and memory

United States commissioner as to testimony for proving up homestead claim was sufficient when it alleged general authority of commissioner to administer an oath and to take testimony in that class of cases, although it did not allege commissioner's authority in that particular case since court would take judicial notice thereof. Barnard v. U. S. [C. C. A.] 162 F 618.

67. Indictment averring that defendant swore he did not believe and that he did not recall that he ever approached certain specified persons and proposed that they should pay him money for his influence in the passage of certain ordinances, that he did in fact do so but did not negative the belief, held insufficent. State v. Coyne, 214 Mo. 344, 114 SW 8.

68. Official oath of election managers. Norton v. State [Ga. App.] 63 SE 662.

69. Indictment for false swearing in bankruptcy proceedings purported to be drawn under § 5392, Rev. S. U. S., and so indorsed, held good as charging offense under § 29, Bankr. Act 1898. Wechsler v. U. S. [C. C. A.] 158 F 579.

70. Evidence held sufficient to sustain conviction. McLaren v. State, 4 Ga. App. 643, 62 SE 138.

71. McLaren v. State, 4 Ga. App. 643, 62 SE 138.

72. Indictment assigning perjury upon several statements could not be quashed as to all except one and defendant required to answer to that alone. Duty v. State [Tex. Cr. App.] 114 SW 817.

73. Evidence held not to show variance. Commonwealth v. DeCost, 35 Pa. Super. Ct. 88. No fatal variance between allegation that defendant said he saw M. set fire to a certain house, the property of G. and proof that he said he saw M. set fire to a certain house on the place of G. Grissom v. State [Ark.] 113 SW 1011.

74. Variance fatal where indictment alleged oath taken before "clerk or judge" and proof showed it was taken before deputy clerk. Jackson v. State [Ala.] 47 S 77. Indictment for subornation of perjury assigning statement that witness never saw a certain person between specified dates cannot be sustained where proof showed that statement actually made was that she did see person in question within such time. People v. Frank, 128 App. Div. 99, 112 NYS 515.

75. State v. Justesen [Utah] 99 P 456.

76. Admission of demurrers to complaint and answer held immaterial since not prejudicial to defendant. State v. Justesen [Utah] 99 P 456.

77. That defendant who swore falsely as to residence of voters upon registration investigation, had told persons in question to register and he would protect them, admissible. People v. Cahill, 193 N. Y. 232, 86 NE 39.

78. On prosecution for perjury in making false statements before commissioner in proving up homestead claim, declarations of claimant as to lack of residence held competent. Barnard v. U. S. [C. C. A.] 162 F 618.

79. Facts bearing upon defendant's knowledge of falsity of statements before superintendent of elections as to residence of voters were admissible. People v. Cahill, 193 N. Y. 232, 86 NE 39. Evidence that defendant had made false statements as witness in proving up homestead claim of another competent as showing design and system in furnishing evidence in support of fraudulent scheme to obtain title to public lands. Barnard v. U. S. [C. C. A.] 162 F 618.

is admissible.[80] On prosecution for subornation of perjury, it is error to admit in evidence the informtaion, minutes of arraignment and the plea of guilty of the person suborned.[81]

*Sufficiency of evidence.* See 10 C. L. 1165—It is not necessary to establish motive for the perjury.[82] The falsity of the testimony must be shown affirmatively.[83] In order to convict, such falsity must be proved by two witnesses, or by one witness and corroborating evidence.[84] To convict upon documentary evidence alone, such evidence must be as strong and convincing as is required in the case of oral testimony.[85] The ordinary rule of proof beyond a reasonable doubt prevails.[86] The guilt of both the person suborned and the suborner must be proved upon the trial of the latter.[87] The fact of subornation may be proved by the uncorroborated testimony of the suborned witness himself,[88] but the fact of the perjury must be established by the testimony of two witnesses, or of one witness and corroborating circumstances.[89]

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**Perpetuation of testimony,** see latest topical index.

## PERPETUITIES AND ACCUMULATIONS.

§ 1. The Rule Against Perpetuities and Accumulations; Its Nature and Applications, 1316.
§ 2. Computation of the Period and Remoteness of Particular Limitations, 1317.
§ 3. Operation and Effect; Complete and Partial Invalidity, 1320.

*The scope of this topic* is noted below.[90]

§ 1. *The rule against perpetuities and accumulations; its nature and applications.*[91] See 10 C. L. 1167—The general policy of the law is against unlimited restrictions on the right of alienation of property,[92] and limitations of estates which contravene this policy are denominated perpetuities.[93] The application of the rule against perpetuities is not determined by the character of the estate conveyed [94] but

80. State v. Coyne, 214 Mo. 344, 114 SW 8.

81. Since subornation of perjury and perjury are distinct offenses, and confession is admissible against none but the person confessing. State v. Justesen [Utah] 99 P 456.

82. State v. Hoel, 77 Kan. 334, 94 P 267.

83. Mere probability of falsity not sufficient. Baker v. State [Ark.] 113 SW 205. Evidence as to falsity of statement by defendant that he had not engaged in dice game held sufficient to support conviction for perjury. Howell v. Com. [Ky.] 113 SW 881.

84. Rule as to sufficiency of evidence satisfied by testimony of two witnesses and contradictory statement of defendant. Grissom v. State [Ark.] 113 SW 1011.

85. Evidence consisting of answer to question in ship's manifest not sufficient to convict on charge of perjury in proceedings for naturalization. Sullivan v. U. S. [C. C. A.] 161 F 253.

86. Charge that jury must be satisfied beyond a reasonable doubt of truth of every fact or circumstance alleged as tending to establish perjury, and it must also be satisfied beyond a reasonable doubt that such facts and circumstances make a case inconsistent with innocence of defendant, was properly refused. Commonwealth v. DeCost, 35 Pa. Super. Ct. 88.

87. Commission of perjury is the basic element of subornation of perjury. Bell v. State [Ga. App.] 63 SE 860.

88. Bell v. State [Ga. App.] 63 SE 860.

89. Oath of perjurer that oath upon which perjury is predicated was false is not sufficient corroboration. Bell v. State [Ga. App.] 63 SE 860.

90. For construction of deeds and wills in so far as they create perpetuities, see Deeds of Conveyance, 11 C. L. 1051; Wills, 10 C. L. 2035. Right to limit alienation of fee or life estate, see Wills, 10 C. L. 2035.

91. **Search Note:** See notes in 2 L. R. A. (N. S.) 432; 9 Id. 913; 49 A. S. R. 117, 118. See, also, Perpetuities, Cent. Dig. §§ 1-73; Dec. Dig. §§ 1-9; 22 A. & E. Enc. L. (2ed.) 701, 703, 727, 730, 734; 24 Id. 863.

92. Elliott v. Delaney [Mo.] 116 SW 494. Village Law, Laws 1897, p. 447, c. 414, § 295, authorizing board of cemetery commissioners to hold property in trust for improvement of cemeteries, is limited by Personal Property Law, § 2, against undue suspension of absolute ownership of personalty. In re Waldron, 57 Misc. 275, 109 NYS 681.

93. A perpetuity is a future limitation, whether executory or by way of remainder, and of either realty or personalty which is not to vest until after expiration of, or will not necessarily vest within, period prescribed by law for creation of future estates and interests, and which is not destructible by person for time being entitled to the property subject to the future limitations, except with concurrence of person interested under that limitation. Hollander v. Central Metal & Supply Co. [Md.] 71 A 442.

94, 95. Hollander v. Central Metal & Supply Co. [Md.] 71 A 442. Where income was limited for three successive lives, it could not be assumed that some beneficiary would die so as to validate limitation. Simpson v.

by the answer to the question whether the estate or interest will necessarily vest within the time fixed thereby.[95] At common law there was no limitation on the number of lives in being during which the alienation could be suspended.[96] A limitation depending on two contingencies, one of which must happen if at all, but the other of which may or may not happen within the time allowed, will take effect if the first mentioned contingency actually happens,[97] but it will not take effect by reason of the happening of the second, even within the legal period.[98] Where a testamentary power which must be exercised if at all within the lawful period can be legally exercised, it is not rendered invalid because its unlawful execution would also be within its terms.[99] The validity of a trust which may continue beyond the statutory period depends on the alienability of the estate by joint action of trustee and beneficiary before the expiration of that period.[1] The doctrine of perpetuities will not prevent an owner from contracting not to sell his property during his lifetime,[2] or from giving another person an option to take the property at the owner's death at a stipulated price,[3] nor does the rule apply to reversions.[4] A renewal clause in a lease, which does not bind the heirs of the parties, does not create a perpetuity.[5] Too remote vesting as well as undue suspension of the power of alienation is condemned by the New York statute.[6]

§ 2. *Computation of the period and remoteness of particular limitations.*[7]—See 10 C. L. 1167—A limitation for a period not measured by lives is invalid.[8] The remoteness of estates which a special power purports to give must be measured from the time of its creation as respecting the common-law rule against perpetuities.[9]

Trust Co., 112 NYS 370. Illegality of suspension is determinable as of date of testator's death. Simpson v. Trust Co., 129 App. Div. 200, 113 NYS 370. Under statutes on absolute ownership and restraint of alienation, it is not sufficient that estates created may by subsequent events be terminated within prescribed period, but to be valid such estates must be so limited that in every possible contingency they will absolutely terminate within that period. In re Wilcox, 194 N. Y. 288, 87 NE 497. Discretionary power of trustees to hold for 25 years property which vested in residuary legatees at testator's death held valid. Lembeck v. Lembeck [N. J. Err. & App.] 71 A 240.

**96.** That duration of trust was limited for lives of over forty persons held not obnoxious. Fitchie v. Brown, 211 U. S. 321, 53 Law Ed. 202.

**97.** Quinlan v Wickman, 233 Ill. 39, 84 NE 38. Remainder over in case life tenant died "leaving no issue which shall attain the age of 21" held not sustainable as based on two contingencies; one valid, that life tenant should die without issue, and the other invalid, that no issue should attain 21, so that fact that life tenant died without issue did not vest remainder. In re Wilcox, 194 N. Y. 288, 87 NE 497, rvg. 125 App. Div. 152, 109 NYS 564.

**98.** Quinlan v. Wickman, 233 Ill. 39, 84 NE 38. Limitation if person in being died without children or if children, if any, died before youngest should become 30 years. Id.

**99.** Power of appointment among donee's "issue." Bartlett v. Sears [Conn.] 70 A 83. Where testatrix bequeathed her property to husband with power of disposal and to appoint any remainder at his death, husband's execution of power was valid, though he willed a life estate to one person with power to appoint to another for life, and with authority in last appointee to will principal to whom she might choose, it not being assumed last appointee would so exercise her power as to render execution of husband's power invalid. In re McClellan's Estate, 221 Pa. 261, 70 A 737.

**1.** Though ordinarily trusts do not offend against statute of perpetuities where trustee has power of sale and beneficiary may dispose of his interest though trust term exceeds two lives and 21 years (In re Adelman's Will [Wis.] 119 NW 929), statute is violated by creation of trust to continue beyond period prescribed thereby where alienation by trustee and beneficiary is forbidden by statute (Id.). Devise, even if considered a trust, held invalid, no power of sale being given, and St. 1898, §§ 2089, 2091, forbidding alienation of trust estate either by trustee or beneficiary. Id.

**2, 3.** Elliott v. Delaney [Mo.] 116 SW 494.

**4.** Provision for reversion to donors' heirs should a trust fail held not to invalidate trust. Kasey v. Fidelity Trust Co. [Ky.] 115 SW 739.

**5.** Hudgins v. Bowes [Tex. Civ. App.] 110 SW 178.

**6.** Remainder in fee to persons in being but limited on prior remainder in fee on contingency which might not happen within two lives held void. In re Wilcox, 194 N. Y. 288, 87 NE 497.

**7. Search Note:** See notes in 10 C. L. 1169; 3 L. R. A. (N. S.) 668; 6 Id. 330; 10 Id. 564.

See, also, Perpetuities, Cent. Dig. §§ 1-73; Dec. Dig. §§ 1-9; 22 A. & E. Enc. L. (2ed.) 908; 24 Id. 863.

**8.** Fifty year trust held void, not being measured by lives. Walter v. Walter, 60 Misc. 383, 113 NYS 465.

**9.** Testamentary power to appoint to issue

Under a general power giving the donee the power to appoint at his pleasure, the period of suspension was computed at common-law from the time of the exercise of the power.[10] Where several trusts are carved out of a fund each will be considered by itself,[11] and if each trust is made distinct it is not necessary that testator actually sever the trust fund.[12] A corporate annuitant will not be deemed a life in being so as to invalidate a trust.[13] Particular limitations are considered below.[14]

of devisee held special and measurable from death of first devisor. Bartlett v. Sears [Conn.] 70 A 33.

**10.** Since donee could appoint himself and thus acquire absolute power of disposition equivalent to actual ownership. Farmers' Loan & Trust Co. v. Kip, 192 N. Y. 266, 85 NE 59. Will limiting trust estate for life of "longest liver" of two daughters, and giving one-fifth of remainder to "appointees of my daughter F by deed or will," when construed in light of statutes and of testator's intent, held not to transmute F's estate in remainder into an estate in fee, making her power of disposition equal to unrestricted ownership so as to authorize computation of period of suspension from time power was exercised; and hence F's testamentary appointment in trust for life of her grandniece with remainder over was void as adding another life to suspension already due to will of her father. Id.

**11.** Will construed to mean that interest on trust fund be paid to widow for life, then to two sons, and on death of either son half of fund should be divided among children of such son. Held not to suspend absolute ownership of personalty for continuance of more than two lives in being at testator's death. Post v. Bruere, 127 App. Div. 250, 111 NYS 51. Will dividing income of estate into three shares for widow, daughter and grandson, widow's share on her death to go to daughter and grandson, daughter's on her death to grandson, and grandson to have his full share of principal of testator's estate on arrival at 26, held to create not a single invalid trust, but three valid ones differing in duration and with remainders to next of kin. Beatty v. Godwin, 127 App. Div. 98, 111 NYS 373.

**12.** Post v. Bruere, 127 App. Div. 250, 111 NYS 51.

**13.** Fitchie v. Brown, 211 U. S. 321, 53 Law. Ed. 202.

**14.** Where C, who was life beneficiary under will of S, exercised power given by such will by appointment for absolute transfer at her death of shares to then living issue of any of her deceased children, shares of her surviving children to be held in trust by her husband for life of each child, unless in his discretion husband should pay share over to such child when of age free of trust, and on death of such child his share to go to his appointee by will or in default of such appointment to persons entitled under intestacy laws, appointment was valid at common law as to C's surviving children, their interests having vested at death of C who was in being at death of S. Bartlett v. Sears [Conn.] 70 A 33. Life estate to C's children being given to immediate issue of C who was in being at death of S, held not void under statute in force at latter's death. Id. Provision for C's grandchildren held void under statute in force at death of S, though such statute was repealed before execution of C's will. Id. Appointment of remainder after death of C's surviving children held void, not vesting necessarily until after 21 years from death of C. Id. Income to sons for life, then to their "heirs at law," and on death of their "wives and children" to son's grandchildren, held valid as to "heirs at law," construed to mean wives and children. Wolfe v. Hatheway [Conn.] 70 A 645. Provision for grandchildren held void, sons having children but no grandchildren at testatrix's death. Id.

**Held valid:** Will construed to limit contingent remainder on death of life tenant without leaving children or grandchildren, and not on an indefinite failure of issue so as not to suspend power of alienation for longer than lives in being. Kasey v. Fidelity Trust Co. [Ky.] 115 SW 739. Contract to permit prospecting on defendant's land and in case of success to purchase held but a promise of sale subject to suspensive condition and not void as a perpetuity because no time was fixed. Anse La Butte (Le Danois) Oil & Mineral Co. v. Babb [La.] 47 S 754. Gift to incorporated missionary society capable of taking gifts "to be applied for purposes of its organization." Ege v. Hering [Md.] 70 A 221. "Church Home and Infirmary of Baltimore * * * to endow a bed according to the custom and purpose of that institution," held valid. Id. Deed to one and his heirs, in trust, for benefit of grantor for life, then "for benefit of her son and his heirs forever," held valid, it being apparent that intent was only to provide for maintenance of grantor and son so long as they or survivor should live. Brown v. Reader [Md.] 71 A 417. To wife for life, property then to be divided into eight parts to be held by executors as trustees for eight children, each part for life of child beneficially interested, and on death of such child his share to vest in his issue, with remainder over in default of issue. Tonnele v. Wetmore, 124 App. Div. 686, 109 NYS 349. Not invalidated by provision that trustees should have power to retain property unsold and undivided until after 1867, coupled with power to sell if they deemed best. Id. Provision for contingent remainder to a college held not to create a trust in favor of college so as to violate rule against perpetuities, despite direction for investment in a fund known as "B Fund," income of which was to be applied as trustees of college might deem best. Hasbrouck v. Knoblauch, 59 Misc. 99, 112 NYS 159. A sum of money to two granddaughters who were not to receive it until they were 25 years old held not to suspend absolute ownership for term of years without trustee to hold or transfer the property. In re Becker, 59 Misc. 135, 112 NYS 221. To wife in trust for support of herself and three children until youngest

*Charitable gifts* See 10 C. L. 1169 are usually exempted from the operation of the rule.[15]

*Accumulations of income.* See 10 C. L. 1169—An accumulation of interest for one life is valid at common law,[16] but by statute accumulations for a period exceeding a minority are often prohibited.[17] When no valid direction is given for the ac-

of them should become of age, when property should be divided between wife and six children, held valid, suspension being for only a minority. In re Mikantowicz's Will, 60 Misc. 273, 113 NYS 278. Trusts for minority of three grandchildren, share of each grandchild to be paid to him when he arrived at 21, and to survivors should he die before that age and should survivors then be of age, and if such survivors were not then of age, to be added to fund held in trust for them, held not invalid at least in so far as pertaining to life of each grandchild. In re Buchner, 60 Misc. 287, 113 NYS 625. To E for life, remainders to E's adult children absolutely, and, as to minor children, their shares to be held until their respective majorities with provision that should any one die in minority his share should be divided between and added to shares of survivors. Held sustainable on theory that testator intended that share of dead infant should at once be paid over to surviving brothers and sisters, regardless of age. Hardenbergh v. McCarthy, 114 NYS 1073. Will creating trust in favor of two children and heirs and next of kin of such children in case of death of either or both, and providing several ways of terminating trust held valid since trust could not extend beyond life of grandchild living at death of testator. Stephens v. Dayton, 220 Pa. 522, 70 A 127. **Ninety-nine year lease with covenant** on part of lessor, heirs and assigns, **to convey fee** to lessee, heirs and assigns on payment of specified amounts. Hollander v. Central Metal & Supply Co. [Md.] 71 A 442. Legacy to town council to hold in perpetual trust for ornamentation and repair of testator's **burying ground** held saved from rule against perpetuities by Gen. Laws 1896, c. 40, § 35, authorizing town councils to receive and execute such trusts. Rhode Island Hospital Trust Co. v. Warwick Town Council [R. I.] 71 A 644. Common-law rule held not violated by will creating trust for **"as long a period as is legally possible,"** to terminate when the law required it "under the statute," to pay annuities therefrom to certain designated annuitants and their heirs, and providing for distribution of trust fund on termination of the trust to those then entitled to the annuities, since testator must have intended to measure duration of trust by lives of annuitants named in will and 21 years, and that distribution of entire trust estate should take place at expiration of the trust term. Fitchie v. Brown, 211 U. S. 321, 53 Law. Ed. 202.

**Held invalid:** Income to C for life then fund to her "issue" as per her will, if any, and if no will then to be divided equally among such "issue," held void as to remainder in absence of will, "issue" being held to mean "descendants." Bartlett v. Sears [Conn.] 70 A 33. To wife for life, then to brother and sister, and, on death of either, to survivor for life with remainder over to nephew and niece, held void both as to trusts and remainder. Simpson v. Trust Co., 59 Misc. 96, 112 NYS 155. Income successively for lives of brother, sister and widow, remainder to nephews and nieces. Simpson v. Trust Co., 112 NYS 370. One-third of estate to widow for life, then to be added to shares of brothers or sisters surviving testator, which shares were to be held and income distributed for life, and on death of any brother or sister his or her share to be added to shares of survivors, and on death of last survivor entire principal to go to others, held void. Simpson v. Trust Co., 129 App. Div. 200, 113 NYS 370. Realty and personalty to daughter for life, then to her issue until majority, at which time each was to have his share absolutely, held invalid as to trust for daughter's issue, in that absolute ownership of personalty might be suspended during lives not in being at testator's death (In re Wilcox, 194 N. Y. 288, 87 NE 497), though it would have been valid as to realty if it could be assumed that trust was severable as to share of each issue (Id.). Limitation over in case daughter should die "leaving no issue which shall attain the age of 21" held void, contingency not necessarily occurring within two lives in being at testator's death. Id., rvg. 125 App. Div. 152, 109 NYS 564. Rule applicable to both realty and personalty. Id. To daughter and her children for life of daughter, then to surviving children on youngest arriving at 30, held void as to children, their interests not necessarily vesting within 21 years after life in being at creation of such interests. Quinlan v. Wickman, 233 Ill. 39, 84 NE 38. Bequest for keeping a graveyard in good condition held void. Van Syckel v. Johnson [N. J. Eq.] 70 A 657. To father for life, then to four persons and survivor of them, then property to be sold for division of proceeds among children of four devisees and testatrix's half brothers and sisters then living, held violative of St. 1898, §§ 2038, 2039, as suspending absolute power of alienation beyond two lives and 21 years. In re Adelman's Will [Wis.] 119 NW 929. Not sustainable as several trusts. Id.

**15.** That trust to charity would be perpetual held immaterial. Kasey v. Fidelity Trust Co. [Ky.] 115 SW 739. Bequest toward salary of pastor of a church held charitable and valid but inseparable from another invalid bequest. Van Syckel v. Johnson [N. J. Eq.] 70 A 657. Bequest in trust for keeping up testator's cemetery lot held not a gift to religious, educational, charitable or benevolent use within Laws 1893, p. 1748, c. 701, but invalid. In re Waldron, 57 Misc. 275, 109 NYS 681.

**16.** Kasey v. Fidelity Trust Co. [Ky.] 115 SW 739.

**17.** Direction for accumulation of income in favor of son until he should arrive at 25 held valid for son's minority and void for time thereafter. In re O'Reilly, 59 Misc.

cumulation of rents and profits pending a legal suspension, such rents and profits will go to the persons presumptively entitled to the next eventual estate.[18]

§ 3. *Operation and effect; complete and partial invalidity.*[19] See 10 C. L. 1171 Invalid provisions not integral parts of a general scheme may be ignored.[20] Where a remainder in trust during the minority of issue is coupled with an absolute gift to them on their arrival at age, the invalidity of the trust entitles the issue to the trust fund on the death of the life tenant.[21]

**Personal Injuries; Personal Property; Persons; Petitions,** see latest topical index.

## PETITORY ACTIONS.[22]

*The scope of this topic* is noted below.[23]

Plaintiff must recover upon the strength of his own title and not on the weakness of that of a defendant in possession,[24] and must show title to the particular property in dispute,[25] and a like rule applies to a defendant who by claim of title converts an action into a petitory form.[26] Where a succession is accepted by one un-

136, 112 NYS 208. Direction that wife need not pay any interest on a mortgage in her lifetime, and if she willed her property to charitable institutions mortgage should be canceled, but if not then it should be collected with interest, held not an accumulation of income so as to be void. In re Harteau, 125 App. Div. 710, 110 NYS 59.

**18.** Where accumulations after death of a son and during life of widow became invalid. Koch v. Semken, 58 Misc. 90, 108 NYS 771. Where daughter died during term of trust for son and daughter, income which would have gone to daughter had she lived went to son. In re O'Reilly, 59 Misc. 136, 112 NYS 208. Where under will creating a trust in favor of three beneficiaries interest of a beneficiary who died during the trust term passed to her husband as to principal, but with possession postponed until trust should terminate as provided in the will, income went to husband until termination of trust, he being entitled to next eventual estate. Levi v. Scheel, 124 App. Div. 613, 109 NYS 182. Where new stock issued by corporation in which testator was stockholder was in excess of income over annual payments directed to be made by the will, it passed to certain charitable institutions, these being entitled to next eventual estate and accumulation being unlawful under statute. In re Harteau, 125 App. Div. 710, 110 NYS 59. Immaterial that only residue of trust estate, after payment of bequests and annuities, could pass to charitable institutions. Id.

**19. Search Note:** See notes in 20 L. R. A. 509; 3 L. R. A. (N. S.) 639; 14 Id. 66; 15 Id. 900; 64 A. S. R. 634; 5 Ann. Cas. 431.

See, also, Perpetuities, Cent. Dig. §§ 1-73; Dec. Dig. §§ 1-9; 22 A. & E. Enc. L. (2ed.) 723; 24 Id. 872.

**20. Held severable:** Life estates held not affected by invalidity of remainders. Bartlett v. Sears [Conn.] 70 A 33; Quinlan v. Wickman, 233 Ill. 39, 84 NE 38. Testamentary power held not destroyed by violation of rule against perpetuities by alternative devise in case power should not be exercised. Bartlett v. Sears [Conn.] 70 A 33. Provision for contingency of death of minor child of life tenant without issue held severable from general scheme of testator if necessary because of illegality of direction that share of such minor should be added to shares of other children. Hardenbergh v. McCarthy, 114 NYS 1073.

**Held not severable:** Where bequest toward salary of a pastor, good because charitable and therefore not within rule against perpetuities, was indivisibly connected with provision for keeping a graveyard in order, invalid as a perpetuity, whole bequest was void. Van Syckel v. Johnson [N. J. Eq.] 70 A 657. Remainder limited on preceding invalid trusts held also invalid. Simpson v. Trust Co., 59 Misc. 96, 112 NYS 155. Invalid fifty year trust held integral part of general scheme of testator and held to invalidate entire distribution of residuary estate. Walter v. Walter, 60 Misc. 383, 113 NYS 465.

**21.** In re Wilcox, 194 N. Y. 288, 87 NE 497.

**22.** See 10 C. L. 1171.

**Search Note:** See Real Actions, Cent. Dig. §§ 21-35; Dec. Dig. §§ 6-8.

**23.** It treats only of matters peculiar to petitory actions under the Louisiana practice.

**24.** Evidence insufficient to establish ownership in plaintiff. Trellieu Cypress Lumber Co. v. Albert Hansen Lumber Co., 121 La. 700, 46 S 699. Declaration of appearers to a notarial act confirmatory of plaintiff's title that they were children and heirs of patentee held not evidence against defendant in possession. Id.

**25.** Under evidence intervenors held not to have exhibited title to any part of land in dispute, hence not entitled to a recovery on a title describing totally different property. Barbier v. Nagel, 121 La. 379, 46 S 941.

**26.** By setting up ownership to property involved in an action of slander of title, defendant converts the action into a petitory one. Teddle v. Riser, 121 La. 666, 46 S 688. As to the issue of ownership he has the burden of proof, and before he is in a position to attack the plaintiff's title, he must maintain his own. Id.

der the benefit of inventory and the de cujus dies testate, his heir and universal legatee under the will, cannot recover the property as an heir at law ignoring the will, and thereby avoid all accounting to an adjudicatee of property of the succession who is an innocent third person,[27] nor, if the heir is entitled to the property, can he recover the same without first tendering the amount of the purchase price.[28] In a petitory action, a defendant possessor in bad faith[29] cannot recover the value of improvements in their nature inseparable from the soil except by way of set off,[30] nor for the value of buildings and constructions separable from the soil unless the plaintiff elects to keep them,[31] but he may recover the necessary expenses incurred in the preservation of the property.[32] Where the plaintiff does not elect to keep the separable buildings and constructions, the rental value of the property should be measured by the rental value of the property without the improvements.[33] The owner cannot recover rents anterior to his acquisition of title since such rents belong to the prior owner and do not pass to the vendee unless specially assigned.[34]

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**Pews; Photographs; Physical Examination; Physicians and Surgeons; Pilots,** see latest topical index.

## PIPE LINES AND SUBWAYS.[35]

*The scope of this topic* is noted below.

The right of a corporation to lay conduits in the public streets must be answered by reference to its articles of incorporation and the acts of the legislature under which they were executed,[37] and the consent of the municipality[38] for which reasonable conditions may be imposed if no contract obligation is violated thereby.[39] The right to construct a separate conduit should be refused where it does not appear that the conduits already constructed are inadequate.[40] The purposes for which lessee of ducts in subways may use the ducts depend upon the construction of

**27.** Hibernia Bank & Trust Co. v. Whitney [La.] 48 S 314.

**28.** Return of price essential to recovery of property sold to pay debts, if sale is void. Hibernia Bank & Trust Co. v. Whitney [La.] 48 S 314.

**29.** Possessor knowing that he has no title is necessarily one in bad faith. Quaker Realty Co. v. Bradbury [La.] 48 S 570.

**30.** Set-off to plaintiff's demand for fruits and revenues. Quaker Realty Co. v. Bradbury [La.] 48 S 570.

**31.** Quaker Realty Co. v. Bradbury [La.] 48 S 570.

**32.** For taxes and repairs on works belonging to owner. Quaker Realty Co. v. Bradbury [La.] 48 S 570.

**33, 34.** Quaker Realty Co. v. Bradbury [La.] 48 S 570.

**35.** See 10 C. L. 1171.

**Search Note:** See note in 6 Ann. Cas. 390.

See, also, Electricity, Dec. Dig. § 9; Eminent Domain, Cent. Dig. §§ 80, 313; Dec. Dig. §§ 34, 119 (10); Gas, Cent. Dig. §§ 2, 3; Dec. Dig. §§ 7, 9; Municipal Corporations, Cent. Dig. §§ 562, 563; Dec. Dig. § 207; Warehousemen, Dec. Dig. § 25(6); Water and Water Courses, Cent. Dig. §§ 147, 223-232, 280; Dec. Dig. §§ 144½, 168, 193, 194; 22 A. & E. Enc. L. (2ed.) 825.

**36. It includes** only matters peculiar to underground conveyance. **It excludes** subway companies as common carriers (see Carriers, 11 C. L. 499), or as employers of labor (see Master and Servant, 12 C. L. 665), and matters relating to the supplying of the public with gas (see Gas, 11 C. L. 1645), or water (see Waters and Water Supply, 10 C. L. 1996). The exercise of the right of eminent domain is also treated elsewhere (see Eminent Domain, 11 C. L. 1198).

**37.** Essential purpose of relator's incorporation, incorporated under Laws 1848, p. 392, c. 265, is to lay electric conductors and not to make conduits. People v. Ellison, 188 N. Y. 523, 81 NE 447.

**38.** Consent granted by aldermen held to be to lay electric conductors and not to make conduits. People v. Ellison, 188 N. Y. 523, 81 NE 447.

**39.** Laws 1884, p. 647, c. 534; Laws 1885, p. 852, c. 499 and Laws 1891, p. 427, c. 231, and contracts made by board of commissioners of electric subways thereunder, held not to violate relator's right, effect of same being to require that electric conductors be laid in conduits constructed in accordance with the general plan prepared in accordance with the statutes. People v. Ellison, 188 N. Y. 523, 81 NE 447.

**40.** Duty of commissioners of water supply, gas and electricity to refuse permit to construct separate conduit, no showing being made that existing conduits were inadequate or that relator, if authorized to use telegraph and telephone conductors, could not on payment of a reasonable rental use those conduits for carrying on purposes for which it was incorporated. People v. Ellison, 188 N. Y. 523, 81 NE 447.

the lease made in pursuance with the rapid transit act.[41] A special franchise to operate a subway acquired under assignment of a contract with a city is exempt from special franchise tax by the exemption of the tax law of a municipality from such tax.[42] A municipality is not liable for an injury caused by the explosion of an inordinate quantity of dynamite stored in a street by a subcontractor in constructing a section of a rapid transit subway.[43] The legislature has power to grant owners of gas well the right of eminent domain for the purpose of piping their products to market,[44] and provide for the use of the highways in the state as well for through travel as for the through transmission of gas, water or other commodities from one place to another, without regard to the question of whether any municipality through which it may pass or those who own the soil of the ways subject to the public easement therein are served or in any way benefited by such use.[45] The laying of pipe lines for the transmission of gas through and under a public street does not impose such additional servitude as entitles the owners of the fee to compensation before a permit can issue,[46] nor does the grant of a location for pipe lines under the express term of the statute effect the right or remedy to recover damages for any injury caused to persons or property by the doings of the company,[47] nor is it material that part of the location of the proposed line is to run through private land.[48] The jurisdiction of a board of aldermen and of the board of gas and electric light commissioners, on appeal, of a petition for a location, is not affected by the fact that part of the location is to run through private land, and that it is unnecessary that the termini at each side of the private land must be stated in the petition,[49] as where the alderman neglects for 30 days to act upon a petition, the board of gas and electric light commissioners acquires upon the company's appeal power to grant a location to the company.[50] In a proper case mandamus will lie to compel the issuance of a permit to lay pipe lines,[51] but when a line constitutes but a private use of the highway,[52] the mere fact that the public is permitted to use water therefrom and that one is duly authorized to lay such pipe does not entitle one to maintain the same without the consent of the owner or the fee to the land through which it runs.[53] A lease granting to a gas company the exclusive right to construct pipe lines across

**41.** Lease under Rapid Transit Act, Laws 1891, p. 3, c. 4, amended by Laws 1892, p. 158, c. 102; Laws 1892, p. 1087, c. 556; Laws 1894, p. 1125, c. 538; Laws 1894, p. 1873, c. 752; Laws 1895, p. 887, c. 519, and Laws 1896, p. 715, c. 729, held to authorize use for transmission for sale of electric currents for motive power, so long as the business did not interfere with operation of the railroad. City of New York v. Interborough Rapid Transit Co., 125 App. Div. 437, 109 NYS 885.

**42.** Statutes considered and operator of subway held exempt from taxation. People v. State Board of Tax Com'rs, 126 App. Div. 610, 110 NYS 577. See Taxes, 10 C. L. 1776.

**43.** Murphy v. New York, 128 App. Div. 463, 112 NYS 807. Immaterial as to liability, where 200 pounds of dynamite exploded, that permit, even if valid, was given to store 50 pounds. Id.

**44.** Ky. St. 1903, § 3766a, conferring right, held constitutional. Calor Oil & Gas Co. v. Franzell, 33 Ky. L. R. 98, 109 SW 328.

**45.** Cheney v. Barker, 198 Mass. 356, 84 NE 492.

**46.** St. 1896, p. 566, c. 537, § 5, amended by St. 1903, p. 396, c. 417, § 9, not unconstitutional for failure to provide compensation. Cheney v. Barker, 198 Mass. 356, 84 NE 492.

**47, 48.** Cheney v. Barker, 198 Mass. 356, 84 NE 492.

**49.** St. 1896, p. 566, c. 537, § 5, amended by St. 1903, p. 396, c. 417, § 9. Cheney v. Barker, 198 Mass. 356, 84 NE 492.

**50.** Alderman's action after expiration of 30 days a mere nullity. St. 1896, p. 566, c. 537, § 5, amended by St. 1903, p. 396, c. 417, § 9. Cheney v. Barker, 198 Mass. 356, 84 NE 492.

**51.** Under statute and ordinance, held duty of aldermen to pass upon application on appeal and mandamus will lie to compel issuance of permit. Cheney v. Barker, 198 Mass. 356, 84 NE 492.

**52.** Trench dug in highway in front of plaintiff's lot to supply water to hotel held a private use not within the public easement. Cary v. Dewey, 127 App. Div. 478, 111 NYS 261.

**53.** Where consent was obtained as authorized by Highway Law, Laws 1890, p. 1180, c. 568, § 14, as amended by Laws 1897, p. 85, c. 204. Cary v. Dewey, 127 App. Div. 478, 111 NYS 261

the lessor's land is void as against public policy in so far as it grants an exclusive right.[54]

**Place of Trial; Plank Roads; Plate Glass Insurance,** see latest topical index.

**PLEADING.**


**§ 1. Principles Common to All Pleadings, 1323.** Interpretation and Construction in General, 1331. Profert and Oyer, 1334. Exhibits, 1334. Bills of Particulars, 1335.
**§ 2. The Declaration, Count, Complaint, or Petition, 1338.** General Rules, 1338. Consolidation of Suits, 1342. Joinder of Causes of Action, 1342. Election, 1346. Splitting Causes of Action, 1346. Prayer, 1347.
**§ 3. The Plea or Answer, 1347.** General Principles, 1347. Denials and Traverses, 1351. Confession and Avoidance, 1352.
**§ 4. Replication or Reply and Subsequent Pleadings, 1352.** Additional Pleadings, 1354.
**§ 5. Demurrer, 1354.**
**§ 6. Cross Complaints and Answers, 1362.**
**§ 7. Amendments, 1362.**
**§ 8. Supplemental Pleadings, 1374.**
**§ 9. Motions Upon the Pleadings, 1374.**
**§ 10. Right to Object, and Mode of Asserting Defenses and Objections; Whether by Demurrer, Motion, etc., 1376.**
**§ 11. Waiver of Objections and Cure of Defects, 1380.**
**§ 12. Time and Order of Pleadings, 1385.**
**§ 13. Filing, Service, and Withdrawal, 1386.**
**§ 14. Issues Made, Proof and Variance, 1387.** The General Issue and General Denials, 1387. Special Issues and Special Denials, 1388. Proof and Variance, 1389. Admissions in Pleadings or by Failure to Plead, 1394. Judgment on the Pleadings, 1397.


*The scope of this topic* is noted below.[55]

§ 1. *Principles common to all pleadings.*[56] *General rules.*[See 10 C. L. 1173] The purpose of a pleading is to frame and present issues.[57] In code states the only proper pleadings are those designated by the code.[58] In code states it is not necessary that any particular name be given a pleading,[59] but it is sufficient if it states facts constituting a cause of action or defense.[60] The character of a pleading is to be determined from its allegations and prayer.[61]

**54.** Calor Oil & Gas Co. v. Franzell, 33 Ky. L. R. 98, 109 SW 328. Lease being void, holder not entitled to compensation for invasion of its exclusive right in condemnation proceeding by another of a similar right of way (Id.) nor for loss of rent because of abandonment by holder of the exclusive right of lease under which right was claimed (Id).

**55.** This topic treats only of the general rules applicable to common law and code pleading. For the sufficiency of pleadings in particular actions, reference should be had to appropriate topics. Matters particularly applicable to equity pleading (see Equity, 11 C. L. 1235) and to affidavits of merits of claim or defense (see Affidavits of Merits of Claim or Defense, 11 C. L. 59). The necessity of verified pleadings and the sufficiency of verification (see Verification, 10 C. L. 1992) and all questions in regard to set-off and counterclaim (see Set-off and Counterclaim, 10 C. L. 1623) have been excluded.

**56. Search Note:** See notes in 6 C. L. 1014; 48 L. R. A. 177; 50 Id. 161; 59 Id. 209; 1 L. R. A. (N. S.) 777.

See, also, Pleading, Cent. Dig. §§ 1-90; Dec. Dig. §§ 1-38; 3 A. & E. Enc. P. & P. 517; 4 Id. 556, 741; 6 Id. 18, 245; 8 Id. 736; 10 Id. 578; 18 Id. 639, 738; 19 Id. 181, 251; 20 Id. 1, 1000; 21 Id. 223.

**57.** Tate v. Rose [Utah] 99 P 1003. Code Civ. Proc. requires pleadings to accomplish this purpose by setting forth facts in plain concise language. National Stamping & Elec. Works v. Wicks, 129 Mo. App. 382, 108 SW 598. Is to inform the adverse party of the cause of action or defense relied upon so that he may have opportunity to meet it. Soden v. Murphy, 42 Colo. 352, 94 P 353.

**58.** In Florida plea of nil debit is not permissible in any action and plea of non-assumpsit is inadmissible to the common courts. Poppell v. Culpepper [Fla.] 47 S 351. Code Civ. Proc. does not authorize a defensive pleading designated as "an affirmative cause of action." National Gum & Mica Co. v. MacCormack, 124 App. Div. 569, 109 NYS 286.

**59.** Right to recover will not be limited by the name given the pleading unless it has misled adverse party. Swank v. Sweetwater Irrigation & Power Co. [Idaho] 98 P 297.

**60.** Complaint which states facts authorizing recovery either under common law or statute is sufficient against demurrer. Pittsburgh, etc., R. Co. v. Rogers [Ind. App.] 87 NE 28. Complaint may be good though the pleader mistakes as to the law awarding him his right. Id.

**61.** Not by what the pleader calls it. Cleveland, etc., R. Co. v. Rudy [Ind. App.] 87 NE 555; Swank v. Sweetwater Irrigation & Power Co. [Idaho] 98 P 297. Classification of cause of action depends upon allegations of the complaint and cannot be affected by admission or opinion of counsel. Bunting v. Hutchinson [Ga. App.] 63 SE 49. Complaint for goods sold held on quantum meruit. Isbell-Porter Co. v. Heineman, 126 App. Div. 713, 111 NYS 332.

Where the court is of limited or special jurisdiction, facts to bring the case within its jurisdiction must be alleged.[62] While the allegation of the time a material fact alleged took place is seldom material,[63] yet pleadings in personal actions must allege every traversable fact to have taken place on a particular day.[64] One seeking to avail himself of a statute must allege facts sufficient to bring himself within its provisions.[65] Foreign statutes must be pleaded if relied upon.[66] Defenses need not be anticipated or negatived,[67] but where a defense is suggested by averment essential to the cause of action, it must be shown not to exist.[68]

62. See Jurisdiction, 12 C. L. 458; Justices of the Peace, 12 C. L. 496. Where a complaint states material facts essential to give the court jurisdiction, it is sufficient. McDaniel v. Staples [Tex. Civ. App.] 113 SW 596. All jurisdictional facts must be alleged. White v. Atlanta B. & A. R. Co. [Ga. App.] 63 SE 234.

63. Gordon v. Journal Pub. Co. [Vt.] 69 A 742. Complaint not demurrable because it shows the cause to be barred. Bulkley v. Norwich & W. R. Co. [Conn.] 70 A 1021. An allegation of time originally immaterial may become material by reason of subsequent pleading. Such result, however, does not follow from demurring. Id. In pleading a judgment it is proper but not always necessary to allege the date thereof, and failure to do so is immaterial where no issue was made rendering the date important. United States Fidelity & Guar. Co. v. People [Colo.] 98 P 828.

64. Words "on about" are indefinite and uncertain. Gordon v. Journal Pub. Co. [Vt.] 69 A 742. The requirement of certainty is not relaxed by the rule that a variance between the time alleged and proved is not fatal. Id.

65. This rule applies to a pleading setting up a homestead right. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219. Where a pleader desires to avail himself of a statutory privilege or right to be granted on particular facts, he must allege such facts. Perkins v. Loux, 14 Idaho, 607, 95 P 694. In order for a plaintiff to avail himself of the protection of the factory act, it is sufficient to plead negligence bringing the case within the statute; specific reference need not be made to the statute. Fowler Packing Co. v. Enzenperger, 77 Kan. 406, 94 P 995. Where a complaint is founded on a statute excepting certain acts, it must show the case without the exception. Chicago & E. I. R. Co. v. Hamilton [Ind. App.] 85 NE 1044. In action based on the Act of Feb. 28, 1903, limiting hours of service of railroad employes but providing that it shall not apply to cases of accident, etc., an allegation that no necessity existed for continuous employment held insufficient. Id. Where an action is brought under a public statute, it is necessary to refer to the section number of the statute. McKenzie v. United R. Co. [Mo.] 115 SW 13. Complaint in statutory action must state facts bringing the case within the statute, and any omission cannot be supplied by intendment. Zeller, McClellan & Co. v. Vinardi [Ind. App.] 85 NE 378. Under laws of Georgia requiring invalidity of statute to be alleged by special plea and Rev. St. § 914 requiring pleadings in federal courts to conform to rules of practice of state courts, such objection must be pleaded in a federal court to be available. Southern R. Co. v. King [C. C. A.] 160 F 332.

66. Where a party seeks to recover or defend under a foreign statute, such law must be pleaded and proved as any other fact. Peck v. Noee [Cal.] 97 P 865. So much of the law of a sister state or foreign country as is material to the case must be set forth. When so set forth, the question as to its legal effect is one of law. Jenness v. Simpson [Vt.] 69 A 646.

See Conflict of Laws, 11 C. L. 665.

67. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574; Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 P 1029; Boothe v. Farmers' & Traders' Nat. Bank [Or.] 98 P 509; Ferrandini v. Bankers' Life Ass'n [Wash.] 99 P 6. In trespass to try title, plaintiff alleged title and in reply to defendant's plea of limitations alleged that one under whom defendant claimed entered under an executory contract to purchase which was never performed, plaintiff was not required to allege the terms of the contract, as any equity defendant had thereunder was matter of defense to be specially pleaded. Glenn v. Rhine [Tex. Civ. App.] 115 SW 91. A plaintiff suing for damages for nondelivery of an express package is not bound to negative a defense of limitations on the amount of damages. Silverman v. Weir, 114 NYS 6. Under the direct provisions of Burns' Ann. St. 1908, § 362, contributory negligence need not be negatived. Inland Steel Co. v. Yedinak [Ind.] 87 NE 229. A complaint by a servant for injuries need not negative assumption of risk. Pennsylvania R. Co. v. Forstall [C. C. A.] 159 F 893. The exception to the law, relieving railroad companies from liability for injuries to stock which entered right of way through gates at farm crossings, is a subsequent enactment and constitutes matter of defense. Central Indiana R. Co. v. Smith [Ind. App.] 85 NE 26. Contributory negligence need not be negatived. Culbertson v. Empire Coal Co. [Ala.] 47 S 237; American Bolt Co. v. Fennell [Ala.] 48 S 97. Complaint in an action under a statute need not negative a proviso therein. Lane v. Bell [Tex. Civ. App.] 115 SW 918. Complaint for wrongful interference with business need not allege that business was lawful. Sparks v. McCrary [Ala.] 47 S 332. One suing in equity is not required to plead the equities of his adversary. Nueces Valley Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633.

68. Karr v. Putnam County Com'rs, 170 Ind. 571, 85 NE 1. Facts showing that a cause is not barred by limitations because of some exception should be pleaded. Burrus v. Cook [Mo.] 114 SW 1065.

A pleading may properly be entitled in the initials of the Christian name of the defendant.[69] In action on account plaintiff should sue in his Christian name.[70] Written pleadings are not always necessary.[71] The paragraphs of a long pleading should be numbered,[72] though in some jurisdictions this practice is not favored.[73]

Whatever circumstances are necessary to constitute a cause of action or ground of defense must be alleged.[74]

Allegations should be definite and certain,[75] direct and in issuable form,[76] and

**69.** Minchew v. Nahunta Lumber Co. [Ga. App.] 62 SE 716.

See Parties, 12 C. L. 1175, as to designation of parties.

**70.** Patrick v. Norfolk Lumber Co. [Neb.] 115 NW 780.

**71.** Where the issues defined by the record and announced by the court were clearly understood, it was held not error to require a trial to proceed without written pleading to a supplemental answer. Veysey v. Bernard, 49 Wash. 571, 95 P 1096.

**72.** Plaintiff may be compelled to number the paragraphs of a five page complaint. Schultheis v. Fishman, 115 NYS 102.

**73.** The numbering of paragraphs in a pleading is not approved for the reason that it leaves room for doubt and uncertainty as to whether it is intended to simply number the paragraphs or to number the causes of action. Toledo Gaslight & Coke Co. v. Toledo, 10 Ohio C. C. (N. S.) 490. The different breaches of a contract are separate causes of action if sued on when occurring, but if no action is brought until after the term of the entire contract, the different breaches become one cause of action, and it is error to require plaintiff to separately state and number the different breaches as separate causes. Id.

**74.** Currier v. King [Vt.] 69 A 873.

**75.** Vague allegations are insufficient. Esteves v. Bayou Terre-Aux-Boeufs Drainage Dist. Com'rs, 121 La. 991, 46 S 992. Negligence must be charged in terms or facts must be averred sufficient to compel the inferences of such negligence. Cleveland, etc., R. Co. v. Perkins [Ind.] 86 NE 405. A cause must be alleged with **sufficient certainty to enable defendant to defend and to plead the judgment in bar of** another action. Kennedy v. McDiarmid [Ala.] 47 S 792. Whether a pleading is indefinite and uncertain within Code Civ. Proc. § 546, authorizing it to be made definite and certain, is to be determined from the pleading itself and not from affidavits. Deubert v. New York, 126 App. Div. 359, 110 NYS 403. It is not error to deny a motion to make more definite and certain where matters sought to be made more specific are within the knowledge of the movant. Sherman v. Hicks [N. M.] 94 P 959. Amended petition pleading former adjudication which does not show that the land involved was the same but simply charging that same titles were arranged against each other properly refused; same titles might not be as to same land. Adams v. Mineral Development Co. [Ky.] 116 SW 246. Counterclaim in action for the price of glass for the front of a building alleging loss of trade, expense of night watchman, etc., held not to allege deprivation of the use of any part of the building. Pittsburg Plate Glass Co. v. Monroe, 79 S. C. 564, 61 SE 92. All the statute requires is that a complaint be couched in such plain and concise language as to enable a person of common understanding to know what was intended. City of Laporte v. Osborn [Ind. App.] 86 NE 995. Complaint alleging that agent of defendant, while serving process for the purpose of effecting service and being encouraged by defendant, committed an assault, does not leave precise meaning in doubt and authorize an amendment under Code Civ. Proc. § 546. Gould v. McLaughlin, 112 NYS 513. Complaint to recover penalties for violation of pure food law by unlawful sale of milk need not separately state and number the causes of action where they are based on one sale of several cans, and to state and number them would make the complaint of ridiculous length. People v. Liberman Dairy Co., 59 Misc. 22, 109 NYS 1067. Reasonable certainty is all that is necessary to render pleadings exempt from attack by special demurrer. Atlantic Coast Line R. Co. v. Davis [Ga. App.] 62 SE 1022. If facts averred show that an accident occurred in the nighttime, it is a sufficient averment of darkness. Not necessary to allege that the night was dark. City of Laporte v. Osborn [Ind. App.] 86 NE 995.

**Held sufficient:** Averments that while plaintiff was driving along the street without knowledge of an obstruction and without being able to see it his horses ran against it are facts directly averred, and not mere recitals. City of Laporte v. Osborn [Ind. App.] 86 NE 995. Complaint alleging in substance that defendant constructed a sewer in 1899 which emptied onto plaintiff's land making it bog and quagmire and had continued such sewer though in 1902 it promised to remedy the evil, held not indefinite and uncertain. Deubert v. New York, 129 App. Div. 359, 110 NYS 403. Conspiracy held clearly enough charged. Richards v. Farmers' & Merchants' Bank, 7 Cal. App. 387, 94 P 393. Answer in action on a fire policy held sufficiently definite and certain. Board of Education v. Alliance Assur. Co., 159 F 994. Complaint against street railway company for failure to permit a passenger to alight at his destination held not demurrable for uncertainty. North Alabama Trac. Co. v. Daniel [Ala.] 48 S 50.

**76.** Facts material and necessary to constitute a cause of action must be directly averred. Cleveland, etc., R. Co. v. Perkins [Ind.] 86 NE 405; McEwen v. Hoffman [Ind. App.] 85 NE 364. An allegation of performance of a contract made in the alternative is not a sufficient allegation of other performance or waiver. Grant v. Cobre Grande Copper Co., 111 NYS 386. In actions for breach of contract, the contract

not left to inference [77] or pleaded by way of recital,[78] but facts alleged carry with them all necessary inferences.[79] Facts, not conclusions, must be alleged;[80] mat-

must be alleged with certainty, and the provisions imposing the obligations sought to be enforced alleged distinctly and positively and not generally or by inference. Kennedy v. McDiarmid [Ala.] 47 S 792. Amended pleading alleging that proof shows a certain fact to be true and that proof is uncontradicted is bad; should positively allege facts. Simpson v. Adams, 32 Ky. L. R. 617, 106 SW 819. An allegation that one has made no effort to do is not the equivalent of an allegation that one is able to do. Lyons v. American Cigar Co., 121 La. 593, 46 S 662. Cannot be supplied by inference or conjecture either at common law or under Burn's Ann. St. 1901, § 341. Wabash R. Co. v. Reynolds, 41 Ind. App. 678, 84 NE 992. A **hypothetical pleading** is bad. Stroock Plush Co. v. Talcott, 129 App. Div. 14, 113 NYS 214. A defense or counter claim which is hypothetically stated is subject to demurrer under Code Civ. Proc. § 494. Stroock Plush Co. v. Talcott, 129 App. Div. 14, 113 NYS 214.

**77.** Allegations must be stronger than to merely suggest an inference; they must be so strong as to enforce the inference which is necessary. Merchants' Mut. Tel. Co. v. Hirschman [Ind. App.] 87 NE 238. Where complaint for injuries left the amount of medical bills blank evidence thereof was not admissible. Lexington R. Co. v. Britton [Ky.] 114 SW 295. Claims for damages must be supported by sufficient allegations. Hildreth v. Western Union Tel. Co. [Fla.] 47 S 820; Currier v. King [Vt.] 69 A 873.

**78.** Mere recitals or conclusions of law are of no effect. Not admitted by demurrer. Pein v. Miznerr, 170 Ind. 659, 84 NE 981.

**79.** Pittsburgh, etc., R. Co. v. Rogers [Ind. App.] 87 NE 28. A pleading should state facts directly but may be aided by inference or presumption. Tate v. Rose [Utah] 99 P 1003.

**80.** Under Burns' Ann. St. 1908, § 343, a complaint must state facts and not conclusions. Dailey v. State [Ind.] 87 NE 4. In action to impeach judgment of court of general jurisdiction, facts showing want of jurisdiction and not conclusions must be alleged. Del Campo v. Camarillo [Cal.] 98 P 1049. In pleading fraud facts and not conclusions must be alleged. Groves v. Sexton [Ga. App.] 62 SE 731. A bare allegation of legal duty is insufficient; facts must be alleged. Chicago, & E. I. R. Co. v. Hamilton [Ind. App.] 85 NE 1044. Fraud must be alleged by stating facts constituting it. In re Nelson's Estate [Neb.] 115 NW 1087; McDonald v. Sullivan, 135 Wis. 361, 116 NW 10. Plea of failure of consideration of a note which does not set out the facts is bad. Light v. Henderson [Ala.] 48 S 588. Mere conclusions in a bill in chancery will not be considered. Benting v. Bell, 137 Ill. App. 600.

**Averments held to be conclusions:** Allegation in petition for mandamus to require a building inspector to issue a permit to make repairs "that it is the duty of the inspector, under the ordinances of the city to issue such permit." State v. Koch, [Wis.] 119 NW 839. Allegation that a corporation has "no legal existence at the present time." Elmergreen v. Weimer [Wis.] 119 NW 836. Allegation that certain acts were illegal and unauthorized. McLean v. Farmers' Highline Canal & Reservoir Co. [Colo.] 98 P 16. Allegation that a person was elected to a term of office commencing on a certain date. Russell v. State [Ind.] 87 NE 13. Allegation that a decree of naturalization was fraudulently and illegally procured. United States v. Rose, 166 F 999. Allegation that a conveyance by one railroad to another of the control and possession of its road was ultra vires and void under certain provisions of the constitution. Murray v. Chesapeake & O. R. Co. [Ky.] 115 SW 821. That a corporate election is void as contrary to the by-laws, etc. West End Athletic Ass'n v. Geiger, 140 Ill. App. 378. Allegations in a complaint by a co-operative insurance society to recover a delinquent assessment that insured was indebted to it in a certain sum, etc. Farmers' Home Ins. Co. v. Carey [Ky.] 113 SW 841. Allegation that plaintiff and defendant were partners. Baum v. Stephenson, 133 Mo. App. 187, 113 SW 225. Allegation that plaintiff is damaged in a certain sum. Connor v. National Roofing & Supply Co. [Ky.] 113 SW 122. An allegation that the court has no jurisdiction. Hendricks v. Calloway, 211 Mo. 536, 111 SW 60. Allegations that land descended to plaintiff and defendant and that plaintiff was a legal representative and heir at law of a deceased son. Toler's Heirs v. Toler, 33 Ky. L. R. 594, 110 SW 388. Allegation in petition to set aside judgment that plaintiff and her husband were not before the court in the action wherein judgment was rendered. Highland Land & Bldg. Co. v. Audas, 33 Ky. L. R. 214, 110 SW 325. Petition for removal of a cause alleging that petitioners' codefendants were not necessary nor proper parties, and that the sole purpose of making them parties was fraudulent and to deprive petitioner of its constitutional right, etc. Clinger's Adm'x v. Chesapeake & O. R. Co., 33 Ky. L. R. 86, 109 SW 315. Plea in action on note that defendant does not owe it, without stating any facts. Scott v. Rawls [Ala.] 48 S 710. In action by a tenant against a landlord for damages caused by bursting of a water pipe, an allegation that it was the duty of the landlord to keep the pipes in a safe condition. Charlie's Transfer Co. v. Malone [Ala.] 48 S 705. Plea that while a rock which fell and injured an employe was being lowered onto a car it was obviously dangerous to get onto the car, etc., and that the employe assumed the risk by getting onto the car. Tallahassee Falls Mfg. Co. v. Moore [Ala.] 48 S 593. Allegation as to effect of order of dismissal of bankruptcy proceedings. Zavelo v. Cohen Bros. [Ala.] 47 S 292. Allegation that certain persons were not qualified voters. Ham v. State [Ala.] 47 S 126. In action for royalties under contract by patentee granting the right to use the patent, an allegation that the patentee did not use reason-

able nmeasures to prevent nonlicensees from using the patent. Alexander v. American Encaustic Tiling Co., 61 Misc. 190, 113 NYS 261. In action by stockholder to enjoin corporation from selling property, an answer that it was necessary to sell such property at the valuation placed to conserve the interests of the corporation. Schwab v. E. H. Potter Co., 129 App. Div. 36, 113 NYS 439. In action by bank against a surety company for losses sustained on a renewal bond, that the bank "warranted" a statement by its cashier at time bond was made that its books were correct. Stapleton Nat. Bank v. U. S. Fidelity & Guar. Co., 60 Misc. 206, 113 NYS 25. Allegation that defendant "knowingly and wrongfully jeopardized lives," etc. Hollis v. Brooklyn Heights R. Co., 128 App. Div. 821, 113 NYS 4. An allegation in a suit to foreclose a mechanic's lien that a payment due plaintiff had not been made is a conclusion where no facts to sustain it were alleged. Mitchell v. Dunmore Realty Co., 60 Misc. 563, 112 NYS 659. Allegations that a signature was procured by fraud and that contract was executed under duress. McCormack v. McCormack, 127 App. Div. 406, 111 NYS 563. Allegation in suit to foreclose a mechanic's lien that defendant failed to pay a certain amount due without allegations of any contract or showing that any sum was due. Mitchell v. Dunmore Realty Co., 126 App. Div. 829, 111 NYS 322. Allegation that plaintiff "walved any and all rights which he may have had" under Laws 1903, p. 308, c. 132, prohibiting the unauthorized use of the name or picture of any person for advertising purposes. Wyatt v. Wanamaker, 58 Misc. 429, 110 NYS 900. Allegations that there was no adequate consideration for a contract and that its execution was procured by fraud. Ellis v. Keeler, 126 App. Div. 343, 110 NYS 542. Allegations that contract was executed under influence of pain induced by various unlawful acts and representations and was not a free act. Id. In suit in equity allegation in answer that plaintiff has an adequate remedy at law. Scheifer v. Freygang, 125 App. Div. 498, 109 NYS 848. Charge of omission or commission in action for negligence. People v. Equitable Life Assur. Soc., 124 App. Div. 714, 109 NYS 453. An allegation that it is the duty of a street commissioner by virtue of his office to keep streets in repair. Hungerford v. Waverly, 125 App. Div. 311, 109 NYS 438. Allegation that defendant "duly cancelled the policy of insurance." Mincho v. Bankers' Life Ins. Co., 124 App. Div. 578, 109 NYS 179. To allege in petition to remove cause to a federal court, that parties are citizens of different states, is a conclusion whether preceded or followed by explanatory facts. O'Connor v. Chicago, etc., R. Co. [Iowa] 117 NW 979. Allegations in complaint to determine rights to insurance that deceased did certain things. Farra v. Braman [Ind.] 86 NE 843. General allegation that a party acted fraudulently. People v. Henry, 236 Ill. 124, 86 NE 195. Allegation that there exists no adequate remedy at law where no facts are alleged. Streator v. Linscott, 153 Cal. 285, 95 P. 42. Allegation that it was a servant's duty to do a certain act and that in so doing he was injured. Chicago & E. I. R. Co. v. Hamilton [Ind. App.] 85 NE 1044. Allegations in plea of self-defense as to defendant's belief. Smith v. Wickard [Ind. App.] 85 NE 1030. Complaint for injuries to an employe that it was his duty to perform such work as might be required of him. Vigo Cooperage Co. v. Kennedy [Ind. App.] 85 NE 986. Complaint in eminent domain that "the change of line of said road is desirable with a view to a more easy ascent and descent to and from the same." Slider v. Indianapolis & L. Trac. Co. [Ind. App.] 85 NE 372. Allegation by board of county commissioners that it had never been made a party to drainage proceedings is a conclusion where by statute the county might have been made a party without being so named. Karr v. Putnam County Com'rs, 170 Ind. 571, 85 NE 1. Complaint against a telephone company for injuries caused by driving against a slack wire suspended over a street, that it was the duty of the company imposed by ordinance to keep its wires up. Cumberland Tel. & T. Co. v. Pierson, 170 Ind. 543, 84 NE 1088. Statement in complaint that plaintiff's hand was "inadvertently" caught in a mangle, etc., was bad on demurrer. Pein v. Miznerr, 170 Ind. 659, 84 NE 981. Allegation that injured person's wounds were so severe as to create an emergency calling for immediate medical attention. Cushman v. Cloverland Coal & Min. Co., 170 Ind. 402, 84 NE 759. Allegation in complaint for negligence that it was defendant's duty to do certain things. Facts must be set forth to show such duty. Bahr v. National Safe Deposit Co., 234 Ill. 101, 84 NE 717. Matters of record are not to be tried by a jury and a reply relating thereto should not conclude to the country. Probate Court v. Fitz-Simon [R. I.] 71 A 641. A pleading which alleged that on a certain date a certain rule was the law of a sister state. Jenness v. Simpson [Vt.] 69 A 646. Answer in action on fire policy that such policy provided that it should be void in case of fraud is a conclusion where policy conditions thereof were not set out. Norwich Union Fire Ins. Soc. v. Prude [Ala.] 46 S 974. Allegation that land is subject to a judgment lien. Greenwood v. Trigg, Dobbs & Co. [Ala.] 46 S 227. Allegation that transfer of defendant's interest in lands rendered it impossible for them to perform their contract. Hall v. Northern & So. Co. [Fla.] 46 S 178. Allegation that railroad was negligent in piling slag and placing a car near a crossing thereby frightening a horse. Louisville & N. R. Co. v. Barnwell [Ga.] 63 SE 501. Allegation that city negligently placed a sidewalk in an unsafe and defective condition and permitted it to remain so. Pullen v. Butte [Mont.] 99 P 290. Allegations that amounts due on bonds sued on are chargeable against the state, that money paid therefor was advanced to the state under contract to repay, and that the state sold the bonds as a purely commercial transaction. Union Trust Co. v. State [Cal.] 99 P 183. In action to impeach a judgment of a court of general jurisdiction, an allegation that the court did not have jurisdiction. Del Campo v. Camarillo [Cal.] 98 P 1049. Where contract sued on and another instrument referred to therein, both were pleaded and showed that defendant was to receive a good title and agreed to purchase allega-

ters of law should not be alleged.[81] Facts may, however, be pleaded according to their legal effect instead of alleging them as they actually exist,[82] though that which is a necessary inference from the facts alleged need not be stated.[83] In some states

tion that he agreed to accept for title as shown by the abstract furnished. Lawson v. Sprague [Wash.] 98 P 737. The general allegation of indebtedness in an action for money had and received. Fox v. Monahan [Cal. App.] 97 P 765. Allegation in bill by private persons to abate a nuisance that they are particularly and peculiarly injured. Van Buskirk v. Bond [Or.] 96 P 1103. Allegation that consideration for a contract was full and adequate. In re Wickersham's Estate, 153 Cal. 603, 96 P 311. Allegation that a city is charged with the duty of maintaining its streets in a safe condition. Herndon v. Salt Lake City, 34 Utah, 65, 95 P 646. Characterization of an act as having been done "with intent to defraud." Gill v. Manhattan Life Ins. Co. [Ariz.] 95 P 89. Allegation that on a specified date defendant was indebted to plaintiff in a certain sum. Chesney v. Chesney, 33 Utah, 503, 94 P 989. In action to recover money advanced by purchasers on a contract of sale. Allegations in answer that title to property sold passed to purchasers on date of contract. Prowers v. Nowles, 42 Colo. 442, 94 P 347. Description of one "as executrix" without any allegation that testator left a will, which has been admitted to probate, or, if so, that she has been appointed and qualified. Brinkerhoff v. Tiernan, 61 Misc. 586, 114 NYS 698. Allegation that a certain sum is now due and owing plaintiff is insufficient as an allegation of indebtedness, unless preceded by a statement of how the indebtedness arose. Chesney v. Chesney, 33 Utah, 503, 94 P 989. In action to enjoin interference with contract rights in patents, allegations of wrongful violation of plaintiff's rights by defendants by co-operating to irreparably injure plaintiff's business. Wise v. Tube Bending Mach. Co., 194 N. Y. 272, 87 NE 430. Allegation that obstruction was wrongfully placed in a street and maintained there an unreasonable length of time. Lefkovitz v. Chicago, 238 Ill. 23, 87 NE 58. Allegation in action for injury to passenger thrown from car platform that carrier held out its train as vestibuled held **in nature of a conclusion.** Pittsburgh, etc., R. Co. v. Schepman [Ind.] 84 NE 988.

**Averments held not to be conclusions:** The exercise of an option given a lessor to grant a renewal of the lease or pay the tenant the value of buildings on the premises is properly designated an election and an allegation that he "elected." Eisner v. Pringle Memorial Home, 130 App. Div. 559, 115 NYS 58. Answer alleging that decedent's injuries resulted directly from his negligence and stating the manner in which he was negligent is a good plea of contributory negligence. Sissel v. St. Louis & S. F. R. Co., 214 Mo. 515, 113 SW 1104. That possession of real estate is lawful. Ullery v. Guthrie, 148 N. C. 417, 62 SE 552. Complaint under oil and gas lease for rentals that oil and gas were found in paying quantities, and that there was a good market 10 miles distant, states ultimate facts. Indiana Natural Gas & Oil Co. v. Wilhelm [Ind. App.] 86 NE 86. The word "duty" may be used in characterizing the nature of a servant's employment where used to describe an ultimate fact as to character of work. Chicago, & E. I. R. Co. v. Hamilton [Ind. App.] 85 NE 1044. Allegation in complaint against a carrier for failure to furnish shipping facilities, that it held itself out as a through carrier. Pittsburgh, etc., R. Co. v. Wood [Ind. App.] 84 NE 1009. Averment that sums recited in a mortgage are fictitious and were never paid. Lamar & Rankin Drug Co. v. Jones [Ala.] 46 S 763. Statement in action for negligence that plaintiff was without fault. Charleston & W. C. R. Co. v. Lyons [Ga. App.] 63 SE 862. Allegation that assault alleged "was done in the prosecution of the company's business, and the said conductor and motorman were acting within the scope of the said company's authority." Savannah Elec. Co. v. McCants, 130 Ga. 741, 61 SE 713. Allegations of defenses in suit to foreclose a mortgage. Schaad v. Robinson, 50 Wash. 283, 97 P 104. Allegation that plaintiff owned a right of way across defendant's land and that it was appurtenant to his land is statement of an ultimate fact. Corea v. Higuera, 153 Cal. 451, 95 P 882. An allegation, which if the details of fact were set forth might properly be held a conclusion from those details, may, when unaccompanied by those details, very properly be held the statement of an ultimate fact. Gill v. Manhatton Life Ins. Co. [Ariz.] 95 P 89. In libel, allegations that defendant published the libelous article recklessly and willfully and without proper investigation. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574.

81. Currier v. King [Vt.] 69 A 873.

82. Allegation that one "purchased" the interest of another is good. Rosenbaum v. New York, 59 Misc. 30, 109 NYS 775. Under the rule that some facts are pleadable according to their legal effect, it is proper in a creditor's suit to allege that judgment was duly rendered in a court having jurisdiction and execution returned unsatisfied. Lehr v. Murphy, 136 Wis. 92, 116 NW 893. The common-law system of pleading despite all the rules against the pleading of "conclusions of law" often allowed conclusions of law to be pleaded as for example the ultimate fact which must be pleaded is frequently an inference, and conclusion from many evidentiary facts and is in a sense a mixed conclusion of fact and law. Crane v. Schaefer, 140 Ill. App. 647. It is not necessary to set out facts from which the conclusion follows, as a matter of law, that plaintiff and the negligent servant of the same master were not fellow-servants, but a general averment is sufficient. Bennett v. Chicago City R. Co., 141 Ill. App. 560. In action for wrong committed by defendant's servant, plaintiff may plead either that defendant committed wrong by his servant, or that the wrong was committed by defendant. Klugman v. Sanitary Laundry Co., 141 Ill. App. 422.

83. It is not necessary to allege that an

statutes permit to be alleged generally that which it would otherwise be necessary to particularize,[84] and permit judgments to be alleged by a statement that they were duly rendered.[85] Alternative relief may be sought in different counts.[86] At law only the ultimate facts as distinguished from matters of evidence should be alleged.[87] Nonissuable facts need not be alleged.[88] Negatives pregnant,[89] and irrelevant,[90] re-

act was "wantonly and willfully" done if the facts alleged clearly lead to that conclusion. Prussner v. Brady, 136 Ill. App. 395.

**84.** Negligence may be pleaded in general terms. Lexington R. Co. v. Britton [Ky.] 114 SW 295. Code Civ. Proc. § 457, expressly provides that in pleading the performance of conditions of a contract it may be alleged generally and facts showing such performance need not be alleged. Needham v. Chandler [Cal. App.] 96 P 325.

**85.** In pleading a judgment under Code Civ. Proc. § 532, pleader may allege that it was "duly made or given" and allegation in affidavit for examination in supplemental proceedings in Municipal Court that judgment was "duly procured" is equivalent to "duly given." Hottenroth v. Flaherty, 61 Misc. 108, 112 NYS 1111. Under Mill's Ann. Code § 65, permitting judgments to be pleaded by simply declaring that they were duly given or made complaint held sufficient. United States Fidelity & Guar. Co. v. People [Colo.] 98 P 828.

**86.** In action to recover personalty taken under attachment against a third person, it was proper for plaintiff in different counts to seek alternative recovery, either on the ground that it belonged to plaintiff and such third person as a firm or as joint owners. Merchants' & Farmers' Nat. Bank v. Johnson [Tex. Civ. App.] 108 SW 491.

**87.** Ultimate facts only need be alleged. Lovering v. Webb Pub. Co., 106 Minn. 62, 118 NW 61. Ultimate facts and not evidence thereof. Hubbell v. Hubbell, 7 Cal. App. 661, 95 P 664. It is not good pleading to set forth evidentiary facts. Hamilton v. Hamilton, 124 App. Div. 619, 109 NYS 221. Under the California system it is proper to plead evidence relied on to prove ultimate facts. Cragg v. Los Angeles Trust Co. [Cal.] 98 P 1063. Complaint charging ultimate facts necessary to be established is sufficient. Carscallen v. Coeur D'Alene & St. Joe Transp. Co. [Idaho] 98 P 622. Matter of proof need not be alleged. Ploof v. Putnam [Vt.] 71 A 188. A bill in equity should state every fact to which plaintiff intends to offer evidence but it is not necessary to allege minutely all matters tending to prove the general charge. Hollander v. Central Metal & Supply Co. [Md.] 71 A. 442. A complaint which alleges ultimate facts to be proved is sufficient. Indiana Natural Gas & Oil Co. v. Wilhelm [Ind. App.] 86 NE 86. Where a defendant sets up in his affidavit of defense certain facts and that he expects to be able to prove them, it is presumed that he will offer proper proof and he is not required to set forth the evidence nor the manner of proof. Gandy v. Weckerly, 220 Pa. 285, 69 A 858. Complaint against railroad company for failure to install cattle guards need not allege necessity that when demand therefor was made plaintiff showed the company that they were necessary. Atlanta, etc., R. Co. v. Brown [Ala.] 48 S 73. In action against city for injuries by falling into open drain ditch in street, city pleaded general denial and alleged specially that city had no sewers but that plaintiff fell into a ditch on a parking strip reserved to adjacent owners. Held facts specially pleaded were matters of evidence provable under the general denial and were properly stricken. Parker v. Bedford [Iowa] 117 NW 955. Paragraphs of an answer containing only matters of evidence and adding nothing to defenses set up in other paragraphs may be stricken. De Ajuria v. Berwind, 127 App. Div. 528, 111 NYS 1029. Evidence need not be pleaded. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. A complaint for breach of contract need not itemize each matter of expense. Dickerson v. Finley [Ala.] 48 S 548. Facts tending to establish negligence need not be alleged. Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N 784, 117 NW 910. In action for ice sold where defendant claimed that price agreed was less than the price charged, an allegation in the answer that plaintiff agreed to sell defendant ice at a certain price was sufficient without alleging that defendant agreed to take it. Woodbridge Ice Co. v. Semon Ice Cream Corp. [Conn.] 71 A 577. Allegation that "the books * * * showed defendant had taken from said business and wrongfully converted to his own use" a certain sum is not one of fact but of evidence to prove a fact, and is insufficient. Robinson v. Stanley, 61 Misc. 608, 114 NYS 162. Complaint for rentals under an oil and gas lease held to allege evidence. Indiana Natural Gas & Oil Co. v. Wilhelm [Ind. App.] 86 NE 86. A complaint for personal injuries should appraise defendant of the injury for which recovery is sought, but evidence by which it is to be established need not be alleged. Louisville R. Co. v. Ellerhorst, 33 Ky. L. R. 605, 110 SW 823. Allegations of mere evidence not necessary to a statement of the cause of action may be stricken on motion. Chittenden v. San Domingo Imp. Co., 125 App. Div. 855, 110 NYS 148.

**88.** In action for injuries to a servant, the issuable facts whether the master failed to promulgate proper rules and whether such negligence was the proximate cause of the injury held not necessary to allege a mere circumstance in the situation. Cristanelli v. Saginaw Min. Co. [Mich.] 15 Det. Leg. N. 784, 117 NW 910.

**89.** Where a complaint alleged that plaintiff had performed all the conditions of a contract by him to be performed, a denial in manner and form as alleged is not frivolous as a negative pregnant where failure to perform any would be fatal to his cause of action. Hudson Co.'s v. Briemer, 113 NYS 997. Reply denying on information, and belief that sums stated in answer as amount of rents received, and alleging that if defendants procured no greater sums it was

pugnant,[91] inconsistent,[92] redundant,[93] and scandalous [94] allegations should be avoided, and sham [95] or frivolous pleadings [96] should not be interposed. Surplusage will be disregarded.[97] Pleadings must be signed by the pleader [98] or his attorney.[99]

because of their neglect in management, admits that defendant received the sums stated. Eldriedge v. Hoefer [Or.] 94 P 563. Where complaint for loss of goods alleged that defendant had agreed to stand good for loss of goods shipped to them and, that the goods burned while in defendant's possession, denials that the goods were delivered to defendants under the contract, or that they had been destroyed, etc., held not to raise an issue. Federal Chemical Co. v. Green, 33 Ky. L. R. 671, 110 SW 859. In proceeding by landlord to recover premises from a tenant, answer of tenant denying on information and belief that as alleged "rent had been demanded from the tenant by service of a three days' written demand" is a negative pregnant. Browning v. Moses, 60 Misc. 111, 111 NYS 651. Where plaintiff sued for money loaned and defendants admitted receiving the money but asserted that a portion only of it was to be regarded as a loan and claimed a right to deduct a certain amount thereof on account of board furnished defendant and the answer alleged that there "remains due" on account of board a certain amount, held an admission that the entire claim of plaintiff was advanced as a loan. Hendelman v. Kahan, 50 Wash. 247, 97 P 109.

**90.** Order refusing to strike a portion of an answer as irrelevant and frivolous is not appealable though such matter might have been stricken. McCandless v. Mobley, 81 S. C. 303, 62 SE 260. Irrelevant and improper matter or matter which tends to embarrass a fair trial may be stricken. Hildreth v. Western Union Tel. Co. [Fla.] 47 S 820. Where a complaint states a cause for at least nominal damages, but contains claims for damages which have no legal basis in the allegations, and are irrelevant and improper, such claims may be stricken. Id. Special pleas that present, irrelevant or immaterial matter, or matter within the general issue, may be stricken. Poppell v. Culpepper [Fla.] 47 S 351. Clearly irrelevant paragraph of an answer may be stricken. De Ajuria v. Berwind, 127 App. Div. 528, 111 NYS 1029.

**91.** A party may not sue on a contract and allege at the same time that it is void for fraud. Statham v. Southern States Life Ins. Co. [Ga. App.] 63 SE 250. Complaint for injuries caused by blasting alleging that injuries were caused by negligent use of explosives or by negligently failing to give notice of the setting off of the blast held not repugnant nor to contain alternative averments. Sloss-Sheffield Steel & Iron Co. v. Salser [Ala.] 48 S 874. A complaint in one count is bad if its allegations are repugnant to each other. This rule does not apply, however, where there are several counts inconsistent with each other. Hoopes v. Crane [Fla.] 47 S 992. Where allegations of a complaint containing but one count are repugnant, they neutralize each other and the complaint is bad. A like result follows if the allegations or statements contained in a cause of action made part of a complaint are inconsistent with the allegations of the complaint. State v. Seaboard Air Line R. Co. [Fla.] 47 S 986. The doctrine of felo de se does not apply where a complaint alleges that a decedent was negligently killed if as a fact he was killed with criminal intent. Applies only where one cause alleged is destroyed by another. O'Brien v. St. Louis Transit Co., 212 Mo. 59, 110 SW 705. Allegation that plaintiff was intoxicated and unable to care for himself is repugnant to averment that he was in the exercise of due care. Keeshan v. Elgin, A. & S. Trac. Co., 132 Ill. App. 416.

**92.** Baker v. Baker, 139 Ill. App. 217.

**93.** Sixteen pages of useless verbiage in a complaint will be stricken on motion. Colonizer's Realty Co. v. Shatzkin, 114 NYS 74. Under Code Civ. Proc. 1902, § 184, redundant and irrelevant matter may be stricken from pleadings on motion. Guinard v. First Baptist Church, 80 S. C. 491, 61 SE 1003. Voluminous complaint setting forth affidavits, clippings from newspapers, and filled with scandalous, sham and redundant matter, evidently intended to abuse and vilify defendants, held to justify order striking it with leave to file a substituted complaint. Crabtree v. Steele, 137 Iowa, 726, 115 NW 593. Irrelevant and redundant matters of evidence alleged will be stricken on motion under Code Civ. Proc. § 545. Hamilton v. Hamilton, 124 App. Div. 619, 109 NYS 221. Matter unnecessary in setting forth the real cause of action may be stricken on motion. Brown v. Brown, 109 NYS 637. Refusal to strike portions of a complaint as redundant or as conclusions will not be reviewed where not prejudicial. Smith v. Hicks [N. M.] 98 P 138. A plea that tends to confuse the issues being tried may be stricken. Poppell v. Culpepper [Fla.] 47 S 351. It is not prejudicial error to strike from an answer matter which alleges only facts which go to an issue already made. Webb County v. Hasle [Tex. Civ. App.] 113 SW 188.

**94.** Code Civ. Proc. § 545, authorizing striking of irrelevant and scandalous matter in a pleading embraces defense or counterclaim. Stroock Plush Co. v. Talcott, 129 App. Div. 14, 113 NYS 214.

**95.** In action to quiet title where defendant set up title under tax deed, and plaintiff by reply denied the validity of the tax deed and alleged defects therein, held the reply was not sham on the ground that plaintiff knew defendant had tax deed. Mitchell v. Knott, 43 Colo. 135, 95 P 335. Verified answer setting up defenses cannot be stricken as sham. Wexler v. Merovitz, 125 App. Div. 924, 110 NYS 5. Answer in action against indorsers of a vote denied first, each and every allegation, "except as hereinafter admitted," and second that if indorsement was made it was without consideration. Held that though second subdivision was subject to be stricken as hypothetical, the first subdivision was good and not thereby vitiated and the second did not admit all that plaintiff had to prove and was not sham. Duke v. Grant, 126 App. Div. 383, 110 NYS 563. Answer not tendering any bona fide issue properly stricken as

*Interpretation and construction in general.*[See 10 C. L. 1182]—A pleading should be construed as a whole [1] and should be given a reasonable construction rather than a technical one,[2] but the court is not authorized to reconstruct a pleading,[3] and it is

sham. First State Bank v. Schatz, 104 Minn. 425, 116 NW 917. A verified answer, though false, cannot be stricken as sham where it amounts to a general denial or a denial of any material averment. Adams v. Western Maryland R. Co., 161 F 777.

**96.** A pleading is not frivolous unless it indicates bad faith in the pleader upon bare inspection. An answer setting up fraud may be demurrable because not alleging that upon discovery of the fraud defendant rescinded or offered to return what he had received is not frivolous. Merchants' Review Pub. Co. v. Buchan's Soaps Corp., 107 NYS 726. Court of chancery may strike a frivolous plea. Moore v. Moore [N. J. Eq.] 70 A 684. That defense is argumentatively or inartificially drawn does not render it frivolous. Krebs v. Carpenter, 124 App. Div. 755, 109 NYS 482. In action on a contract, a plea of set-off of damages arising out of tort is plainly frivolous and is properly stricken. Brash v. Ehrman [Fla.] 47 S 937. Pleas not containing a single element of a valid defense are properly stricken as frivolous under Code 1896, § 3286. Pruett v. Williams [Ala.] 47 S 318. In action by an infant on a judgment recovered in another state for personal injuries, an answer alleging that guardian ad litem in original action was a necessary party, he not being, that defendant has no knowledge as to the truth of the complaint, and alleging contributory negligence and that verdict was excessive, held insufficient and frivolous. Finn v. Post, 61 Misc. 136, 112 NYS 1046.

**97.** Where a declaration states a cause of action, an immaterial averment will be rejected as surplusage. Bogardus v. Phoenix Mfg. Co., 134 Ill. App. 456. Where a complaint contains allegations with exhibits that are not essential to the relief prayed, but which do not destroy the effect of the material allegations in stating a cause of action, such nonessentials may be treated as surplusage. Wood v. Wood [Fla.] 47 S 560. Allegation in complaint against former clerk of federal court as to his official capacity properly stricken as surplusage. Hills v. Valentine [C. C. A.] 164 F 328. Paragraph of a complaint in equity to enjoin several defendants from prosecuting several actions at law against plaintiff and praying that if deprivation of jury trial would be unfair to defendants, the court should refer questions to a jury, is superfluous as the court possesses such right in every suit in equity. Vandalia Coal Co. v. Lawson [Ind. App.] 87 NE 47.

**98.** Signature to pleading in pleader's maiden name instead of her married name, where mistake was made by her attorney but her mark was witnessed, held a sufficient signing. Inhabitants of Wellington v. Corinna [Me.] 71 A 889.

**99.** All pleadings should be signed by counsel. McIntyre v. Smyth, 108 Va. 738, 62 SE 930. It is error to refuse to strike a plea not signed by defendant or his counsel. Brooke v. McWhorter, 130 Ga. 590, 61 SE 404.

**1.** Complaint with exhibits attached must be treated as though exhibits were incorporated therein. Keystone Lumber Yard v. Yazoo & M. V. R. Co. [Miss.] 47 S 803. Answer in action to recover possession of land, denying right to possession in one paragraph and in another setting up a parol contract for the right to possession in defendant, construed as a whole precludes judgment on the pleadings; first paragraph is good. Hampton v. Glass [Ky.] 116 SW 243. An objection to a paragraph of an answer because not showing the nature of a contract is without merit where subsequent paragraphs contain such facts. Walker v. Texas & N. O. R. Co. [Tex. Civ. App.] 112 SW 430. Where a substituted petition is filed in lieu of the original, a purpose to rely on the substituted petition alone is indicated and the rule that several pleadings are to be construed together does not apply. Robards v. Bannon Sewer Pipe Co. [Ky.] 113 SW 429. Plaintiff sued to cancel a contract and defendants filed a cross bill for specific performance, and plaintiff claimed the contract to be void as against public policy. Held in determining whether the cross bill showed the contract to be void, other pleadings would be looked to though point of invalidity was based on the cross bill alone. McCowen v. Pew, 153 Cal. 735, 96 P 893. In construing an affirmative defense, the ultimate facts alleged must be determined from the entire defense and not from one paragraph. National Mut. Fire Ins. Co. v. Duncan [Colo.] 98 P 634. In determining whether a complaint states a cause of action ex contractu or ex delicto, it must be considered in its entirety. Where averments leave it doubtful, every intendment will be given to construe it as on contract. Delaney v. Great Bend Implement Co. [Kan.] 98 P 781. A stricken count still remains part of the pleading for reference purposes and furnishes a sufficient basis for additional counts, alleging in more accurate manner the same damages. Shaughnessy v. Holt, 236 Ill. 485, 86 NE 256. Where a complaint is not founded upon a written instrument attached as an exhibit, its sufficiency must be determined without reference thereto. Under Burn's Ann. St. 1901, § 365. Wabash R. Co. v. Reynolds, 41 Ind. App. 678, 84 NE 992.

**2.** In construing a complaint for negligence to determine whether plaintiff intended to charge one or two acts of negligence, the court must consider not only what the pleader intended but what defendant had reason to understand he intended. Thompson v. Keyes-Marshall Bros. Livery Co., 214 Mo. 487, 113 SW 1128. The unconstitutionality of a statute or of proceedings thereunder need not be pleaded with any greater definiteness or certainty than other issues, and in determining whether pleadings present such issue the usual rules of construction are to be adopted. Union Pac. R. Co. v. Abilene [Kan.] 98 P 224. In replevin the word "team" as used in the pleadings construed to mean horses, harness and vehicle. Krebs

presumed that technical terms were advisedly used.[4] Mere clerical errors will be disregarded.[5] Specific allegations control general allegations which they contradict.[6] Where there is doubt as to whether a complaint is laid in contract or tort, the doubt will be resolved in favor of contract,[7] or to uphold the fullest relief, recovery to which plaintiff is entitled under the facts.[8]

At common law, on general demurrer, everything in a pleading was taken most strongly against the pleader, and this rule still prevails in some states,[9] and this

Hop Co. v. Taylor [Or.] 97 P 44. Allegation in complaint for injuries to employe in coal mine that it was "necessary" for him in the course of his duties to do a certain thing, held to mean reasonably convenient and not indispensable, and proof sustained the allegation. Brooks v. Chicago W. & V. Coal Co., 234 Ill. 372, 84 NE 1028. In replevin for impounded animals, defendant's plea that he found the beasts in his inclosure doing damage and took them meant only that the land was occupied and not that it was fenced. Davis v. Mudgett [Vt.] 69 A 762. Complaint construed and held to allege that there was a warranty of the character and quality of oil sold where "seller guaranteed" its quality. Conkling v. Standard Oil Co., 138 Iowa, 596, 116 NW 822. Complaint in action to determine ownership of stock in national bank and to whom dividends should be paid, alleging that defendant agreed to take the stock in payment of a note and asserting no rights under the note, held based upon title to the stock and not on the note. Hill v. Kerstetter [Ind. App.] 86 NE 858. Allegation that defendant is a domestic corporation "duly" organized and existing and engaged in operating street railways means that it has been legally organized for purposes mentioned. Hollis v. Brooklyn Heights R. Co., 128 App. Div. 821, 113 NYS 4. Allegations of a supplemental complaint that a contract set up by defendant did not contain their mutual agreement and that plaintiff was induced to sign it by fraud held broad enough to avoid the contract. Cotulla v. Barlow [Tex. Civ. App.] 115 SW 294. Complaint in action for injuries construed and held that the pleader intended to charge amount of damages was result of several elements alleged and recovery would not be limited to one element. Carlisle v. Bentley [Neb.] 116 NW 772. Is sufficient under St. 1898, § 2668, if the language used permits of a reasonable construction which will sustain it. Jones v. Monson, 137 Wis. 478, 119 NW 179.

3. Where one count was rendered unintelligible because of reference to count 1 instead of to count 5, the court must treat it as found and cannot change the writing. Charlie's Transfer Co. v. Malone [Ala.] 48 S 705. It cannot be inferred from allegation in petition to remove a cause to a federal court on ground of diversity of citizenship that one is a resident, that he is also a citizen. O'Connor v. Chicago, etc., R. Co. [Iowa] 117 NW 979.

4. It is presumed that terms used were advisedly employed with knowledge of its ordinary meaning and that the pleader intended that they should be interpreted accordingly. Pein v. Miznerr, 170 Ind. 659, 84 NE 981.

5. Where answer setting up a prescriptive right to use watch alleged that diversion commenced in "1901," such allegation was properly construed to mean "1891," where other allegations showed it to be a clerical error. State v. Quantic, 37 Mont. 32, 94 P 491.

6. Cleveland, etc., R. Co. v. Cyr [Ind. App.] 86 NE 868.

7. Where the language of a complaint is equivocal and there is doubt as to whether the pleader intended to claim for tort rather than for breach of contract, the doubt will be resolved by construing it an action in tort. Owens Bros. v. Chicago, etc., R. Co. [Iowa] 117 NW 762. Where a complaint states a good cause for breach of contract, the addition of allegations which are appropriate to a cause for tort will not change the cause from contract to tort. Missouri, K. & T. R. Co. v. Sealy [Kan.] 99 P 230. Where an action can be maintained either in contract or tort, if the language of the complaint is equivocal, it will be construed as in tort. Kansas City S. Ry. Co. v. Rosebrook Josey Grain Co. [Tex. Civ. App.] 114 SW 436.

8. If a complaint against a carrier for loss of goods is ambiguous as to whether it is in tort or on contract, it will be construed in the absence of demurrer to uphold the fullest recovery to which plaintiff is entitled under all the facts. Southern Exp. Co. v. Pope [Ga. App.] 63 SE 809.

9. Sarles v. Illinois Cent. R. Co., 133 Ill. App. 91; Harney v. Lexington [Ky.] 113 SW 115; McFarland's Adm'r v. Louisville & N. R. Co. [Ky.] 113 SW 82; Scott v. Rawls [Ala.] 48 S 710; Johnson v. Western & A. R. Co., 4 Ga. App. 131, 60 SE 1023; Aldis v. Schleicher [Cal. App.] 99 P 526; Crawford v. Engram [Ala.] 47 S 712. Plea held not sufficient to set up estoppel in pais. Crawford v. Engram [Ala.] 47 S 712. Presumed that he will set forth all facts favorable to his case. Cushman v. Cloverland Coal & Min. Co., 170 Ind. 402, 84 NE 759. Allegation in complaint for forcible detainer, otherwise insufficient because not alleging that defendants withheld possession at the commencement of the action, that plaintiff will continue to be damaged in a certain sum for each day possession is withheld, cannot be construed to mean that possession is withheld. Bell v. Haun [Cal. App.] 97 P 1126. Complaint to set aside a sale under a trust deed on ground that no power of sale was given must allege such fact or it will be presumed to have been given. Huens v. Cribb [Cal. App.] 98 P 78. In suit for specific performance of a compromise agreement to release claims to surface, in consideration of a conveyance of minerals, where bill alleged that ejectment had been brought, it is presumed the record of such suit not being set out, that it was for both land and min-

rule is enforced in injunction suits by the requirement that facts precluding relief must be negatived.[10] Under the code, however, pleadings are generally to be liberally construed with a view to substantial justice between the parties,[11] and every reasonable intendment and presumption will be indulged in their favor.[12] In de-

erals, thereby abandoning the compromise agreement. Clinchfield Coal Co. v. Clintwood Coal & Timber Co., 108 Va. 433, 62 SE 329. Liability in solido is not presumed and pleadings are construed against pleader. Breaux Bridge Lumber Co. v. Herbert, 121 La. 188, 46 S 206. It is presumed that a party's pleading is as strong in his favor as the facts to sustain it will warrant. Pein v. Miznerr, 170 Ind. 659, 84 NE 981. Complaint held not to show judgment upon which execution could be issued. Winn v. McCraney [Ala.] 46 S 854. Plea in trespass held not to clearly show breach of peace not committed. Stowers Furniture Co. v. Brake [Ala.] 48 S 89. Where creditors allege in suit brought in July that their creditor transferred property April 27th, an answer denying that such transfer was made April 27th or any other date in April did not put date of transfer in issue since it might have been made after such date. Singletary v. Boener-Morris Candy Co. [Ky.] 112 SW 637. Words "charge and control" in complaint by tenant against landlord being susceptible of construction that they referred to the time when the lease was made, such construction will be adopted. Charlie's Transfer Co. v. Malone [Ala.] 48 S 705. An allegation that defendant was damaged in a certain sum without alleging how does not state a cause of action. Connor v. National Roofing & Supply Co. [Ky.] 113 SW 122. Where plaintiff in special assumpsit set out the memorandum of the contract and relied upon it, it will not be presumed that any other requirement of the statute of frauds was complied with. Crosby v. Bouchard [Vt.] 71 A 835. Ambiguous pleadings are construed against the pleader, especially where the ambiguity is pointed out and no effort made to correct it. Fowler v. Rome Dispensary [Ga. App.] 62 SE 660.

**10.** The rule that statements are construed against the pleader is reinforced in injunction suits by the requirement that essential elements which entitle him to relief must be sufficiently certain to negative every reasonable inference from facts stated from which it might be deduced that he was not entitled to relief. City of Paris v. Sturgeon [Tex. Civ. App.] 110 SW 459. Petition to enjoin a city from depriving one of the use of water held insufficient for failing to show that he was an inhabitant of the city or required water within its limits. Id.

**11.** Pittsburgh, etc., R. Co. v. Rogers [Ind. App.] 87 NE 28. Revisal 1905, § 495, expressly provides that pleadings shall be construed with a view to substantial justice between the parties. Jones v. Henderson, 147 N. C. 120, 60 SE 894. Under the modern rule pleadings are not construed against the pleader, but averments which sufficiently point out the nature of his claim are sufficient if under them he would be entitled to give necessary evidence. Clark v. West, 193 N. Y. 349, 86 NE 1. Where a party actively defends as trustee, it is presumed that he acts in such capacity though he describes himself as defendant. First Nat. Bank v. Farmers' & Merchants' Nat. Bank [Ind.] 84 NE 1077. Where a complaint manifestly pleads an agreed price, an allegation of value will be treated as surplusage rather than as an attempt to state two causes of action. Rubin v. Cohen, 129 App. Div. 395, 113 NYS 843. In testing sufficiency of a pleading, conclusions will be disregarded. Johnson v. American Smelting & Refining Co., 80 Neb. 250, 116 NW 517; Farra v. Braman [Ind.] 86 NE 843. Where a complaint shows a legal right invaded, plaintiff entitled to at least nominal damages and a demurrer will not lie. Williams v. Atlantic Coast Line R. Co. [Fla.] 48 S 209. Code Civ. Proc. § 452, provides that pleadings must be liberally construed with a view to substantial justice. In re Wickersham's Estate, 153 Cal. 603, 96 P 311. As against demurrer to the evidence the petition should be liberally construed. Hennis v. Bowers [Kan.] 100 P 71. Ann St. 1906, p. 652, expressly provides that a pleading shall be construed liberally in determining its effect. Missouri Pac. R. Co. v. Continental Nat. Bank, 212 Mo. 505, 111 SW 574. Allegations in action for delay in delivering a telegram that but for such delay persons would have had a body sent home for burial held to authorize submission of issue whether burial would have been postponed. Western Union Tel. Co. v. Moran [Tex. Civ. App.] 113 SW 625. In action for nondelivery of a telegram, when it was alleged that the body was delivered for dissection because of such nondelivery, evidence of this fact was admissible, no motion to strike having been made, Martin v. Western Union Tel. Co., 81 S. C. 432, 62 SE 833. When service set aside because complaint did not state cause of action, the complaint will be carefully scrutinized on appeal, although under other circumstances would not view it as carefully as on demurrer. Grant v. Cobre Grande Copper Co., 193 N. Y. 306, 86 NE 34.

**Held insufficient:** Rev. St. 1898, § 2986, providing that pleading shall be construed with a view to substantial justice, is ineffective to cure a defect in a complaint which is insufficient to allege an indebtedness. Chesney v. Chesney, 33 Utah, 503, 94 P 989. Under a statutory rule that pleadings must be liberally construed with a view of obtaining justice, a complete defect of averment cannot be supplied by construction. Gill v. Manhattan Life Ins. Co. [Ariz.] 95 P 89.

**12.** More liberality is allowed in favor of the allegations of a pleading where objected to for the first time at the trial than when attacked by demurrer. Walters v. Rock [N. D.] 115 NW 511. A pleading will be held to state all the facts that can be implied from the allegations by reasonable and fair intendment. Vukelis v. Virginia Lumber Co. [Minn.] 119 NW 509. Under County Court rule 17, requiring every reasonable intendment in favor of a pleading

termining the sufficiency of pleadings, only inferences necessarily arising from facts alleged will be indulged.[13] As a general rule, both at common law and under the codes, pleadings will be liberally construed when first attacked at the trial or after judgment.[14] The rule that under the code pleadings should be liberally construed does not apply to applications for extraordinary writs.[15]

*Profert and oyer.*See 10 C. L. 1165—Oyer being granted and a written instrument being read in evidence may thereby in legal effect become part of the preceding pleading with like effect as if provert had been made of it by the plaintiff in the first instance.[16]

*Exhibits.*See 10 C. L. 1186—By statute in some states, when a pleading is founded on a written instrument, the original or a copy thereof must be filed.[17] The object of the rule requiring the cause of action or copy thereof to be filed with the complaint is to enable defendant to plead thereto with greater certainty,[18] but instruments collateral to the issue need not be attached.[19]

As a general rule exhibits cannot be looked to in aid of a pleading,[20] though they

on general exception, complaint by buyers of an automatic piano to rescind held good against general demurrer. Jesse French Piano & Organ Co. v. Garza & Co. [Tex. Civ. App.] 116 SW 150. In construing a complaint every reasonable intendment should be made in its favor. Phillips v. Smith [Ariz.] 95 P 91. Under Burn's Ann. St. 1908, § 385, authorizing liberal construction of pleadings, a pleading is to be read in the light of such ultimate facts as must be necessarily intended from facts pleaded, and matter of substance may often be shown by narrative of an occurrence. Town of Newcastle v. Grubbs [Ind.] 86 NE 757.

13. It will not be presumed from allegation that place of business was a restaurant that a saloon was not also conducted on same premises. Rowan v. Butler [Ind.] 85 NE 714; Cleveland, etc., R. Co. v. Perkins [Ind.] 86 NE 405.

14. A complaint sufficient to bar another action and where its defects may be supplied by proof is good as against a motion in arrest. South Shore Gas & Elec. Co. v. Ambre [Ind.] 87 NE 246. In absence of demurrer the allegations of a complaint are to be liberally construed in aid of a cause of action. Tucker v. Missouri & K. Tel. Co., 132 Mo. App. 418, 112 SW 6. Pleadings are liberally construed for the purpose of sustaining a verdict. Kansas City So. R. Co. v. Rosebrook-Josey Grain Co. [Tex. Civ. App.] 114 SW 436. In absence of a demurrer, after verdict the allegations of a complaint are to be liberally construed in favor of the pleader. Cole v. Metropolitan St. R. Co., 133 Mo. App. 440, 113 SW 684. In determining the sufficiency of a pleading where attacked for the first time **on appeal,** or where the parties go to trial without objection, it will be given a liberal construction. Allen v. Allen's Estate [Neb.] 116 NW 509. Where strict grammatical construction would defeat the action. Carlile v. Bentley [Neb.] 116 NW 772.

15. Bishop v. Huff [Neb.] 116 NW 665.

16. National Council K. & L. of S. v. Hibernian Banking Ass'n, 137 Ill. App. 175.

17. The object of Gen. St. 1906, § 1449, requiring copy of instrument sued upon to be attached to the declaration, is to appraise defendant of the nature of the cause of action. It forms no part of the complaint and cannot be reached by demurrer, nor can failure of plaintiff to so attach it be reached by demurrer. State v. Seaboard Air Line R. Co. [Fla.] 47 S 986; Hoopes v. Crane [Fla.] 47 S 992. Rule 14 of the circuit court requires the clerk to enter a dismissal when cause of action or copy thereof is not filed with the complaint, but such order is subject to review, and, if it is found that a copy was served on defendant's attorney, vacation of the dismissal will not be disturbed. Poppell v. Culpepper [Fla.] 47 S 351.

18. Does not make it a part of the complaint so as to make it to supply an essential allegation omitted. Poppell v. Culpepper [Fla.] 47 S 351.

19. A contract of transfer from one insurance company to another need not be attached as an exhibit in a suit on the policy. Mutual Reserve Life Ins. Co. v. Ross [Ind. App.] 86 NE 506.

20. An exhibit cannot supply lack of necessary and material averments. Malheur County v. Carter [Or.] 98 P 489. Exhibits will not cure an omission to state a cause of action. City of Bowling Green v. Bowling Green Gaslight Co. [Ky.] 112 SW 917. An exhibit referred to will not aid a defective pleading. Sumner v. Griffin [Ky.] 113 SW 422. An exhibit attached is no part of the pleading and is not to be considered as before the court until introduced, but it may be looked to as a matter of convenience for statement of the terms of the contract. Tate v. Wabash R. Co., 131 Mo. App. 107, 110 SW 622. Suit for dissolution of partnership and accounting and sale of partnership property is not founded on articles of partnership, and though filed as an exhibit they could not be referred to to sustain or overthrow the complaint. Marshall v. Matson [Ind.] 86 NE 389. Where complaint on a note is in common courts and does not refer to the note, the note is no part of the pleading though a copy thereof is annexed to the bill of particulars. Mayer v. Roche [N. J. Law] 69 A 246.

may be against it,[21] and the averments thereof are not imported into the pleading.[22] Exhibits attached to a bill control the bill so far as their legal effect is concerned.[23] The rule that exhibits control allegation of the pleading cannot be extended so far as to hold a litigant bound by the whole of a written statement furnished by his adversary because he admits part thereof.[24] In Iowa it is held that an exhibit is controlled by the allegations of the pleading.[25] Failure to indorse on an exhibit the style of the cause is not fatal.[26]

*Bills of particulars.*[See 10 C. L. 1186]—A bill of particulars may ordinarily be demanded in all cases when by reason of the generality of the claim or charge, the adverse party is entitled to know with reasonably certainty what he is required to meet.[27] A motion for a bill of particulars is a common-law practice unknown in equity procedure.[28] The practice on the motion for the bill is controlled by statute.[29] That a demand for a bill of particulars is too broad is no ground for refusing it.[30] The rule denying the bill because of laches does not apply where the adverse party is not prejudiced.[31] In New York a bill of particulars may be required though the cause has been placed on the day calendar.[32] A justice of the municipal court has no power to dismiss a bill for failure to furnish a bill of particulars on demand.[33]

The purpose and effect of a bill of particulars is to amplify the pleading and limit the issues,[34] and reasonably apprise the opposite party of the claim made,[35] and

**21.** An exhibit will not avail to support the pleading of the party who files it, but an adverse party may use it to supply omissions in his pleadings. Baltimore, etc., R. Co. v. Wood & Co. [Ky.] 114 SW 734. In special assumpsit it is not necessary that the declaration set out the memorandum of the bargain, yet, it having been set out, it becomes a part thereof and cannot be rejected as surplusage where it shows the declaration to be bad. Crosby v. Bouchard [Vt.] 71 A 835.

**22.** An agreement that the records of the proceedings upon habeas corpus be made part of the complaint does not make the averments of the petition for the writ averments of the complaint. Moyer v. Peabody, 212 U. S. 78, 53 Law. Ed. 235.

**23.** Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945.

**24.** Clark v. Cross [Wash.] 98 P 607.

**25.** Allegations in the complaint. Pease v. Globe Realty Co. [Iowa] 119 NW 975.

**26.** Evidence is admissible under an account filed with a counterclaim showing names of the parties, and subject-matter of which is the same as that of a count in the complaint and which is otherwise sufficient, notwithstanding omission to indorse on it the style of the action. Anderson v. Lewis [W. Va.] 61 SE 160.

**27.** A bill of particulars may be resorted to to procure the requisite certainty when a cause is set forth so generally as to afford opportunity for surprise. Singers-Begger v. Young [C. C. A.] 166 F 82. If a complaint does not sufficiently advise as to the particulars of damage caused by overflow, defendant should, under Code 1894, § 3249, ask for a bill of particulars. City of Richmond v. Wood [Va.] 63 SE 449. In every pleading the adverse party is entitled to know what the proof will be directed to. McKinney v. Carson [Utah] 99 P 660.

**28.** Tampa & J. R. Co. v. Harrison [Fla.] 46 S 592.

**29.** Code Civ. Proc. § 531, authorizing the court to direct a bill of particulars, impliedly requires the application to contain a statement verified on personal knowledge or other proper sources, and an affidavit by the movant's attorney that he has no personal knowledge and "neither has plaintiff, as I verily believe," is insufficient. Casassa v. A. Cuneo Co., 115 NYS 124. Motion for bill of particulars is properly denied as to particulars specified in notice of motion but not in previous demand for a bill in full. White v. Kaliski, 109 NYS 716.

**30.** Mayer v. Commonwealth Trust Co., 124 App. Div. 932, 109 NYS 27.

**31.** The rule denying a bill of particulars for laches of the movant does not apply where plaintiff has lost nothing by the delay and would not have to submit to a postponement to furnish the bill, though motion was not made until eve of the trial. Convery v. Marrin, 128 App. Div. 265, 112 NYS 673.

**32.** Where a case was on the day calender when a motion for a bill of particulars was made, the fact that plaintiff was administratrix was not ground for denying it as she would be presumed to be ready to prove her case. Bjork v. Post, 125 App. Div. 813, 110 NYS 206. Where a case has reached the call calender and has been set down for trial, it is assumed that plaintiff in an action for damages caused by negligence of a pilot in charge of a tug and float has knowledge respecting the identity of the crafts and pilot, and his bare allegation of lack of such knowledge is an insufficient answer to a demand for a bill of particulars. Ditollo v. Erie R. Co., 126 App. Div. 811, 111 NYS 125.

**33.** Szorc v. Zdanowski, 114 NYS 754.

**34.** The object of a bill of particulars is to amplify the pleading, define the issues, limit the proof, make certain what is uncertain, and appraise the movant of what he is required to meet. Bjork v. Post, 125 App. Div. 813, 110 NYS 206; Mayer v. Com-

not to suggest defenses.[36] A party will not be required to disclose his evidence[37] or the names of his witnesses,[38] or give information peculiarly or equally within the knowledge of the party seeking it,[39] but that the moving party knows the facts is not ground for denying the bill.[40] Ordinarily a bill is no part of the pleading and cannot supply necessary averments therein.[41]

Cases dealing with the right to bills in particular cases,[42] and the sufficiency of

monwealth Trust Co., 124 App. Div. 932, 109 NYS 27; Shaw v. Stone, 124 App. Div. 624, 109 NYS 146. The office of a bill of particulars under Thornton's Ann. Civ. Code, § 135, is to specify more minutely the claim or defense set up. Fletcher v. Southern, 41 Ind. App. 550, 84 NE 526. Where bill of particulars limiting general allegation of the complaint was served after issues framed, the issues should be confined to allegations of the bill of particulars. Segall v. Segall, 130 App. Div. 895, 114 NYS 1025. In action on an insurance policy, amendment to a complaint held unnecessary to render a policy admissible where bill of particulars had been filed. Hurd v. Northern Acc. Co., 153 Mich. 474, 15 Det. Leg. N. 493, 116 NW 977.

**35.** All that the statute requires of a bill of particulars in municipal court is that it be sufficient to apprise the defendant of the nature and character of the demand made against him. Toledo Computing Scale Co. v. Tyden, 141 Ill. App. 21. In a prosecution to recover a penalty for the violation of a statute, it is sufficient for the bill of particulars to set forth the offense alleged to have been committed with sufficient clearness to enable the defendants to know with what they are charged. Zito v. People, 140 Ill. App. 611.

**36.** Defendant is not entitled to a bill of particulars before answer on the ground that it may suggest defenses of which he is not aware. Ehrich v. Dessar, 114 NYS 271.

**37.** Where a claim is sufficiently set forth to show the nature thereof, a pleader will not be required to set forth his evidence in support thereof. Smith v. Anderson, 126 App. Div. 24, 110 NYS 191. By statute, municipal court act, it is provided that in a bill of particulars in an action for tort in municipal court, it is not required to set forth the cause of action with the particularity required at common law. If it clearly and sufficiently advises the defendant of the nature of the action he is called upon to defend, it is sufficient to admit the introduction of ordinances notwithstanding the same are not referred to in such bill of particulars. Chicago, etc., R. Co. v. Houren, 139 Ill. App. 116. Evidence that could be obtained by examination of the pleader. Smith v. Anderson, 126 App. Div. 24, 110 NYS 191. On motion for bill of particulars in action to recover for attorney's services, plaintiff was not required to itemize each step taken and charge made in prosecuting actions, but was required only to state the amount demanded for each action. Thorp v. Ramsey [Wash.] 99 P 584. A court will not require a party to furnish particulars of evidence which it is not within his power to furnish or preclude him from giving lawful evidence at the trial because of his inability to specify in advance what the evidence will be. People v. McClellan, 191 N. Y. 341, 84 NE 68.

**38.** The name of a witness as such may not be required but the name of a person with whom it is claimed a transaction involved in the issues was had may be required though it is the intention to use such persons as a witness. Sundheimer v. Barron & Co., 62 Misc. 263, 114 NYS 804.

**39.** A bill of particulars is not necessary when defendant is sufficiently appraised of the cause of action. Whitworth v. South Arkansas Lumber Co., 121 La. 894, 46 S 912.

**40.** That defendant in conversion by his answer displays knowledge of certain transactions between himself and plaintiff is not ground for denying a bill of particulars. Mayer v. Commonwealth Trust Co., 124 App. Div. 932, 109 NYS 27. That facts sought to be ascertained by bill of particulars are within the knowledge of the moving party is not ground for denial of motion. Bjork v. Post, 125 App. Div. 813, 110 NYS 206.

**41.** A bill of particulars is not a pleading and cannot aid one otherwise demurrable. Singers-Bigger v. Young [C. C. A.] 166 F 82. A bill of particulars cannot create an issue of fact not theretofore tendered. Spitz v. New York Taxicab Co., 62 Misc. 492, 115 NYS 247.

**42. Bill of particulars not necessary:** In action to set aside a partnership dissolution agreement, a bill of particulars pertinent to accounting will not be required since no accounting can be had unless the agreement is set aside. Boskowitz v. Sulzbacher, 124 App. Div. 682, 109 NYS 186. Where the material allegation of an answer was that a certain agreement was consummated, a bill of particulars as to the terms of such agreement would not be required as terms were not material. Smith v. Anderson, 124 App. Div. 24, 110 NYS 191. Complaint for services rendered as manager and agent, and representative states but a single cause, the statement of various relations being merely descriptive, and defendant denying knowledge of any claim as made by plaintiff or of any services rendered, is not entitled to a bill of particulars before answer. Ehrich v. Dessar, 114 NYS 271. In action for goods sold where defendant counterclaimed for increased price paid for similar goods, he was compelled to purchase because of defective quality of goods delivered, where amount purchased was alleged, the contract price, and price paid. Strohmeyer & Arpe Co. v. Hartley Silk Mfg. Co., 62 Misc. 102, 114 NYS 287. Where one sued for a definite amount of indebtedness alleged to have been assumed by defendant as an original undertaking, a bill of particulars specifying items of account is unnecessary. Bush v. Roberts, 4 Ga. App. 531, 62 SE 92. A bill of particulars of allegations of an answer which are in effect mere denials of allega-

particular bills,[43] are illustrated in the footnote. Whether additional particulars should be ordered and whether those furnished are sufficient is within the discretion of the trial court.[44] A party who has in good faith attempted to furnish a bill of particulars should be given opportunity to comply with the order.[45]

tions of the complaint will not be ordered. Allegation that contract sued upon was without consideration. Smith v. Anderson, 126 App. Div. 24, 110 NYS 191. In action on contract where defendant pleads release, he will not be required to particularize it more than to state whether it was express, and if in writing to set forth a copy, or if implied to set forth the general nature of the acts. Id.

**Plaintiff entitled to bill:** In action for price of stock defendant alleged that plaintiff had accepted a valuable consideration in payment. Held plaintiff was entitled to a bill of particulars as to nature of the consideration where he made affidavit that he was ignorant of what defendant referred to, though defendant answered that he had full knowledge. Harris v. Drucklieb, 128 App. Div. 276, 112 NYS 671. In action for wrongful discharge as a sales agent, where allegations of the answer as to plaintiff's failure to comply with his contract are numerous, material and so indefinite as to expose him to danger of surprise, he is entitled to a bill of particulars. Sundheimer v. Barron & Co., 62 Misc. 263, 114 NYS 804.

**Defendant entitled to bill:** In action to set aside a partnership dissolution agreement for fraud, defendant held entitled to bill of particulars of fraud practiced in obtaining the agreement, etc., but not to particularize all to plaintiff's evidence. Boskowitz v. Sulzbacher, 124 App. Div. 682, 109 NYS 186. Where complaint in action against a surety on a building contract alleged only the making of the contract, contractor's failure to perform and damage, defendant was entitled to a bill of particulars as to how contractor failed to perform and items of damages. Schwarzschild & Sulzberger Co. v. Empire State Surety Co., 128 App. Div. 644, 112 NYS 1036. Where complaint for injuries to a servant contains only general allegations of negligence in permitting a machine on which plaintiff was working to become out of repair, or to give proper instructions or make proper rules. Zulkowski v. American Mfg. Co., 163 F 550. In action for a gross sum for injuries to freehold and to personalty. Weinstein v. O'Leary, 128 App. Div. 267, 112 NYS 641. Where a complaint alleges a contract, defendant is entitled to know whether it is oral or written and if written, to a copy, and, if oral, to know the terms. Cozzens v. American General Engineering Co., 126 App. Div. 942, 111 NYS 350. In action for personal injuries defendant is entitled to a bill of particulars as to permanent injures, nature and extent thereof, duration, nature and cost of medical services. Kist v. Haan & Co., 111 NYS 59. Where action was based on sale of corporate stock and buyer alleged that it greatly depreciated in value because of false rumors circulated by seller and others, held a bill of particulars of such false rumors, by whom and to whom circulated, would be required. Smith v. Anderson, 126 App. Div. 24, 110 NYS 191. Where pleader alleges that the effect of circulation of false rumors was to diminish the power of the corporation to borrow money, he may be required to set forth names of parties refusing to make loans though allegation was immaterial. Id. Where pleader alleged that effect of circulation of false rumors was to depress market value of corporate stock from $110 to $85 per share, he may be required to state where, to whom, and when, and what amount of stock was sold for $110. Id. In action for death by negligence where complaint set forth in general terms from which it was impossible to determine nature of decedent's employment, manner of his death or negligent acts complained of, was error to deny motion for bill of particulars. Bjork v. Post, 125 App. Div. 813, 110 NYS 206. Where complaint for injuries alleged broken ribs, injuries to back, and otherwise bruised and injured, etc., a motion for a bill of particulars as to nature, extent and location of injuries should be granted so as to place some limitation on the proof. Greene v. Johnson, 126 App. Div. 33, 110 NYS 104. Where complaint alleged that plaintiff had expended large sums in indeavoring to be cured and had been unable to attend to her business since her injury, bill of particulars as to amount expended for medicines, but not names of druggists, doctors or nurses, nor was it necessary to state length of time plaintiff was unable to walk. Id. In action on insurance policy where plaintiff contended that defendants had waived requirements of its policy as to time within which to bring action and as to furnishing proofs of death, defendant was entitled to a bill of particulars as to acts of omission or commission upon which plaintiff based her claim. Cunningham v. U. S. Casualty Co., 125 App. Div. 916, 109 NYS 1014. In action for damages for refusal to reassign a copyright, held defendant was entitled to a bill of particulars as to the nature of damages claimed and items thereof. Shaw v. Stone, 124 App. Div. 624, 109 NYS 146. Defendant in action for injuries to a servant because of alleged failure to instruct or warn as to operation of machinery held entitled to a bill of particulars showing in what respect defendant is claimed to have been negligent and on what theory plaintiff seeks to hold him liable. Kaplan v. Sher, 109 NYS 20.

43. Order requiring a servant suing for injuries received while oiling a machine to furnish a bill of particulars, showing wherein the master failed to promulgate rules, etc., complied with by stating that he failed to promulgate rules as to the running of the machine and as to times where persons should work about it, especially as oiler. Maloney v. United Dressed Beef Co., 130 App. Div. 369, 114 NYS 927.

44. Hines v. Stanley-G. I. Elec. Mfg. Co., 199 Mass. 522, 85 NE 851.

45. A party who has in good faith, but

§ 2. *The declaration, count, complaint or petition.*[46] *General rules.*See 10 C. L. 1189—The declaration, petition or complaint must allege all the facts necessary to show a cause of action against the defendant[47] in ordinary and concise language

unsuccessfully attempted to serve a sufficient bill of particulars. Boskowitz v. Sulzbacher, 128 App. Div. 537, 112 NYS 890.

**46. Search Note:** See notes in 6 C. L. 1023; 13 L. R. A. (N. S.) 529; 1 Ann. Cas. 947; 3 Id. 285.

See, also, Pleadings, Cent. Dig. §§ 91-155; Dec. Dig. §§ 38½-75; 1 A. & E. Enc. P. & P. 234; 4 Id. 587; 5 Id. 302; 16 Id. 774.

**47.** Plaintiff must stand or fall on allegations of his complaint. Bryant Lumber & Shingle Mill Co. v. Pacific Iron & Steel Works, 48 Wash. 574, 94 P 110. All the elements of a complete cause of action must be set forth clearly, formality may be dispensed with but not substance. Plunkett v. Hamnett, 36 Pa. Super. Ct. 590. Any breach of contract maturing a debt not due on its face must be pleaded and show that the action is not prematurely brought. Zeller v. Wunder, 36 Pa. Super. Ct. 1. Where laches is not apparent but complaint shows delay unaccompanied by circumstances derogatory to equity, plaintiff need not explain the delay. Wills v. Nehalem Coal Co. [Or.] 96 P 528. Complaint must state a present cause of action and show that plaintiff is entitled to relief at the time complaint is filed. Melvin v. Melvin [Cal. App.] 97 P 696. Where all damages complained of resulted from a single wrongful act, based on fraud, all elements going to make up the sum total of the damages should be alleged in a single count. Power v. Turner [Mont.] 97 P 950. An allegation in a complaint that "defendant is informed and believes" certain facts without alleging on such information, and belief that such facts exist, is not a sufficient allegation of any issuable fact. Swank v. Sweetwater Ir. & P. Co. [Idaho] 98 P 297. A complaint which states a cause of action is not vitiated by the incorporation therein of immaterial matter. Pennington v. Gillaspie, 63 W. Va. 541, 61 SE 416. That one of several counts is defective does not authorize dismissal of the action. Seal v. Virginia Portland Cement Co., 108 Va. 806, 62 SE 795. Where petition was held deficient in certain particulars which were cured by amendment, it was error to dismiss it. Johnson v. Babcock Bros. Lumber Co. [Ga.] 63 SE 621. A complaint should by direct allegations or by fair inference therefrom contain all the essentials of a cause of action. Where negligence is basis of recovery, facts showing negligence, injury, and that it was the proximate cause should be alleged. German-American Lumber Co. v. Brock [Fla.] 46 S 740. A complaint should not be held insufficient on demurrer because one paragraph thereof constituted impertinent surplusage. Arnold v. Kutinsky, Adler & Co., 80 Conn. 549, 69 A 350. A petition defective in substance will support a judgment if the facts upon which the demand is based are intelligently set forth. In re Nelson's Estate [Neb.] 115 NW 1087. A complaint whether framed as a bill in equity or otherwise, regardless of the prayer, is good as against demurrer if the facts alleged show that plaintiff is entitled to substantial relief. Lovering v. Webb Pub. Co., 106 Minn. 62, 118 NW 61. Sufficiency of a complaint to determine rights of several claimants to a fund and for an accounting as incidental to the main relief cannot be tested as a complaint for accounting. Lovett v. New York, 128 App. Div. 157, 112 NYS 552. If the general terms and scope of a complaint are sufficient to admit the proof, a complaint is sufficient as against a motion in arrest. City of Lafayette v. West [Ind. App.] 87 NE 650. Complaint alleging two independent issues held not demurrable because of insufficiency of the allegation of state of facts showing injury to animals resulting from negligent operation of a train under the rule that where general and specific allegations as to the same matter are alleged, the general will be controlled by the specific. Texas & G. R. Co. v. Pate [Tex. Civ. App.] 113 SW 994. On motion in arrest under Burns Ann. St. 1908, § 592, a complaint is to be given the benefit of every imperfect allegation, ambiguously pleaded. City of Lafayette v. West [Ind. App.] 87 NE 550. In pleading **negligence,** an allegation of duty is insufficient; facts sufficient to show such duty must be alleged. Hone v. Presque Isle Water Co. [Me.] 71 A 769. In a common-law action for injuries to a servant, the servant may include in his complaint as many acts as he thinks contributed to the injury. Knickerbocker Ice Co. v. Gray [Ind.] 84 NE 341. Complaint alleging gross negligence will sustain a verdict for ordinary negligence. Gorton v. Harmon, 152 Mich. 473, 15 Det. Leg. N. 250, 116 NW 443. In action for **injury to personal property,** loss of use as an element of damages must be especially pleaded. Schulte v. Louisville & N. R. Co., 33 Ky. L. R. 31, 108 SW 941. **General damages** may be recovered under general allegation of damage. Hoskins v. Scott [Or.] 96 P 1112. **Special damages** must be specially alleged. Id; Central Kentucky Trac. Co. v. Chapman [Ky.] 113 SW 438. Facts justifying **punitive damages** must be specially pleaded either expressly or by necessary implication. Saeger v. Metcalf [Ariz.] 94 P 1094. In **suit for divorce** on ground of cruelty, acts and conduct must be alleged. Hubbell v. Hubbell, 7 Cal. App. 661, 95 P 664. In actions for **conversion** of personal property procured by fraud, it is not necessary to allege the fraud, general allegations of conversion are sufficient. Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 P 1029. Where gravamen of action is **nonfeasance or misfeasance** of another, a complaint which sets out facts out of which the duty springs and that defendant failed to perform it need not specify particular acts which he failed to perform. Louisville & N. R. Co. v. Church [Ala.] 46 S. 457. At common law in pleading the **common counts,** promise to pay or that the work was worth a certain amount should be alleged, but under Civ. Code 1896, § 3352, such allegation is not required nor need it be alleged that work was done at the spe-

cial instance and request of defendant if he accepted it. Merrill v. Worthington [Ala.] 46 S 477. The approved form of a count for **money had and received** is that defendant is indebted to plaintiff in a certain sum for money had and received by firm for the use of plaintiff. Fox v. Monahan [Cal. App.] 97 P 765. In action on **contract** plaintiff need not plead whether contract was oral or written. Rubin v. Cohen, 129 App. Div. 395, 113 NYS 843. Complaint alleging that plaintiff at the special instance and request of defendant performed certain work and furnished material for which defendant promised to pay the reasonable sum of $1,000 is sustainable either on the theory of express contract or quantum meruit. Walar v. Rechnitz, 126 App. Div. 424, 110 NYS 777. Not necessary to allege consideration in action on a promissory note. Zimbleman v. Finnegan [Iowa] 118 NW 312. Not necessary to allege consideration in reply to plea of no consideration. Id. The essential allegations where **breach of warranty** is relied upon are the terms of the warranty, the breach and facts from which damages are to be inferred. Segerstrom v. Swenson, 105 Minn. 115, 117 NW 478. A complaint **against one in his fiduciary or representative capacity** must show that the action is so brought and that his interest is in such capacity. Waldrip v. McConnell [Ind. App.] 84 NE 517. Complaint in **quo warranto** to try title to office must set out facts on which relator relies to sustain his title to office. Ham v. State [Ala.] 47 S 126. **Bill in equity** must clearly state the right to the relief prayed. Hollander v. Central Metal & Supply Co. [Md.] 71 A 442. Complaint for **specific performance** must show that recovery of damages for breach of contract would not be an adequate remedy (Herzog v. Atchison, etc., R. Co., 153 Cal. 496, 95 P 898), and must state facts from which the court can determine that the consideration is adequate and the contract just and equitable (Id.). Under Civ. Code § 3391, complaint for specific performance must show that consideration of the contract was adequate. Stiles v. Hermosa Beach Land v. Water Co. [Cal. App.] 97 P 91. Where complaint in suit for specific performance of contract to convey land has been in possession since a certain date, such fact should be alleged. Krah v. Wassmer [N. J. Law] 71 A 404. Bill for specific performance must allege facts entitling plaintiff to such relief by full, clear and distinct statements. Clinchfield Coal Co. v. Clintwood Coal & Timber Co., 108 Va. 433, 62 SE 329.

**Complaint held sufficient:** A complaint sufficient to sustain verdict is ample for admission of all testimony material to the issues. Hoskins v. Scott [Or.] 96 P 1112. A declaration which states a cause of action for any recovery is sufficient as against demurrer. Benedict Pineapple Co. v. Atlanta Coast Line R. Co. [Fla.] 46 S 732. Under Civ. Code Prac. Ky. §§ 2, 4, defining a general demurrer as an objection to a pleading on the ground that it does not state a cause of action or defense, a complaint is not subject to general demurrer because based on an erroneous theory as to rights and measure of damage and does not entitle plaintiff to relief prayed for. Backer v. Penn Lubricating Co. [C. C. A.] 162 F 627. Failure of a petition to state to what term of court it is returnable does not authorize dismissal of the case. Booth v. State [Ga.] 63 SE 502. A complaint for $400 cash may afford sufficient basis for a suit for money had and received, which may be properly amplified by amendment setting forth in detail the circumstances of the transaction. Bass v. West Point Wholesale Grocery Co. [Ga. App.] 62 SE 1004. Complaint against officer of a corporation for paying out corporate funds to one not entitled to them held to state a cause of action though not alleging that payment was wrongfully or negligently made without authority. Mutual Life Ins. Co. v. Granniss, 60 Misc. 187, 112 NYS 1074. Complaint for **injuries** to a passenger held to sufficiently allege **negligence.** Selma St. & S. R. Co. v. Campbell [Ala.] 48 S 378. Complaint under Code 1906, § 1985, for death caused by derailment of a train. Hudson v. Mississippi Cent. R. Co. [Miss.] 48 S 289. Complaint for negligence. Simeoll v. Derby Rubber Co. [Conn.] 71 A 546. General averment of negligence in action for injuries to a passenger thrown violently to the ground. Birmingham, R., L. & P. Co. v. Haggard [Ala.] 46 S 519. Action for injuries to servant. General Supply & Const. Co. v. Lawton [Ga.] 62 SE 293. Complaint for damages for **breach of contract** held to state a cause of action for at least nominal damages. Wessel v. Wessel Mfg. Co., 106 Minn. 66, 118 NW 157. Complaint on contract. Truitt-Silvey-Hat Co. v. Callaway, 130 Ga. 637, 61 SE 481. Petition for writ of **mandamus** to compel issuance of building permit held not, where the defect in the complaint could have been remedied if pointed out. Coon v. San Francisco Board of Public Works, 7 Cal. App. 760, 95 P 913. Complaint held sufficient to state a cause of action to **quiet title.** Sanders v. Herman [Kan.] 99 P 1135. Under Code Civ. Proc. § 749, providing for the making of known and unknown owners parties to a suit to quiet title, failure to include all persons having apparent interest does not render a complaint insufficient to state a cause of action. Blackburn v. Bucksport & E. R. R. Co., 7 Cal. App. 649, 95 P 668. Where some of the items of damages were recoverable, it was error to sustain a demurrer to the entire petition. Tygart v. Albritton [Ga. App.] 63 SE 521. Complaint held sufficient to entitle plaintiff to **nominal damages.** Williams v. Rome R. & L. Co., 4 Ga. App. 370, 61 SE 495; Delaware Ins. Co. v. Pennsylvania Fire Ins. Co., 130 Ga. 643, 61 SE 492.

**Held insufficient:** Complaint held not to show **fraud or mistake** for which covenant for light and air would be declared void by statement on information and belief as to why such covenant was made. Bryan v. Grosse [Cal.] 99 P 499. Where right to **injunction** is left in doubt by a bill and no other relief could be granted, the bill was demurrable though it prayed for general relief. Stinson v. Ellicott City & Clarksville Co. [Md.] 71 A 527. Petition for injunction prayed for relief as to matters not included in the proceeding sought to be enjoined and was subject to demurrer on ground of want of jurisdiction. Crawley v. Barge [Ga.] 63 SE 819. A complaint which,

and in such manner as to enable a person of ordinary understanding to know what is intended.[48] The performance or happening of all conditions precedent to the right

though it alleges **negligence,** shows that the injury did not proximately result from acts specified is subject to dismissal on demurrer. Ayers v. Louisville & N. R. Co. [Ga. App.] 63 SE 530. A complaint for injuries held subject to special demurrer for failing to allege that defects in appliance were not latent or might have been discovered by the exercise of due diligence by the master. Eagle & Phenix Mills v. Johnson [Ga.] 61 SE 990. Complaint for negligence which shows on its face facts from which contributory negligence must necessarily be inferred is demurrable. Smith v. Southern R. Co., 80 S. C. 1, 61 SE 205.

48. A complaint should clearly and distinctly allege every fact essential to the cause of action and the cause of action attached cannot be resorted to, to supply essential allegations. Hoopes v. Crane [Fla.] 47 S 992. A complaint is sufficiently definite and certain if it states the cause with sufficient particularity to enable defendant to prepare his defense. Hughes v. Orangeburg Mfg. Co., 81 S. C. 354, 62 SE 404. Facts constituting a cause of action must be stated in ordinary and concise language. Under Code Civ. Proc. § 49, a complaint alleging that one collected money from a certain person will not sustain judgment where proof shows that he collected it from another. Soden v. Murphy, 42 Colo. 352, 94 P 353. Under Code Civ. Proc. § 671, requiring cause to be stated in ordinary and concise language, complaint for recovery of purchase price paid for corporate stock on an agreement to repurchase within three years after the sale held to comply therewith. Raiche v. Morrison, 37 Mont. 244, 95 P 1061. Motion to make more specific is properly denied where complaint is not so general as to be misleading and where it can be readily understood. Du Bois v. First Nat. Bank, 43 Colo. 400, 96 P 169. A demurrer will not be sustained to a complaint which states a cause of action, however inartificially. Jones v. Henderson, 147 N. C. 120, 60 SE 894. Motion to make complaint more definite and certain properly overruled, where it alleged injury to an employe because of a dangerous and poorly equipped cotton frame, as defendant could have examined the machine and prepare to meet the allegations. Hughes v. Orangeburg Mfg. Co., 81 S. C. 354, 62 SE 404. A complaint is sufficient if it appraises defendant of the grounds, and states facts which if proved entitle plaintiff to relief. Chesapeake & O. R. Co. v. Hoffman [Va.] 63 SE 432. A **bill in equity** must contain a clear statement of the facts upon which plaintiff relies for relief and this rule is vigorously applied where injunctive relief is sought. Stinson v. Ellicott City & Clarkville Co. [Md.] 71 A 527. Complaint based on **negligence** in equipment and management of a vessel is not bad after verdict because it alleges ownership of the vessel by defendant in the present tense only where it further alleges that negligent acts were those of defendant. Puget Sound Nav. Co. v. Lavender [C. C. A.] 160 F 851. Where **complaint in attachment** was uncertain as to whether it was based on notes or fraud and was not specific as to certain receipts, held defendant was entitled to have it made more definite and certain. Isenburger v. Roxbury Distilling Co., 163 F 133. A complaint on a **contract** must show with reasonable certainty facts constituting the contract. McEwen v. Hoffman [Ind. App.] 85 NE 364. Under Code, §§ 3559, 3630, a pleading, which advises the opposite party of the exact claim made, is sufficiently certain though all material allegations should be made with such certainty as to leave no room for doubt as to matters pleaded. McCrary v. Lake City Elec. L. Co. [Iowa] 117 NW 964. A complaint will be deemed sufficient when the necessary allegations may be gathered from all the averments though the pleading is deficient in logical order and technical language. Vukelis v. Virginia Lumber Co. [Minn.] 119 NW 509. Under Code Civ. Proc. § 481, providing that complaint shall contain a plain concise statement of facts, complaint against directors of corporation for misconduct should specifically allege facts constituting such misconduct though brought by the attorney general under Code Civ. Proc. §§ 1781, 1782. People v. Equitable Life Assur. Soc., 124 App. Div. 714, 109 NYS 453. Under Code Civ. Proc. §§ 481, 546, providing that complaint must be definite and certain and authorizing court to require it to be made so, complaint for legal services was properly required to be made more certain by alleging time when and place where request for services was made and manner in which made, etc. Smythe v. Cleary, 127 App. Div. 555, 111 NYS 872. Complaint alleging that "a majority of the qualified voters of said school district voted in favor of" a proposition is subject to motion to make more definite and certain as to whether a majority of those who voted or a majority of the voters and taxpayers was intended. School Dist. No. 3, Tp. 45, Range 6 E. St. Louis County v. Oellien, 209 Mo. 464, 108 SW 529. Under Ann. St. 1906, p. 2135, requiring only a statement in justice court, a statement is sufficient if it appraises the opposite party of the nature of the action and is sufficient to bar another action. Dalton v. United R. Co. [Mo. App.] 114 SW 561. Under the Code it is sufficient in an action of assumpsit to state facts from which a promise to pay would be implied. Bick v. Clark [Mo. App.] 114 SW 1144. In action for balance of purchase price of goods held unnecessary to set out an itemized statement, it appearing that the sale was in bulk at an agreed price. Hamilton v. Dismukes [Tex. Civ. App.] 115 SW 1181.

**Held sufficient:** In **action for injuries** where plaintiff alleged that because of injuries he was unable to do any work and that he would be prevented from following his usual vocation for life, held sufficient to appraise defendant that evidence of vocation and earnings would be offered, and defendant could not object thereto in the absence of special demurrer. Loofbourow v. Utah L. & R. Co., 33 Utah, 480, 94 P 981.

to sue, or an excuse for nonperformance, must be alleged.[49] Matters of defense need not be alleged.[50] Whether the declaration states a cause of action is determined from inspection thereof without reference to the evidence.[51] The complaint must proceed on a definite theory on which plaintiff must recover if at all.[52] The nature of the action, whether it is in tort or on contract,[53] or at law or in equity,[54] and whether more than one cause of action is stated,[55] are questions of construction. A complaint

**Complaint on attachment bond** held sufficiently definite to enable defendants to be understood and intelligently answered. Dackich v. Barich, 37 Mont. 490, 97 P 931. Misdescription of attachment bond sued on as an "undertaking pursuant to law" when it was in fact a common-law bond is immaterial where the bond was set out in the complaint. Id. Complaint though somewhat indefinite. Meshbesher v. Channellene Oil & Mfg. Co. [Minn.] 119 NW 428. Complaint for injuries to a passenger while alighting held not vague, uncertain or indefinite. Birmingham, R., L. & P. Co. v. McGinty [Ala.] 48 S 491. Complaint for specific performance held sufficiently certain as to description as against demurrer. Wilkins v. Hardaway [Ala.] 48 S 678. Complaint for injuries caused by fall of a passenger elevator held to sufficiently allege the relation of passenger and carrier as against a motion in arrest of judgment. Steiskal v. Marshall Field & Co., 238 Ill. 92, 87 NE 117.

**49.** See, ante, § 1. Complaint for injuries to servant which did not show that danger in place of work was not an obvious one and assumed held demurrable. Grover v. New York, S. & W. R. Co. [N. J. Law] 69 A 1082. Petition must show full performance or tender by the plaintiff. Suit on contract. Zeller v. Wunder, 36 Pa. Super. Ct. 1. Plaintiff must allege full compliance with terms of contract in the absence of averment of waiver by defendant. Must contain all averments showing right of recovery suit on building contract. Rosenblum v. Stolzenberg, 36 Pa. Super. Ct. 644.

**50.** In action on appeal bond, a complaint alleging recovery of judgment against principal on the bond was not demurrable for failure to allege that it was unpaid, that is matter of defense. Sweeney v. Metropolitan Surety Co., 129 App. Div. 22, 113 NYS 126.

**51.** A declaration is sufficient which charges that defendant negligently provided a dangerous and unsafe place of which the plaintiff had no knowledge or means of knowledge, and that because of such negligence of the defendant the plaintiff was injured without his fault. Commonwealth Elec. Co. v. Roonsy, 138 Ill. App. 275.

**52.** The rule that a complaint must proceed upon some definite theory refers to the facts on which the right of action is claimed to exist. Pittsburgh, etc., R. Co. v. Rogers [Ind. App.] 87 NE 28. Under the Code system a pleader must recover on the theory of his pleading. While a pleader may elect to rely on contract or tort, the form of action may be material. Wernick v. St. Louis & S. F. R. Co., 131 Mo. App. 37, 109 SW 1027. Notwithstanding the fact that forms of action have been abolished, distinctions cannot be entirely ignored and a complaint should be framed either on the theory that it is in tort or contract. Complaint stating a cause of action for money had and received and for conversion thereof is bad. Jones v. Winsor [S. D.] 118 NW 716. The court cannot treat allegations as to conversion as surplusage and hold it good as stating a cause of action for money had and received. Id. If a cause is stated on two distinct theories in the same paragraph, plaintiff can proceed on but one and must establish his right to recovery on the theory adopted. State v. Scott [Ind.] 86 NE 409.

**53.** Complaint held to state a cause of action for breach of contract and not for conversion. Klepner v. Lewis Mercantile Co. [C. C. A.] 159 F 94. The theory upon which a complaint rests the case is to be determined by the general tenor and character of the pleading. The one most apparent and clearly outlined. State v. Scott [Ind.] 86 NE 409.

**54.** The complaint determines whether the action is at law or in equity. Motley, Green & Co. v. Detroit Steel & Spring Co., 161 F 389. Where complaint shows that plaintiff is entitled to equitable relief, he need not allege that there is no adequate remedy at law. Sullivan v. Bitter [Tex. Civ. App.] 113 SW 193.

**55. Complaint held to state but one cause of action:** Complaint for libel held to state but a single cause of action, and plaintiff would not be compelled to separately state and number his causes. Alison v. China & Japan Trading Co., 127 App. Div. 246, 111 NYS 100. Complaint by servant against master for injuries. Peters v. Louisville & N. R. Co. [Miss.] 48 S 296. Complaint for failure of a railroad company to erect cattle guards and failure to keep them in repair after erecting them stated conjunctively does not state two causes of action because both must be proved. Atlanta & B. Air Line R. Co. v. Brown [Ala.] 48 S 73. There is no misjoinder of causes where the complaint charges on behalf of plaintiff that the contract sued upon is a joint enterprise and action is brought only on one cause. German Ins. Bank v. Martin [Ky.] 114 SW 319. Complaint against a railroad company for obstructing an alley and also alleging a contract under which the company had agreed to pay all damages by reason of the embankment held to state but a single cause of action and not objectionable as joining two causes. Ellis v. St. Louis, etc., R. Co., 131 Mo. App. 395, 111 SW 839. Complaint by owners of mineral springs founded on wrongful interference with their common-law rights, as well as a violation of Laws 1908, p. 1221, for the protection of mineral resources, is not multifarious, nor a misjoinder of causes. Hathorn v. Natural Carbonic Gas Co., 60 Misc. 341, 113 NYS 458. Complaint for work and material furnished under a contract and for prospective profits

should show the interest of all parties defendant.[56] Where action is discontinued as to one defendant, the declaration is to be read as charging against defendants remaining, only.[57]

*Consolidation of suits.*[See 10 C. L. 1192]—The court ordinarily has discretionary power to consolidate to or move pending actions brought by the same plaintiff against the same defendant, for causes of action which could be joined.[58] Where actions are consolidated, the order of consolidation should require an amendment of titles of the cases and pleadings to conform to the order.[59]

*Joinder of causes of action.*[See 10 C. L. 1192]—The codes generally specify certain classes of causes of action which may be joined,[60] provided they are consistent [61] and

where defendant refused to permit completion of the contract states but a single cause of action and plaintiff would not be required to separate and number his causes. Wieser v. Times Realty & Const. Co., 110 NYS 963. Complaint on a bond, the obligation of which is joint and several, against surviving sureties and personal representatives of deceased sureties is a cause of action, one and the same against all and not separate causes against the survivors and personal representatives. Erie County v. Baltz, 125 App. Div. 144, 109 NYS 304. Complaint examined and held to state a cause of action only for goods sold and delivered. Cooper & Cole Bros. v. Witham [Neb.] 116 NW 150. Bill construed and held to be a bill to enforce a lien and to foreclose the same, and not objectionable as joining a cause of action to foreclose a pledge and recover a debt. Wehner v. Baner, 160 F 240. Where the gravamen of the first count of a complaint was the wrongful ejection of a passenger, the averment of other matters of aggravation did not render it demurrable as seeking recovery for both wrongful ejectment and assault. Birmingham, R., L. & P. Co. v. Yielding [Ala.] 46 S 747. Complaint by two partners against a third after dissolution on his promise to account for proceeds of certain goods was not demurrable as stating two separate actions, since the alleged promise was to pay plaintiffs jointly and not severally. Tieman v. Sacks [Or.] 98 P 163. Where one claimed a water right as a riparian owner, as appropriator, and, also, under contract with defendants, the cause of action was single and he was not required to separately state a cause on each ground, and elect. Hutchinson v. Mt. Vernon Water & P. Co., 49 Wash. 469, 95 P 1023. Complaint alleging that plaintiff's intestate and defendant's testator entered into pre-nuptial contract providing that if the former survived the latter she should accept a certain sum in lieu of dower and that thereafter the latter shot her and then committed suicide. Logan v. Whitley, 129 App. Div. 666, 114 NYS 255.

**56.** Where complaint to foreclose a mechanic's lien does not show that a named defendant had any interest in the land and prayer asks no relief against him, his demurrer is well taken. Tobenkin v. Piermont, 114 NYS 948.

**57.** In action for personal injury charging negligence. City of Chicago v. Gathman, 139 Ill. App. 253.

**58.** It is within the discretion of the court to consolidate two suits brought to contest a local option election. McCormick v. Jester [Tex. Civ. App.] 115 SW 278. Actions may be consolidated though there be no statutory sanction. Vandalia Coal Co. v. Lawson [Ind. App.] 87 NE 47. Under Rev. St. U. S. § 921, consolidation rests in the discretion of the court. Id. Consolidation for purposes of trial of actions by contractor, materialmen, etc., to foreclose mechanic's lien, did not change the issues of the respective cases nor render ineffectual admissions in pleadings between contractors and owners. Los Angeles Pressed Brick Co. v. Higgins [Cal.] 97 P 420. Action in ejectment may not be consolidated with a suit in equity to quiet title to the land. Keller v. Harrison [Iowa] 116 NW 327.

**59.** Practice of retaining all original and amended pleadings in each action and presenting them to the court is not approved. Eastern Wisconsin R. & L. Co. v. Hackett, 135 Wis. 464, 115 NW 376.

**60.** Complaint to set aside a sale under a trust deed, and showing facts warranting an accounting against the trustee, is not bad for misjoinder under Code Civ. Proc. § 427, authorizing joinder of causes where claims are against a trustee by virtue of contract or operation of law. Huene v. Cribb [Cal. App.] 98 P 78. Under Code § 3545, relative to joinder of actions, held improper to join an action against a bank to recover a deposit and one against the cashier of the bank as administrator. Faville v. Lloyd [Iowa] 118 NW 871. Action in favor of a corporation against officers and directors for misconduct inumerated in Code Civ. Proc. §§ 1781, 1782, are included in § 484 prescribing what causes may be joined. People v. Equitable Life Assur. Soc., 124 App. Div. 714, 109 NYS 453. Where one paid a judgment against himself and others, an action against the others for contribution and to set aside an alleged fraudulent conveyance by one of them, plaintiff not having reduced his claim to judgment, is an **improper joinder.** Jewett v. Maytham, 59 Misc. 56, 109 NYS 1000. Under Court and Practice Act § 246 plaintiff to bring trespass or case and join therein counts in trespass or case, a writ in case may be followed by a declaration in trespass. Adams v. Lorraine Mfg. Co. [R. I.] 71 A 180.

**61. Properly joined:** Cause of action under Rev. St. 1899, § 2864, for death caused by negligence of an employe operating a train and the cause given by § 2865 for death caused by negligence of a defendant, may be joined when stated in separate counts. King v. St. Louis & S. F. R. Co., 130 Mo. App. 368, 109 SW 859. In suit by husband and wife to enjoin sale of property of wife on execution issued against her husband when

affect all the parties to the action in the same character or capacity.[62] Among the most common of these are causes of action upon claims arising out of the same transaction or transactions connected with the same subject of action [63] and causes of ac-

creditor answered that it was not her separate property but in the event it was so found to subject other property to the claim, held not an abuse of discretion to sustain a plea of misjoinder and confine the action to the relief demanded by the wife. Texas Brew. Co. v. Bisso [Tex. Civ. App.] 109 SW 270.

**Causes held improperly joined:** A suit by a vendee in a contract for sale of land to recover deposit and disbursements made in searching title cannot be joined with an action on the contract to recover for defendant's breach thereof. Realty Transfer Co. v. Cohn, Bear, Myer & Aronson Co., 60 Misc. 623, 113 NYS 994. Under Code Civ. Proc. § 484, providing for joinder of causes arising out of the same transaction providing they are consistent, a cause based on fraudulent representations that all lots in a plat were under building restriction and a cause based on breach of agreement to bring all such lots under such covenants. Kaufman v. Morris Bldg., Co., 126 App. Div. 388, 110 NYS 663.

**Held inconsistent:** Complaint alleging delivery of goods to a truckman to be delivered by him to a common carrier which was to deliver them to consignee and that goods were not delivered by the latter to the consignee, and through their default and omission plaintiff was damaged, held a misjoinder of causes since neither the truckman nor the carrier were liable for the fault of the other. Hirsch v. New England Nav. Co., 129 App. Div. 178, 113 NYS 395. Cause for breach of contract to take a certain amount of electric current and for damages for fraud in inducing plaintiff to make the contract and go to the expense of connecting plaintiff's plant with defendant's. Edison Elec. Illuminating Co. v. Franklin H. Kalbfleisch Co., 127 App. Div. 298, 111 NYS 462. Cause for conversion of bonds and stocks of a corporation cannot be joined with cause against directors for negligence and misconduct. Schlesinger v. Fisk, 113 NYS 578.

**62.** Under Code Civ. Proc. § 484, it must appear from the face of the complaint that causes joined effect all the parties and causes against directors, officers and trustees of a corporation, for alleged misconduct cannot be joined unless conspiracy between all is apparent. People v. Equitable Life Ass'n Soc., 124 App. Div. 714, 109 NYS 453. Complaint to enjoin interference with contract rights in patents is bad if it misjoins matters that are apparently distinct and independent as against particular defendants or if as against all it contains matter not legally connected. Wise v. Tube Binding Mach. Co., 194 N. Y. 272, 87 NE 430.

**Improperly joined:** Cause charging that grantee in deed obtained it by fraud and undue influence prosecuted after death of the grantor and a cause charging that the grantee received title under an express trust for the benefit of heirs of the grantor prosecuted after death of such heirs, may not be joined. Bollinger v. Bollinger [Cal.] 99 P 196. All persons whose property is affected by a nuisance, though they own in severalty, may join in an action to abate it, but they cannot join in an action for such relief their several claims for damages in which there is no joint interest. Nahate v. Hansen, 106 Minn. 365, 119 NW 55. A complaint by a tax payer for himself and others to declare void a paving assessment, and enjoin disposal of assessment certificates, held bad as improperly joining causes of action, each plaintiff being interested only in having his own land relieved from the burden. Carstens v. Fond du Lac, 137 Wis. 465, 119 NW 117. Common law cause of action for injuries and action for violation of a city ordinance cannot be joined in the same count. Wills v. Atchison, etc., R. Co., 133 Mo. App. 625, 113 SW 713.

**No community of interest:** Where an injunction bond was given in action by persons claiming to be officers of a company against others to enjoin them from further managing the company, held an action on such bond for costs and expenses in defending the injunction suit could not be joined with an action for loss of time and salary. Graham v. Rice, 33 Ky. L. R. 441, 110 SW 231. An action by a grantee to cancel a deed to timber on the land as a cloud cannot be joined with an action against the grantor for breach of the covenant against incumbrances consisting of such deed. Lumpkin v. Blewitt [Tex. Civ. App.] 111 SW 1072. Distinct causes between different parties must not be mingled. Southern Steel Co. v. Hopkins [Ala.] 47 S 274.

**63.** Cause for cancellation of release of damages for injuries and for damages for such injuries may be joined. Perry v. O'Neil & Co., 78 Ohio St. 200, 85 NE 41. Count under Rev. Laws, c. 106, for death of employe occasioned by superintendent's negligence and a count for conscious suffering arising from defendant's common law negligence may be joined under St. 1906, p. 345, c. 370. Dulligan v. Barber Asphalt Pav. Co., 201 Mass. 227, 87 NE 567. Actions in equity by stockholder against directors for malfeasance or misfeasance in office may be joined whether legal or equitable. People v. Equitable Life Assur. Soc., 124 App. Div. 714, 109 NYS 453. Suit in equity by attorney general in name of the people for removal of director of a corporation as authorized by Code Civ. Proc. §§ 1781, 1782, may be joined with an action against them for accounting. Id.

**Causes properly joined:** Complaint on fire insurance policy which shows a right to recover on the policy and also alleges adjustment between the parties and an agreement by insurer to pay certain sum, if stating two causes of action shows that they arise out of the policy and plaintiff cannot be compelled to elect. Leslie v. Firemen's Ins. Co., 60 Misc. 558, 112 NYS 496. Action for recovery of money and for cancellation of deeds, based on a single deceit alleged to have been practiced by two defendants on plaintiff, may be brought against two defendants jointly. Oppermann v. Petry [Tex. Civ. App.] 115 SW 300. If it was error to join a cause of action for slander and malicious prosecution growing out of the same transaction, it was not prejudicial

tion on contract.[64] The joinder of legal and equitable causes is usually permissible under the code,[65] but not at common law.[66] Causes of action on contract and in tort may not be joined.[67] Causes should not be joined where the court has no jurisdiction of one of them.[68]

Several aspects of the same cause may ordinarily be pleaded in the same count[69] or in different counts[70] provided they are not inconsistent.[71] Duplicity

where the court could have consolidated the actions if separately brought. Ashford v. Richardson [Ark.] 113 SW 808. A cause of action on a warranty against incumbrances may be joined with a cause for deceit practiced on plaintiff in the transaction in which the deed was executed. Thomas v. Ellison [Tex. Civ. App.] 110 SW 934. Causes in tort and on contract may be joined when they arise out of the same transaction or transactions connected with the subject of the action. Aylesbury Mercantile Co. v. Fitch [Okl.] 99 P 1089.

**64.** Under Ball. Ann. Codes & St. § 4942, permitting joinder of causes of action on contract express or implied, an administratrix properly joined a cause to recover an amount paid by testator by mistake on dissolution of a partnership and to recover the purchase-price of land sold. Moylan v. Moylan, 49 Wash. 341, 95 P 271. Under Kirby's Dig. authorizing joinder of actions arising out of contract, where a lessee agreed to repair fences or pay damages, an action by the landowner to recover costs of such repairs, and to recover rent may be joined. Von Berg v. Goodman, 85 Ark. 605, 109 SW 1006. Under Rev. Code Civ. Proc., § 144, permitting joinder of causes of action arising out of contract express or implied, complaint by a trustee in bankruptcy alleging causes both on conveyance of property in fraud of bankrupt act and payment of money to defendant as a preference properly unites the two causes. Bowler v. First Nat. Bank [S. D.] 115 NW 517 Claims arising ex contractu properly joined. Tygart v. Albritton [Ga. App.] 63 SE 521. Action on contract for labor and material and an action for extras may be joined. Sheinart v. Ritchle, 115 NYS 117.

**65.** Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 NW 751. Under Code Civ. Proc. § 484, actions at law and suits in equity may be joined. People v. Equitable Life Assur. Soc., 124 App. Div. 714, 109 NYS 453.

**66.** Cause on a bond and to foreclase an accompanying mortgage where execution on personal judgment is returned unsatisfied are improperly joincd. City Real Estate Co. v. King, 58 Misc. 69, 110 NYS 231. In federal courts the distinction between actions at law and suits in equity is maintained and an action at law and a suit in equity cannot be joined. American Creosote Works v. Lembcke & Co., 165 F 809.

**67.** Action in equity by corporation against officers and directors for an accounting of losses sustained because of their misconduct cannot be joined with an action against them for negligence. People v. Equitable Life Assur. Soc., 124 App. Div. 714, 109 NYS 453. Civ. Code Proc. § 73, does not authorize action for injuries to a plaintiff in the county where goods were delivered, and such cause may not be joined with an action for breach of contract to carry goods under § 83. Wilson v. Louisville & N. R. Co., 33 Ky. L. R. 985, 112 SW 585.

**68.** It is improper to join in municipal court an action for breach of contract with one for malicious prosecution, the court not having jurisdiction of the latter. Tolzer v. Brooklyn Union El. R. Co., 61 Misc. 59, 113 NYS 18.

**69.** Allegations of trespass vi at armis and de bonis asportates, conjunctively, may be joined in the same count where parts of the same transaction. Stowes Furniture Co. v. Brake [Ala.] 48 S 89. A company was chartered to purchase, sell and handle grain, provisions, etc., but prohibited by its charter from speculating in options. Held a complaint by the company against its general manager to hold him liable for losses caused by his speculation in options, setting up several causes resulting from his failure to perform his duty as manager, is not demurrable for misjoinder of causes sounding in tort and on contract. Hoffman v. Farmers' Co-op. Shipping Ass'n [Kan.] 97 P 440. A complaint for personal injury may charge in the same count several acts of negligence not inconsistent with each other, any or all of which might have produced the result complained of and may in the same count charge common law and statutory negligence. Thompson v. Keyes-Marshall Bros. Livery Co., 214 Mo. 487, 113 SW 1128.

**70.** In an action against a carrier for failure to deliver a shipment of goods, a shipper may plead in different counts breach of common-law duty to deliver, conversion, and breach of contract to deliver within a reasonable time; not inconsistent. Moseley v. Missouri Pac. R. Co., 132 Mo. App. 642, 112 SW 1010. Under reformed system of pleading in force in Missouri, a cause of action on an insurance policy and a cause upon a compromise claim under the policy may be joined in distinct counts which are not inconsistent, and it appears that but a single right of recovery is asserted, which is stated in the two counts as to enable him to recover upon the one which is shown to be the true basis and measure of his right. New York Life Ins. Co. v. Rankin [C. C. A.] 162 F 103. A cause may properly be set forth in separate counts. Reilly v. Steinhardt, 58 Misc. 471, 111 NYS 472. Complaint for injuries is not defective because one count charges promise to remedy the defect which caused the injury, and another charging that defendant directed plaintiff to work and that there was no danger. Seal v. Virginia Portland Cement Co., 108 Va. 806, 62 SE 795.

**71.** Under Code § 8559 providing for joinder of inconsistent states of fact, a count on a written contract may be joined with a count on an oral contract to the same effect. Hendrix v. Letourneau [Iowa] 116 NW 729.

**Held not inconsistent:** Counts in complaint for injuries to passenger while alighting,

should be avoided [72] and separate causes of action [73] and inconsistent states of fact [74] should not be alleged in a single count or paragraph,[75] but the rule that a plaintiff may not allege two states of fact upon one of which defendant is liable and upon the other not, does not apply where defendant is liable upon either.[76] Separate causes should be stated in separate counts.[77] Each count must be complete in itself,[78] except that introductory allegations made in a preceding count may be alleged by way of reference.[79] There is no misjoinder where one of two causes attempted to be

first alleging that defendant negligently started the car and in another count alleging failure to advise or warn plaintiff while alighting, held not inconsistent. Hazen v. Bay City Trac. & Elec. Co., 152 Mich. 457, 15 Det. Leg. N. 304, 116 NW 364. A count on a renewal note and another in the alternative on the original are not inconsistent and no election is required, but one recovery being sought. Farmers' Sav. Bank v. Arispe Mercantile Co. [Iowa] 117 NW 672.

**72.** Complaint by joint plaintiffs cannot embrace counts setting up causes of action in favor of one alone. Southern R. Co. v. Blunt, 165 F 258. Bill by creditor to set aside chattel mortgage as fraudulent and to set aside a sale and for transfer of the property for the same reason is not multifarious. Lamar & Rankin Drug Co. v. Jones [Ala.] 46 S 763. Declaration in libel in three counts, each setting out separate publication, is **not duplicitous.** Gordon v. Journal Pub. Co. [Vt.] 69 A 742.

**73.** Where cause of action by a stockholder based on contract with other stockholders as to his rights to participate in management of the concern is joined with a cause based on his rights as a stockholder, he is properly required to separately state and number the causes. Carr v. Kimball, 130 App. Div. 107, 114 NYS 300. Petition held to state but one cause of action. Defendant claimed it contained two distinct causes; the covenant of seisin and the covenant of warranty. Seyfried v. Knoblauch [Colo.] 96 P 993.

**74. Held contradictory:** Allegation on information and belief held not to show that majority stockholders of a new bank effected a consolidation with an old where such conclusion was contradictory to the allegations of the petition generally. Green v. Bennett [Tex. Civ. App.] 110 SW 108. Allegation in complaint for death of a child killed by a train that the operatives in the exercise of ordinary care should have discovered the peril of the child, etc., held inconsistent with an allegation that because of their negligence the car got beyond their control and they could not stop it in time to avoid injury. Gabriel v. Metropolitan St. R. Co., 130 Mo. App. 651, 109 SW 1042. Complaint demanding damages for breach of contract to deliver goods, predicated on the theory that plaintiffs were purchasers and which also demands commissions on the theory that plaintiffs were brokers acting for defendant, presents inconsistent claims, and the establishment of either precludes recovery under the other. Texas Brokerage Co. v. Barkley & Co. [Tex. Civ. App.] 109 SW 1001.

**Not inconsistent:** Allegations in actions for injuries while alighting from a street car that plaintiff was caused to fall by the sudden starting of the car, and also that she was caused to fall by sudden stopping of the car after it had started, held not so conflicting that proof of one act would disprove the other. Alten v. Metropolitan St. R. Co., 133 Mo. App. 425, 113 SW 691. Counts in a reply in action to quiet title first denying defendant's answer setting up tax title and second setting up defects in such title are not contradictory. Mitchell v. Knott, 43 Colo. 135, 95 P 335.

**75.** Misjoinder of counts is cause for general demurrer. Marter v. Henry Sanchez Co. [N. J. Law] 71 A 41.

**76.** Complaint to recover an alleged preferential payment made by a bankrupt corporation alleging that debt preferred was the corporation's debt for money borrowed on notes of stockholders and used in the business, but if the debt was that of the stockholders, they used the corporate funds in paying their own debt with the defendant's knowledge. Hazelhurst Lumber Co. v. Carlisle Mfg. Co. [Ky.] 112 SW 934. A bill alleging that trust deed is a forgery, but is valid but that the foreclosure is void because of actions preceding and attending sale, shows that the pleader stands on two grounds, on either of which he is entitled to relief, and the allegations are not contradictory though the bill does not comply with Ann. St. 1906, p. 650, authorizing a fact to be alleged alternatively. Hendricks v. Calloway, 211 Mo. 536, 111 SW 60.

**77.** Where a complaint contains allegations tending to set forth a cause of action for money had and received and another for breach of contract, a motion requiring plaintiff to separately state and number his causes as required by Code Civ. Proc. § 483, should be granted. Astoria Silk Works v. Plymouth Rubber Co., 126 App. Div. 18, 110 NYS 175. Under Ball. Ann. Codes & St. § 4942, providing that several causes of action may be united if separately stated, a complaint which seeks different forms of relief against different defendants is subject to motion to separately state the causes. Hockersmith v. Ferguson [Wash.] 98 P 670.

**78.** Under Ann. St. 1906, § 593, providing that different causes must be separately stated with the relief sought for each cause, it is not necessary to repeat in each count mere matter of inducement nor allegations common to all counts, but such allegations may be pleaded by reference. Graves v. St. Louis, etc., R. Co., 133 Mo. App. 91, 112 SW 736. Each cause stated must stand or fall on its own allegations without reference to allegations found in the statement of another cause. Wright v. Willoughby, 79 S. C. 438, 60 SE 971. Allegations in one count of a complaint in intervention cannot aid another count, into which they are not incorporated by repetition or appropriate reference. Cameron v. Ah Quong [Cal. App.] 96 P 1025.

**79.** Power v. Turner, 37 Mont. 521, 97 P 950.

stated is insufficient.[80] A pleading in the alternative is not bad for duplicity.[81] Where a count is in the alternative and attempts to present two causes of action therein, both alternatives must present a cause of action.[82]

*Election.*See 10 C. L. 1197—An election is required whenever a pleader relies on two different inconsistent conditions of fact.[83] The doctrine of estoppel arising out of election of defenses (if the rule applies to defenses) requires a necessary inconsistency between the defenses in order to compel a choice.[84]

*Splitting causes of action.*See 10 C. L. 1197—One may not split his cause of action, but all damages arising from a single wrong or cause of action must be recovered in one suit.[85]

80. Where one cause of action is stated and an attempt to state another is wholly futile, there is no misjoinder. Hentig v. Johnson [Cal. App.] 96 P 390.

81. Keeshan v. Elgin, A. & S. Trac. Co., 132 Ill. App. 416.

82. Since a count can be no stronger than its weakest alternative. Sloss-Sheffield Steel & Iron Co. v. Sharp [Ala.] 47 S 279.

83. If two inconsistent causes of action are set up for the same act, the trial court should require plaintiff to elect upon which he will stand. Symmes v. Rose [Ky.] 113 SW 97. Where a complaint improperly joins two causes, defendant may require plaintiff to elect upon which he will proceed. Flowers v. Smith, 214 Mo. 98, 112 SW 499. Where separate counts are inconsistent, plaintiff may be required to elect at close of proof on which she will go to the jury. Hazen v. Bay City Trac. & Elec. Co., 152 Mich. 457, 15 Det. Leg. N. 304, 116 NW 364. Where but one of several counts is relied upon, and others ignored, the proper practice is to require plaintiff to say on which he relies and inform the jury that only such count can be considered. St. Jean v. Lippitt Woolen Co. [R. I.] 69 A 604. In action for services where grounds of recovery are uncertain, it is proper to count on express contract and quantum meruit, and whether an election will be required is in the discretion of the court. Mellon v. Fulton [Okl.] 98 P 911. If a plaintiff fail to prove a joint tort as alleged, he may elect at the trial which of defendants he will proceed against, and if granted leave to amend proceed against one or more. Krebs Hop Co. v. Taylor [Or.] 98 P 494.

**Election not necessary:** A plaintiff will not be required to elect upon which of several consistent counts he will proceed. Landers v. Quincy, etc., R. Co. [Mo. App.] 114 SW 543. In action for damages arising from pollution of a stream, a count based on wrongful deposit of filth in the stream causing decrease in rental value of adjacent land, pasturage destroyed, sickness caused, and depreciation in value of the land, states but one cause. Kellogg v. Kirksville, 132 Mo. App. 519, 112 SW 296. Where a complaint is in two counts for same services one on contract and the other on quantum meruit, plaintiff will not be compelled to elect, since he is entitled to recover on either count proved. Rubin v. Cohen, 129 App. Div. 395, 113 NYS 843. A complaint for injuries which shows relation between the parties of passenger and carrier is ex delicto and under Code Civ. Proc. 1902, § 186a, all acts of negligence or other wrongs may be set forth without any right in defendant to require an election. Taber v. Seaboard Air Line R. Co., 81 S. C. 317, 62 SE 311. Where plaintiff is entitled to recover on both counts of his complaint, he should not be required to elect on which he will rely. McDuffee's Adm'x v. Boston & M. R. Co. [Vt.] 69 A 124. One who seeks recovery on a contract of employment and on a quantum meruit need not elect at close of evidence on which cause he will rely though he testifies that there was an express contract, entitled to have all evidence submitted. Model Clothing House v. Hirsch [Ind. App.] 85 NE 719. A complainant will not be required to elect whether to proceed on the theory of an express contract or a quantum meruit where the complaint is sustainable on either theory. Walar v. Rechnitz, 126 App. Div. 424, 110 NYS 777.

**Election properly required:** In action on alleged contract for compensation for selling timber where one count alleged a sale to one by which plaintiff would have made a certain profit, but defendant refused to consummate the sale, and also alleging another sale which was executed. Carwile v. Cameron & Co. [Tex. Civ. App.] 116 SW 611. That both specific performance and damages are demanded may be ground for election, but not for exception of no cause of action. E. Sondheimer Co. v. Richland Lumber Co., 121 La. 786, 46 S 806.

84. In action for conversion of timber where defendant pleaded settlement by which plaintiff's grantor released all claims for timber, a defense on second trial that plaintiff's grantor had waived his right to forfeiture of timber was not necessarily inconsistent therewith. Newberry v. Chicago Lumbering Co. [Mich.] 15 Det. Leg. N. 663, 117 NW 592.

85. When several claims payable at different times arise out of the same transaction, separate actions may be brought, but if no action is brought until more than one is due, all claims due must be included. Welch v. Buchans Soap Corp., 56 Misc. 689, 107 NYS 616. Where a plaintiff voluntarily elects to treat his suit as on an express contract, and not on a quantum meruit, he cannot, after the jury has retired, disavow such theory in order to except to refusal to submit the case on a quantum meruit. Walar v. Rechnitz, 126 App. Div. 424, 110 NYS 777. One suing for cancellation of an instrument must bring forward all his grounds in one action and cannot have his rights adjudicated by piecemeal. Moehlenpah v. Mayhew [Wis.] 119 NW 826. Ann. St. 1906, p. 684, requiring all matters to be set forth in one pleading which may be set forth, is manda-

*Prayer.*[See 10 C. L. 1187]—A prayer for relief defines the legal right claimed by plaintiff to guide the court and apprise defendant of what is demanded of him.[86] It should not go beyond the scheme of the complaint.[87] A party will be accorded such relief as the facts alleged and proved entitle him regardless of the demand.[88] An inconsistent prayer may be stricken.[89] In some states both legal and equitable relief may be prayed for.[90] A prayer for alternative relief does not affect a ratification of an illegal act complained of.[91]

§ 3. *The plea or answer.*[92]—[See 10 C. L. 1198]—Matters relating to set-off and counterclaim,[93] affidavits of defense,[94] and the necessity of pleading under oath,[95] are treated in separate articles.

*General principles.*[See 10 C. L. 1198]—The codes generally provide that the answer shall consist of a plain, concise statement of the facts constituting defendant's grounds of defense,[96] or that it shall contain a denial of each allegation of the com-

tory and failure to require defendant filing separate answers to set forth all defenses in one pleading is error. National Stamping & Elec. Works v. Wicks, 129 Mo. App. 382, 108 SW 598. Action on a contract for labor and materials and an action for extras being separate causes, an action by an assignee for the extras is **not objectionable as splitting causes.** Sheinart v. Ritchie, 115 NYS 117. Cause on contract for commissions on sales in defendant's retail departments as compensation for services as superintendent is not the same as a cause for a share of a bonus received by defendant on discontinuance of a department and a separate action for each cause is not a splitting. Muir v. Kalamazoo Corset Co. [Mich.] 15 Det. Leg. N. 1143, 119 NW 1079.

**86.** Alternative relief may be prayed. Cumberland Tel. & T. Co. v. Hickman, 33 Ky. L. R. 730, 111 SW 311. Defendant in suit to quiet title cannot complain that right of a party to enforce a purchase money note against the land was not litigated in former actions where by his answer he prayed that such party be required to look to the land for his money. Martin v. Turner [Ky.] 115 SW 833.

**87.** A prayer in a complaint to reform a deed for mutual mistake that it be adjudged that plaintiff is the owner of the land and that defendant be enjoined from asserting any right thereto goes beyond the scheme of the complaint. Hart v. Walton [Cal. App.] 99 P 719.

**88.** Under the code system one is not necessarily confined to the specific relief demanded; such relief may be awarded as the pleadings and proof warrant. Bradburn v. Roberts, 148 N. C. 214, 61 SE 617. Under Civ. Code Proc. § 90, where there is a prayer for general relief and a defense is made, a party may have all relief to which his pleadings entitle him. Illinois Cent. R. Co. v. Davidson [Ky.] 115 SW 770. Where prayers do not refer to the pleadings, the right to recover does not depend on the form of action nor state of the pleadings, but upon the proof. Swartz v. Gottlieb-Bauern-Schmidt-Straus Brew. Co. [Md.] 71 A 854. Complaint containing usual allegations for recovery of land, mesne profits, damages for cutting timber, and for injunction, held to show purpose, to recover damages and omission of specific prayer for their recovery was an amendable defect. Fitzpatrick v. Paulding [Ga.] 63 SE 213. Under Code § 3775, under a prayer for general relief, one is entitled in equity to any relief consistent with the allegations of the petition. Johnston v. Myers, 138 Iowa, 497, 116 NW 600.

**89.** Where a petition contains prayers for relief appropriate to allegations of fact, it should not be dismissed because of an inconsistent prayer. The inconsistent prayer should be stricken. Pierce v. Middle Georgia Land & Lumber Co. [Ga.] 61 SE 1114.

**90.** Gen. St. 1902, § 613, expressly provides that legal and equitable relief may be demanded in the same action. Dresser v. Hartford Life Ins. Co., 80 Conn. 681, 70 A 39.

**91.** Hinsey v. Supreme Lodge K. of P., 138 Ill. App. 248.

**92. Search Note:** See notes in 66 L. R. A. 513.

See, also, Pleading, Cent. Dig. §§ 156-285; Dec. Dig. §§ 76-137; 1 A. & E. Enc. P. & P. 777; 4 Id. 664; 6 Id. 665, 727; 9 Id. 881; 16 Id. 539; 17 Id. 262; 20 Id. 262.

**93.** See Set-off and Counterclaim, 10 C. L. 1623.

**94.** See Affidavits of Merits of Claim or Defense, 11 C. L. 59.

**95.** See Verification, 10 C. L. 1992.

**96.** While the rule as to trespassers may be very much the same as to licensees, it was held not an abuse of discretion to compel amendment of a plea charging plaintiff with being a "trespasser or licensee." Gainsville & G. R. Co. v. Peck [Fla.] 46 S 1019. In plea of arbitration and award, failure to aver a compliance with Civ. Code 1896, § 511, providing that copy of award shall be delivered to each party, is not fatal. Tennessee Coal, Iron & R. Co. v. Roussell [Ala.] 46 S 866. An exception of no cause of action is not an answer and cannot be ordered to stand as such though filed after default. Davenport v. Ash, 121 La. 209, 46 S 213. Allegation in answer that if decedent received injuries alleged they were sustained as a direct result of his own negligence and not of negligence of defendant is a sufficient plea of contributory negligence. Kirkpatrick v. St. Louis & S. F. R. Co. [C. C. A.] 159 F 855. An answer will resist a general demurrer or motion to strike, no matter how defective in some respects, if it contains any matter of substantial right which defendant may properly present by plea. Medlock v. Wood, 4 Ga. App. 368, 61 SE 516. A plea of payment in an action on a contract which shows that

plaint and a statement of any new matter constituting a defense or counterclaim,[97] which must be set forth in the form prescribed by law.[98] The plea or answer must be responsive to the allegations of the complaint[99] and should not be evasive or ambiguous.[1] One made a party by supplemental complaint may answer by adopting the answer of the original defendant.[2] Pleas should be single,[3] and, except where permitted by the code,[4] inconsistent defenses or pleas cannot be set up in the

some items of payment were charged prior to the execution of the contract and some thereafter is not subject to exception as an entirety but at most is bad only as to items charged before execution of the contract. Schrocter v. Bowdon [Tex. Civ. App.] 115 SW 331. In an action on a contract to perform certain work for an agreed price, plaintiff must prove the contract price, and performance of the work, and defendant could deny the contract, or if made, but the work was not performed, and it was error to require him to elect on which defense he would stand. Benedict v. McMurtry, 115 NYS 87.

97. A plea setting up failure of consideration of a contract sued upon should be framed on the theory that originally there was a consideration which has wholly or partially failed because of subsequent occurrences and must etate facts sufficient to defeat or diminish recovery. Williams v. First Nat. Bank, 20 Okl. 274, 95 P 457. Plea of accord and satisfaction should allege that thing delivered or money paid was delivered or paid, and received in full satisfaction of cause of action alleged. City of Rawlins v. Jungquist, 16 Wyo. 403, 96 P 144. It is not a fatal objection that matter set up as a counterclaim is not expressly defined as such where it distinctly appears that it was intended as such. Shotland v. Mulligan, 60 Misc. 58, 111 NYS 642. A defense within Code Civ. Proc. § 500, requiring answer to contain a statement of new matter constituting a defense, is matter which cannot be proved under a general denial. Stroock Plush Co. v. Talcott, 129 App. Div. 14, 113 NYS 214. Plea averring that arbitrators were sworn according to law is not objectionable as not alleging that they were not sworn according to statute. Tennessee Coal, Iron & R. Co. v. Roussell [Ala.] 46 S 866. Under the rule permitting equitable defenses in actions at law, acts held to constitute an abandonment of a contract precluding recovery of damages for breach there f. Cutright v. Union Sav. & Inv. Co., 33 Utah, 486, 94 P 984. An answer in equity is insufficient if it does not confess or traverse the material allegations of the bill. Prestridge v. Wallace [Ala.] 46 S 970. Breach of warranty is not available as counterclaim to action for the price of the goods. Wilmerding v. Strouse, 112 NYS 1091. Where in an action concerning rights in property the complaint discloses source of plaintiff's title, defendant must plead all his defenses in avoidance of the title disclosed and cannot, as in a case where source of title is not disclosed, offer evidence of matters not pleaded. Dickson v. St. Paul, 105 Minn. 165, 117 NW 426.

98. The phrase "by way of counterclaim" in an answer purporting to set up a counterclaim is improper under the code, providing for the pleading of new matter directly for a counterclaim. Stroock Plush Co. v. Talcott, 129 App. Div. 14, 113 NYS 214. Under Code Civ. Proc. § 507, providing that each defense or counterclaim must be separately stated, an answer containing several defenses or counterclaims should plead them separately as "for a first defense," "for a second defense," "for a first counterclaim," etc. Id.

99. Affirmative defenses in action to establish resulting trust in land, which are not connected with the transaction as pleaded and do not arise out of it, are demurrable. Burling v. Page, 49 Wash. 702, 96 P 155. In action by a corporation on a note, a plea that the corporation had not taken out a license as required by law was bad, it not appearing that the contract was void or that a license was required. Sunflower Lumber Co. v. Turner Supply Co. [Ala.] 48 S 510.

1. Answer alleging that defendant had paid all sums arising from plaintiff's claims for excavating below grade lines was no plea of payment, it being ambiguous, and did not entitle the defendant to judgment on the pleading on the theory that the reply constituted no denial of the plea. Sundmacher v. Lloyd [Mo. App.] 116 SW 12. In action for price of personal property alleged to have been purchased by and delivered to defendant at administrator's sale, mere vague statements in an unverified answer denying such allegations, but admitting a purchase by a firm composed of defendant and another, held insufficient as a plea in abatement. Bray v. Peace [Ga.] 62 SE 1025. No error in rejecting testimony that purchase was made by defendant for his firm. Id.

2. In action to abate a nuisance and recover damages, where a defendant was made a party by supplemental complaint charging it with continuing the nuisance, adoption by it of answer of original defendants held to be in answer to supplemental complaint. Karns v. Allen, 135 Wis. 48, 115 NW 357.

3. Haley v. Supreme Court of Honor, 139 Ill. App. 478. A plea which sets up two separate defenses, each of which defendant claims to be perfect and complete, is clearly double. Royal Neighbors of America v. Sinon, 135 Ill. App. 599.

4. Under Code Civ. Proc. § 507, providing for as many defenses as a party has, he may set up inconsistent defenses. Johnston v. Simpson Crawford Co., 115 NYS 141. Under Code, § 3620, inconsistent defenses may be stated in the same answer, and where defendant in action for breach of covenant of seisin in one division of the answer asserted title under a certain conveyance, he was not precluded from relying on an inconsistent claim that no title was transferred by the conveyance through which plaintiff claimed. Sturgis v. Slocum [Iowa] 116 NW 128. A party may file as many pleas or replications as he desires which may be inconsistent with each other, if they are complete and consistent in themselves. Priest v. Dodsworth,

same answer.[5] Though pleas are inconsistent, defendant is entitled to the benefit of one of them.[6]

A pleading denominated an answer will not be treated as both an answer and demurrer,[7] and a pleading cannot be made to perform the double office of answer and counterclaim [8] except where filed by different parties.[9] A plea in recoupment may be withdrawn pending trial.[10]

Each separate defense must be complete in itself,[11] except that matters alleged in other defenses may be incorporated therein by reference.[12] A plea of defense professing to answer the entire declaration, but which fails to do so is bad,[13] but one

235 Ill. 613, 85 NE 940. Civ. Code 1895, § 5047, expressly provides that pleas, however contradictory, do not oust each other. Albany Phosphate Co. v. Hugger Bros., 4 Ga. App. 771, 62 SE 533. Even if defenses are inconsistent, unless prohibited by statute, they may still be united in one answer and the pleader cannot be compelled to elect. Covington v. Fisher [Okl.] 97 P 615. While a defendant has the privilege of filing contradictory pleas, yet his defenses may be so related to one another that a finding in favor of one of them will estop him from asserting others. Southland Knitting Mills v. Tennile Yarn Mills, 4 Ga. App. 753, 62 SE 532.

**5.** Inconsistent pleas, which amount to incompatibility, must not be made to the same transaction. People's Sav. Bank v. Hoppe, 132 Mo. App. 449, 111 SW 1190.

**Held not inconsistent:** In action on a written contract, an answer denying execution of such contract, and a further answer that defendant's signature thereto was procured by trickery. Loveland v. Jenkins-Boys Co., 49 Wash. 369, 95 P 490. In action on warrants payable out of a special fund, specific denial that defendant had on hand in that fund the sum mentioned is not inconsistent with a general denial of the allegation that it had not applied any part of such sum to payment of prior indebtedness. Pauly Jail Bldg. & Mfg. Co. v. Jefferson County [C. C. A.] 160 F 866. A plea of general settlement and payment of all claims is not an implied admission that any specific cause of action existed in plaintiff's favor and is not inconsistent with a general denial. Fitch v. Martin [Neb.] 119 NW 25. Adverse possession and prior appropriation of water rights are not. Hough v. Porter [Or.] 98 P 1083. In suit to restrain use of water, claims by defendant, as riparian owner, and by adverse user. Davis v. Chamberlain [Or.] 98 P 154.

**Held inconsistent:** In an action on a note by a corporation, a plea alleging that the plaintiff did not have a license to do business could not be amended to make it a good defense without departing from the defense alleged, the contract not being void under the statute. Sunflower Lumber Co. v. Turner Supply Co. [Ala.] 48 S 510.

**6.** In action on notes given for a jack where defendant pleaded breach of warranty, but admitted that the jack was worth something and also pleaded want of consideration, though the pleas were inconsistent, he was entitled to the benefit of one of them. Broderick v. Andrews [Mo. App.] 115 SW 519.

**7.** Where a pleading is designated an answer, it will not be treated as both an answer and a demurrer, though some of alleged defenses are ground for demurrer only; objectionable allegations are regarded as surplusage. Gordon v. Moore, 59 Misc. 151, 110 NYS 374.

**8.** This rule is always applied to pleadings filed by the same party, but not where filed by several as a different plea by each. Cleveland, etc., R. Co. v. Rudy [Ind. App.] 87 NE 555.

**9.** In action by A, B and C, for freight charges for transporting horses under a contract with A, a pleading by defendants reciting "the defendants each for himself," answer and by way of counterclaim, alleges, etc., followed by an answer by two and a counterclaim by one, held a counterclaim by one and an answer by two. Cleveland, etc., R. Co. v. Rudy [Ind. App.] 87 NE 555.

**10.** In suit on note where plea of recoupment is filed, it is error to refuse to permit defendant pending trial to withdraw the plea. Dobbins v. Shy, 4 Ga. App. 438, 61 SE 737.

**11.** Each separate defense pleaded must be complete in itself and contain all that is necessary to answer the whole cause of action or so much thereof as it purports to answer. Haffen v. Tribune Ass'n, 126 App. Div. 675, 111 NYS 225. Sufficiency of separate defenses must be determined without reference to other portions of the answer to which they do not refer. Brackett v. Ostrander, 126 App. Div. 529, 110 NYS 779. A plea by one defendant proposing to set off individual demand against a joint demand is not aided by pleas of other defendants. Priest v. Dodsworth, 235 Ill. 613, 85 NE 940.

**12.** Repeating in a succeeding defense, allegations contained in a preceding defense, which are material and essential to new matter, by reference instead of repeating it, is desirable where the allegations sought to be repeated may be thus clearly pointed out, but where they cannot be thus identified it is bad practice. Wiener v. Boehm, 126 App. Div. 703, 111 NYS 126. Where a sufficient defense in one part of an answer is repeated in a separate defense or is referred to instead of being repeated, such separate defense is not demurrable though the new matter therein might be insufficient. Id.; Strauss v. St. Louis County Bank, 126 App. Div. 647, 111 NYS 130. Where allegations of an answer sufficient to constitute a defense are repeated by reference in a subsequent defense, and are not material to new matter, they are redundant and should be stricken. Wiener v. Boehm, 126 App. Div. 703, 111 NYS 126.

**13.** Staunton Mut. Tel. Co. v. Buchanan, 108 Va. 810, 62 SE 928. Under Code Civ. Proc.

may plead to a part of a count if such part is material and severable from the rest and the plea professes to answer that part only.[14] An answer purporting to respond to the whole of a bill overrules a plea to the bill or any part thereof.[15] The province of a partial defense is to limit or restrict the extent or quality of the relief and not to destroy the complaint.[16] A special plea which sets up facts admissible on general issue is demurrable,[17] and pleas tendering an immaterial issue will be disregarded although not demurred to.[18]

Pleas reiterating defenses[19] or setting up a defense available under a general denial already interposed are bad.[20] A defense personal to one defendant is not available to his codefendants,[21] but a defense to the merits or substance of the complaint may be pleaded by all, or where pleaded by one inures to the benefit of all.[22] Where a plea is abandoned the facts therein are no longer available as a defense.[23] A rule permitting defendants to abandon a special defense and proceed under a general denial eliminates the special defense from the answer.[24]

Dilatory pleas,[25] or pleas in abatement,[26] are not favored and are to be strictly construed, and not aided in construction or by any intendments. They should fully aver what is necessary to be answered.[27] Plea of former adjudication must be pleaded as a separate defense, connected by proper allegations with the subject-matter of the action.[28] The highest degree of certainty is required in pleas to the jurisdiction.[29] A plea in bar goes to the whole bill[30] and must be addressed thereto.[31]

§ 507, providing that unless defense or counterclaim is alleged as a complete answer it must specify the cause which it is intended to answer, where no such specification is made, the plaintiff can and the court must assume that it is pleaded as a complete defense and will be treated as such on demurrer. Price v. Derbyshire Coffee Co., 128 App. Div. 472, 112 NYS 830.

14. Reed v. Firemen's Ins. Co. [N. J. Law] 69 A 724.

15. McDermitt v. Newman [W. Va.] 61 SE 300.

16. Admits right of plaintiff to some relief. Whalen v. Union Bag & Paper Co., 130 App. Div. 313, 114 NYS 220.

17. Hubbard Milling Co. v. Roche, 133 Ill. App. 602.

18. Leave to amend should be given in such case or repleader ordered. Rodriguez v. Merriman, 133 Ill. App. 372.

19. Paragraph of an answer which repeats as a partial defense that which has been previously alleged, and which if true was a perfect defense, is demurrable. Shattuck v. Guardian Trust Co., 125 App. Div. 431, 109 NYS 862.

20. Under plea of "not guilty" in ejectment, any defense is available and striking special pleas of limitation is not erroneous. Lecroix v. Malone [Ala.] 47 S 725. A paragraph of an answer which merely pleads in affirmative form matters put in issue by a traverse in a preceding paragraph is properly stricken. Cumberland Tel. & T. Co. v. Cartwright Creek Tel. Co., 32 Ky. L. R. 1357, 108 SW 875.

21. Such as infancy or coverture. City Nat. Bank v. Jordan [Iowa] 117 NW 758.

22. City Nat. Bank v. Jordan [Iowa] 117 NW 758.

23. Where in action on notes, after plea of limitations, plaintiff by amended complaint on which the case was tried sued on the original promise as well as on renewals of the notes and defendants abandoned their plea, plaintiff is entitled to recover on the original notes. Honaker v. Jones [Tex. Civ. App.] 115 SW 649.

24. Kaufman v. Cooper [Mont.] 98 P 504.

25. Jester v. Bainbridge State Bank, 4 Ga. App. 469, 61 SE 926.

26. Plea that suit is prematurely brought is in abatement and must be verified and filed at first term. Hightower, Pratt & Co. v. Hodges [Ga. App.] 63 SE 541. Defense of another action pending should be raised by verified plea in abatement instead of by notice of special defense under the general issue. Muir v. Kalamazoo Corset Co. [Mich.] 15 Det Leg. N. 1143, 119 NW 1079. A plea in abatement is addressed to the discretion of the court, especially where the term has been permitted to elapse after the disability arose before the plea was offered. Plea of personal disability. Gambill v. Cooper [Ala.] 48 S 691. Dilatory pleas in abatement are not to be encouraged by allowing defendants to plead over when defeated on them. Not abuse of discretion to refuse leave to file when judgment has been entered by confession and then opened up to admit a defense and the case has been set for trial. Northeastern Coal Co. v. Tyrell, 133 Ill. App. 472.

27. A plea of privilege of an individual to be sued in the county of his domicile must allege that the county where the action was brought is not the county of his domicile. Texas & H. O. R. Co. v. Parsons [Tex. Civ. App.] 109 SW 240.

28. Where set up merely as a paragraph in an answer, it is properly stricken. De Ajuria v. Berwind, 127 App. Div. 528, 111 NYS 1029.

29. A plea to the jurisdiction alleging that plaintiff had mistakenly stated the amount sued for but not that it was fraudulently placed at a stated sum for the purpose of giving jurisdiction is fatally defective. Graves v. Bullen [Tex. Civ. App.] 115 SW 1177.

30. Plea for want of proper parties is in

In Mississippi pleas in abatement and in bar cannot be joined.[32] A plea in bar will be considered as such though styled a plea in abatement.[33] A plea of payment is not a plea puis darrein continuance, where it appears that payment was made after suit commenced.[34]

*A plea of nul tiel record* should conclude with a verification.[35] Such a plea is not proper as applied to the proceedings of a court not of record.[36]

*Denials and traverses.*[See 10 C. L. 1201]—The truth of a plea may be put in issue by a traverse,[37] but if it is desired to set up matter of justification or excuse, it must be done by plea in confession and avoidance.[38] Denials should not be in the conjunctive form [39] but are sufficient if in the form prescribed by law.[40] Denials on information and belief are generally permitted by the codes [41] except as to matters presumptively within defendant's knowledge.[42] Where permitted the form prescribed must be adhered to.[43] A general denial followed by a special denial of the

bar and goes to the whole bill, and want of capacity to sue may be taken advantage of. Moore v. Moore [N. J. Eq.] 70 A 684.

31. A plea which professes to answer the whole declaration and prays judgment in bar of the action is irregular where it contains no answer to the common counts. Haley v. Supreme Court of Honor, 139 Ill. App. 478. A plea to the "amended declaration and the additional counts" is a plea to the whole declaration, although but one count of it was amended at the time the plea was filed. Michigan Cent. R. Co. v. Harville, 136 Ill. App. 243.

32. Under Ann. Code 1892, §§ 682, 683, 684, pleas in abatement and in bar cannot be joined. Rice v. Patterson [Miss.] 46 S 255.

33. In action against a firm, pleas styled "pleas in abatement," setting up that firm was a corporation, etc., held pleas in bar, and if valid for any purpose amounted merely to a general issue. Rice v. Patterson [Miss.] 46 S 255.

34. In action for debt where defendant set up general issue and plea of payment and it appeared that debt was paid after suit, held plea of payment was not a plea puis darrain continuance. Stevens v. Standard Oil Co. [Ala.] 47 S 140.

35. Reed v. Waterbury Nat. Bank, 135 Ill. App. 165.

36. Feld v. Loftis, 140 Ill. App. 530.

37, 38. Priest v. Dodsworth, 235 Ill. 613, 85 NE 940.

39. In action by owners in severalty of lots for cancellation of warrants for street assessment work, an answer denying that plaintiff owns or has ever owned two of the lots does not deny ownership, for a denial in the conjunctive raises no issue as to ownership of either of the lots. Toomey v. Knobloch [Cal. App.] 97 P 529.

40. Code Civ. Proc. § 533, expressly provides that a denial that plaintiff had performed all the conditions of a contract by him to be performed, as alleged, raises a material issue. Hudson Cos. v. Briemer, 113 NYS 997. Separate denials of paragraphs of a complaint in compliance with Civ. Code 1895, § 4961, will be regarded as distinct pleas only where the particular allegations denied are such that a simple denial thereof contains all the essential elements of a complete plea within Civ. Code 1895, § 5330. Crockett & Co. v. Gerrard & Co., 4 Ga. App. 360, 61 SE 552. In action for breach of contract, denials held not a distinct defense. Id.

41. Under Code Civ. Proc. 1895, § 690, providing for denial of knowledge or information sufficient to form a belief, held allegation that defendants "have not sufficient knowledge or information to form a belief as to matters and facts alleged in the complaint" is a denial within the statute. Milwaukee Gold Extraction Co. v. Gordon, 37 Mont. 209, 95 P 995. Under Mill's Ann. Code, § 56, providing that in denying allegation not presumptively within defendant's knowledge it shall be sufficient to state that defendant has not and cannot obtain information upon which to base a denial, a denial "on information and belief" is insufficient. Erskine v. Russell, 43 Colo. 449, 96 P 249.

42. In proceeding to recover possession of leased premises, answer by tenant denying on information and belief allegation of rent due held insufficient as a denial of the terms of the lease. Browning v. Moses, 111 NYS 651. Denial of information or knowledge sufficient to form a belief as to matters which the pleader is bound to know does not raise an issue. Balliet v. Metropolitan Life Ins. Co., 125 App. Div. 705, 110 NYS 77. A denial of information or knowledge sufficient to form a belief of facts of which defendant has knowledge does not put such facts in issue. In action against a city for injuries, allegation of presentation of claim to the city as required by statute. Purdy v. New York, 126 App. Div. 320, 110 NYS 822. A denial of knowledge or information sufficient to form a belief of facts which defendant is presumed to know is frivolous. Bogart v. New York, 112 NYS 549. Under Code Civ. Proc. § 1776, providing that in action by a corporation corporate existence need not be proved unless denied by verified answer, an answer that defendant has no knowledge or information sufficient to form a belief as to allegation of corporate existence raises no issue. Stroock Plush Co. v. Talcott, 129 App. Div. 14, 113 NYS 214.

43. Under Code Civ. Proc. § 500, authorizing denial of knowledge or information sufficient to form a belief, a denial of information only supplemented with statement that defendant "therefore denies the same" is insufficient. Locomobile Co. of America v. De Witt, 59 Misc. 221, 110 NYS 413. An answer to an allegation that a certain person voted for defendant, that defendant has no knowledge as to how he voted, is not a denial of facts sufficient to form a belief and does not put plaintiff on proof thereof.

same fact is improper.[44] A general denial may never be included in an affirmative defense of new matter, while a special denial may be so included only when necessary to make such defense complete and available.[45]

*Confession and avoidance.* See 10 C. L. 1202—A plea in confession and avoidance must give color to the matter to which it is applied.[46] A pleading which attempts to confess and avoid, but fails to do so, is bad.[47] A plea of contributory negligence is in the nature of confession and avoidance.[48] In an action for libel where defendant pleaded a general denial, a plea of justification was not by way of confession and avoidance.[49]

§ 4. *Replication or reply and subsequent pleadings.*[50] See 10 C. L. 1202—The code provisions as to the necessity of a reply vary in different jurisdictions. In some states no reply is necessary;[51] in others a reply is necessary only when the answer contains a counterclaim,[52] or new matter constituting a defense or counterclaim,[53] or new and affirmative matter;[54] while under the California statute all new matter in

State v. Trask, 135 Wis. 333, 115 NW 828. Allegation that defendant has no knowledge or information sufficient to form a belief as to truth of particular allegations is insufficient to raise an issue. White v. Gibson, 61 Misc. 436, 113 NYS 983. Answer that defendant has no knowledge as to truth of allegations of the complaint, and therefore denies same, is insufficient. Finn v. Post, 61 Misc. 136, 112 NYS 1046. Under Code Civ. Proc. § 500, denial in answer of knowledge or information sufficient to form a belief is a sufficient denial. Johnston v. Simpson Crawford Co., 115 NYS 141.

**44.** One may be disregarded or stricken on motion or defendant required to elect. Pauly Jail Bldg. & Mfg. Co. v. Jefferson County [C. C. A.] 160 F 866.

**45.** Haffen v. Tribune Ass'n, 126 App. Div. 675, 111 NYS 225.

**46.** Answer justifying libel on the ground of its truth is sufficient if it gives plaintiff notice of what defendant will attempt to prove. Sheibley v. Fales [Neb.] 116 NW 1035. In action for libel where defamatory matter is general in its nature, plea of justification must state specific facts showing what instances and in what manner plaintiff has misconducted himself. Fodor v. Fuchs [N. J. Law] 71 A 108. By a plea of non assault demesne, the defendant justifies an assault and battery by asserting that plaintiff assaulted him and that he merely defended himself. Smith v. Wickard [Ind. App.] 85 NE 1030.

**47.** In action on a judgment for alimony where complaint alleged that plaintiff's testatrix signed a satisfaction while of unsound mind, and answer directed to the whole complaint, but not denying nor avoiding the allegation of mental unsoundness, is demurrable. Wilson v. Fahnestock [Ind. App.] 86 NE 1037.

**48.** Contributory negligence is in the nature of confession and avoidance and is an affirmative defense which must be pleaded and proved. Ramp v. Metropolitan St. R. Co., 133 Mo. App. 700, 114 SW 59.

**49.** In libel where defendant pleaded a general denial and that the articles were true and proof sustained the general denial, held his plea of justification was not by way of confession and avoidance and would not warrant judgment against him. Claverie v. Fabacher [La.] 48 S 578.

**50. Search Note:** See notes in 8 L. R. A. (N. S.) 291.

See, also, Pleading, Cent. Dig. § 321-399; Dec. Dig. §§ 162-186; 18 A. & E. Enc. P. & P. 70.

**51.** Code Civ. Proc. § 145 expressly provides that new matter in an answer not relating to a counterclaim is deemed controverted. Craigo v. Craigo [S. D.] 118 NW 712. Under Code Civ. Proc. § 462, new matter in an answer is deemed controverted by plaintiff, and he may prove matter in avoidance thereof though he does not plead it. No reply is necessary. Peck v. Noee [Cal.] 97 P 865.

**52.** It is not necessary to reply to an answer alleging release of the debt sued on by virtue of bankruptcy proceedings after action was commenced, as an affirmative defense only and not a counterclaim is stated. Erickson v. Eliott [N. D.] 117 NW 361. In action under Comp. Laws 1907, § 2980, to quiet title to land, defendant's claim of ownership is not a counterclaim so as to require a reply under § 2980. Tate v. Rose [Utah] 99 P 1003. Under Comp. Laws 1907, § 2980, providing that there shall be no reply except where counterclaim is set up, plea of limitations does not require a reply. Id.

**53.** Under Ann. St. 1906, p. 640, providing for reply to new matter within such time as the court may direct, in an action on a note where defendant sets up discharge in bankruptcy plaintiff may reply with facts showing that such discharge did not apply. Blackman v. McAdams, 131 Mo. App. 408, 111 SW 599. Under Code Civ. Proc. §§ 483, 486, 558, where an answer sets up adverse possession of a water right for more than 10 years, a reply is required. State v. Quantic, 37 Mont. 32, 94 P 491.

**54.** Allegations in an answer which are merely the converse of allegations of the complaint do not require a reply. Stitzel v. Ehrman [Ky.] 114 SW 280. Answer in action on a note that the note was paid is but a denial of the allegation that it was unpaid and no reply is necessary. Carlton v. Smith, 33 Ky. L. R. 647, 110 SW 873. Under Comp. Laws, 1907, § 2980, a reply is not always required to new or affirmative matter. Tate v. Rose [Utah] 99 P 1003. Allegations of answer are admitted where no reply is filed. Downey v. Moriarity [Conn.] 71 A 581. Under Code Civ. Proc. § 516, pro-

the answer in avoidance or constituting a defense is deemed to be controverted without a pleading to that effect.[55]

The reply must be responsive and defensive to the new matter alleged in the answer.[56] It must not be inconsistent with the allegations of the complaint,[57] nor

viding that when an answer contains new matter the court may require a reply on defendant's motion, where an executor sued for fraud of his testator, and having no personal knowledge thereof set up orders and decrees in proceedings in which plaintiff and testator were parties and sealed instruments signed by plaintiff based on instrument attacked for fraud, held entitled to a reply. Richards v. Greason, 128 App. Div. 320, 112 NYS 675. Where vendor in possession sues to quiet title against a vendee in default, and the vendee sets up equities which with tender of amount due would defeat the action, any countervailing equities the vendor may have as to crops, etc., after default must be specially pleaded. McCullough v. Rucker [Tex. Civ. App.] 115 SW 323. Held sufficiently alleged by supplemental petition. Id. A pleading by defendants may, as to one made a party on their motion, be deemed a cross complaint; but as to plaintiff it is an answer setting up matters of defense. By Rev. St. 1901, par. 1357, such matters are regarded as denied by plaintiff unless expressly admitted. Copper Belle Min. Co. v. Costello [Ariz.] 95 P 803. Where plaintiff in an action to enjoin trespass claims under a lease, an allegation in the answer that such lease has been canceled is new matter which must be taken if true unless denied. Stanser v. Cather [Neb.] 117 NW 98.

**55.** Allegation of answer of delivery of deed under which defendants claimed deemed controverted under Code Civ. Proc. § 462, providing that statement of new matter in answer in avoidance or constituting defense must be deemed controverted. Drinkwater v. Hollar, 6 Cal. App. 117, 91 P 664.

**56.** Separate defense pleaded in reply to counterclaim held but a partial defense, but when considered with denials reiterated therein to constitute a complete defense and not demurrable. Browning & New York Leasing Co., 110 NYS 928. Allegations in separate defenses in a reply held to constitute a complete defense to defendant's counterclaim. Id. A replication must either traverse or confess and avoid the matter pleaded or present matter of estoppel thereto. McKimmie v. Forbes Piano Co. [Ala.] 46 S 772. Held insufficient. Id. In action for assault and battery replication to plea of justification and self-defense held good, and moreover to constitute but a general traverse to pleas alleging use of no more force than was necessary. Abney v. Mize [Ala.] 46 S 230.

**57.** A departure is a desertion of the ground which the pleader occupied in his last antecedent pleading and a resort to another ground. If a reply asserts some ground not counted on in the complaint, it is a departure. Eagle Fire Co. v. Lewallen [Fla.] 47 S 947. Matter in reply inconsistent with the complaint will be regarded as surplusage. Moss v. Fitch, 212 Mo. 484, 111 SW 475. The test of a departure is whether evidence of facts alleged in the reply could be received under the allegations of the complaint. Smart v. Burquoin [Wash.] 98 P 666. Where a declaration alleges performance of all conditions to a right of action, plaintiff cannot by replication to a plea taking issue to the performance of a condition set off waiver thereof. Stratton v. Essex County Park Commission, 164 F 901.

**Held to constitute a departure:** Where complaint by divorced wife sought to set a deed and mortgage executed by her former husband on the ground that they were made with intent to avoid payment of alimony and that the mortgage had been paid, a reply setting up a cause to redeem from the mortgage. Moss v. Fitch, 212 Mo. 484, 111 SW 475. Where a complaint alleged defendant's incorporation, that it was engaged in a certain business, and that plaintiff was employed by it, and a reply denied every allegation and statement in the answer admitted such facts. Hill Brick & Tile Co. v. Gibson, 43 Colo. 104, 95 P 293. Where plaintiff declared on a bill of exchange as payee, a reply alleging himself as indorsee. Alabama Grocery Co. v. First Nat. Bank [Ala.] 48 S 340. Where right of parties has been fixed by arbitration and plaintiff sues under the original contract and defendant pleads award, if plaintiff desires to rely on the award he should plead it by amendment and not by reply. Spiess' Adm'x v. Bartley [Ky.] 113 SW 127. Where complaint sought recovery for work and labor in plowing land and reply admitted that plaintiff took possession under oral agreement for a lease and counted upon eviction. Smart v. Burquoin [Wash.] 98 P 666. Under Civ. Code Proc. § 90, permitting a reply to contain only a traverse or facts in avoidance of defenses or set-off, where a complaint sought recovery for rent of an engine and the answer denied the indebtedness and pleaded an award by arbitrators and the reply sought recovery of such award. Spiess' Adm'x v. Bartley [Ky.] 113 SW 127.

**Not to constitute a departure:** In action on a fire policy, the stipulation against additional insurance being a condition subsequent and set up as matter of defense by plea, a reply alleging waiver. Eagle Fire Co. v. Lewallen [Fla.] 47 S 947. Denial in reply that defendants held under a certain lease and denial of validity of the lease. Ryan v. Lambert, 49 Wash. 649, 96 P 232. Under Ball. Ann. Codes & St. § 4917, providing for new matter in reply, not inconsistent with the complaint where complaint on life policies was in ordinary form, and defendant alleged breach of warranty and fraudulent representations, a reply that defendant was estopped to plead such defense because its physician had examined plaintiff. Ferrandini v. Bankers' Life Ass'n [Wash.] 99 P 6. Defendant in ejectment who sets up tax title in his answer cannot complain that plaintiff assailed such title in his reply. Whitehead v. Callahan [Colo.] 99 P 57. Reply held not a departure on the ground that complaint was on the common counts and reply claimed under a special contract. Merrill v.

can it, as a rule, be used as a ground for affirmative relief.[58] It must either present matter of estoppel to the plea or must traverse, or confess and avoid, the matter pleaded by the defendant.[59] A replication should not commence with precludi non when matter of estoppel is to be replied.[60] The generally accepted doctrine is that a reply to a set-off or counterclaim is restricted to averment of new matter constituting a defense not inconsisent with the complaint.[61] A replication like a plea must be single,[62] and while duplicity does not render it subject to demurrer, it does under the New Jersey practice to a motion to strike.[63] A plaintiff in one replication may traverse a plea and in another confess and avoid it, but the two defenses cannot be embraced in one replication.[64] A plaintiff cannot file a replication concluding with a verification to a plea which concludes to the country.[65] A reply should specifically point out the new matter in the answer denied.[66] A confession and avoidance is not inconsistent with the allegation of the petition, and where the reply denies nothing in the answer except what is "inconsistent with the petition," a court may properly give judgment for the defendant on the pleadings.[67]

A reply setting up adverse possession is no departure from a complaint alleging ownership and possession and that defendant claimed an adverse interest.[68] Replication to a plea of nul tiel record should traverse the plea and offer the record.[69]

*Additional pleadings.* See 10 C. L. 1204

§ 5. *Demurrer.*[70] *General rules.* See 10 C. L. 1204—A demurrer reaches only such defects as are apparent on the face of a pleading[71] to which it is addressed,[72] and

Worthington [Ala.] 46 S 477. Reply held not to constitute a departure nor to traverse and confess and avoid the allegations of the plea. Webster v. State Mut. Fire Ins. Co. [Vt.] 69 A 319. Held to admit some allegations and deny others. Id. Woman who in good faith married a man who had a wife and thereafter sued for divorce on ground of cruelty, and by reply prayed a decree annuling the marriage, held not a departure such as to preclude relief. Buckley v. Buckley, 50 Wash. 213, 96 P 1079.

**58. Affirmative relief not asked:** Where complaint in forcible entry alleged leasing to defendant from month to month, notice to quiet, etc., and answer denied tenancy as alleged and set forth rights under a lease from a prior owner and a reply denied a holding under such lease and attacked the validity thereof, held it was proper to deny motion to strike affirmative matter from the reply, since it injected a new issue into the case and gave plaintiff the right to question the validity of the lease on any ground not inconsistent with other defenses. Ryan v. Lambert, 49 Wash. 649, 96 P 232. Where a petition to quiet title states that defendant has no interest in the land but claims an unfounded dower interest, a reply alleging that the claim is unfounded by reason of defendant's nonresidence does not introduce a new cause. Miner v. Morgan [Neb.] 119 NW 781.

**59.** Supreme Lodge K. & L. of H. v. Benes, 135 Ill. App. 314. A replication of matter of estoppel to a plea amounts to saying that the party is estopped by law from setting it up; it is not an assertion of right by the party pleading it but a denial of the right of the defendant to make the defense attempted and to be availed of should be made the subject of a special demurrer. Id.

**60.** Supreme Lodge K. & L. of H. v. Benes, 135 Ill. App. 314.

**61.** Where defendant files answer setting up matter of defense and also by way of set-of, plaintiff may not by reply allege new matter which constitutes set-off or counterclaim but his statements must be confined to matters which constitute a defense. Beakey v. Meerschen [Kan.] 97 P 478.

**62, 63.** Stratton v. Essex County Park Commission, 164 F 901.

**64.** Priest v. Dodsworth, 235 Ill. 613, 85 NE 940. Replication held fatally defective as an attempt to merge a traverse with a plea of confession and avoidance. Id.

**65.** Stratton v. Essex County Park Commission, 164 F 901.

**66.** Reply denying new matter in the answer without pointing out what the allegations are is faulty. Sundmacher v. Lloyd [Mo. App.] 116 SW 12.

**67.** Douglass v. Downsend, 11 Ohio C. C. (N. S.) 390.

**68.** B. & C. Comp. § 516. Cooper v. Blair, 50 Or. 394, 92 P 1074.

**69.** Reed v. Waterbury National Bank, 135 Ill. App. 165.

**70. Search Note:** See Pleading, Cent. Dig. §§ 400-583; Dec. Dig. §§ 187-227; 6 A. & E. Enc. P. & P. 292.

**71.** As to what defects may be raised by demurrer, see post, § 10. As against general demurrer the question is whether, assuming every fact alleged to be true, a cause of action is stated. Vukelis v. Virginia Lumber Co. [Minn.] 119 NW 509. Objection that the cause stated is barred cannot be raised by demurrer unless it is apparent from the complaint that the statute has run. Corea v. Higuera, 153 Cal. 451, 95 P 882. What the laws of a sister state are is a matter of fact and cannot be considered on demurrer to a bill containing no allegation as to such laws. Peters v. Equitable Life Assur. Soc., 200 Mass. 579, 86 NE 885. Where complaint alleged that word "trustee" appearing in a lease and signature of defendant thereto

must be considered as directed against the pleading as it stands at the time the demurrer is interposed.[73] Its office is to test the sufficiency of a pleading [74] and not to determine whether the cause is of equitable cognizance.[75]

was merely descriptive, it was not subject to demurrer on ground that defendant was trustee for a certain firm consisting of himself and another, since the objection did not appear on the face of the complaint. Erskine v. Russell, 43 Colo. 449, 96 P 249. Oral admissions of fact by a party or his attorney are not proper matters for consideration in passing on a demurrer or motion to dismiss. Hicks v. Beacham [Ga.] 62 SE 45. A ground of demurrer which merely states that the allegations of the complaint do not present a cause of action is but a repetition of the statutory form of demurrer that the complaint is bad in substance and is of no avail unless it appears from the complaint that the substance does not state a cause of action. German-American Lumber Co. v. Brock [Fla.] 46 S 740. Objection that complaint by a foreign corporation did not show that it had paid the license fee required cannot be raised by demurrer. Union Trust Co. v. Sickles, 125 App. Div. 105, 109 NYS 262. Courts must take judicial notice of general laws of the United States, and defendant's claim, depending on such law, that complaint does not state a cause of action may be raised by demurrer. Case v. First Nat. Bank, 59 Misc. 269, 109 NYS 1119. In action for damages for failure to execute a deed pursuant to a decree for specific performance, defendant could not avail himself on demurrer to the complaint of any right he may have had by reason of the decree, the complaint stating the cause of action. Will v. Barnwell, 60 Misc. 458, 112 NYS 462. Where in action on insurance agent's contract of employment it did not appear from the face of the complaint that defendant company was organized under the insurance laws of the state or was engaged in the business of life insurance, the invalidity of the contract because made for more than one year in violation of Laws 1906, p. 796, could not be raised by demurrer. Akers v. Mutual Life Ins. Co., 59 Misc. 273, 112 NYS 254. A demurrer which goes only to a part of the relief asked and not to the bill nor any specific part thereof is bad. Holt v. Hamlin [Tenn.] 111 SW 241. It is error to sustain a demurrer to an answer which denies the material allegations of the complaint. Gunnells v. Latta [Ark.] 111 SW 273. On demurrer a complaint is tested by its allegations. Spaulding Mfg. Co. v. Chaudoin [Ark.] 112 SW 1087. Possibility that proof may be introduced of an injury other than that alleged is not ground for overruling a demurrer to a complaint. Ames v. American Tel. & T. Co., 166 F 820. Mere confusion of statement is not ground for demurrer. Pittsburgh, etc., R. Co. v. Rogers [Ind. App.] 87 NE 28. Under Burns' Ann. St. 1908, § 1101, it is not error to sustain demurrer to paragraphs of an answer provable under a general denial. Ripley v. Lemcke [Ind. App.] 87 NE 237.

**Demurrers well taken:** Where a complaint does not state a cause of action and motion to make more definite is overruled, a demurrer is well taken. Louisiana & A. R. Co. v. State [Ark.] 116 SW 193. Counterclaim not arising from nor legally connected with the subject-matter of the complaint is bad on demurrer, though facts set forth might have been a good defense. State v. Spencer [Ind. App.] 86 NE 492. On demurrer to complaint on a check, the supreme court will not determine from an inspection of it whether it is payable to "Tong Sing Wo Kee" or to "Long Sing Wo Kee." Moy Sie Tighe v. Fargo, 61 Misc. 181, 112 NYS 927. In action against a county and its officers for injuries to property adjacent to a highway, caused by cutting ditches, the entire complaint is properly dismissed on demurrer by the county alone. Heape v. Berkeley County, 80 S. C. 32, 61 SE 203. Demurrer to answer setting forth no defense properly sustained. Low v. Wilson, 77 Kan. 852, 95 P 1135.

**72.** In passing on a demurrer to an amended petition, objectionable parts of the original may not be considered. City of Farmington v. Farmington Tel. Co. [Mo. App.] 116 SW 485. The only facts to be considered are those alleged in the pleading demurred to. Jackson's Adm'x v. Richardson Coal Co., 33 Ky. L. R. 289, 109 SW 902. Demurrer should be to bill as amended and not to amended bill. Bentley v. Barnes [Ala.] 47 S 159. A paragraph of a pleading tested by demurrer must stand or fall unaided by other allegations of another paragraph or another part of the record. Lake Erie & W. R. Co. v. Moore [Ind. App.] 84 NE 506.

**73.** A demurrer is addressed to the pleading as it stands, irrespective of what subsequent proof may be. What the proof will be is not to be considered. Blanks v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 116 SW 377. The effect of sustaining a demurrer to a plea of estoppel is to leave the answer as if estoppel had not been pleaded. Scarborough v. Woodley, 81 S. C. 329, 62 SE 405. The fact that a demurrer to a defense is sustained will not preclude the consideration of facts therein alleged in connection with other defenses as to which they are realleged and made a part. Whalen v. Union Bag & Paper Co., 130 App. Div. 313, 114 NYS 220. No amendment being offered in response to special demurrer, they were properly sustained, and, the answer being irretrievably mutilated as to set forth no defense, the plea as a whole was properly stricken on general demurrer. Ney v. Clere Clothing Co. [Ga. App.] 63 SE 143. Where one ground of a demurrer is sustained and others overruled and plaintiff amends, and defendant does not demur to the amended declaration but pleads thereto, the demurrer does not apply to the amended complaint. Gainesville & G. R. Co. v. Peck [Fla.] 46 S 1019. A demurrer to a complaint is addressed to the case present. Lowe v. Yolo County Consol. Water Co. [Cal. App.] 96 P 379. Upon demurrer to a bill, only the bill itself and exhibits can be looked to. Loar v. Wilfong, 63 W. Va. 306, 61 SE 333. In determining whether a general demurrer should be sustained to an amended

A demurrer cannot go to a fragmentary part of a pleading but must go to the whole of the count, plea, or defense to which it is addressed.[76] A demurrer for want of facts is bad if the complaint warrants the granting of any relief,[77] as is a demurrer addressed to a pleading as a whole if any of the counts or defenses set up therein are good.[78]

A general demurrer is equivalent to a plea to the merits.[79] Due diligence must be exercised in filing a demurrer,[80] and it must be interposed by one entitled to demur,[81] and whether the right to demur has been waived may depend on statutes.[82] A demurrer does not lie to a bill of particulars.[83]

complaint which supersedes the original, only the substituted complaint will be looked to. Robert v. Hefner [Neb.] 116 NW 36. In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof if allegations therein either aid the petition in stating a cause of action or charges facts going to avoid the liability of defendant. Carson v. Hastings [Neb.] 116 NW 673. A demurrer to a complaint containing but one count must be considered as applying to the complaint as an entirety, not to fragmentary portions of it or to the attached copy of the cause of action alone, though the same has by apt words been made a part of the complaint. State v. Seaboard Air Line R. Co. [Fla.] 47 S 986. That two causes of action are not separately stated and numbered as such does not prevent demurrer for improper joinder. They need not be separated and numbered on motion before demurrer. Edison Elec. Illuminating Co. v. F. H. Kalbfleisch Co., 127 App. Div. 298, 111 NYS 462.

**74.** The effect of a demurrer is to admit the facts pleaded, but its object is to test the sufficiency of the facts to constitute a cause of action or defense, and unless it is apparent that it was interposed in bad faith, it may be withdrawn on payment of costs. Asphalt Const. Co. v. Bouker, 127 App. Div. 730, 112 NYS 31. Conditions on withdrawal of demurrer stated. Id.

**75.** Cannot be sustained on the ground that complaint does not state facts justifying interposition of a court of equity. Pape v. Pratt Institute, 127 App. Div. 147, 111 NYS 354.

**76.** The fact that more than one ground of recovery is pleaded or that grounds set up may not be entirely consistent is no reason for sustaining a demurrer challenging only the sufficiency of the facts alleged. Bichel v. Oliver, 77 Kan. 696, 95 P 396. Where a pleading is good in part, a demurrer to it as a whole is properly overruled. Leahart v. Deedmeyer [Ala.] 48 S 371. Demurrer to a complaint as a whole which contains the common counts is properly overruled. George v. Drawdy [Fla.] 47 S 939.

**77.** No demurrer lies to relief prayed if facts alleged show plaintiff entitled to any substantial relief. Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 NW 751. That plaintiff in framing his complaint proceeds on a certain theory does not render the complaint subject to general demurrer, if he states facts entitling him to relief on some other theory. Bell v. Bank of California, 153 Cal. 234, 94 P 889. Under B. & C. Comp. § 68, providing for demurrer to a complaint which shows on its face that the cause is barred, a demurrer cannot attack a part of a recovery sought by a complaint stating a good cause of action. State v. Portland General Elec. Co. [Or.] 95 P 722. The question on demurrer is whether on proof of the facts alleged plaintiff would be entitled to any relief, and not whether he would be entitled to the relief demanded. Guerard v. Jenkins, 80 S. C. 223, 61 SE 258. Does not reach question of damages if complaint shows right to any. Western Union Tel. Co. v. Merritt [Fla.] 46 S 1024. If one paragraph of a complaint is good, it is not demurrable as an entirety. Vandalia R. Co. v. McAninch [Ind. App.] 86 NE 1031.

**78.** Where demurrer to complaint in two counts was improperly sustained as to one, the appellate court will not pass on the question presented by the other count. Hudson v. Mississippi Cent. R. Co. [Miss.] 48 S 289. Where answer contained a general denial and matter set up in other paragraphs was not provable under general denial, it was error to sustain a demurrer to such other paragraphs. Druckamiller v. Coy [Ind. App.] 85 NE 1028. Where a general demurrer is filed to an entire complaint, it should be overruled if any paragraph of the pleading states a cause of action. Cockrell v. Schmitt, 20 Okl. 207, 94 P 521. A demurrer which goes to an entire declaration is bad when two counts of such declaration is good. Van Schoick v. Van Schoick [N. J. Law] 69 A 1080. In action against a mill company for pollution of a stream, an answer alleging that for more than 50 years many mills, including those of plaintiff, have used the stream as a drainage for 50 years, and the primary use of the stream has been changed by reason of such use, is a partial defense and not demurrable. Whalen v. Union Bag & Paper Co., 130 App. Div. 313, 114 NYS 220. Counterclaim demanding affirmative relief is not demurrable because insufficient in law on its face. Sand v. Kenney Mfg. Co., 113 NYS 972.

**79.** Filing a general demurrer is equivalent to a plea to the merits. Bunting v. Hutchinson [Ga. App.] 63 SE 49.

**80.** Where complaint against three defendants is demurrable by two, the third may not raise such objection on failure of his codefendants to demur. Springer v. Collins [Tex. Civ. App.] 108 SW 758.

**81.** Proper to refuse to consider demurrers filed after parties had announced ready for trial, and jurors were being examined on their voir dire. Missouri Valley Bridge & Iron Co. v. Ballard [Tex. Civ. App.] 116 SW 93.

**82.** Right to demur held not waived by moving to make complaint more definite and certain, under Code Civ. Proc. 1902, §§ 181, 164, 167, and Circuit Court Rule 20. Lawrence v. Lawrence, 81 S. C. 126, 62 SE 9.

**83.** Western Union Tel. Co. v. Merritt [Fla.] 46 S 1024.

*Form, requisites and sufficiency.*[See 10 C. L. 205]—A frivolous demurrer is one which raises no serious issue of law.[84] Where statutes prescribe the grounds of demurrer, no others are available.[85] The office of a demurrer is to specifically point out defects to which it is directed so as to afford the opposite party an opportunity to cure them.[86] The demurrer must clearly indicate the part of the pleading assailed.[87] In some states the precise defect relied upon must be pointed out,[88] and only grounds so specified may be considered.[89] A general demurrer need not state the grounds of objection except where the benefit of a personal privilege is claimed.[90] Where the form of demurrer is prescribed by statute, such form must be adhered to.[91] A joint demurrer will be overruled if the pleading attacked is good as to any of the demurrants.[92] It may be proper to amend a demurrer under some circum-

**84.** Where complaint contains much irrelevant matter and statement of facts is confused, yet if a cause of action is stated a demurrer is frivolous. MacMahon v. Simon, 128 App. Div. 921, 112 NYS 1110. Demurrer held not frivolous, and, while properly overruled, leave to answer should not have been denied. Younce v. Broad Road Lumber Co., 148 N. C. 34, 61 SE 624.

**85.** Municipal court act (Laws 1902, p. 1535) does not restrict demurrers to complaints which are written. Spitz v. New York Taxicab Co., 62 Misc, 492, 115 NYS 247. Demurrer to complaint on the ground that it does not state a cause of action does not reach discrepancies between the relief to which the complaint may entitle and the prayer in the summons. Freeman v. Paulson [Minn.] 119 NW 651. Demurrer not assigning any of the grounds prescribed by Burn's Ann. St. 1908, § 344, properly overruled. Conrad v. Hausen [Ind.] 85 NE 710. Held insufficient where not presenting any of the grounds for demurrer enumerated in the code. Minnich v. Packard [Ind. App.] 85 NE 787. "Defect of parties" as ground for demurrer means too few and not too many, and demurrer lies only for nonjoinder and not for misjoinder. Tieman v. Sachs [Or.] 98 P 163. Limitations are not specified in Code Civ. Proc. § 430, as a ground of demurrer, and that objection to a complaint, while required to be stated in the demurrer, must be deemed to be included within the ground of want of facts sufficient to constitute a cause of action. Bell v. Bank of California, 153 Cal. 234, 94 P 889.

**86.** Bryant v. Alabama G. S. R. Co. [Ala.] 46 S 484. One of two separate and distinct defenses in an answer may be demurred. Shelby v. Charlotte Elec. R., L. & P. Co., 147 N. C. 537, 61 SE 377. A demurrer to a reply is insufficient to raise the question whether the reply is evasive or argumentative where the principal objections are not pointed out. Webster v. State Mut. Fire Co. [Vt.] 69 A 319.

**87.** Though a demurrer to a complaint as a whole and to each paragraph was ambiguous, the court by overruling it as to each paragraph construed it as a demurrer to each paragraph seperately. Chicago & E. I. R. Co. v. Hamilton [Ind. App.] 85 NE 1044. where demurrer does not raise question of misjoinder of plaintiffs, the objection is not presented by assignments complaining of overruling of the demurrer. Hill v. Houk [Ala.] 46 S 562.

**88.** A demurrer for defect of parties plaintiff is good when it specifies and correctly names the parties necessary. Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 NW 751. Demurrer to complaint based on failure to comply with a particular section of the code, not specifically referred to, is insufficient under Code 1904, § 3271, providing that trial court may require grounds of demurrer to be specifically stated. Chesapeake & O. R. Co. v. Rowsey's Adm'r, 108 Va. 632, 62 SE 363. Misjoinder of causes is not reached by a demurrer which does not point out the defect. Donnelly v. Cuthbert Oil Co. [Ga.] 63 SE 257. In Florida a demurrer must point out the substantial matters of law to be argued. Benedict Pineapple Co. v. Atlantic Coast Line R. Co. [Fla.] 46 S 732. Grounds of demurrer to bill to specifically enforce a contract that complaint does not state facts entitling plaintiff to relief sought, that agreement mentioned was void, and that the promises of gift alleged cannot be enforced, are too general. Darcey v. Darcey [R. I.] 71 A 595. Where relief prayed was that plaintiff's wife and the sheriff be enjoined from enforcing a judgment for allmony, etc., it could only be granted in equity as provided by Code, §§ 3427, 4354 and a demurrer stating that plaintiff was not entitled under the facts alleged to the relief demanded was sufficiently specific under Code, § 3562. Mengel v. Mengel [Iowa] 120 NW 72.

**89.** Virginia & S. W. R. Co. v. Hollingsworth, 107 Va. 359, 58 SE 572. Where demurrer to complaint for injury in another state did not urge failure to plead statutes of such state, held the court was not required to sustain the demurrer on the ground that the complaint did not state a cause of action at common law, and it would be presumed that the common law prevailed in such state. Charleston & W. C. R. Co. v. Lyons [Ga. App.] 63 SE 862 Neither a paragraph of a petition nor an allegation therein should be stricken on special demurrer for defects not specified in such demurrer. Cowart v. Savannah Elec. Co. [Ga. App.] 63 SE 804.

**90.** In action against administrator on money claim against the estate, defense that no claim was presented for allowance is raised though not specified as a ground. Burke v. Maguire [Cal.] 98 P 21.

**91.** The code provides but one form of demurrer to an answer and it must be substantially complied with. State v. Huff [Ind.] 87 NE 141. Demurrer to answer in quo warranto that neither paragraph of the answer contained facts sufficient to constitute a defense presents no issue. Id.

**92.** A joint demurrer, bad as to one party, is bad as to all. Maw Linney v. Bliss, 124 App. Div. 609, 109 NYS 332.

stances.[93] In New York it is not necessary to first have surplusage stricken from a pleading before interposing a demurrer thereto.[94] A motion to strike may be equivalent to a demurrer.[95]

*Issues raised.* See 10 C. L. 1207—A demurrer raises an issue of law [96] which must be determined upon the words employed in the pleading demurred to.[97] It admits, for the purposes of the demurrer, only [98] the truth of all material allegations of fact which are well pleaded,[99] together with such inferences as may be reasonably drawn

**93.** Where complaint was demurred to generally and for misjoinder of causes, and demurrer was overruled with leave to answer, but before answer defendant moved to compel plaintiff to separately state and number the several causes, which relief could only be obtained by demurrer, it was proper to permit defendant to file an amended demurrer, the effect of which was to overrule order overruling the demurrer. Dent v. Los Angeles County Super. Ct., 7 Cal. App. 683, 95 P 672. Where, at appearance term, a general and special demurrer were filed, the latter was not amendable at a later term by adding new grounds of demurrer. Central of Georgia R. Co. v. Motz, 130 Ga. 414, 61 SE 1.

**94.** Under Code Civ. Proc. § 493, authorizing defendant to demur to a reply to a defense or counterclaim for insufficiency on its face, he is not required to first attack such pleading by motion to strike as surplusage facts already in pleadings. Klauder v. C. V. G. Import Co., 61 Misc. 255, 113 NYS 716.

**95.** A motion to strike a complaint on the ground that it showed on its face to be without merit may be regarded as a demurrer. Delaney v. O'Connor, 234 Ill. 546, 85 NE 226. A motion to strike a paragraph of an answer is an oral demurrer thereto. Kelly v. Malone [Ga. App.] 63 SE 639.

**96.** A demurrer to a complaint by a receiver of an insolvent corporation to recover the statutory liability of stockholders raises the right of plaintiff to maintain the action. Hammond v. Cline, 170 Ind. 452, 84 NE 827. Under Code Civ. Proc. § 508 providing for partial defense, the only question on demurrer to such defense is whether it is sufficient for that purpose. Whalen v. Union Bag & Paper Co., 130 App. Div. 313, 114 NYS 220. A ruling thereon can decide questions of law only. Morrow v. Durant [Iowa] 118 NW 781. Where the facts relied on as constituting contributory negligence are set out, the sufficiency of such facts is, on demurrer, a question of law. Southern R. Co. v. Dickens [Ala.] 45 S 215.

**97.** Foote v. Harrison [Wis.] 119 NW 291. A demurrer admits allegations of the complaint to be true, and for the purpose of deciding the demurrer the facts alleged must constitute the sole guide in the determination of the propositions of law presented. Richards v. Farmers & Merchants' Bank, 7 Cal. App. 387, 94 P 393. Whether court may apply doctrine of comparative injury is not before appellate court on appeal from an order overruling demurrer to complaint in an action to abate a legitimate business as a private nuisance. Does not affect question whether cause of action is stated, and hence, cannot be considered on demurrer. Holman v. Mineral Point Zinc Co., 135 Wis. 132, 115 NW 327.

**98.** Does not admit facts in the sense that the admission can be used on a trial. Donovan v. Boeck [Mo.] 116 SW 543. Truth of facts alleged is admitted for purposes of the demurrer. Shopbell v. Boyd [Cal. App.] 98 P 69; Woods v. Lowrance [Tex. Civ. App.] 109 SW 418.

**99.** Allegations are to be taken as true. Kirchner v. Wapsinonoc Directors of School Tp. [Iowa] 118 NW 51; Sequim Bay Canning Co. v. Bugge, 49 Wash. 127, 94 P 922; Dieterich v. Fargo, 194 N. Y. 359, 87 NE 518; Myers v. Martinez [Miss.] 48 S 291; Louisville & N. R. Co. v. Melton [Ala.] 47 S 1024; Delano v. Holly-Matthews Mfg. Co. [Miss.] 47 S 475; Correro v. Wright [Miss.] 47 S 379; Cawthra v. Stewart, 59 Misc. 38, 109 NYS 770; Fitschen v. Olson [Mich.] 15 Det. Leg. N. 1010, 119 NW 3; Calhoun v. Pullman Co. [C. C. A.] 159 F 387; Eaton v. Kola Lumber Co. [Miss.] 46 S 70; Equitable Life Assur. Soc. v. Kitts' Adm'r [Va.] 63 SE 455; Poythress v. Durham & S. R. Co., 148 N. C. 391, 62 SE 515; Union Trust Co. v. State [Cal.] 99 P 183; Cahill v. Stone & Co., 153 Cal. 571, 96 P 84. Admits **only facts well pleaded.** Warner v. Norwegian Cemetery Ass'n Trustees [Iowa] 117 NW 39; Hone v. Presque Isle Water Co. [Me.] 71 A 769; Caywood v. Supreme Lodge K. & L. of H. [Ind.] 86 NE 482; Foster County Implement Co. v. Smith [N. D.] 115 NW 663; Inland Steel Co. v. Yedinak [Ind.] 87 NE 229. A demurrer **does not admit** any averment contradicting what before appears certain on the record. White v. Avery [Conn.] 70 A 1065. Motion to dismiss because complaint fails to state a cause of action is the same as a demurrer on the same ground, and all issuable facts and reasonable inferences are to be taken as true. Staiger v. Klitz, 129 App. Div. 703, 114 NYS 486. Demurrer to affirmative defense. Shafford v. Brown, 49 Wash. 307, 95 P 270. Estops defendant from urging that they are not true. Raiche v. Morrison, 37 Mont. 244, 95 P 1061. Where servant was injured by collapse of staging resulting from defective rope and plaintiff alleged that the rope was a necessary appliance, held on demurrer the rope must be considered as an appliance and the petition stated a cause of action, though the staging was rigged by the servants themselves with material furnished by the master. Bort v. Quadt [Cal. App.] 96 P 815. Demurrer to complaint admits facts alleged and necessary inference therefrom most favorable to plaintiff. McGhee v. Norfolk & S. R. Co., 147 N. C. 142, 60 SE 912. General demurrer to petition for writ of mandamus. Kingsbury v. Nye [Cal. App.] 99 P 985. Facts stated in petition in nature of a bill or revivor. Deer v. State [Ala.] 46 S 848. Allegation that plaintiff is informed and believes and therefore avers, that defendant corporation in violation of law did certain acts, is a positive allegation of fact. McCarter v. Pitman, Glassboro & Clayton Gas Co. [N. J. Eq.] 69 A 211. On demurrer to new matter in

from them,[1] but does not admit conclusions,[2] nor mere assumptions incapable of proof,[3] but the pleading demurred to is to be liberally construed in favor of its sufficiency.[4] At common law a demurrer admits the jurisdiction but attacks the pleadings.[5] As a general rule a demurrer, whenever and by whosoever interposed, reaches back through the whole record and condemns the first pleading defective in substance.[6]

an answer, all the allegations of the complaint and answer are to be taken as true. National Gum & Mica Co. v. MacCormack, 124 App. Div. 569, 109 NYS 286. Where libelous article did not identify the person libeled and plaintiff alleged that it was published concerning her, such allegation was admitted by demurrer. Van Heusen v. Argenteau, 124 App. Div. 776, 109 NYS 238. Demurrer to a defense admits allegations set forth as well as matter alleged in the complaint to which it refers. Rosenbaum v. New York, 59 Misc. 30, 109 NYS 775. Allegations of a counterclaim. Sand v. Kenney Mfg. Co., 113 NYS 972. Allegation that a certain wall in a quarry was part of the ways, works and machinery of the place. Alabama Consol. Coal & Iron Co. v. Hammond, [Ala.] 47 S 248. Allegation in action on insurance policy that by uniform custom the company had paid damages caused by lightning, though not mentioned. Sleet v. Farmers' Mut. Fire Ins. Co. [Ky.] 113 SW 515. Facts stated in answers demurred to. Spring Garden Ins. Co. v. Imperial Tobacco Co. [Ky.] 116 SW 234. Since facts alleged in an answer upon information and belief are sufficient to raise disputed questions of law and fact, a demurrer thereto admits facts so alleged which are well pleaded and material to the issue. Garfield v. U. S., 31 App. D. C. 332.

1. Admits the truth of the allegations and all that can by fair intendment be implied therefrom. Clark v. West, 193 N. Y. 349, 86 NE 1; Wills v. Nehalem Coal Co. [Or.] 96 P 528; Ellis v. Keeler, 126 App. Div. 343, 110 NYS 542; Greene v. Mercantile Trust Co., 60 Misc. 189, 111 NYS 802; Mason v. Deitering, 132 Mo. App. 26, 111 SW 862; Bena Townsite Co. v. Sauve, 104 Minn. 472, 116 NW 947. In ejectment, admits right to immediate possession by admitting that plaintiff owns the fee. Id.

2. As to what constitutes a conclusion, see ante, § 1. Campbell v. Timmerman, 139 Ill. App. 151; Burger v. Omaha, etc., R. Co. [Iowa] 117 NW 35; Gill v. Manhattan Life Ins. Co. [Ariz.] 95 P 89; Continental Sec. Co. v. Interborough Rapid Transit Co., 165 F 945; Hungerford v. Waverly, 125 App. Div. 311, 109 NYS 438; Ellis v. Keeler, 126 App. Div. 343, 110 NYS 542; Merchants' Exch. v. Knott, 212 Mo. 616, 111 SW 565. Where contract is set out in a complaint, the court on demurrer must construe it independent from the pleader's conclusions from it. Lawson v. Sprague [Wash.] 98 P 737. Does not admit conclusions of law, conclusions of the pleader on the facts, nor the correctness of the construction of an instrument pleaded. Donovan v. Boeck [Mo.] 116 SW 543. Does not admit allegation that an instrument set out is a mortgage and not a conditional sale. Id. In complaint on a contract made a part thereof, allegations as to legal effect and construction of the contract are not admitted. Gminder v. Zeltner Brew. Co., 126 App. Div. 776, 111 NYS 215. Demurrer to alternative writ of mandamus admits all facts set forth but not conclusions or deductions from facts. People v. Butler, 125 App. Div. 384, 109 NYS 900. Complaint against interstate carrier that plaintiffs had been obliged to pay excessive rates without any facts to support the same is a conclusion not admitted by demurrer. Meeker v. Lehigh Valley R. Co., 162 F 354. A demurrer does not confess matters of law deduced by either party from the facts pleaded. Hone v. Presque Isle Water Co. [Me.] 71 A 769. Conclusions as to construction of written instruments attached to pleadings are disregarded. Southern States Life Ins. Co. v. Statham, 4 Ga. App. 482, 61 SE 886. Where contract sued on is set out, it must speak for itself and a demurrer does not admit the pleader's conclusions from it. Lawson v. Sprague [Wash.] 98 P 737.

3. That if a case had been appealed a reversal could have been had. Stockman v. Whitmore [Iowa] 118 NW 403.

4. It is presumed on demurrer to a bill for specific performance that the contract was in writing where such fact does not specifically appear. Crovatt v. Baker, 130 Ga. 507, 61 SE 127; National Gum & Mica Co. v. MacCormack, 124 App. Div. 569, 109 NYS 286; Tepfer v. Ideal Gas & Electrical Fixtures Co., 58 Misc. 396, 109 NYS 664. Complaint will be deemed to state all that can reasonably be inferred from its allegations. Stern v. Miller, 60 Misc. 103, 111 NYS 659. When assailed on general demurrer, every intendment is indulged in favor of a pleading. Landrum v. Stewart [Tex. Civ. App.] 111 SW 769. Answer to complaint on a note held to set up a defense. Id.

5. If it be sustained the action is not dismissed but there may still be opportunity for amendment. Littlefield v. Maine Cent. R. Co. [Me.] 71 A 657.

6. Demurrer searches the record and condemns the first pleading defective. Fulton County Gas & Elec. Co. v. Hudson River Tel. Co., 130 App. Div. 343, 114 NYS 642; Mayer v. Roche [N. J. Law] 69 A 246; Currier v. King [Vt.] 69 A 873; White v. Avery [Conn.] 70 A 1065; Bank of Miller v. Moore [Neb.] 116 NW 167. Demurrer to alternative writ of mandamus relates back to the petition. State v. Koch [Wis.] 119 NW 839. A demurrer to a bad answer cannot prevail where the complaint is not good. Schiefer v. Freygang, 125 App. Div. 498, 109 NYS 848. Demurrer to answer and counterclaim relates back to the complaint. Lyndon Lumber Co. v. Sawyer, 135 Wis. 525, 116 NW 255. Sufficiency of complaint may be attacked by demurrer to the answer. Heath Dry Gas Co. v. Hurd, 193 N. Y. 255, 86 NE 18. Where amended declaration was filed and defendant pleaded limitations to which plaintiff demurred, the sufficiency of the amended complaint was raised. Alameda v. Randall & Co.

*Hearing and decision on demurrer.* See 10 C. L. 1208—Where a demurrer and plea in abatement are both filed, the court may consider either first.[7] A party to whose pleading a demurrer has been sustained should, ordinarily, be given opportunity to plead anew [8] unless the pleading is incapable of amendment;[9] and where a demurrer is overruled, the pleader should be given opportunity to plead over [10] or withdraw his demurrer [11] upon compliance with conditions imposed,[12] but if the demurrer is frivolous he must show that was interposed in good faith.[13] Where a demurrant does not exercise his privilege to plead over, the adverse party is entitled to judgment of dismissal.[14] A demurrer cannot be withdrawn without leave of court.[15] A demurrer not acted upon is considered waived [16] and is abandoned where leave to answer is asked after it has been overruled.[17] A demurrer is properly sustained if some of the grounds are well taken.[18] A demurrer is sustained, if sustained on any ground.[19] A trial court is not required to state the grounds upon which its ruling

[R. I.] 70 A 1043. That a complaint does not state a cause of action is a complete reply to a demurrer to a defense. Maher v. Potter, 112 NYS 102. Where petitioners moved to carry a demurrer to a reply back to the answer but defendants did not move to carry it back to the petition, the court did not err in omitting to do so. Town of Scott v. Artman, 237 Ill. 394, 86 NE 595.

7. As the court deems proper. McLaurin v. Fields, 4 Ga. App. 688, 62 SE 114.

8. Municipal Court Act, § 145, expressly provides that where demurrer is disallowed, the court must grant leave to plead though the return day has passed. Schlesinger v. Meyer Realty Co., 114 NYS 341. Where plaintiff was afforded two opportunities to amend so as to overcome objections raised by a demurrer and was familiar with defects of his pleading, it was not error to sustain a demurrer to a second amended complaint without leave to amend. Bouri v. Spring Valley Water Co. [Cal. App.] 97 P 530. Where demurrer containing both general and special grounds was sustained without affording opportunity to correct defects pointed out, held error. Buchan v. Williamson [Ga.] 62 SE 815. On demurrer to a pleading because not signed by counsel, it is discretionary for the court to permit counsel to sign it. McIntyre v. Smyth, 108 Va. 738, 62 SE 930.

9. Where complaint is defective for failure to allege a condition precedent which it is conceded has not been complied with, it is proper to sustain a demurrer without leave to amend. San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus County [Cal.] 99 P 365. While it may be an abuse of discretion to sustain a demurrer without leave to amend where a cause is stated and the demurrer is directed to matters of form only, no such abuse can be said to be shown where the facts disclose no right in plaintiff. Bell v. Bank of California, 153 Cal. 234, 94 P 889.

10. Though defendant's demurrer was frivolous, he should be allowed to answer. MacMahon v. Simon, 128 App. Div. 921, 112 NYS 1110.

11. Interlocutory judgment overruling demurrer that "in case plaintiff fails to pay costs within 20 days defendant may enter final judgment of dismissal" should be modified by allowing plaintiff to withdraw the demurrer and pay costs. Peters v. Needham Piano & Organ Co., 124 App. Div. 749, 109 NYS 572.

12. Where defendant's demurrer was overruled and they allowed to plead over in payment of $10 costs, it was error for another justice to permit them to answer and proceed to trial without paying the costs. State Board of Pharmacy v. Lurie, 61 Misc. 71, 112 NYS 1092. On overruling a demurrer to complaint for defect of parties, imposition of $10 costs as a condition to answer is proper. Steele v. Korn, 137 Wis. 51, 118 NW 207.

13. Under Code Civ. Proc. § 497, providing that on a decision on a demurrer it is discretionary with the court to permit the party to plead anew on such terms as are just where demurrer to an answer has been overruled on the ground that it is frivolous, defendant must show that the demurrer was interposed in good faith. McNeil v. Suffolk County Sup'rs, 115 NYS 215.

14. Where plaintiff in municipal court did not exercise his privilege to plead over after demurrer to complaint was sustained, defendant on trial day could have judgment of dismissal. Great Northern Moulding Co. v. Bonewur, 128 App. Div. 101, 112 NYS 466. Where plaintiff relies on a complaint after demurrer thereto is sustained, judgment of dismissal or for defendant is proper. Litch v. Kerns [Cal. App.] 97 P 897. If demurrer to defenses is overruled and not withdrawn, defendant is entitled to judgment as a matter of right. Peters v. Needham Piano & Organ Co., 124 App. Div. 749, 109 NYS 572. Upon party's election to abide by his demurrer, the court should enter judgment that plaintiff take nothing by his suit and that defendant go hence without day. Hartzell v. Maryland Casualty Co., 139 Ill. App. 386.

15. Granting leave is discretionary. Peters v. Needham Piano & Organ Co., 124 App. Div. 749, 109 NYS 572.

16. Davis v. Davis [Tex. Civ. App.] 112 SW 948.

17. A demurrer to a complaint. Rogers v. Shawnee Fire Co., 132 Mo. App. 275, 111 SW 592.

18. Lamar & Rankin Drug Co. v. Jones [Ala.] 46 S 763.

19. When any ground of a demurrer to a declaration is sustained, the demurrer is sustained. Gainesville & G. R. Co. v. Peck [Fla.] 46 S. 1019. Where a count is demurred to on several grounds, it is of no effect if demurrer is sustained on any ground. Fidelity & Deposit Co. v. Walker [Ala.] 48 S 600.

on a demurrer is based.[20] A judgment on demurrer is final.[21] The sustaining of a demurrer eliminates from the pleading the matter demurred to.[22] The result of sustaining a demurrer to a complaint on the ground that it shows liability to defendant is to dismiss the action and not give judgment for defendant.[23] Where demurrer is sustained with leave to amend, the action is pending until expiration of the period within which amendment may be made.[24] An order overruling a demurrer with leave to withdraw it and answer, does not make leave to answer dependent on withdrawal of the demurrer.[25] An order overruling a demurrer previously sustained has the effect of vacating the prior order.[26] In overruling a demurrer to a complaint, the court may permit defendant after answer to renew the demurrer and then sustain it.[27] When a demurrer is improperly overruled all that subsequently occurs at the trial is nugatory.[28] A decision overruling a demurrer with leave to amend is an order, not a judgment.[29] Use of "order" instead of "adjudged" in ruling on demurrer is harmless.[30] Any error in sustaining a demurrer is harmless where the facts alleged in the pleading demurred to are proveable under an amendment [31] or otherwise.[32, 33] Judgment in due form is required in some few states.[34] If defendant refuses to plead over, judgment on the merits must enter.[35]

**20.** Hoopers v. Crane [Fla.] 47 S 992.

**21.** Where a demurrer to a petition is sustained on the general ground that it does not state a cause of action and the pleader stands thereon and judgment is rendered, such judgment is final and the same facts cannot be relitigated. Holderman v. Hood [Kan.] 96 P 71. Where complaint for specific performance alleged a contract claimed to be evidenced by writing set out to which demurrer was filed asserting it to be within the statute of frauds which was overruled, held while such order stood evidence of such writing was admissible. Hawkins v. Studdard [Ga.] 63 SE 852.

**22.** State v. Portland General Elec. Co. [Or.] 95 P 722.

**23.** The result of sustaining a demurrer to a petition on the ground that it shows that defendant is not indebted to plaintiff but that plaintiff is indebted to defendant should be to dismiss the action and not to render judgment for defendant on the set-off. Held that entering of such judgment was erroneous. Jellico v. Ballie, 130 Ga. 447, 60 SE 998.

**24.** So that order made therein will warrant contempt proceedings for disobeying it. Ex parte Joutsen [Cal.] 98 P 391.

**25.** An order overruling demurrer to a complaint and providing that plaintiff have judgment but with leave to defendant to withdraw demurrer and answer within 20 days. Hyman v. Susemihl, 137 Wis. 296, 118 NW 837.

**26.** Where after a demurrer was sustained an order overruling it was made, the second order was not void for want of jurisdiction but its effect was to vacate the former. Rogers v. Shawnee Fire Ins. Co., 132 Mo. App. 275, 111 SW 592.

**27.** Blalock v. Condon [Wash.] 99 P 733.

**28.** General Supply & Const. Co. v. Lawton [Ga.] 62 SE 293.

**29.** Decision overruling demurrer with leave to answer is not a judgment but an order subject to vacation under Code Civ. Proc. § 473, authorizing the court to relieve a party from mistake in an order made during progress of the trial. Dent v. Los Angeles County Super. Ct., 7 Cal. App. 683, 95 P 672.

**30.** Use of "order" instead of "adjudged" in overruling a demurrer is not reversible error. Comp. Laws 1897, § 10272, providing that judgment shall not be stayed for any informality in entering judgment. Prussian Nat. Ins. Co. v. Eisenhardt, 153 Mich. 198, 15 Det. Leg. N. 398, 116 NW 1097.

**31.** Error in sustaining a demurrer to a complaint is harmless where an amendment permitted introduction of the same evidence that would have been admissible under the original complaint. City of Bessemer v. Southern R. Co. [Ala.] 48 S 103.

**32, 33.** Sustaining of demurrer to certain counts of a complaint held harmless, where all evidence could be shown under other counts. Carleton v. Central of Georgia R. Co. [Ala.] 46 S 495. Where defendant on facts proved under certain pleas was entitled to judgment, overruling of demurrers to other pleas was harmless. Winn v. McCraney [Ala.] 46 S 854. Where an answer and plea present the same issue, it is harmless error to sustain demurrer to the plea. Selma St. & S. R. Co. v. Campbell [Ala.] 48 S 378.

**34.** Adopted form of judgment in favor of defendant on demurrer is "that said declaration and matters therein contained are not sufficient in law to maintain action of ——— against ———. Therefore it is considered by court that plaintiff take nothing by his writ and that defendant go hence without day and recover from plaintiff his costs in this behalf expended, and that execution issue therefor" or words of similar import. Wilkinson v. Olin, 136 Ill. App. 527. Judgment held informal. Id.

**35.** Where verified petition to enjoin enforcement of order of railroad commission that railroad should run more trains, alleged that sufficient trains were run and general demurrer thereto was overruled, judgment was properly rendered for plaintiff where defendant declined to answer further. Railroad Commission v. Galveston, etc., R. Co. [Tex. Civ. App.] 112 SW 345.

§ 6. *Cross complaints and answers.*[36]—See 10 C. L. 1200—A cross bill is proper whenever a defendant has equities arising out of the subject matter of the original suit which entitle him to affirmative relief which cannot be had in that suit,[37] but the cause of action set up in the cross-bill must affect or be affected by the original cause.[38] That portion of an answer which seeks affirmative relief must be treated as a cross-petition, and if the facts therein set forth entitle the defendant to any relief, the defense thus set up is good as against a general demurrer.[39]

§ 7. *Amendments.*[40]—See 10 C. L. 1210—Amendments are, as a rule, freely granted in furtherance of justice [41] and in many states this rule is prescribed by statute,[42]

**36. Search Note:** See notes in 13 L. R. A. (N. S.) 408.

See, also, Pleading, Cent. Dig. §§ 286-301; Dec. Dig. §§ 138-150; 5 A. & E. Enc. P. & P. 673.

**37.** Mallory v. Globe Boston Copper Min. Co. [Ariz.] 94 P 1116. In action to cancel a lease containing an agreement to sell, an answer asking specific performance held good as a counterclaim in view of B. & C. Comp. § 402, notwithstanding § 391, abolishing crossbills. Merrill v. Hexter [Or.] 94 P 972. New facts which it is proper to introduce into a cross bill are only such as are necessary for the court in deciding the questions raised in the original suit. If a defendant goes beyond this his pleading will not be a cross bill but an original bill. Patterson v. Northern Trust Co., 132 Ill. App. 63.

**38.** Under Civ. Code Proc. § 96, a cross-petition setting up an independent cause of action against persons not parties to the original suit is bad. Mattingly v. Eversole [Ky.] 113 SW 447. In suit to quiet title to land claimed by plaintiff under a state patent, title to land claimed by defendant not within the patent cannot be litigated by way of cross complaint. Worcester v. Kitts [Cal. App.] 96 P 335. A demand necessarily connected with and incident to the suit brought by the plaintiff is a proper matter of cross-action whether liquidated or unliquidated and cannot be defeated by the plaintiffs having elected to sue for the property in kind instead of for the contract price. Bateman v. Hipp [Tex. Civ. App.] 111 SW 971.

**39.** Cincinnati & C. Trac. Co. v. Jewett Car Co., 11 Ohio C. C. (N. S.) 189.

**40. Search Note:** See notes in 4 C. L. 1027; 49 L. R. A. 285; 15 L. R. A. (N. S.) 1003; 51 A. S. R. 414; 5 Ann. Cas. 674; 10 Id. 150.

See, also, Pleading, Cent. Dig. §§ 591-831; Dec. Dig. §§ 229-277; 11 A. & E. Enc. P. & P. 377.

**41.** Statute permitting amendments should be liberally construed in furtherance of justice. Chicago-Virden Coal Co. v. Bradley, 134 Ill. App. 234. The only limitation on the power to permit amendments is that an amendment made at or after trial to conform to proof must not change the cause of action or defense. Driskill v. Rebbe [S. D.] 117 NW 135. Greater liberality than formerly is allowed in the matter of amendments and mere technicalities are not viewed with favor (Anderson v. Wetter, 103 Me. 257, 69 A 105), but well established rules and precedents are to be adhered to (Id.). Under Code Civ. Proc. 1902, § 194, the power of the court to permit amendments in furtherance of justice is unlimited. Taylor v. Atlantic Coast Line R. Co., 81 S. C. 574, 62 SE 1113. Great liberality should be permitted in allowing amendments in furtherance of justice. Havlick v. Davidson [Idaho] 100 P 91. Under Code practice, greater liberality is permitted in allowing **amendments to answers** than in permitting them to the complaint and this rule is sometimes extended so far as to permit an entirely new defense. Cartwright v. Ruffin, 43 Colo. 377, 96 P 261. Unless a complaint cannot be amended so as to obviate objections thereto on demurrer, reasonable opportunity should be given to amend. Payne v. Baehr, 153 Cal. 441, 95 P 895. Properly allowed when they cure and make complete a faulty and incomplete statement. Taylor v. Atlantic Coast Line R. Co., 81 S. C. 574, 62 SE 1113. Under Comp. Laws 1897, § 10113, providing that if a sole plaintiff in a personal action die the action may be prosecuted by his personal representative considered in connection with § 10114, there is the same power of amendment as in ordinary cases. Jones v. Pendleton, 151 Mich. 442, 15 Det. Leg. N. 49, 115 NW 468.

**Amendments properly allowed: Mistake in complaint** in referring to c. 34, Acts 1901, prohibiting employment of children in factories, as c. 159, was so unimportant that its mere suggestion would have been sufficient for leave to amend without granting a continuance. Finley v. Acme Kitchen Furniture Co. [Tenn.] 109 SW 504. Where an allegation in plaintiff's second cause of action that plaintiff was a corporation was a mistake, it being correctly alleged in the first count that it was a partnership, the defect was curable by amendment. Acme Food Co. v. Howerton [Iowa] 119 NW 631. Even if a complaint be technically deficient in **alleging a conclusion** instead of a fact, opportunity to amend should be given. Eisner v. Pringle Memorial Home, 130 App. Div. 559, 115 NYS 58. In an action to compel cancellation of notes given for a machine which though warranted was in fact worthless and it appeared that the notes had been transferred to a bona fide holder, it was proper to permit an amendment **to claim damages** for breach of warranty. Pennebaker Bros. v. Bell City Mfg. Co. [Ky.] 113 SW 829. Where a complaint alleged $20,000 damages but **failed to pray judgment therefor,** an amendment adding such prayer is properly allowed. Cincinnati, etc., R. Co. v. Evans, 33 Ky. L. R. 596, 110 SW 844. Complaint alleging that defendant by its servants entered plaintiff's house, assaulted her and carried off her goods, properly amended by alleging location of house and charging defendant directly with the wrong that plaintiff's injuries were permanent and defendant's acts wanton. Stowers Furniture Co. v. Brake [Ala.] 48 S 89. Petition for separate maintenance could be amended **to ask for divorce,**

the matter being largely committed to the discretion of the trial court,[43] whether

no new issue being made or proof offered. Burke v. Burke [Iowa] 119 NW 129. Where complaint by assignee of a mortgagor of logs against mortgagee alleged conversion but after it had been held on writ of error that facts did not show conversion, an amendment was filed setting up negligence in caring for and selling the logs and acts referred to in amendment were the same as those pleaded in original complaint, held the amendment was authorized. Croze v. St. Mary's Canal Mineral Land Co. [Mich.] 15 Det. Leg. N. 58, 117 NW 81. Where plaintiff has but one cause of action which he failed to properly describe, he may amend so that he may recover on it. Jones v. Pendleton, 151 Mich. 442, 15 Det. Leg. N. 49, 115 NW 468. **Failure to verify** a bill is an amendable defect. Hall v. McKellar [Ala.] 46 S 460. Such special demurrers as were meritorious in action for death held met by amendment. South Georgia R. Co. v. Niles [Ga.] 62 SE 1042. Under Code Civ. Proc. § 194, authorizing court to permit amendments in furtherance of justice by correcting names, inserting material allegations, etc., it was proper to permit plaintiff to amend to bring himself within Civ. Code § 2310, making contracts to deliver cotton void unless the contractor was owner of the cotton. Knight Yancey & Co. v. Aetna Cotton Mills, 80 S. C. 213, 61 SE 396. In condemnation proceedings in the county courts of Colorado, the complaint may be amended to set up jurisdictional facts. Goodman v. Ft. Collins [C. C. A.] 164 F 970. Complaint held not to unequivocally state a cause of action for death after conscious suffering under Rev. Laws, c. 106, § 72, and it was not error to allow an amendment to clearly state a cause under § 73. Herlihy v. Little, 200 Mass. 284, 86 NE 294. The fact that action was brought in name of decedent's administratrix, and that notice of intent to sue required by § 75, alleged death preceded by conscious suffering was not conclusive that plaintiff intended to sue for death preceded by conscious suffering. Id. Amendment which merely makes the description of a place where an injury occurred more certain is permissible. Palmer v. Waterloo, 138 Iowa, 296, 115 NW 1017. It is proper to amend a defect in a complaint which does not show whether defendant is a corporation or a partnership. Stowers Furniture Co. v. Brake [Ala.] 48 S 89. In action by a passenger against a street railway company for injuries where complaint alleged that defendant's servants were "carelessly, negligently, willfully, and maliciously" held not error to permit an amendment striking out "willfully and maliciously." Peck v. Springfield Trac. Co., 131 Mo. App. 134, 110 SW 659. **It is error to refuse leave** to file an amended complaint containing matter germane to the cause of action offered by plaintiff before action was filed. Alexander v. Gardner [Ky.] 113 SW 906. Where plaintiff sued for breach of a contract which he had signed "William Eddy for Eddy family," denial of leave to amend after demurrer sustained on ground that complaint was ambiguous held an abuse of discretion. Eddy v. American Amusement Co. [Cal. App.] 99 P 1115. On trial of action by foreign corporation for goods sold, it was error to refuse to allow defendant who had pleaded payment to amend to allege plaintiff's failure to comply with Laws 1902, p. 1805, requiring foreign corporations to procure a certificate to do business in the state. Steiger Trunk & Bag Co. v. Wharncliffe, 114 NYS 462.

**42.** Under the code, an amendment should always be allowed where it will promote justice, and justice requires it. Young v. McIlhenny [Ky.] 116 SW 728. Under Code 1897, § 3600, authorizing amendments in furtherance of justice, it was proper in an action against a city for injuries caused by an excavation across a sidewalk space to amend so as to allege that the city had constructive notice of the excavation. Pace v. Webster City, 138 Iowa, 107, 115 NW 888. Under Comp. Laws, § 11268, authorizing amendments in furtherance of justice where case made by complaint, was not within § 11206, authorizing action of trespass for forcible detainer, it was proper to allow an amendment striking reference to such statute. McIntyre v. Murphy, 153 Mich. 342, 15 Det. Leg. N. 484, 116 NW 1003. Under Code, § 3600, permitting amendments in furtherance of justice, amendments should be allowed whenever rights are not prejudiced. Hanson v. Cline [Iowa] 118 NW 754. Under Municipal Court Act (Laws 1902, p. 1542, c. 580) authorizing amendments to promote justice, it was error to refuse an amendment showing that a guaranty sued on was without consideration. Marrer v. Marrer, 58 Misc. 526, 109 NYS 735. Under Civ. Code Prac. § 134, providing for amendments in furtherance of justice, it was not error to refuse an amendment in action for divorce setting up acts of apparent infidelity long after the parties had pleaded to the issue, specially where under the pleadings and evidence plaintiff was successful. Robards v. Robards, 33 Ky. L. R. 565, 110 SW 422. Under P. L. 1903, p. 572, authorizing such amendments as may be necessary for determining in the action the real question in controversy, it is the question which the parties intended to try, and not the question at issue upon the record which controls. Miller v. West Jersey & S. R. Co. [N. J. Law] 70 A 175.

**43.** Hirsh v. Beard, 200 Mass. 569, 86 NE 954; McCormick v. Jester [Tex. Civ. App.] 115 SW 278; Benson v. Oregon Short Line R. Co. [Utah] 99 P 1072; Rankin v. Caldwell [Idaho] 99 P 108; Cartwright v. Ruffin, 43 Colo. 377, 96 P 261; Swanston v. Clark, 153 Cal. 300, 95 P 1117; Richner v. Plateau Live Stock Co. [Colo.] 98 P 178; Puritan Mfg. Co. v. Toti [N. M.] 94 P 1022. To be especially liberally exercised in case of answer. Rude v. Levy, 43 Colo. 482, 96 P 560; Ryan v. North Alasko Salmon Co., 153 Cal. 438, 95 P 862. Not subject to review. Motion to amend an answer in personal injury case for purpose of setting up an alleged release was addressed to discretion of court. Goess v. Chicago B. & Q. R. Co., 104 Minn. 495, 116 NW 1115. Where complaint on note alleged joint and several liability, it was discretionary with the court to permit an amendment striking the word "severally." Central Banking & Trust Co. v. Pusey [S. D.] 116 NW 1126. In action on an indemnity given a Wisconsin sheriff by an attorney representing nonresident creditors, an amendment alleging that under the Wisconsin law the attorney had authority to indemnify the sheriff was within the discre-

the proposed amendment be offered before, at,[44] or after the trial,[45] who may take into consideration the diligence exercised in presenting it,[46] and impose such terms as

tion of the court. Audley v. Townsend, 115 NYS 145. An answer is amendable subject to the discretion of the court alleging a release of a debt sued on by virtue of bankruptcy proceeding begun after the action was commenced. Errickson v. Elliott [N. D.] 117 NW 361. Under Rev. Laws, c. 173, § 48, providing for amendments enabling plaintiff to sustain the cause of action intended to be brought and § 121, providing that the cause shall be considered the same if the court so finds, no exception lies to the allowance of an amendment adding four new counts, it not appearing that the cause was not the one intended to be brought. Commonwealth v. National Cont. Co., 201 Mass. 248, 87 NE 590. In an action against a threshing machine company for damages caused by its transferring plaintiff's notes, given for a threshing outfit, alleged not to have complied with representations, it was held within the discretion of the court to permit an amendment setting forth the false representations. Rectenbaugh v. Northwestern Port Huron Co. [S. D.] 118 NW 697.

**Refusal to allow held not an abuse of discretion:** Not error to refuse to permit an amended answer and counterclaim after commissioner had made his report where the defense and counterclaim was fully considered by the court. Wilson v. Barrett [Ky.] 115 SW 812. Refusal to permit plaintiff at conclusion of trial to amend to insert additional grounds of negligence and make it conform to proof held not an abuse of discretion. Gracz v. Anderson, 104 Minn. 476, 116 NW 1116. Refusal to permit a defendant to amend to allege that no guardian had been appointed for the infant defendant before the action was commenced held within the discretion of the court. Patterson v. Melchior, 106 Minn. 437, 119 NW 402. Refusal to permit amendment of answer held not error. First Nat. Bank v. Speed [N. M.] 99 P 696. The allowance of amendments to an unsworn bill before answer is generally a matter of course and an abuse of discretion therein may be reversible error. Baker v. Baker, 139 Ill. App. 217.

**44.** Amendment during trial rests in the discretion of the court. Manns v. Manns [Ky.] 115 SW 715; Goodney v. International & G. N. R. Co. [Tex. Civ. App.] 113 SW 171. Where original complaint alleged breach of contract to replace fruit trees sold, it was discretionary with the trial court to refuse an amendment near close of the trial alleging fraud and conspiracy in selling plaintiff worthless trees. Moyers v. Fogarty [Iowa] 119 NW 159. After the trial of a case has begun, the court may in its discretion permit or refuse an amendment to the pleadings. Sandoval v. Randolph [Ariz.] 95 P 119. Held not abuse of discretion at time of trial where case had been pending eight months and matter presumably within knowledge of party during that time. Schneider v. American Bridge Co., 31 App. D. C. 420.

**45.** Allowance of amendment to make pleading conform to proof. Mansfield v. Mallory [Iowa] 118 NW 290; Dempster v. Oregon Short Line R. Co., 37 Mont. 335, 96 P 717; Higgens v. Supreme Castel of H. N. [Neb.] 120 NW 137. Allowing amendment after evidence is all in. Shannon v. Maetin [Mo. App.] 108 SW 1116. Allowance of amendment of answer after verdict. Tindal v. Sublett [S. C.] 63 SE 960. Where trial proceeds with the understanding that an amended answer shall be filed, allowance of such amendment after verdict as of a prior date is discretionary with the court. Kurinsky v. Lynch, 201 Mass. 28, 87 NE 70.

**46.** Amendment of complaint in personal injury case to increase the amount of damages may be permitted, but, where made long after the action commenced, it cannot be permitted on motion unsupported by suggestion why application had not been previously made or excusing apparent laches. Kenney v. South Shore Natural Gas & Fuel Co., 126 App. Div. 236, 110 NYS 503. Where application to amend is made at special term, some reason showing the propriety of the amendment is required. Kenney v. South Shore Natural Gas & Fuel Co., 126 App. Div. 236, 110 NYS 503. Under Comp. Laws, §§ 10718, 10719, relative to enforcement of mechanic's liens, where a proceeding to foreclose is timely commenced, an amendment bringing in a particular party may be made after the year has expired. Prather Engineering Co. v. Detroit F. & S. R. Co., 152 Mich. 582, 15 Det. Leg. N. 280, 116 NW 376.

**Refusal to allow held not an abuse of discretion:** Not error to refuse leave to amend where plaintiff failed to move for leave until nine months after insufficiency of the complaint had been determined and where in the meantime plaintiff had opposed early trial on the ground that he intended to amend by bringing in other parties. Jones v. Gould, 130 App. Div. 451, 114 NYS 956. Where matters sought to be pleaded by trial amendment could have been discovered before trial by the exercise of ordinary diligence, it was within the discretion of the court to refuse it. City of San Antonio v. Wildenstein [Tex. Civ. App.] 109 SW 231. Request of defendants for leave to amend their answer by denial of execution of the mortgage sued upon, made after jury had been impaneled, and a great part of the evidence in. Home Sav. Bank v. Woodruff [N. M.] 94 P 957. Where answer was filed more than 18 months after complaint and 6 months before trial, it was not error to deny an amendment to the answer at close of plaintiff's case which would make a new issue that plaintiff was not prepared to meet. Richner v. Plateau Live Stock Co. [Colo.] 98 P 178. It was within the discretion of the court to refuse leave to amend a complaint to add a claim for damages "by way of legal relief," asked two years after action commenced and after successive amendments had been made. Bristol v. Pritchard [Conn.] 71 A 558. Where an amended answer is filed in the city court of New York for the sole purpose of delay, and if allowed plaintiff will lose the benefit of the term for which the cause had been noticed, an order striking such amendment is proper. Tillinger v. London, 114 NYS 130. Under Rev. St. § 954, relative to amendments in an action for injuries brought July 7, 1905, it was held not an abuse of discretion to refuse to allow amendments offered March 17, 1906, whether

seem just.[47] Amendments may, on proper leave granted,[48] on proper application and showing,[49] or in some states as a matter of right,[50] be made before trial,[51] at the

it set up a new cause of action or not. Stillwagon v. Baltimore & O. R. Co. [C. C. A.] 159 F 97. Where complaint for partnership accounting asserted existence of the partnership and such theory was adhered to until time of trial, it was proper to deny leave to amend after evidence was in, to allege that the firm had been dissolved at a certain date. Teipner v. Teipner, 135 Wis. 380, 115 NW 1092. A party should not be permitted to amend where by reason of his laches, misunderstanding of the rules of pleading or for any other reason, his opponent would be placed at an unfair disadvantage. Calvert v. Thurston, 58 Misc. 347, 109 NYS 567. In action on a life policy where proof of insured showed all his accident insurance, it was proper to deny leave to file a trial amendment to the answer alleging that insurer had just discovered that insured carried more accident insurance than he represented. Continental Casualty Co. v. Semple [Ky.] 112 SW 1122.

**Permitting amendment held not an abuse of discretion:** Under Laws 1902, c. 580, p. 1542, a court will not be considered as having abused its discretion in permitting amendment of a prayer in a mechanic's lien case to ask for personal judgment without granting an adjournment, where the only objection made was surprise, supported by no reason. Zide v. Scheinberg, 114 NYS 41.

47. The court may permit a plea to be amended on payment of costs and thereafter disregard and reject it. Boswell v. Johnson [Ga. App.] 62 SE 1003. Where trial amendment of complaint did not change the issues nor require different evidence, it was not error to deny defendant time to answer. St. Louis, etc., R. Co. v. State, 85 Ark. 561, 109 SW 545. Terms of allowing amendment are discretionary. Rahles v. Thompson & Sons Mfg. Co., 137 Wis. 506, 118 NW 350; Lyall v. Wood, 130 App. Div. 294, 114 NYS 272. Where motion is granted to amend a complaint tendering new issues and defendant claims to have been misled and requests a continuance, he cannot be required to disclose the names of his witnesses nor the evidence he desires to produce upon another trial. Despatch Laundry Co. v. Employer's Liability Assur. Corp., 105 Minn. 384, 117 NW 506. Order on sustaining a demurrer to a complaint allowing plaintiff to amend as he may be advised will be construed as meaning within the limitations of Code Civ. Proc. 1902, § 194, prescribing amendments which may be made. Smith v. Southern R. Co., 80 S. C. 1, 61 SE 205.

**Continuance:** Held not error to deny a continuance on granting leave to amend a complaint to change, slightly, the corporate name of defendant. Sterns Coal Co. v. Evans' Adm'r, 33 Ky. L. R. 755, 111 SW 308. Under Burns' Ann. St. 1908, §§ 403, 404, relative to delay in filing amendments if an amendment prejudices a defendant in his defense, he should ask a continuance. Miller v. State [Ind. App.] 86 NE 493. Under Civ. Code Prac. § 136, relative to continuance where pleadings are amended where an amendment is filed out of the regular order of pleading, if the adverse party desires a continuance he should inform the court why he cannot proceed to trial. Troendle Coal Co. v. Morgan Coal, Coke & Min. Co. [Ky.] 114 SW 312. A trial court having granted respondents motion to amend a complaint by striking out certain admissions and substituting new issues, appellant was entitled to a continuance. Despatch Laundry Co. v. Employer's Liability Assur. Corp., 105 Minn. 384, 118 NW 152. Continuance on ground of surprise at an amendment are within the discretion of the court. Georgia F. & A. R. Co. v. Sasser, 4 Ga. App. 276, 61 SE 505.

**Payment of costs:** Upon remand for new trial on the ground that the complaint did not state a cause of action, it could be amended only by paying all costs. Audley v. Townsend, 115 NYS 145. In the absence of some reason to the contrary, where amendments are permitted after an unsuccessful trial, the other party should be reimbursed taxable costs, accrued since pleading amended was served. Lyall v. Wood, 130 App. Div. 294, 114 NYS 272. Amendment requested after an unsuccessful trial held allowable in court's discretion; but, it not being claimed that pleader had any information he did not have at prior trial, and no excuse being given for not then amending, it will be allowed only upon payment of all costs and disbursements accruing since original pleading was served, with $10 costs of the motion. Id.

48. Where an amendment was filed in open court during the progress of the trial, was properly entered on the notice book, was before the court and embodied in instructions, formal leave to file the same was not necessary. McGuire v. Chicago, B. & Q. R. Co., 138 Iowa, 664, 116 NW 801. Under Burns' Ann. St. 1908. § 403, providing that all amendments except those as of course shall be filed by leave, where complaint alleged that an oral contract was made in March, it was proper to permit an amendment that it was made in October. Miller v. State [Ind. App.] 86 NE 493. Under Rev. St. 1895, art. 1188, all amendments filed when court is in session must be filed under leave of court; motion in local option election contest to amend on an adjourned date to name other parties, etc., held properly denied. McCormick v. Jester [Tex. Civ. App.] 115 SW 278. An amendment filed without leave should not be stricken if it should have been allowed on leave. Hanson v. Cline [Iowa] 118 NW 754.

49. A notice of application for leave to amend need not be given to a defendant in default, regardless of whether he was served by ordinary process or by publication. Pine Tree Lumber Co. v. Central Stock & Grain Exch., 140 Ill. App. 462. Not error for court to refuse leave to file a plea where no affidavit or showing made. Snow v. Merriam, 133 Ill. App. 641.

50. Code Civ. Proc. § 542, providing that pleading may be amended as of course, without costs or prejudice, within 20 days after served or before period to answer has expired, held, where complaint was amended by order of court on sustaining a demurrer, the amendment is not made as of course and plaintiff may make a second amendment as of course. Backes v. Mechanics' & Traders' Bank, 114 NYS 459. Under Code Civ. Proc.

trial,[52] or at the conclusion of the trial to conform the pleadings to the proof,[53]

§ 542, providing that within 20 days after answer served or at any time before period for answering has expired pleading may be amended as of course, where plaintiff demurred to paragraph of answer, defendant was entitled within time limited to amend by omitting such paragraph. Ullman v. Tanner, 127 App. Div. 808, 111 NYS 844. Under Code Civ. Proc. § 542, permitting amendment as of course within 20 days, held not to permit more than one amendment as of course. Town of Hancock v. Delaware & H. R. Co., 128 App. Div. 693, 113 NYS 80. Under Code Civ. Proc. § 798, providing for double time for doing an act when service is by mail, and § 542, providing for amendment as of course within the period of answer, where answer is served by mail, a party may amend it, of course, within 40 days. Schleger v. Most Holy Trinity Roman Catholic Church [N. Y.] 87 NE 426. A contention that defendant's original answer by being a general denial could not be demurred to and that no further pleadings were necessary would not deprive defendant of his right to double time. Id.

**51.** Under Laws 1902, p. 1542, authorizing amendment at any time in furtherance of justice, defendant should be permitted to amend on day set for trial where motion was made for judgment on pleadings. Miles v. Kuttner, 59 Misc. 224, 110 NYS 225. Where order sustaining demurrer with leave to amend within 20 days is affirmed on appeal, amendment filed within 20 days, after filing of remittitur in the trial court is in time. Hubbard v. Furman University, 80 S. C. 63, 61 SE 210.

**52.** Trial amendments are proper. Peterson v. Metroplitan St. R. Co., 211 Mo. 498, 111 SW 37. In action to set aside a deed on ground of incompetency of the grantor and that she signed it without knowing the nature of her act, it is not error to permit a trial amendment setting up nondelivery. Dexter v. Witte [Wis.] 119 NW 891. The court may in its discretion permit a trial amendment when objection is made to testimony as not within the issue. St. Louis, etc., R. Co. v. Holmes [Ark.] 114 SW 221. In action for injuries it was within the discretion of the court to permit a trial amendment of a complaint alleging "great mental and nervous" shock, etc., to allege that plaintiff was frightened and caused to suffer great mental and nervous shock. Louisville & N. R. Co. v. Brown [Ky.] 113 SW 465. Mistakes of law are within Code Civ. Proc. § 473, authorizing amendments during course of trial curing mistakes in proceedings. Dent v. Los Angeles County Super. Ct., 7 Cal. App. 683, 95 P 672. After announcement by the court that decision would be on the facts, it was proper to refuse to permit plaintiff to withdraw his announcement and file additional pleadings. Yeakley v. Gaston [Tex. Civ. App.] 111 SW 768. Trial amendment increasing amount of the prayer held proper. Midland Valley R. Co. v. Hale & Co. [Ark.] 111 SW 646. In action for negligence plaintiff should have been permitted at the trial to file a reply to the plea of contributory negligence, where defendant moved at close of plaintiff's evidence for judgment on the pleadings on condition that he pay accrued costs. Schulte v. Louisville & N. R. Co., 33 Ky. L. R. 31, 108 SW 941. In absence of motion for a continuance under Rev. Code Civ. Proc. § 150, a trial amendment introducing a new issue may be allowed. Rectenbaugh v. Northwestern Port Huron Co. [S. D.] 118 NW 697. Court may allow amendment at trial in a personal injury case to allege, instead of defect in machine, failure to warn inexperienced servant. Rahles v. Thompson & Sons Mfg. Co., 137 Wis. 506, 118 NW 350. In action for goods lost by a carrier, described as two boxes of household goods and carpets, it was not error to allow an amendment during trial describing the specific articles where defendant was not surprised, and had been furnished a list. Benson v. Oregon Short Line R. Co. [Utah] 99 P 1072. In action by one partner against another on his promise to pay plaintiff what he had drawn from the assets of the firm, it was error to refuse an amendment to cover an accounting where it was material and not objected to, though it introduced equitable issues. Maitland v. Purdy, 49 Wash. 575, 96 P 154. Under Civ. Code Prac. § 134, authorizing amendments in furtherance of justice, the discretion in permitting amendments during trial should be liberally exercised. Schulte v. Louisville & N. R. Co., 33 Ky. L. R. 31, 108 SW 941. Amendment after issues joined held properly refused where evidence in support thereof was hazy and unsatisfactory. Dotson v. Carter [Ky.] 112 SW 1116.

**53.** Declaration may be amended after verdict to make it conform to the proof. Kennedy v. Swift & Co., 140 Ill. App. 141. Complaint on bond of building contractor to recover money paid for mechanic's liens, etc., may be amended after judgment to conform more accurately to proof and instructions. Nowell v. Mode, 132 Mo. App. 232, 111 SW 641. In absence of showing that defendant was deprived of his right to remove a case to the federal court by a trick of plaintiff in demanding judgment for $2,000, and at close of case procuring an amendment to ask for $6,000, it is presumed that original prayer was in good faith and the amendment asked to conform to the proof. Dempster v. Oregon Short Line R. Co., 37 Mont. 335, 96 P 717. Under Laws 1902, p. 1542, c. 580, a court must allow an amendment to make pleadings conform to proof, on application, and it may make such amendment without application. Moran v. Brown, 113 NYS 1038. Order of court that pleadings are amended to conform to proof held not altered by a supplemental statement of the opinion of the court as to plaintiff's rights. Id. Even after verdict it is proper to permit an amendment of the ad damnum fixed in an action commenced before a justice of the peace by endorsement on the summons. No formal amendment of the plea need be filed where motion is allowed "that the ad damnum be increased." Wahl v. Wedel, 135 Ill. App. 175. In action against two persons as partners where one answered as an individual, and at close of plaintiff's case admits liability, it is improper to deny a motion then made without objection to amend the complaint and process, and dismiss as to the other defendant. Lapinsky v. Colish, 61 Misc. 319, 113 NYS 733. Power to authorize

but not after judgment [54] unless authorized by statute.[55] In some cases amendments

amendment making complaint more definite and certain may be exercised at any time before final pudgment. United States Fidelity & Guaranty Co. v. People [Colo.] 98 P 828. Where a variance is immaterial, leave to amend to conform to the proof should be granted. Bauman v. Tannenbaum, 125 App. Div. 770, 110 NYS 108. Petition in action against partnership may be amended to conform to proof that the firm was composed of three instead of two partners. Hambro Distilling & Distributing Co. v. Price & Co. [Iowa] 119 NW 541. May be made after submission and sometimes after verdict in the court's discretion. Burke v. Burke [Iowa] 119 NW 129. Whether an amendment to demand interest on the value of goods destroyed will be permitted after verdict, where no excuse is shown for delay is discretionary. D. J. O'Brien Co. v. Omaha Water Co. [Neb.] 118 NW 1110. An amendment to an answer to make it conform to the proof may be permitted though not requested until after evidence is all in. Barker v. More [N. D.] 118 NW 823. Properly permitted where the opposing party had ample opportunity to present his defense. Mansfield v. Mallory [Iowa] 118 NW 290. An amendment to make an answer conform to the proof may be made at the close of the trial unless it substantially changes the defense. Barker v. More [N. D.] 118 NW 823. Under statute authorizing amendments at any time before judgment, it is proper to permit amendment of complaint after verdict to conform to proof admitted without objection. Kennedy v. Swift & Co., 234 Ill. 606, 85 NE 287. May be permitted after evidence is in but before argument. Reed v. Light, 170 Ind. 550, 85 NE 9. Trial court may direct amendment to conform to proof where necessary to prevent a mistrial. Myers v. Holton [Cal. App.] 98 P 197. It is proper to permit amendment to conform to proof where cause of action is not substantially changed. Lookabaugh v. Bowmaker [Okl.] 96 P 651. Under Code Civ. Proc., § 470, amendment to conform to the proof is timely when filed after the court has heard the evidence and argument, but before filing of findings or judgment. Hedstrom v. Union Trust Co., 7 Cal. App. 278, 94 P 386.

**Properly allowed:** Held proper to allow an amendment to conform to proof by inserting an allegation as to consideration of a contract of shipment. Baltimore, etc., R. Co. v. Wood & Co. [Ky.] 114 SW 734. Where a complaint did not contain proper allegations but defendant had formal notice of the claim and evidence thereof was admitted, it was proper to permit amendment. Coulter v. Independent Order of Foresters, 166 F 805. In suit for specific performances tried June 27, 1906, plaintiff was properly allowed to amend his complaint on July 24, following, to conform to the proof. Stiles v. Hermosa Beach Land & Water Co. [Cal. App.] 97 P 91. Where pending suit on pledged securities by the pledgor they were assigned to the pledgee, it was proper to permit a supplemental complaint to conform to the proof, merely alleging the assignment, the agreement by which the pledgee held them, and how she happened to redeliver them to the pledgor. Merced Bank v. Price [Cal.] 98 P 383. Amendment offered after court had adjourned for the term and taken the case under advisement held properly allowed, the case being reopened at next term. United States Fidelity & Guaranty Co. v. People [Colo.] 98 P 828. Where one of the issues is as to the value of property, it is proper to permit amendment to conform to proof thereof. Rankin v. Caldwell [Idaho] 99 P 108. Clerical amendments which do not change the issues but merely increase the amount demanded may be permitted at any time before verdict. Allen v. Chase [Conn.] 71 A 367. Where original complaint and bill of particulars served all the purposes of a formerly correct complaint, it was proper at close of plaintiff's case to permit an amendment to set forth cause of action indicated by the bill of particulars and to make it conform to the proof. Howland v. Caille, 153 Mich. 349, 15 Det. Leg. N. 460, 116 NW 1079. Under St. 1898, § 2830, authorizing amendments to conform to the proof, held proper to allow an amendment setting up a contract shown by the answer and a modification thereof as proved by defendant. Brooklyn Creamery Co. v. Friday, 137 Wis. 461, 119 NW 126. Under Civ. Code Proc. § 134, authorizing amendment to conform to the proof, it was proper to permit an amendment to allege that defendant had contracted to reduce temperature in a cold storage room to 40 degrees Fahrenheit to correspond to proof that he agreed to reduce it to a temperature required to preserve goods. Paducah Ice Co. v. Hall & Co. [Ky.] 113 SW 104. Where testimony is received without objection on an issue not raised, it is proper to permit an amendment to conform to the proof. St. Louis, etc., R. Co. v. Holmes [Ark.] 114 SW 221.

**Not an abuse of discretion to allow:** In action for death of a brakeman caused by a derailment, it was not an abuse of discretion to refuse to allow amendment of answer after proof setting up contributory negligence where the proof did not sustain it. Louisville & N. R. Co. v. Stewart's Adm'x [Ky.] 115 SW 775. It is not an abuse of discretion to permit an answer to be amended after the case is closed where adverse party was fully protected in his right to meet the amendment. Anglo-Californian Bank v. Field [Cal.] 98 P 267. **Refusal to permit** amendment to conform to the proof held not an abuse of discretion. St. Louis, etc., R. Co. v. Holmes [Ark.] 114 SW 221. Where contractor sued to enforce mechanic's liens and alleged performance of the contract but proof showed variation therefrom because of building regulations, held a motion at close of trial to amend to allege substantial compliance and waiver of strict compliance was properly denied where defendant claimed surprise. Fraenkel v. Friedman, 58 Misc. 451, 111 NYS 436.

54. Under B. & C. Comp. § 102, impliedly inhibiting right to amend after trial, a court is not authorized to set aside its findings after motion for judgment for the purpose of giving a party a right to apply to the court for permission to amend. Scott v. Ford [Or.] 97 P 99. After judgment on

may be made in the appellate court [56] or after remand therefrom,[57] unless the judgment of such court finally disposes of the case.[58] A pleading cannot be amended to conform to proof where objection is duly made to admission of evidence thereunder.[59] An amendment will not be allowed after trial which will entirely change the theory upon which an action was brought and prosecuted.[60] In some states statutes prescribe what amendments may be made; [61] and in some jurisdictions amendments which

order sustaining a demurrer and denial of new trial, the court has no jurisdiction to permit amendments but it has such jurisdiction after the order but before judgment thereon. Dent v. Los Angeles County Super. Ct., 7 Cal. App. 683, 95 P 672. Where case for vacation of a tax certificate was argued on assumption that bill had been amended to allege procurement of tax deed, such amendment must be actually made before decree. Farmer v. Ward [N. J. Eq.] 71 A 401. In action on insurance policy where no issue was raised as to validity of assessment for nonpayment of which it was claimed the policy had lapsed, until after trial, plaintiff could not raise such issue by amendment without moving to set aside the submission. Griffith v. Merchants' Life Ass'n [Iowa] 119 NW 694. It is proper to permit plaintiff to amend his complaint by addition of an ad damnum clause after verdict but before entry of judgment. Florala Sawmill Co. v. Britt-Carson Shoe Co. [Fla.] 47 S 924.

55. Under Rev. St. 1899, § 660, authorizing amendments in furtherance of justice, it was proper to permit an amendment after judgment of a petition to enforce a mechanic's lien to show that items were sold to contractor for the owner's house. Meyer v. Schmidt, 130 Mo. App. 333, 109 SW 832. Under Code Civ. Proc. § 474, providing for joinder by any name of unknown defendant in suit to quiet title and amendment when true name is ascertained, held such amendment may be made on appeal where such defendant answers and asks affirmative relief. Blackburn v. Bucksport & E. R. R. Co., 7 Cal. App. 649, 95 P 668.

56. Where case was **tried in justice** court and one amendment allowed, it was discretionary with the court on appeal to permit further amendment. McLaughlin v. Bradley [Iowa] 118 NW 389. If the identity of the cause of action is preserved, a petition may be amended on **appeal to the district court from the county court.** Segear v. Westcott [Neb.] 120 NW 170. After an appeal from a justice of the peace a new party may be added, and this right is not affected by the fact that such party was a party in the justice court and dismissed therefrom. Merriam v. Martin, 132 Ill. App. 151.

57. May be amended on remand after reversal. St. Louis, etc., R. Co. v. Alverson [Tex. Civ. App.] 114 SW 673. In action for injuries where no objection was made to testimony of time lost, held plaintiff should be permitted to amend on remand to allege time lost and its value. Louisville & N. R. Co. v. Hurst [Ky.] 116 SW 291. Where original complaint was for punitive damages alone, where the supreme court sent the case back for new trial, it was proper to permit an amendment as negligent the acts previously alleged to be wanton and reckless. Taylor v. Atlantic Coast Line R. Co., 81 S. C. 574, 62 SE 1113. Where tenants sued for damages for collapse of the building due to failure to shove up walls while excavating adjacent property, on the theory of violation of building laws, and judgment was reversed on the ground of misapprehension of plaintiff's rights, held they were entitled to amend to allege breach of covenant of quiet enjoyment. Paltey v. Egan, 58 Misc. 345, 111 NYS 13. Plaintiff in foreclosure held entitled to amend after remand from appellate court. Perkins v. Watson [Miss.] 46 S 80. Where cause is sent back from appellate court for a new trial, the power to permit amendments is the same as if there had been no trial. Taylor v. Atlantic Coast Line R. Co., 81 S. C. 574, 62 SE 1113. Allowance of amendments after remand may be reviewed if properly excepted to. Smith v. Schlink [Colo.] 99 P 566. Where judgment for plaintiff is reversed because not sustained by the complaint, plaintiff should be permitted to amend only on payment of costs accruing after service of answer. Woolsey v. Brooklyn Heights R. Co., 129 App. Div. 410, 113 NYS 245.

58. There is no right to amend after remittitur from the appellate court where the judgment of such court finally disposes of the case. Swindell & Co. v. Bainbridge State Bank, 4 Ga. App. 414, 61 SE 847.

59. Only where no objection is made that such amendment may be permitted. Audley v. Townsend, 126 App. Div. 431, 110 NYS 575. Where trial court admitted over objection evidence not within the complaint, the error could not be cured after decision by amendment. Ward v. Bronson, 126 App. Div. 508, 110 NYS 335.

60. Where action for injuries caused by coming into contact with a live wire, the issues to which proof related was negligence in not properly safeguarding a wire, it was proper to refuse to permit plaintiff at conclusion of his testimony to amend to state a cause for maintaining a nuisance. Miller v. Kenosha Elec. R. Co., 135 Wis. 68, 115 NW 355. Where a party obtains leave at the close of the trial to amend to conform to the proof, he cannot go farther than present such fact averments as the evidence tends to establish. Warner v. Trustees of Norwegian Cemetery Ass'n [Iowa] 117 NW 39.

61. The statement "Complaint, personal injuries," indorsed on a summons in the municipal court, is not a statement of facts constituting a cause of action, and demurrer thereto should be sustained and plaintiff allowed to amend under Laws 1902, p. 1536. Spitz v. New York Taxicab Co., 62 Misc. 492, 115 NYS 247. Code, § 3600, authorizing amendments which do not change the claim

change the cause of action are permissible.[62] In some states provision is made for compulsory amendment.[63] The right to add, or eliminate, or substitute parties depends upon the statutes of the various states.[64] An amendment substituting one party for another operates as a dismissal as to the latter.[65] The amendment may be one of substance or form,[66] but amendments changing the cause of action or introducing new issues are not ordinarily permitted,[67] particularly after the running of

or defense, held not applicable. Kossuth County State Bank v. Richardson [Iowa] 118 NW 906.

62. An amendment may be permitted before trial though it changes the cause of action or defense. Driskill v. Rebbe [S. D.] 117 NW 135. Under Code Civ. Proc. 1902, § 194, an amendment in furtherance of justice may be permitted though it inserts another cause of action. Taylor v. Atlantic Coast Line R. Co., 81 S. C. 574, 62 SE 1113.

63. Allegations in a complaint of loss or damage may not be so wholly irrelevant as to be amenable to motion to strike and yet be subject to compulsory amendment under the statute. Williams v. Atlantic Coast Line R. Co. [Fla.] 48 S 209.

64. Even where a statute requires an action to be brought on relation in the name of the state, failure to so bring it is not ground for dismissal but an amendment may be made. Robertson v. Atlantic Coast Line R. Co., 148 N. C. 323, 62 SE 413. It is discretionary to permit a complaint by a receiver, suing on behalf of creditors, to be amended by substituting as plaintiff a creditor suing for himself and on behalf of others. Buist v. Williams, 81 S. C. 495, 62 SE 859. The purpose of Code 1907, § 5367, permitting amendment by striking parties, is to permit improper parties to be stricken without working a discontinuance. Scarbrough v. City Nat. Bank [Ala.] 48 S 62. Where several plaintiffs sue jointly, the petition may be amended by striking the names of such as are not proper parties. Civ. Code 1895, § 5105. Western & A. R. Co. v. Blackford [Ga.] 63 SE 289. A complaint for wrongful death by an administratrix who is not entitled under the statute to maintain the action **cannot be amended so** as to make the widow plaintiff. Rankin v. Central R. Co. [N. J. Law] 71 A 55. The addition of a coplaintiff does not change the cause of action. Price v. Goodrich, 141 Ill. App. 568. Amendment may make an entire change of plaintiffs when necessary. American Home Circle v. Schneider, 134 Ill. App. 600.

65. Owens v. Caraway [Tex Civ. App.] 110 SW 474.

66. Allowance of amendment changing suit in equity to an action at law is discretionary. Institution for Savings in Newburyport v. Puffer, 201 Mass. 41, 87 NE 562. A petition may be demurrable in that it does not state a cause of action, but it may be amended to state one if a new cause is not substituted. City of Farmington v. Farmington Tel. Co. [Mo. App.] 116 SW 485. Under Comp. Laws 1897, § 10268, giving court power to amend in form or substance, it was proper in a personal injury action to permit an amendment inserting the amount of damages claimed in a space left blank. Groat v. Detroit United R. Co., 153 Mich. 155, 15 Det. Leg. N. 395, 116 NW 1081. A complaint may be amended as to matter of substance and to join another party when equity and good conscience will be thereby subserved. Colaluca v. McKenna [R. I.] 69 A 924. Amendments in matters of substance are allowable under rule 5 of the supreme judicial court, but no amendment will be allowed unless it be consistent with the original complaint and for the same cause of action. Anderson v. Wetter, 103 Me. 257, 69 A 105. Failure to allege in petition in bankruptcy that a corporation is such a one as can be declared bankrupt is merely descriptive of the alleged bankrupt and amendable. McAfee v. Arnold [Ala.] 46 S 870. General bill for an account may, where a stated account is set up in bar, be amended on leave to surcharge or falsify the stated account. Branner v. Branner's Adm'r, 108 Va. 660, 62 SE 952.

67. Where it is sought to amend a complaint, if the court is in doubt whether the amendment declares on the same cause, it may inquire de hors the pleadings. Davis Adm'x v. Rutland R. Co. [Vt.] 71 A 724. On determining whether an amendment introduces a new cause of action, the test is whether the effort is to introduce what is a new subject of controversy. Gensler v. Nicholas, 151 Mich. 529, 15 Det. Leg. N. 13, 115 NW 458. Amendment setting up the same matter more fully is permissible. Davis' Adm'x v. Rutland R. Co. [Vt.] 71 A 724. Complaint in action for death of railroad employe, which did not allege that plaintiff knew of breaches of duty alleged is properly amended to supply the omission. Id. If the amendment states a new cause of action, it does not relate back to the beginning of the suit. Klugman v. Sanitary Laundry Co., 141 Ill. App. 422; Maegerlein v. Chicago, 141 Ill. App. 414. Amendment setting up annual value of services rendered held germane and properly allowed. Bunting v. Hutchinson [Ga. App.] 63 SE 49. Amendment setting up different matter is not. Davis' Adm'x v. Rutland R. Co. [Vt.] 71 A 724. Amendment to plea setting up new matter of defense properly refused. Thompson v. Rabun [Ga.] 63 SE 215. Ann. St. 1906, pp. 679, 686, 690, authorizing amendments after judgment in furtherance of justice, does not authorize an amendment by substituting an entirely different cause of action and judgment. City of St. Louis v. Wright Cont. Co., 210 Mo. 491, 109 SW 6. Causes of action not triable in the same proceeding or between the same parties may not be substituted by amendment. Kean v. Rogers [Iowa] 118 NW 515. Under Rev. Laws 1902, c. 173, § 48, the court cannot allow an amendment which will introduce a new cause of action not intended at the time the writ was sued out. Herlihy v. Little, 200 Mass. 284, 86 NE 294. A new cause of action may not be introduced but a count substantially different may be allowed. Charleston & W. C. R. Co. v. Lyons

[Ga. App.] 63 SE 862. The limitation on the power to permit amendments under Code Civ. Proc. 1902, § 194, to conform to the proof that it shall not change the cause of action, applies only during and not before trial. Taylor v. Atlantic Coast Line R. Co., 81 S. C. 574, 62 SE 1113. Where in action to determine rights to land judgment was entered against plaintiff in October, 1902, an application to file an amended complaint presenting a different cause in 1908 was properly denied. Manns v. Manns [Ky.] 115 SW 715. A corporation was induced by fraud to issue paid up stock for benefit of an officer in consideration of forged securities. The stock passed into bona fide hands. The officer died and his widow qualified as administratrix. The corporation sued the widow and her surety for the value of the stock. Held the petition sought recovery on the theory of a stock subscription and an amendment seeking to hold him liable on the ground of implied subscription was improper. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149.

**Amendments held not to set up a new or different cause of action:** An amendment which amounts only to a correction of errors to conform to the evidence. Martin v. Simon, Gregory & Co. [Ark.] 110 SW 1046. Amendment merely amplifying a complaint for injuries to a section foreman caused by explosion of a torpedo. Galveston H. & N. R. Co. v. Murphy [Tex. Civ. App.] 114 SW 443. An amendment which relates to the same matters, is for the same measure of damages, and may be supported by the same evidence, is not a departure. City of Farmington v. Farmington Tel. Co. [Mo. App.] 116 SW 485. Where original complaint for trespass alleged that in June, 1901, and on divers days since, defendant trespassed, an amendment alleging that the greater part of the damage was done in 1902 and 1903. Price v. Greer [Ark.] 116 SW 676. Where original complaint to recover possession of land and damages was by heirs, widow and administrator, the withdrawal by the administrator and filing a substituted complaint by other plaintiffs. Thomas v. Young [Conn.] 71 A 1100. One who seeks to cancel a mortgage on grounds that it was obtained by fraud and was fraudulently altered to include other property does not change his cause of action by amending to charge that the mortgage is a forgery and a substitution for the instrument read to him. Lookabaugh v. Bowmaker [Okl.] 96 P 651. Where original complaint in action on a note alleged that it had matured on the maker transferring his land, and that he had transferred "certain of his land," an amendment alleging that he had "made a transfer of his real real estate" was not inconsistent with the original complaint. Loveday v. Parker, 50 Wash. 260, 97 P 62. Where original complaint against a purchaser by one who had a prior option prayed for the difference between the option price and the price at which defendant purchased, an amendment asking judgment for a broker's commission based on the same promise as the original complaint. Myers v. Holton [Cal. App.] 98 P 197. Complaint for injuries caused by being thrown while alighting from a train and amendment thereto. Southern R. Co. v. Clay, 130 Ga. 563, 61 SE 226. Where original complaint was by one insurance company against another to reform and enforce a contract of reinsurance, a new cause was not added by an amendment setting up a previous contract binding defendant to reinsure and stating method. Delaware Ins. Co. v. Pennsylvania Fire Ins. Co., 130 Ga. 643, 61 SE 492. Where complaint for injuries alleged that servant fell into a hole in the floor negligently left unguarded and that his foot caught in a conveyor, an amendment alleging negligence in leaving the conveyor unguarded. Jackson v. Southern Cotton Oil Co., 81 S. C. 564, 62 SE 854. Where answer to verified petition was filed at first term but was not itself verified, verification permitted was not an amendment which changed the defense so as to open it to special demurrer. Neal v. Davis Foundry & Mach. Works [Ga.] 63 SE 221. Where complaint alleged injury to horses by running locomotive into them, amendment alleging injury caused by horses being frightened onto a trestle by a locomotive. Nashville, etc., R. v. Garth [Ala.] 46 S 583. Amendment did not change substance of demand. Schlater v. Le Blanc, 121 La. 919, 46 S 921. Where original complaint was for a common-law action for injuries to a servant, an amendment by addition of a new count under Employers Liability Act, § 71. Berube v. Horton, 199 Mass. 421, 85 NE 474. Where complaint for injuries alleged negligence in that wall and foundation of a building was unsafe, an amendment setting out the particulars wherein it was unsafe. Hagen v. Schleuter, 236 Ill. 467, 86 NE 112. An action on a contractor's bond by one who had furnished material, where complaint alleged that the oral contract under which the work was done was made in March, an amendment alleging that it was made in October. Miller v. State [Ind. App.] 86 NE 493. Where complaint in action to recover land furnished other means of identification of the premises in controversy than that contained in the specific description, an amendment giving the true description. Gensler v. Nicholas, 151 Mich. 529, 15 Det. Leg. N. 13, 115 NW 438. Where original complaint was against a corporation in its corporate name and certain persons alleged to be its officers, an amendment setting up that at the time the contract was made the corporation had been dissolved and that defendants were trustees. Heenan v. Parmele, 80 Neb. 509, 118 NW 324. A complaint for specific performance of a contract to convey land with an allowance for an encroachment or for damages after judgment, that the purchaser was not bound to take the premises because of the encroachment, it was proper to allow an amendment alleging willingness of buyer to cancel the contract on return of the deposit. Reynolds v. Wynne, 127 App. Div. 69, 111 NYS 248. An amendment does not change the cause of action where the foundation fact, a certain agreement, is the same and other facts are practically the same, except that the pleader draws different conclusions, the object of both bills being the same. Belzoni Oil Co. v. Yazoo & M. V. R. Co. [Miss.] 47 S 468. Where complaint alleged that a city negligently permitted a wire fence to be maintained along a street and plaintiff's horse was injured by becoming unmanageable and running into it, an amendment which

changed "unmanageable" to "frightened." McLemore v. West End [Ala.] 48 S 663. In action on liquor dealer's bond to recover a statutory penalty where husband and wife joined in the original complaint and the wife died, an amendment by the husband. Munoz v. Brassel [Tex. Civ. App.] 108 SW 417. Where original petition alleged a partnership to purchase and own a jack and that one of the copartners fraudulently represented that the price paid for the jack was double the price paid and sought to recover the excess, held an amendment to state that the purchasers were co-owners instead of partners. Gilliam v. Loeb, 131 Mo. App. 70, 109 SW 835. Where complaint in suit to foreclose a mortgage alleged amount due but prayed only for interest and costs, an amendment asking both debt and interest. Highland Land & Bldg. Co. v. Audas, 33 Ky. L. R. 214, 110 SW 325. An amendment asking damages alleged but for which the original complaint failed to pray. Cincinnati, etc., R. Co. v. Evans, 33 Ky. L. R. 596, 110 SW 844. Amendment alleging a new reason or ground of recovery. Adams-Burks-Simmons Co. v. Johnson [Tex. Civ. App.] 113 SW 176. An amended declaration does not set up a new cause of action by merely using more specific or comprehensive words, as in negligence case changing "propelling" its car to "conducted and managed" its car. Chicago City R. Co. v. Ratner, 133 Ill. App. 628. Amended complaint to recover rent under a written lease merely correcting the date of the contract and the per acre rental. Clarkson v. Lee, 133 Mo. App. 53, 113 SW 724. Where identity of demand for work done in the original statement of account, an amendment correcting a mistake in the dates did not add a new cause of action in violation of Ann. St. 1906, p. 2223. Magoon v. O'Connor [Mo. App.] 114 SW 83.

**Amendments held to set up a new or different cause of action:** In an action for coal shipped, the coal charged for was shipped in car load lots and was described in the complaint by car number and name and residence of the consignee. Held an amendment changing the number of the cars and names of consignees. Theodore R. Troendle Coal Co. v. R. Morgan Coal & Min. Co. [Ky.] 114 SW 312. Where an action originally against a corporation to recover a debt due in its corporate capacity, an amendment charging defendants as individuals or partners. Dodge v. Chambers, 43 Colo. 366, 96 P 178. In an action of slander where the alleged defamatory words charged plaintiff with having stolen the land of another, the petition is not amendable by striking the subject-matter of the alleged larceny and leaving the spoken words as charging the plaintiff with having stolen. Jones v. Bush [Ga.] 62 SE 279. Amendment alleging negligence where original complaint charged wantonness and recklessness. Taylor v. Atlantic Coast Line R. Co., 81 S. C. 574, 62 SE 1113. Amendment offered held to set up a new cause. Statham v. Southern States Life Ins. Co. [Ga. App.] 63 SE 250. Original complaint alleged a cause of action at common law for injuries causing death. Held an amendment setting up a cause of action under the statute was a different cause and amendment was properly denied. Anderson v. Wetter, 103 Me. 257, 69 A 105. Amendments in action for injuries. McAndrews v. Chicago, etc., R. Co. [C. C. A.] 162 F 856. Where one filed a bill to establish his title to property and obtained an agreement that the title should be tried, he could not amend his bill to seek to reach the furniture as defendant's property, under Rev. Laws, c. 159, § 3. Otis v. Freeman, 199 Mass. 160, 85 NE 168. Original petition alleged injury by negligence of a third person to whose liabilities defendant succeeded. Amendment alleged injury caused by defendant's negligence. Johnson v. American Smelting & Refining Co., 80 Neb. 250, 116 NW 517. A cause alleged in an amended petition, though founded on the same injury as that set up in the original, is a different cause of action if dependent on entirely different reasons for holding defendant liable. Id. Where, in an action for breach of warranty against incumbrances on horses sold, declarations sounded in tort, etc., and it was admitted that mortgage by virtue of which horses were taken was void, held amendment setting up promise of defendant made six months after the warranty to make good any loss sustained by plaintiff set up a new cause of action, since it could be sued only in assumpsit. Arnold v. White, 153 Mich. 607, 15 Det. Leg. N. 564, 117 NW 164. An amended bill to quiet title to land claimed by defendant under tax deeds void on their face sets up new facts, though the original bill attempted to raise the question whether deeds were prematurely issued, where the dates or the substance of the deeds were not set forth in former bill. Fitschen v. Olson [Mich.] 15 Det. Leg. N. 1010, 119 NW 3. Complaint on agreement to pay a balance due on materials sold by plaintiff to a third person could not be amended to allege sale to defendant and delivery to a third person. Candee v. Fordham Stone Renovating Co., 126 App. Div. 15, 110 NYS 355. Complaint by seller of goods against bankers who had collected the price after sale by a factor cannot be amended to make the action one for conversion or accounting. Kinston Cotton Mills v. Kuhne, 129 App. Div. 250, 113 NYS 779. Where original complaint was for work done for plaintiff, amendment claiming for work done by plaintiff and another as partners and praying an account between the parties. Alabama Const. Co. v. Watson [Ala.] 48 S 506. Where complaint in justice court for injuries to stock by delay in shipment states a cause of action in tort, it may not be amended on appeal to the circuit court to state a cause on contract. Wernick v. St. Louis & S. F. R. Co., 131 Mo. App. 37, 109 SW 1027. Where original complaint was for rent for a certain period and amendment setting up a different period and by a different party. Palmer v. Spandenberg [Tex. Civ. App.] 110 SW 760. An amendment of a complaint bringing in new and necessary parties. International & G. N. R. Co. v. Howell [Texas] 111 SW 142. Where complaint for false imprisonment alleged that commitment was issued after appeal taken and bond given, an amendment charging that the justice before whom the conviction was had had no jurisdiction. Ray v. Dodd, 132 Mo. App. 444, 112 SW 2. Where the amendment retains the identity of the matter on which the suit is founded, it does not thereby introduce a new cause

the statutes of limitation.[68] An amendment which is inconsistent with the cause of action alleged in the complaint,[69] or which changes the nature of the action from contract to tort, will not be allowed.[70] Amendments which are insufficient in substance,[71] or which do not cure the defect sought to be remedied,[72] are ordinarily not permissible.

An amended pleading supersedes the original [73] and relates back to the time of the filing of the latter,[74] except in so far as it introduces a new cause of action.[75] A

of action. Michigan Cent. R. Co. v. Harville 136 Ill. App. 243.

68. See, also, Limitation of Actions, 12 C. L. 609. Where complaint alleged malicious seizure by unlawful process, it cannot be amended after limitations have run to show abuse of process by excessive seizure. Lane v. Sayre Water Co., 220 Pa. 590, 69 A 1126. New cause of action cannot be introduced, new parties brought in, or new subject-matter presented. Id. Where the original complaint does not state a cause of action, an amended complaint which does state a cause of action cannot be filed after the cause is barred by limitations. Bahr v. National Safe Deposit Co., 234 Ill. 101, 84 NE 717.

69. Where complaint by shippers for injury to goods declared on special contracts evidenced by bills of lading, they could not be amended to allege that they were not bound by the terms of such bills of lading. Inman & Co. v. Seaboard Air Line R. Co., 159 F 960. An amendment to a plea is properly rejected where it sets up as a defense a parol agreement without new consideration, at variance and inconsistent with the pleader's written agreement involved in the issues. Porter v. Sims Co. [Fla.] 46 S 420. Demurrer will lie to amended bill which is inconsistent with original and makes a new case. Bentley v. Barnes [Ala.] 47 S 159. Amendment to bill for foreclosure held not a departure from the original bill. Id.

70. Inman & Co. v. Seaboard Air Line R. Co., 159 F 960.

71. In an action for the purchase price of cars, it was held proper to deny an amendment setting up a letter which did not set out any contract. Alabama Const. Co. v. Continental Car & Equipment Co. [Ga.] 62 SE 160. Not error to refuse an amendment to which demurrer will be sustained. Manhattan Life Ins. Co. v. Verneuille [Ala.] 47 S 72. Not error to deny amendment presenting substantially the same features contained in original complaint. Ivey v. Rome [Ga.] 62 SE 1030. It is not proper to set out a letter by amendment of a declaration in attachment merely because it might become admissible in evidence. Alabama Const. Co. v. Continental Car & Equipment Co. [Ga.] 62 SE 160.

72. Where additional matter set up in an amended petition does not entitle plaintiff to any further relief than he might have demanded under the original petition, such petition may be stricken. Butler v. Libe [Neb.] 116 NW 663. Proposed amendment to answer which would not have cured the defect therein properly overruled. Scarborough v. Woodley, 81 S. C. 329, 62 SE 405.

73. An amended petition which completely redrafts a count of the original eliminates such count from the case. Maegerlein v. Chicago, 237 Ill. 159, 86 NE 670. Where a demurrer to a complaint is sustained and plaintiff amends and sets up an inconsistent cause of action, he abandons the cause set up in the original complaint. Symmes v. Rose [Ky.] 113 SW 97. In action by an officer for fees where original complaint demanded excessive fees, he may recover under an amendment demanding the amount due though it is an offense to demand excessive fees. Jones & Co. v. Smith [Tex. Civ. App.] 109 SW 1111. The effect of service of an amended answer is to supersede the original. Ullman v. Tanner, 127 App. Div. 808, 111 NYS 844. An amended complaint filed after demurrer sustained to the original supersedes the original, and a subsequent demurrer, though not denominated a demurrer to the amended complaint, is addressed thereto. Scott v. Lafayette Gas Co. [Ind. App.] 86 NE 495. An amended petition, neither purporting to be an amendment of the original petition nor containing reference to its allegation, should be regarded on demurrer as though no former petition had been filed. City of Ironton v. Wiehle, 78 Ohio St. 41, 84 NE 425. Where original complaint by plaintiff and his wife before her death was for injuries to the wife, and after her death an amended complaint was filed by plaintiff to recover for wrongful death of the wife, the filing of the latter was a new cause of action and the sufficiency of the amendment was to be determined from its own allegations. Groom v. Bangs, 153 Cal. 456, 96 P 503. An amended bill may be looked to in determining whether an injunction granted on an original bill should be dissolved. Belzoni Oil Co. v. Yazoo & M. V. R. Co. [Miss.] 47 S 468. Where plaintiff voluntarily abandoned his first declaration before appearance by defendant had the cause remanded to rules and issued a new writ and declaration to which defendant demurred, the latter could not be regarded as an amendment to the first. Clinchfield Coal Co. v. Wheeler's Adm'r, 108 Va. 448, 62 SE 269. By filing with leave of the court an amended count, complete in itself, containing no reference to the original count, such original count was withdrawn and was superseded by such amended count and defendant has a right to plead thereto de novo. Maegerlein v. Chicago, 141 Ill. App. 414. An amended declaration cannot be aided by the original declaration to which a general demurrer has been sustained. The original bill is presumed to have been abandoned. Joiner v. Fowler, 133 Ill. App. 38.

74. See, also, Limitations of Actions, 12 C. L. 609. Amendment properly allowed relates back so far as statute of limitations is concerned. Clark v. Oregon Short Line R. Co. [Mont.] 99 P 298. An amendment not

party against whom a decree pro confesso has been entered is entitled to notice of subsequent amendment.[76] The effect of the original petition as an admission is treated in a subsequent section.[77] The opposite party may ordinarily plead de novo in case of a material amendment,[78] and if an original complaint states no cause of action and is amended, defendant should also be allowed to amend.[79]

In allowing amendments it is not the practice to inquire critically into the merits of the cause.[80]

Verification of an amendment is regulated by statute.[81]

In New York, where an amendment is filed after note of issue served, the order of the case on the calender is changed.[82]

Where plaintiff after obtaining leave to amend in open court disclaims and abandons the privilege and declares his intention to abide by his declaration, he is not precluded therefrom by having gotten such leave.[83] The action of the court in striking an amendment from the files upon the ground that it was not made in time cannot be complained of where plaintiff elected to stand by his original bill and did not renew his application for leave to amend.[84]

Where the pleadings may be oral, written amendments are not essential.[85] An order specifically requiring and setting out the amendment operates ipso facto as an amendment without the filing of a formal amended pleading.[86]

A trial amendment made by interlineation is a part of the record.[87] Notice of amendments must be given.[88]

objected to as stating a new cause of action relates back to the time of filing the original complaint so that an allegation of loss of future earnings was not a waiver of claim for loss of earnings prior to filing the amendment. Smith v. St. Louis Transit Co., 133 Mo. App. 202, 113 SW 216.

75. Where defendant was in court, judgment against him on an amended petition was not void because he was not served with the amended petition. Irondale Bank v. Terrill [Mo. App.] 116 SW 481. A petition cannot be amended as to matter of substance after publication of notice so as to sustain a judgment by default. Randall v. Snyder, 214 Mo. 23, 112 SW 529.

76. Howton v. Jordan [Ala.] 46 S 234.

77. See post, § 14.

78. In action against a city on street improvement contract where plaintiff was permitted to amend to count specially for raising a street above grade specified in specifications, he could not complain that defendant was permitted to amend its plea to claim that as to such additional work the contract was ultra vires. Peterson v. Ionia, 152 Mich. 678, 15 Det. Leg. N. 389, 116 NW 562. Where defendants answered jointly a complaint to foreclose a mortgage which was thereafter amended and defendants reserved the right prior to taking of testimony to answer the amended complaint, in so doing they were not bound to adhere to defenses alleged in their original answer but could set up any defenses available to them. Ayre v. Hixson [Or.] 98 P 515.

79. O'Toole v. Copeland, 36 Mont. 344, 92 P 967.

80. In allowing amendments it is the practice to permit them without inquiring too critically into the merits or sufficiency of the questions sought to be raised, leaving the question as to the sufficiency in law of the allegations to be litigated at the trial. People v. Buffalo, 62 Misc. 313, 114 NYS 1077.

81. Code 1897, § 3591, expressly provides that an amendment may be made without verification where it does not set up a new cause of action. Keller v. Harrison [Iowa] 116 NW 327.

82. Under Code Civ. Proc. § 977, by filing an amended answer after note of issue served, date of issue is changed and the order of the case on the calendar also changed. Van Norden Trust Co. v. Murphy, 125 App. Div. 369, 109 NYS 725.

83. Sill v. Burgess, 134 Ill. App. 373.

84. Campbell v. Timmerman, 139 Ill. App. 151.

85. Where written pleadings in municipal court are not required by statute, actual literal amendment of written pleadings is not essential. Siegel, Cooper & Co. v. Metropolitan Amusement Ass'n, 141 Ill. App. 89.

86. As "that all the papers and proceedings herein be and the same are hereby amended by discontinuing, etc." Michigan Cent. R. Co. v. Harville, 136 Ill. App. 243. An order specifically stating that "all papers and proceedings in this cause be amended by," etc., is in itself an amendment and not simply a grant of leave to amend. Boynton v. Alwart, 137 Ill. App. 227.

87. Where amendment is made by interlineation at the trial, the original pleading, the amendment, and amended pleading, are parts of the record; not necessary to offer the original in evidence to make it a part of the record. Raapke & Katz Co. v. Schmoeller & Mueller Piano Co. [Neb.] 118 NW 652.

88. Notice need not be given to a party served and in default. Eckels v. Bryant, 137 Ill. App. 234.

§ 8. *Supplemental pleadings.*[89]—See 10 C. L. 1224—The office of a supplemental complaint is to plead facts material to the cause of action accruing after the filing of the complaint.[90] The scope of a supplemental petition is limited to strengthening, developing or re-enforcing the original cause of action, or enlarging the extent thereof, or changing the relief sought.[91] A new cause of action may not be alleged but additional or different relief consistent with the original cause may be demanded,[92] and a supplemental petition may not be amended so as to convert it into a new cause of action.[93] Motions for leave to file supplemental pleadings are addressed to the discretion of the court,[94] who may impose such conditions as are just;[95] but it is almost a matter of course to permit a supplemental complaint to be filed where facts occurring after filing of the original entitle plaintiff to more extensive relief.[96] The time for filing a supplemental petition is regulated by statute.[97]

§ 9. *Motions upon the pleadings.*[98]—See 10 C. L. 1226—Motions to strike and to make more definite and certain are addressed to the discretion of the court[99] and

**89. Search Note:** See notes in 1 L. R. A. (N. S.) 1029; 3 Id. 260.

See, also, Pleading, Cent. Dig. §§ 832-852; Dec. Dig. §§ 273-286; 21 A. & E. Enc. P. & P. I.

**90.** Melvin v. E. B. & A. L. Stone Co., 7 Cal. App. 324, 94 P 389. The special term has power during trial of an action at trial term to permit services of a supplemental answer pleading recovery in another action alleged to be on the same cause. Jones v. Ramsey, 121 App. Div. 704, 111 NYS 993. Where answer is verified and service admitted and afterwards the case is settled, such settlement may be set up by supplemental answer. McRea v. Warehime, 49 Wash. 194, 94 P 924. In action by a married woman where defendant pleaded nonjoinder of her husband in abatement, plaintiff properly replied by supplemental petition that she was living apart from him and that since the commencement of the action she had obtained a divorce. City of San Antonio v. Wildenstein [Tex. Civ. App.] 109, SW 231. That plaintiff in a personal injury action settled with defendant unbeknown to attorneys who had a contingent interest in the recovery is not ground for denial of leave to serve a supplemental answer setting up settlement. Buser v. Jacobowsky, 110 NYS 252. A supplemental petition setting up partition proceeding held properly vacated as premature, it appearing that judgment therein had been opened. Knight v. Union Mfg. & Power Co., 81 S. C. 539, 62 SE 789.

**91.** Kean v. Rogers [Iowa] 118 NW 515. Where after a landlord had commenced an action to enforce a lien for rent against goods in the building it was agreed that the tenant should sell the goods and deposit the proceeds in a bank to be applied to the rent, the landlord might be allowed to file a supplemental petition to establish his lien and satisfy it out of the deposit. Id.

**Not proper matter to be raised:** An incompetent sued through her next friend to vacate a conveyance for undue influence. Pending suit defendant and plaintiff married, and defendant filed a motion to dismiss to which plaintiff filed a pleading denominated a supplemental petition, but which was in fact a reply alleging that the marriage was void and praying that it be set aside. Held the alleged supplemental petition could not be regarded as such and it was error to annul the marriage thereon. Holland v. Riggs [Tex. Civ. App.] 116 SW 167.

**92.** Melvin v. E. B. & A. L. Stone Co., 7 Cal. App. 324, 94 P 389. Where original complaint alleged that defendants threatened to do certain excavating and blasting which would destroy lateral support, a supplemental complaint for damages caused by the blasting which the original complaint sought to enjoin did not state a new cause of action. Id.

**93.** A supplemental petition is not amendable by striking therefrom all matter indicating its supplemental character and substituting other matter, the effect of which is to dissever the orlginal from the supplemental petition and convert the latter into a new action solely against one who was not a party under the original. Shackelford v. Covington, 130 Ga. 858, 61 SE 984.

**94.** Merced Bank v. Price [Cal.] 98 P 383.

**95.** Leave of defendant in personal injury action to file a supplemental answer setting up release should be conditioned on his payment of all accrued costs. Buser v. Jacobowsky, 110 NYS 252.

**96.** Objection that facts do not entitle plaintiff to relief sought cannot be considered on motion for such leave. Johnson v. Victoria Chief Copper Mining & Smelting Co., 60 Misc. 467, 113 NYS 1023.

**97.** St. 1898, § 2687, providing for supplemental pleadings and limiting them to facts discovered or occuring since the former pleading, is adapted from equity practice and such supplemental bill may be filed at any time during the progress of the cause or after hearing or decree. Moehlenpah v. Mayhew [Wis.] 119 NW 826.

**98. Search Note:** See notes in 115 A. S. R. 950.

See, also, Pleading, Cent. Dig. §§ 1046-1209; Dec. Dig. §§ 341-369.

**99.** Motions to strike a portion of a complaint and to make other portions more definite are addressed to the discretion of the court. Simons v. Cissna [Wash.] 100 P 200. Applications to strike portions of pleadings as irrelevant are addressed to discretion of the court. Indelli v. Lesster, 130

will not be granted where useless;[1] and while courts have an inherent power to prevent abuse of procedure by striking a wholly irrelevant pleading,[2] or one which violates a rule or order of court,[3] or if it be a palpable attempt to impose upon or trifle with the court,[4] the striking of a pleading is a severe remedy to be resorted to only in cases palpably requiring it in the administration of justice.[5] A statute authorizing the striking of redundant matter does not warrant the striking of an entire defense,[6] and a statute providing for judgment does not authorize the striking of a defense as frivolous,[7] but where a motion is made under a statute the court may make the proper order, though the motion is not entirely appropriate.[8] In New York a muncipal court has no power to strike pleadings as frivolous.[9] A motion to strike an entire pleading is bad if the pleading is good in part,[10] and a motion to make more specific, which ought not to be allowed in substantially the form presented, is properly overruled.[11]

Though a motion to strike is often equivalent to a demurrer,[12] the remedies by demurrer and motion to strike should not be indiscriminately applied.[13] One goes to the sufficiency of a pleading [14] and the other is to be resorted to when the pleading is wholly irrelevant or improper.[15] At common law a motion to dismiss and a demurrer are not interchangeable.[16]

App. Div. 548, 115 NYS 46. The matter of striking a pleading is discretionary. W. A. Jordan Co. v. Sperry Bros. [Iowa] 119 NW 692.

1. Where five answers of several defendants for the same libel were identical and were served more than one year prior to motion to strike irrelevant matter from one, it would be useless to grant the motion. Barber v. General Asphalt Co., 125 App. Div. 412, 109 NYS 1023.

2. Ray v. Williams [Fla.] 46 S 158. When a plea is not authorized by the rules of pleading, is frivolous, immaterial, or irrelevant, or is destitute or fails to answer of merit, though correctly drawn, it may be stricken. Hammond v. A. Vetsburg Co. [Fla.] 48 S 419.

3. Ray v. Williams [Fla.] 46 S 158.

4. As by merely repeating matter. Ray v. Williams [Fla.] 46 S 158.

5. Ray v. Williams [Fla.] 46 S 158. A pleading should not be stricken for insufficiency; should be tested by demurrer. Id. Applications to strike portions of pleadings as irrelevant or redundant are granted only where it is evident that, if denied, movant will be prejudiced, and denied unless it appears that the adverse party will not be harmed. Indelli v. Lesster, 130 App. Div. 548, 115 NYS 46. Motions to strike as irrelevant or reduntant are not favored and will be denied unless it appears that allegations objected to have no bearing on the subject-matter of the litigation. Id. An amended answer cannot without notice be stricken as having been imposed for delay. Murphy v. Lyon, 127 App. Div. 448, 112 NYS 152. Under Prac. Book 1908, p. 255, § 185, a motion to expunge allegations from pleadings is an exclusive remedy and will be granted only where the defect is plain. Bitello v. Lipson, 80 Conn. 497, 69 A 21. In action to enjoin obstruction of right of way, proper to refuse to expunge allegation that right of way had existed for a long time. Id.

6. Code Civ. Proc. § 545, authorizing the striking of irrelevant, redundant, or scandalous matter, does not authorize the striking of an entire cause of action or defense, though insufficient. Tierney v. Helvetia Swiss Fire Ins. Co., 129 App. Div. 694. 114 NYS 139.

7. Code Civ. Proc. § 537, provides only for judgment and not for striking out a defense as frivolous. Johnston v. Simpson Crawford Co., 115 NYS 141. Plaintiff founding a motion on matter in the answer, being frivolous, cannot invoke Code Civ. Proc. § 538, which only provides for striking a sham answer or defense. Id.

8. Where a motion to strike or to amend is made under the statute, the court may make a proper order respecting the pleading, though the motion is not entirely appropriate. Hildreth v. Western Union Tel. Co. [Fla.] 47 S 820.

9. Municipal court has no power to strike pleadings as frivolous. Martin v. Lefkowitz, 62 Misc. 490, 115 NYS 64.

10. Where part of a reply was good, Mulloy v. Mulloy, 131 Mo. App. 654, 111 SW 843.

11. Keys v. Fink [Neb.] 116 NW 162.

12. Bick v. Dry [Mo. App.] 114 SW 1145 But it cannot be treated as such when it raises an issue of law on some collateral matters instead of on the face of the pleading. Id.

13. Ray v. Williams [Fla.] 46 S 158. Under the civil code a motion to strike a pleading is not designed to perform the office of demurrer. Sufficiency of pleading in regard to facts cannot properly be challenged by such motion. Toledo & I. Trac. Co. v. Indiana & C. I. R. Co. [Ind.] 86 NE 54. A motion to strike and a demurrer afford separate and distinct relief. Hammond v. A. Vetsburg Co. [Fla.] 48 S 419.

14. Ray v. Williams [Fla.] 46 S 158. A motion to strike seeks an order of less dignity than judgment, while a demurrer seeks a judgment on the issue of law raised. Ewing v. Vernon County [Mo.] 116 SW 518.

15. Ray v. Williams [Fla.] 46 S 158. Where pleading answers in part and demurs in part, motion to strike is proper.

A motion to make more definite and certain is not a pleading nor an alternative remedy for demurrer or answer.[17] Its object being to enable movant to demur or answer, it should be made on notice before time for answering or demurring has expired.[18] Motion in the alternative to make more definite and certain or furnish a bill of particulars is bad form,[19] and a party is not entitled to both remedies for the same cause.[20]

The office of a special exception is to point out defects in a pleading.[21] On an exception of no cause of action, the allegations of the petition are taken as true.[22] Such exception is distinct from one of vagueness and insufficiency.[23]

Where a pleading assumes to both answer and demur, a motion to elect is the proper remedy.[24]

A motion for compulsory amendment should state the reasons upon which it is based.[25]

Motions are generally required to be in writing.[26]

The merits will not be considered on motion to amend, but where made on defendant's motion to dismiss the court may make it a condition that the motion to dismiss be deemed to have been made to the complaint as amended.[27] A count stricken out of a declaration by order of the court may yet remain as a subject of reference and as a basis for the allegations of the additional counts.[28]

§ 10. *Right to object, and mode of asserting defenses and objections; whether by demurrer, motion, etc.*[29]—*Want of jurisdiction* See 10 C. L. 1227 if not apparent must be taken by plea in abatement [30] or answer.[31]

Gordon v. Moore, 59 Misc. 151, 110 NYS 374. Under Code 1907, § 5322, providing for striking pleadings which are unnecessarily prolix, frivolous or irrelevant, motions to strike cannot perform the office of demurrer nor be resorted to test the sufficiency of a pleading. Mann Lumber Co. v. Bailey Iron Works Co. [Ala.] 47 S 325. Where demurrers have been sustained and bill amended, a motion to strike should be denied where no rule has been violated, and no attempt to trifle with procedure appears. Ray v. Williams [Fla.] 46 S 158. A motion to strike cannot fill the office of a demurrer. Ewing v. Vernon County [Mo.] 116 NW 518.

16. Littlefield v. Maine Cent. R. Co. [Me.] 71 A 657. On appeal to the district from the justice or probate court on questions of law only, the respondent moving to dismiss the appeal, the district court will not determine the sufficiency of the complaint on such motion. Smith v. Clyne [Idaho] 97 P 40.

17. Lawrence v. Lawrence, 81 S. C. 126, 62 SE 9.

18. Lawrence v. Lawrence, 81 S. C. 126, 62 SE 9. Plaintiff cannot be required to plead facts not material to the allegations made. In action for slander. Loscher v. Hager, 124 App. Div. 568, 109 NYS 562.

19. Casassa v. A. Cuneo Co., 115 NYS 124.

20. Where defendant's application for a bill of particulars was granted, it was proper to deny motion to make more definite and certain as defendant is not entitled to both remedies for the same cause. Thorp v. Ramsey [Wash.] 99 P 584.

21. Western Union Tel. Co. v. Steele [Tex. Civ. App.] 110 SW 546.

22. Goldsmith v. Virgin [La.] 48 S 279.

23. Exception of "no cause of action" is distinct from an exception of "vagueness and insufficiency of pleadings;" one brings about dismissal and the other amendment of pleading. Goldsmith v. Virgin [La.] 48 S 279.

24. Gordon v. Moore, 59 Misc. 151, 110 NYS 374.

25. Motion for compulsory amendment should state that the declaration is so framed as to prejudice defendant or embarass or delay a fair trial. Western Union Tel. Co. v. Merritt [Fla.] 46 S 1024.

26. Under Acts 1903, p. 339, c. 193, requiring motions to insert matter into or strike parts of pleadings to be in writing, an oral motion to amend a pleading by inserting words is properly overruled. Nichols v. Central Trust Co. [Ind. App.] 86 NE 878.

27. Jones v. Gould, 130 App. Div. 451, 114 NYS 956.

28. Shaughnessy v. Holt, 140 Ill. App. 572.

29. **Search Note:** See notes in 113 A. S. R. 639; 115 Id. 950.

See, also, Pleading, Cent. Dig. §§ 400-590, 1046-1209; Dec. Dig. §§ 187-228, 341-369; 6 A. & E. Enc. P. & P. 245, 460; 18 Id. 738; 19 Id. 181; 20 Id. 1; 21 Id. 223.

30. If complaint shows jurisdiction on its face, no exception can be taken to the jurisdiction except by plea in abatement. Pennington v. Gillaspie, 63 W. Va. 541, 61 SE 416.

31. Under Code Civ. Proc. §§ 498, 499, where want of jurisdiction of defendant is not apparent from face of complaint, the objection must be taken by answer or if not it will be waived. Gordon v. Moore, 59 Misc. 151, 110 NYS 374. Where a complaint does not show want of jurisdiction, defendant should point out in answer or other pleadng the reasons showing lack of juris-

*Objection to parties* See 10 C. L. 1228 for misjoinder [32] or defect apparent from the face of the bill [33] may be reached by demurrer,[34] and for nonjoinder by answer.[35]

*Misjoinder of causes of action* See 10 C. L. 1228 is ordinarily ground for demurrer if apparent from the face of the complaint,[36] though in some jurisdictions motion is the proper remedy.[37]

*Duplicity* can only be reached by a special demurrer.[38]

*Irrelevant,* See 10 C. L. 1228 redundant, or immaterial matter, is ordinarily reached by motion to strike [39] and not by demurrer [40] or objection to evidence.[41]

*Formal defects* See 10 C. L. 1229 can ordinarily be reached only by motion to require their correction [42] or to strike,[43] and not by objection to evidence [44] or demurrer,[45]

diction, as provided by Civ. Code Proc. § 113 Richardson v. Louisville & N. R. Co., 33 Ky. L. R. 972, 112 SW 582.

**32.** Where complaint in equity shows that certain parties are proper, though possibly not necessary, they are not entitled to demur. Mawhinney v. Bliss, 124 App. Div. 609, 109 NYS 332.

**33.** A demurrer and not a motion to dismiss is the proper method of reaching defects of parties apparent from the face of a bill. Wood v. Wood [Fla.] 47 S 560.

**34.** Under Code Civ. Proc. §§ 488, 489, providing for demurrer for misjoinder of parties plaintiff, an objection of nonjoinder is properly raised by demurrer, and if not so raised is waived. Dickinson v. Tyson, 125 App. Div. 735, 110 NYS 269.

**35.** Objection that petition to enforce mechanic's lien does not implead necessary parties may be taken by answer or at the hearing. Prather Engineering Co. v. Detroit, F. & S. R. Co., 152 Mich. 582, 15 Det. Leg. N. 280, 116 NW 376.

**36.** Where defect that two causes are improperly united appears on the face of the complaint, it must, under Ann. St. 1906, § 598, be taken advantage of by demurrer. Robinson v. St. Louis & S. F. R. Co., 133 Mo. 101, 112 SW 730. Under Code Civ. Proc. 1902, § 185, misjoinder of causes can be raised only by demurrer and not by motion to vacate an attachment. Seibels v. Northern Cent. R. Co., 80 S. C. 133, 61 SE 435. Where actions at law and in equity which do not affect all the defendants are improperly joined, parties affected by all or a part may demur. People v. Equitable Life Assur. Soc., 124 App. Div. 714, 109 NYS 453. Objection to evidence on a count in a complaint demanding rental value of flooded premises for several years, for the reason that several causes of action are stated therein, does not raise the objection that several causes are improperly joined where they are so stated as to be severable. Graves v. St. Louis, etc., R. Co., 133 Mo. App. 91, 112 SW 736.

**37.** Misjoinder of causes of action on parties can be raised only by motion and not by answer or demurrer. Steber v. Chicago & G. W. R. Co. [Iowa] 117 NW 304. Improper joinder of causes should be taken advantage of by demurrer or motion. Wilis v. Atchison, etc., R. Co., 133 Mo. App. 625, 113 SW 713.

**38.** Michigan Cent. R. Co. v. Harville, 136 Ill. App. 243. Duplicity is ground for special demurrer only, and the demurrer must not only assign it as a cause but must point out wherein the duplicity consists. Jacobs v. Pierce, 132 Ill. App. 547.

**39.** The remedy for irrelevant verbiage in a complaint. Alison v. China & Japan Trading Co., 127 App. Div. 246, 111 NYS 100. Under Code, §§ 3575, 3617, 3630, providing the remedies for defects in pleadings if an answer is redundant, informal or otherwise, the remedy is by motion to make more specific on demurrer and not by motion to strike. W. A. Jordon Co. v. Sperry Bros. [Iowa] 119 NW 692. An answer in an action for injury to one while in defendant's employ raising the question of employment, a material allegation of the complaint, is not "irrelevant" within Code, Civ. Proc. § 545, allowing striking of irrelevant matter. Johnson v. Simpson Crawford Co., 115 NYS 141.

**40.** In Florida a demurrer lies only for matters of substance in stating a cause of action or defense; the objection that a pleading contains irrelevant or improper matter should be taken by motion to strike or to compel amendment. Hildreth v. Western Union Tel. Co. [Fla.] 47 S 820.

**41.** Guignard v. First Baptist Church, 80 S. C. 491, 61 SE 1003.

**42.** Where petition to quiet title alleges on information and belief that plaintiff is the owner and in possession of certain land, though not good form of pleading, objection thereto can be made by motion only and not by demurrer. Mitchell v. Knott, 43 Colo. 135, 95 P 335. Defect in complaint on insurance policy and bond given the state to secure prompt payment of claims, in not setting out a copy of the bond, is one of form to be remedied by motion. Neimeyer v. Claiborne [Ark.] 112 SW 387. Where it is not obvious that a complaint states more than one cause of action, it is proper to overrule a general motion to require plaintiff to separately state and number his causes. Cockrell v. Schmitt, 20 Okl. 207, 94 P 521. Where complaint alleges defendant's liability in the alternative, if there is a formal defect in that it does not show that plaintiff did not know which of two states of the case was true, it was ground for motion to elect or make more definite but not for dismissal. Hazelhurst Lumber Co. v. Carlisle Mfg. Co. [Ky.] 112 SW 934.

**43.** Where denials are improperly included in an affirmative defense of new matter, the proper procedure is by motion to strike. Haffen v. Tribune Ass'n, 126 App. Div. 675, 111 NYS 225. Under B. & C. Comp. § 106, providing that a pleading containing more than one cause of action not separately

except where special demurrers are authorized,[46] and surplusage cannot be reached even by special demurrer.[47] Failure to allege a fact should be raised by objection to evidence.[48]

*Uncertainty* See 10 C. L. 1230 is ground for motion to make more definite and certain,[49] or exception to the complaint,[50] but not for demurrer [51] or objection to evidence.[52]

stated and numbered may be stricken on motion, such defect must be taken advantage of by motion to strike or it is waived. State v. Portland General Elec. Co. [Or.] 95 P 722.

**44.** In action on account defendant cannot, by objecting to evidence, take advantage of fact that plaintiff has not sued in his Christian name. Patrick v. Norfolk Lumber Co. [Neb.] 115 NW 780. Ambiguity and uncertainty in a complaint which states a cause of action cannot be reached by objection to evidence but by special demurrer pointing out the defect. Younie v. Blackfoot Light & Water Co. [Idaho] 96 P 193.

**45.** Demurrer based on the ground that the writing containing the agreement between the plaintiff and the alleged agent of defendant was not attached to the complaint properly overruled. Louisville & N. R. Co. v. Holland [Ga.] 63 SE 898. Under B. & C. Comp. § 69, providing for demurrer to whole or part of a complaint, or any alleged cause of action, it is not available to question any part of a pleading less than a cause of action, and the objection that several causes are not separately stated cannot be raised by demurrer. State v. Portland General Elec. Co. [Or.] 95 P 722. Motion to strike and not demurrer is proper remedy for attacking a pleading for stating conclusions or containing surplusage. Raiche v. Morrison, 37 Mont. 244, 95 P 1061. Should be raised by motion to strike, objection to testimony or instructions. Hall v. O'Neil Turpentine Co. [Fla.] 47 S 609. Objection that damages for physical pain and injury are not recoverable should be taken by motion to strike and not by demurrer. Johnston v. Turner [Ala.] 47 S 570. Objection that causes were not separately stated could not, prior to Code Civ. Proc. § 430, be reached by demurrer. Huene v. Cribb [Cal. App.] 98 P 78. The conclusion of a plea, though informal, is not material on review, where the demurrer sustained thereto was general and did not go to the form. North American Union v. Trenner, 138 Ill. App. 586.

**46.** A defect in complaint to foreclose a mechanic's lien in an allegation of nonpayment can be reached only by special demurrer. Burke v. Dittus [Cal. App.] 96 P 330. Objection that private statute relied upon is not sufficiently pleaded must be made by special demurrer. Louisville & N. R. Co. v. Robbins, 33 Ky. L. R. 778, 111 SW 283. A merely defective plea, wanting in fullness or otherwise subject to attack by demurrer, is not subject to motion to strike, and the court will not determine its sufficiency on such motion. Hammond v. A. Vetsburg Co. [Fla.] 48 S 419.

**47.** Jacobs v. Pierce, 132 Ill. App. 547.

**48.** In action for injuries to bicyclist in collision with automobile, the proper way to have raised question whether under rule of pleading (Practice Book 1908, p. 244), plaintiff should have alleged that the automobile was driven by defendant or by his agent would be to object to proof that it was so driven. Irwin v. Judge [Coun.] 71 A 572.

**49.** When the complaint does not state with sufficient distinctness the facts relied on, the remedy is by motion to make more definite and certain. Wood v. Pacolet Mfg. Co., 80 S. C. 47, 61 SE 95. Complaint for flooding land held not demurrable but remedy was by motion to make more definite and certain. Rentz v. Southern R. Co. [S. C.] 63 SE 743. A defective statement of a cause can be questioned only by motion to make more definite and certain. St. Louis S. W. R. Co. v. Adams [Ark.] 112 SW 186. Where a counterclaim is not sufficiently itemized, plaintiff's remedy is by motion to have it made more specific and certain. Horn v. Bates [Ky.] 114 SW 763. If defendant desires to have a complaint made more specific after he has answered, he should withdraw his answer. Ewing v. Vernon County [Mo.] 116 SW 518.

**50.** Objection that damages claimed were not itemized should be made by exception to the complaint and not by objection to evidence. Postal Tel.-Cable Co. v. Sunset Const. Co. [Tex. Civ. App.] 109 SW 265.

**51.** A demurrer cannot be sustained simply by showing that facts are imperfectly or informally alleged, or that the pleading lacks definiteness or precision, or that facts are argumentatively alleged. Pape v. Pratt Institute, 127 App. Div. 147, 111 NYS 354. If the substantial facts which constitute the cause of action can be inferred by reasonable intendment from matters set forth, though the allegations are imperfect, incomplete and defective, the objection may not be raised by demurrer but by motion to make definite and certain. Phillips v. Smith [Ariz.] 95 P 91. A petition which states a cause of action defectively is not subject to demurrer. Hitchings v. Maryville [Mo. App.] 115 SW 473. Where a complaint in substance states a cause of action, objections to the form of statement cannot be reached by demurrer. If allegations are general or inaptly expressed, the remedy is by motion to strike or amend under the statute. German American Lumber Co. v. Brock [Fla.] 46 S 740. In action on note where it is important on question of indorser's liability whether he made certain payments on a note, a complaint which does not allege by whom payments were made is not demurrable but is subject to a motion to make more definite and certain. Smith Sons Gin & Mach. Co. v. Badham, 81 S. C. 63, 61 SE 1031. Where lessee sued for breach of covenant between himself and lessor's agent, and it did not appear from the complaint whether plaintiff intended to allege that the agent had written or had oral authority to make such contract, defendant's remedy was by motion to make

*Inconsistency or departures.*[See 10 C. L. 1232] are ordinarily reached by motion to strike.[53] A variance between writ and complaint is to be reached by plea in abatement,[54] and a variance between pleading and proof by objection to evidence.[55] Even general demurrer may reach the vice of repugnancy.[56] Departure in a pleading can only be reached by special demurrer.[57]

*Failure to state a cause of action or defense* [See 10 C. L. 1232] may be reached by demurrer,[58] objection to evidence,[59] or motion in arrest,[60] but not by request to take the evidence from the jury.[61] In the absence of a statute permitting, defects in a pleading which may be reached by demurrer and cured by amendment, cannot be reached by a combined motion to strike the complaint and to vacate the summons.[62]

*Matters of defense* [See 10 C. L. 1233] must ordinarily be raised by plea or answer,[63] unless apparent on the face of the complaint, when demurrer will lie.[64]

more definite and certain and not by demurrer. Williams v. Salmond, 79 S. C. 459, 61 SE 79. A party who desires a more specific statement in the pleading of his adversary should seek it by motion and not by demurrer. Schaad v. Robinson, 50 Wash. 283, 97 P 104. An objection that a complaint is indefinite or uncertain should be raised by motion prior to trial and cannot be raised either by demurrer or objection at the trial. Shaw v. Staight [Minn.] 119 NW 951.

**52.** If a defendant was in doubt as to what particular car was referred to in a complaint, he should have made a motion to make the complaint more definite and certain, and the objection may not be raised by objection to the evidence. South Tacoma Fuel & Transfer Co. v. Tacoma R. & P. Co., 50 Wash. 686, 97 P 970.

**53.** Where amended complaint substituted a new cause of action, if defendant did not wish to consent to substitutions, he should move to strike the new complaint from the files and could not raise the objection by demurrer. Groom v. Bangs, 153 Cal. 456, 96 P 503. Where answer is not responsive, the proper remedy is by motion to strike. Stowers Furniture Co. v. Brake [Ala.] 48 S 89. If defenses are inconsistent, motion to strike should be made. Broderick v. Andrews [Mo. App.] 115 SW 519.

**54.** Variance between writ and complaint may, under Code 1906, §§ 3834, 3835, be taken advantage of by plea in abatement, filed at the proper time. Varney v. Hutchinson Lumber & Mfg. Co. [W. Va.] 63 SE 203. Advantage of a variance between summons and complaint cannot be taken otherwise than by plea in abatement. Anderson v. Lewis [W. Va.] 61 SE 160.

**55.** A variance between proof and pleadings cannot be raised by demurrer but must be raised by objection to evidence. Ryan v. Rogers, 14 Idaho, 309, 94 P 427.

**56.** Keeshan v. Elgin A. & S. Trac. Co., 132 Ill. App. 416.

**57.** Kickham v. Kane, 135 Ill. App. 628.

**58.** Gates v. Little, 36 Pa. Super. Ct. 422. Demurrer will lie to a pleading which shows on its face that plaintiff corporation has not complied with the license requirements of the law. Tennessee Packing & Provision Co. v. Fitzgerald, 140 Ill. App. 430. In challenging sufficiency of facts in a count of a bill in intervention to state a cause of action, a demurrer rather than a motion to strike is the better practice. Cameron v. Ah Quong [Cal. App.] 96 P 1025. Objection that complaint for libel does not sufficiently plead special damages may be taken by demurrer that it does not state facts sufficient to constitute a cause of action. Fagan v. New York Evening Journal Pub. Co., 129 App. Div. 28, 113 NYS 62. The proper way to question the sufficiency of a complaint or any count thereof is by demurrer. Klofski v. Railroad Supply Co., 235 Ill. 146, 85 NE 274. If a count is so faulty as not to state a cause of action, it is not error to sustain a demurrer thereto though it may be open to motion under Gen. St. 1906, § 1433. Hoopes v. Crane [Fla.] 47 S 992. Objections in the nature of demurrer and exceptions to the sufficiency of a petition should be raised by demurrer. Steger & Sons Piano Mfg. Co. v. MacMaster [Tex. Civ. App.] 113 SW 337. By demurrer one may take advantage of failure to state a consideration or the statement of an insufficient consideration. Schwerdt v. Schwerdt, 141 Ill. App. 386.

**59.** Objection that complaint does not state cause of action is timely if made in form of objection to introduction of evidence. Carpenter v. Sibley, 153 Cal. 215, 94 P 879.

**60.** If a complaint is so defective that it will not sustain judgment, the objection may be raised by motion in arrest. Henning v. Sampsell, 236 Ill. 375, 86 NE 274.

**61.** In action for price of ice where answer alleged a contract to sell ice for a certain year at a certain price, but did not allege that defendant agreed to take it, the defect should be raised by demurrer or objection to evidence and not by request to take evidence of the contract from the jury. Woodbridge Ice Co. v. Semon Ice Cream Corp. [Conn.] 71 A 577.

**62.** Branson v. Industrial Workers [Nev.] 95 P 354.

**63.** The defense that acts, ordinarily a nuisance, are permissible by **legislative sanction** to a company engaged in a certain business cannot be raised by demurrer but must be pleaded. McArdle v. Chicago City R. Co., 141 Ill. App. 59. That plaintiff has **brought his action prematurely** is a defense not going to the merits of plaintiff's demand, and is dilatory only and must be raised by plea, or, if it appears from face of complaint, by demurrer. Realty Co. v. Ellis, 4 Ga. App. 402, 61 SE 832. That action is prematurely brought can be raised only by plea in abatement, or, if the defect appears on the face of the complaint, by special demurrer. Gate City Fire Ins. Co. v.

§ 11. *Waiver of objections and cure of defects.*[65] See 10 C. L. 1233—A defendant may simultaneously demur, answer, file dilatory pleas and pleas to the merits without waiving any of them.[66] Objections to pleadings must as a rule be made at the earliest opportunity,[67] and, while entire failure to state a cause of action [68] or want of juris-

Thornton [Ga. App.] 63 SE 638. **Limitations** cannot be raised by general demurrer. Murphy v. Stelling [Cal. App.] 97 P 672. Defense of limitations cannot be raised by demurrer unless the complaint shows the cause to be barred. Keegin v. Joyce [Cal. App.] 98 P 396. Though a special count in a declaration may show that the contract sued upon continues executory, and recovery may not be had in the common counts, such is a matter of defense and demurrer cannot be sustained on that ground. Bannister v. Victoria Coal & Coke Co., 63 W. Va. 502, 61 SE 338. The facts attending an officer's action in serving a writ, though reported to the court in a return and importing verity, are facts aliunde the pleadings and must be pleaded to be availed of. Cannot be raised by demurrer. Bulkley v. Norwich & W. R. Co. [Conn.] 70 A 1021. Where plaintiff sued in trespass quare clausum and defendant pleaded adverse possession for ten years and plaintiff demurred on the ground that alleged trespass was committed prior to commencement of adverse possession set up, held the demurrer was a reassignment of trespasses alleged and should have been pleaded by reply. Pike v. Wilbur [R. I.] 69 A 849. Where plaintiff sued attorneys for money alleged to have been converted by them which belonged to an estate of which plaintiff was administrator, the objection that plaintiff in his representative capacity was a necessary party could not be raised by demurrer, as to determine such question it was necessary to refer to proceedings in an action by him as administrator. Cauthen v. Green, 80 S. C. 432, 61 SE 957.

**Questions not raised by demurrer:** In action by contractor to recover on his contract, whether he had complied with his contract was a matter of fact which could not be raised by demurrer. Burton v. Seifert Plastic Relief Co., 108 Va. 338, 61 SE 933. Not the proper method to assail right to damages improperly claimed. Sparks v. McCrary [Ala.] 47 S 332. Measure of damages cannot be raised by demurrer. West v. Johnson [Idaho] 99 P 709.

**64.** If the bar of limitations is apparent from the face of the complaint, the objection may be raised by demurrer. Burrus v. Cook [Mo.] 114 SW 1065; Dees v. Smith [Fla.] 46 S 173. Where the statute of limitations affects the right, the defense may be raised by demurrer. Dowell v. Cox, 108 Va. 460, 62 SE 272. Objection to petition to enforce a mechanic's lien that a receiver is made a party without leave may be made by demurrer. Prather Engineering Co. v. Detroit, F. & L. R. Co., 152 Mich. 582, 15 Det. Leg. N. 280, 116 NW 376. Defense of limitations may be presented by special exceptions where apparent from the face of the complaint. Schutz v. Burges [Tex. Civ. App.] 110 SW 494.

**65. Search Note:** See Pleading, Cent Dig. §§ 1343-1441; Dec. Dig. §§ 400-430; 6 A. & E. Enc. P. & P. 245, 460; 18 Id. 738; 19 Id. 181; 20 Id. 1; 21 Id. 223.

**66.** Cox v. Adams & Co. [Ga. App.] 63 SE 60. Under Rev. St. 1895, art. 1262, providing that defendant may plead as many separate matters as he sees fit, a plea of privilege is not waived by filing at the same time a plea to the merits. Collin County Nat. Bank v. Turner [Tex. Civ. App.] 111 SW 670.

**67.** All errors in pleadings not fundamental and not objected to are waived. Bateman v. Hipp [Tex. Civ. App.] 111 SW 971. The court must render judgment without regard to technical errors or defects which do not affect the merits. Cohen v. Carpenter, 128 App. Div. 862, 113 NYS 168. Plea in abatement is waived by demurring to the bill. Cartwright v. West [Ala.] 47 S 93. Where the adequacy of a reply is in no way challenged at the trial, any defect therein is waived. Rumble v. Cummings [Or.] 95 P 1111. In action involving boundaries where issue had been joined for more than a year, it was not an abuse of discretion to deny a motion to make the answer more specific. Charleroi Timber & Cannel Coal Co. v. Licking Coal & Lumber Co. [Ky.] 116 SW 682. Failure of a party to a suit to file a rejoinder to a reply to defendant's answer held not to preclude the raising of certain issues in view of the unusual procedure of pleading followed. Brackett's Adm'r v. Boreing's Adm'rs [Ky.] 115 SW 766. Allegation in reply denying each and every allegation of material new matter in the answer though objectionable as an attempt on part of plaintiff to determine what facts are material must be objected to at the trial or cannot be raised on appeal. Under B. & C. Comp. § 72, only jurisdictional objections may be first raised on appeal. Ready v. Schmith [Or.] 95 P 817. Where a complaint shows on its face that the cause accrued within the period of limitations if it was barred because of some fact not appearing from the record, defendant is bound to plead such fact as part of his defense. Holland v. Grote, 125 App. Div. 413, 109 NYS 787. Where complaint by bankrupt's trustee to recover alleged preferences alleged that defendant was indorser on notes of bankrupt and was otherwise obligated for his debts to upwards of $40,000, an objection that the total recovery sought far exceeded the amount claimed the defect might have been obviated by amendment and was waived where not promptly urged. Atherton v. Emerson, 199 Mass. 199, 85 NE 530. Defendant **does not waive** rights under charges given it for eliminating counts in a declaration by also asking instructions on the merits. Dickson v. Geo. B. Swift Co., 238 Ill. 62, 87 NE 59. A defendant cannot be heard to attack the pleading for the first time on appeal. Bejma v. Bejma [Iowa] 116 NW 1064. No error is committed by the trial court by permitting a case to come to trial on a demurrable petition, where no demurrer is filed, though it would be error to render judgment on a complaint so fatally defective as to be insufficient to support a judgment. Sandoval v. Randolph [Ariz.] 95 P 119. Where sufficiency of complaint was

diction [69] may be availed of at any time, other objections are waived by pleading responsively,[70] failure to object by motion,[71] demurrer or answer,[72] or going to trial on

not questioned by demurrer, only question on appeal is its sufficiency to sustain judgment. State v. Duncan, 130 Mo. App. 311, 109 SW 73. In determining whether a complaint states a cause of action, all intendments are indulged in favor of its sufficiency. Id. Where warrants were drawn against the "O. S." fund and specified that they were charged to that fund, objection that letters "O. S." had no legal meaning and were not explained not made below comes too late when first made on appeal. McKean v. Gauthier, 132 Ill. App. 376. In absence of objections below or presentation of any propositions of law, defects of pleading which if demurred to would have led to amendment and corresponding proof will not be considered above. Id.

68. Where it appears from the record that the complaint is insufficient to sustain the judgment, the error may be reviewed though not raised. Sandoval v. Randolph [Ariz.] 95 P 119. Under Rev. St. Ohio 1908, § 5063, objection that petition does not state a cause of action is not waived by answering to merits. Republic Iron & Steel Co. v. Yanuszka [C. C. A.] 166 F 684. If a complaint makes no attempt to allege an essential fact, the objection that it does not state a cause of action may be raised at any time even without demurrer. Burke v. Dittus [Cal. App.] 96 P 330. If a complaint fails to allege essential facts, the trial or appellate court may take notice of it and make proper disposition of the cause. Hall v. Northern & So. Co. [Fla.] 46 S 178. Objection that complaint shows on its face that contract sued on is illegal goes to the substance of the petition and may be made at any time. Redland Fruit Co. v. Sargent [Tex. Civ. App.] 113 SW 330. Where no objection is made to a pleading before trial on ground of its insufficiency, the most liberal construction will be adopted to sustain it and objection will not be sustained unless there is total omission of a material fact or failure to state a cause of action or defense. City of Rawlins v. Jungquist, 16 Wyo. 403, 96 P 144.

69. In partition and to determine heirs, a plea to the jurisdiction because the estate was in process of administration is not waived by failure to present it at the first term; may be made at any time before judgment. Wilkinson v. McCart [Tex. Civ. App.] 116 SW 400. In action for death, failure to object before answering to the merits that the administrator is not competent to sue is not a waiver of the objection. Crohn v. Kansas City Home Tel. Co., 131 Mo. App. 313, 109 SW 1068. Under the New York Practice Act, a defendant does not waiver his right to object to the jurisdiction by setting up every defense upon which he relies. Leonard v. Merchants' Coal Co. [C. C. A.] 162 F 885. An admission of the liability alleged and of every thing except measure of damages does not cure failure to allege jurisdictional facts. Grand Trunk W. R. Co. v. Reddick [C. C. A.] 160 F 898. Want of jurisdiction apparent on the face of the pleadings can be taken advantage of at any time. Civ. Code 1895, § 5046. Geer v. Cowart [Ga. App.] 62 SE 1054.

70. Where complaint stated a cause for simple negligence and last paragraph thereof used the term "willful," such term at most rendered the complaint ambiguous and was waived by answer under Rev. Codes, § 6539. Robinson v. Helena L. & R. Co. [Mont.] 99 P 837. Where after demurrer overruled, a bill is amended to cure defects therein and without testing the amended bill by demurrer defendant answers, defects sought to be amended are waived. Tampa & J. R. Co. v. Harrison [Fla.] 46 S 592. In action for separate maintenance, the wife waived every objection to the husband's cross-bill for divorce by replying thereto except objections to the court's jurisdiction. Sharpe v. Sharpe [Mo. App.] 114 SW 584. A cross petition setting up an independent cause against persons not parties to the original suit is not a misjoinder of causes, objection to which is waived by answering. Mattingly v. Eversole [Ky.] 113 SW 447. A defect in a complaint is waived by answering to the merits. Hazelhurst Lumber Co. v. Carlisle Mfg. Co. [Ky.] 112 SW 934. Whether suit can be maintained in manner in which it is brought is the subject of demurrer and is waived by answering. Kansas City v. Youmans, 213 Mo. 151, 112 SW 225. Objection that a petition improperly commingles two causes of action may be waived by answer. Aley v. Missouri Pac. R. Co., 211 Mo. 460, 111 SW 102. In action by minors for the penalty imposed by Ann. St. 1906, p. 1637, for the simultaneous death of their parents where the complaint in one count demanded the penalty of $5,000 for each parent, and defendant answered to the merits without objection, it was proper to give judgment for $10,000. Id. Questions relative to jurisdiction of the person of defendant are waived by answering over. Hendricks v. Calloway, 211 Mo. 536, 111 SW 60. Barring the objections that no cause of action is stated and objection to the jurisdiction, other defects are waived by joining issue on the merits. O'Brien v. St. Louis Transit Co., 212 Mo. 59, 110 SW 705. Objections that allegations of a complaint are not specific or definite are waived by answering to the merits. Knight v. Donnelly, 131 Mo. App. 152, 110 SW 687. By answering amended complaint without objection, defendant waived objection to amendment. Driskill v. Rebbe [S. D.] 117 NW 135. An insufficient verification of a plea in abatement is a mere matter of form and not an amendable defect. If plaintiff does not object to verification of the plea before issue joined, it is too late. Wood v. U. S. Fidelity & Guar. Co., 4 Ga. App. 671, 62 SE 97. But if he pleads to the merits without protestation as to jurisdiction or without simultaneously pleading to it, jurisdiction of the person is waived. Cox v. Adams & Co. [Ga. App.] 63 SE 60.

71. A departure in a reply is waived by failing to move to strike and going to trial on the merits. St. Paul Fire & Marine Ins. Co. v. Mountain Park Stock Farm Co. [Okl.] 99 P 647. One who fails to move for judgment for want of reply to an affirmative defense waives the failure to reply. De Buhr

the merits.[73] Omissions in a pleading are cured when supplied by allegations in the

v. Thompson [Mo. App.] 114 SW 557. A complaint charging negligence generally is good after verdict in the absence of a motion to make more specific. Morgan v. Mulhall, 214 Mo. 451, 114 SW 4. Under Gen. St. 1906, § 1449, and rule 18 So. 8, a cause of action filed with a complaint need not be complete within itself, and if not as full as desired and defendant fails to demand a bill of particulars he waivers the defect. State v. Seaboard Air Line R. Co. [Fla.] 47 S 986. In action by a contractor for breach of street improvement contract, the city cannot insist that evidence of cost of getting ready for work should have been excluded because the only measure of damages was the difference between the contract price and cost, where such expense was alleged; motion to strike such allegation should have been made. Blassingame v. Laurens, 80 S. C. 38, 61 SE 96. In an action on an instrument certifying that defendant held money belonging to plaintiff's intestate, where plaintiff did not except to defendant's plea of mistake in such instrument, every reasonable intendment would be indulged in favor of the plea. Landrum v. Stewart [Tex. Civ. App.] 111 SW 769. Variance between exhibits and complaint is waived by failure to demur or move for judgment on pleadings. Clark v. Cross [Wash.] 98 P 607. Where a defendant joined in an issue of fact upon an imperfect allegation of the existence of a certain custom without moving for a more definite statement, he waived the objection of the sufficiency of the petition to present the issue. Triple Tie Ben. Ass'n v. Wood [Kan.] 98 P 219. Allegation of facts in defective manner is waived by pleading over, and not moving to make more definite and certain. Hoskins v. Scott [Or.] 96 P 1112.

**72.** Defect of parties apparent from face of pleading is waived by failure to demur. Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 NW 751. Under Mills' Ann. Code §§ 50, 55 objection that plaintiff has not legal capacity to sue must be raised by demurrer or it is waived. Loucks v. Davies, 43 Colo. 490, 96 P 191. A departure in the reply from the complaint must be taken advantage of by motion or demurrer before trial or it is waived. Id. Misjoinder of parties is waived if not raised by demurrer, where defect is apparent from the complaint. Ann. St. 1906, p. 624. Fulwider v. Trenton Gas, L. & P. Co. [Mo.] 116 SW 508. Where question whether plaintiff corporation had complied with statutes so as to entitle it to sue was not raised by plea or demurrer, the objection was waived. Huff v. Kinloch Paint Co. [Tex. Civ. App.] 110 SW 467. Though under Rev. St. 1895, art. 3027, recovery for medical expenses incurred cannot be recovered in an action for wrongful death, yet, where such cause is improperly joined, objection thereto is waived if not made by exception to the complaint. Gulf, etc., R. Co. v. Farmer [Tex.] 115 SW 260. General allegations of fraud are sufficient in the absence of special exceptions to the complaint. Mutual Reserve Life Ins. Co. v. Seidel [Tex. Civ. App.] 113 SW 945. Under Ann. St. 1906, § 602, where defendant does not take advantage by demurrer of the improper joinder of causes, he waives the objection. Robinson v. St. Louis & S. F. R. Co., 133 Mo. App. 101, 112 SW 730. Where no demurrer was interposed to a complaint for injuries of a servant by negligence of a fellow servant because of failure to allege that the fellow-servant was acting within the scope of his employment but such fact could be inferred from other facts pleaded, the complaint is sufficient after verdict. Briscoe v. Chicago B. & Q. R. Co., 130 Mo. App. 513, 109 SW 93. Plea of "not guilty" is not the proper plea in action on a policy of disability insurance, but in absence of demurrer thereto it will be construed a plea of general issue. Pennsylvania Casualty Co. v. Mitchell [Ala.] 48 S 78. Where plaintiff in action on bond given on appeal from a judgment of restitution rendered in an action of forcible entry joins a cause against principal and surety with one against the principal alone, the objection is waived under Code Civ. Proc. § 96, where not taken by demurrer or answer. Raapke & Katz Co. v. Schmoeller & Mueller Piano Co. [Neb.] 118 NW 652. Misjoinder of causes of action and parties is waived by failure to demur. Lyon County v. Lien, 105 Minn. 65, 116 NW 1017. Defect of parties apparent from face of petition is waived unless objected to by demurrer. Bishop v. Huff [Neb.] 116 NW 665. Failure of bill to set aside a deed to allege that the consideration was bona fide and truly paid. Lowden v. Wilson, 233 Ill. 340, 84 NE 245. Held that though a bill was probably demurrable, the want of an allegation was waived by failure to demur. American Steel Hoop Co. v. Searles Bros. [Miss.] 46 S 411. By failing to demur, held that defendant waived the right to question validity of contract alleged and set out. Early County v. Fielder & Allen Co., 4 Ga. App. 268, 63 SE 353. A debtor may, by special demurrer, demand a complete statement of each item of a debt upon which action is brought. Failure to demur is a waiver of the right. Hobbs v. Crawford, 4 Ga. App. 585, 62 SE 157. Where sufficiency of complaint is not challenged at the trial, all intendments are in its favor on appeal. Quick v. Swing [Or.] 99 P 418.

**73.** Where trial was had without objection on pleadings wherein reply had departed from complaint, evidence material to issues presented by the reply was properly received. Loucks v. Davies, 43 Colo. 490, 96 P 191. In action on a farm lease where answer was not as specific as it should have been but the trial proceeded on the theory that it was sufficient, held the court should have accepted the parties construction of it, evidence having been admitted without objection. McLeod v. Thompson, 138 Iowa, 304, 115 NW 1105. A defendant who submits his defense on issues raised without attacking the reply waives the objection that it introduces new cause of action. Miner v. Morgan [Neb.] 119 NW 781. By going to trial on merits, plaintiff waives error in overruling his motion to strike the reply and for judgment on the pleadings. Sundmacher v. Lloyd [Mo. App.] 116 SW 12. Complaint against a carrier for death of a passenger under Ann. St. 1906, p. 1637, authorizing recovery where death is caused by

pleading of the adverse party[74] or by subsequent pleadings.[75] After verdict no defects which might have been cured will avail,[76] and the appellate court may regard amend-

negligence or with criminal intent, alleging that death was caused negligently and with criminal intent, though objectionable as stating a cause inconsistently, is not so contradictory as to be self-destructive and is waived by going to trial. O'Brien v. St. Louis Transit Co., 212 Mo. 59, 110 SW 705. Where an account attached to a complaint is defective in not setting forth items with certainty, the objection is waived where defendant participates in the trial on the merits and the pleadings substantially complies with the statute. Whitewater Mercantile Co. v. Devore, 130 Mo. App. 339, 109 SW 808. General objection to evidence on ground of want of facts to constitute a cause of action is not sustainable if a cause is stated on any ground of negligence charged. Republic Iron & Steel Co. v. Yanuszka [C. C. A.] 166 F 684. Where defendant goes to trial on a complaint charging general negligence in failing to furnish an employe a safe place to work and a bill of particulars showing wherein it was unsafe, he may not object to evidence of such particulars on the ground that it is not within the issues. Devine v. Alphons Custodis Chimney Const. Co., 126 App. Div. 7, 110 NYS 119. Where case was tried on pleadings without requiring defendant to separately state and number his defenses, plaintiff was not entitled to have answer stricken and have judgment on pleadings. Wexler v. Merovitz, 125 App. Div. 924, 110 NYS 5. Defense that plaintiff is not the real party in interest is waived where not raised before trial. Calvert v. Thurston, 58 Misc. 347, 109 NYS 567. Where a party proceeds to trial without testing the sufficiency of a pleading by demurrer or otherwise and tries a certain issue, the objection is waived if by any reasonable construction it can be construed to raise such issue. Frederick v. Buckminster [Neb.] 119 NW 228. After trial on merits, defects of pleading which could have been raised by demurrer and which did not prejudicially affect the trial are considered amended. Pittsburg Coal Co. v. Cook, 219 Pa. 539, 69 A 85. Where defendant pleads general issue or other plea of like effect which requires only a general similiter to complete joinder of issue and goes through the trial without noticing the absence of such similiter, he cannot thereafter avail himself of its absence. Knight v. Empire Land Co. [Fla.] 45 S 1025. Where demurrer to reply did not reach all matters presented for the hearing, right to question ruling sustaining it was **not waived** by proceeding to trial. Sullivan v. Sullivan [Iowa] 117 NW 1086. That intervening petition should be taken as true, not being answered or demurred to, cannot be first raised on appeal. Guarantee Gold Bond Loan & Sav. Co. v. Edwards, 7 Ind. T. 297, 104 SW 624.

**74.** Where an amended complaint against several corporations did not name them, but referred to them as defendants who had answered and thereafter such corporations answer describing themselves by their corporate names, the defect is cured. St. Louis & S. F. R. Co. v. Wilhelm [Tex. Civ. App.] 108 SW 1194. Complaint and annexed account though insufficient if assailed by motion, held sufficient after judgment when aided by the answer. Whitewater Mercantile Co. v. Devore, 130 Mo. App. 339, 109 SW 808. Where a complaint to foreclose a mortgage failed to allege an existing indebtedness, such defect was not cured by a general denial followed by an admission of a then existing debt, such allegation not admitting indebtedness when the suit was brought. Chesney v. Chesney, 33 Utah, 503, 94 P 989.

**75.** In replevin for goods deposited in a warehouse, failure to allege presentation of the warehouse receipt on demanding the goods is cured by subsequent pleadings showing that such tender would have been useless. Duffy v. Wilson [Colo.] 98 P 826. Judgment will not be reversed for ruling on demurrer for misjoinder or nonjoinder of parties where the defect has been cured by subsequent pleadings. Patten v. Pepper Hotel Co., 153 Cal. 460, 96 P 296.

**76.** A verdict will aid a defective statement of a cause of action but will not cure the statement of a defective cause of action. Decatur Amusement Park Co. v. Porter, 137 Ill. App. 448. When the statement of plaintiff's cause of action, only, is defective, such defect is cured by a general verdict in his favor. Allegation that "defendants have not kept their covenant aforesaid but have broken the same" held sufficient after verdict. Leman v. U. S. Fidelity & Guar. Co., 137 Ill. App. 258. Objection that a complaint against a carrier for delay in delivering freight in that it did not allege defendant's knowledge of specific facts from which damage accrued is waived where not raised before judgment. Wabash R. Co. v. Newton, Weller & Wagner Co. [Tex. Civ. App.] 110 SW 992. A variance is waived; objection not raised until motion in arrest. Holladay Klotz Land & Lumber Co. v. Beekman Lumber Co. [Mo. App.] 116 SW 436. In the absence of demurrer, defective statements in the petition of some of the elemental facts constituting the cause of action are cured by verdict. Nowell v. Mode, 132 Mo. App. 232, 111 SW 641. Where a complaint alleged specific acts of negligence and also alleged negligence generally and no motion to make more specific was made, and evidence of negligence not specifically alleged was introduced without objection, held after verdict the act must be considered as having been alleged or litigated by consent. Christiansen v. Chicago, etc., R. Co. [Minn.] 120 NW 300. Complaint for damages by flooding caused by construction of a railroad held sufficient after verdict to sustain an award of damages for permanent injury. Hart v. Wabash S. R. Co., 238 Ill. 336, 87 NE 367. Where complaint for injuries because of incompetency of a mine foreman failed to allege that the foreman had not had a certain number of years' experience, the defect was cured by a verdict for plaintiff. Majestic Collieries Co. v. McCoy [Ky.] 116 SW 738. Failure of a complaint under Ann. St. 1906, p. 1637, for wrongful death, to show that it is framed expressly upon such statute, is cured by a verdict which is for the amount prescribed. McKenzie v. United R. Co. [Mo.]

ments obviating such defects as having been made.[77] In the absence of statutory provision to the contrary,[78] pleading to the merits or proceedings to trial without objection[79] waives a previous demurrer or motion.[80] Pleading over[81] or amending[82] after

115 SW 13. An essential fact which may be fairly implied from a complaint though not directly alleged, is cured by verdict. Moellman v. Gieze-Henselmeier Lumber Co. [Mo. App.] 114 SW 1023. A complaint for injuries to a minor alleging that he was in defendant's employ operating a machine in violation of Ann. St. 1906, p. 3217, and stating facts from which it can be inferred that defendant operated a manufacturing establishment, is sufficient after judgment though not expressly alleging the nature of the establishment or motive power. Peters v. Gille Mfg. Co., 133 Mo. 412, 113 SW 706. Defect in a complaint, good as against demurrer but insufficient as against special exception based on indefiniteness, is cured by verdict. Missouri, K. & T. R. Co. v. James [Tex. Civ. App.] 112 SW 774. All intendments are in favor of pleadings when assailed for insufficiency after judgment. Mason v. Deitering, 132 Mo. App. 26, 111 SW 862. Bill for injunction against erection of a livery stable held sufficient. Id. Not error to allow plaintiff to reply at close of the testimony. Reply having been waived by going to trial without demanding judgment for want of it. Gamble v. Harvey-Greenhaw Mercantile Co. [Ark.] 115 SW 946. Failure of trustee in bankruptcy in a suit to compel an assignee for the benefit of creditors to settle his account to comply with the statute as to affidavit purging his demand is waived if not raised before judgment. Comingor v. Louisville Trust Co., 33 Ky. L. R. 53, 108 SW 950. After verdict, an answer treated by the court and parties as adequate will not be held bad. Sheibley v. Fales [Neb.] 116 NW 1035. In proceedings to ascertain compensation to be paid for laying a drain across land, any formal defect as to want of certainty as to the land described in the petition is cured by verdict for defendant. Drainage Com'rs of Dist. No. 8 v. Knox, 237 Ill. 148, 86 NE 636. Where plaintiff waives right to take default or rule defendant to plead, he is estopped after verdict to urge want of plea. First Nat. Bank v. Miller, 235 Ill. 135, 85 NE 312. In action of assumpsit a plea of "not guilty" presents a substantial issue and such mispleading and misjoinder of issue thereon will be cured by verdict under our statute. Bannister v. Victoria Coal & Coke Co., 63 W. Va. 502, 61 SE 338. Where mispleading is due to the fault of defendant, the plea tendered presenting a substantial issue, he will not after verdict be allowed the benefit of his mistake and award a repleader. Id. In determining sufficiency of a pleading on appeal, only a total lack of essential averments will render it insufficient. West v. Johnson [Idaho] 99 P 709. Where date of judgment pleaded was proved without objection, failure to allege it was waived. United States Fidelity & Guar. Co. v. People [Colo.] 98 P 828. Where defendant by filing a stipulation that complaint could be amended by addition to the prayer and had notice of the relief desired, and proceeded to trial without objection, he could not object after judgment that the prayer had not been formally added to the complaint. Murphy v. Stelling [Cal. App.] 97 P 672. Where certain counts in action for wrongful death of child did not aver that parents of deceased were in exercise of due care for his safety, such averment, if necessary, will be held cured where instruction given made it essential to recovery that such care by parents be established by preponderance of evidence. Illinois Cent. R. Co. v. Warriner, 132 Ill. App. 301.

77. Where plaintiff during argument of defendant's counsel moved to amend to conform to the proof and no objection was made thereto and such amendment was in furtherance of justice, it would be considered on appeal as made though the record does not disclose that it was filed. Bullen v. Arkansas Valley & W. R. Co., 20 Okla. 819, 95 P 476. Amendments which might have been made are under Burns' Ann. St. § 700, regarded on appeal as having been made. Axtell v. State [Ind. App.] 86 NE 999. Under Civ. Code Proc. § 134, authorizing amendments at any time in furtherance of justice, a judgment will not be reversed for a technical omission in a pleading not going to the merits. Lindsey's Devisee v. Smith [Ky.] 114 SW 779. Where a receipt in full of all plaintiff's demands was received in evidence without objection, plaintiff could not thereafter object that there was no issue of settlement. Kahn v. Metz [Ark.] 114 SW 911. If in violation of spirit of the court's order requiring all interested persons to be made parties, parties fail to frame issues or frame them in such manner as to make a decree impossible of enforcement, the pleadings may be deemed amended to conform to the proof. Hough v. Porter [Or.] 98 P 1083.

78. Under Rev. St. 1898, § 2965, providing that pleading over after overruling of a demurrer is not a waiver of the demurrer if a complaint does not state a cause of action but is cured by the answer, the defect is not available to defendant after judgment. Chesney v. Chesney, 33 Utah, 503, 94 P 989.

79. Devine v. Chicago City R. Co., 141 Ill. App. 583.

80. Motion to make more specific is waived by answering. Ewing v. Vernon County [Mo.] 116 SW 518.

81. Retail Merchant's Ass'n Mut. Fire Ins. Co. v. Cox, 138 Ill. App. 14; Leman v. U. S. Fidelity & Guar. Co., 137 Ill. App. 258; Suttle v. Brown, 137 Ill. App. 438. By refusing to stand on their demurrer and answering over, defendants waive questions relating to misjoinder and multifariousness. Hendricks v. Calloway, 211 Mo. 536, 111 SW 60. By answering over and going to trial on the merits, a party waives error in ruling on his demurrer. Worrall Grain Co. v. Johnson [Neb.] 119 NW 668. A defendant who answers to the merits after demurrer overruled waives objections except to the jurisdiction. If he desires to take advantage of error in overruling the demurrer he should allow entry of final judgment thereon. Canon City v. Manning, 43 Colo. 144, 95 P 537.

82. Retail Merchants Ass'n Mut. Fire Ins.

ruling on a demurrer or motion,[83] ordinarily waives error in the ruling, unless such ruling was made before the answer.[84] Asking leave to plead after demurrer overruled does not waive the error where before reply is made plaintiff had order granting leave set aside and elected to stand by his demurrer.[85] A demurrer is waived where the case proceeds to judgment without a hearing thereon.[86] Objection that answer is not sufficiently verified is waived by moving for judgment on the pleadings on other grounds.[87] By procuring leave to reinstate a plea before it is amended, defendant waives any right to assign error on the refusal of the court to permit it to be further amended.[88] An objection to misjoinder of parties is waived by withdrawing it from the case.[89] An admission of facts which might have been proved is not a waiver of the right to question the sufficiency of the complaint by motion in arrest of judgment.[90] Filing a demurrer admits the proper filing of the pleading demurred to.[91] The filing of an amended petition may cure defects as to the prematurity of the action.[92]

§ 12. *Time and order of pleadings.*[93] See 10 C. L. 1240—Pleadings must ordinarily be filed within the time prescribed by statute,[94] though the court may in its discretion

Co. v. Cox, 138 Ill. App. 14. By filing a substituted answer, defendant waives the right to correctness of a ruling sustaining a demurrer to the original. Allen v. Chase [Conn.] 71 A 367. Order limiting time for filing additional answer held voluntary, and by filing amended answer defendant waived sustaining of demurrer to the original. Pettus v. Gault [Conn.] 71 A 509. Where demurrer to a complaint is sustained and plaintiff amends, he waives error in sustaining of demurrer. Symmes v. Rose [Ky.] 113 SW 97. If a plaintiff exercises his privilege to amend after demurrer sustained, he cannot object to the sustaining of the demurrer. Tidewater R. Co. v. Hurt [Va.] 63 SE 421. A party who submits to a ruling on the sufficiency of his pleading by voluntarily amending waives the right to except on the ground that amendment was unnecessary. Cowart v. Powell [Ga. App.] 62 SE 664. Asking leave to amend waives any error in sustaining demurrer. National Council K. & L. of S. v. Hibernian Banking Ass'n, 137 Ill. App. 175.

**83.** Where defendant answers over and does not stand on his motion to require plaintiff to elect which of two causes stated he will rely upon, he cannot raise the question on appeal. Hof v. St. Louis Transit Co., 213 Mo. 445, 111 SW 1166. A defendant who answers over to an amended complaint after overruling of a motion to strike the same on the ground that it changes the cause of action, waives the objection. Flowers v. Smith, 214 Mo. 98, 112 SW 499. Error in overruling a motion to elect on the ground of misjoinder of causes is waived by answering to the merits. Hanson v. Neal [Mo.] 114 SW 1073. Rulings on motion to strike and demurrer are waived by answering. Roberts v. Neale [Mo. App.] 114 SW 1120. Error in overruling plea in abatement of another action pending is waived by a stipulation for judgment providing that the other action be dismissed. Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. [Tex. Civ. App.] 111 SW 417. One who pleads over to an amended petition and goes to trial waives his objection to denial of his motion to strike the amended petition. Anderson v. St. Louis, etc., R. Co., 129 Mo. App. 384, 108 SW 605. Error in permitting amendment is waived by pleading thereto. Nelson v. Beidler & Co., 134 Ill. App. 655.

**84.** Overruling of motion to require plaintiff to elect upon which of two causes he will rely filed before answering to the merits is not waived by such answer. Flowers v. Smith, 214 Mo. 98, 112 SW 499.

**85.** Loveland v. Lindsay, 137 Ill. App. 544.

**86.** Hobart Lee Tie Co. v. Keck [Ark.] 116 SW 183. A defendant who files a demurrer and no other pleadings but goes to trial without calling the demurrer up waives it and cannot raise it after verdict. Devine v. Chicago City R. Co., 237 Ill. 278, 86 NE 689.

**87.** Phenix v. Bijelich [Nev.] 95 P 351.

**88.** Royal Neighbors v. Sinon, 135 Ill. App. 599.

**89.** Steber v. Chicago & G. W. R. Co. [Iowa] 117 NW 304.

**90.** Henning v. Sampsell, 236 Ill. 375, 86 NE 274.

**91.** Maegerlein v. Chicago, 141 Ill. App. 414.

**92.** Where suit is brought on order for payment of money accepted on condition before conditions are fulfilled, filing of amended petition after conditions are performed cures any defect as to prematurity of action. Foley v. Houston Co-op. & Mfg. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 224, 106 SW 160.

**93. Search Note:** See Abatement and Revival, Cent. Dig. §§ 175-177, 225, 499-504, 506; Dec. Dig. § 81; Pleading, Cent. Dig. §§ 91-95, 172-178, 208-212, 288, 334-338, 464-469, 1011, 1012; Dec. Dig. §§ 40, 85, 140, 172, 199, 333; 21 A. & E. Enc. P. & P. 678.

**94.** Defendant who has failed to answer within time prescribed cannot escape consequences of his neglect by tendering answer after expiration of the time. Rooker v. Bruce [Ind.] 85 NE 351. At common law and under Burns' Ann. St. 1908, § 410, a circuit court may prescribe the time within which defendant must file his answer. Id. Where special demurrer to answer was not filed until the case was called for trial at second term and no reason for delay appeared, it should have been stricken. Neal

and for cause shown extend the time for pleading,[95] or permit a pleading to be filed out of time,[96] especially where no prejudice results and justice requires such procedure.[97] One desiring to file additional plea must conform to the rules of the court as to making a showing,[98] and the court may strike from files pleas filed without permission, though waived by opposing counsel.[99] Plea to the jurisdiction may be interposed at any time.[1]

§ 13. *Filing, service, and withdrawal.*[2]—See 10 C. L. 1241—Pleadings are generally required to be filed [3] and copies thereof served on the adverse party or his counsel.[4] If service is admitted it is immaterial by whom made.[5] Where there are several

v. Davis Foundry & Mach. Works [Ga.] 63 SE 221. Where defendant failed to comply with an order requiring him to file a statement of his grounds of defense, it was error to overrule objection to evidence offered in support of such defense. Code 1904, p. 1709. Colby v. Reans [Va.] 63 SE 1009. Under circuit court rule 10, where a declaration is amended after plea, such plea stands as to the amended complaint unless defendant within 10 days pleads to it, and he may not plead to it after such time. Michigan United Rys. Co. v. Ingham Circuit Judge [Mich.] 15 Det. Leg. N. 1079, 119 NW 588. Supplemental answer filed after trial and judgment and after appeal perfected is too late. Cofield v. Britton [Tex. Civ. App.] 109 SW 493. Order vacating default and granting leave to answer is not sustainable unless copy of proposed answer is annexed to motion papers. Tuska v. Jarvis, 61 Misc. 224, 113 NYS 767.

**95.** Under Acts 1900, p. 112, defenses should be filed on first day of the first term, but it is discretionary with the court to permit it to be filed later in the term. Bass v. Doughty [Ga. App.] 63 SE 516.

**96.** Though plaintiff failed to file joinder to defendant's general issue or replication to the plea of set off within proper time, the court should allow the same to be filed out of time on proper application. Peterson v. Pusey, 237 Ill. 204, 86 NE 692. Under Code Civ. Proc. § 473, authorizing amendments in furtherance of justice and authorizing extension of time for answer where no copy of amended complaint was served until expiration of time for filing, it was not an abuse of discretion to permit it to be served thereafter but before filing of motion to strike it. Klokke v. Raphael [Cal. App.] 96 P 392. An answer filed after time is not a nullity and plaintiff is not entitled to have it stricken from the files; the court may retain the answer or permit another to be filed or pursue whatever course justice requires. Lunnun v. Morris, 7 Cal. App. 710, 95 P 907. Where a plea has been filed after expiration of the time allowed but the case has never been marked "in default," it is proper on call of the case to refuse to strike the plea and an amendment because not filed in time. Hodnett v. Stewart [Ga.] 61 SE 1124. It is not an abuse of discretion where no injustice results to permit, immediately before the hearing of the cause, the filing of a simliiter to a plea of the general issue and a reply to a plea of set-off, even though the cause has been called for trial and a motion for judgment for failure to so do is made and overruled in connection therewith. Peterson v. Pusey, 141 Ill. App. 578.

**97.** In action on note against administrator of maker and an indorser where administrator did not answer because of reliance on allegation that note had been probated, it was error to refuse him leave to plead where plaintiff's testimony showed that it was not probated and was barred on that ground. Johnson v. Success Brick Mach. Co. [Miss.] 46 S 957. It was also error to deny motion by the indorser made at the same time to file plea, setting up that he indorsed as surety and that as to him the same defense was available. Id.

**98.** Royal Neighbors of America v. Sinon, 135 Ill. App. 599.

**99.** Leman v. U. S. Fidelity & Guar. Co., 137 Ill. App. 258.

**1.** May be made for first time on appeal from justice to county court, though defendant has pleaded to the merits. McQueen v. McDaniel [Tex. Civ. App.] 109 SW 219. The plea of want of jurisdiction ratione materiae may be filed at any time. Bernstein v. Dalton Clark Stave Co. [La.] 47 S 753.

**2. Search Note:** See Pleading, Cent. Dig. §§ 1003-1045; Dec. Dig. §§ 331-340; 8 A. & E. Enc. P. & P. 922; 22 Id. 1322.

**3.** Where defendants were summoned to appear in municipal court to answer a complaint but no complaint was filed, the action should be dismissed though plaintiff had filed a bill of particulars. Johnson v. Pelletreau, 115 NYS 129.

**4.** Where defendant in action to enforce specific performance filed a cross petition for cancellation of the contract as a cloud, the court cannot on nonappearance of plaintiff enter judgment on the cross petition without service of it on plaintiff. Robinson v. Collier [Tex. Civ. App.] 115 SW 915. In Idaho it is proper practice to serve papers in an action on a resident attorney. Beck v. Lavin [Idaho] 97 P 1028. Under Code Civ. Proc. § 465, amended by St. 1907, p. 706, relative to service of cross complaint, service of cross complaint is sufficient if made either on plaintiff or his attorney. Wood v. Johnston [Cal. App.] 96 P 508. Written acknowledgment of service indorsed on a cross complaint and signed by plaintiff's attorney is sufficient proof of due service to warrant default. Id. Under Rev. St. 1895, art. 1212, providing for service of copy on defendants residing out of the county, there is no necessity of such service on those residing in the county. Brummer v. Moran [Tex. Civ. App.] 18 Tex. Ct. Rep. 541, 102 SW 474.

**5.** When an admission is made of the timely receipt of the notice of a hearing by a party already in court, it is immaterial

defendants, statutes generally provide how service shall be made.[6] Statutes generally provide for service by mail of pleading subsequent to the complaint.[7]

The withdrawal of a pleading and replacing it with another is an abandonment of any claim under it.[8]

§ 14. *Issues made, proof and variance.*[9]—See 10 C. L. 1241—Issues arise on the pleadings,[10] and only issues so arising are to be submitted.[11] It is sufficient if the issues made enable the parties to present every material phase of the case.[12] No issue can be raised on unnecessary or immaterial allegations of a pleading.[13] A party is not required to tender an issue where all evidence offered in support of it has been excluded.[14] One good count sufficiently supported by the evidence is sufficient, regardless of whether there is proof sustaining the other counts.[15]

*The general issue and general denials.*See 10 C. L. 1241—A general denial or plea of the general issue puts in issue all allegations to which it is directed,[16] and renders

by whom such notice was served. Ray v. Pollock [Fla.] 47 S 940.

6. Ann. St. 1906, p. 597, providing for service of process on several defendants, does not require that a copy of the petition be served on the first defendant in each county where defendants are in several counties. Collier v. Catherine Lead Co., 208 Mo. 246, 106 SW 971.

7. Service of answer by mail is complete when it is deposited in the mail. Carlson v. Stuart [S. D.] 119 NW 41.

8. Where upon sustaining of a demurrer to a complaint plaintiff withdraws it and replaces with another, he abandons any claim to favorable judgment on the complaint withdrawn. Arnold v. Kulinsky, Adler & Co., 80 Conn. 549, 69 A. 350.

9. **Search Note:** See notes in 69 L. R. A. 601.

See, also, Pleading, Cent. Dig. §§ 1210-1342; Dec. Dig. §§ 370-399; 9 A. & E. Enc. P. & P. 882; 22 Id. 513.

10. Martin v. Knight, 147 N. C. 564, 61 SE 447. A complaint for injuries against a railroad company which shows liability resulting from relation of master and servant is sufficient to submit to the jury and let in proof of allegations going to establish such liability, though plaintiff claims in the petition that he was a passenger; his legal status is to be determined from the proof and not from his conclusion. Southern R. Co. v. West, 4 Ga. App. 672, 62 SE 141.

11. Martin v. Knight, 147 N. C. 564, 61 SE 447. In action against a mine owner for breach of contract to remove stumps and pillars from a portion of his mine, where complaint alleged readiness and ability to do the work and defendant's refusal to permit it to be done, which the answer did not deny, there was no issue. Sagamore Coal Co. v. Clark, 33 Ky. L. R. 134, 109 SW 349. In action for wrongful death where complaint alleged filing of notice of intention to sue, as required by Laws 1886, p. 801, which was not denied, it was not in issue. Bogart v. New York, 128 App. Div. 139, 112 NYS 549.

12. Ives v. Newbern Lumber Co., 147 N. C. 306, 61 SE 70.

13. In proceeding to foreclose a mechanic's lien, on allegation that proceeding had been commenced within 90 days, no issue is raised by denial thereof. Romeo v. City of Yonkers, 126 App. Div. 404, 110 NYS 724.

14. Winslow Bros. & Co. v. Staton [N. C.] 63 SE 950.

15. Chicago City R. Co. v. Phillips, 138 Ill. App. 438.

16. General issue puts in issue not only a wrongful act alleged but also the defendant's participation in it. Feld v. Loftis, 140 Ill. App. 530. As a general rule a general denial requires plaintiff to prove all the allegations of his complaint. Berry v. St. Louis, etc., R. Co., 214 Mo. 593, 114 SW 27. A general denial goes to every material fact of the complaint. Sprague v. Hosie [Mich.] 15 Det. Leg. N. 847, 118 NW 497; Hess v. Doge [Neb.] 116 NW 863. The general issue requires the plaintiff to prove his case as laid in the declaration and admits in defense proof of any matter which shows the cause of action has been discharged, or that in equity or good conscience the plaintiff ought not to recover, but this rule is subject to some exceptions, such as the statute of limitations, justification in actions for slander by proving the truth of the words, etc. Newton v. Peoria, 132 Ill. App. 651. The plea of general issue has the effect of admitting the capacity in which the plaintiff sues. Henssler v. Wiese Drug Co., 133 Ill. App. 539. The plea of general issue will put in issue the **contract of insurance** and its execution, and also whether there is a misjoinder of plaintiffs. Peoria Life Ass'n v. Hines, 132 Ill. App. 642. Defense of **breach of warranty** not admissible under the general issue. Ziegenhein v. Staiger, 133 Ill. App. 191. **In trespass** the general issue does not raise the question of title but only of possession. Prussner v. Brady, 136 Ill. App. 395. **In replevin** a general denial puts in issue plaintiff's right to possession and his title. Frisch v. Wells, 200 Mass. 429, 86 NE 775. In **claim and delivery** a general denial puts in issue both the right to the property and right of possession, as well as all material allegations of the complaint, and defendant may abandon a special plea by which he claimed under a sale and show such facts under a general denial. Kaufman v. Cooper [Mont.] 98 P 504. **In action for slander** or libel, where the general issue is pleaded, the defendant may show in mitigation of damages the general bad reputation of the plaintiff for the particular thing with which he is charged. Good v. Grit Pub. Co., 36 Pa. Super. Ct. 238. Under a general denial to a

admissible all evidence which tends to disprove any one or more averments of the complaint,[17] or to show that plaintiff never had a cause of action.[18] The old and subtle distinction between evidence admissible under a general denial and evidence admissible under a special plea is no longer recognized.[19] A qualified denial may be proven under a general denial but defendant should not be restricted to a general denial which will place him in the position of denying matters not open to denial.[20] A plea is not bad as a general issue unless it sets up matters of fact merely amounting to a denial of such allegations as on general issue would have to be proved to support the case.[21] A plea denying mere matter of inducement does not amount to a general denial.[22] A plea of non est factum not verified does not put plaintiff upon proof of the execution of the instrument sued on.[23]

*Special issues and special denials.* See 10 C. L. 1243—A special denial puts in issue only that to which it is specifically addressed.[24] As a general rule matters which lie in the affirmative proof because of presumptions of law to the contrary, such as contributory negligence,[25] waiver,[26] estoppel,[27] payment,[28] fraud,[29] and the like, must

plea of payment, plaintiff may prove that no payment was made to him nor to any one authorized by him to receive it. Brown v. Koffler, 133 Mo. App. 494, 113 SW 711. Plea of **not guilty** puts in issue the credibility of testimony, even if it is uncontradicted. American Nat. Bank v. Fountain, 148 N. C. 590, 62 SE 738. Gen. St. 1906, § 1968, providing that plea of "not guilty" in ejectment puts title in issue and admits possession in plaintiff, only admits possession of defendant at the time action was instituted. Dallam v. Sanchez [Fla.] 47 S 871. **Release** given by a former administrator, either de facto or de jure, may be shown under the general issue. Chicago, etc., R. Co. v. Wolfrum, 136 Ill. App. 161.

**17.** In action for services rendered, payment may be shown under the general issue. Brooks v. Ardizzone [Cal. App.] 98 P 393. In an action for goods sold, defendant may, under a general denial, show that the contract proved by plaintiff was not the contract made, in that goods of a different character were the subject of the sale. West End Mfg. Co. v. P. R. Warren Co., 198 Mass. 320, 84 NE 488. Any fact which plaintiff must prove to establish his cause of action may be disproved under a general denial. Hilliard v. Wisconsin Life Ins. Co., 137 Wis. 208, 117 NW 999. Under a general denial, any evidence tending to show the nonexistence of a cause of action is admissible. Cushing v. Powell, 130 Mo. App. 576, 109 SW 1054. As a general rule facts in avoidance of the statutes of limitations must be specially pleaded, but facts which go to disprove facts alleged may be proved under a general denial. Hyman v. Grant [Tex. Civ. App.] 114 SW 853. Under the practice and procedure act of Arkansas in force in Indian Territory prior to statehood, all that was necessary in order to enable defendant in replevin to prove any defense he may have had was to deny all the allegations of the complaint. First Nat. Bank v. Barbour [Okl.] 95 P 790. Under a general denial defendant may controvert anything which the plaintiff is bound to prove to make out his cause, or anything that he is permitted to prove for that purpose under the complaint. In action on assigned claim for services rendered by assignor, defendant may show that assignor did the work for other consideration which was paid. Ziegler v. Smith, 115 NYS 99. The **plea of not guilty** in forcible entry in a justice court may, after the case is transferred to the district court, stand as a general denial in ejectment and defendant may introduce thereunder any evidence which tends to disprove facts alleged in the complaint showing plaintiff's title. Bartleson v. Munson, 105 Minn. 348, 117 NW 512.

**18.** If a plaintiff's cause of action never existed, a general denial is the proper answer. Cushing v. Powell, 130 Mo. App. 576, 109 SW 1054. That no cause of action existed when action was commenced may be shown under general denial. Hilliard v. Wisconsin Life Ins. Co., 137 Wis. 208, 117 NW 999. Under a general denial in an action for broker's commission, defendant may show that no purchaser was ever procured. Turner v. Snyder, 132 Mo. 320, 111 SW 858.

**19.** Any thing may be shown which tends to controvert or overthrow plaintiff's case. Rogers v. Clark Iron Co., 104 Minn. 198, 116 NW 739.

**20.** De Ajuria v. Berwind, 127 App. Div. 528, 111 NYS 1029.

**21.** Plea to complaint for broker's commissions that they did not sell the property for amount named, that purchaser did not pay such amount, and that defendant was never indebted as alleged, is not general issue. Seff v. Brotman [Md.] 70 A 106.

**22.** Pleas that deny matters set up in a complaint as mere inducement to the action to show the right to sue do not amount to general issue. Gainsville & G. R. Co. v. Peck [Fla.] 46 S 1019.

**23.** Lefkow v. Taylor, 140 Ill. App. 570.

**24.** Special denial held to go to the material allegations of the complaint. International & G. N. R. Co. v. Brice [Tex. Civ. App.] 111 SW 1094. A plea of **non est factum** only puts in issue the execution of the instrument sued on. Amount of damages and breach of covenant not in issue. Leman v. U. S. Fidelity & Guar. Co., 137 Ill. App. 258.

**25.** See Negligence, 10 C. L. 922.

**26.** See Election and Waiver, 11 C. L. 1162.

**27.** See Estoppel, 11 C. L. 1326.

**28.** See Payment and Tender, 12 C. L. 1299.

be specially pleaded,[30] though plaintiff by anticipating and setting out matters of defense may obviate the necessity of defendant pleading the same.[31] Defenses denominated new matter and required to be specially pleaded are only those which have arisen since the cause of action accrued.[32] While a plea of recoupment alone is equivalent, to an admission of plaintiff's cause of action, a plea of recoupment coupled with nonassumpsit which is a denial of liability does not have that effect.[33]

*Proof and variance.*[See 10 C. L. 1244]—Since a party must recover, if at all, on the allegations of his pleadings,[34] his allegations and proof must substantially corres-

**Payment** is an affirmative defense and must be specially pleaded. Harvey v. Denver & R. G. R. Co. [Colo.] 99 P 31.

**29.** See Fraud and Undue Influence, 11 C. L. 1583. Evidence of fraud is not admissible under a general denial. Scott v. Dillon, 58 Misc. 522, 109 NYS 877.

**30.** An affirmative defense cannot be availed of unless pleaded and proved. Wiltrout v. Showers [Neb.] 118 NW 1080. Defense not set up cannot be made basis of a decree. Pacific R. & Nav. Co. v. Astoria & C. R. Co. [Or.] 99 P 1044. **Failure of consideration** of a note must be specially pleaded. Scott v. Rawls & Rawls [Ala.] 48 S 710. Likewise payment. Id. Under Gen. St. 1906, § 1465, and rules of circuit court 66, 67, alleged **alteration of a promissory note** sued upon must be specially pleaded. Teddor v. Fralelgh-Lines-Smith Co. [Fla.] 46 S 419. Such fact cannot be proved under plea of non est factum or denial of execution of the instrument. Id. **Matter in justification** must be pleaded. Puryear v. Ould, 81 S. C. 456, 62 SE 863. In assault and battery **self-defense** must be pleaded specially, and cannot be shown under a general denial. Iaeger v. Metcalf [Ariz.] 94 P 1094. In action on life policy, failure of plaintiff to furnish proof of death is not available under the general issue. Manhattan Life Ins. Co. v. Verneuille [Ala.] 47 S 72. In trespass to try title, where plaintiff showed title as surviving member of a firm, defendant could not show under a plea of not guilty that he purchased an interest at an auction sale of the firm's assets; must be specially pleaded. Isbell v. Southworth [Tex. Civ. App.] 114 SW 689. General issue in action for injuries sustained by a passenger does not put in issue ownership of track or control of cars. Pell v. Joliet, P. & A. R. Co., 238 Ill. 510, 87 NE 542.

**31.** Where declaration on an insurance policy states facts concerning an alleged breach and attempts to avoid its results, the general issue is sufficient to form the issues tendered by the declaration. Weston v. Mut. Life Assur. Co., 137 Ill. App. 319.

**32.** Cushing v. Powell, 130 Mo. App. 576, 109 SW 1054. Where defendants sold land to plaintiff and agreed in case of failure of title to return earnest money and pay for necessary improvements, held in action to recover, where defendants denied that plaintiffs had made improvements, the issue was made and a further affirmative defense that improvements were not necessary was properly stricken. Kumblad v. Allen [Wash.] 99 P 19. Special defense need not deny allegation of complaint, claiming one-half of an award for condemnation of land, that plaintiff continued a cotenant with defendant in the land until it was condemned, and by virtue thereof was entitled to one-half the award, allegation of right to one-half the award being a conclusion, and the defense conceding the cotenancy, and showing how plaintiff's interest passed to defendant in equity. Rosenbaum v. New York, 129 App. Div. 351, 113 NYS 364.

**33.** Hornblower v. George Washington University, 31 App. D. C. 64.

**34.** Plaintiff must recover on the facts stated in his complaint. Oil Well Supply Co. v. Johnson [Kan.] 98 P 381. Must rely on instrument pleaded and not on proof of another instrument. Genwell v. National Council K. & L. of S., 126 Mo. App. 496, 104 SW 884. Recovery cannot be had on proof establishing a different cause of action from that alleged, though the cause established is good. Soden v. Murphy, 42 Colo. 352, 94 P 353. The relief accorded must conform to the pleadings. Wells v. Blackman, 121 La. 394, 46 S 437. A party cannot allege one cause of action and recover on another. Berman v. Kling [Conn.] 71 A 507. Plaintiff must recover on the state of facts alleged and no other. Haynor v. Excelsior Springs L., P., H. & W. Co., 129 Mo. App. 691, 108 SW 580; Canaday v. United R. Co. [Mo. App.] 114 SW 88. Recovery for negligence must be had on breach of duty charged. South Shore Gas & Elec. Co. v. Ambre [Ind. App.] 87 NE 246. Where throughout the trial the court treated a second cause of action alleged as not before it, because prematurely brought, and defendants were precluded from offering evidence of defenses thereto, it was error to render judgment thereon. Copper Belle Min. Co. v. Costello [Ariz.] 95 P 94. Under a complaint by a divorced wife to enjoin sale of property of her husband on the theory that by virtue of judgment for alimony she held title, she cannot recover on the theory of marital rights. Moss v. Brant [Mo.] 116 SW 503. Where certain causes are alleged to have produced an injury, plaintiff must recover on them or not at all. Nickey v. St. Louis, etc., R. Co. [Mo. App.] 116 SW 477. Cannot plead express contract and recover on implied one. Canaday v. United R. Co. [Mo. App.] 114 SW 88. Plaintiff may declare on an express promise and recover on an implied one, but he cannot declare on a special contract and recover on proof of an implied promise. Indianapolis Coal Trac. Co. v. Dalton [Ind. App.] 87 NE 552. A plaintiff may not charge negligence in one respect and recover on proof of negligence in an entirely different respect. Miller v. Kenosha Elec. R. Co., 135 Wis. 68, 115 NW 355. In a suit by a husband in pursuit of his own interests, he cannot change the issues to the end of sustaining an action in the name of his wife.

pond.[35] Where the deficiency of the evidence is as to the entire scope of the plead-

Viguerie v. Burguieres Planting Co., 121 La. 97, 46 S 114. Where complaint was on the theory that defendant was a guarantor, plaintiff could not on demurrer claim that hs was principal debtor. McFarlane v. Wadhams, 165 F 987. A judgment is void to the extent that it gives relief outside the pleadings. Charles v. White, 214 Mo. 187, 112 SW 645. Where defendant appears in an action commenced under the practice act of Baltimore City and complies with the requirements of the statute and the cause is placed on the trial docket, plaintiff is not confined to cause of action filed and **neither party is bound by affidavits made.** Willar v. Nagle [Md.] 71 A 427. On appeal plaintiff is not entitled to recover on a theory not advanced in his declaration in the lower court. Weidman v. Willson, 153 Mich. 82, 15 Det. Leg. N. 328, 116 NW 539.

35. Crane v. Schaefer, 140 Ill. App. 647; Lovington Tp. v. Adkins, 232 Ill. 510, 83 NE 1043; Padfield v. Frey, 133 Ill. App. 232; Seebach v. Kuhn [Cal. App.] 99 P 723. This is the rule under Practice Act (P. L. 1903, p. 671), and where the complaint set up a contract growing out of commercial paper, proof of a different contract will not authorize recovery. Jordan v. Reed [N. J. Err. & App.] 71 A 280. It is a fatal variance if complainant does not prove the tort substantially as pleaded, even though he may have been needlessly minute in detail. Chicago City R. Co. v. Carrick, 133 Ill. App. 332. One suing for price of goods sold is bound to prove his cause as pleaded. Gross v. Rivkin, 114 NYS 844. This rule, however, applies to proof and not to pleading and is not available in support of a demurrer. State v. Seaboard Air Line R. Co. [Fla.] 47 S 986. Where a plaintiff specifies certain acts of negligence, he cannot recover on any other. Lexington R. Co. v. Britton [Ky.] 114 SW 295. Fatal variance where alleged that plaintiff was injured by the sudden jerk of a car starting from a stationary position while he was attempting to alight, and proof was that car was moving at the time it was alleged to be stationary. Chicago City R. Co. v. Gates, 135 Ill. App. 180. Where one pleads specific acts of **negligence,** he cannot recover on proof of any other acts. Beave v. St. Louis Transit Co., 212 Mo. 331, 111 SW 52. The rule that plaintiff may not sue on one cause and recover on another does not apply where negligence proved is within the scope of the allegations. Knight v. Donnelly Bros., 131 Mo. App. 152, 110 SW 687. Where complaint charges specific acts of negligence, plaintiff is confined to proof of negligence specified, but, if it charges negligence generally, subsequent negligence may be proved. Louisville & N. R. Co. v. Lowe [Ala.] 48 S 99. The maker of a note may not under a plea of no consideration, and that an endorsee knew of such fact and parted with no consideration for the note, prove that there was a defense to the note and that the indorsee was not a bona fide holder. Simers v. Halpern, 114 NYS 163. A variance brought to the attention of the court in apt time will defeat recovery unless it is within some exception. Loucks v. Davies, 43 Colo. 490, 96 P 191. Where several plaintiffs sue to recover land and allege joint title, they cannot recover unless they prove joint title. Shaddix v. Watson, 130 Ga. 764, 61 SE 828. If plaintiff fails to prove the cause alleged but proves another, defendant may refuse to litigate the cause proven. Loeffler v. West Tampa [Fla.] 46 S 426. Allegation in petition to enforce a mechanic's lien as to implied provision of a contract held a conclusion to be disregarded in determining whether there was a variance between contract alleged and contract proved. Beck Coal & Lumber Co. v. Peterson Mfg. Co., 237 Ill. 250, 86 NE 715. To entitle one to rescind a contract for fraud or mistake as established by the evidence, he must plead a case of fraud and mistake or fraud or mistake. Moehlenpah v. Mayhew [Wis.] 119 NW 826.

**Evidence not admissible:** Where complaint in ejectment alleges title by adverse possession in plaintiff's grantor, evidence of title by deed in him is not admissible. Westmoreland v. Plant [Ark.] 116 SW 188. In an action against a street railway company for injuring a horse where plaintiff charged negligence both generally and specifically, held that proof that by the exercise of ordinary care the motorman could have avoided the collision was not admissible under the general averment of negligence. Dalton v. United R. Co. [Mo. App.] 114 SW 661. Proper to exclude evidence as to issues not made by the pleadings. Swanston v. Clark, 153 Cal. 300, 95 P 1117. Evidence not pertinent to the pleadings is properly excluded. Kelly v. Malone [Ga. App.] 63 SE 639. Where pleadings are insufficient to state a cause of action for fraud, evidence of fraud is not admissible. Power v. Turner [Mont.] 97 P 950. In action on note where defendant pleaded a collateral agreement by which he was not to be bound as principal or surety, he could not introduce evidence to establish nature of the debt created under the community property laws and laws as to suretyship. Anderson v. Mitchell [Wash.] 98 P 751. Evidence which might have been admissible under the original petition is properly excluded where such petition has been abandoned and the evidence is not admissible under an amended petition. Symmes v. Rose [Ky.] 113 SW 97. Proof is limited to specific acts of negligence alleged. Missouri Valley Bridge & Iron Co. v. Ballard [Tex. Civ. App.] 116 SW 93. Where both parties rely on an express contract and the only issue is as to its terms, it is not error to exclude evidence as to the value of the services done under the contract. Kelly v. Malone [Ga. App.] 63 SE 639.

**No variance:** In an action against a carrier for negligent failure to make prompt shipment, it is error to authorize recovery on proof of an agreement to pay the difference between the sale price and what it would have been had the goods arrived in time. Missouri, K. & T. Co. v. Carpenter [Tex. Civ. App.] 114 SW 900. In action on a warranty of a horse where plaintiff alleged that the horse was suffering from a disease of the back, evidence that it was suffering from azoturia, a disease of the stomach, liver and kidneys. McCullough v.

ing and not merely to some particular part thereof, there is an entire failure of

Dunn [Neb.] 119 NW 1127. One suing for cancellation of an instrument where the graveman of the bill is fraud and undue influence, and which does not denominate the transaction as being induced by mistake, may recover on proof of mistake on one side and knowledge thereof and advantage taken of it on the other. Moehlenpah v. Mayhew [Wis.] 119 NW 826. Though a servant suing for injuries did not plead a rule of his employer containing information as to the effect of the sudden application or release of an emergency brake on the engine, such rule was admissible to prove an allegation that the sudden application of the brake caused a violent jerk of ths car on which he was riding. Galveston, etc., R. Co. v. Harper [Tex. Civ. App.] 114 SW 1168. In an action on a liquor dealer's bond for selling liquor to plaintiff's husband, where it was alleged that sales were made on certain dates, plaintiff was not required to prove violations on those particular dates. Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428. In action for injuries while alighting from a train where it was alleged that defendant failed to stop the train a sufficient length of time for plaintiff to alight, held not to allege that the train was motionless when plaintiff attempted to alight. Anderson v. Chicago & A. R. Co., 131 Mo. App. 580, 110 SW 650. Under a prayer for general relief, plaintiff held entitled to recover for services under a contract as interpreted by the parties though he proved a different interpretation. Crusel v. Houssiere-Latreille Oil Co. [La.] 48 S 322. Discrepancy between allegation that an injury occurred on a sidewalk 125 feet west of a certain strset and proof that it occurred 93 feet west of the street was not a variance where distance alleged was but an estimate. Williams v. Lansing, 152 Mich. 169, 15 Det. Leg. N. 168, 115 NW 961. In action to set aside a tax deed, plaintiffs claimed as joint tenants and not as tenants in common. Held bill averring that they claimed as joint tenants was not bad for failing to aver that they did not claim as tenants in common. Brimson v. Arnold, 236 Ill. 495, 86 NE 254. Proof that driver of a vehicle was driving longitudinally on a track is not a variance from an allegation that he was driving "at or near the tracks." Murphy v. Evanston Elec. Co., 235 Ill. 275, 85 NE 334. Proof that employes of a regularly appointed bridge tender were negligent is not a variance from an allegation that the tender was negligent. Gathman v. Chicago, 236 Ill. 9, 86 NE 152. In action by a servant for injuries, the issues are as to the master's negligence and the servant's due care and assumption of risk, and the servant's mental capacity is a circumstance which may bear on such issue, and evidence thereof is admissible though it is not pleaded. Doolan v. Pocasset Mfg. Co., 200 Mass. 200, 85 NE 1055. In action for fraud. Adams v. Collins, 196 Mass. 422, 82 NE 498. Where plaintiff's evidence was confined to his bill of particulars and order for goods put in evidence by plaintiff did not tend to vary in proof the items in the bill of particulars, the extreme of technicality is not favored to raise a variance between the proof and the bill. Butler v. Ederheimer [Fla.] 47 S 23. Where plaintiff's bill of particulars showed items constituting a fund which she received from an estate and turned over to defendant to hold for her, defendant having filed a counterclaim, the bill of particulars showing that defendant had placed a part of such fund to plaintiff's credit at a bank, evidence that he had checked out a part of such fund to pay defendant's debts was not a variance from the bill of particulars but showed that defendant's claim of payment was unfounded. Young v. Boyd, 107 Md. 449, 69 A 33. An averment that defendant permitted a hole to remain "within the rails" is not an averment that such hole was within or between the flanges, but is an averment that such hole was within or between the rails proper and that proof that a part of the south rail was broken off at its junction with the web of the rail proper and was gone, leaving a hole where the flange was when in place, was proof of the averment of the declaration. Chicago Union Trac. Co. v. Fitzgerald, 138 Ill. App. 520. Use of word "knuckle" in pleading held not varied from meaning given to it by the proof. Wilkinson v. Kanawha & Hocking Coal & Coks Co. [W. Va.] 61 SE 875. In action of debt on a negotiable note whers the complaint alleges that "the defendant made and signed his certain promissory note in writing," setting out a full description of the note, including place of payment, held the note was admissible. Boyd v. Beebe [W. Va.] 61 SE 304. Count of complaint held sufficiently broad to admit evidence of an express or implied contract. Harvey v. Denver & R. G. R. Co. [Colo.] 99 P 31. Where collision with one car is alleged, proof of another collision occurring a few minutes later and before the horses could be removed from the track was part of the same transaction, and not a variance. South Tacoma Fuel & Transfer Co. v. Tacoma R. & P. Co., 50 Wash. 686, 97 P 970. Where complaint was against a corporation for a corporate debt, it may not be shown that stockholders thereof agreed to pay the debt sued for. Dodge v. Chambers, 43 Colo. 366, 96 P 178. The rule that proof of libel and slander must conform strictly to the allegations is somewhat relaxed, and it is sufficient if the charge is substantially sustained, though the proof does not in each minute particular correspond with the words alleged. Bleitz v. Carton, 49 Wash. 545, 95 P 1099.

**Fatal variance:** In action for slander where words alleged charged bigamy, but proof did not sustain the charge, the variance was held fatal. Bleitz v. Carton, 49 Wash. 545, 95 P 1099. Proof of slanderous words spoken in a conditional or hypothetical statement does not sustain allegation of slanderous words pleaded as a positive assertion. Id. Proof that an injury occurred becauss of a defect in a road some 12 feet east of a bridge held a fatal variance from an allegation that it happened at the east end of the bridge, it not appearing that defendant was responsible for the defect away from the bridge. Presky v. Degnon-McLean Cont. Co., 125 App. Div. 381, 109 NYS 883. Action on bond to indemnify plaintiff for obligations incurred by another selling goods as agent is not sustained by proof

proof.[36] A party is required only to prove the substance of every issue and not every detail of the transaction.[37] Immaterial allegations need not be proved.[38] Failure to prove all that is alleged does not preclude recovery if a cause of action is made out.[39] The parties may enlarge issues by mutually trying out issues not involved in the pleadings.[40]

of an indebtedness for goods sold to such person and not received by him as plaintiff's agent. Sanitas Co. v. Niezorawski [Wis.] 120 NW 292. Recovery cannot be had under an allegation of performance of a special contract on proof of waiver resulting from acceptance of substantial performance. Allen v. Burns, 201 Mass. 74, 87 NE 194. Where a complaint for injuries alleged that injury was caused by being struck by a projection from a passing train, plaintiff could not recover on proof that he was injured by attempting to catch a passing car. De Hoyos v. Galveston, etc., R. Co. [Tex. Civ. App.] 115 SW 75. Where complaint declares on an express contract, recovery may not be had on an implied one. Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631. In an action on a special tax bill for street improvements, held that there was a fatal variance between the description in the bill and in the petition. German-American Bank v. Manning, 133 Mo. App. 294, 113 SW 251. One sued as indorser of a note cannot be held liable as guarantor. Clymer v. Terry [Tex. Civ. App.] 109 SW 1129. Where plaintiff sought to recover commissions under a specific contract for hiring for a certain period, he could not recover on evidence of a hold over agreement. Altmayer v. Lahm, 113 NYS 964. The proof must sustain the allegations of the complaint and a complaint for services by plaintiff on defendant's behalf is not sustained by proof of defendant's written guaranty to pay plaintiff for certain work. Stone v. Stolts, 112 NYS 1045. Complaint alleging negligence in failing to furnish safe place for servant and to publish suitable rules and regulations is not sustained by proof of negligence of a foreman in a detail of the work. Bertolami v. United Engineering & Cont. Co., 125 App. Div. 584, 109 NYS 1006. Where fraud alleged in sale of stock was as to profits but proof showed that investment was made for purpose of increasing capital. Fisher v. Radford, 153 Mich. 385, 15 Det. Leg. N. 499, 117 NW 66. Where complaint was for breach of contract alleging that defendant agreed to buy certain cross ties, and evidence shows a contract to purchase different ties. Nashville, etc., R. Co. v. Wood [Ala.] 46 S 561. A was sued on a written guaranty to pay debt of B to C. Proof showed that B did not owe the debt to C but that D owed C. Southern Car Wheel Iron Co. v. Powers, 4 Ga. App. 412, 61 SE 838. Where pleading alleges absolute promise or agreement and proof shows a contingent or conditional one. Wiggins v. Wilson [Fla.] 45 S 1011. Declaring on an instrument as a "writing obligatory" implies that it is under seal, and where proof shows one not sealed. Kidd v. Beckley [W. Va.] 60 SE 1089. In action for death of locomotive fireman caused by train running away because of negligent construction of the road, there could be no recovery on proof that train was too heavily loaded for the track, which was wet at the time. Cavaness v. Morgan Lumber Co., 50 Wash. 232, 96 P 1084.

**36.** It is not reversible error to refuse to withdraw counts from the jury where there was evidence tending to support them. Olson v. Kelly Coal Co., 236 Ill. 502, 86 NE 88. That the issue is in negative form in cases involving fraud lessens the degree of proof required but does not relieve the party making the charge from the duty of introducing any proof. Prentice v. Crane, 234 Ill. 302, 84 NE 916. Where defendants opened the case on the court's view that the burden of proof was on them and introduced evidence negativing plaintiff's theory, it was error to give judgment for plaintiff in the absence of any proof to sustain the issue tendered by the complaint. Stamaty v. Pappadamitriu [Wash.] 98 P 613. In action for goods sold where plaintiff fails to prove delivery, judgment for defendant is proper but should be without prejudice to a new trial. Gross v. Nitschke, 111 NYS 511. Complaint against a carrier because its gateman misdirected passenger as to his train, alleging that plaintiff purchased his ticket from defendant, is descriptive of the wrong and must be proved, though it need not have been alleged that the ticket was purchased from defendant. Louisville & N. R. Co. v. Cannon [Ala.] 48 S 64.

**37.** In action for price of goods where defendant alleged misrepresentations, it was improper to consider each misrepresentation as a separate thing. Huff v. Kinloch Paint Co. [Tex. Civ. App.] 110 SW 467.

**38.** A party will not be denied recovery because of failure to prove unessential allegations. Shawnee L. & P. Co. v. Sears [Okl.] 95 P 449; Union Wire Mattress Co. v. Wiegref, 133 Ill. App. 506. Nor will his action be denied merely because his proof does not sustain certain averments when it does sustain others sufficient to authorize recovery. Shawnee L. & P. Co. v. Sears [Okl.] 95 P 449. It is sufficient if the substance of allegations be proved. Gueble v. Lafayette, 121 La. 909, 46 S 917. In action for injury caused by injured person's horse becoming frightened at an automobile, it is not necessary to prove that the car was as large as alleged. Brinkman v. Pacholke, 41 Ind. App. 662, 84 NE 762. The rule that the proof must correspond with the allegations applies only to such allegations as are in themselves material to the action, or immaterial allegations so interwoven as to make those material depend upon them and thus expose both to traverse. Elgin, A. & S. Trac. Co. v. Wilcox, 132 Ill. App. 446. Variance to be material must go to the essence of the right to recovery. City of Chicago v. Wieland, 139 Ill. App. 197.

**39.** Where plaintiff alleges and proves facts entitling him to judgment on a joint bond, he may recover though he also alleges, but fails to prove, an alteration of the bond which would entitle him to recov-

Immaterial variances will be wholly disregarded.[41] By statute in some states no variance is deemed material, unless it actually misled the adverse party to his prejudice in maintaining his action or defense on the merits.[42] A variance is waived by

ery as on a joint and several bond. Union Oil Co. v. Mercantile Refining Co. [Cal. App.] 97 P 919. Though waiver of forfeiture of an insurance policy is pleaded in different ways, it is sufficient if any replication is established. Union Cent. Life Ins. Co. v. Washburn [Ala.] 48 S 475.

**40.** Where parties consent to litigate an issue not raised by the pleadings, a judgment on such issue is final. Engel v. Sontag, 110 NYS 933. Where the parties voluntarily depart from and litigate issues not made by the pleadings, the question cannot be raised after verdict. Vaillancour v. Minneapolis, etc., R. Co., 106 Minn. 348, 119 NW 53. Where a case is tried on the assumption that a certain plea is made and no objection is made thereto, the fact that such plea was not filed is not ground for reversal. Webster v. Atlantic Coast Line R. Co., 81 S. C. 46, 61 SE 1080. Consent to try an issue not made by the pleadings will not be inferred from the mere fact that evidence tending to prove the outside issue was received without objection, when such evidence was pertinent and competent on issues actually made. Diamond v. Dennison, 102 Minn. 302, 113 NW 696.

**41.** Brice-Nash v. Barton Salt Co. [Kan.] 98 P 768. Judgment will not be reversed for an immaterial variance which did not mislead the adverse party. Caley v. Mills [Kan.] 100 P 69. A variance which does not mislead a party is immaterial. Haralson v. San Antonio Trac. Co. [Tex. Civ. App.] 115 SW 876. Before a variance is to be deemed material, it must be shown to the satisfaction of the court to be prejudicial. Maloney v. Geiser Mfg. Co. [N. D.] 115 NW 669.

**Immaterial variance:** In action for negligence, a variance in respect to specification of mere matters of detail concerning the manner, not the time or place, or the instrumentalities by which the injury was inflicted. Knicely v. West Virginia M. R. Co. [W. Va.] 61 SE 811. Variance between allegation and proof in action for injuries to passenger, injured while alighting, as to whether she was thrown off or jumped off for safety. Saeger v. Wabash R. Co., 131 Mo. App. 282, 110 SW 686. A variance which results from a clerical error in inserting a word in a corporate name. United States Fidelity & Guar. Co. v. Howes, 33 Ky. L. R. 131, 109 SW 343. Variance between complaint to enjoin stretching of telephone wires across premises which alleged that wires had been stretched and proof which showed that work had progressed only so far as to set poles. Majenica Tel. Co. v. Rogers [Ind. App.] 87 NE 165. There is no material variance under Proc. Book 1908, p. 245, where complaint against maker of a note pleads a special indorsement and proof shows indorsement in blank. E. L. Cleveland Co. v. Chittenden [Conn.] 71 A 935. No material variance between complaint for broker's commission alleging employment and procuring of purchaser and subsequent sale, and evidence that the owner and the purchaser entered into a contract of sale which the owner failed to perform. Sanderson v. Wellsford [Tex. Civ. App.] 116 SW 382. Where particular occurrence which caused an injured person to fall was different from the alleged, not fatal, negligence being the same. Kansas City S. R. Co. v. Williams [Tex. Civ. App.] 111 SW 196. Where complaint alleged that injury to a horse being loaded onto a car was caused by the platform being dangerous and unsafe, but proof showed that the platform was safe but that the horse stepped on a spike while being led over an adjoining track. Letts v. Wabash R. Co., 131 Mo. App. 270, 111 SW 138. Where in an action for slander the words proved were in substance those alleged. Zentzshel v. Richie, 33 Ky. L. R. 657, 110 SW 832. Variance between allegation that a passenger injured was riding on a "trailer" and proof that she was riding on the front car. Peck v. Springfield Trac. Co., 131 Mo. App. 134, 110 SW 659. In action for death of engineer killed in a collision where it was alleged that the accident was caused by failure of the telegraph operator to deliver telegraphic orders to the conductor and engineer, held that proof that the operator had handed orders to the conductor but did not read them to him, and the conductor had not taken a train order, did not constitute a fatal variance. Yazoo & M. V. R. Co. v. Farr [Miss.] 48 S 520. Complaint for commission for selling brickyard, and proof that it was the sale of the owner's interest in the corporation, which owned the brickyard, held immaterial where raised for first time by motion to dismiss at close of plaintiff's evidence. Bauman v. Tannenbaum, 125 App. Div. 770, 110 NYS 108. On liberal construction of complaint, held no fatal variance. Vance v. Great Northern R. Co., 106 Minn. 172, 118 NW 674. Under the rule that all parties to a joint contract are jointly and severally liable where one is sued and complaint alleges a contract made by him and the evidence shows a joint contract, the variance is not fatal unless prejudice is shown. Morgan v. Brach, 104 Minn. 247, 116 NW 490. Held immaterial in view of admissions. Gibson v. Seney, 138 Iowa, 383, 116 NW 325.

**42.** Under Ball. Ann. Codes & St. § 4949, a variance is immaterial unless prejudicial. South Tacoma Fuel & Transfer Co. v. Tacoma R. & P. Co., 50 Wash. 686, 97 P 970. Where there is no conflict in the testimony, a variance is not material. St. 1898, § 2670. State v. School Board Dist. No. 1, 135 Wis. 619, 116 NW 232.

**Variance immaterial:** Under Code Civ. Proc. § 469, providing that a variance shall not be deemed material unless prejudicial, the variance in action for the price of goods between allegation that they were sold to partners and one of them individually, and proof that they were sold to partners. Redwood City Salt Co. v. Whitney, 153 Cal. 421, 95 P 885. Under Kirby's Dig. § 6140, providing that no variance is material unless it mislead a party to his prejudice. Western Coal & Min. Co. v. Buchanan [Ark.] 114 SW 694. Under Ann. St. 1906, p. 671, pro-

failure to make timely objection at the trial.[43] A variance may be cured by an amendment.[44] A variance between the complaint and summons does not entitle defendant to a dismissal of the complaint.[45]

*Admissions in pleadings or by failure to plead.* See 10 C. L. 1249—A party is bound by statements and admissions in his pleadings.[46] Allegations of a pleading which are

viding that no variance is material unless prejudicial, held variance between an allegation that an injured person was coming down a ladder on the side of a car and proof that the ladder was on the end of the car. Crawford v. Kansas City Stockyards Co. [Mo.] 114 SW 1057.

43. Objection to a variance must be made below or it is waived. Rubin v. J. C. Gabler Co., 127 App. Div. 275, 111 NYS 124; Donk Bros. Coal & Coke Co. v. Stroeter, 133 Ill. App. 199; City of Chicago v. Wieland, 139 Ill. App. 197; Helmbacher Forge & Rolling Mills Co. v. Bartels, 133 Ill. App. 22. Variance not preserved for review where no objection to evidence nor motion based on such ground. Hanreddy v. Palilinnas, 139 Ill. App. 148. A variance may be treated as waived where not taken advantage of during a long trial. Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co. [C. C. A.] 159 F 824. In case of variance, a motion to exclude should be made at the time of the alleged variance, and if made at the close of all the evidence comes too late and is waived. Chicago City R. Co. v. Phillips, 138 Ill. App. 438.

44. In action to recover purchase price of an assignment of a permit to drill a well, where a decree is admitted in evidence as a former adjudication that the assignment was void, the fact that such judgment was not pleaded is cured by an amendment. Shannon v. Mastin [Mo. App.] 108 SW 1116. Though there may be a variance between the proof and allegations of the original petition, it ceases to be a variance when fully met by amendment. Macon R. & L. Co. v. Lewis, 4 Ga. App. 313, 61 SE 290. Where a variance could be obviated by amendment, the objection will not be entertained on appeal. Cumberledge v. Brooks, 235 Ill. 249, 85 NE 197.

45. Bradey v. Mueller [S. D.] 118 NW 1035.

46. Where plaintiff attaches a copy of a note sued on to the complaint, and defendants admit execution thereof, they cannot thereafter assert that note was altered after its execution. White v. Smith [Kan.] 98 P 766. In suit to determine rights of adjacent owners to gangway, admission in answer that plaintiff owned a part of it in fee and had an easement in the other part is binding on defendant. McElroy v. McCarville [R. I.] 71 A 646. In action for injuries against a street car company, its answer admitting that plaintiff was a passenger on the car is admissible though plaintiff subsequently took the stand that no blame attached to the company. Louisville, etc., R. Co. v. McDonald, 33 Ky. L. R. 762, 111 SW 289. A portion of a paragraph of an answer containing an admission of a distinct fact is admissible without introduction of explanatory matter which does not alter or modify the admission. Wade v. McLean Cont. Co. [N. C.] 62 SE 919. Admissions and allegations made in a verified complaint bind plaintiff through subsequent proceedings, and an allegation that defendant is a corporation may not be subsequently denied and it be shown that defendant is a partnership. Dodge v. Chambers, 43 Colo. 366, 96 P 178. Where guardian in statements of accounts attached to answer charged himself with interest for a certain period, he cannot thereafter contend that it should be allowed for a less period. Willis v. Rice [Ala.] 48 S 397. Where in an action for claim and delivery for steers, which defendant claimed under a chattel mortgage, the answer alleged that defendant took possession of the steers on the mortgagor's default, he was estopped by his answer to claim that he had not taken possession of them. Kime v. Bank of Edgemont [S. D.] 119 NW 1003. A taxpayer having acknowledged the validity of a statute in his pleadings, and having tried to enforce it to the detriment of others, is precluded from assailing its validity. Home Sav. Bank v. Morris [Iowa] 120 NW 100. Where contractor's complaint in consolidated action by contractors and materialmen against owner to foreclose mechanic's lien alleged that contracts were recorded and answer did not deny such fact but alleged that they were duly recorded, the fact was established and no finding of value of materials was necessary, and a finding that the contract was not recorded did not destroy the admissions. Los Angeles Pressed Brick Co. v. Higgins [Cal.] 97 P 420. Where a finding that plaintiff was a foreign corporation was not excepted to, defendant could not avail itself of its plea that the contract sued on was void because it had not filed its articles, though the answer denied plaintiff's corporate existence and merely alleged that it claimed to be a foreign corporation. Sanitas Co. v. Neizorawski [Wis.] 120 NW 292. Plaintiff is not precluded by a reply denying allegations of the answer from relying on such allegations as an admission. Webb v. Heintz [Or.] 97 P 753. The admission of a party that he made a contract will be construed to mean that it was a valid one executed with the formality required by law. Early County v. Fielder & Allen Co., 4 Ga. App. 268, 63 SE 353. The effect of demurrer to the evidence is to make evidence stated therein part of the record. Loeffler v. West Tampa [Fla.] 46 S 426. By pleading the general issue the sufficiency of the complaint is admitted. Klofski v. Railroad Supply Co., 235 Ill. 146, 85 NE 274. Where plaintiff sued for value of goods sold and defendant denied the allegations of the complaint and alleged that plaintiff sold him goods of less value than alleged and that he had tendered him the value thereof and tendered the same in court, and plaintiff offered no proof but asked judgment for amount tendered, held the answer contained no admission entitling plaintiff to judgment on the pleadings. Rumpf v. Schiff, 109 NYS 51. **Superseded pleadings** are admissible to show admissions of the pleader.

admitted by the pleadings of the opposite party,[47] and matters well pleaded which are not denied or avoided by the allegations of the opposite party,[48] are taken as es-

McClure v. Great Western Acc. Ass'n [Iowa] 118 NW 269. An admission made in a superseded pleading is not conclusive, and when explained is for the jury. Id. Admissions in a pleading adverse to the pleader are admissible against him though the pleading be subsequently withdrawn. Elliff v. Oregon R. & Nav. Co. [Or.] 99 P 76. Plaintiff's **original complaint** verified while he was in the hospital, alleging that the injury happened because of sudden starting of the car, is insufficient to overcome evidence in support of an amended complaint alleging that he was injured by being pushed or dragged from the car by the conductor. McGrath v. Nassau Elec. R. Co. 128 App. Div. 63, 112 NYS 471. Admissions in the form of the **pleadings of a former action** in ejectment against a party's predecessors in title are not conclusive. Floyd v. Kulp Lumber Co. [Pa.] 71 A 13. Where **pleading by defendant in another action** contained material admissions on the facts in issue and there was nothing outside such issues of a prejudicial nature, such pleading was admissible. Seligmann v. Greif [Tex. Civ. App.] 109 SW 214. An **answer in an abandoned action** cannot be admitted as an admission against interest in another action. Wrightsman v. Herrick, 130 Mo. App. 266, 109 SW 104. **Allegation in a trial amendment** in partition setting up claim for rents, that defendant had been in exclusive possession since a specified time, is not evidence of such fact on the issue of limitations, which was denied. Hess v. Webb [Tex. Civ. App.] 113 SW 618. An answer which has been withdrawn is competent evidence in a suit on the part of the plaintiff as an admission by defendant. Loomis v. Norman Printers' Supply Co. [Conn.] 71 A 358.

**47.** When issuable allegations are made in the complaint and admitted in the answer, it is not necessary to introduce the pleading. McCaskill v. Walker, 147 N. C. 195, 61 SE 46. Admission in answer to a bill for infringement of a patent, that defendant had infringed it is all the proof that is required. Fox v. Knickerbocker Engraving Co. [C. C. A.] 165 F 442. Matter admitted by the pleadings need not be proved. McKenzie v. United R. Co. [Mo.] 115 SW 13. Admissions made in the pleadings forming the issues being tried are to be considered without further action. Wood v. Brotherhood of American Yeomen [Iowa] 117 NW 1123. Where general demurrer to complaint was overruled and an answer filed denying all allegations of the complaint and setting up a special defense to which demurrer was sustained and thereafter defendant admitted the allegations of the complaint, the action of the court in sustaining demurrer to the special defense was immaterial. Cameron v. Huntbach [Idaho] 98 P 1080. In a suit to foreclose a vendor's lien, if the vendee seeks enforcement of the contract and pleads tender of the purchase price, he admits that the vendor is entitled to a decree of foreclosure for the amount of the tender. Portsmouth Sav. Bank v. Yeiser [Neb.] 116 NW 38. In action to recover money advanced and commissions on purchases and sales of wheat as brokers, held plaintiff's cause of action was not admitted by the answer. Elliott v. McAllister, 106 Minn. 25, 117 NW 921. Stipulation that prayer of complaint be reduced and that credit due defendant be increased is merely consent to amendment of pleadings and not an admission of the allegations. Phelan v. New York, etc., R. Co., 113 NYS 35. By plea of "not guilty" in ejectment, defendant admitted possession of all land sued for. Cochran v. Kimbrough [Ala.] 47 S 709. Where defendant in ejectment pleaded "not guilty" and admitted that plaintiff had record title to all the land except a few acres to which defendant claimed title by adverse possession, plaintiff was entitled to judgment for all the land except such few acres. Id. Where one sues on a contract made by an agent and defendant admits the contract but claims different terms, he cannot complain that authority of the agent to make the contract was not submitted. Chicago, etc., R. Co. v. Delaney [Ark.] 110 SW 595. In action for conversion of stock, admissions in the answer that the stock was owned by plaintiff's alleged assignee and was thereafter transferred to defendant establishes such fact. McKee v. Bernheim, 130 App. Div. 424, 114 NYS 1080. In action on a contract to indemnify plaintiff for failure of another to pay over money while acting as agent, where the answer alleged that such person was acting as agent and did not deny the indebtedness, such facts need not be proved. Sanitas Co. v. Neizorawski [Wis.] 120 NW 292. Where a complaint alleged that plaintiff was entitled to a certain amount of water for irrigation purposes, and defendant admitted the allegations, except that he denied that the customary run of water was 40 inches for 4 days or any number of days each month, and alleged that for certain day it did not exceed 15 inches for 2 days, held plaintiff's right to 40 inches for 4 days each month was admitted, the denial extending only the fact that he had not received that quantity at a certain time. Collins v. Gray [Cal.] 97 P 142. In action for breach of contract where answer alleges that it was hastily drawn with the understanding that it did not incorporate the whole agreement and that certain stipulations were omitted, the answer must be construed to admit the instrument to be a valid agreement so far as it went, and as seeking to reform it by the addition of parol stipulations. Kansas City Packing Box Co. v. Spies [Tex. Civ. App.] 109 SW 432.

**48.** All proper unequivocal allegations of a complaint which are not denied are admitted. Jester v. Bainbridge State Bank, 4 Ga. App. 469, 61 SE 926; Kansas City S. R. Co. v. Skinner [Ark.] 113 SW 1019; Rodbell v. Gotham Despatch & Exp. Co., 111 NYS 528; Feld v. Loftis, 140 Ill. App. 530; Langham v. O'Meara [Ky.] 112 SW 928; Zettel v. Taylor, 128 App. Div. 251, 112 NYS 639; Madison v. Octave Oil Co. [Cal.] 99 P 176; Tate v. Wabash R. Co. 131 Mo. App. 107, 110 SW 622; St. Louis, etc., R. Co. v. State, 85 Ark. 561, 109 SW 545. In absence of a denial, allegations of a petition stand con-

tablished and need not be proved, but a party is not bound by a casual admission of what prudence would have required of him,[49] and admission by answer of allegations of an opinion or speculation does not convert matters alleged into positive facts.[50] Failure to plead is not an admission where a party is not required to plead.[51] An admission in a special paragraph of an answer will not overcome a general denial.[52] A

fessed where defendant is not an infant or nonresident. Wisconsin Nat. Loan & Bldg. Ass'n v. Pride, 136 Wis. 102, 116 NW 637. Under Code Civ. Proc. § 500, an answer need not formally admit anything; it is sufficient to refrain from denying. McKane v. Dady, 128 App. Div. 190, 112 NYS 650. Where there is no denial in a separate defense of any allegation of the complaint, they stand admitted for the purpose of determining the sufficiency of the defense. 556 and 558 Fifth Ave. Co. v. Lotus Club, 129 App. Div. 339, 113 NYS 886. Under Code Civ. Proc. § 500, requiring an answer to contain a general or special denial of allegations of the complaint, every thing not denied stands admitted. Strock Plush Co. v. Talcott, 129 App. Div. 14, 113 NYS 214. Allegation of an amendment allowed without objection from defendant who fails to amend his answer to deny it is admitted. McCloskey v. Goldman, 62 Misc. 462, 115 NYS 189. Under Comp. Laws 1897, § 2984, failure to deny under oath genuineness and execution of a written instrument made part of a complaint is an admission that it was signed as it purports to be, notwithstanding a sworn answer denying each and every allegation of the complaint. Puritan Mfg. Co. v. Toti [N. M.] 94 P 1022. This statute was not repealed by Comp. Laws 1897, § 2685. Id. Under Code, § 3622, providing that allegation of amount of damages shall not be deemed true, because of failure to controvert it, an answer to action for breach of contract denying nothing but damages raises no issue. Byrne v. Independent School Dist. [Iowa] 117 NW 983. Though by Civ. Code Proc. § 126, failure to answer does not go to the extent of admitting the amount of damages claimed, yet, in an action for alienation of affections, plaintiff is entitled to have the jury fix the amount from the allegations of the complaint. Adkins v. Kendrick [Ky.] 115 SW 814. Where material allegations of a verified petition in special proceedings are not denied by some counter affidavit, they stand sufficiently proved for purposes of ultimate order. In re Simmons, 130 App. Div. 350, 114 NYS 571. Where complaint claimed all the waters of a certain creek and defendant answered and alleged that he had acquired all the water by adverse user, plaintiff by failing to reply admitted defendant's right and it was proper to render judgment for defendant on the pleadings. State v. Quantic, 37 Mont. 32, 94 P 491. In suit to foreclose contract to convey, on purchaser's default, where purchaser does not deny the allegation that he agreed to pay specified interest on deferred payments, interest claimed is properly awarded. Vance Redwood Lumber Co. v. Durphy [Cal. App.] 97 P 702. Compliance with court rule No. 31, providing that defendant admitting that plaintiff has a cause of action as set forth, except so far as defeated by the answer, shall have the right to open and close, is in effect an abandonment by defendant of all pleadings which operate as a denial of any of the facts alleged in the petition, and restricts matters of defense to such as are specially pleaded in avoidance. Meade v. Logan [Tex. Civ. App.] 110 SW 188. Where plaintiff in action to subject land to payment of taxes filed no reply to supplemental answer that certain infant owners were not made parties, nor to an answer of such infants, the allegations of such pleadings are admitted. District of Clifton v. Pfirman, 33 Ky. L. R. 529, 110 SW 406. In action for delay in delivering goods shipped, where the answer did not contain a general denial and the special denial did not extend to the allegations of damages, plaintiff was not required to prove such allegations. Wabash R. Co. v. Newton, Weller & Wagner Co. [Tex. Civ. App.] 110 SW 992. Where a complaint alleges that a certain person is plaintiff's next friend and the averment is not specifically denied, it is admitted, as the validity of the appointment is not raised by a general denial. Berry v. St. Louis, etc., R. Co., 214 Mo. 593, 114 SW 27. If a mortgagor's grantee does not deny allegation in a complaint to foreclose that he assumed the mortgage, the allegation is taken as confessed. Kirby's Dig. § 6137. Kenney v. Streeter [Ark.] 114 SW 923. Such undenied allegation is not disproved by an agreed statement of facts showing that the grantee's deed did not mention the mortgage. It is inferred that there is some other writing. Id. Where complaint was by heirs to sell land to pay certain debts and answer denied such debts and affirmatively alleged payment, which was not denied by reply, defendants were entitled to dismissal. Row v. Back [Ky.] 115 SW 806. Failure to answer a cross bill held not prejudicial. Hickman v. Chaney [Mich.] 15 Det. Leg. N. 1003, 118 NW 993. In action for wrongful discharge, defendant is only required to plead as defense such grounds of justification as are not raised by denial. Kahn v. Guggenheimer, 114 NYS 767. Where a plea is bad for duplicity, plaintiff may demur on that ground or ignore it and plead over; if he pleads over, both matters alleged must be answered or the one unanswered will stand admitted. Webster v. State Mut. Fire Ins. Co. [Vt.] 69 A 319. No findings are necessary as to verified allegations not sufficiently denied. Roussin v. Kirkpatrick [Cal. App.] 95 P 1123. Allegations in plea not denied are taken as admitted, even though such allegations unnecessary and such as might have been proven under the general issue. Mansfield v. Chicago, B. & Q. R. Co., 132 Ill. App. 552.

**49, 50.** Sceville v. Brock [Vt.] 70 A 1014.

**51.** A defendant may answer an amendment admitting or denying the allegations thereof, but his failure to do so is not an admission of such allegations because he is not required to answer. Brown v. Atlanta, B. & A. R. Co. [Ga.] 62 SE 186.

**52.** In action by a stockholder on behalf

plea in confession and avoidance is not an admission where the general issue is filed.[53] An admission which is not as broad as the allegation does not entitle the opposite party to judgment without proof.[54] An admission, in order to be binding, must be made by one with authority.[55] Where an intervenor's transaction was subsequent to and independent of that at issue between the other parties, and his rights are not affected therein, no answer or demurrer to his petition is required but it is regarded as traversed by all the parties.[56]

*Judgment on the pleadings* See 10 C. L. 1251 should be granted when they present such a case of conceded facts as entitles either party to relief,[57] but is improper when there is any material issue of fact,[58] or where the court has jurisdiction of the merits

of a corporation to recover value of goods sold by president, claimed by defendant to have been owned by him, an admission in a special paragraph of the answer did not overcome a general denial in the answer. Tevis v. Hammersmith, 170 Ind. 286, 84 NE 337.

53. Plea of contributory negligence does not admit negligence of the pleader where general issue is also interposed. Birmingham R. L. & P. Co. v. Haggard [Ala.] 46 S 519. A plea of set-off does not admit plaintiff's account where a general issue is filed. Oliver v. Noel Const. Co. [Md.] 71 A 959.

54. Where answer in action on a note admits its execution but denies that it was executed on a week day, the admission not being as broad as the note. Cammack v. Newman [Ark.] 110 SW 802.

55. An answer by one defendant in a chancery suit cannot bind nor be used against a codefendant, either in a former or the present suit, unless the interest of the two parties be joint. Hudkins v. Crim [W. Va.] 61 SE 166. The act of an attorney for defendants in making an express admission by answer does not of itself make such admission the personal declaration of defendants, and such admission having been stricken by amendment, to be evidence against them, must be shown to have been made by their direction. McKane v. Dady, 128 App. Div. 190, 112 NYS 650. Admissions in answer of parents of infant defendants to bill of complaint against them are not binding on them. Glade Coal Min. Co. v. Harris [W. Va.] 63 SE 873. Admissions pleaded by an individual defendant in suit against county and others to establish highway line were not binding on the county. Quinn v. Monona County [Iowa] 117 NW 1100.

56. Guarantee Gold Bond, Loan & Sav. Co. v. Edwards, 7 Ind. T. 297, 104 SW 624.

57. Where general denial, followed by affirmative defenses, so inconsistent that they cannot stand together, plaintiff is entitled to judgment on the pleadings. Held not so inconsistent in action on contractor's bond. Helmer v. Title Guaranty & Surety Co., 50 Wash. 411, 97 P 451. Where allegations of amended complaint are admitted and affimative matter pleaded as cross complaint is insufficient to sustain judgment for defendant, plaintiff is entitled to judgment on the pleadings. Pugh v. Stigler [Okl.] 97 P 566. Where in action for loss occasioned by dishonesty of an agent defendant set up a counterclaim, judgment on pleadings for defendant was proper where it appeared that plaintiff had no case. John Slaughter Co. v. Standard Mach. Co., 148 N. C. 471, 62 SE 599. Where no reply is filed to matter of defense set up in the answer, defendant is entitled to judgment on the pleadings. T. G. Northwall Co. v. Osgood, 80 Neb. 764, 115 NW 308. Where new matter set up in a verified answer would prevent recovery if proved, and reply thereto was not verified as required by Mills Ann. Code, § 61, defendant was entitled to judgment on the pleadings. Hill Brick & Tile Co. v. Gibson, 43 Colo. 104, 95 P 293. Under Code Civ. Proc. § 547, providing for judgment on pleadings in favor of a party entitled thereto at any time after issue joined, where complaint does not state a cause of action, defendant is entitled to dismissal on the merits. Abramowitz v. Abramowitz, 113 NYS 798. Code Civ. Proc. § 547, expressly provides that if either party is entitled to judgment on the pleadings, the court may upon motion at any time after issue joined give such judgment. Mitchell v. Dunmore Realty Co., 60 Misc. 563, 112 NYS 659. Where defendant admitted that he owed notes sued on, plaintiff was entitled to judgment on the pleadings, notwithstanding defendants allegation that he had discharged the obligation of the notes by failure to perform a transaction inter alios acta. Kafka v. Wardwell, 112 NYS 1114. In action in fire policy where answer alleged that plaintiff was not owner of property destroyed, and that she had misrepresented the value of the property and reply merely denied each allegation of new matter, it was error to deny judgment on the pleadings. Hilburn v. Phoenix Ins. Co., 129 Mo. App. 670, 108 SW 576. Where complaint showed the cause to be statute barred and the answer set up the defense and plaintiff replied with matter in avoidance of the statute, held he could not object that dismissal of his action was not supported by the pleadings. Allen v. Allen's Estate [Neb.] 116 NW 509. A judgment in favor of one and against another joint defendant must be taken to have been rendered on the pleadings, and there cannot be in plaintiff's favor a joint and also a separate judgment on one count. Cameron v. Kanrich, 201 Mass. 451, 87 NE 605. On appeal from a judgment on the pleadings for defendant, on the ground of want of facts in the complaint, defenses set up in the answer will not be considered, but only the sufficiency of the complaint. Krug v. Kautz, 21 S. D. 461, 113 NW 623.

58. Where by answer and petition in intervention material questions of fact were involved which had to be determined before judgment could be rendered, it was proper to deny judgment on the pleadings. Cache La Poudre Irr. Ditch Co. v. Hawley, 43 Colo.

of the controversy,[59] and judgment for defendant is improper where he admits a portion of the claim.[60] It is error to grant a motion for judgment on the pleadings where the answer sets up an affirmative defense.[61] Statutes providing for such judgment are remedial and are to be liberally construed.[62] In New York such judgment may be either interlocutory or final.[63] By moving for judgment on the pleadings, a party admits the truth of allegations of his adversary and the untruth of his own allegations denied by his adversary.[64] The motion cannot be made when the verdict is in force.[65] By statute in some states, where an answer admits a part of plaintiff's claim, he may have judgment for the amount admitted.[66] In New York a municipal court has no power to grant judgment on the pleadings.[67] Where a plea should be verified to be of any effect, court may in an action of assumpsit render judgment without the formality of striking the plea from the files.[68]

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**Pleas,** see latest topical index.

## PLEDGES.

**§ 1. Definition and Nature, 1399.**
**§ 2. Right to Make, 1399.**
**§ 3. Property Subject to be Pledged, 1399.**
**§ 4. The Contract and Its Requisites, 1399.**
**§ 5. Rights, Duties, and Liabilities Under the Pledge, 1400.**

*The scope of this topic* is noted below.[69]

32, 95 P 317. In action by heirs to recover property transferred by a widow under a void will, defendants may not have judgment on the pleadings on the theory that the will was valid or that title was acquired by adverse possession, where such averment of title is denied in the reply. Neal v. Davis [Or.] 99 P 69. Where if defendant had not answered plaintiff could not have obtained a judgment, he could not have judgment on the pleadings where the answer was stricken. Allen v. Allen, 125 App. Div. 838, 110 NYS 303. In action to annul a tax deed, as a cloud on title, under Sayles' Ann. Civ. St. 1897, art. 5232n, held error to give judgment on the pleadings where its effect was to relieve defendant of proving certain facts. Hill v. Harris [Tex. Civ. App.] 108 SW 489. Motion under Code Civ. Proc. § 547, amended by Laws 1908, p. 462, permitting judgment on the pleadings after issue, is governed by the same rules as when motion is made at the trial, and if plaintiff is entitled to any relief the motion should be denied. Clark v. Levy, 114 NYS 890.

**59.** Where facts stated in an answer show that the court had no jurisdiction to hear the merits of the controversy, and it would be useless to plead a defense, it is error to render judgment on the pleading. Freight v. Wyandt [Kan.] 99 P 611.

**60.** Where answer in action for price of goods admits the claim to a certain amount. Kleinberg v. Deutsch, 115 NYS 91.

**61.** Proof of affirmative defense must be made before allegations of the answer can have any effect except to settle the issues. Erickson v. Elliott [N. D.] 117 NW 361.

**62.** Code Civ. Proc. § 547, authorizing judgment on pleadings after issue joined. White v. Gibson, 61 Misc. 436, 113 NYS 983. Code Civ. Proc. § 547, expressly provides that the court may at any time after issue joined, render judgment on the pleadings in favor of a party entitled thereto. Milliken v. Fidelity & Deposit Co., 129 App. Div. 206, 113 NYS 809. Code Civ. Proc. § 547, authorizing judgment on pleadings after issue joined, authorizes judgment in foreclosure proceedings where the answer presents no defense. White v. Gibson, 61 Misc. 436, 113 NYS 983.

**63.** Under Code Civ. Proc. § 547, authorizing judgment on the pleadings, judgment may be either interlocutory or final. White v. Gibson, 61 Misc. 436, 113 NYS 983.

**64.** Phenix v. Bijelich [Nev.] 95 P 351. On appeal from judgment on pleadings for plaintiff, the court must treat allegations of the answer as true. Kuker v. Snow [N. C.] 62 SE 909.

**65.** Motion for judgment on pleadings must be made before verdict or after it is set aside, and not while verdict is in force. Shearer v. Guardian Trust Co. [Mo. App.] 116 SW 456.

**66.** Under Code Civ. Proc. § 511, authorizing severance of action when part of the claim is admitted and judgment for part admitted, and § 547, authorizing judgment on pleadings where no defense is set up, where no defense is made to a part of a claim, the action may be severed and judgment on the pleadings rendered for part admitted. Electro-Tint Engraving Co. v. American Handkerchief Co., 130 App. Div. 561, 115 NYS 34.

**67.** Under Code Civ. Proc. § 547, and Laws 1908, p. 462, a municipal court has no power to grant judgment on the pleadings. Martin v. Lefkowitz, 62 Misc. 490, 115 NYS 64. Under Laws 1902, p. 1486, c. 580, a municipal court justice has no authority to grant a motion for judgment on the pleadings. Roberts v. Spero, 62 Misc. 261, 114 NYS 898.

**68.** Snow v. Merriam, 133 Ill. App. 641.

**69.** Matters peculiar to the pledge of negotiable instruments (see Negotiable Instruments, 10 C. L. 962) and to the rights of banks in respect to collateral security (see Banking and Finance, 11 C. L. 370) are more

§ 1. *Definition and nature.*[70]—See 10 C. L. 1253—A pledge is a deposit of goods by a debtor with his creditor as security for his debt,[71] with implied power of sale on default,[72] and is distinct from a mere assignment,[73] mortgage[74] or sale.[75] Parol evidence is admissible to show a transfer absolute on its face to be a pledge,[76] also to clear any ambiguity as to the debt secured[77] or the property pledged,[78] and the lex loci contractus[79] is a part of the contract of pledge.[80] Although the relation of pledgor and pledgee is not per se confidential,[81] it may be when involved with other relations.[82]

§ 2. *Right to make.*[83]—See 10 C. L. 1253—Possession without ownership does not give the right to make an unauthorized pledge,[84] but such authority may be implied from relationship[85] or official position.[86]

§ 3. *Property subject to be pledged.*[87]—See 10 C. L. 1253—The representative of property[88] or money may be pledged by endorsement and delivery.[89]

§ 4. *The contract and its requisites.*[90]—See 10 C. L. 1253—To constitute a valid pledge there must be delivery of the property,[91] either actual or symbolical,[92] not merely constructive[93] or a mere promise to deliver,[94] where pledgor has possession at time of pledge.[95] It is also necessary that there be a good consideration[96] and that the contract be otherwise valid.[97]

fully treated elsewhere, and pledge by way of mortgage (see Mortgages, 10 C. L. 855; Chattel Mortgages, 11 C. L. 611) is excluded, as is the regulation of the business of pawnbroking (see Pawnbrokers and Secondhand Dealers, 12 C. L. 1298). Validity of pledge incident to a gambling contract (see Gambling Contracts, 11 C. L. 1633) and matters common to all contracts (see Contracts, 11 C. L. 729) are also treated in other topics.

**70. Search Note:** See notes in 8 C. L. 1432; 25 L. R. A. 577; 50 Id. 714; 16 L. R. A. (N. S.) 227.

See, also, Pledges, Cent. Dig. §§ 1-13, 16-57; Dec. Dig. §§ 1-4, 6-25; 22 A. & E. Enc. L. (2ed.) 839, 842.

**71.** People v. German Bank, 126 App. Div. 231, 110 NYS 291.

**72.** Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754.

**73.** People v. German Bank, 126 App. Div. 231, 110 NYS 291.

**74.** Grand Ave. Bank v. St. Louis Union Trust Co. [Mo. App.] 115 SW 1071.

**75.** Joline v. Metropolitan Sec. Co., 164 F 144.

**76.** Sequeira v. Collins, 153 Cal. 426, 95 P 876. Corporate stock. Shattuck & Desmond Warehouse Co. v. Gillelen [Cal.] 99 P 348.

**77.** Contemporaneous conversation, showing pledge secured new contract, not reduced to writing by defendant's fault. Wehner v. Bauer, 160 F 240. Only debts intended are secured. Stokes v. Dimmick [Ala.] 48 S 66.

**78.** Contemporaneous statements concerning amount. Hill v. Kerstetter [Ind. App.] 86 NE 997.

**79.** Local custom as to seed. Dunlap v. Berthelot [La.] 47 S 882.

**80.** Place where dated, payable and accepted, rather than where signed. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754.

**81.** Colonial Trust Co. v. Hoffstot, 219 Pa. 497, 69 A 52.

**82.** Between customer and broker when stock is bought on margin. Weir v. Dwyer, 114 NYS 528.

**83. Search Note:** See notes in 14 L. R. A. 234.

See, also, Pledges, Cent. Dig. §§ 16, 17; Dec. Dig. § 6; 22 A. & E. Enc. L. (2ed.) 845, 848.

**84.** By bailee for personal benefit invalid. Schwab v. Oatman, 129 App. Div. 274, 113 NYS 910.

**85.** As wife. Daviess County Bank & Trust Co. v. Wright, 33 Ky. L. R. 45, 110 SW 361.

**86.** As cashier, statute construed. Powers v. Woolfolk, 132 Mo. App. 354, 111 SW 1187.

**87. Search Note:** See, Pledges, Cent. Dig. §§ 14, 15; Dec. Dig. § 5; 22 A. & E. Enc. L. (2ed.) 845.

**88.** Bill of lading. Scheuermann v. Monarch Fruit Co. [La.] 48 S 647. Warehouse receipt. Bank of Sparta v. Butts, 4 Ga. App. 308, 61 SE 298; State v. Robb-Lawrence Co. [N. D.] 115 NW 846. Receipt of one not a warehouseman not to be pledged. Grand Ave. Bank v. St. Louis Union Trust Co. [Mo. App.] 115 SW 1071.

**89.** Insurance policy; lien superior to beneficiary. Clark v. Southwestern Life Ins. Co. [Tex. Civ. App.] 113 SW 335

**90. Search Note:** See notes in 11 Ann. Cas. 793.

See, also, Pledges, Cent. Dig. §§ 1-40; Dec. Dig. §§ 1-17; 22 A. & E. Enc. L. (2ed.) 851, 872.

**91.** Donoven v. Travers [La.] 47 S 769.

**92.** Warehouse receipt. State v. Robb-Lawrence Co. [N. D.] 115 NW 846; Bank of Sparta v. Butts, 4 Ga. App. 308, 61 SE 298. Bill of lading. Scheuermann v. Monarch Fruit Co. [La.] 48 S 647.

**93.** Brick plant. Sequeira v. Collins, 153 Cal. 426, 95 P 876. Not mere assignment of nonwarehouse receipt. Grand Ave. Bank v. St. Louis Union Trust Co. [Mo. App.] 115 SW 1071.

**94.** Little v. Berry [Ky.] 113 SW 902.

**95.** Not apply to nonexisting property as brick to be burned; statute construed. Sequeira v. Collins, 153 Cal. 426, 95 P 876.

**96.** Extension of time sufficient. Central Sav. Bank v. Smith, 43 Colo. 90, 95 P 307.

§ 5. *Rights, duties, and liabilities under the pledge.*[98]—See 10 C. L. 1253—A pledge is liable only for the purpose made,[99] and a present liability is presumed where no time of payment is fixed.[1] The acceptance of a renewal note does not release the collateral,[2] but the acceptance of new and substituted collateral releases the old.[3] The prescription of the note pledged does not carry with it the prescription of the principal obligation.[4] One holding a note as collateral security for an existing debt is a holder for value to the extent of his lien.[5] A corporation may be forced to record the pledging of stock,[6] and such stock is taxable against the pledgor in the domicile of the corporation.[7]

*Possession and custody.*See 10 C. L. 1254—The pledgor is not entitled to possession of the pledged property until payment of the debt is made [8] or tendered,[9] but when this is done he may recover possession [10] by replevin,[11] unless the goods have passed out of pledgee's possession and control.[12] A corporation with which its own stock is pledged may retain the dividends on such stock to be accounted for later,[13] but the pledgor by agreement may vote the stock.[14] While retention of possession by pledgee is essential,[15] redelivery of commercial paper to pledgor for collection does not extinguish the lien.[16]

*Title to the property.*See 10 C. L. 1254—A pledgee does not acquire a general ownership in the thing pledged,[17] nor on holding after an invalid sale has he any different rights than before.[18]

*Duty to realize on collaterals and prevent loss.*See 10 C. L. 1254—The pledgee of a chose in action must use ordinary diligence to collect the same [19] or he will be chargeable with the results [20] of his delay,[21] and any sale of the pledge must be made to best advantage.[22]

Also existing debt. Graham v. Smith [Mich.] 15 Det. Leg. N. 933, 118 NW 726. Also surrender of old collateral for new, or promise of forebearance (Powers v. Woolfolk, 132 Mo. App. 354, 111 SW 1187), or previous debt as between themselves (Id.). But not as to other creditors. Walker v. Harris' Ex'rs [Ky.] 114 SW 775.

**97.** Security given for large loan under financial distress is not duress. Colonial Trust Co. v. Hoffstot, 219 Pa. 497, 69 A 52.

**98. Search Note:** See notes in 4 C. L. 1057; 17 L. R. A. 193; 33 Id. 237; 43 Id. 737; 44 Id. 243; 53 Id. 857; 3 L. R. A. (N. S.) 1199; 6 Id. 298, 487; 10 Id. 757; 32 A. S. R. 711; 83 Id. 392; 2 Ann. Cas. 271; 3 Id. 725; 4 Id. 1166; 6 Id. 107; 7 Id. 395; 10 Id. 1125.

See, also, Pledges, Cent. Dig. §§ 41-194; Dec. Dig. §§ 18-60; 22 A. & E. Enc. L. (2ed.) 862; 16 A. & E. Enc. P. & P. 629.

**99.** Not liable for breach of another contract. Goetzinger v. Donahue [Wis.] 119 NW 823. Statute construed. Bell v. Bank of California, 153 Cal. 234, 94 P 889.

**1.** Stokes v. Dimmick [Ala.] 48 S 66.

**2.** Morehead v. Citizens' Deposit Bank [Ky.] 113 SW 501. Especially if forged. Wise v. Williams, 162 F 161.

**3.** Powers v. Woolfolk, 132 Mo. App. 354, 111 SW 1187.

**4.** Meyer Bros. v. Colvin [La.] 47 S 447.

**5.** Statute construed. Graham v. Smith [Mich.] 15 Det. Leg. N. 933, 118 NW 726.

**6.** Goetzinger v. Donahue [Wis.] 119 NW. 823.

**7.** Equitable ownership, right to vote and collect dividends was retained. Central of Georgia R. Co. v. Wright, 166 F 153.

**8.** Warrington v. Kallauner [Mo. App.] 115 SW 492. Pledgee may hold all till all paid. Goetzinger v. Donahue [Wis.] 119 NW 823.

**9.** Unaccepted tender on the day due, though not kept good, releases lien. Moyer v. Leavitt [Neb.] 117 NW 698. Refusal excuses tender but misstatement does not. Bell v. Bank of California, 153 Cal. 234, 94 P 889. Pledgee waives tender by pleading sale as payment. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754.

**10.** As against one having property for safe keeping. In re Mills, 57 Misc. 315, 107 NYS 1057.

**11.** Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754.

**12.** Then suit for conversion. Bell v. Bank of California, 153 Cal. 234, 94 P 889. Recovery of similar property. Id.

**13.** Booth v. Consolidated Fruit Jar Co., 114 NYS 1000.

**14.** Goetzinger v. Donahue [Wis.] 119 NW 823.

**15.** Slight care over by pledger not invalidated. Grand Ave. Bank v. St. Louis Union Trust Co. [Mo. App.] 115 SW 1071.

**16.** Being chose in action; statute provides lien extinguished where possession necessary element of lien. Merced Bank v. Price [Cal.] 98 P 383.

**17.** Corporate stock. Booth v. Consolidated Fruit Jar Co., 114 NYS 1000. Owned by pledgor subject to lien. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754.

**18.** Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754.

**19.** Spires v. Southern States Phosphate & Fertilizer Co., 4 Ga. App. 323, 61 SE 300.

**20.** With interest. Felgner's Adm'rs v. Slingluff [Md.] 71 A 978.

*Conversion by the pledgee.*[See 8 C. L. 1435]—Conversion consists in the unlawful sale,[23] transfer or surrender to a third party [24] of the thing pledged, or neglect to recover back the same after release from the writ taken under,[25] unless the pledgee retain an exact equivalent [26] or a right of election as to such disposition of the property,[27] irrespective of demand by the pledgor.[28] The cashing of a pledged check is not conversion.[29] It may occur that the pledgor has more than the one remedy, as, for example, he may take a money judgment where a tardy surrender would be inequitable,[30] may sue for damages or in assumpsit, or to enforce his right of redemption; [31] but by accepting the benefits of a conversion,[32] or by delaying to object,[33] he waives his right of recovery. If his suit for conversion becomes barred, it is immaterial that it involves an accounting not barred.[34]

*Redemption and surrender.*[See 8 C. L. 1435]—The pledgee surrenders the pledged property to a third party at his own risk.[35] In a bill to redeem, one with whom complainant has negotiated a sale is not a necessary party.[36] A pledgor may redeem from a broker employed by him to find a purchaser and who buys from pledgee on his own account.[37]

*Default, foreclosure and sale.*[See 10 C. L. 1254]—After default the pledgee may sell [38] in a public place [39] the goods pledged, even though exempt property,[40] as authorized in the contract, reasonable notice of sale [41] being given and demand being made when required.[42] The pledgee may not purchase unless specially authorized by consent or statute,[43] but when so authorized has the same rights as any other purchaser.[44] Where disagreement prevents the performance of conditions precedent to the enforcement of the pledge, equity will supply a remedy.[45] The pledgor may waive his right to object as to time and place of sale, either expressly [46] or by unreasonable delay

21. Not alone create liability or release pledge. Loeb v. German Nat. Bank [Ark.] 113 SW 1017.

22. Hinckley v. Colvin, 233 Ill. 139, 84 NE 174. Was offered double the amount sold for; held liable for actual value. German-American State Bank v. Spokane Columbia River R. & Nav. Co., 49 Wash. 359, 95 P 261.

23. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754. Without notice. Drake v. Pueblo Nat. Bank [Colo.] 96 P 999. Stock bought on margin, sold without notice, damages allowed. Clappe v. Taylor, 125 App. Div. 605, 109 NYS 1072.

24. When on invalid writ prior payment of debt did not avail. MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 NE 801. Neglect to notify of taking. Id.

25. Attachment dismissed. MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 NE 801.

26. As like shares of stock. Bell v. Bank of California, 153 Cal. 234, 94 P 889.

27. Corporate bonds pledged for personal debt, conversion did not date from time pledged or demanded but from the time of transfer by pledgee. MacDonnell v. Buffalo Loan, Trust & Safe Co., 193 N. Y. 92, 85 NE 801.

28. Immaterial except as evidence where possession lawful. MacDonnell v. Buffalo Loan, Trust & Safe Co., 193 N. Y. 92, 85 NE 801.

29. Janson v. Potruch, 62 Misc. 459, 115 NYS 111.

30. Treadwell v. Clark, 124 App. Div. 260, 108 NYS 733.

31. Bell v. Bank of California, 153 Cal. 234, 94 P 889.

32. Reynolds Banking Co. v. Neisler, 130 Ga. 789, 61 SE 828.

33. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754.

34. Statute of limitations. Bell v. Bank of California, 153 Cal. 234, 94 P 889.

35. Legal process must be valid. MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 NE 801.

36. Hinckley v. Colvin, 233 Ill. 139, 84 NE 174.

37. Broker did not represent adverse interests. Hinckley v. Colvin, 233 Ill. 139, 84 NE 174.

38. Bush v. Adams, 165 F 802.

39. Stock bought on the curb may be sold there. Weir v. Dwyer, 62 Misc. 7, 114 NYS 528.

40. Kyle v. Sigur, 121 La. 888, 46 S 910.

41. Time, place and right to redeem. Drake v. Pueblo Nat. Bank [Colo.] 96 P 999. Public sale without public notice is invalid though personal notice unnecessary. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754.

42. As in case of a note indefinitely extended. Drake v. Pueblo Nat. Bank [Colo.] 96 P. 999.

43. Reevcs & Co. v. Bruening, 16 N. D. 398, 114 NW 313.

44. May buy for less than actual value on due notice. Bush v. Adams, 165 F 802.

45. Stokes v. Dimmick [Ala.] 48 S 66.

46. Stock bought on margin. Weir v. Dwyer, 62 Misc. 7, 114 NYS 538

with knowledge.[47] All pleadings will be construed most favorable to the enforcement of the pledge,[48] and foreclosure will not be restrained except to prevent irreparable injury to pledgor.[49]

*Right of action on the debt.* See 10 C. L. 1254—The pledgee of commercial paper may bring an action [50] in his own name [51] to realize on the same when due,[52] or may join with the pledgor,[53] or may join the pledgor as a party defendant.[54] The pledgor may bring suit on the debt pledged, subject to the pledgee's lien,[55] by making the pledgee party to the action.[56] A pledgee purchasing at the foreclosure of the pledged mortgage does not become the absolute owner of the property bought.[57] A mortgagor may not attack the right of the pledgee,[58] nor may the pledgor disturb a compromise not prejudicial to his rights, though unauthorized.[59] The collateral note and that of the pledgor are distinct.[60]

*Effect of insolvency and bankruptcy.* See 8 C. L. 1488—The pledgee's possession of the goods,[61] the validity of the pledge,[62] and the application of the security in accordance therewith,[63] or any existing legal relations, are not disturbed by bankruptcy or insolvency of the pledgor.[64]

*Equities and defenses between one of the parties and third persons.* See 10 C. L. 1255 A pledge has preference [65] over other debts or attempted liens on the same property,[66] and the pledge of a symbolical representative [67] is entitled to secure possession from the custodian,[68] since the relation of bailor and bailee exists between them,[69] and the pledgee is in the privileged position of a bona fide purchaser for value.[70] Notes pledged as collateral will be released under the same circumstances as a surety personally bound.[71] A guarantor may with the debtor's consent pay the debt and demand the thing pledged [72] to be held by him as collateral.[73] Payment to the pledgor [74]

**47.** Value increased meantime. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754.

**48.** Stokes v. Dimmick [Ala.] 48 S 66.

**49.** Not unless insolvency or nonascertainable value be alleged. Howley v. Charles Francis Press, 127 App. Div. 646, 111 NYS 1080.

**50.** Packard v. Abell, 113 NYS 1005.

**51.** By statute, common-law rule adverse. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754.

**52.** Mortgage and note, also corporate dividend. Union Trust Co. v. Hasseltine, 200 Mass. 414, 86 NE 777.

**53.** Though really action of pledgee. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754.

**54.** Vendor's lien note exceeding debt. Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. [Tex. Civ. App.] 111 SW 417.

**55.** By statutory provision. Merced Bank v. Price [Cal.] 98 P 383.

**56.** Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754.

**57.** Holds as trustee for pledgor and for own security. Union Trust Co. v. Hasseltine, 200 Mass. 414, 86 NE 777.

**58.** Merced Bank v. Price [Cal.] 98 P 383.

**59.** Zollman v. Jackson Trust & Sav. Bank, 238 Ill. 290, 87 NE 297.

**60.** May collect attorney fee on each. First Nat. Bank v. J. I. Campbell Co. [Tex. Civ. App.] 114 SW 887.

**61.** Booth v. Atlanta Clearing House Ass'n [Ga.] 63 SE 907.

**62.** Mortgage pledged. In re Falconer Worsted Mills [C. C. A.] 165 F 637.

**63.** In re Merrill, 162 F 590; Stires v. First Nat. Bank [Neb.] 119 NW 258; First Nat. Bank v. J. I. Campbell Co. [Tex. Civ. App.] 114 SW 887.

**64.** Though collecting agent for pledgee. In re Merrill, 162 F 590.

**65.** Where corporation stock over debt due corporation. Central Sav. Bank v. Smith, 43 Colo. 90, 95 P 307. Vendor's lien note pledged on proceeds of sale subject only to intervening liens without notice. In re McGehee, 166 F 928.

**66.** A firm creditor in possession of pledged insurance policies has preference over one to whom a member of the firm gave his note reading, "This note is to be paid out of my insurance before any other claim is paid." Kelley v. Hanes, 238 Ill. 163, 87 NE 282.

**67.** Warehouse receipt. Bank of Sparta v. Butts, 4 Ga. App. 308, 61 SE 298.

**68.** May replevin. Bank of Sparta v. Butts, 4 Ga. App. 308, 61 SE 298.

**69.** State v. Robb-Lawrence Co. [N. D.] 115 NW 846.

**70.** Bank of Sparta v. Butts, 4 Ga. App. 308, 61 SE 298.

**71.** Daviess County Bank & Trust Co. v. Wright, 33 Ky. L. R. 457, 110 SW 361.

**72.** Corporate stock. McKee v. Bernheim, 130 App. Div. 424, 114 NYS 1080.

**73.** Hinckley v. Colvin, 233 Ill. 139, 84 NE 174.

**74.** Powers v. Woolfolk, 132 Mo. App. 354, 111 SW 1137.

by the maker of the note with knowledge of the pledge is no defense,[75] and in the case of negotiable paper it is necessary that the maker have notice or knowledge.[76] The assignee of pledged stock[77] transferred without consent of the pledgor is subrogated to the pledgee's right[78] only.[79] A purchaser of pledged commercial paper is chargeable with all unapplied payments of which he had knowledge,[80] but not with secret and undisclosed advances,[81] and one who buys pledged stock from the pledgor subject to the lien may, after tender of the debt and refusal sue the pledgee for conversion,[82] but where he buys from the pledgee there is no implied warranty of value.[83] The pledgee of an insurance policy may enforce an option without the insured being made a party,[84] and where the company as pledgee makes an invalid sale, the beneficiary may recover for his loss.[85] The pledge of corporation stock will be protected.[86]

**Pointing Firearms,** see latest topical index.

### POISONS.[87]

*The scope of this topic* is noted below.[88]

Opium and its compounds being drugs of a poisonous nature, the regulation or prohibition of its sale is a valid exercise of the police power of the state.[89] An act prohibiting the sale of poison except on prescription is not invalid because no maximum penalty is fixed[90] nor because it contains no prohibition against giving it away.[91]

**Policemen; Police Power; Pollution of Waters; Poor Laws; Poor Litigants; Posse Comitatus,** see latest topical index.

### POSSESSION, WRIT OF.[92]

*The scope of this topic* is noted below.[93]

Original proceeeding by rule is unauthorized in the absence of statute.[94] On ap-

**75.** Landa v. Mechler [Tex. Civ. App.] 111 SW 752.

**76.** Warehouse receipt. Bank of Sparta v. Butts, 4 Ga. App. 308, 61 SE 298.

**77.** Not conversion for pledgee to assign debt and collateral. Potter v. Ketterlinus, 221 Pa. 35, 69 A 1119.

**78.** Pledgee divested of all interest. People v. Corrigan, 129 App. Div. 62, 113 NYS 504. Also of control and right to question expense of collecting. Weeks v. Gattell, 125 App. Div. 402, 109 NYS 977.

**79.** No title. Unity Banking & Sav. Co. v. Boyden [C. C. A.] 159 F 916.

**80.** Usurious interest. Buse v. First State Bank, 105 Minn. 323, 117 NW 490.

**81.** Warehouse advances not shown on receipt. Bank of Sparta v. Butts, 4 Ga. App. 308, 61 SE 298.

**82.** McKee v. Bernheim, 130 App. Div. 424, 114 NYS 1080.

**83.** Worthless stock of insolvent corporation. Sather v. Home Sec. Sav. Bank, 49 Wash. 672, 96 P 229.

**84.** State Nat. Bank v. U. S. Life Ins. Co., 238 Ill. 148, 87 NE 396.

**85.** Interest. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754.

**86.** Not ousted or security lessened. Goetzinger v. Donahue [Wis.] 119 NW 823.

**87.** See 8 C. L. 1440.

**Search Note:** See Poisons, Cent. Dig.; Dec. Dig.; 22 A. & E. Enc. L. (2ed.) 911.

**88.** It treats only regulation of sale of poisons and liability for negligence. As to homicide by poisoning, see Homicide, 11 C. L. 1799, and as to regulaton of drug business, see Medicine and Surgery, 12 C. L. 840.

**89.** St. 1907, p. 126, c. 102, § 8, prohibiting sale of opium compounds except on prescription held valid. Ex parte Hallawell [Cal. App.] 97 P 320.

**90.** Ex parte Hallawell [Cal. App.] 97 P 320.

**91.** St. 1907, p. 126, c. 102, § 8. Ex parte Hallawell [Cal.] 99 P 490.

**92.** See 8 C. L. 1441.

**Search Note:** See Assistance, Writ of, Cent. Dig.; Dec. Dig.; Ejectment, Cent. Dig. §§ 380-395, 398-404; Dec. Dig. § 120; Execution, Cent. Dig. §§ 806-814; Dec. Dig. § 280; Mortgages, Cent. Dig. §§ 1568-1577; Dec. Dig. § 544; 16 A. & E. Enc. P. & P. 744.

**93.** This topic treats only of the common-law writ of possession; writs issued for the purpose of granting possession in particular actions being treated in such topics as Ejectment (and Writ of Entry), 11 C. L. 1153; Forcible Entry and Unlawful Detainer, 11 C. L. 1484; Replevin, 10 C. L. 1514, and the like.

**94.** Gary v. Brenholz, 120 La. 1028, 46 S 12.

plication for an alias writ, the prior decree is conclusive where the issues are stantially the same.[95] Execution of the writ will not be restrained at the instance of persons having no interest in the property involved.[96] To constitute a legal execution, delivery of possession must be effectual and not merely formal.[97]

### POSSESSORY WARRANT.[98]

This topic treats only of the possessory warrant under the Georgia practice.

The right to the writ is dependent on the manner in which possession of the property was acquired.[99]

## POSTAL LAW.

§ 1. The Federal Postal System and Its Administration, 1404.
§ 2. Use of the Mails and Mail Matter, 1405.
§ 3. Postal Crimes and Offenses, 1406.

*The scope of this topic* is noted below.[1]

§ 1. *The federal postal system and its administration.*[2]—See 10 C. L. 1255.—The appointment of a supervisor of delivery requires the approval of the postmaster general,[3] and to entitle one to a salary as superintendent, he must be a de jure an officer.[4]

The United States' money order system is not a business in a commercial sense but a branch of the governmental function of carrying mails.[5] The act of congress making it a misdemeanor for a postmaster to issue money orders without first having received the money therefor is notice of the postmaster's limitation of authority,[6] and one in whose favor a postmaster or postal clerk issues a money order, without first receiving an application and payment therefor, is liable for its value though he may have paid such agent in good faith in other ways.[7] A postmaster and his money order superintendent are not "disbursing officers" so as to give the court of claims jurisdiction over an action by them to recover a sum of postal funds alleged to have been stolen,[8] but as to losses in post offices by robberies and other casualties, provi-

95. Jeffers v. Davis, 85 Ark. 242, 107 SW 1175.

96. Where application for injunction had reference to other land. Jett v. Hunter [Tex. Civ. App.] 115 SW 309.

97. No execution where sheriff merely sent purchasers under a decree a statement that premises were vacant and delivered to them as by law commanded. Jeffers v. Davis, 85 Ark. 242, 107 SW 1175.

98. See 10 C. L. 1255.

**Search Note:** See 22 A. & E. Enc. L. (2ed.) 1032.

99. Animals lawfully impounded cannot be recovered by possessory warrant. Dew v. Smith, 130 Ga. 564, 61 SE 232. For subsequent unlawful detention, owner's remedy is trover. Id.

1. **It includes** the postal system and its administration. **It excludes** matters of administration applicable to the public service generally (see Public Contracts, 10 C. L. 1285; Offices and Public Employes, 12 C. L. 1131), the presumption as to receipt of letters (see Evidence, 11 C. L. 1346, and the service of notices and pleadings by mail (see Pleading, 12 C. L. 1323; Motions and Orders, 12 C. L. 893; Negotiable Instruments, 12 C. L. 1018).

2. **Search Note:** See notes in 6 C. L. 1073; 24 L. R. A. 110; 25 Id. 341; 70 Id. 989; 3 L. R. A. (N. S.) 136; 5 Id. 459; 6 Id. 424; 12 Id. 166, 610; 14 Id. 292.

See, also, Post Office, Cent. Dig. §§ 1-19; Dec. Dig. §§ 1-12; 9 A. & E. Enc. L. (2ed.) 15; 22 Id. 1036, 1039.

3. No appointment of clerk as supervisor of delivery by mere designation by postmaster on roster without approval of roster by postmaster general. Jackson v. United States, 42 Ct. Cl. 39. Under Act March 2, 1889 (25 Stat. L. p. 841), clerk in Hartford post-office designated on roster kept as "superintendent of delivery," but in Washington as "distributor," "foreman of distributors," and as "foreman," not entitled to salary as superintndent, record not showing approval of roster. Id.

4. One not appointed superintendent not entitled to salary, though having performed duties as such. Jackson v. United States, 42 Ct. Cl. 39.

5. Government not bound in respect to money orders exactly as an individual would be. United States v. Bolognesi, 164 F 159.

6. Rev. St. U. S. § 4030 (U. S. Comp. St. 1901, p. 2742). United States v. Bolognesi, 164 F 159.

7. Payment in full of money order in foreign money, no application having been made, no defense. United States v. Bolognesi, 164 F 159.

8. Henderson v. United States, 42 Ct. Cl. 449.

sion is made specially as to the manner in which relief to postmasters can be obtained,[9] and this remedy is exclusive.[10]

An action for libel against the assistant attorney general for the post office department and an inspector of such department, based on the promulgation by them of a fraud order against plaintiff, does not have such rational connection with official duties under the "revenue law" as to make it removable from a state to a federal court by certiorari.[11]

§ 2. *Use of the mails and mail matter.*[12] See 10 C. L. 1256—Administrative orders of the postmaster general as to mailable matter cannot be judicially reviewed except for error of law;[13] hence a bill in equity to enjoin the enforcement of a fraud order made by him is insufficient where it shows a hearing upon due notice on charges of fraud clearly within the statute, but does not show what proofs were adduced,[14] but his authority is neither unbounded, arbitrary, nor discretionary, but limited, and its exercise governed by the acts of congress which confer it and by the laws of the land, and his violation or disregard of either is remediable in the courts.[15] Where ground for equitable interference exists, complainant has the burden of showing irreparable injury.[16]

That a large majority of the letters that are addressed to one party in its own name alone are in reality intended for another does not clothe the latter with the right that the postmaster shall be directed to deliver all mail of that character to it in direct opposition to the address upon the letters,[17] and a ruling in such case by the post office department will not be interfered with by injunction where the party asking for injunctive relief has no clear legal right to the relief sought.[18]

The government in the operation of the post office department is in law regarded as a bailee of the mail matter intrusted to it for transmission,[19] and though under no legal obligation to the senders or addressees of ordinary unregistered mail lost or

**9.** Act of March 17, 1882 (22 Stat. L. 29), amended by Act of May 9, 1888 (Supp. R. S. 91, 585-586), amended by Act of June 11, 1896 (29 Stat. L. 458), to postmasters, but not to clerks or assistants. Henderson v. United States, 42 Ct. Cl. 449.

**10.** No right of action under Rev. Stat. §§ 1059, 1062, exclusive remedy being Act of March 17, 1882 (22 Stat. L. 29), with amendments. Henderson v. United States, 42 Ct. Cl. 449.

**11.** Cause not removable under Rev. St. § 643 (U. S. Comp. St. 1901, p. 521), bill not showing that act had rational connection with duties under a "revenue law" and in same way affected the revenue of the government. People's United States Bank v. Goodwin, 162 F 937.

**12. Search Note:** See notes in 58 A. S. R. 595; 7 Ann. Cas. 125.
See, also, Post Office, Cent Dig. §§ 20-44; Dec. Dig. §§ 13-26; 18 A. & E. Enc. L. (2ed.) 829; 22 Id. 1054.

**13.** Appleby v. Cluss, 160 F 984. **Fraud order** under Rev. St. §§ 3929, 4041, as amended by Act Sept. 19, 1890, c. 909, §§ 2, 3, 26 Stat. 466, and Act March 2, 1895, c. 191, § 4, 28 Stat. 964 (U. S. Comp. St. 1901, pp. 2686, 2688, 2749), in absence of fraud or gross mistake of fact, is conclusive and not reviewable in doubtful case where there is some evidence which is satisfactory to the postmaster to sustain same. People's United States Bank v. Gilson [C. C. A.] 161 F 286.

**14.** Rev. St. §§ 3929, 4041 (U. S. Comp. St. 1901, pp. 2686, 2749). Appleby v. Cluss, 160 F 984.

**15.** People's United States Bank v. Gilson [C. C. A.] 161 F 286. The execution of a fraud order may be enjoined in equity on the ground: (1) that it was issued in a case which was not within the jurisdiction of the postmaster general; (2) that it was issued in the absence of any evidence to sustain it or upon facts found, conceded or established beyond dispute which do not sustain it, or that its issuance was induced by any other error of law; (3) that through fraud or gross mistake of fact the postmaster general fell into a misapprehension of the facts which caused him to issue an order which was palpably wrong. Id.

**16.** Complainant held not to have established essential facts by pleadings. No evidence introduced. People's United States Bank v. Gilson [C. C. A.] 161 F 286.

**17.** National Life Ins. Co. v. National Life Ins. Co., 209 U. S. 317, 52 Law. Ed. 808.

**18.** Ruling that mail addressed to "National Life Insurance Co." at Chicago, Ill., without giving street or office address, be delivered to the corporation of that name and not to a company subsequently incorporated with similar name, not to be interfered with because majority of mail was intended for latter company. Postal Laws and Regulations of 1902, par. 4 of § 645. National Life Ins. Co. v. National Life Ins. Co., 209 U. S. 317, 52 Law. Ed. 808.

**19.** United States v. American Surety Co., 161 F 149.

stolen in transit, yet, where mail matter is stolen by the government clerks, the government's moral obligation to pay the bailors the amount recovered on the bond of the clerks in default is sufficient to enable the government to maintain an action on the bond,[20] but to warrant a recovery the evidence must establish a breach of the fidelity bond.[21]

§ 3. *Postal crimes and offenses.*[22]—See 10 C. L. 1257—The power of congress authorizes all measures necessary to secure the safe and speedy transmission of the mails [23] and to prescribe what may be carried.[24] State courts may however, punish for a crime committed through the mails as a medium without in any sense impunging the right of the national government to control the mails.[25] The venue of a crime committed by mail is at the point where the matter transmitted by mail is delivered and takes effect.[26]

*Obscene matter.*See 10 C. L. 1257—Any person who uses the mails for the transmission of matter which is lewd, lascivious or indecent regardless of the relationship between the sender and addressee [27] and regardless of the effect that the receipt of the article sent may have on the mind of the particular addressee [28] is guilty of a criminal offense. The test as to whether a publication comes within the prohibited class is its tendency to deprave and corrupt the minds of those who are open to such influence and into whose hands it may come,[29] but the rule is broader where indecent language is used upon a postal card or upon the outside of a piece of mail.[30] Whether a letter which is the basis of a charge comes within the scope of the statute is a question for the court to determine on a motion to quash the indictment.[31] Knowledge of the character of the matter mailed is an essential element of the offense,[32] and the indictment must charge knowledge of the character and contents of the articles mailed [33] but it need not set out the same nor further describe and characterize them

**20.** United States v. American Surety Co., 161 F 149. No defense to action for breach of bond by rifling letters that the United States is not liable to senders for losses sustained. United States v. American Surety Co. [C. C. A.] 163 F 228.

**21.** Evidence of guilt of a postal clerk of stealing certain letters held insufficient to establish breach of bond. United States v. American Surety Co., 161 F 149. Evidence held sufficient. United States v. American Surety Co. [C. C. A.] 163 F 228, rvg. 161 F 149.

**22. Search Note:** See Post Office, Cent. Dig. §§ 45-90; Dec. Dig. §§ 27-53; 9 A. & E. Enc. L. (2ed.) 15; 18 Id. 829; 22 Id. 1070; 16 A. & E. Enc. P. & P. 759.

**23.** Congress in enacting such legislative acts under the U. S. Const., art. 1, § 8, and not under the police power. United States v. Musgrave, 160 F 700.

**24.** A statute making it unlawful to solicit orders for intoxicating liquors in prohibited territory through circulars does not conflict in any particular with such power. Zinn v. State [Ark.] 114 SW 227. Freedom to use the mails does not extend to their use as a means for committing crime. Rose v. State, 4 Ga. App. 588, 62 SE 117.

**25, 26.** Rose v. State, 4 Ga. App. 588, 62 SE 117.

**27.** Letter from husband to wife held within prohibition of Rev. St. § 3893, as amended by Act Sept. 26, 1888, c. 1039, § 225, Stat. 496 (U. S. Comp. St. 1901, p. 2658). United States v. Musgrave, 160 F 700.

**28.** If article is of such a nature that its reading would, in the opinion of reasonable persons or jurors, have a tendency to corrupt the minds of reasonable persons and suggest to minds of either sex thoughts of impure or libidinous character, it comes under Rev. St. § 3893, as amended by Act, Sept. 26, 1888, c. 1039, § 2, 25 Stat. 496 (U. S. Comp. St. 1901. p. 2658. United States v. Musgrave, 160 F 700.

**29.** Conviction for sending obscene, lewd and lascivious publication through mails in violation of Rev. St. § 3893 (U. S. Comp. St. 1901, p. 2658) held sustained by the evidence. MacFadden v. United States [C. C. A.] 165 F 51. Letter held to contain matter of such character as to render mailing thereof indictable under Rev. St. § 3893 (U. S. Comp. St. 1901, p. 2658). United States v. Benedict, 165 F 221. Letters held not to contain obscene, lewd or lascivious matter within Rev. St. § 3893 (U. S. Comp. St. 1901, p. 2658) so as to make its mailing an indictable offense. United States v. O'Donnell, 165 F 218.

**30.** Such case covered by Act of Sept. 26, 1888, § 2 (25 Stat. 496).

**31.** Indictment under Rev. St. § 3893 (U. S. Comp. St. 1901, p. 2658). United States v. O'Donnell, 165 F 218.

**32.** Konda v. United States [C. C. A.] 166 F 91.

**33.** Shepard v. United States [C. C. A.] 160 F 584. Indictment under Rev. St. § 3893 (U. S. Comp. St. 1901, p. 2658) charging that defendant unlawfully and knowingly mailed an obscene, lewd and lascivious pamphlet, held to sufficiently charge knowledge of pamphlet's character. Konda v. United States [C. C. A.] 166 F 91.

than that they were obscene, lewd and lascivious;[34] and under such indictment the averment that prohibited matter was deposited in a post office is sustained by proof that it was deposited in letter box and taken therefrom by the United States agents and stamped and sent out.[35] An indictment charging one with having deposited in the mails unmailable matter includes the charge that he caused such matter to be deposited,[36] but the indictment is not broadened in scope by a further characterization of such matter as of an indecent character.[37] An averment that a pamphlet charged to have been mailed was "obscene, lewd and lascivious," is not objectionable as a conclusion of law,[38] and, where it states that the matter was too obscene to be spread of record, it sufficiently identifies the pamphlet by describing its size and appearance by setting forth the title page.[39] An indictment for mailing a letter giving information where, how, of whom and by what means, articles and "things" designed and intended for the procuring of an abortion might be obtained, must specify the articles or "things" about which defendant's letter is alleged to have given information.[40] Instructions must be free from prejudicial error.[41] A corporation has capacity to commit the crime of mailing obscene nonmailable matter,[42] and to fasten knowledge upon the corporation requires no other or different kind of legal inference than is necessary to justify punative damages in cases of tort against a corporation.[43]

*Use of mails to defraud* See 10 C. L. 1257 involves the use of the mails as an incident to the execution of a fraudulent design,[44] but "any scheme or artifice to defraud" when furthered through the mails is within the statute [45] and any one participating, assisting or acquiring therein is liable.[46] To support an indictment a letter need not in and of itself be effective to execute a scheme to defraud.[47] In a prosecu-

**34.** In indictment under Rev. St. § 3894, as amended by Act of Sept. 26, 1888, c. 1039, § 2, 25 Stat. 496 (U. S. St. 1901, p. 2658), averment that defendant knowingly deposited in post office for mailing circulars, etc., held sufficient. Shepard v. United States [C. C. A.] 160 F 584.

**35, 36.** Shepard v. United States [C. C. A.] 160 F 584.

**37.** United States v. O'Donnell, 165 F 218.

**38, 39.** Konda v. United States [C. C. A.] 166 F 91.

**40.** United States v. Somers, 164 F 259. Indictment under Rev. St., § 3893, as amended by Act Sept. 26, 1888, c. 1039, 25 Stat. 496 (U. S. Comp. St. 1901 p. 2658), setting out a written letter inquiring for medicine or means for accomplishing abortion and reply which when read in connection with inquiry offers for a stated consideration to accomplish desired result by some treatment or operation, held sufficient though not specifying the particular means; "thing" in statute including any kind of treatment or operation. Id.

**41.** Instructions in prosecution for depositing prohibited matter in mails considered and held nonprejudicial. Shepard v. United States, [C. C. A.] 160 F. 584. Instruction that defendant was chargeable with knowledge of the character of the matter mailed and that he could not defend himself as establishing absence of knowledge of contents by showing that he negligently refrained from ascertaining contents held erroneous as adding to penal code. Konda v. United States [C. C. A.] 166 F 91.

**42.** Corporation has capacity to commit crime prohibited by Rev. St. 3893, as amended (U. S. Comp. St. 1901 p. 2658). United States v. New York Herald Co., 159 F 296.

**43.** Rev. St. 3893 amended by U. S. Comp. St. 1901, p. 2658, held applicable to corporation organized for purpose of publishing a newspaper and proof of mailing of newspaper containing obnoxious matters sufficient to show knowledge. United States v. New York Herald Co., 159 F 296.

**44.** To constitute an offense under Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696). the person charged (1) must have devised some scheme or artifice to defraud; (2) must have intended to effect such scheme or artifice by opening, or intending to open correspondence with some other person or persons through the United States post office or by inciting some other person to so open communication with him and (3) that in executing such scheme or attempting to do so he either placed in the post office of the United States a letter, circular or advertisement or received one therefrom. Letter deposited need not be effective for the purpose intended. United States v. Smith, 166 F 958.

**45.** Rev. St. § 5480, as amended by Act March 6, 1889, c. 393, 25 Stat. 873 (U. S Comp. St. 1901, p. 3696), not confined to schemes specifically mentioned. Lemon v. United States [C. C. A.] 164 F 953.

**46.** Participation, assistance or acquiescence by officers of a labor union that sends letters and circulars through mail to customers of a manufacturing corporation to induce them to withdraw their custom for purpose of ruining business or forcing it to pay a fine for employing nonunion men, held to render participants liable under Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696). United States v. Raish, 163 F 911.

**47.** Under Rev. St. § 5480, as amended in 1889, held sufficient that letter was designed

tion for conspiracy to use the mails to carry out a scheme to defraud, the government must allege and prove that the defendant devised a scheme to defraud, used the mails, and either sent or received mail connected with the scheme;[48] but in the indictment the names of as many of the persons defendant planned to defraud may be used as the pleader may know, and all mail connected with the scheme shown to have passed through the post office to any person though not named in the indictment is admissible upon the question of the existence of the scheme,[49] and it is sufficient to show that written or printed matter about the scheme charged was mailed to one of the persons named as the persons defendant planned to defraud and that copies of the same printed matter were circulated in the mails throughout the United States to a mailing list.[50] The indictment though not in the language of the statute is sufficient if the averments bring the charge within the meaning and substance of the statute [51] and with reasonable certainty apprises the defendant of the accusation which he will be required to meet,[52] not more than three offenses committed within the same six calendar months may be charged in the same indictment,[53] but this provision does not prevent the joinder in one indictment of counts charging offenses in different periods of six months,[54] nor the imposition of sentences on each of such counts in case of conviction.[55] Joinder of more than three offenses in one indictment should be questioned before sentence and can be cured by dismissing the excess counts or by imposing but one sentence.[56] Instructions embracing propositions of law not applicable to the correct theory of the case or which have been substantially covered may properly be refused.[57]

*Embezzlement and larceny from the mails.*[See 10 C. L. 1259]—The federal statute as to embezzlement by postmasters does not require intent to convert [58] money received and receipted for by a rural letter carrier, from patrons of his route to be used in the purchase and forwarding of money orders while in the possession of such carrier and before surrender at the post office does not constitute "money order funds" under the statute.[59] Provision making it a criminal offense for an employee in the postal service to embezzle a letter necessarily implies that the letter must have come into

for that purpose or to assist the same. Lemon v. United States [C. C. A.] 164 F 953.

48. Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676) and § 5480 (p. 3696). United States v. Marrin, 159 F 767.

49. Rev. St. § 5440 (U. S. Comp. St. 1901 p. 3676) and § 5480 (p. 3696,. United States v. Marrin, 159 F 767. Cash books, checks and entries of cash in defendant's deposit book in a trust company, made during continuance of scheme, admissible to show conspiracy. Id.

50. Under Rev. St. § 5440 (U. S. Comp St. 1901, p. 3676) and § 5480 (p. 3696) not necessary to prove conspiracy to defraud all persons named in indictment. United States v. Marrin, 159 F 767.

51. United States v. Smith, 166 F 958. Indictment under Rev. St. § 5480, as amended by Act of March 2, 1889, c. 393, 25 Stat. 873 (U. S. Comp. St. 1901, p. 3696) held sufficient though not specifically charging that defendants knew their bank to be insolvent. Lemon v. United States [C. C. A.] 164 F 953.

52. United States v. Smith, 166 F 958. Indictment under Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696) though vague held sufficient and not demurrable for not alleging that acts charged were willfully and unlawfully done. Id. Indictment charging that scheme was to be accomplished by means of circulars and newspapers circulated in Iowa and elsewhere held not demurrable for failure to set out advertisements. Id.

53. Rev. St. § 5480 (U. S. Comp. 1901, p. 3696). United States v. McVickar, 164 F 894.

54, 55, 56. United States v. McVickar, 164 F 894.

57. Instructions considered and held properly refused being on wrong theory of case or substantially given. Lemon v. United States [C. C. A.] 164 F 953. Requested instruction held properly refused as not embracing entire scheme to defraud as laid down in indictment and as improperly limiting the time in which the devising of scheme took place. Id.

58. U. S. Comp. St. 1901 §§ 4046, 4053. Griffin v. Zuber [Tex. Civ. App.] 113 SW 961.

59. United States v. Mann, 160 F 552. Rev. St. § 4045 defining, and § 4046 making penal embezzlement of "money order funds," held not applicable to rural mail carrier who through permission of Postmaster General accepts money from patrons with a view to buy for him a postal money order. Id.

his possession in his official character,[60] hence an indictment thereunder must allege such fact.[61, 62]

**Postponement,** see latest topical index.

**POWERS.**

§ 1. Nature and Kinds, 1409.
§ 2. Creation, Construction, Validity and Effect, 1409.
§ 3. Execution of Powers, 1409.

Only powers of appointment are here discussed. Powers of attorney,[63] and powers of sale in executors,[64] trustees,[65] grantees or devisees,[66] are treated elsewhere.

§ 1. *Nature and kinds.*[67]—See 10 C. L. 1250—A general power of appointment is equivalent to absolute ownership.[68] A power is appendant or appurtenant when the donee has an estate in the property and the power is to take effect wholly or in part out of that estate.[69]

§ 2. *Creation, construction, validity and effect.*[70]—See 10 C. L. 1259—No technical language need be used in the creation of a power.[71] In the construction of a power the donor's intention must give way to the statutes of the state.[72] The character of a power in trust and the donee's right to release it are questions determinable by the laws of the state where the property is located and not the laws of the donee's domicile.[73] A power of appointment in default of the exercise of which an estate is given to designated persons does not hold such estate in abeyance but has the effect of only rendering it subject to divestiture by exercise of the power.[74] If the power is not exercised, the property remains in the alternative devisees.[75]

§ 3. *Execution of powers.*[76]—See 10 C. L. 1260—A power given by will cannot be exercised until after the death of the testator,[77] and a power in the survivor of two

**60.** Shaw v. United States [C. C. A.] 165 F 174.

**61, 62.** Indictment under Rev. St. § 5467 (U. S. Comp. St. 1901, p. 3691) held fatally defective as not alleging that letter came into his hands in his official character. Shaw v. United States [C. C. A.] 165 F 174.

**63.** See Agency, 11 C. L. 60.

**64.** See Estates of Decedents, 11 C. L. 1275, and Wills, 10 C. L. 2035.

**65.** See Trusts, 10 C. L. 1907.

**66.** See Real Property, 10 C. L. 1448.

**67. Search Note:** See notes in 4 Ann. Cas. 58.

See, also, Powers, Cent. Dig. § 1; Dec. Dig. § 1; 2 A. & E. Enc. L. (2ed.) 474; 22 Id. 1088, 1091, 1133.

**68.** Will construed in light of Real Property Law, Laws 1896, §§ 129, 133, held not to transmute life estate into a fee by power of appointment "by will or deed" so as to make it permissible to measure remotenees of estates appointed from time of death of doner. Farmers' L. & T. Co. v. Kip, 192 N. Y. 266, 85 NE 59.

**69.** Where life beneficiary had power of appointment in default of exercise of which property was to go to her heirs. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139.

**70. Search Note:** See notes in 4 C. L. 1065; 6 L. R. A. (N. S.) 746, 1186; 22 A. S. R. 726; 4 Ann. Cas. 1191; 7 Id. 138.

See, also, Powers, Cent. Dig. §§ 1-31; Dec. Dig. §§ 1-15; 22 A. & E. Enc. L. (2ed.) 1093, 1131.

**71.** Any words disclosing doner and nature and objects of power are sufficient. Powell v. Woodcok [N. C.] 62 SE 1071.

**72.** Farmers' L. & T. Co. v. Kip, 192 N. Y. 266, 85 NE 59.

**73.** Newton v. Hunt, 59 Misc. 633, 112 NYS 573.

**74.** Freeman's Estate (No 1), 35 Pa. Super. Ct. 185.

**75.** Where widow was given power to devise property received by her under husband's will, but it did not appear that her will was intended to operate as execution of the power, it devised only property held by her in her own right, and remainder of husband's property went to persons entitled thereto under husband's will in event all was not disposed of by wife. American Baptist Publication Soc. v. Lufkin, 197 Mass. 221, 83 NE 401.

**76. Search Note:** See notes in 64 L. R. A. 849; 2 L. R. A. (N. S.) 623; 80 A. S. R. 96; 4 Ann. Cas. 371.

See, also, Powers, Cent. Dig. §§ 32-164; Dec. Dig. §§ 16-44; 22 A. & E. Enc. L. (2ed.) 1098.

**77.** Testator provided, "I will and direct that my wife, Dorothy Hoyle, shall be allowed to dispose of all the rest, residue, and remainder of all my estate and effects (not hereinbefore disposed of) by will or otherwise as she deems just and prudent, previous to her decease, to take effect after her death." Three years afterwards wife made will disposing of residue of husband's property not specially disposed of by him, stating in her will that disposition was made in accordance with the will of husband. The wife died twelve years before

beneficiaries cannot be exercised by either until the death of the other.[78] In determining whether a power has been executed, the intention of the donee is the true criterion.[79] When the circumstances are so equivocal as to leave the mind in doubt whether an execution of the power was intended, it will be held that there was no execution.[80] Where one has income for life with power of disposing of the principal by will, a residuary devise or bequest by him constitutes an execution of the power.[81] Where a power can be lawfully exercised, it is presumed that the donee will so exercise it.[82] The validity of the exercise of a power created by will is governed by the same rules as if the donor had himself made the same provision in favor of the same appointee.[83] A power to appoint by will may not be exercised by deed.[84] Limitations and conditions attached to the exercise of a power accompany also the exercise of a power conferred by the donee on his appointee, though not adverted to by the donee.[85] The language of the donee will be given its fair and ordinary construction where it is sought to ascertain the sufficiency of the exercise of the power.[86]

Possible beneficiaries in the event of a discretionary power being exercised in their favor have no rights as cestuis que trustent before the exercise of the power.[87] Where a power is exercised only as to a portion of the estate which was subject thereto, a devise over in default of appointment will remain in effect as to the residue.[88] When remainders are devised subject to a power given the life tenant and the life tenant devises to the remaindermen, the property is in these by virtue of the first and not by virtue of the second will.[89]

her husband. Held, wife had no power to dispose of residue of estate of husband, that he dies intestate as to such residue, and that his heirs at law took same by descent. Thomas v. Hobson, 10 Ohio C. C. (N. S.) 351.

**78.** Under will giving income to two beneficiaries while both lived, with whole income to survivor and at her death principal to be paid to her appointee by will, power in survivor could be exercised only after death of one of the beneficiaries to take effect at survivor's death and could not be executed by either in favor of the other so as to vest either or both with remainder. Garrett v. Duclos, 128 App. Div. 508, 112 NYS 811.

**79.** Will held to refer to property other than that set apart by previous deed of trust. In re Neill's Estate [Pa.] 70 A 942. Act June 4, 1879 (P. L. 88), providing for execution of powers, held not to affect powers created by deed. Id.

**80.** Where it did not appear life tenant's partition proceeding was intended as execution of her power to sell and dispose of the property. Cramton v. Rutledge [Ala.] 47 S 214.

**81.** Howland v. Parker, 200 Mass. 204, 86 NE 287. Eighth clause of will confessedly a general residuary clause disposing of all personalty "not designated to be held in trust" by seventh clause, which bequeathed remainder of all moneys, securities and deposits in trust, held sufficient to pass a fund from which testatrix had had income up to time of her death, even if seventh clause did not pass same, since words "designated to be held in trust" should be construed to mean "given in trust" so as to make eighth clause cover all personalty not covered by previous provisions. Id.

**82.** Not presumed second life tenant would create a life estate in one not in being at death of testatrix. In re McClellan's Estate, 221 Pa. 261, 70 A 737.

**83.** Question of perpetuities. Bartlett v. Sears [Conn.] 70 A 33.

**84.** Newton v. Hunt, 59 Misc. 633, 112 NYS 573. A power to be exercised by an instrument in the nature of a will is required to be exercised by will. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139.

**85.** Where husband's power of appointment under wife's will was not to be exercised in favor of members of his family, such condition, though not expressed in husband's testamentary appointment giving another power to his appointee, limited also the exercise of appointee's power. In re McClellan's Estate, 221 Pa. 261, 70 A 737.

**86.** "As to all my estate," and "with intent to execute all powers vested in me, I do give, devise, and appoint as follows," held sufficient exercise of power to revoke remainders limited after donee's life estate. Du Bois v. Walnut, 221 Pa. 285, 70 A 796.

**87.** In re Keene's Estate, 221 Pa. 201, 70 A 706.

**88.** Freeman's Estate (No. 1), 35 Pa. Super. Ct. 185.

**89.** Held not taxable as having passed by exercise of power. In re Ripley's Estate [N. Y.] 84 NE 574; Id. [N. Y.] 84 NE 1120. Where remainder under a will was subject to divestiture by exercise of power of appointment by life tenant, but life tenant exercised power in favor of remainderman, latter could elect to take under will and not under appointment. In re Haggarty, 128 App. Div. 479, 112 NYS 1017. Where on death of beneficiary property was to go to her issue in such manner as she should appoint, and in default of appointment then to such issue absolutely, and power was exercised, issue took thereunder and not under will creating the power. In re Lewis'

Alienation of the estate by the donee extinguishes a power appendant.[90] A power in trust, as distinguished from a general beneficial power, cannot be released or relinquished by the donee.[91]

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**Powers of Attorney; Praecipe; Prayers; Precatory Trusts; Preliminary Examination; Preliminary Suits; Prescription; Presumptions; Principal and Agent; Principal and Surety; Prior Appropriation; Priorities Between Creditors,** see latest topical index.

## PRISONS, JAILS AND REFORMATORIES.

**§ 1. Nature and Classes, 1411.**
**§ 2. Custody, Discipline, Government and Employment of Inmates, 1411.**
**§ 3. Administration and Fiscal Affairs, 1411.**

*The scope of this topic* is noted below.[92]

§ 1. *Nature and classes.*[93]—See 4 C. L. 1067

§ 2. *Custody, discipline, government and employment of inmates.*[94]—See 10 C. L. 1261—A prisoner sentenced in one county, under a state law, cannot be confined in the workhouse of another county unless the sentence so directs.[95] Public policy requires that jails should be kept in a clean and sanitary condition.[96] It is within the discretion of a prison board to require a prisoner to do work without the walls of the prison,[97] regardless of whether he was sentenced to hard labor or not.[98]

§ 3. *Administration and fiscal affairs.*[99]—See 10 C. L. 1262—The custodianship of

Estate, 60 Misc. 643, 113 NYS 1112. Where in default of appointment property was to go to daughter's issue and daughter appointed life estate to husband with remainder to her children, latter took under appointment. In re Lowndes' Estate, 60 Misc. 506, 113 NYS 1114.

**90.** Where life cestui que trust had testamentary power of appointment in default of her exercise of which trust property was to go to her heirs, her conveyance of equitable fee extinguished her power and she could not thereafter exercise it in derogation of her grant. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139. Immaterial after conveyance whether statute of uses would have otherwise executed trust by vesting legal title in appointee. Id.

**91.** Where a trust was settled in favor of settler for life with general power of appointment in her, and subsequently trust agreement was modified so as to reserve to settler power to appoint to children or their issue in unequal shares, power of unequal appointment was "created," within meaning of statute, not when original agreement was made but when it was modified, and hence was a special power in trust and not a beneficial power as defined by 1 Rev. St. (1st ed.) pt. 2, c. 1, tit. 2, § 79, and could not be released by covenant of doner and some of children in subsequent mortgage on income and corpus whereby settlor expressed her intention to execute her power by appointment among children in equal shares. Newton v. Hunt, 59 Misc. 633, 112 NYS 573.

**92. It includes only** the management and discipline of prisons and the powers and duties of officers charged therewith. **It excludes** the extent of punishment for crime and in what institutions court may order commitment (see Criminal Law, 11 C. L. 940), status of convicts and validity and interpretation of convict labor contracts (see Convicts, 11 C. L. 807), pardon and parole of convicts (see Pardons and Paroles, 12 C. L. 1165), and peonage laws (see Slaves, 10 C. L. 1673). The appointment, compensation, etc., of sheriffs and jailors is also excluded (see Sheriffs and Constables, 10 C. L. 1648).

**93. Search Note:** See notes in 16 L. R. A. 691; 36 Id. 293; 2 L. R. A. (N. S.) 95; 120 A. S. R. 952.

See, also, Prisons, Cent. Dig. §§ 1-3, 24; Dec. Dig. §§ 1-3; Reformatories, Cent. Dig. §§ 1, 2; Dec. Dig. §§ 1, 2; 15 A. & E. Enc. L. (2ed.) 777; 22 Id. 1298, 1299.

**94. Search Note:** See Prisons, Cent. Dig. §§ 20-56; Dec. Dig. §§ 13-18; Reformatories, Cent. Dig. §§ 3-18; Dec. Dig. §§ 4-12; 15 A. & E. Enc. L. (2ed.) 778; 22 Id. 1299.

**95.** A constable, in a county having no workhouse, but which has made terms, under § 1536-378, Revised Statutes, with a city or district of another county having within its limits a workhouse, cannot commit to such workhouse a prisoner found guilty of violating a state law, unless the sentence so provides, although the writ issued to the constable directs such confinement. Young v. State, 11 Ohio C. C. (N. S.) 466.

**96.** Harkreader v. Vernon County [Mo.] 116 SW 523.

**97.** Statute in this regard held discretionary and not mandatory. State v. Wright [Vt.] 69 A 761.

**98.** Statute requiring hard labor from prisoners regardless of sentence held not punitive but disciplinary and reformative. State v. Wright [Vt.] 69 A 761.

**99. Search Note:** See Prisons, Cent. Dig. §§ 4-19, 47-56; Dec. Dig. §§ 4-12, 18, 19; Reformatories, Cent. Dig. §§ 3, 18; Dec. Dig. §§ 3, 11, 12; 15 A. & E. Enc. L. (2ed.) 779.

the county jail is vested in the sheriff by virtue of his office.[1] He must conduct the jail in an orderly manner [2] and may remove his subordinates upon the assignment of cause.[3] The board of trustees of a state penitentiary has no arbitrary power to dismiss an officer or employee without cause or hearing.[4] Where a statute provides that the prison chaplain shall devote his whole time to the intellectual and moral improvement of convicts, he cannot receive extra pay as superintendent of a night school for them.[5] It is the duty of the county to furnish gas, water and janitor service for the county jail.[6] The unused portion of moneys advanced by the county to the sheriff for the purpose of victualling prisoners must be returned by him to the county,[7] and such repayment may be compelled although the advancement was made with full knowledge and without fraud.[8] A jailor cannot avail himself of an appropriation made for the purpose of maintaining a county jail where it would result in increasing the compensation for his services.[9] Fees received by a city jailer from the state and federal governments for keeping state and federal prisoners cannot be diverted by the city to its owners, nor can the jailer be compelled to account for them.[10] The board of state prison commissioners has no power to insist that, as a condition precedent to the award of a contract for the care of the inmates of the prison, the new contractors should furnish the money to enable the state to take over personal property belonging to the former contractors.[11]

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**Privacy, Right of; Private International Law; Private Schools; Private Ways; Privilege; Privileged Communications; Prize,** see latest topical index.

### PRIZE FIGHTING.[12]

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**Probate,** see latest topical index.

1. Board of Chosen Freeholders of Hudson County v. Kaiser, 75 N. J. Law, 9, 69 A 25.

2. Statute making it the duty of board of county commissioners to erect jail does not carry with it authority to so manage and conduct it as to create a nuisance. Held that injunction would lie to compel jail windows overlooking residence of adjacent property owner to be kept closed to prevent him and his family from being annoyed by sights and sounds in jail. Pritchett v. Knox County Com'rs [Ind. App.] 85 NE 32.

3. Removal of assistant matron of county jail from her position under civil service law (Laws 1899, p. 809, c. 370, amended by Laws 1904, p. 1624, c. 697) could not be reviewed by certiorari where formalities of removal were complied with. People v. Harvey, 127 App. Div. 211, 111 NYS 167.

4. Incoming board could not dismiss clerk duly appointed by former board without cause, he being a public officer and his term being fixed by law. Yerger v. State, 91 Miss. 802, 45 S 849.

5. Mandamus would not lie to compel state auditor to allow claim for additional compensation for such work. McBrian v. Nation [Kan.] 97 P 798.

6. Where county court refused to furnish such items and sheriff furnished them at his own expense, an action against county for reimbursement could be maintained. Harkreader v. Vernon County [Mo.] 116 SW 523.

7. Cannot be retained by sheriff as compensation where statute provides a fixed salary as full compensation for his services. Board of Chosen Freeholders of Hudson County v. Kaiser, 75 N. J. Law, 9, 69 A 25.

8. Voluntary payment held no defense in an action against sheriff to recover surplus of money advanced and not used by him for maintaining jail. Board of Chosen Freeholders of Hudson County v. Kaiser, 75 N. J. Law, 9, 69 A 25.

9. Act approved March 23, 1908 (Acts 1908, p. 116, c. 44), authorizing certain appropriations to be made for maintaining jails, held inapplicable to jailers elected prior to passage of such act and who had assumed office with burden of repairing and maintaining jail at their own expense. Frizzell v. Holmes [Ky.] 115 SW 246.

10. City ordinance requiring city jailer to account for fees received for keeping state and federal prisoners held invalid except in so far that city might be credited on jailer's salary account with such fees to amount equal to difference between minimum salary and salary fixed by city. City of Newport v. Ebert, 33 Ky. L. R. 820, 111 SW 330.

11. State v. Board of State Prison Com're, 37 Mont. 378, 96 P 736.

12. No cases have been found for this subject since the last article. See 4 C. L. 1070.

**Search Note:** See notes in 15 L. R. A. 516.

See, also, Prize Fighting, Cent. Dig; Dec. Dig; 23 A. & E. Enc. L. (2ed.) 389; 16 A. & E. Enc. P. & P. 990.

## PROCESS.

§ 1. Necessity, Nature and Requisites, 1413.
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A. In General, 1415.
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D. The Server, His Qualifications, and Protection, 1421.
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*The scope of this topic* is noted below.[13]

§ 1. *Necessity, nature and requisites.*[14] *Necessity.*See 10 C. L. 1262.]

*Definitions and distinctions.*See 8 C. L. 1449.—In a general sense the term legal process includes the entire proceedings in a judicial proceedings.[15] In a more restrictive sense it applies to judicial writs and orders.[16] In neither sense does it include legislative proceedings or processes.[17] One of the primary meanings of process is the manner by which a court compels the attendance of the defendant,[18] and it is often used synonymously with summons,[19] which is the first process in the institution of an action whereby defendant is notified to appear and answer.[20] A precept is a command or mandate in writing of equal importance with a writ or process.[21] The terms writs and precepts, used generally, include process in criminal cases,[22] and the terms precept and process include summonses.[23] A magistrate's warrant is of itself a process of the court.[24]

*Designation of court and parties.*See 10 C. L. 1262.—A requirement that the names of the parties be stated is not complied with by using the abbreviation "et al." [25] Contractions and abbreviations are permissible as to the names of parties in some instances.[26]

*Signing and sealing.*See 10 C. L. 1263.—Under some of the statutes the signing of process is merely a ministerial act, which may be performed by the clerk.[27] A requirement of signature by the plaintiff or his attorney does not necessarily require a written signature.[28]

**13.** Treats of process generally as distinguished from process in particular proceedings (see such topics as Attachment, 11 C. L. 315; Appeal and Review, 11 C. L. 118; Certiorari, 11 C. L. 591; Justices of the Peace, 12 C. L. 496; Habeas Corpus [and Replegiando] 11 C. L. 1682; Garnishment, 11 C. L. 1637; Divorce, 11 C. L. 1111; Alimony, 11 C. L. 96; Eminent Domain, 11 C. L. 1198), but includes process against particular parties, such as corporations, infants, etc. The word process as here used includes all original processes, summons, etc., and excludes final process (see Executions, 11 C. L. 1433), ancillary (see such topics as Attachment, 11 C. L. 315; Garnishment, 11 C. L. 1637), and intermediate writs and processes, such as subpoenas for witnesses (see Witnesses, 10 C. L. 2079). This topic also excludes service of pleadings (see Pleading, 10 C. L. 1173), collateral attack and former adjudication (see Former Adjudication, 11 C. L. 1537; Judgments, 12 C. L. 408), and abuse of process (see Malicious Prosecution and Abuse of Process, 12 C. L. 638).

**14. Search Note:** See notes in 4 C. L. 1071; 6 Id. 1079; 15 L. R. A. (N. S.) 129; 6 Ann. Cas. 42.

See, also, Process, Cent. Dig. §§ 1-39; Dec. Dig. §§ 1-47; 23 A. & E. Enc. L. (2ed.) 158, 159; 16 A. & E. Enc. P. & P. 769; 20 Id. 1099, 1114.

**15, 16.** Stearns v. State [Okl.] 100 P 909.

**17.** Notice of election is not legal process within Wilson's Rev. & Ann. St. 1908, § 1969, prohibiting service of legal process on Sunday. Stearns v. State [Okl.] 100 P 909.

**18.** Ackermann v. Berriman, 61 Misc. 165, 114 NYS 937.

**19.** Ackermann v. Berriman, 61 Misc. 165, 114 NYS 937. Held synonymous at common law. Id.

**20, 21, 22, 23, 24.** Ackermann v. Berriman, 61 Misc. 165, 114 NYS 937.

**25.** See Saddler v. Smith [Fla.] 45 S 718.

**26.** Styling Baltimore and Ohio Railroad company "B. & O. R. R. Co." in summons and judgment held sufficient to show corporation intended to be sued, and proper person being served with process, not such material variance as to deprive court of jurisdiction of person of defendant or vitiate judgment. Stout v. Baltimore & O. R. Co. [W. Va.] 63 SE 317.

**27.** Under Rev. St. 1887, § 3844, clerk may sign summons with name of probate judge. Zimmerman v. Bradford-Kennedy Co., 14 Idaho, 681, 95 P 825.

**28.** Any method of impressing name is sufficient if adopted by party whose name is attached. Cummings v. Landes [Iowa] 117 NW 22. Printed signature sufficient if adopted by proper party. Id. **Adoption**

*Indorsement.*See 8 C. L. 1450—Process is often required to be indorsed with the names of the parties,[29] but such requirement does not necessarily preclude the use of abbreviations.[30]

*Direction and delivery.*See 8 C. L. 1080

*Description of action.*See 8 C. L. 1451—Under some statutes the file number of the suit must appear,[31] and under others a statement of the nature of the demand is necessary,[32] but in some jurisdictions it is necessary to state only the amount demanded.[33]

*Time and place of appearance.*See 10 C. L. 1283—A time and place for the appearance of the persons served must be named,[34] and the return day must be within the statutory limit.[35]

*Penalties or consequences of nonappearance.*See 8 C. L. 1080

*Alias, counterpart or supplemental process.*See 8 C. L. 1451

§ 2. *Issuance.*[36]—See 10 C. L. 1283—Summons is not "issued" until delivered to the officer charged by law with service thereof.[37] The issuance of a summons is usually a purely ministerial act, which may be performed by the clerk.[38] Where it is the duty of plaintiff to file a praecipe for a summons, the clerk may refuse to issue summons until he does so,[39] but if the clerk issues a summons upon a praecipe filed by a defendant, a co-defendant cannot complain, and jurisdiction is acquired by service of the summons so issued.[40] A summons otherwise duly issued and served is not void merely because issued upon a complaint which is wanting in requisite jurisdictional averments, the same being amendable,[41] or because a copy of the defective complaint is attached to the summons as issued and served.[42]

§ 3. *Extraterritorial effect or validity.*[43]—See 10 C. L. 1284—Process cannot run from the courts of one state into another and summon persons there domiciled to

**presumed** where plaintiff presented notice with printed signature of his attorney to court and procured decree thereon. Id.

**29.** In New Jersey, in suit to enforce penalty, process must be endorsed with name of person who prosecutes and title of statute under which action is brought. Ten Eyck v. Mendel [N. J. Law] 72 A 31.

**30.** Use of names of some with words "et al." held sufficient indorsement in absence of restrictions to contrary imposed by law or rule of court. Dees v. Smith [Fla.] 46 S 173; Saddler v. Smith [Fla.] 45 S 718.

**31.** Citation cannot sustain default judgment unless it states file number of suit as required by Rev. St. 1895, art. 1214. Duke v. Spiller [Tex. Civ. App.] 111 SW 787. Endorsement of file number of suit on back of citation by clerk is not necessary part of citation, and cannot be presumed to have been shown on copies served, so as to cure omission of file number from citation. Id.

**32.** Warrant issued by justice of peace must contain general statement of nature of demand or cause of action. Shannon's Code, § 5958. Memphis St. R. Co. v. Flood [Tenn.] 113 SW 384.

**33.** In New York city municipal court where summons states merely amount demanded, court acquires jurisdiction, and plaintiff may set up any cause of action he chooses. Johnstone v. Weibel, 115 NYS 255.

**34.** Otherwise no jurisdiction. Cummings v. Landes [Iowa] 117 NW 22.

**35.** Municipal Court Act, Laws 1902, p. 1502, c. 580, § 37, providing, in action to enforce mechanic's lien, that return day of summons must be not more than 12 days from its date and that service must be at least 6 days before appearance, controls; not Code Civ. Proc. § 3404, which applies to such action in courts not of record. Bogopoler Realty Co. v. Schwartzman, 59 Misc. 495, 110 NYS 853.

**36. Search Note:** See Process, Cent. Dig. §§ 11, 15-18; Dec. Dig. §§ 18-23; 20 A. & E. Enc. P. & P. 1103.

**37.** Within Burns' Ann. St. 1908, § 317, that action is commenced by issuing summons, etc. Marshall v. Matson [Ind.] 86 NE 339.

**38.** Under Rev. St. 1887, § 3844, summons proper when issued by clerk was good. Zimmerman v. Bradford-Kennedy Co., 14 Idaho, 681, 95 P 825.

**39, 40.** State Life Ins. Co. v. Oklahoma City Nat. Bank [Okl.] 97 P 574.

**41.** Goodman v. Ft. Collins [C. C. A.] 164 F 970. Due personal service of summons brings respondent before court for all purposes of proceeding as fully as would voluntary appearance, and jurisdiction thus acquired is not lost by amendment to complaint by which essential jurisdictional averment is inserted, amendment not being beginning of new action, and hence no new process being required. Id.

**42.** Goodman v. Ft. Collins [C. C. A.] 164 F 970.

**43. Search Note:** See Process, Cent. Dig. § 15; Dec. Dig. § 19.

answer proceedings in the foreign court,[44] and no personal judgment can be based on such extraterritorial service.[45]

Service in another county other than that of the venue is sometimes allowed in certain cases.[46] To authorize summons to another county in personal actions for the recovery of money only, there must be an actual right to join the resident and nonresident defendants.[47] Service of writs to parties residing outside the district where the action is brought is authorized by the federal statutes.[48] This subject is closely allied to that of venue, and the article on that subject should also be consulted.[49]

§ 4. *Service. A. In general.*[50]—See 10 C. L. 1264—Unless waived,[51] service of process is essential to jurisdiction.[52] Statutes providing a method for service of process for the purpose of bringing individuals or corporations into court must be strictly followed, and the court is powerless to declare a service of process valid where there has not been a strict compliance with the provisions of the statute.[53]

(§ 4) *B. Personal service.*[54] *In general.*See 10 C. L. 1264—Persons not served are not bound[55] when they do not appear and are not represented by persons duly authorized.[56] Service must be upon the proper party[57] or upon an authorized

**44.** Holcomb v. Kelly, 114 NYS 1048. Service on nonresident personally and by mail outside state does not confer jurisdiction. Bullowa v. Provident Life & Trust Co., 125 App. Div. 545, 109 NYS 1058. Nonresidents cannot be brought in, upon ordinary demands for money, by process issued from state courts and served beyond limits of jurisdiction thereof, and act No. 23, p. 29, of 1900, purporting to authorize such service violates 14th Amendment to Federal Constitution. Aikmann v. Sanderson [La.] 47 S 600.

**45.** Moss v. Fitch, 212 Mo. 484, 111 SW 475; Johnson v. Tennessee Oil, etc., Co. [N. J. Eq.] 69 A 788.

**46.** Plaintiff resident of one county may sue in the circuit court of such county and clothe it with jurisdiction over defendant by causing its process to be issued, directed to any county in the state, but she may not institute suit in another county, under Proc. Act §§ 1, 2, 3 (Hurd's St. 1905), relating to insurance companies. Hartzell v. Maryland Casualty Co., 139 Ill. App. 366.

**47.** McNeny v. Campbell [Neb.] 116 NW 671. Where jurisdiction of nonresident defendants, in trespass on case, is raised by plea in abatement, plaintiff must show joint liability of defendants to acquire jurisdiction under Pub. Acts 1901, p. 354, No. 225. Rosenthal v. Rosenthal, 151 Mich. 493, 14 Det. Leg. N. 998, 115 NW 729. Action to satisfy claim out of money deposited in bank held "personal" action, hence could be maintained in one county against all, though some were nonresidents of that county. Code, § 3501. Kean v. Rogers [Iowa] 118 NW 515. In action for damages for breach of contract of employment brought against both corporation and its general agent, service of summons upon the company, in manner provided by statute, does not authorize issue of summons to general agent in another county and service upon him there; and service of summons upon the general agent in such other county of his residence does not give the court jurisdiction over him, and action must be dismissed. Bigger v. State Life Ins. Co., 8 Ohio N. P. (N. S.) 27.

**48.** Act March 11, 1902 (32 Stat. 68, c. 183), § 10, providing for issuance of duplicate writs to parties residing in other judicial districts than one where action brought (Texas), is not limited to local actions; applicable in action for wrongful death. Matter of Dunn, 212 U. S. 374, 53 Law Ed. —.

**49.** See Venue and Place of Trial, 10 C. L. 1965.

**50. Search Note:** See Process, 19 A. & E. Enc. P. & P. 567, 597.

**51.** See post, § 7, Defects, Objections and Amendments.

**52.** Court without jurisdiction as to defendant corporation not served. Bernard v. Lembeck & Betz Eagle Brew. Co., 104 NYS 746. Court held without jurisdiction in garnishment or attachment proceedings to direct corporation to transfer stock on its books to plaintiffs, no process having been served on person to whom stock had been issued and delivered, no writ of attachment levied on the property, and no service had on any garnishee indebted to him or having property or effects belonging to him. Pease v. Chicago Crayon Co., 235 Ill. 391, 85 NE 619. Where a petition filed in a pending proceeding has no relation to the subject-matter thereof, parties joined therein are entitled to notice by service of process. LaForge v. Binns, 125 Ill. App. 527.

**53.** 34 Stat. 874, c. 445. New York Continental Jewell Filtration Co. v. Karr, 31 App. D. C. 459.

**54. Search Note:** See notes in 4 C. L. 1075; 6 C. L. 1082, 1086; 10 Id. 1266, 1268; 23 L. R. A. 490; 49 Id. 217; 2 L. R. A. (N. S.) 389; 4 Id. 272, 460; 5 Id. 298.

See, also, Process, Cent. Dig. §§ 46-82; Dec. Dig. §§ 48-68; 19 A. & E. Enc. P. & P. 567, 597, 613, 651.

**55.** Judgment against substituted defendant who was never served with process cannot be sustained. Ziegler v. Schleicher Co., 56 Misc. 582, 107 NYS 85. Judgment against one not served with summons, who has never appeared except to appeal, is void. Chief Pub. Co. v. Schneider, 110 NYS 974. See, also, Jurisdiction, 12 C. L. 458; Judgments, 12 C. L. 408.

**56.** Moneyed judgment rendered against an absentee who is called in warranty through a curator ad hoc to represent him,

agent[56] before the appearance day named in the writ or process[59] and within the time limited by law,[60] and should be made upon a day authorized by law for service.[61]

*Upon incompetents.*[62]—Service upon infants[63] or insane persons[64] must comply with statutory requirements.

*Upon nonresidents or their agents.*[See 10 C. L. 1264]—Personal service on a nonresident found within the state is valid,[65] unless he has been induced to enter the jurisdiction by means of false representations or deceptive device[66] to which plaintiff was privy.[67] To bring in nonresidents by service on an agent, statutory requirements must be complied with,[68] and the agent served must have authority to receive or accept service.[69]

*Upon municipal corporations.*[See 6 C. L. 1084]—At common law, process was served on a municipal corporation by serving its mayor or other chief officer,[70] and in the absence of statutory provision, this mode of service is still valid.[71] Where there is a statute, its provisions must be followed.[72]

*Upon domestic corporations.*[See 10 C. L. 1264]—Statutory provision is usually made for service on corporations by service on its agents.[73] To sustain such a service the

proceedings being carried on contradictorily with such curator, is nullity. Andrews v. Sheehy [La.] 47 S 771.

57. Where citation issued commanding S. L., S. F. & T. R. Co. to be summoned, and this was served on one described in return as agent of S. L. & S. F. R. Co., a different corporation, service was void. St. Louis & S. F. R. Co. v. English [Tex. Civ. App.] 109 SW 424.

58. In action for damages for breach of contract for chartering and use of steamship, service on parties who represented owners in transactions with government was good, they being authorized agents. United States v. Bedouin S. S. Co., 167 F 863. **Service on one partner** authorizes judgment against firm. Lutz v. Kalmus, 115 NYS 230.

59. Service after day named is ineffective. Cummings v. Landes [Iowa] 117 NW 22.

60. Query: Whether Gen. St. 1895, p. 410, § 3, requiring that service of summons issued against board of chosen freeholders shall be made at least 30 days before session of court to which such process is returnable, was not impliedly repealed by Proc. Act Rev. 1903, § 52. Palmer v. Essex County Chosen Freeholders [N. J. Law] 71 A 285.

61. Laws 1839, c. 367, invalidating service on Saturday on persons observing it as holy day, was repealed by Laws 1847, c. 349. Service of moving papers for injunction on Saturday, valid. New York & N. J. Tel. Co. v. Rosenthal, 128 App. Div. 220, 112 NYS 612.

62. See, also, Infants, 12 C. L. 140; Insane Persons, 12 C. L. 205.

63. Service on minors in mother's presence and hearing ineffective under Code, § 3533. Service should be on mother for them. Cummings v. Landes [Iowa] 117 NW 22. When persons upon whom service might be had for defendants who are minors under 14 are all plaintiffs, and clerk appoints a guardian ad litem, under Civ. Code Proc. § 52, service on guardian is valid without service on minor. Cornell v. Cornell [Ky.] 115 SW 795.

64. Where action against insane person was commenced at place of legal residence, service of summons, directed to sheriff of county where he was detained, on insane person in such county, was good. Stuard v. Porter [Ohio] 85 NE 1062. Under Civ. Code Proc. § 63, where lunatic was confined in asylum, service on him alone did not give jurisdiction to appoint guardian ad litem; having no committee or relatives as specified in statute, service should be made on superintendent of asylum. Bayne v. Stratton [Ky.] 115 SW 728. Words "if residing in the county," used in § 53, mean county where defendant is when served. Id.

65. No warning order necessary in such case. Stewart v. Blue Grass Canning Co. [Ky. App.] 117 SW 401.

66. Service on nonresident so brought into state for service is invalid. Ex parte Taylor [R. I.] 69 A 663.

67. Service valid where defendant was induced to come by representations of former directors of company of which receiver, who brought suit, had no notice, directors having no knowledge of receiver's intentions. Ex parte Taylor [R. I.] 69 A 553.

68. Under statute, delivery of one copy of writ to agent of four nonresidents insufficient. One copy should be left for each. Wade v. Wade's Adm'r [Vt.] 69 A 826.

69. Nonresidents cannot be brought into courts of state by service of process on one representing them in state for business purposes but not authorized to receive or accept service. Aikmann v. Sanderson [La.] 47 S 600.

70. As being "most visible part of corporation." Martin v. Tifton [Ga. App.] 63 SE 1132.

71. Martin v. Tifton [Ga. App.] 63 SE 1132.

72. In action against city, service on clerk in corporation counsel's office was nullity, law requiring service on city clerk. Boyle v. Detroit, 152 Mich. 248, 15 Det. Leg. N. 136, 115 NW 1056. Municipality cannot be served by service on the solicitor general of the circuit. Smith v. Washington, 4 Ga. App. 514, 61 SE 923.

73. In Act June 21, 1895, § 1, providing

person served must have been an agent of the defendant corporation [74] and must have been authorized to accept or receive service [75] or within the class of agents designated by law as those upon whom service might be had.[76] Service must also be made at the required place,[77] and the agent must be served in his representative capacity and not as an individual.[78]

*Upon foreign corporations.* See 10 C. L. 1265—The legislature of a state may, in the exercise of its power to impose conditions upon foreign corporations doing business in the state, prescribe a mode of service upon them which will subject them to the jurisdiction of the state courts,[79] provided such mode is not unreasonable or contrary to natural justice,[80] and a foreign corporation is deemed to have consented to the mode of service prescribed when it appoints an agent for service in the state [81] or engages in business in the state,[82] and will be bound thereby; [83] but a state cannot,

that process "may" issue and be directed to any county in state in action against insurance company, "may" does not mean "shall" so as to prevent service upon agent upon whom service could be made in county of suit as permitted by Practice Act 1872, § 4. Luckey v. Yeomen of America, 141 Ill. App. 332. Service upon proper agent in county of suit held sufficient though home office was in another county. Id.

**74.** Conductor of passenger train held to have been acting as such for defendant railroad company when served with process, and service good under Laws 1905, p. 29, § 2. St. Louis & S. F. R. Co. v. Sizemore [Tex. Civ. App.] 116 SW 403.

**75.** In action against railroad company for personal injuries, service, in county where defendant had no line, on agent of another road who sold tickets good on defendant's lines, was invalid. Doster v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 107 SW 579.

**76.** Under Code Civ. Proc. § 431, service upon persons acting as **cashier** of corporation is valid service upon corporation. Russell v. Pittsburg Life Insurance & Trust Co., 62 Misc. 403, 115 NYS 950. Where corporation has office in state in charge of person who acts for corporation, doing business for it, and so manages its business, he is, within the meaning of Code Civ. Proc. §, 432, a **managing agent** upon whom service of corporation may be made. Id. **Foreman,** acting under superintendent, held not "an officer" or "managing or local agent" of company, and service on him invalid. Simmons v. Defiance Box Co., 148 N. C. 344, 62 SE 435. Service upon one as **secretary and agent** of insurance company held sufficient where benefit certificate sued upon showed signature of such person as secretary and proof showed he held office when summons was served and was member of defendant order. Luckey v. Yeomen of America, 141 Ill. App. 332. Service on **freight agent** of railroad company good, under Code Civ. Proc. § 2880, where company had not designated an agent for service and it did not appear that assistant superintendent, who resided in county, was "managing agent" within § 2879. Duval v. Boston & M. R. Co., 58 Misc. 504, 111 NYS 629. Under Pub. Acts 1901, Act No. 208, p. 319, regulating service on interurban electric railways, service on **conductor** in city which is terminus of road is good. Halladay v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 1050, 119 NW 445. Service on **general manager** is insufficient under laws of Arkansas (Mansf. Dig. § 4979, Ind. T. Ann. St. 1899, § 3184) in force in Indian Territory prior to statehood, except in absence from county of president, mayor or chairman of board of trustees. Ravia Granite Ballast Co. v. Wilson [Okl.] 98 P 949. Term **"local agent,"** as used in statutes providing for service process on corporations, implies representative of corporation appointed to transact its business and represent it in a particular locality. It does not embrace the idea of an agent who casually happens to be in the particular territory or who is temporarily sent to such locality to perform some particular act or for some specified purpose or to superintend the business in a general way; and while, under certain circumstances and in a certain sense, the terms "general manager" and "local agent" may convey much the same idea, they are not used, in St. 1895, arts. 1222, 1223, synonymously. Latham Co. v. Radford Grocery Co. [Tex. Civ. App.] 117 SW 909. Where cause of action accrues against railroad company prior to appointment of receivers, suit may be brought against company and service made on any local **agent of receivers.** In re Seaboard Air Line R. Co., 166 F 376.

**77.** Service on secretary of mutual insurance company at company's "usual business office" insufficient. Rev. St. 1899, § 8092, requires service at "principal" office. Thomasson v. Mercantile Town Mut. Ins. Co. [Mo.] 116 SW 1092.

**78.** Service on one as individual is not service on company of which he is president. Ziegler v. George Schleicher Co., 56 Misc. 582, 107 NYS 85.

**79.** Erie R. Co. v. Van Allen [N. J. Law] 69 A 484; Nelson v. Deming Inv. Co. [Okl.] 96 P 742. State may provide for service on adjusting agent of foreign insurance company. Commercial Mut. Acc. Co. v. Davis, 213 U. S. 245, 53 Law. Ed. —. **Federal courts are bound by state decisions** construing state statutes in such regard so long as due process of law is not violated. Swarts v. Christie Grain & Stock Co., 166 F 338.

**80.** Erie R. Co. v. Van Allen [N. J. Law] 69 A 484.

**81.** Nelson v. Deming Inv. Co. [Okl.] 96 P 742.

**82.** Erie R. Co. v. Van Allen [N. J. Law] 69 A 484; Nelson v. Deming Inv. Co. [Okl.] 96 P 742; Swarts v. Christie Grain & Stock Co., 166 F 338. It is not necessary that express authority to receive service of process

without the consent of a foreign corporation, constitute as its agent for service a person not otherwise the agent of such corporation.[84] Since at common law there is no way in which service can be had on a foreign corporation, and it is only by virtue of statutory provisions that such service can be had,[85] the statutory requirements must be strictly followed.[86] Actual notice does not aid defective service.[87] In some states foreign corporations doing business therein are placed upon same basis as domestic corporations as regards service.[88] The meaning of the word "agent" as used in statutes designating person upon whom service may be made must be ascertained with reference to the context.[89] Thus, where the other words refer to officers having some general or supervisory authority, a mere subordinate employe cannot be held an "agent."[90] Where an agent is not expressly authorized to accept service, to legalize service upon him it must appear that he had such connection with the corporation or with the business out of which the alleged cause of action arose that he should be considered the representative of the corporation for the purpose of service.[91] Service upon an agent of a foreign corporation is ineffective unless it is or was at the time of

be shown. The law of the state may designate an agent upon whom service may be made if he be one sustaining such relation to the company that the state may designate him for that purpose, exercising legislative power within the lawful bounds of due process of law. Commercial Mut. Acc. Co. v. Davis, 213 U. S. 245, 53 Law. Ed.—.

**83.** Nelson v. Deming Inv. Co. [Okl.] 96 P 742; Erie R. Co. v. Van Allen [N. J. Law] 69 A 484. Service on captain of boat operated by foreign company held "personal" service authorizing judgment by default. Phillips v. Portage Transit Co., 137 Wis. 189, 118 NW 539.

**84.** Limit of state's power in such regard is to require appointment of certain person, as, for example, the state auditor, as condition precedent to corporation's right to do business in state, and to refuse to recognize the existence of corporations not conforming to such requirements and to punish them for doing business in state without complying with statute. Vance v. Pullman Co., 160 F 707, construing W. Va. Code 1906, §§ 2322, 3805, 3810.

**85.** Nelson v. Deming Inv. Co. [Okl.] 96 P 742.

**86.** Swarts v. Christie Grain & Stock Co., 166 F 338.

**87.** Mere fact that person served with process sent it to general solicitor of company was held not to create agency so as to make service valid. Erie R. Co. v. Van Allen [N. J. Law] 69 A 484.

**88.** Code 1899, c. 50, § 34, as amended by Code 1906, § 1985. Stout v. Baltimore & Ohio R. Co. [W. Va.] 63 SE 317.

**89.** Erie R. Co. v. Van Allen [N. J. Law] 69 A 484.

**90.** Statute authorized service on any "officer, director, agent, clerk, or engineer." Erie R. Co. v. Van Allen [N. J. Law] 69 A 484. Chief clerk of division superintendent of railroad not "agent" on whom personal service could be made binding on company. Hygea Brew. Co. v. Erie R. Co. [N. J. Law] 69 A 981.

**91.** Erie R. Co. v. Van Allen [N. J. Law] 69 A 484. To bring in foreign corporation, person served must be representative of company, such that if such person had accepted service, corporation would be bound and estopped to deny authority of such person as agent. Carpenter v. Willard Case Lumber Co., 158 F 697.

**Service held valid:** Local storage and transfer company receiving, storing and distributing goods forwarded by carload lots made up of goods of several persons by similar company in another state is latter's agent within Ballinger's Ann. Codes & St., § 4875 (Pura's Code, §§ 332, 333), permitting service on agent of foreign corporation doing business in state. Lee v. Fidelity Storage & Transfer Co. [Wash.] 98 P 658. Service on **captain of vessel** operated by foreign corporation was service on "agent having charge of or conducting business of the corporation within the state," under St. 1898, § 2637, subd. 13. Phillips v. Portage Transit Co., 137 Wis. 189, 118 NW 539. One who is not agent of foreign railroad company may be **ticket agent** within Rev. Laws 1905, § 4110, provided it appears that company availed itself of his services, or if company was operating railroad, trains, or cars within state, or if its cars came into state under circumstances reasonably giving rise to inference that it was doing business in state; but joint traffic arrangement whereby one railroad hauls cars of another within state does not constitute operation of railroad or transaction of business so as to make it liable for service of process upon such agent for it. Slaughter v. Canadian Pac. R. Co., 106 Minn. 263, 119 NW 398. Under Vt. St. § 1109, relating to service of attachment, **division superintendent** of nonresident railroad company is "known agent" on whom attachment may be served though he may not be one on whom process generally could be served under § 3948. Boston & M. R. Co. v. Gokey, 210 U. S. 155, 52 Law Ed. 1002. Where summons was served on **local agent** of **fire insurance company**, with whom copy of writ was left, service was good (Code Pub. Gen. Laws 1904, art. 75, § 23) and as effective as if made on president or director of corporation. Girard Fire & Marine Ins. Co. v. Bankard, 107 Md. 538, 69 A 415. Immaterial that agent did not notify company of suit. Id. Under Rev. St. Mo. 1899, vol. 1, § 3570, and vol. 2, § 7992, service upon foreign insurance company can be had by service upon its **adjust-**

the transaction in question engaged in business in the state.[92] The effect of fraud or artifice inducing such a one to come into the state in order that service may be had upon him is, it would seem, the same as in other cases.[93] Statutes commonly prohibit

ing agent authorized to adjust and settle losses. Commercial Mut. Acc. Co. v. Davis, 213 U. S. 245, 53 Law. Ed. —.

**Service held invalid:** Service of summons upon persons formerly in defendant's employ, but at time of service in employ of corporation employed by defendant to look after its affairs after defendant's removal from district, held insufficient though directors and stockholders of defendant and employe corporation were identical in some cases. New York Continental Jewel Filtration Co. v. Karr, 31 App. D. C. 459. "Sales agent" of foreign corporation not one on whom service can be had in action based on transaction with which he had no connection. Hefner v. American Tube & Stamping Co., 163 F 866. Foreign lumber company had no office, property or place of business in state, but took orders through brokers or commission men who did business in state. Held, service on brokers who sent order in transaction in issue did not bind company, under Iowa Code, § 3529. Carpenter v. Willard Case Lumber Co., 158 F 697. One who had taken over bucket-shop business but continued to operate in predecessor's name and send orders to defendant foreign corporation, which had no office or place of business in state, was not authorized to receive service; service on him of no effect. Swarts v. Christie Grain & Stock Co., 166 F 338. Where business out of which alleged cause of action arose was maintenance and repair of planking of railroad crossing, service of process on "resident freight agent," who had nothing to do with such business, was not binding on corporation. Erie R. Co. v. Van Allen [N. J. Law] 69 A 484.

92. The statute contemplates a state of case where the nonresident insurance company is doing or has been doing business in the state, and no substituted service on the superintendent of the insurance department can be valid unless bottomed on the fact that the company sought to be called into court has been doing business in the state; and until it has been doing business within the state and has policies or liabilities outstanding in this state, where it has withdrawn or been excluded from the state, can this statute be invoked to bring a nonresident corporation into court. Under Rev. St. Mo. 1899, § 7991 (Ann. St. 1906, p. 3799), service on superintendent of insurance department, none of facts above appearing, held void. Webster v. Iowa State Traveling Men's Ass'n, 165 F 367. Rev. Laws 1905, § 4109, subd. 3, requires that agent of foreign corporation on which service is made by delivering copy to him must be such agent in fact, and that corporation must be doing business in state. North Wisconsin Cattle Co. v. Oregon S. L. R. Co., 105 Minn. 198, 117 NW 391. Where statute authorized service on "managing agent," return showing service on "general agent," and not showing that corporation was engaged in business in state, was insufficient. Neb. Code, § 75. Swarts v. Christie Grain & Stock Co., 166 F 338. Under Laws 1894, c. 1, p. 49, service of process on soliciting agent of corporation not doing business in state is not sufficient. Saxony Mills v. Wagner & Co. [Miss.] 47 S 899. Code 1906, §§ 919, 920, and Laws 1908, c. 123, p. 132, defining what constitutes doing business within state and who are agents of corporations for purposes of serving process, **held not retroactive statutes.** Id.

**Held to be doing business:** Though contract of purchase was Iowa contract, yet, where considerable portion of business out of which cause of action arose was done in Wisconsin, service on secretary of state for foreign corporation was effective, under statute; immaterial that interstate business involved. Paulus v. Hart-Parr Co., 136 Wis. 601, 118 NW 248.

**Held not to be doing business:** Corporation having no office or place of business in state, but which merely sends traveling salesmen to take orders, transmitted to home office and filled by direct shipment to purchaser, is not doing business within state within Laws 1894, p. 49, c. 61, regarding service of process on foreign corporations. Saxony Mills v. Wagner & Co. [Miss.] 47 S 899. Evidence held sufficient to show that foreign insurance company did business in Missouri where shown that it had outstanding policies upon which premiums were paid and company had right to investigate and adjust losses. Commercial Mut. Acc. Co. v. Davis, 213 U. S. 245, 53 Law. Ed. —. Foreign steamship company not "doing business" in Pennsylvania so that court had jurisdiction by service on local ticket agent, where such agent simply sold tickets on commission and did business all over the country for various other lines. Goepfert v. Compagnie Generale Transatlantique, 156 F 196. Service of summons on agent of foreign railroad company, which had no lines in state, while agent was soliciting passenger and freight traffic in state, ineffective; not "doing business" in state. North Wisconsin Cattle Co. v. Oregon S. L. R. Co., 105 Minn. 198, 117 NW 391. Under Shannon's Code, §§ 4543-4545, foreign railroad company having no lines in state cannot be held to be "doing business" in state, so as to authorize service on traveling solicitor in state, where action is based on negligent handling of nonresident's goods while being carried by defendant as intermediate carrier, though damage was not discovered until goods reached destination in state, agent in question having had nothing to do with transaction. Atlantic Coast Line R. Co. v. Richardson [Tenn.] 117 SW 496. Where defendant, foreign corporation, did no business, had no office or agent or property in New York, service of process on director of corporation while temporarily in New York on private business or business connected with single transaction of company was not valid under rule of federal courts, though good under N. Y. Code, § 432. Craig v. Welch Motor Car Co., 165 F 554.

93. See ante, this subsection, subdivision Upon Nonresidents or Their Agents. Evi-

the revocation of a designation of an agent for service so long as the corporation has outstanding liabilities in the state.[94] A mere change of name by a corporation does not require the appointment of another agent for service.[95] Usually, service on a corporate agent may be had in a county other than that in which the action is commenced.[96] In some states where the corporation has not designated an agent, service may be had on an agent found in the county where the contract in suit was made.[97]

*Upon foreign unincorporated associations.* See 4 C. L. 1076

(§ 4) *C. Substituted.*[98]—See 10 C. L. 1269—Substituted service cannot be had unless expressly authorized,[99] and all statutory requirements, such as necessary preliminary steps,[1] must be strictly followed,[2] and a departure therefrom cannot be aided or cured by actual notice to the person desired to be served.[3] Service at the "late" place of residence is ineffective under a statute providing for service at the "usual" place of residence.[4] "Usual place of abode" means the place where defendant is ac-

dence held insufficient to show that agent of foreign insurance company was induced by fraud and artifice to come into state so that service might be had upon him, and hence upon company. Commercial Mut. Acc. Co. v. Davis, 213 U. S. 245, 53 Law Ed.—.

94. Where contract of insurance between company doing business in North Carolina and person residing in South Carolina was assigned in good faith to resident of North Carolina before insurance company ceased to do business in that state and revoked its designation of agent for service, assignee was entitled to protection of North Carolina statute prohibiting such revocation while liabilities remained outstanding, and service on designated agent was good. Hunter v. Mutual Reserve Life Ins. Co., 192 N. Y. 85, 84 NE 576. Under statute, service may be made on secretary of state or assistant so long as foreign corporation has any liabilities in state, and hence where cause of action arose out of business done in state prior to forfeiture of charter, service could be made on assistant secretary of state after forfeiture. Paulus v. Hart-Parr Co., 136 Wis. 601, 118 NW 248.

95. Corporation remains same. Cable Co. v. Rathgeber, 21 S. D. 418, 113 NW 88.

96. Action to quiet title may be brought in county where land is situated and service had on appointed agent of foreign corporation in another country,, under Wilson's Rev. & Ann. St. 1903, § 1227, which is not invalid as in controvention of provision of organic act requiring actions to be brought in county where defendants or some of them reside. Nelson v. Deming Inv. Co., [Okl.] 96 P 742. Under Virginia statutes where action against foreign corporation doing business in state is commenced in county where wrong, damages for which are sought, arose, process may be served in county where statutory agent of corporation for service resides. Carr v. Bates & Rogers Const. Co., 108 Va. 371, 61 SE 754.

97. In suit to restrain collection of notes and for breach of warranty against foreign corporation which had not designated agent for service in the state, service was properly made, under Civ. Code Prac. § 51, subsec. 3, and § 72, on state agent found in county where contract was made. Pennebaker Bros. v. Bell City Mfg. Co. [Ky.] 113 SW 829. Ky. St. 1903, § 571, requiring foreign corporations to designate agent in state service, provided an additional mode or person for service; did not repeal §§ 51 and 72. Id.

98. **Search Note:** See Process, Cent. Dig. §§ 83-97; Dec. Dig. §§ 69-83.

99. Under Code 1907, § 5301, service of summons by leaving copy at home of defendant is invalid; must be left with defendant. Burt v. Frazer [Ala.] 47 S 572.

1. Merely mailing copies of papere to last known address of defendants who could not be found in city was not compliance with Mun. Ct. Act, Laws 1902, c. 580. Leavitt v. Matzkin, 114 NYS 687. Order granted on **affidavits** dated prior to first alias summons void under Laws 1902, c. 580, § 32. New York Leasing Co. v. O'Brien, 110 NYS 1031. Affidavit that server went to defendant's residence twice, and was informed that she was nurse and was away at work did not show an attempt to "avoid" service. Id. Affidavits held too vague and indefinite as to attempts to serve summons to warrant order for substituted service on ground that defendant was avoiding personal service. Held v. Broadbelt, 113 NYS 1062. If affidavits for substituted service are insufficient on their face, court may set aside such service without considering affidavits of defendant controverting those of plaintiff. Id. Requirement that **order for substituted service and papers** on which it is granted must be filed not less than six days before return day is imperative and essential to give jurisdiction. Municipal Court Act, Laws 1902, c. 580, § 34. New York Leasing Co. v. O'Brien, 110 NYS 1031. That order for substituted service was not obtained within 60 days after filing lis pendens, as required by Code Civ. Proc. § 1670 might affect lis pendens but would not invalidate service. Hess v. Felt, 60 Misc. 541, 112 NYS 470. **Order** for substituted service void when it did not show person signing as "Justice of City Court," etc., was such in fact. New York Leasing Co. v. O'Brien, 110 NYS 1031.

2. Berryhill v. Sepp, 106 Minn. 458, 119 NW 404. Statutes providing for substituted service must be strictly followed. New York Leasing Co. v. O'Brien, 110 NYS 1031.

3. That process is afterwards handed to defendant by one who receives it immaterial, if substituted service not proper. Berryhill v. Sepp, 106 Minn. 458, 119 NW 404.

4. Judgment based thereon void. Minnesota Thresher Mfg. Co. v. L'Heureux [Neb.] 118 NW 565.

tually living at the time when service is made,[5] the customary and settled place of residence.[6]

Substituted service on corporate agents is sometimes authorized.[7]

(§ 4) *D. The server, his qualifications and protection.*[8]—See 8 C. L. 1457—Service should be made by the proper officer,[9] but mere irregularities in this regard, as distinguished from a total lack of authority, do not render the service absolutely void.[10]

(§ 4) *E. Constructive service.*[11] *In general.*See 10 C. L. 1270—Statutes authorizing service by publication are valid [12] but will be strictly construed, and the statutory requirements must be strictly followed.[13] Constructive service cannot, without an appearance, support a personal judgment.[14] The court has power to render judgment only as to the res as property within its jurisdiction,[15] and such judgment is binding only on those to whom effective constructive or actual notice was given;[16] but service by publication, where authorized and made in the prescribed manner, is as effective as personal service.[17]

**5.** Berryhill v. Sepp, 106 Minn. 458, 119 NW 404.

**6.** In case of married man, "house of his usual abode" is prima facie place where wife and family reside. Berryhill v. Sepp, 106 Minn. 458, 119 NW 404. Service on defendant not valid where made by leaving copy with his daughter at home of mother and daughter, where husband and wife were living separate and apart, and husband (defendant) was resident of Montana and had never been on wife's premises. Id.

**7.** Leaving copy of writ at office of division superintendent, in state, with chief clerk of superintendent, is valid service on foreign railroad corporation, under P. L. 1896, p. 305, which authorizes leaving copy at usual place of business of such corporation. Hygea Brew. Co. v. Erie R. Co. [N. J. Law] 69 A 981. In Oklahoma, service on the duly appointed agent of a foreign corporation may be personal, or by leaving the copy at the usual place of residence of such agent. Statutes construed. State Life Ins. Co. v. Oklahoma City Nat. Bank [Okl.] 97 P 574.

**8. Search Note:** See notes in 44 L. R. A. 435.

See, also, Process, Cent. Dig. §§ 57-66; Dec. Dig. §§ 50-55; 19 A. & E. Enc. P. & P. 577.

**9.** Processes emanating from circuit courts should be served by sheriff or deputies, especially in capital cases (service of copy of venire). Bradberry v. State [Ala.] 46 S 968.

**10.** Coroner, being authorized to make service where sheriff is a party, service by former where sheriff is improperly made a party is not void but only voidable, and court acquires jurisdiction. Clause v. Columbia Savings & Loan Ass'n, 16 Wyo. 450, 95 P 54.

**11. Search Note:** See notes in 4 L. R. A. (N. S.) 117; 11 Id. 676; 87 A. S. R. 358.

See, also, Process, Cent. Dig. §§ 98-139; Dec. Dig. §§ 84-111.

**12.** Code Civ. Proc. § 438, authorizing service by publication on foreign corporations does not deny due process of law. Grant v. Greene, 59 Misc. 1, 111 NYS 1089.

**13.** Steinman v. Jessee, 108 Va. 567, 62 SE 275. Statutes authorizing constructive service of process by publication must be strictly pursued in order to give a court jurisdiction to render a decree pro confesso or by default. Cobb v. Hawsey [Fla.] 47 S 484. Failure to strictly follow statute providing for notice to nonresidents by publication invalidates judgment. Deputy v. Dollarhide [Ind. App.] 86 NE 344.

**14.** Service on nonresident not effective in actions in personam. Gassert v. Strong [Mont.] 98 P 497. Neither personal judgments nor execution for deficiency can be rendered against nonresident served by publication not before court. Converse v. Hindes, 139 Ill. App. 370. Proceeding to divest title of nonresident trustee held in personam. Halcomb v. Kelly, 114 NYS 1048. No personal judgment can be had against nonresident constructively served who does not appear, and no finding in such case is binding as to personal liability. Gates v. Tebbetts [Neb.] 119 NW 1120. Judgment in personam for temporary alimony and attorney's fees cannot lawfully be rendered where service on nonresident husband is by publication and he does not appear. Hood v. Hood, 130 Ga. 610, 61 SE 471.

**15.** Upon constructive service (publication or personal outside state) jurisdiction acquired only to proceed against property within jurisdiction. Bristol v. Brent [Utah] 99 P 1000. In suit to foreclose mortgage against nonresidents constructively served, court had power to decree sale to satisfy debt, interest and costs; part of judgment purporting to be personal was invalid. Highland Land & Bldg. Co. v. Audas, 33 Ky. L. R. 214, 110 SW 325. Personal judgment against nonresident based on constructive service void; in action in rem, judgment based on such service valid as to property in jurisdiction on which it operates. Ely v. Hartford Life Ins. Co., 33 Ky. L. R. 272, 110 SW 265.

**16.** To charge property of nonresidents, notice, actual or constructive, must be shown. Wade v. Wade's Adm'r [Vt.] 69 A 826. If actual notice resulting from delivery of copy of writ be not shown, constructive notice by publication should be applied for. Vt. St. 1644. Id. Tax foreclosure proceeding and judgment binding on unknown owners constructively served but not binding on persons in actual possession of land, not served with process. Sellers v. Simpson [Tex. Civ. App.] 115 SW 888.

**17.** Suit to quiet title. Emery v. Kipp

*When proper.*See 10 C. L. 1270—Constructive service is allowed only where the defendants are nonresidents,[18] or where they cannot be found in the state, or their whereabouts is unknown,[19] and where they have property in the state, subject to the jurisdiction of the court,[20] or claim property therein,[21] or where the action is one in rem [22] or quasi in rem,[23] and the court has jurisdiction of the res.[24] Constructive service is also allowed by some statutes against unknown heirs [25] or other unknown claimants of real property where title is in issue.[26] It is allowable only in cases covered by the authorizing statute.[27]

*Procedure to authorize.*See 10 C. L. 1270—The affidavit for publication must state facts showing ground for constructive service,[28] or such facts must be alleged in the

[Cal.] 97 P 17. Nonresident defendants in proceeding to forfeit lands for failure to list and pay taxes duly served in statutory manner, bound by judgment. Eastern Kentucky Coal Lands Corp. v. Com., 33 Ky. L. R. 857, 111 SW 362.

18. Judgment rendered on service by publication against resident of state on whom personal service could have been had is void. Hayes County v. Wileman [Neb.] 118 NW 478. Service by publication sustained, against suit to set aside default on ground that defendant was only absent from state and intended to return, where evidence showed she regarded herself as resident of state where she had gone, and intended to institute proceedings there. Lewis v. Lewis, 138 Iowa, 593, 116 NW 698.

19. Service by publication under Code Civ. Proc. § 435, on ground that place of defendant's sojourn was unknown, is not invalidated by fact that he was known to be in Canada, information as to his exact whereabouts being withheld by family and business representatives. Hess v. Felt, 60 Misc. 541, 112 NYS 470.

20. Where suit in equity grew out of lands and tenements within the jurisdiction, and bill was served upon a resident principal defendant, court was authorized to order service on nonresident defendants, under Act April 6, 1859 (P. L. 387) by service of copy of bill. Smith v. Carter, 219 Pa. 315, 68 A 736. Under Code Pub. Gen. Laws 1904, art. 16, §§ 117, 127, providing for publication in suits on contracts relating to property in state, nonresident defendants in suit for specific performance of covenant to convey, in lease, may be so notified, and under section 91, court may appoint trustee to convey interests of such defendants. Hollander v. Central Metal & Supply Co. [Md.] 71 A 442 Plaintiff attached property of defendant, nonresident, and had order for publication of summons, conforming to N. Y. Code § 439. Cause then removed to federal court. Held, service would support judgment to extent of property attached, though plaintiff's papers moving for order of publication did not show (as required in federal courts) that defendant had property in state. Mercantile Nat. Bank v. Barron, 165 F 831.

21. Service by publication on nonresidents sufficient in suit to quiet title. Kieffer v. Victor Land Co. [Or.] 98 P 877.

22. Constructive service sufficient to support judgment in actions in rem. Gassert v. Strong [Mont.] 98 P 497. When the res of a controversy is within the state, **jurisdiction over foreign corporation** interested therein may be obtained by substituted service of process same as in the case of other nonresident defendants. Proceeding to set aside mortgage. McCarter v. Pitman, Glassboro & Clayton Gas Co. [N. J. Eq.] 69 A 211.

23. Suit to establish and enforce trust in real estate held quasi in rem, and court of jurisdiction in which property was situated could render judgment on service by publication on nonresident. Gassert v. Strong [Mont.] 98 P 497. Garnishment is in nature of proceeding in rem, and judgment therein is binding on nonresident cited by publication or having only constructive notice of original suit. Missouri, K. & T. R. Co. v. Swartz [Tex. Civ. App.] 115 SW 275.

24. Holcomb v. Kelly, 114 NYS 1048.

25. Where, in partition, names and places of residence of some heirs of deceased person are unknown, resort may be had to statute authorizing service by publication on unknown heirs. Hess v. Webb [Tex. Civ. App.] 113 SW 618.

26. In tax foreclosure proceedings, unknown owners constructively served held bound by judgment. Sellers v. Simpson [Tex. Civ. App.] 115 SW 888. See, also, Cobb v. Hawsey [Fla.] 47 S 484; Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley [C. C. A.] 164 F 963.

27. Section 5045, providing for service by publication in certain cases, does not apply to an action in interpleader where brought by the stakeholder. Connecticut Mut. Life Ins. Co. v. Berman, 7 Ohio N. P. (N. S.) 145.

28. Affidavit showing nonresidence of defendant, but not that he could not be found within state, insufficient to support service by publication. Lewine v. Gerardo, 60 Misc. 261, 112 NYS 192. The affidavit for publication should state facts showing due diligence to make personal service, and an affidavit stating merely that service could not be made with due diligence insufficient. Nicoll v. Midland Saving & Loan Co. [Okl.] 96 P 744. Where affidavit alleged that one defendant resided in Iowa and another in Colorado, these facts warranted inference that they could not with reasonable diligence be served in the state, and order for publication was proper under Code § 439. Sunswick Land Co. v. Murdock, 129 App. Div. 579, 114 NYS 436. That affidavit also alleged conclusion that affiant will not be able to serve them in the state on account of their nonresidence was immaterial. Id. Affidavit for publication **against foreign corporation** insufficient and service void where it was not specifically alleged that such corporation had not complied with law, that no agent for service had been ap-

complaint, where the law so requires;[29] and in some states the order must be based upon a complaint stating a good cause of action.[30] The affidavit for publication need not be verified at the exact time suit is commenced.[31] Errors and defects in proceedings taken to obtain jurisdiction of nonresidents, of a nature tending to mislead and prejudice defendant, are fatal.[32] Immaterial irregularities may be disregarded.[33]

*How and when made.*[See 10 C. L. 1271]—Publication of process on Sunday is void in some states.[34] Failure to mail papers to the nonresident, when his postoffice address is known, amounts to fraud and invalidates the service by publication.[35]

*Order of publication; published notice or summons.*[See 10 C. L. 1272]—Issuance of the order is controlled by statutory provisions.[36] The published order, notice or sum-

pointed, and that personal service could not be made. Nicoll v. Midland Savings & Loan Co. [Okl.] 96 P 744. Under Rev. St. Ohio 1908, § 5046, providing that before service by publication can be made an affidavit that summons cannot be served in state upon the defendant and that the case is one mentioned by the statute must be filed, affidavit showing that service could not be made on both of two defendants but failing to state that it could not be made on the foreign corporation alone and there was nothing in context to show that such corporation was not doing business in state or had no office nor managing agent upon whom service might not have been made or that the insertion of "and" was by mistake is insufficient to render subsequent service of foreign corporation by publication valid. Welch v. Farmers' L. & T. Co. [C. C. A.] 165 F 561. **Where unknown owners are made parties** defendant and they are nonresident or whose addresses are unknown, two affidavits are imperatively required, one for the purpose of procuring issue of process and one to authorize the clerk of the court to cause notice by publication to such defendants to be made as directed by other statutory provisions. Substantial compliance with those provisions is essential and indispensable. Chancery Act, Rev. St. §§ 7, 12. Breed v. Baird, 139 Ill. App. 15.

**29.** Under Rev. Codes 1905, § 6840, requiring as basis for constructive service that affidavit must state, or complaint show that defendant has property or debts owing him in state, constructive service proper where complaint contained allegations as to contract for sale of real estate by defendant, facts of ownership being inferred. Hemmi v. Grover [N. D.] 120 NW 561. Under statute [Mans. Dig. Ark. § 4989) issue and service by publication of warning order to unknown heirs where fact appears in complaint that names of heirs are unknown to plaintiff, such averment in complaint is indispensable, and publication of warning order without it does not give jurisdiction. Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley [C. C. A.] 164 F 963. To give court jurisdiction of unknown parties, interested in property involved, by publication, complainant must allege in his verified bill that he believes there are other persons interested other than known defendants whose names are unknown to him. Laws 1905, p. 70, c. 5393. Cobb v. Hawsey [Fla.] 47 S 484. Decree against "unknown heirs" of named person invalid where no such allegation was in bill. Id.

**30.** Complaint held to state cause of action within Code Civ. Proc. § 439, providing that order for publication of summons must be based on complaint stating cause of action. Grant v. Cobre Grande Copper C., 193 N. Y. 306, 86 NE 34, rvg. 126 App. Div. 750, 111 NYS 386. Complaint held sufficient in action between same parties. Grant v. Greene, 59 Misc. 1, 111 NYS 1089. To support service by publication, complaint need not allege that plaintiff is resident, affidavits showing that fact. Id.

**31.** Affidavit for warning order to nonresident need not be verified precisely at time of filing of complaint; verification 3 days prior thereto not fatal. Cannon v. Lunsford [Ark.] 115 SW 940. Order for publication not invalidated by fact that affidavit of nonresidence was made 8 days before order of publication. Himmelberger-Harrison Lumber Co. v. Keener [Mo.] 117 SW 42.

**32.** D'Autremont v. Anderson Iron Co., 104 Minn. 165, 116 NW 357.

**33.** Approving service on certain defendants by publication after evidence had been taken not improper. Earl v. Cotton [Kan.] 96 P 348. Affidavit for publication proper in all respects, not invalidated by fact that it was first filed with justice of peace and then withdrawn and filed in circuit court. Himmelberger-Harrison Lumber Co. v. Keener [Mo.] 117 SW 42. Where affidavit for publication contained essential averments, order reciting that "defendant is without the state and is 'now' a resident," etc., was good, the word "now" being evidently mere clerical error "not" being intended. Kieffer v. Victor Land Co. [Or.] 98 P 877.

**34.** Under Wilson's Rev. & Ann. St. 1903, § 1969, prohibiting "service" of legal process on Sunday, publication of process in a newspaper on Sunday would be void. Stearns v. State [Okl.] 100 P 909. But publication of notice of election is not publication of "process" and is valid. Id.

**35.** In suit to set aside decree of tax foreclosure and to quiet title, plaintiff made affidavit that he did not know defendant's place of residence, when he in fact knew his post office address. Service by publication alone without mailing copy to address of defendant insufficient and amounted to fraud. Noble v. Aune, 50 Wash. 73, 96 P 688.

**36.** Under Rev. St. 1879, § 3494, clerk may issue order for publication in vacation, which includes time during which court was adjourned—from March to June. Himmelberger-Harrison Lumber Co. v. Keener [Mo.] 117 SW 42.

mons must fix a proper day for appearance,[37] which must be within a time prescribed by statute,[38] and must sufficiently designate the defendants sought to be thus served,[39] though in tax foreclosure proceedings an error in the name of the owner,[40] as a designation of owners as "unknown" when their names appear on the roll,[41] has been held not to invalidate the service where the property was properly described. Though failure to insert the middle initial of defendant's name in a summons, where service is by publication, might not be fatal error,[42] the use of a wrong initial will not confer jurisdiction over the real party defendant.[43] Notice to a woman stating her maiden name, in which she took title to real estate, is good, though she has since married.[44] Various statutes require the notice or order to state the nature or object of the action [45] and the file number of the suit.[46]

*Personal service in lieu of publication.* See 6 C. L. 1461—Some statutes permit personal service outside the state in lieu of publication and mailing of summons,[47] and when duly authorized and made, such service is equivalent to service by publication,[48] and gives the court jurisdiction over property of the defendants in the state, but not the power to render a personal judgment.[49] When service in such manner is complete,

37. Notice by publication in equity suits to nonresident defendants need not, under Laws 1893, p. 60, c. 4129, be returnable to rule day. Smith v. Elliott [Fla.] 47 S 387. Published summons insufficient which directed defendant to appear within 60 days after "service" of summons, exclusive of day of service, and did not specify return day; giving date of first publication under attorney's signature did not aid it. Bauer v. Widholm, 49 Wash. 310, 95 P 277. Published summons requiring defendant to appear within 60 days after certain date, and omitting words "after date of first publication," etc., is sufficient as substantial compliance with Ball. Ann. Code, § 4878. Stubbs v. Continental Timber Co., 49 Wash. 431, 95 P 1011.

38. Under Code, § 59, judgment against nonresident proceeded against by warning order citing defendant to appear on first day of term commencing within less than 60 days of date of warning order is void. Highland Land & Bldg. Co. v. Audas, 33 Ky. L. R. 214, 110 SW 325. But this provision does not apply to a court of continuous session. Ky. St. 1903, § 1004, controls in such case, providing that warning order shall direct defendant to appear within 60 days after date of order, and that he shall be considered as constructively summoned in 30 days. Id.

39. Notice by publication describing certain defendants by initials only did not give court jurisdiction. Herbage v. McKee [Neb.] 117 NW 706. Published summons in county tax foreclosure proceeding void as to one not named and whose property was not identified, since he would have no information that he or his property was involved. Ontario Land Co. v. Wilfong, 162 F 999. Doctrine of idem sonans cannot be invoked in aid of published notice entitled "Steinman," body of notice using name "Stinman," and party sought to be bound being "Steinman." Steinman v. Jessee, 108 Va. 567, 62 SE 275.

40. In county tax foreclosure proceeding, immaterial that published summons named owner as "Acenie" instead of "Aune" where property was correctly described. Noble v. Aune, 50 Wash. 73, 96 P 688.

41. Proceeding to foreclose tax certificate being in rem, published summons describing owner as unknown, property being described, was good, though owner's name appeared on tax roll. Tacoma Gas & Elec. L. Co. v. Pauley, 49 Wash. 562, 95 P 1103.

42. D'Autremont v. Anderson Iron Co., 104 Minn. 165, 116 NW 357.

43. Publication of summons to "George H. Leslie" confers no jurisdiction over "George W. Leslie." D'Autremont v. Anderson Iron Co., 104 Minn. 165, 116 NW 357.

44. In suit to quiet title, brought against married woman in her maiden name, in which she had taken title to land in question, service by publication using maiden name gave jurisdiction. Emery v. Kipp [Cal.] 97 P 17.

45. Jurisdiction to proceed against absent defendant in divorce depends upon service upon him of notice of order of publication, which must state object of suit. If notice undertakes also to state grounds of relief, it must state grounds which give court jurisdiction to grant desired relief. P. L. 1903, p. 122; Rules 58, 61. Brant v. Braut, 71 N. J. Eq. 66, 71 A 350. Order for publication in suit for specific performance of covenant to convey, contained in lease, held to sufficiently describe land in question and object of suit, where land was located by reference to streets and alley and order stated that plaintiffs had made written demand for deed, which had been refused, and referred to records where lease and other instruments relating to land were recorded. Hollander v. Central Metal & Supply Co. [Md.] 71 A 442.

46. Citation by publication held to show file number of suit sufficiently where, though it was not stated in body of citation, it was indorsed on it near title of case as shown on face of citation. McLane v. Kirby [Tex. Civ. App.] 116 SW 118.

47. Rev. Codes, § 6521. McLean v. Moran [Mont.] 99 P 836.

48. Under Code, § 156, personal service outside state is equivalent to service by publication. George Norris Co. v. S. H. Levin's Sons, 81 S. C. 36, 61 SE 1103.

49. Personal service outside state under Rev. St. 1899, § 582, is simply a mode of

and the time within which defendant must appear, depend upon the language of the statute.[50] Such service must be authorized by an order,[51] and other statutory requirements should be followed.[52]

§ 5. *Return and proof of service. In general.*[53]—See 10 C. L. 1272—It has been held that no jurisdiction is acquired until return of process or proof of publication,[54] but elsewhere it is said that the court acquires jurisdiction upon proper service of the summons regularly issued [55] and that it is immaterial that the officer serving the summons does not make and file his return until after the answer day.[56] Proof of service should appear in the record.[57] An admission of service may be sufficient though not in the statutory form.[58] An acknowledgment of service should show for whom it is made.[59]

*Official return.*See 10 C. L. 1272—The official return must show legal [60] and timely [61] service on the persons sued,[62] and each of them,[63] and should also show when summons was received for service.[64] A return that the officer after diligent search has been unable to find the desired person has been held equivalent to a return that such person cannot be found.[65] Process and return are admissible in evidence though the return was not made within the time required by law.[66] Mere assumptions and conclusions of law by the sheriff in his return are not binding.[67]

service to affect property or res, equivalent to constructive service under § 575. Personal judgment cannot be based upon it (alimony judgment void). Mass v. Fitch, 212 Mo. 484, 111 SW 475. No personal judgment can be rendered against nonresident, served outside the state, who does not own property in the state and does not appear. Boehrens v. Brice [Tex. Civ. App.] 113 SW 782.

**50.** Under Rev. Codes, § 6521, service by publication or by personally serving defendant out of state is not complete until "day of fourth publication." McLean v. Moran [Mont.] 99 P 836. Defendant has 4 weeks and 20 days in which to appear. Default 20 days after personal service premature. Id. Under Comp. Laws 1907, § 2950, personal service outside state is equivalent to publication, and such service becomes complete on tenth day after actual service. Bristol v. Brent [Utah] 99 P 1000.

**51.** Personal service outside the state, without an order directing it, is a nullity. Freeman v. Freeman, 57 Misc. 400, 109 NYS 705.

**52.** Where officers of corporation were absent from district, service could be had only by complying with U. S. Comp. 1901, p. 513; service personally, or by publication, of order of court directing them to appear by certain named day. Service of subpoena did not answer. Kent v. Honsinger, 167 F 619.

**53. Search note:** See notes in 4 C. L. 1081; 2 Ann. Cas. 11.

See, also, Process, Cent. Dig. §§ 155-205; Dec. Dig. §§ 127-150.

**54.** Deputy v. Dollarhide [Ind. App.] 86 NE 344.

**55.** Pitman v. Heumeier. [Neb.] 115 NW 1083; Spokane Interurban R. Co. v. Connelly, 48 Wash. 515, 93 P 1082. Affidavit to show service by proper person admitted, and court held to have acquired jurisdiction though proper affidavit of service had not been previously filed. Id.

**56.** Pitman v. Heumeier [Neb.] 115 NW 1083.

**57.** Judgment void as to defendants who did not appear when nothing in record shows service upon them. Cox v. Fowler, 33 Ky. L. R. 928, 111 SW 703. See, also, Judgments, 12 C. L. 408.

**58.** Upon suggestion of marriage of woman sued as femme sole, husband being nonresident, notice as to nonresident was sent him, with copy of complaint, and he acknowledged service and receipt of copy in writing, signed by him. Held, return sufficient, though not in statutory form. Balfour v. Tuck [Tex. Civ. App.] 115 SW 841.

**59.** While parent or guardian may acknowledge service on him for minors, an acknowledgment of service on himself merely does not show service for minors. Cummings v. Landes [Iowa] 117 NW 22.

**60.** In action against railroad company before justice of peace, return by constable that he delivered copies to agent insufficient. It should show that he left them. Duval v. Boston & M. R. Co., 58 Misc. 504, 111 NYS 629.

**61.** Return held to show timely service of citation. Duke v. Spiller [Tex. Civ. App.] 111 SW 787.

**62.** Where summons is correct on its face, and return recites service on "within named defendant," return is not invalidated by an error in Christian name of defendant as recited in return. Abraham v. Miller [Or.] 95 P 814. Summons against Hosea E. W. returned as served upon Hosia E. W. held within rule of **idem sonans** where former is shown to have been properly served. Steele v. Wynn, 139 Ill. App. 428.

**63.** Return reciting service on certain defendants named by leaving "a true copy" does not show service of copy on each defendant as required by statute. Duke v. Spiller [Tex. Civ. App.] 111 SW 787. Return not aided by indorsement of fees as for service of copies on each, this not being part of return.

**64.** Marshall v. Matson [Ind.] 86 NE 339.

**65.** Return upheld. Slocum v. McLaren, 106 Minn. 386, 119 NW 406.

**66.** Ancillary process and return in claim and delivery action admissible in evidence

An action lies for damages for false return.[66]

*Return of service on corporations.* See 10 C. L. 1273—The return of service on a corporation must show that the service was made as required or authorized by the statute.[69] A return showing service upon the proper officer is prima facie sufficient.[70]

*Return on constructive service or service by publication.* See 10 C. L. 1274—Proof without a proper jurat is fatally defective.[71] The affidavit of publication should be by one within the class designated by statute,[72] and it must appear the publication was in a proper paper.[73] The date of the publication must also appear.[74] The court may hear proofs of due publication of notice to nonresident, besides certificate of publication.[75] Oral proof of publication has been held sufficient.[76]

*Waiver of irregularities.* See 8 C. L. 1463

though return was not made within 20 days as required by law. Kimmitt v. Deitrich [S. D.] 119 NW 986.

**67.** Webster v. Iowa State Traveling Mens' Ass'n, 165 F 367.

**68.** Sheriff assumes responsibility for correct and true service. Miedreich v. Lauenstein [Ind.] 86 NE 963.

**69.** Under Laws of Ark. (Mansf. Dig. § 4979 [Ind. T. Ann. St. 1899, § 3184]) in force in Indian Territory prior to statehood, return stating service upon N. H. R., General Manager, without showing that its president, mayor or chairman of board of trustees was absent from county, held insufficient. Ravia Granite Ballast Co. v. Wilson [Okl.] 98 P 949. Return of sheriff showing that he read and left copy of summons with agent, in absence of finding any other officers, is sufficient where no defect on face of record is shown, no other defect appears, and examination, since if person served as agent was actually not such it was a question of fact for court's determination on proper plea. Workingmen's Mut. Protective Ass'n v. Swanson [Ind. App.] 87 NE 668. Under Prac. Act, pars. 3, 5 (Hurd's Rev. St. 1905, c. 110), sheriff's return showing service upon M. W. of A. by delivering copy to W. A., venerable consul, and J. D., secretary of branch order No. 7591, located, etc., each being defendant's agents, "president, clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, and station agent of said company not found, etc.," dated and signed, held prima facie sufficient and valid, though service was not made upon president of defendant at its office in another county of state. Dale v. Modern Woodmen of America, 140 Ill. App. 16. Under Prac. Act, § 5 (Hurd's St. 1905), return of sheriff "I have duly served within summons upon within named S. Z. Co. by reading same to C. W. G., superintendent of said S. Z. Co., and at same time delivering to him true copy thereof, president or secretary of said company not found in my county," dated and signed, held prima facie sufficient. Sandoval Zink Co. v. Hall, 133 Ill. App. 196. Under Rev. St. 1895, art. 1222, requiring service to be upon president, secretary, or treasurer or local agent representing company, etc., return reciting service upon "manager" is insufficient, since it cannot be presumed that "manager" was president, secretary, treasurer or local agent. Latham Co. v. Radford Grocery Co. [Tex. Civ. App.] 117 SW 909. Rev. St. 1895, art. 1222, applies to domestic corporations. Id. **Foreign corporation** treated as domestic, and return need not show place of residence of person served. See Code 1899, c. 50, § 34, as amended in Laws 1903, c. 9, p. 79, Code 1906, § 1985. Stout v. Baltimore & O. R. Co. [W. Va.] 63 SE 317.

**70.** Not necessary to judicially ascertain relation of person served to corporation, or that truth of return be admitted by appearance of defendant. Sandoval Zink Co. v. Hale, 133 Ill. App. 196.

**71.** Service held insufficient where there was no personal service nor notice by publication but mere affidavit of service of notice of commencement of suit together with copy of complaint upon defendant in another state, affidavit being sworn to by notary public and sealed with notarial seal, there being no evidence in record that notary was authorized to administer oaths where affidavit was made. Wellington v. Wellington, 137 Ill. App. 394. No jurisdiction where alleged proof of publication was defective, jurat not being signed by officer. Deputy v. Dollarhide [Ind. App.] 86 NE 344.

**72.** Under Sand. & H. Dig. § 4685, affidavit of publication of warning order may be made by publisher, though statute names only "editor, proprietor, manager or chief accountant." Cannon v. Lunsford [Ark.] 115 SW 940. Under Rev. St. c. 100, § 1, where notice was inserted in "National Corporation Reporter," publisher of which is "United States Corporation Bureau," certificate signed by secretary of latter held sufficient though not signed by corporation by secretary. Pine Tree Lumber Co. v. Central Grain Exch., 140 Ill. App. 462.

**73.** Finding in decree that paper was public paper printed and published at certain place held sufficient as against objection that it did not appear that paper was secular newspaper of general circulation. Steele v. Wynn, 139 Ill. App. 428.

**74.** Certificate that first publication was "dated" instead of "made" construed to mean that date was true date of publication. Steele v. Wynn, 139 Ill. App. 428.

**75.** Where clerk's certificate of mailing notice to defendant recites that copy of notice was mailed on Jan. 25, with ten days after first publication, Jan. 25 being more than 30 days from first Monday in March, first publication was made within time required by law. Steele v. Wynn, 139 Ill. App. 428.

**76.** Cannon v. Lunsford [Ark.] 115 SW 940.

*Amendment of return.* See 10 C. L. 1273—Any amendment of the return which makes it speak the truth can be made,[77] and the return, as amended, relates back to the date of service and is to be considered the initial return.[78]

*Impeachment and contradiction of return.* See 10 C. L. 1273—While an officer's return cannot ordinarily be contradicted,[79] especially where third persons have, in good faith, acquired rights in reliance upon the regularity of the proceedings,[80] it does not impart absolute verity but is only prima facie evidence of facts recited,[81] and as against parties acquiring rights with notice of the facts, it is not conclusive.[82] The presumption in favor of its correctness can be overcome only by evidence which is clear, satisfactory and convincing.[83] A false return may, in a proper case, be set aside in equity,[84] and other modes of impeaching a return are now provided by statute, such as by filing a traverse.[85] Where the return of the officer after amendment shows legal service, it can only be attacked by traverse filed thereto, to which the officer making the return is a necessary party.[86]

§ 6. *Defects, objections and amendments. In general.*[87] See 10 C. L. 1274—Im-

77. Amendment can be made by officer making return so as to show official character in making it. Southern Exp. Co. v. National Bank of Tifton, 4 Ga. App. 399, 61 SE 857. Omission to state in return of service of summons of garnishment that agent of corporation served was "agent in charge of office or business of the corporation in the county" can be cured by amendment made by officer who made service and return. Southern Exp. Co. v. National Bank of Tifton, 4 Ga. App. 399, 61 SE 857. Defect in return in calling Baltimore and Ohio Railroad Company "B. & O. R. R. Co." held curable by simple motion. Stout v. Baltimore & O. R. Co. [W. Va.] 63 SE 317.

78. Southern Exp. Co. v. National Bank, 4 Ga. App. 399, 61 SE 857.

79. Rule is founded on public policy for benefit of innocent persons. Hilt v. Heimberger, 235 Ill. 235, 85 NE 304. Sheriff's return imports verity, and court may rely on it. Miedreich v. Lauenstein [Ind.] 86 NE 963.

80. Where rights of third persons have been acquired in good faith, return is conclusive. Hilt v. Heimberger, 235 Ill. 235, 85 NE 304.

81. Hilt v. Heimberger, 235 Ill. 235, 85 NE 304. In action on indemnity policy to recover amount of judgment for personal injuries, false return of service in action in which judgment was recovered was not conclusive as between assured and insurer, so that latter could claim that summons was duly served and should have been forwarded to it according to terms of policy. Frank Parmelee Co. v. Aetna Life Ins. Co. [C. C. A.] 166 F 741.

82. Hilt v. Heimberger, 235 Ill. 235, 85 NE 304.

83. Abraham v. Miller [Or.] 95 P 814; Unangst v. Southwick, 80 Neb. 112, 116 NW 864. There is no fixed rule as to quantum of proof required to establish falsity of officer's return. Evidence reasonably and clearly satisfying trior or triors of fact is sufficient. Raulf v. Chicago Fire Brick Co. [Wis.] 119 NW 646. Finding not against clear preponderance of evidence not disturbed on appeal. Id.

**Evidence insufficient** to show return of service false. Unangst v. Southwick, 80 Neb. 112, 116 NW 864; Abraham v. Miller [Or.] 95 P 814. Evidence insufficient to overcome sworn return that two summonses were properly entitled and duly served. Conroy v. Bigg, 109 NYS 914. Officer's sworn return of service, made few days after service, taken as true as against affidavits of judgment debtor and wife on motion to set aside default. Burton v. Cooley [S. D.] 118 NW 1028. Sworn return of officer showing service on owner of property in mortgage foreclosure not overcome by testimony of owner tending to show no actual service, in view of his contradictory admissions. Bowden v. Hadley, 138 Iowa, 711, 116 NW 689. Affidavit of process server that he served summons by leaving with defendant true copy of original summons, original being correct, not overcome by showing alias summons issued out of wrong district, it not being shown that that was the one served. Lipfert v. Maller, 112 NYS 1056. Evidence held to show delivery of copy of summons to defendant, where it appeared she refused to take it and server placed it upon her shoulder, from which it fell upon floor, she being informed by him as to what it was. Barker v. Schermerhorn, 113 NYS 678.

**Evidence sufficient** to show officer's return of personal service false. Bradley v. Ryan, 110 NYS 977. Evidence held to show no service on defendant. Freeman v. Demorest, 110 NYS 1080. Return of officer showing service overcome by clear and convincing proof that defendant was never served. St. Paul Harvester Co. v. Faulhaber [Neb.] 117 NW 702.

84. Judgment set aside where defendant defaulted because he did not understand process was being read to him and did not know he was being served. Hilt v. Heimberger, 235 Ill. 235, 85 NE 304.

85. See 10 C. L. 1273 and notes.

86. Southern Exp. Co. v. National Bank, 4 Ga. App. 399, 61 SE 857.

87. **Search Note:** See notes in 8 C. L. 1465; 20 L. R. A. 424; 40 A. S. R. 430; 61 Id. 485.

See, also, Process, Cent. Dig. §§ 206-256; Dec. Dig. §§ 151-167; 19 A. & E. Enc. P. & P. 704; 20 Id. 1183.

material errors or irregularities not resulting in prejudice do not affect the validity of the proceedings.[88]

*Objections* See 10 C. L. 1275, 1276 must be timely.[89] A joint plea in abatement by two defendants will be overruled unless it shows service on both to be invalid,[90] since a defect in service on one defendant may not affect the validity of service on a co-defendant.[91] A motion to dismiss on the ground that service was defective should point out the defect.[92] Equitable relief will not ordinarily be granted where there is an adequate remedy at law.[93] In New York service of a complaint, without summons, will be set aside on motion.[94] All facts well pleaded in the complaint stand admitted by a motion to set aside service by publication on the ground that the complaint does not state a cause of action.[95] The procedure where the wrong person is served is indicated in the note.[96] A motion to vacate service of process is properly presented to the federal court after removal from the state court, and the only question presented by it is as to the jurisdiction of the federal court over the defendant.[97] On such a motion only the record may be looked to.[98] Objections to sufficiency of service by publication can be taken only by one so served,[99] and must be taken in the lower court.[1]

*Amendments.* See 10 C. L. 1275—A variance or mistake which is not jurisdictional in character may be cured by amendment.[2] Amendment for the purpose of bringing

88. Defect in title on alias summons immaterial where original summons was attached and was correctly entitled, as was complaint which was served and filed. Conroy v. Bigg, 109 NYS 914. Error in stating year as 1907 instead 1908 in summons in justice court held not jurisdictional defect, and judgment by default valid where defendant was not misled by error and would not have appeared in any case. Epstein v. Prosser, 112 NYS 174. Where summons in justice court notified defendant to appear and answer complaint, and stated nature of claim which was for damages for trespass by animals of defendant, that summons stated that plaintiff would on default take judgment for specified sum, instead of stating that he would pray for relief demanded, was immaterial. Bradley v. Mueller [S. D.] 118 NW 1035.

89. Proper to refuse to allow return to be amended so as to show due service 5 years after it was claimed to have been made where defendant swore he had not been served and officer testified he had no recollection of facts as to service or return. Stubbs v. McGillis [Colo.] 96 P 1005.

90. Plea held not to show defective service on one. Muzroll v. Hetu [Vt.] 72 A 323.

91. Service made on one defendant by one deputy who made no return, and service on codefendant by another who made due return. Latter valid. Muzroll v. Hetu [Vt.] 72 A 323.

92. Otherwise overruled. Thibault v. Connecticut Valley Lumber Co., 80 Vt. 333, 67 A 819.

93. In Missouri suit to set aside a judgment on ground that defendant was not served and that the sheriff's return of service is false does not lie, there being an adequate remedy at law. Reiger v. Mullins, 210 Mo. 563, 109 SW 26.

94. Court has jurisdiction to entertain such motion where indorsements show summons in existence and some mistake in service. Korona v. Piknik, 58 Misc. 315, 110 NYS 867.

95. Grant v. Cobre Grande Copper Co., 126 App. Div. 750, 111 NYS 386.

96. Where the person served is not the one against whom summons was issued, he may appear in such form as to raise this objection if no attention is paid to this objection, and plaintiff refuses to withdraw the summons, he may answer and go to trial and have complaint dismissed, or move to set aside service on ground of mistake. American Oilcloth Co. v. Slonov, 59 Misc. 218, 110 NYS 289. One on whom summons is served by mistake should not be accepted as defendant on answering the answer showing the mistake. Plaintiff should set aside service and begin de novo. Verdict against such person must be set aside. Garvey v. Falk, 58 Misc. 367, 111 NYS 175.

97. Webster v. Iowa State Traveling Men's Ass'n, 165 F 367.

98. Fact in pais and de hors record, such as deposition, inadmissible. Webster v. Iowa State Traveling Men's Ass'n, 165 F 367.

99. Cannot be taken by one other than one so served. Hinton v. Knott, 134 Ill. App. 294.

1. See Saving Question for Review, 10 C. L. 1572.

2. Variance between summons and complaint and return of service, consisting of initials of one name being inverted, cured by amendment. Lewis v. Collier [Ala.] 47 S 790. Proper to allow summons to be amended so as to claim $25,000 instead of $10,000 damages, to make it conform to amended declaration. Comp. Laws 1897, § 10,268. Groat v. Detroit United R. Co., 153 Mich. 165, 15 Det. Leg. N. 395, 116 NW 1081. Where declaration in federal court was properly entitled in district and division of district where defendants resided, but by mistake of clerk summons required them to appear in different division, court

in new parties is elsewhere discussed.[3] Amendment of the return has been discussed in the preceding section.[4]

*Waiver of irregularities or lack of process.*[See 10 C. L. 1276]—Service is ordinarily waived and defects therein cured by a general appearance,[5] or by going to trial on the merits, except, of course, where it is otherwise provided by statute.[6] A warrant of attorney, incorporated in a note to "appear and confess" judgment on the note, is a waiver of notice by service of process.[7] One not acting in a representative capacity or in some way authorized so to do may not waive service of notice for another either by appearance in court or by acknowledging timely service after the date fixed for appearance.[8] Objection to service of process is not waived by appearance to secure removal from state to federal court.[9]

§ 7. *Privileges and exemptions from service.*[10]—[See 10 C. L. 1276]—Nonresident witnesses and nonresident parties as witnesses are privileged from arrest or summons upon civil process while in attendance upon, going to, or returning from the trial of a cause[11] if within the state solely for that purpose,[12] and an action begun by service upon a nonresident while in the state for such purpose is subject to abatement for want of proper service,[13] but this exemption does not usually extend to attorneys.[14] Service of process may be had in a civil action upon an accused person who is voluntarily seeking a hearing before a grand jury in a county other than that of his residence.[15] A federal court has power to protect a litigant from arrest by authorities of a state while he is there for the purpose of attending the trial, his presence being necessary.[16] A juror is subject to service though in attendance upon court as a juror at the time.[17] The presumption is that service on a nonresident

properly allowed summons to be amended and reserved. U. S. Rev. St. § 948. Caraway v. Kentucky Refining Co. [C. C. A.] 163 F 189. Defect in summons in that it designated Baltimore and Ohio Railroad Company the "B. & O. R. R. Co." held curable by simple motion. Stout v. Baltimore & O. R. Co. [W. Va.] 63 SE 317.

3. See Parties, 10 C. L. 1081.

4. See ante, § 5, Return of Service.

5. See Appearance, 11 C. L. 255.

6. Failure of warrant issued by justice to state nature of demand not waived by going to trial, where there was no consent to waiver, as required by Shannon's Code, § 4119. Memphis St. R. Co. v. Flood [Tenn.] 113 SW 884. Nor by oral statement before justice court, where appeal was taken to circuit court, where trial is de novo. Id. Nor was omission cured by §§ 4583-4600, these provisions relating only to formal defects. Id. Nor was defect waived by going to trial in circuit court without moving to quash warrant. Id.

7. Baggett v. Alabama Chemical Co. [Ala.] 47 S 102.

8. Mother could not waive service on children. Cummings v. Landes [Iowa] 117 NW 22.

9. Whether appearance is specially limited or not. Webster v. Iowa State Traveling Men's Ass'n, 165 F 367.

10. **Search Note:** See notes in 4 C. L. 1084; 23 L. R. A. 632; 25 Id. 721; 46 Id. 706; 14 Id. 663; 76 A. S. R. 534; 2 Ann. Cas. 615; 6 Id. 337; 9 Id. 835; 11 Id. 1146.

See, also, Process, Cent. Dig. §§ 140-154; Dec. Dig. §§ 112-126.

11. Martin v. Whitney, 74 N. H. 505, 69 A 888. Party or witness exempt from service if in state for sole purpose of attending court. Finucane v. Warner, 194 N. Y. 160, 86 NE 1118, afg. 128 App. Div. 911, 112 NYS 1129 which afd. 60 Misc. 336, 112 NYS 137. Privilege of freedom from service while attending litigation in another jurisdiction, as party or witness, is founded on public policy and recognized by common law generally. Minnich v. Packard [Ind. App.] 85 NE 787. Person coming into state to testify in his own behalf in action is privileged from service of summons, notwithstanding Burns' Ann. St. 1901, § 315, that actions may be commenced against nonresidents and summons served in any county where they may be found. Id.

12. Party to litigation not privileged where he came to attend to other business and was in state before and after trial longer than was necessary for litigation and transacted other business. Finucane v. Warner, 194 N. Y. 160, 86 NE 1118, afg. 128 App. Div. 911, 112 NYS 1129, which afd. 60 Mis. 336, 112 NYS 137.

13. Service of writ illegal when defendant was at time in state to attend hearing in equity cause as party and witness. Martin v. Whitney, 74 N. H. 505, 69 A 888.

14. Nonresident attorney who comes into state to conduct litigation for client does not come within rule exempting parties and witnesses from service. Kutner v. Hodnett, 59 Misc. 21, 109 NYS 1068.

15. Fields v. Ragelmeir, 7 Ohio N. P. (N. S.) 585.

16. Chanler v. Sherman [C. C. A.] 162 F 19. Writ of protection proper where citizen of Virginia brought suit in federal court of New York, and his presence at trial was necessary, and there was danger that he would be seized under state decree adjudging him insane and placed in asylum. Id.

17. Subject to service of order in supplementary proceedings. Brown v. Edinger, 61

found within the state is valid, and the burden is upon the defendant to show that he was exempt from service.[18]

**Production of Documents,** see latest topical index.

### PROFANITY AND BLASPHEMY.[19]

*The scope of this topic* is noted below.[20]

An excessive claim of damages for a tort is not provable provocation.[21]

**Profert; Profits a Prendre,** see latest topical index.

### PROHIBITION, WRIT OF.

§ 1. Nature, Function and Occasion of Remedy, 1430. | § 2. Practice and Procedure, 1432

*The scope of this topic* is noted below.[22]

§ 1. *Nature, function and occasion of remedy.*[23]—See 10 C. L. 1277.—The writ of prohibition is a preventive rather than a corrective remedy,[24] its office being to prevent usurpation or excess of jurisdiction by judicial tribunals.[25] By statute it has been defined as an order which is issued by the circuit court to an inferior court of limited jurisdiction prohibiting it from proceeding in a matter out of its jurisdiction,[26] and as the counterpart of the writ of mandate.[27] It has also been defined as one of the remedial prerogative writs of the common law to prevent an inferior court from assuming jurisdiction of a matter beyond its legal cognizance.[28] The writ is not one of right [29] but rests in discretion,[30] and being an extraordinary remedy it is to be allowed only on plain grounds.[31] It should never issue except on urgent necessity,[32] or where the ordinary and usual remedies, such as appeal, writ of error, certiorari or other modes of review or injunction, are available,[33] since the writ can-

Misc. 366, 114 NY 1116. If such proceeding interferes with duties as juror, that can properly be presented by motion. Id.

**18.** Proof warranted finding that defendant did not come for sole purpose of attending court. Finucane v. Warner, 194 N. Y. 160, 86 NE 1118, afg. 128 App. Div. 911, 112 NYS 1129, which afd. 60 Misc. 336, 112 NYS 137.

**19.** See 10 C. L. 1277.

**Search Note:** See notes in 22 L. R. A. 353. See, also, Blasphemy, Cent. Dig.; Dec. Dig.; 4 A. & E. Enc. L. (2ed.) 580; 3 A. & E. Enc. P. & P. 633; 16 Id. 1079.

**20.** Use of obscene language (see Indecency, Lewdness and Obscenity, 11 C. L. 1890) or language calculated to produce a breach of the peace (see Disorderly Conduct, 11 C. L. 1108) is elsewhere treated.

**21. No error** in excluding evidence tending to show that demand for damage done by a third person was excessive, fact that excessive damages were asked being no justification of or excuse for the language used in violation of Cr. Code, § 242, even if matter concerned person charged. Roberts v. State [Neb.] 118 NW 574.

**22.** The determination as to the existence of a want of jurisdiction (see Jurisdiction, 12 C. L. 458) and preventive relief by other writs (see Injunction, 12 C. L. 152; Mandamus, 12 C. L. 642) are elsewhere treated.

**23. Search Note:** See notes in 4 C. L. 1086; 6 Id. 1102, 1104; 37 L. R. A. 116; 1 L. R. A. (N. S.) 477, 843; 2 Id. 395; 8 Id. 95; 12 Id. 394; 111 A. S. R. 929; 1 Ann. Cas. 713; 3 Id. 357; 6 Id. 986.

See, also, Prohibition, Cent. Dig. §§ 1-63; Dec. Dig. §§ 1-15; 23 A. & E. Enc. L. (2ed.) 195, 259; 16 A. & E. Enc. P. & P. 1093.

**24.** Morris v. Randall [Ky.] 112 SW 856. It will not lie to prevent exercise of jurisdiction which has already been exercised. In re Quaker Realty Co. [La.] 47 S 369.

**25.** Civ. Code Proc. § 479; Cr. Code Proc. § 25. Morris v. Randall [Ky.] 112 SW 856.

**26.** Civ. Code Proc. § 479. Thomas v. Davis, 33 Ky. L. R. 569, 110 SW 408. Where inferior court had jurisdiction to hear, pass upon and determine case, writ must be denied. Id. Immaterial that judge of superior court may think inferior court will decide case improperly. Id.

**27.** Rev. St. 1887, § 4994. Cronan v. Kootenai County Dist. Ct. [Idaho] 96 P 768.

**28.** In re Macfarland, 30 App. D. C. 365.

**29.** In re Quaker Realty Co. [La.] 47 S 369; Renshaw v. Cook, 33 Ky. L. R. 860, 895, 111 SW 377.

**30.** Renshaw v. Cook, 33 Ky. L. R. 860, 895, 111 SW 377; In re Quaker Realty Co. [La.] 47 S 369; State v. Fort, 210 Mo. 512, 109 SW 737.

**31.** Renshaw v. Cook, 33 Ky. L. R. 860, 895, 111 SW 377.

**32.** In re Harris, 58 Misc. 297, 109 NYS 983. Court's supervisory power denied where it did not appear that additional damage would be done. State v. Second Judicial Dist. Ct., 37 Mont. 226, 95 P 843.

**33.** Evans v. Willis [Okl.] 97 P 1047. Writ will not issue in any case where there is another practical and adequate remedy. In re Macfarland, 30 App. D. C. 365. Code

not be made to serve the purpose of a writ of error or certiorari;[34] but it will issue where there is no other remedy[35] and notwithstanding a remedy by appeal where the latter remedy is inadequate.[36] There is no general rule by which the adequacy or inadequacy of a remedy can be ascertained, but the question is one to be determined upon the facts of each particular issue,[37] but generally prohibition will not lie against a court acting without jurisdiction since the remedy by appeal is both speedy and adequate,[38] and the mere fact that an appeal will lie only to a court which has once decided the matter adversely to the petitioner presents no reason for taking a case out of the general rule,[39] nor will the writ be issued on account of the inconvenience, expense or delay of the other remedies,[40] nor on account of errors or irregularities in the proceedings of a court having jurisdiction, or on account of insufficiency of averment or pleading, or upon matters of defense which may be properly raised in the lower court,[41] but it will be granted where the remedy available is insufficient to prevent immediate injury or hardship to the party complaining,[42] particularly in criminal cases.[43]

The writ usually issues to prevent usurpation or excess of jurisdiction[44] where

Civ. Proc. §§ 1102, 1103. In re Hatch [Cal. App.] 99 P 398. Appeal being adequate, writ will be denied (Josephson v. Powers, 121 La. 190, 46 S 206; State v. Second Judicial Dist. Ct., 37 Mont. 226, 95 P 843; In re Dahlgren, 30 App. D. C. 588), whether court is acting within or without jurisdiction (State v. Pierce County Super. Ct., 50 Wash. 650, 97 P 778). Act Feb. 24, 1905 is unconstitutional as denying right to speedy trial. State v. Walla Walla County Super. Ct. [Wash.] 99 P 740. Where grand jury had been impaneled by court having jurisdiction, though irregularities existed as to the impanelment, appeal is adequate. In re Hatch [Cal. App.] 99 P 398. Prohibition does not lie in case of order appointing receiver for corporation, though there was no jurisdiction to grant the same. California Fruit Growers' Ass'n v. Los Angeles County Super. Ct. [Cal. App.] 97 P 769. Mayor's determination not to approve, under St. 1906, c. 520, § 3, what public convenience requires to be approved, may be reversed by appeal. Mayor of Cambridge v. Railroad Com'rs, 197 Mass. 574, 83 NE 869. Prohibition to restrain trial of a corporation upon ground that it had not been proceeded against in accordance with Pen. Code §§ 1390-1397 inclusive, prior to filing of information, denied, § 995 furnishing a remedy, and if error occurs in same, appeal is adequate. Western Meat Co. v. Sacramento County Super. Ct. [Cal. App.] 99 P 976. Error in refusing to transfer a cause where court had jurisdiction to rule upon motion and jurisdiction of the parties and subject-matter of suit correctable only on appeal. Dunbar v. Bourland [Ark.] 114 SW 467.

**34.** Court having general jurisdiction over subject, writ denied, error, if any in order, being correctable on appeal. In re Dahlgren, 30 App. D. C. 588.

**35.** Lies to restrain circuit court from entertainment and prosecution of certiorari, order granting leave to get license to all intoxicating liquors being final, circuit court having no jurisdiction. Myers v. Circuit Court [W. Va.] 63 SE 201.

**36.** Writ will issue where remedy by appeal is inadequate (State v. Pierce County Super. Ct., 50 Wash. 650, 97 P 778), and where peculiarities of the issues and the exigencies of the litigation require immediate attention, notwithstanding remedy by appeal (McClelland v. Gasquet [La.] 47 S 540). Appeal inadequate where court without authority appoints a receiver and directs him to take possession of property. Cronan v. Kootenai County Dist. Co. [Idaho] 96 P 768. Prohibition lies where police justice had no jurisdiction to impose fine for digging up a street and fee-simple ownership in street is set up, where appeal can be only to hustings court of city, which has no jurisdiction over controversies involving title to realty. Martin v. Richmond, 108 Va. 765, 62 SE 800. Writ lies to prevent superior court from taking jurisdiction under writ of review requiring city and officers to make returns of their action in revoking licenses on ground of lack of jurisdiction. Appeal inadequate, licenses expiring before hearing of appeal. State v. Perce County Super. Ct., 50 Wash. 650, 97 P 778. Issues to restrain court from proceeding under unconstitutional statute delegating to court nonjudicial power, there being no other adequate remedy. In re Macfarland, 30 App. D. C. 365.

**37.** Evans v. Willis [Okl.] 97 P 1047.

**38.** Keith v. Santa Ana, Recorder's Ct. [Cal. App.] 99 P 416. Generally, one in a suit has no right to the remedial writs when there is a right to appeal. McClelland v. Gasquet [La.] 47 S 540.

**39.** That appeal would lie only to superior court of Orange county which had once determined question adversely to petitioner held not to render appeal inadequate so as to authorize issuance of writ. Keith v. Santa Ana Recorder's Ct. [Cal. App.] 99 P 416.

**40, 41, 42.** Evans v. Willis [Okl.] 97 P 1047.

**43.** Writ granted, court not having had jurisdiction and other remedies including appeal being inadequate in criminal case. Evans v. Willis [Okl.] 97 P 1047.

**44.** Prohibition raises question of jurisdiction. In re Quaker Realty Co. [La.] 47 S 369. Lies to a court only to determine whether it has exceeded its jurisdiction. Western Meat Co. v. Sacramento County Super. Ct. [Cal. App.] 99 P 976. Writ will issue to arrest proceedings which are without or in excess

jurisdiction is or is about to be exceeded or usurped,[45] and is granted whenever judicial functions are assumed not rightfully belonging to the person or court assuming them.[46] The exercise of a ministerial or executive function cannot ordinarily be controlled or regulated by prohibition,[47] yet, in the absence of any other adequate remedy, it some times issues to prevent unauthorized individuals from usurping judicial power [48] and to confine public officers performing statutory duties in the exercise of powers lawfully conferred to the use of the means expressly indicated.[49] Since the writ only lies to the court which exceeds the bounds of its jurisdiction,[50] and, probably in some exceptional cases, to a judge at chambers,[51] it will not run against a receiver, commissioners and master appointed by a chancery court.[52]

§ 2. *Practice and procedure.*[53]—See 10 C. L. 1279—An application for a writ of

of jurisdiction of a tribunal, corporation, board or person in all cases where there is no plain, speedy and adequate remedy in the ordinary court of law. Rev. St. 1887, § 4995. Cronan v. Kootenai County Dist. Ct. [Idaho] 96 P 768.

Issue where lower court appears to be without jurisdiction upon the record and admitted facts (Evans v. Willis [Okl.] 97 P 1047), where in an action the court has no jurisdiction (Stephanian v. Sixth Judicial Dist. Ct. [R. I.] 69 A 924) of the subject-matter (Myers v. Tucker County Circuit Ct. [W. Va.] 63 SE 201), or where an inferior court acts without or exceeds its jurisdiction (Cronan v. Kootenai County Dist. Ct. [Idaho] 96 P 768; State v. Fort, 210 Mo. 512, 109 SW 737; State v. Huston [Okl.] 97 P 982), and to prevent a justice of the peace or a police justice from exceeding his jurisdiction by proceeding with prosecution for digging up street in violation of ordinance after fee-simple ownership to street is set up (Moore v. Orr [Nev.] 98 P 398; Martin v. Richmond, 108 Va. 765, 62 SE 800).

**45.** In re Hatch [Cal. App.] 99 P 398. Before writ will issue it must appear that the court has exceeded or is about to exceed the jurisdiction with which it is vested. State v. Twenty First Judicial Dist. Democratic Committee [La.] 47 S 405. Where under Laws 1894, p. 1181, c. 556, commissioner of education had jurisdiction to hear and determine appeal from decision of board of education, writ denied. In re Harris, 58 Misc. 297, 109 NYS 983. Writ to restrain judge from vacating or setting aside a certain judgment denied, defendant having been misled by clerk's notice that a new trial had been ordered, having made no application for a rehearing nor been given notice or time to apply for a recall of remittitur to enable him to submit an application for rehearing. Mystrom v. Templeton [N. D.] 117 NW 473. In action for commissions, long account being involved, where district court has ordered a reference at plaintiff's request and refused to vacate its order therefor, and defendant, in obedience to subpoena, of referee, but under protest, has produced books, and plaintiff is proceeding to examine them, books being pertinent and material, held no case for supervisory control, plaintiff having with defendant examined accounts therein and no claim being made that respondent was required to disclose matters not pertinent or material to inquiry. State v. Second Judicial Dist. Ct., 37 Mont. 226, 95 P 843. Prohibition to restrain trial court from proceeding to enforce execution of writs of seizure and sale denied, court having jurisdiction. Josephson v. Powers, 121 La. 190, 46 S 206.

**46.** State v. Fort, 210 Mo. 512, 109 SW 737.

**47.** Under Rev. St. 1899, c. 97, § 6819, amended in 1901 (Laws 1901 [Am. St. 1906, p. 3344]), designation of depositary is an act in administration of financial affairs of county and exercise of ministerial or executive function, hence not controlled by prohibition. State v. Hawkins, 130 Mo. App. 41, 109 SW 77. The writ does not lie against an executive committee of a political party, for such committee is not a judicial or quasi judicial tribunal or body performing judicial functions. Kump v. McDonald [W. Va.] 61 SE 909.

**48.** Under Civ. Code Prac. § 479, Cr. Code Prac. § 25, writ issues to prevent one claiming to be police judge of a district from executing a judgment of his court for a fine and costs, provision creating police court having been repealed. Morris v. Randall [Ky.] 112 SW 856. Const. §§ 109, 135, 143, held to repeal so much of charter of district of Clinton as provides for a police court thereof. Id.

**49.** Acts of state board of canvassers in canvassing votes of primary election under Laws Ex. Sess. 1907, p. 10, No. 4, held performance of statutory duties, and subject to judicial restraint. Bradley v. State Canvassers [Mich.] 16 Det. Leg. N. 728, 117 NW 649. Duties of canvassers under Laws Ex. Sess. 1907, p. 10, No. 4, ministerial, and board subject to control by mandamus and prohibition. Id. Duties imposed on board of state canvassers in canvassing votes and recounting same on petition under Laws Ex. Sess. 1907, p. 10, No. 4, ministerial, hence board subject to restraint from exceeding jurisdiction. Id.

**50.** Kirby's Dig. § 5157. Dunbar v. Bourland [Ark.] 114 SW 467. Code Prac. art. 845. No usurpation shown. In re Quaker Realty Co. [La.] 47 S 369.

**51.** Kirby's Dig. § 5157. Dunbar v. Bourland [Ark.] 114 SW 467.

**52.** Dunbar v. Bourland [Ark.] 114 SW 467. Especially where there is ample remedy, both by prevention and redress, should they proceed in the discharge of duties imposed upon them in void proceedings of their appointment. Id.

**53. Search Note:** See Prohibition, Cent. Dig. §§ 64-84; Dec. Dig. §§ 16-35; 23 A. &

prohibition will not be considered unless it is shown that relief has been unsuccessfully sought in the lower court,[54] but when the writ has been applied for, considered and denied by the court, its decision is final,[55] and under statute, after the return from the judge ordered to make a return has answered, the superior court issuing the order must pronounce finally and summarily on the right of jurisdiction.[56] The writ will not issue unless the applicant shows himself to be an interested party [57] and files a proper petition or complaint,[58] for the court will not assume that a court will exceed its jurisdiction.[59] That a receiver, commissioner and master appointed by the chancery court proceed in discharge of duties imposed upon them in void proceedings,[60] although on an application for a writ of prohibition to prohibit the trial judge from settling a bill of exceptions in a criminal case on the ground that no notice of application for additional time was given, it will be assumed that the court will take such action on the application for relief as will make it competent for it to settle the bill without error, and if necessary grant relief under statute before settling the bill;[61] and in an application for a writ to prohibit the state corporation commission from taking jurisdiction in a cause pending before it, where the application states facts sufficient to confer jurisdiction, it will be presumed that the commission will not proceed beyond its jurisdiction even if the complaint prays for relief over which the commission has no control,[62] and the assurance of the attorney general, who is the commission's legal adviser, that it will not, is a sufficient guarantee that excessive jurisdiction will not be exercised.[63] The supervisory power of a court must be invoked within a reasonable time,[64] and where court rules require it, service of a copy of the affidavit and notice of the time of hearing of the application for a writ must be made on the parties in interest,[65] but an interested party need not necessarily be named as a party in the original action.[66] The writ does not run

E. Enc. L. (2ed.) 215; 16 A. & E. Enc. P. & P. 1134.

**54.** In re Quaker Realty Co. [La.] 47 S 369; State v. Twenty-first Judicial Dist. Democratic Committee [La.] 47 S 405.

**55.** Court Rule 12 (28 South, IV). State v. Twenty-first Judicial Dist. Democratic Committee [La.] 47 S 405.

**56.** Rule in Code Prac. art. 851 applicable to case, hence delay of 15 days denied. State v. Twenty-first Judicial Dist. Democratic Committee [La.] 47 S 405.

**57.** Cronan v. Kootenai County Dist. Ct. [Idaho] 96 P 768; State v. Herrmann. [Ala.] 48 S 851. Under Rev. St. 1887, § 4994, writ of prohibition is counterpart of writ of mandate, and same degree of strictness in regard to parties is not maintained. Cronan v. Kootenai County Dist. Ct. [Idaho] 96 P 768. Plaintiff held shown to be an interested party. Id.

**58.** Cronan v. Kootenai County Dist. Ct. [Idaho] 96 P 768.

**59.** Action held not by pleading converted into equitable action beyond jurisdiction of justice and prohibition denied, court not assuming that justice would exceed jurisdiction by reforming note. Burns v. Glover [Cal. App.] 96 P 788. Though justice of the peace is without criminal jurisdiction, that of itself does not justify a court in granting a restraining order against the justice on the mere apprehension of the petitioners that the justice will issue a warrant and then punish the petitioner if he should refuse to obey the mandate of the process. State v. Herrmann [Ala.] 48 S 851.

**60.** Where judgment shown that proceeding in which they were appointed was void. Dunbar v. Bourland [Ark.] 114 SW 467.

**61.** Assumed that if necessary court will make its formal order granting relief under Code Civ. Proc. § 473 before settling bill. People v. Soto [Cal. App.] 96 P 913.

**62, 63.** Atchison, etc., Co. v. Corporation Commission [Okl.] 98 P 530.

**64.** Proviso in article 101 of constitution, though not establishing rule as to courts in exercise of jurisdiction conferred by art. 94, held to serve as guide by which court may be governed in cases arising under latter article, when no sufficient reason for all unusual delay is shown. In re Lindner [La.] 48 S 150. Delay for months held to defeat right to writ. Id.

**65.** Under rule 67 of court service upon parties claimed to be acting for creditors, company and receiver held sufficient, not necessary to search out and serve on each creditor where they number by the hundreds. Cronan v. Kootenai County Dist. Ct. [Idaho] 96 P 768.

**66.** May make himself a party by showing interest in controversy and by moving to set aside judgment or order made in excess of jurisdiction. Cronan v. Kootenai County Dist. Ct. [Idaho] 96 P 768. Branch of action for appointment of receiver held to materially and financially interest applicant so as to make him party as soon as motion to set aside order appointing receiver was made. Id.

against a party in the trial court nor against the judge of the court, but only against the court,[67] but the rule to show cause against the issuance of a writ of prohibition must run against both the tribunal to be prohibited from exercising jurisdiction and the person having adverse interests to be affected by the writ,[68] and if the writ is awarded, it likewise should run against both as parties to the same.[69] The question of the prematurity of the application for a writ of prohibition is considered at the time the rule nisi issues.[70] Where error appears and is duly brought up, the question of time in making the application is not all controlling,[71] and the writ will not be lightly dismissed on a plea of prematurity.[72] The only question involved in a proceeding to restrain a lower court from proceeding with a criminal trial is whether or not the court has jurisdiction to hear and determine the matter before it and of the person of the petitioner,[73] and on an application for a writ of prohibition, a moot question,[74] the constitutionality of a statute or a question of practice thereunder[75] cannot be considered. The writ will not issue for the accommodation of an intervenor where the effect thereof will be to retard the principal action.[76] An appellate court has no original jurisdiction to issue a writ of prohibition, but may issue the same only in aid of its jurisdiction,[77] or where the same is necessary to effectuate its superintending control over "inferior courts,"[78] and in order that such court may issue the writ in aid of its jurisdiction, there must be before the court something on or with regard to which its jurisdiction may be exercised.[79] The court of appeals of the District of Columbia has no such inherent superintending or supervisory power over the inferior courts of the District as will warrant the issue of a writ of prohibition to control an inferior court,[80] but it has the power to issue such writ in aid of its appellate jurisdiction,[81] and it is not necessary that an attempt shall have been made to invoke that jurisdiction before it can be said to attach in order to authorize the issue of the writ.[82] In West Virginia, as to writs of prohibition, the original jurisdiction of the circuit courts and of the supreme court is concurrent,[83] and it is usual and commendable to apply first to the circuit court for the writ, and if it is there preliminarily refused upon the petition then to apply to the supreme court for the writ,[84] but a final judgment of a circuit court in such case, upon the merits, is a bar to a new proceeding in prohibition for the same cause and

**67.** In re Petition of Starr, 139 Ill. App. 49.

**68, 69.** Kump v. McDonald [W. Va.] 61 SE 909.

**70, 71, 72.** McClelland v. Gasquet [La.] 47 S 540.

**73.** Court held to have jurisdiction, hence rulings refusing after indictment to allow inquiry into qualifications of grand jurors or as to whether there was reason for a challenge of the panel, even if erroneous, not reviewable on application for writ. Borello v. Amador County, Super. Ct. [Cal. App.] 96 P 404. Ruling in refusing to allow the character of evidence received by grand jury to be shown on motion to quash indictment being within jurisdiction, not reviewable by prohibition. Id. Privilege granted an accused to examine grand jurors touching their qualification being one of grace, a restriction to examination of only a few not reviewable by prohibition. Id.

**74.** Question of validity of Acts 1907, p. 442, repealed by act approved Nov. 23, 1907, held a moot one, not to be determined on application of wirt. Petition denied. Ex parte Perryman [Ala.] 46 S 866.

**75.** State v. Superior Ct. [Wash.] 99 P 740.

**76.** Prohibition to prohibit proceedings pending an appeal from judgment dismissing an intervention, denied. Filhiol v. Schmidt [La.] 48 S 157.

**77.** In re Petition of Starr, 139 Ill. App. 49. Even then only in case of extreme necessity. Id. Supreme court of North Dakota has no jurisdiction to issue the writ for any purpose other than in aid of its original or appellate jurisdiction. State v. Nuchols [N. D.] 119 NW 632.

**78.** Court without jurisdiction to enjoin members of a court-martial from further proceeding with trial of relator upon certain charges. State v. Nuchols [N. D.] 119 NW 632. Court-martial not "inferior court" within Const. § 86, subject superintending control. Id.

**79.** Petition denied, there being nothing before court with regard to which jurisdiction could be exercised. In re Petition of Starr, 139 Ill. App. 49.

**80.** Code, §§ 221-238 (31 Stat. 1224-1227, c. 804), prescribes court's jurisdiction. In re Macfarland, 30 App. D. C. 365.

**81, 82.** In re Macfarland, 30 App. D. C. 365.

**83, 84.** 85. Chesapeake & O. R. Co. v. McDonald [W. Va.] 63 SE 968.

between the same parties in the supreme court.[85] In Kentucky the court of appeals has jurisdiction of an appeal prosecuted by writ of prohibition to test the validity of an ordinance under which a fine is imposed without reference to the amount of the fine.[88]

**Promoters,** see latest topical index.

## PROPERTY.

§ 1. **Definition and Nature, 1435.** Realty or Personalty, 1435. Formulae, Information, Processes, Literary and Like Mental Productions, 1436.
§ 2. **Creation, Possession and Ownership, 1437.**
§ 3. **Estates in Personalty, 1437.** Life Estates, 1438. Reversions. 1438. Vested and Contingent Interests and Remainders, 1438. Interests Created in Individual Cases, 1439. Mutual Rights of Present and Future Tenants, 1440. Capital and Income, 1440.
§ 4. **Transfer, Loss, and Abandonment, 1441.**

*The scope of this title* is noted below.[87]

§ 1. *Definition and nature.*[88]—See 10 C. L. 1280—Property is the right to or interest in a thing[89] whether of a real, personal, or incorporeal nature.[90] The thing may be either movable or immovable.[91]

*Realty or personalty.* See 10 C. L. 1280—Buildings,[92] standing timber,[93] growing crops,[94] water,[95] easements,[96] and leasehold interests,[97] are usually held realty; but matured fruit though still on the trees is personalty,[98] and sand placed on land

86. Cr. Code Prac. § 347, and Ky. St. 1909, § 3639. Chesapeake & Ohio R. Co. v. Com. [Ky.] 116 SW 323. Validity of ordinance being assailed by writ of prohibition in manner provided by Civ. Code Prac. § 479, appeal dismissed. Id.

87. **Includes** general principles pertinent to nature of property and estates in personalty. **Excludes** real property (see Real Property, 10 C. L. 1448), matters of contract respecting personalty (see Bailments, 11 C. L. 365; Chattel Mortgages, 11 C. L. 611; Sales, 10 C. L. 1534), taxation (see Taxes, 10 C. L. 1776, and the doctrine of fixtures (see Fixtures, 11 C. L. 1477).

88. **Search Note:** See notes in 6 C. L. 1107, 1108; 1 Ann. Cas. 687.

See, also, Property, Cent. Dig. §§ 1-8; Dec. Dig. §§ 1-6; 22 A. & E. Enc. L. (2ed.) 746, 747; 28 Id. 472.

89. Commonwealth v. Walsh's Trustee [Ky.] 117 SW 398.

90. "Property" is nomen generalissimum and extends to every species of valuable right and interest, including real and personal property, easements, franchises, and other incorporeal hereditaments. Equitable Fire & Marine Ins. Co. v. St. Louis & S. F. R. Co., [Mo. App.] 114 SW 546. **Property in land** is the right of user, disposition and dominion over it to exclusion of others. Drainage Com'rs of Dist. No. 8 of Oakwood v. Knox, 237 Ill. 148, 86 NE 636. An **easement** is property. Stein v. Chesapeake & O. R. Co. [Ky.] 116 SW 733. **Deposits in savings banks** held property for purposes of taxation. Wyatt v. State Board of Equalization, 74 N. H. 552, 70 A 387.

91. Movable property is such as may be lifted, carried, drawn, turned or conveyed, or in any way made to change place or position. Monarch Laundry v. Westbrook [Va.] 63 SE 1070.

92. House and barn destroyed by fire held realty, and action for destruction held an action for injury to realty. Las Animas & San Joaquin Land Co. v. Fatjo [Cal. App.] 99 P 393.

93. McCoy v. Fraley [Ky.] 113 SW 444. Where timber is sold in view of immediate severance, it is personalty, otherwise it is realty. Strause v. Berger, 220 Pa. 367, 69 A 818. Apple trees held realty but not matured apples thereon. Doty v. Quincy, etc., R. Co. [Mo. App.] 116 SW 112. Lien on land includes growing timber standing thereon when lien is created. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176.

94. Unless reserved, crops standing on ground, matured or not, pass to grantee in deed or devisee under will. In re Andersen's Estate [Neb.] 118 NW 1108. Unless reserved, crops standing on land, matured or not, pass to devisee of land and not to executor. In re Pope's Estate [Neb.] 120 NW 191. Immaterial that land was let and rent reserved in share of crops. Id.

95. Condemnation of land carries water on the land. Philadelphia, Trust Safe Deposit Ins. Co. v. Merchantville [N. J. Eq.] 69 A 729. **Rights to use** of water for irrigation is real estate and proper method of passing title thereto is by deed. Bates v. Hall [Colo.] 98 P 3. Is real property and is subject of grant either with or without the land for which it was appropriated. Davis v. Randall [Colo.] 99 P 322.

96. Corea v. Higuera, 153 Cal. 451, 95 P 882.

97. Though leasehold interests in land are sometimes regarded as personalty, they are ordinarily considered chattels real and are "real estate" within statute prohibiting formation of corporations to hold real estate. Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 NE 167.

98. Matured apples on trees are personalty, but trees are realty. Doty v. Quincy, etc., R. Co. [Mo. App.] 116 SW 1125.

merely for storage does not thereby become realty.[99] Land scrip [1] and securities for the payment of money [2] are personalty.

*Formulae, information, processes, literary and like mental productions.* See 10 C. L. 1281—The right of a servant or employe to make use of his employer's trade secrets is elsewhere treated.[3] Equity recognizes trade secrets as property and will protect them by injunction against disclosure or use by violation of contract or confidential relations.[4] Any person lawfully acquiring knowledge of trade secrets not patented may, however, use them if the manner of obtaining knowledge and the use of them would not constitute a breach of confidence or good faith.[5] It is a mooted question whether an accounting for profits from wrongful use of a secret process will lie without proof of fraudulent intent.[6] Laches may bar relief,[7] but one who wrongfully appropriates a secret manufacturing process knowing that it belongs to another cannot set up laches against a demand for an accounting of profits.[8]

At common law the author of a literary composition had an absolute property right in the production of which he could not be deprived so long as it remained unpublished.[9] He could not be compelled to publish his production [10] and could allow a restricted or limited use thereof without parting with his property therein; [11] but an author who writes and delivers an article, pursuant to an agreement that his employer shall become the sole owner of the copyright, thereby surrenders his literary property therein and cannot maintain trespass thereto based on the manner of publication.[12]

A theatrical manager has no literary property in the manner in which an actor dances or postures.[13] Public presentation of a manuscript play in England does not extinguish the author's common-law rights in the United States.[14]

**99.** Graham v. Purcell, 126 App. Div. 407, 110 NYS 813.

**1.** Soldier's additional homestead scrip under federal statute held personalty and assignable notwithstanding opposed practice of federal land office. Rogers v. Clark Iron Co., 104 Minn. 198, 116 NW 739.

**2.** Note and real estate mortgage to secure it are personal property. Pettus v. Gault [Conn.] 71 A 509. Interest of vendor of land who retains legal title merely as security for payment of the selling price is personalty and not land. Did not pass under will of all land of which testator died seized. In re Miller's Estate [Iowa] 119 NW 977.

**3.** See Master and Servant, 12 C. L. 665.

**4.** Elaterite Paint & Mfg. Co. v. S. E. Frost Co., 105 Minn. 239, 117 NW 388. Findings as basis for injunction held sustained by evidence. Id. Right to use a secret process of manufacture is of same general character as right to a trademark, copyright, or patent (Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 69 A 1103) and may be enforced by same remedies (Id.). Right to acounting of profits could not be defeated on ground process did not belong to complainant, where, though it appeared process had been discovered by a third person, such person was not party to suit and there was no litigation appropriate to decision of question of complainant's title. Id. Use of secret unpatented process by one who obtained it by fraud or bad faith will be enjoined. Eastern Extracting Co. v. Greater New York Extracting Co., 126 App. Div. 928, 110 NYS 738.

**5.** Elaterite Paint & Mfg. Co. v. S. E. Frost Co., 105 Minn. 239, 117 NW 388.

**6.** Bill showing breach of confidence and knowledge on part of codefendant held sufficient even assuming fraudulent intent must be shown. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 69 A 1103.

**7.** No laches where complainant was informed of defendant's wrongful use of process of manufacture in spring of year and filed bill in September, defendant having expended its money when knowledge came to plaintiff. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 69 A 1103.

**8.** Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 69 A 1103.

**9.** Frohman v. Ferris, 238 Ill. 430, 87 NE 327. Right existed in all productions of literature, drama, art, music, etc. Id.

**10.** Frohman v. Ferris, 238 Ill. 430, 87 NE 327.

**11.** Could permit use by one or more persons to exclusion of others or give a copy of manuscript. Frohman v. Ferris, 238 Ill. 430, 87 NE 327.

**12.** Where author merely reserved right to make use of material and memoranda collected by him in writing article in any manner not inconsistent with copyright transferred. American Law Book Co. v. Chamberlayne [C. C. A.] 165 F 313. See, also, Chamberlayne v. American Law Book Co., 163 F 858. Author agreeing to prepare articles for law book company at stated price per page, subject to changes by company, and as it might direct and who reserved no copyright in articles written, held not entitled to have his name appear in published article as author. Jones v. American Law Book Co., 125 App. Div. 519, 109 NYS 706.

**13.** Actors, if any, have right to complain of imitation. Savage v. Hoffman, 159 F 584.

**14.** Though under English statutes presentation of manuscript play extinguishes

§ 2. *Creation, possession and ownership.*[15]—See 10 C. L. 1281—Ownership of personalty may be either general or special.[16] One who is in actual possession of personalty and has actual control over it is prima facie owner,[17] and ownership once proven is presumed to continue.[18] Where property is by consent of its owner invested with a public interest or privilege, the owner can no longer deal with it as his private property only but holds it subject to the rights of the public.[19]

§ 3. *Estates in personalty.*[20]—See 10 C. L. 1282—At least in some jurisdictions, any estate may be created in personalty which can be created in realty.[21] Testamentary gifts based on conditions which are contrary to public policy will not be enforced.[22] The courts are not agreed as to the application of the rule in Shelley's case to personalty.[23]

author's common-law rights. Frohman v. Ferris, 238 Ill. 430, 87 NE 327.

**15. Search Note:** See notes in 11 C. L. 116; 95 A. S. R. 214; 1 Ann. Cas. 312.

See, also, Evidence, Cent. Dig. §§ 78, 87, 106, 109, 111, 144-154, 196, 214, 239, 316, 449, 474½, 759, 788, 822-882, 1033, 1066, 1078, 1095, 1108-1120, 1136, 1178, 1219, 1220, 1276, 1277, 2171, 2192, 2457; Property, Cent. Dig §§ 3, 9; Dec. Dig. §§ 6-10; 22 A. & E. Enc. L. (2ed.) 751; 28 Id. 232, 473.

**16.** General ownership held sufficient to support indictment against one who stole goods while they were in custody of law. People v. Frankenberg, 236 Ill. 408, 86 NE 128.

**17.** Mariner v. Wasser [N. D.] 117 NW 343. Possession prima facie evidence of ownership. Black v. Roberson [Ark.] 112 SW 402. Against everybody except true owner. Amundson v. Standard Print. & Mfg. Co. [Iowa] 118 NW 789. Where a printing press was sold under agreement title should not pass until a mortgage to secure price had been executed, and thereafter a person other than vendee had possession and executed mortgage to seller, his acts and possession were prima facie proof of ownership against everybody except seller though it did not appear how he acquired possession. Id. Mere possession **of non-negotiable instrument** does not raise a presumption of ownership in possession. In re Perry, 129 App. Div. 587, 114 NYS 246.

**18.** In re Perry, 129 App. Div. 587, 114 NYS 246.

**19.** Property devoted to telephone use. State v. Cadwallader [Ind.] 87 NE 644.

**20.** To save unnecessary duplication, cases in which entire estates or parts of estates are disposed of under principles applicable alike to real and personal property, and without separate consideration of the personalty, are treated once only in the article on real property. See Real Property, 10 C. L. 1448.

**Search Note:** See notes in 6 C. L. 461.

See, also, Life Estates, Cent. Dig.; Dec. Dig.; Remainders, Cent. Dig.; Dec. Dig.; Reversions, Cent. Dig.; Dec. Dig.; Trusts, Cent. Dig.; Dec. Dig.; 22 A. & E. Enc. L. (2ed.) 756.

**21.** Civ. Code 1895, § 3080. Crossley v. Leslie, 130 Ga. 782 61 SE 851.

**22.** Corpus of trust to daughter on husband's death or her permanent and legal separation from him held not invalid. Poe v. Hill, 201 Mass. 15, 86 NE 949.

**23. NOTE. Rule in Shelley's Case applied to personalty:** The Supreme Court of Delaware has recently refused to extend the operation of the rule in Shelley's Case as many courts profess to have done, to gifts of personal property, on the ground that the extension would be against both reason and authority. Jones v. Rees [Del.] 69 A 785. The latter proposition, with a few exceptions outside of Delaware, is doubtful; the former seems not to have been closely examined by the courts.

The rule in Shelley's Case, as an inflexible rule of property applicable to the attempted creation of estates under a certain form of words, 7 Columbia L. R. 550, was doubtless originally a protective rule of feudal tenure to eliminate one of the many means devised to defraud the lord of the incidents of seigniory. Van Grutten v. Foxwell, App. Cas. 658. Hence there is no historical reason for its application to personalty. Moreover, to have a gift of chattels such that the rule might operate strictly by way of analogy, would require that the words "to A for life, remainder to his administrators, executors and assigns," be used, not "remainder to his heirs." Bennett v. Bennett, 217 Ill. 434, 75 NE 339, 4 L. R. A. 470. Yet it is always the latter case that arises. There was no technical rule at common law that the word "heirs" might not be used in disposing personalty as a word of purchase, Powell v. Boggis, 35 Beav. 535, and no intimation appears in the earliest cases that the rule in Shelley's Case obtains in gifts of personalty. Thus, not only the word "issue" in a devise of a term for life, afterward to his issue, Warman v. Seaman, Rep. Temp. Finch 279, but even the words "heirs of the body" which should have brought the bequest literally within the rule, were considered words of purchase. Peacock v. Spooner, 2 Vern. 43, 195. The question was purely one of the testator's intent. On the one hand, a devise of a term to a wife and after her death to the heirs of her body, was held to give an absolute estate to the wife, on the ground that the testator intended a gift to the wife in tail, "which could not be" in personalty. Bray v. Buffield 2 Ch. Cas. 236. Similarly, in Richards v. Bergavenny, 2 Vern. 324 a similar intention was found from the fact that the personalty was meant to go with realty given in tail. On the other hand, an assignment of a long term in trust for A for ninety-nine years, if he lived so long, then to his wife for life remainder to the

*Life estates.*[See 10 C. L. 1282]—The general rule that personal property given for life vests absolutely does not apply where a contrary intent is apparent.[24]

*Reversions.*[See 10 C. L. 1282]

*Vested and contingent interests and remainders.*[See 10 C. L. 1282]—Where payment or division is postponed, the estate is contingent or vested according as the element of time is or is not of the substance of the gift.[25] A gift to one dependent on the

heirs of A begotten on his wife did not go absolutely to the first taker, the creation of the short term out of the long one sufficiently showing the donor's intent not to assign the entire term to A. Ward v. Bradley, 2 Vern. 24. The succeeding interval was broken only by Dafforne v. Goodman, 2 Vern. 362, expressly following Peacock v. Spooner, supra.

Apparently, the first recorded instance of the application to personalty of the rule in Shelley's Case is Webb v. Webb, 1 P. Wms. 132. Lord Harcourt decided that an assignment of a term in trust to A for life, remainder to his right heirs, with intervening remainders, vested the entire term in A, saying, "I never heard it said before Peacock v. Spooner, that the limitations of a term in equity differ from the case of a freehold at common law." The gift in this, as in the earlier cases, was of a chattel real, but the step was soon taken from chattels real to chattels personal. Butterfield v. Butterfield, 1 Ves. 133, 155; Garth v. Baldwin, 2 Ves. 646. Notwithstanding, it had been previously held by Lord Harwicke, who decided Garth v. Baldwin, supra, that the words "heirs of the body" could be words of purchase when such an intention appeared elsewhere. Hodgeson v. Bussey, 2 Atk. 80; accord, Hockley v. Mowbry, 3 B. C. C. 81; cf. Knight v. Ellis, 2 B. C. C. 570.

At most, therefore, in England the rule in Shelley's Case as applied to personalty is a rule of construction, easily yielding to the apparent intention of the testator or donor. This, the strongest supporters of the rule in the United States readily admit. Glover v. Condell, 163 Ill. 566, 45 NE 173, 35 L. R. A. 360; Key's Estate, 4 Pa. Dist. 124; Taylor v. Lindsay, 14 R. I. 518, only one being driven to protest along with such admission "that not to apply the rule to personalty is to prostrate one of the great landmarks of property." Horne v. Lyeth, 4 Harr. & J. [Md.] 431. This result may be attributed in part to the fact that to make the rule inflexible would more often defeat the intention of the testator than in the case of realty a consequence which equity strains to avoid. Knight v. Ellis, supra. Indeed, most cases cited in support of the rule merely sustain the principle that personalty cannot be entailed. Gross v. Sheeler, 7 Houst. [Del.] 280. In England, the cases in point seem limited to instances where the words would create an entail in realty. The words in the bequest are construed in terms of realty, and then, if by the operation of the rule in Shelley's Case, an estate tail would have been created, the absolute interest in the personalty is given. In the United States its operation has been extended to words that would create a fee simple in realty. Cf. Horne v. Lyeth, supra. Peculiarly enough, in at least one state, the rule is still applied to personalty though the words would not vest the remainder in the ancestor in a case of realty because of the abrogation of the rule by statute. Powell v. Brandon, 24 Miss. 343; cf. Sands v. Old Colony Trust Co., 195 Mass. 575, 81 NE 300. A further difficulty encountered in the American cases arises where the courts failed to distinguish between a proper application of the rule in Shelley's Case to discover an entail, and an analogous application of the rule against perpetuities where personalty is given over after the death of the first legatee without issue. Both rules have been indiscriminately termed the rule in Shelley's Case. Glover v. Condell, supra; Mason v. Pate's Ex'r, 34 Ala. 379. The decision of the Delaware court is commendable. It is not to be wondered that eminent judges have been puzzled to discern by what process the intention of a donor of personalty must be defeated by the operation of a rule which acts upon a remainder to the "heirs" of one who takes an estate of freehold, because of the technical meaning of that word when applied to real property. Herrick v. Franklin, L. R. 6 Eq. 593; Smith v. Butcher, L. R. 10 Ch. Div. 113. It is curious, also, that courts of equity should have felt bound to follow, at least to an extent, an arbitrary rule of real property at common law, when sustaining interests in chattels unknown to the common law.—From 8 Columbia L. R. 573.

**24.** As where gift blends both realty and personalty. Freeman's Estate, 35 Pa. Super. Ct. 185.

**25. Held vested:** Interest of beneficiary in income held to exist at testator's death though payable quarterly, entitling estate of beneficiary thereto though beneficiary died before end of first quarter. Union Safe Deposit & Trust Co. v. Dudley [Me.] 72 A 166. Direction for payment of pecuniary legacies to each of testator's five sisters after death of widow, and for division of balance among testator's "living" sisters and wife's brother, held to vest legacies to sisters at testators death and not at life tenant's death. Bryant v. Flanders, 201 Mass. 373, 87 NE 574 Will construed to vest stock legacies at death of testatrix, with only delivery of possession postponed. Orange County Trust Co. v. Morrison, 56 Misc. 88, 106 NYS 940. Money to granddaughters share and share alike. They not to receive same until 25 years old held to vest on testator's death with suspension of enjoyment only. In re Becker, 59 Misc. 135, 112 NYS 221. Income to wife for life and "upon and after her death I give" capital to surviving children held to vest remainder at death of testator. Bergmann v. Lord, 194 N. Y. 70, 86 NE 828. Children held to have legal title to remainder though trustee had legal title to trust fund. Id.

**Held contingent:** Rule that bequest in form of direction to pay or divide in future

refusal of another to accept it will take effect if for any reason the other does not accept.[26] Failure of a precedent estate does not necessarily render void the remainder.[27] Remainders are transferrable and subject to seizure for debts.[28]

*Interests created in individual cases.* See 10 C. L. 1283—What kinds of estates or interests are created by the use of particular language is principally a question of intention.[29] An unrestricted power of disposal in one's own right is equivalent to

vests immediately if payment is postponed merely for convenience of fund or estate or to let in some other interest held not applicable where testator gave entire estate to wife for life and "after death of wife I desire that whole of my property both real and personal be sold by executor and after expenses are paid to distribute equally to my legal heirs." Barr v. Denney [Ohio.] 87 NE 267. Direction to pay or distribute to "legal heirs" held to confer a contingent interest not vesting until period of distribution. Id. Bequest to niece held to take effect only in event daughter should die during widow's lifetime and before reaching 21. Frye's Adm'r v. Frye [Ky.] 112 SW 919. Where nephew was given estate of testatrix if he survived her, and also her interest in her mother's estate on same contingency, but subsequent clause provides that if nephew did not survive or if he died before testatrix's estate was fully settled and before proceeds thereof were paid over to him then her estate and right to devise under mother's will should go to first cousin's, held cousins were entitled to all when nephew died shortly after testatrix without having received anything under will. In re McClure's Estate, 221 Pa. 556, 70 A 860.

**26.** Where one of first takers was not in existence and other refused to accept, legacy went to second takers. Ege v. Hering [Md.] 70 A 221.

**27.** On death of wife, $35,000 to the erection of a statue and the remainder to charitable institutions. Held right of remainderman was not dependent on validity of bequest for statue. In re Harteau, 125 App. Div. 710, 110 NYS 59.

**28.** Vested remainder in trust fund subject to life use held transferable same as remainder in realty, and subject to seizure for remaindermen's debts, notwithstanding Code Civ. Proc. § 1879, prohibiting seizure of property held in trust for judgment debtor where trust was created by another. Bergmann v. Lord, 194 N. Y. 70, 86 NE 828.

**29. Absolute estates:** Stock to wife to be hers absolutely during her lifetime, and at her death what might be left to testator's sons, held to give absolute property to wife. Turnbull v. Johnson, 153 Mich. 228, 15 Det. Leg. N. 403, 116 NW 1009. Personalty to wife with provision that if on death of wife property remained it should go to daughter, held to give daughter absolute estate in personalty, her mother dying before testator and daughter surviving both father and mother. In re Dillon's Will, 60 Misc. 636, 113 NYS 929.

**Estates on condition:** Condition that daughter should leave living issue held applicable only to principal and not to income. Haywood v. Wachovia L. & T. Co. [N. C.] 62 SE 915.

**Life estates:** Will construed to give daughter only life interest in trust property, remainder to her heirs discharged of trust. Jones v. Rees [Del.] 69 A 785. Will held to give widow only one-third absolutely and two-thirds for life despite use of precatory words as to her disposal of two-thirds, such words being held sufficient to limit divisees estate though insufficient to create a trust. Gilchrist v. Corliss [Mich.] 15 Det. Leg. N. 971, 118 NW 938. To wife for life, with power to dispose of income and so much of principal as she might deem necessary for support, held only life estate. Hasbrouck v. Knoblauch, 59 Misc. 99, 112 NYS 159. To wife for life, use and control of all estate real and personal with power to use for own use and support of children so much of principal as she might elect, etc., remaining property to go to children at her death, held to give life estate only with power to use principal. In re Davis' Will, 59 Misc. 310, 112 NYS 265. To wife for life to use and enjoy and receive rents and profits for her sole benefit, held to create only a life estate. In re VanValkenburgh's Will, 60 Misc. 497, 113 NYS 1108. To wife "to take and use same and net income during her natural life without giving security as life tenant," without limitation over, held life estate only in personalty. In re Freeman's Estate, 220 Pa. 343, 69 A 816. Niece held to take only life estate in residue, remainder to her children, if any. In re Keene's Estate, 221 Pa. 201, 70 A 706.

**Support:** Where mother received money from brother to use for her maintenance if she desired or needed it, with understanding daughter should have whatever was left at mother's death, mother could pay son such money in consideration he support her during life, and agreement having been performed daughter could not recover from son. Zimmerman v. Hubbs, 115 NYS 541. Charge on legacy to son requiring latter to pay widow $800 as it became necessary for her needs held absolute and not contingent on necessity to keep widow from pauperism. In re Ohse's Will, 137 Wis. 474, 119 NW 93. Widow held entitled to determine for herself character of needs and time when payment to her was necessary to meet such needs. Id.

**Vested or contingent interests:** Where devise of residue to wife was charged with payment of $10,000 to testator's niece on day of her marriage, niece did not take vested interest in such sum but became entitled thereto only in event of her marriage. McClelland's Ex'x v. McClelland [Ky.] 116 SW 730. Voluntary separation of a testator's daughter from her husband held not within will entitling her to capital of a trust fund on her permanent and legal separation from him. Coe v. Hill, 201 Mass. 15, 86 NE 949. Remainder of trust fund to testator's children and grandchildren held contingent on their surviving life benefi-

absolute ownership.[30] A gift clearly intended will not be cut down by subsequent indefinite or doubtful provisions.[31]

*Mutual rights of present and future tenants.*[See 10 C. L. 1283]—A life tenant is entitled to the full use and enjoyment of the property,[32] but sometimes he is required to give security for the forthcoming of the property to the remaindermen.[33]

*Capital and income.*[See 10 C. L. 1284]—The validity of accumulations of income is elsewhere treated.[34] Stock issued under declaration of a stock dividend principal and not income within a testamentary gift of income of a trust fund invested in stocks to life beneficiaries.[35] A person entitled to the income of funds invested in stocks is entitled to only cash dividends excluding dividends declared in liquidation or in reduction of capital.[36] Where bonds worth more than par are left by a testator who directs the income therefrom to be paid to a person for his life with remainder over, the life tenant is entitled to the entire interest without deduction to make good the premium,[37] but, if the trustee himself makes the investment and pays more than par, provision should be made for keeping the principal intact.[38] The time from which income is computable [39] as well as the right to possession of the principal [40] will depend on the language employed and the circumstances of the case.

ciary so as to exclude participation by great-grandchildren whose mother and grandfather both died before beneficiary. Blair v. Keese, 59 Misc. 107, 112 NYS 162. Trust to pay income to daughter for life then to issue during minority, and absolutely at majority; but, if daughter died without issue who should attain 21, then over, held to create vested interests in issue, though trust in their favor was invalid. In re Wilcox, 194 N. Y. 288, 87 NE 497. Gift over on failure of daughter to leave issue who should attain majority held contingent. Id.

**30.** Life estate with unrestricted power of disposition is equivalent to gift absolute. Widow held to take property absolutely under husband's will, her power of disposition covering all methods known to law. In re Welen's Will [Iowa] 116 NW 791. Proceeds of sawmill to wife "for her use" also all other personalty and over "if there should be any thing left," held to give absolute estate to wife. McCloskey v. Thorpe [N. J. Err. & App.] 69 A 973. Widow given use and enjoyment during widowhood in such quantities as might be requisite for her comfortable maintenance, held to take absolutely, gift over of what might be unconsumed being held void for repugnancy. Rolley v. Rolley's Ex'x [Va.] 63 SE 988.

**31.** In re Richards' Estate [Cal.] 98 P 528. Where legacy was of $1,000 to be used towards liquidating debts of a school or towards its proper support, but testator provided request could be changed or modified by executrix according to circumstances. held executrix might modify application of legacy but could not reduce its amount. Blumberg's Estate, 36 Pa. Super. Ct. 649.

**32.** Civ. Code 1895, § 3090. No difference in this respect between realty and personalty. Thomas v. Owens [Ga.] 62 SE 218.

**33.** Held not necessary to require him to give security for preservation of the property where remaindermen were given permission to apply for receiver in case of danger of waste. In re Knowles' Estate, 148 N. C. 461, 62 SE 549.

**34.** See Perpetuities and Accumulations, 10 C. L. 1167.

**35.** Bishop v. Bishop [Conn.] 71 A 583.

**36.** Bishop v. Bishop [Conn.] 71 A 583. "Cash dividends" include all distributions of surplus assets of corporation, whether in form of cash or property made to shareholders pro rata through dividend declarations in such manner that assets so distributed are parted from body of corporate assets to become property of shareholders free from dominion or control of corporation. Id. Bonds constituting unlimited obligations and charge on all corporate assets held not cash dividends such as would go to cestui qui trust. Id.

**37.** Trustee could not retain from interest such amount as would at maturity of bond equal premium at which they were valued at testator's death. Ballantine v. Young [N. J. Eq.] 70 A 668.

**38.** Deduction from interest such as at maturity of bonds will amount to premium should be made. Ballantine v. Young [N. J. Eq.] 70 A 668. Trustees held entitled to recoup themselves where in good faith they had both erroneously retained and erroneously paid out interest. Id.

**39.** Where there is a bequest of the whole or an aliquot part of residue of an estate to a legatee for life, remainder over, and no time is expressly fixed for commencement of life use, legatee is entitled to use or income of clear residue as at last ascertained to be computed from death of testator. Bishop v. Bishop [Conn.] 71 A 583. Contrary not implied from facts that executors were directed to divide estate as soon after testatrix's decease as might be conveniently and lawfully done, that shares thus ascertained were given to the several trustees, and that it was either the income thereof or sums set out of such income which trustees were either required or permitted to pay to beneficiaries. Id. Distribution of bonds to be held for persons entitled to income, less certain bonds "held pending decision of courts as to whether principal or income," held to transfer bonds on condition

§ 4. *Transfer, loss and abandonment.*[41]—See 10 C. L. 1285—Transfer is usually by sale,[42] gift,[43] inheritance [44] or will.[45] That one commits trespass by placing personalty on another's land does not deprive him of the property or the right to recover its value.[46] The mere fact that property loses its marks of identification does not give it the character of lost property.[47]

Abandonment is the relinquishment or surrender of rights or property by one person to another [48] and includes both intention to abandon [49] and the external act by which the intention is carried out.[50] If one abandons property he who thereafter takes possession becomes owner,[51] but the proof as to abandonment must be cogent and decisive.[52]

Treasure-trove at common law usually denotes any gold or silver in coin, plate or bullion found hidden in the earth or some private place but not lying on the ground, the owner of the treasure being unknown.[53] In the absence of statute,[54] title to treasure-trove belongs to the finder as against all the world except the true owner,[55] the place of finding ordinarily not being material.[56] Where several persons are joint finders of treasure readily divisible, each is entitled to an equal share [57] and may sue for the recovery thereof.[58]

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**Prosecuting Attorneys; Prosecution; Proxies; Publication; Public Buildings and Places,** see latest topical index.
**Proximate Cause** (defined), see 12 C. L. 986, n. 38.

they be not judicially declared income, which condition failing, transfer was equitably complete so as to entitle beneficiaries to income accruing since distribution. Id.

**40.** Life beneficiaries who were to have "income," "net income and profits," "net amount of 'increase,' income profits and interests," etc., held entitled to income only, as distinguished from principal. Bishop v. Bishop [Conn.] 71 A 583. Held in view of age of widow and character of property, testator intended she should have possession and use of specific personalty and not merely interest from proceeds of sale. In re Knowles' Estate, 148 N. C. 461, 62 SE 549.

**41. Search Note:** See notes in 4 C. L. 1089; 103 A. S. R. 979; 1 Ann. Cas. 4; 4 Id. 213; 8 Id. 558; 11 Id. 706.

See, also, Abandonment, Cent. Dig.; Dec. Dig.; Finding Lost Goods, Cent. Dig.; Dec. Dig.; Property, Dec. Dig. §§ 11-12; 19 A. & E. Enc. L. (2ed.) 579; 28 Id. 473.

**42.** See Sales, 10 C. L. 1534; Judicial Sales, 12 C. L. 452; Executions, 11 C. L. 1433.

**43.** See Gifts, 11 C. L. 1649.

**44.** See Descent and Distribution, 11 C. L. 1078.

**45.** See Wills, 10 C. L. 2035.

**46.** Sand. Graham v. Purcell, 126 App. Div. 407, 110 NYS 813.

**47.** Sunken logs. Whitman v. Muskegon Log Lifting & Operating Co., 152 Mich. 645, 15 Det. Leg. N. 383, 116 NW 614.

**48.** Phillips v. Hamilton [Wyo.] 95 P 846.

**49.** Intention is paramount object of inquiry. Phillips v. Hamilton [Wyo.] 95 P 846. Evidence insufficient to show intention to abandon mining lease. Id. Where owner of sunken logs made annual efforts to recover them and many were recovered each year, there was no intention to abandon the logs and owners did not lose property therein by abandonment. Whitman v. Muskegon Log Lifting & Operating Co., 152 Mich. 645, 15 Det. Leg. N. 383, 116 NW 614.

**50.** Phillips v. Hamilton [Wyo.] 95 P 846. To constitute abandonment of a water right, there must be concurrence of intention to abandon and actual failure in use. Hough v. Porter [Or.] 98 P 1083. Nonuser alone is insufficient. Id. Nonuser of easement held no abandonment in absence of acquiescence in obstruction thereof or elements of estoppel. Brunthaver v. Talty, 31 App. D. C. 134. Daughter who on marriage departed to reside in another state held not to lose title to furniture by leaving it in father's house until it was sold by father's executor, it not appearing she gave purchasers reason to believe that executor could sell. Guillou v. Campbell, 35 Pa. Super. Ct. 639.

**51.** Graham v. Purcell, 126 App. Div. 407, 110 NYS 813. One may abandon property by evidencing his intention by an act legally sufficient to divest ownership and others may thereafter reduce it to possession without liability for conversion. Huggins v. Reynolds [Tex. Civ. App.] 112 SW 116.

**52.** Insufficient to show abandonment of sand placed on land for storage. Graham v. Purcell, 126 App. Div. 407, 110 NYS 813.

**53.** Weeks v. Hackett [Me.] 71 A 858.

**54.** Rev. St. 1903, c. 100, § 10, et seq., have no reference to law of treasure-trove. Weeks v. Hackett [Me.] 71 A 858.

**55.** Weeks v. Hackett [Me.] 71 A 858.

**56.** Owner of soil acquires no title by virtue of ownership of land. Weeks v. Hackett [Me.] 71 A 858.

**57.** Weeks v. Hackett [Me.] 71 A 858. Evidence held to warrant finding that discovery of coins in cans buried in ground was by joint action of plaintiffs and defendant. Id.

**58.** One joint finder may sue another in conversion where latter refuses to surrender former's share. Weeks v. Hackett [Me.] 71 A 858.

## PUBLIC CONTRACTS.

§ 1. Power of Government and Authority of Its Officers to Contract, 1442.
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*The scope of this topic* is noted below.[59]

§ 1. *Power of government and authority of its officers to contract.*[60]—See 10 C. L. 1286—Municipal corporations can make only such contracts as are expressly [61] or impliedly authorized.[62] Statutory or charter provisions as to the method of contracting must be strictly complied with,[63] and the doctrine of implied contract does not ordi-

59. Includes principles general to contracts whereto the public is a party but not the general law of contracts (see Contracts, 11 C. L. 729), or the law of particular kinds of public projects, such as Public Works and Improvements, 10 C. L. 1307; Building and Construction Contracts, 11 C. L. 464; Sewers and Drains, 10 C. L. 1631; Water and Water Supply, 10 C. L. 1996, or the law of Municipal Bonds, 12 C. L. 897.

60. **Search Note:** See Counties, Cent. Dig. §§ 82. 174-182, 185, 186; Dec. Dig. §§ 111-114, 122, 124, 125; Municipal Corporations, Cent. Dig. §§ 644-667, 678-687, 697, 853; Dec. Dig. §§ 226-233, 244, 246-249; Schools and School Districts, Cent. Dig. §§ 187-191, 197, 198; Dec. Dig. §§ 78, 79, 82; States, Cent. Dig. §§ 89-94, 97, 99, 101; Dec. Dig. §§ 90-97, 100, 102, 103; Towns, Cent. Dig. §§ 69-71, 73-75; Dec. Dig. §§ 36, 37, 39, 40; United States, Cent. Dig. §§ 42-46, 49, 51, 52; Dec. Dig. §§ 59-63, 66, 68, 69.

61. Phillips Village Corp. v. Phillips Water Co. [Me.] 71 A 474; City of Paris v. Sturgeon [Tex. Civ. App.] 110 SW 459; State v. Tampa Waterworks Co. [Fla.] 47 S 358.

62. Phillips Village Corp. v. Phillips Water Co. [Me.] 71 A 474; State v. Tampa Waterworks Co. [Fla.] 47 S 358; City of Paris v. Sturgeon [Tex. Civ. App.] 110 SW 459. Contracts without scope of powers of corporation are void. Bell v. Kirkland, 102 Minn. 213, 113 NW 271. Towns and counties exercise only powers conferred by law. United States Gypsum Co. v. Gleason, 135 Wis. 539, 116 NW 238. Municipal corporations governmental agencies with powers subject to modification or withdrawal at discretion of state. Restriction as to hours of work imposed by labor law valid. Federal constitution inapplicable. People v. Metz, 193 N. Y. 148, 85 NE 1070. On motion for reargument. People v. Metz, 194 N. Y. 145, 86 NE 986. County unauthorized to borrow money. McCurdy v. Shiawassee County [Mich.] 15 Det. Leg. N. 873, 118 NW 625. Grant of authority embraces power to do act incident thereto and to carry authority into execution. Contract for insane asylum authorized and county held to have power to impose conditions for benefit of materialmen. United States Gypsum Co. v. Gleason, 135 Wis. 539, 116 NW 238. Authority of county commissioners to build court house includes authority to employ architect to superintend construction and draw plans. Spalding County v. Chamberlain & Co., 130 Ga. 649, 61 SE 533. Under various statutes of Pennsylvania as construed by supreme court, city of Allegheny was authorized to grant use of public grounds for railway passenger station. Larkin v. Allegheny [C. C. A.] 162 F 611. Cities in Georgia have power to **contract for water supply** for their inhabitants and for fire protection under "general welfare" clause of charters. Mercantile Trust & Deposit Co. v. Columbus, 161 F 135. City clearly authorized to contract for water supply. State v. Tampa Waterworks Co. [Fla.] 47 S 358. Authorized to confer proper privileges and franchises upon public service corporation. Id. Limitations upon taxing and bonding powers of city of Tampa as expressed in charter and statutes do not preclude contract for water supply. Id. Contracts for public service will be sustained where authorized and terms not clearly violative of some provision or principle of law. Id. City not authorized to grant exclusive use of streets when contracting for water. Id. In absence of authority conferred by legislative act or charter, city has no power to contract to furnish water to person outside territory. City of Paris v. Sturgeon [Tex. Civ. App.] 110 SW 459. Sayle's Ann. Civ. St. 1897, art. 418, conferring power on cities incorporated under general incorporation law to supply inhabitants with water, etc., does not authorize city to furnish water to nonresident outside territory. Id. Petition to enjoin city from cutting off water supply, though stating that city was incorporated under general incorporation law and was therefore authorized by Sayle's Ann. St. 1897, art. 418, to furnish inhabitants with water, held defective in failing to state plaintiff as inhabitant or that water was for use within city limits. Id. Allegation of "legal and binding contract" ineffective. Id. **Lease of city property** for armory reciting ordinance and its approval under which lease was made held valid under Baltimore City Charter, art. 4, §§ 1, 13, authorizing purchase and disposal of property by city. Gottlieb-Knabe & Co. v. Macklin [Md.] 71 A 949. Baltimore City Charter, art. 4, § 13, authorizing lease for "fixed and limited term," held not to prevent renting of armory for single evening or series of evenings, whether consecutive or not. Id. Charter power liberally construed to avoid loss of revenue. Id. Lease of public property for temporary and casual public entertainments to avoid loss of revenue not unconstitutional invasion of rights of citizens engaged in entertaining business as depriving them of property without due process of law. Id.

63. Roemheld v. Chicago, 231 Ill. 467, 83

narily apply,[64] persons dealing with municipalities being bound to take notice of the limitations of their power.[65] Usually contracts in excess of a limitation of indebtedness are prohibited.[66] The legislature may subsequently legalize a contract not within the statutory powers of a municipality.[67] Investments of a municipality in private enterprises are protected by the constitutional guaranties securing private property.[68] Unless otherwise provided the power to make municipal contracts resides in the council [69] and an accepted ordinance constitutes a contract.[70] Public officers [71] and

NE 291; Village of Carthage v. Diekmeier [Ohio] 87 NE 178. Though governing body of city have implied power to contract, power must be exercised in pursuance of charter and statutory provisions. State v. Dierkes, 214 Mo. 578, 113 SW 1077. Village corporation attempting to avail itself of granted power must proceed according to terms of act. Phillips Village Corp. v. Phillips Water Co. [Me.] 71 A 474. Warrants issued by county court where Rev. St. 1899, c. 84 (Ann. St. 1906, p. 2705) as to letting contracts, appropriations, etc., is disregarded, do not constitute valid indebtedness of county. Trask v. Livingston County, 210 Mo. 582, 109 SW 656.

**64.** Village of Carthage v. Diekmeier [Ohio] 87 NE 178. Loan by county. McCurdy v. Shiawassee County [Mich.] 15 Det. Leg. N. 873, 118 NW 625. Lowest bidder for highway improvement under good roads act (Pub. Acts 1905, p. 432, c. 232) cannot avoid signing contract and giving bond, and by entering on work hold town liable on implied contract, whether selectmen consent or not. Kelley v. Torrington, 80 Conn. 378, 68 A. 855. **City liable** for water machinery delivered, retained and used for nearly two years, though Kirby's Dig. § 5473, requiring action by city council, was disregarded. Forrest City v. Orgill Bros. & Co. [Ark.] 112 SW 891. Municipality cannot retain property purchased in disregard of statute which might be purchased in proper manner and defeat recovery of price. Id. Contract to purchase water machinery not authorized by ordinance, resolution or order of council as required by Kirby's Dig. § 5473, and not ratified, void. Id.

**65.** Village of Carthage v. Diekmeier [Ohio] 87 NE 178; Wadsworth v. Livingston County Sup'rs, 115 NYS 8; Martindale v. Rochester [Ind.] 86 NE 321. Contract with county. Jones v. Bank of Cumming [Ga.] 62 SE 68. Loan by county. McCurdy v. Shiawassee County [Mich.] 15 Det. Leg. N. 873, 118 NW 625. City's failure to comply with unauthorized agreement. City of Paris v. Sturgeon [Tex. Civ. App.] 110 SW 459.

**66.** Contract for purchase of park property in excess of charter limitation of indebtedness, but tax paid without objection. State v. Hodapp, 104 Minn. 309, 116 NW 589. Mandamus to compel ministerial officer to pay interest. Id. Acts 1905, p. 404, c. 129, § 265 (Burn's Ann. St. 1908, § 8959), providing that street improvements be governed by Acts 1905, pp. 288, 307, c. 129, §§ 108-120; Acts 1905, pp. 286, 287, c. 129, § 107 (Burn's Ann. St. 1908, § 8710), prohibiting contracts for improvements in certain cities when total cost exceeds 50 per cent, applies only to cities named, not towns. Martindale v. Rochester [Ind.] 86 NE 321.

**67.** Issue of bonds in excess of statutory limitation of indebtedness legalized. Wharton v. Greensboro [N. C.] 62 SE 740. Conveyance of street if unauthorized saved by confirmatory act (Acts 1905, p. 595). Kehoe v. Rourke [Ga.] 62 SE 185.

**68.** Town of Southington v. Southington Water Co., 80 Conn. 646, 69 A 1023.

**69.** Coleman v. Hartford [Ala.] 47 S 594.

**70.** Franchise. Town of Sapulpa v. Sapulpa Oil & Gas Co. [Okl.] 97 P 1007; Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855. City ordinance to street railway when accepted is contract. Columbus St. R. & L. Co. v. Columbus [Ind. App.] 86 NE 83. Accepted grant by ordinance to telephone company a contract and irrevocable. City of Rock Island v. Central Union Tel. Co., 132 Ill. App. 248. Where relation of city and telephone company is quasi contractual, ordinance modifying franchise to secure more effective service is not invalid as releasing indebtedness contrary to Const. § 52. Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855.

See, also, Constitutional Law, 11 C. L. 689.

**71.** Martindale v. Rochester [Ind.] 86 NE 321; Lawrence v. Toothaker [N. H.] 71 A 534. Not authorized to make contract binding on county. Ross v. Bibb County, 130 Ga. 585, 61 SE 465. Town not liable for unauthorized improvement of highway. Kelley v. Torrington [Conn.] 71 A 939. State officer not authorized to extend contract. Burgard v. State, 61 Misc. 23, 114 NYS 550. Executive officers of city mere agents. City of Momence v. Shannon & Co., 135 Ill. App. 533. Can only make contracts authorized by ordinance. Id. Mayor has no power to bind unless authorized by governing body or state. Coleman v. Hartford [Ala.] 47 S 594. Where attorney rendered services to mayor and marshal and council repudiated claim, town was not liable. Id. Inspector employed to oversee work of grading and paving alley unauthorized to order contractor to excavate on land adjoining. McGrath v. St. Louis [Mo.] 114 SW 611. Ordinary authorized to make contract for court house on behalf of county not authorized to accept assignment of sums due contractor so as to bind county. Jones v. Bank of Cumming [Ga.] 63 SE 36. Under charter of Lowell (St. 1896, p. 364, c. 415), §§ 3, 6, 7, superintendent of streets had no authority to purchase gravel. "Purchase" of "material" within § 3; construing statute. Bartlett v. Lowell, 201 Mass. 151, 87 NE 195. County commissioners authorized to contract for employes to oversee and inspect work upon highways. Armstrong v. St. Louis County, Com'rs, 103 Minn. 1, 114 NW 89. Laws 1883, p. 666, c. 490, gives aqueduct commissioners power to make contract under seal. Peterson v. New York, 194 N. Y. 437, 87 NE 772. Commissioners given plenary power over form of contract. Id. Where commissioners have plenary power as to form of contract and city as-

boards[72] have only such power to contract on behalf of the public as is conferred by law, and one contracting with them is bound to know the scope of their authority.[73] Irregular contracts may be ratified if the municipality had the power to make the contract in the first instance,[74] but the power to ratify is no greater than the power to contract.[75] Ultra vires contracts are void,[76] though the ultra vires character of a

serts that they were unauthorized to make sealed contract, city has burden of showing that sealed instruments were not usual form of city contracts. Id. No showing that contract was detrimental to interests of city or was in unusual form. Id. In construing power conferred, court will imply that power to follow usual and customary conduct of business is bestowed on agents. Id.

**72.** Board of county commissioners. State v. Dickinson County Com'rs, 77 Kan. 540, 95 P 392. Board of supervisors agent of county with powers defined by law. Wadsworth v. Livingston County Sup'rs, 115 NYS 8. Board of education. Perkins v. Newark Board of Education, 161 F 767. Employment of architect to prepare plans for $400,000 building when only $200,000 appropriated, unauthorized. Id. No presumption that additional appropriations would be made. Id. Board of education authorized to erect and repair schoolhouses. Public School Act of Oct. 19, 1903, §§ 52, 53, 72, 76 (P. L. pp. 21, 26, 28). Scola v. Montclair Board of Education [N. J. Law] 71 A 299. Authorized to build central heating plant for schools. Id. Nothing in act creating, road board of Bibb county (Acts 1871-72 p. 221) or amendment (Acts 1873, p. 221) or road laws of state (Pol. Code 1895, §§ 516-519, inc.) authorizing board to employ counsel at county's expense to defend mandamus brought to compel opening of road. Ross v. Bibb Co., 130 Ga. 585, 61 SE 465. Petition for fees properly dismissed on general demurrer. Id. Under Comp. Laws § 3275, board of public works authorized to contract in their own names as to water and light rates and to bring suit thereon. Board of Public Works v. Pinch, 152 Mich. 517, 15 Det. Leg. N. 289, 116 NW 408. Under Okl. St. 1893, § 395, power to negotiate sale of county refunding bonds conferred exclusively on county treasurer and contract by board of county commissioners with broker void. Theis v. Beaver County Com'rs [Okl.] 97 P 973. Board of county commissioners could not allow claims growing out of contracts which were unauthorized. Warrant issued created no liability. Id. No liability against county by services renered, however beneficial. Id. Resolution designating certain paper as one in which certain notices should be published for certain period held not contract between county and proprietor of newspaper. World Pub. Co. v. Douglas County, 79 Neb. 849, 113 NW 539. Mere exercise of supervisory power of board over acts of county treasurer. Id.

**73.** City of Momence v. Shannon & Co., 135 Ill. App. 533; Burgard v. State, 61 Misc. 23, 114 NYS 550; Martindale v. Rochester [Ind.] 86 NE 321. School trustee. Slattery v. School City of South Bend [Ind. App.] 86 NE 860. Contract by superintendent of streets for gravel unauthorized. Bartlett v. Lowell, 201 Mass. 151, 87 NE 195. Where board of trustees had no power to delegate authority to town engineer to conclusively determine fulfillment of contract for improvement, contractors bound to take notice. Martindale v. Rochester [Ind.] 86 NE 321. Where division engineer of state rejected material for road and contractor substituted more extensive material, he could not recover difference. Burgard v. State, 61 Misc. 23, 114 NYS 550. Person contracting with city board of education chargeable with knowledge of official limitations. Lawrence v. Toothaker [N. H.] 71 A 543. Members not bound personally, there being no guaranty of authority and both parties believing board authorized. Id. No recovery on quantum meruit. Bartlett v. Towell, 201 Mass. 151, 87 NE 195; State v. Dickinson County Com'rs, 77 Kan. 540, 95 P 392.

**74.** If action for purchase of waterworks by town was irregular when acting under St. 1882, p. 103, c. 142, § 7, town had power to "ratify and adopt" contract. Seward v. Revere Water Co., 201 Mass. 453, 87 NE 749. Contract equally binding if entered into under St. 1882, p. 103, c. 142, § 7, and adopted by ratification, or if made under St. 1904, p. 469, c. 457, as result of further negotiations when embodying same conditions. Id. Where county court charged with certain duties undertakes in good faith to execute same but fails to observe some requirement of law so that acts are irregular, such acts if acquiesced in by county are binding. Sparks v. Jasper County, 213 Mo. 218, 112 SW 265.

**75.** Municipality has no power to compromise contract unauthorized except to eliminate unauthorized elements. Wadsworth v. Livingston County Sup'rs, 115 NYS 8. Unauthorized contract for gravel by superintendent of streets not subject to ratification where mayor's only power was to approve. Bartlett v. Lowell, 201 Mass. 151, 87 NE 195.

**76.** An ultra vires municipal contract in its true sense is a contract wholly outside the powers of municipality. Bell v. Kirkland, 102 Minn. 213, 113 NW 271. Agreement for purchase of waterworks by village at expiration of ten years ultra vires, where not granted power to purchase. Phillips Village Corp. v. Phillips Water Co. [Me.] 71 A 474. Bill in equity to enforce ultra vires contract of village cannot be maintained. Id. Contract by board of county commissioners to employ agency to perform duties imposed upon public officers ultra vires and void. State v. Dickinson County Com'rs, 77 Kan. 540, 95 P 392. Agreement to pay for services invalid on ground of public policy. Wadsworth v. Livingston County Sup'rs, 115 NYS 8. Contract by which municipality undertakes to give individual control of litigation is ultra vires and void as against public policy. City of Carbondale v. Brush, 133 Ill. App. 236. Lease of property by mayor and council pursuant to Baltimore City Charter, art. 4, § 13, for armory, not rendered ultra vires

contract may be eliminated where the contract is executed,[77] or a city may be estopped to plead ultra vires.[78] A city cannot by contract deprive itself of any of its legislative powers.[79] Provisions of law applicable to the subject-matter are a part of the contract, whether expressed or not,[80] and a contract for a public service is not objectionable from its exclusive character.[81] A board of elections compelled under mandamus to publish notices in a newspaper cannot avoid the payment of the contract price though the writ is reversed on appeal.[82]

An implied contract arises when the federal government appropriates property as its own which it does not claim.[83] A contract by agents of the United States though omitting the name of the government is not changed in its essential character.[84]

§ 2. *How initiated.*[85]—See 10 C. L. 1288—Statutory conditions precedent as to the mode of exercising the power to contract, such as the passage of ordinances and resolutions,[86] authority from voters,[87] provision for funds,[88] and like matters,[89] should be

by concurrent action of lessors and lessees in renting such armory for entertainments. Gottlieb-Knabe & Co. v. Macklin [Md.] 71 A 949.

77. Moore v. Ramsey County, 104 Minn. 30, 115 NW 750; Morlarity v. New York, 59 Misc. 204, 110 NYS 842. Fully performed, ultra vires contract unassailable. Bell v. Kirkland, 102 Minn. 213, 113 NW 271. Where only small portion of contract was void in any sense and contract was substantially executed, such facts are strong considerations in refusing to hold it void. Id. Ultra vires doctrine should be so administered as not to defeat the ends of justice or work a legal wrong. Id. Contract for construction of sewer being fully authorized is ultra vires only in the secondary or restricted sense. Id. Failure to secure right of way through all private lands, in contract for construction of sewer, does not invalidate entire contract. Id.

78. City estopped to plead ultra vires where additional improvement of street was illegally included in contractor's bid, but work performed and council authorized to contract. Disregard of charter provision as to bids. Peterson v. Ionia, 152 Mich. 678, 15 Det. Leg. N. 389, 116 NW 562. Recital of bond estoppel of surety's assertion that contract was ultra vires. Bell v. Kirkland, 102 Minn. 213, 113 NW 271.

79. Agreement by city engineer that sidewalk be graded only to certain depth would not deprive city of charter power to grade sidewalks, though engineer had authority and made contract for consideration. City of Marshall v. Allen [Tex. Civ. App.] 115 SW 849.

80. Law authorizing regulation of public service corporation part of contract for public service. State v. Tampa Waterworks Co. [Fla.] 47 S 358. Contract for public service containing unreasonable, unenforcible provisions may be relieved by law providing for regulation of service. Id. Terms of contract for public service subject to right of governmental authority under existing laws to regulate rendering of service and charges. State v. Tampa Waterworks Co. [Fla.] 48 S 639.

81. No objection that franchise to water company was exclusive and precluded competition by city, where city had power to contract for water supply for term of years. Mercantile Trust & Deposit Co. v. Columbus, 161 F 135.

82. Morning Tel. Co. v. New York, 61 Misc. 511, 115 NYS 549.

83. Appropriation of patented invention by government officers. Bethlehem Steel Co. v. U. S., 42 Ct. Cl. 365. Knowledge of appropriation by patentee at time immaterial, since owner of patent is not required to guard same from appropriations for public purpose. Id.

84. Speir v. U. S., 31 App. D. C. 476. Board of commissioners of Soldiers' Home in District of Columbia, in contracting for buildings, is an agent of the United States. Id.

85. **Search Note:** See Counties, Cent. Dig. §§ 187-191; Dec. Dig. §§ 115-120; Municipal Corporations, Cent. Dig. §§ 668-674; Dec. Dig. §§ 234-242; Schools and School Districts, Cent. Dig. §§ 192-194; Dec. Dig. § 80; States, Cent. Dig. §§ 95; Dec. Dig. § 98; Towns, Cent. Dig. § 72; Dec. Dig. § 38; United States, Cent. Dig. § 47; Dec. Dig. § 64.

86. Where Acts 1903, p. 418, c. 225, § 7 (Burn's Ann. St. 1908, § 6497), made consent of common council prerequisite to contract for erection of building, there could be no recovery for contract for school building by trustees in disregard of statute. Slattery v. School City of South Bend [Ind. App.] 86 NE 860. More than mere change in plan of building contracted for in proper manner and consequently independent. Id. Trustees of school district can only bind district by corporate meeting as provided by law. Cooke v. White Common School Dist. No. 7, 33 Ky. L. R. 926, 111 SW 686. Under Act May 23, 1893 (P. L. 113), requiring approval of chief burgess to resolutions, a resolution for borrowing money and judgment note were invalid. Long v. Lemoyne Borough [Pa.] 71 A 211. Under Bay City Consolidated Charter (Loc. Acts 1903, p. 720, No. 514), §§ 166, 167, city council had no power to provide for city electric lighting plant without adoption of resolution determining expediency of purpose, based on two-thirds vote of aldermen. Bay City Trac. & Elec. Co. v. Bay City [Mich.] 15 Det. Leg. N. 1039, 119 NW 440. Resolution after letting of contracts ineffectual, being attempt to supply preliminary power, not ratification. Id. Where statute (Laws 1901, p. 58; Ann. St. 1906, § 5503) provided that ordinances do not become effective until 10 days after approval, and another statute required street improvements to be initiated by ordinance (Rev. St. 1899,

complied with, and a contract in disregard thereof is invalid.[90] In the letting of municipal contracts, it is frequently required that bids be called for [91] by proper published notice of the contemplated contract,[92] and that the contract be awarded to the lowest bidder.[93] The object of such provisions is to "prevent favoritism, cor-

§§ 5508, 5561; Ann. St. 1906, pp. 2824, 2882), contract awarded pursuant to advertisement held void, since such advertisement made 5 days before ordinance became effective. Cushing v. Russell [Mo. App.] 114 SW 556. Ordinance contracting with street railway invalid, where rule as to advertisement prescribed by by-law pursuant to statute suspended to permit passage at same meeting. Eggers v. Newark [N. J. Law] 71 A 665.

**87.** Under granted power, village could not compel appraisal of waterworks until vote to purchase. Phillips Village Corp. v. Phillips Water Co. [Me.] 71 A 474. Authority from voters required before contract for sewers pursuant to Laws 1907, p. 388, c. 428, by general village law (Laws 1897, p. 440, c. 414). Mead v. Turner, 60 Misc. 145, 112 NYS 127.

**88.** Appropriation precedent to letting contract for bridge. Rev. St. 1899, § 5188 (Ann. St. 1906, p. 2705). Trask v. Livingston County, 210 Mo. 582, 109 SW 656. Action of council as to purchase of electric lighting plant invalid, where contracts not submitted to and approved by board of estimates, and funds provided. Bay City Trac. & Elec. Co. v. Bay City [Mich.] 15 Det. Leg. N. 1039, 119 NW 440. Breach of contract not basis of suit where excess revenues insufficient to meet contract and no levy of special tax to create sinking fund as required by constitution and statutes. Fund derived from unauthorized tax levy not to be looked to. Ault v. Hill County [Tex. Civ. App.] 111 SW 425, afd. [Tex.] 116 SW 359. Certificate, under Rev. St. 1898, § 2702 (old number) not in compliance therewith when not certifying that specified sum of money for contract to improve street is in treasury to credit of fund from which to be drawn, and not appropriated for other purposes. Village of Carthage v. Diekmeier [Ohio] 87 NE 178. Where defect in certificate discovered and amended, though in figures before execution of contract, and certificate properly filed and recorded, such certificate is limitation of amount to which corporation is liable. Id. Claim for extra work on bridge not to be made unless appropriation by common council to county as provided by Burn's Ann. St. 1901, § 5694 p. 1 (Burn's Ann. St. 1908, § 5939). Under statutes, complaint held insufficient as not alleging that appropriation had been made. Talbott v. St. Joseph County Com'rs [Ind. App.] 85 NE 376. Tax levy, or submission of project to people, not precedent to erection of county courthouse where available funds on hand. Spalding County v. Chamberlin & Co., 130 Ga. 649, 61 SE 533.

**89.** Village Law, Laws 1897, p. 440, c. 414, § 260, requiring map of sewer system before contracting for same, does not require every lateral sewer which might become necessary to be shown. Mead v. Turner, 60 Misc. 145, 112 NYS 127.

**90.** See § 1, ante.

**91.** Resolution that roadway be built two feet higher than existing survey, where land improved for street, held within Ionia Charter ( Loc. Acts 1887, p. 616, No. 485, as amended by Loc. Acts 1897, p. 234, No. 352), § 108, requiring bid when improvement in excess of $100. Peterson v. Ionia, 152 Mich. 678, 15 Det. Leg. N. 389, 116 NW 662. Under Good Roads Act (Pub. Acts 1905, p. 432, c. 232) as to contracts for highways paid partly by state, selectmen were unauthorized to make contract either orally or written without competition, or employ men and teams to do work for reasonable compensation. Kelley v. Torrington, 80 Conn. 378, 68 A 855. Statute mandatory. Id. Requirements of Pub. Acts 1905, p. 432, c. 232, providing for improvements of highways at expense of state, not to be waived by town selectmen. Kelley v. Torrington [Conn.] 71 A 939. Refusal to submit question to jury as to waiver of bond proper, since waiver by town officers not authorized. Kelley v. Torrington [Conn.] 71 A 939.

**92.** Acts 1905, p. 404, c. 129, § 265 (Burns' Ann. St. 1908, § 8959), providing for filing of detailed plans and specifications with town engineer or clerk is for benefit of prospective bidders, and only requires filing within reasonable time before notice of letting of contract. Martindale v. Rochester [Ind.] 86 NE 321. Letting of county bridge contract at spot half mile from bridge site, where advertised to be let, not in compliance with statute requiring public notice of proposed letting of contract, stating time and place. Sparks v. Jasper County, 213 Mo. 218, 112 SW 265. Evidence held to support finding that bridge commissioner and bidders, in letting contract, did not know if other bidders were at site where contract was advertised to be let. Id.

**93.** Where Detroit Charter 1904, § 241, required contract to be let to lowest bidder, etc., city had no power to pass ordinance limiting hours of labor of employes of city contractors, thus increasing bids. Bird v. Detroit, 153 Mich. 525, 15 Det. Leg. N. 502, 116 NW 1065. New York City commissioner of water, gas and electricity, has no power to make regulation that bids for public work be signed by corporation or agent. Contract illegal when entered into by city with higher bidder because lowest bid disregarded commissioner's arbitrary unauthorized regulation. Daly v. O'Brien, 60 Misc. 423, 112 NYS 304. Action of city commission in permitting bidder to reduce bid and accepting same is in effect a rejection of proposals received under advertised submission, wherefore contract private and prohibited by charter. Attorney General v. Public Lighting Com. [Mich.] 15 Det. Leg. N. 958, 118 NW 935. Contract for street improvement with provision that damages from nature of work, unforseen obstruction, elements, etc., be sustained by contractor, held void, so as to authorize setting aside of assessments. Van Loenen v. Gillespie, 152 Cal. 222, 96 P 87. Provision not strictly "specification" as designated by contract, but fact immaterial. Id. Such provisions

ruption and extravagance,"[94] and the specifications must be framed so as to secure fair competition on equal terms to all bidders.[95] Generally, the statutes have been held not to exclude the specification of patented articles, though thereby competition is prevented as to such articles.[96] The acceptance or rejection of bids and the letting of the contracts are purely administrative.[97] Under statutory provisions the calling for bids may be discretionary,[98] or discretion may be vested in boards by provisions that the contract be let to the best[99] or to a "safe" bidder, as where funds are involved.[1]

void as increasing cost of work. Standsbury v. Poindexter [Cal.] 99 P 182. Objection not obviated though bids were not increased on account of such restriction, since bidder might have been deterred from competing. Id. Under School Act 1903, §§ 52, 53 (P. L. 1903, pp. 5-21), board could not modify specifications after acceptance of bid and award to former bidder, where act in good faith and bid reduced. Scola v. Montclair Board of Education [N. J. Law] 71 A 299.

94. To be so construed. Attorney General v. Public Lighting Com. [Mich.] 15 Det. Leg. N. 958, 118 NW 935.

95. Conditions of bids held to afford fair and reasonable opportunity for competition in letting contract for steel pipe line. Holly v. New York, 128 App. Div. 499, 112 NYS 797. City council by adding another make of vitrified brick to specification of material for street paving did not interfere with competitive bidding, but extended field of competition. Muff v. Cameron [Mo. App.] 114 SW 1125. Requirement that material in paving contract be Iola Portland cement or better, did not improperly restrict bidding. Id. That disregard of rules as to competitive bidding resulted in no harm is immaterial since question is not of harm done, but power. Material departure from terms and conditions of bidding renders contract private. City of Independence v. Nagle [Mo. App.] 114 SW 1129. A director of public works in publishing specifications need not decide finally on every item, but may ask for **alternative bids** on two articles to be furnished having set up good standard in specifications and having prescribed method of bidding giving equal opportunity to each bidder. Parker v. Philadelphia, 220 Pa. 208, 69 A 670. Where thing to be furnished under municipal contract may be manufactured in precise conformity to certain specific requirements or purchased in open market for standard price, there is no valid reason for asking for alternative bids; but where thing is protected by patent, or cannot be bought in open market, and any one of a number of kinds fully complies with established standard, interest of municipality will best be served by asking for bids for any or all. Id. Field open to bidder and power of monopoly broken. Id. No discrimination in accepting bid, though excessively high estimate placed upon efficiency of lock bar joint in steel pipe line, resulting in use of thinner plates, where various styles of pipe strictly in accordance with engineering standards. Holly v. New York, 128 App. Div. 499, 112 NYS 797.

96. Though statutes require competitive bids for public work, it is nevertheless permissible to specify patented articles which from the nature of the case exclude competition. Kansas City Hydraulic Press Brick Co. v. National Surety Co. [C. C. A.] 167 F 496. Requirements of charter of Detroit as to bids held applicable to contract for purchase of patented machinery required in city's electrical plant. Attorney General v. Public Lighting Com. [Mich.] 15 Det. Leg. N. 958, 118 NW 935. Authorities in advertising and receiving bids gave construction to charter that it did not apply to machinery and materials of which seller had monopoly, and which was considered best obtainable. Id. Lock bar joint pipe, though made with patented machinery, is not "patented article" within Greater New York Charter (Laws 1901, p. 642, c. 466) § 1554, preventing contract for patented articles except after fair competition, etc. Holly v. New York, 128 App. Div. 499, 112 NYS 797.

97. Depending upon discretion of common council. Menzie v. Greensburg [Ind. App.] 85 NE 484.

98. Under Ballinger's Ann. Codes, & St. § 3767 (Pierce's Code, § 7873), providing as to opening of roads that county commissioners "in their discretion" let contracts etc., when in excess of $50, board has right to call for bids and let to lowest bidder, or let without calling for bids. Giffin v. King County, 50 Wash. 327, 97 P 230. Statute constructed, and phrase "in their discretion" held to refer to manner of letting contract. Id.

99. Under charter power of board of improvements to award contract to lowest and best bidder, price alone is not conclusive. Louisville Steam Forge Co. v. Gast [Ky.] 115 SW 761. Under Rev. St. 1901, par. 979, providing that contract (for public printing) be made with best responsible bidder, function exercised by supervisors in letting contract is not judicial; reviewable by certiorari. Hammer v. Smith [Ariz.] 94 P 1121.

1. Under Acts Extra Sess. 1907, p. 25, No. 23, requiring bids for contracts for depositaries for funds of state boards, board's function is merely to compare face of bids, discretion being limited to ascertaining if bids are regular, and whether bank making highest bid is safe depository. State v. Louisiana State Board [La.] 48 S 148. "Safety" as used in statute means safe keeping and that funds be punctually accounted for. Distant bank not to be excluded from supposed danger in transportation of funds. State v. Louisiana State Board [La.] 48 S 148. Discretion of board must be exercised in good faith. Id.

§ 3. *How closed.*[2]—See 10 C. L. 1289—The acceptance of a bid pursuant to an advertisement constitutes the contract.[3]

§ 4. *Essential provisions in, and conditions pertaining to, public contracts.*[4]—See 10 C. L. 1289—The contract awarded should substantially conform with the advertisement.[5] It should be executed in conformity with charter or statutory provisions,[6] by the proper official,[7] and, if so required, must be in writing,[8] signed by the proper official,[9] but the writing is merely a reduction to form,[10] and the usual mode of contracting may be dispensed with in the case of an emergency.[11] Con-

**2. Search Note:** See notes in 6 C. L. 1113, 1114.

See, also, Counties, Cent. Dig. §§ 190, 191, 194-196; Dec. Dig. §§ 119, 120, 123; Mun. Corp. Cent. Dig. §§ 671-673; Dec. Dig. §§ 239-242; Schools and School Districts, Cent. Dig. §§ 192-196, 340; Dec. Dig. §§ 80, 81; States, Cent. Dig. §§ 95, 98; Dec. Dig. §§ 98, 101; Towns, Cent. Dig. § 72; Dec. Dig. § 38; United States, Cent. Dig. §§ 47, 50; Dec. Dig. §§ 64, 67.

**3.** West Chicago Park Com'rs v. Carmody, 139 Ill. App. 635; State v. Louisiana State Board [La.] 48 S 148; Proffitt v. U. S., 42 Ct. Cl. 248. In advertising for depositary for funds of state board, the agreement as evidence by advertisement (offer) and bid (acceptance) is subject to condition that bidder be safe depositary. State v. Louisiana State Board [La.] 48 S 148.

**4. Search Note:** See Counties, Cent. Dig. §§ 82, 136, 181-183; Dec. Dig. §§ 121, 122; Mun. Corp. Cent. Dig. §§ 666, 667, 675, 683; Dec. Dig. §§ 243, 244; Schools and School Districts, Cent. Dig. §§ 192-194; Dec. Dig. § 80; States, Cent. Dig. §§ 96, 97; Dec. Dig. §§ 99, 100; Towns, Cent. Dig. §§ 72-74; Dec. Dig. §§ 38, 39; United States, Cent. Dig. §§ 46, 48, 49, 51; Dec. Dig. §§ 63, 65, 66, 68.

**5.** Any other rule would open door to favoritism. Hedge v. Des Moines [Iowa] 119 NW 276. Generally speaking, literal conformity is not required. Rule of substantial performance applied with greater strictness where right to enter into contract is challenged at inception of proceedings, and where previous understanding with successful bidder. Id. Where notice stated that expenses of paving would be charged to abutting owners, and contract contained proviso that cost might be paid from city's special fund, contract would not be considered, as not conforming with notice, so as to be void. Hedge v. Des Moines [Iowa] 119 NW 276. Work completed in strict conformity with contract, and proviso authorized by laws mentioned in notice (Code Supp. 1902, §§ 792-a, 792-b, and § 830, Code), would bear construction that city could not escape liability. Id.

**6.** Contract for printing by a municipality held to be fully executed in conforming with charter. Curran Print. Co. v. St. Louis [Mo.] 111 SW 812. Plaintiff lowest bidder, contract in pursuance of bid, bond properly certified and executed, signed in due form by solvent surety, etc. Complete as to formal execution and delivery. Id.

**7.** Under Laws 1903, p. 29, § 7, contract for construction of sewer should be made with chairman of sewerage committee where expense to be paid by special assessments. Broad v. Moscow [Idaho] 99 P 101.

**8.** Under Rev. St. 1899, § 6759 (Ann. St. 1906, p. 3327), probibiting contracts not within powers or expressly authorized, and § 6760 (Ann. St. 1906, p. 3328), requiring contracts to be written and duplicate to be filed with clerk of county court, purpose of latter section was to provide evidence, and contract was valid though no duplicate filed. Blades v. Hawkins, 133 Mo. App. 328, 112 SW 979. Where governing body of St. Louis in two bodies; where Rev. St. 1899, § 6759 (Ann. St. 1906, p. 3327) required city to make only contracts authorized, and that same be written; and charter provision (Ann. St. 1906, p. 4890, St. Louis Charter, art. 16, § 7) required contracts to be written, contract by special committee of bouse delegates employing attorney was within charter and statutory provisions, to be made by ordinance and executed in writing. State v. Dierkes, 214 Mo. 578, 113 SW 1077. Under Pol. Code 1895, § 343, material terms of contract of county by county authorities must be in writing **and entered on minutes.** Spalding County v. Chamberlain & Co., 130 Ga. 649, 61 SE 533. Not entered on minutes. James v. Douglas Co. [Ga.] 62 SE 185; Jones v. Bank of Cumming [Ga.] 62 SE 68; Jones v. Bank of Cumming [Ga.] 63 SE 36.

**9.** City charter provision as to countersigning of contract by comptroller merely directory. Contract not void when not countersigned. Griffin v. Tacoma, 49 Wash. 524, 95 P 1107. Countersigning held ministerial. Id. Pennsylvania Act March 7, 1901 (Acts 1901, p. 29), as to duties of city solicitor, directory as to form of contract and not intended to confer authority to approve or veto city contracts by proper representatives. Larkin v. Allegheny [C. C. A.] 162 F 611.

**10.** Advertisements, bids and acceptances constitute real contract. Proffitt v. U. S., 42 Ct. Cl. 248. Common-law rule whereby all prior undertakings are merged in written contract cannot be strictly applied to contracts made by advertisements, bids and acceptances. Id. See, also, ante, § 3.

**11.** Contracts for service, made in emergencies, need not always rest upon advertisements or be reduced to writing. Rev. St. §§ 3709, 3732. Ceballos v. U. S., 42 Ct. Cl. 318. Commanding officer in conquered territory, or secretary of war, may make reasonable expenditures as to removal of prisoners without written agreement. Id. Recovery on quantum meruit where services rendered, though Rev. St. § 3744 requires contracts by officers of government to be written. Id. Where contract executed, court would assume same, being under $1,000, as awarded properly without competition. Moriarty v. New York, 59 Misc. 204, 110 NYS 842.

tracts must conform to principles of public policy, and are rendered void when the officials are personally interested therein.[12] The act of a city comptroller in cancelling his signature after execution has been held not to avoid the contract.[13] An assignment of moneys due or to become due under a contract is not an assignment of the contract.[14] Parol evidence may be admissible to disclose persons who indemnified a surety and were entitled to share in the moneys assigned to such surety.[15]

Agreements for procuring government contracts, where compensation is contingent upon the success of the promisee's efforts, are void as against public policy.[16]

*Bonds* See 10 C. L. 1291 for the performance of the work may be required by statute.[17] A city contract properly executed has been held unaffected by the refusal of the mayor to approve the bond.[18]

§ 5. *Interpretation and effect of public contracts; performance and discharge. A. Construction and interpretation.*[19]—See 10 C. L. 1291—In public contracts, as in others, the severable, invalid portions may be eliminated and the contract enforced as to the remainder,[20] and, generally, it may be stated that public contracts are

**12.** Sess. Laws 1899, p. 105, § 82, as amended Sess. Laws 1905, p. 71, clearly prohibits contracts of school district with trustee in which latter pecuniarily interested. Independent School Dist. No. 5 v. Collins [Idaho] 98 P 857. Ky. St. 1903, § 2768, prescribing qualifications of councilmen, and prohibiting contracts where officials interested, not declaration of eligibility, but renders such contracts void. Bradley & Gilbert Co. v. Jacques, 33 Ky. L. R. 618, 110 SW 836. Term "contract" extends to case of where city buys daily supplies. Construing statute. Id. Contract by town trustee in violation of Burns' Ann. St. 1901, § 2136, making town trustees who contract with themselves guilty of misdemeanor, void. McNay v. Lowell, 41 Ind. App. 627, 84 NE 778. Where 50 sales of coal to town in violation of statute, sales not to be excused on theory of emergency to prevent shutting down of town's water plant. Id. No implied liability of town. Id. Duty of trustees to be informed of necessity of coal and avoid emergency. Id. Town trustee not excused by fact that sale made at invoice price, and no profit. Id. In suit by town to recover price paid for coal, it was no defense that town had used coal and made no offer to return before bringing action. Id. Fact that moderator was officer of water company contracted with did not debar him from rights as citizen or voter, or prevent town of availing itself of services where no charge of corruption. Seward v. Revere Water Co., 201 Mass. 453, 87 NE 749. Indictment under Code 1906, § 1305, rendering public officer guilty of misdemeanor if interested in contract, etc., held insufficient. Supervisor accepted position of supervising construction of court house, but no charge that he knew or procured order to be made, accepted it as placed on minutes or received any benefit from same. Treen v. State [Miss.] 46 S 252.

**13.** After contract fully executed and filed with register. Curran Print Co. v. St. Louis [Mo.] 112 SW 812.

**14.** Assignee not liable for materials furnished. National Surety Co. v. Maag [Ind. App.] 86 NE 862.

**15.** Where city contractor assigns all moneys due to his surety, a trust company, and writing discloses no consideration or inducement to assignment, though it was conceded that all money received did not belong to trust company, parol evidence was admissible to show that two persons who had indemnified surety were entitled to share in moneys received under parol agreement at time of assignment. Helms v. Delaware County Trust, Safe Deposit & Title Ins. Co., 35 Pa. Super. Ct. 542. Assignment held to cover not only moneys paid for construction of sewer but also assessments on property owners collected by city and paid to surety. Id.

**16.** Agreement to procure contract for publishing legal notices held unenforcible. Russel v. Courier Print. & Pub. Co., 43 Colo. 321, 95 P 936.

**17.** Under 3 Comp. Laws §§ 10743-10745, requiring bond for performance of public improvements, etc., contract with stone and supply company to furnish limestone dust at municipal asphalt plant did not make company contractor within statute and no bond required. People v. Newberry, 152 Mich., 292, 15 Det. Leg. N. 211, 116 NW 419.

**18.** Refusal because of statement that contract was in excess of appropriation, where facts showed unexpended balance of amount appropriated. Curran Print. Co. v. St. Louis [Mo.] 111 SW 812.

**19. Search Note:** See notes in 3 Ann. Cas. 672.

See, also, Counties, Cent. Dig. § 184; Dec. Dig. § 126; Municipal Corporations, Cent. Dig. §§ 688-691; Dec. Dig. § 250; Schools and School Districts, Cent. Dig. §§ 200, 201; Dec. Dig. § 84; States, Cent. Dig. §§ 102, 103; Dec. Dig. § 104; Towns, Cent. Dig. § 76; Dec. Dig. § 41; United States, Cent. Dig. § 53; Dec. Dig. § 70.

**20.** Contract for construction of sewer and appurtenances and sewerage disposal plant held separable so that former could be sustained. Where intention was to have two improvements and advertisement for bids spoke of "contracts," where aggregate of each bid was kept separate from gross sum, there is a valid contract for one im-

construed and interpreted as the contracts of private individuals [21] with the exception that, where a franchise is granted, the contract should be construed strictly against the grantee and liberally in favor of the people.[22]

(§ 5) *B. Performance and discharge.*[23]—See 10 C. L. 1292—The deposit securing performance is forfeited by breach.[24] Also, public contracts often provide for the completion of the work at the contractor's expense in the case of unnecessary

provement despite invalidity of the other. Uvalde Asphalt Pav. Co. v. New York, 128 App. Div. 210, 112 NYS 535. Contract for disposal plant illegal because of failure to comply with charter by city's board of estimate and apportionment. Id.

**21. Illustrations:** Where contract for **grading road** referred to bid and proposal containing clause that there would be no allowance for overhaul of material moved 2,000 feet or less, such terms were incorporated into contract. Moore v. Ramsey County, 104 Minn. 30, 115 NW 750. Reference to another instrument. Under Pub. Acts 1905, p. 432, c. 232, providing for highway improvements at partial expense of state, and Gen. St. § 3824, requiring street railways to change tracks to conform to grade, etc., an agreement with a town by a street railway to pay one-half of town's expense in **changing grade** did not affect state. Kelley v. Torrington [Conn.] 71 A 939. Where city and railroads agreed to separate grades at intersection with street under statute allowing damages to abutting owners, which damages city agreed to pay, no liability resulted to manufacturer whose land did not abut on street but who was compelled to elevate side track to maintain connection. In re Detroit [Mich.] 16 Det. Leg. N. 53, 120 NW 592. **Contract for sinking wells** construed, and held that contractor was entitled to balance due when successful in obtaining water supply equal to 1,500,000 gallons per 24 hours. Green v. Ballard [Wash.] 98 P 95. Stipulation held to show contractor's pay as due when capacity ascertained by test, though city contracted for supply for 14 months. Id. Under contract for **construction of trunk sewer,** contractor held not bound to dispose of water from lateral sewers and entitled to recover for additional expense occasioned thereby. Leahy v. New York, 192 N. Y. 42, 84 NE 574. Contract held to permit city on refusal of contract to go into open market and purchase **coal,** charging vendor with difference between market and contract price (McLean County Coal Co. v. Bloomington, 137 Ill. App. 582), but not entitled to order coal for more than two months in advance in anticipation of strike (McLean County Coal Co. v. Bloomington, 234 Ill. 90, 84 NE 624, rvg. 137 Ill. App. 582). Contract construed, and under reasonable construction with ordinary meaning of words coal company was to deliver coal as city required and needed it. Words "order" and "direct" synonymous with "require," substantially equivalent to "need." McLean County Coal Co. v. Bloomington, 234 Ill. 90, 84 NE 624. Under contract for performance of **mail messenger service** obligating contractor to perform without additional compensation "new or additional service," contractor cannot recover when service is not different in character and kind from that specified in contract. Proffit v. U. S., 42 Ct. Cl. 248. Change simply adding to contractor's service is "new and additional" being of same kind. Id. Contractor required to make additional trips by establishment of new street railway route, but relieved from services to other routes so that total mileage was decreased, cannot recover. Id. Extra service during holidays held to entitle contractor to compensation. Id. Contract for **transportation of Spanish soldiers** and others authorized by treaty of Paris, and contractors were carriers bound to transport pursuant to contract accepted or be rendered liable for breach. Ceballos v. U. S., 42 Ct. Cl. 318. Where contract provided for Spanish officers at one rate and others at lower rate, but two classes were specified and transportation company could only recover for transporting officers' wives and children at lower rate. Id. Evidence held to show government as not responsible for assignment of persons transported to better quarters on ship so as to be entitled to higher rate for transportation. Id. Contract being express excluded any implied contract as to others. Id. Where contract provided specified sum for each person transported, government could not count two children as one person. Id. Where contract provided that requests for transportation be made by government officers, at embarkation contractor could not show larger number disembarked than officers had required transportation for. Id. Fact that some of persons died en voyage did not relieve government of liability. Id. Contracts granting license to use and make **patented printing press** construed and government held not obligated to use presses for any particular length of time. Federal Mfg. & Print. Co. v. U. S., 42 Ct. Cl. 479. Where patentee represents automatic wiper as valuable part of printing press, subsequent patenting of such wiper will not change effect of contract but will be regarded as included. Id.

**22.** Franchise to gas company governed by same rules as other contracts. Town of Sapulpa v. Sapulpa Oil & Gas Co. [Okl.] 97 P 1007.

**23. Search Note:** See notes in 2 Ann. Cas. 403.

See, also, Counties, Cent. Dig. §§ 192, 193; Dec. Dig. §§ 127, 128; Municipal Corporations, Cent. Dig. §§ 692-695; Dec. Dig. §§ 252, 253; Schools and School Districts, Cent. Dig. § 202; Dec. Dig. § 85; States, Cent. Dig. §§ 104, 105; Dec. Dig. §§ 106, 107; Towns, Cent. Dig. § 77; Dec. Dig. § 42; United States, Cent. Dig. §§ 55, 56; Dec. Dig. §§ 72, 73.

**24.** Deposit accompanying bid and accepted by park commissioners forfeited on failure or refusal of bidder to carry out contract. West Chicago Park Com'rs v. Carmody, 139 Ill. App. 635.

delay [25] after notice of annulment,[26] and the new contract entered into is entirely independent of the former one.[27] Default in monthly payments is no defense against the consequences of annulment when waived by the contractor.[28] Performance is not excused by sickness or indisposition.[29] A contractor is bound by contractual specifications as to the acceptance of the work as it progresses,[30] and to release a builder from contractual liability for delay, the acceptance must be unconditional.[31] It has been held that the lack of power to delegate the determination of the fulfillment of a contract did not render the contract void.[32] A claim for extra work is properly disallowed when such work is called for by the bid,[33] but a contractor may recover for extra work when compelled by the wrongful insistence of the city officer that such work is within the contract.[34] It has been held that time is not of the essence of the contract when not specified in the ordinance authorizing the improvement,[35] and the work should be completed in a reasonable time.[36] Where subsequent events show the contract time as unreasonable, it may be extended by a city ordinance.[37] The violation of a statute fixing the hours of labor on municipal contracts may be penalized by a forfeiture of compensation.[38] Where a third person was injured by a contractor's negligence and the latter refused to defend the action against the city and acquiesced in appeals, the city was en-

25. Where contract for construction of sewer defined "board" as metropolitan sewerage commissioners, and "engineer" as chief engineer of such board, and also contained provision for discontinuance of contract in case of unnecessary delay, and later such board was abolished by Act March 30, 1901 (St. 1901, p. 106, c. 168), creating metropolitan water and sewerage board, such new board had authority to put sewerage works under independent engineer, but such act deprived board of rights under provision to discontinuance of work in so far as rights depended on certificate of engineer therein specified. Commonwealth v. National Cont. Co., 198 Mass. 554, 85 NE 86. Where contract for dredging contained annulment clause with provision for continuance of work under Rev. St. § 3709 (U. C. Comp. St. 1901, p. 2484), which authorizes open contracts without advertisement when public exigency so requires, etc., and subsequent clause provided for forfeiture of sums due and permitted recovery of damages, provision of latter clause for recovery of excess cost of completion did not apply to annulment under prior provision before expiration of time of completion. Farrelly v. U. S. [C. C. A.] 159 F 671. No damages recoverable in excess of amounts due and unpaid and reserved percentage as expressly provided for. Id.

26. Notice of annulment, unless increased plant was put on dredging contract, having been made on the 4th of month, a notice mailed on 31st and received on next day was not premature, there being no increased plant put in or sought to be put on work. Farrelly v. U. S. [C. C. A.] 169 F 671. No necessity of approval of notice of annulment by chief of engineers when not required by contract. Id.

27. References held merely descriptive to measure work contracted for. People v. Metz, 193 N. Y. 148, 85 NE 1070. No merger to exempt latter contract from operation of statute enacted after execution of first contract. Id. Where contract failed to complete work and city made new contract for completion of same, payments to latter contractor were not subject to claims of persons who furnished materials to former. Ross v. Beaumont Brick Co. [Tex. Civ. App.] 116 SW 643.

28. Farrelly v. U. S. [C. C. A.] 159 F 671.

29. West Chicago Park Com'rs v. Carmody, 139 Ill. App. 635.

30. Acceptance not conclusive unless so specified. Town of Sterling v. Hurd [Colo.] 98 P 174. Authority prescribed by contract and contractor bound to know that unauthorized act would not bind town. Acceptance of work or materials not complying with contract. Id. Contract construed, and provisions as to town engineer's authority held not to authorize acceptance of waterworks system but to be precautions to insure compliance with contract. Id.

31. Receipt by engineer of fire department on delivery of fire boat neither release nor acceptance of boat by defendant. Not understood as release and engineer unauthorized to release. District of Columbia v. Harlan & Hollingsworth Co., 30 App. D. C. 270. Machinery not put in proper order for nearly four months. Id.

32. Martindale v. Rochester [Ind.] 86 NE 321.

33. Kelley v. Torrington [Conn.] 71 A 939.

34. Nonperformance would be breach. Borough Const. Co. v. New York, 115 NYS 697.

35. Though contained in contract. Brigham v. Hickman [Mo. App.] 116 SW 449.

36. Brigham v. Hickman [Mo. App.] 116 SW 449. Delay of conforming ordinance as result of collusive understanding, so that contractor may have more than reasonable time to do work, an actual fraud. Id.

37. Brigham v. Hickman [Mo. App.] 116 SW 449. In absence of contrary showing time prescribed in extension ordinance presumed reasonable. Id. Evidence held not to overcome presumption of reasonable time in ordinance extending time. Id.

38. People v. Metz, 193 N. Y. 148, 85 NE 1070. On reargument. People v. Metz, 194 N. Y. 145, 86 NE 986.

titled to offset against the claim of the contractor not only the judgment recovered but the moneys expended on the appeals.[39]

§ 6. *Remedies and procedure. A. By taxpayer.*[40]—See 10 C. L. 1293.—The performance of a public contract or the payment of sums due may be properly restrained where an illegal disposition of corporate property is made,[41] where the officials are guilty of misconduct,[42] or where public money is about to be paid upon a void contract.[43] The action can only be maintained upon clear proof that the authorities have acted or are about to act illegally.[44] The right of rescission of a bilateral contract can be exercised only by the town,[45] and though a municipality in contracting for water acts for the benefit of the inhabitants, the individual owners of property destroyed by fire, through the failure to supply water, have been held unable to maintain an action for such property.[46]

(§ 6) *B. By bidder.*[47]—See 10 C. L. 1294.—Requirements of law as to contracts

39. Murphy v. Yonkers, 115 NYS 591.

40. **Search Note:** See Counties, Cent. Dig. § 308; Dec. Dig. § 196; Municipal Corporations, Cent. Dig. §§ 2147-2172; Dec. Dig. §§ 987-1000; Schools and School Districts, Cent. Dig. §§ 265-268; Dec. Dig. § 111; States, Dec. Dig. § 168½; Towns, Cent. Dig. § 104; Dec. Dig. § 61.

41. Street railway franchise. Eggers v. Newark [N. J. Law] 71 A 665. Contract surrendering public park authorized and relief denied. Larkin v. Allegheny [C. C. A.] 162 F 611.

42. Discrimination in accepting bid. Holly v. New York, 128 App. Div. 499, 112 NYS 797. Contract may be enjoined where officials personally interested. Long v. Shepherd [Ala.] 48 S 675. Upon refusal of authorities to recover money paid on void contract, action maintainable by taxpayer. Independent School Dist. No. 5 v. Collins [Idaho] 98 P 857. Taxpayer may seek relief where city disregards its power and duty to refuse to consummate executory street paving contract because of misconduct by councilman in letting same in defiance of St. 1898, § 4475. McMillan v. Fond du Lac [Wis.] 120 NW 240. Evidence held to show misconduct on part of construction company of which councilman was member in violation of St. 1898, § 4475, preventing personal interest of officials. Id.

43. Payment for services of public officer imposed by law. Wadsworth v. Livingston County Sup'rs, 115 NYS 8.

44. Holly v. New York, 128 App. Div. 499, 112 NYS 797; Mead v. Turner, 60 Misc. 145, 112 NYS 127.

**Relief denied:** Taxpayer could not complain because lowest bidder would make larger profit than higher bidder on another style of pipe, in letting contract for steel pipe line. Holly v. New York, 128 App. Div. 499, 112 NYS 797. Taxpayer not authorized to restrain improvement of street in constructing retaining wall outside limits thereof and bringing street to proper grade for public use, though street railway benefited by improvement, and would pay cost of filling. Patterson v. Burlington [Iowa] 119 NW 593. Where county commissioners have authority to contract for buildings, fulfillment of contract cannot be enjoined as inexpedient. Long v. Shepherd [Ala.] 48 S 675. Citizen and taxpayer may not enjoin claims for extra work where contract provides for no change except on order of commissioner's court. Provision for benefit of contracting parties. Id. Where city and village pursuant to legislative authority (Laws 1907, p. 388, c. 428) agreed to construct sewer and sewage disposal works, each paying a portion of expense, Health Law, Laws 1893, p. 1519, c. 661, § 72, providing for payment of sewers by one city when ordered for protection of another's water system, was inapplicable, and contract could not be enjoined on theory of city's entire liability for expense. Mead v. Turner, 60 Misc. 145, 112 NYS 127. Wisdom of majority of voters of village in adopting proposition for construction of sewers not to be questioned. Id. Public funds paid out on contract, completed in good faith and free from fraud and collusion, cannot be recovered at instance of taxpayer, though contract illegal and void. McAlexander v. Haviland School Dist., 7 Ohio N. P. (N. S.) 590.

45. Not by taxpayers who do not represent other taxpayers and are not authorized to act for town. Seward v. Revere Water Co., 201 Mass. 453, 87 NE 749.

46. Hone v. Presque Isle Water Co. [Me.] 71 A 769. Municipality in making contracts for benefit of citizens acts for them collectively, and relation of privity cannot be introduced into such contracts by reason of tax paying or discharge of any civic duty by any individual citizen. Id. Though municipality maintaining fire department pays taxes collected for water furnished by water company, fact does not create any privity of interest between water company and citizen resident or taxpayer. Id. Contract for water supply and fire protection for benefit of inhabitants as well as city. Houck v. Cape Girardeau Waterworks & Elec. L. Co. [Mo. App.] 114 SW 1099. Nature of obligation and purpose to be served determines if for benefit of community as body or for special benefit of inhabitants. Id. Rule that third party designated as beneficiary of contract may sue inapplicable. Id. Private citizen may sue to compel water service, or that water be furnished at certain rate, though contract for water be with city in form of ordinance. Id. Ordinance of city, in form of contract, not police regulation, and water company failing to perform duty was guilty of breach of contract. Not negligence authorizing suit by person damaged. Id.

47. **Search Note:** See Counties, Cent. Dig.

when refused to be complied with by public officials can be enforced by mandamus,[48] but the remedy will not lie to compel an unauthorized act.[49] In determining the qualifications of the highest bidder seeking to become a depositary of funds, discretion must be exercised in good faith, and is subject to mandamus,[50] but where a contract is to be awarded to the lowest and best bidder, the court will not interfere with discretion except in the case of fraud or collusion.[51] A bill by the attorney general on relation of the competitive bidder has been held the proper proceeding where a private proposal is accepted by the city after the sealed bids required by the charter are submitted.[52]

(§ 6) *C. On the contact proper or on a quantum meruit.*[53] See 10 C. L. 1294 A contractor wrongfully prevented from completing his contract may recover for the work done,[54] and money loaned to a borough under an invalid resolution and used by it may be recovered in an action for money had and received.[55] A contractor is chargeable with notice that an improvement is of no special benefit to abutting property,[56] but otherwise a city is generally liable when failing to collect a special fund.[57] Where a city by its own act loses its authority to issue bonds to pay a contract entered into, it is liable for such compensation out of the general fund.[58] Where a valid contract was executed, but the mayor refused to approve the bond, the contractor might sue for the contract price.[59] A city proceeding under statute to remove a collapsed building, with expenses to be paid from a fund established by such statute, is directly liable to a contractor doing the work.[60] Where a city accepted an alternative bid for a city hall to be either cement or brick, the bidder had no contract on which he might sue until the city designated the material to be used,[61] and where the contractor disregarded such designation, it was held that the

§ 197; Dec. Dig. § 129; Municipal Corporations, Cent. Dig. §§ 696-700; Dec. Dig. § 254; Schools and School Districts, Cent. Dig. §§ 203-205; Dec. Dig. § 86; States, Cent. Dig. § 106; Dec. Dig. §§ 108, 108½; United States, Cent. Dig. § 57; Dec. Dig. § 74.

48. Jones v. Bank of Cumming [Ga.] 62 SE 68; Id [Ga.] 63 SE 36. Where ordinary failed to enter contracts on minutes as required by Pol. Code 1895, § 343, and contractor had procured loans from bank, assigning warrants to be received, bank had special interest so as to maintain mandamus to compel ordinary to do duty. Jones v. Bank of Cumming [Ga.] 62 SE 68.

49. Jones v. Bank of Cumming [Ga.] 63 SE 36. Ordinary making contract for court house on behalf of county not authorized to accept written orders given by contractor to bank, from which contractor borrowed money, for delivery of warrants for balance of contract price so as to bind county. Id.

50. Whether bank seeking state funds as depositary is safe. State v. Louisiana State Board [La.] 48 S 148. Where statute required acceptance of highest bid, such bid fulfilled contract giving right to bidder to compel board to let such contract to such bidder. Id. If by mistake of law there is no bona fide exercise of discretion in determining the highest bidder, mandamus will lie. Id.

51. Louisville Steam Forge Co. v. Gast [Ky.] 115 SW 761.

52. Public real complainant. Attorney General v. Public Lighting Commission [Mich.] 15 Det. Leg. N. 958, 118 NW 935.

53. **Search Note:** See Counties, Cent. Dig. § 198; Dec. Dig. § 130; Municipal Corporations, Cent. Dig. § 701; Dec. Dig. § 255; Schools and School Districts, Cent. Dig. §§ 203-205; Dec. Dig. § 86; States, Cent. Dig. §§ 107, 109; Dec. Dig. § 109; United States, Cent. Dig. § 57; Dec. Dig. § 75.

54. Kelley v. Torrington [Conn.] 71 A 939.

55. Judgment note invalid, since unapproved by chief burgess. Long v. Lemoyne Borough [Pa.] 71 A 211.

56. City not liable out of general fund when no steps to collect special fund, no effort to compel such action, and improvement of no benefit to abutting owner. Soule v. Ocosta, 49 Wash. 518, 95 P 1083.

57. Rogers v. Omaha [Neb.] 117 NW 119.

58. Where city authorized to issue bonds entered into contract with engineers for lighting and power plant, and then resubmitted question by bond issue (there being no sale for want of bidders) without providing for payment of engineer's services, whereby city lost its power to issue such bond, city was liable for payment out of general fund. Simons v. Eugene, 159 F 307.

59. Not restricted to mandamus. Curran Print. Co. v. St. Louis [Mo.] 111 SW 812.

60. Under Building Code, §§ 153-155, 157, city has no lien on property for expense. In re Jenkins, 130 App. Div. 702, 115 NYS 385.

61. Where designation of cement, bidder had no contract for erection of brick building, so as to recover compensation or damages for breach of contract. Ketterman v. Ida Grove [Iowa] 120 NW 641.

city in refusing to allow completion and in using the foundation did not accept the work so as to be liable for the reasonable value.[62] The compensation due often involves a construction of the contract.[63] A contractor is not entitled to the full contract price when the work is inferior,[64] and in such case when the compensation is not fixed by statute,[65] the contractor is only entitled to the reasonable value of such work.[66] Money paid by a municipality upon a void contract may be recovered,[67] but the rule does not apply to a contract authorized where the work is accepted and paid for.[68]

The constitutional limitation as to the impairment of contracts applies where a more difficult and uncertain remedy for the enforcement of a public contract is enacted,[69] or where the power of taxation is limited.[70] A petition by a contractor for services rendered should show compliance with statutory regulations as to writing,[71] and a disregard of provisions as to the manner of entering into the contract may prevent recovery.[72] An acceptance by an officer which merely shows

**62.** Ketterman v. Ida Grove [Iowa] 120 NW 641.

**63.** Contract for sewers construed, and contractor held not entitled to compensation for lumber left in work, since stipulations provided that he furnish all material, etc. City of Richmond v. Barry [Va.] 63 SE 1074. Contract for drawing plans and superintending construction of court house entire not severable. Where petition alleged drawing of plans, but stated no excuse for nonperformance of remainder of work, petition was subject to general demurrer. Spalding County v. Chamberlin & Co., 130 Ga. 649, 61 SE 533.

**64.** Contractor not entitled to full contract price where public printing required according to certain specifications, and contractor pursuant to direction of officer used inferior paper. Commonwealth v. Bacon, 33 Ky. L. R. 935, 111 SW 387.

**65.** Under Ky. St. 1903, § 3982, providing rates for public printing, saddle stitched pamphlets bound in card board glued to back could not be charged for as full binding with spring backs. Commonwealth v. Bacon, 33 Ky. L. R. 935, 111 SW 387. Such pamphlets not under any clause of statute fixing price. Id. Blank books used by counties referred to in Ky. St. 1903, § 3956, constitute second class of state printing and are record books. Teachers' registers, grade books and trustees' records not included in second class. Second class more expensive than first. Id.

**66.** Where work not called for by contract for public printing was accepted by board of printing commissioners and statute did not fix price, contractor was entitled to reasonable value. Commonwealth v. Bacon, 33 Ky. L. R. 935, 111 SW 387.

**67.** Interested official. Independent School Dist. No. 5 v. Collins [Idaho] 98 P 857. Rule that neither party to transaction may retain benefits and question invalidity inapplicable to void contract of municipality. Id. In action under School Laws, § 82 (Sess. Laws 1899, p. 105), as amended Sess. Laws 1905, p. 71, to recover money paid on void contract, complaint must allege contract made with defendant when member of board of trustees of school district. Id. Mere fact that contract price paid exceeded reasonable value of services rendered does not render contract invalid, or constitute legal claim against plaintiff for difference between amount paid and reasonable value of services. Where supervisor of certain county roads appointed by commissioners drew $5 per day compensation regardless of whether he worked entire day or not. Armstrong v. St. Louis County Com'rs, 103 Minn. 1, 114 NW 89.

**68.** County expressly authorized to build bridges, which accepted same and paid therefor, could not recover amount so paid on the ground of illegality. Where contract executed and municipality retains benefit and cannot or will not restore property required, can be no recovery of consideration. Sparks v. Jasper County, 213 Mo. 218, 112 SW 265.

**69.** Not limited to destruction of remedy. City of Cleveland v. U. S. [C. C. A.] 166 F 677. State statute, Acts Tenn. 1895, p. 203, c. 120, held to impair contract, since relator, having recovered judgment, was deprived of remedy against recorder to compel assessment of city's property at true value, and such statute void as to relator. Id. Previous provision of charter not repealed as to relator and recorder subject to mandamus to reassess property. Id.

**70.** Welch W. L. & P. Co. v. Welch [W. Va.] 62 SE 497. Where retroactive statutes decrease amount of tax levy, such statutes are void as to contract for light and power. Mandamus proper to impose taxes to meet contract in spite of statute provided levy does not exceed amount authorized where contract made. Id.

**71.** Petition for services rendered county stating that contractor should superintend construction of court house at 5 per cent of contract price, that an order of employment was entered on minutes, subject to general demurrer, since compensation not entered on minutes. Pol. Code. 1895, § 343 requires writing. Spalding County v. Chamberlin & Co., 130 Ga. 649, 61 SE 533. Petition against county upon alleged contract must aver that contract was entered upon minutes of proper authorities in charge of financial affairs of county. James v. Douglas County [Ga.] 62 SE 185. Under Pol. Code 1895, § 343, and in view of construction of Code 1868, § 527. Jones v. Bank of Cumming [Ga.] 62 SE 68.

**72.** Where village purchases supplies in

compliance with the contract does not preclude a town's reliance upon breach of contract,[73] and a village is not estopped, by issuing paving bonds as advance payment, from showing the failure to complete the work.[74] Whether an alleged contract has been entered into may be a question for the jury,[75] and the plaintiff has been held not to be precluded from proof of the contract, though there was no record of the same in the books of the county commissioners.[76] Jury questions are also presented in reference to acceptance of the work,[77] or as to damages for failure to comply with the contract.[78] Evidence of what a contractor owes does not prove the reasonable value of the work done,[79] and that orders had been issued upon a town is incompetent to prove that payment is due.[80] A directed verdict is proper where there is no evidence as to the reasonable value of the work performed.[81] The action may be barred by limitations.[82] A government official, in making a gift to a contractor of a tug to tow a vessel containing lumber contracted for, does not render the government liable to the owners of the vessel, which is destroyed.[83]

*Other remedies.*—A borough president may be compelled by mandamus to sign an order for the payment of a debt due by the borough on a building contract,[84] but the remedy will not lie where there is no duty[85] or to compel the performance of duties and obligations depending upon the contract.[86] Mandamus will not lie to compel the payment of a paving bond where it appears that such bond was issued as advance payment and the work was not completed.[87]

(§ 6) *D. On the contractor's bond.*[88]—See 10 C. L. 1295—Liability to material-

excess of $500 without advertising for bids or entering into contract as required by law, fact that goods were purchased and delivered in good faith does not render village liable therefor because of moral obligation incurred, and upon suit by taxpayer an injunction will lie against payment of bill. Castner v. Pleasant Ridge, 7 Ohio N. P. (N. S.) 174. Failure to aver that contract was one of binding force and effect, and was endorsed by prosecuting attorney in compliance with § 799, Rev. Stat., and that there has been performance of all other prerequisites necessary to complete and valid contract, precludes any recovery thereon by county. Prerequisites of essence of contract. State v. Esswein, 11 Ohio C. C. (N. S.) 225.

73. Where from contract engineer had no authority to accept work. Town of Sterling v. Hurd [Colo.] 98 P 174.

74. Action on bond. Barber Asphalt Pav. Co. v. Highland Park [Mich.] 120 NW 621.

75. Contract of employment to prepare plans for county heat and power plant. Jacoby v. Lehigh County, 36 Pa. Super. Ct. 194.

76. Jacoby v. Lehigh County, 36 Pa. Super. Ct. 194.

77. In action for balance due for constructing waterworks, held jury question whether town's engineer had accepted work, or that by his action town had waived right to have alleged defects in work determined. Town of Sterling v. Hurd [Colo.] 98 P 174.

78. Town of Sterling v. Hurd [Colo.] 98 P 174.

79, 80. Kelley v. Torrington, 80 Conn. 378, 68 A 855.

81. Ketterman v. Ida Grove [Iowa] 120 NW 641.

82. Time limit of statute of limitations, Laws 1895, p. 128, c. 8, § 347, is two years. Thornton v. East Grand Forks, 106 Minn. 233, 118 NW 834. In action for work and materials furnished by plaintiff's assignor to defendant city for paving, as evidenced by estimates allowed and issued by defendant's engineer and common council, plaintiff's cause of action held to have accrued on 10th of month next after estimates allowed, when payments due. Id.

83. Promise to contractor nudum pactum, and owner of vessel destroyed could not claim benefits, being also stranger to contract. Evans v. U. S., 42 Ct. Cl. 287.

84. Refusal on ground of improper performance of work, but decision as to payment for council and signing by president ministerial. Breslin v. Earley, 36 Pa. Super. Ct. 49.

85. Under St. 1898, § 925-94, authorizing board of public works to grant certificate of partial performance of work, such duty was not imposed on city engineer he being only member of board. State v. Icke, 136 Wis. 583, 118 NW 196. Duty also discretionary and mandamus denied. Id.

86. Duty of engineer to estimate work performed, so that contractor could secure payment. State v. Icke, 136 Wis. 583, 118 NW 196.

87. Barber Asphalt Pav. Co. v. Highland Park [Mich.] 120 NW 621. Evidence held to show paving bond issued in advance. Id. Mandamus inapplicable under circumstances, since action on bond proper. Id.

88. **Search Note:** See Counties, Cent. Dig. §§ 194-196; Dec. Dig. § 123; Municipal Corporations, Dec. Dig. § 245; Schools and School Districts, Cent. Dig. §§ 195, 196, 340; Dec. Dig. § 81; States, Cent. Dig. § 98; Dec. Dig. § 101; United States, Cent. Dig. § 50; Dec. Dig. § 67.

men and subcontractors on bonds given for their benefit is elsewhere treated.[89] The obligors of a bond are liable when given as in pursuance of a statute, though such statute does not in fact require a bond.[90] The liability of the sureties is measured by the contract.[91] A surety may be released in the case of unauthorized alterations of the contract,[92] as where time is extended without consent.[93] A surety, having received the consideration for a bond, is estopped to assert the same as void because the city was unauthorized to take it,[94] but a surety has been held not estopped from denying liability from actions in securing a public contract or the compensation due.[95]

(§ 6) *E. Under lien laws.*[96]—See 4 C. L. 1105

## PUBLIC LANDS.

§ 1. The Public Domain and Property Therein, 1457.
§ 2. Lands Open for Settlement and Lands Granted or Reserved, 1458.
§ 3. Mode of Locating and Acquiring Title, 1460.
A. Federal Lands, 1460.
B. State Lands, 1464. Rescissions. Can-

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**89.** See Public Works and Improvements, 10 C. L. 1307.

**90.** Though no bond required under 3 Comp. Laws 1897, §§ 10,743-10,745, where company furnished limestone dust to municipal asphalt plant, obligors were liable. People v. Newberry, 152 Mich. 292, 15 Det. Leg. N. 211, 116 NW 419.

**91.** Contract of suretyship to be construed as other contracts—according to intent of parties. McMullen v. U. S. [C. C. A.] 167 F 460. No intendment or presumptions not arising on contract or bond to be indulged in as against surety. Eau Claire-St. Louis Lumber Co. v. Banks [Mo. App.] 117 SW 611. Where contractor for public printing performed work satisfactorily, but improperly obtained larger compensation than entitled to, sureties on bond were not liable for such amount. Commonwealth v. Bacon, 33 Ky. L. R. 935, 111 SW 387. In action on bond, evidence that city failed to keep street free from deleterious substances which impaired pavement was immaterial, not having been contracted for. Aetna Indemnity Co. v. Little Rock [Ark.] 115 SW 960.

**92.** Contractor or surety cannot complain of change not going to performance of contract. Change in material to be used by street railway in paving space between rails held not to effect remainder of street paved. Aetna Indemnity Co. v. Little Rock [Ark.] 115 SW 960. Surety would be released if city permitted contractor to lay asphalt at lesser degree of heat than contract required, thus impairing durability, but evidence held to show no departure from contract. Id. Assignment of moneys due or to become due contractor not alteration of contract, being expressly provided for. Even if no provision in contract, assignment would not interfere with or impair surety's right of subrogation to complete contract and be paid on contractor's default. City of New Rochelle v. Aetna Indemnity Co., 115 NYS 135. Question of assignment of contract without surety's knowledge, so as to release latter, held for jury, evidence being conflicting. Strandell v. Moran, 49 Wash. 533, 95 P 1106.

**Surety not released:** Where contract provided for changes, sureties being deemed to assent in advance to such changes McMullen v. U. S. [C. C. A.] 167 F 460. Where there was dispute as to foundation of school and contractor tore it out and placed in new foundation, trustees being right, and foundation not being in compliance with contract. Cooke v. White Common School Dist. No. 7, 33 Ky. L. R. 926, 111 SW 686. Where dispute as to whether cellar of schoolhouse should be walled up, and trustees agreed to pay extra sum for work. Id. Where dispute as to whether bridging was required between joists but work was performed and was necessary, since contract called for first class work. Id. Where slight change in plans of schoolhouse to make gable harmonize with building, slight modification being presumed to have been contemplated. Id. Where schoolhouse was built and joists used were "2x8," and additional flue was used, where original contract called for joists "2x6," since changes were made before contract signed. Id. Dispute as to flue in schoolhouse which contractor said was insufficient and which trustees claimed should be larger, but which was built as contractor claimed, insufficient to release. Id.

**93.** Contract for government work giving contractor right to apply for extension of time, but leaving granting of such extension optional, ineffective to add to rights of parties. Sureties discharged by extension without their consent. McMullen v. U. S. [ C. C. A. ] 167 F 460.

**94.** Aetna Indemnity Co. v. Little Rock [Ark.] 115 SW 960.

**95.** Surety not estopped from denying liability where contractor for public printing did work as directed, but improperly received excess compensation, from fact that such surety as attorney argued that work be assigned to such contractor, asked for allowance of claim, and received portion of sum paid. Commonwealth v. Bacon, 33 Ky. L. R. 935, 111 SW 387.

**96.** See, also, Mechanic's Liens, 12 C. L. 815.

**Search Note:** See Mechanics' Liens, Cent. Dig. §§ 14, 15, Dec. Dig. §§ 13, 224; Municipal Corporations, Cent. Dig. § 913; Dec. Dig. § 373.

cellations, Forfeitures and Reversions, 1466.
§ 4. Interest and Title of Occupants, Claimants and Patentees, 1467.
A. Federal Lands, 1467. Railroad Land Grants, 1470. Area Acquired and Boundaries, 1470.
B. State Lands, 1472.
§ 5. Leases of Public Lands and Rights Thereunder, 1475.
§ 6. Spanish and Other Grants Antedating Federal Authority, 1476.
§ 7. Regulations and Policing, and Offenses Pertaining to Public Lands, 1477. Crimes and Offenses Against Public Lands, 1477. Fencing, 1478.

*The scope of this topic* is noted below.[97]

§ 1. *The public domain and property therein.*[98]—See 10 C. L. 1296—The original title to lands in the United States was in the government and not in the Indians, they having merely a right of possession and occupancy.[99] The land department has no arbitrary, unlimited, or discretionary power to sell or grant the public lands,[1] but the federal government or its officers may make such regulations for their use and disposal as are authorized by law,[2] and one whose rights are not affected thereby cannot object.[3] A grant to a state to be disposed of by the latter may be made subject to conditions for such disposal.[4] The federal government may reserve a right of way for irrigation purposes,[5] and when lands under navigable waters are granted, the grantee takes subject to the public right of navigation, which includes

**97. It includes** matters pertaining to the public domain, both federal and state. **It excludes** lands held by the public for school purposes (see Schools and Education, 10 C. L. 1597) location of mining claims (see Mines and Minerals, 12 C. L. 851), and lands held for public use (see Highways and Streets, 11 C. L. 1720); Parks and Public Grounds, 12 C. L. 1173.

**98. Search Note:** See 4 C. L. 1107; 27 L. R. A. 696; 70 Id. 799, 873; 3 L. R. A. (N. S.) 733; 7 Id. 786; 9 Id. 529.

See, also, Public Lands, Cent. Dig. §§ 1-28; Dec. Dig. §§ 1-21; 26 A. & E. Enc. L. (2ed.) 213.

**99.** Allotment of lands to Indians, in accordance with agreement of 1883 between the United States and the chiefs of the Columbia and Colville Indians, merely gave a right of occupancy, title remaining in the United States, which could, therefore, maintain ejectment against a third person who had ousted the Indian allottees United States v. Moore [C. C. A.] 161 F 513.

**1.** Hoyt v. Weyerhauser [C. C. A.] 161 F 324.

**2.** It was within authority of secretary of the interior, acting through commissioner of general land office, to charge registers and receivers with duty to sell lands ceded by Osage Indians to United States under treaty of September 29, 1865 (14 Stat. at L. 687), to be sold for their benefit, and to limit annual compensation of such officers to legal maximum of $2,500. Stewart v. U. S., 206 U. S. 185, 51 Law. Ed. 1017.

**3.** Taxpayer, showing no injury to himself, cannot sue to restrain the governor and commissioner of public lands of Territory of Hawaii from exchanging public lands under § 276, Rev. Laws Hawaii, on the ground that such exchange is illegal under territorial laws because lands are leased and exceed 1,000 acres to each parcel. McCandless v. Pratt, 211 U. S. 437, 53 Law. Ed. 271. It is within power of commandant of a United States military reservation to fix line of his occupation thereof at any point within the legal boundaries of the reservation, and, regardless of whether the line so fixed is the true boundary, those whose rights do not depend upon the true boundary cannot object. Rudolph Herman Co. v. San Francisco [Cal.] 99 P 169.

**4.** Grant of lands by United States to Utah under enabling act of July 16, 1894, was conditioned that lands should be selected from unappropriated lands of the United States, that they should be selected within the limits of the state, and that they should be nonmineral. Brigham City v. Rich, 34 Utah, 130, 97 P 220. Acts Aug. 18, 1894, c. 301, § 4, 28 Stat. 422, as amended by Act June 11, 1896, § 1, c. 420, 29 Stat. 413, and Act March 3, 1901, c. 853, § 3, 31 Stat. 1188 (U. S. Comp. St. 1901, pp. 1554, 1556, 1557), provides that upon proper application by State the government will contract with it to give patent if certain conditions as to filing maps of location are complied with. The state may enter into contracts for irrigation and reclamation, all such contracts to be under supervision of board of land commissioners. Held contract which was not submitted or accepted by such board, and whereby settlers were placed at mercy of contractor as to amount of payment, was against public policy and not enforcible in equity. McKinney v. Big Horn Basin Development Co. [C. C. A.] 167 F 770. Dedication by canal commissioners of part of land to public to aid in erection of public buildings and for streets, for purpose of obtaining greater aggregate price for remainder than they could have obtained had no dedication been made, held to be in compliance with purpose of congress in making grant by Act March 2, 1827, c. 51, 4 Stat. 234, of land to Illinois to aid in opening canal, and providing that state might dispose of same for that purpose and no other. People v. Chicago & N. W. R. Co., 239 Ill. 42, 87 NE 946.

**5.** Act Cong. Aug. 30, 1890, c. 837, 26 Stat. 391 (U. S. Comp. St. 1901, p. 1553), providing for reservation in all patents of right of way for canals constructed by

the right to deepen and widen the channel.[6] Buildings erected upon public domain by mistake or otherwise do not thereby become the property of the government but the owner has a reasonable time in which to remove them.[7]

§ 2. *Lands open for settlement and lands granted or reserved.*[8] See 10 C. L. 1296 Lands already patented,[9] granted,[10] confirmed to a grantee,[11] or otherwise reserved,[12] are not subject to entry. Unoccupied and unimproved lands only are subject to homestead settlement,[13] though the possession of the occupant be wrongful as to the United States.[14] General laws authorizing localization or entries on vacant land do not apply to lands that have been previously reserved.[15] The test of segregation is the recognition of the claimant's right by the land department.[16] Location upon

federal authority, held to apply as well to those to be constructed as to those already in operation. Green v. Willhite, 160 F 755.

**6.** Grant dating from British Crown of land under navigable water used by plaintiff as oyster bed subject to government's right to widen channel. Lewis Blue Point Oyster Cultivation Co. v. Briggs, 129 App. Div. 574, 114 NYS 313.

**7.** Wallbrecht v. Blush, 43 Colo. 329, 95 P 927.

**8. Search Note:** See, also, Public Lands, Cent. Dig. §§ 29-600; Dec. Dig. § 22-187; 26 A. & E. Enc. L. (2ed.) 219.

**9.** A patent already issued will not be set aside in favor of one who has no equitable title originating in settlement made before patent sought to be set aside was issued. Linebeck v. Vos, 160 F 540. Where commonwealth in 1872 had issued a patent for a boundary of land, subsequent patents issued to others for land within such boundary were void. Conley v. Breathitt Coal, Iron & Lumber Co. [Ky.] 113 SW 504. Patent to land previously patented void. Hamilton v. Steele [Ky.] 117 SW 378. Evidence held to sustain finding that area claimed under patent granting large boundary of land from which prior surveys were excepted was not included within such exception. Steele v. Bryant [Ky.] 116 SW 755.

**10.** Transferable title to lands already granted to railway company could not be acquired by alien through mere settlement thereon. Call v. Los Angeles-Pacific Co., 162 F 926.

**11.** Plaintiffs claimed title to a tract of land under Spanish grant of 1767, which grant was confirmed in 1852. In 1882 defendant located confederate scrip upon said land by virtue of which it was surveyed and patented. Held patent gave no title as against plaintiffs. Sullivan v. Solis [Tex. Civ. App.] 114 SW 456.

**12.** Creation of forest reserve severs the land from the public domain and appropriates it to public use. Shannon v. U. S. [C. C. A.] 160 F 870. Lands occupied as a military reservation at time of passage of Act of March 2, 1849, c. 87, 9 Stat. at L. 352, granting swamp lands to Louisiana upon approval of list by secretary of treasury, held already withdrawn from public domain and did not pass under act. Louisiana v. Garfield, 211 U. S. 70, 53 Law. Ed. 92. Act June 5, 1872, c. 308, 17 Stat. 226 providing for survey of 15 townships in Bitter Root Valley, and that none of the lands above the LoLo fork should be open to settlement under homestead or pre-emption laws, held conclusive as against a settler's right to occupy land above such fork, and not changed by Act Feb. 11, 1874, c. 25, 18 Stat. 15, latter act being construed to apply only to the 15 sections already surveyed. Whaley v. Northern Pac. R. Co., 167 F 665.

**13.** One in open and undisturbed possession of public land is entitled to the homestead as against a trespasser who attempts to make entry thereon with knowledge of rights of prior occupant. Lyle v. Patterson, 160 F 545.

**14.** One who occupied public lands under contract of sale from railway company had prior right to make homestead entry as against trespasser, upon decision that railway company had no right to land under canceled grant. Harvey v. Holles, 160 F 531. One cannot acquire homestead rights in lands already occupied by another who had been for several years in open and undisturbed possession under claim of right through purchase from a railroad company whose grant had later been canceled. Dockendorf v. Bassett, 160 F 543.

**15.** A certificate issued under a special law authorizing the beneficiary to locate "upon any of the vacant public lands of the state within or without the several reservations heretofore created by law" held not to entitle beneficiary to enter upon islands they having been reserved by policy of law and their control specially assumed by government of Republic of Texas, Dec. 10, 1836 (Hartley's Dig. art. 1779), providing that all islands belonging to Republic were reserved for government use unless President was especially authorized by congress of the public to sell them. Roberts v. Ferrell [Tex.] 110 SW 733.

**16.** Under swamp land grant of Sept. 28, 1850 (9 Stat. 519, c. 84), providing for segregation of swamp lands and that title thereto should vest in state as of date of passage of act upon judicial determination by land department that lands were in fact swamp lands, it was held in action by United States to recover lands claimed to have passed under such grant, that mere fact that state in pursuance to instructions from land department had appointed agents to determine which were swamp lands, and who had filed their reports with land office, did not constitute recognition of state's claim where federal government had never ratified or sanctioned such reports. United States v. Chicago, etc., R. Co. [C. C. A.] 160 F 818.

public land segregates it from the public domain,[17] although no patent has been issued.[18] Lands embraced within the indemnity limits of a railway grant are open to homestead entry until the list of selections is approved by the secretary of the interior,[19] although such list may have been filed prior to homesteader's entry.[20] No right can be acquired by an attempt to purchase school lands already covered by a valid and subsisting sale,[21] or by one prima facie valid under the law in force at the time of sale,[22] nor can a lessee without the consent of the state terminate his lease so as to open the lands for settlement.[23] Where a settlement under a donation

**17.** Where settler located upon public land and had it surveyed in 1838 and sold it the same year, held that such location and survey operated to segregate land as effectually as a patent would have done in so far as settler's right to convey was concerned. Sims v. Sealy [Tex. Civ. App.] 116 SW 630. So long as a homestead entry valid on its face remains uncontested and uncanceled, the land covered thereby is withdrawn from the public domain and cannot be granted to a subsequent claimant. Jameson v. James [Cal.] 100 P 700. Lands upon which valid oil claims were located held not to be open to public entry so that a railway company could claim a right of way under Act Cong. May 14, 1898, c. 299, § 2, 30 Stat. 409 (U. S. Comp. St. 1901, p. 1575). Alaska Pac. Railroad & Terminal Co. v. Copper River & N. W. R. Co. [C. C. A.] 160 F 862.

**18.** A tract ceases to be subject to the disposal of the United States when it is entered, paid for, and so certified by the land office, although no patent has been issued. United States v. Black [C. C. A.] 160 F 431. Upon location under soldier's warrant land ceases to be part of public domain, though no patent has been issued and legal title is held in trust for person who shows himself entitled to benefit of location, although formal approval of location and issuance of patent suspended because of apparently conflicting assignments of warrant. Herrick v. Sargent [Iowa] 117 NW 751. One who occupied land and enclosed it under state patent, validity of which was questioned, could maintain ejectment against subsequent entryman under United States homestead law, regardless of whether he had title from the state or not. Carmichael v. Campodonico, 7 Cal. App. 597, 95 P 164. A widow entitled as the head of a family to a league of land made application therefor in 1834. Land was surveyed and she exercised ownership over it but never obtained patent. In 1850, by act of legislature, commissioner of general land office issued a patent to her heirs. Held that act of legislature was simply confirmatory of a right she already had. Houston Oil Co. v. Gallup [Tex. Civ. App.] 109 SW 957.

**19.** By Act of March 3, 1863, every alternate odd section of public lands was granted to Kansas for aid in railway construction. Before state had formally accepted grant commissioner of land office in pursuance to request by members of congress from Kansas withdrew public lands along presumed right of way from settlement. Plaintiff, after such withdrawal but before selection of indemnity lands settled upon tract of land within territory so withdrawn and applied for patent which was refused. Held that such withdrawal was unauthorized and void, that land was open to settlement until selection as indemnity land, and since plaintiff's right had attached prior to such selection he was entitled to patent. Brandon v. Ard, 211 U. S. 11, 53 Law. Ed. —.

**20.** Railway company acquired no rights for any purpose under Act March 3, 1857 (11 Stat. 195, c. 99), and March 3, 1865 (13 Stat. 526, c. 105), as amended by Act March 3, 1871 (16 Stat. 588, c. 144) until list of indemnity lands had been approved by secretary of the interior, although list had been filed before adverse entry. Northern Pac. R. Co. v. Wass, 104 Minn. 411, 116 NW 937. Homesteader who settled upon land withdrawn from entry pending determination of validity of trustees' selection of indemnity lands under "Hastings and Dakota Railway Grant" of 1866, and made repeated entry applications, held to acquire homestead rights, all indemnity selections prior to his entry being ineffectual to remove land from homestead settlement. Osborn v. Froyseth, 105 Minn. 16, 116 NW 1113.

**21.** Sale takes land off market and commissioner could not afterwards sell it, superior title remaining in state, while right vested in purchaser to acquire that title by compliance with statutory conditions. Pohle v. Robertson [Tex.] 115 SW 1166.

**22.** Land placed upon market under Act 1897, Laws 1897, p. 184, c. 129, was sold, and because of such sale was never listed by commissioner of land office as required by Acts 1901, Laws 1901, p. 292, c. 125. Held purchaser under later statute could not acquire title as against first purchaser on theory that first sale was invalid and that consequently land remained upon market subject to sale under second law. Williams v. Barnes [Tex Civ. App.] 111 SW 432.

**23.** Where lessee of school lands paid rent in full to time of expiration of lease and surrendered possession to settler, such act did not open land for settlement, the state not having accepted relinquishment of lease. Hopper v. Nation [Kan.] 96 P 77. School lands are not thrown upon the market subject to purchase by the mere fact that the lessee thereof tenders his lease for cancellation and offers to purchase the land, since if the offer is refused the lease remains in force. Halbert v. Terrell [Tex.] 112 SW 1036.

act is abandoned,[24] or where a reservation previously made ceases to be effective, the land again becomes part of the public domain and open to settlement.[25]

§ 3. *Mode of locating and acquiring title. A. Federal lands.*[26]—See 10 C. L. 1297 To acquire a valid right under the homestead law, the settler must actually occupy the land in absolute good faith with the intention of permanently residing thereon.[27] Such occupation must be evidenced by those things which are essential to its beneficial use.[28] The physical presence of the settler upon public lands at all times is, however, not necessary to constitute legal possession,[29] nor need the settler himself construct the improvements required by law.[30] A valid right to public lands can be initiated only by persons qualified [31] after compliance wtih all legal requirements.[32]

**24.** Settlement made under Act Cong. Sept. 27, 1850, c. 76, 9 Stat. 496, but abandoned before same land was selected by railway company under Act July 2, 1864, c. 217, 13 Stat. 365, did not operate to reserve such lands from selection by company. Northern Pac. R. Co. v. George [Wash.] 98 P 1126.

**25.** By order of the president certain public lands in Michigan were withdrawn from sale or entry pending determination whether they would be required for Indians under treaty then being negotiated. Such order was never formally revoked. Treaty was formally accepted by Indians July 31, 1856; June 3, 1856, the United States granted to Michigan in aid of railway company lands included under such withdrawal, but company did not file map of definite location until after treaty had been ratified. Held, that as before filing of map of definite location, land again became public because of designation of other lands under treaty, which lands did not include those in controversy, company's title passed under the grant and became vester in its innocent vendees. United States v. Grand Rapids & I. R. Co. [C. C. A.] 165 F 297.

**26. Search Note:** See 4 C. L. 1109.

See, also, Public Lands, Cent. Dig. §§ 29-600; Dec. Dig. §§ 22-187; 26 A. & E. Enc. L. (2ed.) 236, 321, 374; 12 A. & E. Enc. P. & P. 936; 17 Id. 127.

**27.** Occasional visits to homestead for mere purpose of technically complying with law held insufficient as good faith compliance. Whaley v. Northern Pac. R. Co., 167 F 665. In prosecution for perjury alleged to have been committed in proving up homestead claim, defendant's declarations as to residence on land were relevant. Barnard v. U. S. [C. C. A.] 162 F 618.

**28.** Plaintiff staked out a lot in a mining camp in Alaska, built a log cabin thereon, lived there for 4 months and then left, leaving some of his property there and requesting two different persons to look after his lot. Upon his return more than 3 years later he found defendants in possession, they having bought lot from one who had also located thereon and recorded location, thinking plaintiff had abandoned same. Held that plaintiff's occupancy was not such open and continuous possession either by himself or agent as would ripen into title under townsite law, Rev. St. § 2387 (U. S. Comp. St. 1901, p. 1457), or under act March 3, 1891 (26 Stat. 1095, c. 561 [U. S. Comp. St. 1901, p. 1536]). Gordon v. Ross-Higgins Co. [C. C. A.] 162 F 637.

**29.** Where one attempted to take possession of land not patented, held by a partnership, during an interval where no one was in actual possession pending a change of tenants, such attempted entry was not one on unoccupied public lands. Neal v. Kayser [Ariz.] 100 P 439.

**30.** A settler who actually resides upon land with bona fide intention of acquiring title under homestead law was not deprived of such right because he purchased his improvements from a prior settler instead of constructing them himself. Frodick v. Northern Pac. R. Co. [C. C. A.] 164 F 913.

**31.** Deed to land settled by alien who had not declared his intention of becoming citizen was an absolute nullity. Call v. Los Angeles Pacific Co., 162 F 926. Since a corporation could not become a settler upon public lands, occupancy and enclosure of public lands by it was a violation of Act Cong. Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524). Pacific Live Stock Co. v. Isaacs [Or.] 96 P 460. Under Rev. St. U. S. 2350 (U. S. Comp. St. 1901, p. 1441), prohibiting more than one entry by the same person, one entitled to a preferential entry of coal lands by Rev. St. U. S. §§ 2348, 2349 (U. S. Comp. St. 1901, p. 1441), cannot make an entry apparently for himself but in fact as agent for a person who is himself disqualified. United States v. Forrester, 211 U. S. 399, 53 Law. Ed. 245.

**32.** Claimant alleged title to certain lands claimed due Indians under Chickasaw Treaty of 1834 as against subsequent patentees under federal law, but failed to show that conditions of treaty under which Chickasaw reservations were to be made had been compiled with. Held that by failure to obtain commissioners' and Indian agent's certificate in proper form, neither alleged Indian reservees nor claimant under conveyance from them acquired title. Ayers v. U. S., 42 Ct. Cl. 385. Act May 17, 1884, c. 53, § 8, 23 Stat. 26, provides that Indians or other persons in Alaska shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands are reserved for future legislation by Congress. Held that terms under which one in possession of land within townsite of Juneau might acquire title were expressed in the act of March 3, 1891, c. 561, § 11-14, 26 Stat. 1099 (U. S. Comp. St. 1901, pp. 1467-8), patenting land

While a right to government land cannot be initiated by trespass,[33] every competent locator has the right to initiate a lawful claim by a peaceful adverse entry, although the land be in the possession of those who have no superior right to acquire the title or to hold the possession.[34] An occupant of government lands has a preference right to purchase when the land is placed upon the market.[35] As against the government, a vested easement in public lands for a canal and reservoir site cannot be acquired until the canal and reservoir have been actually completed [36] and the map of definite location approved by the secretary of the interior.[37] Final proof under a timber culture entry may be made although the statutory time for making such proof has passed.[38] The execution of a patent to an entryman under soldier's additional homestead law vests the beneficial title in his assignee.[39] Grants of public lands from the United States to a state must be construed according to their terms.[40]

*Railroad grants.* See 10 C. L. 1298—The right of a railroad company to granted land vests upon the filing of the map of definite location properly approved;[41] its right to indemnity land vests on the approval of its selection by the secretary of the interior.[42] Title so acquired is subject to the condition subsequent of construct-

to townsite trustee in trust for occupants from whom title might be obtained. McGrath v. Valentine [C. C. A.] 167 F 473.

**33.** One who entered by trespass upon unsurveyed island already occupied acquired no right thereby to make homestead entry. Short v. Read [Nev.] 96 P 1060.

**34.** Entry by one claiming as homesteader upon lands to which corporation claimed prior right through possession of assignor. Pacific Live Stock Co. v. Isaacs [Or.] 96 P 460.

**35.** When the government places public lands upon the market, settlers then occupying such lands have a preference right to purchase at the price stated, and the state which has acquired the pre-emption in lands occupied by Indians has the first right to purchase when the lands are put up for sale or to extinguish the Indian title. Seneca Nation of Indians v. Appleby, 127 App. Div. 770, 112 NYS 177.

**36.** No easement acquired under Rev. St. § 2339 and 2340 (U. S. Comp. St. 1901, p. 1437) by one who had staked out claim and commenced construction of ditches but had not completed outlet to reservoir basin nor canals for distribution. United States v. Rickey Land & Cattle Co., 164 F 496.

**37.** No right of way acquired under §§ 18 and 19 of Act March 3, 1901, c 561, 26 Stat. 1101, 1102 (U. S. Comp. St. 1901, p. 1437) where secretary refused to approve map because site withdrawn from sale and reserved by government. United States v. Rickey Land & Cattle Co., 164 F 496.

**38.** The acts of congress and the regulations of the land department permitted one who had made a timber-culture entry to prove his compliance with the requirements of such acts within 5 years from the expiration of 8 years from the entry, and gave local land office jurisdiction to pass thereon. An entryman made such proof more than 14 years after entry. Held mere lapse of time did not prevent such proof from being made. Neff v. U. S. [C. C. A.] 165 F 273.

**39.** The doctrine of relation may be invoked although there is no privity between holder of outstanding title and those who seek to benefit by it. Rogers v. Clark Iron Co., 104 Minn. 198, 116 NW 739.

**40.** Grant from United States to Utah by enabling act July 16, 1894, c. 138, 28 Stat. 107, held to be one in presenti; title passing as of date of grant upon selection duly made and of lands are in fact such as were intended to pass by grant. Rejection of selected lands by secretary of interior does not operate to divest title. McKinney v. Carson [Utah] 99 P 660. Act of September 28, 1850, c. 84, 9 Stat. at L. 519, providing that provisions of act granting swamp lands to Arkansas upon issuance of patent should be extended to the other states containing swamp lands, did not affect Act of March 2, 1849, c. 87, 9 Stat. at L. 352 granting Louisiana whole of swamp lands therein upon approval of list of such lands by secretary of the treasury. Continuous construction of such former statute by land department to effect that patent not necessary, upheld. Louisiana v. Garfield, 211 U. S. 70, 53 Law. Ed. 92.

**41.** After a profile of a railway right of way under grant by Act Cong. March 3, 1875, c. 152, § 1, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), has been approved by the secretary of the interior and filed in local land office, the title is complete in road and subsequent entryman takes subject to such right of way. Moran v. Chicago, B. & Q. R. Co. [Neb.] 120 NW 192. The fact that the profile of a surveyed railroad right of way under grant by Act Cong. March 3, 1875, c. 152, § 1, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), was sent directly to the secretary of the interior by the president of the company instead of being transmitted by him through district land office, was immaterial as long as it was approved by the secretary and thereafter filed in district land office. Id.

**42.** Where grant of indemnity land was made to railway company but not approved and in meantime a settler made bona fide entry and purchase under "timber and stone act" (Act June 3, 1878, c. 151, § 1, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545] and Act Aug. 4, 1892, c. 375, § 2, 27 Stat. 348 [U. S. Comp. St. 1901, p. 1547]), after which

ing the road within the time specified by the act under which the grant is made.[43] The right to make selections of indemnity lands depends upon the status of the lands at the date of selection and not upon their status at the date of the grant,[44] unless the grant specifically provides otherwise.[45]

*Swamp land grants.*[See 8 C. L. 1490]—A grant of swamp land to the state, although a grant in praesenti, does not operate to pass the legal title until such lands have been selected by the state and patents thereto delivered.[46]

*Cancellation and forfeiture.*[See 10 C. L. 1208]—Equity will exercise wide liberality in favor of one who in good faith enters the public lands with a view of making a home thereon.[47] A patent will not be canceled for fraud unless the evidence is clear and convincing,[48] and in such case only at the suit of the government by regular judicial proceedings taken for that purpose.[49] The right to a patent is not affected by failure to file a homestead application within the time limited by law,[50] but failure to make timely entry after contest deprives the successful contestant of his priority.[51] Forfeiture of railway land grants for breach of condition subse-

the company's title was approved and entryman's title canceled, held that title did not rest in company until approval and that upon entryman's purchase land ceased to be at disposal of government, vesting equitably in entryman with legal title in government in trust for his benefit. Hoyt v. Weyerhaeuser [C. C. A.] 161 F 324.

43. Upon approval by the secretary of the interior of the map of definite location of railway right of way granted under Act Cong. June 4, 1898 (30 Stat. 430), grant became definite and fixed and title vested in grantee subject to condition subsequent of constructing road within time specified by act. Spokane & B. C. R. Co. v. Washington & G. N. R. Co., 49 Wash. 280, 95 P 64.

44. Lands originally within place limits of grant to one company but forfeited by it and again becoming public domain could legally be selected by another company where such lands were within indemnity limits of the latter, although grants to both companies were of the same date. United States v. Southern Pac. R. Co. [C. C. A.] 167 F 510.

45. Under grant of March 3, 1871, c. 122, 16 Stat. 573, Southern Pacific Railroad Company could not select as indemnity lands, lands lying within place limits of Atlantic and Pacific Railroad Company under its grant of July 27, 1866, c. 278, 14 Stat. 292, although such grant was forfeited and land again passed under public domain, grant under which Southern Pacific Railroad Company claimed being limited so that it should in no way impair the present or prospective rights of the Atlantic and Pacific Railroad Company or any other railroad company. Southern Pac. R. Co. v. U. S. [C. C. A.] 167 F 514.

46. Swamp land act (Act Cong. Sept. 28, 1850, c. 84, 9 Stat. 519). Little v. Williams [Ark.] 113 SW 340. "Swamp lands" as distinguished from "overflowed lands" are such as require drainage to dispose of needless water or moisture on or in the lands in order to make them fit for successful and useful cultivation. State v. Gerbing [Fla.] 47 S 353. "Overflowed lands" are those that are covered by nonnavigable waters or are subject to such periodical or frequent overflows of water, salt or fresh, not including lands between ordinary high and low water marks of navigable waters, as to require drainage or levees to keep out the waters and thereby render the lands suitable for successful cultivation. Id.

47. Where, in equity suit brought by government to set aside patent for fraud, evidence showed that patentee had been compelled by poverty and sickness to remain away from claim for longer periods than statute allowed, the liberal policy of the law toward honest settlers required dismissal of suit. United States v. Collett [C. C. A.] 159 F 932.

48. Evidence of fraud held insufficient to cancel patent where it appeared that patentee tried in good faith to establish home but was compelled to be absent from claim during statutory period by reason of poverty and sickness. United States v. Collett [C. C. A.] 159 F 932. Although land sold under Act. Feb. 26, 1895, 28 Stat. 627 (U. S. Comp. St. 1901, p. 1519), was in fact occupied by an Indian, which occupancy would under rules of department of the interior have precluded its sale if known, an affidavit that land was not occupied by one having color of title constituted no such misrepresentation or fraud as would require cancellation of patent, occupant not holding under any written instrument. United States v. Casterlin, 164 F 437.

49. Complainants themselves having no right to a patent on land upon which they had located mining claims could not sue for cancellation of patent issued to prior entryman, although such patent was obtained by fraud. Jameson v. James [Cal.] 100 P 700.

50. Failure to file homestead application within 90 days after filing of township plat did not forfeit homesteader's right to a patent under Act May 14, 1880, c. 89, 21 Stat. 140 (U. S. Comp. St. 1901, p. 1392), extending to homestead settlers on unsurveyed public lands same right as pre-emption settlers to perfect their right by application within three months after filing of plat of survey. Trodick v. Northern Pac. R. Co. [C. C. A.] 164 F 913.

51. Successful contestant held to have lost his priority as against a subsequent

quent can only be enforced by the United States government through judicial proceedings, or by an act of congress.[52] The act itself may, however, be so framed as to ipso facto work a forfeiture on breach of its conditions.[53] Upon abandonment of a claim, whatever rights the claimant had are forfeited and the land again becomes subject to entry,[54] but a relinquishment of a homestead entry, previously decided by the secretary of the interior to be valid, does not give a railroad company within whose indemnity limits such lands lie a prior right to select the same.[55]

*Jurisdiction of land officers and courts.*[See 10 C. L. 1208]—The land department of the United States constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to the public land of which it is authorized to dispose, and to execute its judgments by conveyances to the parties entitled tc them.[56] Its ultimate decisions[57] are final and conclusive upon all questions of priority of entry,[58] character of the land,[59] and issues of fact,[60] but error in the

entry when he did not make entry within 30 days, although no notice given. Howell v. Sappington, 165 F 944. Act of Cong. May 14, 1880, c. 89, 21 Stat. 140 (U. S. Comp. St. 1901, p. 1392), providing that after successful contest and payment of land office fees the contestant shall be notified by register of cancellation and shall have 30 days after such notice to enter, does not apply to contested entry under timber and stone act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]). Howell v. Sappington, 165 F 944.

52. Land was granted to defendant railway company under Act June 4, 1898 (30 Stat. 430), and map of definite location approved by secretary of interior but no part of road constructed within time limited by act. Subsequently plaintiff, under Act March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), and Act March 2, 1899, c. 374, 30 Stat. 990 (U. S. Comp. St. 1901, p. 1581), located on same tract and had map duly approved. Held in action for injunction that forfeiture of grant by defendant for breach of condition subsequent could not be enforced by plaintiff. Spokane & B. C. R. Co. v. Washington & G. N. R. Co., 49 Wash. 280, 95 P 64.

53. Act of June 26, 1906, c. 3550, 34 Stat. 482 (U. S. Comp. St. Supp. 1907, p. 553), provides that every grant of right of way over public lands to railway company under Act March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), shall be forfeited where railroad has not been constructed within 5 years, to the extent of any portion of such road unconstructed, except where construction was progressing in good faith at the time of the approval of the act. Held that the act was in itself a legislative adjudication of forfeiture becoming effective at once without judicial proceedings. Columbia Val. R. Co. v. Portland & S. R. Co. [C. C. A.] 162 F 603.

54. Evidence that plaintiff left his claim with no one in possession, that he was absent for over 3 years, that during such time he had actual notice that another had taken possession but made no claim against him until he had erected valuable improvements thereon, held to show abandonment. Gordon v. Ross Higgins Co. [C. C. A.] 162 F 637.

55. Since Act May 14, 1880, § 1 (c. 89, 21 Stat. at L. 140, U. S. Comp. St. 1901, p. 1392), provides that upon relinquishment the land shall be held open to settlement and entry without further action on part of commissioner of general land office, and since company had not previously made a valid selection of such land, it was open to first settler. St. Paul, etc., R. Co. v. Donohue, 210 U. S. 21, 52 Law. Ed. 941.

56. A patent to land which the land department has the power to dispose of is both the judgment of that tribunal and a conveyance to the party adjudged entitled thereto, and is impervious to collateral attack for errors of law or mistakes of fact committed in the decision of the case it determines. Neff v. U. S. [C. C. A.] 165 F 273. Townsite trustee of Juneau, Alaska, clothed with authority under rules of secretary of the interior to hear and determine rights as to applications for title, and in absence of fraud or mistake his decision is final except as it might be reversed by commissioner of general land office or secretary of the interior. McGrath v. Valentine [C. C. A.] 167 F 473.

57. Where two secretaries of the interior made conflicting decisions on the same controversy as to priority and sufficiency of entry, and additional evidence was introduced in the last hearing, such last decision was regarded as the ultimate decision of the department and controlled. Greenameyer v. Coate, 212 U. S. 434, 53 Law. Ed. —.

58. One whose claim of priority of entry had been adversely decided by the land office and who took no appeal therefrom could not thereafter have land in question awarded to him by equity. Harvey v. Holles, 160 F 531. Held conclusive as to priority of settlement and sufficiency of improvements. Greenameyer v. Coate, 212 U. S. 434, 53 Law. Ed. —. Commissioner's findings as to priority of right of entry conclusive in subsequent suit to recover land from patentee. McKenna v. Atherton, 160 F 547.

59. Commissioner's decision held binding that lands in question were never granted to state by swamp land act of 1850 (9 Stat. 519, c. 84). United States v. Chicago, etc., R. Co. [C. C. A.] 160 F 818. A decision of the secretary of the interior as to whether certain lands are within the terms of the swamp land grant is conclusive in the absence of fraud and cannot be collaterally

matter of law is open to inquiry.[61] In the absence of evidence to indicate that a matter of fact was in dispute before the land department, the rule that its decision is conclusive will not be applied.[62] If its decision be erroneous by reason of fraud or mistake, it may be avoided in equity and the legal title charged with a trust in favor of the rightful claimant.[63] The issuance of a patent or certificate of entry is an adjudication that the grantee has performed the acts necessary to entitle him to receive the patent or certificate.[64] Mere clerical errors in its issuance may be corrected by the department provided that the patent has not been delivered.[65] While a controversy as to the right to a patent is pending before the land department, the federal courts will not intervene until that department has refused to act or has acted without authority of law.[66]

(§ 3) *B. State lands.*[67]—See 10 C. L. 1299—The state may impose conditions for the disposal of its lands, compliance with which is necessary to vest title.[68] It may make special agreements of sale,[69] and, as far as its own rights are concerned, may validate what has been irregularly done.[70] In Kansas school land cannot, usually be subdivided and sold in less than forty-acre tracts.[71] Placing lands upon

attacked. Little v. Williams [Ark.] 113 SW 340.

**60.** Finding that claimant had never been on land and of open, continuous and undisturbed possession of another, held conclusive. Linebeck v. Vos, 160 F 540.

**61.** Ayres v. U. S., 42 Ct. Cl. 385.

**62.** Osborn v. Froyseth, 105 Minn. 16, 116 NW 1113.

**63.** Hoyt v. Weyerhaeuser [C. C. A.] 161 F 324. Final action of the department will not be reversed on the ground of newly-discovered evidence upon issue of fraud in making homestead entry where complainant had ample time in which to discover such evidence and where no allegation of fact was made that he was prevented from discovering such evidence, except general allegation of deceit. Greenameyer v. Coate, 212 U. S. 434, 53 Law. Ed. —.

**64.** Such adjudication has the same force as an adjudication by a tribunal having jurisdiction and is binding as against collateral attack. Jameson v. James [Cal.] 100 P 700. Act of land department in allowing location under soldiers' scrip, in delivering final receipt, and in issuing patent, is evidence that all preliminary steps have been duly taken. Rogers v. Clark Iron Co., 104 Minn. 198, 116 NW 739. Certificate of final entry issued by local United States land office is evidence of date of settlement made thereunder. Davis v. Chamberlain [Or.] 98 P 154. Certificate of reservation to Indians under Chickasaw Treaty of 1834 made by register of land office raises a presumption that reservation was made after due compliance with all requirements of the treaty as against a subsequent patent, but such presumption may be rebutted. Certificate based upon insufficient compliance with conditions of treaty carried no title. Ayers v. U. S., 42 Ct. Cl. 385.

**65.** Issuance of patent on unsurveyed lands included with lands surveyed could be corrected by secretary of the interior before delivery, upon discovery of mistake which was apparent on record, although patent being issued in pursuance of final decision of land department and approved of record could not be canceled. Garfield v. U. S., 31 App. D. C. 338.

**66.** United States v. Reese, 166 F 347.

**67. Search Note:** See notes in 4 C. L. 1114; 75 A. S. R. 880.

See, also, Public Lands, Cent. Dig. §§ 383-600; Dec. Dig. §§ 142-187; 26 A. & E. Enc. L. (2ed.) 261.

**68.** Under Act No. 74, p. 95, of 1892, and Act No. 160, p. 242, of 1900, grant of lands made by state to the board of commissioners of Caddo levee district held not a grant in praesenti, but intended to vest in grantee a disposable title only when proper conveyances executed by state auditor and register of state land office are recorded in the parishes where the lands lie. Hence sale of such lands prior to registry is void, and party attempting to purchase is liable to eviction at suit of state. State v. Cross Lake Shooting & Fishing Club [La.] 48 S 891. Sale to attorney and land agent of board of canal commissioners not a violation of Laws 1835-36, p. 145, providing for construction of Illinois and Michigan canal, and prohibiting canal commissioners from acquiring title to lands sold. People v. Chicago & N. W. R. Co., 239 Ill. 42, 87 NE 946.

**69.** Where a county sold leased lands jointly to lessees and others acting under agreement with them, in which agreement it was stipulated that upon failure of any one of purchasers to fulfill his part of contract, option to purchase under lease should revive in favor of lessees, held that, upon default by one of purchasers, title passed nevertheless, and no right remained in county which would entitle it to convey defaulting purchaser's share in violation of option agreement to purchasers other than lessees. Ellerd v. Cox [Tex. Civ. App.] 114 SW 410.

**70.** Patent issued in 1855 calling for a boundary of 140,000 acres, not including prior surveys amounting to about 120,000 acres, held valid under Act March 9, 1868 (Laws 1868, p. 70, c. 1162), legalizing grants theretofore made containing more than 200 acres. Steele v. Bryant [Ky.] 116 SW 755.

**71.** Gen. St. 1901, § 6346. If sold in less quantities, purchaser has burden of proving that such further subdivision was properly made by county superintendent of pub-

the market in the manner required by law is an offer by the state, and acceptance by a qualified purchaser completes the sale [72] though he may be required to deposit his first payment before the bids are opened.[73] If the sale be void, acceptance and retention of the purchase price does not oblige the state to issue a patent.[74] Enclosure of unsurveyed state land may give the occupant a preference right to purchase when the land is placed upon the market.[75] In some states a settler upon school lands must enter the land after it is opened for settlement with the intention of making it his permanent abode,[76] and must evidence his intention by making such improvements as are reasonably necessary for the purpose.[77] In Texas a purchaser of additional lands need not reside upon them in order to acquire title if he has proved a three years' occupancy of his original homestead and is then actually residing thereon,[78] and such residence need not be set out in the application,[79] but a settler upon school lands may transfer his right therein and subsequently complete the statutory period of occupancy necessary to complete title.[80] Title to lands to be selected by the state from the public domain vests in the purchaser as of the date of the grant to the state.[81] The granting of a land certificate is the granting of evi-

lic instruction and the appraisers. Hopper v. Nation [Kan.] 96 P 77.

72. Since state makes offer only to actual settlers, an award made to one not an actual settler conveyed no title. Williams v. Barnes [Tex. Civ. App.] 111 SW 432. An application to purchase land is sufficient under Pol. Code, § 3496, requiring that if applicant be a female the affidavit must show that she is entitled to purchase and hold real estate in her own name, when it states that she is "native born, a married woman, a citizen of the United States, a citizen of this state, of lawful age." Dean v. Dunn [Cal. App.] 99 P 380.

73. Highest bidder for school lands was informed by the chief clerk in state treasurer's office that a check on a bank would be received as first payment. Held that where such check was delivered before time for opening bids, but was collected on same day, that bidder was entitled to the land as against lower bidder who had made his deposit in cash. Whitis v. Robison [Tex.] 117 SW 429.

74. Hopper v. Nation [Kan.] 96 P 77.

75. One, who, on passage of Act April 15, 1905 (Laws 1905, p. 159, c. 103), relating to disposition of state lands, and long prior thereto, had enclosed land in controversy, had a preference right to purchase capable of being exercised at any time within 90 days after notice that land had been surveyed and appraised. King v. Underwood [Tex. Civ. App.] 112 SW 334.

76. One who, one minute after midnight, went upon lands, lease to which expired at midnight Jan. 6, and started to build a house, and thereupon left, had prior right as against one who went upon land Jan. 3, built a house, moved his family, and then left land in order to file, so that when lease expired he was not on land until after his contestant. Clapper v. Skeen [Kan.] 99 P 590. As to settlement of school lands, § 6341, Gen. St. 1901, conduct of claimant, nature of improvements undertaken, his presence upon and his absence from the land with reasons therefor, and all attending circumstances, may be considered in determining fact of settlement and time of its inception. Christisen v. Bartlett [Kan.] 95 P 1130.

77. Evidence in action to try title to lands acquired under additional school lands law held sufficient to sustain finding that defendant was an actual settler on such land with intention of permanently residing there, although his dwelling was humble and incomplete. Corrigan v. Fitzsimmons [Tex. Civ. App.] 111 SW 793. Under Rev. St. 1895, art. 42,181, providing that purchaser of public school lands shall forfeit his title if he fail to reside upon and improve in good faith land purchased by him, held that purchaser need not make improvements beyond those necessarily incident to settlement and occupancy required by other provisions of act. McLendon v. Bumpass [Tex. Civ. App.] 114 SW 462.

78. Where a settler upon school lands purchases additional land under § 6, c. 103, Acts 29th Leg. p. 163, and having proved a three years' occupancy of original homestead, and being in actual occupancy when he applied for additional section, it is not incumbent upon him to occupy either section for three years after the purchase of the additional section. Zettlemeyer v. Shuler [Tex. Civ. App.] 115 SW 78.

79. Under arts. 4218f and 4218fff, Sayles' Ann. Civ. St. 1897, regulating sale of public school lands to one who has previously purchased public lands, while it is essential that purchaser be an actual resident upon his home section, it is not necessary to set out such fact in his sworn application for purchase, only requirement being that he is not acting in collusion with others for purchase. Pohle v. Robertson [Tex. Civ. App.] 116 SW 861.

80. Such contract not void as against public policy. Johnson v. Buchanan [Tex. Civ. App.] 116 SW 875.

81. Where one made application and contract with state for purchase of government lands to be selected by state under provisions of grant of July 16, 1894, c. 138, 28 Stat. 107, which selection was daily made and lands entered thereunder, held that title vested in purchaser as of date of grant to state, or at least as of date of selection, and subjected land to condemnation proceedings by city although secretary of the interior did not approve state's selection until after land was sold under such con-

dence of a right to acquire public lands such as has always been satisfied out of lands used for locations and surveys,[82] and its location, if the certificate be unconditional, gives absolute title to the land.[83] While an award of public school lands made by the commissioner of the land office is a mere ministerial act in making sale of such lands,[84] such an award raises the presumption that the sale was regular.[85]

*Rescissions, cancellations, forfeitures and reversions.*[See 10 C. L. 1301]—The validity of a grant from the state can then only be attacked in direct proceeding in the name of the attorney general.[86] A patent can be vitiated for fraud only where the fraud has been practiced upon the state or its agents.[87] That an award of public school lands is void because made to one not an actual settler can be set up only by one who himself has a better right,[88] and the burden is upon him to show that such award was invalid.[89] A declaration of forfeiture of school lands by the commissioner of the general land office is not conclusive as against the settler.[90] A certificate of occupancy of school lands issued by the commissioner of the general land office is conclusive of the question of occupancy [91] and settlement.[92] Mere irregularities in the entry [93] or mistakes on the part of the state officials will not defeat the grant.[94] Nor will the fact that the purchaser is prohibited under penalty from ac-

demnation. Brigham City v. Rich, 34 Utah 130, 97 P 220.

82. Certificate granted gave right to locate upon "vacant public lands within or without the several reservations heretofore created by law." Held that such qualification was not sufficient to entitle certificate to be located upon islands specially reserved for state purposes. Roberts v. Terell [Tex.] 110 SW 733.

83. Act of Aug. 30, 1856, 4 Laws of Texas, p. 499, Paschals Dig. art. 4210, requiring holders of unconditional headright certificates to return and file same before Aug. 1, 1857, in default of which location and survey should be null and void and land again open to settlement, held unconstitutional as impairing obligation of contract, and would not operate to divest title already completed according to laws in force at inception of right under certificate. Keith v. Guedry [Tex. Civ. App.] 114 SW 392.

84. Williams v. Barnes [Tex. Civ. App.] 111 SW 432.

85. Undisputed fact that state land was awarded to claimant by commissioner of general land office raises presumption that land had been regularly appraised and placed upon market. Smyth v. Saigling [Tex. Civ. App.] 110 SW 550. Evidence held to sustain presumption that state officers in issuing patent examined facts and issued patent in regular course. Osceola Land Co. v. Chicago Mill & Lumber Co., 84 Ark. 1, 103 SW 609.

86. Validity of grant of oyster beds could not be attacked in a proceeding for injunction to restrain trespass. Sooy Oyster Co. v. Gaskill [N. J. Eq.] 69 A 1084.

87. Fraud upon claimant not sufficient. Hulett v. Platt [Tex. Civ. App.] 109 SW 207.

88. Certificate of occupancy for 3 years precluded settler upon same land from setting up that holder of certificate was not an actual settler, such certificate being conclusive after 3 years. Williams v. Barnes [Tex. Civ. App.] 111 SW 432.

89. Zettlemeyer v. Shuler [Tex. Civ. App.] 115 SW 78.

90. Zettlemeyer v. Shuler [Tex. Civ. App.] 115 SW 78.

91. Conclusive as to occupancy of home section in suit to try title to additional section purchased, title to which was alleged to be forfeited in account of nonoccupancy of original section. Zettlemeyer v. Shuler [Tex. Civ. App.] 115 SW 78.

92. Held conclusive as to purchaser's settlement as against claims of one who actually settled upon the lands before its issue but who did not assert his rights at law until afterwards. Williams v. Barnes [Tex. Civ. App.] 111 SW 432. Act of March 16, 1905 (Laws 1905, p. 35, c. 29), provides that persons claiming the right to purchase school lands theretofore sold to another must bring suit within one year, and if no suit is brought within such time, it will be conclusively presumed that all legal requirements with regard to sale have been complied with. Act April 19, 1901 (Gen. Laws 1901, p. 292, c. 125), provides that if any purchaser shall fail to occupy lands bought, he shall forfeit them to the state, such forfeiture to have the effect of placing land upon market without any action whatever on part of commissioner of general land office. Held that, since latter statute does not ipso facto work forfeiture without action by commissioner, evidence as to nonoccupancy of purchaser could not be shown by subsequent purchaser to defeat former's right after one year. Williams v. Keith [Tex. Civ. App.] 111 SW 1056.

93. A junior grantee could not question a prior entry in ejectment on ground that entry was made in wrong county, boundary being disputed, and Shannon's Code, § 3766, providing that when a grant from a state recites that lands are situated in one county, when they were in a different county, grant shall be as valid as if locality were properly recited. Stockard v. McGary [Tenn.] 109 SW 507.

94. Where relator had made deposit of money with state treasurer to purchase certain school lands, application for which purchase was rejected, whereupon relator

quiring land defeat a title acquired in violation of the statute.[95] An award of school lands will not be set aside because the purchaser has acquired additional lands where it appears that the total amount acquired does not exceed the legal quantity.[96] Abandonment operates to extinguish all the settler's rights to the land,[97] which thereupon again becomes part of the public domain.[98]

§ 4. *Interest and title of occupants, claimants and patentees. A. Federal lands.*[99] See 10 C. L. 1302—Occupation and improvement of unsurveyed government land gives a valid right of possession as against every one not showing a better right by connecting himself with the government title.[1] By entry and payment upon lands open to settlement, the purchaser secures a vested interest in the property and the right to a patent therefor,[2] and as between husband and wife, the title, when acquired, relates back to the time of settlement, and takes character from it.[3]

made application to buy another tract for cash directing treasurer to make up deficiency from money already deposited, held that mere fact that commissioner had neglected to inform treasurer that first bid was rejected, which neglect resulted in disposal of money by treasurer so that at time second application was made there was not sufficient money in treasury to meet relator's demands, not enough to deprive relator of his rights to conveyance. Buckley v. Terrell [Tex.] 109 SW 861.

**95.** Texas statute of Aug. 28, 1856 (Pen. Code 1857, act 244), prohibiting any district surveyor from being concerned in the purchase of any right, title or interest in any public land in his own name or in the name of any other person under certain penalties, does not invalidate title acquired against provision of such statute. Tompkins v. Creighton-McShane Oil Co. [C. C. A.] 160 F 303.

**96.** A father purchased 4 sections of school lands and his son two sections, and thereafter, to promote their convenience, each transferred one section to the other. Commissioner of general land office thereupon canceled sale of section made by son as being in violation of Laws 1907, p. 494, c. 20, §§ 6d, 6e, providing that purchaser of school lands may sell same to another purchaser unless total tract acquired by latter shall exceed one complement of sections. Held that, since on purchase by father of one section he sold another to on, he had not acquired more than the 4 sections allowed, and was entitled to have sale reinstated. Cunningham v. Terrell [Tex.] 111 SW 651.

**97.** One who settled upon state lands, but abandoned them in 1896 and asserted no claim thereto until 1905, retained no equity which would pass by transfer to defendant as against right of purchase upon survey and appraisal existing in plaintiff who had entered into possession subsequent to the abandonment. King v. Underwood [Tex. Civ. App.] 112 SW 334.

**98.** Plaintiff, having apparently abandoned an application for right of way for an irrigation ditch over public lands, cannot construct or operate same over lands subsequently entered by homesteaders without their consent or without proper condemnation proceedings therefor. Rasmussen v. Blust [Neb.] 120 NW 184.

**99. Search Note:** See notes in 6 C. L. 1136, 1138; 31 A. S. R. 192; 52 Id. 249. See, also, Public Lands, Cent. Dig. §§ 29-382; Dec. Dig. §§ 22-141; 26 A. & E. Enc. L. (2ed.) 228, 324, 403; 17 A. & E. Enc. P. & P. 131, 132.

**1.** Entry by trespass upon unsurveyed government land already occupied, and making application for survey preliminary to making application for patent, held not to give trespasser better right than prior occupant. Short v. Read [Nev.] 96 P 1060. One who settled upon unoccupied public lands and enclosed the same had a prior right as against a highway surveyed under a grant made prior to such settlement, but which highway was not laid out until after the settler inclosed his lands. McAllister v. Okanogan County [Wash.] 100 P 146. Rights of settler who entered land with bona fide intention of establishing homestead, making improvements thereon, could not be defeated by subsequent settler who claimed part of land by purchase from railway company whose title was later declared invalid, such subsequent claimant having full knowledge of prior occupancy. McKenna v. Atherton, 160 F 547. By Act Cong. March 3, 1803, lands of the Georgia session were authorized to be sold, reserving section 16 in each township for school purposes and in case such sections were already held under British grants, the secretary of the treasury was authorized to select other lands in lieu thereof. Held that, where secretary located such substitute lands upon land held by one under British grant, his action was a nullity, and conferred no title. Warren County v. Catchings [Miss.] 46 S 709.

**2.** Title passes as against unapproved selection of indemnity lands by railway company. Hoyt v. Weyerhaeuser [C. C. A.] 161 F 324. When a declaration is filed under the desert law and part payment made thereunder, it would seem to give the party such a title as cannot be taken from him, provided he further complies with the act so as to become entitled to his patent. Act March 3, 1877, c. 107, 19 Stat. 377 (U. S. Comp. St. 1901, p. 1548). Green v. Willhite, 160 F 755. After location and before issuance of patent, an assignee of soldier's additional homestead scrip who locates land under a power from assignor has a substantial and vested interest in the lands, which may be transferred. Rogers v. Clark Iron Co., 104 Minn. 198, 116 NW 739.

**3.** As between the heirs of the settler and his first wife, who died before the requi-

Title by patent from the United States is title by record, and delivery of the instrument to the patentee is not essential,[4] but a patent issued by mistake does not give title[5] unless it has passed into the hands of an innocent purchaser for value.[6] A patent issued on timber and stone cash entry, to one who after entry and before issuance of patent has conveyed his interest, vests title in such grantee by virtue of the deed of conveyance,[7] or if the entryman die before the patent is issued, title passes directly to the heirs, who take by purchase and not by descent.[8] Title to lands already patented will be declared to be held in trust for another only where he has been fraudulently prevented from establishing his right to them before the land department,[9] and he must show that such right accrued by settlement[10] or purchase before the patent sought to be so charged was issued.[11] As soon as an entryman becomes entitled to his patent from the United States, he may sell or convey the land as though the patent had been issued,[12] as may an allottee of Indian lands upon selection of his allotment.[13] An entryman may sue for injury to the premises,[14] and, while he cannot subject the homestead to the payment of debts contracted prior to the issuance of the patent,[15] he may give a valid mortgage

site three years' residence had been completed, and the heirs under settler's marriage to a second wife within such period, held that homestead was community property of settler and first wife, although patent was obtained after marriage with second wife. Creamer v. Briscoe [Tex.] 109 SW 911.

**4.** Title held to pass although patent remained in land office. Rogers v. Clark Iron Co., 104 Minn. 198, 116 NW 739.

**5.** Claimant applied for patent to two tracts of land and paid therefor. Land department canceled application on ground that one tract was unsurveyed. By mistake patent was made out for both tracts and recorded. Held, on mandamus to compel delivery of patent, that secretary was not bound to deliver patent on unsurveyed land. Garfield v. U. S., 31 App. D. C. 338.

**6.** While the United States, or any party who has the equitable title under a patent, may maintain a bill in equity to set aside such patent or to declare it to be held in trust either on account of error of law, fraud or gross mistake, in the hands of an innocent purchaser for value the title under such patent is impregnable, and the United States may not maintain a bill to avoid the patent or to recover the title. Neff v. U. S. [C. C. A.] 165 F 273.

**7.** Gilbert v. Auster, 135 Wis. 581, 116 NW 177. One who bought under warranty deed lands entered by another under federal timber and stone cash entry act acquired all the interest the United States had to such land at time of entry, including right to bring action for timber trespass. Id.

**8.** Held that widow of entryman, under Timber Culture Act June 14, 1878, c. 190, 20 Stat. 113, not being an heir under Iowa laws, there being direct descendants, acquired no transferable interest as widow, no title having passed to entryman to which dower could attach. Braun v. Mathieson [Iowa] 116 NW 789.

**9.** Where complainants themselves had no right to make entry, they were not entitled to have patent declared to be in trust for them. Jameson v. James [Cal.] 100 P 700. Denial of application to make entry created no right in applicant to have subsequent purchaser charged with trust in his favor. Campbell v. Weyerhaeuser [C. C. A.] 161 F 332.

**10.** Patent already issued will not be set aside in favor of one who has no equitable title, having its origin in a settlement made before patent sought to be set aside was issued. Linebeck v. Vos, 160 F 540.

**11.** One who filed application for entry but had his application refused and had not by acceptance of grant, settlement or purchase otherwise placed himself in privity with the United States in title, could not maintain action in equity to have title subsequently obtained by another charged with trust in his favor. Campbell v. Weyerhaeuser [C. C. A.] 161 F 332.

**12.** Held that entryman after 5 years' residence, and after having made final proof in less than 7 years as provided for by Rev. St. U. S. § 2291 (U. S. Comp. St. 1901, p. 1390), acquired a vested title of which valid transfer could be made. Dale v. Griffith [Miss.] 46 S 543. The rights which a qualified citizen acquires to public lands by location or filing are property susceptible of sale and transfer, and such sale may be made to persons not possessing the qualifications that would enable them to initiate such property interests. May be transferred to a partnership. Neal v. Kayser [Ariz.] 100 P 439.

**13.** A deed by a Creek citizen, not of Indian blood, covering part of the allotment selected by him, made prior to date upon which he received his deed from chief under § 23, Act March 1, 1901, 31 Stat. 861, c. 676 held valid, and passed title to grantee immediately upon receipt by grantor of deed from tribe. McWilliams Inv. Co. v. Livingston [Okl.] 98 P 914.

**14.** Since the amount of compensation depends upon the circumstances of each particular case, it was error, in action for damages to homestead by reason of damming water course and flooding, to instruct that measure of damages was same as if plaintiff had owned land in fee. McLeod v. Spencer [Okla.] 95 P 754.

**15.** U. S. Rev. St. § 2296, (U. S. Comp. St. 1901. p. 1398). As Against creditors, the voluntary sale of the homestead ter-

to cover the expense of proving up and for the purchase price.[16] No community interest results to the spouses by reason of settlement on government land.[17] Soldiers' additional homestead scrip is personal property and assignable.[18] Upon relinquishment and exchange of lands, the settler acquires no title until the exchange is consummated,[19] until which time his interest is not taxable.[20] Land located under assigned soldier's warrant is subject to taxation from the date of entry.[21] When a homestead entry is canceled, a subsequent patentee takes the title subject to water rights which attached prior to the issue of the patent.[22] One who pays money to government officials in charge of public lands in excess of that required by law cannot recover such excess in an action against the United States instituted in the court of claims.[23] A townsite trustee holding title in trust for the individual inhabitants has no power to dedicate such land for street purposes.[24] The general government, in dealing with its public lands, may provide for their transfer as might any other landed proprietor, and make such reservations therefrom by grant, dedication or otherwise as it may see fit.[25] The terms of the grant are therefore contolling on the question as to its nature and conditions.[26]

minates the exemption, and the proceeds of sale may be garnished. Ritzville Hardware Co. v. Bennington, 50 Wash. 111, 96 P 826. Since liability as surety on a supersedeas bond is a "debt" within the meaning of that clause of the timber culture law providing that land acquired thereunder shall not in any event become liable to the satisfaction of any debt contracted prior to the issuing of the final certificate therefor, the surety's homestead could not be subjected to its payment where bond was signed before issuance of final certificate. Leman v. Chipman [Neb.] 117 NW 885. Rev. St. U. S. c. 5, § 2296 (U. S. Comp. St. 1901, p. 1398), providing that homestead lands shall not in any event become liable to satisfaction of any debt contracted prior to issuance of patent, did not apply to execution against homestead for judgment in action for assault and battery rendered subsequent to issuance of final certificate, homesteader not having a family. Shelby v. Ziegler [Okl.] 98 P 989.

16. Rev. St. U. S. §§ 2290-2296 (U. S. Comp. St. 1901, pp. 1389-1398) do not prohibit a pre-emptioner or homesteader from giving a trust deed or mortgage upon the entered lands in advance of patent or receiver's receipt, unless such incumbrance is intended as a means of transferring title. Runyan v. Snyder [Colo.] 100 P 420.

17. Mere settlement creates in the entryman no other rights than those given by statute or departmental rule. Delacey v. Commercial Trust Co. [Wash.] 99 P 574. As the government homestead law was passed without reference to the local laws of the state regulating property rights, these apply only after the title has been vested in the entryman. Id. Where husband and wife settled upon land within limits of railway grant, and husband was ousted by judgment of court, wife could claim no right in property as community prior to final determination of husband's suit. Id.

18. Evidence held to show valid assignment. Rogers v. Clark Iron Co., 104 Minn. 198, 116 NW 739. Bare right of entry of soldier's additional homestead evidenced by certificate, under Act Aug. 18, 1894 (28 Stat. 397), held assignable, although no entry made. Clark v. Welch [Mich.] 15 Det. Leg. N. 816, 118 NW 137.

19. Under Act June 4, 1897, c. 2, 30 Stat. 11-36 (U. S. Comp. St. 1901, p. 3768), authorizing the relinquishment and exchange of forest reserve lands and agricultural settlement lands, no title is vested in the settler as to the exchanged lands until the final consummation of the exchange. Pacific Live Stock Co. v. Isaacs [Or.] 96 P 460.

20. Lands exchanged under Act Cong. June 4, 1897, c. 2, 30 Stat. 36 (U. S. Comp. St. 1901, p. 1541), held not taxable by the state until exchange confirmed and patent issued. and a tax levied on such exchanged premises is void. Johnson v. Crook County [Or.] 100 P 294.

21. Since exemption from taxation for 3 years after issuance of patent is personal privilege of soldier himself, and does not pass to assignee, tax deed to such land against assignee before patent issued vested valid title. Herrick v. Sargent [Iowa] 117 NW 751.

22. Where homesteader permitted plaintiff to appropriate water from spring on his land and to construct pipe line therefrom, cancellation of his entry and subsequent patent to defendants did not divest plaintiff's rights which attached upon such cancellation under § 2339, Rev. Stat. U. S. (U. S. Comp. St. 1901, p. 1437). Le Quime v. Chambers [Idaho] 98 P 415.

23. Claimant who made pre-emption and paid $400 thereunder, which pre-emption entry was, by permission of commissioner of land office, transmitted into homestead entry, could not recover amount paid under pre-emption entry. Millen v. U. S., 42 Ct. Cl. 121.

24. Location and conveyance to trustee under Rev. St. § 2387 (U. S. Comp. St. 1901, p. 1475). McCloskey v. Pacific Coast Co. [C. C. A.] 160 F 794.

25. Riparian and water rights may be reserved from grant under patent. Hough v. Porter [Or.] 98 P 1083. A reservation of any interest in lands by a legislative enactment is as effective, as a matter of law, as if expressly stated in the grant, patent or other instrument through which title

*Railroad land grants.*[See 10 C. L. 1303]—A railroad grant does not include in its primary limits lands occupied by settlers with the bona fide intention of acquiring title under homestead laws.[27] A railroad company's right to select indemnity lands to supply deficiencies within the place limits of a government grant vests upon completion of the road, and is assignable.[28]

*Area acquired and boundaries.*[See 10 C. L. 1303]—Substantial compliance with the statute as to surveying public lands is essential.[29] An individual cannot question the correctness of a United States survey where neither the general government nor the state does so,[30] and as between the parties, such survey is conclusive even though incorrect.[31] Where lands are granted according to an official plat of the survey,

may be asserted. Id. Under Act Cong. May 20, 1826, c. 83, 4 Stat. 179, appropriating for each fractional township, for which no land had been appropriated for school purposes, a certain amount of land for such purposes, the lands so appropriated were not granted directly to the township, but were to be held by the same tenure and on the same terms for the support of schools as section 16 of each township, title to which was held by the state. Black v. Chicago, B. & Q. R. Co., 237 Ill. 500, 86 NE 1065.

**26.** In an action for damages sustained by territory of Oklahoma against railway company for appropriation of school lands, held that as reservation of said land under Organic Act May 2, 1890, c. 182, § 18, 26 Stat. 89, would vest title only when territory should become state, territory had no title to said land. Territory v. Choctaw, O. & W. R. Co., 20 Okl. 663, 95 P 420. An entry of public lands under Rev. St. U. S. § 2387 (U. S. Comp. St. 1901, p. 1457) by probate judge as townsite in trust for occupants carries title to trustees for occupants who were such at time townsite was entered. City of Globe v. Slack [Ariz.] 95 P 126. Since the interest of the territory of Oklahoma in school lands reserved by the United States is that of a tenant at will whose term would only extend to time of admission as state, territory could only recover rental value of land appropriated to railway company and for depreciation of rental value of tract not taken for period limited by admission to statehood. Territory v. Choctaw, O. & W. R. Co., 20 Okl. 663, 95 P 420. In suit by state for injunction to restrain defendants from depleting salt beds claimed by state under government grant for school purposes, held that by clause of section 8 of enabling act of Utah (Act July 16, 1894, c. 138, 28 Stat. 109), "and including all saline lands in said state," it was intention of congress to grant 110,000 acres of land, and in addition all saline lands within borders. State v. Montello Salt Co., 34 Utah, 458, 98 P 549. The county of Liberty, embracing a municipality to which the Republic of Texas had already granted 4 leagues of land, was organized in 1837. The town of Liberty was incorporated in 1837, and act incorporating town authorized it, in conjunction with the county, to alienate any or all of such 4 leagues, proceeds to be used in constructing public buildings. By act of congress of the Republic, commissioners of general land office were required to and did issue patents to town trustees of such 4 leagues. Held that acts of congress in recognizing in act in corporating town the title of the town to the 4 leagues, and in afterwards directing a patent therefor to be issued to town trustees, established title of town, regardless of whether county or town independently of those acts would have succeeded to the rights of the old municipality of Liberty. Vasser v. Liberty [Tex. Civ. App.] 110 SW 119.

**27.** One who has made a bona fide settlement upon unsurveyed land before a railway company made good its grant by filing location map could not be deprived of his right of homestead entry by subsequent filing of such map, land being encumbered with a "claim or right" within meaning of Act May 14, 1880, c. 89, 21 Stat. 140 (U. S. Comp. St. 1901, p. 1392), and therefore not subject to grant to company. Trodick v. Northern Pac. R. Co. [C. C. A.] 164 F 913.

**28.** Right of selection of indemnity lands held to pass by assignment to one for benefit of creditors of the railway company, and could be exercised by assignee within statutory period allowed for winding up company's business. Norton v. Frederick [Minn.] 119 NW 492. Grant to railway company carries with it indemnity lands to extent granted, and when, through opinion that certain lands were included therein, remainder of lands are patented to others, government cannot afterwards cancel such patent to company on ground that it was reserved prior thereto. Nor conceding that such land had been erroneously patented because withdrawal order still in force when grant was made, United States held to have no right to cancellation of such patents or to recovery of purchase price. United States v. Grand Rapids & I. R. Co. [C. C. A.] 165 F 297.

**29.** Rule as to surveying public lands, as laid down in §§ 2395 and 2396, Rev. St. U. S. (U. S. Comp. St. 1906, pp. 1471, 1473), into townships containing 36 sections of a mile square, except where a line of an Indian reservation, tracts of land theretofore surveyed or patented or course of navigable rivers may render it impossible, must not be departed from further than such peculiar circumstances require. Johnson v. Johnson, 14 Idaho, 561, 95 P 499.

**30.** By mistake, lands bordering on lake were included within surveyed meander line as part of lake itself, on issue whether land belonged to riparian owners or had passed under swamp land grant to state, it was held that correctness of survey was conclusive as to those claiming under swamp land grant. Little v. Williams [Ark.] 113 SW 340.

**31.** Where government has parted with its title and controversy is wholly between

the plat is controlling as to area and boundaries.[32] Course and distance as called for by the survey yield to natural and ascertained objects.[33] If a grant to a railway company includes land left unsurveyed by mistake, title passes to the company, notwithstanding its subsequent survey by the government.[34] The locator of lands in Alaska bordering upon navigable or tidal waters acquires no title to the soil below high-water mark.[35] Where there is nothing in the grant of lands bordering a navigable stream indicating an intention to make any reservation or limit the grant to the water's edge, the grantee takes to the middle of the main channel of the stream [36] subject to the easement for the use of the public.[37] A meander line according to which lands upon a navigable stream are granted does not determine the boundaries of such land.[38] A homesteader residing upon a fractional quarter section need not limit his claim thereto.[39]

*Adverse possession.* See 8 C. L. 1500—The statute of limitations will not run as to a contested claim as long as the litigation is pending.[40] In order to defeat title under an older patent, the adverse claimant must prove actual adverse and continuous possession within the lap of the patents for the legal period.[41]

persons asserting conflicting claims under grants or patents based upon official survey, such survey is conclusive, even though incorrect. Barringer v. Davis [Iowa] 120 NW 65.

**32.** Since plat of survey with notes, lines and descriptions becomes part of deed where grant is made according to official plat, grant from railway company of "northwest quarter and lots 1 and 2 according to survey," which survey showed meander line apparently coincident with shore line, carried title to all land between such meander line and true shore line. Barringer v. Davis [Iowa] 120 NW 65.

**33.** Meander corner designated as being at the intersection of the south line of the intersection of the lake is a fixed, natural monument which is controlling in a controversy growing out of a conveyance according to the survey which it witnesses. Barringer v. Davis [Iowa] 120 NW 65.

**34.** Where a land grant for the benefit of railroad company has been made to the state, and the company has constructed the road according to the terms of the grant, the United States no longer retains any title, and if by mistake any part of a section so conveyed has been left unsurveyed, its subsequent survey under an order from the interior department would not have the effect of restoring such land to the public domain. Barringer v. Davis [Iowa] 120 NW 65.

**35.** One who located homestead under "Soldier's Additional Homestead Scrip Act" on bank of navigable river, and proceeded to erect fish trap extending from such claim into deep water, had no right to use shore for such purpose, and could not maintain action for injunction against one who erected another fish trap immediately above his location. Columbia Canning Co. v. Hampton [C. C. A.] 161 F 60. Conveyance by a townsite trustee of land situated upon the public domain and purporting to extend below highwater mark gives no title to such portion as is below highwater mark, the town having no title thereto. McCloskey v Pacific Coast Co. [C. C. A.] 160 F 794.

**36.** Unsurveyed island formed at highwater, not indicated by government plat, held not reserved, but passed with grant. Johnson, 14 Idaho, 561, 95 P 499. Title to unsurveyed island held to be in riparian owner, and not government land. Moss v. Ramey, 14 Idaho, 598, 95 P 513.

**37.** A patent conveyed lands bounded on one side by a navigable river. At high water an island was formed opposite such lands, but at low water island formed territory contiguous with mainland. No such island was shown on government survey. Held in suit to quiet title to such island, that boundary of land covered by patent was thread of stream, and that island formed part thereof. Johnson v. Johnson, 14 Idaho, 561, 95 P 499. The riparian owner takes to the middle of the main channel of the stream. Moss v. Ramey, 14 Idaho, 598, 95 P 513.

**38.** According to government plat, reference to which was made in patent granting lands bounded on one side by navigable stream, lots conveyed contained 44.40 acres. According to actual survey, taking thread of stream as boundary lots contained 92 acres. Held that former figure was simply figure at which land was to be paid for, and was no evidence that more land would not pass under grant, and that only government, and not a stranger, could complain. Johnson v. Johnson, 14 Idaho, 561, 95 P 499.

**39.** One who settled upon fractional section under homestead law and manifested to entire community his intention to claim adjacent lands sufficient to make 160 acres acquired a right to such lands as against indemnity selections made under railroad grant subsequent to such settlement. St. Paul, etc., R. Co. v. Donohue, 210 U. S. 21, 52 Law. Ed. 941.

**40.** Since an entryman cannot set in motion the statute of limitations against the government either in his own behalf or in behalf of those whose occupancy of the land is dependent upon his entry, he cannot in a contest for government land, gain the advantage of the statute over his adversary while the litigation in aid of his title is pending. Delacey v. Commercial Trust Co. [Wash.] 99 P 574.

**41.** Where land claimed by adverse possession was part of an older grant, fact

(§ 4) *B. State lands.*[42]—See 10 3. L. 1303—A patent regular on its face, in proper form, is conclusive evidence of title,[43] and is not subject to collateral attack [44] unless void on its face; its invalidity can only be established in a direct proceeding by the state for that purpose.[45] A patent does not operate to convey title to lands inserted subsequent to its issuance and delivery.[46] Its loss or destruction is immaterial.[47] In some states where a patentee also claims adjoining lands not patented to him but having well defined boundaries and has held such lands for many years, a lawful grant will be presumed [48] even as against a subsequent patent to another.[49] The oldest of several conflicting grants carries the title.[50] One in possession under a contract of purchase from the state has a prior right as against the holder of a purchase contract not in possession.[51] The presumption is in favor of the senior

that claimant had treated it as part of his other property not sufficient in absence of actual possession of that identical portion of land. Brown v. Wallace [Ky.] 116 SW 763.

**42. Search Note:** See Public Lands, Cent. Dig. §§ 383-600; Dec. Dig. §§ 142-187; 26 A. & E. Enc. L. (2ed.) 403; 13 A. & E. Enc. P. & P. 301.

**43.** The heirs of one who assigned certificates of sale of school lands by indorsement in which wife did not join could not claim any interest as to the wife's one-third, where assignee's grantee had acquired a patent. Holland v. Netterberg [Minn.] 120 NW 527. Where an officer having authority to issue a patent, does so in the manner prescribed by law, a patent thus issued conveys to the patentee whatever right the state has, and is good against the state and all parties not having a superior right. Hulett v. Platt [Tex. Civ. App.] 109 SW 207.

**44.** In suit to quiet title to lands in part granted by state as agricultural and unoccupied, held that patent implied a declaration by officers of land department that facts were found in favor of patentee and that such declaration was conclusive as against collateral attack. Worcester v. Kitts [Cal. App.] 96 P 335. An entry, although vague, is not open to collateral attack by a stranger to the title after survey and issuance of a grant by the state. Call v. Robinett, 147 N. C. 615, 61 SE 578.

**45.** Grants to railway company of strip of land under water held valid on its face and not subject to attack by an individual holding a junior patent in a suit in equity. Lally v. New York Cent. & H. R. R. Co., 61 Misc. 199, 113 NYS 177.

**46.** Doe v. McCullough [Ala.] 46 S 472.

**47.** Upon delivery of deed, title is complete, and issuance of duplicate deed upon loss of original under Kirby's Dig. § 4732, does not operate as creating new grant, but is simply a substitute for original. Thornton v. Smith [Ark.] 115 SW 677.

**48.** Lands held since 1844 will be presumed to have been granted as against a subsequent patent unaccompanied by entry issued in 1868. Buckner's Ex'r v. Kirkland's Ex'r, 33 Ky. L. R. 603, 110 SW 399. The possession of ancestor and heir may be tacked to show 20 years possession so as to presume a grant. Bardin v. Commercial Ins. & Trust Co. [S. C.] 64 SE 165. The doctrine, that the effect of a grant from the commonwealth is to invest the senior patentee with constructive seisin of all land included in the grant, and that such seisin continues until disturbed by actual entry of an adverse claimant and is then affected only to the extent to which the first patentee may be dispossessed by the junior claimant, has no application to case of a junior patentee where the contiguity of the original boundary had been severed anterior to the acquisition of the title under which he claims. Hot Springs Lumber & Mfg. Co. v. Sterrett, 108 Va. 710, 62 SE 797.

**49.** Subsequent patent not accompanied by entry into possession does not operate to oust first claimants. Buckner's Ex'r v. Kirkland's Ex'r, 33 Ky. L. R. 603, 110 SW 399.

**50.** Kittel v. Steger [Tenn.] 117 SW 500. A patent issued upon a location and survey, made subsequent to a valid and subsisting survey and appropriation of the same land under a valid certificate is void and cannot serve as a link in a chain of title to support title under a three-years limitation. Keith v. Guedry [Tex. Civ. App.] 114 SW 392. An unofficial survey of state lands was made for claimant but certificate under which survey was made was not actually applied to land until approved by legally acting district surveyor. Prior to this time but subsequent to actual survey, another claimant had survey regularly made and filed. Held that latter claimant had prior right as having first legally appropriated land by survey regularly made and filed as required by Rev. St. 1895, art. 4130-4132. Smyth v. Saigling [Tex. Civ. App.] 110 SW 550. The provisions of the occupying claimant's act (Cobbey's Ann. St. 1907, § 10,858), providing that any person in possession of or claiming any real estate under a certificate of entry or under the homestead or pre-emption laws of the United States shall be considered as having sufficient title, upon being ousted by one having better title, to demand the value of his improvements, applies to evictions had under Code Civ. Proc. § 1019 to § 1032, c. 10, tit. 30. Wells v. Cox [Neb.] 120 NW 433. Where a senior patent was regularly issued by the officer intrusted with the duty of issuing patents, the patent as between the state and the patentee passed to the latter the state's title and furnished to the patentee title or color of title, though another obtained a junior patent based on a right which had its inception prior to the senior patent. Hulett v. Platt [Tex. Civ. App.] 109 SW 207.

**51.** Where certificate holder forfeited his

application, and a junior applicant has the burden of showing its invalidity.[52] Title obtained by a subsequent grantee may be declared to be held in trust for the first enterer if the latter's entry is sufficiently definite to put the subsequent enterer upon notice.[53] A bounty warrant,[54] or a land certificate issued under state authority is personal property until located,[55] and as such is subject to sale or seizure under execution.[56] A mere preference right to file upon lands is not sufficient to make homestead community property, if wife die before such preference right is exercised.[57]

*Area acquired and boundaries.* See 10 C. L. 1304—If the patentee intends to convey all the lands covered by the patent, a mistake in the patent as to area or boundaries does not effect the vesting of the title,[58] but a claim by reason of overlapping surveys confers no right unless accompanied by occupation of such interference.[59] A senior survey takes precedence over junior surveys as to the quantity of land covered.[60] It will be presumed that the original survey was made on the ground [61] and if the survey as called for by the patent is incorrect, other documents referred to may be

rights thereunder and land was subsequently contracted to another, he could not maintain ejectment against latter, since legal title was not vested in him but in the state. Beatty v. Wilson, 161 F 453. One who has entered into possession of lands through a contract with the state for state's selection of public nonmineral lands under federal grant, which selection has been rejected by secretary of interior, has, as against a trespasser, the right to such possession. McKinney v. Carson [Utah] 99 P 660.

52. Evidence as to prior applicant's residence held sufficient to sustain finding for him. Dean v. Dean [Cal. App.] 99 P 380. If an action is brought by one who first filed a proper application, the statement of facts showing that the land was subject to sale, that he was a qualified purchaser, that he made due application to purchase, that defendant claims under a subsequent application and that order of reference has been made, is sufficient to make a prima facie case. Risdon v. Steyner [Cal. App.] 99 P 377. Where B made payments on state lands with full knowledge of plaintiff's prior right to purchase, and in collusion with another to deprive plaintiff of such right, payment was voluntary and B could not therefore claim reimbursement by plaintiff as a condition to her right to a decree vesting title in her as against defendants. King v. Underwood [Tex. Civ. App.] 112 SW 334.

53. Entry of "640 acres lying on the waters of Stony Fork in Elk township adjoining lands of A and others, beginning on a stake in A's line and running various courses for complements," held too vague to put another enterer upon notice. Call v. Robinett, 147 N. C. 615, 61 SE 578.

54. A bounty warrant was issued in 1838 to one who died leaving him surviving a widow and two children. Subsequently both children died and widow after remarriage conveyed bounty warrant, the husband joining in the conveyance. Held that the effect of such transfer was to pass to grantee the equitable title to the land upon its subsequent location by him. Clark v. Hoover [Tex. Civ. App.] 110 SW 792.

55. Certificate issued to heirs of citizen of Texas for military services passed to wife and child according to laws of descent in force in Texas, and not according to laws in force in Virginia where wife was domiciled. Waterman v. Charlton [Tex. Civ. App.] 112 SW 779.

56. Tompkins v. Creighton-McShane Oil Co. [C. C. A.] 160 F 303.

57. One who in good faith occupied public land with his wife and child, believing he had title thereto under deed from his father, but subsequently and after death of wife discovered that he held no title, filed upon land under Acts 1870, p. 68, c. 53, which acts gave him preference right for 12 months to appropriate land as homestead, upon making certificate of 3 years' residence obtained a patent, took such title in his own right and not as community property which would inure to benefit of child. Simpson v. Oats [Tex.] 114 SW 105.

58. Hensley v. Burt & Brabb Lumber Co. [Ky.] 116 SW 316.

59. Where plaintiff and defendant each claim by virtue of overlapping surveys, but plaintiff claiming under junior survey has never been in possession of such interference, his entry outside of such interference did not extend his right thereto. Adams v. Mineral Development Co. [Ky.] 116 SW 246.

60. A senior survey must have its quantity of land out of the public domain which existed when it was surveyed and the junior surveys must give way to it regardless of what other surveys would thereby be thrown into conflict. McCaleb v. Campbell [Tex. Civ. App.] 116 SW 111. Where a chain of special entries has already been surveyed before competing enterer sought to make his entry, it is immaterial that such entries excluded prior claims and yet called for a certain acreage and that therefore a subsequent enterer could not know how to ascertain extent of any of the entries included in the chain, for as long as such survey was not objected to by enterer for whose benefit it had been made, a subsequent enterer could not object. Breckenridge Cannel Coal Co. v. Scott [Tenn.] 114 SW 930.

61. Fact that surveyor did not go on

used to correct the mistake,[62] but such mistakes cannot be set up by a subsequent enterer with notice.[63] Calls for natural objects take precedence over calls for artificial objects.[64] Adjacent surveys are admissible to identify the tract in controversy.[65] The specialty of an entry may be shown by connecting it with the first of a series admittedly special.[66] A patent from the state to lands lying between ordinary high and low water marks gives no title to the patentee,[67] but his right as a riparian owner vests to lands bordering on a lake although according to the survey such lands are part of the lake.[68]

*Adverse possession.* See 10 C. L. 1304—Where the statute of limitations does not run against the state, no rights as against it can be acquired by adverse possession.[69] Title by adverse possession may be acquired as against one holding a subsequently acquired patent.[70] The statute may commence to run in favor of one holding ad-

ground and measure and mark the lines may be shown. Wilkins v. Clawson [Tex. Civ. App.] 110 SW 103.

**62.** Lines of survey as called for by patent failed to close but lines according to certificate of survey did. Held certificate controlled. Hensley v. Burt & Brabb Lumber Co. [Ky.] 116 SW 316.

**63.** Where surveyor by mistake made certain lines longer than entries called and others fell short, running on course and distance, subsequent enterer chargeable with notice of survey as made and would not be justified in superimposing subsequent entry upon prior entries made apparent by such survey, especially after lapse of more than 50 years. Breckenridge Cannel Coal Co. v. Scott [Tenn.] 114 SW 930.

**64.** In order to determine location of a certain league of land in dispute, an instruction that jury should be guided in following footsteps of surveyor, "first by natural objects, such as streams and timber; second by artificial objects, such as the fixed and established line of an adjoining survey about which there is no dispute, and then by course and distance," and that jury must consider all the evidence and follow actual survey as made, held correct. Wilkins v. Clawson [Tex. Civ. App.] 110 SW 103.

**65.** Tract held sufficiently identified under evidence. Sullivan v. Solis [Tex. Civ. App.] 114 SW 456.

**66.** Breckenridge Cannel Coal Co. v. Scott [Tenn.] 114 SW 930.

**67.** Since on its admission as a state on an equal footing with the original states, Florida acquired in trust for the people the navigable waters of the state including the land between high and low-water mark, the Act of 1850 granting swamp and overflow lands does not affect title of state to lands between high and low-water marks, since such title was already in state held in trust for the public and not subject to conveyance. State v. Gerbing [Fla.] 47 S 353. One who claimed title to lands lying between high and low-water marks on a navigable river through a deed from the state by the trustees of the internal improvement fund based upon selection of swamp and overflow lands granted to state by Act Cong. Sept. 28, 1850, c. 84, 9 Stat. 519, acquired no title thereto as against the general public. Id. Term "public lands" as used in Rev. St. 1895, art. 3498a, declaring that "public school, university, asylum and public lands," shall be open to purchase in accordance with Rev. St. art. 3498j, does not include lands covered by tides in bay connecting with gulf, and as to such lands no right of purchase applies. De Meritt v. Robison, Land Com'r [Tex.] 116 SW 796. Where patent was granted to land described as being bounded by low-water mark, patent covering area under water beyond low-water mark. Thereafter by Laws 1857, p. 638, c. 763, and Laws 1878, p. 96, c. 88, shore owners of land were granted by state right to construct piers for outside of line of patent. Held that effect of such acts followed by filling in the land was to relieve ownership of land under water so filled from public use. Bardes v. Herman, 114 NYS 1098.

**68.** Where by mistake lands bordering on lake were included within surveyed meander line as part of lake, patents issued to state and by state to individuals, of fractional sections surrounding such meander lines, conveyed all riparian rights and vested title to lakebed as against claimants under swamp lands act. Little v. Williams [Ark.] 113 SW 340.

**69.** The statute of limitations not running against the state, a railway company could not by 27 years' possession acquire any right to shoal lands so long as title thereto remained in the state. Black v. Chicago, B. & Q. R. Co., 237 Ill. 500, 86 NE 1065. Adverse possession from 1844 to 1868 did not toll the commonwealth's right of entry, the act of the general assembly allowing limitations to run against commonwealth not being passed until 1873. Buckner's Ex'r v. Kirkland's Ex'r, 33 Ky. L. R. 601, 110 SW 399.

**70.** One who has been in possession of land for 50 years claiming it as his own to a well marked boundary under deed from his predecessor who held no record title has good title to such land even as against one holding a subsequently acquired patent thereto. Conley v. Breathitt Coal, Iron & Lumber Co. [Ky.] 113 SW 504. Evidence held sufficient to sustain finding that reservoir constructed on land claimed by plaintiff under Desert Land Act not maintained in such shape as to be of any value, and not to constitute adverse occupation. Dean v. Dean [Cal. App.] 99 P 380.

versely under color of title against the holder of a land certificate on the date of the completed right to a patent.[71]

*Adjudication of title by the courts.*[See 10 C. L. 1304]—The question as to location of land, entered is properly determinable in a protest proceeding.[72] The same rule applied in construing ambiguous language in a deed applies to ambiguous language in a patent.[73] The ordinary rules as to relevancy and competency of evidence apply in actions affecting title and priorities in public lands.[74] The certificate of the commissioner of a state general land office is admissible in evidence only as facts contained in papers, documents or records of his office, and cannot be used as evidence of any fact otherwise known to him which does not directly appear from the records of the office,[75] and a deed from a commissioner of state lands is prima facie evidence of title.[76]

§ 5. *Leases of public lands and rights thereunder.*[77]—[See 10 C. L. 1304]—A lease of Mississippi sixteenth section school lands for ninty-nine years carries with it as full complete ownership as though the title was in fee simple for that period.[78] In order to acquire preferred rights to lease school lands, the claimant must be a bona fide settler or occupant and must have placed upon the land permanent improvements which have enhanced its value.[79] Leased lands are not open to settlement,[80]

**71.** Swamp and overflow land granted by congress to state under Act Sept. 28, 1850, c. 84, 9 Stat. 519, being a grant in praesenti, passed equitable title to state and issuance of certificate thereafter to appellant's ancestor passed equitable title to him with legal title held in trust by state. Held that when grant to state was subsequently confirmed in 1859, ancestor's right to patent was complete and subject to running of statute in favor of adverse holder. Hibben v. Malone, 85 Ark. 584, 109 SW 1008.

**72.** Where defendants made entry upon a certain island claiming that it was located in New Hanover county, and plaintiffs entered their protest claiming that island was in Brunswick county and that they held grant thereof as being in that county, the issue as to which county contained the island was properly determinable in the protest proceeding. Ullery v. Guthrie, 148 N. C. 417, 62 SE 552.

**73.** Hensley v. Burt & Brabb Lumber Co. [Ky.] 116 SW 316.

**74.** Where plaintiff claimed title to uncultivated lands entered by his grantor in 1857 under certificate of sale from county not reciting payment, and same land was subsequently patented to defendant's remote grantor in 1899, evidence consisting of treasurer's receipt to plaintiff's grantor in payment for lands not described held insufficient to warrant finding that lands sold by county to persons named in receipt were the lands described in certificate to plaintiff's grantor. Phillips v. St. Louis Union Trust Co., 214 Mo. 669, 113 SW 1065. Payment of taxes for a number of years is evidence that the state has parted with its title. Bardin v. Commercial Ins. & Trust Co. [S. C.] 64 SE 165. Parol evidence held proper to locate an entry described as "beginning at R. W.'s corner and running S. 70 degrees E. 161 chains to S.'s corner, thence N. 20 degrees E. 27 chains to H.'s corner, thence N. 59 degrees W. 152 chains to D. W.'s corner, then S. 32½ degrees W. 52 chains to first station." Babb v. Gay Mfg. Co. [N. C.] 63 SE 609.

**75.** Certificate attached to sketch from general land office purporting to show that sketch was a "true and correct copy from map of H. county drawn from actual surveys made in 1840, and now an archive of this office" not admissible as proof of actual survey. Wilkins v. Clawson [Tex. Civ. App.] 110 SW 103.

**76.** Deed of commissioner of state lands prima facie evidence of title only. Allen v. Phillips [Ark.] 112 SW 403. Deed of commissioner of state lands conveyed no title upon proof by defendant that sale was not confirmed by court. Id. Except as changed by statute, a deed alone of the commissioner of school lands is not evidence of conveyance of title from the state, but such parts of the record of the court proceedings upon which the deed is based as show forfeiture of the land or title therto in the state are necessary as prima facie evidence that the deed carried the state's title. Feder v. Hager [W. Va.] 63 SE 285.

**77. Search Note:** See Public Lands, Cent. Dig. §§ 170-174, 383-600; Dec. Dig. §§ 55, 142-187.

**78.** Miss. Act Feb. 27, 1833, containing no provision against waste, lease thereunder for 99 years carries with it right to cut timber. Forest Products Co. v. Russell, 161 F 1004.

**79.** Complaint against supervisors for leasing school lands to another which merely set out that plaintiff was occupying said lands and had placed valuable permanent improvements thereon held insufficient under Rev. St. 1901, par. 4036 (§ 5) and par. 4037 (§ 6), as not setting out what improvements were and that they enhanced value. Schley v. Vail [Ariz.] 95 P 113. Erection of dwelling house, barns, corrals, fences, cleaning off brush and undergrowth, and preparing ground for grazing or for raising crops, would have constituted sufficient permanent improvements if properly alleged. Id.

**80.** No valid act of settlement of leased school lands can be done until termination of lease; when lease expires settler must

but where the lease is invalid it furnishes no obstacle to an award.[81] Whether the lease has been informally canceled is a question for the jury.[82]

§ 6. *Spanish and other grants antedating federal authority.*[83] —See 8 C. L. 1503— In order to derive title to land granted under Spanish authority, such grant must be shown to have been perfect and complete.[84] A complete grant will be presumed from long continued possession,[85] and title thereunder may be registered.[86] A confirmation of an entire grant is a confirmation of all its parts.[87] Where the United States brings suit in the court of private land claims to try title to lands included in an unconfirmed Mexican grant, lands patented by the United States to others prior to such suit cannot be excepted from the decree of confirmation,[88] and the grantee obtains complete title to such lands notwithstanding the prior patent.[89]

perform an original act of entry notwithstanding that, with lessee's consent, he has already entered upon land and erected improvements. Clapper v. Skeen [Kan.] 99 P 590.

**81.** In suit to try title between lessee of public school lands and holder of award of same lands, it appeared that land included lands previously leased, which lease was transferred to plaintiff but subsequently canceled for nonpayment of rent whereupon plaintiff acquired new 10-year lease. Buchanan v. Barnsley [Tex. Civ. App.] 112 SW 118. Held that first lease was valid when 10-year lease was executed and latter consequently void and no obstacle to an award made during period of lease. Id. After the existence of facts justifying the cancellation of a lease of public school lands is shown, a stranger to the lease cannot interpose it as a defense to the right of the state to make an award of the land. Trimble v. Burroughs [Tex. Civ. App.] 113 SW 551.

**82.** Where it appeared that the rent under lease of school lands was more than 60 days over due and that one of joint lessees had relinquished his rights and the other knew that commissioner had again placed land upon market, a finding of informal cancellation was authorized. Trimble v. Burroughs [Tex. Civ. App.] 113 SW 551.

**83. Search Note:** See Public Lands, Cent. Dig. §§ 601-730; Dec. Dig. §§ 188-229.

**84.** In suit for ejectment plaintiff traced title to grant made in 1728 by governor and captain general of New Mexico, which grant had not been confirmed by the United States. By the royal regulations of the King of Spain, Oct. 15, 1752, § 3, it was provided that all persons holding grants made after 1700 A. D. should present such grants for confirmation, a failure to do which would result in eviction. It did not appear that grant under which plaintiff claimed had been so confirmed. Held such grant was imperfect because of lack of confirmation and conveyed no title to plaintiff, since recognition of imperfect grants is forbidden by § 12, Act Cong. March 3, 1891 (c. 539, 26 Stat. 859 [U. S. Comp. St. 1901, p. 772]). Sena v. American Turquoise Co. [N. Mex.] 98 P 170.

**85.** A native of province of Banguet, P. I., who was in possession of land held by him and his ancestors for more than 50 years prior to the Treaty of Paris, 1899 (30 Stat. at L. 1754), although his title had not been recognized formally by Spanish Crown, held to be owner of such land although he had failed to comply with Spanish registration law of 1880 where, even if tried by law of Spain as existing before treaty of Paris 1899, it is not clear that he was not the owner. Carino v. Insular Government, 212 U. S. 449, 53 Law. Ed. —. Evidence held insufficient to show such possession as would raise the presumption that a Spanish land grant made in 1728 was confirmed in 1752. Sena v. American Turquoise Co. [N. M.] 98 P 170.

**86.** Act of Philippine Commission No. 926 of 1903, excepting province of Banguet from operation of registry law, dealing only with acquisition of new titles and perfecting of titles under Spanish law, does not prevent registry by one who had title before such act went into effect. Carino v. Insular Government, 212 U. S. 449, 53 Law. Ed. —.

**87.** Plaintiffs claimed title to porcion 107 under Spanish grant of 1767 to plaintiff's ancestor. Said land was surveyed for plaintiffs in 1879 and resurveyed in 1880. In 1852 the legislature confirmed title to several other porciones under said grant but did not include 107 in such confirmation. Held that such confirmation of 1852, Paschall's Dig. art. 4461, operated as confirmation of entire grant, including porcion 107, and severed land from public domain, rendering it not subject to settlement by defendant in 1882. Sullivan v. Solis [Tex. Civ. App.] 114 SW 456.

**88.** Section 14, of Act March 3, 1891, c. 539, 26 Stat. 854 (U. S. Comp. St. 1901, p. 765), providing that if in any case it shall appear that lands decreed to any claimant under provisions of this act shall have been sold or granted by the United States to any other person, such title to such other person shall remain valid, notwithstanding the decree, and that upon proper proof the court shall render judgment in favor of the claimant against the United States for reasonable value of such lands. Held not to apply in suit brought by United States to try title to unconfirmed Mexican grant in court of private land claims. Richardson v. Ainsa [Ariz.] 95 P 103.

**89.** Action to quiet title could be maintained against holders of government patents under confirmatory decree of court of private land claims, and fact that patents antedated confirmation did not constitute defense. Richardson v. Ainsa [Ariz.] 95 P 103.

§ 7. *Regulations and policing, and offenses pertaining to public lands.*[90]—See 10 C. L. 1805—The exercise of the power of the federal government to make all needful regulations concerning the public domain cannot be in any degree restricted by state legislation.[91] The government may enjoin unlawful flooding of the public domain.[92]

*Cutting timber on public lands.* See 10 C. L. 1805—The official approval of the board of timber commissioners is a jurisdictional requirement to make valid a permit to sell state timber.[93] One who unlawfully cuts state timber is liable to the government for the value thereof.[94]

*Crimes and offenses against public lands.*[95]—An entryman under the stone and timber act who makes a false affidavit that he has entered into no agreement to acquire title for another is punishable although no such agreement was ever consummated in fact,[96] and although the affidavit relates to the land alone and not to the timber,[97] but if it is so palpably invalid that it cannot under any circumstances prejudice the government, it will not support a conviction.[98] It is no offense against federal law for an entryman who in good faith has made application under the stone and timber act to contract to sell his rights thereunder.[99] One who has already made an entry violates the statute if he attempts to acquire additional lands through one not disqualified, although the statute does not in terms forbid it.[1] An

**90. Search Note:** See Public Lands, Cent. Dig. §§ 7-28; Dec. Dig. §§ 6-21; 26 A. & E. Enc. L. (2ed.) 452; 17 A. & E. Enc. P. & P. 134.

**91.** Although the state allows cattle to run at large and requires every landowner to fence his own land, it cannot impose such duty upon the federal government as to forest reserves within the state borders. Shannon v. U. S. [C. C. A.] 160 F 870.

**92.** Unauthorized use by private parties of government and as reservoir for irrigation and power purposes enjoined at suit of federal government. United States v. Rickey Land & Cattle Co., 164 F 496.

**93.** Under Laws 1895, p. 349, c. 163, providing for sale of state timber, held that jurisdictional requisite that majority of board of timber commissioners officially sign a statement endorsed upon appraisal of timber proposed to be sold, that sale necessary to protect state from loss, was substantially complied with. State v. Akeley Lumber Co. [Minn.] 119 NW 387. Permit to sell state pine timber held to include "dead and down" timber and jack pine. Id.

**94.** Where the employe of a lumber company made homestead entry with money furnished by the company and thereafter on previous agreement denuded land of timber which was sold to company after which claim was abandoned, held that company was liable to government for full value of the property. United States v. Flint Lumber Co. [Ark.] 112 SW 217.

**95.** See 10 C. L. 1306. See, also, Perjury, 8 C. L. 1344.

**96.** Section 2 of Act June 3, 1878 (20 Stat. 89, c. 151 [U. S. Comp. St. 1901, p. 1545]), requires entryman on making application to make oath that he has not made any agreement or contract directly or indirectly by which title shall inure to the benefit of any person but himself. Held that where an entryman made contract prior to his application for timber entry that he would sell his rights to a company, he was guilty of perjury although such company in fact had no existence, and although its purported manager never in fact intended that contract should ever become effective. Nickell v. U. S. [C. C. A.] 161 F 702.

**97.** Under stone and timber act (Act June 3, 1788, c. 151, § 1, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]), making such lands subject to entry as are available chiefly for timber but unfit for cultivation, an entryman having made affidavit that he sought to purchase the land for his own benefit and not for speculation could not escape punishment on ground that such affidavit related to land and not to timber. Nickell v. U. S. [C. C. A.] 161 F 702.

**98.** Where forged affidavit presented to land office in final proof of entry under timber-culture act was fair on its face but was presented after legal time for filing and making proof, held that its use to induce register to give new opportunity to take testimony was a contingency in which it might have worked injury to government, and hence was sufficient to sustain conviction under R. S. § 5418 (U. S. Comp. St. 1901, p. 3666). Neff v. U. S. [C. C. A.] 165 F 273.

**99.** Conspiracy to induce entryman after application made under Stone and Timber Act, 27 Stat. at L. 348, c. 375 (U. S. Comp. St. 1901, p. 1545), to agree to convey after patent issued, held not one to defraud United States under R. S. U. S. § 5440 (U. S. Comp. St. 1901, p. 3676), since stone and timber act not only does not expressly prohibit such transaction but impliedly sanctions it. United States v. Biggs, 211 U. S. 507, 53 Law. Ed. —.

**1.** U. S. R. S. § 2350 (U. S. Comp. St. 1901, p. 1441) provides that one person shall be entitled to make only one entry upon public coal lands, but does not in terms prohibit one who has already made entry from acquiring other land through one not disqualified, such acquisition held in vio-

indictment need only inform the defendants of the nature and cause of the accusation against them and must allege the facts so as to protect them after verdict against any further prosecution for the same offense.[2]

*Fencing.* See 10 C. L. 1306—A lease containing a covenant for the unlawful fencing of a part of the public domain is invalid although the statute does not in terms avoid such contract.[3] Enclosure of public lands by a bona fide settler is not unlawful.[4]

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**Public Policy,** see latest topical index.

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- J. Remedies by Injunction or Other Collateral Attack, and Grounds Therefor, 1517.
- K. Appeal and Other Direct Review, 1519.


§ 1. *Definitions and scope of title.*[5] See 10 C. L. 1307—This topic treats generally of public works and improvements, including local improvements, the powers and duties of municipalities with respect to public works and improvements, the procedure therefor and the costs thereof including local assessments. The taking of property for public use,[6] the construction and operation of particular public works,[7] and matters peculiar to the powers and fiscal affairs of particular public bodies,[8] are treated elsewhere. While the manner of letting a contract for public work and the

lation of the statute. United States v. Keitel, 211 U. S. 370, 53 Law. Ed. 230.

2. Indictment under Rev. St. § 5440, for conspiring to defraud government of lands embraced by homestead claims, held sufficient when it charged that defendant and others conspired to obtain from government certain specified tracts of land open to homestead entry by inducing certain persons named to enter same by means of false proof in respect to residence, improvements and intent, setting out the facts, and that defendants knew proof was false. Jones v. U. S. [C. C. A.] 162 F 417.

3. Act of Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524). Lingle v. Snyder [C. C. A.] 160 F 627.

4. The Act of Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), to prevent unlawful occupancy of the public domain, is not intended to prevent actual bona fide settlers from occupying and inclosing an entryman's portion of the public lands. McAllister v. Okanogan County [Wash.] 100 P 146.

5. **Search Note:** See notes in 6 C. L. 1144; 58 L. R. A. 757; 11 Ann. Cas. 594.

See, also, Municipal Corporations, Cent. Dig. § 716; Dec. Dig. § 267; 13 A. & E. Enc. P. & P. 295.

6. See Eminent Domain, 11 C. L. 1198.

7. See such titles as Highways and Streets, 11 C. L. 1720; Sewers and Drains, 10 C. L. 1631; Waters and Water Supply, 10 C. L. 1996.

8. See Counties, 11 C. L. 908; Municipal Corporations, 12 C. L. 905; Towns; Townships, 10 C. L. 1863; States, 10 C. L. 1702.

validity of provisions peculiar to contracts of this kind are treated herein, matters pertaining to the making and validity of public contracts in general are excluded.[9] Liability for personal injuries resulting from negligence in the construction and maintenance of public works is also excluded.[10]

§ 2. *Power, duty and occasion to order or make improvements.*[11] See 10 C. L. 1307.—Municipalities have only such powers with respect to the ordering or making of improvements as are expressly or impliedly conferred by statute.[12] Statutes conferring such powers must conform to constitutional requirements.[13] The determination of the necessity, time, place and plan of public improvements is vested exclusively in the legislative body of the municipality,[14] and the exercise of such power is discretionary and final[15] and will be interfered with by the courts only for an abuse of discretion or fraud.[16] Legislative functions delegated to municipalities cannot be delegated by them,[17] but mere matter of detail may be delegated.[18] A city in proceeding under a statute providing for public improvements is acting under special powers conferred and must comply with the requirements of the stat-

**9.** See Public Contracts, 10 C. L. 1285; Building and Construction Contracts, 11 C. L. 464.

**10.** See Negligence, 10 C. L. 922; Municipal Corporations, 12 C. L. 905; Independent Contractors, 11 C. L. 1896.

**11. Search Note:** See notes in 61 L. R. A. 76; 3 Ann. Cas. 676.

See, also, Municipal Corporations, Cent. Dig. §§ 711-757; Dec. Dig. §§ 265-287.

**12.** Act 1899, authorizing cities of over 100,000 population to construct outlet sewers, applies only to such cities, and not to villages. Village of Brookfield v. Pabst, 235 Ill. 355, 85 NE 618. Memphis city charter (Acts 1879, pp. 16, 98, amended by Acts 1887, p. 394), authorizing the city to compel property owners to build sidewalks, confers power on the city to provids by ordinance for building of granolith walks by owners. O'Haver v. Montgomery [Tenn.] 111 SW 449. Power of a village under the village law to construct a sewer at its own expense is not abridged by orders of board of health under Laws 1893, p. 1519, c. 661, § 72. Mead v. Turner, 60 Misc. 145, 112 NYS 127. Under Milwaukee city charter, c. 7, § 2, amended by Laws 1898, § 859-35, the board of public works held authorized to order a street paved without petition of owners, and to assess costs against abutting owners. Loewenbach v. Milwaukee [Wis.] 119 NW 888. Under such statutes, held also that the board has power to order repaving of street without petition. Id. Ky. St. § 3449, providing that a city may order improvement of an entire street, but not less than a block, does not apply to reconstruction of an improvement. Nickels v. Frankfort Councilmen, 33 Ky. L. R. 918, 111 SW 706. Acts 1908, p. 166, c. 10, providing for grading and paving of streets in cities of the first class, is valid. Oklahoma City v. Shields [Okl.] 100 P 559. Incorporated cities and towns **have no power** to compel property owners to construct gutters. Brizzolara v. Ft. Smith [Ark.] 112 SW 181.

**13.** Local Acts 1907, p. 133, No. 411, creating board for directing local improvements, held void as not indicating its provisions in the title. McDonald v. Springwells, 152 Mich. 28, 15 Det. Leg. N. 86, 115 NW 1066.

**14.** Question of necessity and propriety of making an improvement is for exclusive determination of city council. Applegate v. Portland [Or.] 99 P 890. Until that body has acted, the city has not acted. That abutting owners have constructed sidewalks does not prevent the city from ordering sidewalks the cost to be taxed against abutting property under statutory authority. Guilfoyle's Ex'r v. Maysville [Ky.] 112 SW 666. Under Burns' Ann. St. 1908, §§ 8960, 8961, 8963, 8965, the town board of trustees has full jurisdiction over the making of street improvements. Martindale v. Rochester [Ind.] 86 NE 321.

**15.** An ordinance for an improvement will bs declared void for unreasonableness only when clearly arbitrary, unjust and oppressive. City of Chicago v. Hulbert, 234 Ill. 321, 84 NE 922. Evidence insufficient to show that a sidewalk was unnecessary. City of Chicago v. Marsh, 238 Ill. 254, 87 NE 319.

**16.** City of Chicago v. Hulbert, 234 Ill. 321, 84 NE 922. In determining what is reasonably necessary in making a public improvement, "necessary" does not mean indispensable, but includes whatever is appropriate or convenient to render improvement effective. Meriwether v. St. Francis Levee Dist. Directors [C. C. A.] 165 F 317.

**17.** Under Kansas City charter, art. 9, § 2, providing for construction of sidewalks to such extent, in such manner, and under such regulations as may be provided by ordinance, an ordinance delegating to the engineer the duty of locating sidewalks is void. Municipal Sec. Corp. v. Gates, 130 Mo. App. 552, 109 SW 85. Buffalo city charter, Laws 1895, p. 1723, c. 805, requires paving to be ordered by the council, and that body cannot delegate the power to the commissioner of public works. Morey v. Buffalo, 59 Misc. 603, 111 NYS 463.

**18.** Under St. Louis charter (Ann. St. 1906, pp. 4857, 4867, 4832) relative to contracts for improvements, held, in contracting for repair, etc., of sidewalks, the board properly authorized the street commissioner to determine what part of the improvement should be considered as extra and agree to the price therefor. Heman v. St. Louis, 213 Mo. 538, 112 SW 259.

ute,[19] and must exercise powers conferred in such manner as to protect property rights of individual citizens.[20] Only such questions as go to the jurisdiction to make improvements can be raised in a suit to enjoin the improvements.[21]

§ 3. *Funds for improvements and provision for cost.*[22]—See 10 C. L. 1308—The power of a municipality to provide for the cost of public improvements and the method to be pursued in making a particular improvement, are controlled by fundamental law and legislation pursuant thereto.[23] Thus, according to the statute applicable, the cost may be borne by the municipality[24] or defrayed by the issue of bonds[25] or special assessment against property benefited,[26] but the liability of owners

**19.** Must pursue with strictness all conditions precedent. City of Jackson v. Williams [Miss.] 46 S 551. For power of a municipality relative to compelling owners to construct sidewalks should be strictly construed in favor of the individual rights of the citizen, but the general welfare and convenience of the public should also be considered. O'Haver v. Montgomery [Tenn.] 111 SW 449. Rev. St. § 3736, providing that no land shall be purchased on account of the United States except under law authorizing purchase, should not be construed to apply to executed contracts so as to defeat title of the United States to land it has paid for and an act authorizing a public improvement and appropriating money therefor is sufficient authority for the purchase of the land necessary for the improvement. Burns v. U. S. [C. C. A.] 160 F 631.

**20.** Where improvement of street without a culvert would throw surface water on adjacent land, and the municipality, though favorable to construction of culvert, gave no assurance of their construction, it was proper to enjoin such construction as a condition to completion of the improvement. Dilly v. Henderson [Iowa] 118 NW 750. On refusing to enjoin a contractor from paving part of a right of way of a railroad company long used as part of a public street, held, the order should provide that the improvement should not give to the city or the public any title or interest to the land that will obstruct the company in the use of its right of way, or impair its title. Atchison, etc., Co. v. O'Leary [Kan.] 100 P 628.

**21.** All questions triable on appeal or by a particular tribunal must be so tried, and not by injunction. Martindale v. Rochester [Ind.] 86 NE 321. Irregularities will not invalidate proceedings for street improvements though they relate to acquiring of jurisdiction. Id.

**22. Search Note:** See Municipal Corporations, Cent. Dig. §§ 758-761, 818, 1899, 1901, 2039; Dec. Dig. §§ 288, 306, 911, 962.

**23.** Laws 1907, p. 124, c. 91, providing for expense of widening L. street in the borough of Brooklyn, does not embrace more than one subject expressed in its title. In re Lochitt, 58 Misc. 5, 110 NYS 32. Conetruction of sanitary trunk sewer under Laws 1905, p. 1621, c. 646, not violative of Const. art. 8, § 10, prohibiting indebtedness except for county purpose, where present facilities inadequate, and majority of county's inhabitants benefited. Horton v. Andrus, 191 N. Y. 231, 83 NE 1120. Debt for construction of sanitary sewer under Lawe 1905, p. 1621, c. 646, no less county's obligation because of ultimate reimbursement by assessments. Id.

**24.** Under Hurd's Rev. St. 1908, c. 42, § 115, providing that commissioners of drainage district shall make all necessary bridges and culverts over highways, etc., the expense thereof must be borne by the drainage district. People v. Gungenhauser, 237 Ill. 262, 86 NE 669. Laws 1907, p. 124, c. 91, declaring that expense of widening L. street in borough of Brooklyn shall be borne by city of New York, notwithstanding assessments levied, is not ineffective because of erroneous statement of date of resolution of estimate authorizing improvement. In re Lochitt, 58 Misc. 5, 110 NYS 32. Not void as impairing vested rights of the city to assessment. Id. Under, St. 1898, §§ 905, 911, 912, held a village board could authorize street commissioner to hire men and teams to repair street and defray expense thereof from general fund. State v. Wallshlaeger, 137 Wis. 136, 118 NW 643.

**25.** To authorize municipal bonds for construction of bridge, record should show substantial compliance with each step required by statute before issuance. Gilbert v. Canyon County, 14 Idaho, 429, 94 P 1027. Sufficient finding of board as to necessity of constructing bridge. Id. Bonds to cover costs of superintending contruction of bridge authorized, since such work part of construction as well as furnishing material. Id. "All expenses incurred" in Acts 1905, p. 557, authorizing board of commissioners to issue bonds for construction of a highway to amount of contract price, does not include attorney's fee for drawing petition. Overmeyer v. Cass County Com'rs [Ind. App.] 86 NE 77. City ordinance providing that continual annual tax to pay interest and provide sinking fund to pay bonds for public utilities shall be levied on all taxable property within the city substantially comply with Const. art. 10, § 27. State v. Millar [Okl.] 96 P 747. Sewers are public utilities. Id. Const. art. 10, § 27, clearly contemplates that bonds shall run 25 years. Id. Authority to village trusteee to construct a sewer system at a cost of $100,000 and to raise $60,000 by issue of bonds impliedly authorizes them to raise the balance by taxation. Mead v. Turner, 60 Misc. 145, 112 NYS 127. See, also, Municipal Bonds, 12 C. L. 897.

**26.** Under Ann. St. 1906, pp. 2962, 2967, relative to improvements by cities of the third class and payment of the cost thereof, where a resolution declared an intention to pave between the curbs, and the paving was extended for use as a walk at street

for improvement of an adjacent street is strictly statutory.[27] Some of the usual statutory limitations as to funds for improvements are that they must be provided before the indebtedness is incurred.[28] Submission to popular vote,[29] and limitation as to amount of indebtedness [30] or value of the property benefited; [31] but such limi-

intersections, it should be paid for by tax bills. Muff v. Cameron [Mo. App.] 114 SW 1125. Until property once bears the cost of paving done on order of the city council, there has not been an original construction of a payment within a statute authorizing such cost to be taxed against abutting property. Guilfoyle's Ex'r v. Maysville [Ky.] 112 SW 666.

**27.** Is to be determined by the law in force when the work was done, and if no liability then existed the legislature cannot create one. City of Lexington v. Walby, 33 Ky. L. R. 116, 109 SW 299. Where city, pursuant to authority, adopted an ordinance for paving of streets with brick, except that designated portion was to be paved with crushed rock, and after the contract was let, the contractor was authorized to pave the entire street with brick, and after completion of the work an ordinance was adopted providing for the improvement as completed, held, the contract was not complied with, and abutting owners were not liable. Id.

**28.** Certificate of clerk of municipal corporations given under Rev. St. 1898, § 2702, as to amount of fund on hand to be used in paying the contract, is a limitation on the amount to be paid, beyond which the municipality is not liable. Village of Carthage v. Diekmeier [Ohio] 87 NE 178. Certificate of clerk of municipal corporation at time of execution of a contract for an improvement held not to comply with Rev. St. 1898, § 2702, in not stating that a specified sum required from improvement was in treasury. Id. Under Detroit city charter providing that no contract for public work shall be let until approved by council, and no warrant shall be drawn on treasury until money is in the treasury to pay for work, held mandamus would not lie to compel issuance of a warrant where the charter provisions had not been complied with. Garner v. Doremus [Mich.] 15 Det. Leg. N. 735, 117 NW 743. St. Louis charter (Ann. St. 1906, p. 4869), providing that every ordinance for public work shall contain a specific appropriation, does not apply to emergency work which need not be ordered by ordinance. Heman v. St. Louis, 213 Mo. 538, 112 SW 259. Under Const. art. 11, § 5, where no provision is made to pay the contract price of work, the contract is unenforceable, and a tax levied prior to execution of such contract, but not in contemplation of the improvement, and transferred to the general fund, cannot be looked to. Ault v. Hill County [Tex. Civ. App.] 111 SW 425. Failure of auditor or clerk to first certify that money necessary to meet obligations assumed under contract is in treasury to credit of fund from which it is to be drawn, or has been levied and is in process of collection and has not been appropriated for any other purpose, renders the contract void under Rev. St. § 2702 (1536-205). McAlexander v. Haviland Dist., 7 Ohio N. P. (N. S.) 590. Contract for building of school house at cost in excess of amount raised for that purpose from issue of bonds is not void for want of authority on part of board of education to make such contract after having underestimated amount of money needed. Id. Ordinance appropriating private property for building of dike is an ordinance for the expenditure of money, and is void if no certificate has been previously filed and recorded by proper officer as required by Rev. St. § 1536-205 (known as Burne' Law); and injunction will be granted restraining municipality from proceeding in probate court to assess compensation to landowner for land appropriated. Hurst v. Belle Valley, 11 Ohio C. C. (N. S.) 235.

**29.** Election submitting to voters the question of incurring indebtedness for the purpose of constructing public utilities is not void because in preparing the ballots the words "Yes" and "No" were placed under the squares instead of to the left of them as required by statute. State v. Millar [Okl.] 96 P 747. Statement on ballots held sufficiently comprehensive to include re-equipping and making extensions of water system. Id. Under Code, § 1131, women are entitled to vote on the question of issuing bonds increasing tax levy, etc., for construction of a city hall, under Acts 32d General Assembly, Laws 1907, p. 27, c. 34, §§ 1, 2, 4. Coggeshall v. Des Moines, 138 Iowa, 730, 117 NW 309. Evidence that city attorney had told attorney for political equality club that in his opinion women were not entitled to vote and no provision would be made for them was admissible to show denial of the privilege. Id. Where question of issuing bonds for construction of sewers in different parts of the city was submitted to vote as a single proposition, and there was no other alternative than to vote for or against both, the submission was void. State v. Wilder [Mo.] 116 SW 1087.

**30.** Debt created by bonds as authorized by statute, authorizing the charge of improvements against abutting property, is not a municipal indebtedness within the constitutional limitation. Guilfoyle's Ex'r v. Maysville [Ky.] 112 SW 666. Such improvements as paving, sewer construction and abolishing of grade crossings within municipality are improvements within provisions of Rev. St. § 2835, limiting authority of council to issue bonds; and where cost will raise net indebtedness of city beyond 4 per cent limit, council has no authority to issue bonds therefor without approval of electorate. City of Cleveland v. Cleveland, 7 Ohio N. P. (N. S.) 249.

**31.** Laws 1903, p. 121, c. 82, limiting value of improvements to 50 per cent of the value of the property in certain cases, held to place no limit on value of improvements when petitioned for by owners and use of word "percentage" held not to limit assessments to fractional part of the valuation. James v. Seattle, 49 Wash. 347, 95 P 273. In proceeding to restrain making

tation may be exceeded if owners desire to pay the extra cost.[32] Some statutes provide that before money can be borrowed to defray the expense an estimate of the cost should be made.[33]

§ 4. *Proceedings to authorize or validate making. A. In general.*[34]—See 10 C. L. 1309

(§ 4) *B. By whom and how initiated.*[35]—See 10 C. L. 1309—In some states, certain improvements must be initiated by submission to popular vote.[36] Initiatory steps by municipal legislative bodies must be taken in the manner prescribed by statute or charter,[37] but where a council acts under authority conferred upon it, it is no objection that in conducting proceedings it failed to conform to by-laws prescribed by itself to carry into effect the powers conferred.[38] The ordinance providing for the improvement must be passed in the manner required by law,[39] and it

of improvements under Laws 1903, p. 121, c. 82, authorizing cost of improvements to be based on last valuation of abutting property, a contention that there had been no valuation held erroneous where the property had been taxed for general taxation. Id. Where ordinance authorizing improvements pursuant to petition was passed shortly after petition was filed, and was based on a valuation placed on the property between filing of petition and passing of the ordinance, the last valuation was held to control in fixing the assessment. Id. Burns' Ann. St. 1908, § 8710, prohibiting contracts for street improvements in cities of first, second or third classes the total cost of which exceeds 50 per cent of the value of the property, applies only to cities named, and not to towns which are governed by Burns' Ann. St. 1908, § 8959, Acts 1905, p. 288. Martindale v. Rochester [Ind.] 86 NE 321.

32. Under Milwaukee Charter, c. 7, §§ 2, 6, and Laws 1898, § 959-35, amending the charter, property owners may, after limit of expense prescribed has been reached, secure a more expensive pavement than that the city proposes by paying extra cost. Lowenbach v. Milwaukee [Wis.] 119 NW 888.

33. Under Comp. Laws, § 2893, providing that before money shall be borrowed for construction of waterworks the council shall cause to be made an estimate of expense, held, where an estimate was made by the city engineer, but no special action was taken thereon by the council, subsequent proceedings, as well as election proceedings, which followed, were void. Richardi v. Bellaire, 153 Mich. 560, 15 Det. Leg. N. 534, 116 NW 1066. Such statute does not authorize borrowing of money to maintain water works. Id.

34. **Search Note:** See Municipal Corporations, Cent. Dig. §§ 762-849; Dec. Dig. §§ 289-325; 13 A. & E. Enc. P. & P. 298.

35. **Search Note:** See notes in 11 L. R. A. (N. S.) 372.

See, also, Municipal Corporations, Cent. Dig. §§ 768-775, 800-849; Dec. Dig. §§ 291-293, 299-325.

36. Under Henderson Town Charter, §§ 6, 9 (Laws 1901, p. 220, c. 97), a general scheme for paving sidewalks and streets of a town must be submitted to voters. Commissioners of Hendersonville v. Webb & Co., 148 N. C. 120, 61 SE 670.

37. Where, under a town charter, street improvements can only be made by ordinance, and ordinance providing for grading does not authorize paving. Where paving is done, the benefit thereof cannot be assessed against abutting property. Burnett v. Boonton, 74 N. J. Law, 467, 70 A. 67. Under Buffalo City Charter, § 288, providing that owner can be required to lay sidewalk only on direction by resolution of city council, held, construction of new concrete walk in place of a plank one was not the repair of an old walk and the commissioner of public works had no authority to make the improvement except under direction by resolution of the council. Konowalski v. Buffalo, 115 NYS 467. A repair of sidewalk as distinguished from reconstruction involves neither change of materials, regrade or change of surface lines. Id. The words "laying or relaying" of a sidewalk held to have the same meaning as "grading or regrading" in § 8, in each case referring to original work on the sidewalk or street. Id. Where paving is unauthorized by ordinance under which grading is done, the silence of the landowner whose property is benefited does not estop him to deny liability for such improvement. Burnett v. Boonton, 74 N. J. Law, 467, 70 A. 67.

38. As to sufficiency of petition of freeholders for improvement. People v. Buffalo Assessors, 109 NYS 991. Ordinance as to special improvements, if in compliance with statute, is valid, though not in compliance with prior ordinance fixing general rule on subject. City of Jackson v. Williams [Miss.] 46 S 551.

39. Under Starr. & C. Ann. St. Supp. 1902, p. 160, providing that on presentation to council of an ordinance for an improvement exceeding $100,000 the ordinance shall be referred to a committee and published in the proceedings of the council, where a sewer ordinance carrying an expenditure of more than $700,000 was passed June 24, 1907, but was not published in the proceedings of that day, and when published was not signed by any city official, held, proceedings were void because the statute was not complied with. City of East St. Louis v. Davis, 233 Ill. 553, 84 NE 674. Under such statute, the council could not pass the ordinance until the statute had been complied with though no statute other than the improvement ordinance required publication of council proceedings. Id. Under Hurd's Rev. St. 1908, c. 24, requiring an ordinance for an improvement

must conform to charter provisions.[40] In some states, where owners petition for an improvement, no legislative action of the council is required.[41] An ordinance for paving may establish the grade or change the width of the street.[42] An ordinance is not void because of surplusage contained therein,[43] and partial invalidity may not render it wholly void.[44] An ordinance providing for an improvement is not vitiated, by a subsequent ordinance changing the plan of the improvement.[45]

In some cities, abutting owners may be required to construct sidewalks.[46] Where an ordinance is passed requiring owners to lay walks, failure to comply within the period prescribed amounts to a refusal[47] and authorizes the city to proceed with the improvement[48] and collect the cost thereof from abutting owners.[49] Elsewhere, the failure to comply with such mandate subjects the owner to penalty.[50]

involving a certain amount to be published, etc., where the proceedings were not published the ordinance was void. Village of Bellwood v. Latrobe Steel & Coupler Co., 238 Ill. 52, 87 NE 66. Village ordinance for an improvement at estimated cost of less than $100,000, without imposing any penalty or making any appropriation, in force from and after its passage, held not within Hurd's Rev. St. 1908, c. 24, § 517, or § 64, requiring publication, but within the provision declaring all other ordinances shall take effect from their passage, and a publication more than two months after its passage is sufficient. Village of Downers Grove v. Findlay, 237 Ill. 368, 86 NE 732. An ordinance directing an improvement is valid though passed at only one meeting of the council, where all members voted for it. Huesman v. Dersch, 33 Ky. L. R. 77, 109 SW 319. Under Rev. Codes 1905, § 2658, providing that the mayor shall have power to sign or veto any ordinance passed by the council, held, a resolution providing that certain streets should be repaved is of legislative character and subject to veto. State v. Duis [N. D.] 116 NW 751. See, also, Municipal Corporations, 12 C. L. 905, as to general rules.

40. Under Buffalo city charter, Laws 1895, p. 1723, c. 805, providing for ordering of laying of sidewalks by resolution of common council, held, an ordinance in conflict with the charter was void. Morey v. Buffalo, 59 Misc. 603, 111 NYS 463.

41. Under Wilson's Rev. & Ann. St. 1903, § 444, where a majority of property owners on any street petition for paving, no resolution or notice of intention to pave is necessary, and it is not necessary that such improvement be directed or made under ordinance. Paulsen v. El Reno [Okl.] 98 P 958. Where the council acquired jurisdiction by petition, any irregularity subsequently occurring will not be ground for enjoining the improvement where there is no fraud and the complaining party has sustained no special injury and stood by and never protested until the work was partially completed. Id.

42. Ordinance providing for paving is not void because it establishes for the first time, or changes the grade of a street or width of a roadway. City of Chicago v. Hulbert, 234 Ill. 321, 84 NE 922.

43. Ordinance for construction of sewers in one section described the sewer drainage district, and in another section declared that cost of improvement should be paid by special assessment as described in § 2. Held not fatally defective because it contained no § 2, as such reference might be stricken and a sufficient description remain. City of East St. Louis v. Davis, 233 Ill. 553, 84 NE 674.

44. Invalidity of ordinance requiring owners to constrhct sidewalks, curbing and guttering, as to guttering, does not invalidate it as to the other improvements. Brizzolara v. Ft. Smith [Ark.] 112 SW 181. Where an ordinance created two sidewalk districts, in proceedings to charge an owner in district No. 2 for a walk built by the city, on his failure to do so any defect in the ordinance relative to district No. 1 did not affect his liability. Gregg v. Stuttgart [Ark.] 115 SW 394.

45. Where an ordinance authorized condemnation of land on each side of a street for widening it, and subsequently the council passed an ordinance abandoning the plan of widening on one side, held, the change was not material, as the improvment as a whole would not be affected. In re Third, Fourth & Fifth Ave., 49 Wash. 109, 94 P 1075.

46. Ordinance requiring owners to construct sidewalks, curbing and gutters held not void because of failure to provide for proper filling, etc., as such failure did not require them to do work which they could not lawfully be required to do. Brizzolara v. Ft. Smith [Ark.] 112 SW 181.

47. City of Bluefield v. McClaugherty [W. Va.] 63 SE 363.

48. That 20 days was given an owner to lay walks, when the statute requires but 10, will not preclude recovery by the city. City of Bluefield v. McClaugherty [W. Va.] 63 SE 363.

49. A formal assessment of such cost is not essential to recovery by the city, such assessment being ministerial and having no judicial force under the statutes or charter. City of Bluefield v. McClaugherty [W. Va.] 63 SE 363.

50. Under Kirby's Dig. §§ 5462, 5466, property owners may be penalized for each day's delay in failing to comply with an ordinance requiring them to make street improvements. Brizzolara v. Ft. Smith [Ark.] 112 SW 181. Under acts 1887, p. 394, an owner who refuses to construct sidewalks may be penalized by fine and imprisonment. O'Haver v. Montgomery [Tenn.] 111 SW 449.

An ordinance providing for an improvement must be consistent with the resolution authorizing it, and, since it forms the basis for the contract, must be more particular than the resolution, and must specify the details of the work and materials to be used.[51] The ordinance must properly describe the character and location of the proposed improvement[52] and materials to be used,[53] and describe the improvements therein proposed[54] usually by plans and specifications therein contained[55] or referred to,[56] but impracticable exactness in specifications is not required.[57] In some states it must prescribe the period within which the work must be completed,[58] but this requirement is not universal.[59]

51. City of Chicago v. Gage, 237 Ill. 328, 86 NE 633.

52. The ordinance providing for the improvement must specify its locality as well as describe and specify its nature. People v. Willison, 237 Ill. 584, 86 NE 1094. A resolution of intention to make improvements need only be sufficiently specific to inform the public of the general nature of the improvement, and need not give a detailed description thereof. Muff v. Cameron [Mo. App.] 114 SW 1125. An ordinance which requires property owners to lay "granolithic" walk on a street on another portion of which such walk is already laid, and requiring the walk to be of the same width as that already laid, is sufficient to justify recovery of the cost thereof on default of the owner to lay the walk, though it does not specify material used. City of Bluefield v. McClaugherty [W. Va.] 63 SE 363. Under Hurd's Rev. St. 1908, c. 24, requiring sidewalk ordinance to define the location with reasonable certainty, discribe its width, etc., no more certainty is required as to location than is required as to other particulars. People v. Willison, 237 Ill. 584, 86 NE 1094. On fixing of an improvement, a surveyor must look not only to the ordinance but also to maps and plats made part of the record, and may also look to monuments, but cannot use them to contradict the ordinance. Id. On a claim that an ordinance providing for a sidewalk was void for uncertainty as to location of the walk, owners held entitled to show width of traveled way surrounding the square, that it was a park of cerain dimensions, etc. Id. In determining the meaning of an ordinance as to the location of an improvement, the entire ordinance is to be considered. Id. Ordinance providing for sidewalk held not void for uncertainty as to location of sidewalk. Id. Under Burns' Ann. St. 1908, § 8959, relative to street improvements, held, the kind of improvement to be made and material to be used in the wearing surface is determined by the final resolution. Martindale v. Rochester [Ind.] 86 NE 321.

53. Burns' Ann. St. 1908, § 8959, providing that board of trustees of incorporated towns shall order improvements by resolution, declaring the necessity, etc., held, a resolution authorizing the use of two or more kinds of paving material was not void. Martindale v. Rochester [Ind.] 86 NE 321. Burns' Ann. St. 1908, § 8959, providing that on adoption of final resolution for an improvement the board of trustees shall file with the town clerk or engineer detailed plans and specifications, is to enable prospective bidders to ascertain the kind and amount of work, and only requires the filing of such plans within a reasonable time. Id. A provision in an ordinance that ingredient of concrete to be used in paving should be "torpedo sand or lime stone screenings, or other material equal thereto for concrete purposes," does not render it uncertain. Whether the ordinance has been substantially complied with is to be determined by the court in which the assessment is confirmed. City of Chicago v. Gage, 237 Ill. 328, 86 NE 633. It is the duty of the mayor and council to designate under one resolution and under one contract one particular kind of material to be used for paving. Oklahoma City v. Shields [Okl.] 100 P 559.

54. "Pave," in resolution to pave streets, includes construction of gutters, catch basins and sewer connections. Muff v. Cameron [Mo. App.] 114 SW 1125. Under Kirby's Dig. § 5542 relative to the power of municipalities to compel owners to build sidewalks or to pay the cost thereof, ordinance, notices and resolutions construed, and held to furnish sufficient information to an owner to enable him to construct a proper cement walk, and he was liable for the cost of one constructed by the city on his failure to comply. Gregg v. Stuttgart [Ark.] 115 SW 394.

55. Laws 1897, p. 440, providing that board of sewer commissioners shall prepare a map and plan of permanent sewer system, with specifications, etc., does not require that map or plan embrace every lateral sewer that may become necessary with growth of the village. Mead v. Turner, 60 Misc. 145, 112 NYS 127. Specification in sewer ordinance requiring slants every 25 feet is not unreasonable. City of East St. Louis v. Davis, 233 Ill. 553, 84 NE 674.

56. An ordinance for an improvement may adopt specifications as a part of itself which are at the time of its adoption on file in some place designated therein. City of Independence v. Nagle [Mo. App.] 114 SW 1129. Order requiring owners to lay plank walks in accordance with plans and specifications to be furnished by the city engineer construed, as referring to specifications already made and on file, and is sufficient. City of Bluefield v. McClaugherty [W. Va.] 63 SE 363. Under Ann. Code 1892, §§ 3011, 3012, an ordinance for an improvement must definitely describe it, or to refer to plans on file which will give the information. City of Jackson v. Williams [Miss.] 46 S 551. Ordinance for sidewalks held bad for insufficient description of proposed work. Id.

57. Estimate for sewage system describ-

Where a petition by property owners is required,[60] it must be signed by the required number of owners [61] or persons authorized to sign.[62] Where a petition is signed by the requisite number of owners, the fact that it contains an illegal condition does not render it void.[63] That a city charter confers power on assessors to determine whether a property owner's petition is a majority one or not does not preclude the council from prescribing the form of petition,[64] and a charter provision whereby the finding of a city council that a proper petition for the public work has been filed is rendered conclusive is not a denial of due process of law, though such finding is made without notice.[65] In some states the determination of the sufficiency of such petition is for certain boards,[66] which have no authority to determine questions of law as to the form of the petition.[67]

(§ 4) *C. Notice and hearing.*[68]—See 10 C. L. 1311—In the absence of statutory mandate, notice of a proposed improvement to owners of property affected is not es-

ing various kinds and dimensions of sewers, materials to be used, statement of cost and character of building and machinery held sufficiently specific, a detailed statement of items of expense being unnecessary. City of East St. Louis v. Davis, 233 Ill. 553, 84 NE 674.

58. Under St. Joseph city charter (Ann. St. 1906, §§ 5747-9), providing that ordinance for improvement shall fix the time within which it shall be completed, an ordinance providing that delays caused by certain facts shall not be counted held void, "fix" meaning immovable or definite. Rockliff v. Peters [Mo. App.] 115 SW 503.

59. Failure of an ordinance to fix the time for completing an improvement does not invalidate an assessment therefor. Brigham v. Hickman [Mo. App.] 116 SW 449.

60. Under St. 1898, § 925-175, authorizing a city to pave on a two-thirds vote of council, and § 925-176, providing for paving on petition of majority of frontage owners, the power to pave is derived from § 925-175, and the fact that petition is not signed by majority of frontage owners is but an irregularity. Lawton v. Racine [Wis.] 119 NW 331. Where two-thirds of board of trustees of town voted to make an improvement, it is immaterial that petition was not signed by requisite number of freeholders. Daly v. Higman [Ind. App.] 87 NE 669. Under Rev. St. 1887, § 3604, amd. by acts Feb. 7, 1899, and March 14, 1899 (Laws 1899, pp. 136, 443), and since repeal of Rev. St. 1887, § 1762, petition is **unnecessary** to confer jurisdiction on county commissioners to construct bridge. Gilbert v. Canyon County, 14 Idaho, 429, 94 P 1027.

61. Under Buffalo city charter authorizing paving only on petition of a majority of owners of two-fifths of the frontage, several persons owning a parcel are improperly counted as one. People v. Buffalo Assessors, 127 App. Div. 851, 111 NYS 924.

62. An executor is not an "owner," and his signature as executor is not authorized. People v. Buffalo Assessors, 109 NYS 991. There is no presumption that one of two co-owners has authority to sign for the other. Id. There is no presumption that an officer of a corporation has authority to sign a petition for an improvement. It must appear that he was authorized by directors. Id. In the absence of statutory inhibition, property owners may sign a petition for an improvement by attorney. Want of authority of the attorney must be proved. Id. Where a city charter provided that petition for public improvements should be applied for by resident owners, but did not require that such owners appear in person, their authorized agents could appear and fill in date of signing after their signatures. People v. Buffalo Assessors, 193 N. Y. 248, 86 NE 466.

63. Under Laws 1903, p. 121, c. 82, authorizing improvements to amounts stated in petition, where a petition was signed by three-fourths of the owners, the fact that it contained some illegal conditions held not jurisdictional, and did not render action under the petition void. James v. Seattle, 49 Wash. 347, 95 P 273.

64. May reject the petition if not in proper form even after assessors have certified it. People v. Buffalo Assessors, 109 NYS 991.

65. Londoner v. Denver, 210 U. S. 373, 52 Law. Ed. 1103.

66. Under Buffalo city charter (Laws 1891, pp. 221, 222, amended by Laws 1900, c. 707), providing that finding of board of assessors as to certain facts relative to petition for paving streets shall be conclusive, held, their finding that petition contained names of a majority of resident owners, etc., was not reviewable on certiorari. People v. Buffalo Assessors, 193 N. Y. 248, 86 NE 466. On issue as to whether a petition for paving was signed by requisite number of owners, the objection being that it was signed by agents not authorized, evidence held insufficient to overcome the prima facia case arising from the fact that the council found the petition sufficient. Hedge v. Des Moines [Iowa] 119 NW 276.

67. Under Buffalo city charter (Laws 1891, pp. 221, 222, amended by Laws 1900, c. 707) requiring petition for improving streets to be submitted to a board of assessors, who are to certify to certain facts, such board has no jurisdiction to determine questions of law as to form of petition and manner of signing. People v. Buffalo Assessors, 195 N. Y. 248, 86 NE 466.

68. See, also, post, § 9.

**Search Note:** See Municipal Corporations, Cent. Dig. §§ 776-789, 796, 799; Dec. Dig. §§ 294, 295, 298.

sential,[69] but where required it is imperative that it be given,[70] unless waived,[71] and that owners have an opportunity to be heard.[72] The sufficiency of the notice depends on the requirements of the law,[73] and the facts.[74]

(§ 4) *D. Protests and remonstrances.*[75]—See 10 C. L. 1312—Remonstrances must be made by persons entitled to protest,[76] at the proper time.[77]

(§ 4) *E. Estimates of cost.*[78]—See 10 C. L. 1312—An estimate of costs need not contain a complete inventory of every article that is to enter into the construction.[79]

69. Legislature has power without violating due process of law clause, to determine that an improvement shall be made, amount to be raised, territory benefited, and persons to be assessed, or it can commit the matter to commissioners. New York Cent. & H. R. R. Co. v. Rochester, 129 App. Div. 805, 114 NYS 779. Legislature has power to authorize a city council to make improvements in disregard of protests of property owners, and it may declare that determination of assessors that petition is signed by majority of owners is conclusive. People v. Buffalo Assessors, 109 NYS 991. Burns' Ann. St. 1908, § 8959, requiring that declaratory resolution be confirmed, modified or rescinded, after hearing of objections, by final resolution, does not require the giving of notice of such final resolution. Martindale v. Rochester [Ind.] 86 NE 321. Under Hurd's Rev. St. 1908, c. 24, § 513, dispensing with public hearing in proceedings for construction of a sidewalk, hearing held not necessary in proceeding to construct cinder walk with wooden curb and berm as it was nothing but a walk, though it included a curb and berm. City of Chicago v. Bassett, 238 Ill. 412, 87 NE 384. A statute delegating power to make public improvements and assess property is not void because of failure to require notice to owners. Such requirement will be read into the statute. Road Imp. Dist. No. 1 v. Glover [Ark.] 110 SW 1031. Under Act March 6, 1905, requiring petitioners in drainage proceedings to give notice to resident owners not petitioners, a petitioner who gave notice as required by statute, but was afterwards dismissed from the proceeding, held not entitled to additional notice, he having instituted the proceedings. Pumphrey v. Hollis [Ind. App.] 87 NE 255.

70. Where proceedings of municipal authorities plainly indicate that the improvement is intended to be made at public expense, and no special assessment contemplated, the fact that the landowner stood by in silence is no waiver of his right to notice and hearing. Under the circumstances the municipality would be estopped from charging laches. Walsh v. Newark [N. J. Law] 71 A 39. If the determination to make improvements be committed by the legislature to commissioners, they must give notice to persons interested and hearing, but if the legislature makes the determination, no notice or hearing is necessary. New York Cent. & H. R. R. Co. v. Rochester, 129 App. Div. 805, 114 NYS 779. Under Ann. Code 1892, §§ 3011, 3012, cost of sidewalks cannot be taxed against abutting owners unless they are given five days' notice. City of Jackson v. Williams [Miss.] 46 S. 551.

71. A property owner who appears before the city council and objects to a proposed improvement waives defects or irregularities in the notice of intent to make the improvement. Andre v. Burlington [Iowa] 117 NW 1082.

72. Under Hurd's Rev. St. 1905, c. 24, § 590, providing for a hearing after filing by board of local improvements of certificate of the cost of an improvement, to determine whether the improvement conforms to the ordinance, owners of property assessed may show that it does not, and on such finding by the court it is the duty of the board to procure completion so as to so conform. Cosgrove v. Chicago, 235 Ill. 358, 85 NE 599.

73. Notice by publication is sufficient. Guilfoyle's Ex'x v. Maysville [Ky.] 112 SW 666.

74. One who appears before a city council in response to a notice to construct a sewer may not complain of defect in the notice. Andre v. Burlington [Iowa] 117 NW 1082. Where some notice was given of proceedings for town improvement which board of trustees found to be sufficient, its sufficiency was not subject to collateral attack in suit to foreclose an assessment lien. Daly v. Higman [Ind. App.] 87 NE 669. When resolution to construct sidewalk in municipal corporation is duly passed, and notice thereof is duly served upon owner of an abutting lot, who fails to comply with such notice, and afterwards sells and conveys lot, corporation may nevertheless proceed, within reasonable time, to make such improvement and assess expense thereof upon such lot in name of the subsequent purchaser, who must be held to have constructive notice at least. Kahn v. Cincinnati, 11 Ohio C. C. (N. S.) 440.

75. **Search Note:** See Municipal Corporations, Cent. Dig. §§ 797, 798; Dec. Dig. § 297; 13 A. & E. Enc. P. & P. 305.

76. Under Laws 1895, p. 1372, c. 635, providing that if no remonstrance signed by a majority of persons who will be assessed for opening of a street is presented to the council within a certain time the street will be opened, a remainderman may not sign a remonstrance, though life estate was subject to divestiture. In re Glenwood Ave, 115 NYS 654.

77. Discretion of county commissioners in determining that an improvement is demanded by public health, welfare or convenience, will not be interfered with where those complaining failed to make any objections to proceedings before county commissioners. Grove v. Delaware County Com'rs, 5 Ohio N. P. (N. S.) 521.

78. **Search Note:** See Municipal Corporations, Cent. Dig. §§ 792-795, 829; Dec. Dig. §§ 296, 315.

79. Village of Donovan v. Donovan, 236 Ill. 636, 86 NE 575. Estimate of cost of water system including cost of labor and material necessary, so itemized that an experienced contractor could determine cost of omitted articles, is sufficient. Id.

It is sufficient if it contain the substantial component elements.[80] Such estimate must conform to statutory requirements.[81]

(§ 4) *F. Approval and acceptance of work.*[82]—See 8 C. L. 518—Acceptance of the work by city officials is conclusive on the property owners.[83]

(§ 4) *G. Curative legislation and ratification.*[84]—See 10 C. L. 1818—A city may validate a contract for the construction of an improvement by ratification after acceptance of the work.[85] In Illinois the county court has no power to confirm a void ordinance for an improvement.[86]

§ 5. *Proposals, contracts and bonds.*[87]—See 10 C. L. 1813—A contract for a public improvement must be entered into by the duly authorized officials of the municipality,[88] and where a city asserts that officials were without authority, it has the burden to prove it.[89] Persons dealing with public corporations are charged with notice that officials thereof have only the authority conferred upon them by law.[90] In the absence of a charter provision, a city may contract for extra work without first making a specific appropriation.[91] A municipal board, in making a contract for the erection of a municipal building, acts as agent of the municipality, and its contract is the contract of the municipality.[92]

*Advertisements for bids and awarding of contract.*See 10 C. L. 1818—As a general

**80.** An estimate for "constructing one new catch basin at $50," and statement that it included labor and materials, and also contained an item for "adjusting sewers, catch basins and manholes, $485," held a sufficient compliance with an ordinance requiring that the basin be built of brick on a two inch plank, etc., City of Chicago v. Gage, 237 Ill. 328, 86 NE 633.

**81.** Under Starr & C. Ann. St. Supp. 1902, p. 160, requiring estimate of cost of public improvement to be signed by the engineer of the board of local improvements, the estimate signed by the engineer is not defective because not signed by the president of the board. City of East St. Louis v. Davis, 233 Ill. 553, 84 NE 674.

**82. Search Note:** See Municipal Corporations, Cent. Dig. §§ 890-898; Dec. Dig. §§ 358-365.

**83.** Where mayor and council have passed on the work and accepted it as satisfactory, their action is conclusive on the property owners in the absence of fraud. Ferguson v. Coffeyville, 77 Kan. 391, 94 P 1010.

**84. Search Note:** See Municipal Corporations, Cent. Dig. §§ 832-836; Dec. Dig. §§ 318-320.

**85.** Where a city contracted for work which was completed and accepted without the contract having been reported to the council for action, a subsequent ratification rendered it valid. Nickels v. Frankfort Councilmen, 33 Ky. L. R. 918, 111 SW 706. Where improvements were made before the council had acted on the contract therefor, the right of the council to ratify the contract was not affected by the fact that the city had become owner of the claim against the property. Id.

**86.** Petition to confirm an assessment hereunder properly dismissed. Village of Bellwood v. Latrobe Steel & Coupler Co., 238 Ill. 52, 87 NE 66.

**87. Search Note:** See notes in 10 C. L. 1314; 44 L. R. A. 527; 9 L. R. A. (N. S.) 154; 3 Ann. Cas. 745; 7 Id. 107; 8 Id. 396; 9 Id. 832; 10 Id. 709.

See, also, Municipal Corporations, Cent. Dig. §§ 850-913; Dec. Dig. §§ 326-376.

**88.** A contract for construction of a sewer under Laws 1903, p. 29, § 7, should be made with the chairman of the sewerage committee where the expense is to be raised by special assessment. Broad v. Moscow [Idaho] 99 P 101. Under Laws 1897, p. 451, c. 414, § 313, a village treasurer is not a member of the board of trustees, and is not authorized to make contracts on behalf of the village. In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008. Under Laws 1907, p. 338, c. 428, authorizing the city of New York and a village to enter an agreement with the village to provide a sewer system, the village trustees must obtain authority to enter into the contract from the voters by submission to popular vote. Mead v. Turner, 60 Misc. 145, 112 NYS 127. A town is not liable for work on a highway which selectmen had no authority to contract for. Kelley v. Torrington [Conn.] 71 A 939.

**89.** Burden to show that sealed instruments are not the usual form of contracts by the city. Peterson v. New York, 194 N. Y. 437, 87 NE 772. Under Laws 1883, p. 666, c. 490, acqueduct commissioners have power to make a contract under seal for an improvement unless it is shown that such contract is disadvantageous to the city. Id.

**90.** If board of trustees of town had no authority to delegate to town engineer authority to determine fulfillment of contract, persons interested were bound to take notice. Martindale v. Rochester [Ind.] 86 NE 321. Board of health cannot bind city to pay for plans and specifications for a hospital at cost in excess of amount authorized to be expended for hospital purposes. Ely v. Newark [N. J. Err. & App.] 70 A 159. See, also, Public Contracts, 12 C. L. 1442.

**91.** Subject only to the constitutional limitation of 5 per cent. on assessed value. Heman v. St. Louis, 213 Mo. 538, 112 SW 259.

**92.** Arzonico v. West New York Board of Education, 75 N. J. Law, 21, 69 A 450.

rule, contracts for public improvements must be awarded on competitive bids.[93] The fact that no harm was done by letting a contract without competitive bidding is no answer to taxpayers,[94] but a city may be estopped to plead ultra vires where it obtains the benefit of the work.[95] While competitive bidding is not always essential,[96] yet, where it is required, it must be under circumstances which permit of free competition[97] without discrimination in favor of a particular material.[98] Alternative bids may be asked where a standard as to articles is set up in the specifications.[99] Where a thing to be furnished under specifications for a municipal con-

93. Where an ordinance adopts specifications which refer for additional specifications to a formula to accompany the bid, held, the latter specifications were not adopted, and the work and materials provided for and the contract were not the result of competition. City of Independence v. Nagle [Mo. App.] 114 SW 1129. Under Acts 1903, p. 318, Burns' Ann. St. 1901, §§ 5591, 5594a, relative to construction of courthouses and furnishing them, contracts for furniture for a new courthouse must be let on competitive bids based on plans and specifications. Board of Com'rs of Huntington County v. Pashong, 41 Ind. App. 69, 83 NE 383. Where land was taken and improved so as to be usable as a street, a resolution providing that it be built two feet higher held to provide for improvements within Ionia City Charter, § 108, requiring that where improvements exceed $100 in expense, bids shall be called for, on which contract shall be let. Peterson v. Ionia, 152 Mich. 678, 15 Det. Leg. N. 389, 116 NW 562. Contract by a city for paving entered into without proper opportunity for competitive bidding as required by P. L. 1899, p. 370, is void. Mullane v. Newark [N. J. Law] 68 A 412. Pub. Acts 1905, p. 432, provides for improvement of highways, and requires selectmen of a town to advertise for bids according to plans prepared, etc. Held that selectmen cannot waive any of the provisions of the act nor expend any of the money except in conformity to the improvements. Kelley v. Torrington [Conn.] 71 A 939. Hurd's Rev. St. 1905, c. 24, par. 580, § 74, that improvements in excess of $500 be let to the lowest bidder, is mandatory. City not justified in completing abandoned work of contractor on ground of emergency. City of Centralia v. Norton & Co., 140 Ill. App. 46. A contract for the building of school house awarded to contractor who has been permitted to change his bid by omitting various items and thus reducing aggregate cost to amount realized from sale of bonds is contract made without notice or competition, and is illegal and void under Rev. St. § 3988. McAlexander v. Haviland School Dist., 7 Ohio N. P. (N. S.) 590. Under Pub. School Act, §§ 52, 53 (P. L. 1903, pp. 5-21), imposing requirements as to letting contracts for schools, repairs, etc., board of education could not modify specifications and award contract to former bidder, though bid lower after changes. Scola v. Montclair Board of Education [N. J. Law] 71 A 299.

94. No answer to the claim of taxpayers that the tax bills are void because thereof. City of Independence v. Nagle [Mo. App.] 114 SW 1129.

95. Where additional work was illegally included in a contract without advertising for bids as required by statute, but the work was performed and the city obtained the benefits, it was held estopped to plead ultra vires. Peterson v. Ionia, 152 Mich. 678, 15 Det. Leg. N. 389, 116 NW 562.

96. St. 1898, § 921, requiring contracts exceeding $50 to be let to the lowest bidder, does not prevent repair of highways by hiring men and teams without bids, though the total expense exceeds $50. State v. Wallschlaeger, 137 Wis. 136, 118 NW 643. Under St. Louis charter (Ann. St. 1906, p. 4857), relative to contracts for public improvements, held, little odds and ends of jobs and repairing need not be ordered by ordinance and the contract let under competitive bidding. Heman v. St. Louis, 213 Mo. 538, 112 SW 259.

97. Requirement that paving should be done with "Iola cement or better" excludes competition with other brands equally good. Muff v. Cameron [Mo. App.] 117 SW 116. Requirement that cement to be used should be "Iola Portland cement or better" did not restrict competition. Muff v. Cameron [Mo. App.] 114 SW 1125. By merely adding another make of vitrified brick to a specification for material for paving, the field of competition was merely extended, and competitive bidding was not interfered with. Id.

98. Where estimates for various styles of pipe submitted to competition of bidders were made in accordance with engineering standards, there was no discrimination on the ground that an excessively high estimate was placed on efficiency of certain style of pipe. Holly v. New York, 128 App. Div. 499, 112 NYS 797. Unpatented lock bar joint pipe made only by patented machinery is not a patented article within Laws 1901, p. 642, c. 466, providing that no patented article shall be advertised for or purchased except under circumstances that there can be fair opportunity for competition, the conditions of which shall be prescribed by the board of estimate and approval. Id. In selecting material to be used, a material manufactured by a single firm cannot be selected and competition thus eliminated. To justify selection of any article not patented for paving, it must appear that there are no other materials that can be brought into competition. Taylor v. Schroeder, 130 Mo. App. 483, 110 SW 26. Paving ordinance requiring use of certain brick held void. Id.

99. A director of public works when publishing specifications is not required to decide finally on every item. He may ask for alternative bids on two articles to be furnished, having set up a standard as to them in his specifications and prescribed a method

tract may be manufactured by anyone in conformity to requirements for purchase in the open market at a standard price there is no reason for asking alternative bids,[1] but if the thing is protected by patent and any one of a number of articles complies with the established standard, the best interests of the public require that bids be asked for any or all.[2] Where each bidder is given an opportunity for fair competition, the bidders are on equal terms.[3] Statutory requirements as to publication for bids must be complied with.[4] Failure to comply renders the contract void.[5] A rule requiring contracts to be let to the lowest and best bidder does not require them to be awarded to the lowest bidder,[6] and, in the absence of fraud, the discretion of the board which has power to award, in awarding the contract, will not be interfered with.[7] A bidder who makes a mistake in his estimate may be entitled to be relieved from his bid.[8] But where the successful bidder refuses to enter into a contract, the council, by declaring another the lowest bidder, does not rescind its prior finding,[9] and it may forfeit the deposit.[10]

*Form of contract.*[See 10 C. L. 1317]—The acceptance of a definite bid pursuant to an advertisement constitutes the contract,[11] and the contract must correspond with conditions previously laid down as a basis for competitive bidding.[12] Where a contract is divisible, it is not wholly void because of one illegal provision.[13] In Texas the commissioner's court may contract for the construction of bridges according to plans differing from those originally adopted.[14] A contract for a pub-

of bidding which gives equal opportunity to each bidder. Parker v. Philadelphia, 220 Pa. 208, 69 A 670.

**1, 2.** Parker v. Philadelphia, 220 Pa. 208, 69 A 670.

**3.** Holly v. New York, 128 App. Div. 499, 112 NYS 797.

**4.** "Ten successive days," within an ordinance requiring notice of bids to be published for that period, means ten successive days the newspaper can run without violating Ann. St. 1906, p. 1420, prohibiting labor on Sunday. Porter v. Boyd Pav. & Const. Co., 214 Mo. 1, 112 SW 235. Under Burns' Ann. St. 1901, § 4291, providing that in case all bids are rejected the council may order the work done by the street commissioner, where the council accepted a bid and upon reconsideration rejected it and accepted the bid of another bidder without readvertisement, the proceedings were jurisdictionally defective. Zorn v. Warren-Scharf Asphalt Pav. Co. [Ind. App.] 84 NE 509.

**5.** Under Ann. St. 1906, §§ 5503, 5508, 5661, providing that ordinances shall not take effect until 10 days after enactment, and that proceedings relative to street improvements must be initiated by ordinance, publication of proposals for bids before the ordinance becomes effective is unauthorized, and the contract and assessments are void. Cushing v. Russell [Mo. App.] 114 SW 555.

**6.** Other things than price may be taken into consideration. Louisville Steam Forge Co. v. Gast [Ky.] 115 SW 761.

**7.** In the absence of fraud, the discretion of a board of public works in awarding a contract to a higher bidder, who proposed to do the work with a certain kind of brick, instead of to a lower bidder, who proposed to do the work with a kind of brick the board refused to consider, will not be interfered with by the courts. Louisville Steam Forge Co. v. Gast [Ky.] 115 SW 761. Where a contract is awarded to the lowest bidder, a taxpayer cannot complain because the bidder would make a larger profit than a higher bidder for another style of pipe would have made. Holly v. New York, 128 App. Div. 499, 112 NYS 797.

**8.** Where a contractor in making a bid made a mistake and submitted a bid for less than cost of materials, and the council, though notified by their engineer of the facts, accepted the bid, and within 5 hours thereafter the contractor asked to be relieved and offered to pay cost of reletting the contract, held, he was entitled to relief. Bromagin & Co. v. Bloomington, 234 Ill. 114, 84 NE 700.

**9.** Where one refused to enter into a paving contract after having been declared the lowest bidder, by declaring another to be the lowest bidder without readvertising the council did not rescind its finding as to who was the lowest bidder, so as to release the deposit. Turner v. Fremont, 159 F 221.

**10.** Deposits made at the time a bid on paving was submitted held liquidated damages where the bidder refused to enter into the contract. Turner v. Fremont, 159 F 221.

**11.** West Chicago Park Com'rs v. Carmody, 139 Ill. App. 635. No contract exists where contractor making bid made mistake and promptly notified city before bid was accepted. City of Bloomington v. Bromagin & Co., 137 Ill. App. 509.

**12.** Hedge v. Des Moines [Iowa] 119 NW 276. Contract held to conform to notice to bidders in view of Code Supp. 1902, §§ 792a-792b. Id.

**13.** Contract for construction of sewer and appurtenances and disposal plant is divisible, and the former may be sustained though the latter is void where the city intended to have the two improvements separable and advertisement for bids stated that "contracts" would be let and bids were separate. Uvalde Asphalt Pav. Co. v. New York, 60 Misc. 210, 112 NYS 535.

**14.** Under Rev. St. 1895, art. 4792. Webb

lic work is not changed in its essential character where made in the name of public officers rather than the real contractor, the government.[15]

*Particular contract provisions.*See 10 C. L. 1317—In construing a contract for a public improvement, the general rules of construction are to be applied.[16] Where a contract provides that an engineer shall decide certain facts, his determination is conclusive [17] unless he acts in bad faith.[18] But such determination must be made by the engineer specified.[19] Such provision does not preclude judicial construction after performance.[20] A contract is not rendered void by a provision requiring the contractor to guarantee the work,[21] nor by a provision permitting him to appropriate surplus dirt,[22] nor by a provision allowing him compensation for extras furnished.[23] A stipulation that damages arising from the nature of the work shall be borne by the contractor renders the contract void.[24]

*Performance of contract.*See 10 C. L. 1319—A contractor must acquaint himself at his peril with the nature and extent of the work to be performed,[25] and it is often required that the performance of the contract be guaranteed by a deposit.[26] In determining whether a contract has been performed, the test is whether the work has been completed.[27] Where a contract is awarded, the city should proceed with

County v. Hasie [Tex. Civ. App.] 113 SW 188.

15. Contract for Soldiers' Home in name of commissioners by mistake. Speir v. U. S., 31 App. D. C. 476.

16. Contract for construction of water and sewer system construed, and held to be for complete water and sewer system for contract price, and not one to do work on such system to amount of sum named. Atlantic Trust & Deposit Co. v. Laurinburg [C. C. A.] 163 F 690.

17. Contract provided for extra compensation for "rock excavation," and that city engineer should determine quality of materials. Held, determination by the engineer whether certain material was rock was conclusive if made in good faith. City of Atchison v. Rackliffe [Kan.] 96 P 477. Held error to submit to the jury whether engineer misconceived terms of contract respecting meaning to be given "rock," and to charge that in such case his decision could be disregarded. Id.

18. If engineer acted in bad faith, contractor was entitled to extra compensation, at rate fixed by contract. City of Atchison v. Rackliffe [Kan.] 96 P 477. Could not be forced to rely on reasonable value of services, though engineer refused to measure rock. Id.

19. Where a contract for construction of a sewer provided for termination thereof on the certificate of the engineer of the board of metropolitan sewerage commissioners, but the successor of such board under St. 1901, p. 106, placed the work under an independent engineer, such board could not terminate the contract so far as the right of the contractor depended on termination on the certificate of the engineer therein specified. Commonwealth v. National Cont. Co., 198 Mass. 554, 85 NE 86.

20. Provision in contract that in case of dispute engineer shall settle same and interpret meaning of specifications does not deprive parties of their right to judicial construction of contract after it has been performed. Gammino v. Dedham [C. C. A.] 164 F 593.

21. Guaranty of work for seven years, such requirement being authorized by Code Supp. 1902, § 814, and throwing no additional burden on abutting owners. Hedge v. Des Moines [Iowa] 119 NW 276.

22. Provision did not render contract void on collateral attack. Martindale v. Rochester [Ind.] 86 NE 321.

23. That a contract for an improvement required contractor to furnish materials, for which he was to be paid, which were not mentioned in resolution directing the assessment, did not render the contract void. Martindale v. Rochester [Ind.] 86 NE 321.

24. As tending to increase cost of work. Van Loenen v. Gillespie, 152 Cal. 222, 96 P 87; Hatch v. Nevills [Cal.] 95 P 43; Glassell v. O'Dea, 7 Cal. App. 472, 95 P 44; Standsbury v. Poindexter [Cal.] 99 P 182. That bidders did not increase their bids because of such provisions did not obviate the objection, as it might have deterred some persons from bidding. Standsbury v. Poindexter [Cal.] 99 P 182.

25. A contractor for construction of a sewer was required, at his peril, to acquaint himself with the character of the land to be excavated before signing, and conversations relative thereto are not admissible to vary the terms of the contract. Gammino v. Dedham [C. C. A.] 164 F 593.

26. Becomes forfeited on failure to carry out contract. West Chicago Park Com'rs v. Carmody, 139 Ill. App. 635.

27. In determining whether a sewer has been completed within a provision that tax bills shall not be issued until completed, the test is whether it has been completed, and not whether a detail of the work is in accordance with the contract, and proof that work had not been done in accordance with the contract does not show that it is not completed. Porter v. Boyd Pav. & Const. Co., 214 Mo. 1, 112 SW 235. Where a contract required construction of four catch basins, but the city engineer directed omission because the street was not on grade, held property owners could not complain where the cost of the basins was not included in the final estimate. Id. Lack of

reasonable speed to confirm it.[28] It is presumed that extension of time for completing the work allowed by ordinance is reasonable.[29] A city may insert a time limit for completion of the contract though preliminary negotiations, specifications and bids are silent in this respect.[30] Such limitation does not apply to excess work performed,[31] but is not waived because of the fact that assessments are made without respect thereto.[32] Where time limit is specified in the contract but not in the ordinance, it must be completed within a reasonable time.[33] A contractor delayed in constructing a street because of the city's default in failing to obtain a complete right of way may abandon the work or claim damages for the delay.[34] An assignee stands in no better position than the contractor himself,[35] and an assignment of money to become due under the contract is not an assignment of the contract.[36]

*Allowance of claims and recovery by contractor.*[See 10 C. L. 1820]—Whether a contractor is entitled to compensation for materials used,[37] and the measure of compensation, rests in the terms of the contract.[38] Recovery of compensation may be

power of board of trustees of a town to authorize town engineer to conclusively determine fulfillment of contract, amount due contractor, etc., did not avoid entire contract. Martindale v. Rochester [Ind.] 86 NE 321.

**28.** If it delays as a result of collusion with the contractor so that he may have more than a reasonable time to do the work, the contract is void, and assessments cannot be enforced. Brigham v. Hickman [Mo. App.] 116 SW 449.

**29.** Evidence insufficient to overcome such presumption. Brigham v. Hickman [Mo. App.] 116 SW 449.

**30.** Such power is implied from its general powers and from the fact that the work must be done during the summer time. Barber Asphalt Pav. Co. v. Wabash [Ind. App.] 86 NE 1034.

**31.** Where a contractor was obliged to excavate many times the amount of rock estimated, a provision for forfeiture of $10 per day after expiration of the contract period did not apply to time required to excavate the excess rock above 25 per cent. of the estimated amount. Gammino v. Dedham [C. C. A.] 164 F 593.

**32.** A provision for forfeiture of a certain sum per day for failure to complete the work within a certain period is not waived by the fact that the improvement is to be paid for by assessments which were made without respect to such damages. Barber Asphalt Pav. Co. v. Wabash [Ind. App.] 86 NE 1034.

**33.** Where it appears that the contract time is not reasonable, the city may by ordinance extend it. Brigham v. Hickman [Mo. App.] 116 SW 449. Where delay caused by default of lower contractor exceeds one hundred and twenty days, question whether it was an unreasonable delay with reference to the upper contractor is not one for determination by jury, but is of such character as in law to absolve upper contractor from obligations of his contract. County Com'rs v. Carroll, 7 Ohio N. P. (N. S.) 17. Upper contractor will be allowed time beyond that named in his contract, notwithstanding time is of essence of contract. Id.

**34.** Sheehan v. Pittsburgh, 213 Pa. 133, 62 A 642. Delay clearly not within contract provision that contractors be liable for delays from unforeseen obstructions and difficulites. Id.

**35.** Where a town issues warrants against a special fund, and such warrants are assigned by the contractor, and the improvement was not of special benefit to abutting owners, the assignee cannot compel payment out of the general fund, as he stands in no better position than the contractor who was charged with notice that the improvement was not of special benefit to abutting owners. Soule v. Ocosta, 49 Wash. 518, 95 P 1083.

**36.** Where a materialman furnished material to a contractor and the contractor thereafter assigned all his rights to assessments and bonds, etc., the materialman cannot hold the assignee. National Surety Co. v. Maag [Ind. App.] 86 NE 862.

**37.** Contract for construction of sewers providing that contractor shall furnish all materials, that excavations shall be done in most careful manner, all trenches shored with sheathes, piling, etc., held not to give contractor compensation for lumber left in trenches. City of Richmond v. Barry [Va.] 63 SE 1074. Where a contract for public improvements was terminated before full performance pursuant to provision thereof, thus entitling the contractor to compensation for work done, he cannot recover for material and tools not kept by the village nor for buildings and roads constructed. Coates v. Nyack, 127 App. Div. 153, 111 NYS 476.

**38.** Under contract for construction of sewer, contractor held entitled to compensation at specified rate per 1,000 bricks ascertained by measurement of work. City of Richmond v. Barry [Va.] 63 SE 1074. Where contract for construction of a sewer stated approximate quantities of earth and rock to be excavated, provided that estimates could be increased 25 per cent., held that the contractor could recover on a quantum meruit for excess above 25 per cent. on rock excavated. Gammino v. Dedham [C. C. A.] 164 F 593. Contract for bridge construed and no liability, express or implied, imposed on government for temporary liftspan, erected after accident, to prevent delay in opening navigation. Contract contained many stipulations as to uninterrupted railway service with no express

precluded where the work is in violation of an ordinance,[39] or by the construction of the contract which is adopted by the parties.[40] A contractor who furnishes more expensive material than is called for cannot recover the difference in cost.[41] Where a contract provides for payment on the certificate of the building department, liability is contingent on the production of such certificate.[42] The duty of the board of public works to grant a contractor an estimate entitling him to partial payment cannot be enforced by mandamus.[43] Where a city enters into a new contract after a contractor fails to complete the work, payments accruing thereunder are not subject to claims due under original contract.[44] The liability of a municipality for breach of contract depends on the damage sustained by the contractor.[45] Whether delay in making payment constitutes a breach may depend on circumstances.[46] An action by a contractor must be brought within the statutory period,[47] and recovery can be had only according to the allegations.[48] A city may set off against a claim of a contractor the expense of defending an action for injuries sustained on the work.[49] No great formality is required in reference to the form in which claims are presented to a municipal corporation,[50] though they should not be ambiguous as to ownership.[51] A municipality contracting for a public improvement

requirement as to navigability, but in view of time specified same was clearly intended by parties. Phoenix Bridge Co. v. U. S., 211 U. S. 188, 53 Law. Ed. 141. Under contract for pavement requiring contractor to repair for five years, that no allowance be made for unusual difficulties arising, "either affecting the original construction or maintenance of finished work," and that "if for any reason whatever" pavement prove inferior it must be relaid, contractor must make **repairs** when pavement is damaged by escaping gas. Macfarland v. Barber Asphalt Pav. Co., 29 App. D. C. 506. Where city under contract might have pavement relaid or repaired, order for latter was not cause of complaint. Id. Where under terms of street improvement contract city could have conclusively settled amount of work done by measuring and certifying as provided in the contract but did not do so, **question is for jury.** Dispute as to amount due for grading street. Sheehan v. Pittsburg, 213 Pa. 133, 62 A 642.

**39.** Compensation for laying sidewalk not recoverable where work in violation of ordinance as being above established grade. Tananevicz v. Lamczyk, 134 Ill. App. 135.

**40.** Where contractor, pending dispute as to right of compensation for certain work, entered into supplemental contract with same terms as original, with full knowledge of meaning as interpreted by government, he is precluded from claiming compensation for disputed work under new contract. Bowers Hydraulic Dredging Co. v. U. S., 211 U. S. 176, 53 Law. Ed. 136.

**41.** Where one contracted with the state to construct a road, and an engineer without authority rejected material furnished and the contractor without obtaining consent substituted more expensive material, held he could not recover the difference in cost from the state. Burgard v. State, 61 Misc. 23, 114 NYS 550.

**42.** Meyers v. Shapiro, 127 App. Div. 186, 111 NYS 503.

**43.** St. 1898, § 925-94, authorizing board of public works or officers thereof in their discretion to grant a contractor an estimate of amount of work done which will entitle him to receive a proportionate amount of the contract price, does not require an absolute duty which may be enforced by mandamus. State v. Icke, 136 Wis. 583, 118 NW 196.

**44.** Where a contractor fails to complete the work and the city enters into a new contract with another to finish it. Ross v. Beaumont Brick Co. [Tex. Civ. App.] 116 SW 643.

**45.** A breach of contract by the city of New York, where contract was made under Laws 1883, p. 676, c. 490, in failing to make payments provided for, held to render the city liable only for money owing under the contract and not for damages caused by the breach, nor to entitle the contractors to abrogate the contract. Williams v. New York, 114 NYS 652.

**46.** Delay of city of New York in paying an estimate on amount of work completed held, in view of circumstances, not to constitute a breach of the contract. Williams v. New York, 114 NYS 652.

**47.** Action by contractor for labor and materials furnished held to have accrued on 10th day of month after estimates were allowed and were barred in two years under Laws 1895, p. 128, c. 8, § 347. Thornton v. East Grand Forks, 106 Minn. 233, 118 NW 834.

**48.** Under a complaint for certain work and material furnished under a contract, the contractor cannot recover for other work and material. Coates v. Nyack, 127 App. Div. 153. 111 NYS 476.

**49.** Where a contractor, though requested, refused to defend a claim for injuries occasioned by his negligence, held that the city was entitled to set off the amount of the judgment against the claim of the contractor. Murphy v. Yonkers, 131 App. Div. 199, 115 NYS 591.

**50.** May be amended after they are filed, especially when not sufficiently itemized. Hanrahan v. Janesville, 137 Wis. 1, 118 NW 194.

**51.** Claim against a city held ambiguous as to ownership. Hanrahan v. Janesville,

agrees to create a special fund and on failure to do so is liable generally.[52] In such case the liability is one in rem against the property benefited,[53] and it has been held that the municipality being merely an agent to collect and disburse the fund,[54] it is not liable if its officials fail to perform their duties relative thereto,[55] but that the remedy of the contractor is to compel them to perform their duties.[56] A municipality as the trustee or bailee of special assessment fund is directly liable to a contractor for the amount of obligations held by him,[57] and the general funds are liable for payment of special assessment vouchers where the special fund is unlawfully diverted.[58] Special assessment vouchers or bonds must be issued in conformity with statutory regulations.[59] A city is liable where a void tax bill is delivered

137 Wis. 1, 118 NW 194. Mere ambiguity of ownership of a claim is not a jurisdictional defect. Id.

52. Rogers v. Omaha [Neb.] 117 NW 119. City cannot avoid obligation of warrant because of recital of payment out of special fund which city was not authorized to create (Id.), or because city negligently failed collect special fund (Id.). Warrants payable out of special fund not barred by limitations, since time does not commence to run until fund created. Id.

53. Where sewage district is created under Laws 1903, p. 26, and works to be created are to be paid for by assessment against the property, the debt is one against the property of the district and not of the city or village out of which such district is created. Broad v. Moscow [Idaho] 99 P 101.

54. Where a sewerage district is created under Laws 1903, p. 26, and special assessments made to pay for the improvement, the city is merely the agent to collect and disburse the fund and is not liable in damages upon the contract for construction where officers fail to perform their duty. Broad v. Moscow [Idaho] 99 P 101. A town making an improvement under Burns' Ann. St. 1901, §§ 4288-4290, and issuing bonds therefor, incurs no personal liability but is merely an instrumentality in carrying out the improvement and collecting the money on assessments. Town of Windfall City v. First Nat. Bank [Ind.] 87 NE 984.

55. Where public works are to be paid for by special assessment and the city does not obligate itself, the city is not liable because its officers have failed to do their duty, either in collecting such assessments or paying them over to the contractor. Broad v. Moscow [Idaho] 99 P 101.

56. Where sewerage district is created under Laws 1903, p. 26, and improvements are to be paid for by assessment, the contractor must look to the property of the district for payment, and if the city fails to deliver the bonds as agreed, the remedy of the contractor is against the officers to compel them to perform their duty, and not against the city for damages. Broad v. Moscow [Idaho] 99 P 101. Under St. 1871-72, p. 911, authorizing street improvements in San Francisco to be paid for by assessments, failure of board of public works to levy and collect assessments was the default of officers in administering governmental functions for which the state is not liable; the contractor's remedy was to compel the board to perform its duty. Union Trust Co. v. State [Cal.] 99 P 183. The functions of officers charged with the duty of opening streets are governmental. State not suable for their acts. Id. Where a city has contracted for an improvement to be paid for by assessments, it is not liable to the contractor for unauthorized rebates to owners, but his remedy is by mandamus to compel the collection of such rebates, and the city is not liable to him if they cannot be collected. Conway v. Chicago, 237 Ill. 128, 86 NE 619.

57. If funds actually or constructively in possession. City of Chicago v. Conway, 138 Ill. App. 320, rvd. 237 Ill. 128, 86 NE 619. Liability of city to one who has constructed an improvement to be paid for by assessment is limited to the amount of assessments actually collected. Conway v. Chicago, 237 Ill. 128, 86 NE 619. Where ordinance for public improvement expressly referred to Local Improvement Act of 1897, and contractor agreed to take pay in orders, three-fourths of which now payable from special assessment, there could be no recovery for portion of such special assessment until first collected by city. City of Momence v. Shannon & Co., 135 Ill. App. 533.

58. Premature payment of rebates unlawful diversion. Barber Asphalt Pav. Co. v. Chicago, 139 Ill. App. 121. Though made in good faith, being equivalent to refund. City of Chicago v. Conway, 138 Ill. App. 320. City liable though contract provided that city be not liable until money paid into treasury. Id. Payment of special assessment voucher out of instalment other than that which it was issued against a diversion rendering city liable. Barber Asphalt Pav. Co. v. Chicago, 139 Ill. App. 121. Each instalment properly chargeable with its own expenses. Barber Asphalt Pav. Co. v. Chicago, 139 Ill. App. 121; City of Chicago v. Union Trust Co., 138 Ill. App. 545. City must show facts from which propriety of charges may be made in order to charge instalment of assessment with expenses. City of Chicago v. Union Trust Co., 138 Ill. App. 545.

59. Instrument containing express promise to pay money is not bond within Local Improvement Act of 1897 when not complying with such act, not being issued for sum of $100 or multiple thereof, or conforming to provisions as to stating instalment of assessment payable. First Nat. Bank v. Elgin, 136 Ill. App. 453. Vouchers in payment of work are prematurely issued when issued upon condition that contractor perform certain act, which was not performed. Id. County court and not city is

in disregard of contract,[60] or where by virtue of some act it has rendered collection of the assessments impossible,[61] and a city which is the purchaser of delinquent property is liable to the contractor for the amount of the bid.[62] Liability of a city may be avoided by a contract provision,[63] and a city is not liable for unpaid assessments where it has obtained proper tax deeds and tendered them to the contractor.[64] A city is chargeable with interest in favor of contractor where there is an express agreement,[65] where money is wrongfully obtained,[66] and where money is illegally withheld.[67]

*Bonds.* See 8 C. L. 1527—The fact that the penalty of a bond is slightly less than required does not render the contract void.[68] Where a final warrant was issued to a contractor in reliance on his promise to complete the work which he failed to do, the village by issuing a bond was not estopped from showing such noncompliance in an action on the bond.[69] Where a contract forbids an assignment of money due the contractor, an assignment with the consent of the city is not an alteration of the contract as to sureties.[70] The surety's right to subrogation to the reserve fund of a contractor in the hands of the government for work done is superior to the rights of subsequent assignees of contract.[71]

*Enjoining performance of illegal contract.* See 10 C. L. 1321—Courts will not interfere with the performance of contracts unless clearly illegal,[72] resulting in dam-

proper authority to accept work done pursuant to special assessment. Local Improvement Act of 1897. Id. "Voucher" ordinarily means document showing that services have been performed or expenses incurred. Covers any acquittance or receipt discharging person or evidencing payment by him. Id. When used in connection with moneys implies instrument showing on what account or by what authority particular payment was made, or that services have been performed entitling party to payment. Id. Special assessment vouchers or bonds are not negotiable instruments. Id. No presumption that special assessment certificates are rightfully issued. Id. Holder of special assessment certificates occupies same position as contractors. Subject to defenses against contractors. Id.

**60.** Where city of Westport absorbed by Kansas City under Rev. St. 1899, § 6399 (Ann. St. 1906, p. 3197), latter city might issue valid tax bill in lieu of void one. Barber Asphalt Pav. Co. v. Field [Mo. App.] 111 SW 907.

**61.** Where by failure of the city of New Orleans to give certain notice a contractor, under 37th section of the charter as amended by Act 119, p. 217, of 1886, and Act 142, p. 179, of 1894, is defeated in his remedy against abutting owners, the city was held liable though the contract provided that it should not be liable for bills due by abutting owners. Bruning v. New Orleans [La.] 47 S 624.

**62.** Estopped to deny recitals of tax certificate. Barber Asphalt Pav. Co. v. Chicago, 139 Ill. App. 121. Where city in default of bidders purchases property delinquent for assessments, it becomes liable for amount bid and interest. City of Chicago v. Union Trust Co., 138 Ill. App. 545. Under contract, amount assessed not deemed collected where property delinquent and bought by municipality in default of bidders. City of Chicago v. Conway, 138 Ill. App. 320, rvd. 237 Ill. 128, 86 NE 619.

**63.** City not liable where there is provision that it be not liable if special assessments fail to discharge cost. Union Trust Co. v. State [Cal.] 99 P 183. A provision in a contract that the city shall not be liable for the cost precludes recovery against the city if special assessments fail to cover the cost. Id.

**64.** Where a public improvement is to be paid for by assessments, the city is not liable to the contractor for unpaid assessments on which it has obtained proper tax deeds and tendered the same to him. Conway v. Chicago, 237 Ill. 128, 86 NE 619, rvg. 138 Ill. App. 320.

**65.** City of Chicago v. Conway, 138 Ill. App. 320. Liable upon amount paid for delinquent property purchased by it. City of Chicago v. Union Trust Co., 138 Ill. App. 545. Liable upon amount assessed as public benefits. Id.

**66.** City of Chicago v. Conway, 138 Ill. App. 320.

**67.** City of Chicago v. Conway, 138 Ill. App. 320; Barber Asphalt Pav. Co. v. Chicago, 139 Ill. App. 121; City of Chicago v. Union Trust Co., 138 Ill. App. 545.

**68.** Under Acts 1900, p. 153, c. 119, requiring contractor for improvement of highways to execute a bond for the amount of his bid, the fact that the bond was for a few dollars less did not invalidate the contract. Quin v. Pike County [Miss.] 48 S 235.

**69.** Barber Asphalt Pav. Co. v. Highland Park [Mich.] 16 Det. Leg. N. 76, 120 NW 621. Evidence held to show that the bond was issued in advance payment for work not performed. Id.

**70.** So as to release a surety on the contractor's bond for performance of the contract. City of New Rochelle v. Cortright, 131 App. Div. 140, 115 NYS 135.

**71.** Hardaway v. National Surety Co., 211 U. S. 552, 53 Law. Ed. —

**72.** Discretion of city officials in selecting lowest bidder ought not to be interfered with. Holly v. New York, 128 App. Div.

age to the property owner,[73] and injunction will not lie where suit is not commenced within the period prescribed.[74]

§ 6. *Security to subcontractors, laborers and materialmen.*[75] See 10 C. L. 1321 Such security, as a contract provision, may be required by charter provisions.[76] An order given a materialman and accepted by the city constitutes an assignment of such portion of the fund due the contractor.[77] The claim of a materialman for whom the city withheld a certain amount of the contract price is superior to the claim of another materialman.[78]

*Bonds.* See 10 C. L. 1322—Public bodies may contract for the payment of materialmen by a provision in the contractor's bond which inures to the benefit of such materialmen.[79] The benefits of such bonds do not extend to assignees of the contract.[80] A bond for the protection of materialmen is not invalidated, though the contract is void,[81] because of the failure of the city to approve the bond,[82] or where by mistake it runs to the officers having charge of the work rather than the government.[83] Where a judgment is rendered against a contractor for materials

499, 112 NYS 797. In proceedings to restrain improvements authorized under Laws 1903, p. 121, c. 82, conditions in the petition by owners requiring contractors to regrade adjoining property at certain prices, which were adopted by the ordinance authorizing the improvements, held not to increase the expense thereof to property owners and did not render the contract void. James v. Seattle, 49 Wash. 347, 95 P 273.

**73.** In seeking to restrain issuance of bonds based upon special assessment for pavement of street on ground of mere irregularity in exercise of city's power, property owner must not only show irregularity but damage thereby without his own fault. Lawton v. Racine [Wis.] 119 NW 331. Action estopped where abutting owner's grantor signed petition for improvement and plaintiff had knowledge of fact, and where no objection to improvement, which was beneficial and of reasonable cost, until completion. Id.

**74.** Burn's Ann. St. 1908, § 8959, prohibiting suits to enjoin construction of public improvement unless commenced within 10 days from letting of the contract precludes a property owner from preventing recovery by contractor because of irregularities prior to execution of the contract. Martindale v. Rochester [Ind.] 86 NE 321.

**75.** See, also, Mechanics' Liens, 12 C. L. 815.

**Search Note:** See Municipal Corporations, Cent. Dig. §§ 859, 875-878; Dec. Dig. §§ 333, 343-348.

**76.** Kansas City charter, art. 9, § 20, providing that contracts for public improvements shall contain a covenant that contractor shall pay for labor and material, the performance of which covenant shall be secured by two or more sureties signing the contract, held to violate no constitutional provision. Kansas City v. Youmans, 213 Mo. 151, 112 SW 225. Guaranty in contract that contractor would pay for labor and materials up to certain sum, signed by sureties, held a continuing guaranty and attached to each item of the expense or labor. Id. Blasting powder, dynamite fuse, etc., necessary for use in constructing a sewer, are "materials" within a guaranty that contractors would pay for materials used in the work. Id. Tools, implements and appliances are not materials though they were worn out in the work. Id.

**77.** Prior to notices of claims of others against the contractor served subsequently under P. L. 1892, p. 369. Somers Brick Co. v. Souder, 71 N. J. Eq. 759, 70 A 158. Priority and validity of such order held an issue under the pleadings. Id.

**78.** Where a city withheld from a contractor an amount claimed by a materialman pending settlement of a dispute between the materialman and contractor, his right was superior to the claim of an assignee of another materialman under garnishment proceedings against the city. Ross v. Beaumont Brick Co. [Tex. Civ. App.] 116 SW 643.

**79.** Though materialmen are third persons and not named in contract. Eau Claire-St. Louis Lumber Co. v. Banks [Mo. App.] 117 SW 611. A common-law power. Id. Ann. St. 1906, p. 3328, expressly empowers school districts to contract to pay for labor and material furnished in constructing a public building, and they may provide for it in the contractor's bond so that it inures to the benefit of third persons not named. Id.

**80.** Hardaway v. National Surety Co., 211 U. S. 552, 53 Law. Ed. —. Surety on bond of public contractor not liable for labor and materials furnished by assignees of contract where contract of assignment only obligates assignor to assign reserve fund of government and payments due under original contract. Id.

**81.** Fact that paving contract is void because let without competitive bidding does not render void bond given by contractor to secure payment for labor and materials, though it is necessary in suing on bond to rely on the contract. Kansas City Hydraulic Press Brick Co. v. National Surety Co. [C. C. A.] 167 F 496.

**82.** When bond is given to secure persons furnishing labor and materials, sureties cannot avoid liability by showing failure of the city to approve the bond. People v. Carroll, 151 Mich. 233, 14 Det. Leg. N. 921, 115 NW 42.

**83.** Bond of contractor to protect materialmen required by Act Cong. Aug. 13,

by default, in an action on the bond, the plaintiff may introduce the contract and judgment to determine the amount of his claim.[84] The enforcement of bonds required by the federal government is governed by the federal statutes.[85] The right of action is assignable,[86] and the allowance of attorney's fees therein rests in the discretion of the court.[87]

*Liens.*[See 10 C L. 1323]—Liens for the security of laborers and materialmen are provided for by statute,[88] and, to entitle one to the benefit thereof, statutory requirements must be complied with.[89] Action thereon must be commenced within the statutory period.[90]

1894 (28 Stat. at L. 278, c. 280, U. S. Comp. St. 1901, p. 2523), which by mistake runs to commissioners having charge of building Soldiers' Home instead of United States, will not for that reason defeat recovery. Speir v. U. S., 31 App. D. C. 476.

**84.** City of Philadelphia v. Pierson, 217 Pa. 193, 66 A 321. Without independent evidence as to market value of materials. Id. Judgment held conclusive in action on bond, undertaking being to protect materialmen. Id.

**85.** Suit in name of United States on bond of contractor for benefit of materialmen is governed by Act March 3, 1887 (24 Stat. at L. 552, c. 373), as corrected Act March 13, 1888 (25 Stat. at L. 434, c. 866, U. S. Comp. St. 1901, p. 508), providing that civil suits be **brought where person is inhabitant.** Davidson Bros. Marble Co. v. U. S., 213 U. S. 10, 53 Law Ed. —. Act Feb. 24, 1905 (33 Stat. at L. 811, c. 778, U. S. Comp. St. Supp. 1907, p. 709), amending Act. Aug. 13, 1894 (28 Stat. at L. 278, c. 280, U. S. Comp. St. 1901, p. 2523), inapplicable where contract and bond antedate passage of amendatory act. Id. Under Act. Feb. 24, 1905, 33 Stat. 811, amendatory of Act Aug. 13, 1894, 28 Stat. 278, creditor for labor and material furnished on government work cannot sue on bond until **six months after completion of work.** United States v. Winkler, 162 F 397. Settlement had to determine right of the government on the bond, and abandonment of work by contractor who became insolvent is not a performance of contract. Id. A steam vessel built for the United States is a "public work" within Act Aug. 13, 1894, as amended by Act Feb. 24, 1905, 33 Stat. 811, requiring the usual bond and providing that laborers or materialmen may not sue thereon until six months from completion of contract and settlement. Title Guaranty & Trust Co. v. Puget Sound Engine Works [C. C. A.] 163 F 168. Claims for patterns made for a contractor from which to make castings to be used on a public work, for towing and delivery of material, wharfage, and hauling of materials, are for labor and material, recoverable on the bond given under 28 Stat. 278, as amended by 33 Stat. 311. Id. But advances of freight made to a common carrier on the material by a transfer company is not. Id. Under Act Aug. 13, 1905, 28 Stat. 278, amended by Act Feb. 24, 1905, 33 Stat. 811, requiring bond of contractor for government work and providing that materialmen may sue thereon after six months after completion of work and settlement, the provision that such creditors shall on application after such time be furnished a **copy of contract** and bond to sue on is not mandatory, and failure to apply for such copy will not defeat their action. Title Quaranty & Trust Co. v. Puget Sound Engine Works [C. C. A.] 163 F 168.

**86.** The right of laborers and materialmen to enforce their claims against the bond is assignable. Title Guaranty & Trust Co. v. Puget Sound Engine Works [C. C. A.] 163 F 168.

**87.** In an action on such bond the court may in its discretion allow the statutory attorney's fee in favor of each claimant. Title Guaranty & Trust Co. v. Puget Sound Engine Works [C. C. A.] 163 F 168.

**88.** Act March 3, 1892, Gen. St. p. 2078, securing payment for work done or materials furnished toward a public improvement, did not repeal Mechanic's Lien Law, § 3, providing for a lien on public buildings, but prescribed a concurrent remedy so far as it related to public buildings. Arjonico v. West New York Board of Education, 75 N. J. Law, 21, 69 A 450. Under Const. art. 20, § 15, relative to mechanics' liens, while a lien may not be enforcible against a city sewer, it may be against the funds due the contractor. Goldtree v. San Diego [Cal. App.] 97 P 216. Under Ky. St. 1909, § 2492, a lien for materials furnished for a public improvement is inferior to a mortgage filed before filing of lien notice. Trust Co. v. Casey [Ky.] 115 SW 780. The death of the principal contractor, where the contract is completed by his administrator, does not deprive a subcontractor of his statutory lien upon the fund arising from the contract. Vernon v. Harper [Ohio] 86 NE 882. Where one agreed with contractors to furnish materials under financial backing of another who had an interest in the contract, and others furnished materials with such person's knowledge, their lien on the fund in the city's hands was superior to the lien of the former. Di Menna v. New York, 109 NYS 1032. Under Civ. Code 1896, § 2040, a mechanics' lien cannot be enforced against a public school building (Scruggs v. Decatur [Ala.] 46 S 989), nor can such lien be enforced against a fund set apart by the city for the construction of the building, Code 1896, § 2040, exempting property of municipalities from levy and sale (Id.).

**89.** Subcontractor's lien given by Hurd's Rev. St. 1908, c. 82, § 23, creating a lien in favor of one who furnishes material to a public contractor, cannot be enforced unless prior to filing the bill required notice has been given. Pirola v. W. J. Turnes Co., 238 Ill. 210, 87 NE 354.

**90.** Gen. St. Kan. 1901, §§ 5130, 5131, providing that laborers and materialmen may sue on the contractor's bond within **six**

§ 7. *Hours and conditions of labor.*[91]—See 8 C. L. 1532—Laws limiting the hours and conditions of labor cannot be sustained under the police power[92] but they are generally held valid,[93] and where a legislature has constitutional power to fix the number of hours of a day's work on public works, it has incidental power to impose a penalty for violation of the statute.[94] The protection of the law is not waived where rights under it are asserted as soon as violation is discovered.[95] Such a law applies only to persons employed on or about the work.[96] In New York the two statutes relative to the subject provide concurrent remedies.[97]

§ 8. *Injury to property and compensation to owners. A. In general.*[98]—See 10 C. L. 1323—In some states, damages to abutting owners must first be assessed and paid.[99] A city which in pursuance to statutory power and without negligence plans a public improvement is not liable for injuries which result to adjacent property,[1] but, in the case of liability, relief must be sought in the appropriate tribunal.[2]

(§ 8) *B. Establishment or change of grade of street.*[3]

§ 9. *Local assessments. A. Power and duty to make.*[4]—See 10 C. L. 1324—The power to levy assessments is statutory[5] and exists only to the extent that it is con-

months after completion of the work, arises out of the statute and is not given by the statute, so as to exclude operation of the general statute of limitations. Kansas City Hydraulic Press Brick Co. v. National Surety Co. [C. C. A.] 167 F 496.

**91. Search Note:** See notes in 8 L. R. A. (N. S.) 131; 3 Ann. Cas. 309.

See, also, Municipal Corporations, Dec. Dig. § 339.

**92.** Laws 1906, p. 1395, limiting a day's work for municipal corporations to eight hours and prohibiting payment for work done in violation of the statute, cannot be sustained under the police power, as it has no relation to public health, safety or morals. People v. Metz, 193 N. Y. 148, 85 NE 1070.

**93.** Laws 1906, p. 1395, making eight hours a day's work for municipal corporations, is not void as denying equal protection of the laws or as making arbitrary discriminations between persons who work for individuals and those who work for municipal corporations. People v. Metz, 193 N. Y. 148, 85 NE 1070.

**94.** By fine or imprisonment or prohibiting payment for the work. People v. Metz, 193 N. Y. 148, 85 NE 1070. Under Const. art. 12, § 1, and Laws 1903, p. 1453, held the legislature had power to pass a law limiting the hours of a day's work on work done for cities and prohibiting any state or municipal officer from paying for work done in violation of the statute. Id.

**95.** Even if a city may waive Laws 1906, p. 1395, making eight hours a legal day's work for municipal corporations, it did not waive the provision prohibiting payment for such work where it refused to pay over a year after the work was done but where it had just discovered the violation. People v. Metz, 193 N. Y. 148, 85 NE 1070.

**96.** Labor Laws, Laws 1897, p. 462, c. 416, § 3, amended by Laws 1899, p. 1172; Laws 1900, p. 638; Laws 1906, p. 1394, forbidding working of employes on municipal contract more than 8 hours per day, does not affect the contract of one for a municipal building in New York who purchased manufactured articles from one employing laborers for more than 8 hours a day and paying less than the prescribed rate of wages. Bonnen v. Metz, 126 App. Div. 807, 111 NYS 196.

**97.** Laws 1907, p. 1076, amending Pen. Code, § 384h, providing for forfeiture of contract if the contractor requires more than eight hours for a day's work, did not affect Laws 1906, p. 1395, prohibiting municipal corporations from paying for work done in violation of the statute, concurrent remedies, one civil and one penal, are provided. People v. Metz, 194 N. Y. 145, 86 NE 986.

**98. Search Note:** See notes in 6 L. R. A. (N. S.) 1026; 12 Id. 696.

See, also, Municipal Corporations, Cent Dig. §§ 914-999; Dec. Dig. §§ 377-404.

**99.** Under Acts 1907, p. 902, amendatory of acts incorporating city of Rome, before that municipality can proceed with improvement of streets, damages accruing to abutting owners must be assessed and paid from funds on hand. City of Rome v. Rome Hotel Co. [Ga.] 63 SE 830.

**1. Park.** Schweriner v. Philadelphia, 35 Pa. Super. Ct. 128. No obligation to supply sewers. Id. City liable for flooding of adjacent property where work done in negligent manner. Town of North Judson v. Lightcap, 41 Ind. App. 665, 84 NE 519.

**2.** Under constitution and statutes of Arkansas, owner of land injured by overflow as direct result of building a levee has a complete remedy at law to recover damages, and a federal court has no power to grant equitable relief. Meriwether v. St. Francis Levee Dist. Directors, 165 F 317.

**3.** See 8 C. L. 1533. This matter properly appertains to Highways and Streets, 11 C. L. 1720.

**Search Note:** See Municipal Corporations, Cent. Dig. §§ 923-929; Dec. Dig. §§ 383-386.

**4. Search Note:** See notes in 4 C. L. 1143; 6 Id. 1158; 17 L. R. A. 330; 24 Id. 412; 5 L. R. A. (N. S.) 289; 16 Id. 292.

See, also, Municipal Corporations, Cent. Dig. §§ 1000-1002, 1007-1024, 1075-1079; Dec. Dig. §§ 405, 406, 409-420, 451-463; 25 A. & E. Enc. L. (2ed.) 1166.

**5.** Ordinance adopted under Kansas City

ferred by statute.[6] The fundamental fact upon which the validity of assessments rests is an increment of benefit to the property resulting from the improvement,[7] and assessment can be made only for actual benefits[8] which a landowner receives over and above the ordinary benefits which he receives as one of the community.[9] The power to levy special assessments is a special one, and the statute conferring it is to be strictly construed.[10] While special assessments are not taxes in the general acceptation of that term,[11] the levying of assessments is an exercise of the taxing power.[12]

charter, art. 14, § 33, levying assessments for maintaining parks, held a special tax for local improvements, and not a general tax. Corrigan v. Kansas City, 211 Mo. 608, 111 SW 115. A tax for the purpose of raising funds for the construction of a county court house may be lawfully levied without the contract for its construction having first been made. Flewellen v. McKenney, 130 Ga. 356, 60 SE 1000. Village Laws, Laws 1897, pp. 422, 444, authorizing board of trustees to cause improvements to be made and to provide for assessments, and it is not necessary for the village to again provide for the expense by general tax. In re Village of Kenmore, 59 Misc. 388, 110 NYS 1008. Where state board of health has not ordered construction of sewer system in a village, Laws 1893, p. 1519, c. 661, requiring the municipality to stand the cost thereof, does not apply, and a taxpayer may not enjoin collection of an assessment levied for such purpose. Mead v. Turner, 60 Misc. 145, 112 NYS 127. Sewers draining a limited portion of the city, constructed after a general sewer system had been built, held public sewers, for construction of which the whole city could be taxed. State v. Wilder [Mo.] 116 SW 1087. Whether Act 1906, p. 265, authorizing special assessments for improvements already made, be an original or curative act, it involves only principles of taxation, and does not impair the obligation of contracts, though some of the improvements when made were unauthorized, the city having afterwards adopted it. Durkee v. Barre [Vt.] 71 A 819. Such act did not take any vested rights. Id.

**6.** The sprinkling of streets is not a local improvement for which special assessemnt is authorized by Kalamazoo City Charter, c. 16, § 42; c. 23, § 9. City of Kalamazoo v. Crawford [Mich.] 15 Det. Leg. N. 669, 117 NW 572. Ann. St. 1906, pp. 275, 280, 282. Kansas City charter (Ann. St. 1906, pp. 265, 266), held not to forbid exemptions from special assessments of church property. Corrigan v. Kansas City, 211 Mo. 608, 111 SW 115. Power of the legislature, under Const. art. 16, § 11, to impose special taxes for construction of capitol building and to conserve the fund stated. Moore v. Alexander, 85 Ark. 171, 107 SW 395. Laws 1885, p. 1162, c. 229, authorizing a city to charge two-thirds of cost of paving against abutting property, held not to confer any vested right to exemption from further assessment for repaving. Carstens v. Fond du Lac, 137 Wis. 465, 119 NW 117. Under Fond du Lac charter amended by Laws 1885, p. 1162, c. 299, and action of the city in 1904, held that the city on repaving a street could assess cost thereof to abutting property owners. Id. Under Acts 1908, p. 166, expense of laying drain pipes for purpose of macadamizing, curbing, etc., and cost of manholes, catchbasins, etc., can be taxed against abutting property. Oklahoma City v. Shields [Okl.] 100 P 559.

**7.** Union Pac. R. Co. v. Abilene [Kan.] 98 P 224. Special taxes cannot be levied unless the property charged receives a corresponding benefit. City of Owensboro v. Sweeney, 33 Ky. L. R. 823, 930, 111 SW 364. Sprinkling streets does not confer a benefit, and Laws of 1906, p. 376, assessing cost thereof by front foot against abutting property is void. Id. Whether street sprinkling is a benefit for which abutting property may be assessed, not decided. Union Pac. R. Co. v. Abilene [Kan.] 98 P 224.

**8.** Assessment for construction of a drain can be made for actual benefits only. In re Johnson Drainage Dist. No. 9 [Iowa] 118 NW 380. A special assessment which is in excess of benefits is as to such extent a taking of property without compensation. Kirst v. Street Imp. Dist. No. 120 [Ark.] 109 SW 526. In order to sustain an assessment, it must affirmatively appear that it is not in excess of the benefits conferred. Essen v. Cape May Common Council [N. J. Law] 72 A 49.

**9.** Durkee v. Barre [Vt.] 71 A 819.

**10.** The power to levy and collect as special assessment for drainage purposes. Howard v. Emmet County [Iowa] 118 NW 882.

**11.** Const. art. 13, § 1, exempting property of University of California from taxation does not exempt unimproved property from assessments for improvement of streets. City St. Imp. Co. v. University of California Regents, 153 Cal. 776, 96 P 801. Const. 1874, exempting certain classes of property from taxation does not refer to special assessments. Board of Improvement v. Sisters of Mercy [Ark.] 109 SW 1165. Const. art. 13, § 8, providing that each taxpayer may be required to deliver to the assessor a list of his property, etc., has no application to assessments for local purposes. City of Escondido v. Escondido Lumber, Hay & Grain Co. [Cal. App.] 97 P 197. Ann. St. 1906, pp. 275, 278, 283, requiring taxes to be uniform, etc., do not apply to special assessments. Fruin-Bambrick Const. Co. v. St. Louis Shovel Co., 211 Mo. 524, 111 SW 86. Ann. St. 1906, p. 273, relative to taxation, has no reference to special assessments. Id. Local assessments are not regarded as taxes. Board of Improvement v. Sisters of Mercy [Ark.] 109 SW 1165. Street improvement assessment not made in accordance with the laws regulating taxes is not a tax within a provision exempting home-

(§ 9) *B. Constitutional and statutory limitations.*[13]—See 10 C. L. 1325—Under the rule that property cannot be taken for public use without compensation, a city providing for improvement of a street at the cost of abutting owners cannot collect an assessment for benefits without showing that adequate compensation therefor will be made.[14] Legislative power to levy assessments is limited by the principle that the tax must be laid for a public purpose which must directly pertain to the district taxed.[15] Statutes relating to special assessments must conform to constitutional limitations,[16] and to statutory limitations as to the extent to which property may be assessed [17] if such limitation applies.[18] They must not violate the rule prohibiting special legislation.[19] In Illinois acquisition of land necessary for the improvement is a condition precedent to the levy of an assessment.[20]

*Equality and uniformity.*See 10 C. L. 1326—A constitutional provision requiring taxes to be uniform does not apply to special assessments.[21] A statute providing

steads from taxation. City of Beaumont v. Russell [Tex. Civ. App.] 112 SW 950. Laws 1860, p. 56, conferring corporate powers on an institution and exempting its property from taxation, held not to exempt it from assessment for local improvements. "Special Tax" does not mean such assessments. Board of Improvement v. Sisters of Mercy [Ark.] 109 SW 1165. A homestead is not exempt from assessment for local improvement nor from sale on foreclosure thereof. Robinson v. Levy [Mo.] 117 SW 577.

**12.** Porter v. Boyd Pav. & Const. Co., 214 Mo. 1, 112 SW 235. In the exercise of the taxing power, special assessments may be levied against property to defray cost of improvements. McGarvey v. Swan [Wyo.] 96 P 697. Ann. St. 1906, p. 4854, providing for formation of assessment districts for assessment of cost of improvements against abutting property, is valid. The levy of such assessments is referable to the taxing power and the legislature is authorized to create such districts. Fruin-Bambrick Const. Co. v. St. Louis Shovel Co., 211 Mo. 524, 111 SW 86; State v. St. Louis, 211 Mo. 591, 111 SW 89.

**13. Search Note:** See notes in 6 C. L. 1161; 5 Ann. Cas. 890.

See, also, Municipal Corporations, Cent. Dig. §§ 1003-1006; Dec. Dig. §§ 407, 408; 25 A. & E. Enc. L. (2ed.) 1171.

**14.** Showing that contract has been let without showing that it will be performed within a reasonable time is insufficient. City of Austin v. Nalle [Tex. Civ. App.] 115 SW 126.

**15.** To sustain a statute authorizing assessment according to area of adjacent property, it is not necessary to hold that legislative power is unlimited so as to prevent judicial interference where manifest injustice, inequality or constitutional violation is shown in enforcement of rule prescribed. McGarvey v. Swan [Wyo.] 96 P 697.

**16.** The constitutional limit of an assessment in proportion to the taxable value of property by petition is the value of benefits conferred. James v. Seattle, 49 Wash. 347, 95 P 273. Though a drainage district is a municipal corporation, Const. art. 11, § 12, denying the legislature power to impose taxes for municipal purposes, but permitting it to vest in corporate authorities power to tax for such purposes, is not violated by Laws 1903, p. 87, requiring commissioners to levy a tax for preliminary expenses. Northern Pac. R. Co. v. Pierce County [Wash.] 97 P 1099. A tax may be levied for widening a street. In re Lockitt, 58 Misc. 5, 110 NYS 32. Ordinance under Kansas City Charter, art. 10, § 33, exempting church property from assessment, held not to deny equal protection of the laws. Corrigan v. Kansas City, 211 Mo. 608, 111 SW 115.

**17.** Kirby's Dig. §§ 5683, 5716, prohibiting a single improvement which will exceed in cost 20 per cent of the value of the property in the district, does not limit the amount to be assessed against each particular piece of property to 20 per cent of its value. Kirst v. Street Imp. Dist. No. 120 [Ark.] 109 SW 526. City and Village Act 1872, § 7, amended by Hurd's Rev. St. 1908, c. 24, § 604, so as to read substantially the same as § 541, held not to abolish distinctions between special taxation and special assessments, but merely to limit amount to be assessed against any one tract, and the power to conclusively settle question of benefits is committed to court or jury. City of East St. Louis v. Illinois Cent. R. Co., 238 Ill. 296, 87 NE 407.

**18.** Code Supp. 1907, § 792a, providing that assessments shall not exceed 25 per cent of the value of the property assessed, held not to apply to assessments for drainage districts. Farley Drainage Dist. No. 7 v. Hamilton County [Iowa] 118 NW 432.

**19.** Laws 1903, p. 9, c. 7, authorizing cities heretofore incorporated under special charter having less than 10,000 population to make assessments in a special manner, is not void as a local or special law. McGarvey v. Swan [Wyo.] 96 P 697.

**20.** Under Hurd's Rev. St. 1908, p. 435, c. 24, § 559, providing that no special assessment shall be levied until land necessary for the improvement has been acquired, acquisition of right to enter land to construct sewer is a condition precedent to levy of an assessment to pay for it. City of Chicago v. Green, 233 Ill. 258, 87 NE 417. Under Hurd's Rev. St. 1908, p. 435, making acquisition of land necessary for an improvement a condition precedent to levy of an assessment to pay for the improvement, mere permission to enter on land to construct a sewer is insufficient. Id.

**21.** Const. art. 15, § 1; art. 1, § 28. McGarvey v. Swan [Wyo.] 96 P 697.

for assessment according to the value of the property is not arbitrary.[22] An assessment according to benefits is according to value.[23] An assessment under the front foot rule is founded on benefits.[24] If an assessment is equitably apportioned and does not exceed the benefits, there is no constitutional objection which the supreme court can consider.[25]

*Due process of law.*[See 10 C. L. 1327]—As a general rule notice to property owners and an opportunity to be heard is essential to the validity of an assessment,[26] especially where the legislature delegates the power to determine benefits,[27] but no notice is required where the legislature itself makes such determination.[28]

22. Not in conflict with state or federal constitutions. Kirst v. Street Imp. Dist. No. 120 [Ark.] 109 SW 526. It is within the power of the legislature to change the plan and assess according to benefits. Id.

23. "Ad valorem," in Const. art. 19, § 77, requiring assessments to be ad valorem and uniform, means according to value, and an assessment according to benefits is within the provision, as well as a statute directing assessment according to value. Kirst v. Street Imp. Dist. No. 120 [Ark.] 109 SW 526.

24. Rev. Laws, c. 26, §§ 26, 27, providing for assessment of property per front foot for watering streets, contemplates that assessments shall be founded on special benefits received and no assessment exceeding special benefits shall be made. Corcoran v. Cambridge Aldermen, 199 Mass. 5, 85 NE 155. Bill complaining of assessment for paving, alleging that commissioners had found the front footage and assessed on basis of front footage regardless of depth or improvement of lots, and that some lots were not assessed, held to imply that commissioners found that lots not assessed were not benefited. Durkee v. Barre [Vt.] 71 A 819.

25. Farley Drainage Dist. No. 7 v. Hamilton County [Iowa] 118 NW 432.

26. Union Pac. R. Co. v. Abilene [Kan.] 98 P 224. Hurd's Rev. St. 1905, c. 24, § 547, amendatory of Laws 1901, p. 106, providing that unsubdivided tracts may, for purpose of spreading assessments, be divided into 25-foot lots, together with an ordinance dividing such a tract and assessing it, held void as taking property without due process. City of Chicago v. Wells, 236 Ill. 129, 86 NE 197. Ditch assessment made without notice to owner is void. Pumphrey v. Hollis [Ind. App.] 87 NE 255. When a public improvement is made without notice, actual or constructive, to the owner of land benefited, of intention to make such improvement, he cannot be assessed for benefits, unless he has waived his legal right to a hearing. Walsh v. Newark [N. J. Law] 71 A 39. As a general rule, before an assessment is deemed to be conclusively established against a property owner, he is entitled to notices and hearing at some stage of the proceedings. McGarvey v. Swan [Wyo.] 96 P 697. Laws 1906, p. 265, providing that where a street has been paved the city council, after deciding that the improvement was for the public good and necessity of the owners, may direct assessment of benefited property, does not authorize levy of assessments without notice. Durkee v. Barre [Vt.] 71 A 819. Charter of City of Toledo (Loc. Laws Ohio 1836-37, p. 32), authorizing assessments for local improvements, made no provision for hearing to ascertain benefits, and for that reason a sale of property for nonpayment of the assessment was void, as taking property without due process. Anderson v. Messenger [C. C. A.] 158 F 250. Laws 1907, p. 123, c. 73, providing for assessment of tide lands and sale of leasehold interest thereof to satisfy the assessment, which is against the fee only, is void, as depriving the lessee of his property without due process. Coast Land Co. v. Seattle [Wash.] 100 P 856. Barrett Law of Indiana whereby taxing district of 150 feet from street is created, property within 50 feet being primarily liable, and remainder back-lying property being contingently liable, is within power of legislature. Cleveland, etc., R. Co. v. Porter, 210 U. S. 177, 52 Law Ed. 1012. Not insufficient to afford due process of law guaranteed by constitution in regard to notice of assessment, since amount of tax on back-lying property is same as that of abutting owner. Id. Not denial of equal protection of laws. Id.

27. Road Imp. Dist. No. 1 v. Glover [Ark.] 110 SW 1031; Londoner v. Denver, 210 U. S. 373, 52 Law. Ed. 1103. Opportunity to submit objections and complaints to assessment in writing not sufficient hearing where law denies landowner right to object in courts to assessment on ground that objections are only cognizable by board of equalization. Id. Where one or more essential features of an assessment proceeding are committed to some tribunal inferior to the legislature, notice and opportunity to contest must be allowed. Union Pac. R. Co. v. Abilene [Kan.] 98 P 224. Laws 1903, c. 132, p. 257, providing for sprinkling of streets, and authorizing cities to levy a tax therefor, delegates certain features of the proceeding to a class of property owners in a manner excluding notice and hearing to others, and is void. Id.

28. Ann. St. 1906, p. 4854, providing for creation of special taxing districts, and providing for opportunity for property owners to be heard before the tribunal which levies the assessment, does not violate the due process clause, as no notice is required as to matters which the legislature determines or delegates to determination of municipal authorities. Fruin-Bambrick Const. Co. v. St. Louis Shovel Co., 211 Mo. 524, 111 SW 86. The fact that an assessment was levied for maintenance of parks under Kansas City Charter, art. 10, § 33, without notice to property owners, did not deprive them of their property without due process. Corrigan v. Kansas City, 211 Mo.

A notice which enables an owner to appear before some authorized tribunal and contest the validity and fairness of an assessment before it becomes a fixed charge against his land is sufficient,[29] and owners are not entitled to notice of each step in the proceeding.[30] An owner who will not be affected is not entitled to notice.[31] It is not necessarily fatal to a special assessment statute that it does not contain an express provision relative to notice and hearing where terms of the statute permit such provision to be implied.[32]

(§ 9) *C. Persons, property, and districts liable, and extent of liability.*[33]—See 10 C. L. 1328—Local assessments are primarily imposed upon the property rather than the owner thereof.[34] The assessment of benefits in the city of Washington for a public improvement is governed by congress.[35]

608, 111 SW 115. Should it do so, the theory of the law is that the property owner has been given the equivalent of notice and hearing by representation in the legislature. Union Pac. R. Co. v. Abilene [Kan.] 98 P 224.

**29.** City of Kinston v. Loftin [N. C.] 62 SE 1069. Notice by publication pursuant to statute, sufficient where land described. Buchanan v. MacFarland, 31 App. D. C. 6. Rev. Laws, c. 26, § 27, providing for assessment for watering streets against abutting property, and for petition to asessors for abatement, whose right to grant it depends on recommendation of the board or officer who certified the list, held not void as taking property without due process, as the owner is thus given an opportunity for hearing. Corcoran v. Cambridge Aldermen, 199 Mass. 5, 85 NE 155. Laws 1906, p. 265, providing that where a street has been paved and the city council shall decide that such improvement, when made, was for the public good and necessity of individuals, it may order an assessment on notice, does not deprive persons liable of property without due process, because empowering the council to determine the question of public good and necessity without hearing. Durkee v. Barre [Vt.] 71 A 819. Such statute is not objectionable because leaving the jurisdictional facts to the final determination of the council, no property being taken nor assessment made or necessitated. Lazelle v. Barre [Vt.] 71 A 824. Acts 30th general assembly, p. 61, c. 68, §§ 12, 19, providing for assessment and classifications of lands for drainage purposes, held to provide for notice and appeal in case of railroad property, and is not void on that ground. In re Johnson Drainage Dist. No. 9 [Iowa] 118 NW 380. In an action to enforce an assessment under Priv. Laws 1905, c. 338, where the owner is given opportunity to set up every defense on the ground of irregularity of proceedings or on the merits, he cannot complain that the judgment is taking of property without due process. City of Kinston v. Loftin [N. C.] 62 SE 1069; City of Kinston v. Wooten [N. C.] 63 SE 1061.

**30.** Under Hurd's Rev. St. 1908, c. 42, §§ 75-153, providing for classification of lands for drainage assessments, owners who have been notified of classification of their lands are not entitled to notice of levy of assessment. People v. Hulin, 237 Ill. 122, 86 NE 666. Under Buffalo city charter, Laws 1891, p. 221, c. 105, § 398, requiring board of assessors to find whether petition for paving was signed by sufficient number of owners, and § 399, amended by Laws 1900, p. 1541, making assessor's certificate conclusive of facts stated, no right is invaded by not giving owners notice of proceedings before assessment. People v. Buffalo Assessors, 127 App. Div. 851, 111 NYS 924. Under Ann. St. 1906, pp. 3935-3947, relative to establishment of drainage districts and improvements, held, where a landowner was in court at commencement of proceedings, he was present for all purposes as long as the court had duties to perform in the case, and a supplemental assessment without notice to him was not a taking of his property without due process. State v. Wilson [Mo.] 115 SW 549. Where Laws 1905, p. 1630, c. 646, § 14, provides for apportionment of assessments by board after dissolution of commission appointed to construct sewer, taxpayer cannot complain that he is without opportunity to be heard. Horton v. Andrus, 191 N. Y. 231, 83 NE 1120. Act public, and taxpayers bound to take notice of it. Id.

**31.** Abutting owner who is not entitled to damages for change of grade under greater New York Charter, § 951, cannot complain of failure to give notice of proceedings for assessment of damages on account of establishment of a grade. Friest v. New York, 193 N. Y. 525, 86 NE 549.

**32.** Union Pac. R. Co. v. Abilene [Kan.] 98 P 224. Laws 1903, p. 9, c. 7, authorizing sewer assessments, will not be held void as authorizing taking of property without due process or just compensation, unless it is shown void in an individual case. McGarvey v. Swan [Wyo.] 96 P 697.

**33. Search Note:** See notes in 4 C. L. 1146; 10 Id. 1330; 14 L. R. A. 755; 21 Id. 563; 23 Id. 807; 26 Id. 92; 28 Id. 249, 496; 35 Id. 33, 58; 46 Id. 193; 3 L. R. A. (N. S.) 817; 10 Id. 342; 12 Id. 112; 15 Id. 486; 33 A. S. R. 400; 2 Ann. Cas. 587; 3 Id. 11; 5 Id. 905.

See, also, Municipal Corporations, Cent. Dig. §§ 1025-1070, 1073, 1074, 1100-1124; Dec. Dig. §§ 421-448, 450, 457-474; 26 A. & E. Enc. L. (2ed.) 1184.

**34.** Proceeding to assess damages and benefits by reason of extension of street is against land damaged. Buchanan v. MacFarland, 31 App. D. C. 6.

**35.** Extension of street. Buchanan v. MacFarland, 31 App. D. C. 6. Congress may require expenses to be taxed against property benefited in general or in defined district. Columbia Heights Realty Co. v. MacFarland, 31 App. D. C. 112. Statute for street extension with one-half of cost to be

As a general rule the basis of local assessments is the benefit accruing to the property from the improvement,[36] but this rule is not universal and property is sometimes assessed according to its frontage without regard to benefits [37] or value,[38] though an assessment under the frontage rule may be considered as according to benefits.[39] If palpable injustice will result from the application of the front foot rule, equity may interfere.[40]

Under the benefit rule various elements are to be considered, such as value [41] and distance from the improvement.[42] Special benefits must be valued in the proper manner and not arbitrarily.[43] Under authority to assess abutting property

assessed against land within certain area (Act Cong. March 3, 1899 [30 Stat. at L. 1344, c. 431]) and statute extending area to be assessed (Act June 6, 1900 [31 Stat. at L. 665, c. 809, § 12]) proper exercise of congress power. Id.

**36.** See ante, § 9B. Evidence held to show that abutting owners assessed for paving received benefits for which they were assessed. Hedge v. Des Moines [Iowa] 119 NW 276. In assessment proceeding, that a railroad assessed for benefits would remove its tracts from the street, if based on conjectural plans of the company, was too speculative to predicate a benefit thereon. City of East St. Louis v. Illinois Cent. R. Co., 238 Ill. 296, 87 NE 407. Assessment of swamp land for drainage purposes which rendered it available for pasturage held not to exceed benefits. Farley Drainage Dist. No. 7 v. Hamilton County [Iowa] 118 NW 432. Potential as well as present use of property may be taken into account in making assessments. Prentice v. Toledo, 11 Ohio C. C. [N. S.] 299. In assessing special benefits the assessing authority must find that the whole effect of the contemplated improvement is to increase the value of the property, and this fact must be reached by weighing the facts tending to show injury as well as benefits. Park City Yacht Club v. Bridgeport [Conn.] 70 A 631. Property adjacent to a sidewalk is benefited if there is an increase in value for any purpose to which it is adapted. City of Chicago v. Marsh, 238 Ill. 254, 87 NE 319.

**37.** St. 1898, §§ 925-216 to 925-218, providing for assessment of cost of sanitary sewer against abutting property by front foot rule, is valid under the rule that assessments are not limited to benefits when property made under the police power. Chicago, etc., R. Co. v. Janesville, 137 Wis. 7, 118 NW 182.

**38.** City of Owensboro v. Sweeney, 33 Ky. L. R. 823, 930, 111 SW 364. An assessment according to frontage as directed by statute is valid. City of Kinston v. Loftin [N. C.] 62 SE 1069. Under St. 1885, pp. 147, 152, c. 153, §§ 2, 7, a lot fronting on one side of a street may be assessed for the cost of constructing a sidewalk on the opposite side, though the owner has laid a walk for his own convenience without obtaining an agreement from the opposite owner to pay one-half to cost. Millsap v. Balfour [Cal.] 97 P 668. That a corner lot has been once assessed for sewer along one street is no objection to assessing for sewer in the other street. McGarvey v. Swan [Wyo.] 96 P 697.

**39.** Under Code, § 818, providing for assessment by front foot rule, and Code Supp. § 792a, providing that assessments shall be in proportion to benefits, held that basis of assessment is proportionate benefit, though in absence of other considerations frontage may properly be considered as basis for determining benefits. Des Moines Union R. Co. v. Des Moines [Iowa] 118 NW 293. The legislature may lawfully prescribe the front foot rule as a reasonable method of apportioning benefits. Union Pac. R. Co. v. Abilene [Kan.] 98 P 224. Where east 46 feet of four lots were assessed as a single parcel and constituted a homestead, such portion constituted a single lot and was properly assessed as such for paving, though only one lot abutted on the street paved. Loewenbach v. Milwaukee [Wis.] 119 NW 888. Lot widening from 50 foot frontage to 175 feet at rear is wholly taxable for an improvement and not merely the portion between parallel lines extending back at right angles to the street and fifty feet apart. Haller v. Barber Asphalt Pav. Co. [Ky.] 113 SW 516.

**40.** Unless, however, injustice appears, the excess will not be enjoined. Union Pac. R. Co. v. Abilene [Kan.] 98 P 224. Courts will give relief where it appears that application of the frontage rule works gross injustice and violation of the principles of equity. City of Kinston v. Wooten [N. C.] 63 SE 1061. Evidence insufficient to entitle an owner to relief from frontage assessment as imposed. Id. Foot rule cannot be constitutionally applied in rural neighborhoods. Philadelphia v. Manderfield, 32 Pa. Super. Ct. 373. Question whether property charged is urban or rural is one of fact usually for jury. Id.

**41.** Assessment in proceeding to widen a street based largely on the value of the property because the commissioners were of the opinion that benefits were in proportion to the value of the property held not an improper method of determining the amount of the assessment with reference to the rule that they should be based on benefits. In re Seattle, 50 Wash. 402, 97 P 444.

**42.** The mere matter of distance of lands from outlet of a drainage ditch, save as to land thereat which may be drained otherwise than through the ditch, is immaterial in estimating benefits. In re Castener [Iowa] 119 NW 980.

**43.** Evidence held to show that special benefits were not valued in the proper manner but were arbitrarily fixed without consideration of value of property and other elements. Kirst v. Street Imp. Dist. No. 120 [Ark.] 109 SW 526.

according to benefits, nonabutting property may be assessed.[44] Assessment according to area is proper.[45]

Assessments must be equitably distributed and property should not be assessed more than it is benefited nor more than its proportion of the cost of the improvement,[46] but omission to assess certain property does not necessarily invalidate the assessment.[47] Whether an assessment amounts to a spoliation depends not upon the value of the lot alone but upon the value of the lot and improvements after construction of the improvement.[48] It is sometimes provided by statute that cost of improvements be assessed equally against lands benefited.[49]

Purchasers of land prior to reapportionment of an assessment may be liable therefor.[50] A city can make a general levy for the payment of the cost of improvement of street intersections, against all property owners in the city.[51] What property may be assessed may rest in the terms of the statute authorizing the assessment,[52] and the question of whether land is exempt is generally determined on pro-

**44.** Where a municipality is authorized to establish assessment districts and assess cost of sewer against abutting property according to benefits, property benefited is liable to assessment though it is nonabutting and no laterals have been laid to it. Beckett v. Portland [Or.] 99 P 659.

**45.** Assessment according to area of abutting property at so much per square foot is proper. Andre v. Burlington [Iowa] 117 NW 1082.

**46.** In assessment proceedings the questions for the jury are whether the property was assessed more than it was benefited or more than its proportionate share of the cost of the improvement. City of East St. Louis v. Illinois Cent. R. Co., 238 Ill. 296, 87 NE 407. Upon a hearing on the question of benefits in a proceeding for confirmation of an assessment, the only questions to be submitted to the court or jury for decision are whether the objector's property was assessed more than it was benefited or more than its proportionate cost of the improvement. City of Chicago v. Hurbert, 235 Ill. 204, 85 NE 222. Equal assessments per front foot for paving, when the commissioners knew that some lots were deeper than others and some had more valuable improvements on them, and the imposition of no assessments against some lots, do not show that assessments were necessarily unjust and unequal and therefore fraudulent. Durkee v. Barre [Vt.] 71 A 819. In assessment proceeding, evidence of what would be the fair and just proportion that property of objecting owners should bear to like number of feet of frontage on the other side of the street held erroneous where all property was owned by two persons and such comparison would be detrimental to the objecting party. City of East St. Louis v. Illinois Cent. R. Co., 238 Ill. 296, 87 NE 407. Under Code Supp. 1902, § 1989-a12, providing for classification of lands assessed for drains according to a graduated scale of benefits, held that the method of apportioning benefits on other land of a different class was immaterial in determining whether a certain assessment was excessive, the question being whether the assessment was equitable. Farley Drainage Dist. No. 7 v. Hamilton county [Iowa] 118 NW 432. Evidence insufficient to show that assessment was unfair and unreasonable. Park City Yacht Club v. Bridgeport [Conn.] 70 A 631. Under Hurd's Rev. St. 1908, c. 24, § 553, requiring the court on objection to inquire whether an assessment is equitable, held the court in allowing assessments of inside lots to stand at a certain sum was required to reduce the assessments on corner lots. Village of Downer's Grove v. Findlay, 237 Ill. 368, 86 NE 732.

**47.** Omission to assess certain abutting property for a reason considered valid by the council does not avoid the assessment in the absence of fraud. Andre v. Burlington [Iowa] 117 NW 1082.

**48.** If the assessment does not then equal the value of the lot, it will be enforced. Haller v. Barber Asphalt Pav. Co. [Ky.] 113 SW 516.

**49.** Under a charter requiring cost of grading streets to be taxed equally against all lands on both sides of the street, where the cost of grading north half of a street is assessed against property abutting on the north side, cost of grading the south half is properly taxed against property lying south of the street. Brosnahan v. Pitcher, 133 Mo. App. 660, 113 SW 1133.

**50.** Under Ky. St. 1903, §§ 2834, 2839, purchasers of land after payment of an assessment but before reapportionment held liable for an additional assessment, since they knew that the street had been improved and that the cost was a lien against abutting lots and were presumed to know that it was a lien until legal assessment and payment thereof. Comley v. American Standard Asphalt Co. [Ky.] 113 SW 125. Purchasers of land after payment of an assessment cannot complain of a reapportionment resulting in additional assessment because at the time of the assessment neither they nor their vendors were parties, because if reapportionment was made according to opinion of the court of appeals and equally, it is immaterial when it was made. Id.

**51.** Oklahoma City v. Shields [Okl.] 100 P 559.

**52.** Hurd's Rev. St. 1908, c. 42, providing that when drainage commissioners enlarge a channel lying beyond the district they may recover benefits from the owner or the land benefited, does not authorize re-

ceedings to enforce the assessment.[53] As a general rule lands owned by the state are not subject to assessment [54] unless made so by statute.[55] In New York lands used for cemetery purposes are not subject to assessment.[56]

The general rule that the proper method of assessing cost of taking land for a street is to assess the cost of each block taken on property fronting thereon does not apply where a portion of the territory was benefited to a greater extent than other portions.[57]

Property of a street railroad in a street is not assessable for an improvement of the street,[58] but freight depots and spur tracks are assessable though part of the entirety of the company's property,[59] and a street railway [60] or steam railway company may be assessed.[61] Only such items of expense may be included in an assessment as are considered reasonably necessary and incident to the improvement.[62]

covery from owners other than those whose lands are intersected by the channel. Commissioners of Vermilion Special Drainage Dist. v. Shockey, 238 Ill. 237, 87 NE 335. Under Laws 1897, p. 422, c. 114, § 166, amended by Laws 1907, p. 61, c. 44, providing that no landowner shall be required to bear expense of grading any portion of a street not in front of his land, he cannot be assessed for paving a street at the side of his lot where he owned only to the exterior line of the street. O'Leary v. Glens Falls, 128 App. Div. 683, 112 NYS 932. The provisions of municipal cods as to improvements for which special assessments are made, that "the corporation shall pay the cost of intersections," has reference to parts of street improvements at intersection of streets one with another, and has no application to the crossing of street by sewer for purposes of local sanitary drainage. Closs v. Parker, 11 Ohio C. C. (N. S.) 85. In an assessment upon lots to defray cost of local sanitary sewer, municipallty is not required to make deduction because of proximity of public park which does not directly abut thereon. Id.

53. In proceedings for street extension supreme court of District of Columbia sitting as district court has no power to determine whether certain land is exempt. Act June 6, 1900 (31 Stat. at L. 665, c. 809), requires all lands to be assessed. Garfield Memorial Hospital v. McFarland. 31 App. D. C. 447.

54. General expressions of a statute granting a city authority to assess all persons specially benefited by a public improvement do not authorize assessment of land owned by the state. State v. Kilburn [Conn.] 69 A 1028.

55. "Belonging to" in Hartford City charter, § 132, providing that the city in making assessments for benefits may assess land belonging to the state, etc., imports beneficial ownership but contains no implication that land on which the state has a mortgage for the benefit of the school fund may be assessed. State v. Kilburn [Conn.] 69 A 1028.

56. Under Laws 1879, p. 397, c. 310, § 1, lands used for cemetery purposes are not subject to assessment for local improvements. In re Jeroms Ave. 192 N. Y. 459, 85 NE 755. In proceedings to acquire property to widen a street, an assessment for benefits and award of damages in excess thereof is an "assessment for local improvements" under the city's power of taxation within such statute. Id. Under such law and greater New York Charter, Laws 1901, p. 405, c. 466, benefits could not be set off against damages awarded. Id. Abandoned part of a street held not "land actually used as a cemetery." Id. The provisions of Laws 1879, p. 397, c. 310, § 1, exempting land used as a cemetery from assessments, and § 2, providing that when land shall cease to be used for such purposes assessments shall become a lien, are contradictory and no valid assessment can be made against land so used. Id.

57. Each parcel should be considered and assessed separately in proportion to benefits received. In re Spofford Ave. 126 App. Div. 740, 111 NYS 334.

58. In re Third, Fourth & Fifth Ave., 49 Wash. 109, 94 P 1075.

59. Under Laws 1903, p. 688, c. 425, a railroad company's freight depot and spur tracks are assessable though part of the entirety of the company's property. Chicago, etc., R. Co. v. Janesville, 137 Wis. 7, 118 NW 182.

60. Cost and expense of improving street under Acts 1908, p. 166, c. 10, where street railway has two tracks laid, is to be taxed against the company two feet each side of the tracks and paving between the tracks. Oklahoma City v. Shields [Okl.] 100 P 559.

61. Steam railroad company may be assessed to pay for that portion of its right of way more than the portion between the rails and two feet on each side, and the assessment shall be the same as against natural proprietors. Oklahoma City v. Shields [Okl.] 100 P 559. Rule applies equally to street railways who own any part of their right of way and abutting lands. Id. Under Code Supp. § 792, providing that assessments shall be in proportion to benefits, where five of tracks of a railroad which owned two lots on each side of a street extended across such street, and at each crossing there was planking between the rails, held that though planked portions of the street were not included in estimating expense of paving, the company was not entitled to have portions of lots fronting on the paving excluded in assessing benefits. Des Moines Union R. Co. v. Des Moines [Iowa] 118 NW 293. Under Laws 1905, p. 84, c. 55, providing for levy of assessments by commissioners appointed by the court, the determination of the commissioners that a railroad right of way abutting on a street is benefited held proper. City of Seattle v. Seattle & M. R. Co., 50 Wash. 132, 96 P 958.

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(§ 9) *D. Procedure for authorization, levy, and confirmation of assessments.*[63] See 10 C. L. 1331—The power to levy special assessments is a statutory power[64] and must be predicated on a valid statute,[65] and must be exercised in the manner prescribed by statute.[66] The various steps must be taken in the manner prescribed[67] and by the officials designated[68] and persons authorized,[69] and the

**62.** Sidewalk Act of 1875, as amended, authorizing assessments for construction of sidewalks, does not authorize inclusion in assessment for cement walk of expense of berme and sloping bank in addition to hemlock planks supported by posts. People v. Klehm, 238 Ill. 89, 87 NE 119. In assessing cost of watering streets against abutting property, value of the water furnished by the city from its aqueduct maintained at its expense could be included as part of the cost. Corcoran v. Cambridge Aldermen, 199 Mass. 5, 85 NE 155. A certain square held properly a part of a street and cost of paving it was properly charged to abutting owners. Alvey v. Asheville, 146 N. C. 395, 59 SE 999. Cost of manholes and catch basins for sewers may be included in assessment against abutting property though they also drain the street, and Code, § 819, expressly provides that cost of sewers at street intersections may be taxed against abutting property. Andre v. Burlington [Iowa] 117 NW 1082. The city has power to impose and collect a **penalty and interest** on delinquent assessments beyond the actual necessities of the fund, which penalties and interest become a part of the fund. Miller v. Seattle, 50 Wash. 252, 97 P 55.

**63. Search Note:** See note in 3 Ann. Cas. 11.

See, also, Municipal Corporations, Cent. Dig. §§ 1072-1099, 1125-1182; Dec. Dig. §§ 449-456, 475-510; 25 A. & E. Enc. L. (2ed,) 1204; 13 A. & E. Enc. P. & P. 306.

**64.** Municipal Incorporation Act (St. 1883, p. 226, c. 49, § 771), providing a method of assessing adjoining property for street improvements, is repealed so far as inconsistent with St. 1885, p. 147, c. 153. Millsap v. Balfour [Cal.] 97 P 668. Municipal Corporation Act, § 871, is a general law for cities of the sixth class enacted pursuant to Const. art. 11, § 12, making it the duty of the legislature to vest in corporate authorities power to assess for municipal purposes. City of Escondido v. Escondido Lumber, Hay & Grain Co. [Cal. App.] 97 P 197. So far as concerns cities of the third class, all prior legislation relative to construction of sewers and assessments therefor, Laws 1890, c. 7; Laws 1891, c. 160; Laws 1893, c. 70; Laws 1899, c. 126; Laws 1901, c. 113; Laws 1903, c. 27 is repealed by Laws 1903 c. 124, as to initiation and enforcement of assessment. Seattle Cedar Lumber Mfg. Co. v. Ballard, 50 Wash. 123, 96 P 956. Erroneous construction of a law by city authorities whereby the city paid a portion of the cost of repaving a street which should have been paid by special assessment against abutting owners will not estop the city from making an assessment for new paving under a subsequent law. Carstens v. Fond du Lac, 137 Wis. 465, 119 NW 117.

**65.** Laws 1905, p. 84 c. 55, providing for appointment of commissioners to levy assessments, held not void as delegating legislative power to levy assessments to others than corporate authorities. City of Seattle v. Seattle & M. R. Co., 50 Wash. 132, 96 P 958.

**66.** Assessment for construction of a sewer was not erroneous because the commissioner first classified the property and applied a different rate to different classes. City of East St. Louis v. Davis, 233 Ill. 553, 84 NE 674. An assessment imposed by a drainage district on a town is not subject to the objection that it is a tax levied for extraordinary purposes and not for ordinary maintenance of roads and bridges, and therefore cannot be levied without consent of the town auditors. Spring Creek Drainage Dist. v. Joliet Com., 238 Ill. 521, 87 NE 394. Under Buffalo City Charter, Laws 1895, p. 1723, c. 805, owners of premises can be required to lay or relay sidewalks only by resolution of the common council, and when ordered by the board of public works assessments therefore are void. Morey v. Buffalo, 59 Misc. 603, 111 NYS 463. Under Municipal Corporation Act, § 871, local authorities held to have power to determine as of what date assessments shall be made. City of Escondido v. Escondido Lumber, Hay & Grain Co. [Cal. App.] 97 P 197. Where engineers were chosen by an officer in authority to appoint city engineers at a time when no one else was in possession of the office and had been recognized by city authorities and had performed their duties, there was substantial compliance with Gen. St. 1901, § 10,009, to authorize an assessment for an improvement based on an estimate made by such engineers. City of Abilene v. Lambing [Kan.] 96 P 838. Under a statute providing that assessments for taking land for widening a street and changing the grade must be collected to pay awards before the city has a right to possession, assessments proceed on the assumption that street will be widened and regraded. In re Third, Fourth & Fifth Ave., 49 Wash. 109, 94 P 1075. Under Hurd's Rev. St. 1908, c. 42, §§ 106, 75-153, c. 120, § 191, the requirement as to date of filing delinquent list is not mandatory. People v. Hulin, 237 Ill. 122, 86 NE 666. Under St. 1904, p. 336, c. 384, § 3, requiring Taunton sewer commissioners to levy assessments for "estimated average cost" of the improvement and stating how assessments are to be made, held commissioners were not entitled to delay levy of general assessment until completion of the whole system, but it was their duty to levy assessments for completed sections as soon as it could be reasonably done. Dunn v. Crossman, 200 Mass. 252, 86 NE 313.

**67.** Special tax against a lot for the cost

ordinance or resolution providing for the assessment must conform to statutory requirements.[70] Several improvements may be provided for by one ordinance.[71] Where one method of procedure is adopted, it must be adhered to.[72] Statutory requirements as to notice to owners[73] and hearing thereunder must be complied with.[74]

In some states provision is made for classification of lands for certain assessments,[75] and such procedure must conform to statutory requirements,[76] and classi-

of the sidewalk in front of it instead of for the proportion of the cost of the walk according to the frontage of the lot, as provided by Hurd's Rev. St. 1905, c. 24, is void. People v. Hennessy, 234 Ill. 14, 84 NE 692. Provision in Buffalo City charter that assessment must precede making of contract held not to apply to improvement specified in Laws 1902, p. 136, c. 568, § 1, since proceeds of bonds issued under the statute and not the taxes constitute the primary fund to pay for the work. People v. Buffalo, 115 NYS 1057. Under Laws 1903, p. 9, c. 7, authorizing a city to apportion sewer assessments according to area of land benefited, hearing may be had by the city without violating the statute as to total cost to be assessed upon a street, property of ordering improvement, whether improvement is local, etc. McGarvey v. Swan [Wyo.] 96 P 697. Under Code, § 1940, and Acts 30th Gen. Assem. pp. 59, 61, providing for notice to landowners and declaring that they shall be given notice and opportunity to be heard prior to reassessment, the board of supervisors may make an equitable adjustment of his claims and consider damages to his land. Howard v. Emmet County [Iowa] 118 NW 882.

**68.** Under Kirby's Dig. § 7871, providing that an authority conferred upon three or more persons may be exercised by a majority, held two members of a board to assess benefits cannot make a new assessment with notice to the third member. Kirst v. Street Imp. Dist. No. 120 [Ark.] 109 SW 526. Where drainage assessment was levied by unauthorized persons at a meeting held outside the district, it could not be ratified by a resolution adopted long after it had become due. People v. Schwank, 237 Ill. 40, 86 NE 631.

**69.** Commissioner owning land in a district organized under the farm drainage act is competent to make an assessment. People v. Sullivan, 238 Ill. 386, 87 NE 306.

**70.** Tax bills are void where preliminary resolution of the council did not describe the proposed work or materials to be used Coulter v. Phoenix Brick & Const. Co., 131 Mo. App. 230, 110 SW 655. Ordinance for improvement held to provide that it should be paid for by special taxation of contiguous property under Hurd's Rev. St. 1908, p. 431, c. 24, § 541. City of East St. Louis v. Illinois Cent. R. Co., 238 Ill. 296, 87 NE 407. Ordinance under Kansas City Charter, art. 10, § 33, levying assessments for maintaining parks, held not objectionable as stating purposes of the assessment too indefinitely. Corrigan v. Kansas City, 211 Mo. 608, 111 SW 115.

**71.** City may combine in one ordinance widening of street and changing of grade, and each lot liable for assessment should bear its share of the expense to the extent of benefits received from the improvement considered as an entirety. In re Third, Fourth & Fifth Ave., 49 Wash. 109, 94 P 1075.

**72.** Where a city elects to order an improvement by unanimous vote of its council, regardless of petition by owners and limitations contained therein, it cannot subsequently fall back on the petition to uphold an assessment otherwise unauthorized and urge that petitioners were estopped to deny authority to levy the assessment. Schuchard v. Seattle [Wash.] 97 P 1106.

**73.** No further notice than that provided in Code Supp. 1907, § 1989a12, for hearing by county supervisors on apportionment by commissioners of expense of drain, is necessary where commissioners increase assessment of certain tracks. Gray v. Anderson [Iowa] 118 NW 526. The right of property owners to object to a proposed assessment or reassessment under Portland City Charter, § 400, and have objections heard and determined by the council, is a substantial right and all requirements of the law respecting such right must be complied with. Hughes v. Portland [Or.] 100 P 942.

**74.** Under St. 1903, p. 381, c. 268, providing that city clerk shall at next regular meeting of council after expiration of time for filing objections to assessment lay said assessment and objections before the council, objectors must take notice that objections will be heard at the next regular meeting after expiration of 30 days for filing objections. Stoner v. Los Angeles City Council [Cal. App.] 97 P 692. Where a city council fails to take action at next regular meeting on objections to an assessment as provided by St. 1903, p. 381, c. 268, it loses jurisdiction to act except by republication of notice under § 19. Id. Adjournment by county supervisors from day fixed in their notice under Code Supp. 1907, § 1989a12, for hearing of apportionment of expense from a drain, held not to deprive them of jurisdiction nor require further notice. Gray v. Anderson [Iowa] 118 NW 526.

**75.** Under Acts 30th Gen. Assem. p. 64, c. 68, §§ 12, 19, providing for a commission to classify and assess lands for construction of drains, etc., railroad assessments are distinct and their property should not be classified in tracts of 40 acres or less. In re Johnson Drainage Dist. No. 9 [Iowa] 118 NW 380.

**76.** Code Supp. § 1989—a12, requiring commissioners in drainage assessment proceedings to inspect and classify land within 20 days after their appointment, does not require them to make their report within 20 days after appointment. Farley Drainage Dist. No. 7 v. Hamilton County [Iowa] 118 NW 432. Where assessment

fication must be made by persons authorized.[77] In some states provision is made for the creation of assessment districts in a manner prescribed.[78] What land is within such district depends on the creation thereof.[79] Where an assessment district is improperly defined, the remedy of the owner is to sue for cancellation of tax bills and the issue of new bills on a district properly defined.[80] Where an assessment district has been fixed by legislative act and apportionment of cost of an improvement has been made, an owner cannot object that his property has not been benefited the amount assessed against it.[81]

In making an assessment the property assessed must be definitely described[82] and the owner identified.[83] As a general rule, in assessing benefits, each tract or parcel must be considered separately,[84] and the determination of the council or assessing board on the question of benefits is conclusive in the absence of fraud or mistake.[85] In some states the verdict must set off damages against benefits.[86] An

under Hurd's Rev. St. 1908, c. 42, was extended against lands according to the classification made when the district was organized, no notice need be given landowners and no new classification is necessary, but the tax must be extended on the classification adopted. People v. Sullivan, 238 Ill. 386, 87 NE 306.

77. That commissioners who classified lands for assessment, under Hurd's Rev. St. 1908, c. 42, §§ 75-153, were owners within the drainage district did not invalidate the classification. People v. Hulin, 237 Ill. 122, 86 NE 666.

78. Under Ann. St. 1906, p. 4854, providing that assessment districts shall be made by drawing a line midway between the street to be improved and the next parallel street, held the parallel street need not parallel the street being improved the whole district of the improvement but the line must deflect. Fruin-Bambrick Const. Co. v. St. Louis Shovel Co., 211 Mo. 524, 111 SW 86. Under such statute held also that the parallel street is not required to be at least within 600 feet of the street being improved. Id.

79. Under St. Louis Charter (Laws 1906, p. 4854), providing for assessment districts where lots fronting on a street being improved run through to the next parallel street, the whole lot is in the district. State v. St. Louis, 211 Mo. 591, 111 SW 89. Where an original lot has been subdivided, each subdivision is a lot within St. Louis Charter (Ann. St. 1906, p. 4854) relative to creation of assessment districts. Id.

80. State v. St. Louis, 211 Mo. 591, 111 SW 89.

81. Fruin-Bambrick Const. Co. v. St. Louis Shovel Co., 211 Mo. 524, 111 SW 86.

82. Under Laws 1897, p. 400, c. 414, and Laws 1896, p. 803, c. 908, amended by Laws 1899, p. 1594, c. 712, § 3, an assessment of property as "N. Division St." without other location or description did not specify the property so as to render its identification possible and was fatally defective. Allter v. St. Johnsville, 130 App. Div. 297, 114 NYS 855. In assessing property the council may properly recognize the descriptions of property assessed according to ownership. Mitchell v. Portland [Or.] 99 P 881.

83. An assessment describing the owner as a firm or company is no assessment against a member of such firm or company who is the owner. Allter v. St. Johnsville, 130 App. Div. 297, 114 NYS 355.

84. A board of public works in assessing benefits and damages is bound to consider each tract separately and not assume that benefits are equal to cost of doing the work. Loewenbach v. Milwaukee [Wis.] 119 NW 888. Under a statute requiring property to be assessed the value of benefits, assessors should make a fair and just estimate of the benefits to each piece or tract, considering its value, area, and every other factor. Kirst v. Street Imp. Dist. No. 120 [Ark.] 109 SW 526. Under Bridgeport Charter, §§ 2, 47, 48, 59, authorizing the council to lay out highways, appraise benefits and damages, etc., where an avenue was widened and a bridge built and the effect thereof was to prevent an owner to get from his premises to the city without going some distance, held, in determining the special benefit, the injurious effect on the property resulting from the peculiar condition, as well as beneficial effect from other causes, should be considered. Park City Yacht Club v. Bridgeport [Conn.] 70 A 631. Whether buildings on the property are benefited and to what extent are questions for the assessment board. Kirst v. Street Imp. Dist. No. 120 [Ark.] 109 SW 526.

85. Where a council has determined the extent to which property is benefited and its proportionate share of the cost, its decision is final in the absence of fraud or mistake except as appeal is provided by statute, or unless it has proceeded on an erroneous principle of law. Hughes v. Portland [Or.] 100 P 942. Under Portland City Charter, §§ 389, 390, authorizing the council to establish sewer districts and assess cost of sewers against property benefited, and making its action final, its action in establishing a district and determining the question of benefits and making an assessment is conclusive on collateral attack, unless fraudulent on its face. Beckett v. Portland [Or.] 99 P 659. Under Laws 1903, p. 55, c. 15; Laws 1899, p. 147, c. 12; amended by Laws 1903, p. 48, c. 15, a finding by the council that a benefit exceeds an assessment is at least prima facie evidence of such fact, and an owner not having rebutted it cannot object to judgment for the assessment. City of Beaumont v. Russell [Tex. Civ. App.] 112 SW 950.

86. Under Ball. Ann. Codes & St. §§ 775,

assessment is presumed regularly and properly made,[87] and objections of property owners must be presented within the period prescribed.[88] The filing of objections is not sufficient to require a reassessment [89] or to render the subsequent order of confirmation void.[90]

*Essential prerequisites to assessment.* See 10 C. L. 1333—Proceedings whereby property is burdened with special assessments are in invitum and must conform strictly to law.[91] The assessment must be levied under a valid ordinance [92] and must conform thereto.[93] An assessment based on a void condemnation judgment is void.[94] Failure of the contractor to do the work according to the contract renders tax bills against abutting owners void.[95] Under a rule requiring that an assessment precede the contract, the fact that the contract is void does not invalidate the assessment.[96] An assessment for paving is not void because no credit is given for paving taken.[97]

789 et seq., providing that when a street is widened compensation shall be paid by special assessment on property benefited, and compensation for property taken shall be found irrespective of benefit, each lot must bear its proportion of the expense according to benefits and the verdict must offset benefits against damages. In re Third, Fourth and Fifth Ave., 49 Wash. 109, 94 P 1075.

87. One objecting thereto has the burden of proof. In re Johnson Drainage Dist. No. 9 [Iowa] 118 NW 380. Under Starr & C. Ann. St. Supp. 1902, p. 182, providing that no local assessment shall be levied until land necessary to make it has been acquired, and § 9, making recommendation of the board prima facie evidence of compliance with preliminary requirements, held where assessments have been levied, an objector has the burden to prove that title has not been acquired. City of East St. Louis v. Davis, 233 Ill. 553, 84 NE 674. Where order of county court in proceedings for confirmation of drainage assessments did not recite jurisdictional facts, it will not be presumed in proceeding to compel the city to levy taxes to pay the assessment that the court had jurisdiction to enter judgment of confirmation of the assessment. Spring Creek Drainage Dist. v. Joliet Com'rs, 238 Ill. 521, 87 NE 394. A recital in an assessment that it is made in proportion to benefits is not impeached by the fact that the result reached is the same as would have been reached by using the front foot rule. Hedge v. Des Moines [Iowa] 119 NW 276.

88. Under Code, §§ 823, 824, providing that objections to assessments shall be filed within 20 days after notice and that objections not before the council at the hearing are waived, an amendment to an objection filed after hearing will not be considered though notice of the amendment was given at the hearing. Hedge v. Des Moines [Iowa] 119 NW 276. "Hear and determine" in Portland Reincorporation Act, § 400, prescribing manner of reassessment where original assessment is set aside, means a judicial determination of an issue of fact and was not complied with by reference of objections to committee on streets. Applegate v. Portland [Or.] 99 P 890. Owners of lands classified for assessments for drainage, under Hurd's Rev. St. 1908, c. 42, §§ 75-153, who are notified of the classification, should then object and cannot raise the objection on application for judgment for the tax. People v. Hulin, 237 Ill. 122, 86 NE 666. Under Laws 1899, p. 373, c. 150, amended by Laws 1901, p. 388, c. 107, where property owners appeared and objected to an assessment and improvement after notice of completion of the improvement and assessment, he lost none of his rights by failure to object to preliminary order for the improvement. City of Pueblo v. Colorado Realty Co. [Colo.] 99 P 318.

89. Filing of objections insufficient to vacate assessment and require impaneling of a new jury under D. C. Rev. St. § 263, to reassess. Buchanan v. MacFarland, 31 App. D. C. 6.

90. As against attack of persons not parties to original objections. Buchanan v. MacFarland, 31 App. D. C. 6.

91. Brosnahan v. Pitcher, 133 Mo. App. 660, 113 SW 1133. An attempt to subject property to special assessment is a proceeding in invitum to uphold which on direct attack it must appear from the record that statutory requirements have been complied with. Applegate v. Portland [Or.] 99 P 890.

92. A valid ordinance is essential to the validity of an assessment for an improvement. In re Third, Fourth and Fifth Avenues, 49 Wash. 109, 94 P 1075. It is essential to the validity of an assessment that it be levied under a valid statute. Before a statute will be declared void, however, a complaining party must show just grievance. McGarvey v. Swan [Wyo.] 96 P 697. Tax bills arising under an invalid ordinance providing for an improvement are void. Rackliff v. Peters [Mo. App.] 115 SW 503.

93. Under Hurd's Rev. St. 1905, c. 24, providing for making of local improvements, a special assessment to enable a city to acquire strips of land for a sewer system, based on an ordinance providing for condemnation of right of way for sewers, but not providing for construction of sewers, is void. City of Waukegan v. Burnett, 234 Ill. 460, 84 NE 1061.

94. In re Third, Fourth & Fifth Avenues, 49 Wash. 109, 94 P 1075. Opinion modified. In re Third, Fourth & Fifth Avenues, 49 49 Wash. 109, 95 P 862.

95. Coulter v. Phoenix Brick & Const. Co., 131 Mo. App. 230, 110 SW 655.

96. Since Laws 1891, p. 223, c. 105, requires that an assessment must precede a contract for the work, the making of a contract in

*Defective or excessive assessments.*[See 10 C. L. 1333]—As a general rule, defects or irregularities which are not jurisdictional will not invalidate an assessment,[98] especially if timely objection thereto is not made,[99] but if jurisdictional requirements have not been complied with, the assessment is void.[1] Such defects, however, must clearly appear.[2] An assessment will not be held void where the objection involves only a trifling sum.[3] It is presumed that a city council did its duty and levied assessments according to benefits accruing to abutting property,[4] and even if an assessment is made arbitrarily and without reference to actual benefits, the entire assessment should not be declared void, but the court should correct it.[5] Error in apportionment may be corrected in a court by proper apportionment.[6] In New York an illegal assessment may be annulled on certiorari and a new one directed to be made.[7]

violation of statute does not avoid the assessment. People v. Buffalo, 115 NYS 1057.

**97.** Assessment for paving held not void because the old pavement was taken away by city officers and no credit given therefor to abutting owners. Hedge v. Des Moines [Iowa] 119 NW 276.

**98.** Under Ann. St. 1906, p. 4227, providing that no assessment shall be void because of informality in making assessment or in tax lists, etc., held, where valid assessments of drainage district taxes were entered on the tax books, they were valid, notwithstanding irregularity in the entry, extension and certificate of assessment on the tax books, etc. State v. Wilson [Mo.] 115 SW 549. Failure of superintendent of streets to certify to assessors, before assessment of cost of watering streets against abutting owners, a list of streets, number of lineal feet, and amount of assessment on each estate as required by law, is not fatal where the assessors had such a list. Corcoran v. Cambridge Alderman, 199 Mass. 5, 85 NE 155. Mere irregularities in levy of a drainage tax are not grounds for refusing to enforce its collection. People v. Hulin, 237 Ill. 122, 86 NE 666.

**99.** Under Code, §§ 810, 824, if a property owner does not object before the city council that adjacent property was not assessed, the objection is waived, it being an irregularity and not jurisdictional. Andre v. Burlington [Iowa] 117 NW 1082. Abutting owners held estopped from questioning validity of assessment for paving where they failed to protest against the improvement until all proceedings looking to it had been completed and the contract let. Kerker v. Bocher, 20 Okl. 729, 95 P 981. Where owners have knowledge that paving is being done with intention of levying assessment, and permit work to progress, and receive the benefits without protesting to the council, they are estopped to set up any irregularity when they seek to escape payment except jurisdictional defects. Id. Objections to the regularity of proceedings of a city council in levying assessments which do not go to the jurisdiction of the council are waived by failure to appear and object in the manner prescribed by statute. Seattle & Puget Sound Packing Co. v. Seattle [Wash.] 97 P 1093. Irregularity in an assessment for paving by including property in excess of a depth of 150 feet **held not waived** by failure of property owners to object, where proposed schedule did not disclose the excessive assessment. Hedge v. Des Moines [Iowa] 119 NW 276.

**1.** Where proceedings for paving a street were jurisdictionally defective and a property owner gave timely notice that he would contest the assessment, he was not required to enjoin the improvement but could raise the objection in a suit to foreclose the assessment. Zorn v. Warren-Scharf Asphalt Pav. Co. [Ind. App.] 84 NE 509. Objections going to the jurisdiction of the council are not waived thereby. Seattle & Puget Sound Packing Co. v. Seattle [Wash.] 97 P 1093. The fact that property has been benefited will not render the owner liable for an assessment if proceedings are illegal. Municipal Sec. Corp. v. Gates, 130 Mo. App. 552, 109 SW 85 Where judgment in condemnation determined that certain property was damaged in excess of benefits, the city in subsequently assessing benefits exceeded its jusdiction, and the owner could sue to cancel the assessment. Id. Laws 1905, c. 150, providing that when a city council in good faith makes an assessment it shall be valid, is not intended to include jurisdictional defects, and failure to follow the method prescribed of making improvements by assessment is jurisdictional. Seattle Cedar Lumber Mfg. Co. v. Ballard, 50 Wash. 123, 96 P 956.

**2.** Even if objections to the jurisdiction of a city council to make assessments may be made at any time, it must clearly appear that the council was without jurisdiction, and not merely that there were errors or irregularities in the poceedings. Andre v. Burlington [Iowa] 117 NW 1082.

**3.** Where total assessment was over $27,000 and assessment against objecting owners was over $1,200, an objection involving less than $5 would not be considered "De minimis non curat lex." City of Chicago v. Wilshire, 238 Ill. 317, 87 NE 383. Under Code Supp. 1902, § 792a, forbidding assessment of abutting property for more than 25 per cent of its value, an excessive assessment should be reduced, but does not render the entire assessment void. Andre v. Burlington [Iowa] 117 NW 1082.

**4.** Andre v. Burlington [Iowa] 117 NW 1082. To defeat the return of assessors on the ground that it is unjust, there should be a clear preponderance of evidence against the correctness of the return. City of Seattle v. Felt, 50 Wash. 323, 97 P 226.

**5.** Andre v. Burlington [Iowa] 117 NW 1082.

**6.** Huesman v. Dersch, 33 Ky. L. R. 77, 109 SW 319.

**7.** Under Laws 1891, p. 153, c. 105, provid-

*Assessment roll or report.* See 10 C. L. 1334—A statute making a duly certified assessment roll prima facie evidence of the regularity of the assessment does not apply where it is irregular on its face.[8] In special assessment proceedings, the court may, without losing jurisdiction, refer the roll filed by the commissioner back to him, with leave to make a new assessment in accordance with the order for the original assessment.[9]

*Confirmation of assessments.* See 10 C. L. 1334—Questions going to the authority of the council to make an assessment[10] and to the regularity of the proceedings must be raised on application for confirmation thereof.[11] On application for confirmation, one objecting has the burden to overcome the presumption in favor of the validity of the assessment.[12] He must exercise proper diligence to procure his evidence.[13] Judgment of confirmation must be made at the appropriate term.[14] Heirs at law of an owner are bound by the confirmation of an award where the owner dies after a verdict assessing benefits and pending an order to show cause why the award should not be confirmed.[15] There is no authority for abatement of an assessment which has been properly confirmed.[16]

(§ 9) *E. Reassessments and additional assessments.*[17] See 10 C. L. 1335—A reassessment supersedes the original assessment.[18] It must be authorized by a valid

ing for canceling an assessment for illegality and for correcting certain defects, the court may, on certiorari, direct that illegal assessments be annulled and that a new assessment be made on correct principles. People v. Buffalo, 115 NYS 1057.

8. Laws 1897, p. 408, c. 414, making assessment roll properly certified prima facie evidence of regularity of the assessment, right to levy the tax, etc., applies only where irregularity does not appear on face of assessment roll. Aliter v. St. Johnsville, 130 App. Div. 297, 114 NYS 355. Such section does not apply to matters improperly interpolated into the roll. Id. Under Laws 1897, p. 403, c. 414, requiring assessment roll to be prepared by assessors and filed with the clerk, and that the board of trustees shall prepare tax levy, held, the village assessment roll including local assessment was fatally defective, as such assessment had no place therein. Id.

9. Village of Donovan v. Donovan, 236 Ill. 636, 86 NE 575. Where the court in assessment proceedings referred the roll back to the commissioner with leave to make a new assessment in accordance with the order for the original assessment and no objections were raised to the filing of the new roll, whether the court erred in permitting it to be filed in lieu of the original could not be raised in the supreme court on appeal from confirmation. Id.

10. Questions whether council had authority to establish a grade, or whether grade established injured abutting property, must be presented on application for confirmation of the assessment. Cosgrove v. Chicago, 235 Ill. 358, 85 NE 599.

11. Where existing pavement was of value and was not considered in making assessment of cost of new paving, the objection must be raised on application for confirmation of the assessment. Cosgrove v. Chicago, 235 Ill. 358, 85 NE 599. Objections to proceedings under a subsequent ordinance for an improvement based on a prior ordinance must be made on application for confirmation of the assessment under the subsequent ordinance, and not by bill to enjoin collection of the assessment. Id.

12. One objecting to confirmation of an assessment levied under Hurd's Rev. St. 1908, c. 24, §§ 507-605, for street improvement, including sidewalk at street intersection, on the ground that the sidewalk at the intersection was in good repair at the time the ordinance was passed, has the burden to prove such fact, as it is presumed that the assessment was properly spread. City of Chicago v. Wilshire, 238 Ill. 317, 87 NE 383. That in ordinance for a system of water mains mistakes in designating the streets is not ground for refusing confirmation of assessments, where location of the streets is made certain by parol. Village of Donovan v. Donovan, 236 Ill. 636, 86 NE 575. Record of a village board showing that ordinance for an improvement was passed is sufficient to render the ordinance admissible in proceedings to confirm the assessment. Id.

13. One objecting to confirmation of an assessment on the ground that the sidewalk was in good repair when the ordinance was passed, who failed to show that he had exercised reasonable diligence to procure evidence of that fact, was properly denied a continuance to procure such evidence. City of Chicago v. Wilshire, 238 Ill. 317, 87 NE 383.

14. Where the term at which judgment of confirmation of an assessment was entered has expired, the court loses jurisdiction. But where the parties voluntarily appear at a subsequent term, the court may be invested with jurisdiction, except as provided by Hurd's Rev. St. 1908, c. 24, § 562. People v. Noonan, 238 Ill. 303, 87 NE 367.

15. Buchanan v. MacFarland, 31 App. D. C. 6.

16. City of Chicago v. Hurford, 238 Ill. 552, 87 NE 325.

17. **Search Note:** See Municipal Corporations, Cent. Dig. §§ 1207-1215; Dec. Dig. § 514.

18. A reassessment authorized by Portland City Charter, § 400, where the council is in doubt as to validity of the original assessment supersedes the original made under § 394, and where a petition for a writ to review the former assigned no errors as to

statute,[19] made within a reasonable time,[20] and for a purpose specified.[21] A reassessment is not precluded by the fact that an owner has paid the original assessment.[22] Where a landowner's property is not liable for an assessment because the work was not authorized by ordinance, there can be no reassessment.[23] Where the purpose of the power to make a reassessment is to provide curative procedure, the power is not exhausted by one attempt.[24] In making a reassessment the procedure prescribed by statute must be observed and followed.[25] The ordinance need not disclose the method of assessment,[26] but it must appear to have been made to the extent of the respective and proportionate shares of the full value of the improvement.[27] It must be made by the proper tribunal.[28] Objections of landowners must be made in proper time [29] and must disclose wherein the assessment is unjust or void.[30] A second assess-

other matters, the auditor was not required to include in his writ proceedings culminating in the first assessment. Michell v. Portland [Or.] 99 P 881.

19. Burns' Ann. St. 1908, § 8716, requiring appointment by the court of freeholders to reassess benefits upon a petition of a property holder, and making their finding final, if void as depriving courts of judicial powers, did not render the entire statute void. Martindale v. Rochester [Ind.] 86 NE 321.

20. Held invalid where not made within three years. City of Olimpia v. Knox, 49 Wash. 537, 95 P 1090.

21. Cobbey's Ann. St. 1907, § 7992, providing for reassessment of property where assessments have been declared void, does not authorize reassessment for benefit of purchaser at a tax sale who fails to recover from the property because of illegality of the assessment. Barkley v. Lincoln [Neb.] 117 NW 398. In proceeding for supplemental assessment, evidence held insufficient to show a deficiency in the original assessment. City of Chicago v. Hurford, 238 Ill. 552, 87 NE 325.

22. Where assessments for benefits in drainage proceedings were held unconstitutional, the fact that a landowner had paid his assessment held not to prevent reassessment under Acts 30th General Assembly, pp. 60, 65. Howard v. Emmet County [Iowa] 118 NW 882.

23. Under Act March 23, 1881. Burnett v. Boonton, 75 N. J. Law, 467, 70 A 67.

24. The purpose of Portland City Charter, § 400, giving the city council power to make a reassessment where a first assessment has been annulled by a court or otherwise, is to provide curative procedure, and the power of the council is not exhausted by one attempt to make a reassessment. Hughes v. Portland [Or.] 100 P 942.

25. Resolntion for reassessment under Portland City Charter, § 400, held sufficient. Hughes v. Portland [Or.] 100 P 942. Under Portland City Charter, § 400, a reassessment must be made in accordance with benefits, and that each parcel shall be assessed only its share of the cost, a reassessment ordinance showing that such assessment had not been made held void. Id. Under Portland City Charter, § 400, relative to reasessments where it appears that a committee to which the council referred objections presenting questions of fact did not report upon them until after the reassessment ordinance had been adopted, the reassessment was premature. Id. Under Portland City Charter, § 400, providing for reassessment and notice thereof and hearing of property owners, the procedure on such hearing and requisites of findings, etc., stated. Id. Under Portland City Charter, § 400, and the charter of 1898, relative to reassessments and procedure thereon, held, where a remonstrance was filed against the original proceeding, it was for the council to determine whether it was signed by the requisite number of owners so as to bar the proceedings at the proper time, or on hearing of objections to proposed reassessment. Id. It will not be assumed by a court reviewing proceedings for reassessment that issues raised by objections to the original assessment were determined by the council adversely to objectors from the mere fact that the reassessment ordinance was passed. Id.

26. An ordinance or record of the council making a reassessment need not disclose the method of assessment. Hughes v. Portland [Or.] 100 P 942. If a reassessment purports to have been made according to benefits, it will not be disturbed because it does not clearly appear on its face that the council has passed on the question of benefits if under any condition the finding of the council could have been legally made. Except on appeal as provided by charter. Id.

27. A reassessment cannot be sustained where neither the ordinance authorizing it nor the records of the council show that the assessment was to the extent of the respective and proportionate shares of the full value of the improvement. Morgan v. Portland [Or.] 100 P 657. Where the land is subject to assessment on account of work done, the board of assessors may be authorized to make a new assessment in proportion to the benefits recieved, and not in excess thereof. Burnett v. Boonton, 75 N. J. Law, 467, 70 A 67.

28. Under Portland City Charter, § 400, the city council is the only tribunal authorized to make reassessment and it must appear that the council has passed on the question of benefits and applied to each lot or parcel of land, benefited its proportionate share of the cost. Hughes v. Portland [Or.] 100 P 942.

29. Where landowner appeared in response to notice of reassessment and did not object that drainage law, Acts 30th General Assembly, pp. 59, 61, was void because it did not require notice to landowners, he waived the objection. Howard v. Emmet County [Iowa] 118 NW 882.

30. That an owner may insist upon his right to be heard on his objections, they must set out wherein the reassessment is

ment may be made to complete the improvement where the first is inadequate.[31] The power of a board of supervisors to increase drainage assessments does not authorize it to do so arbitrarily.[32] In Washington, where special benefits are set off against damages a subsequent assessment for the same improvement is unauthorized,[33] and cannot be sustained on the ground that the proceeding to assess the cost of the improvement is independent of condemnation proceedings,[34] nor can it be sustained on the ground that conditions have or may have changed since trial of the condemnation proceedings,[35] nor on the ground that the jury in the condemnation proceedings must have taken into consideration, in awarding damages, the assessment to be thereafter levied against the lots.[36]

(§ 9) *F. Maturity, obligation and lien of assessments.*[37]—See 10 C. L. 1336—All private rights in real property in a municipality are subject to the statutory powers of the municipality to levy assessments for local improvements,[38] and the legislature may by statute create liens for such improvements and make them superior to other liens acquired subsequent to the enactment of the statute.[39] The intention of the lawmaking power to give priority to such lien over contract liens of individuals may be implied from the language of the statute.[40] Liens for special assessments being purely statutory, the provisions govern the time of commencement,[41] as well as the time of filing.[42] The test of whether property is liable for a lien depends upon conditions at the time the improvement is made.[43] A stat-

unjust or void, so that the council may know the nature of his objection, and a general objection that it is not made in accordance with benefits or that the appointment is unjust is insufficient. Hughes v. Portland [Or.] 100 P 942.

31. Drainage assessment. People v. Gungenhauser, 237 Ill. 262, 86 NE 669. Under levee act (Hurd's Rev. St. 1905, p. 775, c. 42), money raised by a second assessment can be raised only for the payment of future obligations, and none can be assessed or raised for the purpose of paying obligations already incurred except incidental expenses necessary for the preliminary work in preparing, spreading and levying the additional or second assessment. Vandalia Levee & Drainage Dist. v. Hutchins, 234 Ill. 31, 84 NE 715. Under such act, incidental expenses must be incurred in necessary preliminary work before the assessment is spread or levied, but must be included in the original estimate and paid out of the original assessment. Id.

32. In re Castner [Iowa] 119 NW 980. Increase held not justified. Id.

33. Under Laws 1893, p. 189, c. 84, §§ 15, 22, where special benefits from regrade of a street are offset against damages, a subsequent assessment of benefits against the property, for the same improvement, is unauthorized. Schuchard v. Seattle [Wash.] 97 P 1106.

34, 35, 36. Schuchard v. Seattle [Wash.] 97 P 1106.

37. **Search Note:** See notes in 35 L. R. A. 372; 6 L. R. A. (N. S.) 694.

See, also, Municipal Corporations, Cent. Dig. §§ 1218-1227; Dec. Dig. §§ 518, 519.

38. Lybass v. Ft. Myers [Fla.] 47 S 346. The fact that Laws 1898, p. 150, under which an improvement was made, required the contractor to look to the property and owners thereof for his pay, did not preclude the city under its subsequent charter from charging the property with a lien for its share of the cost. Hughes v. Portland [Or.] 100 P 942.

39. Lybass v. Ft. Myers [Fla.] 47 S 346. Under Const. art. 8, § 2, and Gen. St. 1902, §§ 157, 1954, 2392, relative to the state school fund and authorizing it to be loaned, a mortgage in favor of the state on such fund is a superior lien to assessments for public improvements, though as to a mortgage in favor of a private individual the lien would be superior. State v. Kilburn [Conn.] 69 A 1028.

40. Lybass v. Ft. Myers [Fla.] 47 S 346.

41. Knowles v. Temple, 49 Wash. 595, 96 P 1. Under Municipal Corporation Act, § 871, they are a lien from first Monday in March. City of Escondido v. Escondido Lumber, Hay & Grain Co. [Cal. App.] 97 P 197. Laws 1908, p. 172, c. 10, § 5, providing for lien of assessments, did not take effect until 90 days after expiration of the term of the legislature at which it was passed. Oklahoma City v. Shields [Okl.] 100 P 559. Under Laws 1901, p. 240, c. 118, § 1, providing that an assessment is a lien from the time the roll is placed in the hands of the officer for collection, no lien exists until such time. Knowles v. Temple, 49 Wash. 595, 96 P 1. The effect of Code, § 816, providing that special taxes are a lien from the date the clerk files the proper certificate with the county auditor, is to make such tax when duly assessed a lien, and, and if it is adjudicated that a tax cannot be levied, no lien can exist. Snouffer v. Ford [Iowa] 116 NW 1056.

42. Lien for paving under front foot rule in proceedings under Act May 23, 1889, P. L. 277, is valid where specification of lien is filed within six months after completion of work, and Act May 16, 1891, P. L. 69, providing for filing lien within six months from date of final assessment, has no application. Scranton City v. Clarke, 34 Pa. Super. Ct. 128. Provisions of Act of May 23, 1889, P. L. 277, so far as they vitiate assessments under front foot rule, are not repealed by act May 16, 1891, P. L. 69. Id.

43. Not time when ordinance is enacted.

utory lien of an assessment is in the nature of a governmental tax.[44] In California, owners of separate tracts may join in a suit to cancel a lien which is separate on each tract.[45]

(§ 9) *G. Payment and discharge.*[46]—See 10 C. L. 1337—Funds created from the collection of special assessments are trust funds to pay for the improvement.[47] Interest upon vouchers issued ceases upon receipt by the city of assessments.[48] Whether a valid tender of payment has been made may depend on the terms of the statute [49] or general rules governing payment and tender.[50] A contractor cannot make an agreement with the tax collector to set off his own assessment against moneys to become due him.[51] Where an assessment is paid by check and discharged of record, the fact that the check was forged does not defeat the payment.[52]

(§ 9) *H. Enforcement and collection.*[53]—See 10 C. L. 1337—The lien acquired by the confirmation of assessments and the entry on the tax roll for collection is not impaired by the fact that no method of enforcement was provided.[54]

*Mode of collection.* See 10 C. L. 1337—Assessments are enforcible only against the property.[55]

*Character of action and parties.* See 10 C. L. 1337—Though the action provided by statute for the enforcement of special assessments is deemed statutory, when a court obtains jurisdiction it exercises general jurisdiction, and not mere statutory powers,[56] but it assumes jurisdiction only for the purposes specified.[57] As a general rule, special assessment warrants are not obligations of the city [58] unless it has

Philadelphia v. Manderfield, 32 Pa. Super. Ct. 373. Not time when issue founded on lien is tried in court. Id.

44. Statutory lien for sidewalk improvements is in nature of governmental tax and may be superior to a mortgage given after enactment of the statute but before improvements were made. Lybass v. Ft. Myers [Fla.] 47 S 346. Such lien held superior. Id.

45. Under Code Civ. Proc. § 378, owners in severalty of different lots may join as plaintiffs in a suit to cancel warrants for assessments, though the lien on each lot is separate. Toomey v. Knobloch [Cal. App.] 97 P 529.

46. **Search Note:** See Municipal Corporations, Cent. Dig. §§ 1228-1231, 1237, 1238, 1239; Dec. Dig. §§ 520-522, 524.

47. The city cannot use it for other purposes, and if the city may pay out of such fund for expenses and engineering, it cannot appropriate more than is necessary for such purpose. Conway v. Chicago, 237 Ill. 128, 86 NE 619.

48. Where vouchers were issued to contractors in connection with local improvements, upon receipt by the city of portions of the assessment the interest ceased upon the vouchers to the payment of which the sums received were applicable. City of Chicago v. Hurford, 238 Ill. 552, 87 NE 325.

49. A tender of payment of a certificate of sale of property under an assessment to the "purchaser" under assignment of the certificate is insufficient under Hurd's Rev. St. 1905, c. 120, providing that receipt of redemption money by a purchaser shall release all claims, as the word "purchaser" means "assignee." Ambler v. Glos, 237 Ill. 637, 86 NE 1113.

50. Tender of payment of certificate of sale made to assignor of certificate after assignment and in absence of assignee held insufficient. Ambler v. Glos, 237 Ill. 637, 86 NE 1113.

51. Agreement between owner and tax collector to offset amount of assessment against amount to become due the owner under his uncompleted contract to build part of the drain is void. Harrington v. Dickinson [Mich.] 15 Det. Leg. N. 996, 118 NW 931.

52. A bank paid a check purporting to be drawn by a depositor whose signature was forged for amount of an assessment, whereby the assessment was discharged and the property was conveyed free from incumbrances. Held, the bank, when it charged back the payment, was not entitled to subrogation to the lien of the assessment. Title Guarantee & Trust Co. v. Haven, 126 App. Div. 802, 111 NYS 305.

53. **Search Note:** See notes in 56 L. R. A. 905; 11 Ann. Cas. 811.

See, also, Municipal Corporations, Cent. Dig. §§ 1240-1307; Dec. Dig. §§ 525-588; 25 A. & E. Enc. L. (2ed.) 1229.

54. Congress has power to provide method. Buchanan v. MacFarland, 31 App. D. C. 6.

55. Where land benefited belongs to an estate, assessments cannot properly be demanded of an administrator with will annexed. Hessig v. Hessig's Guardian [Ky.] 115 SW 748.

56. Robinson v. Levy [Mo.] 117 SW 577.

57. Under Hurd's Rev. St. 1908, c. 42, (Farm Drainage Act), the court on appeal from classification of land for assessment, etc., takes jurisdiction merely to correct errors, and the appeal does not suspend proceeding for assessment and collection of benefits. People v. Grace, 237 Ill. 265, 86 NE 628.

58. Holders are required to look solely to the special fund. Jurey v. Seattle, 50 Wash. 272, 97 P 107. City held not liable to contractor for amount of assessments, though the council had passed resolutions requesting redemption of the lots by the county. City of Atchison v. Friend [Kan.] 96 P 348. Under Burns' Ann. St. 1908, §§ 269, 277, and Burns' Ann. St. 1901, § 4297, the holder of street improvement bonds suing to collect an assessment and foreclose a lien against own-

made enforcement of assessment impossible.[59] Where an assessment has been levied and collected by the city, the remedy of the contractor is assumpsit,[60] and where a city wrongfully diverts a special assessment fund, it becomes liable ex delicto in damages to the holders of warrants to the extent of such diversion;[61] but if a city neglect its duty to levy and collect an assessment, the remedy of the contractor is by mandamus[62] if he has performed his contract.[63] Suit for collection may be maintained by the officer authorized.[64] Owners must be joined in the manner prescribed.[65]

*Pleading and proof.* See 10 C. L. 1338—A petition to enforce an assessment must show that it has not been paid,[66] and there must be no variance between the description in the petition and tax bill.[67] A statute making tax bills prima facie evidence of their own validity does not affect rules of evidence.[68] It is presumed that the tax was levied for a lawful purpose and is a legal tax.[69] One objecting to an assessment has the burden to establish its invalidity.[70] An answer alleging that apportionment is bad must show that proper apportionment would be less.[71]

ers may not join the town as it is not an owner of any property affected. Town of Windfall City v. First Nat. Bank [Ind.] 87 NE 984.

59. Where a city purchased several lots, which had been assessed for improvements, to be used in connection with its fire department, thus making it impossible to enforce liens for special assessments, it became absolutely liable to the contractor for the amount of the assessment bonds. City of Atchison v. Friend [Kan.] 96 P 348.

60. Conway v. Chicago, 237 Ill. 128, 86 NE 619. A city which wrongfully diverts money from funds created by special assessments is liable to the contractor for money had and received. Id. Where, on foreclosure of assessment liens under Laws 1901, p. 705, c. 392, against property on which assessment bonds had been issued, it appeared that portions of assessments on which bonds had been issued had been paid to the city, an action can be maintained against the city. City of Acthison v. Friend [Kan.] 96 P 348.

61. Under Seattle City Charter, art. 4, § 29, claims must be presented within thirty days. Jurey v. Seattle, 50 Wash. 272, 97 P 107.

62. Conway v. Chicago, 237 Ill. 128, 86 NE 619.

63. A contractor who has broken his contract and failed to fulfill its terms may not compel, by mandamus, the city to levy and collect an assessment to pay for work done. City of Auburn v. State, 170 Ind. 534, 84 NE 990.

64. Under Ann. St. 1906, p. 3942, the county collector of revenue held to have authority to sue an owner to recover special drainage district taxes and back taxes. State v. Wilson [Mo.] 115 SW 549.

65. Under Kirby's Dig. § 5694, providing that in foreclosure of assessments the owner shall be made defendant if known, and if not known the fact shall be stated in the complaint and the suit shall proceed in rem, held, where suit was brought against an alleged owner after he had conveyed and the complaint did not allege that the owner was known, the suit was not in rem. Farmers' & Merchants' Bank v. Layson Lumber Co. [Ark.] 113 SW 793.

66. Allegation in petition to enforce a special tax bill that "plaintiff is the owner of such tax bill and the same or any part thereof has not been paid" sufficiently shows nonpayment as against collateral attack on the judgment. Robinson v. Levy [Mo.] 117 SW 577. Ann. St. 1906, p. 686, providing that judgment shall not be reversed for certain omissions in pleading failure of petition to enforce a special tax bill to allege nonpayment of the bill, cannot be made the basis of collateral attack on the judgment. Id. Petition to enforce tax bill held sufficient to sustain a judgment on collateral attack. Id.

67. In suit to foreclose a special tax bill, variance between description of land in the petition and in the tax bill held fatal. German-American Bank v. Manning, 133 Mo. App. 294, 113 SW 251.

68. In action to enforce a special tax bill, the bill being filed with the petition, defendant could show under general denial that the bill was void because of omission in the proceedings, Ann. St. 1906, p. 2885, making tax bill prima facie evidence of its validity, not affecting rules of evidence. Cushing v. Powell, 130 Mo. App. 576, 109 SW 1054.

69. People v. Gunzenhauser, 237 Ill. 262, 86 NE 669. Under Hurd's Rev. St. 1908, c. 42, §§ 100, 154-160, providing for dividing of assessments into instalments, held, in a proceeding to enforce an instalment, it is presumed that an order dividing the assessment into instalments had been made and the contrary was not established by proof that the record showed no such order. People v. Hulin, 237 Ill. 122, 86 NE 666. Sheriff's deed on sale on a judgment to enforce an assessment, reciting publication of proper notice of sale, is sufficient without stating whether the newspaper was a daily or weekly. Robinson v. Levy [Mo.] 117 SW 577.

70. Presumed to be valid. People v. Hulin, 237 Ill. 122, 86 NE 666.

71. In action for an assessment, an answer that the apportionment is bad is insufficient unless it shows that proper apportionment would be less. Huesman v. Dersch, 33 Ky. L. R. 77, 109 SW 319.

*Defenses.* See 10 C. L. 1330—A proceeding to enforce an assessment must be commenced within the period of limitations prescribed.[72] Harmless irregularities are not available as a defense,[73] and valid objections may be waived.[74] A defense that drainage commissioners were never legally appointed is untenable where the tax is to be paid by the district.[75] That the work was defectively performed is a good defense,[76] or that there was an illegal departure from the plan of work resulting in special injury.[77] A statute providing that the fact that work was improperly done is no defense if it is accepted, does not deprive an owner of the defense that the work done was not the work provided for.[78] A plea of set-off must show a legal set-off.[79] In action to enforce a special tax bill, failure of the mayor to sign the bill and clerk to attest, omission to file original bills as exhibits, or the fact that the bills are void or statute barred, are matters of defense which cannot be availed of on collateral attack on the judgment.[80]

*The judgment* See 10 C. L. 1341 as a general rule is not a personal one.[81] Costs should not be imposed against a drainage district on sustaining demurrer to a complaint by it.[82]

72. Under Laws 1903, p. 55, c. 15; Laws 1899, p. 147, c. 12; Laws 1893, p. 48, c. 15, limitations do not commence to run against an action for an assessment until 30 days after it is due. City of Beaumont v. Russell [Tex. Civ. App.] 112 SW 950. Under Ann. St. 1906, p. 3942, an action to recover drainage assessments must be commenced within five years after delinquency. State v. Wilson [Mo.] 115 SW 549. Under Ball. Ann. Codes & St. § 1150, action to enforce assessments must be brought within ten years, and one who paid them and became subrogated to the right of the city to the lien had no greater rights than the city. Childs v. Smith [Wash.] 99 P 304. Bill to charge a municipality as trustee under an act which required it to levy and collect taxes within a certain improvement district and from the fund pay interest on bonds, which shows that the municipality has refused for twenty-five years to do anything, and that the bonds matured eight years before suit brought, shows laches defeating the suit. Eddy v. San Francisco [C. C. A.] 162 F 44.

73. Where objections on sale of land for drainage tax raise questions which can have no possible effect on the validity of the tax, the court may properly strike them from the files. People v. Sullivan, 238 Ill. 386, 87 NE 306.

74. In a proceeding to enforce an assessment, an objection that it was levied to pay a debt already incurred without right is waived by a stipulation that it was levied before any liability or indebtedness was incurred. People v. Gunzenhauser, 237 Ill. 262, 86 NE 669.

75. In proceedings to collect a drainage assessment, a contention that drainage commissioners were never legally appointed and are at most merely de facto officers and have no right to compel payment is untenable where the tax is to be paid to the district and not to them personally. Spring Creek Drainage Dist. v. Joliet Com'rs, 238 Ill. 521, 87 NE 394.

76. Where a city has been enjoined from levying an assessment on the ground that the work was defectively performed, the contractor cannot recover from abutting owners on a quantum meruit though his offer to reconstruct the work was refused by the city. Snouffer v. Grove [Iowa] 116 NW 1056.

77. Abutting owner not liable for assessment bill where illegal departure from requirements and specifications for construction of street resulting in special injury. Change whereby surface drainage changed. Philadelphia v. Bilyeu, 36 Pa. Super. Ct. 562. Owner not estopped from objecting to assessment bill where illegal departure from plan when change might have been certified to by chief engineer and surveyor, and owner had no knowledge of same. Id. No ratification and waiver of special injury because public work accepted by city officials. Id. Act April 19, 1843, P. L. 342, as to defenses, no bar to objection to assessment where illegal departure in plan of improvement. Id.

78. Laws 1901, pp. 110, 114, amending Loc. Imp. Act, § 66, 83 (Hurd's Rev. St. 1899, c. 24, §§ 572, 589), providing that it is no defense that work was improperly done if it has been accepted, though valid as applied to work accepted after July 1, 1901, cannot deprive a property owner of the defense that the work done was not the work provided for in the ordinance where such defense was complete when the act took effect. People v. Gage, 233 Ill. 447, 84 NE 616.

79. A plea of set-off in a proceeding to enforce a lien that the grade of the sidewalk had been changed, necessitating filling in, held insufficient because not showing damage or that the grade was not one established by the council as required. Nickels v. Frankfort Councilmen, 33 Ky. L. R. 918, 111 SW 706.

80. Robinson v. Levy [Mo.] 117 SW 577.

81. A judgment for an assessment is not personal against the landowner because it recites that "defendant is indebted to the city" where it directs amount to be levied against the property. Robinson v. Levy [Mo.] 117 SW 577.

82. On sustaining a demurrer to a complaint by commissioners of a drainage district to recover amount of benefits to land, it was improper to award execution, for

*Sale and redemption.* See 10 C. L. 1341—Proceedings for sale must conform strictly to statutory requirements.[88] A tax sale is void where the statute as to assessments failed to provide when each instalment was payable.[84] An order of sale may not be void because it fails to provide for redemption.[85] A decree of sale is conclusive as to questions which should have been raised during the proceedings.[86] Completion of the improvement is not a condition precedent to the sale of property to pay assessments.[87] Under some systems the sale for taxes merges all general and special taxes in one proceeding.[88] A city may properly appropriate money for the purchase of delinquent property.[89]

(§ 9) *I. Recovery back of assessments paid.*[90]—See 10 C. L. 1342—Proceedings to recover back excess assessments paid must be brought within the period prescribed.[91] Excess assessments belong to all who have contributed to the fund.[92] Purchasers of land who are required to pay additional assessment on reapportionment after purchase have recourse against their vendor on his warranty.[93] In Iowa, provision is made for the refunding of assessments to abutting owners when a street railway company pays a portion of the cost of paving.[94]

costs against the district. Commissioners of Vermilion Special Drainage Dist. v. Shockey, 238 Ill. 237, 87 NE 335.

83. Making demand in writing that city treasurer sell land as subject to lien of street improvement is, under St. 1893, p. 36, c. 21, § 5, a condition precedent to the right of a bondholder to have the property sold, and the demand must refer to the exact property subject to sale. Where only the fee of land is subject to the lien, a demand to sell a fee and easement is insufficient. Fox v. Workman [Cal.] 100 P 246.

84. Act Feb. 10, 1899 (30 Stat. at L. 834, c. 150), § 5, defective. Buchanan v. MacFarland, 31 App. D. C. 6. Where act to remedy defect had not been passed at time of sale (Act July 1, 1902 [32 Stat. at L. 616, c. 1352]). Id.

85. Under Ky. St. 1903, § 2838, relative to apportionment warrants and sales thereunder, a judgment foreclosing such warrant held not void because the order of sale failed to povide for redemption especially where there was no offer to redeem within the two years allowed therefor. Maypother v. Gast, 33 Ky. L. R. 395, 110 SW 308. Owner held not prejudiced by form of the judgment where mortgagees of property intervened. Id.

86. Decree of sale in suit to sell land for delinquent drainage reassessment precludes objections on a subsequent bill to enjoin the sale that the owner is entitled to a credit and that reassessment was not properly ordered. Such objections should have been raised in the former suit. Harrington v. Dickinson [Mich.] 15 Det. Leg. N. 996, 118 NW 931.

87. Sale of property for delinquent assessment, assessed by ordinance under Kansas City Charter, art. 10, § 33, and art. 10, § 8, requiring at least one park in each district, will not be enjoined because parks are not entirely completed. Corrigan v. Kansas City, 211 Mo. 608, 111 SW 115.

88. See Taxes, 10 C. L. 1776.

89. City of Chicago v. Union Trust Co., 138 Ill. App. 545. Mandamus proper to compel city to pay amount bid for delinquent property where city had appropriated sum to pay such bid. Id.

90. **Search Note:** See Municipal Corporations, Cent. Dig. §§ 1232-1236; Dec. Dig. § 523.

91. Under Seattle City Charter, art. 8, § 17, limiting right to recover excess assessments paid to two years, where no demand was made for four years, owner held barred from recovering any portion of the excess. Miller v. Seattle, 50 Wash. 252, 97 P 55.

92. Under City Charter, art. 8, § 17, the excess of funds provided by assessment remaining after all expenses have been paid belongs to all who contributed to the fund in proportion to the amount of their original assessment, and not to a delinquent who paid in nearly the entire balance after the cost of the improvement had been paid. Miller v. Seattle, 50 Wash. 252, 97 P 55. Under Hurd's Rev. St. 1905, c. 24, § 590, providing for abatement of assessment if cost of improvement was less than the amount assessed, it may be shown at the hearing provided for that a right of way not provided for was paved, and the cost of such paving may be credited pro rata on the assessment. Cosgrove v. Chicago, 235 Ill. 358, 85 NE 599.

93. Comley v. American Standard Asphalt Co. [Ky.] 113 SW 125. In a suit to set aside proceedings under which property was sold to satisfy assessments, upon setting aside such proceedings the plainitff must return the amount of assessments paid by the purchaser. Kieffer v. Victor Land Co. [Or.] 98 P 877.

94. Under Code, § 835, providing that when a street railway lays its tracks on a paved street it shall pay into the city treasury the value of paving between its tracks, which money shall be refunded to abutting owners, a city which owns the pavement, or a street railway company whose rights have been forfeited, held not abutting owners. City of Oskaloosa v. Oskaloosa Trac. & L. Co. [Iowa] 119 NW 736. Under this statute there can be no recovery which is not to be refunded to abutting owners. Id. The determination by the council of the value of the paving held not conclusive. Id. Code Supp. 1907, § 835, amending Code, § 835, relative to appeal, relates only to determination of value of paving by the council and not

(§ 9) *J. Remedies by injunction or other collateral attack, and grounds therefor.*[95] See 10 C. L. 1342—Defects rendering an assessment void, such as lack of jurisdiction of the proceedings[96] or failure to follow statutory requirements in levying an assessment, are available on collateral attack,[97] but the collection of an assessment will not be enjoined for mere irregularities in procedure[98] which do not go to the jurisdiction,[99] nor for grounds which have been waived by failure to present them in proper time [1] and manner [2] nor for objections which an owner is

to fixing of liability of the company to persons entitled to recover. Id.

**95. Search Note:** See Municipal Corporations, Cent. Dig. §§ 1188-1206; Dec. Dig. §§ 513, 516; 25 A. & E. Enc. L. (2ed.) 1239; 13 A. & E. Enc. P. & P. 318.

**96.** If a city council is without jurisdiction to levy an assessment, the question may be raised at any time and in any kind of proceedings. Andre v. Burlington [Iowa] 117 NW 1082. Injunction will lie to restrain a city council from proceeding under color of right to reassess special taxes and relevy the same upon property when they have no authority to do so. Barkley v. Lincoln [Neb.] 117 NW 398. A suit by a taxpayer to enjoin a threatened assessment against the city for a debt exceeding the constitutional limitation is not premature. Jordan v. Logansport [Ind.] 86 NE 47. Though an answer in a suit to enjoin an assessment denies many of the allegations of the complaint, yet, if affirmative allegations show the assessment to be void, judgment is properly rendered for plaintiff on sustaining a demurrer to the answer and declination of defendant to plead further. Seattle Cedar Lumber Mfg. Co. v. Ballard, 50 Wash. 123, 96 P 956.

**97.** Municipal authorities may be enjoined from doing threatened acts which will result in misappropriation of public funds and entail on taxpayers the expense of litigating void claims. Jordan v. Logansport [Ind.] 86 NE 47. The question of notice in inviting proposals for the work is jurisdictional and may be raised. Menzie v. Greensburg [Ind. App.] 85 NE 484. Where assessment for township ditch is in excess of benefits conferred, its collection may be enjoined notwithstanding trustees had jurisdiction to order improvement and all proceedings were regular. Stemen v. Hizey, 7 Ohio N. P. (N. S.) 601. Where the complaining owner alleges that the assessment laid upon his land is grossly in excess of the benefits conferred, injunction will lie notwithstanding it is directed against the action of a judicial board, and in such a case a court of equity may do justice even though no error is found in the proceedings. Stemen v. Hizey, 11 Ohio C. C. (N. S.) 347.

**98.** In street opening proceeding where necessity for opening street and value of property taken was determined by different juries and the city and parties whose property was taken did not object, held owners assessed for benefits could not raise such objection in suit to enjoin enforcement of assessment. Boussneur v. Detroit, 153 Mich. 585, 15 Det. Leg. N. 568, 117 NW 220. Judgments in local assessment proceedings under the Charter of the City of St. Paul stand upon the same basis as judgments in ordinary tax proceedings and cannot be collaterally impeached except where the jurisdiction of the court is collaterally attacked. Pieper v. MacLaren, 106 Minn. 30, 118 NW 60. In suit to enjoin enforcement of an assessment, the fact that it was commenced before acceptance by owners of property taken of compensation so that such acceptance was not admissible to show consent, was immaterial since they could waive irregularities and the injunction suit could not deprive them of that right. Boussneur v. Detroit, 153 Mich. 585, 15 Det. Leg. N. 568, 117 NW 220. Judgment in local assessment proceedings cannot be attacked for irregularities particularly as to statement of the amount of the judgment. Pieper v. MacLaren, 106 Minn. 30, 118 NW 60, following Willard v. Hodapp, 98 Minn. 269, 107 NW 954. The manner of accepting or rejecting bids and letting contracts is purely administrative in character and cannot be attacked in a suit to enjoin levy and collection of an assessment therefor. Menzie v. Greensburg [Ind. App.] 85 NE 484.

**99.** No objection can be raised in a collateral attack to proceedings for drainage assessments except such as question the jurisdiction of the court. Spring Creek Drainage Dist. v. Joliet Com'rs, 238 Ill. 521, 87 NE 394. Acts 1905, p. 406, requires the successful bidder to enter into a written contract and give bond to the approval of the city authorities. The highest bidder signed a proposal and contract and submitted it with a bond, but the city did not authorize any official to execute the contract and the bond was not formally approved. Held the irregularities did not affect the jurisdiction and were not available in a suit to enjoin levy and collection of an assessment to pay for the work. Menzie v. Greensburg [Ind. App.] 85 NE 484. An action by an owner to enjoin a drainage assessment is a collateral attack and cannot be maintained unless the assessment is void. Pumphrey v. Hollis [Ind. App.] 87 NE 255. A suit to enjoin the levy and collection of an assessment for an improvement already completed is a collateral attack on the proceedings of the city relating to the improvement, and only jurisdictional defects are available. Menzie v. Greensburg [Ind. App.] 85 NE 484. Question of propriety of allowance by the city for extra work done is not jurisdictional and cannot be tried in a suit to enjoin levy and collection of an assessment for the improvement. Id.

**1.** Laws 1903 § 130, c. 122, p. 207, forbidding suit to enjoin special assessments after 30 days from time the amount thereof has been ascertained, applies where assessments have been relevied and notwithstanding suit to enjoin the levy is based on

estopped to assert.[3] Nor will equity entertain a bill for the sole purpose of vacating an assessment and restraining the collection of a tax as unauthorized.[4] That others over whom the court had no jurisdiction were assessed, would not entitle one to restrain an assessment against his own land if the court had jurisdiction over him.[5] In a suit to enjoin an assessment, all proceedings by which it was levied are presumed regular.[6] A tax payer's action to enjoin collection of an assessment can

a judgment holding the original levy void. Kansas City v. McGrew [Kan.] 96 P 484. Where proceedings under a prior ordinance were vacated and contract for the work abandoned and no irregularity was shown in letting the contract under a subsequent ordinance, the prior ordinance and proceedings under it were not available as grounds for enjoining collection of assessment under the subsequent ordinance. Cosgrove v. Chicago, 235 Ill. 358, 85 NE 599. In the absence of special equities, the court of chancery has no jurisdiction over assessments made in the course of municipal improvement and will not interfere by injunction to enjoin collection merely because the complaining party has lost his remedy at law by laches. Goodwin v. Millville [N. J. Err. & App.] 71 A 674. Under Kirby's Dig. § 5685, requiring proceedings attacking an assessment to be commenced 30 days after publication of the ordinance, held owners, who filed cross bills in apt time alleging that assessments are arbitrary and not according to benefits and praying that it be declared void, make an appropriate attack. Kirst v. Street Imp. Dist. No. 120 [Ark.] 109 SW 526. Injunction restraining certification of assessments to county auditor, under Rev. St. § 2297, operates to suspend power to so certify only while injunction is in force, and period which may have elapsed in which certification could have been made prior to granting of injunction must enter into the computation in determining whether two years' limitation has expired. Bell v. Cincinnati, 7 Ohio N. P. (N. S.) 393.

**2.** Suit to enjoin drainage assessment should be dismissed for laches where plaintiff signed drainage petition, had notice of all proceedings, was benefited, did not appeal from the assessment and permitted work to be done without objection. Von Cotzhausen v. Dick [Wis.] 119 NW 822. That board of local improvements made assurances that other streets would be improved, and failure to improve them forced additional travel onto the street in question to the injury of abutting property, is not ground for enjoining collection of the assessment since abutting owners had no right to rely on such assurance and fail to object to confirmation of the assessment. Cosgrove v. Chicago, 235 Ill. 358, 85 NE 599. Collection of a special assessment will not be enjoined in favor of one who has had opportunity to defend in the court where assessment proceedings were had and failure to make his defense there affords no ground for his application to equity to relieve him from the results of his neglect. Id. Under Hurd's Rev. St. 1905, c. 24, § 553, authorizing the court on application to revise an assessment to modify the distribution of the total cost between the public and the property benefited, etc., objections that an assessment failed to charge the city with any part of the cost, or that it failed to charge property benefited with its share of the cost must be presented in the county court on application for confirmation of the assessment and not as ground for enjoining collection of the assessment. Id. Assessment for watering streets against abutting property, levied under Rev. Laws, c. 26, §§ 26, 27, cannot be quashed as illegal where all assessments are not before the court, remedy is by petition to assessors for abatement. Corcoran v. Cambridge Aldermen, 199 Mass. 5, 85 NE 155.

**3.** Failure of a property owner to object to an improvement, is, as to the contractor acting in good faith and under color of law, an acquiescence in what he is doing and precludes such owner from obtaining an injunction against enforcement of an assessment for the work. Menzie v. Greensburg [Ind. App.] 85 NE 484. Where an abutting owner's grantor had signed a petition for paving and he had notice of such fact when he purchased, and made no objection until the work was completed and his property benefited, he is estopped to enjoin issuance of bonds based on assessment therefor. Lawton v. Racine [Wis.] 119 NW 331. Where, in construction by municipality of local sewer for sanitary purposes, by inadvertence of an assistant engineer employed to fix grade thereof, contract or specifications is departed from as to depth of the sewer but without affecting its cost or efficiency and error is not discovered until after work of construction is completed and no substantial injury to the rights of the lot owners is apparent, the assessment against such lot owners will not be enjoined. Close v. Parker, 11 Ohio C. C. (N. S.) 85.

**4.** Because adequate remedy at law and public policy. Buchanan v. MacFarland, 31 App. D. C. 6. Equity will assume jurisdiction where main purpose of bill is to cancel tax certificate as cloud on title on ground that sale was void if assessment valid. Id.

**5.** Pumphrey v. Hollis [Ind. App.] 87 NE 255.

**6.** Where complaint to enjoin an assessment does not show that notice of time and place of hearing of declaratory resolution was not given as required by statute, it is presumed that proper notice was given. Martindale v. Rochester [Ind.] 86 NE 321. In proceedings to enjoin the collection of an assessment, there being no allegations to the contrary, it is presumed that statutory notices were given in proceedings for the confirmation and letting of the contract. Cosgrove v. Chicago, 235 Ill. 358, 85 NE 599. Burns' Ann. St. 1908, § 8959, provides that the council shall hear persons affected by a public improvement and upon such hearing confirm, modify or

be maintained only on clear proof that authorities have acted, or are about to act, illegally or fraudulently.[7] In such suit, the court has nothing to do with the wisdom of the voters in adopting a proposition for construction of the sewer.[8] A property owner who seeks to enjoin issuance of bonds based on assessment for paving because of an irregularity in the proceedings must show the irregularity and that he was damaged thereby without fault on his part.[9] A tax payer, as such, may enjoin a threatened assessment for the construction of a sewer on the ground that it is for a debt in excess of the constitutional limitation, without showing special interest or damage.[10] The rule that a tax payer cannot enjoin an assessment until a cloud is about to be wrongfully cast on his title, applies to cases involving the legality of a specific assessment.[11] In a suit to cancel a tax bill, only issues raised by the pleadings may be proved.[12] A charter provision that in actions on tax bills an owner may prove that the work was not done in a workmanlike manner according to contract applies when an owner sues to cancel the tax bill.[13] In some states statutes prescribe a remedy in case of unjust assessment.[14]

(§ 9) *K. Appeal and other direct review.*[15]—See 10 C. L. 1344—The right of appeal is purely statutory.[16] Proceedings for review must be instituted within the

rescind, the declaratory resolution. A complaint to enjoin an assessment alleged that after such hearing the declaratory resolution was not confirmed, etc., but another resolution ordering improvement was adopted. Held that as the latter resolution was as to the same improvement, it would be presumed to be a final one. Martindale v. Rochester [Ind.] 86 NE 321. Street paving assessments will not be enjoined as excessive and inequitable unless so established by a preponderance of proof. Prentice v. Toledo, 11 Ohio C. C. (N. S.) 299. One seeking to enjoin assessment levied by city council on ground that a statutory requirement has been omitted has burden of establishing such fact by evidence. Close v. Parker, 11 Ohio C. C. (N. S.) 85. An assessment for a street improvement of $943.59 upon property estimated after improvement by complaining owner's witness at $2,800, although slightly above 33 1-3 per cent thereof, will not be interefered with as being in contravention of § 53 of the municipal code of 1902 (Rev. St. §§ 1536-213), where there is other evidence that the assessment is less than 33 1-3 per cent of the value of the property as enhanced by the improvement. Prentice v. Toledo, 11 Ohio C. C. (N. S.) 299.

7. Mead v. Turner, 60 Misc. 145, 112 NYS 127. The enjoining of a special assessment is properly denied under Gen. St. 1901, §§ 3175, 3176, on the ground that members of council were interested in the work where it appears that proceedings of mayor and council were regular, no fraud shown, and it did not appear that any member of the council was interested in the contract. Ferguson v. Coffeyville, 77 Kan. 391, 94 P 1010.

8. Mead v. Turner, 60 Misc. 145, 112 NYS 127.

9. Lawton v. Racine [Wis.] 119 NW 331. Bill to enjoin sale of land for drainage assessment because the amount complainant will earn under his contract to construct the drain will cover his assessment, is without equity. Harrington v. Dickinson [Mich.] 15 Det. Leg. N. 996, 118 NW 931. Property owners who seek to enjoin enforcement of an assessment on the ground that church property omitted should have been assessed held not entitled to such relief as they would only be entitled to a reduction and they did not claim it nor tender their proportionate share. Boussneur v. Detroit, 153 Mich. 585, 15 Det. Leg. N. 568, 117 NW 220.

10, 11. Jordan v. Logansport [Ind.] 86 NE 47.

12. In a suit to cancel tax bills where it was not claimed that bills were void because competition was restricted, question of invalidity on that ground is not raised. Muff v. Cameron [Mo. App.] 117 SW 116. In a suit to cancel tax bills where issue of fraudulent delay in the enactment of a confirmation ordinance extending the time for completion of the work longer than was necessary was not raised by the pleadings, evidence thereof was not admissible. Brigham v. Hickman [Mo. App.] 116 SW 449.

13. Porter v. Boyd Pav. & Const. Co., 214 Mo. 1, 112 SW 235. An owner cannot maintain suit to cancel a tax bill on proof that the contractor though substantially complying with the contract did not perform all the work in a workmanlike manner and omitted certain work under order of the city engineer. Id.

14. Under Kirby's Dig. §§ 5677, 5679, 5680, 5685, held the remedy of property owners in event of unjust assessment is first by appeal to the council and afterwards to institute legal proceedings to correct or avoid the assessment. Kirst v. Street Imp. Dist. No. 120 [Ark.] 109 SW 526.

15. **Search Note:** See Municipal Corporations, Cent. Dig. §§ 1183-1187; Dec. Dig. §§ 511, 512; 13 A. & E. Enc. P. & P. 320.

16. So much of § 2, pl. 7, of "an act to authorize cities to construct sewers," etc., approved March 8, 1882 (P. L. 63), as forbids allowance of certiorari to review assessments made under the act after 30 days from confirmation of the assessment, is repealed by Laws 1907 (P. L. 1907, p. 109). Essen v. Cape May Common Council [N. J.

time and perfected in the manner prescribed.[17] Notice of appeal must designate the proceeding appealed from[18] and be served in the manner required by law.[19] Findings on questions of fact by tribunals authorized to determine such questions in the first instance are not reviewable.[20] Only such questions will be reviewed as were properly saved below[21] by proper objection and exception[22] and presented

Law] 72 A 49. Where a contractor sued a city and an owner for an assessment, an appeal may be maintained in the name of the contractor and the city, from a judgment against the city, and dismissing the petition against the owner, though after judgment the contractor assigned his right of action to the city. Huesman v. Dersch, 33 Ky. L. R. 77, 109 SW 319. No provision for appeal by property owner who complains that assessment is grossly in excess of benefits which he will receive from improvement. Nor will error lie in such a case, inasmuch as there is no provision for a bill of exceptions, and even if transcript of the record of the township trustees was brought up, it would be of no assistance in determining the question whether the assessment exceeds the benefits. Stemen v. Hizey, 11 Ohio C. C. (N. S.) 347.

**17.** Defect in city clerk's certificate to transcript on appeal from confirmation of an assessment may be cured by amendment. Barrett v. Seattle [Wash.] 97 P 1109. Parties affected by assessments in drainage proceedings are necessary parties to appellate proceedings therein. In re Farley Drainage Dist. No. 7 [Iowa] 120 NW 83.

**18.** Where notice of appeal from confirmation by city of an assessment described the proceeding appealed from with great particularity, it was not fatally defective in referring to the wrong condemnation ordinance where the city was not misled. Barrett v. Seattle [Wash.] 97 P 1109. Application to court to set aside a special assessment referring to the improvement, and describing it in language used in order of the council, and also as one which the council ordered on a certain date, sufficiently designates the improvement. Park City Yacht Club v. Bridgeport [Conn.] 70 A 631.

**19.** Service on city clerk of notice of filing transcript in superior court, as required by Laws 1901, p. 242, c. 118, on appeal by the city council from confirmation of assessment, is not jurisdictional and is waived by general appearance by city attorney. Barrett v. Seattle [Wash.] 97 P 1109. Under Code § 1947, giving an appeal from order of board of supervisors fixing an assessment in drainage proceedings, and §§ 1513, 1946, where all petitioners for a drain were affected by the assessment, an appeal upon notice only to the county auditor and not to petitioners was properly dismissed. Poage v. Grant Tp. Ditch & Drainage Dist. No. 5 [Iowa] 119 NW 976. An appeal from action of board of supervisors in drainage assessment proceedings is ineffective to confer jurisdiction where notice of appeal was not served on petitioners, nor Acts 32nd Gen. Assem. 1907, p. 100, c. 95, complied with. In re Farley Drainage Dist. No. 7 [Iowa] 120 NW 83.

**20.** When the estimate of benefits is referred to a board of appraisers, and afterwards approved by the council, the remedy of one who considers himself unfairly assessed is to apply to such tribunal for redress, and failing to do so, he may not overcome such finding in equity, especially where there is no proof that the assessment or appraisement was in any way inequitable or unjust. Kerker v. Bocher, 20 Okl. 729, 95 P 981. Under Hurd's Rev. St. 1908, p. 431, c. 24, §§ 541, 545, 553, the city council on special tax proceedings has sole power to determine what proportion of special tax shall be borne by the city, and such determination is conclusive on the courts; while in special assessment proceeding the decision of the commissioner is reviewable. City of East St. Louis v. Illinois Cent. R. Co., 238 Ill. 296, 87 NE 407. Failure of commissioners in widening a street to assess a part of the cost to the city or against outside property, and the assessment of some property within the district, for less than its proportionate share, is not reviewable. In re City of Seattle, 50 Wash. 402, 97 P 444. The board of directors of a levee district created to construct a levee to protect lands adjacent to a river are vested with a wide discretion as to choice of means and methods, and if they act in good faith their judgment cannot be interfered with by the courts. Meriwether v. St. Francis Levee District Directors [C. C. A.] 165 F 317. Whether benefits resulted and whether assessments were in proportion thereto are matters relating to the exercise of jurisdiction by the council, and disputed questions of fact cannot be reviewed. Michell v. Portland [Or.] 99 P 881. Where the validity of an assessment is directly attacked in equity, members of the assessment board are competent to testify as to the method by which the amount of benefits were fixed. Kirst v. Street Imp. Dist. No. 120 [Ark.] 109 SW 526.

**21.** Defects in resolution of necessity, insufficient notice of proposals for bids, change of plans after contract is let, not raised in the council, cannot be raised on appeal from assessment. Andre v. Burlington [Iowa] 117 NW 1082. Under Code, §§ 823, 824, 825, a property owner can raise only such objections on appeal to the courts as he made before the city council, except in case of fraud. Id. Where no objection was made before the city council to resolution of intention or necessity in assessment proceedings, their sufficiency will not be considered on appeal though discussed in the brief. Id. On appeal in assessment proceedings, evidence held to show that amendments to objections against the proposed assessment were filed with the city council so as to be considered on appeal. Hedge v. Des Moines [Iowa] 119 NW 276.

**22.** Objections to assessments that they

by the record,[23] unless the objection is jurisdictional.[24] On a silent record all presumptions are in favor of the regularity of proceedings below.[25] Under the rule that only constitutional questions may be presented to the supreme court on reserved questions, it will not consider a sewer assessment solely on an allegation that it was levied without regard to benefits, where it did not appear that benefits were not considered.[26] A writ of review as applicable to proceedings of a city council in matters of street improvements may be used to bring before the reviewing court questions affecting the jurisdiction of the council to act either as to subject-matter or person, and to determine whether it has acted in the manner prescribed by law.[27] Certiorari lies to determine regularity of petition of property owners for a street improvement and the certificate of the assessors thereto annexed.[28] In certiorari to review an assessment, the city may move to quash the writ in the form presented by an amended petition though at the time of granting the amendments the court refused to quash the writ.[29] The return of city officers is as much a part of the record as the assessment records in certiorari to quash an assessment.[30]

**Puis Darrein Continuance; Purchase-Money Mortgages; Purchasers for Value; Quarantine; Quasi Contract,** see latest topical index.

## QUESTIONS OF LAW AND FACT.[31]

**Province of Court and Jury in General, 1522. | Particular Facts or Issues, 1525.**

*The scope of this topic* is noted below.[32]

are contrary to state laws and city ordinances are too general. Andre v. Burlington [Iowa] 117 NW 1082.

**23.** Where city clerk's certificate to transcript on appeal from confirmation of an assessment is not in the record, its sufficiency cannot be determined. Barrett v. Seattle [Wash.] 97 P 1109. An estoppel by judgment cannot be pleaded in a petition for a writ of review of an assessment, it not appearing in the record nor having been called to the attention of the council. Michell v. Portland [Or.] 99 P 881.

**24.** In suit by subcontractor against the principal contractor of the municipality to enforce a lien, the objection that the subcontractor had not given notice to the municipality as required by statute may be first raised on appeal. Pirola v. W. J. Furnes Co., 238 Ill. 210, 87 NE 354.

**25.** Since Laws 1903, p. 9, c. 7, authorizing a city to levy sewer assessments according to area of adjacent land, leaves it to the city to regulate the procedure, and there being no showing on reserved questions that the act is unconstitutional, it is presumed that proceedings were regular relative to notice and hearing. McGarvey v. Swan [Wyo.] 96 P 697.

**26.** McGarvey v. Swan [Wyo.] 96 P 697.

**27.** Michell v. Portland [Or.] 99 P 881. Where a city erroneously assessed benefits on property in excess of 150 feet in depth, and on appeal the court orders reassessment to the extent of 150 feet in depth, and on further appeal the city does not complain of the decree, the appellate court will confirm the first assessment to the extent of 150 feet in depth and cancel the excess, and the tax as confirmed will draw interest but no penalties. Hedge v. Des Moines [Iowa] 119 NW 276.

**28.** People v. Buffalo Assessors, 109 NYS 991. Under Buffalo City Charter, Laws 1891, p. 221, c. 105, §§ 398, 399, amended by Laws 1900, p. 1541, Code Civ. Proc. § 2140, held that board of assessors' certificate as to signing of petition for paving by owners is reviewable on certiorari where facts stated in certificate are incorrect, and assessors have acted on an erroneous principle of law. People v. Buffalo Assessors, 127 App. Div. 851, 111 NYS 924. Though assessor's certificate to a petition of property owners is by charter made conclusive as to facts certified, questions of law arising out of preliminary proceedings may be raised on certiorari. People v. Buffalo Assessors, 109 NYS 991.

**29.** People v. Buffalo, 62 Misc. 313, 114 NYS 1077. Refusal to allow petitioners for certiorari to review a paving assessment to amend their petition relative to counting by assessors of resident owners, etc., held an abuse of discretion. Id.

**30.** District of Columbia v. Brooke, 29 App. D. C. 563. Where return alleges notice of assessment, though not shown by records, allegation must be taken as true, especially where no objection to return or express denial in writ. Id.

**31.** See 10 C. L. 1346.

**Search Note:** See note in 15 L. R. A. 332; 27 Id. 825; 31 Id. 489; 37 Id. 613; 38 Id. 788; 2 L. R. A. (N. S.) 876; 3 Id. 535; 5 Id. 99; 7 Id. 213; 8 Id. 1007; 10 Id. 852; 12 Id. 209, 935; 13 Id. 1250; 14 Id. 947; 15 Id. 212.

See, also, 23 A. & E. Enc. L. (2ed.) 543.

**32.** Only the general principles are here treated, with a few illustrative applications. Whether particular facts or issues are questions of law or fact is considered as germane to the particular subject involved, and is treated in the topic referring

*Province of court and jury in general.* See 10 C. L. 1346—Only a few general holdings are here presented, the subject being more fully presented in another topic.[33] It is the province of the jury to decide questions of fact,[34] and of the court to decide questions of law.[35] In civil cases, issues that present only questions of law cannot be submitted to the jury,[36] nor to the court when it sits as a jury.[37] Whether there is evidence legally sufficient is for the court,[38] and whether the evidence offered to establish a fact has a logical and reasonable tendency to do so is a preliminary question for the court;[39] but there being such evidence, its sufficiency to establish the issue is for the jury.[40] The jury are the sole judges of the credibility

thereto (see such titles as Contracts, 11 C. L. 729; Negligence, 12 C. L. 966; Master and Servant, 12 C. L. 665; Railroads, 10 C. L. 1365; Street Railways, 10 C. L. 1730; Highways and Streets, 11 C. L. 1720; Wills, 10 C. L. 2035). The propriety of taking a case from the jury is also treated elsewhere (see Directing Verdict and Demurrer to Evidence, 11 C. L. 1085; Discontinuance, Dismissal and Nonsuit, 11 C. L. 1093), as is the matter of instructions invading the province of the jury (see Instructions, 12 C. L. 218).

**33.** See Instructions, § 2, 12 C. L. 219.

**34.** Livingston v. Taylor [Ga.] 63 SE 694; Burt & Brabb Lumber Co. v. Hurst, 33 Ky. L. R. 270, 110 SW 242; Cincinnati, etc., R. Co. v. Evan, 33 Ky. L. R. 596, 110 SW 844; Cooper v. Ratliff [Ky.] 116 SW 748; Electric Welding Co. v. Prince, 200 Mass. 386, 86 NE 947; Winfrey v. Ragan [Mo. App.] 117 SW 83; McIntosh v. McNair [Or.] 99 P 74; Craver v. Ragon [Tex. Civ. App.] 110 SW 489; Condie v. Rio Grande W. R. Co., 34 Utah, 237, 97 P 120. Negligence. Condie v. Rio Grande W. R. Co., 34 Utah, 237, 97 P 120. Good faith. St. Louis & S. W. R. Co. v. Thompson [Tex.] 113 SW 144. Fact that there might have been countervailing testimony does not destroy one's right to have the theory of the case, as shown by testimony submitted to jury. King v. Wabash R. Co., 211 Mo. 1, 109 SW 671. The decision of every issue of fact in every case in Georgia is exclusively for jury. Davis v. Kirkland, 1 Ga. App. 5, 58 SE 209. Whether a certain mechanical contrivance in form of a pistol was or was not a pistol within purview of Penal Code of 1895, § 344, held a question for jury. Mathews v. Caldwell [Ga. App.] 63 SE 250. In action for breach of contract where plaintiff introduced testimony that skins were of merchantable quality, question of quality one for jury. Hess v. Kaufherr, 128 App. Div. 526, 112 NYS 832. Whether defendant's property upon which assessment was laid was injuriously affected. Philadelphia v. Bilyeu, 36 Pa. Super. Ct. 562. Whether foreign corporation was actually engaged in business within state in contemplation of the Bush Law, held a question of fact for jury. Dempster Mill Mfg. Co. v. Falkenberg [Kan.] 95 P 1045. Rule that so long as a question of fact exists it is for the jury and not for the court obtains in will contests. Scott v. Barker, 129 App. Div. 241, 113 NYS 695.

**35.** Instruction submitting question of law and fact to jury, erroneous. Cooper v. Ratliff [Ky.] 116 SW 748; Cincinnati, etc., R. Co. v. Evan, 33 Ky. L. R. 596, 110 SW 844. In civil case, error to charge jury that they are the judges of the law and the facts of the case, though the error may not of itself require new trial. Livingston v. Taylor [Ga.] 63 SE 694. Instruction that if jury believed from the preponderance of the evidence that defendant cut any timber upon lands set out in petition which the jury believed were the lands of plaintiff, they should find for plaintiff, otherwise for defendant, held erroneous. Burt & Brabb Lumber Co. v. Hurst, 33 Ky. L. R. 270, 110 SW 242. Whether letter could be considered in violation of obligations to laws of society. St. Louis & S. W. R. Co. v. Thompson [Tex.] 113 SW 144. Not error to refuse to instruct jury as to the law of pleading. Peck v. Springfield Trac. Co., 131 Mo. App. 134, 110 SW 659.

**36, 37.** Dronenburg v. Harris [Md.] 71 A 81.

**38.** Loomis v. Norman Printers' Supply Co. [Conn.] 71 A 358; Patty v. Salem Flouring Mills Co. [Or.] 98 P 521. Negligence. Harineg v. Great Northern R. Co., 137 Wis. 367, 119 NW 325; Baltimore Refrigerating & Heating Co. v. Kreiner [Md.] 71 A 1066. Where no evidence directly tending to establish whether engineer saw one on tracks, or some facts from which it might reasonably be inferred, held question for court. Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689. Where evidence was insufficient to sustain a verdict for plaintiff, trial court held not bound to submit any question of fact. Aldrich v. Laul, 126 App. Div. 427, 110 NYS 897.

**39.** Proper to instruct that the evidence did not warrant a finding where there was no evidence tending to show the fact. Theobald v. Shepard Bros. [N. H.] 71 A 26.

**40.** Loomis v. Norman Printers' Supply Co. [Conn.] 71 A 358; Cleveland, etc., R. Co. v. Gossett [Ind.] 87 NE 723; Theobald v. Shepard Bros. [N. H.] 71 A 26. Whether delivery to warehouseman was a sale as against motion to nonsuit, question for jury. Patty v. Salem Flouring Mills Co. [Or.] 98 P 521. How death occurred under evidence, held for jury. Louisville & N. R. Co. v. Bell's Adm'r [Ky.] 114 SW 328. Nonsuit properly refused where some evidence. Smith v. Moore [N. C.] 62 SE 892. Negligence. Messer v. McLean [Wash.] 98 P 106. Under evidence, whether certain provision of policy had been enforced by defendant, or abrogated and disregarded, held question of fact for jury. Lounsbury v. Knights M. W., 128 App. Div. 394, 112 NYS 921. Where some evidence, question for jury however great weight of preponder-

of witnesses [41] and the weight to be given the evidence.[42] Inferences of fact to be drawn from testimony is for jury,[43] but to entitle a case to submission to the jury, there must be substantial evidence to establish the elements of the cause of action.[44] While it is for the jury to determine conflicting evidence [45] and to draw conclu-

ence may be in adversary's favor. Ogden v. Sergeant, 112 NYS 1085.

**41.** Cincinnati, etc., Co. v. Evans, 33 Ky. L. R. 596, 110 SW 844; Louisville & N. R. Co. v. Bell's Adm'r [Ky.] 114 SW 328; Mobile, etc., R. Co. v. Jackson [Miss.] 46 S 142; Blair v. Paterson, 131 Mo. App. 122, 110 SW 615; Peck v. Springfield Trac. Co., 134 Mo. App. 134, 110 SW 659; Railey v. Metropolitan St. R. Co., 133 Mo. App. 473, 113 SW 680; Smith v. Atlantic & C. Air Line R. Co., 147 N. C. 603, 61 SE 575; Patty v. Salem Flouring Mills Co. [Or.] 98 P 521; Metropolitan Life Ins. Co. v. De Vault's Adm'x [Va.] 63 SE 982; Herbert v. Hillman, 50 Wash. 83, 96 P 837. The truth of the testimony together with the reasonable inferences to be drawn therefrom is for the jury. Midgette v. Branning Mfg. Co. [N. C.] 64 SE 5. Where witness was interested in result and there were some possible discrepancies in two depositions given by him, court could not say that it would be arbitrary for jury to disregard his testimony. Main v. Tracy [Ark.] 109 SW 1015; Schleifenbaum v. Rundbaken [Conn.] 71 A 899; More-Jonas Glass Co. v. West Jersey & S. R. Co. [N. J. Err. & App.] 72 A 65; Lounsbury v. Knights M. of W., 128 App. Div. 394, 112 NYS 921; McIntosh v. McNair [Or.] 99 P 74; Condie v. Rio Grande W. R. Co., 34 Utah, 237, 97 P 120. Credibility of plaintiff's testimony, given at trial in view of depositions taken, held for jury. Roe v. Metropolitan St. R. Co., 131 Mo. App. 128, 110 SW 611. Jury may not arbitrarily discredit a witness nor reject his testimony; but the witness may be discredited and his testimony disbelieved if from all the other facts and circumstances in the case it fairly appears that the witness is mistaken, or that his testimony is improbable or untrue (Condie v. Rio Grande W. R. Co., 34 Utah, 237, 97 P 120); nor is court, in passing on one's request to direct a verdict, bound to accept the statement of a witness as conclusive on a subject when there are other facts and circumstances from which the jury can properly find otherwise (Id.).

**42.** Metropolitan Life Ins. Co. v. De Vaul's Adm'x [Va.] 63 SE 982. Weight of the testimony is for the jury. Mobile, etc., R. Co. v. Jackson [Miss.] 46 S 142; Virginia & S. W. R. Co. v. Hawk [C. C. A.] 160 F 348; General Accident, Fire & Life Assur. Co. v. Homely [Md.] 71 A 524; Roe v. Metropolitan St. R. Co., 131 Mo. App. 128, 110 SW 611; Railey v. Metropolitan St. R. Co., 133 Mo. App. 473, 113 SW 680; Patty v. Salem Flouring Mills Co. [Or.] 98 P 521; Philadelphia v. Bilyeu, 36 Pa. Super. Ct. 562; Metropolitan Life Ins. Co. v. De Vault's Adm'x [Va.] 63 SE 982; Herbert v. Hillman, 50 Wash. 83, 96 P 837. Weight and effect of their evidence is for the jury to determine. Schleifenbaum v. Rundbaken [Conn.] 71 A 899.

**43.** More-Jonas Glass Co. v. West Jersey & S. R. Co. [N. J. Err. & App.] 72 A 65. Jury may find for plaintiff though his testimony is opposed by defendant. B. & C. Comp. St. § 857. McIntosh v. McNair [Or.] 99 P 74. Jury held authorized to base their verdict upon uncorroborated contradicted testimony of plaintiff, though verdict involved finding that execution of an instrument was procured by fraud. De Lamar v. Herdeley [C. C. A.] 167 F 530. Jury authorized to give evidence full credence, though same was contradicted and somewhat weakened by cross-examination. Ryan v. Fall River Iron Works Co., 200 Mass. 188, 86 NE 310. Whenever the testimony must be weighed and conclusions deduced therefrom, jury alone must make deductions in first instance. Harrod v. Latham Mercantile & Commercial Co., 77 Kan. 466, 95 P 11. Effect of admissions in pleadings, requests for instructions, etc., in prior action, inconsistent with position taken in later trial, one for jury. Floyd v. Kulp Lumber Co. [Pa.] 71 A 13.

**44.** Error to leave case to jury simply on a question of probabilities, with direction to find in accordance with the greater probability. Virginia & S. W. R. Co. v. Hawk [C. C. A.] 160 F 348.

**45.** Bell v. Carter [C. C. A.] 164 F 417; Davis v. Kirkland, 1 Ga. App. 5, 58 SE 209; Cleveland, etc., R. Co. v. Gossett [Ind.] 87 NE 723; Barrett v. New England Tel. & T. Co., 201 Mass. 117, 87 NE 565; Meily v. St. Louis & S. F. R. Co. [Mo.] 114 SW 1013; Conger v. Baltimore & O. R. Co., 31 App. D. C. 139; Condie v. Rio Grande W. R. Co., 34 Utah, 237, 97 P 120; Scheer v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 1119, 119 NW 1084; Still v. San Francisco & N. W. R. Co. [Cal.] 98 P 672; Strandell v. Moran, 49 Wash. 533, 95 P 1106; Schwartz v. Onward Const. Co., 115 NYS 380; Crowley v. Taylor, 49 Wash. 511, 96 P 1016. Testimony of one witness as to intoxication before his application for insurance held not undisputed evidence precluding issues from jury, witness being uncertain as to time of intoxication and his memory defective. Des Moines Life Ins. Co. v. Clay [Ark.] 116 SW 232. Evidence conflicting, question as to whether there was a market for a certain commodity held one for jury. Schwartz v. Morris & Co., 61 Misc. 335, 113 NYS 524. Where evidence presents issues under pleadings, they are for jury though the evidence is of such slight probative force that it would become duty of trial court or on appeal to set aside verdict found on the evidence. Galveston, etc., R. Co. v. Pigott [Tex. Civ. App.] 116 SW 841. For jury to determine what is an abnormal moisture content in dairy butter. Coopersville Co-operative Creamery Co. v. Lemon [C. C. A.] 163 F 145. Whether insurance policy was accepted and credit given for premium held for jury. Manson v. Metropolitan Surety Co., 128 App. Div. 577, 112 NYS 886. Question of negligence in voluntarily exposing one's self to obvious danger held one for jury. Putnam v. Phoenix Preferred Acc. Ins. Co. [Mich.] 15 Det. Leg. N. 980, 118 NW 922. Where evidence was in

sions from established facts where reasonable minds might differ in respect thereto,[46] the court may decide an issue where the evidence is undisputed,[47] or where there is no substantial conflict therein,[48] and where the evidence will permit of but one reasonable inference;[49] but it is not in every case where the testimony upon a particular issue is uncontradicted, even when sufficient to establish the ultimate facts sought to be proven, that the trial judge can treat the question as one of law and take issue from the jury,[50] and there may be a question of fact when all the witnesses are worthy of belief and no witness contradicts another.[51] An issue of fact, in order to authorize its submission to the jury, must arise both from the pleadings and the evidence.[52] Ordinarily the question as to whether there is sufficient evidence to shift the burden of proof is one for the jury.[53]

conflict as to the time interlineation of a judgment was made, question one for jury to determine. Mayhew v. Smith, 42 Colo. 534, 95 P 549. Where evidence is conflicting, here though the preponderance with one of parties, issue is one for jury. Messir v. McLean [Wash.] 98 P 106. Where testimony is positive, unequivocal, and corroborated by circumstances, hut impeached by direct and circumstantial evidence. issue one for jury. Sicard v. Albenberg Co., 136 Wis. 622, 118 NW 179.

**46.** Toppi v. McDonald, 128 App. Div. 443, 112 NYS 821. If conceded facts are such that reasonable minds might differ as to the conclusion to be drawn, the question is for jury. Still v. San Francisco & N. W. R. Co. [Cal.] 98 P 672; Perrine v. Union Stockyards Co. [Neb.] 116 NW 776; Conger v. Baltimore & O. R. Co., 31 App. D. C. 139; Sans Bois Coal Co. v. Janeway [Okl.] 99 P 153; Galveston, etc., Co. v. Thompson [Tex. Civ. App.] 116 SW 106. It is for jury to draw conclusions from the evidence where reasonable minds might differ in respect thereto. Baltimore Refrigerating & Heating Co. v. Kremer [Md.] 71 A 1066; Clemons v. Chicago, etc., R. Co., 137 Wis. 387, 119 NW 102; Cleveland, etc., Co. v. Gossett [Ind.] 87 NE 723; Putnam v. Phoenix Preferred Acc. Ins. Co. [Mich.] 15 Det. Leg. N. 980, 118 NW 922. Whether foreman was negligent. Toppi v. McDonald, 128 App. Div. 443, 112 NYS 821. As to existence of fellow-servant relation. Sambos v. Cleveland, etc. R. Co. [Mo. App.] 114 SW 567. Proximate cause. Louisville & N. R. Co. v. Keiffer [Ky.] 113 SW 433. Question of negligence. Sambos v. Cleveland, etc., R. Co. [Mo. App.] 114 SW 567. Whether the facts are controverted or not. More-Jonas Glass Co. v. West Jersey & S. R. Co. [N. J. Err. & App.] 72 A 65. If from the evidence on contested issues, though uniform and uncontested different inferences reasonably may be deduced, a question of fact for jury arises. Moellman v. Gieze-Henselmeier Lumber Co. [Mo. App.] 114 SW 1023.

**47.** Bell v. Carter [C. C. A.] 164 F 417; Cooper v. Ratliff [Ky.] 116 SW 748. Where deed contained a warranty of "a perfect and unincumbered title to the property conveyed," and uncontradicted evidence as to one of the lots showed a paramount, outstanding title, held error to submit question as an open one for jury. Perkins Co. v. Wilcox [Ga.] 63 SE 831. Instruction submitting as a doubtful question matter on which there is no conflicting evidence held improper. Mobile, etc., R. Co. v. Jackson [Miss.] 46 S 142. Error to frame issue of fact regarding matter testified to where testimony of relator, who was party in interest, was uncontradicted. State v. Lichtman-Goodman & Co., 131 Mo. App. 65, 109 SW 819.

**48.** Muskogee Land Co. v. Mullins [C. C. A.] 165 F 179.

**49.** Muskogee Land Co. v. Mullins [C. C. A.] 165 F 179; Theobold v. Shepard Bros. [N. H.] 71 A 26; Louisville & N. R. Co. v. Keeffer [Ky.] 113 SW 433. If facts as to a foreman's duties are undisputed and such that reasonable minds cannot differ about the conclusion to be drawn from them, whether fellow-servant relation exists is a question of law for court. Sambos v. Cleveland, etc., R. Co. [Mo. App.] 114 SW 567. Where evidence is so preponderant that it reasonably admits of hut one conclusion, question one of law for court. Bell v. Carter [C. C. A.] 164 F 417; Loomis v. Norman Printers' Supply Co. [Conn.] 71 A 358. Where testimony is of such a conclusive character as to compel the court in the exercise of sound judicial discretion to set aside a verdict in opposition thereto, it may be withdrawn from jury. Walker v. Warner, 31 App. D. C. 76. Though plaintiff may have first made prima facie case where plaintiff's case is destroyed beyond the peradventure of doubt by uncontradicted evidence of defendant, held duty of court to so instruct. Keith v. Guedry [Tex. Civ. App.] 114 SW 392.

**50.** Craver v. Ragon [Tex. Civ. App.] 110 SW 489. Where evidence is uncontradicted but where the ultimate facts which must he found depend solely on the truth of the statements made by the witnesses or evidence offered, or where ultimate facts must he determined by inference and deductions from evidence or by weighing and estimating value of facts stated as warranting a particular finding only provable indirectly by circumstances, issues are for jury. Id.

**51.** Since diverse inferences may be drawn from narrative of a truthful witness. Tousey v. Hastings, 194 N. Y. 79, 86 NE 831.

**52.** Where no evidence to sustain an issue on the pleadings which is essential to plaintiff's recovery, no question for jury. Lone Star Brew. Co. v. Willie [Tex. Civ. App.] 114 SW 186.

**53.** Baltimore Refrigerating & Heating Co. v. Kreimer [Md.] 71 A 1066.

Whether a given subject is one concerning which an expert may express an opinion,[54] and what are the qualifications necessary to entitle a witness to testify as an expert, are questions of law for the court,[55] but whether a certain witness has such qualifications is a question of fact.[56]

*Particular facts or issues.* See 10 C. L. 1347—Only a few general holdings are here presented, the question as to whether particular issues are of law or fact being treated in the topic dealing with the particular issue.[57] Questions of fact are sometimes, though inaccurately, called questions of law because they are for the court and not for the jury.[58] What is a reasonable time when the proofs are conflicting is often a mixed one of law and fact,[59] but where the facts are undisputed and different inferences cannot reasonably be drawn from the same facts, it is a question for the court,[60] but ordinarily the question of reasonable time,[61] motive and intention,[62] and acceptance,[63] are of fact for the jury, but where there is no controversy as to the facts, the question of probable cause is one of law for the court.[64] When the intention of a party is to be ascertained from disputed or ambiguous circumstances, the necessary inferences to be drawn are for the jury,[65] and it is for the jury to find the effect of any determination they may reach,[66] but this rule does not preclude the court from relieving the jury of the labor of determining a subsidiary question submitted, after reaching a conclusion on a primary one necessarily determining the controversy, as they must unavoidably see without being informed on the subject.[67] An admixture of oral and written evidence draws the whole to the jury.[68] Where proof of a fact depends upon oral testimony, the proof is for the jury,[69] and when the narrative is of oral admissions, made sometime before, although the precise words are important it is seldom that a question of fact is not presented.[70] The judge is to construe and interpret contracts and other written instruments that are clear and specific,[71] but where their terms are of doubt-

**54, 55, 56.** Keefe v. Sullivan County R. Co. [N. H.] 71 A 379.

**57.** See Negligence, 12 C. L. 966, and like topics.

**58.** Whether reasonable time had intervened for owner to make an inspection after taking title to premises held one of fact in particular case. Timlan v. Dilworth [N. J. Err. & App.] 71 A 33.

**59.** Timlan v. Dilworth [N. J. Err. & App.] 71 A 33.

**60.** Timlan v. Dilworth [N. J. Err. & App.] 71 A 33; Luhn v. Fordtran [Tex. Civ. App.] 115 SW 667. A period of time may be so short or so long that a court would under proper conditions be justified in declaring it unreasonable. Loomis v. Norman Printer's Supply Co. [Conn.] 71 A 358.

**61.** Luhn v. Fordtran [Tex. Civ. App.] 115 SW 667. What is a reasonable time under circumstances in any given case is for jury. Loomis v. Norman Printer's Supply Co. [Conn.] 71 A 358.

**62.** Coopersville Co-operative Creamery Co. v. Lemon [C. C. A.] 163 F 145.

**63.** Question as to whether insurance policy had been accepted are of fact for jury. Manson v. Metropolitan Surety Co., 128 App. Div. 577, 112 NYS 886.

**64.** Question of probable cause held one for jury. Slater v. Taylor, 31 App. D. C. 100.

**65.** Rule particularly applicable where there was some conflict and ambiguity in circumstances and where different inference might have been drawn from facts and circumstances proved. Continental Lumber Co. v. Munshaw & Co. [Neb.] 118 NW 1057.

**66.** Sicard v. Albenberg Co., 136 Wis. 622, 118 NW 179.

**67.** Instruction that if jury answered first question in the negative they need not answer the second not objectionable. Sicard v. Albenberg Co., 136 Wis. 622, 118 NW 179.

**68.** When matters depending on oral testimony are connected with and necessary to a proper understanding of written evidence, court not bound to consider and give effect to the latter as though it stood alone. Winters v. Schmitz, 36 Pa. Super. Ct. 496.

**69.** Philadelphia v. Bilyeu, 36 Pa. Super. Ct. 562.

**70.** Tousey v. Hastings, 194 N. Y. 79, 86 NE 831.

**71.** Queen City Fire Ins. Co. v. First Nat. Bank [N. D.] 120 NW 545; Cleveland, etc., R. Co., v. Gossett [Ind.] 87 NE 723. Construction of written evidence is exclusively with the court. O'Brien v. Pabst Brew. Co., 31 App. D. C. 56. Where terms of a contract of sale are evidenced by letters and telegrams, it is the duty of the court to construe the contract and declare its terms to the jury. Mann v. Urquhart [Ark.] 116 SW 219. In action for conspiracy in expelling plaintiff from beneficial society because of the writing of a certain letter, whether writing of letter could be reasonably considered in violation

ful or ambiguous meaning, and parol evidence is introduced to show the intention of the parties, their construction becomes one for the jury,[72] as is also the existence and effect of foreign laws.[73] While the interpretation of a foreign law, if found in a single statute or in a single decision, the construction of the language of which is not in dispute, presents a question of law for the court,[74] yet, where the law is to be determined by considering numerous decisions which may be more or less conflicting, or which bear upon the subject collaterally or by way of analogy, and where inferences may be drawn from them, the question to be determined is one of fact for the jury.[75] Where a writing is not a depositive instrument but is put in evidence merely to show an extrinsic fact, it is for the jury to say what inference is to be drawn therefrom.[76] Whether or not an agent is duly authorized to manage some affairs for his principal is a matter for the court.[77]

## QUIETING TITLE.

§ 1. Chancery and Statutory Remedies and Rights, 1526. Title and Possession, 1527.
§ 2. What is a Cloud or Conflicting Claim, 1531.
§ 3. Procedure, 1532.

*The scope of this topic* is noted below.[78]

§ 1. *Chancery and statutory remedies and rights.*[79]—See 10 C. L. 1348—Equity has inherent power independently of statute to entertain suits to quiet title and to remove clouds.[80] Statutes conferring jurisdiction upon equity courts for this purpose are merely declaratory of existing powers and do not operate to confer additional ones.[81] Where by local statute a bill to remove a cloud will lie independently of possession, the enlarged equitable right thus created may be enforced by a federal equity court where grounds of federal jurisdiction exist.[82] Where the plaintiff has an adequate remedy at law, equity will not entertain jurisdiction.[83]

of plaintiff's obligations to laws of society held one for court. St. Louis & S. W. R. Co. v. Thompson [Tex.] 113 SW 144.

72. Cleveland, etc., R. Co. v. Gossett [Ind.] 87 NE 723.

73. Coe v. Hill, 201 Mass. 15, 86 NE 949.

74, 75. Electric Welding Co. v. Prince, 200 Mass. 386, 86 NE 947.

76. Floyd v. Pulp Lumber Co. [Pa.] 71 A 13.

77. Duty being on court, held no error to strike out part of defendant's testimony relating to agent's authority to abrogate original contract of parties or to substitute new agreement in lieu thereof, defendant not having proved agent's power to make contract. Rumble v. Cummings [Or.] 95 P 1111.

78. This topic treats of suits in equity to quiet title to realty and for the removal of clouds and statutory substitutes therefor. The cancellation of particular instruments which may be clouds on title (see Cancellation of Instruments, 11 C. L. 493), quieting title as an incident to statutory actions for the restoration of destroyed instruments (see Restoring Instruments and Records, 10 C. L. 1526) and adverse proceedings for the determination of conflicting interests in mining claims (see Mines and Minerals, 10 C. L. 839) have been excluded. As to proceedings to quiet title to water rights, see Waters and Water Supply, 10 C. L. 1996.

79. **Search Note:** See notes in 4 C. L. 1170; 6 Id. 1183; 15 L. R. A. 784; 6 L. R. A. (N. S.) 516; 12 Id. 652, 15 Id. 413.

See, also, Quieting Title, Cent. Dig. §§ 1-13, 34-60, 106; Dec. Dig. §§ 1-5, 8-26; 6 A. & E. Enc. L. (2ed.) 149.

80. Suit to quiet title an equitable one. Hankins v. Helms [Ariz.] 100 P 460. Has jurisdiction to vacate a fraudulent deed as cloud on title, independent of statute. Cawood v. Howard [Ky.] 113 SW 109.

81. Knauff v. National Cooperage & Woodenward Co. [Ark.] 113 SW 28.

82. American Ass'n v. Williams [C. C. A.] 166 F 17.

83. Where plaintiff alleged foreclosure of mortgage and that by mistake part of lot was omitted from deed executed under foreclosure, which mistaken description was repeated in deed to plaintiff and that plaintiff had been in possession for 13 years, but it appeared that defendant was in possession when suit was filed, the law affords adequate remedy for recovery of possession. Delaney v. O'Donnell, 234 Ill. 109, 84 NE 668. One who claimed to have been wrongfully ejected from premises dedicated to city and of which city had put him in possession, but to which he alleged no title in himself, had an appropriate remedy at law for such ejectment if wrongful. Doty v. Cedar Rapids [Iowa] 119 NW 132. Remaindermen held to have no adequate remedy by ejectment as against tax deed fraudulently obtained by life tenant and his wife, since muniments of

Equity, however, has jurisdiction to cancel a cloud on title notwithstanding there may be a complete defense to any attempt to enforce the instrument constituting such cloud.[84] The test is whether the complainant would be required to resort to extraneous proof to defeat an attempt at law to recover the land.[85] Title to easements[86] and water rights may be quieted.[87] The complainant may be required to do equity as a condition to relief.[88]

*Title and possession.* See 10 C. L. 1349—As a general rule and independently of statute,[89] both possession[90] and legal title[91] are necessary to maintain the action.

title flowing from tax sale proceedings could not be reached. Boon v. Root, 137 Wis. 451, 119 NW 121. No jurisdiction to remove cloud on plaintiff's title caused by conveyance under ancestors will from which will he was omitted, defendants being in possession, but equity would give relief on ground that will was inoperative as to such omitted child. Rowe v. Allison [Ark.] 112 SW 395.

84. No defense to suit to cancel covenant in deed by one church to another, restricting use of property deeded for church purposes only, that such restrictive covenant is unenforceable. Rector of St. Stephen's Church v. Rector of Church of Transfiguration, 114 NYS 623.

85. It is no answer to say that plaintiff could defeat an action of ejectment brought by defendant; true test being whether he would be put to extraneous evidence to do so. Greene v. Boaz [Ala.] 47 S 255. Held that defendant's muniments of title were such as to make out prima facie case if ejectment were brought, and would put plaintiff to extraneous proof to defeat recovery. Parker v. Miller-Brent Lumber Co. [Ala.] 47 S 580.

86. Title may be quieted as to right to cut timber and as to easements in connection therewith. Gazos Creek Mill & Lumber Co. v. Coburn [Cal.] 96 P 359.

87. Action to determine extent and priority of a water right partakes of nature of action to quiet title to real estate. Taylor v. Hulett [Idaho] 97 P 37.

88. One who seeks to have his title quieted as against an invalid tax sale must, before he is entitled to relief, reimburse defendant for back taxes paid by him with interest. Larson v. Peppard [Mont.] 99 P 136. Vendor under contitional deed cannot have title quieted upon nonperformance by vendee where latter has paid a portion of purchase money and makes a good tender of remainder, the right to the premises being then in him. McCullough v. Rucker [Tex. Civ. App.] 115 SW 323. In action to quiet title as against a recorded unperformed contract of sale, plaintiff as vendor must tender performance on his part as a condition precedent to obtaining relief sought. Kane v. Borthwick, 50 Wash. 8, 96 P 516.

89. Independently of state statute, bill to remove cloud upon title will not lie where plaintiff not in actual possession. American Ass'n v. Williams [C. C. A.] 166 F 17.

90. **Complainant held to have possession:** Two years' possession under tax deed sufficient. Townsend v. Penrose, 84 Ark. 316, 105 SW 588. Evidence held to show defendant's acts of posting notices and employing an attorney to prevent trespasses were insufficient to render plaintiff's possession disputed, he having constructive possession through tax deed which was sufficient to make his possession "peaceable" as required by Code 1896, § 809. Wood Lumber Co. v. Williams [Ala.] 47 S 202. Fact that deed of trust is given as security does not deprive grantor of possession within St. 1906, p. 78, c. 59, § 1, limiting right to bring action to one who is by himself or his tenant in actual and peaceable possession. Charles A. Warren Co. v. All Persons Claiming any Interest, etc., 153 Cal. 771, 96 P 807. Placing fish traps by holder of legal title on land continually submerged held to be such possession as would prevail against holder of tax deed who subsequently placed a barb wire around premises. Le Sourd v. Edwards, 236 Ill. 169, 86 NE 212. While Mills Ann. Code, §§ 255-264, requires that plaintiff be in actual possession, such requirement is immaterial where defendant alleges possession in himself and evidence shows that he has paramount title. Mulford v. Rowland [Colo.] 100 P 603. Complainant could under statute maintain suit to quiet title to strip of land excepted by him in sale of lot, where he had never surrendered possession of such strip and where defendant had mere license to use well located thereon. Cullen v. Ksiaszkiewicz [Mich.] 15 Det. Leg. N. 844, 118 NW 496. Vendee placed in possession by vendor's agent may quiet his title to premises although sold under mistaken description, both parties intending that premises sold were the ones to be conveyed. Isaacks v. Wright [Tex. Civ. App.] 110 SW 970. Remaindermen, having right to possession after life tenant's death, may maintain action to quiet title as against tax deed fraudulently obtained by life tenant's wife in collusion with him. Boon v. Root, 137 Wis. 451, 119 NW 121. Evidence held to show that plaintiffs were in possession claiming title, and that acts of defendants in entering land for purpose of surveying and cutting brush were in the nature of temporary trespasses and did not interrupt such possession. Brown v. Dunn, 135 Wis. 374, 115 NW 1097.

**Complainant held not to have possession:** Under Ky. St. 1903, § 11, plaintiff must prove ownership and actual possession where evidence showed that plaintiff was not in possession but that defendant's grantor had been in possession under well defined boundary including land in controversy plaintiff, not entitled to judgment. Dupoyster v. Dunn [Ky.] 113 SW 880. Evidence held to show that plaintiffs had never been in actual possession of overlapping boundary in dispute and were

Such rule has, however, been greatly modified by statute. Thus in some states it is sufficient if the plaintiff have constructive possession.[92] In Kentucky, the plain-

therefore not entitled to maintain action under Ky. St. § 11 (Russell's St. § 14). Cockrell v. Colson [Ky.] 116 SW 775. Actual possession of a tenant in common, claiming in hostility to complainant, another tenant in common, whose title is, in part only, denied, is not for purpose of the act, the possession of such other tenant. Country Homes Land Co. v. De Gray, 71 N. J. Eq. 283, 71 A 340. Action not maintainable where complaint showed that defendants were in possession under claim of title. Guerard v. Jenkins, 80 S. C. 223, 61 SE 258.

**91. Complainant held to have title:** Although a deed of trust had been given as security, grantor still retained an "estate of inheritance" which would enable him, under St. 1906, p. 78, c. 59, § 1, to bring action, notwithstanding Civ. Code § 863 provides that every express trust in real estate vests whole estate in trustee. Charles A. Warren Co. v. All Persons Claiming any Interest, etc., 153 Cal. 771, 96 P 807. Quitclaim deed which grants, sells, remisses, and releases the premises held to constitute sufficient foundation for defendant's counterclaim, praying decree to quiet title. Adams v. Hartzell [N. D.] 119 NW 635. One claiming as riparian owner title to island may maintain action against one who occupied it under claim that it was not patented to plaintiff. Moss v. Ramey, 14 Idaho, 598, 95 P 513. Conveyance by widow under power to plaintiff who had rendered personal service to testator and wife held to be made for adequate consideration and to convey good title to plaintiff notwithstanding no claim for services had ever been presented to executor. Gogreve v. Day, 10 Ohio C. C. (N. S.) 69. On question of disputed boundaries, evidence held to show that land intended to be conveyed to plaintiff's ancestor was located within plaintiff's grant. Whitaker v. Poston [Tenn.] 110 SW 1019. Where neither husband or wife had any beneficial interest in real estate purchased in name of wife and thereafter conveyed to a third person, title of latter was properly quieted. Dodds v. Dodds [Wash.] 98 P 748. Defective location notice when coupled with possession of mining claim under peaceful entry sufficient color of title to warrant finding in favor of locator. Protective Min. Co. v. Forest City Min. Co. [Wash.] 99 P 1033.

**Complainant held not to have title:** Evidence held insufficient to show that occupancy of lands under tax certificate gave title, such certificate not being sufficient to give color of title under statute. Townsend v. Penrose, 84 Ark. 316, 105 SW 588. Plaintiff, claiming through tax sale, not entitled to judgment where tax deed was void. Chatfield v. Iowa & Arkansas Land Co. [Ark.] 114 SW 473. Holder of mortgage, merely, to land as only record evidence of title, had no title sufficient to enable him to maintain suit. Castro v. Adams, 153 Cal. 382, 95 P 1027. Evidence of deed under foreclosure proceedings not sufficient to establish title where assignment to mortgagee of mortgage foreclosed was invalid. Hebden v. Bina [N. D.] 116 NW 85. Evidence held to show that quitclaim deed under which plaintiff claimed was a forgery. Young v. Engdahl [N. D.] 119 NW 169. Voluntary assignment for benefit of creditors made in Wisconsin by holder of second mortgage to lands in North Dakota through which plaintiff claimed title, by virtue of assignee's power of attorney, held to be in nature of proceeding in bankruptcy and consequently ineffective as to lands outside jurisdiction. Adams v. Hartzell [N. D.] 119 NW 635. Plaintiff could not predicate title upon void deed from wife. Carpenter v. Booker [Ga.] 62 SE 983. Evidence held sufficient to sustain finding that plaintiff had conveyed her interest to land to defendant. Austin v. Collier [Ga.] 62 SE 196. Plaintiff showing no possession or title to premises other than master's deed made without proof of possession or title in grantor was not entitled to decree quieting title as against tax deed. Bauer v. Glos, 236 Ill. 450, 86 NE 116. Bill alleging that city wrongfully put plaintiff in possession of premises dedicated to it; that after a year it wrongfully ejected him; that through misuse city lost its title to such dedicated land; that no one held title thereto, not sufficient to show any right or title in plaintiff which would enable him to maintain action. Doty v. Cedar Rapids [Iowa] 119 NW 132. Since tenant in possession under lease cannot obtain title as against his landlord, one who had leased land from defendants and secretly obtained a patent therefor had no such title as would enable him to bring action to quiet title as against the landlord. Mullins v. Hall [Ky.] 112 SW 920. Evidence held to show that deed based upon unrecorded and lost survey, under which plaintiff claimed, was void as against subsequent recorded survey. Overstreet v. Cantrell [Miss.] 46 S 69. Plaintiff claiming under sale of homestead by married woman, void because not joined in by husband, had no legal or equitable title which would enable him to maintain action. Levis-Zukoskl Mercantile Co. v. McIntyre [Miss.] 47 S 435. Where Indian allottee made contract providing for conveyance of his allottment after government restrictions should be removed, held that contract was void and vested no right in vendee thereunder to have deed made by allottee to another set aside. Lewis v. Clements [Okl.] 95 P 769.

92. Complaint alleging that plaintiffs were and had been for more than one year seized and possessed of the land, which was vacant, good under Code Civ. Proc. §§ 1638 and 1639, requiring possession for one year in actions to determine adverse claims. Neale v. Walter, 128 App. Div. 827, 112 NYS 1041. Owner of wild and unoccupied lands, but of which he has constructive possession, may have a decree quieting title when another seeks to impair his right thereto by institution of suit to quiet title in himself. Chatfield v. Iowa & Arkansas Land Co. [Ark.] 114 SW 473.

tiff must show actual possession at the commencement of the action for quieting his title [93] but need not have possession in order to remove a cloud therefrom.[94] In Alabama, peaceable possession without title is sufficient,[95] and in Missouri the plaintiff need only show that his title is better than that of defendant.[96] Possession may be taken for the purpose of the suit if it is not tortious and if it does not disturb a prior possession of another,[97] but possession obtained by unlawful and forcible entry will not support the action.[98] When possession is established, it is prima facie evidence of title sufficient to sustain the action.[99] Where it appears that the title is outstanding in a third party, no action will lie.[1] In certain cases, however, another than the true owner may bring the action.[2] A plaintiff may have his title quieted to so much of the land as he is in possession and owner of, although the persons against whom he asserts title may have a superior title to part of the land.[3] One who has acquired title by adverse possession may go into equity to remove a cloud therefrom.[4] The plaintiff must rely on the strength of his own title

**93.** Under Ky. St. 1903, § 11, plaintiff must introduce testimony to show that he was in actual possession at time of institution of suit if such possession be denied. Horn v. Bates [Ky.] 114 SW 763. One not having actual possession at time of institution of suit cannot maintain action to quiet title under Ky. St. 1903, § 11, authorizing such suit by one who owns title in actual possession. Actual possession in defendant. Dupoyster v. Turk, 33 Ky. L. R. 320, 110 SW 260.

**94.** Suit to remove cloud from title is different from a suit to quiet title under Ky. St. 1903, § 11, which authorizes one in ownership of and in possession, to institute an equitable suit to quiet title, possession not being necessary to maintain suit to remove cloud. Carwood v. Howard [Ky.] 113 SW 109. Deed made and recorded subsequent to deed from same grantor to plaintiff cancelled as cloud in plaintiff's title, although neither party was in possession of premises. Id. Where relief sought was cancellation of deed made by one claiming to own land under mortgage, plaintiff was entitled to relief regardless of fact that he was not in possession. Tucker v. Witherbee [Ky.] 113 SW 123.

**95.** Code 1896, § 809, Code 1907, § 5443, provides that a person in possession, who cannot bring an action at law, may bring action to quiet title against one supposed to have some claim to premises. Complainant need not have title, peaceable possession alone being necessary. The respondent has the burden of proving his claim. Whittaker v. Van Hoose [Ala.] 47 S 741. Evidence held to show that married woman had by antinuptial agreement acquired a right as against her husband to treat property as feme sole; consequently her deed to husband, through which complainant claims, passed title to them as against respondents. Id.

**96.** Under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), where both parties claim title through a common source, plaintiff need not establish title against the world but need only show that his title is better than that of defendant. Charles v. White, 214 Mo. 187, 112 SW 545.

**97.** Under Ballinger's Ann. Codes & Wash. St., § 5521, immaterial that possession is taken for purpose of suit if it is not tortious and if it does not disturb a prior possession of another. Kraus v. Congdon [C. C. A.] 161 F 18.

**98.** Possession obtained by unlawful and forcible entry cannot be availed of to file bill to remove cloud or quiet title, but it may be availed of to defeat a bill for that purpose by the ousted party, where he had an adequate remedy at law. Delaney v. O'Donnell, 234 Ill. 109, 84 NE 668.

**99.** Evidence of occupation and possession insufficient to show title. Castro v. Adams, 153 Cal. 382, 95 P 1027. Evidence held insufficient to show such possession in plaintiff as would support presumption of title from possession. Hebden v. Bina [N. D.] 116 NW 85.

**1.** Held that defendants had established an outstanding title to lands in controversy by showing that patent from the United States was in third party. Rogers v. Clark Iron Co., 104 Minn. 198, 116 NW 739.

**2.** Rule that true owner only can maintain an action to quiet title has no application where one unlawfully obtains a deed from a trustee as purchaser who claims thereunder and at same time attempts to set up superior title outstanding in another. Minor cestui qui trust entitled to have deed given by trustee cancelled regardless of outstanding title in another, order authorizing sale by trustee being invalid. Turner v. Barber [Ga.] 62 SE 587.

**3.** Mullins v. Hall [Ky.] 112 SW 920.

**4.** Parker v. Miller-Brent Lumber Co. [Ala.] 47 S 580. By construction, Civ. Code 1901, par. 2942, held to confer title upon person entitled to its bar; consequently cross-complaint in action to quiet title, setting up adverse possession for statutory period and praying decree quieting title as against plaintiff, is a proper pleading under Civ. Code 1901, c. 1, tit. 71. Work v. United Globe Mines [Ariz.] 100 P 813. Where plaintiffs held land in controversy by adverse possession for statutory period, their title was properly quieted as against overlapping claim under a junior patent. Daniel v. Middleton [Ky.] 116 SW 721. Plaintiff who claimed lands by deed from his grantor which lands embraced part of tract deeded to defendants subsequent to

and not upon the weakness of that of his adversary.[5] Suing out writ of possession by defendant is a confession that complainant has sufficient possession to maintain action to remove cloud.[6]

*Defenses.*[See 10 C. L. 1351]—The right to maintain the action may be lost by laches[7] or by operation of the statute of limitations.[8] The plea of the statute of limitations set up by defendant is an affirmative defense of which he has the burden of proof.[9] Title in defendant[10] or in a third party is a complete defense,[11] as is a former settlement.[12]

deed to plaintiff's grantor entitled to have his title to such interference quieted although not expressed in deed, it appearing that his grantor had occupied premises adversely to defendants for 30 years. Asher v. Cress [Ky.] 115 SW 252. Surviving trustee who was also beneficiary under will executed trust deed to property in question and for 17 years enjoyed together with other beneficiary the benefits of the conveyance. In suit by one of purchasers under trust, held that trust deed was valid and judgment was properly entered barring rights of trustee or her son as beneficiaries and those claiming under them from setting up claim to premises conveyed by trustee. Doscher v. Wyckoff, 63 Misc. 414, 113 NYS 655. Evidence held insufficient to establish prescriptive title in plaintiff or his predecessor in suit for cancellation of defendant's title. Wiggins v. Brewster [Ga.] 62 SE 40.

5. Doty v. Cedar Rapids [Iowa] 119 NW 132. Burden of proof held to be upon plaintiff to show that lands were land and not lakebed at time of government survey, latter being prima facie shown by fact that premises were within meander line. Little v. Williams [Ark.] 113 SW 340. Where both plaintiff and defendant claimed under void tax sales, judgment must be for defendant since plaintiff must rely on his own title. Meyer v. Snell [Ark.] 116 SW 208.

6. Collier v. Goessling [C. C. A.] 160 F 604.

7. Where land in controversy was wild and uncultivated, and neither complainants, the fee owners, nor defendants claiming under tax sale were in possession, and defendants, aside from paying taxes, did nothing with reference to the land from a sense of security caused by complainant's inactivity, complainants were not barred by laches. Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531. Unexcused delay of fourteen years, during which plaintiff's grantor had exercised no act of ownership over land, precluded plaintiff from maintaining action to quiet title on ground that a deed regular in form and duly recorded was executed by him in blank and name of grantee inserted without authority, and that it was intended as a mortgage. Butler v. Peterson, 79 Neb. 713, 116 NW 515. Where heir who was a cotenant with other heirs allowed latter to purchaser under foreclosure of mortgage given by heirs and widow, and made no claim of title during his life, his heirs claiming under him were barred by laches, ten years having passed since defendant's purchase. Likens v. Likens, 136 Wis. 321, 117 NW 799. Purchase-money mortgage provided that price should be paid as soon as realized by sale of land. Held that law implied that sales should be made within reasonable time, and delay for 35 years in bringing suit, no excuse being presented, precluded relief in equity. Castro v. Adams, 153 Cal. 382, 95 P 1027. Plaintiff who delayed bringing suit until death of all parties whose testimony might be available to defendant was barred as against adverse holder under color of title. McBride v. Caldwell [Iowa] 119 NW 741. Descendants of community owners held not barred by lapse of time where it appeared that they were ignorant of their interest and that plaintiff knew thereof but neither informed them nor took such open and notorious possession as would amount to constructive notice that they claimed adversely. Stone v. Marshall [Wash.] 100 P 858.

8. Where trustee sold certain land to state for delinquent taxes, and two days before period of redemption expired clerk sold land to defendant by statutory conveyance, three-year limitation prescribed by Act Tenn. 1899, p. 1143, c. 435, § 66, within which suit may be brought to contest such title, did not begin to run until conveyance by clerk to defendant, no action being previously available which could have concluded the state. Collier v. Goessling [C. C. A.] 160 F 604. Evidence held to show that defendant was in the open and notorious possession of premises in controversy in good faith, under color of title, and that such adverse possession established his title as against plaintiff in suit to determine adverse claims. McBride v. Caldwell [Iowa] 119 NW 741. Rev. St. 1898, §§ 1188, 1189a, 1189b, prescribing limitations in actions by former owners to recover possession of lands sold for taxes or to avoid tax deed, have no application to actions to annul tax title for fraud in tax proceedings in an action to quiet title. Boon v. Root, 137 Wis. 451, 119 NW 121. Defendants, claiming absolute title derived from source common to both parties who admittedly died seised of land in dispute by conveyances through his administrator, coupled with open and undisputed possession for 30 years, held entitled to judgment vesting title in them as against heirs of common source out of possession. Stephenson v. Austin [Mo.] 116 SW 1090.

9. Evidence held insufficient to sustain plea. Tate v. Rose [Utah] 99 P 1003.

10. Evidence held to show that deed under which defendants claimed, by which their mother was granted life interest, with remainder to defendants, was not void as against creditors, and was consequently superior to marshal's deed under execution sale for grantor's debt, and to deed made by defendant's mother by order of court in settlement of claim by execution creditor.

§ 2. *What is a cloud or conflicting claim.*[13]—See 10 C. L. 1352—A cloud on title is a semblance of a title either legal or equitable, or a claim of an interest in land appearing in some legal form, but which is in fact, unfounded, extrinsic facts being required to show it to be invalid.[14]

Morehead v. Allen [Ga.] 63 SE 507. Evidence held to sustain finding that defendant intended to convey all her right to property in controversy, and that she in fact did so, and that complainant was entitled to have his title quieted. Johnson v. Smith [Mich.] 15 Det. Leg. N. 633, 117 NW 563. In an action to quiet title against a sheriff's deed on execution sale, on issue whether execution was so issued on judgments as to preserve their lien after a year from their rendition, or whether directions were given to the officer not to levy the executions, but to let them expire, evidence held to show that no such directions were given. Gouwens v. Gouwens, 237 Ill. 506, 86 NE 1067.

**11.** Competent for defendants who were in adverse possession to defeat action by showing that title was outstanding in a third person without connecting themselves with that title. Rogers v. Clark Iron Co., 104 Minn. 198, 116 NW 739.

**12.** Where rights of the parties have been fully adjusted by a settlement, and decrees entered in pursuance thereof, no suit to quiet title can be maintained. Armstrong v. Campbell [Iowa] 118 NW 898. In suit to remove cloud, evidence held to show that defendant claiming under recorded conveyances from executors of common source of title had no notice of plaintiff's deeds from heirs, such deeds not being recorded, and consequently not valid as against defendant. West Coast Lumber Co. v. Griffin [Fla.] 48 S 36.

**13. Search Note:** See notes in 4 C. L. 1171; 45 A. S. R. 373; 7 Ann. Cas. 334.

See, also, Quieting Title, Cent. Dig. §§ 4, 14-33; Dec. Dig. §§ 6, 7; 6 A. & E. Enc. L. (2ed.) 160.

**14.** Allott v. American Strawboard Co., 237 Ill. 55, 86 NE 685. The clouds upon title which equity will remove are instruments or other proceedings in writing which appear of record and thereby cast doubt upon validity of record title. Id.

**Held to constitute cloud: Deeds** never delivered and placed on record by fraud. Bowers v. Cottrell [Idaho] 96 P 936. Void deeds given by wife to secure husband's debts. Pierce v. Middle Georgia Land & Lumber Co. [Ga.] 61 SE 1114. Quitclaim deed given by heir who only had a contingent remainder which never vested. Dickerson v. Dickerson, 211 Mo. 483, 110 SW 700. Deeds executed by mother to son as gift and placed in escrow, to be delivered at plaintiff's death, but fraudulently obtained and placed on record. Baker v. Baker [Cal. App.] 100 P 892. Instrument recorded as deed, but fatally defective because of vague description. Dillon v. Hegarty [Pa.] 70 A 998. Tax deed obtained by life tenant's wife through fraudulent collusion with him, operating to deprive remaindermen of their interest. Boon v. Root, 137 Wis. 451, 119 NW 121. Recorded deed conveying owner's land to certain persons, to be by them sold and portion of selling price returned to grantor, purpose of which was to build up town, properly canceled on records, where such scheme failed and deed returned to grantor. Bogard v. Sweet, 209 U. S. 464, 52 Law. Ed. 892. Covenant inserted without diocesan authority in deed of property by one church to another, restricting use of such property for any but church purposes, canceled, it appearing that such restriction would prevent full use of property for church purposes. Rector of St. Stephens Church v. Rector of Church of Transfiguration, 130 App. Div. 166, 114 NYS 623. **Mortgage** paid by mortgagor in his lifetime. McArthur v. Griffith, 147 N. C. 545, 61 SE 519. Note and mortgage given and paid by plaintiff's ancestor in his lifetime. Id. Naked **lien** upon judgment debtor's share in insolvent estate, it appearing that debtor had no interest in estate, such interest being extinguished by administrator's sale. Yoder v. Kalona Sav. Bank [Iowa] 119 NW 147. **Lease** fraudulently obtained by defendant signed by plaintiff as lessor without intention to be bound unless defendant agreed to terms. Morgan v. Simmons, 34 Utah, 146, 96 P 1018. **Contract** whereby railway company was to acquire rights to certain coal lands upon condition precedent that road should be constructed opposite such lands, but whereby company never acquired title by reason of nonperformance of condition within time specified. Adams v. Guyandotte Valley R. Co. [W. Va.] 61 SE 341. Contract allowing defendant mining privileges, evidence showing that such contract was abandoned and no royalties paid thereunder for 13 years. Payne v. Neuval [Cal.] 99 P 476. Contract **for sale of real estate** placed on record by vendee after refusal by him to perform on the ground of alleged defects in the vendor's title. Kane v. Borthwick, 50 Wash. 8, 96 P 516. Contract for sale of plaintiff's land made by real estate broker without authority from principal. Miller v. Wehrman [Neb.] 115 NW 1078. Instrument procured by imposition, providing for the sale of Missouri lands for cash payment, or, in lieu thereof, conveyance of complainant's land in Illinois, recorded in Illinois. Beamer v. Werner [C. C. A.] 159 F 99. Contract whereby plaintiff was given the exclusive option to purchase or sell certain property for defendant, since such contract was one for personal services and not capable of specific enforcement. Jolliffe v. Steele [Cal. App.] 98 P 544. **Hostile assertion of title** to vacated alley alleged to be included in sale of premises to plaintiff but not included in deed, evidence showing that alley was to be included in sale, removable under 2 Ballinger's Ann. Codes & St. § 5521 (Pierce's Code, § 1156). Norton v. Gross [Wash.] 100 P 734. Claim of city that strip of beach in plaintiff's possession had been dedicated to it by plaintiff's grantors. Poole v. Lake Forest, 238 Ill. 305, 87 NE 320. **Tax certificate** on community property of plaintiff and defendant's predecessor in

§ 3. *Procedure.*[15]—See 8 C. L. 1576—An action to quiet title must be brought in the county where the real estate is situated.[16] The federal circuit court has jurisdiction of a suit to quiet title within the district where the suit is brought, although neither of the parties are resident in the state where the land lies.[17] Where adverse claims are made by the same party, title to several pieces of property may be quieted in the same action.[18] Suit may be brought at any time within the term required to perfect title by adverse possession.[19] The filing of a notice of lis pendens is not necessary to confer jurisdiction.[20]

*Process.*See 8 C. L. 1577—The subject of process is fully treated elsewhere.[21]

*Parties.*See 10 C. L. 1352—All parties claiming an interest in the property involved may properly be joined as defendants,[22] but parties not asserting an adverse claim need not ordinarily be joined, although the outstanding title may be in them.[23] Where all persons interested are joined, the ultimate rights of all the parties may be determined.[24] A personal representative cannot maintain the action under statutes providing that suit may be brought only by one claiming ownership.[25] The United

interest, such certificate being acquired by plaintiff. Stone v. Marshall [Wash.] 100 P 858.

**Held not to constitute cloud: Deed** by one not connected by any conveyance with the record title to land. Bothin v. California Title Ins. & T. Co., 153 Cal. 718, 96 P 500. Deed not delivered, although recorded, creates a cloud, but if delivered it passes title, and its record establishes no cause of action. Creamer v. Bivert, 214 Mo. 473, 113 SW 1118. Valid **decree** in partition assigning interest in lands partitioned to defendant's grantors. Gillespie v. Pocahontas Coal & Coke Co., 162 F 742. A **void assessment** for sidewalk improvement under Laws 1897, p. 408, c. 414. Allter v. St. Johnsville, 130 App. Div. 297, 115 NYS 355. **Record title** of former owner is not a cloud upon title acquired through tax proceedings. Triangle Land Co. v. Nessen [Mich.] 15 Det. Leg. N. 1054, 119 NW 586. Equity will not remove as cloud an **oral claim** that parts of plaintiff's water rights belong to defendants by prescription. Allott v. American Strawboard Co., 237 Ill. 55, 86 NE 685.

**15. Search Note:** See notes in 4 C. L. 1171, 1172; 69 L. R. A. 682; 12 L. R. A. (N. S.) 49. See, also, Quieting Title, Cent. Dig. §§ 61-105; Dec. Dig. §§ 27-54; 17 A. & E. Enc. P. & P. 274; 18 Id. 427.

**16.** Venue of action to quiet title as against apparent lien of a void judgment is governed by Civ. Code, § 51 (Cobbey's Ann. St. 1903, § 1050). Johnson v. Samuelson [Neb.] 117 NW 470. While action to quiet title to water rights must be brought in jurisdiction in which subject-matter is situated, where diversion of water took place in different state from that in which injury occurred, rights and priorities of defendants to stream in state where diversion took place may be considered as matter of defense. Taylor v. Hulett [Idaho] 97 P 37.

**17.** Suit to remove cloud from title is cognizable under Jurisdictional Act, March 3, 1875, c. 137, 18 Stat. 472, as amended by Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 513), by federal circuit court within district where suit is brought, although neither of parties are residents of state in which such lands lie. Gillespie v. Pocahontas Coal & Coke Co., 162 F 742.

**18.** Complaint seeking to quiet title to 17 pieces of property not objectionable on ground of multifariousness. Mitchell v. Knott, 43 Colo. 135, 95 P 335.

**19.** Delay of 4 years held not laches sufficient to bar plaintiff's rights, it requiring 7 years to acquire title by adverse possession. Pierce v. Middle Georgia Land & Lumber Co. [Ga.] 61 SE 1114.

**20.** Notwithstanding Code Civ. Proc. § 749, omission to file lis pendens would only operate to relieve innocent third parties from operation of judgment affecting title or right of possession of land in dispute. Blackburn v. Bucksport & E. R. R. Co., 7 Cal. App. 649, 95 P 668.

**21.** See Process, 12 C. L. 1413.

**22.** In a petition to cancel deeds which are alleged to be a cloud on the plaintiff's title, all the parties to the deeds sought to be canceled are proper parties to the suit. Pierce v. Middle Georgia Land & Lumber Co. [Ga.] 61 SE 1114. Wife of grantee in deed alleged to constitute cloud on title not necessary nor proper party, since if deed be invalid she could have no dower interest thereunder. Greene v. Boaz [Ala.] 47 S 255.

**23.** It is immaterial that there are others not parties, who might have outstanding titles that would constitute a cloud upon property in question. Mitchell v. Knott, 43 Colo. 135, 95 P 335. Code Civ. Proc. § 749, providing for joinder of all parties known to plaintiff to have some adverse claim, does not require a plaintiff to examine the public records and name as defendants all persons having an interest in the land in controversy, in derogation of plaintiff's title, and failure to include such persons as defendants does not render complaint insufficient to state a cause of action. Blackburn v. Bucksport & E. R. R. Co., 7 Cal. App. 649, 95 P 668.

**24.** Practice Book 1908, p. 257, § 195. Paton v. Robinson [Conn.] 71 A 730.

**25.** Code 1896, art. 13, c. 16, §§ 809-813. Gulf Coke & Coal Co. v. Appling [Ala.] 47 S 730.

States may bring an action to remove cloud in title to lands held by an allottee under a trust patent.[26]

*Bill, complaint or petition.* See 10 C. L. 1353—The ordinary rules of pleading apply,[27] including those as to multifariousness [28] and joinder.[29] The construction of the complaint is determined on the question of whether the suit is one to quiet title.[30] The plaintiff must allege ownership,[31] that he is in possession,[32] that defendant claims adverse interest in the real estate,[33] and that such claim is unfounded.[34] If possession be alleged upon information and belief merely, objection must be made by motion and not by demurrer.[35] If the plaintiff claim by default

**26.** Unauthorized deed given by heir of Indian allottee under trust patent may be removed as cloud under state law, and possession not necessary in such case unless made so by local law. United States v. Leslie, 167 F 670.

**27.** Plaintiff has no cause of action if it appears that his petition describes property totally different from that sued for and evidence tends to show that his author intended to convey the property described. Barbier v. Nagel, 121 La. 979, 46 S 941. Bill deraigning title through patent from state, and alleging that defendants claim under tax deed from state to liquidating levee board, and that they rely on Laws 1888, p. 40, c. 23, that through irregularities such tax sale was void, held to state cause of action as against demurrer. Clark v. McNeill [Miss.] 46 S 536.

**28.** Bill to construe trust deed under which plaintiff claimed, and to quiet title, held not demurrable for multifariousness because defendants claimed title to several separate parcels of land in dispute. Berger v. Butler [Ala.] 48 S 685.

**29.** Bill asking that trust deed under which plaintiff was trustee be construed, and that title be quieted as against several subsequent grantees of grantor of trust deed, not demurrable for misjoinder, as all parties interested in subject-matter were proper parties. Berger v. Butler [Ala.] 48 S 685. Action to remove a trust deed as cloud, based on theory that such deed was forged, is a distinct cause of action from that presented by theory that such trust deed was valid, but that its foreclosure was void. Hendricks v. Calloway, 211 Mo. 536, 111 SW 60.

**30.** Where complaint in one paragraph prayed that title might be quieted, and in another paragraph prayed that deed which was alleged to constitute the cloud be delivered to plaintiff, finding that plaintiff was owner of premises, that defendant did not have claim thereto, and that plaintiff was entitled to have his title quieted, was a disposition of the case on theory that it was one to quiet title. Johnson v. Zimmerman [Ind. App.] 84 NE 541. Complaint alleging that plaintiff was owner under tax deed, that land was unoccupied by adverse claimant who was asserting title and paying taxes, states a cause of action to quiet title, irrespective of whether plaintiff was entitled to a general decree confirming the tax sale under which he held. Knauff v. National Cooperage & Woodenware Co. [Ark.] 113 SW 28. Bill filed against tax collector alone, for purpose of enjoining collection of tax, cannot be construed as being a suit for removal of cloud on title caused by sale of such land for taxes, no one being made party to suit as purchaser or holder of adverse claim. Turner v. Jackson Lumber Co. [C. C. A.] 159 F 923.

**31.** Tate v. Rose [Utah] 99 P 1003. Sufficient to allege and prove that title was vested in a deceased owner at the time of his death, without alleging ownership at the commencement of action, since such ownership will be presumed to continue. Id.

**32.** Under Code Civ. Proc. § 1638, requiring that plaintiffs have been in possession for one year, held that failure to allege such possession is fatal. O'Donohue v. Smith, 57 Misc. 448, 109 NYS 929. Complaint not alleging in whose possession premises are, insufficient. O'Donohue v. Smith, 130 App. Div. 214, 114 NYS 536. Finding that complainant was in possession and was the owner 12 years before filing petition, and was the owner when petition was filed, not sufficient to show possession where petition was filed. Lister v. Glos, 236 Ill. 95, 86 NE 180. No suit could be maintained to quiet title to 6 feet of lot which it was alleged had been left out of deed under foreclosure proceedings by mistake, where proof showed that complainants were not in possession when bill was filed. Delaney v. O'Donnell, 234 Ill. 109, 84 NE 668. Bill for quieting title not demurrable for failure to allege title and possession, where it avers that plaintiff was trustee under trust deed, that he took possession as such trustee, that he has continuously remained in possession, and that he has not disposed of any part of the premises. Berger v. Butler [Ala.] 48 S 685. Complaint must allege that plaintiffs are in possession, or state specific reasons why equity should assume jurisdiction. Bill to set aside conveyance of undivided interest in remainder executed during infancy and brought after death of life tenant. O'Donohue v. Smith, 130 App. Div. 214, 114 NYS 536.

**33.** Plaintiff must not only allege ownership and possession or right of possession, but must set up that some one disputes his rights and who the person is that disputes them. Tate v. Rose [Utah] 99 P 1003. Bill filed under Comp. Laws, § 448, providing for release to plaintiff if he establishes his title, must aver that defendants have asserted title to premises. Triangle Land Co. v. Nessen [Mich.] 15 Det. Leg. N. 1054, 119 NW 586.

**34.** Allegation that deed sought to be removed did not express intention of parties by reason of mistake not sufficient as basis for suit to quiet title. Garrick v. Garrick [Ind. App.] 87 NE 696.

**35.** Mitchell v. Knott, 43 Colo. 135, 95 P 335.

under a contract for the sale of land, he must plead all his equities thereunder.[36] Fraud and undue influence may be proven upon complaint and answer, though not pleaded by the plaintiff.[37]

*Answer, cross complaint and other pleadings.*See 10 C. L. 1354—An averment of ownership and possession set up by defendant does not require a reply.[38] No reply is necessary to a plea of the statute of limitations.[39] The cross complaint need not anticipate defenses.[40] A bare denial of plaintiff's title is sufficient to raise the issue.[41] Title to lands claimed by defendants not included in plaintiff's patents cannot be litigated by way of cross complaint,[42] but otherwise where defendant's title rests upon an executed contract.[43]

*Evidence.*See 10 C. L. 1354—The burden rests upon the plaintiff to establish his title to the premises by sufficient evidence.[44] Where the defendant seeks to defeat the action by showing an outstanding title in a third person, the burden rests upon him to establish such outstanding title.[45] Cases dealing with the admissibility of particular testimony on questions of title,[46] possession,[47] and other matters, will be found in the notes.[48]

**36.** Vendor must plead his equities in suit to quiet title to land sold on contract of which vendee has made default, vendee setting up equities in his favor which, with tender, would defeat the action. Must plead that he planted crops after default. McCullough v. Rucker [Tex. Civ. App.] 115 SW 323.

**37.** Fraud and undue influence in procuring deed executed by plaintiff to be left in escrow with defendant's attorney, and under which defendant's claim may be proved on issue made by complaint and answer, though not pleaded by plaintiff, there being no pleading open to him after answer. Baker v. Baker [Cal. App.] 100 P 892.

**38.** Where defendant merely pleads ownership generally without claiming title through a different or independent source, or that he has a lien, issues are made up under Comp. Laws 1907, §§ 3511, and 2996, by complaint and answer without reply. Tate v. Rose [Utah] 99 P 1003.

**39.** Under Comp. Laws 1907, § 2980, unless plaintiff wishes to avoid bar of statute by showing nonresidence or new promise. Tate v. Rose [Utah] 99 P 1003.

**40.** Cross complaint setting up adverse possession under Civ. Code 1901, § 2937, and praying decree quieting defendant's title, need not show averment that deed under which claim is made was not forged, where it contained averment equivalent to allegation that it was executed by grantors named. Work v. United Globe Mines [Ariz.] 100 P 813. Where answer denies plaintiff's possession in defendant, and denies that plaintiffs are entitled to relief, it need not state that reason is that plaintiffs have an adequate remedy at law. Delaney v. O'Donnell, 234 Ill. 109, 84 NE 668.

**41.** Suit to determine adverse claims. Rev. Codes 1905, § 7526. Hebden v. Bina [N. D.] 116 NW 85.

**42.** Patents not being subject to collateral attack. Worcester v. Kitts [Cal. App.] 96 P 335.

**43.** Under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), relating to quieting title, a railway company made defendant in trespass could, under an answer setting up sale by parol contract from plaintiff, executed by payment of purchase price and delivery of possession, have its interest in land quieted, it appearing that paramount, equitable title was in the company. Lambert v. St. Louis & G. R. Co., 212 Mo. 692, 111 SW 550.

**44.** Evidence held insufficient to show that land was not within portion reserved under sheriff's sale through which plaintiff deraigned title. Hill v. Barner [Cal. App.] 96 P 111. In action to quiet title where one defense filed to complaint consists solely of admissions and denials, and another consists solely of assertion of title in defendant and his grantees, plaintiff is not required to prove his title and possession. Mitchell v. Knott, 43 Colo. 135, 95 P 335.

**45.** Rogers v. Clark Iron Co., 104 Minn. 198, 116 NW 739.

**46.** Under Comp. Laws 1907, §§ 1975, 2000, 2010, 3409, the record of the patent is admissible to show plaintiff's title when record shows that such patent was duly executed and verified. Tate v. Rose [Utah] 99 P 1003. In suit to remove cloud from title where plaintiff claimed through a described series of conveyances, he could not introduce in evidence tax deeds to himself antedating defendant's chain of title, where such tax deeds were not set out in complaint. West Coast Lumber Co. v. Griffin [Fla.] 48 S 36. In suit to quiet title brought by heir against executor relative to alleged fraudulent sale by him, executor's deeds were properly admissible as being defendant's chain of title. Livingston v. Taylor [Ga.] 63 SE 694. Evidential matters relative to source of title immaterial and not subject to attack unless at issue. Action to cancel deed for mental incapacity. Gable v. Gable, 130 Ga. 689, 61 SE 595.

**47.** In a suit to quiet title to land described in the complaint as "west half of southwest quarter" and in the patent as "lots 1, 2, 3, 4," it is competent to introduce oral evidence to show that both descriptions covered same premises. Tate v. Rose [Utah] 99 P 1003. Where plaintiffs occupied strip of beach in controversy by maintaining bathhouse thereon and claimed to be owners of entire strip under paper title, such paper title in connection with acts of

*Trial.*[See 10 C. L. 1355]—The sole issue to be tried is the right, title or claim of the parties to the action.[49] It is within the discretion of the court to allow the bill to be amended so as to include a prayer for the removal of a cloud,[50] and where all the parties are before the court, a mistake in the description of a deed to part of the property in question may be corrected, although the suit is one to quiet title to a larger tract embracing it.[51] Where the cause of action stated is to reform a deed and the question of quieting title is only incidentally involved, a new trial as of right will not be granted although the quieting of title be included in the prayer.[52]

*Findings, decree or judgment.*[See 10 C. L. 1355]—The plea of the statute of limitations, presenting a material issue, requires a finding.[53] The actions being an equitable one, the court may, as a condition for relief, require reimbursement to the losing party for taxes paid by him, together with interest,[54] and the prevailing party should be given a reasonable time in which to comply with such requirements.[55] The court may in a proper case grant affirmative relief, although only general relief is prayed,[56] but affirmative relief as against the plaintiff cannot be granted unless warranted by the pleadings.[57] The findings and judgment should describe the land with such definiteness that its precise limits will appear from the description itself.[58] A judgment quieting title cuts off any lien which the vendor might have for

ownership to which land was adapted was sufficient to establish fact of actual possession. Poole v. Lake Forest, 238 Ill. 305, 87 NE 320.

**48.** In action to quiet title against instrument conferring mining privilege, oral testimony of plaintiff admissible to explain ambiguous nature of instrument. Payne v. Neuval [Cal.] 99 P 476. In action to quiet title as against contract allowing mining privileges, evidence that oil was not discovered in vicinity until after contract was executed was admissible. Id. Evidence that amount tendered by vendee in default under land contract, as against which plaintiff sought to have title quieted, was furnished by vendee's prospective purchaser, immaterial. McCullough v. Rucker [Tex. Civ. App.] 115 SW 323. In suit by vendor under land contract to quiet title against vendee in default, amounts received by defendant as result of contract made by him for sale of premises immaterial. Id. Not error to admit evidence concerning conversation between grantor of mining privileges, which grant was subject of suit to quiet title, and deceased grantee's superintendent respecting abandonment of contract. Payne v. Neuval [Cal.] 99 P 476. Liens against third persons as shown by execution docket not competent in suit to quiet title. Wiggins v. Brewster [Ga.] 62 SE 40.

**49.** Code 1896, § 809. Defendant claiming undivided interest to land, legal title of which was in corporation of which he was a member, held to have no title or interest in property as against plaintiff in possession. Dickinson v. Harris [Ala.] 47 S 78.

**50.** Where bill and answer show that action is one for removing cloud on title, but prayer of bill simply asks that instrument be declared a simple obligation for payment of money. Dillon v. Hegarty [Pa.] 70 A 998.

**51.** Daniel v. Middleton [Ky.] 116 SW 721.

**52.** Garrick v. Garrick [Ind. App.] 87 NE 696.

**53.** In absence of evidence to support plea, court must find in favor of plaintiff. Tate v. Rose [Utah] 99 P 1003.

**54.** Decree requiring plaintiff in suit to quiet title as against irregular tax deed to pay interest on taxes paid by defendant at rate of 2 per cent. per month held erroneous, legal rate only being required. Larson v. Peppard [Mont.] 99 P 136. Successful party required to pay as a condition to the decree one-half the amount paid by adverse party on account of taxes and tax redemptions with interest. Rannels v. Rowe [C. C. A.] 166 F 425. One who sought to remove a tax levy and sale thereunder as a cloud upon title properly required to pay for use of defendant, the amount of taxes made a lien on premises. Buchanan v. MacFarland, 31 App. D. C. 6. Plaintiff in suit to quiet title to lands claimed without color of title may, upon decision that he had no title, have taxes paid by him prorated and have a decree for taxes he paid on portion to which he had no title. Langhorst v. Rogers [Ark.] 114 SW 915.

**55.** Instead of making payment of amount of back taxes and interest disbursed by holder of invalid tax deed a condition precedent to relief, proper practice would be to make order giving plaintiff reasonable time in which to do so, upon doing which relief should be granted. Larson v. Peppard [Mont.] 99 P 136.

**56.** Suit to quiet title as against recorded contract for sale upon which default had been made. McCullough v. Rucker [Tex. Civ. App.] 115 SW 323.

**57.** Where answer and cross complaint of husband alleges that he is owner of certain property described and prays that his title thereto be quieted against his wife's claims for separate maintenance and division of community property, court may grant general or conditional relief but cannot grant affirmative relief to defendant by rendering personal judgment against plaintiff. Loeper v. Loeper [Wash.] 99 P 1029.

**58.** Hill v. Barnet [Cal. App.] 96 P 111.

his purchase money,[59] and where the validity of a certain deed is the sole issue, such judgment is no bar to an assertion of title or possession under other deeds.[60] The title to a mere easement may be quieted only for such period of time as is necessary for the plaintiff to carry out the purpose for which it was granted.[61] An injunction to maintain the status quo of the property may properly be granted as a remedy incident to the suit.[62] A master's decree is effective to pass title, regardless of the correctness of the decision.[63]

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**Quorum,** see latest topical index.

## QUO WARRANTO.

§ 1. Nature, Function, and Occasion of the Remedy, 1536.
§ 2. Jurisdiction, 1538.
§ 3. Parties and the Right to Prosecute, 1538. Leave to File an Information, 1539. Process, 1539.
§ 4. The Information or Complaint, 1539.
§ 5. Answers and Other Pleadings and Motions to Quash and Dismiss, 1540.
§ 6. Trial and Judgment, 1541.
§ 7. New Trial and Review, 1542.

*The scope of this topic* is noted below.[64]

§ 1. *Nature, function, and occasion of the remedy.*[65]—See 10 C. L. 1357—The writ of quo warranto[66] was a common-law remedy,[67] but statutes now generally substitute an information in the nature of quo warranto;[68] and in Colorado an action for trying title to public office or franchise under a statute is in the nature of and a substitute for quo warranto and furnishes the exclusive method so far as district courts are concerned for investigating usurpations of office.[69] Neither the writ of quo warranto nor information in the nature thereof is in force in Tennessee.[70] Quo warranto to try title to office is a proceeding for the public benefit[71] in which the state's interest is real and not nominal,[72] and cannot be maintained in behalf of any private interest[73] other than by one who himself claims the office in question,[74] and an officer to maintain an action to test title to an office must be an officer in fact.[75]

59. Johnson v. Zimmerman [Ind. App.] 84 NE 541.

60. Wetherell v. Adams, 80 Neb. 584, 116 NW 861.

61. Improper to "perpetually" estop defendants from asserting any adverse claim to plaintiff's right to operate wagon road over and maintain sawmill on their lands in connection with contract of cutting timber thereon, although contract provided that it should remain in force until all stumpage cut, since plaintiff did not have indefinite time to remove timber, but only such time as would be reasonably necessary for such purpose, and to such time injunction should have been limited. Gazos Creek Mill & Lumber Co. v. Coburn [Cal.] 96 P 359.

62. Where each of parties claim to own the land and in possession thereof, and it appears that one of them entered upon the land and cut standing timber thereon, an injunction pendente lite to preserve property in status quo was properly granted. Castelbury v. Harte [Idaho] 98 P 293.

63. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139.

64. The grounds for the writ and procedure thereon are included. Topics dealing with the subjects as to which quo warranto is usually invoked (as Corporations, 11 C. L. 810; Franchises, 11 C. L. 1560; Elections, 11 C. L. 1169; Offices and Public Employes, 12 C. L. 1131) should also be consulted.

65. **Search Note:** See notes in 6 C. L. 1191; 24 L. R. A. 295; 60 Id. 243; 63 Id. 761; 8 Ann. Cas. 322; 11 Id. 1170.
See, also, Quo Warranto, Cent. Dig. §§ 1-28; Dec. Dig. §§ 1-26; 23 A. & E. Enc. L. (2ed.) 596, 630; 17 A. & E. Enc. P. & P. 383.

66. For history of remedy, see State v. Standard Oil Co. [Tenn.] 110 SW 565.

67. Toncray v. Budge, 14 Idaho, 621, 95 P 26.

68. Rev. St. 1887, §§ 4612-4619. Toncray v. Budge, 14 Idaho, 621, 95 P 26.

69. Action under Code, c. 27. State Railroad Commission v. People [Colo.] 98 P 7.

70. State v. Standard Oil Co. [Tenn.] 110 SW 565.

71. In the interest and for the protection of the people at large. Toncray v. Budge, 14 Idaho, 621, 95 P 26; State Railroad Commission v. People [Colo.] 98 P 7. Code, § 1, held not to render proceeding one to safeguard private rights of relator against acts of public officers in interest of public. Id.

72. State v. Stickney, 80 S. C. 64, 61 SE 211.

73. Action under Code, c. 27, not maintainable by railroad companies to oust members of railroad commission for fear that they will make some order injurious to relator's private interests. State Railroad Commission v. People [Colo.] 98 P 7.

74. Rev. St. §§ 4612-4619. Toncray v. Budge, 14 Idaho, 621, 95 P 26.

75. Deputy coroner, appointed under pro-

An information by the state at the instance of the attorney general to forfeit the licenses of foreign corporations and the charter of a domestic corporation for misuser is a civil and not a criminal proceeding.[76] Quo warranto is the general remedy to try title to office[77] but is not always exclusive,[78] and the fact that there may be an ample and adequate remedy in equity does not mean that the remedy by quo warranto must fail where both remedies are provided by statute.[79] With respect to those rights which the state only may assert, as the questioning of corporate existence, quo warranto is the exclusive remedy,[80] and where the ousting of an incumbent of the office claimed is necessary, mandamus cannot be maintained.[81] Quo warranto is the proper remedy to exclude an illegally elected school officer from office,[82] to try the legality of a removal from office,[83] to oust one having forfeited his office,[84] to oust a city from the exercise of assumed and unwarranted corporate power,[85] to test the validity of an election by which territory was annexed to a municipality,[86] to amend a "franchise,"[87] to oust officers of a private corporation

visions of § 1209a, held not an officer entitled to maintain quo warranto. State v. Houck, 11 Ohio C. C. (N. S.) 414.

**76.** State v. Standard Oil Co. [Mo.] 116 SW 902.

**77.** Where there is no statutory provision for contesting the election of an officer of an incorporated town, the same must be contested in proceedings in the nature of quo warranto. Ham v. State [Ala.] 47 S 126.

**78.** Relief in equity to determine rights of parties to action for injunction. Munsel v. Boyd, 10 Ohio C. C. (N. S.) 121.

**79.** Both remedies provided by Comp. Laws, § 9755 et seq., and Comp. Laws, § 9950 et seq. People v. Michigan Sanitarium & Benev. Ass'n, 151 Mich. 452, 15 Det. Leg. N. 24, 115 NW 423. Though remedy in equity under Comp. Laws, § 9755 et seq., quo warranto may be used to inquire into right of corporation to exercise powers in excess of its charter, under Comp. Laws, § 9950 et seq., especially since, in latter proceeding, corporation may be restrained from exercising any franchise or privilege not conferred upon it by law without necessarily causing a forfeiture of charter. Id. Contention that in quo warranto proceedings donations which corporation had accepted for purposes of its incorporation would be lost to the public in case of ouster held not to defeat quo warranto proceedings where under information, if true, it would be necessary for court, even in equity to take control of property until such a decree should be made as would do justice. Id. In proceedings to determine right to office of county superintendent of schools, evidence held not to show that respondent had ceased to be a resident of county in and for which he had been elected, and thereby vacated office. State v. Hays, 105 Minn. 399, 117 NW 615.

**80.** Charter of a corporation can neither be challenged nor adjudicated in a collateral proceeding. Henssler v. Wiese Drug Co., 133 Ill. App. 539. Validity of the incorporation of a certain drainage and levee district only to be determined by quo warranto; action to recover district taxes improper remedy. State v. Wilson [Mo.] 115 SW 549.

**81.** Where office from which relator was wrongfully removed was filled by appointment and no office of a similar grade was vacant, quo warranto held proper remedy and exclusive remedy, mandamus denied. People v. Sheehan, 128 App. Div. 743, 113 NYS 230.

**82.** Ouster proper where no ward in city which person claiming office could represent and no election district in which votes could be cast for him. Commonwealth v. Parsons, 217 Pa. 435, 66 A 657. For a board of education seeking to retain their offices as against a new board appointed by the mayor; writ of certiorari denied. In re Newark School Board [N. J. Law] 70 A 881. Injunction held not proper remedy. School Dist. No. 116 v. Wolf [Kan.] 98 P 237.

**83.** Quo warranto to recover office of treasurer of town from which relator had been removed by board of town commissioners. Burke v. Jenkins, 148 N. C. 25, 61 SE 608. To determine whether the facts upon which council has determined one of its members, or one elected to the office of councilman to be disqualified, constitute in law a ground of disqualification. Holbrock v. Smedley [Ohio] 87 NE 269. Though council is exclusive judge of the facts of disqualification, Rev. St. § 1536-612, it is without power to disqualify except on legal grounds, and whether the facts found constitute such ground is for the court to determine. Id.

**84.** Quo warranto ousting mayor from office granted officer having forfeited right to office by failing to make bona fide attempt to enforce liquor laws, etc. State v. Wilcox [Kan.] 97 P 372.

**85.** Writ granted to oust city from exacting simulated fines, and forfeitures for permitting persons to carry on liquor traffic, gambling houses, and bave immunity from prosecution and punishment. State v. Coffeyville [Kan.] 97 P 372.

**86.** Code 1907, § 5453. State v. Birmingham [Ala.] 48 S 843. Complaint held to show actual exercise and not a mere threat to exercise the franchise, hence quo warranto was proper remedy. Id.

**87.** Right granted to a corporation to operate an interurban railway upon streets of city held a "franchise" within quo warranto statute and subject to be amended in proceedings thereunder for cause (City of Olathe v. Missouri, etc., R. Co. [Kan.] 96 P 42), and under Code Civ. Proc. § 1948, attorney general may maintain the action against a person who usurps, intrudes into

where the officers are actually in possession of the offices,[88] or to question the right to exercise the franchise of a corporation.[89] Title to a public employment as distinguished from an office cannot be so tried,[90] nor will the writ issue to determine whether there has been an abuse of discretion in letting a public contract.[91] Laches will preclude one from maintaining the action,[92] but the right to proceed by information is open throughout an official's term of office.[93]

§ 2. *Jurisdiction.*[94]—See 10 C. L. 1359—Power to issue the writ usually exists in courts of both original[95] and appellate jurisdiction,[96] but the latter will not ordinarily entertain the proceeding if it involves the trial of complicated facts.[97]

§ 3. *Parties and the right to prosecute.*[98]—See 10 C. L. 1359—In quo warranto proceedings to try title to a public office, the state is a necessary party[99] unless the statute provides otherwise,[1] and the state's name should appear as part of the title in the action,[2] but the omission thereof from the title is a formal defect which may be remedied by amendment.[3] A city granting the right to operate an interurban railway upon its streets is a proper party in a quo warranto action to amend the

or unlawfully holds or exercises a "franchise" within the state (People v. Consolidated Gas Co., 115 NYS 393). Action by attorney general not maintainable against gas company to prevent further exercise of rights in streets on ground that municipal grants or consents to use streets have terminated by expiration of period to which they were granted, consents not being "franchises" within § 1948, or, if franchises, matter being local, city could by appropriate proceedings withdraw its consents. Id. Comp. Laws, § 9950 and succeeding sections, held to cover information to oust a charitable hospital from exercising rights in excess of its charter and from carrying on business for individual profit, and for holding more property than it was legally entitled to and claiming it exempt from taxation. People v. Michigan Sanitariums & Benev. Ass'n, 151 Mich. 452, 15 Det. Leg. N. 24, 115 NW 423.

88. Certiorari denied, quo warranto to oust or mandamus to compel board to recognize authority of the president being proper remedy. Overman v. Manly Drive Co. [N. J. Law] 71 A 1125.

89. Proceedings held to question right to exercise franchise or privilege of a corporation as authorized under Civ. Code of 1896, c. 94, and not to inquire by what right they exercise the prerogatives of the office of trustees of the corporation. Code 1906, subd. 3, § 3420. Polk v. State [Okl.] 45 S 652.

90. Position or post of chief sanitary inspector not such office as is contemplated by Hurd's Rev. St. 1905, p. 290, § 1, of art. 6. People v. Hedrick, 132 Ill. App. 154.

91. Where a board of supervisors abuses its discretion by entering into a contract less favorable than it could have made with another responsible person, quo warranto to test the right to exercise rights under the contract is not the proper remedy. Duffield v. Ashurst [Ariz.] 100 P 820.

92. Where village was incorporated in 1897, but no attempt to organize government made till 1902, and no taxes were levied on relators' lands for several years, and when relators' lands were treated as part of village and subject to village burdens, in 1906 they acted, held no laches. State v. Small, 131 Mo. App. 470, 109 SW 1079.

93. Toncray v. Budge, 14 Idaho, 621, 95 P 26.

94. **Search Note:** See Quo Warranto, Cent. Dig. §§ 29-30; Dec. Dig. §§ 27, 28; 23 A. & E. Enc. L. (2ed.) 610; 17 A. & E. Enc. P. & P. 413.

95. In proceedings under information in the nature of quo warranto to reach the ineligibility of a person to hold office, the jurisdiction is in the district court. Toncray v. Budge, 14 Idaho, 621, 95 P 26.

96. Const. art. 6, § 3 (Ann. St. 1906, p. 214), held not to confine jurisdiction to quo warranto proceedings proper but to extend to proceedings by information in the nature of quo warranto. State v. Standard Oil Co. [Mo.] 116 SW 902.

97. State v. Tampa Waterworks Co. [Fla.] 48 S 639. Where statutes afford adequate proceeding for determining whether franchises have been abused and should be forfeited, supreme court will not ordinarily determine such questions where initial right to use franchise appears and no good cause is shown for trying complicated issues of fact in the supreme court rather than in proceedings specially provided for in local courts before a jury. Id.

98. **Search Note:** See notes in 4 C. L. 1175, 6 Id. 1192; 1 L. R. A. (N. S.) 826; 15 Id. 603; 52 A. S. R. 312; 6 Ann. Cas. 463, 912.

See, also, Quo Warranto, Cent. Dig. §§ 27, 38-46; Dec. Dig. §§ 24, 30-44; 23 A. & E. Enc. L. (2ed.) 614; 17 A. & E. Enc. P. & P. 428.

99. State v. Stickley, 80 S. C. 64, 61 SE 211. Quo warranto under Act Apr. 8, 1903 (P. L. 1903, p. 377), to try title to municipal office as against alleged intruder, held to affect public interest making state a party. Anderson v. Myers [N. J. Law] 71 A 139.

1. Exception as to person originally entitled to office who may proceed in his own name against usurper. Toncray v. Budge, 14 Idaho, 621, 95 P 26.

2. Anderson v. Myers [N. J. Law] 71 A 139.

3. Failure to name state as party in proceedings under Act April 8, 1903 (P. L. 1903, p. 377), held not ground for demurrer,

franchise,[4] but a municipality, though it might be joined as a party defendant, is not a necessary party to a proceeding challenging one's right to hold the mayoralty of a town because of the unconstitutionality of the act under which he was elected;[5] and when in a quo warranto proceeding or one in the nature thereof the existence of a municipality is denied, the proper respondents are the usurping officials who wield municipal powers and not the municipality whose existence is denied.[6] Taxpayers within the territory of a village illegally incorporated have a sufficient special interest in having the village incorporation declared illegal to maintain quo warranto to determine the existence of the village against persons assuming to act as village officers,[7] but leave to conduct quo warranto proceedings to test the legality of the organization of municipal or quasi-municipal corporations will not be granted at the instance of private relators having no interest in the subject-matter distinct from the public,[8] and the fact that the relator is under indictment by the grand jury of the alleged defectively organized county does not vest in him any distinct or special right within the meaning of the law.[9] One corporation may be joined with another when charged in quo warranto proceedings with abuse or usurpation of corporate rights.[10] A proceeding to try the validity of a corporate organization may be brought either against the corporation or against the individuals comprising it.[11] Mandamus lies to compel the district attorney to perform his statutory duty of instituting quo warranto proceedings.[12]

*Leave to file an information.* See 10 C. L. 1360—The attorney general or district attorney, as the case may be, is the proper one to determine in the first instance whether an office has been usurped and when the interests of the public justify a resort to quo warranto to try title to a public office or franchise.[13]

*Process.* See 10 C. L. 1361

§ 4. *The information or complaint.*[14]—See 10 C. L. 1361—An information in the nature of quo warranto challenging one's right to hold the mayorality of a town because of the unconstitutionality of the act under which he was elected is not necessarily defective for failing to set out the facts which make the act unconstitutional,[15] nor is such information objectionable for failure to join the municipality as a party defendant.[16] In proceedings to determine the respective rights of the relator and respondent to an elective office, an information is sufficient if facts are alleged from which the conclusion follows that relator received the highest num-

pleading being amendable. Anderson v. Myers [N. J. Law] 71 A 139.

4. City a proper party under Gen. St. 1901, § 5150, authorizing action to be brought by a person claiming to an interest adverse to the franchise which is the subject of the action. City of Olathe v. Missouri, etc., R. Co. [Kan.] 96 P 42.

5. State v. Riordan, 75 N. J. Law, 16, 69 A 494.

6. State v. Small, 131 Mo. App. 470, 109 SW 1079. Legality of city's incorporation may be drawn into question in quo warranto against officers thereof. Id.

7. Under Rev. St. 1899, § 4457 (Ann. St 1906, p. 2442). State v. Small, 131 Mo. App. 470, 109 SW 1079.

8. Immaterial that information was directed to board of county commissioners where purpose was to assail county organization. State v. Olson [Minn.] 119 NW 799.

9. While his situation is different, his interest in question of county organization is identical with that of other citizens, varying only in degree. State v. Olson [Minn.] 119 NW 799.

10. Since charge relates to individual contract between corporation and state. State v. Standard Oil Co. [Mo.] 116 SW 902.

11. Gardner v. State, 77 Kan. 742, 95 P 588.

12. Duty under Civ. Code 1901, § 3794. Duffield v. Ashurst [Ariz.] 100 P 820.

13. Under Code, c. 27. State Railroad Commission v. People [Colo.] 98 P 7.

14. **Search Note:** See Quo Warranto, Cent. Dig. §§ 48-52, 60; Dec. Dig. §§ 46-49; 17 A & E. Enc. P. & P. 457.

15. Information held not defective where it pointed out constitutional provision which statute infringed and where facts rendering act unconstitutional appeared on face of act. State v. Riordan, 75 N. J. Law, 16, 69 A 494.

16. Municipality not being a necessary party defendant. State v. Riordan, 75 N. J. Law, 16, 69 A 494.

ber of votes cast of any candidate for the office;[17] hence it need not allege that the votes were canvassed and returned as required by law,[18] nor, where relator's right to the office is grounded upon the proposition that a legislative act is unconstitutional, that the act is unconstitutional where the supreme court has pronounced the act in conflict with the constitution.[19] In proceedings to oust certain school district officers because elected under a void act, the petition need not allege that the act was void on the ground that it was a special act concerning a subject to which a general law could have been made applicable,[20] nor is it necessary that the state either plead or prove the conditions existing in the territory affected, or in other school districts in the state, in order to question the constitutionality on the ground that a general law could have been made applicable.[21] An information in the nature of quo warranto against certain corporations to forfeit their franchises and licenses as authorized by statute, alleging a combination to regulate, control and fix prices, is not fatally defective for failure to charge a combination to "maintain" prices,[22] and where it charges defendants in general terms with forming a pool, trust or combination constituting usurpation of corporate powers, it is sufficient without specifically charging the facts showing the pool, trust or combination,[23] and where it charges respondents with acts which were unlawful per se, the information is not defective for failure to charge the means by which such acts were accomplished.[24] In cases of usurpation and ouster, averments that defendant usurps, unlawfully holds over and exercises the office are sufficient against demurrer,[25] but not under statute providing for the rendition of judgment determining the party entitled to the office, since in such case the complaint must set out the facts upon which the relator relies to sustain his title to the office, and, so far as practicable, specify the objections intended to be made to the title of the respondent.[26]

§ 5. *Answers and other pleadings and motions to quash and dismiss.*[27] See 10 C. L. 1363.—A demurrer admits the truth of the averments that are well pleaded,[28] but a demurrer to an answer in quo warranto proceedings that "neither of said paragraphs of the answer contains facts sufficient to constitute an answer to plaintiff's complaint and information" presents no question for determination.[29] A frivolous and irrelevant answer may properly be stricken,[30] and, under statute, a replication which in effect denies the averments in the return that the respondent has substantially complied with the terms of the ordinance under which a franchise is used is bad.[31]

**17, 18, 19.** State v. Loer [Neb.] 118 NW 120.

**20, 21.** State v. Nelson [Kan.] 96 P 662.

**22.** Information under Rev. St. 1899, § 8971, since § 8978 is to be construed with §§ 9865, 9866, and since last named sections do not in terms prohibit combinations to fix, regulate and control prices. State v. Standard Oil Co. [Mo.] 116 SW 902.

**23.** State v. Standard Oil Co. [Mo.] 116 SW 902.

**24.** Even if necessary to follow the rules governing indictments. State v. Standard Oil Co. [Mo.] 116 SW 902. Under pleading, held incumbent upon respondent either to deny charge of usurpation, or, if exercising authority complained of, to justify conduct by showing charter power to do so. Id.

**25.** Such averments are sufficient under Civ. Code 1896, § 3420. Ham v. State [Ala.] 47 S 126.

**26.** Civ. Code 1896, § 3420. Ham v. State [Ala.] 47 S 126.

**27. Search Note:** See notes in 5 Ann. Cas. 601.

See, also, Quo Warranto, Cent. Dig. §§ 53-61, 66, 67; Dec. Dig. §§ 50-54, 56; 17 A. & E. Enc. P. & P. 467.

**28.** People v. Michigan Sanitarium & Benev. Ass'n, 151 Mich. 452, 16 Det. Leg. N. 24, 115 NW 423.

**29.** Form of demurrer prescribed by code must be substantially followed. State v. Huff [Ind.] 87 NE 141.

**30.** In action to try title of defendant to office of mayor, oust him, and declare relator entitled thereto, allegations that a primary election had been previously held for election of nominee for office, that defendant and relator were candidates and agreed to abide the results, and that at primary defendant was elected as nominee, held properly stricken from answer. Ham v. State [Ala.] 47 S 126.

**31.** Second replication held bad under Gen. St. 1906, § 1436, forbidding a general denial of general averments of perform-

§ 6. *Trial and judgment.*[32]—See 10 C. L. 1864—In quo warranto proceedings,[33] questions not within the issues in the case cannot be considered,[34] nor will evidence which is not in conformity with the theories and the law of the case be admitted in evidence;[35] but in such proceedings to try title to an office, the burden of showing a clear title to the office may be placed upon the respondent by the averments of the information,[36] for where the application shows that the relators were lawfully entitled to the office when a city elects to reorganize, and when respondents were elected, and the return does not show the term and expiration of relator's office, the court may assume that the term had not expired when respondents were elected.[37] The theory upon which a case rests must be determined from the general tenor and character of the pleading, viz., upon the theory that is most apparent and clearly outlined by the leading averments,[38] and in proceedings to oust another from a public office, and to award the relator title thereto, the latter must establish that under the law he was eligible to be elected to the office in controversy,[39] for a recovery can be had only upon the strength of the relator's own title to the office.[40] Where a proceeding is against parties as individuals and not in their official capacity, the cost may properly be adjudged against them in a judgment of ouster,[41] but in proceedings based on unlawful usurpation of franchises not granted, in the absence of mala fides or a stubborn persistence in the usurpation, the corporate existence and legitimate franchises of the company will not be forfeited.[42] Where a person has wrongfully been deprived of his office for an alleged disqualification, the court will not oust the person elected to fill the vacancy and restore the relator to the office when in his petition he admits the fact of such disqualification,[43] and proceed-

ance of conditions precedent. State v. Tampa Waterworks Co. [Fla.] 48 S 639.

32. **Search Note:** See Quo Warranto, Cent. Dig. §§ 68, 69, 71, 72, 74, 75; Dec. Dig. §§ 57, 58, 60, 61, 63, 64; 23 A. & E. Enc. L. (2ed.) 626; 17 A. & E. Enc. P. & P. 479.

33. Action against traction company held in the nature of quo warranto. State v. Lincoln St. R. Co., 80 Neb. 333, 118 NW 326.

34. Questions whether or not, if law authorizes it, city may or may not by proper proceedings seek to revoke license by estoppel held by it, or as to extent or duration of equitable right of railway company in street, not considered, not being within issues. State v. Lincoln St. R. Co., 80 Neb. 333, 118 NW 326. Question as to the amount due and its maturity will not be determined in quo warranto proceedings to annul a franchise. City of Olathe v. Miesouri, etc., R. Co. [Kan.] 96 P 42.

35. In proceedings to recover possession of office which relator resigned on condition that a certain other person who was ineligible should be appointed his successor, evidence that the latter, after his alleged appointment, proposed, without relator's knowledge or authority, to resign his right for a stipulated sum, held inadmissible under theories and law of case. State v. Huff [Ind.] 87 NE 141.

36. Where application for quo warranto to determine the right to membership in a board of education showed that relators were lawfully entitled to hold the office, were in office, with undisputed right, when respondents were elected by the council of city who had adopted Act of Aug. 13, 1907 (Gen. Laws 1907, p. 892), and averred that respondents had usurped and were usurping such office, burden of proof on respondents, though application did not aver precise date when the members of old board were elected, nor show term of their office and date of expiration thereof. State v. Waldrop [Ala.] 48 S 394.

37. Where application showed that relators were lawfully members of board of education on March 3, 1908, when city elected to reorganize under Act Aug. 13, 1907 (Gen. Laws 1907, p. 790), etc., assumption justified. State v. Waldrop [Ala.] 48 S 394.

38. Theory held to be right to office arising from election of July 3d, leading allegations of information, and evidence leading to that conclusion, especially since parties by subsequent averment laid no claim to office under former election. State v. Scott [Ind.] 86 NE 409.

39. Quo warranto to oust or eject one from office of county superintendent of schools and to have relator awarded right to possession. State v. Bradt, 170 Ind. 480, 84 NE 1084. Writ denied, complainant not showing license required by statute. Id.

40. State v. Bradt, 170 Ind. 480, 84 NE 1084.

41. Proceedings against individuals assuming to act as commissioners of a drainage district to test legality of organization of district. People v. Strandstra, 238 Ill. 341, 87 NE 286.

42. Judgment of ouster of excess unlawfully usurped, together with imposition of nominal fine, held to reasonably fulfill requirements of case if defendant would promptly rid itself of stock and bonds and acts done in way of usurpation. State v. Atlantic City & S. R. Co. [N. J. Err. App.] 72 A 111.

43. Where relator was ousted by city

ings by information to try title to an office against usurpers and intruders have reference to conditions at the time the action is brought.[44]

§ 7. *New trial and review.*[45]—See 10 C. L. 1365—Questions of law arising in the determination by the board of canvassers and registration of the result of an election, properly raised in quo warranto proceedings, may be reviewed and finally settled by the supreme court,[46] and the court's statement as to the theory of a case is not binding on appeal where it does not appear from the general tenor of the information, or from the character of the evidence introduced in support thereof, that the parties acquiesced in that theory.[47] On appeal from a judgment denying a petition for quo warranto, objections and exceptions as to errors which do not appear on the face of the judgment order or pleadings must be preserved by bill of exceptions,[48] and affidavits filed in a case do not become a part of the record sent up on appeal, unless made so by being incorporated in the bill of exceptions.[49]

## RACING.[50]

*The scope of this topic* is noted below.[51]

A bookmaker ruled off the track by the judges is not entitled to judicial relief until he has exhausted his remedies within the racing association.[52]

## RAILROADS.


§ 1. **Definitions and General Nature of Railroads, 1543.**
§ 2. **Franchises, Licenses, Permits, and the Like, 1543.**
§ 3. **Route, Location, Termini, and Stations, 1543.**
§ 4. **Rights of Way and Other Lands, and the Acquirement Thereof, 1545.** Grants in Highways and Streets, 1545. Right of Eminent Domain, 1547. Private Grants, 1547. Adverse Possession and Estoppel, 1548. Right to Cross Right of Way of Other Roads, etc., 1548. Abandonment of Right of Way, 1549. Establishment of Highways Over Rights of Way, 1549.
§ 5. **Aids and Bonuses, 1549.**
§ 6. **Taxes, Fees and License Charges, 1550.**
§ 7. **Public Control and Regulation, 1550.** Control by Railroad Commissions, 1551.
§ 8. **Construction and Maintenance, 1552.** Establishment and Maintenance of Depots and Grounds, 1553. Private Farm Crossings, 1553. Public Crossings, 1554. Grade Crossings and the Abolition Thereof, 1555. Crossings with Other Railroads, Street Railways and Canals, 1557. Private Connections, 1557. Cattle Guards, Fences and Stock Gaps, 1558. Drainage and Disposal of Surface Water, 1558. Obstruction of Watercourses, 1559.
§ 9. **Sales, Leases, Contracts and Consolidation, 1560.** Duties and Liabilities Subsequent to Sale or Lease, 1560. Contracts, 1561. Consolidation, 1562.
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§ 11. **Duties and Liabilities Incident to Operation of the Road, 1564.**
A. Obligation to Operate and Statutory Regulations, 1564. Injuries to Adjacent Owners from Smoke, Noise, etc., 1564. Equipment of Cars, 1565. Speed Regulations, 1566. Obstructions at Crossings, 1566. Stops at Railroad Crossings, 1567. Signals at Crossings, 1567. Conveniences at Depots, 1567.


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council in a case where it was without authority to determine the fact of such disqualification. Holbrock v. Smedley [Ohio] 87 NE 269.

**44.** Proceedings under Rev. St. §§ 4612-4619. Toncray v. Budge, 14 Idaho, 521, 95 P 26.

**45. Search Note:** See Quo Warranto, Cent. Dig. §§ 70, 75; Dec. Dig. §§ 59, 62; 17 A. & E. Enc. P. & P. 486.

**46.** Under Const. art. 12, § 1, questions of law, though not raised below, but not of fact, involved in determination of board of canvassers and registration of city of Providence under Pub. Laws 1896, p. 66, c. 353, held reviewable by supreme court. Gainer v. Dunn [R. I.] 69 A 851.

**47.** State v. Scott [Ind.] 85 NE 409.

**48, 49.** People v. Drainage Dist. Com., 235 Ill. 278, 85 NE 215.

**50.** See 10 C. L. 1365.

**Search Note:** See notes in 8 Ann. Cas. 1016.

See, also, Gaming, Cent. Dig; Dec. Dig; 15 A. & E. Enc. L. (2ed.) 746.

**51.** Includes only regulation of racing generally. As to betting on races, see Betting and Gaming, 11 C. L. 417. Larceny by pretended race, see Larceny, 12 C. L. 567.

**52.** Rabb v. Trevelyan, 122 La. 174, 47 S 455.

B. General Rules of Negligence and Contributory Negligence, 1567.
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J. Fires, 1596. Duty as to Equipment and Operation of Engines, 1598. Contractural Exemptions from Liability, 1598. Pleading, 1599. Evidence, Burden of Proof, and Presumptions, 1599. Admissibility of Evidence, 1600. Instructions, 1602. Damages, 1602.
K. Actions for Injuries, 1602. Pleadings, 1602. Burden of Proof, 1603. Evidence, 1605. Instructions, 1607. Double Damages and Attorney's Fees, 1611.
**§ 12. Railroad Corporations, 1611.**
**§ 13. Actions by and Against Railroad Companies, 1613.**
**§ 14. Offenses Relating to Railroads, 1614.**

*The scope of this topic* is noted below.[53]

§ 1. *Definitions and general nature of railroads.*[54]—See 10 C. L. 1366—A railroad having large property interest in a city may be an "inhabitant" thereof within a statute authorizing the city to maintain waterworks to supply its inhabitants.[55]

§ 2. *Franchises, licenses, permits, and the like.*[56]—See 8 C. L. 1591—Franchises granted by a city must be granted in the manner prescribed by statute.[57] On the termination of the corporate existence of a railroad organized under the general railroad laws of New York, franchises, rights and privileges granted by a city do not cease.[58]

§ 3. *Route, location, termini, and stations.*[59]—See 10 C. L. 1366—In the absence of statute,[60] a railroad company may ordinarily select its route and may choose between localities for a consideration moving to itself.[61] Where the articles of in-

**53.** The duties and liabilities of railroad companies as common carriers (see Carriers, 11 C. L. 499), their liabilities to employes (see Master and Servant, 12 C. L. 665), interurban electric lines (see Street Railways, 10 C. L. 1730), and matters common to all corporations (see Corporations, 11 C. L. 810), are elsewhere treated.

**54. Search Note:** See notes in 66 L. R. A. 33; 4 Ann. Cas. 449.

See, also, Railroads, Cent. Dig. §§ 2-4; Dec. Dig. §§ 2-4; 18 A. & E. Enc. L. (2ed.) 560; 29 Id. 138.

**55.** Within Laws 1870, p. 1161, c. 519. Delaware, L. & W. R. Co. v. Buffalo, 115 NYS 657.

**56. Search Note:** See notes in 2 L. R. A. (N. S.) 138, 887; 12 Id. 326; 4 Ann. Cas. 910; 5 Id. 53.

See, also, Railroads, Cent. Dig. §§ 1, 9, 26-30, 39-44, 62-69; Dec. Dig. §§ 1, 8, 13, 14, 18, 19, 31, 32; 18 A. & E. Enc. L. (2ed.) 561; 28 Id. 673; 29 Id. 139.

**57.** Section 23, Charter of Lake Charles, providing that "no franchise" shall be granted except upon competitive bids after publication, held to apply to railroads passing through and to be mandatory. Gill v. Lake Charles, 122 La. 1019, 48 S 440.

**58.** Where acted upon pass to directors as trustee, under Gen. Corp. Law (Laws 1892, p. 1811, c. 687), § 30, for creditors, stockholders, and members of company. City of New York v. Bryan, 130 App. Div. 658, 115 NYS 551.

**59. Search Note:** See notes in 6 C. L. 1196; 15 L. R. A. (N. S.) 594; 7 Ann. Cas. 1032; 9 Id. 58.

See, also, Railroads, Cent. Dig. §§ 101-136; Dec. Dig. §§ 44-60; 23 A. & E. Enc. L. (2ed.) 684; 26 Id. 495; 29 Id. 138; 17 A. & E. Enc. P. & P. 493, 500.

**60.** B. & C. Comp. § 5055, only requires articles of incorporation to designate termini of proposed road, and location of route between such points will not ordinarily be controlled by courts. Pacific R. & Nav. Co. v. Astoria & C. R. R. Co. [Or.] 99 P 1044. In suit to enjoin defendant from interfering with plaintiff's location, evidence held to show that route located was plaintiff's main route between designated terminal points and that it occupied only one of two feasible passes. Id.

**61.** McCowen v. Pew, 153 Cal. 735, 96 P 893. Options on timber to secure freight for proposed road at full value are not void as against public policy, though owner gave same to influence selection of the particular route. Id. In action to cancel options for purchase of timber in which cross complaint asked specific performance, held

corporation are only required to designate the proposed termini, a description of the route therein may be treated as surplusage.[62] The company must follow the statute as to the manner of locating.[63] Where a route has been located and adopted by a railroad company, title thereto passes to it as against other companies,[64] and equity will protect its priority for a reasonable time.[65] The road as constructed must follow the location.[66] A railroad company may, for the purpose of discharging its public duties, change the location of its route,[67] unless it is prescribed by law.[68]

While the location of stations and depots is usually left to the discretion of the railroad company, the power of location has been conferred on the railroad commission in some states.[69] Such power, however, must not be arbitrarily exercised,[70] and the enforcement of an unreasonable order will be enjoined.[71] While public policy forbids any private contract which may hamper a company in the discharge of its public duties,[72] reasonable contracts for the location of stations and depots are valid.[73] A distinction must be made between a contract controlling the

under facts alleged it must be presumed that defendants intended to form railroad corporation and that options were for benefit of corporation. Id.

**62.** Company will not be confined thereto. Pacific R. & Nav. Co. v. Astoria & C. R. R. Co. [Or.] 99 P 1044. Where terminus as described in charter is merely Chicago, company may locate any where in city. Chicago & N. W. R. Co. v. Chicago Mechanic's Institute, 239 Ill. 197, 87 NE 933.

**63.** Where record proof of location has been lost or destroyed, secondary evidence of compliance with statutory requirements may be introduced. United States Peg Wood, Shank & Leather Board Co. v. Bangor & A. R. Co. [Me.] 72 A 190. Where road has been maintained and operated for 25 years over land without objection and record proof of location has been destroyed, every presumption in favor of regularity of location will be indulged. Id. Where road is located over land under special agreement, owner cannot attack validity of location for nonfiling of plan with register of deeds, since purpose is to enable owner to get compensation. Id.

**64.** Dilts v. Plumville R. Co. [Pa.] 71 A 1072.

**65.** Pacific R. & Nav. Co. v. Astoria & C. R. R. Co. [Or.] 99 P 1044.

**66.** Evidsnce, together with plans, surveys, etc., held to show that road as rebuilt did not trespass beyond original location. United States Peg Wood, Shank & Leather Board Co. v. Bangor & A. R. Co. [Me.] 72 A 190.

**67.** Its officers are sole judges of necessity of change. Whalen v. Baltimore & O. R. Co. [Md.] 69 A 390. Construction of a new switch, new sidetracks, or new track on part of main line, does not constitute relocation. Chicago & N. W. R. Co. v. Chicago Mechanics' Institute, 239 Ill. 197, 87 NE 933.

**68.** Where the termini and general route are prescribed by charter, details only being left to company, where once located route or termini cannot be changed without statutory authority. Chicago & N. W. R. Co. v. Chicago Mechanics' Institute, 239 Ill. 197, 87 NE 933.

**69.** Railroad Commission possesses power under Const. art. 284, conferring power to require railroads to build and maintain suitable depots, etc., to fix place for depot. Louisiana R. & Nav. Co. v. Railroad Commission, 121 La. 848, 46 S 884. Statute authorizing corporation commission to order establishment of a union depot impliedly empowers commission to do whatever is reasonably necessary to execute such order. Griffin v. Southern R. Co. [N. C.] 64 SE 16. Where railroad has been restrained from abandoning old location of road after it has constructed depot on proposed new line, it cannot be restrained from removing new depot to old line, though location of depot was not directly involved in suit. Cooper v. Mobile, etc., R. Co. [Miss.] 48 S 832.

**70.** Railroad Commission v. Chicago, etc., R. Co. [Tex. Civ. App.] 114 SW 192. Order of commission will be permitted to stand on appeal unless it clearly appears that error was committed. Louisiana R. & Nav. Co. v. Railroad Commission, 121 La. 848, 46 S 884. Where railroad maintains depot in Oklahoma near boundary line, order requiring it to construct one within few hundred feet therefrom within Texas is unreasonable, advantage of interstate shipments not being sufficient justification. Railroad Commission v. Chicago, etc., R. Co. [Tex. Civ. App.] 114 SW 192. Order fixing location at point of greatest public convenience sustained, although cost was somewhat increased, especially where officers of company were present at locating and made no objection. Louisiana R. & Nav. Co. v. Railroad Commission, 121 La. 848, 46 S 884.

**71.** Railroad Commission v. Chicago, etc., R. Co. [Tex. Civ. App.] 114 SW 192.

**72.** Contract with officer to secure his influence to locate station in particular place or to select particular route is void. McCowen v. Pew, 153 Cal. 735, 96 P 893. Contract to locate and maintain private station or siding will not be enforced in equity as against straightening of main line for public convenience. Whalen v. Baltimore & O. R. Co. [Md.] 69 A 390. Private contract as to location of station will not be specifically enforced where it will interfere with company's discharge of duty to the public. Herzog v. Atchison, etc., R. Co., 153 Cal. 496, 95 P 898.

**73.** Demurrer does not admit that maintenance of private siding and station is

location of a private station and one stipulating for the location of a public one,[74] and, also, between a contract merely calling for a station at a particular place and one restricting the location of other stations.[75] A valid contract for the location of a depot[76] may be specifically enforced, or resulting damages[77] may be recovered for the breach thereof,[78] in an action timely brought.[79] A contract with the owner of a farm, "his heirs and assigns," for the maintenance of a private siding thereon, runs with the land.[80]

§ 4. *Rights of way and other lands, and the acquirement thereof.*[81] See 10 C. L. 1388—The power of a railroad company to acquire a right of way in particular lands,[82] and the extent of the rights acquired therein,[83] are usually controlled by constitution or statute. Likewise, the right to extend route through public domain and the manner of obtaining the privilege are usually controlled by federal statute.[84] A grant of public lands for railroad purposes is not invalid as of time made because not subsequently used for such purpose.[85]

*Grants in highways and streets.* See 10 C. L. 1388—The authority to occupy streets or highways is a franchise proceeding from the state and must be expressly conferred,[86] and all conditions duly complied with.[87] The franchise may be granted

reasonable, which is a question for court from admitted facts. Whalen v. Baltimore & O. R. Co. [Md.] 69 A 390. Complaint for specific performance of contract to locate station at particular place failing to show that same is fair and reasonable, or that it was not an attempt to enforce a mere legal right, held insufficient. Herzog v. Atchison, etc., R. Co., 153 Cal. 496, 95 P 898.

74. Whalen v. Baltimore & O. R. Co. [Md.] 69 A 390. Contract to maintain a private siding and to stop passenger and freight trains thereat for benefit of particular farm held valid. Id.

75. Where contract merely calls for location of station at particular place and does not bar locating of other stations wherever public convenience requires, it will be enforced if otherwise equitable. Herzog v. Atchison, etc., R. Co., 153 Cal. 496, 95 P 898. Contract precluding company from locating stations except at particular places is void. McCowen v. Pew, 153 Cal. 735, 96 P 893. Agreement not to locate stations between two given points is void as against public policy, and where it constitutes, in whole or in part, consideration for bonus agreement, such agreement is void. Farrington v. Stucky [C. C. A.] 165 F 325.

76. Deed reciting that consideration was, among other things, "and a depot on land," held not too indefinite as to location and kind of depot to be enforcible. St. Louis, etc., R. Co. v. Berry [Ark.] 110 SW 1049.

77. Measure of damages for breach of stipulation to build depot on ground conveyed for right of way is value of such right of way. St. Louis, etc., R. Co. v. Berry [Ark.] 110 SW 1049.

78. Freight car placed on sidetrack at which trains stopped on signal held not a depot. St. Louis, etc., R. Co. v. Berry [Ark.] 110 SW 1049.

79. Action on contract to locate depot on land conveyed for right of way as consideration for conveyance is not barred by three-year statute of limitation where road was not completed for two years, since until completed plaintiff had right to assume that depot would be built. St. Louis, etc., R. Co. v. Berry [Ark.] 110 SW 1049.

80. Whalen v. Baltimore & O. R. Co. [Md.] 69 A 390.

81. **Search Note:** See notes in 25 L. R. A. 139; 53 Id. 900; 2 L. R. A. (N. S.) 272; 7 Id. 991, 1187; 10 Id. 1202; 2 Ann. Cas. 718; 6 Id. 242, 10 Id. 1001; 11 Id. 769.

See also, Railroads, Cent. Dig. §§ 137-219; Dec. Dig. §§ 61-82; 8 A. & E. Enc. L. (2ed.) 338; 23 Id. 695.

82. Under Railroad Law 1850, §§ 25, 49, a railroad could acquire lands under water for its purposes, and state's power to make such grant was governed only by company's reasonable necessity therefor. Lally v. New York Cent. & H. R. R. Co., 61 Misc. 199, 113 NYS 177.

83. Railroad under constitution only acquires easement by condemnation. St. Louis, etc., Co. v. Cape Girardeau Bell Tel. Co. [Mo. App.] 114 SW 586. Under express provisions of charters of Southern Railroad Company, the Laurens Railroad Company and the Columbia, Newberry & Laurens Railroad Company such companies acquired right of way 100 feet in width on each side of center of roadbed where there was no written agreement with owners to contrary. Columbia, N. & L. R. Co. v Laurens Cotton Mills [S. C.] 61 SE 1089.

84. Where secretary of interior approved survey of Grand Island & Wyoming Central Railroad Company for building line in Grant County, Neb., and approved survey was filed with district land office by commissioner of general land office, held, under Act Congress March 3, 1875, c. 152, § 1, one entering on such public land took subject to right of way extending 100 feet from center of track on both sides thereof (Moran v. Chicago B. & Q. R. Co. [Neb.] 120 NW 192), but the fact that survey was sent direct to secretary instead of through district land office is immaterial (Id.).

85. Lally v. New York Cent. & H. R. R. Co., 61 Misc. 199, 113 NYS 177.

86. Company incorporated under Act April 4, 1868 (P. L. 62), and supplements thereto, can lay tracks longitudinally on streets of borough, though act under which borough is incorporated provides that streets shall remain common highways for-

through the medium of the courts upon a showing of necessity [88] or municipalities,[89] the latter having only such power in respect thereto as is expressly granted.[90] The state may legalize an act of the municipality in excess of its power where it is a power which the state can confer.[91] A municipal grant usually carries merely the right of occupation, and private abutting property owners must be compensated for actual damages.[92] Where a railroad occupies a street in a bona fide belief that it has acquired the right,[93] or where the abutter makes no objection to the construction of its tracks,[94] punitive damages are not recoverable. Franchise to occupy the streets is strictly construed against the grantee,[95] and the grant of the right to construct its line in a street does not give a right to the exclusive use thereof,[96] and is

ever. Commonwealth v. Beaver Valley R. Co., [Pa.] 71 A 7. One owning property abutting on remote street cannot enjoin use thereof to reach new union depot established under order of commission, especially where city's consent has been obtained and street was so used at time such person purchased. Griffin v. Southern R. Co. [N. C.] 64 SE 16. Tracks cannot be laid in street for purpose of convenience to factory or for yard or station purposes. City of Newark v. Erie R. Co. [N. J. Eq.] 71 A 620.

87. Under Rev. St. 1895, art. 4426, railroad taking highway and opening new one in lieu must restore to former state or to such condition as not to unnecessarily impede use (Hall v. Houston & T. C. R. Co., [Tex. Civ. App.] 114 SW 891) and it cannot escape liability for failure to put it into condition required by statute and as required by contract on ground that contract was made between a citizen committed and two of county commissioners, it having accepted benefits of contract (Id.). Where railroad takes road and agrees to construct another in same condition, any member of public injured by failure to do so may recover. Id. Where railroad closes road and substitutes new road, county authorities cannot release company from obligation to construct as required by statute by acceptance in different condition. Id.

88. In application under Railroad Law, Laws 1890, pp. 1084, 1087, c. 565, § 4, subd. 4, and § 11, authorizing construction of railroads on highways on order of supreme court at special term, evidence held insufficient to show necessity of constructing road in street. Hornell & D. R. Co. v. Trustees of Dansville, 127 App. Div. 867, 111 NYS 845. Mere fact that it is more convenient and less expensive to lay route in street, though properly considered on application for authority, is not conclusive. Id.

89. Legislature may authorize city to vacate street for depot purposes. State v. Louisville & N. R. Co. [Ala.] 48 S 391. Under Revisal 1905, § 2567 (5), authorizing use of streets with the assent of the city, determination of particular street to be used in reaching union depot is for city and property owner cannot complain that another street could be used. Griffin v. Southern R. Co. [N. C.] 64 SE 16.

90. Village of Phoenix v. Gannon, 123 App. Div. 93, 108 NYS 255. Railroad Law, Laws 1890, pp. 1108, 1109, c. 565, art. 4, §§ 90, 92, held not to authorize municipality to grant franchise to individuals. Id. City cannot, unless expressly authorized, permit obstruction of street for depot purposes. State v. Louisville & N. R. Co. [Ala.] 48 S 391. Held that under Act No. 136, p. 224, of 1898, that municipality could grant franchise without submission of question to taxpayers. Lewis v. Colorado Southern, etc., R. Co., 122 La. 572, 47 S 906.

91. Act Dec. 10, 1900 (Laws 1900-01, p. 239), providing that "all" grants, rights, privileges which city council of M has heretofore granted or "attempted to grant," and which have been accepted and utilized for railroad purposes, are hereby legalized, etc., held to legalize attempted vacation of street for depot purposes. State v. Louisville & N. R. Co. [Ala.] 48 S 391.

92. Lewis v. Colorado Southern, etc., R. Co., 122 La. 572, 47 S 906. Unlawful use as against abutter gives rise to a single cause of action for permanent injuries as though right of way had been condemned, and is subject to Revisal 1905, § 394, subd. 2, providing that no suit shall be maintained against railroad for damages caused by construction unless commenced within five years. Staton v. Atlantic Coast Line R. Co., 147 N. C. 42, 61 SE 455. Where jurisdiction depended upon whether cause of action was in trespass or trespass on the case, held error, on defendant filing "exception to the jurisdiction of the court ratione personae," to admit evidence to show character of cause of action. Buteau v. Morgan's Louisiana & T. R. & S. S. Co., 121 La. 807, 46 S 813.

93. Lewis v. Colorado Southern, etc., R. Co., 122 La. 572, 47 S 906.

94. Fontenot v. Colorado Southern, etc., R. Co., 122 La. 779, 48 S 205.

95. Henry v. Mason City & Ft. D. R. Co. [Iowa] 118 NW 310. Franchise to maintain "its railroad track" along a certain street under which single track is maintained for many years held not to authorize additional track, especially where damages to abutters was assessed on basis of single track. Id. Practical construction given to franchise is of great weight in construeing same. Id. Ordinance granting "right to construct and operate a switch or switches, track or tracks," held not to confer authority after locating several tracks to build trestle resting on abutment of concrete located in street. Delaware, L. & W. R. Co. v. Syracuse [C. C. A.] 165 F 631.

96. Stein v. Chesapeake & O. R. Co. [Ky.] 116 SW 733. Right of railroad over street is right of passage only. City of Newark v. Erie R. Co. [N. J. Eq.] 71 A 620.

always subject to the right of the city to authorize the construction of a street car line over the same.[97]

*Right of eminent domain.*[98]—The power of eminent domain is usually conferred on railroad companies,[99] and may be exercised to acquire a right of way over the authorized route.[1] Unless waived,[2] due compensation must be made to the owner for property so taken.

*Private grants.*[See 10 C. L. 1370]—A railroad company holding an option to purchase must exercise it in the prescribed manner [3] within the time limited if time is of the essence of the contract,[4] and the fact that it has expended large sums of money does not prevent optionor from taking advantage of its failure so to do.[5] Unless limited by statute,[6] a railroad company may acquire the fee.[7] The land conveyed depends upon the terms of the grant.[8] Covenants for the benefit of the adjoining land run therewith,[9] but purely personal covenants do not.[10] Covenants will not be specifically enforced where an adequate remedy at law exists.[11] A deed obtained by fraud passes an equitable title though unacknowledged and expressing an inadequate consideration.[12] The company must perform all conditions prece-

97. Evansville & S. I. Trac. Co. v. Evansville Belt R. Co. [Ind. App.] 87 NE 21.

98. See 8 C. L. 1597. See, also, Eminent Domain, 11 C. L. 1198.

99. See Eminent Domain, 11 C. L. 1198. Where company has authority to relocate depot, it has authority to condemn ground therefor. Chicago & N. W. R. Co. v. Chicago Mechanic's Institute, 239 Ill. 197, 87 NE 933. Company possessing power to locate terminus anywhere in Chicago possesses power to condemn ground for new depot site and approaches where required by its business. Id. Where law requires electric company to construct fences along way, cost of such fences cannot be assessed against company, though on failure to build, adjoining owners may do so at company's expense, since it will be presumed that company will comply with law. Indianapolis & W. R. Co. v. Branson [Ind.] 86 NE 834.

1. Charter authorizing line "from" Covington to Erlanger held to mean from within Covington, and land may be condemned within the limits. Devon v. Cincinnati, C. & E. R. Co., 33 Ky. L. R. 122, 109 SW 361. Company may exercise eminent domain notwithstanding that entire line authorized by statute has not been completed in absence of showing that it did not intend to complete same. Id.

2. Validity of location is not affected by nonpayment of compensation if damages are waived by special agreement. United States Peg Wood Shank & Leather Board Co. v. Bangor & A. R. Co. [Me.] 72 A 190.

3. Where option is to be exercised by payment of stated sum, a letter of acceptance does not change rights. Spokane, P. & S. R. Co. v. Ballinger, 50 Wash. 547, 97 P 739.

4. Option providing that if company failed to exercise same within six months, same should be void, held that time was of essence of contract. Spokane, P. & S. R. Co. v. Ballinger, 50 Wash. 547, 97 P 739.

5. As authorized by option. Spokane P. & S. R. Co. v. Ballinger, 50 Wash. 547, 97 P 739.

6. Under general railroad law (Gen. St. 1875, p. 317, tit. 17, c. 2, pt. 9, § 6) and "Act concerning corporations" (Pub. Acts 1883, p. 232, c. 3), railroad company may purchase fee simple for right of way. New York, B. & E. R. Co. v. Motil [Conn.] 71 A 563.

7. Effect of deed containing words apt for conveying fee, and providing that land was to be held by company and its "successors and assigns forever, to their own proper use and behoof," is not qualified by prior description of premises as covered by the location of the railroad. New York B. & E. R. Co. v. Motil [Conn.] 71 A 563.

8. Where agreement authorized taking of "whatever was needed for a road to go across," company was not entitled to full four-rod location unless needed. United States Peg Wood, Shank & Leather Board Co. v. Bangor & A. R. Co. [Me.] 72 A 190. Deed conveying all the land contained within 100 feet in width on each side of track or roadway, measuring from the center of any portion of the lot thereinafter described through which the railway may be "constructed, run and operated," held only to convey right of way through particular part of land actually touched by grantee's main line as originally laid out. American Spinning Co. v. Southern R. Co., 81 S. C. 482, 62 SE 787.

9. Covenant to construct and maintain fences and cattle passes held to run with the land. Munro v. Syracuse, etc., R. Co., 128 App. Div. 388, 112 NYS 938.

10. Agreement to issue passes to grantors held a personal covenant and not to run with the land. Munro v. Syracuse, etc., R. Co., 128 App. Div. 388, 112 NYS 938.

11. Provision in deed obligating railroad to give from year to year, to grantor, sufficient ditch to perfectly drain his land, and what ever crossings he needs, will not be specifically enforced, the remedy at law being adequate. Yazoo & M. V. R. Co. v. Payne [Miss.] 46 S 405.

12. No recovery for injuries caused by construction can be had until deed is set aside. Graves v. St. Louis, etc., R. Co., 133 Mo. App. 91, 112 SW 736.

dent[13] before title passes, and all conditions subsequent[14] to retain the same,[15] unless relieved by agreement or otherwise.[16] Where the company has spent large sums of money under a void grant, ejectment will not lie if the company offers to do equity.[17]

*Adverse possession and estoppel.* See 10 C. L. 1371—In the absence of statute,[18] property may be lost[19] or acquired[20] by adverse possession.

Where railroad company permits an abutter to erect expensive buildings on its right of way, knowing[21] that he claims title thereto, without objection, it is estopped to deny his title.[22]

*Right to cross right of way of other roads, etc.* See 10 C. L. 1371—Unless prohibited by constitution,[23] the legislature may grant the right to cross canals or the right of way of other roads,[24] and may prescribe the method of determining the place and manner of crossing in case of disagreement.[25]

13. Where deed recited as consideration the benefits to accrue from construction of road and maintenance of depot on land conveyed, establishment of depot held condition precedent. Maxell v. Mississippi Valley Co. [Miss.] 48 P 610. Where deed recited that in consideration of public convenience from construction of a road to a particular town, and the establishment of a depot on land conveyed, certain land was conveyed, held that construction of depot was condition precedent. Id. Where deed recited a consideration of $1 and benefits to grantor from construction of railroad through lands, there was no condition precedent. Id. Provision, "It (railroad) will cause the said railroad to be completed within one year, and completed and in operation opposite the said lands by the first of January, 1903, and it is understood that if said railroad is not completed, etc., this agreement will be no longer binding," held to create condition precedent in which time was an essential element. Adams v. Guyandotte Valley R. Co. [W. Va.] 61 SE 341. Term "opposite" as so used construed to mean a place or places from which the land can be conveniently reached, considering all the circumstances, and is not complied with by building road to within 10 miles. Id.

14. Provision in deed containing words apt to convey fee that company shall trestle a pond does not reduce title from fee, but merely creates contractual duty or imposes condition subsequent. New York, B. & E. R. Co. v. Motil [Conn.] 71 A 563.

15. Petition in equitable action to recover certain lands deeded to railroad company "To have said several lots under same tenor as if same had been regularly condemned for right of way, depot, yards, side tracks and other railroad purposes," which showed that part of property was used for railroad purposes and part not, held insufficient where it did not show relative situation of such parts, shape of track, etc. Herrold v. Seaboard Air Line R. Co. [Ga.] 62 SE 326.

16. Deed of strip 25 feet wide on either side of a strip conveyed by a prior deed held to have no reference thereto, and not to relieve company of obligations assumed therein. Illinois Cent. R. Co. v. Davidson [Ky.] 115 SW 770.

17. Alabama Cent. R. Co. v. Long [Ala.] 48 S 363.

18. Under statute making right of way public property, title by adverse possession cannot be acquired. Powell v. Atchison, etc., R. Co. [Mo.] 114 SW 1067.

19. For general elements of adverse possession, see Adverse Possession, 11 C. L. 41. Where adjoining owner erects buildings and evinces a fixed resolve to deny company's claim thereto, it is such interference as starts limitations running. Columbia N. & L. R. Co. v. Laurens Cotton Mills [S. C.] 61 SE 1089. Where abutter builds houses and raises pond on right of way under claim of title thereto, with knowledge of company, there is an appropriation of so much of right of way as is covered by buildings and pond. Id. Where, in action by company, having right of way 100 feet on each side of track, to compel removal of buildings therefrom, issue is joined as to title by adverse possession and jury find that plaintiff has only an easement of 15 feet on each side of track, such finding should not be limited in operation to land actually occupied by building or to duration of buildings. Id. Where, in action to compel defendant to remove building from right of way, there was no question but that strip 100 feet on each side was granted for railroad purposes, failure to specifically so instruct is not error. Id.

20. Stock coral being a necessary adjunct to the transportation of stock, land therefor may be acquired by adverse possession. Hill v. Barner [Cal. App.] 96 P 111.

21. Whether company's silence while $50,000 improvements were being made on right of way under claim of right was due to ignorance of fact, held for jury. Columbia, N. & L. R. Co. v. Laurens Cotton Mills [S. C.] 61 SE 1089.

22. Columbia, N. & L. R. Co. v. Laurens Cotton Mills [S. C.] 61 SE 1089. In action by railroad company to restrain one from erecting structures on right of way and compel removal of other buildings, instruction on estoppel that plaintiff was entitled to win if it had no knowledge of the structures and did not mislead defendant held proper. Id.

23. Constitutional provision that legislature "shall not sell, lease or otherwise dispose" of canals does not prevent legislature from giving right to railroad to cross canal where it does not interfere with the use. Pryor v. Buffalo, 60 Misc. 447, 112 NYS 437.

24. Public Service Commission Law, § 53,

*Abandonment of right of way.* See 10 C. L. 1371—When land is conveyed in fee, extinguishment of right to build the road does not extinguish title thereto.[26]

*Establishment of highways over rights of way.* See 10 C. L. 1371—Where a highway was condemned and ordered opened before the construction of a railroad, it may thereafter be physically opened without further condemnation,[27] but ordinarily a way must be condemned and compensation be made before a highway or street can be extended across a right of way.[28] In condemning for street extension, company is not entitled to compensation for expense necessary to protect the public or to comply with the statute,[29] for possible damage from the negligent construction of the street,[30] nor for increased liability to damages that it might incur on account of accidents.[31] Where a city extends a street, it must make its grade conform to the track grade and must construct safe approaches.[32]

§ 5. *Aids and bonuses.*[33] See 10 C. L. 1372—A voluntary agreement to pay a specified sum in aid of the construction of a road [34] or a line over a particular route [35] is not against public policy, and is enforcible unless vitiated by fraud.[36] An offer of aid must be accepted before it becomes binding,[37] and all conditions imposed by its terms must be complied with before it is enforcible.[38] In voting municipal aid, the authorizing statute must be followed.[39] An assignee of a road cannot enforce

Laws 1907, p. 920, c. 429, held not to supersede or repeal Railroad Law, §§ 11, 12, Laws 1890 relating to crossings and intersections. Village of Ft. Edward v. Hudson Valley R. Co., 192 N. Y. 139, 84 NE 962.

25. Code W. Va. 1906, § 2343, cl. 7, and § 2216, held not to give right to cross at will, but, if companies cannot agree, the place and manner of crossing must be determined by suit in equity, after which crossing may be made by paying compensation fixed in condemnation. Elkins Elec. R. Co. v. Western Maryland R. Co., 163 F 724. Village trustees authorizing construction of tracks in street have right to participate in determination of place and manner of intersections, under Railroad Laws, §§ 11, 12, Laws 1890, p. 1087, c. 565. Village of Ft. Edward v. Hudson Valley R. Co., 192 N. Y. 139, 84 NE 962.

26. New York, B. & E. R. Co. v. Motil [Conn.] 71 A 563.

27. St. Louis etc., R. Co. v. State, 85 Ark. 561, 109 SW 545.

28. Under Const. 1906, art. 3, § 17, providing that private property shall not be taken or damaged for public use except upon due compensation being made, municipality has no power to lay out street over right of way except by exercise of eminent domain, and proceeding under Code 1906, § 4400, relating to counties only, is void. Illinois Cent. R. Co. v. State [Miss.] 48 S 561. No defense to city's right to condemn street extension across right of way that it would entail additional care and expense to protect public. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743.

29. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743. Where highway is opened across railroad right of way, company is not entitled to compensation for cost of putting and maintaining same in safe condition, as required by Burns' Ann. St. 1901, § 5153, cl. 5 (Burns' Ann. St. 1908, § 5195, cl. 5). New York, etc., R. Co. v. Rhodes [Ind.] 86 NE 840.

30. For water which may be precipitated on its track and right of way in large quantities, since it will not be presumed that city will construct street in such negligent manner. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743.

31, 32. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743.

33. **Search Note:** See Railroads, Cent. Dig. §§ 72-100; Dec. Dig. §§ 34-43; 20 A. & E. Enc. L. (2ed.) 1082; 17 A. & E. Enc. P. & P. 630.

34. Promissory note. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785.

35. Farrington v. Stucky [C. C. A.] 165 F 325.

36. Where railroad had determined to build to particular town, but, knowing of great rivalry between citizens thereof and of another town, represented that it would build to latter unless it received a promise of a certain bonus, which was given, held fraudulently procured. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785.

37. Where certain people made a proposition to pay specified sums if company would build along certain route, on certain grade, etc., building of road in accordance therewith, together with suit for the money, held an acceptance. Shreveport Trac. Co. v. Mailhaupt, 122 La. 667, 48 S 144.

38. Where bonus contract called for completion of road by certain time, and note given therefor was expressly made payable only upon completion of road, time was of the essence of the contract. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785.

39. Fact that petition for submission of question of municipal aid, under Const. art. 270 and Act No. 202, p. 483, did not set forth amount to be raised each year, but only a rate of 5 mills per annum and that it did not specify number of years except that it was not to exceed 10, held not to invalidate special tax where voters were not misled. Gooden v. Lincoln Parish Police Jury, 122 La. 755, 48 S 196.

bonuses and aids voted to assignor unless the assignment transfers the same.[40] Where part of the subscribers give aid in excess of that called for by the subscription contract, they cannot enforce contribution therefor from the others.[41]

§ 6. *Taxes, fees and license charges.*[42] See 10 C. L. 1373—Under the statutes of most states, railroads are taxed differently than other propertied corporations, the usual method being to tax according to capital stock, earnings, etc.[43] Ordinarily, a railroad franchise and property necessary to the operation of the road are not subject to a divisional sale,[44] and hence are not usually assessible for local improvements unless made so by statute.[45] Where funds in the hands of the receiver of a lessee company belonging to the lessor are assessed as the property of the lessee, a consolidation of the companies does not validate the assessment.[46]

§ 7. *Public control and regulation.*[47] See 10 C. L. 1373—In the exercise of its police power, a state may make reasonable regulations for public safety[48] and convenience,[49] and to that end may classify long and short lines, where the classification is not arbitrary.[50] Under a statute requiring the station "in" a village to have

**40.** Plaintiff held not entitled to mandamus to compel extension and collection of taxes voted in aid of its assignor where assignment does not transfer same. Louisiana R. & Nav. Co. v. Coushatta, 122 La. 1079, 48 S 532.

**41.** Where it is apparent from subscription contract that purpose was to effect connection with certain lines in A., agreement by subscribers to procure a right of way, depot grounds, etc., as may be required at A., does not include right of way beyond connection, and no contribution can be enforced by subscribers against rest for money so expended. Boyce v. Stringfellow [Tex. Civ. App.] 114 SW 652. For all general matters relating to subscriptions, see Subscriptions, 10 C. L. 1762.

**42. Search Note:** See notes in 60 L. R. A. 687.

See, also, Railroads, Cent. Dig. §§ 9, 30; Dec. Dig. §§ 8, 14; Taxation, Cent. Dig. §§ 250-263, 371-378, 461-464, 652-666; Dec. Dig. §§ 143-148, 231, 283-286, 389-393; 18 A & E. Enc. L. (2ed.) 565; 29 Id. 141.

**43.** Words "earnings" and "net earnings," as used in Burns' Ann. St. 1901, §§ 8496-8499, 8503, requiring railroads to make statements giving amount of capital stock, annual gross and net earnings, etc., for taxation, signifies money and the sum in excess of operating expenses respectively. Clark v. Vandalia R. Co. [Ind.] 86 NE 851. See Taxes, 10 C. L. 1776.

**44.** May be made subject by special legislation. Chicago, etc., Co. v. Janesville, 137 Wis. 7, 118 NW 182.

**45.** Under Laws 1903, p. 688, c. 425, expressly making railroad property assessable for local improvements, lands on which spur track and depot are situated are assessable though part of the entirety of company's property. Chicago, etc., R. Co. v. Janesville, 137 Wis. 7, 118 NW 182.

**46.** Clark v. Vandalia R. Co. [Ind.] 86 NE 851.

**47. Search Note:** See notes in 44 L. R. A. 565; 15 L. R. A. (N. S.) 715; 3 Ann. Cas. 182; 5 Id. 301; 6 Id. 510; 8 Id. 1056; 11 Id. 406.

See, also, Railroads, Cent. Dig. §§ 5-11, 725-788; Dec. Dig. §§ 5-11, 223-255; 8 A. & E. Enc. L. (2ed.) 338.

**48.** May pass statute requiring railroads to maintain switch lights at all main switches. Missouri, K. & T. R. Co. v. McDuffey [Tex. Civ. App.] 109 SW 1104. Laws 1905, p. 77, c. 56, requiring railroads to provide lights at all main switch lines and to keep same lighted from sunset to sunrise applies to main switches used by company, although owned and maintained by another company, and it is liable although owner has contracted to care for switch. Id. Act May 1, 1905, making it unlawful to build or repair railroad equipment without first maintaining at every division point a building or shed over repair tracks where such work is "permanently" done, so as to provide shelter for all men "permanently" employed in construction and repair work, held to apply to repair tracks where "running repairs" are made (St. Louis, etc., R. Co. v. State [Ark.] 112 SW 150), and such act is not unconstitutional as denying equal protection because it applies only to railroad companies or persons owning and operating roads, it not appearing that any corporation or person not owning and operating a railroad is engaged in such repair work (Id.).

**49.** Decree construing Acts of Congress of July 25, 1866, c. 246, 14 Stat. 244, and of Feb. 24, 1871, c. 67, held to give Mason City Company use of tracks specified of Union Pacific Company and of the connections of those tracks with other railroads at or near South Omaha, and at Council Bluffs to move with own engines from its roads east to those west connecting with Union Pacific tracks at South Omaha, and to stop cars at its freight yards and grain yards, though such delivery did not necessitate through transportation across river. Union Pac. R. Co. v. Mason City & Ft. Dodge R. Co. [C. C. A.] 165 F 844. Laws 1906, p. 133, No. 124, § 1, requiring railroads to furnish equal and reasonable terms for connection at depot to all telephones having over 500 subscribers, is not necessarily broken by refusal to allow to one the "same" terms as are given to another, since conditions of companies may be different. State v. Boston & M. R. R. Co. [Vt.] 71 A 1044.

**50.** Chicago, etc., Co. v. State [Ark.] 111 SW 456. Laws 1907, p. 295, providing that

the same name as the village the name of a station partly in two villages need not be changed.[51] A railroad company may be required to maintain telegraphic service where reasonably necessary to its business as a carrier,[52] but not for purely commercial purposes.[53] The legislature may, to a reasonable extent, convert general duties into positive, absolute ones.[54]

*Control by railroad commissions.* See 10 C. L. 1378—Generally, railroad commissions have only such powers as are expressly or impliedly conferred upon them by statute,[55] the powers most frequently vested in them being general supervision of stock issues,[56] public service,[57] and operation.[58] Their orders must be reasonable and just[59] and subject to judicial review,[60] although all orders are presumed reasonable and just,[61] and will be interfered with only in a clear case of mistake or

in operating railroads more than 50 miles in length freight trains consisting of more than 25 cars shall be equipped with crew of not less than an engineer, fireman, conductor and three brakemen, except in case of strikes, etc., held not void as arbitrary and unreasonable. Id. Laws 1907, p. 295, relating to composition of freight crews, would be unconstitutional if construed to eliminate from its operation lines which are less than 50 miles in length and owned by company not owning more than 50 miles of lines and to include lines less than 50 miles in length if owned by company having over 50 miles of road although operated separately (Id.), and hence distinction should not be based on ownership, but if short line is used as part of system, then it should be regarded as part of longer line (Id.).

51. People v. New York, etc., R. Co., 125 App. Div. 641, 110 NYS 2.

52. Atchison, etc., R. Co. v. State [Okl.] 100 P 16.

53. Atchison, etc., R. Co. v. State [Okl.] 100 P 16. Order of corporation commission requiring maintenance of telegraphic facilities based on theory that company owed duty of maintaining same for general benefits of public, reversed, where it could be operated only at loss. Id.

54. Pittsburgh, etc., R. Co. v. Hunt [Ind.] 86 NE 328.

55. Sess. Laws 1907, p. 536, c. 226, amending commission law of 1905, prescribes in § 21, the last section, that there shall be added a section, designated as § 39, providing that "an emergency exists and this act shall take effect immediately." Held that clause applies to amendment of 1907 and not to law of 1905. State v. Railroad Commission [Wash.] 100 P 179.

56. Mere appointment of the receiver does not oust railroad commission of jurisdiction to permit company to issue stock, under Sayle's Ann. Civ. St. 1897, art. 4584f. United States & Mexican Trust Co. v. Delaware Western Const. Co. [Tex. Civ. App.] 112 SW 447. Under Sayle's Ann. Civ. St. 1897, art. 4584f, giving railroad commission supervision over issuing stock, it is duty of commission to value property of each road and all work done on one being constructed. Id.

57. Telephone held a "public service facility and convenience" within Const. art. 9, § 18 (Burn's Ed. § 222), empowering commission to require establishment thereof (Atchison, etc., R. Co. v. State [Okl.] 100 P 11), and where town has but one road and a telephone exchange, and an inland town receiving freight thereat also has exchange, order requiring road to put in telephone sustained (Id.). Under Sess. Laws 1907, p. 538, c. 226, § 2, vesting railroad commission with power to make regulations concerning sufficiency of trackags, railroad connections, etc., commission has power to compel making of physical track connections. State v. Railroad Commission [Wash.] 100 P 179. Order of commissioners requiring company to make connections with another does not give such other company use of complainant's track or terminal facilities, within interstate commerce act relating to interchange of traffic, but declaring that such provision should not require granting of use of track or terminal facilities. Pittsburgh, etc. R. Co. v. Hunt [Ind.] 86 NE 328.

58. Under Acts 28 Leg. (Laws 1903, p. 183, c. 117), railroad commissioners have power to require, if circumstances and public demands require it, operation of more than one passenger train daily, hence judgment restraining order should not be made perpetual, since changing circumstances may render order legal. Railroad Commission v. Galveston, etc., R. Co. [Tex. Civ. App.] 112 SW 345.

59. Where public convenience requires connection, it is no objection to order making same that it will deprive complainant of small amount of trackage. Pittsburgh, etc., R. Co. v. Hunt [Ind.] 86 NE 328. Fact that complainant owned most of land to be taken in making connections with another road pursuant to order of commissioners held not to affect order, since it will be presumed that compensation will be made by way of switching rates or transfer charges. Id. No objection to order of commissioners requiring construction of connections with another road that it would greatly increase danger of handling traffic, since it will be presumed that on application commission will so regulate handling thereof as to protect complainant. Id.

60. Since railroad commission law of 1905, as amended by Sess. Law 1907, p. 536, c. 226, requires regulations to be reasonable and just and gives railroads right of appeal to courts, held not to violate any constitutional guaranty. State v. Railroad Commission [Wash.] 100 P 179. Held, also, that on appeal to courts latter are not limited to evidence produced before or certified by commissioners. Id.

61. Order of corporation commission is prima facie correct and reasonable under

abuse.[62] Final adjudications [63] of the commission on questions of fact are conclusive on the courts in some states.[64]

§ 8. *Construction and maintenance.*[65] See 10 C. L. 1374—By statute, state and federal, a railroad is frequently required to construct its road within a prescribed time under pain of forfeiture.[66] In the prosecution of its work it is liable for trespasses upon adjoining private lands [67] and for actual [68] damage thereto from negligent construction,[69] but not for damages incident to a proper construction of the road.[70] Where a road in the right of way is not a public highway, the company may destroy the same for its own use in lawful manner without liability.[71] While both the company and the construction contractor are bound to use reasonable care to protect the adjoining owners,[72] where the latter constructs the road according to plans and without negligence, at most he is only liable for injuries resulting before turning the road over to the company.[73] The successor of the company creating a nuisance is only liable for the continuance of the same,[74] and the purchaser at the foreclosure of a mortgage executed before the mortgagor assumed a contract obligation to keep a bridge in repair is not bound thereby in the absence of notice or an express provision in the decree in respect thereto.[75] Provisions in a franchise to occupy the streets for the benefit of abutters [76] may be enforced by the public or such abutters.[77]

Const. art. 9, § 22 (Burns' Ed. § 235). Atchison, etc., R. Co. [Okl.] 100 P 11. Orders of railroad commissioners created by Act March 9, 1907 (Laws 1907, p. 454, c. 241), while not conclusive, are presumptively valid and will be set aside only when a clear case is made. Pittsburgh, etc., R. Co. v. Hunt [Ind.] 86 NE 328.

62. Commissioners' order under Burns' Ann. St. 1908, § 5553, fixing place of connection, will not be judicially interfered with except in clear case of mistake or abuse. Pittsburgh, etc., R. Co. v. Hunt [Ind.] 86 NE 328.

63. Where commissioners ordering connections to be made retained jurisdiction to enforce order and to settle questions as to expense, interchange of traffic, etc., order was final for purposes of judicial attack. Pittsburgh, etc., R. Co. v. Hunt [Ind.] 86 NE 328.

64. United States v. Mexican Trust Co. v. Delaware Western Const. Co. [Tex. Civ. App.] 112 SW 447.

65. **Search Note:** See notes in 26 L. R. A. 92; 36 Id. 510; 70 Id. 850; 12 L. R. A. (N. S.) 680; 16 Id. 307; 5 A. S. R. 537; 7 Ann. Cas. 331; 9 Id. 1002.

See, also, Railroads, Cent. Dig. §§ 220-374; Dec. Dig. §§ 83-117; 8 A. & E. Enc. L. (2ed.) 338, 427; 18 Id. 564, 565; 23 Id. 716; 17 A. & E. Enc. P. & P. 501, 502, 626.

66. Act June 26, 1906, c. 3550, 34 Stat. 482 (U. S. Comp. St. Supp 1907, p. 553), provides that every grant of right of way over public lands, under Act March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), "where such railroad has not been constructed and period of five years next following location * * * has now expired, shall be and hereby is declared forfeited," etc., held self-executing (Columbia Valley R. Co. v. Portland & S. R. Co., [C. C. A.] 162 F 603), and pendency of suit by railroad company against third person to determine rights does not change effect of act (Id.).

67. Temporary construction of bridges on private land while abolishing grade crossing is a trespass and not a taking by eminent domain. Davis v. New England R. Co., 199 Mass. 292, 85 NE 475.

68. In action for damage to adjacent property caused by excavating in a road which company claimed was part of right of way, evidence held to show actual damage. Heilbron v. St. Louis S. W. R. Co. [Tex. Civ. App.] 113 SW 610.

69. Davenport v. Norfolk & S. R. Co., 148 N. C. 287, 62 SE 431. Mere casual reference to one of engineers in charge of work as a "resident engineer of" defendant held insufficient to show that defendant was doing the work, where evidence showed that another company let contract. Louisville & N. R. Co. v. Chapman [Ga.] 62 SE 583. Where railroad widening its roadbed and laying additional track acts under legislative authority and has acquired private rights of owners, it is liable for negligence in doing work. Ferdon v. New York, O. & W. R. Co., 131 App. Div. 380, 115 NYS 352.

70. Where owner granted right of way for railroad purposes and cut was made, held that grantee of such owner had no cause of action against company's successor on ground that soil was of crumbly character and would cave unless support was furnished for caving where it had commenced before defendant's succession. Seaboard Air Line R. Co. v. McMurrain [Ga.] 63 SE 1098.

71. Heilbron v. St. Louis S. W. R. Co. [Tex. Civ. App.] 113 SW 610.

72. To protect crops on adjoining lands. Willis v. White & Co. [N. C.] 63 SE 942.

73. Willis v. White & Co. [N. C.] 63 SE 942. Cause of action for water impounded by construction of roadbed arises when substantial damages accrue and not when construction of roadbed is complete. Id.

74. Graves v. St. Louis, etc., R. Co., 133 Mo. App. 91, 112 SW 736.

75. Village of Port Jervis v. Erie R. Co., 59 Misc. 623, 111 NYS 851.

76. Provision in grant of right to occupy

*Establishment and maintenance of depots and grounds.*[See 10 C. L. 1375]—A railroad company must exercise reasonable care to keep its depot and grounds in a safe condition [78] for persons rightfully therein or upon the grounds for mutual advantage [79] or by invitation.[80]

*Private farm crossings.*[See 10 C. L. 1375]—It is generally required by statute [81] or charter provision [82] that suitable private crossings shall be constructed and maintained where reasonably necessary,[83] and a company failing so to do is liable for the damages proximately resulting therefrom,[84] notwithstanding the statute authorizes the abutter to construct the same and recover over.[85] The obligation may also arise from contract,[86] and is frequently imposed as a condition of a grant of right of way.[87] While the statute is usually satisfied by a grade crossing,[88] equity may compel the construction of a nongrade crossing in exceptional cases.[89]

street requiring company to grade and plank and to keep crossings in repair is for benefit of public and abutters. Stein v. Chesapeake & O. R. Co. [Ky.] 116 SW 733.

77. Public may prosecute for maintaining nuisance or bringing action to compel observance, and abutters may bring actions for damages. Stein v. Chesapeake & O. R. Co. [Ky.] 116 SW 733.

78. Evidence held to warrant finding that platform which collapsed was rotten and that reasonable inspection would have revealed fact. Chicago, etc., R. Co. v. Hauber [C. C. A.] 162 F 668.

79. Lowenstein v. Missouri Pac. R. Co. [Mo. App.] 115 SW 2. Where company constructed crossing to hay barn, knowing that it would be used by farmers in taking hay to barn to be shipped, held that one using for such purpose was using for mutual benefit of road and himself. Id.

80. Where car to be loaded is placed beside platform, there is implied invitation to use platform in absence of notice that same is unsafe. Chicago, etc., R. Co. v. Hauber [C. C. A.] 162 F 668.

81. St. 1898, §§ 1810, 1813, requiring railroad operating over inclosed lands to construct crossings and providing that on failure to do so owner or occupant may recover penalty, held not to apply where inclosure was complete only by including barrier including land of another. Miller v. Chicago, & N. W. R. Co., 133 Wis. 183, 113 NW 384. "Inclosure" as used therein held to mean a tract of land surrounded by an actual barrier. Id. Neither execution of unconditional deed for right of way nor receiving of damages for right of way destroys right to compel construction of private crossing. Powell v. Atchison, etc., R. Co. [Mo.] 114 SW 1067.

82. Railroad company created by private act is not relieved of its charter obligations to construct farm crossings by accepting present constitution. Louisville & N. R. Co. v. Robbins, 33 Ky. L. R. 778, 111 SW 283. Allegation that it was a charter duty of defendant to construct private crossings is sufficient though title of private act under which it was incorporated and date of its passage are not averred. Civ. Code Prac. § 119, requiring such matters to be pleaded, not applying where private statute is one peculiarly within knowledge of adverse party. Louisville & N. R. Co. v. Robbins, 33 Ky. L. R. 778, 211 SW 283.

83. Where deed to railroad provided for three grade crossings, they must be deemed all that are reasonably necessary in absence of change of situation, and Railroad Law, Laws 1890, p. 1093, c. 565, § 32, as amended, requiring railroads to construct private crossings where necessary cannot be invoked. In re Ellis, 125 App. Div. 111, 110 NYS 343. Where owner could not go from one portion of farm to another without crossing, legal implication arose that one was necessary. Smith v. St. Louis, etc., R. Co., 132 Mo. App. 612, 112 SW 32. A "farm crossing" is one used in connection with land employed for agricultural purposes. Williams v. Chicago & N. W. R. Co., 132 Ill. App. 274.

84. Where only means of removing crop from low lands was over private crossing and company wrongfully closed same at time flood was threatening, company is liable for loss by flood. Illinois Cent. R. Co. v. Wilson [Ky.] 113 SW 905.

85. Under Rev. St. 1899, § 1899 (Ann. St. 1906, p. 945), requiring railroads to maintain farm crossings, landowner may recover damages for failure to construct crossing, notwithstanding it also authorizes him to construct same and recover over. Price v. St. Louis, etc., R. Co., 133 Mo. App. 653, 113 SW 1136.

86. Where railroad company purchased property of another without notice of verbal contract for farm crossings, and there was nothing to put it on notice, it is not bound to maintain same, especially where it obtained a deed which was silent in respect thereto. Forsythe v. Southern R. Co. [Ky.] 113 SW 85.

87. Undertaking by company in deed of right of way to construct crossing is supported by consideration. Van Jellico Min. Co. v. Rollins, 33 Ky. L. R. 920, 111 SW 328; Forsythe v. Southern R. Co. [Ky.] 113 SW 85.

88. Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), prescribing railroad's duty as to private crossings, does not contemplate underground crossing except in exceptional cases. Powell v. Atchison, etc., R. Co. [Mo.] 114 SW 1067.

89. Powell v. Atchison, etc., R. Co. [Mo.] 114 SW 1067. Where road was originally built on trestle with private crossing under and adjoining owner has built in reference thereto, he has an equity to have underground crossing continued in lieu of proposed grade crossing at another point.

*Public crossings.* See 10 C. L. 1376—Upon the construction [90] of its road, the company is usually required to construct public crossings at all intersections with public highways, and in Arkansas is liable to a penalty for failure so to do.[91] In many states, provision is made for alteration or substitution of highways to avoid unnecessary or dangerous crossings,[92] but the railroad commission of Vermont, having decided that public safety requires a change, has no authority to fix the new location,[93] to take the land necessary to effect the change, nor to appraise damages for such taking.[94]

The crossings provided and the approaches thereto must be reasonably sufficient to accommodate the public,[95] and the company must exercise reasonable care to keep them in a safe condition [96] for vehicles in common use,[97] and is liable for negligence [98] to one injured thereby while in the exercise of due care on his part.[99]

it being feasible. Id. In determining whether crossing should be underground or at grade, convenience of company and adjoining owner and safety of public must be considered. Id. Where underground crossing can be constructed more conveniently than a grade crossing, it may be required. Id.

**90.** Railroad is "constructed" within Kirby's Dig. § 6681, providing that, when a railroad company has constructed a railroad across a highway, it shall construct a crossing, when its tracks have been laid and are ready for running of trains. St. Louis, etc., R. Co. v. State [Ark.] 114 SW 703.

**91.** Penalty, under Kirby's Dig. § 6684, for failure to construct public crossing on notice, being for benefit of county, action is properly brought in name of state for use of county, and not for use of road district in which crossing is located. St. Louis, etc., R. Co. v. State, 85 Ark. 561, 109 SW 545. Not bound to construct crossings except at streets and alleys unless farm crossing. Williams v. Chicago & N. W. R. Co., 132 Ill. App. 274.

**92.** Under Code 1904, § 1294b, providing that "any county road may be altered by a railway corporation for the purpose of avoiding or reducing number of crossings whenever it shall have made an equally convenient road in lieu thereof, the company having first obtained consent of" supervisors, it is duty of board to act on petition when presented, and it is not duty of railroad company to first build road. Carolina C. & O. R. Co. v. Scott County Sup'rs [Va.] 63 SE 412.

**93.** Under Acts 1906, p. 134, No. 125, § 1, it is the duty of selectmen. Stimets v. Highgate [Vt.] 69 A 878. Where, however, selectmen described particular route in petition which was adopted by commissioners, act of commissioners in excess of authority is immaterial where no person interested objected to location. Id.

**94.** Under Acts 1906, p. 134, No. 125, § 1. Stimets v. Highgate [Vt.] 69 A 878. Which is duty of selectmen. Id.

**95.** Sample v. Chicago, B. & Q. R. Co., 233 Ill. 564, 84 NE 643. P. L. 1832, p. 104, § 20, providing that it should be duty of certain company to construct and keep in repair bridges or passageways over or under the road where any public road crosses same so that passage of carriages, etc., shall not be impeded, places company under a continuing duty, and, where increased traffic demands, passage must be widened until it reaches full width of street. Borough of Metuchen v. Pennsylvania R. Co. [N. J. Err. & App.] 69 A 465. Passageway 25 feet wide, with 10-foot sidewalks on either side held sufficient to accommodate traffic of city of 1907 people. Id. Allegation that it was negligence to construct crossing 14 feet wide when it should have been 18 or 20 feet wide, without showing why it should have been 18 or 20 feet wide, or why 14 feet was insufficient. Louisville & N. R. Co. v. Barnwell [Ga.] 63 SE 501.

**96.** Louisville & N. R. Co. v. Onan's Adm'r, 33 Ky. L. R. 462, 110 SW 380. Equity has jurisdiction to compel performance of legal duty to properly maintain crossing. Borough of Metuchen v. Pennsylvania R. Co. [N. J. Err. & App.] 69 A 465. Where railroad company constructed underground passage merely, instead of lowering grade of street, it must keep paving in repair. Id. Township board and highway board cannot complain of crossing with 6 foot embankment where they made no objection until same was nearly completed although they knew that it was to be of such height, and especially where they did not object to 5 foot embankment and court decreed 6 foot as safer. Ecorses Tp. v. Detroit, etc., R. Co. [Mich.] 15 Det. Leg. N. 1101, 119 NW 575. "Crossings and approaches thereto" which railroad must maintain, defined. Chicago, B. & Q. R. Co. v. Sample, 138 Ill. App. 95.

**97.** St. Louis & S. F. R. Co. v. Dyer [Ark.] 113 SW 49. Failure to so charge in action for damages to traction engine is not cured by charge on general duty. Id.

**98.** Charge that if horse did not get frightened as contended by plaintiff, but backed off the embankment of its own accord, no recovery could be had, held erroneous, where there was allegation of negligence in construction. Louisville & N. R. Co. v. Barnwell [Ga.] 63 SE 501. Hole at crossing 2 feet wide, 3 feet long and 14 inches deep, held negligence. Sample v. Chicago, B. & Q. R. Co., 233 Ill. 564, 84 NE 643. Evidence that horse's foot was caught between rail and plank held to make case of negligence for jury. Piver v. Pennsylvania R. Co. [N. J. Err. & App.] 71 A 247. **Evidence** that crossing was such as are in common use throughout country held inadmissible. Texas Cent. R. Co. v. Randall [Tex. Civ. App.] 113 SW 180. Photographs

In the exercise of the police power, the duty to maintain crossings in a safe condition may be prescribed by statute or ordinance,[1] and such regulations are not void as taking property without due process of law [2] or just compensation,[3] nor as impairing the obligation of charter contracts.[4] But an ordinance requiring the company to repave the street where the same went under the tracks cannot be sustained as a police regulation.[5] By these statutes, the company is frequently required to keep the crossing in a certain condition without regard to due care so to do.[6] In constructing a crossing, the company must leave the highway in good condition, and mandamus lies to compel this,[7] or the town may restore the crossing at the expense of the railroad.[8]

*Grade crossings and the abolition thereof.* See 10 C. L. 1878—In the absence of statute a railroad company may usually construct a grade crossing at its discretion,[9] although a court of equity may require a depression or elevation of tracks where it is the only way that joint user can be properly secured.[10] The manner of crossing

of crossing held admissible to show condition where taken while condition remained unchanged. Sample v. Chicago, B. & Q. R. Co., 233 Ill. 564, 84 NE 643. Evidence of repairs is admissible to show that photograph of crossing was not of condition as existed at time of accident. Id. In action for damage to wagon caught in planking and held until struck by train, evidence of prior similar accidents held admissible on issue of negligence. Woodworth v. Detroit United R. Co., 153 Mich. 108, 15 Det. Leg. N. 374, 116 NW 549. **Petition** held sufficient as charging negligence in manner of construction and maintaining approach without rail or guards. Louisville & N. R. Co. v. Barnwell [Ga.] 63 SE 501.

**99.** One is not obliged to reject only crossing reasonably accessible unless danger is so apparent that one of ordinary care would not attempt to use it. St. Louis & S. F. R. Co. v. Dyer [Ark.] 113 SW 49. Negligence in attempting to propel traction engine across defective crossing held for jury. Id. Not negligent as matter of law in not driving directly across crossing. Sample v. Chicago, B. & Q. R. Co., 233 Ill. 564, 84 NE 643.

**1.** Act March 31, 1874, (Rev. St. 1874, c. 114, § 46), requiring all roads to construct and maintain crossings in safe condition, etc., is a police regulation and applicable to roads built before and after. People v. Illinois Cent. R. Co., 235 Ill. 374, 85 NE 606. Burns' Ann. St. 1901, § 5153, cl. 5 (Burns' Ann. St. 1908, § 5195, cl. 5), requiring company to put and keep in safe condition all highways, is valid as police power, though enacted after company acquires right of way and constructs line (New York, etc., R. Co. v. Rhodes [Ind.] 86 NE 840), but it need not depend upon police power, because state has power to provide conditions upon which companies acquire right of way (Id.). Track elevation ordinance, requiring company, in constructing subway, to pave roadway in accordance with certain specifications, and that approaches should be restored as near as possible to their prior condition, held not to require approaches to be paved. City of Chicago v. Hulbert, 234 Ill. 321, 84 NE 922.

**2, 3.** People v. Illinois Cent. R. Co., 235 Ill. 374, 85 NE 606.

**4.** Since charter contract is subject to police power. People v. Illinois Cent. R. Co., 235 Ill. 374, 85 NE. 606.

**5.** Hence void where it imposed burdens in addition to those of charter. People v. Illinois Cent. R. Co., 235 Ill. 374, 85 NE 606.

**6.** Under Rev. St. 1895, art. 4426, company must keep crossing in repair, and ordinary care to do so is not sufficient. Texas Cent. R. Co. v. Randall [Tex. Civ. App.] 113 SW 180. Under Sayles' Ann. Civ. St. 1897, art. 4426, requiring companies to restore highways so as not to unnecessarily impair usefulness, the test of negligence is not whether prudent man would have so left it, but whether usefulness has been unnecessarily impaired. Missouri, K. & T. R. Co. v. Davis [Tex. Civ. App.] 116 SW 423.

**7.** Petition in mandamus to compel restoration of highway may charge obstruction in language of statute. Commissioners of Highways v. Fenton & Thompson R. Co., 135 Ill. App. 394.

**8.** To entitle a town to recover for expenditures in repairing a crossing, it must appear that the commissioner of highways directed service of the notice to repair. Chicago G. W. R. Co. v. Leaf River, 135 Ill. App. 559. The proof must be by record. Id.

**9.** Grade crossings are not per se illegal. City of Newark v. Erie R. Co. [N. J. Eq.] 71 A 620.

**10.** City of Newark v. Erie R. Co. [N. J. Eq.] 71 A 620. Fact that more than one track is laid across does not of itself make grade crossing unsafe. Id. Where number of tracks is not excessive, question whether trains run with such frequency, at such speed or at such angle, etc., that joint user is practically destroyed and elevation of tracks is necessary, is one of fact. Id. Evidence of amount of traffic, number of trains, and conditions, held insufficient to require elevated crossing. Id. Where street becomes so incumbered with tracks as to substantially destroy use as street, injunction against excessive use is proper remedy. Id. Bill in equity praying for elevation or depression of tracks and for general relief held broad enough to warrant injunction against use of certain tracks illegally in street, and illegal use of another. Id.

is frequently prescribed by statute [11] or is left to the discretion of the railroad commission,[12] to be determined upon a hearing of all parties interested [13] and subject to statutory review.[14] A manufacturing company constructing a lateral road under the Pennsylvania statute cannot cross at grade without municipal consent.[15] Where a street is invalidly laid out across the right of way, the company cannot be compelled to construct a viaduct.[16] In most states a proceeding is provided whereby grade crossings can be abolished,[17] and such procedure must be followed.[18] The county commissioners of Massachusetts have no power under the statute relating to repairs, etc., to decree a separation of grades,[19] and especially where the road is constructed under the statute authorizing grade crossings unless the railroad commissioners otherwise order.[20] Unless waived,[21] compensation must usually be made to those abutting upon the portion of the street affected by the change [22] for the

**11.** Act June 7, 1901 (P. L. 501), regulating crossing of highways by railroads and railroads by highways, applies to lateral railroads (Clifton Heights Borough v. Kent Mfg. Co., 220 Pa. 585, 69 A 1114), though such a road was authorized under Act May 5th, 1832 (P. L. 501), prior to its enactment (Id.).

**12.** Although city laid out street before enactment of railroad law, Laws 1897, p. 794, c. 754, it must comply therewith when it attempts to open up and construct crossings. New York Cent. & H. R. R. Co. v. Buffalo, 128 App. Div. 373, 112 NYS 997. Held that, under Railroad Law (Laws 1897, p. 794, c. 754, § 60), railroad commissioners could grant a rehearing as to a crossing order, with due regard to rights of parties. People v. Public Service Commission, 131 App. Div. 335, 114 NYS 636. Affirmance of order of railroad commissioners as to crossing does not prevent a rehearing, especially where affirmed as to power to act. Id. Under Pub. Service Commission Law (Laws 1907, p. 936, c. 429), § 80, abolishing board of railroad commissioners and conferring their power on Public Service Commission, latter may grant rehearing as to grade crossing where former could have done so. Id.

**13.** Where B road owned by long lease two-thirds of passenger station, C owning other third, both using tracks in common, held, on remand by supreme court of order of commissioners directing C company to abolish grade crossing, C and B to bear expense, B was entitled to be heard on question whether crossing was public, thereby imposing part of costs on state and municipality. Central Vermont R. Co. v. State [Vt.] 72 A 324.

**14.** Acts 1906, p. 138, No. 126, creating board of railroad commissioners and providing for appeal from orders to supreme court, held to repeal Acts 1906, p. 134, No. 125, providing for appeal to chancery court from order of board abolishing grade crossing. Central Vermont R. Co. v. State [Vt.] 72 A 324. Where, on appeal from order of commissioners directing abolition of grade crossing, proceedings are remanded, with liberty to railroads to file petition for modification of order, railroads may file petition alleging that crossing was a public highway, so as to impose part of cost on state and municipality. Id.

**15.** Constructing railroad under Act May 5, 1832 (P. L. 501). Clifton Heights Borough v. Kent Mfg. Co., 220 Pa. 585, 69 A 1114.

**16.** Illinois Cent. R. Co. v. State [Miss.] 48 S 561.

**17.** Separate proceeding under Comp. Laws, §§ 4229-4260, to obviate grade crossing, must be had for each street or highway. In re Detroit [Mich.] 16 Det. Leg. N. 11, 120 NW 25. Under Rev. Laws 1902, c. 111, § 149 et seq., conferring power on commissioners to abolish railroad grade crossings, and § 152, requiring them to specify what portion of existing street is abolished or discontinued, fact that lowered part of street is narrower than street as laid out does not work a discontinuance of unworked portion, especially where other streets are created of greater width than worked portion. Bliss v. Attleborough, 200 Mass. 227, 86 NE 299.

**18.** Commissioners ordering changes under Rev. Laws, c. 111, § 134, must prescribe the manner of making same and limits within which they are to be made. Boston & L. R. Corp. v. Middlesex County Com'rs, 198 Mass. 584, 85 NE 108. Order directing construction of bridge 40 feet wide, but not showing width of street, which in places was only 33 feet wide, making no provision for taking land, and which did not prescribe material of which sidewalk should be constructed, held void (Id.), and where matter involved much detail and necessitated special investigation, supreme court on appeal will not cure indefiniteness under its power under St. 1902, p. 485, c. 544, § 27 (Id.).

**19.** County commissioners have no power under Rev. Laws, c. 11, § 132, relating to repairs, etc., to decree separation of grades. Boston & L. R. Corp. v. Middlesex County Com'rs, 198 Mass. 584, 85 NE 108.

**20.** Where road is constructed under St. 1870, p. 297, c. 386. Boston & L. R. Corp. v. Middlesex County Com'rs, 198 Mass. 584, 85 NE 108. In which case proceeding must be instituted under Rev. Laws, c. 111, § 149, in superior court. Id.

**21.** Waiver by street car company of any and all claim for damages by reason of change of grade of any of the streets from loss of traffic, and to any abutting property, held to cover damages suffered by it on other streets than where it operated lines, in some of which it was interested as abutting property owner. City of Detroit v. Detroit United R. Co. [Mich.] 16 Det. Leg. N. 48, 120 NW 600.

**22.** Held, under Comp. Laws, 1897, §§ 4231,

actual damage to them as abutting owners.[23] One whose access to his property is destroyed may maintain mandamus to compel condemnation under the New York statute.[24] The construction of a viaduct over a street as authorized by municipal ordinance cannot be a public nuisance.[25]

*Crossings with other railroads, street railways and canals.* See 10 C. L. 1379—The manner of crossing is usually a matter of mutual agreement [26] or of statutory regulation.[27] In Ohio the circuit court determines such matter on application [28] and apportions the cost of construction [29] and maintenance [30] of the proposed crossing. If the junior road desires a lesser grade than that found practical by the court, it must stand the additional cost thereof.[31] Under the New York statute, intersecting roads must form connections thereat.[32]

*Private connections.* See 10 C. L. 1380—The right to private connections is governed by statute in some states,[33] and a special proceeding is provided in Oklahoma to secure the same.[34] Rights and duties under private agreements depend upon the terms thereof,[35] but the mere fact that a private track is put in does not obligate the company to continue it.[36]

4241, 4244, that upon separation of grades, compensation can be given only for damage to property abutting on portion of street where grade is to be changed, and only for damages resulting from change. Damage arising from general public inconvenience, etc., cannot be recovered. City of Detroit v. Detroit United R. Co. [Mich.] 16 Det. Leg. N. 48, 120 NW 600.

23. Measure of damages is difference between value before and after change. City of Detroit v. Detroit United R. Co. [Mich.] 16 Det. Leg. N. 48, 120 NW 600. Speculative damage to business carried on on abutting premises cannot be recovered. Id. Evidence as to effect of other separations of grades upon property in vicinity, and testimony that on other streets slope of street exceeded new slope, held properly excluded. Id. Testimony on damages too uncertain to establish a right to compensation under statute cannot be made certain by throwing burden of uncertainty on city as active party in making separation of grades. Id.

24. To compel condemnation under Railroad Law, Laws 1897, p. 797, c. 754, § 63. People v. Hamburg Town Board, 58 Misc. 643, 109 NYS 913.

25. Crofford v. Atlanta, B. & A. R. Co. [Ala.] 48 S 366.

26. Although street car company has right to cross, mutual protection is sufficient consideration to support contract respecting crossing, although burdens are all on street car company. Evansville & S. I. Trac. Co. v. Evansville Belt R. Co. [Ind. App.] 87 NE 21.

27. Act April 23, 1904 (97 Ohio Laws, p. 548), held to define policy of not crossing at grade if another crossing is practical (Toledo Railway & Terminal Co. v. Lima & T. Trac. Co. [Ohio] 86 NE 515), and junior company cannot defeat purpose of the act by voluntarily selecting place of crossing where grades cannot be separated (Id.).

28. While supreme court cannot consider weight of evidence, it may examine record to see that order of circuit court, in ordering crossing under Act April 23, 1904 (97 Ohio Laws, p. 548), correctly interpreted law. Toledo Railway & Terminal Co. v. Lima & T. Trac. Co. [Ohio] 86 NE 515. Whether crossing should be for double or single track should be left to junior road on application under Rev. Laws 1908, § 3333-1, to court to have manner of crossing determined. Cincinnati Northern Trac. Co. v. Pittsburg, etc., R. Co. [Ohio] 86 NE 987.

29. Act April 23, 1904 (97 Ohio Laws, p. 548), held to require cost of constructing nongrade crossing to be equitably apportioned. Toledo Railway & Terminal Co. v. Lima & Toledo Trac. Co. [Ohio] 86 NE 515.

30. Rev. Laws 1908, § 3333-1, requires cost of maintenance be apportioned as well as cost of construction. Cincinnati Northern Trac. Co. v. Pittsburg, etc., R. Co. [Ohio] 86 NE 987.

31. Rev. Laws 1908, § 3333-1. Cincinnati Northern Trac. Co. v. Pittsburg, etc., R. Co. [Ohio] 86 NE 987.

32. Under Railroad Law, § 12, Laws 1890, p. 1087, c. 565, intersecting roads must form connections thereat, which may be enforced by attorney general, if not by individual shippers. Village of Ft. Edward v. Hudson Valley R. Co., 192 N. Y. 139, 84 NE 962.

33. Where private track has been put in under statutory requirements, company may change grade as necessity requires, and beneficiary cannot recover damages for costs of making grade of side track conform thereto. In re Detroit [Mich.] 16 Det. Leg. N. 53, 120 NW 592.

34. Private persons desiring construction of side tracks to accommodate their particular industries should proceed under Const. art. 9, § 33 (Burns' Ed. § 246), requiring such persons to pay cost thereof, and not under § 18 (Burns' Ed. § 222), relating to establishment of public service facilities, etc. Chicago, etc., R. Co. v. State [Okl.] 99 P 901.

35. Aside from constitutional or statutory requirement, construction and maintenance of private track is purely matter of contract. In re Detroit [Mich.] 16 Det. Leg. N. 53, 120 NW 592. Contract, reciting that milling company desired spur track, provided that company would give ground therefor free, furnish ties, to repair, etc., while railroad operated for its benefit, rail-

*Cattle guards, fences and stock gaps.*[See 10 C. L. 1380]—While a railroad company is under no common-law duty to maintain fences, such duty is imposed by statute in most states,[37] and, likewise, where its road passes through inclosed lands,[38] it must maintain proper guards. Where the company fails to construct or repair fence or guard after necessary notice [39] to the proper official,[40] it is usually subject to a penalty,[41] or, as is sometimes provided, the adjoining landowner may construct or repair and recover over.[42] It is also liable for damage proximately resulting from its default to stock [43] or to property from trespassing stock,[44] unless the injured party is guilty of negligence.[45]

*Drainage and disposal of surface water.*[See 10 C. L. 1381]—Railroad companies must so construct their roads, especially where it can be done without substantial additional cost and inconvenience,[46] as not to interfere with the natural drainage of surface water,[47] and must keep their drains and culverts in repair,[48] and are li-

road company to furnish rails, switches, etc., and made binding on heirs and assigns of parties, held not a mere license but a contract binding on purchaser of mill. Illinois Cent. R. Co. v. Sanders [Miss.] 46 S 241.

**36.** Mere fact that company puts in private side track does not obligate it to continue same, and hence where company changes grade, manufacturing company cannot recover cost of making side track conform thereto. In re Detroit [Mich.] 16 Det. Leg. N. 53, 120 NW 592.

**37.** Need not fence depot grounds. Chicago, etc., R. Co. v. Hanken [Iowa] 118 NW 527.

**38.** To constitute an inclosure, it is not necessary that field be surrounded by a lawful fence, but it is sufficient if inclosed by fence calculated to turn stock. St. Louis S. W. R. Co. v. Warner [Ark.] 109 SW 1013. Under Kirby's Dig. § 6644, making it the duty of railroad passing through inclosed lands to construct cattle guards, company must construct guard where road enters inclosure, though adjoining field is inclosed and there is a guard where road enters it. Id.

**39.** Code 1896, § 3480, requiring company to put in guards and to keep same in repair whenever owner shall make demand, does not require demand for repairs; but when guards are once put in, company must keep in repair. Atlanta & B. Air Line R. Co. v. Brown [Ala.] 48 S 73. Complaint based upon Code 1896, § 3480, requiring company to erect and keep in repair cattle guards whenever owner makes demand on it or its agent and shows that such guards are necessary, need not allege that when demand was made plaintiff showed to company the necessity therefor, that being matter of evidence. Id.

**40.** Chief clerk in office of station agent, doing routine work, is not an "agent" upon whom notice to construct cattle guards can be made, under Civ. Code 1895, § 2243, making company liable to penalty for failure to construct after notice, etc. Smith v. Southern R. Co. [Ga.] 63 SE 801. Code 1896, § 3480, requiring company to put in guards on demand of adjoining owner, means demand on company, and does not require demand on special agent whose duty it is to construct same. Atlanta & B. Air Line R. Co. v. Brown [Ala.] 48 S 73.

**41.** Where appeal from judgment for penalty for failure to provide and maintain fence guards was dismissed by payment of judgment, suit was pending from time of judgment until payment, so as to prevent accruing of other penalties. Yazoo & M. V. R. Co. v. Neal [Miss.] 47 S 673.

**42.** Burns' Ann. St. 1908, §§ 5447, 5448, authorizing adjoining owner to build fence at expense of company after statutory notice, is not limited to initial fence, but applies where such fence has been destroyed. Vandalia R. Co. v. McAninch [Ind. App.] 86 NE 103.

**43.** See post, § 11.

**44.** Complaint in trespass for damage done by stock because of failure to keep guards in repair held sufficient without specifying which particular ones were defective. Atlantic & B. Air Line R. Co. v. Brown [Ala.] 48 S 73. In action for damages for failure to construct guards, evidence that railroad passing through plaintiff's land was known by the name of defendant and was assessed in that name held to sufficiently connect defendant. Id. Lessor cannot recover for damages to grass due to failure of company to maintain stock gap, but he is limited to injury to land itself. Seaboard Air Line R. Co. v. Brown [Ala.] 48 S 48.

**45.** Owner owes no duty to repair fences to protect against marauding stock. Shankle v. St. Louis S. W. R. Co., 131 Mo. App. 463, 109 SW 1072.

**46.** Railroad is liable for interference with natural drainage only when it can prevent injury without substantial additional expense and inconvenience. Alabama & M. R. Co. v. Beard [Miss.] 48 S 405.

**47.** Where road is so constructed as to impede or not permit flow of surface water in its natural course, company is liable under Rev. St. 1895, art. 4436. Missouri, K. & T. Co. v. Macon [Tex. Civ. App.] 115 SW 847. Company must so maintain culverts as not to obstruct flow of surface water. St. Louis, etc., R. Co. v. Hardie [Ark.] 113 SW 31. Complaint alleging that pond on plaintiff's property was accustomed to flow through culvert erected by defendant, that defendant substituted insufficient pipe, causing water to back, etc., held not demurrable because not alleging that waters obstructed are waters of natural water course, and that cutting off flow of surface water is not actionable, although subject

able for all damages [49] proximately [50] resulting from their negligence,[51] in the absence of contributory negligence.[52] Legal duty may be supplemented by contractual obligation.[53] The duty of maintaining the road so as not to unnecesarily injure adjoining property is a continuing one.[54] A single recovery for the maintenance of a structure flooding adjacent lands must include future damages if such structure is properly constructed and maintained.[55] If negligently constructed or maintained, it is a continuing nuisance, and action will lie for each injury.[56]

*Obstruction of watercourses.* See 10 C. L. 1382—Railroad constructing a road across natural watercourses must provide adequate waterways [57] and must anticipate and

to motion to make more certain. Hentz v. Southern R. Co. [S. C.] 63 SE 743.

**48.** Allegations that natural drain of surface water was across tracks, that defendant constructed ditches but thereafter threw a dump or levee across same, etc., held to state a cause of action. St. Louis, etc., R. Co. v. Hardie [Ark.] 113 SW 31. Where railroad constructs underground passage and drain preventing surface water from running into same becomes defective, company must repair. Borough of Metuchen v. Pennsylvania R. Co. [N. J. Err. & App.] 69 A 465. Company, having adjusted claim for past damages caused by overflow, made alterations in roadbed which included ditch along track, and owner released company from all future damages as "now constructed." Held not to relieve as to damages caused by failure to keep ditch open. Lackey v. St. Louis & S. F. R. Co. [Miss.] 48 S 238.

**49.** Measure of damages for obstructing drains is same whether founded on contract or common-law duty to keep open. St. Louis, etc., R. Co. v. Hardie [Ark.] 113 SW 31.

**50.** Where drainage is insufficient to carry off ordinary rain fall, company held chargeable with knowledge that damage is likely to result from excessive rains. Smith v. Chicago, B. & Q. R. Co. [Neb.] 119 NW 669. Evidence held insufficient to show that construction of drain caused unusual quantities of water to be carried onto adjacent land. McCabe v. New York Cent. & H. R. R. Co., 114 NYS 303. Evidence held to show that proximate cause of flooding was not cutting of way through ridge draining slough, but the digging by another of ditch into slough. Block v. Great Northern R. Co., 106 Minn. 285, 118 NW 1019.

**51.** It is negligence not to provide sufficient openings in roadbed to permit free flow of water from adjoining land. Jonesboro, etc., R. Co. v. Cable [Ark.] 117 SW 550. Count for damages caused by floods held insufficient for failure to allege that construction of roadbed obstructed natural flow of surface water, or that there were ditches, drains or natural courses into which it could have been turned. Graves v. St. Louis, etc., R. Co., 133 Mo. App. 91, 112 SW 736. Complaint held insufficient to allow for damages because of presence of embankment, but sufficient after verdict to allow recovery for damages due to overflow caused thereby, treating it as permanent. Hart v. Wabash S. R. Co., 238 Ill. 336, 87 NE 367. Not necessary to call expert witnesses to show negligent construction. Morse v. Chicago, B. & Q. R. Co. [Neb.] 116 NW 859. Instruction considered and held not to impose absolute duty of preventing submerging of plaintiff's land by surface water, nor to require better protection than natural lay of land afforded before construction. Missouri, K. & T. R. Co. v. Macon [Tex. Civ. App.] 115 SW 847. Requested instruction as to nonliability if change in course of floodwater was not due to any act of company held covered. Id.

**52.** Landowner cannot enter onto abutting right of way and dig ditch for water discharged onto his land. Klopp v. Chicago, etc., R. Co. [Iowa] 119 NW 377.

**53.** Deed providing that all drains should be so bridged by culverts that flow of water should not be impeded requires that company should so maintain culvert as not to obstruct natural flow of water. St. Louis, etc., R. Co. v. Hardie [Ark.] 113 SW 31.

**54.** Lessee held liable for damages due to negligent original construction. Morse v. Chicago, B. & Q. R. Co. [Neb.] 116 NW 859.

**55.** Melendy v. Chicago, etc., R. Co., 132 Ill. App. 431.

**56.** Melendy v. Chicago, etc., R. Co., 132 Ill. App. 431; Atterbury v. Chicago, etc., R. Co., 134 Ill. App. 330.

**57.** Railroad is not bound to so construct its embankment as to allow overflow of creek to pass off in natural course, but, if it does not do so, it must exercise reasonable care to provide other channels sufficient to carry away water. St. Louis, etc., R. Co. v. Walker [Ark.] 117 SW 534. Evidence held to show that backing up of water was due to insufficient opening under bridge. Wilson v. Pennsylvania R. Co., 129 App. Div. 821, 113 NYS 1101. Bound to provide sufficient drain to avoid impounding water on adjoining land. Willis v. White & Co. [N. C.] 63 SE 942. Held negligence to construct culverts sufficient to carry water off lead ditches and then to turn tap ditches into lead ditches, thereby increasing water beyond capacity of culvert. Davenport v. Norfolk & S. R. Co., 148 N. C. 287, 62 SE 431. Where insufficiency of defendant's bridge over tributary stream caused ice, etc., to accumulate which caused water to back upon and turn overflow coming from main river into tributary before it reached latter stream, liability is to be determined by rules relating to obstructing natural water courses rather than surface water. Wilson v. Pennsylvania R. Co., 129 App. Div. 821, 113 NYS 1101. Where construction of roadbed, flooding adjoining land, constitutes a nuisance, permanent damages may be recovered therefor, company acquiring easement upon payment of judgment. Willis v. White & Co. [N. C.]

provide for periodical floods.[58] The duty is sometimes prescribed by statute.[59] Ordinarily, it must not interpose any obstruction which will interfere with navigation,[60] nor permit wreckage or driftwood to accumulate around its piers so as to do so.[61]

§ 9. *Sales, leases, contracts and consolidation.*[62]—See 10 C. L. 1382—The lease is determinative of the property leased [63] and of the rights of the parties thereunder.[64] Where a lease is terminated in the manner prescribed by its terms,[65] and the lessor acquires peaceable possession, an injunction will lie to protect such possession.[66] Upon the surrender of a leasehold, the fixtures pass to the lessor.[67]

*Duties and liabilities subsequent to sale or lease.*See 10 C. L. 1383—A purchaser is bound to perform obligations of vendor assumed as a consideration for the right of way,[68] especially where the deed is recorded,[69] and contract obligations of which it has actual or constructive knowledge,[70] but not unknown personal obligations.[71] The purchaser at a mortgage foreclosure must perform the obligations imposed by the decree.[72] In Arkansas the liabilities assumed by the purchaser must be en-

63 SE 942. Where bridge was sufficient except at times of high water, held that injury was not of permanent character, but new cause of action arose at each flooding. Hughes v. Chicago, B. & Q. R. Co. [Iowa] 119 NW 924.

58. Wilson v. Pennsylvania R. Co., 129 App. Div. 321, 113 NYS 1101. Must construct culvert sufficient to carry off floods reasonably to be anticipated. Hinton v. Atchison & N. R. Co. [Neb.] 120 NW 431.

59. Under Act 30th General Assembly, p. 65, c. 68, § 15, prohibiting obstructing or filling of drainage district ditch, railroad could not construct a bridge which would necessitate placing of piling or other obstructions herein. Mason City & Ft. D. R. Co. v. Wright County Sup'rs [Iowa] 116 NW 805.

60. Where company, having franchise to maintain bridge over river, proposes to construct new one on abutments of old, and it appears from plans of city that channel of river is to be changed so that old one will not be used for navigation, held that company will not be compelled to put in drawbridge. City of Buffalo v. Delaware, L. & W. R. Co., 126 App. Div. 125, 110 NYS 488. See Navigable Waters, 12 C. L. 958.

61. While railroad is not required to keep open space under its drawbridge over navigable stream free from obstructions when they accumulate without its fault, it is its duty to prevent accumulation of wreckage and drift wood around piers so as to interfere with navigation. Louisville & N. R. Co. v. Yarbrough [Fla.] 48 S 634.

62. **Search Note:** See notes in 6 C. L. 1206; 28 L. R. A. 231; 44 Id. 737; 45 Id. 271; 6 L. R. A. (N. S.) 787; 59 A. S. R. 554; 74 Id. 250; 2 Ann. Cas. 190; 4 Id. 999; 6 Id. 85.

See, also, Railroads, Cent. Dig. §§ 375-455; Dec. Dig. §§ 118-144; 5 A. & E. Enc. L. (2ed.) 747; 23 Id. 770; 17 A. & E. Enc. P. & P. 642.

63. Lease of "all of its railroad situated in state of California, known and designated as 'Southern Pacific Railroad of California,' with all its branches," etc., held not to include lines subsequently constructed or acquired. Johnson v. Southern Pac. R. Co. [Cal.] 97 P 520.

64. Where lease provides manner of termination, right of lessor to terminate in accordance therewith cannot be made to depend upon granting of favorable switching privileges. Chicago G. W. R. Co. v. Iowa Cent. R. Co. [Iowa] 119 NW 261.

65. Evidence of correspondence held to show 60 days' notice of intention to terminate and a demand to arbitrate purchase price in accordance with the terms of lease. Chicago G. W. R. Co. v. Iowa Cent. R. Co. [Iowa] 119 NW 261.

66. Chicago G. W. R. Co. v. Iowa Cent. R. Co. [Iowa] 119 NW 261.

67. Lessee not entitled to damages for same in condemnation under reservation in surrender of damages against city, since damages resulted from surrender and not from taking. In re New York, 125 App. Div. 393, 109 NYS 921. See, also, Fixtures, 11 C. L. 1477.

68. Purchaser at foreclosure must perform covenant with adjoining owner, made in consideration for right of way, to maintain fences and cattle passes, but not personal obligations of mortgagor. Munro v. Syracuse, etc., R. Co., 128 App. Div. 333, 112 NYS 938.

69. Maintenance of certain structures. Illinois Cent. R. Co. v. Davidson [Ky.] 115 SW 770.

70. Where way used under contract for right of way was clearly marked and evident, purchaser is charged with notice thereof. Forsythe v. Southern R. Co. [Ky.] 113 SW 85. Evidence held not to show that way under crossing was sufficiently used at time of sale to charge purchaser with notice thereof. Id.

71. Purchaser takes without liability for vendor's unsecured debts or unasserted and undetermined obligations for alleged trespasses of which it had no notice. Denver & S. F. R. Co. v. Hannegan, 43 Colo. 122, 95 P 343. Purchaser held not liable to abutter for damages caused by construction where it had no reason to suspect existence thereof. Id. Grantee is not liable in trespass for damage done by excavating, etc., by grantor. Buck v. Louisville & N. R. Co. [Ala.] 48 S 699.

72. Where judgment in foreclosure permitted purchaser to disavow within certain time any contract or rights thereunder recited as part of property sold, but which

forced within one year after notice of sale.[73] Grantor is not liable for injuries negligently inflicted by the grantee.[74]

Unless released by charter or statute,[75] a lessor is liable for acts of the lessee done in the performance of the public duties of the lessor,[76] and is civilly liable although the lease is void,[77] but not criminally unless the lease was made in contemplation of the offense.[78] The lessee is not liable for defaults of the lessor,[79] but is liable for its own violation of a continuing duty.[80]

*Contracts.* See 10 C. L. 1384—A railroad cannot so contract as to discriminate in the discharge of its duties as a carrier.[81] Contractual rights and obligations are determined by the terms of the controlling contract.[82] Where a construction con-

did not recite right of grantor of right of way to passes, purchaser was not bound to carry out covenant for passes. Munro v. Syracuse, etc., R. Co., 128 App. Div. 388, 112 NYS 938. Complaint based on liability attaching as successor of one primarily liable, which did not show that there had been a merger or negative fact that defendant had succeeded to property as purchaser at judicial sale, held insufficient. White v. Atlanta, B. & A. R. Co. [Ga. App.] 63 SE 234.

73. Notice required by Kirby's Dig. §§ 6587, 6588, providing that actions on liabilities of railroad assumed by a purchasing railroad shall be barred in one year "after notice" of sale is given by purchaser, held to be actual and not constructive. St. Louis, etc., R. Co. v. Batesville & Winerva Tel. Co. [Ark.] 110 SW 1047.

74. Murray v. Chespeake & O. R. Co. [Ky.] 115 SW 821.

75. Clinger's Adm'x v. Chesapeake & O. R. Co., 33 Ky. L. R. 86, 109 SW 315. Ky. St. 1903, § 769, authorizing leasing, held not to relieve lessor from liability for negligent operation by lessee. Id. Unless lease is made pursuant to statutory authority, lessor is not relieved from franchise obligations. Johnson v. Southern Pac. R. Co. [Cal.] 97 P 520.

76. Offner v. Erie R. Co., 140 Ill. App. 562; McCulloch v. Southern R. Co. [N. C.] 62 SE 1096. But not for acts outside of lease and in performance of public duties of lessor. McCulloch v. Southern R. Co. [N. C.] 62 SE 1096. Company permitting another company to use its tracks is liable for negligent operation of latter's trains. O'Bannion's Adm'r v. Southern R. Co., 33 Ky. L. R. 315, 110 SW 329. Entry of lessee which may be justified under charter of lessor, and which is in furtherance of its business, creates no liability at all. McCulloch v. Southern R. Co. [N. C.] 62 SE 1096. Lessor is liable for negligent killing of employe by lessee. Parker v. North Carolina R. Co. [N. C.] 64 SE 186.

77. Louisville R. Co. v. Com. [Ky.] 114 SW 343.

78. Lessor held not liable under Ky. St. 1903, § 795, for lessee's failure to provide separate accommodations for white and black races. Louisville R. Co. v. Com. [Ky.] 114 SW 343.

79. Lessee is not liable for failure of gateman to close gates where he is under exclusive control of lessor. Wills v. Atchison, etc., R. Co., 133 Mo. App. 625, 113 SW 713.

80. Lessee held liable for overflow due to inadequate provisions to carry off water. Smith v. Chicago, B. & Q. R. Co. [Neb.] 119 NW 669. Where defendant operated railroad constructed by another, it is not liable for a nuisance unless it had notice thereof. Nickey v. St. Louis, etc., R. Co. [Mo. App.] 116 SW 477. That train was being run under orders of another company whose track it was using does not relieve it from liability for negligent operation. Chicago, etc., R. Co. v. Stepp [C. C. A.] 164 F 785. Company running trains over track of another company under orders of latter's dispatcher is liable for injuries due to its negligence and no way attributable to orders of dispatcher. Hamble v. Atchison, etc., R. Co. [C. C. A.] 164 F 410.

81. Lease or license of land between tracks and river to logging or tie company held a discrimination, giving such company advantage in shipping ties. Hobart-Lee Tie Co. v. Stone [Mo. App.] 117 SW 604.

82. Under construction contract that materials which could not be "plowed" with specified plow should be considered "loose rock" in computing compensation, word "plowed" held to mean plowed with facility, and a mere "rooting up" of material, or cutting of shallow furrow, or such plowing as required men to ride on beam of plow, is not included. Indianapolis Northern Trac. Co. v. Brennan [Ind.] 87 NE 215. Under a contract for construction of railroad trestles, requiring contractor to furnish piling and to drive and cap it for 24 cents per lineal foot, caps to be furnished by company, contractor was not entitled to extra allowance for capping. Dalhoff Const. Co. v. Maurice [Ark.] 110 SW 218. Where contract for construction work at specified sum provided that company should have option of paying in stocks and bonds, and that, if commission "should not authorize an amount of bonds and stock" equal to such sum, contractor should accept such amount as it did allow in full satisfaction, he could not demand more than was allowed if commission was justified in denying a larger issue (United States & Mexican Trust Co. v. Delaware Western Const. Co. [Tex. Civ. App.] 112 SW 447), and nothing short of arbitrary action on part of commission would justify a resort to courts, and equity could not decree a lien on facts which would not warrant commission in authorizing a larger issue (Id.). Where final payment under terms of construction contract was to be made upon contractor rendering clear receipts from materialmen, etc., he is not entitled to interest from time of furnishing last item, where materialmen

tract calls for completion within a certain time, it is the duty of the company to perform its obligations so as to enable the contractor by reasonable diligence to timely complete the work,[83] and, where it makes the decision of its engineer final upon certain matters, such decision must be honestly made.[84] Where an assignee assumes a certain contract and agrees to indemnify the assignor against recovery for default, such obligation is not a "debt of the lessor" within a clause exempting the assignee from the debts of a lessor.[85] An assignee of a construction contract receiving money due the original contractor does not hold the same in trust for materialmen.[86]

*Consolidation.*See 10 C. L. 1384—While a consolidated corporation is usually regarded as a new corporation,[87] where the constituent corporations continue, the laws of the different states under which they are incorporated must be observed.[88] States may prohibit consolidation of competing line.[89]

§ 10. *Indebtedness, insolvency, liens and securities.*[90] *Mechanics' and materialmen's liens.*See 10 C. L. 1385—A lien can be had only where the work performed and the materials furnished [91] fall within the terms of the statute [92] and all statu-

were asserting claims which would become liens if established. Dalhoff Const. Co. v. Maurice [Ark.] 110 SW 218. Where construction contract required contractor to perform certain work and to discharge all liabilities against railroad except created by issuance of bonds and operating expenses, and provided that, if railroad discharged any obligations of construction company, cost thereof should be deducted, etc., held that liability for doing things required to be done by contractor was a debt of contractor, and upon insolvency of railroad, creditor could insist upon contractor discharging same before participating as a creditor (United States & Mexican Trust Co. v. Delaware Western Const. Co. [Tex. Civ. App.] 112 SW 447), and especially where contractor was in reality owner of railroad and used latter's credit in prosecuting work (Id.). Construction contract requiring work to be delivered free of labor or other liens, and bonds securing compliance with contractor's covenants, gave laborers and materialmen and assignees no rights. Fleming v. Greener [Ind.] 87 NE 719. Where directors of railroad company agreed to transfer all its stock to defendants in consideration of an agreement to electrify line and extend to certain point, and provision for extension is susceptible of two constructions, it will be construed in sense that defendants knew the directors understood it. Callanan v. Keeseville, etc., R. Co., 131 App. Div. 306, 115 NYS 779. Provision for extension in contract transfering stock construed in light of surrounding facts, and held to impose an absolute duty to extend and not merely to express wish. Id. Contract as to joint use of tracks construed. Missouri, etc., R. Co. v. Illinois T. R. Co., 133 Ill. App. 178.

**83.** It was duty of company to secure right of way, do the grading called for, and furnish material, so as to enable contractor by reasonable diligence to timely complete same, and contractor can recover damages for breach thereof. Indianapolis Northern Trac. Co. v. Brennan [Ind.] 87 NE 215.

**84.** Courts may be appealed to in case of fraud or gross or obvious mistake. Indianapolis Northern Trac. Co. v. Brennan [Ind.] 87 NE 215.

**85.** Where contract for delivery of cordwood on right of way is assigned by lessor road to lessee, the latter agreeing to indemnify lessor against recovery for its failure to perform its obligations, on being held on contract, lessor could recover of lessee who was primarily liable, such obligation not coming within clause exempting lessee from debts of lessor. Atlantic & N. C. R. Co. v. Atlantic & N. C. Co., 147 N. C. 368, 61 SE 185.

**86.** Furnishing materials, etc., to original contractor. Flemming v. Greener [Ind.] 87 NE 719.

**87.** Where length exceeded 100 miles, Laws 1895, p. 961, c. 1027, as amended, relating to mileage books, applies, although constituent companies were less than 100 miles long, and hence exempt. Parish v. Ulster & D. R. Co., 192 N. Y. 353, 85 NE 153.

**88.** Except as to matters to which consent of state is implied from authorization of consolidation. Pollitz v. Wabash R. Co., 167 F 145.

**89.** Mobile, etc., R. Co. v. Mississippi, 210 U. S. 187, 52 Law. Ed. 1016.

**90. Search Note:** See notes in 54 A. S. R. 400, 99 A. S. R. 252.

See, also, Railroads, Cent. Dig. §§ 456-710; Dec. Dig. §§ 145-213; 18 A. & E. Enc. L. (2ed.) 564; 23 Id. 797; 17 A. & E. Enc. P. & P. 637; 20 Id. 180.

**91.** Rendering of account for labor and material and approval thereof held sufficient proof that same were furnished. Naylor v. Lewiston & S. E. Elec. R. Co., 14 Idaho, 789, 96 P 573.

**92.** Under Laws 1899, lien may be filed to secure profits upon a contract where such profits are included in contract. Naylor v. Lewiston & S. E. Elec. R. Co., 14 Idaho, 789, 96 P 573. Charge for use of tools in construction work, for which company agrees to pay, is lienable. Id. Services performed as superintendent held lienable item. Id. Where owners of railroad right of way authorized contractors to put crew to work and agreed to pay actual cost of

tory conditions have been timely [98] performed.[94] The person claiming a lien must also be within the class designated by the statute.[95] The lien may be expressly waived,[96] and a provision in the contract of the contractor to that effect waives the lien as to all subcontractors.[97] The lien need not be claimed upon the entire property [98] and may be asserted and foreclosed against an interest less than a fee.[99] In an action to foreclose a lien for labor performed under a subcontractor, such subcontractor need not be made a party if the liability has been adjudicated.[1] Where the railroad is insolvent, the court must consider the rights of all parties.[2]

*Bonds and mortgages and priority of claims.* See 10 C. L. 1386—The terms of the bonds are determinative of the rights of the parties thereunder.[3] A provision in a bond giving an option to exchange for stock is a separate contract and not negotiable [4] and must be exercised before it expires,[5] but, if so exercised, the company is liable in damages for failure to deliver stock.[6] Where construction contractor is the owner of all the stock and therefore the owner of all property rights and franchise, he cannot burden the property and then share with bona fide bond purchasers.[7] Where an insolvent company is in default and its earnings are being diverted, bondholders may foreclose securities and have receiver appointed.[8] While a court in receivership has no general power to displace priorities, operating expenses [9] may be first paid,[10] and, likewise, such expenses have priority where the

labor and materials and sum for tools used and 20 per cent, and bill presented is audited and approved by company, it becomes account stated, and will support a lien. Id.

**93.** Where contract requires delivery of material f. o. b. the cars at a certain place, delivery to carrier at such place constitutes delivery so as to start period for perfecting lien. United States & Mexican Trust Co. v. Western Supply Co. [Tex. Civ. App.] 109 SW 377.

**94.** Even though material is furnished direct to railroad company, the giving of notice and the filing of contract with county clerk are necessary to perfect lien under Sayles' Ann. Civ. St. 1897, art. 3294. United States & Mexican Trust Co. v. Western Supply & Mfg. Co. [Tex. Civ. App.] 109 SW 377. Appointment of receiver does not interfere with nor excuse failure to comply with statutory steps necessary to fix lien. Id.

**95.** Burns' Ann. St. 1908, § 8305, held not to give subcontractors a lien. Cleveland, etc., R. Co. v. De Frees [Ind.] 87 NE 722.

**96.** Provision that "the completed work when offered to the company for acceptance shall be delivered free from all liens, claims, and encumbrances," held not too indefinite to constitute waiver on ground that it could be complied with and lien could thereafter attach upon giving of notice, since inchoate lien exists without notice. Brown Const. Co. v. Central Illinois Const. Co., 234 Ill. 397, 84 NE 1038.

**97.** No lien can be claimed by subcontractor under Hurd's Rev. St. 1905, c. 82, § 8, where contract of original contractor waives same. Brown Const. Co. v. Central Illinois Const. Co., 234 Ill. 397, 84 NE 1038.

**98.** Naylor v. Lewiston & S. E. Elec. R. Co., 14 Idaho, 789, 96 P 573.

**99.** Interest of debtor of whatever character may be sold. Naylor v. Lewiston & S. E. Elec. R. Co., 14 Idaho, 789, 96 P 573.

**1.** Robinson v. St. Louis, etc., R. Co. [Ark.] 113 SW 1008.

**2.** Proceeding to establish lien for construction work is an appeal to equitable powers of court. United States & Mexican Trust Co. v. Delaware Western Const. Co. [Tex. Civ. App.] 112 SW 447.

**3.** Company after issuing first mortgage bonds issued income bonds to draw such interest, not exceeding 6 per cent, as earnings might pay after payment of operating expenses, etc., and interest on "such other bonds * * * as shall from time to time be outstanding" held that interest on income bonds was subordinate to interest on all outstanding bonds and not merely to interest on first mortgage bonds. Yazoo & M. V. R. Co. v. Martin [Miss.] 47 S 667. Affirmed on suggestion of error. Yazoo & M. V. R. Co. v. Martin [Miss.] 48 S 739.

**4.** Lisman v. Milwaukee, etc., R. Co., 161 F 472.

**5.** Lisman v. Milwaukee, etc., R. Co., 161 F 472. Bond gave holder option to exchange for stock within 10 days after declaring of any dividend. Held that it must be assumed that parties contracted with reference to statute giving company right to sell out to another and, when sale was effected and dividend ceased, option expired. Lisman v. Milwaukee, etc., R. Co., 161 F 472; Welles v. Chicago & N. W. R. Co., 163 F 330.

**6.** No right to damages in absence of proof that value of stocks exceeded value of bonds. Lisman v. Milwaukee, etc., R. Co., 161 F 472.

**7, 8.** United States & Mexican Trust Co. v. Delaware Western Const. Co. [Tex. Civ. App.] 112 SW 447.

**9.** Bills for advertising road, its trains, etc., contracted by committee, held legitimate operating expenses. Scott v. Queen Anne's R. Co. [C. C. A.] 162 F 828.

**10.** Merchants' L. & T. Co. v. Chicago R. Co. [C. C. A.] 158 F 923.

bondholders assume control.[11] A court may, in its discretion, order a sale in advance of a determination of the rights of parties claiming liens where it appears undesirable to continue operation under receivership.[12] Where a court decreeing a foreclosure retains jurisdiction to enforce its decree, it may appoint a special receiver where necessary [13] and make such orders as the situation demands.[14]

§ 11. *Duties and liabilities incident to operation of the road. A. Obligation to operate and statutory regulations.*[15]—See 10 C. L. 1387—Whether a company can be compelled to operate to a particular point depends upon whether its charter requires or merely authorizes it so to do.[16] The enactment of statutes and ordinance for public protection does not exclude the common law obligation to exercise due care.[17] Statutes regulating the operation of railroads must comply with constitutional requirements as to title,[18] and state statutes must not amount to a regulation of interstate commerce.[19] Statutes and ordinances sometimes fix the points at which trains shall be stopped.[20] Acceptance of privileges under an ordinance binds the railroad to perform its obligations.[21] A violation of such regulatory statute [22] usually subjects the company to a penalty [23] and gives rise to a cause of action for any injury intended to be avoided thereby.[24]

*Injuries to adjacent owners from smoke, noise, etc.*See 10 C. L. 1387—One whose property does not adjoin the right of way cannot recover for inconvenience arising

**11.** In view of situation, held that management by committee appointed by bondholders and stockholders was virtually that of the bondholders, and that indebtedness incurred in operating road should have priority of mortgage debt. Scott v. Queen Anne's R. Co. [C. C. A.] 162 F 828.

**12.** Bowling Green Trust Co. v. Virginia Passenger Power Co., 164 F 753. In consolidated suits to foreclose various liens, a plan of reorganization proposed by certain bondholders may be considered upon question of ordering sale in advance of determination of rights and on right of bondholders to intervene. Id.

**13.** Court, decreeing that purchaser should pay all debts incurred by receivers and superior to mortgage, may appoint special receiver against whom such claims could be asserted with directions to take possession of sufficient property to pay judgment. Southern R. Co. v. Townsend [C. C. A.] 161 F 310.

**14.** Where purchaser at foreclosure agreed to pay all indebtedness incurred by receivers and adjudged superior to mortgage, subsequent order requiring all claimants to present claims before special master within fixed time does not apply to claims in suit before same court. Southern R. Co. v. Townsend [C. C. A.] 161 F 310.

**15. Search Note:** See notes in 11 C. L. 652; 24 L. R. A. 564; 41 Id. 422; 3 L. R. A. (N. S.) 141; 13 Id. 320; 26 A. S. R. 500; 37 Id. 321. See, also, Railroads, Cent. Dig. §§ 711-788; Dec. Dig. §§ 214-255; 18 A. & E. Enc. L. (2ed.) 564; 23 Id. 727; 29 Id. 141.

**16.** If such operation would not be remunerative. Selectmen of Amesbury v. Citizens' Elec. St. R. Co., 199 Mass. 394, 85 NE 419.

**17.** Speed ordinance. Smith v. San Pedro, etc., R. Co. [Utah] 100 P 673.

**18.** Full Crew Act. March 25, 1907, Acts 30th Leg. p. 92, c. 41, entitled "An act to protect the lives and property of traveling public and employes," requiring use of full crews and defining what shall constitute full crew, held not violative of Const. art 3, § 35, providing that bills shall contain but one subject which shall be expressed in title. Missouri, K. & T. R. Co. v. State [Tex. Civ. App.] 109 SW 867.

**19.** Order for stops held void. Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 Law. Ed. 230. See Commerce, 11 C. L. 643.

**20.** Ordinances construed as not requiring stopping of trains at certain points. People v. Aurora, E. & C. R. Co., 141 Ill. App. 82.

**21.** Chicago T. T. R. Co. v. Chicago, 140 Ill. App. 591.

**22.** Shannon's Code Tenn. §§ 1574, 1575, requiring company to always maintain some one as a look out, applies to train being backed on passing track, and, where it is so long that engineer cannot see and no other lookout is maintained, company is liable for injury. Cincinnati, etc., R. Co. v. Davis [C. C. A.] 161 F 334. Kirby's Dig. Ark. § 6607, providing that "it is the duty of all persons running trains * * * to keep a constant lookout for persons and property on track," does not without more, render company liable where lookout is kept and person is not seen. Springer v. St. Louis S. W. R. Co. [C. C. A.] 161 F 801.

**23.** Where company admitted two distinct violations of Full Crew Act, March 25, 1907, § 2, by operating freight train with less than full crew, relying on unconstitutionality of act, held not abuse of discretion to assess maximum penalty. Missouri, K. & T. R. Co. v. State [Tex. Civ. App.] 109 SW 867.

**24.** Ky. St. 1903, § 782, requiring spark arresters, held not for protection against cinders small enough to enter human eye. Cincinnati, etc., R. Co. v. Baxter, 33 Ky. L. R. 305, 110 SW 243.

from noise [25] but may recover for actual trespass by smoke and cinders unless carried by unusual winds.[26] It has been said that the injury must be different in kind from that suffered by the public generally.[27] Ordinarily, a company is not liable for injuries incident to a careful operation of its road,[28] and, where a railroad is lawfully using the street for making up trains, etc.,[29] the noise and vibrations caused thereby are not such a nuisance as may be prohibited by injunction [30] but liability therefore may be imposed by statute or constitution.[31]

*Equipment of cars.*[See 10 C. L. 1387]—The Federal Safety Appliance Act is valid [32] and prohibits the moving [33] of any interstate car or intrastate car used in connection with other cars carrying interstate commerce,[34] unless equipped at both ends [35] with automatic couplers in working order [36] which may be uncoupled without going between the cars.[37] The act imposes an absolute duty to equip the cars with the required appliance and to keep them in working order.[38] A railroad is under no obliga-

**25.** Illinois Cent. R. Co. v. Elliott, 33 Ky. L. R. 537, 110 SW 817.

**26.** Illinois Cent. R. Co. v. Elliott, 33 Ky. L. R. 537, 110 SW 817. Evidence held to sustain verdict for plaintiff. Wabash R. Co. v. Kiely, 137 Ill. App. 525.

**27.** Danville, etc., R. Co. v. Tidrick, 137 Ill. App. 553.

**28.** Not liable for injuries, such as noise, vibrations and dirt, caused without negligence. Wunderlich v. Pennsylvania R. Co. [Pa.] 72 A 247.

**29.** Legislature may authorize use of streets upon just compensation. Galveston, etc., R. Co. v. De Groff [Tex. Civ. App.] 110 SW 1006.

**30.** Galveston, etc., R. Co. v. De Groff [Tex. Civ. App.] 110 SW 1006. Company occupying street under municipal authority is not liable to abutter for incidental injuries but is liable if it cuts off access. Foudry v. St. Louis, etc., R. Co., 130 Mo. App. 104, 109 SW 80.

**31.** Where railroad acquired charter at time when constitution required compensation only for property taken, subsequent constitutional provision requiring payment for property "damaged" is not invalid as taking property without due process of law in so far as it allows private persons to recover for injury due to private nuisance in manner of operating. Alabama & V. R. Co. v. King [Miss.] 47 S 857.

**32.** Safety Appliance Act held within power conferred on Congress and not violative of subd. 3, § 8, art. 1 of Const. (United States v. Southern R. Co., 164 F 347), nor of 10th amendment (Id.). Safety Appliance Act of March 2, 1893, is not rendered unconstitutional by the unconstitutionality of Amendatory Act of March 2, 1903, which merely construes and applies former act. United States v. Wheeling & L. E. R. Co., 167 F 198.

**33.** Length of haul is immaterial. United States v. Southern Pac. Co., 167 F 699. Moving of foreign car loaded with interstate commerce from exchange track to main track to be delivered held violation though car was switched back. Chicago, etc., R. Co. v. U. S. [C. C. A.] 165 F 423. Complaint held not defective for showing how far car was hauled or actual use of defective coupler. United States v. Denver & R. G. R. Co. [C. C. A.] 163 F 519.

**34.** Intrastate car with defective handirons is a violation of Safety Appliance Act if used in connection with interstate car. United States v. Illinois Cent. R. Co., 166 F 997. Mere use in same train unless coupling with interstate car is not a use in "connection" therewith. Id. Safety Appliance Act applies to empty car forming part of train moving interstate traffic. United States v. Louisville & N. R. Co., 162 F 185. Movement of empty car on own trucks from one state to another in train carrying interstate commerce, with defective coupler, held violation. Chicago, etc., R. Co. v. U. S. [C. C. A.] 165 F 423. Car regularly used in movement of interstate commerce and in train carrying interstate commerce is within act, though empty at time United States v. Wheeling L. E. R. Co., 167 F 198.

**35.** United States v. Philadelphia & R. R. Co., 160 F 696; United States v. Atchison, etc., R. Co., 167 F 696; United States v. Southern Pac. Co., 167 F 699.

**36.** Coupler at each end of car must be in operative order and it is immaterial that defective coupler will couple with one in good order. United States v. Denver & R. G. R. Co. [C. C. A.] 163 F 519.

**37.** United States v. Louisville & N. R. Co., 162 F 185. Act is violated if it is necessary, in opening knuckle when preparing to make coupling, for man to place body, arm, or leg, in dangerous position. United States v. Nevada County N. G. R. Co., 167 F 695; United States v. Southern Pac. Co., 167 F 699. Must equip with coupler which will couple automatically by impact. United States v. Atchison, etc., R. Co., 167 F 696; United States v. Southern Pac. Co., 167 F 699.

**38.** United States v. Denver & R. G. R. Co. [C. C. A.] 163 F 519; United States v. Atchison, etc., R. Co. [C. C. A.] 163 F 517; United States v. Erie R. Co., 166 F 352. Exercise of due care is no defense. United States v. Philadelphia & R. R. Co., 162 F 403; Id., 162 F 405. No defense that coupling became defective or that grab iron was lost so recently before date fixed by petition as to make it impossible to have repaired same. United States v. Wheeling & L. E. R. Co., 167 F 198.

**Contra:** Safety Appliance Act construed to only require reasonable care to maintain coupler in good condition and not to impose absolute duty. St. Louis & S. F. R.

tion to receive a car from another in a defective condition,[39] and is liable although an employe deliberately puts the car in such condition.[40] The federal act does not exclude state statutes on the same subject.[41] The Florida statute relative to the equipment of flat cars is inapplicable to cars of another company being temporarily used.[42] An action to recover the penalty prescribed for a violation of the Safety Appliance Act is not a criminal procedure,[43] and the violation need not be proven beyond a reasonable doubt.[44] The complaint need not negative the proviso exceptions to the act.[45]

*Speed regulations.*See 10 C. L. 1388—A maximum speed limit is prescribed in some towns and cities,[46] and a violation of such limit is negligence.[47] Under a statute making a company liable for any injury by trains when running in excess of speed limit, the liability depends upon the speed at the time the danger is discovered or would have been discovered had the train been running at a lawful rate, and not upon the speed at the time of impact.[48]

*Obstructions at crossings.*See 8 C. L. 1616—In many states the blocking of a crossing for a prescribed time is a penal offense,[49] rendering the company liable to a penalty [50] to be recovered by the traveler [51] delayed thereby first bringing suit.[52] The

Co. v. Delk [C. C. A.] 158 F 931. Where car was at rest in yards for an hour and carrier had opportunity to discover defect, it is liable if it thereafter moves same whether defect could have been discovered by reasonable care or not. United States v. Philadelphia & R. Co., 160 F 696. Duty to repair upon discovering defect if means are at hand otherwise at nearest repair point. United States v. Atchison, etc., R. Co., 167 F 696; United States v. Southern Pac. Co., 167 F 699. Must establish reasonable repair points along line and keep suitable means thereat to make repairs. Id.

**39.** It receives at own risk. United States v. Southern Pac. Co., 167 F 699.

**40.** United States v. Southern Pac. Co., 167 F 699.

**41.** The state law, requiring that all locomotives and cars used in moving intrastate traffic shall be equipped with automatic couplers, is not in conflict with the federal act making the same requirement as to locomotives and cars engaged in moving interstate traffic, but rather the state law is supplementary to the federal law and in harmony with it. Detroit, T. & L. R. Co. v. State, 11 Ohio C. C. (N. S.) 482; State v. Lake Shore & M. S. R. Co., 7 Ohio N. P. (N. S.) 571; State v. Detroit, T. & I. R. Co., 7 Ohio N. P. (N. S.) 541. It is not the train, but the car complained of, that is the unit which these statutes seek to control, and the fact that a large proportion of the cars in a train are loaded with interstate traffic does not prevent the application of the state statute to a car or cars in the same train which are loaded with state traffic; not is it the common use, but rather it is the present use of a car which controls, and an allegation that the car complained of is commonly used in interstate traffic can not save it from the operation of the state statute when at the time alleged it was being used within the state for the transportation of state traffic. State v. Detroit, T. & I. R. Co., 7 Ohio N. P. (N. S.) 541. Proceedings under the Ohio Automatic Coupler Act are civil in their nature, and guilty knowledge and intention are therefore not essential elements of the offense. State v. Lake Shore & M. S. R. Co., 7 Ohio N. P. (N. S.) 571

**42.** Gen. St. 1906, § 2864, making it duty of a railroad company to equip all flat cars belonging to such carrier with standards, railings, etc. Florida R. Co. v. Adams [Fla.] 47 921.

**43.** United States v. Louisville & N. R. Co., 162 F 185. Action for penalty for violation of Safety Appliance Act is civil suit and reviewable at instance of United States. United States v. Louisville & N. R. Co. [C. C. A.] 167 F 306.

**44.** United States v. Louisville & N. R. Co., 162 F 185. Government need make out case only by clear and satisfactory evidence. United States v. Philadelphia R. R. Co., 160 F 696. Only need prove violation by preponderance of evidence. United States v. Nevada County N. G. R. Co., 167 F 695.

**45.** Defensive matter. United States v. Denver & R. G. R. Co. [C. C. A.] 163 F 519.

**46.** Evidence of fireman held to show that train not running at speed in excess of ordinance limit at time of striking deceased, though another witness testified that it was going in excess of 20 miles when it passed him, there being evidence of a slowing down in mean time. Holland v. Missouri Pac. R. Co., 210 Mo. 338, 109 SW 19.

**47.** St. Louis & S. F. R. Co. v. Summers [Tex. Civ. App.] 111 S. W. 211.

**48.** Liability under Code 1906, § 4043. Louisville & N. R. Co. v. Dick [Miss.] 48 S 410.

**49.** Statute making company blocking crossing liable to traveler in specific sum partakes of nature of penal statute and should be strictly construed. Tracy v. New York. etc., R. Co. [Conn.] 72 A 156 Recovery cannot be had under Gen. St. 1902, § 2039, for blocking crossing by "standing" cars for five minutes by evidence that it was blocked for 11 minutes by standing and moving cars. Id.

**50.** Gen. St. 1902, §§ 2040, 3891, 3893, provide a remedy for obstructing of crossing

obstructing of a street in violation of statute is per se negligence,[53] and renders the company liable for resulting damages.[54]

*Stops at railroad crossings.*[See 10 C. L. 1369]—Trains are frequently required to stop at crossing of the tracks of another road unless safety devises are installed.[55]

*Signals at crossings.*—Statutes or ordinances usually require crossing signals.[56] A failure to give statutory crossing signals usually renders the company liable to a penalty,[57] and to damages in case of injury.[58]

*Conveniences at depots.*[See 10 C. L. 1389]—Under the statutes of some states, railroads must keep their depots open for a fixed period before and after the arrival and departure of trains,[59] and must provide wholesome drinking water thereat.[60]

(§ 11) *B. General rules of negligence and contributory negligence.*[61]—[See 10 C. L. 1390]—Ordinarily a railroad company owes reasonable care to avoid injury,[62] but, as in negligence cases generally, no liability arises unless the duty violated is owed to the party injured.[63] The negligence complained of must be the proximate cause of the injury sued for,[64] although it need not be the sole proximate cause,[65]

by both standing cars and by moving cars, but § 2039 provides remedy for only the first. Tracy v. New York, etc., R. Co. [Conn.] 72 A 156. Legislature may fix sum as penalty for blocking crossing without regard to actual damage, provided it is reasonable. Id.

**51.** Passenger in street car is a "traveler" within Gen. St. 1902, § 2039, providing penalty, for blocking crossing, to be recovered by traveler delayed. Tracy v. New York, etc., R. Co. [Conn.] 72 A 156.

**52.** If Gen. St. 1902, § 2039, providing penalty, for blocking crossing, to be recovered by traveler prevented from crossing, authorizes but a single recovery, one first prosecuting suit to final hearing would be entitled thereto. Tracy v. New York, etc., [Conn.] 72 A 156.

**53.** Company obstructing streets in violation of Hurd's Rev. St. 1908, c. 114, § 77. Houren v. Chicago, etc., R. Co., 236 Ill. 620, 86 NE 611.

**54.** Evidence of conditions surrounding fire held to warrant finding that it would not have spread to adjoining building had fire department not been delayed. Houren v. Chicago, etc., R. Co., 236 Ill. 620, 86 NE 611.

**55.** Where interlocking device is maintained at crossing, within Code 1906, § 4896, authorizing the running over crossings without stopping where devise is in use, it is company's duty to keep in safe condition. Gulf & S. I. R. Co. v. Barnes [Miss.] 48 S 823.

**56.** Ordinance requiring ringing of bell held valid. Chicago Junction R. Co., 139 Ill. App. 53. Ordinance requiring signals held not to apply to manufacturer maintaining spur track on his premises. Western Steel Car & Foundry Co. v. Nowalanlak, 135 Ill. App. 137.

**57.** Penalty for failure to give statutory crossing signal is recoverable in civil action only, and, where criminal prosecution is instituted, it must be treated as civil suit. Louisiana & A. R. Co. v. State [Ark.] 116 SW 193. Indictment, treated as civil complaint, held insufficient on demurrer after overruling of motion to make more definite, where it failed to allege place or train which failed to give same. Id.

**58.** See post subd. G.

**59.** Statute requiring depot to be kept open before and after arrival and departure of trains is for convenience of beginning or completing journey, and does not apply to through passengers. St. Louis S. R. Co. v. Texas [Tex. Civ. App.] 112 SW 797.

**60.** Conceding that Act April 23, 1903, requiring railroads to keep wholesome drinking water at waiting rooms is invalid, Act March 31, 1899, covering same matter, then remains in force. St. Louis, etc., Co. v. State [Ark.] 111 SW 260.

**61. Search Note:** See notes in 18 L. R. A. 63, 154; 22 Id. 306; 69 Id. 523; 5 A. S. R. 313; 58 Id. 147; 2 Ann. Cas. 861; 3 Id. 258; 6 Id. 869; 8 Id. 120, 988; 10 Id. 350.

See, also, Railroads, Cent. Dig. §§ 789-1761; Dec. Dig. §§ 256-488; 18 A. & E. Enc. L. (2ed.) 564; 23 Id. 727, 763.

**62.** Company held not negligent as to pedestrian struck while walking along side of track by bucket attached to side of freight car where it did not project farther than wider cars in use and where railroads customarily so carried bucket. Bandekow v. Chicago, B. & Q. R. Co., 136 Wis. 341, 117 NW 812. Where decedent was in place of safety when he discovered approaching train, fact that he became confused and attempted to pass in front does render company liable in absence of showing that it was cause of his confusion. Baltimore & O. S. W. R. Co. v. Abegglen, 41 Ind. App. 603, 84 NE 566. For duty owed and liability to persons and property under particular situations, see various subdivision of this section.

**63.** Violation of duty owed to employes making coupling created no liability as to third person in car. Louthian v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 111 SW 665. Where facts disclosed do not show a duty to child injured, there can be no recovery. International & G. N. R. Co. v. Vallejo [Tex.] 113 SW 4. Instruction that it was duty of defendant to warn "all" persons approaching crossing of backing train held objectionable. Louisville & H. R. Co. v. Veach's Adm'r [Ky.] 112 SW 869.

**64. Must be proximate cause.** Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808;

Kujawa v. Chicago, etc., R. Co., 135 Wis. 562, 116 NW 249. Failure to ring bell or sound whistle. Texas Cent. R. Co. v. Horn [Tex. Civ. App.] 115 SW 911; Southern R. Co. v. Daves, 108 Va. 378, 61 SE 748. Under Rev. St. 1899, § 1102 (Ann. St. 1906, p. 938), failure to give statutory crossing signals is prima facie proximate cause of injury at crossing. Day v. Missouri, K. & T. R. Co., 132 Mo. App. 707, 112 SW 1019. Proof of negligence as to speed and as to failure to keep lookout held not to authorize finding for plaintiff in absence of proof that it was proximate cause of injury. Chicago, etc., R. Co. v. Latham [Tex. Civ. App.] 115 SW 890. Instruction denying recovery if plaintiff failed to look held erroneous as ignoring proximate cause. St. Louis S. W. R. Co. v. Shelton [Tex. Civ. App.] 115 SW 877. Where there is no evidence to show that horse was seriously injured, recovery cannot be had where it appears that he was shot. Denver & R. G. R. Co. v. Brennaman [Colo.] 100 P 414.

**Held proximate cause:** Failure to give signal at crossing, of injury caused by team becoming frightened at proximity of train. Texas & P. R. Co. v. Stoker [Tex. Civ. App.] 115 SW 910. Maintenance of defective bridge, of death of one on track trying to stop train before it struck team stalled on bridge. Thompson v. Seaboard Air Line R. Co., 81 S. C. 333, 62 SE 396. Negligence in permitting broken lug in door carriage to car, causing door to jump track, of injury caused by falling of door. Pennsylvania R. Co. v. Hummel [C. C. A.] 167 F 89. Negligent change of signals, of injury caused by collision. Cleveland, etc., R. Co. v. Gossett [Ind.] 87 NE 723. Evidence that team became frightened when train was about 68 feet away held to show that it was cause of accident. Sarles v. Chicago, etc., R. Co. [Wis.] 120 NW 232. Where failure to give signals caused plaintiff to approach nearer than he otherwise would have and to a point where team took fright and ran into train. Kujawa v. Chicago, etc., R. Co., 135 Wis. 562, 116 NW 249. Where team became stalled at crossing by wheel dropping into a mud hole and driver was hit by flying sack as he was running away, finding that failure to comply with Rev. St. 1899, § 1103, requiring that company cover crossing with macadam or gravel, was proximate cause, sustained. Day v. Missouri, K. & T. R. Co., 132 Mo. App. 707, 112 SW 1019. Where, because of delay of fire department caused by unlawfully blocking street, fire spread to adjoining building, held that obstructing of street was intervening proximate cause of distruction of latter building. Houren v. Chicago, etc., R. Co., 236 Ill. 620, 86 NE 611, afg. 139 Ill. App. 116. Where horse took fright at car standing partly in street and shied into ditch, throwing plaintiff out, negligence in so leaving car in street and in constructed ditch held proximate cause of injury, in absence of intervening contributory negligence. Missouri, K. & T. R. Co. v. Davis [Tex. Civ. App.] 116 SW 423.

**Proximate cause for jury:** Where train approached team stalled at crossing without giving signals, and driver, on discovering it nearby, fled, but was hit by flying sack. Day v. Missouri, K. & T. R. Co., 132 Mo. App. 707, 112 SW 1019. Where plaintiff testified that he was just about to step off track when he was struck, whether speed in excess of ordinance was proximate cause of injury. St. Louis S. W. R. Co. v. Cockrill [Tex. Civ. App.] 111 SW 1092. Whether failure to give statutory signals was proximate cause of death of one killed while attempting to stop train and prevent collision with team stalled at crossing, in that it led him into situation. Thompson v. Seaboard Air Line R. Co., 81 S. C. 333, 62 SE 396.

**Not proximate cause:** Failure to blow whistle or ring bell or have headlight, where decedent was struck by rear cars of long freight train. Baltimore & O. R. Co. v. State, 107 Md. 642, 69 A 439. Where headlight was sufficiently strong to disclose colt as soon as it went upon track, but it was too late to stop, insufficiency of headlight was not cause of injury. Wallace v. Oregon Short Line R. Co. [Idaho] 100 P 904. Failure to give statutory signals, where pedestrian knew of approaching train. Southern R. Co. v. King [C. C. A.] 160 F 332; Baltimore, etc., R. Co. v. Abegglen, 41 Ind. App. 603, 84 NE 566; Stearns v. Boston & M. R. Co. [N. H.] 71 A 21. Was racing to get to depot. Griskell v. Southern R. Co., 81 S. C. 193, 62 SE 205. Failure to give statutory signals, where other signals given actually warned decedent or were sufficient to have warned her had she been exercising due care. Chesapeake & O. R. Co. v. Hall's Adm'r [Va.] 63 SE 1007. Failure to erect signboard and blow whistle, where plaintiff had crossed in safety but was injured while attempting to hold horse by bit while train went by. Laborde v. Louisiana R. & Nav. Co., 121 La. 47, 46 S 97. Failure to maintain gates, where boy had passed safely over crossing and was injured while attempting to catch onto train. Mehalek v. Minneapolis, etc., R. Co., 105 Minn. 128, 117 NW 250. Violation of speed ordinance, where deceased stepped from place of safety to place of danger so suddenly that injury could not have been avoided if train had been going at lawful rate. King v. Wabash R. Co., 211 Mo. 1, 109 SW 671. Negligent speed in violation of ordinance, where train had slowed to speed limit before striking decedent. Holland v. Missouri Pac. R. Co., 210 Mo. 338, 109 SW 19. Where it does not appear that cinder which penetrated into plaintiff's eye was large enough to have been arrested by a spark arrester, such accident is not a probable result of failure to provide arrester. Cincinnati, etc., R. Co. v. Baxter, 33 Ky. L. R. 305, 110 SW 248. Where train was so near at time trainmen discovered traveler that application of brakes would not have avoided collision, it is immaterial that they did not apply them at once. Stearns v. Boston & M. R. Co. [N. H.] 71 A 21. Defective ratchet on brake which decedent was operating held not to have increased danger or contributed to injury caused by derailment. Derrickson's Adm'r v. Swann-Day Lumber Co. [Ky.] 115 SW 191. Absence of headlight, where decedent could have clearly seen train had he looked and where it would not have warned engineer of peril in time to stop. Strickland v. Atlantic Coast Line R. Co. [N. C.] 63 SE 161. Failure to send back flagman, where rear train saw train standing on track when 1½ miles distant. Chicago, etc., R. Co. v. Lacy [Kan.] 97 P 1025. Placing of sand pile in adjacent lot, thereby at-

nor is it necessary that defendant should have foreseen the particular injury sustained,[66] provided it should have reasonably anticipated some injury from its negligence.[67] The failure of a third party owing no duty to affirmatively act cannot be relied upon as an intervening cause.[68] Where defendant negligently creates a situation of apparent peril, it is liable for injury sustained by plaintiff in attempting to escape therefrom though in fact no danger exists.[69] Railroad is not liable for acts of its servants beyond the scope of their authority and not in the performance of their duties,[70] and the doctrine of "discovered peril" is inapplicable.[71] A rule prohibiting a specific act, however, is no defense if the employe acts in the discharge of his duty.[72] A car company engaged with a railroad company in operating fruit cars[73] is liable to a brakeman for a negligent[74] latent defect in the car.[75]

Except where the doctrine of comparative negligence obtains,[76] negligence[77] on

tracting children to vicinity of tracks, held to have nothing to do with injury to one attempting to board moving car. Swartwood's Guardian v. Lainsville & N. R. Co., 33 Ky. L. R. 785, 111 SW 305. Where deceased stepped immediately in front of engine, his negligence, and not prior negligence of company, was proximate cause of injury. Sutton v. Lee Logging Co., 121 La. 557, 46 S 649.

**65.** Instruction that plaintiff could not recover unless failure to ring bell or excessive speed was cause of team taking fright held properly refused as ignoring liability, if it was concurring cause proximately contributing. St. Louis S. W. R. Co. v. Garber [Tex. Civ. App.] 111 SW 227.

**66.** Chicago, etc., R. Co. v. Stepp [C. C. A.] 164 F 785.

**67.** Held that company unlawfully blocking street should foresee delay to fire apparatus, and hence greater damage by fire. Houren v. Chicago, etc., R. Co., 236 Ill. 620, 86 NE 611. Where train standing on crossing is opened to permit team to pass, held that trainmen should have foreseen physical injury from fright by sudden closing while team was passing (St. Louis S. W. R. Co. v. Murdock [Tex. Civ. App.] 116 SW 139), and held that negligence was proximate cause thereof rather than physical condition of plaintiff (Id.). Where defendant could not reasonably anticipate that one desiring information of freight agent would leave office and follow him into car, negligence in making coupling, resulting in injury to him, is not proximate cause thereof. Louthian v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 111 SW 665.

**68.** Failure of policemen to uncouple cars and let them open at crossing by running down decline held not to relieve company from liability for damages arising from delay of fire department. Houren v. Chicago, etc., R. Co., 236 Ill. 620, 86 NE 611.

**69.** Jumped from bridge to escape apparent collision, although in fact train could have stopped before striking him (Texas Midland R. Co. v. Byrd [Tex. Civ. App.] 110 SW 199), and although he acted imprudently in jumping (Id.).

**70.** Not liable for injury caused by throwing of coal from freight car by yard master in violation of rule. St. Louis, etc., R. Co. v. Lavendusky [Ark.] 113 SW 204.

**71.** Doctrine of discovered peril has no application to injury caused by yard master throwing coal, he acting beyond scope of his authority. St. Louis, etc., R. Co. v. Lavendusky [Ark.] 113 SW 204.

**72.** Rule prohibiting employes from placing torpedoes on track near station does not relieve company unless employe acted willfully or not in furtherance of any duty within the scope of his authority. Rhinesmith v. Erie R. Co. [N. J. Err. & App.] 72 A 15.

**73.** Evidence of relations between Continental Fruit Express and railroads held to sustain finding that it was engaged with railroad in operation of fruit cars. Continental Fruit Exp. v. Leas [Tex. Civ. App.] 110 SW 129.

**74.** Evidence held to authorize finding of negligence in attaching handholds on freight cars with lag screws instead of nuts and bolts, although Master Car Builders' Association authorizes use of lag screws. Continental Fruit Exp. v. Leas [Tex. Civ. App.] 110 SW 129.

**75.** Continental Fruit Exp. v. Leas [Tex. Civ. App.] 110 SW 129.

**76.** Laws 1907, p. 491, c. 595, abrogating defense of contributory negligence in certain cases, has no application to cause of action accruing before its passage. Clemons v. Chicago, etc., R. Co., 137 Wis. 387, 119 NW 102. In Tennessee, plaintiff's negligence is no defense, but goes only in mitigation of damages. Cincinnati, etc., R. Co. v. Davis [C. C. A.] 161 F 334. Instruction that if defendant was negligent plaintiff could recover, but amount would be reduced in proportion to amount of negligence of plaintiff, held not erroneous, as not taking into account relative negligence. Alabama G. S. R. Co. v. Hardy [Ga.] 62 SE 71.

**77.** One who voluntarily takes a risk so obvious that the taking thereof is a failure to exercise ordinary care cannot hold another for injuries resulting therefrom. Southern R. Co. v. Hogan [Ga.] 62 SE 64.

**Negligence for jury:** In going in front of car to draw water instead of drawing from side of car. Louisiana & T. Lumber Co. v. Brown [Tex. Civ. App.] 109 SW 950. Plaintiff held not negligent per se in being on track in effort to stop train and prevent injury to team stalled at crossing, and in remaining there until struck, being confused by bright headlight. Thompson v. Seaboard Air Line R. Co., 81 S. C. 333, 62 SE 396.

**Held negligent:** Believing that approaching train was his, attempting to cross track ahead of it without stopping after crawling

the part of plaintiff proximately contributing to the injury [78] will defeat recovery [79] unless the defendant is guilty of willful or wanton negligence,[80] or after discovering [81] and realizing [82] plaintiff's perilous position,[83] defendant could, by the means at

between cars standing on adjoining track. Griskell v. Southern R. Co., 81 S. C. 193, 62 SE 205. Special finding that accident would have been averted if plaintiff had stopped "instantly" when he saw cars, but that he could not stop instantly, is not inconsistent with general verdict for plaintiff, in effect finding that he did not discover train in time to avoid injury. Antonian v. Southern Pac. Co. [Cal. App.] 100 P 877. Finding for plaintiff based on finding that he did not see train in time to avoid it held consistent with instruction that if plaintiff by stopping instantly at any time when train was "in view of him," could have avoided injury, he was negligent. When "in view of him" is construed to mean actual sight of. Id. Where jury find that plaintiff did not see train in time to avoid injury, and that he exercised ordinary care in approaching crossing, they are not required to find for defendant, under instruction that, if plaintiff could have seen cars in time to have avoided injury by stopping instantly, it was his duty so to do, etc. Id.

**78.** Instructions on contributory negligence held properly refused as not requiring that negligence should be proximate cause of injury to defeat recovery. Missouri, K. & T. R. Co. v. Wall [Tex. Civ. App.] 110 SW 453. Where licensee near lumber pile is in better position than employes to discover liability of projecting board to be struck by train, his negligence is proximate cause of injury. Muse v. Seaboard Air Line R. Co. [N. C.] 63 SE 102.

**Not proximate cause:** Negligence in being between cars where brakeman saw him before uncoupling air hose which struck plaintiff and there was no need for haste in disconnecting hose. Chicago, etc., R. Co. v. Lannon [Ark.] 112 SW 177.

**79.** Williams v. Chicago, etc., R. Co. [Iowa] 117 NW 956. Contributory negligence defeats recovery unless company is negligent after discovering peril. Louisiana & A. R. Co. v. Ratcliffe [Ark.] 115 SW 396.

**80.** Central of Georgia R. Co. v. Moore [Ga. App.] 63 SE 642. Evidence held to support finding of willful negligence in running down child on licensed path. Tarashonsky v. Illinois Cent. R. Co. [Iowa] 117 NW 1074. Conflicting evidence as to when decedent stepped upon track and as to distance within which train could have been stopped held to make willful negligence for jury. Zelenka v. Union Stockyards Co. [Neb.] 118 NW 103. Operating train through streets of populous city at great rate of speed and without signals may constitute wantonness, though they did not know that any one in fact was on track. Atchison, etc., R. Co. v. Baker [Kan.] 98 P 804. Petition construed to charge "willful and wanton" negligence in running over plaintiff while unconscious on track. Central of Georgia R. Co. v. Moore [Ga. App.] 63 SE 642. Instruction that "wanton negligence is the failure of one charged with a duty to exercise an honest effort in employment of all reasonable means to prevent injury" held insufficient charge on wanton negligence, and where employe did not know of presence of person, it is necessary that instruction should tell what condition will supply lack of knowledge. Atchison, etc., R. Co. v. Baker [Kan.] 98 P 804.

**81.** Answer "No" to question "Did the employes * * * discover the peril of plaintiff too late to prevent injury by the exercise of ordinary care" held, in view of other answers, to mean that he was not discovered at all. Missouri, K. & T. R. Co. v. Jenkins [Kan.] 98 P 208. Instruction that, notwithstanding contributory negligence, plaintiff could recover if trainmen could have avoided injury, held erroneous in not predicating negligence on previous discovery of peril. Chicago, etc., R. Co. v. Moon [Ark.] 114 SW 228. Complaint failing to aver that defendant discovered decedent's perilous position in time to avoid injury held insufficient. Lake Erie & W. R. Co. v. Bray [Ind. App.] 84 NE 1004. Evidence that track was straight that view was unobstructed, that engineer was looking, held to make question for jury whether he saw child, although he testified that he did not. Southern R. Co. v. Forrester [Ala.] 48 S 69. Evidence as to surrounding conditions, day being cloudy, held to make question for jury whether engineer saw or should have seen child on track. Harrison v. Southern R. Co. [Miss.] 46 S 408. Where decedent was seen as undistinguishable object about 300 feet ahead, but was not discerned to be a human being until within 75 or 80 feet, held, as matter of law, not negligent in not stopping, evidence showing that it requires about 500 feet to stop. Caldwell v. Houston & T. C. R. Co. [Tex. Civ. App.] 117 SW 488.

**82.** Held no material difference in instruction making doctrine of discovered peril applicable if it was "apparent" or "reasonably apparent" that one on tracks would not get off, instead of if they "realized his peril." Missouri, K. & T. R. Co. v. Reynolds [Tex. Civ. App.] 115 SW 340. Conflicting evidence of brakeman, who discovered body on track, that he did not know whether it was human being or not, and that train was promptly stopped on signal, held to show no liability. Jones v. New Orleans G. N. R. Co., 122 La. 354, 47 S 679. Not applicable where situation did not apprise trainmen that decedent was going to cross until too late to avoid injury. Chesapeake & O. R. Co. v. Hall's Adm'r [Va.] 63 SE 1007. Mere fact that brakeman saw deceased standing on flat car as car was "kicked" into it in making coupling does not show that he knew of his peril, where decedent was accustomed to such operations. Davis v. Chicago, B. & Q. R. Co. [Neb.] 119 NW 1121. Where engineer does all in his power to stop after he sees one slowly approaching crossing quicken pace to cross, defendant is not liable, although engineer saw her when a quarter of a mile distant, since he had a right to assume that she would not place herself in position of danger. Sands v.

hand,[84] in the exercise of reasonable care,[85] have avoided the injury.[86] But the

Louisville & N. R. Co. [Ala.] 47 S 323. Evidence that plaintiff approached crossing in manner indicating intention to cross immediately as to distance when seen by engineer, and as to distance within which train could be stopped, held to authorize submission of last clear chance doctrine. Atchison, etc., R. Co. v. Baker [Okl.] 95 P 433. Negligence of trainmen at time they could properly assume that traveler would not attempt to cross will not support recovery under last clear chance doctrine. Stearns v. Boston & M. R. Co. [N. H.] 71 A 21.

**For jury:** In not avoiding injuring one leaning over rail as if to tie shoe while train ran from 180 to 296 feet at rate of 6 to 12 miles per hour. Arkansas Cent. R. Co. v. Fain, 85 Ark. 532, 109 SW 514.

**83.** Where it is admitted that engineer saw plaintiff in time to stop, but only issue is whether he was walking on track or beside it and suddenly turned onto it ahead of train, held proper to qualify instructions on contributory negligence with one on discovered peril. St. Louis S. W. R. Co. v. Cockrill [Tex. Civ. App.] 111 SW 1092. Evidence that employes, on backing engine, saw plaintiff on track waiting for another train to pass, apparently unaware of approaching engine, and had time to stop, etc., held to justify charge on discovered peril. Missouri, K. & T. R. Co. v. Reynolds [Tex. Civ. App.] 115 SW 340. Evidence held to sustain finding that plaintiff was walking in place of danger and to show that she did not suddenly step into danger ahead of engine. St. Louis S. W. R. Co. v. Thompson [Ark.] 117 SW 541.

**84.** Must use every means within power, consistent with safety of train, to avoid injury. St. Louis & S. F. R. Co. v. Summers [Tex. Civ. App.] 111 SW 211; Maxfield v. Texas & P. R. Co. [Tex. Civ. App.] 117 SW 483; Texas & P. R. Co. v. Crawford [Tex. Civ. App.] 117 SW 193. Instruction making liability depend upon failure to use means at hand only if ordinarily prudent person would have used them held erroneous. Maxfield v. Texas & P. R. Co. [Tex. Civ. App.] 117 SW 483. Must use every means at hand, and not enough that employes attempt to attract his attention without attempting to stop engine, which could have been done. Missouri, K. & T. R. Co. v. Reynolds [Tex. Civ. App.] 115 SW 340. Instruction that if trainmen attempted to attract plaintiff's attention, and that if means were such as ordinarily prudent person would have used, to find for defendant though they did not apply brakes or attempt to stop, held on weight. Id. Failure to use all means at hand after discovering peril is not actionable unless use of such means could reasonably have prevented injury. Parkham v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 113 SW 154. Where engineer saw plaintiff walking so near track as to be in a place of danger and apparently oblivious to danger and did not give warning signal, there being time for plaintiff to heed same and step to a place of safety, company is liable. St. Louis S. W. R. Co. v. Thompson [Ark.] 117 SW 541.

**85.** Where train was going at speed of 8 miles per hour when decedent was discovered 60 feet ahead, failure to stop before striking her held not negligence, although there is testimony that it could have been stopped in 20 or 30 feet, only five seconds elapsing between discovery and collision. Hawkins v. St. Louis & S. F. R. Co. [Mo. App.] 116 SW 16. Where collision occurred which would not have happened had train been at such distance as would have enabled engineer to stop after discovering danger, no recovery can be had on last clear chance doctrine. Stearns v. Boston & M. R. Co. [N. H.] 71 A 21. Whether engineer, after discovering peril of one walking on tracks, could have avoided injury, held for jury. Neary v. Northern Pac. R. Co., 37 Mont. 461, 97 P 944. Where fireman discovered plaintiff walking along side track unconscious of train approaching only a little faster than a walk, negligence in yelling to engineer and not ringing bell or sounding whistle held for jury. Texas & P. R. Co. v. Crawford [Tex. Civ. App.] 117 SW 193.

**86.** St. Louis S. W. R. Co. v. Thompson [Ark.] 117 SW 541; Stearns v. Boston & M. R. Co. [N. H.] 71 A 21. Contributory negligence is not defense under doctrine of discovered peril. Missouri, K. & T. R. Co. v. Reynolds [Tex. Civ. App.] 115 SW 340. Where trainmen discovered one's peril in time to avoid injuring him and failed so to do, their negligence, and not the negligence of such person in getting into peril, is proximate cause of injury. Potter v. St. Louis & S. F. R. Co. [Mo. App.] 117 SW 593. While initial negligence in going onto track will defeat recovery for antecedent negligence of company, it will not prevent recovery for negligence after discovering his peril, providing there is not concurrent negligence. Alabama G. S. R. Co. v. McWhorter [Ala.] 47 S 84. Where defendant discovered peril of deceased lying on track in time to avoid striking him and failed to use due care, held liable. Southern R. Co. v. Gullatt [Ala.] 48 S 472. Instruction that, after discovering plaintiff's peril, reasonable care required that engineer use every precaution at hand to avoid injury, held to properly submit issue of discovered peril. Freedman v. New York, etc., R. Co. [Conn.] 71 A 901.

**Doctrine applicable:** Where undisputed facts tend to show that engineer and fireman discovered driver's peril in time to avoid injury by use of means at hand, court properly submitted issue of discovered peril. St. Louis & S. F. R. Co. v. Summers [Tex. Civ. App.] 111 SW 211. Although plaintiff has been guilty of negligence in entering long narrow chute between railroad track on one side and insurmountable obstacles on other, he may recover if engineer saw the situation in time to avoid collision and failed to do so. Chicago, etc., R. Co. v. Clinkenbeard, 77 Kan. 481, 94 P 1001. Evidence in action for running down trespasser at twilight on nearly straight track in city limits held to warrant finding that operatives could have avoided injury after discovering decedent, or by exercise of due care could have discovered her, by giving warnings or slackening train. Everett v.

"discovered peril" doctrine being based upon the rule of sole proximate cause, it does not authorize a recovery where plaintiff's negligence actually concurs therewith.[87] While actual knowledge of plaintiff's peril is usually required to invoke the doctrine,[88] it has been extended in some states to cases where defendant by the exercise of the care owed to the plaintiff would have discovered his peril.[89] One placed in a position of peril without fault on his part, by the negligence of defendant, is not negligent in acting as it seems prudent at the time, though it was not the best method of escaping therefrom.[90] Contributory negligence is to be determined from all the circumstances,[91] and the negligence of a child is to be tested by the care which one of his age would ordinarily exercise under the circumstances.[92] Negligence of carrying road does not preclude recovery by its passengers against another company for negligent collision.[93]

(§ 11) *C. Injuries to passengers and freight.*[94]

(§ 11) *D. Injuries to employes.*[95]

(§ 11) *E. Injuries to licensees and trespassers.*[96] *General rules.* See 10 C. L. 1394

While a railroad is liable to a trespasser for negligence, the fact that one injured is a trespasser is material on the duty owed,[97] since as a general rule the only duty owed to

St. Louis & S. F. R. Co., 214 Mo. 54, 112 SW 486. Though precedent and concurrent negligence is without dispute, liability under last clear chance doctrine is usually for jury. Wilkinson v. Oregon Short Line R. Co. [Utah] 99 P 466.

**Not applicable:** Where one driving along side of track turned suddenly onto same ahead of engine, recovery cannot be had on last clear chance doctrine. Wilkinson v. Oregon Short Line R. Co. [Utah] 99 P 466. Evidence held insufficient to show that engineer saw plaintiff's peril in time to stop where he attempted to pass immediately in front of engine. Whitney v. Texas Cent. R. Co. [Tex. Civ. App.] 110 SW 70.

**87.** Where one on track is conscious of his peril and does not get off, no recovery can be had. Alabama G. S. R. Co. v. McWhorter [Ala.] 47 S 84. Where liability of board projecting from pile to be struck by train is equally apparent to nearby licensee and employes, negligence or fault of both continue up to moment of accident, and last clear chance doctrine cannot apply. Muse v. Seaboard Air Line R. Co. [N. C.] 63 SE 102.

**88.** Southern R. Co. v. Gullatt [Ala.] 48 S 472. Evidence that one of crew on switch engine was looking when engine commenced to back and backed onto plaintiff held to make case for jury. Louisiana & A. R. Co. v. Ratcliffe [Ark.] 115 SW 396. Evidence of danger signals some distance from where decedent was found held sufficient to carry question of knowledge to jury. Southern R. Co. v. Gullatt [Ala.] 48 P 472.

**89.** Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808. Evidence held to authorize finding that if trainmen had exercised due care they would have discovered glare of street car head light as it was about to enter onto track in time to avoid collision. Waliy v. Union Pac. R. Co. [Neb.] 120 NW 174. Where fireman could not see deceased until within 300 or 400 feet of him and in fact did not see him, and train was running at rate of 50 miles per hour, requiring only about 5½ seconds to cover distance, discovered peril cannot be predicated on failure to discover, since fireman cannot give entire time to discovering peril. McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33.

**90.** Ft. Worth & R. C. R. Co. v. Eddlemen [Tex. Civ. App.] 114 SW 425. Doctrine of sudden peril held applicable where evidence showed that there was imminent danger of collision with lever car which justified efforts to escape injury. Douglass v. Southern R. Co. [S. C.] 62 SE 15. Instruction on emergency held proper, though accident occurred at crossing, where circumstances authorized finding that plaintiff thought that way was clear. Id.

**91.** Where only evidence of warning was shout 100 feet away in opposite direction from danger, in answering special issue as to whether plaintiff was warned, jury should consider whether such shout ought to have been understood as a warning of danger to him. Antonian v. Southern Pac. Co. [Cal. App.] 100 P 877.

**92.** In action by parents for injury to child entrusted by mother to care of 11-year-old boy, instructions submitting negligence of boy must exact only such care as a boy of his age would ordinarily exercise under same circumstances. Galveston H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787.

**93.** Gulf & S. I. R. Co. v. Barnes [Miss.] 48 S 823.

**94.** See Carriers, 11 C. L. 499.

**95.** See Master and Servant, 12 C. L. 665.

**96. Search Note:** See notes in 25 L. R. A. 287, 784; 46 Id. 33; 66 Id. 587; 2 L. R. A. (N. S.) 498; 5 Id. 775; 6 Id. 283, 581; 8 Id. 1069; 11 Id. 352; 13 Id. 364; 16 Id. 1103; 30 A. S. R. 53; 1 Ann. Cas. 601, 775; 2 Id. 548; 4 Id. 680; 5 Id. 377, 1007; 8 Id. 866; 11 Id. 901, 990.

See, also, Railroads, Cent. Dig. §§ 868-923; Dec. Dig. §§ 273½-282; 23 A. & E. Enc. L. (2ed.) 735.

**97.** Louisville & N. R. Co. v. Dalton [Ky.] 113 SW 842. Where company falls in the

trespassers [98] and bare licensees [99] is not to willfully or wantonly injure them,[1] and there being no duty to discover their presence on the track,[2] no duty arises until they are in fact discovered,[3] after which reasonable care must be exercised.[4] There is,

performance of its duties in operation of trains and injures licensee, it is liable unless licensee was guilty of contributory negligence. Burton's Adm'r v. Cincinnati, etc., R. Co. [Ky.] 113 SW 442.

98. One walking along path in yards not a public highway is a trespasser. St. Louis, etc., R. Co. v. Lavendusky [Ark.] 113 SW 204. Evidence held to show that child killed on tracks was a trespasser. Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689. Under evidence whether decedent was at crossing when killed. Cincinnati, etc., R. Co. v. Earls' Adm'r [Ky.] 113 SW 854. Unless track is in street or public habitually uses same, one walking thereon is a trespasser. Illinois Cent. R. Co. v. Johnson [Ky.] 115 SW 798. Evidence as to use and recognition held to make question for jury whether street existed where plaintiff was struck. Id. One engaged in moving property onto tracks to save from raging fire held a mere volunteer and company owed no duty except not to wantonly or recklessly injure him. Springer v. St. Louis S. W. R. Co. [C. C. A.] 161 F 801. Where company unlawfully blocks crossing, one leaving street to go around obstruction is not a trespasser. Kurt v. Lake Shore & M. S. R. Co., 127 App. Div. 838, 111 NYS 859. Railroad Law, Laws 1890, p. 1101, c. 565, § 53, prohibiting persons from walking along track, held not to make one walking along same to get around train unlawfully blocking crossing a trespasser. Id. Where licensee is designated as a trespasser, the error is not cured by instruction that company must keep lookout and give warning and must keep trains under control. Burton's Adm'r v. Cincinnati, etc., R. Co. [Ky.] 113 SW 442.

99. Licensee is one who is neither a passenger, servant nor trespasser, and not standing in any contractual relation to the railroad, and is permitted to come onto its premises for his own convenience. Gainesville & G. R. Co. v. Peck, 55 Fla. 402, 46 S 1019. Person at place within private grounds, which has been habitually used by public, is a licensee and not a trespasser. Burton's Adm'r v. Cincinnati, etc., R. Co. [Ky.] 113 SW 442. Where plaintiff procured permission of night yard master to go into yards to search for a relative, held that company owed no duty to give notice to switching crews of his presence. Shults v. Chicago, B. & Q. R. Co. [Neb.] 119 NW 463. Where company maintains spur track on private premises to haul out produce, it and employes are licensees, and it must use reasonable care. Chicago & E. I. R. Co. v. Hendrix [Ind. App.] 87 NE 663. While railroad cannot alienate any part of its right of way so as to interfere with a discharge of its public duties, it may permit construction of drainage ditch over same, and employe of owner thereof on right of way cleaning ditch is not a trespasser. Mize v. Rocky Mountain Bell Tel. Co. [Mont.] 100 P 971.

1. Chicago & A. R. Co. v. Bell, 133 Ill. App. 56; Fosbury v. Aurora, E. & C. R. Co., 141 Ill. App. 98; Shults v. Chicago, B. & Q. R. Co. [Neb.] 119 NW 463; Kurt v. Lake Shore & M. S. R. Co., 127 App. Div. 838, 111 NYS 859; Southern R. Co. v. Fisk [C. C. A.] 159 F 373. Ordinarily owes no duty to protect trespassers. Smalley v. Rio Grande W. R. Co., 34 Utah, 423, 98 P 311. Owes no duty greater than in other property owner would owe under same circumstances. Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689. Evidence held to show that engineer did not discover child in time to avoid injuring it and was not wantonly negligent. Id. Where no one saw killing which occurred at place where there were no residences, held no proof of wantonness or willfullness. Bailey v. Lehigh Valley R. Co., 220 Pa. 516, 69 A 998. Plaintiff, mill employe, alleged that one of defendant's railroad trains was left standing in yards of mill company, that it was not defendant's custom to move same at night, that mill employes were accustomed to travel through yards, that plaintiff was injured while crossing between cars by starting thereof without warning, etc., held not to charge simple negligence, it not appearing that company omitted any duty to plaintiff (Birmingham S. R. Co. v. Kendrick [Ala.] 46 S 588), nor does it charge wanton negligence, it not showing that defendant's servants knew that employes were accustomed to climb between cars (Id.). Violation of speed ordinance does not constitute willful injury. Chicago & A. R. Co. v. Bell, 133 Ill. App. 56.

2. Owes no duty to keep lookout or give warning to trespasser. Burton's Adm'r v. Cincinnati, etc., R. Co. [Ky.] 113 SW 442; Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689. Duty to discover trespasser is same whether a child or an adult. Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689. Not negligent not to keep lookout for children trespassing on track. Id. Bound to exercise ordinary care to discover trespasser not guilty of contributory negligence. Ft. Worth & D. C. R. Co. v. Poteet [Tex. Civ. App.] 115 SW 883.

3. Cummings' Adm'r v. Illinois Cent. R. Co., 33 Ky. L. R. 584, 110 SW 809; O'Bannion's Adm'r v. Southern R. Co., 33 Ky. L. R. 315, 110 SW 329; Little Rock & M. R. Co. v. Russell [Ark.] 113 SW 1021. Owes no duty to bare licensee of previous preparation for protection. Harlow's Adm'r v. Chesapeake & O. R. Co., 108 Va. 691, 62 SE 941. Where children were always ordered from yards, fact that they were frequently therein did not impose duty until discovered. Smalley v. Rio Grande W. R. Co., 34 Utah, 423, 98 P 311.

4. St. Louis, etc., R. Co. v. Raines [Ark.] 111 SW 262; Cincinnati, etc., R. Co. v. Earls' Adm'r [Ky.] 113 SW 854. Though failure to give statutory signals is not negligence as matter of law as to one on tracks not at crossing, it may be negligence as matter of fact. Ft. Worth & D. C. R. Co. v. Poteet [Tex. Civ. App.] 115 SW 883. Finding that deceased was discovered in time to have avoided injury is not supported by testi-

however, a tendency to exact a higher care where the road runs through a thickly populated locality or place where the presence of people on the track is to be anticipated,[5] although the use does not amount to an implied license.[6] Where an express or implied license has been given to an individual to use the tracks,[7] or the public have openly used the same with the knolwedge of [8] and without objection from the company for such a period as to raise an implied license,[9] the company must exercise ordinary care [10] in the maintenance of the premises,[11] in the selection of its trainmen,[12] and in the operation of its trains.[13] One exceeding the license becomes a trespasser.[14] A company operating in public streets must use commensurate care.[15]

mony of one who was inside of his house and did not see engine but located it by sound of whistle. St. Louis, etc., R. Co. v. Raines [Ark.] 111 SW 262.

5. Everett v. St. Louis & S. F. R. Co., 214 Mo. 54, 112 SW 486; Anderson v. Great Northern R. Co. [Idaho] 99 P 91. Evidence held to show negligence of brakeman on detached cars in maintaining lookout for plaintiff, the tracks being frequently used by public. Gulf, etc., R. Co. v. Coleman [Tex. Civ. App.] 112 SW 690. Where it was necessary for employes to pass out over switch and company knew that it was time for them to be leaving, held negligence to run cars in without warning. Chicago & E. I. R. Co. v. Hendrix [Ind. App.] 87 NE 663.

6. Use need not be so extensive as to amount to a license to require employes to keep lookout. Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689. Where no implied license exists but people frequently use premises, duty of keeping lookout is usually for jury. Id.

7. Consent to enter onto track in effort to stop train to prevent collision with team stalled at crossing because of defect therein will be implied, and instruction appropriate to trespasser held properly refused. Thompson v. Seaboard Air Line R. Co., 81 S. C. 333, 62 SE 396. Where employe's duty ends at tool house, no implied consent to use tracks to reach home (Bailey v. Lehigh Valley R. Co., 220 Pa. 516, 69 A 998), and fact that he so used track for long time without objection held not to show assent of company (Id.).

8. Evidence held not to show such user as to charge company with notice thereof. Green v. Terminal R. Ass'n, 211 Mo. 18, 109 SW 715.

9. Public may acquire license to use track by continued open use with knowledge of company. Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689. Evidence that track was habitually used as a way held erroneously excluded where followed by offer to show that fact was known to defendant. Thompson v. Aberdeen & A. R. Co. [N. C.] 62 SE 883. Evidence that public was using track as highway by implied invitation or permission of company is admissible. Moody v. St. Louis, etc., R. Co. [Ark.] 115 SW 400. Where use of track as footpath was so general, long continued and oft repeated that company must have known thereof and acquiesced therein, one using same is licensee and not a trespasser. Id. Held proper to refuse instruction that plaintiff was a trespasser, where it appears that public had regularly used track. Louisville & N. R. Co. v. Dalton [Ky.] 113 SW 842. Ordinarily mere acquiescence by railroad in use by public of right of way does not amount to permission and public are trespassers. Alabama G. S. R. Co. v. Godfrey [Ala.] 47 S 185. Where character of place where trespasser was struck is in dispute as well as member using tracks, negligence in not discovering is for jury. Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689. Where evidence shows that about 20 or 30 people daily walked on track where it was unfenced and no prohibitory signs were erected except at depot, held for jury whether one using same was trespasser. Everett v. St. Louis & S. F. R. Co., 214 Mo. 54, 112 SW 486.

10. Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689; Missouri K. & T. R. Co. v. Williams [Tex. Civ. App.] 109 SW 1126; Louisville & N. R. Co. v. Berry, 33 Ky. L. R. 850, 111 SW 370. Where people of neighborhood have habitually traversed premises without objection, trainmen must regulate conduct accordingly. Smalley v. Rio Grande W. R. Co., 34 Utah, 423, 98 P 311.

11. Liable where some of ties in pathway were removed and no warning lights were placed to give warning at night. Phipps v. Oregon R. & Nav. Co., 161 F 376.

12. Evidence of incompetency of man in charge of handcar held admissible. Louisville & N. R. Co. v. Berry, 33 Ky. L. R. 850, 111 SW 370.

13. Need not give statutory warnings but must give warnings dictated by ordinary care. Birmingham S. R. Co. v. Kendrick [Ala.] 46 S 588. Where persons habitually draw water from water car and to do so frequently go in front thereof, negligence in backing into same without due signal held for jury. Louisiana & T. Lumber Co. v. Brown [Tex. Civ. App.] 109 SW 950. That neither engineer nor fireman saw deceased on track is evidence of negligence in not keeping proper lookout unless they were prevented from seeing by failure of company to furnish headlight. Thompson v. Aberdeen & A. R. Co. [N. C.] 62 SE 883.

**Negligence for jury:** Evidence that train was operated at high speed on dark night, without headlight or signals, within corporate limits. Thompson v. Aberdeen & A. R. Co. [N. C.] 62 SE 883. Operating train at night without headlight. Id.

14. Where evidence tends to show that public habitually used track as pathway, but that plaintiff had stopped along side to pick berries and attempted to cross ahead of train, held for jury whether he was trespasser or licensee. Missouri, K. & T. R. Co. v. Williams [Tex. Civ. App.] 109 SW 1126.

15. Illinois Cent. R. Co. v. Johnson [Ky.] 115 SW 798.

In some states a lookout for trespassers is required by statute.[16] Contributory negligence defeats recovery.[17]

*Employes of other roads and independent contractors.*[See 10 C. L. 1396]—A railroad must exercise reasonable care for the safety of employes of other roads rightfully on its premises [18] and for servants of independent contractors working on the road,[19] but such persons must exercise due care for their own safety.[20] Joint protective rules must be observed.[21] Where a proprietary road agrees to furnish signalmen for trains of another using its tracks, it owes reasonable care to the employes of the latter.[22]

*Persons at station.*[See 10 C. L. 1397]—A railroad company must keep its depot and the approaches thereto [23] in a reasonably safe condition for persons rightfully using the same, but owes no duty to trespasser,[24] especially where his presence is unknown.[25] A company using the station of another owes to the passengers of the latter the same duty as it owes to its own.[26] Persons in and about stations must exercise due care for their own safety.[27]

**16.** Arkansas statute requiring lookout to be kept for trespassers held not to make trainmen liable for resulting injuries. Lockard v. St. Louis & S. F. R. Co., 167 F 675. Complaint for injury to trespasser on track held to state only cause of action for negligence on part of engineer in failing to keep lookout, as required by statute of Arkansas. Id.

**17.** One using track without consent of company is per se negligent. Bailey v. Lehigh Valley R. Co., 220 Pa. 516, 69 A 998. **Negligence for jury** where evidence tended to show that deceased was not at crossing but was walking on track and stepped in front of train. Cincinnati, etc., R. Co. v. Earl's Adm'r [Ky.] 113 SW 854. Where company was not in habit of backing onto or moving cars on spur track on private premises while employes were crossing same in going from work, and plaintiff, an employe, looked and listened, but neither saw nor heard an engine, held not negligence to go between cars. Chicago & E. I. R. Co. v. Hendrix [Ind. App.] 87 NE 663.

**18.** Crossing and station signals held not for employes of other roads having common use of switch yards. Cincinnati, etc., R. Co. v. Harrod's Adm'r [Ky.] 115 SW 699. Where employe of road having joint use of switch yards knew time of through fast train, high rate of speed was not negligent as to him. Id. Where company has notice that employes of another company having joint use of switch yards are likely to be about yards it must give notice of approach of trains. ringing of bell usually being sufficient. Id.

**19.** Held negligent to back train without lookout where presence of employes of contractor should have been anticipated. Chesapeake & O. R. Co. v. McCoy [Ky.] 112 SW 1105.

**Negligence for jury:** Running down flagman sent back to stop train, he having lights in his hands and warning torpedoes having been placed on track, although there was a slight curve in track. Combs v. Mobile & O. R. Co. [Miss.] 46 S 168.

**20. Negligence for jury:** Flagman in being run down by train which he had been sent to stop. Combs v. Mobile & O. R. Co. [Miss.] 46 S 168. Fireman injured in shovelling coal instead of maintaining lookout while crossing at junction. St. Louis, etc., R. Co. v. Dysart [Ark.] 116 SW 224. Where brakeman on dinky train used by contractor stepped back, after throwing switch, to allow his train to pass onto end of ties and was struck by backing train. Chesapeake & O. R. Co. v. McCoy [Ky.] 112 SW 1105. Superintendent of bridge repairs in walking along bridge without looking to see if train was approaching from behind. Chicago, etc., R. Co. v. Baldwin [C. C. A.] 164 F 826. Where employe of another road having joint use of switch tracks knew of exact time that defendant's fast through train was due, **held negligent as matter of law** in stepping back onto track in front of it without looking. Cincinnati, etc., R. Co. v. Harrod's Adm'r [Ky.] 115 SW 699.

**21.** Where two companies jointly use road, employe of one may recover from other for failure to observe rules jointly adopted, resulting in collision. Clay v. Western Maryland R. Co., 221 Pa. 439, 70 A 807.

**22.** Cleveland, etc., R. Co. v. Gossett [Ind.] 87 NE 723. And such employes are not fellow servants of signalmen so furnished. Id. In action for death caused by collision due to signalman changing signals, evidence held to show that signalman knew of orders of decedents' train or would have known thereof in exercise of reasonable care. Id. Complaint held to sufficiently allege negligence in confusing and changing signals contrary to rules. Id.

**23.** Where railroad permits sidewalks maintained by it as approaches to station to become defective, it is liable. Evans v. Chicago, B. & Q. R. Co., 130 Mo. App. 509, 109 SW 79. Rule that abutters are not liable for defective walks does not apply. Id.

**24.** Company owes no duty to exercise vigilance to protect children at depot without invitation and for its own curiosity. Ling v. Great Northern R. Co., 165 F 813.

**25.** No liability where trainmen did not see child leaning against car at time of starting. Ling v. Great Northern R. Co., 165 F 813.

**26.** Chicago, etc., R. Co. v. Stepp [C. C. A.] 164 F 785. Negligence in running through station at high speed when passengers were alighting from train of another company held for jury. Id.

**27.** Where person knowingly attempts to

*Persons loading and unloading cars.*[See 10 C. L. 1397]—Persons rightfully loading or unloading cars [28] are upon the premises by implied invitation,[29] and the company must exercise reasonable care [30] to avoid injuring them, but they must also use due care for their own safety.[31] The duty of exercising due care, however, is only coextensive with the license.[32] Where a car is placed in the usual place for unloading and for that purpose,[33] employes are bound to anticipate the presence of persons therein.[34]

*Children on or near tracks.*[See 10 C. L. 1398]—While trainmen need not anticipate trespassing children [35] nor maintain a lookout for them,[36] upon discovering their presence they must exercise reasonable care,[37] and, where they are in a place of peril,

cross track to station ahead of rapidly approaching train, held negligent though it was through train on regular's time and he thought it would stop. Louisville & N. R. Co. v. Tower's Adm'r [Ky.] 115 SW 719.

**Held negligent:** In stepping onto track knowing that train was approaching, without looking after coming around car. Royster v. Southern R. Co., 174 N. C. 347, 61 SE 179. In attempting to cross track within 30 or 40 feet of approaching train with full knowledge thereof, **as matter of law.** Hermeling v. Chicago, etc., R. Co., 105 Minn. 136, 117 NW 341.

**28.** Fact that many people crossed and recrossed side track does not affect duty to one on car, who was trespasser, unless he was on same for purpose of unloading. Louisville & N. R. Co. v. Hurst [Ky.] 116 SW 291.

**29.** Notice of arrival of car, with notice to unload within fixed time to avoid demurrage, is an invitation to enter onto premises to unload. Ackley v. West Jersey & S. R. Co. [N. J. Err. & App.] 71 A 273.

**30.** Ft. Worth & R. C. R. Co. v. Eddleman [Tex. Civ. App.] 114 SW 425. Owes reasonable care to one unloading. Dooley v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 110 SW 135. Must use reasonable care to furnish safe cars. Pennsylvania R. Co. v. Hummel [C. C. A.] 167 F 89. Must give warning before train is backed into car on side track where company has reason to believe that one may be in same unloading it. Louisville & N. R. Co. v. Hurst [Ky.] 116 SW 291. Evidence held to show negligence of brakeman in disconnecting air-brake hose without shutting off air, causing it to flop violently against plaintiff. Chicago, etc., R. Co. v. Lannon [Ark.] 112 SW 177. Where car kicked onto unloading track struck one in which plaintiff was working, due to dog on brake letting loose because improperly set, negligence is for jury. Eckert v. Great Northern R. Co., 104 Minn. 435, 116 NW 1024. Where manufacturing company's foreman gave directions as to backing into building of cars but trainmen had full charge of train, fact that foreman told engineer to come on held not as matter of law to relieve engineer of duty to take usual precautions as to warnings. Sholl v. Detroit & M. R. Co., 152 Mich. 463, 15 Det. Leg. N. 295, 116 NW 432. Employe of consignor injured by defective car while loading has cause of action ex delicto not ex contractu. Pennsylvania R. Co. v. Hummel [C. C. A.] 167 F 89.

**31.** In action for death to one killed, while working between cars, by train backing into same, testimony that witness and decedent had been informed that train was coming in to take cars out held not to show that decedent was informed of immediate danger. Shall v. Detroit & M. R. Co., 152 Mich. 463, 15 Det. Leg. N. 295, 116 NW 432. Where it was custom to stop outside of building and to give warning before backing into building to get cars which was not done in the particular instance, one caught between car where his work took him held not negligent as matter of law. Id.

**Held negligent:** In driving in narrow space between tracks to load car which could have been loaded with safety from other side, knowing that he had barely time to unload onto car before next train was due. Southern R. Co. v. Hogan [Ga.] 62 SE 64.

**32.** Ackley v. West Jersey & S. R. Co. [N. J. Err. & App.] 71 A 273. Invitation to unload stone from car on side track is not an invitation to so place timber on car as to project over main track. Id.

**33.** Where car was placed at usual place for unloading, held for jury whether that was purpose where there was evidence to contrary. Louisville & N. R. Co. v. Hurst [Ky.] 116 SW 291.

**34.** Need not give notice of presence. Dooley v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 110 SW 135. In action for personal injuries, alleged to have been received while unloading car, caused by another backing into it, instruction to find for plaintiff, if car "was in the proper and usual manner" for unloading and "it was his (plaintiff's) duty to do such work under the circumstances," should be modified by substituting "was so placed for purpose" of being unloaded and "that in so doing he was obeying a general order theretofore given directing him to do such work under the circumstances" in lieu of quoted clauses. Louisville & N. R. Co. v. Hurst [Ky.] 116 SW 291.

**35.** O'Bannion's Adm'r v. Southern R. Co., 33 Ky. L. R. 315, 110 SW 329.

**36.** Complaint not negativing that deceased was a trespasser or averring that defendant's trainmen saw her in time to avoid injury held defective. Southern R. Co. v. Forrister [Ala.] 48 S 69.

**37.** Degree of vigilance that will constitute ordinary care in dealing with children depends largely upon age and intelligence of child. St. Louis S. W. R. Co. v. Davis [Tex. Civ. App.] 110 SW 939. Must exercise at least ordinary care to avoid injury to child, though a trespasser, where rea-

cannot indulge the assumption that they will appreciate and avoid the danger.[38] In the absence of statute,[39] there is no duty to fence against children.[40] A child must exercise care commensurate with his age and discretion for his own safety.[41]

*Adults walking on tracks.*[See 10 C. L. 1308]—Ordinarily a railroad owes no duty to maintain a lookout for persons walking on the track,[42] nor to give statutory crossing signals [43] or other warning,[44] and, where a double track is maintained, it is not negligence to use the left track contrary to custom.[45] Where, however, the tracks are in the street,[46] or are frequently used by people,[47] commensurate care must be exercised. After discovering the presence of a trespasser or licensee, reasonable

sonable probability of injury is known or in exercise of reasonable care would be known. Ft. Worth & D. C. R. Co. v. Cushman [Tex. Civ. App.] 113 SW 198. Instruction imposing duty to watch all children in and about yards and tracks held too severe. International & G. N. R. Co. v. Vallejo [Tex.] 113 SW 4. Conflicting evidence as to when child was discovered on track and when it should have been discovered held to support verdict for plaintiff. Anderson v. Great Northern R. Co. [Idaho] 99 P 91. Where there was nothing to show that child was on tracks from time train came in sight, and fact that her bonnet was found on track some distance from where she was struck is insufficient, fact that track was straight for distance permitting train to stop and that engineer was looking held not to show negligence. O'Bannion's Adm'r v. Southern R. Co., 33 Ky. L. R. 315, 110 SW 329. Where brakeman on rear car of backing train on sidetrack saw child on main track but he was going parallel with train and was in no danger, defendant held not liable where child, unknown to trainmen, crossed over to main track and was struck by second car from engine. International & G. N. R. Co. v. Vallejo [Tex.] 113 SW 4. Where evidence was conflicting as to when child seen walking on cinder path stepped onto track, negligence is for jury. Burton's Adm'r v. Cincinnati, etc., R. Co. [Ky.] 113 SW 442.

**38.** Anderson v. Great Northern R. Co. [Idaho] 99 P 91; Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689. Child 15 months old. Southern R. Co. v. Forrister [Ala.] 48 S 69. Child 25 months old. Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787. Instruction that if trainmen discovered child on track and failed to exercise ordinary care, etc., held not erroneous as failing to distinguish between discovery of child and discovery of its peril. Id.

**39.** Fencing statutes have no application. Bischof v. Illinois S. R. Co., 137 Ill. App. 33. Following construction of superior court of Massachusetts, Rev. Laws Mass., c. 111, § 120, held to impose duty only for benefit of adjoining owners and no liability for failure to fence against children playing on adjoining premises. New York, etc., R. Co. v. Price [C. C. A.] 159 F 330.

**40.** New York, etc., R. Co. v. Price [C. C. A.] 159 F 330.

**41.** Child 25 months old is not negligent as matter of law in going onto and remaining on track in front of approaching train. Galveston H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787. Contributory negligence of boy 7 years old struck by detached cars approaching after engine and cars had passed held for jury. Gulf, C. & S. F. R. Co. v. Coleman [Tex. Civ. App.] 112 SW 690. Instruction for defendant on ground of contributory negligence of boy not quite 10 years old, and deaf, killed while walking on track, held properly refused. Texas & P. R. Co. v. Crump [Tex. Civ. App.] 110 SW 1013.

**42.** Engineer is not chargeable with negligence in not seeing trespasser on track nor in failing to so look as to see him. Cumming's Adm'r v. Illinois Cent. R. Co., 33 Ky. L. R. 584, 110 SW 809. Owes ordinary care to discover trespassers. Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787.

**43.** Morrow v. Southern R. Co., 147 N. C. 623, 61 SE 621. But may be considered on general question of negligence where train is running without headlight. Id. Civ. Code S. C. 1902, § 2132, requiring bell to be rung 500 feet from crossing, has no application to one killed while on track at another point. Ellis v. Southern R. Co. [C. C. A.] 163 F 686.

**44.** Nashville, etc., R. Co. v. Bean's Ex'r, 33 Ky. L. R. 303, 110 SW 328.

**45.** Boulden v. Louisville & N. R. Co. [Ky.] 112 SW 936.

**46.** Holland v. Missouri Pac. R. Co., 210 Mo. 338, 109 SW 19.

**47.** Permission to construct and maintain a footway across railroad tracks, or long use of such a crossing, implies a license to pedestrians to cross at that point, and the rights of persons using such footway are not to be determined by rules applicable to mere trespassers, and where a child nine years of age is struck by a train at such crossing, it is a question for the jury whether he could have avoided injury by a proper use of his faculties. Lear v. Cincinnati, H. & D. R. Co., 11 Ohio C. C. (N. S.) 61. Where tracks are frequently and commonly used by public, company must exercise ordinary care to avoid injury. Gulf, etc., R. Co. v. Coleman [Tex. Civ. App.] 112 SW 690; Chicago Junction R. Co. v. Reinhardt, 139 Ill. App. 53. While trains are not usually under an obligation to keep lookout for persons wrongfully on track, yet, if experience has shown that at particular points people are constantly on track, it must exercise correspondent care. Florida R. Co. v. Sturkey [Fla.] 48 S 34. Where 40 or 50 mill hands customarily use track as pathway, held for jury whether company was negligent in backing without lookout. Id. Trainmen may assume that track used as footpath is free from pedestrians shortly after midnight. Caldwell v. Houston & T. C. R. Co. [Tex. Civ. App.] 117 SW 488.

care must be used to avoid injury,[48] the trainmen, however, having a right to assume, until the contrary becomes apparent, that they will appreciate their danger and leave the track.[49] The duty owed under particular circumstances is sometimes prescribed by statute.[50] Where an express license has been given or the public have so used the tracks as to have acquired an implied license,[51] the company must exercise reasonable care to avoid injury,[52] and cannot claim the advantage of a statute making persons walking thereon trespassers.[53] But such implied license does not prevent

48. Where person is walking in place of safety and there is nothing to apprise trainmen that he is ignorant of approaching train, they need not take extra precautions. Boulden v. Louisville & N. R. Co. [Ky.] 112 SW 936. Negligence to back train along common walkway in night time without end lights. Allen v. North Carolina R. Co. [N. C.] 62 SE 1079. Whether lights held by two men in middle of car 15 feet high and 36 feet long served purpose of headlights held for jury. Id. Evidence as to distance plaintiff could be seen, and as to experiments as to distance in which train could be stopped, held to make negligence in striking plaintiff for jury. St. Louis, etc., R. Co. v. Flinn [Ark.] 115 SW 142. In action for killing of father and one son, the former being insane and held child on track, held that engineer could not reasonably foresee that father, knowing of approaching train, would not leave track with son in time to avoid injury. Parham v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 113 SW 154. Undisputed evidence that engineer could not see decedent until within 60 feet because of curve in track causing engine to shut off view held to disprove negligence in not sooner discovering decedent. Hawkins v. St. Louis & S. F. R. Co. [Mo. App.] 116 SW 16. Evidence held insufficient to show notice to company that steps on car were so loose as to be a menace to one walking by side of track. Harlow's Adm'r v. Chesapeake & O. R. Co., 108 Va. 691, 62 SE 941. Where there was no direct testimony showing when or where deceased came upon track, surrounding circumstances as to sounding of whistle, time required to stop, location of body, blood, etc., held insufficient to go to jury on discovered peril. Nashville, etc., R. Co. v. Bean's Ex'r, 33 Ky. L. R. 303, 110 SW 328. Where there is evidence that fireman saw plaintiff near track, instruction that, if plaintiff went onto track so near engine that engineer could not and did not see him, defendant was not liable, held to ignore duty of maintaining lookout and also duty of fireman to promptly act on discovering peril. Texas & P. R. Co. v. Crawford [Tex. Civ. App.] 117 SW 193.

49. Leave track in time to avoid danger up until the last moment of his ability to do so. Beach v. Southern R. Co., 148 N. C. 153, 61 SE 664. Where train was approaching in full view and danger signals had been given, held not negligent not to attempt to stop until within 60 or 80 feet of trespasser. Id. Company held not liable where it did not appear that one walking on end of ties was not going to step off until too late to stop. Strickland v. Atlantic Coast Line R. Co. [N. C.] 63 SE 161.

50. Under Shannon's Code Tenn. § 1574, subd. 4, providing that when any person or other obstruction appears on track alarm whistle shall be sounded, the brake put down, every means used to prevent, to recover for death it must appear that decedent appeared on track in front of train as obstruction thereto and that engineer failed in statutory particular. Virginia & S. W. R. Co. v. Hawk [C. C. A.] 160 F 348. Burden of proof of such elements rests on plaintiff. Id. Evidence as to manner of death held too indefinite and uncertain to authorize submission to jury. Id.

51. Evidence that plaintiff as well as public had used pathway for 27 years without objection held to show implied license although company posted prohibitory notices. Missouri, K. & T. R. Co. v. Briscoe [Tex. Civ. App.] 109 SW 453. Where trestle is commonly used by public as a footpath with company's acquiescence, license will be presumed. Texas Midland R. Co. v. Byrd [Tex. Civ. App.] 110 SW 199. Fact that public frequently used tracks during daytime does not impose duty of exercising reasonable care at night when track is only infrequently used at night. Missouri, K. & T. R. Co. v. Malone [Tex.] 115 SW 1158. Evidence of frequent use of trestle in going between certain places held admissible on issue of license. Texas Midland R. Co. v. Byrd [Tex. Civ. App.] 110 SW 199. Evidence of use by public of trestle as pathway held to make license for jury. Id.

52. Missouri, K. & T. R. Co. v. Malone [Tex. Civ. App.] 110 SW 958; Ahnefeld v. Wabash R. Co., 212 Mo. 280, 111 SW 95; Hawkins v. St. Louis & S. F. R. Co. [Mo. App.] 116 SW 16; Missouri, K. & T. R. Co. v. Malone [Tex.] 115 SW 1158. Must use ordinary care to avoid license using trestle as pathway, but such care requires greater caution than under less dangerous circumstances. Texas Midland R. Co. v. Byrd [Tex. Civ. App.] 110 SW 199. Negligence in approaching trestle which public commonly used as pathway with company's acquiescence without giving signal held for jury. Id. Evidence held to warrant finding of negligence in running down pedestrian at night walking on track, the public customarily using track as pathway. Missouri, K. & T. R. Co. v. Malone [Tex. Civ. App.] 110 SW 985. Where evidence showed that track was used by public as pathway and authorized finding that plaintiff was seen in time to have avoided injuries, instruction that defendant was not negligent in running train at 30 miles per hour held properly refused. Id.

53. Where company has acquiesced in use of track by public as pathway, it cannot claim exemption under Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), providing that if any person not connected with railroad shall walk on track except at streets or crossings and shall receive harm, he shall be deemed a trespasser. Ahnefeld v. Wabash R. Co., 212 Mo. 280, 111 SW 95.

the company from legitimately using the property,[54] nor relieve the persons exercising the license from the duty to exercise due care.[55] While the train must be run in a prudent manner with such appliances as are approved and in general use as will enable persons to discover its approach if they exercise due care,[56] negligence of the company does not excuse due care on their part,[57] and if negligent no recovery can be had.[58]

*Persons standing, sitting, or lying on tracks.* See 10 C. L. 1401—Ordinarily a railroad owes no duty to a trespasser[59] standing, sitting, or lying on the tracks, unless his presence is known or is to be anticipated,[60] in which case reasonable care must be used,[61] although the trainmen may assume that he will appreciate his peril and avoid injury unless the circumstances apprise them to the contrary.[62] Such trespassers must exercise due diligence for their own safety.[63]

**54.** Permission to the public to use right of way does not prevent company from piling lumber thereon nor render it liable to bare licensee in absence of willful negligence. Muse v. Seaboard Air Line R. Co. [N. C.] 63 SE 102.

**55.** Fact that use by public has created license does not relieve one using bridge in lieu of other safe ways from negligence. Texas Midland R. Co. v. Byrd [Tex.] 115 SW 1163.

**56.** Where train was run at night without headlight, one walking where people in vicinity were accustomed to walk was entitled to warning by signal. Morrow v. Southern R. Co., 147 N. C. 623, 61 SE 621.

**57.** Texas Midland R. Co. v. Byrd [Tex. Civ. App.] 110 SW 199. Failure of company to have lights on end of backing car and to give signals does not relieve pedestrian of the obligation to look and listen for trains. Allen v. North Carolina R. Co. [N. C.] 62 SE 1079.

**58.** Failure to look and listen is not per se negligence. Missouri, K. & T. R. Co. v. Wall [Tex. Civ. App.] 110 SW 453. Where liability of board projecting from lumber pile to be struck by train is equally apparent to permissive licensee as to employes, licensee cannot recover for being struck thereby. Muse v. Seaboard Air Line R. Co. [N. C.] 63 SE 102.

**Negligent as matter of law:** In walking along end of ties knowing that train was due and in failing to use senses to discover same. Strickland v. Atlantic Coast Line R. Co. [N. C.] 63 SE 161. Trespasser walking on bridge at night. Missouri, K. & T. R. Co. v. Malone [Tex.] 115 SW 1158. Walking over bridge when there were other safe ways of reaching destination. Texas Midland R. Co. v. Byrd [Tex.] 115 SW 1163. Where, despite whistles, plaintiff did not look up until reflected light drew his attention to approaching engine and then, although walking on end of ties, he did not step off as did others nearby. St. Louis & S. F. R. Co. v. Ruff [Miss.] 48 S 184.

**Negligence for jury:** Evidence as to confusion of trains and the obscuring of the one doing damage by smoke of another. Everett v. St. Louis & S. F. R. Co., 214 Mo. 54, 112 SW 486. In jumping from trestle to avoid apparent collision. Texas Midland R. Co. v. Byrd [Tex. Civ. App.] 110 SW 199. Negligence in taking route by track instead of safe way. Missouri, K. & T. R. Co. v. Wall [Tex. Civ. App.] 110 SW 453.

**Held negligent:** One voluntarily walking so near track as to be in place of danger when he could have walked in place of safety. Missouri, K. & T. R. Co. v. Wall [Tex.] 116 SW 1140. One stepping onto track ahead of approaching engine, knowing that it was approaching, though not knowing what track it was on. Holland v. Missouri Pac. R. Co., 210 Mo. 338, 109 SW 19. In stepping behind car which knocked him down without looking or looking carelessly. Missouri, K. & T. R. Co. v. Briscoe [Tex. Civ. App.] 109 SW 453. Trespasser failing to use sense of sight. Beach v. Southern R. Co., 148 N. C. 153, 61 SE 664. Where, after signalling train to stop, decedent started down track ahead of train and was struck. Ellis v. Southern R. Co. [C. C. A.] 163 F 686. Trespasser must use both the senses of hearing and sight to discover approaching trains. Beach v. Southern R. Co., 148 N. C. 153, 61 SE 664. Must use senses to avoid injury. Holland v. Missouri Pac. R. Co., 210 Mo. 338, 109 SW 19.

**59.** License to use track for footpath does not include right to lie down thereon. Caldwell v. Houston & T. C. R. Co. [Tex. Civ. App.] 117 SW 488. Fact that person sits down on track while drunk or sick does not make him less a trespasser. Starett v. Chesapeake & O. R. Co., 33 Ky. L. R. 309, 110 SW 282.

**60.** Where one negligently lies down on track trainmen owe no duty until he is discovered. Caldwell v. Houston & T. C. R. Co. [Tex. Civ. App.] 117 SW 488. Knowledge that people without right passed daily along sidetrack and were allowed to stand and go upon sidetrack held not to show license to take shelter from rain by standing at end of box car or to charge employes with knowledge of presence. Curtis v. Southern R. Co., 130 Ga. 675, 61 SE 539. Where object is seen on track, trainmen must exercise at least ordinary care to ascertain whether it is a person. Caldwell v. Houston & T. C. R. Co. [Tex. Civ. App.] 117 SW 488.

**61.** Where engineer of train, cowcatcher of which struck trespasser asleep at side of track, was negligent in not sounding whistle when he testified that he thought boy in safe place and was afraid that whistle would cause him to jump towards tracks. Evans v. St. Louis, etc., R. Co. [Ark.] 113 SW 642.

**62.** Does not obtain where he is apparently unconscious of danger. Missouri, K.

*Persons in switch yards.*[See 10 C. L. 1401]—Ordinarily no duty is owed to one in the switch yards until his presence is discovered,[64] unless he is there in discharge of duties [65] or by invitation,[66] in which case reasonable care must be exercised.[67] Rules governing operation of trains within the yards must be observed.[68] Where a child is discovered in the yards, the trainmen cannot assume, as in the case of an adult, that he will keep out of danger.[69] While a licensee may assume that the company will not endanger him without warning,[70] all persons in switch yards must use due care to avoid injury.[71]

*Persons on trains.*[See 10 C. L. 1402]—The duty owed to particular classes on trains is sometimes prescribed by statute.[72] While a railroad owes no duty to a trespasser [73]

& T. R. Co. v. Reynolds [Tex. Civ. App.] 115 SW 340. Where one is sitting on track with head in hands apparently asleep or unconscious, it cannot be said as matter of law that engineer may assume that he will heed warnings. Starett v. Chesapeake & O. R. Co., 33 Ky. L. R. 309, 110 SW 282.

**63.** One lying down in position calculated to conceal presence is prima facie negligent. Caldwell v. Houston & T. C. R. Co. [Tex. Civ. App.] 117 SW 488. One standing between tracks without looking or giving a thought as to how far she was from either track and likelihood of being struck is negligent as matter of law. Bryne v. Boston El. R. Co., 198 Mass. 444, 85 NE 78. Fact that plaintiff was mistaken as to tracks upon which cars ran held not to authorize her to assume without looking that no car was approaching on one next to which she was standing. Id. A look which is so careless as to fail to disclose car approaching in plain view does not relieve from negligence in standing between tracks. Id. Evidence held to sustain finding that decedent was lying on track because of drunken condition and not because of fainting. Caldwell v. Houston & T. C. R. Co. [Tex. Civ. App.] 117 SW 488.

**64.** Smalley v. Rio Grande W. R. Co., 34 Utah, 423, 98 P 311. Where children ordered from yards again entered without being observed and began catching onto cars as they passed, company held not liable as matter of law for injuries to one of them. Id.

**65.** One employed to look after Pullman cars while standing in yards is entitled to protection of employes. Nelson v. Wabash R. Co., 132 Mo. App. 687, 112 SW 1017. A person in charge of stock, who is walking beside the train to inspect the stock, is not a trespasser or bare licensee. Christiansen v. Illinois Cent. R. Co. [Iowa] 118 NW 387.

**66.** Where company knows of use of switch yards, it must exercise ordinary care to avoid injury. Shrader v. Nashville, etc., R. Co. [Ky.] 114 SW 788; St. Louis, etc., R. Co. v. Hudson [Ark.] 110 SW 590.

**67.** Company held negligent in suddenly backing caboose which had been standing without giving warning to one employed to look after Pullman cars. Nelson v. Wabash R. Co., 132 Mo. App. 687, 112 SW 1017. In action for injuries to one walking in switch yards, instruction that defendant should have given notice by ringing bell or blowing whistle held not erroneous in that it should have based liability on failure to give adequate notice. Shrader v. Nashville, etc., R. Co. [Ky.] 114 SW 788. Bound to anticipate presence of stockmen near track and keep a lookout for them. Christiansen v. Illinois Cent. R. Co. [Iowa] 118 NW 387. Not negligence to "kick" car in switch yard. Gerhards v. Chicago Junction R. Co., 138 Ill. App. 313.

**68.** "Under full control" as used in rule requiring trains to pass through yards under full control means ready to be stopped at any moment. Neary v. Northern Pac. R. Co., 37 Mont. 461, 97 P 944.

**69.** Smalley v. Rio Grande W. R. Co., 34 Utah, 423, 98 P 311.

**70.** One employed to look after Pullman cars held not negligent in giving attention to work. Nelson v. Wabash R. Co., 132 Mo. App. 687, 112 SW 1017.

**71.** Flagman. McDoel v. Heuermann, 141 Ill. App. 113. Employe in yard is not entitled to rely on custom to run incoming trains on particular track. Chicago, etc., R. Co. v. Miller, 135 Ill. App. 26. Held negligent in attempting to go between cars after warning while removing property from raging fire. Springer v. St. Louis S. W. R. Co. [C. C. A.] 161 F 801. Not negligent as matter of law in passing in front of standing detached car which was bumped into plaintiff by train backing in onto switch and against it. St. Louis S. W. R. Co. v. Clark [Tex. Civ. App.] 113 SW 169. Where there is no evidence that plaintiff did not listen, mere fact that she only testified to looking held not to show negligence for failing to listen. St. Louis, etc., R. Co. v. Hudson [Ark.] 110 SW 590. Person walking beside train to inspect cattle under his care held not negligent in failing to keep a constant lookout for train on another track. Christiansen v. Illinois Cent. R. Co. [Iowa] 118 NW 387.

**72.** Liability of railroad towards certain classes riding on the train under a contract between company and their employers is made that of employe in some states. Act June 10, 1907 (P. L. 552), repealing Act April 4, 1868 (P. L. 58), making liability toward certain classes that of master and servant, does not affect accrued right of actions. Lewis v. Pennsylvania R. Co., 220 Pa. 317, 69 A 821.

**73.** One boarding switch engine without invitation and in violation of company's rules is a trespasser. Bailey v. North Carolina R. Co. [N. C.] 62 SE 912. One riding on engine upon invitation of conductor and engineer without intention to pay fare held a trespasser and widow is not entitled to recover for death due to derailment caused by defects in tracks. Morris v. Georgia Railroad & Banking Co. [Ga.] 62 SE 579.

except not to willfully or wantonly injure him,[74] a higher degree of care is owed to one upon the train by invitation [75] of one authorized to give the same,[76] and to volunteers,[77] although no duty is owed to the latter to keep the equipment in a safe condition.[78] A railroad is not required to guard against the unobserved intrusion of children,[79] to inspect the cars before starting to discover their presence thereon,[80] nor to maintain a lookout thereafter to discover children in the habit of jumping on and off,[81] but after their presence is discovered due care must be used.[82] One rightfully [83] occupying camp cars is entitled to reasonable care,[84] and where the family of a foreman is living in camp cars with him with the acquiescence of the company and according to the general custom, ordinary care is owed to them,[85] and they are

74. Bailey v. North Carolina R. Co. [N. C.] 62 SE 912. In absence of evidence negativing mere forgetfulness, leaving of switch open for 5 or 15 minutes by one not knowing of train which afterwards came into yards held not willful negligence. Id. Evidence that collision occurred because of failure of brakes to work, etc., held insufficient to show wanton negligence. Chicago, etc., R. Co. v. Lacy [Kan.] 97 P 1025. Fact that train ran into caboose in daytime held not to raise a presumption of wanton negligence. Id. Evidence held insufficient to show that driver wantonly or intentionally pushed decedent from car, but rather that he unintentionally struck him with his arm while managing horses. Dubnow v. New York City R. Co., 122 App. Div. 723, 107 NYS 729. Allegation that plaintiff's position on ladder of car where he was in danger of being crushed by coming in contact with car on side track was discovered by brakeman who gave emergency signal to stop to fireman, who failed to repeat to engineer or latter disregarded same, held not demurrable whether plaintiff was a licensee or a trespasser. Starr v. Southern R. Co., 4 Ga. App. 436, 61 SE 735.

75. Mere failure of trainmen to drive boys from train held not to constitute license to ride. Mehalek v. Minneapolis, etc., R. Co., 105 Minn. 128, 117 NW 250. Where it did not appear that freight agent's presence in freight car was not temporary or that he was in habit of answering inquiries while in car, there is no implied invitation to one seeking information to follow him into car. Louthan v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 111 SW 665.

76. Neither master mechanic, conductor nor engineer have implied authority to carry one without charge (Clarke v. Colorado & N. W. R. Co. [C. C. A.] 165 F 408), and where he was accepted by them on engine, he not only assumed all risks incident to his exposed position but could recover only for wanton and reckless negligence (Id.).

77. One voluntarily assisting trainmen with their knowledge and apparent acquiescence is not a trespasser but a volunteer (Clarke v. Louisville & N. R. Co., 33 Ky. L. R. 797, 111 SW 344) to whom ordinary care was due (Id.). In action for injuries received while attempting to make coupling, evidence held insufficient to show negligence, it not appearing that engineer saw plaintiff's signal to stop, or, if he saw it, that he had time to stop, or that movement of train was unusual. Id. One knowing of rule forbidding volunteers to ride on freight train, mere fact that at time he was injured he was operating brake at request of engineer held not to make him an employe. Derrickson's Adm'r v. Swann-Day Lumber Co. [Ky.] 115 SW 191. Where employes had no reason to anticipate that train was going to escape control on grade, no liability could be predicated on failure to give warning to volunteer. Id.

78. Derrickson's Adm'r v. Swann-Day Lumber Co. [Ky.] 115 SW 191.

79. St. Louis S. W. R. Co. v. Davis [Tex. Civ. App.] 110 SW 939.

80. St. Louis S. W. R. Co. v. Davis [Tex. Civ. App.] 110 SW 939. Evidence held insufficient to show lack of care to ascertain presence of boy on car and to remove him therefrom. Id.

81. Swartwood's Guardian v. Louisville & N. R. Co., 33 Ky. L. R. 785, 111 SW 305.

82. Instruction making liability depend upon knowledge of trainmen that child of immature age had caught onto car and omitting issue of negligence held erroneous. Ft. Worth & D. C. R. Co. v. Cushman [Tex. Civ. App.] 113 SW 198. Where child was injured while attempting to catch onto car, it must be shown that defendant owed him a duty at that time. St. Louis S. W. R. Co. v. Davis [Tex. Civ. App.] 110 SW 939. In action for injury to 6 year old boy who fell from car on which he was riding, it appearing that it had long been practice of boys to jump onto cars which passed near playgrounds, and that trainmen must have seen boys near track on occasion of accident. Ft. Worth & D. C. R. Co. v. Cushman [Tex. Civ. App.] 113 SW 198.

83. Authority of foreman of bridge crew to hire cook to board men in cars need not be proven by direct evidence. Tinkle v. St. Louis & S. F. R. Co., 212 Mo. 445, 110 SW 1086. Evidence of general method of handling bridge crews, of customary employment of cook by foreman, his general authority to hire and discharge crew, held to authorize introduction of detailed arrangement with foreman under which cook went to work. Id.

84. One employed by foreman of bridge crew to board men in camp car, men to pay specified sum per day, while not an employe or passenger, is more than a bare licensee and company owes same duty to her as to other employes being transported. Tinkle v. St. Louis & S. F. R. Co., 212 Mo. 445, 110 SW 1086. When cook in camp car was injured by jerk of train, she must show that jerk was so sudden as to constitute negligence and that trainmen knew that she was in car. Id. Evidence of sudden jerk held to show negligence. Id.

85. Not merely duty owed to a mere li-

not precluded from recovering for a negligent injury by a secret rule prohibiting such living.[86] Such persons, however, must exercise due care for their own safety.[87] Where a trainman, acting within the scope of his authority [88] and in the discharge of his duty,[89] ejects a trespasser from a moving train or uses unnecessary force, the company is liable unless the trainman had become a cotrespasser.[90] Persons upon trains must exercise due care.[91]

*Persons using hand cars or railroad tricycles.* See 10 C. L. 1403—Company is liable for negligent injury to one using a tricycle on the track.[92]

(§ 11) *F. Accidents to trains.*[93]—See 10 C. L. 1403—A railroad owes ordinary care to the passengers of other roads at intersecting points,[94] but where the apparent danger of collision is not such as to cause experienced trainmen to jump and it has no reason to anticipate the presence of passengers, it is not liable for injuries to a passenger from jumping.[95] Where intersecting roads make joint use of towerman, they are jointly liable for a collision caused by his negligence.[96] A contractor working along a road must not obstruct the same without giving due notice.[97] An employe of another company is not chargeable with the contributory negligence of his fellow-servant.[98]

(§ 11) *G. Accidents at crossings.* 1. *Care required on the part of the company. General rules.*[99]—See 10 C. L. 1403—Although a railroad ordinarily has the right of

censee. Owens v. Yazoo & M. V. R. Co. [Miss.] 47 S 518. Negligence held for jury where plank between cars was only 12 or 14 inches wide, while ordinary one was usually 30 to 36 inches, and cars were left on uneven track, the plaintiff being thrown by tipping of plank. Id.

86. Owens v. Yazoo & M. V. R. Co. [Miss.] 47 S 518.

87. Where cook was standing up at work in camp car while train was moving as was custom for years, and was thrown by unusual jerk, held not negligent as matter of law. Tinkle v. St. Louis & S. F. R. Co., 212 Mo. 445, 110 SW 1086.

88. Evidence held to sustain finding that brakeman ejecting plaintiff from moving train was acting within scope of his authority. St. Louis, etc., R. Co. v. Pell [Ark.] 115 SW 957.

89. That brakemen commonly ejected trespassers from trains authorizes inference that brakemen ejecting plaintiff acted in line of duty. St. Louis, etc., R. Co. v. Pell [Ark.] 115 SW 957. Defendant held not entitled to directed verdict on opening statement of plaintiff's counsel that brakeman kicked plaintiff off because he would not pay him a quarter, as showing that he was not acting in discharge of duty. Barrett v. Minneapolis, etc., R. Co., 106 Minn. 51, 117 NW 1047.

90. Evidence held insufficient to show that plaintiff had bribed brakemen so as to render him a cotrespasser and relieve company from liability for forcing him from the moving train. Barrett v. Minneapolis, etc., R. Co., 106 Minn. 51, 117 NW 1047.

91. Boy 16 or 17 years old held negligent in jumping off engine and attempting to pass in front of moving engine to throw switch, where it was not necessary to throw same until engine passed beyond. Whitney v. Texas Cent. R. Co. [Tex. Civ. App.] 110 SW 70.

92. Evidence that person could be seen 900 feet without evidence that engineer's view was clear held not to show negligence in failing to discover decedent in time to avoid injury. Miller v. Minneapolis & St. L. R. Co., 106 Minn. 499, 119 NW 218.

93. **Search Note:** See Railroads, Cent. Dig. §§ 924-953; Dec. Dig. §§ 283-297; 23 A. & E. Enc. L. (2ed.) 735.

94. Street car crossing tracks. Wills v. Atchison, etc., R. Co., 133 Mo. App. 625, 113 SW 713. Must keep train under control and must maintain lookout. Richmond v. Missouri Pac. R. Co., 133 Mo. App. 463, 113 SW 708. Where fireman does not obey signal of towerman at grade crossing within another company, company is liable without regard to competency of fireman. Gorman v. New York, etc., R. Co., 194 N. Y. 488, 87 NE 682. In action for negligent approach to train on intersecting road which caused plaintiff to jump from latter train in anticipation of collision, evidence held to show gross negligence. Richmond v. Missouri Pac. R. Co., 133 Mo. App. 463, 113 SW 708.

95. Where stock train on belt line was not in habit of carrying passengers, intersecting line was not bound to anticipate presence of passenger thereon. Richmond v. Missouri Pac. R. Co., 133 Mo. App. 463, 113 SW 708. Evidence held to show that danger of collision was not so great as to cause experienced trainmen to jump. Id.

96. Gorman v. New York, etc., R. Co., 194 N. Y. 488, 87 NE 682.

97. Walton v. Miller's Adm'x [Va.] 63 SE 458. Evidence held sufficient to authorize finding of negligence in giving signal. Id.

98. Conductor held not chargeable with negligence of his engineer in failing to give signals. Central Illinois Const. Co. v. Lloyd, 134 Ill. App. 494.

99. **Search Note:** See notes in 15 L. R. A. 426; 16 Id. 119; 17 Id. 254; 47 Id. 301; 3 L. R. A. (N. S.) 778; 12 Id. 1067; 13 Id. 1071, 1074, 1177; 14 Id. 312; 15 Id. 803; 3 Ann. Cas. 361, 449; 4 Id. 294, 952; 10 Id. 485.

See, also, Railroads, Cent. Dig. §§ 954-1019,

way over a traveler, their obligations are reciprocal,[1] and the company must exercise reasonable care [2] to avoid injuring one at a public crossing [3] whether he be a stranger or an employe.[4] The care must be commensurate with the danger,[5] and, where the crossing is unusually dangerous, extra precautions must be taken,[6] it not being sufficient to give merely the statutory signals and warnings.[7] A railroad is only liable for negligence,[8] and trainmen may assume, until the contrary appears,[9] that one approaching a crossing in apparent full possession of all his faculties will not heedlessly place himself in a place of danger,[10] unless such person is too young to appreciate danger.[11] The company must not negligently do acts likely to frighten a team at the crossing.[12] Where a crossing not a public one has been so generally

1090-1104; Dec. Dig. §§ 298-322, 337-340; 8 A. & E. Enc. L. (2ed.) 386; 23 Id. 732.

1. Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808; Vandalia R. Co. v. McMains [Ind. App.] 85 NE 1038.

2. Chicago, etc., R. Co. v. Donovan [C. C. A.] 160 F 826. As to speed and as to giving warnings. Cross v. Illinois Cent. R. Co., 33 Ky. L. R. 432, 110 SW 290.

3. Where lateral boundaries of street are not definite, mere accidental deviation from crossing does not render pedestrian a trespasser in sense that only duty owed is to abstain from willful injury. Southern R. Co. v. Fisk [C. C. A.] 159 F 373. Where child was picked up outside of street limits, but evidence tended to show that he was carried and rolled some distance, held for jury whether he was struck at crossing. Carleo v. Delaware, L. & W. R. Co. [N. J. Err. & App.] 72 A 89.

4. Chicago, etc., R. Co. v. Donovan [C. C. A.] 160 F 826.

5. Southern R. Co. v. Fisk [C. C. A.] 159 F 373; Norfolk & W. R. Co. v. Holmes' Adm'r [Va.] 64 SE 46.

6. Duty to exercise extra precautions is controlled by conditions at time of accident and not at time road was built. Danskin v. Pennsylvania R. Co. [N. J. Err. & App.] 72 A 32. Mere existence of brush obstructing view held not to require extra precautions. Id. Where company leaves cars so as to obstruct view of crossing, it must use extra precautions in approaching same. Cherry v. Louisiana & A. R. Co., 121 La. 471, 46 S 596. Evidence that night was misty and that rails were damp and slippery held to show defendant not negligent in failing to stop before striking plaintiff. Thompson v. Seaboard Air Line R. Co., 81 S. C. 333, 62 SE 396.

7. Illinois Cent. R. Co. v. France's Adm'x [Ky.] 112 SW 929. Compliance with Rev. St. Ohio, § 3336, does not excuse taking extra precautions if demanded by the situation. Erie R. Co. v. Weinstein [C. C. A.] 166 F 271. Where it appears that crossing is unusually dangerous and that it is greatly used, held error to refuse to submit question whether precautions, in addition to statutory signals, were required. Adkisson's Adm'r v. Louisville, etc., R. Co., 33 Ky. L. R. 204, 110 SW 284. Where evidence was conflicting as to speed of train and as to whether snow blinded traveler approaching crossing, court properly charged that giving of statutory signal was not conclusive of due care. Erie R. Co. v. Weinstein [C. C. A.] 166 F 271. Where crossing is unusually dangerous, negligence may be predicated upon failure to have flagman or watchman, though not required by ordinance. Norfolk & W. R. Co. v. Munsell's Adm'r [Va.] 64 SE 50.

8. Fact that wagon was almost over when struck, and that if speed of train had been checked a little sooner collision would not have occurred, does not create liability where company was not negligent. Norfolk & W. R. Co. v. Davis' Adm'r, 108 Va. 514, 62 SE 337. Where engineer sees child pass over crossing, he may assume that he will continue, and company is not liable where he suddenly turns back onto track ahead of engine. Matz v. Missouri Pac. R. Co. [Mo.] 117 SW 584. Evidence held to show that deceased child had safely passed over track and then suddenly turned back onto same immediately ahead of engine. Id.

**Negligence for jury:** Whether child ran onto tracks too close to engine to enable engineer to avoid injury. Harrington v. Butte, A. & P. R. Co., 37 Mont. 169, 95 P 8. Evidence that engine which struck wagon had no headlight and that no signal was given. Graves v. Baltimore & N. Y. R. Co. [N. J. Law] 69 A 971. Evidence held insufficient to sustain verdict for injuries to a child. Maille v. Illinois Cent. R. Co., 121 La. 360, 46 S 355.

9. While engineer may ordinarily assume that one approaching crossing will not place himself in place of danger, he cannot so assume where situation would suggest to ordinarily prudent man that pedestrian was not aware of train. Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808.

10. Louisville & N. R. Co. v. Gilmore's Adm'r, 33 Ky. L. R. 74, 109 SW 321; Norfolk & W. R. Co. v. Davis' Adm'r, 108 Va. 514, 62 SE 337. Where it does not become apparent that one approaching track is going to go upon same until train is within 65 feet of him, and it is then impossible to stop, company is not liable for resultant accident. Louisville & N. R. Co. v. Gilmore's Adm'r, 33 Ky. L. R. 74, 109 SW 321. Striking out words "was rational and" from requested instruction that employes "had a right to assume that intestate was rational and would exercise reasonable care," etc., held not prejudicial. Zetsche v. Chicago, etc., R. Co., 238 Ill. 240, 87 NE 412.

11. Employes may assume that child eight years old, running towards crossing, will not go upon track in absence of facts suggesting contrary. Southern R. Co. v. Daves, 108 Va. 378, 61 SE 748.

12. Where one wiping engine permitted steam to escape, knowing that team was on crossing just ahead of engine, company is liable St. Louis S. W. R. Co. v. Nelson [Tex. Civ. App.] 111 SW 1062. Evidence held to

used by the public, with the acquiescence of the company, as to imply a license,[13] due care must be used to avoid injury.[14]

*Lookout.*[See C. L. 1405]—Trainmen must keep a lookout for travelers at all public crossings [15] and at crossings used under a license,[16] provided the view is such as to make it effective.[17]

*Signals.*[See 10 C. L. 1405]—A railroad must exercise reasonable care [18] to give adequate notice of the approach of trains,[19] and must give the same at such time and place as to make it effective.[20] The giving of signals at public crossings [21] is regulated by statute in most states,[22] and the failure to comply therewith is negligence.[23]

warrant finding that wiper permitted steam to escape just as plaintiff was driving ahead of engine. Id.

**13.** Evidence as to extent of use as crossing held to make question of knowledge and acquiescence for jury. El Paso Elec. R. Co. v. Ryan [Tex. Civ. App.] 114 SW 906. Where public customarily used defined pathway across tracks with consent and acquiescence of company, one using same is not a trespasser. Lamphear v. New York, etc., R. Co., 194 N. Y. 172, 86 NE 1115. Whether license existed held for jury, where it appeared that public had used way for long time and that objections of company had been to use of yard rather than to the way. Tarashonsky v. Illinois Cent. R. Co. [Iowa] 117 NW 1074.

**14.** Where company concedes such public use of pathway with its consent as to eliminate question of public passageway, only question is use of reasonable care to give suitable warnings. Lamphear v. New York, etc., R. Co., 194 N. Y. 172, 86 NE 1115. Where public had customarily used certain pathway with consent of company, instruction that deceased had no license to walk on track and took risks incident thereto, and that no duty rested on defendant except not to willfully injure him, held properly refused. Id.

**15.** Louisiana & A. R. Co. v. Ratcliffe [Ark.] 115 SW 396. Fact that engine needs coaling does not excuse fireman's abandonment of lookout at point on curve where engineer cannot see. Louisville & N. R. Co. v. Gilmore's Adm'r [Ky.] 114 SW 752, rvg. 33 Ky. L. R. 74, 109 SW 321.

**16.** Tarashonsky v. Illinois Cent. R. Co. [Iowa] 117 NW 1074.

**17.** Where obstructions shut off view of crossing until too close to avoid injury to one thereat, court properly refused instruction that it was duty of trainmen to keep lookout. Adkisson's Adm'r v. Louisville, etc., R. Co., 33 Ky. L. R. 204, 110 SW 284.

**18.** In absence of statute, company must exercise due care and, if necessary, give signals. Kujawa v. Chicago, etc. R. Co., 135 Wis. 562, 116 NW 249. Must give warnings of approach. Illinois Cent. R. Co. v. France's Adm'x [Ky.] 112 SW 929.

**Negligence for jury:** Approaching crossing where view was obstructed without giving signals. Texas & P. R. Co. v. Stoker [Tex. Civ. App.] 115 SW 910. Approaching from around curve without proper signals. Hanlon v. Lehigh Valley R. Co., 122 Pa. 490, 70 A 821. Where view was obstructed by trees and brush, finding that failure to give signals was negligence held warranted. Kujawa v. Chicago, etc., R. Co., 135 Wis. 562, 116 NW 249.

**19.** Not necessarily by whistle. Brown v. Long Island R. Co., 129 App. Div. 649, 113 NYS 1090. Held for jury whether ringing of bell was sufficient warning. Id. Where there was positive evidence that headlight was burning before and after accident, question is for jury, though witnesses testify that they did not see light at time of accident. Baltimore & O. R. Co. v. State, 107 Md. 642, 69 A 439. Mere evidence that plaintiff did not hear whistle held insufficient to show that it was not blown, where own evidence showed that because of intervening bluff and adverse wind it was almost impossible to hear. Davis v. Chicago, etc., R. Co. [C. C. A.] 159 F 10. Held for jury whether signals were given. Louisville & N. R. Co. v. Joshlin, 33 Ky. L. R. 513, 110 SW 382. Held for jury, giving of signal, evidence being conflicting. McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33.

**20.** Evidence held to sustain finding that signals were not given or were given too far from crossing to be effective. Cherry v. Louisiana & A. R. Co., 121 La. 471, 46 S 596. Whether whistle was blown just before, at time of, or just after plaintiff was struck. Texas v. N. O. R. Co. v. Reed [Tex. Civ. App.] 116 SW 69.

**21.** "Public road" as used in Civ. Code 1895, § 2222, requiring signals 400 yards from public road crossing, is not limited to roads laid out by authorities by regular proceedings, but includes prescriptive highways, etc. McCoy v. Central of Georgia R. Co. [Ga.] 62 SE 297. Road intended for use in connection with limekiln and mostly used by those having business held "road" within Civ. Code, § 486, requiring signals. Vance v. Atchison, etc., R. Co. [Cal. App.] 98 P 41. In action for injury caused by starting of cars, allegation that cars were left standing in street held insufficient to render Civ. Code 1896, § 3440, applicable, such statute requiring signal on approaching crossing, it not appearing but what train was lying in street parallel therewith. Birmingham S. R. Co. v. Kendrick [Ala.] 46 S 588.

**22.** Under 1 Ann. St. 1906, § 1102, in cities, bell must be rung continuously from point 80 rods from crossing. Turner v. St. Louis & H. R. Co. [Mo. App.] 114 SW 1026. Under Comp. Laws 1907, § 447, requiring trains to stop and to give signals at certain crossings, it cannot be assumed that a crossing at which signals were not given was one within the statute, in absence of proof. Wilkinson v. Oregon Short Line R. Co [Utah] 99 P 466.

**23.** Failure to give signals as required by Ky. St. 1903, § 786, is negligence Louisville & N. R. Co. v. Joshlin, 33 Ky. L. R. 513, 110 SW 382. Positive testimony of en-

Such statutes are for the benefit of one approaching the crossing [24] and are not limited to actual collisions [25] at the crossings,[26] but are not usually available to one not intending to use the crossing.[27] While a statute requiring the blowing of the whistle at a certain distance from the crossing, and the continuous ringing of the bell thereafter, requires the bell to be sounded where the engine starts within the distance to pass over the crossing,[28] it has no application where a caboose is accidentally kicked over.[29] The "eighty rods" from a crossing at which signals are required is to be measured from the end of the train nearest the crossing.[30] No liability attaches, however, unless the failure to give the signals was the proximate cause of the injury,[31] and no recovery can be predicated upon the failure to give signals at another crossing where they were properly given at the one where the injury occurred.[32]

*Speed.*See 10 C. L. 1407—While ordinarily a railroad may operate its trains at such speed as it may choose through rural districts,[33] where running through cities and populous communities it must exercise due care for the safety of persons who may be using the crossings,[34] and must observe statutes and ordinances regulating speed.[35]

*Gates.*See 10 C. L. 1407—Where gates are constructed and are in use, it is no de-

gineer, brakeman, passenger and another that bell and whistle were sounded as required by statute, held to show that signals were given, as against testimony of three that they did not hear them. Weiss v. Central R. Co. [N. J. Law] 69 A 1087.

**24.** Rev. St. 1895, art. 4507, requiring crossing signals, held for benefit of one approaching crossing whose team became frightened 100 yards from same. Texas Cent. R. Co. v. Horn [Tex. Civ. App.] 115 SW 911. Statutory duty to give crossing signal is available to one approaching crossing whose team is frightened by close proximity of train suddenly appearing. Skipworth v. Mobile & O. R. Co. [Miss.] 48 S 964. Failure to give signal required by 1 Ann. St. 1906, § 1102, is available to one approaching crossing who was induced, by failure to give signal, to come closer to crossing and whose horse was frightened by train. Turner v. St. Louis & H. R. Co. [Mo. App.] 114 SW 1026. Under 1 Ann. St. 1906, § 1102, where failure to give signal required thereby caused one approaching crossing to drive closer than he otherwise would have done, which resulted in horse taking fright, defendant has burden of showing some cause of injury other than omission to give signal. Id.

**25.** Code 1906, § 4045, requiring every railroad to give signals on approaching highway crossings, is not limited to cases of actual collision, but is applicable to all cases where injury is directly traceable to failure to give signals. Illinois Cent. R. Co. v. Armstrong [Miss.] 47 S 427. Held properly submitted where engine frightened team and caused runaway although it was stopped before collision occurred. Id.

**26.** Court held to have properly qualified instruction where one killed while on track trying to stop train to prevent collision with team stalled at crossing would not have driven onto track had signals been given. Thompson v. Seaboard Air Line R. Co., 81 S. C. 333, 62 SE 396.

**27.** Failure to give crossing signals is not available to one not killed at crossing. Lynch v. Great Northern R. Co. [Mont.] 100 P 616.

**28.** St. 1898, § 1809. Kujawa v. Chicago, etc., R. Co., 135 Wis. 562, 116 NW 249.

**29.** Rev. Laws, c. 111, § 188. White v. New York, etc., R. Co., 200 Mass. 441, 86 NE 923.

**30.** Elgin, J. & E. R. Co. v. Lawlor, 132 Ill. App. 280.

**31.** See § 11, subd. B.

**32.** Heise v. Chicago G. W. R. Co. [Iowa] 119 NW 371.

**33.** Not negligence to run at high rate of speed over country crossing. McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33; Brown v. Long Island R. Co., 129 App. Div. 649, 113 NYS 1090; Baltimore & O. R. Co. v. State, 107 Md. 642, 69 A 439. Where speed has not been limited, running over crossing 25 to 50 miles per hour as reasonably required is not negligence. Freedman v. New York, etc., R. Co. [Conn.] 71 A 901.

**34.** Must run at such speed in cities as to avoid all injuries to persons using due care. Pittsburgh, etc., R. Co. v. Lynch [Ind. App.] 87 NE 40. Negligence for jury where train was run at high rate of speed through populous city. Illinois Cent. R. Co. v. France's Adm'x [Ky.] 112 SW 929. Running at speed of 50 or 60 miles per hour through small town and failing to ring bell at crossing where view was obstructed held negligence. Liabraaten v. Minneapolis, etc., R. Co., 105 Minn. 207, 117 NW 423.

**35.** Violation of speed ordinance is negligence per se. Chicago, B. & Q. R. Co. v. Sack, 136 Ill. App. 425. Where defendant ran locomotive over crossing at prohibited rate of speed without giving statutory signal, and failed to have flagman as required by ordinance, held negligent. Henry v. Cleveland, etc., R. Co., 236 Ill. 219, 86 NE 231. In action for death of child, evidence held to warrant jury in finding that train was violating speed limit where, had train been running at speed testified to by engineer, child could have been rescued after electric bell ringer began to ring before train reached place of accident. Illinois Cent. R. Co. v. Warriner, 132 Ill. App. 301.

fense to a failure to close them that the city did not require gates,[36] and a company using the tracks of another company is liable for a negligent failure to lower, though the contract placed the duty on the proprietary road.[37] Though a railroad company constructs gates without the sixty day notice required by an ordinance, it is none the less bound by the ordinance as to their operation.[38] A railroad must use reasonable care to so operate its gates as not to injure persons passing thereunder,[39] and to make them effective as a warning.[40]

*Flagmen.*[See 10 C. L. 1408]—Special circumstances of danger may require a flagman,[41] but the maintenance of a flagman does not relieve the company of its duty to give reasonable warnings.[42]

*Switching and backing train.*[See 10 C. L. 1408]—Reasonable care must be exercised in operating switch engines[43] and backing trains[44] over public crossings to avoid injury.

*Blocking crossings.*[See 10 C. L. 1409]—The public is entitled to the free and unobstructed use of crossings,[45] and the company must not unnecessarily place[46] therein or in close proximity thereto any thing calculated to frighten horses.[47]

**36.** Perkins v. Wabash R. Co., 233 Ill. 458, 84 NE 677.

**37.** Louisville & N. R. Co. v. Roth [Ky.] 114 SW 264. Where ordinance requires "all" railroads to erect safety gates, one utilizing gateman of another company is liable for his negligence. Record v. Pennsylvania R. Co. [N. J. Err. & App.] 72 A 62.

**38.** Wabash R. Co. v. Perkins, 137 Ill. App. 514.

**39.** Not an insurer. Kentucky & I. Bridge & R. Co. v. Singheiser [Ky.] 115 SW 192. Negligence held for jury where plaintiff's evidence tended to show that gates were suddenly lowered onto him, while defendant's evidence tended to show that plaintiff approached at such excessive speed that gates could not be lowered in time to stop him. Id. Negligence to fail to provide light or other signal for lowered gates. Record v. Pennsylvania R. Co. [N. J. Err. & App.] 72 A 62. Ordinance requiring erection of gates requires a proper operation thereof although silent in respect thereto. Id.

**40.** Evidence that gates were not lowered and no signals or warnings given held to show negligence. Carleo v. Delaware, L. & W. R. Co. [N. J. Err. & App.] 72 A 89.

**41.** Where gates were open and there were many engines on various tracks, held for jury whether situation required regular or special watchman. Delaware & H. Co. v. Larnard [C. C. A.] 161 F 520.

**42.** Must give statutory or other necessary signals. Cross v. Illinois Cent. R. Co., 33 Ky. L. R. 432, 110 SW 290.

**53.** Louisiana & O. R. Co. v. Ratcliffe [Ark.] 115 SW 396.

**44.** Where train of 130 or 150 feet length was backing towards crossing where view of persons approaching was obstructed, held not error to instruct that it was duty of company to have some one on rear to give warning. Louisville & N. R. Co. v. Veach's Adm'r [Ky.] 112 SW 869. Irrespective of Act May 28, 1907, (Acts 1907, p. 1018), relative to headlights, company may be guilty of negligence in backing over crossings with no lights except lanterns. Chicago, etc., R. Co. v. Moon [Ark.] 114 SW 228. Giving of signal before train starts to back over crossing is insufficient. Norfolk & W. R. Co. v. Holmes' Adm'r [Va.] 64 SE 46. Independent of statute or ordinance, trainmen backing over much used crossing must keep lookout. Id. Negligence in running engine backwards without having lookout on tender depends on circumstances. Southern R. Co. v. Daves, 108 Va. 378, 61 SE 748.

**Negligence:** To operate train through country at rate of 20 miles per hour without headlight and with only a red lantern hung on tender of engine which was backing. Gorton v. Harmon, 152 Mich. 473, 15 Det. Leg. N. 250, 116 NW 443. Running train backward before daylight at speed of 30 to 40 miles per hour without warnings or lights, except such as are usually on rear of train. Kurt v. Lake Shore & M. S. R. Co., 127 App. Div. 838, 111 NYS 859. Running engine backwards at speed greatly in excess of ordinance limit. Inman v. North Carolina R. Co. [N. C.] 62 SE 878. Backing of engine through city at unlawful rate of speed and without warning. Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808. Evidence that engine was backed over crossing at night without lights or giving of signals held to make question of **negligence for jury.** Perkins v. Wabash R. Co., 233 Ill. 458, 84 NE 677. Negligence in backing over crossing without stationing someone on rear to give warning. Norfolk W. R. Co. v. Holmes' Adm'r [Va.] 64 SE 46. In backing engine without a lookout on tender over crossing practically in country and where engiuer had clear view. Southern R. Co. v. Daves, 108 Va. 378, 61 SE 748.

**45.** One desiring to use same need not seek another. Texas Cent. R. Co. v. Randall [Tex. Civ. App.] 113 SW 180. Where car stood partly across private crossing used by consignees, negligence in bumping into it and knocking it against one using crossing without warning held for jury. Mullins v. New York, etc., R. Co., 201 Mass. 38, 87 NE 476.

**46.** Evidence of shipments of ship stuff to certain consignee and position of sacks thereof on highway near tracks held to au-

(§ 11G) 2. *Contributory negligence.*[48] *General rules.*[See 10 C. L. 1409]—One approaching a crossing is bound to know that it is a place of danger,[49] and while he may within reasonable limits assume that the company will not be negligent,[50] he must exercise such care as an ordinarily prudent person would exercise under the same or similar circumstances,[51] notwithstanding the negligence of the railroad,[52] and if he fails so to do no recovery can be had,[53] in the absence of special statute.[54] The care must be commensurate with the dangers incident to the particular crossing,[55] and if it is particularly dangerous additional care must be exercised.[56] Negligence is usually a question for the jury [57] to be determined from all the circumstances.[58] One

thorize finding that company left same there (Louisville & N. R. Co. v. Blackaby, 33 Ky. L. R. 885, 111 SW 317), and that plaintiff's horse was frightened thereat (Id.).

**47.** Butler v. Easton & A. R. Co. [N. J. Err. & App.] 71 A 276. Where evidence tends to show that defendant unnecessarily left standing for unreasonable length of time a new and freshly painted locomotive and tender within highway, negligence is for jury. Id. Negligence in leaving car at or near crossing which frightened horse held for jury. Texas Cent. R. Co. v. Randall [Tex. Civ. App.] 113 SW 180.

**48. Search Note:** See notes in 3 L. R. A. (N. S.) 196, 391; 4 Id. 521; 11 Id. 963; 13 Id. 1066; 6 Ann. Cas. 78; 7 Id. 352, 801; 8 Id. 984; 9 Id. 216; 10 Id. 418.

See, also, Railroads, Cent. Dig. §§ 1020-1089; Dec. Dig. §§ 323-336; 8 A. & E. Enc. L. (2ed.) 427.

**49.** And he must use care of ordinarily prudent man. McFeat v. Philadelphia, W. & B. R. Co. [Del.] 69 A 744.

**50.** Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808; Cleveland, etc., R. Co. v. Lynn [Ind.] 85 NE 999. Negligence cannot be predicated on failure to anticipate that company would run train in excess of speed limit. Dukeman v. Cleveland, etc., R. Co., 237 Ill. 104, 86 NE 712. May assume that company will obey law as to giving statutory signals and keeping flagman. Henry v. Cleveland, etc., R. Co., 236 Ill. 219, 86 NE 231. Where one sees approaching train he cannot assume that it is not running at excessive speed but must use senses to avoid injury. Clemons v. Chicago, etc., Co., 137 Wis. 387, 119 NW 102. Assumption that train is not approaching at unusual speed is not conclusive of negligence. Stearns v. Boston & M. R. Co. [N. H.] 71 A 21.

**51.** Antonian v. Southern Pac. R. Co. [Cal. App.] 100 P 877; Winn v. Cleveland, etc., R. Co., 239 Ill. 132, 87 NE 954; Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808; Chicago, etc., R. Co. v. Assman [Kan.] 96 P 843. Instruction that care required is such as ordinarily prudent person "would exercise" instead of "should exercise" held not erroneous. Southern R. Co. v. King [C. C. A.] 160 F 332. In instruction that if plaintiff saw engine switching back and forth and "negligently" attempted to cross he could not recover qualifying word held proper, for if reasonably prudent man would not have considered danger imminent, plaintiff was not negligent. Louisiana & A. R. Co. v. Ratcliffe [Ark.] 115 SW 396. Mere fact that he could have seen train had he looked held not conclusive of negligence. Liabraaten v. Minneapolis, etc., R. Co., 105 Minn. 207, 117 NW 423. Where plaintiff was injured by horse taking fright at box car standing at crossing, mere fact that he knew that there was danger in attempting to drive by after he saw horse shying, would not make him negligent as matter of law in attempting to pass. Texas Cent. R. Co. v. Randall [Tex. Civ. App.] 113 SW 180. Where switch engine which had blocked crossing moved on, one waiting has a right to cross unless he exposed himself to a danger, in acting on appearance that it would not return, that ordinarily prudent person would not have assumed. Louisiana & A. R. Co. v. Ratcliffe [Ark.] 115 SW 396.

**52.** Antonian v. Southern Pac. R. Co. [Cal. App.] 100 P 877; Chesapeake & O. R. Co. v. Hall's Adm'r [Va.] 63 SE 1007; Louisiana & A. R. Co. v. Ratcliffe [Ark.] 115 SW 396. Negligence of company in failing to give warning signals. Wilkinson v. Oregon Short Line R. Co. [Utah] 99 P 466.

**53.** Wilkinson v. Oregon Short Line R. Co. [Utah] 99 P 466.

**54.** Although 1 Ann. St. 1906, § 1102, makes failure to give signal as required therein and injury a prima facie case, contributory negligence may be shown. Turner v. St. Louis & H. R. Co. [Mo. App.] 114 SW 1026.

**55.** Pendray v. Great Northern R. Co. [N. D.] 117 NW 531.

**56.** Erie R. Co. v. Weinstein [C. C. A.] 166 F 271. Where witnesses disagree as to actual condition with respect to sight and hearing at crossing, conditions can be determined only by jury. Kasarda v. Lehigh Valley R. Co. [Pa.] 70 A 943.

**57.** Verdict based on finding that plaintiff at no time saw train in time to avoid collision is not inconsistent with instruction as to duty of one seeing train in time to avoid it. Antonian v. Southern Pac. R. Co. [Cal. App.] 100 P 877.

**Negligent as matter of law:** Where decedent drove onto crossing after driving 200 feet with view cut off without again looking. McKahan v. Baltimore & O. R. Co. [Pa.] 72 A 251. For adult to knowingly go upon track in front of moving train, unless compelled to do so to avoid impending danger. Louisiana & A. R. Co. v. Ratcliffe [Ark.] 115 SW 396. In assuming that engine would remain on switch and not looking again until almost on crossing, although he was watching for train due from other direction. Wilkinson v. Oregon Short Line R. Co. [Utah] 99 P 466. Where boy 14 years old driving gentle horse is struck at crossing by train which must

have approached in plain sight on level track. Clemons v. Chicago, etc., R. Co., 137 Wis. 387, 119 NW 102. Where decedent, knowing of dangerous character of crossing and partially deaf, went onto crossing in front of train approaching in plain sight without looking until it was almost on to him. Popke v. New York, etc., Co. [Conn.] 71 A 1098. Where one knowing of train approaching in dense fog did not stop to ascertain its proximity. Cleveland, etc., R. Co. v. Houghland [Ind. App.] 85 NE 369. Drove onto track in front of train approaching in plain view, notwithstanding ringing of automatic crossing bell and warning of friend which he must have heard. Peck v. Grand Trunk W. R. Co. [Mich.] 15 Det. Leg. N. 1072, 119 NW 578. Reading book while approaching crossing. Chicago, etc., R. Co. v. Adler, 136 Ill. App. 539. Driving on track with approaching train in plain sight. Chicago, B. & Q. R. Co. v. Sack, 136 Ill. App. 425; Chicago, etc., R. Co. v. Zetsche, 135 Ill. App. 623; Illinois Cent. R. Co. v. Scheevers, 134 Ill. App. 514. Driving on track knowing that train is liable to come along at any time. Chicago Junction R. Co. v. Reinhardt, 139 Ill. App. 53. Pedestrian going on track with unobstructed view of approaching locomotive. Chicago, etc., R. Co. v. Hirsch, 132 Ill. App. 656.

**Not negligent as matter of law:** In attempting to drive horse by car standing partly in street, which shied into ditch and threw plaintiff out. Missouri, K. & T. R. Co. v. Davis [Tex. Civ. App.] 116 SW 423. Where combination of circumstances prevented plaintiff from seeing train until it was too late. McGrath v. Philadelphia & R. R. Co., 166 F 332. Where plaintiff looked before going upon first track but not thereafter before going onto second track, although view was somewhat obstructed at first track. Spannknebel v. New York, etc., R. Co., 127 App. Div. 345, 111 NYS 705. Where old lady, approaching crossing where there was sharp curve in track, stopped and looked when about 3 or 4 feet from track but did not look when on track. Giddings v. Chicago, etc., R. Co., 133 Mo. App. 610, 113 SW 678. In going onto track in front of train approaching on straight track, where it was dark and snow storm in face of one looking in direction from which train came. Erie R. Co. v. Weinstein [C. C. A.] 166 F 271. Going onto track ahead of train where evidence tended to show that engine was backing without light and gave no signal. Perkins v. Wabash R. Co., 233 Ill. 458, 84 NE 677. Where attention of driver was attracted to switch engine nearby and upon discovering approaching engine he attempted to back off. St. Louis & S. F. R. Co. v. Summers [Tex. Civ. App.] 111 SW 211. Drove upon track knowing of approaching train. Stearns v. Boston & M R. Co. [N. H.] 71 A 21. For jury where twelve-year old boy was killed. Chicago & E. R. Co. v. Fowler, 138 Ill. App. 352. Not negligence per se to use crossing knowing of defects therein. Chicago, B. & Q. R. Co. v. Sample, 138 Ill. App. 95. Contributory negligence held for jury on conflicting evidence as to plaintiff's intoxication and as to speed with which he was driving. Elgin, J. & E. R. Co. v. Lawler, 132 Ill. App. 280; Conlon v. Chicago G. W. R. Co., 139 Ill. App. 555. For jury where plaintiff looked and listened until horse became unmanageable. Cleveland, etc., R. Co. v. Cyr [Ind. App.] 86 NE 868. Failure to look and listen at any joint where train could have been discovered not negligence as matter of law. Id. Parent sending 13 year old boy on errand which took him across track, it appearing that he was an unusually careful boy. McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33. Where one about to cross, knowing that train had not passed, stopped, looked and listened but did not discover approaching train and drove onto track, where he became stalled by wheel slipping off culvert into mud hole. When he discovered train he abandoned team but was hit by flying sack. Day v. Missouri, K. & T. R. Co., 132 Mo. App. 707, 112 SW 1019. Where plaintiff looked and saw a clear track for 685 feet which would have given him time to cross had train been running at lawful rate of speed, held not negligent as matter of law in not thereafter discovering train. Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808.

**Negligence for jury:** Negligence of bicycle rider in colliding with train at night, view of crossing being somewhat blocked. Antonian v. Southern Pac. R. Co. [Cal. App.] 100 P 877. In going onto track ahead of engine approaching at about five times speed limit, crossing being somewhat obstructed and decedent being partially deaf. Winn v. Cleveland, etc., R. Co., 239 Ill. 132, 87 NE 954. In driving onto track in front of engine, being misled by fact that engine was backing and was on track used by engines going away from crossing. Gorson v. Atlantic City R. Co. [N. J. Law] 72 A 1. In crossing in front of backing engine where lanterns on rear were insufficient to give correct location. Chicago, etc., R. Co. v. Moon [Ark.] 114 SW 228. Where view was obstructed by cars until within 4 or 5 feet of track, where plaintiff listened for signals and heard none, and where he was struck by train exceeding speed limit. Inman v. North Carolina R. Co. [N. C.] 62 SE 878. In going onto track in front of train, view being blocked by cars. Pittsburgh, etc., R. Co. v. Lynch [Ind. App.] 87 NE 40. Failure to stop where view was clear for last 140 feet and where road was sandy and buggy made but little noise. Kujawa v. Chicago, etc., R. Co., 135 Wis. 562, 116 NW 249. In driving onto track ahead of train, evidence being conflicting as to whether view was obstructed. St. Louis S. W. R. Co. v. Shelton [Tex. Civ. App.] 115 SW 877. Crossing in front of backing train. Little Rock & M. R. Co. v. Russell [Ark.] 113 SW 1021. In attempting to cross where he was about 3 steps from crossing when train was discovered 30 steps away, emergency being created by company's negligence. Central of Georgia R. Co. v. Williams [Ga. App.] 63 SE 917. Where driver stopped a reasonable time to see if locomotive standing in highway would not move or if horse would take fright, and, upon finding that engine was not going to move and that horse did not appear frightened, attempted to drive by, negligence is for jury. Butler v. Easton & A. R. Co. [N. J. Err. & App.] 71 A 276. Whether one who has deter-

riding as the guest of another [59] who has no control of the team is not required to exercise the same diligence as the one driving.[60] Whether parents of a child were in the exercise of due care for its safety is a question of fact for the jury.[61]

ined to cross ahead of train should devote his whole attention to team or should have watched train. Stearns v. Boston v. M. R. Co. [N. H.] 71 A 21. Where evidence was conflicting as to whether view was obstructed by darkness and storm or by smoke and steam from another train. Kasarda v. Lehigh Valley R. Co. [Pa.] 70 A 943. Where plaintiff looked before crossing and train was hidden by curve, especially where she would have crossed in safety had she not stumbled on raised plank. Hanlon v. Lehigh Valley R. Co., 221 Pa. 490, 70 A 821. Where plaintiff's evidence shows that night was dark and cloudy, that driver stopped 10 or 15 feet from track to look and listen but did not see train, that train had no headlight and gave no signal, all of which defendant's evidence tended to disprove. Groves v. Baltimore & N. Y. R. Co. [N. J. Law] 69 A 971. Although witness testified that decedent seemed to be reading soap wrapper, there being evidence that decedent was illiterate and that soap sold had no reading matter on it. Dukeman v. Cleveland, etc., R. Co., 237 Ill. 104, 86 NE 712. Whether conductor on street car was negligent in giving signal to motorman to come on after he had passed over tracks and saw no trains or whether he should have stopped and continued to watch. Cleveland, etc., R. Co. v. Hilligoss [Ind.] 86 NE 485. Where train was backing at rate of 30 miles per hour on stormy night without headlight and against wind. Gorton v. Harmon, 152 Mich. 473, 15 Det. Leg. N. 250, 116 NW 443.

**Held negligent:** In driving onto track ahead of known approaching train, believing that it was to stop at station between station and crossing. Cable v. Spokane, etc., R. Co., 50 Wash. 619, 97 P 744. Where plaintiff, who was riding with her father, made no effort to have him stop before driving onto crossing ahead of train. Id. In attempting to pass ahead of rapidly moving train after looking in that direction and presumably appreciative of the situation. O'Brien v. New York, etc., R. Co., 129 App. Div. 288, 113 NYS 329. In going onto track ahead of approaching train where plaintiff had unobstructed view while train going 35 miles per hour ran 450 feet. Strong v. Grand Trunk W. R. Co. [Mich.] 16 Det. Leg. N. 39, 120 NW 683. In turning from public road and going diagonally upon track and over embankment which caused wagon to tip over onto track where decedent was struck by train, evidence showing that it was a bright moonlight night and that decedent was intoxicated. Smith v. Union Pac. R. Co. [Neb.] 119 NW 230. Evidence held to show that decedent saw train and negligently attempted to beat it. Laun v. St. Louis & S. F. R. Co. [Mo.] 116 SW 553. In crossing in front of train approaching in full sight, although on hearing it she believed that it was coming in opposite direction. Chesapeake & O. R. Co. v. Hall's Adm'r [Va.] 63 SE 1007. In standing on track within couple of feet of caboose which was kicked back over him. White v. New York, etc., R. Co., 200 Mass. 441, 86 NE 923. Where, knowing of dangerous crossing, horse is driven at trot to within 25 feet of track, at which point a view of only about 50 or a 100 feet could be had, and then halted only to a walk, and where hearing could not be relied on because of intervening bluff and adverse wind. Davis v. Chicago, etc., R. Co. [C. C. A.] 159 F 10. Drove horse so close to track before stopping that it took fright and ran in front of train. Potter v. Pennsylvania R. Co., 221 Pa. 550, 70 A 852. Where person killed was walking, evidence that, although view was somewhat obstructed, he could have seen engine about 12 rods up track when 4 feet therefrom. Shunn's Adm'x v. Rutland R. Co. [Vt.] 69 945. Walking on west side of wagon without taking any precautions against train from east, though one was past due, the night being stormy. Schwartz v. Mineral Range R. Co., 153 Mich. 40, 15 Det. Leg. N. 358, 116 NW 540.

**Held not negligent:** In going onto track ahead of backing engine, no signals or warnings having been given, night being dark and view obstructed. Norfolk & W. R. Co. v. Holmes' Adm'r [Va.] 64 SE 46. Where no train was in sight when plaintiff drove onto track and accident was caused by balking of horse. Flannelly v. Delaware & H. Co., 164 F 303.

58. Kujawa v. Chicago, etc., R. Co., 135 Wis. 562, 116 NW 249; Williams v. Chicago, etc., R. Co. [Iowa] 117 NW 956. Fact that one of decedent's horses was afraid of cars may be considered in determining negligence in attempting to cross ahead of known approaching train. Stearns v. Boston & M. R. Co. [N. H.] 71 A 21. Although deceased did not know of rule limiting speed to 25 miles per hour, knowledge of customary speed may have justified him in assuming that it was not approaching at a higher speed. Id.

50. Where one borrowed horse and another a wagon and started out on joint expedition, one could not be considered as guest of other, but both owed duty of stopping and listening. Wade v. Western Maryland R. Co., 220 Pa. 578, 69 A 1112. Where two driving together are companions and engaged in mutual enterprise, one not driving owes same duty as driver to avoid danger and cannot recover where he permitted other to drive into place of danger without objection. Davis v. Chicago, etc., R. Co. [C. C. A.] 159 F 10.

60. Liabraaten v. Minneapolis, etc., R. Co., 105 Minn. 207, 117 NW 423.

61. Jury held warranted in finding that parents of child killed by railroad were in exercise of due care for its safety when they were sufficiently near place of accident to have saved child had railroad not been negligent, and child had been in back yard six minutes before accident, and as soon as bell ringer at crossing started to ring search for child was made. Illinois Cent. R. Co. v. Warriner, 132 Ill. App. 301.

*Acts required of traveler.* See 10 C. L. 1412—The care exacted of one approaching a crossing requires that he should use his faculties of sight and hearing,[62] but the failure so to do is not usually negligence per se [63] and may be excused by the peculiar circumstances of the case.[64] Ordinarily he need not stop unless it is necessary to effectively look and listen.[65] A traveler must exercise reasonable care to look and listen at a time and place to make it effective,[66] and must continue to look and listen unless upon the track.[67] Where a collision occurs with a train approaching in

**62.** Louisiana & A. R. Co. v. Ratcliffe [Ark.] 115 SW 396; Vance v. Atchison, etc., R. Co. [Cal. App.] 98 P 41; Chicago, etc., R. Co. v. Jones, 135 Ill. App. 380; Laun v. St. Louis & S. F. R. Co. [Mo.] 116 SW 553; O'Brien v. New York, etc., Co., 129 App. Div. 288, 113 NYS 329; Cable v. Spokane, etc., R. Co., 50 Wash. 619, 97 P 744. Generally, it is negligence not to look and listen. Little Rock & M. R. Co. v. Russell [Ark.] 113 SW 1021.

**Held negligent:** One approaching crossing with unobstructed view of track without using senses to ascertain if any train is approaching. Williams v. Chicago, etc., R. Co. [Iowa] 117 NW 956. Bright boy 13 years old, familiar with crossing dangers, in attempting to pass over without looking and in spite of warnings. McGee v. Wabash, R. Co., 214 Mo. 530, 114 SW 33. In failing to stop and look, where position in rear of wagon prevented a view of track until horses were almost onto track. Missouri, K. & T. R. Co. v. Jenkins [Kan.] 98 P 208.

**Negligence for jury:** Negligence in failing to look and listen, where defendant violated law as to speed giving of signals, and maintaining of flagman. Henry v. Cleveland, etc., R. Co., 236 Ill. 219, 86 NE 231. Negligence in failing to look and listen. Louisville & N. R. Co. v. Joshlin, 33 Ky. L. R. 513, 110 SW 382. Where train came from direction from which train would not ordinarily be expected, negligence in not looking in that direction. Fowler v. Chicago & E. I. R. Co., 234 Ill. 619, 85 NE 298. Deaf person in approaching, after looking, to track and stopping on track as if to tie shoe string without again looking, and remaining there while train ran 180 or 296 feet at rate of 6 to 12 miles per hour, **negligent as matter of law.** Arkansas Cent. R. Co. v. Fain, 85 Ark. 532, 109 SW 514.

**Not negligent:** Where plaintiff and decedent stopped and looked twice but view was somewhat obstructed. Johnson v. Southern Pac. R. Co. [Cal.] 97 P 520. Where only eye witness did not see decedent until he "lunged" onto track, evidence held to support finding that he stopped, looked and listened in view of presumption of due care. Atchison, etc., R. Co. v. Hayes [Kan.] 99 P 1131.

**63.** Winn v. Cleveland, etc., R. Co., 239 Ill. 132, 87 NE 954; Dukeman v. Cleveland, etc., R. Co., 237 Ill. 104, 86 NE 712. Where opportunity exists, duty to look is absolute. Hain v. Chicago, etc., R. Co., 135 Wis. 303, 116 NW 20; Clemons v. Chicago, etc., R. Co., 137 Wis. 387, 119 NW 102.

**64.** Failure to look and listen is not negligence in all cases. Henry v. Cleveland, etc., R. Co., 236 Ill. 219, 86 NE 231. Though train could have been seen. Texas & N. O. R. Co. v. Reed [Tex. Civ. App.] 116 SW 69. While one failing to look where he has full opportunity to do so cannot recover negligence for jury where view is obstructed or other facts exist which complicate question. Inman v. North Carolina R. Co. [N. C.] 62 SE 878. Not excused from looking and listening because noise of wagon renders it difficult to hear and peculiarities of grade make it difficult to see. Chicago, etc., R. Co. v. Moon [Ark.] 114 SW 228. Where team is uncontrollable, driver is excused from stopping, looking and listening. Sarles v. Chicago, etc., R. Co. [Wis.] 120 NW 232. Team is uncontrollable when driver, with all reasonable efforts, cannot prevent them from going onto track. Id. Not negligence to fail to look where it would have been unavailing because of obstructions. Vance v. Atchison, etc., R. Co. [Cal. App.] 98 P 41.

**65.** Louisiana & A. R. Co. v. Ratcliffe [Ark.] 115 SW 396; Antonian v. Southern Pac. R. Co. [Cal. App.] 100 P 877; Gorton v. Harmon, 152 Mich. 473, 15 Det. Leg. N. 250, 116 NW 443; Shum's Adm'x v. Rutland R. Co. [Vt.] 69 A 945. For jury to say, from facts of particular case, whether traveler should have stopped. Antonian v. Southern Pac. R. Co. [Cal. App.] 100 P 877.

**66.** Antonian v. Southern Pac. R. Co. [Cal. App.] 100 P 877; Chesapeake & O. R. Co. v. Hall's Adm'r [Va.] 63 SE 1007. Must use reasonable care and prudence under circumstances as to place and time of looking and listening. Pittsburgh, etc., R. Co. v. Lynch [Ind. App.] 87 NE 40. Where pedestrian looked, he is not necessarily negligent because he did not look at the most advantageous point. Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808. Not negligent in failing to look for train while on crest of hill, it not appearing that decedent knew at that time that he could not thereafter get a good view. Chicago, etc., R. Co. v. Hansen [Kan.] 96 P 668.

**67.** Clemons v. Chicago, etc., R. Co., 137 Wis. 387, 119 NW 102. Must use sense of sight at last opportunity before passing from line of safety to point of danger. Grimm v. Milwaukee Elec. R. & L. Co. [Wis.] 119 NW 833. Duty of being careful and observant does not cease with mere act of stopping and looking at point some distance from track (Walsh v. Pennsylvania R. Co. [Pa.] 70 A 1088), and, if situation affords opportunity thereafter of observing approaching train, disregard thereof is negligence (Id.).

**Negligent as matter of law:** Where one appproaching crossing looked when about four rods therefrom and, seeing no train, proceeded with horses at walk without again looking, though view was unobstructed. Williams v. Chicago, etc., R. Co. [Iowa] 117 NW 956. In driving onto

plain view, the doctrine of res ipsa loquitur obtains,[68] and displaces the presumption of due care.[69]

*Duty where view of track is obstructed.*[See 10 C. L. 1413]—Where the view of the track is obstructed, one approaching must use commensurate care.[70]

*Parallel tracks.*[See 10 C. L. 1413]—Since danger is correspondingly increased by the number of tracks upon which trains may approach, commensurate care must be used where there are several tracks.[71]

*Right to rely on crossing signals, gates, flagman, etc.*[See 10 C. L. 1413]—While open gates or signals of flagman may constitute an invitation to cross,[72] and must be considered in determining contributory negligence,[73] they do not relieve a traveler

crossing without looking during last 53 feet, knowing that train was due though attention was diverted by prancing of horses. Smith v. Chicago, etc., R. Co., 137 Wis. 97, 118 NW 638.

**68.** Doctrine of res ipsa loquitur applies to accident at crossing where facts indicate that had deceased done what he was bound to do it would not have occurred. Clemons v. Chicago, etc., R. Co., 137 Wis. 387, 119 NW 102. Where surroundings are such that if plaintiff had looked he would have seen train, it will be presumed from occurrence of accident, either that he did not look, or that he did not heed what he saw. Wilkinson v. Oregon Short Line R. Co. [Utah] 99 P 466; Antonian v. Southern Pac. R. Co. [Cal. App.] 100 P 877.

**69.** Clemons v. Chicago, etc., R. Co., 137 Wis. 387, 119 NW 102.

**Held negligent:** Where decedent either did not look, or saw train and attempted to pass ahead of it. Hain v. Chicago, etc., R. Co., 135 Wis. 303, 116 NW 20. Where approaching train was visible for 740 feet, notwithstanding plaintiff testified that she looked but did not see same. Walsh v. Pennsylvania R. Co. [Pa.] 70 A 1088. Testimony of plaintiff and companion that they looked and saw no train held insufficient to raise issue in view of physical fact that train was in plain sight. Schaub v. Kansas City S. R. Co., 133 Mo. App. 444, 113 SW 1163. Evidence that view was unobstructed held to show that plaintiff did not look, or, seeing train, failed to take proper precaution. Id. Where circumstances are such that plaintiff must have seen and heard train had he looked and listened, his mere negative testimony that he looked and listened but did not see or hear train will not sustain verdict. Stetson v. Baltimore & N. Y. R. Co. [N. J. Law] 71 A 113. Negligent as matter of law where evidence is conclusive that train was clearly visible at point where plaintiff testified he stopped and looked although he says that he did not see it. Weiss v. Central R. Co. [N. J. Law] 69 A 1087.

**70.** One approaching crossing where view is obstructed may expect signals to be given. St. Louis S. W. R. Co. v. Shelton [Tex. Civ. App.] 115 SW 877.

**Negligence for jury:** Driver of six horse team who stopped and listened where view was obstructed, in not leaving team and going forward. Vance v. Atchison, etc., R. Co. [Cal. App.] 98 P 41. In not discovering train approaching crossing, view being obstructed. Texas & P. R. Co. v. Stoker [Tex. Civ. App.] 115 SW 910. Approached crossing with automobile at rate of 5 or 6 miles per hour and looked and listened, but did not stop, though view was blocked. Pendroy v. Great Northern R. Co. [N. D.] 117 NW 531.

**Not negligent:** Where plaintiff stopped, looked and listened twice, but view was obstructed by cars and sound was deadened by noise or nearby mill, although it appears that there were particular spots where view would not have been obstructed, it not appearing that he knew thereof. Chicago, etc., R. Co. v. Assman [Kan.] 96 P 843.

**71. Not negligent:** Where four tracks are only 49 feet across, traveler exercises due care in stopping and looking before going onto first track where he has clear view therefrom. Cherry v. Louisiana & A. R. Co., 121 La. 471, 46 S 596.

**Not negligent as matter of law:** In colliding with engine, where box car on fourth track obstructed view until plaintiff passed it, his horses becoming unmanageable on the sixth and collision occurring on eighth. Robison v. New York, etc., R. Co., 128 App. Div. 677, 112 NYS 905. Person going around train obstructing a crossing before daylight, in failing to see train on another track backing at great speed without signals or other warnings and without lights except such as are usually on rear of trains. Kurt v. Lake Shore & M. S. R. Co., 127 App. Div. 838, 111 NYS 859.

**72.** May rely on invitation of flagman to cross. Cross v. Illinois Cent. R. Co., 33 Ky. L. R. 432, 110 SW 290. Held for jury whether partial raising of gates was an invitation. Pulcino v. Long Island R. Co., 125 App. Div. 629, 109 NYS 1076; Wabash R. Co. v. Perkins, 137 Ill. App. 514. Where defendant's evidence tended to prove that gates were not raised at all, but plaintiff's tended to show that they were raised about 6 feet and again lowered, held for jury whether they were raised enough to constitute invitation. Pulcino v. Long Island R. Co., 125 App. Div. 629, 109 NYS 1076.

**73.** Although brakeman has no authority to give crossing signals, such signals when given may be considered on plaintiff's negligence. Guthrie v. Baltimore & O. R. Co. [Pa.] 71 A 542. In determining negligence in not waiting until smoke has cleared away, raising of gates must be considered. Pulcino v. Long Island R. Co., 125 App. Div. 629, 109 NYS 1076. Absence of flag at crossing as required held not to have misled decedent where no such flag had ever been displayed. Peck v. Grand Trunk Western R. Co. [Mich.] 15 Det. Leg. N. 1073, 119 NW 573.

from the duty to exercise due care for his own safety.[74] He must exercise care also to avoid being injured by the lowering of the gates.[75]

(§ 11) *H. Injuries to persons on highways or private premises near tracks.*[76] See 10 C. L. 1414—While a railroad is not liable for injuries caused by horses on nearby highways taking fright at the ordinary operations of its trains,[77] it is liable for negligence,[78] especially after discovering the horses' fright.[79] Likewise, it must exercise reasonable care not to place anything calculated to frighten an ordinarily gentle horse near the highway.[80] Contributory negligence defeats recovery.[81]

(§ 11) *I. Injuries to animals on or near tracks. How far liability extends.*[82]—See 10 C. L. 1415—While it has been held that at common law a railroad owes no duty to a trespassing animal except to refrain from willful injuring it[83] and, hence, need not maintain a lookout,[84] its duty arising only upon actual discovery,[85] the more common

74. Louisville & N. R. Co. v. Roth [Ky.] 114 SW 264; Cross v. Illinois Cent. R. Co., 33 Ky. L. R. 432, 110 SW 290; Willoughby v. Erie R. Co. [N. J. Law] 71 A 41; Delaware & H. Co. v. Larnard [C. C. A.] 161 F 520. Existence of gates does not relieve traveler of duty to use due care. Kentucky & I. Bridge & R. Co. v. Singheiser [Ky.] 115 SW 192. Absence of watchman held not to justify plaintiff in assuming that he was at his post and that way was clear without exercising due care for own safety. Schaub v. Kansas City Southern R. Co., 133 Mo. App. 444, 113 SW 1163. Though flagman was negligent, party injured cannot recover if he was also negligent. Cross v. Illinois Cent. R. Co., 33 Ky. L. R. 432, 110 SW 290.

**Negligence for jury:** In crossing, where gates were up and plaintiff saw light but thought that engine was standing. Beauerle v. Michigan Cent. R. Co., 152 Mich. 345, 15 Det. Leg. N. 290, 116 NW 424. Where driver twice stopped and looked and finally mistaking sign of brakeman on freight train which had just cleared crossing to "keep back" for signal to "come on," attempted to cross and was struck. Guthrie v. Baltimore & O. R. Co. [Pa.] 71 A 542. Where train was in full view when gates raised and plaintiff started to cross, **held negligent.** Willoughby v. Erie R. Co. [N. J. Law] 71 A 41.

75. In action for injury to one struck by lowering gate, evidence held for jury whether he approached at such excessive speed as to be cause of accident. Kentucky & I. Bridge & R. Co. v. Singheiser [Ky.] 115 SW 192.

76. **Search Note:** See notes in 1 L. R. A. (N. S.) 307; 6 Id. 150; 7 Id. 597; 14 Id. 998; 11 Ann. Cas. 20.

See, also Railroads, Cent. Dig. §§ 1220-1392; Dec. Dig. §§ 354-404; 23 A. & E. Enc. L. (2ed.) 732.

77. Vandalia R. Co. v. McMains [Ind. App.] 85 NE 1038. Nonsuit held proper although crossing signals were not given and box car was being pushed ahead of engine. Hughes v. Southern R. Co. [S. C.] 61 SE 1079.

78. Liable where steam is negligently permitted to escape. Vandalia R. Co. v. McMains [Ind. App.] 85 NE 1038. In determining negligence in permitting steam to escape, place, length and character of train, distance from team, purpose and use of steam cocks, etc., may be considered. Id. Evidence that steam in engine standing near crossing could be raised to full head in 3 or 4 minutes, yet was allowed to blow off 10 or 12 minutes before starting time, held to authorize finding of negligence. Id.

79. While trainmen owe no duty to watch for teams on nearby highways, when they see team taking fright they must exercise reasonable care to avoid injury. Illinois Cent. R. Co. v. Martin, 33 Ky. L. R. 666, 110 SW 815.

80. Allegation that defendant negligently piled slag and placed car near road thereby frightening plaintiff's horse without alleging that such acts were unnecessary or of a character to ordinarily frighten horse held insufficient. Louisville & N. R. Co. v. Barnwell [Ga.] 63 SE 501.

81. Driver held negligent where it appears that he did not see train until after horse did and that he did not get lines tightened up until horse was running. Hughes v. Southern R. Co. [S. C.] 61 SE 1079. Contributory negligence held for jury where plaintiff knew that team was liable to run away and unhitched traces, on learning that train was approaching, but did not take team out although he had time. Illinois Cent. R. Co. v. Martin, 33 Ky. L. R. 666, 110 SW 815.

82. **Search Note:** See notes in 14 L. R. A. 841; 25 Id. 161; 37 Id. 659; 49 Id. 625; 3 L. R. A. (N. S.) 111; 6 Id. 911; 7 Id. 203; 11 Id. 228; 20 A. S. R. 161; 3 Ann. Cas. 182.

See, also, Railroads, Cent. Dig. §§ 1393-1656; Dec. Dig. §§ 405-452; 16 A. & E. Enc. L. (2ed.) 472; 17 A. & E. Enc. P. & P. 517, 546.

83. Bateman v. Rutland R. Co., 126 App. Div. 511, 110 NYS 506; Indianapolis & E. R. Co. v. Goar [Ind. App.] 86 NE 968.

84. Indianapolis & E. R. Co. v. Goar [Ind. App.] 86 NE 968.

85. McDonnell v. Minneapolis, etc., R. Co. [N. D.] 118 NW 819. Where railroad knew that sheep were on track and negligently ran into them, it is liable. Smith v. San Pedro, etc., R. Co. [Utah] 100 P 673. Evidence of distance at which horses were seen, that they never left track, that train was under control, etc., held to sustain finding that company failed to exercise reasonable care after discovering them. McDonnell v. Minneapolis, etc., R. Co. [N. D.] 118 NW 819.

rule seems to be that it must exercise ordinary care [86] and is liable for negligence [87] proximately causing injury,[88] especially where the animal is at a crossing.[89] An engineer need not check speed because an animal is near the track unless the situation indicates that it may go upon the track.[90] The duty and liability is sometimes regulated by statute,[91] but the mere violation of stock law does not of itself defeat recovery.[92] In some states a notice of the killing must be served upon the company within a specified time.[93]

*Place of entry on right of way.* See 10 C. L. 1417—The place of entry [94] is often material on the question of liability under the fence laws and where the injury occurs at a private [95] or public crossing.[96]

**86.** "Ordinary care" as used in Rev. St. 1895, art. 4528, making company absolutely liable for killing stock unless it has fenced in track, in which case it shall be liable only for failure to exercise ordinary care, refers to care in operating trains and not to maintenance of fence. Texas Cent. R. Co. v. Pruitt [Tex. Civ. App.] 110 SW 966. Must equip with headlight sufficient to disclose animal at such distance as to enable train to stop. Wallace v. Oregon Short Line R. Co. [Idaho] 100 P 904. Evidence held to show that train was negligently run into sheep upon track. Smith v. San Pedro, etc., R. Co. [Utah] 100 P 673.

**87.** Instruction held as whole to charge that to find for plaintiff it was only necessary to find that company omitted to ring bell, blow whistle or slack or stop train. St. Louis B. & M. R. Co. v. Droddy [Tex. Civ. App.] 114 SW 902.

**Negligent:** Evidence that mules ran on track ahead of engine held to warrant finding that if lookout had been kept they would have been discovered in time to avoid injury. Texas Cent. R. Co. v. Estes [Tex. Civ. App.] 113 SW 547.

**Negligence for jury:** In failing to discover cow approaching track and avoiding striking her. Rio Grande W. R. Co. v. Boyd [Colo.] 96 P 781. Where plaintiff's evidence tended to show that horse crossed track, ran along edge of same and finally turned back onto track and started down same when struck, while defendant's tended to show that she was struck as she first went upon track immediately ahead of engine. Missouri, K. & T. R. Co. v. Shepherd, 20 Okl. 626, 95 P 243. Where one witness testified that no whistle was sounded and no attempt made to stop until train struck cattle. Texas & P. R. Co. v. Corn [Tex. Civ. App.] 110 SW 485. Where plaintiff's evidence tended to show that track was straight and level and night not foggy, negligence in running into cattle held for jury, though defendant's evidence tended to show contrary. Chesapeake & O. R. Co. v. Grigsby [Ky.] 115 SW 237. It being customary to blow alarm whistle to frighten stock from track, it must be presumed that in some cases at least it is effective, hence evidence of failure to whistle after discovering cattle makes question of negligence for jury. Texas & P. R. Co. v. Corn [Tex.] 114 SW 103. **Evidence** held **insufficient** to show negligence in permitting bushes to grow up and obstruct view and in having insufficient headlight, especially where evidence tends to show that horse suddenly came on track. Milham v. Pine Bluff & W. R. Co. [Ark.] 110 SW 595.

**88.** Where bell for one crossing was rung until few seconds before horse was killed, failure to ring for crossing 250 yards beyond held immaterial. St. Louis S. W. R. Co. v. O'Hare [Ark.] 115 SW 942. Where horses get onto track through defective fence and are frightened by approaching train and run onto bridge, defective fence is proximate cause of injuries from falling through bridge. International & G. N. R. Co. v. Dixon [Tex. Civ. App.] 109 SW 978.

**89.** Where animals are being driven across tracks at crossing, obligations of due care are mutual. Smith v. San Pedro, etc., R. Co. [Utah] 100 P 673. Where animals are being driven across tracks at crossing, company must exercise reasonable care to discover, and does not perform duty by exercising reasonable care after discovering. Id.

**90.** Wallace v. Oregon Short Line R. Co. [Idaho] 100 P 904; Rio Grande W. R. Co. v. Boyd [Colo.] 96 P 781. Where train was going at a speed which would require but a few seconds to reach crossing and cow approaching same was walking along, held that situation was such as ought to have appraised engineer of likelihood that she would not stop. Rio Grande W. R. Co. v. Boyd [Colo.] 96 P 781.

**91.** Code 1906, § 4043, providing that railroad may run trains through towns, cities, etc., at rate of six miles per hour and company shall be liable for any damages sustained from running trains through towns, cities, etc., at greater speed, held only to apply to injuries within city limits. Mississippi Cent. R. Co. v. Butler [Miss.] 46 S 558.

**92.** See post, this section, Contributory Negligence.

**93.** Fact that man served responded as the ticket agent held sufficient to show that notice of killing under Stock Act § 6 was served on ticket agent. Rio Grande W. R. Co. v. Boyd [Colo.] 96 P 781.

**94.** Point of entry and not place of collision determines liability. Edie v. Kansas City S. R. Co., 133 Mo. App. 9, 112 SW 993.

**95.** Complaint construed and held not to affirmatively show that horses went onto track at private crossing, followed right of way to public crossing and were killed thereat. Indianapolis & C. Trac. Co. v. Smith [Ind. App.] 86 NE 498. Various statutes construed and held that liability of electric company for killing of animals entering at private crossing is same as railroad company, and, hence, company not liable where gate was left open by another in absence of contract relieving adjoining owner from duty of keeping same closed. Id.

*Duty to maintain fences.* See 10 C. L. 1417—At common law, railroads owed no duty to fence their tracks,[97] but, in the exercise of the police power,[98] many states now require them to fence their right of way [99] except in cities,[1] at depot grounds,[2] switch yards,[3] public crossings,[4] and at places where it would endanger the lives of their employes.[5] An absolute liability [6] is frequently imposed for injuries inflicted by trains [7] upon animals entering [8] at unfenced places [9] where the statute requires a

96. Testimony of engineer, the only eyewitness, that horse was killed at crossing is not conclusive. Bacus v. Chicago, B. & Q. R. Co. [Iowa] 118 NW 751. Evidence of position of body 100 feet from crossing and surrounding facts held to warrant finding that horse was not killed at crossing though engineer, the only eyewitness, testified that he was struck thereat and body carried on pilot. Id.

97. Prior to enactment of Rev. St. 1895, art. 4528, company need not fence, and were only liable for negligence in operating train. Texas Cent. R. Co. v. Pruitt [Tex. Civ. App.] 110 SW 966.

98. New York, etc., R. Co. v. Price [C. C. A.] 159 F 330.

99. Lessee is an "owner" within Civ. Code, § 485, giving cause of action to adjoining owners for animals killed through failure to fence. Barbee v. Southern Pac. R. Co. [Cal. App.] 99 P 541.

1. Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), does not require company to fence track where crossed by streets, but it must fence tracks in towns, etc., where not laid off into streets unless it is essential to transaction of business with public that track be unfenced (Bridges v. Missouri, K. & T. R. Co., 132 Mo. App. 576, 112 SW 37), and "business" referred to is business with public generally, and with itself in connection with stations, but maintenance of passing track merely does not have any connection with station within rule (Id.).

2. To constitute a "depot" within Ann. St. 1906, § 1105, requiring railroads to fence except at depots, etc., it is not indispensable that there be a depot building or a station agent. Welch v. St. Louis & S. F. R. Co., 131 Mo. App. 464, 109 SW 1074. Where company maintained switch track in sparsely settled country but had neither depot building nor station agent thereat, but did handle freight for all who tendered same and stopped for passengers on signal, held for jury whether place was "depot grounds," although mill company was practically only one accommodated. Id.

3. Held for jury whether point of crossing of defendant's tracks with another 300 or 400 feet outside village, at which point cow was killed was within switch yards. Bloomfield v. St. Louis & S. F. R. Co., 130 Mo. App. 373, 109 SW 824.

4. Only liable for negligence in operation of trains at crossings. Worley v. St. Louis & S. F. R. Co. [Mo. App.] 115 SW 1039.

5. Burnham v. Chicago, B. & Q. R. Co. [Neb.] 119 NW 235. Where it appears that to maintain fences about switch yards and sheep pens, located in country, would greatly increase danger to employes' lives, held duty of court to declare that company was under no obligation to maintain same. Id.

6. Where company fails to maintain fences as provided by Gen. St. 1906, § 2871, it is liable for all damage resulting from such failure. Atlantic Coast Line R. Co. v. Peeples [Fla.] 47 S 392. Where animal is killed on unfenced portion of road which should be fenced, company is liable under Rev. St. 1895, art. 4528, regardless of negligence. Rio Grande & E. P. R. Co. v. Garcia [Tex. Civ. App.] 117 SW 204.

7. Instruction construed, and held to require killing by "locomotive or cars" to authorize recovery. Texas & G. R. Co. v. Pate [Tex. Civ. App.] 113 SW 994. Evidence of blood on ties, etc., held to show that animals were killed by collision. Central Indiana R. Co. v. Smith [Ind. App.] 85 NE 26. To recover under Burns' Ann. St. 1901, §§ 5312, 5318, evidence must show that entry was made at place where right of way was not securely fenced and that animals were killed by collision with train. Id.

8. Instruction held erroneous as imposing liability if fence and gate were insufficient, without regard as to whether stock entered at defective point. Fee v. Chicago, B. & Q. R. Co. [Neb.] 119 NW 447. Evidence that some of the cattle were found in corn pens near where others were killed, and that there was no fence for half mile either way, held to authorize finding that cattle entered at point where track was not fenced. Central Indiana R. Co. v. Smith [Ind. App.] 83 NE 26.

9. Rev. St. 1895, art. 4528, requires maintenance of fence in such condition as under ordinary circumstances to effectually turn live stock of ordinary docility, and is not satisfied by exercise of ordinary care to repair. Texas Cent. R. Co. v. Pruitt [Tex.] 109 SW 925; Texas & P. R. Co. v. Corn [Tex.] 114 SW 103; Texas Cent. R. Co. v. Pruitt [Tex. Civ. App.] 110 SW 966. Under statute making company absolutely liable for killing of stock unless right of way was fenced, etc., company failing to maintain guards between wide grounds used by public and narrower fenced portion is liable for stock killed as result thereof. International & G. N. R. Co. v. Seiders [Tex. Civ. App.] 110 SW 997. Under Rev. St. 1895, art. 4528, making company absolutely liable unless it fenced, etc., proof of killing by locomotive makes prima facie case, and defendant has burden of showing that it fenced way, which could be rebutted by evidence that fence was insufficient to turn cattle of ordinary docility. Texas Cent. R. Co. v. Pruitt [Tex. Civ. App.] 110 SW 966. Under statute making company absolutely liable for stock killed unles it fences, etc., railroad has burden of showing that tracks were properly fenced. International & G. N. R. Co. v. Seiders [Tex. Civ. App.] 110 SW 997.

fence,[10] and it is no defense that the adjoining owner prevented the erection of a fence outside of the right of way.[11] While farm crossing gates are a part of the fence,[12] the duty devolves upon the adjoining owner, and not upon the railroad, to keep the same closed [13] unless unnecessary gates have been erected.[14] These statutes, however, are usually for the benefit of the adjoining owner [15] and not for the benefit of the general public.[16] Where a fence has been properly erected, the company must exercise reasonable care to maintain the same in proper condition,[17] and must repair or rebuild in such manner as not to interfere with the efficiency of the fence during the progress of the work.[18]

*Gates.*[See 10 C. L. 1419]—While a railroad must usually exercise reasonable care to maintain gates in proper repair [19] and is liable for injuries proximately resulting from a failure so to do,[20] a recovery is frequently denied where the adjoining owner knew of the defect and could have repaired without substantial cost or trouble.[21]

*Cattle guards.*[See 10 C. L. 1419]—While there is no general common-law duty to maintain guards, special situations may render it negligence not to do so,[22] and it is quite generally required by statute that sufficient guards shall be maintained at fence terminals [23] unless it will materially interfere with the business of the road [24] or will

**10.** In pleading liability under Burns' Ann. St. 1901 (Sp. Acts 1877, p. 61, c. 30, § 1), not necessary to negative exceptions relieving company from duty to fence. Central Indiana R. Co. v. Smith [Ind. App.] 85 NE 26.

**11.** Blankenship v. St. Louis & S. F. R. Co. [Mo. App.] 115 SW 1027.

**12.** Gate at farm crossing is part of "fence" within Rev. St. 1895, art. 4528. Texas Cent. R. Co. v. Pruitt [Tex. Civ. App.] 110 SW 966; Texas Cent. R. Co. v. Wills [Tex. Civ. App.] 116 SW 145.

**13.** Central Indiana R. Co. v. Smith [Ind. App.] 85 NE 26. Not bound to keep guard to see that private gate is closed. Texas & P. R. Co. v. Corn [Tex.] 114 SW 103.

**14.** Under Laws 29th Leg. 1905, p. 226, c. 117, making company liable only for negligently killing stock where it has fenced track in stock law district, where company puts in unnecessary gates it must keep same closed. Texas & P. R. Co., v. Webb [Tex.] 114 SW 1171.

**15.** Civ. Code, § 485, making railroad liable for killing domestic animals belonging to landowners through or "along" whose land the road runs, is inapplicable where land is separated from right of way by public road. Barbee v. Southern Pac. R. Co. [Cal. App.] 99 P 541.

**16.** Civ. Code, § 485, requiring railroads to fence right of way, and giving cause of action to adjoining owners for animals killed because of lack thereof, unless company has paid owner agreed price for making and maintaining such fence, held for benefit of public. Barbee v. Southern Pac. R. Co. [Cal. App.] 99 P 541.

**17.** International & G. N. R. Co. v. Dixon [Tex. Civ. App.] 109 SW 978.

**18.** Toledo, etc., R. Co. v. Varner, 137 Ill. App. 563.

**19.** Evidence held to show negligence in maintaining defective gate. Texas & P. R. Co. v. Webb [Tex. Civ. App.] 114 SW 1170. Evidence as to insufficiency of gate and of defendant's attempts to repair held to authorize judgment for plaintiff. Smith v. St. Louis, etc., R. Co., 132 Mo. App. 612, 112 SW 32. Evidence of recent repairs on gate and placing of lock thereon, that owner did not use lock, and that he passed through gate during evening and left boy to close same, held to show that gate was not open through negligence of company. Wallace v. Oregon Short Line R. Co. [Idaho] 100 P 904.

**20.** Where defective condition of gate prevented it from latching unless lifted, and person passing through neglected to lift it, held that defect was proximate cause of it being open. Texas & P. R. Co. v. Corn [Tex. Civ. App.] 110 SW 485.

**21.** Where evidence tended to show that gate was merely sagged and could have been fixed in a minute or two with hammer and nail, held for jury whether defect was of such substantial character as to require defendant to repair. Texas & P. R. Co. v. Corn [Tex. Civ. App.] 110 SW 485.

**22.** Where company fences in right of way, it may be a common-law duty to construct sufficient guards to turn stock and thus avoid trap. Sheli v. Missouri Pac. R. Co., 132 Mo. App. 528, 112 SW 39.

**23.** Sufficiency of guard, under Ky. St. 1903, § 1793, held for jury where evidence shows that it is one in general use but that cattle pass over it. Nashville, etc., R. Co. v. Russell, 33 Ky. L. R. 447, 110 SW 317. Fact that guard is same as is in general use on defendant's and other roads is not conclusive that it is sufficient under Ky. St. 1903, § 1793, which contemplates a guard reasonably sufficient to turn stock. Id. Mere fact that horse crossed guard in front of train is not of itself evidence of its insufficiency, but manner in which he crossed may be considered with other facts. O'Mara v. Newton & N. W. R. Co. [Iowa] 118 NW 377.

**24.** Rev. St. 1899, § 2867 (Ann. St. 1906, p. 1649), making company liable for injuries occurring where track is unenclosed, does not make company liable for stock killed which enters right of way from public road at point where it would seriously impede business to maintain fence or guards. Edle

endanger the lives of employes,[25] and, if not so maintained, the company is sometimes made absolutely liable for resulting injury [20] or liable in double damages.[27]

*Contributory negligence of owners.* See 10 C. L. 1419—No recovery lies where the owner's negligence [28] proximately contributes to the injury,[29] but the running at large [30] in violation of stock law does not ordinarily preclude a recovery.[31]

(§ 11) *J. Fires.*[32] See 10 C. L. 1420—While in a few states a railroad is absolutely liable for fire escaping from its locomotives,[33] it is generally only required to exercise reasonable care to prevent fires being communicated to adjoining property,[34] and is liable for all injuries proximately resulting from its negligence.[35] While an indepen-

v. Kansas City S. R. Co., 133 Mo. App. 9, 112 SW 993.

**25.** Whether maintenance of guards would be dangerous to employes must be determined form all the circumstances, which is a question for jury unless reasonable minds could not differ upon undisputed facts. Edie v. Kansas City S. R. Co., 133 Mo. App. 9, 112 SW 993.

**26.** Liability under Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), is absolute. Adams v. St. Louis & S. F. R. Co. [Mo. App.] 116 SW 1119. Railroad Law, Laws 1892, p. 1390, c. 676, § 32, requiring railroads to fence track and to maintain sufficient cattle guards and providing that "so long as such fences" are not provided, etc., company shall be liable, re-enactment of Laws 1854, c. 288, § 8, except that cattle guards are omitted from second provision, held not to change liability as to cattle straying over defective guards. Bateman v. Rutland R. Co., 126 App. Div. 511, 110 NYS 506. Under Code, § 2055, providing that railroad failing to maintain sufficient guards shall be liable for stock killed by reason thereof, and, "to recover, it shall only be necessary to prove the loss or injury" to the property, plaintiff must prove insufficiency of guard as well as injury to make prima facie case. O'Mara v. Newton & N. W. R. Co. [Iowa] 118 NW 377. Fact that right of action for injury arises out of violation of statute requiring maintenance of guards and fences does not necessarily make cause of action statutory, but violation of statutory duty may give rise to common-law action. Shell v. Missouri Pac. R. Co., 132 Mo. App. 528, 112 SW 39.

**27.** Under Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), railroad is liable for double damages where animal strays from crossing onto private track beyond through lack of guards. Worley v. St. Louis & S. F. R. Co. [Mo. App.] 115 SW 1039.

**28.** Where horse was turned into lane which led across private crossing to horse pasture, owner returning to house and not seeing where horse was on hearing whistle of approaching train, negligence held for jury. St. Louis, B. & M. R. Co. v. Droddy [Tex. Civ. App.] 114 SW 902. Where, upon burning of overhead bridge, defendant made a temporary crossing but did not open fence so as to give access thereto, held not negligence for plaintiff, who was road overseer, to cut same, especially where fence was insufficient at nearby points to turn stock. Atlantic Coast Line R. Co. v. Peeples [Fla.] 47 S 392.

**29.** Negligence of owner in leaving cow out on highway, where engineer saw her in time to avoid injury but did not slacken speed, held not proximate cause. Rio Grande W. R. Co. v. Boyd [Colo.] 96 P 781.

**30.** Mules which were tied but broke loose during night and went onto track were not running at large. International & G. N. R. Co. v. Seiders [Tex. Civ. App.] 110 SW 997.

**31.** O'Kelly v. Yazoo & M. V. R. Co. [Miss.] 47 S 660. While Stock Law (Laws 26th Leg. 1899, p. 220, c. 128, as amended by Laws 28th Leg. 1903, p. 97, c. 71) prior to amendment by Laws 29th Leg. 1905, p. 226, c. 117, required owners to confine stock, it did not supersede Rev. St. 1895, art. 4528, making railroads liable for stock killed unless road was fenced. Texas & P. R. Co. v. Webb [Tex.] 114 SW 1171. Under Act 1905 (Laws 29th Leg. p. 226, c. 117, § 20a), amending stock law, recovery may be had for horse negligently killed, notwithstanding stock law (Texas & P. R. Co. v. Webb [Tex.] 114 SW 1171, afg. [Tex. Civ. App.] 114 SW 1170), such amendment not being unconstitutional as an amendment by reference to title nor for insufficiency of title (Id.).

**32. Search Note:** See notes in 8 C. L. 1656, 1659; 25 L. R. A. 161; 1 L. R. A. (N. S.) 533; 5 Id. 99; 10 Id. 1175; 12 Id. 382, 472, 526, 624; 20 A. S. R. 161; 42 Id. 538; 1 Ann. Cas. 815; 2 Id. 462; 3 Id. 386; 5 Id. 747; 6 Id. 153, 630, 784; 8 Id. 441.

See, also, Railroads, Cent. Dig. §§ 1657-1761; Dec. Dig. §§ 453-488.

**33.** Act April 18, 1907 (Acts 1907, p. 336), making railroads absolutely liable for fires escaping from engines, held constitutional. St. Louis & S. F. R. Co. v. Shore [Ark.] 117 SW 515.

**34.** Right of company to operate cars over its tracks is coupled with duty to so operate same as not to negligently injure property of other. Benedict Pineapple Co. v. Atlantic Coast Line R. Co., 65 Fla. 514, 46 S 732. Where jury is satisfied that fire was due either to improper construction of engine, lack of repairs, or improper handling, verdict should be for plaintiff although they are uncertain as to which cause fire is attributable. Southern R. Co. v. Darwin [Ala.] 47 S 314. Evidence that defendant knowingly allowed large quantities of fuel oil to escape and saturate surrounding ground held to warrant finding of negligence. Texas & N. O. R. Co. v. Bellar [Tex. Civ. App.] 112 SW 323. Not liable for fire carefully set on railroad premises and spread by unexpected storm. McVay v. Central California Inv. Co., 6 Cal. App. 184, 91 P 745.

**35.** Burning of cover over plants to protect from frost, thereby exposing them, held proximate cause of freezing. Benedict Pineapple Co. v. Atlantic Coast Line R. Co.,

dent, intervening cause relieves the company from liability,[36] where it negligently permits inflammable oils [37] to escape and its presence proximately causes the spread of a fire, it is immaterial who ignited the same.[38] Likewise, where a railroad company [39] negligently [40] moves a burning car to a point near another's property and sets the same on fire, it is immaterial whether the owner protested or not,[41] and it is liable unless the loss was inevitable.[42] The company must exercise reasonable care to keep its right of way free from combustible material,[43] and where it fails so to do and fire starts because thereof, it is immaterial that due care was used in other respects,[44] and that plaintiff's adjoining property was in the same condition.[45] Liability in particular instances,[46] and the duties of roads passing through forests,[47] and lands subject to fires,[48] are sometimes prescribed by statute.[49] Unless a railroad

65 Fla. 514, 46 S 732. Evidence held to show that presence of oil in ground which had been negligently allowed to escape was proximate cause of spread of fire. Texas & N. O. R. Co. v. Bellar [Tex. Civ. App.] 112 SW 323. Where fire escaped from engine to house of O and from there to plaintiff's property, negligence in permitting fire to escape from locomotive was proximate cause of plaintiff's loss. St. Louis S. W. R. Co. v. Wilbanks [Tex. Civ. App.] 113 SW 318. Death of one endeavoring to save property from fire held proximate result of negligent starting of fire. Illinois Cent. R. Co. v. Siler, 133 Ill. App. 2.

**36.** Ordinary wind carrying fire is not an independent, intervening cause. Benedict Pineapple Co. v. Atlantic Coast Line R. Co., 65 Fla. 514, 46 S 732. Where cover over plants is negligently burned, destruction of plants by ordinary and usual frosts is not such an act of God as to relieve company. Id. Where conditions were not materially changed by flood except that additional oil was carried onto land, such flood did not relieve defendant. Texas & N. O. R. Co. v. Bellar [Tex. Civ. App.] 112 SW 323.

**37.** Evidence that fuel oil on ground had on several occasions caught fire held to warrant finding that it was inflammable. Texas & N. O. R. Co. v. Bellar [Tex. Civ. App.] 112 SW 323.

**38.** Texas & N. O. R. Co. v. Bellar [Tex. Civ. App.] 112 SW 323.

**39.** Question held for jury whether crew was acting for defendant railroad company or for lumber company in moving burning car near plaintiff's property. Valentine v. Minneapolis, etc., R. Co. [Mich.] 15 Det. Leg. N. 915, 118 NW 970.

**40.** Evidence held to show negligence in moving burning car to point near plaintiff's property. Valentine v. Minneapolis, etc., R Co. [Mich.] 15 Det. Leg. N. 915, 118 NW 970. Though plaintiff's chance of saving property was small, company has no right to deprive him thereof by pulling burning car near thereto unless necessary to save own. Id.

**41.** Valentine v. Minneapolis, etc., R. Co. [Mich.] 15 Det. Leg. N. 915, 118 NW 970.

**42.** Company has burden of showing that property was doomed anyway. Valentine v. Minneapolis, etc., R. Co. [Mich.] 15 Det. Leg. N. 915, 118 NW 970. Evidence held for jury whether loss was inevitable, regardless of company's acts. Id.

**43.** Owes reasonable care. Atlantic Coast Line R. Co. v. Davis [Ga. App.] 62 SE 1022. Evidence that defendant cut grass and permitted it to lie after drying held to show negligence. Nichols v. Lehigh Valley R. Co., 61 Misc. 195, 114 NYS 942. Proof that right of way was overgrown with dry grass and other combustible material, that fire started in grass and spread to plaintiff's land, makes prima facie case. Diggs v. Wabash R. Co., 131 Mo. App. 457, 110 SW 9. Where fire originates outside of right of way, there is no issue as to combustible material on right of way. Gulf, etc., R. Co. v. Meentzen Bros. [Tex. Civ. App.] 113 SW 1000.

**44.** Atlantic Coast Line R. Co. v. Davis [Ga. App.] 62 SE 1022; Diggs v. Wabash R. Co., 131 Mo. App. 457, 110 SW 9.

**45.** Atlantic Coast Line R. Co. v. Davis [Ga. App.] 62 SE 1022.

**46.** Evidence that plaintiff intended to ship cotton stored in cotton seed house on right of way and was awaiting for car for which he had made a guarantee deposit, held to authorize finding that cotton was there with consent of company, within Civ. Code 1902, § 2135, making exception to company's absolute liability where property destroyed is on right of way without company's consent. Hutto v. Seaboard Air Line R. Co., 81 S. C. 567, 62 SE 835. Complaint alleging that locomotive was so negligently managed that it emitted sparks, which set fire to nearby cotton seed house, held action based on common-law negligence and under Civ. Code 1902, § 2135, making company absolutely liable for fires in certain cases. Id.

**47.** Word "forest" as used in Forest, Fish and Game Laws (Laws 1900, p. 66, c. 20), § 228, providing that a railroad company shall twice a year cut and remove all inflammable material from right of way passing through forest lands, held not to apply to partly wooded land. Higgins v. Long Island R. Co., 129 App. Div. 415, 114 NYS 262. Laws 1900, p. 66, c. 20, § 228, providing that every railroad company shall "on such part of its roads as passes through forest lands," "remove inflammable materials," etc., is applicable to forest lands, whether within forest preserve or not. People v. Long Island R. Co., 126 App. Div. 477, 110 NYS 512.

**48.** Under Laws 1900, p. 66, c. 20, requiring railroad to twice a year cut and remove all inflammable material from right of way through lands "subject to fires," it is not necessary to show that there have been

sets the fire, its employes are under no obligation to assist in extinguishing the same.[50] Contributory negligence of the injured person bars recovery.[51]

*Duty as to equipment and operation of engines.* See 10 C. L. 1421—A railroad must exercise reasonable care in equipping its locomotives with proper appliances for the prevention of fire,[52] but is liable only for negligence.[53] It is usually sufficient, however, if the engines are equipped with the most approved practical appliances in general use.[54] Must operate with such care as is consistent with the lawful, reasonable and effective conduct of its business.[55]

*Contractual exemptions from liability.* See 10 C. L. 1422—Exemption may ordinnarily be imposed as a condition upon the right to place property within the right of way,[56] but where such building is a warehouse, the exemption is not binding on third persons placings goods therein without knowledge thereof.[57] Where the exemption is drawn by the company, it will be construed most strictly against it,[58] and in no case will it be extended beyond the property [59] or the losses [60] manifestly covered

fires to show that land was subject to fires. Higgins v. Long Island R. Co., 129 App. Div. 415, 114 NYS 262.

**49.** Forest, Fish and Game Laws (Laws 1900, p. 66, c. 20, art. 13), as amended, and Laws 1900, p. 62, c. 20, § 220, construed, and held that provision requiring grass, etc., where railroad runs through forest, etc., to be cut twice a year, applies to counties having forests, whether it is a forest reserve or not, but provisions relating to employment of trackmen, devices to prevent escape of fires, etc., only apply to latter counties. People v. Long Island R. Co., 194 N. Y. 130, 87 NE 79.

**50.** Gulf, etc., R. Co. v. Meentzen Bros. [Tex. Civ. App.] 113 SW 1000.

**51.** Attempt to save property from fire not contributory negligence barring recovery for personal injuries. Illinois Cent. R. Co. v. Siler, 133 Ill. App. 2.

**52.** Sims v. American Ice Co. [Md.] 71 A 522. Where jury examined spark arrester and heard testimony as to unusual size of sparks emitted, negligence held for jury although defendant's evidence showed due care. Southern R. Co. v. Darwin [Ala.] 47 S 314.

**53.** Instruction held to properly charge nonliability if engine was properly equipped, managed, etc. Atlantic Coast Line R. Co. v. Williams [Ga. App.] 63 SE 671. Jury need not accept as conclusive statement of trainmen as to care in equipment and operation, but may consider all surrounding facts. St. Louis S. W. R. Co. v. Trotter [Ark.] 116 SW 227. Instruction that proof of proper equipment did not relieve defendant of presumption of negligence, unless it is also shown that engine was operated with reasonable care so as to prevent the escape of sparks, held not to impose absolute duty to prevent escape of sparks. Id. Where defendant submitted evidence that engine was equipped with first class standard spark arrester, was operated in usual manner, and did not emit more sparks than was necessary, while plaintiff offered evidence of two other fires started by the engine and that engine was "puffing and blowing" more than usual, negligence held for jury. Wheeler v. Albany & N. R. Co., 4 Ga. App. 439, 61 SE 839.

**54.** Where company showed that engine was equipped with a screen spark arrester which was in general use, instruction that it was incumbent on company to show that it had on its engine the best known and approved appliances held not erroneous as requiring railroad to prove that engine was equipped with appliances which were better than those in more general use. Helverson v. Chicago, etc., R. Co. [Iowa] 116 NW 699.

**55.** Southern R. Co. v. Darwin [Ala.] 47 S 314.

**56.** Loading platform. Southern R. Co. v. Blunt, 165 F 258. Corporation formed to erect and maintain compress held to have no power to agree in lease of part of right of way to indemnify company against losses to third persons by fire. Morgan v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 110 SW 978.

**57.** Hutto v. Seaboard Air Line R. Co., 81 S. C. 567, 62 SE 835. Though compress company receiving cotton of third person was agent of such party, company was not relieved from liability to such third person for fire by provision in lease of part of right of way to compress company where he had no knowledge thereof. Morgan v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 110 SW 978.

**58.** Morgan v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 110 SW 978.

**59.** Where lessee of part of right of way agreed to "assume all the risks" of fire to any building, improvements, etc., held that assumption only related to property of lessee and did not amount to contract of indemnity as to property of third persons. Morgan v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 110 SW 978. Release executed in consideration of right to build on right of way, exempting company from any liability for fire to any building thereon or thereafter placed on premises, or personal property, or set to such building and communicated to "other property" outside of premises, held not limited to personal property outside of premises but applicable to buildings. Equitable Fire & Marine Ins. Co. v. St. Louis & S. F. R. Co. [Mo. App.] 114 SW 546.

**60.** Where in consideration of a spur track adjoining planing mill owner released company from all liability for property destroyed by fire communicated by locomotives operating on said track or otherwise

by it. While negligence of the owner [61] proximately contributing to the injury [62] generally defeats recovery, unless the railroad after learning thereof [63] can by reasonable care prevent loss, in Florida it affects only the amount of recovery.[64] Ordinarily an adjoining owner may use his property as he sees fit,[65] and negligence can be predicated only on a failure to use due care after the fire starts,[66] he owing no duty to remove combustible material [67] or to keep guard.[68]

*Pleading.* See 10 C. L. 1423—While the complaint must allege negligence [69] and show that it was the proximate cause of the injury complained of,[70] it need not specify with particularity the facts which were the immediate cause of the fire's escape.[71] A general description of the injured premises is sufficient.[72]

*Evidence, burden of proof, and presumptions.* See 10 C. L. 1423—Plaintiff has the burden of proving that the fire was started by defendant [73] and that defendant was

engaged in work connected therewith, such release from liability does not cover property destroyed by sparks emitted from locomotive on main track not engaged in work connected with spur track (Thomason v. Kansas City S. R. Co., 122 La. 995, 48 S 432), and, where fire is set by locomotive on main track, company has burden of showing that it was being used in connection with spur track (Id.).

**61.** Evidence that owner hurried to fire and found corner of barn burning but wholly failing to show what he did held insufficient to show due care. Pittsburg, etc., R. Co. v. German Ins. Co. [Ind. App.] 87 NE 995. Owners may cover plants with canvas, and mere fact that it is within reach of sparks does not prevent recovery for fire negligently started. Benedict Pineapple Co. v. Atlantic Coast Line R. Co., 65 Fla. 514, 46 S 732.

**62.** Where undisputed evidence shows that plaintiff's agent placed cotton on platform so close to track as to be in great danger, held not error to submit question of negligence without question as to proximate cause. Birge-Forbes Co. v. St. Louis & S. F. R. Co. [Tex. Civ. App.] 115 SW 333. Instruction that if plaintiff failed to use care of ordinarily prudent person, and because of such failure he was guilty of negligence contributing to the burning, held to sufficiently charge on proximate cause. Morgan v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 110 SW 978.

**63.** Instruction on discovered peril held erroneous as not requiring actual knowledge of perilous position of cotton. Morgan v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 110 SW 978.

**64.** Benedict Pineapple Co. v. Atlantic Coast Line R. Co., 63 Fla. 514, 46 S 732.

**65.** Subject always to risk of fire from proper operation of road, and hence, where he permits combustible material to be near track, the risk is increased. Southern R. Co. v. Darwin [Ala.] 47 S 314.

**66, 67.** Southern R. Co. v. Darwin [Ala.] 47 S 314.

**68.** Southern R. Co. v. Darwin [Ala.] 47 P 314. Plea alleging proximity of property to tracks and negligence in failing to keep watchman held insufficient on demurrer. Id.

**69.** Complaint alleging that defendant company "so carelessly and negligently managed and operated" one of its engines as to set fire to canvas covering pinery and burn same held sufficient to allow recovery for burning of canvas (Benedict Pineapple Co. v. Atlantic Coast Line R. Co., 55 Fla. 514, 46 S 732), and, where it alleged that fire occurred in January, it is not necessary to allege that it was during winter season or that "defendant" ought to have anticipated a frost to allow recovery for freezing of plants (Id.).

**70.** Allegation that injury to growing plants by frost and cold occurred after and as result of negligent burning of covering used to protect them sufficiently connects injury with the negligence. Benedict Pineapple Co. v. Atlantic Coast Line R. Co., 55 Fla. 514, 46 S 732.

**71.** St. Louis S. W. R. Co. v. Wilbanks [Tex. Civ. App.] 113 SW 318. Complaint held to sufficiently allege negligence in maintenance of smokestack without specifying defect. Atlantic Coast Line R. Co. v. Davis [Ga. App.] 62 SE 1022. Pleading charging such negligent operation as to cause large and unusual sparks and coals to be emitted, and negligence in use of old and out of repair engine without sufficient spark arrester held not subject to motion to be made more definite. Pittsburgh, etc., R. Co., v. German Ins. Co. [Ind. App.] 87 NE 995.

**72.** McVay v. Central California Inv. Co., 6 Cal. App. 184, 91 P 745.

**73.** Byers v. Baltimore & O. R. Co. [Pa.] 72 A 245; Phillips v. Southern R. Co. [Va.] 63 SE 998. Mere probability that fire started from defendant's engine is not sufficient, but fact must be shown by a fair preponderance of proof. Sims v. American Ice Co. [Md.] 71 A 522. Evidence held for jury whether fire originated from spark falling through ventilator or crack in roof, in view of other explanation. Highland Foundry Co. v. New York, etc., R. Co., 199 Mass. 403, 85 NE 437. Passing of train and discovery of fire shortly thereafter raises no presumption that engine ignited same. Birmingham R., L. & P. Co. v. Hinton [Ala.] 48 S 546. Instruction that in considering whether defendant started fire jury should consider all the facts, including direction and velocity of the wind, working of engine, and condition, held not objectionable for failing to charge that facts must be so related as to leave no other conclusion, in absence of request for more specific instruction. Helverson v. Chicago, etc., R. Co. [Iowa] 116 NW 699.

**Held to authorize finding that engine**

negligent,[74] but proof that the fire was started by defendant's engine though established by circumstantial evidence[75] raises a presumption of negligence[76] which defendant is bound to meet with evidence of due care in the equipment and operation of its engine,[77] although it need not show such care by a preponderance of the evidence.[78] That defendant started the fire may be shown by circumstantial evidence.[78]

*Admissibility of evidence.* See 10 C. L. 1424—The general rules relating to hearsay,[80] res gestae,[81] materiality and relevancy,[81a] opinion,[82] documentary evidence,[83]

**started fire:** Evidence that fire started in dry grass near track shortly after train passed. Staples v. Boston & M. R. Co., 74 N. H. 499, 69 A 890. Evidence that fire was discovered shortly after engine emitting sparks passed and that wind blew from track towards building burned. Byers v. Baltimore & O. R. Co. [Pa.] 72 A 245. Evidence that defendant's locomotives habitually emitted sparks, that train passed shortly before discovery of fire. Higgins v. Long Island R. Co., 129 App. Div. 415, 114 NYS 262. Evidence that fire originated about time local train passed that spark arrester was defective, that it was emitting sparks in unusual quantities, that it was running in excess of scheduled speed. Phillips v. Southern R. Co. [Va.] 63 SE 998. Evidence that train passed at speed of 40 miles per hour, going up grade and emitting sparks, and that fire was shortly thereafter discovered in nearby cotton seed house. Hutto v. Seaboard Air Line R. Co., 81 S. C. 567, 62 SE 835. Where building sufficiently near track to be set on fire by sparks from locomotive is destroyed by fire occurring shortly after engine emitting sparks passed. Thomason v. Kansas City Southern R. Co., 122 La. 995, 48 S 432. Evidence that barn near tracks was discovered on fire shortly after train emitting sparks passed. St. Louis S. W. R. Co. v. Trotter [Ark.] 116 SW 227. Evidence that fire was discovered shortly after engine passed held **insufficient** in view of fact that engine was equipped with oil burner, etc., to show that fire was set by engine. Gulf, etc., R. Co. v. Meentzen Bros. [Tex. Civ. App.] 113 SW 1000. Evidence that bridge was burned shortly after engine passed over same, that witnesses saw live coals falling through bridge, **held to make question for jury** whether company set fire, notwithstanding negative testimony of trainmen. Police Jury v. Texas & P. R. Co., 122 La. 388, 47 S 692. Whether fire was started by locomotive, there being evidence that one passed shortly before fire was discovered, and there was no other explanation. Muse v. Gulf & S. I. R. Co. [Miss.] 48 S 897. Testimony of witnesses that they heard train in vicinity about two hours before fire held to authorize finding that train passed there notwithstanding train sheets to contrary. Staples v. Boston & M. R. Co., 74 N. H. 499, 69 A 890.

**74.** Where defendant has overcome presumption arising from fire by showing due care in equipping and operating engine, burden of showing negligence rests on plaintiff. Osborn v. Oregon R. & Nav. Co. [Idaho] 98 P 627. Setting of three fires by same engine within three quarters of a mile held to authorize inference of negligence. Lillard v. Chicago, etc., R. Co. [Kan.] 98 P 213.

**75.** Osborn v. Oregon R. & Nav. Co. [Idaho] 98 P 627.

**76.** Atlantic Coast Line R. Co. v. Davis [Ga. App.] 62 SE 1022; Osborn v. Oregon R. & Nav. Co. [Idaho] 98 P 627; Lillard v. Chicago, etc., R. Co. [Kan.] 98 P 213; Chenoweth v. Southern Pac. R. Co. [Or.] 99 P 86; Hutto v. Seabord Air Line R. Co., 81 S. C. 567, 62 SE 835; Gulf, etc., R. Co. v. Meentzen Bros. [Tex. Civ. App.] 113 SW 1000; St. Louis S. W. R. Co. v. Alexander Eccles & Co. [Tex. Civ. App.] 115 SW 648. Evidence that engine scattered sparks without proof of unusual quantity or unusual size is insufficient to show negligence. Chenoweth v. Southern Pac. R. Co. [Or.] 99 P 86. Evidence of emission of sparks held to authorize submission of negligence to jury although defendant's direct evidence tended to show due care. Id. Charge that, if sparks escaped from locomotive and set fire to grass on right of way which fire was communicated to plaintiff's property, prima facie case was made, held proper. St. Louis S. W. R. Co. v. Eccles [Tex. Civ. App.] 115 SW 648.

**77.** Southern R. Co. v. Darwin [Ala.] 47 S 314; Phillips v. Southern R. Co. [Va.] 63 SE 998; St. Louis S. W. R. Co. v. McLeod [Tex. Civ. App.] 115 SW 85. Prima facie case made by proof of setting of fire although contradicted by direct evidence of due care makes case for jury unless latter is so conclusive that a contrary verdict could not stand. Chenoweth v. Southern Pac. R. Co. [Or.] 99 P 86. Proof of due care in equipping and operating engine overcomes presumption of negligence arising from setting of fire unless other circumstances establish negligence. Id.

**78.** Although, upon proof of fire set by locomotive, company must go forward and show ordinary care in equipping and operating engine, it need not make such proof by preponderance of evidence, but it is sufficient if it equals in weight that growing out of presumption and other evidence of plaintiff. St. Louis S. W. R. Co. v. Starks [Tex. Civ. App.] 109 SW 1003.

**79.** As ignition shortly after passing of train. Gulf, etc., R. Co. v. Meentzen Bros. [Tex. Civ. App.] 113 SW 1000.

**80.** Statements made during fire as to cause of ignition of oil on ground held hearsay. Texas & N. O. R. Co. v. Bellar [Tex. Civ. App.] 112 SW 323. Inspector who did not inspect engine cannot testify as to inspection from record made by another. Chenoweth v. Southern Pac. R. Co. [Or.] 99 P 86.

**81.** Statements made during progress of fire as to cause of ignition held not admissible as res gestae. Texas & N. O. R. Co. v. Bellar [Tex. Civ. App.] 112 SW 323.

cross-examination,[84] and expert testimony,[85] etc., apply, as do the rules of cross-examination.[86]

**81a. Admissible:** Where it is claimed that fire was started by trains which passed on particular morning, defendant may identify engines which passed and show that they were properly equipped. Hitchner Wall Paper Co. v. Pennsylvania R. Co., 158 F 1011. Evidence of apparent repair of spark arrester shortly after fire. Byers v. Baltimore & O. R. Co. [Pa.] 72 A 245. Where complaint charged negligence in using coal instead of fuel oil, he was entitled to introduce evidence to show greater danger. Morgan v. Missouri K. T. R. Co. [Tex. Civ. App.] 110 SW 978. Evidence of inflammable grass and brush along way and length of time it so remained. Higgins v. Long Island R. Co., 129 App. Div. 415, 114 NYS 262. Where there is evidence that sparks are sometimes emitted without negligence, jury may consider conditions of plaintiff's premises on issue of cause of fire as bearing on possibility that it was caused by spark emitted without fault. Hitchner Wall Paper Co. v. Pennsylvania R. Co., 158 F 1011.

**Inadmissible:** Evidence comparing grass on plaintiff's land with that growing upon other people's land as opening up too large a field of collateral inquiry. Chicago, etc., R. Co. v. Matson, 77 Kan. 858, 94 P 1134.

**Custom:** Evidence of custom 10 years prior to time in question is inadmissible to discredit testimony that it was custom to let engines drift past place of fire with steam shut off. Chenoweth v. Southern Pac. R. Co. [Or.] 99 P 86. Practice of other compress companies in handling of cotton, how constructed as bearing on contributory negligence, held inadmissible. Morgan v. Missouri K. & T. R. Co. [Tex. Civ. App.] 110 SW 978. Evidence that engineers sometimes punch holes in spark arresters to make engine steam better is inadmissible in absence of showing that such practice prevailed on defendant road (Hitchner Wall Paper Co. v. Pennsylvania R. Co., 158 F 1011), and witness who has only been on two engines of defendant company for short time is incompetent to testify as to practice (Id.).

**Evidence of other fires: Admissible** evidence of another fire set out at same time as showing that fire was caused by locomotive. Missouri, K. & T. R. Co. v. Miller [Tex. Civ. App.] 110 SW 549. Where defendant offers evidence to show that engine is properly equipped with spark arresters, evidence of other fires set by engine within 10 days is admissible on rebuttal. St. Louis S. W. R. Co. v. Eccles [Tex. Civ. App.] 115 SW 648. Proof of fires in vicinity set by other engines about time of fire in question strengthens presumption of negligence in equipping and operating engines generally. Chenoweth v. Southern Pac. R. Co. [Or.] 99 P 86. Where engine setting fire is not fully identified and defendant introduced evidence that all of its engines were properly equipped, etc., it is proper to permit evidence of other fires in vicinity during fall. Missouri, K. & T. R. Co. v. Dawson Bros. [Tex. Civ. App.] 109 SW 1110. Although engine setting fire is identified, where defendant's own evidence shows that it was no better than the others, evidence of fires set by others. Osburn v. Oregon R. & Nav. Co. [Idaho] 98 P 627.

**Emission of sparks by same engine:** Evidence that engine had emitted sparks shortly before fire in question which had started fires held admissible. Sims v. American Ice Co. [Md.] 71 A 522. Evidence that engine threw out large quantities of sparks held admissible to show that it was not provided with spark arrester or that appliance was defective. Southern R. Co. v. Darwin [Ala.] 47 S 314.

**Emission of sparks by other engines:** Where it is not certain which of several trains started fire, held that court properly refused to confine evidence to train which passed last before discovering fire. Higgins v. Long Island R. Co., 129 App. Div. 415, 114 NYS 262. Where locomotive setting fire is identified, evidence is properly limited to construction, condition and operation of the particular locomotive. Morgan v. Missouri K. & T. R. Co. [Tex. Civ. App.] 110 SW 978. Evidence that engines on another road and through another section had set fires held inadmissible. Sims v. American Ice Co. [Md.] 71 A 522.

**82.** Testimony of engineer that he operated engine in prudent and careful manner as it should be handled by an experienced and competent engineer, inadmissible. Bryan Press Co. v. Houston & T. C. R. Co. [Tex. Civ. App.] 110 SW 99. Master mechanic held competent to testify that engines in yard were equipped with best appliances in use for arresting sparks, although he was unable to say that he had made personal examination. Bryan Press Co. v. Houston & T. C. R. Co. [Tex. Civ. App.] 110 SW 99.

**83.** Dispatcher's train sheet is admissible to identify trains which passed. Hitchner Wall Paper Co. v. Pennsylvania R. Co., 158 F 1011.

**84.** On cross-examination, any object whether in evidence or not may be shown to fix size of cinders which would pass through spark arrester in proper repair. Byers v. Baltimore & O. R. Co. [Pa.] 72 A 245.

**85.** Engineer of 40 years' experience is competent to testify as to best methods of preventing escape of sparks. Morgan v. Missouri K. & T. R. Co. [Tex. Civ. App.] 110 SW 978. Whether train was operated with due care held not proper subject for expert testimony, but question for jury on detailed facts. Bryan Press Co. v. Houston & T. C. R. Co. [Tex. Civ. App.] 110 SW 99. Question to expert as to distance spark will carry must embrace conditions existing at time of fire. Hitchner Wall Paper Co. v. Pennsylvania R. Co., 158 F 1011.

**86.** Where plaintiff, in attempting to show that fire was caused by engine, by process of exclusion, shows rule of plaintiff company prohibiting smoking on premises and observance of it, witness may be cross-examined as to fire within year reported to witness as having been started by smoking. Hitchner Wall Paper Co. v. Pennsylvania R. Co., 158 F 1011.

*Instructions.*[See 10 C. L. 1425]—Instructions must be considered as a whole [87] and must not be misleading [88] or on the weight of the evidence,[89] but requested instructions covered by those given may be refused.[90]

*Damages.*[91]—Where the property destroyed is a part of the realty, the measure of damages is the difference in the value of the land before and after the fire.[92]

(§ 11) *K. Actions for injuries.*[93] *Pleadings.*[See 10 C. L. 1426]—While the complaint must allege negligence [94] against each defendant,[95] it may be alleged generally.[96] Although an allegation of wanton negligence has been held sufficient to

87. Instruction faulty as assuming that sparks escaped from engine held nonprejudicial when considered with other instructions. Missouri, K. & T. R. Co. v. Dawson Bros. [Tex. Civ. App.] 109 SW 1110.

88. Instruction as to plaintiff's burden of showing that fire was started by defendant's engine considered and held not misleading as leading jury to compare rival theories. Helverson v. Chicago, etc., R. Co., [Iowa] 116 NW 699. Where evidence showed that train emitting large quantities of sparks passed shortly before fire was discovered, instruction that passing of train shortly before discovery of fire raises no presumption that it was cause thereof held misleading, though correct in principle. Birmingham R. L. & P. Co. v. Hinton [Ala.] 48 S 546.

89. Instruction that, if sparks escaped from engine and set fire, company would be prima facie negligent, held not objectionable as on weight. St. Louis S. W. R. Co. v. McLeod [Tex. Civ. App.] 115 SW 85.

90. **Held covered:** Instruction on prima facie case from setting of fire. Morgan v. Missouri K. & T. R. Co. [Tex. Civ. App.] 110 SW 978. Instructions **held not to cover requested** instructions as to overcoming presumption of negligence arising from setting of fire by proof of due care in equipping and operating engine. Chenoweth v. Southern Pac. Co. [Or.] 99 P 86.

91. See 8 C. L. 1661. See, also, Damages, 11 C. L. 958.

92. Missouri, K. & T. R. Co. v. McDowell [Kan.] 98 P 201. See Damages, 11 C. L. 958.

93. **Search Note:** See notes in 11 C. L. 1396; 4 L. R. A. (N. S.) 344; 8 Id. 1063; 9 Ann. Cas. 682.

See, also, Railroads, Cent. Dig. §§ 910-923, 944-953, 1105-1219, 1331-1392, 1545-1656, 1694-1761; Dec. Dig. §§ 282, 297, 341-353, 393-404, 433-452, 471-488; 5 A. & E. Enc. P. & P. 688; 17 A. & E. Enc. P. & P. 538.

94. Allegation that plaintiff was conductor on street car crossing defendant's tracks at grade, and that latter without warning, negligently kicked car into street car, etc., held to sufficiently show duty owed to plaintiff. Cleveland, etc., R. Co. v. Hilligoss [Ind.] 86 NE 485. Pleading alleging that defendant negligently ran over plaintiff held not defective in not alleging that plaintiff was where he had a right to be and that engineer discovered him in time to avoid injury, since those facts would bear on question of negligence. Louisville & N. R. Co. v. Dalton [Ky.] 113 SW 842. Complaint charging that defendant negligently backed train onto spur track, etc., held not to allege facts showing duty or violation. Lake Erie & W. R. Co. v. Bray [Ind. App.] 84 NE 1004. Complaint for injuries caused by horse taking fright at handcar in highway held insufficient in not alleging that car was something calculated to frighten horses. Louisville & N. R. Co. v. Vansant [Ala.] 48 S 989. Pleading held insufficient to authorize recovery for failure to give statutory signals at other crossings. Heise v. Chicago G. W. R. Co. [Iowa] 119 NW 371. Allegation that "it was the duty of the railroad company to refrain from wantonly killing any human being on its track, and in order to observe such duty, it would be necessary * * * to blow its whistle or ring its bell" in approaching steam escaping from mine over tracks, held not to show any duty toward deceased who was on track in the steam, it not appearing where on track it was. Lynch v. Great Northern R. Co. [Mont.] 100 P 616. In action for death of cow, "the said killing having been done by reason of the said defendant not having erected and maintained then and there the fences and stock guards on both sides of its said railroad track as aforesaid, as is required by law," held sufficient to admit proof that track was not fenced at time and place where cow was killed. Seaboard Air Line R. v. Harby, 55 Fla. 555, 46 S 590. Complaint held to sufficiently aver negligence in permitting tank of oil to roll off plank while unloading and injuring plaintiff who was on platform to receive express package, to sustain judgment. Robinson v. Paragould S. E. R. Co., 132 Mo. App. 67, 111 SW 827. In action for injury caused by leaving stumps above height allowed by law in road constructed in place of part of one taken, that plaintiff alleged that injury was caused by not restoring original road to its former state, or to such condition as not to impair usefulness, instead of by failure to cut stumps, held not to bar recovery, though latter was proximate cause, where petition showed cause of action without such averment. Hall v. Houston & T. C. R. Co. [Tex. Civ. App.] 114 SW 891.

95. Allegations that defendant "was then and there engaged in running locomotives," etc., and that plaintiff's cow "was run against, upon, and over, and killed by said defendant's cars * * * run and operated upon said defendant's right of way and tracks by its agents," etc., held to sufficiently show that defendant was operating train. Cleveland, etc., R. Co. v. Van Natta [Ind. App.] 87 NE 999. Complaint against railroad company and conductor for negligently kicking car backward onto switch without warning, etc., held to state cause of action against both for concurrent negligence, though imperfectly stated. St. Louis S. W. R. Co. v. Adams [Ark.] 112 SW 186.

96. Allegations that, while on bridge, plaintiff was negligently run over by defendant, because of negligence of its servants in operating train, sufficiently alleged negligence to permit recovery for discovered peril. Murray v. Chesapeake & O. R. Co. [Ky.] 115

permit a recovery for simple negligence,[97] wanton or willful negligence must be specifically pleaded.[98] Where the averred facts unqualifiedly show a statutory liability they are not rendered insufficient by particular facts alleged to show a common-law liability.[99] The complaint must allege injury [1] and show that it proximately resulted from the negligence complained of.[2] Where a license is relied upon, it must be pleaded.[3] Plaintiff need not aver the giving of notice of the time, place, etc., of the injury,[4] nor need he negative contributory negligence unless the facts averred impute negligence,[5] in which case he must allege facts excusing his apparent negligence [6] or authorizing recovery notwithstanding such negligence.[7] Where the complaint avers that plaintiff was a "trespasser or a licensee," a compulsory amendment is proper.[8] The answer must plead contributory negligence,[9] and a general denial is insufficient although complaint alleges due care.[10]

*Burden of proof.* See 10 C. L. 1428—Plaintiff has the burden of proving all the essential elements of his cause of action,[11] including defendant's negligence,[12] but in

SW 821. While particular duty violated must be alleged, it is not necessary to give in detail the particular acts omitted or method of precaution which company ought to have taken. Norfolk & W. R. Co. v. Holmes Adm'r [Va.] 64 SE 46. Complaint merely showing that decedent was killed while on track enveloped in steam from mine, without showing whether he was at street crossing, at place where he had license to be, or at some other place, held insufficient. Lynch v. Great Northern R. Co. [Mont.] 100 P 616.

97. Everett v. St. Louis & S. F. R. Co., 214 Mo. 54, 112 SW 486.

98. Complaint averring that "the engineer saw, or by reasonable diligence could have seen, plaintiff in time to stop said train before it ran over plantiff," etc., held to charge simple negligence, as distinguished from wanton negligence. Hobdy v. Manistee Mill Co. [Ala.] 47 S 69.

99. Texas & G. R. Co. v. Pate [Tex. Civ. App.] 113 SW 994.

1. Complaint averring that defendant's servants, by loud and terrifying noises unnecessary to operation of engine, intentionally frightened plaintiff's horse " to such an extent that it died of fright," is not demurrable on ground "that only claim made in said complaint is for alleged fright, unaccompanied by any bodily injury, and therefore states no cause of action." Louisville & N. R. Co. v. Melton [Ala.] 47 S 1024.

2. Complaint charging that defendant negligently ran one of its locomotives against vehicle in which deceased was riding, that defendant negligently failed to blow whistle, negligently ran at high rate of speed, etc., held to sufficiently allege proximate cause. Cleveland, etc., R. Co. v. Houghland [Ind. App.] 85 NE 369. Complaint alleging that horse became frightened at handcar in highway so that wheel struck car, causing it to make unusual noise, which further frightened horse and caused it to throw plaintiff out, held to sufficiently show that fright of horse and consequent injury was dus to defendant's act in placing car in highway. Louisville & N. R. Co. v. Vansant [Ala.] 48 S 389.

3. Allegation, "and which track for many years pedestrians to and from the said town of C. and the said station and depot of defendant at said town of C. had been accustomed to use as a road or footpath by the forbearance and tacit consent of defendant," held to sufficiently aver license. Abnefeld v. Wabash R. Co., 212 Mo. 280, 111 SW 95.

4. Failure to give notice of time, place, etc., of injury under [illegible] St. 1902, § 1130, is defensive matter. Bulkley v. Norwich & W. R. Co. [Conn.] 70 A 1021.

5. Allegations of complaint as to speed of train, obstructed view, and that plaintiff was looking other way at time train approached, held not to show contributory negligence as a matter of law. Cleveland, etc., R. Co. v. Lynn [Ind.] 85 NE 999. Petition alleging that, while crossing track at place where soldiers and public crossed at all hours, plaintiff fell and was rendered unconscious, and was struck by train, etc., held not to show contributory negligence. El Paso Elec. R. Co. v. Ryan [Tex. Civ. App.] 114 SW 906. Complaint alleging that train was invisible until within 693 feet of crossing because of cut, it not appearing but what it was visible during last 693 feet, held to show negligence in going onto crossing ahead of it. Norfolk & W. R. Co. v. Davis Adm'r, 108 Va. 514, 62 SE 337.

6. Complaint for injury received while drawing water from end of car, due to car being backed into by engine, alleging that it was necessary to go in front of car to draw water, and that plaintiff did not know or have any reason to believe that train was near, etc., held to negative contributory negligence. Louisiana & T. Lumber Co. v. Brown [Tex. Civ. App.] 109 SW 950.

7. Norfolk & W. R. Co. v. Davis' Adm'r, 108 Va. 514, 62 SE 337. Complaint averring that defendant discovered decedent's peril and could have avoided collision had it exercised ordinary care, which it failed to do, held to state cause of action, although it showed negligence on plaintiff's part. Id.

8. Since duty is different. Gainesville & Gulf R. Co. v. Peck, 55 Fla. 402, 46 S 1019.

9. Answer alleging that injury was caused solely by plaintiff's negligence, and that plaintiff, while walking in safe position between tracks, suddenly stepped over onto end of ties in front of engine, held to sufficiently allege contributory negligence. Shrader v. Nashville, etc., R. Co. [Ky.] 114 SW 788.

10. Atchison, etc., R. Co. v. Peck [Kan.] 100 P 54.

11. Evidence that train passed shortly before daylight without sounding crossing signals, and that bull was shortly thereafter found at crossing all mangled, held sufficient

many states a presumption [13] of negligence in all the respects alleged [14] arises from proof of injury by a train,[15] especially where defendant is also shown to have violated a statutory duty.[16] Where defendant owns the road and the rolling stock, it will be presumed that it was operating the particular train causing the injury.[17] While the plaintiff has the burden of showing freedom from contributory negligence in a few states,[18] a presumption of due care exists in most of the states [19] which casts the burden onto the defendant,[20] who must also show that it contributed proximately to the injury.[21] Wherever the burden lies, the evidence of the other party may be

to authorize finding that he was struck by train, and because of failure to give signals. Barbee v. Southern Pac. R. Co. [Cal. App.] 99 P 541. General verdict for plaintiff is not overcome by special findings not showing that the rate of speed and that warning might have been given in time to have enabled plaintiff to avoid injury, since it will not be inferred as against general verdict that conditions were such that signals could have been heard. Cleveland, etc., R. Co. v. Lynn [Ind.] 85 NE 999. Burden is on plaintiff to prove that animal was killed on track, but circumstantial evidence is sufficient. Nelson v. St. Louis & S. F. R. Co. [Mo. App.] 116 SW 1118. Evidence that there were hog tracks on track, blood on ties, and appearance that something had rolled down embankment, and hog track from base of embankment to spot where hog was found dead, with body badly cut and bruised, held to sustain finding that it was killed by train. Id. Plaintiff, relying on discovered peril, has burden of showing that peril was discovered in time to avoid injury. Caldwell v. Houston & T. C. R. Co. [Tex. Civ. App.] 117 SW 488.

12. Notwithstanding Stock Act, § 5, creating a presumption of negligence from killing, plaintiff has burden of showing negligence. Rio Grande Western R. Co. v. Boyd [Colo.] 96 P 781. Burden rests on plaintiff to show that statutory signal was not given. Turner v. St. Louis & H. R. Co. [Mo. App.] 114 SW 1026; McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33. Evidence held to show that lumber company sued and railroad company hauling its lumber, which was at fault, were distinct corporations. Stephens v. Louisiana Long Leaf Lumber Co., 122 La. 547, 47 S 887.

13. Gen. St. § 3148, making company liable for injury to persons from running of train unless company makes it affirmatively appear that their agents used due care, creates a presumption against company, but it does not outweigh proofs. Jones v. Jacksonville Elec. Co. [Fla.] 47 S 1. Evidence that horse suddenly ran onto track immediately in front of engine, from behind box cars, held to overcome presumption of negligence arising from killing. St. Louis S. W. R. Co. v. O'Hare [Ark.] 115 SW 942. Presumption of negligence arising under Code 1906, § 1985, from killing of stock, aided by physical facts, held to make question for jury, notwithstanding evidence of defendant of due care. O'Kelly v. Yazoo & M. V. R. Co. [Miss.] 47 S 660.

14. Ellenberg v. Southern R. Co. [Ga. App.] 63 SE 240. Fact that plaintiff's own evidence shows that defendant was not negligent in one of the alleged respects does not authorize nonsuit. Id.

15. Killing of cattle. Chesapeake & O. R. Co. v. Grigsby [Ky.] 115 SW 237. Code 1906, § 1985, making killing by train prima facie evidence of negligence, being identical with Code 1902, § 1808, except that it is extended to employes, is applicable, though accident occurred prior to passage thereof, where decedent was not an employe of defendant but of another road. Combs v. Mobile & O. R. Co. [Miss.] 46 S 168. Mere killing of stock is insufficient to establish negligence. Starke v. Chicago, B. & Q. R. Co. [Neb.] 118 NW 1066. Evidence that fresh tracks could be traced over cattle guard, down track between rails, to point where blood and hair were found on track, and that body of cow was found a few feet beyond, held sufficient to show that she was struck by engine. Cleveland, etc., R. Co. v. Van Natta [Ind. App.] 87 NE 999.

16. Under Rev. St. 1899, § 1102 (Ann. St. 1906, p. 938), making company liable for damage at crossing where signals are not given, but allowing company to show that failure to give signal was not proximate cause, proof of killing, together with evidence tending to show failure to give signals, makes prima facie case (McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33), and burden rests on defendant to show that such negligence was not proximate cause (Id.).

17. Johnson v. Southern Pac. R. Co. [Cal.] 97 P 520.

18. Shum's Adm'x v. Rutland R. Co. [Vt.] 69 A 945. Plaintiff must prove decedent's freedom from negligence. Popke v. New York, etc., R. Co. [Conn.] 71 A 1098; White v. New York, etc., R. Co., 200 Mass. 441, 86 NE 923; O'Brien v. New York Cent. & H. R. R. Co., 129 App. Div. 288, 113 NYS 329.

19. Atchison, etc., R. Co. v. Hayes [Kan.] 99 P 1131. Presumption that deceased stopped, looked and listened is overcome by testimony of witness who saw accident. Wade v. Western Maryland R. Co., 220 Pa. 578, 69 A 1112. No presumption of due care, though party injured is killed. Shum's Adm'x v. Rutland R. Co. [Vt.] 69 A 945.

20. Turner v. St. Louis & H. R. Co. [Mo. App.] 114 SW 1026; Missouri, K. & T. R. Co. v. Wall [Tex. Civ. App.] 110 SW 453. Instruction held erroneous as requiring plaintiff to prove due care. Huber v. Texas & P. R. Co. [Tex. Civ. App.] 113 SW 984. Since burden of proving contributory negligence rests on defendant, inferences to be drawn from complaint must be drawn in plaintiff's favor. Cleveland, etc., R. Co. v. Lynn [Ind.] 85 NE 999.

21. Where defendant relies upon contributory negligence of plaintiff in cutting fence, it has burden of showing that cattle entered at such place, especially where fence was insufficient at other nearby points to turn cattle. Atlantic Coast Line R. Co. v. Peeples [Fla.] 47 S 392.

utilized.[22] While negative evidence may be sufficient to establish an issue in some cases,[23] the testimony of one who was not looking that he did not notice a headlight has but little probative force.[24]

*Evidence.* See 10 C. L. 1430—There must be no material variance between the allegations and the proof,[25] and plaintiff must recover upon the particular negligence averred.[26] Likewise, where defendant avers specific acts of contributory negligence, he is confined thereto.[27] The general rules as to admissibility of evidence apply.[28] Positive evidence is of greater value than negative as to the giving of signals.[29]

22. McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33.

23. Negative evidence as to giving signals held sufficient to sustain verdict. Louisville & N. R. Co. v. Brown [Ky.] 113 SW 465. Whether positive testimony as to signals is stronger than negative depends upon all circumstances, as person's opportunity to hear, whether his attention was directed toward same, etc. Chicago, etc., R. Co. v. Stepp [C. C. A.] 164 F 785.

24. Strickland v. Atlantic Coast Line R. Co. [N. C.] 63 SE 161.

25. Variance between allegation of negligence in keeping lookout and proof of insufficient headlight. Chicago, etc., R. Co. v. Latham [Tex. Civ. App.] 115 SW 890. Complaint alleging that defendant approached crossing at dangerous speed, without signals, held not supported by evidence of killing at place not a crossing by train going 7 or 8 miles per hour. Motz v. Central of Georgia R. Co. [Ga.] 64 SE 79.

26. Where negligence alleged is maintenance of ditch, recovery cannot be had on absence of lights. St. Louis & S. F. R. Co. v. Elrod [Kan] 98 P 215. Where recital of fact shows that plaintiff relies upon failure to give statutory signal required by Civ. Code 1895, § 2222, providing for signals at public crossings, court properly instructed that recovery could not be had if road was not a public one. McCoy v. Central of Georgia R. Co. [Ga.] 62 SE 297. Where issues were negligence of engineer in discovering child, negligence in stopping train, and negligence of mother, evidence that if whistle had been blown mother could have gotten child off track held inadmissible. Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787. Complaint construed, and held that negligent speed, knowing that sheep were on track, was gist of action, and not violation of speed ordinance. Smith v. San Pedro, etc., R. Co. [Utah] 100 P 673. Where negligence alleged is sudden stopping of engine, causing violent jerk, recovery cannot be had on proof of negligence in running or switching train. Tinkle v. St. Louis & S. F. R. Co., 212 Mo. 445, 110 SW 1086.

27. Where, in action for injuries received by jumping from trestle to avoid apparent collision, defendant pleaded specific acts or omissions as contributory negligence, requested instruction on negligence in not taking another route or going under bridge properly refused where not one of them. Texas Midland R. Co. v. Byrd [Tex. Civ. App.] 110 SW 199.

28. Questions: Did you hear the whistle blow; did you hear the bell ring; and did you see a headlight, held not leading. Baltimore & O. R. Co. v. State, 107 Md. 642, 69 A 439.

**Relevancy and materiality admissible;** Schedule of train, as bearing on speed. Illinois Cent. R. Co. v. France's Adm'x [Ky.] 112 SW 929. Evidence that other stock had passed over cattle guard in question, as bearing on its sufficiency. O'Mara v. Newton & N. W. R. Co. [Iowa] 118 NW 377. Where the jury is permitted to view premises, evidence is admissible to show change since accident. Woodworth v. Detroit United R. Co., 153 Mich. 108, 15 Det. Leg. N. 374, 116 NW 549. Evidence that large numbers of sheep were driven along road at certain time of year, as bearing upon duty required of trainmen at such time. Smith v. San Pedro, etc., R. Co. [Utah] 100 P 673. Evidence of arrangement of camp cars in train held admissible in action for negligent injury to cook, employe making up train knowing of their character. Tinkle v. St. Louis & S. F. R. Co., 212 Mo. 445, 110 SW 1086. Evidence that it was custom of cook in camp cars to stand up and continue work while train was in motion held admissible on negligence in standing up and working while train was moving at time of accident. Id. Passenger may testify that she felt no jar, to rebut testimony of engineer that he applied air brakes and suddenly stopped train. Potter v. St. Louis & S. F. R. Co. [Mo. App.] 117 SW 593. In action for injury occurring at 5:30 p. m. by car door leaving track, condition of door next morning, it appearing that it was old and rickety and lug was broken. Pennsylvania R. Co. v. Hummel [C. C. A.] 167 F 89. Where pleadings set out peculiarities of crossing rendering it especially dangerous, evidence that when train backed over same there was no flagman, no warnings, no light, and that engineer could not see from his cab. Norfolk & W. R. Co. v. Holmes Adm'r [Va.] 64 SE 46. Special instances of blockading crossing may be considered in determining whether company habitually blockaded crossing. Chicago, etc., R. Co. v. Johnson [Tex. Civ. App.] 111 SW 758. Evidence of statutory signals at other nearby crossings held admissible on plaintiff's negligence, where such signals were or could have been heard by him. Heise v. Chicago G. W. R. Co. [Iowa] 119 NW 371. Evidence that guard is in general use, and evidence that cattle pass over it, on issue of sufficiency. Nashville, etc., R. Co. v. Russell, 33 Ky. L. R. 447, 110 SW 317. Where evidence was conflicting as to whether car at which horse took fright was in street or at crossing, and time at which it was seen varied, evidence that car had been moved. Texas Cent. R. Co. v. Randall [Tex. Civ. App.] 113 SW 180. Evidence that switch yard, side tracks and main line were frequently used at all times of day by people living in vicinity, to show constant use by public. Illinois Cent. R. Co. v. France's Adm'x [Ky.] 112 SW 929. In action for injuries received while

passing between cars blocking crossing, evidence that plaintiff and another had passed between cars during the morning as bearing on contributory negligence. Chicago, etc., R. Co. v. Johnson [Tex. Civ. App.] 111 SW 758. Where negligence charged was failure to give signals, plaintiff may show number and character of crossings, etc. Missouri, K. & T. R. Co. v. Malone [Tex. Civ. App.] 110 SW 938. Evidence as to position of engine when backing onto track, as explaining why plaintiff did not see same when he looked. Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808. In action for death of conductor on street car, killed by collision at crossing, contract between companies relieving railroad of duty to give warnings, etc., as bearing on negligence in not doing so. Cox v. Delaware & Hudson Co., 128 App. Div. 363, 112 NYS 443. Evidence of travel, as imposing higher duty, though party killed was trespasser. Anderson v. Great Northern R. Co. [Idaho] 99 P 91. Where plaintiff contends that train could have been stopped between time warning whistle was sounded and child was struck, evidence as to distance between two places by one whoss attention was attracted by whistle and who noted position of engine. Harrison v. Southern R. Co. [Miss.] 46 S 408. Evidence of witnesses and photographs as to use of track as a pathway by public and as to defendant's knowledge thereof, as bearing upon question whether one using same was trespasser or a licensee, although there is evidence that plaintiff had left track to pick berries, which would render him a trespasser. Missouri, K. & T. R. Co. v. Williams [Tex. Civ. App.] 109 SW 1126. Evidence of general use of water car and manner of drawing water therefrom, as bearing on obligation of defendant to use due care. Louisiana & T. Lumber Co. v. Brown [Tex. Civ. App.] 109 SW 950. Where defendant's evidence shows uniform speed, witness may testify as to speed when passing him to prove speed at place of accident. King v. Wabash R. Co., 211 Mo. 1, 109 SW 671. Evidence that plaintiff thought that defendant intended that he should use private crossing to reach car that he was unloading, on issue of implied invitation to use same. Cowans v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 109 SW 403. Evidence of frequency of travel on track at point of accident, to fix knowledge of conditions on servants of defendant. Southern R. Co. v. Forrister [Ala.] 48 S 69.

**Inadmissible:** Evidence of amount of travel at other points to show license to be at place of injury. Louisville & N. R. Co. v. Berry, 33 Ky. L. R. 850, 111 SW 370. Evidence of interlooking systems at other grade crossings and effect thereof, where it appears that they were impracticable at point of collision because of switching. Cox v. Delaware & H. R. Co., 128 App. Div. 363, 112 NYS 443. Where defect in engine is not relied upon as negligence contributing to collision, evidence thereof is inadmissible. Gorman v. New York, etc., R. Co., 194 N. Y. 488, 87 NE 682. Evidence of intoxication on other days, to show condition at time of injury. Starett v. Chesapeake & O. R. Co., 33 Ky. L. R. 309, 110 SW 282. Evidence as to number of coaches in daily train of same number and schedule as that which struck intestate, upon question of number on the occasion, other evidence being attainable. Southern R. Co. v. Gullatt [Ala.] 48 S 472. Where driver of police patrol was injured at place which was not a public crossing, evidence that he had never been told that he did not have a right to use same, or that other streets were blocked, held inadmissible to show right to use. Reinhardt v. Chicago Junction R. Co., 235 Ill. 576, 85 NE 605. Where petition pleaded violation of speed ordinance, but did not rely thereon as cause of the accident, ordinance is inadmissible. Turner v. St. Louis & H. R. Co. [Mo. App.] 114 SW 1026. Evidence that those on handcar were told by foreman to make quick trip is inadmissible, as showing excessive speed. Louisville & N. R. Co. v. Berry, 33 Ky. L. R. 850, 111 SW 370. Where competency of engineer was not in issue, evidence bearing thereon held properly refused. Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787.

**Res Gestae. Admissible:** Statement made by engineer. on coming back to body of child, a couple of minutes after accident. Anderson v. Great Northern R. Co. [Idaho] 99 P 91. Statement of operator of lever car made to plaintiff as he was recovering consciousness. Douglass v. Southern R. Co. [S. C.] 62 SE 15. Statements made by plaintiff to first person to reach him held res gestae, although 10 or 12 minutes had elapsed, he having been suffering great pain in meantime. Missouri, K. & T. R. Co. v. Williams [Tex. Civ. App.] 109 SW 1126.

**Conclusion of Witness. Admissible:** Statement of witness as to how far from crossing cow approaching same could be seen. Rio Grande Western R. Co. v. Boyd [Colo.] 96 P 781. Without qualifying as experts, witnesses may testify that "train ran as fast as it could to stay on the tracks," and "from 50 to 60 miles per hour." Illinois Cent. R. Co. v. France's Adm'x [Ky.] 112 SW 929. Statement, in answer to question whether engineer could have had unobstructed view from certain point, that witness could stand there flat footed and see, and he did not know why engineer could not have seen from cab. St. Louis, etc., R. Co. v. Flinn [Ark.] 115 SW 142. Testimony of person having knowledge of facts that tracks at point of injury were in street. International & G. N. R. Co. v. Morin [Tex. Civ. App.] 116 SW 666. One not expert may give opinion as to speed of train. Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808; Potter v. St. Louis & S. F. R. Co. [Mo. App.] 117 SW 693. One who has ridden on trains and compared speed thereof may testify how fast train on which he was riding was going, fact that he had never timed train only going to weight of testimony. Tinkle v. St. Louis & S. F. R. Co., 212 Mo. 445, 110 SW 1086.

**Inadmissible:** Testimony as to when collision occurred by one hearing crash while sitting at his desk in office 180 feet away, with windows closed, on damp, foggy night. Baltimore & O. R. Co. v. State, 107 Md. 642, 69 A 439.

**Expert testimony:** One who had been engineer for 2 or 3 years 20 years before, but who had observed operation of trains since, may give opinion as to distance within which train can be stopped. Southern R. Co. v. Forrister [Ala.] 48 S 69. Witness who has lived near railroad all her life and who testifies that she knows the "blows of an engine" may testify as to meaning of two blasts. Id. One who had served 2 years as fireman and 3 years as engineer on freight trains, and who

*Instructions.* See 10 C. L. 1433—The instructions should clearly state the law applicable [30] and fairly place the issues before the jury,[31] specially submitting particu-

had observed stopping of passenger trains, held competent as expert to testify as to time and space required to stop passenger train. Southern R. Co. v. Gullatt [Ala.] 48 S 472. Experienced railroad man may testify from sound whether effort was being made to stop train. St. Louis, etc., R. Co. v. Dysart [Ark.] 116 SW 224. Distance within which engine can be stopped held proper subject of expert testimony. Zelinka v. Union Stockyards Co. [Neb.] 118 NW 103. In action for killing by train, testimony of experienced railroad man, who had made observations, that no obstructions prevented engineer from seeing decedent, admissible. Combs v. Mobile & O. R. Co. [Miss.] 46 S 168.

**Prior and subsequent conditions:** In action for injuries caused by door of car leaving track, condition of track next morning, the broken lug appearing to be of old standing, held admissible. Pennsylvania R. Co. v. Hummel [C. C. A.] 167 F 89. Where air brakes can only be applied by turning certain angle cocks, condition thereof immediately after collision is admissible on issue where air was turned on. St. Louis, etc., R. Co. v. Dysart [Ark.] 116 SW 224.

**Admissions and statements of parties:** Where defendant's claim agent has testified to statements made by plaintiff to him, plaintiff may testify as to what was said and the circumstances under which statements were made, though self-serving. Missouri, K. & T. R. Co. v. Williams [Tex. Civ. App.] 109 SW 1126. In action against railroad company and street railway company, admission in answer of latter is admissible, although plaintiff subsequently admitted that no blame attached to it. Louisville, etc., R. Co. v. McDonald, 33 Ky. L. R. 762, 111 SW 289. Where defendant gives evidence of statements made by decedent as to manner of accident, plaintiff may show that he did not say the words ascribed to him, but other and distinct accounts of accident cannot be shown. Louisville & N. R. Co. v. Onan's Adm'r, 33 Ky. L. R. 462, 110 SW 380. Held for jury whether admission of appellee that she saw train was made at time when she was sufficiently conscious to know what she was saying. Louisville & N. R. Co. v. Joshlin, 33 Ky. L. R. 513, 110 SW 382.

**Experiments. Admissible:** Evidence of experiments made at place of accident at same time of day and under similar atmospheric conditions as to distance at which child could be seen. Harrison v. Southern R. Co. [Miss.] 46 S 408. Subsequent experiments made at same time of day as to how far child could be seen on track, as bearing on negligence in not sooner discovering child injured. Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787. Evidence of experiments as to how far child lying on track could be seen has but little weight in determining whether engineer saw child before he testified that he saw it, since experimenter had object specially in mind. Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689. Experiments as to how far red light could be seen, it appearing that there was a red light on truck stalled on crossing when struck, held inadmissible. Green v. Long Island R. Co., 115 NYS 590.

**Customs and habits:** General habits and custom of decedent as bearing on negligence, inadmissible. Baltimore & O. R. Co. v. State, 107 Md. 642, 69 A 439. Evidence of custom to stop train outside of building and to give warning of approach, admissible as bearing on assumption of risk of injury by one whose work took him between cars within building in case stop was not made and no signals given. Shall v. Detroit & M. R. Co. 152 Mich. 463, 15 Det. Leg. N. 295, 116 NW 432.

**Documents:** Duly authenticated ordinances requiring flagmen or gates are admissible. Nichols v. Chicago, B. & Q. R. Co. [Colo.] 98 P 808.

29. Chicago, etc., R. Co. v. Jones, 135 Ill. App. 380; Chicago, B. & Q. R. Co. v. Sack, 136 Ill. App. 425.

30. In action for death of plaintiff's wife who was struck by train while standing beside track, instructions as to discovered peril and duty of those in charge of train held to properly state law applicable. Everett v. St. Louis & S. F. R. Co., 214 Mo. 54, 112 SW 486. Instruction authorizing recovery if defendant failed to give "timely and sufficient warning" on approaching crossing held not erroneous in using words "timely" and "sufficient," as fixing no standard. Illinois Cent. R. Co. v. France's Adm'x [Ky.] 112 SW 929. Where from time plaintiff was first seen it was apparent that he was not aware of approaching train and was on a trestle and hence could not suddenly get out of danger, instruction basing assumption that he would discover train and get out of danger upon giving of timely signal held more appropriate than his discovering the same in exercise of due caution. Texas Midland R. Co. v. Byrd [Tex. Civ. App.] 110 SW 199. Where, in action for injuries received by licensee, caused by catching foot as he was leaving track, and falling and being run into, no issue as to negligent speed was submitted, charge not to consider any evidence relative to whether or not defendant's servants in charge of train were negligent in running at speed it was moving held properly refused, where evidence shows that public was licensed to use track. Missouri, K. & T. R. Co. v. Williams [Tex. Civ. App.] 109 SW 1126.

31. Instruction on discovered peril that if engineer saw decedent on track and realized that they were in peril and "could not, or probably would not, leave the track," etc., held not objectionable, the quoted clause being but an explanation of what court meant by "peril." Parham v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 113 SW 154. Instruction held erroneous is requiring that plaintiff be found to have been negligent both in crossing between cars at crossing and in the manner of so doing before verdict for defendant could be returned. Chicago, etc., R. Co. v. Johnson [Tex. Civ. App.] 111 SW 758. Where instruction that plaintiff as licensee assumed risks incident to proper and natural use of tracks, etc., had reference solely to operation of train through escaping steam, its refusal was not a ground of complaint by defendant where court assumed that company had right to so operate. Tarashonsky v. Illinois Cent. R. Co. [Iowa] 117 NW 1074. Where complaint in action for killing horse alleged that

lar ones where necessary to a clear understanding,[32] but should not submit issues not supported by the pleadings [33] and the evidence.[34] They should be considered as a

cattle guard and fence connecting therewith had been removed, use of term "wing fence" in describing fence in instructions held not a misstatement of issues. Bacus v. Chicago, B. & Q. R. Co. [Iowa] 118 NW 751. Where there was no issue as to engineer seeing plaintiff in time to stop, but only question was as to whether he was walking on track or suddenly stepped thereon ahead of engine, and defendant's theory was fully set out, no error to charge on theory that he was walking between rails. St. Louis S. W. R. Co. v. Cockrill [Tex. Civ. App.] 111 SW 1092. Where there was some evidence that plaintiff was intoxicated, but none that he was lying on track or asleep, instruction denying recovery if he was drunk and lying on track asleep held favorable to defendant Missouri, K. & T. R. Co. v. Malone [Tex. Civ. App.] 110 SW 958. Instructions held to properly submit issues as to license of public to use road as pathway, plaintiff stumbling as he was leaving track and rendered unconscious, and whether he was rendered a trespasser by leaving track to pick berries, etc. Missouri, K. & T. R. Co. v. Williams [Tex. Civ. App.] 109 SW 1126. Where there is no evidence that accident occurred in switchyards, held not error to charge that if defendant failed to give statutory crossing signals it was liable, though such statute did not apply to operations in switchyards. Alabama Great Southern R. Co. v. Hardy [Ga.] 62 SE 71. Instruction reciting conditions at crossings showing unusual dangers, and requiring company to use commensurate care, held not open to objection of leaving jury to impose fanciful requirements. Norfolk & W. R. Co. v. Munsell's Adm'r [Va.] 64 SE 50.

**32.** Where negligence relied on was failure to look in direction from which train would not ordinarily be expected, held error to refuse instruction specifically relating thereto, though court gave general instructions as to duty. Fowler v. Chicago & E. I. R. Co., 234 Ill. 619, 85 NE 298. Where liability is based solely upon willful and wanton negligence, such issue should be presented unconfused with other issues. Central of Georgia R. Co. v. Moore [Ga. App.] 63 SE 642. Duties of traveler and of company at crossings should be separately charged. Louisiana & A. R. Co. v. Ratcliffe [Ark.] 115 SW 396. In action for injuries to child catching onto passing car, question whether he was of sufficient capacity to appreciate danger should be so submitted as to admit of separate consideration from general question of contributory negligence. St. Louis S. W. R. Co. v. Davis [Tex. Civ. App.] 110 SW 939.

**33. Not supported:** Instruction submitting gross or willful negligence. Atchison, etc., R. Co. v. Baker [Okl.] 95 P 433. Where, in action for injuries to trespassing child, liability was predicated upon child's incapacity to appreciate danger, charge on concurrent negligence is improper. St. Louis S. W. R. Co. v. Davis [Tex. Civ. App.] 110 SW 939. Where, in action for injuries received by jumping from trestle to avoid collision, assumed risk was not pleaded, requested instruction thereon held properly refused. Texas Midland R. Co. v. Byrd [Tex. Civ. App.] 110 SW 199.

**Authorized:** General charge on negligence in handling train. St. Louis S. W. R. Co. v. Shelton [Tex. Civ. App.] 115 SW 877. Complaint alleging generally that defendant negligently ran engine against plaintiff held to authorize instruction on discovered peril. Texas & P. R. Co. v. Crawford [Tex. Civ. App.] 117 SW 193. Allegation that train approached crossing without sounding whistle or bell until within 50 feet of crossing held to warrant instruction on statutory duty to give signals 80 rods from crossing. St. Louis S. W. R. Co. v. Garber [Tex. Civ. App.] 111 SW 227. Instruction to find for defendant if plaintiff at time of accident was lying on track "and" asleep, instead of in disjunctive, held responsive to defendant's pleading. Missouri, K. & T. R. Co. v. Malone [Tex. Civ. App.] 110 SW 958.

**34. Warranted:** Evidence that blasts of whistle were in response to signals of conductor, and not to flagging signal, held to warrant instruction that if flagman knew, or by the exercise of ordinary care ought to have known, that blasts were not in response to his signals, he was not justified in discontinuing flagging. Walton v. Miller's Adm'r [Va.] 63 SE 458. Where there is evidence tending to show that deceased suddenly stepped back onto crossing in front of train after safely passing over, instruction thereon should be given, notwithstanding other evidence tends to show that he was on crossing all the time. Matz v. Missouri Pac. R. Co. [Mo.] 117 SW 584. Evidence that person on track was in plain sight held to warrant instruction on discovered peril. Christiansen v. Illinois Cent. R. Co. [Iowa] 118 NW 387. Instruction on acts under emergency held warranted where it appeared that bicycle rider, through negligence of company, had no notice of approaching train until he was almost on track. Antonian v. Southern Pac. Co. [Cal. App.] 100 P 877. Instruction of extra precaution due to dangerous character of crossing, evidence showing that view was cut off, etc. Norfolk & W. R. Co. v. Munsell's Adm'r [Va.] 64 SE 50. Evidence as to defective latch in gate, and of discovery of cattle in time to avoid injury, held to require submission of issues of defect in fence and discovered peril. Texas & P. R. Co. v. Corn [Tex.] 114 SW 103. Although it was undisputed that if plaintiff was negligent his negligence was proximate cause of injury, instruction that if he was negligent, and his negligence proximately contributed to injury, to find for defendant, held negative and not to authorize finding for plaintiff. Ft. Worth & D. C. R. Co. v. Poteet [Tex. Civ. App.] 115 SW 883. Evidence that mules became frightened at bridge and stopped on track and were struck by train held to authorize instruction on liability where negligence concurred with accidental cause. Louisiana & A. R. Co. v. Ratcliffe [Ark.] 115 SW 396. Instruction that company was liable unless either fireman, brakeman or engineer kept lookout, was not objectionable as confining duty to them, it appearing that they were only employes in charge of train. St. Louis, etc., R. Co. v. Flinn [Ark.] 115 SW 142.

**Not supported:** Held error to qualify in-

whole [35] and should be consistent [36] and not misleading,[37] or argumentative.[38] In-

struction on contributory negligence by instruction on discovered peril where there was no evidence to sustain it. Louisville & N. R. Co. v. Veach's Adm'r [Ky.] 112 SW 869. Instruction in action for death of employe through negligent manipulation of signals by signalman of another road, on decedent's assumption of risk if he had observed manipulation for 18 months. Cleveland, etc., R. Co. v. Gossett [Ind.] 87 NE 723. Where it is undisputed that plaintiff was not aware of engine approaching on side track near which he was walking and that fireman saw him walking there, instruction that, if plaintiff unnecessarily moved from safe place to place of danger and engineer did not see him, company was not liable, held properly refused. Texas & P. R. Co. v. Crawford [Tex. Civ. App.] 117 SW 193. Where undisputed evidence showed that decedent came onto track too close to train to permit stopping thereof, instruction on "discovered peril." Illinois Cent. R. Co. v. France's Adm'x [Ky.] 112 SW 929; Louisville & N. R. Co. v. Onan's Adm'r, 33 Ky. L. R. 462, 110 SW 380; Louisville & N. R. Co. v. Joshlin, 33 Ky. L. R. 513, 110 SW 382. Where undisputed evidence shows that deceased jumped from freight train at crossing and onto main track immediately in front of rapidly approaching passenger train, instruction submitting issue of negligence in not stopping held unsupported. Huddleston v. St. Louis, etc., R. Co. [Ark.] 115 SW 381. Where evidence shows that crossing was ordinary country crossing, held error to instruct on duty to exercise extra precaution if crossing was unueually dangerous. Louisville & N. R. Co. v. Onan's Adm'r, 33 Ky. L. R. 462, 110 SW 380. Action of train under application of brakes is not such matter of knowledge as to authorize submission of question of whether train could have been stopped after discovery of danger without evidence upon issue. Stearns v. Boston & M. R. Co. [N. H.] 71 A 21. Held improper to submit issue whether it appeared that plaintiff would see or hear train in time to avoid injury where own evidence showed that he was walking in place of safety until he stepped onto track just ahead of engine. Little Rock & M. R. Co. v. Russell [Ark.] 113 SW 1021. Where pleadings and evidence raised issue as to killing of one of five cattle sued for, held error to charge that, if plaintiff was entitled to recover at all, he could recover for five. Chesapeake & A. R. Co. v. Grigsby [Ky.] 115 SW 237. Where evidence showed that smoke had cleared away before decedent started to cross tracks, instruction on duty to wait until smoke clears away held properly refused. Pulcino v. Long Island R. Co., 125 App. Div. 629, 109 NYS 1076. Where plaintiff was not misled as to direction in which engine was going because light was left on front of back engine, instruction thereon was erroneous. Chicago, etc., R. Co. v. Moon [Ark.] 114 SW 228. Where 11 year old boy charged by his mother with care of child injured was shown to have been bright and obedient and had previously taken care of the child in satisfactory manner, negligence of mother was not in issue. Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787.

**35.** Instruction authorizing recovery if defendant failed to give timely warning of approach held not erroneous as ignoring contributory negligence where it was fully covered by another instruction. Illinois Cent. R. Co. v. France's Adm'x [Ky.] 112 SW 929. Instruction as to degree of care held not erroneous when all instructions are considered. Anderson v. Great Northern R. Co. [Idaho] 99 P 91. Statement in charge that if member of crew had been stationed at crossing to warn people accident might not have happened held not reversible error, where court clearly instructed as to duty of jury and where evidence was such as to warrant finding of negligence in not so placing man. Delaware & H. Co. v. Larnard [C. C. A.] 161 F 520. Instruction that it wae defendant's duty to cause bell to be rung and not to run at greater speed than seven miles per hour held sufficient, in view of other instructions, without expressly charging that violation of duty was negligence. Huber v. Texas & P. R. Co. [Tex. Civ. App.] 113 SW 984. Where instruction charged statutory duty as to signals and that that was full measure of duty, another instruction held not to require warning reasonably sufficient in view of plaintiff's particular situation. Pittsburgh, etc., R. Co. v. Lynch [Ind. App.] 87 NE 40.

**36.** Instruction that watchhouse near track did not excuse plaintiff from failure to observe approaching train and instruction that, in determining whether he exercised due care, jury might consider whether evidence showed that watchhouse prevented him from seeing train, held consistent. Cleveland, etc., R. Co. v. Lynn [Ind.] 85 NE 999. Instruction on discovered peril and liability thereunder considered and held not in conflict with instruction on duty of decedent to look and listen. Potter v. St. Louis & S. F. R. Co. [Mo. App.] 117 SW 593.

**37.** Improper to limit jury to consideration of what deceased was doing at "instant" of accident. Illinois Cent. R. Co. v. Collision, 134 Ill. App. 4433. Instruction to find for plaintiff on proof of defendant's negligence held erroneous for failure to require finding of care by plaintiff. Chicago, etc., R. Co. v. Gill, 132 Ill. App. 310. Instruction implying that defendant must both blow whistle and ring bell at crossing, erroneous. Chicago, Peoria & St. Louis R. Co. v. Zetsche, 135 Ill. App. 622. Instruction literally requiring decedent to have looked in both directione at same time held erroneous. Potter v. St. Louis & S. F. R. Co. [Mo. App.] 117 SW 593.

**Misleading:** Instructions on duty of company where people frequently use tracks, as tending to cause them to disregard contributory negligence. Illinois Cent. R. Co. v. France's Adm'x [Ky.] 112 SW 929. Instruction predicating contributory negligence solely on fact that child 7 years old had sufficient mental capacity to appreciate danger, and it was proper to couple facts therewith. Ft. Worth & D. C. R. Co. v. Poteet [Tex. Civ. App.] 115 SW 883. Where pedestrian could have seen track after passing watchhouse and for 9 feet before entering onto track, instruction that, in determining negligence, jury could consider whether watchhouse obstructed view, as involving idea that watchhouse might be an excuse. Cleveland, etc., R. Co. v. Lynn [Ind.] 85 NE 999. Instruction enumerating certain things which could be considered on contributory negligence, as

structions should not be upon the weight of the evidence,[39] argumentative,[40] invade the province of the jury,[41] or assume disputed facts,[42] nor give undue prominence to particular evidence [43] or issues.[44] While issues must not be ignored,[45] requested instructions substantially covered by others given may be refused.[46]

tending to limit to certain kinds of evidence. Pittsburgh, etc., R. Co. v. O'Conner [Ind.] 85 NE 969. Instruction that, if defendant was willfully negligent, recovery could be had despite plaintiff's negligence, as leading jury to believe that willful omission to give crossing signals was sufficient. Southern R. Co. v. Grizzle [Ga.] 62 SE 177.

**Not misleading:** Instruction on reasonable care, when construed with other instructions, held not to mislead jurors to allow recovery on negligence not pleaded. Smith v. San Pedro, etc., R. Co. [Utah] 100 P 673. Instruction requiring defendant to prove contributory negligence by greater weight "of all the evidence in the case," instead of on the issue. Douglass v. Southern R. Co. [S. C.] 62 SE 15. Instruction that if jury find that defendant was negligent, but also find that plaintiff was negligent, to find for defendant, as authorizing verdict for defendant only in event both were negligent. Texas & P. R. Co. v. Crawford [Tex. Civ. App.] 117 SW 193. Instruction of "discovered peril," as leading jury to understand that plaintiff could recover for negligence in maintaining lookout, notwithstanding contributory negligence. Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787. Where plaintiff's evidence added nothing to defendant's instruction that burden rested on defendant to prove contributory negligence, as causing jury to ignore effect of plaintiff's evidence. El Paso Elec. R. Co. v. Ryan [Tex. Civ. App.] 114 SW 906. Instruction on negligence in failing to discover child held not to authorize recovery by parents, notwithstanding their negligence. Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787. Instruction on "last clear chance" doctrine. Zelenka v. Union Stockyards Co. [Neb.] 118 NW 103. Instruction on right of engineer to assume that right of way of train would be respected held not, when considered with following statement, to excuse him from duty of using every means at hand to avoid injury after discovering peril. Parham v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 113 SW 154. Instruction that defendant has burden of showing contributory negligence by preponderance of whole evidence, unless shown by plaintiff's evidence. Louisiana & A. R. Co. v. Ratcliffe [Ark.] 115 SW 396. Where only issue is whether plaintiff stepped from place of safety to place of danger too close to train to enable trainmen to stop, instructions on duty where public use tracks held not misleading. Boulden v. Louisville & N. R. Co. [Ky.] 112 SW 936. Instruction that defendant was not liable for injury caused by horse taking fright at statutory signal unless trainmen knew, as reasonable men, that by so doing injury would necessarily and proximately result, as leading jury to understand that they should have seen horse on nearby highway. Choctaw, O. & G. R. Co. v. Coker [Ark.] 116 SW 216. Instruction that culpable negligence of plaintiff will defeat recovery, but that nature of primary wrong has much to do with the judgment whether or not the contributing fault was of a negative character and was of itself caused by primary wrong. Douglas v. Southern R. Co. [S. C.] 62 SE 15.

**38.** Instruction as to contributory negligence held argumentative. Illinois Cent. R. Co. v. Collison, 134 Ill. App. 443.

**39. On weight:** Instruction permitting recovery upon finding that defendant omitted to blow whistle, ring bell, or slack or stop train, where evidence showed that engineer let off steam to scare horse from track. St. Louis, B. & M. R. Co. v. Droddy [Tex. Civ. App.] 114 SW 902.

**Not on weight:** Instruction on "sudden peril." Douglass v. Southern R. Co. [S. C.] 62 SE 15. Instruction that company must use ordinary care to avoid injury to persons on track where public commonly resort. Gulf, etc., R. Co. v. Coleman [Tex. Civ. App.] 112 SW 690.

**40. Argumentative:** Instruction telling what jury should consider in determining whether defendant exercised due care towards plaintiff, who was walking on tracks used by public as pathway. Missouri, K. & T. R. Co. v. Malone [Tex. Civ. App.] 110 SW 958. Instruction on burden of proving negligence and that negligence could not be inferred from injury. Nashville, etc., R. Co. v. Garth [Ala.] 46 S 583.

**41. Erroneous:** Instruction that fact that plaintiff is deprived of pleasure and satisfaction of life "which only those having sound body and full use of all their members may enjoy" might be considered. Pittsburg, etc., R. Co. v. O'Connor [Ind.] 85 NE 969. Instruction on statute requiring company to keep lookout, that if object was visible and yet not seen jury would be well warranted in finding that person was not on the lookout, or was not vigilent. Alabama Great Southern R. Co. v. Hardy [Ga.] 62 SE 71. That if decedent went upon crossing in front of approaching train in belief that he could cross before it reached him, but he miscalculated speed of train, etc., he was negligent. Southern R. Co. v. Grizzle [Ga.] 62 SE 177. Where question whether public was licensed to use particular way was for jury, instruction that plaintiff was a trespasser was properly refused, though it properly called attention to evidence bearing on the issue. Tarashonsky v. Illinois Cent. R. Co. [Iowa] 117 NW 1074.

**42.** Where there is no question but that plaintiff's proximity to track was proximate cause of injury by collision, held not error to instruct to find for defendant if jury found plaintiff negligent in so walking. Missouri, K. & T. R. Co. v. Wall [Tex.] 116 SW 1140. Instruction following language of statute as to duty to give signal held not to assume that defendant omitted to give same. Perkins v. Wabash R. Co., 233 Ill. 458, 84 NE 677.

**43.** In action for assault by baggage master in removing plaintiff from premises, instruction to find for defendant if baggageman used no more force than was necessary held not bad as giving undue prominence to statement of baggageman, erroneously ad-

*Double damages and attorney's fees* See 10 C. L. 1438 are allowed in some statutory actions [47] and where defendant is grossly or willfully negligent.[48]

§ 12. *Railroad corporations.*[49]—See 10 C. L. 1488—In New York a certificate of public convenience and necessity must be procured,[50] which is issuable only upon the filing of an affidavit [51] showing that ten per cent of the minimum capital stock has

mitted that he did not use more force than was necessary. Hubbard v. Louisville, etc., R. Co., 32 Ky. L. R. 1337, 108 SW 331.

**44.** Instruction exacting care commensurate with extra dangerous character of crossing held not objectionable as singling out one charge of negligence. Norfolk & W. R. Co. v. Munsell's Adm'r [Va.] 64 SE 50.

**45.** Instruction on contributory negligence held to ignore discovered peril. Chicago, etc., R. Co. v. Johnson [Tex. Civ. App.] 111 SW 758. Instruction directing verdict for defendant if company exercised due care after discovering child held properly refused as ignoring negligence in not sooner discovering child. Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787. Instruction submitting issue of express invitation to use private crossing and closing, "but if you do not so find and believe from the evidence, your verdict should be for defendant," held erroneous as ignoring implied invitation. Cowans v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 109 SW 403. Instruction to find for plaintiff unless jury find for defendant under instructions to be given, one of which was contributory negligence, instruction is not objectionable as ignoring contributory negligence. St. Louis & S. F. R. Co. v. Summers [Tex. Civ. App.] 111 SW 211. Where company claims that warning was given in particular way, court may properly instruct that, if signals were not so given, defendant was negligent. Brown v. Long Island R. Co., 129 App. Div. 649, 113 NYS 1090.

**46. Covered:** Instruction as to bearing of intoxication on contributory negligence. El Paso Elec. R. Co. v. Ryan [Tex. Civ. App.] 114 SW 906. Instruction on burden of proof. Ft. Worth & R. C. R. Co. v. Eddleman [Tex. Civ. App.] 114 SW 425. Instruction predicated on assumed risk held covered by instruction that if plaintiff attempted to draw water from end of car at time and place dangerous to her and she knew the fact, or it was open and obvious, she assumed the risk. Louisiana & T. Lumber Co. v. Brown [Tex. Civ. App.] 109 SW 950. Instruction that one approaching crossing should look and listen at such distance as to avoid injury, etc., held to cover requested instruction that he should look so near crossing as to enable him to cross in safety before train in view, going at usual speed, would reach crossing. Erie R. Co. v. Weinstein [C. C. A.] 166 F 271.

**47.** Complaint for injuries to horse which had passed over defective cattle guards onto right of way and was frightened into fence by approaching hand car construed as common-law action and not under Rev. St. 1899 (Ann. St. 1906, p. 945) §§ 1105, 1106, though attorney fees and double damage was asked. Shell v. Missouri Pac. R. Co., 132 Mo. App. 528, 112 SW 39.

**48.** Punitive damages held properly submitted to jury where injury was caused by team becoming frightened at steam escaping from engine backing towards crossing without giving statutory signals though engine stopped before reaching crossing. Illinois Cent. R. Co. v. Armstrong [Miss.] 47 S 427. It is gross negligence authorizing punitive damages where, through reckless inattention of gateman, gates are left up while train is approaching from direction where view is obstructed. Louisville v. N. R. Co. v. Roth [Ky.] 114 SW 264.

**49. Search Note:** See Corporations, Cent. Dig. §§ 2603-2627, Railroads Cent. Dig. §§ 26-71; Dec. Dig. §§ 13-33; 23 A. & E. Enc. L. (2ed.) 677; 29 Id. 139.

**50.** Where road was of public necessity to territory along part of way but would not be a paying proposition unless given certain terminal connections, fact that it paralleled another road in making the terminal connection is no ground for refusal of certificate. People v. Railroad Com'rs, 126 App. Div. 492, 110 NYS 862. Advantage of competition to coal shippers held to authorize issuance of certificate, especially where existing road could not promptly handle all coal offered. Id. Held not policy in placing rates and facilities of transportation under state and interstate commissions to do away entirely with competition and to compel existing roads to increase facilities. Id. Certificate of public necessity held wrongfully issued to locate route along river front where there was no present need therefore and it would greatly interfere with proposed marine improvements by federal government. People v. Railroad Com'rs, 128 App. Div. 814, 114 NYS 122. Evidence of conditions and need of road to effect exchange of business between different routes held to warrant issuance of certificate of convenience and necessity. In re Buffalo Frontier Terminal R. Co., 131 App. Div. 503, 115 NYS 483. Where certificate of convenience was issued in 1903 but in 1906 only little progress had been made in construction and application was pending to revoke charter, such delay was sufficient to justify commissioners in ignoring its claim to protection against granting certificate to parallel line. People v. Aldridge, 126 App. Div. 484, 110 NYS 820. Determination of commissioners on application for certificate of public convenience that it should not occupy certain avenue is not res judicata on question whether public convenience required another company to occupy it. Id. Laws 1897, p. 794, c. 754, § 60, construed that while commissions could consider number of grade crossings in determining public convenience, it was not necessary to determine manner of crossing before issuing certificate. People v. Railroad Com'rs, 126 App. Div. 492, 110 NYS 862.

**51.** Where curative affidavit is filed, corporation must be treated as defecto corporation so that franchise and right of way could be sold in receivership. In re New York, W. & B. R. Co., 193 NYS 72, 85 NE 1014. Laws 1903, p. 1424, c. 627, authoriz-

been subscribed.[52] While the commission has power to issue a certificate as to a part of the route where a public necessity is only shown therefore, it must issue certificate as to whole route where found to be of public convenience.[53] The determination of the commission is subject to review by the supreme court,[54] and where new conditions have arisen [55] the matter may be remanded for a rehearing.[56] In many states the road must be completed within a certain time under pain of forefeiture,[57] but time during which it was in the hands of a receiver should be deducted.[58] While the repeal of the General Railroad Law of New York did not affect the corporate existence of companies organized thereunder,[59] a company may become extinct through a sale of all of its property.[60] The powers of a railroad corporation and its officers depends upon the constitution [61] and general statutes of the state in which it is incorporated,[62] and the terms of its charter.[63] A change in capital stock can usually

ing filing of curative affidavit where no affidavit was attached to certificate of incorporation showing that required amount of capital stock had been paid in, etc., held designed to place persons who had organized company in good faith in as good position as if affidavit had been filed. Id. But corporation becomes a new one in effect and must procure certificate of public convenience and necessity, as required by Railroad Law of 1892, p. 2083, c. 39, § 59, though such certificate was not necessary when first organization was made. Id.

52. People v. Public Service Commissions, 127 App. Div. 480, 112 NYS 133. Where it appears that directors on day before filing certificate of incorporation deposited $50,000 with bank which was credited to them as directors, held that questions whether they had made any arrangements with bank regarding money or had given their obligation in obtaining money, etc., held improperly excluded. Id.

53. Laws 1907, p. 1086, c. 454, § 1797-51. Eastern R. Co. v. McCord, 136 Wis. 249, 116 NW 841.

54. Whether determination of board of railroad commissioners as to public necessity for a railroad is administrative or juducial power of supreme court to review has been exercised too long to be questioned. In re Buffalo Frontier Terminal R. Co., 131 App. Div. 503, 115 NYS 483.

55. Where after wrongful denial by state railroad commission of certificate of convenience there are material changes in conditions, new roads or increase facilities of old ones, tending to meet need, held on review that case should be remanded for consideration under new conditions. In re Buffalo Frontier Terminal R. Co., 131 App. Div. 503, 115 NYS 483.

56. Court having power to direct public service commission, body possessing original jurisdiction, to issue certificate, may remit matter for a rehearing. In re Buffalo Frontier Terminal R. Co., 131 App. Div. 503, 115 NYS 483.

57. Does not ipso facto terminate corporate existence. Stephens v. Louisiana Long Leaf Lumber Co., 122 La. 547, 47 S 887. Gen. St. 1888, § 3440, providing that if railroad company shall not finish road in five years from filing of articles its corporate existence and powers shall cease, does not ipso facto destroy corporate existence, and where state does not effect forfeiture it remains a corporation de jure. New York, B. & E. R. Co. v. Motil [Conn.] 71 A 563.

58. In re New York, W. & B. R. Co., 193 N. Y. 72, 85 NE 1014.

59. Repeal of general railroad law by Pub. Acts 1905, p. 335, c. 126. New York, B. & E. R. Co. v. Motil [Conn.] 71 A 563.

60. Sale under order to sell "all the rights of said company legal or equitable, in and to its roadbed and right of way, and all its real estate, tracks, and fixtures," held not as a matter of law to dispose of all of interest of stockholders so that company ceased to exist. In re New York, W. & B. R. Co., 193 N. Y. 72, 85 NE 1014.

61. Const. Mo. art. 12, §§ 8, 10, and Rev. St. Mo. 1899, §§ 962, 1050, construed and held that where railroad has issued preferred stock with consent of all stockholders, it may be increased with consent of majority. Pollitz v. Wabash R. Co., 167 F 145. Notwithstanding Const. art. 12, §§ 14, 16, 22, prohibiting a railroad corporation from consolidating with parallel competing line, and federal anti-trust act, declaring illegal every combination in restraint of interstate commerce two parallel and competing lines may subscribe to stock of newly created company to build line into new territory. State v. Skamania Super. Ct. [Wash.] 98 P 739. Where company to meet demand of business and law was making extensive repairs and improvements which involved it in litigation with debenture bondholders payable out of net earnings, held that compromise whereby stockholders voted issue of stock and bonds and agreed to exchange bonds and stock for debenture bonds, stock aggregating face value of bonds was not ultra vires as violating Const. Mo. art. 12, § 8, providing that "no corporation shall issue stock or bonds except for money paid, labor done, or property actually received and all fictitious increase of stock or indebtedness shall be void." Pollitz v. Wabash R. Co., 167 F 145.

62. Under general railroad act (P. L. 1903, p. 647, § 3), railroad corporation may exercise general powers conferred by corporation act of 1896 only so far as they are appropriate to and not inconsistent with railroad act or with provisions under which company is created. State v. Atlantic City & S. R. Co. [N. J. Err. App.] 72 A 111. St. 1906, p. 527, c. 463, part 2, § 57, prohibiting railroad corporation from purchasing unless authorized by general court or the

be effected only by amendment of charter.[64] Before a foreign railroad corporation can operate in some states, it must file a copy of its charter with the secretary of state and comply with certain conditions.[65]

§ 13. *Actions by and against railroad companies.*[66] See 10 C. L. 1489—The jurisdiction of inferior courts,[67] the venue of actions,[68] and the manner of serving process,[69] is largely controlled by statute.

provisions of the act, the stocks or bonds of other corporations, is an affirmative statement of doctrine of ultra vires and determines when company may purchase such stock. Attorney General v. New York, etc., R. Co., 198 Mass. 413, 84 NE 737. Under express provisions of General Corporation Act. § 51 (P. L. 1896, p. 294), corporation organized under general railroad law may acquire bonds and controlling interest in stock of corporation organized under street railway law. State v. Atlantic City & S. R. Co. [N. J. Law] 69 A 468. Though company acquiring right of way and station grounds under act of congress (Act. Feb. 18, 1888, c. 13, 25 Stat. 35) could not acquire other real estate from Choctaw Nation, power held given by subsequent statutes. Choctaw, O. & G. R. Co. v. Bond [C. C. A.] 160 F 403.

**63.** Company, incorporated under P. L. 1903, p. 645, for purpose of constructing a line of railway with definite termini, held without power to hold and own stock of street railroad extending beyond termini (State v. Atlantic City & S. R. Co. [N. J. Err. & App.] 72 A 111), and exercise of power of control and running of its cars over street car line and making of ostensible agreement for continuance of such operation constitutes usurpation of franchise (Id.).

**64.** State v. Railroad Commission, 137 Wis. 80, 117 NW 846. Such change under St. 1898, § 1826, though not called an amendment, is one in fact. Id. St. 1898, § 1774, relating to amendment of articles of incorporation, does not apply to railroads. Id.

**65.** Where it is alleged that defendant was operating in New Mexico Territory, it will be presumed that it complied with Laws N. M. 1903, p. 51, c. 33, requiring railroads operating in territory to file copy of charter with secretary, give its principal place of business and designate one for receiving service of process etc. Denver & R. G. R. Co. v. Wagner [C. C. A.] 167 F 75.

**66. Search Note:** See Railroads, Cent. Dig. §§ 45-61; Dec. Dig. §§ 20-29; 17 A. & E. Enc. P. & P. 518, 532.

**67.** In action before Missouri justice of the peace for mule killed in another state, jurisdiction of justice being prescribed by statute, laws of state governing where killing occurred are properly excluded from evidence. Beth v. St. Louis & S. F. R. Co. [Mo. App.] 116 SW 1111.

**68.** Must be sued in county where it has principal office if chartered under laws of state. White v. Atlanta B. & A. R. Co. [Ga. App.] 63 SE 234. Word "reside" as used in Acts 27th Leg. (Laws 1901, p. 31, c. 27), authorizing bringing of suit in county where injury occurred or where plaintiff resides, means to make abode for considerable time and imports a habitation of some degree of permanency coupled with thought of home. Ft. Worth & D. C. R. Co. v. Monell [Tex. Civ. App.] 110 SW 504. One from another state who was member of gang taking up old and laying down new steel, living in boarding car, and who only intended to work until he could get $50 ahead, held not a resident of state and under Acts 27th Leg. (Laws 1901, p. 31, c. 27) authorizing bringing of suit in any county where road runs. Id. Under Rev. St. 1899, § 3839 (Ann. St. 1906, p. 2128), action before justice for killing of stock must be brought in township where killing occurred or in adjoining township. Beth v. St. Louis & S. F. R. Co. [Mo. App.] 116 SW 1111. Action against railroad having principal office in state upon liability attaching as purchaser or successor of another, primarily liable, must be brought in county where it has principal office. White v. Atlanta, B. & A. R. Co. [Ga. App.] 63 SE 234. Under Act March 13, 1905, where domestic company and two foreign companies were connecting carriers over whose line plaintiff's wife traveled on ticket purchased in another state, all of which operated trains within state, held that court in county through which domestic company operated line had jurisdiction of all for injury occuring beyond line especially where agreement between domestic and one of foreign practically made them partners. St. Louis & S. F. R. Co. v. Sizemore [Tex. Civ. App.] 116 SW 403. Railroad company is suable on contract either in county where executed or in county where it is to be performed. Central of Georgia R. Co. v. Crapps, 4 Ga. App. 550, 61 SE 1126.

**69.** Under Code Civ. Proc. § 2880, summons in action in justice court may be served on freight agent where company has not designated person for service though assistant superintendent of defendant resides in county, unless he is managing agent within Code Civ. Proc. § 2879. Duval v. Boston & M. R. Co., 58 Misc. 504, 111 NYS 629. Ticket agent of local railroad selling joint ticket over foreign road not doing business in the state is not a "ticket agent" of such foreign company on whom process may be served under Rev. Laws 1905, § 4110. Slaughter v. Canadian Pac. R. Co., 106 Minn. 263, 119 NW 398. Foreign railway company not owning or operating a railway within the state is not "transacting business within this state," though its cars are brought into state under a joint traffic arrangement. Id. Act No. 208, p. 319, Pub. Acts. 1901, providing for service upon station agent or any conductor along the line or at end of road, except that provision shall not apply to conductors on electric railways operating within limits of cities, held to authorize service on conductor within city limits where road did not operate wholly within such city. Hal-

§ 14. *Offenses relating to railroads.*[70]—See 10 C. L. 1438—Where a company habitually runs over a crossing at an unsafe speed,[71] fails to discharge its duty to keep a bridge in a safe condition,[72] or willfully [73] blocks [74] a crossing for an unreasonable time,[75] it may be indicted as for a public nuisance[76]. The violation of a speed ordinance is frequently made a misdemeanor.[77] An indictment for criminal negligence resulting in a collision must show that defendant was in control of the train and knew that the other train was due or coming.[78] The West Virginia statute making it an offense to jump off cars, engines, etc., has no application to any employe.[79]

## RAPE.

§ 1. Nature and Elements, 1615.
A. In General, 1615.
B. Female Under Age of Consent, 1615.
C. Attempts and Assaults With Intent to Commit Rape; and Forcible Detention, 1616.
§ 2. Indictment and Prosecution, 1616.
A. Indictment or Information, 1616.
B. Evidence, 1617.
1. Admissibility, 1617.
2. Weight and Sufficiency, 1619.
C. Instructions, 1621.
D. Trial and Punishment, 1622. New Trial, 1622.

*The scope of this topic* is noted below.[80]

laday v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 1050, 119 NW 445. Where domestic corporation, owning no rolling stock and foreign company had working agreement which in legal effect made them partners, held that conductor on foreign company's train, which was operated by same crew beyond state, was foreign company's conductor on whom service could be had under Act March 13, 1905, though agreement provided that crew should be employes of domestic company while in state. St. Louis & S. F. R. Co. v. Sizemore [Tex. Civ. App.] 116 SW 403. For purposs of serving process, foreign railroad corporation doing business in state will be treated as domestic corporation, and return officer need not show that place of service was place of residence of person served. Stout v. Baltimore & O. R. Co. [W. Va.] 63 SE 317.

70. **Search Note:** See Railroads, Cent. Dig. §§ 20-25, 764-788; Dec. Dig. §§ 12, 254, 255; 23 A. & E. Enc. L. (2ed.) 739; 17 A. & E. Enc. P. & P. 521.

71. And without proper warning. Commonwealth v. Baltimore & O. R. Co. [Pa.] 72 A 278.

72. Indictment for maintaining public nuisance, charging the failure to rspair certain bridge but alleging no duty to repair except by way of recital that defendant did "suffer and permit its bridge to become out of repair," held insufficient. Louisville & N. R. Co. v. Com. [Ky.] 113 SW 517.

73. Indictment for "willfully" blocking street means merely intentionally as distinguished from accidental. Louisville & N. R. Co. v. Com., 33 Ky. L. R. 991, 112 SW 578.

74. Indictment merely charging company with frequently and rapidly passing its trains over a crossing, whereby it was obstructed, states no offense. Commonwealth v. Baltimore & O. R. Co. [Pa.] 72 A 278.

75. Use of words "to wit, thirty minutes," as used in instruction relative to blocking crossing unreasonable length of time, held not prejudicial as withdrawing question of reasonableness from jury in view of other instructions. Louisville & N. R. Co. v. Com., 33 Ky. L. R. 991, 112 SW 573.

76. Indictment for constituting a nuisance by blocking certain street held sufficient though it did not state exact date, time of day, character of train or direction in which it was headed. Commonwealth v. Chesapeake & O. R. Co., 33 Ky. L. R. 92, 110 SW 253. Wherein indictment for creating a nuisance by blocking certain street, the exact day or time of day was not alleged and it appears that defendant has many trains over the crossing each day, bill of particulars by commonwealth was properly ordered but it should not have been demanded until state could ascertain facts necessary. Id. Such bill need not give facts within knowledge of defendant nor need it give exact date or hour of the offense or number of train unless witnesses can give same, commonwealth being only required to make an honest effort to give such information. Id.

77. Where railroad violates ordinance as to speed on track in street, remedy of abutter is to apply to proper authorities for a warrant for a misdemeanor. Staton v. Atlantic Coast Line R. Co., 147 N. C. 428, 61 SE 455.

78. State v. MacDonald, 105 Minn. 251, 117 NW 482.

79. Code 1906, § 4282, making it criminal for persons not passengers or employes to jump on or off of railroad engines, etc., does not inhibit employe from so doing although his duties are confined to shop and do not require him to go in or about cars. Diddle v. Continental Casualty Co. [W. Va.] 63 SE 962.

80. **Includes** the common-law and statutory crimes of rape, attempts and assaults to commit rape and the crime of forcible detention with intent to carnally know. Also the statutory crime of defiling a female intrusted to defendant's care. **Excludes** matters common to all crimes (see Criminal Law, 11 C. L. 940; Indictment and

§ 1. *Nature and elements. A. In general.*[81]—See 10 C. L. 1440—Rape at common law is the carnal knowledge of a female, forcibly and against her consent.[82] Actual penetration [83] by means of force,[84] actual or constructive,[85] sufficient to overcome the will of the female,[86] and nonconsent by the female,[87] are essential elements. Pretermitting the question of consent, any unlawful force is sufficient,[88] but from the standpoint of resistence required by the female, there must be sufficient force to overcome her utmost resistance.[89] Some statutes designate grades of the offense, depending upon whether the force was actual [90] or constructive.[91] A "man" within the meaning of the statutes denouncing the offense is any male person who has arrived at puberty,[92] and all male persons of the age of fourteen years or more are prima facie capable of committing rape.[93] Neither force [94] nor actual presence at the time and place of the offense [95] are essential to the crime of aiding and abetting, and, in jurisdictions which have abolished the destinction between principal and accessory, the accessory is guilty as a principal.[96] Action may be barred by limitations,[97] and, where there is uncertainty as to whether the period has run, time becomes an essential.[98]

(§ 1) *B. Female under age of consent.*[99]—See 10 C. L. 1441—It is universally provided by statute that unlawful carnal knowledge of a female under a specified age shall be rape regardless of her consent.[1] Neither force,[2] intent [3] nor knowledge of the age of prosecutrix are essential to statutory rape; [4] nor is time, providing it is within the prohibited age,[5] and it is immaterial that the female is the wife of another.[6] A female attains the age of consent on the day preceding the anniversary of birth.[7]

Prosecution, 12 C. L. 1, and Witnesses, 10 C. L. 2079) also civil actions for damages (See Assault and Battery, 11 C. L. 285).

**81. Search Note:** See notes in 36 L. R. A. 203, 208, 479; 11 Ann. Cas. 93, 1063.

See, also, Rape, Cent. Dig. §§ 1-13, 20-22; Dec. Dig. §§ 1-14, 17-19; 23 A. & E. Enc. L. (2ed.) 847.

**82.** Payne v. Com., 33 Ky. L. R. 229, 110 SW 311.

**83.** Banton v. State, 53 Tex. Cr. App. 251, 109 SW 159. Any penetration, however slight. People v. Sheffield [Cal. App.] 98 P 67.

**84.** Force essential. Pumphrey v. State [Ala.] 47 S 156; Payne v. Com., 33 Ky. L. R. 229, 110 SW 311; Vickers v. U. S. [Okl. Cr. App.] 98 P 467.

**85.** Payne v. Com., 33 Ky. L. R. 229, 110 SW 311.

**86.** State v. Whimpey [Iowa] 118 NW 281; State v. Rhoades [N. D.] 118 NW 233.

**87.** State v. Rhoades [N. D.] 118 NW 233; Vickers v. U. S. [Okl. Cr. App.] 98 P 467; Ex parte Black [Tex. Cr. App.] 113 SW 534. Least consent during act negatives offense. State v. Whimpey [Iowa] 118 NW 281.

**88.** Even the least. Payne v. Com., 33 Ky. L. R. 229, 110 SW 311

**89.** State v. Rhoades [N. D.] 118 NW 233.

**90.** There must be the utmost resistance overcome by actual force to constitute first degree rape. State v. Rhoades [N. D.] 118 NW 283.

**91.** Rape accomplished through fear and threats, accompanied by apparent power of execution, constitutes the second degree. State v. Rhoades [N. D.] 118 NW 233.

**92.** Pub. St. 1901, c. 278, § 15, denouncing rape by "man," held to include youth under 17 years of age. State v. Burt [N. H.] 71 A 30.

**93.** Payne v. Com., 33 Ky. L. R. 229, 110 SW 311.

**94.** One who acts as "lookout" is guilty. Vogel v. State [Wis.] 119 NW 190.

**95.** Stepfather connived at and arranged for ruin of stepdaughter by a boy. People v. Lewis [Cal. App.] 98 P 1078.

**96.** State v. Brooks [Wis.] 120 NW 226. Under Pen. Code, §§ 30, 31, 971. People v. Lewis [Cal. App.] 98 P 1078.

**97.** Ex parte Black [Tex. Cr. App.] 113 SW 534.

**98.** Must be proved beyond reasonable doubt. Battles v. State, 53 Tex. Cr. App. 202, 109 SW 195.

**99. Search Note:** See notes in 5 Ann. Cas. 354.

See, also, Rape, Cent. Dig. § 12; Dec. Dig. § 13; 23 A. & E. Enc. L. (2ed.) 850, 857.

**1.** Payne v. Com., 33 Ky. L. R. 229, 110 SW 311; State v. George, 214 Mo. 262, 113 SW 1116. Pen. Code, § 261, making statutory rape a felony irrespective of intent or knowledge of age, is constitutional. People v. Sheffield [Cal. App.] 98 P 67.

**2.** Payne v. Com., 33 Ky. L. R. 229, 110 SW 311; State v. George, 214 Mo. 262, 113 SW 1116.

**3, 4.** Payne v. Com., 33 Ky. L. R. 229, 110 SW 311.

**5.** People v. Sheffield [Cal. App.] 98 P 67; State v. George, 214 Mo. 262, 113 SW 1116.

**6.** People v. Sheffield [Cal. App.] 98 P 67.

**7.** Connection on Dec. 2 with girl whose sixteenth birthday was next day. Commonwealth v. Howe, 35 Pa. Super. Ct. 554.

(§ 1) *C. Attempts and assaults with intent to commit rape; and forcible detention.*[8] See 10 C. L. 1441—An attempt includes all the ingredients of the offense except its accomplishment.[9] Mere solicitation cannot establish the offense.[10] Intent to accomplish the crime [11] and to use whatever force is necessary in its accomplishment [12] must be present,[13] and an overt act must be shown,[14] which need not, however, amount to a technical assault,[15] but must at least place the female under a sense of constraint and shame.[16] Some jurisdictions distinguished between attempted rape and assault to rape.[17]

*Forcible detention.* See 10 C. L. 1442

§ 2. *Indictment and prosecution. A. Indictment or information.*[18] See 10 C. L. 1442—The indictment must inform the defendant of the full nature of the charge against him,[19] and must set forth facts,[20] sufficient to charge the crime [21] and all its essential elements, including force [22] and nonconsent.[23] Where the punishment is the same, one aiding and abetting may be properly charged as a principal.[24] Statutory rape must be sufficiently alleged,[25] but time is otherwise an immaterial allegation.[26] That the female was under the age of consent need not be alleged in the language of the statute.[27] Previous chastity of the prosecutrix, if essential, must be alleged,[28]

**8. Search Note:** See notes in 10 C. L. 1441. See, also, Rape, Cent. Dig. §§ 14-19; Dec. Dig. §§ 15, 16; 23 A. & E. Enc. L. (2ed.) 863.

**9.** Payne v. Com., 33 Ky. L. R. 229, 110 SW 311.

**10.** Clark v. State [Fla.] 47 S 481.

**11.** Herrick v. Ter. [Okl. Cr. App.] 99 P 1096; Holloway v. State [Tex. Cr. App.] 113 SW 928. Intent must be alleged. Herrick v. Ter. [Okl. Cr. App.] 99 P 1096. Intent must be established. Holloway v. State [Tex. Cr. App.] 113 SW 928.

**12. Must intend to use force.** Eiley v. State [Tex. Cr. App.] 114 SW 793. Reasonably calculated to overcome resistance. Holloway v. State [Tex. Cr. App.] 113 SW 928. Such as is necessary to overcome resistance. Austin v. State [Miss.] 48 S 817. To accomplish purpose regardless of resistance or nonconsent. Clark v. State [Fla.] 47 S 481. To point of overcoming resistance or dissent. Daggs v. Ter. [Ariz.] 94 P 1106. **But see** Pumphrey v. State [Ala.] 47 S 156.

**13.** Beyond reasonable doubt. Clark v. State [Fla.] 47 S 481.

**14.** Payne v. Com., 33 Ky. L. R. 229, 110 SW 311.

**15.** Payne v. Com., 33 Ky. L. R. 229, 110 SW 311. A demonstration of violence amounts to attempt. High v. Ter. [Ariz.] 100 P 448. Not necessary that defendant laid hands on prosecutrix. Payne v. Com., 33 Ky. L. R. 229, 110 SW 311. If the acts of defendant were such as to show a purpose on his part to have carnal knowledge of the prosecutrix by force or with consent, and that he was prepared to carry such intention into effect and would have accomplished it but for the flight of his intended victim, he is guilty. Id. **But see** Williams v. State [Ark.] 113 SW 799.

**16.** Halsell v. State, 53 Tex. Cr. App. 510, 110 SW 441.

**17.** Distinction discussed at length. Holloway v. State [Tex. Cr. App.] 113 SW 928.

**18. Search Note:** See notes in 5 Ann. Cas. 111; 7 Id. 263. See, also, Rape, Cent. Dig. §§ 23-45; Dec. Dig. §§ 20-35; 17 A. & E. Enc. P. & P. 645.

**19.** Vickers v. U. S. [Okl. Cr. App.] 98 P 467.

**20.** Not conclusions of law. Daggs v. Ter. [Ariz.] 94 P 1106. Indictment charging assault with intent to commit rape by forcibly attempting to have sexual intercourse without consent held faulty as not charging intent to press force to the point of overcoming resistance. Id.

**21.** "Did make assault in and upon" prosecutrix, and "unlawfully, forcibly and against her will feloniously did ravish and carnally know," held a sufficient allegation. State v. Goodale, 210 Mo. 275, 109 SW 9. Indictment held sufficient under Kirby's Dig. § 2008. Curtis v. State [Ark.] 117 SW 521. Indictment held insufficient to set forth force and lack of consent. Vickers v. U. S. [Okl. Cr. App.] 98 P 467.

**22.** "Violently" held to sufficiently allege force. State v. Rohn [Iowa] 119 NW 88. "Ravish" imports force and is sufficient allegation thereof. Id.

**23.** After verdict, defendant cannot be heard to object that allegation that defendant overcame resistance of victim does not sufficiently charge such resistance. State v. Rhoades [N. D.] 118 NW 233.

**24.** Vogel v. State [Wis.] 119 NW 190.

**25.** Sufficient to allege and prove prosecutrix under age of consent and not wife of accused. People v. Sheffield [Cal. App.] 98 P 67.

**26.** "On or about" held sufficiently definite, it appearing that prosecutrix was under age of consent and offense within the period of limitations. People v. Sheffield [Cal. App.] 98 P 67.

**27.** Under age of consent, to wit, of age of 15, held sufficient allegation that prosecutrix was under 16. Curtis v. State [Ark.] 117 SW 521. Allegation giving positive information as to age of victim and that she was under age of consent held sufficient. State v. Burt [N. H.] 71 A 30.

**28.** Where punishment depends thereon. Frost v. State [Miss.] 47 S 898.

but felonious intent is not an essential allegation in such cases.[29] A charge of having committed the crime necessarily includes the charge of capacity to commit.[30] While it is usually necessary to negative marriage, such allegation need not always be in express terms,[31] and in statutory rape it may be wholly unnecessary,[32] particularly so as to marriage to another than defendant.[33] It is not usually necessary to set forth the offense in the language of the statute,[34] but an indictment in the very language of a statute cannot be construed to charge the offense under another statute.[35] In charging attempt, the intent must be clearly alleged.[36] The usual rules as to duplicity obtain.[37] Carnal knowledge and carnal abuse are synonymous terms.[38]

(§ 2) *B. Evidence.* 1. *Admissibilty.*[39]—See 10 C. L. 1443—At common law, failure to complain promptly raised a strong presumption of bad faith and might bar as hearsay any testimony as to a subsequent complaint.[40] By the modern rulings, however, the state may introduce evidence of a delayed complaint by properly explaining the delay,[41] and hence may introduce evidence in explanation thereof.[42] Similarly, the state may show why no outcry was made at the time of the offense.[43] Since prompt complaint is an important test of the sincerity of the prosecutrix, testimony as to the fact of such complaint is admissible, but not as to details of the complaint[44] except as res gestae or in corroboration of prosecutrix's testimony when attacked,[45] or under extraordinary circumstances,[46] although it is within the discretion of the court to admit accusations made by prosecutrix during childbirth.[47] The rule which permits the admission of complaints of the victim immediately following is an arbitrary exception to the rule against hearsay evidence and cannot be extended to other offenses.[48] In general, acts and statements of the parties subsequent to the offense

**29.** Howerton v. Com., 33 Ky. L. R. 1008, 112 SW 606.

**30.** Unnecessary to allege that defendant is over age of 17, under Burns' Ann. St. 1908, § 2250. Cheek v. State [Ind.] 85 NE 779.

**31.** Curtis v. State [Ark.] 117 SW 521. Indictment alleging unlawful and felonious carnal knowledge and abuse need not negative marriage. Id.

**32.** Under Ky. St. 1903, § 1155. Commonwealth v. Landis, 33 Ky. L. R. 983, 112 SW 581.

**33.** People v. Sheffield [Cal. App.] 98 P 67.

**34.** Indictment not faulty for failing to allege "and unlawfully" after word "carnally" as set forth in statute, allegation of unlawfulness appearing elsewhere. State v. Hoskinson [Kan.] 96 P 138. Not necessary to set forth the elements of the statutory definition. High v. Ter. [Ariz.] 100 P 448. "Assault" sufficiently imports force and overt act. Id.

**35.** Barton v. State [Miss.] 47 S 521.

**36.** Must allege that the attempt was made with intent to rape. Herrick v. Ter. [Okl.] 99 P 1096. Indictment held sufficient. Westerman v. State, 53 Tex. Cr. App. 109, 111 SW 655.

**37.** Indictment held not bad for duplicity as alleging assault and battery and rape. Cheek v. State [Ind.] 85 NE 779. No error in joining counts of incest and rape, they both referring to same act. State v. Goodale, 210 Mo. 275, 109 SW 9. Indictment charging statutory offense on a day certain, "and at various times and occasions subsequent," not bad for duplicity, state having elected to stand upon date first noted. Leedom v. State [Neb.] 116 NW 496.

**38.** Curtis v. State [Ark.] 117 SW 521.

**39. Search Note:** See notes in 65 L. R. A. 316; 14 L. R. A. (N. S.) 714; 2 Ann. Cas. 234, 834; 6 Id. 771; 8 Id. 459; 9 Id. 1218; 11 Id. 99, 672.

See, also, Rape, Cent. Dig. §§ 48-70; Dec. Dig. §§ 37-49; 23 A. & E. Enc. L. (2ed.) 869.

**40.** Strong presumption of falsity of charge. State v. Sebastian [Conn.] 69 A 1054.

**41.** State v. Sebastian [Conn.] 69 A 1054.

**42.** That husband had warned prosecutrix not to come to him while he was working in field. Salazar v. State [Tex. Cr. App.] 116 SW 819.

**43.** Warren v. State [Tex. Cr. App.] 114 SW 380.

**44.** Skaggs v. State [Ark.] 113 SW 346; State v. Hoskinson [Kan.] 96 P 138. Communication by deaf mute victim immediately after rape held admissible as to act but not as to persons. People v. Weston, 236 Ill. 104, 86 NE 188. Statements of prosecutrix immediately after rescue held admissible as to lack of consent and corpus delicti. Vogel v. State [Wis.] 119 NW 190. Error to admit details. Frost v. State [Miss.] 47 S 898.

**45.** Skaggs v. State [Ark.] 113 SW 346.

**46.** That testimony of complaint of deaf mute victim to witness should be confined to fact of complaint may be modified by fact that communication of deaf mute to one unfamiliar with dactylology is necessarily somewhat imperfect. State v. Rohn [Iowa] 119 NW 88.

**47.** State v. Sebastian [Conn.] 69 A 1054.

**48.** Indecent liberties. People v. Scattura, 238 Ill. 313, 87 NE 332.

are inadmissible [49] except as a part of the res gestae,[50] or in corroboration of the prosecutrix,[51] or as tending to show consciousness of guilt,[52] but subsequent statements by third parties are uniformly inadmissible.[53] Circumstantial or other evidence in corroboration of the prosecutrix may be introduced,[54] such as the appearance and condition of the prosecutrix,[55] her clothing,[56] and the scene of the outrage,[57] if not too remote.[58] Letters written by defendant [59] and the conduct of the parties previous to the crime [60] may also be admissible in corroboration. Where the previous chastity of the prosecutrix is material, evidence bearing upon the same may be introduced,[61] but is premature where not yet assailed by the defense.[62] Evidence of other crimes of the same [63] or a different nature [64] is usually inadmissible except for purposes of impeachment,[65] but evidence tending to prove guilt is admissible,

**49.** People v. Weston, 236 Ill. 104, 86 NE 188; Williams v. State [Tex. Cr. App.] 115 SW 35. Statements by prosecutrix at preliminary inquiry. State v. Hoskinson [Kan.] 96 P 138. Conversation between the parties before justice of peace. State v. Campbell, 210 Mo. 202, 109 SW 706. Prosecutrix' statement three weeks after crime. People v. Corey [Cal. App.] 97 P 907. That defendant was armed half an hour later. State v. Chance, 122 La. 706, 48 S 158.

**50.** It is only when declarations accompany the transaction so as to be wrought into or emanate from it that they are excepted from the rule against hearsay. Commonwealth v. Howe, 35 Pa. Super. Ct. 554. If, under the circumstance, it can reasonably be said that the declaration is probably true, it may be submitted for consideration of the jury with proper instructions. State v. Alton, 105 Minn. 410, 117 NW 617. Declarations and statements of victim within half an hour of the crime, she still being nearly crazed by supposed loss of her child, held natural and spontaneous reproduction of the facts (Id.), but after restoration of child and time for reflection, her further statements held not part of the res gestae (Id.).

**51.** Testimony that after offense prosecutrix repelled friendly advances of defendant is admissible. Warren v. State [Tex. Cr. App.] 114 SW 380.

**52.** Flight. State v. Ralston [Iowa] 116 NW 1058. Flight of defendant upon seeing prosecutrix' father with gun, though it was not shown that defendant knew of the relationship. Holloway v. State [Tex. Cr. App.] 113 SW 928. That during preliminary hearing defendant changed from clothing similar to that alleged by prosecutrix to have been worn by assailant. Id.

**53.** Williams v. State [Tex. Cr. App.] 115 SW 35. Highly improper to permit evidence of statement by third party, "There he is with the same hat." Holloway v. State [Tex. Cr. App.] 113 SW 928. Declarations by husband of prosecutrix in absence of defendant, although there was some evidence of connivance of act by husband. Williams v. State [Tex. Cr. App.] 115 SW 35.

**54.** Pregnancy and miscarriage of female, and her testimony that defendant alone had had connection with her, properly admitted, since taken as a whole it tended to prove guilt. State v. Sebastian [Conn.] 69 A 1054. Prosecutrix' testimony that defendant left stick with which he knocked her down at certain place. and testimony of others as to finding of stick. Griffin v. State [Ala.] 46 S 481.

**55.** Immediately after outrage. Skaggs v. State [Ark.] 113 SW 346.

**56.** Skaggs v. State [Ark.] 113 SW 346. As corroborating testimony of struggle. Salazar v. State [Tex. Cr. App.] 116 SW 819.

**57.** Marks of struggle. Skaggs v. State [Ark.] 113 SW 346.

**58.** Too remotely connected with defendant. State v. Alton, 105 Minn. 410, 117 NW 617. Blood stains on defendant's shirt not shown to be human, nor when deposited, held inadmissable to identify defendant with crime. Id. Pearl button and shred of black shirt held too remote to identify defendant, black shirts being common garb of laborers. Id. That microscopic examination revealed semen on defendant's shirt, without further evidence as to when and how it was deposited, held incompetent. Id. Evidence of venereal disease of victim inadmissible where defendant is not shown to have such disease and intercourse with other men is admitted. People v. Ah Lean, 7 Cal. App. 626, 95 P 380.

**59.** Prosecuting witness competent to identify handwriting. State v. Simmons [Wash.] 100 P 269. Letters by defendant to his wife. Id. Where prosecutrix testified that she accompanied defendant for purpose of being married, and defendant testified that it was for an immoral purpose, letter written by defendant tending to show promise of marriage, admissible. Warren v. State [Tex. Cr. App.] 114 SW 380.

**60.** That when prosecutrix left home with defendant she kissed her mother good bye and wept held admissible as tending to corroborate state's theory that she left with purpose of becoming married. Warren v. State [Tex. Cr. App.] 114 SW 380.

**61.** As to previous but not subsequent acts of unchastity. Griffin v. State [Ala.] 46 S 481. Where reputation is assailed. Warren v. State [Tex. Cr. App.] 114 SW 380. Evidence of reputation of prosecutrix not admissible on the question of character, may be admissible for purpose of discrediting evidence of previous unchastity. Leedom v. State [Neb.] 116 NW 496.

**62.** Specific testimony. Griffin v. State [Ala.] 46 S 481.

**63.** Same parties. People v. Ah Lean, 7 Cal. App. 626, 95 P 380; People v. Bills, 129 App. Div. 798, 114 NYS 587. Different parties. People v. Bills, 129 App. Div. 798, 114 NYS 587.

**64. Burglary.** Vickers v. U. S. [Okl. Cr. App.] 98 P 467.

**65.** May ask if defendant has been previously charged with crime. Leftrick v. State [Tex. Cr. App.] 116 SW 817.

though tending to prove another crime as well,[66] if properly restricted by the court,[67] and, in the case of an accessory, prior offenses may be considered as showing a plan or design.[68] However, it is held in Missouri that previous offenses [69] and improper acts and solicitations prior to the offense charged [70] may be shown to establish intent or motive, but that conversations between the parties, neither improper nor importing solicitations, are inadmissible.[71] The usual rules as to incompetency prevail.[72] In statutory rape, evidence of previous undue familiarity between parties is admissible,[73] as is evidence tending to rebut the state's theory as to the age of prosecutrix.[74] Intent, as an essential of attempt, may be shown by proper evidence, and it has been held that social customs founded on race differences may be considered in this connection.[75]

(§ 2B) 2. *Weight and sufficiency.*[76]—See 10 C. L. 1445—All of the essential elements, such as penetration,[77] resistance,[78] and nonconsent,[79] must be proved;[80] but in many jurisdictions, if there is any evidence upon which to base a verdict, its sufficiency is for the jury,[81] and on conflicting testimony the verdict is final as to the facts.[82] A confession made at a preliminary hearing is a judicial confession and is alone sufficient to convict.[83] The testimony of the prosecutrix must usually be cor-

66. Vickers v. U. S. [Okl. Cr. App.] 98 P 467. Letters of defendant and evidence of pregnancy of victim, tending to show other acts of intercourse between parties, admissible as corroborative, although not referring to the particular act charged. Leedom v. State [Neb.] 116 NW 496.

67. It is within the discretion of the court to admit evidence of other acts of intercourse, properly instructing as to its effect. State v. Sebastian [Conn.] 69 A 1054. Should instruct that the testimony should not be taken as proving other offenses than the one charged. Id.

68. Plan of step-father to cause ruin of step-daughter by a boy. People v. Lewis [Cal. App.] 98 P 1078.

69, 70, 71. State v. Campbell, 210 Mo. 202, 109 SW 706.

72. Testimony as to insane delusions and false accusations of mother of prosecutrix not admissible where she was not a witness and no connection of prosecutrix with such insane delusions is shown. Battles v. State, 53 Tex. Cr. App. 202, 109 SW 195. Proper to exclude question of why witness got into bed with man, it appearing that prosecutrix and witness were in bed with two men at time of alleged offense. People v. Corey [Cal. App.] 97 P 907. That witness had heard defendant's reputation discussed does not qualify him to testify as to general repute; must show knowledge of reputation. Commonwealth v. Howe, 35 Pa. Super. Ct. 554.

73. Battles v. State, 53 Tex. Cr. App. 202, 109 SW 195; State v. Simmons [Wash.] 100 P 269.

74. That prosecutrix had monthly sickness for five years previous to offense. Howerton v. Com., 33 Ky. L. R. 1008, 112 SW 606.

75. Pumphrey v. State [Ala.] 47 S 156.

76. **Search Note:** See Rape, Cent. Dig. §§ 71-84; Dec. Dig. §§ 51-54.

77. Must be conclusively shown to warrant death penalty. Vickers v. U. S. [Okl. Cr. App.] 98 P 467.

78. Utmost resistance sufficiently shown. State v. Whimpey [Iowa] 118 NW 281. Evidence insufficient to show utmost resistance. State v. Rhoades [N. D.] 118 NW 233.

79. Where defence is fornication, strict rule of proof is applied. Vogel v. State [Wis.] 119 NW 190. Nonconsent sufficiently shown. Vogel v. State [Wis.] 119 NW 190; Salazar v. State [Tex. Cr. App.] 116 SW 819. Evidence insufficient to show nonconsent; on the contrary, it clearly showed consent. Ex parte Black [Tex. Cr. App.] 113 SW 534.

80. Beyond reasonable doubt. Adams v. State [Miss.] 47 S 787.

**Held sufficient.** Pierce v. State [Tex. Cr. App.] 113 SW 148. Testimony of prosecutrix and a witness of the act. Innocente v. State, 53 Tex. Cr. App. 390, 110 SW 61. Police broke in and found parties in dishabille. People v. Caulfield, 7 Cal. App. 656, 95 P 666. To establish rape on deaf mute. People v. Weston, 236 Ill. 104, 86 NE 188. Despite failure to make immediate complaint. Railsback v. State, 53 Tex. Cr. App. 542, 110 SW 916. Although pregnancy proved to be due to a subsequent act. State v. Simmons [Wash.] 100 P 269. Although prosecutrix' testimony was somewhat conflicting. Jaureque v. State [Tex. Cr. App.] 116 SW 809. Although some doubt as to which party was principal. Vogel v. State [Wis.] 119 NW 190.

**Held insufficient.** Adams v. State [Miss.] 47 S 787; Mott v. State [Neb.] 119 NW 461.

81. Only where no substantial evidence will verdict be disturbed. State v. Espenschied, 212 Mo. 215, 110 SW 1072. Where there is evidence to sustain verdict, question of law cannot arise. People v. Caulfield, 7 Cal. App. 656, 95 P 666. Sufficient evidence to go to jury. Howerton v. Com., 33 Ky. L. R. 1008, 112 SW 606.

82. Verdict sustained on conflicting evidence. State v. Campbell, 210 Mo. 202, 109 SW 706; Banton v. State, 53 Tex. Cr. App. 251, 109 SW 159; Roberson v. State, 53 Tex. Cr. App. 297, 109 SW 160; Rusk v. State, 53 Tex. Cr. App. 338, 110 SW 58; Innocente v. State, 53 Tex. Cr. App. 390, 110 SW 61; Leftrick v. State [Tex. Cr. App.] 116 SW 817.

83. Skaggs v. State [Ark.] 113 SW 346.

roborated,[84] except as to corpus delicti,[85] by independent evidence of the crime,[86] but in several jurisdictions a conviction may be had on her uncorroborated testimony,[87] although in such cases it should be subjected to careful scrutiny.[88] Failure to make outcry is a circumstance against the state's case,[89] as is failure to make prompt complaint,[90] and raises a strong inference that no offense was committed.[91] Chastity [92] or repute,[93] where material, must be shown by proper evidence. In assaults and attempts, intent must be clearly shown,[94] but is always a question of fact [95] to be inferred from the evidence.[96] In statutory rape, the nonage of the prosecutrix must be proved beyond a reasonable doubt, but time is not otherwise a

Verdict sustained on confession of defendant and testimony of prosecutrix at preliminary hearing, notwithstanding specific denial and explanation of both parties on trial. Id.

84. State v. Hetland [Iowa] 119 NW 961; Harris v. Neal, 153 Mich. 57, 15 Det. Leg. N. 369, 116 NW 535; Mott v. State [Neb.] 119 NW 461. Under Pen. Code, § 283. People v. Bills, 129 App. Div. 798, 114 NYS 587. Under Laws 1907, p. 396. State v. Stewart [Wash.] 100 P 153. Sufficiency of corroborative evidence is for jury. State v. Hetland [Iowa] 119 NW 961; State v. Ralston [Iowa] 116 NW 1058.

85. Corpus delicti may be proved by testimony of victim. State v. Hetland [Iowa] 119 NW 961; Harris v. Neal, 153 Mich. 57, 15 Det. Leg. N. 369, 116 NW 535.

86. Not corroborative of testimony but corroborative of fact. State v. Stewart [Wash.] 100 P 153. Some substantial fact or circumstance connecting defendant with the crime, independent of testimony of prosecutrix. Id. Other facts and circumstances than the statements of prosecutrix. Mott v. State [Neb.] 119 NW 461. Such as tends to strengthen and corroborate the prosecutrix in connecting defendant with the crime. State v. Whimpey [Iowa] 118 NW 281; State v. Ralston [Iowa] 116 NW 1058.

**Held corroborative:** Flight. State v. Hetland [Iowa] 119 NW 961. Admissions of defendant. Id. Confession of sexual intercourse by defendant. Id. Corpus delicti having been established by declaration of prosecutrix, confession of sexual intercourse may be sufficient to connect defendant therewith. Id. Flight and condition of prosecutrix and admissions of defendant. State v. Ralston [Iowa] 116 NW 1058.

**Held not corroborative:** Opportunity. Mott v. State [Neb.] 119 NW 461. Immediate complaint. State v. Stewart [Wash.] 100 P 153.

**Corroboration held sufficient.** State v. Simmons [Wash.] 100 P 269. Corroborative evidence sufficient to sustain verdict of attempt. State v. Hetland [Iowa] 119 NW 961.

**Held not sufficient.** Mott v. State [Neb.] 119 NW 461; People v. Bills, 129 App. Div. 798, 114 NYS 587.

87. People v. Corey [Cal. App.] 97 P 907; State v. Goodale, 210 Mo. 275, 109 SW 9; Vogel v. State [Wis.] 119 NW 190.

88. People v. Corey [Cal. App.] 97 P 907; State v. Goodale, 210 Mo. 275, 109 SW 9.

89. Warren v. State [Tex. Cr. App.] 114 SW 380. Failure to make outcry considered as showing consent. Ex parte Black [Tex. Cr. App.] 113 SW 534. Evidence insufficient to support conviction in absence of corroboration on prompt complaint or outcry. State v. Goodale, 210 Mo. 275, 109 SW 9.

90. State v. Sebastian [Conn.] 69 A. 1054.

91. State v. Goodale, 210 Mo. 275, 109 SW 9.

92. Evidence held to support finding that victim was not common prostitute. Vogel v. State [Wis.] 119 NW 190. Evidence of previous unchastity held insufficient to establish the fact as against verdict. Leedom v. State [Neb.] 116 NW 496. Jury must be satisfied beyond reasonable doubt that prosecutrix was not previously unchaste, but not necessary that chastity be shown by corroborative evidence. Id.

93. Repute is synonymous with reputation, and is not established by admissions of unchastity by prosecutrix. Defendant must show bad repute, good repute presumed. Commonwealth v. Howe, 35 Pa. Super. Ct. 554. Evidence of good character is positive testimony, and its weight is for the jury. Id. Instruction, in effect, that character evidence is a mere make-weight in doubtful cases disapproved. Id.

94. Holloway v. State [Tex. Cr. App.] 113 SW 928. By facts inconsistent with innocence. Clark v. State [Fla.] 47 S 481. Must show intent to use force to overcome resistance. Clark v. State [Fla.] 47 S 481; Pumphrey v. State [Ala.] 47 S 156; State v. Espenschied, 212 Mo. 215, 110 SW 1072.

**Held sufficient.** High v. Ter. [Ariz.] 100 P 448; People v. Moore [Cal.] 100 P 688; People v. Probst, 237 Ill. 390, 86 NE 588; State v. Fishel [Iowa] 118 NW 763; Sanders v. State [Tex. Cr. App.] 112 SW 938. Testimony of prosecutrix strongly corroborated. People v. Moore [Cal.] 100 P 688. Although no actual assault. Payne v. Com., 33 Ky. L. R. 229, 110 SW 311. Notwithstanding failure to make outcry. Warren v. State [Tex. Cr. App.] 114 SW 380. Although some evidence of ulterior motive on part of complainant. State v. George, 214 Mo. 262, 113 SW 1116.

**Held insufficient** to show intent to accomplish the act by force. Clark v. State [Fla.] 47 S 481; Eiley v. State [Tex. Cr. App.] 114 SW 793. That prosecutrix was sleeping in room with parents negatives intent to use force. Eiley v. State [Tex. Cr. App.] 114 SW 793. That negro called to prosecutrix and ran toward her, no proof of intent. Williams v. State [Ark.] 113 SW 799.

95. People v. Moore [Cal.] 100 P 688. Evidence sufficient to go to jury. Pumphrey v. State [Ala.] 47 S 156.

96. From the facts and circumstances. Pumphrey v. State [Ala.] 47 S 156.

material consideration except as regards limitations.[97] Carnal knowledge of a child necessarily implies "abuse," and it is not necessary to prove injury to the genitals.[98] In order to warrant capital punishment, the actual accomplishment of the crime must be clearly proved,[99] and where committed in Indian country, it is necessary to negative the presumption that the offender is an Indian.[1]

(§ 2) *C. Instructions* [2]—See 10 C. L. 1446 are sufficient if they correctly set forth the law of the case when read as a whole,[3] and it is proper to refuse merely cumulative charges [4] or charges giving undue prominence to particular facts.[5] While the issues should be fairly presented to the jury [6] and be confined to the case under consideration, an instruction defining the offense more broadly than necessary, if not misleading, may be unobjectionable.[7] The language of the statute is sufficient,[8] but it is unnecessary to go into obvious details.[9] It is proper to instruct as to the effect of uncorroborated testimony,[10] and circumstantial evidence may be charged where necessary [11] but such a charge is unnecessary where there is positive identification.[12] Where the testimony is uncontradicted, the court may assume that the prosecutrix is under the age of consent,[13] and it has been held proper to suggest to the jury that such is the state of the evidence.[14] Instructions on included offenses are largely discretionary [15] and may be properly refused [16] or omitted [17] in the absence of evidence supporting such a theory; but where proof of the greater crime is

97. Battles v. State, 53 Tex. Cr. App. 202, 109 SW 195. Time is not an essential of the offense, and it is sufficient to show the offense at about the time charged, if within the statute of limitations. Instruction not erroneous where defendant's evidence of alibi was fully set out aliunde. State v. Ferris [Conn.] 70 A 587.

98. Curtis v. State [Ark.] 117 SW 521; State v. Sebastian [Conn.] 69 A 1054; State v. Ferris [Conn.] 70 A 587.

99. Cannot impose death penalty on conflicting testimony of prosecutrix as to penetration. Vickers v. U. S. [Okl. Cr. App.] 98 P 467.

1. Indians excepted from capital punishment in federal act Jan. 15, 1897. Vickers v. U. S. [Okl. Cr. App.] 98 P 467.

2. **Search Note:** See notes in 69 L. R. A. 204; 5 Ann. Cas. 313.

See, also, Rape, Cent. Dig. §§ 88-100; Dec. Dig. § 59.

3. Penetration sufficiently charged. Banton v. State, 53 Tex. Cr. App. 251, 109 SW 159. Utmost resistance properly charged. State v. Whimpey [Iowa] 118 NW 281. Alibi sufficiently charged. People v. Probst, 237 Ill. 390, 86 NE 588. Instruction on reasonable doubt held sufficient. Banton v. State, 53 Tex. Cr. App. 251, 109 SW 159; State v. Hetland [Iowa] 119 NW 961. Where previous chastity was indicated as an essential, it is immaterial that this element was omitted in one portion of the charge. Leedom v. State [Neb.] 116 NW 496.

4. State v. Ralston [Iowa] 116 NW 1058; Holloway v. State [Tex. Cr. App.] 113 SW 928.

5. People v. Probst, 237 Ill. 390, 86 NE 588; Salazar v. State [Tex. Cr. App.] 116 SW 819.

6. Instructions sufficient. Curtis v. State [Ark.] 117 SW 521. Where it is uncertain if period of limitations has run, should instruct on reasonable doubt. Battles v. State, 53 Tex. Cr. App. 202, 109 SW 195. Proper to instruct time immaterial so offense was within age of consent and period of limitations. State v. George, 214 Mo. 262, 113 SW 1116. Proper to instruct on accessories where punishment is the same and there is doubt as to which committed the overt act. Vogel v. State [Wis.] 119 NW 190. Where six defendants committed the offense or aided therein on three occasions within a short time, all of defendants not being present at any one time, an instruction authorizing conviction if some one committed rape and the others assist held not erroneous as not requiring the jury to agree upon a particular act. Id.

7. Railsback v. State, 53 Tex. Cr. App. 542, 110 SW 916; Salazar v. State [Tex. Cr. App.] 116 SW 819.

8. Criterion of force charged as laid down in statute. Salazar v. State [Tex. Cr. App.] 116 SW 819.

9. Need not specify "sexual" penetration. People v. Sheffield [Cal. App.] 98 P 67.

10. As to careful scrutiny. People v. Corey [Cal. App.] 97 P 907.

11. Proper to charge that jury can take into consideration the facts, the manner and condition of the prosecutrix at time of and just after the offense, and all other facts and circumstances in evidence. Salazar v. State [Tex. Cr. App.] 116 SW 819.

12. Jaureque v. State [Tex. Cr. App.] 116 SW 809.

13. People v. Probst, 237 Ill. 390, 86 NE 588.

14. State v. Ferris [Conn.] 70 A 587.

15. Musgrave v. Territory [Ariz.] 100 P 440; Vogel v. State [Wis.] 119 NW 190.

16. Halsell v. State, 53 Tex. Cr. App. 510, 110 SW 441; Vogel v. State [Wis.] 119 NW 190. Under indictment for attempt, proper to instruct on aggravated assault only where evidence fails to show attempt. Halsell v. State, 53 Tex. Cr. App. 510, 110 SW 441.

17. Where not asked. State v. Ralston [Iowa] 116 NW 1058.

inconclusive, it may become the duty of the court to instruct on the lesser.[18] The court should properly limit the effect of evidence introduced for a particular purpose.[19] Where the jury is to assess punishment, the court should so instruct.[20] Objections to instructions, to be available on appeal, must be specific.[21]

(§ 2) *D. Trial and punishment.*[22]—See 10 C. L. 1448.—Venue, in doubtful cases, may be for the jury.[23] The right to have the state elect a particular offense is a matter of local practice[24] and may be lost by failure to raise the question at the proper time.[25] When the state admits the facts to be proved, a continuance to obtain evidence is properly refused.[26] The jury may find a lesser offense, although the evidence warranted conviction for the greater,[27] and may bring a verdict of "guilty without capital punishment," although there were no mitigating circumstances;[28] but where sentence is dependent upon previous chastity of prosecutrix, the greater verdict is not authorized in the absence of an allegation of chastity.[29] A sentence not strictly conformable to the indeterminate sentence statute may in some instances be read as conforming thereto.[30] Twenty years' hard labor is not excessive punishment for premeditated and incestuous rape of an adult.[31]

*New trial.*See 10 C. L. 1448.—The defendant must show diligence in the first instance in order to be entitled to new trial upon the ground of newly-discovered evidence,[32] and may properly be refused where the new evidence is inconclusive[33] or merely cumulative.[34] New trial is primarily within the discretion of the trial court, but it is an abuse of discretion to deny new trial when the court has information as to material facts unknown to the jury.[35] The appellate court will not interfere, however, unless the question is properly brought before it.[36]

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**Ratification,** see latest topical index.

**REAL ACTIONS.**[37]

**Real Covenants; Real Estate Brokers,** see latest topical index.

**18.** Proof of penetration inconclusive. Vickers v. U. S. [Okl. Cr. App.] 98 P 467.

**19.** That testimony could not be taken as proving a different offense. State v. Sebastian [Conn.] 69 A 1054.

**20.** That jury may find "guilty, without capital punishment." Vickers v. U. S. [Okl. Cr. App.] 98 P 467.

**21.** State v. Espenschied, 212 Mo. 215, 110 SW 1072.

**22. Search Note:** See notes in 35 L. R. A. 576.

See, also, Rape, Cent. Dig. §§ 85-105; Dec. Dig. §§ 55-64; 23 A. & E. Enc. L. (2ed.) 885; 17 A. & E. Enc. P. & P. 665.

**23.** Where alleged offense took place during a drive through various jurisdictions, venue may be a question for jury. State v. Fishel [Iowa] 118 NW 763.

**24.** Between count alleging particular date and one alleging offense between certain dates, defendant cannot require election as of right. State v. Sebastian [Conn.] 69 A 1054. Refusing election at commencement of trial is within court's discretion. Id. State need not elect between counts of incest and rape, they both referring to same act. State v. Goodale, 210 Mo. 275, 109 SW 9.

**25.** Where the information charges rape in different degrees, the defendant waives right to have state elect by failing to demur or move for election. State v. Rhoades [N. D.] 118 NW 233. Where several offenses were committed within a short space of time, the defendants, by failure to move and by requesting instructions inconsistent with an intent to so move, waive right to have state elect a particular offense. Vogel v. State [Wis.] 119 NW 190.

**26.** Westerman v. State, 53 Tex. Cr. App. 109, 111 SW 655.

**27.** Skaggs v. State [Ark.] 113 SW 346.

**28.** Vickers v. U. S. [Okl. Cr. App.] 98 P 467.

**29.** Frost v. State [Miss.] 47 S 898.

**30.** Sentence of from 3 to 21 years for a convict 35 years of age must be read in light of the indeterminate sentence law, as in effect a sentence from 2 to 21 years. Cheek v. State [Ind.] 85 NE 779.

**31.** State v. Ralston [Iowa] 116 NW 1058.

**32.** High v. Ter. [Ariz.] 100 P 448. Especially where such evidence is merely cumulative. People v. Probst, 237 Ill. 390, 86 NE 588.

**33.** Where pregnancy is not necessary circumstance to prove case, new trial not granted on it developing that period of gestation has run since alleged act without delivery. State v. Simmons [Wash.] 100 P 269.

**34.** High v. Ter. [Ariz.] 100 P 448.

**35.** Unreliability of prosecutrix. State v. Powell [Wash.] 98 P 741.

**36.** People v. Moritz, 238 Ill. 494, 87 NE 348.

**37.** See 10 C. L. 1448. No cases have been found during the period covered for this topic which includes only the most general

## REAL PROPERTY.

§ 1. Definitions and Nature of Real Property, 1623.
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§ 7. Rights and Remedies Between Third Persons and Present and Future Tenants, 1644.
§ 8. Proof of Title to Realty, 1645.
§ 9. Merger and Abandonment, 1640.

*The scope of this topic* is noted below.[38]

§ 1. *Definitions and nature of real property.*[39]—See 10 C. L. 1440—Real property is land and, generally, whatever is growing upon or affixed thereto.[40]

§ 2. *Present and future estates. A. In general.*[41]—See 10 C. L. 1449—An equitable title to land is a right which is imperfect in law but which may be perfected by a court of chancery.[42] To "vest" an estate is to give a legal or equitable seisin.[43] When an estate is vested for life or years, it is fixed for the prescribed term and its owners are seised thereof for that term.[44] Distinct estates may exist in underlying

rules, matters relating to particular real actions being treated in appropriate titles. See Ejectment, 11 C. L. 1153; Forcible Entry and Unlawful Detainer, 11 C. L. 1484; Trespass, 10 C. L. 1875; Petitory Actions, 12 C. L. and the like.

**Search Note:** See 17 A. & E. Enc. P. & P. 669.

38. This article treats of the nature of realty, the definition, creation and extinguishment of estates therein except estates for years (see Landlord and Tenant, 12 C. L. 528), proof of titles thereto, and such rights and remedies of tenants and third persons as are not fully treated under other topics (see Buildings and Building Restrictions, 11 C. L. 479; Homesteads, 11 C. L. 1780; Trusts, 10 C. L. 1907; Estates of Decedents, 11 C. L. 1275; Descent and Distribution, 11 C. L. 1078; Dower, 11 C. L. 1132; Curtesy, 11 C. L. 948; Easements, 11 C. L. 1140; Tenants in Common and Joint Tenants, 10 C. L. 1850; Adjoining Owners, 11 C. L. 31). Principles peculiar to specific kinds of realty (see Emblements and Natural Products, 11 C. L. 1197; Forestry and Timber, 11 C. L. 1521; Fixtures, 11 C. L. 1477; Mines and Minerals, 12 C. L. 851), or applicable to all kinds of property (see Property, 12 C. L. 1435) and estates in personal property (see Property, 12 C. L. 1435), are elsewhere discussed, as are also perpetuities and accumulations (see Perpetuities and Accumulations, 12 C. L. 1316), conveyances (see Deeds of Conveyance, 11 C. L. 1051; Vendors and Purchasers, 10 C. L. 1942; Powers, 12 C. L. 1409), liens on (see Mortgages, 12 C. L. 878; Mechanics' Liens, 12 C. L. 815), and actions affecting real property (see Trespass, 10 C. L. 1875; Ejectment, 11 C. L. 1153; Quieting Title, 10 C. L. 1347; Foreclosure of Mortgages on Land, 11 C. L. 1487; Judicial Sales, 12 C. L. 452). See, also, Notice and Record of Title, 12 C. L. 1100; Public Lands, 12 C. L. 1456; and Territories and Federal Possessions, 10 C. L. 1854.

39. **Search Note:** See notes in 4 C. L. 1236; 15 L. R. A. 652.

See, also, Property, Cent. Dig.; Dec. Dig.; 11 A. & E. Enc. L. (2ed.) 364; 23 Id. 893; 24 Id. 373, 377.

40. Whether particular property is realty or personalty see Property, 12 C. L. 1435. See, also, such topics as Taxes, 10 C. L. 1776; Venue and Place of Trial, 10 C. L. 1965, and the like. Presumed that house and barn for destruction of which action was brought were permanently resting on soil, and hence were realty. Las Animas & San Joaquin Land Co. v. Fatjo [Cal. App.] 99 P 393.

41. **Search Note:** See Deeds, Cent. Dig. §§ 244-454; Dec. Dig. §§ 120-123; Wills, Cent. Dig. §§ 1293-1309; Dec. Dig. §§ 590-595; 11 A. & E. Enc. L. (2ed.) 366.

42. Ayers v. U. S., 42 Ct. Cl. 385. Where grantors did not possess and could neither sell nor convey, grantee acquired nothing which could be perfected by a court of equity (Id.), nor can equity decree an equitable title where conveyances are taken under treaty providing for valid conveyances on conditions unless conditions were complied with (Id.).

43. An estate vests in one who is given a present, immediate interest as distinguished from one depending on a contingency. In re McClellan's Estate, 221 Pa. 261, 70 A 737. Word applies to personalty and realty. Id. Appointment to trustees held sufficient exercise of power to appoint and "vest" property. Id.

44. Homestead set apart to widow and children held not subject to revaluation from time to time. Brewington v. Brewington, 211 Mo. 48, 109 SW 723.

and overlying strata of soil.[45] Except as illustrative of definitions and principles purtenant to the various divisions of this section, what kinds of estates or interests are created or conferred by the phraseology of particular grants or devises is subsequently shown.[46]

(§ 2) *B. Freeholds.*[47]—See 10 C. L. 1449—A freehold is an estate equal to or greater than a life estate.[48] A freehold estate may be made to commence in the future.[49]

(§ 2) *C. Estates in fee.*[50]—See 10 C. L. 1449—A fee simple is the largest estate and most extensive interest that can be enjoyed in land.[51] The right of alienation is an inherent and inseparable quality of vested fee-simple estates,[52] though reasonable restraints thereon are valid.[53] At common law, a grant or devise without any words of limitation conferred a life estate only,[54] but this rule has been abrogated by statute in many states.[55] In some jurisdictions estates tail are made fee simple estates by statute.[56]

45. Oil lease held to confer no title to stratum in place. Graciosa Oil Co. v. Santa Barbara County [Cal.] 99 P 483.

46. See, post, § 3, Estates Created in Particular Cases and Principles of Classification.

47. **Search Note:** See Estates, Cent. Dig. § 4; Dec. Dig. § 4; 11 A. & E. Enc. L. (2ed.) 366.

48. Life estate is freehold. Hampton v. Glass [Ky.] 116 SW 243. To grantee "and to the heirs of her body" with reservation of life enjoyment by grantor and with reversion to grantor or his estate should grantee die without heirs of body held to create an estate of freehold but not in possession. Robeson v. Duncan [N. J. Eq.] 70 A 685.

49. Grant with reservation of life estate. Dick v. Miller [N. C.] 63 SE 176.

50. **Search Note:** See notes in 7 A. S. R. 428.

See, also, Deeds, Cent. Dig. §§ 344-359, 416-435, 459; Dec. Dig. §§ 124-126; Estates, Cent. Dig. §§ 5-7; Dec. Dig. §§ 5-7; Wills, Cent. Dig. §§ 1319-1359; Dec. Dig. §§ 597-603; 11 A. & E. Enc. L. (2ed.) 366.

51. Additional words in fee simple devise that property should be "possessed absolutely," held ineffectual to qualify or enlarge estate devised. Frank v. Frank [Tenn.] 111 SW 1119. A devise or grant to one and his heirs creates a fee. Thomas v. Owens [Ga.] 62 SE 218.

52. Harkness v. Lisle [Ky.] 117 SW 264.

53. See, post, § 4C.

54. Grant. Adams v. Merrill [Ind. App.] 87 NE 36. Prior to Laws 1903, c. 5145, p. 84, word "heirs" was indispensable to creation of an estate of inheritance by deed. Ivey v. Peacock [Fla.] 47 S 481. Habendum in deed "to have and to hold in full right" etc., "as against said parties of the first part, in fee simple forever," held not of itself sufficient to create estate of inheritance. Id. While "heirs and assigns" are not necessary to fee simple devise in Missouri, they were necessary at common law. Jackson v. Littell, 213 Mo. 589, 112 SW 53. At common law, deed omitting "heirs" passed only life estate though purporting to convey to grantee forever or to him and assigns forever. Teague v. Sowder [Tenn.] 114 SW 484.

55. Under Burns' Ann. St. 1908, §§ 3958, 3960, dispensing with words "heirs and assigns" grant without limitation creates estate of inheritance in grantee unless different intent can be gathered from deed. Adams v. Merrill [Ind. App.] 87 NE 36. Words in will "I give, devise and bequeath," are sufficient to pass fee to devisee named. Aneshaensel v. Twyman [Ind. App.] 85 NE 788. Under Burns' Ann. St. 1901, § 2737, providing that every devise denoting testator's intention to pass his entire interest shall dispose of such interest, words "I give and devise to my husband J. the farm on which we now live" are sufficient to pass fee simple. Bright v. Justice [Ind. App.] 85 NE 794. Additional power to sell and convey as he might see proper held merely to emphasize intent to confer fee. Id. Under Burns' Ann. St. 1908, §§ 3958, 3960, prescribing short form of warranty deed for creation of fee simple estates and requiring that intention to create a less estate be expressed in the deed, grantor may use words "conveys and warrants" and after description of the land effectually express "in the deed" his intention to create in first taker an estate less than one of inheritance. Adams v. Merrill [Ind. App.] 85 NE 114. Deed held to create life estate only in first taker followed by contingent alternative remainders. Id. Limitation over to wife and children, should grantee die leaving such, held effective though deed was prepared under Hurd's Rev. St. § 9, c. 30. Bauman v. Stoller, 235 Ill. 480, 85 NE 657. "To have and to hold the above-granted premises to the said S. and J. and their successors in office to their use and behoof forever" held to create a fee simple estate in trust though no words of limitation to heirs was used. Hamlin v. "Perticuler Baptist Meeting House," 103 Me. 343, 69 A 315. Absolute devise though without words of inheritance held presumptively to pass fee so as to render repugnant subsequent limitation over. Bradley v. Warren [Me.] 72 A 173. Use of word "heirs" is unnecessary to pass fee under a will, but may be considered when intention is doubtful whether life estate or fee should pass. Pratt v. Saline Valley R. Co., 130 Mo. App. 175, 108 SW 1099. Act March 24, 1899 (P. L. p. 531), as amended Act April 9, 1902 (P. L. p. 688), providing that a conveyance to a person without more shall convey fee simple, held inapplicable

*Entails.*See 10 C. L. 1449—Words of procreation are essential to the creation of an estate tail,[57] but it is sufficient if it appears from the whole will or deed that "heirs of the body" were intended.[58] A life estate jointly to two or more who cannot have a common heir, remainder to the heirs of their bodies, gives each ancestor a several inheritance in fee tail in such part as would be the share of the heirs of his body according to the number of joint tenants to whom the freehold is given.[59] Estates tail are by statute converted into fees simple in many states[60] or into life estates with remainders.[61]

*Base or determinable fees.*See 10 C. L. 1449—These are estates which, though limited to heirs general, are subject to divestiture on the happening of some future contingent event.[62] There is no revester unless the contingency happens,[63] and so long as the estate remains the owner in possession has all the rights which he would have if tenant in fee simple.[64] A determinable or qualified fee may embrace what is properly a fee upon condition.[65] The right to improvements on termination of the estate is considered in a subsequent section.[66]

(§ 2) *D. A life estate*[67]—See 10 C. L. 1450 is a freehold[68] limited to determine

to grant to grantee and heirs of her body with reversion to grantor should grantee die without heirs of body. Robeson v. Duncan [N. J. Eq.] 70 A 685. Under Shannon's Code, § 3672, providing deeds shall presumptively pass all estate of grantor, fee simple may be conveyed without use of word "heirs." Teague v. Sowder [Tenn.] 114 SW 484. Devise to M. and C. without more held to give fee under Rev. St. 1895, art. 627, rendering nonessential technical common-law phraseology. Seay v. Cockrell [Tex.] 115 SW 1160.

**56.** See next paragraph, Entails.

**57.** In addition to word "heirs," such words are necessary to indicate the body from which the heirs are to proceed. Webbe v. Webbe, 234 Ill. 442, 84 NE 1054.

**58.** Not necessary that words of procreation be in clause of immediate gift. Webbe v. Webbe, 234 Ill. 442, 84 NE 1054. Balance to children "and to their 'personal' and lawful heirs" held not equivalent to "heirs of body," but children took fee simple. Id.

**59.** Wright v. Gaskill [N. J. Eq.] 72 A 108.

**60.** Shares to daughters and their bodily heirs or the lawful heirs of their bodies, free from debts of their husbands or other persons, held to create fee tail made fee simple by statute. English v. McCreary [Ala.] 48 S 113. To grantee and her bodily heirs after her death, held to create fee tail converted to fee simple by statute. Lawson v. Todd, 33 Ky. L. R. 557, 110 SW 412. Will construed to create estates tail on happening of contingency therein specified, contemplating life estates in grandchildren unborn, so that under statute testator's children took estate in fee simple. Davenport v. Collins [Miss.] 48 S 733. Income of farm to grandchildren after death of widow and on their death farm to descend to their issue, held to create an estate tail enlarged to fee by act April 27, 1855 (P. L. 368), "issue" meaning prima facie "heirs of body." Stayman v. Paxson, 221 Pa. 446, 70 A 803. To brother for life then to brother's four daughters, each for life, and after death of each niece "unto her children and their heirs and assigns forever," held to create an estate tail in each niece, which by Act April 27, 1855, becomes fee simple. Sechler v. Eshleman [Pa.] 70 A 910. Under Act July 9, 1897 (P. L. 213) changing common-law presumption of indefinite failure of issue to one of definite failure, words "death without issue" in devise over in case of death of first taker without issue mean failure of issue in life time of devisee and not indefinite failure, and devisee takes life estate only and not fee tail made fee by act of 1855. Lewis v. Link-Belt Co. [Pa.] 70 A 967.

**61.** To daughters by name and heirs of their bodies forever, held to give daughters life estates by virtue of statute abolishing fees tail, remainder to their children born and unborn. Charles v. White, 214 Mo. 187, 112 SW 545.

**62.** Base fees are not recognized by Indiana laws of descent. Rozell v. Cranfill [Ind. App.] 86 NE 864. To have and hold "to said S. and J. and their success in office to their use and behoof forever," held to create a fee simple trust and not a base or determinable fee. Hamlin v. "Perticuler Baptist Meeting House," 103 Me. 343, 69 A 315. See, also, post, § 3.

**63.** Conveyance by parents in consideration son should support them with provision that in case son died first land should revert to father and mother, held not to leave any possibility of reversion in father's heirs where father died leaving son surviving. Whittaker v. Trammell [Ark.] 110 SW 1041. Reversion to grantor's heirs contingent on devisees dying without issue held not to occur where one of the devisees died leaving issue. Newland v. Louisville & N. R. Co. [Ky.] 116 SW 328.

**64, 65.** Aumiller v. Dash [Wash.] 99 P 583.

**66.** See, post, § 6, subd. Improvements, etc.

**67. Search Note:** See notes in 4 C. L. 442. See, also, Deeds, Cent. Dig. §§ 360-365, 416-435; Dec. Dig. §§ 129; Life Estates, Cent. Dig.; Dec. Dig.; Wills, Cent. Dig. §§ 1393-1435; Dec. Dig. §§ 614-617; 11 A. & E. Enc. L. (2ed.) 377.

**68.** Freehold, not chattel interest. Hampton v. Glass [Ky.] 116 SW 243.

with a human life or lives [69] or at an uncertain time which may be postponed for life.[70] Under some statutes common-law estates tail are made life estates with remainders over.[71] A discretionary power of sale in a life tenant cannot be delegated by him,[72] and in case of doubt a power will be held not to have been executed.[73] On the issue of the value of a life estate, annuity or life tables while properly considered are not conclusive,[74] other evidence also being competent.[75]

(§ 2) *E. Estates upon condition or limitation.*[76]—See 10 C. L. 1450—An estate may be created which will vest or be divested on the performance or nonperformance of some condition,[77] or on the happening of some contingency.[78] A condition subsequent differs from a limitation in that in order to defeat the estate some affirmative act must be done such as making re-entry,[79] whereas an estate on limitation is terminated ipso facto by the happening of the event.[80] To create a condition subsequent, a right of forfeiture and re-entry must be given, either expressly or by implication.[81] Whether words create a condition precedent or subsequent is generally

**69.** Where trust was created for life of beneficiary with direction to convey to beneficiary's appointee by will or to her heirs in default of appointment and beneficiary conveyed the land in her life time, grantee took at least an estate for life of beneficiary. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139. See, also, post, § 3.

**70.** Lease for stipulated monthly rental tenant and his heirs and assigns to hold "while he shall wish to live in Albert Lea," created life estate terminable only by death of tenant or his removal from Albert Lea. Thompson v. Baxter [Minn.] 119 NW 797. Estate **during widowhood** is life estate subject to divestiture by marriage. Haring v. Shelton [Tex. Civ. App.] 114 SW 389.

**71.** See ante, Entails.

**72.** Partition sale, under decree of probate court, at instance of life tenant who was authorized to dispose of such portion of estate as she deemed best, held not an execution of the power. Cramton v. Rutledge [Ala.] 47 S 214.

**73.** Where petition or record in partition did not disclose life tenant's intention to execute power or whether she intended to sell only life estate. Cramton v. Rutledge [Ala.] 47 S 214.

**74.** Holt v. Hamlin [Tenn.] 111 SW 241.

**75.** Nature of property, age and habits of life tenant, taxes, risks, etc. Holt v. Hamlin [Tenn.] 111 SW 241.

**76. Search Note:** See notes in 70 A. S. R. 829; 79 Id. 747.

See, also, Deeds, Cent. Dig. §§ 448, 449, 469-548; Dec. Dig. §§ 134, 144-176; Wills, Cent. Dig. §§ 1446, 1522-1579; Dec. Dig. §§ 621, 624, 639-667; 11 A. & E. Enc. L. (2ed.) 382.

**77.** To grantee for life on condition he makes repairs, pays taxes, etc., and reserving option in grantor to declare forfeiture of conveyance and repossess himself on default in performance of condition, held to create a valid conditional estate subject to forfeiture by breach and re-entry. Lumsden v. Payne [Tenn.] 114 SW 483. Condition that daughter should leave living issue held applicable only to corpus of property devised to her, and not to income, latter being given absolutely. Haywood v. Wachovia L. & T. Co. [N. C.] 62 SE 915.

**78.** See, also, ante, Base or Determinable Fees, and post, Future Estates. Gift to mother contingent on her surviving testatrix held inoperative, mother dying before testatrix. Ege v. Hering [Md.] 70 A 221. A provision for termination of an estate on a widow's remarriage is not void as in restraint of marriage. Haring v. Shelton [Tex. Civ. App.] 114 SW 389. "Marrying again," in event of which divisee's interest in land should terminate, held to include a polygamous marriage, testator having himself been a polygamist and devisee being one of his wives. In re Popleton's Estate, 34 Utah, 285, 97 P 138.

**79, 80.** Low v. Thompson, 58 Misc. 541, 109 NYS 750. Where estate is so expressly limited by words of its creation that it cannot endure longer than until happening of contingency on which it is to fail, provision is a limitation and not a condition. Low v. Thompson, 111 NYS 607. Provision that leasehold should end on 1st day of May 1908 at noon held limitation and not condition. Id. Provision that lessee would quit at expiration of term, and that, if default was made as to any covenant or agreement, tenancy should terminate at option of landlord, did not convert limitation into a condition. Id.

**81.** Words "upon condition," "provided always," or the like, must be employed in absence of words of re-entry and forfeiture. Rector of St. Stephen's Protestant Epsicopal Church v. Rector of Church of the Transfiguration, 114 NYS 623. Where no right of re-entry was reserved for breach of covenant to use property only for church purposes, covenant could not be enforced as a condition subsequent. Id. Recital that conveyance was pursuant to agreement whereby grantee was to convey certain land to grantor and erect certain buildings held not to create estate upon condition, there being no express reservation of right of re-entry. Braddy v. Elliott, 146 N. C. 578, 60 SE 507. Conveyance in consideration of support held to contain only a covenant and not a condition, no words of forfeiture being used, so that breach did not forfeit estate. Cox v. Combs [Tex. Civ. App.] 111 SW 1069.

a question of intention,[82] but courts are averse to construing conditions as precedent when the vesting of estates under a will is thereby defeated,[83] and they are also inclined toward regarding provisions as mere covenants rather than conditions,[84] or as mere executory or contingent limitations.[85] Conditions subsequent do not affect the estate conveyed until they are broken,[86] but they must be complied with,[87] and nonperformance is not excused by contingencies which the holder of the estate could have provided for.[88] If they are not observed, the grantor or his heirs may forfeit the estate by acts sufficient to constitute in law a re-entry,[89] unless, of course, the right of re-entry has been previously lost,[90] but conditions subsequent are not favored,[91] and persons seeking a forfeiture must bring themselves clearly within the terms of the condition,[92] especially where they were not parties to the instrument containing it.[93] The general rule is that the right of re-entry can be exercised only by the grantor or his heirs.[94] A grantor who re-enters and takes possession in execution of a forfeiture for breach of condition acquires thereby an estate which he may assign,[95] remainders or other interests dependent on the grant being thus cut off.[96]

82. Especially when condition is annexed to a devise or bequest. Ege v. Hering [Md.] 70 A 221. Must be determined from a testator's intent as gathered from whole will rather than from use of particular words. Warren's Adm'r v. Bronson [Vt.] 69 A 655. Fulfillment of contract for carrying on farm during widow's life held a condition subsequent, and accordingly title vested in son on testator's death subject to life estate and payment of legacies. Id. There are no technical words determinative of whether estate is on condition precedent or subsequent intention being controlling. De Conick v. De Conick, 154 Mich. 187, 15 Det. Leg. N. 624, 117 NW 570. If language of will shows that act on which estate depends must be performed before vesting, condition is precedent (Id.), but if act does not necessarily precede vesting, condition is subsequent (Id.). All surrounding circumstances at time of execution af deed may be considered. Id. Provision for support of grandniece by grantee held condition subsequent and to require him only to support niece after mother's death. Id.

83. Especially as to residuary bequests. Ege v. Hering [Md.] 70 A 221.

84. Unilateral covenant by tenant "to sell no other beer than that manufactured by" a certain brewing company held not a condition subsequent, but a mere independent and unenforcible covenant. Fortune Bros. Brew. Co. v. Shields, 137 Ill. App. 77. Grant "upon the express condition that grantee and assigns shall keep said premises open as private way," etc., held a covenant, and not a condition giving grantor's heirs no reversionary interest. Druecker v. McLaughlin, 235 Ill. 367, 85 NE 647. Where deed, without violence to its terms, can be construed as containing a covenant rather than a condition subsequent, such construction will be adopted. Freer v. Glen Springs Sanitarium Co., 115 NYS 734. Provision for use for cemetery purposes held not condition subsequent, especially since deed contained no re-entry clause. Id.

85. Where gift was contingent on prior devisee neglecting or refusing to accept, and prior gifts failed because correct names of beneficiaries were not given, and beneficiaries who were probably intended declined to accept, alternative gifts vested, preceding gifts not being conditions precedent but merely executory or contingent limitations. Ege v. Hering [Md.] 70 A 221.

86. Aumiller v. Dash [Wash.] 99 P 583.

87. Evidence held to warrant finding that complainant substantially complied with father's will devising remainder on condition that he care for mother. Morrall v. Morrall, 236 Ill. 640, 86 NE 578.

88. Operation of plant for ten years not excused by destruction of plant by fire. Fowler v. Coates, 128 App. Div. 381, 112 NYS 849.

89. Where more than 20 years elapsed without performance of condition that property conveyed to United States should be used for specified purposes, grantor and his heirs had right of re-entry for breach of condition. Fay v. Locke, 201 Mass. 387, 87 NE 753. That incompetent son of grantor sometimes locked schoolhouse on premises held insufficient as re-entry. Van Meter v. Kelly, 115 NYS 943.

90. Right of re-entry for breach of condition subsequent held not lost by acceptance of deed from referee in bankruptcy proceedings against person to whom land had been conveyed subject to condition. Fowler v. Coates, 128 App. Div. 381, 112 NYS 849.

91, 92, 93. People's Pleasure Park Co. v. Bohleder [Va.] 61 SE 794. Conveyance to corporation composed entirely of colored persons held not breach of covenant that title should never vest in colored persons. Id. Rehearing denied. People's Pleasure Park Co. v. Rohleder [Va.] 63 SE 981.

94. Van Meter v. Kelly, 115 NYS 943. Where, however, a grantor acts only as trustee or agent for an association of which he is member, and subsequently conveys to the other members, latter succeed to right of re-entry for breach of condition in first grant. Fowler v. Coates, 128 App. Div. 381, 112 NYS 849.

95. Lowe v. Stepp [Ky.] 116 SW 293.

96. Where estate was for life, remainder to grantee's children, forfeiture for gran-

(§ 2) *F. Hereditaments and appurtenances.*[97] See 10 C. L. 1450—A franchise to use land is an incorporeal hereditament.[98] A thing is appurtenant to land when it is by right used with the land for its benefit.[99]

(§ 2) *G. Future estates*[1] See 10 C. L. 1450 are such as are limited to commence in possession or enjoyment in futuro.[2] Whether vested or contingent, they are divisible, assignable and transmissable by descent;[3] but a mere possibility of revester is incapable of alienation or devise,[4] such an interest not being sufficient to constitute an estate.[5]

*A reversion.* See 10 C. L. 1451—The interest remaining in a grantor who has conveyed a base or qualified fee is not a reversion but a mere possibility of revester.[6] At common law, where one conveys a life estate but limits a remainder to his own heirs, the latter take, not as remaindermen, but as reversioners,[7] and the grantor, being himself the reversioner, may alienate the reversion.[8] Reversions on termination of base fees have already been considered.[9]

*A remainder* See 10 C. L. 1451 is vested in one when he or his heirs have the present right to immediate possession, whenever or however the preceding estate may determine.[10] It is contingent when limited to a dubious or uncertain person or on a du-

tee's breach of condition to support grantors held to defeat remaindermen's interest. Lowe v. Stepp [Ky.] 116 SW 293.

**97. Search Note:** See notes in 56 A. S. R. 339, 340.

See, also, Estates, Cent. Dig.; Dec. Dig.; Property, Cent. Dig.; Dec. Dig.

**98.** Right to operate street railroad. O'Sullivan v. Griffith, 153 Cal. 502, 95 P 873. Right to continued enjoyment of franchise to operate a boom in navigable stream held an incorporeal hereditament not recoverable by ejectment. Coquille Mill & Mercantile Co. v. Johnson [Or.] 98 P 132.

**99.** Such as a watercourse, an easement, etc. Civ. Code, § 662. Corea v. Higuera, 153 Cal. 451, 95 P 882. Right of way incident to land devised and necessary to its enjoyment held appurtenant thereto and to run therewith. Whitelaw v. Rodney, 212 Mo. 540, 111 SW 560. Whether a right passes with land as an appurtenance depends on circumstances of the case and intention of parties. Davis v. Randall [Colo.] 99 P 322.

**1. Search Note:** See note in 4 C. L. 440, 442; 17 A. S. R. 839; 5 Ann. Cas. 810.

See, also, Deeds, Cent. Dig. §§ 366-374; Dec. Dig. §§ 130-133; Remainders, Cent. Dig.; Dec. Dig.; Reversion, Cent. Dig.; Dec. Dig.; Wills, Cent. Dig. §§ 1440-1445, 1447-1451, 1460-1521; Dec. Dig. §§ 622, 623, 625, 628-638; 11 A. & E. Enc. L. (2ed.) 383; 24 Id. 377.

**2.** Deed held testamentary and not a present grant of a future estate. Boon v. Castle, 61 Misc. 474, 115 NYS 583. Where, after death of four life beneficiaries, property was to be sold and proceeds divided among children of such beneficiaries and testatrix's half-brothers and half-sisters surviving at that time, remaindermen's interests were future estates. In re Adelman's Will [Wis.] 119 NW 929.

**3.** Vested remainders in trust fund held transferable and reachable by remaindermen's creditors. Bergmann v. Lord, 194 N. Y. 70, 86 NE 828. Contingent estates of inheritance as well as springing and executory uses and possibilities, coupled with an interest, are transmissible by descent, devisable, and assignable, where person to take is certain. Fisher v. Wagner [Md.] 71 A 999. Remainder contingent on life tenant dying without issue held devisable before death of life tenant. Id. Where person, who was to take if life tenant died without heirs of body, died before life tenant, who subsequently died without heirs of body, his interest passed to his heirs. Adams v. Merrill [Ind. App.] 85 NE 114. Where property was devised to O for life, remainder to his brothers and survivors, children of any deceased brother to take parent's share, vested interest of one of the brothers in contingent remainder was subject to sale for debts of such brother under Rev. Laws, c. 134, § 2, authorizing alienation of contingent interests in certain cases. Cashman v. Bangs, 200 Mass. 498, 86 NE 932. Contingent remainders are alienable under Hurd's Rev. St. 1905, c. 30, § 7 (Golladay v. Knock, 235 Ill. 412, 85 NE 649), but if grantor dies before happening of contingency, grantee takes nothing (Id.). To A for life, remainder to A and his heirs, gave A remainder which was a future estate in expectancy, descendible, devisable and alienable same as estate in possession, under Real Prop. Law, p. 567, § 49. Ray v. Grube, 115 NYS 737.

**4.** Interest based on possibility that land should cease to be used for church purposes held not to pass by quitclaim deed. North v. Graham, 235 Ill. 178, 85 NE 267.

**5.** Mere possibility of revester on termination of fee conditional. Vaughan v. Langford, 81 S. C. 282, 62 SE 316.

**6.** Not alienable as a reversion. North v. Graham, 235 Ill. 178, 85 NE 267.

**7.** Mayes v. Kuykendall [Ky.] 112 SW 673.

**8.** Mayes v. Kuykendall [Ky.] 112 SW 673. Rule not affected by Ky. St. 1903, § 2345, providing that under conveyance to one for life, and after his death to his heirs, grantee shall take only for life, with remainder in fee to his heirs. Id. Where husband, who had granted wife life estate in land, with reversion to his own heirs, afterwards devised his entire estate to wife for life, remainder to his four children, reversion passed to children to exclusion of grandchildren. Id.

**9.** See ante, Base or Determinable Fees.

**10.** Estate is vested if ready at any time to come into possession provided prior estate

bious or uncertain event,[11] but may be vested subject to a subsequent condition or contingency.[12] If permissible, remainders will be held vested rather than contingent,[13] even though subject to divestiture by exercise of a power of appointment.[14]

Though a remainder cannot be limited on a fee absolute,[15] alternative contingent remainders in fee are valid,[16] and a remainder may be limited after what would have been an estate tail at common law.[17] So, also, by statute, a contingent remainder in fee may be limited on a prior determinable remainder in fee.[18]

Under the old common law rule, which, however, is not now universally adhered to,[19] a contingent remainder fails unless it can vest in interest when the particular estate is destroyed or otherwise terminates,[20] and a life tenant could take ad-

should end. Carter v. Carter, 234 Ill. 507, 85 NE 292. Whenever remainderman is in being and is ascertained, and event which will terminate precedent estate is certain to happen, remainder is vested. Id. Where seven children mentioned by name were to take on death of widow. Id. Vesting not prevented by provision that, should widow again marry, rents should be applied for support and education of children. Id. Remainder is vested when a definite interest is created in a certain person and no further condition is imposed than determination of precedent estate. Golladay v. Knock, 235 Ill. 412, 85 NE 649. Not sufficient that there is a person in being who has present capacity to take should particular estate presently terminate (Id.), but it must also appear that there are no other contingencies which may intervene to defeat the estate before falling in of particular estate (Id.). Where court can point to a person and say to him that by virtue of testamentary grant in remainder he will have an immediate right to possession of lands devised on termination of precedent estate, remainder is vested under Laws 1896, p. 564, c. 547, § 30. Doscher v. Wyckoff, 63 Misc. 414, 113 NYS 655. As to estates in particular cases, see post, § 3.

**11.** Golladay v. Knock, 235 Ill. 412, 85 NE 649; Carter v. Carter, 234 Ill. 507, 85 NE 292. In an estate not ready to come into possession at any moment when prior estate may end. Carter v. Carter, 234 Ill. 507, 85 NE 292. Where life estate was subject to forfeiture by breach of conditions, remainder over was contingent, being dependent on continued existence of life estate. Lumsden v. Payne [Tenn.] 114 SW 483. Where persons to whom remainders were limited were uncertain. In re Adelman's Will [Wis.] 119 NW 929. As to estates in particular cases, see post, § 3.

**Distinction:** Vested remainders vest at once, and only right of enjoyment is dependent on some future event (Jailette v. Bell, 33 Ky. L. R. 159, 110 SW 298), while contingent remainders do not vest immediately but depend on some uncertain future event (Id.). Under Real Property Law, Laws 1896, p. 564, c. 547, § 30, future estates are vested when there is a person in being who would have an immediate right to possession on termination of precedent estate, and contingent while person to whom, or event on which they are limited to take effect, remains uncertain. Trowbridge v. Cass, 126 App. Div. 679, 110 NYS 1108. Uncertainty distinguishing contingent from vested remainder is not uncertainty whether remainderman will live to enjoy estate, but whether he will ever have right to enjoy it. Carter v. Carter, 234 Ill. 507, 85 NE 292.

**12.** If remainder is subject to a precedent condition or contingency, it is contingent; but if subject to a subsequent condition or contingency, it is vested subject to be divested. Golladay v. Knock, 235 Ill. 412, 85 NE 649.

**13.** See post, § 3, under doctrine that law favors early vesting of estates.

**14.** See post, § 3.

**15.** Gaylord v. Barnes, 128 App. Div. 810, 113 NYS 605.

**16.** Remainder in fee to life tenant's heirs of body, and over in default of such heirs. Adams v. Merrill [Ind. App.] 85 NE 114. Life tenant having died without heirs of body living at her death as required by deed, other contingent limitation took effect. "Heirs of body" held not to include surviving adopted child. Id.

**17.** To M for life, and then to her children and the heirs of her body, but over on failure of heirs of body. Adams v. Merrill [Ind. App.] 85 NE 114. Such remainder contemplated by Burns' Ann. St. 1908, § 3994, making common-law estates tail fee simples and fee simples absolute if no remainders are limited thereon. Id.

**18.** Devise over if life tenant should not leave any issue that should attain full age held not within Rev. St. c. 1, tit. 2, § 16, providing that a contingent remainder in fee may be created on a prior remainder in fee, to take effect on death of first remaindermen under 21, etc. In re Wilcox, 194 N. Y. 288, 87 NE 497.

**19.** That children who were remaindermen were not yet born when life tenant died, and testator had not provided for trustees to hold estate to support remainder, held not fatal to remainder, since either executor or trustee appointed by court could preserve estate for remaindermen. Hayward v. Spaulding [N. H.] 71 A 219. Under Ky. St. 1903, § 2346, providing against failure of contingent remainders for want of particular estates, interests of children entitled to take on death of life tenant without issue held not defeated by life tenant's death before death of testator. Golladay v. Thomas, 33 Ky. L. R. 829, 111 SW 721.

**20.** A contingent remainder must take effect on termination of precedent estate, or fail. Simonds v. Simonds, 199 Mass. 552, 85 NE 860; Bond v. Moore, 236 Ill. 576, 86 NE 386. Immaterial whether preceding estate reaches natural termination or is brought to premature end by merger, forfeiture or otherwise. Bond v. Moore, 236 Ill. 576, 86 NE 386. Under strict common law, remainder

vantage of this by forfeiting his own estate and taking a reconveyance.[21] The doctrine of acceleration of remainders is based on a presumed intention that the remainderman shall take from the time of the termination of the preceding estate rather than from the time of the death of the life tenant,[22] and hence does not apply where no such intention can be presumed.[23] Remainders are transferable.[24]

*Executory interests.* See 10 C. L. 1452—An executory devise is an estate permitted at common law to be created by will, to commence in the future either with or without a precedent estate.[25] It can be limited on a fee [26] or to take effect after death without issue,[27] but an absolute power of disposition in the first taker is inconsistent.[28] If an estate can take effect as a remainder, it will not be held to be an executory devise.[29]

*Expectancies.* See 10 C. L. 1452—Alienations of expectancies by heirs apparent are sustained if made in good faith and for a sufficient consideration; [30] but one has no such interest in the realty of one's living ancestor as to be able to prevent a voluntary alienation to strangers.[31]

§ 3. *Estates created in particular cases, and principles of classification.*[32]—See 10 C. L. 1453—Of primary importance is the intention of the parties to be gathered from the particular language of the entire instrument creating the estate,[33] and

would lapse where, on termination of life estate, remaindermen were yet unborn. Hayward v. Spaulding [N. H.] 71 A 219. Forfeiture of precedent life estate on condition held to destroy remainder. Lumsden v. Payne [Tenn.] 114 SW 483.

21. Might forfeit life estate by tortlous conveyance by deed of feoffment with livery of seisin and thus destroy remainders and take free title by reconveyance. Bond v. Moore, 236 Ill. 576, 86 NE 386.

22. Holdren v. Holdren, 78 Ohio St. 276, 85 NE 537.

23. Where one-sixth was devised to widow for life, with remainder in fee to a son, and widow elected to take more than value of life estate under law, remainder did not accelerate, but life estate would be sequestered to compensate disappointed legatees. Holdren v. Holdren, 78 Ohio St. 276, 85 NE 537.

24. See ante, Future Estates.

25. To daughter, with remainder in fee to her children, but should she die without children, then to testator's children then living, held in nature of executory devise. Frank v. Frank [Tenn.] 111 SW 1119.

26. Frank v. Frank [Tenn.] 111 SW 1119.

27. Not void for remoteness of contingency of indefinite failure of issue. Stisser v. Stisser, 235 Ill. 207, 85 NE 240. Could not be argued devise was dependent on indefinite failure of issue where testator used words "without issue" in sense of "without children."

28. Absolute fee, but over as to "estate remaining" should son die without issue who attained majority, gave absolute power of disposal, and limitation over could not take effect as executory devise. Galligan v. McDonald, 200 Mass. 299, 86 NE 304.

29. Construction of deed that it created a shifting use held not at variance above rule, even if such rule applies to springing and shifting uses. Simonds v. Simonds, 199 Mass. 552, 85 NE 860.

30. Son's conveyance of expectancy and agreement not to contest ancestor's will held not against public policy. In re Wickersham's Estate, 153 Cal. 603, 96 P 311.

31. Owner can convey to strangers without consideration as against heirs at law. Schumacher v. Draeger [Wis.] 119 NW 305.

32. **Search Note:** See notes in 2 C. L. 1463, 1464; 11 A. S. R. 99; 3 Ann. Cas. 397; 7 Id. 953.

See, also, Deeds, Cent. Dig. §§ 344-548; Wills, Cent. Dig. §§ 120-176; Wills, Cent. Dig. §§ 1293-1579; Dec. Dig. §§ 590-668; 25 A. & E. Enc. L. (2ed.) 639.

33. Deed with words of limitation in habendum instead of in premises. Condor v. Secrest [N. C.] 62 SE 921. Under Revisal 1905, § 946, providing conveyance of realty shall create estates in fee whether word "heirs" is used or not, unless conveyance shall plainly show grantor meant a less estate intention of grantor, and not technical words of common law, governs. Triplett v. Williams [N. C.] 63 SE 79. Intention of grantor giving an ambiguous deed must be ascertained, if possible, by giving every word of deed its appropriate meaning, regardless of mere formal divisions of instrument. Teague v. Sowder [Tenn.] 114 SW 484.

**Fee simple estates:** Will construed to create fee simple in children and not fee tail, "and to their personal and lawful heirs" not being equivalent to "heirs of body." Webbe v. Webbe, 234 Ill. 442, 84 NE 1054. Will giving vested remainder in a son's share to testator's other children named "in same way, subject to same trusts and provisos upon which they respectively receive their portions of my estate," held not to give absolute equitable fee to a surviving son such as would pass to his heirs, but to pass his interest in the remainder subject to all restrictions contained in devise to him. Rackemann v. Tilton, 236 Ill. 49, 86 NE 168. Estate to widow, to be by her used and disposed of during her natural life same as testator might do if living, with power of disposal, held to confer fee. In re Weien's Will [Iowa] 116 NW 791. To wife for "her lifetime, to manage and dispose of as she may see cause," without gift over, held to give wife fee, especially in view of Ky. St. 1903, § 2342, providing that, unless a different purpose appear by express words or necessary inference, every estate

created by will without words of inheritance shall be deemed a fee simple. Alsip v. Morgan, 33 Ky. L. R. 72, 109 SW 312. Will held to give fee to daughter on her arrival at 21, widow having renounced will. Frye's Adm'r v. Frye [Ky.] 112 SW 919. Will construed to give husband fee simple title to certain land, subject only to charge for maintenance and education of a nephew, latter taking no interest therein or in surplus proceeds except right to maintenance during minority, and to be educated for a profession should he in good faith desire it. Knight v. Collins [Ky.] 113 SW 131. Deed held to convey equitable fee simple estate, though caption stated grantee as "trustee for C and children," "heirs" and "assigns" being used in all parts of deed conveying or warranting estate. Wilson v. Shumate [Ky.] 113 SW 851. To sister in trust "to nurture, support and educate" grantor's children, with power to sell and convey "to whomsoever she might think proper, and to manage and control said property or its proceeds as she might deem best in her discretion for the use of said children," held to convey fee simple to trustee, especially in view of Ky. St. 1903, § 2342, making estates fee simple in absence of contrary intention appearing. Maxwell's Committee v. Centennial Perpetual Bldg. & Loan Ass'n [Ky.] 114 SW 324. To daughter, "to her and her heirs forever, without right to her or her husband to ever sell or transfer same, yet, should she leave heirs, they may sell and dispose of it," held to give fee regardless of validity of restraint on alienation. Disman v. Flippin's Adm'x [Ky.] 116 SW 740. Devise to a son "and his children" held to give son fee and not life estate, in view of other devises, restraints and charges. Harkness v. Lisle [Ky.] 117 SW 264. To son and his heirs forever, but, in default of surviving issue or if such issue should die in minority, then over as to "estate remaining" at son's death, held to create fee. Galligan v. McDonald, 200 Mass. 299, 86 NE 304. To wife, her heirs and assigns forever, with privilege of selling, and after her death, or at any time when she might arrange to relinquish her interest, property should revert to testator's son after daughters should have received certain sums, held to give wife fee simple, with full power to convey. Jackson v. Littell, 213 Mo. 589, 112 SW 53. To grantee and her heirs "with this provision," that in event of death of grantee before that of S, latter should have life estate, "and after death of parties herein named" property should revert to grantee's heirs, held to create fee in grantee, she surviving S. Gaylord v. Barnes, 128 App. Div. 810, 113 NYS 605. To son, farm and all pertaining thereto, his heirs and assigns forever, excepting what was devised to his mother for life, "at her death same to be sold and money divided—equally 5 shares," held to give fee simple to son subject to life estate. Hershey v. New York & Cleveland Gas Coal Co., 220 Pa. 651, 69 A 1046. Where remainder was given to life tenants, sisters and brothers mentioned in will "or their heirs," heirs was word of limitation, so that brothers and sisters took fee. In re Bentz's Estate, 221 Pa. 380, 70 A 788. Except a certain piece of land "which shall be held in reserve for my widow" gave widow fee. Birkbeck v. Wadsworth [Pa.] 70 A 998. "Bargain and sell" to grantees, "their heirs and assigns forever with the exception of mine and my wife's homestead or lifetime," held to convey fee simple. Teague v. Sowder [Tenn.] 114 SW 484. Premises of deed to grantees, "their heirs and assigns forever," except homestead, habendum to grantees, "their lifetime and to their heirs and assigns forever," held to create fee simple, clauses being repugnant and context not disclosing grantor's intention. Id.

**Fees determinable:** To daughter and heirs of her body, but should she die without issue surviving, then to her heirs at law, held to create a fee tail, raised by statute to absolute fee, but reduced to determinate fee by limitation based on death without issue. Carter v. Couch [Ala.] 47 S 1006. Devise over should devisee die before arriving at 21, or die leaving no bodily heirs, held to refer to death either before or after death of testator, so that estate was only a base or determinable fee. Wey v. Dooley, 134 Ill. App. 244. Church held to take determinable or qualified fee where deed provided that land should revert to grantor whenever it should cease to be occupied for a meeting house or church. North v. Graham, 235 Ill. 178, 85 NE 267. To Mrs. S, in premises and granting clause of deed, habendum to her in fee, but, if she died without heirs, then to husband if living, if dead then part to Mrs. S's "next" legal heirs, and part to husband's "next" legal heirs, held to create conditional fee, so that husband and wife could pass fee absolute. Hamilton v. Sidwell [Ky.] 115 SW 204. Conveyance with restriction as to use confers a qualified fee subject to divestiture for breach of restriction. Aumiller v. Dash [Wash.] 99 P 583. Conveyance with restriction that land shall be used only for a road grants fee and not a mere easement. Id.

**Life estates:** Will held to vest in deaf and dumb children only life estates in any property coming to them thereunder. Potts v. Prior [Ga.] 62 SE 77. Codicil held to carve life estate for sister out of estates previously devised to other legatees. Thomas v. Owens [Ga.] 62 SE 218. Will drawn by ignorant notary held to create life estate in widow, with remainder to persons named as heirs, land being excepted from direction for sale when youngest child should attain age, though it was the only land testator owned. Poll v. Cash, 234 Ill. 53, 84 NE 719. Will held to create trust estate at least for life of a daughter. Copeland v. Bruning [Ind. App.] 87 NE 1000. Residue to husband for life, with full power to sell same or as much thereof as might be needed for his support, then to children, held to give husband only life estate, with power of alienation for specific purposes. Hamilton v. Hamilton [Iowa] 115 NW 1012. Where husband and wife deeded land in which wife had only an inchoate dower right and reserved life estate to themselves during their natural lives, husband took life estate, but wife took nothing but life estate in what she theretofore had, her dower right. White v. Marion [Iowa] 117 NW 254. Deed construed to create only a life estate in grantee's wife, with remainder to her children by him, including after-born children. Bowe v. Richmond, 33 Ky. L. R. 173, 109 SW 359. Transfer of net income from transferror's interest in certain realty, such interest being a life estate, held not to create a life estate in transferee, but to give her only rents, less taxes, etc. Kalfus v. Davie, 33 Ky. L. R. 663, 110 SW 871.

Deed reserving full control during lives of grantor and wife and providing it should take effect after their death held to create life estates in grantors and vest title in grantee subject thereto. Martin v. Stewart, 33 Ky. L. R. 729, 111 SW 281. Deed to daughter and her heirs as an advancement, grantor to control property in his lifetime, daughter to have control after his death only to work upon for her lifetime, then to her living children, held to give daughter only a life estate, with remainder to children. Williams v. Grimm [Ky.] 112 SW 839. Will devising testatrix's interest in a lot, with full power in devisee to dispose of same by will or otherwise, but giving daughter a home thereon, held to give daughter home for life only in case lot was not previously disposed of. West v. McDonald [Ky.] 113 SW 872. To children for their lives, then to their legal heirs in default of issue of their bodies, without right of disposal, held to give children only life estate, remainder to their children, if any. Trustees of Common School Dist. No. 31 v. Isaacs' Guardian [Ky.] 115 SW 724. Deed reserving to grantors all right, title and control as long as either of them should live, and requiring grantee, after their death, to pay certain sums to designated persons, held to create life use for grantors, with lien for payment of sums specified. Engel v. Ladewig, 153 Mich. 8, 15 Det. Leg. N. 380, 116 NW 550. That one of grantors was other's wife and had only an inchoate right to dower held immaterial. Id. Balance of realty and personalty to wife, with request that she will two-thirds to charities to be named by her, "amount so willed to be payable at her death, as it is my will that she have and use all the income from that portion of my estate willed to her as long as she lives," held to give only one-third of estate absolutely, and life estate in remaining two-thirds. Gilchrist v. Corliss [Mich.] 15 Det. Leg. N. 971, 118 NW 938. Where widow's attempted disposition to charities failed for indefiniteness, the two-thirds descended to testator's heirs, and not to those of testatrix. Id. Will construed to give daughter only a life estate, with remainder to her heirs, in view of 50-year restraint on alienation and other devises of life estates. Pratt v. Saline Valley R. Co., 130 Mo. App. 175, 108 SW 1099. Where deed was to grantee "and to the heirs of her body" with reservation of possession and enjoyment for lives of grantor and wife, and reversion to grantor should grantee die in grantor's lifetime without heirs of body, and to his "estate" should grantee so die after grantor's death, grantee took only a life estate with limitation over by way of contingent remainder. Robeson v. Duncan [N. J. Eq.] 70 A 685. Quitclaim back to grantor gave only estate for life of original grantee. Id. To granddaughter for life, then to her issue, and, in default of issue, to her sister for life, then to latter's issue, and to a third person should both grandchildren die without issue, gave granddaughters only life estates, though third person died before testatrix, so that granddaughters could not convey fee. Guernsey v. Van Riper, 126 App. Div. 368, 110 NYS 642. Will construed to give only a life estate in grandchild, subject to prior life estate to widow, but enlargeable to fee should granddaughter arrive at 21 and have issue. Cone v. Kent, 128 App. Div. 409, 113 NYS 37. To wife for life, to have, use and enjoyment thereof and receive rents and profits for her sole benefit, held to give life estate only. In re Van Valkenburgh's Will, 60 Misc. 497, 113 NYS 1108. To J and wife S, and S's heirs, held to give husband life estate if he survived his wife, remainder to wife's heirs. Sprinkle v. Spainhour [N. C.] 62 SE 910. Husband held not to take fee by survivorship nor by virtue of Revisal 1905, § 946, making estates fees unless estate of less dignity was plainly intended. Id. Deed to grantee "and her heirs forever," to have and hold during life of grantee, with remainder to children, gave grantee life estate only. Triplett v. Williams [N. C.] 63 SE 79. To wife, "her heirs and assigns forever," in fee simple forever "so long as she shall remain a widow," gave widow only life estate, terminable on remarriage, though will contained no limitation over. Haring v. Shelton [Tex. Civ. App.] 114 SW 389. "During her natural life, then to the heirs of her body, if any; if no chilrden, to her sisters," gave life estate. Johnson v. Smith, 108 Va. 725, 62 SE 958. To one for life, remainder to his issue, and, in default of issue, then over. Steele v. Korn, 137 Wis. 51, 118 NW 207. Grant to use of a designated person for life, then to use of a third person, no active duties being imposed on trustee, held within St. 1898, § 2073, giving legal estate to grantees entitled to possession and rents; and hence designated person took **absolute legal estate** for life, remainder to third person. Schumacher v. Draeger [Wis.] 119 NW 305.

**Vested remainders:** Will held to give like interests to grandchildren in certain property except as to time of possesion and to vest remainder in grandson on testator's death, and hence his interest was not contingent on his arriving at 25. Morton Trust Co. v. Chittenden [Conn.] 70 A 648. Will giving use and control to widow for life, with privilege of making arrangement with children so as to let any of them have their part before her death, and directing division among children equally after widow's death, held to create vested remainders in children on testator's death. Broas v. Broas, 153 Mich. 310, 15 Det. Leg. N. 488, 116 NW 1077. Will construed to give children living at testator's death a vested, not contingent, remainder distributively as tenants in common, subject only to termination of preceding trust during lives of widow and daughter. Trowbridge v. Coss, 126 App. Div. 679, 110 NYS 1108. That testator authorized sale after death of widow and daughter held not to indicate intention that children should not take vested interests. Id. Residue to widow for life or widowhood, then to children equally, children of any child who at that time might be deceased to take share parent would have taken, held to create vest-remainder in children. Genunge v. Murphy, 59 Misc. 381, 112 NYS 310. In trust to wife for life, and on her death property to go to children then living, trustee having power of sale, vested remainder in children at testator's [illegible] Joscher v. Wyckoff, 63 Misc. 414, 118 NYS 655. Will held to create vested remainder in trust which passed by devisee's will at his death before life tenant. Gillis v. Long, 8 Ohio N. P. (N. S.) 1. Life estates to daughters, remainder in fee to their children, and over in default of children, gave vested remainuers to grandchildren living at

testator's death and contingent remainders as to grandchildren not then in use. Frank v. Frank [Tenn.] 111 SW 1119. Will held to create vested remainders in children, but **subject to divestiture** as to children dying before life tenant, so that children of any such child, taking under will and not as heir, were entitled to parent's share as against parent's grantee who purchased before death of life tenant. Richards v. Burbanks, 201 Mass. 253, 87 NE 575. To K for life, then to issue, and, in default of issue, to K's appointee by will, and in default of appointment, to C if she should survive K, held to give vested remainder in C subject to divestiture by K's having issue or exercising power of appointment. In re Haggerty, 128 App. Div. 479, 112 NYS 1017. To widow for life, and at her death to children "and in case any of my children shall have died" his share to go to his issue, if any, and in case of death of any child without issue his share to vest in surviving brothers and sisters, held to vest property in children at testator's death, but subject to divestiture by failure to survive life tenant. Schwartz v. Rehfuss, 129 App. Div. 630, 114 NYS 92. "And at her decrease I devise the same to her children same manner as if she died seised of it in her own right, to share and share alike," held gift to a class, which class would remain **open for new members** until death of life tenant, but members of which, who lived at testator's death, took vested remainders. Clark v. Morehous [N. J. Eq.] 70 A 307.

**Contingent remainders:** Remainder to "such child or children, they being the heirs of her body, as she (life tenant) may leave in life," held to create contingent remainder, vesting in such children only as survived life tenant. Smith v. Smith, 130 Ga. 532, 61 SE 114. To widow, and to children after her death, and, if she should not leave children, then to G and his heirs, held contingent to G and his heirs. Golladay v. Knock, 235 Ill. 412, 85 NE 649. Where widow's daughter and some of G's heirs predeceased widow, they took no interest. Id. Gift to one for life, with remainder to testator's next of kin, where life tenant is sole next of kin at death of testator, vests remainder in persons who answer description at termination of life estate, and renders remainder contingent. Bond v. Moore, 236 Ill. 576, 86 NE 386. Limitation to testatrix's nearest relatives should son who was life devisee die without children. Id. To unmarried daughter, and, on her death, to her issue if she should leave issue living at her death, created a contingent, not a vested remainder. Jailette v. Bell, 33 Ky. L. R. 159, 110 SW 298. To wife, but, "if she marries or ceases to be my widow, the farm then reverts to my children, to be equally divided between them, and at her death such farm to be divided between my surviving children and grandchildren, if any, whose parents are dead," gave contingent, not vested, remainders to children and grandchildren. Dickerson v. Dickerson, 211 Mo. 483, 110 SW 700. Remainders to son's children held contingent where sons had no children when will took effect. Hayward v. Spaulding [N. H.] 71 A 219. Remainder to issue held contingent, it being provided that, should life tenant die without issue, property should go over. Staton v. Godard, 148 N. C. 434, 62 SE 519.

**Estates in common:** Residue to children named and any after-born child held not to create joint tenancy so as to give shares of children dying before testator to survivors, but children took as tenants in common. In re Krummenacker, 112 NYS 596. See, also, Tenants in Common and Joint Tenants, 10 C. L. 1850.

**Trust estates:** See Trusts, 10 C. L. 1907.

**Miscellaneous and plural limitations:** Codicil held to change will which gave nephews land in fee, so that nephew's children took contingent remainders until birth, and vested remainders as born, subject to divestiture by death before parent, and so as to cut nephews' fee to life estate, and to provide an alternate devise in default of children living at death of nephews. Smith v. Smith [Ala.] 47 S 220. To L and A for life of L, remainder to A, but, should both die without issue, then all not previously disposed of by executor, should revert to testator's heirs at law, held to give joint life estate to L and A during life of L, with defeasible vested remainder to A, subject to divestiture on her death without issue during life of L, passing land to testator's heirs on A's death without issue during life of L and L's death without issue. Satterleld v. Tate [Ga.] 64 SE 60. To husband, but, if he should not survive testatrix, then to her brother, husband in case of his survival to have and hold property for life, then to will it to testatrix's brother, held to give husband life estate with remainder to the brother. Rooney v. Hurlbut [Kan.] 98 P 765. To two granddaughters, with provision that should either die survivor should have all, and reversion to testator's heirs should both die without issue, held to give son of granddaughter fee simple in one-half on mother's death, and vested remainder to other half subject to divestiture by death of other granddaughter leaving issue, heirs of testator acquiring no interest. Newland v. Louisville & N. R. Co. [Ky.] 116 SW 328. Testator's heirs would also take nothing should "dying without issue" be held to refer to testator's death, for then granddaughters would have taken fee. Id. Residue to wife forever, but charged with certain money bequests and payment of three-fourths of what should remain at wife's death to others, and permission to wife to dispose of remaining fourth by will, or, if she made no will, such fourth to follow law of descent, held to give wife life estate in three-fourths and fee in one-fourth, with power to sell and dispose of so much of residue as should become necessary for her support. McClelland's Ex'x v. McClelland [Ky.] 116 SW 730. To son and his wife, and in case of death of son before his wife, then to wife and children, and if widow remarried, then absolutely to children, held to create estate in fee by entirety in son and wife, with limitation over by way of executory, devise in event of son's death before wife either before or after death of testatrix, so that on son's death fee would pass to widow and children equally, and if widow remarried her share would be divested in favor of children. Fischer v. Fischer [N. J.] 71 A 488. "All and every right, title and interest in and to Tusculum plantation and all its belongings" held sufficient to pass not only **fee** but **also lesser rights**, such as right to redemption money should any third person be entitled to redeem property. Rue v. Connel, 148 N. C. 302,

this intention will not be defeated by inaccurate expressions,[34] such as the misuse of technical terms.[35] An estate given in decisive language will not be reduced by subsequent clauses not equally decisive [36] or by repugnant provisions,[37] nor will it be so

62 SE 306. Use of word "assigns" in granting clause of a deed imports intention to confer on grantee **power of disposal.** Teague v. Sowder [Tenn.] 114 SW 484. Will construed to create **cross easements** in a certain strip of land along rear of lots devised to wife and brother, and not undivided interests therein in fee simple. Whitelaw v. Rodney, 212 Mo. 540, 111 SW 560. "Undivided one-third fee simple interest and easement in and to" certain lots held to create both an undivided **fee title** in soil **and easement** thereon in favor of adjoining tracts held by parties in severalty. Thompson v. De Snyder [N. M.] 94 P 1014.

**34.** To two brothers for life, with remainders to their children, and in default of children of either, then to "survivor" or "surviving brother," with limitation over on both dying without children, held to necessarily imply cross remainders between strips of life tenants, "surviving" or "surviving brother" being held to mean "other" or "other brother," giving entire estate to sole surviving child of one of the brothers after death of both. Smith v. Smith [Ala.] 47 S 220.

**35.** Apparent and lawful intent will control technical terms. Williams v. Grimm [Ky.] 112 SW 839. Use of word "remainder" in habendum clause of deed held not conclusive that technical remainder was meant. Simonds v. Simonds, 199 Mass. 552, 85 NE 860.

**36.** In re Carney's Estate [Ind.] 86 NE 400. Where fee is given in unequivocal language in first clause of a will, it cannot be cut down to a life estate by subsequent clauses without express words or unmistakable intention. Pratt v. Saline Valley R. Co., 130 Mo. 175, 108 SW 1099. Not cut down by subsequent or ambiguous words inferential in intent. Jackson v. Littell, 213 Mo. 589, 112 SW 53. Intention must be clear (Ault v. Karch, 220 Pa. 366, 69 A 857), first taker being entitled to benefit of every implication (Robinson v. Jones [Pa.] 70 A 948). Attempt to create a trust either by positive or precatory words, though unsuccessful, may be sufficient to indicate intention to limit estate of first taker. Where trust failed for indefiniteness, remainder after devisee's life use went to intestate and not to devisee's heirs, though testator only "requested" that devisee will two-thirds to charity. Gilchrist v. Corliss [Mich.] 15 Det. Leg. N. 971, 118 NW 938. Codicil held to cut to life estate fee given by will proper to nephews by providing nephews should not sell but cultivate the land, and giving property to nephews' children, if any, at their deaths, and over should both die and leave no children. Smith v. Smith [Ala.] 47 S 220. Provision, after creation of fee, "should any of my younger children die before having or leaving any heir, then their shares to be divided between the remainder or surviving part of said four younger children," if intended to restrict daughter's estate, simply postponed vesting of fee until birth of issue. English v. McCrary [Ala.] 48 S 113. "Heir" held to mean "child," vesting estate in daughter absolute when she gave birth to a child, and extinguishing limitation over. Id. Gift over in case of death of any legatee held not applicable to residuary legatees. In re Richards' Estate [Cal.] 98 P 528. Absolute fee to railroad company held not reduced by description of premises as within location of roadbed, or by clause as to trestling of a pond. New York, B. & E. R. Co. v. Motil [Conn.] 71 A 563. Estate to sister and her heirs held not cut down by codicil directing testatrix's estate to be held together for sister's life, giving sister income for life, etc. Thomas v. Owens [Ga.] 62 SE 218. Entire estate to wife "for her sole use and benefit, to use the same for her and her children as she may see proper," held to vest fee. Schneiderhahn's Guardian v. Zeller, 33 Ky. L. R. 694, 110 SW 834. Fee not cut by devise of "estate remaining" at death of first taker, quoted words referring only to what should be undisposed of. Galligan v. McDonald, 200 Mass. 299, 86 NE 304. Not cut by provision giving devisee power to sell and dispose of property at any time. Tisdale v. Prather, 210 Mo. 402, 109 SW 41. Fee to wife not cut by inferential limitation over to son on wife's death. Jackson v. Littell, 211 Mo. 589, 112 SW 53. Meaningless provision for division on death of life tenant held not to cut down remainder given in fee. Hershey v. New York & Cleveland Gas Coal Co., 220 Pa. 651, 69 A 1046. Will held to give wife fee in land notwithstanding subsequent gifts declared in lieu of dower. Feuerstein v. Bertels, 221 Pa. 425, 70 A 804. Fee not reduced by clause providing for trustee and disposal of any part remaining at devisee's death. Hawley v. Watkins [Va.] 63 SE 560. Fee of third of a farm to each of three devisees held not cut by provision that one buy out the others and placing valuation on farm. In re Moore's Estate [Wis.] 120 NW 417.

**37.** Devise over of estate already devised in fee is void (Harkness v. Lisle [Ky.] 117 SW 264; Jackson v. Littell, 213 Mo. 589, 112 SW 53; Hawley v. Watkins [Va.] 63 SE 560), as where wife is given fee with limitation over of property undisposed of at her subsequent marriage or death (Becker v. Roth [Ky.] 115 SW 761). Devise absolute and entire in terms presumptively passes fee without words of inheritance rendering void any limitation over. Bradley v. Warren [Me.] 72 A 173. Devise to daughter and attempt to dispose of what might remain at her death held to give daughter fee absolute. Id. Fee simple created by granting clause of deed held not cut by repugnant clauses in prefatory part and habendum speaking of grantor's interest as a life estate. Dickson v. Van Hoose [Ala.] 47 S 718. Later of two repugnant clauses held to cut fee simple devised by earlier clause to life estate with remainder over under rule that later of two clauses in a will controls if clauses cannot be reconciled. Frank v. Frank [Tenn.] 111 SW 1119. Where repugnant clauses cannot be reconciled, clause conferring greater estate controls. Hopkins v. Hopkins [Tex. Civ. App.] 114 SW 673.

enlarged.[38] Many authorities hold that an estate is a fee simple if the holder is given an absolute power of disposition [39] as distinguished from a limited or contingent one,[40] and that limitations over are void, as repugnant;[41] but there are also jurisdictions in which this rule is rejected, or at least qualified.[42] After an absolute devise in fee, a devise over in case of death of the first taker, or his death without issue, is generally held to refer to his death in the lifetime of the testator [43] except

**38.** A life estate expressly created will not be enlarged to a fee by inference or implication or any language falling short of positive direction. Hasbrouck v. Knoblauch, 59 Misc. 99, 112 NYS 159. Life estate to wife held not enlarged by subsequent provisions as to "what remains," or by power of sale given widow as executrix. Bradshaw v. Butler, 33 Ky. L. R. 531, 110 SW 420.

**39.** Life estate with absolute power of disposition gives fee. McKnight v. McKnight [Tenn.] 115 SW 134. To wife for "her lifetime, to manage and dipose of as she may see cause," held to pass fee. Alsip v. Morgan, 33 Ky. L. R. 72, 109 SW 312. Held, if daughter did not take fee under general provisions of will, power to sell and dispose of land as she saw fit carried full property interest. Tisdale v. Prather, 210 Mo. 402, 109 SW 41. Suggestion as to investment of proceeds of a sale if desired held not to restrict devisee's power of disposal as owner of fee. Id. Devisee held entitled to mortgage the land. Id.

**40.** Life tenant's limited power to appoint the fee does not enlarge his life estate. Appointees held not entitled to crops growing at time of life tenant's death. Keays v. Blinn, 234 Ill. 121, 84 NE 629, afg. 137 Ill. App. 474. To wife for life, with right to use any part thereof at her discretion, and power to sell any of it, held not to confer on wife absolute power of disposition so as to give her fee simple, but to give only life estate, vesting remainder over as to property not disposed of. In re Pierson, 58 Misc. 94, 110 NYS 476. To wife for life, with absolute power to dispose of income and so much of principal as she might think necessary for her support, held not absolute gift in fee simple. Hasbrouk v. Knoblauch, 59 Misc. 99, 112 NYS 159. Widow held to take only life estate and power to use principal. In re Davis' Will, 59 Misc. 310, 112 NYS 265. Power in widow to absolutely control and dispose of income and so much of principal as she might deem necessary for support held not to give fee. Hasbrouck v. Bookstaver, 114 NYS 949. Power of disposal not being absolute, Real Property Law (Laws 1896, p. 579, c. 547), § 129, enlarging life tenant's estate to a fee for benefit of creditors, purchasers and encumbrances where life tenant has absolute power of disposal, but making it subject to future estates limited thereon if power is not exercised is inapplicable (Id.), but even if will gives absolute power, subsequent estate takes effect under statute if power is not exercised (Id.). Real Property Law (Laws 1896, p. 580, c. 542), § 133, providing that every power by means of which grantee is enabled in his lifetime to dispose of fee is absolute, only makes power, not grantee's estate, absolute. Id. Widow's power of disposition held not absolute, being only power to dispose of property by will, and, this not having been exercised, property went to testator's heirs. McKnight v. McKnight [Tenn.] 115 SW 134. A life estate may be coupled with a limited power of disposition which, when regularly exercised, will enlarge estate to a fee in grantee. Where life tenant was given power of sale while she remained unmarried or if she should become a widow, and she conveyed while yet unmarried, grantee took fee. Johnson v. Smith, 108 Va. 725, 62 SE 958.

**41.** Life estate with unqualified power of disposal is equal to fee and limitation over is void. Bradley v. Warren [Me.] 72 A 173. To wife, to be used and enjoyed by her during her life or widowhood in such quantities as might be requisite for her comfortable maintenance, whatever should remain to go over, held to give fee, limitation over being held void for repugnancy. Rolley v. Rolley's Ex'x [Va.] 63 SE 988. To wife with full power of disposal, but any property remaining undisposed of to go to testator's heirs, held to give wife fee. Commonwealth v. Stoll's Adm'r [Ky.] 116 SW 687, withdrawing, on rehearing, opinion in 114 SW 279. Will construed not to give fee with absolute power of disposition and attempt to destroy same by limitation over; hence wife took only life estate. McClelland's Ex'x v. McClelland [Ky.] 116 SW 730.

**42.** Devise giving only life estate may be coupled with unlimited power of disposal (Paxton v. Paxton [Iowa] 119 NW 284), and vest remainder in fee at once as to whatever may not be disposed of, subject only to life estate (Id.); compare In re Weien's Will [Iowa] 116 NW 791. To widow, to be used and enjoyed by her as she might choose during her natural life, and, at her death, any property that should remain to be divided among children, held to pass life estate only, with power of disposition, so as to cut off children's interest. Paxton v. Paxton [Iowa] 119 NW 284. Absolute power of disposal in first devisee gives him fee unless estate is expressly given for life only. Pratt v. Saline Valley R. Co., 130 Mo. 175, 108 SW 1099. If only life estate is devised, power to sell and dispose of property at any time does not enlarge it to a fee. Tisdale v. Prather, 210 Mo. 402, 109 SW 41. Power of disposition does not enlarge life estate into fee where there is a limitation over of what may be undisposed of, devisee taking only life estate, with power of disposal during continuance of such estate for his benefit. Parker v. Travers [N. J. Err. & App.] 71 A 612.

**43.** Devise to three daughters, without right to convey except by joint consent, with provision that on death of any daughter without issue her share should pass to the others as tenants in common, subject to same provision as to alienation, held to give daughters a fee simple. Ault v. Karch, 220 Pa. 366, 69 A 857. Residue to three children, provision for appraisement should any desire his money out of estate, and direction

where a different intent is clear,[44] as where the estate is preceded by another one for life or years.[45] Estates will vest as early as the language of the grant or devise will permit,[46] but, under a direction for payment to or division among a class, only

that, should either die without lawful heir, his share should fall to last named heir or heirs held to create fee simple. Robinson v. Jones [Pa.] 70 A 948. Limitations over as to children dying without issue held to refer to death before testator, but applicable as well to remainder interests of children as to their immediate gifts. Lumpkin v. Lumpkin [Md.] 70 A 238. In devise or bequest to one, and, "in case of his death," to another, "in case of death" refers to death before death of testator if context gives no explanation. Fischer v. Fischer [N. J. Eq.] 71 A 488. Devise to daughter in terms sufficient to pass fee, followed by proviso that in case of her death property should be sold and divided equally among other surviving heirs, gave daughter fee where she survived testator. Aneschaensel v. Twyman [Ind. App.] 85 NE 788. In devise to children absolutely and in equal shares, but, by concluding sentence, should any of testator's sons die without issue, his or their shares should revert to testator's children then living, "die without issue" meant death without issue during testator's life, though statute provided that every contingent limitation made to depend on any person dying without heir should take effect when such person dies without heir living at time of death, unless otherwise expressly and plainly declared. Frank v. Frank [Tenn.] 111 SW 1119. All property to F, but, should he die without issue, then to a charitable institution, gave fee to F where he survived testator. St. Paul's Sanitarium v. Freeman [Tex. Civ. App.] 111 SW 443.

**44.** Phrase "in case of" and similar expressions, referring to death of prior legatee in connection with some collateral event, contemplate happening of contingency after, as well as before, death of testator. Fischer v. Fischer [N. J. Eq.] 71 A 488. To son and wife, and, in case son should die before wife, then to wife and children, and, if wife remarried, then to children absolutely, held to refer to death of son before or after death of testator. Id. To widow for life, then to grandchild for life, remainder to heirs of her body and, in default of such heirs, then to a niece, with direction for payment to grandchild on arrival at 21, or to heirs of her body, if any, after her decease, but that property should not be delivered unless she had heirs, held not to vest fee in grandchild where she died without issue, though having passed 21. Cone v. Kent, 128 App. Div. 409, 113 NYS 37. Rule that in case of devise in fee, but in case of death to another, refers to death in testator's lifetime, has no application where a point of time for distribution is mentioned other than death of testator, or where a life estate intervenes, or where context indicates contrary intent. In re Salisbury's Will, 61 Misc. 550, 115 NYS 976. "All property, real, personal and mixed, that I may own and be possessed of at time of my death," but in subsequent paragraph devise over if first taker should "die without issue," held to create estate, subject to be defeated by death without issue at any time. St. Paul's Sanitarium v. Freeman [Tex.] 117 SW 425, rvg. [Tex. Civ. App.] 111 SW 443.

**45.** Where, after granting of a life estate and remainder, it is provided that should remaindermen die without children or issue then the property shall go over to another, words "dying without children or issue" refer to death of remainderman before termination of particular estate. Bradshaw v. Butler, 33 Ky. L. R. 531, 110 SW 420. Where remainderman survived termination of life estate, she took fee. Id. To M for life, then to her issue, but, if she should die without issue, to L and E for their lives and then over, held not to give M's children vested remainder prior to M's death and M leaving no issue her surviving, property went to L and E as life tenants, and not to M's husband. Staton v. Godard, 148 N. C. 434, 62 SE 519. To husband, then to plaintiff, and, should he die without issue, then to charity, held to relate to time of plaintiff's not testator's death. St. Paul's Sanitarium v. Freeman [Tex. Civ. App.] 111 SW 443.

**46.** Early vesting favored. Webbe v. Webbe, 234 Ill. 442, 84 NE 1054; Taylor v. Richards, 153 Mich. 667, 15 Det. Leg. N. 565, 117 NW 208; Dickerson v. Dickerson, 211 Mo. 483, 110 SW 700; Clark v. Morehous [N. J. Eq.] 70 A 307; Trowbridge v. Cass, 126 App. Div. 679, 110 NYS 1108. Estates will vest in interest at death of testator unless some later time is clearly expressed or necesarily implied. Carter v. Carter, 234 Ill. 507, 85 NE 292. Creation of a trust does not necessarily prevent estate of beneficiary from vesting. Remainders held vested in testator's children whether or not direction that in case widow should remarry rents should be used for their support and education should be considered a trust. Id. Farm to devisee on his arrival at 25, control to be in executors in meantime, and corpus transferred should devisee "show himself worthy," held to pass entire estate to devisee and executors, contingency applying only to time of full enjoyment. Taylor v. Richards, 153 Mich. 667, 15 Det. Leg. N. 565, 117 NW 208. **Remainders** will be held vested rather than contingent if words used in their creation can be so construed. Freeman's Estate, 35 Pa. Super. Ct. 185; Doscher v. Wyckoff, 63 Misc. 414, 113 NYS 655. Any reasonable doubt will be resolved in favor of vested as against contingent remainder. Dickerson v. Dickerson, 211 Mo. 483, 110 SW 700. Law favors vesting of remainders absolutely and at earliest possible moment and presumes that words of postponement relate to enjoyment and not to vesting. In re Carney's Estate [Ind.] 86 NE 400. Provision that share of child who should die before distribution of testator's estate as provided in will should descend as provided by law where a person dies intestate held not to prevent vesting of remainders at testator's death. Id. Devise for life, remainder to devisee's children, but, if devisee should die "without issue and unmarried," property should go to her brothers and sisters, held to vest in life tenant and remaindermen on

those who are members of the class at the time fixed for payment or division take, and their interests do not vest until that time [47] except where payment or division is deferred merely for the purpose of giving another person a preceding life use,[48] and there is a conflict as to whether words of survivorship in a will devising a life estate and remainder refer to death of testator or to that of the life tenant.[49] Unless a contrary intention is expressed, a devise given in default of an appointment vests on the death of the testator, subject to divestiture by exercise of the power,[50] and, if the power is exercised as to only a part of the estate which was subject thereto, the residue remains vested.[51] The tendency is to construe a grant or devise to a person and his children as creating a life estate in the parent, with remainders to the children,[52] but an estate to one for life, remainder to him and his heirs, passes the remainder to him, and not to his heirs by purchase.[53] A mere limitation over should the first taker of an estate die without issue or descendants is insufficient to create an estate by implication in the issue or descendants,[54] but, if the intention is clear, an estate will arise.[55]

devisee's marriage and birth of issue. Fisher v. Lott, 33 Ky. L. R. 609, 110 SW 822. "And on her (wife's) death, I give and bequeath capital of said fund unto such of my children as shall survive me," held not of substance as to time, so as to prevent immediate vesting. Bergmann v. Lord, 194 N. Y. 70, 86 NE 828.

**Vesting postponed:** Will held not to vest residue until property not specifically devised had been converted into money by executors and period of distribution had arrived. Barnes v. Johnston, 233 Ill. 620, 84 NE 610. One devisee having died before time for distribution, his share went to his daughter under terms of will, and free from claim of devisee's widow. Id. To wife for life, and on her death to children and survivor of them, issue of deceased child to take parent's share, but to wife absolutely if neither child survived her or died leaving lawful issue, held not to vest interests in children until death of wife. In re Salisbury's Will, 61 Misc. 550, 115 NYS 976.

**47.** Children who are mentioned by name take as individuals and not as a class. Carter v. Carter, 234 Ill. 507, 85 NE 292. To wife, to hold until youngest child should be 21, then to sell and divide proceeds between children and descendants, latter taking parent's share, held not to vest children's shares until youngest child become of age, barring any interest in husband of child who died before vesting. Ross v. Ware's Adm'r [Ky.] 116 SW 241. To widow for life, with direction that executor divide remainder among testator's sisters and brothers or their heirs, and authorization to sell for such purpose, held to vest remainder at widow's death. In re Tallmadge's Estate, 113 NYS 621. Rule that bequest in form of direction to pay or divide in future vests immediately, if payment is postponed for convenience of fund or estate, or merely to let in some other interest, held not applicable where realty and personalty were given widow for life and executor was directed after death of widow to sell and "distribute equally to my legal heirs." Barr v. Denney, 79 Ohio St. 358, 87 NE 267. Direction held to create only contingent interests, not vesting until time for distribution. Id.

**48.** Share to wife for life, subject to divestiture in favor of children should widow remarry, and to children on widow's death, held to vest children's interests on death of testator and not on death of widow. Carter v. Carter, 234 Ill. 507, 85 NE 292.

**49.** In order to vest remainder early, words of survivorship will be held to refer to testator's death unless contrary intention is clear. To wife for life, then to be sold and proceeds divided "between my surviving children and children of any of my deceased children," held to vest remainder at death of testator. Crossley v. Leslie, 130 Ga. 782, 61 SE 851. Survivorship between devisees never relates to testator's death unless there is no other time to which it can be referred (Smith v. Smith [Ala.] 47 S 220), but naturally relates to death on which previous estate terminates and on which new estate is limited (Id.).

**50.** Power of appointment does not create estate or hold it in abeyance. Freeman's Estate, 35 Pa. Super. Ct. 185. Existence of an unexecuted power of appointment in the holder of the precedent estate does not prevent vesting of future estate limited in default of execution of power. In re Haggerty, 128 App. Div. 479, 112 NYS 1017. Trust to daughter for life, then to her appointees and, in default of appointment, to daughter's issue, held to give vested remainder to issue. In re Chapman's Estate, 61 Misc. 593, 115 NYS 981.

**51.** Where appointment was of only a life estate, remainder passed to devisees under will of donor of power. Freeman's Estate, 35 Pa. Super. Ct. 185.

**52.** Grant for use and benefit of a wife and children in terms declared to be a provision for the family held to give wife only life estate, remainder to children, including afterborn ones. Tally v. Ferguson [W. Va.] 62 SE 456.

**53.** Ray v. Grube, 115 NYS 737.

**54.** Estate for life, and over in default of issue, does not imply remainder in life tenant's issue. Bond v. Moore, 236 Ill. 576, 86 NE 386. Devise to son, and over should he die without lineal descendants, held insufficient to create estate by implication in lineal descendants (Anderson v. United Realty Co., 79 Ohio St. 23, 86 NE 644), but son took fee defeasible on death without lineal

Of course, one cannot in his own right confer upon another a greater estate than he himself has,[56] but by statute it is often provided that, where a grantor has assumed to convey a greater interest than he had, the conveyance shall transfer whatever he could convey.[57] Where lands are granted or devised to two or more persons as joint tenants, and any one is incapable of taking, the whole estate goes to the others.[58]

*The rule in Shelley's case* See 10 C. L. 1459 gives the ancestor the whole estate when limited to him and his heirs or the heirs of his body,[59] provided the two estates are of the same quality;[60] but words of progeny will not render it applicable unless used in the sense of heirs or heirs of body generally.[61] "Children" is a word of purchase[62] except where other words show that it is used in the sense of heirs.[63]

descendants, and, in event of descendants, fee became absolute and free from interests in descendants (Id.).

**55.** Realty and personalty in trust to daughter for life, remainder to her brothers and sisters should she die without issue, held to give remainder to issue should she leave any. Close v. Farmers' L. & T. Co. [N. Y.] 87 NE 1005.

**56.** Conveyance from life tenant purporting to grant entire estate passes only interest of life tenant. Satterfield v. Tate [Ga.] 64 SE 60. Railway company purchasing right of way from a life tenant acquires only title possessed by grantor, notwithstanding payment of full value and deed purporting to convey fee. Turner v. Missouri Pac. R. Co., 130 Mo. 535, 109 SW 101. Remaindermen held to have cause of action after death of life tenant for damages due to continued occupancy of railroad company. Id. One who takes from holder of defeasible estate takes subject to the contingency. Vested remainder defeasible on holder's death without issue during life tenancy. Satterfield v. Tate [Ga.] 64 SE 60. Purchaser took subject to contingency that remainderman should not survive life tenant. Schwartz v. Rehfuss, 129 App. Div. 630, 114 NYS 92. Where remainder was to be divested on death of remainderman without issue pending life estate, remainderman's grantee would take title if remainderman survived. Small v. Hockinsmith [Ala.] 48 S 541. If remainderman died without issue before life tenant, remainder went over. Id.

**57.** Where grantor had previously sold the land to another, his lien for purchase money held not "a right or estate in lands," within Am. Code 1892, § 2444, providing that conveyances purporting to convey a greater estate than grantor has shall convey as much as he could lawfully convey. Howell v. Hill [Miss.] 48 S 177. Under Rev. St. 1895, art. 626, providing that alienations purporting to convey greater estates than grantor has shall carry so much as grantor might lawfully convey, conveyance of fee by tenant for life or years operates to transfer his own interest only. Kennedy v. Pearson [Tex. Civ. App.] 109 SW 280.

**58.** Conveyance by wife direct to husband and daughter passed legal title to entire estate to daughter. McCord v. Bright [Ind. App.] 87 NE 654.

**59. Held applicable:** In trust to A for life then to convey to A's appointee or in default of appointment to her heirs at law. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139. Beneficiary could convey equitable title and exclude heirs. Id. To grantee "for life and to her heirs at her decease," "intention being to convey" to grantee "a life estate with remainder in fee to the heirs of her own body." Daniels v. Dingman [Iowa] 118 NW 373. Life estate and, on failure of descendants, to "such persons as would inherit as heirs" in case of intestacy, held to give fee to first taker. Cook v. Councilman [Md.] 72 A 404. Income to son for life and on his death title to vest in his heirs at law held within rule in Shelly's Case though son was to pay rent during life of testator's widow, and also taxes and assessments, and though executor held title, but only on dry trust. Marsh v. Platt, 221 Pa. 431, 70 A 802. To M and A, with provision against alienation and direction that on their death property should revert to their "heirs." Seay v. Cockrell [Tex.] 115 SW 1160; Id. [Tex. Civ. App.] 116 SW 652.

**60.** Where trustee took legal title for purpose of conveying to life beneficiary's appointee by will or to her heirs at law in default of appointment, limitation to heirs was of same kind and quality as life estate, giving life beneficiary the equitable fee. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139.

**61.** Rule not applicable where words "children," "issue" and "heirs" are used interchangeably as meaning "children." Stisser v. Stisser, 235 Ill. 207, 85 NE 240. To H "for and only for and during her natural life, and to the heirs of her body begotten, in fee simple, to take effect as to such heirs at the death of said H, their mother," held grant of life estate with remainder to specific persons, children of H. Ault v. Hillyard, 138 Iowa, 239, 115 NW 1030. Term "lawful issue" does not, like technical word "heirs," necessarily bring grant under the rule. Hopkins v. Hopkins [Tex. Civ. App.] 114 SW 673. To son and his heirs, followed by provision giving son life estate, with remainder to children, held controlled by rule in Shelley's case, "heirs" meaning heirs in general. Id.

**62.** Sechler v. Eshelman [Pa.] 70 A 910. Rule in Shelley's case inapplicable to conveyance to one for life, remainder to children. Ault v. Hillyard, 138 Iowa, 239, 115 NW 1030.

**63.** To niece for life, then "to her children and their heirs and assigns forever," held to limit remainder to heirs of body making "children" word of limitation. Sechler v. Eshelman [Pa.] 70 A 910. Ultimate gift over to heirs in default of children held to enlarge effect of word "children" antecedently used and show general intent that estate

The rule does not apply where the limitation over is by way of contingent remainder,[64] and a spendthrift trust is not within its operation.[65] It is an inflexible rule of property not intended to effectuate the intention of the parties [66] and has therefore been abolished or modified in many states.[67]

§ 4. *Covenants and restraints. A. Restrictive covenants* [68]—See 10 C. L. 1460 are very often building restrictions.[69] Conditions restraining the free use or alienation of realty, though viewed unfavorably, are upheld, if not unreasonable or repugnant to plain provisions of law [70] and will be enforced by injunction or other proper procedure.[71] To constitute a covenant, a restriction or promise must be based on a consideration [72] and must in some way benefit the party seeking to enforce it.[73] Acceptance of a deed poll binds the grantee to the performance of covenants therein contained,[74] but a covenant may be of such character as to exclude any presumption of liability on part of covenantor after he has parted with title and possession.[75] A grantee's covenant may be enforced against a subsequent grantee though it is not one technically running with the land.[76]

should descend to heirs. Cook v. Councilman [Md.] 72 A 404.

**64.** Provision for reversion back to grantor or his estate should grantee die without heirs of body. Robeson v. Duncan [N. J. Eq.] 70 A 685. Grantee held to take only life estate with contingent remainder over. Id.

**65.** Will held to give brother only an equitable life interest. Nightingale v. Phillips [R. I.] 72 A 220.

**66.** McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139; Cook v. Councilman [Md.] 72 A 404; Hopkins v. Hopkins [Tex. Civ. App.] 114 SW 673.

**67.** Life estate with remainder to heirs of body held to vest remainder in children on their birth. Peck v. Ayres [Kan.] 100 P 283. Under 1 Gen. St. 1895, p. 1195, § 11, an estate in fee tail gives ancestor an estate for life with remainder in fee to heirs of body. Robeson v. Duncan [N. J. Eq.] 70 A 685. Rule in Shelley's case was abolished by Act 1851-52, p. 113, c. 91, § 1 (Shannon's Code, § 3674), providing that heirs or heirs of body of person given life estate with remainder to his heirs or heirs of his body shall take as purchasers (Teague v. Sowder [Tenn.] 114 SW 484); hence grant of life estate with remainder to his heirs gives heirs a remainder interest if grantor so intended (Id.). Rule was abolished by Gen. Laws 1896, c. 201, § 6, providing for life estate in first taker with remainder in fee to his heirs and c. 203, § 10, providing that devise for life and children of issue generally, in fee, shall vest only life estate, remainder to children or issue generally agreeably to will. Nightingale v. Phillips [R. I.] 72 A 220. **In force** in Maryland. Cook v. Councilman [Md.] 72 A 404. Also in Texas. Seay v. Cockrell [Tex.] 115 SW 1160.

**68. Search Note:** See notes in 15 L. R. A. 231; 19 Id. 262; 21 Id. 58.

See, also, Covenants, Cent. Dig. §§ 49-51; Dec. Dig. §§ 49-52; Deeds, Cent. Dig. §§ 469-548; Dec. Dig. §§ 144-176; Wills, Cent. Dig. §§ 1522-1579; Dec. Dig. §§ 639-668.

**69.** See Buildings and Building Restrictions, 11 C. L. 479.

**70.** Building restrictions held not unreasonable. Highland Realty Co. v. Groves [Ky.] 113 SW 420.

**71.** Restriction in conveyance precluding sale of intoxicants will be enforced by injunction if clearly imposed by terms of conveyance. Guyers v. Auers, 132 Ill. App. 520. General demurrer held not to raise question of ultra vires to impose restriction. Id. Charging variant fees depending on visitor's intention to enter certain parts of a pier or certain amusements thereon **held violation** of restriction in deed confining owner to charging "only an entrance fee." Atlantic City v. Associated Realties Corp. [N. J. Err. App.] 72 A 61. **Burden is on grantee** who denies obligation of covenant in his deed. Required to establish defense by fair preponderance of evidence where he denied obligation of covenant not to build any fence east of a certain line. Beck v. Heckman [Iowa] 118 NW 510.

**72.** Covenant to use property only for church purposes held not supported by consideration, property not being appurtenant to any other property nor beneficial to grantor, and covenant having been inserted merely by grantor's officers without authority and without deduction in price. Rector, etc., of St. Stephen's Protestant Episcopal Church v. Rector, etc., of Church of the Transfiguration, 114 NYS 623.

**73.** Restriction in form of covenant that property should be used only for church purposes held not enforceable as a covenant where enforcement would not benefit, nor violation thereof injure grantor. Rector, etc., of St. Stephen's Protestant Episcopal Church v. Rector, etc., of Church of the Transfiguration, 114 NYS 623,

**74.** Sexauer v. Wilson, 136 Iowa, 357, 113 NW 941.

**75.** Grantee who covenants to perpetually maintain a division fence is not liable on covenant after parting with title and possession. Sexauer v. Wilson, 136 Iowa, 357, 113 NW 941.

**76.** Reservation of right to sue for prior damages to easements held enforceable against subsequent grantee, it being sufficient he had notice. Maurer v. Friedman. 25 App. Div. 754, 110 NYS 320. Purchaser with notice held bound by existing covenant for an easement, regardless of whether in law it ran with land. Bryan v. Grosse [Cal.] 99 P 499.

(§ 4) *B. Covenants running with the land.*[77]—See 10 C. L. 1460—In order that a covenant may run with the land, its performance must touch and concern the land or some right or easement annexed or appurtenant thereto [78] and tend necessarily to enhance its value or render it more convenient or beneficial to the owners or occupants.[79] In determining whether a covenant runs with the land, the material inquiries are, first, whether the parties meant to charge the land; [80] and, second, whether the burden is one that can be imposed consistently with policy and principle.[81] The use of the technical word "assigns" is not essential,[82] for intention to

**77. Search Note:** See notes in 82 A. S. R. 664.

See, also, Covenants, Cent. Dig. §§ 22, 52-92; Dec. Dig. §§ 53-84.

**78.** Whalen v. Baltimore & O. R. Co. [Md.] 69 A 390. Covenant which does not touch or concern the land is personal, binds only covenantor, and can be taken advantage of only by covenantee. Id. Must be in respect to thing granted, and act covenanted must concern land or estate conveyed. Munro v. Syracuse, etc., R. Co., 128 App. Div. 388, 112 NYS 938. Covenant to maintain division fence touches and concerns land itself and, hence, may be subject of covenant running with land. Sexauer v. Wilson, 136 Iowa, 357, 113 NW 941.

**79.** Whalen v. Baltimore & O. R. Co. [Md.] 69 A 390. Where railroad company, granted right of way through a farm, covenanted to construct and maintain a siding, to stop trains for passengers going to and from farm, and to unload freight at siding for grantor, and agreement was made with owner and assigns, first two covenants ran with land but not the third. Id. Covenant running with land is annexed to freehold enhancing its value or benefiting it in some way. Munro v. Syracuse, etc., R. Co., 128 App. Div. 388, 112 NYS 938.

**80.** Sexauer v. Wilson, 136 Iowa, 357, 113 NW 941.

**81.** Sexauer v. Wilson, 136 Iowa, 357, 113 NW 941. Covenant requiring payment for use of party wall can run with land. Morris v. Burr, 59 Misc. 259, 112 NYS 243.

**Held to run:** Contract held to create an easement in a ditch with covenants running therewith and with adjoining land binding owners of ditch and their successors. Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co., 40 Colo. 467, 92 P 290. Covenants, in warranty deed, **against incumbrances and for peaceable possession.** Newman v. Sevier, 134 Ill. App. 544. Covenant **of seisin.** Sturgis v. Slocum [Iowa] 116 NW 128. **Building restrictions or covenants.** Highland Realty Co. v. Groves [Ky.] 113 SW 420; Hisey v. Eastminster Presbyterian Church, 130 Mo. App. 566, 109 SW 60. Covenants of railroad company, acquiring right of way, **to build and maintain fences and cattle passes.** Munro v. Syracuse, etc., R. Co., 128 App. Div. 388, 112 NYS 938. Covenant **not to obstruct windows and light** to prejudice of adjoining owner. O'Connor v. Bauer, 127 App. Div. 854, 111 NYS 869. A covenant **to convey** to lessees their heirs and assigns. Hollander v. Central Metal & Supply Co. [Md.] 71 A 442. Landlord's covenant **to repair.** Silberberg v. Trachtenberg, 58 Misc. 536, 109 NYS 814. Where one transfers a half interest in a fence and stipulates for himself, his heirs and assigns, to make the necessary repairs, such covenant probably runs with the land. Ready v. Schmith [Or.] 95 P 817. Agreement **to pay for use of party wall** held to run with land, covenantor expressly binding his grantees and agreeing that covenant should so run. Morris v. Burr, 59 Misc. 259, 112 NYS 243.

**Held not to run:** Promise **to pay for timber rights** held not enforceable by subsequent purchaser of land against subsequent assignees of such rights, though conveyance of timber rights recited that all covenants and agreements should run with land, especially where negotiable notes evidencing purchase price were outstanding. Jackson v. Aripeka Sawmills, 53 Fla. 578, 43 S 601. Covenant **of seisin.** Newman v. Sevier, 134 Ill. App. 544. Covenant against existing **incumbrances.** Pease v. Warner, 153 Mich. 140, 116 NW 994. Grantee's agreement to assume and pay an existing mortgage does not run with land though found in connection with covenants of seisin and against incumbrances. Clement v. Willett, 105 Minn. 267, 117 NW 491. Lessee's covenant **not to sell any other beer** than that manufactured by a certain brewing company held not to run with land but held merely an independent, unilateral and unenforcible promise. Fortune Bros. Brew. Co. v. Shields, 137 Ill. App. 77. Provision in deed that it was based on consideration in part that grantor **should never be required to grade curb or build a pavement** on street for which land was conveyed held personal to grantor so as not to relieve his grantee of remaining land from obligation to construct a sidewalk at direction of city council. City of Richmond v. Bennett, 33 Ky. L. R. 279, 109 SW 904. A deed, not signed by the grantee, conveying land in consideration and on condition that the grantee **construct a basin** on the land but containing nothing which can be construed as either a covenant with the grantor and his assigns, or a covenant by the grantee for himself and his assigns, creates no covenant running with the land. Dawson v. Western Maryland R. Co., 107 Md. 70, 68 A 301. Railroad company's covenant **to grant passes** to grantor of right of way. Munro v. Syracuse, etc., R. Co., 128 App. Div. 388, 112 NYS 938. Agreement between railroad and street railroad companies whereby latter was **to maintain street crossing** held not to run with land so as to render foreclosure purchaser of street railroad company's properties liable thereon. Evansville & S. I. Traction Co. v. Evansville Belt R. Co. [Ind. App.] 87 NE 21.

**82.** Held in view of decisions since Spencer's case, 5 Coke, 16, 1 Smith's Leading cases, that it ought not to be said that "assigns" as a technical word is or ever has been essential at common law to covenant running with land as to things not yet in

charge the land may be shown by other language in the deed [88] and is generally to be ascertained from the tenor of the instrument, the thing to be done, the period of continuance, and the like.[94] Where a contract expressly designates which of its covenants shall run with the land all others will be held not to run.[85] A covenant imposing a burden will run with the land as readily as one conferring a benefit.[86] A covenant which runs with the land is binding on both the burdened land and the person of the owner thereof [87] and favors both the benefited land and whoever shows privity of estate.[88]

(§ 4) *C. Restraints.*[89]—See 10 C. L. 1460—The rights of an owner of a specified legal estate are defined by law, and attempts to create repugnant restraints are futile,[90] but a donor may create such equitable interests as he may desire without regard to rights incidental to legal estates.[91]

Restraints on alienation are enforcible if reasonable and consistent with the estate conferred [92] and provided they do not violate the rule against perpetuities.[93]

§ 5. *Rents and charges.*[94]—See 10 C. L. 1460—Where by reason of a widow's renunciation of her husband's will she becomes the owner in fee of a portion of lands devised to others, she also becomes entitled to a corresponding portion of the rents from such lands falling due after testator's death.[95]

§ 6. *Mutual and relative rights and remedies of present and future tenants.*[96]—See 10 C. L. 1460—A life tenant is quasi trustee for the remaindermen [97] and cannot

esse. Sexauer v. Wilson, 136 Iowa, 357, 113 NW 941. That covenant related to building of a fence and word "assigns" was not used held not to preclude covenant from running with land and binding covenantor's grantee. Id.

**83, 84.** Sexauer v. Wilson, 136 Iowa, 357, 113 NW 941. Intention to charge land held fairly inferrable from promise that maintenance of fence should be perpetual. Id. Covenant held not to relate solely to something not in esse. Id.

**85.** Provision that covenants should be considered as running with land so far as relating to erection of fences, etc., held to exclude idea that covenant to grant passes should run. Munro v. Syracuse, etc., R. Co., 128 App. Div. 388, 112 NYS 938.

**86.** Obligation of ditch owners to irrigate adjoining lands. Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co., 40 Colo. 467, 92 P 290.

**87.** Covenant to furnish water for irrigation. Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co., 40 Colo. 467, 92 P 290.

**88.** Ownership of benefited land and easement to water therefor held to show privity of estate and right to enforce covenant to supply water. Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co., 40 Colo. 467, 92 P 290.

**89. Search Note:** See Deeds, Cent. Dig. §§ 469-548; Dec. Dig. §§ 144-176; Wills, Cent. Dig. §§ 1522-1579; Dec. Dig. §§ 639-668.

**90.** If a will passes legal title to a life estate, attempts to limit enjoyment or power of alienation by same instrument are void. Mattison v. Mattison [Or.] 100 P 4.

**91.** Life trust may be created in which interest of beneficiary shall not be subject to alienation by him nor liable for his debts. Mattison v. Mattison [Or.] 100 P 4. Will construed to create such trust. Id. See, also, Trusts, 10 C. L. 1907.

**92.** Restraint of alienation for reasonable time is valid. Harkness v. Lisle [Ky.] 117 SW 264. Condition against alienation to any one is void, but conditions against alienation to a specified person or his heirs are valid. Id. Prohibition against alienating or incumbering devised land during lifetime of any of devisees held unreasonable and inconsistent with fee simple devise. Id. Condition of inalienability attached to donation for pious uses is void, both as creating a tenure not provided for by code and as putting property out of commerce, and hence being contrary to public policy. Female Orphan Soc. v. Young Men's Christian Ass'n, 119 La. 278, 44 S 15. Provision against alienation held void whether devisees took fee or life estate. Seay v. Cockrell [Tex.] 115 SW 1160. Restriction preventing devisee or her heirs from selling land for 50 years, though void as an unlawful restraint, may be considered as showing testator's intention. Pratt v. Saline Valley R. Co., 130 Mo. 175, 108 SW 1099. Testator's "will and desire" that realty devised to sons should not be sold until eldest son should be 35 held equivalent to a direction precluding conveyance in violation thereof, though sons' interests were subject to their debts as provided by statute. Girdler v. Girdler [Ky.] 113 SW 835.

**93.** See Perpetuities and Accumulations, 12 C. L. 1316.

**94. Search Note:** See notes in 2 Ann. Cas. 645.

See, also, Estates, Cent. Dig. § 8; Dec. Dig. § 9; Wills, Cent. Dig. §§ 1531, 1532, 1543; Dec. Dig. §§ 645, 646, 652.

**95.** Held entitled to one-half. Keays v. Blinn, 234 Ill. 121, 84 NE 628.

**96. Search Note:** See notes in 6 C. L. 464; 66 L. R. A. 673; 2 L. R. A. (N. S.) 87, 819; 6 Id. 436; 14 Id. 185; 13 A. S. R. 78; 14 Id. 628, 630; 81 Id. 183; 113 Id. 55; 114 Id. 448; 3 Ann. Cas. 689; 6 Id. 787; 8 Id. 725, 1121.

See, also, Life Estates, Cent. Dig.; Dec. Dig.; Remainders, Cent. Dig.; Dec. Dig.; Reversions, Cent. Dig.; Dec. Dig.

**97, 98.** Small v. Hockensmith [Ala.] 48 S 541. Where life tenant took possession of

destroy or impair their rights in property not consumed in the using [98] either by unauthorized conveyances,[99] other agreements or partitions to which the remaindermen are not parties,[1] waste,[2] failure to pay taxes,[3] or otherwise wrongfully acquiring outstanding titles.[4] He may, however, acquire an outstanding title subject to the rights of the remaindermen,[5] and the latter cannot have the benefit thereof without offering to contribute their proportionate parts of the price paid.[6] The life tenant is usually entitled to the immediate possession and enjoyment of the property,[7] except in cases of trusts [8] or where the legal representative of a decedent is entitled to possession for administration purposes.[9] In Georgia a life tenant's lessee for years may remain in possession until the end of the current year, notwithstanding death of the life tenant,[10] and unless the rent has already been paid,[11] it will be apportioned between the remaindermen and the life tenant's estate.[12] The rule that

personal estate and invested it in realty, remaindermen could elect to take realty with any enhanced value in lieu of funds invested. Id. Held not barred by laches or limitations. Id.

**99.** Life tenant cannot by conveyance divest remaindermen's vested interests. Mims v. Hair, 80 S. C. 460, 61 SE 968. Life tenant, with remainder to children, held without power to convey fee without children joining or conveying their interests by separate instruments. Luigart v. Lexington Turf Club [Ky.] 113 SW 814. Widow who has life estate with power of disposition for her benefit, but subject to divestiture on remarriage, cannot defeat effect of remarriage by prior conveyance merely for purpose of cutting of remainder. Parker v. Travers [N. J. Err. & App.] 71 A 612. Unauthorized lease by life tenant giving lessee right to remove sand and gravel from shore of land held not ratified by subsequent deeds to land by life tenant and remaindermen providing they were subject to the lease and referring to its record. Potomac Dredging Co. v. Smoot [Md.] 69 A 507. Evidence insufficient to show that life tenants conveyed lands not for reinvestment, and purchaser had knowledge thereof, so as to entitle remaindermen to recover on ground that lands were conveyed in violation of will giving power to sell for reinvestment. Whitfield v. Lyon [Miss.] 46 S 545. Though life tenants had power to sell only for purposes of reinvestment, they could mortgage part of land for purposes of paying taxes where they had no other resource, so that title under mortgage held fee. Id.

**1.** In partition at instance of life tenant, remainder cannot be sold unless remaindermen are made parties. Cramton v. Rutledge [Ala.] 47 S 214. Where, under will, children held for life, with remainder to their children if they had any, neither statutory partition nor agreement among life tenants could effect interests of remaindermen not parties. Watkins v. Gilmore, 130 Ga. 797, 62 SE 32.

**2.** One who is only life tenant cannot open new mines for **minerals, or wells** for oil or gas, or lease to others for such purposes. Shulthis v. MacDougal, 162 F 331. Owner of reversion seeking to compel life tenant by mandatory injunction to keep property in repair and prevent allowance of permissive waste must show unlawful invasion of her rights irreparable and continuing in nature, that there is no adequate remedy at law, and that he cannot be compensated in damages. Gleason v. Gleason [Ind. App.] 87 NE 689. There being no attempt to declare forfeiture, proceeding was not governed by Burns' Ann. St. 1908, § 288. Id.

**3.** Could not deprive remaindermen of title by neglecting to pay taxes and having wife obtain tax title. Boon v. Root, 137 Wis. 451, 119 NW 121. Burden on those claiming under tax title to show wife acquired it in good faith. Id. **Purchaser** of a life estate, who goes into possession, cannot defeat title of remaindermen by thereafter acquiring a tax title based on a tax sale made before purchase and due to delinquency of original life tenant. Wiswell v. Simmons, 77 Kan. 622, 95 P 407. **Mortgagee** of a life estate, who is **in possession,** cannot assert against remaindermen a tax title based on taxes accruing during his occupancy. Id.

**4.** Where, with connivance of life tenant, her son purchased mortgage and foreclosed and, for purpose of vesting title in life tenant absolutely, conveyed to her, remainderman could redeem by paying amount of mortgage, less present worth of an annuity equal to annual interest on mortgage running during life tenant's expectancy. Engel v. Ladewig, 153 Mich. 8, 15 Det. Leg. N. 380, 111 NW 550.

**5.** Purchase is valid and presumed for benefit of all parties in interest. Morrison v. Roehl [Mo.] 114 SW 981.

**6.** Morrison v. Roehl [Mo.] 114 SW 981.

**7** Will construed to give life tenant right to possession as against executor. Thomas v. Owens [Ga.] 62 SE 218. Deed reserving life estate gives grantee no right to enter or cultivate during life tenancy. Sessoms v. Tayloe, 148 N. C. 369, 62 SE 424. Remainderman is not entitled to any part of estate until falling in of life estate. Buckler v. Robinson, 29 Ky. L. R. 1174, 96 SW 1110.

**8.** See Trusts, 10 C. L. 1907.

**9.** See Estates of Decedents, 11 C. L. 1275.

**10.** Under Civ. Code 1895, § 3093, a life tenant's tenant is entitled to possession until end of year on compliance with contract, notwithstanding life tenant dies during year Butt v. Story [Ga. App.] 63 SE 658.

**11.** If tenant pays year's rent to life tenant, payment is good as against remaindermen. Butt v. Story [Ga. App.] 63 SE 658. Life tenant's taking of negotiable note for year's rent and subsequent transfer thereof to a third person is equivalent to payment as between undertenant and remaindermen (Id.), but not taking and transfer of a non-negotiable note (Id.).

**12.** If life tenant does not, in law, collect year's rent and dies before expiration of year,

a devise of the fee of land carries crops growing at testator's death does not apply where devisor is only life tenant and merely exercises a power to appoint the fee.[13] After allowing emblements to the life tenant,[14] the remaindermen are entitled to the use and occupation of the land on termination of the life tenancy.[15] Statutory proceedings are often authorized for partition[16] for the purpose of selling realty in which there are several estates or interests and reinvesting the proceeds in other realty.[17]

*Possession is not adverse to remaindermen* See 10 C. L. 1462 or reversioners pending the life tenancy,[18] and limitations will not ordinarily run against them until death of the life tenant,[19] nor can they be barred by laches until that time[20] or by estoppel;[21] but, by statute, remaindermen may have the right pending the life estate to sue to quiet title or to remove a cloud therefrom,[22] and in such case limitations will run from the time such right accrues.[23]

*Improvements, taxes, incumbrances, etc.* See 10 C. L. 1463—As a rule, a life tenant must pay taxes, insurance and interest on incumbrances[24] and make ordinary re-

undertenant is entitled to possession to end of year (Butt v. Story [Ga. App.] 63 SE 658), but he is accountable to remaindermen for such proportion of rent agreed to be paid as period between death of life tenant and end of year bears to whole year (Id.).

13. Crop passed to representative as personalty. Keays v. Blinn, 137 Ill. App. 474; Keays v. Blinn, 234 Ill. 121, 84 NE 628.

14. See Emblements and Natural Products, 11 C. L. 1197.

15. Evidence insufficient to justify finding concerning value of use and occupation for part of crop year subsequent to death of life tenant. Hobson v. Huxtable, 79 Neb. 334, 116 NW 278. Remaindermen held entitled to premises after death of life tenant and to sue to set aside fraudulent tax proceeding in which life tenant had attempted to deprive them of title. Boon v. Root, 137 Wis. 451, 119 NW 121.

16. See Partition, 12 C. L. 1193.

17. Mere assignee of part of rents for life of assignor who was life tenant held not owner of a "particular estate of freehold in possession," or of a "present or vested interest," within Code Prac. § 491 and Gen. St., c. 63, authorizing sale by action of realty for reinvestment of proceeds. Kalfus v. Davie, 33 Ky. L. R. 663, 110 SW 871.

18. Webster v. Pittsburg, C. & T. R. Co., 78 Ohio St. 87, 84 NE 592. Possession of life estate held not adverse to remaindermen until after death of life tenant. Cramton v. Rutledge [Ala.] 47 S 214; Peck v. Ayres [Kan.] 100 P 283. Proper to exclude evidence of possession by life tenant's grantees having for its purpose establishment of prescription. Brinkley v. Bell [Ga.] 62 SE 67. Possession of grantee of life beneficiary held not adverse to appointee under power held by beneficiary. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139. Where estate to testator's heirs was contingent on death of life tenants without issue, and life tenants conveyed to another, no prescription could arise in favor of grantee's and against testator's heirs until after death of both life tenants. Satterfield v. Tate [Ga.] 64 SE 60.

19. Reversioners and remaindermen are not affected by statute of limitations until precedent estate has determined and their right of entry accrues. St. Vincent's Roman Catholic Congregation v. Kingston Coal Co., 221 Pa. 349, 70 A 838; Webster v. Pittsburg, C. & T. R. Co., 78 Ohio St. 87, 84 NE 592. Held not to run against remaindermen. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139; Peck v. Ayres [Kan.] 100 P 283; Bush v. Halsted, 121 App. Div. 538, 106 NYS 133. Remaindermen's interest in life estate of a surviving spouse will not support ejectment during life tenancy, and limitations will not run against such action until demise of surviving spouse. Hobson v. Huxtable, 79 Neb. 334, 116 NW 278. That title to five-sixths interest in certain land had been lost to remaindermen by limitations held not to bar recovery by them of the one-sixth which was subject to a life estate and as to which limitations did not run until life tenant's death. Schnabel v. McNeill [Tex. Civ. App.] 110 SW 558. Not estopped by participation in distribution of estate. Id. Where devise to widow amounted to only a life estate, terminable on her remarriage, and widow sold the land, limitations did not run against heirs' action to recover land from purchaser until remarriage or death of widow. Haring v. Shelton [Tex. Civ. App.] 114 SW 389.

20. Not barred from suing to reform deed held by parent on ground it gave parent only a life estate, with remainder to complainant, by failure to assert title against purchasers from parent. Teague v. Sowder [Tenn.] 114 SW 484.

21. That married woman claiming remainder failed to assert same against purchasers of land for nearly twenty-five years, though she lived within five miles of property, held no estoppel. Teague v. Sowder [Tenn.] 114 SW 484.

22. Where surviving husband took life estate in wife's property and wife's heirs took vested remainders, heirs could maintain suit to quiet title pending husband's life estate, by virtue of §§ 57, 58, 59, c. 73, Comp. St. 1907 (sections 4814-4816). Hobson v. Huxtable, 79 Neb. 334, 116 NW 278.

23. Ten years held bar to such action. Hobson v. Huxtable, 79 Neb. 334, 116 NW 278. As to remaindermen under disability, statute will not run until removal of disability (Id.), but fact that one remainderman is under disability will not toll statute as to others not within exception (Id.).

24. Duty of life tenant to pay taxes. Boon v. Root, 137 Wis. 451, 119 NW 121.

pairs.[25] Improvements made by a life tenant inure to the benefit of the remaindermen.[26] A reversion on discontinuance of public or quasi public uses for which land was conveyed does not carry with it permanent improvements made by the grantee for such uses.[27]

§ 7. *Rights and remedies between third persons and present and future tenants.*[28]—See 10 C. L. 1463—A life tenant cannot recover for the wrongful cutting of timber on the land[29] except for resulting injury to his use and enjoyment of the property.[30] Though remaindermen are not entitled to possession until expiration of the preceding estate,[31] they may sue to obtain an adjudication of their rights and interests, where adverse claims are asserted by persons in possession.[32] Where an estate is vested, subject only to contingent rights in persons yet unborn, the living owners represent the whole estate for purposes of litigation respecting it.[33] The fact that a life tenant dies shortly after a sale by him of his interest does not relieve the purchaser from the obligation of his agreement.[34] Questions pertaining to the sale and conveyance of real estate generally,[35] the competency of grantors or devisors,[36] mistake,[37] fraud or undue influence,[38] and the right to have conveyances canceled[39] or reformed,[40] are fully treated elsewhere and also what interests may be reached by creditors.[41]

Where lands are conveyed in trust, with directions to pay income to one for life with remainder over, person entitled to income is equitable tenant for life, subject to duties of life tenant, including payment of taxes and interest on incumbrances. In re Morton's Estate [N. J. Eq.] 70 A 680. Where trust estate consists in part of improved revenue producing property, and in part of unimproved property, life tenant must pay taxes on unimproved property from income derived from revenue producing property so far as it will go. Id. Will held not to set apart proceeds of sale of unimproved property for satisfaction of taxes and interest. Id. On accounting under will directing division of real and personal estate and payment of income therefrom to life beneficiaries, succession taxes were properly chargeable to principal account, and realty taxes to income account. Bishop v. Bishop [Conn.] 71 A 583. As to duty of life tenant to pay **insurance,** see 33 L. R. A. 239; 44 L. R. A. 711.

**25.** It is duty of life tenant to preserve property by making ordinary repairs (Hamilton v. Hamilton [Iowa] 115 NW 1012), and he cannot decide for himself as to necessity of resorting to corpus for purpose of obtaining money for repairs or with which to discharge existing incumbrances (Id.). Held not entitled to sell part of property or encumber same. Id.

**26.** Remaindermen occupying land with life tenant and under her held not entitled to reimbursement from the other remaindermen for permanent improvements they had placed on the land. Carter v. Carter, 234 Ill. 507, 85 NE 292.

**27.** Lot conveyed for purpose of erecting and maintaining railroad station. Young v. Oviatt, 35 Pa. Super. Ct. 603. Owner held not entitled to injunction restraining removal of building. Id.

**28. Search Note:** See notes in 4 Ann. Cas. 371; 6 Id. 145.

See, also, Life Estates, Cent. Dig.; Dec. Dig.; Remainders, Cent. Dig.; Dec. Dig.; Reversions, Cent. Dig.; Dec. Dig.

**29.** Daffin v. Zimmerman Mfg. Co. [Ala.] 48 S 109.

**30.** Held entitled to more than nominal damages, there being evidence that land was cut up and rendered less accessible. Daffin v. Zimmerman Mfg. Co. [Ala.] 48 S 109.

**31.** See ante, § 6.

**32.** Bowe v. Richmond, 33 Ky. L. R. 173, 109 SW 359.

**33.** Proceeding against life tenant and vested remainderman held to bar defendants and unborn children and next of kin. Doscher v. Wyckoff, 63 Misc. 414, 113 NYS 655. Contingent remaindermen held not necessary parties to action to enforce lien against trust property. Jailette v. Bell, 33 Ky. L. R. 159, 110 SW 298. The rights of contingent remaindermen not in esse may be finally adjudged when remaindermen in esse are made parties as representatives of the class. Hunt v. Gower, 80 S. C. 80, 61 SE 218.

**34.** Life tenant's administrator held entitled to recover price agreed on though life tenant had agreed to give a deed on receipt of price, possession having been delivered immediately and land having been sold within one year as contemplated. Ferris v. Poucher, 151 Mich. 251, 15 Det. Leg. N. 183, 115 NW 1054.

**35.** See Deeds of Conveyance, 11 C. L. 1051; Vendors and Purchasers, 10 C. L. 1942.

**36.** See Incompetency, 11 C. L. 1885; Wills, 10 C. L. 2035.

**37.** See Mistake and Accident, 12 C. L. 869.

**38.** See Fraud and Undue Influence, 11 C. L. 1583.

**39.** See Cancellation of Instruments, 11 C. L. 493. Also Vendors and Purchasers, 10 C. L. 1942.

**40.** See Reformation of Instruments, 10 C. L. 1496.

**41.** See Creditors' suit, 11 C. L. 936; Executions, 11 C. L. 1433; Attachment, 11 C. L. 315, and kindred topics.

§ 8. *Proof of title to realty.*[42] See 10 C. L. 1464—The general rules of evidence apply,[43] in addition to the principles here given and such as are more or less peculiar to particular actions involving realty.[44] Though where the parties claim through a common source of title,[45] the one who has the burden must connect himself with that source by a complete chain of transfers,[46] he need not trace his title farther back,[47] since adverse parties cannot impeach the title of a person under whom they both claim.[48] Ancient deeds are admissible without proof of executions,[49] but not mere copies or records thereof.[50] By statute, records of deeds are admissible in certain cases,[51] as where the originals are lost,[52] and parol evidence may be resorted to where it appears that deeds or records are lost or destroyed.[53] The mere fact that a person is occupying a parcel of land is not evidence of claim under any particular deed,[54] but where real estate or an interest therein is acquired by appropriation, and no paper title is in existence, proof of possession and use is prima facie evidence of title,[55] and ownership of realty for injury to which an action is brought is

**42. Search Note:** See notes in 11 C. L. 1389, 1394.

See, also, Evidence, Cent. Dig. §§ 78, 87, 106, 109, 111, 144-154, 196, 214, 239, 316, 449, 474½, 759, 788, 822-882, 1033, 1066, 1078, 1095, 1108-1120, 1136, 1178, 1219, 1220, 1276, 1277, 2171, 2192, 2457; Property, Dec. Dig. § 9; 21 A. & E. Enc. P. & P. 710.

**43.** See Evidence, 11 C. L. 1346. Under Gen. St. 1902, § 705, relative to admission of declarations of decedents in actions by representatives, declarations of deceased as to his title to land held admissible in action by devisee to recover land. Foote v. Brown [Conn.] 70 A 699. In ejectment for a strip in east half of lots 5 and 6, held not error to admit in favor of plaintiff deed from original patentee of lot 6, though there was no deed to such patentee from person who entered strip in lot 5. Sloan v. Chitwood [Mo.] 116 SW 1086.

**44.** See topics Ejectment (and Writ of Entry), 11 C. L. 1153; Quieting Title, 12 C. L. 1347; Trespass, 10 C. L. 1875; and the like.

**45.** In cases of boundary disputes between adjoining owners who have purchased from a common vendor, the vendor is common source of title as to land in dispute. San Antonio Mach. & Supply Co. v. Campbell [Tex. Civ. App.] 110 SW 770.

**46.** That defendant also introduced a deed relied on by plaintiff as a link in latter's chain back to common source held not to render unnecessary proof by plaintiff that grantors therein were either heirs, devisees, or grantors of next preceding grantee, the deed not being a link in defendant's chain. San Antonio Mach. & Supply Co. v. Campbell [Tex. Civ. App.] 110 SW 770.

**47.** Title need not be traced back of common source. Sloan v. Chitwood [Mo.] 116 SW 1086.

**48.** Defendants in action for cutting timber held to claim under plaintiff and his grantor, so that plaintiffff was not required to prove title. McKoy v. Cape Fear Lumber Co. [N. C.] 62 SE 699. Where both parties claimed title under same person, and plaintiff as heir sought to set aside defendant's deed on ground of incompetency of grantor, defendant could not attack ancestor's title or show that deed to him had not been properly attested. Gable v. Gable, 130 Ga. 689, 61 SE 595.

**49.** Held not necessary to prove identity of signors of ancient conveyance as proprietors, same being presumed. Foote v. Brown [Conn.] 70 A 699.

**50.** Rule admitting in evidence ancient deeds without proof of execution does not apply to copies or records. McCleery v. Lewis [Me.] 70 A 540.

**51.** Record of purported deed is no evidence that such deed was in fact executed and delivered when party offering such record claims as grantee or heir of grantee named in record. Rev. St. c. 84, § 125, making such records evidence, does not include such cases, but applies only to prior deeds. McCleery v. Lewis [Me.] 70 A 540.

**52.** Rule that copies of records of deeds are admissible when originals are lost applies only where it appears that there was in fact an original executed and delivered. McCleery v. Lewis [Me.] 70 A 540. If grantees or heirs cannot produce immediate deeds, they must produce evidence aliunde record that such deeds were in fact executed and delivered. Id.

**53.** Parol evidence of recognition of deed by grantor and grantee is competent on issue of its existence. Evidence of admissions, and acts of ownership, including receipt of condemnation money, held to prove existence of deeds. Vincent v. Means, 207 Mo. 709, 106 SW 8. Under Hurd's Rev. St. 1905, p. 465, c. 30, § 12, providing that an administrator's deed need not contain copy of judgment under which it was made, but making it sufficient if certain references are made, where administrator's deed in compliance with such section was offered in evidence, and records of proceedings on which it was based had been destroyed, parol evidence was adminisible to show proceedings had and that court had jurisdiction. Felix v. Caldwell, 235 Ill. 159, 85 NE 228.

**54.** McCleery v. Lewis [Me.] 70 A 540.

**55.** Held sufficient to establish title to water rights for purposes of irrigation. Bates v. Hall [Colo.] 98 P 3. Defendant who himself was compelled to resort to such evidence held not entitled to complain. Id.

prima facie established by proof of plaintiff's possession at the time of the injury and his testimony without objection that he was owner.[56] Where a decedent owns and is in possession of land at the time of his death, the title is presumed to continue in his estate.[57] A judgment may be admitted as a link in plaintiff's chain of title, though defendant was not party to the action in which it was rendered.[58] The views of previous holders of a title as to its validity cannot be considered.[59] Every presumption should be indulged against the United States where it claims title to land in the Philippine Islands for which for more than fifty years before the treaty with Spain has been occupied by the present native holder and his ancestors under claim of private ownership.[60]

§ 9. *Merger and abandonment.*[61] See 10 C. L. 1464—Merger is the annihilation of a lessor estate by union with a greater.[62] It can be affected only when the same person acquires both the legal and equitable title.[63] When a life estate and the next vested estate in remainder or reversion meet in the same person the particular estate will merge to the destruction of the contingent remainder,[64] except where the creation of the particular estate and the remainder or reversion occur at the same time and by the same instrument.[65]

*Abandonment* See 10 C. L. 1465 is a relinquishment without reference to any particular person or purpose.[66] Mere nonclaim is insufficient to raise a presumption of divestiture of a fee simple title.[67]

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**Reasonable Doubt; Recaption; Receiptors; Receipts,** see latest topical index

**RECEIVERS.**

**§ 1. Nature, Grounds, and Subjects of Receivership, 1647.** Liability for Wrongful Appointment, 1649.
**§ 2. Appointment, Qualification and Tenure of Receivers, 1649.**
A. Proceedings for Appointment and Qualifications, 1649.
B. Who May Be Appointed, 1651.
C. Tenure of Receiver, 1652.
**§ 3. Title and Rights in and Possession of the Property, 1652.**
A. Title in General, 1652.
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**§ 4. Administration and Management of the Property, 1653.**
A. Authority, Powers and Liabilities in General, 1653.
B. Payment of Claims Against Receiver or Property, 1655. Priorities in General, 1656. Debts Created by Receiver and Expenses of Admin-

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**56.** Sanitary Dist. of Chicago v. Kompare, 135 Ill. App. 312.

**57.** Tate v. Rose [Utah] 99 P 1003.

**58.** There being no claim that judgment barred or cut off any claims or equities of defendant. McMillan v. Walker, 48 Wash. 342, 93 P 520.

**59.** Letters by them indicating doubts as to whether they possessed entire legal title held inadmissible against defendant in ejectment. People v. Chicago & N. W. R. Co., 239 Ill. 42, 87 NE 946.

**60.** Carino v. Insular Government, 212 U. S. 449, 53 Law. Ed. —. Title should be recognized by insular government though no document of title has issued from Spanish crown, where, even if tried by laws of Spain and regardless of change of sovereignty, it is not clear holder is not owner of the land. Id.

**61. Search Note:** See 4 C. L. 1237; 89 A. S. R. 153; 99 Id. 153; 7 Ann. Cas. 700.

See, also, Abandonment, Cent. Dig.; Dec. Dig.; Estates, Cent. Dig. §§ 9-13; Dec. Dig. § 10; Mortgages, Cent. Dig. §§ 696, 815, 817-831; Dec. Dig. §§ 268, 295.

**62.** Life tenant's conveyance of his estate to remaindermen merges his estate in fee. Bond v. Moore, 236 Ill. 576, 86 NE 386. Where life tenant inherits remainder, merger takes place and he is entitled to whole estate. In re Wadsworth, 58 Misc. 489, 111 NYS 630.

**63.** That cotenant of equity of redemption reacquired notes and mortgage given by all tenants held not to extinguish debt by merger of both legal and equitable estates. Curry v. Lafon, 133 Mo. App. 163, 113 SW 246.

**64, 65.** Bond v. Moore, 236 Ill. 576, 86 NE 386.

**66.** See Adverse Possession, 11 C. L. 41; Easements, 11 C. L. 1140; Public Lands, 12 C. L. 1456; Mines and Minerals, 12 C. L. 851. One who has acquired good title by presumption cannot be said to have abandoned same so long as he continues to perform acts inconsistent with abandonment. Dyson v. Knight, 130 Ga. 573, 61 SE 468.

**67.** Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662.

istration, 1656. Receiver's Certificates, 1657. Counsel Fees, 1658.
C. Sales by Receivers, 1658.
D. Actions by and against Receivers, 1659.

§ 5. Accounting by Receivers, 1660.
§ 6. Compensation of Receivers, 1661.
§ 7. Liabilities and Actions on Receivership Bonds, 1661.
§ 8. Foreign and Ancillary Receivers, 1662.

*The scope of this topic* is noted below.[68]

§ 1. *Nature, grounds, and subjects of receivership.*[69]—See 10 C. L. 1465—Relief by way of receivership is equitable in its nature[70] and is controlled by and administered upon equitable principles,[71] even where it has been extended by statute,[72] unless such extension is essentially legal in its nature.[73] Receivership proceedings are ancillary in their nature,[74] the purpose of a receivership being to preserve the status quo pending litigation,[75] or to administer funds or property.[76] The exercise of the power to

**68.** Treats of receiverships generally. As to particular kinds of receiverships, see such topics as Corporations, 11 C. L. 810; Foreign Corporations, 11 C. L. 1508; Railroads, 12 C. L. 1365; Street Railways, 10 C. L. 1730; Bankruptcy, 11 C. L. 383; Supplementary Proceedings, 10 C. L. 1765; Foreclosure of Mortgages on Land, 11 C. L. 1487. As to the writ of sequestration, see Sequestration, 10 C. L. 1622.

**69. Search Note:** See notes in 4 C. L. 1239; 16 L. R. A. 603; 20 Id. 210; 5 L. R. A. (N. S.) 771; 71 A. S. R. 353; 72 Id. 29; 4 Ann. Cas. 66. See, also, Receivers, Cent. Dig. §§ 1-37; Dec. Dig. §§ 1-28; 23 A. & E. Enc. L. (2ed.) 992, 24 Id. 1, 4; 17 A. & E. Enc. P. & P. 675.

**70.** Right to appoint receiver is inherent in court of equity. Ritchie v. People's Tel. Co. [S. D.] 119 NW 990. Courts of equity have always had the power to appoint receivers. Cobe v. Guyer, 237 Ill. 516, 86 NE 1071. Proceeding for appointment of receiver for purpose of administering and distributing assets of insolvent partnership, association or corporation is one appealing to equity side of court. Wehrs v. Sullivan [Mo.] 116 SW 1104. General **statutes** concerning receiverships must be construed in the light of the settled doctrine of courts of equity respecting the powers of receivers. Marion Trust Co. v. Blish, 170 Ind. 686, 84 NE 814.

**71.** Principles in regard to bill for injunction apply also to one for receiver. Baker v. Baker [Md.] 70 A 418.

**72.** Homestead and Loan Association Act of Illinois, providing for receivers under certain circumstances, held not to be in derogation of the common law, but an extension thereof to be exercised in usual form of chancery proceeding. Cobe v. Guyer, 237 Ill. 516, 86 NE 1071. The mere fact that the general assembly may make provisions authorizing certain officials in control of certain departments of the state government to institute proceeding for the appointment of receivers under certain circumstances does not in any way change the equitable nature of the actions, but is simply an aid or supplement to the general jurisdiction, and under Missouri statute, it was not necessary for the supervisor of building and loan associations after the dissolution of a building and loan association to institute an independent suit for appointment as receiver but could secure such relief by a petition for interventions. Wehrs v. Sullivan [Mo.] 116 SW 1104.

**73.** Rev. St. 1895, art. 1465, extends rights granted by equitable practice, and to the extent of such extension the remedies are legal. Shaw v. Shaw [Tex. Civ. App.] 112 SW 124.

**74.** Under West Virginia Code, such suit cannot be maintained where only basis of equity jurisdiction is appointment of such receiver, but there must be independent equity jurisdiction. Ward v. Hotel Randolph Co. [W. Va.] 63 SE 613. There being no action for a receivership, no receiver will be appointed unless remedy is ancillary to some other ultimate equitable relief and where necessary to make that other relief effective. Benson v. Columbia Life Ins. Co., 7 Ohio N. P. (N. S.) 113.

**75.** Hammond v. Cline, 170 Ind. 452, 84 NE 827; Summers Fiber Co. v. Walker, 33 Ky. L. R. 153, 109 SW 883; Russell v. Pittsburg Life & Trust Co., 115 NYS 950. Where transfer of assets of mutual insurance company for inadequate consideration is contemplated, receiver will be appointed to take charge of property pendente lite. Russell v. Pittsburgh Life & Trust Co., 115 NYS 950. Receiver for incomplete building held proper in view of probability of protracted litigation pending which taxes and lien would pile up and building go to decay. Chicago Title & Trust Co. v. Chapman, 132 Ill. App. 55. Court has jurisdiction, under rules of equity and in view of provisions of Rev. St. § 5539, to appoint a receiver **for protection of surety** for rent which has accrued and will accrue under a lease, who further alleges that he is a stockholder of the defendant company and also a large creditor and many attachment suits have been commenced against the company in various places and others are threatened. Payne v. Stapely Co., 7 Ohio N. P. (N. S.) 361. Where there was **dispute as to ownership of property** as between two library associations, appointment of receiver without expense was proper where the property and business of the associations were not such that a loss would occur from not being used. Ladies' Library Ass'n v. Ladies' Library Ass'n [Mich.] 15 Det. Leg. N. 1150, 119 NW 1098. Prima facie owner of oil and gas in tract of land is entitled to have receiver appointed to take charge of property pending settlement of rights of all parties interested. Sulb v. A. Hochestetter Oil Co., 63 W. Va. 317, 61 SE 307. After judgment for plaintiff setting aside conveyance of land as in **fraud** of creditors, the court may appoint receiver to take charge of the land, collect

appoint a receiver is discretionary [77] and will be disturbed only for abuse,[78] but receivership is a harsh and extraordinary remedy, and a court of equity, when considering the remedy, will look to the equities of the entire case as well as the mere technical legal rights of plaintiffs,[79] and the court's discretion in the premises will never be exercised affirmatively except upon grave necessity.[80] The existence of an adequate remedy at law is always a bar to the aid of equity granting a receivership,[81] but the remedy at law must be as adequate and efficient as the appointment of a receiver.[82] The probability that the complainant will ultimately be entitled to relief is a material element for consideration by the court, and some courts hold that if ultimate success is a matter of grave doubt the appointment of a receiver should not be made.[83] The equities of the petitioner, therefore, must be clear,[84] as must also his title to the property involved [85] or his claim against the same, as that he has a lien thereon,[86] or that it constitutes a special fund to which he has a right to resort for the satisfaction of his claim; [87] but relief by way of receivership is not necessarily precluded by the failure to make out an absolutely certain case,[88] or by the mere fact that the title to the property is in dispute,[89] or because there is a defect of parties.[90] The right of recovery alone does

rents, pay proper sums chargeable against premises, and to hold balance till further order of court. O'Neill v. Kilduff [Conn.] 70 A 640. Where a son who is in business and is insolvent fraudulently transfers goods to his father to defeat judgment, but remains in possession of goods, it is proper upon sale being set aside to appoint receiver to hold property. Rankin v. Schultz [Iowa] 118 NW 383. Where, under verbal **partnership** agreement, three parties deposited $1,500 each for purposes of partnership, but one party proceeded to use fund as his own, a receiver was properly appointed. Fitzgerald v. Flynn [R. I.] 69 A 921. Receivers are sometimes appointed to collect rents pending **partition** proceedings. Baker v. Baker [Md.] 70 A 418. In a suit to determine **separate interest of married woman** in property, receiver may be appointed under the provisions of Texas statute to protect it from danger of material injury. Shaw v. Shaw [Tex. Civ. App.] 111 SW 223; Shaw v. Shaw [Tex. Civ. App.] 112 SW 124.

**76.** Where parties hold funds not in any way public and refuse to pay them out in satisfaction of claims judicially determined, receivership is proper mode to attain that end. Stern v. State Board of Dental Exam'rs, 50 Wash. 100, 96 P 693.

**77.** Bank of Meadville v. Hardy [Miss.] 48 S 731; Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 SE 307.

**78.** Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 SE 307. Upon evidence, there was no abuse of discretion in refusing to appoint receiver. Ederheimer, Stein & Co. v. Carson [Ga.] 62 SE 815.

**79.** Benson v. Columbia Life Ins. Co., 7 Ohio N. P. (N. S.) 113.

**80.** Galvin v. McConnell [Tex. Civ.. App.] 117 SW 211; Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 SE 307; Southern R. Co. v. Townsend [C. C. A.] 161 F 310. No occasion for appointment of receiver for partnership. Smith v. Brown, 50 Wash. 240, 96 P 1077. Creditor having legal claim is entitled to take usual steps to collect without being burdened with expense and delay of receivership. Galvin v. McConnell [Tex. Civ. App.] 117 SW 211.

**81.** Southern R. Co. v. Townsend [C. C. A.] 161 F 310 and cases cited. If dangers threaten from irregularities and acts constructively fraudulent, no moral turpitude being involved, and if such can be effectively prevented by some other remedy, as, for example, injunction, no receiver will be appointed. Benson v. Columbia Life Ins. Co., 7 Ohio N. P. (N. S.) 113.

**82.** Shaw v. Shaw [Tex. Civ. App.] 112 SW 124. Sequestration or attachment held inadequate to furnish full relief to married woman in matter of determination of her separate estate. Shaw v. Shaw [Tex. Civ. App.] 111 SW 223.

**83.** Hurt v. Hurt [Ala.] 47 S 260. Where allegations of neglect, mismanagement, misuse of corporate funds, etc., contained in petition, are entirely unsupported by proof, and in fact disproved, plaintiff as minority stockholder presents no case for appointment of receiver. Felix v. Kenner Canning & Packing Co. [La.] 48 S 884.

**84, 85.** Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 SE 307.

**86.** Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 SE 307. Under Kentucky Code, § 298, one having lien upon property may have receiver appointed where it is in danger of being lost or materially injured because of a failure to properly care for it. Summers Fiber Co. v. Walker, 33 Ky. L. R. 153, 109 SW 883.

**87.** Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 SE 307.

**88.** Where there is immediate necessity for preservation of the property, a receiver may be appointed, though upon a full hearing a different construction might be possible. Graham v. Consolidated Naval Stores Co. [Fla.] 48 S 743.

**89.** Fact that title to property is involved will not preclude equitable relief when facts are not in dispute and question of title is merely one of law. Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 SE 307.

**90.** Hurt v. Hurt [Ala.] 47 S 260.

not entitle one to a receivership.[91] The rights of the parties to the litigation are in no way affected by the appointment of a receiver.[92]

*Liability for wrongful appointment.* See 10 C. L. 1468—Where the appointment of a receiver is wrongfully made, the party at whose instance the wrong was done must bear the expense.[93] Liability on receivership bonds is treated in a subsequent section.[94]

§ 2. *Appointment, qualification and tenure of receivers. A. Proceedings for appointment and qualifications.*[95] See 10 C. L. 1468—A receiver may be appointed on the filing of the bill or at any time after, during the pendency of the suit,[96] but not prior to the institution of the suit.[97] The bill must lay a foundation for the appointment by stating facts which show the necessity and propriety thereof.[98] Notice to the defendant is usually required,[99] and, in order to authorize an appointment without such notice, a strong case must be made,[1] including a showing of good cause for such procedure.[2] If, by statute, notice is made jurisdictional, it must state the time and place of the hearing, and the hearing must be had at that time and place.[3] The application may be granted without delay where all the parties

**91.** Decedent's estate consisted mostly of interest in partnership. In an action by a daughter for an accounting, receiver not necessary, especially where defendant was ingaged in going business and was apparently solvent. Joseph v. Herzig, 115 NYS 330.

**92.** Chicago Title & Trust Co. v. Chapman, 132 Ill. App. 55.

**93.** Wills Valley Min. Mfg. Co. v. Galloway [Ala.] 47 S. 141.

**94.** See post, § 7.

**95. Search Note:** See 6 C. L. 1253; 23 L. R. A. 545; 11 L. R. A. (N. S) 960; 15 Id. 657; 72 A. S. R. 29; 11 Ann. Cas. 980.

See, also, Receivers, Cent. Dig. §§ 38-113; Dec. Dig. §§ 29-64; 23 A. & E. Enc. L. (2ed.) 1002, 1126; 24 Id. 7; 17 A. & E. Enc. P. & P. 696.

**96.** Benjamin v. Staples [Miss.] 47 S 425.

**97.** Appointment prior to the service of the summons in proceedings is void. Marshall v. Matson [Ind.] 86 NE 339. Appointment in advance of filing bill is void. Bank of Meadville v. Hardy [Miss.] 48 S 731. Where settlement of estate is pending in probate court and suit is brought for accounting and discovery in chancery court and **cross bill** is filed asking that receiver be appointed, effect of original bill is to withdraw administration of estate from probate court and to give chancery court jurisdiction to proceed with the cause so that the appointment of receiver would not be premature. Hurt v. Hurt [Ala.] 47 S 260.

**98.** Suit v. Hochstetter Oil Co., 63 W. Va. 317, 61 SE 307. An allegation that a defendant is probably insolvent is equivalent to and probably stronger than the statutory phrase **"in imminent danger of becoming insolvent,"** and is sufficient to sustain an order appointing a receiver. Payne v. Stapely Co., 7 Ohio N. P. (N. S.) 361.

**99.** Marshall v. Matson [Ind.] 86 NE 339. Temporary receiver for a corporation in dissolution proceedings should not be appointed without notice and a hearing to those representing the majority interests. In re Manoca Temple Ass'n, 128 App. Div. 796, 113 NYS 172.

**1.** Hurt v. Hurt [Ala.] 47 S 260. When petition does not fully disclose facts necessary to inform court of real situation, such as right of petitioner to relief, and of necessity or reason for proceeding without notice to others to be affected, especially if it shows some right of possession of property, etc., in another, court ought not to proceed ex parte. Baker v. Baker [Md.] 70 A 418. Statutory authority to appoint temporary receiver for sequestration of property of domestic corporation does not justify such appointment as matter of right upon bare complaint alone. This relief should not be awarded until after final judgment except where it appears essential to protection of plaintiff's rights. Federman v. Standard Churn Mfg. Co., 128 App. Div. 493, 112 NYS 834. Appointment of partnership receiver without notice **held unwarranted** by facts. Lawrence Lumber Co. v. Lyon & Co. [Miss.] 47 S 849.

**2.** Marshall v. Matson [Ind.] 86 NE 339. Burns' Ann. St. 1908, § 1288, prohibits appointment without notice except for cause. Id.

**What is sufficient cause** will be determined in the light of precedent and adjudged cases. Marshall v. Matson [Ind.] 86 NE 339. Appointment without notice held error where it did not appear that a temporary restraining order or other method might not be effective and that defendants were beyond jurisdiction, or not to be found, nor any emergency making appointment without notice necessary to prevent waste, etc., nor that notice would jeopardize getting possession of property, nor no great necessity for immediate action. Id. Sufficient cause shown for appointment of receiver of bank. Benjamin v. Staples [Miss.] 47 S 425. Where, on cross bill petitioning that executor give bond or receiver be appointed, after hearing, the executor was ordered to give bond but failed so to do and was insolvent, it was proper to appoint receiver without notice to him. Hurt v. Hurt [Ala.] 47 S 260.

**3.** Notice stated hearing to be Nov. 3. Receiver was appointed Nov. 2. Appointment void. Gibson v. Sexson [Neb.] 118 NW 77.

agree [4] or are in court.[5] The burden is on the applicant to show clear title to the right claimed, or a very strong probability of the genuineness of his claim and the ultimate establishment thereof.[6] Where the hearing is without notice, the evidence is limited to affidavits filed,[7] which, however, include the complaint if properly verified.[8] Where it does not appear but that one receiver can discharge the office satisfactorily, only one will be appointed.[9] The power of a chancellor to correct, change or annul an interlocutory decree appointing a receiver exists unimpaired as long as the cause remains open and within the jurisdiction of the court,[10] but in Louisiana the court cannot ex proprio motu annul its order appointing a receiver where it had jurisdiction to make such order and all the proceedings were taken contradictorily up to and included the order of appointment.[11] A refusal to set aside an original order of appointment on a motion to vacate after a trial amendment alleging new facts is in affect a reappointment of the receiver.[12] One intervening with full knowledge of all the proceedings is precluded from asserting that fraud appears upon the face of the record,[13] and, a fortiori, he cannot assert fraud to which he is a party.[14] An appointment by a disqualified judge cannot be validated by a nunc pro tunc order by a qualified judge.[15] Knowledge of the disqualification of the judge making the appointment is essential to a waiver of objection to the defect.[16] On an appeal from an order on a petition for the appointment of a receiver which refers to the proceedings had, and where the bill and exhibits show the title of the petitioners, the court may consider all the proceedings in the cause in passing upon the petition.[17] Where the appointment of a receiver is made at a regular term of court, it will be presumed on appeal that its action was warranted by the facts.[18] Where an objection to a motion for a receiver is treated as a demurrer to the petition in the cause, all well pleaded allegations of such petition will be taken as true in examining the merits of the judgment complained of.[19] A final entry of judgment appointing a receiver, made in vacation time and without jurisdiction, will be reversed,[20] but, if there was no other error and large public interests are involved, direction will be given that the premature judgment be entered in term time if the case at that time is not materially changed.[21] The appointment of a receiver cannot be collaterally attacked [22] unless the appointment is void on the face of the record.[23] The recital of jurisdictional facts in the order appointing a receiver is prima

**4.** Receivership proceedings were in fact proceedings of firm. Southwell v. Church [Tex. Civ. App.] 111 SW 969. Consenting partner cannot object to appointment of partnership receiver. Id.

**5.** Baker v. Baker [Md.] 70 A 418. In creditor's suit prior to securing lien where defendant appears and interposes no objection, equity has jurisdiction to appoint receiver. Union Trust Co. v. Southern Sawmills & Lumber Co. [C. C. A.] 166 F 193.

**6.** Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 SE 307. It is error to appoint receiver when equities are fairly denied by answer and no other testimony is offered. Id.

**7, 8.** Marshall v. Matson [Ind.] 86 NE 339.

**9.** Central Trust Co. v. Third Ave. R. Co., 159 F 959.

**10.** Hurt v. Hurt [Ala.] 47 S 260. Court appointing may remove or discharge a receiver at any stage of litigation and appoint another in his place. Wehrs v. Sullivan [Mo.] 116 SW 1104.

**11.** Nelson & Co. v. Adolphe Rocquet & Co. [La.] 48 S 756.

**12.** Southwell v. Church [Tex. Civ. App.] 111 SW 969.

**13, 14.** Dilley v. Jasper Lumber Co. [Tex. Civ. App.] 114 SW 878.

**15, 16.** Davis Colliery Co. v. Charlevoix Sugar Co. [Mich.] 15 Det. Leg. N. 974, 118 NW 929.

**17.** Baker v. Baker [Md.] 70 A 418.

**18.** City of Middlesborough v. Coal & Iron Bank, 33 Ky. L. R. 961, 111 SW 335.

**19.** Ingram v. Cincinnati, etc., R. Co., 32 Ky. L. R. 849, 107 SW 239.

**20, 21.** Booth v. State [Ga.] 63 SE 502.

**22.** Mandamus held collateral attack. Ex parte Hurt [Ala.] 47 S 264. Appeal from interlocutory appointment is not collateral attack. Marshall v. Matson [Ind.] 86 NE 339.

**23.** Notice of hearing for Nov. 3d. Receiver appointed Nov. 2d. Gibson v. Sexson [Neb.] 118 NW 77. Where receiver was properly appointed ex parte and property was in hands of the court, through its receiver, appointment was not void and was not subject to collateral attack. Benjamin v. Staples [Miss.] 47 S 425. Where bill prayed for appointment of receiver but did not ask for process, and a receiver was appointed who took possession of property, such appointment was not

facie evidence of the existence of such facts.[24] A writ of prohibition will not run against a receiver whose appointment is void, there being ample remedies for redress should he attempt to act under the void appointment.[25] It is held in Louisiana that the jurisdiction of the state court in receivership proceedings is ousted by the filing of a petition in bankuptcy,[26] except to the extent that the retention of jurisdiction by the state court may be essential to the preservation and enforcement of vested rights of creditors against the property;[27] but in Texas it seems to be held, broadly, that the state court may retain jurisdiction where it first acquires it.[28] A federal court which has appointed a receiver will not release the property to receivers appointed by a state court except upon a proper showing.[29]

*Bonds.* See 10 C. L. 1471—A nonresident receiver's bond should contain a clause requiring him to appear when required, either on notice to him within or without the state or on notice to counsel.[30]

(§ 2) *B. Who may be appointed.*[31]—See 10 C. L. 1471—A receiver is an officer of the court and under its control, and should be disinterested, unbiased and impartial,[32] and where any breach of propriety in any such respect occurs, it is the duty of the court to remove the receiver and substitute another;[33] but the appointment of an interested party is not void,[34] and must be seasonably objected to if it is desired to have such appointee removed.[35] In any case, objections to the personnel of the receiver must be made in proper time.[36] In some cases it is not only proper but desirable to have an interested party appointed.[37] A trustee of property may be appointed receiver thereof.[38] Where the interests of several parties are adverse, separate receivers may be necessary.[39]

void and could not be attacked collaterally by one not defendant in receivership proceedings even though bill was demurrable for want of parties. Id.

**24.** Notice required by statute presumed to have been given. Starr v. Bankers' Union of the World [Neb.] 116 NW 61.

**25.** Dunbar v. Bourland [Ark.] 114 SW 467.

**26.** All funds, except such as are subject to lien, in receiver's hands, to be turned over to trustee. I. Trager Co. v. Cavaroc Co. [La.] 48 S 949.

**27.** Where receiver was appointed for concern occupying leased premises and lessor had asserted his lien against fund in receiver's hands, the lessor's lien and rights are his property and not that of lessee surrendered in bankruptcy proceedings, and bankrupt act does not divest state court of jurisdiction or confer upon trustee right to take away fund affected by lien until claim secured has been adjudicated and satisfied therefrom. I. Trager Co. v. Cavaroc Co. [La.] 48 S 949.

**28.** Where receiver has been appointed in partnership proceedings in state court, such court properly refused to allow a receiver subsequently appointed in bankruptcy proceedings to intervene. Southwell v. Church [Tex. Civ. App.] 111 SW 969.

**29.** Federal court having appointed receivers for two properties operated together will not direct properties to be turned over to temporary receivers appointed by state courts in separate suits brought against each property until the suits have progressed so far as to determine whether or not complainant in state court will prevail and to disclose precisely what situation is upon which federal court is asked to act. Pennsylvania Steel Co. v. New York City R. Co., 160 F 224.

**30.** Lotte Bros. v. American Silk Co., 159 F 499.

**31. Search Note:** See Receivers, Cent. Dig. §§ 73-76; Dec. Dig. § 48; 23 A. & E. Enc. L. (2ed.) 1032; 24 Id. 8; 17 A. & E. Enc. P. & P. 758.

**32.** Hilliard v. Sterlingworth R. Supply Co., 221 Pa. 503, 70 A 819. Party to controversy or one interested in litigation will not ordinarily be appointed receiver. Gen. St. 1901, § 4702. Reneau v. Lawless [Kan.] 100 P 479.

**33.** Hilliard v. Sterlingworth R. Supply Co., 221 Pa. 503, 70 A 819.

**34, 35.** Reneau v. Lawless [Kan.] 100 P 479.

**36.** Objections three years after appointment held too late. Patterson v. Northern Trust Co., 132 Ill. App. 208.

**37.** See Corporations, 11 C. L. 810. Where one of main purposes of a receivership is to enable all parties in interest to save a business concern, it is desirable that at least one receiver shall be chosen from management because of his familiarity with affairs. Lotte Bros. v. American Silk Co., 159 F 499.

**38.** Patterson v. Northern Trust Co., 132 Ill. App. 208.

**39.** Where receivers were appointed in creditors' suit against lessee of street railway to which suit lessor was made party, and subsequently foreclosure suits against property were instituted by bondholders of lessor company who were entitled to their own receiver, it was essential that separate

(§ 2) *C. Tenure of receiver.*[40] See 6 C. L. 1255—The court in its discretion may remove its receiver and substitute another in his stead,[41] and where any breach of propriety in respect to disinterestedness or impartiality occurs, it is the duty of the court to remove the receiver and substitute another;[42] but in all cases the court must be guided by sound discretion,[43] and no definite rule can be laid down,[44] and hence the action of the court in this connection is not ordinarily subject to review.[45] The court has power to discharge a temporary receiver and to restore the property to its owners without appointing a permanent one where the circumstances warrant.[46] A receiver should be discharged upon the payment of the debt for the enforcement of which he was appointed.[47] One seeking to procure the removal of a receiver must become a party to the original litigation.[48]

§ 3. *Title and rights in and possession of the property. A. Title in general.*[49] See 10 C. L. 1471—Title to property is not actually changed by the appointment of a receiver, the effect being rather to place the property in the hands of the receiver for the benefit of those ultimately entitled to it,[50] and not to change title.[51] The receiver's trust embraces only such property as is in controversy in the suit[52] and in the possession or under the control of the party whose property is sought to be sequestrated,[53] and the receiver takes only such title as such party had.[54] The trust reposed in a receiver by the transfer of property to him will be presumed to have lapsed after a long period of time where no steps are taken meanwhile in regard thereto.[55]

(§ 3) *B. Rights as between receivers, claimants or lienors.*[56] See 10 C. L. 1472—The claim of one to property taken from him by a receiver is properly presented in the proceeding in which the receiver is appointed.[57] The Massachusetts statute providing for the dissolution of an attachment by the appointment of a receiver by any court of competent jurisdiction in the state does not apply to receivers appointed by the federal courts.[58]

receivers be appointed to represent two roads, as assets of lessee were practically ready for distribution and there would be an accounting between companies. Pennsylvania Steel Co. v. New York City R. Co., 165 F 463.

**40. Search Note:** See Receivers, Cent. Dig. §§ 97-113; Dec. Dig. §§ 58-64; 23 A. & E. Enc. L. (2ed.) 1128; 24 Id. 41; 17 A. & E. Enc. P. & P. 760, 847.

**41.** Wehrs v. Sullivan [Mo.] 116 SW 1104.

**42, 43, 44.** Hilliard v. Sterlingworth R. Supply Co., 221 Pa. 503, 70 A 819.

**45.** Order removing a receiver is not appealable. In re Irish [Minn.] 116 NW 656. Where lower court refused to remove a receiver who was interested and used his position for his own gain, the discretion of lower court on appeal was held to have been properly exercised. Hilliard v. Sterlingworth R. Supply Co., 221 Pa. 503, 70 A 819.

**46.** People v. Hamilton Bank of New York, 57 Misc. 345, 108 NYS 461.

**47.** Patterson v. Northern Trust Co., 132 Ill. App. 208.

**48.** Some who were parties and some who were not joined in the petition and it was dismissed. Hearn v. Clare [Ga.] 62 SE 187.

**49. Search Note:** See note in 1 Ann. Cas. 296.

See, also, Receivers, Cent. Dig. §§ 114-149; Dec. Dig. §§ 65-80; 23 A. & E. Enc. L. (2ed.) 1041; 24 Id. 19, 26; 17 A. & E. Enc. P. & P. 834.

**50.** Sullivan Timber Co. v. Black [Ala.] 48 S 870; Hammond v. Cline, 170 Ind. 452, 84 NE 827.

**51.** Sullivan Timber Co. v. Black [Ala.] 48 S 870; Flynn v. American Banking & Trust Co. [Me.] 69 A 771.

**Title to negotiable note** held vested in receiver, at least for purpose of endorsement and transfer to owner of equitable title. Gibson v. Gutru [Neb.] 120 NW 201.

**52.** Hammon v. Cline, 170 Ind. 452, 84 NE 827; Sult v. A. Hochstetter Oil Co., 63 W. Va. 317, 61 SE 307.

**53.** Receiver of company held not entitled to bank deposit to company's credit but not subject to its check. Indiana L. & T. Co. v. Lincoln Trust Co., 207 Mo. 370, 105 SW 737.

**54.** Claims. Marion Trust Co. v. Blish, 170 Ind. 686, 85 NE 344.

**55.** Where a receiver, appointed thirty-six years after death of his predecessor, attempted to convey land conveyed to such predecessor, such conveyance was held void, as trust in receiver was presumed to have ceased because of the lapse of time. Pooler v. Sammet, 58 Misc. 469, 111 NYS 658.

**56. Search Note:** See notes in 51 L. R. A. 146; 2 L. R. A. (N. S.) 1013; 3 Id. 1073.

See, also, Receivers, Cent. Dig. §§ 137-148; Dec. Dig. §§ 76-79; 23 A. & E. Enc. L. (2ed.) 1043, 1086.

**57.** Strain v. Palmer [C. C. A.] 159 F 628.

**58.** Later provisions regulating disposition of property so as to protect such creditor in case of dismissal or discharge of

(§ 3) *C. Possession and restitution.*[59]—See 10 C. L. 1473—The right of possession as between the parties is not changed by the appointment of a receiver,[60] possession by the receiver being, in legal contemplation, possession by the court,[61] and such possession cannot be interfered with except by order of the court.[62] The legal custody is not changed by the removal of one receiver and appointing another in his stead.[63] Where on appeal it is determined that the appointment of a receiver was wrongful, the receiver will be ordered to restore the property.[64] Where a receiver is appointed and authorized by the court to lease land, it is proper upon his discharge to direct him to turn over all the property in his hands except such lands as he has so leased.[65] The receiver's right to receive the property must be affirmatively established before its delivery to him is ordered.[66] It is not contempt to refuse to obey an order requiring the payment of money to a receiver, unless such refusal is willful.[67]

§ 4. *Administration and management of the property. A. Authority, powers and liabilities in general.*[68]—See 10 C. L. 1473—A receiver represents all parties concerned[69] and must act in good faith and not use his position to take advantage of either party,[70] and it is the duty of the court to see that he does so act;[71] but, since the possession of the receiver is the possession of the court,[72] the owner is not liable for injuries caused by the negligence of the receiver in managing the property,[73] and for the same reason any loss resulting from the receiver's mismanagement must fall upon the owner,[74] whose remedy is against the receiver.[75] Ordinarily, a receiver acting within his powers is not personally liable upon his contracts,[76] but he may so act as to bind himself, and, if he acts beyond his powers, he necessarily assumes individual responsibility.[77] Whether a receiver has assumed personal liability is to be

receiver could not be enforced as against federal court, and for this reason statute held to apply only to state courts. Borden v. Enterprise Transp. & Transit Co., 198 Mass. 590, 85 NE 110.

**59. Search Note:** See Receivers, Cent. Dig. §§ 127-135; Dec. Dig. §§ 71-74.

**60.** Sullivan Timber Co. v. Black [Ala.] 48 S 870.

**61.** McKinnon-Young Co. v. Stockton, 55 Fla. 708, 46 S 87; Wehrs v. Sullivan [Mo.] 116 SW 1104. Receiver's possession is not possession of party for whose property receiver was appointed. Henning v. Sampsell, 236 Ill. 375, 86 NE 274.

**62.** Rule not changed by statute allowing suits by and against receivers. Paine v. Carpenter [Tex. Civ. App.] 111 SW 430. Property in hands of receiver is not subject to execution from another court. Grosscup v. German Savings & Loan Soc., 162 F 947.

**63.** Wehrs v. Sullivan [Mo.] 116 SW 1104.

**64.** Wills Valley Min. & Mfg. Co. v. Galloway [Ala.] 47 S 141.

**65.** Shaw v. Shaw [Tex. Civ. App.] 112 SW 124.

**66.** One cannot be ordered to pay money merely because he himself may have no right thereto. Burnham v. Barrett, 137 Ill. App. 119.

**67.** Burnham v. Barrett, 137 Ill. App. 119.

**68. Search Note:** See notes in 8 A. S. R. 49; 15 Id. 79; 83 Id. 72; 3 Ann. Cas. 116.

See, also, Receivers, Cent. Dig. §§ 150-380; Dec. Dig. §§ 81-189; 23 A. & E. Enc. L. (2ed.) 1056, 1062; 24 Id. 13; 17 A. & E. Enc. P. & P. 766.

**69.** Marion Trust Co. v. Bilsh, 170 Ind. 686, 84 NE 814. Creditors. Bulst v. Williams, 81 S. C. 495, 62 SE 859. That receiver is appointed at instance of creditor is a mere incident and does not affect the interests or rights of the parties. Id.

**70.** Metropolitan Trust Co. v. North Carolina Lumber Co., 162 F 170. Receiver appointed to hold property during litigation could not use the knowledge obtained by him as receiver to buy in paramount title and set it up against person who turns out to be the true owner on conclusion of litigation. Halman v. Burlen, 198 Mass. 494, 85 NE 167.

**71.** Where injured railroad conductor, who had received contract of employment during good behavior in return for release of all claims, was peremptorily dismissed by receivers, it was held that such act was unwarranted. Farmers' L. & T. Co. v. Central R. & Banking Co., 166 F 333.

**72.** See ante, § 3c.

**73.** Henning v. Sampsell, 236 Ill. 375, 86 NE 274.

**74.** Flynn v. American Banking & Trust Co. [Me.] 69 A 771.

**75.** Where property is converted and afterwards placed in hands of a receiver, damages for the conversion cannot be calculated beyond the time when the receiver takes possession. Aylesbury Mercantile Co. v. Fitch [Okl.] 99 P 1089.

**76.** In re Kalb & Berger Mfg. Co. [C. C. A.] 165 F 895.

**77.** In re Kalb & Berger Mfg. Co. [C. C. A.] 165 F 895. Personal undertaking by receiver binds him personally. Wolf v. Lovering [C. C. A.] 159 F 91. Any loss by administration of estate outside legal functions of receiver should be borne by re-

determined from the facts and circumstances of the case.[78] The presumption is that where a receiver is dealing with receivership property he binds himself officially and not personally.[79] In any case, contractual liability of a receiver must be predicated either upon a contract made in his official capacity or upon a contract which by legal construction is held to have the quality of personal responsibility.[80] Receivers are only bound to act in good faith and exercise the diligence of a man of ordinary prudence and ability with reference to his own affairs.[81] A receiver, however, may be personally liable for damages for wrong done,[82] and if he has been discharged, it is not necessary to set aside the discharge and open up the former proceedings.[83] The liabilities of a receiver are fully discharged where he has duly administered the assets of the estate.[84]

A receiver's powers are limited by the terms of the order of his appointment[85] or by the statute authorizing such appointment.[86] He is an officer of the court, dealing with the property under orders of the court,[87] but is bound to conform to all laws and regulations in the operation of the property to the same extent as other parties.[88] Receivers of a federal court need not, however, obey the requirements of a state commission where such obedience will involve a loss and the power of the commission to make such requirements is uncertain.[89] The court may adopt the recommendations of a receiver as to the method of dealing with the property,[90] and where a contract by receivers has been suggested and passed upon by the court, the matter will not be reopened against objection unless for strong reasons shown.[91] In case of successive receivers, each succeeding one has all the powers and duties of his predecessors.[92] A receiver may retain counsel if necessary without previous authority from the court.[93] He has power also to indorse a note of the insolvent concern to a third party,[94] and, generally, has power to make bona fide compromises of claims in favor of the estate.[95] Receivers of a system composed of leased properties may operate under the leases for a reasonable period to determine the advisability of continuing without incurring any liability for rental under the lease,[96] but if

ceiver, as when receiver continued temporarily to operate company without court's order. Villere v. New Orleans Pure Milk Co., 122 La. 717, 48 S 162. Such loss should be deducted from his commissions. Id.

78. Facts held sufficient to show an agreement in his individual capacity. Wolf v. Lovering [C. C. A.] 159 F 91.

79. Not sufficient in case at hand to take from the jury. Wolf v. Lovering [C. C. A.] 159 F 91.

80. Evidence held to fail to show any contractual liability either officially or personally. Hebard v. Tilley, 134 Ill. App. 1.

81. State v. Germania Bank, 106 Minn. 164, 118 NW 683. In those cases involving legal questions which make it necessary for a receiver to take the advice of counsel and competent counsel is employed and his advice followed in good faith, the receiver is not liable for loss resulting therefrom. Failure to sue stockholders until expiration of their liability. Id.

82. Bought up claims for nominal sum by false representations as to the condition of the estate. State v. Merchants' Bank [Neb.] 120 NW 157. Evidence against a receiver for fraud and conspiracy considered and held insufficient. State v. Merchants' Bank [Neb.] 116 NW 667.

83. State v. Merchants' Bank [Neb.] 120 NW 157.

84. Flynn v. American Banking & Trust Co. [Me.] 69 A 771.

85, 86. Lockport Felt Co. v. United Box Board & Paper Co. [N. J. Eq.] 70 A 980.

87. McKinnon-Young Co. v. Stockton, 55 Fla. 708, 46 S 87. Cannot make any contract effectual against property without lawful authority or ratification by court. Lazear v. Ohio Valley Steel Foundry Co. [W. Va.] 63 SE 772; Metropolitan Trust Co. v. North Carolina Lumber Co., 162 F 170.

88. Robinson v. Harmon [Mich.] 16 Det. Leg. N. 713, 117 NW 664.

89. State public service commission required the receivers and an independent company to establish through routes and put in force a joint rate of fare by use of free transfers. Pennsylvania Steel Co. v. New York City R. Co., 165 F 470.

90. In re Forty-Second Street, etc., R. Co., 160 F 226.

91. Morton Trust Co. v. Metropolitan St. R. Co., 165 F 493.

92. McKinnon-Young Co. v. Stockton, 55 Fla. 708, 46 S 87.

93. Villere v. New Orleans Pure Milk Co., 122 La. 717, 48 S 162.

94. Gibson v. Gutru [Neb.] 120 NW 201.

95. Brown v. Allebach, 166 F 488.

96, 97. Morton Trust Co. v. Metropolitan St. R. Co., 165 F 489.

they decide not to operate and to cancel the lease, they should account for the net receipts.[97] Courts should not continue the operation of private concerns beyond the protection and preservation of property for the creditors,[98] and the authority of a receiver to so continue will not be implied.[99] On the final discharge of a receiver, he ceases to be a representative of the court,[1] and, furthermore, receivership proceedings being in rem, only one administration can be had with respect to the same property.[2]

(§ 4) *B. Payment of claims against receiver or property.*[3] See 10 C. L. 1474—A receiver has no discretion, generally speaking, as to the application of funds which are in his hands subject to the receivership, their disposal being entirely subject to the direction of the court,[4] but, where an interlocutory decree gives a receiver no authority to pay debts, the court has power after the payment of debts to enter an order nunc pro tunc to permit the receiver to pay debts,[5] imposing terms if necessary,[6] but the court will not, on a motion for such an order, pass upon the validity of the claims.[7] It is no objection to a claim presented in the receivership proceedings that it is a purely legal claim and that the cross bill by which it was brought forward was not germane to the original bill.[8] Where a large number of tort claims have been filed, it is desirable that something be done to facilitate their liquidation,[9] and this may most conveniently be done by dividing them into groups and appointing additional special masters to undertake the work of liquidating such of them as may not have been already liquidated by trial and verdict before they are called for hearing.[10] Where suit is brought by one creditor in behalf of all to distribute assets, it is unnecessary that other creditors who have filed their claims and are proving them before a special master should formally intervene.[11] Where a creditor is guilty of laches in filing a claim, he may be allowed to file the same but not to share in a dividend about to be declared.[12] A provision in a decree reserving jurisdiction after

98. Cronan v. Kootenai County Dist. Court [Idaho] 96 P 768.

99. Order appointing receiver with power to "administer its affairs for best interests of all parties" held not sufficient. Villere v. New Orleans Pure Milk Co., 122 La. 717, 48 S 162.

1. Interstate Trust & Banking Co. v. Dierks Lumber & Coal Co., 133 Mo. App. 35, 113 SW 1.

2. Buist v. Williams, 81 S. C. 495, 62 SE 859.

3. **Search Note:** See 71 A. S. R. 352; 7 Ann. Cas. 585.

See, also, Receivers, Cent. Dig. §§ 257-316; Dec. Dig. §§ 147-163; 23 A. & E. Enc. L. (2ed.) 1071, 1117; 24 Id. 27, 38.

4. Receiver cannot pay out any money which has come into his hands by virtue of his office without being authorized by order of court. Sullivan Timber Co. v. Black [Ala.] 48 S 870. No receiver can compromise claims and with avails of such compromise pay creditor until authorized by court to declare a dividend, and hence transaction was invalid whereby receiver agreed to compromise claim against A if he would assume debt due from receivership to B, the enforcement of which agreement would amount to a payment by receiver. Buffalo Forge Co. v. Columbus & Hocking Clay Const. Co., 112 NYS 460. Consent order that party should hold certain funds until further order of court held not to constitute him a receiver thereof so as to render him in **contempt** for refusing subsequently to turn over such funds, where they were found to be such party's own property. Struckmeyer v. People, 133 Ill. App. 336.

5. Kliger v. Rosenfeld, 114 NYS 1006.

6. Where receiver made unauthorized payments, on motion for amendment of decree nunc pro tunc to permit payments to be made and directing referee of accounts to take proof of all payments made, and plaintiff objected to some of accounts as fraudulent and that he was not now able to produce evidence which he had at hearing before a former referee, it was held that receiver would not be permitted to take advantage of his failure to procure enabling order before paying claims and motion would only be granted on stipulation by receiver to assume burden of proving validity of claims and that evidence produced at former hearing might be read from transcripts, etc. Kliger v. Rosenfeld, 114 NYS 1006.

7. Kliger v. Rosenfeld, 114 NYS 1006.

8. Midland Tel. Co. v. National Tel. News Co., 236 Ill. 476, 86 NE 107.

9. Pennsylvania Steel Co. v. New York City R. Co., 161 F 784.

10. Claims divided into those to recover statutory penalties for failure to give transfers and into those based on negligence and other torts. Pennsylvania Steel Co. v. New York City R. Co., 161 F 784.

11. American Hay Co. v. Dry Dock, etc., R. Co., 165 F 486.

12. Whelan v. Enterprise Transp. Co., 166 F 138.

confirmation of sale that all claims not presented within a certain time shall be barred, does not include claims already before the court.[13] Claims should be presented separately, although all of the same kind.[14] A federal court will not permit an execution issued by a state court to be levied upon property in the hands of its receivers where they have in good faith taken an appeal.[15] The fact that one is related by kinship to a receiver does not necessarily preclude him from purchasing claims against the estate.[16] A receiver cannot appeal from an allowance made by a court in favor of a claimant.[17] Notice of the hearing of an application by a receiver for instructions will ordinarily be given to the parties interested.[18]

*Priorities in general.* See 10 C. L. 1474—Existing securities and liens are unaffected by a receivership,[19] and unsecured creditors have no interest in property subject to a lien until the debt secured thereby is paid in full;[20] but a lienor may lose his priority by intervening for the allowance of his claim in the receivership proceedings.[21] In the case of a secured claim, the appointment of a receiver does not stop the running of interest stipulated for so far as payable out of the security,[22] but interest is payable out of the general fund only up to the time of the receivership, unless a surplus remains after the payment of all debts and expenses, when interest should be paid in full.[23] Tort claims for personal injuries are not entitled to priority.[24]

*Debts created by receiver and expenses of administration.* See 10 C. L. 1475—The assets going to the beneficiaries are the net assets after paying the expenses of the trust,[25] and the priority of such charges and expenses may be decreed by the court,[26] and their payment may be enforced by retention of the property until payment;[27] but these preferred claims may themselves be inferior to already existing liens,[28] and

13. Southern R. Co. v. Townsend [C. C. A.] 161 F 310.

14. Party as attorney appeared for several hundred persons making one claim. Pennsylvania Steel Co. v. New York City R. Co., 165 F 458.

15. Pennsylvania Steel Co. v. New York City R. Co., 165 F 471.

16. Brother of receiver held at liberty to buy up claims against receivership where there is no suggestion that receiver was interested with him in purchase. L. Luderbach Plumbing Co. v. Its Creditors, 121 La. 371, 46 S 359.

17. Sullivan Timber Co. v. Black [Ala.] 48 S 870.

18. Street railroad receivership. Pennsylvania Steel Co. v. New York City R. Co., 160 F 221.

19. Under the Arkansas statute providing for the dissolution of attachments upon the appointment of a receiver, the lien of a levy of execution made before the receiver's appointment is not affected. McGuire & Co. v. Barnhill [Ark.] 115 SW 1144.

20. First Nat. Bank v. J. I. Campbell Co. [Tex. Civ. App.] 114 SW 887.

21. Claim of owner of receiver's certificate allowed preference to mortgage lien on specific property sold. Dilley v. Jasper Lumber Co. [Tex. Civ. App.] 114 SW 878.

22, 23. First Nat. Bank v. J. I. Campbell Co. [Tex. Civ. App.] 114 SW 887.

24. Tort claims accruing prior to receivership rank with general unsecured claims and will be so classified. Pennsylvania Steel Co. v. New York City R. Co., 165 F 457. Claims for injuries and damages will not be paid prior to any mortgage, rental or fixed charges. Pennsylvania Steel Co. v. New York City R. Co., 165 F 467.

25. Buist v. Williams, 81 S. C. 495, 62 SE 859.

26. Equity has the power to direct receiver to care for, protect and preserve property and decree charges and expenses therefor as preferred liens. Pennsylvania Steel Co. v. New York City R. Co., 165 F 455. Court may reserve right to impose lien upon property itself for any obligations incurred by court in its operation and also for expenses of court proceeding. Pennsylvania Steel Co. v. New York City R. Co., 165 F 463. Under North Carolina statute giving priority to judgments for labor or injuries received over mortgages, judgments obtained for labor may be proved and given priority over a prior mortgage indebtedness, and decree adjudging amount of the claim will be held in equity equivalent to a judgment. Union Trust Co. v. Southern Sawmills & Lumber Co. [C. C. A.] 166 F 193.

27. Where a street railway system was placed in receiver's hands at request of creditor and with consent of its lessor and lessor bondholders and operated by them until taken over by receivers representing bondholders in foreclosure proceedings, all indebtedness incurred and all damages sustained by reason of the operation of the property by court will be secured or paid before the court parts with the property, and it is immaterial to the creditor which receiver was operating road when his damage or indebtedness was incurred. Pennsylvania Steel Co. v. New York City R. Co., 165 F 463.

28. Security given by West Virginia code to seller who records notice of reservation of title is, in case of goods sold to a receiver for construction work, subject to

the claims of persons not parties to the proceedings of the time of the expenditures cannot be subordinated thereto.[29] Aside from quasi public corporations,[30] courts have no authority generally to direct the receiver to carry on the business of the insolvent and charge the expense as a preferred lien over existing prior liens.[31] There is, however, one circumstance which will justify the court in displacing prior liens, and that it where money is required, not for the purpose of operating the business, but for the purpose of saving the property from destruction.[32] The displacement of liens upon incumbered property should under any circumstances be sparingly done.[33] A receiver has no authority merely by virtue of his office to borrow money by the issue of any evidence of indebtedness by which shall be a lien on the property.[34] Certificates issued in payment of debts incurred prior to receivership cannot be made a first lien, preferred to mortgage indebtedness.[35] A court has no jurisdiction to issue receivers' certificates which are a lien on lands in another state.[36] The party procuring the appointment of a receiver must pay the costs of the receivership where he himself procures the receiver's discharge,[37] and when the appointment of a receiver is determined to be void,[38] or when the fund proves insufficient, it has been held that a court, in the exercise of its equity powers, may compel the party who procured the receiver to be appointed to pay into court a sum sufficient to meet the expenses of the receivership,[39] but the discretion of a court of equity does not authorize it to require one party, and the sureties on his cost bond, to pay to the other, under the name of costs, items paid from the fund for services and expenses in administering a fund properly in court, nor any other items not within the federal fee bill act.[40] A receiver is entitled to charge for expenses incident to his administration.[41]

*Receiver's certificates.* See 10 C. L. 1476—The lien and priority of receiver's certificates have already been considered.[42] A receiver's certificate is not a negotiable instrument,[43] but it is an assignable chose in action.[44] Where a loan by the issue of

prior lien of creditors and holders of receiver's certificates properly authorized, where sale price is insufficient to pay holders of certificates, court will not attempt to adjust alleged equities of sellers. Lazear v. Ohio Valley Steel Foundry Co. [W. Va.] 63 SE 772. Decree appointing receiver with authority to issue certificates and to complete construction of plant will not be construed as implying authority to purchase material on credit with reservation of title in seller, as provided by statute, as security for purchase price so as to endanger lien of certificate holders. Id.

**29.** Expenditures for betterments made by receiver of sawmill before bondholders were before court cannot be made lien on corpus of property prior to that of bondholders. Union Trust Co. v. Southern Sawmills & Lumber Co. [C. C. A.] 166 F 193.

**30.** See Corporations, 11 C. L. 810. See, also, topics dealing with particular public service corporations, such as Railroads, 10 C. L. 1365; Street Railways, 10 C. L. 1730.

**31.** Union Trust Co. v. Southern Sawmills & Lumber Co. [C. C. A.] 166 F 193; Lockport Felt Co. v. United Box, Board & Paper Co. [N. J. Eq.] 70 A 980; Cronan v. Kootenai County Dist. Ct. [Idaho] 96 P 768; Bernard v. Union Trust Co. [C. C. A.] 159 F 620.

**32.** Certificates might be issued to save foreclosure. Lockport Felt Co. v. United Box Board & Paper Co. [N. J. Eq.] 70 A 980. Court of bankruptcy has power to authorize receiver to borrow money and issue certificates therefor and conduct business for purpose of preserving assets. In re Resteln, 162 F 986.

**33.** Union Trust Co. v. Southern Sawmills & Lumber Co. [C. C. A.] 166 F 193.

**34.** Lockport Felt Co. v. United Box Board & Paper Co. [N. J. Eq.] 70 A 980.

**35.** Bernard v. Union Trust Co. [C. C. A.] 159 F 620; Union Trust Co. v. Southern Sawmills & Lumber Co. [C. C. A.] 166 F 193.

**36.** Lockport Felt Co. v. United Box Board & Paper Co. [N. J. Eq.] 70 A 980.

**37.** Wife in action to determine her separate interest in property requested appointment of receiver and his subsequent discharge, and husband's interest could not be charged with any part of expense. Shaw v. Shaw [Tex. Civ. App.] 112 SW 124.

**38, 39.** McIntosh v. Ward [C. C. A.] 159 F 66.

**40.** Rev. St. §§ 823, 983. McIntosh v. Ward [C. C. A.] 159 F 66.

**41.** Employment of stenographer by consent was proper expense for allowance. Sullivan Timber Co. v. Black [Ala.] 48 S 870. Premium on bond proper expense charge. Id.

**42.** See ante, this section and subsection, subd. Debts Created by Receiver and Expenses of Administration.

**43.** Bernard v. Union Trust Co. [C. C. A.] 159 F 620. Receivers' certificate of indebtedness, which is non-negotiable, is subject to all equities existing against it in hands

certificates for a certain sum is authorized, but the receiver issues only a part thereof, borrowing the balance without issuing certificates, the persons making the latter loans are entitled to share on the same basis as the certificate holders.[45] The rights of certificate holders are vested to the extent that courts cannot divest them of their lien.[46]

*Counsel fees.* See 10 C. L. 1478—The fees of the attorney filing the complaint will be paid from the funds realized for the creditors before distribution,[47] but creditors generally cannot have their counsel fees paid from the assets.[48] The question of the allowance of counsel fees is in the first instance solely for the court which appointed the receiver.[49] Such fees must be reasonable.[50] Counsel fees are allowed as part of the receiver's compensation [51] unless the employment was not authorized or ratified.[52] Where a receiver employs his law partner as his counsel, he himself will not be allowed fees for his services in assisting such counsel.[53] Only parties substantially interested in the assets will be heard on the question of the allowance of counsel fees out of the fund in court.[54] The court is not bound to refer the matter of counsel fees to a master.[55]

(§ 4) *C. Sales by receivers.*[56]—See 10 C. L. 1477—Judicial sales generally are treated elsewhere.[57] After sale under order of court, confirmation after notice, and payment of the purchase money, the title to the property vests in the purchaser.[58] Objections to a sale should be made when it comes before the court for confirmation.[59] Where a sale is made free of all claims, claimants who, though having notice, fail to asset their claims in a proper and timely manner, cannot thereafter assert them.[60] A surety on the bond of a receiver appointed in vendor's lien proceedings is responsible for a proper accounting as to the purchase price received by the receiver for purchase-money bonds sold.[61] A foreign receiver may sue to enforce a sale of property already in his possession at the time of the sale.[62]

of original owner when transferred to an innocent holder. McCarthy v. Crawford, 238 Ill. 38, 86 NE 750, rvg. 141 Ill. App. 276.

**44.** Certificate issued as evidence of a pre-existing debt. McCarthy v. Crawford, 238 Ill. 38, 86 NE 750, rvg. 141 Ill. App. 276. Where non-negotiable certificate of indebtedness contains form for assignment and the custom and intention is clearly to have the same so assignable, it may be assigned by execution of such form as affectively as in case of certificates of stock. Id. Assignment of a receiver's certificate of indebtedness entitles the assignee to share in the distribution of assets to the same extent as his assignor and to compel **registration of transfer** to him. Id.

**45.** In re Restein, 162 F 986.

**46.** Lazear v. Ohio Valley Steel Foundry Co. [ W. Va.] 63 SE 772.

**47, 48.** Buist v. Williams, 81 S. C. 495, 62 SE 859.

**49.** In court appointing ancillary receiver, only counsel fees covering services in such proceedings can be recovered, as consideration and allowance of fees for other services should be had and made in court of original jurisdiction. Bowker v. Haight & Freese Co., 161 F 655.

**50.** Counsel fees considered and held reasonable. Miers v. Columbia Mut. Bldg., etc., Ass'n, 166 F 781.

**51, 52.** Sullivan Timber Co. v. Black [Ala.] 48 S 870.

**53.** Jones v. Gardner [Tex. Civ. App.] 112 SW 826.

**54.** Hopelessly insolvent corporation not entitled to be heard on appeal. Haight & Freese Co. v. Weiss [C. C. A.] 165 F 430.

**55.** Haight & Freese Co. v. Weiss [C. C. A.] 165 F 430.

**56. Search Note:** See notes in 10 C. L. 1477. See, also, Receivers, Cent. Dig. §§ 224-256; Dec. Dig. §§ 130-146; 23 A. & E. Enc. L. (2ed.) 1080; 17 A. & E. Enc. P. & P. 832.

**57.** See Judicial Sales, 12 C. L. 452.

**58.** Dilley v. Jaspers Lumber Co., [Tex. Civ. App.] 114 SW 878.

**59.** Where there was no objection but an acquiescence by later applying for allowance of a claim out of proceeds, subsequent motion to vacate was properly denied. Dilley v. Jasper Lumber Co. [Tex. Civ. App.] 114 SW 878.

**60.** Where street railroad was sold at receiver's sale free of all claims, the claims of abutter for damage due to their estates from its operation and construction were lost where they had been notified of the sale but made no application to intervene to claim damages for depreciation. Hutchinson v. International & G. N. R. Co. [Tex. Civ. App.] 111 SW 1101.

**61.** Bowman v. Liskey, 108 Va. 678 62 SE 942. Surety on bond of receiver in vendor's lien proceedings may compel accounting by purchaser of bonds from such receiver where part of purchase price was paid on understanding that he was to receive it back in payment of personal indebtedness of receiver. Id.

**62.** Interstate Trust & Banking Co. v.

(§ 4) *D. Actions by and against receivers.*[63]—See 10 C. L.1478—The general rule is to hear and determine all rights of action and demands against a receiver by petition in the original cause in which he was appointed, without remitting the parties to an independent suit,[64] and it is a matter entirely within the discretion of the court whether or not it will permit an independent suit against its receiver,[65] or, in the case of a receiver appointed in a federal court, whether or not it will require such receiver to submit to the demands of state courts or commissions.[66] The discretion of a court with regard to suits against its receiver is regulated, however, by fixed rules, and if a petition for leave to bring an independent suit discloses a case where it should be granted, it is the duty of the court to do so,[67] and statutes in some jurisdictions provide that a receiver may be sued without leave of court.[68] The failure of the complaint to allege leave of court does not render it demurrable,[69] the effect of such failure being operative, not upon the suit itself, but upon the complainant, as putting him in contempt of court.[70] Where a right of action accrues before the appointment of a receiver, no leave to sue is necessary, the action being against the company and the receivers coming in to defend,[71] and if judgment is obtained, it should be certified to the court having jurisdiction of the receivership for payment.[72] Generally, also, the receiver makes application to the appointing court for leave to sue,[73] unless he has been appointed with authority to sue [74] or is authorized by statute so to do.[75] After his discharge, a receiver cannot sue or be sued as the representative of the estate,[76] but in some jurisdictions, by statute, where a receiver is

Dierk's Lumber & Coal Co., 133 Mo. App. 35, 113 SW 1.

**63. Search Note:** See notes in 26 L. R. A. 218; 13 L. R. A. (N. S.) 709; 6 A. S. R. 185; 8 Id. 49; 71 Id. 356; 74 Id. 285; 94 Id. 54; 7 Ann. Cas. 44.

See, also, Receivers, Cent. Dig. §§ 317-380; Dec. Dig. §§ 164-189; 23 A. & E. Enc. L. (2ed.) 1073, 1122; 24 Id. 20; 17 A. & E. Enc. P. & P. 770.

**64.** Claims for damages and to impress preferential lien on property of the insolvent. De Forrest v. Coffey [Cal.] 98 P 27. Upon intervention in the original cause, a trial by jury upon issues may be had and the trial proceed as in any ordinary action. Id.

**65.** De Forrest v. Coffey [Cal.] 98 P 27; Stenbom v. Brown-Corliss Engine Co., 137 Wis. 564, 119 NW 308. Receiver cannot be sued without leave of the court appointing. Prather Engineering Co. v. Detroit, F. & S. R. Co., 152 Mich. 582, 15 Det. Leg. N. 280, 116 NW 376. Orders in reference to bringing suit will be severed only for abuse of such discretion. Stenbom v. Brown-Corliss Engine Co., 137 Wis. 564, 119 NW 308.

**66.** Receivers instructed to appear at hearing before public service commission of New York, as they might conclude to bring matter to state court, and in order to do so effectively it might be necessary for them to be represented. In re Metropolitan St. R. Co., 166 F 1006.

**67.** De Forest v. Coffey [Cal.] 98 P 27.

**68.** All cases where there is cause of action of any kind. Paine v. Carpenter [Tex. Civ. App.] 111 SW 430. Under 24 Stat. 554, c. 373, §§ 2, 3, however, a receiver of a corporation appointed by the federal court may be sued in the state court without first obtaining leave of the federal court. Peterson v. Baker [Kan.] 97 P 373.

**69, 70.** Di Chiara v. Southerland, 115 NYS 622.

**71, 72.** In re Seaboard Air Line R. Co., 166 F 376.

**73.** Permission will be granted receiver to foreclose railroad first mortgage in federal court where there has been four month's default of interest and other conditions existing making it duty of trustee to foreclose. Massey v. Camden & T. R. Co. [N. J. Eq.] 71 A 241. Upon appointment of a receiver for insolvent stock corporation, he may be authorized to sue for unpaid stock subscriptions. Marion Trust Co. v. Blish, 170 Ind. 686, 84 NE 814. Receiver held not to have authority without leave of appointing court, to become party to mortgage foreclosure by filing exceptions to master's report therein. Metropolitan Trust Co. v. North Carolina Trust Co., 162 F 170.

**74.** May bring action of replevin. Littlefield v. Maine Cent. R. Co. [Me.] 71 A 657.

**75.** Van Schaick v. Mackin, 129 App. Div. 335, 113 NYS 408; McKeag v. Pirie, 134 Ill. App. 652.

**76.** Interstate Trust & Banking Co. v. Dierks Lumber & Coal Co., 133 Mo. App. 35, 113 SW 1. Where after commencement of action for personal injuries against receivers they were discharged on condition that all debts should be paid and owner of property was substituted as sole defendant, but the latter having failed to meet conditions one of the receivers was reappointed and made defendant in his new capacity, no judgment could be rendered against his former coreceivers in absence of supplemental proceedings raising point that conditional discharge was inoperative by reason of default in performance of conditions. Lee v. Powell Bros. & Sanders Co., 122 La. 639, 48 S 134.

discharged during the pendency of a suit commenced by him, the effect is not to compel an abatement of the suit,[77] but pending actions may also be saved by the terms of the order of discharge.[78] Where an action is commenced against a receiver prior to bankruptcy proceedings, the state court is not deprived of its jurisdiction, and the receiver may continue to act notwithstanding the action of the bankruptcy court.[79] A receiver may be restrained by the appointing court from prosecuting an action in another state.[80] A receiver appointed by bill in equity in the federal court does not thereby become entitled to maintain a bill in equity against one not a party to recover on a purely legal demand, his remedy being an action at law in the federal circuit court.[81] Where a receiver has been appointed in a federal court, judgment cannot be obtained against the insolvent in a state court without notice to the receiver.[82] A creditor cannot ordinarily intervene in an action against a receiver,[83] but the federal circuit court has discretion in a suit by a receiver on behalf of the creditors to allow an amendment substituting as plaintiff a creditor suing in behalf of himself and other creditors.[84] It is the general rule that in the ordinary receivership the receiver can only sue in the right of the insolvent, subject to all the equities available against the latter,[85] except that the receiver so far represents the general creditors that he may avoid transactions in fraud of their rights.[86] The claims of estates, though in the hands of the same receivers, must be prosecuted independently.[87] A judgment against receivers should be made payable in due course of administration of the receivership.[88] A receiver must give bonds as provided for by statute as with other litigants in case of appeal or injunction.[89]

§ 5. *Accounting by receivers.*[90]—See 10 C. L. 1481—The court has a large discretion in the allowance of receiver's accounts,[91] but it is customary to subject accounts of receivers to the scrutiny of a referee before passing upon them when large sums have to be accounted for,[92] especially in the event of objections.[93] Where on an accounting it appears that the receiver has paid claims without authority and the court enters a decree nunc pro tunc authorizing their payment, it may further direct the referee appointed to pass on the accounts and to take proofs of all payments made by the receiver.[94] Conversion or wrongful expenditure by a receiver is a contempt.[95]

77. Interstate Trust & Banking Co. v. Dierks Lumber & Coal Co., 133 Mo. App. 35, 113 SW 1.

78. Where receiver appointed by federal court is sued in state court, discharge by the federal court which provides for a continuance of the suit in name of the receiver is not a dismissal of the suit in the state court. Peterson v. Baker [Kan.] 97 P 373. Court may reserve jurisdiction over pending actions and may thereafter appoint special receiver to retake sufficient property to satisfy judgments therein. Southern R. Co. v. Townsend [C. C. A.] 161 F 310.

79. Springer v. Ayer, 50 Wash. 642, 97 P 774.

80. Guaranty Trust Co. v. Edison United Phonograph Co., 128 App. Div. 591, 112 NYS 929.

81. Whelan v. Enterprise Transp. Co., 164 F 95.

82. Hollister v. Vermont Bldg. Co. [Iowa] 119 NW 626.

83. Receiver represents creditor. Springer v. Ayer, 50 Wash. 642, 97 P 774.

84. Buist v. Williams, 81 S. C. 495, 62 SE 859.

85, 86. Marion Trust Co. v. Blish, 170 Ind. 686, 84 NE 814.

87. Central Trust Co. v. Third Ave. R. Co., 165 F 473.

88. West Chicago St. R. Co. v. Muttschall, 131 Ill. App. 639, afd. Eckels v. Muttschall, 230 Ill. 462, 82 NE 872.

89. Paine v. Carpenter [Tex. Civ. App.] 111 SW 430.

90. **Search Note:** See notes in 5 Ann. Cas. 208.

See, also, Receivers, Cent. Dig. §§ 381-386, 402-408; Dec. Dig. §§ 190-194, 201-204; 17 A. & E. Enc. P. & P. 836.

91. Discretion in allowing accounts of receiver, where disbursements and expenses were supported by evidence, not disturbed. Hulings v. Jones, 63 W. Va. 696, 60 SE 874.

92. People v. Oriental Bank, 129 App. Div. 865, 114 NYS 440.

93. Under New York statute, receiver's account, upon exceptions filed by creditor, may be referred to referee for hearing. In re Home Book Co., 60 Misc. 560, 112 NYS 1012.

94. Kliger v. Rosenfeld, 114 NYS 1006.

95. Where receiver has wrongfully converted or expended money in his hands and is proceeded against in cause in which he is appointed for contempt because of a failure to comply with an order to pay, inability to pay resulting from the wrongful

§ 6. *Compensation of receivers.*[96] See 10 C. L. 1481—It is in order on the accounting and discharge of receivers for their compensation and expenses to be fixed and ordered paid out of the assets before they are turned over.[97] Whether any amount should be allowed,[98] and, if so, the amount thereof, are within the discretion of the court,[99] and the exercise of such discretion will not be disturbed except for abuse.[1] A receiver is entitled to a reasonable compensation for his services and no more.[2] There is no fixed rule for determining what is reasonable and proper compensation, but custom has in some jurisdictions settled upon five per cent. as a reasonable and ordinarily fair allowance,[3] and to justify the award of a larger sum the reasons therefor should affirmatively appear.[4] Compensation out of the estate should not be denied because the appointment was unauthorized, where the receiver was actually appointed and in good faith performed his duties as receiver.[5] A receiver should not be allowed compensation for services in different capacities.[6] Where no objection is offered to the allowance of compensation, it is within the discretion of the court to refuse to reopen the case and hear oral testimony, or send the matter to a master.[7] Evidence as to the value of the receiver's services must be offered in proper time.[8] An order fixing the amount of the fee of a receiver is an interlocutory judgment, binding on all parties and appealable [9] by parties interested therein.[10] An order of removal does not necessarily adjudicate the receiver's claim,[11] and where it purports to do so it is appealable, notwithstanding that it is otherwise unappealable.[12]

§ 7. *Liabilities and actions on receivership bonds.*[13] See 10 C. L. 1483—Where the

act does not present a valid excuse, and the receiver may be imprisoned for contempt. People v. Zimmer, 238 Ill. 607, 87 NE 845.

**96. Search Note:** See Receivers, Cent. Dig. §§ 387-401; Dec. Dig. §§ 195-200; 23 A. & E. Enc. L. (2ed.) 1102; 24 Id. 25; 17 A. & E. Enc. P. & P. 840.

**97.** People v. Knickerbocker Trust Co., 127 App. Div. 215, 111 NYS 2.

**98.** Sullivan Timber Co. v. Black [Ala.] 48 S 870.

**99.** Whether in form of periodical payments or in form of commission. Sullivan Timber Co. v. Black [Ala.] 48 S 870. Allowance of extra attorney's fees over amount authorized to be incurred by receiver in ordinary cause of his duties is within discretion of court. State v. Germania Bank, 103 Minn. 129, 114 NW 651.

**1.** Sullivan Timber Co. v. Black [Ala.] 48 S 870. Wilder v. Co-Operative Distilling & Rectifying Co., 136 Ill. App. 359. Allowance of commissions to a receiver. Talbot v. Tyson, 147 N. C. 273, 60 SE 1125.

**2.** Compensation held adequate. Goodman v. Wilder, 234 Ill. 362, 84 NE 1025; People v. Knickerbocker Trust Co., 127 App. Div. 215, 111 NYS 2. Where receiver turned over $40,000 after paying debts to same amount, but did not operate business and his management did not interfere with his regular affairs, court would not say that $2,500 was inadequate for receiver's services there being dispute as to value thereof. Wilson v. Murphy's Adm'r, 33 Ky. L. R. 716, 110 SW 893.

**3, 4.** Calhoun v. Dragon Motor Co., 166 F 980.

**5.** Sullivan Timber Co. v. Black [Ala.] 48 S 870. Receivers are not, as a matter of law, deprived of any compensation because order appointing them was vacated, provided cause is not want of jurisdiction. People v. Oriental Bank, 129 App. Div. 865, 114 NYS 440. In Alabama allowance rests in sound discretion of court where appointment was unwarranted and unauthorized. Sullivan Timber Co. v. Black [Ala.] 48 S 870. Where, in enforcing tax lien, a receiver was appointed and it was later determined that part of property was not subject to such lien, **appointment held not void,** and receiver was entitled to payment for services and expenses in regard to such piece of property. City of Middlesboro v. Coal & Iron Bank, 33 Ky. L. R. 469, 110 SW 355.

**6.** Claim of receiver for compensation as president of the corporation after dissolution. Sullivan Timber Co. v. Black [Ala.] 48 S 870.

**7.** No evidence of value of services except papers in case were offered, and court thereupon allowed certain sum which was not objected to by other parties. Goodman v. Wilder, 234 Ill. 362, 84 NE 1025.

**8.** Where receiver submitted question of compensation upon his reports and petitions, without evidence other than his own estimates, it was too late after chancellor's award to offer evidence as to value of services. Wilder v. Co-Operative Distilling & Rectifying Co., 136 Ill. App. 359.

**9.** In re Burguieres Planting Co., 122 La. 602, 48 S 121.

**10.** Where a receiver was twice appointed, on a judgment fixing his fees after his final accounting, the third party at whose instance and cost he had first been appointed was an interested party and might appeal therefrom. In re Burguieres Planting Co., 122 La. 602, 48 S 121.

**11, 12.** In re Irish [Minn.] 116 NW 656.

**13. Search Note:** See notes in 15 L. R. A.

bond is conditioned upon the payment of all moneys as directed by the court, the court's direction is conclusive as to the amount payable and the receiver's liability therefor.[14] Where a complainant is compelled to give a bond to pay any damages sustained by the appointment of the receiver, persons so damaged have a right of action on the bond regardless of whom the costs in the vacating suit are taxed against.[15]

§ 8. *Foreign and ancillary receivers.*[16] See 10 C. L. 1483—A foreign receiver should execute a sufficient bond to insure the safety of funds in the state.[17] In appointing an ancillary receiver, provision will be made for the protection of domestic creditors.[18] Where the law as to the allowance of claims differs in the jurisdiction appointing the ancillary receiver from that appointing the primary receiver, claims filed with the ancillary receiver, when proved, will be remitted to the court of primary juridiction for allowance or rejection.[19] A foreign receiver will not be refused recognition as a suitor in the courts of the foreign state, even if a claim of one of its citizens is injuriously affected, if the receiver prosecutes solely for a party who is also a citizen of the state,[20] and he may always sue with respect to transactions concerning property already reduced to possession.[21]

## RECEIVING STOLEN GOODS.

§ 1. Nature and Elements; Other Crimes Distinguished, 1662. | § 2. Indictment and Prosecution, 1663.

*The scope of this topic* is noted below.[22]

§ 1. *Nature and elements; other crimes distinguished.*[23] See 10 C. L. 1484—Receiving stolen goods knowing,[24] at the time they are received,[25] or believing [26] that they were stolen, and with felonious intent to deprive the owner of their possession,[27] constitutes this offense. It is independent of the crime of theft,[28] and the offense

262; 16 Id. 90; 46 Id. 201; 59 Id. 673; 63 Id. 228; 120 A. S. R. 277.

See, also, Receivers, Cent. Dig. §§ 422-427; Dec. Dig. §§ 212-218; 23 A. & E. Enc. L. (2ed.) 1096, 1114; 24 Id. 20; 17 A. & E. Enc. P. & P. 852,

14. Conclusive upon sureties. State v. Abbott, 63 W. Va. 189, 61 SE 369.

15. Sullivan Timber Co. v. Black [Ala.] 48 S 870.

16. **Search Note:** See notes in 22 L. R. A. 52; 4 L. R. A. (N. S.) 824; 5 Ann. Cas. 570.

See, also, Receivers, Cent. Dig. §§ 409-421; Dec. Dig. §§ 205-211; 23 A. & E. Enc. L. (2ed.) 1109; 24 Id. 26.

17. Harris v. Hibbard [N. J. Eq.] 71 A 737.

18. Decree appointing a receiver in another state as an ancillary receiver in Massachusetts should provide that assets in Massachusetts should not be tranferred by the ancillary receiver to himself as receiver in the other state until provision had been made for attaching creditors as provided by statute. Thornley v. J. C. Walsh Co., 200 Mass. 179, 86 NE 355.

19. Claim for rent not yet accrued provable in New York but not in Massachusetts. Whelan v. Enterprise Transp. Co., 166 F 138.

20. Harris v. Hibbard [N. J. Eq.] 71 A. 787.

21. Suit for price of property sold by him. Interstate Trust & Banking Co. v. Disrks Lumber & Coal Co., 133 Mo. App. 35, 113 SW 1.

22. **Includes** all matters peculiar to the criminal offense. **Excludes** accessory after the fact of larceny (see Larceny, 12 C. L. 567).

23. **Search Note:** See notes in 7 Ann. Cas. 350.

See, also, Receiving Stolen Goods, Cent. Dig. §§ 1-8; Dec. Dig. §§ 1-6; 24 A. & E. Enc. L. (2ed.) 43, 44.

24. Territory v. West [N. M.] 99 P 343. Knowledge essential. Murray v. State, 4 Ga. App. 450, 61 SE 741. Facts to put on inquiry insufficient. State v. Daniels, 80 S. C. 368, 61 SE 1073; State v. Rountree, 80 S. C. 387, 61 SE 1072; State v. Pirkey [S. D.] 118 NW 1042.

25. State v. Rountree, 80 S. C. 387, 61 SE 1072.

26. Though no actual positive knowledge. State v. Rountree, 80 S. C. 387, 61 SE 1072. Standard of sufficiency of facts to induce belief is personal. State v. Denny [N. D.] 117 NW 869.

27. Intent to derive gain or profit. Convicted though received to return to owner for reward. State v. Denny [N. D.] 117 NW 869.

28. Trial without reference to that of thief. People v. Feinberg, 237 Ill. 348, 86 NE 584. Thief not accomplice. State v. Shapiro [Mo.] 115 SW 1022; State v. Gordon, 105 Minn. 217, 117 NW 483; People v. Feinberg, 237 Ill. 348, 86 NE 584.

of receiving does not merge in that of being accessory before the fact.[29] If the receiving is pursuant to a participation in the larceny, the receiver is guilty of larceny.[30]

§ 2. *Indictment and prosecution. Indictment.*[31]—See 10 C. L. 1484—The information must allege guilty knowledge by the receiver,[32] describe the property stolen,[33] and name the owner,[34] but the consideration need not be stated.[35] All acts constituting a single offense may be conjunctively charged,[36] and while receiving stolen goods and larceny are distinct offenses,[37] they are not inconsistent.[38]

*Evidence.*See 10 C. L. 1484—The burden is on the state to show all the elements of the offense,[39] as that the goods were stolen as charged and were received with guilty knowledge,[40] but identity of the thief need not be proven,[41] and proof of value merely, in diminution of sentence, is a matter of defense.[42] Variance between indictment and testimony of prosecuting witness is not necessarily fatal to conviction.[43] Only the best evidence obtainable may be used,[44] but guilty knowledge may be shown by circumstantial evidence,[45] such as similar related transactions,[46] or inadequacy of consideration,[47] and the jury may consider all evidence tending to show a systematic purpose.[48] Neither the thief nor the receiver is an accomplice of the other, but their offenses are distinct.[49] The conviction [50] or acquittal [51] of the alleged thief is not conclusive of the theft and does not affect the proof.

*Instructions.*See 10 C. L. 1485—An instruction is erroneous which authorizes a conviction for receiving goods of a different description [52] or having a different owner

**29.** People v. Feinberg, 237 Ill. 348, 86 NE 584.

**30.** Clerk consenting to larceny of employer's goods and receiving part of the stolen property. Bowmer v. State [Tex. Cr. App.] 116 SW 798.

**31. Search Note:** See notes in 6 Ann. Cas. 916.

See, also, Receiving Stolen Goods, Cent. Dig. §§ 9-23; Dec. Dig. §§ 7-10; 24 A. & E. Enc. L. (2ed.) 50; 17 A. & E. Enc. P. & P. 887.

**32.** Sanford v. State, 4 Ga. App. 449, 61 SE 741.

**33.** When charged with stealing copper, cannot be convicted of stealing brass. State v. Shapiro [Mo.] 115 SW 1022.

**34.** May be either general, special, or any joint owner. Bryan v. State [Tex. Cr. App.] 111 SW 1035. Error to name minor son of owner. Id.

**35.** Gist of offense is buying or receiving with guilty knowledge. "Upon any consideration" synonymous with "any motive," and may be omitted. State v. Pirkey [S. D.] 118 NW 1042.

**36.** Charge that defendant bought, received, and took stolen property into his possession, not defective as charging two offenses. Sufficiency illustrated. State v. Pirkey [S. D.] 118 NW 1042.

**37.** May be convicted as accessory before fact to larceny and of receiving same goods. People v. Feinberg, 237 Ill. 348, 86 NE 584.

**38.** Charged together. State v. Rountree, 80 S. C. 387, 61 SE 1072.

**39.** Proof of proper description, theft, and guilty knowledge essential. State v. Gordon, 105 Minn. 217, 117 NW 483.

**40.** Insufficient for not showing accused received stolen horses from B, or that B had stolen them and at place alleged. Bryan v. State [Tex. Cr. App.] 111 SW 1035. Scienter must be proven. Sanford v. State, 4 Ga. App. 449, 61 SE 741.

**41.** State v. Denny [N. D.] 117 NW 869. Immaterial, surplusage if in information. State v. Pirkey [S. D.] 118 NW 1042.

**42.** Presumed from quantity. State v. Dixon [N. C.] 62 SE 615.

**43.** In description of goods, but other witnesses supported the indictment. State v. Shapiro [Mo.] 115 SW 1022.

**44.** Sufficient foundation not laid to admit copy of letter. State v. Denny [N. D.] 117 NW 869. Nonexpert witness cannot give opinion or conclusion. Id. Unsigned bill of sale, if denied, is inadmissible. State v. Pirkey [S. D.] 118 NW 1042.

**45.** Jury may presume accused as having had such knowledge and belief as a reasonable minded man in like circumstances. State v. Gordon, 105 Minn. 217, 117 NW 483. Yet test is a personal one. State v. Denny [N. D.] 117 NW 869. Taken at unusual hour. State v. Gordon, 105 Minn. 217, 117 NW 483.

**46.** Different time and place. Territory v. West [N. M.] 99 P 343. Similar purchases from same parties. State v. Rountree, 80 S. C. 387, 61 SE 1072.

**47.** Stolen goods exchanged for goods received. State v. Pirkey [S. D.] 118 NW 1042.

**48.** Knowledge and intent, questions of fact. Territory v. West [N. M.] 99 P 343.

**49.** State v. Shapiro [Mo.] 115 SW 1022; State v. Gordon, 105 Minn. 217, 117 NW 483; People v. Feinberg, 237 Ill. 348, 86 NE 584.

**50.** Not conclusive that goods are stolen. State v. Daniels, 80 S. C. 368, 61 SE 1073.

**51.** Different jury. New trial refused. State v. Ryan, 122 La. 1095, 48 S 537.

**52.** Copper charged, brass testified to. State v. Shapiro [Mo.] 115 SW 1022.

than charged,[53] since the jury must find all the essential elements of the crime to be as alleged in the indictment,[54] as is also the assumption that any disputed element of the charge is true,[55] or an attempt to fix a standard by which the jury shall determine the question of guilty knowledge,[56] or an instruction, in effect, that a person is presumed to intend all the possible consequences of his act.[57]

*Verdict.*[See 10 C. L. 1485]—The verdict need not find the value of the stolen property unless it be a material matter in issue.[58]

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**Recitals,** see latest topical index.

**"Recklessness" and "Wantonness,"** see 12 C. L. 969, n. 17.

## RECOGNIZANCES.[59]

*The scope of this topic* is noted below.[60]

A recognizance is an official record, and to be effective must be signed by the magistrate.[61] Under the Georgia statute, a county has no interest in money collected from forfeited recognizances until after all the legal claims on such funds held by officers bringing the money into court, including constables and justices, shall have been allowed and paid,[62] and therefore, when the petition does not show that the state has an interest in such funds, is a money rule by the county the proper remedy to compel the clerk to issue execution upon a rule absolute forfeiting a recognizance bond.[63]

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**Recordari; Recording Deeds and Mortgages,** see latest topical index.

## RECORDS AND FILES.

§ 1. What Are Records, 1664.
§ 2. Keeping and Custody, 1665.
§ 3. Publicity and Access, 1665.
§ 4. Proof of Records and Use in Evidence, 1665.
§ 5. Amendment and Cancellation, 1666.
§ 6. Crimes Relating to Records, 1666.

*The scope of this topic* is noted below.[64]

§ 1. *What are records.*[65]—[See 10 C. L. 1486]—An order which has been duly filed and entered becomes a judicial record,[66] and the file includes all papers belonging

53. Bryan v. State [Tex. Cr. App.] 111 SW 1035.

54. Error to refuse charge that if jury find horses were not stolen by B, or were bought in good faith, or not bought where alleged, they should acquit. Bryan v. State [Tex. Cr. App.] 111 SW 1035.

55. Court assumed defendant received stolen goods in instructing as to guilty knowledge. Not neutralized by other instructions. People v. Feinberg, 237 Ill. 348, 86 NE 584.

56. Test is personal and not that of ordinary man. State v. Denny [N. D.] 117 NW 869.

57. Error to define "feloniously" as "an intent to commit a wrongful act which might result in the commission of a felony." State v. Denny [N. D.] 117 NW 869.

58. Value alleged $1,200. All evidence showed exceeded $20. Verdict sufficient reading "as charged in information." State v. Pirkey [S. D.] 118 NW 1042.

59. See 10 C. L. 1485.

**Search Note:** See Recognizances, Cent. Dig.; Dec. Dig.; 24 A. & E. Enc. L. (2ed.) 155, 159, 177, 182, 187, 210.

60. This title includes only the law of recognizances as obligations and their general enforcement. The general law of bail is elsewhere shown (see Bail, Civil, 11 C. L. 360; Bail, Criminal, 11 C. L. 361).

61. Walker v. Goding, 103 Me. 400, 69 A. 621.

62. Code, § 1085 et seq. Randolph County v. Ellis, 130 Ga. 121, 60 SE 458.

63. Randolph County v. Ellis, 130 Ga. 121, 60 SE 458.

64. **It includes** matters relating generally to public records and files. **It excludes** matters peculiar to judgment records (see Judgments, 12 C. L. 408), records on appeal or error (see Appeal and Review, 11 C. L. 118), records of title and transfer (see Notice and Record of Title, 12 C. L. 1100), municipal records (see Municipal Corporations, 12 C. L. 905), public statistics (see Census and Statistics, 11 C. L. 590), the restoring of lost or destroyed records (see Restoring Instruments and Records, 10 C. L. 1526), and the filing of motions and other proceedings in court (see Motions and Orders, 12 C. L. 893; Pleading, 12 C. L. 1323, and topics treating of particular proceedings).

65. **Search Note:** See Courts, Cent. Dig. §§ 362-374; Dec. Dig. §§ 111-117; Records, Cent. Dig. §§ 1-13, 18, 27; Dec. Dig. §§ 1-8, 10-12; 17 A. & E. Enc. P. & P. 905.

66. Bank of Meadville v. Hardy [Miss.] 48 S 731.

to the cause,[67] but the original draft of a decree is no part of the record.[68] A document is filed when it is delivered to the proper officer and lodged by him in his office.[69]

§ 2. *Keeping and custody.*[70]—See 10 C. L. 1487—It is the duty of the recorder to file and record all instruments which are offered and are entitled to record in his office.[71] His duties are ministerial,[72] and if he refuses to record an instrument which is entitled to record, mandamus will lie.[73] Papers which have become part of the official records of the court may not be withdrawn [74] without permission from the court; [75] however, the parties to the suit may have them sealed, to be opened only on the order of the court.[76] The original transcript of testimony remains a record of the circuit court, although filed with the clerk of the court of appeals as a part of the transcript of the record of the case.[77] Records may be temporarily removed from the state for the purpose of being used in a federal court.[78] Extra compensation cannot be collected for work done by the custodian of records unless so provided by statute.[79]

§ 3. *Publicity and access.*[80]—See 10 C. L. 1487—A statute which provides that all persons shall have the right to take memoranda and abstracts from the public records gives the right to any person to inspect and copy such records for the purpose of compiling books to be used in a business enterprise of furnishing abstracts and information to other persons,[81] and where it is provided that on request the custodian of a record shall furnish a transcript of any paper in his office, such duty is ministerial and may be enforced by mandamus.[82] The right to inspect records and make memoranda therefrom is limited to such records as the recorder is required by law to keep,[83] and the right must be exercised subject to such reasonable regulation as the recorder sees proper to make for the orderly government of his office.[84] Because a person may be deprived temporarily of the use of public records is no ground for granting an injunction restraining their removal from the state.[85]

§ 4. *Proof of records and use in evidence* [86]—See 10 C. L. 1487 are treated in another topic.[87]

67. Includes original subpoenas, when executed. Jackson v. Mobley [Ala.] 47 S 590.

68. Does not determine when decree was rendered. Horn v. Metzger, 234 Ill. 240, 84 NE 893.

69. Not properly filed when left at clerk's office but not brought to his notice. Fitzgerald v. Paisley [Iowa] 119 NW 166. If paper handed to clerk elsewhere than his office is taken by him to his office and filed there, it is of record from the time he filed it. Guffey Petroleum Co. v. Hooks [Tex. Civ. App.] 20 Tex. Ct. Rep. 254, 106 SW 690.

70. **Search Note:** See Courts, Cent. Dig. §§ 365, 366; Dec. Dig. § 113; Records, Cent. Dig. § 3; Dec. Dig. § 13; 17 A. & E. Enc. P. & P. 909.

71. Hill v. Lane [N. C.] 62 SE 1074.

72. First Nat. Bank v. McElroy [Tex. Civ. App.] 112 SW 801.

73. Duty is ministerial. United States v. Merriam [C. C. A.] 161 F 303.

74. Ex parte Davidge [S. C.] 63 SE 449.

75. On return of case from superior court, parties have no right to withdraw original contracts which have been filed without permission. Federal Chemical Co. v. Green, 33 Ky. L. R. 671, 110 SW 859.

76. Ex parte Davidge [S. C.] 63 SE 449.

77. Harbison & Walker Co. v. White [Ky.] 114 SW 250.

78. Injunction by taxpayer to restrain removal, refused. Dickinson v. Kingsbury [Cal. App.] 96 P 329.

79. Work done by the county clerk was not within County Laws (Laws 1892, p. 1751, c. 686), § 26; authorizing payment for "copies" of existing indexes. Wadsworth v. Livingston County Sup'rs, 115 NYS 8.

80. **Search Note:** See notes in 2 C. L. 1483; 4 Id. 1255, 1256; 8 Id. 1699, 1701; 27 L. R. A. 82; 6 Ann. Cas. 542.

See, also, Records, Cent. Dig. §§ 13-24; Dec. Dig. §§ 14-16.

81. Act May 31, 1887 (Laws 1887, p. 258; Hurd's Rev. St. 1905, c. 115), § 21, and Act June 16, 1887 (Laws 1887, p. 256, § 1, as amended by Laws 1903, p. 291, § 1) construed as giving the right to an abstracter to copy the abstract books belonging to the county. Chicago Title & Trust Co. v. Danforth, 236 Ill. 554, 86 NE 364, afg. 137 Ill. App. 338.

82. Code 1896, § 934, subd. 14. When proper fees are tendered, clerk of court must furnish transcript of subpoenas. Jackson v. Mobley [Ala.] 47 S 590.

83, 84. Chicago Title & Trust Co. v. Danforth, 236 Ill. 554, 86 NE 364.

85. May be removed for temporary use in federal court, although taxpayer objects. Dickinson v. Kingsbury [Cal. App.] 96 P 329.

86. **Search Note:** See Criminal Law, Cent.

§ 5. *Amendment and cancellation.*[88] See 10 C. L. 1488—Every court of record has inherent power to make its record speak the truth [88] by an entry nunc pro tunc.[90] The common law courts have power to correct their own judgments so as to make them conform to the fact,[91] and the power of the court to expunge a record entered without jurisdiction exists independent of statute and without reference to statutory time.[92] In general, amendment can be made only when there is something in the record to amend by.[93] Correction of a judicial record may be made at any time before its final authentication,[94] and after authentication at any time during the term,[95] and correction after the term is often allowed by direct proceedings,[96] on proper notice.[97] An appeal from a judgment or decree does not deprive the court which rendered it of control over its records or of jurisdiction to amend them;[88] but reversal leaves the record without legal existence and there is nothing to amend.[99] A superior court cannot modify the record of an inferior tribunal,[1] nor compel an amendment;[2] nor can a court of equity, in the absence of fraud, order the amendment of a common-law record.[3]

§ 6. *Crimes relating to records.*[4] See 8 C. L. 1702—The defacing of each separate recorded certificate is a separate offense, though all were done at the same time.[5]

**Redemption; Re-Exchange,** see latest topical index.

## REFERENCE.

**§ 1. Definitions and Distinctions, Master and Referee and Umpire or Arbitrator, 1667.**
**§ 2. Occasion for Reference, 1667.**
**§ 3. Time and Stage of Proceedings, 1668.**
**§ 4. Motion and Order for Reference, and Stipulations or Consents on Voluntary Reference, 1668.**

Dig. §§ 879-886, 1018-1032; Dec. Dig. §§ 400, 401, 429-447; Evidence, Cent. Dig. §§ 460-675, 1230-1677; Dec. Dig. §§ 157-187, 325-383; 17 A. & E. Enc. P. & P. 914, 935.

**87.** See Evidence, § 4, as to secondary evidence; § 7C, as to proof by original or certified copy.

**88. Search Note:** See Records, Cent. Dig. §§ 8-12; Dec. Dig.; 17 A. & E. Enc. P. & P. 914.

**89.** Appeal of Dunn [Conn.] 70 A 703; Brown v. Clark [Conn.] 71 A 727; Schofield v. Rankin [Ark.] 109 SW 1161. May change record so that correct date of entry of judgment will appear. Power v. Turaer, 37 Mont. 521, 97 P 950.

**90.** Clerical mistake in formal order of eale of land to pay debt of an estate, entered by the court, may be corrected. Lambert v. Rice [Iowa] 120 NW 96. Where the court still had jurisdiction, it was not error to enter an order nunc pro tunc to make the record conform to a previous agreement that as to two of the parties the allegation of the petition could be traversed of record. Roberts v. Respass [Ky.] 114 SW 341. Where a claim affidavit was filed but the court of ordinary omitted to make an entry of filing on the affidavit, the formal entry may be made nunc pro tunc. Beach v. Lott [Ga.] 63 SE 627. Clerk's failure to mark or properly mark date of filing certificate of delinquency delivered by county treasurer may be corrected nunc pro tunc after judgment of foreclosure. Peabody v. Meacham, 49 Wash. 381, 95 P 322.

**91.** Montgomery v. Viers [Ky.] 114 SW 251.

**92.** Hollister v. Vermont Bldg. Co. [Iowa] 119 NW 626.

**93.** Private memorandum not sufficient. Strong v. Wesley Hospital, 135 Ill. App. 187. Appeal bond or bill of exceptions in law case in view of the absence from record of a prayer for and allowance of an appeal and an order fixing time for filing bond and bill of exceptions cannot be deemed a record. Id.

**94.** At any time before it is signed by the judge. Puckett v. Guenther [Iowa] 120 NW 123.

**95.** Record remains in the breast of the judge during the continuance of the term. Heimberger v. Chamberlin, 135 Ill. App. 615. Rule is applicable to probate courts. Id.

**96.** Horn v. Metzger, 234 Ill. 240, 84 NE 893.

**97.** A clerical mistake by which the language of the recorded judgment fails to conform to the decision actually rendered may be corrected. Brown v. Clark [Conn.] 71 A 727. Can amend record after term on proper notice. Strong v. Wesley Hospital, 135 Ill. App. 187. Clerical error made in describing property sold under mortgage foreclosure decree may be corrected. Walsh v. Colby, 153 Mich. 602, 15 Det. Leg. N. 588, 117 NW 207.

**98.** Schofield v. Rankin [Ark.] 109 SW 1161.

**99.** The reversal of a decree annuls such decree and leaves nothing to amend. Schofield v. Rankin [Ark.] 109 SW 1161.

**1, 2.** Hansen v. De Vito [N. J. Law] 70 A 668.

**3.** Strong v. Wesley Hospital, 135 Ill. App. 187.

**4. Search Note:** See Records, Cent. Dig. §§ 45-47; Dec. Dig. §§ 21, 22; 8 A. & E. Enc. P. & P. 917.

**5.** Ex parte Dreesen [Tex. Cr. App.] 114 SW 806.

§ 5. Selection and Qualifications of the Referee; His Oath and Induction into Office, 1668.
§ 6. General Scope of Reference and Powers of Referees or Masters, 1668.
§ 7. Appearance Before Referee, Hearing and Adjournments, Trial and Practice Thereon, 1669.
§ 8. The Report, Its Form, Requisites and Contents, and Return and Filing, 1669.
§ 9. Revision of Report Before the Court, 1669.
§ 10. Decree or Judgment on the Report, Confirmation or Overruling, Recommittal or Additional Findings, Modification, Conformity of Judgment With Report, 1670.
§ 11. Appellate Review, 1671.
§ 12. Compensation, Fees and Costs, 1671.

*The scope of this topic* is noted below.[6]

§ 1. *Definitions and distinctions, master and referee and umpire or arbitrator.*[7]—See 6 C. L. 1272—A referee or master is merely the agent of the court appointing him, acting under its direction.[8]

§ 2. *Occasion for reference.*[9]—See 10 C. L. 1490—A reference is usually proper in cases where the stating of an account is required [10] or where it appears that the issues cannot be properly disposed of by a jury,[11] but, being merely for the convenience of the court, need not be made where it will not facilitate matters.[12] Compulsory references are usually controlled by statute,[13] being generally granted where it appears from the complaint,[14] or from a counterclaim connected with the matter

6. Reference to masters in chancery is elsewhere treated (see Masters and Commissioners, 12 C. L. 809), as is reference to arbitrators (see Arbitration and Award, 11 C. L. 262), this topic including only reference of actions at law and under the codes.

7. **Search Note:** See notes in 13 L. R. A. (N. S.) 146.

See, also, Reference, Cent. Dig. § 1; Dec. Dig. § 1; 24 A. & E. Enc. L. (2ed.) 218, 219; 17 A. & E. Enc. P. & P. 978.

8. Referee appointed to effect sale of property in partition suit held not a trustee within Code, § 1312, requiring trustee to list property for taxation. In re Boyd, 138 Iowa, 583, 116 NW 700.

9. **Search Note:** See Reference, Cent. Dig. §§ 2-33; Dec. Dig. §§ 2-17, 19; 24 A. & E. Enc. L. (2ed.) 220; 17 A. & E. Enc. P. & P. 983.

10. Where itemized accounts covering 12 pages of printed abstract were filed with counterclaims and no correct finding could be made without examination of books of account, reference held proper. Mulloy v. Mulloy, 131 Mo. App. 654, 111 SW 843. Although court did not pass directly upon the existence of a contract or the interpretation thereof, will of supervisory control will not issue to restrain a reference where it appears that some sort of an account exists on books and that no further damage can occur from a further examination of them. State v. Silver Bow County Second Judicial Dist. Ct., 37 Mont. 226, 95 P 843.

11. Northrop v. Butler, 126 App. Div. 906, 110 NYS 815. Reference in suit for attorney's fees should be made only where it is reasonably apparent that items are so numerous that jury cannot properly dispose of same. Russell v. McDonald, 125 App. Div. 844, 110 NYS 950. Where bill of particulars shows that disbursements are insignificant, and there are 3 retainers and 22 items connected with only 5 matters, reference is improper. Id. Where receiver's account involves large sums, it should be referred to referee. People v. Oriental Bank, 129 App. Div. 865, 114 NYS 440. Where, in partition, court has decided to sell land and timber together, although some of the timber is owned separately, reference is proper to determine relative value of land and timber. Rivers v. Atlantic Coast Lumber Corp., 81 S. C. 492, 62 SE 855.

12. Held not error to not refer to special master question of allowance of counsel fees. Haight & Freese Co. v. Weiss [C. C. A.] 165 F 430. Where facts are undisputed court, in proceeding to establish and enforce an attorney's lien, may find value of services without reference. In re Kaufman, 113 NYS 525. Where, upon dissolution of preliminary injunction, the only damages claimed are expenses incidental to motion to dissolve, no reference need be made though items are numerous, they being readily subject to proof. Dempster v. Lansingh, 234 Ill. 381, 84 NE 1032.

13. Code, § 3735, providing for compulsory reference in actions involving accounts, applies only in cases formerly cognizable in equity. Faville v. Lloyd [Iowa] 118 NW 871. Code Civ. Proc. § 1015, authorizing a reference to determine and report on question of fact arising in any stage of the action on a motion or otherwise, except on pleadings, applies only to equity actions. Lindner v. Starin, 128 App. Div. 664, 113 NYS 201. Code Civ. Proc. § 1015, providing that the court may direct a reference to determine and report on question of fact for information of the court, etc., held not to authorize reference in effect to take deposition of witness to oppose motion to vacate supplemental summons. Johnson v. Wellington Copper Min. Co., 58 Misc. 353, 110 NYS 1098. Where objections filed to account of receiver, appointed under Code Civ. Proc. § 2429, are sufficiently specific to compel receiver to be examined under oath in respect thereto, referee should be appointed under 2 Rev. St. (1st. ed.) pt. 3, c. 8, tit. 4, § 86. In re Home Book Co., 60 Misc. 560, 112 NYS 1012.

14. As a general rule long account must be involved in complaint to authorize a

involved in the complaint,[15] that it will be necessary to examine a long account.[16] Where, however, the issues made upon plaintiff's cause of action entitle him to a trial by jury, such right cannot be defeated by a counterclaim involving a long examination of documents, etc.,[17] and is not referable unless the jury is waived.[18]

§ 3. *Time and stage of proceedings.*[19]—See 10 C. L. 1491

§ 4. *Motion and order for reference, and stipulations or consents on voluntary reference.*[20]—See 10 C. L. 1491—The statutory manner of procuring an order must be followed,[21] and the order should disclose whether the party named is to act as a referee or as a court commissioner[22] and, without prejudice to either party,[23] should designate the scope of the reference.[24] Nonjurisdictional irregularities may be waived,[25] and a reference without the consent of the parties is not error where the findings are only advisory and the ultimate findings are made by the court.[26]

§ 5. *Selection and qualifications of the referee; his oath and induction into office.*[27]—See 8 C. L. 1704—The failure of the referee to take the statutory oath[28] and matters of implied bias[29] may be waived.

§ 6. *General scope of reference and powers of referees or masters.*[30]—See 10 C. L. 1491—The powers and duties of the referee are measured by the order of the reference[31] and are limited in scope to the issues made by the pleadings.[32]

reference and cannot be brought in by way of counterclaim. Barber v. Ellingwood, 115 NYS 43.

15. Berry v. Maldonado & Co., 61 Misc. 442, 113 NYS 800. Where in action against stockbrokers for wrongfully selling stocks defendant, by way of counterclaim, alleged that plaintiff opened three accounts involving numerous transactions, etc., held not to authorize reference, it not appearing that they were connected with account sued on. Barber v. Ellingwood, 115 NYS 43.

16. Whether action be one at law or in equity, Code Civ. Proc. § 1013, authorizes a compulsory reference only where a long account is required. Lindner v. Starin, 128 App. Div. 664, 113 NYS 201. In action for money due for services to be compensated for by one-third of net profits, determination of amount due held to constitute long account where items were in dispute. Lindner v. Starin, 113 NYS 652, rvg. 128 App. Div. 664, 113 NYS 201. Action for work and materials involving 43 items held not to constitute a long account though done in 43 different apartments of an apartment house, the work and materials being furnished under single contract. Levine v. Royal Bank, 61 Misc. 226, 113 NYS 523.

17. Snell v. Niagara Paper Mills, 193 N. Y. 433, 86 NE 460.

18. Where, in action for money due for services under contract, jury is waived, reference may be had where long account is involved. Lindner v. Starin, 113 NYS 652.

19. **Search Note:** See Reference, Cent. Dig. § 34; Dec. Dig. § 18; 24 A. & E. Enc. L. (2ed.) 222; 17 A. & E. Enc. P. & P. 1005.

20. **Search Note:** See Reference, Cent. Dig. §§ 35-62; Dec. Dig. §§ 20-34; 17 A. & E. Enc. P. & P. 1005.

21. General Rules of Practice, rule 72, providing that in divorce actions court shall not order reference without proof by affidavit of service of summons and complaint, etc., held to apply to default cases only and not applicable where defendant has made a general appearance. Freeman v. Freeman, 126 App. Div. 601, 110 NYS 686.

22. Order referring to such person as "court commissioner" held sufficiently definite. Howard v. Hanson, 49 Wash. 314, 95 P 265.

23. Although accounting was dependent upon finding of fraud, a recital in order that it appears that an accounting is necessary held not reversible error in absence of showing that referee was influenced thereby. Logan v. Brown, 20 Okl. 334, 95 P 441.

24. An order referring receiver's account should provide that accounts and objections be referred to specified referee, that he report thereon, with his opinion, as well as upon question as to what compensation and expense should be allowed to receiver and by whom paid. People v. Oriental Bank, 129 App. Div. 865, 114 NYS 440.

25. Irregularity in order in failing to name judge to whom report should be returned held waived where objector did not raise point before referee or in his moving papers. Lewis v. Beach, 112 NYS 200.

26. Babcock v. De Mott [C. C. A.] 160 F 882.

27. **Search Note:** See Reference, Cent. Dig. §§ 63-73; Dec. Dig. §§ 35-46; 24 A. & E. Enc. L. (2ed.) 227; 17 A. & E. Enc. P. & P. 1012, 1085.

28. Waived where parties knowingly proceed to trial without objection. Logan v. Brown, 20 Okl. 334, 95 P 441.

29. Fact that referee had been a clerk of defendant's attorney will not vitiate his proceedings where the fact was made known to plaintiff's attorney who disclaimed any objection at the hearing. Fleck v. Cohn, 115 NYS 652.

30. **Search Note:** See Reference, Cent. Dig. §§ 74-79; Dec. Dig. §§ 47-50; 24 A. & E. Enc. L. (2ed.) 229; 17 A. & E. Enc. P. & P. 1076.

31. On reference under Code Civ. Proc. § 623, to ascertain damages from a preliminary injunction, referee must report full damages though in excess of bond. Harrison v. Hind & Harrison Plush Co., 128 App. Div. 460, 112 NYS 834. Where interlocutory judgment directs referee to state an account of rents and profits of premises

§ 7. *Appearance before referee, hearing and adjournments, trial and practice thereon.*[33]—See 10 C. L. 1491—Matters of trial and practice before a referee are largely controlled by statute,[34] and, where he is authorized to try a case as a court, the order of proof lies within his discretion.[35]

§ 8. *The report, its form, requisites and contents, and return and filing.*[36]—See 10 C. L. 1492—A referee's report must conform to the statute as to form and statement of findings,[37] although surplusage may be disregarded,[38] and must be timely filed with the court to which it is returnable.[39] Upon arriving at a judgment, the referee, in Florida, must give notice thereof to the interested parties.[40] A specific finding of fact controls a mere restatement in figures of conclusions based thereon in case of conflict.[41]

§ 9. *Revision of report before the court.*[42] *Objections and exceptions.*See 10 C. L. 1492—Exceptions must be filed within the statutory time, unless an extension thereof is granted,[43] comply with all court rules,[44] and, where they necessitate an examination of evidence, such evidence must be duly incorporated therein, attached thereto, or properly referred to.[45] The exceptions filed generally control the scope of the review.[46]

received by cotenant from a certain time, referee cannot pass on question whether defendant is liable for profits received more than six years before bringing action. Adams v. Bristol, 126 App. Div. 660, 111 NYS 231. Where reference is made to auditor "to hear the parties, state the facts, and report the questions of law and evidence requested by parties," and party makes no requests at hearing, he is not entitled as a matter of right, after auditor has completed his report and submitted it to parties for suggestions as to minor details, to make requests for findings which will necessitate a re-examination of whole case. Houlihan v. St. Anthony Corp., 165 F 511.

32. Where particular finding of fact is not predicated on issues joined by pleadings, it must be set aside. Lee v. Haizlip [Okl.] 99 P 806.

33. **Search Note:** See Reference, Cent. Dig. §§ 80-108; Dec. Dig. §§ 51-75; 24 A. & E. Enc. L. (2ed.) 231; 17 A. & E. Enc. P. & P. 1022.

34. Under Gen. St. 1906, § 1661, referee may enlarge time for hearing on motion for new trial. Hammond v. A. Vetsburg Co. [Fla.] 48 S 419.

35. Logan v. Brown, 20 Okl. 334, 95 P 441.

36. **Search Note:** See References, Cent. Dig. §§ 115-156; Dec. Dig. §§ 78-99; 24 A. & E. Enc. L. (2ed.) 232; 17 A. & E. Enc. P. & P. 1033.

37. Code Civ. Proc. § 1022, providing that report of referee upon trial of the "whole issues of fact" must separately state the fact found, is not applicable where issues are tried by court and merely amount of damages is submitted to referee. Teale v. Tilyou, 127 App. Div. 287, 111 NYS 165.

38. Where the evidence and rescript filed by a referee authorized him to reach the same result as a referee, statement in his report that in awarding judgment he exercised the powers of an equity court will be regarded as surplusage. Haslam v. Jordan [Me.] 70 A 1066.

39. Need not file decision and judgment until motion for new trial has been disposed of. Gen. St. 1906, § 1662. Hammond v. A. Vetsburg Co. [Fla.] 48 S 419.

40. Gen. St. 1906, § 1660. Hammond v. A. Vetsburg Co. [Fla.] 48 S 419.

41. Phalen v. Hershey Lumber Co., 136 Wis. 571, 118 NW 219.

42. **Search Note:** See notes in 6 C. L. 1276. See, also, Reference, Cent. Dig. §§ 157-168, 207-210; Dec. Dig. §§ 100, 107; 24 A. & E. Enc. L. (2ed.) 236; 17 A. & E. Enc. P. & P. 1043.

43. Under Code Civ. Proc. 1902, § 195, providing that court may in its discretion allow answer or reply to be made, or other act done, after time limited by code, etc., held to authorize court in its discretion to permit filing of exceptions to referee's report after 10 days' notice of filing of report. Odom v. Newton, 81 S. C. 76, 61 SE 1071.

44. Chancery practice rule 94 (Code 1896, p. 1222), requiring solicitor for exceptant to a register's report to note at foot of each exception to conclusions of fact, evidence relied on held not complied with by excepting to items, specified by number, and by separate sheet of paper containing statement, "Reference to evidence to support exceptions," followed by statement of number of exceptions and evidence relied on. McGuire v. Appling [Ala.] 47 S 700. Supreme court will not review chancellor's decree of exceptions to rsgister's report where there is no compliance with chancery practice rule 94 (Code 1896, p. 1222), prescribing how exceptions shall be made. Id.

45. Brock v. Wildey [Ga.] 63 SE 794. Failure of one excepting to auditor's report on matters of fact, or on matters of law dependent upon evidence, to set forth with each exception the evidence necessary to be considered in passing thereon, or to point out same by proper reference, held sufficient reason in equity case for refusing to approve exceptions of fact and overruling exceptions of law. Winkles v. Simpson Grocery Co. [Ga.] 63 SE 627.

46. In action on logging contract an exception to referee's finding of fact, "except

§ 10. *Decree or judgment on the report, confirmation or overruling, recommittal or additional findings, modification, conformity of judgment with report.*[47]—See 10 C. L. 1493—Unless made conclusive by statute,[48] the report of the referee is only prima facie correct,[49] having the effect of a jury verdict,[50] and to be set aside only when clearly against the evidence.[51] All presumptions are in favor of the regularity and validity of proceedings before a referee,[52] but where it appears that the matter was not fully heard [53] without the fault of the objector,[54] or where the referee misconceived the scope of the reference,[55] a re-reference is proper. In equity cases a recommitment for additional evidence may be made,[56] or the court may proceed and hear the same and render such decree as the referee should have made.[57] Where the referee's duties were of a ministerial character, the only question on hearing is whether the directions of the court have been followed.[58] The report of the referee must be reasonably construed,[59] and where it is silent upon a particular fact,[60] a presumption arises that such fact has not been proven.[61] But an omission to make a particular finding is not reversible error where the decision for the plaintiff was not based thereon.[62] In some states, judgment may be entered by the parties upon the referee's findings or by the court pro forma.[63]

quantity of logs driven," etc., does not authorize review of finding as to quantity driven. Phalen v. Hershey Lumber Co., 136 Wis. 571, 118 NW 219. Failure to except to conclusion of law of referee that certain decree was res adjudicata as to all matters thereby determined held not to preclude consideration of question whether particular matter was so determined. Morton Trust Co. v. Sands, 195 N. Y. 28, 87 NE 785.

47. **Search Note:** See notes in 6 C. L. 1277. See, also, Reference, Cent. Dig. §§ 169-206; Dec. Dig. §§ 101-106; 17 A. & E. Enc. P. & P. 1068.

48. Under Code Civ. Proc. §§ 1018, 1228, a referee appointed to hear, try and determine has same power as the special term, and later cannot review, reverse or set aside his decision, but must enter judgment thereon if sufficient. Ward v. Bronson, 126 App. Div. 508, 110 NYS 335.

49. Brock v. Wildey [Ga.] 63 SE 794.

50. Richardson v. Harsha [Okl.] 98 P 897. Where consent reference is made to special master "to hear the evidence and decide all the issues," etc., his report has same conclusiveness as a verdict of jury, and will not be disturbed where reasonably supported by evidence. Hope v. Bourland [Okl.] 98 P 580.

51. Lynn Shoe Co. v. Auburn-Lynn Shoe Co., 103 Me. 334, 69 A 569. Finding on conflicting evidence will not be disturbed unless clearly against preponderance of the evidence. Phalen v. Hershey Lumber Co., 136 Wis. 571, 118 NW 219. Denial of motion to confirm report of referee is discretionary with the court when the facts on which motion is made are in dispute. Partridge v. Moynihan, 111 NYS 31.

52. Where report of auditor is received in evidence as prima facie proof of facts found, instruction that it must be assumed that the auditor, as an officer of the court acting in a judicial capacity, had acted in a proper manner, held not erroneous. Hunneman v. Phelps, 199 Mass. 15, 85 NE 169. Where in action for balance due for erection of a building, plaintiff relied unreservedly upon auditor's report, the findings therein must be deemed to have been regarded as basis of recovery. Norcross Bros. Co. v. Vose, 199 Mass. 81, 85 NE 468.

53. In absence of agreement that auditor's report be final on questions of fact, motion to discharge report on ground that defense was not fully heard is addressed to discretion of the court. Hunneman v. Phelps, 199 Mass. 15, 85 NE 169. Where defendant did not ask to have report recommitted, as provided by Rev. Laws, c. 165, § 58, on ground that defense was not fully heard, and expressly refused to ask to have any part stricken out, court properly denied motion to discharge report and submitted it to jury. Id.

54. Case will not ordinarily be referred back to admit further proof where such proof could have been produced by reasonable diligence during original time. Wilson v. Barrett [Ky.] 115 SW 812.

55. Lynn Shoe Co. v. Auburn-Lynn Shoe Co., 103 Me. 334, 69 A 569.

56, 57. Kossuth County State Bank v. Richardson [Iowa] 118 NW 906.

58. Report of referees appointed to partition real property. Richardson v. Ruddy [Idaho] 98 P 842. And hearing thereon should be confined thereto. Id.

59. Finding of master that complainant had no title to disputed land and did not acquire same by adverse possession, though applicable to all the land, must be construed not to apply to strip of which the other findings show that he had adverse possession. Demeritt v. Parker [Vt.] 71 A 833.

60. Statement in report that evidence was not sufficiently clear to warrant finding in plaintiff's favor on particular issue held equivalent to finding against plaintiff thereon. Alexander v. Wellington [Colo.] 98 P 631.

61. Especially where, under Wilson's Rev. & Ann. St. 1903, § 4480, referee's report has the effect of a special verdict. Brooks v. Garner [Okl.] 97 P 995.

62. Alexander v. Wellington [Colo.] 98 P 631.

63. Code Civ. Proc. § 1228, providing that

§ 11. *Appellate review.*[64] See 10 C. L. 1494—On appeal, regularity will be presumed in favor of the proceedings of the referee where the record is silent.[65] While ordinarily the case will be referred back for corrections, the appellate court may make them when it has sufficient data before it.[66]

§ 12. *Compensation, fees and costs.*[67] See 10 C. L. 1495—The fees and costs allowable to a referee rest largely within the discretion of the court,[68] unless fixed by statute.[69] A referee foreclosing a mortgage may ordinarily refuse to proceed unless his expenses are advanced, but where he does not do so, his only remedy is a cause of action against the party owing the same.[70]

## REFORMATION OF INSTRUMENTS.

**§ 1. The Remedy, 1671.**
A. Nature and Office, 1671.
B. Right to Remedy, 1671.
C. Instruments Reformable, 1672.
**§ 2. Procedure, 1673.**
A. Jurisdiction and Form of Proceedings, 1673.
B. Parties, 1673.
C. Pleading and Evidence, 1674.
D. Trial and Judgment, 1674.

*The scope of this topic* is noted below.[71]

§ 1. *The remedy. A. Nature and office.*[72] See 10 C. L. 1496

(§ 1) *B. Right to remedy.*[73] See 10 C. L. 1496—The right to the reformation of a written instrument is based on fraud, accident or mistake[74] of fact[75] or of law.[76] Before a court of equity will grant relief, in the absence of fraud[77] or imposition,[78]

report of referee shall stand as decision of the court and judgment may be entered thereon by parties, construed with § 1229, providing that, on return of report in divorce cases, judgment shall be entered by court, and held that court could refuse to affirm report and to enter judgment. Perkins v. Perkins, 114 NYS 960. Where court on hearing on exceptions to referee's report recommitted same to have certain definite items omitted therefrom and ordered judgment to be entered on corrected report, held that such decree was final so as to start interest, although referee, who was also clerk, made mistake in correcting report, which necessitated an order correcting judgment entered thereon. Brown v. Rogers, 80 S. C. 289, 61 SE 440.

**64. Search Note:** See Appeal and Error, Cent. Dig.; Dec. Dig.; 17 A. & E. Enc. P. & P. 1076.

**65.** Will be presumed that he took required oath. Logan v. Brown, 20 Okl. 334, 95 P 441.

**66.** It will not be recommitted where it appears that neither party desires it. Thurston v. Hamblin, 199 Mass. 151, 85 NE 82. Where findings of referee are given the effect of a special verdict, and judgment is entered thereon for amount greater than is recoverable under pleadings and stipulations, court may modify judgment instead of reversing. Lee v. Haizlip [Okl.] 99 P 806.

**67. Search Note:** See Costs, Cent. Dig.; Dec. Dig.; Reference, Cent. Dig.; Dec. Dig.; 24 A. & E. Enc. L. (2ed.) 237; 17 A. & E. Enc. P. & P. 1086.

**68.** Where, in reference to determine whether summons had been served, twelve full hearings were had, referee taking 555 pages of testimony and 12 days in reading same and preparing report, held that costs taxed at $938, $500 as referee's fees, $428 as stenographer's fees, and $10 motion costs, were not excessive. Dollard v. Koronsky, 61 Misc. 392, 113 NYS 793. Where defendant successfully demurred to bill after it had been reduced by several amendments to original form, complainant is not entitled to costs on ground of defendant's failure to demur in first instance. Jones v. Howard, 234 Ill. 404, 84 NE 1041.

**69.** By express provision of Code Civ. Proc. § 3251, on reference under § 3236, which includes reference under § 623, to determine damages resulting from an injunction, court may award costs, not exceeding $10, besides necessary disbursements for referee's fees. Harrison v. Hind & Harrison Plush Co., 128 App. Div. 460, 112 NYS 834.

**70.** Second sale will not be stayed to enforce payment of expense of first. Carter v. Builders' Const. Co., 115 NYS 339.

**71.** For what constitutes mistake and the proof thereof, see Mistake and Accident, 12 C. L. 869, and for the reformation of insurance policies, see Insurance, 12 C. L. 252.

**72. Search Note:** See notes in 2 L. R. A. (N. S.) 548.

See, also, Reformation of Instruments, Cent. Dig. §§ 1-116; Dec. Dig. §§ 1-29; 24 A. & E. Enc. L. (2ed.) 604, 609; 18 A. & E. Enc. P. & P. 748.

**73. Search Note:** See notes in 4 C. L. 1266; 6 Id. 1281; 11 L. R. A. (N. S.) 357; 30 A. S. R. 621; 65 Id. 481; 117 Id. 227.

See, also, Reformation of Instruments, Cent. Dig. §§ 2-4, 68-116; Dec. Dig. §§ 2-4, 15-29; 24 A. & E. Enc. L. (2ed.) 610.

**74.** Isner v. Nydegger, 63 W. Va. 677, 60 SE 793.

**75.** Wrong description in deed. American Ass'n v. Williams [C. C. A.] 166 F 17.

**76.** Condor v. Secrest [N. C.] 62 SE 921.

**77.** Where person signing is illiterate and physically at a disadvantage, and contract signed was not like one agreed upon it constitutes fraud. Dannelly v. Cuthbert Oil Co. [Ga.] 63 SE 257.

**78.** Hope v. Bourland [Okl.] 98 P 580.

the mistake complained of must possess mutuality [79] or its equivalent,[80] such as mistake on one side and fraud or inequitable conduct on the other.[81, 82] To entitle one to reformation, an enforcible contract [83] agreed on [84] must have been formulated in such manner as not to express the real agreement of the parties,[85] so as to be inequitable [86] and to work injury to a party.[87] Reformation may be granted against a subsequent purchaser with notice.[88]

A party may be estopped by his own laches [89] or negligence,[90] and his action to reform a written instrument may become barred by the statute of limitations.[91] In an action for the reformation of an instrument, the rule that he who seeks equity must do equity applies with full force.[92]

(§ 1) *C. Instruments reformable.*[93]—See 10 C. L. 1498—Reformation may be decreed of any written instrument [94] executed with contractual intent,[95] such as a deed [96] erroneous in description,[97] in the consideration stated,[98] in the assumption of

79. Smith v. Interior Warehouse Co. [Or.] 95 P 499, denying petition for rehearing in 94 P 508; Lesser v. Demarest [N. J. Eq.] 72 A 14; Cherry v. Brizzolara [Ark.] 116 SW 668; Chelsea Nat. Bank v. Smith [N. J. Eq.] 69 A 533; Coppes v. Keystone Paint & Filler Co., 36 Pa. Super. Ct. 38. Evidence insufficient to show mistake as to parties. Eustis Mfg. Co. v. Saco Brick Co., 201 Mass. 391, 87 NE 696. Where mistake not mutual, remedy is by rescission, not by reformation. Prindle v. Union Free School Dist. No. 5, 61 Misc. 533, 116 NYS 888.

80. Mistake on one side and knowledge thereof on the other. Moehlenpah v. Mayhew [Wis.] 119 NW 826. Where one party observed mistake and remained silent, relief is granted to reform lease. Chelsea Nat. Bank v. Smith [N. J. Eq.] 69 A 533.

81, 82. Western Loan & Sav. Co. v. Thibodeau [C. C. A.] 159 F 370. Or fraud. Sykes v. Life Ins. Co., 148 N. C. 13, 61 SE 610. Insurance company liable for act of general agent contrary to provision in policy forbidding alteration. Sloss-Sheffield Steel & Iron Co. v. Aetna Life Ins. Co. [N. J. Eq.] 70 A 380.

83. Moehlenpah v. Mayhew [Wis.] 119 NW 826.

84. See post, § 1C.

85. Knuckles v. Hughes Lumber Co. [Ky.] 118 SW 1193; Moran Bolt & Nut Mfg. Co. v. St. Louis Car Co., 210 Mo. 715, 109 SW 47. Written instrument will not be reformed to include an oral restriction agreed to, yet intentionally omitted. Adams v. Gillig, 115 NYS 999.

86. Error in deed, yet transaction was equitable. Fleming v. Wheeler, 153 Mich. 331, 15 Det. Leg. N. 417, 116 NW 1085.

87. Relief refused where grantee under trust deed was not injured by a mistake occurring in a former conveyance and continuing through subsequent transfers. Graham v. Bryant [Miss.] 48 S 518.

88. Remm v. Landon [Ind. App.] 86 NE 973.

89. Insurance company cannot wait until after fire, with copy of policy in its possession several months, to ask reformation of policy as to property covered. National Union Fire Ins. Co. v. John Spry Lumber Co., 235 Ill. 98, 85 NE 256.

90. As where party refused to read and did not demand it to be read to him. Coppes v. Keystone Paint & Filler Co., 36 Pa. Super. Ct. 38. Inquiry must be duty, and failure to make a negligent omission, since duty to make is exacted in favor of innocent parties, and not of wrongdoers, to constitute negligence. Hart v. Walton [Cal. App.] 99 P 719. Consider whether insurance company sought reformation of policy promptly and on equitable principles. Queen Ins. Co. v. Spry Lumber Co., 138 Ill. App. 620.

91. Action to reform description in deed held not action to recover real property, so as to be barred by statute of limitations of latter. Hart v. Walton [Cal. App.] 99 P 719.

92. Plaintiff vendor must waive forfeiture of contract by purchaser before he can secure reformation of contract, and his refusal to agree to reformation ordered will defeat his action for specific performance. Cuthbertson v. Morgan [N. C.] 62 SE 744.

93. **Search Note:** See notes in 8 L. R. A. (N. S.) 66; 13 Id. 1089; 77 A. S. R. 804; 109 Id. 33.

See, also, Reformation of Instruments, Cent. Dig. §§ 6-67; Dec. Dig. §§ 5-14; 24 A. & E. Enc. L. (2ed.) 652.

94. There is no absolute requirement as to the contents of a written instrument before it may be reformed, it being sufficient that there is an attempt to reduce the contract to writing; need not be certain and complete in any respect. House v. McMullen [Cal. App.] 100 P 344.

95. Instrument may be defective in execution as well as in contents. Mortgage reformed between parties where not in Code form, amount of debt omitted, and acknowledged as act of officers instead as of corporation. Spedden v. Sykes [Wash.] 98 P 752. Will not reform letter which is mere memorandum of parol agreement and not adopted by both parties as their agreement, but only used as evidence. Simpson Plumbing & Heating Co. v. Geschke [N. J. Eq.] 72 A 90. Contract in the form sought must have actually existed, at least in the minds of the parties. Kreiger v. DeMass, 41 Ind. App. 252, 83 NE 734.

96. Coppes v. Keystone Paint & Filler Co., 36 Pa. Super. Ct. 38.

97. Though described by metes and bounds. Home & Farm Co. v. Freitas, 153 Cal. 680, 96 P 308. As to property described. Jones v. Levy [Miss.] 46 S. 825. Where error in boundaries. Dochterman v. Marshall [Miss.] 46 S 642.

98. Jones v. Anderson [Ky.] 116 SW 253.

indebtedness,[99] form,[1] or in the estate conveyed;[2] a deed of trust;[3] a contract of sale erroneous as to consideration;[4] a note and mortgage for an excessive amount;[5] a lease;[6] an insurance policy;[7] an official[8] or indemnity bond;[9] a notary's certificate to any instrument;[10] or a contract of employment;[11] but there is no power in equity to reform a will duly admitted to probate,[12] or a partition decree,[13] or to reform void proceedings,[14] and a deed of gift may not be reformed in the absence of fraud or undue influence without consent of all parties.[15]

§ 2. *Procedure. A. Jurisdiction and form of proceedings.*[16]—See 10 C. L. 1498— A court of law is without jurisdiction to reform or correct a written instrument,[17] such being the province of a court of equity, the equitable jurisdiction remaining concurrent with powers conferred by statute in courts of law.[18]

(§ 2) *B. Parties.*[19]—See 10 C. L. 1498—Either the plaintiff or the defendant may invoke the aid of equity to secure the reformation of an instrument.[20] All parties affected by the reformation are generally necessary parties.[21] A mistake will only be corrected between the original parties and those claiming under them in privity.[22] Reformation may be granted in favor of a subsequent innocent purchaser[23] without notice or knowledge of facts to put on inquiry,[24] although not if it affects the intervening equities of innocent third persons.[25]

99. Even in foreclosure action if mortgagee has not acted on the assumption to his detriment. Arnstein v. Bernstein, 127 App. Div. 550, 111 NYS 987.

1. Corrected where words of limitation placed in habendum instead of premises. Condor v. Secrest [N. C.] 62 SE 921.

2. A deed absolute on record but intended to convey only a life estate. Laches not apply until falling in of life estate. Teague v. Sowder [Tenn.] 114 SW 484. A deed absolute on its face but given as a mortgage. Fuson v. Chestnut, 33 Ky. L. R. 249, 109 SW 1192.

3. In suit by trustee against grantor. Craig v. Pendleton [Ark.] 116 SW 209.

4. Evidence held sufficient. Thomas v. Winkler [Iowa] 120 NW 680. Mutual mistake. Ragsdale v. Turner [Iowa] 120 NW 109.

5. Western Loan & Sav. Co. v. Thibodeau [C. C. A.] 159 F 370.

6. Chelsea Nat. Bank v. Smith [N. J. Eq.] 69 A 533.

7. Sykes v. Life Ins. Co., 148 N. C. 13, 61 SE 610. To make it accord with the real agreement. Sloss-Sheffield Steel & Iron Co. v. Aetna Life Ins. Co. [N. J. Eq.] 70 A 380.

8. Where principal was designated by mistake as holding different office. Board of School Inspectors v. Tyng, 135 Ill. App. 571.

9. To fill blank at suit of either party, but maker can not declare it to be void by reason of blank. Bindseil v. Federal Union Surety Co., 115 NYS 447.

10. Reformed to comply with statute where the facts justify. Booth Mercantile Co. v. Murphy, 14 Idaho, 212, 93 P 777.

11. As to name of one of parties to contract where manager of several corporations inserted name of wrong corporation. Blair v. Kingman Implement Co. [Neb.] 117 NW 773.

12. Polsey v. Newton, 199 Mass. 450, 85 NE 574.

13. Purchaser at sheriff's sale is a purchaser in invitum and the doctrine of caveat emptor applies in its full force. Wells v. Gay [Miss.] 46 S 497.

14. Such as sale of wrong property under attachment. Dunnivan v. Hughes [Ark.] 111 SW 271.

15. From husband to wife. Johnson v. Austin [Ark.] 111 SW 455.

16. **Search Note:** See notes in 65 A. S. R. 481, 496.

See, also, Reformation of Instruments, Cent. Dig. §§ 117-202; Dec. Dig. §§ 30-51; 24 A. & E. Enc. L. (2ed.) 610; 18 A. & Enc. P. & P. 750.

17. Eagle Fire Ins. Co. v. Spry Lumber Co., 138 Ill. App. 609.

18. Equity may still correct error not apparent on face of instrument of conveyance, although Act Tenn. 1809, c. 101, gives powers of reformation to courts of law. American Ass'n v. Williams [C. C. A.] 166 F 17.

19. **Search Note:** See Reformation of Instruments, Cent. Dig. §§ 112-139; Dec. Dig. § 33; 24 A. & E. Enc. L. (2ed.) 654; 18 A. & E. Enc. P. & P. 795.

20. By way of defense or counter-claim. Cuthbertson v. Morgan [N. C.] 62 SE 744.

21. Wells v. Gay [Miss.] 46 S 497. Deed. Daniel v. Middleton [Ky.] 116 SW 721.

22. Action not lie against mortgagor where erroneous discription in mortgage and mortgagees became purchasers at foreclosure sale and afterwards conveyed by proper description to one who by the same description conveyed to plaintiff. Jackson v. Lucas [Ala.] 47 S 224. May be corrected against a subsequent purchaser with notice. Remm v. Landon [Ind. App.] 86 NE 973. Mistake in description. Craig v. Pendleton [Ark.] 116 SW 209.

23. Is "party aggrieved" to whom statute gives right to bring suit. Hart v. Walton [Cal. App.] 99 P 719.

24. Teague v. Sowder [Tenn.] 114 SW 484.

25. Judgment creditor purchasing is not such. Jones v. Anderson [Ky.] 116 SW 253.

(§ 2) *C. Pleading and evidence.*[26]—See 10 C. L. 1499—The averments must be made with great particularity,[27] care being taken to allege that the parties agreed to the terms of the contract sought to be established,[28] and to show that the decree sought will be effectual.[29] A pleading is sufficient though reformation is asked for as alternative relief,[30] and it is not necessary to ask for reformation if facts be pleaded which show a right to such relief.[31] In case of overpayment by reason of error in contract, the remedy may be to recover such overpayment by action at law and reformation need not be asked for unless the contract be pleaded as a defense.[32] The burden of proof is on the party seeking the reformation.[33] Proof of fraud,[34] inequity [35] and of mistake must be full, clear and satisfactory,[36] not a mere preponderance,[37] and should approach certainty where reformation amounts to rescission,[38] and in case of mistake should be shown to be common to both parties.[39] The nature and extent of the mistake and any omitted provision,[40] and the reformation warranted according to the agreement of both parties,[41] must be shown with great exactness by positive testimony,[42] especially where denial of mistake is made under oath,[43] but parol evidence is competent and admissible for such purpose.[44]

(§ 2) *D. Trial and judgment.*[45]—See 10 C. L. 1501—Instructions must be clear and not too general or misleading.[46] Where trial is had before a jury, it is error for the court to withdraw the case on the ground of insufficiency of the evidence as to mistake, where any evidence supports such contention.[47]

The judgment may be for the reformation of the instrument as to any material matter,[48] irrespective of the place of its execution,[49] and for its specific enforcement

**26. Search Note:** See Reformation of Instruments, Cent. Dig. §§ 141-193; Dec. Dig. §§ 35-45; 18 & E. Enc. P. & P. 802.

**27.** Lucas v. Boyd [Ala.] 47 S. 1017.

**28.** House v. McMullen [Cal. App.] 100 P 344.

**29.** Omission of invalid assignment in deed is immaterial error. Gilbert v. Auster, 135 Wis. 581, 116 NW 177.

**30.** Trust deed. Jones v. Levy [Miss.] 46 S 825.

**31.** As where there was conversion of mortgaged goods without notice, permission being given in note by mistake. Drake v. Pueblo Nat. Bank [Colo.] 96 P 999.

**32.** Though, if there be no objection, one may recover overpayment in equity action to reform contract. Ragsdale v. Turner [Iowa] 120 NW 109.

**33.** On vendor seeking to reform. Bibb v. American Coal & Iron Co. [Va.] 64 SE 32.

**34.** Where equitable relief asked by defendant. Strout v. Lewis [Me.] 71 A 137.

**35.** Western Loan & Sav. Co. v. Thibodeau [C. C. A.] 159 F 370.

**36.** Fosler v. Miller, 132 Ill. App. 464; Cherry v. Brizzolara [Ark.] 116 SW 668; Lucas v. Boyd [Ala.] 47 S 1017. Yet mere conflict of testimony not necessitate denial of relief. Home & Farm Co. v. Freitas, 153 Cal. 680, 96 P 308. One witness insufficient where inconsistent with all other facts and circumstances. Zeilda Forsee Inv. Co. v. Ozenberger, 132 Mo. App. 409, 112 SW 22. **Lease.** Lesser v. Demarest [N. J. Eq.] 72 A 14. Sufficient where evidence of omission is undisputed. Preston v. Hill-Wilson Shingle Co., 60 Wash. 377, 97 P 293. As to mutual mistake to correct deed where it is claimed part of land was omitted in description. Norton v. Gross [Wash.] 100 P 734.

**37.** Bibb v. American Coal & Iron Co. [Va.] 64 SE 32. Mere preponderance not sufficient, but must appear beyond reasonable controversy. Hope v. Bourland [Okl.] 98 P 580.

**38.** Queen Ins. Co. v. Spry Lumber Co., 138 Ill. App. 620.

**39.** Tyler v. Merchants' & Planters' Bank [Ark.] 116 SW 213.

**40.** Knuckles v. Hughes Lumber Co. [Ky.] 116 SW 1193.

**41.** Indian River Mfg. Co. v. Wooten, 55 Fla. 745, 46 S 185.

**42.** Testimony as to mere belief is insufficient. Moran Bolt & Nut Mfg. Co. v. St. Louis Car Co., 210 Mo. 715, 109 SW 47.

**43.** Lesser v. Demarest [N. J. Eq.] 72 A 14.

**44.** Hughes v. Payne [S. D.] 117 NW 363. In case of fraud or mistake. House v. McMullen [Cal. App.] 100 P 344. To prove reservations omitted in contract to convey land. Tossini v. Donahoe [S. D.] 117 NW 148.

**45. Search Note:** Ses Reformation of Instruments, Cent. Dig. §§ 194-199, 202; Dec. Dig. §§ 46-48, 61; 18 A. & E Enc. P. & P. 850.

**46.** Held too general in statement of required fraud or mistake. Foddrell v. Dooley [Ga.] 63 SE 350.

**47.** Cuthbertson v. Morgan [N. C.] 62 SE 744.

**48.** Reformed contract for sale of real estate by adding price and time and manner of payment, all being omitted by mistake. Hughes v. Payne [S. D.] 117 NW 363.

**49.** Reformation enforced through deed recorded in another state, but could not reach and modify record in other state.

after such reformation,[50] but not for rescission where suit is brought for reformation.[51] Where there has been a mutual mistake as to amount, complainant is entitled to have the instrument reformed and to have an abatement in price proportional to the deficiency, together with specific performance of the reformed contract.[52]

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**Reformatories; Registers of Deeds; Registration; Rehearing; Reinsurance; Rejoinders; Relation,** see latest topical index.

**RELEASES.**

**§ 1. Nature, Form and Requisites, 1675.**
**§ 2. Parties to Release, 1675.**
**§ 3. Interpretation, Construction and Effect, 1675.**
**§ 4. Defenses to, or Avoidance of, Releases, 1676.**
**§ 5. Pleading, Proof and Practice, 1677.** Evidence, 1677.

*The scope of this topic* is noted below.[53]

§ 1. *Nature, form and requisites.*[54] See 10 C. L. 1502—At common law a release was required to be under seal, but this is usually dispensed with by statute,[55] and it is sufficient that it be a formal contract, either written or oral, in the nature of a settlement.[56] It is, however, distinct from a mere receipt[57] or a covenant not to sue.[58] An agreement to release a debtor upon payment of a part of an amount acknowledged to be due is not binding.[59] A release may be implied[60] and may become effective without surrender of the evidence of indebtedness.[61] While releases of liability for future negligence are generally deemed against public policy,[62] a person injured through negligence of another may for a consideration release his right of action.[63]

§ 2. *Parties to release.*[64] See 8 C. L. 1714—At common law an executor or administrator may release a claim without express authority.[65]

§ 3. *Interpretation, construction and effect.*[66] See 10 C. L. 1502—The law favors releases given by way of compromise,[67] and any defense must be supported by clear

Lyndon Lumber Co. v. Sawyer, 135 Wis. 525, 116 NW 255.

**50.** Insurance policy. Sykes v. Life Ins. Co., 148 N. C. 18, 61 SE 610. Deed of trust reformed and foreclosed in same suit. Craig v. Pendleton [Ark.] 116 SW 209. Contract. Hughes v. Payne [S. D.] 117 NW 363.

**51.** Lucas v. Boyd [Ala.] 47 S 1017.

**52.** Moffett v. Jaffe, 61 Misc. 584, 114 NYS 614.

**53.** This topic includes only formal releases, excluding settlements and the effect of a release as an accord and satisfaction (see Accord and Satisfaction, 11 C. L. 13).

**54. Search Note:** See notes in 100 A. S. R. 394, 107 Id. 615.

See, also, Release, Cent. Dig. §§ 1-28; Dec. Dig. §§ 1-14; 24 A. & E. Enc. L. (2ed.) 282, 283.

**55.** Olston v. Oregon Water Power & R. Co. [Or.] 96 P 1095.

**56.** Newberry v. Chicago Lumbering Co., 164 Mich. 84, 15 Det. Leg. N. 663, 117 NW 592.

**57.** Willoughby v. Hannon [Ala.] 47 S 241.

**58.** Texarkana Tel. Co. v. Pemberton, [Ark.] 111 SW 257.

**59.** Bodenhofer v. Hogan [Iowa] 120 NW 559. See, also, Accord and Satisfacton, 11 C. L. 13; Payment and Tender, 12 C. L. 1299.

**60.** A sale of land injured is in effect a release of any claim for damages to such land as against grantee. Thomas v. Booth-Kelly Co. [Or.] 97 P 1078.

**61.** As note and mortgage. Donovan v. Boeck [Mo.] 116 SW 543.

**62.** See Contracts, 11 C. L. 729.

**63.** Nason v. Chicago, etc., R. Co. [Iowa] 118 NW 751.

**64. Search Note:** See Release, Cent. Dig. §§ 53-71; Dec. Dig. §§ 26-29; 24 A. & E. Enc. L. (2ed.) 295.

**65.** Compromise on claim. Olston v. Oregon Water Power & R. Co. [Or.] 96 P 1095.

**66. Search Note:** See notes in 6 C. L. 1286; 4 Id. 1272; 34 L. R. A. 788; 58 Id. 293; 65 Id. 578; 8 L. R. A. (N. S.) 1034; 10 Id. 1202; 14 Id. 321; 11 A. S. R. 906; 36 Id. 145; 92 Id. 872; 111 Id. 281; 1 Ann. Cas. 63; 4 Id. 548, 647; 8 Id. 1042; 9 Id. 519; 11 Id. 397.

See, also, Release, Cent. Dig. §§ 47-84; Dec. Dig. §§ 25-40; 24 A. & E. Enc. L. (2ed.) 290.

**67.** Edens v. Fletcher [Kan.] 98 P 784. Evidence insufficient to show did not know nature of instrument. St. Louis, etc., R. Co. v. Campbell, 85 Ark. 592, 109 SW 539. Though money afterwards refused. Illinois Cent. R. Co. v. Vaughn, 33 Ky. L. R. 906, 111 SW 707.

and satisfying evidence.[68] A release should be liberally [69] construed, so as to make all parts operative,[70] and its validity not made to depend upon the validity of the cause of action [71] or of the capacity in which a release may act,[72] whether he act in an individual or representative capacity.[73] In the absence of explanatory evidence, any ambiguity is construed against the releasor [74] and in favor of a complete release,[75] but the words of the release are not to be extended beyond the consideration,[76] or to damages discovered [77] or arising subsequently,[78] unless specified.[79] The release of one of several persons jointly liable releases all,[80] except as otherwise provided by statute [81] or by the release itself,[82] but the authorities conflict where the one released was not actually liable.[83]

§ 4. *Defenses to, or avoidance of, releases.*[84]—See 10 C. L. 1503—An unauthorized release is no bar to an action.[85] A general release under seal may be avoided only by showing great inequity.[86] A mutual mistake of fact is a valid defense to a release,[87] but a party's mere ignorance of its contents or the extent of the other's liability at the time of signing is not.[88] A right to rescind a release should be claimed without unreasonable delay,[89] and any consideration received thereunder should be promptly returned [90] unless had for a separate and distinct matter [91] or the question

68. Mental incapacity at time of signing was alleged, but evidence held insufficient. Barrett v. Lewiston, B. & B. St. R. Co. [Me.] 72 A 308.

69. Though made in advance of damage by fire to building near right of way. Equitable Fire & Marine Ins. Co. v. St. Louis & S. F. R. Co. [Mo. App.] 114 SW 546.

70. But as between attorney and client, ambiguity is to be construed in favor of latter. Brackett v. Ostrander, 126 App. Div. 629, 110 NYS 779.

71. Cleveland, etc., R. Co. v. Hilligoss [Ind.] 86 NE 485.

72. Administrator acting under voidable appointment. Chicago & Eastern Ill. R. Co. v. Wolfrum, 136 Ill. App. 161.

73. Member is bound by a release made by him for partnership, also insurance company by release of owner. Equitable Fire & Marine Ins. Co. v. St. Louis & S. F. R. Co. [Mo. App.] 114 SW 546.

74. Barnes v. American China Development Co., 115 NYS 703.

75. Harvey v. Denver & R. G. R. Co. [Colo.] 99 P 31. Whether part or all released pending appeal. Thomas v. Booth-Kelly Co. [Or.] 97 P 1078.

76. Payment by insurance company of only indemnity due and demanded is invalid as to future liability. Moore v. Maryland Casualty Co. [N. C.] 63 SE 675.

77. Church Cooperage Co. v. Pinkney, 163 F 653.

78. From overflow. Ramey v. Baltimore, etc., R. Co., 235 Ill. 502, 85 NE 639. Recorded release by owner of land to railroad company, to "run with the land," operates against subsequent tenant injured. Gulf, etc., R. Co. v. Thornton [Tex. Civ. App.] 109 SW 220.

79. Royalties from coal lands. Hatfield v. Followay [Ky.] 113 SW 853.

80. Tort feasors. Cleveland, etc., R. Co. v. Hilligoss [Ind.] 86 NE 485. Joint debtors. Warthen v. Melton [Ga.] 63 SE 832. Release of one partner from firm obligation during existence of partnership releases all. Statute permitting separate compositions and limitation as to firm debtors, construed. Barber v. Davidson, 115 NYS 819.

81. Under Rev. Civ. Code, § 1187, release of one does not release others nor effect their right of contribution from him. Central Banking & Trust Co. v. Pusey [S. D.] 116 NW 1126. Since joint tort feasors are not joint debtors, within the meaning of the statute providing that release of one joint debtor does not release all, until the claim has been reduced to judgment or otherwise liquidated by the parties, and it follows that the release of one joint tort feasor operates as a discharge of all others jointly liable for the same tort. Moore v. P., C., C. & St. L. R. Co., 7 Ohio N. P. (N. S.) 368.

82. Edens v. Fletcher [Kan.] 98 P 784.

83. Where one released not joint tort feasor, not release others. Edens v. Fletcher [Kan.] 98 P 784. Immaterial that one released was not liable. Cleveland, etc., R. Co. v. Hilligoss [Ind.] 86 NE 485.

84. Search Note: See notes in 4 C. L. 1273; 6 L. R. A. (N. S.) 663; 11 Id. 690; 3 Ann. Cas. 574; 4 Id. 655; 6 Id. 807; 8 Id. 179; 10 Id. 739.

See, also, Release, Cent. Dig. §§ 30-46; Dec. Dig. §§ 16-24; 24 A. & E. Enc. L. (2ed.) 317.

85. Release by widow with children before her appointment as administratrix, not bind estate, even though she be afterward appointed and though probate court has approved the settlement, not having jurisdiction to do so. Aho v. Republic Iron & Steel Co., 104 Minn. 322, 116 NW 590.

86. Such as would justify a court of equity in setting it aside. Barnes v. American China Development Co., 115 NYS 703.

87. Predicated on opinion as to extent of injury by releasee's physician. St. Louis, etc., R. Co. v. Hambright [Ark.] 113 SW 803.

88. Action for personal injury. No fraud or incapacity shown. Simpson v. Pennsylvania R. Co. [C. C. A.] 159 F 423.

89. Then question for jury. Texas & P. R. Co. v. Jowers [Tex. Civ. App.] 110 SW 946.

90. Where fraud. Wells v. Royer Wheel

of donation is involved,[92] in which case the amount received may be deducted from the amount recovered.[93] A release, though under seal, may be attacked at law for fraud either in the consideration or execution.[94] Equity will set aside a release if there be no consideration or it be executed under duress.[95]

*Consideration wanting.* See 10 C. L. 1503—Failure[96] or gross inadequacy[97] of the consideration[98] is a valid defense as between the parties, and in such case the release does not estop recovery on the liability.[99]

*Fraud* See 10 C. L. 1503 avoids a release as it does any other contract, the subject being treated in a separate topic.[1]

§ 5. *Pleading, proof and practice.*[2]—See 10 C. L. 1503—A void release may be ignored,[3] but a voidable release must set aside before recovery may be had,[4] although an action to avoid a release and one for recovery may be united in the same petition.[5] The release of another as being liable for the same injury may be pleaded as a defense,—without alleging facts showing joint liability.[6] An instruction need not deal with admitted facts.[7]

*Evidence.* See 10 C. L. 1503—The burden of proof is upon a party seeking to cancel a release, its execution being admitted,[8] and parol evidence is not admissible to vary

Co. [Ky.] 114 SW 737; Rabitte v. Alabama Great Southern R. Co. [Ala.] 47 S 573. Negligence case. Evidence insufficient to show fraud and incapacity. Shaw v. Delaware, L. & W. R. Co., 126 App. Div. 210, 110 NYS 362.

**91.** Simeoli v. Derby Rubber Co. [Conn.] 71 A 546. Not where there is controversy as to whether payment was for injuries or for reimbursement for loss of time. St. Louis, etc., R. Co. v. Hambright [Ark.] 113 SW 803; Illinois Cent. R. Co. v. Edmonds, 33 Ky. L. R. 933, 111 SW 331.

**92.** Then question for jury. Brambell v. Cincinnati, etc., R. Co. [Ky.] 116 SW 742.

**93.** Texas & P. R. Co. v. Jowers [Tex. Civ. App.] 110 SW 946. If duress be alleged as a ground for release, all its essential elements must be proven. Not duress where party free to act. Bonney v. Bonney, 237 Ill. 452, 86 NE 1048. Not where mere financial distress. Louisville Veneer Mills Co. v. Clemonts, 33 Ky. L. R. 106, 109 SW 308.

**94.** By statute, but at common law only in equity. Olston v. Oregon Water Power & R. Co. [Or.] 96 P 1095. But conclusive unless fraud. Zdancewicz v. Burlington County Trac. Co. [N. J. Law] 71 A 123. And any ambiguity should be submitted to the jury. Meaning and effect of "In full" on check is open to proof. Millert v. Augustinian College, 36 Pa. Super. Ct. 511, following principles elaborated in Benseman v. Insurance Co., 13 Pa. Super. Ct. 363. Evidence insufficient to show release of joint tort feasor. Borchardt v. People's Ice Co., 106 Minn. 134, 118 NW 359. By administrator. Whether bound the estate. Olston v. Oregon Water Power & R. Co. [Or.] 96 P 1095. As a question of fact. Barnes v. American China Development Co., 115 NYS 703.

**95.** Settlement pending divorce proceeding. Bonney v. Bonney, 141 Ill. App. 476.

**96.** Willoughby v. Hannon [Ala.] 47 S 241; Belyea v. Cook, 162 F 180; Texas Cent. R. Co. v. Johnson, [Tex. Civ. App.] 111 SW 1098. A release of insurance benefits in favor of one not entitled and given under a mistaken idea of legal right is invalid. Knights of Columbus v. McInerney, 153 Mich. 574, 15 Det. Leg. N 551, 117 NW 166. Mere promise of one partner to pay firm debts no consideration for release of other partner. Ray v. Pollock [Fla.] 47 S 940.

**97.** Where jury allowed $900 for injury to leg. Atchison, etc., R. Co. v. Peck [Kan.] 100 P 54. Made in haste and while in dazed condition. Missouri, K. & T. R. Co. v. Craig [Tex. Civ. App.] 114 SW 850. Conditions considered only as they exist at time of release, not as afterwards arising. Wells v. Royer Wheel Co. [Ky.] 114 SW 737. But any consideration accepted is adequate there being no fraud or other inequity. Cleveland, etc., R. Co. v. Hilligoss [Ind.] 86 NE 485.

**98.** Bonney v. Bonney, 237 Ill. 452, 86 NE 1048.

**99.** Signed by sailor on leaving vessel before return to part of discharge. Belyea v. Cook, 162 F 180.

**1.** See Fraud and Undue Influence, 11 C. L. 1583.

**2. Search Note:** See notes in 4 C. L. 1277; 14 L. R. A. (N. S.) 329.

See, also, Release, Cent. Dig. §§ 85-117; Dec. Dig. §§ 43-61; 24 A. & E. Enc. L. (2ed.) 321; 18 A. & E. Enc. P. & P. 88.

**3.** Invalidity need not be pleaded. Simeoli v. Derby Rubber Co. [Conn.] 71 A 546.

**4.** Action for damages. Perry v. O'Neill & Co., 78 Ohio St. 200, 85 NE 41.

**5.** Perry v. O'Neill & Co., 78 Ohio St. 200, 85 NE 41.

**6.** Cleveland, etc., R. Co. v. Hilligoss [Ind] 86 NE 485.

**7.** Where mental condition at time of settlement, need not instruct beyond. Wells v. Royer Wheel Co. [Ky.] 114 SW 737.

**8.** Perry v. O'Neill & Co., 78 Ohio St. 200, 85 NE 41.

the terms of an unambiguous written release.[9] A release given pending appeal may be shown by evidence dehors the record.[10]

**Relief Funds and Associations,** see latest topical index.

## RELIGIOUS SOCIETIES.

§ 1. Organization as a Corporation and Status of Society, 1678.
§ 2. Membership and Meetings, 1678.
§ 3. Ministers, 1679.
§ 4. Powers and Liabilities of Society in General, 1679.
§ 5. Property and Funds, 1679.
§ 6. Jurisdiction of Courts, 1679.
§ 7. Actions by or Against Society or Members, 1680.

*The scope of this topic* is noted below.[11]

§ 1. *Organization as a corporation and status of society.*[12]—See 10 C. L. 1503—Incorporated societies stand on the same footing as other corporations and are subject to common-law rules relating thereto,[13] their officers having only such power as the charter confers.[14] Incorporated church organizations of the same faith may, in the absence of charter restrictions, consolidate,[15] the question of whether such harmony of faith exists as to permit union being of exclusive ecclesiastical cognizance.[16] The Roman Catholic Church in Porto Rico[17] and in the Philippine Islands[18] is a legal personality capable of taking property by gift,[19] and the laws of Porto Rico relating to business corporations have no application to it.[20] The constitution and laws of West Virginia expressly prohibit the incorporation of religious organizations.[21] The general assembly of the Presbyterian Church is invested with the general governing power.[22]

§ 2. *Membership and meetings.*[23]—See 10 C. L. 1504—The rights of members of an incorporated society are, except as ecclesiastical questions are involved,[24] the same as those of stockholders in a civil corporation;[25] thus, they must exhaust their remedies within the corporation before seeking judicial aid to control the action of the directors.[26] Expulsion from membership cannot be reviewed in the civil courts where no property right is involved.[27]

9. Pennsylvania Casualty Co. v. Thompson, 130 Ga. 766, 61 SE 829; Tate v. Wabash R. Co., 131 Mo. App. 107, 110 SW 622; Smith v. Georgia R. & Banking Co. [Ga.] 62 SE 673. Writing presumed to contain the whole agreement. Evidence, if admitted, must be clear and convincing. Chaplin v. Gerald [Me.] 71 A. 712.

10. Thomas v. Booth-Kelly Co. [Or.] 97 P 1078.

11. Matters common to all associations (see Associations and Societies, 11 C. L. 308) or corporations (see Corporations, 11 C. L. 810) are excluded, as are questions of charitable gifts (see Charitable Gifts, 11 C. L. 604).

12. **Search Note:** See notes in 32 L. R. A. 92; 11 Ann. Cas. 236.
See, also, Religious Societies, Cent. Dig. §§ 1-17, 47-74, 80-99, 208-215; Dec. Dig. §§ 1-6, 9, 11-13, 32-35; 22 A. & E. Enc. L. (2ed.) 761; 24 Id. 323, 327.

13. Horst v. Traudt, 43 Colo. 445, 96 P 259.

14. Male member's meeting held to have no power to divide property on separation of several churches controlled by a single corporation. Trustees of Methodist Episcopal Church v. Asbury Sunday School Soc. [Md.] 72 A 199.

15. Fussell v. Hall, 134 Ill. App. 620; Wallace v. Hughes [Ky.] 115 SW 684; Brown v. Clark [Tex.] 116 SW 360.

16. Fussell v. Hall, 134 Ill. App. 620; Wallace v. Hughes [Ky.] 115 SW 684.

17. Ponce v. Roman Catholic Apostolic Church, 210 U. S. 296, 52 Law. Ed. 1068.

18, 19. Santos v. Holy Roman Catholic & Apostolic Church, 212 U. S. 463, 53 Law. Ed.

20. Ponce v. Roman Catholic Apostolic Church, 210 U. S. 296, 52 Law. Ed. 1068.

21. Miller v. Ahrens, 163 F 870. Courts take judicial notice of fact that under § 47, art. 6, of Constitution (Code 1896, p lxiii), and Code 1906, § 2293, religious denomination or church cannot be incorporated. Lunsford v. Wren [W. Va.] 63 SE 308.

22. Power to unite hitherto severed branches under its jurisdiction, determined. Wallace v. Hughes [Ky.] 115 SW 684; Brown v. Clark [Tex.] 116 SW 360.

23. **Search Note:** See notes in 22 L. R. A. 206; 69 Id. 255; 7 Ann. Cas. 767.
See, also, Religious Societies, Cent. Dig. §§ 18-46; Dec. Dig. §§ 7, 8; 22 A. & E. Enc. L. (2ed.) 761; 24 Id. 338.

24. See post, § 6.

25, 26. Horst v. Traudt, 43 Colo. 445, 96 P 259.

27. Mandamus to compel reinstatements, denied. State v. Cummins [Ind.] 85 NE 359.

§ 3. *Ministers.*[28]—See 10 C. L. 1504—Mandamus will not lie to compel reinstatement of a minister where he has no temporal right in the office and no fees or emoluments are concerned.[29]

§ 4. *Powers and liabilities of society in general.*[30]—See 10 C. L. 1504—A society is not bound by its ultra vires acts,[31] nor by unauthorized acts of its officers.[32] The liability of religious societies for tort is elsewhere treated.[33]

§ 5. *Property and funds.*[34]—See 10 C. L. 1505—Statutes frequently limit the amount of real estate which may be held by a church organization,[35] and devises contrary to such statutes are absolutely void.[36] The Roman Catholic Church has capacity to take and hold real property,[37] and the fact that such property is acquired by gifts, even of public funds, does not affect the absoluteness of its rights.[38] Where religious societies have power to hold land, a conveyance to one in trust for a particular congregation vests the title in such congregation,[39] which may compel the trustee named to convey to another selected by the congregation,[40] and such right cannot be impaired by the ecclesiastical rules of the church.[41] Limitations by the donors of church property must be clearly expressed.[42] In case of division, the property is ordinarily awarded to that faction to which the majority adheres [43] unless the property is charged with a trust for the support of certain doctrines, in which case the court must determine which faction adheres thereto;[44] but where a local church makes a valid union with the general organization of its denomination, those members accepting the union retain the church property,[45] the determination of which members remain part of the general body being for the ecclesiastical courts.[46] Where a local church is part of a general organization, the property must be used in accordance with valid orders of the governing body.[47]

§ 6. *Jurisdiction of courts.*[48]—See 10 C. L. 1507—Civil courts will not review the findings of the ecclesiastical tribunals as to purely religious questions,[49] nor will they

**28. Search Note:** See Religious Societies, Cent. Dig. §§ 180-193; Dec. Dig. § 27; 24 A. & E. Enc. L. (2ed.) 332.

**29.** State v. Cummins [Ind.] 85 NE 359.

**30. Search Note:** See notes in 38 L. R. A. 687; 109 A. S. R. 372.

See, also, Religious Societies, Cent. Dig. §§ 75-98; 168-179, 194-198; Dec. Dig. §§ 10-12, 26, 28-30; 24 A. & E. Enc. L. (2ed.) 340, 370, 372.

**31.** A corporation organized for social and religious purposes cannot contract for death benefits to members. Society of St. Stephen v. Sikorski, 141 Ill. App. 1.

**32.** Where a contract lien on church property was executed by alleged trustees, the burden is on the lien claimants to show their authority. Owens v. Caraway [Tex. Civ. App.] 110 SW 474.

**33.** See Charitable Gifts, 11 C. L. 604.

**34. Search Note:** See notes in 2 L. R. A. (N. S.) 828.

See, also, Religious Societies, Cent. Dig. §§ 103-179; Dec. Dig. §§ 15-26; 24 A. & E. Enc. L. (2ed.) 360.

**35.** Code 1906, §§ 2606, 2613, cannot be evaded by devise to a trustee and conversion into personalty by lien. Miller v. Ahrens, 163 F 870.

**36.** Cannot be ratified, nor can any estoppel preclude one from asserting the invalidity. Miller v. Ahrens, 163 F 870.

**37.** Ponce v. Roman Catholic Apostolic Church, 210 U. S. 296, 52 Law. Ed. 1068; Santos v. Holy Roman Catholic & Apostolic Church, 212 U. S. 463, 53 Law. Ed. —.

**38.** Santos v. Holy Roman Catholic & Apostolic Church, 212 U. S. 463, 53 Law. Ed. —. Church held entitled to hold property acquired by gifts from residents of the barrio of Concepcion. Id.

**39.** Act 1731 (1 Smith's Laws, p. 192). Krauczunas v. Hoban, 221 Pa. 213, 70 A 740.

**40.** Krauczunas v. Hoban, 221 Pa. 213, 70 A 740.

**41.** That the trustees named in the conveyance was bishop and under rules of church held title to all realty does not entitle him to retain the property. Krauczunas v. Hoban, 221 Pa. 213, 70 A 740.

**42.** Endowments held not to preclude union of churches. Fussell v. Hail, 134 Ill. App. 620.

**43, 44.** Wallace v. Hughes [Ky.] 115 SW 684.

**45.** Brown v. Clark [Tex.] 116 SW 360; Wallace v. Hughes [Ky.] 115 SW 684.

**46.** Wallace v. Hughes [Ky.] 115 SW 684.

**47.** St. Vincent's Parish v. Murphy [Neb.] 120 NW 187.

**48. Search Note:** See notes in 15 L. R. A. 801; 49 Id. 384; 3 L. R. A. (N. S.) 854; 4 Id. 1154; 68 A. S. R. 864; 100 Id. 734.

See, also, Religious Societies, Cent. Dig. §§ 100-102; Dec. Dig. § 14; 24 A. & E. Enc. L. (2ed.) 347.

**49.** Whether there is such harmony of faith between two churches as permits of union. Fussell v. Hail, 134 Ill. App. 620; Wallace v. Hughes [Ky.] 115 SW 684. Expulsion from membership where no civil rights are involved. State v. Cummins [Ind.]

ordinarily review rulings of general organization by which a local church or parish is governed.[50] The courts will prevent a majority from diverting the church property to the promulgation of teachings clearly contrary to the adopted faith of the church,[51] and may enjoin use of church property in manner contrary to orders of the governing body.[52] Where property is given for the support of a particular doctrine, the courts will decide, between rival claimants, which supports such doctrine.[53]

§ 7. *Actions by or against society or members.*[54]—See 10 C. L. 1507—Ejectment lies to try title to property between rival claimants to trusteeship.[55]

Where several persons seek to enforce a trust imposed by the donor of church property, the attorney general should be made a party.[56] The pastor of a church is not a necessary party to a bill to enforce a trust imposed by the donor of the church property.[57]

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**Remainders; Remedy at Law; Remittitur,** see latest topical index.

**REMOVAL OF CAUSES.**

**§ 1. Right to Remove From State to Federal Court, 1680.**
**§ 2. What is a "Suit" or "Action" so Removable, 1681.**
**§ 3. Nature of Controversy or Subject-Matter and Existence of Federal Question, 1681.**
**§ 4. Diversity of Citizenship and Alienage of Party, 1682.**
**§ 5. Prejudice and Local Influence and Denial of Civil Rights, 1683.**
**§ 6. Amount in Controversy, 1683.**
**§ 7. Procedure to Obtain and Effect the Removal, 1684.**
**§ 8. Transfer of Jurisdiction and Other Consequences of Removal, 1686.**
**§ 9. Practice and Procedure After Removal; Remand or Dismissal, 1687.**
**§ 10. Transfer Between Courts of the Same Jurisdiction, 1688.**

*The scope of this topic* is noted below.[58]

§ 1. *Right to remove from state to federal court.*[59]—See 10 C. L. 1508—The power granted by congress to a party litigant to remove to a federal court his controversy is not a constitutional or vested right[60] but a mere privilege which congress may grant or withhold at will, and when granted at all it is upon such terms, conditions and limitations as may be prescribed.[61] No suit or action is removable from a state court to a federal circuit court unless it be one that plaintiff could originally have brought in the circuit court.[62] An action pending before a justice of the peace in a state is removable.[63] A cause can only be removed from the court of original jurisdiction and not from the appellate tribunal.[64]

85 NE 359. As to which faction remains part of the general ecclesiastical body. Wallace v. Hughes [Ky.] 115 SW 684.

50. St. Vincent's Parish v. Murphy [Neb.] 120 NW 187.

51. Maintaining in office a minister guilty of gross and repeated immorality. Yanthis v. Kemp [Ind.] 85 NE 976; Id. [Ind. App.] 86 NE 451.

52. St. Vincent's Parish v. Murphy [Neb.] 120 NW 187.

53. Wallace v. Hughes [Ky.] 115 SW 684.

54. **Search Note:** See Religious Societies, Cent. Dig. § 14; 24 A. & E. Enc. L. (2ed.) 371; 18 A. & E. Enc. P. & P. 99.

55. Yanthis v. Kemp. [Ind. App.] 86 NE 451.

56, 57. Larkin v. Wikoff [N. J. Eq.] 72 A 98.

58. While the rule that a cause to be removable from state to federal court must be within the jurisdiction of the federal courts is here treated, the nature and extent of that jurisdiction pertains to another topic (see Jurisdiction, 12 C. L. 458).

59. **Search Note:** See notes in 24 L. R. A. 289; 53 Id. 568; 6 Ann. Cas. 325.

See, also, Criminal Law, Cent. Dig. § 198; Removal of Causes, Cent. Dig. §§ 1-35; Dec. Dig. §§ 1-17; 18 A. & E. Enc. P. & P. 159.

60, 61. Mahopoulus v. Chicago, etc., R. Co., 167 F 165.

62. 24 Stat. 552, § 2; 25 Stat. 433; U. S. Comp. St. 1901, p. 509. Mahopoulus v. Chicago, etc., R. Co., 167 F 165.

63. Civil action pending before justice court, value in controversy exceeding $2,000, plaintiff being a citizen of the state of Nebraska and defendant a foreign corporation, removal allowable. Katz v. Herschel Mfg. Co., 160 F 684.

64. Katz v. Herschel Mfg. Co., 160 F 684.

§ 2. *What is a "suit" or "action" so removable.*[65]—See 10 C. L. 1508—A proceeding instituted by a city to condemn the property of a water company by an application to a state court for the appointment of commissioners to appraise the property is a judicial proceeding removable into a federal court[66] from its inception.[67] An action to remove a cloud from the title to land lying within the district where the suit is brought may be removed to the federal court, although neither party is a resident of the state in which the suit is brought.[68]

§ 3. *Nature of controversy or subject-matter and existence of federal question.*[69]—See 10 C. L. 1508—An action is removable if a federal question is involved or if the case arises under the constitution or laws of the United States.[70] But to authorize a removal on the ground that a federal statute is involved, a substantial defense thereunder must be shown.[71] If in a joint action against several defendants a federal question is raised as to one of the defendants, it permeates the entire action and affects all the defendants,[72] and the fact that one of several defendants is indemnified by one of the other defendants does not make the party indemnified a nominal or formal party.[73] Ordinarily, to justify the removal of a cause from a state to a national court on the ground that the case is one arising under the constitution or laws of the United States, that fact must appear from the plaintiff's petition in the case,[74] though plaintiff fraudulently conceal the facts giving rise to the right of removal.[75] To render an action against an officer of the United States removable from a state to a federal court by certiorari, the acts which constitute the cause of action must have some rational connection with official duties under "a revenue law," and in some way effect the revenue of the government,[76] and the fact

**65. Search Note:** See Removal of Causes, Cent. Dig. §§ 11-26; Dec. Dig. §§ 4-8; 18 A. & E. Enc. P. & P. 166.

**66.** Requisite amount being involved and defendant a citizen of another state. Metropolitan Water Co. v. Kansas City, 164 F 738; Kansas City v. Metropolitan Water Co., 164 F 728.

**67.** Kansas City v. Metropolitan Water Co., 164 F 728. Citizen from another state held entitled to remove cause at any time after application for appointment of commissioners when deprived of property and only question for litigation is amount of compensation payable. Id.

**68.** Under Jurisdictional Act March 3, 1875, c. 137, 18 Stat. 470, amended Act March 3, 1887 c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508). Gillespie v. Pocahontas Coal & Coke Co., 162 F 742.

**69. Search Note:** See Criminal Law, Cent. Dig. § 198; Removal of Causes, Cent. Dig. §§ 36-59; Dec. Dig. §§ 18-25; 18 A. & E. Enc. P. & P. 181.

**70.** Action against corporation created by act of congress to establish a joint liability is, as to the individual defendants and the corporation, a suit arising under the federal constitution or laws, and removable under removal provisions. Matter of Dunn, 212 U. S. 374, 53 Law. Ed. —. Action based upon carrier's common-law duty to furnish facilities for shipping, although damages arose by act of a carrier engaged in interstate business, not one to enforce an act of congress relating to interstate commerce between the states. Pittsburgh, etc., R. Co. v. Wood [Ind. App.] 84 NE 1009. An action against a federal corporation is an action arising under the laws of the United States. Choctaw, O. & G. R. Co. v. Hendricks [Okl.] 95 P 970. Choctaw, Oklahoma & Gulf Railroad Company held such federal corporation that a suit against it presents a question under the laws of the United States, for which reason a removal may be had under Enabling Act, § 16 (Act June 16, 1906, c. 335 [34 Stat. 276], amending Act March 4, 1907, c. 2911, § 1 [34 Stat. 1286]). Choctaw, O. & G. R. Co. v. Hamilton [Okl.] 95 P 972; Choctaw, O. & G. R. Co. v. Hendrick [Okl.] 95 P 970. Contention that suit is one against an officer of United States for acts done in discharge of official duties does not present federal question. People's U. S. Bank v. Goodwin, 160 F 727.

**71.** Where injuries were received in the Indian Territory while Mans. Dig. Ark. c. 20, § 566, was in force by virtue of Act Congress, May 2, 1890 (26 Stat. 81, c. 182), held action arose under statutes of Arkansas and not under act of congress; hence removal properly denied, no federal question being involved. Missouri K. & T. R. Co. v. Blachley [Tex. Civ. App.] 109 SW 995.

**72, 73.** Choctaw, O. & G. R. Co. v. Hamilton [Okl.] 95 P 972.

**74, 75.** People's U. S. Bank v. Goodwin, 160 F 727.

**76.** Action for libel against assistant attorney general for post office department and an inspector of department, based on promulgation by them of fraud order against plaintiff, held not within Rev. St. § 643 (U. S. Comp. St. 1901, p. 521). People's U. S. Bank v. Goodwin, 162 F 937.

that the officer performed such duties must appear on the face of the complaint in the action or in the petition for the writ of certiorari.[77]

§ 4. *Diversity of citizenship and alienage of party.*[78]—See 10 C. L. 1509—Diversity of citizenship is ground for removal,[79] unless neither party resides in the district where the suit is brought.[80] Residence in the state where suit was brought for a temporary purpose and for an indefinite time does not defeat the removal of a cause for diversity of citizenship.[81] There can be no diversity of citizenship so as to give rise to removal on that ground where the defendant is a federal corporation, since such corporation is not a citizen of any state.[82] An action brought by a nonresident alien in a state court against a citizen of another state is removable by the defendant where the requisite amount is involved.[83] Under the removal act, right of removal upon the ground of diverse citizenship is conferred only upon persons who are defendants in the plaintiff's suit and not on an actual plaintiff even though affirmative relief against him in the suit might be claimed by way of counter demand.[84] All the defendants must be nonresidents,[85] except that a fraudulent joinder,[86] or joinder of a nominal or formal party, can neither defeat nor give the right of removal.[87] To render an action removable to the federal court on the ground of al-

77. People's U. S. Bank v. Goodwin, 162 F 937.

78. **Search Note:** See notes in 8 C. L. 1724; 1 L. R. A. (N. S.) 370, 375; 5 Id. 50; 4 Ann. Cas. 1150, 1154; 8 Id. 75; 9 Id. 760.
See, also, Criminal Law, Cent. Dig. § 198; Removal of Causes, Cent. Dig. §§ 60-115; Dec. Dig. §§ 26-61; 18 A. & E. Enc. P. & P. 187.

79. Oroville & N. R. Co. v. Leggett, 162 F 571. Where bill in equity was filed in court of chancery by a citizen of Delaware against two respondents, one a citizen of Delaware and the other a citizen of Maryland, petition of latter averring that controversy was between respondent, a citizen of Maryland, on one side, and complainant and the other respondent, both citizens of Delaware, on the other, case being otherwise within removal act, removal for diversity held proper. Hutton v. Joseph Bancroft & Sons Co. [Del.] 67 A 972.

80. Gillespie v. Pocahontas Coal & Coke Co., 162 F 742. Action by alien, a nonresident of the United States, against a corporation, brought in court of another state than that of defendant's incorporation, but in which it does business, hence is subject to service and suit in state court, held not removable by defendant for diversity of citizenship unless where plaintiff does not consent thereto. Mahopoulus v. Chicago, etc., R. Co., 167 F 165.

81. "Residence" held to involve some idea of permanency and fixed intention to remain at place of removal. Evidence held not to show such residence so as to defeat removal of cause. Willingham v. Swift & Co., 165 F 223.

82. Choctaw, O. & G. R. Co. v. Hendricks [Okl.] 95 P 970.

83. Even against objection of alien plaintiff when timely interposed. Barlow v. Chicago & N. W. R. Co., 164 F 765.

84. Plaintiff in suit for less than $2,000 not to have become a defendant giving right of removal on ground of diversity of citizenship because defendant, in answer, made counterclaim for more than $2,000. Illinois Cent. R. Co. v. Waller & Co., 164 F 358. "Defendant" as used in earlier removal act, having been construed by supreme court to include only party defendant on record in state court, given same construction as used in act March 3, 1875, c. 137, § 2, 18 Stat. 470, amended Act March 13, 1887, c. 373, § 1, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 509). Id.

85. The parties must be considered collectively in determining the question of the removal of a cause for diversity of citizenship. Parties defendant. Santa Clara County v. Goldy Mach. Co., 159 F 750. Joint action in Illinois against lessor and lessee railway company, charging joint negligence and liability, held not removable by lessee on ground that it was a foreign corporation, in exclusive use and operation, and alone liable if any liability for injury complained of and that codefendant was fraudulently joined, since in Illinois a joinder and joint recovery in such case in state courts is permissible. Willard v. Chicago R. & P. R. Co. [C. C. A.] 165 F 181.

86. Two persons cannot be wrongfully joined as defendants solely for the purpose of defeating removal from state to federal court. St. Louis S. W. R. Co. v. Adams [Ark.] 112 SW 186. If at any time it becomes apparent to the court that a resident defendant was joined without reasonable grounds therefor, the court should set aside the order refusing to remove the case and direct the removal of the cause. Ward v. Pullman Car Corp. [Ky.] 114 SW 754. A joinder of parties cannot be fraudulent which is authorized by the laws of the state in which the suit is brought. Id. Under pleadings in action against railway company and manufacturer of car, who were nonresidents, and two of railways' car inspectors, who were residents of state, held joinder of inspectors was fraudulently joined to prevent removal. Id.

87. Choctaw, O. & G. R. Co. v. Hamilton [Okl.] 95 P 972. In matter of removal of causes for diversity of citizenship, garnishees are not indispensable parties to a suit. Contention that garnishees are indispensable parties, and that, since some of them are residents of same state with plaintiff, cause should be remanded, untenable. Macurda v.

leged diversity of citizenship, such diversity must be made to appear to have existed both at the beginning of the suit and when the petition was filed.[88]

*Separable controversy.*See 10 C. L. 1511—A separable controversy [89] justifies a removal as to a single nonresident defendant,[90] and, in a case where a party joined is not an indispensable party, the mere fact that such party, a nonresident, is joined by him as a defendant along with the defendant, does not operate to prevent application of separable controversy rule.[91] The right of removal to a federal court on the ground of separable controversy must be determined exclusively with reference to the complaint itself, unaided by judicial knowledge or subsequent pleadings.[92] The court will look only to the record as it stood in the state court at the time the petition for removal was filed.[93] Where the complaint on its face states a cause of action against both defendants, which can be properly joined in one action, the cause cannot be removed from state to federal court on the ground that it is a separable controversy merely by raising an issue of fact in the petition for removal as to whether or not a joint cause of action exists.[94]

§ 5. *Prejudice and local influence and denial of civil rights.*[95]—See 8 C. L. 1726

§ 6. *Amount in controversy.*[96]—See 10 C. L. 1511—The value of the entire amount in dispute must exceed $2,000,[97] to be determined by the sum demanded as appears

Glove Newspaper Co., 165 F 104. Defendants, joined in suit in state court to recover an interest in lands only as trustees holding paramount title in trust, and whose title as such was not disputed, held not indispensable parties, whose citizenship and residence in same state as complainant would prevent removal of cause by other defendants, who were real parties in interest. Lawrence v. Southern Pac. Co., 165 F 241.

88. O'Connor v. Chicago, etc., R. Co. [Iowa] 117 NW 979.

89. Separable removable controversy by foreign corporation, joined as a party defendant to foreclose mortgage, held to exist where mortgagor and mortgagee, citizens of state, unite in attacking validity of prior mortgage in favor of such corporation on ground that it was doing business without complying with state laws, and that note secured embraced charges exacted because of an illegal combination. Fritzlen v. Boatman's Bank, 212 U. S. 364, 53 Law. Ed. — Matters alleged held to constitute such concurrent acts of negligence against defendants as to defeat application for removal. Stratton Cripple Creek Min. & Development Co. v. Ellison, 42 Colo. 498, 94 P 303. Action for negligence, under Kirby's Dig. § 6607, against railway company and engineer, held removable, there being no liability against engineer for failure to "keep a lookout." Lockard v. St. Louis & S. F. R. Co., 167 F 675. In action against railway company, which, if sued alone, would have been removable, and a resident not entitled to remove, where verdict was rendered in favor of resident but against corporation, on which judgment was entered and reversed on company's appeal, fact that plaintiff did not appeal from judgment in favor of resident did not entitle railway company, after reversal, to remove cause as a separable controversy against plaintiff and itself. Huber v. Texas & P. R. Co. [Tex. Civ. App.] 113 SW 984. Action to condemn right of way, fee being in defendant, a citizen of same state as plaintiff, held not to involve separable controversy between plaintiff and nonresident defendant, joined as having leasehold interest in all or part of tract, so as to entitle latter to remove cause. Oroville & N. R. Co. v. Leggett, 162 F 571. Where the object of a suit is to condemn deed, appropriate to public use separate and distinct tracts of land, each owned by a different person, each constitutes a separable controversy (Id.), but the fact that defendants can file separate answers, tendering distinct and varying issues relating to their respective estates in one tract, does not create separable controversies within meaning of statute (Id.). An action by a resident of one state against a resident and a nonresident of the same state is not removable to a federal court on the application of the nonresident, where the resident defendant is a proper, if not a necessary, party to the determination of the controversy. Wilson v. Big Joe Block Co., 135 Iowa, 531, 113 NW 348.

90. McCulloch v. Southern R. Co. [N. C.] 62 SE 1096.

91. Fritzlen v. Boatman's Bank, 212 U. S. 364, 53 Law. Ed. —.

92. Stratton Cripple Creek Min. & Development Co. v. Ellison, 42 Colo. 498, 94 P 303.

93. Oroville & N. R. Co. v. Leggett, 162 F 571.

94. St. Louis S. W. R. Co. v. Adams [Ark.] 112 SW 186.

95. **Search Note:** See notes in 4 Ann. Cas. 455; 5 Id. 704.

See, also, Criminal Law, Cent. Dig. § 198; Removal of Causes, Cent. Dig. §§ 116-127; Dec. Dig. §§ 62-70; 18 A. & E. Enc. P. & P. 184.

96. **Search Note:** See Removal of Causes, Cent. Dig. §§ 128-134; Dec. Dig. §§ 71-76; 18 A. & E. Enc. P. & P. 267.

97. Where plaintiff tenders as an essential issue question of title, and, in addition to a money judgment, prays for general relief under the state practice, and title is put in issue by the answer, value of such title should be taken into account in determining right of removal. Title together with $1,500 held to exceed $2,000. Porter v. Northern Pac. R. Co., 161 F 773.

by the record at the time the petition is filed,[98] and, when an amendment is made, the sum last demanded is "the matter in dispute."[99] The right of removal is affected by the amount in controversy only where there is a diversity of citizenship, and not where the action arises under the constitution, laws or treaties of the United States.[1]

§ 7. *Procedure to obtain and effect the removal.*[2]—See 10 C. L. 1511—Removal is effected by the timely filing[3] of bond[4] and petition. No order is essential to a removal nor to put an end to the state jurisdiction.[5] The petition must adequately aver the ground of removal,[6] and while there is no law requiring that a petition for

98, 99. McCulloch v. Southern R. Co. [N. C.] 62 SE 1096.

1. Enabling Act of Oklahoma, § 16. Choctaw, O. & G. R. Co. v. Hendricks [Okl.] 95 P 970.

2. **Search Note:** See notes in 5 Ann. Cas. 247; 11 Id. 962.

See, also, Removal of Causes, Cent. Dig. §§ 135-212; Dec. Dig. §§ 77-99; 18 A. & E. Enc. P. & P. 273.

3. Under Code 1904, § 3260, petition for removal of cause to federal court must be filed on or before the rule day on which a plea in abatement must be filed. Southern Exp. Co. v. Jacobs [Va.] 63 SE 17. Act of congress Aug. 13, 1888, c. 866, § 3, 25 Stat. 435, provides that one desiring to remove a cause to the federal court must file a petition in the state court at the time defendant is required by the laws of the state to answer or plead. South Park Com'rs v. Ayer, 237 Ill. 211, 86 NE 704. Under eminent domain act (Hurd's Rev. St. 1908, c. 47), § 4, and chancery act (Hurd's Rev. St. 1908, c. 22), § 16, held petition for removal not filed until after day for answering is too late, though law did not require filing of written pleading, and though no default was taken in eminent domain proceedings' notice served on nonresident, being returnable on day for answering. Id. A petition for removal is in time when filed as soon as the petitioner learns of the filing, without notice of additional pleadings in the state court, the effect of which is to disclose a removable controversy. Fritzlen v. Boatman's Bank, 212 U. S. 364, 53 Law. Ed.—. Under act of congress providing that motion be made in state court at time, or at any time before, defendant is required to answer, held motion made at close of plaintiff's evidence and after a verdict had been directed against one of defendants was too late, and properly denied. Cincinnati, etc., R. Co. v. Evans, 33 Ky. L. R. 596, 110 SW 844. Under Act congress March 3, 1875, c. 137, § 3, 18 Stat. 471, amended Act March 3, 1887, c. 373, § 1, 24 Stat. 552, and Act. Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, pp. 508, 510), application filed after expiration of time given defendant by state laws to plead is too late, and insufficient to deprive state court of jurisdiction. Wilson v. Big Joe Block Coal Co., 135 Iowa, 531, 113 NW 348. Extension of time to plead under Code, § 3554, held not to extend time fixed by § 3552, federal statute not relating to special orders granted on application or stipulation of parties. Id. Where defendants, citizens of state, were dismissed, leaving action solely between corporations of different states, removable petition presented 9 days after rendition of judgment, with no prior notice that it would be filed, held too late. Aetna Indemnity Co. v. Little Rock [Ark.] 115 SW 960. Under the Oklahoma enabling act, an application for removal may be made at any time before the termination of the second term of the court in which the case is pending. Oklahoma enabling act (Act June 16, 1906, c. 3335, § 16, 34 Stat. 276). Choctaw, O. & G. R. Co. v. Burgess [Okl.] 95 P 606. Under Oklahoma enabling act (Act June 16, 1906, c. 3335, § 16, 34 Stat. 276), acts of plaintiff in error held to constitute an election to proceed in state court, so as to preclude him from right to transfer cause to federal court for review, Id. Under enabling act (Act June 16, 1906, c. 3335, § 16, 34 Stat. 276, amending Act March 4, 1907, c. 2911, § 1, 34 Stat. 1286), defendant held to have elected to proceed in state courts, so as to be precluded from having his regularly appealed case reviewed in the federal courts by not appearing upon due notice of time for hearing. Choctaw, O. & G. R. Co. v. Sittel [Okl.] 97 P 362.

4. Under removal act (Act March 3, 1875, c. 137, § 3, 18 Stat. 470, as amended by act Aug. 3, 1888, c. 1866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 510]), the bond must be such as is capable of enforcement in case of default. Alexandria Nat. Bank v. Willis C. Bates Co. [C. C. A.] 160 F 839.

5. McCulloch v. Southern R. Co. [N. C.] 62 SE 1096; Barlow v. Chicago & N. W. R. Co., 164 F 765. No refusal to make such order will prevent the jurisdiction of that court from attaching, and all questions of the truth of the facts alleged in the petition for removal are to be determined in the federal court. Barlow v. Chicago & N. W. R. Co., 164 F 765. Upon a refusal of the state court to order the removal, the defendant need not proceed with the trial in that court (Id.), but he may, at his option, and it is the better practice to file a copy of the record in the federal court and require that the right of removal be contested there (Id.).

6. A removal petition must state the necessary jurisdictional facts. Santa Clara County v. Goldy Mach. Co., 159 F 750. A petition for the removal of a cause filed by one defendant alone and based solely on diversity of citizenship held fatally defective where it failed to disclose that the other defendant was merely nominal party to action and such fact did not appear elsewhere in record; nor may such defect be cured by amendment in federal court. Id. Petition filed by alien, which alleges that plaintiff is a citizen of the United States, and on information and belief that he is a citizen and resident of the district, held sufficient to give federal court jurisdiction on face of record. Holton v. Helvetia-Swiss Fire Ins. Co., 163

removal be verified, verification is the better practice.[7] The whole record may be looked to in aid of the averments of the petition, where these do not fully disclose sufficient grounds for the jurisdiction upon removal.[8] Mere conclusions in a petition for removal of a cause will not be considered.[9] A court will not assume that the allegations of a pleading are untrue and that one is joined for the purpose of preventing the removal of a cause to the federal court.[10] The right must exist upon the ground stated in the petition,[11] and, while a petition may be amended by making a more perfect statement of the alleged ground of removal,[12] an amendment will not be permitted which sets up an entirely new and distinct ground.[13] Upon the filing of a petition setting up grounds for removal of a cause from the state court to the federal court, it is the duty of the state court to accept the petition and bond and proceed no further in said suit,[14] and it is reversible error to deny an application to transfer made upon proper and sufficient grounds.[15] Where a motion for removal is denied for a defect in the petition, a renewal motion is properly denied when by an allowed amendment the cause of action remains the same.[16] When an amendment transforms

F 659. A petition for removal must state the facts which deprive the state court of the right to proceed with the case, and that the federal court has jurisdiction, together with the grounds for which the removal is asked. Neesley v. Southern Pac. Co. [Utah] 99 P 1067. Petition held insufficient, for, while title to cause showed that plaintiff was designated as a national bank, there was nothing in the petition by way of averment to show that it was organized and incorporated as a national bank under the laws of the United States, nor that bank was a citizen of Virginia, title to cause not being an averment of petition. Alexandria Nat. Bank v. Willis C. Bates Co. [C. C. A.] 160 F 839. Petition avering that controversy in action is between citizens of different states, that defendant at time of commencement was, and still is, a citizen and resident of Illinois, that plaintiff was and is a resident of Iowa, held insufficient as failure to allege the citizenship of plaintiff at commencement of action. O'Connor v. Chicago, etc., R. Co. [Iowa] 117 NW 979. Where from the petition it is apparent defendant corporation is a citizen of a particular state and that it is a nonresident of another particular state, it is sufficient. Wisecarver v. Chicago, etc., R. Co. [Iowa] 117 NW 961. Need not negative every defense which may be made to the petition. Id. Allegations showing nonresidence are sufficient for the retention of jurisdiction, even if the direct statement of nonresidence is not set forth in the words of the statute, for, if plaintiff desires to controvert the alleged citizenship, proper remedy is by a countershowing. Id.

7. Porter v. Northern Pac. R. Co., 161 F 773. Verification by attorney for defendant, made on belief, held sufficient, especially where defendant was a corporation. Id.

8. Gillespie v. Pocohantas Coal & Coke Co., 162 F 742. A petition is sufficient where, taken in connection with the entire record in the case, it sufficiently shows that the petitioner is the defendant in plaintiff's action. Wisecarver v. Chicago, etc., R. Co. [Iowa] 117 NW 961. Where petition averred that defendant was a corporation organized under New York laws, and defendant in answer and in his petition for removal expressly admitted that it was "a corporation or joint stock company" organized and existing under and by virtue of laws of New York, held requisite diversity of citizenship sufficiently appeared by pleadings. Adams Exp. Co. v. Adams [C. C. A.] 159 F 62.

9. Conclusions as to parties, fraudulent joinder, and negligence of one of codefendants, etc. Clinger's Adm'x v. Chesapeake & O. R. Co., 33 Ky. L. R. 86, 109 SW 315. To aver that the controversy is between citizens of different states is but a conclusion, whether it precedes specific allegations of fact by way of explanation or follows them by inference to be drawn therefrom. O'Connor v. Chicago, etc., R. Co. [Iowa] 117 NW 979.

10. No such assumption in petition alleging that conductor by gross negligence so managed and operated train that it resulted in injury, etc. Clinger's Adm'x v. Chesapeake & O. R. Co., 33 Ky. L. R. 86, 109 SW 315.

11. Removal petition based wholly on ground of diverse citizenship, defendant held not entitled to removal on proof that plaintiff was an alien and that case was removable on ground that it was one brought by an alien in a state court against a citizen. Wallenburg v. Missouri Pac. R. Co., 159 F 217.

12. Wallenburg v. Missouri Pac. R. Co., 159 F 217.

13. Where removal was based wholly on diversity of citizenship and proof showed plaintiff was an alien, court held without jurisdiction to cure defect by amendment setting up new ground for removal. Wallenburg v. Missouri Pac. R. Co., 159 F 217.

14. St. Louis S. W. R. Co. v. Adams [Ark.] 112 SW 186.

15. When error is presented by proper assignment. Hercules Torpedo Co. v. Smith [Ind. App.] 87 NE 254. The state court upon the filing of a petition for the removal of a cause may, though a sufficient bond is filed, examine the petition and ascertain if the facts as stated are of such a character as to entitle the petitioner to a removal. Wilson v. Big Joe Block Coal Co., 135 Iowa, 531, 113 NW 348.

16. Amendment not changing cause of action nor effecting defendant's appearance. Cincinnatti, etc., R. Co. v. Evans. 33 Ky. L. R. 596, 110 SW 844.

a nonremovable cause into a removable one, the defendant may have a second petition for removal.[17]

§ 8. *Transfer of jurisdiction and other consequences of removal.*[18]—See 10 C. L. 1513—If the case is removable and one of which the federal court may take jurisdiction,[19] on filing of the petition and bond the jurisdiction of the state court ceases eo instante,[20] and the court has no jurisdiction to make any order whatever except that it will proceed no further,[21] and the court to which a cause has been removed in the protection of its jurisdiction will stay further proceedings that are without authority,[22] but no stay of proceedings in a cause in a state court exists, under the provisions of the removal statute, unless the removal proceedings are valid and accomplish their purpose of divesting the state court of jurisdiction and vest the same in the federal court.[23] On removal an action comes to the federal court in the condition it was in when removed from the state court,[24] for the record as it comes from the state court for the purpose of such motion cannot be amended.[25] A petition and bond for removal are in the nature of process,[26] and defendant filing a petition for removal to a federal court consents to accept the jurisdiction of that court [27] and waives any objection to the venue and right to be sued in the federal district of his residence.[28] A

**17.** St. Louis, etc., R. Co. v. Neal, 83 Ark. 591, 98 SW 958. Where complaint before amendment showed as clearly as after amendment whether a federal question was involved, case not within rule. Id.

**18. Search note:** See notes in 3 L. R. A. (N. S.) 295.

See, also, Removal of Causes, Cent. Dig. §§ 204-212; Dec. Dig. §§ 95-99; 18 A. & E. Enc. P. & P. 347.

**19.** The provision of the removal acts that it shall be the duty of the state court to accept the petition and bond for removal of a cause and proceed no further in the suit does not apply to a suit which could not originally have been brought in the court to which the action is sought to be removed. Act March 3, 1875, c. 137, § 2, 18 St. 470 (U. S. Comp. St. 1901, p. 509). Ward v. Pullman Car Corp. [Ky.] 114 SW 754. Action held not to involve question of whether property should be appropriated under power of eminent domain against owner's will and beyond federal court's jurisdiction, but to involve solely a question as to what compensation should be paid for wrongful use of land or a mere trespass, hence removable. McCulloch v. Southern R. Co. [N. C.] 62 SE 1096.

**20.** Act March 3, 1887, c. 373, § 1, 24 St. 554 (U. S. Comp. St. 1901, p. 510). McCulloch v. Southern R. Co. [N. C.] 62 SE 1096. Rev. St. U. S. § 629 (U. S. Comp. St. 1901, pp. 503-516). Bryne v. Lathrop, Shea & Henwood Co., 112 NYS 273; Anderson v. United Realty Co., 79 Ohio St. 23, 86 NE 644. Where a proper petition and bond are presented to a state court, the court should proceed no further with the suit. Barlow v. Chicago & N. W. R. Co., 164 F 765; Metropolitan Water Co. v. Kansas City, 164 F 738. Where action was begun in state court, and, after issuance of temporary injunction procured by plaintiff's giving bond, cause was removed, decided for defendant, state court held without power to grant motion under Code Civ. Proc. § 623, for a reference to ascertain damages sustained by injunction, proceeding being incident of action. Metropolitan Water Co. v. Kansas City, 164 F 738. A state court has no jurisdiction to try an issue of fact arising upon a petition or removal to a federal court; but, where the petition and bond are sufficient, the case must be removed. Wisecarver v. Chicago, etc., R. Co. [Iowa] 117 NW 961.

**21.** After filing of bond and petition state court, under Act March 3, 1887, c. 373, § 1, 24 St. 554 (U. S. Comp. St. 1901, p. 510), held without jurisdiction to declare that amended complaint did not state a cause of action, and so remit plaintiff to his original complaint so as to prevent removal for insufficiency of amount involved. McCulloch v. Southern R. Co. [N. C.] 62 SE 1096.

**22.** Metropolitan Water Co. v. Kansas City, 164 F 738.

**23.** Tierney v. Helvetia-Swiss Fire Ins. Co., 126 App. Div. 446, 110 NYS 613. An ex parte order of removal is void and inoperative where the petition upon which it is based fails to state the jurisdictional facts necessary to vest jurisdiction in the federal court. Petition failing to show citizenship of plaintiff's assignors. Id. Where such removal order has been made but no stay of proceedings has been obtained, the state court is not divested of jurisdiction of the case but may properly enter a default judgment on default of serving an answer. Id.

**24.** Act March 3, 1875, c. 137, § 4, 18 St. 471 (U. S. Comp. St. 1901, p. 511). Mercantile Nat. Bank v. Barron, 165 F 831.

**25.** Webster v. Iowa State Traveling Men's Ass'n, 165 F 367.

**26.** In re Moore, 209 U. S. 492, 52 Law. Ed. 904.

**27.** In re Moore, 209 U. S. 492, 52 Law. Ed 904. One removing a cause from the state court waives his right to afterwards object to the jurisdiction of the court of removal unless the court from which it was removed had no jurisdiction. Barlow v. Chicago & N. W. R. Co., 164 F 765.

**28.** Cussiarre v. New York Cent. & H. R. Co. [C. C. A.] 163 F 38. The statutory requirement that an action in the federal court based upon diversity of citizenship shall be brought in the district of the residence of either plaintiff or defendant is waived by the defendant's removal of the cause from the state court. De Valle Da Costa v. Southern Pac. Co., 160 F 216.

motion to vacate the service of process may properly be presented to the federal court after removal of the cause where defendant has appeared only for the purpose of such removal, whether so limited or not,[29] but consent of both parties to the federal jurisdiction waives all objections to the jurisdiction of that court over a suit which, by reason of the nonresidence of both parties, could not have been in the first instance brought in that particular circuit court,[30] and plaintiff makes a general appearance where, after removal, instead of challenging the jurisdiction by motion to remand, he files an amendment petition in the federal court and signs a stipulation giving time to answer.[31] But the jurisdiction acquired by a federal court by removal is strictly limited to the statutory grounds and tests solely on the sale of facts and controversy of record as brought from the court of original cognizance,[32] neither acquiescence of the parties, failure to press motion to remand, nor other proceeding in the federal court after removal, can enlarge the statutory authority of the federal court nor divest that of the state court.[33] After the removal of a cause into a federal court in a district in which the defendant could not originally have been sued in such court, and subsequent to notice that a motion by the plaintiff to remand the case is to be made, the defendant cannot improve his position by entering a general appearance.[34]

§ 9. *Practice and procedure after removal; remand or dismissal.*[35]—See 10 C. L. 1513—If it affirmatively appear after removal that the United States courts had no jurisdiction,[36] or in case of doubt as to jurisdiction, the action should be remanded,[37] the existence of grounds of removal being a question for the federal court.[38] The court can with the consent of the parties remand a cause after it has been removed,[39] and the jurisdiction may be restored by the withdrawal of the petition for removal before an action upon the petition has been taken in the federal court,[40] or the plaintiff may dismiss his action after it has been removed to a federal court and bring a second suit for the same cause in a state court.[41] Where a cause is erroneously removed from a state court to the circuit court of the United States and thereafter remanded to the state court, all orders made in the case by the circuit court except the one remanding the case are void for want of jurisdiction.[42] A case of which federal and state courts have concurrent jurisdiction properly removed to a federal court and there dismissed cannot under stat-

29. Webster v. Iowa State Traveling Men's Ass'n, 165 F 367.

30. Act of Aug. 13, 1888 (25 St. at L. 433, c. 866, U. S. Comp. St. 1901, p. 508, § 1). In re Moore, 209 U. S. 492, 52 Law. Ed. 904.

31. In re Moore, 209 U. S. 492, 52 Law. Ed. 904.

32, 33. Willard v. Chicago, B. & Q. R. Co. [C. C. A.] 165 F 181.

34. Tierney v. Helvetia-Swiss Fire Ins. Co., 163 F 82.

35. **Search Note:** See notes in 7 L. R. A. (N. S.) 501; 4 Ann. Cas. 891; 9 Id. 942.

See, also, Appeal and Error, Cent. Dig. §§ 725, 752, 3401; Costs, Cent. Dig. § 255; Removal of Causes, Cent. Dig. §§ 213-253; Dec. Dig. §§ 100-120; 18 A. & E. Enc. P. & P. 357.

36. Holton v. Helvetia-Swiss Fire Ins. Co., 163 F 659. That officers might have been brought in by certiorari under Rev. St. § 643 (U. S. Comp. St. 1901, p. 521), no justification for retention of improperly removed cause under removal act. People's U. S. Bank v. Goodwin, 160 F 727. Where complaint avers proper jurisdictional facts to justify a dismissal under such act for want of jurisdiction, proof must be such as to satisfy court that the suit does not really and substantially come within jurisdiction. Hill v. Walker [C. C. A.] 167 F 241. When the jurisdictional fact is disputed, it devolves upon the petitioner seeking to have the case removed to establish the right of removal. Wallenburg v. Missouri Pac. R. Co., 159 F 217.

37. Tierney v. Helvetia-Swiss Fire Ins. Co., 163 F 82.

38. Willard v. Chicago, B. & Q. R. Co. [C. C. A.] 165 F 181. An issue of fact arising on a petition for the removal of an action is triable only in the federal court on a motion to remand. St. Louis S. W. R. Co. v. Adams [Ark.] 112 SW 186. The question whether the state is the real party plaintiff must be determined from the consideration of the nature of the case as disclosed by the record. Ex parte Nebraska, 209 U. S. 437, 52 Law. Ed. 876.

39, 40. Anderson v. United Realty Co., 79 Ohio St. 23, 86 NE 644.

41. Dismissal for want of prosecution. Shotwell v. Chesapeake & O. R. Co. [Ky.] 113 SW 512.

42. Order of circuit court permitting party to demur. Floody v. Chicago, etc., R. Co., 104 Minn. 132, 116 NW 111.

ute be renewed in the state court within six months of such dismissal so as to avoid the bar of the statute of limitations.[43] When a cause has been removed to the federal court on the ground of diversity of citizenship and the record supports the order of removal, the record will not thereafter be amended at plaintiff's instance, either as a matter of right or discretion, by substituting another defendant for the sole purpose of defeating the federal courts' jurisdiction.[44] The decision of the federal court in remanding that no federal question is involved is conclusive in the state courts.[45] If, after the order to remand has been made, it results from the subsequent pleadings or conduct of the parties to the cause that the cause is removable, the order remanding the cause does not control the right to make a second application for removal.[46] Mandamus does not lie to correct an error committed by a federal court in denying a motion to remand.[47]

§ 10. *Transfer between courts of the same jurisdiction.*[48]—See 10 C. L. 1514—In a proper case mandamus is available to compel one court to transfer a cause to another.[49]

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**Rendition of Judgment; Repleader; Replegiando,** see latest topical index.

**REPLEVIN.**

§ 1. Nature and Form of Action, 1688.
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*The scope of this topic* is noted below.[50]

§ 1. *Nature and form of action.*[51]—See 10 C. L. 1314—Replevin is a possessory action for the recovery of personal property[52] wrongfully taken or detained.[53] It is a mixed action, partly in rem and partly in personam, and can be brought only

43. Civ. Code 1895, § 3786. Webb v. Southern Cotton Oil Co. [Ga.] 63 SE 135.

44. Where suit was brought in state court against Adams Express company and service of writ was threatened by motion to quash, and plaintiff successfully moved to substitute president of company as defendant, amendment denied in federal court. Taylor v. Weir, 162 F 585.

45. St. Louis, etc., R. Co. v. Neal, 83 Ark. 591, 98 SW 958.

46. Fritzlen v. Boatmen's Bank, 212 U. S. 364, 53 Law. Ed. —. Changes of pleadings in foreclosure proceedings after cause had been remanded to state court, showing untruth of averment in petition of junior character of another mortgage held by a foreign corporation which was made a party defendant, and existence of a separable controversy between the corporation and the other parties, who were all citizens of the state, held sufficient to justify granting of second application for removal. Id.

47. Where motion presented for decision question whether there was a controversy wholly between citizens of different states, state, though named as party, not being a necessary party. Ex parte Nebraska, 209 U. S. 437, 52 Law. Ed. 876.

48. **Search Note:** See Courts, Cent. Dig. §§ 499-791, 1021, 1027-1030, 1288-1323; Dec. Dig. §§ 210-254, 384, 386, 482-488; Criminal Law, Cent. Dig. §§ 198-205; Dec. Dig. § 101; 18 A. & E. Enc. P. & P. 403.

49. To compel district court sitting as successor of United States court of Indian Territory to transfer to county court all records and documents pertaining to certain actions which were transmitted to such district court from such United States court. Davis v. Caruthers [Okl.] 97 P 581.

50. Includes right to the remedy of replevin or equivalent statutory remedies and procedure therein. Substantive rights of property are treated in topics relating thereto.

51. **Search Note:** See Replevin, Cent. Dig. § 1; Dec. Dig. § 1; 24 A. & E. Enc. L. (2ed.) 475, 477; 18 A. & E. Enc. P. & P. 494.

52. Where it appeared that goods were in possession of plaintiff suing as trustee in bankruptcy, judgment in his favor was error. Sloan v. Merchants' Sav. & Trust Co. [C. C. A.] 160 F 654. Action commenced by service of summons in municipal court and oral complaint demanding "claim and delivery" of safe and damages for refusal to deliver, not an action in replevin. Johnstone v. Weibel, 115 NYS 255.

53. Replevin held to lie against bank which held stock certificates belonging to wife as security for husband's debt, 3 Burns'

against the persons having possession when suit is begun.[54] The statutory action of claim and delivery is substantially the same as the action of replevin.[55] In some states by express statutory provision, a bill in equity will lie to recover specific personal property which is so withheld by defendant that it cannot be replevied.[56]

§ 2. *Right of action and defenses.*[57] See 10 C. L. 1515—In order to maintain the action, the plaintiff must have a general or special property in the goods sued for [58] and the right to immediate possession.[59] The action will lie for goods converted by a vendee, although sold in the regular course of trade and placed by the vendor in his possession.[60] The true owner may recover property attempted to be sold to an innocent purchaser by one who has merely the possession of such property.[61] Where the right of possession depends upon conditions precedent, a waiver of such conditions perfects the cause of action.[62] If the defendant's possession be lawful in the first instance, a demand is essential to the cause of action,[63] but where the taking was wrongful,[64] or where plaintiff's bailee has disposed of the property without au-

Ann. St. 1901, § 6964, making contract of suretyship by married women voidable. Opperman v. Citizens' Bank [Ind. App.] 85 NE 991.

**54.** Where complaint alleged a joint wrongful taking and detention of plaintiff's team by two parties defendant, he could elect to proceed against the one having possession and dismiss as to the other. Krebs Hop Co. v. Taylor [Or.] 98 P 494. On rehearing; for former opinion, see Id., 97 P 44.

**55.** B. & C. Comp. St. § 284, et seq. Krebs Hop Co. v. Taylor [Or.] 98 P 494. Action of claim and delivery takes the place of, and has all the elements of, detinue, replevin and trover. If party in possession has converted property and no longer has it in his possession, he is liable for value thereof. American-German Nat. Bank v. Gray & Dudley Hardware Co., 33 Ky. L. R. 547, 110 SW 393.

**56.** Farnsworth v. Whiting [Me.] 72 A 314.

**57. Search Note:** See notes in 4 C. L. 1287; 10 Id. 1516; 21 L. R. A. 206; 55 Id. 280; 69 Id. 732; 1 L. R. A. (N. S.) 474; 5 Id. 495; 8 Id. 216, 224; 25 A. S. R. 256; 80 Id. 697, 741; 1 Ann. Cas. 984; 7 Id. 907; 11 Id. 302.

See, also, Replevin, Cent. Dig. §§ 2-117; Dec. Dig. §§ 2-16; 24 A. & E. Enc. L. (2ed.) 479.

**58.** Plaintiff as vendor under land contract agreed orally with vendee that latter might cut certain timber on land, take it to plaintiff, who was to have it sawed, and apply balance on vendee's debt. Before delivery to plaintiff, logs were seized and sold to defendants for a debt due them from agent of vendee under land contract. Held that plaintiff had such interest in logs, although not delivered to him, as would entitle him to maintain replevin. Rohrer v. Lockery, 136 Wis. 532, 117 NW 1060. Plaintiff sold certain iron pillars to firm of contractors doing work for defendant. This firm transferred its right to goods to defendant by incorporating them into houses which were being built for defendant. Thereafter, being unable to pay plaintiff, they gave order on defendant who refused to surrender possession. Held not entitled to recover. Fagan Iron Works v. Dawson Realty Co., 109 NYS 740. Replevin could not be maintained under authority of a chattel mortgage for goods to be paid for by instalments where it appeared that the mortgage and note which it secured had been abandoned and a new agreement made. Rhodes-Burford Co. v. Gartner, 133 Ill. App. 164.

**59.** Must prove that he was entitled to possession of property when action for claim and delivery commenced. Segars v. Segars [S. C.] 63 SE 891. Defendants, having taken possession of planing mill under instrument alleged to be mortgage, but on which time had not expired, could not retain such property as against plaintiff's writ of replevin. Cummings v. Badger Lumber Co., 130 Mo. App. 557, 109 SW 68. Evidence held to show that plaintiff was entitled to possession as lessee of land from which defendant, also claiming as lessee, cut hay sought to be replevied, and therefore entitled to maintain the action. Loucks v. Winne, 127 App. Div. 460, 111 NYS 485. Held that evidence showed that household goods seized under execution upon a judgment for alimony while in possession of plaintiff in replevin as trustee under will of plaintiff's wife were the property of the deceased and rightfully held by plaintiff. Dreyer v. Dickman, 131 Mo. App. 660, 111 SW 616.

**60.** Stock of whips sold by plaintiff, and by defendant sold to another in fraud of plaintiff, could be treated by latter as its own and recovered by it from such third party. American-German Nat. Bank v. Gray & Dudley Hardware Co., 33 Ky. L. R. 547, 110 SW 393.

**61.** Evidence held to show that plaintiff's foreman who sold team bought with plaintiff's money had never acquired title as against plaintiff. Hussey v. Blaylock [Okl.] 95 P 773. Unauthorized sale by bailee. Taylor v. Welsh, 138 Ill. App. 190.

**62.** Replevin of goods stored in warehouse, return of which could be had only upon condition precedent of returning warehouse receipt, could be maintained where return of such receipt was waived by basing refusal to deliver upon another ground and by making refusal before plaintiff had opportunity to tender receipt. Duffy v. Wilson [Colo.] 98 P 826.

**63.** Where it appeared that horses replevied by plaintiff under claim of loan to defendant's brother were held by defendant under claim of contract of sale from plaintiff, replevin could not lie in absence of demand. Anderson v. Pendl, 153 Mich. 693, 15 Det. Leg. N. 588, 117 NW 326.

**64.** Demand not necessary where horse re-

thority, no demand is necessary.[65] Property seized by an officer under a writ of attachment,[66] or by virtue of an execution against a third person, may be recovered without making a previous demand therefor.[67] The plaintiff must recover on the strength of his own interest,[68] and if such interest is not exclusive, no action will lie.[69] The right to recover may depend upon title and ownership of the property,[70] but such title cannot be litigated if the plaintiff already has possession,[71] and how title was acquired is immaterial.[72] At common law and in some states, replevin will not lie unless the defendant is in possession at the commencement of the action,[73] but the modern rule, under statutes allowing a judgment in the alternative, is that possession in the defendant is unnecessary,[74] and in Illinois constructive possession is sufficient.[75]

plevied was taken from plaintiff's barn in night time without his consent. Ryan v. Schutt, 135 Ill. App. 554.

**65.** No demand necessary before bringing replevin for cat attempted to be sold by person in whose charge it was. Taylor v. Welsh, 138 Ill. App. 190.

**66.** Brady v. Whaley [Kan.] 98 P 1134.

**67.** No demand necessary where plaintiff, as assignee in insolvency, had legal title and possession, which was taken from him by constable acting under execution against assignor. Pogue v. Rowe, 236 Ill. 157, 86 NE 207.

**68.** Not sufficient to show that property sought to be replevied from sheriff, holding under attachment, did not belong to defendants, or that it did belong to others. McLeroth v. Magerstadt, 136 Ill. App. 361.

**69.** Where it appeared that plaintiff had merely an undivided eleven-twelfths interest in barges sought to be replevied, and owner of remaining interest was not joined, no action in replevin would lie. McCabe v. Black River Transp. Co., 131 Mo. App. 531, 110 SW 606.

**70. Plaintiff held to have title:** On replevin by receivers for recovery of certain copper wire, defendants alleged that wire was in its possession as bailee of one who claimed ownership under an attachment, and that action could not be maintained until proper demand and refusal. Held evidence showed service of writ after refusal, and that upon refusal plaintiff could replevy property immediately. Littlefield v. Maine Cent. R. Co. [Me.] 71 A 657. Plaintiff claiming general property in engine and pump was entitled to possession as against defendants who claimed as vendees of owner without notice, it appearing that plaintiff had made proper demand, that defendants claimed as owners, and that plaintiff was not estopped by accrediting former owner's asserted title. O'Neill v. Thompson, 152 Mich. 396, 15 Det. Leg. N. 299, 116 NW 399. In suit for replevin of goods sold at auction and not paid for by note according to agreement, evidence held to show that defendants had no vested right to the property. Bailey v. Dennis [Mo. App.] 115 SW 506. Evidence held to sustain finding that plaintiff had purchased cattle replevied prior to execution of mortgage under which defendant held possession. Kime v. Bank of Edgemont [S. D.] 119 NW 1003. Plaintiff in replevin for yokes and collars manufactured by him from defendant's raw material, having paid to defendant a judgment obtained by latter for spoiling such raw material by inefficient workmanship, held to have title to such goods by virtue of implied special assumpsit raised by the judgment against him. Bauer v. Hess [N. J. Law] 69 A 966.

**Plaintiff held not to have title:** Replevin could not be maintained for saddle bought by defendant under execution against plaintiff which execution embodied the amounts of two judgments, since, execution being merely irregular and not void, upon elimination of amount of the excessive judgment, sale was valid. Bigham v. Dover [Ark.] 110 SW 217. In a suit for replevin of a stock of goods taken in trade by plaintiff, instruction that plaintiff acquired no title until delivery to him of possession and offer of performance on his part held correct. Robinson v. Yetter, 238 Ill. 320, 87 NE 363. Where plaintiff sought to recover, by replevin, team of mules, title to which he claimed under contract with defendant, and evidence showed that contract had been broken on plaintiff's part, held that title did not vest in plaintiff and action could not be maintained. Ellis v. Whitney [Tex. Civ. App.] 111 SW 158. Right to bring action in replevin on breach of conditional sale of horse held barred by previous election to treat title as having passed and bringing suit for balance due. Frisch v. Wells, 200 Mass. 429, 86 NE 775. Evidence held to show that delivery of switchboard to bankrupt defendants by plaintiff was a sale passing title, and therefore not subject to replevin for failure to pay purchase price. Detroit Trust Co. v. F. Bissell Co. [Mich.] 15 Det. Leg. N. 919, 118 NW 722.

**71.** While proper to litigate title of suit brought by one who has right to do so, it cannot be litigated if evidence shows that plaintiff already has possession. Sloan v. Merchants' Sav. & Trust Co. [C. C. A.] 160 F 654.

**72.** Where owner of automobile disposed of it by lottery to plaintiff and gave him an order for same on defendant garage keeper, who subsequently refused to deliver same on ground that others were joint owners with plaintiff and that joint order was necessary, held that question of illegality could not come up, title having already passed from former owner to plaintiff. Dee v. Sears-Nattinger Automobile Co. [Iowa] 118 NW 529.

**73.** Would not lie against executrix to recover property sold and delivered by her to purchaser without notice, which property was claimed by plaintiff under bill of sale executed by decedent. Runge v. Wilson, 7 Cal. App. 577, 95 P 178.

**74.** Plaintiff entitled to damages for unlawful seizure by defendants, although latter not in possession at commencement of

Replevin will not lie to recover the value of labor or services,[76] nor for the recovery of title deeds where the controversy would involve the title to the land.[77] The action will lie to recover the possession of tangible personal property,[78] although it is part of a mass and through confusion with goods belonging to the defendant is incapable of identification.[79]

In some states set-off cannot be pleaded in replevin,[80] and the counterclaims which may be set up are restricted by the peculiar nature of the action.[81] Where the court has no jurisdiction of an affirmative defense, it cannot be set up as a counterclaim.[82] Title and right of possession in a third person,[83] or want of right of possession in defendant, is a complete defense.[84] The action may be barred by estoppel.[85]

§ 3. *Jurisdiction and venue.*[86]—See 10 C. L. 1518—If the action is commenced

suit. Segars v. Segars [S. C.] 63 SE 891. Fact that defendant had parted with possession of goods held as security, not a defense. American-German Nat. Bank v. Gray & Dudley Hardware Co., 33 Ky. L. R. 547, 110 SW 393.

75. Where replevin suit was dismissed and defendant told by constable to take his property, he had such constructive possession thereof, although he had not actually retaken the property, as would enable replevin by another to be maintained for the same property. Lee v. Laswell, 137 Ill. App. 433.

76. Where verdict was given for chattels replevied and also for labor and services in installing them in defendant's building, judgment for plaintiff must be reversed. Roth v. Felt, 111 NYS 649.

77. Would not lie for deed to exchanged lands where defendant claimed no delivery was intended until title examined. Campbell v. Brooks [Miss.] 47 S 545. Replevin, or the provisional remedy of claim and delivery which is a substitute for replevin and detinue, is appropriate for the recovery of deeds, when the object of the action is to regain possession of the specific paper, and not to test the right or title to the property which it represents. Where the right to demand delivery of the deed in dispute, the action will not lie. Bridgers v. Ormond, 148 N. C. 375, 62 SE 422.

78. Certificate of stock is tangible personal property, subject to replevin. Opperman v. Citizens' Bank [Ind. App.] 85 NE 991. Logs are chattels, and when wrongfully detained their value may be recovered in replevin. Sanborn v. Franklin County Lumber Co., 55 Fla. 389, 46 S 85.

79. Recovery could be had although defendants had wrongfully mixed plaintiff's ore with inferior ore belonging to them, and although, upon the seizure, part of defendant's ore was also taken. Blurton v. Hansen [Mo. App.] 116 SW 474.

80. In replevin for boiler and engine leased, one defendant could not allege that he had a lien thereon for debt of codefendant, who was his partner. Eureka Knitting Co. v. Snyder, 36 Pa. Super. Ct. 336.

81. Those counterclaims which will aid instead of hinder court in adjusting rights of litigants in respect to the "transaction" or "subject of action" in sense these words are used in Rev. St. 1899, § 605, regulating counterclaims. Small v. Speece, 131 Mo. App. 513, 110 SW 7. Defendant may set up, as counterclaim to an action in replevin for the recovery of certain mules, his damages caused by plaintiff's breach of his contract to allow defendant to work with mules furnished by plaintiff. Bateman v. Hipp [Tex. Civ. App.] 111 SW 971.

82. In replevin, defendant set up by way of counterclaim a demand for the surrender and cancellation of notes held by plaintiff for sale of piano replevied on ground of fraud. Held that, as this relief was an equitable one, and as the action was begun in justice court, the counterclaim could not be maintained, justice having no jurisdiction of the defense. Small v. Speece, 131 Mo. App. 513, 110 SW 7.

83. Replevin of mortgaged wheat by mortgagee cannot be sustained where evidence showed that title to wheat was in third party. First Nat. Bank v. Farquharson [Okl.] 97 P 559.

84. Libelants instituted a petitory and possessory suit for a quantity of bay rum in possession of collector of customs under claim that it was subject to tax. Collector was not served, but the United States filed notice alleging that goods were subject to internal revenue tax. Held that, in absence of affirmative proceeding on part of government other than such notice, the libelant was entitled to possession of the goods. Plaut v. One Hundred & Seven Barrels of Porto Rican Bay Rum, 165 F 941.

85. In replevin of mare fraudulently sold by owner's bailee, evidence held insufficient to show that statements made by owner's agent to person in possession of mare were misleading in that they did not disclose owner's claim and that there was therefor no estoppel. Martin v. Stong, 35 Pa. Super. Ct. 635. Plaintiff not estopped to claim title to bureau left in father's dwelling until his death, when it was sold by his executor under impression that it belonged to his estate. Guillou v. Campbell, 35 Pa. Super. Ct. 639. Plaintiff held not entitled to maintain replevin for stock certificate for 2,500 shares held by defendant for benefit of plaintiff and third party, it appearing that third party owned 500 shares represented by the certificates, and that plaintiff himself prevented delivery by defendant by breach of his agreement to allow stock to be reissued in form of three certificates giving each of the parties their share. Sulzner v. Cappeau [Pa.] 72 A 270.

86. **Search Note:** See Replevin, Cent. Dig. §§ 118-119; Dec. Dig. §§ 17-20; 24 A. & E. Enc. L. (2ed.) 478; 18 A. & E. Enc. P. & P. 502.

before a justice of the peace, the amount in controversy is jurisdictional.[87] Where the value of the property replevied exceeds the extent of the justice's jurisdiction, he has merely the power to return the property to the defendant,[88] and appeal confers no jurisdiction upon the circuit court.[89]

§ 4. *The affidavit.*[90]—See 10 C. L. 1518—The affidavit need not allege that the property was wrongfully taken,[91] nor its value, unless jurisdiction depends thereon,[92] in which case it is prima facie evidence of the value of the goods replevied.[93] Where the statute makes an affidavit necessary, goods replevied without such affidavit,[94] or upon an affidavit subsequently withdrawn, must be returned to the defendant.[95]

§ 5. *Plaintiff's bond.*[96]—See 8 C. L. 1735—The defendant may waive a replevin bond, since it is provided for his protection.[97] A wife, as owner of the property replevied, may execute the bond jointly with her husband.[98]

§ 6. *The writ and its execution.*[99]—See 8 C. L. 1735—If the writ describes the property insufficiently, a motion to quash is proper.[1]

§ 7. *Custody and delivery of property.*[2]—See 10 C. L. 1519—The property replevied may be placed in the custody of the officer, to be held by him until final judgment.[3] Where bankruptcy proceedings are subsequently instituted against the defendant, he cannot be summarily compelled to deliver such property to the receiver.[4]

87. Where it appeared that value of the property replevied exceeds two hundred dollars, justice was without jurisdiction under Rev. St. c. 79, art. 2, par. 5. Jarrett v. McIntyre, 134 Ill. App. 581. Value of property replevied may be determined by jury in justice court where suit commenced in order to determine whether justice has jurisdiction of amount involved. Id.

88, 89. Jarrett v. McIntyre, 134 Ill. App. 581.

90. **Search Note:** See Replevin, Cent. Dig. §§ 128-137; Dec. Dig. §§ 26-32; 18 A. & E. Enc. P. & P. 511.

91. Such allegation not required by statute (§ 4, c. 119), affidavit following language of statute being sufficient. Ryan v. Schutt, 135 Ill. App. 554.

92. Statement in affidavit as to value of iron tank and copper coils sought to be replevied held immaterial on trial of case on merits, no question of jurisdiction being raised. Mattoon H. L. & P. Co. v. Walker, 134 Ill. App. 414.

93. Richardson v. Gilbert, 135 Ill. App. 363.

94. Where petition does not allege that property sought to be replevied "has not been seized under any process, execution or attachment against the property of the plaintiff," nor "that plaintiff will be in danger of losing said property unless it be taken out of the possession of defendant or otherwise secured," and where there is no affidavit to that effect as required by Rev. St. 1899, § 4463 (Ann. St. 1906, p. 2447), the property must be returned to defendant if delivered before judgment. United Shoe Machinery Co. v. Ramlose, 210 Mo. 631, 109 SW 567.

95. If plaintiff's original petition was sworn to and contained allegations required in affidavit provided for by Rev. St. 1899, § 4463, and under that petition, plaintiff obtained possession, and thereafter filed unverified amended petition which did not contain these averments, and there was no affidavit on file, separate and apart from petition, which accompanied original petition containing these necessary averments, then filing of amended petition was a withdrawal of the first, and defendant was entitled to return of property; but if there was an affidavit on file when amended petition was filed, which was not part of original petition, then amended petition did not operate to withdraw the affidavit, and defendant was not entitled to return of property. United Shoe Machinery Co. v. Ramlose, 210 Mo. 631, 109 SW 567.

96. **Search Note:** See Replevin, Cent. Dig. §§ 138-153; Dec. Dig. § 33; 24 A. & E. Enc. L. (2ed.) 529; 18 A. & E. Enc. P. & P. 614.

97. Gamble v. Harvey-Greenhaw Mercantile Co. [Ark.] 115 SW 946.

98. Where wife's property is taken from joint possession of husband and wife, wife has by statute the right to replevy it and may give bond in replevin therefor, which bond may be executed jointly with husband. Wandelohr v. Grayson County Nat. Bank [Tex.] 112 SW 1046.

99. **Search Note:** See Replevin, Cent. Dig. §§ 154-199; Dec. Dig. §§ 34-54; 18 A. & E. Enc. P. & P. 519.

1. Anderson v. Stewart [Md.] 70 A 228.

2. **Search Note:** See notes in 69 L. R. A. 283.

See, also, Replevin, Cent. Dig. §§ 174-186; Dec. Dig. §§ 44-50; 18 A. & E. Enc. P. & P. 637.

3. Taking of property sold upon condition by marshal in replevin suit brought by vendor, not a taking by vendor under Lien Law (Laws 1897, p. 541, c. 418), such taking being merely to hold property until final judgment. Sigal v. Frank E. Hatch Co., 61 Misc. 332, 113 NYS 818.

4. Where sheriff in action pending in state court holds property in replevin taken by him prior to bankruptcy proceedings under claim of ownership, district court has no jurisdiction by summary order to compel sheriff to deliver property to receiver. In re Rudnick & Co. [C. C. A.] 160 F 903.

*Forthcoming bond.*—See 10 C. L. 1519—Where property retained under a forthcoming bond has been partly destroyed, judgment may be entered in favor of the plaintiff for its entire value.[5] In Pennsylvania a writ will issue upon judgment in plaintiff's favor for the return of property retained by defendant under a forthcoming bond.[6] Where the sheriff has released all claim to property, one in whose custody he has placed it has no lien thereon for charges.[7]

§ 8. *The pleadings and parties to the action.*[8]—See 10 C. L. 1519—The petition should allege ownership or a general or special interest in the property,[9] the facts creating the plaintiff's interest[10] and that the property is wrongfully detained by the defendant.[11] A general allegation of ownership may be sufficient without specifically alleging the right of possession also.[12] The facts relied upon to establish the cause of action need not be pleaded.[13] Unless the statutes requires it,[14] the value of the property need not be alleged.[15] Demand, being a matter of proof, need not be set out.[16] The petition must give such a description of the property as will enable the officer to identify it,[17] and, if it be insufficient, objection should be raised by demur-

**5.** Where all but small portion of property retained by defendant under forthcoming bond was accidentally distroyed by fire, judgment should have been entered in plaintiff's favor for entire ascertained value. Bradley v. Campbell, 132 Mo. App. 78, 111 SW 514.

**6.** At common law and prior to passage of Act April 19, 1901 (P. L. 88), regulating procedure in replevin, if defendant retained possession under claimed property bond, plaintiff could only recover damages, such bond putting an end to his title; but after passage of act, plaintiff may have a writ of retorno habendo, as well as one of fieri facias, to recover value and damages. Reber v. Schroeder, 221 Pa. 152, 70 A 556. By virtue of Act April 19, 1901 (P. L. 88), regulating procedure in replevin, plaintiff held to be entitled in judgment to return of stock certificates in possession of defendant at time of his death and held by him under claim property bond, and to be entitled to writ enforcing such right. Id.

**7.** Beek v. Lavin [Idaho] 97 P 1028.

**8. Search Note:** See notes in 11 Ann. Cas. 1150.

See, also, Replevin, Cent. Dig. §§ 121-124; 200-279; Dec. Dig. §§ 21-24, 55-69, 18 A. & E. Enc. P. & P. 531.

**9.** Remington Typewriter Co. v. Simpson [Neb.] 120 NW 428. Allegation that goods "belonged" to plaintiff sufficient averment of ownership. Littlefield v. Maine Cent. R. Co. [Me.] 71 A 657. Averment that plaintiff was "lawfully entitled to the possession," insufficient. Donnell v. Miller, 133 Mo. App. 693, 113 SW 1132. Petition failing to allege that plaintiff had general or special interest in barges sought to be replevied, fatally defective. McCabe v. Black River Transp. Co. 131 Mo. App. 531, 110 SW 606.

**10.** Complaint alleging that plaintiffs are owners and are entitled to possession, and reciting facts showing that title was acquired under chattel mortgage not detracting from allegation held sufficient. Donovan v. Stuber, 114 NYS 593. Complaint affirmatively showing that plaintiff was mortgagee of property in South Dakota, which property was seized by sheriff in Nebraska under judgment, that debt secured by mortgage was neither due nor paid, but stating no facts showing plaintiff entitled to possession, held insufficient. Pennington County Bank v. Bauman [Neb.] 116 NW 669.

**11.** All that plaintiff need allege is that he is owner of, or has a special interest in, the property, with right of possession, and that property is wrongfully detained by defendant. Remington Typewriter Co. v. Simpson [Neb.] 120 NW 428.

**12.** Since ownership imports right of possession, such allegation sufficient under Code. Illinois Sewing Mach. Co. v. Harrison, 43 Colo. 362, 96 P 177.

**13.** Remington Typewriter Co. v. Simpson [Neb.] 120 NW 428. Complaint need not set out particular certificate by which shares of stock sought to be replevied are held. Hill v. Kerstetter [Ind. App.] 86 NE 997.

**14.** Value of each separate article must be alleged under Code to enable court to render money judgment in case defendant fails to deliver the property. American-German Nat. Bank v. Gray & Dudley Hardware Co., 33 Ky. L. R. 547, 110 SW 393.

**15.** Allegation of value unnecessary, but an averment that plaintiffs gave bond in certain amount, being twice value of said goods, would have been sufficient. Littlefield v. Maine Cent. R. Co. [Me.] 71 A 657.

**16.** Littlefield v. Maine Cent. R. Co. [Me.] 71 A 657.

**17.** Affidavit describing property as 2,500 pounds of zinc and lead ore, the same being a quantity of said ore delivered to defendants on a day named, to be milled, of the value of $50, and alleging that it had been damaged by being mixed with inferior ore, held sufficiently definite. Blurton v. Hansen [Mo. App.] 116 SW 474. Petition setting forth name and value of each item of property sued for is a sufficiently definite description of the property sought to be recovered. Charles v. Valdosta Foundry & Mach. Co., 4 Ga. App. 733, 62 SE 493. Where neither pleadings nor evidence described harness sought to be replevied so as to identify it, no recovery thereof could be had. Ellis v. Whitney [Tex. Civ. App.] 111 SW 158. Description in writ of one reel 4-0 grooved copper trolley wire be-

rer.[18] The declaration need not anticipate and negative defendant's claim of right of possession.[19] An answer which fails to allege the insufficiency of a tender by plaintiff is demurrable.[20] If the complaint is silent as to the source of the plaintiff's title, the defendant may show that it is fraudulent without pleading the fraud.[21] If the statute requires that an affidavit of defense be filed within a given time, it cannot be filed afterwards.[22] It is within the discretion of the court to allow an allegation of special ownership to be substituted for one of general ownership.[23] Any matter which will defeat plaintiff's claim may be proved under a general [24] or specific denial.[25]

A foreign corporation may bring the action without averring compliance with the statute regarding the right of such corporations to sue.[26] One not the sole owner of chattels cannot sue without joining the remaining owners,[27] but a partner may maintain replevin of property sold to the firm, and his recovery is that of the firm.[28] One who claims no interest in the controversy is not a proper party to the action.[29]

§ 9. *Evidence.*[30]—See 10 C. L. 1621—The plaintiff must prove his general or special right of ownership [31] by a preponderance of evidence.[32] In Maryland it is not

longing to plaintiffs held sufficient. Littlefield v. Maine Central R. Co. [Me.] 71 A 657.

18. Anderson v. Stewart [Md.] 70 A 228.

19. Where plaintiff claimed that defendant held as his bailee, and defendant contended he held as bailee of plaintiff and others jointly, plaintiff could show that written agreement upon which such latter claim was based was not binding, although declaration contained no averment to that effect. Dee v. Sears-Nattinger Autmobile Co. [Iowa] 118 NW 529.

20. Where defendant sought to set up as a defense to replevin suit for cars held on demurrage charges that amount tendered by plaintiff was not a reasonable sum for the demurrage, and that amount claimed by defendant was reasonable, but failed so to allege, demurrer would lie. Darlington Lumber Co. v. Missouri Pac. R. Co. [Mo.] 116 SW 530.

21. Where plaintiff merely alleged ownership of goods in hands of sheriff, latter could show that contract between plaintiff and judgment debtor was fraudulent, although no fraud pleaded. Walker v. Ward, 104 Minn. 386, 116 NW 647.

22. Replevin Act of April 19, 1901, § 4 (P. L. 88), providing that defendant shall, within 15 days after filing of declaration, file an affidavit of defense, held to be mandatory, and that plaintiff was entitled to judgment by default where no such affidavit filed, although return day was subsequent to expiration of 15 days. Griesmer v. Hill, 36 Pa. Super. Ct. 69.

23. Amendment setting up special ownership as pledgee, allowed. Gray v. Doty, 77 Kan. 446, 94 P 1008.

24. In replevin for goods mortgaged to secure note endorsed to plaintiff, failure of consideration could properly be shown under general denial. Dewey v. Bobbitt [Kan.] 100 P 77. Defendants, who were sued for recovery of stock of goods which plaintiff had placed in their possession to be disposed of with option of purchase, could, under general denial, show that they claimed goods under sale from plaintiff's alleged vendee. Kaufman v. Cooper [Mont.] 98 P 504.

25. Question in replevin being the right to possession of specific personal property, and under a pleading that puts in issue all allegations of the complaint and denies right to possession of plaintiff any evidence tending to show right of possession in another is admissible. First Nat. Bank v. Barbour [Okl.] 95 P 790. Where replevin was brought to recover possession of certain personal property covered by mortgage in order to sell same, fact that note had been paid because of misapplication of payment by plaintiff to another note was admissible under specific denial. Id.

26. United Shoe Machinery Co. v. Ramiose, 210 Mo. 631, 109 SW 567.

27. Plaintiff, who had merely an undivided eleven-twelfths interest in barges sought to be replevied, could not maintain action without joining owner of remaining interest. McCabe v. Black River Transp. Co., 131 Mo. App. 531, 110 SW 606.

28. Anderson v. Stewart [Md.] 70 A 228.

29. In replevin for property in hands of defendant which had been purchased by him from third party who had possession subject to plaintiff's lien for money advanced, such third party, claiming no interest, is not a proper party defendant. Hight v. Oates [Ark.] 113 SW 40. Replevin to recover certain promissory notes payable to plaintiff, executed by one under guardianship. Guardian was defendant and alleged application of payment to one of the notes, but did not claim to have accounted to plaintiff for money so applied. Held, ward not a proper party, since he did not claim any interest in the notes, his only claim being against defendant. Gerth v. Gerth, 7 Cal. App. 735, 95 P 904.

30. **Search Note:** See Replevin, Cent. Dig. §§ 280-295; Dec. Dig. §§ 70-72.

31. Plaintiff as mortgagee must show that property replevied under chattel mortgage in fact belonged to mortgagor. First Nat. Bank v. Farquharson [Okl.] 97 P 559. In replevin for mule alleged to have been sold on condition that title should be reserved in vendor until purchase price paid, evidence held insufficient to show in ab-

necessary that the plaintiff show absolute title, the only issue being the right of possession at the time of issuing the writ.[33] In the absence of direct evidence, possession is prima facie evidence of ownership.[34] If the question of ownership be in dispute, it must be submitted to the jury if there is evidence thereof.[35] The burden is upon the plaintiff to show his right of possession to the identical property in question [36] by sufficient evidence.[37] Parol evidence is admissible to identify property described under general words merely.[38] When the sheriff has seized the property a presumption arises that he seized the property described in the writ, and the defendant has the burden of controverting such presumption.[39] An officer who holds a writ of attachment is not required to prove the debt of the attaching creditor, where possession was taken from the officer and not from the attaching creditor.[40] The value of the property replevied is not competent when offered merely for the purpose of laying foundation for an appeal to the supreme court.[41] No plaintiff may, on a second trial, introduce evidence inconsistent with that relied upon in the first.[42]

sence of admission of conditional sale that plaintiff had title to the mule. Black v. Roberson [Ark.] 112 SW 402.

**32.** Where hog sought to be replevied was conceded to be in defendant's possession, instruction that finding must be for defendant if plaintiff failed to establish by preponderance of evidence that hog belonged to him was correct. McMahon v. Scott, 132 Ill. App. 582. Undisputed testimony that property belonged to plaintiff, that it had been taken by defendant, that demand had been made, that it was of a certain value, establishes a prima facie case. Kimmitt v. Deitrich [S. D.] 119 NW 986.

**Conditional sales:** Immaterial in replevin for goods sold whether they were leased or sold upon condition that title should not pass until full payment, since in either case, or breach of condition, replevin will lie at the suit of vendor. Branstetter Motor Co. v. Silverberg, 140 Ill. App. 451. Evidence held to show that automobile replevied was sold upon condition that title should not pass until purchase price paid. Id. Evidence held to sustain finding that plaintiff, in replevin for cow alleged to have been bought with money advanced by plaintiff, with a reservation of title in him, was not entitled to the ownership. Hight v. Oates [Ark.] 113 SW 40.

**Chattel mortgages:** Evidence held not to sustain findings that defendant who held possession of replevied cattle under chattel mortgage was entitled to the property as against plaintiff who claimed ownership by purchase, it appearing that plaintiff's husband had, without her authority, given defendant permission to mortgage cattle. Roberts v. Little [N. D.] 120 NW 563. The right of plaintiff in replevin being based upon a chattel mortgage, the meeting and overthrowing of the mortgage by rights existing in the mortgagor overthrew it for all the defendants. Bayse v. McKinney [Ind. App.] 87 NE 693. In replevin for live stock claimed by plaintiff under chattel mortgage alleged by defendant to be fraudulent, evidence held to show that mortgagor had title and that plaintiff was entitled to recover possession. Berwick v. McClure [Minn.] 119 NW 247.

**33.** Anderson v. Stewart [Md.] 70 A 228.

**34.** Question as to whether property replevied under mortgage was owned by defendant when he executed mortgage thereon. First Nat. Bank v. Adams [Neb.] 118 NW 1055.

**35.** Where plaintiff claimed to be owner of crops in hands of sheriff, seized by him on execution against plaintiff's alleged tenant, held that there was sufficient evidence to require submission to jury of question of ownership as between plaintiff and judgment debtor. Walker v. Ward, 104 Minn. 386, 116 NW 647.

**36.** Brunson v. Volunteer Carriage Co. [Miss.] 47 S 377.

**37.** In replevin for a hog, where case turned upon its identification, instruction that burden was upon plaintiff to prove his case by a preponderance of the evidence held correct. McMahon v. Scott, 132 Ill. App. 582. Evidence held insufficient to show that buggy sought to be replevied was the one sold by plaintiff to defendant. Brunson v. Volunteer Carriage Co. [Miss.] 47 S 377. Evidence held insufficient to show that stolen diamond ring sought to be replevied was the ring in defendant's possession. Ehrman v. Simpson, 110 NYS 481.

**38.** Charles v. Valdosta Foundry Mach. Co., 4 Ga. App. 733, 62 SE 493.

**39. Sheriff's return,** "Replevied and delivered to plaintiff," raises a presumption that he was able to locate and identify the property described in writ, and burden is upon defendant to show that property replevied is not the same which plaintiff intended should be replevied. Anderson v. Stewart [Md.] 70 A 228.

**40.** In replevin brought by vendor for chattels sold conditionally, against constable who holds possession under writ of attachment issued against vendee at instance of a stranger to the replevin suit, the constable is not required to prove debt of attaching creditor, where possession was taken from officer and not from attaching creditor. Curtis-Baum Co. v. Lang [Neb.] 120 NW 178.

**41.** Mattoon H. L. & P. Co. v. Walker, 134 Ill. App. 414.

**42.** Proper for plaintiff in justice's court to introduce evidence showing that property was in hands of judgment debtor under written contract for conditional sale, and to show in district court that property was held under verbal contract permitting

The ordinary rules as to variance,[43] admissions,[44] competency,[45] and materialty apply.[46]

§ 10. *Trial.*[47]—See 10 C. L. 1522—The sole issue to be determined is the right to the possession of the property.[48] The issue of ownership [49] and right of possession may be one for the jury.[50] If plaintiff fail to prove a joint wrongful taking as alleged, he may elect at the trial as to which of the defendants he will proceed against.[51] The plaintiff may meet defendant's claim on the bond, although the suit is dismissed for want of jurisdiction.[52] A motion to dismiss will lie only when the record discloses that the court has no jurisdiction.[53] Instructions must not be misleading.[54]

examination with view to purchase, and that written conditional contract was a forgery. Remington Typewriter Co. v. Simpson [Neb.] 120 NW 428.

**43.** Where complaint in claim and delivery set out that defendants sold plaintiffs certain tobacco which was delivered to plaintiffs, that it was in a house on defendant's land, and was to be hauled by them to plaintiff's warehouse, and proof showed an agreement that tobacco should remain in defendant's possession as property of plaintiff, held no material variance. Andrews v. Grimes, 148 N. C. 437, 62 SE 519. Evidence of sales, contract for goods replevied showing sale to have been made to plaintiff's firm instead of to plaintiff as alleged, not a variance under title that plaintiff need only show right of possession. Anderson v. Stewart [Md.] 70 A 228.

**44.** Evidence that plaintiff in claim and delivery for horse, buggy and harness, told defendant that if property was his he could take it, that property was taken in plaintiff's absence and without his authority, held not to show an admission of defendant's ownership or of a surrender to him. Taylor v. Mills, 148 N. C. 415, 62 SE 556. Admission of defendant that he was in possession does not justify judgment against him where he is an innocent purchaser without notice of plaintiff's fraud in acquiring property. American-German Nat. Bank v. Gray & Dudley Hardware Co., 33 Ky. L. R. 547, 110 SW 393.

**45.** Evidence on claim and delivery of tobacco alleged to have been sold by defendants to plaintiff, that plaintiff had placed insurance thereon, held competent as to title and possession. Andrews v. Grimes, 148 N. C. 437, 62 SE 519. Ancillary process issued under statute in claim and delivery, and return thereon, admissible, though return not filed within 20 days. Kimmitt v. Deitrich [S. D.] 119 NW 986. In replevin for live stock, evidence as to the name of the record owner of the land upon which the live stock was kept properly received on question of location and possession. Bernick v. McClure [Minn.] 119 NW 247.

**46.** In replevin for stock of goods which plaintiff had placed in possession of G to be disposed of with option to purchase, which goods were subsequently delivered to defendants under similar contract, evidence offered by defendants of payments made by G while he was in possession was not material. Kaufman v. Cooper [Mont.] 98 P 504. In replevin for cattle held by defendant under lien for pasturage, held that evidence relating to what cattle would have gained on first class feed during time they were pastured was immaterial under pleadings and issues. Bouvier v. Brass [Ariz.] 100 P 799. In claim and delivery of live stock under chattel mortgage, evidence as to how many head of stock were in mortgagor's possession a year after mortgage executed held irrelevant. Kime v. Bank of Edgmont [S. D.] 119 NW 1003.

**47. Search Note:** See Replevin, Cent. Dig. §§ 320-387; Dec. Dig. §§ 85-97; 18 A. & E. Enc. P. & P. 563.

**48.** Remington Typewriter Co. v. Simpson [Neb.] 120 NW 428. Court's rulings in permitting plaintiff to file an amended affidavit in replevin and in refusing to set aside the order of delivery are upon ancillary matters not affecting main issue of possession, and error in regard thereto is immaterial. Brady v. Whaley [Kan.] 98 P 1134.

**49.** Question as to which of parties was entitled to ownership of jeweler's tools replevied, one for jury. Morris v. Williams, 131 Mo. App. 370, 111 SW 607.

**50.** Where, if defendant's testimony be true, horses replevied were rightfully in his possession under contract of sale, and where no demand had been made upon him for a return, it was error to direct a verdict for plaintiff, who claimed that he had loaned horses to defendant's brother and that there was no sale. Anderson v. Pendl, 153 Mich. 693, 15 Det. Leg. N. 588, 117 NW 326.

**51.** Where joint taking of plaintiff's team by city marshal and another was alleged, it was error to deny plaintiff the right to make election. Krebs Hop Co. v. Taylor [Or.] 98 P 494. On rehearing; for former opinion, see Id. 97 P 44.

**52.** Dismissal of a replevin suit for want of jurisdiction does not preclude plaintiff from meeting defendant's claim that he had been injured by breach of the replevin bond with showing that defendant had not been injured because not entitled to possession of the property. Rev. St. 1899, § 3924. Bailey v. Dennis [Mo. App.] 115 SW 506.

**53.** A motion to dismiss will not lie on ground of insufficient description of property taken; want of allegation of ownership, or right of possession in plaintiffs; want of allegation of demand before suit; and want of allegation of value. These objections should be raised by demurrer. Littlefield v. Maine Cent. R. Co. [Me.] 71 A 657. Objection that replevin bond is not signed with sufficient sureties is properly made by motion to dismiss. Id.

**54.** In replevin for a horse, of which de-

*Verdict and findings.*—See 10 C. L. 1523—A verdict for plaintiff is properly directed where the uncontradicted evidence shows title and right of possession in him,[55] but a defendant is not entitled to a directed verdict merely because the plaintiff obtained possession of the property before trial.[56] A general verdict where only a special interest is claimed, and which ignored an instruction to fix the value of the property, is irregular.[57] The verdict is not fatally defective in not specifying in whose possession the property was.[58] If the verdict fails to designate the specific articles to be returned to the plaintiff, objection should be made by motion to make it more complete.[59] Such designation, however, need not be made or the specific value of the articles stated where it appears from the petition that they have been disposed of,[60] or where plaintiff has obtained possession before trial or is not entitled to possession.[61] The defendant waives his right to a separate valuation if he does not demand it, or if he fails to object to the verdict before the jury is discharged.[62] A special finding of ownership is conclusive where no exception is taken.[63]

§ 11. *Judgment and award of damages.*[64]—See 10 C. L. 1523—The judgment should be alternative in form, providing for possession, or, if possession cannot be had, for the value of the property,[65] instead of for a specified omount.[66] The alternatives should be those prescribed by the statute.[67] In Kentucky the plaintiff may elect to take an execution for the value even though the property be tendered.[68] Under the Colorado statute, the entire property must be returned substantially in the same condition as when taken or judgment for its full value must be given.[69] Where defend-

fendant claimed to be the innocent purchaser, a charge to find for plaintiff, if at time of bringing suit defendant had no notice of plaintiff's claim, held error, as being misleading in that, though jury might have concluded that plaintiff was estopped, yet they could not find for defendant if, as evidence showed, at time suit was brought defendant had knowledge of plaintiff's claim. Sparks v. De Bord [Tex. Civ. App.] 110 SW 757. In replevin for siphon bottles, instruction that, if jury found for defendant, they should fix the value of the bottles and defendant's interest in them, held not open to objection that it was misleading, evidence showing title to be in defendants. Enno-Sander Mineral Water Co. v. Fishman, 127 Mo. App. 207, 104 SW 1156.

**55.** Where the uncontradicted evidence showed that plaintiff had bought lumber and that his agent, acting within apparent scope of his authority, had contracted debts for its transportation, whereby it was sold to defendant by sheriff, a verdict for plaintiff should have been directed, it appearing that title was in him. Cooper v. Ratliff [Ky.] 116 SW 748.

**56.** Since action must proceed to determine costs and whether defendant is entitled to a return of property. Kimmitt v. Deitrich [S. D.] 119 NW 986.

**57.** Should have shown whether defendant was general or special owner. Cary Mfg. Co. v. Malone. 115 NYS 632.

**58.** Failure to specify against which of two defendants, not jointly bound, verdict was rendered. Segars v. Segars [S. C.] 63 SE 891.

**59.** Motion must be made when verdict returned; too late after jury dismissed. Gambrell v. Gambrell [Ky.] 113 SW 885.

**60.** Gambrell v. Gambrell [Ky.] 113 SW 885.

**61.** If articles for which petition asks a return have been surrendered to the plaintiff before trial, or if proof shows that they belong to defendant, or not the property of plaintiff, it is not necessary for the jury to find in their verdict concerning such articles. Gambrell v. Gambrell [Ky.] 113 SW 885.

**62.** Dunlap v. Flowers [Okl.] 96 P 643.

**63.** A special finding by the jury that the plaintiff, in replevin for a horse to which he claimed title under assignment of a Holmes note, had himself authorized assignor of note, who was payee therein, to sell horse to innocent purchaser, is conclusive where exceptions fail to show what the issues were. Hix v. Giles, 103 Me. 439, 69 A 692.

**64. Search Note:** See notes in 2 Ann. Cas. 961; 4 Id. 71.

See, also, Replevin, Cent. Dig. §§ 296-319, 388-445; Dec. Dig. §§ 73-84, 99-115; 24 A. & E. Enc. L. (2ed.) 511; 18 A. & E. Enc. P. & P. 587.

**65.** Duffy v. Wilson [Colo.] 98 P 826.

**66.** Such irregularity may be modified on appeal. Dunn v. Field, 113 NYS 485.

**67.** Judgment, though in alternative, which does not give plaintiff the option of taking the property or its assessed value, sustained, where verdict was proper, the irregular judgment being properly corrected by the appellate court. Morris v. Williams, 131 Mo. App. 370, 111 SW 607.

**68.** Upon judgment rendered for return of certain mirrors, and, in event that they could not be delivered, for their value, plaintiff may, under Ky. St. 1903, § 1665, elect to take an execution for the value, even though the property itself be tendered. Martin v. Ferguson, 33 Ky. L. R. 761, 111 SW 281.

**69.** Plaintiff not entitled to judgment itemizing articles taken so that defendant may return what is in his possession and

ant retains possession under a forthcoming bond, the judgment should order a return of the property to the plaintiff, and, if not returned, for the value, with interest and costs.[70] If plaintiff is entitled only to part of the goods, one judgment must be rendered for him as to that part and another judgment for the return of the remainder to defendant.[71] Whese the property is in plaintiff's possession under a replevin bond, a judgment for the defendant should give him the right to take immediate possession, or, at his election, a recovery against the plaintiff and his sureties on the bond.[72] Damages for detention of the property should be the same whether a return can be had or not.[73] Such damages are to be computed to the date of filing the complaint, and not to entry of judgment.[74] Where property sold conditionally is replevied by the vendor, the amount paid by the vendee may be considered on the question of damages.[75] An injury to the property itself is a proper subject for damages.[76] In a proper case, stipulated rent of the property replevied is an element of damages.[77] That the judgment as entered makes the sureties liable on the replevin bond, while the judgment as rendered by the court does not, is not sufficient to impeach the judgment as entered.[78]

§ 12. *Costs.*[79]—See 8 C. L. 1741.—The plaintiff may have costs although he recovers judgment for part of the goods only.[80]

§ 13. *Review.*[81]—See 10 C. L. 1525.—A presumption that plaintiff retains an interest in the subject-matter of the controversy is sufficient to entitle him to appeal.[82] The issue of estoppel to claim ownership will not be considered where first raised on appeal.[83] Mere clerical errors in the notice of appeal are harmless.[84]

pay for rest. Duffy v. Wilson [Colo.] 98 P 826.

**70.** Judgment for plaintiff and that he retain property, not in proper form. Pratt v. Seamans, 43 Colo. 517, 95 P 929.

**71.** Replevin brought for bitch and four pups. Judgment that one pup was to be returned to defendant. Held court should also have adjudged that plaintiff was entitled to remainder. Cronin v. Barry, 200 Mass. 563, 86 NE 953.

**72.** Judgment that constable, sued as defendant, have the right to take immediate possession of the property in plaintiff's possession under replevin bond, or, at his election, a recovery against plaintiff and the sureties on the bond of the amount of the property, held proper. Dallas v. Hansford, 132 Mo. App. 303, 111 SW 870.

**73.** Verdict that plaintiff was entitled to return of property and damages for detention at rate of $50 a month, or, if no return could be made, for the value and $150 damages, held incorrect, but not prejudicial, since such $150 was less than appellant would have had to pay at rate of $50 a month. Compressed Air Machinery Co. v. West San Pablo Land & Water Co. [Cal. App.] 99 P 531.

**74.** Where such amount does not exceed award, error in this respect not reversible, but may be corrected on appeal. Compressed Air Machinery Co. v. West San Pablo Land & Water Co. [Cal. App.] 99 P 531.

**75.** No award of damages made to plaintiff upon replevin of automobile sold upon condition where it appeared that machine was sold for $850, that it was worth $500, and that $475 had been paid, thus leaving $125 as margin for damages already paid. Branstetter Motor Co. v. Silverberg, 140 Ill. App. 451.

**76.** Cummings v. Badger Lumber Co., 130 Mo. App. 557, 109 SW 68.

**77.** Where in action to recover property leased with option to purchase upon termination of the lease, option had not been exercised, and only allegation of damage was for failure to pay stipulated sums of money for rent of the property, held that such sums were proper element of damage. Compressed Air Machinery Co. v. West San Pablo Land & Water Co. [Cal. App.] 99 P 531.

**78.** Kreisel v. Snavely [Mo. App.] 115 SW 1059.

**79. Search Note:** See Replevin, Cent. Dig. §§ 460-469; Dec. Dig. § 117; 24 A. & E. Enc. L. (2ed.) 528; 18 A. & E. Enc. P. & P. 609.

**80.** Where, on replevin by mortgagee of several articles, it appeared that mortgagor had no title to part of them, plaintiff, being entitled to judgment for the balance of the property, was entitled to costs in the lower court. First Nat. Bank v. Farquharson [Okl.] 97 P 559.

**81. Search Note:** See Replevin, Cent. Dig. §§ 446-459; Dec. Dig. § 116; 18 A. & E. Enc. P. & P. 612.

**82.** Replevin bond given by equitable plaintiff's on behalf of use plaintiff creates a presumption that suit was for their benefit and that use plaintiff still retained an interest which would entitle him to appeal. Anderson v. Stewart [Md.] 70 A 228.

**83.** Issue that plaintiff was estopped to claim ownership of mare fraudulently disposed of by his bailee not timely when first raised on appeal. Martin v. Stong, 35 Pa. Super. Ct. 635.

**84.** Notice of appeal signed by attorneys as attorney for plaintiff, instead of for plaintiffs, where suit was brought by one as use plaintiff for a firm, such mistake

§ 14. *Liability of plaintiff or his bond, and of receiptors.*[85] See 10 C. L. 1525—The bond in replevin is statutory and creates no liability unless a return of the property is adjudged.[86] The liability of the sureties cannot be enlarged by any equities that may arise between the parties to the suit.[87] All who are in privity with defendant and have an interest in the suit are entitled to the benefits of the bond where such interest is duly shown.[88] Suit may be brought on the bond regardless of the fact that the court had no jurisdiction of the replevin action.[89] Matters litigated in the replevin suit cannot be retried in the suit on the plaintiff's bond.[90] The plaintiff need not prove that the goods were not returned to him where such fact is admitted of record.[91] Where a return is adjudged but the value of the property is not found, the defendant may nevertheless maintain his action on the bond to recover its value.[92] A judgment that defendant recover the property in plaintiff's possession if not delivered within ten days is allowable.[93] The judgment must show the value of each separate article of the property replevied.[94] Where the wife is a joint principal with the husband, judgment must be entered against her in order to bind the sureties.[95] Defendant's attorney's fees may properly be included in the judgment.[96]

**Replication; Reported Questions; Reports; Representations; Reprieves; Res Adjudicata; Rescission; Rescue; Res Gestae; Residence; Resisting Officer; Respondentia; Restitution,** see latest topical index.

**Resign,** see 12 C. L. 1142, n. 14.

## RESTORING INSTRUMENTS AND RECORDS.

§ 1. Evidence and Proof of Loss and of Contents, 1699.
§ 2. Proceedings to Restore Lost Papers or Instruments, 1700.
§ 3. Proceedings to Restore Lost or Destroyed Records, 1700.

*The scope of this topic* is noted below.[97]

§ 1. *Evidence and proof of loss and of contents.*[98] See 10 C. L. 1526—The degree of evidence required depends upon the circumstances of the particular case,[99] but as a

was a mere clerical error. Anderson v. Stewart [Md.] 70 A 228.

**85. Search Note:** See notes in 4 Ann. Cas. 1135.

See, also, Replevin, Cent. Dig. §§ 470-540; Dec. Dig. §§ 118-135; 18 A. & E. Enc. P. & P. 626.

**86.** Cummings v. Badger Lumber Co., 130 Mo. App. 557, 109 SW 68.

**87.** Where plaintiff recovered judgment in replevin for goods upon which defendant had lien, defendant was not entitled to judgment over against sureties on plaintiff's bond, although plaintiff sold the goods in violation of defendant's rights to the lien. Cummings v. Badger Lumber Co., 130 Mo. App. 557, 109 SW 68.

**88.** Evidence held not to show that one who made a contract to defend defendant's title to certain goods conditionally sold by plaintiff had given notice to plaintiff. Schlitz Brew. Co. v. Barr, 135 Ill. App. 467.

**89.** Although affidavit stated that value of cattle replevied was $250, and evidence on appeal showed $500, and consequently exceeded justice's jurisdiction, the sureties on bond were estopped from setting up such lack of jurisdiction. Janssen v. Duncan, 43 Colo. 286, 95 P 922.

**90.** Where costs were adjudicated, such adjudication was final. Lindsey v. Hewitt [Ind. App.] 86 NE 446.

**91.** Where, in a suit on a replevin bond, the averment that goods were not returned is admitted of record, an instruction that if plaintiff failed to prove that goods were not returned, he could not recover the value, was erroneous. Richardson v. Gilbert, 135 Ill. App. 363.

**92.** This upon ground that right of action arises by common law out of breach of contract to return, and, statute giving a remedy without negative words, common-law remedy still remains, and may be pursued at option of plaintiff suing on bond. Lindsey v. Hewitt [Ind. App.] 86 NE 446. Verdict for value of replevied property upon plaintiff's bond held not excessive. Id.

**93.** Dallas v. Hansford, 132 Mo. App. 303, 111 SW 870.

**94.** Judgment not sustainable where value of each of mules sued for not given. Bateman v. Hipp [Tex. Civ. App.] 111 SW 971.

**95.** Suit to recover wife's separate property. Wandelohr v. Grayson County Nat. Bank [Tex.] 112 SW 1046.

**96.** Richardson v. Gilbert, 135 Ill. App. 363.

**97.** Excludes secondary evidence (see Evidence, 11 C. L. 1346), competency of witnesses (see Witnesses, 10 C. L. 2079), and the right to recover upon lost instruments (see such titles as Bonds, 11 C. L. 424; Negotiable Instruments, 12 C. L. 1018).

**98. Search Note:** See Records, Cent. Dig. §§ 32, 33; Dec. Dig. § 17(7); 19 A. & E. Enc. L. (2ed.) 575; 13 A. & E. Enc. P. & P. 349.

**99.** Smith v. Lurty, 108 Va. 799, 62 SE 789.

general rule, equity, in exercising jurisdiction to establish an instrument which is to constitute a muniment of title, requires strong and conclusive proof of its former existence.[1] When the papers of a case are lost and a proceeding is instituted to supply the lost record, the proof taken by the commissioner in the proceedings may be read as a substituted record,[2] but the testimony taken by the commissioner is the evidence upon which the court must act in making a substitution for the lost record.[3] When the record has been properly supplied by an order of the court, the judgment of the court is conclusive that all preliminary steps were properly taken,[4] but until it is thus supplied, the substituted record cannot be read.[5] Where a court is required to pass upon the sufficiency of proof, it acts in a judicial capacity.[6]

§ 2. *Proceedings to restore lost papers or instruments.*[7]—See 10 C. L. 1526.—Equity has jurisdiction to restore lost instrument,[8] but proceedings to establish lost papers in a pending suit will be either at common law or in chancery, according to character of suit,[9] and jurisdiction is not ousted by reason of a court of law having assumed or, by statute, been given jurisdiction.[10] In decreeing payment where future liability may occur, a court may require an indemnity bond.[11] The judgment in proceedings to establish a lost deed can have only the force and effect of an original conveyance.[12] Where statutory remedies are given, and it is not expressly provided that the method of reviewing orders made therein shall be by appeal, the only manner of obtaining a review is by writ of error.[13]

§ 3. *Proceedings to restore lost or destroyed records.*[14]—See 19 C. L. 1527.—Statutes authorizing the restoring of records are usually merely cumulative.[15] Such a statute is not special legislation.[16] To supply the lost record, it is essential that the court should make an order to that effect[17] after proper notice and adjudication.[18] One seeking substitution must act promptly.[19] In order to warrant a review of the

In establishing title to real estate, it is not necessary to show diligence in making inquiry as to others rights to same. St. 1906, p. 78, c. 59, providing for establishment and quieting of titles to real estate in case of loss or destruction of public records. Hoffman v. San Francisco Super. Ct., 151 Cal. 386, 90 P 939. Existence and contents of lost power of attorney held proved. Rogers v. Clark Iron Co., 104 Minn. 198, 116 NW 739. Destruction of deed by fire and purport thereof held proved. Hurst v. Taylor, 32 Ky. L. R. 1051, 107 SW 743. Evidence repudiated contention that deed had been made. Reaves v. Baker, 33 Ky. L. R. 1004, 112 SW 609. Execution and contents of lost deed held shown. Simpson Bank v. Smith [Tex. Civ. App.] 114 SW 445.

1. Evidence held sufficient. Smith v. Lurty, 108 Va. 799, 62 SE 789. Where assault on record title is made by attempting to establish title in third person, by proof of a lost muniment of title, a high degree of proof is required. Rogers v. Clark Iron Co., 104 Minn. 198, 116 NW 739.

2, 3, 4, 5. Morrison v. Price [Ky.] 112 SW 1090.

6. Under Ky. St. 1903, § 3991, requiring court to establish lost records upon satisfactory proof. Jones v. Drake [Ky.] 112 SW 644.

**Mandamus** will not lie to compel court to establish judgment record under Ky. St. 1903, § 3991. Jones v. Drake [Ky.] 112 SW 644.

7. **Search Note:** See Courts, Cent. Dig. § 370; Records, Cent. Dig. §§ 25-35; Dec. Dig. § 17; 24 A. & E. Enc. L. (2ed.) 555; 13 A. & E. Enc. P. & P. 357.

8. Suit to recover on lost bonds. Prescott v. Williamsport & N. B. R. Co., 159 F 244.

9. Jones v. Escambia Land & Mfg. Co., 55 Fla. 783, 46 S 290.

10. Prescott v. Williamsport & N. B. R. Co., 159 F 244.

11. Prescott v. Williamsport & N. B. R. Co., 159 F 244. Suit on lost bank certificate of deposit. In re Ellard, 114 NYS 827. See Negotiable Instruments, 12 C. L. 1018.

12. Statute declares that proceeding shall have, as to persons notified, effect of deed executed by persons possessed of land. McNeely v. Laxton [N. C.] 63 SE 278.

13. Jones v. Escambia Land & Mfg. Co., 55 Fla. 783, 46 S 290.

14. **Search Note:** See Judgment, Cent. Dig. § 1157; Records, Cent. Dig. §§ 36-43; Dec. Dig. § 18; 24 A. & E. Enc. L. (2ed.) 556; 13 A. & E. Enc. P. & P. 372.

15. Supreme court has inherent power to restore record, independently of Rev. & Ann. St. 1903, §§ 5203, specifically conferring such power. Lawrence v. Richardson [Okl.] 100 P 529.

16. Laws Ex. Sess. 1906, p. 73, c. 55. People v. Fallon [Cal.] 99 P 202.

17. Morrison v. Price [Ky.] 112 SW 1090.

18. It is error for court to grant plaintiff leave to file copy of declaration in lieu of lost original without notice to defendant and without adjudication that copy so filed is correct or substantial copy of lost declaration. Williams v. Norton, 135 Ill. App. 112.

19. Letters making up records in divorce proceedings, lost. Relief not sought until ten months after discovery of loss. Lowery v. Lowery [Iowa] 115 NW 1035.

evidence, it must be preserved by a bill of exceptions.[20] Where the trial court decides from evidence that lost records cannot be substituted and so orders, an appellate court cannot order the substitution.[21] In California the district court of appeals to which a case has been transferred by the supreme court may restore a transcript lost prior to such transfer,[22] and it will not entertain a motion to strike out the substituted copy on the sole ground of deficiencies and defects in the proof of the correctness of such copy and of the destruction of the original transcript.[23] No application for leave of the court to supply a supplemental transcript of record containing the restored bill of exceptions is required when it appears that the original and the supplemental transcript of record are duly filed.[24] A stipulation to incorporate the original bill of exceptions in the transcript is applicable to the bill when restored.[25]

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**Restraint of Alienation; Restraint of Trade; Retraxit; Returnable Package Laws; Returns; Revenue Laws; Reversions; Review; Revival of Judgments; Revivor of Suits; Revocation,** see latest topical index.

## REWARDS.

§ 1. Nature and Definition, 1701.
§ 2. The Offer, 1701.
§ 3. Earning Reward, 1701.

This topic treats only of rewards offered to the public generally.

§ 1. *Nature and definition.*[26]—See 2 C. L. 1521

§ 2. *The offer.*[27]—See 8 C. L. 1743.—The offer must be made by one who has power to offer the reward.[28]

§ 3. *Earning reward.*[29]—See 10 C. L. 1528. Substantial performance is usually held sufficient.[30] One who is entitled to a reward on conviction of a prisoner cannot recover against a sheriff on his bond for loss thereof by the escape of the prisoner.[31]

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**Right of Privacy; Right of Property,** see lastest topical index.

## RIOT.[32]

*The scope of this topic* is noted below.[33]

Where there is no statute defining or describing a riot, the common law must be

**20.** Heywood & Morrill Rattan Co. v. Jacobson, 140 Ill. App. 319.

**21.** Lowery v. Lowery [Iowa] 115 NW 1035.

**22.** Under St. Extra Sess. 1906, p. 73, c. 55. People v. Garnett [Cal. App.] 98 P 247.

**23.** People v. Garnett [Cal. App.] 98 P 247.

**24.** Two documents together purported to contain complete transcript of record. Heywood & Morrill Rattan Co. v. Jacobson, 140 Ill. App. 319.

**25.** Heywood & Morrill Rattan Co. v. Jacobson, 140 Ill. App. 319.

**26. Search Note:** See notes in 14 L. R. A. 480; 42 Id. 63.

See, also, Rewards, Cent. Dig. §§ 1, 2; Dec. Dig. § 1; 24 A. & E. Enc. L. (2ed.) 941.

**27. Search Note:** See notes in 4 C. L. 1309, 1310; 3 Ann. Cas. 157.

See, also, Rewards, Cent. Dig. §§ 3-6; Dec. Dig. §§ 2-4; 24 A. & E. Enc. L. (2ed.) 941.

**28.** The private secretary of the governor of the state has no authority to make such offer in the absence of the governor. Hager v. Sidebottom [Ky.] 113 SW 870.

**29. Search Note:** See notes in 4 C. L. 1310; 7 L. R. A. (N. S.) 216; 9 Id. 1057; 11 Id. 1170; 1 Ann. Cas. 285; 8 Id. 860; 10 Id. 729.

See, also, Rewards, Cent. Dig. §§ 7-24; Dec. Dig. §§ 5-15; 24 A. & E. Enc. L. (2ed.) 955; 18 A. & E. Enc. P. & P. 1151.

**30.** Reward was offered for delivery of one to sheriff of Washington County, Ga. Held that person making arrest in California and causing prisoner to be held until he could be turned over to agent of state of Georgia was entitled to reward. Hewitt v. Lamb, 130 Ga. 709, 61 SE 716.

**31.** McPhee v. U. S. Fidelity & Guaranty Co. [Wash.] 100 P 174.

**32.** See 10 C. L. 1528.

**Search Note:** See notes in 10 L. R. A. (N. S.) 925.

See, also, Riot, Cent. Dig.; Dec. Dig.; 24 A. & E. Enc. L. (2ed.) 971; 18 A. & E. Enc. P. & P. 1198.

**33.** Matters common to all crimes (see Criminal Law, 11 C. L. 940; Indictment and Prosecution, 12 C. L. 1) and liability of municipalities for mob violence (see Municipal Corporations, 12 C. L. 905) are elsewhere treated.

looked to for a definition.[34] To constitute riot, there must be two or more persons acting jointly and in execution of a common intent, in the commission of an unlawful act of violence, or of some other act in a violent and tumultuous manner.[35] An assemblage of persons unaccompanied by force or violence is not riot.[36]

## RIPARIAN OWNERS.

§ 1. Riparian Lands and Owners, 1702.
§ 2. Title and Rights of Riparian Owner, 1703.
§ 3. Accretion, Reliction and Avulsion, 1708.
§ 4. Public Rights in Riparian Lands, 1708.
§ 5. Remedies and Procedure, 1709.

*The scope of this topic* is noted below.[37]

§ 1. *Riparian lands and owners.*[38]—See 10 C. L. 1528—This section treats only of what are riparian lands and who are riparian owners, the rights and title of riparian owners being treated in the following section.[39]

Riparian lands include as well the lands over as those along which the stream flows.[40] They have been held not to be included in the term "public lands."[41] Tide lands are such as are covered and uncovered by the flow and ebb of the ordinary or neap tides and constitute the seashore.[42]

A riparian proprietor is the owner[43] of land bounded by a watercourse[44] or lake or through which a stream flows.[45]

34. Held that acts of those assembled constituted riot within meaning of the term used in insurance policies. Spring Garden Ins. Co. v. Imperial Tobacco Co. [Ky.] 116 SW 234.

35. Pen. Code 1895, § 354. Act of defendant which was not done jointly with another held not riot. Croy v. State, 4 Ga. App. 457, 61 SE 847. Where four persons are jointly indicted and convicted for the offense of riot, and certiorari assigning error on the conviction is sustained as to three and overruled as to the other, it is error in overruling the certiorari as to the one, as riot cannot be committed by one person. Lewis v. State [Ga. App.] 63 SE 570.

36. Held that force and violence was lacking and that the intent of the jury was to find defendants guilty of unlawful assemblage, for which there was no penalty provided by the statute. State v. Stephanus [Or.] 99 P 428.

37. This topic includes matters relating to ownership and use of soil bordering on and under water, accretion and reliction, and rights incidental thereto. Matters relating to water, navigable or otherwise, are treated elsewhere (see Waters and Water Supply, 10 C. L. 1996; Navigable Waters, 12 C. L. 958).

38. **Search Note:** See notes in 6 L. R. A. (N. S.) 194; 11 Id. 1062; 9 Ann. Cas. 1235. See, also, navigable waters, Cent. Dig. §§ 180-187, 240; Dec. Dig. §§ 36-39; Waters and Water Courses, Cent. Dig. §§ 30, 31, 118; Dec. Dig. § 31; 28 A. & E. Enc. L. (2ed.) 206.

39. See § 2, infra, Title and Rights of Riparian Owners.

40. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

41. Held that there is nothing in Rev. St. 1895, arts. 3498a, 3498j, which indicates that the legislature used words "public lands" in sense other than that which law attaches to them, and hence it follows that commissioner of general land office has no power to sell soil lying below ordinary high tide, since in contemplation of law it was water and not land. De Meritt v. Robison Land Com'r [Tex.] 116 SW 796.

42. Eichelberger v. Mills Land & Water Co. [Cal. App.] 100 P 117.

43. One does not become riparian owner by virtue of contract for use of water with one who is riparian owner. Stoner v. Patten [Ga.] 63 SE 897. As between grantee of certain rights from riparian owner, who retains title to bed of stream and to lands overflowed, and upper riparian owner or occupant, as to whom grantor and those claiming under him are only riparian owners of lower riparian lands with their incidents, grantee, as deriving title to certain riparian rights from such lower riparian owner, may be, by reason of such grant, riparian owner and entitled as against other riparian owners or diverters to all rights of riparian owner conferred upon him by his grantor, true riparian owner. Deed in effect conveying right of exclusive possession and occupation for certain purposes of riparian lands, right of access and crossing to water over such lands, for purposes of making such use of water as was characterized as riparian owner's use, but also containing agreement that right of grantee to divert was not reserved and that diversion by grantee was not to be affected thereby, held to constitute grantee in first riparian owner as to all except grantor, within limits of use placed upon grantee in deed. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

44. River. Hobart-Lee Tie Co. v. Stone [Mo. App.] 117 SW 604. Grantee of deed describing property as beginning at river held riparian owner. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

45. Stoner v. Patten [Ga.] 63 SE 897.

§ 2. *Title and rights of riparian owners.*[46]—See 10 C. L. 1528.—*Title in general.*—Under the common law of England, the title of all soil over which the tide ebbed and flowed was in the king,[47] and the title to land under all other waters was in the riparian owner.[48] The title in both cases, however, was subject to the public rights, such as access and navigation, if the waters were in fact navigable.[49] The king's right to lands under tide water and the riparian owner's right to lands under all other waters was called the jus privatum,[50] and the public right was called the jus publicum.[51] The jus privatum was private property and could be conveyed at will, subject to the jus publicum,[52] while the jus publicum was held by the king in trust for the people and was inalienable.[53] In this country, however, the jus privatum, being inapplicable to the new conditions, was largely abandoned to the upland owner,[54] while the jus publicum,[55] and so much of the jus privatum as did not devolve upon the litterol and riparian owners, went to the people in their sovereign capacity,[56] subject to control and regulation by the legislature.[57] The result is that except in the case of tide lands, title to which, the courts agree, is in the state,[58]

**46. Search Note:** See notes in 1 L. R. A. (N. S.) 762; 19 A. S. R. 226; 1 Ann. Cas. 184; 9 Id. 1235; 10 Id. 235.

See, also, Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 201-265, 283-293; Dec. Dig. §§ 36-39; Waters and Water Courses, Cent. Dig. §§ 27-95, 118-120; Dec. Dig. §§ 89-92, 111; 17 A. & E. Enc. L. (2ed.) 530, 533, 978; 28 A. & E. Enc. L. (2ed.) 206.

**47.** Johnson v. Johnson, 14 Idaho, 561, 95 P 499; Moss v. Ramey, 14 Idaho, 598, 95 P 513; Bardes v. Herman, 114 NYS 1098.

**48.** In nontidal streams, whether navigable or not, title in fee to bed of stream was in riparian owner. Johnson v. Johnson, 14 Idaho, 561, 95 P 499; Moss v. Ramey, 14 Idaho, 598, 95 P 513.

**49.** Public had easement or right of passage over and along stream. Johnson v. Johnson, 14 Idaho, 561, 95 P 499; Moss v. Ramey, 14 Idaho, 598, 95 P 513.

**50.** Ownership of soil between high and low-water mark was included in term jus privatum. Bardes v. Herman, 114 NYS 1098.

**51.** Bardes v. Herman, 114 NYS 1098. Jus publicum or right of public is right of access to water for purpose of navigation, boating, bathing and fishing. Id.

**52.** King had title in his private capacity. It was property right which he could convey and vest in others of his own private will, subject, however, to jus publicum. Bardes v. Herman, 114 NYS 1098.

**53.** King also had dominion which he held in trust for people for purposes of navigation and access for other purposes. As he was constitutional monarch, he could control or limit public use only through laws passed by parliament. Bardes v. Herman, 114 NYS 1098. Public rights, like that of navigation, were inalienable by king, being vested in him not individually but in crown or sovereignty in trust for people at large. Grantee of crown takes subject to such public right. Lewis Blue Point Oyster Cultivation Co. v. Briggs, 129 App. Div. 574, 114 NYS 313, afg. 58 Misc. 55, 110 NYS 37. Under Norwood patent granted under proprietory government of Duke of York before New York became crown colony, jus privatum in foreshore was granted, but jus publicum remained in grantor, passed to state on revolution, public therefore having right to use foreshore for fishing, bathing, boating and navigation. Bardes v. Herman, 114 NYS 1098.

**54.** Jus privatum of crown, by which sovereign of England was deemed to be absolute owner of soil of sea and of navigable rivers, was totally inapplicable to conditions of our colonies where common law was adopted by them, and this right seems to have been abandoned to proprietors of upland so as to have become common right, and thus common law of state. Barnes v. Midland R. Terminal Co., 193 N. Y. 378, 85 NE 1093. Common law of England as to ownership by sovereign of jus privatum never obtained in province which became state of New York; but jus privatum, which is complete title subject to rights of public, was abandoned to owners of upland. This abandonment was result of common usage so as to become common right, and thus common law of state. Bardes v. Herman, 114 NYS 1098.

**55.** Bardes v. Herman, 114 NYS 1098.

**56.** Barnes v. Midland R. Terminal Co., 193 N. Y. 378, 85 NE 1093.

**57.** Bardes v. Herman, 114 NYS 1098.

**58.** State by virtue of its sovereignty exercises control and ownership over tide lands. Eichelberger v. Mills Land & Water Co. [Cal. App.] 100 P 117. Shore and space between high and low-water mark is part of bed of navigable water, title to which is in state in trust for public. Ferry Pass I. & S. Ass'n v. White's River I. & S. Ass'n [Fla.] 48 S 643. Under Norwood patent granted under proprietory government of Duke of York before New York became crown colony jus privatum in foreshore was granted but jus publicum remained in grantor and passed to state on revolution, public therefore having right to use foreshore for fishing, bathing, boating and navigation. Bardes v. Herman, 114 NYS 1098. Rule at common law is that grant of land bordering on coast where tide ebbs and flows conveys title only to line of ordinary high tide, unless there be something to indicate intention to extend grant beyond line. De Meritt v. Robison Land Com'r [Tex.] 116 SW 796. Where defendant claimed land as appurtenant to his riparian rights and showed land affected by ebb

there is a great conflict of holding as to the riparian owner's title; thus riparian owners on navigable streams, in some cases, hold to the center of the stream,[59] subject to the public easement,[60] in others, to water's edge at low-water mark,[61] and in still others, to high-water mark.[62] In the case of non-navigable rivers, title is generally [63] in the riparian owner,[64] while in the case of navigable lakes the owner has been held to take only to high-water mark,[65] and in the case of a non-navigable lake, to the center thereof.[66] Occasionally, as in the case of Alaska, the matter is governed by

and flow of tide, but did not show either high or low-water mark nor its relation thereto, insufficient to enable determination of riparian rights of defendant. Austin v. Minor, 101 Va. 101, 57 SE 609. Where state constitution asserts ownership in beds and shores of all navigable waters of state up to and including line of ordinary high tide in water where tide ebbs and flows, such declaration vests title in lands claimed in state, unless the meander line established by government in lands granted by the government prior to constitution runs below such line. Grantee of government in territorial days held to hold only to high water line. Brace & Hergert Mill Co. v. State, 49 Wash. 326, 95 P 278; Muir v. Johnson, 49 Wash. 66, 94 P 899. One cannot maintain injunction to restrain occupation of navigable waters of lake in front of his land on ground that he is riparian owner. Muir v. Johnson, 49 Wash. 66, 94 P 899.

**59.** Under common law, riparian owner bounded on, or by stream above tidewater, although navigable in fact, acquires exclusive ownership in soil to middle thread of current, subject to public easement of navigation; and all grants of government bounded upon, or by such stream, entitle grantee to all islands lying between mainland and thread of current, unless it appears, either from grant itself, or from other circumstances surrounding same, that government intended to reserve such island from such grant. Johnson v. Johnson, 14 Idaho, 561, 95 P 499; Moss v. Ramey, 14 Idaho, 598, 95 P 513. In this state all streams which are capable of being used for purpose of carrying boats, passengers, freight, floating logs, wood, timber or any other product to market, are recognized and declared to be navigable streams, beds of which remain in riparian owner subject to public easement. Johnson v. Johnson, 14 Idaho, 561, 95 P 499; Moss v. Ramey, 14 Idaho, 598, 95 P 513. Fact that navigable rivers are reserved as public highways, by Rev. St. U. S. § 2476 (U. S. Comp. St. 1901, p. 1567), in no way interferes with legal doctrine that riparian owner takes to thread of stream. Johnson v. Johnson, 14 Idaho, 561, 95 P 499; Moss v. Ramey, 14 Idaho, 598, 95 P 513. Where fresh water river is designated as boundary, center line of river, medium filium aquae is boundary line. Line running "to the river" generally, and without subsequent qualification or restriction, extends to center of stream. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

**60.** Johnson v. Johnson, 14 Idaho, 561, 95 P 499; Moss v. Ramey, 14 Idaho, 598, 95 P 513.

**61.** Hobart-Lee Tie Co. v. Stone [Mo. App.] 117 SW 604.

**62.** Where state constitution asserts ownership in beds and shores of all navigable waters of state up to and including line of ordinary high tide, in waters where tide ebbs and flows, and up to and including line of ordinary high water within banks of all navigable rivers and lakes, such declaration vests title in lands claimed in state, unless meander line established by government in lands granted by government prior to constitution runs below such line. Brace & Hergert Mill Co. v. State, 49 Wash. 326, 95 P 278. Grantee of government in territorial days held to hold only to high water line. Id. Upland owner bordering on navigable stream owns only to high water mark. River and its banks and bed belong to the state. State v. Portland General Elec. Co. [Ore.] 95 P 722. Owner of uplands in navigable stream takes only to high water mark. Point to which water of navigable stream usually rises in ordinary season of high water is meander line which forms boundary title of government. State v. Portland General Elec. Co. [Ore.] 98 P 160. Court will take judicial notice that one can acquire title to such property only by legislative grant. Property below high water line. Id.

**63.** Shores and beds of bodies of water, whether navigable or not, belong to state in which they are situated, and it is for state to say whether or not it will assert its title to such shores and beds or whether it will surrender them to upland owner. Brace v. Hergert Mill Co. v. State, 49 Wash. 326, 95 P 278.

**64.** Johnson v. Johnson, 14 Idaho, 561, 95 P 499; Moss v. Ramey, 14 Idaho, 598, 95 P 513. State grants riparian owner soil over which smaller streams and creeks flow without reservation. Commonwealth v. Foster, 36 Pa. Super. Ct. 433.

**65.** Fact that lake was capable of being navigated and was used for such purpose even for limited extent held to preclude claims to ownership to center. Brace & Hergert Mill Co. v. State, 49 Wash. 326, 95 P 278. Held to be no equity in claim of upland owner to center of lake where government did not extend its surveys across lake nor include bed of lake in any grants made by it, but treated lake as navigable when it made such grants. Id.

**66.** Little v. Williams [Ark.] 113 SW 340. Legal effect of patents to state of fractional sections and parts of sections surrounding meandered lines of lake, according to official plats of public survey, was to convey all riparian rights, and by virtue thereof to vest prima facie title to bed of lake as shown on plats from meandered shore lines to center. Conveyances executed by state in turn had same effect. Id. Entry and location of tract of land, under provisions of law relating to acquisition of

special statute.[67] Islands in a stream belong to the holder of title to lands under the adjacent waters.[68]

*Divestiture of title* to riparian lands by adverse possession depends upon the rule of the local jurisdiction.[69]

*Title to lands under water.*—See 10 C. L. 1528.—Title to lands under water is either in the king,[70] the state,[71] or the owner of the adjacent land,[72] subject in all cases to the jus privatum mentioned above.[73]

title through soldiers' additional homestead rights, held to give entryman no possessory right of shore in front of or abutting such location, since Act of Congress May 14, 1898, c. 299, 30 Stat. 409 (U. S. Comp. St. 1907, p. 1412), extending homestead laws to Alaska, etc., provided specifically that nothing therein contained should be so construed as to authorize entries to be made or title to be acquired to shore of any navigable water. Columbia Canning Co. v. Hampton [C. C. A.] 161 F 60.

**67.** Act May 17, 1884, c. 53, 23 Stat. 24, 26, establishing civil government in Alaska, and providing in § 8 that persons shall not be disturbed in possession of lands actually in use or occupation or now claimed by them, etc., refers only to possession held at time of passage of act and not to possession, etc., thereafter. Columbia Canning Co. v. Hampton [C. C. A.] 161 F 60. Land claimed by one's grantors at such time between roadway running along line of stream and line of low tide may protect his right in absence of congressional legislation removing protection of act, even though such person would ordinarily lose his rights to such lands to public upon dedication of land along line of stream as highway. McCloskey v. Pacific Coast Co. [C. C. A.] 160 F 794.

**68.** Johnson v. Johnson, 14 Idaho, 561, 95 P 499; Moss v. Ramey, 14 Idaho, 598, 95 P 513; United States v. Chandler-Dunbar Co., 209 U. S. 447, 52 Law. Ed. 881.

**69.** Title by adverse possession up to edge of river and to river bank held sufficient to establish title to riparian lands along which river flows. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472. Since statute of limitations does not run **against state** except with its consent, where, after state asserted title to tide and shore lands, much of which it found in possession of individuals who had erected and were maintaining costly structures, many of which were of public nature, thereon, it recognized their right to such improvements by giving them preferences as to purchase, and required purchaser to pay for improvements and evidenced clear intention that they should not be disturbed until land was placed on market for sale (Laws 1889-90, c. 11, p. 435, § 11; Acts 1895, c. 178, p. 559, § 74; Acts 1897, c. 89, p. 250, § 45). Such possession will be held to be permissive, and consent previously existing permitting adverse possession will be held to have been thereby withdrawn. Brace & Hergert Mill Co. v. State, 49 Wash. 326, 95 P 278. Where inception of claim is under license by shore owner, whose license is subordinate to paramount ownership of fee by state, two rights exist together, not in antagonism to one another, but one is superior to other, and shore owner or one by his license occupying and using portion of navigable stream adjacent to shore for booming logs must be presumed to do so under his riparian right and not as one claiming to be owner of bed of stream. Until it is shown them that one owning and operating boom for holding and storing logs in front of property of shore owner has explicitly and openly disclaimed any and all holding under presumed riparian right, and has unequivocally asserted ownership of bed of stream and brought some notice to state of that claim, statute could not begin to run against it if at all. Coquille Mill & Mercantile Co. v. Johnson [Or.] 98 P 132. Statute relating to adverse possession under color of title and payment of taxes for seven years **expressly excepts state** from its provisions (Laws 1893, p. 20, c. 11). Brace & Hergert Mill Co. v. State, 49 Wash. 326, 95 P 278. State held not estopped by fact that it permitted sale, mortgage, etc., of improvements which it had recognized. Id.

**70. Tide lands:** Title to land over which tide ebbed and flowed was in king. Johnson v. Johnson, 14 Idaho, 561, 95 P 499; Moss v. Ramey, 14 Idaho, 598, 95 P 513; Bardes v. Herman, 114 NYS 1098.

**71. Tide lands:** State by virtue of its sovereignty exercises control and ownership over tide lands. Eichelberger v. Mills Land & Water Co. [Cal. App.] 100 P 117; Bardes v. Herman, 114 NYS 1098; Austin v. Minor, 101 Va. 101, 57 SE 609; Brace & Hergert Mill Co. v. State, 49 Wash. 326, 95 P 278; Muir v. Johnson, 49 Wash. 66, 94 P 899. This is founded on principle that shores and beds of bodies of water, whether navigable or not, belong to state in which they are situated, and that it is for state to say whether or not it will assert its title to such shores and beds or whether it will surrender them to upland proprietor. Brace & Hergert Mill Co. v. State, 49 Wash. 326, 95 P 278. By common law, title to shore of sea below ordinary high tide is in state. McCloskey v. Pacific Coast Co. [C. C. A.] 160 F 794. State by virtue of its sovereignty holds in trust for all inhabitants of state title to lands under navigable waters within state, including shore or space between high and low-water marks. Ferry Pass I. & S. Ass'n v. White's River I. & S. Ass'n [Fla.] 48 S 643.

**Navigable stream:** Title to bed of navigable stream is prima facie in state. Coquille Mill & Mercantile Co. v. Johnson [Or.] 98 P 132; State v. Portland General Elec. Co. [Or.] 95 P 722. Willamette river is public navigable stream, public highway, title to bed and banks of which is in state for benefit of public. State v. Portland General Elec. Co. [Or.] 98 P 160.

**Non-navigable river.** Brace & Hergert Mill Co. v. State, 49 Wash. 326, 95 P 278.

**Navigable lake.** Brace & Hergert Mill

*Rights of riparian owners.*—Riparian rights are natural rights,[74] in the nature of easements,[75] incident to the ownership of lands contiguous to navigable waters.[76] These rights, as distinguished from the rights incident to the waters themselves,[77] consist principally in the rights of access,[78] a right of wharfage, limited so as not to interfere with the public right of navigation,[79] usually proportionate to the shore

Co. v. State, 49 Wash. 326, 95 P 278. Title to Lake Michigan below ordinary high-water mark is in state and state may delegate to city right to control harbors, etc. Beck v. Milwaukee [Wis.] 120 NW 293. State is owner of shores and beds of all tidal waters, and navigable fresh water lakes and streams, in absence of any prior disposition made by congress before their admission into union. State of Washington held to have asserted such right by Const. art. 17, legislature pursuant to and in recognition thereof to have provided for control and sale of same, and courts to have affirmed state ownership. McGilvra v. Ross, 161 F 398. Owners of lands abutting navigable lakes under patents issued by government prior to admission of Washington to union held to hold only to high-water mark. Id. Rule that general government holds title to such lands in trust for future state to be created out of territory acquired by it, in absence of any prior disposition by congress during territorial condition, has become doctrine of universal acknowledgement. Id. Oregon county, of which Washington state is part, did not come into union in such different manner as to render different rule applicable. Id.

72. **Streams:** In nontidal streams, whether navigable or not, title in fee to bed of stream was in riparian owner. Johnson v. Johnson, 14 Idaho, 561, 95 P 499; Moss v. Ramey, 14 Idaho, 598, 95 P 513. Non-navigable. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

**Non-navigable lake.** Little v. Williams [Ark.] 113 SW 340.

73. Johnson v. Johnson, 14 Idaho, 561, 95 P 499; Moss v. Ramey, 14 Idaho, 598, 95 P 513; Bardes v. Herman, 114 NYS 1098.

74. Riparian rights, strictly and technically so called, are rights not originating in grants but arise by operation of law, and are called natural rights because they arise by reason of ownership of lands upon or along streams of water which are furnished by nature, and lands to which these natural rights are attached are called, in law, riparian lands. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

75. Technically and legally, perhaps, such rights, which are described to be of character of riparian owner's rights, may be most accurately designated as "easements" because they arise by grant, and do not, like true riparian rights, arise by nature, by reason of the ownership of riparian lands; but they are easements which, as against upper riparian owners, are effective only to the extent that their exercise comes within limits of natural riparian rights of lower owner. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

76. Ferry Pass I. & S. Ass'n v. White's River I. & S. Ass'n [Fla.] 48 S 643. Riparian rights are incident to lands on bank as well as those forming bed of stream. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472. Common-law rights of riparian owners with reference to navigable waters are incident to ownership of uplands that extend to high-water mark. Ferry Pass I. & S. Ass'n v. White's River I. & S. Ass'n [Fla.] 48 S 643.

77. See Waters and Water Supply, 10 C. L. 1996.

78. Owner of lands abutting shore of sea is entitled to free access to navigable waters at all points in front thereof. McCloskey v. Pacific Coast Co. [C. C. A.] 160 F 794. Owner or locator of lands in Alaska which border upon navigable or tidal waters has, under general law, right of access to such waters for purpose of navigation, but he can acquire no right or title in soil below high-water mark. Columbia Canning Co. v. Hampton [C. C. A.] 161 F 60. Littoral right attached to homestead rights of one locating upon land abutting navigable or tidal waters entitles such locator to free access to such navigable waters, but not to build upon shore or erect any structure reaching out into deep water. Decker v. Pacific Coast S. S. Co. [C. C. A.] 164 F 974. If owner of land has title to high-water mark, his land borders on water, since shore to high-water mark is a part of bed of waters; and, if it is navigable waterway, he has, as incident to such title, riparian rights accorded by common law to such owner. Ferry Pass I. & S. Ass'n v. White's River I. & S. Ass'n [Fla.] 48 S 643. All shore owners on lakes have right to access to navigable water if it is feasible to give it to them. Stuart v. Greanyea, 154 Mich. 132, 15 Det. Leg. N. 689, 117 NW 655. Riparian owner has right of access to navigable part of river in front of its premises and to use of waters for all purposes not inconsistent with public right of navigation therein. Hobart-Lee Tie Co. v. Stone [Mo. App.] 117 SW 604. Littoral or riparian owner, in his capacity as such, acquires only those rights in foreshore which are necessary to enable him to make reasonable use of his upland. Principal attribute of such use is access to and egress from open water. Barnes v. Midland R. Terminal Co., 193 N. Y. 378, 85 NE 1093. Patent from state granting right to erect piers and buildings of substantial character on certain lands under water, coupled with condition that grantee should not maintain any obstruction of any kind in land lying between lines of high and low water which will interfere with, inconvenience or prevent crossing such land between high and low water mark, held to give grantee sams rights as littoral owner. Id.

79. Riparian owner whose land is bounded by navigable water has right of access thereto from front of his land, and such right includes construction and maintenance of pier on land under water beyond high-water mark for his own use or for use of public, subject to such general rules and regulations as congress or state legis-

frontage,[80] and such other rights as are expressly permitted by law [81] and do not affect the public right of navigation, the right to improve the bottom lands so as to facilitate navigation,[82] the substantial rights of other riparian owners.[83] Like other property rights, they may be conveyed [84] together with, or severed from, the adjoining uplands,[85] except as limited by law,[86] are subject to waste,[87] and must be

lature may provide for protection of rights of public. Doctrine held as applicable to littoral owners whose lands front upon surf-beaten shore of open ocean as to owners whose lands border upon bays of sea, inland lakes, or other navigable waters. Barnes v. Midland R. Terminal Co., 193 N. Y. 378, 85 NE 1093. To extent that reasonable exercise of this right necessarily interferes with right of public to pass along foreshore, right of littoral owner is paramount and rights of public subordinate; and logical corollary to that proposition is that just in so far as attempted exercise of littoral or riparian right passed prescribed bounds of necessity and reason, conditions were reversed and right of passage along foreshore remained paramount right. Id. Riparian owners upon navigable fresh rivers and lakes may construct, in shoal water in front of their land, wharves, piers, landings and booms in aid of and not obstructing navigation. This is riparian right, being dependent upon title to bank and not upon title to bed of river. Coquille Mill & Mercantile Co. v. Johnson [Or.] 98 P 132. Its exercise may be regulated or prohibited by state, but, so long as not prohibited, it is private right, derived from passive or implied license by public. As it does not depend upon title to soil under water, it is equally valid in those states in which river beds are held to be public property, and in those states in which they are held to belong to riparian proprietors usque ad filum aquae. Such right, however, is franchise and is distinguished from appropriation and occupation of the soil under water. It is not personal to shore owner, so that it must be exercised by him alone, or not at all, but is subject of grant and may be severed. Id. Littoral right attached to homestead rights of one locating upon land abutting navigable or tidal waters entitles such locator to free access to such navigable waters, but not to build upon shore, or erect any structure reaching out into deep water. Decker v. Pacific Coast S. S. Co. [C. C. A.] 164 F 974. If **street line and line of navigable stream coincide,** wharfing privileges are in public to exclusion of any private right of that nature in proprietor on landward side of street. Doctrine rests in theory that private right of access has been merged in public right, which is inconsistent with its exercise, and, in application of doctrine, it is immaterial whether title to intervening street is vested in public or remains in adjacent owner. McCloskey v. Pacific Coast Co. [C. C. A.] 160 F 794. Evidence held to show dedication of littoral land as street. Id.

**80.** It is general rule that frontage on navigable waters for wharfage is proportionate to extent of shore frontage, but fair apportionment being object of rule, it may be modified where circumstances seem to require it. Rule applied under Pub. Acts 1905, p. 170, No. 122, in contest over right to fish in certain lands. Stuart v. Greanyea, 154 Mich. 132, 15 Det. Leg. N. 689, 117 NW 655.

**81.** Civ. Code 1896, § 3155, granting riparian owners on certain waters right to plant oysters within certain limit, held valid exercise of legislative power. Cleveland v. Alba [Ala.] 46 S 757.

**82.** Navigable waters are concededly public highways, and rights in soil under these waters are similar to those of owners of soil in public highway upon upland, that is, owner may make such use of them as does not interfere with navigation. He may plant his crop and may harvest and market it, but it is all time subject to hazard of improvement of highway in which it is planted. United States may improve navigation by dredging oyster bed without compensation to lessee of such bed. Lewis Bluepoint Oyster Cultivation Co. v. Briggs, 58 Misc. 55, 110 NYS 37. Public right of navigation always includes right of government to facilitate and improve navigation by erection of beacons, removal of obstructions, cutting and deepening of channels, etc. Lewis Bluepoint Oyster Cultivation Co. v. Briggs, 129 App. Div. 574, 114 NYS 313, afg. 110 NYS 37. Lessee of oyster bed cannot enjoin government contractor from dredging through such bed in order to improve navigation. Lewis Bluepoint Oyster Cultivation Co. v. Briggs, 58 Misc. 55, 110 NYS 37. Municipality which has power under its charter to protect its harbor may by ordinance prohibit removal of material below ordinary high-water mark when such removal is injurious to harbor. Evidence held to show that removal would be dangerous. C. Beck v. Milwaukee [Wis.] 120 NW 293.

**83.** Owner of land bordering on lake has legal right to occupy land between high and low-water mark so far as adjoining owners are concerned, where it does not affect latter's actual substantial rights. May fill in between high and low-water marks. Morse v. Swanson, 129 App. Div. 835, 114 NYS 876.

**84.** Held that littoral owner along navigable or tidal waters in Alaska can convey his right of access to individual or corporation to erect and maintain wharf for benefit of commerce and navigation. Decker v. Pacific Coast S. S. Co. [C. C. A.] 164 F 974. Deed held to have conveyed such rights so that grantors cannot maintain action to abate wharf as nuisance. Id.

**85.** Owner of bed of stream, who is at same time owner of lands adjoining, may sever one from other, and also right to contract with reference to use or control of rights which, in absence of express contract, would pass to grantee of ripa as natural riparian rights. Riparian rights, as natural rights, and being incidents annexed solely by operation of law to lands under and along the stream, differ, in respect to effect of contracts upon them, from those ordinary easements in lands whose

compensated for when taken under eminent domain.[88] Remedies for the protection of the rights are treated in a subsequent section.[89]

§ 3. *Accretion, reliction and avulsion.*[90] See 10 C. L. 1530.—It is settled law that the owner of land bordering on a stream, a lake, or the sea, which is added to by accretion, becomes thereby the owner of the new made land.[91] If the middle of a river forms a boundary, that boundary follows any changes in the stream which are due to gradual accretion to or degradation of its banks.[92] If, however, the change is sudden and rapid, such as occurs when a river forms a new course by cutting through a bend, the boundary does not follow the stream, but remains in the middle of the old channel.[93]

§ 4. *Public rights in riparian lands.*[94] See 10 C. L. 1530.—The title to all riparian lands under waters capable of navigation is subject to the public right of navigation[95] without injury to the banks or unlawful trespass thereon,[96] and such other

only source is a grant, actual or presumed, and, by reason of this difference of origin and character of the right, are not subject to that general rule relating to easements by force of which unity of ownership of dominant and servient lands extinguishes the easements. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

**86.** At common law, owner of riparian land bordering on navigable water could not grant right to take sand and gravel from water front or shore of his land below high-water mark, but this rule has now been modified by statute. Modified by Acts 1900, p. 905, c. 577, and Acts 1906, p. 784, c. 426. Potomac Dredging Co. v. Smoot [Md.] 69 A 507.

**87.** Dredging and carrying away sand and gravel from shore of land and removing fast land and trees above high-water mark constitute waste. Potomac Dredging Co. v. Smoot [Md.] 69 A 507.

**88.** Parties owning fee to center of street are not deprived of property without just compensation in violation of Const. art. 1, § 21, by holding that street having its terminus at high-water mark, continues to have its terminus at high-water mark, though such mark has extended seaward through accretion, and parties are not compensated for portion of street so acquired by accretion and of which they own fee to center of street. Law conclusively presumes that damages originally awarded on laying out of street covered damages for all time, and that property compensated for was in full and covered extension of easement by operation of law. State v. Yates [Me.] 71 A 1018. When parties owning land to center of street having its terminus at high-water mark gain soil by accretion, they gain same subject to easement, and are not entitled to damages or compensation for land gained for street by same process. Id.

**89.** See post, § 5.

**90. Search Note:** See notes in 18 L. R. A. 695; 51 Id. 425; 58 Id. 193; 6 L. R. A. (N. S.) 162, 194; 12 Id. 687; 35 A. S. R. 307, 308, 312; 72 Id. 280.

See, also, Navigable Waters, Cent. Dig. §§ 253-255, 266-282; Dec. Dig. §§ 39-46; Waters and Watercourses, Cent. Dig. §§ 96-103, 105, 118, 119, 121; Dec. Dig. §§ 93, 94, 109, 111; 24 A. & E. Enc. L. (2ed.) 978, 979.

**91.** Parties owning to center of street as originally described held to have gained title by accretion to so much of added land as lies in front of their half of street. State v. Yates [Me.] 71 A 1018. Where terminus of street as originally laid out was high-water mark, and this mark has moved seaward, public easement extends with accretion, and street at all times ends with high-water mark wherever that is. Id.

**92.** State boundary. Rober v. Michelsen [Neb.] 116 NW 949. Where islands in river gradually caved in and deposits on point of opposite shore increased until islands were upon other side of main channel, they become portion of state holding to mid-channel of that side, and state in which islands were formerly located has no jurisdiction over them. Sutton v. Archer [Miss.] 46 S 705. If creek has changed its course and change has been gradual change and made little by little, line has followed thread of stream. Pack v. Stepp, 33 Ky. L. R. 677, 110 SW 887.

**93.** Certain land held transferred from Nebraska to Iowa by accretion, and latter transfer of land to Nebraska side of river by avulsion did not take it out of Iowa and place it in Nebraska. Rober v. Michelsen [Neb.] 116 NW 949.

**94. Search Note:** See notes in 40 L. R. A. 393; 41 Id. 494; 64 Id. 977.

See, also, Navigable Waters, Cent. Dig. §§ 1-179; Dec. Dig. §§ 1-35; Waters and Water Courses, Cent. Dig. §§ 27-107, 118-125; Dec. Dig. §§ 34-98, 108-114.

**95.** Johnson v. Johnson, 14 Idaho, 561, 95 P 499; Moss v. Ramey, 14 Idaho, 598, 95 P 513. Title to lands under water, whether in king or riparian owner, was subject to public's rights, such as access and navigation, if waters were in fact navigable. Public had easement or right of passage over and along. Johnson v. Johnson, 14 Idaho, 561, 95 P 499. Jus publicum, or right of public, is right of access to water for purpose of navigation, boating, fishing and bathing. Bardes v. Herman, 114 NYS 1098. Evidence held to show unwarranted obstruction of public right to use foreshore by erection of planks, etc. Barnes v. Midland R. Terminal Co., 193 N. Y. 378, 85 NE 1093. Property granted to riparian owners in soil under smaller streams and creeks, though granted without reservation, is subject to public easement of use of such stream for purposes of navigation so far as they are capable of it. Commonwealth v. Foster, 36 Pa. Super. Ct. 433.

rights as may be expressly declared by statute.[97] These rights may, however, in some cases, be extinguished or released by statute.[98]

§ 5. *Remedies and procedure.*[99]—See 10 C. L. 1530.—Riparian rights may be protected by the same remedies as other property rights.[1]

Any sale of tide lands by state must be subject to paramount right of public in navigable waters thereof, and confers no right to obstruct navigation therein. Judson v. Tide Water Lumber Co. [Wash.] 98 P 377; Ami Co. v. Tide Water Lumber Co. [Wash.] 98 P 380.

**96.** Public have easement in and right to use navigable streams of this state, but in so doing must have due consideration and reasonable care for rights of riparian owner, whose rights to use stream implies necessity as well as right to pass to and from stream. Johnson v. Johnson, 14 Idaho, 561, 95 P 499. To recover property, marked or unmarked, not abandoned or lost, from bed of stream, without injury to its banks or unlawful trespass thereupon, is no unlawful interference with rights or enjoyment of riparian owner. Saw logs in bottom of stream. Whitman v. Muskegon Log Lifting & Operating Co., 152 Mich. 645, 15 Det. Leg. N. 383, 116 NW 614. Placing logs raised from bottom of stream on shore constitutes trespass. Id.

**97.** There is no public right, under Law 1901 declaring that public fishing shall exist in waters or parts of waters which have been or may be declared navigable by acts of assembly, to use bed of stream not in fact navigable, and which has been declared navigable only for limited purposes for purposes of fishing. Commonwealth v. Foster, 36 Pa. Super. Ct. 433.

**98.** If jus publicum is released or extinguished over any portion of foreshore, it follows that all rights, which, combined, constitute fee, are quo ad hoc vested in owner of adjacent land. Bardes v. Herman, 114 NYS 1098. Grantee of lands extending 500 ft. beyond low-water mark, in interest of commerce, held, under Laws 1857, p. 638, c. 763, and Laws 1878, p. 96, c. 88, granting right to shore owners to extend or construct piers or bulkheads far beyond land in question, to have been permitted to fill in such land, and to have been relieved of burden of public rights therein, and hence to have marketable title. Id.

**99. Search Note:** See Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-293; Dec. Dig. §§ 39-46; Waters and Water Courses, Cent. Dig. §§ 39, 40, 50-54, 63-66, 75-90, 104, 124, 125; Dec. Dig. §§ 49, 59-63, 73-77, 83-87, 98, 114; 18 A. & E. Enc. P. & P. 1213.

**1.** Owner of lands abutting shore of sea is entitled to **injunction** against erection of any structure on tide lands, or in water in front thereof, which will interfere with his free access at any point thereof. Riparian owner may enjoin erection of wharf. McCloskey v. Pacific Coast Co. [C. C. A.] 160 F 794. Owner or locator of land in Alaska which borders on navigable tidal waters, though having no right or title to soil below high-water mark, may have right of action against intruder who places obstacles on shore that prevent him from having access to navigable waters. Columbia Canning Co. v. Hampton [C. C. A.] 161 F 60. Owner or locator of lands in Alaska which border upon navigable or tidal waters, having no right or title to soil below high-water mark, has no right of possession upon which he can base action against intruder whom he charges with interfering with and obstructing him in erection and use of structure upon shore below such high-water mark. Id. Fish trap. Id. In virtue of fact that legislature has given upland owner preference right to purchase shore lands in front of his property when offered for sale by state, he can maintain injunction to prevent obstruction or to remove obstacles placed therein subsequent to passage of act giving him such preference. Muir v. Johnson, 49 Wash. 66, 94 P 899. Record held to show insufficient facts for maintenance of action by riparian owner. Id. The remedy of a riparian owner whose rights have been impaired by a contractor working under state direction is against the state, through the **court of claims.** Where contract made contractor liable only for damage caused during construction of work and not for riparian rights appropriated by the state. Meneely v. Kinser Const. Co., 128 App. Div. 799, 113 NYS 183. The right to the continued enjoyment of a franchise, granted by an abutting owner to another, to operate a boom in a navigable stream adjacent to his property, which right, as a thing distinguished from appropriation and occupation of the soil under water, is an incorporeal hereditament, for the possession of which an action in **ejectment** will not lie. Coquille Mill & Mercantile Co. v. Johnson [Or.] 98 P 132. Act of 1901, providing that fishing shall exist in all waters or parts of waters that have been or may be declared navigable by acts of assembly, does not operate to prevent riparian owner from prosecuting **trespass** under Act April 14, 1905 (P. L. 169), making it unlawful to trespass upon land posted by private property where stream in question has never in fact been navigable, and has been declared navigable only for limited purposes; and if stream in question did come under act of 1901, such act would be unconstitutional as taking property for public purpose without compensation, and not legitimate exercise of police power. Commonwealth v. Foster, 36 Pa. Super. Ct. 433. **Threatened trespass** upon oyster bed by persons who have once previously committed trespass and who are financially irresponsible will be enjoined. Sooz Oyster Co. v. Gaskill [N. J. Eq.] 69 A 1084. One who has been divested of his littoral rights cannot maintain suit to enjoin obstruction to his access to navigable waters in front of his land, case coming within general rule that individuals are not entitled to redress against **public nuisance.** Dedication of littoral land as street. McCloskey v. Pacific Coast Co. [C. C. A.] 160 F 794. One sus-

## ROBBERY.

§ 1. Nature and Elements, 1710.
§ 2. Indictment and Prosecution, 1710.
A. Indictment, 1710.
B. Evidence, 1711.
C. Instructions, 1712.

*The scope of this article* is noted below.[2]

§ 1. *Nature and elements.*[3]—See 10 C. L. 1531—Robbery, at common law and as defined by most statutes, is the felonious [4] taking [5] from the person of another of goods or money to any value [6] by violence or putting in fear,[7] however slight,[8] the gist [9] and distinguishing element of the action being that of force and putting in fear,[10] the offenses of larceny and larceny from the person, being included.[11] Absolute ownership by the victim of the property taken is not usually essential,[12] though the question of ownership may have a bearing upon the question of defendant's intent.[13] Neither is it essential that the robber succeed in retaining possession of the property which he has once taken.[14]

§ 2. *Indictment and prosecution. A. Indictment.*[15]—See 10 C. L. 1531—The in-

taining special damages may sue, though it is a public right which is invaded. Barnes v. Midland R. Terminal Co., 193 N. Y. 378, 85 NE 1093.

**2.** Matters common to all crimes are elsewhere treated (see Criminal Law, 11 C. L. 940, and Indictment and Prosecution, 12 C. L. 1).

**3. Search Note:** See notes in 25 L. R. A. 341; 36 Id. 469; 57 Id. 432; 67 Id. 343; 1 L. R. A. (N. S.) 1024; 10 Id. 744; 2 Ann. Cas. 264; 8 Id. 127.

See, also, Robbery, Cent. Dig. §§ 1-15; Dec. Dig. §§ 1-15; 24 A. & E. Enc. L. (2ed.) 990, 991; 18 A. & E. Enc. P. & P. 1217.

**4.** State v. McAllister [W. Va.] 63 SE 758. Evidence that one who had shown money was hit over head by accused with stick held insufficient to warrant conviction for assault with intent to rob, particularly where accused gave other equally plausible motives for his act and there was no testimony showing intent to rob. Sanders v. State, 53 Tex. Cr. App. 613, 111 SW 157.

**5.** By "taking," necessary in offense of robbery, is implied that robber must be in possession of thing taken, and offense is not actually completed without such taking. State v. McAllister [W. Va.] 63 SE 758. Where complaining witness was taken from Kentucky to West Virginia by armed defendants to get checks, checks not being delivered to defendants until return to Kentucky, taking, if any, took place in latter state. Id.

**6.** Thing taken must be of some value and must be taken from peaceable possession of owner. State v. McAllister [W. Va.] 63 SE 758.

**7.** State v. McAllister [W. Va.] 63 SE 758. Violence must be concomitant or concurrent with taking. Tiller v. State, 11 Ohio St. (N. S.) 461. Violence held concomitant and concurrent. Id.

**8.** In absence of active opposition, if article is so attached to person or clothes as to create resistance, however slight, or if there be struggle to keep it, taking is robbery. People v. Campbell, 234 Ill. 391, 84 NE 1035.

**9.** Gist of action is force and terror employed. State v. McAllister [W. Va.] 63 SE 758; Brown v. Com. [Ky.] 117 SW 281.

**10.** Difference between stealing from person of another and robbery lies in force or intimidation used. People v. Campbell. 234 Ill. 391, 84 NE 1035. Where money was stealthily taken only, there was no robbery. Bibb v. Com., 33 Ky. L. R. 726, 112 SW 401.

**11.** Crime of robbery as defined in Code, § 4753, includes larceny, larceny from person, and accomplishment of such larceny by force and violence or by putting in fear. State v. Taylor [Iowa] 118 NW 747. Evidence held to warrant instructions as to larceny. Id.

**12.** Under indictment charging that certain person was owner of property taken, proof that same was in lawful possession was sufficient proof of ownership as against accused, though property may actually have belonged to another. State v. Carroll, 214 Mo. 392, 113 SW 1051.

**13.** Held, where accused and prosecuting witness were engaged in game of cards, and it is sharply controverted as to who was entitled to money alleged to have been forced by accused from prosecuting witness by duress and threats, that instruction embodying question whether accused had any fraudulent intent, or that he honestly believed money had been fairly and properly won and belonged to him, should have been submitted to jury, and accused acquitted if jury found in his favor. Carr v. State [Tex. Cr. App.] 116 SW 591. Instruction on point submitted by accused, approved. Id.

**14.** Held that verdict of robbery was sustained by evidence, though prosecuting witness later attacked accused and recovered articles taken. Foster v. State [Neb.] 119 NW 475. While there must be actual severance of property from person to constitute robbery, still crime is consummated if thief retains possession of property but short time, it is no less robbery because ineffectual in its consequences. People v. Campbell, 234 Ill. 391, 84 NE 1035.

**15. Search Note:** See notes in 5 Ann. Cas. 687.

See, also, Robbery, Cent. Dig. §§ 16-43;

dictment must sufficiently charge the essential elements of the offense,[16] such as intent[17] and taking by force and violence[18] against the will of the victim.[19] But unnecessary averments are not necessarily fatal to the indictment.[20]

(§ 2) *B. Evidence.*[21]—See 10 C. L. 1533—The commission of robbery may be established by circumstantial evidence.[22] Complaining witness may testify that he did not consent to the taking of his property.[23] Defendant may not show the amount of money possessed by him at time of robbery as bearing upon his intent.[24] Evidence of recent possession of the stolen articles is competent,[25] and if unexplained[26] is sometimes said to be prima facie evidence of guilt,[27] though the weight to be given to the possession of stolen property soon after the commission of the offense is ordinarily for the jury alone.[28] One who buys property knowing it to be stolen is an accomplice within the law relating to the testimony of accomplices.[29] The evidence must be sufficient to connect accused with the commission of the offense,[30] to show the use of force[31] and the existence of the other elements of the offense.[32]

Dec. Dig. §§ 16-30; 18 A. & E. Enc. P. & P. 1217.

**16.** Indictment charging that accused on certain day, in certain place, represented that he was an officer and threatened to arrest certain person, and thereupon did willfully and feloniously take, steal, etc., certain personal property, through fear and threatened injury, held to charge no offense. Blackwell v. State [Miss.] 48 S 290. Under St. 1898, § 4378, punishing robbery when robber is not armed with dangerous weapon, indictment otherwise sufficient is not rendered insufficient by fact that indictment did not allege robber was not so armed. Gillotti v. State, 135 Wis. 634, 116 NW 252.

**17.** Indictment failing to allege intent to steal, but merely alleging taking pistol from person of another by violence, etc., held insufficient. Jones v. State [Miss.] 48 S 407.

**18.** Under St. 1898, § 4378, requiring either "force and violence" or "assault and putting to fear" to constitute robbery, indictment charging "forcibly and by violence" held sufficient, there being no appreciable distinction between first expression of statute and that of indictment. Gillotti v. State, 135 Wis. 634, 116 NW 252.

**19.** Indictment charging acts of violence in attempt to perpetrate robbery, and that all these acts were done against will of party upon whom attempt was made, held not insufficient for failure to charge that attempt was made with intent to deprive owner of use of his property without his consent. State v. Carroll, 214 Mo. 392, 113 SW 1051.

**20.** Indictment for robbery under Pen. Code 1895, § 856, otherwise sufficient, held not misleading, confusing, contradictory, duplicitous, and not to charge more than one offense in one count, where it makes unnecessary averments of value of property taken and that it was taken without the consent and against will of person robbed. Flannagan v. State [Tex. Cr. App.] 116 SW 54.

**21. Search Note:** See Robbery, Cent. Dig. §§ 28-36; Dec. Dig. §§ 21-24; 24 A. & E. Enc. L. (2ed.) 1005.

**22.** Evidence held sufficient though there were no eyewitnesses and no person present who testified that owner was deprived of his property in manner necessary to constitute robbery. State v. King, 214 Mo. 383, 113 SW 1089.

**23.** Davis v. State [Ala.] 48 S 694.

**24.** Evidence that there was large amount of money at house of accused is not competent to show that accused did not commit assault with intent to rob. Craig v. State [Ind.] 86 NE 397.

**25.** Where accused admitted possession of Russian coin, and did not attempt to show that it was different in amount from the one complaining witness testified had been taken from him, evidence of two witnesses that they saw Russian coin in accused's possession, without identifying it as to amount or other particulars, is competent. People v. Deluce, 237 Ill. 541, 86 NE 1080.

**26.** While recent possession is prima facie evidence of guilt, yet it should not control when it is explained by other circumstances, and if possession is recent after theft and there are no attendant circumstances or other evidence to rebut presumption or to create reasonable doubt as to guilt, mere fact of such possession would warrant conviction. People v. Deluce, 237 Ill. 541, 86 NE 1080. It does not mean, however, that after this prima facie evidence is introduced, burden shifts to defendant, but only that if after jury, considering all evidence, including evidence of recent possession and any explanation of such recent possession which may have been given, then entertain reasonable doubt of guilt of accused, he must be acquitted, and that such proof is only sufficient to convict when unexplained. Id.

**27.** People v. De Luce, 237 Ill. 541, 86 NE 1080.

**28.** Question of fact and not of law. People v. Deluce, 237 Ill. 541, 86 NE 1080.

**29.** Wyatt v. State [Tex. Civ. App.] 114 SW 812.

**30. Evidence held sufficient:** Evidence held to sustain conviction for robbery where prosecuting witness stated that he recognized accused and believed him to be man, there being corroboration evidence. Rogers v. State [Ark.] 109 SW 1160. To

(§ 2) *C. Instructions.*[33]—See 10 C. L. 1533—The instructions must contain correct principles of law [34] and cover the essential elements of the offense.[35] The propriety of instructing as to included offenses [36] and accessories [37] is governed by the usual rules.

**Rules of Court; Safe Deposits,** see latest topical index.

**SALES.**

**§ 1. Definition; Distinction From Other Transactions, 1713.**
**§ 2. Contract Requisites of a Sale, 1715.**
**§ 3. Modification, Rescission and Revival, 1717.**
**§ 4. General Rules of Interpretation and Construction, 1717.**

warrant finding that defendant was present at time of robbery of which he was convicted. People v. Campbell, 234 Ill. 391, 84 NE 1035. Finding by jury that accused was among those committing offense held not contrary to weight of evidence. People v. Deluce, 237 Ill. 541, 86 NE 1080. To sufficiently identify accused as guilty party, though no one positively identified accused as man who committed act. Craig v. State [Ind.] 86 NE 397. Where one of accused assisted in crime by separating prosecuting witness from friend, another asked him for dime with which to get beer, and third violently snatched money from his hand when he was preparing to comply with request, jury was warranted in finding that first two were accomplices. Brown v. Com. [Ky.] 117 SW 281. To warrant jury in finding that accused was participant in crime. Id. Where accused was positively identified by prosecuting witness, and latter's testimony was sustained by other witnesses and accused's conduct, verdict will not be set aside because of latter's denial corroborated by alibi testified to by nephew and niece. Lillie v. State [Neb.] 119 NW 476.

**31.** Finding that accused had intent to maim or kill if robbery was resisted held justified, though there was no proof that revolver was loaded. People v. Deluce, 237 Ill. 541, 86 NE 1080. Evidence that spiral stickpin was jerked out of shirt and fastening smashed in scuffle held sufficient to warrant conviction for robbery. People v. Campbell, 234 Ill. 391, 84 NE 1035. Where one while examing rings in jewelry store under pretense that he desired to purchase, seized tray containing rings and ran and he was followed by clerk, and at door of store there was struggle, with result that thief escaped with tray, held that pursuit by clerk and struggle at door were concomitant or concurrent with taking of rings, and accused was properly convicted of robbery as distinguished from larceny. Tiller v. State, 11 Ohio C. C. (N. S.) 461. Evidence held to show clearly that force was used. Brown v. Com. [Ky.] 117 SW 281. On information for robbery alleging striking and wounding, statute being in alternative, proof of either will suffice. McDuffee v. State, 55 Fla. 125, 46 S 721.

**32.** Evidence of robbery by use of pistol held sufficient to sustain charge of robbery by assault, though higher offense might have been charged. Wyatt v. State [Tex. Cr. App.] 114 SW 812. Evidence held sufficient to warrant finding that defendant committed robbery in first degree. People v. Jordan, 125 App. Div. 522, 109 NYS 840.

**33. Search Note:** See notes in 69 L. R. A. 203.

See, also, Robbery, Cent. Dig. §§ 38-40; Dec. Dig. § 27; 18 A. & E. Enc. P. & P. 1231.

**34.** Instruction assuming that state of evidence was such that jury might find that offense committed was larceny from person, and which also instructed jury that such offense was not included offense and which made acquittal of defendant dependant upon affirmative showing that he was guilty of larceny from the person, held erroneous. State v. Taylor [Iowa] 118 NW 747.

**35.** Instruction that if accused took pistol from person of another by violence, etc., but which failed to charge intent to steal, held erroneous. Jones v. State [Miss.] 48 S 407. Where first part of instruction on reasonable doubt, in robbery, required jury to find that property was taken from victim with fraudulent intent to deprive him of it and appropriate it to his own use beyond reasonable doubt, and last portion required acquittal if not satisfied beyond reasonable doubt that property was taken from victim's person by assault and violence, such instruction is not erroneous in failing to instruct jury to acquit if not satisfied beyond reasonable doubt that property was taken with intent to appropriate it to accused's use. Walling v. State [Tex. Cr. App.] 116 SW 813.

**36.** Refusal of instruction on larceny held proper where proof was wholly to effect that force was used. Brown v. Com. [Ky.] 117 SW 281. Held not error for court to fail to charge as to include offenses where instruction was not requested and jury were warranted in finding accused guilty of robbery in first degree. People v. Jordan, 125 App. Div. 522, 109 NYS 840. If evidence warrants, accused is entitled to instructions that if there was reasonable doubt as to element of force or violence, it was their duty to find accused guilty of no greater offense than larceny from person, and that if there was reasonable doubt in their minds as to whether stolen article was taken from person of prosecuting witness, it was their duty to find accused guilty of no greater offense than larceny. State v. Taylor [Iowa] 118 NW 747.

**37.** Instruction as to an accesory held properly given where it may be properly inferred that accused did not himself take property from person of complaining witness, but stood by holding revolver. People v. Deluce, 237 Ill. 541, 86 NE 1080.

§ 5. **Property Sold, 1719.**
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§ 14. **Conditional Sales, 1758.** Definition, Validity and Formation, 1758. Rights of Parties to the Contract, 1759. Rights of Third Persons, 1761.

*The scope of this topic* is noted below.[38]

§ 1. *Definition; distinction from other transactions.*[39]—See 10 C. L. 1534—A sale is generally defined as the exchange of an interest in real or personal property for money or its equivalent,[40] though a sale of personal property usually means an exchange for a money consideration.[41] Only sales of personal property are here discussed.[42] Whether a given transaction is a sale or a mere executory agreement to sell,[43] or option,[44] or a guaranty,[45] or a bailment,[46] pledge,[47] mortgage,[48] trust agree-

**38. It includes** generally matters relating to private sale of chattels. **It excludes** matters common to all contracts (see Contracts, 11 C. L. 729), reality of assent (see Fraud and Undue Influence, 11 C. L. 1583; Duress, 11 C. L. 1138; Incompetency, 11 C. L. 1885; Mistake and Accident, 12 C. L. 869), the validity of bulk sales (see Fraudulent Conveyances, 11 C. L. 1620), the operation of the statute of frauds (see Frauds, Statute of, 11 C. L. 1609), and matters peculiar to the sale of particular kinds of property, such as growing crops (see Emblements and Natural Products, 11 C. L. 1197), corporate stock (see Corporations, 11 C. L. 810), and standing timber (see Forestry and Timber, 11 C. L. 1521).

**39. Search Note:** See notes in 14 L. R. A. 230; 2 A. S. R. 711; 94 Id. 209, 254.

See, also, Sales, Cent. Dig. §§ 1-19; Dec. Dig. §§ 1-8; 24 A. & E. Enc. L. (2ed.) 1022.

**40, 41.** Mansfield v. District Agr. Ass'n No. 6 [Cal.] 97 P 150.

**42.** See Vendors and Purchasers, 10 C. L. 1942; Exchange of Property, 11 C. L. 1430; Gifts, 11 C. L. 1649.

**43.** Oral agreement to give cattle in exchange for care of owner during sickness held mere executory contract to sell, not a sale, there being no delivery and no writing. Van Dey Mark v. Corbett, 115 NYS 911. Contract for purchase of season's crop of tobacco held an executory contract though some expressions indicated completed sale. Grenawalt v. Roe, 136 Wis. 501, 117 NW 1017.

**44.** Under agreement providing for payment of certain sum cash and giving defendant right to buy vessel on payment of certain further sum within specified time and giving plaintiff right to retain money paid if option was not exercised, and that defendant should then owe nothing more, plaintiff, having retained money paid, had no further recourse against defendant. Ollinger & Bruce Dry Dock Co. v. Tunstall [Ala.] 48 S 482.

**45.** One of defendants told salesman to ship goods to third person and that he, defendant, would pay for them. Held not a sale to defendants but a guaranty, and defendant's partners not bound. Cairo Thread Works v. Lubell, 111 NYS 664.

**46.** See, also, Bailments, 11 C. L. 365. Evidence held to entitle plaintiff to have transaction declared a **loan** where on the face of the instrument it appeared to be an absolute sale. Heise v. Selected Securities Co., 105 NYS 1079. Where owner of cow allowed another to have it "to double" for two years, transaction was **sale, not bailment,** since there was no obligation to return identical

ment,[49] or other form of security,[50] or a lease,[51] or a contract of agency,[52] or an absolute sale,[53] depends upon the intention of the parties,[54] which is to be gathered from the language used by them and all the facts and circumstances,[55] and may become a question for the jury.[56] Where the chattel is in existence at the time the contract is made, and the vendor is to do some work upon it to adapt it to the use of the vendee, the transaction is a sale.[57] An agreement to make certain articles not then in existence is not a sale.[58] The mere assignment of a money demand which is to arise only upon the performance of a contract by the assignor is not necessarily and as matter of law a sale of the subject-matter of the contract.[59] An option is simply a continuing offer by which the owner stipulates with another that he shall have a right to buy the property at a certain price within a certain time,[60] and unless it be founded upon a consideration, it may be revoked or withdrawn at any time.[61] The mere expenditure of money by the one holding such option in an

cow. Van Dey Mark v. Corbett, 115 NYS 911. Contract for furnishing fertilizer at certain price, to be paid for at certain time, goods and proceeds to remain property of seller until payment in full, held contract **of sale, not bailment,** with attempt to reserve title. Action for debt would lie. Coweta Fertilizer Co. v. Brown [C. C. A.] 163 F 162.

**47.** See, also, Pledges, 12 C. L. 1398. **Contract construed as pledge** to secure advances made on brick to be manufactured, and not a sale. Sequeira v. Collins, 153 Cal. 426, 95 P 876. Where neither absolute nor defeasible title was vested in plaintiff, but he was given possession of property with power to sell in case of default in payment, transaction was neither sale nor mortgage, but pledge. Grand Ave. Bank v. St. Louis Union Trust Co. [Mo. App.] 115 SW 1071. Instrument held to be an ordinary promissory note with a pledge of corn therein mentioned as collateral security. Gravert v. Goothard [Neb.] 115 NW 559.

**48.** See Chattel Mortgages, 11 C. L. 611. Where cotton was transferred to bank which had advanced money to owner, but no price per pound was specified, bank being empowered to sell to repay advances, transaction was **mortgage, not sale.** McKinney Cotton Oil Mill Co. v. Van Brown [Tex. Civ. App.] 111 SW 438. Writing showing delivery of property to sheriff for delivery to bank, in satisfaction of claim for checks drawn on bank, held to show **sale, not chattel mortgage.** Leak v. Bank of Wadesboro, 149 N. C. 17, 62 SE 733.

**49.** See Trusts, 10 C. L. 1907. Where owner transferred title to his son to allow him to close up business and distribute proceeds to such creditors as he saw fit, transaction was secret trust rather than sale, under Rev. Civ. Code, § 1299, which defines sale as contract transferring interest in property for consideration. Hall v. Feeney [S. D.] 118 NW 1038.

**50.** Bill of sale of lumber held mere security for note; lumber reverted to owners when note was paid; was not mortgage and of no effect after payment of said note. First Nat. Bank v. Manser [Me.] 71 A 134. The recitals of consideration and of delivery in a deed or bill of sale of personal property are not conclusive (Donoven v. Travers, 122 La. 458, 47 S 769), and where it appears that there was no delivery, and no cash paid, the intention being to give security for a debt, there is no sale (Id.). Deed of mules given for debt, mules remaining in possession of debtor. Id.

**51.** See, also, Landlord and Tenant, 12 C. L. 528. Contract to furnish steam shovel at monthly rental for 8 months, at which person using it was to buy it at certain price. Instead, he continued to pay monthly rental. Held, lease not sale; owner entitled to shovel, not bankrupt estate. McEwen v. Totten [C. C. A.] 164 F 837.

**52.** See Agency, 11 C. L. 60; Brokers, 11 C. L. 446; Factors, 11 C. L. 1454. Contract held one of **employment as selling agent,** and not one of sale of goods. Barr v. American Copying Co., 142 Ill. App. 92. Correspondence construed as making **contract to sell on commission,** and not one to buy outright. Sligh v. Kuehne Commission Co. [Mo. App.] 115 SW 1065. Contracts purporting to be consignment contracts to agents for sale of proprietary medicines, reserving title in vendors, but requiring payment at fixed price, **held sales** rather than agency contracts, purpose of form being to evade anti-trust act. Dr. Miles Medical Co. v. John D. Park & Sons Co. [C. C. A.] 164 F 803.

**53.** Telephone company held to have purchased property of another telephone company absolutely and unconditionally, so as not to be bound by service contract of seller. Southern Bell Tel. & T. Co. v. Jacoway, 131 Ga. 483, 62 SE 640.

**54.** Insurance company sent collateral securities to bank and requested check, with understanding that securities were to be returned four days later, when insurance company would send check, which they did, paying interest on amount for four days. Held, transaction was **not sale, but mere colorable sale** to enable company to report that it had no collateral loans. People v. Corrigan, 195 N. Y. 1, 87 NE 792, rvg. 129 App. Div. 62, 113 NYS 504.

**55.** See post, § 4.

**56.** Evidence sufficient to go to jury on alleged claim that delivery to warehouseman was sale. Patty v. Salem Flouring Mills Co. [Or.] 98 P 521. Rehearing denied. Patty v. Salem Flouring Mills Co. [Or.] 100 P 298.

**57.** Binder v. Robinson, 61 Misc. 278, 113 NYS 766.

**58.** Complaint held not to show sale. Binder v. Robinson, 61 Misc. 278, 113 NYS 766.

**59.** Assignment of invoice of lumber not sale of lumber in transit. Grant v. Sicklesteel Lumber Co. [Mich.] 15 Det. Leg. N. 1145, 119 NW 1092.

**60, 61.** Ganss v. Guffey Petroleum Co., 125 App. Div. 760, 110 NYS 176.

examination of the property does not make it binding on the owner,[62] though such act or expenditure may constitute a sufficient consideration for the option if induced by the owner.[63]

§ 2. *Contract requisites of a sale.*[64]—See 10 C. L. 1535—The requisites of a contract must exist.[65] Thus the minds of the parties must meet [66] on the subject-matter of the sale [67] and all the essential terms.[68] Where the contract of sale is by correspondence, there must be an offer and an acceptance [69] of the offer as made [70] communicated to the offerer.[71] An order taken subject to acceptance by the seller does not become effective until and unless accepted.[72] A mere offer to sell may be withdrawn at any time before it has been accepted; [73] after its acceptance, both

**62.** Owner of steamship could withdraw option though holder had examined boat. Ganss v. Guffey Petroleum Co., 125 App. Div. 760, 110 NYS 176.

**63.** Ganss v. Guffey Petroleum Co., 125 App. Div. 760, 110 NYS 176.

**64.** See, also, Contracts, 11 C. L. 729.

**Search Note:** See notes in 6 C. L. 1325; 8 Id. 1757; 17 L. R. A. 176; 36 Id. 161; 12 L. R. A. (N. S.) 595; 1 A. S. R. 752; 3 Id. 196; 32 Id. 450. See, also, Sales, Cent. Dig. §§ 20-151, Dec. Dig. §§ 9-53; 4 A. & E. Enc. L. (2ed.) 556; 24 Id. 1028.

**65.** Written and printed list of goods signed by defendant held not contract, but mere memorandum of goods, clause ordering goods having been stricken. Price v. Rosenberg, 200 Mass. 36, 85 NE 887.

**66.** Correspondence of parties held to show no meeting of minds so as to constitute sale of cement. Hunkins-Willis Lime & Cement Co. v. Los Angeles Warehouse Co. [Cal.] 99 P 369.

**67.** If buyer of coal had one kind in mind and seller another, minds of parties did not meet, and there was no contract. Indiana Fuel Supply Co. v. Indianapolis Basket Co., 41 Ind. App. 658, 84 NE 776.

**68.** Contract of sale made where parties agreed on price, quantity and terms. Tuttle v. Bracey-Howard Const. Co. [Mo. App.] 117 SW 86.

**69.** There must be offer and intention to sell on one side and acceptance and intent to buy on other. Priest v. Hodges [Ark.] 118 SW 253. Where letter made offer of cut stone for court house and jail, telegram, "We accept your bid for cut stone for court house and jail," made completed contract. Bollenbacher v. Reid [Mich.] 15 Det. Leg. N. 961, 118 NW 933. Letter, in reply to one requesting leave to offer stock for sale, that seller will not sell for less than certain price, held not continuing offer, and, being refused, no contract resulted. Sprague v. Hosie [Mich.] 15 Det. Leg. N. 847, 118 NW 497. Evidence insufficient to show completed contract for sale of fruit by correspondence. Scudders-Gale Grocery Co. v. Gregory Fruit Co. [Cal. App.] 99 P 978. Order for lumber not accepted by acquiescence where defendant tried to get definite information as to it by correspondence and, failing, gave notice of refusal 19 days after order. Harris v. Santee River Cypress Lumber Co. [R. I.] 72 A 392. Contract of agency for sale of typewriters also contained order for machines "to be shipped when ordered." Held, title to machines did not pass and no right of action against agent for price arose until he ordered machines. Oliver Typewriter Co. v. Huffman [W. Va.] 63 SE 1086.

**70.** Evidence of three different ways of buying fruit in market admissible to show materiality of offer to buy as modification of previous offer to sell. Scudders-Gale Grocery Co. v. Gregory Fruit Co. [Cal. App.] 99 P 978. Order for doors at price less than that listed not binding until accepted by defendant. Harris v. Santee River Cypress Lumber Co. [R. I.] 72 A 392. Written offer to sell quantity of coal was verbally accepted, parties agreeing that formal contract should be drawn up. Seller sent written contract different from first proposal, and buyer refused to accept it. Held, in action for breach of contract made by first offer and acceptance, plaintiffs could not insist that defendants were bound thereby, since they themselves proposed new one; must be mutuality; no contract. Hite & Rafetto v. Savannah Elec. Co. [C. C. A.] 164 F 944. Where it is doubtful whether the acceptance varied from the offer, if the parties treat the contract as complete, it will be so regarded. Great Western Coal & Coke Co. v. St. Louis & Big Muddy Coal Co., 140 Ill. App. 368.

**71.** Mere uncommunicated purpose to accept, or letter or telegram written but not mailed or sent, is not acceptance; acceptance does not become effective until beyond power of person sending, and not then if order has been countermanded. Northwestern Thresher Co. v. Kubicek [Neb.] 118 NW 94.

**72.** Letter requesting call to talk over order for goods held not an acceptance of order. Waxelbaum v. Schloss, 116 NYS 42. Order for goods contained printed notice that it must be accepted by home office. Held no contract where home office rejected order. Id. Where order was taken by agent, subject to seller's acceptance and seller did not accept but wrote that it could not deliver machine ordered and offered to supply one of a different kind, there was no contract. Bronson v. Weber Implement Co. [Mo. App.] 116 SW 20. Where contract provided for deposit of price with third person until buyer received and accepted goods, refusal of buyer to receive goods terminates contract, unless refusal is fraudulent or in bad faith. Holtz v. Gaidry [Ind. App.] 87 NE 997.

**73.** Evidence held to show that offer to sell mortgage was withdrawn before acceptance; no contract. East End Sav. & Trust Co. v. Chadwick [Pa.] 72 A 258. Offer to furnish castings at certain price for certain time does not bind offerer except as to orders taken thereunder; offer is revocable; no contract until accepted. Hopkins v. Racine Malleable & Wrought Iron Co., 137 Wis. 583, 119 NW 301. Defendant's letter that after stock of castings on hand was exhausted it could not accept orders except at revised

parties are bound.[74] An order, subject to seller's acceptance, may be countermanded before acceptance.[75] Where an order reserves the right to cancel but fixes no time, the right must be exercised within a reasonable time.[76] What is a reasonable time is a question for the jury unless the facts are undisputed and such as to admit of but one reasonable conclusion.[77] Whether an order has been countermanded is largely a question of intention as shown by the language and conduct of the parties.[78] The contract must be definite and certain as to its terms,[79] or capable of being made so,[80] must be mutually enforcible,[81] and free from fraud [82] and mistake.[83] Where there are conditions precedent to the sale becoming effective, such conditions must of course be performed,[84] and statutory requirements must be

prices held revocation of former offer to furnish castings at certain prices. Id.

74. When an offer to sell a quantity of goods at a specified price has been accepted, both parties become bound by the terms of the offer and neither can withdraw. Oak City Cooperage Co. v. Kennedy Stave & Cooperage Co., 4 Ga. App. 344, 61 SE 499. Correspondence held to contain offer and acceptance of barrel staves at certain price and to constitute contract. Id.

75. No contract where order was countermanded before accepted by company. Northwestern Thresher Co. v. Kubicek [Neb.] 118 NW 94.

76, 77. Bauman v. McManus Bros. [Kan.] 101 P 478.

78. Before expiration of time allowed to countermand order, buyer wrote requesting that goods be held until he instructed shipment. He did not expressly countermand order, and subsequent correspondence showed that neither party understood that it was countermanded. Held not countermanded. McDuffie v. Dilley [Tex. Civ. App.] 115 SW 612.

79. Stout v. Caruthersville Hardware Co., 131 Mo. App. 520, 110 SW 619. Correspondence held not to constitute contract for sale of pickles because there was no agreement as to quantity and quality of goods. Jordan v. Walker, 154 Mich. 394, 15 Det. Leg. N. 777, 117 NW 942. Where contract for season's output of lumber mill referred to certain price list for prices, contract was sufficiently definite and certain to sustain action for damages for breach, and fact that list omitted No. 3 dimension was immaterial, since it would be assumed that parties omitted that class of lumber. Hobe Lumber Co. v. McGrath, 104 Minn. 345, 116 NW 652.

80. Telegrams held valid contract for ties, reference to another cargo being sufficient to fix quantity oral proof of quantity in that cargo being competent. Maydwell v. Rogers Lumber Co. [C. C. A.] 159 F 930. Contract is not made indefinite and uncertain by omission of time of delivery or payment, since law implies that delivery is to be in reasonable time and that payment is to be on delivery. Bollenbacher v. Reid [Mich.] 15 Det. Leg. N. 961, 118 NW 933.

81. Agreement by seller of stock to repurchase at end of three years at certain price held not lacking in mutuality; enforcible. Raiche v. Morrison, 37 Mont. 244, 95 P 1061. Proposition to supply all timber of certain kind required on building, when accepted, is valid contract of sale; not mere option to furnish such as may be ordered. Campfield v. Sauer [C. C. A.] 164 F 833. Plaintiff agreed to furnish defendant entire consumption of coal as required at certain price, and to have 1,000 tons constantly on hand and 3,000 tons on dock and in transit. Held defendant impliedly agreed to take and use the coal, and contract was mutual and enforcible. Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co. [C. C. A.] 162 F 848. Even if defendant had right under contract to refuse to use coal of plaintiff, where it did in fact use it, and both parties acted and relied on contract, defendant could recover damages for plaintiff's failure to deliver as agreed. Id. Agreement to sell mill culls left it optional with other party to buy, but agreement was contained in lease given by seller. Held agreement to pay rent was consideration for agreement to sell as well as lease. Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92. Contract whereby A agrees to sell and deliver to B all the ties he can produce and ship up to certain date, and B agrees to take all ties A can produce and ship during that time, is unenforcible for want of mutuality; A's agreement not enforcible. Hazelhurst Lumber Co. v. Mercantile Lumber & Supply Co., 166 F 191. Where transfer of farm and sale of stock of goods were parts of one contract, and agreement as to land was unenforcible, being Indian land, agreement as to stock of goods was unenforcible, and no damages were recoverable for its breach. Terrance v. Crowley, 116 NYS 417.

82. See Fraud and Undue Influence, 11 C. L. 1583. Buyer cannot defeat liability on written order for goods by setting up fraud in procuring it where he signs it without reading it, having opportunity and ability to read it. United Breeders Co. v. Wright [Mo. App.] 115 SW 470.

83. See Mistake and Accident, 12 C. L. 869. Where buyer asked and seller submitted bid for entire lot of lumber desired, bid not containing items, mistake by bidder in figuring one item before submitting total bid was not mutual and did not entitle seller to relief in action of assumpsit. Boeckeler Lumber Co. v. Cherokee Realty Co. [Mo. App.] 116 SW 452.

84. Where order for goods was signed by buyer's clerk on understanding that it was not to be sent in by selling agent until approved by member of buying firm, and he refused to approve it, but selling agent sent it in, maker of order could countermand and refuse to receive goods. American Jobbing Ass'n v. Register, Carter & Co., 5 Ga. App. 543, 63 SE 599. Where sale of corporate stock was conditioned on procuring majority of it for one maker of note for price, and on procuring another signer of note, there was no sale until these conditions were per-

complied with.[85] No formal instrument or writing is essential. The contract may be shown by correspondence [86] on book entries,[87] or may rest in parol.[88] The requirements of the statute of frauds are elsewhere considered.[89]

§ 3. *Modification, rescission and revival.*[90]—See 10 C. L. 1538—The right of a party to rescind for breach is treated in other sections.[91] The contract may of course be rescinded or modified by mutual consent.[92] Where a new agreement is made, the fact that it takes the place of the old one is held a sufficient consideration,[93] though a different consideration may be shown.[94] In some jurisdictions, a subsequent oral agreement cannot be proved unless based upon a consideration.[95] Where terms modifying an existing contract are offered by one party, they must be explicitly, fully, and unconditionally accepted by the other to effect a new contract.[96] Whether a contract has been modified must be determined with reference to the facts of the particular case.[97] A mere suggested modification, customary in the trade, is not a breach.[98]

§ 4. *General rules of interpretation and construction.*[99]—See 10 C. L. 1539—In construing the contract the intention of the parties controls; [1] as in construing other

formed. Key v. Usher, 33 Ky. L. R. 575, 110 SW 415. Notes and mortgage for machine were delivered to seller's agent under agreement that if machine worked satisfactorily on test they were to become effective; if machine proved unsatisfactory, notes and mortgage were to be null and void. Latter contingency occurring, there was no sale. J. I. Case Threshing Mach. Co. v. Barnes [Ky.] 117 SW 418. Where check was given under conditional contract of purchase, and condition upon which check was to be returned arose, and holder was notified, there could be no recovery on check. Shulman v. Damico, 115 NYS 90.

85. Contract for sale of fertilizer not enforcible where state statute (Tennessee) relating to inspection, marking, etc., of such fertilizer was not complied with. Coweta Fertilizer Co. v. Brown [C. C. A.] 163 F 162.

86. Fact that no formal contract mentioned in letters and telegrams immaterial, where they alone showed contract, nor did subsequent proposals or request for formal writing change contract already made. Bollenbacher v. Reid [Mich.] 15 Det. Leg. N. 961, 118 NW 933.

87. Where contract of sale is made through brokers, the entries on their books constitute the contract, and the bought and sold notes are merely copies of the original contract. Ankeny v. Young Bros. [Wash.] 100 P 736.

88. Where order for goods was taken over telephone, and written order sent out to parties by agent, contract was oral, writing not constituting contract but mere shipping directions so far as seller was concerned. Bewley v. Schultz [Tex. Civ. App.] 115 SW 294.

89. See Frauds, Statute of, 11 C. L. 1609.

90. **Search Note:** See notes in 18 A. S. R. 862; 33 Id. 791; 94 Id. 119.

See, also, Sales, Cent. Dig. §§ 251-329; Dec. Dig. §§ 89-134; 24 A. & E. Enc. L. (2ed.) 1097.

91. See post, § 10 A, as to rescission by seller; § 11 A, as to rescission by buyer.

92. Parties may rescind contract and enter into new agreement. Peters & Reed Pottery Co. v. Felockemer, 131 Mo. App. 105, 110 SW 598. Contract for sale of shingles mutually rescinded when seller wrote informing buyer of destruction of dry kilns, asking buyer not to rely on order, and seller answered expressing regret. West Coast Shingle Co. v. Markham Shingle Co., 50 Wash. 681, 97 P 801.

93. Peters & Reed Pottery Co. v. Folockemer, 131 Mo. App. 105, 110 SW 598.

94. Action on modified contract to buy raisins. Evidence that market was declining admissible to show consideration for agreement to take one instead of two cars. Fresno Home Packing Co. v. Turle, 111 NYS 839.

95. Porter v. Sims Co., 55 Fla. 504, 46 S 420.

96. Woodbridge Ice Co. v. Semon Ice Cream Corp. [Conn.] 71 A 577. Where contract was made to supply ice for certain time at certain price, it could not be changed by letters sent by seller notifying buyer that price would thereafter be higher; acceptance of ice thereafter and payment of higher price would be strong evidence of consent to change by buyer, but not conclusive. Id.

97. Evidence held to show that contract was not modified as to quality of lumber to be furnished. Burton v. Berthold [C. C. A.] 166 F 416. In action for damages for breach of option agreement, complaint held not to show modification of contract provision that defendant should owe nothing more after failure to exercise option. Ollinger & Bruce Dry Dock Co. v. Tunstall [Ala.] 48 S 482. Proof of statements by buyer to third persons inadmissible to show that he paid higher price under protest and that he had not waived original contract and agreed to change. Woodbridge Ice Co. v. Semon Ice Cream Corp. [Conn.] 71 A 577.

98. Where wire was ordered in accordance with contract, mere intimation, in order that subsequent modification of specifications might be required, was not breach of contract by buyer, such modification being customary in trade. In re National Wire Corp., 166 F 631.

99. **Search Note:** See notes in 6 C. L. 1330; 62 L. R. A. 795; 8 L. R. A. (N. S.) 793; 9 Id. 1187; 11 Ann. Cas. 327.

See, also, Sales, Cent. Dig. §§ 152-250; Dec. Dig. §§ 54-88; 4 A. & E. Enc. L. (2ed.) 556.

1. Where contract provided that it could be countermanded only by written consent

contracts, and in ascertaining this intention, the attendant facts and circumstances may be shown and considered,[2] and the construction which the parties themselves have placed upon it is entitled to great weight.[3] Where the contract is reduced to writing, prior oral negotiations, representations and warranties are merged therein,[4] and, where the writing is complete and unambiguous, oral evidence is incompetent to vary, add to or contradict it,[5] and especially is this true where the writing itself expressly excludes all agreements not contained therein.[6] But, if the writing is incomplete or ambiguous, parol evidence is received to aid in its interpretation.[7] Thus, proof of the trade meaning of terms used by the parties is competent,[8] and customs prevailing in the trade may be shown and considered,[9] if general;[10] but

of seller "and" upon certain terms which would save seller harmless, word "and" was construed as "or" to make contract reasonable. Gibbes Machinery Co. v. Johnson, 81 S. C. 10, 61 SE 1027.

2. Facts and circumstances surrounding execution of contract may be shown. Adeline Sugar Factory Co. v. Evangeline Oil Co., 121 La. 961, 46 S 935. All surrounding circumstances may be shown and considered in determining whether transaction is intended as chattel mortgage or conditional sale. Stalker v. Hayes [Conn.] 71 A 1099.

3. Where language used in contract renders its meaning doubtful. Gibbes Machinery Co. v. Johnson, 81 S. C. 10, 61 SE 1024.

4. Where the contract is complete, oral representations and warranties, and implied warranties, and all oral negotiations, are merged therein. Kullman Salz & Co. v. Sugar Apparatus Mfg. Co., 153 Cal. 725, 96 P 369. Where a bill of sale is placed in escrow to be delivered on payment of price, it does not become effective until delivery; hence negotiations while it was in escrow were merged in instrument and could not be proved to modify contract by parol. Schoblasky v. Rayworth [Wis.] 120 NW 822.

5. Oral evidence incompetent to vary written order. Porter v. Sims Co., 55 Fla. 504, 46 S 420. Contract of sale unambiguous; proof of prior conversations inadmissible. St. Dunstan Soc. v. Picard, 115 NYS 1079. Written contract complete and unambiguous as to all terms; prior oral representations could not be proved. Bruner v. Kansas Moline Plow Co. [C. C. A.] 168 F 218. Oral evidence as to quality and kind of wine ordered incompetent where written order contained description. Stonehill Wine Co. v. Lupo, 110 NYS 408. Expression "free on board" at certain place in sale contract not ambiguous, and not open to explanation by proof of custom or other parol proof. Chandler Lumber Co. v. Radke, 136 Wis. 495, 118 NW 185. Order for goods in writing and complete; oral evidence to vary or add to it inadmissible. Massillon Sign & Poster Co. v. Buffalo Lick Springs Co., 81 S. C. 114, 61 SE 1098. Contract declared on being unambiguous; oral evidence of prior conversation and circumstances inadmissible. Kellerman Cont. Co. v. Chicago House Wrecking Co. [Mo. App.] 118 SW 99. Where telegram, which was part of contract for purchase of coal, provided for "shipment in any equipment available," evidence that word "cars" used in order meant ordinary cars and not hopper-bottom cars was inadmissible. Fowler Utilities Co. v. Chaffin Coal Co. [Ind. App.] 87 NE 689.

6. Where contract expressly excluded all agreements not contained in the writing, an oral warranty by the seller's agent could not be proved. Stimpson Computing Scale Co. v. Taylor, 4 Ga. App. 567, 61 SE 1131. Where written and printed order provided that it could not be countermanded after acceptance, and that no stipulations made by agent were binding unless placed in contract and accepted by company, arrangement with agent that order could be countermanded if previous order to another concern could not be cancelled, was of no effect. Metropolitan Aluminum Mfg. Co. v. Lau, 61 Misc. 105, 112 NYS 1059.

7. Where a contract provides for delivery of goods within a certain time, parol evidence is admissible to show that time is of the essence of the contract. Alabama Const. Co. v. Continental Car & Equipment Co., 131 Ga. 365, 62 SE 160. Where bill of sale does not purport to state entire contract but simply evidences transfer of title, parol evidence is admissible to show real contract, as that sale included good will of restaurant business. Hall v. Barnard, 138 Iowa, 523, 116 NW 604. Where contract of sale of malt was uncertain as to time of shipment, oral evidence of circumstances and conditions of parties and their subsequent conduct was proper. Jung Brew. Co. v. Konrad, 137 Wis. 107, 118 NW 548.

8. Evidence admissible to explain meaning of phrase "slightly processed" used in regard to fruit. Scudders-Gale Grocery Co. v. Gregory Fruit Co. [Cal. App.] 99 P 978. Evidence admissible to show trade meaning of "shipping culls" and "mill culls." Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92. Where contract called for "Geneva washed furnace coke" evidence was admissible to show trade meaning of phrase and to show that coke furnished was not kind and quality contracted for. McKeefrey v. Dimmick, 166 F 370. Evidence admissible to show meaning given by merchants to such terms as "May 1st, 2 per cent., or July 1st," referring to discount allowed in case of payment before account is due. Howes v. Union Mfg. Co. [Ky.] 113 SW 512. Evidence admissible to show meaning of phrase "10 and up" in lumber contract. Salmon v. Helena Box Co. [C. C. A.] 158 F 300.

9. General custom prevailing in trade in which parties are engaged presumed to have entered into contract. Smith & Co. v. Russell Lumber Co. [Conn.] 72 A 577.

10. Proof of custom in particular trade cannot be made unless evidence shows it to be so general that knowledge of it may be presumed. Merchants' Grocery Co. v. Ladoga Canning Co. [Ark.] 117 SW 767.

evidence of this character cannot be received to contradict plain terms of the contract.[11] The construction of a plain and unambiguous written contract is for the court; but, where the written terms are uncertain and oral evidence is received to explain them, the construction of the contract is for the jury.[12] Decisions dealing with the place of sale are given in the note;[13] this subject is fully discussed elsewhere.[14]

Whether a contract of sale is entire or divisible depends upon the intention of the parties and must be determined from the language employed and the subject-matter.[15] A contract for the sale of different articles at different prices is usually held to be severable,[16] even though a certain sum is paid generally on account at the time.[17]

§ 5. *Property sold.*[18]—See 10 C. L. 1540—What property is included in the sale,[19] or the amount which the seller is required to deliver,[20] must be determined by reference to the terms of the contract. An agreement to sell and deliver in the future is held not invalid under a statute requiring the subject of a sale to be property, title to which can be immediately transferred.[21]

**11.** Custom cannot be proved which is at variance with express terms of contract; but, where terms are in dispute, custom may be proved on issue whether parties contracted with reference to it. Smith & Co. v. Russell Lumber Co. [Conn.] 72 A 577. Where contract called for 50,000 shingles 5x16, proof of custom to count a 5x16 shingle as 1 1-4 and that shipment of 40,000 shingles complied with order was inadmissible. Birmingham & A. R. Co. v. Maddox [Ala.] 46 S 780.

**12.** Jung Brewing Co. v. Konrad, 137 Wis. 107, 118 NW 548.

**13.** Where order was received and accepted at liquor dealer's place of business, goods being taken from his stock at that place, is sale at his place of business and not at place of delivery, unless parties agree upon latter as place of sale. State v. Davis, 62 W. Va. 500, 60 SE 584. Iowa company sold, through agent, to defendant in Connecticut certain jewelry, f. o. b. cars in Iowa. Held, contract of sale was Iowa contract, and not invalidated by Connecticut statute (Gen. St. 1902, § 1381), making sale or keeping for sale goods like those sold misdemeanor. Moline Jewelry Co. v. Dinnan [Conn.] 70 A 634.

**14.** See Conflict of Laws, 11 C. L. 665; also Intoxicating Liquors, 12 C. L. 332.

**15.** Contract for different amounts of different kinds of varnish at various prices held separable, buyer liable for shipment, though entire order not filled. Equitable Trading Co. v. Stoneman, 115 NYS 285. Where giving of check for marble stock and business, and signing of agreement not to engage in business for 3 years in city, took place at practically same time, they were parts of one contract, and agreement not to engage in business was part of consideration for check. Skaggs v. Simpson, 33 Ky. L. R. 410, 110 SW 251. Where contract was for 11 car loads of lumber, it was entire in sense that default by one would excuse performance by other; yet it was severable in that each car was to be billed separately and paid for 60 days after delivery. Harris Lumber Co. v. Wheeler Lumber Co. [Ark.] 115 SW 168.

**16.** Barlow Mfg. Co. v. Stone, 200 Mass. 158, 86 NE 306. Contract itemizing goods and giving separate prices held severable. American Standa Jewelry Co. v. Hill [Ark.] 117 SW 781.

**17.** Barlow Mfg. Co. v. Stone, 200 Mass. 158, 86 NE 306.

**18. Search Note:** See notes in 23 L. R. A. 449; 1 L. R. A. (N. S.) 704, 1055, 81 A. S. R. 42.

See, also, Sales, Cent. Dig. §§ 20-24; 182-202; Dec. Dig. §§ 9-14, 67-73; 24 A. & E. Enc. L. (2ed.) 1040.

**19.** Sale of all horses bearing certain brand did not include unbranded colt, though dam had borne such brand. Graves v. Davenport [Colo.] 100 P 429. Bill of sale purporting to transfer only personal property cannot be held to include real estate or any covenant or assurance of title or right to convey realty. Falls City Lumber Co. v. Watkins [Or.] 99 P 884. Bill of sale held to include all personalty on land conveyed, where vendees took possession at once and sellers vacated, and terms of bill of sale were general. Houghton Co. v. Kennedy [Cal. App.] 97 P 905. Evidence held to show purchase of two identified lots of coffee and not sale by sample. Ankeny v. Young Bros. [Wash.] 100 P 736. Revenue stamps held not included in sale of all "stationery" and fixtures in bank. Gregory v. Keller, 137 Ill. App. 441. An offer to seller "to hold good for 10,000 barrels" is an offer to sell that number, and a general acceptance makes contract for such sale. Netterstrom v. Peerless Portland Cement Co., 133 Ill. App. 579.

**20.** Contract to furnish logs sufficient to cut 250,000 feet of lumber per month, vendor reserving right to cut lumber also if vendee did not require all timber. Held, vendor impliedly agreed to supply usual run of logs; breach of contract to keep best logs and supply vendee with culls only. Williams v. Roper Lumber Co. [C. C. A.] 167 F 84. An agreement to buy not less than 5,000 nor more than 9,000 barrels of oil monthly binds buyer to take at least 5,000 barrels each month, and buying greater quantity in previous months, will not relieve him from duty to buy at least 5,000 monthly thereafter. Central Oil Co. v. Southern Refining Co. [Cal.] 97 P 171.

**21.** Agreement to sell and deliver oil in certain quantities monthly for one year is

§ 6. *Transition of title.*[22]—See 10 C. L. 1541—The transition of title, in order to determine the locus of crime, as in sales of inhibited articles, is largely treated elsewhere.[23]

*Meaning and effect of contract.*See 10 C. L. 1541—The transition of title is a matter of intention [24] to be determined from the terms of the contract,[25] and, when the contract itself is not clear, from the acts of the parties and all the facts and circumstances.[26] Very slight acts of surrender of possession by the seller or acquirement of dominion by the purchaser are often sufficient to evince such intention,[27] and the intention may exist and have effect in the absence of any change of possession whatever.[28] Where the contract is executory, all of its stipulations must be performed, or performance thereof tendered and refused, before title passes.[29] So long as something remains to be done, such as the ascertainment of the price or quantity,[30] title does not pass,[31] unless the parties have in some manner evinced a contrary intention.[32]

A contract to supply materials for construction of a building and to affix them thereto is not a contract of sale but one for the improvement of real estate,[33] and title does not pass until the materials have become part of the building.[34]

*Separation and designation of the goods.*See 10 C. L. 1541—The giving and receiving of an order for goods to be manufactured or supplied from a general stock, warehoused at another place, is a mere executory contract, which does not divest or

agreement to sell and deliver in future, and is valid (Civ. Code, §§ 1726, 1729, 1730, 1754). Not invalid under § 1722. Central Oil Co. v. Southern Refining Co. [Cal.] 97 P 177.

**22. Search Note:** See 6 C. L. 1333; 22 L. R. A. 415; 55 Id. 513; 2 L. R. A. (N. S.) 383, 1078; 13 Id. 413, 696; 22 A. S. R. 866; 26 Id. 451; 45 Id. 203; 120 Id. 868; 5 Ann. Cas. 263; 9 Id. 26; 10 Id. 141.

See, also, Sales, Cent. Dig. §§ 418-421, 512-585; Dec. Dig. §§ 197-218; 24 A. & E. Enc. L. (2ed.) 1045.

**23.** See Intoxicating Liquors, 12 C. L. 332.

**24.** Passing of title, matter of intention. Priest v. Hodges [Ark.] 118 SW 253; Sprague Canning Machinery Co. v. Fuller [C. C. A.] 158 F 588. Transition of title pursuant to contract of sale is almost entirely matter of intention. Hoeffler v. Carew, 135 Wis. 605, 116 NW 241.

**25.** Contract of sale construed to mean that only such cattle as were actually delivered to buyer and paid for were to become his property. Ettien v. Drum [Mont.] 101 P 151. Contract for sale of coal construed and held that parties intended that title should not pass until final delivery of coal f. o. b. cars on dock. State v. Patterson [Wis.] 120 NW 227. Goods purchased "on memorandum" Sept. 21st. and 30, option to retain within 30 days. Petition filed Oct. 23. Seller entitled to goods delivered on Sept. 30, but not entitled to those delivered Sept. 21st. In re Schindler, 158 F 458.

**26.** State v. Patterson [Wis.] 120 NW 227. Evidence held to show that plates made for particular lithograph job became property of customer, not of printer. New York City Car Advertising Co. v. Globe Lithographic Co., 114 NYS 788. Lumber to be cut was sold, payments to be made according to estimates, and final settlement made after inspection. Lumber was cut, estimates and payments made, buyer's name put on piles, and lumber insured by buyer, seller consenting. Held, title passed, though final settlement not made. Stearns v. Grand Trunk R. Co. [Mich.] 16 Det. Leg. N. 68, 120 NW 572.

**27.** Evidence sufficient to show intention to pass title of piano to buyer though left where it was. Hoeffler v. Carew, 135 Wis. 605, 116 NW 241. Cotton planter sold, at beginning of ginning season, certain number of bales of cotton at agreed price, delivery to be made at gin, and payment to be made after delivery and examination of weights. Thereafter, buyer and agent of third person, examined cotton, in planter's presence, and buyer sold to third person. Held, there was intent to deliver so as to pass title to buyer and make him liable for price. Moreland v. Newberger Cotton Co. [Miss.] 48 S 187.

**28.** Hoeffler v. Carew, 135 Wis. 605, 116 NW 241.

**29.** In case of tender of performance, there must be readiness and ability to perform. C. B. Coles & Sons Co. v. Standard Lumber Co. [N. C.] 63 SE 736.

**30.** Where certain acts are to be done to determine the price or the quantity of the property sold, the transaction is not complete and title does not pass until such acts are done. McCoy v. Fraley [Ky.] 113 SW 444. Where cotton was placed on scales, and both parties showed by acts that they intended it should be weighed, but it was burned before being weighed, there was no delivery or passing of title. Priest v. Hodges [Ark.] 118 SW 253. Where the ascertainment of the consideration for property is rendered impossible by the destruction of the property, there is no sale. Cotton destroyed by fire before being weighed; contract fixed price per pound. Deadwyler & Co. v. Karow, 131 Ga. 227, 62 SE 172.

**31.** If something remains to be done. Priest v. Hodges [Ark] 118 SW 253.

**32.** Priest v. Hodges [Ark.] 118 SW 253.

**33, 34.** Steiger Terra Cotta & Pottery Works v. Sonoma [Cal. App.] 110 P 714.

transfer title to any particular property.[35] Title passes only when certain goods are manufactured or segregated and appropriated to the contract,[36] and, in the absence of a more specific agreement, such appropriation does not take place until the delivery of the goods to the carrier consigned to the buyer,[37] at which time and place the sale is perfected and title passes.[38]

*Payment.* See 10 C. L. 1541—Where a sale is for cash on delivery, and the law presumes a sale to be for cash in the absence of any agreement,[39] title does not pass until payment has been made,[40] unless there is a waiver of cash payment,[41] as where the seller fails to retake the goods promptly on default by the buyer.[42] Similarly, where the contract provides for the giving of security as a condition precedent, title does not pass until the security is given,[43] the right thereto not being waived.[44] Payment is not a condition precedent to transition of title when the agreement or intent of the parties is to the contrary.[45] Satisfaction by the buyer of a judgment

35. Witt Shoe Co. v. Seegars & Co., 122 La. 145, 47 S 444. Title did not pass at time of original sale where goods were not in existence but had to be manufactured. Schwab v. Oatman, 129 App. Div. 274, 113 NYS 910.

36. George D. Witt Shoe Co. v. Seegars & Co., 122 La. 145, 47 S 444. Title to goods ordered held to have passed to buyer when goods were appropriated to contract, though only part were delivered, buyer having prevented delivery of balance. Buyer liable for all. Massillon Sign & Poster Co. v. Buffalo Lick Springs Co., 81 S. C. 114, 61 SE 1098. If seller had cut, graded and set apart lumber called for by contract, and buyer had paid for it or stood ready to do so, and nothing was to be done but to take charge of it, which seller refused to allow buyer to do, buyer was owner entitled to possession of the lumber. C. B. Coles & Sons Co. v. Standard Lumber Co. [N. C.] 63 SE 736.

37, 38. George D. Witt Shoe Co. v. Seegars & Co., 122 La. 145, 47 S 444.

39, 40. Berlaiwsky v. Rosenthal [Me.] 71 A 69; E. I. Dupont Co. v. John Shields Const. Co., 162 F 198. Upon a contract for the sale of personal property for cash, payment and delivery are concurrent acts, and payment is condition precedent to right of possession of goods. Lumley v. Miller [S. D.] 119 NW 1014. Buyer not entitled to retain goods not paid for, payment not being waived. Howard v. Haas, 131 Mo. App. 499, 109 SW 1076. Delivery f. o. b. car as agreed does not pass title unless payment is made as expected. Berlaiwsky v. Rosenthal [Me.] 71 A 69. Under executory contract for sale and delivery of cattle requiring specified sum to be paid on presentation of contract, title did not pass where payment was refused by consignee and delivery was not made. Rev. Civ. Code, §§ 951, 1169. Lumley v. Miller [S. D.] 119 NW 1014. Machinery sold by two concerns was to be paid for, in one case by cash on delivery, in the other cash when installed by seller. Machinery was taken by receiver of insolvent buyer but never unpacked. Held title did not pass from vendors. Pridmore v. Puffer Mfg. Co. [C. C. A.] 163 F 496.

**Where contract provided for payment of draft attached to bill of lading** for each shipment and shipments were consigned to shipper, care of buyer, title was not to pass until payment of draft. State v. Malony, 81 S. C. 226, 62 SE 215.

41. Berlaiwsky v. Rosenthal [Me.] 71 A 69.

42. The seller waives his right to retake the goods unless he makes his election without delay. Title passes if seller does not reclaim goods on default in payment. E. I. Dupont Co. v. John Shields Const. Co., 162 F 198.

43. Where property was delivered conditionally, condition being that buyer should give secured note, title did not pass until note was given. Bailey v. Dennis [Mo. App.] 115 SW 506. Where contract provided that title of printing press should not pass until mortgage was given, passing of title was concurrent with giving of mortgage. Amundson v. Standard Printing & Mfg. Co. [Iowa] 118 NW 789. Contract provided title should not pass until payment was made or notes and mortgage given. Held acceptance of press would not pass title if mortgage was not given. Id.

44. Delay in executing notes and mortgage for printing press, caused by disputes as to condition of machine, freight charges, etc., held not waiver of provision that title should not pass until notes and mortgage were given. Amundson v. Standard Printing & Mfg. Co. [Iowa] 118 NW 789.

45. Where parties agreed that lot of tobacco sold was to be buyer's property, though allowed to remain on defendant's land, and though price had not been paid, title passed. Andrews v. Grimes, 148 N. C. 437, 62 SE 519. Under contract for sale of standing hay, it was to be weighed and paid for before taken from land. Buyer went on land, cut and stacked it, and baled and hauled away part. Held that title to entire crop passed though payment not made. Allen v. Rushforth [Neb.] 118 NW 657. Where ties were delivered, on railroad right of way, marked, inspected and accepted, title passed though payment was not made, contract not requiring payment on delivery; subsequent attachment and bankruptcy proceedings ineffective. McDonald v. Clearwater Shortline R. Co., 164 F 1007. Tender of price of cattle to bank which held them in pledge to secure payment of money advanced by it did not effect transfer of property or title, but gave vendee at most only right of action for failure to deliver. Lumley v. Miller [S. D.] 119 NW 1014.

recovered against him for the purchase price transfers the title,[46] and a refusal to deliver thereafter amounts to conversion.[47]

*Delivery and acceptance.* See 10 C. L. 1541—Generally, in the absence of some other agreement, or when other conditions have been performed,[48] title passes when goods have been delivered [49] and accepted and not until then.[50] Delivery of goods by the vendor to the carrier is equivalent to delivery to the buyer,[51] subject only to the right of stoppage in transitu,[52] and this is true through the purchase money is afterwards collected by the vendor or agent at the place from which the goods were shipped.[53] There is a conflict of authority as to the rule where the shipment is c. o. d.,[54] but it is said that the weight of authority is that the rule is the same in such case.[55] Where the contract is for delivery f. o. b. cars at a certain point, title is presumed to pass on arrival of goods on cars at the designated place.[56] Delivery to the carrier does not pass title to the buyer where the goods are sent on approval,[57]

**46, 47.** Action held one on contract for price and not for damages for breach. Pacific Coast Borax Co. v. Waring, 112 NYS 458.

**48.** See preceding paragraphs in this section as to payment, designation of goods, and meaning and effect of contract.

**49.** On sale and delivery of property, title at once passes. Giordano v. Nizzari, 115 NYS 719. Where switchboard was delivered and set up, and seller demanded full payment, but buyer refused to pay in full on ground of needed changes, held title had passed to buyer. Detroit Trust Co. v. F. Bissell Co. [Mich.] 15 Det. Leg. N. 919, 118 NW 722. Lumber company under contract to furnish ties to railroad company delivered certain ties on railroad's right of way, where ties were inspected, accepted, marked, and invoice issued. Held title passed to railroad and was not affected by attachment and bankruptcy proceedings thereafter. McDonald v. Clearwater Shortline R. Co., 164 F 1007.

**50.** Buyer must show **intention to accept** before title will pass. Priest v. Hodges [Ark.] 118 SW 253. Where **buyer refused to accept** goods and reshipped them to seller, they became latter's property and buyer could not recover for their loss in transit. Nathan v. Missouri Pac. R. Co. [Mo. App.] 115 SW 496. If the goods had not been accepted by buyer, no title passed and the seller could reclaim from trustee in bankruptcy. In re Planett Mfg. Co. [C. C. A.] 157 F 916. If goods shipped do not meet terms of contract, there is **no completed sale until buyer receives, inspects and accepts** goods shipped. Bray Clothing Co. v. McKinney [Ark.] 118 SW 406. Under executory contract for **future delivery** of fish, title did not pass until delivery though payment was made. In re Alaska Fishing & Development Co., 167 F 875. Bill of sale of yacht was delivered to buyer containing provision that she was to be delivered at port of New York, being then at Detroit. Held intention was to make **executory contract** under which title was not to pass until delivery to buyer at New York. Robinson v. Alger [C. C. A.] 167 F 968. Logs sold **f. o. b. cars** at various sidings. Held title did not pass to buyer so as to make him liable for taxes until such delivery on cars. Gow v. McFarren [Mich.] 16 Det. Leg. N. 104, 120 NW 800. Where books were nominally pledged to secure debt, but **possession was never taken** by creditor, who did not exercise option to sell them and credit debtor with proceeds, they were subject to levy as debtor's (bankrupt's) property and passed to trustee. In re Gebbie & Co., 167 F 609.

**51.** State v. Rosenberger, 212 Mo. 648, 111 SW 509. On delivery of goods to carrier there is presumptive delivery to consignee. Wertheimer v. Wells, Fargo & Co., 112 NYS 1062. Delivery to carrier, consigned to buyer, is delivery to buyer. American Standard Jewelry Co. v. Hill [Ark.] 117 SW 781. Under sale f. o. b. place of shipment, title passed to buyer on delivery to carrier. Tuttle v. Bracey-Howard Const. Co. [Mo. App.] 117 SW 86. Buyer of cotton, subject to landlord's lien, directed seller to ship certain firm. Delivery of cotton to carrier pursuant to such instructions divested seller of title. Bank of Guntersville v. Jones Cotton Co. [Ala.] 46 S 971. An agreement to deliver goods previously unascertained, free on board a vessel or vehicle, is satisfied and title passes to purchaser, and goods are at his risk when the proper goods are actually loaded on board. Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co., 199 Mass. 22, 84 NE 1020.

**52.** State v. Rosenberger, 212 Mo,. 648, 111 SW 509. Where seller delivers goods to the carrier consigned to the buyer, title and right to possession at once vest in the buyer, in the absence of any agreement to the contrary, and subject to the right of stoppage in transitu, in case of insolvency. Acme Paper Box Factory v. Atlantic Coast Line R. Co., 148 N. C. 421, 62 SE 557.

**53.** Sale is at place of delivery to carrier. State v. Rosenberger, 212 Mo. 648, 111 SW 509.

**54.** See authorities pro and con cited in State v. Rosenberger, 212 Mo. 648, 111 SW 509.

**55.** State v. Rosenberger, 212 Mo. 648, 111 SW 509. Where purchaser of goods instructs seller to ship by express c. o. d., he makes carrier his agent and title passes to purchaser on delivery to carrier though purchaser is not entitled to actual possession until payment, and though carrier is seller's agent to receive payment. State v. Mullin, 78 Ohio St. 358, 85 NE 556.

**56.** In general, nothing to the contrary appearing, where contract provides for delivery f. o. b. cars at certain point, intention of parties is presumed to be that title shall pass upon such delivery occuring. State v. Patterson [Wis.] 120 NW 227.

**57.** Where goods were sent subject to in-

nor where the goods shipped do not conform to the requirements of the contract,[58] nor where the goods are consigned to the seller,[59] nor where the agreement is for delivery to the buyer.[60] To convert the carrier into the agent of the consignee, the goods must be delivered to the carrier in the manner specified by the consignee.[61] If there is a material variation as to route, time place or manner of delivery to the carrier, the consignee is not bound thereby, and the carrier is the agent of the consignor.[62] hus, when the purchaser orders goods shipped insured and they are delivered to the carrier uninsured and are lost in transit, the loss must be borne by the seller, unless he can recover from the carrier.[63]

Actual delivery is not essential. Thus title to stock may pass, though certificates are retained as security;[64] and where stock is in the hands of a pledgee, a formal transfer and direction to the pledgee to deliver, on payment of the debt, passes title from the seller.[65] The general rule is that delivery of a bill of lading by the person entitled to receive the goods is a transfer of his title.[66] Indorsement of the bill of lading is not necessary.[67] The transfer by indorsement of a bill of lading to shipper's order vests the title to the goods in the transferee as the purchaser or pledgee, as the case may be,[68] unless the shipper has previously parted with his title.[69]

*How proved.* See 6 C. L. 1766

*Divestiture of title.* See 10 C. L. 1542

*Ad interim damages.* See 8 C. L. 1769

§ 7. *Delivery and acceptance under the terms of the contract. A. Necessity, time, place, amount, etc.*[70] See 10 C. L. 1542—To put the vendee in default, the vendor must tender the property, or a conveyance of it, if it is not susceptible of manual delivery;[71] but such tender is unnecessary if the vendee refuses to perform, or declares his intention not to perform, before the time for delivery by the vendor.[72] There can be no breach of an option extending over a number of years until the option is exercised and performance tendered by the vendee.[73] The time,[74] place[75]

spection and approval by consignee, and nothing had been paid, delivery to carrier did not pass title; consignor could sue for loss. Fein v. Weir, 129 App. Div. 299, 114 NYS 426.

58. Delivery of goods to carrier consigned to buyer is delivery to buyer so as to complete sale only when goods are in accordance with all terms of contract. Bray Clothing Co. v. McKinney [Ark.] 118 SW 406.

59. Shipment of goods by vendor consigned to himself held not such delivery to carrier as to pass title to purchaser, where delivery to purchaser was not to be made except upon certain conditions, which were not fulfilled. Seaboard Air Line R. Co. v. Phillips, 108 Md. 285, 70 A 232.

60. Where the agreement is to deliver to the buyer, title does not pass until delivery, and up to that time the seller may recover them from the carrier or any one who converts them while in transit. Acme Paper Box Factory v. Atlantic Coast Line R. Co., 148 N. C. 421, 62 SE 557.

61, 62, 63. McDonald v. Pearre Bros. & Co., 5 Ga. App. 130, 62 SE 830.

64. Separate agreement by which seller of corporate stock retained certificates as security for payment did not prevent passing of title. Sherwood v. Graham, 106 Minn. 542, 118 NW 1011

65. Owner of stock accepted offer to buy and directed pledgee to deliver it on payment of debt, and formally transferred the stock. Held completed sale, though pledgee refused to deliver, and buyer could recover from pledgee in conversion, having tendered payment of debt. McKee v. Bernheim, 114 NYS 1080.

66, 67. McMeekin v. Southern R. Co. [S. C.] 64 SE 413.

68. Scheuermann v. Monarch Fruit Co. [La.] 48 S 647.

69. Where bale of cotton had been delivered to carrier pursuant to buyer's directions, indorsement of draft, with bill of lading attached, by seller, payee therein, to bank, did not make bank seller, nor vest title to cotton in it, seller having parted with his title. Bank of Gunterville v. Jones Cotton Co. [Ala.] 46 S 971.

70. **Search Note:** See notes in 4 C. L. 1332; 96 A. S. R. 215; 6 Ann. Cas. 245.

See, also, Sales, Cent. Dig. §§ 214-227, 350-495; Dec. Dig. §§ 79-81, 83, 150-182; 24 A. & E. Enc. L. (2ed.) 1068.

71. Moyses v. Schendorf, 238 Ill. 232, 87 NE 401, afg. 142 Ill. App. 293.

72. Moyses v. Schendorf, 238 Ill. 232, 87 NE 401.

73. Mere allegation that plaintiff offers to pay held not sufficient to support action for damages for breach of contract. Harls v. Brennig, 131 App. Div. 742, 116 NYS 51.

74. Correspondence held to show contract to deliver 500 to 800 cords of wood during July, August and September. Barber v. Oz-

and manner [76] of delivery, and whether time is of the essence of the contract,[77] depend upon the intention of the parties as shown by the terms of their agreement and the surrounding facts and circumstances.[78] If time is not made the essence of the contract originally, it may be made so by notice by the vendee to the vendor fixing a reasonable time for delivery.[79] Where the contract contemplates delivery on demand, a proper demand puts the seller in default, if refused.[80] Where delivery and payment are to be concurrent, the seller need not deliver until payment is made or tendered,[81] and where goods are to be shipped as ordered, the seller is not in default when no orders are received.[82] When the contract does not fix a time for delivery,[83] the law presumes that it is to be made within a reasonable time,[84] what

ark Imp. Co., 131 Mo. App. 717, 111 SW 846. Contract for structural steel, made by letters, held to require delivery by June 1, or within reasonable time thereafter. Kelley Maus & Co. v. Hart-Parr Co., 137 Iowa, 713, 115 NW 490. Contract held to require shipment of 2,500 tons of coal monthly for 7 months, though it provided for subsequent shipments "in about equal monthly proportions." Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co., 199 Mass. 22, 84 NE 1020.

75. Contract for coal held to require delivery at defendant's yard, words "f. o. b. Philadelphia," occurring in contract, being used to designate cost to defendant to that point, separate price for subsequent transportation being fixed. Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co. [C. C. A.] 162 F 848. Where parties understood that contract called for delivery of steel at Boston, and that buyer was to stand expense of transportation to Everett, seller could recover expense of transportation paid by it. Houdlette v. Dewey, 200 Mass. 419, 86 NE 790.

76. Under contract requiring delivery of coal f. o. b. cars, seller had for several months obtained cars and excused delay in delivery on ground of shortage of cars, no claim being made that purchaser was bound to furnish cars. Held, seller bound to supply cars. American Trust & Sav. Bank v. Zeigler Coal Co. [C. C. A.] 165 F 34. Contract for sale of distillery slops for feeding held to require seller to arrange tubs, troughs, pipes, etc., in place for feeding. Damages recovered for failure to do so. Kentucky Distilleries & Warehouse Co. v. Lillard [C. C. A.] 160 F 34.

77. Where contract provided for delivery of certain quantity of goods weekly, commencing at certain date, time was of the essence of the contract. Augusta Factory v. Mente & Co. [Ga.] 64 SE 553. When failure to perform contract to deliver large quantity of lumber is due to inability of seller to obtain it, and there is partial delivery after the time fixed, time is not of the essence of the contract, so that parties might not by their acts continue the life of the contract for reasonable time thereafter. Pitch Pine Lumber Co. v. Wood Lumber Co. [Fla.] 48 S 993. Stipulation, in contract for sale of whiskey in bonded warehouse in distant state, that delivery would be within 10 days, as ordered, held not to require delivery within such time after order, where buyer knew conditions; seller could show shipment as soon as possible. Meyer v. Stone Valley Distilling Co., 128 App. Div. 161, 112 NYS 615. Statement by selling agent that delivery would be in about 10 days after order held not condition of contract, goods being whisky in bonded warehouse in distant state, as buyer knew. Id. Where contract provided for delivery of certain quantity of goods weekly, commencing at certain date, such agreement as to delivery was not modified by printed matter on letter heads providing that all contracts were subject to strikes, accidents and delays beyond seller's control. Augusta Factory v. Mente & Co. [Ga.] 64 SE 553.

78. Evidence admissible to show trade meaning of "when transit car," used on sale slip for sale of lumber. Harlow v. Parsons Lumber & Hardware Co. [Conn.] 71 A 734. Evidence of conversations between parties admissible on question of time of delivery when contract was indefinite. Loomis v. Norman Printers' Supply Co. [Conn.] 71 A 358. Proof of certain necessary work on machines, prior to shipment, admissible on same issue. Id. Where contract provided for delivery of engine "as soon as possible" parol evidence was admissible to show that buyer told seller's agent that it was important to have engine in time for commencement of hay harvest season, June 10. Berry Bros. v. Fairbanks, Morse & Co. [Tex. Civ. App.] 112 SW 427.

79. Augusta Factory v. Mente & Co. [Ga.] 64 SE 553. Where vendee fixes reasonable time for delivery by notice to vendor, failure to deliver within that time is breach, giving right to damages. Id.

80. Contract for stock contemplated delivery on demand, and buyer's demand, authorizing seller to draw on him for price, was refused without objection to mode of payment. Held, demand so made fixed time of delivery and measure of damages. Sloan v. McKane, 115 NYS 648.

81. Where delivery and payment are to be concurrent, seller need not deliver until payment is made. Catlin v. Jones [Or.] 97 P 546. Contract for sale of stock and assets of corporation, providing for payment of price in instalments, held to require delivery of stock and assets only on final payment, and not in proportionate parts as payments were made. Eppley v. Kennedy, 131 App. Div. 1, 115 NYS 360.

82. Salmon v. Helena Box Co. [C. C. A.] 158 F 300.

83. Sales slip using only words "when transit car" held not to fix time of delivery of lumber. Harlow v. Parsons Lumber & Hardware Co. [Conn.] 71 A 734. Under contract calling for delivery "about June, 1906," delivery during June or in reasonable time

is a reasonable time being usually a question of fact to be solved by the jury.[85] No place of delivery being specified, the seller's place of business is the place of delivery.[86]

(§ 7) *B. Sufficiency of delivery; actual, symbolical.*[87]—See 10 C. L. 1544—Delivery must be made at the time and place and in the manner required by the contract,[88] and whether there has been such delivery is usually a question of fact.[89] To constitute a delivery, the goods must at least be placed in the vendee's power.[90] Delivery to the carrier is delivery to the buyer,[91] unless goods are consigned to the seller or his order, in which case indorsement and delivery of the bill of lading is necessary.[92] Placing bills of lading in the mails, directed to the consignee, has been held to complete delivery.[93] A constructive delivery can be effected only by an agreement between the carrier or middleman and the buyer or person claiming un-

thereafter would be sufficient. Loomis v. Norman Printers' Supply Co. [Conn.] 71 A 358. Contract held not to provide for exact date or time of delivery, seller having refused to fix a time as shipment was to be by boat. Sumrell v. International Salt Co., 148 N. C. 552, 62 SE 619.

84. When parties do not fix time of delivery, law presumes it was to be made in reasonable time. Harlow v. Parsons Lumber & Hardware Co. [Conn.] 71 A 734; Bollenbacher v. Reid [Mich.] 15 Det. Leg. N. 961, 118 NW 933; Kelley, Maus & Co. v. Hart-Parr Co., 137 Iowa, 713, 115 NW 490.

85. Harlow v. Parsons Lumber & Hardware Co. [Conn.] 71 A 734; Loomis v. Norman Printers' Supply Co. [Conn.] 71 A 358.

86. Gross v. Ajello, 132 App. Div. 25, 116 NYS 380.

87. **Search Note:** See Sales, Cent. Dig. §§ 367-445, 469-495; Dec. Dig. §§ 155-176, 180-182; 24 A. & E. Enc. L. (2ed.) 1082.

88. Delivery at the specified time is an essential and not a collateral term of the contract. Braitsch v. Kiel & Arthe Co., 114 NYS 372.

**Delivery sufficient:** Contract required delivery f. o. b. cars at certain point, freight and duty prepaid. Arrival of goods at such point, freight and duty paid, was delivery under contract. Neumeyer v. Hooker, 131 App. Div. 592, 116 NYS 204. Evidence held to show agreement to deliver thresher engine at farm, that such delivery was never made, and that buyer was not bound. Northwestern Thresher Co. v. Kubicek [Neb.] 118 NW 94. Evidence held sufficient to show delivery of coffee at warehouse at point of shipment in accordance with custom, and acceptance by broker acting as buyer's agent. Ankeny v. Young Bros. [Wash.] 100 P 736. Where machinery was ready for delivery 7 days after time desired, delay in delivery was not unreasonable. Tidwell v. Southern Engine & Boiler Works [Ark.] 112 SW 152. Machine was delivered to agent of buyer in accordance with order, and buyer was notified and promised to get machine. Held, there was delivery, and seller could recover price. Hansen v. Rolison [Mich.] 16 Det. Leg. N. 62, 120 NW 574. Contract for steel required payment on delivery at Boston, though buyer's plant was at Everett. Held, delivery on Boston wharf and notice to buyer was delivery under contract. Houdlette v. Dewey, 200 Mass. 419, 86 NE 790. Where contract required buyer to furnish vessels to haul coal and required seller to ship 2,500 tons monthly, date of shipment was when vessel was fully loaded and ready to sail. Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co., 199 Mass. 22, 84 NE 1020.

**No delivery:** F. O. B. cars at certain place means that seller must deliver on board cars free to be taken by buyer without any obstruction, burden or impediment, and delivery subject to lien for freight does not comply with contract. Chandler Lumber Co. v. Radke, 136 Wis. 495, 118 NW 185. Machine company, by its agent, sold machine at place where buyer was in business, and consigned it to itself, care of its agent, at such place, and its agent set it up and removed it from car. Order provided machine was to be shipped as seller's property, but did not name place of delivery. Held, no delivery to buyer. Aultman & Taylor Machinery Co. v. Gay, 108 Va. 647, 62 SE 946. Contract for building material authorized contractor to inspect it before receiving and accepting it. Held, load rejected, sent back to be replaned, and not inspected or accepted thereafter, was not delivered under contract. Beidler & Co. v. Hutchinson, 233 Ill. 192, 84 NE 228.

89. Whether cotton was in fact delivered, so as to make buyer liable for price, after loss by fire, held for jury. Moreland v. Newberger Cotton Co. [Miss.] 48 S 187. Whether seller of machinery shipped "as soon as possible," as required by contract, held mixed question of law and fact. Berry Bros. v. Fairbanks, Morse & Co. [Tex. Civ. App.] 112 SW 427.

90. Gross v. Ajello, 132 App. Div. 25, 116 NYS 380. Merely setting aside goods for buyer, without notice or tender of delivery, is not delivery. Id.

91. Delivery to carrier is delivery to vendee, subject to right of stoppage in transitu. People v. Andre, 153 Mich. 531, 15 Det. Leg. N. 503, 117 NW 55.

92. Delivery to carrier is delivery to buyer when goods are consigned to buyer, but when consigned to seller's order, there is no delivery until payment of draft and delivery of bill of lading properly endorsed. Hunter Bros. Mill. Co. v. Stanley, 132 Mo. 303, 111 SW 869. Delivery to carrier, to be delivered only on seller's order, is not a delivery to the buyer. Lepman v. Woldert Grocery Co., 133 Ill. App. 362.

93. When bills of lading were deposited in mails, directed to consignee, delivery was complete and title perfect. In re Kessler & Co., 165 F 508.

der him whereby the former agrees to hold goods for the latter for some purpose other than that of carriage and delivery at their original destination.[94] In the absence of an agreement with the buyer or claimant to the contrary, the carrier is presumed to hold goods in his original capacity.[95] The carrier cannot constitute himself the buyer's agent for the custody of the goods, nor can the buyer make the carrier his agent for custody without the carrier's consent.[96] Where there has been no actual or constructive delivery, goods held by the carrier are deemed to be still in transit.[97] The delivery of an order on a warehouse is nullified where the seller takes the goods without notice to the buyer.[98]

(§ 7) *C. Acceptance; necessity; time; what is.*[99]—See 10 C. L. 1544—Where goods of a certain kind and quality are ordered, the buyer has the right to inspect before acceptance [1] and to reject if the goods are not as ordered,[2] and is entitled to a reasonable time in which to exercise that right,[3] what is a reasonable time being a question of fact.[4] The right to inspect is not affected by delivery to the carrier [5] or consignment to the seller,[6] and a refusal to allow an inspection justifies rejection.[7] Where the contract provides for inspection, the buyer is entitled to the right so given,[8] and the seller is bound by the buyer's inspection in the absence of fraud or bad faith,[9] especially where he or his agent participates therein.[10] The question of acceptance of goods is ordinarily one for the jury.[11] Merely receiving the goods,[12] or allowing them to be unloaded for inspection,[13] or making a cash payment,[14] or

**94, 95, 96, 97.** State v. Intoxicating Liquors [Me.] 72 A 331.

**98.** Gross v. Ajello, 132 App. Div. 25, 116 NYS 380.

**99. Search Note:** See notes in 6 L. R. A. (N. S.) 273; 10 Id. 638; 11 Id. 254; 15 Id. 368. See, also, Sales, Cent. Dig. §§ 445-495; Dec. Dig. §§ 177-182; 24 A. & E. Enc. L. (2ed.) 1088.

**1.** Especially where seller has notified him that part of goods are not as ordered. Plumb v. Bridge, 128 App. Div. 651, 113 NYS 92. In case of an executory sale and consignment to seller's order, buyer has right to opportunity to inspect as to quality and quantity before accepting goods; after inspection, delivery and payment should be contemporaneous acts. Hunter Bros. Mill. Co. v. Stanley, 132 Mo. App. 308, 111 SW 869.

**2.** Buyer of dress had right to reject it when it was not in accordance with order. Paquin v. M. Cowen Co., 113 NYS 1004. Remedy of buyer of wine on delivery of goods which were not as ordered was to refuse to accept. Stonehill Wine Co. v. Lupo, 110 NYS 408. Where goods of certain kind and quality are ordered, buyer may refuse to receive any of goods sent unless all conform to contract. Wiburg & Hannah Co. v. Walling & Co. [Ky.] 113 SW 832.

**3.** Where goods are delivered by the vendor to a carrier to be forwarded to the vendee at a distant point, and no provision is made for inspection and acceptance before or at time of shipment, the vendee is entitled to a reasonable time, after the arrival of the goods, to inspect them, and to accept or reject them if they do not comply with the contract. Eaton v. Blackburn [Or.] 96 P 870.

**4.** Whether buyer retained goods unreasonable length of time before rejecting them held for jury. American Standard Jewelry Co. v. Hill [Ark.] 117 SW 781.

**5.** Delivery to carrier by vendor does not operate as acceptance by vendee or as waiver of right or inspection given by contract. Malcomson v. Reeves Pulley Co. [C. C. A.] 167 F 939.

**6.** That goods are consigned to seller does not affect buyer's right to inspection before accepting. Plumb v. Bridge, 128 App. Div. 651, 113 NYS 92.

**7.** Refusal to allow inspection of goods justifies rejection where order was for goods of certain kind and quality. Plumb v. Bridge, 128 App. Div. 651, 113 NYS 92.

**8.** Provision in contract for inspection of engines at seller's plant held condition precedent to acceptance. Where buyer had no notice of inspection and shipment by seller, he could not be held to have accepted, though contract provided that seller's inspection should stand in absence of buyer. Malcomson v. Reeves Pulley Co. [C. C. A.] 167 F 939.

**9.** Where buyer is allowed right of inspection at point of loading, the seller is bound by buyer's inspection, in absence of fraud or bad faith. Lanier & Co. v. Little Rock Cooperage Co. [Ark.] 115 SW 401. That staves rejected by buyer's inspector were afterwards sold to others did not tend to show fraud in inspection, in absence of proof that staves were as required by contract. Id.

**10.** Where inspections were not being made fast enough by buyer and seller sent on agent to assist, seller could not thereafter claim that such joint inspection was breach of contract. Lanier & Co. v. Little Rock Cooperage Co. [Ark.] 115 SW 401.

**11.** Whether hay was accepted, and right to reject because of quality, waived. Eaton v. Blackburn [Or.] 96 P 870. Evidence warranted finding that defendant did not accept lumber and that contract was abandoned. Continental Lumber Co. v. Munshaw & Co. [Neb.] 118 NW 1057.

**12.** Eaton v. Blackburn [Or.] 96 P 870.

**13.** Where goods of certain kind and quality are ordered, buyer does not accept by allowing them to be unloaded for inspection, where such inspection cannot otherwise be made. Wiburg & Hannah Co. v. Walling & Co. [Ky.] 113 SW 832.

**14.** Fact that cash payment was made did not alone show acceptance of press, where

offering to sell and dispose of goods before an examination of them on the assumption that goods were as ordered,[15] or an unauthorized sale by an agent of the buyer of part of the goods, promptly repudiated by the buyers,[16] or a use of the rejected property to reduce the buyer's damages,[17] will not alone operate as an acceptance. Where a tender of goods includes some which should have been previously delivered, the buyer need not sort out the goods delivered in time, but may reject the entire lot.[18]

(§ 7) *D. Excuses for and waiver of breach.*[19]—See 10 C. L. 1545—A repudiation of the contract by the buyer,[20] or failure of the buyer to perform conditions precedent,[21] or to make timely requests for delivery when the contract contemplates such requests,[22] or to make agreed payments,[23] or to provide for payment in the manner agreed,[24] excuses failure of the seller to deliver. Whether strikes and other causes beyond the seller's control will excuse delivery,[25] and to what extent delivery will

there was other evidence showing refusal to accept on account of certain defects. Anundson v. Standard Printing & Mfg. Co. [Iowa] 118 NW 789.

**15.** Not waiver of right to reject as inferior in quality. Eaton v. Blackburn [Or.] 96 P 870.

**16.** Eaton v. Blackburn [Or.] 96 P 870.

**17.** Certain mill machinery was rejected as unsatisfactory, but, as buyer had stock on hand and ordered which he was bound to pay for and could not sell, he used part of machines rejected to manufacture stock into salable goods, to protect himself and seller of machines from loss. Held, such use of machines was not an acceptance. Inman Mfg. Co. v. American Cereal Co. [Iowa] 119 NW 722.

**18.** Braitsch v. Kiel & Arthe Co., 114 NYS 872.

**19. Search Note:** See notes in 54 L. R. A. 718; 7 L. R. A. (N. S.) 1114; 14 Id. 1107; 11 Ann. Cas. 508.

See, also, Sales, Cent. Dig. §§ 425-444, 458; Dec. Dig. §§ 171-176; 24 A. & E. Enc. L. (2ed.) 1088.

**20.** Acts and conduct of party may amount to repudiation if they evince an intention no longer to be bound by contract. Jung Brew. Co. v. Konrad, 137 Wis. 107, 118 NW 548.

**21.** Failure to deliver crop of peas in good condition for canning excused where buyer was bound by contract to specify time for harvesting peas and by want of due care failed to do so, after notice by seller that peas were ready to be harvested. Empson Packing Co. v. Clawson, 43 Colo. 188, 95 P 546.

**22.** Where delivery was to be before stated time and contract, as construed by parties, required buyer to give seller notice of desired delivery, and no notice was given to deliver before stated time, seller had right to refuse to be further bound by contract. In re Millbourne Mills Co., 165 F 109. Where contract contemplated weekly orders for and shipments of malt, the buyer's failure to send any order for two months, after disagreement with seller as to quality of car load, was repudiation of contract, relieving sellers of duty to perform. Jung Brew. Co. v. Konrad, 137 Wis. 107, 118 NW 548. Contract for sash and doors contemplated delivery of certain number of doors and all sash needed during certain year. Buyer delayed orders for doors until so late in year that they could not be turned out in ordinary course. Held, failure or refusal to file order was excused. Gauger & Co. v. Sawyer & Austin Lumber Co. [Ark.] 115 SW 157. Such delay in ordering doors amounted to breach of contract for buyer. Id.

**23.** Where buyer fails to make payments as agreed seller is justified in refusing to make further shipments until past due payments are made. Harris Lumber Co. v. Wheeler Lumber Co. [Ark.] 115 SW 168. Where plaintiff agreed to sell entire annual output of cement plant, payment to be made monthly, and defendant was in default for three months, plaintiff was justified in stopping shipments, and could recover for amount delivered. Burt v. Garden City Sand Co., 237 Ill. 473, 86 NE 1055. Dealer who failed to make payments as agreed could not insist on manufacturer filling orders for goods sent in too late to fill in ordinary course of business during life of contract. Gauger & Co. v. Sawyer & Austin Lumber Co. [Ark.] 115 SW 157.

**24.** Where terms of payment for ties were cash on delivery of bill of lading and invoice at bank, sellers would be excused from making actual delivery, if buyers had not prepared to pay cash as agreed and could not do so. McCormirk v. Tappendorf [Wash.] 99 P 2. Whether buyer had failed to prepare for payment and was unable to perform, should have been submitted to jury. Id.

**25.** Seller of cement who made reasonable efforts to procure cars in which to ship was not liable for failure to ship due to inability to procure cars. Burt v. Garden City Sand Co., 237 Ill. 473, 86 NE 1055. Contract was for delivery in June, unless prevented by strikes. Buyer later requested July delivery which seller refused unless storage charges were paid by buyer, which buyer agreed to pay. Held, seller could not thereafter set up strike in July, not affecting transportation as excuse for non-delivery. American Steel Hoop Co. v. Searles [Miss.] 46 S 411. Contract to supply tin cans to cannery provided for release from liability in case of inability to perform because of damage by "elements" or "unavoidable casualty." Fact that defendants expected to use cargo of tin then en route from Liverpool to San Francisco,

be excused [26] depends upon the language of the contract [27] and the facts and circumstances of the particular case. Adverse claims to the property by third persons will not excuse nondelivery.[28] Delay in delivery is waived where both parties treat the contract as alive thereafter.[29] The waiver of a particular breach by the seller does not extend to the former breaches so as to bar a claim of damages therefor.[30] The failure of the seller to exercise a right to buy from others, and demand of the seller the difference in price, is not a waiver of the claim of damages by reason of the seller's breach.[31] Acceptance of goods shipped is not, as matter of law, a waiver of a claim for damages for breach by delay in delivery or failure to deliver the agreed amount,[32] though it may be evidence of a waiver,[33] but an acceptance bars the seller's breach as a defense to an action for the price.[34]

§ 8. *Warranties and conditions. A. In general.*[35]—See 10 C. L. 1546—A warranty is a contract collateral to the sale; if made subsequently it must be based on a consideration.[36]

and that vessel was delayed by storms, did not excuse breach, such facts not appearing in contract. Pacific Sheet Metal Works v. California Canneries Co. [C. C. A.] 164 F 980. Inability to obtain cars. Burt v. Garden City Sand Co., 141 Ill. App. 603.

**26.** Strikes and causes beyond seller's control did not excuse failure to deliver to one buyer amounts proportionate to those delivered to others, especially where new contracts were made by seller after stringency arose. Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co., 199 Mass. 22, 84 NE 1020.

**27.** Letter containing confirmation of sale required seller to report at once any errors in it, but seller kept silent and thereafter set up as excuse for nondelivery agreement that contract was subject to his ability to get cars, and that he could not get them. This was not in confirmation. Held, seller estopped to set up this defense. J. H. Teasdale Commission Co. v. Keckler [Neb.] 120 NW 955.

**28.** Where purchaser sues for damages for breach of contract to sell and deliver timber, seller, who failed to deliver because of adverse claims to timber, could not defend on ground that sale was nullity, under Code, art. 2452, as sale of thing belonging to another, as nullity under this law is relative and is for benefit of bona fide purchaser. Jefferson Sawmill Co. v. Iowa & La. Land Co., 122 La. 983, 48 S 428.

**29.** Where both parties treated contract as alive after delays, they were waived. Pitch Pine Lumber Co. v. Wood Lumber Co. [Fla.] 48 S 993. Buyer of boiler waived delay in delivery where, after specified time had passed, he treated contract as existing and requested seller to delay shipment. Tidwell v. Southern Engine & Boiler Works [Ark.] 112 SW 152.

**30.** By accepting delayed shipment under one order, buyer did not waive delay in other orders. Braitsch v. Kiel & Arthe Co., 114 NYS 872. Letter by buyers asking when delivery of goods under previous orders could be expected, and asking seller not to ship orders for subsequent delivery until requested, was not waiver of delay in delivery under previous orders. Id. Acceptance of coal under contract requiring delivery of certain quantity was not waiver of damages for former breach, right of action for which had accrued. Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co. [C. C. A.] 162 F 848. Breach by buyer in payment of one shipment would not excuse breach by seller in prior year. R. P. Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92.

**31.** Such other right being optional with buyer. Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co., 199 Mass. 22, 84 NE 1020.

**32.** Acceptance does not waive right to set up counterclaim for damages for delay. Reading Hardware Co. v. New York, 129 App. Div. 292, 113 NYS 331. Acceptance of and payment for coal without objection held not waiver of right to damages for failure to deliver amounts as agreed, when buyer did not discover the breach of contract until afterwards. Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co., 199 Mass. 22, 84 NE 1020. Buyer does not, as matter of law, waive claim for damages for failure of seller to ship goods as agreed by accepting what he can get under contract. Id. Acceptance of ice by buyer after the agreed time of delivery, and acceptance by seller of delayed payments, held not waiver of buyer's right to damages for delay in making delivery of orders or of full amount sued for. Anderson v. Savoy, 137 Wis. 44, 118 NW 217. Where vendor shipped property some days after the time agreed and wrote vendee, and vendee wrote that he would remit first payment on arrival of property, this was not waiver of claim of damages for delay so as to authorize court to direct verdict for seller for full price. Alabama Const. Co. v. Continental Car & Equip. Co., 131 Ga. 365, 62 SE 160.

**33.** Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co., 199 Mass. 22, 84 NE 1020.

**34.** Acceptance of goods and payment of a part of the price waives delay in delivery as a defense to an action for the balance of the price. Reading Hardware Co. v. New York, 129 App. Div. 292, 113 NYS 331.

**35. Search Note:** See notes in 4 C. L. 1335; 15 L. R. A. 795; 5 Id. 197; 75 A. S. R. 77.

See, also, Sales, Cent. Dig. §§ 236-238, 706-823, 1207-1320; Dec. Dig. §§ 85, 246-288, 425-449; 6 A. & E. Enc. L. (2ed.) 500; 30 A. & E. Enc. L. (2ed.) 129.

**36.** Where contract is complete, subse-

(§ 8) *B. Express and implied warranties and fulfillment or breach thereof.*[37] See 10 C. L. 1548—No specific words are necessary to constitute an express warranty,[38] and it may rest in parol,[39] but cannot be established by parol contrary to the express stipulations of a written contract of sale.[40] Any affirmation of a material fact, made by the seller at the time of the sale as an inducement thereto, understood and intended as a warranty by the parties and relied on by the buyer as such, amounts to an express warranty [41] when made by one authorized to bind the seller.[42] Terms describing the articles sold or to be manufactured are to be treated as part of the contract and not as an express warranty.[43] Whether there was an express

quent oral warranty cannot be proved, unless shown to be based on consideration. Baltimore Refrigerating & Heating Co. v. Wetzel [C. C. A.] 162 F 117. Delivery of goods held not equivalent to acceptance; warranty made after delivery not without consideration. Luckes v. Meserole, 132 App. Div. 20, 116 NYS 350.

**37. Search Note:** See notes in 4 C. L. 1336; 6 Id. 1343; 14 L. R. A. 492; 22 Id. 187, 195; 36 Id. 92; 53 Id. 153; 70 Id. 653; 6 L. R. A. (N. S.) 180; 12 Id. 82; 15 Id. 855, 884; 16 Id. 410; 102 A. S. R. 607; 5 Ann. Cas. 128; 6 Id. 115.

See, also, Sales, Cent. Dig. §§ 719-805; Dec. Dig. §§ 259-284; 6 A. & E. Enc. L. (2ed.) 504; 30 A. & E. Enc. L. (2ed.) 135; 15 A. & E. Enc. L. (2ed) 1212.

**38.** Conkling v. Standard Oil Co., 138 Iowa, 596, 116 NW 822; Heath Dry Gas Co. v. Hurd, 193 N. Y. 255, 86 NE 18. Word "warranty" is not essential. Meshbesher v. Channellene Oil & Mfg. Co. [Minn.] 119 NW 428; Schlichting v. Rowell [Iowa] 119 NW 151.

**39.** Conkling v. Standard Oil Co., 138 Iowa, 596, 116 NW 822.

**40.** Though purchaser cannot read or write, and relies on verbal assurances of seller. Boswell v. Johnson, 5 Ga. App. 251, 62 SE 1003.

**41.** Representations made at time of sale to induce sale are warranties. Chestnut v. Ohler [Ky.] 112 SW 1101. Word "warranty" need not be used; clear representation of quality of thing sold made by seller to buyer as part of contract and relied on by buyer is warranty. Meshbesher v. Channellene Oil & Mfg. Co. [Minn.] 119 NW 428. To constitute express warranty there must be an express undertaking to warrant in so many words, or, if representations be relied on to make out the warranty, they must be made in such manner and circumstances as to authorize vendee to understand them as warranty and he must have relied on them. Segerstrom v. Swenson, 105 Minn. 115, 117 NW 478. No specific words necessary to constitute warranty of quality, but seller must show intent to make warranty and buyer must have so understood seller. Woodridge v. Brown, 149 N. C. 299, 62 SE 1076. Statement that indebtedness of business sold was certain amount, relied on by buyer, would amount to warranty, and, if in fact indebtedness was greater, buyer could recover compensatory damages Wrenn v. Morgan, 148 N. C. 101; 61 SE 641. An affirmation of a material fact, made by the seller at the time of the sale and as an inducement thereto, and accepted and relied on by the buyer, amounts to a warranty. Id. To constitute warranty there must be statement of fact intended to be relied on and which was reasonably relied on. Smith v. Alphin [N. C.] 64 SE 210. Mere fact that buyer told salesman that he desired coal to burn brick, and that salesman said coal sold would burn brick, did not amount to warranty of quality of coal. Woodridge v. Brown, 149 N. C. 299, 62 SE 1076. Where seller represented that he would sell goods as cheaply as they could be had anywhere, such representation was not mere trade talk but was a material representation and actionable, and excessive price paid could be recovered. Staut v. Caruthersville Hardware Co., 131 Mo. App. 520, 110 SW 619. Instruction that "any positive statement or affirmation of fact and not of opinion as to the quality on condition of the thing sold made by the seller in the course of the negotiations, and naturally and fairly importing that he intends to bind himself to its truth and so understood and relied on by the buyer, constitutes a warranty," held not open to objection urged. Barnes v. Love [Iowa] 119 NW 613. A warranty arises when there is a distinct assertion of fact, which is relied on, respecting the quality of the goods or the adaptability thereof to the purpose for which they are desired. Conkling v. Standard Oil Co., 138 Iowa, 596, 116 NW 822. While word "warranty" or "guaranty" is not necessary to a warranty, where one of these is not used, it must appear that seller made some assertion of quality with intent that buyer should believe and rely on it, and buyer must have relied on it. Schlichting v. Rowell [Iowa] 119 NW 151. Instructions erroneous which ignored element of intent of seller and reliance of buyer. Id. Evidence sufficient to show express oral warranty by selling agent that oil sold was suitable and safe for use in cooling automobile and engine, and was noninflammable. Conkling v. Standard Oil Co., 138 Iowa, 596, 116 NW 822.

**42.** Agent selling goods designed for particular purpose has implied authority to give warranty that goods are suitable and safe for intended purpose. Conkling v. Standard Oil Co, 138 Iowa, 596, 116 NW 822.

**43.** Heath Dry Gas Co. v. Hurd, 193 N. Y. 255, 86 NE 18. Sale of grain in elevator was made orally and buyer inspected it. Held, letter confirming sale did not embody contract, and reference to grain as No. 2 and 3 was not warranty but merely descriptive of grain. St. Anthony & Dakota Elevator Co. v. Princeton Roller Mill Co., 104 Minn. 401, 116 NW 935 Mere de-

warranty in a particular case may be a question for the jury.[44] Whether a warranty has been met depends upon the facts of the particular case.[45]

*Implied warranties.*See 10 C. L. 1548—The law implies a warranty of title.[46] Upon sale by sample, there is an implied warranty that goods shall be according to sample.[47] Where goods are sold by a manufacturer without inspection, the law implies a warranty that they are merchantable and reasonably fit for the intended purpose [48] and free from latent defects growing out of the process of manufacture.[49] The mere use of a trade name does not, however, carry with it any warranty of the article so designated.[50] When articles sold are articles of food and are sold direct to the consumer for immediate consumption there is an implied warranty of fitness.[51] Where a definitely known and described article is ordered, there is no warranty of fitness, though the buyer's purpose is known to the seller.[52]

Subject to the foregoing exceptions, the general rule is that, in the absence of fraud, there is no implied warranty of the quality or fitness of the article sold,[53] even though the seller knows that the buyer desires the article for a particular purpose.[54] Thus there is no implied warranty where the buyer gets the identical property ordered [55] or selected by him,[56] or where he has an opportunity to inspect the

scription of pictures sold as first class and up to proofs submitted held not warranty, for breach of which buyer could recover after acceptance of goods showing defects. Electro-Tint Engraving Co. v. American Handkerchief Co., 130 App. Div. 561, 115 NYS 34.

44. Buyer asked if horse was all right, and seller said yes, except a little distemper which he would soon get over, and buyer then made offer, on what seller said and what buyer saw, which was accepted. Whether there was warranty for jury. Harris v. Cannady, 149 N. C. 81, 62 SE 771.

45. Warranty that cement would be of certain quality met if it was of that quality at time of delivery under contract. Burt v. Garden City Sand Co., 237 Ill. 473, 86 NE 1055. Warranty that mining roasting plant would handle certain quantity of ore daily was warranty that it would handle it properly, and warranty was not met by plant which wasted ore by not handling it properly. Trego v. Roosevelt Min. Co., 136 Wis. 315, 117 NW 855.

46. Kinch v. Haynes, 58 Misc. 499, 111 NYS 618; Barasch v. Kramer, 62 Misc. 475, 115 NYS 176. Where goods are in the constructive possession of the seller at time of sale, there is an implied warranty of title. North American Commercial Co. v. North American Transportation & Trading Co. [Wash.] 100 P 985. If there is no express warranty, the seller in all cases (unless expressly or from nature of transaction excepted) warrants that he had valid title and right to sell. Burpee v. Holmes [Ga.] 64 SE 486. Possession of property and act of sale amounts to representation that seller is owner, and is implied warranty of title. Acts 1908, c. 237, § 13. Hartley v. Rotman, 200 Mass. 372, 86 NE 903. Sale of cut timber carries an implied warranty of title. Pierce v. Coryn, 126 Ill. App. 244.

47. Kinch v. Haynes, 58 Misc. 499, 111 NYS 618.

48. Cochran v. Chetopa Mill & Elevator Co. [Ark.] 114 SW 711; American Standard Jewelry Co. v. Hill [Ark.] 117 SW 781; Heath Dry Gas Co. v. Hurd, 193 N. Y. 255, 86 NE 18. Where an article is ordered for a particular known purpose, there is a warranty of fitness. International Filter Co. v. Hartman, 141 Ill. App. 239. Manufacturer of oil designed to be used as cooler for automobile and engine impliedly warrants that oil is suitable and safe for such purpose. Conkling v. Standard Oil Co., 138 Iowa, 596, 116 NW 822. Contract for carbureters providing that they should be constructed in a careful, workmanlike and skillful manner, was not an express warranty, since law implied warranty in effect the same. Heath Dry Gas Co. v. Hurd, 193 N. Y. 255, 86 NE 18. Where goods are sold by description without opportunity for inspection before purchase, there is ordinarily an implied warranty, not only that goods conform to description, but also that they are merchantable. R. P. Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92. Agreement to build barge with four coal bins which could be loaded or unloaded separately implied warranty of fitness of bins for such use. Excelsior Coal Co. v. Gildersleeve [C. C. A.] 160 F 47.

49. Kinch v. Haynes, 58 Misc. 499, 111 NYS 618; Heath Dry Gas Co. v. Hurd, 193 N. Y. 255, 86 NE 18.

50. Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co., 153 Cal. 715, 96 P 369.

51. Kinch v. Haynes, 58 Misc. 499, 111 NYS 618; Deason v. McNeill, 133 Ill. App. 304.

52. International Filter Co. v. Hartman, 141 Ill. App. 239.

53. There is no implied warranty of quality of chattels sold; there must be representations or warranty, or rule of caveat emptor applies. Lambert v. Armentrout [W. Va.] 64 SE 260. But no warranty against inherent defects in the articles arises. Pierce v. Coryn, 126 Ill. App. 244.

54. A warranty of the fitness of a chattel for a certain purpose is not necessarily implied because the seller knows the buyer is buying for such purpose. W. R. Colchord Machinery Co. v. Loy-Wilson Foundry & Machinery Co., 131 Mo. App. 540, 110 SW 630.

55. There is no implied warranty when the buyer gets the identical property or-

property [57] and test it.[58] In such cases, in the absence of fraud or an express warranty, the doctrine of caveat emptor applies.[59] The rule of caveat emptor has been repudiated in South Carolina,[60] and, in that state, the seller, without any express warranty or representation of value, is held to warrant the article sold to be of value for the purpose to which it is ordinarily applied.[61] While there is no implied warranty against obvious defects,[62] yet, if the buyer is deceived and misled as to the effect of such defects by fraud and misrepresentations of the seller, a warranty is implied.[63] No warranty will be implied where there is an express warranty.[64]

Implied warranty of title is broken if, after sale, the property is taken and sold under mortgage to which it is subject, given and duly recorded prior to sale.[65] The seller is not relieved from a warranty of title by suggesting ineffectual means of resisting an attack and offering to pay attorney's fees.[66]

(§ 8) *C. Conditions and fulfillment or breach.*[67]—See 10 C. L. 1549—The contract between the parties is the measure of their rights [68] and obligations,[69] and its

dered and selected. W. R. Colchord Machinery Co. v. Loy-Wilson Foundry & Machinery Co., 131 Mo. App. 540, 110 SW 630. Where contract called for lumber of certain dimensions, quality and price, and lumber of that kind was delivered at agreed price, there was no room for implied warranty that lumber was suitable for buyer's uses. Manning v. National Saw Co., 126 App. Div. 325, 110 NYS 685.

56. Where buyer of an article uses his own judgment in selecting what he wants, there is no implied warranty by the seller that the article is suitable and safe for the use intended by the buyer. Conkling v. Standard Oil Co., 138 Iowa, 596, 116 NW 822. Where purchase of machine is made on inspection by buyer, there is no implied warranty. Ford Motor Co. v. Osburn, 140 Ill. App. 633.

57. There is no implied warranty, covering defects discoverable by a reasonable inspection, opportunity for which is afforded, that the property is fit for the purpose for which it is bought. W. R. Colchord Machinery Co. v. Loy-Wilson Foundry & Machinery Co., 131 Mo. App. 540, 110 SW 630. Where chattel sold was in existence, specifically described in written contract, and capable of being examined and its condition ascertained by each party, there was no implied warranty. Watkins v. Angotti [W. Va.] 63 SE 969. No implied warranty that cow was not diseased where, after sale, seller said she was all right, butcher who bought having examined her, nor was this an express warranty. Kinch v. Haynes, 58 Misc. 499, 111 NYS 618. Where machine was expressly sold as secondhand and without warranty, and buyer inspected it fully before buying, he could not hold seller as upon warranty and defeat recovery of price and foreclosure of mortgage by setting up defects. J. I. Case Threshing Mach. Co. v. Bailey [Ark.] 115 SW 949.

58. Contract to deliver machine on certain payments, machine to be used 90 days and returned at end of such time in lieu of last payment if machine did not do desired work, held lease for experimental purpose, with option to buy, not sale within Civ. Code, § 1770, that one who manufactures article for certain use warrants it as fit for such use. Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co., 153 Cal. 725, 96 P 369. Civ. Code, § 1771, that one who sells article inaccessible to examination warrants it as sound and merchantable, does not apply where machine was shipped under agreement for 90 days' experimental use. Id.

59. No implied warranty of secondhand machine when buyer knew what he was getting. W. R. Colchord Machinery Co. v. Loy-Wilson Foundry & Machinery Co., 131 Mo. App. 540, 110 SW 630. In the absence of a warranty, fraud or mistake, the doctrine of caveat emptor applies. O'Sullivan v. Griffith, 153 Cal. 502, 95 P 873. Where seller expressly refuses to warrant, buyer cannot rescind, in absence of fraud. Grojean v. Darby [Mo. App.] 116 SW 1062. Doctrine of caveat emptor applies where it is sought to enforce an implied warranty of quality or soundness and buyer had opportunity to inspect. Springfield Shingle Co. v. Edgecomb Mill Co. [Wash.] 101 P 233. Seller of mules did not know that one had certain eye disease, but knew that one had had sore eyes, and told buyer so, Held buyer was put on inquiry and doctrine of caveat emptor applied. Grojean v. Darby [Mo. App.] 116 SW 1062.

60, 61, 62. Walker, Evans & Cogswell Co. v. Ayer, 80 S. C. 292, 61 SE 557.

63. That machine was secondhand did not preclude reliance on representations that it would do certain work. Walker, Evans & Cogswell Co. v. Ayer, 80 S. C. 292, 61 SE 557. If seller knows purpose for which buyer desires property, and knows of defect which makes it unsuitable for such purpose, it is his duty to disclose the facts. Grojean v. Darby [Mo. App.] 116 SW 1062.

64. Buyer who loses right to rely on express warranty has no remedy as his rights are fixed by written contract. Guhy v. Nichols & Shepherd Co., 33 Ky. L. R. 237, 109 SW 1190. Express warranty that scales sold would be accurate in weight and computation, excluded implied warranties as to suitability of scales. Stimpson Computing Scale Co. v. Taylor, 4 Ga. App. 567, 61 SE 1131.

65. Burpee v. Holmes [Ga.] 64 SE 486.

66. Baker v. Hooks [Ga. App.] 64 SE 573.

67. **Search Note:** See Sales, Cent. Dig. §§ 236-238; Dec. Dig. § 85.

68. Agreement to receive secondhand piano as payment of $90 on new piano did not entitle purchaser to lower priced

terms must be complied with both by seller[70] and buyer,[71] as a breach by one relieves the other of the duty of performance.[72] Where the contract requires article sold to be satisfactory, without stating to whom it is to be satisfactory, it means satisfactory to the buyer.[73]

(§ 8) *D. Conditions on a warranty.*[74]—See 10 C. L. 1550—Where the warranty is conditional, the purchaser must show performance of the condition before he can hold the seller on the warranty.[75]

secondhand instrument with credit for $90. Graham v. Pease Piano Co., 111 NYS 60. Where buyer of building failed to remove materials and clear site, but his contract provided only for sale to him, seller could not recover cost of clearing site from buyer in action for breach of contract; buyer's duty to remove did not rest on contract; remedy in tort or implied assumpsit by proper party. Kellerman Cont. Co. v. Chicago House Wrecking Co. [Mo. App.] 118 SW 99. Negotiations construed and held to make contract whereby plaintiff, seller, reserved right to inspection by disinterested parties if defendant's, buyer's, inspection (of lumber) proved too severe, but seller did not have right to cancel, especially where buyer had resold. Holladay Klotz Land & Lumber Co. v. Beekman Lumber Co. [Mo. App.] 116 SW 436.

**69.** Contract to sell entire output of cement plant means all that is actually produced; agreement to operate mill at full capacity cannot be implied if not stipulated in contract. Burt v. Garden City Sand Co., 237 Ill. 473, 86 NE 1055. Acceptance of offer of staves "equal to samples," average width of which was 5½ inches, did not require delivery of staves all 5½ inches wide, but of staves equal to samples. Caraway v. Kentucky Refining Co. [C. C. A.] 163 F 189. Where contract provided simply for sale of building to wrecking company, there was no implied agreement by buyer to remove all the materials and clear the site. Kellerman Cont. Co. v. Chicago House Wrecking Co. [Mo. App.] 118 SW 99.

**70.** Certain machines held to conform to specifications of contract. Murphy v. St. Louis Cypress Co., 122 La. 905, 48 S 319. Evidence held to show boiler tubes up to standard grade. Id. Evidence held to show that higher grade of coal than that delivered was contracted for. Indiana Fuel Supply Co. v. Indianapolis Basket Co., 41 Ind. App. 658, 84 NE 776. Under contract to construct electric sign containing certain number of lights in border, doctrine of substantial compliance inapplicable; buyer was entitled to number of lights contracted for, even though less number would make better sign. Ellison Furniture & Carpet Co. v. Langever [Tex. Clv. App.] 113 SW 178. Shingles sold as "Star A Star," which brand was well known to trade as meaning shingles of certain quality and dimensions. Held buyer not required to use skill in inspecting, but had right to rely on contract. Inferior shingles being delivered, buyer could recover difference between price paid and market price of those delivered. Springfield Shingle Co. v. Edgecomb Mill Co. [Wash.] 101 P 233. Agreement to deliver shipping culls at $10 per M. and mill culls at $5 per M. would be performed by delivery of merchantable culls of this description, but delivery of inferior kind for superior kind, and charging higher price, would be breach. Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92. Buyer, by promising liberal inspection, but refusing modification of contract for lumber, held not estopped to demand quality contracted for. Burton v. Berthold [C. C. A.] 166 F 416. A sale of an article of a particular description amounts to a contract that article sold and delivered answers that description. The contract rests upon a condition rather than a warranty. Springfield Shingle Co. v. Edgecomb Mill Co. [Wash.] 101 P 233. Held immaterial how inspection of lumber was made, as that representative of county, joined with defendant buyer's representative in making it, sole question before jury being whether lumber delivered was in accordance with specifications. Bushnell v. King Bridge Co. [Iowa] 118 NW 407.

**71.** Buyers of hay who agree to press it have right to press it within time agreed upon for removal of hay from seller's premises. Austin v. Langlois, 81 Vt. 223, 69 A 739. Where dealer ordered sash and door by one contract from manufacturer, he could not insist on provision as to delivering sash and refuse to fulfill contract as to doors. Gauger & Co. v. Sawyer & Austin Lumber Co. [Ark.] 115 SW 157. Order for jewelry contained in separate columns, enumeration of goods, price per dozen, amount, and retail price, and required retailer to keep goods on sale continuously, and contained guaranty by seller that retailer would sell at least 1½ times the value of order. Held, where retailer refused goods, seller could recover amount of order without proving that goods would sell at retail price stated. Rice v. Malone [Mich.] 16 Det. Leg. N. 25, 120 NW 605.

**72.** See post, § 8E. Failure of buyers of hay to press it as agreed would be breach of contract, releasing seller. Austin v. Langlois, 81 Vt. 223, 69 A 739. In action to recover price of organ, plaintiff adopted view that, by second agreement to do certain work to remedy defects, other imperfections were waived by buyer. Held, under strict construction so adopted, plaintiff could not recover without showing strict performance of the entire agreement made by him. Howard v. Albright, 129 App. Div. 763, 114 NYS 194.

**73.** Kidder Press Co. v. Reed & Co. [Ky.] 117 SW 950. Where an executory contract provides that title to article sold shall not vest in buyer, and payment need not be made unless it is satisfactory, the seller cannot recover unless the buyer is satisfied and accepts. Printing press of special make. Id.

**74. Search Note:** See notes in 8 C. L. 1781. See, also, Sales, Cent. Dig. §§ 780-796, 806-816; Dec. Dig. §§ 276-280, 285-287.

**75.** Where buyer notified seller that ma-

(§ 8) *E. Waiver of warranties and conditions; excuse for breach.*[78]—See 8 C. L. 1781—In the absence of a warranty, the acceptance and retention of goods with notice of defects, or after an opportunity to inspect, is a waiver of claims that goods are defective or not as ordered,[77] and where the contract imposes conditions as to the time and manner of inspection, notice of defects, and return of goods, these conditions must, in general, be performed by the buyer.[78] In the absence of an express contract provision, the buyer has, however, a reasonable time in which to inspect[79] and to return goods found to be unsatisfactory,[80] and to perform other conditions required of him.[81] The right to rescind may be lost without waiving a

chine was unsatisfactory, but failed to send it to place where he bought it, as required, he could not hold seller on warranty. Jasper County Bank v. Barts, 130 Mo. App. 635, 109 SW 1057. Where husker-shredder was warranted to do good work, but contract provided for 10 days' trial and notice thereafter if machine did not work, and gave seller right to remedy defects, and to replace machine, or rescind if it could not furnish a satisfactory one, buyer after keeping machine two seasons without complaint had no right of action for damages. J. I. Case Threshing Mach. Co. v. Harp [Ky.] 113 SW 488.

**76. Search Note:** See notes in 4 C. L. 1340; 6 Id. 1349; 4 L. R. A. (N. S.) 1167; 11 Id. 245; 11 Ann. Cas. 547.

See, also, Sales, Cent. Dig. §§ 813-823; Dec. Dig. § 288; 6 A. & E. Enc. L. (2ed.) 508; 30 A. & E. Enc. L. (2ed.) 182.

**77.** In the absence of a warranty, retention of goods is a waiver of claims of defects in goods. Wilmerding v. Strouse, 112 NYS 1091. Where goods were not made up as ordered but buyer accepted alteration, buyer was liable. Massillon Sign & Poster Co. v. Buffalo Lick Springs Co., 81 S. C. 114, 61 SE 1098. One who received and kept coal could not defeat recovery of price unless coal was worthless. Home Ice Factory v. Howells Min. Co. [Ala.] 48 S 117. Where buyer received and kept books for year, paying part of price, he could not thereafter defeat recovery of balance by claiming books were damaged when received. St. Dunstan Soc. v. Picard, 115 NYS 1079. Buyer who, with full knowledge of defects in scales, gave note for price, waived defects known to him, and cannot set up known facts as defense in action on note. Stimpson Computing Scale Co. v. Taylor, 4 Ga. App. 567, 61 SE 1131. Standard goods being ordered, buyer found on delivery that weights were short and so notified seller, but kept and used goods. Held, buyer could not recover for short weights. American Steel Hoop Co. v. Searles Bros. [Miss.] 46 S 411. Seller may recover though buyer insists that goods are not as ordered, where buyer nevertheless retains and uses them, not merely to test them, but as owner, defects, if any, being patent. Edwards v. Woodridge [Tex. Civ. App.] 115 SW 920. Where goods of certain description or quality are ordered for future delivery and vendor tenders goods not of kind ordered, and vendee, after inspection or opportunity therefor, accepts such goods, he cannot thereafter recover damages for defects in goods. O. L. Gregory Vinegar Co. v. J. Weller Co. [Ky.] 116 SW 247. Vinegar of certain grain strength was ordered and buyer accepted shipments and made only two complaints, one of which he withdrew and one was settled. He kept last consignment 11 months before testing. Held, he could not recover damages for defects. Id.

**78.** Where contract for sale of machinery gave seller right to remedy defects and required notice thereof, and buyer failed to give notice for 4 years and then gave renewal notes on agreement to repair defects, and for 2 years failed to give notice of defects, buyer could not defend action on notes by showing breach of warranty. Guhy v. Nichols & Shepard Co., 33 Ky. L. R. 237, 109 SW 1190. Where contract provided that seller would put scales in repair any time within two years, if sent to him, and buyer did not send scales for repair, he could not avail himself of defects in action on note given for price. Stimpson Computing Scale Co. v. Taylor, 4 Ga. App. 567, 61 SE 1131. Where goods were sold by sample under contract providing for their return if unsatisfactory, if goods shipped were according to sample, buyer could not defeat liability for price on ground that they were unsatisfactory without returning the goods. American Standard Jewelry Co. v. Hill [Ark.] 117 SW 781. Contract for sale of rolls provided for 30 days' trial and return of rolls if unsatisfactory immediately after expiration of 30 days. Buyer gave notice that rolls were unsatisfactory but did not take them from mill or load on cars as agreed, but kept them until time of trial. Held, liable for price. Sturtevant Mill Co. v. Kingsland Brick Co., 74 N. J. Law, 492, 70 A 732.

**79.** Under contract requiring notice of defects to be given within 10 days, instruction that defendant could not recover for defects unless notice was given within 10 days was properly refused, as ignoring defendant's rights as to defects, not discovered within 10-day limit. Adams v. Gary Lumber Co. [Tex. Civ. App.] 117 SW 1017.

**80.** If machinery was bought and notes given on condition that machinery could be returned and notes recovered if it proved to be unsatisfactory, buyer had right to return it within reasonable time if he found it unsatisfactory. Krenz v. Lee, 104 Minn. 455, 116 NW 832.

**81.** Where sale contract required vendee to give evidence of bank credit, but did not specify any time for doing so, the law implied, in absence of any general custom, that it was to be done within a reasonable time. Rose v. Lewis [Ala.] 48 S 105. Where buyer supplied labels for apricots

claim for damages for failure of the seller to comply with the contract.[82] It is held that where refusal to accept is based upon particular grounds, deliberately stated, other objections are waived,[83] and vendor can recover on proving compliance with contract in particulars covered by objections raised.[84] Elsewhere it is said that where the buyer has absolutely rejected goods, for any reason, his silence as to other objections which would justify rejection is not a waiver of his right to insist on such other grounds, when not accompanied by conduct which may have misled and prejudiced the vendor.[85] An express warranty is usually held to survive acceptance of the goods,[86] certainly where the defects are not discovered until after acceptance;[87] but an unconditional acceptance of goods bought with express warranty has been held a waiver of known defects.[88]

*Conditions.*[See 10 C. L. 1550]—Provisions or conditions of the contract may be waived by failure to take advantage of or insist upon their performance,[89] but there can be no waiver by a mere statement after the time for performance has expired.[90]

(§ 8) *F. Remedies*[91]—[See 10 C. L. 1551] for breach of warranties and conditions are treated in subsequent sections.[92]

§ 9. *Payment, tender and price as terms of the contract.*[93]—[See 10 C. L. 1551]—To be enforcible, the contract of sale should fix the price or specify some method of definitely ascertaining it,[94] and the amount to be paid is to be determined from the contract.[95] Where, under a contract uncertain as to price, the goods sold are delivered,

before seller needed them, this was sufficient performance. Ellsworth v. Knowles [Cal. App.] 97 P 690.

82. Though buyer, having agreed to take seller's inspection and selection of goods ordered, could not rescind, he did not thus waive his right to damages for failure of seller to comply with contract. Wiburg & Hannah Co. v. Walling & Co. [Ky.] 113 SW 832.

83, 84. Skins rejected because unmerchantable. Delay in delivery not available in action for price. Hess v. Kaufherr, 128 App. Div. 526, 112 NYS 832.

85. List & Son Co. v. Chase [Ohio] 88 NE 120.

86. See 8 C. L. 1782, n. 16. Mere acceptance and use of goods, even with knowledge of defects, do not preclude resort to claim of damages for breach of warranty. Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92. If, when the property is tendered to the purchaser and before final acceptance, he discovers defects and complains thereof to the seller, and the seller insists that the buyer retain it and pay for it and promises to remedy the defects, such acceptance and partial payments thereafter do not amount to a waiver of the warranty. Piano retained after complaint and promise by seller to remedy defects. Promise not being kept buyer not liable for balance of price retained as damages for breach of warranty. Jesse French Piano & Organ Co. v. Barber, 5 Ga. App. 344, 63 SE 233.

87. Where contract called for air tight cans for canning fruit, and defects in cans were latent and not discoverable until after fermentation had set in, buyer was not estopped to claim damages for breach of warranty by retaining and using cans. Stewart v. Blue Grass Canning Co. [Ky.] 117 SW 401. Breach of warranty in installation of heating plant not waived by acceptance after test, and lien enforcible subject to right of action on guaranty. Scott v. Keeth, 152 Mich. 547, 15 Det. Leg. N. 206, 116 NW 183.

88. The unconditional acceptance of an article bought under an express warranty usually operates as a waiver of such defects as were within the actual knowledge of the purchaser at the time of acceptance. Jesse French Piano & Organ Co. v. Barber, 5 Ga. App. 344, 63 SE 233.

89. Provision in contract for apricots that buyer was to furnish lace paper for packing and receive an allowance therefor, being for buyer's benefit, could be waived by him. Ellsworth v. Knowles [Cal. App.] 97 P 690. Where parties disagreed on classification of lumber sold, but seller acquiesced in buyer's classification of certain lumber and allowed it to be hauled away, he could not thereafter deny or object to buyer's classification. Federal Lumber Co. v. Reece [Ky.] 116 SW 783.

90. Failure to tender stock, under agreement to repurchase after one year, at expiration of year, or within a reasonable time thereafter, was not waived by statement by seller made 5 months after expiration of year. Wright v. Berger, 114 NYS 912.

91. **Search Note:** See Sales, Cent. Dig. §§ 1207-1320; Dec. Dig. §§ 425-449; 15 A. & E. Enc. L. (2ed.) 1252; 30 A. & E. Enc. L. (2ed.) 189; 19 A. & E. Enc. P. & P. 82.

92. See post, §§ 10, 11, 12.

93. **Search Note:** See notes in 2 L. R. A. (N. S.) 383, 529; 5 Id. 475.

See, also, Sales, Cent. Dig. §§203-213, 228-233, 496-511; Dec. Dig. §§ 74-78, 80, 82, 183-196; 24 A. & E. Enc. L. (2ed.) 1094.

94. Where seller agreed to make prices as low as could be obtained in any market, this was not sufficiently definite. Stout v. Caruthersville Hardware Co., 131 Mo. App. 520, 110 SW 619.

95. Contract held to require seller of machinery to pay for its installation; no

the transaction is treated as a sale for the reasonable value of the goods.[96] Ordinarily, no other agreement being made, payment and delivery are concurrent obligations,[97] and payment need not be made until delivery;[98] but the parties may fix the terms of payment by their contract,[99] or by a course of dealing.[1] Failure to pay in the manner [2] and at the time agreed upon is a breach of contract which relieves the seller from the duty of further performance,[3] unless the breach of contract by the buyer has been waived by the seller.[4] Where orders are separate, failure to pay for one is not a breach as to others.[5] The giving of lien notes to be paid on delivery of goods is not payment for goods.[6] The seller may look to the party to whom he sold for payment, regardless of such party's contracts with third persons;[7]

recovery for such expense. Murphy v. St. Louis Cypress Co., 122 La. 905, 48 S 319. Plaintiff made contract to sell his entire product of dried curd for 5 years to drug company, which agreed to pay not less than 4 cents per pound and that price should equal highest price paid under any of its contracts. Drug company assigned contracts to defendant, a larger concern. Held, plaintiff could recover only highest price paid under drug company's contracts; not highest price paid anywhere by defendant. Casein Co. of America v. Van Dam [C. C. A.] 168 F 45. Contract for sale held to include fixtures as well as merchandise for sale under term "stock of goods"; hence all were to be invoiced at wholesale prices as agreed in order to determine amount of second payment. Hendrickson v. Anderson [S. D.] 120 NW 765.

96. Stout v. Caruthersville Hardware Co., 131 Mo. App. 520, 110 SW 619. In absence of evidence tending to show inflated prices or unfair trade conditions, reasonable value means market value, that is prices at which goods are customarily bought and sold at the time and place in question. Wagoner Undertaking Co. v. Jones [Mo. App.] 114 SW 1049.

97. In the case of executory contract, the obligations to pay and to deliver are mutual and dependent. Gross v. Ajello, 132 App. Div. 380, 116 NYS 380. Shipping goods in seller's name and sending bill of lading with sight draft attached in ordinary course of business does not justify rejection of goods. Plumb v. Bridge, 128 App. Div. 651, 113 NYS 92.

98. Catlin v. Jones [Or.] 97 P 546; Delaware Trust Co. v. Calm [N. Y.] 88 NE 53. Laws imply that payment is to be on delivery if no time fixed. Bollenbacher v. Reid [Mich.] 15 Det. Leg. N. 961, 118 NW 933.

99. Second and additional contract for sale of machines held to contain terms of payment, which controlled. Blakeslee & Co. v. Reinhold Mfg. Co., 153 Mich. 230, 15 Det. Leg. N. 468, 117 NW 92. Where contract provided for "payment sight draft against papers," buyer was not obliged to tender payment to put seller in default for nondelivery, since contract contemplated shipment before payment. Ellsworth v. Knowles [Cal. App.] 97 P 690. Evidence admissible to show by usage that phrase "payment sight draft against papers" meant that seller would ship and that payment was to be made on delivery of bill of lading. Id.

1. Payment is presumed to be cash if no other provision is made, but parties may by acts make different arrangement, and will be bound by their construction. Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92.

2. Where plaintiff was at work for defendant, using mule teams, and defendant bought a new team, agreeing that $50 a month should be deducted from amounts due plaintiff until payment of price by plaintiff, when he should have mules, plaintiff, having abandoned work without cause, was not entitled to pay balance and receive mules Ellis v. Whitney [Tex. Civ. App.] 111 SW 158.

3. See, also, ante, § 7D. Where lumber was to be shipped in car load lots, and payment was to be for cars separately, failure to pay as agreed was breach of contract by buyer. Harris Lumber Co. v. Wheeler Lumber Co. [Ark.] 115 SW 168 Where payment for goods is to be made at stated times after delivery, refusal to make payment as agreed is breach of contract, and relieves seller of duty of making future deliveries; failure to make such deliveries is therefor no ground for recoupment. Webster v. Moore, 108 Md. 672, 71 A 466. Where goods were ordered and order accepted, without any condition, buyer had no right of inspection; refusal to pay draft without inspection was breach of contract relieving seller of obligation to deliver. Cochran v. Chetopa Mill & Elevator Co. [Ark.] 114 SW 711. Where plaintiff failed to make payment for machines as required by contract, defendant was not bound to delivery as agreed, and plaintiff could not recover lost profits for breach by defendant. Blakeslee & Co. v. Reinhold Mfg. Co., 153 Mich. 230, 15 Det. Leg. N. 468, 117 NW 92.

4. Breach of contract by failure to make payments as agreed may be waived by continuing to make shipments and accepting past due payments. Harris Lumber Co. v. Wheeler Lumber Co. [Ark.] 115 SW 168. That payment for corn was in script was no defense to action for damages for failure to deliver where defendant did not allege that script had not been accepted. Stahr v. Hickman Grain Co. [Ky.] 116 SW 784.

5. Braitsch v. Kiel & Arthe Co., 114 NYS 872.

6. Where lumber was to be sold for cash, the giving of lien notes as security for shipments not paid for on delivery was not payment. Such shipment could be charged on books and price recovered in general assumpsit. Taplin v. Marcy, 81 Vt. 428, 71 A 72.

7. Plaintiff sold coal to firm, which later incorporated, corporation promising to pay

and the buyer liable only to the person from whom he ordered goods, in the absence of fraud or collusion.[8] The obligation of one who assumes another's debts depends upon the terms of his contract.[9] Payment by the vendee to a third person does not relieve him from liability to his vendor, who was in possession at the time of the sale.[10]

Accepted sight draft for the price of goods, with bill of lading attached, indorsed and negotiated by the payee, is governed by commercial law.[11]

§ 10. *Remedies of the seller. A. Rescission and retaking of goods or action for conversion. Rescission.*[12]—See 10 C. L. 1552—The seller may rescind when the buyer has been guilty of fraud[13] or has failed to comply with the contract,[14] but he must first return what he has received under the contract.[15]

*Recovery of chattels.*See 10 C. L. 1554—Where goods have been obtained by fraud, with the intention of cheating the vendor, he may elect to treat the sale as a nullity,[16] and may bring an action for the recovery of the goods or their value,[17] unless, after discovery of the fraud, he ratifies the sale.[18] In such action the burden is upon plaintiff to establish the fraud.[19] In replevin to recover goods from one who claims under a fraudulent vendee, the burden is upon defendant to show that he is a purchaser in good faith for value.[20]

firm debts. Corporation gave note for debt and plaintiff sold note to bank supposing it was given by partners. Corporation became insolvent. Bank sued in equity to enforce collection of note; plaintiff sued firm for price. Held, latter suit maintainable, though former was for plaintiff's benefit. Roberts v. Rowe [N. H.] 70 A 1074.

**8.** If defendant who received goods from another was in collusion with him to defraud plaintiff, who furnished goods, plaintiff could recover from him; but if defendand ordered goods from such other, and had no knowledge of his arrangement with plaintiff, defendant had right to pay such other. Greenville Lumber Co. v. National Pressed Brick Co., 133 Mo. App. 217, 113 SW 236.

**9.** Where purchaser of drug stock assumed and agreed to pay "open and outstanding account" of seller, he did not thereby assume payment of note of seller. Kramer v. Gardner, 104 Minn. 370, 116 NW 925.

**10.** Vendee having notice of vendor's title. Gaertner v. Western Elevator Co., 104 Minn. 467, 116 NW 945.

**11.** Bank of Gunterville v. Jones Cotton Co. [Ala.] 46 S 971. Where bank discounted draft in ordinary course before maturity, and sued drawee and acceptor, they could not set up as defense want or failure of consideration. Id.

**12. Search Note:** See notes in 10 C. L. 1552; 21 L. R. A. 206; 1 L. R. A. (N. S.) 474; 11 Id. 948.

See, also, Sales, Cent. Dig. §§ 824-1108; Dec. Dig. §§ 289-389; 24 A. & E. Enc. L. (2ed.) 1097; 24 A. & E. Enc. L. (2ed.) 1134; 19 A. & E. Enc. P. & P. 67.

**13.** See, also, Fraud and Undue Influence, 11 C. L. 1583. Also, following paragraph.

**14.** Where buyer refused to make payment as agreed unless seller would undertake to fill orders which came too late to be filled in ordinary course during life of contract, contract was broken by buyer, and seller had right to rescind, except as to right to sue for payments due. Gauger & Co. v. Sawyer & Austin Lumber Co. [Ark.] 115 SW 157. A failure to pay has been held sufficient consideration for rescission. Tuttle v. Bracey-Howard Const. Co. [Mo. App.] 117 SW 86.

**15.** Where a contract of sale is invalid on account of mistake or fraud, a party thereto who seeks to replevin the goods and rescind the sale must first return what he has received. Duluth Music Co. v. Clancey [Wis.] 120 NW 854.

**16.** American-German Nat. Bank v. Gray & Dudley Hardware Co., 33 Ky. L. R. 547, 110 SW 393.

**17.** American-German Nat. Bank v. Gray & Dudley Hardware Co., 33 Ky. L. R. 547, 110 SW 393. The remedy of one from whom property has been procured by fraud is trover or replevin. Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 P 1029.

**18.** Where a sale is procured by fraud, no title passes and the vendor retains his right in the property, unless after discovery of the fraud, he assents to and ratifies the act of sale either positively or by delay. Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 P 1029.

**19.** Replevin. Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 P 1029. Evidence sufficient to show that buyer was insolvent at time of purchase and had no intention to pay for goods. American-German Nat. Bank v. Gray & Dudley Hardware Co., 33 Ky. L. R. 547, 110 SW 393. Though plaintiff, in action to recover goods, simply alleged ownership, and not that it had been deprived of possession by fraud, it could recover on proof of sale to one intending not to pay therefor but to cheat the vendor, since it had right to treat goods as its own. Id.

**20.** Evidence held not to sustain such defense. Beinert v. Tivoli & Co., 62 Misc. 616, 116 NYS 4.

(§ 10) *B. Stoppage in transitu.*[21]—See 10 C. L. 1554—The right of stoppage in transitu does not end with the mere arrival of goods at their destination but continues until actual or constructive delivery to the vendee.[22] The right ceases to exist where the administrator of a deceased buyer takes possession before the exercise of the right.[23] The doctrine of stoppage in transitu was not abrogated by the federal bankruptcy law,[24] and the shipper may stop goods after the consignee has been declared a bankrupt and a receiver or trustee has been appointed,[25] provided he exercises the right previous to a demand by the receiver or trustee or any delivery by the carrier.[26]

(§ 10) *C. Lien.*[27]—See 10 C. L. 1554—Contracts reserving title as security are valid.[28] Where a municipal corporation enters into a contract of purchase without power to do so, having exceeded its debt limit, the seller is not confined to the remedy of rescission, but may enforce its lien for the price by sale of the property.[29] In Louisiana, a vendor's lien upon a farming utensil is superior to that of the lessor of the land.[30] The creditor of a bankrupt for goods sold does not waive his vendor's privilege, given by Louisiana statute by proving the debt against the bankrupt as one without security.[31] In Arkansas, a vendor's lien on personal property can only be created by suit, and only when the property is in the hands of the vendee.[32] In Missouri, property cannot be followed into the hands of an innocent purchaser and judgment for the price enforced against it.[33] In Mississippi, the procedure in an action by the seller of property to subject same to sale for payment of purchase price is the same as in an attachment proceeding.[34] Hence, a claimant of the property may assert his claim in such proceeding against the seller.[35]

(§ 10) *D. Resale.*[36]—See 10 C. L. 1554—If payment be not made, seller may retake goods and sell to another.[37]

(§ 10) *E. Action for the price and quantum valebat.*[38] *Right of action and conditions precedent.*See 10 C. L. 1555—Delivery of goods[39] which conform to the re-

**21. Search Note:** See notes in 4 C. L. 1344; 50 L. R. A. 721; 1 A. S. R. 312.

See, also, Sales, Cent. Dig. §§ 824-855; Dec. Dig. §§ 289-299.

**22.** Jacobs v. Bentley [Ark.] 110 SW 594. The shipper may exercise the right of stoppage at any time before delivery by the carrier, or a demand by the consignee, or some act of ownership, provided the consignee is actually insolvent. In re Darlington Co., 163 F 385.

**23.** Title then having vested in estate. Jacobs v. Bentley [Ark.] 110 SW 594.

**24, 25.** In re Darlington Co., 163 F 385.

**26.** Notice to carrier timely; shipper had title as against receiver. In re Darlington Co., 163 F 385.

**27. Search Note:** See notes in 66 L. R. A. 44; 83 A. S. R. 451.

See Sales, Cent. Dig. §§ 856-889; Dec. Dig. §§ 300-315; 24 A. & E. Enc. L. (2ed.) 1143.

**28.** See, also, post, § 14. Sale contract providing that title shall remain in vendor until payment in full, and that equity acquired by vendee should be held by him in trust as security for payment of balance to vendor, held valid contract under Louisiana law, giving vendor valid lien. National Bank of Commerce v. Williams [C. C. A.] 159 F 615.

**29.** City of Bardwell v. Southern Engine & Boiler Works. [Ky.] 113 SW 97.

**30.** Steam engine, used exclusively to operate machinery used to harvest crops, is farming utensil upon which vendor's privilege primes that of lessor of land, and that, whether engine be acquired as part of implements with which it is used or not. Lahn & Co. v. Carr, 120 La. 797, 45 S 707.

**31.** La. Civ. Code, § 3227. Lessler v. Paducah Distilleries Co. [C. C. A.] 168 F 44.

**32.** Bell v. Old [Ark.] 113 SW 1023. When the vendor consents to the vendee's mortgaging the property, and allows it to pass out of vendee's possession, he waives the right to create a vendor's lien. His transferree of the note, after maturity, has no right of lien. Id.

**33.** Rev. St. 1899, § 3170, making personal property subject to execution on judgment for the price, except in hands of innocent purchaser for value without notice, does not permit property to be followed into hands of innocent purchaser so as to warrant judgment against him for price. Barbee & Co. v. Crawford, 132 Mo. App. 1, 111 SW 614.

**34.** Code 1906, § 3080, makes provisions relating to attachment applicable. Quillin v. Paine [Miss.] 47 S 898.

**35.** Quillin v. Paine [Miss.] 47 S 898.

**36. Search Note:** See Sales, Cent. Dig. §§ 914-926, 1107; Dec. Dig. §§ 332-339; 24 A. & E. Enc. L. (2ed.) 1139.

**37.** Berlaiwsky v. Rosenthal [Me.] 71 A 69.

**38. Search Note:** See notes in 4 C. L. 1347; 3 L. R. A. (N. S.) 908; 7 Ann. Cas. 543.

See Sales, Cent. Dig. §§ 927-1082; Dec. Dig. §§ 340-368; 24 A. & E. Enc. L. (2ed.) 1118; 19 A. & E. Enc. P. & P. 12.

**39.** Where a sale and delivery are al-

quirements of the contract[40] and a performance of conditions to be performed by the seller,[41] or a tender of delivery and full performance,[42] or a waiver thereof,[43] must be shown as a condition precedent to the right to recover the purchase price. The sum sued for must be due[44] and unpaid,[45] and the seller must own the right of action.[46] A vendor cannot recover the price from a subsequent bona fide purchaser for value.[47]

*Defenses and election between them.* See 10 C. L. 1555—Fraud in procuring the contract,[48] and notice that goods were being held for seller, subject to payment of charges,[49] want or failure of consideration,[50] rejection of goods because not as ordered,[51] and the retaking of the goods by the vendor,[52] have been held valid de-

leged, plaintiff cannot recover without proof of delivery. Gross v. Ajello, 132 App. Div. 25, 116 NYS 380. Delivery of order on warehouse for goods would warrant recovery of price, if not revoked. Id. Defendant ordered guano shipped to another by seller, which was done, but goods arrived too late for use and plaintiff, seller, was notified. Third person had, however, used some and sold some, and seller retook balance. Held, seller entitled to recover for all except what he retook. Swift Fertilizer Works v. Peacock [Ga.] 64 SE 328.

**40.** Machinery held to be as warranted. Recovery of price sustained. Crucible Steel Co. v. Moen [C. C. A.] 167 F 956. Buyer not liable for price of coal which was refused because not of quality ordered. Indiana Fuel Supply Co v. Indianapolis Basket Co., 41 Ind. App. 658, 84 NE 776. In action for price of goods rejected by buyer on ground that goods were not up to requirements of contract, plaintiff must show not only shipment of goods but also that they answered requirements of contract. American Standard Jewelry Co. v. Hill [Ark.] 117 SW 781.

**41.** Where maker and seller of electric sign placed fewer lights in border than agreed, he could not recover price. Ellison Furniture & Carpet Co. v. Langeuer [Tex. Civ. App.] 113 SW 178. Where purchaser of hay crop objected to scales and refused to take hay away, evidence held to show that seller offered to accept railway weights, or to allow person named by buyer to inspect and correct scales. Allen v. Rusforth [Neb.] 118 NW 657. Defendant directed plaintiff to have shipped to him, over certain road, corn, at certain price, weight and grade to be finally determined by official certificate. Defendant liable for full price when plaintiff shipped corn of required grade as directed though it was damaged by heating in transitu. Champlin v. Church [N. J. Err. & App.] 70 A 138. Where parties disagreed as to classification of lumber sold, and part of it was laid aside for inspection, and buyer removed it before such inspection without seller's consent, seller could recover value of lumber so taken. Federal Lumber Co. v. Reece [Ky.] 116 SW 783.

**42.** Where there is no actual delivery, plaintiff can recover only by showing readiness to perform and a tender of performance on his part. Gross v. Ajello, 132 App. Div. 25, 116 NYS 380. Where article is sold under particular description, tender or delivery of article answering to this description is condition precedent to recovery of price. Springfield Shingle Co. v. Edgecomb Mill Co. [Wash.] 101 P 233. Seller of machine to be constructed could not recover price without tendering delivery under contract. Vollmer v. Hayes Mach. Co., 129 App. Div. 426, 114 NYS 446. May store goods and sue for price. International Filter Co. v. Hartman, 141 Ill. App. 239.

**43.** To recover on a delayed tender of delivery, plaintiff must prove a waiver or an estoppel. Braitsch v. Kiel & Arthe Co., 114 NYS 872.

**44.** Where contract was for sale of goods to certain amount, buyer agreeing to pay half price within 10 days and balance within 60 days after each instalment of goods received, action could be maintained after 10 days had expired since delivery of goods though all had not been delivered. Ikonograph Co. v. J. N. Porter Co., 113 NYS 537.

**45.** Where portion of price for stock had been paid (as had been found by a court), in second suit for value of stock there could not be recovery for sum already paid, though portion of original contract of sale was held illegal. Hess v. Reick [N. J. Law] 69 A 1090.

**46.** Right of seller to recover from buyer on note given for price not affected by seller's giving to indorser after maturity of note, bill of sale of goods to which he then had no title. Ketterson v. Inscho [Tex. Civ. App.] 118 SW 626.

**47.** Goods transferred to pay indebtedness included some not paid for; no fraud or collusion. Barbee & Co. v. Crawford, 132 Mo. App. 1, 111 SW 614.

**48.** No recovery where contract for goods was secured by fraud, salesman representing that another paper was being signed. Price v. Rosenberg, 200 Mass. 36, 85 NE 887.

**49.** Where signature to order for goods was obtained by fraud, consignee was not bound though he did not return goods. Notice to sellers that he held goods subject to their order, on payment of charges advanced, relieved consignee. Loveland v. Jenkins-Boys Co., 49 Wash. 369, 95 P 490.

**50.** Notes given for process of manufacture held without consideration where seller had previously sold substantially same process to third person. Sweeting v. Iroquois China Co., 129 App. Div. 777, 113 NYS 945.

**51.** Lumber was rejected because not as ordered. Buyer not liable to assignee of

fenses to an action for the price. Breach of warranty is a defense where the buyer rescinds and returns, or offers to return, the property.[53] It is not a defense where the buyer retains the goods,[54] or a part of them.[55] That the contract was obtained by illegal means,[56] or that the vendor has been doing business under a firm name, in violation of law,[57] is no defense to an action for goods sold and delivered. Delay in delivery is no defense when waived by the buyer, who is not damaged.[58] Where goods are as ordered, that they cannot be used is no defense.[59] Defenses must be consistent.[60]

*Complaint.*[See 10 C. L. 1556]—In the notes are cited cases dealing with the sufficiency of the pleading to state a cause of action for the price [61] or on a quantum meruit [62] against the persons sued.[63]

*Answer and counterclaim.*[See 10 C. L. 1557]—The plea of total failure of consideration includes that of partial failure,[64] and a plea of want of consideration is not inconsistent with an admission that property has some value.[65] But an allegation of

invoice for price. Grant v. Sicklesteel Lumber Co. [Mich.] 15 Det. Leg. N. 1145, 119 NW 1092.

52. Where seller retakes property sold, buyer may waive conversion, acquiesce in seller's act and treat contract as rescinded, and set up rescission as defense to action for price. Boggs v. Young [Neb.] 116 NW 501.

53. Where several persons bought shares in horse upon warranty that he was sure foal getter, etc., they could not, on discovery of breach of warranty retain their interest in horse and defeat recovery on note given for price; but if they offered to return their shares, breach of warranty would be good defense. Crouch v. Morgan [Mo. App.] 116 SW 475. In suit against some of several shareholders of horse to recover price, breach of warranty of horse as foal getter, and offer to return defendants' shares or interests in horse, was good defense, since they could not return horse itself and offered to return all they could. Id.

54. Where buyer retains goods, breach of warranty that goods correspond to sample is not available as defense. Wilmerding v. Strause, 112 NYS 1091.

55. Where defendant relies on breach of warranty in action for price, he must show a rescission of the contract by a return or tender of all goods and benefits received under contract. Rescission of contract for engraving not effective where only plates were returned, and drawings retained and used. Central Bureau of Engraving v. J. W. Pratt Co., 60 Misc. 120, 111 NYS 561.

56. Fact that brick company was instrumental in having paving contract calling for use of its brick made, and that such contract was afterward held illegal because of want of competition, was no defense to action against contractor and surety to recover price of brick. Kansas City Hydraulic Press Brick Co. v. National Surety Co. [C. C. A.] 167 F 496.

57. Vendor violated Pen. Code, § 363. Hopp v. McWhirter, 107 NYS 823.

58. Delay in delivery of engine would not bar recovery of price if buyer was not damaged, having accepted it. Hendry v. Irvine [Cal. App.] 99 P 408.

59. Dubinski Elec. Works v. Lang Elec. Co. [Tex. Civ. App.] 111 SW 169. If buyer received goods just as he ordered them, including stamping or marking, the fact that they could not legally be sold, owing to markings, would be no defense in action for price, in absence of fraud. Moline Jewelry Co. v. Dinnan [Conn.] 70 A 634.

60. Defense that signature to contract sued on was obtained by fraud is not inconsistent with defense that goods sent were not those agreed upon with salesman. Price v. Rosenberg, 200 Mass. 36, 85 NE 887.

61. Complaint construed as action on contract for price, and not for damages for breach. Pacific Coast Borax Co. v. Waring, 128 App. Div. 66, 112 NYS 458. Where complaint alleged sale and delivery of goods at certain price, it was not defective for failing to allege performance of other conditions; if there were such, their nonperformance was matter of defense. Ikonograph Co. v. J. N. Porter Co., 113 NYS 537. Complaint alleging indebtedness for goods sold and delivered, and that plaintiff sold and delivered certain goods to defenant at his special instance and request, between certain dates, and that itemized account was contained in exhibit stated cause of action. Rosebud Lumber Co. v. Serr [S. D.] 117 NW 1042. Where the complaint shows that the sale was one in bulk, at a price agreed on by the parties, and that delivery was made in accordance therewith, it was unnecessary to set out an itemized statement of goods sold. Hamilton v. Dismukes [Tex. Civ. App.] 115 SW 1181.

62. Complaint alleging that machinery first installed by plaintiff was not accepted by defendant, but that subsequently installed was accepted, and that defendant was indebted for its value was on quantum meruit. Isbell-Porter Co. v. Heineman, 126 App. Div. 713, 111 NYS 332.

63. Complaint for goods sold against partnership and one member individually alleging sale to "defendants," shows joint purchase by partnership and individual. Redwood City Salt Co. v. Whitney, 153 Cal. 421, 95 P 885.

64. Gutta Percha & Rubber Mfg. Co. v. Cleburne [Tex.] 112 SW 1047.

65. In action on note given for price of jack, defendant may plead want of consideration, though admitting jack was worth

failure of consideration and worthlessness of property is inconsistent with an allegation of a tender of the property and offer to pay for its use.[66] A defense or counterclaim cannot be relied upon unless pleaded.[67] Cases dealing with the sufficiency of the answer to set up certain defenses are cited in the note.[68]

*Parties.*—Parties not liable may be discharged.[69] The joinder of an improper party defendant in an action of assumpsit for goods sold and delivered will not defeat recovery against the proper defendant.[70] Joint purchasers are all liable,[71] but, upon separate agreements to pay, a joint judgment cannot be rendered.[72]

*Admissibility of evidence* See 10 C. L. 1558 depends upon its relevancy to the issues [73] and its competency.[74]

something. Rev. St. 1899, § 645, allows pleas of want of consideration in actions founded on written contract. Broderick v. Andrews [Mo. App.] 115 SW 519.

**66.** Action on note given for price of machine. Acme Harvester Mach. Co. v. Barkley [S. D.] 118 NW 690.

**67.** Offer to return goods no defense to action on note where agreement under which note was made did not reserve such right and no ground of rescission is pleaded or suggested. Zichermann v. Wohlstadter, 60 Misc. 362, 113 NYS 403. In action for price of coal, buyer could not show warranty and breach thereof without pleading it. Woodridge v. Brown, 149 N. C. 299, 62 SE 1076. Collateral promise by sellers of business to obtain renewal of lease not enforceable in action for price, no counterclaim being set up. Norton v. Abbott, 113 NYS 669.

**68.** In action on note for price of horse, answer held to allege sufficiently misrepresentations of character and quality of horse, such as to warrant an alleged rescission of the sale and failure of consideration of note. City Nat. Bank v. Jordan [Iowa] 117 NW 758. Answer in action on note given for price of machine held insufficient to set up rescission of contract by reason of breach of warranty, where time of tender of machine was not alleged. Acme Harvester Mach. Co. v. Barkley [S. D.] 118 NW 690.

**69.** Action against church and two others for price of brick furnished to build church. Allegations making others than church liable, stricken, and other parties discharged, there being nothing to show they were anything more than agents of the church. Guignard v. First Baptist Church, 80 S. C. 491, 61 SE 1003.

**70.** Franz v. Barr Dry Goods Co., 132 Mo. App. 8, 111 SW 636.

**71.** Joint purchasers of goods are both liable on promise of one which made purchase possible. Elmer v. Campbell [Mo. App.] 117 SW 622.

**72.** Where delivery was to be to two persons in common, but each agreed to pay half the cost, it was error to render joint judgment against them. Argo Mfg. Co. v. Parker [Wash.] 100 P 188.

**73. Held relevant and admissible:** Bills of lading showing shipment of goods. Butler v. Ederheimer, 55 Fla. 544, 47 S 23. In action for price of stock, evidence of value of assets and book accounts of corporation admissible to show value of stock and probability of price alleged. McIntosh v. McNair [Or.] 99 P 74. Action on note given for price of horse, wherein answer alleged rescission of sale on account of misrepresentations. Proof of misrepresentations, admissible. City Nat. Bank v. Jordan [Iowa] 117 NW 758. Evidence admissible to show possession and use of property by defendant shortly after date of alleged sale. Alabama Const. Co. v. Continental Car & Equipment Co., 131 Ga. 365, 62 SE 160. Defense in action for price being payment, error to exclude evidence to show authenticity of receipts. American Lithographic Co. v. Rickert, 111 NYS 25. Where order was for goods like those previously delivered, evidence was admissible to show character of goods previously delivered. Greenbaum v. Greenfield, 114 NYS 832. Oral evidence admissible to show quantity of ties sold, where contract referred to another cargo in fixing terms. Maydwell v. Roger's Lumber Co. [C. C. A.] 159 F 930. Evidence relating to defendant's set-off, admissible. Barnes v. Loomis, 199 Mass. 578, 85 NE 862. In action for price of canned goods, to prove goods shipped were of required quality, evidence tending to identify lot and quality of goods from which shipment was made was admissible. Webster v. Moore, 108 Md. 572, 71 A 466. Evidence that goods from same lot were sold to others and that no complaint was made was inadmissible. Id. In action to recover price of stock sold defendant, corporate books were admissible to prove that there was surplus at or about time of sale. Gilboa v. Kimball [R. I.] 69 A 765.

**Held irrelevant:** Where defense to action for price of electric sign was failure to place agreed number of lights in border, evidence that more than agreed number were placed in another part of sign was inadmissible. Ellison Furniture & Carpet Co. v. Langever [Tex. Civ. App.] 113 SW 178. In action for price of machines, pleadings contained no allegation of warranty, express or implied, and it appeared that machines had been kept by defendant after demand for their return. Evidence that machines were unsatisfactory and could not be made to work properly, excluded. Climax Tag Co. v. American Tag Co., 234 Ill. 179, 84 NE 873. In quantum meruit for value of machinery installed, after other plant had been refused, evidence of difference in value between machinery called for by contract and that installed was inadmissible. Isbell-Porter Co. v. Heineman, 126 App. Div. 713, 111 NYS 332. Contract between two defendants as to division of expense of making fenders irrelevant on

*Issues, proof and variance.*[See 10 C. L. 1557]—The plaintiff must show facts entitling him to a recovery [75] upon the theory and cause of action set up in his complaint.[76] Plaintiff may allege an express contract and recover on an implied promise.[77] Under a complaint to recover for goods sold and delivered at an agreed price, plaintiff may show any contract of sale, oral or written, under which goods were delivered.[78] Though there may have been a written contract for the sale of personalty, yet, where the seller brings suit on open account and proves delivery and complete compliance with the contract, nothing remaining except payment by the

issue whether defendant bound himself to pay plaintiff for materials. Sterling Meaker Co. v. Nessler, 110 NYS 246. Where breach of warranty of ore roaster was set up in action for price, proof of plaintiff's assays was not admissible when ore assayed was not shown to have been kind of ore machine was warranted to handle. Trego v. Roosevelt Min. Co., 136 Wis. 315, 117 NW 855. Where original orders for seeds are offered in evidence to prove knowledge by buyer of disclaimer of warranty, and such orders do not show such disclaimer, their exclusion is not reversible error. Vaughan's Seed Store v. Stringfellow [Fla.] 48 S 410.

74. Order for goods, showing items, admissible though it used abbreviations for names of goods where witness testified in regard thereto. Butler v. Ederheimer, 55 Fla. 544, 47 S 23. In action for goods sold and delivered, immaterial that order shown to be original was not signed, nor was book account best evidence. Id.

75. **Evidence sufficient** to show sale, delivery and acceptance of goods. Ward v. Jonasson & Co., 114 NYS 57. To show sale and delivery of goods to defendant. Kroder v. Siegel Hardware Co., 113 NYS 575. To show delivery of goods. Scheuer v. Rosenbaum, 110 NYS 260. Evidence made prima facie case for sale and delivery of goods. Tannebaum v. Nikop, 114 NYS 32. Evidence sufficient to make prima facie case for apples sold and delivered. Plumb v. Hallauer & Sons Co., 130 App. Div. 284, 114 NYS 474. Evidence held to sustain plaintiff's claim as to value of piling and amount furnished. Dalhoff Const. Co. v. Maurice [Ark.] 110 SW 218. Evidence held to show that no one except plaintiff had any interest in beets sold. Cole v. Utah Sugar Co. [Utah] 99 P 681. Evidence held to sustain verdict for plaintiff in suit for price of twine sold. Herpolsheimer v. Acme Harvester Co. [Neb.] 119 NW 30. In action for reasonable value of goods sold, evidence that seller had sent bills designating certain price and that buyer had made no response was sufficient to sustain finding that sum named was reasonable value. Jones v. De Muth, 137 Wis. 120, 118 NW 542. Certain stock was delivered to defendant, and thereafter plaintiff's stock was segregated, and delivered by defendand to plaintiff's agent, defendant promising to pay for it in a few days. Held, there was contract to buy plaintiff's stock enforceable by plaintiff. Avery v. Wall [Mont.] 101 P 249.

**Evidence insufficient** to show sale and delivery as alleged. Gross v. Rivkin, 114 NYS 844. To sustain claim for goods sold and delivered. Feinstein v. Hindes, 111 NYS 837. To show order covered goods sued for, in action to recover for goods ordered by defendants and delivered to third person. Brown v. Grossman, 128 App. Div. 496, 112 NYS 827. No recovery where evidence failed to show sale by plaintiff to defendant. Greenville Lumber Co. v. National Pressed Brick Co., 133 Mo. App. 217, 113 SW 236. Evidence insufficient to show agency of buyer of goods for defendants, and held not to show admission of liability by defendants. Stark v. Solomon, 114 NYS 133. Purchaser of cigars himself ordered labels which he said he desired placed on cigars, and made one payment. Cigar seller not liable for labels. American Lithographic Co. v. Feinberg, 113 NYS 920.

76. Where the seller sets up a contract and performance and sues for the price, he cannot recover as for damages for breach of the contract, where buyer refused to receive goods, having notified seller not to deliver. Backes v. Schlick [Neb.] 117 NW 707. Action on common counts for price of cultivator, plaintiff must rely on contract, not on note given for price. Ruthruff v. Faust, 154 Mich. 409, 15 Det. Leg. N. 783, 117 NW 902. Plaintiffs as E. B. & Co., contracted with defendant to supply certain quantity of turkeys at certain price, and shipped defendant turkeys as B. Bros. Held, plaintiffs suing as E. Bros., could recover for turkeys shipped, but could not recover on contract made with E. B. & Co. Brightman Bros. v. Griffin & Co. [R. I.] 70 A 1057. **Variance not material** where complaint alleged sale to partnership and individual and proof showed sale to partners. Redwood City Salt Co. v. Whitney, 153 Cal. 421, 95 P 885. Where complaint was for agreed price of goods sold and delivered, and answer set up counterclaim for failure to make other deliveries under contract, and reply was general denial, proof by plaintiff of modification of contract was not material variance. Brooklyn Creamery Co. v. Friday, 137 Wis. 461, 119 NW 126. Where complaint stated cause of action for price of goods sold and evidence showed that plaintiff was doing business under "company" name, recovery warranted, though last fact was not alleged. Grossman v. Lieb 126 App. Div. 348, 110 NYS 386.

77. Alleged contract that defendant agreed to pay for and took gravel delivered by plaintiff; recovery on implied contract proper. Indianapolis Coal Trac. Co. v. Dalton [Ind. App.] 87 NE 552.

78. Brooklyn Creamery Co. v. Friday, 137 Wis. 461, 119 NW 126.

buyer, a nonsuit will not be granted.[78] The burden is upon defendant to establish any affirmative defense [80] or counterclaim.[81]

*Trial and instructions.*[See 10 C. L. 1580]—Questions of fact are for the jury,[82] and the instructions should properly submit all the issues raised by the pleadings and evidence,[83] though harmless error will be disregarded on appeal.[84]

79. Alabama Const. Co. v. Continental Car & Equipment Co., 131 Ga. 365, 62 SE 160.

80. Vendee who alleges and relies on breach of warranty must prove it. American Standard Jewelry Co. v. Hill [Ark.] 117 SW 781. The burden is on defendant, claiming failure of consideration to prove it, and he must produce evidence from which jury may find the extent to which the consideration failed. Gutta Percha & Rubber Mfg. Co. v. Cleburne [Tex.] 112 SW 1047. Where drill was sold under agreement for its return if it proved to be unsatisfactory, and defendant returned it, burden was on him, in action for price to show that it was defective. Coverdale v. Rickards [Del.] 69 A 1065. In action for price of cattle food, evidence that defendant could not sell second lot, that persons to whom he sold former lot said food was worthless, and that it made his own cattle scour, held not to sustain plea of failure of consideration for contract. Acme Food Co. v. Howerton [Iowa] 119 NW 631. Evidence sufficient to take to jury question whether cash registers delivered to defendants were the ones ordered. National Cash Register Co. v. Dehn [Mich.] 15 Det. Leg. N. 936, 118 NW 724. In action to foreclose mortgage given to secure note for horse, evidence insufficient to show warranty that horse would get with foal 65 per cent of mares served, and that notes and mortgage would be returned if he failed to do so. Hartley v. Furgeson, 50 Wash. 309, 97 P 234. Evidence sufficient to show payment for goods by reason of other transaction and debt of seller. Valley Lumber Co. v. McGilvery [Idaho] 101 P 94.

81. Evidence held not to show greater damage to buyer by seller's delay in delivery than allowed by court. Gregory Vinegar Co. v. J. Weller Co. [Ky.] 116 SW 247. Error to give judgment for full amount, when defendant's testimony in support of counterclaim for defects in goods was undisputed. Mann v. Warshawsky, 112 NYS 1062. Dismissal of counterclaim affirmed, basis of it—work—not having been made necessary by plaintiff. Huber v. Klebold Press, 112 NYS 203.

82. Whether property was sold to defendant or another, held for jury. Rundlett v. Heileman Brew. Co., 104 Minn. 337, 116 NW 833. Whether goods were in fact shipped to defendant held for jury. Bray Clothing Co. v. McKinney [Ark.] 118 SW 406. In quantum meruit for value of machinery whether defendant accepted same, and its value, held for jury. Isbell-Porter Co. v. Heineman, 126 App. Div. 713, 111 NYS 332. Where evidence was conflicting on issue whether goods delivered were as ordered, and not clear on issue whether order had been altered by seller's agent, it was error to direct verdict which took these issues from jury. Eldorado Jewelry Co v. Hitchcock, 130 Ga. 778, 61 SE 855. Where fraud in obtaining signed paper was alleged whether defendants in fact ordered goods sued for, was held for jury. Neumeyer v. Hooker, 131 App. Div. 592, 116 NYS 204. Instruction which took from jury issue whether defendant accepted goods by retaining and using them, erroneous. Edwards v. Woodridge [Tex. Civ. App.] 115 SW 920.

83. Instructions held to properly present issues in action for price of ties in which defendant set up different contract from that alleged by plaintiff, and claimed advances to plaintiff in excess of contract price of ties. Ohio Valley Tie Co. v. Harvey's Adm'r [Ky.] 116 SW 278. Where pleading and evidence warranted finding of partial failure of consideration, error for court to instruct only on theory of total failure. Gutta Percha & Rubber Mfg. Co. v. Cleburne [Tex.] 112 SW 1047. Instructions not erroneous as requiring jury to find certain contract; they informed jury of parties' rights in case jury found certain contract. Gimnich Furniture Mfg. Co. v. Sorensen, 34 Utah, 109, 96 P 121. In action for price of paint, defense was misrepresentations as to quality and fraud. Held instruction requiring proof of misrepresentations substantially as alleged sufficient; proof of every representation not required, but proof of mere opinions would not suffice. Huff v. Kinloch Paint Co. [Tex. Civ. App.] 110 SW 467. Where defendant, in action for price of ice, set up counterclaim for difference in value of ice delivered and that agreed to be delivered, instruction allowing, also, recovery of alleged overpayments, which was not asked for in answer, was erroneous. Woodbridge Ice Co. v. Semon Ice Cream Corp. [Conn.] 71 A 577. Evidence sufficient to show that coat was returned to seller by one of seller's employes; instruction requiring defendant in action for value of coat to show that seller was party to attempt to cheat improper. McMahon v. Rothchild, 114 NYS 817. Defense to action on note for price of horse was that it was not signed by all members of association who were to sign at time of delivery. Held court should have submitted issue whether written guaranty of horse bearing prior date was given and accepted as part of transaction. Comstock v. Taggart [Mich.] 16 Det. Leg. N. 14, 120 NW 29. Action on one of three notes given for price of horse, it appearing that plaintiff had pledged other two to third person. Court properly assumed in instructions that such notes had been accepted in payment. Id.

84. Error in defining fraud harmless, where defendant's evidence, if believed, showed fraud as defined but jury evidently did not believe it. McCaskey Register Co. v. Keena [Conn.] 71 A 898.

(§ 10) *F. Action for breach.*[85] See 10 C. L. 1561—In an action for breach of contract by the buyer, the seller must prove the contract[86] and a breach thereof. An unqualified refusal to accept goods,[87] or conduct showing an intention on the part of the buyer not to perform,[88] warrants the maintenance of the action. The seller must also show a tender of performance by himself, substantially as agreed,[89] but, if the buyer clearly shows an intention not to perform, the seller need not show a delivery[90] or tender of performance.[91] Special defenses must be specially pleaded.[92] The instructions should properly present the issues.[93] Damages for breach of contract are legitimate claims against an insolvent's estate.[94]

(§ 10) *G. Action for damages for goods not accepted.*[95] See 8 C. L. 1382—The plaintiff must, in such action, show performance by himself of the contract alleged as the basis of recovery.[96]

(§ 10) *H. Choice and election of remedies.*[97] See 10 C. L. 1561—Where vendee has defaulted on an executory contract to purchase, the vendor may keep the goods and sue for damages for breach of contract,[98] or hold them as bailee of the buyer and recover the price,[99] or sell them as agent of the buyer and recover the difference between the purchase price and the amount realized on the sale.[1] The seller

**85. Search Note:** See Sales, Cent. Dig. §§ 1083-1108; Dec. Dig. §§ 369-389; 24 A. & E. Enc. L. (2ed.) 1113.

**86.** Where seller of building brought action on contract to recover of buyer cost of clearing site and removal of materials after wrecking of house, but failed to prove any agreement by buyer to clear site, he could not recover. Kellerman Cont. Co. v. Chicago House Wrecking Co. [Mo. App.] 118 SW 99.

**87.** Unqualified refusal to accept and pay for goods contracted for is breach warranting recovery of damages. Moffatt v. Davitt, 200 Mass. 452, 86 NE 929.

**88.** Repudiation of contract for goods could be inferred from proof of delay of buyer in making payments and of letters from buyer's manager showing that buyer was intending not to perform. Moffat v. Davitt, 200 Mass. 452, 86 NE 929. Such evidence not weakened by proof of tender of performance by buyer's attorney in attempt to settle dispute. Id.

**89.** Seller had burden of proving tobacco packed as agreed and in agreed condition in order to recover for breach by buyer. Grenawalt v. Roe, 136 Wis. 501, 117 NW 1017.

**90.** Where contract provided for stipulated damages in case of refusal of buyer to receive goods, and buyer refused to give shipping directions and showed intention not to carry out contract, actual delivery of goods was not condition precedent to claim of liquidated damages. McDuffie v. Dilley [Tex. Civ. App.] 115 SW 612.

**91.** Contract for sale of stocks and bonds provided for delivery at office of trust company in Chicago. Plaintiffs had them where they could be sent to Chicago when required, but was notified by agent of defendants that they could not receive and pay for them. Held, plaintiffs, being ready and able to deliver, were not required to make tender in Chicago in order to maintain action for breach of contract. Watson, Preston & Co. v. Greenwood & Co., 164 F 294.

**92.** In action for damages for refusal to receive goods manufactured to order, the defense that seller could not have filled order, or was otherwise employed, or could have sold goods at contract price to others, must be specially pleaded. Cleveland-Canton Springs Co. v. Goldsboro Buggy Co., 148 N. C. 533, 62 SE 637.

**93.** In action for damages for breach of contract to take structural steel, where defendant claimed contract had never been consummated by reducing it to writing and by plaintiff giving bond as agreed, instruction construed as properly presenting issues. Lynch v. Snead Architectural Iron Works [Ky.] 116 SW 693.

**94.** May be proved in bankruptcy proceedings. Forest City Steel & Iron Co. v. Detroit, etc., R. Co., 154 Mich. 182, 15 Det. Leg. N. 653, 117 NW 645.

**95. Search Note:** See Sales, Cent. Dig. §§ 1083-1108; Dec. Dig. §§ 369-389; 19 A. & E. Enc. P. & P. 63.

**96.** Sellers not entitled to recover difference in price received and price to be paid by buyer, who refused to accept delayed delivery, when complaint alleged that delivery was to be on arrival of car (lumber) and evidence failed to sustain such allegation or to show delivery within reasonable time. Harlow v. Parson's Lumber & Hardware Co. [Conn.] 71 A 734.

**97. Search Note:** See Sales, Cent. Dig. §§ 824, 826, 890-895, 924, 926, 927-942, 1083, 1084, 1107; Dec. Dig. §§ 289, 315, 339, 340, 369; 19 A. & E. Enc. P. & P. 4.

**98.** Wolfsheim v. Ammann Mfg. & Const. Co., 110 NYS 943; Gross v. Ajello, 132 App. Div. 25, 116 NYS 380.

**99.** Wolfsheim v. Ammann Mfg. & Const. Co., 110 NYS 943; Gross v. Ajello, 132 App. Div. 25, 116 NYS 380. Vendor may tender delivery and, on refusal of vendee to accept, may keep the goods for vendee and sue for the price. Heilbrunn v. Weislow, 129 App. Div. 532, 114 NYS 50.

**1.** Gross v. Ajello, 132 App. Div. 25, 116 NYS 380; Wolfsheim v. Ammann Mfg. & Const. Co., 110 NYS 943. But he is not entitled to recover difference between contract price and market price at time of trial. Id.

may reserve title until payment and may also reserve the right to enforce payment by foreclosure.[2] If he elects to proceed by trover, he rescinds the sale and cannot thereafter sue for the price.[3] He may, however, sue the note given for the price to judgment without waiving his right to maintain trover,[4] but a suit to foreclose the mortgage is a bar to a subsequent action in trover.[5] The seller may waive a right to retake goods and sue for the price.[6] Where the vendor rescinds[7] or acquiesces in a rescission by the vendee,[8] he cannot maintain an action for the price. An erroneous resort to a remedy not available, the action being dismissed, is not a bar to an action for the price.[9] An agreement to pay in goods and chattels is enforcible by the recovery of money and not of the specific article.[10] For breach of the buyer's agreement to deliver goods, seller has remedy in action for damages.[11] Remedies given by the contract must be enforced, or an effort made to enforce them in the manner therein provided.[12] A claim that goods delivered were as ordered is a waiver of rights under a provision of the contract for a return of the goods if found unsatisfactory.[13] Where the contract is executory, the buyer may stop performance by notice to that effect,[14] subject to damages thus caused the seller.[15] After such rescission, the seller cannot perform and recover the contract price; his only remedy is for damages for breach of contract.[16]

§ 11. *Remedies of purchaser. A. Rescission.*[17]—See 10 C. L. 1561—Misrepresentations,[18] fraud,[19] mutual mistake[20] and breach of contract by the seller[21] are

**2, 3.** Mitchell v. Castlen, 5 Ga. App. 134, 62 SE 731.

**4.** Judgment is not payment. Mitchell v. Castlen, 5 Ga. App. 134, 62 SE 731.

**5.** After suit to foreclose mortgage on mules, one of which officer could not find, trover would not lie. Mitchell v. Castlen, 5 Ga. App. 134, 62 SE 731.

**6.** Buyer agreed that if he did not pay instalment of price when due, he would surrender premises and business to sellers. Held this was not sole remedy of sellers; they could sue on notes for price. Norton v. Abbott, 113 NYS 669.

**7.** Where vendor elects to rescind, he cannot thereafter maintain an action for the purchase price. Boggs v. Young [Neb.] 116 NW 501.

**8.** Where the buyer countermands an order for goods before shipment, thus rescinding contract, seller cannot recover price but must sue for damages for breach of contract. Frederick v. Willoughby [Mo. App.] 116 SW 1109.

**9.** Suit by seller of property against buyer and others for conspiracy to defraud her of the property, which was dismissed because she had no interest in property, was not a bar to suit for balance of purchase price; no election, first suit not being available remedy. Henry v. Herrington, 193 N. Y. 213, 86 NE 29.

**10.** Sugar Beets Product Co. v. Lyons Beet Sugar Refining Co., 161 F 215.

**11.** An agreement to deliver products of a machine at a certain price in payment of the machine will not be specifically enforced against the buyer, since seller has adequate remedies at law. Sugar Beets Product Co. v. Lyons Beet Sugar Refining Co., 161 F 215.

**12.** Where contract for stock required part payment in cash, and provided that certain other stock should be delivered to third person to be sold within 6 days to some one agreeable to another named person, held sale of other stock could not be enforced without showing that no effort had been made to make sale agreeable to designated person. Kuker v. Snow, 149 N. C. 181, 62 SE 909.

**13.** Where seller offered evidence, in action for price of jewelry, that goods shipped were as ordered, he waived rights under clause in contract that goods could be returned if not as ordered, where buyer claimed goods were not as ordered but had not offered to exchange. Price v. Rosenberg, 200 Mass. 36, 85 NE 887.

**14, 15, 16.** Backes v. Schlick [Neb.] 117 NW 707.

**17.** See, also, ante, § 7C.

**Search Note:** See notes in 6 C. L. 1365; 21 L. R. A. 135; 3 L. R. A. (N. S.) 678; 8 Id. 727, 1110, 1167.

See, also, Liens, Dec. Dig. § 7; Sales, Cent. Dig. §§ 286-329, 1109-1320; Dec. Dig. §§ 112-134, 178, 390-449; 24 A. & E. Enc. L. (2ed.) 1106.

**18.** A sale may be rescinded for a false and fraudulent warranty or representation. Baker v. Robbins [Wash.] 99 P 1. If jewelry was sold by fraud and was not as represented, buyer could refuse goods within reasonable time. Moline Jewelry Co. v. Dinnan [Conn.] 70 A 634. Where contract for sale of acetylene gas plant was made directly with seller and no representations were then made, contract being free from fraud, buyer was not entitled to rescind on account of misrepresentation of seller's agent made on previous occasion. Daylight Acetylene Gas Co. v. Hardesty [Ky.] 112 SW 847. Seller knew buyer wanted pianola and knew that instrument sold was not pianola, but assured buyer she was getting what she wanted. Held, buyer had right to rescind. Smith & Nixon Co. v. Lewis [Ky.] 112 SW 1113. Where seller expressly refused to warrant mules as having good eyesight, buyer could not rescind on ground that seller knew or ought to have known that they were dis-

grounds for rescission by the buyer. Breach of warranty is not ground for rescission in some states.[22] In some, a breach of warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended to operate as a condition.[23] The right to rescind must be exercised promptly on discovery of facts giving the right of rescission.[24] Any unreasonable delay, or any

eased and failed to state the fact, or misrepresented facts. Grojean v. Darby [Mo. App.] 116 SW 1062. In action to rescind sale of mules because of false statement by seller that if anything was the matter with the mules he did not know it, doctrine of implied knowledge held inapplicable, it being proved that seller had had mules 4 months, had examined them, and either believed his statement correct or else willfully misrepresented. Id. Buyer of piano entitled to rescind if false and fraudulent representations were made regarding it on which buyer relied and by which purchase was induced. Instructions criticised. Jesse French Piano & Organ Co. v. Garza & Co. [Tex. Civ. App.] 116 SW 150. If buyer of typesetting machine relied on representations as to its value for the work for which it was desired and these representations were false and the machine worthless, the buyer was entitled to rescind, though representations were made in good faith. Walker, Evans & Cogswell Co. v. Ayer, 80 S. C. 292, 61 SE 557. Complaint in action to rescind for breach of warranty, alleging representations that piano would give no trouble and require no repairs, reliance thereon, falsity thereof, etc., held good as against demurrer. Jesse French Piano & Organ Co. v. Garza & Co. [Tex. Civ. App.] 116 SW 150. Statements as to matters of opinion not ground for rescission. Burwash v. Ballou, 132 Ill. App. 71.

**19.** Buyer may rescind for fraud. Jacobsen v. Whitely [Wis.] 120 NW 285; Rosenberg v. McKinney [Wis.] 120 NW 230. A purchaser who has been induced to enter into contract by fraud may elect to rescind upon discovery of the fraud or within a reasonable time thereafter. Clampitt v. Doyle [N. J. Err. & App.] 70 A 129. Buyer of horse who, on discovery of fraud, had offered to return horse, had right to rescind without taking affirmative steps to compel rescission. Fuller v. Chenault [Ala.] 47 S 197. Evidence sufficient to show fraud in sale of jewelry. Buyer, having rescinded sale, held not liable for price. Equitable Mfg. Co. v. Waful, 131 Mo. App. 211, 110 SW 1102. Where property is obtained by means of fraud, the transaction is not void but voidable at the election of the party defrauded. Blackman v. McAdams, 131 Mo. App. 408, 111 SW 599. Purchase of mining stock, by one who controlled corporation by owning majority of stock, from manager of corporation, held not fraudulent, so as to warrant setting sale aside, in view of manager's position and knowledge of affairs of corporation. Steinfeld v. Nielsen [Ariz.] 100 P 1094.

See Fraud and Undue Influence, 11 C. L. 1583.

**20.** Buyer of beer agency and good will of corporation and carload of beer in transit advanced to corporation $600 to enable it to get beer from carrier so that agency would not be forfeited, but neglected to take this amount into account in contract. Held, buyer became unsecured creditor of corporation for $600; could not rescind contract on ground of mutual mistake. City Nat. Bank v. Fenner [Tex. Civ. App. 116 SW 136.

See Mistake and Accident, 12 C. L. 869.

**21.** Where article is sold under particular description, buyer may reject and recover back money paid if article delivered does not answer to description. Springfield Shingle Co. v. Edgecomb Mill Co. [Wash.] 101 P 233. If typesetting machine proved absolutely worthless, buyer would be entitled to rescind, even in the absence of express warranty or representations. Walker, Evans & Cogswell Co. v. Ayer, 80 S. C. 292, 61 SE 557. Contract for exchange of stock of goods for land and boot money being executory, and owner of goods having received and accepted check but refused to surrender possession of goods, other party had right to rescind and demand return of check. Somers v. Sturre, 106 Minn. 221, 118 NW 682. Where goods were to be sold at "invoice price," meaning cost mark, attempt of seller to put goods into invoices at higher prices than cost marks was breach of contract, entitling buyer to rescind. New York Brokerage Co. v. Wharton [Iowa] 119 NW 969. Lack of invoices not waived by buyers where they attempted in good faith to invoice goods but did not complete invoice or accept that made by seller, but refused to proceed. Id. Where seller reserves right to make selection and inspection of goods ordered, buyer cannot reject if there is substantial compliance with contract. There must be fraud or lack of good faith to warrant rescission. Wiburg & Hannah Co. v. Walling & Co. [Ky.] 113 SW 832. Evidence held to show cancellation of contract for automobile because it was not satisfactory. Buyer entitled to recover amount deposited. Pierce v. Cleveland Motor Car Co., 112 NYS 1096. Where there is express or implied agreement that vendee may return property if it is not as agreed upon, vendee may return it under contract. Jesse French Piano & Organ Co. v. Costley [Tex. Civ. App.] 116 SW 135. Though jewelry received by buyer was as ordered, except that it was so stamped as to render its sale illegal in Connecticut (Gen. St. 1902, § 1381), buyer had right to refuse goods after reasonable time for examination. Moline Jewelry Co. v. Dinnan [Conn.] 70 A 634. Statement in printed order that seller would replace articles shipped if desired did not affect buyer's right to rescind if goods were not as represented. Id.

**22.** Breach of warranty does not give right to return property. Giordano v. Nizzari, 115 NYS 719; Tokheim Mfg. Co. v. Stoyles, 142 Ill. App. 198. Buyer who has bought with warranty cannot upon breach of warranty return the property and rescind the sale. Gelb v. Waller, 115 NYS 201. In action for damages for breach of warranty, buyer could not return property and recover entire purchase price. Id.

**23.** Poirier Mfg. Co. v. Kitts [N. D.] 120 NW 558.

**24.** Mizell v. Watson [Fla.] 49 S 149; Electric Vehicle Co. v. Price, 138 Ill. App. 594.

action taken in continued recognition of the contract as a binding obligation, amounts to a ratification or election to abide by the contract and bars a subsequent rescission.[25] Whether an offer to rescind and return property is made within a reasonable time is ordinarily a question for the jury,[26] unless the facts are undisputed and the time such as to be reasonable or unreasonable as a matter of law.[27] To perfect his rights, the offer to rescind must be unconditional[28] and complete,[29] and the property received must be returned to the seller[30] within a reasonable time[31] in as good condition as when delivered, unless injured without fault of the buyer,[32] or a return of the property must be tendered,[33] though a tender or return is unnecessary where the seller refuses absolutely to receive it.[34] It has been held that goods may be retained, after notice of rescission, until a valid charge against them has been paid.[35] Where the contract imposes conditions upon the right to rescind, such as notice or opportunity to remedy defects, these conditions must be per-

One induced to buy horse by fraud had right to rescind by offering to return it promptly on discovery of fraud. Fuller v. Chenault [Ala.] 47 S 197. Rescission for fraud must follow promptly on discovery of fraud. Retention of proceeds of sale after discovery waives right of action. Waymire v. Shipley [Or.] 97 P 807. Offer to rescind about 90 days after date of contract, not too late, where buyer had been trying to make machine work during all that time. Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co., 153 Cal. 725, 96 P 369. Evidence held to warrant finding that buyers of horse were reasonably diligent in investigating truth of representations and in rescinding sale. Swanke v. Herdemann [Wis.] 120 NW 414. Failure of vendee to discover falsity of representations as to amount of indebtedness standing against property sold held not to bar action for rescission brought promptly on discovery of fraud. Pitman v. Erskine, 49 Wash. 166, 94 P 921.

**25.** Mizell v. Watson [Fla.] 49 S 149. Several months' delay after discovery of alleged fraud **held election to treat sale as valid.** Clampitt v. Doyle [N. J. Err. & App.] 70 A 129. Vendee of stock, having retained stock and accepted benefits of contract after discovery of alleged fraud, lost right to rescind and was liable for price. Rosenberg v. McKinney [Wis.] 120 NW 230. Cannot rescind after accepting and using part of goods. Waukesha Canning Co. v. Horner & Co., 138 Ill. App. 564. If a vendee of chattels upon refusal of the vendor to accept an offer to return them, where a right to rescind exists, retains the property and uses it as owner, he loses the right to rescind, as he cannot retain and use property and insist on prior tender as rescission. Mizell v. Watson [Fla.] 49 S 149. Retention of horse by buyer before discovery of fraud which induced its purchase is **not ratification of sale.** Fuller v. Chenault [Ala.] 47 S 197. Where buyer sought to rescind purchase of horse and offered to return it, its subsequent use merely to exercise and keep it in condition was not waiver of right to rescind. Baker v. Robbins [Wash.] 99 P 1. Where buyer offered to return horse, which he was induced by fraud to buy, on discovery of fraud, and seller refused to receive it, subsequent retention and use of horse by buyer was not ratification of sale, which he had thus rescinded. Fuller v. Chenault [Ala.] 47 S 197.

**26.** Mizell v. Watson [Fla.] 49 S 149. Whether drill, returned as unsatisfactory after two weeks' use, was returned within reasonable time, held for jury. Coverdale v. Rickards [Del.] 69 A 1065. Whether buyer of beans delayed an unreasonable length of time after discovery of misrepresentations before rescinding sale held for jury. McNitt v. Henderson [Mich.] 15 Det. Leg. N. 987, 118 NW 974.

**27.** Mizell v. Watson [Fla.] 49 S 149.

**28.** Letter construed as unconditional refusal to receive goods ordered; not merely request to cancel. Frederick v. Willoughby [Mo. App.] 116 SW 1109. Offer to rescind contract of sale for breach of warranty, conditioned on payment of freight and storage, and coupled with offer to settle for portion of property, held ineffective to defeat action for price, not being unconditional. Poirier Mfg. Co. v. Kitts [N. D.] 120 NW 558.

**29.** Acts of defendant in selling some machines, retaining others, and offering partial rescission, held affirmance of contract. Poirier Mfg. Co. v. Kitts [N. D.] 120 NW 558. Buyer of horse and buggy under warranty of horse cannot rescind and sue for price on ground of breach of warranty and retain and use buggy, contract being entire and buggy not being worthless. Mizell v. Watson [Fla.] 49 S 149.

**30.** Where buyer attempted to return horse, but seller refused to take it, and month later left horse at seller's stable, but failed to show with whom or upon what terms he left it, there was no rescission. Gelb v. Waller, 115 NYS 201.

**31.** Return of drill, claimed to be unsatisfactory, must have been within reasonable time, considering all the circumstances. Coverdale v. Rickards [Del.] 69 A 1065.

**32.** Tender of automobile injured by buyer's servant, ineffective. Pitcher v. Webber [Me.] 71 A 1031.

**33.** Where buyer of business agreed to surrender premises to sellers in case of default in payments, a letter by buyer notifying sellers that premises were rented to third person on certain day, when he would vacate, and advising sellers to do something, was not valid tender of premises. Norton v. Abbott, 113 NYS 669.

**34.** Where seller of horse absolutely refused to entertain proposition to rescind, technical insufficiency of tender and return was waived. Swanke v. Herdemann [Wis.] 120 Mo. 414.

formed [36] unless waived by the seller.[37] Where goods are to be delivered in instalments under an executory contract, an acceptance of certain instalments thereunder does not prevent a rescission of the contract in case of failure thereafter to perform according to its terms.[38] But where delivery of part of an instalment is tendered, and there is then a refusal to deliver the entire instalment, an acceptance of the goods tendered bars a subsequent rescission of the entire contract,[39] unless the acceptance is accompanied by a demand for full performance.[40]

(§ 11) *B. Action to recover purchase money paid or to reduce price.*[41]—See 10 C. L. 1563—Money paid by the buyer may be recovered upon a breach by the seller [42] and election by the buyer to rescind, accompanied by a return or tender of property received,[43] where that is possible,[44] unless performance by the seller has been prevented by the buyer,[45] or the seller's breach has been waived.[46] Money paid on an illegal executory contract,[47] and money paid in excess of the agreed price, under mistake,[48] may be recovered. An agreement by the seller to repurchase is enfor-

**35.** Where buyer refused to accept article because not satisfactory, he was not bound to return it until seller paid him expenses incurred in testing it, which was valid charge against seller. Kidder Press Co. v. Reed & Co. [Ky.] 117 SW 950.

**36.** No effective rescission of contract for machine where buyer did not give notice of intention to return it as unsatisfactory; immaterial that seller gave him parts to replace those which were broken. Acme Harvester Mach. Co. v. Barkley [S. D.] 118 NW 690. Buyer of machine in 1905 kept and used it without complaint or notice of breach of warranty or intention to rescind until 1906, contract requiring reasonable notice and opportunity to repair or put machine in shape. Held, no right to rescind. Id. Mere fact that selling corporation had been succeeded by another did not excuse want of notice, officers remaining substantially same. Id. Jury's finding, on conflicting evidence, that buyer gave notice that machine was unsatisfactory within 30 days, as required by contract, held conclusive. Victoria Acetylene Co. v. Cushing [Me.] 71 A 1015. Where contract called for first class engine but gave seller option to make needed repairs or replace defective parts, and buyer refused to allow repairs to be made though seller was ready and willing to make them, buyer had no right to rescind. City of Bardwell v. Southern Engine & Boiler Works [Ky.] 113 SW 97.

**37.** Where general agent of machine company was on ground assisting in test of machine, no notice to company of failure of machine to work properly would be necessary. Acme Harvester Mach. Co. v. Barkley [S. D.] 118 NW 690.

**38, 39, 40.** Wolfert v. Caledonia Springs Ice Co. [N. Y.] 88 NE 24.

**41. Search Note:** See notes in 6 C. L. 1366. See, also, Sales, Cent. Dig. §§ 1109-1139; Dec. Dig. §§ 390-398; 24 A. & E. Enc. L. (2ed.) 1156; 19 A. & E. Enc. P. & P. 71.

**42.** Advance payment recoverable on failure to deliver machine. Vollmer v. Hayes Mach. Co., 129 App. Div. 426, 114 NYS 446. Upon failure to deliver automobile at designated place, after three attempts, buyer was entitled, on demand, to return of money paid. Washburn v. Rainier Co., 130 App. Div. 42, 114 NYS 424. Where sellers refused to allow buyer an inspection, and notified him they would resell and hold him, and did so, and buyer had another buy goods and turn them over to him, he was entitled to recover what he had paid seller on account of contract. Plumb v. Bridge, 128 App. Div. 651, 113 NYS 92. Where horse was sold under warranty and agreement to take it back if not as warranted, and it was found to be not as warranted and returned, seller was entitled to recover purchase money. J. Dickman & Co. v. Berlin, 116 NYS 552.

**43.** Where vendor insists on execution of chattel mortgage by wife of vendee, without warrant either at common law or by statute, the vendee is excused from making formal tender of chattel mortgage and money and notes, and may maintain action for recovery of deposit without such tender. Chess v. Vockroth, 75 N. J. Law, 665, 70 A 73.

**44.** Where goods, after sale, were confiscated for nonpayment of duties, buyer was not obliged to tender goods before suing for purchase price paid. Hamrah v. Maloof & Co., 127 App. Div. 331, 111 NYS 509.

**45.** Buyer could not recover amount paid when he prevented performance by refusing to allow "fixtures" as well as other goods to be invoiced at wholesale prices, this being provision of contract. Hendrickson v. Anderson [S. D.] 120 NW 765.

**46.** Buyer, after receiving, inspecting, and paying for office furniture, could not reject furniture for defect apparent on inspection, and recover price paid. Budd v. McCann's Tours, 110 NYS 1051. Payment for goods by checks and notes (which were transferred), before discovering that duties had not been paid by seller, did not estop buyer to sue for recovery of purchase price, after confiscation of goods by government. Hamrah v. Maloof & Co., 127 App. Div. 331, 111 NYS 509. Where plaintiffs bought goods and paid for them by checks and notes, and government thereafter seized and confiscated goods for nonpayment of duties, plaintiffs were not estopped to claim price paid by appearing as claimants in proceeding by government. Id.

**47.** McCall v. Whaley [Tex. Civ. App.] 115 SW 658. Contract to sell lot and building and stock of drugs provided for exchange of deeds, and that money paid was to be retained if balance not paid. Seller remained in possession and continued to run store, and no deeds were given. Held, executory contract within rule above stated. Id.

**48.** In action to recover excess paid by

cible.[49] Holdings as to pleadings,[50] admissibility,[51] and sufficiency [52] of evidence, and instructions,[53] are given in the notes.

(§ 11) *C. Action for breach of contract.*[54]—See 10 C. L. 1563—The buyer has a right of action for damages for breach by the seller.[55] Where goods are to be delivered in instalments, a failure to deliver one instalment is a breach which entitles the buyer to rescind and sue for damages.[56] A refusal to deliver is equivalent to a breach,[57] and formal demand for performance is not condition precedent to action for damages.[58] A buyer who is in default, or who has broken the contract, cannot maintain an action for breach by the seller,[59] and he cannot recover without proof of performance or a tender thereof, by himself,[60] together with readiness and ability to perform.[61] Holdings as to pleadings,[62] issues,[63] variance,[64] ad-

plaintiff over agreed price of goods, it was immaterial that goods were billed to third person, where both parties understood that third person was to pay to cancel a debt owed to plaintiff. Stout v. Caruthersville Hardware Co., 131 Mo. App. 520, 110 SW 619. Where seller represented that he would sell goods as cheaply as they could be had anywhere, and buyer relied thereon and paid price asked, he could recover as for money had and received the amount paid in excess of the reasonable value of the goods. Id.

**49.** Agreement to repurchase stock at advanced price enforcible. Vohland v. Gelhaar, 136 Wis. 81, 116 NW 869.

**50.** Where, in action to rescind and recover price paid for breach of warranty, defendants desire to deny the sale or the warranty, they should plead nonassumpsit, or a plea traversing the contract or agreement. Mizell v. Watson [Fla.] 49 S 149. If they desire to admit the sale and warranty and deny the breach, they should plead by way of confession and avoidance. Id.

**51.** Where plaintiff in suit to rescind for breach of warranty alleged express warranty, evidence that agents customarily gave such warranty was inadmissible. Jesse French Piano & Organ Co. v. Garza & Co. [Tex. Civ. App.] 116 SW 150. In suit to recover amount paid for goods to be shipped, where seller had refused to allow inspection, and buyer had rejected goods for that reason and had bought same goods from third person to whom seller had sold, plaintiff had right to show inspection by third person, and quality of goods to show his good faith. Plumb v. Bridge, 128 App. Div. 651, 113 NYS 92.

**52.** In action to recover price paid for horse, sufficiency of tender of property, and whether formal tender was waived, held for jury. Baker v. Robbins [Wash.] 99 P 1. Evidence held to warrant finding of contract for $10 worth of steel, that steel was not delivered and that plaintiff was entitled to recover $10 paid. Morse v. Ressler, 153 Mich. 512, 15 Det. Leg. N. 507, 116 NW 1069. In action to recover price of furnace, evidence held to warrant finding that sellers warranted furnace would heat buyer's house in coldest weather. Schlichting v. Rowell [Iowa] 119 NW 151. Where deposit on sale of newspaper route was to be returned in case business did not show average weekly "income" of $18, buyer was not entitled to return of deposit on proof that weekly "profits" were less than $18. Levine v. Field, 114 NYS 819. In action to recover price paid for horses, plaintiff having rescinded sale for breach of warranty, finding by jury, on conflicting evidence, of warranty and breach thereof not disturbed. Mitchell v. Emmons [Me.] 71 A 321.

**53.** In suit to rescind for fraud, instructions held inapplicable to issues made by pleadings. Grojean v. Darby [Mo. App.] 116 SW 1062. In action to rescind sale of piano and recover price paid, answer was only general denial. Held, seller could not complain of instruction on ground that it failed to submit issue of abatement of part of price for use of piano, which was not pleaded. Jesse French Piano & Organ Co. v. Garza & Co. [Tex. Civ. App.] 116 SW 150.

**54. Search Note:** See notes in 3 L. R. A. (N. S.) 1042.

See, also, Sales, Cent. Dig. §§ 1146-1206; Dec. Dig. §§ 404-424; 24 A. & E. Enc. L. (2ed.) 1149; 19 A. & E. Enc. P. & P. 74.

**55.** If seller of hay agreed to press it and refused to do so, his refusal was breach of contract, and buyer could press it and recover damages. Austin v. Langlois, 81 Vt. 223, 69 A 739.

**56.** Failure of seller to deliver instalment of ice gave buyer right to rescind entire contract and sue for damages. Wolfert v. Caledonia Springs Ice Co. [N. Y.] 88 NE 24.

**57.** Where seller of cattle refused to deliver as agreed, buyer could treat refusal as breach and sue at once for damages. Caley v. Mills [Kan.] 100 P 69.

**58.** Where seller notifies buyer that goods will not be sent, formal demand is not prerequisite to action for damages. Packers Fertilizer Ass'n v. Harris [Ind. App.] 85 NE 375.

**59.** Under code, art. 1913, one cannot claim damages for breach of contract, where he himself has made default; hence buyer of lumber cannot recover damages for refusal to deliver where he himself has failed to make payments as required, and seller has discontinued deliveries for that reason. Sitman v. Lindsey [La.] 48 S 646. Where seller fails to make shipments as agreed, buyer may abandon contract and sue for damages for seller's breach, but he cannot withhold payments to force shipments without himself breaking the contract. Harris Lumber Co. v. Wheeler Lumber Co. [Ark.] 115 SW 168.

**60.** To recover for breach by the seller, the buyer must show performance or a tender thereof by himself. Catlin v. Jones [Or.] 97 P 546. If present at the time and place of delivery, he must show payment or a tender thereof. Id.

**61.** No recovery for breach of contract to deliver corporate stock without proof that

missibility [65] and sufficiency [66] of evidence, and instructions,[67] in actions by the buyer, are given in the notes. For breach of a contract to sell, the vendee cannot recover damages from a subsequent vendee, though the latter had knowledge of the existence of the prior contract.[68]

(§ 11) *D. Action for breach of warranty.*[69]—See 10 C. L. 1563—An express warranty is broken, if at all, at the time of the sale, and the right of action for damages accrues at once.[70] The action may be maintained without returning the property or giving notice,[71] unless such conditions are imposed by the contract, and are not waived by the seller.[72] In order to recover, plaintiff must allege [73] and prove,[74]

plaintiffs offered to perform and are able and willing to do so. Phelan v. Jones, 114 NYS 9. Whether buyer was ready, able, and willing to perform for jury though agent did not have money with him at time of delivery, there being evidence that he could have obtained it. Catlin v. Jones [Or.] 97 P 546. In action for damages for failure to deliver goods, defense was alleged rescission of contract for failure of plaintiff to make payments. Held, an offer to deliver for cash did not limit plaintiff to nominal damages, when jury found such offer was not in good faith and that defendants could not deliver. Harrison v. Argyle Co., 128 App. Div. 81, 112 NYS 477.

62. Allegations of general damages for breach of contract by failure to deliver goods held sufficient, liberally construed. Harrison v. Argyle Co., 128 App. Div. 81, 112 NYS 477. In action for breach of contract defendant may, under general denial, show that broker who signed contract failed to report it to defendant for confirmation, as required by rules of association of which parties were members. Floresville Oil & Mfg. Co. v. Texas Refining Co. [Tex. Civ. App.] 118 SW 194. Where statement of claim for damages for nondelivery of goods was general and alleged market price in France, place of delivery, affidavit of defense denying market price in France is denial of damage sufficient to prevent summary judgment. Connilleau v. Rogers, Holloway & Co., 162 F 998.

63. Defendant having authority to sell cattle, as shown by evidence, issue as to wife's ownership should have been ignored. Gibbens v. Hart [Tex. Civ. App.] 117 SW 168.

64. Where suit for damages alleged contract to deliver wood during winter as ordered, there could be no recovery on proof of contract to deliver during summer. Barber v. Ozark Imp. Co., 131 Mo. App. 717, 111 SW 846. Where complaint in action for breach by buyer alleged agreement to buy such ties as plaintiff could procure and deliver, and breach thereof, and proof showed agreement to buy certain ties then belonging to a designated person, variance was fatal. Nashville, C. & St. L. R. Co. v. Wood [Ala.] 46 S 561.

65. Where plaintiff sued for failure to deliver and defendant claimed right to withhold shipments until previous bills were paid, evidence that defendant had held back other shipments, and that price had gone up, was irrelevant. Smith & Co. v. Russell Lumber Co. [Conn.] 72 A 577. Where parties agreed on what would be performance of original contract, proof that such performance was not made was admissible in action for breach of contract. Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92. In action by buyer for breach by seller, where seller claimed different contract, and that buyer had violated it to seller's damage, proof of damage, including amount, was admissible to prove contract, though seller did not claim damages, jury being properly instructed. Austin v. Langlois, 81 Vt. 223, 69 A 739. Action by buyer to recover difference between contract price of goods rejected because not as ordered and what buyer was obliged to pay elsewhere. Evidence that seller sold rejected goods to another at higher price inadmissible. Merchants' Grocery Co. v. Ladoga Canning Co. [Ark.] 117 SW 767. Action for damages by buyer which had rejected goods shipped. Card quoting prices on goods inadmissible without proof that it was generally relied on in trade. Id.

66. Evidence held to sustain verdict for plaintiffs in action for damages for failure to deliver property sold. German Ins. Bank v. Martin [Ky.] 114 SW 319. Evidence held not to show contract for sale of corn, but only negotiations which did not result in sale. Schon-Klingstein Meat & Grocery Co. v. Snow, 43 Colo. 538, 96 P 182.

67. "Sound merchantable corn" and "good merchantable corn" held equivalent in meaning; that court used former in instructions and contract used latter phrase, not error, in action for damages for failure to deliver. Stohr v. Hickman Grain Co. [Ky.] 116 SW 784.

68. Bonds sold to defendant after sellers had contracted to sell to plaintiff. Sweeney v. Smith, 167 F 385.

69. **Search Note.** See notes in 3 L. R. A. (N. S.) 465; 12 Id. 540.

See, also, Sales, Cent. Dig. §§ 1207-1320; Dec. Dig. §§ 425-449.

70. An express warranty is broken, if at all, when delivery is made and title passes, but this does not give purchaser right to rescind but gives right of damages for breach of warranty. Giordano v. Nizzari, 115 NYS 719. Where unsound property is sold with warranty, warranty is broken and cause of action accrues and **limitations** commence to run at date of sale. Woodland Oil Co. v. Byers & Co. [Pa.] 72 A 518. Action for breach of warranty not controlled by Code Civ. Proc. § 338, subd. 4, requiring actions based on fraud to be brought within three years. Murphy v. Stelling [Cal. App.] 97 P 672.

71. Mayer v. Automobile Exchange, 125 Ill. App. 648. Where wheat is sold under an executory contract, and wheat delivered is inferior in quality to that contracted for, buyer may retain inferior wheat and recover damages for breach of contract by seller, without returning wheat or giving any notice to seller. Rosenbaum Grain Co. v. Pond Creek Mill & Elevator Co. [Okl.] 98 P 331.

72. See, also, ante, §§ 8D, 8E. Fact that notice of failure of machine to work properly

by competent and relevant evidence,[75] a warranty, a breach thereof, and consequent damage. An action for trespass on the case for deceit lies for breach of warranty in the same jurisdictions.[76]

Breach of warranty of title, if any, occurs at time of sale, and cause of action then accrues.[77] The buyer may maintain an action for breach of warranty of title without returning or offering to return the property to the seller,[78] and a delivery to one claiming the goods without an offer to return to the seller, or giving him an opportunity to retake the goods, does not bar the action.[79] Where goods sold with warranty of title are subject to a lien at the time, the buyer may redeem from the lien and recover the amount paid from the seller.[80] Where property sold under warranty against encumbrances is taken from the purchaser by a mortgagee, the purchaser may maintain against the seller either an action in trespass on the case for the false warranty [81] or an action in assumpsit for the breach.[82]

(§ 11) *E. Recovery of chattel; replevin or conversion.*[83]—See 10 C. L. 1583—If the buyer has fully performed,[84] he is entitled to possession of the property. In an

was not given seller in manner contemplated by warranty immaterial, where seller acted upon same notice and sent an expert to examine machine, and did everything it could have done had regular notice been given. Buchanan v. Minneapolis Threshing Mach. Co. [N. D.] 116 NW 335.

**73. Pleading:** A general averment that plaintiff warranted the article sold will support proof of either an express or implied warranty. Segerstrom v. Swenson, 105 Minn. 115, 117 NW 478. Complaint held to show sale and warranty by both defendants. Murphy v. Stelling [Cal. App.] 97 P 672. Complaint held to state cause of action for misrepresentations and breach of warranty of boiler. Williams v. Roper Lumber Co. [C. C. A.] 167 F 84. Petition construed as action for breach of warranty of title and not for damages for deceit. Burpee v. Holmes [Ga.] 64 SE 486. Where petition alleged that, at time of purchase of jack, seller falsely represented that jack was sound and good foal getter and that buyer bought in reliance thereon, it stated cause of action for breach of warranty, notwithstanding other allegations as to fraud. Chestnut v. Ohler [Ky.] 112 SW 1101.

**74. Burden of proof:** Plaintiff must prove warranty, breach, and damage. Excelsior Coal Co. v. Gildersleeve [C. C. A.] 160 F 47. Burden of proving cement not as contracted for rested on buyer, setting up breach of warranty. Burt v. Garden City Sand Co., 237 Ill. 473, 86 NE 1055. In action for breach of contract, there was evidence that defendants had fraudulently commingled two grades of goods and charged higher price for all. Held, burden was on defendants to show amount of higher grade actually delivered. Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92.

**Sufficiency of evidence:** Evidence sufficient to show that original contract for computing scale was not modified, and to show breach of warranty. Moneyweight Scale Co. v. Hjerpe, 106 Minn. 47, 118 NW 62. Evidence held to sustain finding and judgment for damages for breach of warranty of wheat sold. Worrall Grain Co. v. Johnson [Neb.] 119 NW 668. Evidence sufficient to warrant finding of breach of warranty of heating plant, and verdict for damages. Cooper v. Scott Co. [Iowa] 120 NW 631. Evidence warranted verdict for plaintiff in action for breach of warranty of barge; error to direct verdict for defendant. Excelsior Coal Co. v. Gildersleeve [C. C. A.] 160 F 47. Evidence insufficient to show warranty of canned tomatoes. Krikorian v. Preiser, 115 NYS 82. In action for damages for breach of warranty of rope furnished to lower safe, mere fact that rope broke would not be conclusive, res ipsa loquitur doctrine not being applicable; it should appear that rope was being properly used and broke solely from weight of safe. Oregon Auto-Dispatch v. Portland Cordage Co. [Or.] 95 P 498.

**Variance:** In action to recover on warranty that horse sold was sound, allegation that it was suffering from disease or defect of back, and proof that it died of another disease, was not fatal variance. McCullough v. Dunn [Neb.] 119 NW 1127.

**75.** Where contract of sale referred specifically to certain lots of fruit sold, oral evidence was inadmissible to show warranty that fruit would be equal to sample. Germain Fruit Co. v. J. K. Armsby Co., 153 Cal. 585, 96 P 319. Tests after condition of article has changed, not admissible. Burt v. Garden City Sand Co., 141 Ill. App. 603.

**76.** Action for trespass on the case for deceit held to lie where warranty of bridgework on plaintiff's teeth was broken by substitution of inferior material for gold which was agreed to be furnished and used. Demers v. Andrews Bros. [R. I.] 69 A 923.

**77, 78, 79.** Hartley v. Ratman, 200 Mass. 372, 86 NE 903.

**80.** Coal held subject to lien for unpaid customs duty at time of sale. North American Commercial Co. v. North American Transportation & Trading Co. [Wash.] 100 P 985.

**81, 82.** Arnold v. White, 153 Mich. 607, 15 Det. Leg. N. 564, 117 NW 164.

**83. Search Note:** See Sales, Cent. Dig. §§ 1140-1145; Dec. Dig. §§ 399-403; 19 A. & E. Enc. P. & P. 71.

**84.** Right of buyer to recover possession of property depends upon compliance with terms of contract, and this may be question for jury. C. B. Coles & Sons Co. v. Standard Lumber Co. [N. C.] 63 SE 736.

action to recover from a subsequent vendee, the rights of the latter may be determined.[85] Evidence tending to show exercise of ownership by the buyer is admissible in an action of replevin against the seller.[86]

(§ 11) *F. Lein for price paid.*[87]—See 10 C. L. 1564

(§ 11) *G. Recoupment and counterclaim.*[88]—See 10 C. L. 1564—In an action by the seller for the price, the buyer may recover, by way of recoupment or counterclaim, damages for breach of contract,[89] or warranty,[90] or for fraud,[91] where the right to claim such damages has not been waived or lost.[92] In an action on account for the price of certain goods sold and delivered, defendant cannot recoup damages for delay in delivery of other goods.[93] A counterclaim must be pleaded as such,[94] and the pleading must contain the necessary allegations to support the claim.[95] Defendant must prove the breach of contract or warranty[96] and damage sustained.[97]

**85.** Where buyer had had possession, but former owner regains possession and sells to another, only part of price being paid, first buyer, after demand on second, has right to possession of goods, though second buyer's special interest may be determined in same action. O'Neill v. Thompson, 152 Mich. 396, 15 Det. Leg. N. 299, 116 NW 399.

**86.** That buyer had had property insured. Andrews v. Grimes, 148 N. C. 437, 62 SE 519.

**87. Search Note:** See notes in 83 A. S. R. 451.

See, also, Liens, Dec. Dig. § 7; Sales, Dec. Dig. § 178.

**88. Search Note:** See Sales, Cent. Dig. §§ 1207-1320; Dec. Dig. §§ 425-449.

**89.** In action for price of goods, defendant properly pleaded as counterclaim that contract required other deliveries which plaintiff failed to make. Brooklyn Creamery Co. v. Friday, 137 Wis. 461, 119 NW 126. In action for price of boiler, work of putting it on foundation and building chimney "suitable for the boiler," defendant may counterclaim for cost of necessary extension of chimney to make it conform to contract requirements. Logan Iron Works v. Klein, 132 App. Div. 16, 116 NYS 333. One who bought "run of mine" coal and received and kept it could not defeat right to recover price unless coal was absolutely worthless. He might reduce amount if quality was poor. Home Ice Factory v. Howells Min. Co. [Ala.] 48 S 117. That seller's agent told buyer of coal that it would burn brick, buyer having told him he wanted coal for that purpose, did not entitle buyer to reduction in price on showing coal to be inferior, in absence of warranty. Woodridge v. Brown, 149 N. C. 299, 62 SE 1076.

**90.** Where goods are sold on warranty and there is breach thereof, buyer may retain goods and in action for price recoup in damages difference between actual and warranted value. Strauss v. American Chewing Gum Co. [Mo. App.] 114 SW 73. Buyer of piano, on discovering that it was not as represented, could keep it, relying on warranty, and in action by seller's for price could set up breach of warranty and recover as damages difference between actual value and value if it had been as warranted. Mathes v. McCarthy, 195 N. Y. 40, 87 NE 768. Contract for furnaces, with guaranty, provided that buyer would provide foundations, and, if furnaces proved unsatisfactory after 30 days, buyer could remove materials and hold furnaces subject to seller's order. Held, remedy not exclusive. Buyer could counterclaim for damages for breach of warranty in suit to foreclose lien for price. White Furnace Co. v. Miller Transfer Co., 131 App. Div. 559, 115 NYS 625. If contract provision for rescission was intended to be exclusive remedy in case of breach of warranty, this was modified by payments made by buyer on assurance by seller that furnaces sold would work. Id.

**91.** In action on notes for price of business, where it appeared plaintiff had been guilty of fraud and had violated agreement not to engage in business, defendant could recover on counterclaim for money paid. Schwartz v. Smoke, 115 NYS 221.

**92.** The right to set up a counterclaim for damages for breach of warranty exists only where the buyer would have had the right to rescind. Acme Harvester Mach. Co. v. Barkley [S. D.] 118 NW 690. Defendant bought machines and gave notes for price. Thereafter, notes were renewed and time extended and payment on account made, all without objection that certain appliance had not been furnished with machine. Held, in action on notes 2 years after purchase, defendants could not recoup for appliance not furnished. Hinchman v. Johnson, 108 Md. 661, 71 A 424. Mere partial payment of price is not a waiver of the right to counterclaim for damages for breach of warranty in action for the balance of the price. Keniston v. Todd [Iowa] 117 NW 674. If a waiver or presumption of settlement does exist, it does not eliminate the right to set off damages to the extent of the unpaid portion of the price. Id.

**93.** Contract being severable. Barlow Mfg. Co. v. Stone, 200 Mass. 158, 86 NE 306.

**94.** Under a defense that goods did not correspond to sample, there can be no recovery as upon a counterclaim for breach of warranty. Wilmerding v. Strouse, 112 NYS 1091.

**95.** Answer insufficient as counterclaim for damages for breach of warranty which did not allege value of machine if it had been as warranted. Acme Harvester Mach. Co. v. Barkley [S. D.] 118 NW 690. In action for price of engine, answer alleging that seller knew it was to be used to operate ginnery, that it was not delivered until 40 days of ginning season had expired, and that buyer thereby suffered loss, held to state counterclaim for rental value of ginnery plant dur-

(§ 11) *H. Choice and election of remedies.*[98]—See 10 C. L. 1584—Where the sale is induced by fraud, the vendee may, on discovery of the fraud, rescind, or retain the goods and recover damages for the fraud.[99] An election not to rescind is final.[1] Where there is a breach of warranty, the buyer may rescind and reject the goods,[2] though the authorities are not agreed as to this,[3] or accept the goods and bring an action for breach of warranty,[4] or recoup by way of counterclaim for damages, in an action by the vendor for the price.[5] A court of equity will not entertain a suit for the specific performance of a contract for the sale of chattels unless special facts are alleged and proved showing that an award of damages for breach of the contract would not afford adequate relief.[6]

§ 12. *Damages for breach of sale and warranty. A. General rules.*[7]—See 10 C. L. 1565—Only damages which result from the alleged breach are recoverable.[8] Interest on damages cannot be recovered[9] until the amount is made certain and the right thereto has accrued.[10] The amount is usually a question for the jury.[11]

ing time alleged. Standard Supply Co. v. Carter, 81 S. C. 181, 62 SE 150. Where breach of warranty is relied on, the essential allegations are the terms of the warranty, the breach and facts from which damages may be inferred. Answer sufficient in action for price of piano. Segerstrom v. Swenson, 105 Minn. 115, 117 NW 478. Counterclaim for damages for failure to deliver held not defective because not alleging buyers readiness and willingness to perform, since it alleged refusal by seller to perform, which relieved buyer of duty of performing. Halladay-Klotz Land & Lumber Co. v. Beekman Lumber Co. [Mo. App.] 116 SW 436.

**96.** Evidence sufficient to show that engine conformed to specifications and did required work. Hendry v. Irvine [Cal. App.] 99 P 408. Evidence held not to warrant finding that machine was worthless. Keniston v. Todd [Iowa] 117 NW 674.

**97.** In action for breach of contract to buy lumber, proper to instruct that defendants could not recover on counterclaim for damages for refusal to deliver as agreed, where there was no proof that defendants could not have purchased in open market without loss. Salmon v. Helena Box Co. [C. C. A.] 158 F 300.

**98. Search Note:** See Sales, Cent. Dig. §§ 1109, 1140, 1146, 1207, 1208; Dec. Dig. §§ 390, 399, 404, 425.

**99.** One induced to purchase stock by fraudulent representations could rescind, return stock and demand price paid, or affirm contract and sue for damages for fraud. Elliott v. Brady, 192 N. Y. 221, 85 NE 69. Where purchaser retains property and does not offer to rescind, but brings action for damages for fraud and deceit of the seller, he ratifies the sale, and the action is in tort for damages for deceit. Kemmerer v. Pollard [Idaho] 96 P 206. One induced to buy stock by fraud may rescind, or may retain stock and recover from seller difference between actual value of stock and value as it would be if representations were true. Jacobsen v. Whitely [Wis.] 120 NW 285. Vendee of corporate stock, on discovery of fraud, had right to rescind, or waive fraud and retain stock. Rosenberg v. McKinney [Wis.] 120 NW 230.

**1.** Clampitt v. Doyle [N. J. Err. & App.] 70 A 129.

**2.** Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92.

**3.** See ante, § 11A.

**4.** Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92. See, also, ante, § 11D.

**5.** Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92. See, also, ante, § 11G.

**6.** Harle v. Brennig, 131 App. Div. 742, 116 NYS 51.

**7. Search Note:** See notes in 6 C. L. 1372; 7 Ann. Cas. 280.

See, also, Sales, Cent. Dig. §§ 1095-1107, 1170-1201, 1258-1301; Dec. Dig. §§ 380-384, 414-418, 438-442.

**8.** Where damage to buyer of engine was caused by inadequacy of pump to do required work, and engine was delivered before pump, delay in delivery of engine did not cause damage to buyer. Hendry v. Irvine [Cal. App.] 99 P 408.

**9.** Interest not allowable on damages for breach of contract by seller. Ellsworth v. Knowles [Cal. App.] 97 P 690.

**10.** Interest should not be allowed on damages for breach of warranty where they are unliquidated. Krasilnikoff v. Dundon [Cal. App.] 97 P 172. Damages capable of being made certain by calculation draw interest from accrual of right thereto, under Civ. Code, § 3287. Profits lost by refusal of buyer to take goods draw interest from filing of complaint for damages. Central Oil Co. v. Southern Refining Co. [Cal.] 97 P 177. In action for breach, interest is allowable only from date of breach, not from date of contract. Loomis v. Norman Printers' Supply Co. [Conn.] 71 A 358. Interest recoverable on damages for failure to deliver from date of agreed delivery. Long Pole Lumber Co. v. Saxon Lime & Lumber Co., 108 Va. 497, 62 SE 349.

**11.** Evidence as to damages for breach of warranty of press not conclusive. Case should have gone to jury. Golding v. Russell, 131 App. Div. 540, 115 NYS 359. Damages awarded in action for breach of contract not excessive where it appeared that seller had fraudulently commingled goods of two grades and charged for higher grade. Jury warranted in finding all goods delivered to be of lower grade. Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92.

(§ 12) *B. Breach by seller.*[12] See 10 C. L. 1565—For breach by the seller, the buyer may recover only the actual loss[13] sustained by him as a consequence of the breach,[14] less such sum as he could have saved by reasonable efforts to mitigate his loss,[15] where such efforts are required by the circumstances.[16]

*On failure to deliver.* See 10 C. L. 1566—As a general rule, the measure of damages for failure to deliver is the difference between the contract price and the market price at the time and place of delivery.[17] Where similar goods are obtainable in the market[18] and where the delivery is to be by instalments, the value is to be estimated as of the time the several instalment ought to have been delivered.[19] If

**12. Search Note:** See notes in 6 Ann. Cas. 976; 7 Id. 1175; 10 Id. 654.

See, also, Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.

**13.** Where machine delivered was not kind ordered and buyer had guaranteed certain freight rate, he could recover as damages for breach of contract, on account of freight, only the amount he actually paid. Connell v. Harron, 7 Cal. App. 745, 95 P 916. Where seller fails to deliver, and buyer buys elsewhere and makes same profit he would have made had seller delivered in full, buyer cannot recover for lost profits on goods so obtained and resold. Packers' Fertilizer Ass'n v. Harris [Ind. App.] 85 NE 375. In action for damages for failure to deliver goods within time agreed, which had been paid for by other goods and notes, it was error to allow recovery for value of goods not delivered, less notes, without also deducting an amount which had been due seller prior to contract, which was made part of price. Loomis v. Norman Printers' Supply Co. [Conn.] 71 A 358.

**14.** Measure of damages where lumber delivered was not up to specifications was difference between contract price and market price at time and place of delivery, where suitable lumber had to be purchased in market. Bushnell v. King Bridge Co. [Iowa] 118 NW 407. In replevin for goods wrongfully detained without payment, buyer counterclaimed for damages for failure to deliver agreed quantity. Measure of damages on counterclaim was difference between contract price and value at date of breach, less damages caused by defendant's wrongful detention. Howard v. Haas, 131 Mo. App. 499, 109 SW 1076. In action for breach of contract to deliver stock, defendant tendered part of it. Held, plaintiff was entitled to stock tendered and damages for failure to deliver the balance which was agreed to be delivered by contract. Shuler v. Allam [Colo.] 101 P 350. Contract for sale of rolls provided that they were to be erected in buyer's mill and given 30 days' trial and returned if unsatisfactory. Rolls proving unsatisfactory, seller was not liable for cost of foundation for rolls, contract having provided that seller should stand only expense of expert, who put them up. Sturtevant Mill Co. v. Kingsland Brick Co., 74 N. J. Law, 492, 70 A 732. Engine delivered being in accordance with contract specifications, expenses incurred in making it run were not chargeable to seller. Hendry v. Irvine [Cal. App.] 99 P 408.

**15.** Where buyers were informed by seller's agent that seller could not deliver, they should have bought elsewhere; not having done so, they could not recover from seller difference between contract price and later market price when they bought. Aronson v. H. B. Claplin Co., 115 NYS 97.

**16.** Where defendant refused to deliver salmon contracted for on ground that association which it represented refused to deliver goods for exportation, having another agent for such business, plaintiff was not bound to try to buy the goods from association to mitigate damages. Delafield v. J. K. Armsby Co., 131 App. Div. 572, 116 NYS 71. Where buyers sought as damages only difference between contract and market price at time of delivery and made no claim for lost profits, they were not obliged to go into the market and try to buy corn to lessen damages. Stahr v. Hickman Grain Co. [Ky.] 116 SW 784. Where buyer of goods did not concede seller's rescission in May of contract to deliver in September, buyer was not bound to order elsewhere to reduce loss from seller's breach, especially where market was falling, and goods could not be bought on open market but had to be ordered in advance. Harrison v. Argyle Co., 128 App. Div. 81, 112 NYS 477.

**17.** Barton-Child Co. v. Scarborough, 61 Misc. 334, 114 NYS 1043; Long Pole Lumber Co. v. Saxon Lime & Lumber Co., 108 Va. 497, 62 SE 349; Bushnell v. King Bridge Co. [Iowa] 118 NW 407; Piedmont Wagon Co. v. Hudgens, 4 Ga. App. 393, 61 SE 835; Schon-Klingstein Meat & Grocery Co. v. Snow, 43 Colo. 538, 96 P 182; Carney v. Vogel [Wash.] 100 P 1027; Delafield v. J. K. Armsby Co., 131 App. Div. 572, 116 NYS 71; Richner v. Plateau Live Stock Co. [Colo.] 98 P 178. Difference between the contract price and the price the buyer is compelled to pay in the open market. Difference between contract price and market price at agreed time of delivery or within reasonable time thereafter. Strohmeyer & Arpe Co. v. Hartley Silk Mfg. Co., 130 App. Div. 102, 114 NYS 287. Breach of contract to deliver stock. Sloan v. McKane, 131 App. Div. 244, 115 NYS 648. Failure to deliver staves. Lamer & Co. v. Little Rock Cooperage Co. [Ark.] 115 SW 401. Failure to deliver cattle. Gibbens v. Hart [Tex. Civ. App.] 117 SW 168. Where contract called for delivery of corn on or before January 1, 1908, measure of damages for failure to deliver was difference between contract price and market price January 1, 1908. Stahr v. Hickman Grain Co. [Ky.] 116 SW 784. Upon failure to deliver structural steel within reasonable time, buyers could buy elsewhere at best price and recover increase in price over contract price as damages. Kelley, Maus & Co. v. Hart-Parr Co., 137 Iowa, 713, 115 NW 490.

**18.** If goods are reasonably obtainable in market. Anderson v. Savoy, 137 Wis. 44, 118 NW 217.

there is no market value at the place of delivery, the market value in the nearest available market is the basis for estimating damages,[20] and if the buyer purchases goods in such market, the cost of transportation and necessary expenses may be added to his damages.[21] Where like goods cannot be obtained in the open market,[22] special damages are recoverable,[23] such as loss resulting from failure to procure the goods.[24] Special damages are recoverable for breach by the seller when they are the result of special circumstances, known to the parties at the time of the sale, and are the natural and direct result of the breach, and ascertainable with reasonable certainty.[25] Thus, loss of profits may be recovered as damages for breach of contract if reasonably within contemplation of parties and if established with reasonable certainty.[26] Prospective and anticipatory profits, purely speculative and conjectural, are not recoverable.[27]

**19, 20, 21.** Long Pole Lumber Co. v. Saxon Lime & Lumber Co., 108 Va. 497, 62 SE 349.

**22.** Special damages arising from purchase of goods elsewhere on failure to deliver, can be recovered only on allegation and proof that there is no market price. Strohmeyer & Arpe Co. v. Hartley Silk Mfg. Co., 130 App. Div. 102, 114 NYS 287.

**23.** Where buyer tried to buy goods which seller did not deliver in open market but failed to get any, ordinary rule of damages did not apply. Schwartz v. Morris & Co., 61 Misc. 335, 113 NYS 524. Where like goods cannot be bought in the open market and the vendor knows that the goods are to be used for a certain purpose by the purchaser, the vendor is liable for special damages arising, without fault of the purchaser, from the failure to deliver. Richner v. Plateau Live Stock Co. [Colo.] 98 P 178.

**24.** If goods cannot be obtained in market, measure of damages for failure to deliver is difference between contract price and what goods would have been worth at agreed time of delivery. Anderson v. Savoy, 137 Wis. 44, 118 NW 217. Where vendor knew hay was to be used to feed cattle, and purchaser was unable to procure elsewhere hay sufficient to properly sustain them, he could recover as damages, for failure to deliver, expense of procuring other hay and loss and depreciation in value of cattle. Richner v. Pleateau Live Stock Co. [Colo.] 98 P 178. In action for breach of contract to ship machine of certain kind, where buyer did not prove what he could have bought an equivalent machine for in nearest market, he could recover only amount paid by him on account of the price, under Civ. Code, § 3308 (excess in value to buyer over amount due seller). Connell v. Harron, 7 Cal. App. 745, 95 P 916.

**25.** Iowa Mfg. Co. v. B. F. Sturtevant Co. [C. C. A.] 162 F 460. Defendant, in suit for price, entitled to counterclaim for damages caused by delay in delivery, which caused delay in completion of contract, for which they were charged $25 a day liquidated damages, where plaintiff, seller, knew that defendants must have goods by certain day and would be liable for liquidated damages in case of delay in completing contract Id. Evidence held to show that defendants in fact lost $1,475 by delay. Id. If a seller knows that machinery sold is to be installed in a certain plant, the measure of damages for delay in delivery is the rental value of the plant for the time during which its operation was prevented. Failure to deliver engine to operate cotton ginnery. Standard Supply Co. v. Carter, 81 S. C. 181, 62 SE 150. Where buyer of coal was required by contract to have vessels ready to receive and convey coal at time delivery was to be made, seller was liable to buyer for demurrage as natural and probable result of seller's delay in making delivery. Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co., 199 Mass. 22, 84 NE 1020. For failure to deliver lumber in accordance with specifications, buyer could not recover as damages expense of guarding bridge during delay caused by failure to deliver suitable lumber, seller not having notice of use to which lumber would be put. Bushnell v. King Bridge Co. [Iowa] 118 NW 407.

**26.** Loss of profits on timber recoverable on breach of contract by seller. Jefferson Sawmill Co. v. Iowa & Louisiana Land Co., 122 La. 983, 48 S 428. If the seller knows that the goods are the subject of an agreement under which the purchaser must deliver and for which he is to obtain an advanced price, the purchaser may recover the profits he would have made. Barton-Child Co. v. Scarborough, 61 Misc. 334, 114 NYS 1043. If seller ought reasonably to have contemplated resale by buyer, and buyer was unable to buy goods, which seller refused to deliver, elsewhere, the loss of profits on resale could be considered on issue of damages. Delafield v. J. K. Arsmby Co., 131 App. Div. 572, 116 NYS 71. Where parties understood that plaintiffs were to use tin cans which defendants agreed to furnish to can fruits for sale, plaintiffs could show profits they would have made on sale of canned fruit which they would have canned and sold had defendants performed. Pacific Sheet Metal Works v. Californian Canneries Co. [C. C. A.] 164 F 980.

**27.** Where no resale of wagons was alleged, and it was conjectural whether there would be resale, profits could not be recovered. Piedmont Wagon Co. v. Hudgens, 4 Ga. App. 393, 61 SE 835. Loss of profits expected to be made by operation of ginnery, and expected advantages in collection of accounts, by taking cotton and seeds, held too speculative and remote to be recoverable as damages for failure to deliver machinery to operate ginnery. Standard Supply Co. v. Carter, 81 S. C. 181, 62 SE 150. Where contract called for 20,000 barrels of oil, with privilege of 15,000 more, and partles understood oil was for use as fuel in operation of sugar plantation, and that only enough oil in excess of 20,000 barrels was to be delivered to handle sugar crop, and seller deliv-

(§ 12) *C. Breach by purchaser.*[28] *For nonacceptance.* See 10 C. L. 1567—The measure of damages for refusal to accept is ordinarily the difference between the contract price and market value at time and place of delivery,[29] or at the time of the repudiation of the contract by the buyer.[30] For refusal to accept goods specially manufactured, the measure of damages is the difference between the contract price and the cost of manufacture and delivery.[31] The measure of damages for breach of an executory contract for goods is the expense incurred by the seller, plus profits which would have been made.[32] Where, on default by the buyer, the seller elects to treat the goods as the buyer's and to resell as the buyer's agent, he may recover as damages the contract price, less the amount received from a fair sale, and the expenses of storage and sale, and interest.[33] It is the seller's duty to mitigate his loss by a resale, unless prevented by the buyer.[34] Preventable losses, such as cost of shipping after repudiation by the buyer,[35] or costs of completing manufacture after cancellation of order,[36] cannot be recobered. Where liquidated damages have been provided for,[37] the stipulated sum is recoverable.[38]

(§ 12) *D. Breach of warranty.*[39]—See 10 C. L. 1567—The measure of damages

ered all that was needed, buyer could not recover as damages profits it would have made on difference between 35,000 barrels and quantity delivered, since such damages were not in contemplation of parties. Having suffered no actual damage, buyer could recover nothing. Adeline Sugar Factory Co. v. Evangeline Oil Co., 121 La. 961, 46 S 935.

**28. Search Note:** See notes in 2 Ann. Cas. 1000; 6 Id. 166.

See, also, Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.

**29.** Salmon v. Helena Box Co. [C. C. A.] 158 F 300. Measure of damages for refusal of vendee to accept completely manufactured article is not purchase price but difference between purchase price and market value at time and place when acceptance is required. Malcomson v. Reeves Pulley Co. [C. C. A.] 167 F 939.

**30.** Where contract for sale of iron was entire, measure of damages for breach by buyer, who refused to accept any of iron, was difference between market and contract price on entire amount contracted for, at time of repudiation of contract. Moffat v. Davitt, 200 Mass. 452, 86 NE 929.

**31.** Where article has no fixed market value. Ridgeway Dynamo & Engine Co. v. Pennsylvania Cement Co., 221 Pa. 160, 70 A 557. Damages for refusal to accept steel beams manufactured to order is difference between contract price and cost of manufacture and delivery. Isaacs v. Terry & Tench Co., 113 NYS 731. Proof of sale of beams elsewhere, immaterial. Id. Measure of damages for breach of contract to buy iron manufactured according to defendant's specifications is difference between cost of manufacture and delivery and contract price, where evidence makes calculation of such damages by jury possible. Holliday & Co. v. Highland Iron & Steel Co. [Ind. App.] 87 NE 249. Measure of damages for refusal to take goods manufactured for buyer is difference between cost of manufacture and contract price. Cleveland-Canton Springs Co. v. Goldsboro Buggy Co., 148 N. C. 533, 62 SE 637. Profits lost by breach of contract by buyer, recoverable, since they would be difference between cost and contract price; not conjectural. Gibbes Machinery Co. v. Johnson, 81 S. C. 10, 61 SE 1027.

**32.** Frederick v. Willoughby [Mo. App.] 116 SW 1109.

**33.** Including pay for time as agent. Vanstory Clothing Co. v. Stadiem, 149 N. C. 6, 62 SE 778.

**34.** Though it was seller's duty to lower damages by selling hay which buyer refused to take away, seller was relieved where buyer refused to allow hay to be sold to another or removed. Allen v. Rushforth [Neb.] 118 NW 657.

**35.** Where buyer rescinds before shipment of goods, seller can recover only difference between contract and market price. He cannot enhance damages by shipping goods after rescission by buyer. Frederick v. Willoughby [Mo. App.] 116 SW 1109.

**36.** After cancellation of a contract for manufactured goods by the buyer, the seller cannot complete the manufacture and recover the full contract price. Is bound to reduce damages. Woolf v. Hamburger, 129 App. Div. 883, 114 NYS 186.

**37.** Provision in contract for sale of automobiles for refund of 2½ per cent. in case full number of cars were not sold held simply adjudgment of commissions, and not provision for liquidated damages. Usual damages recoverable for breach by buyer. Klauder v. C. V. G. Import Co., 61 Misc. 255, 113 NYS 716.

**38.** Where order for machinery provided it was not to be countermanded except on payment of 20 per cent. of price, which was to be considered as liquidated damages, that amount was recoverable for breach by buyer. Tidwell v. Southern Engine & Boiler Works [Ark.] 112 SW 152. Each party to agreement of sale of fixtures deposited $100 with third person, to be paid in case of default to other party. Held, there was option to purchase and consideration therefor, and seller, on breach by buyer, was entitled to recover $100 deposited by buyer. Nagel v. Cohen, 112 NYS 1066.

**39. Search Note:** See notes in 3 L. R. A. (N. S.) 1047; 5 Id. 1151; 7 Ann. Cas. 937.

See, also, Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442; 30 A. & E. Enc. L. (2ed.) 209.

for breach of warranty is the actual loss resulting therefrom,[40] which will usually be the difference between the value of the goods received and their value if they had been as warranted or represented.[41] Generally, damages for breach of warranty of quality are to be estimated with reference to values at time and place of delivery.[42] But where property is sold to be used at some place other than that of the sale and delivery, this being known to the seller, damages may be estimated with reference to values at such place.[43] The cost of repairs may in some cases indemnify the buyer and may be considered by the jury, but is not the sole measure of damages.[44] Nominal damages at least may be recovered where goods are returned and others shipped and accepted.[45] For breach of warranty of title, the indemnity provided by the terms of the contract may be recovered.[46]

(§ 12) *E. Evidence as to damages.*[47]—See 10 C. L. 1568—Damages cannot be recovered unless the evidence shows the elements or data on which their computation must be based.[48] The admissibility of evidence usually depends upon the rule of law governing the measure of damages in the particular case.[49]

**40.** Where seed sold under warranty produces crop not injurious to land, but of poorer character or of inferior quality and less value than would have been produced had warranty been fulfilled, the measure of damages is the value of the crop which seed as warranted would ordinarily have produced that year, less expense of raising it, and less value of crop actually raised. Vaughan's Seed Store v. Stringfellow [Fla.] 48 S 410. Where seeds sold under warranty fail to grow or germinate and no crop is produced by them, measure of damages is cost of seed, expense of preparing ground and planting seed, and loss sustained by having ground lie idle. Id. Where seller warranted threshing machine to give satisfaction, and notes were taken for price and sold to bona fide purchaser, buyer was entitled to recover as damages, when machine proved worthless, amount of notes and freight on machines. Pennebaker Bros. v. Bell City Mfg. Co. [Ky.] 113 SW 829. In action for breach of warranty of apricots sold by sample, buyer could recover actual loss, difference between price and amount brought by sale, and also profits lost by reason of fruit not being as warranted; all as general damages. Germain Fruit Co. v. J. K. Armsby Co., 153 Cal. 585, 96 P 319. Where threshing machine, warranted to give satisfaction, proved worthless, buyer had right to recover amount of notes given, which had passed to bona fide holders, and freight paid by him. Pennebaker Bros. v. Bell City Mfg. Co. [Ky.] 113 SW 829. In action for damages for breach of warranty of fruit sold by sample, buyer could recover, as general damages, actual loss, difference between price paid and amount for which fruit sold, and loss of profits by reason of fruit not being as represented, and latter loss need not be alleged as special damages. Germain Fruit Co. v. J. K. Armsby Co., 153 Cal. 585, 96 P 319. Seller of corporate stock guaranteed that liabilities of company do not exceed by more than $100 an amount set forth. Held, he was liable to buyer for amount of excess of liabilities over that set forth, less $100. Childs v. Krey, 199 Mass. 352, 85 NE 442.

**41.** Bodger v. Hills, 113 NYS 879; Jacobsen v. Whitely [Wis.] 120 NW 285; Poirier Mfg. Co. v. Griffin, 104 Minn. 239, 116 NW 576; Sears v. Bailey, 58 Misc. 145, 110 NYS 467. Measure of damages for breach of warranty of engine is difference between value of engine received and cost of engine such as described by contract and warranty. Hardie-Tynes Mfg. Co. v. Eastern Cotton Oil Co. [N. C.] 63 SE 676. Measure of damages for delivery of oats inferior in quality to those ordered is difference between value of those ordered and paid for and those received. Browne v. Allen [Tex. Civ. App.] 116 SW 133. Measure of damages for breach of warranty that indebtedness outstanding against stock of goods was certain amount would be difference in value of stock of goods due to such greater indebtedness. Wrenn v. Morgan, 148 N. C. 101, 61 SE 641.

**42.** Krasilnikoff v. Dundon [Cal. App.] 97 P 172.

**43.** Where boilers were for use in Siberia, damages for breach of warranty of capacity properly estimated with reference to value in Siberia. Krasilnikoff v. Dundon [Cal. App.] 97 P 172.

**44.** Hardie-Tynes Mfg. Co. v. Eastern Cotton Oil Co. [N. C.] 63 SE 676.

**45.** Where steel was rejected and returned as unsatisfactory, and new lot shipped and accepted, buyer was entitled to at least nominal damages for breach. G. & W. Mfg. Co. v. Denman, 113 NYS 128.

**46.** Contract for ties provided that seller should indemnify buyer for loss, damages, and expenses of litigation, if any, to protect title. Cost of proceedings by government to recover ties wrongfully cut, recoverable, but not cost of wrongful attachment proceedings. McDonald v. Clearwater Shortline R. Co., 164 F 1007.

**47. Search Note:** See Sales, Cent. Dig. §§ 1095-1097, 1170-1173, 1258-1283; Dec. Dig. §§ 380-383, 414-417, 438-441; 30 A. & E. Enc. L. (2ed.) 225.

**48.** Plaintiff, failing to prove market price at time of delivery of corn, could not recover damages for failure to deliver. Schon-Klingstein Meat & Grocery Co. v. Snow, 43 Colo. 538, 96 P 182. No damages recoverable where private stock was transferred to plaintiff which had been represented to him as treasury stock of the corporation, where there was no evidence to show any difference in the market value. Findlater v. Dorland, 152 Mich. 301, 15 Det. Leg. N. 285, 116

§ 13. *Rights of bona fide purchasers and other third persons.*[50]—See 10 C. L. 1569—In general, the true owner of property cannot be deprived of it without his consent,[51] and his title will prevail as against creditors of one who has possession but no title,[52] in the absence of statutory provisions requiring change of possession or recordation.[53] Thus, a sale by one having no title or authority to sell transfers no title [54] even to a bona fide purchaser for value.[55] Where goods are obtained by fraud, title does not pass, and a subsequent vendee requires nothing,[56] especially where he has knowledge of the fraud.[57] A sale is usually held invalid as to creditors of the seller where the property is allowed to remain in the possession and use of the seller [58] and where delivery is not impossible,[59] though a sale without

NW 410. Where contract included all cattle on farm marked with certain described brands, and other property, and in action for breach by seller the only evidence of the number of cattle was statement of seller that he supposed there were 1,000 or 1,200 and there was no proof of market value, judgment for damages could not be sustained George v. Drawdy [Fla.] 47 S 939. Evidence not sufficient to warrant recovery of damages for failure to deliver ice when it did not show whether ice could reasonably be obtained in market, nor what ice would have been worth if delivered, nor what amount would have been lost by melting and cutting. Anderson v. Savoy, 137 Wis. 44, 118 NW 217.

**49.** Where delivery was to be between April 1 and October 1, evidence of market price in January and February was inadmissible in action for damages for failure to deliver. McManus v. American Woolen Co., 126 App. Div. 68, 110 NYS 680. Upon failure of seller to deliver, buyer need not purchase other goods to fix damages, and proof of such purchase and amount paid would be inadmissible. Strohmeyer & Arpe Co. v. Hartley Silk Mfg. Co., 130 App. Div. 102, 114 NYS 287. In action for damages for failure to deliver goods, evidence of specific contracts of resale at profit was inadmissible where goods had market price. McManus v. American Woolen Co., 126 App. Div. 68, 110 NYS 680. Price at which buyer resold goods inadmissible to show damages for breach of warranty. Bodger v. Hills, 113 NYS 879. In action for damages for failure to deliver poles, that buyer could have bought from other parties was immaterial on question of damages. Carney v. Vogel [Wash.] 100 P 1027. Where defendant counterclaimed for breach of warranty of mare, evidence of value of colt, born since sale and 11 months old, was inadmissible. Sears v. Bailey, 58 Misc. 145, 110 NYS 467.

**50. Search Note:** See notes in 6 C. L. 1379, 1380; 55 L. R. A. 631.

See, also, Sales, Cent. Dig. §§ 657-705; Dec. Dig. §§ 234-245; 24 A. & E. Enc. L. (2ed.) 1161.

**51.** Owner of piano gave bill of sale of it to dealer in part payment for new instrument, and it was agreed that it should remain in customer's home until demanded by dealer. Held, dealer's title good against purchaser at execution sale under judgment against customer. Forbes Piano Co. v. Hennington [Miss.] 48 S 609. Ties having been sold by owner, buyer, who had paid for them, could recover, from one who took part of them after the sale, their value, less what such party had paid to seller on purchaser's check. White v. Ayer & Lord Tie Co. [Ky.] 116 SW 349.

**52.** In replevin suit, evidence held to make prima facie case for plaintiff, showing title in him by bill of sale of goods from defendant's debtor, defendant having caused attachment of goods. Rosenthal v. Rapaport, 115 NYS 1073.

**53.** Under Code, § 2906, sale of drug stock and business without change of possession and without recording of conveyance was void as to existing creditors without notice. Rankin v. Schultz [Iowa] 118 NW 383. Bill of sale and "lease" construed together its chattel mortgage void as against vendor's creditors not being filed. Dickinson v. Oliver [N. Y.] 88 NE 44.

**54.** One who buys property from one having no title or authority to sell acquires no title. Boswell v. Thompson [Ala.] 49 S 73. After completed sale, though without delivery, subsequent sale by first seller transfers no title. McKee v. Bernheim, 130 App. Div. 424, 114 NYS 1080. Where writing showed absolute sale, not mere mortgage, it conveyed good title as against subsequent mortgagee, though it was not recorded. Leak v. Bank of Wadesboro, 149 N. C. 17, 62 SE 733.

**55.** Where one who has possession of property but no title attempts to sell it, the owner can recover, though buyer acts in good faith and pays for property. Hussey v. Blaylock [Okl.] 95 P 773.

**56.** If a buyer who is insolvent fraudulently misrepresents his financial condition and obtains goods with the intention of not paying therefor, title does not pass, and his asignee does not acquire title. Evidence held to show fraud. Lowry v. Hitch's Assignee, 33 Ky. L. R. 573, 110 SW 833.

**57.** Where goods were bought and placed in warehouse and warehouse receipt assigned by buyer to bank and bank sold goods and applied proceeds in payment of indebtedness of buyer to bank, jury was warranted in finding that bank was not bona fide purchaser. American-German Nat. Bank v. Gray & Dudley Hardware Co., 33 Ky. L. R. 547, 110 SW 393. In claim and delivery action to recover goods obtained by fraud, with intent to cheat seller, mere possession by subsequent purchaser who bought in good faith for value without notice of fraud did not warrant entry of judgment against such innocent purchaser. Id.

**58.** W. P. Chamberlain Co. v. Tuttle [N. H.] 71 A 865. Right to locate and acquire land under Texas land certificate is, before location, personal property, and where certificate was sold but vendor kept possession,

change of possession may be valid as against all except creditors and bona fide purchasers for value.[60] Where the owner and shipper of goods has parted with his control over them and cannot change their destination, his creditors cannot attach them.[61] Inadequacy of consideration is to be taken into account in determining the good faith of a purchaser.[62] Conveyances in fraud of creditors are elsewhere more fully discussed.[63] In the absence of statutory provision to the contrary, an absolute, unconditional and bona fide sale vests the title in the purchaser free from contractual claims against the seller.[64] A purchaser of an order on a manufacturer for the delivery of personal property is justified in assuming that the order is valid and free from defenses in the absence of any representations to the contrary.[65]

§ 14 *Conditional sales. Definition, validity and formation.*[66]—See 10 C. L. 1569.—By the term "conditional sale" is usually meant a sale wherein title is reserved by the vendor until full payment has been made,[67] though it is also used to designate a sale in which the transfer of title in the thing sold is made to depend upon the performance of some condition.[68] Whether a particular transaction is a conditional sale or a contract of another kind depends upon the intention of the parties.[69] Where a conditional sale is intended, it will be so construed though

a levy on it as vendor's property gave purchaser at sale good title. Tompkins v. Creighton-McShane Oil Co. [C. C. A.] 160 F 303.

**59.** Hotel furniture sold on Saturday afternoon, at place 6 miles away, no delivery until Monday. Creditors attaching before delivery acquired prior rights. W. P. Chamberlain Co. v. Tuttle [N. H.] 71 A 865.

**60.** One who claims to have bought chattels from owner and produces bill of sale, showing consideration, and proves that he had had possession, former owner subsequently obtaining possession shows title against all except creditors of owner and subsequent buyers in good faith and for value. O'Neill v. Thompson, 152 Mich. 396, 15 Det. Leg. N. 299, 116 NW 399.

**61.** Scheuermann v. Monarch Fruit Co. [La.] 48 S 647.

**62.** Where goods were bought from one who bought them on credit with intent not to pay for them. Pelham v. Chattahoochee Grocery Co. [Ala.] 47 S 172.

**63.** See Fraudulent Conveyances, 11 C. L. 1620.

**64.** Telepbone company purchasing another telephone company's property is not bound by seller's service contracts in absence of privity of contract between purchaser and seller's subscribers. Soutbern Bell Tel. & T. Co. v. Jacoway, 131 Ga. 483, 62 SE 640.

**65.** However, where no request to apply rule to specific facts, and where evidence was contradictory as to what representations were made, no error to fail to so charge jury. Riley v. Galarneault, 103 Minn. 165, 114 NW 755.

**66. Search Note:** See notes in C. L. 1588; 4 Id. 1366; 6 Id. 1382, 1384; 32 L. R. A. 445; 47 Id. 305; 68 Id. 100; 2 L. R. A. (N. S.) 97; 13 Id. 1132; 1 A. S. R. 63; 46 Id. 295; 94 Id. 210, 234; 1 Ann. Cas. 268; 2 Id. 321; 3 Id. 639; 6 Id. 685; 8 Id. 129.

See, also, Sales, Cent. Dig. §§ 1321-1457; Dec. Dig. §§ 450-483; 6 A. & E. Enc. L. (2ed.) 436.

**67.** Note for balance of price of piano, reserving title in vendor, was conditional sale. McKimmie v. Forbes Piano Co. [Ala.] 46 S 772. Where contract referred to "proposition and specification" attached, and such proposition contained clause reserving title in vendor, it became part of contract. Garrett-Cromwell Engineering Co. v. New York State Steel Co., 167 F 143. Where seller offered machine at certain price, machine to remain seller's property until fully paid for, and offer was accepted, transaction was conditional sale, and title remained in seller until payment in full. Falaenau v. Reliance Steel Foundry Co. [N. J. Eq.] 69 A 1098. Where lease gave lessee option to buy, and provided that in case of exercise of option title was to remain in lessor until full payment, and notes for rent and price and memorandum of transaction were executed same day, title to goods would not pass until full payment by lessee if he used his option to buy. Taylor v. Applebaum, 154 Mich. 682, 15 Det. Leg. N. 928, 118 NW 492.

**68.** Poirier Mfg. Co. v. Kitts [N. D.] 120 NW 558.

**69.** Where sewing machine was placed in shop on trial, and memorandum showed value and contained option to buy, but no agreement to pay price or rent, there was no conditional sale or lease, within Comp. St. 1907, c. 32, §, 26, and attaching creditor obtained no rights as against original owner. Singer Sewing Mach. Co. v. Omaha Umbrella Mfg. Co. [Neb.] 119 NW 958. Where firm advancing money to another for purchase of goods to be sold by latter in regular course of business took legal title and possession of goods as security, but were bound to turn over profits to debtor, transaction was **not conditional sale.**. Irby v. Cage, Drew & Co., 121 La. 615, 46 S 670. Where machinery was to be paid for in cash on delivery and when installed, sale was not conditional, and Civ. Code S. C. 1902, § 2456, requiring conditional sale contracts to be recorded, did not apply. Pridmore v. Puffer Mfg. Co. [C. C. A.] 163 F 496. Oral contract, consummated by notes and chattel mortgage, held not to constitute conditional sale, but **sale with chattel mort-**

in form a lease,[70] mortgage,[71] or contract of agency.[72] Statutes providing for execution and recordation of conditional sales should of course be complied with,[73] though as between vendor and vendee, a conditional sale may be valid though oral,[74] and not acknowledged or recorded.[75] It will be presumed that a conditional bill of sale was executed at the place named in the caption and that the attesting officer was acting within his jurisdiction, unless the contrary appears from the face of the instrument.[76] Where the record of the instrument is attacked on the ground that the officer was acting without the limits of his jurisdiction, evidence is competent in aid of the record to show execution within the limits of his jurisdiction.[77] A contract for sale of goods to be resold by the buyer, title being reserved in the first vendor until payment in full, is contrary to public policy in Tennessee, and no action to enforce the reservation of title will lie in the state or federal courts.[78]

*Rights of parties to the contract.*[See 10 C. L. 1570]—The rights of the parties are of course governed by the terms of their contract.[79] A conditional sale, with reservation of title in vendor and possession given vendee, is none the less a sale.[80] Retention of title by the vendor does not make him absolute owner, but is at most a form of security for payment of the price.[81] But the vendor's rights are sufficient to entitle him to the protection of a statute making it a crime to remove or sell personal property to hinder or defraud any person who has a valid claim thereto, with knowledge of such claim.[82] A conditional vendee has the right to possession of the property only so long as he complies with the contract.[83] Upon default by him, the vendor may retake the property,[84] though he must do so peaceably.[85] But

**gage to secure price.** Chicago Cottage Organ Co. v. Crambert, 78 Ohio St. 149, 84 NE 788. Contract of sale of stock of goods provided for monthly payments, and that upon default seller could resume possession, treat payments made as rent, and retain possession until full payment. Held, transaction was **sale and mortgage back.** Remedy was to foreclose. Jones' Adm'r v. Jones' Adm'x, 33 Ky. L. R. 1036, 112 SW 650.

**70.** Contract construed as conditional sale of building, fixtures, etc., not mere lease. Coors v. Reagan [Colo.] 96 P 966. Contract held conditional sale of drug stock and not lease. Vette v. Merrell Drug Co. [Mo. App.] 117 SW 666. Contract purporting to "rent" property, but providing for retention of title until payment of price and transfer at that time, was conditional sale, and not lease. Steele v. State [Ala.] 48 S 673. Written agreement providing for hire of piano and monthly payments, and that, on payment in full of value named, receipted bill would be given, piano remaining property of first party until that time, was conditional sale. Lauter Co. v. Isenreath [N. J. Law] 72 A 56. Lease with option to purchase, payment of certain sum in dues to be in full, title remaining in lessor until such sum paid, was conditional sale. Weiss v. Leichter, 113 NYS 999.

**71.** Contract construed as conditional sale, not chattel mortgage. Powers v. Burdick, 126 App. Div. 179, 110 NYS 883.

**72.** Contract held conditional sale of machinery, not agency for sale. Poirier Mfg. Co. v. Kitts [N. D.] 120 NW 558.

**73.** Conditional sale contract is properly signed by vendor, under Code, § 2905. Zacharia v. M. C. Cohen Co. [Iowa] 119 NW 136. Bookkeeper and credit man for vendors in conditional bill of sale, being on salary only, held mere agent, without precuniary interest such as to make him incompetent as attesting witness to contract. Steele v. State [Ala.] 48 S 673.

**74.** Lien Law, art. 9, as to filing, etc., is for protection of third persons. Alexander v. Kellner, 116 NYS 98.

**75.** Conditional sale contract is valid as between parties and as to parties with noitce though not acknowledged or recorded as provided in Code, § 2905. Zacharia v. Cohen & Co. [Iowa] 119 NW 136. Under Lien Law, § 115, the filing of conditional sale of household goods is unnecessary and adds nothing to its validity as between parties, but saves it from rule which would make it invalid as against subsequent purchasers from buyer. Barasch v. Kramer, 62 Misc. 475, 115 NYS 176. Property held under unrecorded contract of conditional sale passes to the trustees in bankruptcy. In re Perkins, 155 F 237.

**76, 77.** Rowe v. Spencer [Ga.] 64 SE 468.

**78.** Coweta Fertilizer Co. v. Brown [C. C. A.] 163 F 162.

**79.** Original conditional sale agreement being abandoned and new one entered into, rights of parties are controlled wholly by latter. Smith v. Goff [R. I.] 72 A 289.

**80.** Bequest of mules "owned by me" held not to include mules conditionally sold. Hunter v. Crook [Miss.] 47 S 430.

**81.** Steele v. State [Ala.] 48 S 673. Reservation of title is as security for debt. Hunter v. Crook [Miss.] 47 S 430.

**82.** Vendee in conditional sale convicted of crime, under Code 1907, § 7342, for removing articles sold to him. Steele v. State [Ala.] 48 S 673.

**83.** Liver v. Mills [Cal.] 101 P 299.

**84.** Seller may treat the sale as rescinded and recover the property on default. Amer-

the right to declare a forfeiture upon default is not the exclusive remedy of the seller.[86] He may waive that right and sue for the price.[87] But these remedies are inconsistent,[88] and an election to pursue one is a waiver or abandonment of the other.[89] Statutory prerequisites, to the right to declare and enforce a forfeiture, must be complied with,[90] though the conditional sale is oral.[91] Where a statute

ican Process Co. v. Florida White Pressed Brick Co. [Fla.] 47 S 942. Conditional sale contract provided for payment of price with interest in weekly installments. Held, seller had right to retake property for nonpayment of interest, agent receiving payments having no authority to waive interest. A'Hern v. Lipsett, 154 Mich. 196, 15 Det. Leg. N. 658, 117 NW 577. Plaintiff bought cattle at sale for taxes, and resold to defendant on agreement that defendant should pay taxes, and plaintiff reserved title until taxes were paid him. Held on default in payment plaintiff entitled to recover cattle. Bailey v. Napier [Ky.] 117 SW 948. Lease of piano provided that it should not be removed from lessee's residence without lessor's consent. Lessor found it on lessee's veranda boxed as for long shipment, other goods having been removed from house. Held, lessor justified in taking piano, not liable as for conversion. Frishberg v. Wissner, 125 App. Div. 627, 110 NYS 4.

**85.** Action for assault committed in taking goods. Stowers Furniture Co. v. Brake [Ala.] 48 S 89.

**86.** Gigray v. Mumper [Iowa] 118 NW 393.

**87.** And retain his security by lien on the goods for the same. Gigray v. Mumper [Iowa] 118 NW 393. The vendor in a conditional sale, on default by the vendee, may treat the sale as absolute and sue for the price. American Process Co. v. Florida White Pressed Brick Co. [Fla.] 47 S 942. Vendor in conditional sale may sue on debt or reclaim property. Stalker v. Hayes [Conn.] 71 A 1099. A vendor who has reserved title until the price is paid may, upon default of payment, retake the property or sue to recover the debt, thereby affirming the sale. Bell v. Old [Ark.] 113 SW 1023. Where seller reserves title to machine which is to be paid for by delivery of products of machine and buyer fails to deliver goods as agreed, seller may rescind and retake machine or sue for price. Sugar Beets Product Co. v. Lyons Beet Sugar Refining Co., 161 F 215. Where contract was construed as executory contract of sale reserving title in the vendor until payment, vendor had right to sue for unpaid portion of price of goods in possession of vendee. Hartman Furniture & Carpet Co. v. Krieger [Wis.] 119 NW 347. Where title was not to pass until payment of price in full and delivery of bill of sale, failure to pay installments when due was breach of contract, and vendor could treat it as agreement for goods sold and delivered, and sue for price, or in tort for conversion, or in replevin. Frisch v. Wells, 200 Mass. 429, 86 NE 775.

**88.** On breach of conditional sale by vendee, rights of vendor to treat title as having passed and sue for price, or to sue in conversion or replevin, were inconsistent, and election necessary. Frisch v. Wells, 200 Mass. 429, 86 NE 775. The vendor in a contract of conditional sale may elect whether he will recover possession of the property sold in which he still retains title, or waive his title and sue for the value or price, but he cannot do both. Poirier Mfg. Co. v. Kitts [N. D.] 120 NW 558.

**89.** American Process Co. v. Florida White Pressed Brick Co. [Fla.] 47 S 942. Suit by vendor for balance of price after breach of conditional sale by vendee was waiver of reservation of title and election to treat title as having passed, and subsequent action of replevin was barred. Frisch v. Wells, 200 Mass. 429, 86 NE 775. Where one who had consigned property to dealer, without giving notice to third person to whom he knew it would be sold of reservation of title, and after merely filing praecipe in action for conversion against third party, commenced proceedings to get payments from one to whom he sold, and received part payment, he could not maintain action against third person. American Process Co. v. Florida White Pressed Brick Co. [Fla.] 47 S 942. Where the contract, in the form of a lease, gives the alternative rights to sue for instalments of the price, or rent when due, or to retake the property ("lease" of steam roller construed as giving such rights. Kelley Springfield Road Roller Co. v. Schlimme, 220 Pa. 413, 69 A 867), a retaking of the property after all payments are due, but none paid, is a rescission of the contract, and bars an action thereon for the price (Id.). Could not sue on notes, having taken property. Kelley Springfield Road Roller Co. v. Schlimme, 220 Pa. 413, 69 A 867.

**90.** Under § 116, et seq. of lien law, where vendor takes property upon default, he may hold it 30 days and then sell, and vendee may regain property by paying amount unpaid and expenses of caring for property; vendor is entitled only to be made whole. Powers v. Burdick, 126 App. Div. 179, 110 NYS 883. Where seller of goods, reserving title, sued in replevin, and marshal took goods, this was not "taking by seller," within Lien Law, § 116; hence vendee not entitled to recover price paid, since statute was complied with by seller. Sigal v. Frank E. Hatch Co., 61 Misc. 332, 113 NYS 818. Rev. St. 1899, § 3413, provides that it shall be unlawful for owner of goods, sold conditionally, to retake same without tendering back money paid, after deducting reasonable compensation for use, breakage and damage; held statute does not compel retaking of goods but prevents retaking without such tender. Vette v. Merrell Drug Co. [Mo. App.] 117 SW 666. To rescind conditional sale, as against buyer's creditors, seller must take immediate possession of property and keep it, under Mills' Ann. St. § 2027. Coors v. Reagan [Colo.] 96 P 966.

**91.** That a conditional sale is oral does not preclude the vendee from taking advantage of the statute providing that vendor, on retaking goods, must notify vendee

makes a conditional sale void as to the seller but enforcible by the buyer, the seller cannot deny the contract and replevin the goods without returning to the vendee the consideration received.[92] Under a conditional sale, the vendor cannot maintain an action for goods sold and delivered and recover the entire price until all instalments are due.[93] But when all payments are due, he has the right to treat the transaction as a cash sale made upon the same reservation of title,[94] and may elect to disaffirm the sale and recover the goods, or affirm the sale and sue for the price.[95] Where the vendor has not demanded the property, the vendee is not in default and may pay the amount due with interest and retain the property,[96] and a subsequent purchaser, who buys when the vendee is in arrears but has not been placed in default, has the same right.[97] Where the vendor retakes the property on default by the vendee, the latter may still complete the contract and perfect his title by paying the balance due.[98] Such retaking by the vendor is under a right conferred by the contract, and its exercise does not terminate the contract.[99] But if the vendee or his assignee denies the vendor's title, and refuses to return the property or to pay the balance due, he repudiates the contract and cannot thereafter perfect his title by a tender of the balance due.[1] The vendor may in such case also treat the contract as rescinded and retake and keep the property.[2]

In an action to recover the property conditionally sold, on default, plaintiff must show that the vendee is in default.[3] The property sought to be recovered must be sufficiently described in the pleading.[4] In such action, defendant cannot recoup damages for breach of warranty [5] or of the contract.[6] The measure of damages for conversion by the vendor, the vendee not being in default, is the actual value of the goods less the unpaid balance of the price.[7]

*Rights of third persons.* See 10 C. L. 1571—At common law, a reservation of title until payment in full is valid and and enforcible as against creditors of the vendee,[8] and even against subsequent bona fide purchasers for value,[9] though there are

of sale of same at auction, and that, if he does not give such notice, the vendee may recover the amount paid by him. Lien Law § 116, amended by Laws 1900, c. 762. Alexander v. Kellner, 131 App. Div. 809, 116 NYS 98.

**92.** Duluth Music Co. v. Clancey [Wis.] 120 NW 854.

**93, 94, 95.** Taylor v. Esselstyn, 62 Misc. 633, 115 NYS 1105.

**96.** National Cash Register Co. v. Wapples [Wash.] 101 P 227.

**97.** Buyer from original vendee could pay amount due into court in replevin suit and retain property. National Cash Register Co. v. Wapples [Wash.] 101 P 227.

**98.** Though retaking is by action of claim and delivery. Liver v. Mills [Cal.] 101 P 299.

**99.** Even though contract does not expressly reserve right to retake on default. Liver v. Mills [Cal.] 101 P 299.

**1, 2.** Liver v. Mills [Cal.] 101 P 299.

**3.** Seller of property, reserving title, who seeks to recover same in replevin suit, must show that price was not paid. Brunson v. Volunteer Carriage Co. [Miss.] 47 S 377. In action to recover property, alleged to have been sold conditionally, sale and reservation of title not being admitted, burden is on plaintiff to prove continuation of indebtedness. Black v. Roberson [Ark.] 112 SW 402.

**4.** In trover to recover "one sorrel horse, seven years" old, sold by plaintiff conditionally, copy of contract containing quoted description was attached to petition. Held, petition sufficiently described property; contract admissible. Beaty v. Sears [Ga.] 64 SE 321.

**5.** In action to recover possession of piano sold conditionally, plea setting up warranty and breach thereof in reduction of amount due on note was bad on demurrer. McKimmie v. Forbes Piano Co. [Ala.] 46 S 772.

**6.** In replevin by the vendor to recover goods conditionally sold, after default, defendant cannot recoup damages for delay in delivery and noncompliance with terms of contract. Dearing Water Tube Boiler Co. v. Thompson [Mich.] 16 Det. Leg. N. 129, 120 NW 801.

**7.** Agreed price is to be taken as actual value in absence of other evidence. Smith v. Goff [R. I.] 72 A 289.

**8.** Where threshing machine was sold under conditional sale reserving title in sellers until full payment, where buyers were in default at time sheriff seized machine under order of sale in suit to foreclose laborers liens, against buyers only, sellers had right to terminate contract and take machine from sheriff. Holt Mfg. Co. v. Collins [Cal.] 97 P 516. Contract for sale of machinery to be resold by vendee held conditional sale, notwithstanding provisions for payment by notes and mortgages as security; title of vendor good as against trustee in bankruptcy. Monitor Drill Co. v. Mercer [C. C. A.] 163 F 943.

**9.** In California even bona fide purchasers

authorities to the contrary.[10] A verbal reservation of title has been held sufficient,[11] but this is so only when the vendor actually has title and makes a sale in good faith, possession of the property having actually changed.[12] Where there is a sale and immediate resale, amounting to a mere verbal mortgage, without change of possession, the rule is inapplicable.[13] A subsequent purchaser with notice of course takes subject to the vendor's rights,[14] and in some jurisdictions, becomes liable for the price to the conditional vendor.[15] An agreement to pay, if he is allowed to retain the goods, is enforcible.[16] A vendor who consents to a mortgage of the property, waives his reservation of title as to the mortgagee and those claiming under him.[17] It will be presumed, as to one who purchases after the time for payment has expired, that such payment has been made.[18]

In most jurisdictions the rights of creditors and bona fide purchasers are now fixed by statutes requiring the filing or recordation of conditional sale contracts.

from one to whom personal property is delivered under a conditional contract of sale acquire no valid claim to the property. Liver v. Mills [Cal.] 101 P 299. Agreement to sell mare, and agreement of buyer to work for seller, held parts of one entire contract; where buyer abandoned contract and quit work, having sold mare to third person, seller had right to recover mare from third person, as he acquired no better title than his seller had. Cleary v. Morson [Miss.] 48 S 817. Simply entrusting possession of chattels to another by the owner under a conditional executory contract of sale is insufficient to estop the owner from setting up title thereto against an innocent purchaser thereof for value and without notice of the condition. Lockwood Bros. v. Frisco Lumber Co. [Okl.] 97 P 562. Where a chattel is sold with a reservation of title in the vendor until the price is paid, title remains in him until the condition is performed, and a purchaser of the vendee acquires no title, though he buys in good faith for a valuable consideration and without notice of the condition. Id. Where contract did not purport to pass title, purchaser from vendee did not acquire title as against vendor, even though he had no notice. Taylor v. Applebaum, 154 Mich. 682, 15 Det. Leg. N. 928, 118 NW 492.

**10.** Mere possession of personal property is only prima facie evidence of title (American Process Co. v. Florida White Pressed Brick Co. [Fla.] 47 S 942), and a purchaser from one who has only possession under an incomplete conditional sale cannot, in general, defeat the title of the true owner, though such purchaser bought for value and without notice (Id.). But where an owner consigns personal property to a dealer with express or implied authority to sell, or delivers or consigns to another personal property with indicia of ownership, but with title reserved until payment, a purchaser who pays value and obtains possession of such goods without notice of the terms or conditions of the original delivery, consignment or sale, obtains good title as against the original owner, which will usually prevail against his reserved title. Id. Owner sent machinery to dealer who was in business of installing same in buildings of others, knowing it would be affixed to land of another person, and did not give any notice of reservation of title, and third person paid for machinery in good faith without notice of reservation. He acquired title against owner. Id.

**11.** Personal property may be sold with verbal retention of title, and the claim of the vendor to the purchase money will prevail over the claims of subsequent grantees. Parker v. Payne [Miss.] 48 S 835.

**12.** Parker v. Payne [Miss.] 48 S 835.

**13.** To secure debt, debtor sold mules and creditor resold conditionally to debtor, reserving title verbally. Held, conditional vendor did not acquire title good as against subsequent grantee in trust deed. Parker v. Payne [Miss.] 48 S 835.

**14.** Lien of conditional vendor prior to that of mortgagee who had notice of vendor's rights. Zacharia v. Cohen Co. [Iowa] 119 NW 136. Evidence held to show that mortgagee had notice of rights of prior conditional vendor. Id. Where conditional sale contract provided that vendee could not sell without vendor's consent, this did not invalidate sale by vendee to his wife, but she took subject to rights of vendor. Powers v. Burdick, 126 App. Div. 179, 110 NYS 883.

**15.** If purchaser from one who bought under contract reserving title had notice thereof, seller or his assignee could recover purchase price from such subsequent purchaser. Hogan v. Detroit United R. Co., 154 Mich. 478, 15 Det. Leg. N. 830, 118 NW 140. In action to recover from subsequent purchaser, with notice of conditional sale provision, unpaid price of goods, evidence was admissible to show that one who made demand on defendant was real owner, though assignee was nominal plaintiff. Id.

**16.** Successor in interest of original vendees of conditional sale agreed to pay balance due if goods were left. Held, enforcible agreement, based on sufficient consideration. Barth v. Sanders, 113 NYS 651.

**17.** Bell v. Old [Ark.] 113 SW 1023.

**18.** Where conditional sale calls for payment within 60 days, the presumption is, as to subsequent purchaser long after 60 days, that payment had been made and title had passed. Barasch v. Kramer, 62 Misc. 475, 115 NYS 176.

In general, the reservation of title is valid when the contract is duly executed [19] and filed or recorded.[20]

A conditional contract of sale is assignable,[21] and its assignment by the vendor transfers title to the property,[22] and all the remedies of the vendor.[23] Where the contract is also a promissory note, the payee, by transfer and indorsement, becomes liable as indorser.[24] In an action to enforce the vendor's lien, a third person, claiming right of possession, is a proper party defendant,[25] but a deficiency judgment should be rendered only against the vendee.[26] In an action on notes given for purchase money reserving title in vendors until payment, against makers of notes and their successors, judgment should be against the makers only, if solvent, for the amount of the note and interest.[27] If they are insolvent, judgment may be had against subsequent owners of property to the extent that they are shown to have received any of the property and converted same to their use.[28] In a suit by a subsequent mortgagee to enforce his lien, the burden is upon him to allege and prove that a prior conditional sale was not properly acknowledged and recorded, and that he had no notice.[29]

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**Salvage; Satisfaction and Discharge,** see latest topical index.

**Salary,** see 12 C. L. 1160, n. 71.

### SAVING QUESTIONS FOR REVIEW.

§ 1. Invlting Error, 1764.
§ 2. Acquiescing in Error, 1766. Change of Theory, 1770.
§ 3. Mode of Objection, Whether by Objection, Motion, or Request, 1774.
§ 4. Necessity and Time of Objection, 1774.
§ 5. Necessity and Time of Motion or Request, 1777.
§ 6. Necessity of Ruling, 1781.
§ 7. Necessity and Time of Exceptions, 1782.
§ 8. Form and Sufficiency of Objection, Motion, or Request, 1786.
§ 9. Form and Sufficiency of Exception, 1792.
§ 10. Waiver of Objections and Exceptions Taken, 1794.

*The scope of this topic* is noted below.[30]

**19.** An unacknowledged conditional sale agreement is entitled to be recorded. Rev. St. 1901, pars. 2702, 1135. National Cash Register Co. v. Bradbury [Ariz.] 95 P 180.

**20.** See Notice and Record of Title, 12 C. L. 1100.

**21.** An instrument acknowledging receipt of property and containing a promise by the maker to pay certain sums, reserving title to the property in the vendor until payment in full is assignable, under Code 1895, § 3682. Walker v. Carpenter, 5 Ga. App. 427, 63 SE 576.

**22.** Where conditional bill of sale was duly executed, acknowledged and filed, an assignment of it by vendors to plaintiff transferred title of goods to plaintiff, who could maintain conversion against officer who levied on them as goods of buyer. Picone v. Freeman, 115 NYS 128.

**23.** The transfer of a promissory note given for the price of personal property, the seller retaining title until payment, carries with it the right to the security and the remedy of the vendor against the vendee in reference thereto. Turnell v. Carter [Ga. App.] 64 SE 114. After transfer, vendor has no title, and seizure and sale of property under judgment against vendor by transferee of note is mere nullity, and fact that holder of note became purchaser at void sale did not release vendor from obligation to pay note nor estop holder from enforcing payment. Id.

**24.** When payee, by writing on back of instrument, transferred, sold, and assigned bill of sale, note and title to property, he became an indorser liable to suit in an action against the maker. Walker v. Carpenter, 5 Ga. App. 427, 63 SE 576.

**25.** Default of conditional vendee. Singer Sewing Mach. Co. v. Leipzig, 113 NYS 916.

**26.** Not against a defendant claiming only same right of possession only. Singer Sewing Mach. Co. v. Leipzig, 113 NYS 916.

**27, 28.** Lienkauf Banking Co. v. Haney [Miss.] 46 S 626.

**29.** Zacharia v. M. C. Cohen Co. [Iowa] 119 NW 136.

**30.** This topic covers the things that must be done in the trial court in order to save matters complained of for review. It does not, however, treat of bills of exceptions, statements of case, or any of the formal steps incidental to the transmission of the case to the appellate court (see Appeal and Review, 11 C. L. 118). The manner of objecting to pleadings (see Pleading, 12 C. L. 1323), parties (see Parties, 12 C. L. 1175), depositions (see Depositions, 11 C. L. 1069), and to the reports of masters (see Masters and Commissioners, 12 C. L. 809) and referees (see Reference, 12 C. L. 1666), being generally excluded. Objections to jurisdiction and the waiver thereof are more fully treated in a separate topic (see Jurisdiction, 12 C. L. 458).

§ 1. *Inviting error.*[31]—See 10 C. L. 1572—A party cannot complain of error which he himself invites.[32] Thus he cannot complain of the admission of evidence which he himself introduces,[33] or which he procures to be introduced,[34] or which is brought

31. **Search Note:** See Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.

32. Chicago & N. W. R. Co. v. Chicago Mechanics' Institute, 239 Ill. 197, 87 NE 933; Hof v. St. Louis Transit Co., 213 Mo. 445. 111 SW 1166; City of Victoria v. Victoria County [Tex. Civ. App.] 115 SW 67. For which he is partly responsible. Rollo v. City Elec. R. Co., 152 Mich. 77, 15 Det. Leg. N. 148, 115 NW 727. Where newspapers reported opinion expressed by judge in absence of jury and defendant's counsel stated that defendant would take his chances and stopped court from directing jury to disregard them, there being yet time to prevent jury from reading papers, objection was waived, and was not ground for new trial. Spreckels v. Brown, 212 U. S. 208, 53 Law Ed. —. Of **substitution of parties** made on his own motion. Quinn v. Minneapolis Threshing Mach. Co., 102 Minn. 256, 113 NW 689. Erroneous ruling as to **evidence.** Barnes v. Danville St. R. & L. Co., 235 Ill. 566, 85 NE 921. Of **form of questions** asked by adverse party where his own were subject to same objection. Krier v. Milwaukee Northern R. Co. [Wis.] 120 NW 847. Of **remark of court** suggested by his own argument. Elgin, J. & E. R. Co. v. Lawlor, 132 Ill. App. 280. **Form of special interrogatory** submitted at his own request. Indianapolis Coal Trac. Co. v. Dalton [Ind. App.] 87 NE 552. Of **dismissal** of cross complaint where he urged its dismissal. Rollins v. Fearnley [Colo.] 101 P 345. Where plaintiff moved to dismiss action, held that he could not complain that it was dismissed as to defendant surety, though motion was denied as to defendant principal who had interposed counterclaim. Northwestern Port Huron Co. v. Iverson [S. D.] 117 NW 372. Where plaintiff secured order sustaining demurrer to facts pleaded as **answer,** and they were subsequently pleaded as **counterclaim,** held that he could not contend that they should have been pleaded as answer. State v. Spencer [Ind. App.] 86 NE 492. Defendant in motion for nonsuit assumed and urged that action was based on contract itself as an entirety. Plaintiff, by amending without waiting for ruling of court, acquiesced in such interpretation. Held that defendant could not complain of **allowance of amendment** whether his position so asserted and urged was correct or not. Realty Co. v. Ellis, 4 Ga. App. 402, 61 SE 832. Where defendant pleaded written contract as regulating its liability, and court so held, held that it was not misled by variance between oral contract sued on and written one proved, and could not complain that court took its view of matter and overruled motion for peremptory instruction because of such **variance.** Baltimore, etc., R. Co. v. Wood & Co. [Ky.] 114 SW 734. Defendant held not entitled to complain that court erred in **assuming fact in instruction** contrary to plaintiff's testimony, where his own witness testified to existence of such fact. Valentine v. Minneapolis, etc., R. Co. [Mich.] 15 Det. Leg. N. 915, 118 NW 970. Defendant held not entitled to complain that court erroneously placed **burden of proof** to show contributory negligence on it, where court erroneously submitted issue of contributory negligence, which was not pleaded, to jury at defendant's request. Ramp v. Metropolitan St. R. Co., 133 Mo. App. 700, 114 SW 59. Where counsel representing both partners in action against them jointly on firm debt expressly admitted that one of such partners was liable in any event, latter could not complain of instruction **directing verdict** against him in any event on ground that several judgments could not be entered. P. Hoffmaster Sons Co. v. Hodges, 154 Mich. 641, 15 Det. Leg. N. 926, 118 NW 484. Where plaintiffs informed master that they did not desire **finding** as to particular matter, held that such matter was not open on their exceptions and appeal. Lipsky v. Heller, 199 Mass. 310, 85 NE 453. Where order remanding case on reversal by appellate court of judgment in plaintiff's favor was struck out on plaintiff's motion, held that he could not complain, on appeal to supreme court, **that cause was not remanded.** Henning v. Sampsell, 236 Ill. 375, 86 NE 274. Defendant held not entitled to object to amount of damages awarded where he ignored true rule as to **measure of damages** in production of his evidence. Seyfried v. Knoblauch [Colo.] 96 P 993. Where court adopted defendant's contention that damages were temporary only, held that, while he could contend on appeal that there were no damages, he would not be permitted to complain of theory invoked by him as to true measure of damages. Fischer v. Missouri Pac. R. Co. [Mo. App.] 115 SW 477. Defendant held not entitled to complain that value of products as fixed by court was excessive, where court accepted his account as correct in fixing such value. Somers v. Musolf [Ark.] 109 SW 1173. Defendant held not entitled to contend that telegram did not suggest on its face that certain item of expense would be incurred by delay in delivery so as to authorize recovery therefor, in view of instruction as to measure of damages given at its request. Western Union Tel. Co. v. Arant [Ark.] 115 SW 136.

33. Botts v. Botts, 142 Ill. App. 216. Of refusal to instruct jury to disregard evidence introduced by himself. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Plaintiff held not entitled to contend that defense of forfeiture was not provable under general issue where all evidence heard on case was introduced by her. Weston v. State Mut. Life Assur. Soc., 234 Ill. 492, 84 NE 1073. Defendant held not entitled to complain of injection into case of issue not raised by pleadings, where evidence relating to subject was developed on cross-examination and otherwise by defendant as a defense admissible under its general denial. Ft. Worth & D. C. R. Co. v. Monell [Tex. Civ. App.] 110 SW 504. Defendant held not entitled to complain of admission of evidence, where he did not object or move to strike it out, where he

out in response to his own questions,[35] or which is similar to evidence introduced by himself,[36] or for which he opens the way,[37] or of the absence of evidence excluded on his own objection [38] or invitation,[39] or of the exclusion of evidence similar to that excluded on his objection,[40] or that the evidence as to certain facts is too indefinite to sustain a finding where he fails to take advantage of an opportunity to obtain more specific information in regard to them,[41] or of error in instructions given at his own request,[42] or of instructions substantially the same as those which he has himself requested [43] or which are subject to the same objection [44] or which are in

was as much responsible for its introduction as his adversary. Morris v. Williams, 131 Mo. App. 370, 111 SW 607.

**34.** On cross-examination of defendant's head clerk, plaintiff asked him to produce and have attached to his deposition copy of defendant's by-laws in force during certain year, which he did. Held that plaintiff could not object to by-laws on ground that no showing had been made of their legal adoption by defendant order. Crites v. Modern Woodmen of America [Neb.] 117 NW 776.

**35.** On cross-examination. Texas & N. O. R. Co. v. McCoy [Tex. Civ. App.] 117 SW 446. Of refusal to strike testimony elicited by himself on cross-examination. Maxton v. Gilsonite Const. Co. [Mo. App.] 114 SW 577. Court is under no duty to exclude evidence on motion of party who brings it out. Union Naval Stores v. Pugh [Ala.] 47 S 48. If party by cross-examination elicits and restores to record incompetent testimony previously stricken out on his motion, he is not prejudiced by repetition of such testimony on redirect examination. St. Louis & S. F. R. Co. v. Gaba [Kan.] 97 P 435.

**36.** Where has himself previously introduced evidence of same kind. Mitchell v. Smith [Ark.] 111 SW 806. Where adopted precisely same kind of evidence to prove his version of how accident occurred. St. Louis, etc., R. Co. v. Flinn [Ark.] 115 SW 142. Plaintiff held to have waived conditions on which secondary evidence was admissible by adducing such evidence himself. Mullins v. Columbia County Bank [Ark.] 113 SW 206. Of admission of parol evidence, where he himself first introduced such evidence. Cleveland, etc., R. Co. v. Gossett [Ind.] 87 NE 723; New York City Car Advertising Co. v. Globe Lithographic Co., 114 NYS 788.

**37.** Of evidence induced by evidence offered by him. Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496. Of testimony as to collateral matter introduced by his cross-examination of same witness. Gilboa v. Kimball [R. I.] 69 A 765. Where plaintiff first introduced evidence as to conversation, he could not complain that defendant met issue so raised by showing whole conversation. Mead v. Arnold, 131 Mo. App. 214, 110 SW 656.

**38.** Nashville, etc., R. Co. v. Garth [Ala.] 46 S 583. That particular fact was not proved. Illinois Cent. Trac. Co. v. Mann, 142 Ill. App. 561; Kramer v. Grant, 60 Misc. 109, 111 NYS 709; Caldwell Banking & Trust Co. v. Porter [Or.] 97 P 541. Plaintiff held not entitled to contend that defendant did not dispute plaintiff's title to land and hence court was not deprived of jurisdiction because title was involved, where evidence offered by defendant to show that he was owner of land was erroneously excluded on plaintiff's objection. Taylor v. Gilleran, 60 Misc. 96, 111 NYS 719.

**39.** Remark of counsel held not to have invited erroneous exclusion of evidence. Chlanda v. St. Louis Transit Co., 213 Mo. 244, 112 SW 249.

**40.** Lord v. Henderson [W. Va.] 64 SE 134.

**41.** Where could have obtained more specific information on cross-examination, but did not do so. Ward v. Sherman [Cal.] 100 P 864.

**42.** St. Louis S. W. R. Co. v. Grayson [Ark.] 115 SW 933; Manitou & P. P. R. Co. v. Harris [Colo.] 101 P 61; McDermott v. Mahoney [Iowa] 116 NW 788, afg. 115 NW 32; Penney v. St. Joseph Stockyards Co., 212 Mo. 309, 111 SW 79; Potter v. St. Louis & S. F. R. Co. [Mo. App.] 117 SW 593; Benson v. Tacoma R. & P. Co. [Wash.] 98 P 605. Even though they are erroneous and open to same objection as other instructions requested by him and refused. Brown v. Globe Printing Co., 213 Mo. 611, 112 SW 462.

**43.** Lanier & Co. v. Little Rock Cooperage Co. [Ark.] 115 SW 401; Graves v. Davenport [Colo.] 100 P 429; Keefer v. Amicone [Colo.] 100 P 594; City of Chicago v. Wieland, 139 Ill. App. 197; Doyle v. Cavanaugh, 139 Ill. App. 359; Tanton v. Martin [Kan.] 101 P 461; Camden Interstate R. Co. v. Lester [Ky.] 118 SW 268; Hitt v. Terry [Miss.] 46 S 829; Kinlen v. Metropolitan St. R. Co. [Mo.] 115 SW 523; Robinson & Co. v. Roberts, 20 Okl. 787, 95 P 246. Asserting same doctrine. Moore v. Board of Regents for Normal School in Dist. No. 2 [Mo.] 115 SW 6. Embodying same principles. Louisa County v. Yancey's Trustee [Va.] 63 SE 452. Embodying same theory. Donk Bros. Coal & Coke Co. v. Stroeter, 133 Ill. App. 199; Riggs v. Metropolitan St. R. Co. [Mo.] 115 SW 969; Texas & N. O. R. Co. v. Geiger [Tex. Civ. App.] 118 SW 179. As to burden of proof. Ferris v. Loyal Americans of the Republic, 152 Mich. 314, 15 Det. Leg. N. 193, 116 NW 445. That they were not supported by evidence, where instructions requested by him submitted same question. Mount Vernon Brew. Co. v. Teschner, 108 Md. 158, 69 A 702; Texas Cent. R. Co. v. Johnson [Tex. Civ. App.] 111 SW 1098. Of submission of question to jury, where same question was submitted in prayers asked by him and granted. O'Dwyer v. Northern Market Co., 30 App. D. C. 244; City of Farmington v. Wallace, 134 Ill. App. 366. Of interlineation of words in instruction, where instruction requested by him propounds in same words proposition of law announced by such interlineation. City of

accordance with his theory of the case,[45] or of a conflict of instruction for which he is responsible, where those given at his request are erroneous,[46] or of findings substantially the same as those proposed by him,[47] or of a judgment which he himself invites.[48] It has, however, been held that an erroneous instruction as to the law of the case is ground for reversal, though given at the request of the complaining party.[49] One may object that the jury disregarded erroneous instructions given at his own request.[50]

§ 2. *Acquiescing in error.*[51]—See 10 C. L. 1574—Except in the case of fundamental errors apparent on the face of the records,[52] or where the question did not

Richmond v. Wood [Va.] 63 SE 449. One cannot question accuracy of charge embracing same instruction contained in charge requested by himself, whether requested charge is given or refused, unless it appears that judge was not misled by request. Nagle v. Simmank [Tex. Civ. App.] 116 SW 862. Special charge will be presumed to have invited error in general charge in absence of showing to contrary. Id. Where defendant requested instruction, in effect asserting that plaintiff was entitled to recover rental value of premises from certain date, held that he could not complain of instruction authorizing recovery from that date. Denecke v. Miller [Iowa] 119 NW 380. Error held not invited by requested instruction of adverse party. Hof v. St. Louis Transit Co., 213 Mo. 445, 111 SW 1166.

**44.** Pettus v. Kerr [Ark.] 112 SW 886; Little Rock & M. R. Co. v. Russell [Ark.] 113 SW 1021; Illinois Cent. R. Co. v. Warriner, 132 Ill. App. 301; Wabash R. Co. v. Perkins, 137 Ill. App. 514; Guthmann Transfer Co. v. McGuire, 138 Ill. App. 162; Nagle v. Keller, 141 Ill. App. 444; Louisville & E. R. Co. v. Hardin [Ky.] 117 SW 381; Peters v. Gillo Mfg. Co., 133 Mo. App. 412, 113 SW 706; Lathrop v. Quincy, etc., R. Co. [Mo. App.] 115 SW 493; Morrow v. Barnes [Neb.] 116 NW 657. Assuming that certain facts constituted negligence. St. Louis & S. F. R. Co. v. Vaughan [Ark.] 113 SW 1035. That word used in instruction was not defined. Gordon v. Park [Mo.] 117 SW 1163; Courtney v. Kneib, 131 Mo. App. 204, 110 SW 665.

**45.** In accordance with position taken by him at trial. Oexner v. Loehr, 133 Mo. App. 211, 113 SW 727. Adopting his interpretation of pleadings. Beans v. Denny [Iowa] 117 NW 1091. One who requests court to submit case on certain theory cannot complain whether such theory is right or wrong. Keefer v. Amicone [Colo.] 100 P 594.

**46.** Cannot complain that instructions are conflicting where invited error. National Bank of Commerce v. Southern R. Co. [Mo. App.] 115 SW 547. Where plaintiff's instructions are correct and defendant's are erroneous, defendant cannot complain that such instructions are conflicting. Hall v. Missouri Pac. R. Co. [Mo.] 118 SW 56.

**47.** St. Paul, M. & M. R. Co. v. Howard [S. D.] 119 NW 1032. Of finding of fact and conclusions of law identical with those proposed by him. Jensen v. Sheard, 49 Wash. 593, 96 P 2.

**48.** Of judgment entered at his request, and accepted by adverse party, in lieu of a new trial. Hodge v. Hodge, 47 Wash. 196, 91 P 764. Where plaintiff in foreclosure suit offered in petition to pay amount of supposed tax lien on mortgaged property, and prayed right to make such payment, held that he could not complain of decree directing him to pay it, though evidence showed that he was under no legal obligation to do so. Gibson v. Sexson [Neb.] 118 NW 77.

**49.** Law of case means, not application of recognized rules of law to proven facts, but precise application of law as laid down by trial judge, and, if erroneous, is ground for reversal, though erroneous instruction is given at request of complaining party and narrows scope of his liability, and though upon facts and law recovery would otherwise be upheld. Weeks v. Auburn & S. Elec. R. Co., 60 Misc. 400, 113 NYS 636.

**50.** Dickson v. Swift & Co., 238 Ill. 62, 87 NE 59, rvg. 142 Ill. App. 655.

**51. Search Note:** See Appeal and Error, Cent. Dig. §§ 1018-1764, 3611-3616; Dec. Dig. §§ 169-305, 883-884; 21 A. & E. Enc. P. & P. 649.

**52.** Objection that court had no **jurisdiction of the subject-matter** may be made for first time on appeal. Western Union Tel. Co. v. Cooper, 2 Ga. App. 376, 58 SE 517; City of Aurora v. Schoeberlein, 230 Ill. 469, 82 NE 860; Becklenberg v. Becklenberg, 232 Ill. 120, 83 NE 423; Allott v. American Strawboard Co., 237 Ill. 55, 86 NE 685; Harty Bros. & Harty Co. v. Polakow, 237 Ill. 559, 86 NE 1085; Thomasson v. Mercantile Town Mut. Ins. Co. [Mo.] 116 SW 1092; Underhill v. Cohen, 61 Misc. 627, 114 NYS 115; Ullery v. Guthrie, 148 N. C. 417, 62 SE 552; Lenoir Realty & Ins. Co. v. Corpening, 147 N. C. 613, 61 SE 528; McDaniel v. Staples [Tex. Civ. App.] 113 SW 596; Frazee v. Piper [Wash.] 98 P 760; Hanger v. Com., 107 Va. 872, 60 SE 67; City of New Orleans v. Howard [C. C. A.] 160 F 393. Only want of jurisdiction to render decree appealed from. Knapp v. Milwaukee Trust Co. [C. C. A.] 162 F 675. Objection that judge was disqualified on account of interest and of formerly having been counsel in case. Lee v. British-American Mortg. Co. [Tex. Civ. App.] 115 SW 320. Where action at law is tried to court without jury, and jurisdictional facts are properly alleged in complaint, and there is general finding in favor of plaintiff, and no objection is made to jurisdiction at trial, appellate court cannot look into evidence contained in bill of exceptions to ascertain whether jurisdiction was properly proven at trial. Hill v. Walker [C. C. A.] 167 F 241. **Sufficiency of statement of claim** may be first raised on appeal from judgment for want of sufficient affidavit of defense, since such judgment is

exist or could not have been raised and passed upon below,[53] only questions raised in the trial court will be considered on appeal.[54] Some of the questions to which this rule has been applied are, qualification of the trial court or tribunal,[55] jurisdiction of the person,[56] venue,[57] capacity to sue,[58] misjoinder[59] or nonjoinder[60] of parties unless it appears that an omitted party will be deprived of some material right,[61] that the action has been prematurely brought,[62] the sufficiency,[63] amend-

in effect a judgment on demurrer, and hence must be self-sustaining on the record. Zellar v. Wunder, 36 Pa. Super. Ct. 1. **Prescription** may be considered though not passed on below, where there is no cause to remand case in order that countervailing proof of acknowledgment, suspension, or interruption may be shown. Succession of Watt, 122 La. 952, 48 S 335. **Allowance of compound interest** where plaintiff did not ask for it or prove right to it. Pullis v. Somerville [Mo.] 117 SW 736.

**53.** Constitutionality of statute regulating practice in appellate court. Clowry v. Holmes, 238 Ill. 577, 87 NE 303.

**54.** Esmond v. Esmond, 142 Ill. App. 233; First Nat. Bank v. Estherville City Council, 136 Iowa, 203, 112 NW 829; O'Dell v. Goff, 153 Mich. 643, 15 Det. Leg. N. 560, 117 NW 59; Butters v. Butters, 153 Mich. 153, 15 Det. Leg. N. 447, 117 NW 203; Muir v. Kalamazoo Corset Co. [Mich.] 15 Det. Leg. N. 1074, 119 NW 589; Miner v. Morgan [Neb.] 119 NW 781; Davis v. Bouton Motor Co., 132 App. Div. 64, 116 NYS 508; Burton Lumber Corp. v. Houston, 45 Tex. Civ. App. 363, 19 Tex. Ct. Rep. 580, 101 SW 822; City of Pittsburgh v. Jonathan Clark & Sons Co. [C. C. A.] 154 F 464. Will not review question not raised below with sufficient definiteness to make it clear that there was no misunderstanding of point ruled upon. Erie R. Co. v. Waite, 63 Misc. 372, 114 NYS 1115. Objection to service by publication. Hinton v. Knott, 134 Ill. App. 294. That jury was not waived. Gillian v. Schmidt, 131 Mo. App. 666, 111 SW 611. That abbreviation designating fund on which warrants were drawn had no legal meaning. McKean v. Gauthier, 132 Ill. App. 376. Objection to form of scire facias sur municipal lien. Scranton v. Koehler, 36 Pa. Super. Ct. 95. Objection to affidavit in replevin. Ryan v. Schutt, 135 Ill. App. 554. Sufficiency of facts set forth in affidavits for opening default to show excusable neglect. Aaron v. Holmes [Utah] 99 P 450. In action for breach of covenant, that land mentioned in mandate of supreme court in action in which title was adjudged in third person was not same as that described in action for breach of covenant. Beach v. Nordman [Ark.] 117 SW 785. Objection that copy of testimony taken under Bankruptcy Act, § 21a, was not served with order to show cause why third persons should not be ordered to pay money to temporary receiver in bankruptcy should be made at or before argument in district court, and cannot first be raised in court of appeals on petition to review proceedings. In re Friedman [C. C. A.] 161 F 260. Plaintiff held not entitled to contend that he did not have his day in court, that question in dispute should have been submitted to jury, and even if verdict was directed it should not have been on merits, where he made no such contention in trial court and permitted verdict to be directed against him without objection or exception. Reader v. Haggin [C. C. A.] 160 F 909. Where court directed verdict for part of damages sued for instead of granting nonsuit as he should have done, but neither party complained or raised question, but plaintiff contended that he was entitled to recover other damages, held that judgment would not be reversed at his instance. Jones v. Augusta City Council, 130 Ga. 716, 61 SE 599. Supreme court held not bound to determine whether mere acceptance of bill of lading by shipper bound her as fully as though she had expressly assented to its terms, so that she could not thereafter assert ignorance of its contents, where court in instructions did not make her ignorance of contents test of her liability thereunder. Atkinson v. New York Transfer Co. [N. J. Err. & App.] 71 A 278.

**55.** See § 4, post.

**56.** Clinton v. Winnard, 135 Ill. App. 274; Singletary v. Boener-Morris Candy Co. [Ky.] 112 SW 637; In re Quaker Realty Co., 122 La. 43, 47 S 369. Objection to jurisdiction of court in another case. City of New Orleans v. Howard [C. C. A.] 160 F 393. That suit was not brought in proper federal district. Ingersoll v. Coram, 211 U. S. 335, 53 Law Ed. 208. Objection to judgment because of alleged insufficiency of citation. Menard v. MacDonald [Tex. Civ. App.] 115 SW 63.

**57.** Where defendant did not object to being sued in certain district, but on contrary removed case to federal court in that district. Cucciarre v. New York Cent. & H. R. R. Co. [C. C. A.] 163 F 38.

**58.** El Paso & N. E. R. Co. v. Gutierrez [Tex. Civ. App.] 111 SW 159. Of trustee in bankruptcy. Knapp v. Milwaukee Trust Co. [C. C. A.] 162 F 675.

**59.** People v. O'Connor, 239 Ill. 272, 87 NE 1016; Choctaw, O. & G. R. Co. v. Burgess [Okl.] 97 P 271.

**60.** Peeples v. Hayley, Beine & Co. [Ark.] 116 SW 197; State Nat. Bank v. U. S. Life Ins. Co., 238 Ill. 148, 87 NE 396; Kennard v. Curran, 239 Ill. 122, 87 NE 913; Singletary v. Boener-Morris Candy Co. [Ky.] 112 SW 637; Delta & Pine Land Co. v. Adams [Miss.] 48 S 190; Isaacks v. Wright [Tex. Civ. App.] 110 SW 970; Pierce County v. Bunch, 49 Wash. 599, 96 P 164.

**61.** State Nat. Bank v. U. S. Life Ins. Co., 238 Ill. 148, 87 NE 396. As where rights of parties not before court are so intimately connected with subject-matter of controversy that final decree cannot be made without materially affecting their rights and interests. Larson v. Glos, 235 Ill. 584, 85 NE 926. Where it is impossible to make proper decree until certain persons have been made defendants, supreme court, of its own motion, will decline to act until

ment,[64] or verification[65] of pleadings, variance,[66] objections to an agreed statement of facts,[67] qualification of jurors,[68] the admission, exclusion and sufficiency of evidence,[69] depositions,[70] instructions,[71] findings,[72] formal objections to the verdict,[73] objections to the judgment,[74] costs,[75] counsel fees,[76] and procedure for perfecting intermediate appeals.[77] One cannot predicate error upon matters to which he has

such persons have been brought in. Gates v. Union Naval Stores Co. [Miss.] 45 S 979.

62. Poirier Mfg. Co. v. Kitts [N. D.] 120 NW 558.

63. For full discussion of the necessity, time, and manner of objecting to pleadings, see Pleading, 12 C. L. 1323.

64. Springfield Shingle Co. v. Edgecomb Mill Co. [Wash.] 101 P 233.

65. That petition was not verified. McCullough v. McCullough, 238 Ill. 50, 87 NE 69.

66. See, also, Pleading, 12 C. L. 1323. Cumberledge v. Brooks, 235 Ill. 249, 85 NE 197; Ragsdale v. Illinois Cent. R. Co., 236 Ill. 175, 86 NE 214; Houren v. Chicago, etc., R. Co., 236 Ill. 620, 86 NE 611; Gascoigne v. Metropolitan West Side El. R. Co., 239 Ill. 18, 87 NE 883; Reavely v. Harris [Ill.] 88 NE 238; Forge & Rolling Mills Co. v. Bartels, 133 Ill. App. 22; Donk Bros. Coal & Coke Co. v. Stroeter, 133 Ill. App. 199; Kellyville Coal Co. v. O'Connell, 134 Ill. App. 311; Central Illinois Const. Co. v. Lloyd, 134 Ill. App. 494; City of Waukegan v. Sharafinski, 135 Ill. App. 436; City of Fairfield v. Sechrest, 136 Ill. App. 8; Linnberg v. Rock Island, 136 Ill. App. 495; Springer v. Schwitters, 137 Ill. App. 103; Huff v. Cleveland, etc., R. Co., 138 Ill. App. 89; Commonwealth Elec. Co. v. Rooney, 138 Ill. App. 275; City of Chicago v. Wieland, 139 Ill. App. 197; Wells Bros. Co. v. Flanagan, 139 Ill. App. 237; Baltimore, etc., R. Co. v. Wood & Co. [Ky.] 114 SW 734; Mississippi Cotton Oil Co. v. Smith [Miss.] 48 S 735; Robinson v. Helena L. & R. Co. [Mont.] 99 P 837; Sturza v. Interborough Rapid Transit Co., 113 NYS 974. Where variance was not taken advantage of by objection, held that, even if question was raised by requests for instructions, there was ground on which court was justified in treating it as impliedly waived. Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co. [C. C. A.] 159 F 824.

67. That it was in nature of conclusion from particular facts rather than statement of such facts. Mulford v. Rowland [Colo.] 100 P 603.

68. Objection that jurors had previously served during same term not considered, where they were not challenged individually on that ground, which was not ground for challenge to the array. Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 116 SW 365.

69. See post, § 4, Necessity and Time of Objection.

70. That it was taken after depositions of other witnesses. Civ. Code Prac. § 587. Hall v. Wilson [Ky.] 116 SW 244.

71. Waligora v. St. Paul Foundry Co. [Minn.] 119 NW 395. That charges of negligence were not sufficiently pleaded to warrant their submission to jury. Roenfranz v. Chicago, etc., R. Co. [Iowa] 116 NW 714. Mistake in stating issues raised by pleadings. Jones v. Parker, 81 S. C. 214, 62 SE 261. Instruction as to matter not in issue and as to which there was no evidence. Plunkett v. Piedmont Mut. Ins. Co., 80 S. C. 407, 61 SE 893. That charge was not marked filed. Carter v. Kieran [Tex. Civ. App.] 115 SW 272.

72. Finding not assailed by either party is conclusive on appeal. Mansfield v. District Agr. Ass'n No. 6 [Cal.] 97 P 150.

73. Sandoval Zink Co. v. Hale, 133 Ill. App. 196. Failure of foreman of jury to sign answers to certain interrogatories. Perry-Matthews-Buskirk Stone Co. v. Smith [Ind. App.] 85 NE 784. Where defendants remained silent when forms of verdict were explained and delivered to jury and when verdict was returned and accepted, held that they could not question form of verdict rendered on appeal. Pelton v. Goldberg [Conn.] 70 A 1020.

74. Decree setting aside fraudulent conveyances of several tracts of land and ordering sale thereof not reversed because making no reference to homestead, where no such objection was made below and it appeared that homestead rights could be readily preserved in carrying out decree. Mette v. Mette, 154 Mich. 662, 15 Det. Leg. N. 901, 118 NW 588. Cannot complain that on appeal from justice's court to county court judgment was rendered against defendant without in any manner disposing of case against his codefendant, where no such objection made in county court in motion for new trial or otherwise. Keefer v. Amicone [Colo.] 100 P 594.

75. Question of taxation of costs not considered where not called to trial court's attention. Whitelaw v. Rodney, 212 Mo. 540, 111 SW 560.

76. Allowance of solicitor's fees. Beck Coal & Lumber Co. v. Peterson Mfg. Co., 237 Ill. 250, 86 NE 715. Plaintiff not entitled to judgment for attorney's fees on appeal, where did not ask for such judgment below. Des Moines Life Ins. Co. v. Clay [Ark.] 116 SW 232.

77. That notice of appeal from justice court to municipal court was not served in time. Cordello v. Deponte [Minn.] 120 NW 902. Whether writ of error from circuit court to county court was perfected in time, and, hence, whether circuit court had jurisdiction, it being question which might have been affected by matters not appearing in record, and for nonappearance of which petitioner was not responsible. Louisa County v. Yancey's Trustee [Va.] 63 SE 452. Where question of jurisdiction of district court on appeal from order disallowing claim against county was in no manner raised below, but case was tried on its merits, any irregularity in getting before that tribunal could not be complained of. Washington County v. Murray [Colo.] 100 P 588. Objection that justice had not signed certificate to transcript. Roblin v. Jenkins, 83 Ark. 517, 104 SW 203. Though filing of duly authenticated transcript is essential to perfect appeal from

expressly [78] or impliedly [79] consented, nor upon rulings to which he has submitted [80]

county to district court, and though it is not so authenticated, yet if parties proceed in district court on theory that appeal has been perfected, they cannot question sufficiency of such transcript on further appeal to supreme court. Whitcomb v. Chase [Neb.] 119 NW 673. Fact that district court on appeal tried case on theory that proper parties were before it held not to preclude dismissal of further appeal to supreme court for failure to serve necessary parties. In re Farley Drainage Dist. No. 7 [Iowa] 120 NW 83.

78. Where case was submitted on agreed statement which provided that court should determine the question of jurisdiction and should treat the record as though formal plea to jurisdiction had been filed, it would be so considered on appeal. Lucas v. Patton [Tex. Civ. App.] 20 Tex. Ct. Rep. 796, 107 SW 1143. Where plaintiff stipulated that court should decide issues of fact upon testimony given at former trial, he could not predicate error on refusal to admit evidence on such trial. Dooley v. Burlington Gold Min. Co. [Ariz.] 100 P 797. Where plaintiff in action of forcible entry and unlawful detainer was in possession and asserting right to possession of premises when case was transferred from municipal to district court, and his rights were there litigated with his consent, held that he could not contend on appeal that action should have been dismissed in municipal court because he was not in possession when it was commenced. Bartleson v. Munson, 105 Minn. 348, 117 NW 512. Where parties consented that court should consider such statutes and decisions of another state as were adduced by them and give judgment thereon, neither could object that foreign law was not properly proved. Union Cent. Life Ins. Co. v. Dukes [Ky.] 113 SW 454. Alleged error in decreeing sale of property in bulk in partition suit held not open to consideration, where appellant reserved no exception to master's report advising sale and stated in answer to rule that he had no objections to urge against confirmation. City of New Orleans v. Howard [C. C. A.] 160 F 393. One who by stipulation below has waived the right to object to the method of taking testimony and to delay in decision cannot urge such objections on appeal. Vucci v. Pelletieri, 111 NYS 784. No error requiring reversal where judgment was entered in accordance with agreement signed by attorneys and filed with papers, defendants having appeared and answered, and court having jurisdiction of parties and subject-matter. Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. [Tex. Civ. App.] 111 SW 417. Defendants held not entitled to contend that court erred in referring cause to referee because suit should have been brought in equity instead of at law, where they consented to **reference** and in every way treated action as one at law. Crocker v. Barteau, 212 Mo. 359, 110 SW 1062. Where court and parties treated demurrer to return to writ of mandamus as answer, and consent order was issued referring only controverted issue to referee to report testimony, and upon his report demurrer was overruled and motion for peremptory writ denied, held that relator, having consented to **irregular procedure,** could not complain. State v. District Board of School Dist. No. 1, 135 Wis. 619, 116 NW 232. Defendant held not entitled to complain that master considered findings prepared by parties, where he suggested their submission and both parties agreed to and participated in course pursued. Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 NE 132. **Right to trial by jury** regularly chosen waived where counsel consented to set trial at time when he knew picked-up jury would have to be used. Texas & P. R. Co. v. Coggin, 44 Tex. Civ. App. 423, 18 Tex. Ct. Rep. 75, 99 SW 1052. Where party stipulated that court might make findings of fact, he could not complain of failure to submit case to jury. Dooley v. Burlington Gold Min. Co. [Ariz.] 100 P 797. Consent to **admission of evidence** as condition precedent to reopening case held to preclude objection to its admission. Cutter-Tower Co. v. Clements, 5 Ga. App. 291, 63 SE 58. Withdrawal of objection to evidence is consent to its admission and precludes subsequent objection. Ham v. St. Louis & S. F. R. Co. [Mo. App.] 117 SW 108. Where counsel did not object to particular **instruction,** but after procuring modification of another one stated in response to question as to whether he had anything more to say, that he was through, held that he could not question such instruction on appeal. Cucciarre v. New York Cent. & H. R. Co. [C. C. A.] 163 F 38. Statement of counsel held acquiescence in what court said on certain subject in charge. Hoagland v. Canfield, 160 F 146. Counsel held to have waived right to raise question that certain requests were not charged by stating, when court offered to read all requests, that he would not insist on his doing so. Jones v. Parker, 81 S. C. 214, 62 SE 261.

79. Party who sits by without objection and permits general verdict to be dispensed with and answers or findings upon particular questions of fact to be returned into open court, and afterwards files motion for judgment in his favor thereon, cannot complain because no general verdict was returned. Stanard v. Sampson [Okl.] 99 P 796. Where, at beginning of trial, defendants admitted execution of note sued on, and assumed burden of proof when it was later offered in evidence by plaintiff in rebuttal, held that it could not be excluded on ground that its execution must be proved by witness by whom it was attested. Ford v. Parker, 131 Ga. 443, 62 SE 526.

80. Where plaintiffs appeared in court to which case was transferred and contested suit, held that they could not contend that court had no jurisdiction because no order of transfer was made by court in which action was originally brought. Kruegel v. Daniels [Tex. Civ. App.] 109 SW 1108. Where, after judgment on demurrer to complaint, plaintiff does not except, but amends so as to meet views of court, he acquiesces in the judgment, and cannot assign it for error. Rice v. McAdams, 149 N. C. 29, 62 SE 774. On second trial, court ruled that certain evidence was inadmissible under complaint and granted plaintiff leave to withdraw juror, ordering him to pay $30 trial fee. Thereafter, special term allowed amendment on payment of $10 costs only on assumption that theory of first trial and appeal was that complaint was sufficient to admit such evidence. Held that plaintiff was not at liberty

or in which he has acquiesced,[81] nor can he complain of errors which he might have obviated.[82]

*Change of theory.* See 10 C. L. 1577—The theory on which the case was tried below will be adhered to on appeal,[83] whether such theory relates to the pleadings,[84] the

to urge such view since he acquiesced in court's ruling. Purcell v. Hoffman House, 115 NYS 778.

81. Where defendant acquiesced in removal of administrator from making of order until petition for rehearing on appeal from judgment in action on bond given by administrator on sale of land, held that it was too late to question validity of order of removal. Moore v. State [Ind.] 84 NE 1096. Where counsel withdrew question on being asked by court whether he thought it proper, held that he could not contend that court erred in excluding the testimony. Beck v. Ann Arbor R. Co. [Mich.] 16 Det. Leg. N. 141, 120 NW 983. Where ruling striking answer as not responsive plainly invited further examination, but counsel did not pursue subject further, held that he could not complain. Putnam v. Phoenix Preferred Acc. Ins. Co. [Mich.] 15 Det. Leg. N. 980, 118 NW 922. Where counsel was permitted on cross-examination of expert to ask for description of certain muscles, and stated that he did not desire witness to give their technical names, held that he could not complain of ruling that witness need not give such names. Burton v. Neill [Iowa] 118 NW 302. Cannot complain of admission of certain evidence in rebuttal where participated therein. Van Cleve v. St. Louis, etc., R. Co. [Mo. App.] 118 SW 116. Defendant held not entitled to complain of misleading instruction where he might have taken steps to protect himself but did not. Poull & Co. v. Foy-Hays Const. Co. [Ala.] 48 S 785. Cannot complain of failure to submit question to jury where acquiesced in submission of another one. Campbell v. Long Island R. Co., 127 App. Div. 258, 111 NYS 120. Defendant not entitled to new trial on ground of surprise where moved for directed verdict after introduction of surprising evidence. Remington Typewriter Co. v. Simpson [Neb.] 120 NW 428.

82. Where plaintiff failed to take advantage of opportunity to offer oral testimony of witness, but objected to having her brought into court, he could not complain of refusal to admit her ex parte deposition. Holland v. Riggs [Tex. Civ. App.] 116 SW 167.

83. Reed v. Reed, 80 Conn. 401, 68 A 849; Mitchell v. Nelson, 142 Ill. App. 534; Conrad v. Hausen [Ind.] 85 NE 710; Siemonsma v. Chicago, etc., R. Co., 137 Iowa, 607, 115 NW 230; Anderson v. Maxwell [Miss.] 48 S 227; Huss v. Heydt Bakery Co., 210 Mo. 44, 108 SW 63; Sharp v. Missouri Pac. R. Co., 213 Mo. 517, 111 SW 1154; Hof v. St. Louis Transit Co., 213 Mo. 445, 111 SW 1166; Taylor & Sons Brick Co. v. Kansas City So. R. Co. [Mo.] 112 SW 59; Morrison v. Roehl [Mo.] 114 SW 981; Riggs v. Metropolitan St. R. Co. [Mo.] 115 SW 969; Fulwider v. Trenton Gas L. & P. Co. [Mo.] 116 SW 508; Beauchamp v. Taylor, 132 Mo. App. 92, 111 SW 609; Lowenstein v. Missouri Pac. R. Co. [Mo. App.] 115 SW 2; Erie R. Co. v. Waite, 63 Misc. 372, 114 NYS 1115; Morris v. Salt Lake City [Utah] 101 P 373. Where party proceeds below in manner inconsistent with intent to assert right to which he might be entitled, he will not be permitted to shift his position on appeal and claim for first time a benefit which he has rejected in all prior stages of the proceeding. Madison v. Octave Oil Co. [Cal.] 99 P 176. That bank and W., trustee, were cross complainants in cross complaint filed in bank's behalf. First Nat. Bank v. Farmers' & Merchants' Nat. Bank [Ind.] 86 NE 417. That all notes sued on were practically within same legal status. Hunter v. Allen, 127 App. Div. 572, 111 NYS 820. Counsel by their conduct held to have treated question as embraced in and settled by special verdict, or as established by undisputed evidence. Maxon v. Gates, 136 Wis. 270, 116 NW 758. Where both parties tried case on theory that burden was on defendant to show that signature to note was forgery, when it was in fact on plaintiff, error in permitting defendant to open and close held not ground for reversal. Nagle v. Schnadt [Ill.] 88 NE 178. Where plaintiff conceded in writing below that defendant's default was due to inadvertence and excusable neglect, and questions involved were submitted on that theory, held that he could not change his position on appeal and assert that default was not excusable. Aaron v. Holmes [Utah] 99 P 450. Where it was assumed throughout trial that street was city street, held too late to raise question on argument after close of evidence that it had characteristics of rural highway. Gannett v. Independent Tel. Co., 55 Misc. 555, 106 NYS 3. Statement in findings of fact that relator proceeded on certain theory held not to render such theory binding on supreme court, where it did not appear from general tenor of information or from character of evidence that parties acquiesced therein. State v. Scott [Ind.] 86 NE 409. Cannot urge on appeal that recital in deed was admissible to show fact recited, where was not relied upon or offered for that purpose below, and instruction to jury not to so consider it was not objected to. Ryle v. Davidson [Tex. Civ. App.] 116 SW 823.

84. Theory of complaint. Bell v. Edwards, 78 S. C. 490, 59 SE 535. That complaint was based on statute instead of cause of action at common law. Zeller, McClellan & Co. v. Vinardi [Ind. App.] 85 NE 378. Where on appeal appellant claimed that action was based wholly upon a statute, and appellee that independently of statute judgment could be upheld as common-law action, held that supreme court was required to determine theory of action according to theory upon which it was presented to trial court, and in doing so would look to pleadings and entire record and briefs of counsel. Knight & Jillson Co. v. Miller [Ind.] 87 NE 823. That answer sets up defense of laches. Wilder's Ex'x v. Wilder [Vt.] 72 A 203. Defendant's plea of payment was broad enough to cover payment before or after suit brought, and plaintiff joined issue thereon without objection. Defendant below contended that payment was made before suit brought, and court found that it was made after and rendered judgment for defendant. Held that, by

form of the action,[85] the issues[86] of law[87] or of fact,[88] parties,[89] the evidence,[90]

contending that plea was broad enough to admit proof of payment after suit brought, defendant was not taking advantage of informality of his own plea for first time on appeal. Stevens v. Standard Oil Co. [Ala.] 47 S 140. Where both parties without objection joined in rehearing of demurrer to complaint on motion for judgment after answer filed, and treated complaint, bill of particulars and affirmative allegations of answer as true, held that practice could not be criticised on appeal. Singers-Bigger v. Young [C. C. A.] 166 F 82. Where there was no plea setting up extension of time of payment as releasing surety, held that question of extension was not presented by record in supreme court, though it was considered in trial and appellate courts. Commercial L. & T. Co. v. Mallers, 237 Ill. 119, 86 NE 728. Where all parties treated amendment to complaint as duly made, it will be so treated on appeal. Springfield Shingle Co. v. Edgecomb Mill Co. [Wash.] 101 P 233.

85. That action was one in tort. Wabash R. Co. v. Reynolds, 41 Ind. App. 678, 84 NE 992. That case was equity case. Ware v. White, 81 Ark. 220, 108 SW 831; Northup's Trustees v. Sumner's Trustee [Ky.] 116 SW 699. That case was law case. Rowe v. Allison [Ark.] 112 SW 395; Pennebaker Bros. v. Bell City Mfg. Co. [Ky.] 113 SW 829; Locust v. Caruthers [Okl.] 100 P 520. That action should have been at law instead of in equity. Wait v. Mystic Workers of the World [Iowa] 119 NW 72. That proper remedy was by suit in equity instead of action at law. Reed v. Engel, 142 Ill. App. 413.

86. Where instruction given at plaintiff's request assumed validity of contract, held that plaintiff could not contend on appeal that contract was invalid. Woodbridge Ice Co. v. Semon Ice Cream Corp. [Conn.] 71 A 577. Issues on appeal must be same as those made below. Vicksburg Mfg. & Supply Co. v. J. H. Jaffray Const. Co. [Miss.] 49 S 116; Hartshorn v. Wright County Dist. Ct. [Iowa] 120 NW 479; Nueces Valley Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633.

**Where treat issues as regularly made up,** cannot contend to the contrary on appeal. Want of plea. First Nat. Bank v. Miller, 235 Ill. 135, 85 NE 312; Planters' & Merchants' Independent Packet Co. v. Webb [Ala.] 46 S 977. Failure of defendant made party by amended petition to answer separately. Holland v. Coleman [Ky.] 114 SW 305. That plea was not at issue. Dietrich v. Hutchinson, 81 Vt. 160, 69 A 661. Failure to reply. De Buhr v. Thompson [Mo. App.] 114 SW 557; Krbel v. Krbel [Neb.] 120 NW 935; American Freehold Land Mortgage Co. v. Smith [Neb.] 120 NW 1113. Defendant held to have waived and abandoned its cross complaint and rights conferred on it by default. Madison v. Octave Oil Co. [Cal.] 99 P 176. Complainant failed to file formal answer to defendant's cross complaint, and defendants caused default to be entered. Held that, case having been heard upon proofs on all disputed questions of fact, supreme court would, by an order nunc pro tunc, set aside default and treat cross claims as answered by denial in all essential particulars. Hickman v. Chaney [Mich.] 15 Det. Leg. N. 1003, 118 NW 993.

**Issue of law or fact:** Where plaintiff tried case on theory that evidence on certain issue made question for jury, he could not contend that court should have directed verdict for him. Grimes v. Cole, 133 Mo. App. 522, 113 SW 685. Where question of contributory negligence was treated by both parties as issue of fact for jury, held that defendant could not complain of such submission though plaintiff was guilty of contributory negligence as matter of law. Dahmer v. Metropolitan St. R. Co. [Mo. App.] 118 SW 496.

87. Claims of law are to be construed with reference to matters in fact being litigated. Greist v. Gowdy [Conn.] 71 A 555. Contention that law of state under which defendant fraternal benefit association was organized did not permit issuance of certificate sued on cannot be first raised on appeal. Ancient Order of the Pyramids v. Dixon [Colo.] 100 P 427.

**Constitutional questions** will not be considered on appeal where they were not raised below. State v. Birmingham [Ala.] 48 S 843; In re McWhirter's Estate, 235 Ill. 607, 85 NE 918; Haas Elec. & Mfg. Co. v. Springfield Amusement Park Co., 236 Ill. 452, 86 NE 248; Vermilion Special Drainage Dist. Com'rs v. Shockey, 238 Ill. 237, 87 NE 335; Walker v. Dunham [Mo. App.] 115 SW 1086; Lyon v. Bertolero [S. D.] 120 NW 766; Southern R. Co. v. King [C. C. A.] 160 F 332. Parties who did not attempt to register their titles below held not entitled to question constitutionality of section of registration act, where court was not at any time called upon to pass on question. McMahon v. Rowley, 238 Ill. 31, 87 NE 66. Where constitutional question first arose on motion after judgment, it was **timely** presented in motions for new trial and in arrest. Wabash R. Co. v. Flannigan [Mo.] 117 SW 722. Question held raised too late by motion for new trial. Hartzler v. Metropolitan St. R. Co. [Mo.] 117 SW 1124.

88. Where point that evidence failed to show certain fact specifically was not made below, and court assumed that plaintiff's evidence related to it, held that case would, on plaintiff's appeal, be determined on facts so assumed. Welton v. Crystal Tp., 152 Mich. 486, 15 Det. Leg. N. 247, 116 NW 390. Case must be tried on the pleadings filed below. Burrow v. Hicks [Iowa] 120 NW 727. Question not within issues as raised by pleadings, not considered. Anderson v. Mitchell [Wash.] 98 P 751. Issue on which case was not put to jury, eliminated. Riggs v. Metropolitan St. R. Co. [Mo.] 115 SW 969. New trial will not be granted solely for purpose of raising issues pleaded but abandoned below. La Roche v. Mulhall, 112 NYS 1115. Contention that question of negligence was narrowed to specific act of negligence alleged in notice of injury and complaint cannot be first raised on appeal. Campbell v. Long Island R. Co., 127 App. Div. 258, 111 NYS 120. Where parties, with consent of court, unite in trying case on theory **that particular matter is within issues,** they will not be permitted to depart therefrom on review. Missouri, K. & T. R. Co. v. Wilhoit [C. C. A.] 160 F 440; Western Coal & Min. Co. v. Buchanan [Ark.] 114 SW 694; Peck v. Noee [Cal.]

grounds of recovery[91] or defense,[92] burden of proof,[93] measure of damages,[94] or

97 P 865; Triple Tie Ben. Ass'n v. Wood [Kan.] 98 P 219; Wilcox v. Court of Honor [Mo. App.] 114 SW 1155. That pleadings embraced all matters considered by referee in making up findings. Johnson v. Carter [Iowa] 120 NW 320. For purpose of determining relevancy of evidence, court will regard as issue of fact to be tried that which was tendered and accepted as such by parties in court below, without objection. Axel v. Kraemer, 75 N. J. Law, 688, 70 A 367. Where case was tried on theory that payment of usury was only issue, plaintiff could not contend that judgment should be reversed because usury was not pleaded in answer. Farmers' & Merchants' Bank v. Zook, 133 Mo. App. 603, 113 SW 678. Defendant held not entitled to contend that opinion of architect was final in absence of fraud and that no fraud was alleged in reply, in view of requested instructions, etc. Moore v. Board of Regents for Normal School in Dist. No. 2 [Mo.] 115 SW 6. Cannot raise question of **variance** where voluntarily litigate issues not made by pleadings. Vaillancour v. Minneapolis & St. L. R. Co., 106 Minn. 348, 119 NW 53. Where pleadings were treated as sufficient to sustain cause of action on which plaintiff recovered. Epstein v. Gordon, 114 NYS 438. Where case was tried on theory of substantial performance, though complete performance was alleged. Rubin v. J. C. Gabler Co., 127 App. Div. 275, 111 NYS 124. Rule that, when case has been tried and decided upon theory that evidence was within issues made by pleadings, defeated party may not avail himself of objection that pleadings did not warrant admission of such evidence, held not applicable where plaintiff in no way recognized issues as being in case, and evidence, though not specifically objected to, was so clearly outside any issue made by answer that trial court was justified in disregarding it. Sun Ins. Office v. Heiderer [Colo.] 99 P 39.

**89.** Where parties saw fit, without formal amendment, to proceed and try case as though certain person not made a party had been impleaded as partner, held that defendant could not claim fatal variance in proof. Hambro Distilling & Distributing Co. v. Price & Co. [Iowa] 119 NW 541. Objection that defendant was misnamed not available where it made no objection below, asserted in its answer to suit that it was the defendant therein, and sought recovery in its favor from plaintiff on account of transactions between them set out in petition. Sullivan-Sanford Lumber Co. v. Cline [Tex. Civ. App.] 114 SW 175. One sued as "J. G., Trustee," held not entitled to contend on appeal that he was sued individually, where he appeared and prosecuted appeal as trustee. Brimson v. Arnold, 236 Ill. 495, 86 NE 254. That beneficiary and trustee were cross complainants in cross complaint filed in behalf of beneficiary. First Nat. Bank v. Farmers' & Merchants' Nat. Bank [Ind.] 84 NE 1077.

**90.** That paper was not formally offered in evidence where it was treated by both parties as being in evidence. Sieberts v. Spangler [Iowa] 118 NW 292. That note and mortgage on which action was founded were in evidence, though not formally introduced. Watson v. Bowman [Iowa] 119 NW 623.

**91.** Peterson v. Conlan [N. D.] 119 NW 367; Harris v. First Nat. Bank [Okl.] 95 P 781. Cannot rely on different cause of action than that pleaded, proved and relied on below. MacArdell v. Olcott, 189 N. Y. 368, 82 NE 161. Where petition alleges specific grounds of negligence, others cannot be relied on on appeal. Fulwider v. Trenton Gas L. & P. Co. [Mo.] 116 SW 508. Remedy. Luigart v. Lexington Turf Club [Ky.] 113 SW 814. Theory of cause in mandamus proceedings. State v. Schnitger, 16 Wyo. 479, 95 P 698. Plaintiff held not entitled to recover on theory that defendant's entry was trespass for which he had statutory right to recover in assumpsit, where theory was not called to court's attention and was not supported by pleadings. Weidman v. Willson, 153 Mich. 82, 15 Det. Leg. N. 328, 116 NW 539. Where plaintiff rested his right under deed on theory that homestead in land conveyed had been abandoned, held that appellate court was limited to that theory. Jones v. Kepford [Wyo.] 100 P 923. Question of defendant's right to allowance for improvements on theory that they were made by him in good faith when he supposed he was owner of property, where he defended solely upon claim of ownership. Hall v. O'Connell [Or.] 96 P 1070. Where plaintiff grounded case from first to last on **express warranty,** and requested submission thereof on theory that it should turn upon whether there was such warranty or not, and it was so submitted, held that he could not contend that issue of implied warranty should have been submitted. Sherwood v. Hulett, 134 Wis. 561, 114 NW 1111. Where trial below proceeded on theory of defendant's **absolute liability,** and that only issue was amount of damages, and both parties requested instructions on that theory, held that defendant could not complain of failure to submit question of its negligence. Berger v. St. Louis Storage & Commission Co. [Mo. App.] 116 SW 444. Where case was tried on theory that **cause of action** was for breach of express warranty, it could not be contended that issue was not before court, but cause of action pleaded was one in tort, even though point was not raised by appellee. Conkling v. Standard Oil Co., 138 Iowa, 596, 116 NW 822. Where case was tried on theory that it was based on statute, cannot claim on appeal that recovery may be had at common law independent of statute. Mathieson v. St. Louis & S. F. R. Co. [Mo.] 118 SW 9. Where case was tried on theory that action was for recovery of damages for deceit, held that question whether complaint stated cause of action for recovery of money earned by defendant as plaintiff's agent was not open to consideration. Wessel v. Gigrich, 106 Minn. 467, 119 NW 242.

**Grounds not available** because not urged below: Consideration for contract not urged below. Holliday-Klotz Land & Lumber Co. v. Beekman Lumber Co. [Mo. App.] 116 SW 436. Contention of materialman that he was entitled to priority of lien over contractors and subcontractors. Hurley v. Tucker, 128 App. Div. 580, 112 NYS 980. In action to enjoin construction of bridge, contention that no authority to construct bridge across river, as required by federal statutes, was shown. Watters v. Mankato, 106 Minn. 161, 118 NW

358. Where case was tried on theory that deed was valid, that if it created contingent remainder it was void under rule against perpetuities. Buxton v. Kroeger [Mo.] 117 SW 1147. Doctrine of res ipsa loquitur. Gascoigne v. Metropolitan West Side El. R. Co., 239 Ill. 18, 87 NE 883. That defendant conceded its negligence. MacDonald v. Metropolitan St. R. Co. [Mo.] 118 SW 78.

**92. Defenses not made below** will not be considered on appeal. O'Brien v. Big Casino Gold Min. Co. [Cal. App.] 99 P 209; Nickels v. Frankfort City Councilmen, 33 Ky. L. R. 918, 111 SW 706; Howland v. Caille, 153 Mich. 349, 15 Det. Leg. N. 460, 116 NW 1079; Laverne Citrus Ass'n v. Chicago G. W. R. Co. [Minn.] 119 NW 795. Where respondent in involuntary bankruptcy proceedings did not appear and try out issue of insolvency below, though it had opportunity to do so, held that it could not do so on appeal Young & Holland Co. v. Brande Bros. [C. C. A.] 162 F 663. That plaintiff was not building and loan association, and hence not entitled to exact certain rate of interest. Iowa Business Men's Bldg. & Loan Ass'n v: Fitch [Iowa] 120 NW 694. That defendant is voluntary unincorporated association not authorized to be sued under laws of state. Iron Moulders' Union v. Allis-Chalmers Co. [C. C. A.] 166 F 45. That plaintiff held title in trust, where his title was alleged in complaint and reply and admitted in answer. Dodds v. Dodds [Wash.] 98 P 748. Contention that railroad company could not be held liable for obstruction of watercourse because road was not built by it, and it had not been shown that it had notice that it was a nuisance or an obstruction. Nickey v. St. Louis, etc., R. Co. [Mo. App.] 116 SW 477. That defendant was mere licensee. Habina v. Twin City General Elec. Co., 150 Mich. 41, 14 Det. Leg. N. 605, 113 NW 586. Whether surety was released because not notified of principal's default. Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729. In action on guaranty, question whether due diligence was used in pursuing original debtor. National Bank of Chester County v. Thomas, 220 Pa. 360, 69 A 813. That certain articles were not baggage. Kansas City So. R. Co. v. Skinner [Ark.] 113 SW 1019. Waiver of vendor's lien. State Bank v. Brown [Iowa] 119 NW 81. Objections to lien statements in action to foreclose mechanic's lien. Schmoll v. Lucht, 106 Minn. 188, 118 NW 555. That identity of signers of instrument conveying town land as proprietors was not established. Foote v. Brown [Conn.] 70 A 699. That copies of contracts were not signed by brokers so as to bind both parties. Anderson v. Stewart, 108 Md. 340, 70 A 228. That writing was not intended as contract of sale. Price v. Rosenberg, 200 Mass. 36, 85 NE 887. Right to rescind contract for breach of warranty. Baker v. Robbins [Wash.] 99 P 1. That title to note sued on was not in plaintiff. Brethauer v. Schorer [Conn.] 70 A 592. Defendant's claim that plaintiff had not complied with contract sued on in certain particular, where matter was not fully explained by evidence and neither party insisted on determination of it by court or jury. Trego v. Roosevelt Min. Co., 136 Wis. 315, 117 NW 855. Delivery of deed. Fitzgerald v. Tevdt [Iowa] 120 NW 465. That indorsement of note was for accommodation of makers. Van Norden Trust Co. v. Rosenberg, 62 Misc. 257, 114 NYS 1025. In suit against indorsers of checks, point that neither due presentation nor due notice to defendants of nonpayment had been pleaded or proved. Teitelbaum v. Somerling, 113 NYS 528. In action on insurance policy, that part of unpaid premium should have been deducted from plaintiff's recovery. Kephart v. Continental Casualty Co. [N. D.] 116 NW 349. Effect on fire policy of fact that premises were left vacant. National Mut. Fire Ins. Co. v. Duncan [Colo.] 98 P 634. That attorney had no authority to make compromise, where answer admitted that it was made. Rivers v. Campbell [Tex. Civ. App.] 111 SW 190. Question of homestead. Miller v. Wroton [S. C.] 63 SE 449. That compromise of claim was without consideration. Rivers v. Campbell [Tex. Civ. App.] 111 SW 190. That plaintiff could not be held liable for false representations by his coplaintiff, case having been tried on theory that latter represented former as well as himself. Scovell v. Pfeffer [Iowa] 117 NW 684. Where government did not raise question as to proper test for ascertaining "chief value" of importations, but conceded that collector of customs was in error in his finding as to relative values, could not raise question on appeal. United States v. Leerburger [C. C. A.] 160 F 651. Where, in foreclosure proceedings, court erroneously held that agreement by mortgage to accept proceeds of foreclosure sale as full discharge was not supported by sufficient consideration, and hence not an enforcible accord, held that it could not be contended on appeal that there had been no satisfaction because mortgagor had not paid foreclosure expenses as he had agreed, where question was not called to attention of trial court and case was not decided on that ground. Gilson v. Nesson, 198 Mass. 598, 84 NE 854. Where there was no evidence as to when action to foreclose lien was begun, and no such question was raised during trial, but case was tried on merits, held that it could not be urged that lien had lapsed because action was not brought in time. Romeo v. Yonkers, 126 App. Div. 404, 110 NYS 724. **Laches.** Hill v. Barner [Cal. App.] 96 P 111; Henshaw v. State Bank [Ill.] 88 NE 214. That complainant has an **adequate remedy at law.** McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 NE 174; Bauer v. International Waste Co., 201 Mass. 197, 87 NE 637; Rivers v. Campbell [Tex. Civ. App.] 111 SW 190.

**93.** Where party erroneously assumes burden of proof as to particular fact. Burgraf v. Byrnes, 104 Minn. 343, 116 NW 838.

**94.** Case tried on theory that, if plaintiff could recover substantial damages at all, he was entitled to recover for continuing pain and suffering whether aggravated by his continued pursuit of his business or not. Dempster v. Oregon Short Line R. Co., 37 Mont. 335, 96 P 717. Where defendant tried case on theory that, if plaintiff was entitled to recover interest, it was at rate fixed by foreign statute, he could not contend that such statute was improperly admitted in evidence because not pleaded, and hence no interest could be recovered in excess of rate fixed by statute of forum. Santa Clara Valley Mill & Lumber Co. v. Prescott, 238 Ill. 625, 87 NE 851. Where, in suit for infringement of patent, claimant sought below to recover for lost profits only, he could not recover in ap-

stipulations.[95] This rule is, however, applied only in support of the judgment, and not where it would result in overthrowing it.[96]

§ 3. *Mode of objection, whether by objection, motion, or request.*[97]—See 10 C. L. 1578—The manner of raising objections to pleadings,[98] parties [99] and depositions [1] is fully treated in separate articles. Evidence admitted without objection to the question eliciting it will not be excluded on motion [2] unless the answer of the witness is not responsive,[3] or unless its improper character does not appear until after its admission.[4] Counsel should object to improper argument and move to exclude it.[5] Objection on the ground of variance must be made by objection to the evidence when offered,[6] or by a request for an instruction directing the jury to disregard evidence not within the issues raised by the pleadings.[7] An objection to the theory on which a case is tried may be saved by excepting to the instructions given.[8] A request is essential to the review of a failure or refusal to make findings,[9] or a failure to submit a particular question in a special verdict.[10]

§ 4. *Necessity and time of objection.*[11]—See 10 C. L. 1579—Except as to fundamental errors,[12] or errors apparent from the record proper,[13] a timely [14] objection

pellate court on basis of reasonable royalty. McSherry Mfg. Co. v. Dowagiac Mfg. Co. [C. C. A.] 163 F 34.

**95.** Defendant against whom alone judgment was rendered held not entitled to contend for first time on appeal that stipulation required that both he and his codefendant should be condemned if either was, and that latter's trustee in bankruptcy should have been made party. Camp v. Baldwin-Melville Co. [La.] 48 S 927.

**96.** Though case was tried below on theory that no proof of fact essential to plaintiff's recovery was necessary, held that supreme court could not assume existence of such fact for purpose of reversing judgment for defendant. Jones v. Thie [Iowa] 119 NW 616.

**97. Search Note:** See Appeal and Error, Cent. Dig. §§ 1382-1416; Dec. Dig. §§ 233-241; Judgment, Cent. Dig. §§ 457-497; Dec. Dig. §§ 259-267; Trial, Cent. Dig. §§ 169-266, 346-348, 359-367, 376-395; Dec. Dig. §§ 73-105, 150, 159, 167; 8 A. & E. Enc. P. & P. 153.

**98.** See Pleading, 12 C. L. 1323.

**99.** See Parties, 12 C. L. 1175.

**1.** See Depositions, 11 C. L. 1069.

**2.** Union Naval Stores Co. v. Pugh [Ala.] 47 S 48; Birmingham R., L. & P. Co. v. Chastain [Ala.] 48 S 85; Stowers Furniture Co. v. Brake [Ala.] 48 S 89; Wilson v. Jernigan [Fla.] 49 S 44; McClure v. Great Western Acc. Ass'n [Iowa] 118 NW 269; Klopp v. Chicago, etc., R. Co. [Iowa] 119 NW 377; De Laval Separator Co. v. Sharpless [Iowa] 120 NW 657; Holland v. Riggs [Tex. Civ. App.] 116 SW 167. Cannot complain of refusal to strike out incompetent evidence elicited by himself on cross-examination. Maxton v. Gilsonite Const. Co. [Mo. App.] 114 SW 577.

**3.** For necessity of motion in such case, see § 5, post. Remedy in such case is by motion. Stowers Furniture Co. v. Brake [Ala.] 48 S 89.

**4.** For necessity of motion in such case, see § 5, post. Carlile v. Bentley [Neb.] 116 NW 772. Where bill of exceptions does not disclose question calling forth illegal testimony and otherwise shows motion was not overruled because of speculative delay, refusal to strike constitutes error. Skinner Mfg. Co. v. Douville, 54 Fla. 251, 44 S 1014.

**5.** Where he fails to do so, it is not error to refuse instructions asked for sole purpose of answering such argument. Birmingham R., L. & P. Co. v. Chastain [Ala.] 48 S 85.

**6.** Cumberledge v. Brooks, 235 Ill. 249, 85 NE 197; Mississippi Cotton Oil Co. v. Smith [Miss.] 48 S 735. Simple mofion to dismiss complaint on ground that plaintiff has not made out cause of action is insufficient. Bauman v. Tannenbaum, 125 App. Div. 770, 110 NYS 108. Motion for new trial does not preserve question for review in absence of an objection or motion to exclude objectionable testimony. Gascoigne v. Metropolitan West Side El. R. Co., 239 Ill. 18, 87 NE 883.

**7.** Held that court should, when so requested, have instructed jury to disregard evidence as to grounds of negligence not alleged in declaration though evidence was not objected to when offered. Hagen v. Schleuter, 236 Ill. 467, 86 NE 112.

**8.** People's Bank v. Stewart [Mo. App.] 117 SW 99.

**9.** Exception to failure or refusal insufficient. McFarlan v. McFarlan [Mich.] 15 Det. Leg. N. 1103, 119 NW 1108; In re Hut's Estate, 115 NYS 984.

**10.** Exception to verdict because it did not contain such question insufficient. Bucher v. Wisconsin Cent. R. Co. [Wis.] 120 NW 518.

**11. Search Note:** See Appeal and Error, Cent. Dig. §§ 1141-1431; Dec. Dig. §§ 181-231, 243-247; 8 A. & E. Enc. P. & P. 157.

**12.** See ante, § 1.

**13.** See, also, ante, § 1. In absence of objection, judgment can be questioned only for error apparent from record proper. Schafer v. Gerbers, 234 Ill. 468, 84 NE 1064. Illegal items of costs may be excluded on motion to retax though no formal objection thereto before clerk. Boothe v. Farmers' & Traders' Nat. Bank [Or.] 101 P 390.

**14.** As to timeliness of objections to evidence, instructions, etc., see following notes. Exceptions to award of arbitrators because of alleged misconduct held properly dismissed where no objection was filed until after award was filed. Burns v. Pennsylvania R. Co., 222 Pa. 406, 71 A 1054. Error, if any, in submitting to jury in divorce case question as to who was enti-

is essential to the preservation of questions for review, and only questions so saved will be considered by the appellate court.[15] This rule has been applied to the qualifications of the trial court or tribunal,[16] matters relating to the selection and swearing of jurors,[17] objections to pleadings,[18] and parties,[19] the admission[20] or suf-

tled to custody of children held waived where no objection until after verdict, and in motion for new trial. Wright v. Wright [Tex. Civ. App.] 110 SW 158. Where in bastardy proceedings no question was raised prior to judgment as to overseer's right to prosecute, held that exception to order for support of child being made payable to town was insufficient to enable defendant to question town's right to payment. Reynolds v. Hassam, 80 Vt. 501, 68 A 645.

15. Failure to pass on exceptions to depositions prior to entering upon trial of case on merits. Scaly v. Williston [Ky.] 117 SW 959. Orator held not entitled to contend that mandate directing recommittal to master to find certain fact did not authorize taking of additional testimony where first reception of evidence on rehearing was on orator's offer and no objection was made to taking of further testimony, and report was not excepted to on that ground. Scoville v. Brock, 81 Vt. 405, 70 A 1014.

16. That person before whom case was tried as acting mayor was without authority to act as mayor. Baker v. Marcum [Okl.] 97 P 572. That special judge who tried case was not properly chosen. White v. Sohn [W. Va.] 64 SE 442. That special judge selected by parties did not take oath of office. Johnson v. Jackson [Ky.] 114 SW 260. That case involving assessments under levee act was tried in county court before judge who had previously been attorney for drainage commissioners and had advised and assisted in organization of district. Nutwood Drainage & Levee Dist. v. Reddish, 234 Ill. 130, 84 NE 750. Objection to particular judge presiding at trial. Commonwealth Elec. Co. v. Rooney, 138 Ill. App. 275. Objection to disqualification of judge in time when made as soon as discovered. Davis Colliery Co. v. Charlevoix Sugar Co. [Mich.] 15 Det. Leg. N. 974, 118 NW 929.

17. **Time of objection:** Too late after verdict and judgment to object that jury was not sworn. Texas & P. R. Co. v. Butler [Tex. App.] 114 SW 671.

18. For full discussion of manner and time of raising objections to pleadings, see Pleading, 12 C. L. 1323.

19. See Parties, 12 C. L. 1175. Partner who interposed no objection to refusal to permit receiver to intervene held not entitled to complain. Southwell v. Church [Tex. Civ. App.] 111 SW 969.

20. Stowers Furniture Co. v. Brake [Ala.] 48 S 89; St. Louis, etc., R. Co. v. Flinn [Ark.] 115 SW 142; Gainsville & Gulf R. Co. v. Peck, 55 Fla. 402, 46 S 1019; Thomas Bros. Co. v. Price [Fla.] 48 S 262; Wilson v. Jernigan [Fla.] 49 S 44; Hawkins v. Studdard [Ga.] 63 SE 852; Barco v. Taylor, 5 Ga. App. 372, 63 SE 224; Graham v. Matton City R. Co., 234 Ill. 483, 84 NE 1070; Peterson v. Elgin, Aurora & So. Trac. Co., 238 Ill. 403, 87 NE 345; Reavely v. Harris [Ill.] 88 NE 238; Patton & Gibson Co. v. Shreve, 134 Ill. App. 271; City of Chicago v. Thomas, 141 Ill. App. 122; Holroyd v. Millard, 142 Ill. App. 392; Low v. Wilson, 77 Kan. 852, 95 P 1135; Ryan v. Logan County Bank [Ky.] 116 SW 1179; Nichol v. Ward [Mich.] 16 Det. Leg. N. 39, 120 NW 569; Helberger v. Missouri & Kansas Tel. Co., 133 Mo. 452, 113 SW 730; Stone v. Perkins [Mo.] 117 SW 717; Van Cleve v. St. Louis, etc., R. Co. [Mo. App.] 118 SW 116; Kearns v. Waldron [N. J. Law] 69 A 960; Levin v. Public Service R. Co. [N. J. Law] 71 A 58; Fein v. Weir, 129 App. Div. 299, 114 NYS 426; Hawes v. Birkholz, 114 NYS 765; New York City Car Advertising Co. v. Globe Lithographic Co., 114 NYS 788; McCormack v. O'Connor, 62 Misc. 297, 114 NYS 1030; In re O'Bold's Estate, 221 Pa. 145, 70 A 555; South Texas Tel. Co. v. Tabb [Tex. Civ. App.] 114 SW 448; Moore v. Kirby [Tex. Civ. App.] 115 SW 632; Kozik v. Czapiewski, 136 Wis. 70, 116 NW 640. Correction of his testimony by witness. Russell v. Holman [Ala.] 47 S 205. Because not supported by pleadings. Buchanan v. Minneapolis Threshing Mach. Co. [N. D.] 116 NW 335. Testimony enlarges pleadings when it is evident that knowingly and with deliberation witnesses have testified regarding facts not alleged and the proof has been admitted without objection. Wells v. Blackman, 121 La. 394, 46 S 437. Where proof of certain element of damage was made without objection, question of its propriety cannot be first raised on appeal. Hawes v. Birkholz, 114 NYS 765. Error cannot be predicated on refusal of requested instruction limiting damages recoverable to one item, where evidence received without objection shows other damage, since to support it would require attacks on competency of evidence. City of Richmond v. Wood [Va.] 63 SE 449. Not entitled to claim that damages were not determined by exact rule governing recovery in such case, where he did not object to proof of damages by any other methods. Toledo, etc., R. Co. v. Boaz, 130 Ill. App. 17. Where all of several acts of negligence alleged as cause of plaintiff's injury were proved, held that fact that several others were also proved without objection would not defeat recovery. Simeoli v. Derby Rubber Co. [Conn.] 71 A 546. Failure to object to admission of incompetent evidence held not to preclude party from complaining of erroneous instructions based thereon. Walkeen Lewis Millinery Co. v. Johnston, 131 Mo. App. 693, 111 SW 639. Interjected request of counsel after overruling of objection to question held not new question, but request to witness to answer one already asked, so that another objection was not necessary. Scott v. Smith [Ind.] 85 NE 774. **Competency of witness.** Amidon v. Snouffer [Iowa] 117 NW 44. Competency to testify as to transaction with person since deceased. Hanrahan v. O'Toole [Iowa] 117

ficiency[21] of evidence, the giving[22] or refusing[23] of instructions, misconduct of counsel,[24] objections to depositions,[25] matters of practice and procedure generally,[26]

NW 675; Lewis v. Jacobs, 153 Mich. 664, 15 Det. Leg. N. 553, 117 NW 325. Incompetency of administratrix to testify as to value of personal assets of estate of decedent. Curtis v. Hunt [Ala.] 48 S 598. Objection that testimony of physician should not be considered because privileged. In re More's Estate, 153 Mich. 695, 15 Det. Leg. N. 609, 117 NW 329.

**Evidence admitted without objection will be considered** though it would have been excluded had a proper objection been interposed. Lamb's Estate v. Morrow [Iowa] 117 NW 1118; Sutton v. Western Union Tel. Co., 33 Ky. L. R. 577, 110 SW 874; Hubbard v. Allyn, 200 Mass. 166, 86 NE 356; Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co., 199 Mass. 22, 84 NE 1020. Hearsay. Sheibley v. Nelson [Neb.] 121 NW 458. Secondary evidence. Loew Filter Co. v. German-American Filter Co. [C. C. A.] 164 F 855. Evidence of incompetent witness. Weidenhoft v. Primm, 16 Wyo. 340, 94 P 453. Evidence as to transactions and conversations with decedent. Dashner v. Dashner [Iowa] 120 NW 975. **In equity case** court may disregard hearsay evidence admitted without objection. Jones v. Plummer [Mo. App.] 118 SW 109.

**Time of objection:** Evidence must be objected to when offered. Holland v. Riggs [Tex. Civ. App.] 116 SW 167. Exception alone to its admission is insufficient. Civ. Code Prac. § 333, subsec. 3. Moss Tie Co. v. Myers [Ky.] 116 SW 255. Objections to testimony cannot be considered when first called to court's attenton by special charges instructing jury to disregard it. Holland v. Riggs [Tex. Civ. App.] 116 SW 167. Where master's report did not show that any objection was made to oral evidence of appointment of administrator, held that exception to report because of its reception was without force. Warren's Adm'r v. Bronson, 81 Vt. 121, 69 A 655. Where specific objection of incompetency of witness to testify as to transactions with decedent was not interposed when her deposition was taken, held that that portion of testimony should not have been excluded on that ground at trial. Campbell v. Hughes [Ala.] 47 S 45. Objection to question after it has been answered comes too late. Birmingham R., L. & P. Co. v. Chastain [Ala.] 48 S 85; Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553; City Council of Montgomery v. Shirley [Ala.] 48 S 679; Cohn & Goldberg Lumber Co. v. Robbins [Ala.] 48 S 853; Culbertson v. Salinger [Iowa] 117 NW 6; Rosenkovitz v. United R. & Elec. Co., 108 Md. 306, 70 A 108; Stewart v. Watson, 133 Mo. App. 44, 112 SW 762; Cataract City Mill. Co. v. Meunier [R. I.] 69 A 602; Houston, etc., R. Co. v. Roach [Tex. Civ. App.] 114 SW 418; One cannot predicate error on refusal to strike responsive testimony admitted without objection. Birmingham R., L. & P. Co. v. Chastain [Ala.] 48 S 85; Stowers Furniture Co. v. Brake [Ala.] 48 S 89; Wilson v. Jernigan [Fla.] 49 S 44; McClure v. Great Western Acc. Ass'n [Iowa] 118 NW 269; Klopp v. Chicago, etc., R. Co. [Iowa] 119 NW 377; De Laval Separator Co. v. Sharpless [Iowa] 120 NW 657. One cannot complain of the admission of evidence where same or similar evidence has been previously admitted without objection. Contos v. Jamison, 81 S. C. 488, 62 SE 867. Judgment not disturbed because of admission of evidence, where testimony not objected to embraced testimony broad enough to imply that objected to and for which reversal was sought. Birkman v. Fahrenhold [Tex. Civ. App.] 114 SW 428. Where question was not objected to and there was no motion to strike answer, held that defendant waived right to have subsequent objection to similar question later in trial, which was sustained, considered applicable to first question, and was in same position as though no objection had been interposed at any time. Graham v. Matton City R. Co., 234 Ill. 483, 84 NE 1070.

**21.** Where it is apparent that if timely objection had been made at trial, proof could have been supplied. William Messer Co. v. Rothstein, 113 NYS 772. Failure of plaintiff to prove citizenship in suit to quiet title to mining claim. Hankins v. Helms [Ariz.] 100 P 460. Contention that there was no evidence as to length of time defect in sidewalk by reason of which plaintiff was injured had existed. Field v. Gowdy, 199 Mass. 568, 85 NE 884. That evidence was insufficient to show that plaintiff, a foreign corporation, had procured certificate permitting it to do business in state. Locomobile Co. v. De Witt, 59 Misc. 221, 110 NYS 413.

**22.** Mayhew v. Smith, 42 Colo. 534, 95 P 549; Ellering v. Minneapolis, etc., R. Co. [Minn.] 119 NW 507; Green v. Terminal R. Ass'n, 211 Mo. 18, 109 SW 715; Kinlen v. Metropolitan St. R. Co. [Mo.] 115 SW 523; Ershowsky v. Korn, 113 NYS 478; Carroll v. Farley, 113 NYS 478; Kenway v. Hoffman [Wash.] 98 P 98. Charge not objected to is the law of the case. As to measure of damages. Harrison v. Argyle Co., 128 App. Div. 81, 112 NYS 477. Cannot object that interest was improperly allowed, where verdict including it was in exact conformity to instructions, which were not objected to on that ground, and there was no request with respect thereto, and only question of liability was disputed before referee. Locomobile Co. v. De Witt, 59 Misc. 221, 110 NYS 413.

**Time of objection:** Where mistake of fact is made by court in stating party's claims in instruction, he must have same corrected at once. Middlebrook v. Slocum, 152 Mich. 286, 15 Det. Leg. N. 322, 116 NW 422. Must call attention to obviously unintentional misstatements and verbal inaccuracies in charge before jury retires. Waligora v. St. Paul Foundry Co. [Minn.] 119 NW 395. Must call attention to variance between complaint and charge before case is finally submitted to jury. Id.

**23.** Mayhew v. Smith, 42 Colo. 534, 95 P 549; Dimond Bros. v. Beckwith, Quinn & Co. [Wyo.] 98 P 889.

**24.** Peterson v. Pusey, 237 Ill. 204, 86 NE 692; Threshing Mach. Co. v. Stein, 133 Ill. App. 169; Beans v. Denny [Iowa] 117 NW 1091; Johnson v. Union Pac. R. Co. [Utah]

misconduct of jurors,[27] the submission of interrogatories to the jury,[28] objections to the form[29] or sufficiency[30] of the verdict, objections to findings,[31] the failure to make findings,[32] and objections to the judgment[33] So, too, only grounds of objection urged below will be considered on appeal.[34] Only the party asking a question may object that the answer is not responsive.[35]

§ 5. *Necessity and time of motion or request.*[36]—See 10 C. L. 1582—It is often necessary to invoke the action of the court by motion or request in order to predicate error on its failure to act.[37] Thus, a timely motion for judgment[38] or dis-

100 P 390; Kersten v. Weichman, 135 Wis. 1, 114 NW 499.

**Time of objection:** Must be taken at the time. Galveston, etc., R. Co. v. Powers [Tex. Civ. App.] 117 SW 459. Improper argument must be excepted to when made, or at least during trial. Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631. Comes too late when not made until close of argument. Lund v. Upham [N. D.] 116 NW 88.

**25.** For full discussion of manner and time of objecting to depositions, see article Depositions, 11 C. L. 1069. Allowing deposition to be read without objection held waiver of noncompliance with statute relating to custody of depositions and notice of filing. McClure v. Great Western Acc. Ass'n [Iowa] 118 NW 269.

**26. Dismissal.** Loose v. Cooper [Iowa] 118 NW 406. **Removal of case from stet calendar.** Smith v. Ross, 31 App. D. C. 348. Permitting **view by jury.** Woodworth v. Detroit United R. Co., 153 Mich. 108, 15 Det. Leg. N. 374, 116 NW 549. At expense of successful party. Shepherdson v. Clopine [Neb.] 120 NW 420. **Remark of court.** Central Consol. Mines Corp. v. Mills [Colo.] 100 P 410. Fact that requested **charges** were **read to jury by counsel** instead of court. O'Dell v. Goff, 153 Mich. 643, 15 Det. Leg. N. 560, 117 NW 59. Action of court in **reading to jury,** at their request, **portion of evidence** from stenographer's notes **after they had retired** and had considered case for sometime. Smith v. Ross, 31 App. D. C. 348. **Admission of affidavit of juror to impeach verdict.** Milbourne v. Robison, 132 Mo. App. 198, 110 SW 598. Jurisdiction of special term to set aside verdict and grant **new trial because of inadequacy of damages.** Hunt v. Long Island R. Co., 115 NYS 478.

**27.** Losing party held not entitled to complain that jury went to home of one of successful parties for dinner while viewing locus in quo where, though having knowledge of facts, he failed to call matter to court's attention or to object until after verdict. Shepherdson v. Clopine [Neb.] 120 NW 420.

**28.** Will be presumed to have consented. Freedman v. New York, etc., R. Co. [Conn.] 71 A 901.

**29.** That no general verdict was returned, but only special one. Stanard v. Sampson [Okl.] 99 P 796. Right to complain that answers to interrogatories were not signed held waived, where no objection to receiving same unsigned, and no request that they be signed. Id.

**Time of objection:** Whether formal written verdict should have been required where verdict was directed not decided, where omission was first called to court's attention on motion for new trial. American Soda Fountain Co. v. Hogue [N. D.] 116 NW 339.

**30.** That verdict and judgment were against preponderance of evidence. Missouri, K. & T. R. Co. v. House [Tex. Civ. App.] 113 SW 154. Held that objection that jury found amount due plaintiff to be ten cents less than amount named in instruction should have been made before discharge of jury, and was too late when matter was not called to court's attention until after judgment had been rendered. Nichols & Shephard Co. v. Steinkraus [Neb.] 119 NW 23. Failure to answer interrogatories not considered where no objection to reception of verdict without such answers. Freedman v. New York, etc., R. Co. [Conn.] 71 A 901.

**31.** Meeve v. Eberhardt [Tex. Civ. App.] 108 SW 1013.

**32.** Findings of fact and conclusions of law. In re City of Seattle [Wash.] 100 P 1013.

**33.** Contention that there was no allegation or proof of demand for certain item and that therefore judgment allowing it was erroneous held untenable where no objection below to finding of court or to form of judgment on that account. Hill v. Kerstetter [Ind. App.] 86 NE 997, rehearing denied, 87 NE 695. Rendition of judgment on last day of term held not ground for reversal where defendant did not object before judgment was announced. Harris v. Harris [Tex. Civ. App.] 109 SW 1138. Prior to amendment of 1907 no objection to judgment was necessary to obtain review of judgment of municipal court. Wolf v. Scully, 137 Ill. App. 87.

**34.** See § 8, post.

**35.** Alabama City G. & A. R. Co. v. Bullard [Ala.] 47 S 578.

**36. Search Note:** See Appeal and Error, Cent. Dig. §§ 1382-1416, 1650-1764; Dec. Dig. §§ 216, 234-241, 282-305; Trial, Cent. Dig. §§ 627, 628, 630-641, 660, 662-676; 8 A. & E. Enc. P. & P. 153; 20 Id. 986; 22 Id. 1307.

**37.** In absence of **motion to quash service of summons,** uncertainty or ambiguity in return held unavailable on appeal after default, where it did not render service and return void. Zimmerman v. Bradford-Kennedy Co., 14 Idaho, 681, 95 P 825. Where no **motion to quash garnishment bond** was made below, court of appeals will not make mathematical calculation to determine whether it was sufficient in amount. Burge v. Beaumont Carriage Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 918, 105 SW 232. Whether party was entitled to jury trial not considered where no **demand for jury** was made. Grimm v. Pacific Creosoting Co., 50 Wash. 415, 97 P 297; Snow v. Merriam, 133 Ill. App. 641. Contention that issue should have been

missal,[39] or for a directed verdict,[40] or to strike out,[41] or for a new trial,[42] or for a

submitted to jury not open to consideration where no request for submission was made, but both parties moved for directed verdict. Kephart v. Continental Casualty Co. [N. D.] 116 NW 349. Cannot complain that had no opportunity to amend on sustaining of demurrer where made no **request to amend.** Healey v. Zobel [Colo.] 101 P 56; Lott v. Barnes & Jessup Co. [Fla.] 48 S 994. Cannot object to form of referee's report on appeal where made no **motion to refer** same back for correction, but acted on it without objection. Greason v. Holcomb, 116 NYS 336. Cannot complain that counsel stated reasons why continuance should not be granted in presence of jury, where made no **motion to exclude jury.** Case Threshing Machine Co. v. Stein, 133 Ill. App. 169. Written **motion to suppress deposition** necessary to save objections to manner and form of taking it. Wabash R. Co. v. Newton, Weller & Wagner Co. [Tex. Civ. App.] 110 SW 992. Must make **motion to open case** to supply omitted evidence at first opportunity. Bittrick v. Consolidated Imp. Co. [Wash.] 99 P 303. Defendants held not entitled to complain that plaintiff's evidence alone was heard after case was reopened where made no **request for permission to introduce evidence.** Reiff v. Coulter, 47 Wash. 678, 92 P 436. Where was no **request to submit particular issue** and no such issue was tendered, held that failure to submit it could not be objected to after verdict. Clark's Code, § 395. Rich v. Morisey, 149 N. C. 37, 62 SE 762. Where allegation of complaint was denied under oath, and no evidence thereof was offered, and issue was not submitted and there was no request for its submission, held that such issue would not be noticed on appeal. Blackburn v. Chicago, etc., R. Co. [Tex. Civ. App.] 115 SW 874. Held that **request that jury be ordered to answer interrogatories,** or objection to reception of verdict without such answers, was necessary to save objection that they were not answered. Freedman v. New York, etc., R. Co. [Conn.] 71 A 901. If plaintiff desired to submit interrogatories, or to have those presented by defendant answered in case of verdict for defendant, held that they should have so requested before verdict was rendered. Id. Failure to make **application for leave to answer argument** held to preclude objection that no opportunity to answer it was offered. Thomas v. Fos [Wash.] 98 P 663. Before appeal can be prosecuted from void judgment or clerical misprision, **motion to correct judgment** in lower court must first be acted upon by that tribunal. Duff v. Combs [Ky.] 117 SW 259. Error assigned on overruling motion for new trial cannot be considered, where no **request to file reasons for overruling motion,** and none were given. Groat v. Detroit United R. Co., 153 Mich. 165, 15 Det. Leg. N. 395, 116 NW 1081.

**38.** Where no motion for judgment non obstante upon special findings, cannot consider whether they were sufficient to support general verdict. Alexander v. Oklahoma City [Okl.] 98 P 943.

**39.** Failure to move to dismiss because no complaint was filed held election to try particular issue. Johnson v. Pelletreau, 115 NYS 129. Where insufficiency of evidence as to minor details, which could have been readily supplied, was not made subject of properly detailed motion for dismissal, held that it would be inferred that evidence was deemed by all parties to be sufficient. Ward v. Jonasson & Co., 114 NYS 57. Failure to deliver copies of writ for nonresident defendants held waived where motion to dismiss on that ground was not filed within time allowed for dilatory pleas. Wade v. Wade's Adm'r, 81 Vt. 275, 69 A 826. Dilatory objection must be raised at earliest opportunity, which cannot be later than time allowed for dilatory pleadings by the rule of court in a case governed by the rule. Id.

**40.** Failure to move for directed verdict concedes that there is question for jury. Epstein v. Gordon, 114 NYS 438. Question whether evidence fairly tends to establish cause of action can only be saved by asking for written instructions to direct verdict. Reiter v. Standard Scale & Supply Co., 237 Ill. 374, 86 NE 745. Question whether evidence in record tends to support finding of facts of appellate court cannot be reviewed in supreme court in absence of motion in trial court for directed verdict made by defeated party at close of all the evidence and an exception to ruling thereon if adverse. Scheevers v. Illinois Cent. R. Co., 235 Ill. 227, 85 NE 192.

**41. Evidence:** Irresponsive answer to proper question. Sloss-Sheffield Steel & Iron Co. v. Sharp [Ala.] 47 S 279; Barnes v. Danville St. R. & L. Co., 235 Ill. 566, 85 NE 921; McMahon v. Chicago City R. Co., 239 Ill. 334, 88 NE 223; Brooks v. Brierton, 142 Ill. App. 369. Where witness in answer to question calling for fact, gives opinion or conclusion. Midgette v. Branning Mfg. Co. [N. C.] 64 SE 5. Where evidence is shown to be inadmissible after its admission. Pratt v. Seamans, 43 Colo. 517, 95 P 929. Where objectionable character is first discovered on cross-examination. Graham v. Matton City R. Co., 234 Ill. 483, 84 NE 1070; Beans v. Denny [Iowa] 117 NW 1091; McCormack v. O'Connor, 62 Misc. 297, 114 NYS 1030. Testimony rendered incompetent by subsequent introduction of pleadings. Neumeyer v. Hooker, 131 App. Div. 592, 116 NYS 204. Where question is in itself unobjectionable, but answer goes beyond what is called for, and incompetent or improper testimony is produced. Elliff v. Oregon R. & Nav. Co., [Or.] 99 P 76. Evidence admitted subject to exception. Moneyweight Scale Co. v. McCormick [Md.] 72 A 537. Motion to exclude must be made as soon as inadmissibility is discovered. Holland v. Riggs [Tex. Civ. App.] 116 SW 167. Objection to evidence on ground that witness had not qualified himself to testify as to value held too late when first made by motion to strike it out after testimony had been closed and other party had made his argument to jury. Gulf, etc., R. Co. v. Gillespie [Tex. Civ. App.] 118 SW 628.

**Pleadings** [See, also, Pleading, 12 C. L. 1323]: Defendant held not entitled to complain of admission of evidence in support of allegations of complaint as to elements of damages not recoverable, where he did not attempt to have such allegations stricken or

request instructions that such elements should not be considered. Fass v. Western Union Tel. Co. [S. C.] 64 SE 235.

42. As to practice on motions for new trial, see New Trial and Arrest of Judgment, 12 C. L. 1070.

**Arizona:** In absence of motion for new trial, can only determine whether complaint states cause of action and whether facts as found are sufficient to sustain judgment. McDonald v. Cox [Ariz.] 100 P 457. Motion on that ground necessary to obtain review of denial of motion for instructed verdict (Pickthall v. Steinfeld [Ariz.] 100 P 779), or of sufficiency of evidence to support judgment or findings of fact on which it is based (McDonald v. Cox [Ariz.] 100 P 457). Civ. Code 1901, p. 1476, as amended by Laws 1907, c. 74. Id.

**Arkansas:** Motion on that ground necessary to review of admission of evidence. Mitchell v. Smith [Ark.] 111 SW 806.

**Florida:** Motion necessary to save question of sufficiency of evidence to sustain verdict or finding, though case is tried by judge without jury, and though finding and judgment were excepted to. Manatee County State Bank v. Wade [Fla.] 47 S 927.

**Georgia:** Rulings sustaining or overruling demurrers, or allowing or disallowing amendments to pleadings, cannot be made grounds of motion for new trial, but direct exceptions must be filed thereto in order to obtain review thereof. Hawkins v. Studdard [Ga.] 63 SE 852.

**Idaho:** Orders and rulings to which no exception is necessary under Rev. St. 1887, § 4427, can only be reviewed on order granting or refusing new trial. Perkins v. Loux, 14 Idaho, 607, 95 P 694.

**Illinois:** Motion and exception to order overruling same necessary to review sufficiency of evidence to support verdict. Yarber v. Chicago & A. R. Co., 235 Ill. 589, 85 NE 928; Cattinari v. Delmagro, 135 Ill. App. 452; Myers v. Buell, 142 Ill. App. 467; Gschwendtner v. Gebhardt, 142 Ill. App. 260. Weight of evidence. Eckels v. Hawkinson, 138 Ill. App. 627. Propriety of giving or refusing instructions, or admission or rejection of evidence, may be reviewed where rulings of court have been excepted to and incorporated in bill of exceptions, regardless of fact that no motion for new trial was made. Laws 1837, p. 109, § 2; Laws 1857, p. 103; Hurd's Rev. St. 1905, c. 110, § 78. Yarber v. Chicago & A. R. Co., 235 Ill. 589, 85 NE 928. Hence failure to except to order overruling motion does not preclude consideration of such questions in such case, where they are among grounds specified in written motion. Id. Motion held necessary to review of rulings admitting or excluding evidence. Cattinari v. Delmagro, 135 Ill. App. 452; Eckels v. Hawkinson, 138 Ill. App. 627; Tokheim Mfg. Co. v. Stoyles, 142 Ill. App. 198; Gschwendtner v. Gebhardt, 142 Ill. App. 260. Motion not necessary to preserve ruling directing verdict (Myers v. Buell, 142 Ill. App. 467), or to procure review of instructions given and refused (Eckels v. Hawkinson, 138 Ill. App. 627; Cattinari v. Delmagro, 135 Ill. App. 452). Motion is neither required nor authorized in cases tried by court without jury. Climax Tag Co. v. American Tag Co., 234 Ill. 179, 84 NE 873; Schofield v. Thomas, 236 Ill. 417, 86 NE 122; Siegmund v. Strackbein, 140 Ill. App. 454. Where objector to municipal assessments failed to question validity of ordinance at trial and did not preserve evidence and exceptions by bill of exceptions taken at same term, held that he could not preserve question for review by motion for new trial made 14 terms later. City of Chicago v. Hulbert, 235 Ill. 204, 85 NE 222.

**Indiana:** Motion on that ground necessary to review of error in instructions (Parker Land & Imp. Co. v. Ayers [Ind. App.] 87 NE 1062), or overruling of motion to suppress deposition whether before or during trial (Louisville & S. I. Trac. Co. v. Worrell [Ind. App.] 86 NE 78), or error in overruling petition for removal of case to federal court (Hercules Torpedo Co. v. Smith [Ind. App.] 87 NE 254), or error in submitting case to jury for new trial and in refusing to submit it to court (Kelley v. Bell [Ind.] 88 NE 58).

**Iowa:** Motion not necessary to review of alleged error in giving instructions which were excepted to when given. Scurlock v. Boone [Iowa] 120 NW 313.

**Kansas:** Alleged errors not considered where no motion. Work v. Fidelity Oil & Gas Co. [Kan.] 98 P 801.

**Kentucky:** Motion necessary to review rulings at trial. Burrow v. Maxon [Ky.] 112 SW 661. Motion on that ground necessary to review of error in admission of evidence (City of Louisville v. Lambert [Ky.] 116 SW 261), or objection that judgment was rendered against one defendant only (American-German Nat. Bank v. Gray & Dudley Hardware Co., 33 Ky. L. R. 547, 110 SW 393). In penal action in absence of motion and grounds for new trial, court can only consider whether pleadings support judgment. Commonwealth v. Standard Oil Co., 33 Ky. L. R. 1074, 112 SW 632.

**Michigan:** Motion necessary to save objection that verdict is excessive (Cascarella v. National Grocery Co., 151 Mich. 15, 14 Det. Leg. N. 838, 114 NW 857; Dice v. Sherberneau, 152 Mich. 601, 15 Det. Leg. N. 255, 116 NW 416; Wescott v. Wade, 153 Mich. 340, 15 Det. Leg. N. 489, 116 NW 1002), or contention that case was submitted on erroneous theory (Putnam v. Phoenix Preferred Acc. Ins. Co. [Mich.] 15 Det. Leg. N. 980, 118 NW 922).

**Minnesota:** Where motion was not considered on merits because made too late, held that assignment of error that evidence was insufficient to sustain verdict could not be considered. Wehring v. Modern Woodmen of America [Minn.] 119 NW 245. Ruling not assigned as error in motion not considered. Moneyweight Scale Co. v. Hjerpe, 106 Minn. 47, 118 NW 62.

**Missouri:** Motion on that ground necessary to consideration of contention that jury was not waived (Gillian v. Schmidt, 131 Mo. App. 666, 111 SW 611), or the rejection of evidence (Almond v. Modern Woodmen of America, 133 Mo. App. 382, 113 SW 695), or ruling limiting number of witnesses (Felver v. Central Elec. R. Co. [Mo.] 115 SW 980), or error in placing burden of proof (Barnes v. William Waltke & Co. [Mo. App.] 116 SW 7), or in giving instruction (Almond v. Modern Woodmen of America, 133 Mo. App. 382, 113 SW 695).

**Montana:** Motion on that ground necessary to raise question that verdict is excessive. Dempster v. Oregon Short Line R. Co., 37 Mont. 335, 96 P 717.

**Nebraska:** Motion on that ground neces-

continuance,[43] or in arrest of judgment,[44] or for modification of the judgment,[45]

sary to review of rejection of evidence (Tyson v. Bryan [Neb.] 120 NW 940), or instructions (Pennington County Bank v. Bauman [Neb.] 116 NW 669), or error in failing to submit particular issue to jury (Helwig v. Aulabaugh [Neb.] 120 NW 162), or sufficiency of evidence to sustain findings and judgment of district court affirming judgment of county court correcting order admitting will to probate (In re Swan's Estate [Neb.] 118 NW 478). Motion not necessary to secure review of equity case (Ogden v. Garrison [Neb.] 117 NW 714), or ruling striking out parts of petition (Anderson v. Union Stockyards Co. [Neb.] 120 NW 1124). Where bill of exceptions has been quashed and therefore nothing remains for consideration on appeal except pleadings and decree, motion is not condition precedent to review. Walker v. Burtless [Neb.] 118 NW 113. Where special findings are in conflict with general verdict, party relying on verdict may, during term, and within three days of return of findings, move to vacate findings and for judgment on verdict, and, upon overruling of motion and entry of judgment on findings, may, within three days, and during term, move to vacate last recited order and thereby save all questions presented in motion to set aside findings, regardless of whether last motion was filed within three days of return of verdict. Platte County Bank v. Clark [Neb.] 115 NW 787. Is immaterial whether application to vacate findings be indorsed as motion for new trial or to set aside findings. Id. Held not necessary to include motion for vacation of general verdict. Id.

**North Carolina:** Where no motion was made to set verdict aside, finding as to certain issue not disturbed. Jones v. Seaboard Air Line R. Co. [N. C.] 64 SE 205.

**North Dakota:** Sufficiency of evidence to sustain verdict not reviewable in absence of motion. Rev. Codes 1905, § 7226. Landis Mach. Co. v. Konantz Saddlery Co. [N D.] 116 NW 333.

**Oklahoma:** Motion necessary to obtain review of errors occuring at trial, though case is tried to court without a jury. Ahren-Ott Mfg. Co. v. Condon [Okl.] 100 P 556. Cannot complain because no general verdict was rendered where question not presented by motion. Stanard v. Sampson [Okl.] 99 P 796. Where jury returned answers to specific questions submitted, and no motion for new trial was filed for re-examination of facts or to set aside such findings, held that only question left for trial court was to render judgment on facts found, and if, under pleadings, they supported judgment as rendered, same would not be disturbed on appeal. Id. Motion not necessary to review of errors apparent on judgment roll or record proper (Baker v. Hammett [Okl.] 100 P 1114), or to have supreme court determine reasonableness and justness of an order of corporation commission from which an appeal is prosecuted (Kansas City S. R. Co. v. Love [Okl.] 100 P 22; Atchison, etc., R. Co. v. Love [Okl.] 99 P 1081).

**South Carolina:** Sustaining objection to question on cross-examination, where only ground on which evidence would have been admissible was not called to trial court's attention by motion. Barrineau v. Charleston Consol. R. Gas & Elec. Co., 81 S. C. 20, 61 SE 1063.

**Texas:** Motion necessary to procure review of verdict on ground that it is not supported by evidence (Liljeblad v. Sasse [Tex. Civ. App.] 108 SW 787), or failure to render judgment for amount admitted to be due (Morris v. Morris [Tex. Civ. App.] 19 Tex. Ct. Rep. 809, 105 SW 242). Motion not necessary to render available errors in instructions. Farenthold v. Tell [Tex. Civ. App.] 113 SW 635; Young v. State Bank [Tex. Civ. App.] 117 SW 476.

**Utah:** All orders, rulings and decisions made by trial court during trial, including his ruling in directing or refusing to direct a verdict, and all questions of fact in equity cases on which trial court has passed, including the findings, and also all errors in findings of fact and conclusions of law made by court in law cases, are reviewable without motion for new trial. Comp. Laws 1907, § 3304. Law v. Smith, 34 Utah, 394, 98 P 300; Neesley v. Southern Pac. R. Co. [Utah] 99 P 1067.

**West Virginia:** Motion not necessary where case is tried by court without jury. Fisher v. Bell [W. Va.] 63 SE 620.

**Wisconsin:** Motion necessary to review sufficiency of evidence to support verdict. Cayouette v. Raddant Brew. Co., 136 Wis. 634, 118 NW 204; Maxon v. Gates, 136 Wis. 270, 116 NW 758. Motion for judgment, notwithstanding verdict cannot be treated as such a motion. Id. Motion is not condition precedent to review of ruling granting motion for directed verdict. Beebe v. Minneapolis, etc., R. Co., 137 Wis. 269, 118 NW 808.

**Federal courts:** Contents of motion do not limit or otherwise affect matters which may be embraced in assignment of errors. Owen v. Giles [C. C. A.] 157 F 825.

**43.** Request necessary to obtain review of refusal to grant continuance for absence of witness. Cincinnati, etc., R. Co. v. Lorton, 33 Ky. L. R. 689, 110 SW 857. Defendant cannot complain that he was not granted continuance after allowance of amendment to complaint, or time to meet new issues tendered thereby, where he did not request same. Harrison v. Carlson [Colo.] 101 P 76. Party who does not ask for continuance cannot complain of refusal to grant new trial on ground of surprise by evidence (Hobart Lee Tie Co. v. Keck [Ark.] 116 SW 183; Remington Typewriter Co. v. Simpson [Neb.] 120 NW 428), or complain of time when case was tried (City of Rock Island v. Larkin, 136 Ill. App. 579), or claim prejudice because answer was allowed to be amended at trial so as to set up new defense (Law v. Wilson, 77 Kan. 852, 95 P 1135). Claim of surprise because of variance between evidence introduced before referee and pleadings cannot be maintained, where there was no application for adjournment or re-reference to enable procurement of rebutting testimony. Brooklyn Creamery Co. v. Friday, 137 Wis. 461, 119 NW 126. Party held not entitled to contend that time between notice of hearing and date of such hearing was too short, where cause was submitted by both parties on date named, on pleadings and affidavits, and

or a request for declarations of law,[46] or for instructions,[47] or to make findings of fact,[48] is sometimes essential to save certain questions for review. The form and sufficiency of such motions and requests is treated in a subsequent section.[49]

In Illinois where a jury case is by consent tried without a jury,[50] questions of law other than those relating to pleadings and the admission and sufficiency of the evidence[51] can be preserved only by submitting propositions of law.[52]

§ 6. *Necessity of ruling.*[53]—See 10 C. L. 1586—Question not presented to nor ruled on in the trial court will not be considered on appeal.[54] The court cannot shift responsibility for an erroneous ruling upon counsel.[55]

without any suggestion that continuance should be granted. Hurt v. Hurt [Ala.] 47 S 260.

44. To obtain review of record proper. Baird v. Baird [Mo. App.] 113 SW 216. Where it appeared on face of judgment that trial court erroneously imposed penalty, held that objection was not waived by defendant's failure to include it in his motion in arrest. Barber Asphalt Pav. Co. v. Field [Mo. App.] 111 SW 907.

45. Fact that judgment was erroneous in taxing improper item as costs held not reviewable where was no motion to correct or modify it. Campbell v. State [Ind.] 87 NE 212. Where judgment recited that sum allowed on counterclaim was whole debt due, and neither party applied for modification thereof neither could complain thereof on appeal. Walker v. Ludwig, 55 Misc. 272, 105 NYS 157. Failure to move for modification as authorized by municipal court act (Laws 1902, p. 1563, c. 580, § 254) held not to preclude right to appeal from compromise judgment. Jacobs v. Cohen, 116 NYS 566. Right to have sufficiency of evidence to support findings reviewed on appeal from order overruling motion for new trial is not prejudiced by failure to move, under Code Civ. Proc. §§ 663, 663½, that judgment be set aside and another and different one entered. J. F. Parkinson Co. v. Building Trades Council [Cal.] 98 P 1027.

46. Home Sav. Bank v. Fiske [Mo. App.] 115 SW 495. Where no declarations of law were requested in action tried to court, and none were given by court of its own motion, assignments directed to holdings on questions of law cannot be reviewed. Hayden v. Ogden Sav. Bank [C. C. A.] 158 F 90.

47. For full discussion of necessity, time and sufficiency of requests for instructions in order to obtain an instruction, see topic Instructions, 12 C. L. 218. Where neither granted, rejected nor modified prayers, nor instructions given, referred to the pleadings, no question whether evidence made case within the pleadings could arise, and the only question was whether the evidence established a cause of action in any form. Rosenkovitz v. United R. & Elec. Co., 108 Md. 306, 70 A 108. Where prayers made no reference to pleadings, but were granted upon evidence and facts in case, appellate court in passing on them held confined to evidence to which they referred, and to be precluded from considering state of pleadings. Maryland Apartment House Co. v. Glenn, 108 Md. 377, 70 A 216. Since, if in argument counsel took erroneous view of law applicable to evidence, request for proper instructions as to its relevancy would have protected defendant, held that it would be presumed in absence of such a request that charge was proper upon point suggested. Lane v. Manchester Mills [N. H.] 71 A 629.

48. For full discussion of necessity, time and sufficiency of requests for findings, see Verdicts and Findings, 10 C. L. 1974.

49. See § 8, post.

50. Prac. Act, § 41, does not apply to case where parties are not entitled to jury trial. Kempton v. Funk, 139 Ill. App. 387. Not to contested proceedings for probate of will. Schofield v. Thomas, 236 Ill. 417, 86 NE 122. Propositions not necessary in certiorari proceedings. Bennett v. Millard, 142 Ill. App. 282.

51. Where no propositions are submitted, it will be presumed that court applied law correctly, and nothing is open to review except questions arising upon rulings upon evidence or pleadings and sufficiency of evidence to support finding. Ryan v. Schutt, 135 Ill. App. 554. Propositions held unnecessary in case tried in municipal court, it being patent that no such legal propositions were involved as necessitated submission of propositions to test legal principle applied by trial judge to facts as he interpreted them from the evidence. Siegmund v. Strackbein, 140 Ill. App. 454.

52. Where no proposition was presented by plaintiff stating correct measure of damages, and no proposition stating an incorrect measure was held by court, held that supreme court could not render judgment for full amount to which he was entitled, though he was entitled to larger judgment than that rendered. Sandoval Zinc Co. v. New Amsterdam Casualty Co., 235 Ill. 306, 85 NE 219. That finding and judgment were contrary to evidence, and that court erred in applying law to facts, not considered, where no propositions submitted, and no exception to finding and judgment. Keller v. Jersey County, 142 Ill. App. 514. Offering in evidence bill of exceptions of former trial of same case, which included propositions and action of court thereon at former trial, held not to present such propositions for ruling or decision of court at second trial, nor to raise any question on appeal. Kempton v. Funk, 139 Ill. App. 387.

53. **Search Note:** See Appeal and Error, Cent. Dig. §§ 1417-1425; Dec. Dig. § 242; 8 A. & E. Enc. P. & P. 153.

54. Where evidence was conflicting, appellate court will not express opinion on issue of fact which record shows was not passed on by jury. Pierce v. Texas Rice Development Co. [Tex. Civ. App.] 114 SW 857. Supreme court not required to hear equity case de novo until there has been hearing and decision below. Novak v.

§ 7. *Necessity and time of exceptions.*[56] See 10 C. L. 1587—In the absence of a statutory provision to the contrary,[57] and except in the case of fundamental errors

Novak, 137 Iowa, 519, 115 NW 1. Affidavit for continuance of hearing before an examiner, not appearing to have been brought to attention of examiner or the chancellor, not considered. Putnam v. Morgan [Fla.] 48 S 629. Where chancellor did not find that particular transfer was void as to creditors, held that that question was not open to consideration on appeal by another transferee from judgment declaring transfer to him to be fraudulent. Singletary v. Boener-Morris Candy Co. [Ky.] 112 SW 637. Right to open and close. Moore v. Kirby [Tex. Civ. App.] 115 SW 632. Question whether plaintiff was entitled to injunction. Shawnee County Com'rs v. Jacobs [Kan.] 99 P 817. To be in position to avail of objection or motion must insist upon and obtain ruling and except thereto, or, if court refuses to rule, must except to such refusal. Chicago & Eastern Ill. R. Co. v. Heilingenstein, 137 Ill. App. 35. Question not considered where record did not show that lower court was requested to rule upon it. Rippy v. Southern R. Co., 80 S. C. 539, 61 SE 1010. Attack on rule against constable on ground that it was granted without any petition as basis therefor not considered where not made or decided below. Puckett v. State Banking Co., 130 Ga. 586, 61 SE 465. Cannot consider exceptions not passed on below. Rev. St. 1899, § 864. Hubbard v. Slavens [Mo.] 117 SW 1104. Order of Baltimore city court, in petition to rescind assessment by tax appeal court, that property was liable to assessment and legally assessed held not to present clear question of law for court of appeals, it being necessary to bring it before latter court by exception to ruling of lower court on prayer, or on admissibility of evidence or by demurrer, or in some way plainly presenting questions of law. Isaac Hamburger v. Baltimore, 106 Md. 479, 68 A 23; Fleming v. Northern Tissue Paper Mill, 135 Wis. 157, 114 NW 841. Cannot predicate error on failure to pass on motion to suppress depositions where does not appear that counsel called it to court's attention and asked for ruling thereon. Bidwell v. Sinclair [Okl.] 99 P 653. Assignments of error that verdict was against weight of evidence and was not supported by evidence held not open to consideration, where, though motion for new trial was filed, record did not show that it was ever acted upon. Thomas Bros. Co. v. Price [Fla.] 48 S 262.

**Pleadings:** Demurrer. Hobart Lee Tie Co. v. Keck [Ark.] 116 SW 183; Jones & Co. v. Smith [Tex. Civ. App.] 109 SW 1111; Wabash R. Co. v. Newton, Weller & Wagner Co. [Tex. Civ. App.] 110 SW 992; St. Louis S. W. R. Co. v. Foster [Tex. Civ. App.] 112 SW 797; Nagle v. Simmank [Tex. Civ. App.] 116 SW 862. Demurrer will not be sustained on ground not presented or passed on below. Keystone Lumber Yard v. Yazoo & M. V. R. Co. [Miss.] 47 S 803. Where demurrer was submitted without argument, and trial judge was therefore not given opportunity to pass on counsel's contentions, held that they would not be considered on appeal. Frazee v. Piper [Wash.] 98 P 760. Motion to make more definite and certain. Apker v. Hoquiam [Wash.] 99 P 746. Filing of second amended complaint. Myers v. Holton [Cal. App.] 98 P 197. Insufficiency of plea. Jenness v. Simpson, 81 Vt. 109, 69 A 646.

**Evidence:** Admission of testimony. Kennedy v. Swift & Co., 140 Ill. App. 141; Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729; Brackett's Adm'r v. Boreing's Adm'r, 33 Ky. L. R. 292, 110 SW 276; Neumeyer v. Hooker, 131 App. Div. 592, 116 NYS 204; Kozik v. Czapiewski, 136 Wis. 70, 116 NW 640. Cannot complain of failure to rule on objections, where did not insist on rulings or except to refusal to rule. Sims v. Hall [Mo. App.] 117 SW 103. Where court received evidence subject to objection of plaintiff, stating that he would rule on it later, held that plaintiff could not complain of its admission where he did not afterward bring matter to attention of court, nor ask for ruling, nor save an exception. Ashdown v. Ely [Iowa] 117 NW 976. Exclusion of question on cross-examination not considered, where only ground on which evidence would have been admissible was not called to trial court's attention. Barrineau v. Charleston Consol. R. Gas & Elec. Co., 81 S. C. 20, 61 SE 1063. Cross-examination was objected to on ground that defendant was not entitled to give evidence on its defense of fraud. Counsel for defendant did not claim that examination had reference to question of amount due, as to which it was proper, but only that it had reference to defense of fraud, and subsequently abandoned latter defense. Held that he could not contend on appeal that examination was proper on question of amount due, since court's attention was not called to that point, but was diverted from it. McDonnell v. McCoun, 127 App. Div. 302, 111 NYS 312. Failure to obtain ruling on objection goes only to admissibility or competency of evidence, and not to its probative force, and does not require supreme court to accept it as conclusive. Yellow Pine Lumber Co. v. Jerigan [Fla.] 47 S 945.

**Misconduct of counsel.** Howren v. Chicago, etc., R. Co., 236 Ill. 620, 86 NE 611; Plummer v. Boston El. R. Co., 198 Mass. 499, 84 NE 849; Shuler v. American Benev. Ass'n, 132 Mo. App. 123, 111 SW 618; Johnson v. Union Pac. R. Co. [Utah] 100 P 390; Kersten v. Werchman, 135 Wis. 1, 114 NW 499.

**Instructions:** Special exceptions to prayers. Modern Woodmen of America v. Cecil, 108 Md. 357, 70 A 331.

**Judgment:** That it was not in conformity to verdict. Segars v. Segars [S. C.] 63 SE 891.

**55.** Not by stating, on admitting evidence over defendant's objection, that he leaves responsibility with plaintiff's attorney. Mayer v. Detroit, etc., R. Co., 152 Mich. 276, 15 Det. Leg. N. 231, 116 NW 429.

**56. Search Note:** See Appeal and Error, Cent. Dig. §§ 1432-1649; Dec. Dig. §§ 248-280; 8 A. & E. Enc. P. & P. 163.

**57.** Under Rev. St. 1887, § 4427, it is unnecessary to take an exception to an **order striking out pleading,** or portion thereof.

apparent on the face of the record,[58] a timely[59] exception to rulings[60] or to the

Perkins v. Loux, 14 Idaho, 607, 95 P 694. Where objection to **evidence** is interposed, and ruling made thereon, no exception is required. Bal. Ann. Codes & St. § 5054 (Pierce's Code, § 671). Nelson v. Western Steam Nav. Co. [Wash.] 100 P 325. Before enactment of St. 1907, p. 715, c. 379, amending Code Civ. Proc. § 647, it was necessary to except to **instructions.** Randall v. Freed [Cal.] 97 P 669. **Findings of fact** need not be excepted to. Rev. Code Civ. Proc. § 293; Rev. Civ. Code § 2465. Kelly v. Wheeler [S. D.] 119 NW 994. Erroneous entry of judgment for costs against sureties on cost bond held reviewable though not raised below by motion to retax, question not having arisen until after entry of judgment, and it being unnecessary, under Bal. Ann. Codes & St. § 5051, to except to **judgment** itself. Hamilton v. Witner, 50 Wash. 689, 97 P 1084. Exception not necessary to obtain review of **ruling and decisions of municipal court** upon trial. Municipal Court Act § 23, subd. 8. Siegmund v. Strackbein, 140 Ill. App. 454. Since under Revisal 1905, § 1542, no exception is required as to **errors apparent on face of record,** an appeal is itself a sufficient exception to the judgment. Ullery v. Guthrie, 148 N. C. 417, 62 SE 552. On appeal from judgment, any intermediate order involving merits and which necessarily affects judgment, appearing upon record transmitted, may be reviewed though not excepted to St. 1898, § 3070. Smith v. Wisconsin Veterans' Home Trustees [Wis.] 120 NW 403. Written exception changing answer to question of the special verdict incorporated into the order for judgment upon such verdict is within statute. Billington v. Eastern Wis. R. & L. Co., 137 Wis. 416, 119 NW 127. Order determining provisions of the judgment on subject of costs is reviewable whether excepted to or not. Jones v. Broadway Roller Rink Co., 136 Wis. 595, 118 NW 170. Statute applies only to orders which are part of record proper without appearing in bill of exceptions, and not to rulings or orders granting or refusing motions to direct verdict. Beebe v. Minneapolis, etc., R. Co., 137 Wis. 269, 118 NW 808.

**58.** Errors apparent on judgment roll or record proper. Baker v. Hammett [Okl.] 100 P 1114. Error in granting relief by way of injunction. Randall v. Freed [Cal.] 97 P 669. Ruling sustaining demurrer to complaint need not be excepted to. Rayburn v. Abrams [Wash.] 100 P 751. Verdict not directed may be set aside on motion in supreme judicial court if from whole record it appears clearly wrong, it not being necessary in such case to bring case to law court on exceptions to rulings of presiding justice. Simonds v. Maine Tel. & T. Co. [Me.] 72 A 175. In absence of exception, judgment can be questioned only for errors apparent from record proper. Schafer v. Gerbers, 234 Ill. 468, 84 NE 1064. Defense based on statute of which appellate court would take judicial notice held open to defendant on appeal though he failed to except to striking out of that portion of answer setting it up. Denver & R. G. R. Co. v. Wagner [C. C. A.] 167 F 75.

**59.** Must be taken at time decision is made. Climax Tag Co. v. American Tag Co., 234 Ill. 179, 84 NE 873. Except in cases specified by Code Civ. Proc. § 647, exception must, under Id. § 646, be taken when ruling is made. Randall v. Freed [Cal.] 97 P 669. Fact that trial was conducted by one not versed in law does not change rule. Id. Party held entitled to exception to denial of renewed motion though he did not except to denial of original motion. Stevenson v. Brooks, 62 Misc. 489, 115 NYS 118. **Instructions** not excepted to save in motion for new trial which was filed too late not considered. In re Overpeck's Will [Iowa] 120 NW 1044. Presentation of exceptions to instructions at special term within regular term held to have satisfied St. 1898, § 2869, requiring exceptions to instructions to be presented during pendency of trial term. American States Sec. Co. v. Milwaukee Northern R. Co. [Wis.] 120 NW 844. Objections and exceptions raising question that court erred in submitting case on theory of express contract alone, and in not permitting verdict on theory of quantum meruit, held timely though taken after jury had come into court with sealed verdict, but before it was presented to court. Code Civ. Proc. § 992. Walar v. Rechnitz, 126 App. Div. 424, 110 NYS 777. Exception to overruling of **motion for new trial** held sufficient, though not made until after judgment. Redd v. Carnahan [W. Va.] 64 SE 138. Judge granted new trial on ground that instruction was misleading. Plaintiffs failed to except at that time, but were permitted to make request for ruling on same question on motion for rehearing, and their exception to refusal to rule was allowed. Held that such exception was available. Loveland v. Rand, 200 Mass. 142, 85 NE 948.

**60.** Stowers Furniture Co. v. Brake [Ala.] 48 S 89; Sternberger v. Moffat [Colo.] 99 P 560; North Side Planing Mill v. Kimball, 77 Kan. 782, 95 P 1134; Moneyweight Scale Co. v. Hjerpe, 106 Minn. 47, 118 NW 62; Saxon v. White [Okl.] 95 P 783; Burns v. Pennsylvania R. Co., 222 Pa. 406, 71 A 1054; Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428. Ruling of trial court that exception to adverse rulings is presumed will not be recognized on appeal. Green v. Terminal R. Ass'n, 211 Mo. 18, 109 SW 715. Exception is an objection upon a matter of law to the decision made by a court, judge, referee, or other judicial officer, in an action or proceeding. Comp. Laws 1907, § 3282. Johnson v. Union Pac. R. Co. [Utah] 100 P 390. Whether legal principals, with reference to which appellate court is bound to consider evidence, were correctly applied to case can only be raised by objection to evidence, by instructions or propositions of law, or by motion to direct verdict, and by exceptions properly preserved in trial court to action of that court in those particulars. Luckowitz v. Eagle Brew. Co., 235 Ill. 246, 85 NE 213. Defendants who had not been served with process and were not in court held not to have waived anything by failing to except to report of commissioners in partition proceedings. Deputy v. Dollarhide [Ind. App.] 86 NE 344. Where no exceptions to evidence or sufficiency of averments of bill, court may decree according to proof, regardless of whether allegata

and probata correspond. Code Pub. Gen. Laws 1904, art. 5, § 36. Reed v. Reed [Md.] 72 A 414.

**Argument and conduct of counsel.** Peterson v. Pusey, 237 Ill. 204, 86 NE 692; Casavan v. Sage, 201 Mass. 547, 87 NE 893; Brauer v. New York City Interboro R. Co., 129 App. Div. 384, 113 NYS 705; Enos v. Rhode Island Sub. R. Co. [R. I.] 70 A 1011; Johnson v. Union Pac. R. Co. [Utah] 100 P 390. Ruling as to right to open and close. Moore v. Kirby [Tex. Civ. App.] 115 SW 632.

**Pleadings:** Allowance of amendment. Smith v. Schlink [Colo.] 99 P 566; Swartz v. Gottlieb-Bauern-Schmidt-Straus Brew. Co. [Md.] 71 A 854; State v. Stevens [Mo. App.] 114 SW 1113. Refusal to allow amendment. Jones v. Poole, 5 Ga. App. 113, 62 SE 711; Thornbury v. Bolt [Ky.] 116 SW 1177; Shawnee Sewerage & Drainage Co. v. Vegiard [Okl.] 97 P 565. Refusal to permit filing of additional plea. Thomas v. Walden [Fla.] 48 S 746; Leman v. U. S. Fidelity & Casualty Co., 137 Ill. App. 258. Order sustaining demurrer to pleas. Simpson v. Minnix, 30 App. D. C. 582. Denial of motion to dismiss complaint as to certain item. Schmid v. Dohan [C. C. A.] 167 F 804. Striking out of portion of petition. Steele v. Bryant [Ky.] 116 SW 755. Striking out portion of answer. Denver & R. G. R. Co. v. Wagner [C. C. A.] 167 F 75. Where it appears that on former trial defense was stricken and no exception taken to such action, defendant cannot on second appeal complain of exclusion of evidence in support of such defense. Mantle v. Dabney, 47 Wash. 394, 92 P 134.

**Evidence:** Admission of evidence. Randall v. Freed [Cal.] 97 P 669; Scott v. Herrell, 31 App. D. C. 45; Suarez v. State, 55 Fla. 187, 45 S 825; Thomas Bros. Co. v. Price [Fla.] 48 S 262; Reavely v. Harris, 239 Ill. 526, 88 NE 238; Kennedy v. Swift & Co., 140 Ill. App. 141; Savage v. Chicago & J. R. Co., 142 Ill. App. 342; Ashdown v. Ely [Iowa] 117 NW 976; Board of Public Works of Niles v. Pinch, 152 Mich. 517, 15 Det. Leg. N. 289, 116 NW 408; O'Dell v. Goff, 153 Mich. 643, 15 Det. Leg. N. 560, 117 NW 59; Nichol v. Ward [Mich.] 16 Det. Leg. N. 39, 120 NW 569; Green v. Terminal R. Ass'n, 211 Mo. 18, 109 SW 715; Heiberger v. Missouri & Kan. Tel. Co., 133 Mo. App. 452, 113 SW 730; Rearden v. St. Louis & S. F. R. Co. [Mo.] 114 SW 961; Home Sav. Bank v. Fiske [Mo. App.] 115 SW 495; Van Cleve v. St. Louis, etc., R. Co. [Mo. App.] 118 SW 116; Shandy v. McDonald [Mont.] 100 P 203; Perry v. Maryland Casualty Co. [N. H.] 72 A 369; McCormack v. O'Connor, 62 Misc. 297, 114 NYS 1030; Neumeyer v. Hooker, 131 App. Div. 592, 116 NYS 204; Webster v. Atlantic Coast Line R. Co., 81 S. C. 46, 61 SE 1080; Kelly v. Wheeler [S. D.] 119 NW 994; Brunner Fire Co. v. Payne [Tex. Civ. App.] 118 SW 602; City of Bluefield v. McClaugherty [W. Va.] 63 SE 363. Permitting testimony of witness at former trial to be read in evidence. Jordan v. Le Messurier [Mich.] 15 Det. Leg. N. 1007, 118 NW 952. Cross-examination. Peck v. Springfield Trac. Co., 131 Mo. App. 134, 110 SW 659. Admission of incompetent evidence held not to have warranted trial court in setting aside verdict where such evidence was not excepted to. Maloney v. Silberman, 115 NYS 1075. Where no exception was reserved to evidence, held that it would be considered on appeal for what it was worth. Egbert v. Minneapolis, etc., R. Co., 106 Minn. 23, 117 NW 998. Failure to except to admission of incompetent evidence held not to preclude party from complaining of erroneous instructions based thereon given over objection. Walkeen Lewis Millinery Co. v. Johnston, 131 Mo. App. 693, 111 SW 639. Exclusion of evidence. United States Oil & Land Co. v. Bell, 153 Cal. 781, 96 P 901; Gainesville & G. R. Co. v. Peck, 55 Fla. 402, 46 S 1019; Dahlin v. Sherwin, 132 Ill. App. 566; Board of Public Works of Niles v. Pinch, 152 Mich. 517, 15 Det. Leg. N. 289, 116 NW 408; Huggins v. Jasper [Mo. App.] 114 SW 545; Home Sav. Bank v. Fiske [Mo. App.] 115 SW 495; Shandy v. McDonald [Mont.] 100 P 203; Pike v. Hauptman [Neb.] 119 NW 231. Striking out testimony. Jarrett v. McIntyre, 134 Ill. App. 581.

**Instructions:** Fact that requested charges were read to jury by counsel instead of by court. O'Dell v. Goff, 153 Mich. 643, 15 Det. Leg. N. 560, 117 NW 59. Giving instructions. Stowers Furniture Co. v. Brake [Ala.] 48 S 89; Fleischhauer v. Fabens [Cal. App.] 96 P 17; Randall v. Freed [Cal.] 97 P 669; Wiley v. McNab [Cal. App.] 96 P 332; Mayhew v. Smith, 42 Colo. 534, 95 P 549; City & County of Denver v. Magwirey [Colo.] 96 P 1002; Supreme Lodge K. of P. v. Bradley, 33 Ky. L. R. 413, 109 SW 1178; Swartz v. Gottlieb-Bauern-Schmidt-Straus Brew. Co. [Md.] 71 A 854; Green v. Terminal R. Ass'n, 211 Mo. 18, 109 SW 715; Kinlen v. Metropolitan St. R. Co. [Mo.] 115 SW 523; Carlton v. Monroe [Mo. App.] 115 SW 1057; Robinson v. Helena L. & R. Co. [Mont.] 99 P 837; Pennington County Bank v. Bauman [Neb.] 116 NW 669; Hart v. Chicago & N. W. R. Co. [Neb.] 120 NW 176; Weitzmann v. Barber Asphalt Co., 129 App. Div. 443, 114 NYS 158; Epstein v. Gordon, 114 NYS 438; Territory v. Choctaw, O. & W. R. Co., 20 Okl. 663, 95 P 420; Alexander v. Oklahoma City [Okl.] 98 P 943; Baker v. Robbins [Wash.] 99 P 1; Nethery v. Nelson [Wash.] 99 P 879; Hinds v. Hinchman-Renton Fireproofing Co. [C. C. A.] 165 F 339; Western Inv. Co. v. McFarland [C. C. A.] 166 F 76. Instruction law of case in absence of exception thereto. Gascoigne v. Metropolitan West Side El. R. Co., 239 Ill. 18, 87 NE 883; Harrison v. Argyle Co., 128 App. Div. 81, 112 NYS 477; South Dakota Cent. R. Co. v. Smith [S. D.] 116 NW 1120. Verdict held sustained by evidence as controlled by instructions to which no exceptions were taken. Larsen v. Sanzieri [Neb.] 119 NW 661. Where case was submitted under general instructions which were not excepted to, held that prejudice to defendants by reason of denial of their special requests was not shown. Herlihy v. Little, 200 Mass. 284, 86 NE 294. Where there was no exception to submission of special interrogatory, nor to charge relating thereto, nor to refusal to charge answer to such interrogatory, held that it could not be contended that instruction was erroneous, particularly where objecting party moved to change answer, instead of to strike question and answer. Cook Land Const. & Prod. Co. v. Oconto Co., 134 Wis. 426, 114 NW 823. Cannot question proposition when

did not except to its submission to jury. Campbell v. Long Island R. Co., 127 App. Div. 258, 111 NYS 120. Refusal to instruct. Wiley v. McNab [Cal. App.] 96 P 332; Mayhew v. Smith, 42 Colo. 534, 95 P 549; Hotchkiss v. Vanderpoel Co., 139 Ill. App. 325; Dawson v. Ash Grove White Lime Ass'n [Mo. App.] 113 SW 718; Helwig v. Aulabaugh [Neb.] 120 NW 162; Dimond Bros. v. Beckwith, Quinn & Co. [Wyo.] 98 P 889.

**Direction of verdict.** Vogelsang v. Fredkyn, 133 Ill. App. 356; Kephart v. Continental Casualty Co. [N. D.] 116 NW 349. Where court directed verdict for defendant and plaintiff took nonsuit and excepted to subsequent action of court in refusing to set aside nonsuit, held merits of case could not be reviewed, where no exception was saved to instructing verdict. Montei v. St. Louis & S. F. R. Co., 130 Mo. App. 149, 108 SW 1073.

**Verdict or findings:** That no general verdict was returned but only special one. Stanard v. Sampson [Okl.] 99 P 796. Conclusions of law. Theobald v. Clapp [Ind. App.] 87 NE 100. Findings. Board of Public Works of Niles v. Pinch, 152 Mich. 517, 15 Det. Leg. N. 289, 116 NW 408; Crowe & Co. v. Brandt, 50 Wash. 499, 97 P 503. Findings not excepted to are conclusive. Lauridsen v. Lewis, 50 Wash. 605, 97 P 663; Nueces Valley Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633; Jones v. De Muth, 137 Wis. 120, 118 NW 542; Hoffman v. Lincoln County, 137 Wis. 353, 118 NW 850. Exception to findings essential to consideration of contention that they are not supported by evidence (Van Eps v. Newald [Wis.] 120 NW 853; Hector v. Hector [Wash.] 99 P 13; Keller v. Jersey, 142 Ill. App. 514), or that they are mere conclusions, and are indefinite and confusing (Lauridsen v. Lewis, 50 Wash. 605, 97 P 663), or contention in divorce suit that amount allowed wife for future support was excessive (Hector v. Hector [Wash.] 99 P 13). Failure to except to finding that petitioner was duly organized and existing corporation, and had put itself in position to maintain condemnation proceedings, held to preclude respondent from objecting on certiorari that stockholders were not sufficient in numbers to warrant exercise of corporate functions. State v. Pacific County Super. Ct. [Wash.] 99 P 3. Sufficiency of findings to sustain judgment may be questioned though findings are not excepted to. Hector v. Hector [Wash.] 99 P 13; Nueces Valley Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633. Refusal to make corrections in and additions to findings. City of Bridgeport v. Bridgeport Hydraulic Co. [Conn.] 70 A 650. Party desiring more particular finding on an issue must call attention of court thereto, and except to refusal to find, or to finding as made, if not satisfactory. Maxon v. Gates, 136 Wis. 270, 116 NW 758. Assignment of error alleging failure to make certain findings is bad where no requests for such findings were made and no exceptions to those made were filed. Kenworthy v. Equitable Trust Co., 218 Pa. 286, 67 A 469.

**Judgment or decree.** Wehrs v. Sullivan [Mo.] 116 SW 1104; W. P. Chamberlain Co. v. Tuttle [N. H.] 71 A 865; Owens v. Caraway [Tex. Civ. App.] 110 SW 474. Direct bill of exceptions will not be considered unless there is at least a general exception to the final judgment. Jones v. Poole, 5 Ga. App. 113, 62 SE 711. Bill of exceptions dismissed where no exception to final judgment, but only to ruling on motion to strike defendant's plea. Ox Breeches Mfg. Co. v Bird, 1 Ga. App. 40, 57 SE 975. Omission of court to decide whether plaintiff was entitled to injunction. Shawnee County Com'rs v. Jacobs [Kan.] 99 P 817. Rendition of judgment after motion to dismiss. Nichol v. Ward [Mich.] 16 Det. Leg. N. 39, 120 NW 569. Sufficiency of evidence to support judgment cannot be considered, where no exception is preserved to findings and judgment. People v. Waite, 237 Ill. 164, 86 NE 572; Keller v. Jersey, 142 Ill. App. 514; Baumeister v. Fink, 141 Ill. App. 372. Case tried to court without jury. Climax Tag Co. v. American Tag Co., 234 Ill. 179, 84 NE 873. But if exceptions have been properly preserved to prior rulings, they are reviewable though there is no exception to the judgment. Baumeister v. Fink, 141 Ill. App. 372. In case tried to court without jury exception to judgment not necessary to review ruling refusing to hear certain offered testimony duly excepted to. Climax Mfg. Co. v. American Tag Co., 234 Ill. 179, 84 NE 873. **Contra.** Rosenweig v. McDermaid, 135 Ill. App. 595. Prior to amendment of 1907, no exception to entry of judgment was necessary to obtain review of judgment of municipal court. Wolf v. Scully, 137 Ill. App. 87. Modified judgment taking place of one originally entered held final one, so that exception to it was sufficient though original judgment was not excepted to. Washington County v. Murray [Colo.] 100 P 588. When decision to which exception relates is entered of record, it is sufficient if exception is noted at end thereof. Code §§ 3750, 3751. Warner v. Norwegian Cemetery Trustees [Iowa] 117 NW 39.

**Miscellaneous rulings:** Rulings on questions raised by written **objections in condemnation proceedings.** Acts 1905, c. 48, § 5; Burns' Ann. St. 1908, § 930. Toledo & I. Trac. Co. v. Indiana & Co. Interurban R. Co. [Ind.] 86 NE 54. Removal of case from stet **calendar.** Smith v. Ross, 31 App. D. C. 348. Granting of **continuance.** Id. **Substitution of parties.** State Bank of Gothenburg v. Carroll [Neb.] 116 NW 276. Error in **calling jury.** Randall v. Freed [Cal.] 97 P 669. Failure to pass on exceptions to **depositions** prior to entering upon trial of case on merits. Sealey v. Williston [Ky.] 117 SW 959. **Variance.** Proof of value in excess of that alleged. Teal v. Templeton, 149 N. C. 32, 62 SE 737. **Conduct of court** must be excepted to immediately. Court & Prac. Act. 1905, § 483. Campbell v. Campbell [R. I.] 71 A 1058. Remark of court. Central Consol. Mines Corp. v. Mills [Colo.] 100 P 410; Elgin, J. & E. R. Co. v. Lawlor, 132 Ill. App. 280. That court commented on evidence waived where words thought to constitute comment were not excepted to on that ground. In re Seattle [Wash.] 100 P 330. Ordering **view** by jury. Woodworth v. Detroit United R. Co., 153 Mich. 108, 15 Det. Leg. N. 374, 116 NW 549. Where there was no exception to **submission of issue to jury** or to instruction in regard to it, question whether court should have decided it as matter of law not presented. Jones v. Seaboard Air Line R. Co. [N. C.] 64 SE 205. Failure to submit question.

refusal to rule [61] is ordinarily necessary to preserve the same for review, though there are exceptions to this rule in some states.[62] In some states a specification of error on a motion for a new trial dispenses with the necessity for an exception [63] while a contrary rule prevails in others.[64]

§ 8. *Form and sufficiency of objection, motion, or request.*[65] See 10 C. L. 1589 A motion,[66] or an objection [67] not apparent of record [68] must point out specifically

Chess v. Vockroth, 75 N. J. Law, 665, 70 A 73. Assessment of damages by court without jury. Snow v. Merriam, 133 Ill. App. 641. Objection that request for answers to **interrogatories** were submitted to jury with interrogatories. Phoenix Accident & Sick Benefit Ass'n v. Stiver [Ind. App.] 84 NE 772. **Dismissal.** Loose v. Cooper [Iowa] 118 NW 406. Error in **refusing to dismiss.** Epstein v. Gordon, 114 NYS 438. **Refusal to order nonsuit.** Hines v. Stanley-G. I. Elec. Mfg. Co., 199 Mass. 522, 85 NE 851. Denial of **motion for judgment non obstante veredicto** not considered were not excepted to. Beauerle v. Michigan Cent. R. Co., 152 Mich. 345, 15 Det. Leg. N. 290, 116 NW 424. Dismissal of motion upon a question of law reserved. Philadelphia v. Bilyeu, 36 Pa. Super. Ct. 562. Refusal to allow plaintiff to file additional exception, setting up new matter, after rendition of judgment non obstante for defendant. Lewis v. Pennsylvania R. Co., 220 Pa. 317, 69 A 821. Denial of **motion for new trial.** Beebe v. Minneapolis, etc., R. Co., 137 Wis. 269, 118 NW 808; Snyder v. Michigan Trac. Co., 154 Mich. 418, 15 Det. Leg. N. 781, 117 NW 889; Blakeslee & Co. v. Reinhold Mfg. Co., 153 Mich. 230, 15 Det. Leg. N. 468, 117 NW 92. Comp. Laws 1897, § 10,504. Comstock v. Taggart [Mich.] 15 Det. Leg. N. 14, 120 NW 29. Errors occurring at trial for which new trial might be granted cannot be considered, where no exception to order overruling motion for new trial. Alexander v. Oklahoma City [Okl.] 98 P 943. In absence of statute there is no authority for taking of exception to order overruling motion for new trial. Yarber v. Chicago & A. R. Co., 235 Ill. 589, 85 NE 928. **Dismissal of appeal** from justice's court and denial of motion to amend notice of appeal, though overruling of motion for rehearing was excepted to. Tower Grove Planing Mill Co. v. Hornberg, 133 Mo. App. 305, 113 SW 222. **Retaxation of costs.** Nichols & Shepard Co. v. Steinkraus [Neb.] 119 NW 23.

**61.** Objections to evidence. Sims v. Hall [Mo. App.] 117 SW 103. Failure to rule on objection to argument of counsel. Cincinnati Trac. Co. v. Jennings, 7 Ohio N. P. (N. S.) 462.

**62.** Exception to overruling of demurrer to petition not necessary. Hanson v. Neal [Mo.] 114 SW 1073. Where case is submitted on agreed statement of facts or on demurrer, no exception is necessary, appeal being itself an exception in such case. Mershon & Co. v. Morris, 148 N. C. 48, 61 SE 647. Plaintiff is responsible for his own showing, and defendant is not called upon to remind him of insufficiency in weight of his evidence by exception thereto before submission of the cause. Despard v. Pearcy [W. Va.] 63 SE 871. Where attention of court was directed to fact that defendant wished to show that plaintiff had not incurred certain expenses claimed as damages, and court refused to admit evidence to that effect, held that it was not necessary to except to instruction authorizing such recovery in order to preserve question. Nelson v. Western Steam Nav. Co. [Wash.] 100 P 325.

**63.** To entitle party to review of ruling not formally excepted to on trial, it must be assigned as error in court below on motion for new trial. American Engine Co. v. Crowley, 105 Minn. 233, 117 NW 428. Assignments of error on appeal do not answer purpose of exceptions permitted to be taken on motion for new trial by Rev. Laws 1905, § 4200. Id. Correctness of charge not open to consideration, where no exception thereto was taken at trial and there was no motion for new trial. Id. Where defendant duly moves for new trial, he is not deemed to have waived his rights by not objecting and excepting to court's action in reserving decision. Code Civ. Proc. § 999. Smith v. Long Island R. Co., 129 App. Div. 427, 114 NYS 228. In absence of proper motion for a new trial, and appropriate exception to denial of same, order directing verdict will not be reviewed unless it is excepted to. Beebe v. Minneapolis, etc., R. Co., 137 Wis. 269, 118 NW 808.

**64.** Party moving for new trial can only rely on errors excepted to by him at trial. Code Civ. Proc. § 301, subd. 7. Traxinger v. Minneapolis, etc., R. Co. [S. D.] 120 NW 770. Giving and refusing of instructions, not reviewed where no exceptions, though made grounds of motion for new trial. Cammack v. Southwestern Fire Ins. Co. [Ark.] 115 SW 142.

**65. Search Note:** See notes in 63 L. R. A. 33.

See, also, Appeal and Error, Cent. Dig. §§ 1299, 1351, 1352, 1368, 1430, 1431; Dec. Dig. § 231, 232; Depositions, Cent. Dig. §§ 326, 327; Pleading, Cent. Dig. 1439; Trial, Cent. Dig. §§ 194-227, 689-696; 8 A. & E. Enc. P. & P. 153.

**66.** Ground of motion to dismiss levy because alleged fi. fa. did not follow judgment on which it was based held not open to consideration on appeal where there was no specification as to variance claimed to exist, and neither judgment nor petition was before supreme court, and it was not shown that they were placed before trial court. Young v. Germania Sav. Bank [Ga.] 64 SE 552.

**Motion to strike evidence:** Must state grounds thereof. Stowers Furniture Co. v. Brake [Ala.] 48 S 89. Should point out particular evidence objected to. McBride v. McBride [Iowa] 120 NW 709. Motion to strike on ground of variance must point out particular variance. Flanagan v. Wells Bros. Co., 237 Ill. 82, 86 NE 609. Defendant moved to strike evidence received without

objection. Court stated that part of it ought to be allowed to stand but that some of it might be irrelevant. Defendant then excepted. Held that motion should have been restated in such manner that ruling thereon would have shown what evidence was intended to be left in record, and that, where this was not done, defendant could not urge error. Zetsche v. Chicago, etc., R. Co., 238 Ill. 240, 87 NE 412.

**Motion to direct verdict:** Court of appeals will not refuse to consider ruling on motion because motion was general on whole record and did not specifiy grounds, where it is apparent that propositions relied on were brought to attention of court below. O'Halloran v. McGuirk [C. C. A.] 167 F 493.

**Motion for new trial:** Statutory motion must state grounds upon which it is based at least as specifically as they are mentioned in the statute. Beebe v. Minneapolis, etc., R. Co., 137 Wis. 269, 118 NW 808. Ground assigned for new trial which is not a cause for a new trial will not be considered. Conrad v. Hausen [Ind.] 85 NE 710. Motion based on improper **admission of excinsion of evidence** should name witness and disclose what particular evidence was admitted on rejected. Indianapolis & W. R. Co. v. Ragan [Ind.] 86 NE 966. Cause for new trial that court erred in refusing to permit defendants to show certain facts held insufficient where it did not name document by which, or witnesses by whom, defendants offered to prove matters alleged therein, or whether evidence excluded was oral or documentary. Conrad v. Hausen [Ind.] 85 NE 710. Assignment of error in motion complaining of admission or rejection of testimony is not valid when such evidence is not literally or in substance set forth in motion or attached thereto as an exhibit. Sims v. Sims, 131 Ga. 262, 62 SE 192. Grounds of motion held insufficient where they did not state who offered evidence, did not identify witness, and it was mpossible to tell from them whether witness had given same evidence in substance without objection, or whether error existed at all, or, if so, whether it was material. Id. Grounds of motion complaining of errors in admission of evidence, but failing to set out objections, if any, urged in court below, will not be considered. Fain v. Ennis, 4 Ga. App. 716, 62 SE 466. Rulings admitting and excluding evidence not considered where motion did not direct court's attention to the particular rulings. Carpenter v. Savage [Miss.] 46 S 537. Reasons held sufficiently specific to preserve objection to ruling excluding all that part of deposition not admitted. Mullins v. Columbia County Bank [Ark.] 113 SW 206. Must specifically point out **variance** complained of, it being insufficient to charge variance in general terms. Gascoigne v. Metropolitan West Side El. R. Co., 239 Ill. 18, 87 NE 883. Assignment that a group of **instructions** are erroneous is bad if anyone of them was properly given. Cowperthwait v. Brown [Neb.] 117 NW 709. Instruction held single one though containing two paragraphs so that separate objection to each paragraph in motion was not necessary to enable supreme court to consider error assigned in giving it. Tyson v. Bryan [Neb.] 120 NW 940. Grounds for new trial based upon oral charge must specifically point out portions objected to. Stowers Furniture Co. v. Brake [Ala.] 48 S 89. Ground of motion which selected several fragments of sentences from different parts of charge, which were incomplete and unintelligible as set out in such ground, held not sufficiently definite. Kennedy v. Hagans [Ga.] 64 SE 330. Exception to instructions embodied in motion for new trial held insufficient under Code, § 3709, authorizing exceptions to giving or refusal of instructions to be embodied in such motions, but requiring them to specify part of charge or instruction objected to, and ground of objection. Knopp v. Chicago, etc., R. Co., [Iowa] 117 NW 970. Recital in motion for new trial that court erred "in his instructions numbers 1 to —, both inclusive, and in each of them, which were all excepted to by the defendant at the time," held not to sufficiently identify instructions excepted to, except number 1. Id. Where instructions were excepted to when given and again in motion for new trial, held that ground of objection to particular instruction was not waived, though not specifically raised in said motion. Williams v. Clarke County [Iowa] 120 NW 306. Ground specified in motion held insufficient to present objection that **referee's report** did not contain any findings of fact, and that supposed findings were blended with conclusions of law. Alexander v. Wellington [Colo.] 98 P 631. Motion specifying that **verdict is contrary to law and evidence** does not raise question of excessive damages, but motion must specifically assign that ground. Duffy v. Radke [Wis.] 119 NW 811. In action against county to recover value of goods used by persons in quarantine, held that asking that verdict be set aside as contrary to evidence raised question as to whether evidence showed what goods were so used. Louisa County v. Jancey's Trustee [Va.] 63 SE 452. Motion on ground that verdict is not supported by evidence must point out particulars in which evidence is insufficient. Liljeblad v. Sasse [Tex. Civ. App.] 108 SW 787. **Specification unnecessary:** Provisions of Prac. Act, § 77 (Hurd's Rev. St. 1905, c. 110, § 78), requiring party moving for new trial to file points in writing, particularly specifying grounds of motion, is directory only, and statement is waived if court does not require it, and motion is submitted without it and without objection. Yarber v. Chicago & A. R. Co., 235 Ill. 589, 85 NE 928. If motion is submitted without specifying grounds, party may avail himself of any grounds appearing in record, whether it be admission or exclusion of evidence, giving or refusing of instructions, insufficiency of evidence, or any error occurring on the trial. Id. No points are waived by failing to file written motion for new trial, and, where opposing counsel does not require reasons to be specified in writing, will be presumed that every reason urged on appeal was urged below. Illinois Valley R. Co. v. Haremski, 132 Ill. App. 423. Refusal of appellate court to consider errors assigned because not set out with sufficient detail or precision in motion for new trial held error where case was tried and appeal perfected when rules

provided that error so assigned would be considered whether set out specifically in motion for new trial or not. Missouri K. & T. R. Co. v. Wilhoit [C. C. A.] 160 F 440. Judgment not reversed though peremptory instruction for plaintiff was given in absence of defendant's counsel and before opportunity was offered him to present additional proof, in absence of satisfactory **showing on motion** for new trial, as to character and effect of the additional evidence which would have been offered. Evans v. Lilly & Co. [Miss.] 48 S 612.

**67. Evidence:** Merrill v. Worthington [Ala.] 46 S 477; Campbell v. Hughes [Ala.] 47 S 45; Stowers Furniture Co. v. Brake [Ala.] 48 S 89; Merced Bank v. Price [Cal.] 98 P 383; Sertaut v. Crane Co., 142 Ill. App. 49; City of Garrett v. Winterich [Ind. App.] 87 NE 161; Jordan v. Missouri & Kansas Tel. Co. [Mo. App.] 116 SW 432; Lee v. Unkefer, 77 S. C. 460, 58 SE 343. Though testimony is incompetent, it need not be excluded on that ground unless that objection is specifically raised. Monahan v. National Realty Co., 4 Ga. App. 680, 62 SE 127. Statement that counsel did not think evidence would be competent held insufficient. Hutchinson & Co. v. Morris Bros., 131 Mo. App. 258, 110 SW 684. Where witness, who was admittedly a medical expert, was asked whether he was able to say as a physician whether plaintiff's condition was due to fright or electric shock, and instead of answering question gave his opinion, held that objection that he was not qualified to give such an opinion could be made on appeal though question was not specifically objected to on that ground below. United R. & Elec. Co. v. Corbin [Md.] 72 A 606. General objection is insufficient unless evidence is plainly inadmissible for any purpose. Sanders v. Davis, 153 Ala. 375, 44 S 979; Bufford v. Little [Ala.] 48 S 697; Seaboard Air Line R. Co. v. Harby, 55 Fla. 555, 46 S 590; Spencer v. Dell, 55 Fla. 790, 46 S 729; Gainsville & Gulf R. Co. v. Peck, 55 Fla. 402, 46 S 1019; Vaughan's Seed Store v. Stringfellow [Fla.] 48 S 410; McKinnon v. Johnson [Fla.] 48 S 910; Geissendoerfer v. Western Horse Shoe Co., 131 Mo. App. 534, 110 SW 640; Chess v. Grant [C. C. A.] 163 F 500. Question held so obviously incompetent that general form of objection was sufficient. Brown v. Carson, 132 Mo. App. 371, 111 SW 1181. Objections to answers to interrogatories propounded to witness held too general. Butler v. Ederheimer, 55 Fla. 544, 47 S 23. Objection to evidence as incompetent, irrelevant, and immaterial, held too general. Buchanan v. Minneapolis Threshing Mach. Co. [N. D.] 116 NW 335. General objection insufficient to raise objection that evidence is secondary. People v. Waite, 237 Ill. 164, 86 NE 572. General objection held not to reach objection that evidence offered was not best evidence. Bufford v. Little [Ala.] 48 S 697. Objection that evidence is incompetent, irrelevant, and immaterial, does not raise question of its admissibility under pleadings. Bartleson v. Munson, 105 Minn. 348, 117 NW 512. Objection to notes, as incompetent, irrelevant, and immaterial, too general to raise objection that their execution has not been proved. Landis Mach. Co. v. Konantz Saddlery Co. [N. D.] 116 NW 333. Objection to admissibility of evidence on ground of variance is waived unless specifically made on that ground and objection pointed out. Weston v. State Mut. Life Assur. Soc., 234 Ill. 492, 84 NE 1073. Objection held insufficient to raise question of variance. Forge & Rolling Mills Co. v. Bartels, 133 Ill. App. 22. Where only objection to declarations of pain was that evidence was incompetent, irrelevant, and immaterial, could not be contended on appeal that declarations were made in contemplation of institution of action for damages. Johnston v. Cedar Rapids & M. C. R. Co. [Iowa] 119 NW 286. Objection held not sufficiently definite to call court's attention to real ground of inadmissibility. Kinnane v. Conroy [Wash.] 101 P 223. Objection to question as immaterial, irrelevant, incompetent, and not within issues held not to present question of competency of witness as expert, or that sufficient foundation had not been laid to permit him to testify. Modlin v. Jones & Co. [Neb.] 121 NW 934. Objection of illegality held not to have raised question of competency of witness to testify as to transactions with decedent. Campbell v. Hughes [Ala.] 47 S 45. Admission of evidence held not error as against objections interposed. Missouri, K. & T. R. Co. v. Rich [Tex. Civ. App.] 112 SW 114. Objection that evidence could not be given under complaint, and that such damage was not included in it, held too general to raise question that it related to special damage not pleaded. Newman v. Seifter, 115 NYS 211. Objection to competency of evidence held insufficient to raise question as to competency of witness to testify as to transaction with person since deceased. Hanrahan v. O'Toole [Iowa] 117 NW 675. Objection that evidence is irrelevant to illustrate certain issue may be overruled if it is relevant to any other issue in case, and if **no objection is made to its competency.** Monohan v. National Realty Co., 4 Ga. App. 680, 62 SE 127. Where only objection amounted to assertion that no evidence of that character was admissible for purpose indicated, which was not the case, question of admissibility held not open to consideration. Chicago G. W. R. Co. v. McDonough [C. C. A.] 161 F 657. Objection to hypothetical question because containing matter which evidence does not tend to support must point out definitely and specifically the vice in question. Long Distance Tel. & T. Co. v. Schmidt [Ala.] 47 S 731; Southern R. Co. v. Gullatt [Ala.] 48 S 472. General objection to hypothetical question that it did not include all facts which evidence tended to prove and assumed some not proven held properly overruled, where counsel refused to point out such matters when requested. Kinlen v. Metropolitan St. R. Co. [Mo.] 115 SW 523. Where facts deemed material are omitted from hypothetical question, they should be specifically pointed out by objections, or counsel should ask question which he deems proper on cross-examination. Galveston, etc., R. Co. v. Henefy [Tex. Civ. App.] 115 SW 57. Objection that evidence was incompetent held sufficient to preserve contention that it was self-serving declaration. Cooper v. Bower [Kan.] 96 P 794. Addition of words "irrelevant and immaterial" held not to so far detract from force of objection as to

the matter to which it is directed and the grounds on which it is based,[69] and only

render it unavailing. Id. Objection that proper foundation had not been laid for admission of certified copy of public record held to go to question of identity of party signing certificate, and of his signature. Kellog v. Finn [S. D.] 119 NW 545. Where plaintiff objected to letter unless witness read whole letter, and court ruled that whole should be admitted, plaintiff held not entitled to complain. Hutchinson & Co. v. Morris Bros., 131 Mo. App. 258, 110 SW 684. After plaintiff had announced close of his evidence and demurrer thereto had been argued, court permitted him to introduce bill of lading. No objection was made that it was not pleaded, nor was any reason given, nor was there any application for continuance, and record merely recited "objections by defendant." Held tantamount to no objection, and that matter could not be reviewed. Holland v. Atchison, etc., R. Co., 133 Mo. App. 694, 114 SW 61. Evidence outside pleadings may be considered on appeal where no specific objection below that case was being tried outside pleadings. Neuberger v. Long Island R. Co., 116 NYS 311. Trial court may grant new trial for admission of inadmissible evidence, though objection is general. Geissendoerfer v. Western Horse Shoe Co., 131 Mo. App. 534, 110 SW 640.

**Instructions.** Pettus v. Kerr [Ark.] 112 SW 886. General objection is insufficient to point out ambiguity. Aluminum Co. v. Ramsey [Ark.] 117 SW 568. General objection to phraseology of instruction is insufficient, but counsel should point out defects specifically and ask specific instruction correcting it. Rock Island Plow Co. v. Rankin Bros. [Ark.] 115 SW 943. Use of objectionable word should be met by specific objection thereto, and not general one to whole instruction. Sloan v. Little Rock R. & Elec. Co. [Ark.] 117 SW 551. General objection to modification of instruction held not to present point that it left out proper qualification of rule therein stated. St. Louis, etc., R. Co. v. Puckett [Ark.] 114 SW 224. Formal general objection to instruction defective in form held insufficient. Arkansas Midland R. Co. v. Rambo [Ark.] 117 SW 784.

**Miscellaneous objections:** Objection to reading from first paragraph of answer which had been stricken before trial, and making statement of proof proposed to be introduced upon that point, held too general where said paragraph contained some matter which could properly be proved. Kansas City S. R. Co. v. Anderson [Ark.] 113 SW 1030. In **proceedings for improvement of highways**, grounds of objection must be set forth specifically and not in general terms. Conrad v. Hausen [Ind.] 85 NE 710. Objection to **manner of drawing jury** held not to have been made with sufficient clearness to call court's attention to matter. Houston Elec. Co. v. Seegar [Tex. Civ. App.] 117 SW 900. Objection held sufficient to raise question that **fees allowed master in chancery** were excessive. Keuper v. Mette's Unknown Heirs, 239 Ill. 586, 88 NE 218. Objection to decree directing taxation of specific sum as master's fees held sufficient to present question of propriety of allowance. Wirzbicky v. Dranicki, 235 Ill. 106, 85 NE 396.

**68.** Whether objection to substitution of plaintiffs was sufficiently specific held immaterial, where error was apparent on face of record, and of such a nature as to compel notice. Welch v. Lynch, 30 App. D. C. 122.

**69. Motion to dismiss.** Lichtman v. Rose, 110 NYS 935.

**Motion to strike evidence.** Union Naval Stores Co. v. Pugh [Ala.] 47 S 48; Coorman v. Brooklyn Heights R. Co., 127 App. Div. 315, 111 NYS 531.

**Motion for nonsuit.** Yetter v. Gloucester Ferry Co. [N. J. Law] 69 A 1079; Mims v. Hair, 80 S. C. 460, 61 SE 968. Cannot urge that trial court erred in refusing to direct nonsuit because of variance, where attention of judge was not specifically called to point. Epstein v. Gordon, 114 NYS 438. Though defendant did not, on argument of motion to direct verdict for him, make claim as to absence of evidence on certain point, he may urge such ground as against exceptions to granting motion. Mears v. Smith, 199 Mass. 319, 85 NE 165.

**Motion to direct verdict.** Yetter v. Gloucester Ferry Co. [N. J. Law] 69 A 1079.

**Motion for new trial.** Storch v. Rose, 152 Mich. 521, 15 Det. Leg. N. 312, 116 NW 402; Cataract City Mill. Co. v. Meunier [R. I.] 69 A 602. Though it appears from record that court directed verdict, proposition that direction was unauthorized because evidence was conflicting is not presented for review, where only exception is to overruling of motion for new trial containing general and special grounds in none of which the point is presented. Arnold v. Ragan, 5 Ga. App. 254, 62 SE 1052. In such case court will pass upon propositions contained in motion for new trial as if verdict had been returned by jury after they had been regularly charged as to law of case. Id. That finding and judgment are excessive can only be raised by assigning erroneous assessment of damages as ground of motion. Gwinn v. Wright [Ind. App.] 86 NE 453. Failure of plaintiff to establish freedom from contributory negligence not considered, where it was not referred to in motion for new trial save in general statement that verdict was contrary to evidence, and court's attention was not therefore, specifically called to matter. Johnston v. Cedar Rapids & M. C. R. Co. [Iowa] 119 NW 286. Where there was no contention in motion for new trial that plaintiff had assumed risks because of knowledge of defect, could not be raised on appeal. Texas Mexican R. Co. v. Trijerina [Tex. Civ. App.] 111 SW 239. Where written motion for new trial specifies grounds on which defeated party relies, grounds not specified are waived. Chicago, etc., R. Co. v. Cukravony, 132 Ill. App. 367; Galesburg Elec. Motor & Power Co. v. Williams, 132 Ill. App. 598; Commonwealth Elec. Co. v. Rooney, 138 Ill. App. 275; Olson v. Brundage, 139 Ill. App. 559; Aygarn v. Rogers Grain Co., 141 Ill. App. 402; Yarber v. Chicago & A. R. Co., 235 Ill. 589, 85 NE 928. Where motion specified, among other grounds, admission of improper evi-

those grounds so specified in the motion or objection [70] will be considered on appeal. An objection based on extraneous facts must be accompanied by a showing of such facts.[71] It is generally held that an objection to evidence as a whole is properly overruled if any part of it is admissible,[72] though there seems to be some conflict of authority in this regard.[73] So, too, a general objection to evidence by all of several

dence and giving of improper instructions, exceptions taken to action of court in those particulars were not waived by motion, and were available whether exception was taken to order overruling motion or not. Yarber v. Chicago & A. R. Co., 235 Ill. 589, 85 NE 928.

**70.** Pratt v. Seamans, 43 Colo. 517, 95 P 929; Lake St. El. R. Co. v. Sandy, 137 Ill. App. 244; Pittsburgh, etc., R. Co. v. Rogers [Ind. App.] 87 NE 28; Schmidt v. Beiseker [N. D.] 120 NW 1096. To allowance of amendment. Harrison v. Carlson [Colo.] 101 P 76; Dempster v. Oregon Short Line R. Co., 37 Mont. 335, 96 P 717. Where defendant made but single objection to form of verdict, held that he would be deemed to have consented to such form except as thus criticised. Twentieth Century Co. v. Quilling, 136 Wis. 481, 117 NW 1007. Where court cautioned counsel that ground of objection should be specifically stated, and counsel stated that he had no other grounds than those stated, grounds not stated were waived. Managle v. Parker [N. H.] 71 A 637.

**Evidence.** Union Naval Stores Co. v. Pugh [Ala.] 47 S 48; Koosa & Co. v. Wharten [Ala.] 48 S 544; Seaboard Air Line R. Co. v. Harby, 55 Fla. 555, 46 S 590; Spencer v. Dell, 55 Fla. 790, 46 S 729; City of Arcola v. Wilkinson, 233 Ill. 250, 84 NE 264; Elgin, Aurora & S. Trac. Co. v. Hench, 132 Ill. App. 535; Huff v. Cleveland, etc., R. Co., 138 Ill. App. 89; Merchants' Mut. Tel. Co. v. Hirschman [Ind. App.] 87 NE 238; Crowell v. Northwestern Nat. Life Ins. Co. [Iowa] 118 NW 412; Neindorf v. Van de Voorde [Iowa] 120 NW 84; Alexander v. Tebeau [Ky.] 116 SW 356; In re McNamara's Estate, 154 Mich. 671, 15 Det. Leg. N. 934, 118 NW 598; Lockard v. Van Alstyne [Mich.] 15 Det. Leg. N. 1132, 120 NW 1; Mississippi Cotton Oil Co. v. Smith [Miss.] 48 S 735; Moseley v. Missouri Pac. R. Co., 132 Mo. App. 642, 112 SW 1010; Jordan v. Missouri & Kansas Tel. Co. [Mo. App.] 116 SW 432; In re Ayers' Estate [Neb.] 120 NW 491; Chess v. Vockroth, 75 N. J. Law, 665, 70 A 73; Wilber v. Gillespie, 127 App. Div. 604, 112 NYS 20; Columbus Circle Hotel Co. v. Dobroczynski 112 NYS 1049; Dalton v. New York Taxicab Co., 114 NYS 858; Neumeyer v. Hooker, 131 App. Div. 592, 116 NYS 204; Lee v. Unkefer, 77 S. C. 460, 58 SE 343; Wabash R. Co. v. Newton, Weller & Wagner Co. [Tex. Civ. App.] 110 SW 992; South Texas Tel. Co. v. Tabb [Tex. Civ. App.] 114 SW 448; Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 116 SW 365; Missouri, K. & T. R. Co. v. Pettit [Tex. Civ. App.] 117 SW 894; Adams v. Gary Lumber Co. [Tex. Civ. App.] 117 SW 1017; American Locomotive Co. v. Hoffman, 108 Va. 363, 61 SE 759; McCrorey v. Thomas [Va.] 63 SE 1011; Warren's Adm'r v. Bronson, 81 Vt. 121, 69 A 655; Drown v. New England Tel. & T. Co., 81 Vt. 358, 70 A 599. Permitting testimony of witness at former trial to be read in evidence. Jordan v. Le Messurier [Mich.] 15 Det. Leg. N. 1007, 118 NW 952. Competency of witness to testify as expert. Modlin v. Jones & Co. [Neb.] 121 NW 984. Allowing witness to refresh his memory. Rumble v. Cummings [Or.] 95 P 1111. Trial court will not be put in error for overruling specific objection which does not cover defect in evidence offered. Bufford v. Little [Ala.] 48 S 697.

**Instructions.** St. Louis, etc., R. Co. v. Richardson [Ark.] 112 SW 212; St. Louis, etc., R. Co. v. Holmes [Ark.] 114 SW 221; Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038.

**71.** Proper time for party objecting to introduction in evidence of instrument which has been altered to offer evidence that alterations were made subsequent to signing held to be when question of admissibility was before court for determination. Manuel v. Flynn, 5 Cal. App. 319, 90 P 463.

**72.** Sims v. Sims, 131 Ga. 262, 62 SE 192; Dolvin v. American Harrow Co., 131 Ga. 300, 62 SE 198; Robertson v. Heath [Ga.] 64 SE 73; Iowa Life Ins. Co. v. Haughton [Ind. App.] 87 NE 702; Fein v. Weir, 129 App. Div. 299, 114 NYS 426; Sullivan v. Fant [Tex. Civ. App.] 110 SW 507; Texas Cent. R. Co. v. Wheeler [Tex. Civ App.] 116 SW 83; Hudson v. Slate [Tex. Civ. App.] 117 SW 469; Stubbs v. Marshall [Tex. Civ. App.] 117 SW 1030. Where interrogatories were offered in evidence, objection to each question of each witness and the answer thereto held general objection to each deposition, and to have been properly overruled where each contained some legal evidence. Hammond v. A. Vetsburg Co. [Fla.] 48 S 419. When document containing proper and improper matter is offered as a whole, it is not ordinarily duty of court to segregate the one from the other, but objecting party must point out and direct his objection against part or parts that are not proper. Groot v. Oregon Short Line R. Co., 34 Utah, 152, 96 P 1019. If party desires to avail himself of objection to whole document, he must make double objection, one to part which is in fact improper, and other to document as a whole. Id. Court cannot be put in error for overruling objection to entire question as calling for conclusion where part of it did not. Selma St. & S. R. Co. v. Campbell [Ala.] 48 S 378.

**73.** Rule that general objection to evidence will not avail where any portion thereof is admissible does not apply without modification to an objection made in course of oral examination of witness to question which includes several different propositions, a part of which are not subject to the objection. Cooper v. Bower [Kan.] 96 P 794. Ordinarily it is incumbent on examiner to frame question so that in its entirety it is free from objection made; otherwise objection should be sustained. Id.

coparties is properly overruled if it is admissible against one of them,[74] and a motion to exclude evidence a part of which is admissible is properly denied,[75] but the fact that only a part of the grounds for the motion are tenable does not require that it be denied.[76] An objection to the exclusion of evidence must ordinarily be accompanied by an offer of proof showing what the evidence is,[77] its purpose,[78] and that it is admissible;[79] but this rule has been held not to apply where evidence is excluded on cross-examination,[80] nor where the court in effect eliminates the issue in support of which it is offered.[81] Evidence offered as a whole is as a rule, properly

74. Holroyd v. Millard, 142 Ill. App. 392.

75. Taylor v. McClintock [Ark.] 112 SW 405; St. Louis, etc., R. Co. v. Taylor [Ark.] 112 SW 745; Gainesville & Gulf R. Co. v. Peck, 55 Fla. 402, 46 S 1019; Wilson v. Jernigan [Fla.] 49 S 44; Elgin, J. & E. R. Co. v. Lawlor, 132 Ill. App. 280; Fein v. Weir, 129 App. Div. 299, 114 NYS 426; City of Bluefield v. McClaugherty [W. Va.] 63 SE 363; Chicago G. W. R. Co. v. McDonough [C. C. A.] 161 F 657. Rule has no application where whole answer of witness to question is subject to the objection made. Sterne v. Mariposa Commercial & Min. Co., 153 Cal. 516, 97 P 66.

76. United States Oil & Land Co. v. Bell, 153 Cal. 781, 96 P 901.

77. Sloss-Sheffield Steel & Iron Co. v. Sharp [Ala.] 47 S 279; St. Louis S. W. R. Co. v. Myzell [Ark.] 112 SW 203; Boland v. Stanley [Ark.] 115 SW 163; Tanner v. Clapp, 139 Ill. App. 353; Sertaut v. Crane Co., 142 Ill. App. 49; Brinkman v. Pacholke, 41 Ind. App. 662, 84 NE 762; Indianapolis Trac. & T. Co. v. Rowe [Ind. App.] 87 NE 653; Boisvert v. Ward, 199 Mass. 594, 85 NE 849; Grimestad v. Lofgren, 105 Minn. 286, 117 NW 515; Louis v. Louis [Mo. App.] 114 SW 1150; Blondel v. Bolander, 80 Neb. 531, 114 NW 574; Carlile v. Bentley [Neb.] 116 NW 772; Olmstead v. Noll [Neb.] 117 NW 102; Miller v. Donahue, 11 Ohio C. C. (N. S.) 436; Missouri, K. & T. R. Co. v. Neiser [Tex. Civ. App.] 118 SW 166; Delmar Oil Co. v. Bartlett, 62 W. Va. 700, 59 SE 634; Lord v. Henderson [W. Va.] 64 SE 134. Unless it is apparent from question what evidence sought to be elicited is. Shandy v. McDonald [Mont.] 100 P 203. Where licensing board refuses to admit evidence on hearing of application for license. In re Phelps [Neb.] 116 NW 681. Error in sustaining objections to questions put to plaintiff when called for cross-examination under the statute not available in absence of offer of proof or showing that answers would be material under issues formed by pleadings. Soules v. Brotherhood of American Yeomen [N. D.] 120 NW 760.

78. Langston v. National China Co. [Fla.] 49 S 155. Must be made to appear that it would have been beneficial. Missouri, K. & T. R. Co. v. Neiser [Tex. Civ. App.] 118 SW 166. Where evidence was not admissible for either of purposes for which it was offered, it could not be contended for first time on appeal that it was admissible as preliminary to certain other evidence. Dunham v. Cox [Conn.] 70 A 1033. Offer to prove facts wholly disconnected with any matter concerning which the witness has been questioned is not proper and presents no question for review. Pike v. Hauptman [Neb.] 119 NW 231. Offer held not to offer to prove that law of foreign state did not permit transfer of franchise without state's consent. O'Sullivan v. Griffith, 153 Cal. 502, 95 P 873. Rulings excluding testimony as to motive in bringing suit, claimed to be admissible in mitigaton of damages, held proper, where no such issue was tendered by questions propounded or by offers of testimony. Liebler v. Carrel [Mich.] 15 Det. Leg. N. 976, 118 NW 975. Plaintiffs held not to have shown themselves aggrieved by exclusion of contents of letter where text of letter and purpose for which it was offered were not stated. Deane v. American Glue Co., 200 Mass. 459, 86 NE 890. Offer held insufficient to raise issue whether slanders were uttered by defendant's agents in course of their employment. Kane v. Boston Mut. Life Ins. Co., 200 Mass. 265, 86 NE 302. Where court below treated offer as basis for ruling on admissibility of evidence, on appeal case must be treated as though such facts were in evidence and had been disregarded by lower court. Meyer v. Doherty, 133 Wis. 398, 113 NW 671.

79. Must indicate relevancy of evidence. Blondel v. Bolander, 80 Neb. 531, 114 NW 574. Sustaining objection to evidence, relevancy of which was not apparent, held not ground for reversal where there was no offer to make such relevancy appear. Vaughan's Seed Store v. Stringfellow [Fla.] 48 S 410. Where answer may or may not be pertinent, overruling of question will not constitute reversible error unless party objecting to exclusion of evidence shows its pertinency. More-Jonas Glass Co. v. West Jersey & S. R. Co. [N. J. Err. & App.] 72 A 65. Offer held insufficient since it contained only part elements necessary to make evidence admissible. Grimestad v. Lofgren, 105 Minn. 286, 117 NW 515.

80. Formal offer not necessary to obtain review of ruling of excise board excluding answer to proper question asked on cross-examination. In re Powell [Neb.] 119 NW 9.

81. Held not to apply to issue raised by counterclaim where latter was expressly excluded and court announced that no proof tending to sustain it would be received, to which exception was taken. Palmer v. La Rault [Wash.] 99 P 1036. Where ruling excluding evidence made it impossible for plaintiff to recover, held that he was not bound to offer further proof, and judgment against him would not be sustained because offer which he did make was not sufficiently full and specific. Murphey v. Brown [Ariz.] 100 P 801.

excluded if any part of it is inadmissible,[82] though the contrary has been held in certain cases.[83] A question cannot be objected to as hearsay.[84]

§ 9. *Form and sufficiency of exception.*[85]—See 10 C. L. 1593—Though no particular form of exception is necessary, it must appear that what counsel did at the time was intended to preserve the ruling complained of for review.[86] The allowance of an appeal may sometimes be equivalent to an exception.[87] As a general rule, an exception must point out specifically the particular error complained of,[88] though gen-

**82.** Wallach v. MacFarland, 31 App. D. C. 130; Crucible Steel Co. v. Moen [C. C. A.] 167 F 956.

**83.** As where no objection was made on that ground and it clearly appears that the ruling was made solely with reference to that part of the evidence which was admissible. James McCreery & Co. v. Ollendorff, 116 NYS 30. Where written statement signed by witness previous to trial was in many respects contradictory of his testimony, held error to exclude it entirely on general objection to its materiality and competency, even if part of it did not tend to impeach witness. Archbold v. Joline, 114 NYS 169.

**84.** Gulf, etc., R. Co. v. Farmer [Tex.] 115 SW 260.

**85. Search Note:** See Appeal and Error, Cent. Dig. §§ 1620-1645, 1764; Dec. Dig. §§ 273, 274; Trial, Cent. Dig. §§ 256-258, 375, 406, 689-696, 965; 8 A. & E. Enc. P. & P. 153.

**86.** Mere announcement by counsel that he disagrees with court is not equivalent to exception to ruling. Climax Tag Co. v. American Tag Co., 234 Ill. 179, 84 NE 873. Held that no exception was taken to remark of counsel, in proper sense of term. Enos v. Rhode Island Suburban R. Co. [R. I.] 70 A 1011. Fair construction of what took place held to show exception to refusal of defendant's request to go to jury. Maxwell v. Martin, 130 App. Div. 80, 114 NYS 349.

**87.** Recital in order denying motion for new trial that, plaintiff having at the time prayed for an appeal, same was granted, held tantamount to exception. Moody v. St. Louis, etc., R. Co. [Ark.] 115 SW 400.

**88.** Must be sufficiently specific to direct judge's attention to precise point upon which he is alleged to have made an erroneous ruling. Gerhardt v. Boettger, 75 N. J. Law, 916, 70 A 173; Holt v. United Security Life Ins. & Trust Co. [N. J. Err. & App.] 72 A 301. Exception held sufficient to present questions of law made in lower court by petition for certiorari and answer, and to be sufficient in form. Meeks v. Carter, 5 Ga. App. 421, 63 SE 517. Exception held one to finding on plaintiff's affidavit of claim, and not to assessment of damages by court without jury. Snow v. Merriam, 133 Ill. App. 641. Exception to charge held not to have challenged suggestion of court that limitations had run against action for assault. Taranto v. North German Lloyd S. S. Co., 128 App. Div. 72, 112 NYS 499. Exception to direction of verdict saves only question of sufficiency of evidence. Mullen v. Quinlan & Co. [N. Y.] 87 NE 1088. Exception to denial of motion to direct verdict as against law and evidence raises no question of law. Lally v. Prudential Ins. Co. [N. H.] 72 A 208. Where both parties moved for directed verdict, held that exception by plaintiff to direction of verdict for defendants was not sufficient to notify court of objection to its disposing of case, but only suggested that plaintiff would have verdict directed in his favor. Kinnel v. Whipple, 128 App. Div. 736, 113 NYS 337.

**Instructions:** Must point out specific error claimed. Millen & S. W. R. Co. v. Allen, 130 Ga. 656, 61 SE 541; B. F. Sturtevant Co. v. Cumberland Dugan & Co., 106 Md. 587, 68 A 351; Wood v. Dodge [S. D.] 120 NW 774; Morris v. Salt Lake City [Utah] 101 P 373. Exceptions that instructions were improper, irrelevant, did not state law, and were inapplicable to case, held too general. Tonopah Lumber Co. v. Riley [Nev.] 95 P 1001. General exception to entire charge cannot be considered. Schneider v. Winkler, 74 N. J. Law, 71, 70 A 731; Comeau v. Hurley [S. D.] 117 NW 371; Gustafson v. West Lumber Co. [Wash.] 97 P 1094. General exception to considerable portion of charge cannot be regarded as presenting specific objection to lesser portion. Chicago G. W. R. Co. v. McDonough [C. C. A.] 161 F 657. Exception to charging of all the requests presented by plaintiff insufficient to preserve objections to particular charge. Murdock v. Gould, 193 N. Y. 369, 86 NE 12. Exception to action of court in reading requests of both parties and stating that they were good law except as modified, on ground that there were irreconcilable conflicts between requests and that there were no modifications in general charge, held too general. Goodwin v. Atlantic C. L. R. Co. [S. C.] 64 SE 242. Exception challenging an instruction combining several different propositions of law is of no avail unless it shows precise ground of objection, in which case review is confined to precise ground alleged. Holt v. United Security Life & Trust Co. [N. J. Err. & App.] 72 A 301. Exception to refusal to charge as requested, and to charge as given on subject-matter of requests, held too general. Davis' Adm'x v. Rutland R. Co. [Vt.] 71 A 724. Where defendant submitted 12 requests to charge, exception to refusal to charge as requested, and to charge given upon subject-matter of requests, held too general to save question of error in refusing to give 4 of requests. Mahoney's Adm'r v. Rutland R. Co., 81 Vt. 210, 69 A 652. Where parts of charge are excepted to generally, and in themselves are correct statements of abstract principles of law, court will not search record to discover whether instructions were authorized under facts. Mutual Life Ins. Co. v. Chambliss, 131 Ga. 60, 61 SE 1034. Exceptions severally taken, each to specific charge, held sufficiently specific. Tucker v.

eral exceptions have been held sufficient in certain cases,[89] and is sometimes,[90] though not always,[91] required to state the grounds on which it is based. Exceptions should not be in gross.[92] An exception depending on an erroneous conception of law is valueless.[93]

Dudley, 127 App. Div. 403, 111 NYS 700. Exception to instruction on ground that it instructed jury on a matter of fact held sufficient. Tonopah Lumber Co. v. Riley [Nev.] 95 P 1001. Where counsel presented written requests, exception as to those which court refused to charge was sufficient to preserve refusal to charge as to matter covered by one of such requests. Murray v. Narwood, 192 N. Y. 172, 84 NE 958.

**Evidence:** Exceptions to rulings on admission of evidence not considered, where did not set out substance of evidence to which objections related. Arnold v. Ragan, 5 Ga. App. 254, 62 SE 1052. Exception to refusal of court to require witness to allow copy of whole of certain agreement to be made and annexed to record held without merit, where, so far as appeared, portion of agreement put in evidence embraced all of it that was pertinent to case, and counsel, who had examined paper, failed to specify either below or on appeal, what bearing suppressed portion had on case. Rogers v. Chester [R. I.] 69 A 848. If counsel desired to raise question of plaintiff's credibility, held that appropriate request to charge should have been made, or at least exception directed to that point should have been taken, and question was not presented by exception specifically directed to another point. Moglia v. Nassau Elec. R. Co., 127 App. Div. 243, 111 NYS 70. Exception to denial of motion to dismiss bill for want of proof does not raise question whether there was evidence to support decree in its entirety, an exception to the decree being necessary for that purpose. Perry v. Maryland Casualty Co. [N. H.] 72 A 369. Exception to conclusions of law does not raise question of sufficiency of evidence to support findings of fact. Pittinger v. Ramage, 40 Ind. App. 486, 82 NE 478.

**Findings:** General exception to all findings made, or all requested and refused, is insufficient for any purpose. Pederson v. Ullrich, 50 Wash. 211, 96 P 1044. General exception to refusal to find as requested. Crowe & Co. v. Brandt, 50 Wash. 499, 97 P 503. Where plaintiff excepted to finding "except quantity of logs driven and the ownership of the enumerated parts," held that part of finding as to quantity of logs driven was not open to review. Phalen v. Hershey Lumber Co., 136 Wis. 571, 118 NW 219. Exception to decree as whole is exception to every finding included therein which enters into conclusion expressed by decree. Warner v. Trustees of Norwegian Cemetery Ass'n [Iowa] 117 NW 39. Exception to decree as whole held to save ruling in effect overruling demurrer to cross bill and awarding defendants relief therein prayed for. Id. Exceptions to judgment held to authorize review of findings of fact, though no exceptions to latter were filed. Mutual Reserve Fund Life Ass'n v. Green [Tex. Civ. App.] 109 SW 1131.

**Judgment or order:** Must specify error alleged to exist therein. Neal v. Davis Foundry & Machine Works, 131 Ga. 701, 63 SE 221. Exception to order in bastardy proceedings held not sufficiently specific to save question as to want of terms limiting successive payments to life of child and its need of support. Reynolds v. Hassam, 80 Vt. 501, 68 A 645. Where facts were conceded in mandamus proceeding, exception that order and judgment were not supported by law or evidence should be construed to mean that conceded facts do not warrant result reached. State v. Kaikofen, 134 Wis. 74, 113 NW 1091.

**89.** Where exceptions to auditor's report were overruled, and proper exceptions pendente lite taken to judgment overruling them, and final decree was entered adopting report, held that bill of exceptions assigning error generally on final decree and specifically on pendente lite exceptions was sufficient. Potts v. Prior, 131 Ga. 198, 62 SE 77. No statute or rule of court requires specific exceptions to orders of clerk in condemnation proceedings, and either party may except generally and on appeal present any question appearing on record; hence defendant could have reviewed clerk's order appointing commissioners to which he excepted generally. Johnson City S. R. Co. v. South & W. R. Co., 148 N. C. 59, 61 SE 683.

**90.** Granting continuance. Smith v. Ross, 81 App. D. C. 348. Statement in record that appellant objected to refusal to give each and every one of her requests for instructions held to present no question, where no specific reason why they should have been given was urged. Ward v. Sturdivant [Ark.] 109 SW 1167. Defendant cannot complain that there was no evidence to support instructions given at instance of plaintiff, where he did not except to plaintiff's prayers on that ground. Mount Vernon Brew. Co. v. Teschner, 108 Md. 158, 69 A 702.

**91.** Grounds of exception to decree need not be stated. Code, §§ 3750, 3751. Warner v. Trustees of Norwegian Cemetery Ass'n [Iowa] 117 NW 39. May consider question that refused instruction was not sustained by evidence, though no special exception on that ground. Mount Vernon Brew. Co. v. Teschner, 108 Md. 158, 69 A 702. Exception pointing out precise language of instruction objected to held sufficient, it not being necessary to state reason for exception. Davenport v. Prentice, 126 App. Div. 451, 110 NYS 1056. Is only where error was merely inadverent that exception should suggest correction. Id.

**92.** Exception to ruling of court overruling **demurrer** to each paragraph of complaint held to properly present sufficiency of each paragraph. United States Cement Co. v. Koch [Ind. App.] 85 NW 690. General exception to all **instructions** insufficient if any of them are correct. Ward v. Sturdivant [Ark.] 109 SW 1167; Boswell v.

§ 10. *Waiver of objections and exceptions taken.*[94] See 10 C. L. 1595—Objections and exceptions may be waived by compliance with the ruling,[95] by withdrawing the grounds of objection,[96] by failure to follow up the objection or insist upon similar objections in subsequent proceedings,[97] by assuming inconsistent positions,[98] answer-

Gillen, 131 Ga. 310, 62 SE 187; A. B. Farquhar Co. v. Sherman [Okl.] 97 P 565. General exception to instruction containing two distinct propositions is not available if either is correct. Graves v. Davenport [Colo.] 100 P 429. Exception "to those portions of the charge to the jury which are as follows," followed by more than two pages of printed matter contained in charge covering many propositions, most of which were unassailable, held to present no specific question for consideration. Agnew v. Baldwin, 136 Wis. 263, 116 NW 641. Exception to instruction as a whole is insufficient where instruction is not bad as a whole and is not claimed to be. Pennington v. Redman Van & Storage Co., 34 Utah, 223, 97 P 115. Where exception to refusal to give instruction is general one, if any of instructions are bad, exception does not preserve others for review. St. Louis, etc., R. Co. v. Hambright [Ark.] 113 SW 803. Exception to "refusal to give said charges numbered 1, 2, and 3" will not be sustained if either charge was properly refused. Hutto v. Stough [Ala.] 47 S 1031. Where defendant submitted 12 requests to charge, held that exception to refusal to charge according to first 9, and to charge as given on subjects thereof, was too general to be available, unless charge on such subjects was entirely erroneous. Drown v. New England Tel. & T. Co., 81 Vt. 358, 70 A 599. General exception to all **findings** is insufficient unless all are erroneous. Warehime v. Schweitzer [Wash.] 98 P 747. General exception "to refusal of court to find the first 31 requests to find facts and also the first 17 requests to find conclusions of law" held not well taken, where court was not compelled to find as requested in many instances. Ostrander v. State, 192 N. Y. 415, 85 NE 668.

**93.** Atlantic C. L. R. Co. v. Odum, 5 Ga. App. 780, 63 SE 1126.

**94. Search Note:** See Appeal and Error, Cent. Dig. §§ 1646-1649; Dec. Dig. § 280; Trial, Cent. Dig. §§ 968-986; Dec. Dig. §§ 406-427.

**95.** Exception to paragraph of answer was allowed, and question was not in terms reserved. Answer was amended by striking out paragraph referred to, and decree rendered in accordance with agreement of parties. No claim was then made that such paragraph should be considered or passed on, and it was not in fact passed on. Held that any error in sustaining exception was waived. Wilder's Ex'x v. Wilder [Vt.] 72 A 203. Where motion for new trial was granted on condition that defendant elect to have new trial on question of damages only, which he did, and jury returned verdict covering whole case, held exceptions relating only to proceedings on first trial were not reviewable. Timpary v. Handrahan, 198 Mass. 575, 85 NE 183. Ruling sustaining objection to testimony on ground of incompetency of witness held to warrant plaintiff in not inquiring further as to matter. Barto v. Harrison, 138 Iowa, 413, 116 NW 317. Defendant objected to admission of deed on ground that description of land was ambiguous, and offered evidence of surveyors that they could not take deed and locate land therefrom. Court correctly ruled that deed was not ambiguous on its face and admitted it, and that evidence would not be admitted at that time. Held that, in order to put court in error for excluding testimony which, in connection with deed, would have shown insufficient description, defendant should have offered such evidence separately and obtained ruling thereon. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662.

**96.** Objection held withdrawn and not renewed. Mayhew v. Smith, 42 Colo. 534, 95 P 549. After affidavit of defense was filed, rule for judgment was taken, which was afterward discharged. Plaintiff then filed amended statement of demand, and defendant filed protest in which he denied right of plaintiff to require him to file affidavit of defense to such amended statement. Later he voluntarily filed such affidavit. Held that, on appeal from order making rule for judgment absolute, defendant could not question right of plaintiff to compel him to file second affidavit. Burns v. Armstrong [Pa.] 72 A 255.

**97.** Argument was objected to as commenting on testimony which had been excluded. Court being in doubt as to whether such testimony had been excluded, directed counsel to proceed and stated that he would have stenographer look matter up, which he forgot to do. Held that court should have been reminded of matter before trial closed, and where did not do so, could not predicate error on overruling motion for new trial on ground that argument was improper. Southern Pac. R. Co. v. Hart [Tex. Civ. App.] 116 SW 415. Where evidence was excluded on ground that there was no issue as to point on which it was sought to be introduced, defendant was not bound to persist in his efforts to introduce it or to present it in such form as not to be otherwise objectionable. Lichtenstein Millinery Co. v. Peck, 59 Misc. 193, 110 NYS 410. Where defendant was led to refrain from formally presenting proposed supplemental answer on theory that it would be of no avail in view of ruling as to amendment, and neither court nor counsel objected on that ground, held that he would not be deprived of right to reversal because of erroneous refusal to allow service of such answer for failure to present it. Jones v. Ramsey, 127 App. Div. 704, 111 NYS 993.

**98.** Exception to admission of evidence not waived by cross-examination of witness. United R. & Elec. Co. v. Corbin [Md.] 72 A 606. Admission by defendant of prima facie case in plaintiff in order to get opening and closing argument, whether made in original answer or by amendment, does not estop defendant from complaining of

ing over,[99] going to trial on the merits,[1] by the introduction of evidence,[2] by failing to renew a motion,[3] or to repeat an objection,[4] by requested instructions,[5] by filing a

prior rulings on demurrer to which exceptions pendente lite have been filed. Albany Phosphate Co. v. Hugger Bros., 4 Ga. App. 771, 62 SE 533. Fact that plaintiff requested dismissal after demurrer to declaration was sustained held not to preclude him from complaining, it being manifestly his intention to decline to amend, and to have dismissal on that ground. Davis v. Woods [Miss.] 48 S 961. Where instrument is admitted in evidence, against objection without proof of execution, and case is thereafter reported to law court for its determination, and it appears from whole record that instrument was executed, objection is no longer tenable, since, if party objecting felt aggrieved, he should have taken exceptions and not have consented to report. Anderson Carriage Co. v. Bartley, 102 Me. 492, 67 A 567.

99. See, also, Appearance, 11 C. L. 255; Parties, 12 C. L. 1175; Pleading, 12 C. L. 1323. Answering over after overruling motion to require plaintiff to elect which of two defendants he would proceed against, and overruling of demurrer to complaint held waiver of exceptions to such rulings. Worrall Grain Co. v. Johnson [Neb.] 119 NW 668.

1. See, also, Pleading, 12 C. L. 1323. Demurrer waived by proceeding to trial without objection while it is undisposed of. Devine v. Chicago City R. Co., 141 Ill. App. 583. Exception to overruling motion to strike reply and for judgment on pleadings waived by going to trial on merits. Sundmacher v. Lloyd [Mo. App.] 116 SW 12. Where defendant's exception on record to denial of motion for jury trial was erroneously refused, held that he was entitled to review though he proceeded with the trial. Stevenson v. Brooks, 62 Misc. 489, 115 NYS 118. Where defendant asserted right to trial by jury of twelve at outset of trial, before any evidence was taken, held that exception to ruling against him was not waived by participation in trial before jury of six. Skinner v. Allison, 127 App. Div. 15, 111 NYS 264. Exception to ruling denying jury trial held not waived by filing answer and going to trial in equity. Jamison v. Ranck [Iowa] 119 NW 76.

2. Waiver of objections and exceptions to overruling of motions to direct a verdict (see Directing Verdict and Demurrer to Evidence, 11 C. L. 5), or motions to dismiss or for a nonsuit (see Discontinuance, Dismissal and Nonsuit, 11 C. L. 1093) are treated in separate topics. One cannot complain of the admission of evidence where he subsequently introduces evidence to same effect (Missouri, K. & T. R. Co. v. Pettit [Tex. Civ. App.] 117 SW 894), or where he subsequently brings out the same evidence on cross examination (Sullivan v. Fant [Tex. Civ. App.] 110 SW 507; Texas & N. O. R. Co. v. Broom [Tex. Civ. App.] 114 SW 655; Hill v. Houser [Tex. Civ. App.] 115 SW 112; Texas & N. O. R. Co. v. McCoy [Tex. Civ. App.] 117 SW 446; Missouri, K. & T. R. Co. v. Pettit [Tex. Civ. App.] 117 SW 894). Further inquiry held not waiver of error in ruling excluding evidence on ground of incompetency of witness where evidence sought was not elicited. Barto v. Harrison, 138 Iowa, 413, 116 NW 317. Motion to exclude all of plaintiff's evidence relating to certain items, made at close of plaintiff's evidence, waived where after it was overruled defendants afterwards introduced evidence relating to same subject, thereby supplementing plaintiff's evidence. Lord v. Henderson [W. Va.] 64 SE 134. Where after denial of motions to strike answer from files, and for judgment on pleadings, and overruling of demurrer to answer, all based on fact that answer contained no general denial, plaintiff introduced evidence and tried case as if general issue had been joined, held that he thereby consented to enlargement of issues, and could not thereafter complain because case was tried upon such issues. Rockefeller v. Ringle, 77 Kan. 515, 94 P 810.

3. For necessity of renewing motion to dismiss or for nonsuit, see Discontinuance, Dismissal and Nonsuit, 11 C. L. 1093.

4. Where objection to evidence on direct examination is properly overruled, if counsel conceive that matters brought out on cross-examination show it to be incompetent, they must again challenge it. Burger v. Omaha, etc., R. Co. [Iowa] 117 NW 35. Objection to proof of rule by parol waived, where appellant permitted it to be proven on cross-examination of its own witness without objection. Petersen v. Elgin, A. & S. Trac. Co., 142 Ill. App. 34. Estopped to assert that admission of testimony was error where witness at another time repeated substance of such testimony without objection. Missouri, K. & T. R. Co. v. Pettit [Tex. Civ. App.] 117 SW 894. Evidence introduced by plaintiff, was objected to, and was subsequently withdrawn on defendant's motion when shown to be inadmissible on cross-examination. On redirect examination same question was gone into again by plaintiff without objection. Held no question as to admissibility of evidence was presented on plaintiff's appeal. Town of Newcastle v. Grubbs [Ind.] 86 NE 757. Objections made when depostion of witness was taken held waived where not called to trial court's attention. Thomas v. Boyd, 108 Va. 584, 62 SE 346. Question was objected to and exception taken to overruling of objection. Witness then asked to be allowed to state matter in her own way, and examiner said "Very well." Held not necessary to renew objection. Cooper v. Bower [Kan.] 96 P 59.

5. Defendant held not entitled to object that certain damages could not be recovered under pleadings, where it asked and obtained instruction broad enough to authorize such recovery. Mississippi Cotton Oil Co. v. Smith [Miss.] 48 S 735. Asking for and obtaining instruction that assessment of property as building on land of third person was no evidence that land belonged to latter and not to defendant held waiver of exception to admission of evidence of such assessment for purpose of showing that defendant did not own land.

motion for a new trial,[6] or by failing to take advantage of an opportunity to correct an alleged error.[7]

**Savings Banks; Scandal and Impertinence; School Lands,** see latest topical index.

## SCHOOLS AND EDUCATION.

§ 1. **The School System in General, 1796.**
§ 2. **Right, Privilege and Duty of Attendance, 1797.** Separate Schools for Races, 1797. Vaccination of Pupils, 1797. Duty to Furnish School Facilities, 1797.
§ 3. **School Districts, Sites and Schools, 1798.** Formation, Alteration, Consolidation and Dissolution of Districts, 1798. Establishment of High Schools, 1800. Sites, 1800.
§ 4. **Organization, Meetings and Officers, 1801.**
§ 5. **Property and Contracts, 1804.**
§ 6. **Fiscal Affairs, 1808.** School Bonds, 1808. Miscellaneous Power to Expend Money and Create Indebtedness, 1809. Taxes and Revenues, 1810. Property of Absentees, 1812. State School Funds, 1812.
§ 7. **Teachers and Instruction, 1813.** Employment, Control and Dismissal, 1813. Salary, 1813.
§ 8. **Control and Discipline of Scholars and Regulation of Attendance, 1814.** Fraternities, 1815. Corporal Punishment, 1815.
§ 9. **Torts and Liability for the Same, 1815.**
§ 10. **Offenses, 1815.**
§ 11. **Decisions, Rulings, and Orders of School Officers, and Review of the Same, 1815.**
§ 12. **Actions and Litigation, 1815.**
§ 13. **Libraries, Reading Rooms and Other Auxiliary Educational Institutions, 1816.**
§ 14. **Private Schools, 1816.**

*The scope of this topic* is noted below.[1]

§ 1. *The school system in general.*[2] See 10 C. L. 1597—A common school is one common to all children of proper age and capacity, free, and subject to, and under the control of, the qualified voters of the school district.[3]

City of Manchester v. Duggan [N. H.] 70 A 1075. Where, in action on benefit certificate, insurer submitted by its instruction and as sole question in issue, whether insured in his lifetime elected to sever his connection with order and abandon same, and whether order waived prompt payment of certain assessment, it could not contend on appeal that proof of waiver was incompetent. Jones v. Supreme Lodge K. of H., 236 Ill. 113, 86 NE 191. Where letter claimed to have been written by defendant was offered and received in evidence before he had denied writing it, held that he did not waive his exception to ruling by requesting instruction that jury might consider letter, if found to have been written by defendant, only as bearing on his credibility as a witness. McDermott v. Mahoney [Iowa] 116 NW 788, afg. 115 NW 32. Defendant held not to have waived right to object that verdict disregarded instructions eliminating remaining paragraphs of complaint by asking instructions on merits of case. Dickson v. Swift & Co., 238 Ill. 62, 87 NE 59.

6. Application for, and acceptance of, rule to show cause why new trial should not be granted, by one holding bill of exceptions, is waiver of all exceptions not expressly reserved. Kari v. Diamond [N. J. Law] 71 A 46. After allowance by circuit court of rule to show cause why there should not be a new trial with no reservation of exceptions only common error such as appear upon record are assignable and all assignments based upon exceptions sealed will be stricken. Hansen v. De Vita [N. J. Law] 68 A 1062.

7. Where plaintiff was afforded opportunity for correction of supposed error in instruction by court offering to modify it after jury retired, but declined to have it modified, held that he waived right to rely on error. Mester v. Zaiser [Iowa] 120 NW 466. Defendant excepted to charge and requested submission of particular question to jury. Plaintiff consented to modification of charge and submission of such question. Defendant then withdrew such request to charge. Held that defendant waived exception, and acquiesced in charge as originally given. Aker v. Brooklyn Daily Eagle, 130 App. Div. 412, 114 NYS 968.

1. **It includes** matters relating to common schools, private schools and public educational facilities, such as libraries. **It excludes** institutions of higher learning (see Colleges and Academies, 11 C. L. 632). It also excludes health regulations (see Health, 11 C. L. 1717) and matters relating generally to the public domain (see Public Lands, 12 C. L. 1456), public officers (see Officers and Public Employes, 12 C. L. 1131), and the like.

2. **Search Note:** See Schools and School Districts, Cent. Dig. §§ 12-16, 38; Dec. Dig. §§ 9-14, 20.

3. School Dist. No. 20, Spokane County v. Bryan [Wash.] 99 P 28.

The legislature may provide better schools than the constitution itself requires.[4]

The adoption of school laws by referendum and use of voting machines is treated in another topic.[5]

§ 2. *Right, privilege and duty of attendance.*[6]—See 10 C. L. 1597.—*Separate schools for races* See 10 C. L. 1598 may be provided but the accommodations must be substantially equal.[7] The state's power to regulate school corporations of its own creation with regard to separate instruction of the races is practically absolute.[8]

*Vaccination of pupils.*See 8 C. L. 1852—This section deals only with the right to close the schools to unvaccinated pupils, all other matters with reference to vaccination being treated elsewhere.[9] Children from infected homes and those unable to show a proper certificate of vaccination are sometimes required to be excluded from the public schools by statute,[10] but where the matter is not regulated by statute or constitution, a city cannot require vaccination as a prerequisite to admission,[11] unless the requirement is reasonable in its character and rests upon the ground that it is necessary to preserve public health.[12]

*Duty to furnish school facilities.*See 10 C. L. 1598—The school board cannot be required to furnish school facilities to the lone inhabitant of an island.[13] While place of attendance may be regulated, the board cannot require pupils to attend school at a locality beset with danger to them.[14] Upon proper application, pupils in some states may be transferred from one district to another for educational purposes,[15]

4. Constitution makes minimum rather than maximum requirement as to schools. In re Newark School Board [N. J. Law] 70 A 881. Fact that law provides for education of children between 5 and 20 years old, while constitution provides for education between 5 and 18 only, does not render law invalid. In re Newark School Board [N. J. Law] 70 A 881.

5. See Statutes, 10 C. L. 1705.

6. **Search Note:** See notes in 26 L. R. A. 581; 65 A. S. R. 330; 3 Ann. Cas. 693.

See, also, Schools and School Districts, Cent. Dig. §§ 15, 184-205, 319-339; Dec. Dig. §§ 13, 75-86, 148-168; 25 A. & E. Enc. L. (2ed.) 29; 25 A. & E. Enc. L. (2ed.) 22.

7. Board of education of city of first class may provide separate schools for white and colored children in grades below high school, provided equal educational facilities are furnished; but where location of school for one of these classes is such that access to it is beset with such dangers to life and limb that children of class for which it is designated ought not to be required to attend it, such children are denied equal educational facilities, and the action of board requiring them to attend such school and denying them admission to any other is abuse of discretion. Where children would be required to cross 16 tracks on which trains were constantly passing. Williams v. Board of Education of Parsons [Kan.] 99 P 216.

8. Ky. Acts 1904, c. 85, prohibiting teaching pupils of both races, so far as it applies to corporations whose charter state may alter, amend or repeal, does not violate federal constitution. Berea College v. Kentucky, 211 U. S. 45, 53 Law Ed. 81.

9. See Health, 11 C. L. 1717.

10. Under Act June 18, 1895 (P. L. 203), §§ 11-14, 21, principals or other persons in charge of school must exclude such persons. Commonwealth v. Rowe, 218 Pa. 168, 67 A 56. Duty is placed upon principals or other persons in charge of schools, and not upon directors. Id.

11. General police power to pass ordinances and make regulations for promotion of health or suppression of disease does not include passage of such ordinance. Peopls v. Chicago Board of Education, 234 Ill. 422, 84 NE 1046.

12. Ordinance refusing admission to schools of one not vaccinated within 7 years held unreasonable and void. People v. Chicago Board of Education, 234 Ill. 422, 84 NE 1046.

13. One who has chosen to establish himself on small island, most of which is owned by him, and who is only permanent inhabitant, cannot compel town to furnish school facilities upon island for his children, only two of whom are under 14, one of these being under school age, even though he is required by law to send one of them to school. Davis v. Chilmark, 199 Mass. 112, 85 NE 107.

14. Where children entitled to school privileges in city, if required to attend certain school designated by board of education, would be exposed to daily dangers to life and limb so obvious and so great that their parents in exercise of reasonable prudence should not permit them to incur hazard necessarily and unavoidably involved in such attendance, they should not be compelled to attend school so designated. Williams v. Board of Education of Parsons [Kan.] 99 P 216.

15. Under Laws 1898, p. 21, No. 25, amended by Laws 1900, p. 18, No. 23, permitting child who can conveniently be better accommodated in school of adjoining

and may enforce their right to attend school in,[16] and be transported at the district's cost to, the district to which they have been transferred by proper proceedings.[17]

§ 3. *School districts, sites and schools.*[18]—See 10 C. L. 1599—Notice of an election to determine whether a district shall adopt the provisions of a particular law must accurately name the place of the election [19] and sufficiently inform the voters of the business to be transacted.[20] Only voters possessing the statutory qualifications may vote at such an election.[21]

The right to use school buildings for other than purely school purposes may be granted by statute.[22]

*Formation, alteration, consolidation and dissolution of districts.*See 10 C. L. 1600—The formation, alteration and consolidation of school districts is usually regulated by statutes,[23] which are liberally construed.[24] These statutes usually contain limitations with reference to the territory which may be included or affected by the change,[25] and usually provide that the action taken shall be voluntary on the part

district to "demand" privileges of said school, its tuition to be paid by district of its residence, etc., "demand" implies application to board of its residence and not mere assertion of right, and law contemplates application to board of adjoining district to determine question to receive children of other district, refusal in either case being subject to appeal and final determination by county examiners of teachers. Town of Wallingford v. Clarendon, 81 Vt. 245, 69 A 734. Laws 1904, p. 60, No. 36, took away right to appeal. Id.

**16.** Action is properly brought only on relation of transferred child by its next friend. Teeple v. State [Ind.] 86 NE 49. Child of school age and not parent, guardian, or person in custody of such child, is one transferred for educational purposes, and hence parent or guardian, not being resident of transferred district, cannot sue to compel such district to hire teacher or provide facilities. Burns' Ann. St. 1908, §§ 6449-6453; Burns' Ann. St. 1901, §§ 5959a-5959e. Id.

**17.** Mandamus to transport children to school improperly issued where not shown that trustee had money on hand which he could lawfully devote to such purpose or that advisory board had appropriated money for that purpose alone. Dunten v. State [Ind.] 87 NE 733. To sustain mandamus to compel transportation of children to school, it must be shown that trustee had in his hands sufficient sum appropriated for such purpose by advisory board. Waters v State [Ind.] 88 NE 67. Mere allegation that trustee had sufficient sum to pay for cost of transportation held insufficient. Id.

**18. Search Note:** See notes in 14 L. R. A. 579; 33 Id. 118.

See, also, Schools and School Districts, Cent. Dig. §§ 39-91, 161-185; Dec. Dig. §§ 21-44, 64-75; 25 A. & E. Enc. L. (2ed.) 46; 25 A. & E. Enc. L. (2ed.) 31; 19 A. & E. Enc. P. & P. 242.

**19.** Notice of election which states election would be held in school house held defective where there were two school houses in district far separated one from other. State v. Green, 131 Wis. 324, 111 NW 519.

**20.** Mere statement to qualified electors that meeting was to determine whether or not they wished to adopt and ratify provisions of general charter law relating to schools, which had been adopted by city council, held insufficient to give requisite information as to business to be transacted. State v. Green, 131 Wis. 324, 111 NW 519.

**21.** Under St. 1898, § 925—113, amended by Laws 1899, c. 287, p. 502, state's electors qualified to vote at election to determine whether district under general law shall ratify adoption of general city charter law applicable to schools. State v. Green, 131 Wis. 324, 111 NW 519.

**22.** Under Rev. St. 1899, § 9763 (Ann. St. 1906, p. 4477), regarding use of schoolhouses by literary societies, etc., members of such society properly authorized to use same may enter building by means of key obtained from one not authorized to deliver it, though board had closed buiding against them improperly. State v. Kessler [Mo. App.] 117 SW 85.

**23.** Acts 19th general assembly, c. 118, p. 111, including certain territory in limits of independent school district within city, held not retroactive because bringing within city district territory annexed recently before passage of act, it being held that enlargement of city school district was effective only from time of act. Independent School Dist. of Fairview v. Independent School Dist. of Burlington [Iowa] 117 NW 668. Act held not unconstitutional as affecting vested rights of another district. Id. Code, § 2794. Independent School Dist. of Frazer v. Jones [Iowa] 120 NW 315. Code Supp. § 2793a relates to enlarging existing districts, and not to newly established districts. Id.

**24.** Rev. St. 1899, § 9742 (Ann. St. 1906, p. 4463), regarding formation and consolidation of districts, will be liberally construed. State v. Andrae [Mo.] 116 SW 561. Rev. St. 1899, § 9742 (Ann. St. 1906, p. 4463), regarding arbitrators in consolidation proceedings, held not delegation of judicial power prohibited by Const. art. 6, § 1. Id.

**25.** Under Const. art. 7, §§ 3, 8; Const. art. 6, §§ 5, 8, regarding formation of districts "within counties," etc., and Const. art. 11, § 10, authorizing constitution of city or town independent district, legislature cannot constitute city or town situated in two counties single district. Parks v. West [Tex.] 111 SW 726. Motion for rehearing denied by Parks v. West [Tex.] 113 SW 529.

of the people,[26] though occasionally it is left to the discretion of the school board,[27] and sometimes, as in the case of consolidation in Kansas, the action of the people is ineffective unless the county superintendent in the exercise of his discretion sees fit to declare it,[28] though he possesses no disorganizing or consolidating power of his own.[29] The action by the people in this regard is usually accomplished by means of an election called as required by statute,[30] at which the proposition must be approved by the requisite vote,[31] or, as in Kansas in the case of a change of boundary, by proper petition to the county superintendent,[32] which petition it has been held may, under certain circumstances, be oral.[33] The division of property between districts after the change [34] and the status of the district's debt are also generally regu-

Under Rev. St. 1895, art. 616a (Batt's Ann. Civ. St. art. 3994), authorizing incorporation of certain towns into school districts not to exceed certain size, encroachment to extent of 1½ square miles upon other district, where number of children of scholastic age is not shown, held not improper. Brewer v. Hall [Tex. Civ. App.] 111 SW 788.

**26.** Gardner v. State, 77 Kan. 742, 95 P 588.

**27.** Revisal 1905, §§ 4116, 4121, 4124. Will not be revised in absence of allegation of misconduct or violation of statute. Pickler v. Davie County Board of Education [N. C.] 62 SE 902.

**28, 29.** Gardner v. State, 77 Kan. 742, 95 P 588.

**30.** Under Acts 32d General Assembly (Laws 1907, p. 153), c. 155, § 2, providing for calling of election to consolidate school districts, corporation having largest number of voters need not be entirely within city limits, sole test being number of voters within district, though part of voters may be without city. State v. Grefe [Iowa] 117 NW 13. Under Acts 30th General Assembly (Laws 1904, p. 7), c. 8, census of state is competent evidence as to district of city having largest number of voters as required by Acts 32d General Assembly (Laws 1907, p. 153), c. 155, § 2, regarding establishment of consolidated district. Held evidence, though more than two years old. Id. Evidence that district outside city limits, but within school district, was rural, separated into farms, and contained only 150 voters, held competent. Id. School register completed near time of filing petition in pursuance of Code, § 2755, held competent. Id. Acts 32d General Assembly (Laws 1907, p. 153), c. 155, is not unconstitutional for failure to express its subject in its title, as impairing abligation of contracts, depriving people of management of their own affairs, as being class legislation, or as taking private property for public use without just compensation. Id.

**31.** Under Laws 1901, c. 305, p. 557, § 1, providing for voluntary disorganization and consolidation of adjacent school districts, majority of voters in district must vote for proposition to disorganize and consolidate or proposition is lost. Majority of those who attend meeting is insufficient unless that also be majority of voters in district. Gardner v. State, 77 Kan. 742, 95 P 588. Statute contemplates that all districts proposing to disorganize and consolidate must vote on same proposition which must carry in all or be lost. Id. Action held insufficient where districts voted for many different propositions. Id. Batt's Ann. Civ. St. art. 3994, regarding change of established school districts only with consent of majority of voters in all affected districts, applies to changes made in districts created by commissioner's court, and not to changes resulting from incorporation of independent districts. Brewer v. Hall [Tex. Civ. App.] 111 SW 788.

**32.** Statute contemplates filing of petition with county superintendent for change of boundaries of school district as basis for issuance by him of notice setting time for hearing upon requested change. School Dist. No. 116 v. Wolf [Kan.] 98 P 237.

**33.** Where verbal request is made for change and proper notice is given, interested parties appear, order is made, appeal is taken to board of county commissioners, and order is affirmed, proceeding is only irregular, and not void. School Dist. No. 116 v. Wolf [Kan.] 98 P 237. Such order so made and affirmed is final, and is not subject to collateral attack in action for injunction. Gen. St. 1901, § 6121. Id.

**34.** Under Act March 8, 1901 (Sess. Laws 1901, c. 28, art. 1, p. 187 [Wilson's Rev. & Ann. St. 1903, §§ 6219-6223]), and Const. art. 17, § 8 (Burns' Ed. § 337; Snyder's Ed. p. 342), former establishing higher school in Woods county, and latter detaching territory from Woods county to form Alfalfa county, embracing location of high school, high school became property of Alfalfa county, and it was duty of county commissioners to appoint trustees thereof. Wilhite v. Mansfield [Okl.] 99 P 1087. Under B. & C. Comp. St. 3365, as amended by Laws 1903, p. 125, regarding division of assets on formation of new districts, tax collected for building and repairing is divisible asset, and it is immaterial whether amount be taken from proceeds of tax or from other funds. School Dist. No. 61, Polk County v. School Dist. No. 32, Polk County [Ore.] 98 P 523. If such tax is trust fund, it would continue such in hands of new district, and hence division would not be diversion contrary to Const. art. 9, § 3. Id. When board of county commissioners creates new school district out of territory taken from existing districts, as authorized by Gen. St. 1894, § 3674, it may make division of moneys, funds and credits to district affected by change at subsequent regular meeting without notice or hearing therein. School Dist. No. 131 v. School Dist. No. 5 [Minn.] 120 NW 898.

lated by statute,[35] as is the matter of appeal,[36] be had where taken in proper time [37] and after due notice.[38] The effect of the change is to transfer the inhabitants of the affected districts to the new district as voters.[39] The organization of an incorporated town alone has no effect upon the boundaries of school districts.[40] The validity of curative statutes is governed by the usual rules.[41]

*Establishment of high schools.*[See 10 C. L. 1603]—The proposition of establishing a county high school, when submitted to the voters, must be sustained by the requisite vote,[42] and any misapprehension of the board of county commissioners as to the actual result of the vote cannot change its effect.[43]

*Sites.*[See 10 C. L. 1603]—Except in case of emergency, and until the wishes of the voters may be consulted,[44] all matters regarding school sites must usually be referred to the people of the district,[45] at an election after due notice [46] designating the site

**35.** Entire school district as it existed prior to change continues liable to creditors to same extent after diversion as before. State v. Grefe [Iowa] 117 NW 13. Debt once existing must remain debt against corporation that created it, and its obligation is not destroyed by a change in corporate limits. Change in boundaries of district held not to affect its liability on bonds previously issued. Wayne County Sav. Bank v. School Dist. No. 5 of Mikado Tp., 152 Mich. 440, 15 Det. Leg. N. 252, 116 NW 378.

**36.** Under Acts 29th Leg., p. 281, c. 124, §§ 70, 71, 25, regarding management of schools by trustees and providing for appeal to county superintendent, appeal to court from action of trustees in consolidating schools lies only after remedy by appeal to superintendent of public instruction has been exhausted. McCollum v. Adams [Tex. Civ. App.] 110 SW 526. Action to recover sum apportioned abolished school used after consolidation to support consolidated school. Id. Where impossible to obtain ruling of superintendent of public instruction to action consolidating schools and claim for money apportioned to school abolished by consolidation and now used to maintain consolidated school in time to give children benefit of funds in controversy, remedy is by appeal to superintendent and injunction against using funds pending appeal. Id.

**37.** Under Rev. St. 1899, § 9742 (Ann. St. 1906, p. 4463), regarding time for appeal in consolidation proceedings, it will be presumed that appeal was properly taken in absence of showing on record of county superintendent, he not being required to keep record. State v. Andrae [Mo.] 116 SW 561.

**38.** Under Rev. St. 1899, § 9742 (Ann. St. 1906, p. 4463), regarding consolidation of districts and appeal, it will be presumed that clerk did his duty with regard to posting notices, and petition for appeal is not insufficient for failure to show such fact where alleged that no votes were cast for consolidation. State v. Andrae [Mo.] 116 SW 561.

**39.** Act of county superintendent changing boundary line of district as authorized by Ky. St. § 4458, so as to include whole of certain farm, has effect of transferring tenants on farm into new district as voters. Farmer v. Pace [Ky.] 116 SW 324.

**40.** Code 1897, § 599. Independent School Dist. of Frazer v. Jones [Iowa] 120 NW 315.

**41.** Laws 1907, c. 244, p. 384, purporting to legalize and validate steps taken to disorganize and consolidate certain districts, held not curative but creative in effect and void as special legislation. Gardner v. State, 77 Kan. 742, 95 P 588.

**42.** Before provisions of Laws 1905, 397, p. 658, providing for establishment of county high schools, can be legally adopted, proposition when submitted at general election must receive majority of votes cast upon any question or office voted for at such election. Board of Education of Humbolt v. Klein [Kan.] 99 P 222.

**43.** Where only 1,821 of 4,558 votes were cast in favor of adopting provisions of 1905 high school laws while only, 1,205 were cast against it, proposition failed to carry, and fact that board of county commissioners, under misapprehension of laws, declared result and assumed proposition was carried, does not affect result. Board of Education of Humbolt v. Klein [Kan.] 99 P 222.

**44.** In cases of emergency, such as fire, pestilence or danger of action of ejectment or damages after lawful notice to vacate premises belonging to other persons, and for temporary purposes until electors may be consulted, directors may themselves remove school, but this does not justify wilful disregard of peoples' wishes regarding permanent location of school thus removed and provision for its future conduct. Arbitrary removal from center of district, at notice of owners to vacate site, to remote portion thereof and attempted location there without giving electors opportunity to vote upon question, and after voters had at previous elections voted against removal held improper. State v. Lyons, 37 Mont. 354, 96 P 922.

**45.** School board has no power to build or remove school buildings and to purchase or sell school lots until they have referred matter to electors and been directed to act. Pol. Code 1895, § 1797, as amended by Laws 1897, p. 130. Arbitrary removal of school building from center of district. State v. Lyons, 37 Mont. 354, 96 P 922. Hurd's Rev. St. 1908, c. 46, § 428, 429, providing for submission to electors of school districts various questions of public policy, do not on their face seem intended to regulate hold-

in substantial compliance with statute,[47] and at which the requisite vote is cast.[48] In some states, however, the action may be taken only after proper notice and petition[49] addressed to the county superintendent,[50] while in others the matter is one resting in the sound discretion of the school committee.[51] It has been held in connection with the matter of sites that a statute prohibiting the placing of schools within a certain distance of one another does not prevent the repair of an old established school which violates the statutory requirement as to distance,[52] that the board may accept a gift of a new site prior to the determination of the legality of the removal proceedings,[53] that the failure to vote the necessary funds for removal does not invalidate the decision to remove where such funds are donated to the district,[54] and that in condemnation proceedings the question of the location of a school site and the necessity of taking land therefore is vested entirely in the school authorities and is not for the commission or jury.[55]

§ 4. *Organization, meetings and officers.*[56] See 10 C. L. 1604—The school township is a corporation having control of the schools, schoolhouses and school funds,[57]

ing of any elections for choice of school site, and hence do not by implication repeal provisions of such other acts. Southworth v. School Dist. No. 131, Board of Education, 238 Ill. 190, 87 NE 403. Under Hurd's Rev. St. 1905, c. 122, § 166, board of education had no power to select suitable site for school after election at which no site received majority of votes. Id.

**46.** To establish validity of election to determine location of school site, it is jurisdictional prerequisite that board give notice and that record show same. Southworth v. School Dist. No. 131, Board of Education, 238 Ill. 190, 87 NE 403.

**47.** Designation that schoolhouse be located so as not to be more than 2½ miles from any point of certain specific boundary line set out, and as near as practicable to center, held sufficient. Ky. St. § 4464 (Russell's St. § 5736). Taylor v. Cundiff [Ky.] 118 SW 379.

**48.** Election to select schoolhouse site is not "duly called and held" within Hurd's Rev. St. 1905, c. 122, § 166, amended by act effective July 1, 1908, legalizing choice of sites by board, where election was held without any site receiving majority. Southworth v. School Dist. No. 131 Board of Education, 238 Ill. 190, 87 NE 403. Rev. St. 1899, § 9750, subd. 11 (Ann. St. 1906, p. 4470), regarding majority vote to remove site nearer center of district, means majority of taxpayers present and voting. Tucker v. McKay, 131 Mo. App. 728, 111 SW 867.

**49.** Order of superintendent made upon improper notice and petition for change of site of schools, on appeal after refusal of trustee to sign petition signed by majority of school patrons, is without effect. Brandt v. State [Ind.] 86 NE 337. If building of new schoolhouse on existing site is sought, appeal may be taken to county superintendent of schools from refusal of township school trustee to sign petition for erection of building already signed by majority of school patrons. Id.

**50.** Under Acts 1893, p. 17, c. 18, change of schoolhouse site can be affected only by concurrent desires of majority of school patrons, trustee of school township, and county superintendent of schools, wishes of first two parties to be expressed by signing petition, and last by order for or against. Hence, statute is not complied with where trustee refused to sign petition. Brandt v. State [Ind.] 86 NE 337. Burns' Ann. St. 1908, §§ 6590, 6591, in so far as they relate to removal of school buildings and changing of school sites, were repealed by Acts 1893, p. 17, c. 18, Burns' Ann. St. 1908, § 6590. Id.

**51.** Rebuilding of school and change of site are matters vested by statute in sound discretion of school committee, and are not to be restrained by courts unless in violation of some provision of law, or committee is influenced by improper motives, or there is misconduct on their part. Venable v. Pilot Mountain School Committee, 149 N. C. 120, 62 SE 902. Fact that member of board contributed to fund of $400 to buy site in center of town for school, it being agreed that old site worth $300 was to be transferred to donors of new site, does not invalidate transaction where new site was worth more than old and member did not profit personally from transaction. Id. Fact that brothers of two of committee contributed to purchase of new site cannot be held per se any interest invalidating action of board in absence of any evidence that they in any way influenced any member of board. Id.

**52.** Revisal 1905, § 4129. Pickler v. Davie County Board of Education [N. C.] 62 SE 902.

**53.** Tucker v. McKay, 131 Mo. App. 728, 111 SW 867.

**54.** Where removal was voted but no funds provided because two voters promised to stand expense, fact did not affect right to remove except to prevent expense being charged to district. Tucker v. McKay, 131 Mo. App. 728, 111 SW 867.

**55.** Mill's Ann. St. § 4013. Kirkwood v. School Dist. No. 7 in Summit County [Colo.] 101 P 343.

**56. Search Note:** See Schools and School Districts, Cent. Dig. §§ 92-160; Dec. Dig. §§ 45-63; 25 A. & E. Enc. L. (2ed.) 52.

**57.** Burns' Ann. St. 1908, §§ 6404, 6405; Burns' Ann. St. 1901, §§ 5913, 5914. Teeple v. State [Ind.] 86 NE 49.

the validity of whose organization can only be attacked seasonably [58] in a direct proceeding.[59]

The procedure for calling elections depends upon the statute of local jurisdiction.[60]

*Trustees and boards of education.* See 10 C. L. 1604—The governing board of the school district is usually a board of directors clothed only with statutory power.[61] This board, whose number is controlled by statute [62] and whose members are civil officers,[63] can exercise its powers only when acting as a body at meetings called and held in the manner and place provided or authorized by law,[64] and must keep a complete record of its acts,[65] which may be supplemented by parol in certain particulars.[66]

*School officers.* See 10 C. L. 1605—This section deals only with matters peculiar to school officers, all other matters being treated in another topic.[67] All matters regarding the eligibility,[68] qualification [69] and disqualification,[70] compatibility of offices,[71] oath,[72] time [73] and power to select officers [74] and fill vacancies,[75] validity of

58. Objection to defects in orders of court authorizing election to establish graded school cannot be raised 17 years after establishment and maintenance without objection by anyone during intervening years. McDonald v. Parker, 33 Ky. L. R. 805, 110 SW 810.

59. Cannot be collaterally attacked in suit to enjoin collection of taxes. Black v. Early, 208 Mo. 281, 106 SW 1014. Validity can be attacked only by quo warranto. Id. It is not collateral attack on school district for taxpayers to resist collection of tax on ground that district had now power to levy same, though reason given for lack of authority may be lack of constitutional power in district to exist. Parks v. West [Tex.] 111 SW 726. District located in two counties. Id. Fact that school district sought to become and was made party to suit tendering issue of its corporate existence does not estop it from raising defense that its corporate existence cannot be collaterally attacked in proceeding. Black v. Early, 208 Mo. 281, 106 SW 1014.

60. While there is no express provision as to when and how election shall be called yet, when exigency arises requiring trustees to consult electors for authority to act, they must do so, and when there are no express provisions as to how they shall proceed, provisions touching periodical meetings for election of trustees, or for calling special elections to obtain authority to issue bonds and like, furnish safe guide. Removal of school house. State v. Lyons, 37 Mont. 354, 96 P 922.

61. State v. McBride [Nev.] 99 P 705; Perkins v. Newark Board of Education, 161 F 767. Board of education, under its power to erect, enlarge, repair, and furnish schoolhouses, may build central heating plant to supply heat to schoolhouses situated in its vicinity. Under Public School Act Oct. 19, 1903 (P. L. p. 5), though such plant be separate and distinct from schoolhouses themselves. Scola v. Montclair Board of Education [N. J. Law] 71 A 299. Board of directors of school district is body clothed with authority to discharge such functions of public nature as are expressly prescribed by statute. It can exercise no power not expressly conferred or fairly arising by necessary implication from those conferred. State v. Kessler [Mo. App.] 117 SW 85. Granting of power of local self-government to boards of school directors is not delegation of legislative power prohibited by statute. State v. Andrae [Mo.] 116 SW 561.

62. Under Mills' Ann. St. § 3997, which constitutes Gen. Laws 1877, § 2479, as amended by Sess. Laws 1889, p. 337, regarding union highschools, where the board of a district including a county seat is increased from 3 to 5, it is discretionary with board whether highschool committee should consist of all or but 3 of board members. Money v. McCauley [Colo.] 98 P 1.

63. In re Election of School Committee [R. I.] 72 A 417.

64. Under Rev. St. 1899, § 9761 (Ann. St. 1906, p. 4476), meeting must be held within district. State v. Kessler [Mo. App.] 117 SW 85. Action taken at meeting held without district held void. Id.

65. Under St. 1899, § 9750 (Ann. St. 1906, p. 4469), regarding records of school meetings, record held not so incomplete as to defeat action taken, where actual vote taken was not shown but proposition voted upon was recorded as carried. Tucker v. McKay, 131 Mo. App. 728, 111 SW 867.

66. Oral evidence to show what actually took place at meeting and that record was carried is competent. Tucker v. McKay, 131 Mo. App. 728, 111 SW 867.

67. See Officers and Public Employes, 12 C. L. 1131.

68. Evidence held insufficient to show ineligibility to office of county superintendent through lack of residence. State v. Scott [Ind.] 86 NE 409.

69. To be eligible to office of county superintendent, one must possess license required by statute. Post-graduate diploma of state normal school held insufficient. Acts 1905, p. 492, c. 163, § 1; Burns' Ann. St. 1905, § 5902a. State v. Bradt, 170 Ind. 480, 84 NE 1084.

70. Evidence held not to show that county superintendent of schools lost residency in county so as to become disqualified under Rev. Laws 1905, § 2667. State v. Hays, 105 Minn. 399, 117 NW 615.

71. Under rule prevailing in Minnesota, offices of county superintendent of schools in one county and superintendent of

the selection,[76] the effect of an invalid election,[77] tenure,[78] the effect of a forged resignation,[79] removal,[80] salary,[81] bonds,[82] duties,[83] and judicial control of school officers,[84] are usually controlled by local statutes.

schools of town in another county are not incompatible. State v. Hays, 105 Minn. 399, 117 NW 615.

**72.** Oath of clerk of school district held not defective under Const. art. 5, § 8, for failure to name office duties which were sworn would be faithfully performed. State v. Ladeen, 104 Minn. 252, 116 NW 486.

**73.** Under Gen. Laws 1907, pp. 790, 875, § 169, regarding election of boards of education by council at April meeting, election in April 1908 held unauthorized where act by its terms did not become effective until April 1909. State v. Waldrop [Ala.] 48 S 394.

**74.** Under § 199, relating to election only of such officers as were not provided for by new charter under such act, there is no authority for election of new board of education as constituted under Act Feb. 11, 1891, amending old charter, until incumbent's terms expired. State v. Waldrop [Ala.] 48 S 394. Public Laws 1888, p. 22, c. 728, cl. 2, § 22, providing for election of members of school committee of Woonsocket by city council, does not conflict with Const. art. 7, § 1, of amendments, providing that electors shall have right to vote in election of all civil officers, latter expression meaning not that they shall have right to vote for all civil officers but only for all civil officers required to be elected by people. In re Election of School Committee [R. I.] 72 A 417.

**75.** Provision in New Britain city charter, Sp. Acts 1905 (14 Sp. Laws, p. 915), providing that city council shall fill all vacancies in any office, and also providing for consolidated school district, is effective as against Gen. St. 1902, § 2818, providing for filling vacancies in school committees by such committee. State v. Hatch [Conn.] 72 A 575.

**76.** Burns' Ann. St. 1908, § 6376, providing that county auditor shall be clerk at election of county superintendent by township trustees, and shall keep a record in book kept for that purpose, is directory only, and total absence of same does not invalidate election. Election in such case may be shown by parol or other written evidence. State v. Scott [Ind.] 86 NE 409.

**77.** Failure of township trustees to make valid election on date set for such election in Burns' Ann. St. 1908, § 6376, does not preclude election at subsequent time. State v. Scott [Ind.] 86 NE 409. Where attempted election is fruitless, duty of trustees to elect remains unperformed and continuing, and no failure or delays less in obligation to perform and to do so without unnecessary delays. As soon as auditor learns of result of unsuccessful election, he must notify trustees to reassemble for purposes of election, and, if he neglects to do so, trustees must themselves assemble to elect as soon as notice gets to them from other reliable sources. Id.

**78.** Loc. Acts 1896-97, p. 514, creating special school district, held to create life tenure of members of school board conditional only on residence in district. State v. White [1Aa.] 49 S 78. Members of school board of town within such special district cannot be ousted by quo warranto under Gen. Acts 1907, p. 486, alleged to repeal Loc. Act. Id. Gen. Acts 1903, p. 289, amended by Gen. Acts 1907, p. 486, § 6; regarding redistricting public schools, held not to impliedly repeal Loc. Acts 1896-97, p. 514, creating special district out of certain township, etc. Id. Town within limits of such special district and subject to provisions of such act held not such town as was referred to in later general act, and its existence is hence unaffected. Id. Loc. act held not repealed by Gen. Acts, § 200, repeaing all laws, general and special, in conflict therewith. Id. Section 177, General Act above, held to exempt districts in which members of board of education hold office by life tenure and hence to exempt town in special school district established by local act above. Id. One entitled to hold office for 4 years, or until his successor is elected and qualified, is not entitled to hold over for full term of 4 years for mere reason that successor was not elected and qualified at time of expiration of his term, but his right to office ceased moment qualified successor presented himself to assume it. State v. Scott [Ind.] 86 NE 409.

**79.** Evidence held to show that resignation of members of board was forgery, and hence that appointment to fill vacancy was void, and likewise contract entered into majority consisting of new appointee and another. Terry v. Terry [Ky.] 117 SW 284.

**80.** See Quo Warranto, 12 C. L. 1536. If school district was legally laid out and election of trustees held therein under Acts 1905, p. 425, fact that portion of that act relating to local taxation in districts for school purposes was held unconstitutional did not oust trustees from office, nor did Acts 1906, p. 61, have that effect. Griffin v. Brooks, 129 Ga. 698, 59 SE 902. Upon detachment of territory within which school district officer resides from school district of which he is officer, his office immediately becomes vacant ipso facto, and may be filled by appointment. School Dist. No. 116 v. Wolf [Kan.] 98 P 237. County commissioners have no power to remove county superintendent of schools, but may only fill office after it has become vacant through act of incumbent or has been vacated by proper judicial proceedings. State v. Hays, 105 Minn. 399, 117 NW 615. Under Act June 6, 1893 (P. L. 330), providing for removal of directors for failure to provide suitable and adequate school accomodations, etc., since statute does not provide for appeal, appellate court will consider matter as on certiorari and look to record only to ascertain whether court exceeded its jurisdiction. In re Slippery Rock Tp. School Dist., 222 Pa. 538, 71 A 1085.

**81.** Under Ky. St. § 4419, regarding salaries of county superintendents, fiscal court must fix salary before beginning of term, but if not so fixed it may be fixed later,

§ 5. *Property and contracts.*[85] *Contracts.*[See 10 C. L. 1608]—Matters common to all public contracts are treated elsewhere.[88]

The power of school officers to contract is limited by statute,[87] and all persons contracting with them are charged with notice of the extent of their authority.[88] They usually have the power to provide necessary school supplies,[89] furniture [90] and buildings,[91] where they can do so with the money at their disposal.[92] Their con-

and when fixed cannot be changed during incumbent's term. Breathitt County v. Noble [Ky.] 116 SW 777. Salary being fixed by statute, it cannot be changed by agreement, waiver, estoppel or other implication, and hence acceptance of smaller amount is no bar to suit for full amount. Id. Held, where superintendent was allowed 15 cents for pupil for first nine months, he must be allowed some rate thereafter. Id. Holdover tax collector who gives bond required and performs duties of his office with full knowledge that smaller sum than maximum fixed by statute has been allowed by board for his compensation cannot recover greater sum. Under Gen. St. 1896, c. 50, §§ 4, 5, allowing commission of 5 per cent unless smaller sum is agreed upon, where board prior to collector's qualification allowed sum of $200 only. Wood v. Warwick, School Dist. No. 5, 28 R. I. 299, 67 A 65. Mere fact collector holding over had received 5 per cent commission during previous year gives him no right to same commission during subsequent years. Id.

82. Risk of county school commissioner's bond may not be increased without releasing sureties by his being intrusted by county board of education with large sums of money to be disbursed under orders of county board of education, which moneys were not received as part of common school fund, nor at times provided by law for payment of such fund. Board of Education of Miller County v. Fudge, 4 Ga. App. 637, 62 SE 154. Sureties upon bond of county school commissioner are not liable upon bond provided for faithful discharge of his duties for any moneys borrowed by board of education. In case of loans to county boards of education, entire transaction is individual and not official. Id. In case where action cannot be maintained against sureties of official bond because act of principal is personal and not official, neither can action be maintained upon contract as against principal, though he may be individually liable in different manner. Id.

83. Act No. 17, p. 19, of 1907 (extra session), held constitutional, and to make it plain duty of parish treasurers acting as treasurers of school boards to turn over to their successors, parish superintendents of schools, thereby made treasurers of such boards, books, etc., pertaining to office, and duty may be enforced by mandamus. State v. Romero, 122 La. 885, 48 S 312. Funds derived by county boards of education from borrowing money are not included in county school funds, and proper receipt and disbursement of such borrowed money is not one of duties of county school commissioner by virtue of his office. Board of Education of Miller County v. Fudge, 4 Ga. App. 637, 62 SE 154.

84. Under Rev. St. 1895, art. 946, prohibiting issuance of mandamus against governor, writ cannot be issued against state board of education of which governor is member since writ must go against all or none. McFall v. State Board of Education [Tex.] 110 SW 739.

85. **Search Note:** See notes in 20 L. R. A. 136.

See, also, Schools and School Districts, Cent. Dig. §§ 17-22, 161-207; Dec. Dig. §§ 15, 64-88.

86. See Public Contracts, 12 C. L. 1442.

87. Perkins v. Newark Board of Education, 161 F 767.

88. Slattery v. School City of South Bend [Ind. App.] 86 NE 860.

89. Broad discretion is reposed in boards of education regarding purchase of necessary supplies for schools, and, in purchase of fuel, gradation of quality of coal, heating capacity, adaptability to heating apparatus, and experience or skill of janitors and other persons managing school furnaces, are essential facts to be considered in making selection therefor, which may render it inadvisable to accept lowest priced coal offered; and where it appears that board has complied with requirement that it act in good faith for best good of schools according to light and understanding of its members, acceptance of other than cheapest coal will not be enjoined Gosline v. Toledo Board of Education, 11 Ohio C C. (N. S.) 195.

90. Const. 1902, § 136 (Code 1904, p. ccxlv), regarding expenditure of money raised for schools as district, city, etc., raising sum may see fit, does not prohibit legislative action giving state board of education power to select school furniture. Commonwealth v. Norfolk School Board [Va.] 63 SE 1081. Code 1904, § 1538, amended by Acts 1906, c. 293, pp. 513, 515, and re-enacted § 10, regarding power of city school board to "provide" furniture, etc., and Act March 15, 1906, c. 248, p. 432 (Code 1904, § 1433), giving state board of education power to "select" school furniture, etc., held pari materia under which city board could by contract engage to "provide" only furniture of kind "selected" by board. Id.

91. Under St. 1898, §§ 423, 430, authorizing school directors to rent or build schoolhouse and to levy tax to rent same, board may rent part of parochial school where district schoolhouse is inadequate. Dorner v. School District No. 5, 137 Wis. 147, 118 NW 353. Subscription list whereby money was contributed to erect building, upper portion to be used by lodge and lower for school purposes, under direction of joint committee which supervised schools for several years, etc., held to constitute contract between lodge and community entitling community to use of lower portion for school purposes. Rhodes v. Maret [Tex. Civ. App.] 112 SW 433.

92. Board is without power to contract for plans and specification of $400,000 building

racts, however, can bind the district and their successors [93] only when action has been properly [94] taken at a corporate meeting held as provided by law,[95] by a board at least de facto the board of the district,[96] and where they have complied with the statutory provisions regarding bids,[97] if any,[98] and have obtained the requisite municipal consent where that is required.[99] Their contracts are governed by the ordinary rules as to the individual liability of officers under their contracts,[1] and the validity of a contract in which the officer entering into it is interested.[2]

*Change of text books and publisher's bonds.* See 10 C. L. 1608—Statutes regarding change of text books are for the protection of the public only;[3] the state is the

where only $200,000 has been appropriated regardless of fact that additional appropriations were expected. Perkins v. Newark Board of Education, 161 F 767. Contract for building of schoolhouse at cost in excess of amount raised for that purpose from issue of bonds is not illegal and void for want of authority on part of board of education to make such contract after having underestimated amount of money needed. McAlexander v. Haviland Village School Dist., 7 Ohio N. P. (N. S.) 590.

**93.** Board held bound by acts of predecessor providing for selection of plan and architect of building by competition. Palmer v. Pittsburg Central Board of Education, 220 Pa. 568, 70 A 433. Architects entering competition under rules prescribed by committee in line with its authority held entitled to injunction to prevent succeeding board from hiring architect without following plan proposed by its predecessors. Id.

**94.** Where board of education appointed committee to take charge of erecting building and unanimously adopted report of such committee deciding to select plan and architect by completion, since such adoption of committee's plan was full authorization to committee to proceed in manner it recommended, everything thereafter done in accordance with report was action of board and binding upon board and its successors. Palmer v. Pittsburg Central Board of Education, 220 Pa. 568, 70 A 433. It is unnecessary that full board specifically approve instructions to architects prescribed by committee in order that they be bound by such rules, where method approved by board necessarily implied such instruction. Id.

**95.** Cooke v. White Common School Dist. No. 7, 33 Ky. L. R. 926, 111 SW 686.

**96.** Contract to teach entered into for district by de jure and de facto trustees constituting majority of board is binding on district. Johnson v. Sanders [Ky.] 115 SW 772.

**97.** Under School Act Oct. 19, 1903 (P. L. pp. 5-21), §§ 52, 53, 243 requiring advertisements for proposals for building, enlargement or repair of school buildings, and that no bid not conforming to specifications shall be received, board of education cannot modify specifications and after deductions from bid of lowest bidder award him contract under modified specifications. Scola v. Montclair Board of Education [N. J. Law] 71 A 299. Contract for building of schoolhouse awarded to contractor who has been permitted to change his bid by omitting various items and thus reducing aggregate cost to amount realized from sale of bonds is contract made without notice or competition, and is illegal and void under § 3988. McAlexander v. Haviland Village School Dist., 7 Ohio N. P. (N. S.) 590.

**98.** Director of schools is not required, under §§ 3988, 4017, to go to expense of advertising for bids for every trivial thing in way of supplies which may have been ordered by board to be purchased. Gosline v. Toledo Board of Education, 11 Ohio C. C. (N. S.) 195. Neither Rev. St. § 3987, specifically empowering boards of education, among other designated things, to provide fuel; nor § 3988, prescribing for bids for certain designated supplies and contracts, but omitting mention of fuel; nor § 4017, requiring director of schools, where one is chosen, to advertise for bids, etc., without providing when or how he shall advertise therefor, requires advertising for bids for coal or purchase from lowest responsible bidder. Board must only act in good faith and for best good of schools according to their light and understanding. Board held to have so acted. Id.

**99.** Consent of common council is condition precedent to entering into any contract for erection of building. Under Acts 1903, p. 418, c. 225, § 7 (Burns' Ann. St. 1908, § 6497), no recovery can be had under contract involving more than mere change in plan of building as originally contracted for. Slattery v. School City of South Bend [Ind. App.] 86 NE 860. City board of educaton cannot bind city by their contracts unless empowered to do so. Contract with architect held not binding. Lawrence v. Toothaker [N. H.] 71 A 334.

**1.** Mere fact that board of education had no power to contract for and on behalf of city does not render members of board individually liable when they attempt to do so. Contract with architect who entered into contract believing it bound city. Lawrence v. Toothaker [N. H.] 71 A 534.

**2.** Trustee is prohibited by law from making contract with his district in which he is pecuniarily interested. Sess. Laws 1899, p. 105, § 82, as amended by Sess. Laws 1905, p. 71. Independent School Dist. No. 5 v. Collins [Idaho] 98 P 857. Penalty attached to contracts in which trustee is interested is that no action can be maintained or recovery had against district upon contract (Id.), but that does not change rule that money paid by municipal corporation upon void contract may be recovered back (Id.). Complaint in action brought under above statute must allege that contract was made while defendant was trustee. Id.

**3.** Ky. St. 1903, § 2957, regarding change of text books is not for benefit of book sellers

real party in interest in a suit upon the seller's bond,[4] and, though the county superintendent has certain statutory duties with reference to the suit,[5] he cannot bind the state by acts in excess of such authority.[6]

*Bonds for the protection of school boards.* See 10 C. L. 1608—School corporations are frequently authorized [7] or required to take bonds for the protection of subcontractors,[8] and made liable under certain conditions for their failure to do so.[9] To be available to the subcontractors, such bonds must come within the statute,[10] and the suit thereon must be properly brought.[11]

*Property.* See 10 C. L. 1606—The title to property of a school district is divided between the board and its members, the equitable title being in the former and the legal title in the latter.[12] A board of education may lose title by adverse possession to property held by it for sale and not devoted to any public use.[13] The board has general power to control the school property [14] and may rent [15] or sell it [16] even to a lower bidder [17] where they act in good faith.[18]

but only for that of public and sellers of discarded books have no right to compel obedience of statute. Allyn v. Louisville School Board [Ky.] 115 SW 206.

**4.** Under Civ. Code Proc. §§ 18, 21, requiring suits to be brought by real party in interest, in action on text book bond required by Ky. St. 1903, § 4424, commonwealth is real party in interest, and action brought in name of commonwealth and county superintendent, satisfaction of judgment obtained in which is later sought to be set aside in some of same parties, cannot be dismissed by county superintendent against objection of county attorney. Heath & Co. v. Com. [Ky.] 113 SW 69.

**5.** Under Ky. St. 1903, § 4422, as amended by Act March 1902, and §§ 4423, 4424, regarding suits, etc., on school book bonds, county superintendent has power only to sue, collect, and pay proceeds into school fund and not to compromise judgment by accepting note for portion thereof and enter satisfaction of judgment. Heath & Co. v. Com. [Ky.] 113 SW 69.

**6.** Under Ky. St. 1903, § 4424, regarding text book bond, action to recover on note improperly accepted in compromise of judgment on bond by county superintendent does not estop state from suing to set aslde satisfaction entered after such compromise since acts were outside agent's authority. Heath & Co. v. Com. [Ky.] 113 SW 69. Under Ky. St. 1903, § 130, regarding county attorney's duty as to unsatisfied judgments in favor of county, he may require payment of judgment rendered on text book bond given under Ky. St. 1903, § 4424, and object to dismissal of action to set improper satisfaction of such judgment aside. Id.

**7.** Rev. St. 1899, § 6761, expressly authorizes municipal and public bodies to contract for payment of all claims which may be made for labor and materials furnished in construction of public buildings and may cover that in bond so that it inures to benefit of third parties not named. Eau Claire-St. Louis Lumber Co. v. Banks [Mo. App.] 117 SW 611.

**8.** Board of trustees of Indiana State Normal School may by contract require contractor constructing building to pay laborers and materialmen and take bond conditioned on his making payment. Acts 1903, p. 373, c. 208, § 2. National Surety Co. v. Foster Lumber Co. [Ind. App.] 85 NE 489.

**9.** Evidence held sufficient to show district not liable to subcontractors and materialmen for failure to take bond of principal contractor as required by Gen. Laws 1901, c. 321, p. 535, where liability might have been enforced against contractor had action been timely. Wilcox Lumber Co. v. School Dist. No. 268 of Otter Tail County, 106 Minn. 208, 118 NW 794.

**10.** Bond held not to come within Rev. St. 1899, § 6761, for failure to contain clause carrying condition that it be for payment for all material used and labor performed on such work whether by subcontract or otherwise. Eau Claire-St. Louis Lumber Co. v. Banks [Mo. App.] 117 SW 611. Bond held so drawn as to protect school district only. Id.

**11.** Suit on bond under Rev. St. 1899, § 6761 must be in name of school district for use of plaintiff. Rev. St. 1899, § 6762 (Ann. St. 1906, p. 3328). Eau Claire-St. Louis Lumber Co. v. Banks [Mo. App.] 117 SW 611.

**12.** Deed conveying land to directors conveys equitable title in board, legal title being in directors. O'Donnell v. Robson, 239 Ill. 634, 88 NE 175.

**13.** Comp. Laws 1907, §§ 2856, 2866x, 2884. Abandoned school property in city held for sale. Pioneer Investment & Trust Co. v. Salt Lake City Board of Education [Utah] 99 P 150.

**14.** Under Rev. St. 1895, art. 3992, regarding control of schoolhouses, etc., by trustees, trustees held to have succeeded to trusteeship of lodge holding lower part of building erected on lodge's land for school purposes which building was erected by subscription under agreement that top portion be used for lodge and lower portion for school purposes. Rhodes v. Maret [Tex. Civ. App.] 112 SW 433.

**15.** Under Hurd's Rev. St. 1908, c. 122, cl. 10, § 147, board of school directors have power to rent to fraternal orders use of portions of school buildings not needed or used for school purposes where schools were not disturbed, property injured and money went to increase term of school possible by one month. Lagow v. Hill, 238 Ill. 428, 87 NE 369.

**16.** When real estate owned by district is

*School lands.*See 10 C. L. 1607—Title to school lands cannot be acquired by adverse possession as against the state.[19] School land sold and kept in good standing cannot be resold by the commissioner,[20] nor can a sale [21] or lease be canceled by him.[22] The purchaser must show the invalidity of the prior sale,[23] comply with the statutory requirements regarding residence,[24] and may lose his title by default, forfeiture and resale.[25]

The commissioner's deed is not always evidence of a conveyance from the state [26] unless properly supplemented by the proper records.[27] Forfeiture of school land purchase by commission of general land office is not conclusive,[28] but his certificate of occupancy is for certain purposes.[29] Whether there has been an informal cancellation of a lease is a question for the jury.[30]

not needed as school site, trusees of such district may sell same, and if money is needed toward purchase of new site it should be so applied, and if not, then it may be applied to any legitimate needs of district for school purposes. Ky. St. 1903, § 4439. Gatliff v. Inman [Ky.] 115 SW 254.

**17.** Action of trustees in accepting bid lower than others offered held no abuse of discretion under circumstances. Gatliff v. Inman [Ky.] 115 SW 254. On resale of lot trustees need not recognize bid of one who had previously failed to complete purchase, one unable to pay bid, or one not bidding in good faith but doubt as to good faith is insufficient and bids should be accepted in order of amount giving each reasonable opportunity to comply with terms of sale. Id. Bidder at sale cannot refuse to execute bond after sale until he can examine title, etc., but must have done so before sale and cannot complain of resale where he failed to execute bond within 30 minutes after demand as required by trustees. Id.

**18.** Trustees are presumed to act for best interests of district and they may sell either publicly or privately, and when they act their action is final, and unless it is shown that the have acted corruptly or fraudulently in the sale of the real estate their action is not subject to review. Gatliff v. Inman [Ky.] 115 SW 254.

**19.** Purchaser of lands from state may maintain action for possession as against persons maintaining dam and claiming title by prescription. Kinney v. Munch [Minn.] 120 NW 374. Ballinger's Ann. Codes & St. § 4807 (Pierce's Code, § 1519), regarding operation of statute of limitations against state, does not permit adverse possession of school lands against state. To so construe statute would violate Enabling Act (Act Feb. 22, 1889, c. 180 [25 Stat. 679] § 11; Const. Art. 16, § § 1, 2). O'Brien v. Wilson [Wash.] 97 P 1115.

**20.** Zettlemeyer v. Shuler [Tex. Civ. App.] 115 SW 78. Commissioner has no right to sell land while prior valid sale subsists, but has power only to see to compliance by purchaser with conditions imposed upon him. Resale does not give purchaser color of title. Pohle v. Robertsen [Tex.] 115 SW 1166.

**21.** Commissioner of land office cannot cancel award to school land purchaser, such power being judicial and vested in courts. Trimble v. Burroughs [Tex. Civ. App.] 113 SW 551.

**22.** Fact that lessee of school lands seeks to purchase same and tenders surrender of lease does not authorize refusal to sell, cancellation of lease, and sale to another, but merely requires lessee to hold to his lease, lease not being affected by tender where purchase by lessee is refused. Halbert v. Terrell [Tex.] 112 SW 1036.

**23.** Zettlemeyer v. Shuler [Tex. Civ. App.] 115 SW 78.

**24.** Rev. St. 1895, art. 4218l, permitting absence from land to earn money with which to pay for same not exceeding six months per year, held not repealed by Laws 1905, c. 103, p. 159, repealing all conflicting laws and requiring three years residency, former law being not repugnant to latter but merely declares what shall not break continuity of occupancy. Gaddis v. Terrell [Tex.] 110 SW 429. Under Acts 29th Leg. c. 103, p. 163, § 6, purchaser need not reside on either home or additional section within three years of award of latter where he has lived three years on former. Zettlemeyer v. Shuler [Tex. Civ. App.] 115 SW 78.

**25.** Where there is sale of school land followed by default, abandonment, nonpayment of taxes, notice of forfeiture, proper service, but defective return, proper posting and marking record canceled, lease by state, inquiry to state officials by prospective purchaser followed by resale, actual possession and valuable improvements, assignees of original purchases cannot maintain ejectment. Thayer v. Schaben [Kan.] 98 P 1134; Burgess v. Hixon, 75 Kan. 201, 88 P 1076.

**26.** Except as changed by statute, deed of commissioner of school lands is not alone evidence of conveyance of title from state, but such parts of record of court proceedings upon which deed is based as show forfeiture of land title thereto in state are necessary as prima facie evidence that deed carried state's title. Feder v. Hager [W. Va.] 63 SE 285. Code 1899, c. 105, § 19, as amended by Acts 1905, c. 42, p. 406 (Code 1906, § 3531), wherein reference is made to such deed as evidence applies only to suits and proceedings under said chapter. Id.

**27.** Court proceedings introduced to support deed are not evidence that state had title which was thereby conveyed, if they contain no reference to such fact of title. Feder v. Hager [W. Va.] 63 SE 285.

**28.** Zettlemeyer v. Shuler [Tex. Civ. App.] 115 SW 78.

**29.** Certificate of occupancy issued by commissioner of General Land office held conclusive of fact of occupancy so far as

§ 6. *Fiscal affairs.*[31]—See 10 C. L. 1606 *School bonds.*See 10 C. L. 1611—All matters concerning the issuance of school bonds must ordinarily be submitted to the school electors,[32] and after they have expressed their wishes, the board has no discretion but to carry them out.[33] The issue of bonds must be based upon a constitutional tax levy,[34] must mature at the statutory rate,[35] and sufficient provision must be made for interest and sinking fund.[36] The discretion of boards of education with regard to bond issues, will sometimes be controlled by injunction[37] or mandamus in proper cases.[38] The ordinary rules as to the validity of bonds apply.[39]

question of allowance of additional section is concerned. Zettlemeyer v. Shuler [Tex. Civ. App.] 115 SW 78.

**30.** Trimble v. Burroughs [Tex. Civ. App.] 113 SW 551.

**31. Search Note:** See notes in 14 L. R. A. 418, 474; 15 Id. 825; 8 Ann. Cas. 925.

See, also, Schools and School Districts, Cent. Dig. §§ 17-37, 209-268; Dec. Dig. §§ 15-19, 90-111; 25 A. & E. Enc. L. (2ed.) 63; 19 A. & E. Enc. P. & P. 236.

**32.** Since act of 1889 (Hurd's St. 1905, c. 122, p. 1826, § 218), it is necessary that voters of district vote upon amount of bonds to be issued and date of their payment before any bonds may be issued or money borrowed to erect school house. People v. School Directors of Dist. No. 248, 139 Ill. App. 620. Under Const. §§ 157, 187 regarding assent of voters to increased tax levy, and maintenance of separate schools, issue of bonds for white schools cannot be enjoined because question of issuance was not submitted to colored voters, and hence not sustained by requisite number of voters, since such questions are determined by white or colored voters alone as they are affected, neither being taxed for support of other's schools. Crosby v. Mayfield [Ky.] 117 SW 316. Such procedure is not discrimination against races under U. S. Const. Id. Priv. Acts 1908, p. 38, c. 31, permitting issuance of bonds for high school, held void under Const. art. 7, § 7, prohibiting municipalities from contracting debt or levying tax, except in case of necessary expenses, unless authorized by electors. Hollowell v. Borden, 148 N. C. 255, 61 SE 638. Held unconstitutional, regardless of fact that bonds could be paid without assessment of special tax, and issuance held not necessary expense. Id. School district bonds issued without first submitting question of issuance to electors, and issued by district under express provisions of act under which it had insufficient qualification to issue them, provisions of act being printed on bonds, are void. State v. School Dist. No. 50 [N. D.] 120 NW 555.

**33.** Officers of school district are in effect agents of voters and taxpayers, and when district, at regularly called and conducted election, votes to issue bonds of district and from proceeds to build school house, such vote is instruction by principal, and such officers have no discretion as to obeying their instructions. Where officers refused to issue bonds after vote, and entered into stipulation with one seeking to enjoin issuance to dismiss suit admitting allegations of complaint. Schouweiler v. Allen [N. D.] 117 NW 866. Rev. Codes 1905, § 911, providing for issuance of bonds if approved by majority vote, is mandatory. Id.

**34.** Issuance of bonds based on greater annual tax levy than 20 cents per $100, which levy has been held unconstitutional, will be enjoined. Snyder v. Baird Independent School Dist. [Tex.] 113 SW 521.

**35.** Under Act Mar. 6, 1907 (St. 1907, c. 47, pp. 93, 94), and Act Mar. 12, 1907 (Acts 1907, c. 59, p. 106) as amended by Act Feb. 8, 1908, § 2, relating to issuance of bonds, district cannot issue bonds maturing at rate exceeding $1,000 per annum. State v. McBride [Nev.] 99 P 705. Cannot issue bonds to mature at rate of $1,000 per annum for 8 years and at rate of $1,500 per annum for eight years thereafter. Id.

**36.** Under Const. art. 10, § 12 (Ann. St. 1906, p. 287), regarding provision for interest and sinking fund of any indebtedness, estimate for such purposes for bonds sold after but not before time of such estimate is proper, and tax levied thereunder cannot be enjoined because estimate was for interest, etc., on bonds unsold. Black v. Early, 208 Mo. 281, 106 SW 1014.

**37.** Unwarranted, unauthorized exercise and abuse of authority in submitting question of issuing bonds. McAlexander v. Haviland Village School Dist., 7 Ohio N. P. (N. S.) 590.

**38.** Under Laws 1907, p. 522, regarding issuance of bonds by trustees, trustees cannot be compelled by mandamus to sign contract to lithograph $3,500 of bonds where they consider $2,000 enough and it nowhere appears that bonds can be sold for statutory price, even though electors have authorized issue of $3,500. Lanford v. Drummond, 81 S. C. 174, 62 SE 10. Petition for mandamus to compel borrowing of money to build school house by issuing bonds held defective for failure to allege that district was not indebted to constitutional limit, that money was on hand to build school, or that voters had voted on amount of bonds, etc. People v. School Directors of Dist. N. 248, 139 Ill. App. 620.

**39.** See Bonds, 11 C. L. 424. Fact that bonds are refunding bonds issued in lieu of presumably valid obligations does not validate their issuance where prohibited by Laws 1887, c. 11, p. 39, § 9. State v. School Dist. No. 50 [N. D.] 120 NW 555. Recital that bonds are issued to refund present indebtedness "as authorized by act of legislature (Laws 1887, p. 39, c. 11), entitled," etc., held not to estop school district from urging defense that bonds were illegally issued even against innocent purchaser. Id. Evidence held to sustain finding that school bond sued against was valid and binding upon school district. Wayne County Sav. Bank v. School Dist. No. 5, 152 Mich. 440, 15 Det. Leg. N. 252, 116 NW 378.

*Miscellaneous power to expend money and create indebtedness.* See 10 C. L. 1613 School money may only be expended for proper purposes,[40] and after it has been properly appropriated for such purposes.[41]

School districts are frequently permitted or required to issue orders [42] to a limited amount,[43] or in anticipation of taxes already levied.[44] Such orders must be authorized at the proper meeting of the board,[45] and must be issued for proper purposes.[46] In some states they are not negotiable,[47] cannot be made payable outside of the state,[48] and are not necessarily void for defects of execution.[49] The burden of showing their invalidity is usually on the one asserting it.[50] School districts may also borrow money where authorized to do so by statute,[51] or, where sanctioned by the proper authority,[52] upon a sufficient showing of necessity.[53] In some states, districts may render themselves liable to other districts for tuition.[54]

**40.** Tax collector who makes expenditures not required nor authorized by the board is not entitled to reimbursement therefor. Wood v. School Dist. No. 5, 28 R. I. 299, 67 A 65. Tax collector who gives bond with surety company as surety, though not required nor authorized to do so, is not entitled to reimbursement for amount expended therefor. Id.

**41.** Under Acts 1899, pp. 150-158, c. 105 and amendment thereof in 1901 (Acts 1901, pp. 415, 418, c. 185), power of township trustee to expend township money is limited to cases in which township advisary board has appropriated same for such purposes. State v. Anderson, 170 Ind. 540, 85 NE 17. Trustee is not subject to mandamus to compel transportation of children to school in absence of appropriation therefor. Id.

**42.** School board or executive committee acting as board has power to create obligations against district and to audit claims and control issuing of orders or warrants, and power to do this carries with it duty to do so where interest of the public is concerned. Laws 1901, c. 160, p. 194, §§ 522-530. Rogers-Ruger Co. v. Brule School Directors [Wis.] 120 NW 849.

**43.** Indebtedness contracted and incurred for necessary and lawful purposes by district by virtue of organic act (Act May 2, 1890, c. 182, 26 Stat. 81) and laws of territory of Oklahoma prior to taking of first assessment for purposes of territorial and county taxation, is valid if issued within limit of 4 per centum of value of taxable property as ascertained by said assessment, but warrants prior to first assessment issued for such purposes in excess of said 4 per centum limit are void. Ray v. School Dist. No. 9 [Okl.] 95 P 480.

**44.** R. S. c. 146a, § 2, as amended May 11, 1901, held to authorize school authorities to sell warrants drawn against and in anticipation of taxes already levied for cash, or, in other words, to borrow money to meet necessary expenses of schools, after tax has been levied for said expenses to extent of 75 per cent of such tax levy previously made. Gray v. Peoria School Inspectors, 135 Ill. App. 494. Board of school inspectors of Peoria held to be one of school corporations which, by R. S. ch. 146a, § 2, as amended by Act May 11, 1901, is authorized to issue and dispose of warrants against tax already levied. Id. Fact that board states amount needed and city council levies tax, and hence board only indirectly levies tax, held not to change rule. Id.

**45.** Evidence held insufficient to establish fact that meetings at which certain orders were issued were special meetings, that only president and secretary were present, or that orders were not properly audited. Rogers-Ruger Co. v. Brule School Directors [Wis.] 120 NW 849. Asking officer whether any meetings were held which he did attend because he had no notice of meeting held insufficient proof of lack of notice. Id.

**46.** Orders issued to president and secretary are not void in absence of showing for what they were drawn and that they were not drawn for salaries properly allowed officers. Rogers-Ruger Co. v. Brule School Directors [Wis.] 120 NW 849.

**47.** Orders drawn in anticipation of taxes as provided by R. S. c. 146a, § 2, as amended May 11, 1901. Gray v. Peoria School Inspectors, 135 Ill. App. 494.

**48.** Orders drawn in anticipation of taxes as provided for by R. S. c. 146a, § 2, as amended May 11, 1901. Gray v. Peoria School Inspectors, 135 Ill. App. 494.

**49.** Orders drawn in anticipation of taxes as provided by R. S. c. 146a, § 2, as amended May 11, 1901, merely stating that they were "issued in anticipation of taxes of 1905," held not wholly void but defective of execution. Gray v. Peoria School Inspectors, 135 Ill. App. 494. Where orders were improperly made payable out of state, and were imperfectly executed but not wholly void under R. S. c. 146a, § 2, as amended May 11, 1901, providing for issuing orders in anticipation of taxes, they will be presumed to have been issued for proper purposes in absence of contrary allegation, and their payment will not be enjoined. Id.

**50.** Burden of showing invalidity of school orders is on one asserting invalidity. Rogers v. Brule School Directors [Wis.] 120 NW 852.

**51.** Acts 1905, p. 507, authorizing certain special school district to borrow not to exceed certain sum, held impliedly repealed by acts 1905, p. 651, authorizing any special school district to borrow for building purposes without limitation. Hampton v. Hickey [Ark.] 114 SW 707. Power to make arrangements for efficient operation of schools conveyed by Pol. Code 1895, § 1363 does not include power to borrow money. Board of Education v. Fudge, 4 Ga. App. 637, 68 SE 154.

**52.** Discretionary power of trustees of adjoining townships to establish joint school districts and build joint school houses when properly petitioned, subject to appeal to

*Taxes and revenues.*[See 10 C. L. 1609]—Subject to general constitutional provisions,[55] such as provisions against special legislation,[56] provisions requiring uniformity of taxation,[57] and provisions regulating the rate of taxation,[58] all matters relating to the levy of school taxes, such as the binding effect of the estimate of the school authorities upon the board of tax levy,[59] the validity of the latter's action,[60]

county superintendent, and to decide upon location, plan, and maximum cost of such building (Burns' Ann. St. 1901, §§ 6001, 6002a, 6028, 5920; Acts 1901, p. 514, c. 224, amending § 5920) was not in any way limited by advisory board law (Acts 1899, p. 150, c. 105), except that required expenditure must be first sanctioned by board. Acts 1901, p. 415, c. 185, amending Burns' Ann. St. 1901, §§ 8085a, 8085f. Advisory Board of Harrison Tp. v. State, 170 Ind. 439, 85 NE 18.

**53.** Provision contained in Burns' Ann. St. 1901, § 8085f, amended by Acts 1901, p. 415, c. 185, for finding by board of existence of public necessity for improvement, is expressly obviated by Acts 1903, p. 431, c. 229. Acts 1903, p. 431, c. 229, held not unconstitutional for defective title, as amending statutes by reference to their title, nor as supplementary to a repealed act. Advisory Board of Harrison Tp. v. State, 170 Ind. 439, 85 NE 18. Under provision of latter act, petition signed by majority of patrons of the two districts, and not by majority of each, is conclusive evidence of emergency required by Burns' Ann. St. 1901, § 8085f, as amended in 1901. Id. Facts averred in complaint held to clearly bring case within Acts 1903, p. 431, c. 229, making petition of majority of patrons of both districts conclusive evidence of emergency, etc. Id.

**54.** Where directors gave children permission to attend school in adjoining district where they were accepted, and directors of former district paid the annual bills for several years, they were liable for such tuition until withdrawal of their permission was brought to attention of latter district. Town of Wallingford v. Clarendon, 81 Vt. 245, 69 A 734.

**55.** Acts 1905, p. 425, is not unconstitutional for defect in title, for failure to specify that tax shall be used for instruction of children in elementary branches of English, for failure to provide that schools shall be free, to all, or for failure to provide that schools for races shall be separate, since act in these regards will be construed with reference to existing laws. Coleman v. Emanuel County Board of Education, 131 Ga. 643, 63 SE 41. Neither is act unconstitutional as providing that tax shall be imposed on all property in county, since it will be construed in connection with exemption statutes. Id. Act is not unconstitutional as depriving person of property without due process of law in failing to provide for contesting elections held thereunder or for having his rights or interest thereunder passed upon. Id. 2 Laws 1887-88, c. 637, p. 376, special law, authorizing tax for common school district thereby incorporated, is not repealed by subsequent amendment to constitution prohibiting special laws, it not being intended that amendment should be retroactive. Smith v. Simmons, 33 Ky. L. R. 503, 110 SW 336. 2 Laws 1887-88, c. 637, p. 376, incorporating certain school district and providing for tax in addition to common school fund, held not to conflict with constitutional provision requiring uniform system of common schools. Id. School Law of 1903 (P. L. p. 5) is not unconstitutional because it creates an appointive board of estimate, with power to fix amount to be raised by taxation. In re Newark School Board [N. J. Law] 70 A 881.

**56.** Laws 1907, c. 368, p. 534, providing for levy of special tax for construction, etc., of high school building for Scott county, Kansas, held invalid as special legislation contrary to Const. art. 2, § 17. Deng v. Scott County Board of Com'rs, 77 Kan. 863, 95 P 592.

**57.** Acts 1905, p. 425, as amended by acts 1906, p. 61, regarding local school district taxation held not unconstitutional as conflicting with Const. art. 8, §§ 3, 4 (Civ. Code 1895, §§ 5908, 5909), as imposing ununiform tax or as establishing new political subdivisions of state, in view of Const. amend. 1903, authorizing local public school taxation. Henslee v. McLarty, 131 Ga. 244, 62 SE 66. Const. art. 5, § 1, limiting poll tax to $2 is inapplicable to special school district created under Revisal 1905, § 4115, which is held to be included in term municipal corporation as used in Const. art. 7, tax in such district being limited to that approved by vote of electors and must be uniform and ad valorem. Perry v. Franklin County Com'rs, 148 N. C. 521, 62 SE 608.

**58.** Under Const. art. 11, §§ 4, 5, 10, art. 7, § 3, regarding constitution of school districts and school taxes, corporation for school purposes only is not incorporated city or town, and hence Acts 30th Leg. Sp. Laws, c. 6, p. 79, creating special district and authorizing levy of tax exceeding 20 cents per $100, is void so far as tax is concerned. Snyder v. Baird Independent School Dist. [Tex.] 111 SW 723. Under Const. art. 7, § 3, public free school district consisting of village and surrounding territory cannot levy tax in excess of 20 cents per $100. Brewer v. Hall [Tex. Civ. App.] 111 SW 788. Under Const. art. 7, § 3, regarding amount of tax levy in certain districts, independent district incorporated for school purposes only is not exempted from operation of constitutional provision as being incorporated city or town, though district comprises incoporated town and rural territory, and hence election to determine question of additional tax after maximum under constitution had been levied is void. Jenkins v. De Witt [Tex. Civ. App.] 115 SW 610.

**59.** City council of Peoria held bound to levy such sum for taxes for educational purposes as board of school inspectors fixes, not exceeding statutory limit of such taxation. Peoria special charter. People v. City Council of Peoria, 139 Ill. App. 488. Council cannot cut down either amount or rate of levy. Id. Special charter of Peoria, in force Feb. 20, 1869, held still in force so far as relates to subject of public schools, notwithstanding subsequent adoption by city of Peoria of

what property is exempt,[61] the taxation of tracts extending into two districts,[62] the necessity of an election prior to the levy,[63] the sufficient compliance with the preliminaries to the election,[64] the validity of the election returns,[65] and the certificate of the tax voted,[66] the effect of voting an amount in excess of that permitted by statute,[67] the effect of an election held under an unconstitutional statute,[68] the power to rescind action previously taken,[69] the right of the school authorities to en-

general act for incorporation of cities. Id. Estimate furnished to city by school board of amount needed to meet expenses of maintenance of schools for year was not controlling on city except to minimum amount provided by statute. Levy over minimum amount held left to discretion of city, and cannot be affected by mandamus. (Acts 1873, p. 73, No. 36). State v. New Orleans, 121 La. 762, 46 S 798. Under Const. art. 9, § 3, regarding division of county into school districts, wherein school is to be maintained at least 4 months, and Revisal 1905, § 4112, regarding levy of school tax, duty of county commissioners to levy tax is peremptory but amount to be levied rests in judgment and discretion unaffected by amount asked for by board of education of district, and hence levy of tax to bring amount desired by board of education cannot be enforced by mandamus. Board of Education of Cherokee County v. Cherokee County Board of Com'rs [N. C.] 63 SE 724.

**60.** Fact that board of county commissioners acted under misapprehension of legal effect of election returns and levied high school tax for one year will not estop board from claiming proposition was never legally carried in action brought to compel them to levy tax another year. Board of Education v. Klein [Kan.] 99 P 222. Order of commissioners' court for tax held not insufficient to show election was held. Taylor v. Cundiff [Ky.] 118 SW 379.

**61.** Tax of 10 mills authorized by Const. art. 232 to be levied in aid of public schools is not special assessment, and hence property exempt from taxation by constitution is not subject to it. Louisiana & N. W. R. Co. v. State Board of Appraisers, 120 La. 471, 45 S 394.

**62.** Under Laws 1894, p. 1235, c. 556, tit. 7, § 63, regulating taxation of tracts of land extending into two school districts, corporation is not person within meaning of law so that it can complain of taxation in each district of proportionate part of its property therein. People v. Marens, 62 Misc. 317, 116 NYS 189.

**63.** Where election was held on June 18, 1907, adopting law for taxation for school districts under provisions of Acts 1906, p. 61, and complaining parties had previously made their tax returns for state and county purposes, but it was not shown that tax was levied by county authorities prior to election or that day for so doing had arrived, it was not illegal for district school tax to be levied and collected for that year. Cairo Banking Co. v. Ponder, 131 Ga. 708, 63 SE 218.

**64.** Petition to ordinary held as whole to be petition for county election, and hence order for county election was not void because based on petition for district election. Coleman v. Emanuel County Board of Education, 131 Ga. 643, 63 SE 41. In absence of showing to contrary, notices of election will be held to have been properly posted. Taylor v. Cundiff [Ky.] 118 SW 379.

**65.** Evidence held to authorize finding against contention that returns from certain precincts should be excluded because election was held to place other than lawfully established precincts. Coleman v. Emanuel County Board of Education, 131 Ga. 643, 63 SE 41. That registrars, because of lack of sufficient time before election, failed to purge registration list, but furnished to election managers unpurged lists, except at one precinct, where no list was furnished, and that superintendent of election failed to consolidate returns from several precincts promptly at noon next day succeeding election, and received returns from precinct which did not arrive until 2 o'clock, and received returns which had been sent by mail to ordinary and by him opened and delivered to superintendents, are irregularities resulting from failure to observe statutory provisions which are merely directory, and, in absence of any fraud or evidence that persons had voted who were not authorized to vote, or had been deprived of voting who were entitled to vote, and that such votes would have changed result of election, will not be sufficient cause to set aside entire election. Id.

**66.** Under Code, § 2767, secretary of board of school directors must certify to board of supervisors any tax voted by electors, unless vote is rescinded, and this notwithstanding any action board may take. Kirchner v. Wapsinonoc School Directors [Iowa] 118 NW 51. Fact that secretary in his certificate requested board to levy tax as required by statute held not to invalidate certificate. Id. Clerk's certificate stating that tax has been voted "on taxable property of district" held not nullity as implied intention to tax district's property. Id.

**67.** Under Code, § 2149, subd. 7, school tax is not void because electors voted larger sum than could be raised in any one year, since statute provides that supervisors shall levy only so much of tax as statute permits. Kirchner v. Wapsinonoc School Directors [Iowa] 118 NW 51.

**68.** Local school district election to authorize levy, and collection of tax provided for in acts 1905, p. 425, declared unconstitutional, held prior to amendment by Acts 1906, p. 61, will not warrant assessment and collection of tax provided for by amendatory act. Dolvin v. Lewis, 131 Ga. 29, 61 SE 913; Jordan v. Franklin, 131 Ga. 487, 62 SE 673.

**69.** Under Code, § 2750, as amended by acts 28th Gen. Assem. (Laws 1900, p. 81, c. 104), it is discretionary with board to call meeting to vote to rescind former vote to assess tax for school house. Kirchner v. Wapsinonoc School Directors [Iowa] 118 NW 51. After previous action of school electors in voting certain tax which has been levied

force the payment to them of taxes already levied and collected,[70] procedure to contest the levy or collection of taxes,[71] and matters which will be considered in such actions, are governed by local statutes.[72] Such statutes are governed by the ordinary rules of construction.[73]

*Property of absentees.*—In Maryland funds left by persons presumed to be dead from the continuance of their absence may be administered for the benefit of the schools.[74]

*State school funds.*[See 10 C. L. 1612]—The basis[75] and prerequisites of the apportionment of state school funds,[76] the purposes for which it may be used,[77] and the recovery back of funds not used are regulated by statute and constitution.[76]

and partially collected, school electors have no right to ask for vote to rescind previous action. Id.

**70.** Where county board pursuant to unconstitutional acts levied taxes for benefit of high school districts, and taxpayers voluntarily paid same, such funds are public funds which may be distributed to school districts for which raised under provisions of subsequent legislation. School Dist. No. 30 v. Cuming County [Neb.] 116 NW 522. County has no vested right to public fund created by levy of taxes for benefit of high school districts under unconstitutional statute, and where it collected and held taxes for benefit of such districts, it cannot question distribution of funds to such districts by subsequent legislation. Id. Payment to school board of taxes for school purposes is not to be postponed until all taxes of particular year are collected but should be turned over from time to time as received. Constitute trust fund payment of which can be enforced. Board of School Directors v. Police Jury [La.] 49 S 5.

**71.** Held no abuse of discretion to deny injunction sought on ground that railroad property had been omitted from taxation under denial in sworn answer and evidence in case. Cairo Banking Co. v. Ponder, 131 Ga. 708, 63 SE 218. Under Const. § 157, where school was condemned by county superintendent and erection of new building ordered, trustees may levy annual tax until amount is sufficient to build new school, and fact they ultimately contracted to build school for amount in excess of that raised does not render tax void but only indebtedness in excess of amount raised. Trustees of White School Dist. No. 15 v. Cummins, 33 Ky. L. R. 739, 111 SW 286. Taxpayer is not entitled to injunction to restrain entire tax where portion thereof is valid and he failed to tender amount of tax properly due. Black v. Early, 208 Mo. 281, 106 SW 1014.

**72.** Validity of de facto school district cannot be attacked in suit to restrain collection of taxes levied for payment, etc., of bonds. Black v. Early, 208 Mo. 281, 106 SW 1014. As general rule, courts of equity will not deal with contests of election; but, where statute authorizes tax on property, and provides that law shall become effective in any county or school district only upon election at which application of law should be favored by requisite vote, if after pretended election, levy of tax is attempted, equity will, on appropriate allegations of taxpayer, inquire into validity of election. Coleman v. Emanuel County Board of Education, 131 Ga. 643, 63 SE 41.

**73.** In view of legislative intent as gathered from entire act of 1905 (Acts 1905, p. 425), as amended by Acts 1906, p. 61, and of language used in amending portion of latter act, word "now" as contained in second line of fourth section in reciting entire act as amended was evidently a clerical error and should read "not." Cairo Banking Co. v. Ponder, 131 Ga. 708, 63 SE 218. Word "town" as used in Priv. Laws 1907, p. 1267, c. 482, § 50, held to have been used with reference to election, required to be held as provided by act and to refer only to portion of town lying within school district and hence that act did not authorize taxing for school purposes persons in town outside school district. McLeod v. Carthage Com'rs, 148 N. C. 77, 61 SE 605.

**74.** Under Acts 1908, p. 260, c. 125, Code Gen. Pub. Laws 1904, art. 93, § 134, and Baltimore City charter, city's agent held properly appointed administrator of fund left by one formerly resident of city who has not been heard of for more than seven years, to enable its use for benefit of schools. Savings Bank of Baltimore v. Weeks [Md.] 72 A 475. Petition in such case need not allege that there were no creditors or relatives of such supposed deceased. Id.

**75.** Under Const. 1885, art. 12, § 7, which contemplates apportionment of state school fund upon basis of counties as units, Laws 1905, c. 5381, p. 32, § 1, is unconstitutional as making certain schools with average daily attendance of 80 per cent beneficiaries of act. Santa Rosa County Board of Public Instruction v. Croom [Fla.] 48 S 641.

**76.** Acts 1907, p. 467, § 12, held to authorize county school commissioner to pay portion of public school fund to trustees of Boynton school system only upon estimate made by board of education of county. McGill v. Osborne, 131 Ga. 541, 62 SE 811.

**77.** Under Loc. Acts 1898-99, p. 30, Code 1907, §§ 133, 134, 138, 158, Gen. Acts 1907, p. 728, § 3, Code 1907, §§ 133, 134, 138, 158, does not relate to high schools erected under Gen. Acts 1907, p. 728, and board of revenues cannot appropriate county funds to aid in their construction. Kumpe v. Bynum [Ala.] 48 S 55. Appropriation enjoined at instance of taxpayer. Id. Evidence held to show that employment by trustees of professors of sectarian college which had been destroyed by fire was not such use of school funds for sectarian purposes under Const. § 189, as warranted refusal by county superintendent to turn school district funds over to district. McDonald v. Parker, 33 Ky. L. R. 805, 110 SW 810. School taxes received from state by graded common school cannot be used to purchase a lot or erect or furnish a school building but must be used for educational

§ 7. *Teachers and instruction.*[79] *Employment, control and dismissal.* See 10 C. L. 1613—Teachers must ordinarily be hired at a regular meeting of the board,[80] for a definite term,[81] by a contract in writing.[82] Only teachers possessing the required certificates[83] properly filed may be hired.[84] The dismissal of teachers is restricted by statute[85] and hearing is sometimes but not always required.[86] The ordinary rules governing measure of damages for breach of contract are applicable.[87]

*Salary.* See 10 C. L. 1614—In New York the salary of teachers has been fixed by statute[88] with a view to immediate uniformity.[89] Its provisions are inapplicable

purposes only. Crabbe v. Graded Common School Dist. Trustees [Ky.] 116 SW 706. Under Const. art. 9, §§ 2, 3, regulating use of revenues of common schools, model training school intended to be established at normal school by Laws 1907, c. 97, p. 181, is not common school and so much of law as provides for apportionment of common school fund in support thereof violates constitution. School Dist. No. 20 v. Bryan [Wash.] 99 P 28.

**78.** Under Const. § 186, St. 1909, §§ 4375, 4376, 4480, regarding distribution of state school fund, funds paid district but not used during certain year are recoverable from district only after lapse of second year without demand of funds and hence funds should be paid on demand at any time during second year. Crabbe v. Graded Common School Dist. Trustees [Ky.] 116 SW 706.

**79. Search Note:** See notes in 50 L. R. A. 371, 374; 7 L. R. A. (N. S.) 403; 12 Id. 614; 15 Id. 1147; 16 Id. 860; 8 A. S. R. 411; 102 Id. 537; 105 Id. 151.

See, also, Schools and School Districts, Cent. Dig. §§ 283-318, 334-340; Dec. Dig. §§ 127-147, 162-168; 25 A. & E. Enc. L. (2ed.) 8; 19 A. & E. Enc. P. & P. 245.

**80.** Under Ann. St. 1906, § 9766, regarding hiring of teachers, meeting not called by president, but each director being present by agreement with school teacher to decide as to her employment, held special meeting and action taken thereat binding on board. Hibbard v. Smith [Mo. App.] 116 SW 487.

**81.** Held sufficient finding on issue whether plaintiff was hired and paid for four months only. Roussin v. Kirkpatrick [Cal. App.] 95 P 1123.

**82.** Kirby's Dig. § 7615, requires contracts with teachers to be in writing. Griggs v. School Dist. No. 70 [Ark.] 112 SW 215. Parol evidence inadmissible to vary. Id.

**83.** Under Ann. St. 1906, §§ 9766, 9796, regarding necessity of teacher's license to valid contract of employment, requirement is satisfied if teacher has certificate in force when hiring occurs and obtains another extending over term of employment upon expiration of other. Hibbard v. Smith [Mo. App.] 116 SW 487.

**84.** Under Ann. St. 1906, § 9766, regarding filing of teacher's certificate before attestation of contract of employment by clerk, it is sufficient if certificate be filed after attestation. Hibbard v. Smith [Mo. App.] 116 SW 487.

**85.** Teacher holding city certificate who was elected for indefinite term held protected from removal by Pol. Code § 1793, except for causes mentioned in § 1791. Barthel v. San Jose Board of Education, 153 Cal. 376, 95 P 892. Election and dismissal of teachers in public schools are not municipal affairs which may be regulated in manner in conflict with that provided by general law by freeholders' charter. Id. Under San Jose charter, art. 9, §§ 5, 13, regarding election, dismissal, etc., of teachers, probationary teacher duly elected for year can be dismissed only on adverse report by classification committee. Id.

**86.** Board of education may dismiss teacher for lack of qualifications without giving her a hearing. 34 Stat. 321, c. 3446, § 10, does not apply to such cases. United States v. Hoover, 31 App. D. C. 311. 34 Stat. 316, c. 3446, creating board of education for District of Columbia will be liberally construed so as to give board discretion in carrying out its objects. Id. Existence of charges resulting in dismissal of teacher cannot be shown by introduction of letters written third persons by superintendent after dismissal where his letters could not bind the board and were not board's letters. Id.

**87.** When such contract is disregarded by district, it is teacher's duty to decrease damages by seeking other employment. Byrne v. Independent School Dist. of Struble [Iowa] 117 NW 983. If discharged teacher does not accept other employment, her damages should not be diminished for failure to secure it unless it be shown that by reasonable diligence she might have secured employment of same grade in same locality where she was engaged to teach. Answer held not to state facts sufficient to constitute defense. Id.

**88.** Teacher employed for term of years held entitled to recover unpaid balance of salary on basis provided for by schedule adopted by board. Eagan v. Board of Education, 115 NYS 165. Statutory provision that no teacher receive more than sum scheduled to be paid for seven years' service unless approved as "fit and meritorious" held void for indefiniteness. Id. Under Laws 1906, p. 11, 31, c. 473, superseding Laws 1898, p. 384, c. 182, § 96, board of education had power to provide for high school of commerce although expenditures for same were not included in estimates contemplated by act of 1898 and its amendments and hence one performing duties of principal is entitled to have board of estimate and apportionment fix his salary as provided by his appointment. People v. Troy Board of Estimate, 115 NYS 907.

**89.** Laws 1900, c. 751, p. 1607 (N. Y. City Charter § 1091) § 4, regulating salary of teachers and rendering same uniform, held to intend immediate uniformity so that provision therein relative to annual increases did not entitle one whose salary was above

to persons not possessed of the requisite certificate [90] and to persons who have not been regularly appointed to the position the salary attached to which is sought.[91] In Ohio a contract stipulating against any charge by the teacher for attending teacher's institute is void as against public policy.[92]

§ 8. *Control and discipline of scholars and regulation of attendance.*[93]—See 10 C. L. 1616—School authorities are vested with a broad discretion in the government and discipline of pupils,[94] and in the exercise of that discretion may make all needful rules and suspend any pupils for noncompliance therewith.[95] This power has been held to extend to drunkenness and disorderly conduct,[96] refusal to take part in commencement exercises,[97] and under certain circumstances offenses committed outside of school hours and the presence of the teachers,[98] but not to permit the requirement that pupils pay damages for school property accidentally injured or destroyed under penalty of suspension.[99] The action of the school authorities in this regard is final and conclusive [1] unless the person aggrieved [2] can show that they have acted maliciously, oppressively or arbitrarily.[3]

minimum to annual increase until salaries of those in class with her had come to equal hers as result of successive annual increments. McHench v. New York City Board of Education, 127 App. Div. 294, 111 NYS 303. Laws 1897, p. 394, c. 378, § 1091, as amended by Laws 1900, p. 1607, c. 751, § 4, relative to salaries of teachers held to entitle teacher to no change until end of year during which act went into effect but that salary when above minimum required by appropriate schedule should be continued to end of year and teacher be then placed in proper schedule provided salary was not thereby decreased. Loewy v. New York City Board of Education, 59 Misc. 70, 112 NYS 4.

**90.** Greater New York Charter (Laws 1897, p. 404, c. 378, § 1117), relative to permanency of teacher's position, held inapplicable to one whose license expired within current year except for such time as he was licensed. Wood v. New York City Board of Education, 59 Misc. 605, 112 NYS 578. Appointment of teacher as vice-principal subject to his receiving license held subject also to by-law that no one not holding first assistant teacher's license should be appointed assistant principal so that one holding assistant teacher's license only could not recover salary of assistant principal. Id.

**91.** Under New York Charter (Laws 1901, p. 473, c. 466, §§ 1091, 1101), one acting temporarily as head teacher, but who was not shown to be eligible to appointment as head teacher, and who has never been so appointed, cannot sue to recover salary attached to office of head teacher, though he has continually performed duties of such position. Hazen v. New York City Board of Education, 127 App. Div. 235, 111 NYS 337. Held under Laws 1900, p. 1605, c. 751, that one contracting to render such services as might be required of him and who was employed largely at instructing and somewhat in assisting principal was not vice-principal or first assistant within law so as to be entitled to compensation provided therein for such positions. Wood v. New York City Board of Education, 59 Misc. 605, 112 NYS 578.

**92.** Board of Education of Elizabeth Tp. v. Burton, 11 Ohio C. C. (N. S.) 103.

**93.** Search Note: See notes in 4 C. L. 1412; 11 Id. 1718; 25 L. R. A. 152; 41 Id. 593; 62 Id. 160; 3 L. R. A. (N. S.) 496; 7 Id. 352; 2 Ann. Cas. 522; 6 Id. 435, 998; 9 Id 42.

See, also, Schools and School Districts, Cent. Dig. §§ 341-347; Dec. Dig. §§ 169-177; 25 A. & E. Enc. L. (2ed.) 24, 27.

**94.** Courts should not interfere with exercise of such authority unless it has been unreasonably or illegally exercised. Board held not to have abused discretion in suspending pupils causing publication of poem in paper. State v. District Board of School Dist. No. 1, 135 Wis. 619, 116 NW 232.

**95.** St. 1898, § 439. Rules made by themselves or by teacher with their consent. State v. District Board of School Dist. No. 1, 135 Wis. 619, 116 NW 232. Large discretion is allowed teacher and board within statute in determining what course of conduct on part of pupils is necessary for good of schools. Any conduct on part of pupil tending to demoralize other pupils, interfere with proper and successful management of school, i. e. impair discipline, which teacher and board shall consider necessary for best interest of school may subject offending one to statutory punishment. Kirby's Dig. § 7637. Douglas v. Campbell [Ark.] 116 SW 211.

**96.** Kirby's Dig. § 7637. Douglas v. Campbell [Ark.] 116 SW 211.

**97.** Under Ky. St. 1903, §§ 4367, 4473, regulating school discipline, pupil may request to be excused from part assigned to him in commencement exercises, but if principal deems his reasons insufficient and he refuses to take part as commanded he may be suspended where such exercises were annually provided for by trustees as part of regulations. Cross v. Walton Common School Trustees, 33 Ky. L. R. 472, 110 SW 346.

**98.** School authorities have power to suspend pupil for offense committed outside of school hours, and not in presence of teacher, which has direct and immediate tendency to influence conduct of other pupils while in school room, to set at naught proper discipline of school, to impair authority of teachers and to bring them into ridicule and contempt. Publication of poem in paper held to warrant suspension. State v. District Board of School Dist. No. 1, 135 Wis. 619, 116 NW 232.

**99.** State v. District Board of School Dist. No. 1, 135 Wis. 619, 116 NW 232.

**1.** Action of board of trustees in approving

The parent has no right to sue for damages for the unlawful expulsion or suspension of his child unless he has suffered direct pecuniary injury,[4] his remedy being by mandamus to compel the school authorities to allow his child to attend school.[5] Suit to redress wrongful suspension must be timely and for the proper cause [6] and the petition must allow the facts relied upon.[7]

*Fraternities.* See 10 C. L. 1616

*Corporal punishment.* See 10 C. L. 1616

§ 9. *Torts and liability for the same.*[8] See 10 C. L. 1617

§ 10. *Offenses.*[9] See 10 C. L. 1617

§ 11. *Decisions, rulings, and orders of school officers, and review of the same.*[10] See 10 C. L. 1617—The courts will not ordinarily interfere to control the acts of school officers until all remedies afforded by the school machinery have been exhausted.[11] The appeal to the courts must be taken in the proper manner [12] and must be sustained by sufficient proof.[13]

§ 12. *Actions and litigation.*[14] See 10 C. L. 1617—This section deals only with the general matters regarding actions and litigation, all matters pertaining to matters treated specifically in the various sections of the topic being kept in such sections. The district's right and duty to sue [15] and power to control the action is

suspension of pupil by principal is final and conclusive and cannot be questioned by courts unless they acted arbitrarily or maliciously. Suspension for refusal to take part in commencement services held not arbitrary or malicious. Cross v. Walton Common School Trustees, 33 Ky. L. R. 472, 110 SW 346.

**2.** It will be presumed that teacher and board have best interests of school at heart, and that they have acted in good faith in exercising authority with which law has clothed them and burden is upon him who calls in question their conduct to show that they have not been actuated by proper motives. Douglas v. Campbell [Ark.] 116 SW 211.

**3.** Cross v. Walton Common School Trustees, 33 Ky. L. R. 472, 110 SW 346. If teacher and board should through malice, arbitrarily and without reason suspend pupil, pupil would have his remedy by mandamus and parent for damages if any have been sustained. Douglas v. Campbell [Ark.] 116 SW 211. Only requirement necessary to review of dismissal of student from school is that action be so unreasonable and oppressive as to warrant conclusion that action was malicious, unfair or from some improper motive, some motive other than proper enforcement of regulations of school and maintenance of proper discipline. Evidence held insufficient to warrant finding of improper dismissal. Manson v. Culver Military Academy, 141 Ill. App. 250.

**4.** Complaint held demurrable for failure to allege personal pecuniary injury or facts showing unlawful expulsion. Douglas v. Campbell [Ark.] 116 SW 211.

**5.** Douglas v. Campbell [Ark.] 116 SW 211.

**6.** One suspended for remainder of term ending April 29, cannot sue in July to require trustees to readmit him on theory that he had been expelled where inspection journal kept by trustee under Ky. St. 1903, § 4473, would have shown that he was suspended only. Cross v. Walton Common School Trustees, 33 Ky. L. R. 472, 110 SW 346.

**7.** Resolution of petition actually suspending pupil only cannot be attached on ground that it did not state decision of board correctly and was not entered as adopted where petition does not allege such facts. Cross v. Walton Common School Trustees, 33 Ky. L. R. 472, 110 SW 346.

**8. Search Note:** See notes in 37 L. R. A. 301; 65 Id. 890; 3 Ann. Cas. 884; 10 Id. 406.

See, also, Schools and School Districts, Cent. Dig. § 208; Dec. Dig. § 89.

**9. Search Note:** See Schools and School Districts, Cent. Dig. §§ 159, 160, 345.

**10. Search Note:** See Schools and School Districts, Cent. Dig. §§ 96-99, 107, 108, 143, 144; Dec. Dig. §§ 47, 48, (6, 7), 59-61.

**11.** Administration of school laws cannot be interfered with by courts until ruling of superintendent of public instruction has been invoked upon matter in controversy, unless parties aggrieved cannot obtain ruling from him upon question in time to protect their rights. In such event interference by courts cannot extend beyond time question is decided by him, or, in event of appeal from his ruling to state board of education from time when it is decided by such board, unless decision is clearly wrong. McFall v. State Board of Education [Tex.] 110 SW 739.

**12.** Motion for appointment of committee to render effective vote of election, and passing of resolution to institute condemnation proceedings, held to have been sufficiently shown on record of board and that such acts were not ministerial so as to preclude review by certiorari. Southworth v. Board of Education of School Dist. No. 131, 238 Ill. 190, 87 NE 403.

**13.** Where in action to enjoin changing of site and appropriation for erection of building on new site, plaintiff alleges he is resident taxpayer and qualified voter, such allegation being material must be proved. Hess v. Dodge [Neb.] 116 NW 863.

**14. Search Note:** See Schools and School Districts, Cent. Dig. §§ 269-282; Dec. Dig. §§ 112-126; 19 A. & E. Enc. P. & P. 230.

**15.** Under Gen. Laws 1903, p. 289, regarding management and control of schools, etc., district trustees as representatives of pub-

regulated by statute.[16] Other matters such as the right of a voter to sue to compel action by the district,[17] laches,[18] the title of the action,[19] necessary allegations in a suit upon a note of the district,[20] rights after default,[21] the scope of the judgment against the district,[22] and costs are governed by the usual rules.[23]

§ 13. *Libraries, reading rooms and other auxiliary educational institutions.*[24] See 8 C. L. 1869—A board of trustees of a state library have no power to issue at the state's expense a library catalogue or reference index under the power to issue a library bulletin.[25]

§ 14. *Private schools.*[26]—See 8 C. L. 1869—Private schools whose income from tuition exceeds their necessary expenditures are not charitable institutions such as are exempted from taxation by statute.[27] The right to tuition,[28] and the right to recover back tuition paid depends upon the contract between the parties.[29]

lic with duty to conserve right of public to use of public school property for public school purposes may resort to chancery court for injunctive relief when necessary. Hill v. Houk [Ala.] 46 S 562. Injunction against attempted revocation of dedication of property for school purposes. Id.

16. Under Gen. St. 1901, §§ 6127, 6162, relative to prosecution and defense of suits to which district is party and appearance by director therein, district director has full authority to represent district and may control action as fully as individual might control his own action, which authority is not lessened by fact that other directors acted in unison with him. School Dist. No. 116 v. School Dist. No. 141 [Kan.] 99 P 620. Motion to dismiss appeal made by director where attorney refused to do so though informal will be binding. Id.

17. Member of school corporation may invoke interference of court of equity to practically coerce reluctant corporation to enforce its legal rights against its officers and their confederates. Use of district money for sectarian instruction. Dorner v. School Dist. No. 5, 137 Wis. 147, 118 NW 353.

18. Electors of school district cannot sue to collect of directors of school district money wrongfully spent for sectarian education where action was known and acquiesced in for twenty years. Dorner v. School Dist. No. 5, 137 Wis. 147, 118 NW 353.

19. When action is brought against "trustee of township," it is conclusively presumed that action is against trustee of civil township and not school township. Teeple v. State [Ind.] 86 NE 49.

20. Petition in action on note executed by school trustees need not allege that it was not invalid under Const. § 157, limiting indebtedness to revenue. Trustees Common School Dist. No. 10. v. Miller, 32 Ky. L. R. 367, 105 SW 457.

21. Where trustees have allowed judgment upon notes executed by them contrary to Const. § 157, because in excess of revenue, etc., to be entered against them by default. they cannot urge invalidity of such notes for such reason in action for mandamus to compel levy by them of tax to pay judgment. Trustees Common School Dist. No. 10 v. Miller, 32 Ky. L. R. 367, 105 SW 457.

22. Under St. 1909, § 4437, regarding right to remove improvements from lands not owned in fee by trustees, judgment authorizing trustees to remove improvements from land purchased from life tenant should not make payment of rent condition precedent to removal within such time as it may deprive district of use of school. Trustees of Common School Dist. No. 31 v. Isaacs' Guardian [Ky.] 115 SW 724.

23. Claims for costs under Code Civ. Proc. § 3245, properly presented to auditing department of board may be recovered. Eagan v. Board of Education, 115 NYS 167.

24. **Search Note:** See Schools and School Districts, Cent. Dig. §§ 184-186; Dec. Dig. §§ 75, 76.

25. Under Laws 1903, p. 9, c. 6, § 2, and Laws 1895, p. 481, c. 118, § 9, providing for issuance at least twice yearly of bulletin containing recommendations as to methods of library work, notes on library progress, and such other matters as general information relating to library work as they may deem proper, they may not issue at state's expense "a Reference Index to Biographical Sketches of New Hampshire Men, etc." Chandler v. Eastman [N. H.] 71 A 221. Particularly where intended to take place of several bulletins which otherwise would be issued. Id. Under Laws 1893, p. 28, c. 31, § 7, providing that, after catalogue of books be first made and printed, alphabetical catalogue of books received thereafter should be made in each report of librarians, power, except to issue supplements in librarian's report, was exhausted upon publishing catalogue giving author's list, it not being intention that catalogue should consist of many volumes, cataloguing books upon all theories of arrangement and classification known to bibliographers. Id. State board of library trustees held to have no power to issue "a Reference Index to Biographical Sketches of New Hampshire Men, etc." under such statute. Id.

26. **Search Note:** See Schools and School Districts, Cent. Dig. §§ 1-11; Dec. Dig. §§ 1-8.

27. If payments by students yield more than cost of maintenance, institution is not maintained by public or private charity even though surplus be used to enlarge institution, it not being shown that maintenance of institution depended upon its enlargement. Mercersburg College v. Poffenberger, 36 Pa. Super. Ct. 100. And in determining whether tuition received exceeds cost of maintenance, rental value of lands and buildings is to be excluded. Id. Institution giving free tuition to few students, and reduced tuition to some, but whose paid tuition resulted in annual surplus of $9,000, used to enlarge institution and not to decrease tuition, is not purely public charity. Id.

28. Evidence in action for tuition held

### SCIRE FACIAS.[30]

*The scope of this topic* is noted below.[31]

Scire facias is a common-law judicial writ to revive judgments, or to obtain satisfaction thereof from sureties upon bail or other recognizances taken in the proceedings in which the judgment is rendered.[32] It is considered both as a process and declaration, and hence its informalities are properly taken advantage of by demurrer,[33] and it is subject to proper amendment.[34] Appearance and pleading without objection waives the right to insist upon a declaration [35] and objections to the form of the writ,[36] while answering after demurrer to writ has been overruled waives the demurrer.[37]

**Seals; Seamen,** see latest topical index.

## SEARCH AND SEIZUR

**§ 1. What is an Unreasonable Search and Seizure, 1817.**

**§ 2. Procedure for Issuance, and Execution of Search Warrants, 1817.**

*The scope of this topic* is noted below.[38]

§ 1. *What is an unreasonable search and seizure.*[39]—See 10 C. L. 1618—The constitutional inhibition against unreasonable searches and seizures applies exclusively to searches and seizures made through governmental agencies.[40] It applies to executive as well as judicial officers.[41] The entering of private property by officers without a warrant on mere suspicion that a misdemeanor is being committed there is an unreasonable search,[42] but the search of a suspect by police officials,[43] or the entering by sanitary officers into certain places of business during business hours,[44] is not. Search and seizure is available only in the furtherance of public prosecutions.[45]

§ 2. *Procedure for issuance, and execution of search warrants.*[46]—See 6 C. L.

not to sustain finding certain contract for tuition. Hartbridge School v. Riordan, 112 NYS 1089.

**29.** Under contract with military academy providing that if cadet is dismissed no money is recoverable, recovery is dependent upon improper dismissal such as to constitute a breach of contract. Manson v. Culver Military Academy, 141 Ill. App. 250.

**30.** See 10 C. L. 1618.

**Search Note:** See Scire Facias, Cent. Dig.; Dec. Dig.; 19 A. & E. Enc. P. & P. 258.

**31.** Includes only matters relating generally to the writ, its issuance and sufficiency in particular proceedings being treated in such topics as Bail, Criminal, 11 C. L. 361; Judgments, 12 C. L. 408, and the like.

**32.** Egan v. Chicago G. W. R. Co., 163 F 344.

**33.** State v. Delaney [N. J. Err. & App.] 70 A 311. Whether considered as original or judicial writ it is action, and such as defendant may plead to. Id.

**34.** Crim v. Rhinehart [W. Va.] 63 SE 212.

**35.** State v. Delaney [N. J. Err. & App.] 70 A 311.

**36.** Scranton v. Koehler, 36 Pa. Super. Ct. 95.

**37.** State v. Stevens [Mo. App.] 114 SW 1113.

**38.** Aside from a general treatment of the question of validity, the seizure of property used in violation of law (see Betting and Gaming, 11 C. L. 417; Intoxicating Liquors, 12 C. L. 332), and the search of arrested persons (see Arrest and Binding Over, 11 C. L. 278) are excluded. Procurement of evidence by unlawful search or seizure and power and process to compel the production of evidence (see Evidence, 11 C. L. 1346; Indictment and Prosecution, 12 C. L. 1) are also excluded.

**39. Search Note:** See notes in 4 C. L. 1416; 6 Id. 1437, 1438; 101 A. S. R. 328.

See, also, Searches and Seizures, Cent. Dig. § 5; Dec. Dig. § 7; 25 A. & E. Enc. L. (2ed.) 144.

**40.** Not to search by a private person or petty officer, yet evidence obtained thereby is admissible. Cohn v. State [Tenn.] 109 SW 1149.

**41.** Officers in executing warrants must be considerate and cause no unnecessary damage, or they will be liable therefor. Buckley v. Beaulieu [Me.] 71 A 70.

**42.** Fairmont Athletic Club v. Bingham, 61 Misc. 419, 113 NYS 905.

**43.** See Arrest and Binding Over, 11 C. L. 278. Whether arrest is made or not. Gisske v. Sanders [Cal. App.] 98 P 43.

**44.** Under statute providing for inspection of barber shops. Pub. Laws 1903, p. 28, c. 1100, § 4. State v. Armeno [R. I.] 72 A 216.

**45.** Not in civil proceedings. State v. Dery [Ind.] 85 NE 765.

**46. Search Note:** See notes in 4 C. L. 1417, 1418; 6 Ann. Cas. 615.

See, also, Searches and Seizures, Cent. Dig.

1438—Such procedure may be merely a proceeding in rem.[47] The warrant must specifically describe and designate the locality to be searched.[48]

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**Seaweed; Secondary Evidence; Secondhand Dealers; Secret Ballot; Security for Costs, see** latest topical index.

## SEDUCTION.

**§ 1. Nature and Elements of the Tort, 1818.**
**§ 2. Civil Remedies and Procedure, 1818.**
**§ 3. The Crime, 1819.**
**§ 4. Indictment and Prosecution, 1819.** Suspension of Prosecution by Marriage, 1819. Burden of Proof, Evidence and Instructions, 1819.

*The scope of this topic* is noted below.[49]

§ 1. *Nature and elements of the tort.*[50]—See 8 C. L. 1871—Where it is held that the gravamen of seduction as a tort is the unlawful intercourse,[51] the use of force does not necessarily negative the legal conception of seduction so far as civil liability is concerned,[52] even where the female herself is the complaining party,[53] and under the same conception of the tort, the previous chastity of the female is also immaterial except upon the question of damages.[54] Where the consent of the female is a material element, it is not necessarily negatived by previous force.[55]

§ 2. *Civil remedies and procedure.*[56]—See 10 C. L. 1619—An action for seduction may be brought for a minor by a parent or guardian.[57]

§§ 1-6; Dec. Dig. §§ 1-8; 25 A. & E. Enc. L. (2ed.) 147; 19 A. & E. Enc. P. & P. 323; 19 A. & E. Enc. P. & P. 414.

**47.** No service being had or contemplated other than upon or against the offending thing and the person in whose possession it is found. State v. Hooker [Okl.] 98 P 964.

**48.** Not sufficient to say at a "place" in possession of defendant. State v. Fezzette, 103 Me. 467, 69 A 1073.

**49.** Includes both criminal responsibility and civil liability to the injured female or her parents. Related topics should be consulted. See Abduction, 11 C. L. 9; Assault and Battery, 11 C. L. 285; Bastards, 11 C. L. 413; Breach of Marriage Promise, 11 C. L. 437; Husband and Wife, 11 C. L. 1838; Rape, 12 C. L. 1614. The criminal offense of carnal knowledge of a female under the age of consent is treated in connection with the crime of rape. See Rape, 12 C. L. 1614. The measure of damages is excluded from this topic. See Damages, 11 C. L. 958.

**50. Search Note:** See notes in 14 L. R. A. 700; 8 A. S. R. 870, 76 Id. 659, 670.

See, also, Seduction, Cent. Dig. §§ 1-24; Dec. Dig. §§ 1-11; 25 A. & E. Enc. L. (2ed.) 190.

**51.** So held in Michigan. Velthouse v. Alderink, 153 Mich. 217, 15 Det. Leg. N. 452, 117 NW 76.

**52.** Velthouse v. Alderink, 153 Mich. 217, 15 Det. Leg. N. 452, 117 NW 76.

**53.** Under Comp. Laws. § 10,418, authorizing recovery by seduced female, the injured female may recover, though the act complained of was accomplished wholly by force. Velthouse v. Alderink, 153 Mich. 217, 15 Det. Leg. N. 452, 117 NW 76.

**Note:** In Velthouse v. Alderink, 153 Mich. 217, 15 Det. Leg. N. 452, 117 NW 76, the majority of the court, after declaring it to be settled that a father may recover for seduction of his daughter, notwithstanding that the act complained of was accomplished by force, several Michigan cases being cited to the proposition, extended this doctrine to the case where the action is by the injured female herself, and in reaching this conclusion the court purported to follow Marshall v. Taylor, 98 Cal. 55, 33 P 867, 35 Am. St. Rep. 144, where it was declared that the force merely aggravated the injury, citing Furman v. Applegate, 23 N. J. Law, 28; Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100. Carpenter, J., however, dissented from the conclusion reached by the majority on the ground that in the case at bar the act was accomplished wholly by force as distinguished from a case where it is accomplished in part by artifice and in part by force, and on the ground that the declaration itself made out a case of rape as distinguished from seduction, and on this latter ground he distinguished Marshall v. Taylor, supra, which, according to his interpretation, involved merely a variance which was not objected to. He concurred, however, in the affirmance of the judgment for the plaintiff on the ground that declaration made out a case at common law for damages, regardless of the reference to the seduction statute, but the majority of the court refused to hold that the reference to the statute could be disregarded and based its affirmance squarely upon the doctrine above announced.—[Ed.]

**54.** Unmarried woman may recover for her own seduction even though she be not of previous chaste character. Olson v. Rice [Iowa] 119 NW 84.

**55.** Where defendant ravished plaintiff and she afterwards consented to other acts of intercourse. Murrilla v. Guis [Wash.] 98 P 100.

**56. Search Note:** See notes in 8 Ann. Cas. 1115.

See, also, Seduction, Cent. Dig. §§ 25-52; Dec. Dig. §§ 12-28; 25 A. & E. Enc. L. (2ed.) 193; 19 A. & E. Enc. P. & P 400.

**57.** Velthouse v. Alderink, 153 Mich. 217, 15 Det. Leg. N. 452, 117 NW 76.

*Pleadings.* See 10 C. L. 1619

*Evidence and trial.* See 10 C. L. 1619—The rule requiring corroboration applies only to criminal cases.[58]

§ 3. *The crime.*[59] See 10 C. L. 1619—Persuasion is an element of the crime.[60] In some jurisdictions, previous chastity of the female is also an element,[61] and hence subsequent acts of intercourse do not constitute separate offenses,[62] and limitations run from the first act.[63] Under the South Carolina statute, the seduction must be accomplished by means of deception and promise of marriage.[64] The persuasion or inducement essential to constitute the offense may consist in a promise of marriage alone,[65] but such promise must have been relied on and not have been contingent on the occurrence of a problematic event.[66] The term "unmarried" as used by the statutes means never having been married.[67] The term "virtuous" has reference to physical and not moral status or condition.[68]

§ 4. *Indictment and prosecution.*[69] See 10 C. L. 1619—All the essential elements of the crime must be alleged,[70] but in some states previous chastity need not be alleged, though unchastity at the time of the act charged is a defense.[71]

*Suspension of prosecution by marriage.* See 10 C. L. 1620—Some statutes make the suspension contingent on support for a definite time after marriage.[72]

*Burden of proof, evidence and instructions.* See 10 C. L. 1620—The burden is on the state to prove the offense and its commission on a day within the statutory bar of limitations,[73] and every element of the offense must be proved beyond a reasonable doubt.[74] Usually the testimony of the prosecutrix must be corroborated.[75] It is often held that previous chaste character will be presumed.[76]

58. Olson v. Rice [Iowa] 119 NW 84.

59. **Search Note:** See Seduction, Cent. Dig. §§ 53-62; Dec. Dig. §§ 29-36; 25 A. & E. Enc. L. (2ed.) 226.

60. Simmons v. State [Tex. Cr. App.] 114 SW 841.

61. Jennings v. Com. [Va.] 63 SE 1080. Under express terms of Code 1906, § 1081, previous chastity is an element of offense of seduction of female under age of 18 years. Hatton v. State [Miss.] 46 S 708. Under South Carolina statute, previous chastity is not an element but is a matter of affirmative defense. State v. Turner [S. C.] 64 SE 424.

**Meaning of term:** Chaste character means personal virtue as distinguished from good reputation. Hatton v. State [Miss.] 46 S. 708.

**NOTE. Previous chaste character.** See 4 C. L. 1418.

62, 63. Hatton v. State [Miss.] 46 S 708.

64. State v. Turner [S. C.] 64 SE 424.

65. Woodard v. State, 5 Ga. App. 447, 63 SE 573.

66. Such as pregnancy. Simmons v. State [Tex. Cr. App.] 114 SW 841.

67. Devorcee is not unmarried woman within statute. Jennings v. Com. [Va.] 63 SE 1080.

68. Every virgin is virtuous. Woodard v. State, 5 Ga. App. 447, 63 SE 573.

69. **Search Note:** See notes in 14 L. R. A. (N. S.) 727, 750, 752; 2 Ann. Cas. 769.

See, also, Seduction, Cent. Dig. §§ 63-95; Dec. Dig. §§ 37-54; 25 A. & E. Enc. L. (2ed.) 236.

70. Under South Carolina statutes "good repute" of female must be alleged. State v. Turner [S. C.] 64 SE 424.

71. 24 Stat. p. 937, provides that no conviction shall be had "if on the trial it is proved" that the female was unchaste. State v. Turner [S. C.] 64 SE 424.

72. Laws 1905, p. 57, c. 33. State v. Walla Walla Super. Ct. [Wash.] 99 P 740.

73. Bar raised by plea of "not guilty." Hatton v. State [Miss.] 46 S 708.

74. Under South Carolina statute, state must prove that seduction was accomplished by "means of deception and promise of marriage." State v. Turner [S. C.] 64 SE 424.

75. State v. Turner [S. C.] 64 SE 424.

76. Woodard v. State, 5 Ga. App. 447, 63 SE 573. Statute does not make previous chastity an element, but makes unchastity a matter of affirmative defense. State v. Turner [S. C.] 64 SE 424.

**Note:** Following decisions uphold view that chastity of woman whose seduction is charged will be presumed. Kerr v. U. S., 7 Ind. T. 486, 104 SW 809; Wilhite v. State, 84 Ark. 67, 104 SW 531; Caldwell v. State, 73 Ark. 139, 83 SW 929, 108 Am. St. Rep. 28; Andre v. State, 5 Iowa, 389, 68 Am. Dec. 708; Mills v. Com., 93 Va. 815, 22 SE 863; Smith v. State, 118 Ala. 117, 24 S 55; People v. Kenyon, 26 N. Y. 203, 84 Am. Dec. 177; McTyies v. State, 9 Ga. 254, 18 SE 140. In some states, where statute expressly makes previous chastity an element of the offense, it must be proved. State v. Lockerby, 50 Minn. 363, 52 NW 958, 36 Am. St. Rep. 656; Ex parte Vandiveer, 4 Cal. App. 650, 88 P 993; Harvey v. Ter., 11 Okl. 156, 65 P 837. Even where there is no express provision as to character, it is held in some jurisdictions that previous chastity must be proved. Norton v. State, 72 Miss. 128, 16 S 264, 18 S 916, 48 Am. St. Rep. 538; West v. State, 1 Wis. 209.—Adapted from State v. Turner [S. C.] 64 SE 424.

The construction of terms used by the statutes is a matter of law for the court.[77]

**Self-Defense; Sentence; Separate Property; Separate Trials; Separation,** see latest topical index.

### SEQUESTRATION.[78]

*The scope of this topic* is noted below.[79]

*In Texas.* See 10 C. L. 1622—Sequestration will lie when plaintiff makes oath that he fears that the person in possession will injure or waste the property or remove it from the jurisdiction.[80] The writ may be granted although the plaintiff has never been in possession of the property.[81] The affidavit must give a sufficient description,[82] with the value of each item if the property be personal.[83] Where real property is sequestered, it is enough to describe and state the value of the whole number of acres.[84] Several grounds for the issuance of the writ may be alleged conjunctively if they are not inconsistent [85] and if not stated in the alternative.[86] Unless the delay is such as to warrant the inference that conditions have changed, lapse of time between the making of the affidavit and the commencement of suit affords no ground for a motion to quash.[87] In establishing the value of the property sequestered and of its use, the ordinary rules as to evidence apply.[88] A chattel mortgage authorizing the mortgagee to retake possession on breach of condition constitutes a complete defense to a reconvention for damages for making false affidavit and maliciously suing out the writ.[89] The bond in replevin of property sequestered must conform to the statutory requirements with regard to sequestration of real or personal property respectively.[90] A judgment on a bond in sequestration of land, conditioned against damage and for the payment of rents, includes growing and unharvested crops severed from the land during the pendency of the litigation.[91]

*In Louisiana.* See 10 C. L. 1623—Where it appears that plaintiff has no title nor right to the property, the writ is properly dissolved.[92] The order of dissolution is appealable if the writ was issued to protect property rights.[93] If the defendant

77. Meaning of term "virtuous." Woodard v. State, 5 Ga. App. 447, 63 SE 573.

78. See 10 C. L. 1622.

**Search Note:** See Sequestration, Cent. Dig.; Dec. Dig.; 25 A. & E. Enc. L. (2ed.) 477; 9 Id. 281; 19 A. & E. Enc. P. & P. 540.

79. **It includes** only the writ of sequestration as the same obtains in the states of Texas and Louisiana. **It excludes** sequestration by other process. See Receivers, 12 C. L. 1646 and like topics.

80. Is a plain, speedy and adequate legal remedy under Rev. St. 1895, art. 4864, subd. 2. Frazier v. Coleman [Tex. Civ. App.] 111 SW 662. Appropriate remedy for assignee for benefit of creditors in case where assignor repudiated assignment and refused to deliver the property. Id.

81. Assignee seeking possession as against assignor in insolvency could maintain action although never in possession. Frazier v. Coleman [Tex. Civ. App.] 111 SW 662.

82. Description held sufficient. Duncan v. Jouett [Tex. Civ. App.] 111 SW 981.

83. Is only when personal property is subject-matter of suit and is sought to be sequestered that value of each item must be stated in affidavit. Caruthers v. Hadley [Tex. Civ. App.] 115 SW 80.

84. Caruthers v. Hadley [Tex. Civ. App.] 115 SW 80.

85. Affidavit that plaintiff "fears that defendant will waste and convert to his own use the fruits produced during the pendency of this suit" held not duplicitous. Duncan v. Jouett [Tex. Civ. App.] 111 SW 981.

86. Duncan v. Jouett [Tex. Civ. App.] 111 SW 981.

87. Delay held not such as to warrant inference that conditions stated in affidavit had ceased to exist. Duncan v. Jouett [Tex. Civ. App.] 111 SW 981.

88. Market value of well-boring outfit could not be established by evidence of isolated sales. Hammond v. Decker [Tex. Civ. App.] 18 Tex. Ct. Rep. 556, 102 SW 453.

89. Nichols v. Paine [Tex. Civ. App.] 113 SW 972.

90. Replevin bond given for personal property sequestered under Rev. St. 1895, art. 4874, is essentially different from that prescribed under art. 4875 in cases of sequestration of real property, and invalid as a substitute therefor. Broussard v. Hinds [Tex. Civ. App.] 101 SW 855.

91. Love v. Perry [Tex. Civ. App.] 111 SW 203.

92. Sequestration of 20 mules claimed by plaintiffs as theirs under sale. Evidence held to show alleged sale not consummated. Donoven v. Travers, 122 La. 458, 47 S 769.

93. Hecker v. Bourdette, 121 La. 467, 46 S 575.

fails to file a bond to set the sequestration aside within the time allowed him by law for that purpose, the right to do so becomes exclusive in the plaintiff.[94]

Service, see latest topical index.

## SET-OFF AND COUNTERCLAIM.

§ 1. Nature and Extent of Right in General, 1821.
§ 2. To be Available as a Set-off or Counterclaim, a Demand Must, Ordinarily, Have Been a Vested and Subsisting Cause of Action at the Time of the Commencement of Plaintiff's Suit, 1823.
§ 3. Demands Must Be Mutual, and the Parties Must Stand in the Same Right and Capacity, 1824.
§ 4. To Admit of Set-Off or Counterclaim the Main Action Must be Similar in Form and Remedy to That Required for the Other, 1826.
§ 5. Pleading and Practice, 1827.

*The scope of this topic* is noted below.[95]

§ 1. *Nature and extent of right in general.*[96]—See 10 C. L. 1624—A set-off is a final demand growing out of an independent transaction, liquidated or unliquidated, not sounding in damages merely, subsisting between the parties at the commencement of the suit.[97] Except as confined to demands of similar nature under statute, it is purely an equitable right.[98] A counterclaim [99] or plea in reconvention [1] has all the characteristics of an independent suit, and must be tested by the ordinary rules relating to jurisdiction.[2] If the case be a proper one, defendant is entitled as a matter of right to plead and prove his counterclaim,[3] and such right is not defeated by the fact that a third party has a lien on the cause of action.[4]

*Equitable set-off.*See 10 C. L. 1624—Where no relief can be had at law, equity will order a set-off if justice requires it,[5] but facts constituting a complete legal defense cannot be made the basis for an equitable counterclaim.[6] Equity will grant relief

**94.** Under Code Prac. art. 279, providing that property sequestered may be delivered to defendant if proper bond is furnished within 10 days, and that if he fail to do so, the plaintiff has the same right, where defendant fails to file bond within 10 days, the right became exclusive in plaintiff, regardless of order to show cause why defendant should not be permitted to do so. Hecker v. Bourdette, 121 La. 467, 46 S 575.

**95.** Set-off of judgments (see Judgments, 12 C. L. 408) and effect of failure to assert set-off (see Former Adjudication, 11 C. L. 1537) are treated elsewhere.

**96. Search Note:** See notes in 4 C. L. 1422; 6 Id. 1443; 10 L. R. A. (N. S.) 734; 16 Id. 494; 47 A. S. R. 142, 578; 6 Ann. Cas. 720.

See, also, Set-off and Counterclaim, Cent. Dig. §§ 1-25; Dec. Dig. §§ 1-21; 25 A. & E. Enc. L. (2ed.) 519, 604; 25 A. & E. Enc. L. (2ed.) 488, 546, 568.

**97.** Poull & Co. v. Foy-Hays Const. Co. [Ala.] 48 S 785.

**98.** Plea of set-off based on tort not connected with note sued on and requiring affirmative equitable relief could not be entertained by city court of Miller county, it being without equity jurisdiction. Geer v. Cowart, 5 Ga. App. 251, 62 SE 1054.

**99.** Plaintiff could not, by dismissing original action, destroy defendant's right of action in counterclaim, and it was within sound discretion of court to refuse to allow such dismissal. Inman & Co. v. Hodges, 80 S. C. 455, 61 SE 958. Counterclaim by county treasurer sued by state held to be in effect suit against state and subject to rule that state cannot be sued without its consent. State v. Holgate [Minn.] 119 NW 792. In suit by state against county treasurer to compel payment of taxes, a claim by county for money lost through failure of depositaries could not be set up as counterclaim, it not being connected with the claim of the state, and therefore not consented to. Id.

**1.** Dixon v. Watson [Tex. Civ. App.] 115 SW 100.

**2.** Where amount exceeds jurisdiction of court, it cannot be considered. Dixon v. Watson [Tex. Civ. App.] 115 SW 100.

**3.** In summary proceedings to obtain possession of premises for nonpayment of rent, it was error to disregard tenant's defenses set up by way of counterclaim for goods sold landlord to knowledge of assignee of the rents. Costello v. Seidenberg, 110 NYS 924. Held that evidence of damage for withheld possession set up as counterclaim in action for rent should have been submitted to jury. Bailey v. Krupp, 59 Misc. 459, 110 NYS 994.

**4.** Defendant's right to set off judgment recovered by attaching creditor on merits not defeated by lien for attorney's fees for plaintiff in action on attachment bond. State v. U. S. Fidelity & Guar. Co. [Mo. App.] 115 SW 1081.

**5.** Insolvency of plaintiff. Willson v. Williams, 108 Md. 522, 70 A 409. Set-off allowed of mutual credits in suit upon promissory note, since, under strict rules of law, justice could not be effectuated. Tuttle v. Bisbee [Iowa] 120 NW 699.

**6.** In suit against surety on bond of trustee in bankruptcy, surety could not set up by way of equitable counterclaim that it was

where there are mutual credits between the parties founded on the existence of some debt due by the crediting party to the other,[7] although not constituting a legal counterclaim nor seeming within the statute of set-off.[8] Insolvency is a distinct ground of equitable set-off,[9] but such set-off will not be allowed if it creates a preference as to the other creditors.[10] The debtor of an insolvent cannot set off claims acquired after the execution of the assignment.[11] A wrongdoer who has in good faith taken goods in a crude state and enhanced their value may set off such value in suit for wrongful taking.[12] Expenses incurred in extinguishing an outstanding title cannot be offset by the vendee as against the purchase price where he is estopped from asserting such title.[13]

*Statutory set-off and counterclaim.* See 10 C. L. 1624.—It is generally provided that a counterclaim or set-off must be either a cause of action arising out of the transaction set forth in the complaint as the basis of the plaintiff's claim [14] or connected with the subject of the action,[15] or, in an action on contract, any other cause of ac-

not bound by decision of federal court in bankruptcy proceeding, since such defense was good at law. Cohen v. American Surety Co., 129 App. Div. 166, 113 NYS 375.

**7.** Total items of each year's services rendered by maker of note properly applied as credit on note on last day of each year, note providing for 8 per cent interest on interest not paid at maturity. Tuttle v. Bisbee [Iowa] 120 NW 699.

**8.** In suit by insolvent nonresident upon joint promissory note, defendants could set off individual claims although not joint. Piotrowski v. Czerwinski [Wis.] 120 NW 268. Such rights may be the proper subject for equitable counterclaim, under Prac. Act 1879 (Laws 1878-79, p. 43, c. 83, § 5), although not founded on any debt which could be called "mutual" under definitions established under statutes. Hubley Mfg. & Supply Co. v. Ives [Conn.] 70 A 615.

**9.** Judgment for cases due insolvent set off against debt not reduced to judgment claimed by adverse party. Willson v. Williams, 108 Md. 522, 70 A 409. Shareholder in insolvent corporation may, when sued for his liability for unpaid stock aside from suit for accounting in behalf of all creditors, set off a claim against the corporation for money loaned to it. Austin-Powder Co. v. Commercial Lead Co. [Mo. App.] 114 SW 67. Set-off of mutual indebtedness may be had where one of parties becomes insolvent, although amount sought to be canceled by set-off not due. Brown v. Sheldon State Bank [Iowa] 117 NW 289. A surety company sued by an assignee of principal for the recovery of money deposited with it as collateral could, after judgment against it upon another bond, set off such deposit against assignee's claim. Sullivan v. Bankers' Surety Co., 59 Misc. 54, 112 NYS 173.

**10.** In suit by trustee in bankruptcy to recover assets preferentially transferred, defendant was not entitled to offset money paid as guarantor of bankrupt's notes, since under facts it would result in giving the very preference which act is intended to prevent. Moody v. Chicago Title & Trust Co., 138 Ill. App. 233.

**11.** Would enable him to acquire preference to full extent of claim. Richardson v. Anderson [Md.] 72 A 485.

**12.** One who in good faith had felled trees not included in his lease and manufactured cross ties from them could recover enhanced value in set off. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270. Same rule applies if defendant not original trespasser but has innocently bought from trespasser. He may have value he himself has added and value added by vendor if latter has acted in good faith. Id.

**13.** Estoppel by knowledge of outstanding title at time of purchase and by relation of landlord and tenant. De Steagner v. Pittman [Tex. Civ. App.] 117 SW 481.

**14.** Claim for value of services performed in making collections properly set off against claim for advances made to traveling salesman, although no compensation agreed on for such collection. French, Finch & Co. v. Hicks [Tex. Civ. App.] 114 SW 691. Cutting of other trees than those included in contract or negligent cutting, injuring defendant's fencing, were matters arising out of transaction sued on and connected with subject of action under Civ. Code Prac. § 96. Cranor Smith Lumber Co. v. Frith [Ky.] 118 SW 307. In suit for balance due on goods, defendant might properly plead in reconvention that plaintiff had received land in part payment, together with abstract of title which he had converted to his own use. Rev. St. 1895, art. 755. Hamilton v. Dismukes [Tex. Civ. App.] 115 SW 1181. In action for sequestration of mules claimed by plaintiff, and for their rental value while in defendant's possession, defendant could properly plead in reconvention a breach of contract by plaintiff in not allowing him to carry out grading contract for which he bought the mules from plaintiff. Bateman v. Hipp [Tex. Civ. App.] 111 SW 971.

**15.** Counterclaim for price of sewing machines admissible under Revisal 1905, § 481, in suit for damages for defendant's failure to furnish successful agent for resale of machines. John Slaughter Co. v. Standard Mach. Co., 148 N. C. 471, 62 SE 599. In action by one joint tort feasor against the other for reimbursement for money paid to person damaged, held that defendant's counterclaim for reimbursement against plaintiff for money paid to another party injured by same cause was one directly connected with subject of action set forth in complaint. Fulton County Gas & Elec. Co. v. Hudson River Tel. Co., 130 App. Div. 343,

tion also on contract and existing at the commencement of the action,[16] but only in the latter case is it necessary that the counterclaim be due when the action is begun.[17] Where the cause of action arises out of the same transaction, it is immaterial whether plaintiff's cause of action is in tort or contract.[18] The statutory right of set-off is confined to demands or claims of a similar nature.[19]

*Recoupment.*[See 10 C. L. 1626]—In order that recoupment may lie, the cross claim must arise out of or be connected with the contract[20] or transaction which constitutes the plaintiff's cause of action,[21] and can be availed of only to that extent.[22] Damages for failure to carry out the contract sued on may properly be determined under a plea in recoupment.[23] While a plea of recoupment alone is equivalent to an admission that plaintiff has a cause of action, a mere notice of recoupment coupled with a plea of nonassumpsit does not have such effect.[24]

§ 2. *To be available as a set-off or counterclaim, a demand must, ordinarily, have been a vested and subsisting cause of action at the time of the commencement of plaintiff's suit.*[25]—[See 10 C. L. 1629]—The cause of action must have accrued at the time of the commencement of plaintiff's suit,[26] or concurrently therewith.[27] Where

113 NYS 22. In action for balance due on partition of land between tenants in common, damages for breach of independent contract to keep premises in repair could not be set up as counterclaim under Kirby's Dig. § 6099, providing that counterclaim must arise out of transaction set forth in complaint, or be connected with subject of action. Mitchell v. Moore [Ark.] 112 SW 216. Where only connection between two causes of action is that each grew out of transactions concerning same tract of land, it is not sufficient as basis for counterclaim. Id.

**16.** Counterclaim for price of sewing machines admissible under Revisal 1905, § 481, providing that where suit is on contract any other cause of action in contract may be pleaded, in suit for damages by vendee for defendant's failure to furnish honest agent for resale of machines. John Slaughter Co. v. Standard Mach. Co., 148 N. C. 471, 62 SE 599. Costs awarded against plaintiff in former trials properly pleaded as counterclaim under Code Civ. Proc. § 501. Braun v. Finger, 113 NYS 573.

**17.** Counterclaim of instalment of purchase price of sewing machines sold to plaintiff available in action ex delicto founded upon defendant's failure to furnish honest agent for resale of machines, although such instalment fell due after commencement of action. Revisal 1905, § 481, subs. 1. John Slaughter Co. v. Standard Mach. Co., 148 N. C. 471, 62 SE 599.

**18.** Revisal 1905, § 481, subs. 1. John Slaughter Co. v. Standard Mach. Co., 148 N. C. 471, 62 SE 599.

**19.** Civ. Code 1895, §§ 3996, 4944. Geer v. Cowart, 5 Ga. App. 251, 62 SE 1054. Counterclaim which does not arise out of, or is not connected with, the subject-matter upon which the complaint is based, is bad on demurrer for want of facts although the facts set forth might have constituted a good defense if pleaded by way of answer. State v. Spencer [Ind. App.] 86 NE 492.

**20.** On suit upon promissory note, damages arising out of plaintiff's breach of independent contract to extend time not pleadable in recoupment. Jester v. Bainbridge State Bank, 4 Ga. App. 469, 61 SE 926.

**21.** Defendants could not recoup against purchase price for husker failure to furnish pea-hulling attachment where husker was sold by company and contract therefor made with it, and pea-hulling attachment was sold by plaintiff under independent contract with him. Hinchman v. Johnson, 108 Md. 661, 71 A 424. Damages for delay in delivering books bought from plaintiff may be set up in recoupment in action for purchase price. Roberts-Manchester Publishing Co. v. Wise, 140 Ill. App. 443.

**22.** Defendant, sued for purchase price of certain furniture, could not recoup for damages arising through plaintiff's failure to make prompt delivery of other furniture, bought at same time, it appearing that contract of purchase was severable and not entire. Barlow Mfg. Co. v. Stone, 200 Mass. 158, 86 NE 306.

**23.** In action by subcontractor to recover on contract for construction work, if defendant had suffered damage on account of plaintiff's breach of the contract a plea of recoupment is the procedure by which defendant may have his damages considered. Poull & Co. v. Foy-Hays Const. Co. [Ala.] 48 S 785. Such plea may be maintained **against partnership,** although contract was entered into and partially carried out by one of members before partnership was formed (Posey & Co. v. West Const. Co. [Miss.] 46 S 402), even though action by partnership purports to be upon a quantum valebat, the material, however, having been delivered and received pursuant to the contract (Id.).

**24.** Hornblower v. George Washington University, 31 App. D. C. 64.

**25. Search Note:** See notes in 4 C. L. 1424; 15 L. R. A. 710; 17 Id. 456.

See, also, Set-off and Counterclaim, Cent. Dig. §§ 26-125; Dec. Dig. §§ 22-54; 25 A. & E. Enc. L. (2ed.) 512.

**26.** Defendant could not counterclaim for future expenses in selling fanning mills under contract with plaintiff where such expenses were problematical and had not yet been incurred. J. L. Owens Co. v. Doughty [N. D.] 116 NW 340.

**Held to have accrued:** Judgments that are subsisting claims against plaintiff when acquired by defendant may be offset by him

the counterclaim arises out of the same transaction, it is sufficient if it is due when filed.[28] It is only where the counterclaim is one in contract that the demand must be due when suit is commenced.[29] A statute requiring plaintiff to pay all damages arising from an unjustifiable seizure of mortgaged property does not change the rule.[30]

§ 3. *Demands must be mutual, and the parties must stand in the same right and capacity.*[31]—See 10 C. L. 1626—Counterclaim will be allowed in equity where there has been a mutual credit given by each party based upon the debt of the other.[32] Demands, to be the subject of set-off, must be mutual[33] between all parties to the

to their full value. Brackett's Adm'r v. Boreing's Adm'rs [Ky.] 115 SW 766; on rehearing, for former opinion, see Id., 33 Ky. L. R. 292, 110 SW 276. In suit for rent, where lease contained absolute obligation to make payment on 1st of month in advance, held that, if premises were rendered untenantable by fire, suspension of rent contemplated by lease might have been set up as counterclaim if such condition existed when next payment of rent was due. Einstein v. Tutelman, 59 Misc. 462, 110 NYS 1025. Plaintiff brought suit to enforce specific performance of clause in contract for release of obligations of maintenance of defendants. Held, plaintiff having breached contract before commencement of suit, defendants could set up such breach and enforce rescission by way of counterclaim. Mootz v. Petraschefski, 137 Wis. 315, 118 NW 866. Plaintiff's assignor having agreed to release certain stranded vessels, under contract whereby insurer would be saved from damage and not merely indemnified against loss, latter, when sued for contract price of services, could counterclaim for damages sustained by reason of delay in releasing boats, though payment had not been made to owner. Klauck v. Federal Ins. Co., 131 App. Div. 519, 115 NYS 1049.

**Held not to have accrued:** Counterclaim for damages arising out of wrongful issuance of attachment cannot be pleaded in answer to complaint in original action, there being no cause of action until writ dissolved. Veysey v. Bernard, 49 Wash. 571, 95 P 1096. Debtor of assignor for benefit of creditors cannot offset his liability as accommodation endorser on note to trust estate not yet due; otherwise if due when assignment made. Richardson v. Anderson [Md.] 72 A 485. In action to evict tenant for nonpayment of rent, held that tenant could not set off, against rent that had already accrued, damages arising from having to abandon premises by orders of tenement house department. Kressner v. Manganaro, 114 NYS 889. Evidence held to show that defendant had no basis for counterclaim for work and services set up in suit to recover money already paid by plaintiff for machinery to be constructed by defendant, it appearing that defendant had not fulfilled his contract. Vollmer v. Hayes Mach. Co., 129 App. Div. 426, 114 NYS 446. Cause of action set up in counterclaim held not to have accrued where it was based on damages for plaintiff's conversion before sale of grain covered by chattel mortgage given to him by defendant, conversion not taking place until after plaintiff had commenced foreclosure proceedings. Strehlow v. McLeod [N. D.] 117 NW 525. **Judgment** recovered by garnishee against debtor's estate could not be set off where it had been recovered subsequent to garnishment. Nordstrom v. Corona City Water Co. [Cal.] 100 P 242. Judgment for damages for injury to skins, for labor upon which suit was brought, not existing at commencement of action, could not be interposed as counterclaim. Rosenfeld & Co. v. Solomon, 61 Misc. 238, 113 NYS 723. In action for work and labor performed in dying skins, defendants could not, under Mun. Ct. Act, § 151, subd. 2, providing for counterclaims arising on contract and existing at commencement of action, interpose judgment recovered for damages done to such skins, although counterclaim was interposed before judgment recovered. Id.

**27.** Cause of action stated in counterclaim, based upon plaintiff's breach of contract not to sue on promissory note, held to have arisen concurrently with plaintiff's act in bringing suit, and consequently maintainable as counterclaim. Hall v. Parsons, 105 Minn. 96, 117 NW 240.

**28.** Promissory note could properly be pleaded as counterclaim, although it was not due when action was commenced, but became due before answer was filed. Code Civ. Proc. § 437, subd. 1. California Canneries Co. v. Pacific Sheet Metal Works [C. C. A.] 164 F 978.

**29.** Under Code Civ. Proc. § 438, providing that counterclaim may be pleaded when it arises out of same transaction or is connected with subject of action, or where it arises on contract where plaintiff's claim is also on contract existing at commencement of plaintiff's action. California Canneries Co. v. Pacific Sheet Metal Works [C. C. A.] 164 F 978.

**30.** Rev. Code 1905, § 7515, relating to conditions of undertaking required to be given by plaintiff before seizure of mortgaged property, and providing that plaintiff pay all damages which defendant may sustain by reason of unjustifiable seizure, in no way changes rule that counterclaim is restricted to cause of action in existence when action commenced. Strehlow v. McLeod [N. D.] 117 NW 525.

**31. Search, Note:** See notes in 6 L. R. A. (N. S.) 118; 9 Id. 781; 12 Id. 126; 55 A. S. R. 921; 2 Ann. Cas. 600; 8 Id. 307, 554.

See, also, Set-off and Counterclaim, Cent. Dig. §§ 76-122; Dec. Dig. §§ 41-53.

**32.** Services performed by defendant available as offset against claim for money loaned by plaintiff's decedent, where evidence showed that debts based upon mutual understanding. Printy v. Cahill, 235 Ill. 534, 85 NE 753.

**33.** Claim on certificate of deposit representing money borrowed against insolvent

action,[34] and must be brought in consequence of plaintiff's demand,[35] but, where separate judgments may be had, a counterclaim based upon a separate contract between several plaintiffs and one defendant may be pleaded.[36] That a third party has assumed to pay part of the debt does not prevent a set-off of the whole amount,[37] but a joint note of plaintiff and a third person cannot be set off, although the third person is surety merely.[38] A debt accruing to one in his individual capacity cannot be pleaded against a debt due from him as trustee,[39] nor can claims held by the same person in different representative capacities be set off against each other.[40] An administrator may set off claims accruing during his decedent's lifetime,[41] and one sued for a debt by the administrator may set up damages consequent upon intestate's death.[42] A surety may, with the consent of his principal, set up a debt due the latter.[43] When the action is brought by the assignee, claims against the assignor may be pleaded [44] to the extent of the interest assigned,[45] but claims

bank and claim of insolvent's receiver for amount owing by claimant on open account, held mutual and might be set-off against each other. Brown v. Sheldon State Bank [Iowa] 117 NW 289. Judgment for costs and open account not reduced to judgment are obligations of same kind or quality. Willson v. Williams, 108 Md. 522, 70 A 409. Plaintiff brought suit to recover for boarding defendant's horses, defendant set up damage to his wagons through plaintiff's failure to furnish suitable place for their accommodation. Held, that relation of bailor and bailee of wagons existed and that damage resulting from breach of contract would be set-off. Van Horn v. New York Pie Baking Co., 110 NYS 964. Underwriters sued by wrecking company for contract price of salvage services were not entitled to counterclaim for owner's damages for delay in floating vessels, contract with wrecking company disclosing neither benefit to, nor interest on part of owner. Klauck v. Federal Ins. Co., 111 NYS 1037.

**34.** Individual demand of one defendant for damages occasioned by plaintiff's negligence in making collection of certain notes not available in set-off against plaintiff's joint demand for legal services against two defendants. Priest v. Dodsworth, 235 Ill. 613, 85 NE 940. Counterclaim for tortious injury to child would not avail defendant wife in suit for wages due servant, since right to child's services and right to sue for their loss belongs to father exclusively. Weiss v. Rosenbaum, 115 NYS 121. St. 1907, p. 706, c. 372, providing that when defendant seeks affirmative relief against any party to action relating to transaction he may file cross complaint, held not to entitle guarantor of promissory note to bring in coguarantors and have contribution between them determined. Merchants' Trust Co. v. Bentel [Cal. App.] 101 P 31.

**35.** Reconventional demand not available when brought contingently against plaintiff's vendor in suit on warranty where vendor had made no claim against defendant. Andrews v. Sheehy, 122 La. 464, 47 S 771.

**36.** In foreclosure of mechanics' lien, counterclaim based upon separate contract between plaintiffs and defendant could properly be pleaded under Code Civ. Proc. 3416, providing for separate deficiency judgments. Valett v. Baker, 129 App. Div. 514, 114 NYS 214.

**37.** Costs awarded to insolvent party could be set off against such party's claim to amount not reduced to judgment but admitted to be due, although codefendant had assumed to pay part of such costs. Willson v. Williams, 108 Md. 522, 70 A 409.

**38.** Defendant cannot be compelled to set off against plaintiff's demand, joint note of plaintiff and another, although it is proven that plaintiff is principal and third person merely surety. Cross v. Gall [W. Va.] 64 SE 533. Section 3890, Code 1906, has no application to any case except joint suit against principal and sureties particularly covered thereby. Id.

**39.** Plaintiff as lessor of mine had no right to retain in its possession trust funds belonging to defendant lessee consisting of proceeds of ore previously mined, in order that it might off-set against such funds an amount of damages alleged to be due it for violation of terms of lease. Florence-Goldfield Min. Co. v. First Judicial Dist. Ct. [Nev.] 97 P 49.

**40.** Maker of promissory note held by receiver of insolvent bank has no right to set off deposit in bank standing in his name as executor. Stasel v. Daugherty, 7 Ohio N. P. (N. S.) 424.

**41.** Defendant could offset claim for services performed for plaintiff's decedent against claim for money loaned, since rights of other creditors not prejudiced, as that portion of debt which was paid in life time of deceased cannot be regarded as an asset of the estate. Printy v. Cahill, 235 Ill. 534, 85 NE 753.

**42.** One sued by administrator on note and mortgage made to decedent could set off damages caused to him through death of administrator's intestate and consequent failure to perform contract for services as dentist in defendant's office, it not appearing that defendant could have made as favorable terms with equally skillful dentist. Mendenhall v. Davis [Wash.] 100 P 336.

**43.** Failure of title to principal as to part of property, for sale of which injunction bond forming basis of suit was given. Fidelity & Deposit Co. v. Walker [Ala.] 48 S 600.

**44.** Loss sustained by employer through employe's neglect may properly be counterclaimed in suit by employe's assignee for wages. Sand v. Kenney Mfg. Co., 113 NYS 972. In action for money deposited in

against third persons, not parties to the assignment, cannot be set off against him.[46] A claim against a firm, of which plaintiff was formerly a member, cannot be set off where the suit is brought by the plaintiff in his individual capacity,[47] although an individual sued by partners may plead a claim against them to the extent that the claim accrued while the right thereto remained in the firm as such.[48]

§ 4. *To admit of set-off or counterclaim the main action must be similar in form and remedy to that required for the other.*[49]—See 10 C. L. 1627—Unliquidated damages cannot be set off against a claim founded upon contract,[50] nor against a liquidated claim,[51] unless the law provides a pecuniary standard for its measurement.[52] A claim arising ex delicto cannot ordinarily offset one arising ex contractu [53] or vice versa,[54] unless both causes of action are incident to the same transaction,[55] in which case it is immaterial whether the cause of action sought to be counterclaimed arises out of contract or tort.[56] A cause of action arising on con-

escrow to pay certain water rents on understanding that balance was to be applied on trustee's claim for services, held that in action by subsequent assignee of fund defendant could set up his rights under contract as to balance of fund by way of counterclaim. Natella v. Primstein, 114 NYS 342.

45. In action by assignee of notes executed by defendant to third party, defendant was not entitled to recover upon his counterclaim against assignor any greater sum than amount of notes with interest. Price v. Gatliff's Ex'rs, 33 Ky. L. R. 324, 110 SW 332.

46. Defendants, sued for money advanced to their employe to be used for their benefit, could not counterclaim against shipbrokers who had helped to procure advancement of money for misdeeds, it not appearing that plaintiff claimed as assignee through broker but in an independent cause of action. Commercial Nat. Bank v. Sloman, 194 N. Y. 506, 87 NE 811.

47. In suit by attorney for services, defendant could not set off claim against firm for printing. Cahill v. Dellenback, 139 Ill. App. 320. Depends on actual facts; and immaterial that defendant had no notice of dissolution of partnership. Id.

48. Where plaintiff brought suit on note for threshing machinery given by defendant, discounted by plaintiff's firm and later acquired by plaintiff who was member of firm, defendant could under Code Civ. Proc. § 106 (Cobbey's St. 1907, § 1109), set off his claim under contract with firm for sale of other machinery to extent that such claim had accrued at time firm owned note. Fish v. Sundahl [Neb.] 118 NW 82.

49. **Search Note:** See notes in 11 L. R. A. 257; 109 A. S. R. 137; 3 Ann. Cas. 486; 8 Id. 737.

See, also, Set-Off and Counterclaim, Cent. Dig. §§ 15-22; Dec. Dig. §§ 12-17; 25 A. & E. Enc. L. (2ed.) 488.

50. Damages held not made certain by allegations in declaration. Taylor-Stites Glass Co. v. Manufacturers' Bottle Co., 201 Mass. 123, 87 NE 558.

51. Claim by heirs of tax collector against succeeding collector for taxes collected and held in trust for plaintiff cannot be offset by liquidated demand arising from failure of plaintiff's decedent to pay money collected to state. Bond v. Poindexter [Tex. Civ. App.] 116 SW 395.

52. Set-off based upon failure of plaintiff to comply with covenants in deed providing for the supply of certain apparatus to be used in mine sold held not open to objection that damages were unliquidated, law giving pecuniary standard for their measurement. Fidelity & Deposit Co. v. Walker [Ala.] 48 S 600.

53. Civ. Code 1895, §§ 3996, 4944. Geer v. Cowart, 5 Ga. App. 251, 62 SE 1054. Claim in tort for damages sustained by reason of annoying suits and malicious prosecutions could not be set-off in action on contract for goods sold, although such actions grew out of same subject-matter as that upon which plaintiff's suit was founded. Brash v. Ehrman [Fla.] 47 S 937.

54. Defendants, when sued for wages due servant, could not counterclaim for tortious injury to their child. Weiss v. Rosenbaum, 115 NYS 121.

55. Where plaintiff brought suit for wrongful interference with easement to take away timber from defendant's land, defendant could not plead as counterclaim that plaintiff had cut timber, not sold, on another tract and under violaton of a contract not sued on by plaintiff. Cranor Smith Lumber Co. v. Frith [Ky.] 118 SW 307. Such tort might be waived and claim pleaded as set-off where only value of timber is claimed. Id. In replevin for horse held by defendant for keep, defendant might properly set up in defense his justifiable claim for sum due him as liveryman bailee, but he could not interpose as counterclaim another action on contract. Campbell v. Abbott, 60 Misc. 93, 111 NYS 782. It has long been settled that to avoid multiplicity of actions a defendant, when sued upon contract, may file counterclaim, even though it be in nature of tort arising out of same transaction. Caraway v. Kentucky Refining Co. [C. C. A.] 163 F 189.

56. Damages by reason of wrongful taking of threshing machine properly counterclaimed on action for purchase price. Northwestern Port Huron Co. v. Iverson [S. D.] 117 NW 372. Damages for failure to deliver tomatoes according to contract properly counterclaimed in replevin by plaintiff for tomatoes delivered but not paid for. Code Civ. Proc. § 605. Howard v. Haas, 131 Mo. App. 499, 109 SW 1076.

tract may be offset by a claim ex contractu, although founded upon the commission of a tort.[57] A cause of action founded on tort is not usually allowed as a counterclaim to another cause of action founded on tort.[58]

§ 5. *Pleading and practice.*[59]—See 10 C. L. 1628—The defendant is entitled to file a counterclaim at the time he files his answer.[60] It is not necessary that the answer in express terms designate the counterclaim as such, if it appears that it was so intended.[61] A pleading may serve both as a counterclaim and as an answer where it is filed as the separate pleading of several defendants,[62] but, where allegations which may constitute both a defense and a counterclaim are by express nomination, pleaded as a defense only, they must be treated as such.[63] The plea of set-off or counterclaim must contain the substance of a declaration [64] and must be tested by the rules applicable thereto.[65] It must not be pleaded contingently or hypothetically,[66] but affirmatively,[67] setting forth plainly the nature and extent of the claim.[68] If the statute requires it to allege that it rises out of the transaction

**57.** Judgment procured by defendant's assignor may be set-off against claim on bond for wrongful attachment, since such claim is one ex contractu, although founded on commission of tort. State v. U. S. Fidelity & Guar. Co. [Mo. App.] 115 SW 1081.

**58.** In action for false representations whereby plaintiff was induced to pay defendant a certain sum, latter could not, under Kirby's Dig. 6098, set up as counterclaim based upon wrongful arrest of defendant on charge of obtaining money under false pretenses and embezzlement. Jones v. Lewis [Ark.] 117 SW 561.

**59. Search Note:** See notes in 15 L. R. A. (N. S.) 340.

See, also, Pleading, Cent. Dig. §§ 286-298, 300, 1296-1298, 1384, 1385; Dec. Dig. §§ 138-146, 384, 411; Set-Off and Counterclaim, Cent. Dig. §§ 126-134; Dec. Dig. §§ 55-61; 19 A. & E. Enc. P. & P. 715.

**60.** Smith v. Redmond [Iowa] 119 NW 271. If defendant is not found to be in default with his answer, counterclaim filed in connection therewith, is not open to objection that it is not aptly filed. Id.

**61.** Designation "For second defense," and prayer for "such further relief as may be just," sufficient. Shotland v. Mulligan, 60 Misc. 58, 111 NYS 642. Under Code, it is improper to plead counterclaim by using phrase "by way of counterclaim;" it should be pleaded directly. Stroock Plush Co. v. Talcott, 129 App. Div. 14, 113 NYS 214.

**62.** Pleading contained but one statement of fact, facts as set forth purporting to be pleaded by each defendant for himself, one demanding judgment for damages, the others for costs. Held, pleading good as counterclaim in favor of the one so pleading it. Cleveland, etc., R. Co. v. Rudy [Ind. App.] 87 NE 555.

**63.** Allegations pleaded as "second and separate defense" could not be treated as counterclaim, especially as question turned upon want of reply, although prayer was for affirmative relief. Ortiz v. Cornell, 116 NYS 89.

**64.** Although Code 1907, p. 1202, form 37, enlarges subject of set-off, it does not relieve defendant from setting up in his plea an indebtedness from plaintiff to him. Light v. Henderson [Ala.] 48 S 588.

**65. Held sufficient:** Counterclaim, in suit for price of lumber sold under repudiated contract, not defective in failing to allege defendant's willingness to perform, there being no obligation to perform after repudiation. Holliday-Klotz Land & Lumber Co. v. Beekman Lumber Co. [Mo. App.] 116 SW 436. Where defendant was a citizen of Connecticut, and plaintiff a Massachusetts corporation sued on judgment rendered by a Rhode Island court, defendant could under Practice Act 1879 (Laws 1878-9, p. 43, c. 83, § 5), counterclaim for unliquidated damages for breach of contract. Hubley Mfg. & Supply Co. v. Ives [Conn.] 70 A 615.

**Held insufficient:** Allegations of fact in counterclaim against claim for services in stabling defendant's horses held not sufficient to state cause of action for money illegally paid to plaintiff. Armstrong v. St. Louis County Com'rs, 103 Minn. 1, 114 NW 89. Averment that former partner had received partnership assets, for which he had not accounted to one who was sued in replevin by vendor of engine and boiler, not sufficient averment to show such liability as partner in possession of funds as would make it available in set-off. Eureka Knitting v. Snyder, 36 Pa. Super. Ct. 336. Plea, seeking set-off for value of certain personal property turned over to plaintiff, demurrable in not alleging that property belonged to defendant. Light v. Henderson [Ala.] 48 S 588. Plea seeking set-off for value of certain personal property to plaintiff but averring no indebtedness for same is demurrable Id. In replevin action for piano, defendant could not maintain counterclaim based upon fraud in sale, where equitable relief of cancellation of notes for purchase price was payed in justice court, justice having no equitable jurisdiction. Small v. Speece, 131 Mo. App. 513, 110 SW 7.

**66.** Stroock Plush Co. v. Talcott, 129 App. Div. 14, 113 NYS 214.

**67.** In foreclosure of mechanic's lien damages, at rate per day fixed by contract, for each day defendant was kept out of possession, could not be recovered in absence of affirmative plea. Steltz v. Armary Co. [Idaho] 99 P 98.

**68.** Contractor garnisheed set up that defendant subcontractor was indebted to garnishee for damages incurred in building a certain railway line, but failed to definitely

set forth in the complaint, or is connected with the subject of the action, it is demurrable if it fails [69] to do so. If the counterclaims are in fact separately stated, they need not so allege,[70] but unless a counterclaim is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer,[71] and, where no such statement is made, it must be assumed that it is pleaded as a complete defense and must be tested as such.[72] When off-set is set up by notice, a former adjudication of the claim sought to be set off cannot be pleaded.[73] Unless set-off or counterclaim is pleaded no proof thereof can be made,[74] but in a proper case, if evidence is introduced without objection, a set-off may be adjudged.[75] Objections to the form of the counterclaim should be made by demurrer or replication.[76] Where the counterclaim is not properly itemized,[77] or if the notice of set-off is deficient, the plaintiffs must move before trial for a more specific bill of particulars,[78] but objection to the sufficiency of the notice of set-off cannot first be raised on appeal.[79] A plea of recoupment may be withdrawn as a matter of right at any time before the publication of the verdict.[80] It is within the discretion of the court to allow plaintiff to dismiss his suit after notice of set-off has been filed.[81] The right to a set-off cannot be determined on the hearing of a motion for an order to tax costs.[82] When a plea of set-off is accompanied by a

state claim or fix amount. Held insufficient. Monroe Grocer Co. v. Perdue & Co. [La.] 48 S 1002.

**69.** Code Civ. Proc. §§ 2938, 2945. Counterclaim held insufficient. Smith v. Rensselaerville Creamery Co., 131 App. Div. 387, 115 NYS 273.

**70.** Under Code Civ. Proc. § 507, providing that defenses or counterclaims shall be separately stated, such counterclaims need not recite that they are separately stated. Stroock Plush Co. v. Talcott, 129 App. Div. 14, 113 NYS 214.

**71.** Code Civ. Proc. § 507. Price v. Derbyshire Coffee Co., 128 App. Div. 472, 112 NYS 830.

**72.** Set-off of credits to bankrupt within four months before bankruptcy, not specifying as to which cause of action intended to apply under "c," § 40 of Bankr. Act, not sufficient since not constituting complete defense. Price v. Derbyshire Coffee Co., 128 App. Div. 472, 112 NYS 830.

**73.** Menke v. Barnhart, 137 Ill. App. 223.

**74.** Defendant could not prove right to additional credits in suit on notes where no set-off, counterclaim, or payment was pleaded. Rev. St. 1895, art. 1266. Richey Grocery Co. v. Warnell [Tex. Civ. App.] 103 SW 419. Failure to plead breach of warranty as counterclaim in suit for price of goods. Wilmerding v. Strouse, 112 NYS 1091. Instruction that defendant be allowed expenses and brokerage fees for transfer of land in which he had defrauded plaintiff properly refused, not being pleaded. Jameson v. Kempton [Wash.] 100 P 186. In quantum meruit for value of certain mantels and materials furnished defendant, it was error to permit recovery by defendant of damages sustained by him on account of defective workmanship, such counterclaim not being pleaded. Central Mantel Co. v. Thaler, 133 Mo. App. 86, 113 SW 220.

**75.** While set-off must be specially pleaded, and evidence in support of it not admissible unless so pleaded, when such evidence is introduced without objection, and right to recover is not confined by the prayers to the pleadings and evidence, the jury, or court sitting as jury, may find the set-off in defendant's favor. Richardson v. Anderson [Md.] 72 A 485. After plaintiff's evidence had been introduced on appeal in suit brought in justice court, defendant offered to prove set-off which had not been pleaded either in justice court or in circuit court. Held, evidence thereof should have been admitted, adverse party not having asked for bill of particulars. Cook v. Baker, 137 Ill. App. 401.

**76.** Caraway v. Kentucky Refining Co. [C. C. A.] 163 F 189.

**77.** Not fatal where no such objection taken and where testimony not objected to apprizes plaintiff of all the items. Horn v. Bates [Ky.] 114 SW 763.

**78.** Failure so to move held waiver. Dorrance v. Dearborn Power Co., 136 Ill. App. 86.

**79.** Dorrance v. Dearborn Power Co., 136 Ill. App. 86.

**80.** Is in nature of cross action and may be withdrawn under Civ. Code 1895, § 4970, allowing petitioner to dismiss suit at any time if adverse party not prejudiced. Dobbins v. Shy, 4 Ga. App. 433, 61 SE 737.

**81.** Where matter of set-off had already been decided in another court adversly to defendant, it was no abuse of discretion for court to allow him to dismiss his case and to carry set-off with it. Menke v. Barnhart, 137 Ill. App. 223. Where defendant based set-off upon contract for services but failed to show that contract was fully performed on his part, and court of own motion offered leave to withdraw plea of set-off, mere fact that defendant moved to be allowed to introduce evidence of a quantum meruit which motion was refused, did not justify court in subsequently refusing plea to be withdrawn. Cooper v. Andrews & Co., 137 Ill. App. 334.

**82.** On motion to tax costs by unsuccessful party, his right to set off against judgment for costs, an unliquidated claim, could not be determined. Bell v. Thompson [Cal. App.] 97 P 158

plea of the general issue to the plaintiff's entire claim, the set-off does not operate as an admission of the correctness of the plaintiff's account.[83] A general denial to the counterclaim puts in issue the facts upon which it is based.[84] Where the matter of recoupment grows out of the same transaction upon which the suit is brought, the recoupment may be proven under the general issue.[85] The burden is upon the defendant to prove his set-off [86] with detail and precision [87] by sufficient evidence.[88] That a tender of part of the amount claimed is made does not preclude defendant from setting up any counterclaim he may have.[89] Waiver is a defense was counterclaim.[90] The offsetting of defendant's claim by way of counterclaim is a complete bar to a subsequent action based upon such claim.[91] Where the amount of the claim and the amount of the counterclaim are equal, an affirmative judgment for defendant for the amount of the counterclaim and for costs is improper,[92] and it is error to give judgment for the full amount of the counterclaim where plaintiff has established his claim which exceeds the amount of the counterclaim.[93]

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**Settlement of Case; Settlements; Severance of Actions,** see latest topical index.

**83.** Oliver v. Noel Const. Co. [Md.] 71 A 959.

**84.** Proof of modification of contract upon which defendant based his claim might properly be made by plaintiff under general denial. Brooklyn Creamery Co. v. Friday, 137 Wis. 461, 119 NW 126.

**85.** Hubbard Mill. Co. v. Roche, 133 Ill. App. 602.

**86.** Poull & Co. v. Foy-Hays Const. Co. [Ala.] 48 S 785. Defendant sued upon contract for instruction and books furnished by plaintiff correspondance school set up counterclaim for money paid by him during infancy. Held burden rested upon him to show that it would be inequitable for plaintiff to retain the money. International Text-Book Co. v. Doran, 80 Conn. 307, 68 A 255. In suit on note, defendant had burden of showing set-off for advertising. Cahill v. Lauf, 133 Ill. App. 607.

**87.** Defendant's evidence of set-off for money advanced held insufficient to sustain it, in suit on note given by him. Cahill v. Lauf, 133 Ill. App. 607. Purchaser of land with outstanding titles which he has extinguished has burden of proving such outstanding title, where he sets up expense of extinguishing it as offset to purchase price. De Steaguer v. Pittman [Tex. Civ. App.] 117 SW 481.

**88. Held sufficient:** Showing that contract provided for set-off of amount of unpaid premium note sufficient to sustain plea in suit upon insurance policy. Union Cent. Life Ins. Co. v. Washburn [Ala.] 48 S 475. In action by contractor for balance due held that set-off of judgment for damages against city caused by contractor's negligence, together with expenses of appeals in damage suit, was properly allowed, proof showing that contractor had acquiesced in appeal. Murphy v. Yonkers, 131 App. Div. 199, 115 NYS 591. In suit on notes given on sale of a certain business, evidence held to sustain finding for defendant on counterclaim based upon agreement not to engage in competing business. Schwartz v. Smoke 115 NYS 221.

**Held insufficient:** In action for services defendant counterclaimed for amount of stipulated damages for breach of agreement of employment. Held that evidence failed to show breach of agreement of contract as a whole. Brownold v. Rodbell, 130 App. Div. 371, 114 NYS 846. In suit for wages earned by driver of ice wagon, company sought to offset as counterclaim amounts collected by plaintiff, but not turned over. Held evidence insufficient to support plea. Knickerbocker Ice Co. v. White, 133 Ill. App. 652. Failure to prove counterclaim for expenses incurred in extending chimney, erection of which was part of contract sued on by plaintiff. Logan Iron Works v. Klein, 132 App. Div. 16, 116 NYS 333.

**89.** Error for court to exclude proof of counterclaim, under Ballinger's Ann. Codes & St. § 4913 (Pierces' Code, § 380), for damages arising from plaintiff's negligent treatment as veterinary surgeon of defendant's horses, although defendant had made tender of part of amount sued for on account. Palmer v. La Rault [Wash.] 99 P 1036.

**90.** Evidence held not to show waiver of stipulated damages for delay in fulfilling contract to furnish materials. Reading Hardware Co. v. New York, 129 App. Div. 292, 113 NYS 331.

**91.** Offsetting of the defendant's entire claim by way of equitable counterclaim, in order that amount he might be called upon to pay in event that execution issue against him, is bar to subsequent action by defendant based upon claim so offset. Piotrowski v. Czerwinski [Wis.] 120 NW 268.

**92.** Amount of counterclaim where plaintiff's claim admitted could at best only be offset against such amount. Darlington v. Hamilton Bank, 63 Misc. 289, 112 NYS 1097.

**93.** In action for balance due for work and material furnished under written contract, it was error to give judgment for defendant for full amount of his counterclaim with costs, where it appeared that plaintiff was entitled to his claim which exceeded amount of counterclaim. New York Cornice & Skylight Works v. Zipkin, 114 NYS 58.

## SEWERS AND DRAINS.

§ 1. State and Municipal Authority and Control, 1830.
§ 2. General Powers Under the Various Statutes, 1831.
§ 3. Independent Organizations Controlling Drainage, Reclamation and Sanitation, 1832.
§ 4. Procedure in Authorization and Construction of Sewers and Drains, 1833.
§ 5. Compensation to Property Owners for Lands Taken or Damaged, 1840.
§ 6. Provision for Cost, 1842.
§ 7. Management and Operation; Duty to Properly Construct, Maintain, and Repair Works, and Provide Drainage, 1849.
§ 8. Private and Combined Drainage, 1851.
§ 9. Obstruction of Drains, 1851.

*The scope of this topic* is noted below.[94]

§ 1. *State and municipal authority and control.*[95] See 10 C. L. 1631—The construction of sewers by a municipality may be authorized by statute,[96] and legislative enactments, such as those providing for the connection of improved premises with the public sewer,[97] or authorizing one municipality to invade the territory of another to dispose of sewage,[98] are a proper exercise of the police power. Such statutes must conform to constitutional limitations.[99] A sewer is usually considered a public utility within the meaning of constitutional provisions permitting a debt in excess of the usual limitation where the purchase of public utilities is involved.[1] The authority of trustees of a district created for the disposal of sewage is to be determined by a construction of the act.[2] The right to construct and

**94.** Matters relating to eminent domain proceedings (see Eminent Domain, 11 C. L. 1198), public contracts (see Public Contracts, 12 C. L. 1442), public works and improvements in general, including special assessments therefor (see Public Works and Improvements, 12 C. L. 1478), the pollution of streams by sewage (see Waters and Water Supply, 10 C. L. 1996), and to drainage district bonds (see Municipal Bonds, 12 C. L. 897), are more fully treated elsewhere.

**95. Search Note:** See notes in 6 C. L. 1449; 38 L. R. A. 319; 61 Id. 673; 29 A. S. R. 737. See, also, Drains, Cent. Dig. §§ 1-3, 17; Dec. Dig. §§ 1-11; Municipal Corporations, Cent. Dig. §§ 711-761, 1519-1525; Dec. Dig. §§ 265-288, 708-715; 10 A. & E. Enc. L. (2ed.) 222, 237; 7 A. & E. Enc. P. & P. 211.

**96.** Laws 1902, c. 124 (P. L. p. 371), authorizing construction, etc., of sewers by incorporated towns, applies to any town incorporated at time proceedings under Act are begun. Frelinghuysen v. Morristown [N. J. Law] 70 A 77, afd. [N. J. Err. & App.] 72 A 2. Power of village under village law, to construct sewer at its own expense, is not abridged by orders made by board of health under Laws 1893, p. 1519, c. 661, § 72, authorizing board to require sewer system to protect water supply. Mead v. Turner, 60 Misc. 145, 112 NYS 127. City may be authorized to construct sewers and drains, but is not bound to do so. Schweriner v. Philadelphia, 35 Pa. Super. Ct. 128. City authorized to improve park, under no obligation to provide sewers with sufficient capacity to carry off water. Id.

**97.** District of Columbia v. Brooke, 29 App. D. C. 563.

**98.** Under Act 1902, c. 124 (P. L. 371), incorporated town need not secure consent of another municipality to erection of sewage disposal works within limits of latter. Frelinghuysen v. Morristown [N. J. Law] 70 A 77, afd. [N. J. Err. & App.] 72 A 2. Laws 1902, c. 124 (P. L. 371). Laws 1902, c. 124. Proper exercise of police power to protect public health. Id. Town not restricted by Act of Oct. 29, 1907 (P. L. 1907, p. 707), as to location of disposal works. Frelinghuysen v. Morristown [N. J. Law] 70 A 77. Affirmed by different reasoning. Frelinghuysen v. Morristown [N. J. Err. & App.] 72 A 2.

**99.** Laws 1902, c. 124 (P. L. 1902, p. 371), sufficiently expresses object of act in title. Frelinghuysen v. Morristown [N. J. Law] 70 A 77, afd. [N. J. Err. & App.] 72 A 2. Act Cong. May 19, 1896 (29 Stat. 125, c. 206), authorizing commissioners to make drainage connections with lots of nonresidents and to assess cost, and imposing fine upon residents for failure to comply with act, is unconstitutional and void as discriminating between residents and nonresidents. District of Columbia v. Brooke, 29 App. D. C. 563.

**1.** As in Const. art. 10, § 27. State v. Millar [Okl.] 96 P 747.

**2.** Under sanitary district act as to city of Chicago and adjoining municipalities, board of trustees of said district are not authorized to construct and levy assessments for sewer connecting with outlet. City of Chicago v. Green, 238 Ill. 258, 87 NE 417. History and previous enactments as to drainage district, considered. Id. Sanitary district act was enacted for construction of main channel or outlet for sewers and drains of various municipalities within district and to build additions so as to connect all sewers and drains with such main channel. Id; City of Chicago v. Green, 239 Ill. 304, 87 NE 1021. Act May 14, 1903 (Hurd's Rev. St. 1908, c. 24), enlarging boundaries of sanitary district of Chicago, construed, and words "adjuncts" and "additions" held synonymous with "auxiliary channel." Did not mean city sewers connecting with sanitary district so as to authorize district authorities to take charge of building of sew-

maintain a sewer imposes upon the land over which it is constructed a perpetual servitude, constituting a perpetual easement in favor of the city,[3] and such right may be acquired by prescription.[4] Permission for the construction of a sewer across the Illinois and Michigan canal is not within the constitutional provision that such canal be not sold or leased except by vote of the people.[5]

The legislative authority to enact drainage statutes is derived generally from the police power, the power of eminent domain, or the taxing power.[6] The element of public health may be considered the prime factor,[7] with the benefits and assessments as incidental.[8] From their beneficial nature, statutes of this kind will be upheld by the courts[9] and liberally construed,[10] though, as in other statutes, constitutional limitations must be observed.[11] The act determines whether a drainage law includes the subject of overflowed lands,[12] or whether natural water courses may be included in establishing a drainage ditch.[13]

§ 2. *General powers under the various statutes.*[14]—See 10 C. L. 1631

ers of municipalilites within district. City of Chicago v. Green, 238 Ill. 258, 87 NE 417; Id., 239 Ill. 304, 87 NE 1021.

**3.** A freehold estate in land to be acquired by deed, prescription or condemnation. City of Chicago v. Green, 238 Ill. 258, 87 NE 417. Mere license insufficient, being revocable. Id; City of Chicago v. Green, 239 Ill. 304, 87 NE 1021.

**4.** Ditch maintained over ten years. Sturges v. Meridian [Miss.] 48 S 620. City could not enlarge ditch by excavation or increasing flow of water. Id. Sewer constructed with permission of owner under oral agreement and maintained 7 years, until owner's death, and then 17 years more. Alderman v. New Haven [Conn.] 70 A 626. Easement may be acquired by 15 years' adverse use. Id. Use none the less adverse because beginning under contract where city claimed right. Id. Possession and use held so open that knowledge would be imputed to individual and successors in title. Id. Where city accepted proposition of landowner and was permitted to construct sewer, allowing owner connections without assessments and giving up proposed street, such sewer was constructed under an agreement which if written would be enforcible against owner and successors. Id. Not mere license, and equity would enforce. Id. Evidence of what occurred at meeting where oral contract granting permission to construct sewer was entered into, admissible. Id. Records of common council admissible to show acceptance of owner's proposition. Id.

**5.** Permission by commissioners not within constitution (Hurd's Rev. St. 1908, p. 75). City of Chicago v. Green, 238 Ill. 258, 87 NE 417.

**6.** Proceedings under Montana statute essentially of eminent domain. Summers v. Sullivan [Mont.] 101 P 166. Right to order local improvements derived from police power. Soliah v. Cormack [N. D.] 117 NW 125.

**7.** That proposed improvement is one of public utility is jurisdictional fact, and otherwise governmental power should not be exercised. State v. Hanson, 80 Neb. 724, 117 NW 412. Drainage improvements only to be entered upon to promote public health convenience or welfare. Id. Individuals cannot improve property through agency of government when public will not be benefited. Id.

**8.** Assessments incidental. Soliah v. Cormack [N. D.] 117 NW 125. A government in promoting public health, convenience or welfare will incidentally cast special benefits upon property of individuals which is reclaimed, and for this reason cost and expense of improvement may be taxed to property receiving special benefits. State v. Hanson, 80 Neb. 724, 117 NW 412.

**9.** Patent clerical error corrected, since otherwise drainage act would be destroyed. In re Barker [Ky.] 116 SW 686. Where title to Act March 27, 1908 (Acts 1908, p. 212, c. 73), expresses purpose to amend Carroll's Ky. St. 1903, § 2380, subsec. 11, etc., and body of act refers to subsec. 2, though amendment is pertinent to subsec. 11, legislature intended to amend and re-enact subsec. 11, though subsec. 2 remains in full force. Id. Drainage statutes often loosely drawn and only to be upheld by reason of public nature of work and actual benefits accruing to persons taxed. Appeal of Chandos [Wis.] 120 NW 523.

**10.** Liberally construed to promote public health, drainage and reclamation of wet or overflowed land. State v. Baxter, 104 Minn. 364, 116 NW 646.

**11.** Drainage Act of 1881 (Comp. St. 1907, c. 89, art. 1), restricted by title to draining swamp and marsh lands, is not void as contravening Const. art. 3, § 11, as to title of act. Omaha & N. P. R. Co. v. Sarpy County [Neb.] 117 NW 116.

**12.** Drainage Act of 1881 and subsequent enactments not intended to embrace subject of overflowed lands, especially where caused by surface waters. Campbell v. Youngson [Neb.] 118 NW 1053.

**13.** Ky. St. 1909, c. 76, art. 8 (Russell's St. 1909, §§ 4455-4485), authorizes inclusion of natural water courses as well as artificial ditches in establishing drainage ditch. Ex parte Barker [Ky.] 116 SW 1176, additional opinion to 116 SW 686.

**14. Search Note:** See Drains, Cent. Dig. §§ 1-3, 17; Dec. Dig. §§ 1-11; Municipal Corporations, Cent. Dig. §§ 711-761, 1519-1525; Dec. Dig. §§ 265-288, 708-715.

§ 3. *Independent organizations controlling drainage, reclamation and sanitation.*[15]—See 10 C. L. 1632—The authority to make improvements as to drainage may be conferred upon districts especially organized for that purpose and upon municipal corporations,[16] as well as upon county boards or special officers.[17] Drainage districts are quasi corporations[18] organized for a special and limited purpose,[19] with powers restricted to such as the legislature deems necessary.[20] An action for the recovery of benefits by one district against another may be authorized.[21]

*Limitation of drainage districts.*See 10 C. L. 1633—Under the statutes contiguous tracts of land extending into two or more counties may be included in one district,[22] branch ditches may be included,[23] and the boundaries of drainage districts may overlap.[24] A change of boundaries by commissioners may be subject to notice to the landowners.[25] Injunction may be maintained where the owner of land entirely outside a district connects with a drain without authority.[26]

*Combined systems.*See 10 C. L. 1633

**15. Search Note:** See notes in 2 L. R. A. (N. S.) 227; 12 Id. 900.

See, also, Drains, Cent. Dig. §§ 4-15; Dec. Dig. §§ 12-21; 10 A. & E. Enc. L. (2ed.) 233; 7 A. & E. Enc. P. & P. 209.

**16.** Competent for state to authorize creation of governmental agencies for enforcement of its police power (State v. Fuller [Neb.] 120 NW 495), and by great weight of authority, authority to make improvements as to drainage may be conferred upon municipal corporations, county boards, special officers, or districts organized for the purpose (State v. Hanson, 80 Neb. 724, 117 NW 412).

**17.** Legislature may clothe county commissioners, supervisors or other administrative officers or boards with authority to establish drainage districts for reclamation of lands which constitute a menace to public health. State v. Fuller [Neb.] 120 NW 495. Drainage Act (Rev. Code 1905, §§ 1818-1850) held not in conflict with Const. § 25, vesting legislative power of people in legislative power of people in legislative assembly. Not unwarranted delegation of legislative power to board of drainage commissioners. Soliah v. Cormack [N. D.] 117 NW 125. See, also, post, § 4.

**18.** Drainage district quasi corporation if act under which it is organized does not make it corporation in fact; but not created for political or governmental purposes. Bradbury v. Vandalia Levee & Drainage Dist., 236 Ill. 36, 86 NE 163. Drainage district a public corporation. People v. Anderson, 239 Ill. 266, 87 NE 1019. Corporations organized under various drainage acts have same powers, rights and liabilities, though methods of procedure may differ. Drainage Dist. No. 1 v. Dowd, 132 Ill. App. 499.

**19.** Drainage Dist. No. 1 v. Dowd, 132 Ill. App. 499. Drainage district an involuntary public corporation created and organized as an instrument of state to effect specified purpose in specified way. Bradbury v. Vandalia Levee & Drain. Dist., 140 Ill. App. 298.

**20.** Drainage Dist. No. 1. v. Dowd, 132 Ill. App. 499. Drainage district can only perform duties in manner provided by statute. Id.

**21.** Under drainage statute, Rev. St. 1905, p. 837, §§ 2, 4, 5, 6, it is error for court to submit issues of suit by one district against another for recovery of benefits to jury, but should be determined by court. Union Drainage Dist. No. 1 v. Drain. Dist. 1, 134 Ill. App. 478. Declaration by drainage commissioner under Farm Drainage Act, § 41 (Hurd's Rev. St. 1908, c. 42, § 116), to recover benefits resulting from improvement, fatally defective when failing to allege that channel improved was on defendant's land. Vermilion Special Drainage Dist. Com'rs v. Shockey, 238 Ill. 237, 87 NE 335.

**22.** Legislature not rendered powerless to include contiguous tracts of land into one district by fact that such lands extend into two or more counties. State v. Fuller [Neb.] 120 NW 495. Gen. Laws 1907, p. 474, c. 153 (Cobbey's Ann. St. 1907, § 5598 et seq.) authorizing commissioners of one county upon proper petition to establish a drainage district including lands in another county, is valid. Provision that county board wherein greater area is situated should act is reasonable. Id.

**23.** Comp. St. 1907, c. 89, are. 1, § 2, authorizing inclusion of branch ditches, etc., is not confined to ditches designed to drain land lateral to line of main ditch. Includes ditch north and east of initial point of main ditch. Omaha, & N. P. R. Co. v. Sarpy County [Neb.] 117 NW 116.

**24.** Under Gen. Laws 1907, p. 474, c. 153 (Cobbey's Ann. St. 1907, § 5598 et seq.), boundaries of drainage districts may lawfully overlap. State v. Fuller [Neb.] 120 NW 495.

**25.** Under Gen. Laws 1907, p. 474, c. 153 Cobbey's Ann. St. 1907, § 5598 et seq.), commissioners may change boundaries of district before rights of third parties accrue, but landowners must have three weeks' notice of election. State v. Fuller [Neb.] 120 NW 495. Notice should correctly describe boundaries of proposed district. Id. Where commissioners after notice of election change boundaries of district and do not change notice of election, landowner within altered district who did not participate in election may by timely action maintain quo warranto to dissolve district and oust officers. Id.

**26.** Lawrence v. Broadwell Special Drain Dist., 134 Ill. App. 590. Drainage Act 1885, § 42, permitting connection, etc., does not permit owner of outside tract to connect with district, where drainage of lands of others who have taken no action and assumed no burden is diverted. Id.

§ 4. *Procedure in authorization and construction of sewers and drains.*[27]—See 10 C. L. 1633—*Petition or application for drain or district.* See 10 C. L. 1635—The statutes may provide for a preliminary hearing by some governmental agency to determine whether the proposed drain will be a public benefit,[28] and thereupon the proposition of whether the benefits of the act shall be availed of may be submitted to vote.[29] Whether the procedure be that of petitioning for a district or applying for a drain, the statutes usually require that the applicants be freeholders,[30] landowners,[31] or persons residing within the district to be benefited.[32] The requirement of notice is essential,[33] though varying in the various states,[34] and provision for the same by a supplemental petition may be made.[35] It may be stated generally that all persons affected by the proposed proceeding must be made parties,[36] and the requirement will extend to political subdivisions.[37] The accuracy of the description

**27. Search Note:** See notes in 60 L. R. A. 161.

See, also, Drains, Cent. Dig. §§ 16-54, 60; Dec. Dig. §§ 24-39; Municipal Corporations, Cent. Dig. §§ 762-913; Dec. Dig. §§ 289-376; 10 A. & E. Enc. L. (2ed.) 237.

**28.** Necessary that some governmental agency be invoked to determine whether an improvement will in fact be benefit. State v. Hanson, 80 Neb. 724, 117 NW 412. Laws 1907, p. 474, c. 153, construed, and necessary inference that county board must determine public utility of proposed district. No imperative duty to fix boundaries if reclamation would not promote public health, convenience or welfare. Id. Under Gen. Laws 1907, p. 646, c. 448, § 3, court properly proceded on first hearing to determine whether proposed ditch would be public benefit and utility. Retrial at second hearing properly denied. Heinz v. Buckham, 104 Minn. 389, 116 NW 736.

**29.** After county board has determined that district would be public benefit, legislature may provide that property owners vote on proposition as to whether benefits of act be availed of. State v. Hanson, 80 Neb. 124, 117 NW 412. Provisions that only property owners vote, that vote be cast for each acre of land in district, that nonresident owners and foreign corporations owning land affected be allowed to vote, are proper. Bill of Rights, § 22, as to elective franchise, inapplicable. Id.

**30.** Person having in equity a right to premises in fee, a freeholder within statute. Bakker v. Fellows, 153 Mich. 428, 15 Det. Leg. N. 535, 117 NW 52. Lessee for life a freeholder under Comp. Laws § 8787, within Comp. Laws, § 4319, requiring application to be signed by 10 freeholders. Id.

**31.** Only landowners in proposed territory qualified to be petitioners for drainage district. People v. Seaman, 239 Ill. 611, 88 NE 212. Evidence held to warrant conclusion that "Newell Marks," a landowner in a district who was promotor of organization, and later commissioner under name of "H. N. Marks," was same person. Id.

**32.** Petition filed with court, praying for incorporation of drainage district held to sufficiently allege that it was signed by one-half of adult owners of lands within proposed district. State v. Wilson [Mo.] 115 SW 549. Under Kirby's Dig. § 1438, where drainage ditch is to be located in two counties, only those whose lands are liable to be benefited may proceed to establish a joint drainage district. Where no lands to be benefited in one county, district could not be formed. Beasley v. Gravette [Ark.] 110 SW 1053. Laws 1895, p. 274, c. 115, § 4, as to drainage districts, contemplates inclusion of other lands than those benefited thereby. Northern Pac. R. Co. v. Pierce County [Wash.] 97 P 1099.

**33.** Notice of hearing of county commissioners, jurisdictional. Johnson v. Morrison County [Minn.] 119 NW 502. Under drainage Act (Laws 905, p. 456, c. 157), petition for main drain, and subsequent supplemental petition for an arm, are not one proceeding, so that party served with notice of principal petition is deemed to have notice of supplemental petition. Righter v. Keaton, 170 Ind. 461, 84 NE 977. Statute does not fix time of giving notice of filing, and service must therefore be made within a reasonable time. Id.

**34.** Under Rev. Codes, § 2415, proceedings for drain are not invalid for failure to name nonconsenting landowner, where land is described. Allegations of complaint as to nonconsenting landowner held insufficient. Summers v. Sullivan [Mont.] 101 P 166. In proceedings to condemn a drainage right of way, a married woman having only an inchoate right of dower in her husband's land is not a necessary party. Id.

**35.** In drainage proceeding, jurisdiction may be extended over all persons by supplemental petition. Burns' Ann. St. 1901, § 5629; Burns' Ann. St. 1908, § 6148. Karr v. Putnam County Com'rs, 170 Ind. 571, 85 NE 1. Acts 1905, p. 456 c. 157, § 8, provides right to file supplemental petition for arms or branches of drain, notice of which shall be given as provided in filing of original petition. Richter v. Keaton, 170 Ind. 461, 84 NE 977.

**36.** All landowners affected by proposed establishment of public drain are required to be made parties. Karr v. Putnam County Com'rs, 170 Ind. 571, 85 NE 1. Includes holders of easements. Id. Any party whose lands are affected by drainage proceeding may file petition therein to be made party during progress of work. On filing of petition, it is right and duty of court or judge to protect landowner's interest as circumstances may require. Id.

**37.** Necessary, either by original or supplemental proceedings, to make political subdivision having ownership or quasi own-

of the land in the petition varies with the procedure of the various states.[38] Pending proceedings may be protected by a saving clause where a statute is repealed.[39]

The formation of a district may be effected by user,[40] and a new district may be organized for the maintenance of such ditches which become out of repair.[41] A subdistrict need not be formed for a small extension of one ditch.[42]

*A report by viewers or commissioners* See 10 C. L. 1637 is usually provided by the statutes as a step in the proceedings.[43] Such report may be in the nature of a decision,[44] being prima facie evidence of the facts therein set forth.[45] A report will not be held defective for a slight irregularity.[46]

ership of bridge or highway affected by drain a party, that public interest may be represented in determining whether taking is necessary. Karr v. Putnam County Com'rs, 170 Ind. 571, 85 NE 1. Township trustee, upon whose township rests primary duty of repairing a bridge, should be party. Id.

**38.** In petition that county commissioners entertain proceeding, description of proposed ditch need only be stated with approximate accuracy. Johnson v. Morrison County [Minn.] 119 NW 502. Petition under Rev. St. 1899, § 8319 (Ann. St. 1906, p. 3935), held to sufficiently describe proposed district and levee, boundary lines and description being stated with greatest detail, and also describing ditches, levee, giving general course, etc. State v. Wilson [Mo.] 115 SW 549.

**39.** Pending proceedings for ditch, within saving clause of Acts 1905, p. 456, c. 157, may be completed as though act had not been passed. Johnson v. Amacher [Ind.] 86 NE 1014. Under Act March 6, 1905 (Acts 1905, p. 456, c. 157), providing new drainage law, repealing other laws, but providing that repeal does not affect pending proceedings where lake exceeding 10 acres in area will not be affected, petition held to show that lakes would be affected by plan of drainage when branch was to commence at outlet of lake more than 10 acres in area, etc. Kunkalman v. Gibsson [Ind.] 84 NE 985. Statute does not require that there be both an attempt to lower a lake and an actual situation in which the construction of drain will have that effect to terminate drainage proceeding, but either sufficient. Kunkalman v. Gibson [Ind.] 86 NE 850. Where attempt in fact to affect protected lake when Act of 1905 (Laws 1905, p. 456, c. 157) became effective, there was no authority to continue proceeding. Time referred to necessarily testing time with every drainage proceeding then pending. Kunkalmann v. Gibson [Ind.] 84 NE E 985. Act of 1885 not continued in force as to existing drainage proceedings by virtue of Burns' Ann. St. 1901, §§ 243, 248. All former "acts" repealed. Id. No disturbance of vested rights of plaintiffs by repeal of drainage act of 1885 (Acts 1885, p. 159, c. 40) by Act of 1905 (Acts 1905, p. 456, c. 157). Id.

**40.** Under Farm Drainage Act (Hurd's Rev. St. 1908, p. 867, c. 42, § 151), § 76, providing for formation of drainage districts by user, only such lands can be included as those of which owners have voluntarily connected with main ditch or branches. People v. Strandstra, 238 Ill. 341, 87 NE 286.

**41.** Under Hurd's Rev. St. 1905, c. 42, § 152, permitting formation of drainage district to include lands interested in maintenance of ditches, out of repair, previously constructed by voluntary action of parties, commissioners of highways, in corporate capacity and as representatives of public, are to be considered as owners of land, where ditch was originally constructed in highway by commissioners and adjoining owners have merely drained their lands thereunto. People v. Magruder, 237 Ill. 340, 86 NE 615. Commissioners held to be in same category with, and subject to same burdens as, other landowners, the situation being the same as though lands in highway were owned by private persons without burdens of easement. Id. It is not fatal to the organization of a drainage district under Hurd's Rev. St. 1905, c. 42, § 151, that certain lands, owners of which contributed toward improvement of existing ditch which left system of combined drainage in existence, which is now out of repair, etc., are not included in petition for such organization. Id. Under Hurd's Rev. St. c. 42, § 151, owners of land draining into ditch both before and after improvement thereof, but who contributed nothing to expense of improvement, are parties who have by voluntary action constructed ditches, etc., where before improvement was made such owners were owners of lands which with other land described in petition required combined system of drainage, where they had constructed ditches draining into ditch draining highway prior to deepening of latter and such deepening left system of combined drainage in existence. Id.

**42.** Where district organized under farm drainage act, it was not necessary to organize a subdistrict to extend one ditch 800 feet from the upper end. People v. Sullivan, 238 Ill. 386, 87 NE 306.

**43.** Under Gen. Laws 1907, p. 641, c. 448, surveyors and viewers may be appointed after which merits of ditch are determined at hearing. Heinz v. Buckham, 104 Minn. 389, 116 NW 736. Under Code Supp. 1907, tit. 10, c. 2, § 1989a2 et. seq., survey and report by engineer is prerequisite to authority of board of supervisors to establish district. Hartshorn v. Wright County Dist. Ct. [Iowa] 120 NW 479. Under Ky. St. 1903, § 448, as to majorities, report by two of three reviewers appointed by county court is valid. Bennett v. Knott [Ky.] 112 SW 849.

**44.** Proceeding may be dismissed at any time before report of commissioners. Pumphrey v. Hollis [Ind. App.] 87 NE 255.

**45.** Acts 1907, p. 508, c. 252. Zehner v. Milner [Ind.] 87 NE 209. Proper evidence on remonstrance. Id.

**46.** Commissioner's report stating amount of damages to each tract separately, so that

*Remonstrances.*See 10 C. L. 1636—The statutes usually provide an opportunity for hearing objections before a final order is entered.[47] The right of remonstrance being given by statute can only be enjoyed by a compliance with the terms on which it rests.[48]

*Final hearing; organization of district; order for work.*See 10 C. L. 1637—At the final hearing, the feasibility of the proposed drain may be submitted to the jury [49] under appropriate instructions.[50] In the absence of statute, general procedure provisions obtain.[51] Objections to reports of viewers should be timely,[52] though the proceedings are usually to be liberally construed.[53] Where authority as to the con-

addition was all that was necessary to ascertain aggregate, held in sufficient compliance with statute requiring statement of aggregate. State v. Wilson [Mo.] 115 SW 549. While commissioner's report did not state whether proposed district would embrace all of land to be damaged and benefited, it did state that 3,500 acres of land, with names of owners, would be reclaimed and drained, and though falling short of statute, under Rev. St. 1899, § 8331 (Ann. St. 1906, p. 3941), defect was mere irregularity and not jurisdictional question. Id. Objection to reviewer's report as not made in accordance with law in that route specified was not followed, improperly raised. Johnson v. Amacher [Ind.] 86 NE 1014.

**47.** In a ditch proceeding under Gen. Laws 1907, p. 641, c. 448, where court appoints engineer and viewers and requires filing of their respective reports, notice of the second and final hearing must be given and an opportunity for objections by parties interested afforded. Heinz v. Buckham, 104 Minn. 389, 116 NW 736. Chapter to be construed as a whole. Id. Under Gen. Laws 1907, p. 641, c. 448, three classes of cases are contemplated: First, court may finally establish ditch at first hearing, as where petitioners agree to pay all expenses; second, court may deny petition at first hearing where objections are sufficient and to avoid unnecessary expense; third, at first hearing, objections may not be so clear as to justify conclusion adverse to petitioners, and merits may not justify immediate establishment of ditch. Id. In latter case, surveyor and viewers are appointed and merits determined after investigation and hearing. Id. Under Gen. Laws 1907, p. 641, c. 448, action of court in determining questions as to public utility of ditch and benefits and damages on reports of surveyor and viewers appointed on prior proceedings dismissed on merits, after which ditch extension was ordered, and on second hearing excluding objection to ditch, was error. Id. In ditch proceeding under Gen. Laws 1907, p. 641, c. 448, petitioners who appeared at first hearing and demanded additional damages at second hearing were not prevented by estoppel or election of remedies from objecting to establishment of ditch. Id.

**48.** Righter v. Keaton, 170 Ind. 461, 84 NE 977. Right to have petition for drain dismissed under Act 1905, p. 456, c. 157, dependent upon signature of two-thirds of parties interested, and assessable as determined by preliminary report. Id. Remonstrance not signed by two-thirds of persons affected should be overruled. Id. Failure of petitioner to do duty with respect to notice of arm to drain did not modify statute or affect class necessary to vote on remonstrance. Id. Under facts, reasonable time had not elapsed when remonstrance was filed, and court could have ordered petitioner to give required notice. Statute to be liberally construed. Id. As a ground of remonstrance against a final report, it is not sufficient to use the general terms of the statute that the report is not according to law, but the particulars must be specified (under Acts 1905, p. 461, c. 157, § 4). Northern Indiana Land Co. v. Tyler, 170 Ind. 468, 84 NE 828. Remonstrance insufficient even if drainage commissioners did not file report within time directed by court. Northern Indiana Land Co. v. Tyler, 170 Ind. 468, 84 NE 828.

**49.** Whether proposed ditch will be benefit to lands assessed and a public utility, question for jury. Bennett v. Knott [Ky.] 115 SW 849.

**50.** Not erroneous to charge jury to consider that parties liable for cost are liable for maintenance and repairs. Bennett v. Knott [Ky.] 112 SW 849.

**51.** For government of courts, wherein jurisdiction over drainage proceedings is vested. Karr v. Putnam County Com'rs, 170 Ind. 571, 85 NE 1.

**52.** Where, on proceeding to establish ditch, parties announced themselves ready and went to trial before jury, motions to quash report of viewers and to file report of reviewers came too late. Such motions matters in abatement waived by going on trial. Bennett v. Knott [Ky.] 112 SW 849. Objection to reviewer's report improperly raised by unverified motion to dismiss after return of adverse verdict. Johnson v. Amacher [Ind.] 86 NE 1014. Where remonstrator's exceptions to preliminary report went to merits, motion to dismiss on ground that report was not filed within time directed by court was too late. Such motion should have been made at earliest opportunity. Northern Indiana Land Co. v. Tyler, 170 Ind. 468, 84 NE 828. Remonstrators had recognized validity of report by objecting to merits. Id. Under Acts 1905, p. 458, c. 157, § 3, providing that preliminary report of drainage commissioners be prima facie evidence of facts stated in subsequent proceedings, where remonstrators waived right to strike out such report for failure to file in time, they waived right to object to its subsequent admission as prima facie evidence. Id.

**53.** Under Acts 1905, p. 470, c. 157, § 8, providing that act be liberally construed, etc., court committed no reversible error in permitting preliminary report to be read in evidence. Northern Indiana Land Co. v. Tyler, 170 Ind. 468, 84 NE 828. Refusal to

struction of the entire drain is vested in the courts,[54] mere improper use of the power will not render a judgment ipso facto void.[55] Such courts may condemn property [56] or order and complete the construction of a public drain extending into another county.[57]

As a result of the final hearing, the court may promulgate the order for the establishment and construction of the ditch,[58] which order should conform to statute [59] and should definitely locate the ditch.[60] An order of county supervisors may be confined to the approval of plans adopted by an engineer,[61] and the order of a county board considered as an exercise of legislative or administrative discretion, is subject to rescission.[62] Authority may be granted to county supervisors to fix such conditions as to letting contracts as are necessary to protect the persons and townships affected by the proceedings.[63] In the absence of statute, a drainage district may properly extend its outlet into another county.[64] The determination of the legality of the organization of a drainage district may be vested in a county court,[65] and the judgment rendered is regarded as conclusive.[66]

allow filing of report of reviewers, harmless where merely advisory and question remained at trial whether on evidence ditch should be opened. Bennett v. Knott [Ky.] 112 SW 849.

**54.** Burns' Ann. St. 1908, § 6147, providing that drainage commissioner be at all times under control of court, applies to orders of judge in vacation. Karr v. Putnam County Com'rs, 170 Ind. 571, 85 NE 1. Commissioner and contractor in drainage proceeding agencies or arms of court. Necessarily incident to authority to construct drain that both be under jurisdiction and subject to contempt for disobedience of ad interim orders of court or judge in vacation. Id.

**55.** Since courts possess broad powers. Karr v. Putnam County Com'rs, 170 Ind. 571, 85 NE 1. Judgment establishing public drain not invalid because seriously injuring or destroying highway bridge. Id.

**56.** Circuit court has jurisdiction to condemn property for drainage purposes, under statute. Zehner v. Milner [Ind.] 87 NE 209. Where mill is run almost for private use or benefit and does very little grinding for toll, drainage commissioners may take dam for public use in preventing overflows and removing stagnant water though mill dam was originally secured by condemnation. Id.

**57.** Karr v. Putnam County Com'rs, 170 Ind. 571, 85 NE 1.

**58.** Under Gen. Laws 1907, c. 448, p. 641, court is not necessarily bound by finding on first hearing that ditch will serve public ends. Heinz v. Buckham, 104 Minn. 389, 116 NW 736.

**59.** Rev. Laws 1905, p. 303, c. 230, § 1, construed and in establishing ditch, where waters are to be diverted from natural course, ditch should follow general direction of watercourse when practicable. State v. Baxter, 104 Minn. 364, 116 NW 646. Departure permissible when necessary. Id.

**60.** Order required by Laws 1905, p. 315, c. 230, § 10, establishing ditch, must in itself, or by reference to engineer's report, definitely locate ditch by giving proper starting point, route and terminous. Order void. Johnson v. Morrison County [Minn.] 119 NW 502.

**61.** Under Code Supp. § 1989a5, § 1989a2, § 1989a3. May not adopt or consider other plans not recommended by competent engineer. Hartshorn v. Wright County Dist. Ct. [Iowa] 120 NW 479.

**62.** State v. Ross [Neb.] 118 NW 85. County board upon petition may rescind order for ditch where no rights have accrued in consequence of order and no proceedings have been taken thereunder except employment of engineer who performed portion of preliminary work of surveying. Id.

**63.** Authority granted boards of supervisors of counties by Pub. Acts 1905, p. 32, No. 21, amending general drain law, is within Const. art. 4, § 38, providing that legislature may confer powers of local legislative and administrative character on county boards. Chandler v. Heisler, 153 Mich. 1, 15 Det. Leg. N. 333, 116 NW 626. Laying of drains a neighborhood matter. Id. Condition precedent to construction of drain, implied by resolution of county board of supervisors acting under Pub. Acts 1905, p. 32, No. 21, required that permission be signed by majority of members of each township board, the townships necessarily acting severally. Id. Resolution imposing conditions precedent to contract, not invalid as delegation of legislative authority to township boards or members, the power being for the protection of rights of township. Id. Supervisors, in imposing condition precedent, pursuant to Pub. Acts 1905, p. 32, No. 21, might permit township board, in consenting, to dispense with formality usually required, and signatures of individuals were proper. Id.

**64.** Beasley v. Gravette [Ark.] 110 SW 1053.

**65.** Rev. St. 1899, § 8331 (Ann. St. 1906, p. 3941), expressly gives county court jurisdiction. State v. Wilson [Mo.] 115 SW 549.

**66.** Under Rev. St. 1899, § 8331 (Ann. St. 1906, p. 3941), where parties within district were notified of hearing before county court as to assessment and incorporation of district, judgment rendered after hearing was conclusive upon all objections to incorporation of district, legal or jurisdictional. State v. Wilson [Mo.] 115 SW 549. Finding as to necessity of proposed district and that drain would be useful for drainage of land to be used for agriculture held in substantial compliance with statute. Id. Where orders of county court in proceedings for organization

Proceedings for drains have been held to be in rem, subject to being brought forward from time to time on notice.[67]

*Validity and performance of contracts* See 10 C. L. 1037 for drains is controlled largely by the general rules governing public contracts [68] and other public works.[69] Statutory provisions govern an officer's authority in accepting work [70] and paying for the same.[71] The employment of a drainage commissioner as an engineer may be violative of statute.[72] In the absence of contractual provisions to the contrary, a contractor may employ the usual and approved means of excavation,[73] and is not liable for damages naturally resulting to adjacent lands,[74] though reasonable care should be used to avoid injury.[75]

*Attack on proceedings.* See 10 C. L. 1038—Objections to a drainage improvement must be of a substantial character [76] by a proper party litigant,[77] and while injunction is proper in certain cases, as where the proceedings are defective,[78] a landowner cannot disregard a court vested by statute with authority as to the drain and proceed in another court.[79] Usually acts of drainage commissioners can not be questioned collaterally,[80] unless a jurisdictional defect is shown.[81] Per-

of drainage district state that due notice has been given according to law, and that court has jurisdiction of parties and subject-matter, finding cannot be contradicted by parol. Spring Creek Drainage Dist. v. Joliet Highway Com'rs, 238 Ill. 521, 87 NE 394. Where nothing in record to contradict findings, district held duly organized, and report of commissioners in accordance with levee act, duly confirmed. Id.

**67.** Proceedings need not be kept on docket, but may be brought forward on notice, on supplementary petition. Staton v. Staton, 148 N. C. 490, 62 SE 596. Judgment, in proceeding under Revisal 1905, §§ 3983-4028, for right to drain into canal, confirming report of commissioners, duties of parties and amount each should pay, is not final. Id. Supplementary proceeding under drainage act (Revisal 1905, §§ 3983-4028). setting out that repairs are needed, etc., is not uncertain for restating termini of canal. Id. Sufficient in original proceeding or plaintiff should be allowed to amend. Id. Proceedings not highly technical, but intended to be inexpensive, molded from time to time by orders of court as may best promote beneficial results contemplated. Id.

**68.** See Public Contracts, 12 C. L. 1442.

**69.** See Public Works and Improvements, 12 C. L. 1478.

**70.** Under drainage act (Laws 1887, p. 148, c. 97), authority of county surveyor is limited to inspecting work when completed, and accepting same. Cannot authorize incurring of extra expenses. Bowler v. Renville County, 105 Minn. 26, 116 NW 1028. Acceptance of completed ditch with knowledge of extra work by contractor not ratification to render county liable. Id.

**71.** Laws 1905, p. 321, c. 230, § 17, with proviso at end, authorizing partial payments on drainage contracts when approved by county auditor and engineer in charge of work construed, and payments authorized without consent of county commissioners. Moody v. Brasie, 104 Minn. 463, 116 NW 941.

**72.** Under Rev. St. 1899, §§ 8318-8345, (Ann. St. 1906, pp. 3935-3947), as to duties of drainage commissioners, employment of one by other two as engineer would be against intent of law and in violation of absolute prohibition, in § 8336. Seamon v. Cap-au-Gris Levee Dist. [Mo.] 117 SW 1084. Compensation not recoverable. Id.

**73.** Not liable for injuries to adjacent property. Fitzgibbon v. Western Dredging Co. [Iowa] 117 NW 878.

**74.** While carrying plan of drainage into execution. Fitzgibbon v. Western Dredging Co. [Iowa] 117 NW 878. Where contract for ditch provided that same be cut across course of stream, but did not bind contractor to care for surplus water by establishing dams and by-passes, contractor in undertaking to excavate ditch according to plans was not liable for injuries caused by overflow. Id.

**75.** Fitzgibbon v. Western Dredging Co. [Iowa] 117 NW 878.

**76.** Evidence that lands would be injured by drain insufficient to sustain finding to that effect. Backus v. Conroy, 104 Minn. 242, 116 NW 484.

**77.** Objections that drainage district improperly included certain lands improper, where litigant had no pecuniary interest in same; no allegation that plaintiff's property was of class not benefited. Esteves v. Bayou Terre-Aux-Boeufs Drainage Dist. Com'rs, 121 La. 991, 46 S 992.

**78.** Injunction proper to prevent county drain commissioner from proceeding to construct a drain, where conditions precedent imposed by county supervisors pursuant to statute are disregarded. Chandler v. Heisler, 153 Mich. 1, 15 Det. Leg. N. 333, 116 NW 626. Where three railroad companies (owner, lessee and sublessee) joined to restrain proceedings, under drainage act of 1881 (L. 1881, p. 236, c. 51) on ground that due notice was not given, plaintiffs have burden of showing want of knowledge of existence of proceedings at time to appear and contest same. Omaha & N. P. R. Co. v. Sarpy County [Neb.] 117 NW 116.

**79.** Karr v. Putnam Com'rs, 170 Ind. 571, 85 NE 1.

**80.** In locating and constructing drains. Southern Indiana R. Co. v. Railroad Commission of Indiana [Ind.] 87 NE 966.

**81.** In action to enjoin removal of bridges in construction of drain where drainage proceedings collaterally attacked for want of notice, complaint was insufficient when failing to show what record shows concerning matters which might confer jurisdiction.

sons not parties to the drainage proceedings may enjoin the wrongful overflowing of lands,[82] and an injury to public highway bridges may be prevented,[83] but, where the proceedings are in the exercise of eminent domain, an impairment of rights, which is an element of damages, will not give rise to a cause of action by injunction.[84] A ditch constructed under an unconstitutional statute may be regarded as a private enterprise.[85] An information in the nature of quo warranto against individuals, assuming to exercise the powers of drainage commissioners, is the proper method to challenge the legal existence of a district.[86] The landowners may be allowed to join as relators,[87] and the drainage commissioners in answering must either disclaim or justify.[88] On an appeal by the individual commissioners, they cannot assign as error an error which only affects the district.[89]

*Incidental remedies and review.* See 10 C. L. 1639—Usually the statutes provide for an appeal upon proper notice [90] and other conditions [91] to a court of limited powers.[92] Such statutes are required to be liberally construed.[93] The appeal to the

Karr v. Putnam County Com'rs, 170 Ind. 571, 85 NE 1. Presumed that record shows appearance by county and consent to judgment which would authorize order, though county not mentioned in petition or report. Id. Allegation by board of county commissioners that board had never been made party to drainage proceedings held bad on demurrer as legal conclusion, though allegation that neither board or county was named in complaint or petition as party. Karr v. Putnam County Com'rs, 170 Ind. 571, 85 NE 1. Under Burn's Ann. St. 1901, § 5624, county may be party in effect without being so named. Id.

82. Injunction proper to prevent wrongful overflowing of land by drainage commissioners where drain does not traverse land and plaintiffs are not parties to drainage proceedings. Smafield v. Smith, 153 Mich. 270, 15 Det. Leg. N. 487, 116 NW 990. Injunction denied where drain would not flood plaintiff's land beyond degree contemplated when certain river was dredged to provide outlet and plaintiff's presumed paid for land taken. Id.

83. Right to enjoin threatened injury to public highway bridge by establishment of drain not in both county and township. Karr v. Putnam County Com'rs, 170 Ind. 571, 85 NE 1. Not dependent upon varying circumstances, as size of bridge, importance of highway, ability of township, taking of steps by latter to cause appropriation by county for undertaking. Id.

84. Under Rev. Code, § 2412, fact that establishment of drain will be an impairment of landowners, irrigation rights is an element of damages, not giving rise to cause of action to prevent the drain. Summers v. Sullivan [Mont.] 101 P 166.

85. Ditch constructed under unconstitutional statute (L. 1907, p. 215, c. 191) by supervisors is without authority, being in fact simply private enterprise. Lyon County v. Lien, 105 Minn. 55, 116 NW 1017.

86. People v. Anderson, 239 Ill. 266, 87 NE 1019; State v. Wilson [Mo.] 115 SW 549. Proper to question title of drainage commissioners to office. People v. Anderson, 239 Ill. 266, 87 NE 1019. Attorney general may file information questioning powers of drainage district. Id. Information sufficient where allegations of usurpation of power in general terms. People v. O'Connor, 239 Ill. 272, 87 NE 1016.

87. Where landowners question rights of drainage commissioners to incorporate lands, on quo warranto, it is practice to allow several landowners to join as relators. People v. O'Connor, 239 Ill. 272, 87 NE 1016.

88. Default, disclaimer. People v. O'Connor, 239 Ill. 272, 87 NE 1016.

89. Service of process. People v. O'Connor, 239 Ill. 272, 87 NE 1016.

90. Where an appeal is not simply from an award of damages, but is from the joint action of two boards in different counties, notice of appeal should be given to auditor of each county, since all are persons interested, neither board can act without concurrence of other, and final action of district court under statute might materially affect orders of respective boards in joint session. Appeal of Head [Iowa] 118 NW 884. Where petition, under Drainage Act (Acts 1905, p. 456, et seq. c. 157), is dismissed on ground that two-thirds of landowners affected, as shown by preliminary report, have remonstrated on appeal, all persons remonstrating should be made parties by being named in assignment of errors. Lauster v. Meyers, 170 Ind. 548, 84 NE 1087. So that case may be reviewed on merits. Where remonstrant omitted, appeal will be dismissed. Id.

91. Under Rev. St. 1899, § 8292, as amended by Acts 1903, p. 235, and Acts 1905, p. 185, (4 Ann. St. pp. 3922, 3923), appellants in proceedings to establish drainage district, on appeal to circuit court shall file written application specifying matters appealed from. Drainage Dist. No. 4 v. Wabash R. Co. [Mo.] 116 SW 549. Under Burn's Ann. St. 1908, § 1354, want of approval of **appeal bond** filed within prescribed time with county auditor is not ground for dismissal. Appellant may file in court sufficient bond with acceptable surety. Miller v. Wabash R. Co. [Ind.] 85 NE 967.

92. Under Code Supp. 1907, §§ 1989a6 on appeal from order of supervisors establishing or refusing district, district court is limited to affirming or reversing orders of supervisors and to making orders requisite to give effect to court's decree. Cannot decree establishment of district substantially different from that under consideration. Hartshorn v. Wright County Dist. Court [Iowa] 120 NW 479. Under Code Supp. 1907, § 1989a6, there is no purpose to confer original powers in premises on appellate court.

supreme court should be from a final order,[94] and may be limited.[95] In certain cases, certiorari is the proper remedy.[96] The question of drainage has been held

At most, court has power to try case de novo upon issues before supervisors, and can make no order which board could not have made. Id. While Code Supp. 1907, § 1989a46, providing that failure to appeal from order of supervisors be waiver of illegality, and that remedies provided by act be exclusive, may take away right to have proceedings of board reviewed by certiorari, it does not limit review of judgment of district court entered on appeal from such board. Id. Where county board of supervisors under statute had no power to establish a drainage district not planned or recommended by competent engineer, district court on appeal could not exercise such power. Id. On appeal from action of supervisors in establishing a drain, the district court should be very reluctant to interfere. Id. On appeal, district court has no authority to establish district for benefit of intervenors who did not appeal. Id. Decree of district court on appeal, shortening proposed ditch by mile and cutting out area of 3½ miles, is substantial variance from district proposed by supervisors and beyond power of court to decree. Id. Where no notice, district court had no jurisdiction to enter order by two boards in joint session. Appeal of Head [Iowa] 118 NW 884. Only two questions reviewable on appeal to circuit court, viz., whether compensation has been allowed for property appropriated, and whether proper damages have been allowed for property affected by improvement. Drainage Dist. No. 4 v. Wabash R. Co. [Mo.] 116 SW 549. Appeal which did not specify particular order appealed from, and which specified, as objections to reports of viewers and findings of court, that assessment was out of proportion and excessive, that ditch was inadequate, and that petitioner had protected its property and would derive no benefit from ditch, should be dismissed for failure to comply with statute. Id. On appeal, circuit court could not decide whether Rev. St. 1899, § 8285 (Ann. St. 1906, p. 3920), authorizing viewers to assess damages and benefits, was in violation of Const. art. 3 (Ann. St. 1906, p. 172). Id. On appeal to circuit court, which should have been dismissed, appellant is not deprived of constitutional right to trial by jury, by action of court in discharging jury and rendering judgment of affirmance. Id. Under Burns' Ann. St. 1908, §§ 6151, 6027, when appeal is taken from board to circuit court, it must proceed de novo and determine case on merits, and not upon mere question of practice. Discretion lodged in circuit court is either to execute final judgment or remand cause with directions for proper execution. Miller v. Wabash R. Co. [Ind.] 85 NE 967. Remand at intermediate stage with directions to permit filing of remonstrance, error. Id. Under circuit court drainage law of 1881 (Acts 1881, p. 399, c. 43, § 4; Rev. St. 1881, § 4276), and Act of 1885 (Acts 1885, p. 134, c. 40, § 4; Burns' Ann. St. 1901, § 5625), judgment of court establishing drain and approving assessments is valid. Lake Shore Sand Co. v. Lake Shore & M. S. R. Co. [Ind.] 86 NE 754.

**93.** Under Drainage Act, § 47 (Acts 30 Gen. Assem., p. 74, c. 68), that statute be liberally construed, failure of auditor of one county to keep record of proceedings for establishment of drain in two counties in drainage record book as required by statute did not invalidate proceedings. Appeal of Head [Iowa] 118 NW 884.

**94.** Under Laws 1905, p. 303, c. 230, appeal is only provided where petition for ditch is refused and upon questions of damages. State v. Posz, 106 Minn. 197, 118 NW 1014. In drainage proceedings order is final and appealable when it defeats the proceedings and requires that it be started over. Order of county court sustaining challenge to array of jurors who made unauthorized additional assessment, interlocutory, not final. Claussen Park Drainage & Levee Dist. Com'rs v. Dailey, 239 Ill. 428, 88 NE 201. Being final, appeals were properly taken from judgments establishing drains and approving assessments, either in term time under Rev. St. 1881, § 638 (Burns' Ann. St. 1901, § 650; Burns' Ann. St. 1908, § 679), or in vacation under Rev. St. 1881, § 640 (Burns' Ann. St. 1901, § 652; Burns' Ann. St. 1908, § 681). Lake Shore Sand Co. v. Lake Shore & M. S. R. Co. [Ind.] 86 NE 754. Where appeal taken from judgments under Rev. St. 1881, § 638 (Burns' Ann. St. 1901, § 650; Burns' Ann. St. 1908, § 679), it was term time appeal, governed by such statute as to who should be named in assignment of errors as appellants. Id. Under Drainage Act 1905 (Act 1905, p. 461, c. 157), § 3, authorizing interlocutory appeal from circuit or superior court to supreme court and § 9 (p. 472) authorizing appeal from final judgment, where defendants permitted exceptions to preliminary report to be overruled, and matter referred back to commissioners for final report, and final report was filed before attempt to appeal, appeal was waived. Renicker v. Davis [Ind.] 85 NE 964.

**95.** On appeal from circuit court in proceedings to establish drainage ditch, supreme court cannot consider errors of county court not properly brought before circuit court. Can only determine whether circuit court trying case anew committed error. Bennett v. Knott [Ky.] 112 SW 849.

**96.** Certiorari available to review order of county commissioners acting under L. 1905, p. 303, c. 230, in establishing ditch where no appeal provided by statute. State v. Posz, 106 Minn. 197, 118 NW 1014. Certiorari proper to test question of law in establishment of ditch, as to whether court erroneously denied hearing of objections at second hearing and had no jurisdiction to establish ditch finally at first hearing. Heinz v. Buckham, 104 Minn. 389, 116 NW 736. General drain law (Pub. Acts 1897, p. 367, No. 254, c. 5, § 3), providing remedy of certiorari was evidently intended for reviewing action of drain commissioners in establishing drain. Chandler v. Heisler, 153 Mich. 1, 15 Det. Leg. N. 333, 116 NW 626. Appeal to township board under general drain law (Pub. Acts 1897, p. 367, No. 254, c. 5), not permissible where board has duty inconsistent with that required when sitting in review of proceedings. Id.

a matter of governmental policy not reviewable by the courts.[97] In the absence of a contrary showing, the proceedings are presumed regular on appeal.[98]

*Costs.*See 10 C. L. 1640—The imposition of a fee as costs, in the absence of statute, is improper where parties in proceedings to establish a ditch employ counsel, and litigate at arm's length [99] and costs should not be awarded against a district.[1]

In regard to sewers, as in other municipal improvements or contracts,[2] the charter or statutory provisions contain rules relative to the passage of ordinances, fixing the plan of work [3] or requiring authority from voters,[4] without which the contract or tax bill is void.[5] Statutes often provide for the creation of a sewerage district which contracts for the improvement.[6] The erection of a sewage disposal plant could not be questioned upon the ground that the town had not acquired title, where condemnation was authorized.[7]

§ 5. *Compensation to property owners for lands taken or damaged.*[8]—See 10 C. L. 1640—A drainage district, for the purposes of its organization, is clothed with the

97. Power to exercise control over administrative bodies not to be conferred on courts. In re Johannes [Neb.] 120 NW 176. Cobbey's Ann. St. 1907, authorizing appeal from decision of county board upon question of public utility, is void. Id.

98. In absence of contrary showing, it will be presumed that notice of clerk of county court in proceedings to establish drainage district was in subtantial compliance with Rev. St. 1899, § 8320 (Ann. St. 1906, p. 3936), as to description, when hearing would be held, etc. State v. Wilson [Mo.] 115 SW 549. Under Code, § 4648, that proceedings of officers or courts of limited jurisdiction be presumed regular, in support of a judgment or decree, it will be presumed that notice essential to validity of action was given. Appeal of Head [Iowa] 118 NW 884. Burden of proving no statutory notice as required rests upon objector. Id.

99. Provision in judgment establishing ditch, declaring that plaintiff's attorney is entitled to reasonable fee to be taxed as costs, is not final order, not being enforcible without further action, and error does not call for reversal. Bennett v. Knott [Ky.] 112 SW 849.

1. Execution for costs against individual commissioners, not drainage district, proper. People v. O'Connor, 239 Ill. 272, 87 NE 1016. Costs properly adjudged against commissioners on judgment of ouster, where district organized by user and suit against commissioners individually. People v. Strandstra, 238 Ill. 341, 87 NE 286. In an action by drainage commissioners to recover amount of benefits to land b ond district, where demurrer was sustained, it was improper to award an execution for costs against district. Vermilion Special Drainage Dist. Com'rs v. Shocky, 238 Ill. 237, 87 NE 335.

2. The procedure in authorization and construction of public improvements is fully treated in Public Works and Improvements, 12 C. L. 1478 and Public Contracts, 12 C. L. 1442.

3. To render proceedings to construct sewer valid under Kansas City charter, there must be an ordinance as a prerequisite prescribing dimensions, material and character of sewer, and public letting of contract after notice. McCormick v. Moore [Mo. App.] 114 SW 40. Proceedings invalid where specifications finally prepared for construction of sewer contained material alterations from plans on file when the bids were made. Id. Under Kansas City charter, art. 9, § 10, where ordinance did not give dimensions or character of manholes, catchbasins, etc., so as to enable intelligent bid for work, it was insufficient. Id. Under Village Law, Laws 1897, p. 440, c. 414, § 260, requiring map or plans as precedent to adoption of sewer system, such map need not embrace every lateral sewer which may become necessary. Mead v. Turner, 60 Misc. 145, 112 NYS 127.

4. Where Laws 1907, p. 388, c. 428, as to sewer system, did not provide how village should carry out portion of agreement, general village law was applicable. Authority from voters prerequisite to tax levy and issuance of bonds to carry out contract. Mead v. Turner, 60 Misc. 145, 112 NYS 127. Sewer by city and village. Id. Where proposition submitted to voters authorized sewer at $100,000, with $59,800 to be raised by issue and sale of bonds, tax levy for balance was authorized by necessary implication. Id. Under Act 1902, c. 124 (P. L. 371), action of sewerage board is only preliminary to legislative action by governing body of town and by voters at special election. Fixing site of disposal works as land in which member of board is interested, not voidable in absence of fraud. Frelinghuysen v. Morristown [N. J. Law] 70 A 77, afd. [N. J. Err. & App.] 72 A 2.

5. Under Kansas City Charter, art. 9, § 10, where only plans referred to by ordinance were general plans, without details as to dimensions, material, etc., tax bill issued for improvement was void. McCormick v. Moore [Mo. App.] 114 SW 40.

6. Under Laws 1903, p. 29, § 7, city not liable. Board v. Moscow [Idaho] 99 P 101.

7. Prosecutors, having waited until plan of sewerage board as to disposal plant was approved by voters, could not, by certiorari, question contract for erection of plant upon ground that town had not yet acquired title, since title by condemnation was authorized by law. Frelinghuysen v. Morristown [N. J. Law] 70 A 77; afd. [N. J. Err. & App.] 72 A 2.

8. **Search Note:** See notes in 39 L. R. A. 69; 6 Ann. Cas. 177; 11 Id. 588.

See, also, Drains, Cent. Dig. §§ 67-69; Dec. Dig. §§ 56-61; Eminent Domain, Cent. Dig.;

power of eminent domain,[9] and compensation must be made for lands taken or damaged.[10] All statutory requirements must be alleged and proved to recover for the land taken.[11] The authority of a levee district to arbitrate damages suffered by landowner by the construction of levee may be vested in a board of directors.[12]

*For what allowed.* See 10 C. L. 1640—Damages have been allowed for the perpetual maintenance of a bridge, rendered necessary by a ditch.[13] Where a remedy was provided by statute, a landowner had no title to the title of an old drain, supplanted by a new one.[14]

*Amount and ascertainment thereof.* See 10 C. L. 1640—Where three companies are interested in railroad to be damaged by a ditch proceeding, the question of damages should be settled in an original proceeding, not collaterally.[15] Under some procedures, the question of damages may be deferred to a second hearing.[16] The overruling of a demurrer to an answer in a proceeding for compensation was harmless where the plaintiff could have the issue determined on merits.[17]

*Appeals* See 10 C. L. 1641 should be taken from a final judgment.[18] The right may be denied where the statute renders a justice's judgment final and conclusive.[19]

Dec. Dig.; Municipal Corporations, Cent. Dig. §§ 914-999; Dec. Dig. §§ 377-404; 10 A. & E. Enc. L. (2ed.) 232.

**9.** Bradbury v. Vandalia Levee & Drainage Dist., 236 Ill. 36, 86 NE 163.

**10.** Lands taken or damaged are taken or damaged for public use. Bradbury v. Vandalia Levee & Drainage Dist., 236 Ill. 36, 86 NE 163. District prohibited by constitution from taking or damaging property without compensation. Id. Drainage district organized under Act May 29, 1879 (Laws 1879, p. 120), and amendments is liable (§ 2) for damages sustained by lands above district by construction of levee, ditch or drain. Id. Not relieved from liability on theory that drainage district is governmental agency and that damage resulted from exercise of state's police power. Id. Damages recovered to be collected by assessments. Id. **Declaration** against drainage district averring overflow of lands by levee and only averring damage to plaintiff's land not subject to special demurrer on ground that it charged other lands as damaged. Id.

**11.** Drainage Dist. No. 1 v. Dowd, 132 Ill. App. 499. Must allege and prove that tax has been levied or fund obtained for paying for such right of way. Id.

**12.** Contract by president, unauthorized and not ratified, could not bind district. Plum Bayou Levee Dist. v. Harper [Ark.] 116 SW 196.

**13.** Where railroad constructs bridge over ditch under Acts 30th General Assembly, p. 66, c. 68, § 19, it is entitled to damages for perpetual maintenance of bridge. Duty to take care of bridge permanently. Mason City, etc., R. Co. v. Wright County Sup'rs [Iowa] 116 NW 805. Judgment for $2,200 damages to railroad for establishment of drainage district, supported by evidence. Id. Where railroad agreed to construct bridge and that opening in embankment be as large as ditch planned at that place, evidence of secret intention of engineer to make ditch unusually large so as to require unusually large bridge was inadmissible. Unlawful to place piling or other obstructions in ditch, and, under Acts 30th General Assembly, p. 66, c. 68, § 19, ditch must be constructed in accordance with plans and specifications of engineer. Id.

**14.** Landowner had no title to tile of old drain constructed under Code, § 1952, supplanted by new drain under Acts 30th General Assembly, c. 68, § 46 (Code Supp. 1907, § 1989a25). Remedy provided by latter statute. Smittle v. Haag [Iowa] 118 NW 869. Exclusive against supervisors in absence of bad faith, though not availed of. Id. If remedy by statute not exclusive and plaintiff might recover damages for removal of old title in establishing new drain, measure of damages would not be cost of restoring tile, especially since not restored. Id. Landowner who treated Code, § 1952, as constitutional, and acquiesced in proceedings had thereunder for 20 years, cannot question constitutionality of statute on claim that title of drain became part of his land by operation of law, through invalidity of statute and proceedings. Id. Acts 30th General Assembly, c. 67, 68, curative of all defects in Code, § 1952, validating all proceedings except those relative to assessments. Power of reassessment and relevy was conferred. Id.

**15.** Proceedings not void and subject to collateral attack because no damages allowed one company. Omaha & N. P. R. Co. v. Sarpy County [Neb.] 117 NW 116.

**16.** Under Gen. Laws 1907, c. 448, p. 641, court may defer question of damages to adjoining owners until second hearing, when expedient or necessary. Heinz v. Buckham, 104 Minn. 389, 116 NW 736.

**17.** Where a defendant filed petition for assessment of compensation through deprivation of property by change of city's drains, and city brought present action to enjoin such condemnation proceedings as unnecessary, whereupon defendant filed an explanatory or qualified denial in effect setting forth defendant's view of facts alleged, an order overruling plaintiff's demurrer to such answer for want of facts was not ground for reversal, since on merits plaintiff could have issue determined. City of Columbia v. Melton, 81 S. C. 356, 62 SE 245.

**18.** Order of court on appeal from assessment of damages in ditch proceeding, assessing damages and ordering judgment, is not final order within Gen. Laws 1905, p. 334, c. 230, § 51, or an appealable order within § 41. Prahl v. Brown County, 104 Minn. 227, 116 NW 483.

**19.** In proceeding under Farm Drainage

§ 6. *Provision for cost.*[20]—See 10 C. L. 1641—The preliminary expenses may be assessed upon all the lands of the district where a drain is denied.[21]

*Bonds* See 10 C. L. 1641 may be required to protect the county against the expenses of the preliminary proceedings.[22] Drainage districts in incurring indebtedness are subject to limitations,[23] and the election by which a drainage district votes a tax and the issuance of bonds may be required to be under the auspices of a police jury.[24] The submission of an issue of bonds for two distinct systems of sewers, so that voters had no alternative but to vote for or against both systems is invalid.[25] Proceedings to contest an election for a tax and issuance of bonds are subject to limitations.[26]

*Local assessments.*[27]

*Power to assess and property liable.*See 10 C. L. 1642—The legislature may determine benefits or assessments, or delegate the duty to an inferior tribunal [28] and the power of levying assessments may be considered as incidental to the main power conferred.[29] Statutes conferring the power should be strictly construed.[30]

Act (Hurd's Rev. St. 1908, c. 42), §§19, 20, appeal cannot be taken from judgment of justice's court as to damages to landowners, judgment by statute "shall be final and conclusive" and appeal not permissible under general statute. Niles Drainage Com'rs v. Harms, 238 Ill. 414, 87 NE 277. Failure of act to provide appeal does not render same unconstitutional, since freehold is not involved. Id.

**20. Search Note:** See notes in 4 C. L. 1433; 56 L. R. A. 919; 58 Id. 353.

See, also, Drains, Cent. Dig. §§ 72-103; Dec. Dig. §§ 66-91; Municipal Corporations, Cent. Dig. § § 1000-1307; Dec. Dig. § § 405-588; 10 A. & E. Enc. L. (2ed.) 253; 19 A. & E. Enc. P. & P. 214.

**21.** Question entirely foreign to damages and benefits. Northern Pac. R. Co. v. Pierce County [Wash.] 97 P 1099.

**22.** Laws 1901, p. 413, c. 258, § 2, requiring bond, is for protection of county against expenses necessarily incurred in preliminary proceedings which are essential to determination of merits of petition, in case board finds against petitioners on merits and fail to establish ditch. Freeborn County v. Helle, 105 Minn. 92, 117 NW 153. In action on ditch bond pursuant to Laws 1901, p. 413, c. 258, § 2, where board of county commissioners had made order establishing ditch, which order was vacated in an independent action to which neither obligors of bond nor petitioners were sureties, for an alleged failure to comply with law as to adjournments on hearing, facts did not show **breach** of bond. Id. Petitioners for ditch not liable upon bond for expense incurred in employment of engineer to lay out ditch, where order establishing ditch is set aside, since condition of bond is for paying costs when commissioners find against impairment. State v. Ross [Neb.] 118 NW 85.

**23.** Under Const. art. 281, authorizing drainage districts, upon vote, to incur debt and issue bonds upon basis of ad valorem tax, not exceeding 5 mills on dollar, and also authorizing districts, on same condition, to incur debt and issue bonds upon basis of specific tax, not exceeding 25 cents per acre, bonds in either case not to run over 40 years, where a debt could not be incurred upon either basis, being excessive, it could not be incurred upon theory that both bases might be combined, so that debtors of ad valorem and specific taxes would be bound, each class, for the whole. Bayou Terre Aux Boeuf Drainage Dist. v. Baker [La.] 48 S 654. Person who agreed to buy bonds to be issued by commissioners could not be held to agreement upon bases of tender of bonds predicated on such theory. Id.

**24.** Not board of commissioners. Esteves v. Bayou Terre Aux Boeuf Drainage Dist., 121 La. 991, 46 S 992. Power to order and direct conduct of special drainage tax elections is vested in police juries by Act 1900, p. 178, No. 114. Not repealed by Act 1902, pp. 248, 293, Nos. 145, 159, or Acts 1906, p. 225, No. 135. Bayou Terre Aux Boeuf Drainage Dist. v. Baker [La.] 48 S 654. Under Const. art. 281, as amended, determination of question as to who shall have power to order and direct conduct of special drainage tax elections is in legislature. Id. Provision, in amendment to Const. art. 281 proposed by Act 1908, p. 450, No. 300, and adopted Nov. 1908, validating contribution and acreage taxes in drainage districts, is re-enactment of amendment proposed by Acts 1906, p. 207, No. 122, adopted in Nov. 1906, and purports to validate only contributions and taxes authorized by majority of taxpayers. Id.

**25.** State v. Wilder [Mo.] 116 SW 1087. See, also, Municipal Bonds, 12 C. L. 897.

**26.** Prescription of six months (Act 1899, p. 12, No. 5, § 17) to contest election inapplicable where no election for tax and issuance of bonds. Esteves v. Bayou Terre Aux Boeuf Drainage Dist., 121 La. 991, 46 S 992.

**27.** See 10 C. L. 1642. See, also, Public Works and Improvements, 12 C. L. 1478.

**28.** When performed by inferior tribunal, it is agency carrying out legislative will. Caton v. Western Clay Drainage Dist. [Ark.] 112 SW 145. Act May 23, 1907 (Acts 1907, pp. 890-910), not invalid as delegation of judicial power to board of directors. Id. Provisions of constitution (art. 16, § 5) in regard of taxation not applicable to assessments for public improvements levied and authorized by general assembly. Id. Power to levy assessments properly delegated to drainage board. Not unconstitutional. Soliah v. Cormack [N. D.] 117 NW 125.

**29.** Power not affected by fact that contemplated improvement failed. Northern

Where a district is voluntarily entered into, the burden may be considered self-imposed.[31] The expense of constructing a drainage ditch should be assessed against the property to be benefited,[32] and an assessment should be made for the actual benefits only.[33] The statutes contain provisions regarding lands outside a district,[34] lands within municipalities,[35] and railroad lands.[36] A second assessment may be made to complete a drainage system when the first proves inadequate,[37] and lands subsequently annexed to a district may be required to pay their proportionate share of the cost.[38]

In levying sewer assessments, as in other public improvements,[39] it is essential that the assessment be levied under a valid and constitutional statute,[40] though

Pac. R. Co. v. Pierce County [Wash.] 97 P 1099.

30. Special power for special purpose. Howard v. Emmet County [Iowa] 118 NW 882.

31. Unnecessary to determine if district is municipality within Const. art. 11, § 12, with power to assess. Northern Pac. R. Co. v. Pierce County [Wash.] 97 P 1099. Laws 1903, p. 87, c. 67, as to levy of taxes, not within Const. art. 2, § 37, requiring act revised to be set forth at length, act being law of procedure complete in itself. Id.

32. Bowler v. Renville County, 105 Minn. 26, 116 NW 1028. Roadbed of railroad, when in fact benefited, should be included in property assessed. Omaha & N. P. R. Co. v. Sarpy County [Neb.] 117 NW 116. While improvement of joint county ditch may not be affected by proceedings for establishment of ditch wholly within county, yet joint county ditch may be widened and deepened by the commissioners of one of abutting counties where purpose is to provide more adequate outlet for streams emptying therein, and cost of such an improvement may properly be assessed upon those most benefited thereby. Love v. Simon, 11 Ohio C. C. (N. S.) 359.

33. In re Johnson Drainage Dist. No. 9 [Iowa] 118 NW 380. Assessments cannot exceed benefits. Drainage Dist. No. 1 v. Dowd, 132 Ill. App. 499. Where tract of land taxed at $1,200 was assessed $800 for drain, and it appeared that land previously was swamp land and useless, but by improvement became available for pasture and was doubled in value, assessment did not exceed benefits. Farley Drainage Dist. No. 7 v. Hamilton County [Iowa] 118 NW 432. Code Supp. 1907. § 792a (Acts 28th General Assembly, p. 14, c. 29, § 1), limiting assessments in cities and towns, inapplicable to assessment for drain. Tax in excess of 25 per cent of value of land proper. Id. Mere matter of distance of lands from outlet of drainage ditch, save as to land thereat which may be drained otherwise than through ditch immaterial in estimating benefits. In re Castner [Iowa] 119 NW 980. Under Farm Drainage Act (Hurd's Rev. St. 1908, c. 42, § 115), § 40½, requiring necessary bridges to be constructed by commissioners, etc., **expense of constructing bridge** or culvert along or across a railroad right of way must be borne by the drainage district where there is no natural watercourse. People v. Gunzenhauser, 237 Ill. 262, 86 NE 669.

34. Farm drainage act (Sess. Laws 1885, p. 78) does not provide for assessment upon lands benefited outside district in question unless lands are, or may become, part of another district, or the channel is across the lands to be assessed. Vermillion Special Drainage Dist. Com'rs v. Shockey, 142 Ill. App. 272.

35. Property located wholly within town, though benefited, not subject to assessment. Quick v. Templin [Ind. App.] 85 NE 121. Under Act March 6, 1905 (Acts 1905, p. 407, c. 129, § 267), towns and cities are given exclusive jurisdiction over sewers and drains within corporate limits. Id. Where county surveyor had no authority over drains within corporate limits of town, he would be assumed to have followed law. Assessments presumed made on ditch without town. Id. Assessment imposed upon town by drainage district not subject to objection that it is tax for extraordinary expenditures requiring consent of town auditors and assessors as to levy. Spring Creek Drainage Dist. v. Joliet Highway Com'rs, 238 Ill. 521, 87 NE 394.

36. Acts 30th General Assembly, p. 64, c. 68, §§ 12, 19, construed, and railroad assessments in latter section held entirely distinct from others. Railroad property not to be classified in tracts of 40 acres or less as provided by § 12. In re Johnson Drainage Dist. No. 9 [Iowa] 118 NW 380.

37. People v. Gunzenhauser, 237 Ill. 262, 86 NE 669.

38. Under Levee Act, § 58 (Hurd's Rev. St. 1905, c. 42), lands annexed can be compelled to pay proportionate share of original cost of improvement at any time after being brought into district, either by being assessed in separate proceeding or together with other lands. Schafer v. Gerbers, 234 Ill. 468, 84 NE 1064. Where entire cost of original work paid by former assessment before annexed lands brought into district and no future work requiring additional outlay, proportionate share of annexed land should be paid and amounts collected rebated proportionally to lands originally assessed, so that all property pay just proportion. Id. Payments made by owners of land originally assessed do not relieve land afterward annexed to district from bearing its proportionate share of cost of improvement. Id.

39. See Public Works and Improvements, 12 C. L. 1478.

40. McGarvey v. Swan [Wyo.] 96 P 697. Laws 1903, p. 231, c. 124, supersedes all other legislation upon subject of sewer construction in cities of third class; such act being inconsistent with former acts not previously repealed, in that there is a different mode of initiation and procedure in enforcing assessments. Seattle Cedar Lumber Mfg. Co. v. Ballard, 50 Wash. 123, 96 P 956. Laws 1903, p. 9, c. 7, for designation of districts to be

constitutional limitations relative to taxation are usually considered inapplicable.[41] The special assessments may be levied upon adjacent or abutting property especially benefited,[42] or according to the general public benefit.[43] The existence of a sewer is no defence against an assessment for a new sewer,[44] but a special assessment could not be levied where a city had not acquired the right to enter on the land.[45]

*Procedure.* See 10 C. L. 1643—Officials in exercising the power of levying assessments should act in pursuance to statute, with reasonable strictness,[46] and the levy may be required to be made at a meeting within the district[47] and in pursuance to an estimate.[48] Power to increase assessments by a board of supervisors does not authorize an arbitrary increase,[49] and it may be required that petitions for an assessment should clearly set out the purpose for which the money is to be used.[50] The lands should be classified on an equitable basis[51] and the report submitted

charged with construction of sewers, and providing manner of apportionment, held not special legislation as to cities to which applicable. McGarvey v. Swan [Wyo.] 96 P 697. Though only one city at time of passage could derive benefit from act. Id. To sustain statute authorizing city to apportion sewer assessments, it is unnecessary to hold legislative power as unlimited, so as to prevent judicial interference, where manifest injustice or violation of constitutional principle is shown in enforcement of rule prescribed. Legislative authority limited by rule that purpose of tax be public, and must directly appertain to district taxed. Id. Laws 1903, p. 907, held constitutional where no showing to contrary in individual case. Id.

41. Const. art. 15, § 1, requiring lands to be listed for assessment, valued for taxation and assessed separately, not applicable to special assessments. McGarvey v. Swan, [Wyo.] 96 P 697. Const. art. 1, § 28, requiring all taxation to be equal and uniform, not restriction of power to levy municipal special assessments. Id.

42. McGarvey v. Swan [Wyo.] 96 P 697. State basing apportionment of assessment upon area and frontage establishes equitable and just rule. Id. In an assessment upon lots to defray the cost of a local sanitary sewer, the municipality is not required to make a deduction because of the proximity of a public park which does not directly abut thereon. Close v. Parker, 11 Ohio C. C. (N. S.) 85. Provisions of municipal code, as to improvements for which special assessments are made, that "corporation shall pay cost of intersections" has reference to parts of street improvements at intersection of streets one with another, and has no application to the crossing of a street by sewer for purposes of local sanitary drainage. Id.

43. Property benefited liable though nonabutting, and no laterals laid to it. Beckett v. Portland [Or.] 99 P 659. Where city established sewer system and subsequently extended corporate limits so that two sewer districts were formed, on proposal to construct sanitary sewer in first additional district and storm sewer in the other, each to be independent, such proposed sewers were public for which whole city could be taxed, though only limited portion would be drained. State v. Wilder [Mo.] 116 SW 1087.

44. Property enhanced in value, though at present unnecessary. McGarvey v. Swan [Wyo.] 96 P 697. That corner lot has been once assessed for sewer along one street shown not constitutional reason for a subsequent assessment along and through other street. Id.

45. Under Local Improvement Act, § 53 (Hurd's Rev. St. 1908, p. 435, c. 24, § 559). City of Chicago v. Green, 238 Ill. 258, 87 NE 417.

46. McDougall v. Bridges [Wash.] 100 P 835. Reasonably substantial following of statutory method of making public improvements by special assessments is essentially a jurisdictional matter. Failure to proceed, under Laws 1903, p. 231, c. 124, as to sewer assessment rendered same void. Seattle Cedar Lumber Mfg. Co. v. Ballard, 50 Wash. 123, 96 P 956. Laws 1905, p. 281, c. 150, providing that special assessment be not set aside unless made fraudulently and in bad faith, not intended to reach beyond irregularities and include jurisdictional facts. Id.

47. Assessment at meeting outside district in absence of and without notice to clerk, void. People v. Schwank, 237 Ill. 40, 86 NE 631.

48. Under Ballinger's Ann. Codes & St. § 3738 (Pierce's Code, § 4554), as amd. Laws 1905, p. 363, c. 175, as to levy by drainage commissioners, a levy in excess of amount required for maintenance and repairs, made without previous estimate and in part to pay outstanding warrants, is void. McDougall v. Bridges [Wash.] 100 P 835. Excess not separable from amount legally to be levied for maintenance. Id. Officials of a drainage district have no power to create an **indebtedness in advance** for work, and then levy an assessment. Schafer v. Gerbers, 234 Ill. 468, 84 NE 1064.

49. Court will remedy abuse of power. In re Castner [Iowa] 119 NW 980. Increase of assessment not justified by evidence. Under circumstances showing hostility of officials, little weight should be given to usual presumption that assessment, being official action, was properly raised. Id.

50. Petition for levying original assessment (Hurd's Rev. St. 1905, c. 42, §§ 11-13), or for additional assessment (§ 37), must clearly set out nature of work or purpose for which money is to be used. Property owners have right to be heard as to act materially affecting extent or cost of improvement. Schafer v. Gerbers, 234 Ill. 468, 84 NE 1064. Petition sufficient to show purpose for which money was to be raised. Id.

51. Under Code 1907, § 1989-a12, as to

within the time specified.[52] Drainage commissioners may be required to make a new classification where the prior one is unfair.[53] Statutory provisions govern reassessments,[54] the extension of a tax for repairs,[55] or whether a new assessment for the enlargement of a drain by supplemental petition is proper.[56] Drainage commissioners making an assessment, who are also property owners in the same district, may be disqualified.[57]

Procedures for sewers must conform to the requirements of notice and hearing,[58] and any ditch assessment made without notice to the landowner is void,[59]

classifying lands receiving benefits on scale of one hundred, where petitioner's land was all swamp land receiving greatest benefits, method of apportioning assessments on other lands was immaterial. Farley Drainage Dist. No. 7 v. Hamilton County [Iowa] 118 NW 432. Real question whether assessment was equitable. Id.

52. Code Supp. 1907, § 1989-a12, requiring drainage commissioners to inspect and classify land benefited within 20 days, held directory rather than mandatory. No requirement that report be submitted within 20 days. Farley Drainage Dist. No. 7 v. Hamilton County [Iowa] 118 NW 432.

53. Under Farm Drainage Act (Hurd's Rev. St. 1908, c. 42), § 21, where commissioners find prior classification to be unfair, it is their duty to make a new one. Nothing left to discretion. People v. Schwank, 237 Ill. 40, 86 NE 631. Where new classification quashed on certiorari, fact did not affect duty to make new classification. Not authorization of abandonment. Id. Resolution adopted after assessment due, purporting to ratify levy, ineffective. Id.

54. Under Acts 30th Gen. Assem. p. 60, c. 67, §§ 3, 4 and c. 68 (p. 65), providing for reassessments and relevy, a reassessment would not be prevented by fact that former illegal levy had been paid. Howard v. Emmet County [Iowa] 118 NW 882. Under Code, § 1940, as to notice and Acts 30, Gen. Assem. pp. 59, 61, cc. 67, 68, as to hearing on reassessment, board may make equitable adjustment of landowner's claims and consider damages. Id.

55. In assessment under Farm Drainage Act § 41 (Hurd's Rev. St. 1908, § 116), no new classification is required, but tax must be extended on classification previously adopted. People v. Sullivan, 238 Ill. 386, 87 NE 306. Under Farm Drainage Act § 41 (Hurd's Rev. St. 1908, c. 42, § 116), where assessment extended according to classification made when district organized, no notice of assessment required. Id.

56. Laws 1905, p. 716, c. 419, as to drainage construed, and, under the various sections, commissioners could not make a new assessment of benefits for an enlargement of a drain by supplemental petition under last paragraph of § 10. Appeal of Chandos [Wis.] 120 NW 523. Demurrer by drainage commissioners to remonstrance against supplemental petition by commissioners for new assessment of benefits related back to petition, and should be sustained if petition was insufficient. Id.

57. Nutwood Drainage & Levee Dist. v. Reddish, 234 Ill. 130, 84 NE 750. Disqualification of commissioners being landowners unobjectionable, where classification by previous officers. Spreading of assessment mere mathematical computation. People v. Schwank, 237 Ill. 40, 86 NE 631. Classification not invalidated by fact that commissioners were landowners, when assessment under Farm Drainage Act (Hurd's Rev. St. 1908, c. 42). People v. Hulin, 237 Ill. 122, 86 NE 666. In assessment under Farm Drainage Act, § 41 (Hurd's Rev. St. 1908, § 116), commissioner owning land in district is not incompetent to make assessment. People v. Sullivan, 238 Ill. 386, 87 NE 306.

58. McGarvey v. Swan [Wyo.] 96 P 697. Where Laws 1903, p. 9, c. 7, authorizes city to regulate procedure of assessments, and no showing by petition in relation to such municipal regulations, it must be assumed on review that required notices and hearing to constitute due process of law were provided for and complied with. Id. Where statute prescribes district to be specially assessed and fixed standard of apportionment so that only mathematical calculation is required to determine amount of assessment, a hearing upon the question of benefits or the application of the statutory rule is not necessary to constitute due process of law. Id.

59. Pumphrey v. Hollis [Ind. App.] 87 NE 255. Act May 23, 1907 (Acts 1907, pp. 890-910), providing (§ 8, par. g.) for publication of notice to persons interested in assessments with 30 days for exceptions, complies with constitution as to **due process** of law. Caton v. Western Clay Drainage Dist. [Ark.] 112 SW 145. Acts 30th Gen. Assem. p. 61, c. 68, §§ 12, 19, construed and latter section held to provide for notice (as provided in §§ 3, 12) and appeal (§ 14), wherefore not unconstitutional. In re Johnson Drainage Dist. No. 9 [Iowa] 118 NW 380. Drainage Act (Rev. Codes, 1905, §§ 1818-1850) not violative of 14th amendment of federal constitution or state Const. § 13, as to taking of property without due process of law. Soliah v. Cormack [N. D.] 117 NW 125. Statute providing for organization of drainage districts with special assessments in proportion to benefits received, and that notice be given to property owners, with right to appeal from order of assessment, violates no constitutional rights, such as taking of private property for private use (State v. Hanson, 80 Neb. 724, 117 NW 412), taking of property for public use without compensation (Id.), taking of property without due process of law (Id.). Laws 1907, p. 678, c. 448, § 40, providing that owners of lands, benefited by construction of new ditch and its connection with ditch already constructed for which land was not assessed, shall pay same proportion of benefits received by their lands that lands assessed for original ditch were forced to pay, are unconstitutional as deprivation of property for public purpose without compensation and

but an owner properly advised of the proceeding will be charged with notice of subsequent actions.[60] Sewer commissioners may not delay an assessment an unreasonable time.[61]

*Validity of assessment and objections thereto.* See 10 C. L. 1644—Usually the proceedings are not subject to collateral attack,[62] and injunction can only be maintained if the assessment is void.[63] A party objecting to an assessment has the burden of establishing its invalidity[64] and only objections going to the jurisdiction of the court should be urged against an application for judgment for nonpayment of an assessment.[65] The sufficiency of objections by the owners may be ques-

due process of law. Lyon County v. Lien, 105 Minn. 55, 116 NW 1017. Other portions of statute not affected. Id.

**60.** Landowner by statute charged with notice of proceeding which he instituted. Pumphrey v. Hollis [Ind. App.] 87 NE 255. Under Act March 6, 1905 (Acts 1905, p. 458, c. 157), § 3, requiring petitioners to note date of hearing and notify persons not petitioners either personally or through sheriff, landowner, who was petitioner but was dismissed before proof of notice was made, was not entitled to additional notice. Id. Under Farm Drainage Act (Hurd's Rev. St. 1908, c. 42), owners of land having been notified of classification are not entitled to notice of levying of drainage tax. People v. Hulin, 237 Ill. 122, 86 NE 666. Under Rev. St. 1899, c. 122, art. 5 (Ann. St. 1906, pp. 3935-3947) and § 8337, legislative intent was that landowner in court at commencement of proceeding was in court at all stages of procedure; supplemental assessment without notice not taking of property without due process of law, where landowner a petitioner. State v. Wilson [Mo.] 115 SW 549. Under Code Supp. 1907, § 1989a12, where notice given that supervisors would take action on commissioner's apportionment of assessments, adjournment to subsequent day did not deprive them of jurisdiction or require further notice. Gray v. Anderson [Iowa] 118 NW 526. Under Code Supp. 1907, § 1989a12, where notice given landowners that supervisors will act on apportionment of commissioners at hearing, at which hearing board might "increase, diminish, annul or affirm apportionment," no further notice is necessary. Id. Reduction of some assessment would involve increase of others, and landowners must take notice. Id.

**61.** Under St. 1904, p. 336, c. 384, § 3, sewer commissioners could not delay assessment until completion of system, but must levy for completed sewers or sections as soon as reasonably possible. Dunn v. Taunton, 200 Mass. 252, 86 NE 313. Failure to levy assessments for an unreasonable time, as required by St. 1904, p. 336, c. 384, § 3, ground for removal of sewer commissioners. Id.

**62.** No objections can be urged in an action collateral to proceedings in county court as to an assessment, except such as question jurisdiction. Spring Creek Drainage Dist. v. Joliet Highway Com'rs, 238 Ill. 521, 87 NE 394. Under Portland city charter §§ 389, 390, action of city council in establishing sewer district, determining benefits and making assessment is conclusive on courts on collateral attack, unless prima facie fraudulent. Beckett v. Portland [Or.] 99 P 659.

**63.** Pumphrey v. Hollis [Ind. App.] 87 NE 255. Levied without authority of law. Carr v. Arnold, 239 Ill. 37, 87 NE 870. That other persons were assessed over whom court had no jurisdiction cannot prevail plaintiff seeking to restrain assessment against his land. Pumphrey v. Hollis [Ind. App.] 87 NE 255. Under Burn's Ann. St. 1908, § 270, re-enacting the equity rule for the joinder of parties, several parties whose lands were specially assessed to repair a drain, and who claimed such assessment as void, because the lands were not liable, were entitled to join in suit to restrain enforcement. Quick v. Templin [Ind. App.] 85 NE 121. Bill to enjoin collection of taxes where certain taxes had been held illegal, and quo warranto to test legality of district was pending, held fatally defective in failing to allege threat or intention of commissioner's to levy another assessment. Carr v. Arnold, 239 Ill. 37, 87 NE 870. Where assessment for township ditch is in excess of benefits conferred, its collection may be enjoined, notwithstanding trustees had jurisdiction to order improvement, and all proceedings were regular. Stemen v. Hizey, 7 Ohio N. P. (N. S.) 601. Where answer in suit to enjoin assessment, denies many allegations of complaint, but affirmative allegations reveal invalidity of assessment, judgment is properly rendered for plaintiff on sustaining of demurrer and refusal of defendant to plead further. Seattle Cedar Lumber Mfg. Co. v. Ballard, 50 Wash. 123, 96 P 956. Where, in construction by municipality of local sewer for sanitary purposes, by inadvertence of an assistant engineer employed to fix grade thereof, contract or specifications is departed from as to depth of sewer but without affecting its cost or efficiency, and error is not discovered until after work of construction is completed, and no substantial injury to rights of the lot owners is apparent, assessment against such lot owners will not be enjoined. Close v. Parker, 11 Ohio C. C. (N. S.) 85.

**64.** Presumption that assessing officers did their duty. People v. Hulin, 237 Ill. 122, 86 NE 666; In re Johnson Drainage Dist. No. 9 [Iowa] 118 NW 380; People v. Gunzenhauser, 237 Ill. 262, 86 NE 669. Where landowners objected to tax, because district was charged for construction of bridge over natural watercourse, along or across a railroad right of way, they should introduce evidence to establish such fact. People v. Gunzenhauser, 237 Ill. 262, 86 NE 669. Under statutes, since division of drainage tax could have been made subsequent to Sept. 30, introduction of record to and including that date was insufficient to rebut presumption that tax had been legally divided into installments and made matter of record. People v. Hulin, 237 Ill. 122, 86 NE 666.

**65.** People v. Seaman, 239 Ill. 611, 88 NE

tioned on a motion to strike.[66] Where a county court sustained an objection to an additional assessment roll, it could make no further order for assessment.[67]

*Waiver or correction of irregularities.*[See 10 C. L. 1645]—Objections to assessments are subject to the principles of waiver[68] and estoppel.[69] The fact that a commissioner's report was defective and presented a jurisdictional question could not be raised in an action to collect a drainage tax, where it was adjudicated on the incorporation of a district.[70]

*Review of assessment proceedings.*[See 10 C. L. 1645]—The statutes usually provide for an appeal from an order fixing an assessment[71] after notice to the parties affected,[72] and injunction to restrain an execution is an improper method of re-

212. Irregularities in levy, which do not go to substantial justice of tax, are not ground for refusing to enforce its collection. People v. Hulin, 237 Ill. 122, 86 NE 666. In proceedings to compel collection of drainage assessment, an objection that district was not legally organized, and that commissioners were de facto officers, could not be upheld, since assessment was payable to district not individuals. Spring Creek Drainage Dist. v. Joliet Highway Com'rs, 238 Ill. 521, 87 NE 394. Where order of county court confirming assessment rolls recites no jurisdictional facts, and record does not show notice, jurisdiction of county court does not appear on face of proceedings. No presumption to authorize confirmation of assessment roll against city. Id.

66. Not necessarily by plea or demurrer. People v. Sullivan, 238 Ill. 386, 87 NE 306. Objections properly stricken from files without hearing evidence, when not possibly effective to question validity of assessment. Id. Objection not sustained by evidence properly overruled. Id.

67. Under original petition. Claussen Park Drainage & Levee Dist. Com'rs v. Daily, 239 Ill. 428, 88 NE 201. Provision of order that, if property owners objected to spreading of assessment, jury should spread, not authorized by law. Challenge to array of jurors, who spread assessment pursuant to order, properly sustained by county court. Id.

68. Landowner appearing and failing to object to reassessment waived same. Howard v. Emmet County [Iowa] 118 NW 882. Contention that assessment was levied to pay indebtedness already incurred held waived by stipulations. People v. Gunzenhauser, 237 Ill. 262, 86 NE 669. Where landowner notified of classification under farm drainage act (Hurd's Rev. St. 1908, c. 42), he should then appear and object, if he so desires, since failure means waiver. People v. Hulin, 237 Ill. 122, 86 NE 666. Landowner cannot raise objection to classification on application for judgment against land for drainage tax. Id. Where classification acquiesced in for 20 years, any objection as to manner in which it was made would be regarded as waived. People v. Schwank, 237 Ill. 40, 86 NE 631. Suit to enjoin assessment dismissed where landowner had knowledge of proceedings, permitted drain to be built, and accepted benefits. Laches and want of equity. Von Cotzhausen v. Dick [Wis.] 119 NW 822. Landowner signing petition for drain chargeable with constructive notice of decision and subsequent proceedings in establishing ditch, making apportionment and assessment Id.

69. Drainage commissioner who participated in preliminary steps for establishment of district, including assessments, estopped to object that court was without jurisdiction to confirm assessment. Grantee held to have notice and also estopped. People v. Seaman, 239 Ill. 611, 88 NE 212. Petitioner for formation of district with notice of hearing could not subsequently urge invalidity of districts' incorporation in action against him to recover taxes. State v. Wilson [Mo.] 115 SW 549. Where landowner did not object to formation of district, inclusion of land, or petition to determine districts' debt, appeal being provided for all such proceedings, he was estopped to question assessment, except as to constitutionality of law under which assessment made. Northern Pac. R. Co. v. Pierce County [Wash.] 97 P 1099. Under Laws 1899, p. 373, c. 150, as amended by Laws 1901, p. 388, c. 107, § 3, as to procedure of assessments, property owners who, in response to preliminary notice, did not object to creation of district and sewer improvement, are **not precluded** from subsequently objecting to assessment. City of Pueblo v. Colorado Realty Co. [Colo.] 99 P 318. Construing various sections. Id.

70. State v. Wilson [Mo.] 115 SW 549.

71. County board in fixing assessments for ditch under Comp. St. 1907, c. 89, art. 1, acts judicially; judgment subject to revision and correction in direct proceedings. Omaha & N. P. R. Co. v. Sarpy County [Neb.] 117 NW 116. Under farm drainage act (Hurd's Rev. St. 1908, c. 42) as to assessments on graduated scale, and as to appeals, county or circuit court on appeal takes jurisdiction merely to correct errors, not to hear matter de novo and make an independent classification. People v. Grace, 237 Ill. 265, 86 NE 628. Appeal from classification under statute does not vacate classification. Classification of commissioners in force until modified on appeal as provided by statute. Id. Levy by commissioners pending appeal, valid. Judgment may be rendered for legal rate as established by final classification. Id. On appeal classification of drainage commissioners may be laid before jury to correct errors. Farm Drainage Act (Hurd's Rev. St. 1908, c. 42), § 25. Id.

72. Under Code, § 1947, as to appeal from order fixing assessments, and § 1946 as to apportionment of cost, with notice to petioners, appeal from assessment without notice to petitioners was properly dismissed. Poage v. Grant Tp. Ditch & Drainage Dist. No. 5 [Iowa] 119 NW 976. Parties affected by assessment of damages and benefits are necessary parties to appellate proceedings. In re Farley Drainage Dist. No. 7 [Iowa] 120 NW 83. Failure to serve notice of appeal on four

view.[73] Drainage commissioners disqualified from making an assessment by being property holders in the district, are necessarily incompetent to sit as a commission to determine questions of fact arising upon objections.[74] Writ of error may be a proper method of review,[75] and the consideration of the validity of a sewer assessment has been refused when submitted on reserved questions.[76] The right to appeal from an assessment and to demand a jury trial may be denied an owner who is only assessed to pay the cost of construction of a sewer.[77]

*Collection.*[See 10 C. L. 1846]—A county collector of revenue may be authorized to sue for the recovery of drainage taxes,[78] and, in such suits, statutory requirements relative to the assessments are liberally construed.[79] A statutory provision as to the filing of a delinquent tax list has been held merely directory,[80] not affecting a state's right to sue.[81] Proceedings for the collection of an assessment cannot be prevented by the fact that debtor has a counterclaim.[82] Statutes may authorize the

persons first named in petition fatal to jurisdiction of court. Id. Acts 32d General Assembly 1907, p. 100, c. 95, authorizing employment of counsel to represent districts on appeal, does not change necessity of notice to confer jurisdiction on appellate courts. Id.

73. Omaha & N. P. R. Co. v. Sarpy County [Neb.] 117 NW 116.

74. Nutwood Drainage & Levee Dist. v. Reddish, 234 Ill. 130, 84 NE 750. County court erred in compelling petitioners to try objection before prejudiced tribunal. Id.

75. Hurd's Rev. St. 1905, p. 625, authorizing writ of error in special assessment proceedings, not affected by repeal of Levee Act, § 25 (Hurd's Rev. St. 1905, c. 42), as to writs of error and appeals. Judgment order of county court, reviewable. Schafer v. Gerbers, 234 Ill. 468, 84 NE 1064. Nothing in levee act as now amended referring to review by writ of error. Id.

76. Only constitutional questions to be considered. McGarvey v. Swan [Wyo.] 96 P 697. Will not consider validity of sewer assessment from constitutional standpoint on allegation that city levied according to area without regard to benefits, in absence of showing procedure adopted in levy, since such allegation does not disprove consideration of benefits. Id.

77. Under Act May 16, 1891 (P. L. 75), §§ 2, 6, as amended by Act April 2, 1903 (P. L. 124), owner of property assessed only to pay cost of construction of sewer does not have right to appeal from assessment and demand jury trial. Only person whose property is taken injured or destroyed, or who is assessed to pay damages for property injured, etc., who possesses right. Seventh Street Sewer, 35 Pa. Super. Ct. 484. Under Act May 16, 1891 (P. L.) 75), §§ 2, 6, as amended by Act April 2, 1903 (P. L. 124), only remedy of owner assessed for benefits to pay cost of sewer exclusively is to file exceptions to report of viewers and thus secure modification. Id. Jury trial denied on statement of property owner that viewers had made excessive assessment for benefits and that assessment against city should have been larger. Id.

78. Under Rev. St. 1899, § 8332 (Ann. St. 1906, p. 3942), and §§ 9194, 9291, 9302, 9309 (pp. 4233, 4268, 4272, 4281), county collector of revenue has authorty to sue owner of land within drainage district to recover special drainage and back taxes. State v. Wilson [Mo.] 115 SW 549.

79. When valid assessment is shown, its entry upon tax book, and failure to pay it when due, a good cause of action is made out. All other requirements and proceedings are mere formalities intended to assist collection. State v. Wilson [Mo.] 115 SW 549. Where valid drainage assessments entered on books, taxes were valid notwithstanding irregularities in entry, extension, and certificate of assessments, and informality of certificate of authenticity of county clerk. Under Rev. St. 1899, § 8344 (Ann. St. 1906, p. 3947), provisions of art. 5 to be liberally construed. Id. Under Rev. St. 1899, § 8332 (Ann. St. 1906, p. 3942), § 9291 (p. 4268), and § 9313 (p. 4283), as to delinquent taxes, drainage taxes due Jan. 1, and July 1, 1896, did not become delinquent until Jan. 1, 1896, and suit brought Dec. 28, 1900, was not barred by **limitations,** being brought within 5 years after deliquency. Id.

80. Hurd's Rev. St. 1908, c. 42, p. 851, § 106, held directory, not mandatory. Statute considered in connection with Revenue Act (Hurd's Rev. St. 1908, c. 120), § 191, that no tax be illegal because not returned within time required by law. People v. Hulen, 237 Ill. 122, 86 NE 666.

81. Where levy of special taxes properly made, and taxes not paid, failure to return and certify taxes as delinquent did not affect state's right to sue for taxes. Suit maintainable 5 years after taxes should have been returned as delinquent. State v. Wilson [Mo.] 115 SW 576. Failure to return unpaid special taxes as delinquent destroys tax bill of prima facie affect as evidence that taxes are past due and payable Id. Failure to return would not affect state's right to lien for taxes where properly levied and unpaid. Id.

82. In action by county collector of revenue for drainage and levee taxes, defendant could not set off value of old levee for which promoters of district had promised to reimburse him in consideration of signing of petition for district, since neither collector nor district owner of taxes sued for. State v. Dumphy [Mo.] 115 SW 573. Suit by collector as trustee for owners of taxes. Id. Bill to enjoin a sale of land under drainage assessment because amount to be earned by complainant in constructing portion of drain would cover assessment is without equity, since delinquent should pay assessment and collect contract price Harrington v. Dickinson [Mich.] 15 Det. Leg. N. 996, 118 NW 931. Decree of sale in suit by auditor general to sell land delinquent for assessments precludes objections on injunction that owner is en-

payment of assessments under protest.[88] A city board of health required by ordinance to record its proceedings and orders can not establish a lien on a lot for the expense of draining it when the order to drain was not entered on the minutes.[84]

§ 7. *Management and operation; duty to properly construct, maintain, and repair works, and provide drainage.*[85]—See 10 C. L. 1646—A drainage district may be required to construct a bridge where a natural channel is enlarged, pursuant to statute so as to be impassable.[86] Where a railroad company established a satisfactory culvert to handle the waters of a natural channel, it could not be compelled under a drainage act to furnish additional improvements to take care of the water discharged into such channel by a drainage system.[87] Ordinarily, drainage corporations are not liable for negligence in the performance of duties,[88] but the drainage commissioners may be liable.[89] Proceedings of drainage commissioners at a meeting held outside the district have been held illegal and void.[90] A mandatory duty imposed upon drainage commissioners as to widening a drain may be enforced by a manda-

titled to credit or that reassessment was not ordered by supervisors. Property to have been determined in prior suit. Id. Decrees and sales in tax foreclosure proceedings only to be set aside when taxes paid or land exempt. Objections held irrelevant. Id. Agreement with tax collector to offset amount to become due landowner on completion of contract to build portion of drain, invalid. Id. No authority for paying taxes in installments. Id.

83. Comp. Laws 1897, § 4359, held to authorize payment of drain taxes under protest, as given to taxpayers by general tax law. Williams v. Merritt, 152 Mich. 621, 15 Det. Leg. N. 204, 116 NW 386. General statute authorizing payment of taxes under protest does not apply to drain taxes. Id. Taxpayer entitled to recover entire tax paid under protest where contracts illegal and legal portion of tax not severable. Id.

84. Proceedings by board of health pursuant to Kirby's Dig. §§ 5722, 5723. Dinning v. Moore [Ark.] 117 SW 777. Defective report of commissioners adjudicated by county court incorporating district, not cause for objection, in action to collect drainage tax. State v. Wilson [Mo.] 115 SW 549.

85. **Search Note:** See notes in 4 C. L. 1438; 41 L. R. A. 751; 69 Id. 805; 4 Ann. Cas. 1080.

See, also, Drains, Cent. Dig. §§ 55-71; Dec. Dig. §§ 41-65; Municipal Corporations, Cent. Dig. §§ 1521-1525; 1772-1802; Dec. Dig. §§ 711-715, 827-846; 10 A. & E. Enc. L. (2ed.) 227, 239.

86. Under Farm Drainage Act (Hurd's Rev. St. 1905, 810) §§ 41, 74, where drainage district so enlarges natural drain through farm that it is impossible for owner to get from one portion of farm to another, which was possible before enlargement, such district must provide bridge, though land was situated in another drainage district so far as local drainage was concerned, and though right to construct such enlargement was secured by voluntary agreement instead of by condemnation, since statutory requirement of bridge applies to both cases. Lake Fork Drainage Dist. Com'rs v. Biggs, 134 Ill. App. 239.

87. Acts 30th General Assembly, p. 66, c. 68, § 19. Mason City, etc., R. Co. v. Wright County Sup'rs [Iowa] 116 NW 805.

Code, § 2021, that railway companies shall keep in good repair bridges over drains, etc., does not apply in such case. Mason City & Ft. D. R. Co. v. Wright County Sup're [Iowa] 116 NW 805.

88. Duties and powers assumed in invitum and no liability to respond in damages for neglect in performance of duties, unless so provided by statute. Drainage Dist. No. 1 v. Dowd, 132 Ill. App. 499. Drainage district not liable to respond in damages when causing overflow of land. Bradbury v. Vandalia Levee & Drainage Dist., 140 Ill. App. 298. Drainage district not liable for unauthorized acts of commissioners for which they are personally liable. Bradbury v. Vandalia Levee & Drainage Dist., 236 Ill. 36, 86 NE 163. Intentional neglect of statutory duty as to widening drains. Langan v. Milk's Grove Special Drainage Dist. No. 1, 239 Ill. 430, 88 NE 182.

89. In action under Levee Act, § 50 (Hurd's Rev. St. 1905, c. 42), making drainage commissioners liable for neglect of duty, an instruction that owner might recover damages if the commissioners might have furnished adequate drainage by a practical and feasible plan, but failed to do so should have been given. Binder v. Langhorst, 234 Ill. 583, 85 NE 400. Instruction that, if money was insufficient, commissioners should levy an additional assessment, should also have been given. Id. In action under levee act, error to instruct that commissioners could not be found guilty except for neglect of statutory duty, when failing to inform what duty was. Id. Commissioners not relieved by fact that ditch as constructed by former commissoners was inadequate. Duty to furnish drainage and to correct mistakes so as to secure adequate protection. Id. Commissioners not relieved from liability because natural conditions caused flooding. Id. Power of commissioners under direction of court to construct any work necessary for ample drainage of lands, whether within or without district, and to raise moneys by assessments, is plainly given by statute. Id.

90. People v. Anderson, 239 Ill. 266, 87 NE 1019. Jurisdiction of drainage commissioners confined to territorial limits of district. People v. Schwank, 237 Ill. 40, 86 NE 631.

91. Langan v. Milk's Grove Special Drainage Dist. No. 1, 239 Ill. 430, 88 NE 182. Petition in mandamus to compel drainage com-

mus,[91] and mandamus will lie to compel the removal of conditions of drainage which constitute a wrong and inflict an injury on property,[92] but the remedy is inapplicable as to discretionary duties.[93] The employment of labor by a drainage official may be authorized so as to bind the district.[94] Jurisdiction as to repairs of drains may be vested in municipalities within the corporate limits.[95] Liability of a municipality as to the maintenance of sewers may be predicated upon the negligent construction of such improvements.[96] A city required by charter to promptly repair sewers is not an insurer against injuries to property from obstructions.[97] A

missioners to deepen and widen main and lateral drains held sufficiently certain showing it was practicable to enlarge ditches to carry away water. Petitioner not required to ascertain exact character and amount of work necessary, or furnish plans. Id. Farm Drainage Act, §§ 17, 41 (Hurd's Rev. St. 1908, c. 42, §§ 91, 116), as to duty of drainage commissioners to provide ditches, is mandatory. Ample power conferred for performance of duty. Id. Proceeding by mandamus to compel widening of drain, an action at law, governed by rules of pleading as to such actions. Statute of limitations not available unless pleaded. Id. Averment that petitioners requested drainage commissioners to deepen and enlarge ditches, sufficient averment of demand. Id. Under facts, no merit in defense of laches. Id. Judgment commanding commissioners to deepen and widen ditches so as to provide outlet of ample capacity to carry off waters from petitioner's land held sufficiently definite and certain. Id.

92. By property owner. Latham v. Holland, 133 Ill. App. 144. Property owners entitled to insist that drainage commissioners construct ditches of sufficient capacity to protect lands from overflow, provided cost of whole work did not exceed benefits to be derived. Id.

93. Under Farm Drainage Act, § 17 (Hurd's Rev. St. 1905, c. 42, § 91), authorizing drainage system, with preference to tile drains, and § 76 (§ 151), providing that ditches, when open, be of tile drains if practicable, determination of whether tile drain is practicable is for commissioners, and cannot be reviewed by mandamus unless fraudulent. People v. Henry, 236 Ill. 124, 86 NE 195. Petition insufficient to aver fraud. Id.

94. Under Act 1905, p. 231, §§ 16, 33, as to levee district, president of district had power to hire work done on private levees, and district was liable for payment, where work necessary to protect district from overflow and partly constructed levees from damage. Red River Levee Dist. No. 1 v. Russell [Ark.] 114 SW 213. Where president of levee district has ordered work done under supervision of board's chief engineer, and has power to bind district, engineer would be acting within scope of authority, and action would bind district. Id.

95. Under Acts 1905, p. 407, c. 129, § 267, giving towns exclusive jurisdiction of drains within corporate limits, and Acts 1905, p. 474, c. 157, § 10, as to repairs, etc., county surveyor may only repair drains outside town. Quick v. Templin [Ind. App.] 85 NE 121.

96. Not liable for erroneous judgment as to what will be adequate. Schweriner v. Philadelphia, 35 Pa. Super. Ct. 128. City liable for negligence in plan, construction and maintenance of public sewers. State v. Concordia [Kan.] 96 P 487. Where city sewer becomes choked because of want of ordinary care by city, fact that an extraordinary flood occurred will not relieve the city, negligence of city being proximate cause. City of Richmond v. Wood [Va.] 63 SE 449. **Complaint** held to contain unnecessary verbiage and repetitions, but stating cause of action as to negligent construction of sewer whereby plaintiff's premises were flooded. City of Garrett v. Winterich [Ind. App.] 84 NE 1006. Sufficient as against demurrer. City of Garrett v. Winterich [Ind. App.] 87 NE 161. Declaration alleging sewer to be choked, wherefore water entered plaintiff's lot and dwelling, and concluding that plaintiff was otherwise damaged, sufficient to cover damage to all buildings on lot. City of Richmond v. Wood [Va.] 63 SE 449. If not sufficiently advised of damages by declaration, **bill of particulars** should be demanded. Id. Where city sued for overflow caused by sewers being insufficient, **evidence** of complaints to engineer of other overflows was inadmissible. Facts of overflows admissible. Id. Opinion evidence of civil engineers as to whether sewers were of sufficient capacity to drain area, properly admitted. City engineer of 30 years' experience, who was engineer when city constructed system, and who was familiar with pipes, etc., competent witness. City of Garrett v. Winterich [Ind. App.] 87 NE 161. Evidence sufficient to establish negligence by city in plan devised for drainage of city. Plaintiff's premises flooded. City of Garrett v. Winterich [Ind. App.] 84 NE 1006; City of Garrett v. Winterich [Ind. App.] 87 NE 161. In action for injuries from falling into open drain in street, where city entered general denial, plaintiff had **burden** of showing negligence in falling to maintain place in reasonably safe condition. Parker v. Bedford [Iowa] 117 NW 955. **Instruction** that city was only bound to maintain sewers to meet ordinary conditions, and that if there was an extraordinary flood, "and not such as reasonably might be expected," city would not be liable, held proper. Quoted clause properly interlined to submit question if flood was extraordinary. City of Richmond v. Wood [Va.] 63 SE 449. Construction of greenhouse on land liable to overflow, as contributory negligence, **question for jury.** Knowledge of danger held for jury. City of Garrett v. Winterich [Ind. App.] 84 NE 1006. Finding of no negligence justified by evidence. City of Garrett v. Winterich [Ind. App.] 87 NE 161. Whether city was negligent in leaving drain without barriers near traveled street, for jury. Parker v. Bedford [Iowa] 117 NW 955.

97. Only liable for negligence. Katzenstein v. Hartford, 80 Conn. 663, 70 A 23. Under averments, plaintiff could only recover damages for negligent failure to remove obstruc-

superintendent of highways has been held personally liable for the laying of pipe across private land to connect a catch basin in a street with a ditch,[98] but the city was not liable for the negligence of such superintendent in failing to keep the ditch free from obstructions.[99]

§ 8. *Private and combined drainage.*[1]—See 10 C. L. 1047—Two or more adjoining landowners may lawfully join in the construction of a ditch solely upon the premises of one to drain a pond partly situated on the lands of all such proprietors.[2] The owner of dominant land is not entitled to discharge waters at such points as he pleases where a mutual system of drainage is entered into.[3] Parol permission for a drainage ditch is a mere license and is revoked by the conveyance of the land.[4]

§ 9. *Obstruction of drains.*[5]—See 10 C. L. 1048—A person obstructing a drain may be guilty of a nuisance.[6] The action for damages for the obstruction of a ditch, with relief by injunction as ancillary is not appealable to the circuit court under the Ohio practice.[7]

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**Sham Pleadings; Shelly's Case,** see latest topical index.

## SHERIFFS AND CONSTABLES.


**§ 1. The Office, Election or Appointment, 1851.**
**§ 2. Powers, Duties and Privileges, 1852.**
**§ 3. Compensation, 1852.**
**§ 4. Deputies, Undersheriffs and Bailiffs, 1853.**
**§ 5. Liabilities and Rights, 1853.**
A. Liability in General, 1853.
B. Failure to Execute Process or Insufficient Execution, 1854.
C. Failure to Return Process and False Return, 1855.
D. Failure to Take Security, 1855.
E. Wrongful Levy, Sale or Arrest, 1855.
F. Misappropriation of Proceeds, 1856.
G. Rights of Levying Officers, 1856.
**§ 6. Liability on Bonds, 1857.**


*The scope of this topic* is noted below.[8]

1. *The office; election or appointment.*[9]—See 10 C. L. 1048—Usually by statute,

tions after notice. Id. Evidence of character of obstruction admissible to show no negligence of city in failing to remove. Evidence of other obstructions that one complained of admissible, where no claim that main sewer was defective or insufficient. Id.

**98.** Smith v. Gloucester, 201 Mass. 329, 87 NE 626. Laying out of street not authority for constructing pipe over private land. Id. City not liable for laying pipe across private land, etc. Id.

**99.** Act of superintendent not act of city. Smith v. Gloucester, 201 Mass. 329, 87 NE 626. Evidence did not warrant finding that city had made drain its own, so as to be liable for obstructions. Id. Evidence held not to warrant finding that pipe line, catchbasin and easement in ditch were adopted by city as main drain, under Rev. Laws 1902, c. 49, § 1, or otherwise. Id. That water was run from catchbasin through pipe into ditch for over 20 years might have subjected land to easement, but use made by public, not city. No liability. Id. Where ditch limited to carrying off surface water collected in catchbasin, it could not become a main drain or sewer so that city would be liable as a commercial enterprise. Id.

**1. Search Note:** See Drains, Cent. Dig. §§ 1, 2; Dec. Dig. §§ 22, 23; Municipal Corporations, Cent. Dig. § 1520; Dec. Dig. § 710; 10 A. & E. Enc. L. (2ed.) 235.

**2.** Arthur v. Glover [Neb.] 118 NW 111. Owner of land may drain ponds or basins of temporary character by discharging waters by artificial channel into natural drain and through property of another, even though flow in natural drain is thereby increased. Must be done in reasonable and careful manner, without negligence. Id.

**3.** Rev. St. c. 92, pars. 187, 189. Mackey v. Wrench, 134 Ill. App. 587.

**4.** McIntyre v. Harty, 236 Ill. 629, 86 NE 581. Act June 4, 1889 (Laws 1889, p. 116), providing that drain constructed by mutual license or agreement of adjoining owners be for benefit of all lands, etc., applies to ditches in effect when act became law. Cannot revise revoked license. Id. If construed to revive revoked license, would be unconditional. Id.

**5. Search Note:** See Drains, Cent. Dig. § 70; Dec. Dig. § 63; Municipal Corporations, Cent. Dig. §§ 1772-1802; Dec. Dig. §§ 827-846.

**6.** Under Acts 30th General Assembly, p. 65, c. 68, § 15, providing that person obstructing ditch be guilty of nuisance, railroad company could not construct bridge over ditch which would necessitate piling or other obstructions therein. Mason City, etc., R. Co. v. Wright County Sup'rs [Iowa] 116 NW 805.

**7.** Jury case. Fisher v. Bower, 79 Ohio St. 248, 87 NE 256.

**8.** Includes all matters relating to the powers, duties, liability and compensation of sheriffs and constables. Municipal police officers (see Officers and Public Employes, 12 C. L. 1131) and the duties of sheriffs in respect to particular proceedings (see Attachment, 11 C. L. 315; Executions, 11 C. L. 1433, and the like) are excluded.

**9. Search Note:** See notes in 38 L. R. A. 211.

See, also, Sheriffs and Constables, Cent.

a sheriff is required to give bond,[10] and the failure to comply with such condition may render the office vacant and authorize the appointment of a successor without notice.[11] The statutes of Indian Territory make the United States marshals sheriffs, with the rights and liabilities of that office.[12] Where a sheriff is disqualified from serving a venire, the duty is to be performed by the coroner,[13] but if both are disqualified, an elisor must be appointed.[14]

§ 2. *Powers, duties and privileges.*[15]—See 10 C. L. 1649—A sheriff owes a two-fold duty, one to the public and one to private individuals who are concerned in the execution of civil or quasi civil process.[16] In the absence of constitutional limitations the legislature has power to define, add to and vary the duties of a sheriff.[17] The powers and duties of constables or peace officers as to the arrest of a person committing a crime are the same as sheriff's.[18] A sheriff cannot appoint or detail deputies to act as a guard for private property except to prevent threatened crime.[19] A sheriff may be an ex-officio tax collector,[20] and it has been held that the collection of taxes after the expiration of a term was not usurpation of office within a statute punishing such offense.[21]

§ 3. *Compensation.*[22]—See 10 C. L. 1649—The compensation of sheriffs is determined entirely by statute, and the various enactments provide an allowance for keeping prisoners,[23] or attending court,[24] that expenses be approved or audited,[25] that the compensation of one deputy be paid by the sheriff,[26] or that uncollected

Dig. §§ 1-30; Dec. Dig. §§ 1-14; 9 A. & E. Enc. L. (2ed.) 368; 25 A. & E. Enc. L. (2ed.) 662.

10. Under Sess. Laws 1906, p. 152, c. 22, requiring quietus from auditor of public accounts before tax book be delivered to sheriff, etc., quietus is not condition precedent to execution of bond required. Renshaw v. Cook, 33 Ky. L. R. 860, 895, 111 SW 377.

11. Ky. St. 1903, §§ 4134, 4557; Sess. Laws, p. 152, c. 22. Renshaw v. Cook, 33 Ky. L. R. 860, 895, 111 SW 377. County judge may enter order declaring office vacant and appoint successor. Id.

12. Sanders v. Clins [Okl.] 101 P 267.

13. People v. Vasquez [Cal. App.] 99 P 982.

14. People v. Vasquez [Cal. App.] 99 P 982. Statutes held to contain no provision for appointment of elisor by inferior courts, as by justice of peace. State v. Cotten [Mo. App.] 115 SW 1064.

15. **Search Note:** See notes in 4 C. L. 1442; 33 L. R. A. 92; 4 Ann. Cas. 1168.

See, also, Sheriffs and Constables, Cent. Dig. §§ 100-344; Dec. Dig. §§ 77-153; 25 A. & E. Enc. L. (2ed.) 669.

16. McPhee v. U. S. Fidelity & Guar. Co. [Wash.] 100 P 174. Duty of sheriff is to keep prisoners for public and produce them for trial. Id.

17. Cain v. Woodruff County [Ark.] 117 SW 768.

18. Arrest of intoxicated man. People v. Stillwater Auditors, 126 App. Div. 487, 110 NYS 745. Police constable may, without warrant, arrest an intoxicated person upon highway in any town in county. See Laws 1891, p. 244, c. 106, tit. 2; Id. tit. 7, § 7; Code Cr. Proc. §§ 117, 154, 960. Id.

19. Texas & N. O. R. Co. v. Parsons [Tex.] 113 SW 914.

20. Ky. St. 1903, § 4129. Commonwealth v. Bush [Ky.] 115 SW 249. Where failure to collect taxes, not returned and allowed as delinquent, sheriff might be required to account for them as if collected. Kujawa v. Chicago, etc., R. Co., 185 Wis. 562, 116 NW 249. Sheriff subrogated to rights of county and state. Id.

21. Ky. St. 1903, § 1364. Receipt given as ex-sheriff. Commonwealth v. Bush [Ky.] 116 SW 249.

22. **Search Note:** See Sheriffs and Constables, Cent. Dig. §§ 45-99; Dec. Dig. §§ 28-76; 25 A. & E. Enc. L. (2ed.) 730; 25 A. & E. Enc. L. (2ed.) 676.

23. Acts 1907, p. 328, amending Kirby's Dig. § 4402, allowing sheriff 75 cents per day for kesping and feeding prisoners, being enacted in pursuance to constitutional authority, is valid. Cain v. Woodruff County [Ark.] 117 SW 768. Not void as in conflict with Const. art. 7, § 28, declaring that county court have exclusive original jurisdiction as to disbursements, etc. Id.

24. Under Rev. St. 1895, art. 4900, art. 1531e, as to sheriff's duty in attending courts, and art. 2460, as to compensation, county was liable only for $2 per day for attendance of sheriff or deputy upon criminal district court. Ledbetter v. Dallas County [Tex. Civ. App.] 111 SW 193. County not liable for pay for two deputies, though appointment of extra deputy authorized by court and necessary. Id.

25. Under facts shown, sheriff had approval of commissioners' court as to employment of two guards at county jail. Required by Rev. St. art. 4898. Ledbetter v. Dallas County [Tex. Civ. App.] 111 SW 193. $1.50 per day for each necessary guard appointed allowed by Code Cr. Proc. 1895, art. 1098. Id. Appointment of jailer as authorized by Cods Cr. Proc. art. 52, immaterial. Id. County commissioners in making allowances to sheriff may properly include items of carfare in service and return of summons and in serving warrants of arrest on persons charged with lunacy, and telephone tolls where expended in matters pertaining to duties of the office, where by

fees belong to the county.[27] A sheriff is also generally entitled to reimbursement for expenses necessarily incurred in the performance of the duties imposed on him by law.[28] A sheriff is entitled to commissions where an execution is issued and levied, though the judgment is satisfied by payment to the plaintiff's attorney.[29] Where a member of a state constabulary cannot by statute collect a fee for serving a criminal warrant, he cannot collect the same for the use of the state.[30]

§ 4. *Deputies, undersheriffs and bailiffs.*[31]—See 10 C. L. 1650—The appointment of a deputy may be mandatory.[32] Under a statute requiring the filing of a certified copy of the certificate of a deputy, the appointment is made a matter of public record.[33] Where a sheriff is disqualified from performing a duty, the disqualification will apply to a deputy.[34]

§ 5. *Liabilities and rights. A. Liability in general.*[35]—See 10 C. L. 1651—Generally, a sheriff is never liable at the suit of third persons unless expressly bound by the duty of his office,[36] though there is an exception to the rule, in that the sheriff owes a duty to his prisoner to keep him in health and free from harm.[37] Legal process, regular on its face and issued by competent authority, is a protection to a sheriff acting in obedience thereto,[38] but the protection obtains only when

using cars and telephone the business of the office may be expedited and saving effected to the county over other methods of performing the same service. Boes v. Montgomery County Com'rs, 7 Ohio N. P. (N. S.) 76. Auditing and allowing of bill for expenses by circuit court held unnecessary, determination of action to recover same being sufficient audit. Harkreader v. Vernon County [Mo.] 116 SW 523.

**26.** Code Supp. 1907, § 510b, construed, and deputy required in all counties, for whose compensation sheriff, not county, is liable. Statute allows other deputies if fixed by supervisors, but "chief deputy" to be paid by sheriff, and where chief deputy was sole deputy, sheriff was responsible. Culver v. Fayette County [Iowa] 120 NW 627. Under Code Supp. 1907, § 510b, where deputy appointed and salary fixed at $50 per month by supervisors, to be paid by sheriff, latter could not escape obligation by having duties discharged under **private contract** at less rate. Bodenhofer v. Hogan [Iowa] 120 NW 659. Such contract illegal. Illegal contract not defense in action for compensation fixed by law, plaintiff not claiming under such contract. Id. Deputy not estopped to recover full amount by receipt of smaller amounts under illegal contract. Id.

**27.** Under Code 1902, § 510a, sheriff may retain mileage fees collected, but uncollected sums belong to county. Cremer v. Wapello County [Iowa] 117 NW 954. Where Code, § 511, fixes mileage for serving civil process, and Code Supp. 1902, § 510a, authorizes retention of such mileage by sheriff, but declares that "fees" uncollected belong to county, such mileage is fees within latter section. Id.

**28.** May recover same. Harkreader v. Vernon County [Mo.] 116 SW 523. County bound to provide janitor service for sheriff's office, and sheriff entitled to reimbursement for expense on that account. Id. Entitled to reimbursement for stamps used in official business. Id. No defense that presiding judge of county court told sheriff that court would furnish things required. Id. Mere offer. Id. Sheriff not estopped from claiming reimbursement for water and gas when stating that he would use city water and gas "if he had to pay for it himself," since on complaint county court refused to restore such service. Id. Rev. St. 1899, § 8104 (Ann. St. 1906, p. 3848), requiring clean jails, contemplates water supply, and sheriff may compel reimbursement for same. Id.

**29.** Entitled to commissioners same as if money paid to him. Davis v. Gott [Ky.] 113 SW 826.

**30.** Walsh v. Luzerne County, 36 Pa. Super. Ct. 425.

**31. Search Note:** See notes in 13 L. R. A. 721; 19 Id. 177.

See, also, Courts, Cent. Dig. §§ 201-203; Dec. Dig. § 58; Sheriffs and Constables, Cent. Dig.; Dec. Dig.; 9 A. & E. Enc. L. (2ed.) 368.

**32.** Under Code Supp. 1907, § 510b. Culver v. Fayette County [Iowa] 120 NW 627. Appointment without approval of board of supervisors, invalid. Bodenhofer v. Hogan [Iowa] 120 NW 659.

**33.** Burns' Ann. St. 1901, § 7536, cl. 2 (Rev. St. 1881, § 5522). State v. Sutton, 170 Ind. 473, 84 NE 824. Appointment authorized by Burns' Ann. St. 1901, §§ 7533-7535, 7585, 7945, 7947. Id.

**34.** Executing venire. People v. Vasquez [Cal. App.] 99 P 982. Deputy sheriff possesses only powers of principal. Pol. Code, § 865. Id.

**35. Search Note:** See notes in 15 A. S. R. 315; 86 Id. 554; 89 Id. 413, 448; 95 Id. 96, 115.

See, also, Sheriffs and Constables, Cent. Dig. §§ 100-344; Dec. Dig. §§ 77-153.

**36.** McPhee v. U. S. Fidelity & Guar. Co. [Wash.] 100 P 174. Sheriff not liable where contract between third persons dependent upon his act, though loss occasioned by wrongful act or default. Id.

**37.** Liable for breach resulting in injury or death. McPhee v. U. S. Fidelity & Guar. Co. [Wash.] 100 P 174. Survivors cannot maintain action unless deceased could. Id.

**38.** However unlawful proceedings preceding were. Sanders v. Cline [Okl.] 101 P 267. Officer obeying command of writ of replevin not liable in trespass. Muskin v. Moulton [Me.] 72 A 617. Where judgment

the officer is acting within the scope of the writ,[39] and a sheriff is not protected when the process is issued without jurisdiction.[40] Usually sheriffs are liable for the acts of deputies in serving process or performing duties which they are called on to perform by virtue of their office,[41] but the liability does not extend to wanton, extraofficial acts.[42] In an action by a sheriff against his deputy for an accounting, it is no defense that they both hold their offices through an unlawful contract.[43] A sheriff and sureties have been held liable for the escape of a person arrested on a writ of capias ad respondendum, though a copy of the writ and affidavit was not actually served.[44]

(§ 5) *B. Failure to execute process or insufficient execution.*[45]—See 10 C. L. 1651—The failure or refusal of a sheriff to execute process renders him liable for the resulting damages,[46] though sometimes the failure to execute a writ may be excused by written consent.[47] At common law, an officer was bound to levy execution on a defendant's property whether claimed by third persons or not,[48] but generally, by statute, a sheriff may now refuse to levy unless an indemnity bond is given.[49] In an action for damages for failure to levy an execution, the burden is upon the sheriff to justify his official conduct.[50] An execution prematurely issued is voidable, not void, and, unless quashed, protects the officer.[51] A deposit of fees may be precedent to the execution of a foreign writ.[52] A rule issued against a con-

not satisfied when execution issues writ, being fair on face, protects officer. Davis v. Gott [Ky.] 113 SW 826. Official status of sheriff not changed by infirmity in process rendering it void, acts being none the less official. Gehlert v. Quinn [Mont.] 98 P 369. Process regular on its face, issued by court having jurisdiction, not only protects ministerial officer for acts done thereunder but persons called to assist in execution. McCarthy v. McCabe, 131 App. Div. 396, 115 NYS 829. Where defendant loaned teams to constable to assist in levy. Id.

**39.** Sanders v. Cline [Okl.] 101 P 267.

**40.** Judgment of justice of peace a nullity for lack of jurisdiction, and execution thereunder was no justification to officer who made levy. Squires v. Detwiler [Colo.] 101 P 342.

**41.** Sanders v. Cline [Okl.] 101 P 267. Petition held to state cause of action against marshal and deputy for wrongful eviction or trespass. Id.

**42.** Sanders v. Cline [Okl.] 101 P 267.

**43.** Eversole v. Holliday [Ky.] 114 SW 1195.

**44.** Person submitted and was in custody while attempting to secure bail, and sheriff could at any time have completed service. People v. Gebhardt, 154 Mich. 504, 15 Det. Leg. N. 818, 118 NW 16.

**45. Search Note:** See notes in 4 Ann. Cas. 979.

See, also, Sheriffs and Constables, Cent. Dig. §§ 137-142, 158-176, 193, 204; Dec. Dig. §§ 99-108; 25 A. & E. Enc. L. (2ed.) 680; 20 A. & E. Enc. P. & P. 122.

**46.** Sheriff liable to execution defendant when failing to make levy on corn subject to mortgage, to make sale, or take bond as required by statute (Ky. St. 1903, § 1709, and subsec. 4). Davis v. Gott [Ky.] 113 SW 826. Also liable to mortgagee for any damage sustained. Id. Under Kirby's Dig. § 360, where writ of attachment was lien on property, since sale took place after writ came into his hands, officer and sureties were liable for damages sustained by failure to perfect lien. McKinney v. Blakeley [Ark.] 112 SW 976. Liability of sheriff in case of neglect or refusal to proceed under Act May 26, 1897, P. L. 95, relating to **interpleaders** in execution is for damage sustained by party injured. In action for refusal to sell goods levied upon, where sheriff had not applied for interpleader, he may show that goods did not belong to debtor, but stranger, and that consequently plaintiff suffered no injury. Necker v. Sedgwick, 36 Pa. Super. Ct. 593.

**47.** Under Ky. St. 1903, § 1713. Davis v. Gott [Ky.] 113 SW 826.

**48.** Must show property exempt to excuse failure to levy. Mayfield Woolen Mills v. Lewis [Ark.] 117 SW 558. Could not require bond for indemnity in case property was owned by another. Id.

**49.** Where third party claims property, or circumstances would justify prudent person in apprehending litigation. Mayfield Woolen Mills v. Lewis [Ark.] 117 SW 558. Mere suspicion insufficient. Id. Under Kirby's Dig. §§ 3246, 3247, officer cannot arbitrarily refuse to levy execution unless indemnity bond is given. Id. Within discretion of constable to accept delivery bond when levy upon property upon justice's execution. Snyder v. Powell, 133 Ill. App. 393.

**50.** Directed verdict error. First International Bank v. Lee [N. D.] 120 NW 1093. **Complaint** in action for damages for neglect to levy upon certain property held sufficient. Id.

**51.** Roettger v. Reifkin [Ky.] 113 SW 88.

**52.** Judgment creditor cannot maintain action against sheriff for failure to execute foreign writ of execution, or for failure to index foreign execution docket, or to do other things enumerated in § 1212, Rev. St., unless such judgment creditor has made deposit of sheriff's fees with clerk issuing writ, as required by § 5596. Smith Sons' Lumber Co. v. Kennard, 11 Ohio C. C. (N. S.) 161.

stable to show cause why he should not pay over moneys due on executions may be made absolute without waiting for the constable's voluntary appearance and answer.[53] An officer having a vested interest in an execution is disqualified from executing it.[54]

(§ 5) *C. Failure to return process and false return.*[55]—See 8 C. L. 1900—An officer failing to make a return of an execution is prima facie liable for the amount of the judgment.[56] A false return is not cause for complaint where the damage is due to the plaintiff's own default or misconduct.[57] Where a sheriff's return calling in outstanding county warrants for cancellation and reissue did not negative the fact that the townships named were all that there were in the county, such fact would be judicially noticed.[58]

(§ 5) *D. Failure to take security.*[59]—See 6 C. L. 1462—Liability for breach of duty may be predicated upon the failure to secure a delivery bond in a replevin suit,[60] or a forthcoming bond in a claim case,[61] and a sheriff may become special bail upon the failure to secure a bail bond for the appearance of a prisoner.[62]

(§ 5) *E. Wrongful levy, sale, or arrest.*[63]—See 10 C. L. 1652—Though the writ under which goods are seized is valid, officers executing the same will not be protected when guilty of trespass to persons or property on the levy,[64] and a levy upon property subject to mortgage, after notice of the same, is made at the sheriff's own risk.[65] Generally a sheriff is not liable for the seizure of property of a

53. Constable must suffer consequences of default. Puckett v. State Banking Co., 130 Ga. 586, 61 SE 465. Rule returnable instanter, and must be returned as soon as service is made, when subject to be heard, or as soon as counsel can be heard. Id. Order should be given reasonable construction so as not to work oppressively, but cannot be extended so as to allow constable his own time in answering. Id. No defense that other liens contested proceeds. Id. Allegations insufficient to cause default to be set aside. Id.

54. People v. Loeff, 142 Ill. App. 30.

55. **Search Note:** See Sheriffs and Constables, Cent. Dig. §§ 230-236; Dec. Dig. §§ 123, 124; 25 A. & E. Enc. L. (2ed.) 680; 20 A. & E. Enc. P. & P. 122.

56. Can only be relieved by showing judgment creditor not aggrieved. Smith v. Geraty, 61 Misc. 101, 112 NYS 1100. Judgment for sheriff erroneous where no showing of levy or that judgment debtor had no property subject to levy. Id.

57. Where plaintiff knew of action and contested service, and then failed to contest merits, it could not recover damages of office for serving summons for false return. State v. McCarthy [Mo. App.] 114 SW 1110.

58. Chicago, etc., R. Co. v. Perry County [Ark.] 112 SW 977.

59. **Search Note:** See Sheriffs and Constables, Cent. Dig. §§ 219-221; Dec. Dig. § 121.

60. McAleenan v. Dickman, 128 Mo. App. 703, 107 SW 444. Rev. St. 1899, § 4465 (Ann. St. 1906, p. 2450), requiring bond before taking or receiving property in replevin suit, mandatory. Id. Where delivery bond in replevin not contained in record, it will be presumed to comply with statute. Id. Sheriff's joinder in motion for costs in replevin after accepting delivery bond not an admission that delivery bond was insufficient. Id.

61. Duty of sheriff in claim case, when delivering property to claimant, to secure forthcoming bond. Civ. Code, 1895, § 4614. Hightower, Pratt & Co. v. Hodges, 5 Ga. App. 408, 63 SE 541.

62. Under Code 1906, § 1464. Cooper v. Rivers [Miss.] 48 S 1024. Where sheriff received money from third person to be forfeited unless accused answered to criminal charge, sheriff was special bail. Id. On payment of money into court, third person could not obtain judgment against sheriff. Id. Third person in pari delicto with sheriff and cannot recover deposit, since improper for sheriff to accept money as security, instead of bond. Id.

63. **Search Note:** See notes in 51 L. R. A. 193; 12 L. R. A. (N. S.) 1019.

See, also, Sheriffs and Constables, Cent. Dig. §§ 180-194; Dec. Dig. §§ 109-117; 25 A. & E. Enc. L. (2ed.) 701; 20 A. & E. Enc. P. & P. 123.

64. Stowers Furniture Co. v. Brake [Ala.] 48 S 89.

65. Chattel mortgage. Breit v. Solferino [N. J. Law] 72 A 79. District court act, § 190, P. L. 1898, p. 624, providing mode for trying claim to property, inapplicable since claim ignored, and claimant might rely on common-law remedy. Id. Execution sale of property subject to prior, valid mortgage, held conversion. Adams v. Overboe, 105 Minn. 295, 117 NW 496. Where note and mortgage was given attorney to dissolve attachment, which was affected, sheriff might retain property pending appeal, but when order dissolving attachment was affirmed, such mortgage became prior lien, and sheriff's sale of property under execution pursuant to judgment in main action was wrongful. Id. Possession did not entitle sheriff to transfer lien of attachment to execution, and thus defeat rights of mortgagee. Id. When property is found in possession of stranger claiming title, possession of writ will not justify seizure by sheriff. McRale v. Lachmann [Cal. App.]

third person unless he has knowledge of the ownership,[66] and prima facie ownership by virtue of possession is usually sufficient to authorize a levy.[67] Under statutory provisions, where a sheriff is sued in conversion for property attached, the litigation may be turned over to the plaintiff in the original action.[68] An attachment is a good defense in an action by a fraudulent vendee against a sheriff for seizing the property attached.[69] Where a constable wrongfully levied upon exempt property, the measure of damages was the value of the property and the value of the use and hire of such property.[70] Actions against a sheriff for conversion,[71] or to enforce liability in an official capacity,[72] may be barred by limitations.

(§ 5) *F. Misappropriation of proceeds.*[73]—See 10 C. L. 1653—Generally a sheriff collecting money upon legal process must pay it over to the persons entitled thereto.[74] A sheriff selling property for taxes and failing to collect the price is responsible to the state and county.[75] A sheriff is also liable for surrendering the property of a prisoner to another in disregard of the prisoner's rights,[76] or for delivering property seized in detinue after the tender of sufficient bond.[77]

(§ 5) *G. Rights of levying officers.*[78]—See 10 C. L. 1653—A sheriff who levies upon chattels by virtue of an execution acquires a special property therein and may sue one who takes them from his possession,[79] and statutory provisions permit the continuance of the action by the undersheriff where the sheriff dies.[80] Prop-

96 P 505. In action by mortgagee against sheriff for goods taken under attachment against mortgagor, complaint, failing to state mortgagee as creditor of mortgagor or otherwise questioning validity of mortgage, is nevertheless sufficient on demurrer, since sheriff to justify levy must show that attachment plaintiff was creditor of mortgagor and entitled to question validity of mortgage. Id.

**66.** Sheriff not guilty of conversion unless he has knowledge that property levied upon belongs to another. Mariner v. Wasser [N. D.] 117 NW 343. Under Code 1897, § 3991, notice without consideration stated was insufficient. Gray v. Carroll [Iowa] 120 NW 1035. Insufficiency of notice may be raised by demurrer. Id.

**67.** Mariner v. Wasser [N. D.] 117 NW 343.

**68.** Practice is to deliver papers served to plaintiff in original action, or attorney, and to perfunctorily verify answer, permitting plaintiff to control litigation after furnishing indemnity bond. Gehlert v. Quinn [Mont.] 98 P 369.

**69.** Even if fraudulent transfer had preceded attachment. Hart v. Clarke & Co., 194 N. Y. 403, 87 NE 808.

**70.** Not value of property with interest. Railey v. Hopkins [Tex. Civ. App.] 110 SW 779.

**71.** Action against sheriff three years after property converted by sale under execution not barred by limitations. Rev. Laws 1905, § 4077. Adams v. Overboe, 105 Minn. 295, 117 NW 496.

**72.** Where levy by defendant in good faith assuming to act as marshal and believing he had authority, act must be regarded not as trespass but in official capacity, and is barred by limitation after one year. Kirschberg v. Coghlen, 62 Misc. 629, 115 NYS 1078. Municipal Court Act (Laws 1902, p. 1577, c. 580), § 304, makes provisions as to taking of property by sheriffs applicable to marshals, and Code Civ. Proc. § 385, subd. 1, requires suit to enforce liability in official capacity within one year. Id.

**73. Search Note:** See notes in 47 L. R. A. 737.

See, also, Sheriffs and Constables, Cent. Dig. §§ 224-229; Dec. Dig. § 122; 25 A. & E. Enc. L. (2ed.) 714; 20 A. & E. Enc. P. & P. 129.

**74.** Under Civ. Code 1895, §§ 4099, 4162, duty of constable making collections on executions, when no conflicting claims to money, is to distribute same. Sparks v. Bloodworth, 131 Ga. 563, 62 SE 989. Constable subject to rule if failing to pay over proceeds of collection to person entitled thereto. Civ. Code 1895, §§ 4099(3), 4162. Meeks v. Carter, 5 Ga. App. 421, 63 SE 517.

**75.** Bailey v. Napier [Ky.] 117 SW 948. Where tax levy excessive, sheriff should return remainder of proceeds. Id.

**76.** Liable in trover without precedent demand for returns of property, property being in possession of third party. Bell v. Carter [C. C. A.] 164 F 417.

**77.** A trespasser ab initio liable for all damages naturally resulting from misconduct. Pruett v. Williams [Ala.] 47 S 318. Attorney's fees an element of damages. Id. Error to leave jury to assess damages according to value of horse, as though claim was for loss of horse, instead of use. Id.

**78. Search Note:** See Sheriff's and Constables, Cent. Dig. §§ 120-136; Dec. Dig. §§ 88-92; 25 A. & E. Enc. L. (2ed.) 697; 20 A. & E. Enc. P. & P. 113.

**79.** Either to recover possession or damages for conversion. Dickinson v. Oliver [N. Y.] 88 NE 44.

**80.** Under Code Civ. Proc. §§ 766, 189, 1388, where sheriff died after commencing action for conversion of property levied, action should be continued by "undersheriff" as such, not as "sheriff." Section 766 held to apply to actions by officers under statutory authority, not common law, wherefore action did not abate. Dickinson v. Oliver

erty in the custody of the sheriff, who places it in the care of a custodian or keeper, is in the absolute control of the sheriff, and the custodian has no lien thereon for his fees or the costs of keeping.[81] Where live stock is seized for delinquent taxes, a sheriff is entitled to reimbursement for the reasonable cost of keeping the same between seizure and sale.[82] A constable has been held not guilty of contempt in refusing to obey an order requiring the acceptance of a delivery bond when such order was without jurisdiction.[83]

§ 6. *Liability on bonds.*[84] See 10 C. L. 1654—The statutes provide who shall approve a sheriff's bond,[85] and ordinarily the official bonds cover the entire term of office.[86] The obligation is not be to extended beyond its express terms,[87] and the liabilities of sureties are largely dependent upon statutes to be construed in connection with the obligation.[88] A surety is, as against the public, liable for the misfeasance of a sheriff where the bonds for the previous year were void because of the forgery of one surety's signature.[89] The liability of sureties on an indemnity bond is measured by the obligation,[90] and sureties on such a bond given to make a levy are not released by the fact that the property was sold to one of the deputies in violation of law.[91] It may be stated generally that a sheriff is liable on his official bond for breach of duty, either to the public or to individuals concerned in execution of process,[92] and liability has been predicated upon the misappropriation

[N. Y.] 88 NE 44. Where undersheriff substituted by stipulation as sheriff and no objection upon trial defendant could not complain. Id.

**81.** Beck v. Lavin [Idaho] 97 P 1028. Sheriff entitled to retain possession of property until fees paid, but keeper had no such right. Id. Provisions of Rev. St. 1887, § 3445, as amended Laws 1893, p. 67, giving special lien inapplicable to property in custody of law. Id.

**82.** Bailey v. Napier [Ky.] 117 SW 948.

**83.** Constable not guilty of contempt in refusing to obey order of court requiring release of levy and acceptance of delivery bond, where levy preceded certiorari to review judgment under which levy made. Order without jurisdiction. Snyder v. Powell, 133 Ill. App. 393. Statutory duties and rights of constable in regard to goods levied upon cannot be changed by court to which appeal is taken or from which certiorari is obtained after levy. Id.

**84. Search Note:** See notes in 71 A. S. R. 519; 91 Id. 534.

See, also, Sheriffs and Constables, Cent. Dig. §§ 345-422; Dec. Dig. §§ 154-171; 25 A. & E. Enc. L. (2ed.) 730.

**85.** Under Ky. St. 1909, § 1060, order approving sheriff's bond may be signed by successor of judge. U. S. Fidelity & Guar. Co. v. Salyer [Ky.] 115 SW 767.

**86.** Under Ky. St. 1909, § 4134, as to bonds and sureties, official bonds of sheriff cover entire term of office and all sureties are cosureties. U. S. Fidelity & Guar. Co. v. Salyer [Ky.] 115 SW 767.

**87.** McPhee v. U. S. Fidelity & Guar. Co. [Wash.] 100 P 174.

**88.** Pol. Code Mont. 1895, § 1064 (Rev. Codes, § 391), providing that official bonds be for benefit of persons injured, must be read in connection with conditions of bond. When so construed, refers only to liabilities arising within fair meaning of obligation itself. McPhee v. U. S. Fidelity & Guar. Co. [Wash.] 100 P 174. Under B. & C. Comp. § 2528, requiring bond of sheriff; § 3093, making him ex officio tax collector, since Hill's Ann. Laws, § 2794, requiring additional bond, had been construed as not cumulative to render sureties of official bond liable for taxes collected; under B. & C. Comp. § 3094, requiring bond as tax collector in addition to official bond, it is held that recourse for sheriff's default as tax collector against sureties on general bond is limited to cases where the additional bond is unenforcible or insufficient. Wheeler v. Keeton [Or.] 95 P 819. Released where no bond required or given. Id.

**89.** Where county officers had no knowledge that bonds executed in one year were void, surety of bonds for subsequent year had equal opportunity to ascertain invalidity, and such surety was as against public liable for misfeasance. U. S. Fidelity & Guar. Co. v. Sayler [Ky.] 115 SW 767.

**90.** An indemnity bond conditioned to save a sheriff from all harm, etc., because of a levy on money in his hand, which he was directed to apply upon the execution mentioned therein, could not be confined to damages resulting from the acts of the execution defendant, but covered a judgment recovered against the sheriff by a third party claiming the money. McKnight v. Ballif [Colo.] 100 P 433. In action on bond of marshal for misconduct, plaintiff can only recover compensation from sureties. Commonwealth v. Teel, 33 Ky. L. R. 741, 111 SW 340.

**91.** Since damages occasioned by seizure and detention of property. Railey v. Hopkins [Tex. Civ. App.] 110 SW 779.

**92.** To create cause of action, duty in either event must be direct (McPhee v. U. S. Fidelity & Guar. Co. [Wash.] 100 P 174), must result to party injured (Id.), and must operate as deprivation of existing right (Id.).

of proceeds collected,[93] a false return,[94] a wrongful seizure of property,[95] an excessive levy,[96] the failure to take security,[97] and an unlawful arrest.[98] A sheriff failing to collect taxes, which are not returned and allowed as delinquent, may be required to account to the county and state as if collected.[99] Recoveries on a bond for the involuntary escape of a prisoner are limited to the actual damages arising out of and measured by the act itself.[1] Neither a constable nor his sureties are liable where a levy is released under ample security.[2] A suit for damages in the commission of a tort cannot be joined in one count with a suit on official bonds of the officers for committing such tort.[3] A petition in an action for damages for trespass has been held not to state a cause of action against the surety where there was no allegation of aid or benefit from such trespass.[4] A sheriff is not liable for breach of bond in failing to accept property tendered in a detinue suit after the expiration of his term,[5] and in such an action it is a defense that the property was tendered to the plaintiff, who also refused to accept it.[6] A complaint for breach of bond in that a sheriff refused to deliver property seized in detinue, though a sufficient bond was tendered, is not demurrable for failing to set out the writ of detinue,[7] the bond tendered,[8] or because showing that the property was in custody of the law.[9] Generally, in suits on an official bond for failure to sell property, the sheriff can show that the same is not subject to execution.[10] As an official bond is simply collateral security for the performance of an officer's duty, the action is barred by limitations when the suit for breach of duty is barred.[11]

**93.** In action on bond for failure to turn over proceeds collected under execution, it is **no defense** that constable was to receive commission in excess of statutory allowance. People v. Loeff, 142 Ill. App. 30.

**94.** In action on official bond of sheriff for making false return, costs taxed in chancery suit resulting in setting aside of judgment predicated upon false return may properly be included as **damages,** being direct and proximate result of false return. People v. Barrett, 141 Ill. App. 168. Regardless of fact that no effort was made to collect same in judgment fraudulently obtained. Id.

**95.** Bailey v. Napier [Ky.] 117 SW 948.

**96.** Selling more property than necessary to satisfy taxes. Bailey v. Napier [Ky.] 117 SW 948.

**97.** Where sheriff sued on bond for damages because of unauthorized act in delivering property to claimant without requiring forthcoming bond, neither he nor sureties can attack legality of levy made by deputy. Hightower, Pratt & Co. v. Hodges, 5 Ga. App. 408, 63 SE 541. Cannot attack verdict and judgment in claim case, finding property subject to execution. Id. Liability of sheriff conclusively established by evidence. Id.

**98.** Bond of marshal for faithful performance of duties broad enough to cover unlawful arrest. Commonwealth v. Teel, 33 Ky. L. R. 741, 111 SW 340. In action on bond of marshal for unlawful arrest, **petition** should allege that plaintiff was not committing any offense nor had committed any offense to show arrest without warrant as unlawful. Id. Need not allege fixing of penal sum named in bond since, under Ky. St. 1903, § 3752, plaintiff is not limited by penalty. Id. Petition not defective for failing to state approval of bond. Id.

**99.** Sums in such event due to sheriff being subrogated. Commonwealth v. Bush [Ky.] 115 SW 249.

**1.** In no case measured by loss incurred or profits anticipated under independent contract between third person, though performance of contract depends on conduct of sheriff. McPhee v. U. S. Fidelity & Guar. Co. [Wash.] 100 P 174. Sheriff not liable on bond for damages resulting from escape of prisoner kept for persons entitled to reward for their arrest and conviction. Id.

**2.** Where levy released and money received to cover amount of execution under agreement that money be held subject to disposition of matter according to law, and appeal was prosecuted without effect. People v. Peck, 138 Ill. App. 348.

**3, 4.** Sanders v. Cline [Okl.] 101 P 267.

**5.** Under Code 1907, §§ 3778, 3783, requiring delivery of property seized in detinue on giving of bond, and § 1549, requiring retiring sheriff to turn over such bond to successor, sheriff is not liable after expiration of term, for breach of bond for failing to accept property. Carroll v. Burgin [Ala.] 48 S 667.

**6.** In action on sheriff's bond for refusal of deputy to receive property tendered by defendant, holding same on forthcoming bond whereby same was lost, it was defense that same had also been tendered to plaintiff who also refused. Carroll v. Burgin [Ala.] 48 S 667. Only damage claimed was loss of property. Id. No defense that same was offered by attorney for plaintiff who refused it, since, under bond, property was to be delivered to plaintiff. Id.

**7, 8, 9.** Pruett v. Williams [Ala.] 47 S 318.

**10.** Rule inapplicable, when property levied upon subject to execution and plaintiff damaged by failure to take forthcoming bond. Hightower, Pratt & Co. v. Hodges, 5 Ga. App. 408, 63 SE 541.

**11.** Phillips v. Hail [Tex. Civ. App.] 118

In an action on the bond of a marshal for wrongful acts, the city is not a necessary party.[12]

**Sheriff's sales,** see latest topical index.

## SHIPPING AND WATER TRAFFIC.


**§ 1. Public Control and Regulation; Extent of State Jurisdiction, 1859.**
**§ 2. Nationality, Registration, Enrollment and Ownership, 1859.**
**§ 3. Master and Officers, 1860.**
**§ 4. Seamen, 1860.** Shipping Articles, 1860. Wages and Subsistence, 1860. Expense of Enlisting Seamen, 1861. Care of Injured Seamen, 1861.
**§ 5. Mortgages, Bottomry, Maritime and**
**§ 6. Charter Party, 1862. Cargo, 1861.**
**§ 6. Charter Party, 1861.**
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A. Rules for Navigation and Their Operation in General, 1865.
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F. Sole or Divided Liability, and Division of Damages, 1869.
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H. Common-Law Liability for Negligent Navigation, 1871.
**§ 8. Carriage of Passengers, 1871.**
**§ 9. Carriage of Goods, 1872.** The Harter Act, 1874.
**§ 10. Freight and Demurrage, 1874.**
**§ 11. Pilotage, Towage and Wharfage, 1876.**
**§ 12. Repairs, Supplies and Like Expenses, 1876.**
**§ 13. Salvage, 1878.**
**§ 14. Vessels or Persons Liable for Loss and Expense, and Limitation of Liability Therefor, 1879.**
**§ 15. General Average, 1880.**
**§ 16. Wreck, 1881.**
**§ 17. Marine Insurance, 1881.**
**§ 18. Maritime Torts and Crimes, 1883.**


*The scope of this topic* is noted below.[13]

§ 1. *Public control and regulation; extent of state jurisdiction.*[14] See 10 C. L. 1655—A vessel may by physical presence acquire a physical situs elsewhere than at the place of her registration or enrollment,[15] and may be subjected to a license tax at the situs thus acquired.[16] The regulations adopted by the board of supervising inspectors pursuant to federal statute, when approved by the secretary of the treasury, have the force of law.[17]

§ 2. *Nationality, registration, enrollment and ownership.*[18] See 10 C. L. 1655—

SW 190. Action barred by 2 year limitation. Action against sureties of sheriff on official bond may be brought within six years after expiration of term of office. Rev. Laws 1905, § 4076. Adams v. Overboe, 105 Minn. 295, 117 NW 496.

**12.** Though refusing to join in action for benefit of person injured. Commonwealth v. Teel, 33 Ky. L. R. 741, 111 SW 340. Under Ky. St. 1903, § 3690, making marshal liable on bond for assault in making arrest; § 4 giving cause of action to widow of one killed by deadly weapon; and Civ. Code Prac. §§ 18, 21, requiring action to be prosecuted in name of real party in interest, widow in suing marshal and bondsmen for wrongful killing need not join town or commonwealth as plaintiff. Bolton v. Ayers, 33 Ky. L. R. 591, 110 SW 385.

**13.** Excludes jurisdiction of courts of admiralty and practice and procedure therein (see Admiralty, 11 C. L. 33), obstruction of navigable waters (see Navigable Waters, 12 C. L. 958), matters relating to aliens and emmigration (see Aliens, 11 C. L. 90), matters relating to carriers generally (see Carriers, 11 C. L. 499), and matters relating peculiarly to the operation of Ferries (see Ferries, 11 C. L. 1467).

**14. Search Note:** See notes in 26 L. R. A. 484.

See, also, Shipping, Cent. Dig. §§ 1-49; Dec. Dig. §§ 1-17; 3 A. & E. Enc. L. (2ed.) 859; 9 Id. 418; 22 Id. 813; 25 Id. 863; 28 Id. 260, 261.

**15.** City of Galveston v. Guffey Petroleum Co. [Tex. Civ. App.] 113 SW 585; State v. Higgins Oil & Fuel Co. [Tex. Civ. App.] 116 SW 617; Shrewsbury Tp. v. Merchants' Steamboat Co. [N. J. Law] 69 A 958.

**16.** Coastwise vessels doing local business for hire, plying in Alaskan waters, are required to pay license fee to the United States, although duly enrolled, registered and taxed at home port, Seattle, if they incidentally touched at Alaskan ports, under 31 St. pp. 321, 331. The Pacific Coast Steamship Co. v. U. S., 42 Ct. Cl. 228.

**17.** Adopted pursuant to Rev. St. §§ 4488 and 4405. Mere failure to make certain sections specially applicable to foreign vessels does not make them inapplicable thereto. Deslions v. La Compagnie Generale Transatlantique, 210 U. S. 95, 52 Law. Ed. 973.

**18. Search Note:** See notes in 2 L. R. A. 197.

See, also, Shipping, Cent. Dig. §§ 1-119; Dec. Dig. §§ 1-33; 25 A. & E. Enc. L. (2ed.) 878.

The registration, enrollment or ownership of a vessel does not control her physical situs.[19]

§ 3. *Master and officers.*[20]—See 10 C. L. 1655—The authority of a master to arrest passengers cannot be delegated to another unless necessitated by danger to the ship or other passengers.[21] A mate in charge of the unloading is a vice-principal.[22]

§ 4. *Seamen.*[23]—See 10 C. L. 1655—One must be a regular employe on a vessel to have the rights of a seaman.[24] After the termination of their contract term of service, seamen are not released from their ordinary duties as seamen until they can be conveyed to some port where they can be discharged,[25] but they cannot, after such termination, be required to engage in other business.[26]

*Shipping articles.*See 10 C. L. 1655—Shipping articles to be binding must be executed by persons having capacity to contract[27] and due authority in the premises,[28] and should set forth the nature and, so far as practicable, the duration of the intended voyage or engagement.[29] Rights of seamen thereunder are governed by the law of the country where the contract was made.[30] A change of voyage entitles mariners to damages,[31] but in order to release them from their contract the change must be made willfully by the master and enforced against their consent,[32] and must be material.[33] The parol evidence rule applies to shipping articles.[34]

*Wages and subsistence.*See 10 C. L. 1655—The court will take judicial notice of the fact that seamen's accrued wages rarely aggregate $100.[35] Seamen have a lien upon the vessel for their wages.[36] A seaman forfeits his wages by desertion, that is, unlawful and wilful abandonment of the vessel without intention of returning to duty,[37] but not by a mere breach of duty by leaving without permission

19. See ante, § 1.

20. **Search Note:** See notes in 39 L. R. A. 183.

See, also, Shipping, Cent. Dig. §§ 245-318; Dec. Dig. §§ 59-71; 20 A. & E. Enc. L. (2ed.) 193.

21. Must be exercised or directed by him personally, or if so delegated must be to person of known experience, character, intelligence, judgment and tact. Ragland v. Norfolk & Washington Steamboat Co., 163 F 376.

22. Is not fellow-servant of employe. Ragland v. Norfolk & Washington Steamboat Co., 163 F 376.

23. **Search Note:** See notes in 28 L. R. A. 546; 37 Id. 54; 50 Id. 438; 1 A. S. R. 812; 31 Id. 805; 6 Ann. Cas. 68; 7 Id. 203, 347; 9 Id. 505, 530.

See, also, Seamen, Cent. Dig.; Dec. Dig.

24. Casually employe on barge coaling ship is not a seaman. Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co., 162 F 912.

25. Where term expired while vessel was ice bound. Belyea v Cook, 162 F 180.

26. Seamen on ice-bound vessel could not be required to engage in whaling. Belyea v. Cook, 162 F 180.

27. Minors may disaffirm contract of shipment and recover reasonable value of their services. Belyea v. Cook, 162 F 180.

28. Under Rev. St. § 4504, master of coastwise vessel may sign his own crew. The William H. Clifford, 165 F 59.

29. The Grace Dollar [C. C. A.] 160 F 906.

30. Although courts of this country will not enforce remedy not permitted here, it may investigate and then leave him free to pursue his remedy elsewhere. The Ucayali, 164 F 897.

31. Seamen are entitled to damages resulting from voluntary departure from regular and usual course of specified voyage the vessel being required to visit designated ports in order named. Northwestern S. S. Co. v. Turtle [C. C. A.] 162 F 256.

32. The Grace Dollar [C. C A.] 160 F 906. Enforced **return to port** for repairs does not end voyage so as to entitle seamen to recover on quantum meruit for services rendered thereafter. Belyea v. Cook, 162 F 180.

33. The Grace Dollar [C. C. A.] 160 F 906.

34. Contract must remain as evidenced by shipping articles. The Ucayali, 164 F 897. Articles cannot be varied by evidence of verbal agreement. Rev. St. § 4511. Northwestern S. S. Co. v. Turtle [C. C. A.] 162 F 256.

35. In determining jurisdiction of justice of the peace. Detroit Lumber Co. v. The Petrel, 153 Mich. 528, 15 Det. Leg. N. 506, 117 NW 80.

36. Derrick hoist held to be a vessel subject to such lien. The Sallie, 167 F 880.

37. Seamen will not be excused for leaving ship by order of mate who has no authority to give such order. The Ucayali, 164 F 897. Desertion by reason of immaterial deviation in coast route held not justifiable. The Grace Dollar [C. C. A.] 160 F 906. Leaving vessel by reason of being temporarily required to go without food for refusal to perform work required under shipping articles is desertion. The William H. Clifford, 165 F 59.

or failure to return where there was no original intention not to return,[38] though a seaman failing to return to a ship after leave is chargeable with the excess wages paid out to fill his place[39] and with fines imposed according to law.[40] A seaman may by his conduct be precluded from recovering costs in an action for wages, though he has incurred no forfeiture of the wages themselves.[41]

*Expense of enlisting seamen.* See 10 C. L. 1655

*Care of injured seamen.* See 10 C. L. 1656—A vessel is liable for damages for failure to give an injured seaman proper medical treatment and attention,[42] and is chargeable with the cost of his maintenance and care,[43] regardless of any question of negligence on the part of the vessel's officers.[44]

§ 5. *Mortgages, bottomry, maritime and other liens on the vessel, craft or cargo.*[45] See 10 C. L. 1656—The lien of a mortgage will not attach to after-acquired vessels as against intervening equities of strangers,[46] but a mortgage upon a vessel owned by the mortgagor at the time takes precedence over subsequent claims,[47] and, when recorded pursuant to the provisions of the act of congress, has the effect of a mortgage on real estate.[48] Under the American decisions, a draft given by the master to the charterer for an advance to be supplied to the vessel's disbursements, such draft being made payable out of the first freight received and secured by a pledge of the vessel and freight, is equivalent to a loan on bottomry.[49]

Maritime liens are given primarily for the benefit of commerce[50] and apply only to vessels engaged in maritime service.[51] They apply not only to the vessel but also to its necessary equipment,[52] and to foreign as well as domestic vessels.[53] An act providing for such lien will not be so construed as to defeat the purpose of the legislature.[54] The lien given for damages caused by a vessel is a sort of an equitable attachment[55] and is not limited to the case of damages done to trans-

38. The Charles K. Schull, 166 F 374. Offense of desertion held not committed where seaman left vessel by permission and was arrested and imprisoned for being drunk and thereby prevented from returning with vessel. Id.

39. The Charles K. Schull, 166 F 374.

40. See Rev. St. § 4596, as amended by Act Dec. 21, 1898, c. 28, § 19 (30 St. 760, U. S. Comp. St. 1901, p. 3113). The Charles K. Schull, 166 F 374.

41. Where seamen left vessel with leave, got drunk and was arrested, and was thus prevented from returning to his ship before her departure, and on his return to home port sued for his wages without making previous demand therefor. The Charles K. Schull, 166 F 374.

42. Where there is no surgeon on board, vessel may be required under some circumstances to put back to port. The Fullerton [C. C. A.] 167 F 1.

43. Duty to care for and cure injured seaman does not terminate with voyage but continues until cure is complete. The Teviotdale, 166 F 481.

44. The Teviotdale, 166 F 481.

45. **Search Note:** See notes in 70 L. R. A. 353; 90 A. S. R. 387; 5 Ann. Cas. 652; 11 Id. 681.

See, also, Shipping, Cent. Dig. §§ 361-398, 488, 516-520, 597, 635; Dec. Dig. §§ 88-100, 133, 154, 166 (6), 185, 201; 4 A. & E. Enc. L. (2ed.) 736; 19 Id. 1079; 25 Id. 871; 28 Id. 272; 20 A. & E. Enc. P. & P. 249.

46. Berwind-White Coal Min. Co. v. Metropolitan S. S. Co., 166 F 782.

47. Woods v. Klein [Pa.] 72 A 523.

48. Mortgage recorded in accordance with Act. Cong. July 29, 1850, c. 27, 9 Stat. 440, has effect of mortgage on realty and is unaffected by State Statute relative to chattel mortgages. Woods v. Klein [Pa.] 72 A 523.

49. Monsen v. Amsinck, 166 F 817.

50. Under the necessities of commerce, there is presumpton, in absence of evidence to contrary, that where necessary, supplies are furnished in foregin port, on order of caption, ship's agent, and even in some cases of owner, a lien on the ship will attach therefor, and the same presumption arises with respect to services, domestic or foreign. The Alligator [C. C. A.] 161 F 37.

51. Scow can acquire no maritime lien on dredge for hire, where dredge is temporarily mounted on scow, the dredge not being employed in maritime service and the contract not being maritime. Bouker Cont. Co. v. Proceeds of Sale of Dredging Machine, 168 F 428.

52. Equipment in case of fishing vessel included hooks, lines, bait, ice and covers. The Emma B., 162 F 966.

53. Lien provided for by Ball. Ann. Codes & St. § 5953 (Pierce's Code, § 6077). West v. Marlin [Wash.] 97 P 1102. Lien may be enforced anywhere, and the fact that some of the provisions of act N. J. P. L. p. 382, as amended at p. 248, may contravene admiralty law, does not make void provisions not so conflicting. Berwind-White Coal Min. Co. v. Metropolitan S. S. Co., 166 F 782.

54. Detroit Lumber Co. v. The Petrel, 153 Mich. 528, 15 Det. Leg. N. 506, 117 NW 80.

55. In case where given by statute, receiver being appointed who takes charge,

portable property,[56] but does not extend to freight money due the owner on the cargo.[57] Damage liens on the same vessel, resulting from collisions on different dates, take priority in the inverse order of such dates.[58] When such a lien is not within the jurisdiction of admiralty, it is enforcible in the state courts.[59] Liens for seamen's wages,[60] towage and wharfage,[61] repairs, supplies and expenses,[62] are treated elsewhere. The effect of bankruptcy is treated in another topic.[63] The court will take cognizance of any agreement between the parties,[64] but a vessel is not relieved from a lien for lighterage, as between it and the lienor, by reason of any contract between it and the shipper to which the lienor is not a party.[65] A mutual understanding is essential to create a lien except in emergency cases.[66] The rights of a lienor may be defeated by his laches [67] or by his failure to present his claim in an action in rem,[68] but not by his failure to enter merely personal action against the owner.[69]

Liens created by state laws may be enforced in another jurisdiction where the property is being administered,[70] or in admiralty,[71] unless the subject-matter is not within the jurisdiction of the admiralty courts,[72] in which case they may be enforced in the state courts.[73] The court may apportion liens between several vessels according to the terms of a joint contract therefor,[74] adjudicate the liens in accordance with their priority,[75] and make disbursement of all proceeds according to ownership thereof.[76]

§ 6. *Charter party.*[77]—See 10 C. L. 1656—This subject is treated in another section in so far as it relates to demurrage.[78] The usual provisions of a charter will

bond given to release vessel takes place of property and thereafter no question can be raised as to regularity of attachment. West v. Martin [Wash.] 97 P 1102.

56. Under Bal. Ann. C. & St. § 6077. It includes damages to bridges. West v. Martin [Wash.] 97 P 1102.

57. Seizure of freight money is not justified under admiralty rule 15, in action in rem. The Charles C. Lister, 161 F 585.

58. Liens for damages on same vessel resulting from collisions on different dates take their priority in inverse order of such dates. Interest of first claimant is construed as being liable for subsequent risks. The America, 168 F 424.

59. Under Bal. Ann. C. & St. § 6077. West v. Martin [Wash.] 97 P 1102.

60. See ante § 4, subd. Wages and Subsistence.

61. See post, § 11.

62. See post, § 12.

63. See Bankruptcy, 11 C. L. 383.

64. Where settlement of maritime libel provided for release and discharge of vessel and her master from all further claims except right to recover judgment for possession of certain foods and costs, the court refused to go behind it and ordered the costs to be paid by vessel and her master. The Eva D. Rose, 153 F 912.

65. Where shipper agreed to protect vessel in such matter. The Garonne [C. C. A.] 160 F 847.

66. Notable emergency cases are those arising out of the necessities of the situation such as for pilotage, for seamen's wages, for towage and salvage services. The Alligator [C. C. A.] 161 F 37.

67. Lienor is not guilty of laches by extending credit to owner until close of season. Berwind-White Coal Min. Co. v. Metropolitan S. S. Co., 166 F 782.

68. Any lien claimant failing to enter action in rem and present his claim waives his right to any part of fund from sale of vessel and his only remedy is in personam against owner. The Ethelwold, 165 F 806.

69. Where a personal action is brought against owner, bolders of maritime liens are not required to submit their claims in such suit, since only interests of owners as such are affected in such action and sale therein, and only effect is to delay enforcement of liens while property in custody of court, but lienor having voluntarily submitted his claim in such action, it becomes res judicata to purchaser. The J. R. Langdon [C. C. A.] 163 F 472.

70. In insolvency proceedings or creditor's suit, lien provided for under Act. N. J. P. L. p. 382, as amended at P. L. p. 248, may be enforced in equity in another jurisdiction. Berwind-White Coal Min. Co. v. Metropolitan S. S. Co., 166 F 782.

71. The Emma B., 162 F 966.

72, 73. West v. Martin [Wash.] 97 P 1102.

74. This is accomplished without difficulty under statutes of New Jersey. Berwind-White Coal Min. Co. v. Metropolitan S. S. Co. 166 F 782.

75. The America, 168 F 424.

76. Surplus in proceedings in rem after liens are paid belongs to owner and not to general creditors. Bouker Cont. Co. v. Proceeds of Sale of Dredging Machine, 168 F 428.

77. **Search Note:** See notes in 5 Ann. Cas. 623; 8 Id. 496.

See, also, Shipping, Cent. Dig. §§ 120-244; Dec. Dig. §§ 34-58.

78. See post, § 10.

be construed in the light of custom,[79] but its express provisions will not be overridden by custom [80] or otherwise.[81] A reference in the charter party to a certain clause in a bill of lading does not incorporate therein the entire bill of lading.[82] A charter whereby the owner is to navigate the vessel for the charterer operates as a demise, with a continued responsibility on the part of the owner for her proper navigation,[83] and in such case the owner is responsible for acts of navigation by a pilot,[84] unless the vessel is under the command of a compulsory pilot.[85] In some instances, the relation between owner and charterer is regarded as that of bailor and bailee.[86] A charterer cannot shift an obligation upon the vessel by directing the master to perform it.[87] Where the charterer undertakes to keep the vessel in repair, he cannot hold the owner liable therefor.[88] An exemption clause is waived by an unnecessary deviation of the vessel from its agreed course.[89] The burden is upon charterers to avoid liability for loss of the vessel while in their possession [90]

79. Under provision permitting cleaning at least once every six months and suspension of hire during time of **cleaning,** such time may be estimated from time last cleaned, and not necessarily from time of commencement of hire, regardless of her actual condition. Munson S. S. Line v. Miramar S. S. Co. [C. C. A.] 166 F 722. Under clause providing that charterer shall procure and pay for all consular charges except those pertaining to the captain, officers or crew, it was duty of owner to procure and pay for **bill of health** pertaining to such persons so excepted. The Queen Olga, 162 F 490. **Lay days** are determined according to the established custom of port. Expression "weather working day" in charter was construed according to custom of Savannah port providing that rain during working hours previous to noon shall prevent that day from counting. Pyman S. S. Co. v. One Hundred Tons of Kainit, 164 F 364. In case of overlap, a charter running for about certain **period** is construed to run for one round voyage of character contemplated in charter, unless delay was due to charterer's own fault. The Rygja [C. C. A.] 161 F 106. Where vessel chartered for period of "about six calender months," with option of extending period for six months, last six months was construed to commence to run with time she entered upon second voyage, and when chartered arrived in New York 30 days before the expiration, held to be entitled to his option to redeliver vessel in European port, with damages for prevention. Id. **A break down clause** providing that payment of hire shall cease until she be again in efficient state to resume her service relates only to physical efficiency, and not to procuring of survey and Loyd's certificate. The Queen Olga, 162 F 490. Liability for **loss of cargo** in loading is in accordance with terms of charter party, and stipulation that loading at a later place should be at shipper's risk and expense held to include exception as to acts of God, perils of the sea, etc., which was inserted, particularly in respect to former place. The Exmoor, 163 F 642.

80. Held that charters were under obligations to furnish vessels safe berths at which they could load within reasonable time, and that failing to do so they were liable for demurrage under provisions of charter. Constantine & Pickering S. S. Co. v. Auchincloss [C. C. A.] 161 F 843.

81. Under special clause, charterers may retain prepaid freight in case of loss even though owners under charter party cannot recover from charterer. Burn Line v. U. S. & A. S. S. Co. [C. C. A.] 162 F 298.

82. Reference to negligence exemption clause held not to permit owners to avail themselves of a clause providing that prepaid freight should be considered as earned. Burn Line v. U. S. & S. S. Co. [C. C. A.] 162 F 298.

83. The Hathor, 167 F 194. Where owner by oral contract let boat, including master's services, such **master** remains agent of owner, and the charterer is not liable for damage resulting to boat solely through negligence of master in having mooring line too short, as result of which boat filled and sunk. Zabriskie v. New York, 160 F 235.

84. Acts of **pilot** are acts of navigation for which responsibility rests on owner, although charterer agreed to provide and pay for pilotage and port charges. The Leader, 166 F 139.

85. Pilot in such case is agent of neither owner nor charterer. The Hathor, 167 F 194.

86. Relation of bailor and bailee exists between owner and charterer of vessel under management of captain selected by owner in determining their relative liability for loss of vessel caused by overloading in captain's absence, vessel being in a sense in charge of charterer and, unless owner knew or had reason to believe that captain was neglecting his duties, it being charterer's duty to notify owner of the captain's absence before allowing loading to continue. Schoonmaker v. Henry Steers, 128 App. Div. 655, 113 NYS 257.

87. Hammett v. Chase, Talbot & Co., [C. C. A.] 165 F 1005, afg. 158 F 203. Charterer is not relieved from liability for damage to vessel occuring in work for which he is responsible by employment of master and made to take charge of work as where in unloading heavy boilers the mast was broken by reason of insufficient tackle. Bull v. New York & Porto Rico S. S. Co. [C. C. A.] 167 F 792.

88. Columbia Dredging Co. v. Sanford & Brooks Co., 163 F 362.

89. Globe Navigation Co. v. Russ Lumber & Mill Co., 167 F 228.

90. Charterer must show circumstances of loss and freedom from negligence. Terry

or for nonpayment of charter hire,[91] and while they may offset against such hire due damages for the wrongful withdrawal of a vessel,[92] they will be held liable for failure to fulfill their contract with an assignee, as a result of which the owner takes back the vessel.[93] The charterer may recover damages from the owner caused by failure to provide service as agreed.[94] A receipt in full does not release a claim for such damages where they were not discovered until after the receipt was given.[95] An owner is liable in damages for failure to fulfill a charter [96] within the specified time,[97] but there is no liability in rem against a vessel for failure to enter upon a charter.[98] Where the vessel is not delivered in time for the first voyage the charterers may refuse to accept her until time for the second.[99] At the expiration of a fixed period, charterers are no longer entitled to possession.[1] A charter will not be construed unreasonably so as to permit cancellation.[2] When the number of lay days is specified and dispatch money allowed, the charterers must bear any extra expense incurred by them in accelerating the discharge.[3] Lay days ordinarily begin at the beginning of the loading or unloading,[4] and the date of such beginning is a question of fact.[5] Express provisions as to when lay days shall begin are controlling.[6] A vessel having brought her cargo to destination with no stipulation

& Tench Co. v. Merritt & Chapman Derrick & Wrecking Co. [C. C. A.] 168 F 533. Where pile driver in respondent's exclusive possession was lost while being towed, burden was on respondent as bailee to show that loss was free from negligence on his part. Swenson v. Snare & Triest Co. [C. C. A.] 160 F 459.

**91.** Claim for charter hire admittedly due held not defeated by claim of charterer that master refused to load full cargoes. Comparison was made of different voyages but it was held that the fact that one captain carried more than another was not determinative as one may have been over-rash and the other over-cautious. Vaccarezzo v. 567,000 Gallons of Molasses [C. C. A.] 161 F 543.

**92.** Vessel was wrongfully withdrawn for nonpayment where hire in arrears was tendered before such withdrawal. Luckenbach v. Pierson, 168 F 403.

**93.** In this case, charterer failed to furnish proper fittings to assignee as agreed for carrying oil in bulk. Guffey Petroleum Co. v. Coastwise Transportation Co., 168 F 379.

**94.** Damages may be recovered for delay in loading or discharging when caused by insufficient supply of steam to operate winches which power owner agreed to furnish. Munson S. S. Line v. Miramar S. S. Co. [C. C. A.] 166 F 722. Damages resulting from condition of vessel cannot be recovered from owner where vessel was delivered to charterer in condition agreed. Charterer could not recover for odor of creosote where vessel was cleaned as specified. Church Cooperage Co. v. Pinkney, 163 F 653.

**95.** Church Cooperage Co. v. Pinkney, 163 F 653.

**96.** Liable although he was mistaken as to nature of cargo. The Margaretha [C. C. A.] 167 F 794.

**97.** Charterer may recover only damages properly caused by delay in delivering vessel, and may not recover for ungathered bananas which were destroyed by storm during delay. Lombard S. S. Co. v. Lanasa & Goffe S. S. & Importing Co. of Baltimore City, 163 F 433. In absence of contract from delivery on particular day, vessel is not liable for damages for delay. But delay simply extends time within which demurrage may be charged against charterer. Milburn v. Federal Sugar Refining Co. of Yonkers [C. C. A.] 161 F 717.

**98.** The Margaretha [C. C. A.] 167 F 794.

**99.** Where there is fixed time for trips, charterer is not in such case responsible for hire for intervening time. Lombard S. S. Co. v. Lanasa & Goffe S. S. & Importing Co. of Baltimore City, 163 F 433.

**1.** This kind of charter presents considerable difficulties by reason of uncertainty as to length of voyage, and charterer is liable at the charter rate of freight for overlap, and for difference between charter rate and market rate in addition. The Rygja [C. C. A.] 161 F 106.

**2.** "Ready for loading by" a certain day does not permit cancellation if ready to load at any time during such last day, and "ready for loading" means ready in so far as information requested and furnished them by charterer will permit, the presence of necessary ballast when character of cargo is unknown not being unreadiness. Ruprecht v. Delacamp, 165 F 381.

**3.** Charterer who, in order to secure discharge money, accelerates discharge by night work, is liable for extra expense thereby incurred, though discharge is by brokers representing both him and ship. The Bencliff [C. C. A.] 161 F 909.

**4.** In estimating dispatch money, the lay days commence at time discharge actually begins, where both parties are ready and commence at time prior to that stated in charter. Elder Dempster S. S. Co. v. Earn Line S. S. Co., 163 F 868.

**5.** Earn Line S. S. Co. Ennis [C. C. A.] 165 F 633.

**6.** For purpose of computing dispatch money, lay days do not commence until time fixed in charter party, and where it is provided that they shall not commence until 24 hours after entry, they do not commence prior thereto, although vessel may have commenced discharging at once. Elder

as to lay days or demurrage performs her contract by discharging it in a safe place if no one claims it after a reasonable time.[7]

§ 7. *Navigation and collision. A. Rules for navigation and their operation in general.*[8] See 10 C. L. 1658—By their terms, the rules of navigation are not so iron-clad that literal compliance with them always exempts from liability, nor does a departure from them always cause liability.[9] The articles of the statutory navigation rules are of superior authority in case of conflict with the pilot rules.[10] Statutory rules of navigation do not apply where the vessels are co-operating in an agreed manoeuvre.[11] Failure to stand by and give assistance as required by statute raises a presumption of fault.[12]

(§ 7) *B. Lights, signals and lookouts.*[13] *Lights.* See 10 C. L. 1659—Obedience of the important requirement of the law as to displaying lights must be certain and unremitting,[14] and in some cases, lights must be displayed even in the absence of such law or any regulation.[15] Evidence of lack of lights after the occurrence of the collision has comparatively little weight.[16] The mere fact that a vessel carried proper lights may cast the responsibility for a collision upon the other vessel.[17] A party cannot recover damages for a collision caused [18] by his own negligence.[19]

*Signals.* See 10 C. L. 1659—A vessel is liable for a collision caused by violation of the signal rules,[20] inattention,[21] or failure to follow up the signals given.[22]

Dempster S. S. Co. v. Earn Line S. S. Co. [C. C. A.] 168 F 50.

**7.** Milburn v. Federal Sugar Refining Co. of Yonkers [C. C. A.] 161 F 717.

**8. Search Note:** See notes in 10 Ann. Cas. 382.

See, also, Collision, Cent. Dig. §§ 1-22; Dec. Dig. §§ 1-26; 22 A. & E. Enc. L. (2ed.) 817; 25 Id. 896, 977.

**9.** Those in charge are bound to take notice of customs peculiar circumstances and local conditions in passing in narrow channels, of which things they would be presumed to have general knowledge. The Esparta [C. C. A.] 160 F 289.

**10.** The John H. Starin [ C. C. A.] 162 F 146.

**11.** There is no presumption that one is privileged, it being a special circumstance where each is bound to act prudently toward the agreed end. The Monterey [C. C. A.] 161 F 95.

**12.** See 26 Stat. 425. The Williamsport, 167 F 184.

**13. Search Note:** See Collision, Cent. Dig. §§ 105-151, 207; Dec. Dig. §§ 75-79; 25 A. & E. Enc. L. (2ed.) 952.

**14.** Under art. 11 of pilot rules for inland waters, providing that where vessel is of 150 feet or upward in length two lights must be displayed at anchor, the stern light lower than one forward, to indicate they are both on same vessel, and direction she is pointing, nor is it any excuse for this being left undone that a defective light is being repaired, it being the master's duty to know that lights are continually up. The Santiago, 160 F 742. Sailing vessels are governed by rule 5 of the statutory rules for rivers and harbors, and not by rule 11 of pilot rules regarding lights to be carried by barges and towed canal boats. The Merrill C. Hart, 162 F 371. Dredge held at fault for navigating without lights. United States v. Port of Portland, 161 F 193. Tug and tow held in fault for not exhibiting colored light. The Merrill C. Hart, 162 F 371. Scows held in fault for carrying but one light in violation of rule 11 of harbor inspectors, requiring two. The H. B. Rawson [C. C. A.] 162 F 312. Scow held at fault for negligently being adrift without lights. Eastern Dredging Co. v. Winnisimmet Co. [C. C. A.] 162 F 860.

**15.** Where there is no harbor regulation concerning display of signal lights by anchored vessel, the determination of negligence for failure to display same depends upon particular circumstances of time and place. Failure to display signals would be negligent if there are so many vessels usually plying to and fro that collision would likely result, but not if the vessel is moored where few vessels are plying and out of the way of incoming and outgoing vessels. Carscallen v. Coeur D'Alene & St. Joe Transp. Co. [Idaho] 98 P 622.

**16.** Evidence concerning lack of lights, based on ex parte examination made after collision, has little weight as against positive evidence of owners and navigators, where no notice of finding or inspection was given to parties in interest. The Dorchester, 163 F 779. Positive evidence that lights were burning 40 minutes before, corroborated by statements in log that they were burning immediately after, will prevail against testimony of persons that they were not burning when they boarded vessel after severe collision. Pennell v. U. S., 162 F 64.

**17.** Where overtaking steamer collided with tows, all of which carried proper lights. The Patience, 167 F 855.

**18.** Proximate cause is for the jury. Ives v. Gring [N. C.] 63 SE 609.

**19.** Collision between tug and marine railway which carried no lights. Ives v. Gring [N. C.] 63 SE 609. Burden is on defendant to set up and prove contributory negligence on the trial under Revisal 1905, § 483. Id.

**20.** Vessel proceeding in violation of signal rules takes risk of not hearing other signals and of not having her own signals

*Lookouts.* See 10 C. L. 1659—A proper [23] and diligent [24] lookout, properly stationed,[25] is an essential requirement.

(§ 7) *C. Steering and sailing rules.*[26] See 10 C. L. 1659—A vessel must not attempt to pass too close to other vessels,[27] and must stop and reverse when a head-on collision is imminent.[28] Although sailing vessels have the right of way as against steamers,[29] and the privileged one of two steam vessels has the right to rely upon the other keeping out of her way,[30] yet such privileged vessel is bound not to em-

heard. The Gerry, 161 F 413. Vessel liable for **failure to give signals** according to Int. Nav. Rule 8. The M. E. Luckenbach, 163 F 755. Failure of overtaking tug with tow to signal as to which side of another tug and tow she would attempt to pass on. Id. In a narrow channel, in undertaking to pass on starboard side of meeting vessel, if vessel receives **no assenting signal,** it is her duty to stop and reverse until course of the other is ascertained. See rules 11, 18, 25, in this instance. The Gerry, 161 F 413. Negligence to proceed without receiving assenting signal. The M. E. Luckenbach, 163 F 755. It is the duty of a steam vessel which receives no answering signal in a fog to sound alarm signals, stop and reverse if necessary, until the course and position of other vessel can be ascertained, under rules 26 and 15, governing navigation on the Great Lakes. Hawgood Transit Co. v. Mesaba S. S. Co. [C. C. A.] 166 F 697. Where steamship is uncertain of course of tug by reason of such tug's failure to comply with signal, she must slow down and signal such fact, in accordance with rule 3 of pilot rules or she will be held guilty of contributory negligence, although rule 21 (art. 19, I. N. Rules, U. S. Comp. St. 1901, p. 2883), requires such former vessel to keep her course and speed. In this case, she continued porting her helm and, although the initial fault was with the tug, was held to be in part fault. The Robert Dollar [C. C. A.] 160 F 876. Rule for giving the **bend signal** is imperative upon every vessel approaching a bend or curve, whatever may be her own intention as to future navigation after she shall have reached it. Inland rule 5, U. S. Comp. St. 1901, p. 2882. The Winnie [C. C. A.] 161 F 101. Vessel held liable for not giving bend signal. Id. One was negligent for not stopping and waiting for vessel whose **fog signals** were heard before changing her course to enter port, the other was negligent for not stopping and navigating carefully on hearing fog signals of former vessel, in accordance with art. 16, Inland Rules (U. S. Comp. St. 1901, p. 2880). The Tremont, 160 F 1016. Rule requiring steam vessels to sound fog signals in thick weather is imperative. Under rule 14 of navigation on the Great Lakes (28 Stat. 645), fog signals are to be sounded at intervals of one minute, and giving of passing signals is not sufficient. Hawgood Transit Co. v. Mesaba S. S. Co. [C. C. A.] 166 F 697.

**21.** The Winnie [C. C. A.] 161 F 101. Duty of dredge and scow to sound fog signals and to hear approach of steamship. The Kennebec, 167 F 847. Failure of lookout to hear fog signal is immaterial when it was heard by the mate. Pennell v. U. S., 162 F 64. Liable for inattention in failing to hear and comply with signals. The No. 4 [C. C. A.] 161 F 847.

**22.** Both equally liable where neither followed up their own signals. The Reliable, 167 F 571.

**23.** Must keep proper lookout. The Dorchester [C. C. A.] 167 F 124; The Merrill C. Hart, 162 F 371; The H. B. Rawson [C. C. A.] 162 F 312; Eastern Dredging Co. v. Winnisimmet Co. [C. C. A.] 162 F 860. Steamer held liable for not having proper lookout. The Charles G. Endicott, 163 F 797. Dredge held at fault for navigating without lookout. United States v. Port of Portland, 161 F 193. The sole fault was with steamer for not maintaining proper lookout where schooner was sailing near mouth of river in light wind and kept her course and speed with lights easily to be seen on the vessel, though not seen until too late by master or lookout by reason of their negligence. The Dorchester, 163 F 779.

**24.** Law imposes upon lookout of steam vessel utmost diligence. The Dorchester, 163 F 779.

**25.** Bark held liable for improper stationing of lookout and inattention of officers. The Annasona, 166 F 801. Ferryboat was guilty of contributory fault by not having lookout properly stationed. Eastern Dredging Co. v. Winnisimmet Co. [C. C. A.] 162 F 860. Improper stationing of lookout on tug does not make it liable unless that be contributing **cause.** The Pawnee, 168 F 371.

**26. Search Note:** See Collision, Cent. Dig. §§ 23-64, 152-233; Dec. Dig. §§ 27-56, 80-110; 25 A. & E. Enc. L. (2ed.) 909.

**27.** The Merrill C. Hart, 162 F 371. Tug and tow held at fault in "shaving" another tug and tow in passing. The M. E. Luckenbach, 163 F 755.

**28.** The Merrill C. Hart, 162 F 371.

**29.** Steamer is required to notice and provide for a sailing vessel's leeway, under usual rule requiring former to avoid the latter. The Bulgaria, 168 F 457; The Dorchester, 163 F 779. Steamer held at fault for proceeding at full speed into the schooner, where, in lower New York Bay, Steamer was going at 13 miles per hour and schooner at three knots, and latter kept her course and speed, except that just before collision she turned to starboard and thereby lessened injury. The Charles G. Endicott, 163 F 797.

**30.** Privileged vessel is not necessarily at fault for keeping her course and speed, although burdened vessel failed to answer her signals. The Deveaux Powell [C. C. A.] 165 F 634. Light schooner is liable for suddenly changing her course and getting in way of laden schooner which had right of way. The Benjamin A. Van Brunt, 168 F 103. Burdened vessel cannot depend on privileged one varying from its legal rights

barrass the other, either by changing its course or by an excessive rate of speed.[31] There is no right of way when it is obvious that, if adhered to, there is danger of a collision.[32] Vessels approaching each other must pass port to port,[33] but this rule applies only when they are approaching head-on or nearly so.[34] The rules for narrow channels [35] require that, if safe and practical, vessels shall keep on the side of the fairway which lies to the starboard side,[36] and shall navigate at a speed consistent with the safety of other vessels,[37] especially in case of a fog.[38] A like care is required in a harbor,[39] and reasonable care of a steamer in a fog at sea in the course of regular navigation.[40] A vessel should slow down upon becoming uncertain of the course of a meeting vessel.[41] Where a vessel collides with another which she is passing from behind, she has the burden of showing not only that she was free from negligence but that the other vessel was negligent.[42]

or relieve itself from liability by showing its obedience to invalid rule; starboard hand situtions is not changed by signals and inspector's rule 9 permitting her to adopt a two whistle course and pass ahead, since inspector's rule is repugnant to starboard hand rule and invalid. The Pawnee, 168 F 371. Burdened ferryboat held at fault, under I. Nav. Rules, arts. 19, 22, 23, in crossing, without slacking, ahead of steamer with right of way. The John H. Starin [C. C. A.] 162 F 146.

31. Under Nav. Rules of 1864, Rules 20 and 21. Pennell v. U. S., 162 F 64. Steamer having right of way held at fault, under I. Nav. Rules, art. 21, in failing to keep her course. The John H. Starin [C. C. A.] 162 F 146. Privileged vessel held at fault in changing her course. Montgomery v. Chatfield [C. C. A.] 162 F 882.

32. The John H. Starin [C. C. A.] 162 F 146. Vessel that has the right of way is not thereby exempt from taking all proper steps to avoid collision. The Aries, 165 F 514. Schooner held liable for negligent navigation in not avoiding tow carrying proper lights. Id. Approaching steamer is liable for not stopping upon seeing a dangerous maneuver of tug with tows. The Algeria, 162 F 1006.

33. The Merrill C. Hart, 162 F 371.

34. The Esparta [C. C. A.] 160 F 289.

35. "Narrow channels" are bodies of water navigated up and down in opposite directions and do not include harbor waters with piers on each side. I. N. Rules, art. 25. The No. 4 [C. C. A.] 161 F 847.

36. Under I. N. Rules art. 25 (U. S. Comp. St. 1901, p. 2883) which is held applicable to the Columbia River in vicinity of Westport Light. United States v. Port of Portland, 161 F 193. Vessel held liable for damage resulting from failure to keep on side of fair way or midchannel that lay to starboard side of vessel where evidence showed that collision occurred as a result of vessel at fault being on port side and also from her suddenly changing her course contrary to rule 25. The Abram F. Skidmore, 160 F 265. Vessel is liable for collision caused by its failure to keep on right hand side of 600 foot channel. The Winnie [C. C. A.] 161 F 101. Scow held not in fault by reason of fact that in shifting her position she swung across course of tug and tow rounding a bend, and tow was injured by being run against bridge abutment, where tug was on wrong side of river contrary to rules. The Three Brothers, 162 F 388.

37. The Kennebec, 167 F 847.

38. The No. 4 [C. C. A.] 161 F 847. Collision in fog which occurs despite all efforts to avoid it must, as a rule, be due to excessive speed of one or both; in such case 8 knots an hour is excessive, under Inland Regulations, art. 16. Id. Speed of five or six knots an hour in fog is excessive for a tug with long hawsers in a narrow channel, and such tug is liable for collision although part of such speed is due to flood current. The Matanzas, 166 F 985.

39. Ferryboat held solely liable for excessive speed in fog, getting out of course and sinking car float at pier. The Somerville [C. C. A.] 162 F 681. Speed of five miles an hour in dense fog in crowded harbor held excessive. Id. Vessel outward bound and passing to stern of anchored schooner navigated with care at slow speed outside the dredged channel, on anchorage ground and on her own side, held not at fault for collision from meeting steamer in fog. The Simon Dumois [C. C. A.] 163 F 490. Steamer is bound to use only such precautions as will enable her to stop in time to avoid collision, after an approaching vessel going at moderate speed comes in sight; in case of dense fog this might require both vessels to come to standstill, until course of each was definitely ascertained, while in lighter fog it might authorize each to keep their engines in sufficient motion to preserve their steerageway. The Kennebec, 167 F 847.

40. Doctrine of maritime courts is that steamer in fog must not run at such speed as will prevent her from reversing and stopping before colliding with vessel which she ought to have seen; seven knots an hour held to be excessive, but 3½ knots an hour not, there being nothing in the very complete log of other vessel to indicate greater speed. See Nav. Rules 1864, No.'s 20, 21. Pennell v. U. S., 162 F 64. Collison held due to excessive speed of gunboat, since brig was not at fault and could not have avoided collision after hearing whistle. Id.

41. Complainant held in fault for not slowing to steerage way, as required by rule three, when her master became uncertain as to the course of other vessel. The Esparta [C. C. A.] 160 F 289.

42. The M. E. Luckenbach, 163 F 755. Overtaking steamer held solely liable for

(§ 7) *D. Vessels anchored, drifting, grounded.*[43] See 10 C. L. 1660—Although anchorage grounds are not used exclusively for anchoring,[44] vessels navigating there must do so with the utmost caution,[45] and where there is a collision, the usual presumption is that the moving vessel is at fault.[46] A vessel is liable for a collision caused by its being anchored with due care,[47] or as required by the harbor regulations.[48]

(§ 7) *E. Tugs and tows, pilot boats, fishing vessels, etc.*[49] See 10 C. L. 1660—A tug contracts with its tow as an expert,[50] and is liable for liability to handle the tow[51] and for negligence,[52] which liability continues until the tow is safely anchored;[53] but a tug is neither a common carrier nor an insurer,[54] and, hence, its liability must be predicated upon negligence[55] proximately resulting in the injury complained of.[56] Where damage results to the tow through the negligence of the

collision with tows, all of which carried proper lights, negligence of steamer being either in failing to locate tow or in failing to keep away from it. The Patience, 167 F 855.

**43. Search Note:** See Collision, Cent. Dig. §§ 85-104; Dec. Dig. §§ 67-74; 25 A. & E. Enc. L. (2ed.) 939.

**44.** May be used for necessary navigation with due regard for right of vessels anchored there. The Merrill C. Hart, 162 F 371.

**45.** Vessels must not proceed at excessive speed in anchorage grounds. The Merrill C. Hart, 162 F 371. Law requires steam vessel entering anchorage ground upon dark night to carefully feel her way to avoid accidents. The Santiago, 160 F 742. It is always a question of fact whether the speed is excessive or not, and in determining that question, the locality, hour, state of weather, darkness of night, surroundings and all circumstances of case, are to be fully considered. Id. Vessel held not negligent in navigating at four miles an hour through anchorage grounds. Id. Vessels causing extraordinary **swells** although navigated in the usual manner are liable for their effects upon innocent vessels in dock, since the latter are not expected to so manage as to receive such swells without harm. The Hendrick Hudson, 163 F 862. While vessel is usually liable for damage caused by its swells to vessels lying at bulkhead, although going at its usual speed, she is not liable for injury which could not have been anticipated, as where injury was caused to other vessel by swell throwing it against unknown projection, where passing vessel for many years had passed same place at same speed without causing injury. The New York [C. C. A.] 167 F 315. Vessel held not liable for injury caused by swells which were no greater than those incident to reduced speed, especially in the absence of any evidence of negligence, and evidence that swells were caused by her was not clear. The Providence, 168 F 564.

**46.** The Santiago, 160 F 742. If vessel lying at anchor in plain view is run into by another, the reasonable presumption is that collision resulted from negligence in operation of moving vessel, but if it appear that, while moving boat was being properly navigated, her rudder chains suddenly broke and she became unmanageable, no such presumption arises, such presumption existing only in absence of, and not in presence of explanation. Dentz v. Pennsylvania R. Co., 75 N. J. Law 893, 70 A 164.

**47.** Mud scow negligently moved and went adrift. Eastern Dredging Co. v. Winnisimmet [C. C. A.] 162 F 860. Steamship advancing cautiously at night through channel past dredge at very slow speed held not at fault for collision with loaded scow cast adrift by dredge so as to extend far out into channel, and having no one on board and insufficient light. The Cretan, 163 F 546. There is prima facie **presumption** of negligence when vessel goes adrift. Eastern Dredging Co. v. Winnisimmet Co. [C. C. A.] 162 F §60.

**48.** Vessel at anchor must comply with rules of port and general rules applicable thereto or it will be held liable for injury to passing vessels caused by violations thereof. The Annasona. 166 F 801.

**49. Search Note:** See notes in 5 L. R. A. (N. S.) 303; 7 Id. 920.

See, also, Collision, Cent. Dig. §§ 65-84; Dec. Dig. §§ 57-66; 25 A. & E. Enc. L. (2ed.) 930; 28 Id. 262.

**50.** The El Rio, 162 F 567.

**51.** Tug should not undertake the service unless able to complete it with safety. The J. S. T. Stranahan [C. C. A.] 165 F 439.

**52.** Must exercise reasonable care. The Printer [C. C. A.] 164 F 314.

**53.** The Printer [C. C. A.] 164 F 314. Tug was held liable for failure to stand by until anchorage was seen to be safe. The Printer [C. C. A.] 164 F 314.

**54.** The El Rio, 162 F 507. Tug not liable for injury from collision caused by weather. The Pottsville, 164 F 447. Where tug parted from its tow of coal boats which drifted and caused damage in fog, there being no fog when tug was sent out, tug was not liable because some riverman thought there was "liable" to be some fog. Bray v. Monongahela River Consol. Coal & Coke Co. [C. C. A.] 161 F 277.

**55.** Tug not liable unless negligence is shown. Morris & Cummings Dredging Co. v. Moran Towing & Transportation Co., 163 F 610. **Burden of proving lack of care** is on complainant. The El Rio, 162 F 567.

**56.** Tug not liable where it was claimed she was negligent in going out in unfavorable weather, but it was not shown that injury was due to weather and not to some unexplained cause. Morris & Cumings Dredging Co. v. Moran Towing & Transportation Co., 163 F 610.

tug, the latter is liable.[57] It is the duty of the tug to make up the tow.[58] As regards other vessels, a tug must navigate in accordance with rules and regulations,[59] and without negligence.[60] A tug is not liable for the insufficiency of its tow's anchor chains.[61] On the other hand, the tow is not responsible for the negligence of the tug,[62] but the tow must also exercise due care to avoid an accident made imminent by reason of the negligence of the tug and the other vessel.[63] A tow is not liable for casting off its hawsers when danger is imminent.[64]

Great vigilance and caution is required of ferryboats navigating a harbor.[65]

(§ 7) *F. Sole or divided liability and division of damages.*[66]—See 10 C. L. 1661— A failure to comply with the statutory requirements is presumed to have contributed to the collision,[67] and where the fault on the part of one vessel is clearly

**57.** As where in order to break a way through ice, tug left vessel in helpless position with such way on as to carry her into ice with force enough to cause injury. The Hercules [C. C. A.] 160 F 453. Vessel having entered upon her towage contract is liable for injury to barges occurring thereafter through lack of proper care or attention, performance of contract being construed as entered upon where tug went to where barges were to take them in tow and then, although they were ready, left them till next day, during which time they drifted on shore and were damaged. The Somers N. Smith, 159 F 1016. Tug is liable for damage resulting to vessel stranded while in tow, where towed barge struck on unknown obstruction, the master of tug not apparently understanding situation and being outside dredged basin used as anchorage ground. The Resolute [C. C. A.] 160 F 659. **Tugs jointly towing a vessel** are both liable for damage, although one is a helper acting under orders of master of other. The Anthracite, 162 F 384.

**58.** But if tug selects positions to be occupied by component vessels, attends to leading hawser, and prescribes distance apart of different tiers, then details of making fast the lines may be left to herself where she has her own master aboard. The Edwin Terry [C. C. A.] 162 F 309.

**59.** The M. E. Luckenbach, 163 F 755. Held to be sole fault of tow and tug being on the **wrong side of channel** of river, passing at that point being usual and proper and steamer keeping as close to proper bank as it could get. The Frank K. Esherick [C. C. A.] 163 F 224. Tug liable for **navigating** on port side of channel contrary to law. The Little, 168 F 393. Tug was at fault for not **keeping out of way** of schooner carrying proper lights and keeping in her course. The Dauntless, 163 F 431. It is duty of tug to see that tow carries **lights.** North American Dredging Co. v. Cutler [C. C. A.] 162 F 457. Overtaking vessel is not required to distinguish indistinct lights of tug to ascertain where there is a tow. Id. Tug held solely liable for personal injury occurring to one on scow caused by tow line, where no lights were on tow. Id.

**60.** Tug is liable for damages caused to another tow through failure to properly manage her tow, whether from not having a proper lookout, too long a tow or otherwise, where it is shown that every precaution was used to keep other tow out of way. The Prinz August Wilhelm, 166 F 995. Tug with tows is not ordinarily negligent for navigating at sea at night at speed of from four to six knots. The Patience, 167 F 855. Tug may be guilty of negligence in going more than 200 feet out of its course and out of regular channel and colliding with marine bridge. Ives v. Gring [N. C.] 63 SE 609. Tug held in fault for proceeding independently of orders from tow and for suddenly changing her course. The Annasona, 166 F 801. An **unnecessarily long tow** at night does not render tug liable for collision with steamer unless shown to have been contributing cause. The Patience, 167 F 855. Tug held negligent for stringing tows across three-fourths of channel. North & East River Steamboat Co. v. New York, etc., R. Co. [C. C. A.] 162 F 682. Dredge held at fault for too long extension with 100 ft. cutter and 27 pontoons trailing 1,000 feet. United States v. Port of Portland, 161 F 193. Tug was at fault for having tow nearly a mile long, nearly stationary and across usual course of vessels. The Aries, 165 F 514. Tug is liable for failing to give sufficient room to allow for **effect of tide on tow.** The Williamsport, 167 F 184. Tug is liable for attempting to execute **dangerous maneuver** upon approach of crossing steamer. The Algeria, 162 F 1006.

**61.** The William S. Kirby, 163 F 783.

**62.** Towed car float is not responsible for collision occasioned solely through fault of the tug towing it. Eugene F. Moran v. New York Cent. & Hudson R. R. Co., 212 U. S. 466, 53 Law. Ed. —.

**63.** Tow held at fault because of inattention, improper stationing of lookout, and failure to follow promptly a change of course by tow. The Annasona, 166 F 801.

**64.** The Algeria, 162 F 1006.

**65.** Rules are stricter than those applicable to vessels at sea. Eastern Dredging Co. v. Winnisimmet Co. [C. C. A.] 162 F 860. Ferryboat held at fault in failing to have proper lookout. Id.

**66. Search Note:** See Collision, Cent. Dig. §§ 296-298; Dec. Dig. §§ 143-146; 25 A. & E. Enc. L. (2ed.) 1006; 28 Id. 274.

**67.** In absence of evidence to contrary, this presumption attends every fault, and requires a showing that such failure to comply could not have so contributed. The Henry O. Barrett [C. C. A.] 161 F 481. Fact that ship was at time of collision in actual violation of statutory rule designed to prevent collisions places burden upon her to

established and is sufficient alone to account for the accident, the presumption is adverse to any claim of fault on the part of the other vessel,[68] but where everything about a vessel indicates a reasonable degree of diligence, the probability that she complied with her duty is prima facie established.[69] Where there is a conflict of testimony, circumstantial evidence may be considered to determine the fault.[70] No recovery may be had when the collision is due to inevitable accident.[71] Whether in a particular case the injury was due to the fault of one of the vessels or of both must be determined with reference to the rules of navigation, which have already been considered.[72]

The rule of equal division of damages among the guilty vessels generally prevails,[73] and such damages are assessed between the vessels, irrespective of the fact that more than one vessel belongs to the same owner.[74]

(§ 7) *G. Ascertainment and measure of damages.*[75]—See 10 C. L. 1662—The measure of damage is the amount necessary to make good the loss[76] and not the difference in the market value.[77] Interest is not allowed on a claim for damages against the United States.[78] In any case only such damages are allowable as are definitely ascertained.[79]

show that such violation could not have contributed to collision. Hawgood Transit Co. v. Mesaba S. S. Co. [C. C. A.] 166 F 697.

**68.** Any reasonable doubt will be construed in favor of other vessel. United States v. Port of Portland, 161 F 193; North American Dredging Co. v. Cutler [C. C. A.] 162 F 457. Where fault of one vessel is clearly established, it is not enough for her to raise a doubt with regard to management of other. Where collision was caused by tug which initiated passing agreement without being able to handle her unwieldy tow. Thames Towboat Co. v. Pennsylvania R. Co. [C. C. A.] 165 F 617.

**69.** The Henry O. Barrett [C. C. A.] 161 F 481.

**70.** It is proper to consider manner in which vessels were manned, and, when one was manned by competent, fresh seamen, with lookout, and other was in charge of unlicensed deckhand with no lookout, latter was held solely at fault. The Henry O. Barrett [C. C. A.] 161 F 481. To ascertain fault, speed and distances may be tested by known facts. The Erandio, 163 F 435. Fact that log of vessel fails to mention alleged faults of another vessel contributing to collision tends to discredit her claim. Pennell v. U. S., 162 F 64.

**71.** This is a rare case, as where leading vessel was stopped by ice and following vessel, using due precaution, ran into her. The Erandio, 163 F 435. Loss attributed solely to weather conditions must be borne by libelant, as where there was no negligence on part of crew of other vessel and they labored for several hours in adverse weather to prevent possibility of such collision. The William S. Kirby, 163 E 783.

**72.** See ante this section, subsections A. to E. inclusive.

**73.** It prevails in some cases, at least, when one vessel is libelant as well as when they are all on the same side. The Eugene F. Moran v. New York, etc., R. Co., 212 U. S. 466, 53 Law Ed. —. Damages equally divided. The Algeria, 162 F 1006; The Tremont, 160 F 1016; Id [C. C. A.] 161 F 1; The No. 4 [C. C. A.] 161 F 847; Hawgood Transit Co. v. Mesaba S. S. Co. [C. C. A.] 166 F 697. Half damages were allowed libelant and reference ordered, where pilotboat was run down by steamer on board which former had agreed to put pilot, neither being properly attentive. The Monterey [C. C. A.] 161 F 95. Where two vessels are equally at fault, each is liable for its respective share of **damage to cargo,** and, in case one has been exempted by previous contract with cargo owner, only half damage may be recovered from other, such not being in reality a case of joint tort feasors and rule therefor not applying. The Maine, 161 F 401.

**74.** Fact that owner of one of vessels at fault is also owner of injured vessel not at fault is not material. The Eugene F. Moran v. New York, etc., R. Co., 212 U. S. 466, 53 Law Ed. —.

**75. Search Note:** See notes in 6 Ann. Cas. 131.

See, also, Collision, Cent. Dig. §§ 280-295; Dec. Dig. §§ 126-142, 147, 148; 25 A. & E. Enc. L. (2ed.) 1022.

**76.** In case of injury to dredge from collision, amount sufficient to place in prior condition was not excessive. The Park City, 160 F 282. Evidence as to value of ship and equipment considered. Pennell v. U. S., 162 F 75. **Expenses during delay** resulting from collision are proper elements of damage, such as daily demurrage allowed on the average net earnings of three previous voyages, expenses such as wages of crew, provisions, and the like, but not insurance premiums and general office and agent's expenses. The Tremont [C. C. A.] 161 F 1.

**77.** In the case of injury to a toll bridge by vessel colliding with it. West v. Martin [Wash.] 97 P 1102.

**78.** Under Rev. St. § 1091, not allowed, unless expressly contracted or authorized by law, and there is no such provision for such cases. Pennell v. U. S., 162 F 75.

**79.** Damages for loss of business are not allowed where profits are not shown, as where, by reason of collision, vessel lost mail contract. The Tremont [C. C. A.] 161 F 1. Claim for unearned freight for the

(§ 7) *H. Common-law liability for negligent navigation.*[80] See 10 C. L. 1862 Where a vessel commits no fault, it cannot be held liable for collision on a mere unproved hypothesis that if she had done something other than what she did the collision might not have occurred.[81] In determining the negligence of the pilot, the question is whether he did all that reasonable prudence required him to do in view of the dangers, emergencies and conditions surrounding him.[82] The fact that a structure is a nuisance does not authorize a vessel to run into it.[83] Negligence in particular aspects has already been treated.[84]

§ 8. *Carriage of passengers.*[85] See 10 C. L. 1882 A passenger[86] may maintain an action against the vessel for failure to furnish proper accommodations[87] and safe conveyance,[88] and for injury resulting from the official acts of the master[89] or the misrepresentations of an agent,[90] but not for an injury entirely attributable to accident[91] or to unofficial acts of the vessel's officers.[92] The ordinary rules apply as to the admissibility of evidence[93] and the amount of damages.[94] A clause in a ticket limiting the liability for damage occurring to baggage through negligence is valid[95] and binding, notwithstanding that such clause was not called to the passenger's attention.[96]

voyage cannot be recovered where there is not sufficient proof to establish what it would have been. Pennell v. U. S., 162 F 75. Net amount injured vessel would have earned during the time lost may be estimated as part of damage, when it is capable of being definitely ascertained as in the case of injury to combination steamboat and pile driver having definite employment. Carscallen v. Coeur D'Alene & St. Joe Transp. Co. [Idaho] 98 P 622.

**80. Search Note:** See Collision, Cent. Dig.; Dec. Dig.

**81.** One vessel held not to blame if another, through bad steering, drifted from agreed course, into or dangerously near course of other, and mistook such other's signals. The Esparta [C. C. A.] 160 F 289.

**82.** Test is not that he might have done any one of a number of other things at time and under circumstances, but was he careless or negligent in doing the particular thing that he did. Carscallen v. Coeur D'Alene & St. Joe Transp. Co. [Idaho] 98 P 622.

**83.** Tug is not authorized to run into a marine railway unnecessarily and carelessly, even though such railway be public nuisance. Ives v. Gring [N. C.] 63 SE 609. See Nuisance, 10 C. L. 1031. See, also, Navigable Waters, 10 C. L. 917.

**84.** See ante this section, subsections A. to E. inclusive.

**85. Search Note:** See notes in 5 L. R. A. (N. S.) 1012; 10 Id. 969.

See, also, Shipping, Cent. Dig. §§ 522-564; Dec. Dig. §§ 156-169.

**86.** One receiving pay from vessel, though performing no service, is not a passenger, and is not entitled to receive accommodations as such. The Vueltabajo, 163 F 594.

**87.** The Vueltabajo, 163 F 594. Launch acting as a common carrier is liable to passengers for suffering and injury caused by lack of heat, insufficient supplies, and exposure. North Coast Lighterage Co. v. Greenwood [C. C. A.] 162 F 25.

**88.** Vessel liable for injury to passenger by being caught in coils of lines over which he was crowded without warning and not seeing them, there being no contributory negligence in such case. The Annie L. Vansciver, 161 F 640.

**89.** Shipowners are liable for false imprisonment and arrest of passenger, as where he was arrested by watchman without justification, dragged down stairway by collar and kept in custody for an hour, the damage properly allowed in case at bar being $1,000. Ragland v. Norfolk & Washington (D. C.) Steamboat Co., 163 F 376.

**90.** Steamship company is liable for misrepresentations made by its agent to passengers, damages resulting therefrom, and passage money wrongfully obtained, where it is not charter contract but joint enterprise, as where company contracted with corporation to bring laborers to Seattle at so much passage per head, after their having been procured by corporation, and where representative of corporation so contracted with Japanese laborers, but tickets were issued to Victoria, B. C., and received by laborers who could not read, and as soon as they learned of fraud they left vessel and brought suit. The Stanley Dollar [C. C. A.] 160 F 911.

**91.** Vessel is not liable where passenger was injured by skylight which he himself had misplaced. The Caracas, 163 F 662.

**92.** Vessel is not liable for assault and battery by master, remedy being in personam. The Vueltabajo, 163 F 594.

**93.** Evidence of the custom of vessel in making landings and discharging passengers is inadmissable in action by passenger for injury received in landing, where she was precipitated into lake by sudden starting of boat, and evidence was conflicting on question of negligence. McKay v. Anderson Steamboat Co. [Wash.] 99 P 1030.

**94.** Laborers suing as passengers are not entitled to damages for loss of time while waiting for trial of case, nor should more than one docket fee be allowed where several libels are consolidated. The Stanley Dollar [C. C. A.] 160 F 911.

**95.** Limit of recovery being fixed at $100. The Morro Castle, 168 F 555; Sterling Amusement Co. v. La Compagnie Generale Transatlantique, 61 Misc. 603, 113 NYS 1032.

**96.** Darnana v. La Compagnie Generale Transatlantique, 114 NYS 118.

§ 9. *Carriage of goods.*[97] *In general.*[See 10 C. L. 1663]—A common-law obligation rests upon a carrier by sea to receive goods according to its facilities for transportation [98] and to show no preference between shippers,[99] unless such carrier be not a public institution.[1] A common carrier is liable for damages resulting from its failure to diligently and directly,[2] and in the manner agreed,[3] forward [4] safely [5] goods received for shipment,[6] or offered for shipment under previous contract,[7] and for loss resulting from inefficiency of the crew,[8] negligence of its agents,[9] unseaworthiness of the vessel,[10] and for any loss not occasioned by act of God or public enemies,[11] except in so far as it may be relieved therefrom by an exemption clause.[12]

**97. Search Note:** See notes in 4 Ann. Cas. 412; 6 Id. 16.

See, also, Shipping, Cent. Dig. §§ 399-521; Dec. Dig. §§ 101-155.

**98.** Ocean S. S. Co. v. Savannah Locomotive Works & Supply Co., 131 Ga. 831, 63 SE 577.

**99.** Carrier must receive and carry goods, as able, in order of their tender. Ocean S. S. Co. v. Savannah Locomotive Works & Supply Co., 131 Ga. 831, 63 SE 577. **Advance bookings** will not be allowed as method of discrimination. Merchants' & Miners' Transp. Co. v. Granger [Ga.] 63 SE 700. Rule against carrier giving preference to shippers does not prevent carrier by sea from making bookings in advance, where opportunity is open to all shippers or where its extension to one class of shippers only does not interfere with carrier's duties to other shippers. Ocean S. S. Co. v. Savannah Locomotive Works & Supply Co., 131 Ga. 831, 63 SE 577. In a proper case **equitable relief** will be granted shipper against discriminating favors to other shippers. Merchants' & Miners' Transp. Co. v. Granger [Ga.] 63 SE 700, following Ocean S. S. Co. v. Savannah Locomotive & Supply Co., 131 Ga. 831, 63 SE 577. Equity will interfere to prevent advance bookings which work unjust discriminations between shippers, as where privilege of advance booking was granted to foreign and not to domestic shippers. Merchants' & Miners' Transp. Co. v. Granger [Ga.] 63 SE 700.

**1.** Carrier, not public institution by terms of its charter, may select goods it proposes to carry and refuse to accept goods in excess of its carriage capacity. Ocean S. S. Co. v. Savannah Locomotive Works & Supply Co., 131 Ga. 831, 63 SE 577.

**2.** Contract of affreightment implies that ship's owner will diligently and directly carry goods on agreed voyage (Globe Nav. Co. v. Russ Lumber & Mill Co., 167 F 228); directly means without unnecessary deviation, deviation being defined as any unnecessary or unexcusable departure from usual course or general mode of carrying on voyage, thereby changing risk (Id.).

**3.** Where carrier contracts to not place more than a certain amount of shipper's goods on any one vessel, he is liable for any damages which he might have anticipated resulting from breach thereof, such as difference which shipper fails to recover from insurance company by reason of such breach. Hood Rubber Co. v. Rutland Transit Co., 161 F 790. While it is not customary to incorporate in contract for carrying coal, an agreement as to what boat shall do the **towing,** when so incorporated, is binding. Flannery v. New England Transp. Co., 168 F 397.

**4.** Carrier held liable for damages, where there was fall in price during delay caused by its failure to forward goods on vessel which had issued bill of lading therefor and to which they were constructively delivered. The Gutenfels, 166 F 989.

**5.** The Pokanoket, 161 F 383.

**6.** Reception of goods by master, or other person authorized on board or at wharf near vessel, binds ship for their safe carriage and delivery. The Pokanoket, 161 F 383.

**7.** No recovery may be had from steamship company for its failure to carry goods unless there shall have been a binding contract therefor, and where there was delayed delivery by shipper after cargo was complete under offer to carry made by defendants, there was no mutuality of agreement, and acceptance of one car load for shipment does not make vessel liable for refusal to accept the balance, but shipper may recover from railroad company causing delay by disregard of his directions, though such company relied upon notice given out by vessel. White v. North German Lloyd S. S. Co., 61 Misc. 268, 113 NYS 805. Duty of carrier to the public does not require it to violate valid special contract. Hood Rubber Co. v. Rutland Transit Co., 161 F 790. Neutral carrier is liable for his failure to fulfill contract to carry **contraband of war,** where he knew the war conditions, and his undertaking will be enforced by courts of neutral state, a clause exempting him from liability for damages occasioned by "arrest, or restraint of princes, rulers, or people" being construed as applying only to actual arrest or seizure and confiscation and affording no ground for repudiation of contract by reason of danger. Balfour, Guthrie & Co. v. Portland & Asiatic S. S. Co., 167 F 1010.

**8.** Not only must vessel have full complement of licensed officers and sufficient crew, but they must be competent and equal to any likely emergency. Under Rev. St. 4463. Northern Commercial Co. v. Lindblom [C. C. A.] 162 F 250.

**9.** Carrier held liable for injury to cargo in loading, although loading agent was loading company employed at shipper's request. Stockton Milling Co. v. California Nav. & Imp. Co., 165 F 356.

**10.** Vessel is liable for its unseaworthy condition, whether common or private carrier, and where libelant was ignorant of vessel's condition by reason of negligent examination. Braker v. F. W. Jarvis Co., 166 F 987.

**11.** Whether such vessel be engaged in

A vessel which is not a common carrier is not liable for loss of cargo not due to its negligence but to some external cause,[13] its liability thus being essentially different from that of a common carrier.[14] A vessel assumes the risk of damage resulting from the carriage of dangerous explosives, the character of which is known to it.[15] The regulations concerning shipments of dangerous substances apply to foreign private steam vessels carrying from ports of the United States.[16] A shipper is, by long usage, entitled to a bill of lading, but the master may endorse thereon any claim he has for demurrage,[17] and a "boat note" may be received in evidence as complimentary thereto.[18] In an action by the shipper against the carrier for loss of goods, a provision in the bill of lading that the carrier shall have the benefit of the insurance is not available as a defense,[19] although the insurance has been collected.[20] The burden is upon the carrier when sued for a loss to prove that there was insurance to the benefit of which he is entitled.[21] In an action for loss the shipper must prove his affreightment contract, payment of freight and ownership,[22] although such ownership may be special.[23] The measure of damages for a loss of goods is the actual loss sustained.[24]

coastwise or in foreign commerce, its liability is that of insurer, in the absence of same valid agreement to contrary. Jahn v. Steamship Folmina, 212 U. S. 19, 53 Law. Ed. —. Charterers are liable to owner of cargo for damages resulting thereto through a defective pier, although not themselves negligent, being common carriers. Vogemann v. American Dock & Trust Co., 131 App. Div. 216, 115 NYS 741. Carrier is liable for **shortage** due to goods being stolen from warehouse before delivery to shipper. Evans v. New York & P. S. S. Co., 163 F 405. Goods are at ship's risk with respect to contents until delivery, and ship is liable for deficiency in absence on valid exception in bill of lading. The Seneca, 163 F 591.

**12.** When injury resulted from cause excepted in bill of lading, carrier is not responsible unless negligence be shown, as where injury was caused by heat and possibly without negligence, vessel being well ventilated. The St. Quentin [C. C. A.] 162 F 883. Strike clause in bill of lading is binding, though in small type, and constitutes good defense in action for damages caused by delay in discharging cargo of onions occasioned by strike. The Toronto, 168 F 386. Assumption of risk or carriage by shipper does not relieve carrier from liability for his own or his agent's **negligence,** where there was injury to cargo in loading. Stockton Milling Co. v. California Nav. & Imp. Co., 165 F 356. Unnecessary deviation from course is **waiver** of exemption clause. Globe Nav. Co. v. Russ Lumber & Mill Co., 167 F 228. **Burden of proof** is upon carrier to show that goods were injured in manner excepted by terms of bill of lading, where they were received in good order and found to be damaged by seawater at end of voyage. Jahn v. Steamship Folmina, 212 U. S. 19, 53, Law Ed. —.

**13.** Lighter is not ordinarily a common carrier. The Wildenfels [C. C. A.] 161 F 864. A lighter, hired exclusively to convey goods of one person to particular place for agreed compensation, is not common carrier. Id. Where lighter is not negligent, it is not liable for damage to cargo of tow, as where tow, by reason of its unseaworthiness, dumps its cargo. The G. N. Hannold, 166 F 637.

**14.** Hence it was at least discretionary with court, after evidence had been concluded, to refuse to permit amendment alleging vessel to be common carrier, since it had effect of changing action from one ex delicto to one ex contractu, or of adding the latter. The Wildenfels [C. C. A.] 161 F 864.

**15.** When shipment is soap containing naphtha as shown by name on boxes and previous warning to ship's agents, but nevertheless same was confined in hold without sufficient ventilation, ship could not recover from shipper. International Mercantile Marine Co. v. Fels, 164 F 337.

**16.** Rev. St. § 4476 construed with § 4400 as amended by § 1882 and § 1895 (Act Aug. 7, 1882, c. 441, 22 St. 346 and Act March 1, 1895, c. 146, 28 St. 699, apply to foreign and interstate commerce and include in their meaning metalic cartridges. United States v. Giordani, 163 F 772.

**17.** Watt v. Cargo of Lumber [C. C. A.] 161 F 104.

**18.** Receipt called "boat note" received from lighters may be received as complementary to bill of lading and in respect to packages of apparently uniform weight, those tampered with will be presumed to have been of same weight as those not tampered with. The Seneca, 163 F 591.

**19.** Baker & Co. v. New York, etc., R. Co., 162 F 496.

**20.** Insurance is not available as defense, although it does not appear that the suit was brought for the benefit of the insurer. Stockton Milling Co. v. California Nav. & Imp. Co., 165 F 356.

**21.** Baker & Co. v. New York, etc., R. Co. [C. C. A.] 168 F 248.

**22.** Evidence held sufficient to go to jury in support of plaintiff's claim. Northern Commercial Co. v. Lindblom [C. C. A.] 162 F 250.

**23.** Shipper of grubstaking outfit is owner thereof until delivery to miners, and is entitled to sue vessel for damage thereto, even though title had passed. Northern Commercial Co. v. Lindblom [C. C. A.] 162 F 250.

**24.** Recovery may be for market value at destination, which jury may ascertain by adding to price at place of shipment the

Where from the evidence it must be presumed that the minds of the parties never met, an agreement for an exclusive interchange of traffic between two carriers must be held not to have existed.[25]

*The Harter Act.*[See 10 C. L. 1664]—The Harter Act relieves the shipowner from liability for fault in the management of the vessel,[26] but not from liability for his own fault, negligence or other tort,[27] or for theft of the cargo;[28] nor can it be invoked where the goods have not been placed on board and the voyage has not commenced.[29] Notwithstanding the exceptions given by the Harter Act, an innocent cargo owner is entitled to recover his entire damage in case of a collision from the carrying and noncarrying vessel, and the latter's right, set-off, or recovery from the carrying vessel, is not affected.[30] An agreement made in consideration of a lower rate, to exempt a private carrier from injury to cargo from negligence, is not in violation of the Harter Act and is valid and enforcible,[31] and when, in case of a collision, both vessels are libeled and it appears that both were in fault, the fact that, by reason of the exemption, no recovery can be had against the carrying vessel, does not increase the liability of the other vessel.[32] Where the loss is admitted, the burden is clearly upon the owner to show that the vessel was seaworthy at the commencement of the voyage.[33] The master, in the case of vessels engaged in foreign trade, is required to give the shipper a bill of lading.[34] To sustain a conviction under the criminal provisions in the Harter Act,[35] the indictment need not make allegations as to matters of proof.[36] The violation must be clear and not a mere presumption.[37]

§ 10. *Freight and demurrage.*[38] *Freight.*[See 10 C. L. 1664]—Freight is due only on the goods actually carried[39] to the destination.[40] A party paying freight in good faith may be subrogated to the water carrier's lien.[41]

cost of carriage and interest. Northern Commercial Co. v. Lindblom [C. C. A.] 162 F 250.

**25.** In case of alleged agreement between steamship line and railroad. Graham v. Oregon R. & Nav. Co. [C. C. A.] 161 F 262.

**26.** Where due diligence has been observed, faults in navigation or management of ship are not by construction of law faults of owner, and owner is not liable for damage to cargo, under Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445). The Jason, 162 F 56. Owner is not liable in case of damage to cargo from water being pumped out, the damage resulting from valve being left partly open and not from any defect of valve, it being closed at time of loading. Sun Co. v. Healy [C. C. A.] 163 F 48.

**27.** The Jason, 162 F 56.

**28.** The Seneca, 163 F 591.

**29.** Act held inapplicable where goods were injured while being transported to vessel by lighter, though goods were held to have been received for carriage so as to render vessel liable. The Pokanoket, 161 F 383.

**30.** The Maine, 161 F 401.

**31.** See Harter Act (U. S. Comp. St. 1901, p. 2946). The Maine, 161 F 401.

**32.** Other vessel is still entitled to claim apportionment of liability, and can be held liable only for its apportioned part of the damages. The Maine, 161 F 401.

**33.** Under Harter Act (27 Stat. 145), an instruction held confusing as tending to impress the jury that burden was on plaintiff to show unseaworthiness. I. C. Levy's Son & Co. v. Gibson Line of Steamers, 130 Ga. 581, 61 SE 484.

**34.** Under § 3 of the Harter Act. A shipper required to sign and accept bill of lading containing improper charge is not bound thereby so that it will take the place of the original bill of affreightment and prevent his recovery of freight overpaid and of damages. Equi Valley Marble Co. v. Becker [C. C. A.] 165 F 437.

**35.** Manager, agent, master or owner inserting in bills of lading provisions exempting them from liability for negligence, or refusing to insert therein certain statements, are subject to indictment and prosecution therefor. United States v. Cobb, 163 F 791.

**36.** Where bill shows on its face that it was signed by another, no averment that it was signed by defendant's authority need be made. United States v. Cobb, 163 F 791.

**37.** Bill held to not violate §§ 1 and 2, and to reasonably comply with § 4. United States v. Cobb, 163 F 791.

**38. Search Note:** See notes in 35 L. R. A. 623; 5 L. R. A. (N. S.) 126; 30 A. S. R. 634, 639; 5 Ann. Cas. 388.

See, also, Shipping, Cent. Dig. §§ 500-520, 565-597; Dec. Dig. §§ 144-154, 170-185.

**39.** Where captain refuses to carry cargo of agreed amount, shipper is liable for freight only on amount carried, and freight overpaid in such case, under compulsion, may be recovered back. Clancy v. Dutton, 129 App. Div. 23, 113 NYS 124.

**40.** Under rule in this country freight may be recovered back, if paid in advance, in case of nondelivery, if there be no contract to the contrary. Burn Line v. U. S. & A. S. S. Co. [C. C. A.] 162 F 298.

**41.** Railroad subrogated to take carrier's

*Demurrage.*[See 10 C. L. 1665]—Stipulations in a bill of lading as to demurrage are to be construed according to prevailing custom [42] and the intent of the parties,[43] and are binding.[44] A detention by reason of a legal seizure on a claim subsequently dismissed creates no action for demurrage, where the libeling of the vessel was not in bad faith or malicious.[45] In the absence of a contract therefor, one is not liable for demurrage when the delay is caused by unavoidable detention by acts of a third party,[46] unless the contracting parties may be held to have foreseen such acts.[47] Demurrage for less than a day is equivalent to a day.[48]

The liability of a charterer for demurrage is dependent upon the terms of the charter.[49] Ordinarily, the charterer is liable for delay occasioned by his own fault,[50] but not when due to the fault of the owner.[51] A mere mistake in judgment is not

lien. Bennett Bros. Lumber Co. v. Robinson [C. C. A.] 159 F 910.

**42.** Coal vessel is not entitled to demurrage because transatlantic steamers arriving after it, in accordance with contracts and long custom, were permitted to discharge first at wharf other than that at which coal barges were usually discharged, though entitled to precedence, after arriving coal barges and after assignment to berth, over any other vessel as to such berth. Ross v. Cargo of 3,408 Tons of Pocahontas Coal, 165 F 722.

**43.** Demurrage not defeated by conditions with regard to which the parties cannot be presumed to have contracted as where company gave precedence to vessels carrying cargoes of coal for its own use, in absence of express provision therefor. Ross v. Cargo of 3,408 Tons of Pocahontas Coal, 165 F 722. Counterclaim for failure to receive goods was dismissed where no agreement therefor was shown except when formal declarations were made, upon which proper action was taken. Tweedie Trading Co. v. New York Cent. & H. R. R. Co., 166 F 993.

**44.** Where amount of demurrage is specified in bill of lading, parties are bound by its terms; hence, where bill provided that demurrage should be estimated on discharge of 300 tons per day, number of vessels given precedence is immaterial. Ross v. Cargo of 3,408 Tons of Pocahontas Coal, 165 F 722.

**45.** Watt v. Cargo of Lumber [C. C. A.] 161 F 104.

**46.** Consignee held not liable for delay in discharging cargo where delayed by dredges engaged in improving the waterway, where obstruction was not known when the dock was designated. Roney v. Chase, Talbot & Co., 160 F 268.

**47.** Demurrage is allowed where delay was caused by dredging by government, though no mention of demurrage is made in contract, there being nothing unforseen or extraordinary about the dredging. Roney v. Chase, Talbot & Co. [C. C. A.] 161 F 309.

**48.** Tweedie Trading Co. v. New York Cent. & H. R. R. Co., 166 F 993.

**49.** Where charter provided that lay days should commence at certain time. Charterer had to bear loss occasioned by delay after such time in getting berth, where such delay was due to owner of berth. Pyman S. S. Co. v. Mexican Cent. R. Co., 164 F 441. Charterer must pay demurrage for any unreasonable delays not vessel's fault. The obligation as to time of discharge being treated as entirely upon charterer, it being presumed that vessel is anxious to deliver as soon as possible. Milburn v. Federal Sugar Refining Co. of Yonkers [C. C. A.] 161 F 717. Owners are entitled to recover demurrage from charterer for delay, under charter providing for customary dispatch, where delay resulted from vessel's detention at first port longer than was anticipated and without her fault, as result of which berths reserved for her in last port were occupied and she was obliged to wait, the charterer being bound by custom of port. Leary v. Talbot [C. C. A.] 160 F 914. Where, by charter party, charterer is required to discharge vessel with "customary dispatch," demurrage is charged from time vessel reaches designated berth although obliged to wait her turn, there being no proof of any contrary custom of port. Swan v. Wiley, Harker & Camp Co. [C. C. A.] 161 F 905. Proof that vessel was delayed beyond customary time for unloading such cargoes throws upon charterer burden of proving facts excusing such delay by introducing proof of actual circumstances of delivery and his reasonable diligence thereunder. Roney v. Chase, Talbot & Co. [C. C. A.] 161 F 309. Liability for **loss occasioned by legal proceedings or penalties** rests upon one whose duty it was under charter to comply with legal requirements. This was case of failure to procure bill of health, with duty to procure on owner. The Queen Olga, 162 F 490.

**50.** It is duty of charterer to name berth of discharge, and he will be liable for delay occasioned by delay in doing so. Swan v. Wiley, Harker & Camp. Co. [C. C. A.] 161 F 905. Charterers cannot avoid paying demurrage where delay was caused by their failure to perform a duty, even though they directed the master to perform it. Hammett v. Chase, Talbot & Co. [C. C. A.] 165 F 1005. Where cargo is not as specified in charter, demurrage is recoverable for delay caused thereby, but not for time lost in obtaining tug unless due to charterer's default, or for time of towage charged as lay days for loading, under charter which required charterer to pay towage between two points of loading. Hagan v. Cargo of Lumber, 13 F 657.

**51.** Owner refused to discharge without settlement of prior claim for demurrage at port of loading. Hagan v. Cargo of Lumber 163 F 657. Where the duty of discharging is upon owners, neither charterer nor cargo is liable for delay beyond lay days, unless it be shown to be fault of one or the other. West Hartlepool Steam Nav. Co. v.

sufficient basis for a claim of fraud in the execution of a charter so as to relieve the payment of demurrage.[52]

§ 11. *Pilotage, towage and wharfage.*[53] *Pilotage.*[See 10 C. L. 1666]—The pilot of a vessel approaching a drawbridge is required to exercise only ordinary care,[54] and may usually presume that the persons in charge of the bridge will commence to open the draw in time.[55]

*Towage.*[See 10 C. L. 1666]—Towage is destinguished from salvage in a subsequent section.[56] In the absence of negligence, a tug may collect for its service though unsuccessful therein.[57] Ordinarily, a tug has a lien upon the vessel and its cargo for towage services.[58]

*Wharfage.*[See 10 C. L. 1667]—A demand for wharfage is not an assertion of sovereignty within the provision of the Federal constitution prohibiting states from levying a duty on tonnage without the consent of congress,[59] the essence of such demand being the use of the private property of the wharfinger.[60] What constitutes chargeable use of a wharf depends largely upon the circumstances of the particular case.[61] The wharfinger has a lien on the vessel for wharfage.[62]

The wharfinger is liable for damages caused by his negligence,[63] but the burden of proof as to such issue is on the vessel.[64] On the other hand, a vessel is liable for the actual damage caused to a dock through its negligence.[65]

§ 12. *Repairs, supplies and like expenses.*[66]—[See 10 C. L. 1667]—Between the owner and the master, the ordinary rules of principal and agent apply in relation

Virginia-Carolina Chemical Co. [C. C. A.] 164 F 836. Charterers are not liable for demurrage due to fault of owners, although arising through failure of owners to comply with clause which it proved impossible to comply with, where impossibility did not arise through any fault of charterers. Gans v. Auchincloss, 166 F 991.

**52.** Where discharge took four days instead of three days as estimated. Tweedie Trading Co. v. Kates, 167 F 226.

**53. Search Note:** See notes in 39 L. R. A. 177; 27 A. S. R. 557.

See, also, Pilots, Cent. Dig.; Dec. Dig.; Towage, Cent. Dig.; Dec. Dig.; Wharves, Cent. Dig.; Dec. Dig.; 22 A. & E. Enc. L. (2ed.) 821; 28 Id. 261, 271; 20 A. & E. Enc. P. & P. 255, 259, 260.

**54.** Anderson v. Pennsylvania R. Co. [N. J. Err. & App.] 71 A 333.

**55.** Anderson v. Pennsylvania R. Co. [N. J. Err. & App.] 71 A 333.

**56.** See, post, § 13.

**57.** Towage may be collected though towed lighter be sunk, no agreement to take especial care of lighter nor any negligence on part of tug being shown. The Patrick McGuirl, 168 F 453. Towage may be recovered although tow became stranded, where tug was not negligent. Neall v. P. Dougherty, Co., 168 F 415.

**58.** Such lien is ordinarily implied. In re Alaska Fishing & Development Co., 167 F 875. Tug which waits on barge engaged in towing is not entitled to lien on vessel towed. The Alligator [C. C. A.] 161 F 37.

**59.** U. S. Const. art. 1, § 10, cl. 3, does not prohibit city owning a wharf from collecting wharfage. City of St. Louis v. Eagle Packet Co., 214 Mo. 638, 114 SW 21.

**60.** City of St. Louis v. Eagle Packet Co., 214 Mo. 638, 114 SW 21.

**61.** Question held for jury where wharf was entirely under water. City of St. Louis v. Eagle Packet Co., 214 Mo. 638, 114 SW 21.

**62.** Lien in nature of maritime lien exists against domestic vessel of state, navigating waters of United States, for dockage, which lien is enforcible in admiralty courts of United States, under B. & C. Comp. Or. 1901, § 5706, where wharfage was extended at request of owner. The George W. Elder, 159 F 1005. Before any lien can accrue against vessel for wharfage of lighter and damages for loss of use of same, it must appear that lighter was delivered to master or someone authorized by master or owner to receive same. The Garonne [C. C. A.] 160 F 847.

**63.** Where pier was worm eaten and cargo damaged by its collapse, owners of pier are liable. Vogemann v. American Dock & Trust Co., 131 App. Div. 216, 115 NYS 741. Recovery may be had where injury resulted from grounding of lighter, which was being properly handled, upon submerged piles which owner of wharf had left in dock. Philadelphia Transportation & Litherage Co. v. Pennsylvania R. Co., 160 F 557. Owner of bulkhead is liable for injury to vessel thereat occasioned by hidden obstruction unless master knew or was notified of danger, although she took position farther along than berth assigned. Schoonmaker v. New York [C. C. A.] 167 F 975.

**64.** Held no evidence to show sinking caused by negligence and injury to bottom of vessel as alleged. Philadelphia Transportation & Litherage Co. v. Mechling Bros. Mfg. Co., 160 F 555.

**65.** But vessel is not liable for loss of use of dock where all business was taken care of at another dock belonging to the same party. The Ferguson, 167 F 234.

**66. Search Note:** See Maritime Liens, Cent. Dig.; Dec. Dig.; Shipping, Cent. Dig. §§ 323-325; Dec. Dig. § 71

to incurring liabilities, except in so far as the peculiar exigency involved alters it.[67] A very similar rule applies to the creation of a lien by the master,[68] managing owner,[69] or a special owner in charge,[70] the basis of such a lien being benefit received by the vessel.[71] Where the contract is had directly with the owner, the presumption is that the credit was extended to him personally.[72] Where the ship's husband is not a part owner of the ship, all the owners are responsible in solido for his just expenditures and charges, but where he is part owner, each is liable only for his own share.[73] The repairer of a vessel is liable for only such damages for

67. Exigency arises from voyage or necessity when master is out of touch with principal, and it is necessity, not necessaries, that is basis of rule that gives master authority. May v. Hurley [N. J. Err. & App.] 71 A 913. Under general authority which master of ship has, he may make contracts and do all things necessary for due prosecution of voyage in which ship is engaged, but this does not usually extend to case where, owner can himself interfere, as in home port, or in port where he has appointed agent who can do things required. May v. Hurley [N. J. Err. & App.] 71 A 913. Master of vessel has authority to incur necessary **outfitting expenses,** and owner is liable therefor in case where German vessel put in at New Orleans for cargo, the laws of Germany and of this country not differing in respect thereto. Commercial Nat. Bank v. Sloman, 194 N. Y. 506, 87 NE 811. Owner is liable for **supplies** ordered by master although by terms of charter of which libelants had no knowledge charterer was to pay for same, where master was engaged by broker in whose hands owner had placed vessel with instructions that he should not be at any expense in outfitting vessel. Rudolph v. Bryan, 161 F 233. Managing owner in home port cannot alone bind co-owners to personal liability for supplies where no one was made master or ship's husband or agent and vessel was lying within easy reach and constant access of city where co-owners lived. Such co-owners have power to absolutely relieve themselves from liability by notice, there then being no implied agency. Briggs v. Barnett, 108 Va. 404, 61 SE 797. One advancing money to master which was used in paying obligations for **necessities** for vessel may recover from owner in action for money had and received, as, where plaintiff cashed draft of master on owner, pledging vessel and cargo as security under mistaken belief that it was valid, he may disregard such void draft and sue as above stated, even after another court has refused judgment on draft. In such action, the owners can set up as counterclaim claims against the brokers who secured supplies, plaintiffs not claiming as assignees of such brokers; nor will any item of necessities be disallowed because the owner had paid it to a third party; nor will money paid for brokers' commissions be disallowed in such case. Commercial Nat. Bank v. Sloman, 194 N. Y. 506, 87 NE 811.

68. Since master cannot bind vessel for payment of borrowed money if owner can be consulted, vessel is not bound on bare statement of master that money was needed to pay crew, where lender knew owners, that they lived in same state, were responsible, and had agent in same port, neither being consulted and the money not being so needed or used. The George W. Anderson, 161 F 760.

69. Repairs and not construction work, ordered by the master and managing owner in a foreign port, in the absence of a contrary showing, are presumed to create a lien, the alterations not changing the character of vessel and being such as to better fit her for a particular business. The Emma B., 162 F 966. Advances made to master and managing owner without inquiry as to credit or standing of owners and not shown to have been needed or used for vessel do not give rise to a lien. Id.

70. Where owner, under contract of sale, allows purchaser to assume entire control and makes him the owner pro vice, he must be deemed to consent that such special owner may create liens binding on former's interest as security for performance of contracts of affreightment and for maritime service. The Garonne [C. C. A.] 160 F 847.

71. Vessel is not liable for supplies not shown to have been ordered by proper authority or delivered to vessel or someone authorized to receive them although person ordering represented himself as being either captain or cook and goods were charged to vessel. The Curtin, 165 F 271. Lien may be created without labor and material having been furnished on credit of vessel, where not required by state statute authorzing lien. Berwind-White Coal Min. Co. v. Metropolitan S. S. Co., 166 F 782. Services or supplies must have been furnished to particular vessel upon which lien is claimed. The Alligator [C. C. A.] 161 F 37.

72. No lien applies against vessel for supplies or labor furnished in foreign port where contract therefor is had direct with known owner, in absence of any special contract or mutual understanding to that effect, and the burden of proving that there was such contract or understanding is upon the party claiming the lien. The Clinton [C. C. A.] 160 F 421.

73. Obligation in absence of special contract, being several in latter instance, but one voluntarily paying more than his share cannot recover contribution from another, since essence of contribution is that there be a joint or a joint and several liability. Briggs v. Barnett, 108 Va. 404, 61 SE 797. One holding position of tenant in common with other owners of vessel is entitled to reasonable pay for his special services in connection with repair of vessel and for his individual appliances used, though there is no express contract therefor. Id. Held to be tenants in common and not joint owners where each had an individed interest in vessel lying aground, and that third person

defective work as proximately result therefrom and which might have been anticipated.[74]

§ 13. *Salvage.*[75]—See 10 C. L. 1668—Salvage is a reward, upon the basis of risk to life and property, for assistance rendered a ship or vessel, or its cargo, or the lives of persons belonging thereon, by which they are rescued from danger or loss.[76] It is not necessary that the loss should appear inevitably certain.[77] Salvage is distinguished from towage in the degree of peril of the rescued vessel and the danger attending the rescue.[78] The owners may collect salvage for themselves though not present, and it sometimes occurs that the award to them includes the services of the master and crew.[79] The fact that the owner of a salving vessel has at the time chartered her to the owner of that which is salved does not disentitle him from claiming salvage.[80] Where the property is saved by different vessels, they are entitled to share in proportion to the risk and the value of the services rendered.[81] There is no fixed rule for salvage allowance.[82] The principal considerations in determining the amount of salvage are the increased dangers to the salvors other than those incurred by all who go to sea, peril other than that of the contemplated voyage, skill and labor required in the rescue and the amount of time consumed, considered in connection with the degree of peril from which the other vessel was rescued and the value of the salved property.[83] Salvage should be awarded

buying eighth interest became liable for his share of expense of repairs. Id.

**74.** Not liable for leakage setting fire to four barrels of lime when he had no notice that lime was to be carried, such being a remote cause, but plaintiff was grossly liable for starting on voyage without inspection. Bell v. Mutual Mach. Co. [N. C.] 63 SE 680. In action for making repairs to vessel, damages resulting from defective work must be pleaded or such **counterclaim** will be barred by judgment. Id.

**75. Search Note:** See notes in 4 C. L. 1484; 64 L. R. A. 193; 66 Id. 206, 232; 1 L. R. A. (N. S.) 873; 8 Id. 862.

See, also, Salvage, Cent. Dig.; Dec. Dig.; 20 A. & E. Enc. P. & P. 256.

**76.** Salvage is reward allowed for services in saving property from danger or imminent peril of loss to owner, by one on whom rests no legal obligation to perform such service. The Job H. Jackson, 161 F 1015. Salvage was allowed although salvors were warned not to rescue vessel by owner and master who failed to make known his authority. The White Seal [C. C. A.] 162 F 642. Term **ship or vessel** does not include a dry dock, floating bridge, or meeting house permanently moored and attached to wharf, lighted gas bouy, or dismantled boat used as hotel, but in case at bar was held to include caisson lashed to vessel for transportation, being then considered cargo though not actually on board. Gonzales v. U. S., 42 Ct. Cl. 299.

**77.** Although danger must be apparent, fact that peril was slight or duration of service brief will not prevent recovery, if claimants are otherwise entitled thereto. Gonzales v. U. S., 42 Ct. Cl. 299.

**78.** The Carroll, 163 F 425. Tugs coming in response to signal for a tow hoisted by principal salvor and taking no risk are not entitled to salvage. The Job H. Jackson, 161 F 1015. Where the danger is not certain and extreme and service is not in its nature different from customary towage employment of salvor, an allowance bearing some relation to cost of service if rendered under contract is fairer than percentage of value of salved property. The Carroll [C. C. A.] 167 F 112. Where lack of enterprise, skill and perseverance was shown by owner's tug seeking vessel as compared with that shown by tug claiming salvage, and former had apparently abandoned search, vessel recovered was held to be direlect. The Gibson, 160 F 230.

**79.** In such case, owners are accountable to master and crew for their share. Gonzales v. U. S., 42 Ct. Cl. 299.

**80.** Exceptional services are not presumed to be within the contract. Gondales v. U. S., 42 Ct. Cl. 299. Where contract of vessel is for day seryice and she saves property of her employer after the day's work is done, she is entitled to salvage therefor. Id.

**81.** Failure of one set of salvors to prosecute their claim will not inure to the benefit of those who do. Gonzales v. U. S., 42 Ct. Cl. 299.

**82.** It rests in sound dircretion of court, and, although old rule in cases of derelict was 50 per cent, now allowance may be either more or less. The Job H. Jackson, 161 F 1015.

**83.** In case at bar, only consideration in **relation to the salved property and time consumed** held to apply. The Sun, 161 F 385. Court in determining amount may take into consideration **injury suffered and time lost** in undergoing repairs, though no allowance can be made therefor, and also risk taken and value of property saved. Gonzales v. U. S., 42 Ct. Cl. 299.

**Amount allowed:** 20 per cent of value of property saved. Gonzales v. U. S., 42 Ct. Cl. 299. Tug allowed $850, including amount paid for assistance, for saving launch. The White Seal [C. C. A.] 162 F 642. Award of 12½ per cent of value of ship, cargo, and freight money of that first rescued and 7½ per cent from each of the others, where one tug rescued another tug towing five barges

with that discreet liberality which will encourage others to like undertakings,[84] but should not be such as to deter vessels in distress from accepting the necessary help.[85] The judgment in a salvage suit is binding upon all who have any interest in the res.[86] Until it has paid the owner, the insurer is not entitled to set off against the claim of the salvor its liability for damage occasioned by the salvor's delay.[87] Salvage of a wrecked vessel undertaken under contract is treated in another section.[88]

§ 14. *Vessels or persons liable for loss and expense, and limitation of liability therefor.*[89]—See 10 C. L. 1670—Where a charterer is compelled by suit to respond in damages to a cargo owner for injury to the cargo caused by a wharfinger's negligence, the charterer has a right of recovery over against the wharfinger,[90] and the judgment in favor of the cargo owner against the charterer is conclusive upon the wharfinger,[91] provided the latter had proper notice of the suit against the charterer.[92] Neither the owner nor the charterer is liable for the acts of a compulsory pilot.[93] The sinking of a vessel without known external cause is presumptively due to unseaworthiness.[94] So, also, the presumption of negligence is against a vessel going ashore in clear and calm weather on a route traveled before under the same command.[95] There is no fault in discarding property damaged beyond profitable repair.[96] Various specific liabilities are treated elsewhere in this topic.[97]

*Limitation of liability.*[See 10 C. L. 1670]—A libelant who is chargeable with privity of knowledge[98] of the fault causing the disaster is not entitled to a limitation of

in Chesapeake Bay. The Carroll, 163 F 425. Salvage 40 per cent of vessel by agreement. The Jason, 162 F 56. Tug and crew were allowed 50 per cent, 75 per cent of which was to go to vessel and 25 per cent to crew, those going on board to receive a larger share. The Gibson, 160 F 230. Award of 12½ per cent on one vessel and 7½ per cent on each of the two others was not disturbed, though considered very liberal where service was not much different from towage and danger not certain. The Carroll [C. C. A.] 167 F 112. $3,500 was awarded for rescue of schooner and cargo worth from $2,600 to $40,000 by vessel worth, with tows and cargo, about $200,000 30 hours and 36 miles deviation from course being required, where service was not of high merit or attended with any special danger, although rescued vessel was helpless and in some danger of being driven ashore. The Benjamin A. Van Brunt, 164 F 775.

84. Gonzales v U. S., 42 Ct. Cl. 299; The Carroll [C. C. A.] 167 F 112.

85. The Carroll [C. C. A.] 167 F 112.

86. Standard Marine Ins. Co. v. Nome Beach Lighterage & Transp. Co. [C. C. A.] 167 F 119.

87. Release of insurer by owner in such case releases the salvage company, nor is insurer entitled to prosecute such claim as trustee of an express trust for benefit of owner. Klauck v. Federal Ins. Co., 111 NYS 1037.

88. See post, § 16.

89. **Search Note:** See notes in 14 L. R. A. (N. S.) 1114; 90 A. S. R. 355; 7 Ann. Cas. 283; 11 Id. 32.

See, also, Shipping, Cent. Dig. §§ 319-360, 637-662; Dec. Dig. §§ 72-87, 203-211; 25 A. & E. Enc. L. (2ed.) 1048.

90, 91. Vogemann v. American Dock & Trust Co., 131 App. Div 216, 115 NYS 741.

92. Notice is sufficient which states pendency of action, invites help in defense, and states that owner will be held liable for judgment recovered. Vogemann v. American Dock & Trust Co 131 App. Div. 216, 115 NYS 741.

93. The Hathor, 167 F 194.

94. Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co., 162 F 912.

95. The Jason, 162 F 56.

96. Where those in charge of injured dredge requested captain of other vessel to examine damage, offenders thus refusing to look at it cannot berate others for discarding injured property the repair of which they considered as costing more than it was worth. The Park City, 160 F 282.

97. Injury to passengers or baggage, see § 8, for repairs, etc., see § 12.

98. Privity of corporation owner is measured by that of its managing officers within meaning of Rev St. § 4283, in suit for limitation of liability as owner, where unseaworthiness of vessel was cause. Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co., 162 F 912. Promulgation of regulations which reiterate international rule as to speed in fog is sufficient to negative privity or knowledge of fault on part of steamship company, and sufficient to entitle owners to limited exemption from liability provided by law; and in such case burden of proving that such rules were not promulgated in good faith, or that their willful violation occurred and was countenanced by the company, is upon claimants. Deslions v. La Compagnie Generale Transatlantique, 210 U. S. 95, 52 Law Ed. 973. Mere proof of negligence does not necessarily establish privity of knowledge on part of owner of vessel, under U. S. Rev. St. § 4283, according to shipowners a limited exemption from liability. Id. Privity of knowledge of excessive speed cannot be imputed from existence of subsidy contract, such contract being with French government and requiring high average annual speed with premium and penalty attached. Id.

liability.[99] "Freight pending[1] should be surrendered when action is brought for limitation of liability,[2] unless there be an honest controversy as to the existence of such freight pending.[3] The limitation of the liability of a ship owner does not apply where he is sought to be charged upon a personal contract.[4] The question of a right to limit liability involves a right to contest it.[5] The costs of invoking the statute cannot be recovered on an uncontested petition.[6] In the proceedings the vessel should be appraised at its actual value at the time of the injury.[7] In such action, in the courts of this country, by a foreign owner, the foreign laws applicable will be given their full force,[8] but the international rules of navigation will be interpreted in accordance with the rulings of the courts of this country.[9]

§ 15. *General average.*[10]—See 10 C. L. 1670.—Where ship and cargo are saved together, the total salvage paid for the benefit of all is apportioned upon the ship and cargo according to their respective values,[11] unless the accident was due to negligence of the vessel.[12] All rights therein are determined by the law of the place of destination or where ship and cargo finally separate.[13] The owner of a cargo sacrificed for the benefit of the vessel is entitled to contribution.[14] An ad-

99. Libelant who is chargeable with privity of unseaworthiness of vessel sinking from such cause is not entitled to limitation of liability, as in case of vessel not having been properly examined and surveyed, the defects having been evident. Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co., 162 F 912.

1. Receipts from passengers and freight on trip over need not be surrendered as freight pending in proceedings for limitation of liability for claims arising out of collision on return trip, under U. S. Rev. St. §§ 4283, 4284, the voyage being from Havre to New York and return, unless such freight and passage be prepaid under an absolute agreement that such sums are in any event to belong to owner, in which case they are to be considered freight pending. Deslions v. La Compagnie Generale Transatlantique, 210 U. S. 95, 52 Law Ed. 973. No part of an annual subsidy paid steamship company need be surrendered as freight pending in proceedings for limitation of liability, under U. S. Rev. St. § § 4283, 4284, such subsidy being paid by French government for operation of weekly steamship between Havre and New York. Id.

2. Where vessel surrendered was at time of injury engaged in raising sunken vessel for stated sum, such sum may be considered as "freight pending" within the meaning of the statute, and must be surrendered, but nothing may be deducted therefrom by reason of petitioner's failure to surrender other vessels and appliances used in the service. The Captain Jack, 162 F 808.

3. Limitation of liability will not necessarily be refused by reason of failure to surrender pending freight, where there is such controversy and owner is perfectly solvent. Deslions v. La Compagnie Generale Transatlantique, 210 U. S. 95, 52 Law. Ed. 273.

4. Act of Congress, 23 St. 57, applies to limit individual liability of shipowner to that proportion of debts that his interest bears to whole value of vessel, only where he is charged as shipowner. Richardson Fueling Co. v. Seymour, 235 Ill. 319, 85 NE 496.

5. When petitioner's right to contest and limit has been decided in her favor on appeal, it only remains to determine whether claimant is entitled to recover and, if so, to what extent. The Tommy, 168 F 563.

6. May be recovered on any contested issue against the losing party. The W. A. Sherman [C. C A.] 167 F 976.

7. All allowance should be made for subsequent repairs at their market value at present time, not at cost. The Captain Jack, 162 F 808.

8. French law, authorizing recovery against vessel for loss of life, will be enforced against French vessel seeking limitation of liability in courts of the United States, although interpretation of French courts of the rule as to speed in fog would hold such vessel not at fault. Desloins v. La Compagnie Generale Transatlantique, 210 U. S. 95, 52 Law. Ed. 973.

9. One seeking benefit of law of the United States for limitation of liability of shipowners will have question of liability determined by international rule as to speed permissible in a fog, as interpreted by rules of courts of United States, as where owner of French vessel sues Brittish vessel for loss in collision. Deslions v. La Compagnie Generale Transatlantique, 210 U. S. 95, 52 Law. Ed 973.

10. **Search Note:** See Shipping, Cent. Dig. §§ 598-636, Dec. Dig. §§ 186-202; 17 A. & E. Enc. L. (2ed.) 610; 24 Id. 952.

11. The Jason, 162 F 56.

12. Where stranding must be charged to vessel's own negligent navigation, she is not entitled to recover contribution in general average from cargo owners on account of salvage, as where she sailed for more than an hour by inacurate chart in shoals which vigilant outlook should have seen. The Jason, 162 F 56.

13. In Portugal, loan on bottomry contributes to general average but not in America. Monsen v. Amsinck, 166 F 817.

14. Following decision by the House of Lords of Great Britain and there being no contrary decision in this country; where spontaneous combustion occurred due to inherent quality of cargo known to both parties, The Wm J. Quillan, 168 F 407. This right is not affected by Harter Act, and while in such action shipowners are entitled to have salvage payments made by respective

vance on freight is liable to contribution.[15] Expense for the benefit of both owner and insured is a general average charge.[16]

§ 16. *Wreck.*[17]—See 4 C. L. 1487—Delay in raising a sunken steamer, when caused by stormy weather, does not preclude recovery of the contract price for the service performed.[18] The owner has no interest in a salvage contract made by the insurer.[19]

§ 17. *Marine insurance.*[20]—See 10 C. L. 1671—The policy as a whole and each part thereof should be given its natural and logical construction,[21] in accordance with the laws of the place where issued.[22] A stipulation as to manner or place of navigation is binding,[23] but may be modified or waived by parol agreement.[24] Con-

parties taken into the general average adjustment, they are not entitled to an affirmative recovery of any balance due him on any such adjustment. The Jason, 162 F 56.

**15.** Fact that master's draft is given for advance does not prevent it from being advance on freight and liable to contribute in general average, where charter provides that charterer shall advance cash for ordinary disbursements at port of loading, although advance is not endorsed on bill of lading. Monsen v. Amsinck, 166 F 817.

**16.** Such as expense of towing a vessel to a certain port for repairs, although she takes on a cargo which is not liable for such charge and such trip was in completion of the voyage. Dollar v. La Fonciere Compagnie, 162 F 563.

**17. Search Note:** See notes in 3 L. R. A. N. S.) 1120.

See, also, Shipping, Cent. Dig. §§ 663-667; Dec. Dig §§ 212-217; 30 A. & E. Enc. L. (2ed.) 1298.

**18.** Contract made provision for delay caused by weather and ice, and no lack of diligence was shown. The Myrtie M. Ross [C. C. A.] 160 F 19.

**19.** Klauck v. Federal Ins. Co., 111 NYS 1037.

**20. Search Note:** See notes in 4 C. L. 1488; 66 L. R. A. 200, 234; 1 L. R. A. (N. S.) 1095; 14 Id. 1161, 4 Ann. Cas. 501.

See, also Insurance, Cent. Dig. §§ 572-588, 709-743, 1088-1121, 1188-1265; Dec. Dig. §§ 272, 273, 312-315, 402,417; 1 A. & E. Enc. L. (2ed.) 4; 9 Id. 418, 19 Id. 447, 930.

**21.** Policy of marine insurance held to consist of three papers, and not of a typewritten paper alone, such paper appearing incomplete. Kuh v. British America Assur. Co., 59 Misc. 589, 112 NYS 410 Typewritten **rider** is considered, but loss is confined to particular risks insured against. Kuh v. British America Assur. Co., 130 App. Div. 38, 114 NYS 268 Where policy provision not clearly applicable provided no right of abandonment unless constructive total loss exceeded 75 per cent of value, and rider provided for such right in case loss exceeded 50 per cent and was clearly applicable, the rider controlled. Royal Exch. Assur. v. Graham & Morton Transp. Co. [C. C. A.] 166 F 32. Phrase **existing insurance** in policy includes any other insurance during continuance of risk. Lehigh Valley R. Co. v. Providence-Washington Ins. Co., 167 F 223. Provisions merely for simplification of proof are not to be construed as **limitation of liability,** and hence, where policy of "disbursement insurance" stated to be "against risk of total or constructive total loss of the vessel only" and contained the clause, "total or constructive total loss paid by insurers on hull to be a total loss under this policy," it was held that proof of the fact of such loss, however established, authorizes recovery. Royal Exch. Assur. v. Graham & Morton Transp. C. [C. C. A.] 166 F 32. Clause read "This insurance is not to cover more than $100,000 by any one steamer, or in any one place at any one time." Held that amount stated referred to value of cargo and not amount of recovery, and only such part of loss could be recovered as said amount bore to such entire value. Hood Rubber Co. v. Atlantic Mut. Insurance Co., 161 F 788; Hood Rubber Co. v. Rutland Transit Co., 161 F 790. Under **War-risk** policy, coaling contrary to instructions of owner but in accordance with provisions of policy does not release insurer, route being direct and ordinarily safe and act of coaling being reasonable, nor does carrying of false documents which were surrendered, nor taking on freight clerk during voyage who was not connected with belligerent government. Northwestern S. S. Co. v. Maritime Ins. Co., 161 F 166. Usual policy against war risks will be construed to cover risk of vessel's seizure and capture, and provision that it should cover only "those risks excluded by the 'warranted free of capture, seizure or detention' clause in marine policy or policies" must be construed as referring to marine policies generally, and not to any particular policy on vessel. Id; Coastwise S. S. Co. v. Aetna Ins. Co., 161 F 871. A **running-down clause** of a policy covers only cases where insured vessel actually comes into collision with another vessel, and does not extend to damages caused by her in causing two other vessels to come together. Western Transit Co. v. Brown [C. C. A.] 161 F 869.

**22.** Insurance policy issued on American vessel in England, at which place delivery was made and permium paid, is English contract. Northwestern S. S. Co. v. Maritime Ins. Co., 161 F 166.

**23.** There can be no recovery where vessel is navigating elsewhere than provided. Norris v. China Traders' Ins. Co. [Wash.] 100 P 1025. Scope of policy is only for voyage insured. which voyage must be prosecuted with diligence and by best known route. Ship must be seaworthy at commencement of each stage of voyage, reasonable precaution being taken for safety and termination without delay or loss, to accomplish which reasonable and customary means may be adopted without releasing insurer. Northwestern S. S. Co. v Maritime Ins. Co., 161 F 166.

**24.** While policy is subject to statute and

cealment of any material fact which the insured knows and ought to disclose [25] and which is unknown to the insurer [26] will avoid the policy.[27] The insurer is liable in accordance with the terms of the policy,[28] provided action is begun within the time specified therein,[29] and is bound by the decree in the salvage suit.[30] The insured need not plead matters of defense.[31] The burden of proof to establish the right of abandonment is upon the assured as libelant [32] and must be promptly claimed.[33] Such right depends upon the facts as they actually exist [34] and must be determined as of the time of abandonment.[35] It does not depend upon the certainty of loss but upon high probability thereof.[36] Under the American maritime rule, constructive total loss, with the right of abandonment to the insurers, exists in the event of damage in excess of one-half the insured valuation.[37] Where the right of abandonment is the only issue, formal proof of loss is not essential.[38] A latent ambiguity in the policy may be explained by parol.[39] An insurer of goods, upon payment of the loss becomes subrogated to the assured's right of action,[40] but is controlled by any pre-

rules governing other contracts, the rule barring parol evidence to vary written contract does not apply in such case, and insurer has right to waive condition made for its benefit, but questions of fact concerning such matter are for jury. Condition was waived by failure to object, receiving premiums thereafter and proof of loss and statement that loss would undoubtedly be paid. Norris v. China Traders' Ins. Co. [Wash.] 100 P 1025. As to what will constitute breach or waiver of provision of warranty under policy is question of law. Robinson v. Insurance Co. of North America, 129 App. Div. 1, 113 NYS 105.

25. Applicant is required to disclose fully all material facts known to him but not those unknown or immaterial or which are of common knowledge to those engaged in insurance business. Materiality to be determined from all circumstances and conditions. Northwestern S. S. Co. v. Maritime Ins. Co., 161 F 166. Where vessel carrying contraband goods bound from Seattle to Vladivostok during war between Russia and Japan was insured against war risks, and true nature of cargo and intention to clear at Shanghai was not disclosed, but policy contained permission to run blockade, and fact that cargo would probably be treated as contraband if captured was known to insurer. Id.

26. Insurer may not avoid payment on account of defects known at time of taking risk as where double permium is paid in consideration of fact that vessel is not completely seaworthy as required by policy. Farmers' Feed Co. v. Insurance Co. of North America [C. C. A.] 166 F 111, afg. 162 F 379.

27. St. Paul Fire & Marine Ins. Co. v. Balfour [C. C. A.] 168 F 212.

28. Owner may recover from insurer his damages for delay under terms of policy, and not because caused by wrecking company employed by insurer. Klauck v. Federal Ins. Co., 111 NYS 1037.

29. Contractual limitation of one year within which to commence action is binding and is not affected by defendant's agreement to hear part of loss by fact that he had not refused to pay by reason of such clause, or by fact that carrier's liability had not been adjudicated. Lehigh Valley R. Co. v. Providence-Washington Ins. Co., 167 F 223.

30. Such decree is admissible in evidence though not entered until after insurance action was commenced. Standard Marine Ins. Co. v. Nome Beach Lighterage & Transportation Co. [C. C. A.] 167 F 119.

31. Not necessary for plaintiff to plead warranties that goods were free from claim on account of capture, seizure, detention or destruction by any belligerent nation, or by or from any officer or person claiming to act in their name. Kuh v. British America Assur. Co., 59 Misc. 589, 112 NYS 410.

32. Royal Exch. Assur. v. Graham & Morton Transp. Co. [C. C. A.] 166 F 32.

33. Royal Exch. Assur. v. Graham & Morton Transp. Co. [C. C. A.] 166 F 32.

34. Assured cannot be required to abandon, whatever be the actual or prospective loss, but his right to do so depends wholly upon facts as they actually exist, and not upon whether it was more profitable for him to do so or not. Royal Exch. Assur. v. Graham & Morton Transp. Co. [C. C. A.] 166 F 32.

35. Right is not changed by subsequent events, although they may be shown so far as they relate back prior to abandonment. Royal Exch. Assur. v. Graham & Morton Transp. Co. [C. C. A.] 166 F 32.

36. Royal Exch. Assur. v. Graham & Morton Transp. Co. [C. C. A.] 166 F 32.

37. Royal Exch. Assur. v. Graham & Morton Transp. Co. [C. C. A.] 166 F 32. Customary value of wrecking services performed in attempted rescue may be considered as evidence of the high probability of constructive total loss, although such services were performed under a conditional contract and were not required to be paid for. Id.

38. Royal Exch. Assur. v. Graham & Morton Transp. Co. [C. C. A.] 166 F 32.

39. Where attached rider referred to another policy by a number in which no policy had been issued, real intention may be shown by evidence of company's custom. St. Paul Fire & Marine Ins. Co. v. Balfour [C. C. A.] 168 F 212. Different parts of marine policy covering shipments while on land and sea considered, and policy held ambiguous so as to authorize parol proof that underwriters, by agreement to pay "for loss in weight in excess of one per cent. on entire shipment," meant to pay for loss due to leakage and wear and tear of voyage, so that plaintiff was not required to plead and rely solely on perils enumerated in policy, which were only sea perils. Kuh v. British America Assur. Co., 59 Misc. 589, 112 NYS 410.

40. Irrespective of whether there is express

vious waiver thereof by the assured.[41] The insurer has the power to enter into and release a contract for the salvage of an insured wreck.[42]

§ 18. *Maritime torts and crimes.*[43]—See 10 C. L. 1672—Various specific torts are considered in other sections.[44]

*Liability for personal injuries.*See 10 C. L. 1672—The vessel as well as the owner is liable for personal injuries caused by defects in the vessel,[45] or by negligence in her maintenance [46] and operation,[47] and for unjustifiable assaults of the master,[48] except when the injured party is guilty of contributory negligence [49] or where the rule as to assumption of risk applies.[50] Unless there is an actual demise of the

provision therefor in contract. Walter Baker & Co. v. New York, etc., R. Co., 162 F 496. Insurer, having paid insurance, acquires corresponding right in any damages to be recovered by assured from party responsible for loss which right may be enforced by action at law in name of assured, or, when case admits of proceeding in equity or admiralty, by suit in his own name. Stockton Mill. Co. v. California Nav. & Imp. Co., 165 F 356.

41. As where insured, as lienor, fails to present his claim in action in rem. The Ethelwold, 165 P 806.

42. If such contract is made independent of owners, they have no cause of action for its breach, not being the persons intended to be benefited thereby. Klauck v. Federal Ins. Co., 111 NYS 1037.

43. **Search Note:** See notes in 6 C. L. 1493. See, also, Shipping, Cent. Dig. §§ 30-49, 333-360; Dec. Dig. §§ 16, 17, 78-87; 3 A. & E. Enc. L. (2ed.) 859; 20 A. & E. Enc. P. & P. 246, 254.

44. See ante, §§ 3, 4, 7, 8, 9.

45. Vessel is liable for injury to seaman resulting from use of **inefficient tow line** vessel being unseaworthy in such respect, seaman not being negligent, and it not being shown that a proper chain could not have been procured. The Fullerton [C. C. A.] 167 F 1. Owner of boat owes to person making repairs reasonable care, and is responsible for injury caused by his stepping on **defective covering of manhole** while engaged in lawful errand under direction of foreman. Casey v. Lehigh Valley R. Co., 128 App. Div. 86; 112 NYS 522. Owner of vessel is liable for drowning of a seaman resulting from attempt to open a **defective port.** Puget Sound Nav. Co. v. Lavender [C. C. A.] 160 F 851. Where non-expert witness testifies as to condition of port so that result of attempt to open it is obvious, it is not error to permit him to testify as to such probable result. Id. Owner is liable for injury to seaman occasioned by **negligent construction of hatch cover,** since such hatch cover when in place constituted a "way" within the meaning of employers' liability act (Laws N. Y. 1902, p. 1748, c. 600). Negligence is question for jury. La Compagnie Gererale Transatlantique v. Maguire [C. C. A.] 168 F 34.

46. Negligence on part of owner may be shown by evidence of uncovered manhole and insufficient light, by reason of which an employe was injured. Clinton v. Munson S. S. Line, 116 NYS 383. Held to be no evidence to justify finding that cover was taken and left off manhole by fellow-servant, but to show that it was custom of vessel for it to be left off. Id. Unless vessel is guilty of negligence, it is not liable for injury to stevedore from stepping on loose planks where their presence and fact that they were loose were apparent. The Clan Graham, 163 F 961.

47. Vessel liable for retaining winchman of whose carelessness it had previous notice. In case of injury to stevedore resulting from negligence of winchman, where three complaints of winchman's carelessness had been made by foreman to commanding officer of vessel, the vessel being required to use ordinary care in selection and retention of its servants, was held liable. The Brookby, 165 F 93. Vessel liable for injury to a regular employe ordered to do work out of his regular employment and with the dangers of which he is not familiar, there being no assumption of risk and it not appearing that he was negligent. Smith v. Cook, 164 F 628. Vessel is not liable for injuries to stevedore not caused by defects in appliances furnished. The Ranza, 164 F 699. No failure of duty in leaving hatchway open where it was reasonably protected by railing and seaman had opportunity to know condition and position of hatch. Campbell v. Trinidad Shipping & Trading Co., 165 F 270. Vessel is **not liable** for injury to seaman through exposure which was no fault of officers, in case of loss of fingers from frost bite, where he was relieved from duty as soon as it was known he was suffering from cold and every proper attention given him. The Teviotdale, 166 F 481.

48. Seamen are entitled to recover damages from both master and ship for unjustifiable assaults of master committed in wanton disregard of their personal rights and for inflicting cruel punishments. Belyea v. Cook, 162 F 180.

49. Reasonable prudence would require employe to take proper precautions to avoid falling into hatchway in dark, such as calling for help or previous notice that he would need a light where want could have been anticipated. Kennedy v. Netherlands American Steam Nav. Co. [N. J. Err. & App.] 72 A 382. Question of contributory negligence may become question of law for determination of court when it is manifestly the cause of injury that is, when the minds of the jury could not fail to agree, as where an employe was injured through placing riffle in chute by means of ladder unnecessarily used, instead of standing on overturned chute. Stewart v. Balfour [Wash.] 98 P 103.

50. Rule as to assumption of risk by seamen is not applicable to one casually employed in coaling. Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co., 162 F 912. Employe on vessel who does not take usual and manifestly safer course in performance of work assumes risks thereof. Stewart v.

vessel [51] or other cause necessitating his release, the liability of the owner continues,[52] but such ownership must be sufficiently alleged [53] and proved.[54] So, also, negligence, as a ground of liability, must be pleaded properly [55] and proved.[56] A recovery may be had for an injury caused by an employe,[57] unless such employe is a fellow-servant of the person injured.[58] The damages allowed should be reasonable as determined from the injury,[59] loss of time,[60] and expenses.[61] A release signed by seaman who left the vessel during the voyage does not estop him from maintaining an action for mistreatment.[62]

*Maritime crimes.*[See 10 C. L. 1672]—Owners and masters of vessels should be held to the strictest accountability and required to exercise the highest degree of skill and care.[63] The captain's duty is a personal one,[64] and he is criminally liable for

Balfour [Wash.] 98 P 103. There is no assumption of risk unless employe had knowledge or means of knowing the danger, as in case of carpenter drowned by reason of barge capsizing through unseaworthiness. Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co., 162 F 912. Where vessel goes to sea in violation of Rev. St. § 4561, as amended at 30 Stat. 758, making it a penal offense to knowingly send to sea an American vessel "in such an unseaworthy state that the life of any person is likely to be thereby endangered," there is no assumption of risk by seamen shipping thereon. The Fullerton [C. C. A.] 167 F 1.

51. Must be such demise as destroys relation of master and owner and substitutes that of bailor and bailee or the master is held to remain servant and agent of owner. There is no demise of control of servants unless hirer has right to discharge them and employ others in their place. Nelson v. Western Steam Nav. Co. [Wash.] 100 P 325. Control of vessel may be shown by evidence of payment of damages resulting from collision. Id. Liability for injury to employe on vessel is not determined from ownership but from possession and control of vessel, and hence, where respondent had sold vessel but it was still operated in its name without its knowledge or consent, injured employe could not recover from such respondent. Id.

52. Owner is not relieved from liability for negligence of his employe, causing injury to one not his employe, by fact that such employe was assisting to unload under direction of stevedores, unless injury directly resulted from such direction. Stewart v. Balfour [Wash.] 98 P 103.

53. Allegation of ownership of vessel is not insufficient after verdict where it is alleged in present tense but negligent acts are specified as those of the defendant, in the absence of demurrer or motion to make pleading more certain. Puget Sound Nav. Co. v. Lavender [C. C. A.] 160 F 851.

54. In personal injury case, ownership of boat may be prima facie shown by insignia thereon, there being no presumption that two corporations will use exactly same design. Casey v. Lehigh Valley R. Co., 128 App. Div. 86, 112 NYS 522.

55. In absence of objection thereto, a general allegation of negligence is sufficient. Phillips v. Portage Transit Co., 137 Wis. 189, 118 NW 539.

56. Burden is on plaintiff to show more than possible liability of defendant, but he must show such circumstances as would justify inference that injury resulted from neglect of duty by defendant and exclude idea that it was due to cause for which defendant was not responsible. Kennedy v. Netherlands American Steam Nav. Co. [N. J. Err. & App.] 72 A 382. Where system adopted by defendant for lighting hatchway was sufficient, company was not liable for temporary interference with passage of light where it was not shown to have been done by direction of defendant company or any one representing it, or that company was chargeable with notice. Id.

57. The Boveric [C. C. A.] 167 F 520.

58. If injury is caused by negligent act of fellow-servant, master is not liable therefor. Kennedy v. Netherlands American Steam Nav. Co. [N. J. Err. & App.] 72 A 382. Vessel employing contractor to do loading is not liable for injury to employes of contracting stevedores caused by manner in which they did work, as in case of inefficient lighting by fellow-servant with candles furnished by contracting stevedores. The Clan Graham, 163 F 961. Vessel is not chargeable with injury to stevedore occurring through negligence of winchman, though due to machinery not being properly oiled, where there was no notice or complaint to officers. The Hilarius, 163 F 421. Winchman and another employe working under orders of same contracting stevedore are fellow-servants, although winchman was furnished by vessel from crew and stevedore was employed by charterer. The Brookby, 165 F 93. Winchman furnished by ship under **charter party** and stevedore furnished by charterer are not fellow-servants. The Boveric [C. C. A.] 167 F 520. Mate in charge of unloading is **vice-principal** and not fellow-servant of employe injured, and owner is liable for such mate's negligence, where mate caused injury through his carelessness while drunk. Nelson v. Western Steam Nav. Co. [Wash.] 100 P 325.

59. Damages allowed to seamen for exposure held reasonable. Northwestern S. S. Co. v. Turtle [C. C. A.] 162 F 256. For loss of a right arm entailing much pain and suffering, an award of $17,500 to mate earning $150 per month is not excessive. The Fullerton [C. C. A.] 167 F 1.

60. Evidence of earnings of like voyage in previous year competent to be considered in determining damage. Puget Sound Nav. Co. v. Lavender [C. C. A.] 160 F 851.

61. Injured seaman cannot recover hospital and medical expenses before payment. Nelson v. Western Steam Nav. Co. [Wash.] 100 P 325.

62. Belyea v. Cook, 162 F 180.

63. Van Schaick v. U. S. [C. C. A.] 159 F 847.

64. Captain has no right to rely upon statements of inspectors, and it is part of

disaster resulting through his misconduct, negligence or inattention to his duties,[65] regardless of the question of intent,[66] especially where the circumstances are such as to call for extraordinary watchfulness;[67] but in order to sustain a conviction, it is necessary to prove that the defendant was captain, that he was guilty of misconduct, negligence or inattention, resulting in the disaster.[68] Questions of fact are usually for the jury as in other cases.[69]

Offenses under the immigration laws are treated elsewhere.[70]

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**Sidewalks; Signatures; Similiter; Simultaneous Actions; Slander,** see latest topical index.

### SLAVES.[71]

*The scope of this topic* is noted below.[72]

*Peonage.*See 10 C. L. 1673—Voluntary service by the debtor is lawful,[73] and a statute making criminal the fraudulent breach of a contract of employment is not involved.[74]

*Slave marriages, their offspring and inheritance.*See 10 C. L. 1674—Slave marriages were binding in morals but did not produce any of the civil effects which result from a lawful marriage,[75] and such unions could only be validated by ratification after emancipation or by express legislation,[76] and consequently the issue of such unions was illegitimate.[77] Issue of marriages contracted in slavery was legitimated by statute in Kentucky.[78]

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**Sleeping Cars; Societies,** see latest topical index.

his duty to comply strictly with rules of board of inspectors provided for by U. S. Comp. St. 1901, p. 3017. Van Schaick v. U. S. [C. C. A.] 159 F 847. It is no defense that government inspectors failed to do their duty. Id.

**65.** See U. S. Rev. St. §§ 4471, 4482, 5344 (U. S. Comp. St. 1901, pp. 3049, 3054, 3629). Van Schaick v. U. S. [C. C. A.] 159 F 847. Captain held guilty of failing to drill and discipline his crew and in failing to provide suitable life preservers, hose and apparatus for fighting fire, causing death of large number of persons. Id. No excuse for not **testing hose** for thirteen years. Id. The rawer the crew the greater the necssity of instructing and **drilling crew,** and crew should not be taken out until sufficiently drilled. Id.

**66.** Intent is not element of offense, malice need not be proved, and it is unnecessary to show that acts or omissions which caused loss of life were willful or intentional. Van Schaick v. U. S. [C. C. A.] 159 F 847.

**67.** The fact that vessel is a "tinder box" and thronged with human beings makes greater degree of watchfulness essential. Van Schaick v. U. S. [C. C. A.] 159 F 847.

**68.** Prosecution under Rev. St. § 5344 for manslaughter. Van Schaick v. U. S. [C. C. A.] 159 F 847.

**69.** Where evidence was conflicting, point where the fire was discovered was question for jury. Van Schaick v. U. S. [C. C. A.] 159 F 847.

**70.** See Aliens, 11 C. L. 90.

**71. Search Note:** See notes in 3 Ann. Cas. 321; 7 Id. 959.

See, also, Slaves, Cent. Dig.; Dec. Dig.; 25 A. & E. Enc. L. (2ed.) 1088.

**72.** Includes the effect of abolition of slavery, the validity of slave marriages, and statutes designed to prevent the condition of peonage.

**73.** One may legally contract to purchase the notes of another even though such notes be payable in labor, provided he who has agreed to labor voluntarily consents to the transfer. Potts v. Riddle, 5 Ga. App. 378, 63 SE 253.

**74.** Young v. State, 4 Ga. App. 827, 62 SE 558.

**75.** Succession of Walker, 121 La. 865, 46 S 890. Were not legal for any purpose before 1866. Lindsey's Devisee v. Smith [Ky.] 114 SW 779.

**76.** Ratification required some sort of affirmative action in which the two minds concurred. Succession of Walker, 121 La. 865, 46 S 890.

**77.** As deceased was therefore an illegitimate child, and as the appellant was not related to the mother of the deceased, he could not inherit the property. Speese's Heirs v. Shores [Neb.] 116 NW 493.

**78.** Act Feb. 14, 1866 (Laws 1865-66, p. 37, c. 556). One of the objects of this statute was to enable such issue to inherit from either parent. Lindsey's Devisee v. Smith [Ky.] 114 SW 779. Statute operated alike on issue of different marriages by the same slave. Id. Subsequent act held not to effect plaintiff's rights, as such rights had attached long before latter act was passed. Id.

**SODOMY.**[79]

*The scope of this topic* is noted below.[80]

Copulation per os is within the Iowa statute.[81] Actual penetration must be proven,[82] and may be shown by facts and circumstances.[83] The indictment must charge a crime.[84] Evidence as to experiments under similar conditions, tending to show at what distance the act of penetration would have been visible at night, is admissible.[85]

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**Solicitation to Crime; Spanish Land Grants; Special Assessments and Taxes; Special Interrogatories to Jury; Special Jury; Special Verdict,** see latest topical index

**SPECIFIC PERFORMANCE.**


§ 1. **Nature and Property of Remedy in General, 1886.**
§ 2. **Subject-Matter of Enforcible Contracts, 1888.**
§ 3. **Requisites of Contract, 1889.**
A. Necessity of Contract, 1889.
B. Mutuality of Contract, 1891.
C. Definiteness of Contract, 1891.
D. Legality and Fairness of Contract, 1892.
E. Necessity of Written Contract, 1894.
§ 4. **Performance by Complainant, 1895.**
§ 5. **Actions, 1898.** Jurisdiction, 1898. Parties, 1898. Defenses, 1898. Pleading, 1900. Evidence, 1901. The Relief Granted, 1901. Decree, 1903. Appeal, 1903.


*The scope of this topic* is noted below.[86]

§ 1. *Nature and propriety of remedy in general.*[87] See 10 C. L. 1674—Specific performance being a purely equitable remedy, the granting of such relief is not an absolute right but rests in the sound discretion of the court,[88] controlled by settled principles of equity.[89] The fact that the plaintiff is able to establish a valid contract at law is not alone sufficient,[90] and, per contra, equity may give relief though the contract is not legally enforcible.[91] As a general statment, the con-

**79.** See 8 C. L. 1946.

**Search Note:** See notes in 11 Ann. Cas. 93. See, also, Sodomy, Cent. Dig.; Dec. Dig.; 25 A. & E. Enc. L. (2ed.) 1144; 20 A. & E. Enc. P. & P. 274.

**80.** Includes not only the common-law crime, but, also, every other form of unnatural, carnal copulation, whether with man or beast, such as buggery, bestiality, crime against nature, etc. For indecency, etc., generally, see Indecency, Lewdness, and Obscenity, 11 C. L. 1890, and for matters common to all crimes, see Indictment and Prosecution, 12 C. L. 1; Criminal Law, 11 C. L. 940.

**81.** Code Supp. § 4937-a. State v. Gage [Iowa] 116 NW 596. Although committed by persons of same sex. Id.

**82.** State v. Gage [Iowa] 116 NW 596.

**83.** Condition, position, and proximity of defendants as testified to by eyewitnesses held sufficient to sustain verdict. State v. Gage [Iowa] 116 NW 596.

**84.** Indictment held not to charge offense against state law, there being no legislation to cover particular crime in question. Harvey v. State [Tex. Cr. App.] 115 SW 1193.

**85.** Exclusion on ground that it was matter of common knowledge held error. Speers v. State [Tex. Cr. App.] 116 SW 568.

**86.** Includes matters relative to the right to and procedure on a bill for specific performance. The validity of contracts generally is elsewhere treated (see Contracts, 11 C. L. 729; Vendors and Purchasers, 10 C. L. 1942, and the like).

**87. Search Note:** See 4 C. L. 1495, 1496; 10 Id. 1677; 16 L. R. A. 614; 35 Id. 433; 69 Id. 681; 2 L. R. A. (N. S.) 210; 4 Id. 410; 68 A. S. R. 749; 1 Ann. Cas. 999; 3 Id. 1004; 8 Id. 359; 10 Id. 562.

See, also, Specific Performance, Cent. Dig. §§ 1-55; Dec. Dig. §§ 1-24; 26 A. & E. Enc. L. (2ed.) 14.

**88.** Newman v. Johnson, 108 Md. 367, 70 A 116; Lanahan v. Cockey, 108 Md. 620, 71 A 314; Banaghan v. Molany, 200 Mass. 46, 85 NE 839; New York Brokerage Co. v. Wharton [Iowa] 119 NW 969; Ulrey v. Keith, 237 Ill. 284, 86 NE 696; Shubert v. Woodward [C. C. A.] 167 F 47; Stanton v. Driffkorn [Neb.] 118 NW 1092; Mundy v. Shellaberger [C. C. A.] 161 F 503; Colonna Dry Dock Co. v. Colonna, 108 Va. 230, 61 SE 770; Creecy v. Grief, 108 Va. 321, 61 SE 769; Jones v. Jones, 148 N. C. 358, 62 SE 417; Pearson v. Millard [N. C.] 63 SE 1053; Shoop v. Burnside [Kan.] 98 P 202; Lopeman v. Colburn [Neb.] 118 NW 116; Launtz v. Vogt, 133 Ill. App. 255; Gillespie v. Fulton Oil & Gas Co., 140 Ill. App. 147; Tombigbee Valley R. Co. v. Fairford Lumber Co. [Ala.] 47 S 88; Souter v. Witt [Ark.] 113 SW 800; Telegraphone Corp. v. Canadian Tel. Co., 103 Me. 444, 69 A 767.

**89.** Mundy v. Shellaberger [C. C. A.] 161 F 503; Colonna Dry Dock Co. v. Colonna, 108 Va. 230, 61 SE 770; Alabama Cent. R. Co. v. Long [Ala.] 48 S 363; Joffrion v. Gumbel [La.] 48 S 1007; Zempel v. Hughes, 235 Ill. 424, 85 NE 641.

**90.** Shoop v. Burnside [Kan.] 98 P 202. Lacking in mutuality. Ulrey v. Keith, 237 Ill. 284, 86 NE 696. Many contracts unenforcible at equity which will sustain action at law for breach. Tombigbee Valley R. Co. v. Fairford Lumber Co. [Ala.] 47 S 88.

**91.** Parol contracts to convey lands. See § 3, post.

tract must be reasonable, fair, certain, legal, mutual and founded upon a valuable or at least meritorious consideration,[92] but since the decision of each case depends largely upon particular circumstances, the rules governing must be more or less flexible.[93] Relief will, as a general rule, be granted when it is apparent from all the circumstances of the particular case that it will subserve the ends of justice and work no hardships upon the party who has entered into the contract[94] and where a refusal would operate as a fraud upon plaintiff's rights.[95] The relief, on the other hand, will be refused where it would operate in a harsh, inequitable and unjust manner,[96] or where performance is impossible,[97] and, as in other cases, equity will consider the comparative hardship of granting or refusing relief.[98] Where performance in toto is impossible,[99] as where vendor's wife is not a party to the contract to convey and refuses to release her dower, equity will not intervene,[1] except that part performance may be decreed, if the complainant so desires, of so much as may be performed.[2] Relief will further be denied where the complainant has an adequate remedy at law.[3] A contract may be specifically enforced despite the fact that it stipulates for a sum as liquidated damages on its breach.[4] A party insisting upon specific performance must make out a complete equity[5] and come with clean hands.[6] He must show himself to have been ready and willing.[7]

**92.** Colonna Dry Dock Co. v. Colonna, 108 Va. 230, 61 SE 770. See post, § 3.

**93.** Voight v. Fidelity Inv. Co., 49 Wash. 612, 96 P 162; Zempel v. Hughes, 235 Ill. 424, 85 NE 641.

**94.** Pearson v. Millard [N. C.] 63 SE 1053; Jones v. Jones, 148 N. C. 358, 62 SE 417; City of Eau Claire v. Eau Claire Water Co., 137 Wis. 517, 119 NW 555; Wiley v. Verhaest [Wash.] 100 P 1008.

**95.** Plaintiff took possession of land and made extended improvements. Tidewater R. Co. v. Hurt [Va.] 63 SE 421.

**96.** Aiple-Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 SW 480; Tombigbee Valley R. Co. v. Fairford Lumber Co. [Ala.] 47 S 88; Phelan v. Neary [S. D.] 117 NW 142; Murphy v. Fox, 128 App. Div. 534, 112 NYS 819. Will not compel purchaser to take doubtful title. Triplett v. Williams, 149 N. C. 394, 63 SE 79. Will not actively enforce forfeiture. Telegraphone Corp. v. Canadian Tel. Co., 103 Me. 444, 69 A 767.

**97.** A court of equity cannot decree the specific performance of a contract to convey property to which the defendant has no title. Ryan v. Martin, 165 F 765; Clifton v. Charles [Tex. Civ. App.] 116 SW 120. Cannot enforce contract for sale of timber where defendant has parted with the same prior to bringing bill. Hardy v. Ward [N. C.] 64 SE 171.

**98.** If the enforcement of the contract would impose a great burden on the defendant, with a slight or no corresponding benefit to the plaintiff, or such enforcement would be detrimental to the interest of the public, a denial of relief is warranted. Erection of station at certain place. Herzog v. Atchison, etc. R. Co., 153 Cal. 496, 95 P 898.

**99.** The contract must be one which can be enforced in its entirety. Tombigbee Valley R. Co. v. Fairford Lumber Co. [Ala.] 47 S 88. Partial enforcement, piecemeal, will not suffice. Id. One may not be compelled to accept part performance but has the option to do so. Stromme v. Rieck [Minn.] 119 NW 948.

**1.** If a wife refuses to join her husband in the conveyance of lands and there is no fraud on the husband's part in her refusal, a court will deny specific performance (Aiple-Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 SW 480), unless it further appears that complainant is willing to pay the full purchase money and accept a deed from the vendor alone, with covenants called for in the contract (Id.).

**2.** Jersey City v. Flynn [N. J. Eq.] 70 A 497. Where statutes make a contract for sale of a homestead by a husband alone invalid, equity will not enforce performance as to any excess over the statutory limitation of value of homestead nor will damages be awarded in lieu thereof. Mundy v. Shellaberger [C. C. A.] 161 F 503. Where a husband alone signs a deed for land not a homestead, it may be enforced against him to the extent of his ability to perform but cannot affect the wife's interest. Stromme v. Rieck [Minn.] 119 NW 948.

**3.** Bernier v. Griscom-Spencer Co., 161 F 438. In a contract to assign a patent to a corporation which was then to sell stock and perform other conditions or reassign the patent, it was held that an action at law was not adequate upon failure to perform conditions equity would compel reassignment although it amounted to a forfeiture. Telegraphone Corp. v. Canadian Telegraphone Co., 103 Me. 444, 69 A 767.

**4.** Moss v. Wren [Tex. Civ. App.] 118 SW 149. A vendor may enforce specific performance of a contract to convey land although there is a stipulation in the contract for a forfeiture of earnest money in case of failure of the vendee to comply with terms, the vendor to accept the same as liquidated damages for nonperformance. Moss v. Wren [Tex.] 113 SW 739. A contract for the sale of land, although providing for a forfeiture of $1,000 by the party failing to perform, may be specifically enforced. Newton v. Dickson [Tex. Civ. App.] 116 SW 143.

**5.** The plaintiff must state and prove that he is entitled to equitable relief. Stiles v. Hermosa Beach Land & Water Co. [Cal.

§ 2. *Subject-matter of enforcible contracts.*[8]—See 10 C. L. 1677—Generally speaking, any fair and valid contract[9] may be specifically enforced if the elements of equity jurisdiction are present.[10] Thus equity will enforce a proper contract to convey land almost as a matter of course,[11] and, by statute in Montana, conveyance by the representative of a deceased vendor may be compelled.[12] Specific performance of contracts for sale of personal property are not usually enforcible, as the breach ordinarily may be compensated for in damages.[13] But specific performance may be decreed where the article cannot be purchased in the market and the delivery of the thing itself, and not mere pecuniary consideration, is the redress practically required,[14] as for example the transfer of stock not procurable in the market and of a pecuniary value not readily ascertainable.[15] An agreement to transfer or assign a patent may be specifically enforced,[16] as well as a contract to assign future inventions.[17] Principles guiding a court of equity are the same in decreeing specific performance of such contracts as in the case of those relating to realty.[18] Contracts to dispose of property by will are enforcible,[19] as are contracts to

App.] 97 P 91. Where in an action to specifically enforce the defendant seeks to reform the contract as set out, specific performance may be denied where plaintiff refuses to submit to a decree under the contract as reformed. Cuthbertson v. Morgan, 149 N. C. 72, 62 SE 744.

**6.** No unfairness on part of plaintiff. Shubert v. Woodward [C. C. A.] 167 F 47.

**7.** Colonna Dry Dock Co. v. Colonna, 108 Va. 230, 61 SE 770. May refuse to grant if there is not a full disclosure of facts in bill. Facts held too meagre. Newman v. Johnson, 108 Md. 367, 70 A 116.

**8. Search Note:** See notes in 4 C. L. 1498; 21 L. R. A. 127; 24 Id. 763; 38 Id. 810; 50 Id. 501; 60 Id. 412; 2 L. R. A. (N. S.) 884; 3 Id. 828; 6 Id. 585, 1115; 7 Id. 734; 8 Id. 1130; 9 Id. 157; 12 Id. 232; 15 Id. 466; 16 Id. 307; 21 A. S. R. 484; 118 Id. 592; 1 Ann. Cas. 990; 3 Id. 942; 5 Id. 269; 9 Id. 160, 603; 10 Id. 230, 934.

See, also, Specific Performance, Cent. Dig. §§ 188-224; Dec. Dig. §§ 62-86; 26 A. & E. Enc. L. (2ed.) 87.

**9.** See post, § 3.

**10.** See ante, § 1.

**11.** Cumberledge v. Brooks, 235 Ill. 249, 85 NE 197; Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853; Gorder v. Pankonin [Neb.] 119 NW 449; Zempel v. Hughes, 235 Ill. 424, 85 NE 641; Combes v. Adams [N. C.] 63 SE 186; Krah v. Wassner [N. J. Law] 71 A 404. Vendee looked upon as equitable owner. Freeman v. Paulson [Minn.] 119 NW 651. Where a covenant in a lease (to convey to the lessees, their heirs and assigns) touches and concerns the land or estate demised, and enhances the value thereof and forms a part of the consideration for the acceptance of the lease by the lessee, a court of equity will decree specific performance thereof, not only between the parties but also as between those claiming under them in privity of estate. Hollander v. Central Metal & Supply Co. [Md.] 71 A 442.

**12.** Rev. Code, § 7614. In re Grogan's Estate [Mont.] 100 P 1044.

**13.** Strause v. Berger, 220 Pa. 367, 69 A 818; Lumley v. Miller [S. D.] 119 NW 1014. An agreement to pay in goods is enforcible by the recovery of money and not of the specific article. Sugar Beets Product Co. v. Lyons Beet Sugar Refining Co., 161 F 215. Damages adequate for breach of contract to participate in subscription rights to underwriting syndicate. Dingwall v. Chapman, 63 Misc. 193, 116 NYS 520. Not enforcible in case of chattels unless special facts are alleged and proved which show that an award of damages would not afford adequate relief. Harle v. Brennig, 131 App. Div. 742, 116 NYS 51.

**14.** Decreed in sale of a special kind of timber for a special use. Strause v. Berger, 220 Pa. 367, 69 A 818.

**15.** Harle v. Haggin, 116 NYS 51. Agreement to enter into defendant's employ for three years and to receive therefor 250 shares of stock in the defendant's corporation. Safford v. Barber [N. J. Eq.] 70 A 371. Contract for sale of shares in a private corporation may be enforced under certain circumstances. If readily obtainable in the market, vendee left to his remedy at law. Deitz v. Stephenson [Or.] 95 P 803; Bernier v. Griscom-Spencer Co., 161 F 438. Allegation of contract to buy stock on margin which fluctuates greatly in value does not state a cause for specific performance. Morrison v. Chapman, 63 Misc. 195, 116 NYS 522. Specific performance of contract to purchase shares of stock not procurable in the market. Sherman v. Herr, 220 Pa. 420, 69 A 899.

**16.** Sufficient if oral. McRae v. Smart [Tenn.] 114 SW 729.

**17.** Fairchild v. Dement, 164 F 200; McRae v. Smart [Tenn.] 114 SW 729.

**18.** In order that specific performance of a contract to deliver shares of stock be decreed, it is necessary that the agreement should not involve any breach of trust (Deitz v. Stephenson [Or.] 95 P 803), or include the performance by either party of obligations, the performance of which the court cannot practically enforce (Id.). Personal services in consideration of transfer of stock. Id.

**19.** Klussman v. Wessling, 238 Ill. 568, 87 NE 544; Starnes v. Hatcher [Tenn.] 117 SW 219; Jones v. Bean, 136 Ill. App. 545. Contract to will property in consideration for services. Barry v. Beamer [Cal. App.] 96 P 373.

adopt[20] or to convey land in consideration of support.[21] Oral contracts to make a testamentary disposition will not be enforced, however except upon the clearest and most convincing evidence.[22] A partnership agreement may be enforced.[23] Equity will enforce an award of an arbitrator appointed by the parties[24] or a compromise,[25] but is without authority to carry out a mere agreement to submit matters in controversy to arbitration.[26] Specific performance may be had of provisions of contract calling for the payment of certain sums as liquidated damages where the actual damage could not readily be ascertained.[27] A contract to make a contract is enforcible,[28] and equity may compel the execution of a mortgage to secure money advanced.[29] In the absence of controlling public interest or other equities of the complainant in the case, or of clear evidence that irreparable injury will result, a court of equity ought not to compel the enforcement of a contract which cannot be consummated by a speedy, final decree, but which involves the supervision of a continuous series of acts, extending through a long period of time and requiring special skill and knowledge,[30] contracts of employment being a common illustration of this rule.[31] The agreement of a public service corporation to furnish service in return for the grant of franchise may be enforced.[32]

§ 3. *Requisites of contract. A. Necessity of contract.*[33]—See 10 C. L. 1679—To warrant a decree for specific performance, there must be a complete contract,

**20.** Peterson v. Bauer [Neb.] 119 NW 764; Starnes v. Hatcher [Tenn.] 117 SW 219.

**21.** Taylor v. Taylor [Kan.] 99 P 814.

**22.** Evidence insufficient. Tousey v. Hastings, 127 App. Div. 94, 111 NYS 344. Oral agreement to make a testamentary disposition must be supported by clear and satisfactory evidence before it will be enforced. Tousey v. Hastings, 194 N. Y. 79, 86 NE 831.

**23.** Contract did not show partnership; mere agreement to employ. Deitz v. Stephenson [Or.] 95 P 803. Will enforce a partnership agreement to turn over an interest in mining claims upon payment of a certain sum. Whistler v. MacDonald [C. C. A.] 167 F 477.

**24.** Caldwell v. Caldwell [Ala.] 47 S 268.

**25.** Webb v. Parker, 130 App. Div. 92, 114 NYS 489. An agreement of compromise where some of the property in question is real estate may be enforced (Blount v. Wheeler, 199 Mass. 330, 85 NE 477), as well as a compromise of claims to the estate of a decedent (Id.). Under the Massachusetts probate practice. Id.

**26.** Caldwell v. Caldwell [Ala.] 47 S 268.

**27.** Jersey City v. Flynn [N. J. Eq.] 70 A 497.

**28.** Contract for sale of land included an option to purchase adjacent lands. Noyes v. Tschlegel [Cal. App.] 99 P 726.

**29.** Poole v. Tannis, 137 Wis. 363, 118 NW 864. Specific performance of a contract to give a mortgage on lands where the contract, although parol, has been performed on claimant's part. Clark v. Van Cleef [N. J. Eq.] 71 A 260.

**30.** Management of theatrical enterprises. Shubert v. Woodward [C. C. A.] 167 F 47. Contracts requiring a continuous succession of acts which will demand supervision with the exercise of special skill are not as a rule specifically enforced. Operation of a saw mill construction of roadbed. Tombigbee Valley R. Co. v. Fairford Lumber Co. [Ala.] 47 S 88. It is not at all a proper thing for the chancery court to decree a specific performance of the common covenants of husbandry. Will not enforce a provision that the defendant railroad across plaintiff's land would give the plaintiff sufficient ditch to drain his land and whatever crossings he needs. Yazoo & M. V. R. Co. v. Payne [Miss.] 46 S 405. Will not ordinarily enforce a building contract as it requires the exercise of skill and judgment. Bromberg v. Eugenotto Const. Co. [Ala.] 48 S 60.

**31.** Jolliffe v. Steele [Cal. App.] 98 P 544; Adams v. Murphy [C. C. A.] 165 F 304. No direct and efficient means of compelling affirmatively the performance of contract for personal services. Dietz v. Stephenson [Or.] 95 P 803. Courts of equity have no efficient means and therefore will not ordinarily attempt to constrain an individual to perform personal acts requiring special knowledge and experience and the exercise of skill, discretion and cultivated judgment. Management of theatrical enterprises. Shubert v. Woodward [C. C. A.] 167 F 47.

**32.** Where the consideration for a right for franchise is the furnishing of a service, equity may compel performance. Franchise giving right to occupy public streets with poles and wires. Cumberland Tel. & T. Co. v. Hickman, 33 Ky. L. R. 730, 111 SW 311. Equity will not enforce a contract made by a public service corporation to perform certain acts which will hamper the company in the performance of its duties to the public. To place station in a certain place, none other to be built within a prescribed limit. Herzog v. Atchison, etc., R. Co., 153 Cal. 496, 95 P 898. But where the contract does not bind the company to limit in any degree the facilities to be furnished to the public, it may be enforced. Agreement to place a station in a particular place. Id.

**33. Search Note:** See notes in 14 L. R. A. (N. S.) 317.

See, also, Specific Performance, Cent. Dig. §§ 56-187; Dec. Dig. §§ 25-61; 26 A. & E. Enc. L. (2ed.) 20.

finally concluded and agreed upon,[34] which must be distinctly proved.[35] A contract which has been rescinded [36] or abandoned cannot be enforced,[37] but, where one has no right to rescind, an attempt to do so does not affect the right to performance.[38] Contract rights accruing on a rescission may however, be enforced.[39] One not a party to a contract cannot be compelled to carry it out,[40] unless he be a subsequent purchaser with notice,[41] or other person in privity,[42] nor can he maintain an action for its specific performance.[43] The contract of a duly authorized agent may be enforced in equity,[44] but not that of an unauthorized agent [45] unless ratified.[46]

**34.** Correspondence did not establish clear contract. Phelan v. Neary [S. D.] 117 NW 142; Geish v. Ferrea [Cal. App.] 101 P 27. Minds of parties must meet on all essentials. Colonna Dry Dock Co. v. Colonna, 108 Va. 230, 61 SE 770; German Sav. & L. Soc. v. McLellan [Cal.] 99 P 194; Stanton v. Driffkorn [Neb.] 118 NW 1092; Thompson v. Burns [Idaho] 99 P 111. Written option withdrawn before acceptance. Ward v. Davis [Mich.] 15 Det. Leg. N. 779, 117 NW 897. Cannot enforce offer to transfer bank stock where the owner thereof withdrew his offer within the time limit set and before any acceptance. Blanks v. Sutcliffe, 122 La. 448, 47 S 765. A mere moral claim is not sufficient ground upon which to base an action for specific performance, such relief must be had upon the ground of contract obligation. Starnes v. Hatcher [Tenn.] 117 SW 219.

**35.** Colonna Dry Dock Co. v. Colonna, 108 Va. 230, 61 SE 770. One seeking to enforce specific performance is bound to establish clearly and satisfactorily existence and terms of contract. Prairie Development Co. v. Leiberg [Idaho] 98 P 616. Evidence insufficient to show any agreement to surrender notes in return for the reconveyance of land. Elwell v. Hicks, 238 Ill. 170, 87 NE 316. See further, § 3E, Necessity of Written Contract, as to proof of parol contracts.

**36.** Monds v. Birchell, 59 Misc. 287, 112 NYS 249. Where a part payment was made under an agreement to purchase land and the contract provided that if, upon objections pointed out, the vendor did not make the title marketable within a reasonable time then upon demand the vendor would repay the advance paid and the contract then terminate, the fact that the title was not good and the vendor refused to make it good entitled the vendee to rescind without a demand for the advance paid, and when he so rescinded his right to enforce terminated. Johnson v. Lara, 50 Wash. 368, 97 P 231. Evidence in an action for specific performance held not to prove an irrevocable agreement to convey land by parties executing mutual wills. German v. Camburn [Mich.] 15 Det. Leg. N. 719, 117 NW 641.

**37.** Where contract has been abandoned, it is not error to refuse specific performance. Abandoned by both parties. Saxon v. White [Okl.] 95 P 783. Nonpayment of instalments, taxes, and assessments held to be an abandonment of a contract preventing its enforcement. Voight v. Fidelity Inv. Co., 49 Wash. 612, 96 P 162.

**38.** Swanston v. Clark, 153 Cal. 300, 95 P 1117.

**39.** A covenant in a contract assigning patent rights that provided that upon failure of the assignee to perform certain conditions the assignments should terminate and become void and the plaintiff should have, hold and repossess them, etc., held to create an obligation to reassign the patent rights enforcible in equity. Telegraphone Corp. v. Canadian Telegraphone Co., 103 Me. 444, 69 A 767.

**40.** Where rights in patent jointly owned are transferred to trustee without power to sell, a contract of sale by him as trustee cannot be enforced even as to his own interest, for purchaser was charged with notice of rights of other parties. McDuffee v. Hestonville, etc., R. Co. [C. C. A.] 162 F 36. Will not require wife to release dower where she never consented to transfer of land. Aiple-Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 SW 480.

**41.** One taking land with the knowledge of the existence of a contract by the grantor to sell the same may be compelled to convey although not a party to such contract. Van Dyke v. Cole, 81 Vt. 379, 70 A 593; Drake v. Brady [Fla.] 48 S 978. Equity will enforce a proper contract relating to land against all persons taking with notice of it. Codman v. Bradley, 201 Mass. 361, 87 NE 591.

**42.** Wherever, regardless of form and technical character of a contract, performance of a covenant in respect to lands would have been decreed between the parties, it will be decreed as between persons claiming under them in privity of estate or of representation or of title. Hollander v. Central Metal & Supply Co. [Md.] 71 A 442. Where a lumber company sold certain lumber to complainant and then made another agreement differing in terms subsequently orally agreeing to haul and cut the timber, one who purchased with the knowledge of the first agreement and of the oral agreement could not be compelled to perform the acts of cutting and hauling the timber. Ohio Pail Co. v. Cook & Co., 222 Pa. 487, 71 A 1051.

**43.** Hills v. McMunn, 135 Ill. App. 338. Where a deed is made to a grantee and "his wife," whose name is not given, she becomes the owner at her husband's death and can enforce the contract. McArthur v. Weaver, 129 App. Div. 743, 113 NYS 1095.

**44.** Evidence sufficient to show agent's authority. Kempner v. Gans [Ark.] 112 SW 1087.

**45.** Evidence held to show contract of sale made by an unauthorized agent. Foss Inv. Co. v. Ater, 49 Wash. 446, 95 P 1017. Where agent's authority had been revoked prior to his executions of agreement. Hagler v. Ferguson [Tex. Civ. App.] 111 SW 673. A contract for sale of land made by an agent in excess of his authority cannot be

(§ 3) *B. Mutuality of contract.*[47]—See 10 C. L. 1680—The contract must by its terms impose mutuality of obligation,[48] or there must have been part performance,[49] or an offer to perform by the party seeking to enforce.[50] An optional contract to convey land founded upon a consideration may be specifically enforced upon an acceptance of the terms of the contract and a tender of the price within the time specified,[51] but the mere tender of performance of personal services, the performance of which cannot be compelled in equity, is not sufficient to relieve the case of lack of mutuality of remedy.[52] In enforcing a unilateral contract, the courts will exercise their discretion with great care.[53] Denying specific performance does not deny the legality or obligation of a contract, for there is a distinction in equality between mutuality in the obligation of contracts and mutuality in the remedy.[54]

(§ 3) *C. Definiteness of contract.*[55]—See 10 C. L. 1681—The contract must be

enforced (Hagler v. Ferguson [Tex.] 118 SW 133), despite the fact that the purchaser may be willing to waive unauthorized terms (Id.).

**46.** Where a husband enters into a contract for the sale of his wife's real estate and she thereafter confirms his act and stands ready to perform, the other party cannot take advantage of the statute against a power of attorney between husband and wife to sell estate to repudiate the obligations undertaken by him. Stromme v. Rieck [Minn.] 119 NW 948.

**47. Search Note:** See notes in 6 C. L. 1503; 6 L. R. A. (N. S.) 391, 397, 403; 27 A. S. R. 173.

See, also, Specific Performance, Cent Dig. §§ 89-99; Dec. Dig. §§ 32; 26 A. & E. Enc. L. (2ed.) 28.

**48.** Garrick v. Garrick [Ind. App.] 87 NE 696. Rev. Codes 1905, § 6610. Knudtson v. Robinson [N. D.] 118 NW 1051; Levin v. Dietz, 194 N. Y. 376, 87 NE 454; Marsh v. Lott [Cal. App.] 97 P 163; Shubert v. Woodward [C. C. A.] 167 F 47. Contract for personal services. Jolliffe v. Steele [Cal. App.] 98 P 544; Dietz v. Stephenson [Or.] 95 P 803. Where plaintiff's acts required continuous skilled work which equity would not compel performance of, they could not enforce performance. Tombigbee Valley R. Co. v. Fairford Lumber Co. [Ala.] 47 S 88. Lease to become void upon payment of $2,000 at any time by parties of second part. Ulrey v. Keith, 237 Ill. 284, 86 NE 696. Offer in a unilateral contract may be withdrawn at any time, preventing decree for performance and leaving the plaintiff to his remedy of law. Leuschner v. Duff, 7 Cal. App. 721, 95 P 914. Party must have performed or be able to be compelled to perform. Id. Covenant to convey and covenants to pay the first installments of the purchase price held not mutual and concurrent. Voight v. Fidelity Inv. Co., 49 Wash. 612, 96 P 162. A contract for interchange of service between telephone companies was silent as to question of continuation or discontinuation, and held not enforcible as lacking in mutuality. State v. Cadwallader [Ind.] 87 NE 644. Not a lack of mutuality where the contract in a preamble states that, "whereas the plaintiff intends to construct a railroad," etc., where it is plain that is not a covenant to build a railroad (which covenant could not be enforced). Tidewater R. Co. v. Hurt [Va.] 63 SE 421. Agreement to buy shares of stock wherever either party was able and to then divide them was mutual and enforcible. Sherman v. Herr, 220 Pa. 420, 69 A 889. Under the terms of an option providing for the payment of the purchase price in installments and a forfeiture of amounts in case of failure to pay in full, there was no mutuality of contract entitling the vendee to enforcement until payment had been made in full. Rude v. Levy, 43 Colo. 482, 96 P 560. Excutory agreement to convey in consideration of support to be furnished by one during the lifetime of another cannot be specifically enforced until fully performed by first party. Newman v. French, 138 Iowa, 482, 116 NW 468.

**49.** Leuschner v. Duff, 7 Cal. App. 721, 95 P 914. Schubert v. Woodward [C. C. A.] 167 F 47. Rev. Codes 1905, § 6610. Knudtson v. Robinson [N. D.] 118 NW 1051. Complainants had not substantially performed, and could not for a period of four years, their contract in regard to operation of theatres. Shubert v. Woodward [C. C. A.] 167 F 47. Option given without consideration, but acted on so that irreparable injury would result from breach. O'Connor v. Harrison, 132 Ill. App. 264. Where the plaintiff has fully performed such part of the consideration which could not be specifically enforced, the obligaton may be enforced in specle against the party in fault. Cal. Civ. Code, § 3386. Bown v. Sebastofol, 153 Cal. 704, 96 P 363. Contract signed by vendor alone ceases to be unilateral when price is paid and vendee takes possession. Krah v. Wassmer [N. J. Eq.] 71 A 404.

**50.** A unilateral contract may become binding and enforcible by the filing of a bill by the party not previously bound. Krah v. Wassmer [N. J. Eq.] 71 A 404; Leuschner v. Duff, 7 Cal. App. 721, 95 P 914.

**51.** Corbett v. Cronkhite, 239 Ill. 9, 87 NE 874.

**52.** Dietz v. Stephenson [Or.] 95 P 803.

**53.** Offer continued for a specified time without consideration, and revoked prior to expiration of the time, cannot be inforced. Corbett v. Cronkhite, 239 Ill. 9, 87 NE 874. Look with disfavor on options until vendee has made his election and complied or attempted to comply with the terms. Rude v. Levy, 43 Colo. 482, 96 P 560.

**54.** Ulrey v. Keith, 237 Ill. 284, 86 NE 696.

**55. Search Note:** See notes in 2 L. R. A. (N. S.) 221; 15 Id. 81; 8 Ann. Cas. 664.

See, also, Specific Performance, Cent. Dig. §§ 61-85; Dec. Dig. §§ 27-30; 26 A. & E. Enc. L. (2ed.) 32.

definite and certain in its terms,[56] as in the description of the subject-matter,[57] and a greater degree of certainty is required than in an action at law.[58] Where, however, the terms, though not sufficiently definite, may be identified by reference to an external standard[59] or by parol,[60] the contract may be enforced. Where the contract has been acted under and interpreted by the parties, specific performance will not be refused because of its uncertainty.[61]

(§ 3) *D. Legality and fairness of contract.*[62]—See 10 C. L. 1682—Equity will not

**56.** Krah v. Wassner [N. J. Eq.] 71 A 404. Evidence of a statement by a party that if a child would stay with him he would see that she had plenty, an education and clothing, falls far short of a promise to convey a particular piece of land, so that it may be enforced. Collins v. Harrell [Mo.] 118 SW 432. Memorandum stated a sale of three houses in Danvers belonging to the D. estate. It was held that this description was not certain on its face and was open to becoming wholly indefinite, and the plaintiff should allege facts sufficient to state a case clearly, which calls for specific performance by setting out in substance that three houses referred to were the only ones owned by defendant in the town. Harrigan v. Dodge, 200 Mass. 357, 86 NE 780. Bond for deed did not set forth purchase price nor terms of payment, nor was there anything on the face of the paper to indicate what the purchaser was to perform. La Belle Coke Co. v. Smith, 221 Pa. 642, 70 A 894. Agreement to devise held not too uncertain, indefinite and unfair to permit of specific performance. Sarasohn v. Kamalky, 193 N. Y. 203, 86 NE 20. No rental fixed, no duration of term in an alleged lease sought to be enforced. Lanahan v. Cockey, 108 Md. 620, 71 A 314. Failure to specify any time when a mortgage should mature and be payable prevented specific performance. Poole v. Tannis, 137 Wis. 363, 118 NW 188. Deed of land with contract to reconvey upon terms held definite and enforcible. Porter v. Farmers' & Merchants' Sav. Bank [Iowa] 120 NW 633. Cal. Civ. Code, § 3390, subd. 6, provides that on agreement the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable cannot be enforced. Claim that a secured note to be given for balance of purchase price, but such was not incorporated in the agreement in a sufficiently definite manner. Marsh v. Lott [Ca'. App.] 97 P 163. A contract for the sale of real estate, stipulating for a mortgage back, stating certain terms and that it was to be executed with the conveyance, is sufficiently definite to be enforced, and it is immaterial that certain terms usually stated in mortgages were not included. Carr v. Howell [Cal.] 97 P 885. Complaint setting out a lease with option to purchase held to show a contract sufficiently certain. Swanston v. Clark, 153 Cal. 300, 95 P 1117. According to letters, the seller was to give a full warranty deed, the property to be vacant. The seller, being unwilling to give full warranty, reformed the deed sent to him and warranted only against acts by the grantor. He also refused to agree to deliver the property vacant. Cavagnaro v. Johnson [N. J. Eq.] 70 A 995.

**Negative specific performance** by way of injunction must be sustained by usual requisites as to certainty of terms of contract. Streator Independent Tel. Co. v. Interstate Independent Tel. Co., 142 Ill. App. 183.

**57.** Description of land in contract held sufficiently definite. Heenan v. Parmele, 80 Neb. 509, 113 NW 324; Alabama Cent. R. Co. v. Long [Ala.] 48 S 363; Stromme v. Rieck [Minn.] 119 NW 948. Where land described is fully known to both parties, the fact that it is described as of a wrong county which it adjoins is immaterial. Robbins v. Clock, 59 Misc. 289, 112 NYS 246. No description in the evidence of the land sought to be conveyed. Davis v. Wheeler [Mo.] 114 SW 1199.

**58.** Marsh v. Lott [Cal. App.] 97 P 163.

**59.** Bill held to contain sufficient averments to show that the uncertainty of a boundary in a contract was rendered certain. Wilkins v. Hardaway [Ala.] 48 S 678. A greater degree of certainty and definiteness is required for specific performance than to obtain damages at law. Description of an invention held sufficient. McRae v. Smart [Tenn.] 114 SW 729.

**60.** Where terms are capable of being made certain, they are held to be certain. Contract to buy stock when able. Price was certain, for it was fixed by the price paid at purchase. Sherman v. Herr, 220 Pa. 420, 69 A 899. A description giving one boundary line and certain other points and the number of acres was held to be sufficiently identified so that it might be made certain by parol and enforced. Kight v. Kight [W. Va.] 63 SE 335. Where description of land is not specific, but locates the same where the vendor owns but one piece of property, the presumption that this is the property intended is sufficiently strong to make the description so certain that specific performance may be had. Agreement for sale of real estate described as 56 x 155 ft. to an alley, on the east side of Broadway between Sixth and Seventh streets in a city named, being part of lot 7 in block 17, Ord's survey. Carr v. Howell [Cal.] 97 P 885. A description of phosphate mining property held capable of being made certain. Bradley v. Heyward, 164 F 107. Sufficient if it can be made certain from surrounding circumstances. The fact that the time of performance is not fixed does not prevent specific performance. The legal implication is that performance will be made within a reasonable time. Inglis v. Fohey, 136 Wis. 28, 116 NW 857.

**61.** Lease. Gorder v. Pankonin [Neb.] 119 NW 449.

**62. Search Note:** See notes in 6 C. L. 1504; 1 L. R. A. (N. S.) 1032.

See, also, Specific Performance, Cent. Dig. §§ 56-60, 153-176; Dec. Dig. §§ 25, 26, 51-55; 26 A. & E. Enc. L. (2ed.) 22.

grant relief where the contract is illegal [63] or void,[64] or where it is of such a nature that it would be unconscionable to enforce it.[65] There need not be a sufficient ground for rescission,[66] but it is sufficient if there is a substantial misrepresentation which induced the defendant to contract,[67] even though innocently made.[68] Mere hardship alone, however, aside from any question of fraud or other circumstances, furnishes no ground for refusing specific performance,[69] and a contract, fair as of the time when entered into, will not be refused performance because of a great loss or increase in value to one party by subsequent developments.[70] Even where the

**63.** Will not enforce a provision in contract ousting courts of jurisdiction. Bauer v. International Waste Co., 201 Mass. 197, 87 NE 637. Grant of franchise for unauthorized term. City of Clay Center v. Clay Center L. & P. Co. [Kan.] 97 P 377. Contract preventing director from acting for interests of stockholders. Hampton v. Buchanan [Wash.] 98 P 374.

**64.** Corporation cannot specifically enforce ultra vires contract made by it. Phillips Village Corp. v. Phillips Water Co. [Me.] 71 A 474. A contract which has been altered by one party since its execution cannot be enforced by him. Pope v. Taliaferro [Tex. Civ. App.] 115 SW 309. Bond to convey homestead not separately signed and acknowledged by wife. Clark v. Bird [Ala.] 48 S 359. The submission to arbitration by parol of question of title to land being invalid, the award cannot be specifically enforced. Walden v. McKinnon [Ala.] 47 S 874.

**65.** Stanton v. Driffkorn [Neb.] 118 NW 1092; Shubert v. Woodward [C. C. A.] 167 F 47; New York Brokerage Co. v. Wharton [Iowa] 119 NW 969; Tombigbee Valley R. Co. v. Fairford Lumber Co. [Ala.] 47 S 88; Mundy v. Shellaberger [C. C. A.] 161 F 503. Contract must be fair and equal. Zempel v. Hughes, 235 Ill. 424, 85 NE 641. The contract must be fair. Alabama Cent. R. Co. v. Long [Ala.] 48 S 363. Where there are circumstances of oppression, unfairness or advantage taken, a court of equity will not specifically enforce an unconscionable bargain. Cumberledge v. Brooks, 235 Ill. 249, 85 NE 197. An agreement by a widow, the sole legatee and devisee under a will, to surrender nearly all the property so left, amounting to about $20,000, to the children in consideration of their withdrawing objections to the probate of the will, must be shown to have been fairly made and positively entered into. In re Panko's Estate [Neb.] 119 NW 224. It must appear that the contract was entered into in perfect fairness and without misapprehension. Stanton v. Driffkorn [Neb.] 118 NW 1092.

**Held unfair:** Failure of consideration. Wilson v. Larson, 138 Iowa, 708, 116 NW 703. Option to purchase land. Rude v. Levy, 43 Colo. 482, 96 P 560. Attempted forfeiture of oil lease. Work v. Fidelity Oil & Gas Co. [Kan.] 98 P 801. Party induced by false statement to make contract rendering her liable to her agents for $150 commission. Winchester v. Becker [Cal. App.] 97 P 74. Contract of sale by a subagent for purpose of himself acquiring title. Fisk v. Waite [Or.] 99 P 283. When the enforcement of skillfully drawn timber contracts is sought, a due regard to the rights of parties and the conservation of one of the most valuable natural resources of the state imposes upon the court the duty of requiring that the contract be free from ambiguity, understood by the parties, and based upon a valuable consideration. Hardy v. Ward [N. C.] 64 SE 171. Facts held to show that advantage was taken of the defendant, an aged, inexperienced and ignorant woman. Banaghan v. Malaney, 200 Mass. 46, 85 NE 839. Where a contract called for payments by instalments, entitling to conveyance after the first payment, and there would then be no contract signed by anyone to be charged calling for a subsequent payment of $70,000 four years later and no security therefor, the contract is not just and reasonable. Marsh v. Lott [Cal. App.] 97 P 163.

**Held not unfair:** No facts alleged which made it appear that an agreement by a railroad company to erect and maintain a station at a particular place in consideration for the transfer of land was fair and just and that it would be equitable to enforce it. Herzog v. Atchison, etc., R. Co., 153 Cal. 496, 95 P 898. No **evidence** of fraud or mistake in a contract to convey land so as to prevent specific performance. Elliott v. Elliott [Tex. Civ. App.] 109 SW 1142. No evidence of fraud in the release by a vendee of his rights under a contract of sale and a leasing of the land. Swanson v. James [Neb.] 116 NW 780. No fraud in contract for sale of land. Carr v. Howell [Cal.] 97 P 885; Prichard v. Mulhall [Iowa] 118 NW 43. Where plaintiff, unable to get $450 for certain lots, finally agreed to sell for $350, and the land proved to be worth between $750 and $10,000, there was no evidence of fraud preventing a decree for performance. Robbins v. Clock, 59 Misc. 289, 112 NYS 246. Contract between city and water works company for purchase of plant held not unconscionable. City of Eau Claire v. Eau Claire Water Co., 137 Wis. 517, 119 NW 555. A partnership agreement in mining property held not unfair. Whistler v. McDonald [C. C. A.] 167 F 477.

**66.** Banaghan v. Malaney, 200 Mass. 46, 85 NE 839; Shoop v. Burnside [Kan.] 98 P 202.

**67.** Where a purchaser got the granddaughter of a woman 80 years old, the owner of land, to write and make an offer for the land, and the owner had not been near the land for 8 years and was unacquainted with the fact that values had risen in that vicinity, it was held that, though there was no evidence of fraud, it would be inequitable to enforce the contract. Shoop v. Burnside [Kan.] 98 P 202.

**68.** It is immaterial whether a plaintiff knows of the falsity of his representations which are relied on. New York Brokerage Co. v. Wharton [Iowa] 119 NW 969.

**69.** Bradley v. Heyward, 164 F 107.

**70.** Sale of mining property. Bradley v. Heyward, 164 F 107.

contract is found to have been procured by unfair or inequitable means, equity may still enforce it if it would otherwise work an injustice.[71] Mere inadequacy of price will not in general prevent specific performance of a contract to convey land [72] unless it is so gross as to show fraud or shock the conscience,[73] yet it is a circumstance which will be taken into consideration with all the facts in determining whether a court of equity is called upon to compel performance.[74] What was the real consideration may be determined despite the fact that there is a seal.[75] By statute in some states, an adequate consideration is a prerequisite to the aid of equity in compelling performance,[76] and this is so despite the fact that the parties have fixed the amount after mature deliberation.[77]

(§ 3) *E. Necessity of written contract.*[78]—See 10 C. L. 1663—The statute of frauds is as binding on courts of equity as on courts of law,[79] but, being clothed with the salutary power of preventing fraud, courts of equity will grant performance where not to do so would result in the very situation which the statute was designed to prevent,[80] as where there has been a part or complete performance by a purchaser;[81] but the question of enforcement of an oral contract after perform-

**71.** Stanton v. Driffkorn [Neb.] 118 NW 1092.

**72.** Combes v. Adams [N. C.] 63 SE 186; Shoop v. Burnside [Kan.] 98 P 202; Worth v. Watts [N. J. Eq.] 70 A 357; Jersey City v. Flynn [N. J. Eq.] 70 A 497; Zempel v. Hughes, 235 Ill. 424, 85 NE 641. But see **contra.** Tombigbee Valley R. Co. v. Fairford Lumber Co. [Ala.] 47 S 88; Alabama Cent. R. Co. v. Long [Ala.] 48 S 363.

**73.** Worth v. Watts [N. J. Eq.] 70 A 357; Jersey City v. Flynn [N. J. Eq.] 70 A 497; Zempel v. Hughes, 235 Ill. 424, 85 NE 641; Bradley v. Heyward, 164 F 107; Corbett v. Cronkhite, 239 Ill. 9, 87 NE 874.

**74.** Shoop v. Burnside [Kan.] 98 P 202. Accompanied by other inequitable incidents. Worth v. Watts [N. J. Eq.] 70 A 357; Jersey City v. Flynn [N. J. Eq.] 70 A 497.

**75.** Corbett v. Cronkhite, 239 Ill. 9, 87 NE 874. In a naked option reciting a nominal consideration of $1, the lack of real consideration may be shown in an action for specific performance, even though there is a seal. Rude v. Levy, 43 Colo. 482, 96 P 560.

**76.** No allegation of adequacy of consideration or facts from which it might be inferred. Complaint held insufficient. Kaiser v. Barron, 153 Cal. 788, 96 P 806. Civ. Code, § 3391. No statement of the value of a right of way transferred in consideration for the erection of a railroad station. Herzog v. Atchison, etc., R. Co., 153 Cal. 496, 95 P 898. Code has no application to the sufficiency of consideration paid for the executed contract whereby defendant transferred to plaintiff the right to purchase at a stipulated price. Marsh v. Lott [Cal. App.] 97 P 163. Under Civ. Code, § 3391, consideration must be adequate. Valentine v. Streeton [Cal. App.] 99 P 1107. By Cal. Civ. Code, § 3391, specific performance cannot be granted against a party if he has not received an adequate consideration, if it is not just and reasonable. Cummings v. Roeth [Cal. App.] 101 P 434. South Dakota Code provides that specific performance cannot be enforced if the consideration is inadequate. Phelan v. Neary [S. D.] 117 NW 142.

**77.** Cummings v. Roeth [Cal. App.] 101 P 434.

**78. Search Note:** See notes in 8 L. R. A. (N. S.) 870.

See, also, Specific Performance, Cent. Dig. §§ 113-132; Dec. Dig. §§ 38-47.

**79.** Contract invalid under statute of frauds not enforced. Rogan v. Arnold, 135 Ill. App. 281; Garrick v. Garrick [Ind. App.] 87 NE 696. To meet the statute of frauds, the contract for sale of lands must express a valuable consideration and describe the subject-matter directly, or make reference to something outside of the writing by resort to which certainty may be established. Alabama Cent. R. Co. v. Long [Ala.] 48 S 363. Rev. St. 1899, § 173, of Missouri, providing that the vendee in a written contract with a decedent for the conveyance of land may petition the probate court to enforce the same by deed from the administrator, does not authorize such performance of an oral contract. McQuitty v. Wilhite [Mo.] 117 SW 730.

**80.** The doctrine that specific performance will not be granted when the party invoking its aid has not parted with any consideration or property, and no irreparable damage is suffered, and no fraud inflicted upon him, and he is in statu quo at the time of the commencement of the action, applies to parol contracts only, and not to the attempted enforcement of a written contract. Long v. Needham, 37 Mont. 408, 96 P 731.

**81.** Krah v. Wassmer [N. J. Eq.] 71 A 404. Part performance must be unequivocal and relate to contract. Collins v. Harrell [Mo.] 118 SW 432. Sufficient part performance to avoid the statute. Ready v. Schmith [Or.] 95 P 817. Where one is put in possession of land under an oral contract by which he was to receive title provided he supported the grantor during his life, he is entitled to specific performance where he did this and also made expensive improvements. By statute. Felt v. Felt [Mich.] 15 Det. Leg. N. 994, 118 NW 953. Equity will compel performance of an oral contract to convey lands where the contract is definite and certain and there have been such acts of part performance that neither party can be restored to his former position. Taking off briars and weeds and making improvements

ance by the plaintiff depends on the circumstances of each case.[82] Some act of the purchaser showing an assertion of dominion over the land in his own right as purchaser is necessary,[83] such as improvements made on the premises.[84] Possession, in order to take a parol contract out of the statute so that it may be enforced, must be exclusive,[85] but a joint possession of the property by consent of the plaintiff does not change the fact of exclusive possession by the plaintiff.[86] Proof of a parol contract to convey land must be clear and convincing.[87] It is the practice to decree performance of oral contracts to convey land in cases in which the contract in the bill is admitted, or substantially admitted, by the answer.[88, 89]

§ 4. *Performance by complainant.*[90]—See 10 C. L. 1085—One seeking specific performance must show that he has performed,[91] or, if performance by him is not a

on adjoining land not sufficient. Hoover v. Baugh, 108 Va. 695, 62 SE 968. In order that an oral contract relating to lands may be enforced, it must be clear, definite and unequivocal in all its terms, and established by clear and satisfactory proof and there must be a partial performance (Crane's Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co., 108 Va. 862, 62 SE 954), and furthermore, the agreement must have been so far executed that a refusal of full execution would operate as a fraud on the other party and place him in a situation which does not lie in compensation and the acts of such partial performance must refer to, result from, or be made in pursuance of, the agreement proved (Id.). Entry upon land and delivery of a horse to vendor and clearing a small space and planting crops, etc., held insufficient. Id. Where the vendee relies upon possession to take the case out of the statute, he must show a possession delivered to him by the vendor pursuant to the contract under which he seeks a conveyance. Parol contract to make a will will be enforced where there has been sufficient performance to take the contract out of the statute. Garrick v. Garrick [Ind. App.] 88 NE 104; Starnes v. Hatcher [Tenn.] 117 SW 219. Payment of entire purchase price and entering into possession. Krah v. Wassmer [N. J. Eq.] 71 A 404.

**82.** Oral contract to devise realty. Peterson v. Bauer [Neb.] 119 NW 764.

**83.** Where the owner of land by himself or through his agent makes a verbal contract of sale of such land to another for an agreed price and puts the vendee in possession, upon compliance with the terms of his contract of purchase, a court of equity will, in favor of such purchaser, enforce specific performance, notwithstanding the statute of frauds. Demps v. Hogan [Fla.] 48 S 998.

**84.** The purchase money paid by the plaintiff and improvements made on the land by him were sufficiently substantial. Babcock v. Lewis [Tex. Civ. App.] 113 SW 584. Where complainant paid part of purchase price, was put in possession by the agent, and had expended $600 in improvements upon the land, he may have performance of an oral contract. Jones v. Gainer [Ala.] 47 S 142.

**85.** Sufficient if as exclusive as terms of contract would permit. Conveyance of land if son would furnish a home thereon during life of owner. His possession with owner sufficient. Taylor v. Taylor [Kan.] 99 P 814. Possession as tenant of vendor is possession of the vendor, and not sufficient to take the parol contract out of the statute. Babcock v. Lewis [Tex. Civ. App.] 113 SW 584.

**86.** Plaintiff in possession had dug a well and put in a stable foundation, and the fact that he afterwards allowed vendor to occupy with him was immaterial if it was subordinate to the plaintiff's possession. Babcock v. Lewis [Tex. Civ. App.] 113 SW 584.

**87.** A mere declaration of intention to convey land is insufficient. Collins v. Harrell [Mo.] 118 SW 432. To warrant specific performance of an oral contract to convey, even when taken out of the statute of frauds by proof of the making of improvements, there must be clear and convincing testimony as to the contract. Not sufficient. Wills v. Westendorf [Iowa] 118 NW 376. Evidence insufficient to establish a parol contract for sale of land with such certainty as to entitle plaintiff to a decree. Jones v. Jones [Ala.] 47 S 80.

**88, 89.** Krah v. Wassmer [N. J. Eq.] 71 A 404.

**90. Search Note:** See notes in 10 L. R. A. (N. S.) 117, 125; 4 Ann. Cas. 852.

See, also, Specific Performance, Cent. Dig. §§ 225-317; Dec. Dig. §§ 87-101; 26 A. & E. Enc. L. (2ed.) 41; 26 A. & E. Enc. L. (2ed.) 48.

**91.** Robinson v. Yetter, 238 Ill. 320, 87 NE 363; Launtz v. Vogt, 133 Ill. App. 255; Campbell v. Lombardo, 153 Ala. 489, 44 S 862; In re Grogan's Estate [Mont.] 100 P 1044; McRae v. Smart [Tenn.] 114 SW 729. Plaintiff willfully and persistently violated contract for separate support which she sought to have enforced. Chandler v. Chandler, 220 Pa. 311, 69 A 806. In an action for performance of an oral contract to adopt and leave property by will, performance by complainant is shown by evidence of residing with adopted parent 18 years, performance of duties faithfully, and that leaving was by consent. Peterson v. Bauer [Neb.] 119 NW 764. Specific performance will be decreed although the complainant has committed acts entitling the vendor to forfeiture by cutting timber on premises, the subject of the contract where the title remained in the vendor as security for the balance of the purchase price and the provision against cutting timber being for purpose of preserving the security, where timber cut amounted to only $70 and the balance due on the purchase price was $700 and the premises, because of improvements made by complainant, were worth $2,000 or $3,000. Van Dyke v Cole, 81 Vt. 379, 70 A 593. In

precedent condition, that he is willing and able to perform,[92] as by showing an offer to perform or tender,[93] but performance or offer to perform is excused where it appears that it would have been useless.[94] Where parties have rendered performance by themselves impossible,[95] or have once refused to perform,[96] they cannot compel performance. A subvendee cannot compel performance except upon payment of the whole amount due from the original vendee of all the tract.[97] If time is es-

connection with a naked option or offer to sell, even though the same be in writing, a full and proper tender to the vendor of the consideration in accordance with the terms of the instrument is an essential condition precedent to a suit for specific performance, where the only consideration stated is the usual $1 and it further remains for the vendee to perform some acts before the option develops into a contract. Rude v. Levy, 43 Colo. 482, 96 P 560. Where a contract for the sale of land calls for the delivery of notes on the part of the vendee for deferred payments of the purchase price, the personal liability of the vendee is a controlling element, and the tender of notes of an assignee does not satisfy the terms nor warrant the assignee in asserting a right to specific performance based upon such tender. Montgomery v. De Picot, 153 Cal. 509, 96 P 305. Failure to comply with development provisions in oil lease. Gillespie v. Fulton Oil & Gas Co., 140 Ill. App. 147.

**92.** In re Grogan's Estate [Mont.] 100 P 1044. Sufficient if ability or willingness are shown and it may be doubted whether performance, etc., is material, when the bill shows part performance further prevented by act of defendant and that further offers to perform would not be accepted if tendered. Part of purchase money paid and ready to pay balance upon tender of deed as required. Vendor refused a deed. No need to tender balance. Campbell v. Lombardo, 153 Ala. 489, 44 S 862. Where one is in possession of property which defendant has agreed to sell to him, he is in a continual state of showing his intention of carrying out his agreement to buy, and where the defendant takes no steps to deny the continuance of the contract, equity will not allow the lapse of time to prejudice the complainant's right to specific performance. Van Dyke v. Cole, 81 Vt. 379, 70 A 593. The complainant cannot demand specific performance of a contract where he repudiates part thereof. Jersey City v. Flynn [N. J. Eq.] 70 A 497.

**93.** Campbell v. Lombardo, 153 Ala. 489, 44 S 862; McRae v. Smart [Tenn.] 114 SW 729; Chandler v. Chandler, 220 Pa. 311, 69 A 806; Robinson v. Yetter, 238 Ill. 320, 87 NE 363. Agreement to transfer an acre of land in consideration of the transfer of a half interest in a fence held enforcible without tender of a deed of the interest in the fence, in the absence of evidence of an agreement to transfer the same by deed. Ready v. Schmith [Or.] 95 P 817. A bill praying for performance of a contract to convey waterworks on payment by the complainant of such part of the purchase price as might be ascertained to be due was not the equivalent of a tender of the price which was required by the contract. Jersey City v. Flynn [N. J. Eq.] 70 A 497. An offer to pay the purchase price is sufficient. Need not deposit money in court. Anse La Butte Oil & Mineral Co. v. Babb, 122 La. 415, 47 S 754.

**94.** Campbell v. Lombardo, 153 Ala. 489, 44 S 862; In re Grogan's Estate [Mont.] 100 P 1044; Long v. Needham, 37 Mont. 408, 96 P 731. The general rule is that repudiation of an executory contract by one party relieves the corresponding obligor from the necessity of tendering performance as a prerequisite to maintaining a bill for specific performance. Marsh v. Lott [Cal. App.] 97 P 163. Where defendants have, by steps taken, asserted a termination of the contract. Van Dyke v. Cole, 81 Vt. 379, 70 A 593. The vendor of land having repudiated the contract and transferred the land to another, it was unnecessary for complainant to make a tender before bringing his bill. Cumberledge v. Brooks, 235 Ill. 249, 85 NE 197. Tender of price not necessary where vendor demands a larger sum than agreed on. Porter v. Farmers' & Merchants' Sav. Bank [Iowa] 120 NW 633. The rule that no tender is necessary where it would be useless is not, however, applicable to unilateral contracts such as an option to purchase, for there is no mutuality until the tender accepting the option is made. Marsh v. Lott [Cal. App.] 97 P 163. A repudiation of the contract renders it unnecessary for the plaintiff to make a formal tender of the amount actually due. Defendant refused to settle on basis contracted for. Babcock v. Lewis [Tex. Civ. App.] 113 SW 584; Bodcaw Lumber Co. v. White, 121 La. 715, 46 S 782.

**95.** Where parties make performance on their own part impossible by transfering land to bona fide purchasers, they cannot demand performance. Groden v. Jacobsen, 129 App. Div. 508, 114 NYS 183.

**96.** Where a tender of a drawn deed in good faith is refused as not conforming to the contract, it is the vendee's duty to show the contract or furnish a copy thereof, or to draw a deed himself and submit it to the vendor. If he refuses to do either, he cannot then demand specific performance. Skinner v. Creasy [Ky.] 116 SW 753. Where a vendee does not insist on performance but demands a return of deposit made and a rescission, he cannot later seek to compel performance. Whalen v. Stuart, 194 N. Y. 495, 87 NE 819. Where one party cannot fully perform and the other refuses to accept part performance, the latter cannot later compel performance. Vendee claimed vendor did not have clear title, but vendor claimed it was alright and refused to take any steps but sold to another after notice to the vendee of his intention so to do. Vendee could not have specific performance against purchaser with notice. Newman v. Johnson, 108 Md. 367, 70 A 116.

**97.** Hoover v. Baugh, 108 Va. 695, 62 SE 968.

sential, the stiulation in regard thereto must be strictly complied with, and failure to perform on the exact day cuts off the rights of the defaulting party,[98] unless excused[99] or waived.[1] If, however, time is not of the essence, and performance is not demanded or tendered, the rights of the defaulting party are not lost by a failure to strictly comply with the terms[2] if there is no unreasonable delay.[3] Where time is stipulated to be of the essence of the contract,[4] it will be held decisive of the question in equity,[5] unless such stipulation is contrary to the manifest equity disclosed by all the facts and circumstances of the case.[6] He who seeks performance must, however, show himself ready and able to perform.[7] The burden of proof is upon the plaintiff to excuse nonperformance or offer to perform for a long period.[8] Specific performance will not be decreed unless conditions precedent have occurred or been performed,[9] but a failure to perform a covenant which is not a condition precedent, but is dependent upon performance by the defendant, will not prevent specific enforcement.[10] A party does not forfeit his right to the interposition of a court of equity to enforce performance if he reasonably and in good faith offers to comply, and continues ready to comply, with its stipulations, although he may err in estimating the extent of his obligations.[11] There is a conflict of opinion as to

**98.** Where time is of the essence, plaintiff must show strict compliance with the terms of payment in order to recover damages in an action for specific performance. Hardy v. Ward [N. C.] 64 SE 171. Conclusion irresistible that payment at time specified was made a condition precedent to right to acquire title. Souter v. Witt [Ark.] 113 SW 800.

**99.** Noyes v. Schlegel [Cal. App.] 99 P 726. Where time is of the essence, but performance is rendered impossible by acts of the defendant despite every reasonable effort by the complainant to make a tender and complete the contract, equity will not refuse performance. Zempel v. Hughes, 235 Ill. 424, 85 NE 641.

**1.** Secombe v. Fuller, 60 Wash. 666, 97 P 805.

**2.** Abernathy v. Florence [Tex. Civ. App.] 113 SW 161; Robinson v. Collier [Tex. Civ. App.] 115 SW 915. Exception to the general rule that specific performance will not be granted in favor of plaintiff, himself in fault. Abernathy v. Florence [Tex. Civ. App.] 113 SW 161. Where time was not of the essence, a delay by the vendee to discover whether an adjoining owner was claiming title to a part of the premises was reasonable and did not prevent him from compelling specific performance. Carr v. Howell [Cal.] 97 P 885. If time is not of the essence of a contract, it is sufficient if the complainant can give clear title at the time of the decree, despite the fact that it was incumbered at the time of bringing the bill. Agens v. Koch [N. J. Eq.] 70 A 348. Where one goes into possession with vendor's consent, mere delay will not cut off his right to relief until the vendor places a limit to the lapse of time by a demand for payment at a specified time. Jones v. Gainer [Ala.] 47 S 142. Where the purchase price of land was split up into small notes and the contract provided that upon failure to pay there should be a forfeiture, the payments to be considered as rent, a failure to pay notes when due was held immaterial, and the vendee entitled to specific performance upon tender of balance due. Turpin v. Beach [Ark.] 115 SW 404.

**3.** Unreasonable delay in doing the acts to be done will justify and require the denial of relief. Joffrion v. Gumbel [La.] 48 S 1007. A delay of two or three months will not ordinarily suffice to deprive of relief, except possibly where values are fluctuating. Tacoma Water Supply Co. v. Dumermuth [Wash.] 99 P 741. A party may, however, lose his right to specifically enforce performance of a contract by mere lapse of time. Id.

**4.** See Vendors and Purchasers, 10 C. L. 1942.

**5.** Where time is expressly stipulated to be of the essence of the contract, it will be held decisive of the question in a court of equity. Telegraphone Corp. v. Canadian Telegraphone Co., 103 Me. 444, 69 A 767.

**6.** Telegraphone Corp. v. Canadian Telegraphone Co., 103 Me. 444, 69 A 767.

**7.** Joffrion v. Gumbel [La.] 48 S 1007. A vendor to enforce a contract to purchase must show a merchantable title. Lindsey v. Humbrecht, 162 F 548; Slotter v. Patterson, 221 Pa. 68, 70 A 286; Institution for Savings v. Puffer, 201 Mass. 41, 87 NE 562. Free from restrictions. Likely to affect its value. Shea v. Evans [Md.] 72 A 600. It is sufficient if title is made good before entry of decree. Wiley v. Verhaest [Wash.] 100 P 1008. The fact that the defendant does not have title to land contracted to be sold does not deprive equity of jurisdiction where it does not appear that he cannot acquire title. Krasnow v. Topp, 128 App. Div. 156, 112 NYS 546.

**8.** Clinchfield Coal Co. v. Clintwood Coal & Timber Co., 108 Va. 433, 62 SE 329.

**9.** Stock to be transferred in the event that defendant got control of a corporation and upon completion of a payment by the plaintiff by applying the value of his services at $65 a month. Deitz v. Stephenson [Or.] 96 P 803.

**10.** Agreement to build a railroad, etc., over land if defendant conveyed certain premises. Tidewater R. Co. v. Hurt [Va.] 63 SE 421.

**11.** Cash tendered instead of a four-year note. Pearson v. Millard [N. C.] 63 SE 1053.

whether a party is entitled to waive a breach of an agreement to perfect the title within a reasonable time and demand performance, some holding that there is an absolute termination of all obligations as to each party,[12] and others holding that a provision of this kind is for the benefit of the vendee and that he may elect to terminate or elect to waive that right and wait until the vendor can perfect his title if it can be done within a reasonable time.[13]

§ 5. *Actions.*[14] *Jurisdiction.*See 10 C. L. 1687—A submitted controversy arising out of a sale of land may be treated as a bill for specific performance.[15] Where an Indian nation is exempt from civil suit, a bill cannot be brought in equity to force performance of a contract for the payment of money.[16]

*Parties.*See 10 C. L. 1687—All parties in interest must be joined.[17] The absence of parties will not prevent a decree where there is no dispute as to facts and the only question of law does not render the title unmarketable.[18] An action is properly brought in the name of a vendee, although he has contracted to sell the same premises to another but on different terms.[19] Parties no longer interested nor having title at the time of commencement of proceedings, although interested between the time of the contract and the time proceedings were begun, are not necessary parties.[20]

*Defenses.*See 10 C. L. 1688—One may defend for mutual mistake,[21] or even for

**12, 13.** Sccombe v. Fuller, 50 Wash. 666, 97 P 805.

**14. Search Note:** See notes in 6 C. L. 1507, 1510; 10 Id. 1693.

See, also, Specific Performance, Cent. Dig. §§ 318-441; Dec. Dig. §§ 102-134; 26 A. & E. Enc. L. (2ed.) 127; 20 A. & E. Enc. P. & P. 385.

**15.** Campbell v. Cronly [N. C.] 64 SE 213.

**16.** Employment of complainant as attorney. Adams v. Murphy [C. C. A.] 165 F 304.

**17.** Where a contract for conveyance of land on consideration of support provided also for a payment to defendant's daughter A when she became 18 years old, she was a necessary party in an action to compel performance. Mootz v. Petraschefski, 137 Wis. 315, 118 NW 865. Where a woman contracts for the sale of land and is later married and has children, she cannot compel performance unless they are made parties so as to be bound by the decree. Triplett v. Williams, 149 N. C. 394, 63 SE 79. Even if conveyance of land contracted to be sold was made to third parties without any statement of trust, but the vendor retained control and the right to sell, such third persons were properly parties in an action to enforce performance of the contract. East River & Astoria Land Co. v. Kindred, 128 App. Div. 146, 112 NYS 540. Where a husband who has agreed to convey property dies and his wife brings ejectment against the complainant in possession, she is a necessary party to his bill for performance. Collins v. Leary [N. J. Err. & App.] 71 A 603. In a suit for specific performance of a contract to convey where the vendor has died, his heirs are necessary parties defendant. Id. Wife is a necessary party to a bill to enforce performance of a contract to convey to a man and his wife. Krah v. Wessmer [N. J. Eq.] 71 A 404. Action to compel performance of a contract to convey, the grantor having died. Held, it was no defense in an action by the executors to compel purchase that the widow and heirs were not parties, for they had no interest in the land. Hald v. Claffy, 131 App. Div. 251, 115 NYS 561. The heirs must be made parties to a suit, under the Missouri statute, to enforce a contract to convey land by a party deceased. McQuitty v. Wilbite [Mo.] 117 SW 730. One having an equity in an insurance policy is not a necessary party to a bill to compel specific performance of contract relating to insurance. State Nat. Bank v. U. S. Life Ins. Co., 238 Ill. 148, 87 NE 396. In the case of a bill for specific performance of a contract to convey lands, the only proper parties in general are the parties to the contract itself. Purchasers from the vendee are not proper parties. Steinman v. Hagan, 108 Va. 563, 62 SE 348.

**18.** The absence of parties having an interest in the construction of a will from a suit to compel performance of a contract to buy will not prevent a decree for performance where there is no dispute as to facts and the only question of law does not render the title unmarketable. Hardenbergh v. McCarthy, 130 App. Div. 538, 114 NYS 1073.

**19.** For the original vendee is bound to deliver good title to his vendee. Bittrick v. Consolidated Imp. Co. [Wash.] 99 P 303.

**20.** In an action to compel renewal of a lease to a partnership, it is immaterial that between the commencement and the end of the term strangers to the lease were partners where at the time of bringing suit the partners were the same. Gorder v. Pankonin [Neb.] 119 NW 449. Where one who has agreed to convey land to complainant conveys to a third party, with knowledge of such agreement, it is not necessary in a bill against such third parties to join the person making the agreement to convey. Van Dyke v. Cole, 81 Vt. 379, 70 A 593.

**21.** McDonald v. Benge, 138 Iowa, 591, 116 NW 602. Mistake is not a ground of defense to specific performance of a contract unless it appears that there was some reasonable ground for misapprehension. Bradley v. Heyward, 164 F 107.

pure mistake of fact, on the part of one party to a bill for specific performance,[22] but the mere fact that one did not fully understand the contract entered into is no defense.[23] Whether laches will bar relief depends on all the circumstances of each case.[24] Inability of the party sought to be charged to perform is a defense.[25] It is a good defense that an agent was acting for an undisclosed principal.[26] A price much less than the actual value is not of itself a defense.[27] A defense, although not pleaded, may be good if there is evidence on the subject,[28] but a trial on the merits without demurrer is a waiver of the defense of adequate remedy at law.[29] Where parties themselves do not raise the question of invalidity of the contract on the ground of public policy, the court will not take note of it.[30] The causes for which specific performance will be denied under the Montana Code must be interposed by the defendant as defenses and the burden of proof to establish them is upon him, and it is not incumbent on the plaintiff to avoid every negative statement contained in the provisions of the Code.[31] For a consideration of further special defenses alleged see cases below.[32]

**22.** Krah v. Wassmer [N. J. Eq.] 71 A 404.

**23.** The mere fact that one did not know the contents of a contract signed is no defense to an action to enforce it where it does not appear that there was any duress or that the party was mentally weak. Ellis v. Keeler, 126 App. Div. 343, 110 NYS 542. The mere fact that one is old and has no one to advise him is no defense to an action to compel performance of his contract. 83 years old. Id.

**24.** Nowell v. McBride [C. C. A.] 162 F 432. No evidence of laches in asserting title to mining claims under a partnership agreement. Whistler v. MacDonald [C. C. A.] 167 F 477. Where one is in possession under a contract to convey and what he assumes is a valid deed, it is not laches to fail to bring suit for specific performance for 20 years. Stonehouse v. Stonehouse [Mich.] 16 Det. Leg. N. 21, 120 NW 23. Delay of 14 months not laches. Robbins v. Clock, 59 Misc. 289, 112 NYS 246. The mere lapse of time without any material change in the value of the property involved is not necessarily conclusive. Nowell v. McBride [C. C. A.] 162 F 432. Where no time for performance is stated, it was not unreasonable to delay two months before attempting to enforce a contract to convey. McArthur v. Cheboygan [Mich.] 16 Det. Leg. N. 45, 120 NW 575. See further on question of delay, § 1 and § 4, supra. No rule respecting the length of delay which will be fatal can be laid down, for each case must depend on its peculiar circumstances. Joffrion v. Gumbel [La.] 48 S 1007. Must institute a suit within a reasonable time and before any material change affecting the interests of the parties has taken place. Id. Where one party, arbitrarily or otherwise, notifies the other that he will not perform the contract, the bill for specific performance must be speedily filed, unless the party receiving notice be in possession. Delay held to be satisfactorily explained. Agens v. Koch [N. J. Eq.] 70 A 348. Where one has a remedy at law for damages which is barred by the lapse of time under the statute of limitations, he cannot compel performance of the contract after the lapse of a similar period. Clark v. Van Cleef [N. J. Eq.] 71 A 260. Under the rule that a party must have been ready, eager and prompt at all times, the rule of laches is more strongly applied in cases of specific performance than in other cases. Parties had played fast and loose with an agreement for the transfer of mineral rights in land for a period of twenty-five years. Clinchfield Coal Co. v. Clintwood Coal & Timber Co., 108 Va. 433, 62 SE 329.

**25.** Defendant not owner of premises sought. Harrigan v. Dodge, 200 Mass. 357, 86 NE 780.

**26.** New York Brokerage Co. v. Wharton [Iowa] 119 NW 969.

**27.** Robbins v. Clock, 59 Misc. 289, 112 NYS 246. See infra, § 3 D.

**28.** Shea v. Evans [Md.] 72 A 600.

**29.** Bauer v. International Waste Co., 201 Mass. 197, 87 NE 637.

**30.** Agreement by purchaser at referee's sale to transfer part to referee. Rasch v. Jensen [Iowa] 120 NW 662.

**31.** In re Grogan's Estate [Mont.] 100 P 1044.

**32.** One cannot defend an action for specific performance on the ground of forfeiture where he himself was unable to perform at the time. Zempel v. Hughes, 235 Ill. 424, 85 NE 641. Where, under a contract to convey land, a default by the assignors of complainants to make payment has been waived and further attempts to make payments by complainant have been prevented by the inequitable conduct of the defendant, the latter cannot defend on the ground of forfeiture in an action for specific performance. Hickman v. Chaney [Mich.] 15 Det. Leg. N. 1003, 118 NW 993. Where a deed is in fact a mortgage, the agreement being to reconvey if the mortgagor find a purchaser within a year, it is no defense that the mortgage is to be paid off by means of the purchase price and not from some independent source, for such is the plain term of the agreement. Porter v. Farmers' & Merchants' Sav. Bank [Iowa] 120 NW 633. The failure of complainant to adverse the application of defendant for a patent to lands will not estop him from obtaining a decree for specific performance of a contract to convey such land, for complainant's suit amounts to the establishment and enforcement of a trust. Nowell v. McBride [C. C. A.] 162 F 432. Where an agreement to convey land included a larger tract than the description in the deed, a protest by the

*Pleading.* See 10 C. L. 1689—Specific performance will not be granted on a bill for another purpose,[33] though a prayer for general relief will authorize award of specific performance.[34] The bill should allege all facts necessary to make out the plaintiff's right to relief,[35] such as the terms of the contract,[36] performance or offer and ability to perform,[37] title,[38] and in some jurisdictions the consideration,[39] and that the remedy at law is inadequate.[40] The bill must set out the plaintiff's right fully, clearly, and with certainty.[41] A complaint seeking to enforce an oral agreement,

vendors against the retention of the disputed tract by the vendee, not having been made until after entry into possession thereof by the vendee, affords no reason for the refusal by a court of equity to compel performance of the agreement to convey. Starrett v. Boynton [N. J. Err. & App.] 70 A 183.

**33.** Cannot be decreed on bill for partition. Felt v. Felt [Mich.] 15 Det. Leg. N. 994, 118 NW 953.

**34.** Williamson v. Warfield, Pratt, Howell Co., 136 Ill. App. 168.

**35.** It is incumbent on the plaintiff to state such facts as will enable the court to decide whether the contract is of such a character that it would not be inequitable to enforce it. Stiles v. Hermosa Beach Land and Water Co. [Cal. App.] 97 P 91. No case for specific performance where contract calls for performance within 10 months and bill is brought at end of 7 months, and bill does not allege any default or intended default. E. Sondheimer Co. v. Richland Lumber Co., 121 La. 786, 46 S 806. Where complainant has been in possession of land in question since a certain date, his bill should show such fact. Krah v. Wassmer [N. J. Eq.] 71 A 404.

**36.** Must allege terms and conditions of agreement. Campbell v. Timmerman, 139 Ill. App. 151. Interest of a party and extent thereof in lands not made clear. Jones v. Jones [Ala.] 47 S 80. Under the Montana Code, if a petition shows a contract fair on its face and one the specific performance of which may be decreed, it is sufficient without negativing all the defenses enumerated by the code. In re Grogan's Estate [Mont.] 100 P 1044.

**37.** Complaint must allege performance or show a readiness to perform on the part of the complainant. Complaint alleged verbal agreement to partition between widow and children and that widow repudiated. No allegation of a tender of a deed, etc., by complainant. Garrick v. Garrick [Ind. App.] 87 NE 696. A mere assertion by a complainant that he was at all times ready, willing, and able to carry out the contract on his part will not suffice, when the admitted facts on the face of the bill refute the assertion. Clinchfield Coal Co. v. Clintwood Coal & Timber Co., 108 Va. 433, 62 SE 329. Bill must allege readiness to perform and ask for performance. Hoover v. Baugh, 108 Va. 695, 62 SE 968. Must be proof or allegation to the effect that at the time of tender complainant was able to perform in accordance with the terms of the contract (Dietz v. Stephenson [Or.] 95 P 803), and that, at all or any times since, he bas been ready, able, and willing to perform (Id.). Complaint must show a readiness on plaintiff's part to perform. Chandler v. Chandler, 220 Pa. 311, 69 A 806; Garrick v. Garrick [Ind. App.] 88 NE 104. Allegations of petition to enforce conveyance of school lands held sufficient to show that plaintiff could comply with the law in regard to such lands. Pope v. Taliaferro [Tex. Civ. App.] 115 SW 309. Bill failed to show a sufficient tender of purchase money. Mitchell v. Wright [Ala.] 46 S 473.

**38.** A bill need not set forth that the defendant is the owner of the premises. Inability to perform is a matter of defense. Harrigan v. Dodge, 200 Mass. 357, 86 NE 780. A bill by vendee against vendor which does not show title in the vendor is bad on demurrer. Ryan v. Martin, 165 F 765. A statement that plaintiff was the owner and entitled to possession of land at the time of contracting to convey that the title, however, stood in the name of a sister, who subsequently transferred to the wife to be held for her husband, states a good cause of action where both are made parties. East River & Astoria Land Co. v. Kindred, 128 App. Div. 146, 112 NYS 540. A bill to compel conveyance of land by one party of land in the name of another should show such situation. Krah v. Wassmer [N. J. Eq.] 71 A 404.

**39.** In California a complaint in order not to be demurrable must state such facts as will enable the court to decide whether the consideration is adequate and that the contract as to the defendant is just and reasonable. Stiles v. Hermosa Beach Land & Water Co. [Cal. App.] 97 P 91. A complaint specifically stating the consideration and that it is fair and just is not demurrable as failing to present facts that will enable the court to say that the consideration is adequate and the contract just. Brown v. Sebastopol, 153 Cal. 704, 96 P 363.

**40.** Bernier v. Griscom-Spencer Co., 161 F 438.

**41.** A bill is defective in averment which fails to set out with sufficient particularity and clearness the terms of the contract. Mitchell v. Wright [Ala.] 46 S 473. In a suit by an assignee to compel performance of a contract to lease to lessees and their assignees, it is sufficient to allege the fact that complainant is assignee without further facts to prove it. Hollander v. Central Metal & Supply Co. [Md.] 71 A 442. Contract to pay for services between father and son held set out with sufficient certainty. Stonehouse v. Stonehouse [Mich.] 16 Det. Leg. N. 21, 120 NW 23. May refuse relief where facts set out in the bill are meagre and not a full disclosure of the entire transaction. Newman v. Johnson, 108 Md. 367, 70 A 116. Facts and circumstances entitling appellant to the relief prayed for are not averred by full, clear, positive, and distinct statements as the rule requires. Clinchfield Coal Co. v. Clintwood Coal & Timber Co., 108 Va. 433, 62 SE 329. A de-

which is subject to the statute of frauds, should state sufficient facts to take it out of the statute.[42] The greatest strictness is required in the conformation of allegations and proofs in the case of a request for specific performance,[43] but a bill is not demurrable because certain remote inferences might be drawn from the facts alleged rendering a decree improper.[44] A petition setting out a written contract for the sale of land, which is disavowed subsequently by setting forth an oral contract changing its terms, states no cause for equitable jurisdiction.[45] An answer to enforce an agreement to convey land alleging rescission as provided for but not offering to restore the complainant to his position prior to entering upon the agreement is bad on demurrer.[46] A general demurrer does not lie to an answer which, although admitting the execution, denies some of the essential facts entitling to relief and also sets up further facts which, if true, constitute a good defense.[47] The trial court should require an amendment to the complaint where an issue material to the determination of the case has been tried without being presented in the pleadings.[48]

*Evidence.* See 10 C. L. 1690—The contract sought to be enforced must be shown by competent and satisfactory evidence.[49] Parol evidence will be heard not to vary or contradict the written contract but to put the court in possession of all of the facts and circumstances surrounding the contract to the end that it may ascertain, whether there was any element of fraud, mistake or unfair advantage taken by the party seeking the aid of the court.[50]

*The relief granted.* See 10 C. L. 1691—Equity will adapt its relief to the state of facts existing at the time of the entry of the final decree.[51] Where jurisdiction is properly acquired, the court will proceed to do complete justice by adjudicating all matters involved[52] and to that end may grant injunctions.[53] Damages may be

scription in an amended complaint of various parcels by metes and bounds, without further facts to identify, held incomplete. Bogard v. Barhan [Or.] 96 P 673. An amended complaint intending to describe a 5 A. tract which did not close, but if closed by extending the last distance given described more than 60 A, was insufficient. Id. An amended complaint describing but three sides of a quadrangular tract of land is defective. Id.

**42.** A complaint alleging and seeking to enforce an oral partition agreement was demurrable for failing to allege such part performances as took the contract out of the statute of frauds. Garrick v. Garrick [Ind. App.] 87 NE 696.

**43.** Jones v. Mahone [Ala.] 47 S 195.

**44.** Bill is not demurrable on ground that enforcing performance will infringe on defendant's homestead, either in the particular tract or in the right of selection from a larger tract, where it does not appear in the bill that the land in question is part of the homestead, though it does appear that it is part of a larger tract owned by defendant, for it is not to be presumed from that fact alone that it was a part of the homestead. Wilkins v. Hardaway [Ala.] 48 S 678.

**45.** Lyons v. American Cigar Co., 121 La. 93, 46 S 662.

**46.** In an action on a lease with an option to purchase, an answer alleging rescission by the lessor prior to election by the lessee to purchase, which does not offer to repay the money expended by the lessee in improvements but only the money paid by the lessee to the lessor, and to restore everything received under the agreement, is bad on demurrer. Swanston v. Clark, 153 Cal. 300, 95 P 1117.

**47.** Where plaintiffs sought specific performance of a contract to convey land and defendants in answering admitted its execution but not all the essential facts entitling plaintiff to a decree, and further pleaded facts which, if true, were a good defense, it was error to sustain a general demurrer to the answer. Benedict v. Minton [Neb.] 120 NW 429.

**48.** Stiles v. Hermosa Beach Land & Water Co. [Cal. App.] 97 P 91.

**49.** Creecy v. Grief, 108 Va. 321, 61 SE 769; Thompson v. Burns [Idaho] 99 P 111. Testimony of statements by the owner of land made prior to an alleged oral contract to convey that he intended to give the land to the complainant is entitled to little weight in an action to enforce the oral agreement. Wills v. Westendorf [Iowa] 118 NW 376.

**In negative specific performance** by way of injunction, degree of proof required is same as in suit for positive performance, that is, it must be clear and satisfactory. Streator Ind. Tel. Co. v. Interstate Ind. Tel. Co., 142 Ill. App. 183.

**50.** Rudisill v. Whitener, 149 N. C. 439, 63 SE 101.

**51.** Bill brought to enforce payments by instalments. Pending hearing of bill, all payments became due and were enforced in final decree. Bauer v. International Waste Co., 201 Mass. 197, 87 NE 637.

**52.** Abatement of price is allowed as an incident to the action of specific perform-

awarded in lieu of specific performance,[54] but only when specific performance could not be had,[55] and only when the case is one for equitable interposition, such as would entitle the plaintiff to specific performance but for intervening facts.[56] The

ance in order to do substantial justice. Knudtson v. Robinson [N. D.] 118 NW 1051. May have title quieted on a cross bill in an action for specific performance. Gish v. Ferrea [Cal. App.] 101 P 27. In suit for specific performance with abatement from the agreed price because of outstanding lease, evidence held insufficient to show the amount of damage to plaintiff because of such lease. Kuhn v. Eppsteln, 239 Ill. 555, 88 NE 174. May grant that which is equitable under the evidence and deny specific performance, although the defendant did not raise the question of the right to such relief. Newman v. French, 138 Iowa, 482, 116 NW 468. Where under a contract to convey land to complainant upon support and care of the owner during his lifetime but the owner left the complainant, she was not entitled to specific performance during his lifetime, but he might be restrained from conveying to others and the fee decreed to vest in her after her obligations had been fully performed. Id. In a suit for specific performance of a contract to convey land, where the vendor is charged with the rental value of the land during the period that conveyance is refused and the vendee with interest on the purchase price, the rule of partial payments should be applied and the rental charged against the interest due each year, and hence no interest charged on the rental value. Haffey v. Lynch, 193 N. Y. 67, 85 NE 817. Where amounts tendered by complainant under a contract of sale of land were not the full amount due when tendered, he should pay interest on the full amount due up to the time of the decree. Hickman v. Chaney [Mich.] 15 Det. Leg. N. 1003, 118 NW 993. Where specific performance of a contract to convey property is decreed, the letter of the contract is not allowed to stand in the way of an equitable adjustment as to interest on the one hand and rents and profits on the other. Jersey City v. Flynn [N. J. Eq.] 70 A 497. Equity may decree an accounting where it has jurisdiction of the bill for performance. Collins v. Leary [N. J. Err. & App.] 71 A 603. Where a vendee in an action to compel specific performance shows an unmarketable title, he may recover, under the Rhode Island statutes, the deposit made and payments and expenses. Lowe v. Molter [R. I.] 71 A 592. Where plaintiffs having an option to purchase occupied as lessees and made a tender which was refused upon a decree for specific performance, the vendor will not be compelled to pay taxes, etc., accruing since the tender, the vendees having occupied the premises without any liability for rent. Swanston v. Clark, 153 Cal. 300, 95 P 1117. Where right to transfer of land denied, cannot have damages for loss of rentals. Cummins v. Roeth [Cal. App.] 101 P 434. Decree entered ordering defendant to convey without warranties, upon payment of a certain sum by plaintiff and, in case of failure to pay, the defendant to have possession of the premises and the plaintiff to have his costs. Walton v. McKinney [Ariz.] 100 P 471.

**53.** Restrain transfer of land pending happening of a condition precedent. Newman v. French, 138 Iowa, 482, 116 NW 468. Enjoined from claiming any interest in an invention on agreement to convey which was also enforced. McRae v. Smart [Tenn.] 114 SW 729.

**54.** In an action for specific performance, the damages may be adjusted in the action if specific performance be refused as impracticable. Performance held practicable. Robbins v. Clock, 59 Misc. 289, 112 NYS 246. Where specific performance was denied because of the alteration of the contract so that the amount tendered was not the real balance due, and there was no evidence that the plaintiff was responsible for the alteration or had been in possession of the land, he was entitled to recover payments made. Lowe v. Maynard [Ky.] 115 SW 214. A bill to compel specific performance may be retained, notwithstanding performance is refused for lack of proof for the purpose of allowing the purchaser compensation, where it appears that he went into possession and made valuable improvements on the land upon the faith of his contract, if he has not adequate remedy at law. Jones v. Gainer [Ala.] 47 S 142.

**55.** In order for a decree to provide for a money payment for damages, it must be established that specific performance could not be had. Will v. Barnwell, 60 Misc. 458, 112 NYS 462. Money judgment proper where specific performance is impossible. Krasnow v. Topp, 128 App. Div. 156, 112 NYS 546.

**56.** A plaintiff praying for specific performance cannot compel the chancery court to retain jurisdiction of his cause solely for the purpose of assessing damages, when for any reason other than the infirmity of his claim both at law and equity, the peculiar equitable relief sought is denied. Institution for Savings v. Puffer, 201 Mass. 41, 87 NE 562. Where a bill is brought to enforce performance of a contract to convey a homestead which is invalid, and the original party has died and his estate been finally settled, the bill will not be retained to assess damages but the action will be dismissed as improperly brought. Knudston v. Robinson [N. D.] 118 NW 1051. Where complainant in a bill for specific performance failed to show any ground for equitable relief, it was error to retain jurisdiction and award a decree for money loaned. Brauer v. Laughlin, 235 Ill. 265, 85 NE 283. Where a complaint did not show cause for equitable relief, which was all that was asked for, a demurrer will be sustained although the complaint states a cause of action for damages. Dingwall v. Chapman, 63 Misc. 193, 116 NYS 520; Morrison v. Chapman, 63 Misc. 195, 116 NYS 522. In a suit to specifically perform a void contract, the complainant cannot recover for services as on a quantum meruit. McKinney v. Big Horn Basin Development Co. [C. C. A.] 167 F 770. The power to grant relief by way of compensation exists only as ancillary to grant specific performance, and, where there is no

court, however, is not bound to retain a bill for specific performance for the purpose of giving relief in damages, where plaintiff does not even request it.[57] The court will not decree a vain and unless thing.[58] The court cannot compel parties to perform on terms never agreed upon.[59] Where defendant admits a substituted contract, the complainant is entitled to have a decree for the specific performance of the substituted contract if he chooses to perform it on his part, and he can have such relief in his suit on the original contract.[60] In Kentucky if no defense is made, the plaintiff cannot have judgment for any relief not specifically demanded.[61] In an action for specific performance, where a general denial is filed, it is error to make a decree quieting plaintiff's title.[62]

*Decree.*[See 10 C. L. 1695]—The contract merges with the decree which should leave defendant no alternative but to perform,[63] but the performance decreed may be in the alternative.[64] While the court cannot enforce a decree, requiring a nonresident to execute a deed, its decree may be made effective under the provisions of statutes.[65] In some states a decree may be entered for specific performance which will operate as a conveyance.[66]

*Appeal.*[See 10 C. L. 1695]—The rule that, in case of conflicting evidence, a finding will not be disturbed on appeal is limited in actions for specific performance by the necessity of establishing the contract and the terms thereof clearly and satisfactorily.[67] Where, in an action for specific performance and injunction, specific performance is denied but an injunction granted and the complainant does not appeal but the defendant appeals from the decree granting the injunction, the question of whether a case for specific performance was made out is not open.[68]

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**Spendthrifts,** see latest topical index.

## STARE DECISIS.

**§ 1. The Doctrine and Its Application, 1903.**
**§ 2. Decisions and Obiter Dicta, 1905.**
**§ 3. Rules of Property, 1905.**
**§ 4. Courts of Different Jurisdictions, 1906.**
A. Inferior and Appellate, 1906.
B. Federal and State Courts, 1906.
C. Different Federal Courts, 1909.
D. Different State Courts, 1909.

*The scope of this topic* is noted below.[69]

§ 1. *The doctrine and its application.*[70]—[See 10 C. L. 1695]—The doctrine of stare

jurisdiction to decree specific performance and no other special equity intervenes, the bill cannot be retained for the purpose of awarding damages. Bromberg v. Eugenotto Const. Co. [Ala.] 48 S 60.

**57.** Banaghan v. Malaney, 200 Mass. 46, 85 NE 839.

**58.** Would not enforce lease against party who was entitled to cancel at will. Ulrey v. Keith, 237 Ill. 284, 86 NE 696.

**59.** Jersey City v. Flynn [N. J. Eq.] 70 A 497.

**60.** Krah v. Wassmer [N. J. Eq.] 71 A 404.

**61.** Civ. Code Prac. § 90. Illinois Cent. R. Co. v. Davidson [Ky.] 115 SW 770. Where there is an equitable petition for damages to which a defense is made, and there is a prayer for all proper and equitable relief, the court has a right to enforce specific performance. Illinois Cent. R. Co. v. Davidson [Ky.] 115 SW 770.

**62.** Mancuso v. Rosso [Neb.] 116 NW 679.

**63.** Must not be an option on behalf of either party. Thompson v. Burns [Idaho] 99 P 111.

**64.** Decree in an action to compel performance of a contract to convey land which is in the alternative, either to settle according to the terms of the contract or to pay the full purchase price with interest, is proper. Prichard v. Mulhall [Iowa] 118 NW 43.

**65.** Maryland Code by appointment of trustees to convey. Hollander v. Central Metal & Supply Co. [Md.] 71 A 442.

**66.** Ready v. Schmith [Or.] 95 P 817.

**67.** A substantial conflict does not arise where there is some evidence to support a contract. Prairie Div. Co. v. Leiberg [Idaho] 96 P 616.

**68.** Hazard v. Hope Land Co. [R. I.] 69 A 602.

**69.** Conclusiveness of adjudication of facts is elsewhere treated (see Former Adjudication, 11 C. L. 1537), as is the binding effect of previous decision on a subsequent review of the same case (see Appeal and Review, 11 C. L. 118).

**70. Search Note:** See notes in 12 L. R. A. (N. S.) 1081; 73 A. S. R. 98; 2 Ann. Cas. 725; 11 Id. 1107.

See, also, Courts, Cent. Dig. §§ 311-343;

decisis is to be distinguished from that of former adjudication.[71] The rule of stare decisis is founded on public policy,[72] adherence to established precedents being a cardinal principal in jurisprudence.[73] Former decisions will not be overruled except for very cogent reasons,[74] or unless the court is satisfied that they were clearly and palpably wrong,[75] but except as to decisions which have become rules of property,[76] a wrong decision may be overruled.[77] In overruling a previous decision, particularly one which may affect title to property, the court should expressly indicate such overruling.[78] Long acquiescence in a decision strengthens it as a precedent,[79] as does the concurrence of a long line of decisions.[80] Although the doctrine is applicable to decisions rendered by a divided court,[81] it is not as a rule readily applied to such decisions,[82] and a decision by an evenly divided court[83] or one where a majority of the court concurred in the result only[84] does not settle any rule of law. The doctrine should not be extended and applied to an erroneous decision on general mercantile law which is contrary to accepted doctrine and recognized business methods.[85] The last expression of the court on a question is controlling as against prior opinions conflicting with it.[86] The decision of a court of supreme jurisdiction overruling a former decision is, as a general rule, retrospective in its operation.[87] There is an exception to this principle,[88] but such exception will not be extended to an erroneous decision on general mercantile law.[89] The overruling of a decision as to one proposition of law declared by it does not argue unsoundness

Dec. Dig. §§ 88-100; 26 A. & E. Enc. L. (2ed.) 159, 176; 2 A. & E. Enc. P. & P. 381; 7 Id. 47; 18 Id. 38.

71. The determination on appeal in another action of the same issue is entitled to weight under the doctrine of stare decisis, but is not res judicata. Quinn v. Monona County [Iowa] 117 NW 1100. See Former Adjudication, 11 C. L. 1537.

72. Mason v. Nelson Cotton Co., 148 N. C. 492, 62 SE 625. General rules of business should not be interfered with. Id.

73. Coulter v. Phoenix Brick & Const. Co., 131 Mo. App. 230, 110 SW 655.

74. Kahle v. Peters [W. Va.] 62 SE 691; Randolph County v. Elis, 130 Ga. 121, 60 SE 458; Kapp v. Kapp [Nev.] 99 P 1077.

75. Refusing to overrule decision that a statute requiring freehold qualifications as to city office holders was constitutional. Kahle v. Peters [W. Va.] 62 SE 691.

76. See post, § 3.

77. Nothing to prevent a court from overruling its own decisions. McCollum v. McConaughy [Iowa] 119 NW 539. Erroneous construction of a statute when its correction will not inflict serious injury on any one and will enforce the legislative intent. Law v. Smith, 34 Utah, 394, 98 P 300. Overruling decisions that statute prohibiting soliciting orders for the purchase or delivery of intoxicating liquor was unconstitutional as to nonresidents. McCollum v. McConaughy [Iowa] 119 NW 539.

78. Fisher v. Wagner [Md.] 71 A 999.

79. Nortnass v. Pioneer Townsite Co. [Neb.] 117 NW 951. Decision, which has stood for 25 years, that a deed of trust should be treated as an incumbrance in applying certain statutes, will be followed. Hollywood Lumber Co. v. Love [Cal.] 100 P 698.

80. As to tax bills issued for street improvement. Coulter v. Phoenix Brick & Const. Co., 131 Mo. App. 230, 110 SW 655.

81. Doctrine should be applied to a decision of four of five justices where the case was carefully presented and considered at great length and there has been no change in the trend of judicial opinion unfavorable to it and it has been received with favor by the profession. Willcutt & Sons. v. Driscoll, 200 Mass. 110, 85 NE 897.

82. Adopting dissenting opinion in a former case in which the decision was rendered by three of the justices. Thompson v. Shelverton, 131 Ga. 714, 63 SE 220.

83. Westhus v. Union Trust Co. [C. C. A.] 168 F 617; Kinney v. Conant [C. C. A.] 166 F 720; City of Kalamazoo v. Crawford [Mich.] 15 Det. Leg. N. 669, 117 NW 572.

84. Expressions in the opinion are only entitled to consideration as the views of the judge who wrote the opinion. State v. Goodwin, 81 S. C. 419, 62 SE 1100.

85. Overruling decision that assignee of draft with bill of lading attached as security becomes the owner outright of the goods, and responsible for the stipulations of the bargainor given in the original contract of sale. Mason v. Nelson Cotton Co., 148 N. C. 492, 62 SE 625.

86. Martin v. St. Joseph [Mo. App.] 117 SW 94.

87. Effect is not that the former decision was bad but that it never was the law. Mason v. Nelson Cotton Co., 148 N. C. 492, 62 SE 625.

88. Where a constitution or statute has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under those impaired, by a change of construction made by a subsequent decision. Mason v. Nelson Cotton Co., 148 N. C. 492, 62 SE 625.

89. Not extended to a decision that the assignee of a draft with bill of lading attached as security is liable for a breach of warranty. Mason v. Nelson Cotton Co., 148 N. C. 492, 62 SE 625.

therein as to other separate and distinct propositions enunciated thereby.[90] A precedent established in a court of equity may, from the differing nature of the tribunals, be inapplicable in a court law.[91]

§ 2. *Decisions and obiter dicta.*[92]—See 10 C. L. 1696—To constitute a precedent, a decision must be upon a question presented to the court under the issues and essential to the disposition of the cause,[93] and actually decided.[94] The value of former adjudications as precedents is usually confined to the issue directly involved [95] and to cases where the facts and issues presented are for practical purposes the same,[96] and such cases will be tested and interpreted as based on and applicable to the state of facts [97] stated in the opinion.[98] The mere failure of the court to discover and point out other objections to the ruling brought under consideration should not be construed as approving it in all other respects.[99] A statement which is not necessary to a decision of the case is obiter dicta,[1] and is entitled to no greater weight than would be given it as an expression of an opinion of the justice writing the opinion,[2] but dictum is not always to be disregarded.[3]

§ 3. *Rules of property.*[4]—See 10 C. L. 1697—Decisions which have become rules of property will not be overruled,[5] particularly when of long standing [6] and when

**90.** Pennington v. Gillaspie, 63 W. Va. 541, 61 SE 416.

**91.** Precedent established by court of equity held not applicable to a case in a court of law. Larson v. Salt Lake City, 34 Utah, 318, 97 P 483.

**92. Search Note:** See Courts, Cent. Dig. § 335; Dec. Dig. § 92; 26 A. & E. Enc. L. (2ed.) 163, 168.

**93.** Although like questions may have been involved, little weight will be given the decision if they were not presented or considered by the court. Wyatt v. State Board of Equalization, 74 N. H. 552, 70 A 387. Questions must have been considered. Buchanan v. MacFarland, 31 App. D. C. 6. Decision is only a precedent to the extent of the points presented, considered and determined. Hough v. Porter [Or.] 98 P 1083. Expressions not based on any questions involved in the suit are not controlling. Johnson v. Crook County [Or.] 100 P 294.

**94.** Construction of statute on certain point not construed to include other points not considered. Broadwater v. Wabash R. Co., 212 Mo. 437, 110 SW 1084.

**95.** Young v. State Bank [Tex. Civ. App.] 117 SW 476; Kansas City v. Hennegan, 152 F 249. When the court goes beyond the precise issue, its views will be respected, but cannot control a subsequent case where the very point is squarely presented. State v. Great Northern R. Co., 106 Minn. 303, 119 NW 202; Georgia, S. & F. R. Co. v. Wright, 130 Ga. 696, 61 SE 718. Precedents in negligence cases must be limited to the points actually decided upon the facts then before the court. Wankowski v. Crivitz Pulp & Paper Co., 137 Wis. 123, 118 NW 643. Evidence and the questions raised must be the same. Crier v. Innes, 160 F 103.

**96.** New Jersey Shoe Tree & Last Co. v. Baker Shoe Tree Mfg. Co., 166 F 322. Power of the state to change the rate of taxation of railway corporations. State v. Great Northern R. Co., 106 Minn. 303, 119 NW 202. Approval on appeal of instructions given in one case does not necessarily justify their application in another. Illinois Cent. R. Co. v. France's Adm'x [Ky.] 112 SW 929.

**97.** American Nat. Bank v. Fountain, 148 N. C. 590, 62 SE 738.

**98.** Record should not be looked to for the facts upon which the case was decided. Moriarty v. New York, 116 NYS 323.

**99.** Decisions of appellate courts are confined to the particular errors assigned and to the accompanying propositions and arguments. Young v. State Bank [Tex. Civ. App.] 117 SW 476.

**1.** Miesen v. Ramsey County, 101 Minn. 516, 112 NW 874; In re Ellis, 76 Kan. 368, 91 P 81. Expressions of opinions upon or to decisions of questions not necessary to ascertainments of rights of the parties. State v. Great Northern R. Co., 106 Minn. 303, 119 NW 202.

**2.** Detroit Lumber Co. v. The Petrel, 153 Mich. 528, 15 Det. Leg. N. 506, 117 NW 80

**3.** A correct principle of law may be announced in a given case, although it may not be necessary to there apply it. San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus County [Cal.] 99 P 365. If due consideration is given a point, the ruling is not dictum. Kinney v. Conant [C. C. A.] 166 F 720.

**4. Search Note:** See Courts, Cent. Dig. §§ 336-339; Dec. Dig. § 93.

**5.** An interpretation of a statute which has become a rule of property will be followed. Manner and form of the examination of a married woman upon a deed. Gillespie v. Pocahontas Coal & Coke Co. [C. C. A.] 163 F 992. Construing words "die without issue and unmarried," in will. Fisher v. Lott, 33 Ky. L. R. 609, 110 SW 822. Decision that land acquired by a married man under the act of congress providing for the sale of timber lands is his separate property. James v. James [Wash.] 97 P 113. Decision that the state is bound by the acts of its taxing officers in placing property previously adjudicated to the state for unpaid taxes on the regular rolls for succeeding years and thereby waiving the prior adjudication. Gauthreaux v. Theriot, 121 La. 871, 46 S 892. That adoption under a statute of a foreign state which confers the right of inheritance on the adopted child is not binding. Brown v. Finley [Ala.] 47 S 577.

property has been acquired and transferred in reliance thereon.[7] Where the law is changed by judicial decision, such change will not affect transactions made with reference to the law as it stood previous to such change.[8]

§ 4. *Courts of different jurisdictions. A. Inferior and appellate.*[9]—See 10 C. L. 1697—Until a case decided by the supreme court of the state has been overruled by that court, the law there announced is binding upon the lower court,[10] and the appellate courts of intermediate jurisdiction are also conclusively bound,[11] except in the case of a state court where a federal question is involved.[12] Decisions of an inferior court are not binding on the court of last resort.[13] A decision of a question of law by the appellate division of the supreme court of New York should control a judge at special term,[14] and it is the duty of the judge of the special term to follow the decision of the appellate division in the same department where there is a conflict between such decision and that of the appellate division of another department.[15] The court of civil appeals of Texas is bound by the decisions of the court of criminal appeals on matters pertaining to the enforcement of the criminal law,[16] but is not bound to follow a construction of a statute which affects a civil transaction.[17] The constitution of Missouri provides that the court of appeals shall follow the last previous ruling of the supreme court on the question,[18] and inference from remarks of the court of appeals outside the point of decision should not be drawn against express decision of the supreme court.[19]

(§ 4) *B. Federal and state courts. When federal courts follow state decisions.*[20]—See 10 C. L. 1698—When the validity, meaning and effect of a state statute involves no question arising under the constitution or laws of the United States, the federal courts should accept the meaning and effect given to such statute by the highest court of the state,[21] and especially so if the statute affects titles to real

6. Right of widow, who elects to take under the statute instead of the will, to a fee in one-third of the real estate and a life estate in the remaining two-thirds. Rocker v. Metzger [Ind.] 86 NE 403.

7. A decision that, where one had purchased land under contract of sale and thereafter assigned to another, the wife of the first purchaser had no dower interest therein, establishes a rule of property. Nortnass v. Pioneer Townsite Co. [Neb.] 117 NW 951. Decision granting condemnation of certain land will not be reversed where valuable improvements have been made thereon. Cape Girardeau, etc., R. Co. v. Southern Ill. & Mo. Bridge Co. [Mo.] 114 SW 1084.

8. Metzger v. Greiner, 9 Ohio C. C. (N. S.) 364.

9. **Search Note:** See Courts, Cent. Dig. §§ 313-334, 351, 939-984; Dec. Dig. §§ 90, 91, 94-98, 358-376; Statutes, Cent. Dig. § 256.

10. Caywood v. Supreme Lodge K. & L. of H., 41 Ind. App. 639, 84 NE 782. Even though the federal supreme court has held to the contrary, no federal question being involved. Rogers Park Water Co. v. Chicago, 131 Ill. App. 35. Will be followed though the soundness of the decision is questionable. Williams v. Keith [Tex. Civ. App.] 112 SW 948.

11. Holding of supreme court not only strong but conclusive evidence of the law. Heffron v. Concordia Fire Ins. Co., 138 Ill. App. 483. Conclusively bound by decision of supreme court as to a question before it. Fowles v. Bentley [Mo. App.] 115 SW 1090. Expressions of opinion will be treated with respect. Cragg v. Levinson, 141 Ill. App. 536.

12. Missouri, K. & T. R. Co. v. Swartz [Tex. Civ. App.] 115 SW 275.

13. Decision of county courts construing statute entitled to consideration. Gibson v. People [Colo.] 99 P 333.

14. William Fox Amusement Co. v. McClellan, 62 Misc. 100, 114 NYS 594.

15. Maass v. Rosenthal, 62 Misc. 350, 115 NYS 4.

16. Determining the validity of a city ordinance prohibiting and punishing offenses punishable under a general law of the state. Robinson v. Galveston [Tex. Civ. App.] 111 SW 1076.

17. Construing statutes affecting local option elections. Griffin v. Tucker [Tex.] 118 SW 635.

18. Court of appeals must determine for itself the last previous ruling. Houck v. Cape Girardeau Waterworks & Elec. L. Co. [Mo.] 114 SW 1098.

19. As to foreign administrator's capacity to sue. Crohn v. Clay County State Bank [Mo. App.] 118 SW 498.

20. **Search Note:** See notes in 4 C. L. 1516. See, also, Courts, Cent. Dig. §§ 329-334, 939-984; Dec. Dig. §§ 97, 358-376; 26 A. & E. Enc. L. (2ed.) 171.

21. Construing art as one imposing tax upon shares and not upon corporate assets of national bank. Hager v. American Nat. Bank [C. C. A.] 159 F 396. Construction of Gen. St. Kan. 1901, § 747, relative to proposals for construction of public works. Kansas City Hydraulic Press Brick Co. v. National Surety Co. [C. C. A.] 167 F 496.

property.[22] This has sometimes been done, even where it involves an overruling of federal decisions.[23] If there is no decision of the state court upon the statute, decisions of another state which has a like statute will be looked to,[24] but the decision to be followed must be a decision of the highest state court.[25] When rights have vested or contracts have been made under such statutes before it has received interpretation by the state court, the federal court will exercise its independent judgment,[26] irrespective of decisions of the state court subsequently rendered,[27] and in interpreting the rights of parties under transactions made prior to the change of opinion of the supreme court of the state, the federal court will follow its own decisions made prior to such change.[28] They are not bound where the determination of the general law is involved,[29] except where there is a statutory regulation;[30] and, when a contract is executed and is to be carried out within the state, the decisions of the highest courts of the state will be of most pursuasive influence.[31] The effect of a violation of the provisions of a state statute upon collateral and independent con-

Following construction of state court that right of action for death in favor of surviving relatives did not extend to relatives who were nonresident aliens. Maiorano v. Baltimore & O. R. Co., 213 U. S. 268, 53 Law. Ed. —. Statutes authorizing a reference by consent in actions at law. United States v. Ramsey, 158 F 488. That statute did not authorize assignment of a cause of action arising purely out of tort. Joseph Dixon Crucible Co. v. Paul [C. C. A.] 167 F 784. State statute has such meaning as judicial department of the state construes it to have. Commonwealth v. International Harvester Co. [Ky.] 115 SW 703. Following decision of state court that whenever an employee has after the accident elected to receive benefits as a member of a relief department, and has released the railroad company, he cannot maintain an action for damages notwithstanding the South Carolina act of assembly. Atlantic Coast Line R. Co. v. Dunning [C. C. A.] 166 F 850. Construction of charter of insurance company obtained under the general laws of the state. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 Law. Ed. —. Decision that act providing that service may be upon agent of foreign corporation applied equally to a domestic corporation will be followed. Swarts v. Christie Grain & Stock Co., 166 F 338. Rights of fishery. Percy Summer Club v. Astle [C. C. A.] 163 F 1. Statutes regulating the dissolution of corporations. In re Munger Vehicle Tire Co. [C. C. A.] 159 F 901. That bonds imposed general liability upon the city. Olmsted v. Superior, 155 F 172. Construction of tax law. Singer Mfg. Co. v. Adams [C. C. A.] 165 F 877. Statute of limitation. Cheatham v. Evans [C. C. A.] 160 F 802. Constitution and the statute giving the right of action for wrongful death, and the statute imposing the limitation thereupon, still remain componant, parts of one and the same statute. De Valle Da Costa v. Southern Pac. Co., 167 F 654.

22. Construction of statute directing manner and form of the examination of a married woman upon a deed. Gillespie v. Pocahontas Coal & Coke Co. [C. C. A.] 163 F 992.

23. Percy Summers Club v. Astle [C. C. A.] 163 F 1.

24. United States v. Ramsey, 158 F 488.

25. Not bound by any decision of any appellate division of the supreme court of the state. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945. Intermediate court not binding but entitled to consideration. Federal Lead Co. v. Swyers [C. C. A.] 161 F 687.

26. Hager v. American Nat. Bank [C. C. A.] 159 F 396; Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945.

27. Holding of state court that the suit is one against the state not followed. Fleischmann Co. v. Murray, 161 F 162.

28. Statutory right of lessee of school lands construed as giving the right to the lessee to cut the timber; following former decisions. Forest Products Co. v. Russell, 161 F 1004.

29. Whether defendant owed plaintiff duty of reasonable care. Pennsylvania R. Co. v. Hummel [C. C. A.] 167 F 89. Whether statute of one state, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state. Leyner Engineering Works v. Kempner, 163 F 605. Measure of damages recoverable in an action of tort. Woldson v. Larson [C. C. A.] 164 F 548. Definition of "telegraph." Sunset Tel. & T. Co. v. Pomona, 164 F 561. Decisions on general commercial law, not binding. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945. When a case involving negligence, or what constitutes a contract of carriage, etc., is removed from state court to federal court, unless action is founded on a statute of the state, it involves a matter of general law. Force v. Standard Silk Co., 160 F 992. Question of responsibility of railroad corporation for injuries caused to or by its servants. Salmons v. Norfolk & W. R. Co., 162 F 722. As to whether liability imposed upon stockholders of corporation by a state constitution is wholly statutory or partially contractual and therefore transatory is a matter of general law. Converse v. Mears, 162 F 767.

30. Whether a conductor and engineer are fellow-servants is determined by the constitution and decisions of the supreme court of South Carolina. Snipes v. Southern R. Co. [C. C. A.] 166 F 1.

31. In absence of federal question the federal supreme court will ordinarily follow state court's construction of policy of insur-

tracts is a matter of general law, as to which the federal court must exercise its independent judgment.[32] The decision of the state courts of last resort as to matters of purely local law is binding upon the federal court,[33] and, where the decision of the state court, though based upon the common law, is deemed of an application especially local, this decision is given an authority almost as great as would be assigned to it if it construed a state statute;[34] and the rule of public policy established by a state by its statutes or the decisions of its highest courts will be followed, although directly opposite to that established by the federal court.[35] Whether a suit in a federal court involves the necessary jurisdictional amount is not a local question controlled by the statute of the state or the ruling of its supreme court,[36] and, where a federal question is involved, the construction of the state court is not conclusive.[37] The federal courts will follow the construction given by the local courts to a statute of a territory where such statute has been in existence for a considerable time and property rights have been predicated on it.[38]

*When state courts follow federal decisions.*[See 10 C. L. 1700]—Where a federal question is involved, the decisions of the federal courts thereon are binding upon the state courts,[39] and federal decisions are the final authority as to what constitutes a federal question.[40] Where varient views are entertained by the federal courts, it is the duty of the state court to decide for itself,[41] and, when it has done so upon full consideration, it will adhere to the rule laid down,[42] and, so far as the federal decision relates to the administration of justice within the state and the powers and proceedings of the state tribunals, it is not controlling.[43] The fact that the af-

ance issued and to be performed in such state. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 Law. Ed. —.

32. Kansas City Hydraulic Press Brick Co. v. National Surety Co. [C. C. A.] 167 F 496.

33. Construing act as a remedial statute. Hager v. American Nat. Bank [C. C. A.] 159 F 396. Where a proceeding to condemn land under a city charter is construed as indivisible unit, and the whole finding must be embraced in one judgment so that, if reversed on appeal, the entire case must be tried de novo as to all defendants, held that under such construction nonresidents who were joined with residents in the proceeding could not remove case to federal court. Kansas City v. Hennegan, 152 F 249. Statute requiring owners of mills and factories to safe guard their machinery is a local law and decisions thereon are binding. Welsh v. Barber Asphalt Pav. Co. [C. C. A.] 167 F 465. What constitutes a misnomer in a criminal complaint is a local question. O'Halloran v. McGuirk [C. C. A.] 167 F 493.

34. Rights of riparian owners. Percy Summer Club v. Astle [C. C. A.] 163 F 1.

35. Whether insurance could be recovered on life of insured who had been executed. McCue v. Northwestern Mut. Life Ins. Co. [C. C. A.] 167 F 435.

36. Heffner v. Gwynne-Treadwell Cotton Co. [C. C. A.] 160 F 635.

37. Whether statute impairs obligation of contract. Sunset Tel. & T. Co. v. Pomona, 164 F 561.

38. Decision of the territorial courts of Hawaii that a statute legitimating children born out of wedlock did not apply to issue of an adulterous relation followed. Kealoha v. Castle, 210 U. S. 149, 52 Law. Ed. 998.

39. As to whether the law impairs obligation of contract. Einstein v. Raritan Woolen Mills [N. J. Eq.] 70 A 295. Control of federal court over railroad rates fixed by state corporation commissioner. People v. Willcox, 194 N. Y. 383, 87 NE 517. Whether city ordinance attempts to regulate interstate commerce. State v. Glasby, 50 Wash. 598, 97 P 734. Whether posting of schedules and tariff is condition precedent to the establishment and placing in force of tariff rates. Mires v. St. Louis & S. F. R. Co. [Mo. App.] 114 SW 1052. Whether appeal to federal supreme court operated as supersedeas of judgment appealed from is governed by federal statutes and decisions. North Shore Boom & Driving Co. v. Nicomen Boom Co. [Wash.] 101 P 48. Will follow decision interpreting the federal employer's liability act as applied to the territories. Gutierrez v. El Paso & N. E. R. Co. [Tex.] 117 SW 426. As to what is due process of law under the constitution of the United States. Seaboard Air Line R. Co. v. Simon [Fla.] 47 S 1001; Liddell v. Landau [Ark.] 112 SW 1085.

40. Decision of federal supreme court that claim of immunity from liability for attorney's fees as one of the elements of damages, under an injunction bond given in an injuction suit in a federal court, presented a federal question. Beekman Lumber Co. v. Acme Harvester Co. [Mo.] 114 SW 1087.

41. Rule as to the legality of transactions previous to bankruptcy proceedings. Stuart v. Farmers' Bank, 137 Wis. 66, 117 NW 820.

42. Especially so where the view established in the state court is supported later by the utterances of the federal supreme court. Stuart v. Farmers' Bank, 137 Wis. 66, 117 NW 820.

43. Decision of federal supreme court that the action of a state corporation commission in fixing future rates of transportation of passengers is legislative is binding upon the state courts only so far as the control of the

firmance of the decision of a state supreme court by the United States supreme court is placed upon a ground different from that taken by the state court does not affect the binding authority of the state court's decision.[44]

(§ 4) C. *Different federal courts.*[45]—See 10 C. L. 1701—The lower federal courts are bound by the decisions of the supreme court of the United States and those of the circuit court of appeals in their own circuit,[46] but are not bound by those of a federal court of co-ordinate jurisdiction, or even the decisions of a federal court of appeals in another circuit.[47] Although the questions propounded have been adversely decided in another circuit court of appeals, still they will be entitled to an independent consideration and judgment in the circuit court of appeals in which they are brought.[48] Federal courts of one circuit ordinarily concur in the decisions of the circuit court of appeals in another circuit,[49] but the decision of another circuit will not be followed if it would involve a conflict of results for which there would be no remedy.[50] Where no direct attack has been made upon a prior adjudication by a circuit court of the question sought to be subsequently raised in a similar suit in the court of appeals, the prior adjudication, unless clearly erroneous, should be followed.[51] The circuit court of appeals of the District of Columbia will follow the decision of a circuit court of appeals of another district in a patent case, where there is no material difference in the case and especially where there has been a protracted litigation.[52]

(§ 4) *D. Different state courts.*[53]—See 10 C. L. 1701—The construction placed upon the statute of a state by its own judicial tribunals will be followed by the courts of other states in determining the right of parties under such statute.[54] They are not, however, bound by the interpretation placed upon the common law,[55] but it has been held that, in a transitory common-law action, the interpretation of the common law obtaining in the state where the action accrued will govern,[56] and that, if a litigant had no case in the courts of that state, he had none elsewhere.[57] The court of one state is not bound as a matter of comity to enforce, against a citizen of that state, a stockholder's liability arising under the laws of another state.[58] Comity applies only to questions which have been actually decided and which arose under the same facts.[59]

federal court extends over such matter. People v. Willcox, 194 N. Y. 383, 87 NE 517.

44. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

45. **Search Note:** See Courts, Cent. Dig. §§ 325, 327, 328; Dec. Dig. § 96.

46. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945. Following rule of proximate cause of death as the result of negligence. Mella v. Northern S. S. Co., 162 F 499.

47. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945.

48. Heckendorn v. U. S. [C. C. A.] 162 F 141.

49. Following decision with reference to tariff act as applied to the products of petroleum. United States v. Marsily & Co. [C. C. A.] 165 F 186.

50. Refusing to follow conclusion of the circuit court of appeals of the eighth district relative to a suit against the collector of internal revenue for an alleged inheritance tax paid under protest. Kinney v. Conant [C. C. A.] 166 F 720.

51. This rule is especially applicable to suits of the character of custom litigation. Hill v. Francklyn [C. C. A.] 162 F 880.

52. Brill v. Washington R. & Elec. Co., 30 App. D. C. 255.

53. **Search Note:** See Courts, Cent. Dig. §§ 313-321, 351; Dec. Dig. §§ 90, 94.

54. Mining Corporation, penalty for failure to file annual report. Commercial Nat. Bank v. Kirk, 222 Pa. 567, 71 A 1085. Construing liability of stockholders of corporation. Hayward v. Sencenbaugh, 141 Ill. App. 395.

55. Common-law liability of master and servant. Lay v. Nashville, etc., R. Co., 131 Ga. 345, 62 SE 189. Construing the common law pertaining to the sale of pledges. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754.

56. Decisions on the subject of contributory negligence followed. Gabriel v. St. Louis, etc., R. Co. [Mo. App.] 115 SW 3.

57. Gabriel v. St. Louis, etc., R. Co. [Mo. App.] 115 SW 3.

58. Refusing to enforce liability of stockholder as assessed by a Minnesota court. Converse v. Hamilton, 136 Wis. 589, 118 NW 190.

59. Brill v. Washington R. & Elec. Co., 30 App. D. C. 255

*Courts of co-ordinate jurisdiction.*See 10 C. L. 1701—A court is not bound by a ministerial order of a court of co-ordinate jurisdiction.[60] How far one court shall be bound by another of co-ordinate jurisdiction is a question of comity.[61]

**State Lands; Statement of Claim; Statement of Facts,** see latest topical index.

**STATES.**

§ 1. Boundaries, Jurisdiction and Sovereignty, 1910.
§ 2. Property, 1911.
§ 3. Contracts, 1912.
§ 4. Officers and Employes, 1912.
§ 5. Fiscal Management, 1914.
§ 6. Claims, 1915.
§ 7. Actions by and Against State, 1917.

*The scope of this topic* is noted below.[62]

§ 1. *Boundaries, jurisdiction and sovereignty.*[63] *Boundaries.*See 10 C. L. 1702 The question of boundaries is more political than legal,[64] but such question is not to be confused with the determination of where the true boundary is, which is properly determinable by the courts upon competent proof.[65] In the absence of further description,[66] the designation of a "river" as the boundary of a state means its middle.[67] State boundaries follow the thread of a stream where its course is changed by accretion and erosin, but where an avulsion takes place, the boundaries remain unchanged.[68]

*Jurisdiction and sovereignty.*See 10 C. L. 1702—A state upon its admission into the Union is upon an equal footing with other states, and has complete and full jurisdiction over all persons and things within its limits.[69] Jurisdiction over Indians

**60.** Order of judge refusing to send a case back to a referee for further evidence is not binding upon another judge to whom the case has been sent after appeal and remand. Whittle v. Jones [S. C.] 64 SE 403.

**61.** Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945.

**62.** Many matters common to public bodies in general are elsewhere treated (see Officers and Public Employes, 12 C. L. 1131; Public Contracts, 12 C. L. 1442.

**63. Search Note:** See notes in 4 C. L. 1517; 6 Id. 1515; 15 L. R. A. 187.

See, also, States, Cent. Dig. §§ 1-27; Dec. Dig. §§ 1-22; 26 A. & E. Enc. L. (2ed.) 465.

**64.** Determination of boundary by legislature, conclusive. State v. Bowman [Ark.] 116 SW 896; De Loney v. State [Ark.] 115 SW 138. Where "Choctaw Strip" tendered to Arkansas by federal government (Act Cong. Feb. 10, 1895, c. 571, 33 Stat. 714, U. S. Comp. St. Supp. 1907, p. 378) and accepted (Acts of state legislature 1905, p. 124), courts would not question boundary, but would assume that state had jurisdiction over crimes in such "strip." State v. Bowman [Ark.] 116 SW 896.

**65.** State v. Bowman [Ark.] 116 SW 896. Proof of private survey not authorized by adjoining states is not competent evidence of location of state boundary. De Loney v. State [Ark.] 115 SW 138. Flagstaff man in corps of surveyors employed by Indian commission could not testify as to state boundary where survey not authorized by states. Id. Evidence of whether house was north or south of former bank of river properly received on issue as to location of house as to Texas-Arkansas boundary formed by Red river. Id. Ancient public boundaries may be shown by general reputation, tradition, and by hearsay declarations of persons with knowledge, before the controversy arose. Id.

**66.** South bank of Red river, and not thread of stream, is Texas-Arkansas boundary. Shown by Spanish-American treaty (8 Stat. 252 et seq.) that river belong to United States; by Mexican-American treaty of 1828 (8 Stat. 372); by act of Cong. June 16, 1836; by Cont. Ark. 1836 and subsequent constitutions; by act of Texas congress of 1836 (Laws 1836, p. 133); and by Act Cong. 1845 (Act March 1, 1845, 5 Stat. 797), admitting Texas to union. De Loney v. State [Ark.] 115 SW 138.

**67.** De Loney v. State [Ark.] 115 SW 138.

**68.** De Loney v. State [Ark.] 115 SW 138; Rober v. Michelsen [Neb.] 116 NW 949. Land changed by process of erosion and accretion from Nebraska to Iowa, and not restored to former state by avulsion. Id. Where islands in Mississippi river were gradually washed to the Arkansas shore, they became part of the state of Arkansas. Sutton v. Archer [Miss.] 46 S 705. Western boundary of Missouri (extended by Act Cong. June 7, 1836, 5 Stat. 34, c. 86) remains center of stream, though by erosion land east of original boundary line is taken from Missouri. Missouri v. Kansas, 213 U. S. 78, 53 Law. Ed. —. Where Columbia river contained two ship channels and middle of north **channel** was described as boundary between Oregon and Washington (Act Feb. 14, 1859; 11 Stat 383, c. 33), such channel remains the boundary, subject to changes by accretion. Washington v. Oregon, 211 U. S. 127, 53 Law. Ed. 118. Not changed by fact that channel shifted and south channel became main channel. Id.

**69.** Except as restrained by federal or state constitution. Dick v. U. S., 208 U. S. 304, 52 Law. Ed. 520.

may be retained by congress,[70] but an Indian citizen is otherwise subject to the jurisdiction of a state.[71] Where two states have concurrent jurisdiction over a river which is a boundary, the state which first acquires jurisdiction may finally punish an act malum in se, prohibited by both states,[72] but where the act is merely malum prohibitum and only prohibited by one state, the rule differs.[73] Jurisdiction over a portion of the Potomac river was lost by the state of Virginia on the cession to the United States of the territory now the District of Columbia.[74]

§ 2. *Property.*[75]—See 10 C. L. 1702—As a sovereign, the state holds the property right of unobstructed navigation of its waters in trust for the people.[76] Property for a private, as distinguished from a public use, may be acquired.[77] The public property of the state cannot ordinarily be devoted to private use.[78] A state is not to be deprived of its property by adverse possession,[79] and the rights of a state are not to be diminished by statute unless clearly disclosed by express terms or necessary implication.[80] Grants of public land by a sovereignty to corporations or individuals must be construed liberally as to the grantor and strictly as to the grantee.[81] A conveyance by a state of part of its swamp lands, by bargain and sale

**70.** Authority of congress to regulate commerce with Indian tribes superior to authority of state within whose limits are Indians. Dick v. U. S., 208 U. S. 340, 52 Law. Ed. 520. Stipulations in agreement between United States and Nec Perce Indians that federal laws as to intoxicating liquors apply to lands ceded to United States or allotted to Indians, not an invasion of sovereignty of Idaho. Id.

**71.** Under Act Cong. Feb. 8, 1887, c. 119, § 6, 24 Stat. 390, Indian allottee is citizen of United States and state of residence, and cannot claim immunity from criminal laws of state as to fish and game by virtue of federal treaties. State v. Morrin, 136 Wis. 552, 117 NW 1006. See, also, Indians, 11 C. L. 1898.

**72.** Nielsen v. Oregon, 212 U. S. 315, 53 Law. Ed. —.

**73.** Nielsen v. Oregon, 212 U. S. 315, 53 Law. Ed. —. State of Oregon cannot, because of concurrent jurisdiction, under Act Cong. Feb. 14, 1859; 11 Stat. 383, c. 33, over Columbia river, make operation of purse net within limits of Washington criminal, when authorized by license of latter state. Id.

**74.** In view of acts of Maryland and Virginia in ceding territory to United States, compact of those states of 1785 that rights of fishing on Potomac be common to citizens of both states was never effective in the ceded territory. Evans v. U. S., 31 App. D. C. 544. When territory ceded, legislative power passed immediately to congress which in exercise of police power might regulate fishing. Id. Virginia's easements and privileges, lost by cession of territory to federal government, were not revived by recession of portion of land (Act Cong. July 9, 1846; 9 Stat. 35, c. 35). No express revival and consequently no revival by implication. Id. Controversy between Maryland and Virginia, resulting in arbitration award approved by congress (Act March 3, 1879, 20 Stat. 481, c. 196), of no effect as to portion of river in District of Columbia. Id. No acceptance by congress of terms of award or grant of jurisdiction as to waters of Potomac. Id. Citizen of Virginia subject to conviction for violation of law as to fishing in District of Columbia. Id.

**75. Search Note:** See notes in 6 C. L. 1516; 29 L. R. A. 378.

See, also, States, Cent. Dig. §§ 83-88; Dec. Dig. §§ 82-89.

**76.** State v. Columbia Water Power Co. [S. C.] 63 SE 884.

**77.** Tomlin v. Cedar Rapids & Iowa City R. & Light Co. [Iowa] 120 NW 93.

**78.** District agricultural association formed under St. 1880, p. 62, c. 69, as re-enacted by St. 1891, p. 138, c. 126, held to hold property as agent for state, and amendment of 1895, St. 1895, p. 14, c. 8, § 10½, authorizing transfer of such property to subsidiary, private corporations, was void under Const. art. 4, § 31. Sixth Dist. Agr. Ass'n v. Wright [Cal.] 97 P 144.

**79.** One cannot acquire by occupancy title to parts of lots beyond high-water mark of meandered river, since limitations do not run against state. Cedar Rapids Gaslight Co. v. Cedar Rapids [Iowa] 120 NW 966. Title to school lands cannot be acquired by adverse possession against state. Kinney v. Munch [Minn.] 120 NW 374. Ballinger's Ann. Codes & St. § 4807 (Pierce's Code, § 1519), making limitations applicable to actions by state, etc., does not authorize acquisition of title to school lands by adverse possession. Such construction would be repugnant to Enabling Act (Act Feb. 22, 1889, c. 180, 25 Stat. 679), § 11, and Const art. 16, § 2, requiring school lands, to be disposed of at public sale, etc. O'Brien v. Wilson [Wash.] 97 P 1115. Repugnant to Const. art. 16, § 1, that public lands be held in trust for people, etc. Id.

**80.** General expressions granting city power to assess persons benefited by public improvement do not impart permission to assess state's property. State v. Kilburn [Conn.] 69 A 1028. Charter of Hartford, § 132, authorizes assessments on land "belonging to" state. "Belonging to" imparts beneficial ownership. Id. No implication that land on which state has mortgage for benefit of school fund is to be assessed. Id.

**81.** Nothing passes by implication. Morrow v. Warner Valley Stock Co. [Or.] 101 P 171. Especially where grant is gratuitous. Id. Rule applies to grants to a state to aid in public or quasi public improvements. Id.

deed purporting on its face to deal with the full title, transfers to the grantee therein an after-acquired title.[82]

§ 3. *Contracts.*[83]—See 10 C. L. 1703—A state can only be bound by a contract of its officers where they act in conformity to law,[84] and a state's contract cannot be enlarged, diminished or varied by a subordinate officer.[85] In its governmental capacity, a state may contract for the sale of an article manufactured in its state prison.[86] Legislation authorizing the union of resident corporations, when mutually concerted by different states, is not prohibited by the federal constitution prohibiting agreements between states.[87] A state is as liable for breach of contract as an individual[88] and is also subject to estoppel,[89] but liability cannot be predicated upon a contract unless the state is a party.[90]

§ 4. *Officers and employes.*[91]—See 10 C. L. 1703—The determination of the qualifications of members of a state legislature may be constitutionally vested in that body.[92] Apportionment acts should conform to constitutional limitations as to ratios,[93] but courts will not declare a legislative apportionment act unconstitutional where there is no valid prior enactment to fall back on,[94] and a legislative appor-

In construing statute making grant to state, court may recur to history of time when act passed, to assist in interpretation. Id. Swamp land act construed. Id.

**82.** Morrow v. Warner Valley Stock Co. [Or.] 101 P 171. Under Act Cong. March 12, 1860, c. 5, 12 Stat. 3 (Rev. St. U. S. §§ 2490; U. S. Comp. St. 1901, p. 1591), transferring swamp lands to state, provided that grant do not include lands sold, reserved, or disposed of by government prior to confirmation of title, legal title of state will not relate back to date of act, giving stability to deeds made by state prior to receipt of patent. Id. Effect would be to invalidate title of persons who took lands under homestead and pre-emption laws after passage of swamp land act but before issuance of patent. Id.

**83. Search Note:** See notes in 4 C. L. 1517; 11 Id. 1344; 50 A. S. R. 489; 6 Ann. Cas. 307.

See, also, States, Cent. Dig. § § 89-109; Dec. Dig. §§ 90-110; 26 A. & E. Enc. L. (2ed.) 469, 477.

**84.** Hager v. Sidebottom [Ky.] 113 SW 870.

**85.** Burgard v. State, 61 Misc. 23, 114 NYS 550. In contract for construction of road, where division engineer without authority rejected material, causing the substitution of more expensive material, state was not liable for additional cost. Id.

**86.** State of Minnesota in manufacture of binding twine in state prison and in selling same under express statute is engaged in governmental function, not private enterprise. In re Western Implement Co., 166 F 576. Debt created from transaction a debt due state within meaning of its insolvency laws. Id.

**87.** Const. art. 1, § 10. Mackay v. New York, etc., R. Co. [Conn.] 72 A 583.

**88.** Though not suable without consent. Union Trust Co. v. State [Cal.] 99 P 183.

**89.** State making itself party to contract or grant in its proprietary capacity is subject to law of estoppel as other contracting parties. Chicago, etc., R. Co. v. Douglas County, 134 Wis. 197, 114 NW 511.

**90.** State not bound to pay special improvement bonds where nothing to show state as obligor. Union Trust Co. v. State [Cal.] 99 P 183. State not liable for failure of board of public works to levy and collect assessments to pay public improvement bonds under Act April 1, 1872 (St. 1871-72, p. 911, c. 726), in absence of legislative provision binding it. Id.

**91. Search Note:** See notes in 38 L. R. A. 210; 16 A. S. R. 220; 2 Ann. Cas. 759; 11 Id. 649.

See, also, States, Cent. Dig. § § 28-82; Dec. Dig. §§ 24-81; 4 A. & E. Enc. L. (2ed.) 479.

**92.** State v. Schnitger, 16 Wyo. 479, 95 P 698. Under Const. art. 4, § 9, board of district canvassers cannot reject majority of votes for senator on ground that such person is ineligible. Attorney General v. Canvassers of Seventh Senatorial Dist. [Mich.] 15 Det. Leg. N. 923, 118 NW 584. Supreme court cannot determine decision or reject it when made. Id.

**93.** Legislative apportionment act of 1907 (Laws 1907, p. 81, c. 69), fixing numbers of senators at 27 and representatives at 56, is within Const. art. 3, § 3, providing that number of representatives be not less than twice or greater than three times number of senators. State v. Schnitger, 16 Wyo. 479, 95 P 698. Legislative apportionment act of 1901 (Laws 1901, p. 98, c. 91), fixing ratios, is repealed by act of 1907 (Laws 1907, p. 81, c. 69), whereby ratios are based on number of inhabitants and number of senators and representatives. Id. Provisions of apportionment acts of 1893 (Laws 1893, p. 55, c. 26), 1901 (Laws 1901, p. 98, c. 91) and 1907 (Laws 1907, p. 81, c. 69), establishing districts, are authorized by constitution and if other portions be invalid, valid portions are severable. Id. In absence of express ratios in legislative apportionment act, ratios are number of inhabitants of state divided by number of senators or representatives fixed by act. Id. Senatorial and representative district is a territorial unit, and cannot be senatorial district alone. Id. Right of new counties to representation to be considered in any apportionment. Id. Court will take judicial notice of membership of legislature, terms of officers as constituted, and journals of either branch, as far as germane to validity of apportionment act. Will take judicial notice of subdivisions of state. Id.

**94.** State v. Schnitger, 16 Wyo. 479, 95 P 698. Legislature elected under inequitable

tionment of congressional districts is not judicially reviewable where there are no constitutional provisions controlling apportionment.[95] The legislature has broad discretionary power to investigate any subject respecting which it may desire information to aid in the proper discharge of legislative functions,[96] or to perform any other act delegated to it by the fundamental law, through duly authorized committees.[97] The number of employes of a senate may be limited by constitutional provisions.[98]

The powers and duties of state officers are governed by constitutional and statutory provisions.[99] Compensation may be in the form of a salary, with fees to be

apportionment act is not illegal, since court cannot inquire into qualification of members. Id. Court has no power to apportion. Id. Where Const. art. 3, subtit. "Apportionment," § 4, provided for 16 senators and 33 representatives, and Acts 1893 (Laws 1893, p. 55, c. 26), and 1901 (Laws 1901, p. 98, c. 91) established new districts, pursuant to which senators and representatives were elected and classified according to constitution, so that 13 senators, including one from new district, held over, though it be conceded that legislative acts were invalid, court could not compel election under apportionment in constitution. Id. Election under constitutional apportionment would result in 19 senators and 36 representatives, contrary to constitutional provision that representatives be not less than twice number of senators. Id. Voters in two of new counties would have to submit to representation by nonresidents, in whose election they had no voice. Id. Legislative apportionment in constitution, temporary in application, not to be applied to disturb conditions which are legitimate outgrowth of other portions of constitution. Valid legislative enactment unnecessary to render constitutional apportionment inapplicable. Id.

**95.** Nothing in state constitution as to manner of apportionment. Richardson v. McChesney, 32 Ky. L. R. 1237, 108 SW 322. Nothing in federal constitution. Id.

**96.** State v. Frear [Wis.] 119 NW 894. Workings of primary election law for selection of party candidates for United States senator, a proper subject for legislative inquiry. Whether law valid or not. Id. Resolution not void as attempt to administer void law, where broad enough to cover field of legislative inquiry respecting policy of such laws. Id. Legislative investigation for public purpose of general interest, though dominated by members of political party. Id. Legislative investigating committee not judicial tribunal within constitution. Id. The senate joint resolution passed by general assembly Feb. 14, 1908, providing for appointment of committee to investigate charges of corruption in government of city of Cincinnati and County of Hamilton, is exercise of judicial power not expressly conferred by constitution, and gross violation of § 32 of art. 11 thereof, unless it can be justified on ground of seeking information in aid of intended legislation. State v. Gayman, 11 Ohio C. C. (N. S.) 257. Resolution clearly not in good faith for legislative investigation, and beyond power. Id. Fact that general assembly had adjourned sine die deprives investigation of purpose announced, and leaves matter in same situation as though no purpose had been declared by resolution. Id.

**97.** State v. Frear [Wis.] 119 NW 894.

**98.** Under Const. § 249 as to employes of senate, and Ky. St. 1903, § 342, as to payment of contingent expenses of general assembly, one employed by chief clerk of senate to copy bills is not entitled to payment from state treasury as contingent expense on voucher of chief clerk, though expense necessary. James v. Cromwell, 33 Ky. L. R. 1024, 112 SW 611.

**99.** Power to offer reward for apprehension of criminal, discretionary with **governor** (Ky. St. 1903, §§ 1932, 1933). Hager v. Sidebottom [Ky.] 113 SW 870. Under Const. art 6, § 8, that governor cause laws to be faithfully executed, he is entitled to institute suit for and in name of state. State v. Huston [Okl.] 97 P 982. Under Wilson's Rev. & Ann. St. Okl. 1903, § 6567, **attorney general** has no power to bring suit in name of state, prosecute or defend same in district court of state, in any civil or criminal cause in which state may be party or interested, except when requested by governor or branch of legislature. Id. Under Ky. St. 1903, §§ 118, 127, 135, where commonwealth's attorney refused to institute civil proceedings at suggestion of governor, latter might employ **special counsel** at state's expense to assist and co-operate with county attorney in prosecution of such proceedings. James v. Helm, 33 Ky. L. R. 871, 111 SW 335. Private **secretary** of governor cannot discharge duties of governor in his absence. Act 1906, p. 260, c. 30. Hager v. Sidebottom [Ky.] 113 SW 870. Cannot offer reward. Id. Under Rev. St. 1887, § 452, **secretary of state** must keep office open for transaction of business from 10 a. m. until 4 p. m., except holidays. When open after 4 p. m., must receive business presented. Grant v. Lansdon [Idaho] 97 P 960. Refusal to file certificate of nomination after 4 p. m., improper. Id. Duties of state **auditor** defined by constitution. Daily v. State [Ind.] 87 NE 4, Supreme court must take judicial notice of fact that auditor is without authority to collect current undefaulted insurance taxes on behalf of state, either as official or individual. Id. Under Laws 1903, p. 9, c. 6, § 2, imposing on board of **trustees of state library** duties formerly of board of library commissioners, and Laws 1895, p. 481, c. 118, § 9, as to library bulletin to be issued, statute contemplated publication of small pamphlets directly relating to library work. Chandler v. Eastman [N. H.] 71 A 221. Publication of index to biographical sketches of state men, requiring over 100 pages of printed matter, in place of special bulletins, not authorized. Id. Under Laws 1893, p. 28, c. 31, § 7, authorizing trustees of state library to issue alphabetical list of books received, etc., where list arranged alphabetically accord-

collected for the state's benefit.[1] The state is not liable for the torts of officers though committed in the discharge of official duties,[2] and as a rule the state's rights are not affected by the laches [3] or illegal conduct of its officers.[4] A state treasurer acting as the custodian of municipal warrants, who sells them without authority before funds are raised by municipality for redemption, is liable for conversion.[5]

§ 5. *Fiscal management.*[6]—See 10 C. L. 1703—Appropriation laws are to be construed to effect their object,[7] but such laws must conform to constitutional limitations relative to the manner of passage,[8] the purpose of the appropriation,[9] and the amount thereof.[10] Also, appropriations must be for a proper purpose,[11] and a

ing to author's names was issued, board could not also issue second catalogue according to subjects of books. Id.

1. State v. Dunbar [Or.] 98 P 878. Allowance for clerk hire proper, though secretary of state paid by salary. Id. State cannot recover fees unlawfully collected though Const. art. 13 fixes salary of secretary of state, where no statutory provision that fees be for state's benefit. Id. Under Burns' Ann. St. 1908, § 9218, defining duties, auditor can only collect fees for official services for and on behalf of state, unless special authority is conferred. Dailey v. State [Ind.] 87 NE 4.

2. Exemption based on sovereign character of state and absence of obligation, not on ground of no remedy. Claussen v. Luverne, 103 Minn. 491, 115 NW 643. Neither state nor its officials managing state institutions as governmental duty and without profit are liable for wrongdoing of employe who negligently inflicts injury on another. Funds collected for maintenance of lunatic asylum are collected for charitable purposes, and not to be diverted to pay for injuries inflicted on inmates by negligent employe. Kittorer's Adm'r v. State Board of Control [Ky.] 115 SW 200. State board of control and superintendent of asylum not liable for acts of employes. Id.

3. Hager v. Sidebottom [Ky.] 113 SW 870.

4. Can only be estopped by legislative act or resolution. Booth v. State, 131 Ga. 750, 63 SE 502. Collection of debt. Id.

5. Measure of damages need not necessarily include interest until time of payment. State v. Kelly [Kan.] 96 P 40.

6. **Search Note:** See notes in 22 A. S. R. 638, 639; 60 A. S. R. 799; 5 Ann. Cas. 858.

See, also, States, Cent. Dig. §§ 112-160; Dec. Dig. §§ 113-168½; 26 A. & E. Enc. L. (2ed.) 472.

7. State v. Brian [Neb.] 120 NW 916. Laws 1907, p. 465, c. 151, being an "appropriation" of "the proceeds of the one mill tax for the years 1907 and 1908," is an appropriation of the whole amount of the tax, not the portion actually collected during the biennium. Id. "Proceeds" defined as "the amount proceeding or accruing from some possession or transaction," "yield, issue, product." "Levy" is "the amount accruing from a tax or execution. Id. Comp. St. 1905, c. 87, § 19, appropriating income from grants of land to use of university, creating board of regents with power to expend such funds, etc., is a complete appropriation of income from trust funds to beneficiary. Id. Const. art. 3, § 19, as to biennial appropriations, inapplicable to trust funds devoted by congress to specific use. Id.

8. Acts of 1907, p. 19, No. 17, providing for consolidation of offices of superintendent of public schools and treasurer of school boards, with requirement that latter receive no compensation, etc., not in conflict with Const. art. 75, where, from facts, constitutional provision that governor enumerate legislation at special sessions complied with. State v. Romero, 122 La. 885, 48 S 312. Order of general assembly to state treasurer to pay debt with money is not "pledging faith of state" within Const. art. 2, § 16, as to reading bills on passage. Battle v. Lacy [N. C.] 64 SE 505. Act authorizing state treasurer to deliver bonds previously issued for payment of debt not within Const. art. 2, § 16. Id. Sp. Sess. 1907, Act No. 21, re-enacting Acts 1906, p. 69, No. 49, § 13, with appropriations to meet expense of primary elections, not violative of Const. 1898, art. 55, requiring appropriations, except general appropriation bills, to be in separate bill embracing only one subject. State v. Michels, 121 La. 374, 46 S 430.

9. Under Const. art. 3, § 19, providing that appropriations end with expiration of first fiscal quarter after adjournment of next regular session of legislature, it is not essential that money be actually drawn during two-year period, but expense for which appropriation is made should be incurred during such period. State v. Brian [Neb.] 120 NW 916. Unexpected surplus of appropriation lapses, not uncollected portion. Id.

10. Whether appropriation is debt within Const. §§ 49, 50, relative to limitations as to incurring of indebtedness, depends upon character of appropriation and manner of payment. James v. State University [Ky.] 114 SW 767. Act March 16, 1908 (Acts 1908, p. 22), being appropriation to university to be paid in successive years, is not in violation of Const. §§ 49, 50, it not appearing that there will be deficit where payments are to be made. Id. Not indebtedness against commonwealth prohibited by Const. §§ 49, 50, being subject to reduction or change by legislature. Id. Const. art. 10, § 23 (Burns' Ed. § 289), construed to mean that state might contract debts in addition to debts of territory of Oklahoma, or such debts as were expressly assumed by constitution to meet casual deficits or failures on revenue, but such debts, direct and contingent, singly or in aggregate, must not exceed $400,000. In re Menefee [Okl.] 97 P 1014. Mandatory that moneys arising from sale of **refunding bonds** be applied to repay debts and liabilities, and no other purpose (Const. art. 10, § 25 Burn's Ed. § 291). Id. Refunding bonds neither create nor increase debt, but change form of existing indebtedness. Laws 1907-08, p. 155, c. 7, for issuance of refunding bonds, may take effect, without

legislature may properly recognize state institutions [12] and claims founded on justice and equity,[13] or incur reasonable necessary expenses in performing their duties.[14] Specific constitutional provisions limit the legislative power in establishing state depositaries [15] or extending appropriations for the compensation of officers.[16] warrants are subject to the limitation of indebtedness.[17] An agreement appointing a bank as state depositary, with no provision as to termination, is terminable by notice of either party.[18] A taxpayer may maintain an equitable action to prevent a secretary of state and state treasurer from disbursing state moneys for illegitimate purposes.[19]

§ 6. *Claims.*[20]—See 10 C. L. 1704—Claims against a state treasury must be war-

submission to election. Id. Const. art. 10, § 29 (Burn's Ed. § 295), requiring certificate of auditor and attorney general, does not require joint execution. Bonds equally valid if signed separately. Id.

**11.** Primary election law (Acts 1906, p. 69, No. 49), requiring state to pay part of primary election expenses, not violative of Const. 1898, art. 58, as to granting funds to person, etc. State v. Michels, 121 La. 374, 46 S 430. Not violative of Const, 1898, art. 212, providing that all elections "except" primary and municipal elections in certain towns be at state's expense. Id.

**12.** St. 1897, p. 447, c. 274, appropriating a sum for maintenance of home under auspices of Woman's Relief Corps made home state institution, under exclusive management of state. Within Const. art. 4, § 22, prohibiting appropriations except to corporations under management of state. Board of Directors of Women's Relief Corps Home Ass'n v. Nye [Cal. App.] 97 P 208. No constitutional prohibition from converting private corporation into state institution, provided purposes of such corporation are within general legislative powers or involve function of government. Id. St. 1897, p. 447, c. 274, appropriating a sum to home under auspices of Woman's Relief Corps not to be held a gift prohibited by Const. art. 4, § 31. Duty of state to care for citizens unable to support themselves. Id. Appropriation for home under auspices of Woman's Relief Corps (St. 1897, p. 447, c. 274), not unconstitutional as **special legislation.** General power of state to care for citizens unable to help themselves and under Const. art. 4, § 25, subd. 33, legislature may enact special law where general law inapplicable. Id. State university and state normal schools are educational institutions for which legislature may make appropriations without submitting questions to voters, under Const. § 184. James v. State University [Ky.] 114 SW 767. Change of name and departments under Act March 15, 1908 (Acts 1908, p. 22), not change of university as public corporation and state institution as to appropriations. Id.

**13.** McSurely v. McGrew [Iowa] 118 NW 415.

**14.** State v. Frear [Wis.] 119 NW 894. Resolution for legislative investigation and expenses not debt within Const. art. 8, § 8, as to passage. Term "debt" not reference to ordinary legislative expenses. Id. Resolution appropriating money to defray expenses of legislative investigation not violative of Const. art. 6, § 2, making secretary of state the state auditor, where expenses to be audited according to St. 1898, § 127. Where expense accounts to be audited by secretary of state on certificate of chairman of committee of facts, to which legislative fee bill to be applied in gain case, but no auditing authority conferred upon chairman. Id.

**15.** Laws 1908, c. 96, providing for establishment of state depositaries, etc., is not in conflict with Const. § 137, requiring statements of funds in treasury by state treasurer, verified by governor, etc. State v. Edwards [Miss.] 46 S 964.

**16.** Under Const. art. 5, § 56 (Burns' Ed. § 129), before appropriations for compensation of any officer or employe can be made office must be created and salary fixed, or employment authorized and compensation provided for either therein or in separate bill. Bryan v. Menefee [Okl.] 95 P 471. Under Const. art. 5, § 56 (Burns' Ed. § 129), an appropriation to cover compensation of employes, not prior to that time authorized by law, and compensation fixed, can only be enacted as a separate appropriation bill embracing but one subject. Id. Appropriation by separate bill containing but one subject providing for contingent expense of state officer, is valid. Warrant properly drawn against such contingent fund to pay for clerical assistance is valid. Id.

**17.** Issuance of warrant not creation of indebtedness within Const. art. 10, § 29, where issued by proper officer for payment of money by virtue of valid appropriation, money being in treasury or tax levy made with provision for collection. Bryan v. Menefee [Okl.] 95 P 471. Evidence of indebtedness as used in constitution means indebtedness as usually evidenced by bond. Id.

**18.** Agreement to be terminated by some certain unequivocal act. State Nat. Bank v. Com. [Ky.] 112 SW 678. Where Ky. St. 1903, § 4692, as to state depositaries, is silent as to time depositary shall act as such, the relation, in the absence of agreement, continues during the mutual will of state treasurer and depositary designated. Id. Where bank agreed to pay 2½ per cent. interest, its refusal to execute renewal bond did not affect agreement, such renewal bond being only to protect state's interest (Ky. St. 1903, § 4693). Bank not relieved from liability for interest where continuing to act as depositary, though use of fund deemed by bank unsafe. Id.

**19.** Where attorney general refuses to act. State v. Frear [Wis.] 119 NW 894.

**20. Search Note:** See notes in 42 L. R. A. 33; 4 Ann. Cas. 973.

See, also, States, Cent. Dig. §§ 161-177

ranted by law.[21] The power to examine all claims may rest in a state board of examiners,[22] and such officers act in a quasi judicial capacity.[23] The allowance of a claim may be compelled by mandamus when refused arbitrarily upon questions of law alone,[24] but where a state has consented to be sued and provided a court for actions involving claims,[25] such court may render a recommendatory judgment as to a claim disallowed by the examiners.[26]

The jurisdiction of a specially provided court of claims as to parties[27] and matters of practice[28] is governed by the statutes relative thereto. In such a court, the state has been held liable for damages involved in the construction of canals,[29] as where the state neglected to repair a bridge,[30] for land appropriated in construct-

Dec. Dig. §§ 169-187; 26 A. & E. Enc. L. (2ed) 476.

21. Cannot arise by implication. Hager v. Sidebottom [Ky.] 113 SW 870.

22. Under Const. art. 4, § 18, state board of examiners is given power to examine all claims against state except salaries and compensation of officers fixed by law. Thomas v. State [Idaho] 100 P 761. Power cannot be exercised by district court in entering judgment against state and thus seeking to bind examiners. Id.

23. May exercise discretion in discharge of official duties. State v. Cutler, 34 Utah, 99, 95 P 1071.

24. State v. Cutler, 34 Utah, 99, 95 P 1071. Allowance of stenographer's fees. Id.

25. Where state provides court in which actions involving claims must be brought, such court has exclusive jurisdiction of such actions. Thomas v. State [Idaho] 100 P 761, Under statute creating Albion State Normal School (Rev. Codes, §§ 517, 519, 520), and Const. art. 5, § 10, supreme court has exclusive jurisdiction in actions involving claims against state. Id. Consent is given board of trustees to sue and be sued. Id. Action against board of trustees of Albion State Normal School to recover money judgment is in fact action against state, board of trustees being mere agents of state in administration of affairs of school. Id. Intention of legislature to provide for suits against trustees in any court of competent jurisdiction, but when claims were involved, supreme court alone had jurisdiction. Id. Judgment of district court against trustees of normal school in fact judgment against state and insufficient as claim to be filed against state with state board of examiners. Id.

26. Thomas v. State [Idaho] 100 P 761. Where services performed by superintendent of state capitol grounds under employment of capitol building board, and claim disallowed by state board of engineers, appropriation by legislature would be equitable and just. Daniels v. State [Idaho] 98 P 853.

27. Jurisdiction of court of claims to bring in other parties, under Code Civ. Proc. §§ 264, 281, is limited to proceedings in which state has consented to be sued. Elmore & Hamilton Cont. Co. v. State, 62 Misc. 58, 115 NYS 1071. Motion to bring in county as party defendant will be denied where claim is presented for damages in construction of road in such county, under Code Civ. Proc. § 281, since court has no jurisdiction over such county. Id.

28. Under statutes relative to practice in state court of claims (Code Civ. Proc. § 1022, providing generally that courts state facts and conclusions of law separately; § 3347, subd. 7, 4, where rule does not apply to court of claims; Code Civ. Proc. § 265, and Laws 1897, p. 15, c. 36, as to such court, and amendment, Laws 1906, p. 1887, c. 692, § 3), later provisions control, and court of claims must state separately conclusions of law and facts found in conformity to practice of supreme court. Ostrander v. State, 192 N. Y. 415, 85 NE 668.

29. Under Canal Law (Laws 1894, p. 629, c. 338), § 37, one injured by widening and deepening of ditch to convey surplus waters of canals may prosecute his claim for damages without any other legislative authority. Town of Lenox v. State, 61 Misc. 28, 114 NYS 744. Town may maintain claim against state where widening of ditch to convey surplus waters of canal was done negligently, resulting in destruction of two highway bridges. Id. State liable for damages in deepening or widening ditch, but not for expense of better bridge constructed. Id. State, in constructing barge canal, may locate its banks where it would, subject only to liability for compensation for damage to be obtained through court of claims. Meneely v. Kinser Const. Co., 128 App. Div. 799, 113 NYS 183. Where obstruction of stream involved in state plan for construction of barge canal, remedy of riparian owner was against state, through court of claims. Contractor not liable where stream obstructed by direction of state engineer. Id. State might construct canal so as to injure riparian rights, liability being clearly indicated by statute. Laws 1903, p. 342, c. 147, § 13, shows contemplation of legislature to provide for damages in addition to compensation for lands, structures or waters appropriated. Meneely v. Kinser Const. Co., 130 App. Div. 325, 114 NYS 1136. Contractor protected by state's right. Id. State liable for all damages where lands overflowed by water discharged from canal into creek flowing through plaintiff's lands, though creek swollen by heavy rains, where no showing that without discharge plaintiff's lands would have been overflowed. Carhart v. State, 61 Misc. 13, 114 NYS 544. On claim against state for damages for flood caused by escape of waters from canal feeder, evidence of heavy rains at some distance from claimant's farm, though somewhat remote, was not incompetent or inadmissible as matter of law. Ostrander v. State, 192 N. Y. 415, 85 NE 668.

30. Where state appropriated bed of stream for canal and built new bridge to replace one out of repair, excluding travel for long time, though not allowing town to repair, state was liable to owner of hotel

ing such improvements,[31] or where a duty to keep a bridge in safe condition was disregarded.[32] The state is not liable for injury resulting from an insufficiently guarded road constructed by an independent contractor.[33] To put a state in default for the payment of an ordinary claim, the holder must apply to the proper state official and present claim and vouchers in required form.[34] An individual and a sovereign power cannot be regarded as joint tort feasors in an alleged conspiracy.[35]

§ 7. *Actions by and against state.*[36]—See 10 C. L. 1704—A sovereign state cannot be sued without its consent,[37] and the provision by which such consent is often given [38] is to be strictly construed.[39] The appearance of an attorney general, in an action where the state was made a party without statutory authority, did not operate to waive the state's exemption.[40] The exemption applies to a state agency,[41] though it has been held that boards, commissions, and bodies created by legislative authority, have an incidental capacity to sue and be sued.[42] Though a state has consented to be sued in its own courts, the right does not exist in a federal court.[43]

adjacent to bridge, who suffered damage for want of public access thereto. Kline v. State, 61 Misc. 18, 114 NYS 318. State cannot close bridge forming part of a public highway and arbitrarily and negligently omit to make repairs without rendering itself liable to special damages occurring to abutting owner on highway. Id. Damages that occur where repairs and improvements are diligently prosecuted by a state are damnum absque injuria. Id.

31. Court of claims, in adjudging compensation for land appropriated by state, cannot place value below that given by any witness. Buchard v. State, 128 App. Div. 750, 113 NYS 233. Claimant for compensation for land appropriated by state is entitled to reimbursement for expense of obtaining clerks search showing her title, which is prerequisite to payment of claim, since otherwise she would not receive full compensation as entitled by constitution. Id. Cost of search not disbursement within Code Civ. Proc. § 274, providing that no disbursements be allowed by court of claims. Burchard v. State, 128 App. Div. 750, 113 NYS 233. State cannot take land for canal without disbursement. Id.

32. Where state, with duty of keeping bridge in safe condition, permitted use of same by street railway on condition that it pay damages that might occur from construction and maintenance of railway, and bridge, being weakened by continuous use, collapsed, resulting in injury of passenger, which was paid by state, state **could not recover** such damages from railway, the consent not binding the company to maintain the bridge in a safe condition. People v. Syracuse Rapid Transit R. Co., 129 App. Div. 800, 114 NYS 776. Primary duty to keep bridge in safe condition upon state as far as traveling public is concerned. Laws 1894, pp. 621, 630-633, 643, c. 338, §§ 23, 50, 53, 111. Real cause of injury, gross negligence of state. Id. Where duty, state properly liable for damages resulting to claimant and costs of enforcing same. Laws 1894, p. 629, c. 338, § 37, and Laws 1899, p. 621, c. 280, § 1. Id.

33. Held independent contractor. Coolidge v. State, 61 Misc. 38, 114 NYS 553.

34. Not like ordinary debtor. People v. Glynn, 126 App. Div. 519, 110 NYS 405.

35. American Banana Co. v. United Fruit Co. [C. C. A.] 166 F 261.

36. **Search Note:** See notes in 6 C. L. 1519; 5 Ann. Cas. 295.

See, also, States, Cent. Dig. §§ 178-203; Dec. Dig. §§ 190-215; 26 A. & E. Enc. L. (2ed.) 485; 20 A. & E. Enc. P. & P. 587.

37. Thomas v. State [Idaho] 100 P 761; Union Trust Co. v. State [Cal.] 99 P 183.

38. Must be found in state constitution or statutes. Thomas v. State [Idaho] 100 P 761. See ante, § 6, Claims.

39. Must be clear and unambiguous. Thomas v. State [Idaho] 100 P 761.

40. In action to admeasure dower which had escheated to state, appearance of attorney general generally in action, and also upon hearing before referee on title, did not work waiver by people of jurisdictional question involved in making state a party. Smith v. Doe, 111 NYS 525. Judgment not conclusive where no statutory authority to make state party. Id.

41. Officers of dispensary created by law are officers of government, and are not suable as such except by express provision of law. Fowler v. Rome Dispensary, 5 Ga. App. 36, 62 SE 660.

42. For that purpose to be regarded as corporations sub modo. Stern v. State Board of Dental Examiner, 50 Wash. 100, 96 P 693. State board of dental examiners not exempt from suit by individuals. Id. Action against state dental board of examiners by attorney for services in assisting in prosecutions pursuant to employment by board is in no sense an action against the state. State not bound by judgment, and none of its funds charged with payment. Id. Ballinger's Ann. Codes & St. § 5676 (Pierce's Code, § 1358), as to enforcing judgments against counties and other public corporations, not applicable to judgments against state dental board. Not public corporation of character specified, not paying by orders and warrants but, by § 3031 (Pierce's Code, § 4474), handling its funds as individuals. Id. If mandamus proper to enforce payment of judgment, it is concurrent, not exclusive. Receivership proper remedy. Id.

43. Murray v. Wilson Distilling Co., 213 U. S. 151, 53 Law. Ed. —. Bill in equity to compel specific performance if contract between individuals and state cannot, as

A suit against state officials to enjoin the enforcement of unconstitutional legislation,[44] a suit to compel the performance of official duties,[45] or a suit where the state has no pecuniary interest or substantive right to protect,[46] is not an action against the state.

A state's power to maintain a suit has been exercised where an obstruction in a city street constituted a public nuisance,[47] where the navigation of a canal was obstructed,[48] and where money was received which a claimant was not entitled to.[49]

against objection of a state, be maintained in federal court. Id. Considering constitution and statutes of South Carolina establishing dispensary system, relation of debtor and creditor arose where state through officers purchased liquor. Id. Relation of debtor and creditor not altered by winding up act of Feb. 16, 1907. Id. Bill by vendors of liquor to enjoin dispensary commission, appointed to close out South Carolina dispensary, from disposing of fund and asking a receiver, on ground that fund of commissioners was trust fund to pay creditors, not maintainable, being suit against state within 11th Amendment. Id.; Murray v. South Carolina, 213 U. S. 174, 53 Law. Ed. —. Action to enjoin attorney general from instituting criminal proceedings, in effect an action against the state, and not maintainable in federal courts under Const. Amend. 11. Logan v. Postal Tel. & Cable Co., 157 F 570.

**44.** Not action against state since officers are judicially regarded as acting in personal capacities. Bennett v. Vallier, 136 Wis. 193, 116 NW 885; Ex parte Young, 209 U. S. 123, 52 Law. Ed. 714; Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 53 Law. Ed. 150. Immaterial whether officers are specially charged with enforcement of statute or whether duty devolves on them under general laws. Central of Georgia R. Co. v. Railroad Commission, 161 F 925. Suit to prevent enforcement of unconstitutional act not against state, as officers are ministerial subject to control of equity. Merchants Exch. v. Knott, 212 Mo. 616, 111 SW 565. Suit in federal court to prevent enforcement of rates not violative of Const. Amend. 11. Central of Georgia R. Co. v. Railroad Commission, 161 F 925; Consolidated Gas Co. v. New York, 157 F 849; Lindsley v. Natural Carbonic Gas Co., 162 F 954; St. Louis & S. F. R. Co. v. Hadley, 161 F 419. Where rate statutes were repealed and others substituted, repeal did not abate suits, and supplemented bills might be filed to enjoin enforcement of new acts. Central of Georgia R. Co. v. Railroad Commission, 161 F 925. **Action of federal court in enjoining** state officers from enforcing unconstitutional statute involves no question of state rights or right of local self-government. Id. Rates fixed by Virginia state corporation commission subject to injunction by federal court of confiscatory, though commission for some purposes is a court. Proceedings to establish rates legislative. Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 53 Law. Ed. 150. Bill to enjoin enforcement of rates as confiscatory is not bad as attempt to enjoin legislation. Id. Not barred by U. S. Rev. St. § 720, U. S. Comp. St. 1901, p. 581, forbidding federal courts from enjoining proceedings in state courts, since act looks to character of proceedings not body. Id. Suit not within prohibition of Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), where no proceedings begun in state court. Lindsley v. Natural Carbonic Gas Co., 162 F 954. Federal circuit court on principles of county **should not entertain suit to enjoin** rates before appeal to highest state court. Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 53 Law. Ed. 150.

**Relief denied:** Bill to enjoin enforcement of California statute, imposing license tax on corporations (St. 1905, p. 493, c. 386, as amended by St. 1906, p. 22, c. 19, and St. 1907, p. 664, c. 347), held not to state cause of action, since defendant secretary of state was charged with no duty to enforce law, had only made threats and no presumption that statute would be construed to render it obnoxious to federal constitution. Grand Trunk Western R. Co. v. Curry, 162 F 978. District court has no jurisdiction of **quo warranto to oust** railroad commission on ground that future acts would injure relator as unjust discrimination. State Railroad Commission v. People [Colo.] 98 P 7. Judicial department has no jurisdiction to interfere in advance of action with railroad commission acts, being state board performing functions of governmental character. Id.

**45.** Fleischman Co. v. Murray, 161 F 152.

**46.** Ex parte Fitzpatrick [Ind.] 86 NE 964. Requiring state board to pay costs of opinion of supreme or appellate courts is not requiring state to pay in ordinary sense, though payment is made from fund derived from state. Id. Under Burns' Ann. St. 1908, § 620 providing that, in actions on relation of state, relator pay costs, except when relator is state officer by virtue of his office, and considering prior statutes, express provisions and policy of law are against taxation of costs or fees to state. Id.

**47.** City's right not exclusive. Alabama Western R. Co. v. State [Ala.] 46 S 468. Public street, public highway. Id.

**48.** State as trustee for people has right to intervention of court to protect valuable right of free navigation. State v. Columbia Water Power Co. [S. C.] 63 SE 884. State's property right might be protected by injunction. In addition to being permanent nuisance. Id. Remedy by indictment not exclusive nor adequate. Id. Under Civ. Code 1902, § 641, state by attorney general might file information against persons who intruded on property of state or erected nuisance thereon. Even if attorney general's right to enjoin obstruction of navigation of canal as nuisance were doubtful. Id. Refusal to enjoin obstruction when right to free navigation established by law and express contract would be arbitrary. Application not to be refused on ground that benefits to city exceed value of right to free navigation. Id. No defense that necessity of free navigation has ceased when contract for same. Id.

**49.** An action by state is proper to enforce obligation. Commonwealth v. Bacon, 33 Ky.

The state can always proceed by mandamus to enforce a legal duty created by the authority to which it has intrusted power to create it;[50] but the use of the state's name in mandamus may be altogether unnecessary.[51] The common-law prerogative right of a sovereign to priority in payment of demands due is sometimes exercised by a state.[52] A state which institutes a suit in its own behalf to some extent subjects itself to the rules applicable to ordinary suitors.[53] Limitations do not run against a state[54] unless the privilege is waived[55] or an estoppel arises.[56] In mandamus to compel the issuance of a warrant by the auditor to pay a reward offered by the governor, a meritorious defense should be allowed, though not tendered in time.[57]

## STATUTES.

§ 1. **Enactment, 1920.** Authentication and Approval, 1921. Special Sessions, 1921. When Effective, 1921. Submission to Popular Vote, 1922. Publication, 1922. The Journals, the Enrolled Bill, and Other Evidence, 1922.
§ 2. **Special or Local Laws, 1923.** In General, 1923. Classification, 1925. Based on Population, 1927. Local Option Laws, 1927. County and Township Affairs, 1927. Municipalities, 1927.
§ 3. **Subjects and Titles, 1928.** Partial Invalidity, 1933.
§ 4. **Amendments, Adoptions, Codes and Revisions, 1934.** Reference to Act Amended, 1934. Effect of Amend-

L. R. 935, 111 SW 387. Under Ky. St. 1903, § 3974, as to presentation of bills for public printing, commissioners act simply in ministerial capacity, and where claim approved by mistake, or by being misled by claimant, state may recover money improperly received. Id.

**50.** When state invests city with power to make orders as to construction and operation of street railroad, it charges those against whom orders are directed with duty of obeying, and obligation is therefore imposed by law. State v. New York, etc., R. Co. [Conn.] 71 A 942. Where Gen. St. 1902, § 3824 (Pub. Acts 1907, p. 806, c. 219) authorizes city control over street railway tracks, etc., and also authorizes mandamus to compel obedience, procedure may be in name of city, of state on relation of city, or in name of state alone. Id. Mandamus entitled "State ex rel.," is procedure by state as plaintiff to enforce its laws. Id.

**51.** Mandamus by certain counties to compel assessment of railroad's property. Where counties real partie's complainant, with right to sue in their own name. State v. Enloe [Tenn.] 117 SW 223. Right of counties to use name of state in mandamus to compel assessment of tax not authorized by Shannon's Code, § 495. Not within §§ 5165 5187, as to proceedings by state against corporations and to prevent usurpation of office. Id. No statute authorizing state's name to be used in such case. Id. Where state is to be bound by proceedings to collect taxes by suits at law or equity or other debts due state, it must appear by attorney general. Shannon's Code, § 5756, subsec. 5, § 6105. Id. Demurrer to mandamus properly sustained where counties acting in name of state sought to compel assessment of certain railroad properties, and effect would be to deprive state of benefits previously obtained for right which would be burden in reality. Id. Whether state be considered real party or not. Id.

**52.** State is entitled to priority over other creditors of defaulting public officer in collection of its delinquent revenue on his bond. United States Fidelity & Guaranty Co. v. Rainey [Tenn.] 113 SW 397. Part of common law transmitted to Tennessee from North Carolina. Id. Under the common law, state is entitled to priority of payment out of the effects of an insolvent, and rule not changed by statute. Booth v. State, 131 Ga. 750, 63 SE 502. State entitled to priority of assets bank, which was state depositary against individual creditors and depositors. Id.

**53.** State v. Holgate [Minn.] 119 NW 792. Equitable action by state opens door to any defense or cross complaint germane to controversy that defendant may see fit to interpose. State v. Kilburn [Conn.] 69 A 1028; State v. Holgate [Minn.] 119 NW 792. Claims and demands arising out of independent transactions are in effect suits against the state and cannot, without state's consent, be asserted as set-off or counterclaim. Id. In mandamus by state to compel payment of taxes collected and in possession of county treasurer, defendant cannot plead, by way of set-off or counterclaim, that other money formally collected had been lost through failure of banks, where deposited and paid in expectation of refund from banks and bondsmen. Id. State party to action subject to estoppel as other party litigant. Chicago, etc., R. Co. v. Douglas County, 134 Wis. 197, 114 NW 511.

**54.** In re Wyoming Valley Ice Co., 165 F 789; Cedar Rapids Gaslight Co. v. Cedar Rapids [Iowa] 120 NW 966. Under Shannon's Code, § 4453, there is no limitation applicable to the state in civil actions. State v. Standard Oil Co. [Tenn.] 110 SW 565. Rule applicable where state, though not real party in interest. Anderson v. Ritterbusch [Okl.] 98 P 1002. Person paying delinquent taxes equitable subrogated to rights and lien of state, against which limitations did not run. Childs v. Smith [Wash.] 99 P 304.

**55, 56.** In re Wyoming Valley Ice Co., 165 F 789.

**57.** State not affected by laches of officers. Hager v. Sidebottom [Ky.] 113 SW 870. See ante, § 4, Officers.

ments and Adoptions, 1935. Revisions and Codes, 1936.
**§ 5. Interpretation, 1937.**
A. Occasion for Interpretation, 1937.
B. General Rules, 1937.
C. Aids to Interpretation, 1942.
D. Words, Punctuation and Grammar, 1945.
E. Exceptions, Provisos, Conditions and Saving Clauses, 1947.
F. Mandatory or Directory Acts, 1948.
G. Strict or Liberal Constructions, 1948.
H. Partial Invalidity, 1951.
**§ 6. Retrospective Effect, 1953.** Curative Acts, 1954.
**§ 7. Repeal, 1955.**
A. In General, 1955.
B. Implied Repeal, 1957.

*The scope of this topic* is noted below.[58]

§ 1. *Enactment.*[59] See 10 C. L. 1705—The legislature has full power to legislate on any subject and to adopt its own rules, regulations, and methods of enacting such legislation, unless prohibited by the constitution.[60] Legislative rules or constitutional requirements relating to the passage of bills by the legislature,[61] such as those requiring notice of special legislation,[62] those relating to readings of the bill,[63] and entry of the final vote in the journals,[64] must of course be complied with,

**58. It includes** general rules as to enactment, amendment, interpretation and repeal of statutes, and the rules as to special or local legislation, and subjects and titles. **It excludes** constitutional limitations generally (see Constitutional Law, 11 C. L. 689) and the interpretation of particular acts (see topic dealing with subject-matter).

**59. Search Note:** See notes in 14 L. R. A. 251; 15 Id. 243; 23 Id. 340; 35 Id. 188; 37 Id. 391; 49 Id. 243; 47 A. S. R. 814; 3 Ann. Cas. 737; 4 Id. 905; 6 Id. 717; 9 Id. 532.

See, also, Statutes, Cent. Dig. §§ 1-50; Dec. Dig. §§ 1-52, 65; 26 A. & E. Enc. L. (2ed.) 534, 23 Id. 589.

**60.** Canek v. Skeen [Va.] 63 SE 11.

**61.** Journal record of bill and amendment held to show compliance with Const. art. 3, § 15, in passage of bill. Tarr v. Western Loan & Sav. Co. [Idaho] 99 P 1049. Gen. Acts 1907 (Spec. Sess.), p. 80, is **void** because senate journal shows that bill was reported back from one committee after having been referred to another. Const. 1901, § 62, violated. Tyler v. State [Ala.] 48 S 672. Const. 1901, § 63, having been violated on final passage of bill, **defect** was **not cured** by proper passage of amendment suggested by governor on returning bill. Last vote, under Const. 1901, § 125, is only on amendment. State v. Martin [Ala.] 48 S 846. Bill originating in senate was there passed, and amended and passed in house, and senate now concurred in amendments, and conference committee agreed on amended bill, and senate adopted report by aye and nay vote by constitutional majority. Held, bill **legally adopted** by senate in accordance with rule 39 adopted for 1903 session. Stephens v. Labette County Com'rs [Kan.] 98 P 790.

**62.** Const. 1901, § 106, requiring notice of intention to apply for local or special law, is **mandatory,** and invalidates a law passed without it. Larkin v. Simmons [Ala.] 46 S 451. **Portion of law held valid,** having been published in accordance, with Const. 1901, § 106. Immaterial that substance of another section, held void and expunged, was not published. Ham v. State [Ala.] 47 S 126.

**Notice insufficient:** Notice of intention to apply for law for transfer of causes in county court and to invest circuit court with jurisdiction held insufficient to authorize passage of Act Aug. 1, 1907, relating to courts. Larkin v. Simmons [Ala.] 46 S 451.

**Notice sufficient:** One day's notice by member introducing bill, under Comp. Laws, §§ 8569, 8570, 8571, held sufficient where it repealed local corporation charter. Const. art. 15, § 16, requiring notice of "alteration" of corporate charter, inapplicable. People v. Calder, 153 Mich. 724, 15 Det. Leg. N. 619, 117 NW 314.

**Notice necessary:** Constitutional requirements as to manner of passing acts authorzing counties, etc., to issue bonds, are mandatory. Compliance therewith necessary to validity of legislation. Wittkowsky v. Jackson County Com'rs [N. C.] 63 SE 275. Word, "County," used in Const. art. 2, § 14, prescribing mode of passing laws authorizing counties, etc., to issue bonds, includes townships and similar subdivisions. Id.

**Notice unnecessary:** Acts 1908, c. 97, changing mode of administration of board of Yazoo-Mississippi delta, does not violate Const. § 234, that no bill changing boundaries or affecting revenue of district shall be considered unless published, etc. Babo v. Yazoo-Mississippi Delta Com'rs [Miss.] 46 S 819. Const. 1890, § 234, that no bill affecting taxation or revenue in Yazoo-Mississippi levee district shall be considered in legislature unless published four weeks in newspaper, etc., does not apply to Acts 1908, p. 59, c. 73, § 7, imposing privilege tax on fire insurance companies and prohibiting imposition of any further tax by local subdivisions or levee districts, since latter act is general and affects Yazoo-Mississippi district only incidentally. Royal Ins. Co. v. Yazoo-Mississippi Delta Com'rs [Miss.] 48 S 183.

**63.** Where record shows bill was "read in full" before final passage, this shows reading in full, "section by section," as required by constitution. Tarr v. Western Loan & Sav. Co. [Idaho] 99 P 1049. Bill authorizing state treasurer to issue bonds to pay debt, or to pay debt with money, does not "pledge the credit of the state" within Const. art. 2, § 16, requiring such bills to be read three times in each house. Battle v. Lacy [N. C.] 64 SE 505.

**64.** Colorado Const. art. 5, § 22, that "no bill shall become a law * * * unless on

though provision is sometimes made for suspension of rules in emergency cases.[65] Whether an act is a special or local law, so as to require notice of intention to apply for it, is a legislative, not a judicial, question.[66] Revenue bills must originate in the lower house in some states.[67] A revenue bill is one having for its main object the raising of revenue. The term did not include a bill having a different purpose but under which revenue is incidentally created.[68]

*Authentication and approval.* See 10 C. L. 1705—Where the constitution provides only for presentation to and approval by the governor, an act is not invalidated by failure to comply with a rule of the legislature requiring authentication of bills by the presiding officers of both houses.[69] Authentication, in accordance with rules, by the presiding officers of both houses, is not conclusive evidence of the passage of a bill or of its contents when passed, and it may be contradicted or controlled by journal entries.[70] Authentication by a de facto presiding officer is sufficient.[71] Approval of a bill differing from that passed is ineffective.[72] Approval by the governor is the last legislative act essential to the enactment of a statute.[73]

*Special sessions* See 8 C. L. 1977—are ordinarily authorized to consider only such matters as are embraced within the call by which the session was convoked.[74]

*When effective.* See 10 C. L. 1705—Statutes usually become effective when approved,[75] or within a stated time after their approval [76] or after the adjournment of

its final passage the vote be taken by ayes and noes, and the names of those voting be entered on the journal," is mandatory. Failure to comply is fatal to act. Portland Gold Min. Co. v. Duke [C. C. A.] 164 F 180. Sess. Laws 1901, p. 161, c. 67, never became law, because vote on final passage was never entered on journal. Id. Where bill was passed by one house, amended by the other, and returned, it was not necessary to enter ayes and noes and names of those voting on the amendment on the journal. Const. art. 5, § 24, applies to final passage of original bills. Johnson v. Great Falls [Mont.] 99 P 1059. Const. 1901, § 63, violated where, on final passage of bill, senate journal showed that there were 14 yeas and 14 nays, and that presiding officer cast ballot for bill, and journal set out names of those voting for, but omitted those voting against, the bill. State v. Martin [Ala.] 48 S 846.

65. Const. art. 3, § 15, providing for three readings of bills on separate days, and that such provision may be dispensed with by two-thirds vote in urgent cases, applies to amendments as well as original bills, and three readings of amendment may be dispensed with in same way. Tarr v. Western Loan & Sav. Co. [Idaho] 99 P 1049. Acts 1908, p. 594, c. 336, was passed under vote dispensing with three readings on separate days, as permitted by Const. 1902, § 50, but did not contain an emergency clause making it effective at once, as allowed by § 53. Held valid. No emergency clause needed. Conek v. Skeen [Va.] 63 SE 11, Fort Worth City Charter, Laws 1907, § 163, held to contain sufficient declaration of emergency, under Const. art. 3, § 32, to warrant suspension of rule requiring three readings and immediate operation of law on passage. Orrick v. Fort Worth [Tex. Civ. App.] 114 SW 677.

66. Under Const. art. 5, § 25. Caton v. Western Clay Drainage Dist. [Ark.] 112 SW 145.

67. Anderson v. Ritterbusch [Okl.] 98 P 1002.

68. Sess. Laws 1907-08, c. 81, art. 9, for discovery of property for listing and taxation, is not revenue bill; origin in senate proper. Anderson v. Ritterbusch [Okl.] 98 P 1002.

69. Approval by governor makes bill the law, though not signed by president of senate. Simon v. State [Ark.] 111 SW 991.

70. Simon v. State [Ark.] 111 SW 991.

71. Governor being ill, authentication by president of senate as such and also as governor held sufficient. Simon v. State [Ark.] 111 SW 991.

72. Where bill as passed by two houses contained certain sections which were not in bill as signed by speaker of house, president of senate, and governor, it was invalid; cannot be presumed that bill passed would have been signed, or that that signed would have been passed. King Lumber Co. v. Crow [Ala.] 46 S 646.

73. Stuart v. Chapman [Me.] 70 A 1069.

74. Act No. 17, p. 19, of 1907 (Extra Sess.), relating to care of parish school funds, is germane to objects expressed in governor's call. State v. Romero, 122 La. 885, 48 S 312. Acts 1908, p. 1112, providing scheme for raising revenue for development of penitentiary system and care of convicts, held within object expressed in call for session of legislature by which it was passed. Carroll v. Wright, 131 Ga. 728, 63 SE 260.

75. When no time is fixed for the taking effect of an act, it becomes effective from the day of its approval. Montgomery Trac. Co. v. Knabe [Ala.] 48 S 501.

76. Where act provides that it shall take effect six months after its passage, this means six months after its approval. Denver & R. G. R. Co. v. Brennaman [Colo.] 100 P 414.

the session,[77] in the absence of an emergency clause.[78] The declaring of an emergency by the legislature by expressing in the act that it is immediately necessary for the preservation of the public place, health, and safety, when it is not of the class specifically excepted from its application is conclusive on the courts.[79] Nothing appearing to the contrary, statutes approved on the same day are presumed to have been approved contemporaneously.[80] The numbering of statutes is not a legislative, but a ministerial act,[81] and no presumption as to order of time in which statutes were passed can arise from their numbering.[82] Where a statute provides that it shall take effect and operate from and after a day named, the phrase "from and after" includes the day from which the reckoning is to be made.[83]

*Submission to popular vote* See 10 C. L. 1708 is sometimes necessary before a law becomes effective.[84] Initiative and referendum provisions in state constitutions do not violate the federal constitution.[85] A statute enacted under the initiative and referendum clause of a constitution is not subject to the veto power of the governor.[86]

*Publication* See 10 C. L. 1706 is sometimes a prerequisite to the law taking effect.[87]

*The journals, the enrolled bill, and other evidence.* See 10 C. L. 1706—Whether a purported public statute is or is not a law is a question of law,[88] in determining which judicial notice will be taken of the published legislative journals.[89] Legislative journals are the sole evidence of their proper contents. They cannot be aided or varied by loose memoranda made by clerical officers.[90] The only official journal is that filed in the office of the secretary of state, and this must control when there is a discrepancy between it and the printed journal.[91] Courts will go behind a statute and examine the legislative records only when some defect therein is suggested.[92] An enrolled statute imports absolute verity and is conclusive evidence of the passage of the act and of its validity,[93] unless the journals of the legislature show affirmatively, clearly and conclusively, and beyond all doubt, that the act was not passed regularly and legally,[94] and this rule applies to the title as well as to the body of the act.[95] In Kentucky an enrolled bill cannot be impeached by the journals of either house,[96] and where the enrolled statute is plain and unambiguous, there is

77. Laws 1908, p. 172, c. 10, § 5, creating lien for assessments, did not take effect until 90 days after adjournment of session. Oklahoma City v. Shields [Okl.] 100 P 559. Section 44 of General Game Law (Laws 1907, p. 81) became effective 30 days after adjournment of session enacting it (Code 1896, § 5540), there being no express provision as to when it should become effective. Glenn v. State [Ala.] 48 S 505. Where an act provides that it shall go into effect immediately upon its approval by the governor, and it becomes a law without the governor's approval, it does not become effective until 60 days from final adjournment of session of legislature at which it was enacted. Thompson v. State [Fla.] 47 S 816.

78. Act providing for preliminary examination in felony cases (Laws 1907, p. 243) had no emergency clause, did not become effective until July 14, 1907, and did not apply to robbery case begun before that time. State v. Moran [Mo.] 115 SW 1126.

79. In re Menefee [Okl.] 97 P 1014; Oklahoma City v. Shields [Okl.] 100 P 559.

80. Stuart v. Chapman [Me.] 70 A 1069.

81. Performed by executive officers in secretary of state's office. Stuart v. Chapman [Me.] 70 A 1069.

82. Stuart v. Chapman [Me.] 70 A 1069.

83. Whittaker v. Mutual Life Ins. Co., 133 Mo. App. 664, 114 SW 53.

84. Local option law (Gen. Laws 1905, p. 41) was approved by vote of people June 6, 1904, and became effective by proclamation of governor June 24, 1904. When made applicable in any particular district, it relates back to date of promulgation. Hall v. Dunn [Ore.] 97 P 811.

85, 86. State v. Pacific States Tel. & T. Co. [Or.] 99 P 427.

87. Official publication of a law on July 4th does not make it invalid. State v. Bertrand, 122 La. 856, 48 S 302.

88. Cannot be made on issue of fact by the pleadings. Portland Gold Min. Co. v. Duke [C. C. A.] 164 F 180.

89. Portland Gold Min. Co. v. Duke [C. C. A.] 164 F 180.

90, 91, 92. State v. Martin [Ala.] 48 S 846.

93, 94. Stephens v. Labette County Com'rs [Kan.] 98 P 790.

95. Stephens v. Labette County Com'rs [Kan.] 98 P 790. Where journals were self-contradictory, but, reasonably construed together, indicated that title of bill was same when adopted by both branches as it appears in enrolled bill, presumption in favor of validity is sustained. Id.

no necessity, in construing the statute, to call to aid the legislative journals or other extraneous matter.[97] Where there is a conflict between the language of the bill as enrolled in the office of the secretary of state and as it appears in the volume published by the public printer, the former controls.[98]

§ 2. *Special or local laws. In general.*[99] See 10 C. L. 1706—"Local" means applicable only to a portion of the territory of the state.[1] A private bill is one which applies only to individuals or private corporations.[2] A general law is one which applies equally and uniformly[3] to all persons or things of a class.[4] A special act is one which applies only to particular persons or things of a class, or one which grants some special right, privilege or immunity, or imposes a special burden or disability.[5] The test of generality is not whether an act embraces all of the governed,[6] but whether it operates alike on all similarly situated.[7] Whether a law is

**96, 97.** Duncan v. Combs [Ky.] 115 SW 222.

**98.** Bass v. Doughty, 5 Ga. App. 458, 63 SE 516.

**99. Search Note:** See notes in 14 L. R. A. 566; 16 Id. 251; 5 L. R. A. (N. S.) 327; 1 A. S. R. 903; 21 Id. 780; 25 Id. 870; 93 Id. 106; 4 Ann. Cas. 659; 6 Id. 926.

See also, Statutes, Cent. Dig. §§ 67-116; Dec. Dig. §§ 66-104; 26 A. & E. Enc. L. (2ed.) 529.

**1.** People v. Wilcox, 237 Ill. 421; 86 NE 672. Local means confined to particular municipality or portion of state. Gubner v. McClellan, 130 App. Div. 716, 115 NYS 755. Words "local" and "special" synonymous as used in Const. art. 3, § 30, prohibiting special laws. Eckerson v. Des Moines, 137 Iowa. 452, 115 NW 177.

**2.** One applying to municipal corporation, not private. Gubner v. McClellan, 130 App. Div. 716, 115 NYS 755.

**3.** A constitutional provision that laws shall not be local or special does not require uniformity, but uniformity is only a test of their generalty. Pulaski Tp. Poor Dist. v. Lawrence County, 222 Pa. 358, 71 A 705.

**4.** P. L. 1902, p. 371, authorizing incorporated towns to construct, operate and maintain systems of sewers, applies to any town which may be incorporated at time proceedings under act are begun. Act is valid. Frelinghuysen v. Morristown [N. J. Law] 70 A 77, afd. [N. J. Err. & App.] 72 A 2. Laws 1907, c. 230, prohibiting running at large of live stock in counties where three-fourths of lands outside corporate limits are fenced, and requiring county board to determine whether three-fourths of lands are fenced on petition by 10 or more freeholders, is valid, applying generally; not discriminatory. State v. Storey [Wash.] 99 P 878. Public Service Commissions Law (Laws 1907, p. 889, c. 429) is general and public, not private or local law. Gubner v. McClellan, 130 App. Div. 716, 115 NYS 755. Provision in Motor Vehicle Act, § 18, that proof of excessive speed and injury makes prima facie case of negligence, does not make it special legislation. Hartje v. Moxley, 235 Ill. 164, 85 NE 216. Exemption of women from provisions of registration statute (Code, § 1131), valid, since they are allowed to vote only on certain questions, and not at general elections. Coggeshall v. Des Moines, 138 Iowa, 730, 117 NW 309.

**5.** "Special" means that same right, privilege or immunity has been granted to, or some burden imposed upon, some portion of the people less than all. People v. Wilcox, 237 Ill. 421, 86 NE 672. A law is not general if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law. Cal. St. 1907, p. 836, c. 447, as to proof in actions on insurance contracts, is **invalid.** Board of Education v. Alliance Assur. Co., 159 F 994. Appeal statute which gave appellate court power to render final judgment against one party but not other **held special legislation.** Statutes must confer equal rights and burdens upon all. Hayward v. Sencenbaugh, 235 Ill. 580, 85 NE 939. Statute making certain acts criminal only when committed against citizens or residents of state of Nebraska, invalid as **special** legislation. Greene v. State [Neb.] 119 NW 6. Primary Election Law of 1906, § 2, defining political party as one casting at least ten per cent of votes for governor at last election, is **not invalid** as special law creating special privileges, in violation of Const. 1898, art. 48. State v. Michels, 121 La. 374, 46 S 430.

**6.** A law is general, not because it embraces all of the governed, but because it may do so when they occupy the same position as those who are embraced in its terms. Saylor v. Duel, 236 Ill. 429, 86 NE 119.

**7.** See, also, post, Classification. That a law does not operate equally on every individual or municipal corporation in the state does not make it special. A law is general if it operates alike on all similarly situated. Dawson Soap Co. v. Chicago, 234 Ill. 314, 84 NE 920. Under Const. art. 3, § 56, prohibiting special or local laws on certain subjects and in all cases where a general law can be made applicable, unless notice is given, etc., a special law is one applicable to certain persons or matters. A law is general if it applies equally and uniformly to all things or persons within the territorial limits described. Smith v. State [Tex. Cr. App.] 113 SW 289. Whenever a law of a general nature is in terms applied to the state generally, it is uniform in operation, though practically it does not operate in every part of the state. Anderson v. Ritterbusch [Okl.] 98 P 1002. Application rather than subject determinative of

general or special is to be determined by the subject-matter and not by its form.[8] Where a law is enacted to accomplish a governmental purpose and carry out a direct mandate of the constitution, and the nature of the subject is such that no general law could be made to apply, it is no objection to the validity of the law that it is special in form.[9] Local or special legislation is prohibited by constitutional provisions in most jurisdictions.[10] In some, the constitution prohibits special legislation on certain enumerated subjects,[11] and such provisions are mandatory.[12]

whether act is special or general. Eckerson v. Des Moines, 137 Iowa, 452, 115 NW 177. Acts 1908, p. 359, c. 654, is general in that it provides complete system for construction, regulation and control of **public roads**, though technically local in that it applies only to Anne Arundel county. Anne Arundel County Com'rs v. United R. & Elec. Co. [Md.] 72 A 542. Laws Ex. Sess. 1906, c. 55 (Burnit Record Act), authorizing **restoration of lost or destroyed records**, is not local or special legislation. People v. Fallon [Cal.] 99 P 202. St. 1907, p. 414, c. 189, making it **crime to receive bank deposits with knowledge of banks' insolvency**, is not invalid, as special legislation. Ex parte Pittman [Nev.] 99 P 700. Laws 1907, p. 400, c. 250, regulating **sale of black powder to miners**, is not special legislation. Ex parte Williams [Kan.] 98 P 777. Acts 1904, p. 214, c. 116, providing that any **corporation chartered as social club** and **paying tax to state** may distribute liquors to members without paying any other tax or license, is general, not special. City of Norfolk v. Trade & Business Men's Ass'n. [Va.] 63 SE 987. Code 1904, §§ 1759, 1766, is not a local or special law, since it applies equally throughout the state and makes all persons guilty of violations guilty of misdemeanor **(regulating sale of poison)**. Bertram v. Com., 108 Va. 902, 62 SE 969. Cobbey's St. 1907, § 9800 et seq., **regulating practice of medicine**, not invalid as special legislation. Mathews v. Hedlund [Neb.] 119 NW 17. An act under which special elections for **relocation or removal of county seats** are provided for, applicable to all the counties of the state alike, is not special or local, within Const. art. 5, §§ 32, 46. City of Pond Creek v. Haskell [Okl.] 97 P 338.

**8.** State v. Lawrence [Kan.] 100 P 485.

**9.** State v. Lawrence [Kan.] 100 P 485. Laws 1870, p. 54, c. 21, authorizing City of Lawrence, on vote of people, to issue bonds in aid of university and levy and collect taxes to pay sams, does not violate Const. art. 12, nor art. 11, § 1. Id.

**10. Held invalid:** Law for **protection of fish**, excluding part of state from its operation, invalid. Peopls v. Wilcox, 237 Ill. 421, 86 NE 672.

**11.** Const. art. 4, § 33, prohibits amendment, extension or modification of local or special act by another local or special act, not by general act. Farwell v. Minneapolis 105 Minn. 178, 117 NW 422. Const. art. 3, § 18, prohibiting passage of special or local act **altering or discontinuing highways**, is violated by Laws 1895, p. 2067, c. 1018, empowering Rochester water commissioners to close highway in certain town, without consent of town highway commissioners, to improve its water supply. City of Rochester v. Gray, 60 Misc. 591, 112 NYS 774. Acts 1906, p. 121, providing for **change of county lines** in certain cases, **held not special** but general; does not violate Civ. Code 1895, §§ 5926, 5732, prohibiting special legislation in certain cases. Manson v. College Park, 131 Ga. 429, 62 SE 278. Should Laws 1905, p. 883, c. 375, be construed as re-enactment of charter of hospital exempting it from taxation, it would be void under Const. art. 3, § 18, prohibiting local or special laws granting **exemptions from taxation.** People v. Raymond, 126 App. Div. 720, 111 NYS 177. Const. art. 3, § 7, prohibiting special acts **changing methods of collecting debts or enforcing judgments**, is violated by Mechanic's Lien Law (1901), § 28 (P. L. 445), giving subcontractor or materialman right to issue attachment execution against owner or other party, being for benefit of special class of creditors. Vulcanite Portland Cement Co. v. J. W. Allison Co., 220 Pa. 382, 69 A. 855. Act June 4, 1901, § 46 (P. L. 452), relating to mechanics' liens, provides that, where judgment is recovered on claim which names property essential to business of public service corporation, claimant shall have execution as in other cases of judgments against corporations, thus giving remedy by proceeding in personam. Held invalid as special legislation, ordinary remedy to enforce liens being by proceeding in rem only. Vulcanite Pav. Co. v. Philadelphia Rapid Transit Co., 220 Pa. 603, 69 A 1117. Laws 1907, p. 269, c. 139, providing for drawing of juries in counties having a city or cities aggregating 30,000 or mors population, is a general law, within Const. art. 3, § 56, prohibiting special laws relating to **drawing of juries**, though act differs from jury law in other parts of the state. Smith v. State [Tex. Cr. App.] 113 SW 289; Logan v. State [Tex. Cr. App.] 111 SW 1028; Pate v. State [Tex. Cr. App.] 113 SW 759; Northern Tex. Trac. Co. v. Danforth [Tex. Civ. App.] 116 SW 147. Cal. St. 1907, p. 836, c. 447, requiring disclosure of certain proof by insurance companies defending actions on contracts, invalid as special legislation regulating **practice**, prohibited by Cal. Const. art. 4, § 25, subd. 3. Board of Education v. Alliance Assur. Co., 159 F 994. Hurd's Rev. St. 1905, c. 37, § 300, authorizing judges of municipal courts to instruct juries orally or in writing, is not invalid as special or local law regulating **court practice** (Const. art. 4, § 22) nor does it lack uniformity of operation (Const. art. 4, § 34). Morton v. Pusey, 237 Ill. 26, 86 NE 601. Municipal Court Act, § 23, is invalid because it attempts to provide special mode of **procedure** in appellate court in cases brought up from municipal court. Clowry v. Holmes, 238 Ill. 577, 87 NE 303. Act granting franchise to existing corporation to construct canal and toll locks in river not violative of Const. art. 11, § 2, prohibiting creation of **private corporations** by

Some constitutions prohibit special laws where a general law can be made applicable.[13] Under such a constitutional provision, it is usually held that the legislative determination of the question whether a general law can be made applicable is conclusive on the courts,[14] except where there has been a clear disregard of the constitutional limitation.[15] But in Kansas the question has now been made a judicial one upon which the courts may pass,[16] and, in that state, the principle that an act is presumptively valid and must be upheld, if possible, is not in such case applicable.[17] In some states, local or special acts may be passed on some subjects when the procedure prescribed by the constitution is followed.[18] A law making an appropriation to an individual or corporation is valid though it is not and cannot be made general.[19]

*Classification.* See 10 C. L. 1708—A reasonable classification of objects of legislation or localities may be resorted to without rendering an act objectionable as a local or special law.[20] The classification must be reasonable and not merely ar-

special act. State v. Portland General Elec. Co. [Or.] 98 P 160. Under Const. art. 8, § 1, prohibiting creation of corporations by special act where object of incorporation can be attained under general laws, whether general laws suffice or special act is necessary is question for legislative discretion, not reviewable by courts. Economic Power & Const. Co. v. Buffalo, 59 Misc. 571, 111 NYS 443. Const. art. 12, § 1, that corporations must be formed under general laws, construed with § 4, defining "corporations," refers only to private corporations, not to hospital for insane maintained by state, which is state agency. Napa State Hospital v. Dasso, 153 Cal. 698, 96 P 355.

12. No special acts can be passed on such subjects. People v. Wilcox, 237 Ill. 421, 86 NE 672.

13. Laws 1908, p. 50, c. 52, **creating new court** for Wyandotte county, is void because special. State v. Hutchings [Kan.] 98 P 797. General law can be made applicable to whole state and adequate to furnish reasonable facilities for discharging the judicial business which now comes or may come within cognizance of the district court in any county. Id. Laws 1907, p. 94, c. 72, providing for **erection and removal of bridges** in Cloud county and authorizing commissioners to issue bonds for expense, is invalid, under Const. art. 2, § 17. Anderson v. Cloud County Com'rs, 77 Kan. 721, 95 P 583. Laws 1907, p. 384, c. 244, attempting to **legalize steps taken in disorganization and consolidation of certain school districts,** is not curative but creative act, and is special and void under Const. art. 2, § 17. Gardner v. State, 77 Kan. 742, 95 P 588. Laws 1907, p. 536, c. 370, attempting to **disorganize certain school districts and consolidate them into one is void.** State v. Nelson [Kan.] 96 P 662. Laws 1907, p. 285, c. 179, special act purporting to **create city court** of Chanute, is void because a general act can be passed giving similar judicial facilities to cities with like conditions. State v. Nation [Kan.] 96 P 659. Laws 1907, p. 534, c. 368, providing for **special tax levy for construction and equipment of county high school** building for Scott County, is special and invalid. Deng v. Scott County Com'rs, 77 Kan. 863, 95 P 592.

14. Whether general law can be made applicable is for legislature, not for courts. People v. McBride, 234 Ill. 146, 84 NE 865. Determination by legislature that no general law can be made applicable is not open to review. People v. Wilcox, 237 Ill. 421, 86 NE 672. Prior to constitutional amendment of 1906, enactment of special law was conclusive determination by legislature that general law was not applicable. Stephens v. Labette County Com'rs [Kan.] 98 P 790.

15. Whether general law can be made applicable is for legislature. Courts may interfere only in cases of clear disregard of constitution. Board Directors of Woman's Relief Corps Home Ass'n v. Nye, [Cal. App.] 97 P 208.

16. Under Const. art. 2, § 17, that in all cases where a general law can be made applicable no special law shall be passed, the question whether a general law is applicable must be first solved by the legislature, but on an attack being made on an act, the final solution of the question is for the courts, the decision of the legislature not being conclusive. Anderson v. Cloud County Com'rs, 77 Kan. 721, 95 P 583; State v. Nation [Kan.] 96 P 659; Gardner v. State, 77 Kan. 742, 95 P 588; State v. Nelson [Kan.] 96 P 662.

17. Anderson v. Cloud County Com'rs, 77 Kan. 721, 95 P 583.

18. In South Carolina a bill for a special charter may be introduced by a two-thirds vote of both houses, and may then be passed as any other bill. Const. art. 9, § 2. McMeekin v. Central Carolina Power Co., 80 S. C. 512, 61 SE 1020.

19. McSurely v. McGrew [Iowa] 118 NW 415. Laws 1907, p. 257, c. 255, legalizing acts of supervisors of county releasing treasurer from liability on bond for loss of funds deposited in approved bank which failed, is valid, no general law being applicable. Id. Act does not repeal Code, § 1457, prohibiting release of treasurer, so as to require general law. Id.

20. McGarvey v. Swan [Wyo.] 96 P 697. Laws may be enacted applicable only to certain classes if the classification is reasonable. Ex parte Pittman [Nev.] 99 P 700. The legislature has power to arrange municipalities into different classes and to grant each class powers different from the others. Eckerson v. Des Moines, 137 Iowa, 452, 115 NW 177.

bitrary,[21] that is, it must be based upon some sound distinction.[22] The question

**21.** It is sufficient if the classification is based on some reasonable ground, some differences which bear a just and reasonable relation to the classification, and is not merely arbitrary. Ex parte Williams [Kan.] 98 P 777. The classification must not be arbitrary but must be founded upon some natural intrinsic or constitutional distinction, and some reason must appear why the act is not made to apply generally to all classes. Board of Education v. Alliance Assur. Co., 159 F 994.

**22.** Classification must be based on substantial distinction rendering special legislation for each class proper. McGarvey v. Swan [Wyo.] 96 P 697. An act applying uniformly to the whole of any single class of individuals or objects, where the classification is founded upon some natural intrinsic or constitutional distinction, is a general law. Board of Education v. Alliance Assur. Co., 159 F 994. Upon subjects as to which the constitution does not specifically prohibit special legislation, special laws may be upheld when applicable to a particular class, where the classification rests upon some ground marking them as proper objects for special legislation. People v. Wilcox, 237 Ill. 421, 86 NE 672. Special laws may be justified by classification only on the ground of imperative necessity growing out of peculiar conditions. Vulcanite Portland Cement Co. v. J. W. Allison Co., 220 Pa. 382, 69 A 855. Legislature cannot adopt merely arbitrary classification. It must rest upon such a difference in the situation and circumstances of the persons or subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them. Euziere v. Tracy, 104 Minn. 378, 116 NW 922. A classification of municipalities, such as counties, cities, villages, and towns, may be made a basis for legislation if such classification is based on a rational difference of situation or condition found in municipalities placed in different classes. Dawson Soap Co. v. Chicago, 234 Ill. 314, 84 NE 920. Legislature may provide different laws and different penalties touching the same character of offenses in different political subdivisions of the state, the only limitation upon the power being that law must operate uniformly on all citizens in the subdivision, or on all to whom it applies and its classifications must be reasonable within the sphere of its operation. State v. Fountain [Del.] 69 A 926. Act not local when bringing municipalities similarly conditioned in class as to which act is to have uniform operation. Not special because conferring exclusive powers on class. Eckerson v. Des Moines, 137 Iowa, 452, 115 NW 177.

**ILLUSTRATIONS. Classification proper:** Act by which any district in which secretary of state had placed voting machine could determine whether or not it would use it, not local or special. Mara v. Bayomme [N. J. Law] 71 A 1131. P. L. 1906, p. 203, § 4 (Bishop's law), **regulating sale of liquors,** is not invalid as granting special privileges, classification of inns, taverns, hotels, etc., being valid. Meehan v. Jersey City Com'rs, 75 N. J. Law, 557, 70 A 363. P. L. 1905, p. 237, **turnpike statute,** operates alike on all counties similarly situated. Clarion County v. Clarion Tp., 222 Pa. 350, 71 A 543. Laws 1907, p. 72, c. 55. **giving preference rights in taking over roads,** trails, etc., to those having franchises or contracts, held not special or invalid, being based on reasonable classification. Duffield v. Ashurst [Ariz.] 100 P 820. Pub. Acts 1903, p. 277, No. 195, imposes **inheritance tax** and exempts transfers of personalty to lineal heirs where value is less than $2,000, and taxes entire transfer where personalty is worth more than $2,000. Classification valid. No discrimination between members of same class. In re Fox's Estate, 154 Mich. 5, 15 Det. Leg. N. 674, 117 NW 558. Hurd's Rev. St. 1905, c. 38, § 256a, **makes cities and counties liable** to owners for three-fourths of **damage to property caused by riots.** That villages and towns are not made liable does not invalidate act, classification being sound. Dawson Soap Co. v. Chicago, 234 Ill. 314, 84 NE 920. In act providing for **separation of unplatted lands from corporate limits** of cities of 10,000 or less, and excepting cities having home rule charters, classification of cities into those having and those not having home rule charters is valid. Euziere v. Tracy, 104 Minn. 378, 116 NW 922. Statute providing for separation of unplatted lands from city limits held not invalid because it gives benefit of act only to owners of 40 acres of land or more, and excludes others. Classification valid both as to character of land, used for agricultural purposes, and amounts owned. Id. The **financial condition of counties** as shown by the relation between bonded indebtedness and the assessed valuation of property is a proper basis for classification for the purpose of legislation with reference to **increase of indebtedness by issuing bonds** without popular vote. Gen. Laws 1907, c. 130, valid. Wall v. St. Louis County, 105 Minn. 403, 117 NW 611. **Veteran soldiers and their dependent relatives, and nurses** and their relatives, constitute special class, and legislature may provide for their support and maintenance by special laws, and may provide differently for the soldiers and for their female relatives and nurses. Board of Directors of Woman's Relief Corps Home Ass'n v. Nye [Cal. App.] 97 P 208.

**Classification improper:** Act regulating **control and use of playgrounds** which divides city playgrounds into two classes according to acreage, invalid, classification being illusory. Strock v. East Orange [N. J. Law] 72 A 34. Laws 1903, p. 9, c. 7, provides for **designation of assessment districts** to be charged with special assessments for sewers, and mode of apportioning same, and makes act apply to every city "heretofore" "incorporated under special charter," "having population of not less than 10,000," "to be determined by last preceding federal census," and "having power to make special assessments for construction of sewers." Held that none of characteristics quoted above make the classification improper or the act special. McGarvey v. Swan [Wyo.] 96 P 697. Laws 1905, p. 159, c. 77, providing for **county seat removals** in organized counties not having more than 6,500 inhabitants, and in which no court house had been con-

of classification is, however, primarily for legislature,[23] and it is only in cases where it is manifest on the face of the statute that the classification adopted by the legislature is purely arbitrary that courts will interfere.[24]

*Based on population.* See 10 C. L. 1709—Classification of cities for various purposes of municipal government, by population, is proper if such classification appears to be reasonable and not arbitrary,[25] and the fact that only one city is within the class at the time does not of itself necessarily render the act special.[26] Where population is the basis of classification, the subject-matter must be such as suggests a necessity for the legislation arising out of the fact of population.[27]

*Local option laws* See 10 C. L. 1709 are usually held valid.[28]

*County and township affairs.* See 10 C. L. 1709—The validity of acts applicable to such matters depends upon local constitutional provisions.[29]

*Municipalities.* See 10 C. L. 1709—Special laws changing municipal charters[30] or

structed prior to taking effect of act, is unconstitutional as special legislation. Ex parte Connolly [N. D.] 117 NW 946. Act includes counties to be subsequently organized, but classification into counties having no court house at certain date, and those having a court house, is arbitrary. Id.

**23.** Though necesary that it be founded on some appreciable difference in condition, existing or to be apprehended. Eckerson v. Des Moines, 137 Iowa, 452, 115 NW 177.

**24.** Euziere v. Tracy, 104 Minn. 378, 116 NW 922. Abuse of legislative discretion as to classification should be reasonably clear to justify interference by courts. McGarvey v. Swan [Wyo.] 96 P 697.

**25.** Act 32d General Assembly, p. 38, c. 48, providing organization of government for cities of over 25,000, not special law within Const. art. 3, § 30. Eckerson v. Des Moines, 137 Iowa, 452, 115 NW 177. Gen. Laws 1907, c. 52, p. 61, providing for **issuance of bonds** by cities having population of 50,000 or more, is not invalid as special legislation. Farwell v. Minneapolis, 105 Minn. 178, 117 NW 422.

**26.** McGarvey v. Swan [Wyo.] 96 P 697. Fact that only one city may enjoy privileges of act immaterial in determining special legislation. Eckerson v. Des Moines, 137 Iowa, 452, 115 NW 177. That act authorizing **acquisition of waterworks systems** was applicable only to cities of over 50,000 population did not make it special legislation, though there was only one such city in state (under Kansas decisions), Metropolitan Water Co. v. Kansas City, 164 F 738.

**27.** Gen. Laws 1907, c. 458, providing for **appointment of superintendent of highways** in counties having less than 200,000 population, is invalid. Classification by population not valid in legislation of this kind. Hjelm v. Patterson, 105 Minn. 256, 117 NW 610.

**28.** Legislature has power to pass local option laws, and hence may fix time when licenses shall terminate in towns which have adopted no license system. People v. Bashford, 128 App. Div. 351, 112 NYS 502. Local option law of 1907 not special because it is only applicable to particular localities where adopted by vote of people. People v. McBride, 234 Ill. 146, 84 NE 865. Under Delaware constitution legislature has power to provide for submission of local option laws at special election. State v. Fountain [Del.] 69 A 926. Laws 1907, p. 304, § 19, giving county court final jurisdiction to determine contests in local option election cases, is not special legislation, though denying right of appeal in such cases. Saylor v. Duel, 236 Ill. 429, 86 NE 119.

**29.** Acts 1906, p. 121, providing for **change of county lines,** not invalid as special legislation. Town of Maysville v. Smith [Ga.] 64 SE 131. **Repeal of town charter** by special law not prohibited by Const. art. 3, § 34, or by subd. 12 of section as to general legislation. Board of Tp. Com'rs v. Buckly [S. C.] 64 SE 163. Statute authorizing **issuance of bonds** for construction of court house and jail in particular county, valid. State v. Lytton [Nev.] 99 P 855. Act Feb. 17, 1906, **establishing town government** for town on Sullivan's Island, is not invalid as special law, under Const. art. 3, § 34, or art. 7, § 11, owing to special conditions existing there. Board of Tp. Com'rs v. Buckly [S. C.] 64 SE 163. Legislature has power to create **fencing district** by special act and to change limits by subsequent act. Henderson v. Dearing [Ark.] 117 SW 1066. P. L. 1903, p. 18 for **relief of sick and indigent** having no legal settlement in state, held not local or special, though mode of caring for such persons varied in different counties, and though it provided different mode of caring for residents and nonresidents. Pulaski Tp. Poor Dist. v. Lawrence County, 222 Pa. 358, 71 A 705. St. 1898, § 1152, providing for **assessment and collection of taxes** by officers of adjoining town in case of failure to elect officers and assess and collect taxes, does not violate constitutional provisions as to town government, nor as to uniformity thereof, since it affects all alike and provides for emergency only. Strange v. Oconto Land Co., 136 Wis. 516, 117 NW 1023. **County ordinance passed pursuant to void statute** would be invalid. Ex parte Young [Cal.] 97 P 822.

**30.** Under Const. art. 3, § 27, municipal charter cannot be amended by local or special law. McGarvey v. Swan [Wyo.] 96 P 697. Laws 1907, p. 398, providing for carrying into effect initiative and referendum powers granted by constitution, is **not an amendment** of Portland city charter, but suspends its operation. Does not violate Const. art. 11, § 2. Long v. Portland [Or.] 98 P 149; Long v. Portland [Or.] 98 P 1111. Chicago City Charter, art. 5, cl. 45, giving

regulating the internal affairs of a municipality [31] are prohibited in same jurisdictions. In others, legislation of this character is permissible [32] where the constitutional mode of procedure is followed.[33] An act conferring upon a municipality powers to be exercised by it as a governmental agency, in carrying out a mandate of the constitution, is valid.[34]

§ 3. *Subjects and titles.*[35]—See 10 C. L. 1710—Constitutions usually provide that a statute shall embrace but one subject,[36] which must be expressed in its title.[37]

city power to prohibit exhibition of immoral or obscene pictures, applies to every city incorporated under act, and is **not special** within Const. art. 4, § 22, prohibiting special laws incorporating cities or amending charters. Block v. Chicago, 239 Ill. 251, 87 NE 1011.

**31.** P. L. 1906, p. 203, § 4 (Bishops' Law), regulating sale of liquors, does not violate Const. art. 4, § 7, subd. 11, prohibiting special, private or local laws regulating internal affairs of municipalities. It operates equally on all, and **does not regulate internal affairs.** Meehan v. Jersey City Com'rs, 75 N. J. Law, 557, 70 A 363. An ordinance licensing bawdy houses in a city did not relate to "municipal affairs" within the meaning of Const. art. 11, § 6, providing that city charters shall be subject to general laws, except as to municipal affairs; hence ordinance does not suspend statute covering bawdy houses. Farmer v. Behmer [Cal. App.] 100 P 901.

**32.** Constitution authorizes legislature to confer **special powers** on municipalities, and this includes power to authorize **municipal license tax.** Hardee v. Brown [Fla.] 47 S 834. P. L. 1905, p. 260, **prohibiting discharge of sewage** into waters of state but allowing continuance of existing systems maintained by municipalities and discharging into such waters, held not to violate Const. art. 3, § 7, prohibiting local or special laws granting special privilege to any corporation, association or individual. Municipal corporations not within constitutional provision. Commonwealth v. Emmers, 221 Pa. 298, 70 A 762. Loc. Act, 1907, p. 902, authorizing **annexation of territory** to city and election to determine whether act shall become effective, does not violate Const. 1901, § 104, par. 29. State v. Birmingham [Ala.] 48 S 843.

**33.** In Virginia, legislature may amend municipal charter in manner provided in Const. art. 4 if special act is passed by **recorded vote of two-thirds** of each house as required by art. 8, § 117. Miller v. Pulaski [Va.] 63 SE 880.

**34.** Const. art. 12, § 1, was intended to prevent the legislature from conferring upon cities and towns corporate powers to be exercised in the performance of functions for which they were primarily created. Intention was not to prevent legislature from conferring powers to be exercised as governmental agency in carrying out mandate of constitution. State v. Lawrence [Kan.] 100 P 485.

**35. Search Note:** See notes in 14 L. R. A. (N. S.) 519; 15 Id. 430; 64 A. S. R. 70; 79 Id. 456; 1 Ann. Cas. 584.

See, also, Statutes, Cent. Dig. §§ 117-194; Dec. Dig. §§ 105-126; 26 A. & E. Enc. L. (2ed.) 572.

**36.** If the matters claimed to constitute two subjects are not separate and distinct but are connected with each other and germane to the primary objects of the statute, the act containing them is not invalid. State v. Fountain [Del.] 69 A 926. An act is proper if all parts of it have a natural connection and can reasonably be said to relate directly or indirectly to one general legitimate subject of legislation. State v. Ross [Mont.] 99 P 1056. There is in **New York** no constitutional objection to embracing several separate matters in a general, as distinguished from a private or local, bill. Gubner v. McClellan, 130 App. Div. 716, 115 NYS 755.

**Act valid; subject single:** That an act provides for a **penalty** which is enforcible by **civil or criminal procedure** does not make it invalid as relating to more than one subject. Pearson v. Bass [Ga.] 63 SE 798. Laws 1907, p. 287, prohibiting gambling, providing remedies for recovery of money lost, and creating penalties, is not invalid for providing for criminal and civil remedies in one act. State v. Ross [Mont.] 99 P 1056. Legislature may in same act provide for **recovery of penalty** for violation of provisions and also fix **measure of damages.** Pearson v. Bass [Ga.] 63 SE 798. That **local option law** made certain acts (false swearing and forged signatures in petition for election) crimes did not make it void as embracing more than one subject. People v. McBride, 234 Ill. 146, 84 NE 865. **Public Service Commissions Law** of 1907 does not contain more than one subject. Gubner v. McClellan, 130 App. Div. 716, 115 NYS 755. **Appropriation** made by separate bill containing but one subject, providing for contingent expense of state officer, is valid. Bryan v. Menefee [Okl.] 95 P 471. **An appropriation** to cover compensation of employes in the executive, legislative, or judicial departments of the state, where such employment had not been authorized by statute and their compensation fixed prior to the passage of such general appropriation bill, can only be enacted as a separate appropriation bill, embracing but one subject. Id. Act No. 57, p. 81, of 1898, relating to **use of slot machines,** does not embrace more than one subject, nor is text broader than title, within Const. art. 31. State v. Abrams, 121 La. 550, 46 S 623. Acts 1907, p. 147, c. 132, providing for punishment of keepers of **disorderly houses,** and for suppressing them by injunction, does not relate to more than one subject. Lane v. Bell [Tex. Civ. App.] 116 SW 918. Title of Act No. 85, p. 124, of 1886, and act, have but one subject, **punishment of physicians** who, by prescriptions, assist in evading liquor laws. State v. Breaux, 122 La. 514, 47 S 876. Acts 1907, p. 1538, c. 460, intended **to reduce fire loss,** is not invalid because embracing provision for expense and means

of carrying out law. Rhinehart v. State [Tenn.] 117 SW 508. Title, "An act to provide for the **appointment of additional judges** * * *; making an appropriation and declaring an emergency," expresses but one subject, latter clause being related to former. In re Seventh Judicial Dist. County Com'rs [Okl.] 98 P 557. Const. 1898, art. 55, requiring appropriations, except in general appropriation bill, to be made by separate bills, each embracing but one subject, is not violated by **primary election law** which provides an appropriation to carry out its provisions. State v. Michel, 121 La. 374, 46 S 430. Bill relates to but one object, expressed in title. Id. Gen. Laws 1907, p. 509, c. 24, provides for appointment of stenographers, making up and filing of statement of facts, etc. Held, title embraces but one subject, **appellate procedure.** Texas & P. R. Co. v. Stoker [Tex.] 113 SW 3. Acts 1907, p. 786, **amending charter** of city of Macon, does not refer to more than one subject. Richardson v. Macon [Ga.] 63 SE 790. Laws 1900-01, p. 239, ratifying and **legalizing grants and privileges given by city** council to railroad and utilized by latter, has single subject. State v. Louisville & N. R. Co. [Ala.] 48 S 391. Sp. Laws 1907, p. 81, c. 7, incorporating and **granting charter to city** of Fort Worth, does not embrace more than one subject, though it makes city independent school district and provides for administration of schools therein. Orrick v. Ft. Worth [Tex. Civ. App.] 114 SW 677.

**Act void:** Act No. 103, p. 157, of 1902, amending and re-enacting Act No. 137, p. 177, of 1890, making it felony to trespass on another's timber lands, is void because **creating several offenses** not cognate; hence violatee Const. art. 31. State v. Peterman, 121 La. 651, 46 S 672; State v. Davis, 121 La. 623, 46 S 673.

**37. Title Sufficient. In general:** Title of Laws 1903, p. 187, sufficient. Vineyard v. Grangeville City Council [Idaho] 98 P 422. Object of Act No. 57 of 1908, as expressed in title and body of act, same. State v. Scheffield [La.] 48 S 932. Provisions of Loc. Acts 1905, p. 770, No. 579, held germane to title. Township of Stambaugh v. Iron County Treasurer, 153 Mich. 104, 15 Det. Leg. N. 368, 116 NW 569. Title of Laws 1870, p. 14, **"to appropriate funds for construction of steamboat canal** at," etc., is broad enough to include provision requiring payment of certain per cent of tolls to state as condition of appropriation. State v. Portland General Elec. Co. [Or.] 95 P 722. Acts 1906, p. 25, c. 10, entitled "An act **to promote the sheep industry** and to provide a tax on dogs," does not violate Const. § 51, object being promotion of sheep industry, and dog tax being a means thereto. McGlone v. Womack, 33 Ky. L. R. 811, 864, 111 SW 688. Title of **dentistry act** (St. 1901, p. 564, c. 175), sufficient. Ex parte Hornef [Cal.] 97 P 891. Title, "An act to regulate the **practice of medicine and surgery,"** broad enough to include provision as to who may call himself "doctor." Title of original act regulating **pharmacists** and **sale of poisons** (Acts 1885-86, p. 405, c. 364) is sufficient. Bertram v. Com., 108 Va. 902, 62 SE 969. "Physician" or "Surgeon." State v. Pollman [Wash.] 98 P 88. Oklahoma law providing for **guaranty of bank deposits** (Laws 1907-08, p. 145, c. 6, art. 2, as amended p. 153, c. 6, art. 3) is valid, guaranty provisions being within title. Noble State Bank v. Haskell [Okl.] 97 P 590. Title, **"An act to incorporate** the Economic Power & Construction Company" (Laws 1893, p. 949, c. 459), is sufficient to cover provisions creating corporation, defining its objects, powers, organization, etc. Economic Power & Const. Co. v. Buffalo, 59 Misc. 571, 111 NYS 443. Also sufficient to cover special franchise to occupy streets and highways of state, this being only a power of the corporation. Id. Act **creating corporation** and giving it power to transmit and utilize power is private act within Const. art. 3, § 16 (one subject, expressed in title), though bill expressly declares powers conferred for public purpose and use. Id. Title of Loc. Acts 1901, p. 485, No. 439, operation of electric cars, held broad enough to cover provision as to right of action for damages resulting from violation. Fortin v. Bay City Trac. & Elec. Co. [Mich.] 15 Det. Leg. N. 741, 117 NW 741. Title of P. L. 1905, p. 161, **license fees by brokers, etc.,** sufficient. Commonwealth v. S. W. Black Co. [Pa.] 72 A 261. Title of **anti-trust act** (Laws 1889, p. 257, c. 148) sufficient, being general, though act does not express intent with which acts must be done, title containing a recital as to intent. Knight & Jillson Co. v. Miller [Ind.] 87 NE 823. Laws 1905, p. 244, c. 136, § 2, limiting appointment of officers of **militia** to two years, is germane to title of act. State v. Peake [N. D.] 120 NW 47.

**Liquor and local option laws:** Title of Acts 1907, c. 16, pp. 29-33, liquor law, sufficient. Rose v. State [Ind.] 87 NE 103. Title of Acts 1907, p. 727, liquor law, broad enough to include provisions relating to prescriptions by persons other than physicians, and prohibiting certain acts on Sunday. McAllister v. State [Ala.] 47 S 161. Title of Laws 1907-08, p. 594, c. 69, sufficient, though it contained brief abstract of contents of act, general object of which was to prohibit **sale of intoxicants** except as therein provided. State v. Hooker [Okl.] 98 P 964. Laws 1897, c. 72, §§ 11, 16, giving right of action for damages for **sale of liquor** to intoxicated persons, being regulations and restrictions of sale of liquor, are within scope of title of act. Palmer v. Schurz [S. D.] 117 NW 150. Title of Laws 1907, p. 297, **local option** law, not **misleading or deceptive.** People v. McBride, 234 Ill. 146, 84 NE 865. Title of Laws 1907, p. 297, **local option law,** held sufficient, matters treated in act being all related to general subject expressed in title. Id.

**Relating to municipal affairs:** Act March 20, 1901 (P. L. 1901, p. 116). Title, "An act to authorize any town or city of this state to enter into **contracts with railroad companies** whose roads enter their corporate limits, to change or elevate their railroads, and, when necessary for that purpose, to vacate, change the grade of, or alter the lines of any streets or highways therein," held sufficient. Morris & E. R. Co. v. Newark [N. J. Err. & App.] 70 A 194. Title of Acts 1908, c. 97, regulating **mode of procedure** of board of commissioners of Yazoo-Mississippi levee district, was sufficient, as identity of board was sufficiently shown. Bobo v. Yazoo-Mississippi Delta Com'rs [Miss.] 46 S 819. Acts 1907, p. 786, § 7, **amending** Macon **city charter,** conferring

certain powers on recorder, is within title. Richardson v. Macon [Ga.] 63 SE 790. Title, "An act providing for the **organization and government of cities and villages,**" is sufficiently broad to embrace every subject-matter incident to the administration of city and village government, which includes designation of offices and how they may be united and filled. Vineyard v. Grangeville City Council [Idaho] 98 P 422. Laws 1907, p. 124, c. 91, providing for **expense of widening street,** treats but one subject, which is expressed in title. In re Lockitt, 58 Misc. 5, 110 NYS 32. Title of P. L. 1902, p. 371, c. 124, sufficiently expresses object of act including authority to **construct sewage disposal works** beyond limits of town. Frelinghuysen v. Morristown [N. J. Law] 70 A 77, afd. [N. J. Err. & App.] 72 A 2. Title "to authorize cities **to purchase lands**" does not embrace a provision giving power to condemn. Griffith v. Trenton [N. J. Law] 69 A 29. Title of Laws 1907, p. 153, authorizing **consolidation of cities** of certain size into independent school districts, is sufficient. State v. Grefe [Iowa] 117 NW 13. Title of Oregon Laws 1901, p. 417, creating part of **Portland** and authorizing dry dock, sufficient, though not referring to dry dock, such subject being germane to general purposes of act. The George W. Elder, 159 F 1005. Title of Laws 1902, p. 1196, c. 506, **amending charter** of village, held sufficient to embrace matters treated. Scott v. Saratoga Springs, 115 NYS 796. Acts 1906, p. 61, title of which describes tax to be levied thereunder as **"local tax** for educational purposes," is not invalid on ground that provision for levy of local tax for public schools is not within title. Coleman v. Emanuel County Board of Education, 131 Ga. 643, 63 SE 41. Title of Acts 1908, p. 594, c. 336, **removal of court house** of any county, sufficient. Conek v. Skeen [Va.] 63 SE 11. Acts 1906, p. 121, **change of county lines,** held not invalid for expressing more than one subject in title, nor as containing matter not referred to in title. Manson v. College Park, 131 Ga. 429, 62 SE 278. Acts 1906, p. 121, providing for **change of county lines,** not invalid as treating matter not included in title, nor as treating more than one subject. Town of Maysville v. Smith [Ga.] 64 SE 131.

**Relating to governmental and judicial affairs:** Title of **apportionment acts** of 1893, 1901, 1907, "An act fixing the state senatorial and representative districts and determining the legislative representation thereof," relates to cognate subjects germane to apportionment. State v. Schnitger, 16 Wyo. 479, 95 P 698. Title is sufficient to cover legislative recognition of organization of new counties and declaration of right of such counties to be represented, since that right is given by constitution to each county. Id. St. 1903, p. 365, c. 266, **creating board of bank commissioners** and prescribing duties, is valid, containing no provision outside title. People v. Bank of San Luis Obispo [Cal.] 97 P 306. **Primary Election Law** of 1907 (p. 457, c. 209) does not violate Const. art. 2, § 19, title being sufficiently broad. State v. Nichols, 50 Wash. 508, 97 P 728. Laws 1907-08, p. 155, c. 7, providing for **funding indebtedness of state** and issuing bonds, is valid as to subject and title. In re Menefee [Okl.] 97 P 1014. Title of **Public Service Commissions Law** of 1907 (c. 429), sufficient. Gubner v. McClellan, 130 App. Div. 716, 115 NYS 755. Title of Acts 1908, p. 1112, providing for revenue for **convict system** by licensing sale of liquors, etc., held sufficient. Carroll v. Wright, 131 Ga. 728, 63 SE 260. All provisions of act relating to **nomination and election of United States senators** are germane to subject expressed in act. State v. Blaisdell [N. D.] 118 NW 141. Title of P. L. 1905, p. 237, sufficiently expresses subject of act **(maintenance of turnpikes for public use** free of tolls). Clarion County v. Clarion Tp., 222 Pa. 350, 71 A 543. Comp. St. 1907, c. 89, art. I, valid as to lands in question, though title restricted to **drainage of marsh and swamp lands.** Omaha & N. P. R. Co. v. Sarpy County [Neb.] 117 NW 116. Title of Acts 1908, c. 118, partially repealing and amending statute relating to **appraisers of estates,** held sufficient under Const. art. 3, § 29. Barron v. Smith, 108 Md. 317, 70 A 225. Use of word "alternative" in title of St. 1907, p. 753, c. 410, providing for **new method of appeal,** is not misleading, since act provides method which may be substituted for existing method. In re McPhee's Estate [Cal.] 97 P 878. Laws 1905, p. 386, c. 163, **abolishing defense of assumed risk,** was not invalid as encroaching on defense of contributory negligence, latter subject not being expressed in title. Texas & N. O. R. Co. v. Barwick [Tex. Civ. App.] 110 SW 953. Acts 1907, p. 367, dividing state into circuits and fixing time of holding **courts,** does not embrace matters not cognate to subject expressed in title. Chambers v. Morris [Ala.] 47 S 235.

**Criminal law and procedure and police regulations:** Title of **anti-cigarette law** (1907, p. 293, c. 148), sufficient. State v. Winsor, 50 Wash. 407, 97 P 446. That act provided for making of certain **defenses** by one charged with violations of its provisions did not make it invalid. Pearson v. Bass [Ga.] 63 SE 798. Title, "The **Penal Code.** An act relative to crimes and punishment and proceeding in criminal cases," sufficient to include section prohibiting opening theatres for amusement on Sunday. In re Donnellan, 49 Wash. 460, 95 P 1085. Title of Acts 1903, p. 376, c. 169, to prohibit **"shooting on Sunday,"** included offense denounced by § 6, having in possession in open air implements for shooting, on Sunday. State v. Sexton [Tenn.] 114 SW 494. Title of act relating to protection of game, etc., also included amendment made by Laws 1907, p. 639, c. 185, providing for speedy trial of persons charged with violating its provisions, and disposition of fines, forfeitures, etc. Id. Laws 1907, p. 107, c. 49, to amend previous act, and "generally to suppress **gambling,"** valid, though it makes it an offense to wager money on cards. Singleton v. State, 53 Tex. Cr. App. 625, 111 SW 736. Not necessary that title of Laws 1907, p. 287, prohibiting **gambling** and providing remedies for recovery of money lost, should refer specifically to penalties. State v. Ross [Mont.] 99 P 1056. Title of Laws 1891, p. 127, c. 69, § 25, prohibiting opening of **theatres** on Sunday, sufficient. In re Donnellan, 49 Wash. 460, 95 P 1085. Provision that proof of excessive speed and injury makes prima facie case of negligence in Motor Vehicle Law, § 13, is included in title, "An act regulating the use

While this provision is mandatory[38] and must be complied with,[39] yet it should not be so exactingly enforced as to cripple legislation,[40] but, it and the legislation being considered, should be construed so as to effectuate the object sought to be attained.[41] The meaning of terms used in the title is to be tested and determined by the same rules as words used in the body of the act,[42] and the title and the body of the act are to be considered together.[43] A title need not be an index to, nor an ab-

and speed" of **motor vehicles.** Hartje v. Moxley, 235 Ill. 164, 85 NE 216. Title of Loc. Acts 1900-01, p. 688, "in relation to **trials of misdemeanors** in Fayette County, Alabama," is sufficient, and provisions of act are germane thereto. Glasscock v. State [Ala.] 48 S 700.

**Title not sufficient: Mechanics' lien act** as amended in 1889, title of which refers specifically only to "mechanics, laborers and materialmen," would be invalid if construed to include contractors, as title does not include them. Indianapolis Northern Trac. Co. v. Brennan [Ind.] 87 NE 215. Any provision giving rights to others than those named would be void, construing act and amendments. Fleming v. Greener [Ind.] 87 NE 719. Sess. Laws 1907, p. 350, c. 159, entitled "An act relating to the **power of counties** of the first class to construct or aid in the construction of canals," etc., is void because title does not cover § 3, which attempts to validate prior acts of county in issuing bonds. State v. King County, 49 Wash. 619, 96 P 156. Title of St. 1907, p. 59, c. 32, "to provide for **appointment of stenographers,**" etc., held not broad enough to cover provision as to use of testimony taken on preliminary examinations on subsequent trial. State v. Gibson [Nev.] 96 P 1057. Title of Laws 1907, pp. 92, 93, c. 41, "to **protect the lives and property of the traveling public and the employes of railroads,**" is too indefinite to express subject of act, which makes it unlawful to run trains outside yard limits without full crews of specified numbers. Missouri, K. & T. R. Co. v. State [Tex.] 113 SW 916. Title of Laws 1903, c. 25, relating to **defense of limitations** in actions by state or municipality, is not broad enough to include provision as to actions by individuals. Blalock v. Condon [Wash.] 99 P 733. Title of Loc. Acts 1903, p. 160, "An act to **extend the corporate limits** of the town of Elba," is not broad enough to include § 2, which provides that town shall not be liable for maintenance and repair of bridges in new territory, etc. Ham v. State [Ala.] 47 S 126. Gen Laws 1907, p. 790, relates, according to title, to **cities and towns.** Section 120, relating exclusively to counties, is void, as without title. State v. Miller [Ala.] 43 S 496. Acts 1905, p. 135, § 5, is entitled "An act to create the office of **state dairy commissioner,** and to define his term of service, duties and powers." Provisions attempting to establish standard of purity of dairy products, and providing for prosecutions and penalties under act, were not within title, and void. City of St. Louis v. Wortman, 213 Mo. 131, 112 SW 520.

**38.** Const. 1890, § 71, that title must indicate subject of act, and Code 1896, § 3406, applying same principle to ordinances, are **mandatory.** Sample v. Verona [Miss.] 48 S 2.

**39.** If the subject is not expressed in the title or if the act embraces more than one subject, the act will be void. People v. McBride, 234 Ill. 146, 84 NE 865. The requirement that the title shall "express" the object of the act is not met by the title "embracing" the subject-matter. Jersey City v. Speer [N. J. Law] 72 A 448.

**40.** Constitutional requirement as to subject and title mandatory, but not to be exactingly enforced or so construed as to cripple legislation. In re Seventh Judicial Dist. County Com'rs [Okl.] 98 P 557.

**41. Object** is to prevent the combination in one act of several distinct and incongruous subjects, and fairly appraise the legislature and the people of the nature of pending legislation. Const. art. 3, § 29; one subject, described in title. Somerset County Com'rs v. Pocomoke Bridge Co. [Md.] 71 A 462. The only purpose of the constitutional requirement is to prevent the joining in one act of incongruous and unrelated matters. People v. McBride, 234 Ill. 146, 84 NE 865. The rule is the same whether the act be one to be passed by the legislature or submitted to popular vote. Id. Const. art. 3, § 16, was designed to prevent two evils: (1) Grouping of two or more separate matters in a single, private of local bill; (2) failure to express in title the single subject to which bill relates. Gubner v. McClellan, 130 App. Div. 716, 115 NYS 755. Purpose of Const. art. 2, § 19, is beneficial, and courts should not hesitate to declare void statutes which do not conform thereto, especially where they are retroactive in effect. State v. King County, 49 Wash. 619, 96 P 156. In determining whether a provision is embraced within the title of an act, a **liberal construction** is to be given the constitutional requirement (People v. McBride, 234 Ill. 146, 84 NE 865), and unless the act contains matters having no proper connection or relation to the title, it will not be held void as to such matters (Id.). Courts cannot by construction enlarge scope of title provided by legislature. City of St. Louis v. Wortman, 213 Mo. 131, 112 SW 520. The rule that a penal statute is to be strictly construed does not apply so as to extend or expand the general words used in the body of an act beyond the scope of its title, or to limit them within the subject of the title so as to make the act invalid. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823.

**42.** Indianapolis Northern Trac. Co. v. Brennan [Ind.] 87 NE 215.

**43.** Knight & Jillison Co. v. Miller [Ind.] 87 NE 823; In re McPhee's Estate [Cal.] 97 P 878. If statute is within spirit of title and object there expressed, it is valid. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. Title is to be considered but does not control when interpretation may be gathered from act and its history. Chesapeake & O. R. Co. v. Pew [Va.] 64 SE 35. Inser-

stract or synopsis of the contents of an act,[44] nor need it mention specifically details of the act;[45] it is sufficient if it fairly indicates the general subject,[46] and reasonably covers all the provisions of the act,[47] and is not misleading.[48] The title need not set out specially what will follow legally and logically from the proposed legislation.[49] If the title contains a reference to the subject, it is sufficient though coupled with a false description.[50] That the title of an act is unnecessarily comprehensive[51] or prolix,[52] or that it expresses more than one subject,[53] does not in-

tion of black letter line over section by compiler not controlling over body of act. Id. The title is to be construed in the light of the general object and purpose of the act. State v. Peake [N. D.] 120 NW 47.

**44.** People v. McBride, 234 Ill. 146, 84 NE 865. Title need not be index; sufficient if expressive of subject, provisions being cognate and germane to subject. Ex parte Hallawell [Cal.] 99 P 490. Constitutional requirement to be liberally construed; all that is required is reasonably intelligent reference to subject of act; title need not be catalogue or abstract of contents of act. In re McPhee's Estate [Cal.] 97 P 878.

**45.** General title suffices; need not contain details. In re County Com'rs [Okl.] 98 P 557; Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. Title need not be an index and need not give details; need only call attention to subject-matter of act so as to give notice of matter being legislated upon. State v. Nichols, 50 Wash. 508, 97 P 728. Act is not invalid because it includes details germane to general subject but not expressed in act. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823.

**46.** People v. McBride, 234 Ill. 146, 84 NE 865; City of St. Louis v. Wartman, 213 Mo. 131, 112 SW 520. The generality or comprehensiveness of a title is no objection if it is not misleading or deceptive and fairly directs the mind to the subject legislated upon. People v. McBride, 234 Ill. 146, 84 NE 865.

**47.** People v. McBride, 234 Ill. 146, 84 NE 865. Title may be general; sufficient if provisions of act are all referrable and cognate to subject expressed therein. State v. Louisville & N. R. Co. [Ala.] 48 S 391; Ham v. State [Ala.] 47 S 126. General titles, expressive of the subject of the act, include all special matters relating thereto without specially naming them. In re Donnellan, 49 Wash. 460, 95 P 1085. Any number of provisions may be included in an act so long as they are not inconsistent with or foreign to the general subject and in furtherance of such subject. People v. McBride, 234 Ill. 146, 84 NE 865. The title may be expressed in general words, or it may be a brief statement of the subject, or it may be an index to, or abstract of the contents. State v. Hooker [Okl.] 98 P 964. A title should not only fairly indicate the general subject of the act but should be sufficiently comprehensive to cover to a reasonable extent all its provisions, and must not be misleading by what it says or omits. Somerset County Com'rs v. Pocomoke Bridge Co. [Md.] 71 A 462. The constitutional requirement as to subject and title has no application to a section of the statutes which makes the commission of different acts misdemeanors and provides separate punishments for the commission of such acts, providing the offenses defined are germane to the title and subject of the act in which the section is embraced. Rev. St. 1899, § 3045, relating to druggists and their licenses, not void under Const. art. 4, § 28. State v. Hamlett, 212 Mo. 80, 110 SW 1082. Const. 1901, § 45, is satisfied if act has but one general subject fairly indicated in title, and such title will support all matters reasonably connected with it and all proper agencies, instrumentalities or measures to facilitate its accomplishment and germane or cognate to title. Glasscock v. State [Ala.] 48 S 700. The requirement is obeyed if all the provisions of the act relate to one subject indicated in the title, and are parts of it, or incident to it, or reasonably connected with it. People v. McBride, 234 Ill. 146, 84 NE 865. If provisions of act appear to be in furtherance of general purpose expressed in title, act will be upheld. State v. Peake [N. D.] 120 NW 47. Any phraseology which clearly indicates the subject to which all details of the act relate is sufficient. Title of Australian ballot law sufficient to cover § 25 of c. 78, Laws 1893, § 3 of c. 222, Laws 1905. Getty v. Holcomb [Kan.] 99 P 218. The title need not refer all the **exceptions and provisos** in the body of the act which relate to the general subject expressed in the title. Act relating to cities of 10,000 or less not invalid because title did not refer to exception of cities having home rule charters. Euziere v. Tracy, 104 Minn. 378, 116 NW 922. Act not void because proviso, restricting its operation, was not mentioned in title. Lane v. Bell [Tex. Civ. App.] 115 SW 918.

**48.** People v. McBride, 234 Ill. 146, 84 NE 865.

**49.** Title of P. L. 1901, p. 639, as to legal relation of illegitimate children to other children and to mother and her heirs, sufficient though not referring to exemption from collateral inheritance tax of estates from mother to legitimated children. Commonwealth v. Mackey [Pa.] 72 A 250.

**50.** Wisconsin River Imp. Co. v. Pier, 137 Wis. 325, 118 NW 857.

**51.** That the title is broad enough to include matters not embraced in the act does not invalidate it. Advisory Board of Harrison Tp. v. State, 170 Ind. 439, 85 NE 18. When subject expressed in title is not misleading, the fact that the subject embraced in the act is less comprehensive than that expressed in title does not invalidate act. Seaboard Air Line R. Co. v. Simon [Fla.] 47 S 1001.

**52.** That title recites purpose of act at greater length than necessary is no objection to the validity of the title or the act. State v. Ross [Mont.] 99 P 1056.

**53.** Plurality of title is not an objection to an act which deals with but one subject. People v. McBride, 234 Ill. 146, 84 NE 865.

validate it if it fairly indicates the matter treated and is not misleading, and if the act itself treats of but one subject.[54] Whether an act is invalid because of plurality of subject must be determined from the body of the act.[55] An amendatory act, the title of which recites the title of the act amended, is valid if its provisions are germane to the subject expressed in the title of the original act.[56] An amendment embracing matters not included within the scope of the title of the original act is invalid.[57] If the title of an original act is sufficient to embrace matters covered by the provisions of an amendatory act, the sufficiency of the title of the latter is unimportant.[58] An act adopting a part of another act is valid if the part adopted relates to the general subject expressed in the title of the adopting act.[59] Where a statute has been re-enacted in the code, the sufficiency of the title of the original act is immaterial.[60] A defect in an act in that a provision of it is not within the scope of the title may be cured by subsequent amendments.[61]

*Partial invalidity.*[62]—Where the provisions of an act are broader than its title, it is still valid as to such provisions as are within the scope of its title,[63] provided

That the title expresses more than one subject is immaterial if the act itself treats but one subject; as the portion of the title which treats of another subject may be treated as surplusage. State v. Ross [Mont.] 99 P 1056. If there is but one subject in the act and the title expresses more than one, the subject expressed in the title and not embraced in the act would be regarded as surplusage (People v. McBride, 234 Ill. 146, 84 NE 865); and the word "subject" is not synonymous with "provision" (Id.).

54. That the title is more comprehensive than the letter of the act does not invalidate it when the act from its nature embraces the subject and spirit of the title. Knight & Jillison Co. v. Miller [Ind.] 87 NE 828. A title is not bad merely for comprehensiveness, but it is bad if it is so indefinite as to express no subject, or if it does not express the particular subject of the act. Missouri, K. & T. R. Co. v. State [Tex.] 113 SW 916. The constitutional requirement as to what shall be embraced in an act has no application to its title but only to its enacting clauses. Jersey City v. Speer [N. J. Law] 72 A 448.

55. Laws 1907, p. 297, local option law, deals with one subject. People v. McBride, 234 Ill. 146, 84 NE 865.

56. Sess. Laws 1889, pp. 313, 314, amending Sess. Laws 1887, p. 336, valid. Colorado Farm & Live Stock Co. v. Beerbohm, 43 Colo. 464, 96 P 443. The title of an amendatory act, amending a section or sections of a prior act, is sufficient if it refers to the section or sections amended and names the title of the act amended, and the subject-matter of the amendment is embraced within the title of the original act. Vineyard v. Grangeville City Council [Idaho] 98 P 422. Laws 1905, p. 226, c. 117, amending Laws 1899, p. 220, c. 128 (as amended in 1903), does not add new subject but is included in subject expressed in title of original act (stock law). Texas & P. R. Co. v. Webb [Tex.] 114 SW 1171. Act entitled "A supplement to an act entitled 'An act'," etc. (reciting title), held sufficiently entitled as it was in fact supplemental. Mara v. Bayonne [N. J. Law] 71 A 1131. To amend, repeal, or add to any part of the code, it is necessary only to refer to the proper chapter and section, and adopt and express in the title of the amendatory act the number and subject of such chapter if the provisions of the amendatory act are germane to the subject of the chapter. Bertram v. Com., 108 Va. 902, 62 SE 969.

57. Pub. Acts, 1897, p. 138, No. 121, amending Haw. Ann. St. § 6025 (authorizing sale of real estate of decedents to pay debts and expenses), and authorizing sale to preserve estate or when it is for best intereets of estate, is void because not embraced in title of original act. Bresler v. Delray Real Estate & Investment Ass'n [Mich.] 16 Det. Leg. N. 28, 120 NW 21. Laws 1901, p. 370, No. 238, amending general railroad law (Comp. Laws, c. 164), invalid because relating to street railroads, while title of act amended referred only to railroads. Ecorse Tp. v. Jackson, etc., R. Co., 153 Mich. 393, 15 Det. Leg. N. 528, 117 NW 89. Acts 1891, p. 221, amending previous statutes as to fees and compensation of district attorneys, are void because subject-matter is not germane to subject expressed in title of amending act nor of act amended. Teller County Com'rs v. Trowbridge, 42 Colo. 449, 95 P 554. Act amending one section of an act and referring to another in title would be void under Const. § 51. In re Barker [Ky.] 116 SW 686. Act April 1, 1901, entitled "an act to amend section 19 of chapter 10, Comp. St. 1899, and to repeal said section as now existing," is void because the matter sought to be added is not germane to subject of act as enacted. Prowett v. Nance County [Neb.] 117 NW 996.

58. Vineyard v. Grangeville City Council [Idaho] 98 P 422.

59. State v. Marion County Com'rs [Ind.] 85 NE 513.

60. Bertram v. Com., 108 Va. 902, 62 SE 969. Const. 1869, art. 5, § 15, was not intended to apply to codifications but to separate acts. Bertram v. Com., 108 Va. 902, 62 SE 969.

61. Infirmity in Pub. Acts 1877, p. 186, No. 177, cured by subsequent amendments. Robinson v. Harmon [Mich.] 15 Det. Leg. N. 711, 117 NW 661.

62. See 10 C. L. 1714. See, also, post, § 5 H.

63. Omaha, N. P. R. Co. v. Sarpy County [Neb.] 117 NW 116. Const. art. 4, § 13, provides that where an act embraces a subject not expressed in the title it shall be void

they are severable from the provisions not included within the title.[64] When two subjects are expressed in the title of a bill and the body of the act embraces both, the entire act is void.[65] In Utah, general appropriation bills are exempted from the constitutional provision requiring all bills to contain but one subject, to be expressed in the title, but this does not permit the amendment, modification or repeal of an act by a general appropriation act under a general title.[66]

§ 4. *Amendments, adoptions, codes and revisions.*[67]—See 10 C. L. 1714—The presumption is that no change in existing law is intended unless expressly declared; and when an act creating a right or remedy does not prescribe procedure, it will be assumed that the general mode of procedure then existing was intended to apply unless expressly excluded.[68] In some states a bill cannot be amended, during its passage, in such a way as to change the object of the bill.[69]

*Reference to act amended.*See 10 C. L. 1714—In most jurisdictions an act cannot be amended by reference to its title merely. The act amended must be set out and re-enacted in the amending statute,[70] but this rule does not apply, in some states, to amendments to sections of a code.[71] An act may be amended by adding a new section without re-enacting the entire act.[72] A statute which is complete in itself

as to the matter not expressed. People v. McBride, 234 Ill. 146, 84 NE 865. If act contains matter not expressed in title, it is void only as to such matter. Texas & P. R. Co. v. Webb [Tex. Civ. App.] 114 SW 1170. Words "or to disturb in any way said relation" are not covered by title of Acts 1901, p. 63, as amended by Acts 1903, p. 91, and such provision is void, but this does not affect validity of balance of act. Pearson v. Bass [Ga.] 63 SE 798. Provisions of Sp. Laws 1907, p. 81, c. 7, charter of Ft. Worth, relating to it as independent school district, are severable from remainder, and if invalid, because not within title, do not affect validity of balance. Orrick v. Ft. Worth [Tex. Civ. App.] 114 SW 677. That title of amendatory act mentioned a statute which was not amended by body of act did not invalidate act as to matter contained in it to which title referred. Reference to act not amended could be treated as surplusage. Chattanooga Sav. Bank v. Tanner [Ala.] 47 S 790. Where only one subject is expressed in the title and the body of the act embraces matter not within the purview of the title, if such matter is distinct and severable from that expressed in the title and the two are not dependent the one on the other, the courts will permit the one to stand though the other is expunged as void, provided effect can be given to the legislative intent. Section 1 of Loc. Acts 1903, p. 160, providing for extension of limits of town, valid, though § 2, relating to repair of bridges, etc., is void. Ham v. State [Ala.] 47 S 126.

**64.** Where part not germane to title is severable, it may be dropped and balance of act upheld. Thornton v. Bramlett [Ala.] 46 S 577. Matters expressed in title and treated by act being severable from other matters not expressed in title, act is enforcible as to matters expressed. Bryant v. Skillman Hardware Co. [N. J. Law] 69 A 23. If an act embraces some matter not expressed in its title, it is unconstitutional only as to that part unless the provisions are so connected in subject-matter, meaning or purpose that it cannot be presumed that the legislature would have passed or the people voted for, the one without the other. People v. McBride, 234 Ill. 146, 84 NE 865.

**65.** Ham v. State [Ala.] 47 S 126.

**66.** State v. Cutler, 34 Utah, 99, 95 P 1071.

**67. Search Note:** See notes in 4 C. L. 1532; 55 L. R. A. 833; 60 Id. 564; 1 L. R. A. (N. S.) 431; 86 A. S. R. 267; 4 Ann. Cas. 920.

See, also, Statutes, Cent. Dig. §§ 197-217; Dec. Dig. §§ 129-148; 26 A. & E. Enc. L. (2ed.) 703.

**68.** State v. Oldfield [Okl.] 98 P 925; State v. Hooker [Okl.] 98 P 964.

**69.** Acts 1888-89, p. 64, was changed during passage from a bill providing for the time of "opening" courts to one providing for time of "holding" courts, but terms were synonymous, as used. Held Const. 1875, art. 4, § 19, against amendments during passage changing original object of bill, not violated. Letcher v. State [Ala.] 48 S 805.

**70.** State v. Cutler, 34 Utah, 99, 95 P 1071. St. 1907, p. 59, c. 32, violates Const. art. 4, § 17, in that it attempts to amend Comp. Laws, § 4121, by reference to section of criminal code without restating it. State v. Gibson [Nev.] 96 P 1057. Statute providing that "§ 34 of an act entitled," etc., should be amended by adding a section authorizing, etc., violated Const. art. 3, § 36, prohibiting amendment by reference. Henderson v. Galveston [Tex.] 114 SW 108.

**Act held valid:** Acts 1900, p. 170, does not violate Const. art. 4, § 45, as amendment is re-enacted and published at length. Thornton v. Bramlett [Ala.] 46 S 577. Title of Act No. 89 of Laws 1905 expresses fully subject of act, measure of damages and distribution of amount recovered in actions under survival act, and Const. art. 4, § 25, prohibiting revision, alteration or amendment by reference to title only, is not violated by it. Little v. Bousfield & Co. [Mich.] 15 Det. Leg. N. 763, 117 NW 903.

**71.** Amendment of section in Penal Code by reference to its number held proper. In re McCue, 7 Cal. App. 765, 96 P 110.

**72.** Amending by adding entire new section does not require re-enactment. Texas & P. R. Co. v. Webb [Tex.] 114 SW 1171.

and does not purport to amend any other is not within this requirement, though it operates to amend or change existing law.[73] That an act refers to other acts to indicate procedure or facts upon which it shall operate does not make it an amendatory act,[74] though the statutes referred to may be modified or amended by implication.[75]

*Effect of amendments and adoptions.* See 10 C. L. 1715—The effect of an amendment is to so change the original act as to make it read in the same manner it would have read, and to give it the same effect it would have had, if originally enacted as amended.[76] Where an amendment preserves a section of the statute amended and adds new matter, it is equivalent to an independent statute embodying the new matter.[77] When an act has been properly amended, amendments to the act as amended become amendments of the original act.[78] Amendatory sections are to be treated, as to matters occurring after their enactment, as parts of the original act.[79] In the absence of any constitutional or legislative provision on the subject, an amending act may operate as a repeal of the statute amended.[80] But the general rule is that an amendment is only a repeal as to the portions of the original act left out of the amendment,[81] and as to the portion unchanged, in form or substance, the amendatory act is a mere continuation of the original act,[82] which remains in force as of the date of its original enactment.[83] This latter rule

Where no section of a statute was re-enacted but an additional section was added and the title of the original act, the first section of which had been twice amended, was set out, and reference made to the amendments of the first section, Const. art. 3, § 36, was not violated. Texas & P. R. Co. v. Webb [Tex. Civ. App.] 114 SW 1170.

**73.** Const. art. 2, § 37 (amendment, etc., by reference), does not prevent enactment of statutes, complete in themselves, which supersede or limit the effect of others. Primary Law valid. State v. Nichols, 50 Wash. 508, 97 P 728. Acts 1908, c. 118, § 1, construed as partial repeal of statute relating to appraisers of estates, and not an amendment; hence reference to title and section sufficient. Barron v. Smith, 108 Md. 317, 70 A 225. Act No. 89, Pub. Acts 1905, does not affect or amend Comp. Laws, § 10,117, hence no violation of constitutional prohibition against amendment by reference only. Norblad v. Minneapolis, etc., R. Co. [Mich.] 15 Det. Leg. N. 887, 118 NW 595. Laws 1903, p. 87, c. 67, "An act to provide for payment of expenses incurred in compliance with an act entitled, 'an act,'" etc., is not invalid as an attempt to amend by reference only, since it is an act of procedure complete within itself. Northern Pac. Ry. Co. v. Pierce County [Wash.] 97 P 1099. P. L. 1905, p. 237, is complete act (relating to turnpikes), and not amendment of P. L. 1887, p. 310; hence Const. art. 3, § 6, prohibiting revival, amendment or extension of any law by reference to title, is not violated. Clarion County v. Clarion Tp., 222 Pa. 350, 71 A 543. Act complete and original, not purporting to change existing law, does not violate constitutional prohibition against amendment, etc., by reference only, though it provides that powers conferred by it shall be exercised in accordance with existing general laws. City of Pond Creek v. Haskell [Okl.] 97 P 338. P. L. 1905, p. 161, relating to licensing of brokers is complete act, though it operates to amend and extend existing law; hence does not violate Const 1874, art. 3, § 6, as to amendments. Commonwealth v. S. W. Black Co. [Pa.] 72 A 261.

**74.** Within Const. art. 4, § 21, prohibiting amendments by reference only. Harrison Tp. Advisory Board v. State, 170 Ind. 439, 85 NE 18. Laws 1907, p. 297, local option law, held not invalid as amending or reviving acts by reference to title, because it does not amend or revive other acts, but adopts as part of itself provisions of other laws, such as election laws. People v. McBride, 234 Ill. 146, 84 NE 865.

**75.** Harrison Tp. Advisory Board v. State, 170 Ind. 439, 85 NE 18.

**76.** Henderson v. Dearing [Ark.] 117 SW 1066.

**77.** Hamnyack v. Prudential Ins. Co., 194 N. Y. 456, 87 NE 769.

**78.** Henderson v. Dearing [Ark.] 117 SW 1066.

**79.** Federal railroad act, so far as it amends interstate commerce act to be treated as part of it. State v. Adams Exp. Co. [Ind.] 85 NE 337.

**80.** People v. Zito, 237 Ill. 434, 86 NE 1041.

**81.** People v. Zito, 237 Ill. 434, 86 NE 1041. Where a statute is amended to read in certain way, the matter of the original act not incorporated in the amendatory act is repealed. Boughner v. Bay City [Mich.] 16 Det. Leg. N. 79, 120 NW 597.

**82.** People v. Zeto, 237 Ill. 434, 86 NE 1041.

**83.** Applies to transactions prior to amendment. Boughner v. Bay City [Mich.] 16 Det. Leg. N. 79, 120 NW 597. Portions of an amended section which are not altered are to be considered as having been the law from the time they were enacted, and the new provisions are considered to have been enacted at the time of the amendment. In re McGee's Estate [Cal.] 97 P 299. Amendments to laws regulating motor vehicles did not affect powers of park commissioners to make rules as to parks and streets, which powers were saved by acts

is statutory in Illinois.[84] The rule that an amendemnt is deemed a continuation of the provisions of the original law which are unchanged applies only to existing laws, not to those that have been repealed.[85] The invalidity of an amendatory act which seeks to extend the provisions of the original act does not make the original act invalid.[86] Where an amendment did not materially change or repeal existing law, but put into one section what had been in three, its validity or invalidity was immaterial.[87] Where an existing general law is amended so as to leave it in full force and effect so far as it goes and the only amendment consists in the addition of new matter, a limitation in the amendatory statute providing that such statute shall not affect pending suits or proceedings qualifies only the addition made to the statute, not the pre-existing general law.[88] One statute may adopt a part or all of another law or statute by a specific and descriptive reference thereto, and the effect is the same as if the law or statute or the part adopted had been written into it.[89] When so adopted, only such portion is in force as relates to the particular subject of the adopting act and is applicable and appropriate thereto.[90] That an act, to fix the statute of a proceeding under it, refers to a repealed act, does not affect its validity.[91] To the extent that a statute refers to the provisions of a repealed statute and adopts them, the repealed law is re-enacted and becomes law as much as though fully set out.[92] A statute adopting the provisions of another statute by reference adopts it as it exists at the time of adoption [93] and continues it in force as a part of the adopting statute, regardless of subsequent amendment or repeal of the statute adopted.[94] The provisions of an existing act are extended by a supplemental act when the latter simply carries forward all the provisions of the original act.[95] If the purpose be to ingraft a radically new provision on the original act, some other word than "extended" must be used.[96]

*Revisions and codes.* See 10 C. L. 1715—The object of a revision is to consolidate and simplify the law, to bring together statutes relating to the same matters, to expunge obsolete and redundant matter and correct imperfections in text,[97] but not ordinarily to change the law.[98] Mere verbal changes in the revision of a statute do not alter its meaning.[99] Where a compilation of laws, prepared by a commissioner, is adopted as a separate, independent act, it becomes law, regardless of the authority of the commissioner as to the insertion of new matter.[1] That a statute was embodied in the code did not give it validity, where the code was adopted before the statute was enacted.[2] The code proper, as adopted by the legislature, is

amended. Commonwealth v. Tyler, 199 Mass. 490, 85 NE 569.

84. Rev. St. 1874, c. 131, § 2. People v. Zito, 237 Ill. 434, 86 NE 1041.

85. In re McGee's Estate [Cal.] 97 P 299.

86. Validity of safety appliance act of 1893, not affected by partial invalidity of amendment of 1903 attempting to apply law to intrastate traffic. United States v. Wheeling & I. E. R. Co., 167 F 198.

87. In re Donnellan, 49 Wash. 460, 95 P 1085.

88. Homnyack v. Prudential Ins. Co., 194 N. Y. 456, 87 NE 769.

89, 90, 91. State v. Marion County Com'rs [Ind.] 85 NE 513.

92. Lyles v. McCown [S. C.] 63 SE 355.

93, 94. Crohn v. Kansas City Home Tel. Co., 131 Mo. App. 313, 109 SW 1068.

95, 96. Jersey City v. Speer [N. J. Law] 72 A 448.

97. Morrow v. Warner Valley Stock Co., [Or.] 101 P 171.

98. Dropping word "reserved" in Rev. St. U. S. 1873, § 2490, relating to public lands, was intentional, and did not change effect of land grants to state. Morrow v. Warner Valley Stock Co. [Or.] 101 P 171.

99. Inhabitants of Great Barrington v. Gibbons, 199 Mass. 527, 85 NE 737. In the amendment or revision of statutes, the mere change of phraseology or the mere omission of words which are deemed redundant does not indicate a legislative intent to change the pre-existing law. Hamilton v. State, 78 Ohio St. 76, 84 NE 601.

1. In re Donellan, 49 Wash. 460, 95 P 1085.

2. City of Anniston v. Calhoun County Com'rs [Ala.] 48 S 605. An invalid section of a statute is not made valid by its incorporation as separate section of Code, when statute of which it is part was adopted after the enactment of the law adopting the Code. State v. Miller [Ala.] 48 S 496.

the manuscript prepared by the code commissioner, revised by the code committee, and adopted by the legislature, not the printed bound volumes.[3]

§ 5. *Interpretation. A. Occasion for interpretation.*[4]—See 10 C. L. 1715—Statutes are to be construed by the court.[5] Resort to rules of construction is proper only when there is some ambiguity or uncertainty in the language used.[6] When the language is plain and unambiguous, its meaning cannot be limited or extended by the courts,[7] and in such case there is no necessity nor room for judicial construction.[8] Legislative questions submitted to the supreme court must be connected with pending, not with completed, legislation,[9] and sufficient time for argument and careful consideration must exist before the adjournment of the legislature.[10]

(§ 5) *B. General rules.*[11]—See 10 C. L. 1716—It will be presumed that the legislature acted with knowledge of the law[12] and of the constitutional limitations upon its powers,[13] and it will not be assumed that the legislature intended to exceed its jurisdiction[14] or to change established principles of law[15] or procedure,[16] unless such intent is clearly manifested. Every presumption is in favor of the validity of a statute,[17] and it should be upheld if reasonably susceptible of a construction

**3.** Volumes labeled "Alabama Code" not "Code" proper. City of Anniston v. Calhoun County Com'rs [Ala.] 48 S 605.

**4. Search Note:** See Courts Cent. Dig. §§ 939-984; Dec. Dig. §§ 358-376; Constitutional Law, Cent. Dig. § 47; Statutes, Cent. Dig. §§ 52-66, 195, 196, 254-377; Dec. Dig. §§ 53-64, 174-278.

**5.** Construction of language of statute fixing boundary lines is for court alone. Surveyor general has no power to construe act. Sierra County v. Nevada County [Cal.] 99 P 371.

**6.** State v. Hinkel, 136 Wis. 66, 116 NW 639. Resort to rules of construction is proper, but such rules will not be allowed to defeat plain legislative will. Gibson v. People [Colo.] 99 P 333. When language ambiguous, necessary to construe to ascertain legislative intent. James v. U. S. Fidelity & Guar. Co. [Ky.] 117 SW 406.

**7.** Statutes cannot be extended by construction beyond fair and natural meaning of language used. Moore v. Fannin, 7 Ind. T 580, 104 SW 842. Courts cannot disregard plain language of a statute but must give it effect as written. McGann v. People, 238 Ill. 203, 81 NE 847. Courts must construe language used by legislature according to established rules of construction, but cannot read into a statute an intent not shown by its terms. Ex parte Pittman [Nev.] 99 P 700. Language used, controlling when clear and unambiguous, having definite meaning. Atlantic Coast Line R. Co. v. Richardson [Tenn.] 117 SW 496.

**8.** Clark v. Kansas City, etc., R. Co. [Mo.] 118 SW 40; James v. U. S. Fidelity & Guar. Co. [Ky.] 117 SW 406; Commonwealth v. Glover [Ky.] 116 SW 769; State v. Bareo [N. C.] 63 SE 673; Blanks v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 116 SW 377; Ex parte Rickey [Nev.] 100 P 134; State v. Maughan [Utah] 100 P 934; King v. Armstrong [Cal. App.] 99 P 527; United States v. Four Hundred and Twenty Dollars, 162 F 803; Board of Health v. Phillipsburg [N. J. Eq.] 71 A 750. Resort should first be had to language used and if that is clear there should be no speculation as to intent. Nance v. Southern R. Co., 149 N. C. 366, 63 SE 116.

**9, 10.** In re Senate Bill No. 416 [Colo.] 101 P 410.

**11. Search Note:** See notes in 1 Ann. Cas. 570, 752; 6 Id. 860.

See, also, Statutes, Cent. Dig. §§ 254-341; Dec. Dig. §§ 174-260; 26 A. & E. Enc. L. (2ed.) 596.

**12.** In re Low, 128 App. Div. 915, 112 NYS 619; In re Simmons, 130 App. Div. 350, 114 NYS 571. Statutes presumed to have been passed in light of **previous judicial decisions** relating to subject-matter. In re Moffitt's Estate, 153 Cal. 359, 95 P 653. Rehearing denied, 153 Cal. 359, 95 P 1025.

**13.** Legislature presumed to have known limitations upon its power, and not to have intended an invalid and ineffectual enactment. Boeden v. Enterprise Transp. & Transit Co., 198 Mass. 590, 85 NE 110. A statute will not be held to have extraterritorial effect unless the intention to give it such effect is clear. Marriage law. Lanham v. Lanham, 136 Wis. 360, 117 NW 787.

**14.** Always presumed that legislature did not intend to, and has not, exceeded its jurisdiction. People v. McBride, 234 Ill. 146, 84 NE 865.

**15.** It will not be presumed that the legislature intended to overturn long established principles of law unless the intent to do so appears clearly by express declaration or necessary implication. Lowe v. Yolo County Consol. Water Co. [Cal. App.] 96 P 379. A statute will not be construed to alter the common law further than the act expressly declares or than is necessarily implied from the fact that it covers the whole subject-matter. State v. Cooper [Tenn.] 113 SW 1048.

**16.** A statute is not to be given a construction at variance with established rules of procedure unless the intention of the legislature is apparent. State v. Central Vt. R. Co., 81 Vt. 459, 71 A 193.

**17.** Economic Power & Const. Co. v. Buffalo, 59 Misc. 571, 111 NYS 443. There is a presumption both of fact and law in favor of the validity of any statute. St. Louis &

which will sustain it.[18] Thus, a statute will not be held void for uncertainty if capable of any reasonable construction which will uphold it.[19] But courts cannot supply defects or omissions,[20] and a statute so uncertain or defective as to be incapable of enforcement must be held void.[21] Statutes should be construed reasonably [22] and so as not to lead to hardship, injustice, or absurdity.[23] It will be con-

S. F. R. Co. v. Hadley, 168 F 317. Doubts to be resolved in favor of constitutionality. Logan v. State [Tex. Cr. App.] 111 SW 1028; People v. McBride, 234 Ill. 146, 84 NE 865.

**18.** Darlington Lumber Co. v. Missouri Pac. R. Co. [Mo.] 116 SW 530. Two or more constructions being possible, that one will be adopted, if reasonable, which will uphold validity of act. State v. Barrett [Ind.] 87 NE 7; State Water Supply Commission v. Curtis, 192 N. Y. 319, 85 NE 148; Road Imp. Dist. No. 1 v. Glover [Ark.] 110 SW 1031; State v. Louisiana & M. R. Co. [Mo.] 114 SW 956; Euziere v. Tracy, 104 Minn. 378, 116 NW 922; Chesebrough v. San Francisco, 153 Cal. 559, 96 P 288. Statute must, if possible, be so construed as to make it constitutional. State v. Northwestern Tel. Exch. Co. [Minn.] 120 NW 534; Sturges v. Chicago, 237 Ill. 46, 86 NE 683. A court will not declare an act unconstitutional except upon the most careful consideration, and then only where there is hardly room for reasonable doubt. Heinszen v. U. S., 42 Ct. Cl. 58. Courts may declare an act of the general assembly unconstitutional only when such act clearly and plainly violates the constitution in such manner as to leave no doubt or hesitation in the mind of the court. Commonwealth v. Norfolk School Board [Va.] 63 SE 1081. Construction which will make act unconstitutional should not be adopted if voidable. Jersey City v. Speer [N. J. Law] 72 A 448. It is duty of courts to uphold, and so far as possible give effect to, all statutes enacted by the legislature. Commonwealth v. International Harvester Co. [Ky.] 115 SW 755. Presumption is that legislature intended acts to be valid and enforcible; must be construed as valid and consistent with other laws and with constitution if possible. Commonwealth v. International Harvester Co. [Ky.] 115 SW 703. Statutes will be presumed to be constitutional unless they clearly appear to be unconstitutional. They will be construed so as to avoid conflict with constitution when possible. State v. Fountain [Del.] 69 A 926. When a particular construction would render an act unconstitutional, this is strong evidence that the legislature did not so intend it. State v. People's Nat. Bank [N. H.] 70 A 542.

**19.** State v. Dvoracek [Iowa] 118 NW 399. Acts 1908, c. 118, § 2, relating to appointment and duties of appraisers in Baltimore city, held intelligible and capable of enforcement. Barron v. Smith, 108 Mo. App. 317, 70 A 225.

**20.** Courts cannot supply defects or omissions so as to make statutes operative and capable of enforcement. Road Improvement Dist. No. 1 v. Glover [Ark.] 117 SW 544. Courts cannot by construction add to or amend a statute so as to supply a defect and make it enforcible. Kehr v. Columbia [Mo. App.] 116 SW 428.

**21.** Doubtful and uncertain statute, whose provisions were doubtful or impossible to be complied with, will be held void. People v. Briggs, 193 N. Y. 457, 86 NE 522. Proviso in Gen. Laws 1896, c. 102, § 4, local option law, as to petitions for elections, held void for uncertainty. Ruhland v. Waterman [R. I.] 71 A 450. Section 2 of Senate Bill No. 152 of 10th legislature is void for uncertainty, because not providing procedure for special election required by it, provisions of general election law being inapplicable. Knight v. Trigg [Idaho] 100 P 1060. Acts 1907, p. 340, providing for road improvement districts, is incapable of enforcement, since it does not provide for assessment of lands, nor mode thereof. Road improvement Dist. No. 1 v. Glover [Ark.] 117 SW 544. Statute provided that no teacher should receive more than sum scheduled to be paid for seventh years' service unless and until services should have been approved as "fit and meritorious." Last clause too indefinite and uncertain. Proviso void. Eagan v. Board of Education, 115 NYS 165. Laws 1907, p. 63, c. 47, § 3, providing for determination by superior judge of "next nearest judicial district" adjoining district in which certain county is situated as to whether certain division of county would have constitutional number of inhabitants in each part, unconstitutional as indefinite and uncertain, where three districts fulfilled requirements. State v. Pacific County Super. Ct., 47 Wash. 453, 92 P 345.

**22.** A statute is to be construed so as to give it a reasonable effect, pursuant to the legislative intent. St. Louis, etc., R. Co. v. Batesville & W. Tel. Co. [Ark.] 110 SW 1047. Construction consonant with reason and common sense should be sought. Darlington Lumber Co. v. Missouri Pac. R. Co. [Mo.] 116 SW 530. Where a statute is capable of two meanings, and one is more reasonable and hence more probable than the other, this fact may be considered on the question of intent. Carter v. Whitcomb, 74 N. H. 482, 69 A 779. Where a statute cannot in the nature of things be made to apply, it must be held that it does not apply and that legislature did not intend that it should. State v. Harsha [Kan.] 101 P 454. It is usually safe to reject an interpretation that does not naturally suggest itself to the mind of the casual reader but is rather the result of a laborious effort to extract from the statute a meaning which it does not at first seem to convey. Shulthis v. MacDougal, 162 F 331.

**23.** In re Caldwell, 164 F 515. Uncertain or ambiguous words should always be construed so as, if possible, to give a reasonable and just result. State v. Louisiana & M. R. Co. [Mo.] 114 SW 956. Statute should be given such construction as will avoid absurdity, hardship or injustice and as will bring it within legislative authority. Harvey v. Hoffman, 108 Va. 626, 62 SE 371. Where two constructions are possible, that will be adopted which will not lead to absurd conclusions. Landrum v. Graham [Okl.] 98 P 432. Statutes should be so construed as to give sensible and intelli-

clusively presumed that the legislature has acted in good faith.[24] Rules of construction are sometimes provided by statute.[25] Such rules are not exclusive or applicable in all cases[26] and should not be applied so as to thwart the intent of the legislature as expressed in the statutes to be construed.[27] An unscientific and bungling statute cannot be construed and interpreted by the same strict scientific rules as a consistent and scientific statute.[28]

*Legislative intent and purpose.* See 10 C. L. 1716—The cardinal rule of construction is to ascertain and effectuate the legislative intent,[29] and that construction should be adopted which will carry out the apparent purpose of the legislature,[30] and

gent meaning to every part and to avoid absurd and unjust consequences. People v. Sholem, 238 Ill. 203, 87 NE 390. A statute is to be sensibly construed, and general terms so limited in their application as not to lead to injustice or oppression. Cumberland Tel. & T. Co. v. Kelly [C. C. A.] 160 F 316. A construction which will lead to mischievous and absurd results will not be adopted if any other construction, more reasonable, is possible. Curry v. Lehman, 55 Fla. 847, 47 S 18. An unwise or unjust purpose will not be imputed to the legislature when it can be avoided by a reasonable construction. Pattison v. Clingan [Miss.] 47 S 503. Where meaning is doubtful, results may be considered, and construction leading to oppression, invasion of rights, or hardship should be rejected, if possible, without doing violence to language used. Nance v. Southern R. Co., 149 N. C. 366, 63 SE 116. Statutes should receive a sensible construction so as to effectuate the legislative intent and avoid an unjust and absurd conclusion. Provisions of immigration law excluding aliens afflicted with certain diseases, etc., are applicable to Chinese immigrants otherwise entitled to admission. In re Lee Sher Wing, 164 F 506.

24. Repeal of charter of corporation. People v. Calder, 153 Mich. 724, 15 Det. Leg. N. 619, 117 NW 314.

25. Rev. St. 1874, c. 131, establishing rules of construction, by its own terms, applies to all laws existing when it was enacted, as well as to subsequent laws. People v. Zito, 237 Ill. 434, 86 NE 1041.

26. Rev. St. 1899, § 4160, subd. 17, does not fix definition of word "residence" for all purposes. State v. Shepperd [Mo.] 117 SW 1169.

27. People v. Zito, 237 Ill. 434, 86 NE 1041.

28. Reynolds v. Bingham, 126 App. Div. 289, 110 NYS 520; Town of Pelham v. Shinn, 129 App. Div. 20, 113 NYS 98; Hodgins v. Bingham, 128 App. Div. 151, 112 NYS 543.

29. Ruhland v. Waterman [R. I.] 71 A 450; People v. Glynn, 128 App. Div. 257, 112 NYS 695; State v. Barrett [Ind.] 87 NE 7; Sunflower Lumber Co. v. Turner Supply Co. [Ala.] 48 S 510; Grinstead v. Kirby, 33 Ky. L. R. 287, 110 SW 247; Dekelt v. People [Colo.] 99 P 330; State v. Barco [N. C.] 63 SE 673; Empire Copper Co. v. Henderson [Idaho] 99 P 127. The cardinal rule of construction is to ascertain and give effect to the general intent of the act, if that can be discovered. State v. Weller [Ind.] 85 NE 761. Sole object of construction is to arrive at legislative intent. Coggeshall v. Des Moines, 138 Iowa, 730, 117 NW 309. Obvious intention of legislature should control, especially when object of act is wholesome. Armstrong v. Modern Brotherhood of America, 132 Mo. App. 171, 112 SW 24. Ingenious distinctions not controlling, intent being evident. State v. Scheffield [La.] 48 S 932. Under Kirby's Dig. § 7792, it is duty of courts to construe general terms, phrases and provisions liberally, with a view of ascertaining true intent of legislature. Brown v. Nelms [Ark.] 112 SW 373. Legislative intent controls scope of statute whether plainly expressed or discoverable by aid of rules of judicial construction. State v. Railroad Commission, 137 Wis. 80, 117 NW 846. Penal as well as other statutes are to be so construed as to effectuate legislative intent. State v. Bass Pub. Co. [Me.] 71 A 894. Statutes for disposal of public lands presumptively intended to produce best results for all concerned. Such intent should be effectuated if possible. Hough v. Porter [Or.] 98 P 1083. Rules of construction permit of looking at act as whole to its subject-matter, its spirit and reason, of giving words broad or narrow meaning within their reasonable scope, of supplying clearly omitted words, of changing words clearly misplaced or used erroneously, and thus spelling out real intent. State v. Railroad Commission, 137 Wis. 80, 117 NW 846.

30. Moody v. Brasie, 104 Minn. 463, 116 NW 941. Object of law. Gibson v. People [Colo.] 99 P 333. Legislative purpose and object are to be borne in mind. Dekelt v. People [Colo.] 99 P 330. Such construction should be adopted as will not defeat manifest object of statute. City of Cheyenne v. State [Wyo.] 96 P 244; Greenough v. Police Com'rs [R. I.] 71 A 806. Evil sought to be remedied and object sought to be obtained. Marquette Third Vein Coal Co. v. Allison, 132 Ill. App. 221. Where language is not explicit, evils sought to be remedied and remedy proposed are to be considered. Dekelt v. People [Colo.] 99 P 330. The intention is to be gathered from the necessity and reason of the enactment and the meaning of words enlarged or restricted according to the true intent. People v. Sholen. 238 Ill. 203, 87 NE 390. Purpose of act being to prevent deception, it will be construed to effectuate that purpose. State v. Pollman [Wash.] 98 P 88. To clear up obscurities, act should be read with reference to its leading idea. State v. Railroad Commission, 137 Wis. 80, 117 NW 846. Statutes will be interpreted so as to carry out the object of the legislature, which in the case of Laws 1897, p. 394, c. 378, § 1091, as amended by laws 1900, p. 1607, c. 751, § 4, was to secure uniformity of salaries. Loeuy v. New York Board of Education, 59 Misc. 70, 112 NYS 4. Construction which completely nullifies a plain statutory provision cannot be adopted when the law is susceptible of another construction which is reasonably in harmony

where this clearly appears from the language used, resort cannot be had to other rules of construction,[31] and the meaning of the language used cannot be extended by construction.[32] Where a general intention is expressed in a statute and the act also expresses a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception.[33]

*The entire act is to be considered*[34]—See 10 C. L. 1717 and construed as a whole,[35] and such a construction adopted as will avoid conflict in its provisions[36] and give effect to every word and part of the statute if possible.[37] Where there are specific

with apparent object sought to be accomplished by legislature. State v. Duis [N. D.] 116 NW 751. Construction of Rochester charter will not be adopted which would make farce of liquor tax law and its enforcement. People v. Craig, 111 NYS 909. Construction of charter of Greater New York should be adopted which will give effect to legislative intent and obviate evils sought to be avoided. People v. Ahearn, 115 NYS 664. Even in penal statutes, mischief and remedy must be considered, and strict letter may yield to spirit of law. Babo v. Yazoo Mississippi Delta Com'rs [Miss.] 46 S 819. Regard must be had to the subject-matter of the statute as well as its language, and to the consequence that would follow the proposed construction. State v. Audette, 81 Vt. 400, 70 A 833.

**31.** United States v. Musgrave, 160 F 700. Language may be so plain and specific that its meaning cannot be changed by any general principles of construction. People v. Long Island R. Co., 194 N. Y. 130, 87 NE 79. If language used is unambiguous, resort must be had to that alone. Commonwealth v. International Harvester Co. [Ky.] 115 SW 703. When language is clear, intention expressed by it must control. Empire Copper Co. v. Henderson [Idaho] 99 P 127. Language actually used, taken in its fair and obvious meaning, is test of intention. State v. Montello Salt Co., 34 Utah, 458, 98 P 549. That statute may lead to some confusion cannot control or change plain language as used in act. Lahart v. Thompson [Iowa] 118 NW 398. Court will give statute meaning which it is apparent that legislature, from language used, had in mind at time. State v. Hanson, 60 Neb. 724, 117 NW 412. Rules of construction do not justify the disregarding of plain language of the statute. Neither rule of liberal nor strict construction justifies judicial legislation. City of Detroit v. Detroit United R. Co. [Mich.] 16 Det. Leg. N. 48, 120 NW 600. Only where an ambiguity, such as apparent conflict with other laws or with the constitution, arises, may the courts look beyond the words of the statute to ascertain the legislative intent. Commonwealth v. International Harvester Co. [Ky.] 115 SW 703.

**32.** The courts are powerless to extend a remedy which lies with the legislature. Board of Health v. Phillipsburg [N. J. Eq.] 71 A 750. A law which says that a salary shall not be reduced cannot be preverted into meaning that the salary must be increased. Laws 1897, p. 394, c. 378, § 1091, as amended by Laws 1900, p. 1607, c. 751, § 4, applying to powers of board of education of city of New York. Loewy v. New York Board of Education, 59 Misc. 70, 112 NYS 4.

**33.** State v. Moore, 108 Md. App. 636, 71 A 461.

**34.** In re Klein's Estate, 152 Mich. 420, 15 Det. Leg. N. 230, 116 NW 394; State v. Central Vermont R. Co., 81 Vt. 463, 71 A 194. Entire act must be considered in ascertaining what constitutes offense under dental act (Rev. Pol. Code, art. 10, c. 4, § 289). State v. Carlisle [S. D.] 118 NW 1033.

**35.** The legislative intent must be gathered from the whole act. Board of Health v. Phillipsburg [N. J. Eq.] 71 A 750; Dekelt v. People [Colo.] 99 P 330; Willis v. Kalmbach [Va.] 64 SE 342. Intention of the whole act will control interpretation of parts. Lederer Realty Corp. v. Hopkins [R. I.] 71 A 456. All parts of the act are to be considered together and such construction given as will best effectuate the intention of the legislature. State v. People's Nat. Bank [N. H.] 70 A 542. Letter of law will not be followed when not consistent with legislative intent as shown by act as whole. Curry v. Lehman, 55 Fla. 847, 47 S 18. Statute presumed to be harmonious and consistent, and to be construed as a whole. State v. Standard Oil Co. [Mo.] 116 SW 902. Statute, after amendment, must be considered as a whole with amendment, according to plain and obvious meaning. George v. Woods [Miss.] 49 S 147. One section of statute will not be so construed as to render another abortive, if they can be made to harmonize by any reasonable construction. Lawson v. Tripp, 34 Utah, 28, 95 P 520. Rule that words are to be construed in connection with context, especially applicable to criminal statutes. People v. Hemleb, 127 App. Div. 356, 111 NYS 690. Several sections of act are to be considered as whole and harmonized if possible. Coggeshall v. Des Moines, 138 Iowa, 730, 117 NW 309. Where form of notice is part of legislative act, and is not contradictory with other provisions, form must be considered as legislative exposition of question or proposition to be voted upon. People v. School Directors, 139 Ill. App. 620.

**36.** Statute should be so construed as to reconcile apparent conflict between two provisions. Hill v. State [Tex. Cr. App.] 114 SW 117. Should be so construed as to avoid apparent conflict, if possible, and give effect to every part. Ingle v. Batesville Grocery Co. [Ark.] 117 SW 241. If different portions seem to conflict, courts must harmonize them if possible, favoring such construction as will give effect to all. Trapp v. Wells Fargo Exp. Co. [Ok.] 97 P 1003. Of two constructions, either of which is warranted by the words of the act, that should be preferred which best harmonizes with the entire act. People v. Sholem, 238 Ill. 203, 87 NE 390.

**37.** No portion being disregarded or rendered nugatory. Attorney General v. Detroit Board of Education, 154 Mich. 584, 15 Det. Leg. N. 902, 118 NW 606; United States v. MacVeagh, 29 S. Ct. 556; State v. Rutland R.

provisions relating to a particular subject, they must control as to such subject as against general provisions occurring elsewhere,[38] but a particular provision should not be given a meaning at variance with general provisions, unless the language demands it.[39] The grant of a specific power or the imposition of a definite duty confers by implication authority to do whatever is necessary to execute the power or perform the duty.[40] The numbering of sections in an act is a purely artificial and unessential arrangement resorted to for convenience only, and can never be allowed to prevent a correct construction of the act as a whole,[41] though the numbering of sections in a chapter of a code has been held important.[42] An enumeration of certain specified things excludes all others not therein mentioned,[43] but this rule does not apply where there are no others that could have been excluded.[44] When a statute limits a thing to be done in a particular way, it necessarily requires that it shall not be done otherwise.[45]

*Ejusdem generis.*[See 10 C. L. 1717]—The general rule is that where general words follow particular ones, the general words will be held to apply to persons or things or conditions of the same character as those covered by the particular words.[46] But this rule will not be applied when to do so would defeat the legislative intent as shown by the act as a whole,[47] nor when the particular words embrace all the persons or objects of the class mentioned,[48] nor where the general word itself indicates a thing different from that indicated by the particular word.[49]

Co., 81 Vt. 508, 71 A 197; Baxter v. York Realty Co., 128 App. Div. 79, 112 NYS 455; City of Escondido v. Escondido Lumber, Hay & Grain Co. [Cal. App.] 97 P 197; Hettel v. Nevada First Judicial Dist. Ct. [Nev.] 96 P 1062; Town of Ft. Edward v. Hudson Valley R. Co., 127 App. Div. 438, 111 NYS 753; Robinson v. Harmon [Mich.] 15 Det. Leg. N. 711, 117 NW 661; Jones v. Grieser, 238 Ill. 183, 87 NE 295; Freeman v. Freeman, 126 App. Div. 601, 110 NYS 686; Trapp v. Wells Fargo Exp. Co. [Okl.] 97 P 1003. Entire act or section should be considered and every word given effect. Nance v. Southern R. Co., 149 N. C. 366, 63 SE 116. Effect should be given to every word and clause, and such construction as will make a proviso repugnant to the body of the act avoided, if possible. State v. Weller [Ind.] 85 NE 761. All language to be considered and so interpreted as to effectuate legislative intent. Rohlf v. Kasemeier [Iowa] 118 NW 276. Meaning clearly expressed should be given to law; if language ambiguous, true intent should be ascertained, if possible. McLeod v. Carthage Com'rs, 148 N. C. 77, 61 SE 605.

38. Though general provisions standing alone would be broad enough to include particular subject. King v. Armstrong [Cal. App.] 99 P 527.

39. Particular provision should not be given special meaning at variance with general intent, unless language demands it. People v. Long Island R. Co., 194 N. Y. 130, 87 NE 79.

40. Brown v. Clark [Tex.] 116 SW 360.

41. In re Bull's Estate, 153 Cal. 715, 96 P 366.

42. Under Pol. Code, § 4484, if conflicting provisions are found in different sections of the same chapter or article, the provisions of the sections last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter or article. In re Scott [Cal. App.] 96 P 385.

43. Consolidated Coal Co. v. Miller, 236 Ill. 149, 86 NE 205. Where a statute enumerates certain things as necessary to the creation of a lien on real estate, it excludes the idea of anything else being necessary to the perfection of the lien. Hughes v Wallace [Ky.] 118 SW 324.

44. Kinney v. Heuring [Ind. App.] 87 NE 1053.

45. Scott v. Ford [Or.] 97 P 99.

46. Mertens v. Southern Coal & Min. Co., 235 Ill. 540, 85 NE 743; Pioneer Inv. & Trust Co. v. Board of Education [Utah] 99 P 150; Gibson v. People [Colo.] 99 P 333; State v. Prather [Kan.] 100 P 57; Nance v. Southern R. Co., 149 N. C. 366, 63 SE 116; Lantry v. Mede, 127 App. Div. 557, 111 NYS 833; State Board of Pharmacy v. Gasau [N. Y.] 88 NE 55. Where words of specific and limited signification are followed by general words of more comprehensive import, the general words are to be construed as embracing only such persons, places and things as are of like kind or class to those designated by the specific words, unless a contrary intention is clearly shown. Wiggins v. State [Ind.] 87 NE 718.

47. United States Cement Co. v. Cooper [Ind.] 88 NE 69. The rule always yields to manifest legislative intention. State v. Prather [Kan.] 100 P 57. Where it clearly appears that such general words are not so limited, they will not be so construed. Mertens v. Southern Coal & Min. Co., 235 Ill. 540, 85 NE 743.

48. In such case, general words must be given independent meaning or none at all. United States Cement Co. v. Cooper [Ind.] 88 NE 69.

49. Rule of ejusdem generis not applicable where statute relating to crime of assault used terms "stick or other weapon," since a stick is not technically a weapon. Held, any foreign matter or substance used committing an assault, capable of producing injury or pain, is "weapon." Martin v. State [Ala.] 47 S 104

(§ 5) *C. Aids to interpretation.*[50] *The title* See 10 C. L. 1718 as well as the body of the act may be considered in ascertaining the legislative intent,[51] but cannot, of course, control the provisions of the statute.[52]

*Surrounding conditions* See 10 C. L. 1718 and contemporary facts and circumstances relative to the subject-matter,[53] including the objects sought to be attained and the evils sought to be remedied,[54] may be considered.

*Legislative history.* See 10 C. L. 1718—The history of legislation on the subject and prior acts,[55] including acts that have been repealed,[56] and their construction,[57] may be considered, and legislative records and debates[58] and the history of a constitutional convention has, also, been held competent,[59] but the intentions, motives,

**50. Search Note:** See notes in 14 L. R. A. 459; 1 Ann. Cas. 147; 4 Id. 7; 9 Id. 303; 10 Id. 51.

See, also, Statutes, Cent. Dig. §§ 282-309; Dec. Dig. §§ 204-226; 26 A. & E. Enc. L. (2ed.) 625.

**51.** State v. Northwestern Tel. Exch. Co. [Minn.] 120 NW 534. The title or subtitle, as well as the enacting clause, may be looked to in determining the intention of the legislature. Robinson v. U. S., 42 Ct. Cl. 52. Reference may be had to the title, even after the act has been re-enacted in the Code and the title omitted. Wimberly v. Georgia Southern & F. R. Co., 5 Ga. App. 263, 63 SE 29. The title of an act, while it may not be used to extend or restrain any positive provisions found in the body of the act, may be resorted to in a case of doubt for the purpose of ascertaining its meaning. United States v. Nakashima [C. C. A.] 160 F 842.

**52.** Title of act of congress need not embrace all its provsions; hence body of act must be looked to for intent. Hough v. Porter [Or.] 98 P 1083.

**53.** Existing conditions, which it will be presumed legislature intended to meet, and existing laws may be considered. Bull v. New York City R. Co., 192 N. Y. 361, 85 NE 385. If meaning be doubtful, court may consider contemporary circumstances and facts leading to enactment, and read law in light of surrounding facts. City of Chicago v. Green, 238 Ill. 258, 87 NE 417. Statute must be read in light of circumstances existing at time of enactment of constitution as then written, and of law as then declared. Wyatt v. State Board of Equalization, 74 N. H. 550, 70 A 387.

**54.** Object to be attained and evils to be remedied, as well as language, may be considered. City of Chicago v. Green, 238 Ill. 258, 87 NE 417. Object sought to accomplish is excellent aid. James v. U. S. Fidelity & Guarantee Co. [Ky.] 117 SW 406. The mischief intended to be prevented by a statute may be considered. Minneapolis Threshing Mach. Co. v. Haug, 136 Wis. 350, 117 NW 811. Occasion and necessity for law and mischief and remedy should be considered. Norfolk & Portsmouth Trac. Co. v. Ellington's Adm'r, 108 Va. 245, 61 SE 779. Courts may look to old law, the mischief, and the remedy. State v. Stewart [Wash.] 100 P 153. Evil to be corrected, language of act, title, history of enactment, and state of law already in existence, may be considered. Curry v. Lehman, 55 Fla. 847, 47 S 18. History of times and evils sought to be cured may be considered. Commonwealth International Harvester Co. [Ky.] 115 SW 703. What may be, as well as what is presently being effected, must be considered. Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326, 87 NE 504.

**55.** Legislative history generally held inadmissible. Tennant v. Kuhlemeier [Iowa] 120 NW 689. History of legislation on subject and prior acts considered, in construing act. Nance v. Southern R. Co., 149 N. C. 366, 63 SE 116. Legislative history and prior laws and their construction to be considered. State v. Rutland R. Co., 81 Vt. 508, 71 A 197. History of liquor legislation consulted in construing liquor law. Ruhland v. Waterman [R. I.] 71 A 450. Laws 1879, p. 77, descent of property, cannot be construed so as to permit persons related to decedents in third degree to take by representation, when that construction would change construction given law for 20 years, and construction given by many re-enactments and judicial decisions, no later law expressly changing it. Green v. Bancroft [N. H.] 72 A 373. Reference to history of legislation and earlier statutes on subject always competent and often of great value. Wyatt v. State Board of Equalization, 74 N. H. 552, 70 A 387.

**56.** A repealed law may be considered for the purpose of interpreting a living statute. Advisory Board of Harrison Tp. v. State, 170 Ind. 439, 85 NE 18. Where there is doubt as to meaning of excepting clause, other statutes on same subject may be considered though some have been repealed. Steck v. Prentice, 43 Colo. 17, 95 P 552. Though by the Revised Statutes of the United States all statutes, prior to 1873, any part of which is embraced in the revised statutes, are repealed, the original acts may be consulted in construing any section of the revised statutes, especially in view of the authorization of marginal notes by the act authorizing the revision. People's U. S. Bank v. Goodwin, 162 F 937.

**57.** It is presumed that legislature was informed of existing laws and practical construction they had received. State v. Rutland R. Co., 81 Vt. 508, 71 A 197.

**58.** Congressional records and debates may be considered (construing provision of customs laws). Shallus v. U. S. [C. C. A.] 162 F 653.

**59.** History of proceedings in constitutional convention may be consulted as aid to interpretation, but is of little aid or importance where provision to be construed is clear. State v. Fountain [Del.] 69 A 926. History of constitutional convention and debates therein considered in determining ef-

and purposes of individual legislators is held incompetent.[60] Consideration given to subject-matter by a state legislature is held immaterial when a federal court is considering the act.[61] Communications to the law-making body by other persons cannot be considered.[62]

*Official construction.*See 10 C. L. 1718—Practical construction of a statute by the officers charged with its enforcement may be considered [63] and given more or less weight, according to circumstances,[64] but this rule is inapplicable where the language of the statute is plain [65] and the official construction is in violation of it.[66]

*Construction placed by courts of other countries* on similar provisions of law may be considered.[67]

*Contemporaneous construction* See 10 C. L. 1718 placed on the statute at the time of enactment, and soon thereafter, is entitled to great weight.[68]

*Legislative construction* See 10 C. L. 1718 of a statute is entitled to weight but is not conclusive.[69]

*Common law.*[70]—All statutes capable of more than one construction are to be examined in the light of common-law principles.[71] When a statute is merely de-

fect of constitutional provision as to local and special laws. People v. Wilcox, 237 Ill. 421, 86 NE 672.

**60.** Opinions of individual legislators, remarks on passage of act, debates, motives and purposes of individual legislators, or intention of draughtsman of act, are held too uncertain to be considered. Tennant v. Kuhlemeier [Iowa] 120 NW 689. Code commission being mere draughtsman, its intent, though admissible, cannot control legislative intent as shown in act finally adopted. Id.

**61.** Consideration given by legislature to questions underlying railroad rate law, immaterial when federal court passes on validity of act. St. Louis & S. F. R. Co. v. Hadley, 168 F 317.

**62.** Communication by manufacturer to ways and means, committee, making tariff suggestion, cannot be considered in construing bill. Thomas v. Vandergrift & Co. [C. C. A.] 162 F 645.

**63.** Moriarty v. New York, 59 Misc. 204, 110 NYS 842. Usage and construction by officials executing law. Douglas County v. Vinsonhaler [Neb.] 118 NW 1058. Long-continued practical construction entitled to considerable weight. In re Hastings Brew. Co. [Neb.] 119 NW 27. Official interpretation of administrative statutes entitled to weight. Ewing v. Vernon County [Mo.] 116 SW 518. Great weight is to be given construction placed on act by departments of government charged with its execution. Wyatt v. State Board of Equalization, 74 N. H. 552, 70 A 387. Where the language of a statute is ambiguous and susceptible of two reasonable interpretations, weight is given to the practical contemporaneous construction. State v. Rutland R. Co., 81 Vt. 508, 71 A 197. Where statute is ambiguous, long-continued practical construction of it by authorities charged with its execution will be given great weight. City of New York v. New York City R. Co., 193 N. Y. 543, 86 NE 565. Penal statute should not be construed in manner different from that adopted by attorney general, upon whose opinion respondent relied, unless clear and unambiguous language so requires. State v. Hay [Wash.] 99 P 748. Construction placed on statute by attorney general's department, on which defendant acted, followed by court. State v. Brady [Tex. Civ. App.] 114 SW 895. Federal supreme court followed construction placed by land department on swamp land laws applicable to Louisiana. Louisiana v. Garfield, 211 U. S. 70, 53 Law. Ed. 92. Opinion of interstate commerce commission on interstate commerce act and its interpretation, entitled to great weight. Greenwald v. Weir, 130 App. Div. 696, 115 NYS 311.

**64.** Practical construction entitled to more or less weight, according to circumstances when long continued, as for 50 years, it is entitled to controlling weight. State v. Frear [Wis.] 120 NW 216.

**65.** The rule that contemporaneous, long, uniform and practical construction by administrative officers of statute will be followed by court, inapplicable, where statute was not doubtful and no practical construction of it was shown. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93.

**66.** Practice in violation of the plain meaning of an act cannot be recognized. Moriarty v. New York, 59 Misc. 204, 110 NYS 842.

**67.** Though **ecclesiastical law** has not been adopted in this country, yet, in considering certain facts under a statute, the court may consider decisions by courts having jurisdiction over same subjects, applying principles of ecclesiastical law, not dissimilar to those of statute. Hawkins v. Hawkins, 193 N. Y. 409, 86 NE 468.

**68.** Mississippi Levee Com'rs v. Refuge Cotton Oil Co., 91 Miss. 480, 44 S 828.

**69.** Fact that legislature, in city charter, gave police court jurisdiction to try petit larceny, second offense, was legislative construction that it was misdemeanor. People v. Craig, 60 Misc. 529, 112 NYS 781. Legislative construction not conclusive, but entitled to weight. Crohn v. Kansas City Home Tel. Co., 131 Mo. App. 313, 109 SW 1068. Due consideration should be given a legislative construction of an act, but such construction is not conclusive on courts. Gibson v. People [Colo.] 99 P 333.

**70.** See 10 C. L. 1716, n. 88, 89.

**71.** State v. Central Vermont R. Co., 81 Vt. 459, 71 A 193.

claratory of the common law, it is to be construed as near to the reason and rule of the common law as may be.[72] Statutes intended to remedy defects in or supersede the common law must be read and construed in the light of that law.[73] Where words of a definite signification under the common law are used in such statutes, and there is nothing to show they are used in a different sense, they are deemed to be employed in their known and defined common-law meaning.[74]

*Statutes adopted from other states or countries* See 10 C. L. 1719 are presumed to have been adopted with the judicial construction which has been there previously placed upon them.[75]

*Re-enactment statutes.* See 10 C. L. 1719—Where a statute is substantially re-enacted, it is presumed to have been re-enacted in view of the previous judicial interpretation of it,[76] if there has been such interpretation,[77] unless the language used shows a contrary intent.[78] Similarly, where a term used in a statute has been construed by appellate courts of the state, it will be understood to have been used as construed by the courts.[79] A change in the language of a statute indicates, of course, an intent to change the meaning.[80] A statute should be construed with respect to a limitation impressed upon its operation by its original title, notwithstanding its re-enactment as part of a practice act.[81]

*Laws in pari materia* See 10 C. L. 1720 will be construed together,[82] and harmon-

**72.** Cumberland Tel. & T. Co. v. Keely [C. C. A.] 160 F 316.

**73, 74.** Truelove v. Truelove [Ind.] 86 NE 1018.

**75.** Devine v. Healy, 141 Ill. App. 290; Harrill v. Davis [C. C. A.] 168 F 187; State v. Blaisdell [N. D.] 119 NW 360; Carlson v. Stuart [S. D.] 119 NW 41; Genty v. Bearss [Neb.] 118 NW 1077; Besser v. Alpena Circuit Judge [Mich.] 15 Det. Leg. N. 1081, 119 NW 902; Chesapeake & O. R. Co. v. Pew [Va.] 64 SE 35; Murphy v. Brown [Ariz.] 100 P 801; United States Fidelity & Guar. Co. v. People [Colo.] 98 P 828. In adopting language of English statute, presumption is that judicial interpretation of act was adopted. Lavender v. Rosenheim [Md.] 72 A 669. Laws Oregon 1907, p. 302 (safe guarding machinery), being adopted from Washington statute, previous construction of Washington Act also adopted. Welsh v. Barber Asphalt Pav. Co. [C. C. A.] 167 F 465. Where congress, legislating for a territory adopts statutes from another state, such statutes should be construed in the light of the construction which had been placed on them by the courts of the state from which they were taken. State v. Caruthers [Okl. Cr. App.] 98 P 474.

**76.** Atton v. South Chicago City R. Co., 236 Ill. 507, 86 NE 277; Hoy v. Hoy [Miss.] 48 S 903; Miller v. Givens, 41 Ind. App. 401, 83 NE 1018. The legislature, readopting a section identical with one previously interpreted by the court, presumably intend that it shall be administered in view of such interpretation. State v. Derry [Ind.] 85 NE 765. A re-enacted statute adopts previous judicial construction. Marshall v. Matson [Ind.] 86 NE 339. Re-enactment of statute which has been judicially construed makes construction part of statute. Tennessee Coal Iron & R. Co. v. Roussell [Ala.] 46 S 866. Where statute is re-enacted in Code unchanged, after judicial construction, it will be presumed that such construction was correct and effectuated legislative intent. State v. Branner, 149 N. C. 559, 63 SE 84. The re-enactment of a statute without change is, in the absence of weighty evidence to the contrary, an adoption of previous judicial construction. Wyatt v. State Board of Equalization, 74 N. H. 552, 70 A 387. Where provision of practice act is re-enacted in same language in a code, presumption is that legislature intended it to have same meaning as it had been construed by courts to have in practice act. State Commission in Lunacy v. Welch [Cal.] 99 P 181.

**77.** Cannot be assumed that legislature, in re-enacting statute, adopted a judicial construction which was unknown to state officials, state's counsel and members of court. Inference must rather be that law was not construed as claimed, but in accordance with views of officials. Wyatt v. State Board of Equalization, 74 N. H. 552, 70 A 387.

**78.** Language of Appeal statute (Laws 1907, p. 468) shows intent not to adopt previous construction. Atton v. South Chicago City R. C., 236 Ill. 507, 86 NE 277.

**79.** Cohen v. State, 53 Tex. Cr. App. 422, 110 SW 66. Where the legislature in a later statute uses the term of an earlier one which has received judicial construction, it adopts such judicial construction as controlling construction of later act. In re Baird's Estate, 126 App. Div. 439, 110 NYS 708.

**80.** When a procedure statute is changed, it must be presumed that legislature intended to change rule. McLean v. Moran [Mont.] 99 P 836.

**81.** Bryant v. Skillman Hardware Co. [N. J. Law] 69 A 23.

**82.** State v. Central Vermont R. Co., 81 Vt. 463, 71 A 194; United States v. Moore [C. C. A.] 161 F 513; Howard v. Emmet County [Iowa] 118 NW 832; DeGraffenreid v. Iowa Land & Trust Co., 20 Okl. 687, 95 P 624; Stewart v. Chapman [Me.] 70 A 1069; McCarter v. Vineland Light & Power Co. [N. J. Err. & App.] 70 A 177. Act March 15,

ized, if possible,[83] as parts of a legislative scheme or plan,[84] whether enacted at the same or at different times.[85] Statutes are in pari materia when they relate to the same person or thing or to the same class of persons or things.[86]

(§ 5) *D. Words, punctuation and grammar.*[87]—See 10 C. L. 1720—Words of a statute are to be given their plain, usual and popular meaning,[88] unless they have

1906, p. 432, c. 248, and Act 1906, pp. 513, 515, c. 293, construed. Commonwealth v. Norfolk School Board [Va.] 63 SE 1081. Statutes relating to same subject-matter should be construed together and made to harmonize if possible. Rowe v. Richmond [Va.] 64 SE 51. Statutes relating to same subject must be construed together as though constituting but one statute. Curry v. Lehman, 55 Fla. 847, 47 S 18. Construction which will make statute conflict with others should be avoided if possible. State v. Martin [Ala.] 48 S 847. Two or more statutes enacted at different sessions, dealing with same subject, are to be treated in pari materia. Commonwealth v. Internat. Harvester Co. [Ky.] 115 SW 703. Statute to be construed in connection with cognate provisions of other laws. Darlington Lumber Co. v. Missouri Pac. R. Co. [Mo.] 116 SW 530. Entire statute and others in pari materia to be considered. Norfolk & Portsmouth Trac. Co. v. Ellington's Adm'r, 108 Va. 245, 61 SE 779. Statute should be construed in light of all general laws on same subject in force at time of its enactment. Chappell v. Lancaster County [Neb.] 120 NW 1116. Certain statutes construed together, as all dealing with maintenance of asylums. State v. Lewis [N. D.] 119 NW 1037. Closely related sections of statutes, relating to same subject, may be considered. In re Corby's Estate [Mich.] 15 Det. Leg. N. 798, 117 NW 906. All consistent statutes relating to same subject are to be construed together and as though passed at same time. Downey v. Coykendall [Neb.] 116 NW 503. Where statute was amended by two amendatory acts approved same day amendatory acts were to be construed together, and act amended treated as amended by both. Stuart v. Chapman [Me.] 70 A 1069.

**83.** Acts passed on same day, separately, or at same session, are to be construed together, presumption being that they are all intended to operate, and may not be revoked or altered by construction, when the words may have their proper operation without it. Trapp v. Wells Fargo Exp. Co. [Okl.] 97 P 1003. Laws 1903, p. 1424, c. 627, is general law, amending Laws 1893, p. 462, c. 238, also general law, both relating to railroads, former should be construed with general railroad law, in harmony therewith if possible. In re New York, W. & B. R. Co., 193 N. Y. 72, 85 NE 1014.

**84.** Statute to be construed as part of system, not alone. Co-ordinate rules and statutes to be considered. Minnich v. Packard [Ind. App.] 85 NE 787. Where one statute confers limited jurisdiction over offenses generally and another larger jurisdiction over specified offenses, the latter must be given effect according to its terms, and both must stand together, one as law of general subject and other as law of special offense. State v. Stanley [Vt.] 71 A 817. A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it forms a part. Presumption is that legislature knew existing law and intended statute to harmonize with it. State v. Snyder [W. Va.] 63 SE 385. All laws upon a subject or germane to it should be construed together so that all may be given effect as parts of a harmonious whole, and legislature will be presumed to have enacted laws with reference to those already in existence. Ensley v. State [Ind.] 88 NE 62. All statutes which are consistent and can stand together, though enacted at different dates, relating to same subject, are treated prospectively and construed together as though constituting one. In re Kreiner [Mich.] 16 Det. Leg. N. 110, 120 NW 785. Amending statutes are to be construed as a part of the acts amended, and both are to be construed as a part of the same statutory scheme. Brooks v. Fitchburg & L. St. R. Co., 200 Mass. 8, 86 NE 289.

**85.** All statutes in pari materia to be taken together as treated as parts of connected whole, though enacted at different times. In re Hastings Brew. Co. [Neb.] 119 NW 27. Subsequent legislation on kindred subjects considered in determining effect of drainage law of 1881. Campbell v. Youngson [Neb.] 118 NW 1053.

**86.** De Graffenreid v. Iowa Land & Trust Co., 20 Okl. 687, 95 P 624.

**87. Search Note:** See notes in 30 A. S. R. 775; 4 Ann. Cas. 420; 9 Id. 140; 10 Id. 1083. See, also, Statutes, Cent. Dig. §§ 266-281; Dec. Dig. §§ 187-203; 26 A. & E. Enc. L. (2ed.) 605.

**88.** Willis v. Kalmbach [Va.] 64 SE 342. Plain, ordinary meaning. People v. Bashford, 128 App. Div. 351, 112 NYS 502. Usual, ordinary meaning. Law v. Smith, 34 Utah. 394, 98 P 300. Usual and accepted meaning. People v. Glynn, 128 App. Div. 257, 112 NYS 695. Plain language must be given its fair and natural meaning, considering subject-matter. In re Klein's Estate, 152 Mich. 420, 15 Det. Leg. N. 230, 116 NW 394. Words given usual ordinary meaning unless contrary intent clearly appears. Booker v. Castillo [Cal.] 98 P 1067. It will be assumed that words were used in accustomed and approved sense, and that if some other meaning was intended, some other appropriate expression would have been used. Town of Southington v. Southington Water Co., 80 Conn. 646, 69 A 1023. Words should be taken in ordinary sense and given such force as will effectuate legislative purpose. City of New York v. Manhattan R. Co., 192 N. Y. 90, 84 NE 745. Words to be construed in plain, popular and usual meaning, unless this would defeat legislative intent. Indianapolis Northern Trac. Co. v. Brennan [Ind.] 87 NE 215. Prima facie, the word **"child," or "children,"** or other terms of kindred, means legitimate child, children or kindred only, not illegitimate. Jackson v. Hocke [Ind.] 84 NE 830. "Operation" is a

a well understood technical meaning,[89] and unless the intention to give them some special or unusual significance clearly appears.[90] Words of doubtful meaning are to be construed with the context [91] and in accordance with the legislative purpose [92] and intent [93] as shown by the entire statute.[94] Words having a well settled meaning in the law are to be given that meaning in the absence of evidence of a contrary intention.[95] It is presumed that the legislature intended what the language used expresses,[96] and the language cannot be changed or given a different meaning by construction [97] if a reasonable and just result can be reached. But a statute need not be read literally when to do so would render it senseless [98] or absurd,[99] or defeat the evident legislative intent.[1] Thus, when necessary to effectuate the intention of the lawmakers, plain clerical errors may be corrected,[2] and words inaptly or incorrectly used may be changed [3] or given an extended meaning.*

"thing" within the letter and spirit of the statute, "thing" being a comprehensive term as used in U. S. Comp. St. 1901, p. 2658. United States v. Somers, 164 F 259. Words "provide" and "select," as used in statute relating to school supplies, are not synonymous. Act March 15, 1906, p. 432, c. 248, and Acts 1906, pp. 513, 515, c. 293. Commonwealth v. Norfolk School Board [Va.] 63 SE 1081. "In the same manner," as used in Act of Congress March 3, 1905, held not to include time. Porter v. Brook [Okl.] 97 P 645.

89. Words are to be taken in usual and popular sense, unless they have well understood technical meaning. Ex parte McCoy [Cal. App.] 101 P 419. "Passenger train" and "regular passenger train" have no technical meaning, within Rev. St. 1899, § 4160, and hence are to be taken in ordinary sense. State v. Missouri Pac. R. Co. [Mo.] 117 SW 1173.

90. Words of a statute are to be taken in ordinary meaning (Pub. St. 1901, c. 2, § 2), in absence of evidence that they have attained special significance in law. Wyatt v. State Board of Equalization, 44 N. H. 552, 70 A 387. A legislative investigation duly authorized in the courss and in aid of ordinary legislative business does not create a debt within the meaning of Const. § 8, art. 8, restricting manner of creating debt. State v. Frear [Wis.] 119 NW 894. The term "debt" as used in § 8, art. 8, of the state constitution, does not refer to mere ordinary legislative expenses, but refers to matters of the sort mentioned in the preceding § 6. Id.

91. Words used to be construed in connection with context. Rohlf v. Kasemeier [Iowa] 118 NW 276.

92. Words of doubtful meaning are to be construed with context and in accordance with legislative purpose. State v. Missouri Pac. R. Co. [Mo.] 117 SW 1173.

93. Words used must be so construed as to work out the evident intention of the legislature. Delta & Pine Land Co. v. Adams [Miss.] 48 S 190.

94. Legislative intent as shown by entire statute controls in ascertaining meaning of word, though its use is inappropriate. People v. Willison, 237 Ill. 584, 86 NE 1094.

95. Where a term or word is not defined by statute, the court must look to its common-law meaning. State v. Shepperd [Mo.] 117 SW 1169. Words having a precise and well settled meaning in the jurisprudence of a country are to be understood in the same sense when used in a statute, unless a contrary intent is clearly shown. Loewy v. Gordon, 129 App. Div. 459, 114 NYS 211. A word which is well known and has a fixed and definite meaning at common law will be restricted to that sense. Fort v. Brinkley [Ark.] 112 SW 1084.

96. Legislature must be presumed to have intended what language used expresses, when construed with context. Barron v. Kaufman [Ky.] 115 SW 787.

97. Words may neither be stricken out nor added if reasonable construction can be given language used. Nance v. Southern R. Co., 149 N. C. 366, 63 SE 116. Nothing can be added to or subtracted from statutory words of general scope and comprehension unless there is an adequate ground for the conclusion. Kunkalman v. Gibson [Ind.] 84 NE 985.

98. Where words taken in their literal sense render a statutory provision absurd and senseless, a more liberal construction must be given them. State v. People's Nat. Bank [N. H.] 70 A 542.

99. The interpolation of words by construction is allowable only when necessary to rescue an act from an absurdity, or to carry into effect a purpose obviously plain from the act as a whole. Barron v. Kaufman [Ky.] 115 SW 787.

1. A thing within the intention of the statute is within the statute, though an exact literal construction would exclude it. In re Low, 128 App. Div. 103, 112 NYS 619. In construing word "servant," courts have not consdered themselves bound by definitions of dictionaries, but have construed it to carry intent of legislature into effect. In re Caldwell, 164 F 515.

2. Insertion of word "not" in statute being clearly clerical error, statute was construed as though it were not there. Bobo v. Yazoo-Mississippi Delta Com'rs [Miss.] 46 S 819. Patent clerical error may be corrected when to refuse to do so would result in destroying entire law on subject. In re Barker [Ky.] 116 SW 686. Where amendatory act by mistake referred to wrong section of statute amended, error was corrected. Id.

3. Inapt words may be disregarded and act should be construed and intent gathered from entire act, read in connection with title and evident purpose. St. Louis, etc., R. C. v. State [Ark.] 112 SW 150. Term "paragraph" will be construed to mean

Grammatical rules of construction should be considered and applied with other rules where there is no conflict between them, and effect given to all.[5] They are not controlling where an intent in conflict with them is disclosed,[6] but they are not unimportant and may influence a doubtful case,[7] and where there is nothing out of accord therewith, either in the particular language or general intent of the act, they are of controlling force.[8]

General words in a statute are not to be construed as imposing a liability on the state.[9] Where the intention can be ascertained from the language of an enactment, the court will not consider itself bound to follow the words last used.[10]

(§ 5) E. *Exceptions, provisos, conditions and saving clauses.*[11] See 10 C. L. 1720 The office of a proviso is to limit the operation of the enactment[12] by excluding therefrom something which might otherwise come within its scope,[13] and not to impair or destroy the main purpose or to enlarge the meaning or effect of the statute to which it is added.[14] Provisos are often inserted out of an abundance of caution, to preclude a possible construction at variance with the legislative intent, and where such a purpose is apparent, they are to be construed strictly, and their scope limited to avoid a result manifestly not in harmony with the legislative intent.[15] But a plain and unambiguous exception must be given effect according to its terms, though the principal clause is thereby rendered meaningless or ineffective.[16] Provisos of exemption in penal statutes are liberally construed.[17] Though a proviso is void and unenforcible, it cannot be disregarded in construing the section to which it is attached.[18] The general intent of an enacting clause will be controlled by the particular intent subsequently expressed in a proviso or exception.[19] Ordinarily, a proviso affects only the section to which it is attached.[20] But where it plainly appears from a consideration of the entire act that the provision was intended as an independent enactment, it will be so construed without reference to the limitations of the preceding portions of the section to which it is apparently a proviso.[21]

"section" when to do so will effectuate legislative intent. Alfrey v. Colbert [C. C. A.] 168 F 231. **"Or" any be read "and"** when legislative intent requires it. James v. U. S. Fidelity & Guar. Co. [Ky.] 117 SW 406. Whenever it is clear that either of the words "or" or "and" has been mistakenly used for the other, the word intended will be substituted for the one mistakenly used so as to carry out the legislative intent. Not that one word ever has meaning of other, but that evident mistake may be corrected. State v. Hooker [Okl.] 98 P 964.

**4.** Female minor may have disabilities as minor removed, under Rev. St. 1935, art. 3499, etc., though statute uses words "he" and "his," in view of rule of construction in Final Title, § 3, of revised statutes and art. 3268, cls. 3, 6. Texas Cent. R. Co. v. Wheeler [Tex. Civ. App.] 116 SW 83.

**5.** State v. Louisiana & M. R. Co. [Mo.] 114 SW 956.

**6, 7, 8.** First Nat. Bank v. Farmers' & Merchants' Nat. Bank [Ind.] 84 NE 1077; Id. [Ind.] 86 NE 417.

**9.** Union Trust Co. v. State [Cal.] 99 P 183.

**10.** First. Nat. Bank v. Farmers' & Merchants' Nat. Bank [Ind.] 84 NE 1077; Id. [Ind.] 86 NE 417.

**11. Search Note:** See Statutes, Cent. Dig. §§ 310; Dec. Dig. § 228; 26 A. & E. Enc. L. (2ed.) 678.

**12.** Not to enlarge it. Attorney General v. Detroit Board of Education, 154 Mich. 584, 15 Det. Leg. N. 902, 118 NW 606.

**13.** State v. Twin City Tel. Co., 104 Minn. 270, 116 NW 835.

**14.** State v. Twin City Tel. Co., 104 Minn. 270, 116 NW 835. The office of an exception is, generally speaking, to take or exclude from the operation of the statute things which would otherwise be included therein. Campbell v. Jackman Bros. [Iowa] 118 NW 755. Provisos and exceptions are intended to restrain the enacting clause, to except something which would otherwise be within its terms. State v. Barrett [Ind.] 87 NE 7.

**15.** State v. Twin City Tel. Co., 104 Minn. 270, 116 NW 835. Provisos appended to statutory enactments will be construed in accordance with their general purpose, which is to take something out of the enacting clause which might otherwise come within its scope. Moody v. Brasie, 104 Minn. 463, 116 NW 941. Proviso to Laws 1905, § 17, c. 230, p. 321, held to authorize payment on drainage contracts without approval of county commissioners. Id. The general rule is that provisos in statutes are strictly construed and take no case out of the enacting clause which does not fall fairly within their terms. Rule absolute where proviso is remedial. Board of Health v. Phillipsburg [N. J. Eq.] 71 A 750.

**16.** Campbell v. Jackson Bros. [Iowa] 118 NW 755.

**17.** Board of Health v. Phillipsburg [N. J. Eq.] 71 A 750.

**18.** Ruhland v. Waterman [R. I.] 71 A 450.

**19.** State v. Barrett [Ind.] 87 NE 7.

**20, 21.** Hackett v. Chicago City R. Co., 235 Ill. 116, 85 NE 320.

Statutes general in their terms are frequently construed to admit implied exceptions.[22]

(§ 5) *F. Mandatory or directory acts.*[23]—See 10 C. L. 1721—Statutory prescriptions in regard to the time, form and mode of proceedings by public functionaries are generally directory, as they are not of the essence of the thing to be done.[24] But where a statute gives a right or provides a remedy, the manner provided in the statute whereby the right may be acquired must be strictly followed.[25] The word "may" usually denotes discretion or permission, but its use is not decisive of the question whether a statute is mandatory.[26] It is sometimes equivalent to "must" or "shall," and is then mandatory.[27] Its meaning in a particular case depends upon the legislative intent as shown by the entire act.[28] The word "may" will be construed to mean "shall" whenever the rights of the public or third persons depend upon the exercise of the power or performance of the duty to which it refers,[29] and such is its meaning in all cases where public interest and rights are concerned, or a public duty is imposed upon public officers, and the public or third persons have a claim de jure that the power shall be exercised.[30]

(§ 5) *G. Strict or liberal constructions.*[31]—See 10 C. L. 1721—Strict construction means a close and conservative adherence to the letter of the statute and leads to the exclusion of cases not clearly within its terms.[32] Statutes liberally construed may be extended to include cases within the mischief sought to be remedied, unless such construction does violence to the language used.[33] A statute may be remedial as to some, and penal as to other, persons included within its terms.[34] Statutes which provide a penalty recoverable by the party aggrieved are in many cases con-

**22.** Gen. St. 1902, § 4487, making owners of dogs liable for damage done by animals, construed to except cases where dogs are provoked by persons injured. Kelley v. Killourey [Conn.] 70 A 1031.

**23. Search Note:** See notes in 5 L. R. A. (N. S.) 340.

See, also, Statutes, Cent. Dig. §§ 308, 309; Dec. Dig. § 227; 26 A. & E. Enc. L. (2ed.) 688.

**24.** Hudson v. Williams, 5 Ga. App. 245, 62 SE 1011. Statutes which merely prescribe modes of procedure, without being a limitation upon power, are usually only directory. Prescribing time for presentation of statement of facts to adverse party. Ferris Press Brick Co. v. Hawkins [Tex. Civ. App.] 116 SW 80. Statutory provisions prescribing the time for performance of official acts are usually directory only. Provision as to time of selecting grand jurors in act of congress for Oklahoma Territory. Price v. Ter. [Okl. Cr. App.] 99 P 157. Statute prescribing time of act, directory, unless phraseology makes it limitation on officer's power. Hudson v. Williams, 5 Ga. App. 245, 62 SE 1011. Provision of Acts 1902, p. 181, c. 127, § 150a, fixing time for appointment of city treasurer as on or before designated day each year directory only. Appointment later, valid. State v. Fahey, 108 Md. 533, 70 A 218.

**25.** Commonwealth v. Glover [Ky.] 116 SW 769.

**26.** Code Civ. Proc. 1895, § 1004, subd. 6, that action may be dismissed by court on failure to demand or enter judgment for 6 months, is mandatory. State v. Ninth Judicial Dist. Ct., 37 Mont. 298, 96 P 337.

**27.** "May" usually denotes discretion or permission, but sometimes is equivalent to "shall" or "must" and is then mandatory. Bass v. Doughty, 5 Ga. App. 458, 63 SE 516.

**28.** Whether "may" is equivalent to "shall" or "must" must be determined by reference to context and entire legislative scheme. Bass v. Doughty, 5 Ga. App. 458, 63 SE 516. Word "may" may be construed as "must" or "shall," but legislative intent must clearly appear before such judicial correction will be made. Ostrander v. Richmond [Cal.] 101 P 452.

**29.** Binder v. Langhorst, 234 Ill. 583, 85 NE 400.

**30.** Binder v. Langhorst, 234 Ill. 583, 85 NE 400. The word "may" is mandatory where a great right is involved, as where a court or office is given power to exercise a function for the benefit of the right of an individual or the public. In such case, the power given must be exercised in the interest of the right. State v. Stepp, 63 W. Va. 254, 59 SE 1068.

**31. Search Note:** See notes in 25 L. R. A. 564.

See, also, Statutes, Cent. Dig. §§ 316-328; Dec. Dig. §§ 235-247; 26 A. & E. Enc. L. (2ed.) 657.

**32, 33.** Lagler v. Bye [Ind. App.] 85 NE 36.

**34.** Juvenile acts are remedial so far as they relate to children and their welfare: as to adults who are charged with offenses thereunder, they are penal and are to be construed according to their fair import, under B. & C. Comp. § 2192. State v. Dunn [Or.] 99 P 278. Rehearing denied, State v. Dunn [Or.] 100 P 258.

strued as remedial as well as penal.[35] Such statutes are to be construed strictly on account of the penalty and liberally to prevent the mischief aimed at by the act and to advance the remedy thereby given.[36]

*Penal statutes.*[See 10 C. L. 1722]—A penal statute is one which inflicts a forfeiture for violation of its provisions.[37] It involves the idea of punishment and its character is not changed by the mode in which it is inflicted, whether by civil or criminal procedure.[38] Penal statutes are, as a general rule, to be strictly construed,[39] and cannot be extended by construction to include persons or things not clearly included by their terms.[40] But the rule of strict construction is subject to the qualification that the legislative intent is to be ascertained and given effect,[41]

**35, 36.** Lagler v. Bye [Ind. App.] 85 NE 36.

**37.** Lagler v. Bye [Ind. App.] 85 NE 36. Certain provisions of the Immigration Act (34 St. 903) are penal. United States v. Four Hundred and Twenty Dollars, 162 F 803.

**38.** Lagler v. Bye [Ind. App.] 85 NE 36. Statute providing that, in erection of buildings three or more stories high, the erection of the third story shall not be commenced until the floor of the story below has been laid is penal. Id. Statute prohibiting sale of misbranded or adulterated food is penal and to be strictly construed. State v. Neslund [Iowa] 120 NW 107. Statute imposing damages for failure of tax collector to pay over taxes collected is penal. Adams v. Saunders [Miss.] 46 S 960. St. 1898, § 2316a, prohibiting mortgagee from selling or removing property, chattels, and authorizing recovery of liquidated damages in addition to actual damage, for violation, etc., is highly penal and to be strictly construed. Minneapolis Threshing Mach. Co. v. Haug, 136 Wis. 350, 117 NW 811. A law which takes away a man's property or liberty as a penalty for an offense must so clearly define the acts upon which the penalty is denounced that no ordinary person can fail to understand his duty and the departure therefrom denounced by the act. Brown v. State, 137 Wis. 543, 119 NW 338. Code, § 2446, authorizing suspension or removal of any county attorney who willfully refuses to enforce mulct tax law, is penal or quasi-criminal and to be strictly construed. Tennant v. Kuhlemeier [Iowa] 120 NW 689.

**39.** People v. Friedman, 132 App. Div. 61, 116 NYS 538; Lagler v. Bye [Ind. App.] 85 NE 36; Diddle v. Continental Casualty Co. [W. Va.] 63 SE 962; Jonesboro, etc., R. Co. v. Brookfield [Ark.] 112 SW 977. Not enlarged or extended by implication. United States v. Four Hundred & Twenty Dollars, 162 F 803. Words of penal act to be strictly construed. Ex parte Rickey [Nev.] 100 P 134. A criminal statute should be strictly construed, and words should not be read into it which are not there. United States v. McVickar, 164 F 894. A penal statute which creates and prescribes punishment for an offense committed by a specific class must be strictly construed. Martin v. U. S. [C. C. A.] 168 F 198. Criminal and penal statutes are to be construed with reasonable strictness. United States v. Louisville & N. R. Co., 165 F 936. Criminal statute to be strictly construed; nothing added by intendment. Rohlf v. Kasemeier [Iowa] 118 NW 276.

**40.** Nance v. Southern R. Co., 149 N. C. 366, 63 SE 116; Jennings v. Com. [Va.] 63 SE 1080. Strict construction of a penal statute means that the language is not to be extended by implication so as to embrace cases or acts not clearly within the prohibition of the statute. State v. Prather [Kan.] 100 P 57. Criminal statutes must be strictly construed to avoid the creation of penalties by construction. Groff v. State [Ind.] 85 NE 769. Statutes penal in nature should not be extended by construction beyond their natural meaning. Independent School Dist. No. 5 v. Collins [Idaho] 98 P 857. One cannot recover penalty without bringing himself strictly within terms of statute and showing compliance therewith. St. Louis, etc., R. Co. v. McClerkin [Ark.] 114 SW 240. Penal statutes strictly construed; one seeking to recover penalty must bring case clearly within meaning and language of law. Cox v. Atlantic Coast Line R. Co., 148 N. C. 459, 62 SE 556. Penal statutes cannot be extended by construction to meet the gravity of a particular offense. Hatton v. State [Miss.] 46 S 708. Criminal statutes should never be construed so as to catch those who have honestly conformed to the law as it has been expounded by the proper authorities, and, where the court of appeals has held a certain thing allowable under a statute, refined distinctions should not be drawn so as to include persons within statute who have relied on the judicial construction. Commonwealth v. Standard Oil Co. [Ky.] 112 SW 902. Operation and scope of criminal laws should not be enlarged by implication; where there is any well-founded doubt as to any act being a public offense, especially when not malum in se, it should not be declared such. McCord v. State [Okl. Cr. App.] 101 P 280. One who was not beyond reasonable doubt within the class by the express terms of the statute may not be brought within it after the event by interpretation. Ex post facto law by judicial construction as pernicious as ex post facto legislation. Martin v. U. S. [C. C. A.] 168 F 198. In construing penal statute, courts will not go beyond clear meaning and purpose of statute and attempt to spell out creation of new offense not clearly indicated by ordinary meaning of words used. People v. Briggs, 193 N. Y. 457, 86 NE 522; People v. Weinstock, 193 N. Y. 481, 86 NE 547.

**41.** Such reasonable view must be taken as will effectuate the intent and purpose of the act. Groff v. State [Ind.] 85 NE 769. A penal statute or one in derogation of common law, though to be strictly construed, should not be hedged in to less than the legislative intent if that be clearly revealed by act as whole. Wabash R. Co. v. U. S.

and, where the statute is perfectly clear, there is no room for construction.[42] The rule of strict construction is modified by statute in some states.[43] Where there is doubt as to the construction of conflicting provisions of a criminal statute, that interpretation should be given which best protects the rights of the accused to a trial according to the common law.[44]

*Statutes changing common law.* See 10 C. L. 1722—Statutes in derogation of the common law,[45] or which create new disabilities,[46] or which impose restrictions upon personal or property rights,[47] or grant new rights and privileges,[48] are to be strictly construed. A statute which affords a remedy supplying defects in the common or statutory law is penal,[49] the only exception to this rule being where a statute provides for more than actual compensations, such as double or treble recovery for the commission of some wrong which would have given the party injured a cause of action at common law for actual compensation. In such cases the statute allows the party no cause of action for a newly-created offense.[50]

*Tax laws* are to be construed strictly,[51] and in case of doubt or ambiguity every intendment is against the taxing power.[52] The rule of strict construction extends to exemptions as well as to impositions.[53] Statutory provisions relating to special assessments are strictly enforced, but those relating to general taxes are liberally construed when an irregularity complained of has not been prejudicial.[54] A stat-

[C. C. A.] 168 F 1. Every penal statute should be construed to carry out intent of legislature, and to include only cases coming within its letter, spirit, and purpose. State v. Fisher [Or.] 98 P 713. Penal statutes are to be strictly construed, but not so strictly as to defeat will of legislature. State v. Bass Pub. Co. [Me.] 71 A 894. Rule of strict construction of penal statutes is subject to qualification that legislative intent is to be ascertained, and statute is not to be too narrowly or broadly construed, but legislative design is to be carried out. Mills v. Southern R. Co. [S. C.] 64 SE 238.

**42.** The rule that penal statutes are to be strictly construed has no room for application where the statute is so clear as not to require interpretation. Downey v. Coykendall [Neb.] 116 NW 503.

**43.** Laws of Oklahoma are to be liberally construed in interests of justice; conviction not reversed on technicality not affecting substantial rights of accused. Buck v. Territory [Okl. Cr. App.] 98 P 1017. Penal statutes must be interpreted not according to the strict letter thereof but in conformity with the fair import of their terms. B. & C. Comp. § 2192. State v. Dunn [Or.] 99 P 278. Rehearing denied, Id., 100 P 258.

**44.** People v. Craig [N. Y.] 88 NE 38.

**45.** Statute in derogation of common law should be strictly construed, as one permitting a summary proceeding. Bank of North Wilkesboro v. Wilkesboro Hotel Co., 147 N. C. 594, 61 SE 570. Statutes highly penal in character, in derogation of the common law, are to be strictly construed and not extended by construction. Acts 1905, p. 73, c. 50, requiring certain duties of coal mining corporations for benefit of miners, held penal in character. Sourwine v. McRoy Clay Works [Ind. App.] 85 NE 782.

**46.** A statute creating a liability not before existing ought not to be extended to include others than those designated or fairly within its terms. Alexander v. Crosby [Iowa] 119 NW 717.

**47.** Statutes restricting private rights of person or property should be strictly construed in favor of citizens. Nance v. Southern R. Co., 149 N. C. 366, 63 SE 116. A law placing a privilege or occupation tax on the business of plumbers is in the nature of an abridgment of personal liberty and should receive strictest construction. Wilby v. State [Miss.] 47 S 465. Laws restrictive of common rights are strictly construed; do not apply to persons not named. Ex parte Dillin, 160 F 751.

**48.** Where a statute gives a new right or privilege under certain circumstances, conditions, or qualifications, the party claiming such right must bring himself within the requirement of the statute by his pleading. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219. When a statute giving a privilege unknown to the common law, or enlarging a privilege, authorizes something to be done in the manner therein described, it by necessary implication forbids that it shall be done in any other way, though that other would be just as good or better. Loewy v. Gordon, 129 App. Div. 459, 114 NYS 211.

**49, 50.** Lagler v. Bye [Ind. App.] 85 NE 36.

**51.** In re Bull's Estate, 153 Cal. 715, 96 P 366.

**52.** When a statute seeks to impose a burden or duty on the property or rights of the citizen in the nature of taxation, in all cases of doubt or ambiguity, every intendment is to be indulged against the taxing power, especially where the burden or tax is of an unusual or special character. Lynch v. Union Trust Co. [C. C. A.] 164 F 161.

**53.** In re Bull's Estate, 153 Cal. 715, 96 P 366.

**54.** State v. Several Parcels of Land [Neb.] 119 NW 21.

ute for the raising of revenue, though accompanied by provisions of a highly penal nature, is still to be construed as a whole and in a fair and reasonable manner and not strictly in favor of a defendant.[55]

*Remedial statutes.*[See 10 C. L. 1722]—Remedial statutes,[56] such as those relating to judicial procedure,[57] are to be construed liberally to effectuate their purpose [58] as to all persons who come within their terms,[59] but when in derogation of common law, strict construction is the rule in determining what persons are within their terms.[60]

(§ 5) *H. Partial invalidity.*[61]—[See 10 C. L. 1722]—If invalid portions of an act are separable from the valid portions,[62] so that the latter are enforcible alone,[63] and it may be presumed that the legislature would have passed the valid portions in any case,[64] the valid portions may be sustained and the invalid portions stricken.

**55.** United States v. Graf Distilling Co., 208 U. S. 198, 52 Law. Ed. 452.

**56.** Priorities in bankruptcy act remedial; liberally construed. In re Caldwell, 164 F 515. Comp. Laws, § 6235, authorizing recovery of penalty by shippers aggrieved by violation by carriers of duty to transport freight are not penal, but remedial statute. Robinson v. Harmon [Mich.] 15 Det. Leg. N. 713, 117 NW 664. Rev. St. 1899, § 2864, giving right of action for penalty for death caused by negligence in management of trains, is penal; §§ 2865, 2866, giving right of action for death by wrongful or negligent act, is remedial. Crohn v. Kansas City Home Tel. Co., 131 Mo. App. 313, 109 SW 1068.

**57. Codes** are to be liberally construed, but not so liberally as to destroy the effect of provisions therein. State v. Second Judicial Dist. Ct. [Mont.] 99 P 139. Purpose of code was to simplify practice, and it must, by its own provision, be liberally construed. State v. Clallam County Super. Ct. [Wash.] 100 P 155. Statutes making duly authenticated copies of records admissible in **evidence** are to be given reasonable, if not liberal, construction. Tate v. Rose [Utah] 99 P 1003. Remedial statute, as to **pleading and procedure,** should be liberally construed, so as to permit court to bring parties to an issue. Asheville Land Co. v. Lange [N. C.] 63 SE 164. All statutes making provisions in **aid of appeals** are to be liberally construed and applied. Mitchell v. California & O. S. S. Co. [Cal.] 99 P 202. Statutes **giving right of appeal** should be liberally construed in furtherance of justice. Should be construed to give equal rights to both parties. People v. Sholem, 238 Ill. 203, 87 NE 390. Statutes permitting **appellate courts** to allow amendments to bonds should be liberally construed. Lewellyn v. Ellis [Tex. Civ. App.] 115 SW 84.

**58.** State v. Central Vermont R. Co., 81 Vt. 459, 71 A 193; Clark v. Kansas City, etc., R. Co. [Mo.] 118 SW 40. Intention of remedial statute will always prevail over its literal sense. Robinson v. Harmon [Mich.] 15 Det. Leg. N. 713, 117 NW 664. Remedial statutes should be broadly construed to effectuate the remedy. First Nat. Bank v. Farmers' & Merchants' Nat. Bank [Ind.] 84 NE 1077.

**59, 60.** Indianapolis Northern Trac. Co. v. Brennan [Ind.] 87 NE 215.

**61. Search Note:** See Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64; 26 A. & E. Enc. L. (2ed.) 570.

**62.** Denver & R. G. R. Co. v. Wagner [C. C. A.] 167 F 75; Ex parte Hallawell [Cal. App.] 97 P 320. Though one provision of a statute is unconstitutional, yet, if it is distinct in operation and separable from the balance, it may be ignored and the balance upheld. State v. King [W. Va.] 63 SE 468.

**63.** Severable provision may be upheld though others invalid. Berea College v. Kentucky, 211 U. S. 45, 53 Law. Ed. 81. If the elimination of the invalid portion of a statute will leave the remainder complete in itself, sensible, and capable of being executed against all alike, the remainder will be enforced. State v. Barrett [Ind.] 87 NE 7. In determining whether a statute partially invalid may be upheld as to the balance, the test should be the sufficiency for practical working purposes of the portion of the act remaining after the constitution has been applied. Oliver v. Chicago, etc., R. Co. [Ark.] 117 SW 238. Where parts of law, viewed by themselves, are invalid, and other parts so viewed are not, former may be condemned and latter upheld, if they are separable, otherwise not. If act, as whole, has one or more features pervading entire act, it must be regarded as an entirety and all be condemned. Bonnett v. Tallier, 136 Wis. 193, 116 NW 885.

**64.** Entire statute falls if it can be said that valid portion would not have been passed alone. Ohio-Colorado Min. & Mill. Co. v. Elder [Colo.] 99 P 42. Part of statute so far separable from rest that legislature would probably have enacted it by itself had they thought the rest invalid, held valid. Mutual Loan Co. v. Martell, 200 Mass. 482, 86 NE 916. Acts will be declared wholly void for invalidity of certain portions only when it can be held that the legislature would not have adopted the remainder without the objectionable parts. Michigan Cent. R. Co. v. Murphy [Mich.] 16 Det. Leg. N. 168, 120 NW 1073. The valid part of a statute remains operative unless all the provisions of the act are connected in subject matter and depend upon each other and operate for same purpose, or are otherwise so connected that it cannot be presumed that legislature would have passed one without the others. State v. Winsor, 50 Wash. 407, 97 P 446. The invalidity of one provision will not invalidate the entire act unless the provisions are so connected in

Illustrative holdings are given in the note.[65] The unobjectionable portion of an

subject-matter, meaning, or purpose that it cannot be presumed that the legislature would have passed one without the other. Somerset County Com'rs v. Pocomoke Bridge Co. [Md.] 71 A 462; In re Seventh Judicial Dist. County Com'rs [Okl.] 98 P 557.

65. **Statutes held partially void:** Invalidity of § 3 of c. 102 of Laws 1907, delegating certain powers to pharmacy board, does not invalidate § 8, prohibiting sale of certain poisons except on prescription. Ex parte Hallawell [Cal. App.] 97 P 320. Provisions of Laws 1900, p. 125, c. 88, defining a trust or combine, are severable. If any one is unconstitutional, balance may be upheld. State v. Jackson Cotton Oil Co. [Miss.] 48 S 300. Provisions of Okl. Laws 1899, p. 186, § 4, as to inspection and branding of products of petroleum, may be upheld, though those making it crime to sell products not conforming to statute be held invalid. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 Law. Ed. —. Though provisions of Elkins' Law of 1903, imputing to carriers the acts, omissions and failures of officers and agents, be held invalid, yet those imputing acts, amounting to criminal violations of act, to corporation carriers, may be upheld. New York, etc., R. Co. v. U. S., 212 U. S. 481, 500, 53 Law. Ed. —. Invalidity of provisions in railroad commission statute relative to disposition of fines and penalties recovered, and for suspension or remission of fines, held not to affect validity of rest of act. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969. Criminal feature of Acts 1900, p. 170, could be dropped and balance of act (stock law) be held valid. Thornton v. Bramlett [Ala.] 46 S 577. Where an act amending charter of town provided for condemnation of land for furnishing water to inhabitants of town and to others, the private and public uses were not separable, and provision being invalid as to private purpose, entire act was void. Miller v. Pulaski [Va.] 63 SE 880. An act requiring railroad companies to keep water-closets at depots in sanitary condition is valid when applied to existing water-closets, but invalid as to requirement for construction of such closets, no reasonable time for construction being allowed. Houston & T. C. R. Co. v. State [Tex.] 20 Tex. Ct. Rep. 462, 107 SW 525. Acts 1897, p. 85, the object of which is to authorize and confirm bond issues by counties, is valid as to that purpose, though § 8, which alone refers to elections already held, should be held, invalid. Lippitt v. Albany, 131 Ga. 629, 63 SE 33. Provisions of act regulating pharmacists and sale of poisons, making pharmacy association only informers, if invalid, do not render void the other provisions of the act. Bertram v. Com., 108 Va. 902, 62 SE 969. Invalidity of § 2 of Senate Bill No. 152 of 10th Legislature does not affect validity of rest of bill, creating judicial district. Knight v. Trigg [Idaho] 100 P 1060. Laws 1902, c. 3, § 64, required domestic corporations to pay annual license tax and § 65 required foreign corporations to pass tax twice as large, and act was held invalid as to foreign corporations and was repealed and re-enacted, making tax same for both, a section of later act providing that repeal should not affect penalties which had accrued under former act. Held this saving clause showed that valid part of act of 1902 would have been passed in any case, and hence invalidity of portion relating to foreign corporations did not affect validity of portion relating to domestic corporations. Ohio-Colorado Min. & Mill. Co. v. Elder [Colo.] 99 P 42. Primary Law of 1907 could be held valid as to remainder though §§ 30, 31 or §§ 7, 9, 10, 24, 36, and others relating to nomination of representatives and senators, were held invalid. State v. Nichols, 50 Wash. 508, 97 P 728. Partial invalidity of statute held not to render all void (statute authorizing dissolution of banks, which violate law). People v. Bank of San Luis Obispo [Cal.] 97 P 306. Legislative apportionment acts of 1893, 1901, 1907, contain provisions establishing senatorial and representative districts, and also recognition of new counties and their right to representation. Held, provisions separable. Invalidity of former does not make latter invalid. State v. Schnitger, 16 Wyo. 479, 95 P 698. Laws 1903, p. 308, c. 132, § 2, authorizing suit for injunction and damages where one's picture is used for advertising purposes without the written consent of the person, or his parent, is valid so far as it regulates use of one's picture, though provision as to written consent may be invalid as restriction of personal rights. Wyatt v. James McCreery Co., 126 App. Div. 650, 111 NYS 86. Laws 1903, p. 308, c. 132, is valid in part though portion requiring written consent to permit use of photograph for advertising purposes be held void as unreasonable. Wyatt v. Wanamaker, 58 Misc. 429, 110 NYS 900. Acts 1907, p. 336, making railroad companies liable in damages for fires started by locomotives, is valid and enforcible as to that provision, though it should be held void as to other persons, or as to fires communicated by means other than locomotives. St. Louis & S. F. R. Co. v. Shore [Ark.] 117 SW 515. Laws 1907, Act No. 193, p. 453, requiring carriers to furnish cars to shippers when demanded, etc., may be upheld as to intrastate business (§ 1) though invalid as to interstate business (§ 17). Oliver v. Chicago, etc., R. Co. [Ark.] 117 SW 238. Provisions of Acts 1907, p. 1538, c. 460, concerning prevention of fires, etc., could be upheld, where § 4, authorizing investigations by insurance commissioner, to be condemned as providing for unlawful search and seizure. Rhinehart v. State [Tenn.] 117 SW 508. Invalidity of N. Y. Laws 1905, c. 736, and Laws 1906, c. 125, as to gas pressure and penalties, does not affect validity of other provisions as to gas rates. Wilcox v. Consolidated Gas Co., 212 U. S. 19, 53 Law. Ed. —. Those portions of Laws 1907, p. 495, c. 254, defining liability for injuries to railroad employes, which confer judicial powers on juries, and which attempt to extend rights and liabilities to injuries occurring in other states, are separable from remainder of act, and do not affect its validity. Kiley v. Chicago, etc., R. Co. [Wis.] 119 NW 309. Provision for referendum in school law valid, though provision for use of voting machines at election of officers invalid. In re Newark School Board [N. J. Law] 70 A 881. Invalidity of § 5 of Bishop's Law (P. L. 1906, p.

act will be sustained, if possible, where the act itself declares that, so long as the main purpose and object of the act be sustained, any provision held void shall not affect its validity.[66] Acts which are wholly void are of course ineffective for any purpose.[67]

§ 6. *Retrospective effect.*[68] See 10 C. L. 1723—A retroactive law gives a right where none before existed, or takes away one which before existed.[69] The presumption is that statutes are intended to operate prospectively and not retrospectively,[70] and they will not be given a retroactive effect unless it clearly appears that the legislature intended to give them that effect;[71] but when a statute is plainly intended

205) does not invalidate remainder of act. Meehan v. Jersey City Com'rs, 75 N. J. Law, 557, 70 A 363. Invalidity of provision of N. M. Laws 1903, p. 51, c. 33, requiring notice of injuries within 90 days and commencement of suit within one year, did not affect validity of rest of act. Denver & R. G. R. Co. v. Wagner [C. C. A.] 167 F 75. Provision in act incorporating bridge company, requiring levy of tax by two counties and payment to company, being invalid because not within title, provision for free passage of residents of county fell with it; but remainder of act, incorporating company and authorizing collection of tolls, valid. Somerset County Com'rs v. Pocomoke Bridge Co. [Md.] 71 A 462.

**Statutes held wholly void:** Laws 1907, p. 561, c. 287, amending Code, § 10, declaring holidays, which permits governor to declare special holidays on which courts shall be open for transaction of all judicial business, except trial of actions based on contracts for payment of money, is wholly void, the special, invalid exception being integral part of law. Diepenbrock v. Sacramento County Super. Ct., 153 Cal. 597, 95 P 1121. Laws 1907, p. 1188, c. 575, limiting hours of continuous work of certain railroad employes, being invalid because in terms applicable to interstate as well as domestic commerce, cannot be held valid as to latter and invalid as to former. State v. Chicago, etc., R. Co., 136 Wis. 407, 117 NW 686. Laws 1908, c. 185, § 2, making it misdemeanor to admit children under 16 to theaters, etc., but exempting from its operation entertainments on public piers, being void as to exemption, is void in toto. In re Van Horne [N. J. Eq.] 70 A 986.

**66.** Michigan Cent. R. Co. v. Murphy [Mich.] 16 Det. Leg. N. 168, 120 NW 1073.

**67.** Election to authorize levy and assessment of school tax, held under law which was wholly void, was of no effect, and did not warrant assessment and collection of tax. Jordan v. Franklin, 131 Ga. 487, 62 SE 673. Assignment for benefit of creditors is not void because it does not comply with Laws 1905, p. 284 (Bulk Sales Act), since that act is unconstitutional. Pogue v. Rowe, 236 Ill. 157, 86 NE 207.

**68. Search Note:** See notes in 4 C. L. 1540; 9 L. R. A. (N. S.) 1066; 10 Id. 415, 818; 12 Id. 591; 120 A. S. R. 468.

See, also, Statutes, Cent. Dig. §§ 342-377; Dec. Dig. §§ 261-278; 26 A. & E. Enc. L. (2ed.) 692.

**69.** Keith v. Guedry [Tex. Civ. App.] 114 SW 392. A retroactive law is one made to affect acts or transactions occurring before it came into effect or rights already accrued, and which imparts to them characteristics or ascribes to them effects which were not inherent in their nature in the contemplation of the law as it stood at the time of their occurrence. Id.

**70.** State v. Flandry [La.] 49 S 169; O'Donnell v. Healy, 134 Ill. App. 187; Corbitt v. Nebern [Ga.] 64 SE 479; State v. Grunewald [La.] 49 S 162; State v. Lewis [La.] 49 S 167.

**71.** Winfree v. Northern Pac. R. Co., 164 F 698; Leahart v. Deedmeyer [Ala.] 48 S 371. Statutes will not be given retrospective effect unless language demands it. Texas & N. O. R. Co. v. Wells-Fargo Exp. Co. [Tex.] 110 SW 38; People v. Lower, 236 Ill. 608, 86 NE 577; Attorney General v. Detroit Board of Education, 154 Mich. 584, 15 Det. Leg. N. 902, 118 NW 606. Not have retrospective operation unless other meaning impossible or unless intention of legislature not otherwise satisfied. De Ferranti v. Lyndmark, 30 App. D. C. 417. Unless contrary intention clearly appears, a law operates only in future and upon future transactions. Rhodes v. Sperry & Hutchinson Co., 193 N. Y. 223, 85 NE 1097. Statutes will not be given retroactive effect unless it is clearly demanded and legislative intent cannot otherwise be satisfied. Burton v. Frank A. Seifert & Co., 108 Va. 338, 61 SE 933. Statutes are not to be given a retrospective effect if their language reasonably admits of another construction. Frelinghuysen v. Morristown [N. J. Err. & App.] 72 A 2. A statute will be considered to have a prospective operation only unless the legislative intent to the contrary is clearly expressed or necessarily implied from the language used. In re Pope's Estate, 103 Me. 382, 69 A 616. Statutes will not be given retroactive effect unless legislative intent to have them so operate is clear, especially where they would be invalid if given such force. In re Richmond's Estate [Cal. App.] 99 P 554.

**Illustrations:** Laws 1907, p. 66, c. 68, § 1, imposing tax on property passing by will or inheritance not applicable to estates in course of settlement. Carter v. Whitcomb, 74 N. H. 482, 69 A 779. P. L. 1907, p. 474, authorizing annulment of marriage at suit of husband if he was under 18 at time of marriage, inapplicable where marriage was prior to enactment of law. Williams v. Brokaw [N. J. Eq.] 70 A 665. St. 1889, p. 328, c. 219, amending Civ. Code, § 164, providing that, when property is conveyed to married woman by written instrument presumption is that title was vested in her as her separate property, not retroactive. Nilson v. Sarment, 153 Cal. 524, 96 P 315. Act No. 89, Laws 1905, relating to measure of damages and distribution of amount recov-

to have a retroactive effect, it will be so construed.[72] The mere fact that the language used is sufficiently broad to embrace matters existing at the time of the passage of the act will not alone give it a retrospective operation.[73]

The rule that statutes are presumed to have only a prospective operation does not apply to those affecting only remedies or modes of procedure.[74] A statute which is purely remedial, affording a new remedy without affecting or impairing existing rights, applies to proceedings begun after its passage, though relating to acts done previously.[75] Where a statute affecting a remedy will in a particular case operate to defeat or change a right, if given a retroactive effect, it will not be held applicable.[76] A statute of limitations will not be given a retroactive operation unless it appears by express provision or necessary implication that such was the legislative intent.[77] In an equity suit for injunctive relief, the rights of the plaintiff, where they depend upon a statute, are to be determined with reference to the statute in force at the time when relief, if any, is awarded.[78]

Ex post facto laws, and laws impairing contract obligations or vested rights, and limitations upon the power to enact them, are elsewhere discussed.[79]

*Curative acts.* See 10 C. L. 1724—A curative act is necessarily retrospective in character and undertakes to cure or validate errors or irregularities in legal or administrative proceedings or to give effect to contracts which have failed to comply with some technical requirement.[80] A curative act may be passed whenever the irregularity consists in the doing of an act, or the doing of it in such manner as the legislature might have made immaterial or authorized by prior law.[81] Such an act is

ered in actions under survival act, does not apply to actions pending at time of its passage. Little v. Bansfield & Co., 154 Mich. 369, 15 Det. Leg. N. 763, 117 NW 903. Language of amendment being in future tense and susceptible of construction making it applicable to future and not to pending actions, it should be so construed. State v. Ju Nun [Or.] 98 P 513. Laws 1907, p. 277, c. 143, amends prior usury law and provides remedy for those paying usurious interest "hereafter." Held, statute operated prospectively and saved actions under existing law. Stewart v. Lattner [Tex. Civ. App.] 116 SW 860. Act Cong. 1908, c. 149, liability of railroads to employes, has prospective operation only; not applicable where injury was received prior to passage of act. Winfree v. Northern Pac. R. Co., 164 F 698. Elkins' act applies to rebate paid after passage of act on shipment made before its passage. New York, etc., R. Co. v. U. S., 212 U. S. 481, 500, 53 Law. Ed. —.

**72.** Anderson v. Ritterbusch [Okl.] 98 P 1002.

**73.** Statute relating to surety bonds held inapplicable to bonds in existence. In re Pope's Estate, 103 Me. 382, 69 A 616.

**74.** Clark v. Kansas City, St. L. C. R. Co. [Mo.] 118 SW 40. An act which applies only to forms of procedure and modes of attaining or defending rights can be availed of in an action pending when the act took effect. People v. Syracuse, 128 App. Div. 702, 113 NYS 707. Code Civ. Proc. § 1774, relating to entry of judgment in actions for annulment of marriages, applies to procedure and is retroactive, applies to pending actions. Brown v. Brown, 115 NYS 1039. Statute relating to costs enacted after action was begun but before trial, held applicable. Lew v. Bray [Conn.] 70 A 628. Statute providing that repeal of statute should not affect pending actions held to yield to later act relating to costs, in terms applicable to pending actions. Id.

**75.** Construing statute providing remedy where street railway company abandons streets. Selectmen of Amesbury v. Citizens' Elec. St. R. Co., 199 Mass. 394, 85 NE 419.

**76.** Wallace v. Oregon Short Line R. Co. [Idaho] 100 P 904.

**77.** Theis v. Beaver County Com'rs [Okl.] 97 P 973.

**78.** Dieterich v. Fargo, 194 N. Y. 359, 87 NE 518.

**79.** See Constitutional Law, 11 C. L. 689.

**80.** McSurely v. McGrew [Iowa] 118 NW 415. Rev. St. 1895, art. 2312, as amended Acts 1907, p. 308, c. 165, cures deeds recorded for 10 years, but not properly acknowledged. Act is valid, being only rule of evidence, making such deeds competent. Ariola v. Newman [Tex. Civ. App.] 113 SW 157; Haney v. Gartin [Tex. Civ. App.] 113 SW 166. St. 1903, c. 59, cures tax deeds to state in which date of redemption is erroneously fixed, and acts retroactively, validating deed to and title of state, and also title of one who acquires the state's title, prior to the act. Peck v. Fox [Cal.] 99 P 189. Pol. Code 1895, § 5035, is **not curative act,** but merely maintains statu quo of all existing municipal corporations at time of adoption of Code. McGillie v. Corby, 37 Mont. 249, 95 P 1063.

**81.** McSurely v. McGrew [Iowa] 118 NW 415. Acts 1868, p. 70, c. 1162, to legalize issuance of grants of land of over 200 acres, cured prior grant of 10,000 acres, since legislature had power to dispose of state lands and validate prior illegalities. Steele v. Bryant [Ky.] 116 SW 755.

necessarily special and is not objectionable on the ground of nonuniformity.[82] Retroactive, curative laws may heal irregularities in an action, but they cannot cure a want of authority to act at all,[83] and if the defects are jurisdictional or relate to substantive contract rights, they cannot ordinarily be cured by a healing act.[84] A curative statute validating evidences of indebtedness cannot create any original liability or cause of action.[85] A curative act cannot give life or validity to that which was void.[86] The application of a curative act depends upon its terms.[87] Generally speaking, the legislature may by subsequent acts validate and confirm previous acts of a corporation otherwise invalid.[88]

§ 7. *Repeal. A. In general.*[89]—See 10 C. L. 1724—A partial repeal may be effected by reference to title or section only.[90] The scope and effect of a repealing act, and the extent to which it operates as a repeal, depend, of course, upon its terms.[91] A clause repealing all laws or parts of laws in conflict with the repealing law operates only on laws repugnant to the repealing act.[92] A clause repealing all former acts within the purview of an act repeals only former statutes relating to cases covered in the body of the repealing act.[93] A repealing statute, though absolute in terms, and declared to be in full force and effect from the time of publication, as therein provided, may nevertheless continue in force, for some purposes and to some extent, the provisions of the statute repealed.[94] Where a provision is repealed by one law and re-enacted as part of another, it continues in force.[95] Where a statute repeals all acts in conflict with it and is intended as a substitute for a former act, and the substituted act is unconstitutional, the repealing clause is also void.[96] The annulment by congress of an act passed by a territorial legislature does not relate back to the time of enactment of the law. The act remains in force until congress has acted.[97] A special law applicable to a particular locality does

**82.** McSurely v. McGrew [Iowa] 118 NW 415.

**83.** As defects in levy and collection of taxes. Heinszen v. U. S., 42 Ct. Cl. 58.

**84.** McSurely v. McGrew [Iowa] 118 NW 415. A curative act can operate to validate only such acts as the legislature had power to authorize originally. Cannot divest wife of interest in property and vest it in husband by retroactive act. Wright v. Johnson, 108 Va. 855, 62 SE 948.

**85.** Construing Laws 1903, p. 695, c. 382, § 9. Thornton v. East Grand Forks, 106 Minn. 233, 118 NW 834.

**86.** Void ordinance could not be so validated. McGillic v. Corby, 37 Mont. 249, 95 P 1063. Legislature cannot by curative act validate deed of married woman void from its inception because not executed as required by statute. Klumpp v. Stanley [Tex. Civ. App.] 113 SW 602.

**87.** Laws 1887, p. 183, providing that records of unacknowledged deeds shall impart notice, by its terms, applies only to deeds recorded a year prior to the passage of the act. Williams v. Butterfield, 214 Mo. 412, 114 SW 13.

**88.** McSurely v. McGrew [Iowa] 118 NW 415.

**89. Search Note:** See notes in 14 L. R. A. 721; 9 L. R. A. (N. S.) 165; 11 Ann. Cas. 472.
See, also, Statutes, Cent. Dig. §§ 218-253; Dec. Dig. §§ 149-173; 26 A. & E. Enc. L. (2ed.) 715.

**90.** Acts 1908, c. 118, § 1, construed as partial repeal, as to Baltimore City, of existing statute relating to appraisers of estate. Barron v. Smith, 108 Md. 317, 70 A 225.

**91.** Under general saving clause of act of 1907 (34 Stat. 905) relating to deportation of alien prostitutes, act of 1903 (32 Stat. 1218) is continued in force. Ex parte Durand, 160 F 558. Code 1907, § 10, providing that local or special laws are not repealed by Code, refers to repeal by implication. Section 6733, relating to criminal jurisdiction of justices, and expressly repealing local or special law in conflict therewith, repeals such acts. State v. Spurlock [Ala.] 48 S 849. Acts 1900-01, p. 794, withdrawing criminal jurisdiction from Mobile justices, is not in conflict with and not repealed by code. Id.

**92.** Gaddis v. Terrell [Tex.] 110 SW 429. Provision in city charter repealing all acts inconsistent therewith not entitled to much weight, being customary provision used out of caution. Legislative intent must govern notwithstanding such provision. People v. Craig, 60 Misc. 300, 111 NYS 909. Rochester charter giving police court power to try persons for misdemeanors and repealing all acts inconsistent therewith did not repeal provision of liquor tax law requiring certain violations to be prosecuted by indictment and trial in court of record, etc. Id.

**93.** Clark v. State [Ind.] 84 NE 984.

**94.** State v. Payton [Iowa] 117 NW 43.

**95.** Akers v. Mutual Life Ins. Co., 59 Misc. 273, 112 NYS 254.

**96.** Former act is left in force. St. Louis, etc., R. Co. v. State [Ark.] 111 SW 260.

**97.** Under organic act of New Mexico.

not repeal a general law embracing such locality where the manifest intention of the legislature is merely to amend or broaden the scope of the general law.[98]

*Effect.* See 10 C. L. 1725—Existing rights and powers,[99] or liabilities or penalities,[1] and pending judicial proceedings,[2] are frequently taken out of the operation of a repeal by saving clauses. Where a repeal statute does not contain a saving clause, a general saving clause may apply.[3] A proviso or saving clause will be strictly construed and will not be held to embrace anything which is not fairly within its terms.[4] If a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits thereunder must stop where the repeal finds them.[5] Where a statute repeals a law and saves the rights of the state, only the cause of action is saved, and it must be prosecuted under some other law than that repealed.[6]

*The repeal of a law conferring jurisdiction* See 10 C. L. 1725 takes away all right to proceed in all matters pending at the time of the repeal, unless there is a saving clause,[7] and this is true of appellate as well as original jurisdiction.[8]

*Effect on vested rights.* See 10 C. L. 1725—The repeal of a statute does not impair vested rights or existing contract obligations,[9] nor does it affect judgments theretofore regularly pronounced under the act repealed.[10]

*Effect on crimes.* See 10 C. L. 1725—One may be convicted for an offense committed before the repeal of the law creating it.[11]

Atchison, etc., R. Co. v. Somers, 213 U. S. 65, 53 Law. Ed. —.

**98.** Greater New York Charter, § 1482, making it an offense to admit minors under the age of 14 years to theaters in certain cases, did not repeal § 290, Pen. Code, under which the age limit is 14 years. People v. Jensen, 99 App. Div. 355, 90 NYS 1062. But this effect was given the above statutes in view of § 1608 of the charter, which in effect throws back the provision of § 1482 to the time of the consolidation act, and § 2143 of the consolidation act, which declares that the penal code is to have the same effect as if passed subsequent to it (Id.), and in view of the fact that the provision of the penal code relating to the admission of children to theaters was passed subsequent to the consolidation act (Id.).

**99.** Acts 1907, p. 536, c. 5823, establishing municipality of city of Miami and giving it power to impose license taxes, was not repealed by the general act subsequently passed (Acts 1907, p. 41, § 5597) permitting license taxes by cities on express companies, not exceeding $50 in cities of 5,000 to 10,000 inhabitants, since, though act contained general repeal clause, it expressly saved rights and powers conferred by special charter. Hardee v. Brown [Fla.] 47 S 834.

**1.** Repeal of statute regulating railway rates, and substitution of new sections in lieu of those repealed, repealing act expressly providing that any liability or penalty incurred under former provisions should be enforced, did not abate proceedings to enforce penalties under old act. St. Louis & S. F. R. Co. v. Hadley, 161 F 419. Under Rev. St. c. 131, § 4, repeal of penal statute does not prevent recovery of penalty incurred thereunder. Chicago, etc., R. Co. v. People, 136 Ill. App. 2.

**2.** Act 1903, repealing previous insanity law of 1897, saves actions pending under that act for support of insane person. Napa State Hospital v. Dasso, 153 Cal. 698, 96 P 355. Where, pending suits to enjoin enforcement of law regulating railroad rates, law was repealed and substitutes passed placing institution of suits in hands of private persons but leaving rate-making feature, held, repeal of law did not abate suits for injunction previously brought in federal court. Central of Georgia R. Co. v. Railroad Commission, 161 F 925. Where terms of act repealing previous inconsistent acts expressly saved pending prosecutions and offenses already committed from its operation, prosecution under prior law was not affected. State v. Monfre, 122 La. 513, 47 S 876.

**3.** Gen. St. 1901, § 7342, applies where repealing act amending criminal penalty contained no saving clause. "Penalty incurred" not affected. In re Schneck [Kan.] 96 P 43.

**4.** State v. Brady [Tex.] 118 SW 128. Where there is a plain provision for the repeal of all existing laws on a certain subject, with certain exceptions, courts are not authorized to declare a further exception in order to give the statute an equitable operation. Kunkalman v. Gibson [Ind.] 84 NE 985. Drainage law of 1905 (p. 456, c. 157) repealed existing laws and saved proceedings already commenced, except in certain cases. Proceeding not within exception was abated. Kunkalman v. Gibson [Ind.] 86 NE 850.

**5.** Stewart v. Lattner [Tex. Civ. App.] 116 SW 860.

**6.** State v. Brady [Tex.] 118 SW 128.

**7, 8.** State v. Ju Nun [Or.] 98 P 513.

**9.** Liability of stockholders of corporation for debts rests upon contract obligation and neither liability nor remedy to enforce it can be affected by repeal of statute under which rights and liability attached. Walterschied v. Bowdish, 77 Kan. 665, 96 P 56.

**10.** City of Wichita v. Murphy [Kan.] 99 P 272.

**11.** Draper v. State [Ga. App.] 64 SE 117.

(§ 7) *B. Implied repeal.*[12]—See 10 C. L. 1725—Repeals by implication are not favored,[13] and all statutes upon a subject will be upheld and sustained if possible,[14] in the absence of an express repeal,[15] especially if passed at the same session.[16] But if two statutes are so repugnant as to be irreconcilable by any reasonable construction,[17] the latter act must prevail [18] and will be held to have repealed the earlier

**12. Search Note:** See note in 88 A. S. R. 271; 5 Ann. Cas. 202.

See, also, Statutes, Cent. Dig. §§ 228-243; Dec. Dig. §§ 158-167; 26 A. & E. Enc. L. (2ed.) 720.

**13.** Pearson v. Mills Mfg. Co. [S. C.] 64 SE 407; Porter v. Brook [Okl.] 97 P 645; Curry v. Lehman, 55 Fla. 847, 47 S 18; Patterson v. Clingan [Miss.] 47 S 503; State v. Railroad Commission [Wash.] 100 P 184; State v. Clausen [Wash.] 99 P 743; Commonwealth v. Internat. Harvester [Ky.] 115 SW 703; Raymore Special Road Dist. v. Huber, 212 Mo. 551, 111 SW 472; City of Topeka v. McCabe [Kan.] 99 P 602; Southworth v. Ogle County Board of Education, 238 Ill. 190, 87 NE 403; Schafer v. Gerbers, 234 Ill. 468, 84 NE 1064. Repeals not favored unless such construction demanded, especially where it would be against public welfare. Snead v. State [Tex. Cr. App.] 117 SW 983. Repeals by implication are not favored and will not be adjudged except where they are inevitable, or it is obvious that such was the legislative intent. State v. Dalton [Mo. App.] 114 SW 1132.

**14.** Repeals are not favored and it is the duty of courts to give effect to both acts if possible. Lederer Realty Corp. v. Hopkins [R. I.] 71 A 456. Implied repeals not favored; must be repugnancy such that both cannot stand. City of St. Louis v. Klausmerier, 213 Mo. 119, 112 SW 516. No implied repeal where statutes are not inconsistent. Anderson v. Norvell-Shapleigh Hardware Co. [Mo. App.] 113 SW 733. Courts will, if possible, so construe two legislative acts that each will have the force and effect intended by the legislature. Ayres v. Chicago, 239 Ill. 237, 87 NE 1073. Repeal by implication is not favored. The court will, if possible, give effect to both statutes, and will declare that one repeals the other only when its terms are so inconsistent that no other reasonable construction can be given. Comp. Laws, § 10,136, held not repealed by Comp. Laws, § 10,188. Nolan v. Garrison, 151 Mich. 138, 14 Det. Leg. N. 915, 115 NW 58. Statutes alleged to be inconsistent with each other, in whole or in part, must be so construed as to give reasonable effect to all, unless there be some positive repugnancy between them. Brooks v. Fitchburg & L. St. R. Co., 200 Mass. 8, 86 NE 289. A statute will not be construed as repealing a former act on the same subject, in the absence of express words to that effect, unless there is such an inconsistency between them that they cannot stand together. Central Vermont R. Co. v. State [Vt.] 72 A 324. Wilson's Rev. & Ann. St. 1903, §§ 624, 626, not repealed by Sess. Laws 1903, p. 107, c. 7, § 4, since acts are not irreconcilable. Kuchler v. Weaver [Okl.] 100 P 915. Laws 1903, c. 25, relating to defense of limitations in actions by or for benefit of state or municipalities, does not by implication repeal previous limitation statutes relating to suits by individuals. Blalock v. Condon [Wash.] 99 P 733. Laws 1907, p. 153, authorizing consolidation of certain cities into independent school districts, is not inconsistent with and does not impliedly repeal Code Supp. 1907, § 2793, regulating change of boundaries of school districts. State v. Grefe [Iowa] 117 NW 13. Laws 1907, p. 269, providing for selection of juries in counties having cities of certain size, does not repeal Rev. St. 1905, art. 3219, providing for summoning talesmen by sheriff where regular panel has been exhausted. Houston Elec. Co. v. Seegar [Tex. Civ. App.] 117 SW 900.

**15.** Statute without repealing clause to be construed in harmony with previous laws if possible. Williams v. Keith [Tex. Civ. App.] 111 SW 1056.

**16.** Acts of the same assembly should be construed together as consistent if possible. Wilson v. Hahn [Ky.] 115 SW 231. Where two acts are passed at the same session, the presumption is strong against implied repeal, and effect must be given to each if possible. State v. Marion County Com'rs [Ind.] 85 NE 513. If courts can, by any fair, strict or liberal construction of two provisions passed at same session and relating to same subject, find a reasonable field of operation without destroying their evident intent and meaning, preserving the force of both and harmonizing them, it is their duty to do so. Curry v. Lehman, 55 Fla. 847, 47 S 18.

**17.** Repeals by implication are not favored and will never be presumed where old and new statute may well stand together. State v. Hatch [Conn.] 72 A 575. Repeals by implication are not favored, and one statute will not be held to have repealed another if the two can possibly be reconciled. Birch v. Steele [C. C. A.] 165 F 577. To be in conflict, there must be express conflicting provisions. There is no conflict where one is silent on matter as to which other speaks. City of St. Louis v. Klausmeier, 213 Mo. 119, 112 SW 516. To effect a repeal by implication on account of repugnancy, the repugnancy must not only be plain but the provisions of the two statutes must be incapable of any reasonable reconcilement. Pearson v. Mills Mfg. Co. [S. C.] 64 SE 407. The doctrine of implied repeal can be invoked and applied only where there exists between the two statutes such a repugnancy that they cannot consistently stand together. State v. White [Ala.] 49 S 78; Heydecker v. Price, 136 Ill. App. 512.

**18.** Where they are irreconcible, and both cannot be given effect, the latest in point of time will prevail. Ayers v. Chicago, 239 Ill. 237, 87 NE 1073; Spurlin v. State [Tex. Civ. App.] 115 SW 128; Martin v. Ferguson, 33 Ky. L. R. 761, 111 SW 281; Commonwealth v. Internat. Harvester Co. [Ky.] 115 SW 703. Where statutes conflict in terms, the later prevails over the earlier, and the specific over the general. Jones v. Broadway

one.[19] A subsequent statute covering the entire subject, and evidently intended as a substitute for existing laws, operates as a repeal of prior acts on the subject,[20] though there is no express repeal and no necessary repugnancy between the acts.[21] A re-enactment of a statute which omits provisions of the former statute operates as a repeal of the matter omitted,[22] but a statute is not repealed by its re-enactment, with a material change, by a later statute which does not expressly repeal the former one,[23] and the re-enactment of an existing statute in substantially the same words operates to continue it.[24] No contrary intention being expressed in the act adopting a code, all general statutes of a public nature in force when the code is adopted and promulgated, and not embraced therein, are repealed.[25] But the adoption of a code, prepared by a commission acting under instructions to omit obsolete or repealed laws, does not repeal former laws omitted from the code which had not been repealed or become obsolete.[26] In case of conflict between a general and special act, the special act will prevail,[27] and a general law will not impliedly repeal a special law previously enacted [28] unless the two are so glaringly

Roller Rink Co., 136 Wis. 595, 118 NW 170. If the two are irreconcilable, the one which was approved last will prevail, even if they took effect on the same day. State v. Marion County Com'rs [Ind.] 85 NE 513. Where two inconsistent statutes relating to same subject-matter, but passed at different times, are both incorporated into a general revision, the court, in construing them, will ascertain the dates of enactment and give effect to the latest expression of the legislature. State v. Hennepin County Dist. Ct. [Minn.] 120 NW 894. Any provision of the Civil Code is subject to a general law necessarily in conflict therewith subsequently passed, wherever that law may be placed. People v. Bank of San Luis Obispo [Cal.] 97 P 306. As to convict convicted of an offense committed after the indeterminate sentence law of 1897 took effect, that law repeals by implication the act of 1883 providing for diminution of time by good behavior. McCoy v. Reid [Ind.] 87 NE 1086.

**19.** Hampton v. Hickey [Ark.] 114 SW 707. State v. Cooper [N. D.] 120 NW 878; State v. Railroad Commission [Wash.] 100 P 184.

**20.** Thornton v. State, 5 Ga. App. 397, 63 SE 301; City of Topeka v. McCabe [Kan.] 99 P 602. Central Vermont R. Co. v. State [Vt.] 72 A 324; In re Donellan, 49 Wash. 460, 95 P 1085. Whether general or special. Hampton v. Hickey [Ark.] 114 SW 707. Where a statute is designed to create a new and independent system and is not merely cumulative of the common law or of existing statutes and disposes of the whole subject of legislation, such statute displaces the old system without an express repealing clause. § 1276 of Mansfield's Digest, in force in Indian Territory, held repealed by Act of Congress March 3, 1905. Porter v. Brook [Okl.] 97 P 645. The insertion in an act, intended as a revision and substitute for former acts, of the clause, "all acts and parts of acts in conflict herewith are hereby repealed," does not change the general rule that such revising act repeals all former acts for which it is intended as substitute. Smock v. Farmers' Union State Bank [Okl.] 98 P 945. Laws 1905, c. 86, providing complete system of regulating automobiles, repeals Pub. St. 1901, c. 264, § 18, so far as latter makes automobile speeding offense against police of city. Rockingham County v. Chase [N. H.] 71 A 634. Gen. St. 1867, c. 251, §§ 10, 14, prohibiting fishing in certain waters, repealed by fish and game laws in Gen. Laws 1878, in view of legislative history. State v. Rolfe [N. H.] 72 A 691. Laws 1905, p. 713, c. 168, is repealed by Laws 1907, p. 154, c. 104 (pure food law), latter act covering same subject, being more comprehensive and creating new offenses and penalties. State v. Squibb, 170 Ind. 488, 84 NE 969.

**21.** Smock v. Farmers' Union State Bank [Okl.] 98 P 945; Frelinghuysen v. Morristown [N. J. Law] 70 A 77; City of Buffalo v. Lewis, 192 N. Y. 193, 84 NE 809.

**22.** Where statute prescribing qualifications for certain office is re-enacted by subsequent amendatory and supplemental act in which one qualification is omitted, the later act will be held to have repealed the former as to such omitted matter. Martin v. Harsha [Kan.] 101 P 456.

**23.** Carter v. Whitcomb, 74 N. H. 482, 69 A 779.

**24.** State v. Beck [Wis.] 119 NW 300.

**25.** Theo. Poull & Co. v. Foy-Hays Const. Co. [Ala.] 48 S 785. Acts 1819, p. 472, c. 13, giving illegitimates right of inheritance to limited extent, not being carried into Code, was repealed. Turnmire v. Mayes [Tenn.] 114 SW 478.

**26.** Clark v. State [Ind.] 84 NE 984.

**27.** Shock v. Colorado County [Tex. Civ. App.] 115 SW 61; McKean v. Gauthier, 132 Ill. App. 376.

**28.** Hall v. Dunn [Or.] 97 P 811. Special act will not be presumed to have been repealed by general act. State v. Clausen [Wash.] 99 743. Loc. Acts 1896-97, p. 514, not repealed by Gen. Acts 1907, p. 879. State v. White [Ala.] 49 S 78. A special and local statute providing for a particular case or class of cases is not affected by a statute, general in its terms, broad enough to include cases embraced in the special law, unless the intent to repeal or alter is manifest. State v. Hatch [Conn.] 72 A 575. Laws 1891, p. 108, general election law, repealing inconsistent acts, did not repeal Act April 25, 1889, relating to annexation of cities and villages by special petition and

inconsistent [29] as to clearly manifest a legislative intent that the general act shall operate as a repeal.[30] A special statute operates to limit the effect of a prior general law from which it differs.[31] A constitutional provision requiring taxes to be levied by general laws does not repeal or make inoperative special laws previously passed.[32] In case of conflict between a statute and an ordinance, the statute must prevail.[33]

*Repeal of common law.* See 10 C. L. 1722—Statutes in derogation of the common law are construed strictly and as not operating to repeal prior law beyond their words or the clear repugnance of their provisions.[34] The common law on a given subject may be repealed by express words contained in the statute,[35] or, impliedly, by such repugnance in the two laws as indicates that they may not both operate together, or by such a revision of the whole subject matter as indicates an intent to substitute the statute for the prior law.[36] A subsequent statute revising the whole subject-matter of the former law, and evidently intended as a substitute for it, operates as a repeal,[37] and this doctrine applies with special force where, in the case of a criminal statute, not only the subject-matter is included, but the common-law offense is defined and enacted by a statute prescribing a penalty.[38] When the statute contains no express words of repeal, and the common law and a subsequent affirmative statute differ on a given subject, the common law gives place to or is repealed by the statute only when the matter is couched in exclusive words or in negative terms, or the matter of the statute is so clearly repugnant that it necessarily implies a negative.[39]

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**Statutory Crimes; Stay Laws,** see latest topical index.

## STAY OF PROCEEDINGS.[40]

**Grounds for Stay, 1959.**
**Power to Grant, 1960.**
**Proceedings to Obtain a Stay, 1961.**
**Effect of Stay, 1961.**
**Waiver of Stay, 1961.**

*The scope of this topic* is noted below.[41]

*Grounds for stay.* See 10 C. L. 1726—The court may postpone the hearing of an action at law until after the hearing of a cause in chancery involving the same matters,[42] or when it appears that the same matter is a subject of litigation in another court.[43] While the actions and parties must be alike,[44] they need not be identi-

election, latter being special act. Village of East Springfield v. Springfield, 238 Ill. 534, 87 NE 349. Statute requiring certain street railway company to place tracks on roads and streets so as to leave 14-foot space for vehicles, not repealed by later general act giving county commissioners power to compel railway companies to change character and location of tracks. Anne Arundel County Com'rs v. United R. & Elec. Co. [Md.] 72 A 542.

**29.** State v. White [Ala.] 49 S 78; Anne Arundel County Com'rs. v. United R. & Elec. Co. [Md.] 72 A 542.

**30.** State v. White [Ala.] 49 S 78. Whether general act repeals special act is matter of intention. Hampton v. Hickey [Ark.] 114 SW 707. General tax law of 1896 repeals by implication special laws relating to Suffolk county. Cone v. Lauer, 131 App. Div. 193, 115 NYS 644.

**31.** Hall v. Dunn [Or.] 97 P 811.

**32.** Statute incorporating common school district and providing for local tax, not affected. Smith v. Simmons, 33 Ky. L. R. 503, 110 SW 336.

**33.** Mantel v. State [Tex. Cr. App.] 117 SW 855.

**34, 35, 36, 37, 38, 39.** State v. Dalton [Mo. App.] 114 SW 1132.

**40. Search Note:** See Action, Cent. Dig. §§ 739-751; Dec. Dig. §§ 67-69; Costs, Cent. Dig. §§ 1045-1060; Dec. Dig. §§ 276, 277; 26 A. & E. Enc. L. (2ed.) 767; 1 A. & E. Enc. P. & P. 53.

**41.** As to stay pending appeal, see Appeal and Review, 11 C. L. 118, and stay of execution, see Executions, 11 C. L. 1433. As to effect of removal to federal court, see Removal of Causes, 12 C. L. 1680.

**42.** Vaughan v. Brooke, 153 Mich. 478, 15 Det. Leg. N. 537, 116 NW 1086.

**43.** One party brought action to cancel lease and the other then brought action for rent under lease in municipal court. Held that injunction staying latter action should issue upon undertaking being given and approved for payment of rent in case cancel-

cal in all respects.[45] In a court of record, a second action may be stayed in the discretion of the court until the costs of the former trial on the same matter have been paid,[46] whether such second action be brought prior or subsequent to the award of costs in the first,[47] unless the remedies sought are different;[48] but there is no authority for granting such stay in the municipal court of New York.[49] No stay not necessary for the protection of the parties should be granted.[50]

*Power to grant.* See 10 C. L. 1727—All courts, whether of law or equity, possess inherent power to stay proceedings before them to the end that abuse, oppression and injustice may be prevented.[51] Where two tribunals have equal jurisdiction, a stay should be granted in the court in which the action was last brought.[52] A federal court of equity may enjoin an infringement on property rights by criminal proceeding threatened to be brought in the state court,[53] the procedure in such case being an injunction against the litigant actors in the criminal action, such being the only way by which a court of equity may stay proceedings in a court of law.[54] The bankruptcy court after adjudication has power, within the limits of the jurisdiction of the district court,[55] to stay proceedings by a restraining order, during the statutory period and pending bankruptcy, upon claims which are provable,[56] unless it be a matter wherein the trustee is not concerned,[57] but this power is permissive and not mandatory.[58]

lation of lease should be denied. Van Riempst v. Weiher, 116 NYS 218. Federal court will stay its own proceedings where complainant subsequently sues in state court in regard to same matter, but it will later determine any question remaining undermined by state court. Vowinckel v. Clark, 162 F 991.

44. Subsequent action for same debt will not be stayed where parties and evidence of debt are different. Brown v. Kight, 63 Misc. 58, 116 NYS 592.

45. Since law looks to substance of things, postponment is matter of convenience in practice and not always of strict right. De La Vergne Mach. Co. v. New York & Brooklyn Brew. Co., 125 App. Div. 649, 110 NYS 24.

46. Under Comp. St. § 9992. Clark v. Bay Circuit Judge, 154 Mich. 483, 15 Det. Leg. N. 811, 117 NW 1051; City council of Montgomery v. Shirley [Ala.] 48 S 679.

47. First action was dismissed for want of prosecution. Ryan v. Benjamin, 128 App. Div. 51, 112 NYS 441; Conlon v. National Fireproofing Co., 128 App. Div. 270, 112 NYS 652.

48. The former being an action in equity, the latter an action at law, no stay granted. Maass v. Rosenthal, 62 Misc. 350, 115 NYS 4.

49. Since Code Civ. Proc. § 779 has no application to the municipal court, being limited to courts of record by subd. 6 of § 3347. Hirschfield v. Hassett, 59 Misc. 154, 110 NYS 264; Roth v. Wallach, 59 Misc. 515, 110 NYS 934; Goldman v. Brooklyn Heights R. Co., 129 App. Div. 657, 114 NYS 182.

50. Under Const. art. 6, § 5, and Code Civ. Proc. §§ 1310, 1343, 1344, 3188, regulating appeals from the city court of New York, a special term of the supreme court cannot stay on motion a judgment regularly entered in the city court and affirmed by the appellate term. Stern v. Barrett Chemical Co., 124 App. Div. 377, 108 NYS 811.

51. Where a court, having jurisdiction both at law and in equity, stays a law action pending before it in order that the whole controversy may be settled in an equity suit also pending before it, such stay was an injunction, and was appealable. Griesa v. Mutual Life Ins. Co. [C. C. A.] 165 F 48.

52. The supreme court will entertain jurisdiction if matters are involved of which surrogate court does not have jurisdiction; otherwise not. In re Farrell, 125 App. Div. 702, 110 NYS 41.

53. Held not in conflict with prohibition against federal court issuing an injunction to stay proceedings in state court (§ 720, Rev. St. U. S. [U. S. Comp. St. 1901, p. 581]), or enjoining state (eleventh amendment to constitution), and to be a justifiable exception to general rule that courts of equity cannot enjoin criminal proceedings. Lindsley v. Natural Carbonic Gas. Co., 162 F 954.

54. Injunctive power is invoked in such case, though words "restrain and enjoin" be not used. Griesa v. Mutual Life Ins. Co. [C. C. A.] 165 F 48.

55. Construing § 11 (30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]) and § 2, subd. 15 (30 Stat. 546 [U. S. Comp. St. 1901, p. 3421]). Beekman Lumber Co. v. Acme Harvester Co. [Mo.] 114 SW 1087.

56. Creditor commencing suit in inferior court and refusing to obey order of referee as to stay was adjudged guilty of contempt. In re Mustin, 165 F 506.

57. Where a bond was given pending suit, that any judgment obtained would be paid, subsequent bankruptcy of defendant is not ground for stay of such action, the trustee having no interest in surety bond given, and such stay not being required under § 11 of the bankruptcy act (U. S. Comp. St. 1901, p. 3426), and the state practice in New York applying. In re Mercedes Import. Co. [C. C. A.] 166 F 427.

58. Construing Bankr. Act, July 1, 1898, c. 541, § 11, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426), providing that such stay may

*Proceedings to obtain a stay.* See 10 C. L. 1727—An order of a municipal court granting a stay for a longer period than permitted by law is without force,[59] and no order granting a stay in such court is appealable.[60]

*Effect of stay.* See 8 C. L. 2000—An injunction to stay legal proceedings does not operate upon the court but upon the parties to the litigation.[61] At the end of the time or fulfillment of the condition terminating stay, plaintiff is entitled to trial without notice to the defendant.[62]

*Waiver of stay.* See 6 C. L. 2001—The right to a stay of the prosecution of claims against a bankrupt is waived unless the stay be applied for.[63]

### STEAM.[64]

*The scope of this topic* is noted below.[65]

In an action for injuries caused by a boiler explosion, evidence of prior explosions and conditions is admissible to show the condition of the boiler at the time of the accident, as is also evidence of condition shortly after the accident.[66]

### STENOGRAPHERS.[67]

*The scope of this topic* is noted below.[68]

The Texas statute providing for the appointment of stenographers has been held valid.[69] A court has inherent power to select and appoint its own stenographers [70] and fix their compensation,[71] and such compensation becomes a charge against the state as a liquidated claim.[72]

It is the duty of an official stenographer to furnish a transcript of his notes in narrative form when requested by a party to the suit,[73] and if he refuses, he may be compelled to do so,[74] but having rendered such service, he is entitled to compensation.[75] A stenographer employed by a referee may recover fees from either

be granted. Feigenspan v. McDonnell, 201 Mass. 341, 67 NE 624.

59. Municipal Ct. Act (Laws 1902, p. 1486, c. 580) limits stay to five days, but where defendant relied on invalid stay, he should be granted relief. Goldstein v. Rosenthal, 113 NYS 1012; Sowden & Co. v. Murray, 114 NYS 164.

60. Granted for nonpayment of costs in municipal court. Hirschfield v. Hassett, 59 Misc. 154, 110 NYS 264; Roth v. Wallach, 59 Misc. 515, 110 NYS 934.

61. Beekman Lumber Co. v. Acme Harvester Co. [Mo.] 114 SW 1087.

62. Judgment had by default. Tuska v. Jarvis, 61 Misc. 224, 113 NYS 767.

63. Mere adjudication of bankruptcy does not operate as stay against prosecution of claim, but order of stay may be obtained by application therefor to state courts. Under provisions of Bankr. Act July 1, 1898, c. 541, § 11, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426), especially where property levied on would not pass to trustee. Maas v. Kuhn, 130 App. Div. 68, 114 NYS 444.

64. See 10 C. L. 1727.

**Search Note:** See Steam, Cent. Dig.; Dec. Dig.; 26 A. & E. Enc. L. (2ed.) 990.

65. It includes the regulation of steam machinery and the licensing of persons operating the same. As to liability for negligence in the operation of steam machinery, see Master and Servant, 12 C. L. 665, and as to liabilities for steam explosions, see also the topic Explosives and Inflammables, 11 C. L. 1450.

66. Chicago G. W. R. Co. v. McDonough [C. C. A.] 161 F 657.

67. See 10 C. L. 1727.

**Search Note:** See Courts, Cent. Dig. §§ 198-200; Dec. Dig. § 57; Criminal Law, Cent. Dig. § 1456; Dec. Dig. § 643; Trial, Cent. Dig. § 41; Dec. Dig. § 23; 26 A. & E. Enc. L. (2ed.) 772.

68. This topic includes only official stenographers, their duties, compensation, and the like. Private contracts (see Contracts, 11 C. L. 729) are excluded, as is the authenticity and effect of the stenographer's transcript as part of the record on appeal (see Appeal and Review, 11 C. L. 118).

69. Title of acts 30th Legislature (Gen. Laws 1907, p. 509, c. 24) does not contain more than one subject. Texas & P. R. Co. v. Stoker [Tex.] 113 SW 3.

70. State v. Cunningham [Mont.] 101 P 962.

71. Rev. Codes, § 262, authorizing the board of examiners to employ clerical help for any state affair or board, does not apply to supreme court stenographers, and therefore the said board has no authority to fix compensation of such stenographers. State v. Cunningham [Mont.] 101 P 962.

72. Stenographer's claim held not to be an unliquidated claim within the class which must be approved by the board of examiners. State v. Cunningham [Mont.] 101 P 962.

73. Jones & Co. v. Smith [Tex. Civ. App.] 109 SW 1111.

74. Routledge v. Elmendorf [Tex. Civ. App.] 116 SW 156.

75. This is so even if the custom and

party to the reference,[78] but such fees must be reasonable.[77] A contract for furnishing a transcript of testimony which has been given does not include testimony thereafter to be taken.[78] If no authority is given by statute, traveling expenses cannot be collected.[79] Under a statute of Utah, a district judge may contract to pay a stenographer certain mileage without reference to the amount actually paid for such travel,[80] and if the state board of examiners refuse to pay such mileage, mandamus will lie.[81] Under a statute of Texas providing for the compensation of stenographers out of the fees collected and turned over to the county, a stenographer is entitled to such fees whether they are collected during his term of office or thereafter.[82] An official stenographer's appointment does not necessarily terminate with the death of the judge who made the appointment.[83]

## STIPULATIONS.[84]

**Right to Make and Form and Construction, 1962.** | **Enforcement and Effect, 1963.**

*The scope of this topic* is noted below.[85]

*Right to make and form and construction.* See 10 C. L. 1728—A stipulation may be entered into by the agents of the parties.[86] Stipulation of counsel as to matters relating to the conduct of the case bind their clients,[87] but an oral stipulation which is not made in open court and entered of record is not enforcible.[88] The parties may by stipulation amend the pleadings,[89] waive the right to move to vacate,[90] substitute an agreed statement for findings,[91] present evidence on appeal,[92] or give to

practice of the courts make the preparation of a statement of facts part of the legal service to be rendered by the attorney of the party appealing. Jones & Co. v. Smith [Tex. Civ. App.] 109 SW 1111.

76. A joint and several promise is implied by law against both parties through the acceptance of the stenographer's service. Eckstein v. Schleimer, 62 Misc. 635, 116 NYS 7.

77. Cannot recover 25 cents a folio when the rate allowed official stenographers is 10 cents. Eckstein v. Schleimer, 62 Misc. 635, 116 NYS 7.

78. Testimony before grain commission. Law Reporting Co. v. H. Poehler Co., 106 Minn. 213, 118 NW 664.

79. Code Civ. Proc. § 274 does not authorize payment of traveling expenses in civil cases. Irrgang v. Ott [Cal. App.] 99 P 528.

80. Comp. Laws 1907, §§ 721, 722. May contract to pay 10 cents a mile. State v. Cutler, 34 Utah, 99, 95 P 1071. Laws 1907, p. 172, c. 123, does not apply to contracts authorized by Comp. Laws 1907, §§ 721, 722. Id.

81. Even though the examiner act in a quasi judicial capacity. State v. Cutler, 34 Utah, 99, 95 P 1071.

82. Gen. Laws 28th Legislature 1903, p. 84, c. 60, §§ 1, 9. Shock v. Colorado County [Tex. Civ. App.] 115 SW 61.

83. May continue in such position if the remaining members of the court or successor of deceased judge do not object. People v. Kelley, 134 Ill. App. 642.

84. **Search Note:** See notes in 4 C. L. 1555; 6 Id. 1555.

See, also, 26 A. & E. Enc. L. (2ed.) 785; 20 A. & E. Enc. P. & P. 604.

85. It includes agreements between counsel relative to proceedings in a pending suit. Contracts generally (see Contracts, 11 C. L. 729) and the power of an attorney to represent his client in the making thereof (see Attorneys and Counselors, 11 C. L. 332) are excluded.

86. Held that the bank, in making agreement with plaintiff as to the entry of the judgment in the litigation, was acting as defendant's agent. Voorhees v. Geiser-Hendryx Inv. Co. [Or.] 98 P 324.

87. Stipulation between counsel that, if master's report was affirmed, a certain sum should be recovered, held to conclude all parties. Gage v. Smyth Mercantile Co. [C. C. A.] 160 F 425. Stipulation attached to bill of exceptions, signed by plaintiff's attorney and by appellant's counsel, held to be binding as to appellant's codefendants though they were not mentioned in the stipulation. Walker Bros. v. Skliris, 34 Utah, 353, 98 P 114.

88. State v. Quillen [Tex. Civ. App.] 115 SW 660.

89. Parties stipulated that the only issue in the case was whether the assured had given immediate notice. Held that the stipulation eliminated all questions but the one as to the time of notice. Gilles v. U. S. Casualty Co., 114 NYS 54.

90. Where, after an order had issued for examination of defendant before trial, he requested an adjournment, stipulating that the examination should take place on a designated day, held that the stipulation waived the right to move to vacate the order. Schweinburg v. Altman, 131 App. Div. 795, 116 NYS 318.

91. Quist v. Hill [Cal.] 99 P 204.

92. Parties stipulated that the transcript of evidence might be used by either on appeal without certificate from the judge. Held, although not the proper method, that neither party could complain if the court gave the stipulation effect. Houtz v. Union Pac. R. Co. [Utah] 99 P 99.

evidence a character which otherwise it would not have,[93] and they may, by stipulation, waive formalities,[94] or waive objections to evidence,[95] or substitute parties,[96] or stipulate as to matters relating to the entry of the judgment,[97] but they cannot establish rules of procedure.[98] A stipulation between parties litigant as to the constitutionality of a statute is void.[99] A stipulation should be so construed as to effectuate the object had in view.[1]

*Enforcement and effect.* See 10 C. L. 1729—A stipulation between attorneys relating to the conduct of the suit should be enforced unless good cause is shown to the contrary.[2] The express terms of a stipulation of facts bind the parties [3] and pre-

**93.** Affidavit of publisher attached to mailing lists of the paper containing the notice of assessment on insurance policy held prima facie evidence of the mailing and receipt of the notice because of the stipulation of facts. Underwood v. Modern Woodmen [Iowa] 119 NW 610. Parties stipulated that either party might read from abstract of title any instrument therein contained as if the loss of the original had been proven. Held that it did not permit appellant to read the instrument from the record without proof of the loss of the original. Whittaker v. Thayer [Tex. Civ. App.] 110 SW 787.

**94.** Parties stipulated upon appeal to district court that no question would be raised as to whether the claim was a personal or official liability. In re Pope's Estate [Neb.] 120 NW 191.

**95.** Stipulation, whereby a case is submitted to a trial court upon a deposition, acts as a waiver to any objections to such deposition. Steele v. Crabtree [Iowa] 120 NW 720. Objections to a map offered as evidence held waived by stipulation. City of Victoria v. Victoria County [Tex. Civ. App.] 115 SW 67.

**96.** One appointed as committee for an incompetent defendant is bound by his own stipulation substituting himself as defendant in lieu of the incompetent. Capen v. Delaney, 128 App. Div. 648, 113 NYS 50. Where a sheriff died pending suit for conversion, and by stipulation of the parties the deputy sheriff was substituted as sheriff and not as undersheriff, held that defendant could not object at the trial that the substitution was irregular. Dickinson v. Oliver [N. Y.] 88 NE 44.

**97.** Parties stipulated that the justice should have two weeks to make his decision after the receipt of last brief. Held decision was in time within the Municipal Court Act (Laws 1902, p. 1486, c. 580). Beinert v. Tivoli & Co., 62 Misc. 616, 116 NYS 4.

**98.** Parties agreed that six separate actions involving the same facts should be tried at once. On appeal, the six judgments were brought up in a single transcript. Held that the stipulation could not be urged to change the rules of procedure in the court. Mobile Imp. & Bldg. Co. v. Stein [Ala.] 48 S 368. A federal court of equity will not permit the parties by stipulation to substitute state practice for the equity practice of that court. Stipulation of council that a ruling upon a formal demurrer to the answer should have the same effect as upon a demurrer to an answer in a law action will not be permitted. Vitzthum v. Large, 162 F 685.

**99.** Respondent admitted in argument that certain acts were unconstitutional. Held that the parties could not determine the validity of a statute but that it was a matter of law for the court to decide. State v. Schnitger, 16 Wyo. 479, 95 P 698.

**1.** A stipulation to suspend the sale of mortgaged property, until the commissioners of appraisal are appointed to determine the value of a portion of the property to be taken by the city, should not be disregarded. Mayer v. Jones, 132 App. Div. 106, 116 NYS 300. Held that the stipulation of the parties was not an agreed case supplanting the pleadings but that it pertained merely to the evidence on trial, as both parties amended their pleadings without regard to the stipulation. Clason v. Matko [Ariz.] 100 P 773. Plaintiffs agreed to a continuance on condition that they should not be required to pay further premiums pending the suit. Held that the stipulation did not entitle plaintiff's to have rules declared in the action by which future assessments should be made. Jones v. Provident Sav. Life Assur. Soc. [N. C.] 64 SE 166. Parties stipulated to a dismissal, but provided that the dismissal was with leave to reinstate the action at any time without notice. Held that it was not the intention of the parties to constitute a final disposition of the action. McGoodwin v. Lusterine Min. & Polishing Co., 33 Ky. L. R. 521, 110 SW 409. Parties stipulated that the rents accruing during foreclosure should "be held to abide the event of the action." Held that the intent of the stipulation was that the accrued rent should go to plaintiff if defendant was found personally liable for any deficiency. Rutherfurd Realty Co. v. Cook, 130 App. Div. 76, 114 NYS 274. Stipulation that a township included in a certain boundary was included in list of lands granted to state, under swamp land act (9 Stat. 519), held to refer only to township as property surveyed by government surveyors. Little v. Williams [Ark.] 113 SW 340. Stipulation of parties that one died seised of certain property held to mean seised in fee simple and that the legal definition would not apply. Hobson v. Huxtable, 79 Neb. 334, 116 NW 278. Where it is stipulated that all proper pleadings in assumpsit for recovery of commissions for sale of real estate should be considered, there is no necessity of a special count on the contract or of any other formal pleading. Tanner v. Clapp, 139 Ill. App. 353. A stipulation of the parties that a lien should be satisfied out of the judgment held to conclude the parties from questioning the validity of the lien. McCall v. Cohn, 113 NYS 540.

**2.** Brennan v. American Sulphur & Min. Co. [Colo.] 100 P 412.

clude the denial of such facts [4] and any objection for want of proper pleadings.[5] If no agreement is made that the court may draw inferences of fact, all the elements required to establish the claim must be found in the stipulated facts.[6] A stipulation to the entry of a judgment waives the right of appeal therefrom,[7] and is a waiver of an alleged error in overruling a plea in abatement.[8] The court, in an action in which the parties are entitled to a jury trial, cannot make findings of fact and conclusions of law unless the stipulation of the parties so provide.[9] A stipulation that one of two actions was for a new judgment is binding in determining its effect on the other action, which was a scire facias proceeding.[10] A stipulation avoiding the announcement of an exception will not relieve counsel from making the necessary objections at proper times.[11] One who is bound by a stipulation cannot be heard to question its validity because there may have been others who might have questioned it.[12] A court cannot relieve one party from a stipulation, in whole or in part, and still leave the other party concluded and bound by it.[13] A court of equity will not specifically enforce a stipulation for judgment which does not contain all the compromise agreement.[14] A stipulation entered into during a trial is binding between the parties on a subsequent trial.[15] Absolute judgment is liable to be rendered against one on appeal if he stipulates to that effect.[16] A stipulation changing the forum from law to equity is binding upon the parties.[17] An ultra vires stipulation is ground for setting aside a judgment rendered by virtue of such stipulation.[18] A stipulation entered into in advance of the trial that the de-

3. McLennon v. Siebel [Mo. App.] 115 SW 484.

4. One having entered into a stipulation of facts cannot later claim that the record did not show such facts. North v. Graham, 235 Ill. 178, 85 NE 267. A stipulation quieting title in plaintiff cannot later be attacked on the ground that the instrument under which plaintiff holds is not a deed but a mortgage. Armstrong v. Campbell [Iowa] 118 NW 898. Where a stipulation of facts in an action on an insurance policy referred to an assessment as having been made "for the month of October," the plaintiff will be estopped from denying that the assessment was not due in that month. Underwood v. Modern Woodmen [Iowa] 119 NW 610.

5. Conway v. Chicago, 237 Ill. 128, 86 NE 619; Fay v. Locke, 201 Mass. 387, 87 NE 753.

6. Cunningham v. Connecticut Fire Ins. Co., 200 Mass. 333, 86 NE 787.

7. Agnew v. Baldwin, 136 Wis., 263, 116 NW 641.

8. Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. [Tex. Civ. App.] 111 SW 417.

9. Parties stipulated, after the evidence had been submitted to the jury and motion made for a directed verdict, that the court might submit the value of the property and determine the other questions as those of law. Held that the court had not the right to make findings of facts and conclusions of law. Lumley v. Miller [S. D.] 119 NW 1014.

10. Held that, according to the stipulation, the former action was one of debt on the judgment and therefore not ground to quash the writ of scire facias. Bick v. Dry [Mo. App.] 114 SW 1146.

11. Counsel stipulated that at all times when there was an adverse ruling of the court the counsel might have an understanding between themselves that in that case an exception be noted. Held that this stipulation did not include a general objection to all the evidence. State v. Bridgham [Wash.] 97 P 1096.

12. That a stipulation for the allowance of certain claims was not binding upon part of the heirs and creditors of a decedent's estate does not make it invalid as to those who executed it. In re McNamara's Estate, 154 Mich. 671, 15 Det. Leg. N. 924, 118 NW 598.

13. Held that an order permitting plaintiff to submit additional evidence, without giving defendant the opportunity to rebut such evidence was error. Adams v. Hartzell [N. D.] 119 NW 635.

14. Held that the stipulation omitted important features of the compromise scheme and that one of the parties had entered into the stipulation through mistake. Cook v. Newby, 213 Mo. 471, 112 SW 272.

15. Held not error for the court to refuse a charge to the effect that such stipulation was not binding in the subsequent trial. Combest v. Wall [Tex. Civ. App.] 115 SW 354.

16. Plaintiff appealed from the decision of the appellate division, which reversed the judgment and granted new trial, and stipulated that in case of affirmance judgment absolute should be rendered against him. The court of appeals, on finding against him, rendered judgment absolute. Tousey v. Hastings, 194 N. Y. 79, 86 NE 831.

17. Appellant estopped from avoiding the decree on the ground of want of jurisdiction. Darst v. Kirk, 132 Ill. App. 203.

18. Lower court was misled by void stipulation. People v. Santa Clara Lumber Co., 60 Misc. 150, 113 NYS 70.

fendants, if liable at all, are liable in solido, is binding upon the parties.[19] A stipulation amending the pleadings is not an admission of the correctness of the allegations.[20] The parties to a stipulation will be justified in relying on its performance.[21]

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**Stock and Stockholders; Stock Exchanges; Stock Yards; Stoppage in Transit; Storage; Store Orders,** see latest topical index.

## STREET RAILWAYS.


**§ 1. The Franchise or License to Operate a Street Railway and Regulation of Its Exercise, 1965.**
**§ 2. Property and Acquirement Thereof, 1969.**
**§ 3. Taxes and License Fees, 1969.**
**§ 4. Street Railway Corporations, 1970.**
**§ 5. Location and Construction, 1973.**
**§ 6. Injuries to Passengers, 1976.**
**§ 7. Injuries to Employes, 1976.**
**§ 8. Injuries to Persons Other Than Passengers or Servants, 1976.**
A. General Rules as to Negligence and Contributory Negligence, 1976. "Last Clear Chance" Doctrine, 1985.
B. Travelers on Highway, 1986. Injuries to Pedestrians, 1986. Children Run Over, 1988.
C. Accidents to Drivers or Occupants of Wagons, 1988. Driving on or Near the Tracks, 1990. Frightening Horses, 1991.
D. Bicycle Riders; Automobiles; Animals, 1991.
**§ 9. Damages, Pleading and Practice in Injury Cases, 1991.**
**§ 10. Statutory Crimes, 1996.**


*The scope of this topic* is noted below.[22]

§ 1. *The franchise or license to operate a street railway and regulation of its exercise.*[23]—See 10 C. L. 1730—A street railway company in New York must secure a certificate of public necessity and convenience.[24] The state, as trustee of the streets and highways, may prescribe the terms and conditions upon which they may be occupied,[25] and the consent of the local municipal authorities[26] is usually required.[27] Where municipal consent is a prerequisite, the city may impose a valid[28]

**19.** Camp v. Baldwin-Melville Co. [La.] 48 S 927.

**20.** Therefore not a proper basis for a judgment. Phelan v. New York Cent. & H. R. Co., 113 NYS 35.

**21.** Pending a suit to establish and foreclose a mortgage, the mortgagee stipulated he would redeem the property from a tax sale, but bought it instead. Held that the mortgagor was the beneficial owner. Teich v. San Jose Safe Deposit Bank [Cal. App.] 97 P 167.

**22.** This topic is limited to the law of street railways, excluding their ordinary character as carriers (see Carriers, 11 C. L. 499), corporations (see Corporations, 11 C. L. 810), or employers (see Master and Servant, 12 C. L. 665), but including railways which though not upon streets or strictly urban, are more akin in the character of their public service to street railroads than to ordinary railroads (compare Railroads, 12 C. L. 1542).

**23. Search Note:** See notes in 15 L. R. A. 604; 36 Id. 33; 2 L. R. A. (N. S.) 138; 25 A. S. R. 475; 28 Id. 235; 47 Id. 272; 104 Id. 636; 4 Ann. Cas. 449; 5 Id. 53.

See, also, Street Railroads, Cent. Dig. §§ 1-143; Dec. Dig. §§ 1-64; 4 A. & E. Enc. L. (2ed.) 15; 10 Id. 878; 27 Id. 8, 31, 48, 53, 896.

**24.** Determination that public convenience did not require trolley line is not res judicata on subsequent application of another company. People v. Aldrigde, 126 App. Div. 484, 110 NYS 820. Trolley road which secured certificate of public convenience from commissioners in 1903, but which in 1906 had made so little progress that application to revoke charter was pending, has no claim to protection against granting certificate to a proposed parallel line. People v. Aldridge, 126 App. Div. 484, 110 NYS 820.

**25.** Laws 1901, p. 370, No. 238, giving interurban railways right to occupy highways under certain conditions, amending general railroad laws, Comp. Laws, c. 164, held unconstitutional as not germane to purposes expressed in title. Ecorse Tp. v. Jackson, etc., R. Co., 153 Mich. 393, 15 Det. Leg. N. 528, 117 NW 89.

**26.** Term "legislative authority of the city," as used in Laws 1903, p. 364, c. 175, as amended by Laws 1907, p. 192, c. 99, authorizing legislative authority of city to grant franchise, held to mean council and mayor, and ordinance passed by council and approved by mayor is effective, notwithstanding amendment to charter requiring submission to voters. Benton v. Seattle Elec. Co., 50 Wash. 156, 96 P 1033. Ordinance authorizing construction of second track, not submitted to mayor for approval as required by Act April 3, 1902, held a nullity. Specht v. Central Pass R. Co. [N. J. Err. & App.] 72 A 356.

**27.** Company which has lost municipal consent to use street through failure to perform conditions imposed cannot, without municipal consent, use tracks of another. City of Erie v. Erie Trac. Co., 222 Pa. 43, 70 A 904.

**28.** Where restriction imposed is unlawful, it is invalid, but the location is legal. Se-

and reasonable condition upon the granting of the same,[29] such as requiring the completion of the construction work within a designated period,[30] repair of streets,[31] etc., and a company cannot, while enjoying the benefits of a franchise, repudiate its burdens.[32] The granting of a municipal franchise is frequently conditioned upon the consent of property owners abutting on the street proposed to be occupied,[33] although such requirement does not apply where the street is vacated for the use of the company.[34] The city determines in the first instance whether such consent has been obtained,[35] and, where the consent of the requisite number has been duly given, it is immaterial that the consent of others was invalidly obtained.[36] An abutter consenting to the construction work being done,[37] or remaining silent while large sums of money are being expended,[38] cannot ordinarily enjoin its completion, and in all cases the public interests must be considered.[39] Except as owner of the fee in the street,[40] he cannot enjoin the maintenance of a public

lectmen of Clinton v. Worcester Consol. St. R. Co., 199 Mass. 279, 85 NE 507.

**29.** City of Chicago held to have power to exact compensation for privilege of occupying street. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266. Ordinance granting privilege of occupying street and requiring company to pay city 55 per cent of net earnings held not invalid as making city and company partners in operation of system. Id. Ordinance granting franchise upon payment of 55 per cent of "net earnings," and providing for a board of supervising engineers to supervise re-equipment and operation, so far as necessary, to reach conclusion as to what net earnings would be, held not invalid as taking control of system from directors and delegating same to engineers. Id. Restriction requiring half fares for pupils attending schools, etc., imposed by town of Clinton as condition of granting location, held not affected by subsequent legislation, nor by St. 1887, p. 916, c. 284, organizing Worcester Consolidated Street Railway Company, which assumed burden of restriction when it purchased road to which location was given. Selectmen of Clinton v. Worcester Consol. St. R. Co., 199 Mass. 279, 85 NE 507.

**30.** Under Gen. St. 1902, § 3833, city may require completion within shorter time than that fixed by statute as a condition of its approval of plans. State v. New York, etc., R. Co. [Conn.] 71 A 942. Failure to complete within time fixed by city in order approving plans does not excuse company from thereafter so doing, and its lessee stands in its shoes in this respect. Id.

**31.** May require company to repave portion used with designated material. Village of Madison v. Alton, G. & St. Louis Trac. Co., 235 Ill. 346, 85 NE 596.

**32.** Since, under Pub. St. 1882, c. 113, § 2, et seq., lawful restrictions imposed by municipal authorities upon right to occupy streets are conditions precedent to granting of franchise to be a corporation. Selectmen of Clinton v. Worcester Consol. St. R. Co., 199 Mass. 279, 85 NE 507. Held, in view of Pub. St. 1882, c. 113, § 43, that municipal authorities, in granting location, could impose restrictions as to fares not unlawful in themselves and company accepting and organizing on basis of such restrictions could not question reasonableness (Id.), and especially where application is not made to railroad commissioner to have same modified (Id.).

**33.** Act April 21, 1896 (P. L. p. 329), giving municipal authorities power to grant franchise to occupy street upon consent of owners of one-half of abutting property, such consent was limitation belonging to abutters, regardless of ownership of fee. St. Columba's Church v. North Jersey St. R. Co. [N. J. Eq.] 70 A 692. Act April 21, 1896 (P. L. p. 329), prohibiting construction of street railroad without consent of one-half of abutters, etc., held to apply to original construction, and company could be given permission to construct second track without such consent. Specht v. Central Pass. R. Co. [N. J. Err. & App.] 72 A 356. Under Act 1903 (Laws 1903, p. 285), city may grant use of streets without consent of abutting owners, notwithstanding City and Village Act (Hurd's Rev. St. 1905, c. 24), § 62, cl. 90, the former controlling. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266.

**34.** Tomlin v. Cedar Rapids & Iowa City R. & Light Co. [Iowa] 120 NW 93. And need not compensate abutting property owners. Id.

**35.** Where council held condition attached to consent void and passed ordinance granting franchise, abutter's remedy was to review by certiorari. St. Columba's Church v. North Jersey St. R. Co. [N. J. Eq.] 70 A 692.

**36.** Where company secured consent of two-thirds of abutters to occupy highway, as required by Comp. Laws, c. 164, § 51, art. 2, as amended by Laws 1901, p. 370, No. 238, without fraud, right is not affected by fact that consent of others was acquired by fraud. Ecorse Tp. v. Jackson, etc., R. Co., 153 Mich. 393, 15 Det. Leg. N. 528, 117 NW 89.

**37.** Words, "I know where you want to go, and go ahead and I will see you in a few days," held to show consent. Maust v. Pennsylvania & M. St. R. Co., 219 Pa. 568, 69 A 80.

**38, 39.** Maust v. Pennsylvania & M. St. R. Co., 219 Pa. 568, 69 A 80.

**40.** Bill by abutter to compel removal of tracks from street should show whether based upon ownership of fee in street or upon rights as an abutter. St. Columba's Church v. North Jersey St. R. Co. [N. J. Eq.] 70 A 692. Where it appears that company,

nuisance unless he suffers special injury.[41] Subject to constitutional and statutory restrictions, a city and a street railway company may agree upon their mutual rights,[42] and, upon inability to do so, may appeal to the courts.[43] The right to occupy a street does not authorize the placing of unreasonable obstructions therein,[44] and as to what constitutes an unreasonable obstruction is a question of fact.[45] A franchise duly accepted by the company [46] and acted upon [47] becomes a contract,[48] and cannot ordinarily [49] be altered or changed [50] except by mutual agreement based upon a sufficient consideration.[51]

*Rights and duties under franchise.* See 10 C. L. 1734—The rights and duties of a street railway company are largely controlled by the terms of its franchise,[52] which

without license from plaintiff, placed wires through trees upon her hand, held trespasser, in absence of proof of public authority. Bathgate v. North Jersey St. R. Co., 75 N. J. Law, 763, 70 A 132.

41. St. Columba's Church v. North Jersey St. R. Co. [N. J. Eq.] 70 A 692; Woods v. Lincoln Trac. Co. [Neb.] 118 NW 1067. Where it is not shown that petitioning abutter's ingress and egress will be affected, and only injury will be from noise, etc., suffered by all abutters, he cannot enjoin occupancy as a public nuisance. Ayers v. Citizens' R. Co. [Neb.] 118 NW 1066.

42. Act March 20, 1901 (P. L. 1901, p. 116), held sufficient as to title, and to authorize city to agree to pay specified sums upon separation of grades (Morris & E. R. Co. v. Newark [N. J. Err. & App.] 70 A 194), and payment thereof does not constitute a donation or appropriation of public funds within prohibition of §§ 19, 20, of art. 1, Const. (Id.).

43. Jurisdiction of court of equity under Act June 19, 1871 (P. L. 1360), to determine conflicting rights, etc., does not extend to questions involving validity of charters or forfeiture thereof. Myersdale & S. St. R. Co. v. Pennsylvania & M. St. R. Co., 219 Pa. 558, 69 A 92.

44. Not permissible to provide platform along street for use of passengers. Robinson v. Helena Light & R. Co. [Mont.] 99 P 837. Company occupying street cannot receive freight therein when to do so will unreasonably block the street and interfere with public use thereof. Town of Ft. Edward v. Hudson Valley R. Co., 127 App. Div. 438, 111 NYS 753. Injunction should be granted only after full hearing, since public as well as company is inconvenienced thereby. Id.

45. Not only the actual obstruction, but any littering of the highway by reason of receiving freight thereon so as to frighten horses, would be chargeable to the railroad company both as cause and occasion thereof. Town of Ft. Edward v. Hudson Valley R. Co., 127 App. Div. 438, 111 NYS 753.

46. Written acceptance in name of president and secretary and bearing corporate seal is prima facie evidence of acceptance. City of Niles v. Benton Harbor-St. Joe R. & Light Co., 154 Mich. 378, 15 Det. Leg. N. 757, 117 NW 937. Where charter provides that corporate powers shall be exercised by board of directors, acceptance of franchise by board is binding on stockholders. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266.

47. Village of Madison v. Alton, G. & St. Louis Trac. Co., 235 Ill. 346, 85 NE 596.

48. Columbus St. R. & Light Co. v. Columbus [Ind. App.] 86 NE 83; Indianapolis & E. R. Co. v. New Castle [Ind. App.] 87 NE 1067. Special charter, when adopted, becomes contract. City of New York v. New York City R. Co., 193 N. Y. 543, 86 NE 565.

49. Under Act Feb. 6, 1865 (Laws 1865, p. 597), amending Act Feb. 14, 1859 (Laws 1859, p. 530), authorizing, among other things, the changing of any contract by council with written consent of other party, ordinance adopted Feb. 11, 1907, constituting agreement between city and company whereby latter surrendered all rights and accepted in lieu right to continue for 20 years under certain conditions, held not ultra vires (Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266), and such contract could be entered into by company notwithstanding objection of single stockholder (Id.). Original franchise ordinance held repealed by new franchise ordinance covering practically every subject contained therein. Indianapolis & E. R. Co. v. New Castle [Ind. App.] 87 NE 1067. On rehearing former opinion, in 114 NW 422, held merely to hold that company was rightfully occupying street, and not to pass upon right of city to revoke right in future. State v. Lincoln St. R. Co., 80 Neb. 333, 118 NW 326.

50. Shreveport Trac. Co. v. Shreveport, 122 La. 1, 47 S 40. Fixing rates. Id. Cannot change character of materials to be used in paving. Village of Madison v. Alton, G. & St. Louis Trac. Co., 235 Ill. 346, 85 NE 596. Where company is granted right to construct and maintain tracks "along and across the streets of the city," and constructs certain lines in conformity to a system which contemplates additional lines and branches as public needs require, city cannot arbitrarily revoke franchise except as to tracks constructed. Mercantile Trust Co. v. Denver, 161 F 769.

51. Right of city to designate kind of poles to be used, and free carriage of children under six, held sufficient consideration for new franchise ordinance relieving company from obligation to pay for paving. Indianapolis & E. R. Co. v. New Castle [Ind. App.] 87 NE 1067. Where amendatory franchise ordinance is based on a consideration and is not tainted with fraud, it will not be set aside as injudicious or for inadequacy of consideration. Id.

52. Ordinance giving right to occupy street and to construct necessary switches, curves, cross-overs, and turnouts, held not to authorize construction of curved track across sidewalks. Breen v. Pittsburg, Harmony, Butler & N. C. R. Co., 220 Pa. 612, 69 A 1047. Franchise to construct and op-

must be strictly construed against it[53] and in favor of the public.[54] Where a franchise does not specify its duration, it is measured by the corporate life of the grantee.[55] The route and construction must be in accordance with the approved[56] plans submitted as a basis for municipal consent and any germane condition imposed.[57] Street railway companies are quasi public corporations and are bound to exercise their franchises for the benefit of the public,[58] and cannot ordinarily[59] discontinue service at will.[60] A company succeeding to the franchise of another by novation[61] or lease[62] must perform its obligations. Mandamus at the instance of the proper relator[63] will lie to enforce franchise duties,[64] and quo warranto lies in case of misuse of the franchise.[65] The courts cannot enforce a charter provision for proper car service by prescribing a schedule, the matter being in the first instance executive.[66]

erate a street railway does not authorize it to permit another to use its line without municipal consent and against municipal protest. City of Erie v. Erie Trac. Co., 222 Pa. 43, 70 A 904. Street railway having charter power to extend branch lines held to have power to contract with another for use of line to connect main line with extension (Hannum v. Media, etc., Elec. R. Co., 221 Pa. 454, 70 A 847), and abutting property owners cannot complain thereof (Id.). Where permission to cross bridge was given on condition that company should construct and maintain the railway at own expense, and should pay all damages that might occur to the state or to individuals in consequence of the construction and maintenance of the railway, held that company need not reimburse state for damages paid to one injured by car breaking down bridge because of its insufficiency due to age. People v. Syracuse Rapid Transit R. Co., 129 App. Div. 800, 114 NYS 776.

53. Columbus St. R. & Light Co. v. Columbus [Ind. App.] 86 NE 83.

54. City of New York v. New York City R. Co., 126 App. Div. 36, 110 NYS 720.

55. Mercantile Trust Co. v. Denver, 161 F 769.

56. Where plan under Gen. St. 1902, § 3833, was presented as an entirety, an approval thereof is an approval of it as an entirety. State v. New York, etc., R. Co. [Conn.] 71 A 942. Amendment to charter of Connecticut Railway & Lighting Company in 1905, though confirming and validating location and construction as made, does not prevent state from compelling, by mandamus, the completion of route according to approved plans. Id.

57. Condition of approval of plans submitted under Gen. St. § 3833, that grade of street be brought to specified grade, and that street be made safe, held germane and proper. State v. New York, etc., R. Co. [Conn.] 71 A 942.

58. Selectmen of Amesbury v. Citizens' Elec. St. R. Co., 199 Mass. 394, 85 NE 419.

59. Various statutes and the charter of Citizens' Electric Street Railway Company and of its predecessor's considered, and held that it was not under any obligation to continue line. Selectmen of Amesbury v. Citizens' Elec. St. R. Co., 199 Mass. 394, 85 NE 419.

60. Where extension has been completed and put into operation, no part of it can be abandoned at will of company. State v. New York, etc., R. Co. [Conn.] 71 A 942. St. 1906, p. 302, c. 339, now St. 1906, p. 614, c. 463, pt. 3, § 76, authorizing mayor to petition supreme judicial court to compel street railway unlawfully discontinuing a part of its line, being remedial only, may be invoked, though discontinuance occurred before its enactment. Selectmen of Amesbury v. Citizens' Elec. St. R. Co., 199 Mass. 394, 85 NE 419.

61. Where company, which had franchise to enter city and was obligated to pay certain amount towards paving, agreed to surrender franchise and be released from such obligation, and another company receiving franchise agreed to assume same, all being a part of same transaction, held a novation (City of Niles v. Benton Harbor-St. Joe R. & Light Co., 154 Mich. 378, 15 Det. Leg. N. 767, 117 NW 937), and company was bound to pay same though franchise required it to apply for right of grade crossing over certain railroad tracks and provided that if application was denied, rights should cease at election of city council, etc. (Id.), and even if it was to be relieved if application was refused, it must show due diligence to secure same, and mere showing that application was refused is insufficient (Id.), and in any event, it is bound until city elects to cancel franchise (Id.). Statutes held to authorize transfer of street railway franchise without formal or express consent of state. O'Sullivan v. Griffith, 153 Cal. 502, 95 P 873.

62. Must complete extension begun and put same in operation (State v. New York, etc., R. Co. [Conn.] 71 A 942), and it is no defense to mandamus that it was not a party to proceedings for the proposed extension (Id.).

63. Under Gen. St. 1902, § 3824, mandamus to compel company to obey order of city as to placing of tracks, etc., may be in name of city, but it may also be in name of state, or in name of state on relation of city. State v. New York, etc., R. Co. [Conn.] 71 A 942.

64. Oklahoma City v. Oklahoma R. Co., 20 Okl. 1, 93 P 48.

65. Right to operate street railway held franchise within quo warranto statute. City of Olathe v. Missouri & K. Interurban R Co. [Kan.] 96 P 42.

66. Honolulu Rapid Transit & L. Co. v. Hawaii, 211 U. S. 282, 53 Law. Ed. 186.

*Rates, fares and transfers.*[67]

§ 2. *Property and acquirement thereof.*[68]—See 10 C. L. 1738—Where there is a conflict of authority as to whether a street railway constitutes an additional burden,[69] where the affirmative rule prevails, the right must be acquired by contract,[70] prescription,[71] or condemnation.[72] The power of a company to condemn private property depends upon the state constitution, statutes, and charter.[73] With municipal consent,[74] a company may usually lease its property to another.[75] A deposit for the protection of abutters should not be released until its purpose has been fully served.[76] A bond does not become binding until actually delivered for a valuable consideration.[77]

§ 3. *Taxes and license fees.*[78]—See 10 C. L. 1739—Taxes upon the net[79] or

**67.** See 8 C. L. 2009. See, also, Carriers, 11 C. L. 499.

**68. Search Note:** See notes in 29 L. R. A. 485.

See, also, Street Railroads, Cent. Dig. §§ 31-134; Dec. Dig. §§ 17-57; 10 A. & E. Enc. L. (2ed.) 878, 901; 27 Id. 45; 20 A. & E. Enc. P. & P. 840.

**69.** Use of street for street railway purposes held additional burden under Const. 1890, § 17, providing that private property should not be taken or damaged. Slaughter v. Meridian Light & R. Co. [Miss.] 48 S 6. In determining whether use of street by street railway company is a legitimate use, state constitution and laws must be looked to rather than common law. Id. For general treatment, see Eminent Domain, 11 C. L. 1198. Construction of spur tracks connecting with car barns held not additional servitude, and property owner can recover only for negligent construction. Donner v. Metropolitan St. R. Co., 133 Mo. App. 527, 113 SW 669.

**70.** Where private grant gives grantor right to revoke so-called lease upon granting a new route, injunction to restrain use held properly refused where notice to remove did not designate new route. Virginia-Carolina Chemical Co. v. Rome R. & Light Co., 131 Ga. 95, 61 SE 1116.

**71.** Where legislative grant authorized use of two elevated tracks, user thereof was interrupted by construction and use of third track between same so built that original tracks helped to support such third track, and burden was thereby increased before 20-year period expired. Roosevelt v. New York El. R. Co., 58 Misc. 463, 111 NYS 440. That abutter acquiesced in use of two original tracks of elevated road for 17 years does not affect right where third track was built which increased traffic capacity of road. Id.

**72.** Company starting to lay its tracks in the street in which abutters own to the center, without condemning right or agreeing with abutters, is a trespasser (Duncan v. Nassau Elec. R. Co., 127 App. Div. 252, 111 NYS 210), and abutter is entitled to such damages as he suffers and injunctive relief, unless company as an alternative will pay the amount which would be awarded in condemnation (Id.).

**73.** Suburban and street railroad companies incorporated under Civ. Code 1895, § 2180 have power to condemn private property outside limits of incorporated towns and cities. Piedmont Cotton Mills v. Georgia R. & Elec. Co., 131 Ga. 129 62 SE 52. Laws 1894, p. 1873, c. 752, amending rapid transit act of 1891, authorizing city to construct subway, held not to enlarge city's governmental functions, but made it a railroad corporation, in effect, to construct subway, and city must make compensation to abutters as other roads. In re Low, 128 App. Div. 103, 112 NYS 619. Where company has charter power to make connections in designated counties, it has authority to enter city in one of designated counties. City of Niles v. Benton Harbor-St. Joe R. & Light Co., 154 Mich. 378, 15 Det. Leg. N. 757, 117 NW 937.

**74.** Where company leased property to another, municipal assent as required by Const. art. 12, § 20 (Ann. St. 1906, p. 309), will be presumed in absence of evidence (Chlanda v. St. Louis Transit Co., 213 Mo. 244, 112 SW 249), and where plaintiff introduced lease in evidence, he cannot thereafter object that it is void for failure of defendant to show municipal assent (Id.).

**75.** Contract granting use of property for 40 years in consideration of specific rent and performance of certain duties in nature of restoration of property at end of term held a lease, and to relieve lessor from liability for torts of lessee. Chlanda v. St. Louis Transit Co., 213 Mo. 244, 112 SW 249. Validity of lease cannot be determined summarily on a motion by creditors of lessee in creditor's suit, but can be questioned only in a plenary suit to which all interested are parties. Pennsylvania Steel Co. v. New York City R. Co., 165 F 467.

**76.** On application to have fund, deposited under charter of Boston Elevated Railway Company (St. 1894, p. 766, c. 548) as a fund out of which executions for damages to abutters by construction and operation might be paid, released, court cannot assume that sole ground for creation of fund was uncertainty of enterprise and release same, while some claims remain unsettled, on ground that success of company is a settled fact. Boston El. R. Co. v. Chapin, 199 Mass. 137, 85 NE 75.

**77.** Zimmermann v. Timmermann, 193 N. Y. 486, 86 NE 540.

**78. Search Note:** See Street Railroads, Cent. Dig. §§ 157-165; Dec. Dig. § 69; Taxation, Cent. Dig. §§ 267-269, 669; Dec. Dig. §§ 149-153, 394.

**79.** Laws 1867, p. 1275, c. 489, § 9, provided that company should pay 5 per cent of net income from passenger traffic to the city in such manner as legislature "may hereafter direct." Laws 1868, p. 2033, c. 855, § 2, specified that pursuant to § 9 of act 1867, com-

gross [80] earnings are frequently imposed, and likewise, a franchise tax for the use of the streets,[81] based upon the number of cars,[82] is sometimes demanded.[83] An ordinance will not be construed as a contractual relinquishment of the right to impose license fees unless an express intent to do so appears.[84]

§ 4. *Street railway corporations. Powers, receivers, etc.*[85] See 10 C. L. 1739 Unless restricted, a street railway company may ordinarily mortgage its property,[86] and the terms thereof are determinative of the property covered thereby.[87] The

pany should pay 5 per cent of its net income to comptroller, quarterly. Held that tax was created by act 1867, and should be computed on income from passenger traffic. City of New York v. Manhattan R. Co., 119 App. Div. 240, 104 NYS 609. "Net income" held to mean that sum remaining after deducting cost of producing same (City of New York v. Manhattan R. Co., 192 N. Y. 90, 84 NE 745), but without reduction of taxes, rentals, damages to abutting owners for trespass upon their interest in street, or interest on bonds (Id.), and where referee made only a general finding as to taxes upon entire system, and did not apportion taxes on portion from which income accrued, no deduction could be made on account of such taxes (Id.). Under Laws 1867, p. 1275, c. 489, § 9, requiring company to pay to city 5 per cent of net income "from passenger traffic," amounts paid for general taxes, rental, damages to abutters for trespass, interest on bonds, etc., should not be deducted from gross receipts. City of New York v. Manhattan R. Co., 119 App. Div. 240, 104 NYS 609.

**80.** Laws 1892, p. 705, c. 340, § 4, construed, and held that, while report of earning was to be made at end of each fiscal year, the obligation to pay percentage of gross earnings arose whenever daily earning for "any period of six months" exceeded on average of $1,700 per day, though not in some fiscal year. City of New York v. Union R. Co., 125 App. Div. 861, 110 NYS 944. Under St. 1897, p. 504, c. 500, § 10, amending St. 1894, p. 768, c. 548, § 21, imposing franchise tax based upon "gross earnings of all the lines of elevated or surface railroads," etc., such tax is computed upon earnings from railroad in transporting passengers, as distinguished from other income incidental to business. Boston E. R. Co. v. Com., 199 Mass. 96, 84 NE 845.

**81.** Obligation imposed by Laws 1892, p. 705, c. 340, § 4, held not a tax but a charge for use of street by consolidated company in lieu of all other charges therefore imposed on constitutent companies. City of New York v. Union R. Co., 125 App. Div. 861, 110 NYS 944.

**82.** Charter of street railroad company (Laws 1860, p. 1042, c. 513) provided that company should be subject "to the payment to city of same license fees annually, for each car run thereon, as is now paid by other city railroads in said city." At time, no company paid license on each car run during year, but paid on basis of greatest number of cars in use at busiest season, and for 40 years company in question paid on such basis. Held that terms of charter being vague, practical construction adopted should be followed by court. City of New York v. New York City R. Co., 193 N. Y. 543, 86 NE 565, rvg., 126 App. Div. 36, 110 NYS 720; Id., 126 App. Div. 39, 110 NYS 722.

**83.** Under ordinance approved June 8, 1908, requiring payment of certain annual license fee on or before June 1 of each year, such fees are not inforcible until June 1, 1909, though ordinance prescribed that it should be enforcible "on and after June 1, 1908." Atlantic City & S. R. Co. v. Ventnor City [N. J. Law] 71 A 1132.

**84.** Issue of permit for certain period in consideration of stipulated sum does not create an inviolable contract in absence of expressed intention to that effect. St. Louis v. United R. Co., 210 U. S. 266, 52 Law Ed. 1054.

**85. Search. Note:** See Street Railroads, Cent. Dig. §§ 2-6, 22-54, 135-143; Dec. Dig. §§ 3, 14-19, 57-63.

**86.** Const. § 203, declaring that no corporation shall lease or alienate its franchise so as to relieve franchise or property held thereunder from liabilities of lessor or grantor, does not affect right to mortgage, and hence, where mortgaged in good faith for more than value at time judgment is obtained against it for negligence in operation, such judgment is not enforcible against property on lands of purchaser at sale to pay mortgage debt. Russell's Adm'r v. Frankfort & Suburban R. Co. [Ky.] 116 SW 289.

**87.** Mortgage on all after-acquired engines, machinery, tools, and equipment of every description used in operating mortgagor's lines, held to cover machinery installed in after-acquired buildings which were not included in mortgage, such machinery being used in operating lines. Guaranty Trust Co. v. Metropolitan St. R. Co., 166 F 569. Mortgage covering all the property of mortgagor and specifically enumerating number of lines of roads either owned or leased by it, and providing that it should include all "equipment of every description now used or which may hereafter be used or employed upon said lines or routes, whether now owned by company or hereafter to be acquired for use upon or in connection with the same," held to cover rolling stock and all personal property subsequently acquired by mortgagor and devoted to use generally on its system which included, not only enumerated lines, but after acquired lines operated in connection therewith. Id. Company made contract with construction company whereby it was to pay latter cost of construction and 15 per cent. After work was partly done and materials furnished, franchise was declared void, and company gave money and bonds to one owning and controlling both companies equal to amount due, he agreeing to hold company harmless on construction contract, which was silent as to ownership of material furnished. Held that bond issue

general principles relating to bonds [88] and mortgages [89] are elsewhere treated. In a suit by stockholders to avoid an existing monopolistic combination,[90] receivers of certain of the constituent roads appointed prior to the commencement of the suit are proper, but not necessary, parties.[91] Provision deferring re-entry for nonpayment of rent until one year after default becomes inapplicable where the system is disrupted by foreclosure of mortgages.[92]

*Receivers.* See 10 C. L. 1739—The general rules as to the grounds for appointment of receivers [93] and the conduct of the receivership [94] apply. Receivers may do whatever is reasonably necessary to render the road efficient,[95] and should cancel all disadvantageous contracts [96] and leases,[97] unless it would be inequitable to do so,[98] and discontinue all burdensome privileges.[99] Where the receivers discontinue a

was supported by sufficient consideration, and on delivery thereof and payment of money, materials became property of company and subject to antecedent mortgage covering after-acquired property. Haynes v. Kenosha St. R. Co. [Wis.] 119 NW 568.

88. See Bonds, 11 C. L. 424. Evidence held insufficient to show that holder of bonds agreed that interest thereon should be deemed paid if net earnings be transferred to surplus fund and dividends declared. Jackson & S. Trac. Co. v. Green [C. C. A.] 167 F 806.

89. See mortgages, 12 C. L. 878. As to materials that are affixed to and made a part of a railroad, which is subject to a mortgage both present and future property will be subject to the lien of such mortgage in favor of bona fide mortgage bondholders, in superiority to any contract between vendor of the property and the railroad. Haynes v. Kenosha St. R. Co. [Wis.] 119 NW 568.

90. Where street railways have entered into a monopolistic combination, appointment of receivers for some of the constituent roads does not of itself take them out of combination. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945.

91. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945.

92. Pennsylvania Steel Co. v. New York City R. Co., 165 F 463.

93. Where, in creditors' suit against insolvent lessee of a street railway system, to which lessor became a party, receiver was appointed who operated for all parties in interest until foreclosure suits were instituted by lessor's bondholders and affairs of lessee have been so far liquidated that they may be soon wound up and an accounting had between it and the lessor, separate receivers should be appointed to represent the adverse interests. Pennsylvania Steel Co. v. New York City R. Co., 165 F 463.

94. Where system was placed in hands of receiver in suit by creditors of lessor, but with consent of lessor, to be operated for benefit of all interested, all damage claims and liabilities incurred during such operation, will be made charge upon entire property so far as they cannot be paid from earnings and property of lessee. Pennsylvania Steel Co. v. New York City R. Co., 165 F 463. Where a receiver is appointed for a lessee street railway company, and subsequently, on foreclosure by the bondholders of the lessor company, a separate receiver is appointed, any insurance placed upon the property by the receiver of the lessee company should be transferred to the receiver of the lessor, the former accounting for so much of the premium as covered the period of his responsibility. Id.

95. And to perfect the service in return for franchise given. Pennsylvania Steel Co. v. New York City R. Co., 165 F 445. Recommendations of receivers proposing changes in operation of cars to give increase service, adopted. In re Forty-Second Street, etc., R. Co., 160 F 226. Where, after a receiver has been appointed at the request of a creditor to operate a leased street railway line, a separate receiver is appointed in foreclosure by the bondholders of the lessor company, the receivers of the lessor will adopt and confirm all contracts concerned with the operation of the system which were adopted or entered into by the receivers of the lessee. Pennsylvania Steel Co. v. New York City R. Co., 165 F 463.

96. Receiver will not be required to continue arrangement by which company furnishes power and use of tracks to independent company free. Central Trust Co. v. Third Ave. R. Co., 165 F 494. Receiver in foreclosure will not, in absence of great necessity, be authorized to discontinue operation of cars over part of line where it would thereby forfeit franchise thereto, although to continue it must pay rent to another company for use of tracks which would render it temporarily unprofitable. Lorain Steel Co. v. Union R. Co. 165 F 500.

97. Where rent is excessive. Pennsylvania Steel Co. v. New York City R. Co., 165 F 459; Pennsylvania Steel Co. v. New York City R. Co., 165 F 462.

98. Where contract letting advertising space in cars has been modified by receivers of company with approval of court, and lessee has presumably made contracts in reliance thereon, it will not be disturbed in absence of strong reasons. Morton Trust Co. v. Metropolitan St. R. Co., 165 F 493.

99. Receivers should curtail transfer privileges, where it will increase earnings, where no law requires the issuing thereof. In re Receiverships of Street Rys., 161 F 879. Where receivers of leased system discontinued one lease line and it was being operated independently, held authorized to discontinue transfers on due notice to public. Guaranty Trust Co. v. Second Ave. R. Co., 165 F 487. Receivers of a street railway system will not be required to continue to supply power and the use of its tracks

lease after operating beyond the period for which rent has been paid, they must account to the lessor for the net receipts during such period,[1] and must comply with the terms of the lease as to the return of the property.[2] Necessary operating expenses incurred by receivers have preference over secured debts,[3] and upon a sale under mortgage foreclosure, the decree should reserve the right to impose liens thereafter, if necessary, for such expenses.[4] General defaults of the insolvent company must be presented as claims against the estate,[5] and tort claims cannot be given preference over secured liens.[6] The negligence of the receivers of a sublesse does not create any claim against the leasee or its receivers.[7] Receivers operating leased lines as a unitary system need not keep the earnings separate to meet the claims against the respective lessors.[8] The mere fact that leased property now

to another company without compensation. Central Trust Co. v. Third Ave. R. Co., 165 F 494.

1. Pennsylvania Steel Co. v. New York City R. Co., 165 F 472; Morton Trust Co. v. Metropolitan St. R. Co., 165 F 489. Receiver of a leased line who elect not to operate the same should account to the lessor for net receipts received between the last rent day and the date of returning the property. Pennsylvania Steel Co. v. New York City R. Co., 165 F 477.

2. Where lease provided that, upon termination thereof for default, lessee should return certain money, etc., held that receivers of lessee need not return same where none of it came into their hands, but lessor had claim against lessee's estate for damages. Morton Trust Co. v. Metropolitan St. R. Co., 165 F 489. Where, at time of leasing, cash in lessor's treasury was turned over to lessee as owner and not as lessee, lease providing that, if it should be terminated by reason of lessee's default, money should be deemed a loan, etc., and be returned with other property, receivers of lessee are not required to return it where none of the money came into their hands, but lessor should present claim against property of lessee. Pennsylvania Steel Co. v. New York City R. Co., 165 F 472. Upon cancellation of a long term lease providing that lessee should maintain property and return same, and substitutes for such as has ceased to exist, receivers must comply therewith, and property of same kind exclusively used on line at time of appointment of receivers may be assumed to be substitutes (Id.), but electric cars could not be presumed to be substitutes for horse cars which were transferred to other part of lessee's line (Id.). Coal and repairs in power house which were adapted to use for general system should not be considered as substitutes, but repairs adopted for use only on leased line should be. Central Trust Co. v. Third Ave. R. Co., 165 F 478.

3. Where it appears that one fourth of expenditure for bridge repairs was necessary for the continued operation and had been performed on credit of earnings within six months prior to appointment of receivers, but other threefourths was not necessary, preference should only he allowed for one fourth. Guaranty Trust Co. v. Philadelphia & L. V. Trac. Co., 160 F 761. Fact that receiver's certificates were rendered necessary to repair waste committed by lessee held not to entitle lessor and its bondholders to have them declared first lien on lessee's property to displacement of claims for material and supplies furnished lessee within four months prior to appointment of receivers. Pennsylvania Steel Co. v. New York City R. Co., 165 F 455. Receiver's certificates to the amount of $3,500,000 authorized superior in lien to the general and collateral trust mortgage and the refunding mortgage. Pennsylvania Steel Co. v. New York City R. Co., 161 F 787. Receivers of two street railway companies, one leased to the other, authorized to issue receivers' certificates, and make them a preferred lien where necessary to keep the railways in operation for the benefit of creditors. Pennsylvania Steel Co. v. New York City R. Co. [C. C. A.] 163 F 242. Money acquired by certificates issued by receivers of a street railway and made a prior lien to mortgages on the property may be used to maintain leased property where its maintenance is essential to the proper operation of the entire property, and especially where such expenditure is required by the lease. Pennsylvania Steel Co. v. New York City R. Co., 165 F 477.

4. For receivership charges and expenses of operation, including personal injury claims, and balances which may be found due to lessors whose lines have been returned for personal property wrongfully withheld. Guaranty Trust Co. v. Metropolitan St. R. Co., 166 F 569.

5. Where lessee neglected to pay taxes and assessments against property as provided by lease, receivers are not bound to indemnify lessor, but he must present claim against estate of lessee. Morton Trust Co. v. Metropolitan St. R. Co., 165 F 489. Where, under the lease of a street railway, it was provided that the property should be kept in good repair and should be retransferred in toto with all the substitutes, additions and increments, and a receiver took charge of the leased line in foreclosure proceedings, the claim against the lessee for damages and waste and broken covenants will be referred to a special master for investigation and report. Central Trust Co. v. Third Ave. R. Co., 165 F 478.

6. Pennsylvania Steel Co. v. New York City R. Co., 165 F 457.

7. Henning v. Sampsell, 236 Ill. 375, 86 NE 274; Eckels v. Henning, 139 Ill. App. 660.

8. Pennsylvania Steel Co. v. New York City R. Co., 165 F 468.

returned to the owners has been in the hands of the receiver of the lessee appointed by the federal court does not give the federal court jurisdiction of the foreclosure of its mortgage bonds.[9]

§ 5. *Location and construction.*[10] *Location.*[See 10 C. L. 1740]—The location of the tracks in the street is usually fixed by the franchise,[11] statute,[12] or some special board,[13] which must be liberally construed.[14] A location once made[15] exhausts the power of the company in respect thereto,[16] although municipal or county authorities may usually require a relocation[17] upon equitable principles of indemnity.[18] A company possessing a franchise with a definite location has priority over a subsequent grant of the same location to another.[19]

*Construction.*[See 10 C. L. 1740]—The company is usually required to commence the construction work within a designated time,[20] but its franchise cannot be forfeited

**9.** Guaranty Trust Co. v. Second Ave. R. Co., 165 F 487.

**10. Search Note:** See notes in 46 L. R. A. 193, 52 Id. 448; 1 L. R. A. (N. S.) 981; 7 Id. 991; 15 Id. 840; 1 Ann. Cas. 219; 7 Id. 381.
See, also, Street Railroads, Cent. Dig. §§ 57-59, 68, 86, 90-114; Dec. Dig. §§ 20, 31-46½; 10 A. & E. Enc. L. (2ed.) 883, 902; 27 Id. 24, 39; 20 A. & E. Enc. P. & P. 832, 846, 849, 864.

**11.** Power given city council by Bristol city charter to designate route held not limited by Const. 1902, art. 4, § 58, prohibiting legislature from enacting any law whereby private property is taken or damaged without just compensation, nor by Code 1904, § 1294, providing that tracks shall not unnecessarily interfere with use of street. Wagner v. Bristol Belt Line R. Co., 108 Va. 594, 62 SE 391. Location by city council of tracks on one side of center will not be judicially interfered with in absence of fraud or abuse of discretion. Id. Where grant of location required tracks to be laid flush with surface of street, and so maintained as not to unnecessarily impede travel, held that abutter's rights were not impaired, though track was only six feet from curb and team could not stand in space while car passed (Id.), company being obliged to allow reasonable opportunity for vehicles to stop at curb to unload goods and passengers (Id.).

**12.** Acts 1908, p. 359, c. 654, § 196, authorizing county commissioners of Anne Arundel county to compel street railway companies to change location of tracks in highways, held not to repeal Acts 1890, p. 557, c. 505, requiring company thereby chartered to place tracks on margin as to leave 14 feet space for vehicles. Anne Arundel County Com'rs v. United R. & Elec. Co. [Md.] 72 A 542.

**13.** Certificate of rapid transit commissioners construed, and held to authorize occupation of ground under D. street for terminal and station purpose as well as for double track. Hudson & M. R. Co. v. Wendel, 193 N. Y. 166, 85 NE 1020. Under Rapid Transit Act (Laws 1891, p. 14, c. 4), § 23, as amended by Laws 1902, p. 1610, c. 584, rapid transit commissioners fixed route, etc., and section 6 of railroad law, requiring written notice to occupants of land embraced in route of filing of map and profile, is inapplicable. Id.

**14.** New York, etc., R. Co. v. Stevens [Conn.] 69 A 1052.

**15.** Where charter does not prescribe exact location, the location is the final selection and demarkation of route by directors. New York, etc., R. Co. v. Stevens [Conn.] 69 A 1052.

**16.** State v. New York, etc., R. Co. [Conn.] 71 A 942.

**17.** Acts 1908, p. 359, c. 654, repealing specified acts, and providing that county commissioners may compel street railway companies to change the character and location of tracks upon public roads, held not violative of Const. art. 3, § 29, providing that every law shall contain but one subject which shall be expressed in title. Anne Arundel County Com'rs v. United R. & Elec. Co. [Md.] 72 A 542.

**18.** While legislature may amend charter so as to require change of location of tracks, it can be enforced only upon fair principles of indemnity as to expenditures in good faith in reliance upon charter. Ann Arundel County Com'rs v. United R. & Elec. Co. [Md.] 72 A 542.

**19.** Company whose rights in the street have been lost by failure to complete line cannot question right of another to occupy street. Myersdale & S. St. R. Co. v. Pennsylvania & M. St. R. Co., 219 Pa. 558, 69 A 92. Where it does not appear that purchaser of rights, privileges and franchise of company participated in organization of complainant company or conveyed his interests to it, complainant cannot question rights of another company in the street. Id.

**20.** Where franchise required commencement of work within 60 days, evidence of conversations between one of grantees and members of council before granting of franchise as to impossibility of procuring rails, and of grantee's conclusion therefrom that no physical work need be done within 60 days, is inadmissible, as being a conclusion, and it not being necessary to have rails to commence work. Spencer v. Palestine [Tex. Civ. App.] 116 SW 857. Preparing of map of city drawing up specifications, incorporating payment of first year's franchise tax to state, letting of contract for machinery, and erecting of six poles not of character or in position to be of use, held not a "commencement of work" within franchise provision that if work was not commenced within 60 days deposit should be forfeited. Id.

for a failure to do so unless it expressly so provides.[21] Where an extension is approved as a whole and the company constructs a part thereof, it must complete the whole extension within a reasonable time.[22] A street railway company must exercise reasonable care in the construction of its tracks [23] and the erection of its poles,[24] and where it makes an excavation in the street, it must properly guard the same,[25] although it is not liable for an excavation in or about its tracks made by another [26] unless it assumes to guard the same.[27] This common-law duty may be supplemented by statute [28] or by franchise contract.[29] The municipal authorities in Connecticut may require the electric conduits to be placed under ground.[30] A company, however, is not ordinarily liable after it abandons its property.[31] Since

21. Without suit for that purpose. Spencer v. Palestine [Tex. Civ. App.] 116 SW 857.

22. State v. New York, etc., R. Co. [Conn.] 71 A 942.

23. Company laying tracks in street in endeavor to acquire franchise held bound at common law, and under ordinance, to keep tracks and streets in reasonably safe condition. Citizens R. & L. Co. v. Johns [Tex. Civ. App.] 116 SW 62. Must keep track in safe condition of repair, and, on city changing grade of street, it must lay tracks at new grade. City of New York v. Bleecker St. & F. Ferry R. Co., 115 NYS 592. Maintenance of rail with edge chipped off held not negligence. Stern v. Metropolitan St. R. Co., 193 N. Y. 328, 85 NE 1089. Liable where it allows rails to protrude above surface of street in dangerous manner. Citizens' R. & L. Co. v. Johns [Tex. Civ. App.] 116 SW 62. Evidence that rails projected from three inches to foot above surface of street, and that plaintiff stumbled over same while trying to avoid runaway team, held to make prima facie case of negligence. Huff v. St. Joseph R. L. H. & P. Co., 213 Mo. 495, 111 SW 1145. In action for injuries caused by car leaving switch and striking plaintiff, evidence of defect held to make question for jury. Geiser v. Pittsburg Rys. Co. [Pa.] 72 A 351. Where company placed track in street in endeavor to acquire franchise, and on failure to acquire it, sold property, etc., to another, the purchaser, knowing of existence of track in street, is liable for failure to keep in a reasonably safe condition. Citizens' R. & L. Co. v. Johns [Tex. Civ. App.] 116 SW 62. Must keep track in safe condition for vehicles. Chicago Union Trac. Co. v. Fitzgerald, 138 Ill. App. 520.

24. Where company was unable to procure right to set pole supporting wires behind curb line, negligence cannot be predicated on placing it six inches outside of curb line, where it would increase obstruction to set it farther out. Lanigan v. Brooklyn Heights R. Co., 125 App. Div. 622, 110 NYS 30. Held not negligence to fail to place hub stone at foot of pole placed six inches from curb line. Id.

25. Held negligent in maintaining warning light where excavation extended to middle of street and light was on right hand side. Ripley v. Metropolitan St. R. Co., 132 Mo. App. 350, 111 SW 1180. Count alleging that defendant removed dirt from under ties at place much frequented by public and did not light place to warn pedestrians that plaintiff stumbled and fell and was struck by car, held not demurrable for failure to allege that crossing was provided by defendant or used with its knowledge (Smith v. Gulfport & Mississippi Coast Trac. Co. [Miss.] 48 S 295), nor as failing to show a duty on defendant to maintain crossing in safe condition (Id.).

26. Company is not primarily bound to guard trench dug by city water department. Phinney v. Boston El. R. Co., 201 Mass. 286, 87 NE 490. Where defendant was not responsible for excavation extending under its tracks, no liability attaches because of involuntary successful attempts of its employes to warn plaintiff and to get horse out. New York Mail Co. v. Joline, 112 NYS 1067.

27. Where trench dug by city water department passes under track, and to avoid taking down and replacing guards every time car passed, company agreed to station watchman thereat, it is liable for his negligence. Phinney v. Boston El. R. Co., 201 Mass. 286, 87 NE 490.

28. Where law requires company to keep rails flush with street or so nearly level as not to materially interfere with travel, instruction that company was not required to keep tracks in a reasonably safe condition, and was not required to keep space between rails filled with "dirt, cinders, or any other materials," but was only required to exercise ordinary care to keep space in reasonably safe condition, was misleading. Huff v. St. Joseph R. L. H. & P. Co., 213 Mo. 495, 111 SW 1145.

29. Company purchasing property and franchise of another, which franchise bound seller to keep tracks and street in reasonably safe condition, is bound by such contract so long as it permits tracks to remain in street. Citizens R. & L. Co. v. Johns [Tex. Civ. App.] 116 SW 62.

30. Held, under Revision of 1902, §§ 3905, 3824, that municipal authorities have power to compel placing of electric conductor under ground, subject to review by railroad commissioners (Appeal of New York, etc., R. Co., 80 Conn. 623, 70 A 26), notwithstanding Sp. Laws 1905 p. 711, § 3, amending charter and giving general authority to locate conduits in, under, or over streets, etc. (Id.). "Appeal" held proper process to review action of municipal authorities compelling placing of conduits under ground. Id. Gen. St. 1902, § 3905, authorizing appeal to judge of superior court from orders of municipal authorities as to placing of conduits, etc., does not authorize court to interfere with purely legislative or administrative matters, and refusal of council to allow placing of overhead wires on ground of public safety is final. Id.

31. Where purchaser of property of com-

a city is primarily liable for the condition of its streets,[32] it may prohibit any disturbance of the surface without a permit,[33] and may recover over against the company on being held liable for an injury, especially where the company has agreed to hold it harmless.[34] It may also make reasonable regulations as to kind of materials used, etc.[35] The company is liable only for injury resulting proximately from its negligence[36] and without contributory negligence.[37] The manner of crossing the tracks of a steam railroad company in the street is frequently prescribed by statute,[38] and where not so regulated, the companies may agree thereon.[39] Such contracts, however, do not usually run with the land or road.[40] In the absence of statute,[41] ordinance,[42] or contract,[43] a company is not bound to pave the portion

pany which had laid tracks in street, but had not used same, after injury, took up track, held to show that there had been no abandonment. Citizens' R. & L. Co. v. Johns [Tex. Civ. App.] 116 SW 62.

32. Rev. Laws, c. 112, § 45, defining liability of street railway companies for defects in street between track, etc., held not to relieve city from liability for defect not necessary to operation of cars. Cammett v. Haverhill, 197 Mass. 76, 83 NE 331.

33. Laws 1901, p. 168, c. 466, § 391. Schuster v. Forty-Second St., etc., R. Co., 192 N. Y. 403, 85 NE 670.

34. Citizens' R. & L. Co. v. Johns [Tex. Civ. App.] 116 SW 62.

35. Ordinance provided that only "Johnson" or "girder" rails should be used on streets repaved with asphalt or brick, and petition for injunction to restrain use of T rails alleged that "safe and permanent streets can be made with brick only when tracks are constructed with Johnson rails." Held not demurrable, though not very explicit. City of New Albany v. New Albany St. R. Co. [Ind.] 87 NE 1084.

36. Maintenance of rail with edge chipped held not proximate cause of injury caused to one stepping thereon and slipping into hole in street. Stern v. Metropolitan St. R. Co., 193 N. Y. 328, 85 NE 1089. Baltimore City Code 1906, § 24, requiring railroad companies to keep the streets covered by tracks in "thorough repair," etc., held not to impose absolute liability. Miller v. United Rys. & Elec. Co., 108 Md. 84, 69 A 636. Not liable for defect in cable slot in absence of notice, actual or constructive and negligent failure to repair. Id.

37. Negligence for jury in running into excavation with automobile, the excavation extending to middle of street, but warning lights being on one side. Ripley v. Metropolitan St. R. Co., 132 Mo. App. 350, 111 SW 1180.

38. Under Act June 19, 1871 (P. L. 1361, § 2), grade crossing with railroad is to be avoided unless impractical to avoid (Delaware, L. & W. R. Co. v. Danville & B. St. R. Co., 221 Pa. 149, 70 A 578), and relative danger to public is not the test (Id.).

39. Where franchise authorizing street car company to cross steam railway tracks does not prescribe details thereof, safety secured by contract regulating same is sufficient consideration, though burdens are all on one side (Evansville & S. I. Trac. Co. v. Evansville Belt R. Co. [Ind. App.] 87 NE 21), but, since steam railroad occupying street is subject to right of city to authorize street railway to pass over same, mere granting of right to cross by railroad to street car company having franchise so to do is not a sufficient consideration (Id.).

40. Contract regulating manner of crossing of street railway with steam railroad, and imposing cost of construction and maintenance on former, is not a covenenat running with the road. Evansville & S. I. Trac. Co. v. Evansville Belt R. Co. [Ind. App.] 87 NE 21. Purchase at mortgage foreclosure sale does not establish such privity of contract as to make purchaser liable on contract entered into by mortgagor after execution of mortgage whereby it assumes cost of constructing and maintaining crossing. Id.

41. Railroad Law (Laws 1890, p. 1112, c. 565), § 98, requiring company to keep in permanent repair portion of street between track, etc., held to require more than patching of old pavement, when, through changed conditions, improved kind of pavement is required, and where company continues to operate under franchise, it becomes obligated. Under Laws 1884, p. 309, c. 252, and ordinance granting right to occupy street, imposing absolute duty to repair and to keep in permanent repair, etc., company held bound to repave when new pavement was required by condition of street, of which city was judge, but company must be given opportunity to do so before it can be charged with costs thereof. City of New York v. Broadway & S. A. R. Co., 115 NYS 872; City of New York v. Metropolitan St. R. Co., 115 NYS 878. Railroad Law (Laws 1890, p. 1112, c. 565), § 98, requiring company to keep in permanent repair portion between tracks and for two feet out side, held to require it to repave where city repaves street. City of New York v. New York City R. Co., 60 Misc. 487, 113 NYS 869.

42. Ordinance granting franchise, merely providing that if city elected to pave street company should pave between tracks, was not an exemption from imposition of additional burden, and Act April 17, 1908, requiring it to pave two feet on either side of track, is valid. Oklahoma City v. Shields [Okl.] 100 P 559.

43. Under franchise requiring grantee to keep space between tracks in thorough repair (Laws 1860, p. 715, c. 411, confirming grant, and Railroad Law [Laws 1890, p. 1112, c. 565], § 98, requiring all railroads to

of the street occupied by it,[44] and a mere contract to "repair" does not impose such burden.[45] Where the company repaves, it must use the same materials as the city used in the remainder of the street.[46] Where the company fails to pave as required by statute or contract, the city may resort to mandamus,[47] or it may proceed, after due notice,[48] unless waived,[49] to pave and recover the cost thereof from the company. Under the Iowa statute, the costs assessed against the company by the city council[50] are for the benefit of the abutting property owners.[51] Notice to repair is not ordinarily required.[52]

§ 6. *Injuries to passengers.*[53]

§ 7. *Injuries to employes.*[54]

§ 8. *Injuries to persons other than passengers or servants.* A. *General rules as to negligence and contributory negligence.*[55] See 10 C. L. 1741. The only duty owed to licensee or trespasser on the tracks[56] or on the cars is not to willfully or

keep in repair pavement in such space), held that company acting under franchise was obliged to repave when necessary, and upon refusal to do so was liable for cost thereof. City of New York v. Ninth Ave. R. Co., 115 NYS 876. Ordinance requiring grantee to keep street between tracks and adjacent thereto in as good repair and condition as other parts of street are kept by city obligates grantee to pave where it is necessary to put into condition corresponding to rest of street. Columbus St. R. & L. Co. v. Columbus [Ind.] 86 NE 83.

**44.** City of New York v. Bleecker St. & F. Ferry R. Co., 115 NYS 592; Indianapolis & E. R. Co. v. New Castle [Ind. App.] 87 NE 1067. Company bound by statute or contract to keep pavement within tracks in repair must bear its proportion of cost of new pavement, and keep same in repair. City of New York v. Bleecker St. & F. Ferry R. Co., 115 NYS 592.

**45.** Columbus St. R. & L. Co. v. Columbus [Ind.] 86 NE 83; Indianapolis & E. R. Co. v. New Castle [Ind. App.] 87 NE 1067.

**46.** City of New York v. Bleecker St. & F. Ferry R. Co., 115 NYS 592.

**47.** Where franchise required company to pave space between rails and one foot outside thereof with same material that city was using in paving street, and to do work at same time, evidence that city was paving street and that company had refused held to warrant mandamus (Denison & S. R. Co. v. Denison [Tex. Civ. App.] 112 SW 780), and writ commanding it to use same material as the city and to pave at the same time as city does its work held not too indefinite as to material and time. Id.

**48.** Where notice by city to repave is definite as to extent thereof, mere fact that in approximating square yards included, it makes error, does not preclude recovering for full amount. City of New York v. New York City R. Co., 60 Misc. 487, 113 NYS 869. Notice making no distinct statement to company to repair pavement or lay new pavement within 30 days, nor statement as to what portion of pavement company should pay for, is insufficient, under Laws 1890, p. 1112, c. 565, § 98, to charge company with cost. City of New York v. Bleecker St. & F. Ferry R. Co., 115 NYS 592.

**49.** Letter of company that it was advised that it was not responsible for repaving, and that it did not care to negotiate in respect thereto, held waiver of notice to repave. City of New York v. Ninth Ave. R. Co., 115 NYS 876. Letter of company to department of public works that, for any repavement by city for which company was lawfully liable, it would reimburse the department, held waiver of notice to repair. City of New York v. Broadway & S. A. R. Co., 115 NYS 872.

**50.** Assessment by city council under Code, § 835, for paving between rails, held to be conclusive only of value of pavement, and not of company's liability therefor, or amount to be collected on behalf of each abutting owner (City of Oskaloosa v. Oskaloosa Trac. & L. Co. [Iowa] 119 NW 736), and provision for appeal from assessment, added by Code Supp. 1907, § 835, if applicable at all to prior assessments, only relates to determination of value of pavement (Id.).

**51.** Under Code, § 835, city cannot recover anything in its own right for paving between rails except as an abutting owner, the assessment thereunder being for benefit of abutters. City of Oskaloosa v. Oskaloosa Trac. & L. Co. [Iowa] 119 NW 736. Neither another company which had formerly had tracks in street, but whose rights had been forfeited, nor city, by reason of ownership of pavement between such tracks, or ownership of street, is an abutting owner. Id.

**52.** Laws 1890, p. 1112, c. 565, § 98, as amended by Laws 1892, p. 1404, c. 676, requiring company to keep portion of street in repair under supervision of local authorities, and authorizing latter to repair at expense of companies on 30 days' notice, construed, and held that notice was not condition precedent to duty to repair. Schuster v. Forty-Second St., etc., R. Co., 192 N. Y. 403, 85 NE 670.

**53.** See Carriers, 11 C. L. 499.

**54.** See Master and Servant, 12 C. L. 665.

**55. Search Note:** See notes in 26 L. R. A. 300; 8 L. R. A. (N. S.) 1093; 9 Id. 244; 15 Id. 282; 16 Id. 890; 25 A. S. R. 475; 3 Ann. Cas. 258, 334; 9 Id. 840; 10 Id. 336, 605, 947.

See, also, Street Railroads, Cent. Dig. §§ 144-273; Dec. Dig. §§ 65-120; 10 A. & E. Enc. L. (2ed.) 887; 27 Id. 57.

**56.** Evidence held to show that decedent was not using footpath when killed, and insufficient to show that public ever used

wantonly injure him,[57] and to exercise reasonable care after discovering his peril.[58] A company occupying a street [59] has no exclusive [60] or superior [61] rights therein, but only equal rights [62] with one using the same as a public street, and both the company [63] and the traveler [64] must exercise reasonable care [65] under the particular surrounding circumstances.[66] Since, however, a car is confined to a particular portion of the street,[67] in a limited sense it has the right of way.[68] In the use of its

embankment. Trigg v. Water, Light & Transit Co. [Mo.] 114 SW 972.

**57.** Prenderville v. Coney Island & B. R. Co., 115 NYS 633. Where conductor approached boy 9 years old stealing ride on folded running board with hands extended, but said nothing and made no threat, company is not liable if boy became frightened and fell off. Id. Since a trespasser is not a passenger, an assault by conductor cannot constitute a breach of contract of carriage. Rothstein v. Brooklyn Heights R. Co., 129 App. Div. 527, 114 NYS 344.

**58.** Birmingham R., L. & P. Co. v. Sawyer [Ala.] 47 S 67.

**59.** Where "Railroad Ave.," while not a street, was used as such to defendant's knowledge, and defendant and plaintiff's employer had built platform between tracks for unloading beer, plaintiff while so engaged was not a mere licensee but rightfully there, and ordinary care was owed. Obenland v. Brooklyn Heights R. Co., 127 App. Div. 418, 111 NYS 686.

**60.** Grimm v. Milwaukee Elec. R. & L. Co. [Wis.] 119 NW 333.

**61.** Newport News & Old Point R. & Elec. Co. v. Nicolopoolos [Va.] 63 SE 443.

**62.** Kinlen v. Metropolitan St. R. Co. [Mo.] 115 SW 523; Vandenbout v. Rochester R. Co., 129 App. Div. 844, 114 NYS 760; Felver v. Central Elec. R. Co. [Mo.] 115 SW 980; Savannah Elec. Co. v. Elarbee [Ga. App.] 64 SE 570; Dahmer v. Metropolitan St. R. Co. [Mo. App.] 118 SW 496; Bremer v. St. Paul City R. Co. [Minn.] 120 NW 382. Bridge. Riggs v. Metropolitan St. R. Co. [Mo.] 115 SW 969. One using track in street is not a trespasser. Birmingham R., L. & P. Co. v. Williams [Ala.] 48 S 93. Question of abstract rights in street held immaterial in view of actual fact. Liutz v. Denver City Tramway Co., 43 Colo. 58, 95 P 600. If motorman sees one driving toward track so that if both pursue their course a collision will ensue, he must stop his car though driver ought not to proceed. Carrahan v. Boston & N. St. R. Co., 198 Mass. 549, 85 NE 162. Rights of company and of persons using street are equal, and latter may assume that company will use ordinary care to avoid collision. Indiana Union Trac. Co. v. Pheanis [Ind. App.] 85 NE 1040. Where motorman had ample opportunity to observe plaintiff crossing track, plaintiff cannot be charged with negligence because crossing may involve lessening of speed of car. Robkin v. Joline, 114 NYS 98.

**63.** Migans v. Jersey City, H. & P. St. R. Co. [N. J. Err. & App.] 70 A 168; Morse v. Consolidated R. Co. [Conn.] 71 A 553. "Ordinary care" means such care as a man of average prudence and skill would exercise in operation of car under same circumstances. Louisville R. Co. v. Boutellier, 33 Ky. L. R. 484, 110 SW 357. Owes special duty to one on tracks in crossing same to take passage. San Antonio Trac. Co. v. Levyson [Tex. Civ. App.] 113 SW 569.

**64.** Mere fact that pedestrian has equal right in street does not authorize him to go onto track without taking any precautions because track is not at that moment occupied by car. Riedel v. Wheeling Trac. Co., 63 W. Va. 522, 61 SE 821.

**65.** Each must so act as not to unreasonably hinder or endanger other in use of same. Anniston Elec. & Gas Co. v. Rosen [Ala.] 48 S 798. Right to use street must be exercised with due care to prevent accident. Riggs v. Metropolitan St. R. Co. [Mo.] 115 SW 969. Equal right in street does not excuse negligence. Reidel v. Wheeling Trac. Co., 63 W. Va. 522, 61 SE 821. Instruction requiring motorman to use "all means at his command" requires too high degree of care. Elgin, A. & S. Trac. Co. v. Wilcox, 132 Ill. App. 446.

**66.** Liutz v. Denver City Tramway Co., 43 Colo. 58, 95 P 600. While duty of using reasonable care is same at all times, danger incident to a crossing may require greater precautionary acts. Denis v. Lewiston, B. & B. St. R. Co. [Me.] 70 A 1047. Where conditions are unusually dangerous, commensurate care must be exercised. Engelman v. Metropolitan St. R. Co., 133 Mo. App. 514, 113 SW 700. Because of frequency of teams and pedestrians at crossing, ordinary care requires that motorman have car under control. Denis v. Lewiston, B. & B. St. R. Co. [Me.] 70 A 1047. In determining care to be used, character of street, its congested condition, frequency of cars, etc., must be considered. Boyce v. New York City R. Co., 126 App. Div. 248, 110 NYS 393; Savage v. Chicago & Joliet R. Co., 142 Ill. App. 342. Greater care required at crossings. Chicago City R. Co. v. Kastrzewa, 141 Ill. App. 10. Where shadows of columns darkened plaintiff's position on or near track and curve in track prevented headlight from illuminating same, such circumstances increased rather than obviated duty of keeping lookout. Riggs v. Metropolitan St. R. Co. [Mo.] 115 SW 969.

**67.** Due consideration must be given to fact that street car company is confined to a fixed portion of street, that its cars are propelled by powerful motive force, etc. Bremer v. St. Paul City R. Co. [Minn.] 120 NW 382. Words "car track," as used in instruction referring to a person standing thereon, held to mean space covered by passing cars. Crosby v. Portland R. Co. [Or.] 100 P 300.

**68.** While car has right of way, due care under the circumstances must be exercised to avoid injury. Birmingham R., L. & P. Co. v. Williams [Ala.] 48 S 93; Denver City Tramway Co. v. Martin [Colo.] 98 P 836. Fact that company owns right of way in

electric power, the company must exercise care commensurate with the dangers incident thereto,[69] must properly equip its cars[70] and man them with competent employes,[71] who must operate the cars at a reasonable speed[72] and give proper warnings.[73] The motorman[74] must keep a lookout[75] and have the car under

street does not affect its relation to public where its patronage was dependent upon its relation to street. McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459. Company between blocks does not have paramount right of way over "all and every portion" of the street, but only over such portion as is necessary to operate its cars. Newman v. New York & Q. C. R. Co., 127 App. Div. 12, 111 NYS 289.

**69.** Must keep wires in a reasonably safe condition. Crosby v. Portland R. Co. [Or.] 100 P 300. That wire broke loose from fastenings and sagged towards street for two weeks held to warrant a presumption of negligence. Crosby v. Portland R. Co. [Or.] 101 P 204. Where sagging wire did not hang low enough to be dangerous to persons and was used for 10 days by company in that condition, plaintiff held not negligent in using street and coming in contact. Crosby v. Portland R. Co. [Or.] 100 P 300. For general liability incident to use of electricity, see Electricity, 11 C. L. 1185.

**70.** Not necessarily bound to equip cars with lights in common use, since it may have a better one. Currie v. Consolidated R. Co. [Conn.] 71 A 356. Cars must be provided with sufficient light to enable motorman to see a sufficient distance to do whatever reasonable care may demand to avoid collision. Id. Franchise ordinance held not to require cars to have fenders. Englund v. Mississippi Valley Trac. Co., 139 Ill. App. 572.

**71.** One who has had four months' service as conductor and one month's service as motorman held of sufficient experience to be placed in charge of car as motorman. Cloud v. Alexandria Elec. R. Co., 121 La. 1061, 46 S 1017. Where motorman did all that could possibly have been done to avoid injury, negligence in hiring him on account of youth is immaterial. Id.

**72.** Must operate at speed compatible with lawful and customary use of streets by others. Savage v. Chicago & J. Elec. R. Co., 238 Ill. 392, 87 NE 377; Chicago City R. Co. v. Kastrzewa, 141 Ill. App. 10. Speed at which car may be run depends somewhat upon sufficiency of light used. Currie v. Consolidated R. Co. [Conn.] 71 A 356; Chicago City R. Co. v. Nonn, 133 Ill. App. 365. Held that court properly left it to jury to say whether rate was compatible with lawful and customary use of street. Savage v. Chicago & J. Elec. R. Co., 238 Ill. 392, 87 NE 377. Unless expressly permitted, speed should not be greater than is reasonable and consistent with the customary use of highway with safety. Newport News & Old Point R. & Elec. Co. v. Nicolopoolos [Va.] 63 SE 443. Finding that speed of 15 miles per hour was negligent held not erroneous as matter of law. Union Trac. Co. v. Howard [Ind. App.] 87 NE 1103. Evidence as to distance decedent was knocked and car ran after striking him held to show excessive speed. Louisville R. Co. v. Byer's Adm'x [Ky.] 113 SW 463. Having refused instruction that plaintiff could not recover if decedent stepped onto track too close to car to enable motorman to stop in time to avoid injury, in exercise of ordinary care, court should have charged that under such circumstances recovery could not be had unless inability to stop was due to dangerous rate of speed at which car was being run. Id. Instruction that if car was running at ordinary rate, that is, not exceeding 12 miles an hour, and plaintiff suddenly and imprudently drove upon track ahead of car, he was negligent, held not erroneous as charging that speed in excess of 12 miles was not ordinary and rendered plaintiff's negligence immaterial. Engelber v. Seattle Elec. Co., 50 Wash. 196, 96 P 1039. Ten miles an hour in middle of block not negligent speed. Wilson v. Chicago City R. Co., 133 Ill. App. 433. Negligence in running eight or nine miles an hour on crowded street with brake chain entirely unwound held for jury. Chicago City R. Co. v. Hackett, 136 Ill. App. 594.

**73.** Chicago City R. Co. v. Kastrzewa, 141 Ill. App. 10; Stewart v. Omaha & C. B. St. R. Co. [Neb.] 118 NW 1106. Instruction requiring "proper" warning held not erroneous in use of word "proper," since it adds nothing. Engelman v. Metropolitan St. R. Co., 133 Mo. App. 514, 113 SW 700.

**74.** Instruction held erroneous as allowing recovery if conductor, who owed no duty to keep lookout, failed to do so. Louisville R. Co. v. Gaar [Ky.] 112 SW 1130.

**75.** Newport News & Old Point R. & Elec. Co. v. Nicolopoolos [Va.] 63 SE 443; Mobile Light & R. Co. v. Baker [Ala.] 48 S 119; Anniston Elec. & Gas Co. v. Rosen [Ala.] 48 S 798. Must keep lookout for peril of travelers, and on discovering same must use reasonable care to avoid injury. Dahmer v. Metropolitan St. R. Co. [Mo. App.] 118 SW 496. Motorman, from time immediately before car starts until after it stops, must keep lookout. Louisville R. Co. v. Johnson's Adm'r [Ky.] 115 SW 207. While it is technically the duty of motorman to keep lookout, such duty is not owed to one lying on embankment which was not used by public. Trigg v. Water, Light & Transit Co. [Mo.] 114 SW 972. That child was running parallel to track and so close that a step or two would place her on it does not as a matter of law excuse motorman from seeing another child in danger. Davis v. Westmoreland County R. Co., 222 Pa. 356, 71 A 538. Must keep lookout for pedestrians on bridge, even at night and though it maintained slats and columns to show its section of bridge. Riggs v. Metropolitan St. R. Co. [Mo.] 115 SW 969. Fact that company placed slats on bridge, similar to cattle guards, held not such warning of company's exclusive use of that portion of bridge as to relieve it of duty to keep lookout. Id. Instruction that if motorman failed to keep lookout for deceased on track, etc., held not erroneous as requiring

control.[76] A company cannot maintain a nuisance [77] and must observe regulatory measures for the protection of the public,[78] and a failure to do so is usually per se negligence.[79] A street car company, however, is only liable for negligence [80] proxi-

motorman to keep lookout for particular person. San Antonio Trac. Co. v. Levyson [Tex. Civ. App.] 113 SW 569.

**76.** Required to anticipate possible injury to pedestrians at crowded crossing and to take precautions accordingly. Chicago City R. Co. v. O'Leary, 136 Ill. App. 239; Chicago City R. Co. v. Hackett, 136 Ill. App. 594. Cars must be kept so under control as not to unnecessarily expose others, rightfully using street, to danger. Currie v. Consolidated R. Co. [Conn.] 71 A 356.

**77.** Under Laws 1890, p. 1108, c. 565, as amended by Laws 1901, p. 1529, c. 638, providing that, where road is operated one year under a change of motive power, such fact shall be presumptive evidence that right was duly obtained, where it is conceded that overhead trolley system has been maintained for over a year, no recovery can be had on the theory of a nuisance. Hollis v. Brooklyn Heights R. Co., 128 App. Div. 821, 113 NYS 4.

**78.** Title of Local Acts 1901, p. 485, No. 439, entitled "An act to regulate the operation of electric cars within" designated county, held sufficiently broad to cover provision making company failing to equip cars with brakes as required liable to persons injured by reason thereof. Fortin v. Bay City Trac. & Elec. Co., 154 Mich. 316, 15 Det. Leg. N. 741, 117 NW 741. Municipal ordinances requiring suitable and seasonable warnings at crossings are valid. Denver City Tramway Co. v. Martin [Colo.] 98 P 836. Since, under "Enabling Act," Kansas City had exclusive control over its streets, etc., street railroad operating in city was not obliged to stop car before crossing steam railroad tracks, as required by Rev. St. 1899, § 1180 (Ann. St. 1906, p. 995). Wills v. Atchison, etc., R. Co., 133 Mo. App. 625, 113 SW 713. Ordinance requiring cars to slacken speed to rate not exceeding 3 miles per hour when approaching car, "when such car has stopped or is about to stop to permit passengers to get off or on," has no application when passenger has alighted and car has proceeded nearly a block. Detroit United R. Co. v. Nichols [C. C. A.] 165 F 289. Although Const. art. 17, § 9, forbidding "construction" of street railways without the consent of local authorities, applies only to construction, city's power of regulation extends to operation. City of Erie v. Erie Trac. Co., 222 Pa. 43, 70 A 904.

**79.** Speed in excess of lawful rate is negligence. Wilson v. Puget Sound Elec. R. Co. [Wash.] 101 P 50; Engelker v. Seattle Elec. Co., 50 Wash. 196, 96 P 1039. Evidence held to show dangerous rate of speed in excess of lawful rate. Wilson v. Puget Sound Elec. R. Co. [Wash.] 101 P 50. Where regulatory statute is for general benefit of public, failure to comply therewith is at least evidence of negligence. Fortin v. Bay City Trac. & Elec. Co., 154 Mich. 316, 15 Det. Leg. N. 741, 117 NW 741.

**80.** Request for ruling excluding distinction between negligence and mere error of judgment properly refused. Blackburn v. Boston & N. St. R. Co., 201 Mass. 186, 87 NE 579. Instruction that it was duty of railroad to do all that it could to avoid injury, held erroneous. Netterfield v. New York City R. Co., 129 App. Div. 56, 113 NYS 434.

**Negligence for jury:** In passing one signaling to car to stop at a high rate of speed and striking one just beyond. Savage v. Chicago & J. Elec. R. Co., 238 Ill. 392, 87 NE 377. Speed of 15 to 20 miles per hour within city. El Paso Elec. R. Co. v. Tomlinson [Tex. Civ. App.] 115 SW 871. In running into one hurrying across tracks to take car, motorman having seen signal. Northern Texas Trac. Co. v. Smith [Tex. Civ. App.] 110 SW 774. In taking handle from controller and losing control of car while in close proximity to wagon, and after inducing plaintiff to believe that car would stop. Cowart v. Savannah Elec. Co., 5 Ga. App. 664, 63 SE 804. Running up aside truck on curve where car would strike same on making the curve. Leonard v. Joline, 61 Misc. 336, 113 NYS 682. Speed and lookout maintained, night being unusually dark and stormy, and people being in habit of using street to drive on. Engelman v. Metropolitan St. R. Co., 133 Mo. App. 514, 113 SW 700. Evidence, in action for death caused by collision, that car was run at unlawful rate of speed, held to make case of negligence for jury. Kern v. Des Moines City R. Co. [Iowa] 118 NW 451. Where workman in trench slipped and in falling grasped rail and had fingers cut off, it cannot be held as a matter of law that it was not negligence to fail to give usual warning of approaching car, on theory that he was suddenly thrown into danger since he might have jumped into ditch instead of grasping rail (Hanley v. Boston El. R. Co., 201 Mass. 55, 87 NE 197), nor can it be said that company was not negligent in running at 18 or 20 miles per hour, since if had been going slower he might have released hold (Id.).

**Held negligent:** In backing five cars without lookout on rear on thoroughfare used as a public street. Obenland v. Brooklyn Heights R. Co., 127 App. Div. 418, 111 NYS 686. Running at excessive speed with motorman on rear end. Vandenbout v. Rochester R. Co., 129 App. Div. 844, 114 NYS 760. Negligent speed. Plunkett v. Brooklyn Heights R. Co., 129 App. Div. 572, 114 NYS 276. Operation of car, between dusk and dark, at high rate of speed, and without light or signal, past car discharging passengers. Donnelson v. East St. L. & S. R. Co., 235 Ill. 625, 85 NE 914. Evidence held to sustain finding that no warning was sounded. Union Trac. Co. v. Howard [Ind. App.] 87 NE 1103. In action for injuries caused by car taking switch, evidence held to sustain finding of negligence in maintaining defective switch or in blocking same. Reynolds v. Metropolitan St. R. Co. [Mo. App.] 116 SW 1135. Evidence of speed and failure to give warning, as required by ordinance, held to sustain finding of neg-

mately causing injury,[81] and the employes may ordinarily assume that one in a safe place will not heedlessly go into a position of danger,[82] until the contrary appears.[83] It is not liable for acts of its employes beyond the scope of their authority,[84] nor for the acts of third persons.[85] Except where the doctrine of comparative negligence exists,[86] contributory negligence defeats recovery,[87] unless the defendant is guilty of gross or willful negligence,[88] or, after discovering plaintiff's

ligence. Denver City Tramway Co. v. Martin [Colo.] 98 P 836.

**Held not negligent:** Where plaintiff fell from wagon onto track suddenly and motorman did all in power to stop and would have succeeded had fuse not blown out. Moyer v. United Trac. Co., 221 Pa. 147. 70 A 551. Where plaintiff in charge of extension work on bridge gave no signal to motorman to stop, but took hold of girder swinging over the track and held it back and was injured because of inability to hold same which swung against second car and caught plaintiff. Fay v. Brooklyn Heights R. Co., 129 App. Div. 375, 113 NYS 689.

81. Morse v. Consolidated R. Co. [Conn.] 71 A 553. Instruction on duty to keep lookout held not to make company liable for failure to keep same without regard to whether it contributed to injury. Jacksonville Elec. Co. v. Hellenthal [Fla.] 47 S 812. Instruction held erroneous as allowing recovery if car was not under control and was running at excessive speed, although plaintiff was too near car to have enabled motorman to have avoided injury had car been under control and running at reasonable rate of speed. Louisville R. Co. v. Gaar [Ky.] 112 SW 1130. Instruction authorizing recovery on finding that operatives were negligent, and that such negligence "directly contributed to cause such injury," held erroneous as not requiring negligence to be cause of injury. Hof v. St. Louis Transit Co., 213 Mo. 445, 111 SW 1166.

**Held proximate cause:** Failure to keep lookout of collision. San Antonio Trac. Co. v. Levyson [Tex. Civ. App.] 113 SW 569. Although decedent was knocked onto track by passing wagon, recovery may be had where but for negligent speed of car it could have been stopped in time to have avoided injury. Louisville R. Co. v. Buckner's Adm'r [Ky.] 113 SW 90. Where, if proper lookout had been maintained, plaintiff's perilous position would have been discovered in time to have avoided injury, failure to keep lookout was proximate cause of injury. Anniston Elec. & Gas Co. v. Rosen [Ala.] 48 S 798.

**Not proximate cause:** Where motorman saw boy as soon as he manifested intention to cross track, failure to maintain lookout on front car was immaterial. Downey v. Baton Rouge Elec. & Gas Co., 122 La. 481, 47 S 837. Lack of control and excessive speed, where plaintiff stepped onto track too near car to have enabled motorman to have avoided injury had car been under control and running at reasonable speed. Louisville R. Co. v. Gaar [Ky.] 112 SW 1130. Where there is no evidence connecting death occurring several months after accident with the same directed verdict for defendant held proper. Krikorian v. Rhode Island R. Co. [R. I.] 71 A 369.

**For jury:** Whether violation of ordinance prohibiting horse to be driven faster than a walk, before reaching crossing, contributed to collision. Mullane v. St. Paul City R. Co., 104 Minn. 153, 116 NW 354.

82. Anniston Elec. & Gas Co. v. Rosen [Ala.] 48 S 798. Where motorman saw child playing on sidewalk, he was not negligent in diverting his attention to other duties, and, where it was impossible to avoid injury after discovering child running towards track, there is no liability. Cloud v. Alexandria Elec. R. Co., 121 La. 1061, 46 S 1017.

83. Cannot rely thereon after danger becomes imminent. Randle v. Birmingham R., L. & P. Co. [Ala.] 48 S 114. Where motorman had reason to believe that one crossing track intended to go to platform at which passengers were received, he owed double duty to stop at platform and to avoid collision. McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459.

84. Motorman attempting to clear tracks by pushing wagon held acting within scope of employment, though he undertook to push wagon to top of grade. Chapman v. Public Service R. Co. [N. J. Law] 72 A 36. Evidence held to show no authority on part of superintendent of electric railway company to direct employe of such company and of a power company to take care of high tension wires so as to render power company liable for his acts. Clough v. Rockingham County L. & P. Co. [N. H.] 71 A 223.

85. Company is not liable for injuries to one hit by bundle of papers gratuitously thrown from car by passenger without request from conductor. Louisville R. Co. v. Holmes [Ky.] 117 SW 953. Testimony of passenger that he threw bundle of papers from car and of conductor that he did not held to overcome testimony of one witness that conductor threw same.

86. Under Civ. Code 1895, § 2322, plaintiff can only recover where his negligence is less than defendant's. Macon R. & L. Co. v. Carger, 4 Ga. App. 477, 61 SE 882.

87. Denver City Tramway Co. v. Cobb [C. C. A.] 164 F 41; Anniston Elec. & Gas. Co. v. Rosen [Ala.] 48 S 798; Riedel v. Wheeling Trac. Co., 63 W. Va. 522, 61 SE 821. Held error to refuse instruction that any negligence of plaintiff, however slight, contributing to injury defeats recovery. Hartman v. Joline, 112 NYS 1057. Where child was negligent in running ahead of cars, negligence in providing brakes held immaterial. Downey v. Baton Rouge Elec. & Gas Co., 122 La. 481, 47 S 837.

88. Complaint held to charge simple negligence in running at excessive speed. Anniston Elec. & Gas Co. v. Rosen [Ala.] 48 S 798. Count held to charge simple negligence in failing to keep lookout, and held error to sustain demurrer to defense of contributory negligence. Mobile Light & R. Co. v. Baker [Ala.] 48 S 119.

**Gross negligence:** To run grip car on populous street without keeping lookout. Mc-

perilous position, fails to use ordinary care to avoid injury,[89] provided it proximately contributes to the injury.[90] While a traveler may cross the tracks at other points than at street intersections,[91] or at a crossing which is torn up for repair,[92] and may ordinarily assume that the company will exercise due care,[93] he must observe reasonable care on his part [94] under all the surrounding facts,[95] and is not excused by defendant's negligence.[96] While the same degree of watchfulness is not required in crossing the tracks of a street railway as in crossing those of a steam railroad,[97] ordinary care may dictate that one look and listen before

Namara v. Metropolitan St. R. Co., 133 Mo. App. 645, 114 SW 50. Evidence that plaintiff, an old man, was run down while hastening along path adjacent to track, after signaling car to stop, to reach stopping place. Jackson Elec. R. L. & P. Co. v. Carnahan, [Miss.] 48 S 617.

**89.** While company, after discovering peril of one negligently on track, must use reasonable care, it is not liable for antecedent negligence. Riedel v. Wheeling Trac. Co., 63 W. Va. 522, 61 SE 821. See post, subsec. B. & C. Mere fact that plaintiff did not look after leaving curb held not to warrant dismissal, where motorman had ample opportunity to observe plaintiff attempting to cross. Robkin v. Joline, 114 NYS 98.

**90.** Decedent's negligence in stepping immediately in front of car held proximate cause of death from collision. Lintz v. Denver City Tramway Co., 43 Colo. 58, 95 P 600. Fact that workman in trench near tracks knew that pipe on which he was standing had become slippery held not, as a matter of law, to have required him to anticipate that, if he slipped and in falling grasped the rail to prevent falling, his fingers would be cut off by car, the approach of which he had no notice. Hanley v. Boston El. R. Co., 201 Mass. 55, 87 NE 197.

**Not proximate cause:** Contributory negligence in getting on moving engine where he had reached place of safety and was injured by street car colliding therewith. Garrett v. Beaver Valley Trac. Co., 222 Pa. 586, 71 A 1083.

**91.** Boyce v. New York City R. Co., 126 App. Div. 248, 110 NYS 393.

**92.** Not contributory negligence to use crossing which is being repaired, if still passable and open for travel. Springfield Consol. R. Co. v. Hopkins, 137 Ill. App. 561.

**93.** May assume that company will not exceed speed limit. Kern v. Des Moines City R. Co. [Iowa] 118 NW 451; Hauck-Haerr Bakery Co. v. United R. Co., 127 Mo. App. 190, 104 SW 1137. Person seeing car approaching is not, as a matter of law, entitled to assume that it is approaching at lawful rate. Netterfield v. New York City R. Co., 129 App. Div. 56, 113 NYS 434. One crossing track is charged with knowledge of speed permitted by ordinance. McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459. Where court had charged that plaintiff could assume that car was approaching at a lawful speed, held error to modify requested charge that, if it was apparent to person exercising ordinary care that car would inevitably overtake him unless speed was slackened, it was imprudent for plaintiff to assert his right to proceed, "though it was motorman's duty to slow down and stop to enable him to cross," by omitting quoted part. Netterfield v. New York City R. Co., 129 App. Div. 56, 113 NYS 434.

**94.** Riggs v. Metropolitan St. R. Co. [Mo.] 115 SW 969; Carrahan v. Boston & N. St. R. Co., 198 Mass. 549, 85 NE 162; Birmingham R. L. & P. Co. v. Williams [Ala.] 48 S 93; Tognazzi v. Milford & U. St. R. Co., 201 Mass. 7, 86 NE 799. "Ordinary care," as applied to driver of wagon on street car tracks, means such care as a man of average prudence, driving wagon in the city and on the street where accident occurred, would have exercised under same circumstances. Louisville R. Co. v. Boutellier, 33 Ky. L. R. 484, 110 SW 357. Instruction that if plaintiff, before going onto tracks, "looked a distance she thought sufficient" and saw no car she was not negligent, held error. Detroit United R. Co. v. Nichols [C. C. A.] 165 F 289. In the rightful use of street one may go upon track, but he must exercise reasonable care to avoid injury. Deitsch v. Trans St. Mary's Trac. Co. [Mich.] 15 Det. Leg. N. 841, 118 NW 489. Where excessive speed was manifest to one in plaintiff's position as he was about to cross, he is chargeable with knowledge thereof. McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459. Traveler seeing car approaching must determine whether, in the exercise of reasonable care, he has a reasonable opportunity to cross in safety. Netterfield v. New York City R. Co., 129 App. Div. 56, 113 NYS 434. Instruction that, when pedestrian attempts to cross street car track at such distance from approaching car that he has reasonable ground to suppose that he will be able to cross, it is driver's duty to give him a reasonable opportunity to pass held not erroneous as making his mere "supposition" the standard of care. Sperry v. Union R. Co., 114 NYS 286.

**95.** Lintz v. Denver City Tramway Co., 43 Colo. 58, 95 P 600. Fact that when collision occurred plaintiff was crossing to reach platform at which car would likely stop must be considered. McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459. Instruction that, when pedestrian attempts to cross street car track at such distance from approaching car that he has reasonable ground to suppose that he will be able to cross, it is driver's duty to give him a reasonable opportunity to cross, held not erroneous as excluding speed of car, etc. Sperry v. Union R. Co., 129 App. Div. 594, 114 NYS 286.

**96.** Instruction on negligence if speed limit was exceeded held not to allow recovery without regard to plaintiff's negligence. Engelker v. Seattle Elec. Co., 50 Wash. 196, 96 P 1039.

**97.** Union Trac. Co. v. Howard [Ind. App.]

crossing, though it is rarely negligence per se to fail to do so [98] although special

87 NE 1103; Stewart v. Omaha & C. B. St. R. Co. [Neb.] 118 NW 1106.

**98.** Riedel v. Wheeling Trac. Co., 63 W. Va. 522, 61 SE 821; Anniston Elec. & Gas. Co. v. Rosen [Ala.] 48 S 798; Tully v. New York City R. Co., 127 App. Div. 688, 111 NYS 919; Grimm v. Milwaukee Elec. R. & L. Co. [Wis.] 119 NW 833. Not per se negligence to not stop, look, and listen. Bremer v. St. Paul City R. Co. [Minn.] 120 NW 382. Failure to look and listen is per se negligence, if it appears that a reasonable use thereof would have disclosed the danger. Riedel v. Wheeling Tract. Co., 63 W. Va. 522, 61 SE 821. Fact that pedestrian looked before leaving curb to cross track does not relieve him from duty of looking again. Glynn v. New York City R. Co., 110 NYS 836. Pedestrian seeing car 375 feet away is not bound as a matter of law to look a second time as he crosses. Kern v. Des Moines City R. Co. [Iowa] 118 NW 451. Circumstances may make it negligence in fact. Denis v. Lewiston, etc., R. Co. [Me.] 70 A 1047. Whether it is negligence not to look and listen depends upon all the surrounding facts and circumstances. Id. Driver of heavy load must look both ways. Langlois v. Chicago City R. Co., 141 Ill. App. 439. Unexcused failure to look, negligence, as matter of law, where looking would have disclosed danger. Cotter v. Chicago City R. Co., 141 Ill. App. 101.

**NOTE. "Stop, look, listen" as applied to street railways:** A street is used concurrently by the street car company and by the public. Kinsey v. Union Trac. Co., 169 Ind. 563, 81 NE 922; Indianapolis Trac. & T. R. Co. v. Kidd, 167 Ind. 402, 79 NE 347, 7 L. R. A. (N. S.) 143 (collecting cases at page 145); Attorney General v. Metropolitan R. Co., 125 Mass. 515, 28 Am. Rep. 264; Robbins v. Springfield St. R. Co., 165 Mass. 30, 42 NE 334; Benjamin v. Holyoke St. R. Co., 160 Mass. 3, 35 NE 95, 39 Am. St. Rep. 446; Hall v. Ogden City St. R. Co., 13 Utah, 243, 44 P 1046, 57 Am. St. Rep. 726; Newark R. Co. v. Block, 55 N. J. Law, 605, 27 A 1067, 22 L. R. A. 374; Citizens' Coach Co. v. Camden, 33 N. J. Eq. 267, 36 Am. Rep. 542; Lawler v. Hartford St. R. Co., 72 Conn. 74, 43 A. 545; Clark v. Bennett, 123 Cal. 275, 55 P 908; Spiking v. Consolidated R. & P. Co., 33 Utah, 313, 93 P 838; Pilmer v. Boise Trac. Co., 14 Idaho, 327, 94 P 432, 125 Am. St. Rep. 161, 15 L. R. A. (N. S.) 254; United R. & Elec. Co. v. Watkins, 102 Md. 264, 62 A 234; 2 C. L. 1762, 4 A. & E. Ann. Cas. 449, note. Every traveler has an equal right on public streets to every part thereof with any other traveler, including street railways. * * * Even in New York (see post) it has been held that, as to persons who have occasion to cross the highway, the rights of the street car are precisely the same in kind as the right of other persons or vehicles. Dunican v. Union R. Co., 39 App. Div. 497-500, 57 NYS 326; Sesselmann v. Metropolitan St. R. Co., 65 App. Div. 484, 72 NYS 1010; O'Neil v. Dry-Dock, etc., R. 129 N. Y. 125, 29 NE 84, 26 Am. St. Rep. 512. This is certainly the rule in this state. Shea v. St. Paul City R. Co., 50 Minn. 395, 52 NW 902; Holmgren v. Twin City Capital Rapid Transit Co., 61 Minn. 85, 63 NW 270; Watson v. Minneapolis St. R. Co., 53 Minn. 551, 55 NW 742; Kennedy v. St. Paul City R. Co., 59 Minn. 45, 60 NW 810; Smith v. Minneapolis St. R. Co., 95 Minn. 254, 104 NW 16.

The mutual rights of travelers and street cars to use public streets imposes the duty on both to exercise mutual care. * * * Shea v. St. Paul City R. Co., 50 Minn. 395, 52 NW 902; Pilmer v. Boise Trac. Co., 14 Idaho, 327, 94 P 432, 15 L. R. A. (N. S.) 254. * * * The motorman ordinarily is justfiied in assuming that a person using the highway will exercise ordinary care for his own protection (8 C. L. 2023, note 32). * * * See, for example, Baly v. St. Paul City R. Co., 90 Minn. 39, 95 NW 757; Bresee v. Los Angeles Trac. Co., 149 Cal. 131, 85 P 152, 5 L. R. A. (N. S.) 1059. The general rule is none the less certain that at a street crossing the motorman in charge of a car approaching one discharging passengers is bound to keep a sharp lookout for * * * persons who may attempt to cross the tracks behind the standing or moving car, to have his car under control, * * * and to give such signals as will usually protect travelers who are in the exercise of ordinary prudence. Louisville City R. Co. v. Hudgins, 124 Ky. 79, 30 Ky. L. R. 316, 98 SW 275, 7 L. R. A. (N. S.) 152. And see Chicago City R. Co. v. Robinson, 127 Ill. 9, 18 NE 772, 11 Am. St. Rep. 87, 4 L. R. A. (N. S.) 126; Cincinnati St. R. Co. v. Whitcomb, 14 C. C. A. 183, 66 F 915; Birmingham R. & Elec. Co. v. City Stable Co., 119 Ala. 615, 24 S 558, 72 Am. St. Rep. 955. * * * Traction Co. v. Lushby, 12 App. D. C. 295, 301. * * * The rule in this state accords. In Watson v. Minneapolis St. R. Co., 53 Minn. 551, 55 NW 742 Gilfillan, C. J., said: "At street car crossings as high a degree of care is required of those in charge of electric cars as of other persons using the highway." And see Gray v. St. Paul City R. Co., 87 Minn. 280, 91 NW 1106; Peterson v. Minneapolis St. R. Co., 90 Minn. 52, 95 NW 751.

On the other hand, a traveler on a street has a right to rely on the exercise of prudence * * * by the motorman, and is not bound to anticipate negligence on his part. O'Brien v. St. Paul City R. Co., 98 Minn. 205, 108 NW 805; 10 C. L. 746. Thus, where he has alighted from a car and is passing behind it, and undertakes to cross another track, "he no doubt has a right to expect that any car which might be upon the other track would not run at a dangerous rate of speed and would be lawfully managed" (Creamer v. West End R. Co., 156 Mass. 320, 31 NE 391, 32 Am. St. Rep. 456, 16 L. R. A. 490), and that it would be under control, * * * and that it would give the usual warning of its approach (Scott v. San Bernardino Valley Trac. Co., 152 Cal. 604, 93 P 67; Spiking v. Consolidated R. & P. Co., 33 Utah, 313, 93 P 838; Binns v. Brooklyn Heights R. Co., 89 App. Div. 359, 85 NYS 874; Evansville St. R. Co. v. Gentry, 147 Ind. 408, 44 NE 311, 62 Am. St. Rep. 421, 37 L. R. A. 378; Smith v. Minneapolis St. R. Co., 95 Minn. 254, 104 NW 16; White v. Wilmington City R. Co. [Del.] 63 A 931). "There is no priority of right, so that the right of neither is exclusive. * * * Life and limb are of more consequence than

circumstance may excuse a traveler from so doing.[99] Where a perilous situation is

quick transit. The opposite doctrine seems to have found lodgment in many minds, and there seems to be disposal to assume that a foot passenger has no right upon a public street as against a street car. * * * As a matter of law it is as much a duty of vehicles to keep out of the way of footmen, and especially at crossings, as it is for the latter to escape being run over, giving due consideration to the great difficulty of guiding and arresting the progress of a vehicle." Spear, J., in Cincinnati St. R. Co. v. Snell, 54 Ohio St. 197, 43 NE 207, 209, 32 L. R. A. 276. The traveler himself, however, owes the duty to exercise due care in protecting himself and in avoiding harm. * * * In some jurisdiction that care is held to be practically the same as the caution required of travelers about to cross the tracks of an ordinary freight and passenger railroad upon a rural highway; that is, he must, at his peril, "stop, look, and listen." For example, see Hoelzel v. Crescent City R. Co., 49 La. Ann. 1302, 22 S. 330, 38 L. R. A. 708; Hornstein v. United R. Co., 195 Mo. 440, 92 SW 884, collecting cases at 887, 113 Am. St. Rep. 693, 4 L. R. A. (N. S.) 729. This is the rule in Pennsylvania. Berger v. Philadelphia Rapid Transit Co., 141 F 1020. That this position is not tenable clearly appears from what has been previously said as to the primary distinction between the mutual rights and duties recognized by law as existing between users of the highway and of a street car company. * * * Accordingly, this general rule is that the same care or watchfulness is not required in crossing a street car track as in crossing a railway track. Lynam v. Railway Co., 114 Mass. 88, per Gray, J.; Robbins v. Springfield St. Co., 165 Mass. 30, 42 NE 334; Hall v. West End R. Co., 168 Mass. 461, 47 NE 124; White v. Worcester Consol. St. R. Co., 167 Mass. 43, 44 NE 1052; Marden v. Portsmouth, etc., R. Co., 100 Me. 41, 60 A. 530, 109 Am. St. Rep. 476, 69 L. R. A. 300 (a leading case); Newark R. Co. v. Block, 55 N. J. Law, 605, 27 A 1067, 22 L. R. A. 374; Consolidated Trac. Co. v. Scott, 58 N. J. Law, 682, 34 A 1094, 55 Am. St. Rep. 620, 33 L. R. A. 122; Richmond R. & Elec. Co. v. Garthright, 92 Va. 627, 24 SE 267, 53 Am. St. Rep. 839, 32 L. R. A. 220; Richmond Passenger & Power Co. v. Gordon, 102 Va. 498, 46 SE 772; Chauvin v. Detroit United R. Co., 135 Mich. 85, 97 NW 160; Pilmer v. Boise Trac. R. Co., 14 Idaho, 327, 94 P 432, 15 L. R. A. (N. S.) 254; Spiking v. Consolidated Railway & Power Elec. Light & Gas. Co., 33 Utah, 313, 93 P 838; Perue v. Citizens, 131 Iowa, 710, 109 NW 280; Kramm v. Stockton, Elec. R. Co., 3 Cal. App. 606, 86 P 738, 903; Niebeyer v. Washington Water Power Co., 45 Wash. 170, 88 P 103; Saylor v. Union Trac. Co., 40 Ind. App. 381, 81 NE 94. More specifically, "persons crossing street railway tracks in the city are not obliged to stop, as well as look and listen, before crossing such tracks, unless some circumstances may make that ordinary prudence." Taft, J., in Cincinnati St. R. Co. v. Whitcomb, 14 C. C. A. 183, 66 F 915; Brooklyn Heights R. Co. v. Gentry, 147 Ind. 408, 44 NE 311, 62 Am. St. Rep. 421, 37 L. R. A. 378. Failure to look and listen may constitute contributory negligence as a matter of law. Hooks v. Huntsville, R., L. & P. Co., 147 Ala. 700, 41 S 273; Blackwell v. Old Colony St. R. Co., 193 Mass. 222, 79 NE 335; Price v. Rhode Island R. Co., 28 R. I. 220, 66 A 200, 125 Am. St. Rep. 736; Phillips v. Washington & R. R. Co., 104 Md. 455, 65 A 422. The rule as to the requirement of looking and listening is not a "hard and fast one" (Mitchell, J., in Holmgren v. Twin City Rapid Transit Co., 61 Minn. 85, 63 NW 270; Shea v. St. Paul City R. Co., 50 Minn. 395, 52 NW 902), nor does "it apply with the same force" as at a railroad crossing (Lovely, J., in Metz v. St. Paul City R. Co., 88 Minn. 48, 92 NW 502. And see Shea v. St. Paul City R. Co., 50 Minn. 395, 52 NW 902; Smith v. Minneapolis St. R. Co., 95 Minn. 254, 104 NW 16, and cases there collected), nor "in its strict sense" (The Traction Co. v. Lusby, 12 App. D. C. 295). And it has been held that mere "failure to look and listen does not per se constitute negligence." Spear, J., in Marden v. Portsmouth, etc., R. Co., 100 Me. 41, 60 A 530, 109 Am. St. Rep. 476, 69 L. R. A. 300; In Pilmer v. Boise Trac. Co., 14 Idaho, 327, 94 P 432, 15 L. R. A. (N. S.) 254, Sullivan, J., quotes from Richmond, J., in Richmond Passenger & Power Co. v. Gordon, 102 Va. 498, 46 SE 772, and approves the following instructions as a correct statement of the law: "While, generally speaking, one who is about to cross a street railway should both look and listen for cars, this is not an inflexible rule, nor is it to be enforced with any such strictness as in the case of ordinary steam railroads. It is not negligence as a matter of law to omit to do so. The question is whether men of ordinary prudence, exercising ordinary care and prudence, would have thought it necessary to do so." And see Evansville St. R. Co. v. Gentry, 147 Ind. 408, 44 NE 311, 62 Am. St. Rep. 421, 37 L. R. A. 378. Indeed, mere failure to look, it has been held, does not necessarily prevent recovery. Benjamin v. Holyoke St. Co., 160 Mass. 4, 35 NE 95, 39 Am. St. Rep. 446. In the nature of things, when failure to look and listen constitutes negligence must depend on the peculiar circumstances of each case. As Brown, J., said in Russell v. Minneapolis St. R. Co., 83 Minn. 304, 86 NW 346: "Failure to look and listen might be conclusive or at least very strong evidence in one case, and in another of no controlling force at all. The ultimate determination of the question must depend largely in each case on the circumstances." And see Start, C. J., in Curran v. St. Paul City R. Co., 100 Minn. 58, 110 NW 259, and O'Brien v. St. Paul City R. Co., 98 Minn. 205, 108 NW 805. —From opinion of Jaggard, J., in Bremer v. St. Paul City R. Co. [Minn.] 120 NW 382.

99. Negligence in failing to look and listen depends upon all the circumstances and where car was at such distance that if it had been seen it would not have been negligence to attempt to cross, failure to look will not preclude recovery. Denver City Tramway Co. v. Martin [Colo.] 98 P 836. Where driver does not know of existence of street and physical conditions are not such as to reveal same, no absolute duty to look and listen. Id. Neither haste nor preoccupation of mind will excuse failure to

created through the negligence of the defendant, plaintiff is not held to the same strict account [1] provided his own negligence did not contribute to the situation.[2] The question of negligence is usually for the jury.[3] While the negligence of the driver will defeat recovery by the master for injuries to the wagon,[4] it will not prevent recovery by the other occupants unless he is acting under their control and direction.[5] Such occupants, however, must exercise ordinary care for their own safety.[6] Negligence of the husband will defeat his recovery for injuries to the wife.[7]

look and listen. Riedel v. Wheeling Trac. Co., 63 W. Va. 522, 61 SE 821.

1. Kern v. Des Moines City R. Co. [Iowa] 118 NW 451. Defendant cannot negligently place one in perilous position and complain that he does not act with the prudence which one would exercise under ordinary circumstances. Id. Where front wheels are on track where car is seen approaching very rapidly 20 or 30 feet away, it cannot be said as a matter of law that prudent man would have gone ahead or backed up. Adams v. Union Elec. Co., 138 Iowa 487, 116 NW 332. **Negligence for jury** in driving ahead instead of swinging to right to avoid car striking wagon on turn, car through negligence of company not being discovered until directly opposite plaintiff. Leonard v. Joline, 61 Misc. 336, 113 NYS 682.

2. Where plaintiff walked so fast that he could not stop before going onto track ahead of car, he cannot excuse himself under doctrine of "sudden peril." Rundgren v. Boston & N. St. R. Co., 201 Mass. 156, 87 NE 189.

3. **Negligent as matter of law:** In going onto track immediately ahead of brightly lighted car. Pietraroia v. New Jersey & H. R. R. & Ferry Co., 131 App. Div. 829, 116 NYS 249. Where one riding on seat of furniture paid no attention to approaching cars though driver stopped before van cleared track. Caminez v. Brooklyn, etc., R. Co., 127 App. Div. 138, 111 NYS 384. One attempting to cross when the danger is so obvious that reasonable men could not differ in opinion about it. Riedel v. Wheeling Trac. Co., 63 W. Va. 522, 61 SE 821.

**Negligence for jury:** Where flagman got too near track while flagging a team and was run down by car coming without warning from direction in which plaintiff looked just before commencing to signal. Ross v. Joline, 115 NYS 106. In attempting to cross after signaling to stop. Northern Texas Trac. Co. v. Smith [Tex. Civ. App.] 110 SW 774. In approaching tracks with automobile at rate of 4 or 5 miles per hour and without stopping, view being obstructed until within few feet of track. Union Trac. Co. v. Howard [Ind. App.] 87 NE 1103. Where driver of automobile did not discover approaching car until within few feet of track, held not negligent as matter of law in going on instead of trying to stop in absence of evidence that automobile could have been stopped in such space. Id. Evidence held to make contributory negligence of one riding in, but not driving, automobile for jury. Wilson v. Puget Sound Elec. R. Co. [Wash.] 101 P 50. Where plaintiff standing at curve at such distance as to be safe if car was run at ordinary speed was struck because of wide swing due to excessive speed. Cordray v. Savannah Elec. Co., 5 Ga. App. 625, 63 SE 710. Where plaintiff, unloading onto platform between tracks, cramped horse so that he thought that car could pass though he was mistaken or horse moved. Obenland v. Brooklyn Heights R. Co., 127 App. Div. 418, 111 NYS 686. Where company sent flagman whose duty it was to warn men working in trench near track of approach of cars and he had regularly done so, workman was not negligent as matter of law in relying thereon instead of entirely upon own observation (Hanley v. Boston El. R. Co., 201 Mass. 55, 87 NE 197), and company will not be permitted to say that he should have depended entirely upon himself (Id.).

**Negligent:** In standing between rails waiting for car which struck him, and in failing to get off notwithstanding he saw car 30 feet away. Wood v. Omaha, etc., R. Co. [Neb.] 120 NW 1121. Where facts clearly show that had plaintiff looked he would have seen car, his protest that he did not see car is of no avail. Riedel v. Wheeling Trac. Co., 63 W. Va. 522, 61 SE 821. Where plaintiff, seeing car approaching a little distance off and knowing that it would not stop unless signaled, stooped over rail to strike match to give signal, and was struck. Norfolk & P. Trac. Co. v. White [Va.] 63 SE 418. Testimony of plaintiff that he looked back four times as he turned onto track, where he testified on former trial that he looked back once. Bang v. New York & Q. C. R. Co., 128 App. Div. 134, 112 NYS 530.

**Not negligent:** Where plaintiff was struck by car, suddenly taking switch, through negligence of company. Reynolds v. Metropolitan St. R. Co. [Mo. App.] 116 SW 1135. One crossing tracks is not negligent if it reasonably appears to him in the exercise of ordinary care that he can cross in safety, though he is in fact mistaken. Grimm v. Milwaukee Elec. R. & L. Co. [Wis.] 119 NW 883.

4. Louisville R. Co. v. Boutellier, 33 Ky. L. 484, 110 SW 357; Potter v. Ft. Wayne & W. U. Trac. Co. [Ind. App.] 87 NE 694.

5. Negligence of experienced automobile driver cannot be imputed to lady passenger who had and assumed no control over him. Chadbourne v. Springfield St. R. Co., 199 Mass. 574, 85 NE 737. Evidence held to authorize finding that mother was guest of 20 year old son who was driving. Peabody v. Haverhill, etc., R. Co., 200 Mass. 277, 85 NE 1051. Mere fact that plaintiff was mother of driver or that latter turned back at her request to get mother's glasses, held not to show that driver was under control of mother. Id.

6. Caminez v. Brooklyn, etc., R. Co., 127 App. Div. 138, 111 NYS 384. Where husband with whom wife was riding was an experi-

*"Last clear chance" doctrine.*[See 10 C. L. 1743]—Where the person in charge of and operating the car [8] discovers one in peril in time to avoid injuring him but fails to do so, recovery may be had despite contributory negligence [9] which becomes a remote condition thereof.[10] It is not necessary that defendant's acts be wanton or willful.[11] The defendant, however, must have actual knowledge [12] of plaintiff's peril [13] in time, under existing conditions,[14] to avoid injury.[15] The doctrine of

enced and competent driver and had full control of team, finding that wife was not negligent in not looking and listening sustained. Denis v. Lewiston, etc., R. Co. [Me.] 70 A 1047. Where experienced automobile driver following street car on narrow bridge turned out to pass in only direction that he could, held that inexperienced guest was not negligent as a matter of law not warning driver not to turn out onto adjoining track. Chadbourne v. Springfield St. R. Co., 199 Mass. 574, 85 NE 737. Evidence that plaintiff, riding with her 20 year-old son who was driving looked for car, but view was somewhat obstructed, held to authorize finding of due care. Peabody v. Haverhill, etc., R. Co., 200 Mass. 277, 85 NE 1051.

**7.** Citizens' R. & L. Co. v. Johns [Tex. Civ. App.] 116 SW 62.

**8.** Instructons as whole held to charge motorman alone with duty of exercising reasonable care, he being in control of movements of car. Heinzle v. Metropolitan St. R. Co., 213 Mo. 102, 111 SW 536.

**9.** Anniston Elec. & Gas. Co. v. Rosen [Ala.] 48 S 798; Bladecka v. Bay City Trac. & Elec. Co. [Mich.] 15 Det. Leg. N. 965, 118 NW 963; Cole v. Metropolitan St. R. Co., 133 Mo. App. 440, 113 SW 684; Felver v. Central Elec. R. Co. [Mo.] 115 SW 980. Last clear chance doctrine assumes negligence of decedent. Felver v. Central Elec. R. Co. [Mo.] 115 SW 980. Notwithstanding plaintiff's negligence, evidence warranting finding that motorman might have avoided accident by exercise of due care after discovering plaintiff's peril supports general verdict. Wichita R. & L. Co. v. Liebhart [Kan.] 101 P 457. Whether plaintiff was lying drunk on track or was rendered unconscious by passing car is immaterial where car thereafter negligently ran over him. Riggs v. Metropolitan St. R. Co. [Mo.] 115 SW 969. Instruction that contributory negligence would not defeat recovery, etc., held erroneous as not limiting principle to humanitarian doctrine. Ross v. Metropolitan St. R. Co., 132 Mo. App. 472, 112 SW 9. Evidence held to support finding that motorman discovered plaintiff about to go onto track in front of car in time to avoid injury but negligently attempted by increased speed to pass him. Northern Texas Trac. Co. v. Smith [Tex. Civ. App.] 110 SW 774.

**Negligence for jury:** Where motorman saw old man about 4 or 5 feet from track approaching, apparently unconscious of his peril, and made no effort to stop until within 8 feet of him. Louisville R. Co. v. Knocke's Adm'r [Ky.] 117 SW 271. As to negligence in failing to stop after discovering plaintiff attempting to cross. Dahmer v. Metropolitan St. R. Co. [Mo. App.] 118 SW 496. Evidence as to speed, distance within which car could be stopped and surrounding facts. Waddell v. Metropolitan St. R. Co., 213 Mo. 8, 111 SW 542. Negligence in backing in attempt to remove body held for jury, evidence being conflicting as to exact situation. Lintz v. Denver City Tramway Co., 43 Colo. 58, 95 P 600. Where facts are in dispute or different reasonable inferences can be drawn therefrom, questions whether motorman realized plaintiff's danger and whether he could have avoided injury by exercise of reasonable care. Randle v. Birmingham R., L. & P. Co. [Ala.] 48 S 114. Whether ring of gong was sufficient exercise of care to avoid injury to one walking near track held for jury. Id. Whether, after discovering plaintiff's driver going onto track, motorman could have avoided injury by exercise of reasonable care. Hauck-Hoerr Bakery Co. v. United Rys. Co., 127 Mo. App. 190, 104 SW 1137. Failure to discover plaintiff's negligence and to exercise reasonable care to avoid injury by stopping or giving warning signals. McNamara v. Metropolitan St. R. Co., 133 Mo. App. 645, 114 SW 50. Evidence held for jury whether lights were lighted and whether in exercise of due care motorman could have seen plaintiff on track in time to have avoided injuring him. Felver v. Central Elec. R. Co. [Mo.] 115 SW 980.

**Held negligent:** Evidence held to sustain finding that motorman saw decedent's peril in time to have avoided injury by exercise of due care. Roanoke R. & Elec. Co. v. Young, 108 Va. 783, 62 SE 961. Evidence of motorman as to speed of car, discovering plaintiff hemmed in on or near track, and actions thereafter, held to show that he recklessly ran into him with knowledge of his peril. Bladecka v. Bay City Trac. & Elec. Co. [Mich.] 15 Det. Leg. N. 965, 118 NW 963.

**10.** Randle v. Birmingham R., L. & P. Co. [Ala.] 48 S 114. Where motorman failed to exercise due care to avoid injury after discovering plaintiff's peril, plaintiff's original negligence becomes a mere condition. Anniston Elec. & Gas Co. v. Rosen [Ala.] 48 S 798.

**11.** Heinzle v. Metropolitan St. R. Co., 213 Mo. 102, 111 SW 536.

**12.** Knowledge of peril must be shown and proof of failure to look is not sufficient. Anniston Elec. & Gas Co. v. Rosen [Ala.] 48 S 798. Complaint alleging that motorman knew "or by the exercise of reasonable care" could have known of plaintiff's peril, etc., held insufficient. Id. Where plaintiff, running alongside of car to board it when it stopped, was caught between such car and another going in opposite direction, and only evidence as to when he was discovered was testimony of motorman that when he discovered plaintiff he was so close that he did not have time to stop, no recovery can be had. O'Farrell v. Metropolitan St. R. Co. [Mo. App.] 117 SW 615.

**13.** Not applicable where collision was caused by wagon wheel slipping along rail as driver attempted to turn out although

"last clear chance" has no application where the plaintiff knowingly encounters danger [16] or his negligence continues and contributes to the injury and is not a mere condition precedent.[17]

(§ 8) *B. Travelers on highway. Injuries to pedestrians.*[18] See 10 C. L. 1744. Pedestrians having an equal right in the street,[19] the company must exercise reasonable care for their safety;[20] but a motorman having reasonable grounds for believing that one on the track has knowledge of the approaching car [21] may ordin-

motorman saw wagon for couple of blocks. Hebeler v. Metropolitan St. R. Co., 132 Mo. App. 551, 112 SW 34. Motorman, who mistook one lying near track for piece of dirt, is not legally bound to slacken speed. Trigg v. Water, Light & Transit Co. [Mo.] 114 SW 972. Since child 6 years old is too young to appreciate danger, motorman seeing her start diagonally towards street car tracks to cross is bound to realize danger. Heinzle v. Metropolitan St. R. Co., 213 Mo. 102, 111 SW 536. Where deceased signaled motorman to stop, thereby indicating her knowledge of car's approach, fact that she continued to walk rapidly toward track did not charge him with notice that she was going onto same, it not being necessary to do so to board. Liutz v. Denver City Tramway Co., 43 Colo. 58, 95 P 600. Motorman, having right to assume that one standing between rails waiting for car would get off in time to avoid injury, held not negligent in striking him, where is appeared that car stopped promptly. Wood v. Omaha, etc., R. Co. [Neb.] 120 NW 1121. Duty of having car under control and of giving usual signals is part of duty of exercising ordinary care to discover the peril of persons crossing tracks and to avoid injuring them after their peril is discovered. Louisville R. Co. v. Knocke's Adm'r [Ky.] 117 SW 271.

**14.** Speed of car can only be considered on question of negligence in stopping car after discovering plaintiff's peril. Kinlen v. Metropolitan St. R. Co. [Mo.] 115 SW 523. Where motorman sees one about to cross ahead of car, he must make reasonable use of means at hand to avoid injury without regard to such person's negligence. Dahmer v. Metropolitan St. R. Co. [Mo. App.] 118 SW 496.

**15.** Unless car can be stopped in time to avoid a collision after discovery of peril, there is no subsequent negligence. Mobile Light & R. Co. v. Baker [Ala.] 48 S 119. No recovery where motorman did every thing possible to stop car after discovering plaintiff's danger. Denver City Tramway Co. v. Cobb [C. C. A.] 164 F 41. Where plaintiff suddenly appeared from behind wagon and onto space between tracks just as car reached that point, no liability. Norfolk R. & L. Co. v. Higgins, 108 Va. 324, 61 SE 766. Evidence held to show that motorman acted with due diligence after discovering plaintiff lying on track on bridge. Riggs v. Metropolitan St. R. Co. [Mo.] 115 SW 969.

**16.** Does not apply where one drives in front of approaching car knowing that he will not have time to cross in safety. Kinlen v. Metropolitan St. R. Co. [Mo.] 115 SW 523.

**17.** Denis v. Lewiston, etc., R. Co. [Me.] 70 A 1047; Denver City Tramway Co. v. Cobb [C. C. A.] 164 F 41. No recovery where plaintiff negligently failed to look to moment of accident. Denver City Tramway Co. v. Cobb [C. C. A.] 164 F 41.

**18. Search Note:** See notes in 5 L. R. A. (N. S.) 1059; 15 Id. 254.

See, also, Street Railroads, Cent. Dig. §§ 166-221; Dec. Dig. §§ 78-105; 10 A. & E. Enc. L. (2ed.) 887; 27 Id. 77.

**19.** See ante, subsec. A.

**20.** Where motorman sees pedestrian on or dangerously near track, he must give warning. Birmingham R., L. & P. Co. v. Williams [Ala.] 48 S 93. Evidence held to sustain finding of negligence in maintaining lookout at street intersections. San Antonio Trac. Co. v. Levyson [Tex. Civ. App.] 113 SW 569.

**Negligence for jury:** Running at high rate of speed around curve where car could not be seen for any great distance. Morris v. St. Paul City R. Co., 105 Minn. 276, 117 NW 500. In suddenly backing car without signaling, at night. Canerdy v. Port Huron, etc., R. Co. [Mich.] 16 Det. Leg. N. 85, 120 NW 582. Speed and failure to give signals. Savage v. Chicago & J. R. Co., 142 Ill. App. 342. Motorman must approach car from which passengers are being discharged with car under control. Bremer v. St. Paul City R. Co. [Minn.] 120 NW 382. Whether plaintiff's position near track when seen by motorman was one of obvious peril. Birmingham R., L. & P. Co. v. Williams [Ala.] 48 S 93. Where evidence is conflicting as to whether car stopped to allow passengers to alight and suddenly started as plaintiff was crossing, etc. O'Leary v. Chicago City R. Co., 235 Ill. 187, 85 NE 233. Verdict on conflicting evidence sustained. Chicago Union Trac. Co. v. Scanlon, 136 Ill. App. 212; Chicago City R. Co. v. Phillips, 138 Ill. App. 438.

**Not negligent:** Evidence of speed, giving of warnings, and efforts to stop on slippery rails, held to show due care to avoid striking deceased. Fay v. Hartford & S. St. R. Co. [Conn.] 71 A 364. Where plaintiff is aware of approaching car, and danger from attempting to cross ahead of it is apparent, employes need not give warning or slow down. Mullen v. Joline, 111 NYS 776. Speed of 12 to 20 miles per hour in sparsely settled part of city, where tracks are on embankment seldom used by public. Trigg v. Water, Light & Transit Co. [Mo.] 114 SW 972. No simple negligence antecedent to collision, unless motorman could have discovered plaintiff's attempt to cross in time to have avoided injury. Mobile Light & R. Co. v. Baker [Ala.] 48 S 119.

**21.** It cannot be assumed that a person has knowledge of approach of car from mere fact that he is within sound of bell. Riley v. Consolidated R. Co. [Conn.] 72 A 562.

arily assume that he will leave the same in time to avoid danger, but such presumption cannot be indulged after the danger becomes imminent.[22]

While a pedestrian has the right to cross the tracks of a street car company, he must exercise due care,[23] and must look and listen at such points as to make it effective.[24] Crossing in front of known approaching car is not negligence per se, [25] especially where there is an implied invitation to do so.[26]

**22.** Birmingham R., L. & P. Co. v. Williams [Ala.] 48 S 93.

**23.** While pedestrian may cross street between crossings, company has paramount right of way, and pedestrian must exercise due care. Glynn v. New York City R. Co., 110 NYS 836.

**Negligence for jury:** In stepping ahead of car. San Antonio Trac. Co. v. Levyson [Tex. Civ. App.] 113 SW 569. Where evidence is conflicting as to whether car stopped to allow passengers to alight and suddenly started as plaintiff was crossing, etc. O'Leary v. Chicago City R. Co., 235 Ill. 187, 85 NE 233. In going onto track where plaintiff noted position of car when he left curb and again when he came to track. Robkin v. Joline, 114 NYS 98. Where old lady was run down at night by car going at excessive speed, there being a headlight on car, and she testifying that she looked. Plunkett v. Brooklyn Heights R. Co., 129 App. Div. 572, 114 NYS 276. In attempting to cross ahead of approaching car, which attempt would have been successful if plaintiff had not slipped and fell. Vandenbout v. Rochester R. Co., 129 App. Div. 844, 114 NYS 760. In going behind car at night, which suddenly backed onto plaintiff. Canerdy v. Port Huron, etc., R. Co. [Mich.] 16 Det. Leg. N. 85, 120 NW 582. Where decedent looked in both directions before leaving curb and was struck by car running at excessive speed. Boyce v. New York City R. Co., 126 App. Div. 248, 110 NYS 393. Whether one repairing tracks of railroad company, which required him to work on or very near street railway tracks, in bending over to place plank after seeing car approaching 150 feet away, which struck him was negligent. Malizia v. Brooklyn Heights R. Co., 127 App. Div. 202, 110 NYS 1003. Where plaintiff was struck by car in daytime, where she testified that she looked and saw no car, and there was evidence from which it might be inferred that view was obstructed. Thornton v. Interurban St. R. Co., 128 App. Div. 872, 113 NYS 127. In going onto track ahead of approaching car, it having been signaled to stop at intermediate point. Savage v. Chicago & J. Elec. R. Co., 238 Ill. 392, 87 NE 377. Where plaintiff testified that she looked but did not see car rounding curve, evidence being conflicting as to whether car was clearly visible. Morris v. St. Paul City R. Co., 105 Minn. 276, 117 NW 500. Where, at time plaintiff entered into danger, car was at such distance that he might reasonably believe that he could cross in safety, and collision was due to excessive speed. McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459. Crossing in front of approaching car with knowledge of excessive speed. Id. Where one alighting from car looked for car on adjoining track when his car had proceeded about 10 feet, negligence in not again looking as he stepped onto track held for jury. Stewart v. Omaha, etc., R. Co. [Neb.] 118 NW 1106. In passing from bench provided for passengers across tracks ahead of car, to reach boarding place. San Antonio Trac. Co. v. Levyson [Tex. Civ. App.] 113 SW 569. Evidence that view was somewhat obstructed, that arc light was so situated as to tend to dazzle plaintiff's sight, held to make negligence in going onto track for jury. Hof v. St. Louis Transit Co., 213 Mo. 445, 111 SW 1166.

**Negligent:** Attempt to cross so close that accident is probable unless car stops. Moreland v. Chicago City R. Co., 141 Ill. App. 164. Where plaintiff saw car approaching rapidly 50 or 60 feet away and attempted to cross. Mullen v. Joline, 111 NYS 776. Where plaintiff saw car approaching but paid no heed to it after leaving curb to cross. Tully v. New York City R. Co., 127 App. Div. 688, 111 NYS 919. Fact that pedestrian testified that he looked but did not see the car held not to authorize recovery, where it appears from facts disclosed by him that he could have seen car had he used due care. Farese v. North Jersey St. R. Co. [N. J. Law] 69 A 959. In passing around car from which plaintiff had just alighted onto adjoining track without discovering approaching car, it appearing that she was following another and that car was running at excessive speed. Bremer v. St. Paul City R. Co. [Minn.] 120 NW 382.

**Negligent as matter of law:** In walking diagonally across track in front of rapidly approaching car without looking for one approaching from opposite direction. McVaugh v. Philadelphia Rapid Transit Co., 221 Pa. 518, 70 A 822. One crossing track without looking after leaving curb. Glynn v. New York City R. Co., 110 NYS 836. In going ahead of car known to be rapidly approaching, having just alighted from another. Thomas v. Kansas City El. R. Co. [Kan.] 99 P 594. Walking in close proximity to track, knowing that if car came he would be struck without looking or paying any attention to cars. Fay v. Hartford & S. St. R. Co. [Conn.] 71 A 364. In failing to look for greater distance than 50 feet up track before going thereon. Detroit United R. Co. v. Nichols [C. C. A.] 165 F 289. Cripple about 60 years old, in attempting to cross ahead of car which he saw approaching and in disregard of warnings. Callaghan v. Boston El. R. Co., 200 Mass. 450, 86 NE 767.

**Not negligent:** Where pedestrian suddenly walked into side of car to escape approaching team. Rose v. Alcott [N. J. Err. & App.] 72 A 67.

**24.** Looking from sidewalk at time when view was obstructed held insufficient. Denver City Tramway Co. v. Cobb [C. C. A.] 164 F 41.

**25.** But circumstances may render it negligence as matter of law. McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459. Pe-

*Children run over.* See 10 C. L. 1747.—While the company is liable only in case of negligence,[27] due consideration must be given to the heedlessness and non-appreciativeness of childhood to danger.[28] Ringing of the bell is immaterial where injured child was too young to appreciate the warning.[29] Contributory negligence cannot be imputed to a child under seven,[30] and, until he becomes sui juris,[31] his conduct must be measured by the care to be expected of one of his age.[32]

(§ 8) *C. Accidents to drivers or occupants of wagons.*[33]—See 10 C. L. 1748.—While the motorman need not stop or slacken speed every time that he sees a team crossing the track, ordinary care[34] requires him to keep a vigilant lookout for those in danger,[35] although he need not anticipate that a team will suddenly change its course and go onto the track ahead of the car.[36] A rule requiring the motorman to have the car under control as it approaches a fire engine house is reasonable.[37] Negligence is usually a question for the jury.[38] One about to drive upon the

destrian may cross track, though car is approaching, where he has reason to believe that car will slow down at crossing and give him time to cross. Vandenbout v. Rochester R. Co., 129 App. Div. 844, 114 NYS 760.

**26.** Where company provided bench for passengers on side of tracks opposite to boarding point, it impliedly invites them to cross tracks ahead of car, and must keep lookout. San Antonio Trac. Co. v. Levyson [Tex. Civ. App.] 113 SW 569. Where plaintiff, who had just alighted from car, saw another on adjoining track, he could not go to jury on his right to rely, and his reliance in fact, on sign directing motormen to "go slowly," and on defendant's practice to slow down under like circumstance. Rundgren v. Boston & N. St. R. Co., 201 Mass. 156, 87 NE 189.

**27.** Evidence that motorman saw child running toward track when 40 feet away, and that car could have been stopped in 25 feet held to warrant finding of negligence. Tatarewicz v. United Trac. Co., 220 Pa. 560, 69 A 995. Rule that company is not liable where a child suddenly leaves place of safety and goes onto track is not applicable where company has notice in time to stop. Id. Evidence that car which struck boy was running "very, very fast," at "a high rate of speed," etc., held to make negligence for jury. Dirigolano v. Jersey City, etc., R. Co. [N. J. Err. & App.] 71 A 257. Where child suddenly ran ahead of car, negligence of company for jury. Feinstein v. Brooklyn Heights R. Co., 114 NYS 587. Could not anticipate that boys watching fire would run in front of car. Wilson v. Chicago City R. Co., 133 Ill. App. 433.

**28. Evidence for jury** where child was injured at crossing. Chicago City R. Co. v. Reddick, 139 Ill. App. 160; Rastetter v. Peoria R. Co., 142 Ill. App. 417. Negligence for jury in not running car at lower rate and in not having slack on brake taken up, there being several hundred children just out from school near track. Hackett v. Chicago City R. Co., 235 Ill. 116, 85 NE 320. Whether motorman who saw boys playing on top of snow bank adjacent to track, or saw plaintiff attempting to climb up bank, used due care. Fogarty v. Jersey City, etc., R. Co. [N. J. Law] 69 A 964. **Evidence held not to show negligence** where children ran in front of car. Chicago City R. Co. v. Roberts, 139 Ill. App. 9.

**29.** Chicago City R. Co. v. Reddick, 139 Ill. App. 160.

**30.** Hackett v. Chicago City R. Co., 235 Ill. 116, 85 NE 320. Child 4½ years old held too young to appreciate danger, and instruction on contributory negligence should not have been given. Louisville R. Co. v. Gaar [Ky.] 112 SW 1130.

**31.** Charge of trial court held to show that case was not tried on assumption that deceased child, 8½ years old, was sui juris. Grealish v. Brooklyn, etc., R. Co., 114 NYS 582.

**32.** Colehour v. Rockford & Interurban R. Co., 132 Ill. App. 558. Child 13 years old held negligent in crossing track without looking after leaving curb. Glynn v. New York City R. Co., 110 NYS 836. Eight year-old boy held negligent in running immediately ahead of cars. Downey v. Baton Rouge Elec. & Gas Co., 122 La. 481, 47 S 837. Child 6 years old, in playing on snow bank adjacent to track and slipping onto track ahead of car, or in slipping back onto track while climbing up snow bank, is not negligent as matter of law. Fogarty v. Jersey City, etc., R. Co. [N. J. Law] 69 A 964.

**33. Search Note:** See notes in 6 C. L. 1576; 25 L. R. A. 663; 11 L. R. A. (N. S.) 166; 7 Ann. Cas. 1127.

See, also, Street Railroads, Cent. Dig. §§ 166-221; Dec. Dig. §§ 78-105; 27 A. & E. Enc. L. (2ed.) 68.

**34.** Paducah Trac. Co. v. Sine, 33 Ky. L. R. 792, 111 SW 356.

**35.** Kinlen v. Metropolitan St. R. Co. [Mo.] 115 SW 523. Duty of motorman to keep lookout and when he sees team go onto track to sound gong and to exercise reasonable care to prevent accident. Louisville R. Co. v. Boutellier, 33 Ky. L. R. 484, 110 SW 357.

**36.** Need not check speed until such fact becomes apparent. Louisville R. Co. v. Boutellier, 33 Ky. L. R. 484, 110 SW 357.

**37.** Dole v. New Orleans R. & L. Co., 121 La. 945, 46 S 929.

**38. Negligence for jury:** Where evidence tends to show that motorman, having car under control and able to stop before striking plaintiff, suddenly increased speed as plaintiff approached. Migans v. Jersey City, etc., R. Co. [N. J. Err. & App.] 70 A

tracks must exercise ordinary care,[39] or rather, care commensurate with dangers incident to the particular crossing.[40] In the exercise of ordinary care, drivers may change their course as they see fit.[41] It is not per se negligence to cross the tracks withouut looking and listening,[42] and one seeing an approaching car is not arbitrarily obliged to stop,[43] though it is said to be negligence as a matter of law to attempt to cross when it is obvious that a collision will result unless the car is stopped.[44]

168. Negligent speed. Hauck-Hoerr Bakery Co. v. United R. Co., 127 Mo. App. 190, 104 SW 1137. Whether motorman exercised due care in keeping lookout and in taking steps to avoid collision. Louisville R. Co. v. Boutellier, 33 Ky. L. R. 484, 110 SW 357.

**Negligent:** Where motorman on car passing immediately in front of engine house approached with car at full speed and failed to see signal to stop, resulting in collision with hose cart. Dale v. New Orleans R. & L. Co., 121 La. 945, 46 S 929. Where motorman increased speed and ran into plaintiff where if he had been observant he would have seen plaintiff on track, but with sufficient time to cross if speed was not increased. Fallon v. Boston El. R. Co., 201 Mass. 179, 87 NE 480. Evidence that car was far enough away to enable plaintiff to cross if motorman had been attentive and slowed up, but that he was engaged in conversation with conductor. Paff v. Union R. Co., 125 App. Div. 773, 110 NYS 145. Evidence of collision with wagon, excessive speed, and failure to give timely warning, held to sustain finding of negligence. Vincent v. Lehigh Valley Transit Co., 220 Pa. 350, 69 A 812. Evidence that motorman saw plaintiff when 100 feet distant, that car could be stopped in 90 or 100 feet, and that motorman applied brakes and then released same, held to sustain finding of negligence. Peabody v. Haverhill, etc., R. Co., 200 Mass. 277, 85 NE 1051. Where, notwithstanding negligence of driver, motorman could, in exercise of ordinary care, have avoided injuring one riding with him, recovery may be had whether failure to stop car was due to excessive speed or on account of his not maintaining lookout. Paducah Trac. Co. v. Sine, 33 Ky. L. R. 792, 111 SW 356.

39. Denis v. Lewiston, etc., R. Co. [Me.] 70 A 1047.

**Negligence for jury:** Where driver of covered wagon testified that he looked through window and saw no car as he turned onto track. Shiles v. Public Service Corp. [N. J. Err. & App.] 72 A 68. In turning onto track to cross to barn, team being struck on second track. Wright v. Pittsburg R. Co. [Pa.] 72 A 347. Where evidence authorized finding that when plaintiff approached tracks it was apparently safe. Migans v. Jersey City, etc., R. Co. [N. J. Err. & App.] 70 A 168. In attempting to cross tracks after seeing car 175 or 200 feet away, which was approaching at high speed. Netterfield v. New York City R. Co., 129 App. Div. 56, 113 NYS 434. Where, as plaintiff was about to turn team in street, necessitating going onto track, he observed car 900 feet away and did not again look. Grimm v. Milwaukee Elec. R. & L. Co. [Wis.] 119 NW 833. Where plaintiff saw car but had time to cross if speed had not been increased. Fallon v. Boston El. R. Co., 201 Mass. 179, 87 NE 480. Where driver might have passed in safety had car not been running at excessive speed. Adams v. Union Elec. Co., 138 Iowa, 487, 116 NW 332. In looking for car, in view of obstructions and surrounding physical facts. Hauck-Hoerr Bakery Co. v. United R. Co., 127 Mo. App. 190, 104 SW 1137. Whether plaintiff, who was driving on track on dark, stormy night, used due care in keeping lookout. Engelman v. Metropolitan St. R. Co., 133 Mo. App. 514, 113 SW 700.

**Held negligent:** In driving onto tracks about 15 feet ahead of approaching car, whether at crossing or just beyond. Fitzgibbon v. Joline, 115 NYS 123. Looked and listened half block away, it not appearing whether view at that point was obstructed, nor at intervening points. Enders v. Brooklyn Union El. R. Co., 131 App. Div. 170, 115 NYS 155. In knowingly driving across track in such close proximity to car as to be struck before he can cross. Kinlen v. Metropolitan St. R. Co. [Mo.] 115 SW 523. Driver of covered wagon in turning onto track without looking or listening, having crossed track and driven about 300 feet since last looking. Tognazzi v. Milford & U. St. R. Co., 201 Mass. 7, 86 NE 799.

**Not negligent:** Evidence of obstructed view until onto tracks, speed of car, and failure to give signals of approach, held to show due care of driver struck by car. Denver City Tramway Co. v. Martin [Colo.] 98 P 836. Deliveryman in rear of covered ice wagon, who could look out only by leaning backward and around cover, held not negligent in not seeing car. Paducah Trac. Co. v. Sine, 33 Ky. L. R. 792, 111 SW 356. Where one seeing car approaching decides, in the exercise of reasonable prudence, that he can safely cross, he is not negligent in so doing though collision occurs. Adams v. Union Elec. Co., 138 Iowa, 487, 116 NW 332.

40. Engelman v. Metropolitan St. R. Co., 133 Mo. App. 514, 113 SW 700.

41. Louisville R. Co. v. Boutellier, 33 Ky. L. R. 484, 110 SW 357.

42. See ante, § 8A.

43. Adams v. Union Elec. R. Co., 138 Iowa, 487, 116 NW 332. While cars ordinarily have right of way over other vehicles, and driver of latter owes duty of looking before going onto track, where circumstances are such that he may reasonably assume that he has time to cross, it is not negligence to attempt to do so. Dietsch v. Trans St. Mary's Trac. Co. [Mich.] 15 Det. Leg. N. 841, 118 NW 489.

44. Langlois v. Chicago City Ry. Co., 141 Ill. App. 439; Sampsell v. Wilkie, 138 Ill. App. 518.

*Driving on or near the tracks.*[See 10 C. L. 1750]—While a company has a limited superior right of way over teams between street intersections,[45] it has no exclusive right to the space occupied by its tracks,[46] and one driving thereon is not a trespasser.[47] Both the company [48] and one driving on the track [49] must exercise reasonable care to avoid injury, and a motorman has no right to assume that such person will leave the track in time to avoid danger where it is apparent that he is un-

**45.** Held error to refuse to charge as to company's paramount right of way over one driving on tracks between crossings. Jaffa v. Nassau Elec. R. Co., 131 App. Div. 852, 116 NYS 324.

**46.** Motorman has no exclusive right of way and must keep lookout and when it becomes apparent that vehicle on track will not get off in time to avoid collision, car must stop. Baldie v. Tacoma R. & P. Co. [Wash.] 100 P 162. Public having equal right with company in use of streets, use of portion occupied by tracks is not usually negligence. San Antonio Trac. Co. v. Levyson [Tex. Civ. App.] 113 SW 569.

**47.** McKenzie v. United R. Co. [Mo.] 115 SW 13.

**48.** Mere fact that car has right of way does not relieve motorman as a matter of law from anticipating danger. Baldie v. Tacoma R. & P. Co. [Wash.] 100 P 162. Where motorman sees buggy hanging to or sliding along rail, ordinary care requires that he stop car or slacken speed. Kinten v. Metropolitan St. R. Co. [Mo.] 115 SW 523.

**Negligence for jury:** In running into rear of wagon, evidence showing that in rounding curve motorman could not sand track, that trolley came off, that no explanation was made as to cause of trolley coming off, and tending to show that car was not in good shape. Conlon v. Pittsburg R. Co. [Pa.] 72 A 233. In colliding with buggy hanging to or sliding along rails. Kinlen v. Metropolitan St. R. Co. [Mo.] 115 SW 523. Car going at excessive speed, colliding with rear of wagon on bridge. Fledderman v. St. Louis Transit Co. [Mo. App.] 113 SW 1143. Where car ran into rear of automobile driven on tracks, evidence as to darkness, speed and failure to give signals, held to make negligence for jury. Baldie v. Tacoma R. & P. Co. [Wash.] 100 P 162. In running into rear of buggy which was near tracks in narrow street. Heidemann v. St. Paul City R. Co., 105 Minn. 48, 117 NW 226. Evidence that work train which ran down plaintiff was operated at high speed without lookout at rear of backing train. Indiana Union Trac. Co. v. Pheanis [Ind. App.] 83 NE 1040. In running car at high rate of speed at night and colliding with wagon on track, without giving signal. Ball v. Camden & T. R. Co. [N. J. Err. App.] 72 A 76.

**Negligent:** Evidence as to clear view held to show that motorman should have seen wagon on track in time to have avoided it. McKenzie v. United R. Co. [Mo.] 115 SW 13. Where motorman saw plaintiff attempting to turn off from tracks, but unable to do so because of teams, and made no effort to stop car. Ross v. Metropolitan St. R. Co., 132 Mo. App. 472, 112 SW 9. In sounding gong and increasing speed while passing vehicle in narrow street, which brought horse in close proximity to car, thereby frightening horse and causing injury. Sauter v. International R. Co., 128 App. Div. 400, 112 NYS 863. Where motorman saw team 25 rods distant and should have known that sleigh bells would prevent driver from hearing signals, failure to slacken speed and to control car held to sustain finding of negligence. Denis v. Lewiston, etc., R. Co. [Me.] 70 A 1047.

**49.** One driving on street car track need not look constantly to the front and rear, but must exercise ordinary care. Felver v. Central Elec. R. Co. [Mo.] 115 SW 980. One unnecessarily driving on tracks must exercise reasonable care for own safety, and cannot rely on motorman giving signal. Paladino v. Staten Island Midland R. Co., 127 App. Div. 183, 111 NYS 715.

**Negligence for jury:** In driving near or onto tracks in narrow street. Heidermann v. St. Paul City R. Co., 105 Minn. 48, 117 NW 226. Driving automobile on track at night without looking back. Baldie v. Tacoma R. & P. Co. [Wash.] 100 P 162. One driving 120 or 140 feet onto tracks without looking. Carrahan v. Boston & N. St. R. Co., 198 Mass. 549, 85 NE 162. In attempting to turn to right in leaving track, instead of to the left, especially in view of fact that van made it impracticable to turn to left. Brunhild v. Chicago Union Trac. Co., 239 Ill. 621, 88 NE 199. Failing to discover car approaching from rear, although plaintiff testified that he looked back. Fledderman v. St. Louis Transit Co. [Mo. App.] 113 SW 1143. Where plaintiff, driving on tracks, attempted to turn off, but was unable to do so because of teams. Ross v. Metropolitan St. R. Co., 132 Mo. App. 472, 112 SW 9. Where it appears that plaintiff drove out of alley onto track where view was somewhat obstructed. Vincent v. Lehigh Valley Transit Co., 220 Pa. 350, 69 A 812. Driver of huckster wagon who attempted to cross tracks but found rails too high and drove down track, looking for place to turn off. Indiana Union Trac. Co. v. Pheanis [Ind. App.] 85 NE 1040. In driving on tracks without keeping lookout to rear. Ball v. Camden & T. R. Co. [N. J. Err. App.] 72 A 76.

**Negligent:** In unnecessarily driving on tracks without paying any attention to own safety. Paladino v. Staten Island Midland R. Co., 127 App. Div. 183, 111 NYS 715. Where driver drove 200 yards or more on track without looking or listening for car and was run into. Hinode Florist Co. v. New York & Q. C. R. Co., 131 App. Div. 118, 115 NYS 252. Testimony of plaintiff, who was driving on track, that "after driving several blocks, I looked back, and saw car right back of me, and I was just about to turn out when the car struck me," held not, as matter of law, to show due care. Jaffa v. Nassau Elec. R. Co., 131 App. Div. 852, 116 NYS 324.

aware of the approaching car and no signal is given.[50] Negligence of the driver is not imputed to one in the vehicle unless the driver was under his control.[51]

*Frightening horses.* See 10 C. L. 1752—The company is not liable for injuries caused by horses taking fright at such noises as are usual, necessary, and incidental to the lawful use of cars,[52] but recovery may be had for negligence.[53]

(§ 8) *D. Bicycle riders; automobiles; animals.*[54] See 10 C. L. 1752—A street railway company must exercise due care to avoid colliding with bicycle riders,[55] automobiles,[56] or other vehicles[57] and animals[58] on the track, but is relieved from liability by contributory negligence.[59]

§ 9. *Damages, pleading, and practice in injury cases.*[60] See 10 C. L. 1752—By statute, in some states, notice of injury from defective street must be given.[61]

*Pleadings.* See 10 C. L. 1752—The complaint must show a duty resting upon defendant[62] and a violation thereof,[63] and must characterize the negligence relied upon,[64] a specific allegation controlling a general charge of negligence.[65] While

**50.** Riley v. Consolidated R. Co. [Conn.] 72 A 562.

**51.** Chicago City R. Co. v. Nonn, 133 Ill. App. 365.

**52.** Hoag v. South Dover Marble Co., 192 N. Y. 412, 85 NE 667.

**53.** Where car stopped to let plaintiff drive across track, held, as matter of law, not negligence to release brakes making hissing noise while horse was near car, he having shown no signs of fright. Hoag v. South Dover Marble Co., 192 N. Y. 412, 85 NE 667. Verdict on conflicting evidence sustained. Springfield Consol. R. Co. v. Blakesley, 134 Ill. App. 424.

**54. Search Note:** See notes in 25 L. R. A. 508; 34 Id. 481; 47 Id. 302; 5 L. R. A. (N. S.) 1081; 6 Id. 911.

See, also, Street Railroads, Cent. Dig. §§ 166-221; Dec. Dig. §§ 78-105; 4 A. & E. Enc. L. (2ed.) 15; 27 Id. 89.

**55.** Negligence for jury in suddenly moving car backwards while bicycle rider was crossing tracks. Singley v. Easton Transit Co., 221 Pa. 174, 70 A 718.

**56.** Evidence held to warrant finding of negligence on part of motorman in not discovering automobile stalled near track, and avoiding collision. Lawrence v. Fitchburg & L. St. R. Co., 201 Mass. 489, 87 NE 898. Where bridge was so narrow that it was impossible to pass car without turning onto adjoining track, motormen must anticipate such situations and approach with cars under control. Chadbourne v. Springfield St. R. Co., 199 Mass. 574, 85 NE 737.

**57.** Where motorman ran into heavy truck on track as it was turning off, without making any effort to slacken speed, held negligent. Koehler & Co. v. Brooklyn Heights R. Co., 111 NYS 600. Negligence of motorman in running into steam street roller, speed being excessive, held for jury. Parker-Washington Co. v. St. Louis Transit Co., 131 Mo. App. 508, 109 SW 1073.

**58.** Negligence for jury, in taking no precaution on discovering cows near track 75 or 80 feet ahead, they being in safe place at time. Craft v. Peekskill Lighting & R. Co., 128 App. Div. 878, 113 NYS 235.

**59. Negligence for jury,** in passing behind standing car which suddenly backed up, there being nothing except trolley pole to indicate that it was backing. Singley v. Easton Transit Co., 221 Pa. 174, 70 A 718. Of engineer of steam roller in going onto track to get off soft asphalt after seeing approaching car, latter running at excessive speed. Parker-Washington Co. v. St. Louis Transit Co., 131 Mo. App. 508, 109 SW 1073.

**Not negligent:** Finding of due care sustained where it appears that automobile driver when 20 feet from track observed car 150 feet away and thought that he could cross, which he could have done had speed of car not been increased. Joerg v. Public Service R. Co. [N. J. Law] 71 A 1126. Evidence that driver saw no car as he drove onto track with heavy truck and was run into by rapidly moving car as he was turning off held to support finding of due care. Koehler & Co. v. Brooklyn Heights R. Co., 111 NYS 600. In remaining in stalled automobile after discovering car approaching 700 feet away, relying on motorman discovering automobile and stopping. Lawrence v. Fitchburg & L. R. Co., 201 Mass. 489, 87 NE 898.

**60. Search Note:** See Street Railroads, Cent. Dig. §§ 222-273; Dec. Dig. §§ 106-120; 20 A. & E. Enc. P. & P. 866.

**61.** Rev. Laws c. 51, § 20, requiring notice of injury to be given to county, city, town, or person obliged to keep way in repair, is not applicable where negligence relied on was failure of man sent by company to guard trench dug by city to properly discharge duties. Phinney v. Boston El. R. Co. 201 Mass. 286, 87 NE 490.

**62.** Complaint alleging that sublessee was in possession and operating cars held not to state cause of action against receivers of lessee or of sublessee, there being no allegation connecting them. Henning v. Sampsell, 236 Ill. 375, 86 NE 274.

**63.** Complaint alleging duty to provide and maintain proper appliance to stop car without alleging that such appliances were not provided states no cause of action. Hackett v. Chicago City R. Co., 235 Ill. 116, 85 NE 320.

**64.** General allegation that defendant negligently ran car into plaintiff without specifying particular wherein company was negligent held insufficient as a count in trespass or in trespass on the case. Newport News & Old Point R. & Elec. Co. v. Nicolopoolos [Va.] 63 SE 443. Petition held to state a cause of action for running into plaintiff while standing at curve but not on

it is not necessary to name the negligent servant,[66] where negligence of servants is charged, it must appear that they were acting within the scope of their authority.[67] Where distinct charges of negligence are alleged, they must be consistent.[68] A motion to make more specific is proper where the complaint does not enable defendant to ascertain what car caused the injury.[69] Wrongful occupation of the street must be pleaded.[70] In some states, the complaint must show due care on the part of plaintiff.[71]

Ownership and operation of car is not put in issue by a general plea of not guilty,[72] and where defendant relies upon particular facts to justify violation of speed ordinance, it must plead the same.[73]

*Burden of proof and evidence.* See 10 C. L. 1754—Plaintiff has the burden of proving all the essential allegations of his complaint,[74] including defendant's[75] negli-

track, who was struck by outward swing of car, there being a crowd listening to street vendor. Cordray v. Savannah Elec. Co., 5 Ga. App. 625, 63 SE 710. Complaint held to charge negligence in failing to give proper warnings and in speed of car. Engelman v. Metropolitan St. R. Co., 133 Mo. App. 514, 113 SW 700. Complaint alleging that while plaintiff was necessarily upon track its car propelled with great force struck his wagon, and his injuries were due solely to the carelessness and negligence of defendant, held sufficient. Wright v. United Trac. Co., 115 NYS 630. Complaint alleging that motorman discovered plaintiff in time to have avoided injuring him if brakes had been in working order held not demurrable for failure to allege particular defects. Smith v. Gulfport & Mississippi Coast Trac. Co. [Miss.] 48 S 295. Declaration held sufficient in action by pedestrian injured at crossing. Chicago Union Trac. Co. v. Scanlon, 136 Ill. App. 212. "Defendant then and there, by its servants, agents, and employees so carelessly, recklessly, willfully, negligently" drove and managed its car that "by and through the negligence * * * of the defendant through its said servants" the plaintiff was injured. West Chicago St. R. Co. v. Mileham, 138 Ill. App. 569.

**65.** Evidence that motorman, in exercise of ordinary care, could have seen horse in time to stop held inadmissible under general allegation of negligence, which is followed by specific allegations not embracing such negligence. Dalton v. United Rys. Co. [Mo. App.] 114 SW 561.

**66.** Complaint averring negligence of company in general terms is sufficient without alleging name of negligent servant. Anniston Elec. & Gas. Co. v. Rosen [Ala.] 48 S 798.

**67.** Complaint held to sufficiently charge that servants were acting for defendant in performing negligent acts, although containing no direct allegation. Cincinnati, L. & Electric St. R. Co. v. Cook [Ind. App.] 88 NE 76.

**68.** Count held inconsistent as charging simple negligence, wanton negligence, and failure to use due care after discovering peril. Anniston Elec. & Gas Co. v. Rosen [Ala.] 48 S 798. Petition alleging negligence in failing to keep vigilant lookout for children, in discovering plaintiff approaching tracks in time to avoid injury, and in failing to approach crossing with car under control held consistent. Heinzle v. Metropolitan St. R. Co., 213 Mo. 102, 111 SW 536.

**69.** South Tacoma Fuel & Transfer Co. v. Tacoma R. & Power Co., 50 Wash. 686, 97 P 970.

**70.** Where complainant alleges that defendant is a common carrier and occupies street and does not allege that such occupation is wrongful, evidence that it had no license properly refused. Huff v. St. Joseph R. L., H. & P. Co., 213 Mo. 495, 111 SW 1145.

**71.** Burns' Ann. St. 1908, § 362, relieving plaintiff in an action for personal injuries or for death of necessity of alleging absence of contributory negligence, has no application to action for injury to carriage. Potter v. Ft. Wayne & W. V. Trac. Co. [Ind. App.] 87 NE 694. Complaint held defective for failing to allege due care or facts showing due care on part of driver. Id.

**72.** Brunhild v. Chicago Union Trac. Co., 239 Ill. 621, 88 NE 199.

**73.** Engelker v. Seattle Elec. Co., 50 Wash. 196, 96 P 1039.

**74.** Evidence held to sustain finding that decedent was run into while on track, and was not knocked on to track ahead of car by passing wagon. Louisville R. Co. v. Buckner's Adm'r [Ky.] 113 SW 90. Evidence held to sustain finding that plaintiff was run into at street intersection by rapidly moving car, and not while crossing street diagonally and while suddenly passing from behind wagon onto track. Austen v. Brooklyn Heights R. Co., 115 NYS 582. Evidence held to show that decedent's death was caused by injury received before car struck him. Brink v. North Jersey St. R. Co. [N. J. Law] 71 A 1120.

**75.** Must prove defendant's ownership of car. Frisby v. St. Louis Transit Co., 214 Mo. 567, 113 SW 1059; Mobile Light & R. Co. v. MacKay [Ala.] 48 S 509. Ownership of car may be shown by reasonable inferences from facts in case. Frisby v. St. Louis Transit Co., 214 Mo. 567, 113 SW 1059. While defendant's counsel may concede ownership in opening statement, such concession is not available on appeal unless preserved in record. Id. Though defendant was named in caption as "Mobile Light & Railroad Company," held that jury might infer from plaintiff's testimony he had a mule killed on certain street, and that railroad runs on said street, that it was the track of the "Mobile Light & Railway" and that "they "operated cars. Mobile Light & R. Co. v. MacKay [Ala.] 48 S 509. Evidence held insufficient to show ownership, inferences from facts being equally applicable to

gence,[76] since the law presumes due care,[77] although proof of the accident may raise a presumption of negligence under the doctrine of res epsa loquitur in some cases.[78] Proof of violation of franchise or regulatory provision for public protection is prima facie proof of negligence.[79] Defendant's negligence must be shown to be the proximate cause of the injury.[80] It is only necessary, however, to prove the substance of the allegations,[81] and where several negligent acts are averred, recovery may be had on proof of any one.[82] Plaintiff must recover on the particular negligence alleged,[83] and there must be no fatal variance between the allegations and proof.[84] Where a street car company employes a motorman under twenty-one, it has the burden of proving his competency in case of accident.[85] In some states, the burden of proving due care of plaintiff rests upon him,[86] but in other states such care is presumed,[87] but wherever the burden rests, the evidence of both parties must be considered in determining the question.[88] The usual rules as to time of producing evidence applies.[89] In the production of evidence the usual

another company occupying street. Frisby v. St. Louis Transit Co., 214 Mo. 567, 113 SW 1059.

**76.** Fay v. Hartford & St. R. Co. [Conn.] 71 A 364. Where evidence wholly fails to show how far car was away when plaintiff stepped onto track or the surrounding circumstances, finding of negligence on part of defendant is unwarranted. Tully v. New York City R. Co., 127 App. Div. 688, 111 NYS 919. Where decedent's conduct and situation at time of accident is not shown and defendant's negligence is speculative, verdict for defendant was properly directed. Morse v. Consolidated R. Co. [Conn.] 71 A 553.

**77.** Kinlen v. Metropolitan St. R. Co. [Mo.] 115 SW 523.

**78. Applicable:** Where trolley pole jumped track and no effort was made to prevent injury until pole became disconnected and fell onto driver of nearby wagon. Washington v. Rhode Island R. Co. [R. I.] 70 A 913. Where bolt is seen to fall from elevated tracks as train was passing and to strike plaintiff, doctrine of res ipso loquitur applies. Sturza v. Interborough Rapid Transit Co., 113 NYS 974. Testimony of track walker that he examined track following day and found no bolt missing, and testimony of foreman and track supervisor that no such bolt was used in track, held not as a matter of law to overcome presumption. Id. Sagging wire giving shock to passerby coming in contract therewith. Crosby v. Portland R. Co. [Or.] 100 P 300.

**Inapplicable:** Where uncontradicted evidence shows that turn out switch was of standard pattern and was properly laid, no recovery can be had under doctrine of res ipsa loquitur for injury received by one thrown from wagon which skidded against it. Alcott v. Public Service Corp. [N. J. Law] 71 A 45. Falling of wheel into cable slot held insufficient to raise presumption of negligence. Miller v. United R. & Elec. Co., 108 Md. 84, 69 A 636.

**79.** Violation of provision of franchise as to manner of guarding wires is prima facie negligence. Conrad v. Springfield Consol. R. Co., 240 Ill. 12, 88 NE 180.

**80.** While proximate cause may be shown by circumstantial evidence, it must be established by facts affording a logical basis for an inference as to cause. Morse v. Consolidated R. Co. [Conn.] 71 A 553. Mere fact that car was going at excessive speed at time of accident does not of itself show that it was proximate cause of collision. Id.

**81.** Where it is alleged that car was running at negligent rate of speed, to-wit, 45 miles per hour, it is sufficient to prove negligent speed though less than 45 miles per hour. Union Trac. Co. v. Howard [Ind. App.] 87 NE 1103.

**82.** Union Trac. Co. v. Howard [Ind. App.] 87 NE 1103.

**83.** Where negligence alleged was excessive speed, instruction submitting question whether motorman in exercise of ordinary care could have stopped car after plaintiff was knocked onto track held error. Louisville R. Co. v. Buckner's Adm'r [Ky.] 113 SW 90. Instruction authorizing recovery if defendant was negligent, etc., held erroneous as not limiting negligence to that alleged. Hof v. St. Louis Transit Co., 213 Mo. 445, 111 SW 1166.

**84. No variance:** Between allegation that plaintiff was driving "at or near the tracks," and proof that he was driving longitudinally on the same. Murphy v. Evanston Elec. R. Co., 235 Ill. 275, 85 NE 334. Proof held not variant from allegation as to hole between rails at crossing. Chicago Union Traction Co. v. Fitzgerald, 138 Ill. App. 520. Complaint alleging that team "was struck and knocked down and run over by defendant's cars" held broad enough to admit evidence of collision with second car which ran into horses as they were being removed. (South Tacoma Fuel & Transfer Co. v. Tacoma R. & Power Co., 50 Wash. 686, 97 P 970), and, in any event, it must be regarded as part of same transaction (Id.).

**85.** Cloud v. Alexandria Elec. R. Co., 121 La. 1061, 46 S 1017.

**86.** Enders v. Brooklyn Union El. R. Co., 131 App. Div. 170, 115 NYS 155; Paladino v. Staten Island Midland R. Co., 127 App. Div. 183, 111 NYS 715.

**87.** McKenzie v. United Rys. Co. [Mo.] 115 SW 13.

**88.** Boyce v. New York City R. Co., 126 App. Div. 248, 110 NYS 393.

**89.** Plaintiff should introduce as evidence in chief testimony as to distance within which car could be stopped, in suit for injuries resulting from collision. Louisville R. Co. v. Gaar [Ky.] 112 SW 1130.

rules of relevancy,[90] res gestae,[91] hearsay,[92] conclusions of witness,[93] and those gov-

**90.** Where plaintiff was unconscious when run over, his testimony as to his position is without probative force. Riggs v. Metropolitan St. R. Co. [Mo.] 115 SW 969. Evidence that after accident motorman would not stop car, but wanted to get away and desired to beat those endeavoring to detain him, held irrelevant. Netterfield v. New York City R. Co., 129 App. Div. 56, 113 NYS 434. Though injuries and death are conceded, evidence of character of wounds is admissible to show where deceased was struck and position when struck. Kern v. Des Moines City R. Co. [Iowa] 118 NW 451. Where the insufficiency of headlight is alleged, evidence of civil engineer experienced in construction of street railways that at time of accident searchlights of considerable power were in use and approved, held relevant. Currie v. Consolidated R. Co. [Conn.] 71 A 356. Although child killed was too young to be chargeable with negligence, plaintiff is not excused from showing her conduct and situation as bearing upon defendant's negligence. Morse v. Consolidated R. Co. [Conn.] 71 A 553. Where car was making nonstop trip and track was clear, held not error to allow evidence of speed several blocks from point of collision. Hillary v. Minneapolis St. R. Co., 104 Minn. 432, 116 NW 933. Fact that injury occurred in thickly populated portion of city may be shown, though not pleaded. Reynolds v. Metropolitan St. R. Co. [Mo. App.] 116 SW 1135. Fact that witness did not form estimate of speed as car passed but did so afterwards, goes only to weight of evidence and not to admissibility. Dalton v. United R. Co. [Mo. App.] 114 SW 561. Evidence of condition of street outside of track relevant as bearing on negligence of plaintiff in driving on track. Murphy v. Evanston Elec. R. Co., 235 Ill. 275, 85 NE 334. Testimony that car was going very fast as it passed her, that it stopped one or two blocks beyond and then started and ran very fast until it struck plaintiff, held not objectionable as relating to speed several blocks away. Id. In action for injury received by tripping over rail, the issue is negligence in maintaining tracks in safe condition and it is immaterial whether it is rightfully in street. Huff v. St. Joseph R. L. H. & P. Co., 213 Mo. 495, 111 SW 115. Where one attempts to board moving car, it is immaterial whether intention so to do was entertained when he left curb or came afterwards. Leighton v. Chicago Consol. Trac. Co., 235 Ill. 283, 85 NE 309.

**Ordinances:** Ordinance requiring suitable and seasonable warning at crossings admissible on issue of negligence. Denver City Tramway Co. v. Martin [Colo.] 98 P 836. Where negligence charged is failure to give proper warning at crossings, ordinance requiring giving of suitable warnings is admissible. Id.

**Rules of company:** Where the violation of a rule results in injury, such rule is admissible on issue of negligence though it exacts higher duty than imposed by law, and was unknown to person injured. Sullivan v. Richmond L. & R. Co., 128 App. Div. 175, 112 NYS 648. Where automobile was struck while turning out to pass car on narrow bridge by car going in opposite direction, rule of company prohibiting two cars to be on bridge is admissible as bearing on negligence. Chadbourne v. Springfield St. R. Co., 199 Mass. 574, 85 NE 737. Rules of company as bearing on negligence, held inadmissible. Louisville R. Co. v. Gaugh [Ky.] 118 SW 276.

**Prior and subsequent conditions:** Evidence of condition of switch four hours after accident, there being evidence that conditions remained unchanged for long time after accident, admissible. Reynolds v. Metropolitan St. R. Co. [Mo. App.] 116 SW 1135.

**Custom:** Evidence of custom of stopping cars at crossing to permit vehicles to cross when they were in position of one with which car collided, is admissible. Daniels v. Bay City Trac. & Elec. Co., 153 Mich. 96, 15 Det. Leg. N. 388, 116 NW 548.

**91. Admissible:** Declarations of motorman immediately after accident. Kern v. Des Moines City R. Co. [Iowa] 118 NW 451. Declarations of motorman made at time and place of accident that he saw the man and his fate and tried to stop but could not. Louisville R. Co. v. Johnson's Adm'r [Ky.] 115 SW 207. Where pleadings raise issues as to plaintiff's negligence and last clear chance doctrine, held error to exclude declarations of motorman made immediately after accident which might bear thereon. Kern v. Des Moines City R. Co. [Iowa] 118 NW 451.

**Inadmissible:** Declarations of motorman immediately after collision with wagon that driver thereof had bothered him all across a bridge, held inadmissible where collision did not occur on the bridge. Brauer v. New York City Interborough R. Co., 131 App. Div. 682, 116 NYS 59. Declarations by motorman subsequent to collision. Mobile L. & R. Co. v. Baker [Ala.] 48 S 119. Declaration of conductor to motorman to keep still and not to make statement. Louisville R. Co. v. Johnson's Adm'r [Ky.] 115 SW 207. Declaration of by-standers as to cause of accident, they not being connected with accident. Id. Statement by bystander that it was no wonder that decedent was hurt, in view of conduct of his companions, being merely an expression of opinion. Id. Declarations of motorman two or three minutes after accident as to how same happened. Morse v. Consolidated R. Co. [Conn.] 71 A 553. Declarations of motorman after accident as to how same happened held not binding on company. Id.

**92.** Statement of motorman out of court are admissible to impeach his testimony, but not as evidence of facts. Riggs v. Metropolitan St. R. Co. [Mo.] 115 SW 969.

**93.** Question of nonexpert "Now, from the way the curve was there, you may state what that indicated to you as to how the accident happened" inadmissible. Cincinnati, L. & A. Elec. St. R. Co. v. Cook [Ind. App.] 88 NE 76. Testimony that at time of accident witness saw flash of electricity and thought that he saw something roll held not objectionable as "not descriptive." Leighton v. Chicago Consol. Trac. Co., 235 Ill. 283, 85 NE 309.

erning experiments,[94] expert testimony,[95] etc., apply. One not an expert may testify as to speed.[96]

*Instructions.* See 10 C. L. 1756—The instructions as a whole should fairly and fully submit the case to the jury,[97] conforming to the issues raised and supported by the pleadings [98] and the evidence,[99] without being argumentative [1] or misleading.[2]

**94.** Where person in picture was sitting up near rails where headlight would strike him but person injured was lying down and in shadow of bridge column where he could not easily be seen, difference renders pictures inadmissible. Riggs v. Metropolitan St. R. Co. [Mo.] 115 SW 969. Where witness stated generally that picture clearly represented the scene of accident but stated specifically that position of person in picture was different from plaintiff's position at time of accident, latter qualifies former. Id. Held that motorman did admit that dummy figures in pictures introduced to illustrate plaintiff's position were true representations of his position. Id. Nonexpert who has made observations cannot testify how far ahead one on platform can see with single incandescent bulb where power of bulb is not stated. Currie v. Consolidated R. Co. [Conn.] 71 A 356.

**95.** Expert in operation of cars may testify as to distance in which car could be stopped running at speed of car in question. Randle v. Birmingham R., L. & P. Co. [Ala.] 48 S 114. Motorman of 17 years experience. Bladecka v. Bay City Trac. & Elec. Co. [Mich.] 15 Det. Leg. N. 965, 118 NW 963. Motorman of 5 or 6 years experience. Kinlen v. Metropolitan St. R. Co. [Mo.] 115 SW 523.

**96.** Kern v. Des Moines City R. Co. [Iowa] 118 NW 451. Person who has been in habit of watching cars and estimating speed for years held qualified to testify as to speed on particular occasion. Fledderman v. St. Louis Transit Co. [Mo. App.] 113 SW 1143.

**97.** Request for ruling on liability held properly refused as excluding question of contributory negligence. Blackburn v. Boston, etc., R. Co., 201 Mass. 186, 87 NE 579. Instruction held to ignore defendant's theory that plaintiff jumped from wagon and ran diagonally across track into side of car. Norfolk R. & L. Co. v. Higgins, 108 Va. 324, 61 SE 766. Where plaintiff was knocked down while walking on path along track, held that defendant was entitled to have liability on theory of simple negligence, coupled with contributory negligence, presented, and also right to presume that such pedestrian would leave path. Jackson Elec. R. L. Co. v. Carnahan [Miss.] 48 S 617. Where it was defendant's theory that plaintiff, seeing car, stepped onto track too close to same to enable motorman with means at hand to stop, and was knocked onto adjoining track too close to car thereon to enable motorman thereof to stop, instruction thereon should have been given that no recovery could be had unless inability to stop was due to negligent speed. Louisville R. Co. v. Gaugh [Ky.] 118 SW 276. Where court charged that, if accident happened as detailed by defendant's witnesses, to find for defendant, held error to refuse instruction that, if it happened as described by plaintiff's witnesses, they might still find for defendant, there being still a question of fact whether defendant was negligent and plaintiff was free from negligence. Netterfield v. New York City R. Co., 129 App. Div. 56, 113 NYS 434. Held error to refuse instruction that if, when approaching girder, motorman saw that his car could pass in safety, and plaintiff, who was holding swinging girder away from track, gave no signal to stop, verdict must be for defendant, girder having come into contact with second car because plaintiff let same loose Fay v. Brooklyn Heights R. Co., 129 App. Div. 375, 113 NYS 689. Instruction as to negligence of parents in allowing child to play in street, approved. Englund v. Mississippi Valley Trac. Co., 139 Ill. App. 572. Instruction as to contribution negligence of driver crossing track with approaching car in plain sight, approved. Chicago City R. Co. v. Soszynski, 134 Ill. App. 149. Instruction as to duty of motorman to anticipate danger, approved. Id.

**98. Not supported:** Instruction limiting recovery to finding that plaintiff was struck by "front of car." Leighton v. Chicago Consol. Trac. Co., 235 Ill. 283, 85 NE 309. Instruction on last clear chance doctrine. Toledo R. & L. Co. v. Campbell, 79 Ohio St. 441, 87 NE 1142.

**99. Supported:** Held proper to instruct on duty to keep lookout, although there was no evidence of failure to do so, it being necessary to define legal duties of motorman. Louisville R. Co. v. Byer's Adm'x [Ky.] 113 SW 463. Evidence as to collision with buggy held to warrant instruction on last clear chance doctrine. Kinlen v. Metropolitan St. R. Co. [Mo.] 115 SW 523. Evidence held to tend to show negligence in keeping lookout, and to support instruction on duty. Louisville R. Co. v. Byer's Adm'x [Ky.] 113 SW 463.

**Not supported:** Instruction based on sudden driving of plaintiff onto track held not supported where no one saw wagon until after accident and after it was off track. Murphy v. Evanston Elec. R. Co., 235 Ill. 275, 85 NE 334. Where accident occurred through negligence of defendant or of decedent, held error to instruct that there could be no recovery in case of mere "accident." Felver v. Central Elec. R. Co. [Mo.] 115 SW 980. Instruction that due diligence required of motorman to stop car to prevent collision requires that he shall use ordinary care to avail himself of all the means within his power to stop car held erroneous, where issues are negligence as to speed and keeping lookout. El Paso Elec. R. Co. v. Tomlison [Tex. Civ. App.] 115 SW 871.

**1.** Instruction limiting recovery to discovered peril held argumentative. Birmingham R. L. & P. Co. v. Williams [Ala.] 48 S 93.

**2. Misleading:** Instruction limiting recovery to discovered peril. Birmingham R. L. & P. Co. v. Williams [Ala.] 48 S 93. In-

They must be consistent with one another[3] and should not invade the province of the jury,[4] assume facts in dispute,[5] or unduly emphasize particular facts.[6] Requested instructions, substantially covered by those given, need not be submitted.[7]

§ 10. *Statutory crimes.*[8]—See 10 C. L. 1759—Municipalities of Ohio have no power to enact penal ordinances requiring interurban cars to stop at street intersections.[9] By ordinance, cars in Detroit must run to the end of the line unless there is through car following in the same block in which case the car may be turned back to restore service,[10] in which case a transfer must be given,[11] and upon violation the company is subject to a penalty.[12]

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**Streets; Strikes; Striking Out; Struck Jury,** see latest topical index.

### SUBMISSION OF CONTROVERSY.[13]

*The scope of this topic* is noted below.[14]

An agreed case stands for a petition, answer, all the evidence, and a verdict

struction that motorman performed his whole duty by sounding whistle. Chicago & J. Elec. R. Co. v. Wanic, 132 Ill. App. 477. Instruction that one who by pursuing his course without increase of speed would naturally first reach intersecting point has right of way, as making jury believe that fact that plaintiff first reached such point was decisive of right to recover. Carrahan v. Boston, etc., R. Co., 198 Mass. 549, 85 NE 162.

**3.** Instruction that, if plaintiff was negligent in driving along track, "then he cannot recover," and instruction submitting last clear chance doctrine, held conflicting. Gessner v. Metropolitan St. R. Co., 132 Mo. App. 584, 112 SW 30.

**4. Held to invade:** Instruction that plaintiff was negligent in allowing himself to be or remain in close proximity to track. Birmingham R. L. & P. Co. v. Williams [Ala.] 48 S 93. Instruction limiting recovery to discovered peril. Id. Where negligence and contributory negligence were questions of fact, charge that, if jury believe testimony of plaintiff and his witnesses, then plaintiff has proven defendant's negligence and his freedom from negligence, held erroneous. Bingham v. Joline, 114 NYS 112.

**5. Erroneous:** Instruction held erroneous as assuming that defendant was negligent either in failing to control the car or to check its speed or stop it. Gessner v. Metropoltan St. R. Co., 132 Mo. App. 584, 112 SW 30.

**Not erroneous:** Where defendant did not contest its duty to keep lookout, instruction properly assumed such duty. Riggs v. Metropolitan St. R. Co. [Mo.] 115 SW 969. Instruction that: If therefore you find from the evidence that M. L. K. was at the time and place in position of imminent danger, and by reason of the fact that the buggy in which he was seated was upon or approaching track, etc., held not to assume that place was one of danger simply because buggy was on or near track. Kinlen v. Metropolitan St. R. Co. [Mo.] 115 SW 523. Instruction that if motorman failed to keep lookout for deceased on or along track, etc., held not erroneous as assuming that he was walking along track. San Antonio Trac. Co. v. Levyson [Tex. Civ. App.] 113 SW 569.

**6.** Instruction on contributory negligence, held properly refused as improperly pointing out particular things with respect to which driver should have exercised ordinary care. Louisville R. Co. v. Boutellier, 33 Ky. L. R. 484, 110 SW 357. Instruction that if motorman was exercising due care and had car under control, but plaintiff came onto track so close that it was impossible to avoid injury by exercising of ordinary care, there is no liability, held not erroneous. Goldstein's Adm'r v. Louisville R. Co. [Ky.] 115 SW 194.

**7. Held covered:** Instruction on right of employes to assume that driver of vehicle will exercise reasonable care. Jacksonville Elec. Co. v. Hellenthal [Fla.] 47 S 812. Instruction on rights of company because confined to track. Id. Instruction as to liability in case of pure accident. Id.

**8. Search Note:** See Street Railroads, Cent. Dig. §§ 274-277; Dec. Dig. §§ 121, 122.

**9.** Municipal Code 1902, § 7, enumerating general powers conferred upon muncipalities. Towsend v. Circleville, 78 Ohio St. 122, 84 NE 792.

**10.** Right to turn cars to restore service, under ordinance requiring cars to run to end of line, except in cases of unavoidable delay, when cars may be turned back to restore service, is not affected by fact that there are cars in barn which might have been sent back. People v. Detroit United R. Co., 154 Mich. 514, 15 Det. Leg. N. 820, 118 NW 9.

**11.** Notice to conductor on receiving car to accept passengers without transfers is not a compliance, especially where unknown to passengers who were not aware of practice. People v. Detroit United R. Co., 154 Mich. 514, 15 Det. Leg. N. 820, 118 NW 9.

**12.** Prosecution under ordinance requiring cars to be run to end of line, except in specified cases, held a prosecution in name of state, and not a civil proceeding on behalf of passenger. People v. Detroit United R. Co., 154 Mich. 514, 15 Det. Leg. N. 820, 118 NW 9.

**13.** See 10 C. L. 1759.

**Search Note:** See notes in 11 Ann. Cas. 148. See, also, Submission of Controversy, Cent. Dig.; Dec. Dig.; 27 A. E. Enc. L. (2ed.) 197; 1 A. & E. Enc. P. & P. 384; 11 Id. 599.

**14.** It includes only submission to a court on agreed facts. Submission to arbitrators

returned to the court.[15] It is essential to the consideration of an action submitted that the controversy be real, that the subject-matter be properly described, that all the parties agreeing thereto be persons sui juris,[16] and that the relief demanded be set forth,[17] but facts plainly evident or immaterial to the issue need not be shown.[18] The controversy must be one that may be determined by an action as distinguished from a special proceeding.[19] A court of equity may determine the question of title upon an agreed statement.[20] Statutes authorizing submission of controversies generally apply only to cases where the submitted facts alone are relied on.[21] A court of equity may set aside an agreed statement made under a mutual mistake.[22] The judgment must be strictly upon the agreed facts [23] where there is no reservation that the court may draw inferences therefrom,[24] and must be sustained thereby,[25] since the court will not go outside the facts and issues stated.[26] Submission under a stipulation of facts precludes objection for want of proper pleading by either party,[27] but does not prevent objection to jurisdiction.[28] Judgment on an agreed statement may be reviewed by error [29] if the statement is properly made of record.[30] The agreed statement of facts in a submitted cause is not evidence in a subsequent proceeding.[31].

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**Subpoena,** see latest topical index.

## SUBROGATION.

**§ 1. Definition and Nature, 1998.**
**§ 2. Right to Subrogation, 1998.**
**§ 3. How Forfeited or Lost, 2000.**
**§ 4. Remedies and Procedure, 2000.**

*The scope of this topic* is noted below.[32]

is treated in Arbitration and Award, 11 C. L. 262.

**15.** Peake v. Webb, 132 Mo. App. 601, 112 SW 13.

**16.** Submission agreed to by Indian, as to land improperly described, while restrictions against alienation exist, held invalid. Goodrum v. Buffalo [C. C. A.] 162 F 817.

**17.** Woodruff v. People, 193 N. Y. 560, 86 NE 562.

**18.** As nature of property already converted into money, or that a party died intestate, where it appears that administrator has been appointed. Knickerbocker Trust Co. v. King, 126 App. Div. 691, 111 NYS 192.

**19.** Under Code Civ. Proc. §§ 1279, 1280. 1281, and certain provisional remedies cannot be granted in such action, which is tried on case alone. Woodruff v. People, 193 N. Y. 560, 86 NE 562.

**20.** Laws 1893, p. 37, c. 6 (Revisal 1905, § 1589), construed. Where contract to sell land was made and title in dispute, submission treated as a bill for specific performance. Campbell v. Cronly [N. C.] 64 SE 213.

**21.** And do not restrict the right of litigants to make admissions in open court, nor apply to a case where such right is exercised and other evidence introduced. Construing Municipal Ct. Act (Laws 1902, p. 1560, c. 580), §§ 241-243. Rosenfeld & Co. v. Solomon, 61 Misc. 238, 113 NYS 723.

**22.** Though under Rev. St. 1899, § 793 (Ann. St. 1906, p. 757), there is no power to amend. Peake v. Webb, 132 Mo. App. 601, 112 SW 13.

**23.** Not assume that a road master appointed under Act of April 12, 1905, P. L. 142, was authorized to use his team by supervisors and to receive pay therefor. Andrus v. Shippen Tp., 36 Pa. Super. Ct. 22.

**24.** Cunningham v. Connecticut Fire Ins. Co., 200 Mass. 333, 86 NE 787.

**25.** Where, in action for negligence, fact of negligence was not agreed, verdict may not be made to rest on conclusion of law from facts stated. Levasseur v. Berlin [N. H.] 71 A 628.

**26.** Not determine constitutionality of an act where question not raised. Higgins v. Price, 36 Pa. Super. Ct. 215.

**27.** Conway v. Chicago, 237 Ill. 128, 86 NE 619.

**28.** Where agreed statement provided that court should determine question of jurisdiction and treat record as though formal plea to jurisdiction had been filed. Lucas v. Patton [Tex. Civ. App.] 20 Tex. Ct. Rep. 796, 107 SW 1143.

**29.** Where, in an otherwise jury cause, ultimate facts are agreed and cause submitted to court for its decision of question of law, judgment may be reviewed upon writ of error. United States v. Cleage [C. C. A.] 161 F 85.

**30.** On appeal all questions submitted in the lower court as shown by the agreed statement must be embodied in bill of exceptions, and clerk's certificate is insufficient. Truesdale v. Montrose County Com'rs [Colo.] 99 P 63. A supplementary agreed statement not in the records of the lower court will be disregarded. Woodruff v. People, 193 N. Y. 560, 86 NE 562.

**31.** For such facts may be admitted merely to test question of law. Same rule applies to special verdict found thereon. Gibson v. Rowland, 35 Pa. Super. Ct. 158.

**32.** Treats generally of subject of subrogation. For a more specific treatment with reference to particular relations, topics dealing with such relations should be con-

§ 1. *Definition and nature.*[33]—See 10 C. L. 1760—Subrogation is an equitable doctrine that gives a party secondarily liable, who pays a debt, the right to any securities or remedies which the creditor may hold against the principal,[34] and is broad enough to include every instance in which one party pays a debt for which another is primarily liable.[35] It is the mode adopted to compel the ultimate payment of a debt by any one who in justice, equity, and good conscience ought to pay it,[36] regardless of contractual relation,[37] and contemplates some original privilege on the part of him to whose place substitution is claimed.[38] It is generally confined to the relation of principal and surety and guarantors, or where a person is compelled to remove a superior title in order to protect his own, and also to cases of insurers,[39] but has been steadily growing in importance and extent in its application,[40] and is founded on the facts and circumstances of each particular case and on the principles of natural justice,[41] so that a court may consider it with other existing equities in the case.[42]

§ 2. *Right to subrogation.*[43]—See 10 C. L. 1760—It is usually essential that the person making the payment be under some obligation regarding it, or have some interest to be protected by it,[44] but this rule is relaxed in certain cases,[45] though subrogation is never allowed in favor of a person who is himself primarily liable for the debt,[46] or who will thereby reap advantage from his own wrongdoing.[47] It is allowable in favor of a surety,[48] or a guarantor,[49] or an insurer.[50] Other cases in

sulted. See such topics as Mortgages, 12 C. L. 878; Partnership, 12 C. L. 1206; Suretyship, 10 C. L. 1768.

**33. Search Note:** See notes in 4 C. L. 1583; 2 L. R. A. (N. S.) 263; 8 A. S. R. 506; 99 Id. 474.

See, also, Subrogation, Cent. Dig. §§ 1, 2; Dec. Dig. § 1; 27 A. & E. Enc. L. (2ed.) 202.

**34.** Paton v. Robinson [Conn.] 71 A 730.

**35.** Where proceeds of lots sold by city were applied to payment of city bonds, the purchasers of such lots were entitled, upon failure of title thereto, to subrogation to rights of bondholders. Vasser v. Liberty [Tex. Civ. App.] 110 SW 119.

**36.** Cobb v. Crittenden [C. C. A.] 161 F 510.

**37.** Poluckie v. Wegenke, 137 Wis. 433, 119 NW 188. Does not depend on privity of contract, except in so far as the known equity may be supposed to be imparted into the transaction, and thus raise a contract by implication. Vasser v. Liberty [Tex. Civ. App.] 110 SW 119.

**38.** Teter v. Teter [W. Va.] 63 SE 967.

**39.** Prindiville v. Curran, 132 Ill. App. 162; Brown v. Sheldon State Bank [Iowa] 117 NW 289. Subrogation takes place of right for benefit of him who, being a creditor, pays another creditor whose claim is preferable by reason of privileges or mortgages. Iberville Planting & Mfg. Co. v. Monongahela Coal Co. [C. C. A.] 168 F 12.

**40.** Prindiville v. Curran, 132 Ill. App. 162.

**41.** Vasser v. Liberty [Tex. Civ. App.] 110 SW 119.

**42.** Persons seeking subrogation had received benefits equal to rights claimed. Martin v. Turner [Ky.] 115 SW 833.

**43. Search Note:** See notes in 21 L. R. A. 33; 23 Id. 124; 29 Id. 282; 54 Id. 614; 2 L. R. A. (N. S.) 922; 3 Id. 79; 5 Id. 838; 8 Id. 559; 9 Id. 117; 14 Id. 155; 16 Id. 233, 470; 2 A. S. R. 328; 99 Id. 474; 1 Ann. Cas. 885; 2 Id. 363, 462; 5 Id. 902; 6 Id. 204, 395; 10 Id. 211; 11 Id. 676.

See, also, Subrogation, Cent. Dig. §§ 3-98, 106; Dec. Dig. §§ 2-34; 27 A. & E. Enc. L. (2ed.) 207.

**44.** Davis v. Davis, 81 Vt. 259, 69 A 876. Mere volunteer not entitled to subrogation. Vasser v. Liberty [Tex. Civ. App.] 110 SW 119; Davis v. Davis, 81 Vt. 259, 69 A 876.

**45.** If payment is made by stranger in expectation of being substituted in place of creditor, subrogation is allowed. Prindiville v. Curran, 132 Ill. App. 162.

**46.** Brown v. Sheldon State Bank [Iowa] 117 NW 289.

**47.** When county treasurer deposited county funds in bank contrary to Code, § 1457, and was therefore compelled, upon bank's failure, to repay such funds, he was not entitled to subrogation to rights of county. Brown v. Sheldon State Bank [Iowa] 117 NW 289.

**48.** Surety who pays the debt becomes entitled to all rights and remedies of creditor against principal debtor. Alexander v. Fidelity & Deposit Co., 108 Md. 541, 70 A 209; Sessler v. Paducah Distilleries Co. [C. C. A.] 168 F 44. Principal made fraudulent conveyances which creditor could have had set aside. Fortune v. Cassidy, 140 Ill. App. 580. Surety subrogated to judgment held as security. Ryan v. Logan County Bank [Ky.] 116 SW 1179. Agreement of a third person to pay debt of principal. Subrogated to rights of principal under agreement whereby third party agreed to pay debt. Van Meter v. Poole, 130 Mo. App. 433, 110 SW 5. **Surety of administrator** has right against distributees, as where surety is required to pay claim presented after all assets were distributed. Baldwin v. Alexander [Ala.] 47 S 176. **Surety of guardian** was compelled to pay judgments obtained by ward against guardian. Reaves v. Coffman [Ark.] 112 SW 194. **Surety of government contractor** is entitled to contractor's right to funds held in reserve by government. Hardaway v. National Surety Co.,

which the doctrine of subrogation has been applied are, where a city pays a contractor debts contracted by property owners for sidewalks,[51] where a grantor is compelled to respond in damages to a tenant by reason of the grantee's failure to keep his covenants,[52] where there is a judgment lien on two pieces of land, one being primarily liable, and a purchaser of the other, is compelled to pay the lien,[53] where a connecting carrier pays freight charges due to prior carriers,[54] where corporate officers make up shortage in corporation's assets caused by loss of securities,[55] where an attorney negligently accepts an insufficient deed in satisfaction of a judgment in favor of his client, and thereafter himself pays the judgment and takes an assignment thereof,[56] where one is compelled, in order to protect his property, to pay a debt for which another is primarily liable,[57] where a junior lienor pays off the senior lien,[58] where one who is legally ejected from land has paid off liens or claims against the same,[59] where one advances money to pay a mortgage note on agreement that the security of the note be turned over to him,[60] when land sold subject to a mortgage is subsequently sold to satisfy the mortgage.[61] A void sale under a decree will operate to subrogate the purchaser to the rights of the judgment creditor,[62] if the money is applied in exoneration of the debt.[63] Where bonds are placed in the hands of a trustee as security for a debt, he, by paying the debt, is subrogated to the creditor's rights in said bonds,[64] but an administrator who pays claims against the estate with his own money is not subrogated to the creditor's rights.[65] Subrogation to a lien held by the state or a municipality for a public tax is allowed only in exceptional cases,[66] but will nevertheless be allowed in a proper case.[67] One

211 U. S. 552, 53 Law. Ed. —. **Bondsmen of state** officer subrogated to rights of state, where officer defaulted. State v. Reid, 122 La. 590, 47 S 912. **Surety on mortgage note** is entitled to rights of mortgagee (Wilder's Ex'x v. Wilder [Vt.] 72 A 203) but where a surety of mortgagor advances money to the latter to redeem from a foreclosure sale, he acquires no lien, the lien being extinguished by the redemption (Handford v. Edwards [Ark.] 115 SW 1143).

**49.** Guarantor of debt secured by pledge of corporate stock. McKee v. Bernheim, 130 App. Div. 424, 114 NYS 1080. Guarantor of note to payee is not entitled upon payment to have it delivered with guaranty by payee to indorsee. Home Sav. Bank v. Shallenberger [Neb.] 118 NW 76.

**50.** Walter Baker & Co. v. New York, etc., R. Co., 162 F 496; Southern R. Co. v. Blunt, 165 F 258. Loss caused by negligence. Illinois Cent. R. Co. v. Hicklin [Ky.] 115 SW 752. Rule does not apply in **life or accident insurance.** Gatzweiller v. Milwaukee Elec. R. & Light Co., 136 Wis. 34, 116 NW 633.

**51.** Nickels v. Frankfort Councilmen, 33 Ky. L. R. 918, 111 SW 706.

**52.** Grantor was held liable on oral contract with tenant which grantee agreed to comply with. Beck v. McLane, 129 App. Div. 745, 114 NYS 44.

**53.** Purchaser may look to land primarily liable, for reimbursement. Pleasant Hill L., P. & W. Co. v. Quinlan, 130 Mo. App. 487, 109 SW 1061.

**54.** Is subrogated to rights of prior carriers. Bennett Bros. Lumber Co. v. Robinson [C. C. A.] 159 F 910.

**55.** Officers upon making up shortage in bank's assets caused by lost notes are entitled to bank's rights to notes. Royce v. Bank of Commerce [Okl.] 96 P 640.

**56.** Is subrogated to rights of grantee. Prindiville v. Curran, 132 Ill. App. 162.

**57.** Poluckie v. Wegenke, 137 Wis. 433, 119 NW 188. Where wife redeems land of husband sold at foreclosure sale, to protect her interest, she is entitled to equitable lien on land for amount paid on redemption. Kopp v. Thele, 104 Minn. 267, 116 NW 472.

**58.** One having attachment lien property, by paying vendor's lien, is subrogated to rights of owner of said vendor's lien. Attay v. Knox Gem Coal Co., 33 Ky. L. R. 327, 110 SW 345. Junior mortgagee as purchaser at sale is subrogated to mortgagor's right to redeem land from prior mortgage foreclosure. Bristol v. Hershey, 7 Cal. App. 738, 95 P 1040.

**59.** Subrogated to mortgage debt discharged by immediate grantor. Butler v. Peterson, 79 Neb. 713, 113 NW 161.

**60.** Subrogated to mortgagee's rights. Watson v. Bowman [Iowa] 119 NW 623.

**61.** Purchaser from mortgagor is subrogated to rights of mortgagee. Kinney v. Heuring [Ind. App.] 87 NE 1053.

**62.** Grosscup v. German Sav. & Loan Soc., 162 F 947.

**63.** Lanier v. Heilig, 149 N. C. 384, 63 SE 69.

**64.** Cobb v. Crittenden [C. C. A.] 161 F 510.

**65.** In re Bernstein's Estate, 58 Misc. 115, 110 NYS 473.

**66.** Brown v. Sheldon State Bank [Iowa] 117 NW 289.

**67.** Where tax sale, being invalid, does not divest the title of the owner. Seldon v. Dudley E. Jones Co. [Ark.] 116 SW 217; Patton v. Minor [Tex. Civ. App.] 117 SW 920. Where a person, believing that he has a valid lien on property, pays taxes and assessments thereon. Childs v. Smith

who pays the compensation of officers of the court for services which are properly taxable as costs will not be subrogated to their rights.[68]

The doctrine of subrogation applies only where payment has been made in full,[69] at least so far as the rights of the principal creditor are concerned.[70]

§ 3. *How forfeited or lost.*[71]—See 10 C. L. 1781—The right to subrogation may be lost by failure to exercise it until after the statute of limitations has barred it.[72]

§ 4. *Remedies and procedure.*[73]—See 10 C. L. 1761—The right of subrogation cannot be invoked against one not a party to the suit.[74] It must in any case be pleaded and proved,[75] but may be allowed under a pray for general relief.[76] One asserting the right is not entitled to a postponement in order that the assets or securities may be marshalled,[77] nor can one entitled to the right be permitted to interfere with or delay injuriously the right of a principal creditor to pursue every remedy open to him for the collection of his debt,[78] nor can he force a creditor into a court of equity for the purpose of enforcing the collection of collateral notes.[79] A surety is entitled to exercise the right against the debtor but it does not give him the right to control the action of the creditor,[80] but special circumstances may take the case out of this general rule and give the surety a right to require the creditor to look to certain liens before calling upon the surety,[81] and a surety may prosecute his claim in bankruptcy in the name of the principal creditor, when subrogation takes place after proof of the debt.[82] In this connection the topic dealing specifically with the relation of principal and surety should be consulted.[83]

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**Subscribing Pleadings,** see latest topical index.

## SUBSCRIPTIONS.

**§ 1. Nature, Requirements, and Sufficiency as a Contract, 2000.**
**§ 2. Rights and Liabilities Arising From Subscriptions, 2001.**
**§ 3. Enforcement, Remedies, and Procedure, 2001.**

*The scope of this topic* is noted below.[84]

§ 1. *Nature, requirements, and sufficiency as a contract.*[85]—See 10 C. L. 1762—

[Wash.] 99 P 304. Mortgagee prior to sale may pay the taxes and acquire lien for amount paid. Farmer v. Ward [N. J. Eq.] 71 A 401. Not allowed in favor of mere **volunteer** who pays taxes on property of another. Title, Guaranty & Trust Co. v. Haven, 126 App. Div. 802, 111 NYS 305.

**68.** Officers have no assignable lien for costs to be taxed. Willson v. Williams, 108 Md. 522, 70 A 409.

**69.** Jefferson v. Century Sav. Bank [Iowa] 120 NW 308; Plunkett v. State Nat. Bank [Ark.] 117 SW 1079.

**70.** Jones v. Harris [Ark.] 117 SW 1077.

**71. Search Note:** See Subrogation, Cent. Dig. §§ 107, 108; Dec. Dig. § 35; 27 A. & E. Enc. L. (2ed.) 270.

**72.** Surety who has paid the debt must assert right of subrogation within five years, when he seeks contribution from cosureties. Burrus v. Cook [Mo.] 114 SW 1065. See Suretyship, 10 C. L. 1768.

**73. Search Note:** See Subrogation, Cent. Dig. §§ 99-118; Dec. Dig. §§ 36-41; 27 A. & E. Enc. L. (2ed.) 271; 20 A. & E. Enc. P. & P. 996.

**74.** Schneider v. Schmidt [N. J. Eq.] 70 A 688.

**75.** Martin v. Turner [Ky.] 115 SW 833. In order to assert equity of subrogation in property that had been illegally sold, facts must be pleaded. Wilkin v. Owens [Tex.] 114 SW 104. On rehearing, cause remanded, and opportunity to amend pleadings given. Id. [Tex.] 115 SW 1174. Where insurer of mortgagor agreed to pay loss to mortgagee, insurer to avail itself of rights of mortgagee must allege and prove facts which, under contract of insurance, would entitle it to exemption from liability to mortgagor. Sun Ins. Office v. Heiderer. [Colo.] 99 P 39.

**76.** Ryan v. Logan County Bank [Ky.] 116 SW 1179.

**77, 78.** Jones v. Harris [Ark.] 117 SW 1077.

**79.** Defendants were accommodation makers for third person. Third person deposited notes with payee as collateral. Plunkett v. State Nat. Bank [Ark.] 117 SW 1079.

**80, 81.** Bank Com'rs v. Watertown Sav. Bank [Conn.] 70 A 1038.

**82.** Sessler v. Paducah Distilleries Co. [C. C. A.] 168 F 44.

**83.** See Suretyship, 10 C. L. 1768.

**84.** Includes only agreements by several to a common object. Stock subscriptions (see Corporations, 11 C. L. 810), subscriptions to periodicals, and the like (see Contracts, 11 C. L. 729), are excluded.

**85. Search Note:** See notes in 4 C. L. 1587; 22 L. R. A. 80; 26 Id. 305.

See, also, Subscriptions, Cent. Dig. §§ 1-

Like any other contract, a subscription must be on consideration [86] and is vitiated by fraud.[87]

§ 2. *Rights and liabilities arising from subscriptions.*[88]—See 8 C. L. 2944—The subscription contract is to be construed according to the usual rules governing other contracts;[89] hence such a contract is not assignable if it requires the exercise of personal skill and experience.[90] Whether the liability on the subscription is several, or joint and several, depends upon the terms of the contract.[91] Where each subscriber promises to pay the amount set opposite his name, the obligation is several,[92] and failure of one to pay cannot enlarge the liability of the others;[93] but if the total sum subscribed is in excess of that required, the amount collected from each subscriber should be proportionately less.[94] The subscription may be conditional, and if the conditions are not complied with, no liability arises.[95] A subscription made upon condition that a further sum shall be raised within a certain time requires either that the money be actually paid or that valid obligations therefor be given [96] in good faith.[97] An assignee of a subscription agreement takes subject to all the equities in the hands of the assignor.[98]

§ 3. *Enforcement, remedies and procedure.*[99]—See 19 C. L. 1762—Where some of the subscribers have paid the whole amount, they may maintain an action for contribution against those who have not paid,[1] but only for a proportionate share of the amount expended in accomplishing the object of the subscription.[2] Instructions in an action on a subscription must not be argumentative.[3]

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**Substitution of Attorneys; Substitution of Parties; Subways; Succession,** see latest topical index.

9; Dec. Dig. §§ 1-9; 27 A. & E. Enc. L. (2ed.) 276.

**86.** Note delivered in escrow, to be paid to church if certain further sum be raised in given time, cannot be enforced unless supported by consideration. St. Paul's Episcopal Church v. Fields [Conn.] 72 A 145.

**87.** Fraud and misrepresentations of railway company consisting of statements that, unless citizens subscribed bonus for building road, it would be built to another point, held a defense to suit on note given by citizen as subscription to aid in its construction. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785.

**88. Search Note:** See notes in 4 C. L. 1587; 13 L. R. A. 698.

See, also, Subscriptions, Cent. Dig. §§ 10-24; Dec. Dig. §§ 10-20; 27 A. & E. Enc. L. (2ed.) 283.

**89.** Subscription contract providing for constructing railway line to connecting point of other lines, and to procure whatever right of way company might require at such point, construed to mean that all company could require was sufficient right of way to accomplish object in view. Boyce v. Stringfellow [Tex. Civ. App.] 114 SW 652. Subscription note payable when certain railway line, for aid in construction of which note was given, was in operation, held to embody time as essence. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785.

**90.** Contract to build canning factory, entered into by subscribers and contractor, could not be assigned by latter without consent of all subscribers. Johnson v. Vickers [Wis.] 120 NW 837.

**91.** Subscription contract for stock to organize creamery company held joint and several. Chicago Bldg. & Mfg. Co. v. Peterson [Ky.] 118 SW 384. Clause in subscription contract for stock in creamery association, "For any unpaid or deferred balance of subscription, all delinquent subscribers are jointly liable," held to be joint liability dependent upon delinquency. Id.

**92.** Los Angeles Nat. Bank v. Vance [Cal. App.] 98 P 58.

**93.** Los Angeles Nat. Bank v. Vance [Cal. App.] 98 P 58. Payment of total sum by other subscribers could not be regarded as payment by one who had not paid his subscription, for which he was severally liable; hence no suit for contribution could be maintained by him. Id.

**94.** Los Angeles Nat. Bank v. Vance [Cal. App.] 98 P 58.

**95.** Subscription to bond issue conditional upon subscription by others to certain amount created no liability where such amount was not subscribed. Real Estate Trust Co. v. Riter-Conley Mfg. Co. [Pa.] 72 A 695.

**96.** Resolution of standing committee of church that when certain legacy became available it should be used to make up part of amount, raising of which was condition for subscription, held insufficient, since not enforcible nor binding. St. Paul's Episcopal Church v. Fields [Conn.] 72 A 145.

**97.** Subscription which was not made by person apparently able to pay it would not be subscription in good faith within meaning of contract, though not made for purpose of committing fraud. Stone v. Monticello Const. Co. [Ky.] 117 SW 369.

**98.** Real Estate Trust Co. v. Riter-Conley Mfg. Co. [Pa.] 72 A 695.

**99. Search Note:** See Subscriptions, Cent. Dig. §§ 25-29; Dec. Dig. § 21; 27 A. & E.

**SUICIDE.**[4]

*The scope of this topic* is noted below.[5]

The common-law rule that if one counsels another to commit suicide, and the other, by reason of the encouragement and advice, kills himself, the adviser is guilty of murder as an aider and abettor, provided he was present when his advice was carried out, has been changed by statute in different states;[6] but if one has counseled another to commit suicide and later endeavors to persuade the other to abandon it, he is not guilty of a crime.[7] Where suicide is not a violation of law, it has been held not a crime for one to furnish the means to another to commit suicide.[8]

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**Summary Proceedings; Summary Prosecutions; Summons,** see latest topical index.

**SUNDAY.**

§ 1. Sunday as Dies Non Juridicus, 2002.
§ 2. Violation of Sunday Laws as Defense to Actions, 2002.
§ 3. Sunday Laws and Prosecutions for Their Violation, 2003.

*The scope of this topic* is noted below.

§ 1. *Sunday as dies non juridicus.*[10]—See 10 C. L. 1762.—Judicial business[11] may not be transacted on Sunday but ministerial acts may be lawfully performed on that day.[12]

§ 2. *Violation of Sunday laws as defense to actions.*[13]—See 10 C. L. 1762.—A contract executed[14] on Sunday is usually held to be void[15] as to one having some voluntary agency in consummating the contract on that day,[16] and is not susceptible of ratification,[17] and, while it may be subsequently adopted by the parties without

Enc. L. (2ed.) 283; 20 A. & E. Enc. P. & P. 1003.

1. Boyce v. Stringfellow [Tex. Civ. App.] 114 SW 652.

2. Certain subscribers, who in good faith had expended $5,000 for certain railroad construction, of which only $1,655 was actually used for purpose of which subscription was made, might compel subscribers who had not paid to contribute their proportionate share of the $1,655. Boyce v. Stringfellow [Tex. Civ. App.] 114 SW 652.

3. Instruction condemned. Ford v. Gray, 131 Mo. App. 240, 110 SW 692.

4. See 10 C. L. 1762.

**Search Note:** See notes in 36 L. R. A. 479; 66 Id. 304; 4 Ann. Cas. 1157; 8 Id. 354.

See, also, Suicide, Cent. Dig.; Dec. Dig.; 3 A. & E. Enc. L. (2ed.) 252; 20 A. & E. Enc. P. & P. 1189, 1198, 1201.

5. It includes only the offense of attempting to commit suicide and a few general holdings as to the nature and proof of suicide. For the effect of suicide as invalidating insurance policies, see Insurance, 12 C. L. 252; Fraternal Mutual Benefit Associations, 11 C. L. 1564.

6. Rev. St. 1899, § 1822 (Ann. St. 1906, p. 1266), provides that such acts constitute manslaughter. State v. Webb [Mo.] 115 SW 998.

7. State v. Webb [Mo.] 115 SW 998.

8. Sanders v. State [Tex. Cr. App.] 112 SW 68.

9. Includes Sunday as a nonjudicial day and violation of Sunday laws. Excludes sale of liquor on Sunday, see Intoxicating Liquors, 12 C. L. 332.

10. **Search Note:** See Sunday, Cent. Dig. §§§ 1, 73-85; Dec. Dig. §§ 1, 30; Time, Cent. Dig. §§ 34-52; Dec. Dig. § 10; 27 A. & E. Enc. L. (2ed.) 386.

11. Award made by statutory arbitration is judicial proceedings. Code Civ. Proc. Sec. 6. In re Picker, 130 App. Div. 88, 114 NYS 289.

12. Entry of judgment by clerk. Puckett v. Guenther [Iowa] 120 NW 123.

13. **Search Note:** See notes in 4 C. L. 1590; 10 Id. 1763; 17 L. R. A. 779; 4 L. R. A. (N. S.) 1151; 5 Id. 295; 13 Id. 1271; 15 Id. 243; 50 A. S. R. 641; 7 Ann. Cas. 634.

See, also, Sunday, Cent. Dig. §§ 1-64; Dec. Dig. §§ 1-27; 27 A. & E. Enc. L. (2ed.) 403.

14. A contract, signed by one party on Sunday but delivered and assented to by the other party on a secular day, is valid. Burr v. Nivison [N. J. Err. & App.] 72 A 72.

15. Contract for sale. King v. Graef, 136 Wis. 548, 117 NW 1058. Lease. Miles v. Janvrin, 200 Mass. 514, 86 NE 785. Contract of employment. Bendross v. State, 5 Ga. App. 175, 62 SE 728. Agreement for cancellation of insurance policies dated on secular day but in fact signed and delivered by insured and money paid to him by agents of insurer on Sunday. Horn v. Dorchester Mut. Fire Ins. Co., 199 Mass. 534, 85 NE 853. Contract made in violation of St. 1904, p. 477, c. 460, § 2, prohibiting doing certain business on Sunday under penalty, held void. Id.

16. Note executed in violation of Code, § 5040, is not void but voidable. Collins v. Collins [Iowa] 117 NW 1089.

17. King v. Graef, 136 Wis. 548, 117 NW 1058; Burr v. Nivinson [N. J. Err. & App.] 72 A 72.

formality,[18] it cannot be made to take effect from the beginning;[19] and acts done on a week day which are mere incidents to a Sunday transaction, will not save it from the condemnation of the statute.[20] Some courts hold, however, that a Sunday contract is voidable only.[21] Conversation relative to Sunday contract may be used to explain a subsequent contract.[22] The courts will not lend their aid in the enforcement of contracts which are illegal because made on Sunday but will leave the parties where it finds them,[23] and this is equally true whether the effort is made to sue directly on the contract or to interpose it as a defense to an otherwise valid cause of action.[24] A creditor who receives and retains a payment made on Sunday is estopped from denying such payment.[25]

§ 3. *Sunday laws and prosecutions for their violation.*[26]—See 10 C. L. 1763—Sunday means the entire day, from midnight Saturday until midnight Sunday.[27] A legislature may impose upon society the civil duty of observing one day in seven as a day of rest,[28] and laws to that effect are not unconstitutional,[29] but it is beyond its power to impose the observance of Sunday as a purely religious duty.[30] Constitutional religious rights are not violated by a statute prohibiting the sale of property on Sunday.[31] The scope of a law or ordinance with reference to the things, the sale of which is prohibited on Sunday, is a matter of construction.[32] Sunday laws usually except works of necessity and charity from their prohibitions.[33] By

**18.** Miles v. Janvrin, 200 Mass. 514, 86 NE 785. Defendant agreed on Sunday to sell plaintiff a car load of potatoes. The potatoes were weighed and paid for on Monday. Monday transaction construed as a new contract and not influenced by Sunday contract. King v. Graef, 136 Wis. 548, 117 NW 1058.

**19.** Miles v. Janvrin, 200 Mass. 514, 86 NE 785.

**20.** St. 1898, § 2308. King v. Graef, 136 Wis. 548, 117 NW 1058.

**21.** Collins v. Collins [Iowa] 117 NW 1089.

**22.** Miles v. Janvrin, 200 Mass. 514, 86 NE 785.

**23.** Although performance on Sunday of a valid contract will not be treated as a nullity, it will not be given an independently affirmative effect beyond mere performance. Horn v. Dorchester Mut. Fire Ins. Co., 199 Mass. 534, 85 NE 853.

**24.** Insurer cannot set up agreement to cancel insurance made on Sunday as defense to action on policies. Horn v. Dorchester Mut. Fire Ins. Co., 199 Mass. 534, 85 NE 853; Hurr v. Nivinson [N. J. Eq.] 69 A 1094.

**25.** Instalments on note were paid and testimony to that effect was objected to. Campbell v. Davis [Miss.] 47 S 546.

**26. Search Note:** See notes in 14 L. R. A. 192; 17 Id. 830; 22 Id. 721; 41 Id. 658, 670; 5 L. R. A. (N. S.) 320; 14 Id. 1259; 15 Id. 646; 30 A. S. R. 27; 78 Id. 264; 1 Ann. Cas. 93, 279, 282; 6 Id. 980; 7 Id. 934; 10 Id. 948, 1016.

See, also, Sunday, Cent. Dig. §§ 1-21, 66-72; Dec. Dig. §§ 1-8, 28, 29; 27 A. & E. Enc. L. (2ed.) 387.

**27.** Muckenfuss v. State [Tex. Cr. App.] 116 SW 51.

**28.** District of Columbia v. Robinson, 30 App. D. C. 283.

**29.** In re Donnellan, 49 Wash. 460, 95 P 1085; Ex parte Caldwell [Neb.] 118 NW 133. Not considered class legislation because certain articles are allowed to be sold on Sunday. Silverberg Bros. v. Douglass, 62 Misc. 340, 114 NYS 824. Are restraints upon civil liberty within the police power, and valid. Id.

**30.** Held, act of assembly of Maryland of 1723, chap. 16, was intended as a religious regulation and of no effect. District of Columbia v. Robinson, 30 App. D. C. 283.

**31.** Plaintiffs of Jewish faith claimed, because they kept Saturday as holy time, that they could not be prohibited from selling goods on Sunday as otherwise they would be denied religious liberty. Silverberg Bros. v. Douglass, 62 Misc. 340, 114 NYS 824.

**32.** "Goods, wares, and merchandise," and "other articles and things whatsoever," held to include newspapers on sale on tables and shelves of newsdealer. Newcastle City v. Treadwell, 35 Pa. Super. Ct. 30.

**33.** Barbering not a work of necessity. State v. Kuehuer [Mo. App.] 110 SW 605; Ex parte Caldwell [Neb.] 118 NW 133. Sales or deliveries of ice or fresh meat is not a work of necessity. State v. James, 81 S. C. 197, 62 SE 214. One who desires to set up the defense that his opening of a grocery on Sunday was a work of necessity or charity must prove by satisfactory evidence that the sales which he made were of a character that would bring them within a proper definition of works of necessity or charity. Schlichte v. State, 8 Ohio N. P. (N. S.) 265. The opening of a grocery on Sunday, for the purpose of selling to all who may come, is not a work of necessity, and is a clear violation of the statute forbidding the performance of common labor on that day.

**NOTE. Sale of foodstuffs as work of necessity:** The delivery of foodstuffs on Sunday may be recognized as a work of necessity (City of Topeka v. Hempstead, 58 Kan. 328, 49 P 87), but the sale of such commodities is not so privileged (State v. James, 81 S. C. 197, 62 SE 214, 18 L. R. A. [N. S.] 617; Arnheiter v. State, 115 Ga. 572, 41 SE 989, 58 L. R. A. 382; Commonwealth v. Crowley, 145 Mass. 430, 14 NE 459), nor is

statute in Pennsylvania, cities of the third class have authority to enact Sunday laws forbidding the sale of merchandise on that day.[34] Some states make it unlawful to give public exhibitions or amusements on Sunday,[35] but in Texas it is lawful if no admission fee is charged.[36] The keeping open of theater and selling tickets therein on Sunday is labor within the meaning of an ordinance prohibiting labor on that day.[37] The rule ejusdem generis applies in determining what acts fall within the prohibition.[38] Playing of baseball on Sunday is not a crime under the New York statute unless an admission is charged or the repose of the community is disturbed.[39] There seems to be a conflict of opinions in New York relative to the status of moving picture exhibitions given on Sunday.[40] A farm laborer who sells refreshments on only one Sunday is not guilty of violating a statute against "conducting a business" on that day.[41] Having in possession in the open air the implements of shooting on Sunday is prohibited by statute in Tennessee.[42] If a train is detained by unavoidable circumstances, it may continue until it reaches its destination without violating the Georgia statute forbidding the running of trains on Sunday.[43] By statutes of North Carolina the permission of the railroad company to the running of the trains is an essential ingredient of the offense.[44] A conviction cannot be had upon a statute prohibiting the performance of business on Sunday unless the complaint or record negatives the exceptions as to necessary and charitable acts,[45] and one conviction for opening place of business on Sunday is a bar to prosecutions for opening at other times on the same day,[46] as the separate acts only constitute one entire offense,[47] but one may, by reason of separate violations of the Sunday law, commit the single crime of conspiracy to defeat such law.[48] The time of committing the offense of running freight trains on Sunday is not material.[49] In Greater New York a theatrical license which allows Sunday

the sale of fruits, ices and pastries (City of Gulfport v. Stratakos, 90 Miss. 489, 43 S 812; Burry's Appeal, 1 Monaghan [Pa.] 89; Connor v. Quest, 36 L. T. [N. S.] 28) even within the statutory exception permitting sales of "milk, bread and other necessities" (State v. Jacques, 69 N. H. 220, 40 A 398), nor is the sale of milk permissible under a statute permitting its delivery on Sunday (Commonwealth v. Martin, 7 Pa. Co. Ct. 154), but an exception has been made as to the sale of lemons on the ground of their well known medicinal value (State v. Campbell, 206 Mo. 579, 105 SW 637). It cannot be assumed in the absence of proof that the sale of meat on Sunday is a work of actual present necessity (People v. Hagan, 36 Misc. 349, 73 NYS 564).—Adapted from 18 L. R. A. (N. S.) 617.

**34.** Ordinance held authorized by act of May 23, 1889, art. V, § 3, clause 28, P. L. 277. New Castle v. Cummings, 36 Pa. Super. Ct. 443.

**35.** Cannot perform as an actor. Peirce's Code § 1886 held constitutional. In re Donnellan, 49 Wash. 460, 95 P 1085.

**36.** Theater. Pen. Code 1895, art. 199. Ex parte Jacobson [Tex. Cr. App.] 115 SW 1193.

**37.** City of Topeka v. Crawford [Kan.] 96 P 862.

**38.** Ball playing is not prohibited by statute, making it a misdemeanor to play "at cards or game of any kind." Gen. St. 1901, § 2258. State v. Prather [Kan.] 100 P 57.

**39.** People v. Roach, 61 Misc. 42, 114 NYS 742.

**40.** **Held forbidden:** Moving picture show. Pen. Code, § 265. Gale v. Bingham, 110 NYS 12.

**Held not forbidden:** Moving pictures to illustrate public lecture. People v. Finn, 57 Misc. 659, 110 NYS 22. Indoor moving picture exhibition. People v. Hemleb, 127 App. Div. 356, 111 NYS 690. Not a "secular business" within the meaning of Pen. Code, § 259. William Fox Amusement Co. v. McClellan, 114 NYS 594. Moving picture shows in a hall for which admission is charged, and are not "public shows," as the term means out of door shows. Id. Not prohibited by Pen. Code, § 277 or § 1481 of the charter (Laws 1897, p. 522, c. 378.) Id.

**41.** Pen. Code 1895, § 442. Ellis v. State, 5 Ga. App. 615, 63 SE 588.

**42.** Acts 1903, p. 376. State v. Sexton [Tenn.] 114 SW 494.

**43.** The situation is not changed because the train is compelled to run to its destination on an extra schedule. Westfall v. State, 4 Ga. App. 834, 62 SE 558.

**44.** Revisal 1905, § 3844. State v. Atlantic Coast Line R. Co., 149 N. C. 470, 62 SE 765.

**45.** Wright v. State [Del.] 69 A 1003.

**46.** Muckenfuss v. State [Tex. Cr. App.] 116 SW 51.

**47.** State v. James, 81 S. C. 197, 62 SE 214.

**48.** Verdict of conspiracy to defeat Sunday laws held sustained by the evidence Commonwealth v. Boulos, 35 Pa. Super. Ct. 102.

**49.** Held that the variance between the indictment and proof as to the Sunday on which the train was run was not fatal. State v. Seaboard Air Line R. Co., 149 N. C. 508, 62 SE 1088.

performances cannot be revoked by summary proceedings but only by obtaining judgment for the penalty prescribed.[50] The violation of Sunday laws is a public grievance, and mandamus by a private person will not lie to compel the enforcement of the statute.[51]

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**Supersedeas; Supplemental Pleadings,** see latest topical index.

### SUPPLEMENTARY PROCEEDINGS.


§ 1. Nature, Occasion and Propriety, 2005.
§ 2. Proceedings Necessary on Which to Base Remedy, 2005.
§ 3. Application for Examination of Defendant and Debtors, 2006.
A. Affidavit and Opposition to Same, 2006.
B. Order and Citation Process on Warrant, 2006.
§ 4. Procedure At and After Examination, 2006.
§ 5. Relief Against Defendant, 2006.
A. Order for Payment or Delivery, 2006.
B. Receivership or Other Equitable Relief, 2007.
C. Contempt, 2008.


*The scope of this topic* is noted below.[52]

§ 1. *Nature, occasion and propriety.*[53]—See 10 C. L. 1765—Supplementary proceedings are not special proceedings but are proceedings in an action,[54] but while collateral to an original action are quite independent of it,[55] and, being summary in character, contemplates no pleadings or formal issue, their purpose being to discover property [56] which cannot be reached by ordinary processes.[57] It is the proper remedy to prevent disposition of property by a pledgee of the debtor, pending an action to determine the rights of property.[58] United States courts have authority to conduct examinations supplementary to execution as provided by the state laws.[59] In New York this proceeding may be brought before a city court justice.[60] In New Jersey, the district courts have jurisdiction thereof,[61] and a supreme court examiner may take depositions upon an order of discovery.[62] An agreement on consideration to refrain from supplementary proceedings is binding.[63]

§ 2. *Proceedings necessary on which to base remedy.*[64]—See 10 C. L. 1766—A final adjudication [65] in due form,[66] and in some states issue and return of execution,[67]

**50.** In re City of New York, 131 App. Div. 767, 116 NYS 353.

**51.** Sweet v. Smith, 153 Mich. 674, 15 Det. Leg. N. 560, 117 NW 59.

**52.** Includes statutory proceedings for the examination of execution debtors. The equitable procedure to the same end is treated in the topic Creditors' Suit, 11 C. L. 936.

**53. Search Note:** See Execution, Cent. Dig. §§ 1091-1105; Dec. Dig. §§ 358-372; 21 A. & E. Enc. P. & P. 85.

**54.** They are not within meaning of Code Civ. Proc. § 3334. Simon v. Underwood, 61 Misc. 369, 115 NYS 65.

**55.** Since they embrace all elements of an independent civil action. McKenzie v. Hill [Cal. App.] 98 P 55. Being then original proceedings, and not against the judgment debtor but against his debtor and in the nature of a creditor's bill, wherefore no notice of appeal need be served on judgment debtor. Id.

**56, 57.** Bennett v. Valley Min. Co. [Iowa] 120 NW 654.

**58.** Being essential under Comp. Laws, § 2705 and § 3226 not applying. Persing v. Reno Stock Brokerage Co. [Nev.] 96 P 1054.

**59.** Under U. S. Comp. St. 1901, p. 684, but not in N. Y. against a corporation debtor. Meyer v. Consolidated Ice Co., 163 F 400.

**60.** Under Code Civ. Proc. § 2434. Hottenroth v. Flaherty, 61 Misc. 108, 112 NYS 1111.

**61.** Under Act 1901, P. L. p. 372, which is applicable to district courts. Hershenstein v. Hahn [N. J. Law] 71 A 105.

**62.** Under authority granted him under P. L. 1903, p. 596, empowering him to take affidavits. Hershenstein v. Hahn [N. J. Law] 71 A 105.

**63.** So long as debtor fulfills his obligations although his conduct is very reprehensible in collateral matters. Swalm v. Lyons, 59 Misc. 384, 112 NYS 355.

**64. Search Note:** See notes in 21 A. S. R. 593.

See, also, Execution, Cent. Dig. §§ 1091, 1093; Dec. Dig. §§ 360, 369; 21 A. & E. Enc. P. & P. 103.

**65.** This remedy will be for the costs of a final order in a special proceeding, but not of an interlocutory order. Construing Code Civ. Proc. § 779 and § 2432, as amended by Laws 1896, p. 105, c. 176. In re Stoddard, 128 App. Div. 759, 113 NYS 157.

**66.** Will not lie upon a judgment containing a mistake in the name of the judgment debtor, until such error be corrected by amendment. Simon v. Underwood, 61 Misc. 369, 115 NYS 65. May be based upon a verdict, however informal, if such verdict be plain to the court. Kelley v. Bell [Ind.] 88 NE 58.

**67.** Lewis v. Beach, 112 NYS 200.

are prerequisite. Errors in the original action, which could have been determined by motion for new trial and appeal, will not be considered.[68]

§ 3. *Application for examination of defendant and debtors. A. Affidavit and opposition to same.*[69]—See 10 C. L. 1766—The affidavit may be made either by the judgment creditor or by his attorney on allegations of personal knowledge.[70] It should show the jurisdiction of the former court and allege that the judgment therein was duly recovered,[71] but need not aver under what statute the action is brought or specifically describe the property sought,[72] providing it substantially comply with all requirements.[73] The defendant may be designated by a fictitious name, if his real name is unknown, and a description be added identifying him.[74] An objection to supplemental proceedings that the property is not subject thereto goes to the sufficiency of each paragraph of the complaint and may be raised by a motion in arrest of judgment.[75]

(§ 3) *B. Order and citation process or warrant.*[76]—See 10 C. L. 1788—An error in the order by reason of a defect in the name of the person cited is waived by appearance.[77] The order should require the debtor to appear for examination in the county of his residence.[78] It may be served on the debtor while he is a juror.[79] Any obtainable witness needed,[80] and especially a third party having possession of property clearly belonging to defendant, may be ordered to appear and be examined.[81]

§ 4. *Procedure at and after examination.*[82]—See 10 C. L. 1787—The examination will not be conducted by a judge in vacation where the exercise of general equity powers is required.[83] Irregularities thereat not objected to[84] or which are concurred in by both parties are waived.[85]

§ 5. *Relief against defendant. A. Order for payment or delivery.*[86]—See 10 C.

**68.** Kelley v. Bell [Ind.] 88 NE 58.

**69. Search Note:** See Execution, Cent. Dig. §§ 1109-1113, 1121, 1125; Dec. Dig. §§ 377, 383, 387; 21 A. & E. Enc. P. & P. 117.

**70.** In proceedings under Code Civ. Proc. N. Y. § 432, especially when not attacked. Meyer v. Consolidated Ice Co., 163 F 400.

**71.** Under Code Civ. Proc. § 532, allegation that it was "duly recovered" is sufficient in place of "duly given or made" (Hottenroth v. Flaherty, 61 Misc. 108, 112 NYS 1111), especially in supplementary proceedings had in municipal court (Hilbring v. Wisansky, 59 Misc. 149, 110 NYS 184). Jurisdiction not shown where it fails to state that the corporation debtor had a place for the regular transaction of business in the county to which execution was issued. Under Code Civ. Proc. § 2458. Solomon v. Rosenfeld & Co., 114 NYS 770.

**72.** Where action brought under Gen. St. 1902, § 1099. Allen v. Lyness [Conn.] 71 A 936.

**73.** Though not necessarily as exact as in attachment and arrest. Meyer v. Consolidated Ice Co., 163 F 400. Allegation that execution was "duly issued" is sufficient statement that it was issued according to law in matters of substance as well as form, nor is there any material distinction between allegation that judgment was "duly recovered" or "duly rendered." Sheri v. Kurzman, 60 Misc. 332, 113 NYS 288.

**74.** Under Code Civ. Proc. § 451. But must amend upon true name being discovered. Simon v. Underwood, 61 Misc. 369, 115 NYS 65.

**75.** Kelley v. Bell [Ind.] 88 NE 58.

**76. Search Note:** See Execution, Cent. Dig. §§ 1114-1117, 1122, 1126-1128, 1142, 1143; Dec. Dig. §§ 378, 379, 384, 388, 389, 391; 21 A. & E. Enc. P. & P. 127.

**77.** Simon v. Underwood, 61 Misc. 369, 115 NYS 65.

**78.** Held to be in county where he voted and his family resided, though his business was elsewhere and he only visited his family occasionally. Lewis v. Beach, 112 NYS 200.

**79.** But if proceedings interfere with his duties, the court will give it due consideration on motion for continuance. Brown v. Edinger, 61 Misc. 366, 114 NYS 1116.

**80.** Within district and within 100 miles, as provided by U. S. Comp. St. 1901, p. 667. Meyer v. Consolidated Ice Co., 163 F 400.

**81.** Under Comp. Laws, § 3226, where title undisputed and third party claims no interest therein. Persing v. Reno Stock Brokerage Co. [Nev.] 96 P 1054.

**82. Search Note:** See Execution, Cent. Dig. §§ 1143-1155; Dec. Dig. §§ 393-400; 21 A. & E. Enc. P. & P. 140.

**83.** Such as dissolution of foreign corporation and distribution of assets through receiver. Bennett v. Valley Min. Co. [Iowa] 120 NW 654.

**84.** As in examination before referee, error being in order not naming judge to whom returnable. Lewis v. Beach, 112 NYS 200.

**85.** No error in not closing testimony where treated as closed by both parties. Hershenstein v. Hahn [N. J. Law] 71 A 105.

**86. Search Note:** See Execution, Cent. Dig. §§ 1156-1159; Dec. Dig. § 402; 21 A. & E. Enc. P. & P. 154.

L. 1767—Such order may reach United States consol bonds [87] and also real estate situated in the county where the order is made [88] when the debtor has not parted with title thereto,[89] unless the action be only for the recovery of costs.[90] It may also reach the leviable interest of a debtor in his property, though subject to a past due mortgage,[91] and other property not exempt.[92] Where such order is in form a court order instead of a judge's order, it is not void but voidable.[93] Two orders cannot be in force at the same time.[94] Harmless errors in its issuance will be disregarded.[95]

(§ 5) *B. Receivership or other equitable relief.*[96] *Receivership.* See 10 C. L. 1737 When a receiver is appointed as authorized by statute,[97] he is immediately vested with title to the debtor's property for the benefit alone of that creditor for whom the proceedings were instituted.[98] The court has no power to order the transfer of an interest to a receiver when such action would destroy the right of redemption.[99] A receiver does not take title to realty but only the right of possession,[1] and his authority does not extend beyond the rights of the creditor.[2] He pays money to the plaintiff at his peril during the time allowed defendant in which to appeal.[3]

*Action against third party.* See 10 C. L. 1767—In California, by order of the court or after a denial of indebtedness without such order,[4] a creditor may bring an action against the debtor of judgment debtor,[5] which action is designed to take the place of a creditor's bill,[6] and is not dependent upon a prior garnishment of the debt.[7] In such action the right of the creditor in garnishment upon execution to recover the debt from the garnishee is superior to any claim or demand accruing subsequently,[8] and any variance in the pleading and proof therein that could not mislead or prejudice the defendant will be disregarded.[9] The garnishee may set

87. Kelley v. Bell [Ind.] 88 NE 58.

88. Under § 4079 of Code, limited to county. Bennett v. Valley Min. Co. [Iowa] 120 NW 654.

89. Proper course if debtor has parted with title, is for receiver to bring action to set aside assignment. William A. Thomas Co. v. Lowenthan, 113 NYS 1092.

90. In re Stoddard, 128 App. Div. 759, 113 NYS 157.

91. Interest must be surrendered to receiver. Moss v. Lightfine, 60 Misc. 62, 111 NYS 675.

92. Property only qualifiedly exempt must be claimed. Moss v. Lightfine, 60 Misc. 62, 111 NYS 675.

93. Being order directing delivery to receiver and is not reviewable in contempt proceedings, but only upon direct review. Goldreyer v. Shatz, 114 NYS 339.

94. A second order supersedes the first. In re Fancher, 58 Misc. 11, 110 NYS 157.

95. Failure to file or have depositions signed till after order issued is immaterial under statute, where they were presented to judge prior thereto and omission was afterwards rectified. Hershenstein v. Hahn [N. J. Law.] 71 A 105.

96. **Search Note:** See notes in 4 C. L. 1593. See, also, Execution, Cent. Dig. §§ 1160-1193; Dec. Dig. §§ 404-413; 21 A. & E. Enc. P. & P. 181.

97. Under Code Civ. Proc. § 2464, construed with § 1810 et seq., receiver may be appointed for corporation. Rabbe v. Astor Trust Co., 61 Misc. 650, 114 NYS 131.

98. Under Code Civ. Proc. § 2468, and not for those who may subsequently have such receivership extended for their benefit. Hubbard v. J. P. Lewis Co., 128 App. Div. 416, 112 NYS 1050. A receiver appointed in supplementary proceedings under the New York statute is entitled to hold property against a trustee in bankruptcy subsequently appointed, but not unless he follows and takes possession of the same. Receiver appointed and a year later A went into bankruptcy. A owned a seat in the stock exchange and it was sold after his bankruptcy by the exchange and the cash deposited. Held receiver could not claim it. Wrede v. Gilley, 61 Misc. 530, 113 NYS 609.

99. Bennett v. Valley Mining Co. [Iowa] 120 NW 654.

1. Debtor and his wife may convey equitable interest to receiver as where title in another who is really mortgagee. Maples v. O'Brien, 116 NYS 175.

2. Where creditor is entitled to execution against personal property only, and none is found, receiver cannot be appointed though debtor has real estate. In re Stoddard, 128 App. Div. 759, 113 NYS 157.

3. And must look to the persons to whom he paid it for reimbursement. Johnson v. Joslyn, 47 Wash. 531, 92 P 413.

4. When order is issued under Code Civ. Proc. § 720 it is sufficient, if in substantial compliance with statute and defect is cured by denial by defendant. Nordstrom v. Corona City Water Co. [Cal.] 100 P 242.

5. As a garnishee. McKenzie v. Hill [Cal. App.] 98 P 55.

6. Proceeding under Civ. Code, §§ 717-720. Nordstrom v. Corona City Water Co. [Cal.] 100 P 242.

7. Nordstrom v. Corona City Water Co. [Cal.] 100 P 242.

8. Levy creates lien and, where made prior to death of garnishee, presentation of claim to administratrix is not necessary. Nordstrom v. Corona City Water Co. [Cal.] 100 P 242.

9. Variance relating to basic judgment.

off his claims existing against the judgment debtor at the time of the garnishment.[10] Such action is not barred by the statute of limitations, unless action is barred against the judgment debtor.[11] In an action against a third party to recover property fraudulently transferred, the gist of the action is the debtor's fraud,[12] and the creditor must allege and prove not only that a conveyance was made with intent to defraud subsequent creditors but also that the property was being concealed and withheld from the reach of civil [13] process, and that the debtor did not then have sufficient other property to pay his debts,[14] except in a case where it is contended by the plaintiff that it is still his property and merely transferred in trust.[15] A strong presumption of fraud will warrant a suit by the receiver to set aside a transfer,[16] and, while he need not make the debtor a party to such suit,[17] there should be actual notice to him of leave to sue.[18] If the receiver allege his due appointment, he need not aver that the judgment was duly recovered.[19] He may employ the attorney of the creditor to conduct the action.[20] He should not bring an action against innocent purchasers from transferee.[21]

(§ 5) *C. Contempt.*[22]—See 10 C. L. 1767—Obedience to orders may be enforced by contempt proceedings.[23] Contempt proceedings will not lie against a judgment debtor for false swearing upon his examination,[24] for failure to devote all his earnings to his creditors [25] or when the debtor's ability to comply with the order is not shown.[26] Proper service of the order [27] and its validity at the time of violation [28] are essential. After the violation of an order, he cannot impeach the proceeding because of a defect which does not of itself make the proceeding void,[29] nor can he avail himself of the defense that a default order, from which he has asked no

Nordstrom v. Corona City Water Co. [Cal.] 100 P 242.

**10.** Not claims arising subsequently. Nordstrom v. Corona City Water Co. [Cal.] 100 P 242.

**11.** Nordstrom v. Corona City Water Co. [Cal.] 100 P 242.

**12.** And future creditors must show grantee had agreed to hold title for debtor's benefit. Allen v. Lyness [Conn.] 71 A 936.

**13.** Allen v. Lyness [Conn.] 71 A 936.

**14.** "From the time" of the transfer is sufficient as alleging "at the time" of transfer Kelley v. Bell [Ind.] 88 NE 58.

**15.** Where transferred to his children. Kelley v. Bell [Ind.] 88 NE 58.

**16.** Fraud evidenced by convenient use of corporation laws and powers to cover property, where debtor, his wife, and his attorney comprised corporation. Brady v. Shary, 62 Misc. 236, 114 NYS 852.

**17.** Since title to debtor's property is vested in receiver. Rabbe v. Astor Trust Co., 61 Misc. 650, 114 NYS 131.

**18.** Where transferee was a corporation, affidavit by secretary in opposition disclosed actual notice. Brady v. Shary, 62 Misc. 236, 114 NYS 852.

**19.** Since third party will not be allowed in collateral proceeding to raise issue as to proceedings theretofore taken. Rabbe v. Astor Trust Co., 61 Misc. 650, 114 NYS 131.

**20.** Brady v. Shary, 62 Misc. 236, 114 NYS 852.

**21.** Where transferee, in reality held title only as security, although receiver may obtain judgment against such transferee for the debtor's interest. Maples v. O'Brien, 116 NYS 175.

**22. Search Note:** See Execution, Cent. Dig. §§ 1195-1204; Dec. Dig. §§ 416-419; 21 A. & E. Enc. P. & P. 165.

**23.** By Gen. St. 1902, § 1099. Allen v. Lyness [Conn.] 71 A 936. In Maine the arrest and imprisonment of the debtor is authorized in a disclosure matter. Under part of Rev. St. 1903, c. 114, as amended by Pub. Laws 1905, p. 144, c. 134 and p. 137, c. 131. Stuart v. Chapman [Me.] 70 A 1069.

**24.** And he cannot be punished therefor, especially when it does not appear that any right or remedy was impaired, impeded or defeated. Saggese v. Virgilio, 106 NYS 1100.

**25.** Since to require that would in substance make him a slave and require the court to enforce servitude. Hershenstein v. Hahn [N. J. Law] 71 A 105.

**26.** In absence of evidence by interrogatories and any contradiction, affidavits of defendant are taken as true, and in this case held not to be sufficient cause for adjudging guilty since inability to comply with order is shown. Hershenstein v. Hahn [N. J. Law] 71 A 105.

**27.** Defendant is not liable for contempt for failure to pay over to the receiver the property demanded until he has been properly served with a copy of the order appointing such receiver, nor is receiver's act in calling on defendant, showing copy of order and "satisfying" him of appointment, legal service. Dowling v. Twombly, 113 NYS 970.

**28.** Not for a violation of the first of two orders issued in the same proceedings, since where more than one was issued, only last is effective. In re Fancher, 58 Misc. 11, 110 NYS 157.

**29.** As where affidavit was voidable. In re Fancher, 58 Misc. 11, 110 NYS 157.

relief, is erroneous.[30] The creditor is liable for the false imprisonment of the debtor where he approves it by paying for his support in jail.[31] The punishment for contempt should be reasonable.[32]

**Support and Maintenance; Surcharging and Falsifying,** see latest topical index.

### SURETY OF THE PEACE.[33]

*The scope of this topic* is noted below.[34]

Where there are reasonable grounds for apprehending that one will commit an offense, the court may require a bond,[35] and an order requiring such bond is not appealable.[36] Actual violence, or a menace of violence, or any other act intended and calculated to excite alarm or to provoke a breach of the peace, is a violation of a bond to keep the peace.[37]

### SURETYSHIP.


**§ 1. Definitions and Distinctions, 2009.**
**§ 2. The Requisites of the Contract, 2010.**
**§ 3. The Surety's Liability, 2011.**
**§ 4. The Surety's Defense, 2013.**
A. Legal Defenses to Surety's Liability, 2013.
B. Defenses Based on Extinguishment or Absence of Principal's Liability, 2013.
C. Defenses Based on Change of Contract or Increase of the Risk, 2014.
D. Defenses Arising Out of Forbearance or Suspension of Liability of Principal, 2015.
E. Defenses Based on Impairment of Surety's Secondary Remedies Against Principal, Cosureties, or Collateral Securities, 2016.
F. Defenses Based on Fraud or Concealment by Creditor of Material Facts, 2017.
G. Other Defenses, 2017.
**§ 5. Rights of Surety Against Principal and Cosurety, 2017.**
**§ 6. Security Held by Surety and Rights Therein, 2020.**
**§ 7. Remedies and Procedure, 2020.**


*The scope of this topic* is noted below.[38]

§ 1. *Definitions and distinctions.*[39]—See 10 C. L. 1768—There must be a principal to the obligation before a condition of suretyship can arise.[40] An accommodation indorser is in effect a surety,[41] but there is a distinct difference between an ordinary indorser and a surety in their remedies to secure repayment.[42] The creation

**30.** As that disputed question of ownership was summarily determined. Goldreyer v. Shatz, 114 NYS 339.

**31.** In case where disclosure commissioner has acted without his jurisdiction. Stuart v. Chapman [Me.] 70 A 1069.

**32.** Where matter of inadvertence on part of debtor and he has submitted himself to examination, held it should not be greater than actual costs. In re Fancher, 58 Misc. 11, 110 NYS 157.

**33.** See 8 C. L. 2050.

**Search Note:** See notes in 90 A. S. R. 799. See, also, Breach of the Peace, Cent. Dig. §§ 1, 2, 3, 5-7, 9-15; Dec. Dig. §§ 15-22.

**34.** Includes proceedings to bind over for the keeping of the peace. As to bail bonds, see Bail, Criminal, 11 C. L. 361.

**35.** Where defendant in a labor strike had been guilty of acts tending to endanger life and property, bond was properly required. Lowe v. Com., 33 Ky. L. R. 1078, 112 SW 647.

**36.** Circuit Code Prac. § 347 does not provide for appeal in such cases. Lowe v. Com., 33 Ky. L. R. 1078, 112 SW 647.

**37.** To call a man a liar and raise a stick to strike him, if in anger, is a violation under Pen. Code 1895, §§ 1238, 1239. Rumsey v. Bullard, 5 Ga. App. 802, 63 SE 921

**38.** This topic excludes bonds (see Bonds, 11 C. L. 424), their requisites, form, and validity, and the rights and liabilities under particular kinds of bonds (see Indemnity, 11 C. L. 1892 [fidelity and like bonds]; Officers and Public Employes, 12 C. L. 1131 [official bonds]; Appeal and Review, 11 C. L. 118 [appeal bonds], and like topics); it is confined to the law of suretyship strictly.

**39. Search Note:** See notes in 9 L. R. A. (N. S.) 88; 10 Id. 436.

See, also, Principal and Surety, Cent. Dig. §§ 1-7; Dec. Dig. §§ 1-6; 27 A. & E. Enc. L. (2ed.) 43.

**40.** Barrett-Hicks Co. v. Glas [Cal. App.] 99 P 856. If no liability against principal, then none against surety. Hardaway v. National Surety Co., 211 U. S. 552, 53 Law. Ed. —. But see post, § 2. Southern States Life Ins. Co. v. Statham, 4 Ga. App. 482, 61 SE 886. Surety cannot be held on bail bond void as to principal, (Carr v. Davis, [W. Va.] 63 SE 326), nor on a bond where no judgment may be obtained against the principal as an injunction bond reading that sureties will pay, but not executed by principal. City of Chamberlain v. Quarnberg [S. D.] 119 NW 1026.

**41.** Osborne v. Fridrich [Mo. App.] 114 SW 1045.

**42.** Surety upon paying debt may sue prin-

of a copartnership does not create the relation of suretyship.[43] A surety on the obligation of a bankrupt is a "creditor" in the sense in which that term is used in the bankruptcy act.[44]

§ 2. *The requisites of the contract.*[45] See 10 C. L. 1768—It is essential to its validity that the surety be not disqualified by law to enter into such contract.[46] While it is necessary that there be a principal obligation,[47] failure of the principal to sign the bond does not necessarily invalidate the obligation.[48] Although a bond may not be so broad in description as the contract which it secures [49] or not exactly in statutory form,[50] it may yet be binding. Failure of the sureties to justify, when required by statute, is fatal to the validity of the bond.[51] A party may become a surety by his act of accepting a deed stipulating that he will assume and pay the mortgage indebtedness.[52] While a bond may be delivered in escrow to the principal,[53] it may not be so delivered to the obligee.[54] Mere irregularity in the filing [55]

cipal on implied promise to repay, but indorser must seek his remedy against maker through suit on note itself after having recovered it back from indorsee. Keye v. Keys' Estate [Mo.] 116 SW 537.

**43.** As where party purchases real estate and gives mortgage thereon and has agreement with another whereby he has interest therein. Downing v. Robinson [Md.] 71 A 129. Being distinct relations. Randall v. Union Trust Co. [Mich.] 16 Det. Leg. N. 92, 120 NW 594.

**44.** Under Bankr. Act. 1898 (U. S. Comp. St. 1901, p. 3418, and payment to him within the four month period may constitute a preference. Kahn v. Bledsoe [Okl.] 98 P 921.

**45. Search Note:** See notes in 2 Ann. Cas. 225, 487.

See, also, Principal and Surety, Cent. Dig. §§ 8-100; Dec. Dig. §§ 7-51; 27 A. & E. Enc. L. (2ed.) 432.

**46.** In Georgia a married woman may not be surety for her husband (McDaniel v. Akridge, 5 Ga. App. 208, 62 SE 1010), nor bind her separate estate therefor, nor assume nor pay her husband's debts, if creditor has reasonable cause to believe such is the effect of contract, but mere cause to suspect is not sufficient as notice (Third Nat. Bank v. Pal, 5 Ga. App. 113, 62 SE 826), but as against a bona fide holder for value, a married woman signing negotiable instrument will not be permitted to show that she was surety, for purpose of invalidating her contract, under Civ. Code § 2488. Smith v. First Nat Bank, 5 Ga. App. 139, 62 SE. 826. In Kentucky a married woman cannot be personally held as surety on note but she may pledge her separate property therefor or her general property with her husband's consent (Daviess County Bank & Trust Co. v. Wright, 33 Ky. L R. 45, 110 SW 361), and may be held as principal when she signs as such (Swearingen's Ex'r & Trustee v. Tyler [Ky.] 116 SW 331). Where payee refused to accept her except as principal, she is estopped to claim she signed as surety, though money received was used by her husband who also signed note, it being an ordinary business transaction where the payee received no benefit except interest. Id. Fact that married woman does not claim her right to be relieved on ground of coverture does not prevent her later pleading discharge from judgment on other grounds common to all sureties, such as statute discharging judgment after seven years. Columbia Bldg Loan & Sav. Ass'n's Assignee v. Gregory, 33 Ky. L. R. 1011, 112 SW 608.

**47.** See ante, § 1.

**48.** As where principal in bond would be able without reference to bond for acts constituting breach and where the parties bind themselves severally as well as jointly, citations given. United States Fidelity & Guaranty Co. v. Haggart [C. C. A.] 163 F 801.

**49.** Depres v. Folz, 134 Ill. App. 111.

**50.** An official bond given by surety company for pay and containing all statutory conditions but one, may be good as common-law bond. United States Fidelity & Guaranty Co. v. Rainey [Tenn.] 113 SW 397. A statutory bond conforms to the statute while a common-law bond does not, although it was so intended. City of Mt. Vernon v. Brett, 193 N. Y. 276, 86 NE 6. Stay bond is not sufficient as appeal bond. Libby v. Spokane Valley Land & Water Co. [Idaho] 98 P 715.

**51.** Rabb v. Thomas, 137 Ill. App. 255. Construing Rev. St. 1887, § 4842, as applicable, certificate of secretary of state is sufficient justification by surety company, but this is essential. Libby v. Spokane Valley Land & Water Co. [Idaho] 98 P 715.

**52.** Assumed by **accepting deed.** Perry v. Ward [Vt.] 71 A 721. Contract to assume and pay mortgage is not covenant of seisin or covenant against incumbrances since they do not inhere in and run with land, and it is not an integral part of the deed; and such clause is construed according to laws of state where contract was made, not where land is situated. Clement v. Willett, 105 Minn. 267, 117 NW 491. **No personal liability,** though deed specifies, taken subject to mortgage. Perry v. Ward [Vt.] 71 A 721. Where land was transferred subject to mortgages but not agreement to pay or assume, grantee, or his estate, was not personally liable, though assignor was husband of assignee. Kinney v. Heuring [Ind. App.] 87 NE 1053. In Minnesota, contrary to rule in Iowa, stipulation in deed to assume and pay mortgage for which grantor himself is not liable does not create personal liability, though where grantor had assumed, either he or mortgagee may maintain action against grantee. Clement v. Willett, 105 Minn. 267, 117 NW 491.

**53.** Where it was not to become operative until certain number of signatures obtained, then stipulation therein as to

or approval [56] of an official bond, or even its destruction before or after the benefits have been received under it, do not release the sureties from liability.[57]

§ 3. *The surety's liability.*[58]—See 10 C. L. 1768—A surety has the right to stand upon the strict terms of his obligation [59] and the intent of the parties,[60] as derived from a fair and intelligent construction of the language used,[61] and no intendment or presumption outside those necessarily arising on the performance of the contract may be indulged in against him.[62] The tender consideration accorded to a voluntary surety is not, however, accorded with the same force to surety com-

such number was notice to obligee, and conditions which it is not in his power to waive. French, Finch & Co. v. Hicks [Tex. Civ. App.] 114 SW 691. An agreement to secure other surety may be condition to delivery if creditor knows of it as from penciled notation thereon and further shown by parol he is bound thereby. Hunter v. First Nat. Bank [Ind.] 87 NE 734. Where sureties on obligation given for antecedent debt signed on condition that certain other persons would sign as sureties but such condition was not fulfilled, those who signed were not bound, though they were notified of receipt of obligation by obligee, and of names of obligators thereon, there having been, however, no waiver of the condition. Lemp Brewing Co. v. Secor [Okl.] 96 P 636.

**54.** Becomes binding from date of delivery to obligee. Snowden v. State 53 Tex. Cr. App. 439, 110 SW 442.

**55.** Where claimant's bond in attachment was served on plaintiff's attorney and approved by him, liability of sureties became fixed without filing under Municipal Ct. Act., § 85, filing being an irregularity that plaintiff could waive. Ehrlich v. Sklamberg, 116 NYS 602.

**56.** Failure of proper officer to approve official bond does not invalidate it, providing it be approved by his successor. United States Fidelity & Guaranty Co. v. Salyer [Ky.] 115 SW 767.

**57.** Ehrlich v. Sklamberg, 116 NYS 602.

**58. Search Note:.** See notes in 10 A. S. R. 843; 115 Id. 85; 1 Ann Cas. 383; 2 Id. 170, 355; 5 Id. 949; 6 Id. 919; 11 Id. 272.

See, also, Principal and Surety, Cent. Dig. §§ 103-130; Dec. Dig. §§ 59-87; 27 A. & E. Enc. L. (2ed.) 450, 533.

**59.** Bessemer Coke Co. v. Gleason [Pa.] 72 A 257; Terrell v. McLean, 130 Ga. 633, 61 SE 485. Parties who, in view of financial embarrassment of public **contractor,** agree for certain per cent of total cost, to complete contract, are not sub-contractors furnishing labor and material in sense which entitles them to recover on contractor's bond, conditioned under U. S. Comp. St. 1901, p. 2523, for prompt payment of all persons supplying contractor with labor and material. Hardaway v. National Surety Co., 211 U. S. 552, 53 Law. Ed. —. Bond, in an opinion dissented to, held to be to indemnify church only and not for lienors. Eureka Stone Co. v. First Christian Church [Ark.] 110 SW 1042. Under provision where sureties bound themselves for faithful performance of work, they are not liable for money improperly obtained by principal. Commonwealth v. Bacon, 33 Ky. L. R. 935, 111 SW 387. Not liable for material furnished to bonded contractor, which was not according to specifications or not used as provided in contract, but is liable for reasonable value of that used though of inferior quality. United States v. U. S. Fidelity & Guaranty Co. [Vt.] 71 A 1109. Sureties on bond of insurance agent held not liable for acts not contemplated by bond. McClary v. Trezevant [Tex. Civ. App.] 112 SW 954. Surety on bond given to discharge receiver in case of mortgage foreclosure is liable only for debt claimed in complaint at time bond is given and not for any additional sum that may be asked for in an amended complaint, especially where additional amount asked for would not constitute part of lien. Lacy Bros. & Kimball v. London [Ark.] 116 SW 207. Sureties upon bond of county school commissioner are not liable, upon bond providing for faithful discharge of his duties, for any moneys borrowed by such county board of education, since Pol. Code 1895, § 1363, does not include power to borrow money and transaction is individual and not official. Board of Education of Miller County v. Fudge, 4 Ga. App. 637, 62 SE 154. Relation may not be changed by charging bill directly to surety without his consent. Barrett-Hicks Co. v. Glas [Cal. App.] 99 P 856.

**60.** The intention of the parties may be considered. Chicago Crayon Co. v. McNamara [Mo. App.] 118 SW 118. Contract extends so far as intended and contracted though insurance policies not issued for all. Equitable Trust Co. v. Aetna Indemnity Co., 168 F 433. Rules for its construction are not to be confused with rule that sureties are favorites of the law and have right to stand upon the strict terms of their obligation (McMullen v. U. S. [C. C. A.] 167 F 460), but latter is rule of application rather than of construction (Daly v. Old [Utah] 99 P 460), and intention of parties is sought to be ascertained and the same rules apply as to the construction of contracts in general, court being governed by language and nature of circumstances (Cerero v. American Surety Co., 59 Misc. 548, 111 NYS 615). Agreement to build, construct and complete, requires to furnish material and is an agreement to protect against liens, which are not a cause but a consequence flowing from nonpayment. Stoddard v. Hibbler [Mich.] 16 Det. Leg. N. 114, 120 NW 787.

**61.** Contract guaranteeing payment of students room rent construed. Harvard College v. Kempner, 131 App. Div. 848, 116 NYS 437.

**62.** Eau Claire-St. Louis Lumber Co. v. Banks [Mo. App.] 117 SW 611. Sureties are liable for discrepancies only in accordance with precise terms of the bond. Turner v. National Cotton Oil Co. [Tex. Civ. App.] 109 SW 1112. Strict letter of attachment bond not extended by liberal interpretation. State v. Pitman, 131 Mo. App. 299, 111 SW 134.

panies acting for a consideration,[63] and has no application whatever in so far as an action affects the principal.[64] Where a contract made for pay is susceptible of two interpretations, that interpretation most favorable to the assured will generally be adopted,[65] if consistent with the object for which it was given,[66] but where the suretyship is a mere voluntary contract, doubtful questions are answered in favor of the surety,[67] and in either case the specific recitals of a bond will control the general provisions,[68] and a contract, for the performance of which it is given, must be construed as much a part thereof as though written therein.[69] While a bond is not presumed to cover prior obligations,[70] it may be made to do so by its express terms.[71] The sureties on an official bond are liable only[72] in accordance with the conditions specified[73] for the official conduct of the officer[74] during his term of office, unless otherwise agreed,[75] and where a statute makes such bond a lien upon the real estate of the obligors, it should be construed according to its positive, clear, and unmistakable requirements.[76] A surety is bound to take notice of public records[77] and of existing statutes,[78] but in the absence of a statute otherwise providing is not liable for any fines and penalties that may be assessed against the principal,[79] and may procure its release from such bond as by statute provided.[80] A

63. Atlantic Trust & Deposit Co. v. Laurinburg [C. C. A.] 163 F 690; Lakeside Land Co v. Empire State Surety Co., 105 Minn. 213. 117 NW 431. They being bound by contracts carefully drawn by themselves and as a general rule satisfactorially secured by counter indemnity. Baglin v. Title Guaranty & Surety Co., 166 F 356. Before a bonding company can be released, it must show that the change made in a contract operated injuriously to affect its rights and liabilities. Atlantic Trust & Deposit Co. v. Laurinburg [C. C. A.] 163 F 690. Stricter rule for noncompensated than compensated surety, but both are bound unless there has been a substantial deviation. Title Guaranty & Trust Co. v. Murphy [Wash.] 100 P 315.

64. Not apply where action on injunction bond was dismissed as to sureties and proceeded against principal alone. Akin v. Rice [Mo. App.] 117 SW 655.

65. But plain, unambiguous words having but one meaning are not subject to interpretation (Lesher v. U. S. Fidelity & Guaranty Co., 239 Ill. 502. 88 NE 208), though, like other contracts, insurance contract should receive reasonable construction in order to carry out presumed intention of parties as expressed by language used (Bryant v. American Bonding Co., 77 Ohio St. 90, 82 NE 960).

66. Chicago Crayon Co. v. McNamara [Mo. App.] 118 SW 118.

67. Bryant v. American Bonding Co.. 77 Ohio St. 90, 82 NE 960.

68. Bond of insurance agent applying to loans and advances made "for the purpose of enlarging his business. or otherwise," held not to apply to personal advances made for support of his family. New York Life Ins. Co. v. McDearmon, 133 Mo. App. 671, 114 SW 57.

69. Litchgi v. Gottlieb [Mo. App.] 113 SW 1134.

70. Merrinane v. Miller [Mich.] 15 Det. Leg. N. 811, 118 NW 11.

71. Injunction bond. Fidelity & Deposit Co. v. Walker [Ala.] 48 S 600.

72. For official conduct and not for fees received to which he was not entitled, and such bond not to be treated as a common-law obligation as to such fees. Rice v. Vasmer [Tex. Civ. App.] 110 SW 1005. Not liable where probate judge takes possession of property unlawfully and converts it to his own use. Stephens v. Hendee, 80 Neb. 754, 115 NW 283.

73. Kuhl v. Chamberlain [Iowa] 118 NW 776.

74. To hold securities, it must appear that there was breach of official duty for which sureties were answerable under bond and that damage resulted. Terrell v. McLean, 130 Ga. 633, 61 SE 485. Administrator is liable on his bond for whatever property he receives in virtue of his representative character, although it may not belong to estate. Wiseman v. Swain [Tex. Civ. App.] 114 SW 145. The sureties on offical bond of clerk of superior court are answerable in damages to parties injured by officer's misconduct and neglect. Terrell v. McLean, 130 Ga. 633, 61 SE 485.

75. Ordinarily indemnity bond given by indemnity bonding company will be construed to extend for term of office, but not where the application and bond construed together show otherwise and where the officer fails to pay annual premium. Bryant v. American Bonding Co., 77 Ohio St. 90, 82 NE 960. Bond of officer of corporation held to be for period of his appointment, as disclosed by by-laws and rules of corporation. First Nat. Bank v. Samuelson [Neb.] 118 NW 81. Sustained and rehearing denied in Id. [Neb.] 119 NW 250.

76. Not take bond from section under which it was given and place it under another section. See Laws 1892, p. 360, also, p. 1656, amended by Laws 1894, p. 841, c. 403. City of Mt. Vernon v. Brett, 193 N. Y. 276, 86 NE 6.

77. Executor's bond. Bankers' Surety Co. v. Wyman [Iowa] 120 NW 116.

78. Not liable for fines and penalties provided for by a statute enacted after such bond was given. Hunter State Bank v. Mills [Ark.] 117 SW 760.

79. Hunter State Bank v. Mills [Ark.] 117 SW 760.

80. Under Civ. Code, § 812, and Laws 1901, p. 1290, surety on guardian bond entitled to

surety on a building contract is liable to the extent of the bond for amounts expended above the contract price after the contractor has abandoned the work,[81] but where, by consent he takes charge, he is not bound by any statements of the contractor made thereafter.[82] A judgment against sureties is limited to the amount fixed in the bond [83] and the actual loss or expenditure of the creditor.[84]

§ 4. *The surety's defense. A. Legal defenses to surety's liability.*[85]—See 10 C. L. 1770—A surety for pay cannot attack the constitutionality of an act requiring its principal to give bond,[86] or plead invalidity of his appointment,[87] or the action requiring the bond.[88] The burden is upon a surety to sustain a defense of ultra vires.[89] A surety may interpose the defense of usury [90] and of the statute of limitations by pleading such defenses.[91] Partial payment by a principal will toll the statute of limitations as to the defense of a surety.[92]

(§ 4) *B. Defenses based on extinguishment or absence of principal's liability.*[93]—See 10 C. L. 1770—A surety has the benefit of any defense which might be available to the principal,[94] such as failure of consideration,[95] release,[96] or absence of contractual liability,[97] since their liabilities are the same.[98] But while the general rule prevails that, where there is no liability on the principal, none exists against the sureties,[99] an exception is found where a person becomes surety for a married

discharge on notice to principal as matter of right, and court can not fix arbitrary condition thereto. In re American Surety Co., 61 Misc. 542, 115 NYS 860. Statute providing conditions whereunder surety on bond may apply for and secure release held not to be retroactive, since statutes, unless expressly stated otherwise, are prospective only. In re Pope's Estate, 103 Me. 382, 69 A. 616.

**81.** Eureka Stone Co. v. First Christian Church [Ark.] 110 SW 1042.

**82.** Where contractor agreed to allowance of an improper claim. Exposition Amusement Co. v. Empire State Surety Co., 49 Wash. 637, 96 P 158.

**83.** City of Chamberlain v. Quarnberg [S. D.] 119 NW 1026.

**84.** Plaintiff cannot recover for part yet in hand and which he is under no legal obligation to pay out, as where liens were not filed. Woodruff v. Schultz [Mich.] 15 Det. Leg. N. 899, 118 NW 579.

**85. Search Note:** See notes in 17 L. R. A. 460, 13 L. R. A. [N. S.] 576; 18 A. S. R. 614. See, also, Principal and Surety, Cent. Dig. §§ 390-396; Dec. Dig. §§ 141-144; 27 A. & E. Enc. L. (2ed.) 489.

**86.** Laws 1907, p. 263, c. 185, considered. Patti v. United Surety Co., 61 Misc. 445, 115 NYS 844.

**87.** As Guardian. Talbott v. Curtis [W. Va.] 63 SE 877.

**88.** It is too late, after it and its principal have reaped the benefit, to plead that city had no authority to require or to accept such bond. Aetna Indemnity Co. v. Little Rock [Ark.] 115 SW 960.

**89.** Baglin v. Title Guaranty & Surety Co., 166 F 356.

**90.** Osborne v. Fridrich [Mo. App.] 114 SW 1045.

**91.** Bank of Wilkesboro v. Wilkesboro Hotel Co., 147 N. C. 594, 61 SE 570.

**92.** But not when made on a renewal note which surety deems invalid. State v. Allen, 132 Mo. App. 98, 111 SW 622.

**93. Search Note:** See notes in 4 C. L. 1599; 9 L. R. A. (N. S.) 581; 14 Id. 507; 2 Ann. Cass. 766; 4 Id. 884; 8 Id. 245. See, also, Principal and Surety, Cent. Dig. §§ 219-239, 392; Dec. Dig. §§ 109-113, 143; 27 A. & E. Enc. L. (2ed.) 489.

**94.** Under P. S. 2689. United States v. U. S. Fidelity & Guaranty Co. [Vt.] 71 A 1109.

**95.** Duggan v. Monk, 5 Ga. App. 206, 62 SE 1017.

**96.** A party, having released the principal, will not be permitted to show in action against surety that such release was obtained through fraud and to avoid the same, while retaining proceeds of settlement. Cook v. Fidelity & Deposit Co. [C. C. A.] 167 F 95. As trial on appeal from justice court is trial denovo, plea of discharge in bankruptcy presents valid defense and releases sureties on appeal bond. U. S. Comp. St. 1901, p. 3428, providing sureties not released by discharge of bankrupt, having no application. House v. Schnadig, 235 Ill. 301, 85 NE 395. Since act has not happened upon which liability of surety was made to depend. Id. But not by reason of payment where creditor choose to apply payment made upon one of two debts for which there is no surety, since that is his privilege. Where no direction to the contrary. Cain v. Vogt, 138 Iowa 631, 116 NW 786.

**97.** Absence of principal's liability is not shown, in suit on bond for paving contract by pleading failure of the city to keep the street clean, where it does not appear that it agreed to do so. Aetna Indemnity Co. v. Little Rock [Ark.] 115 SW 960.

**98.** A surety on an administrator's bond has no right to any favor or immunity that would not be accorded to his principal (Ordinary v. Connolly [N. J. Eq.] 72 A 363), since the liability of principal is necessarily the liability of his sureties (Wiseman v. Swain [Tex. Civ. App.] 114 SW 145), but ordinarily surety may have the benefit of any defense which his principal could plead, such as fraud and deceit practiced on principal in execution of note (City Nat. Bank v. Jordan [Iowa] 117 NW 758).

**99.** See ante, § 1.

woman, minor or other person incapable of contracting.[1] He may not plead a counterclaim or set-off existing in favor of such principal,[2] unless it be a judgment obtained in the action in which the bond sued on was given,[3] or a set-off allowed by statute where the principal consents.[4]

(§ 4) *C. Defenses based on change of contract or increase of the risk.*[5] See 10 C. L. 1771—Sureties are favorites of the law,[6] and any material alteration in the contract[7] or change therein, increasing the risk of the surety,[8] not within the contemplation of the parties[9] or terms of the whole agreement[10] as they

1. Gates v. Tebbetts [Neb.] 119 NW 1120. Even voluntary surety cannot raise defense of infancy of principal. Harvard College v. Kempner, 131 App. Div. 437, 116 NYS. 437.

2. Elliott v. Brady, 192 N. Y. 221, 85 NE 69.

3. In action on attachment bond, surety may set off amount of judgment obtained by his principal against obligee, in action in which bond was given. State v. U. S. Fidelity & Guaranty Co. [Mo. App.] 115 SW 1081.

4. With such consent, a surety may, when sued alone, set off a debt due principal from the creditor at the commencement of the action, under Code 1896, § 3731. Fidelity & Deposit Co. v. Walker [Ala.] 48 S 600.

5. **Search Note:** See notes in 10 L. R. A. (N. S.) 1160; 6 A. S. R. 458; 28 Id. 691; 5 Ann. Cas. 442; 6 Id. 359

See, also, Principal and Surety, Cent. Dig. §§ 143-185; Dec. Dig. §§ 93-102; 27 A. & E. Enc. L. (2ed.) 494.

6. And are entitled to stand strictly upon the terms of their contract,. and if it be altered in any material manner, without their consent or knowledge, they are discharged. Parker Land & Imp. Co. v. Ayers [Ind. App.] 87 NE 1062.

7. Haigler v. Adams, 5 Ga. App. 637, 63 SE 715. Any **material** departure releases surety. Stoddard v. Hibbler [Mich.] 16 Det. Leg. N. 114, 120 NW 787. Changes held to be material in building contract. Luling Oil & Mfg. Co. v. Gohmert [Tex. Civ. App.] 110 SW 772. Evidence held to show changes increased expense and not to be in this case an agreement for more additions to building, which might be treated as new, separate and distinct contract leaving original contract undisturbed. Woodruff v. Schultz [Mich.] 15 Det. Leg. N. 899, 118 NW 579. Court could not say change immaterial though it reduced debt where greater cash payment was required than agreed. Chandler Lumber Co. v. Radke, 136 Wis. 495, 118 NW 185. Sureties on paving contract, who guarantee paving to last a certain number of years, have the right to insist that it be laid at the specified heat, since change therein would impair its durability. Aetna Indemnity Co. v. Little Rock [Ark.] 115 SW 960. Held **not material variation in building contract,** where constructed in accordance with specification changed to correct a mere technical error. Nowell v. Mode, 132 Mo. App. 232, 111 SW 641. Where not change in contract but mere change in manner of doing work or alteration of plans, and though contract contain provision for written order, surety not released by noncompliance, especially where changes do not materially alter contract price or cost, and not materially affect obligation of surety, but if work is substantially changed, in such case, whether with or without a written order surety is released. Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729. Where the contract on bond does not provide time of payment, surety is not released by payment to contractor before completion of work (Litchgi v. Gottlieb [Mo. App.] 113 SW 1134), or by changes in work not included within the terms of contract (Aetna Indemnity Co. v. Little Rock [Ark.] 115 SW 960), or by mere assignment of money due, where contract prohibits assignment of work (City of New Rochelle v. Aetna Indemnity Co., 115 NYS 135). Court may properly submit to jury the question of whether change was such as to constituute change in contract or simply change in manner of doing work under contract. Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729. Admission of others to premises who are not tenants under lease, and by which there is no modification of the lease, held not material variation. Dodd v. Vucovich [Mont.] 99 P 296. Evidence of variation is admissible as a defense under a lease. Revel Realty & Sec. Co. v. Maxwell, 115 NYS 1033.

8. Where contract provided that last payment should be held until completion of work and all was paid in advance. Leiendecker v. Aetna Indemnity Co. [Wash.] 101 P 219. Change in manner of principal's compensation and in method of doing business, where bond given for faithful performance, increases risk. Despres v. Folz, 134 Ill. App. 111. Widow gave note for deceased husband's indebtedness, which was afterwards partly paid out of the estate. Held simply to diminish her liability and not to release her. Golding v. McCall, 5 Ga. App. 545, 63 SE 706.

9. McMullen v. U. S. [C. C. A.] 167 F 460. Modifications of the character contemplated by the parties to the bond do not relieve the surety. Jersey City Water Supply Co. v. Metropolitan Const. Co. [N. J. Law] 69 A 1088. Changes in building contract held immaterial. Cooke v. White Common School Dist. No. 7, 33 Ky. L. R. 926, 111 SW 686. A surety, who signs defective statutory bond, is not released by its subsequent amendment by order of court, since he signs it with knowledge of law permitting such amendment. Gelders v. Mathews [Ga. App.] 64 SE 576.

10. Variance between bond and specifications of contract, where work according to specifications not material. Title Guaranty & Trust Co. v. Murphy [Wash.] 100 P 315. Where bond enlarges right to make changes over the contract made previous thereto, bond will control. Hax-Smith Furniture Co. v. Toll, 133 Mo. App. 404, 113 SW 650. Sureties are discharged as to any substantial change of plan of work, unless right given in bond or contract which it guar-

remain in force,[11] made by the obligee or by his authority[12] and without the consent of the surety,[13] will in equity[14] release the surety,[15] even in some cases where such surety is not injured thereby,[16] but a mere attempted change[17] or violation[18] of the contract has not such effect.[19] Where collateral is treated as surety for the debt of another, it will be released under the same circumstances as a surety personally bound.[20] The burden of proving a material alteration is upon the complaining surety.[21]

(§ 4) *D. Defenses arising out of forbearance or suspension of liability of principal.*[22]—See 10 C. L. 1772—Likewise,[23] an extension of time granted for a valid

antees regardless of whether surety for pay. Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729. Not released by change authorized by the terms of contract. Eureka Stone Co. v. First Christian Church [Ark.] 110 SW 1042.

**11.** An endorsed condition on trust deed given as security and permitting an extension on payment of interest is not revoked by death of surety. Prussing v. Lancaster, 234 Ill. 462, 84 NE 1062; Lancaster v. Prussing, 139 Ill. App. 33.

**12.** Acts of defendant's principal in making changes, but not assented to by other party, do not release the surety of building contractor. Equitable Trust Co. v. Aetna Indemnity Co., 168 F 433. A material alteration in contract by stranger to it, or by one of several sureties without privity of obligee, does not avoid contract in its entirety, even though without consent of parties to be bound, but recovery may be had in accordance with original terms. Union Oil Co. v. Mercantile Refining Co. [Cal. App.] 97 P 919

**13.** School Dist. of Barfield v. Green [Mo. App.] 114 SW 578. Surety may consent in advance to changes or alterations which may be made in character of the work or manner of doing it. Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729. Burden on other party to show his actual consent, which is something more than knowledge. Cal. cases cited. Barrett-Hicks Co. v. Glas [Cal. App.] 99 P 856. Provision that any changes agreed to by owner or architect shall not release sureties is valid. Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729. Where surety consents to all changes that may be made in the manner of doing work, provision for written order is presumed to be for benefit of plaintiff and may be waived by him without releasing surety. Id. Sureties knowing of alteration and not notifying obligee and permitting him to act in belief that it was made by their authority are estopped to claim it was made by cosurity without their authority. Union Oil Co. v. Mercantile Refining Co. [Cal. App.] 97 P 919.

**14.** The equity of surety to be discharged when prejudiced by any act of creditor does not depend upon contract to that effect, but upon fact that it is inequitable in creditor knowingly to prejudice rights of surety, and fact that bona fide holder for value of negotiable instrument did not know of suretyship of an apparently joint maker when he took the paper makes foregoing rule no less applicable, if he was given notice of suretyship before he did the prejudicial act by which discharge is alleged to have been effected. Smith v. First Nat. Bank, 5 Ga. App. 139, 62 SE 826.

**15.** To the extent of the injury, as where advances were made to bonded contractor contrary to agreement. Jersey City Water Supply Co. v. Metropolitan Const. Co. [N. J. Law] 69 A 1088.

**16.** Even though it may appear that the change is for his benefit. American Bonding Co. v. U. S. [C. C. A.] 167 F 910. But there is liberal construction of contract where sureties are not injured, and surety on contractor's bond is not released where another is placed in charge of work by owner under agreement with surety after abandonment by contractor. Title Guaranty & Trust Co. v. Murphy [Wash.] 100 P 315. Strict rule as to change of contract applies regardless of injury to surety, unless statute to the contrary, but since no injury resulted to surety from alteration, he was not released under Rev. Code, §§ 5686, 5673-4 Dodd v. Vucovich [Mont.] 99 P 296. Surety is bound only by strict terms, and it is not question of whether he is harmed or benefited, and advance payments made contrary to contract may discharge him. Eager v. Seeds [Okl.] 96 P 646. A change not injuring was held not to discharge surety. Eureka Stone Co v. First Christian Church [Ark.] 110 SW 1042.

**17.** Surety was not released by modification by parol which did not become binding by performance or otherwise (Willis v. Fields [Ga.] 63 SE 828), or by extension of time to which principal did not consent and where no consideration was given (Moyses v. Schendorf, 238 Ill. 232, 87 NE 401), or by unenforcible agreement by creditor to indulge principal (Corydon Deposit Bank v. McClure, 33 Ky. L. R. 679, 110 SW 856), or by mere mention of a change or giving right to apply therefor without consent that it may be made (McMullen v. U. S. [C. C. A.] 167 F 460). Extension of time granted where not provided for is a material variation. Id.

**18.** Invalid assignment by tenant of lease by assigning bogus copy while plaintiff retained original and had no part in such assignment did not release surety on lease. Fleck v. Feldman, 110 NYS 412.

**19.** Since act constituting change must have been done without consent of surety and by consent of one authorized to make it valid in order to release surety, an endorsement on note is not alone sufficient to show binding extension of time by payment of interest. Prussing v. Lancaster, 234 Ill. 462 84 NE 1062.

**20.** Daviess County Bank & Trust Co. v. Wright, 33 Ky. L. R. 45, 110 SW 361.

**21.** See post (§ 4) D. Prussing v. Lancaster, 234 Ill. 462, 84 NE 1062; Lancaster v. Prussing, 139 Ill. App. 33.

**22. Search Note:** See notes in 53 L. R. A. 316; 5 L. R. A. (N. S.) 764; 10 Id. 129.

See, also, Principal and Surety, Cent. Dig.

consideration [24] or the acceptance of a new obligation due at a later time,[25] without the consent of the surety [26] and by authority of the creditor,[27] extinguishes the surety's liability,[28] as does any act whereby the creditor to the possible injury [29] of the sureties, interferes with their right to protect themselves,[30] unless it amount to a mere indulgence,[31] failure or refusal of the creditor to prove a debt in bankruptcy [32] or failure to present his claim against the estate of a deceased principal, does not release the surety,[33] but when the creditor has the right and opportunity to apply property of the principal to the satisfaction of his debt, his failure to do so effects such release.[34] A request upon the creditor to take action against the principal must conform to the statute to be available as a release.[35] While, as in the case of other alterations of contract, the burden is on the surety to show an actual and binding change,[36] any extension of time is presumed to be to his prejudice.[37].

(§ 4) *E. Defenses based on impairment of surety's secondary remedies against principal, cosureties, or collateral securities.*[38]—See 10 C. L. 1772—A surety is released by the discharge [39] of his cosurety without his consent.[40] Failure of the obligee to have an instrument recorded or probated as required by law within a reasonable time [41] and the improper conversion of collateral security by the creditor are valid defenses.[42]

§§ 186-218, 352-355; Dec. Dig. §§ 103-108; 27 A. & E. Enc. L. (2ed.) 508.

**23.** For general rule as affect of any change in contract, see ante (§ 4) C.

**24.** If no consideration, surety is not discharged. Eureka Stone Co. v. First Christian Church [Ark.] 110 SW 1042.

**25.** Smith v. First Nat. Bank, 5 Ga. App. 139, 62 SE 826. By taking renewal note in consideration of payment of interest in advance, and where principal then solvent has become bankrupt. Morehead v. Citizen's Deposit Bank [Ky.] 113 SW 501.

**26.** Although the sureties on bond of justice of the peace are not discharged by failure of notice to them of his default, yet where county attorney agrees that such justice may use fees due to such attorney, sureties are released as to such fees. Wright v. Deaver [Tex. Civ. App.] 114 SW 165. If surety consent, he is not discharged. Powers v. Woolfolk, 132 Mo. App. 354, 111 SW 1187.

**27.** Surety not released by extension by agent without authority. Fullerton Lumber Co. v. Snouffer [Iowa] 117 NW 50.

**28.** Surety's right to pay off debt when due cannot be taken away by extension to debtor by creditor, as that would work a novation. Daviess County Bank & Trust Co. v. Wright, 33 Ky. L. R. 45, 110 SW 361.

**29.** Extension of time on deposit of additional security does not release bonding company. Baglin v. Title Guaranty & Surety Co., 166 F 356.

**30.** Execution of supersedeas bond held to release sureties on forthcoming bond, whether principals on forthcoming bond were solvent or not. Broughton v. Saylor, 33 Ky. L. R. 611, 110 SW 866.

**31.** Even though agreed to by creditor and for definite length of time, not being binding. Daviess County Bank & Trust Co. v. Wright, 33 Ky. L. R. 45, 110 SW 361. All that surety has right to require of creditor is that no affirmative act shall be done that will operate to his prejudice, as the law affords him sufficient protection. Yerxa v. Ruthruff [N. Dak.] 120 NW 758. Surety cannot relieve himself from liability by simple request of creditors to proceed against principal, nor will mere passiveness on the part of the creditor relieve him, especially where active diligence would hazard releasing surety. Id.

**32.** Under U. S. Comp. St. 1901, p. 3428. Gordon v. Farmers' & Merchants' Bank, 5 Ga. App. 244, 62 SE 1024.

**33.** In absence of statute to contrary, since surety could pay claim and then present it, or present it without paying. Yerxa v. Ruthruff [N. D.] 120 NW 758.

**34.** A waiver of such right without the consent of the surety discharges the surety at least pro tanto where liability for labor and material. Pauly Jail Bldg. & Mfg. Co. v. Collins [Wis.] 120 NW 225.

**35.** Under Civ. Code, § 2974, must be in writing. Jordan v. Farmers' & Merchants' Bank, 5 Ga. App. 244, 62 SE 1024.

**36.** See ante, § 4C. Where payment of interest is only consideration promised for extension of time upon such payment, the agreement to extend becomes binding, but if the giving of renewal note is also made condition to extension, both must be done before it is binding. Farmers' Bank v. Wickliffe [Ky.] 116 SW 249.

**37.** Daviess County Bank & Trust Co. v. Wright, 33 Ky. L. R. 45, 110 SW 361.

**38. Search Note:** See notes in 9 L. R. A. (N. S.) 557; 13 Id. 576; 16 Id. 343; 3 Ann. Cas. 433.

See, also, Principal and Surety, Cent. Dig. §§ 240-296; Dec. Dig. §§ 114-119; 27 A. & E. Enc. L. (2ed.) 512.

**39.** Where creditor dismisses his action as to one surety or his representatives, that does not release remaining sureties. Carlton v. Krueger [Tex. Civ. App.] 115 SW 619.

**40.** Hunter v. First Nat. Bank [Ind.] 87 NE 734. Release of one surety by obligee releases all not consenting thereto who signed after, and possession of bond by obligee at time of alteration is prima facie evidence made by or with his consent. Hilliboe v. Warner [N. D.] 118 NW 1047.

**41.** Where mortgage on property of prin-

(§ 4) *F. Defenses based on fraud or concealment by creditor of material facts.*[43] See 10 C. L. 1772—Fraud by the obligee against either the principal [44] or the surety, unless waived by a subsequent act [45] or by an existing legal presumption in the case of official bonds,[46] is a sufficient defense; but the mere concealment of an immaterial fact [47] or a collateral matter [48] or even a false statement by a public officer not amounting to a breach of duty [49] does not constitute fraud.

(§ 4) *G. Other defenses.*[50] See 10 C. L. 1773—When a bond is signed by the surety upon a certain consideration, failure thereof relieves him from liability.[51] A new bond does not necessarily terminate the old, in the absence of evidence to the contrary.[52] Mere failure by plaintiff to inform the court, where an action is brought on contract against two parties that the relation of principal and surety exists, does not release the surety.[53] In a suit on a supersedeas bond, the sureties may prove tender and failure of the creditor to accept and thereby absolve themselves to amount of value thereof.[54] The temporary hindrance or claim, by a receiver in bankruptcy, of property afterwards released will not affect the sureties' liability.[55]

§ 5. *Rights of surety against principal and cosurety.*[56] See 10 C. L. 1773—Except in the case of a bail bond,[57] a surety can maintain an action against his principal in a court of law, or in a court of equity when equitable matters are involved,[58] upon an implied promise [59] for reimbursement in the full amount [60] which he has

cipal debtor is taken simultaneously with creation of the suretyship, the creditor owes to surety the duty of having it properly probated and recorded within a reasonable time. Cordele Grocery Co. v. Thigpen, 4 Ga. App. 643, 62 SE 97, controlled by Cloud v. Scarborough, 3 Ga. App. 7, 59 SE 202. Where plaintiff knew of the suretyship at time of its execution. Johnson v. Success Brick Mach. Co. [Miss.] 46 S 957.

**42.** Surety must show that he was thereby deprived of benefit of collateral (Hunter v. First Nat. Bank [Ind.] 87 NE 734), but cannot require creditor to watch market and sell at highest price (Id.)

**43. Search Note:** See notes in 21 L. R. A. 409; 8 A. S. R. 246.

See, also, Principal and Surety, Cent. Dig. §§ 71-96; Dec. Dig. §§ 38-48; 27 A. & E. Enc. L. (2ed.) 460.

**44.** Gates v. Tebbetts [Neb.] 119 NW 1120.

**45.** Not plead fraud where surety renewed indorsement after discovery of fraud. Elliott v. Brady, 192 N. Y. 221, 85 NE 69.

**46.** Sureties on additional official bonds are not relieved by the fact that one of the signatures on the original bond was a forgery, where they had equal opportunity with county to ascertain the validity since they are presumed to have assumed such risk. United States Fidelity & Guaranty Co. v. Salyer [Ky.] 115 SW 767.

**47.** Where bond was given for return of bonds and outside agreement gave option of paying cash instead. Baglin v. Title Guaranty & Surety Co., 166 F 356. Ignorance of minor detail immaterial. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149.

**48.** As another agreement. Klein v. Title Guaranty & Surety Co., 166 F 365.

**49.** No defense to sureties on trustee's bond that upon inquiry the county judge informed them that trustee's accounts were correct and properly secured, when in fact they were not, since there was no official duty to give such information, United States Fidelity & Guaranty Co. v. Com., 31 Ky. L. R. 1179, 104 SW 1029.

**50. Search Note,** See notes in 45 L. R. A. 321; 5 L. R. A. (N. S.) 418; 8 Id. 944; 63 A. S. R. 327.

See, also, Principal and Surety, Cent. Dig. §§ 130-380; Dec. Dig. §§ 88-131; 27 A. & E. Enc. L. (2ed.) 489.

**51.** As where an agent of obligees obtains surety's signature upon his promise to also sign. Fidelity Mut. Life Ins. Co. v. Johnson, 152 Mich. 578, 15 Det. Leg. N. 326, 116 NW 404.

**52.** Each considered an independent agreement. First Nat. Bank v. Story, 131 App. Div. 472, 115 NYS 421.

**53.** Gates v. Tebbetts [Neb.] 119 NW 1120.

**54.** Replevin action. Ervin v. Montgomery [Neb.] 120 NW 903.

**55.** Bank Act 1898, c. 541, § 67, does not apply to release surety. Ehrlich v. Sklamberg, 116 NYS 602.

**56. Search Note:** See notes in 12 L. R. A. 131; 16 Id. 115; 70 A. S. R. 443; 117 Id. 35.

See, also, Principal and Surety, Cent. Dig. §§ 468-650; Dec. Dig. §§ 167-200; 27 A. & E. Enc. L. (2ed.) 468; 16 A. & E. Enc. P. & P. 958.

**57.** There is no implied promise and the law will not enforce an express promise of principal or even of third party to reimburse the surety for loss on a bail bond given in criminal case, since it would be against public policy as giving the public the security of one person only instead of two. Carr v. Davis [W. Va.] 63 SE 326.

**58.** The right of surety to recover from principal the amount paid may be established in court of law, but his right to stand in the place of his creditor as to all securities, funds, liens and equities which he has may be established only in court of equity. Burrus v. Cook [Mo.] 114 SW 1065, following and confirming dissenting opinion of Ellison J., 117 Mo. App. 385, 93 SW 888.

**59.** Keys v. Keys' Estate [Mo.] 116 SW 537.

**60.** Surety may recover of his principal

actually [61] been out in the payment [62] of any valid [63] and accrued [64] claim against his principal, for which he was liable, and including interest thereon at the legal rate from the date of his payment.[65] He should plead all facts essential to his recovery.[66] Ordinarily a surety has no right to initiate affirmative action against the principal until he shall have paid the debt [67] but is permitted by equity, in some instances, to bring an action prior thereto.[68] A surety by paying the whole of [69] his principal's obligation acquires the right [70] to be subrogated to all the rights,

the costs which he has been compelled to pay in action brought against him as surety, since he is entitled to be reimbursed and made whole. Ordinary v. Connolly [N. J. Eq.] 72 A 363.

61. Cosurety gets the benefit of any compromise settlement, since a surety is not permitted to speculate off his principal or cosurety (Burrus v. Cook [Mo.] 114 SW 1065), nor to settle by giving his own note and then to recover full amount off the principal (Sandoval v. U. S. Fidelity & Guaranty Co. [Ariz.] 100 P 816).

62. Where surety gave principal money to pay debt, he makes principal his agent for that purpose and principal is estopped to claim he paid debt with his own money whether identical be money used or not. Holtzclaw v. Craynor Smith Lumber Co. [Ky.] 114 SW 271.

63. Surety cannot recover for unauthorized payment of void judgment (More v. Churchill [Cal.] 101 P 9); nor of a judgment obtained against it on motion without authority of law, though there is provision therefor in stay bond, being a condition outside requirements of Code Civ. Proc. § 943, and without consideration (United States Fidelity & Guaranty Co. v. More [Cal.] 101 P 302). A **principal** is given **no right** in law or equity **to recover** on behalf of his surety money paid on a void judgment by such surety. Civ. Code, § 1559, permitting a third person to sue upon contract made for his benefit nor §§ 1050, or 2846, do not apply here, and his remedy is by defense if sued by surety. More v. Churchill [Cal.] 101 P 9.

64. A surety legally bound to pay an obligation has undoubted right to pay same and proceed against his principal or cosureties for repayment, as soon as his principal is in default and without waiting for suit to be brought against him. Sandoval v. U. S. Fidelity & Guaranty Co. [Ariz.] 100 P 816. Where principal fails to secure stay of judgment during time allowed for perfecting an appeal, surety is justified in protecting itself by payment of judgment. Id. Surety has the right whenever debt is due to sue to compel principal to pay it by rules of equity and Gen. St. 1901, § 5006. Hutchison Wholesale Grocer Co. v. Brand [Kan.] 99 P 592. Under Gen. St. 1901, § 5007, an attempt of principal to escape payment by fraud is made ground of action, even before maturity. Id. A surety company which pays bond before becoming liable is mere volunteer and not entitled to recover. Civ. Code 2778 interpreted as liability of surety. United States Fidelity & Guaranty Co. v. More [Cal.] 101 P 302.

65. And not rate stated in original obligation, even though an actual assignment was made. Burrus v. Cook [Mo.] 114 SW 1065.

66. Should allege not paid at time paid by surety, but complaint sufficiently alleges nonpayment of judgment which states that "said defendants on the 24th day of June, 1908, had wholly failed to pay the said judgment * * * and upon said date said sum was due and owing upon said judgment." Sandoval v. U. S. Fidelity & Guaranty Co. [Ariz.] 100 P 816. Should allege that amount sued for is unpaid, but a defective statement of the fact of nonpayment may be good unless tested by a general demurrer. Id.

67. Hunter v. First Nat. Bank [Ind.] 87 NE 734. While the law implies contract whereby maker will reimburse indorser of accommodation paper for any moneys he may be compelled to pay out, indorser can maintain no action until after such payment. Blanchard v. Blanchard, 61 Misc. 497, 113 NYS 882. Notice to cashier to charge against his account and cashier's agreement to do so is sufficient in equity to constitute a payment, though check had not been given at time suit was begun or note formally cancelled, and fact of cancellation might be shown by supplemental petition. Gribben v. Clement [Iowa] 119 NW 596.

68. Under the equitable rule, a surety after debt has become due may maintain bill to require principal debtor to pay it whether surety has been sued for it or not. Downing v. Robinson [Md.] 71 A 129. As between grantor and grantees, grantee becomes primarily liable for mortgage assumed and grantor is in position of surety, and upon failure of grantee to pay grantor may sue and recover amount due, whether he has paid it or not. Perry v. Ward [Vt.] 71 A 721. Under the stipulations of an excise bond as soon as liability is incurred, it becomes principal's duty to protect surety and surety need not wait to enforce his claim until he has paid the debt, but his cause of action is complete when he becomes legally liable. Sullivan v. Bankers' Surety Co., 59 Misc. 54, 112 NYS 173. Payment is not necessary before surety may recover from third party who has assumed principal's obligation, as where he took over trust deed held by surety as security. Elmer v. Campbell [Mo. App.] 117 SW 622.

69. Where surety pays only part of note, he has no right of subrogation but only right to sue principal for the amount paid; but, where there is security, and he pays full note, he is entitled to be subrogated to benefit of such security (Jefferson v. Century Sav. Bank [Iowa] 120 NW 308); as he is, also where the purchaser of mortgaged premises assumed the payment of the mortgage debt, and surety on mortgage paid the entire deficiency (Van Meter v. Poole, 130 Mo. App. 433, 110 SW 5).

70. Surety on payment of debt does not become ipso facto, subrogated to rights of creditors but only acquires right to such

remedies and securities held by the creditor against the principal debtor.[71] A surety may prosecute his claim in bankruptcy in the name of the principal creditor when subrogation took place after proof of the debt.[72] It is not sufficient to save a principal from liability in an action by his surety that he indemnify and save such surety harmless, but he must actually pay the debt.[73] As between themselves, the mere form of an instrument of surety will be disregarded in the face of convincing evidence of its actual character.[74] In an action by surety against principal or cosurety, the statute of limitations runs from the time of payment by the surety.[75] All persons who are bound, although by different instruments executed at different times, for the same debt or duties of the same individuals, are bound as cosureties to contribute to any loss which either may sustain,[76] but a cosurety owes no affirmative duty to protect another against the contingency of liability for such contribu-

subrogation which he must assert before such legal remedy is barred. Burrus v. Cook [Mo.] 114 SW 1065. Surety has right to be subrogated to rights of creditor in a certain amount though she does not ask for it specifically, but asks for the whole fund and for all general and equitable relief. Ryan v. Logan County Bank [Ky.] 116 SW 1179.

71. See Subrogation, 12 C. L. 1760. Though such surety be wife of principal, and such security be a judgment against a third party. Ryan v. Logan County Bank [Ky.] 116 SW 1179. A husband or his heirs who is surety on mortgage given by his wife is entitled to be subrogated to the rights of mortgagee as against another heir of his wife. Wilder's Ex'x v. Wilder [Vt.] 72 A 203. Under St. 1903, § 4666, surety on payment of a judgment may have it assigned to him and is entitled to have execution issued for such amount as will fully reimburse him, including interest on amount he has expended. Patton's Ex'r v. Smith [Ky.] 114 SW 315. So far as necessary to protect rights of surety, payment of a debt does not extinguish it, but it still subsists with its liens and priorities to enable him to recover from his principal and compel contribution from his cosuretes and he is entitled to all rights and remedies of the creditor since such payment operates as an equitable assignment (Burrus v. Cook [Mo. ] 114 SW 1065), but equity will not make the assignment where the sole purpose is to avoid the statute of limitations (Id.). Ordinarily, where the owner transfers property without express provision in reference to mortgage debt, the grantee takes subject to mortgage, but mortgagor is yet principal; and, if the land is sold to satisfy debt, grantee is entitled in equity to be subrogated to rights of mortgagee as against mortgagor and his remedy is in accord with rules in relation of principal and surety. Kinney v. Heuring [Ind. App.] 87 NE 1053. Sureties on bond of a delinquent official upon payment of such delinquency become subrogated to the rights of the state. State v. Reid, 122 La. 590, 47 S 912. Upon payment being made by surety, he is entitled to reimbursement by reason of any agreement therefore had with his principal or may sue upon the implied promise which the law raises in his favor or may be subrogated to rights of creditor, under Rev. St. 1901, § 3555, and the **measure of recovery** is the same whether action is brought on express or implied promise to reimburse for loss. Sandoval v. U. S. Fidelity & Guaranty Co. [Ariz.] 100 P 816. Right of surety on public contract to be subrogated to contractor's right to reserve fund representing work done previous to assignment, in the hands of the government, is superior to any rights of assignees of contractor. Hardaway v. National Surety Co., 211 U. S. 525, 53 Law Ed. ——. Payment of judgment by surety cancels it as to both, since he should have it assigned to a trustee for his benefit; but, where he does not intend to extinguish the judgment, equity will subrogate him by appointing a trustee without such assignment. Bank of North Wilkesboro v. Wilkesboro Hotel Co., 147 N. C. 594, 61 SE 570. Several states have statutes held valid, to the effect that upon producing receipt showing payment surety may obtain judgment against principal through the clerk of court, who may then issue execution thereon. Id. In such case, as in case of any summary remedy, where no provision is made for notice, principal is entitled to reasonable notice. Id. Surety who advances money to his principal to enable him to redeem his property from mortgage is not entitled to be subrogated to rights of the mortgagee, the mortgage lien having been extinguished thereby. Handford v. Edwards [Ark.] 115 SW 1143.

72. Under Rev. Civ. Code, La. art. 2162. Sessler v. Paducah Distilleries Co. [C. C. A.] 168 F 44.

73. Perry v. Ward [Vt.] 71 A 721.

74. See post § 7. While relation as it appears on face of instrument may be binding between creditor and signers, evidence may be introduced to reverse positions of signers as between themselves, such as between a son and the mother's estate. In re Taussig's Appeal, 221 Pa. 62, 70 A 294.

75. Not from the time when the debt became due. Blanchard v. Blanchard, 61 Misc. 497, 113 NYS 882; Burrus v. Cook [Mo. ] 114 SW 1065, holding with dissenting opinion of Ellison J., in same case, 117 Mo. App. 385, 93 SW 888.

76. But a forthcoming bond and a supersedeas bond given in the same cause are not such instruments. Broughton v. Saylor, 33 Ky. L. R. 611, 110 SW 866. See Subrogation, 12 C. L. 1760. It is essential for purpose of contribution that sureties be bound for same principal and for performance of same duty, although not dependent on privity or knowledge. Bankers' Surety Co. v. Wyman [Iowa] 120 NW 116.

tion.[77] To make one surety liable as principal to another surety, it must appear positively or by fair inference that such was the intent.[78] A cosurety who takes over property of the principal and disposes of it is in the position of trustee of the proceeds for the benefit of all the sureties.[79] Where successive bonds remain in full force, sureties are deemed cosureties.[80] When a principal debtor has given any security or other pledge to his surety, the creditor is entitled to the benefit thereof.[81] A surety may foreclose a recorded mortgage given for his security as against the principal or a purchaser of the property from the principal,[82] but ordinarily such right exists only when the principal is insolvent.[83] He has the right to assign security held by him to a third party who pays the debt,[84] and to retain money of the principal in his hands to offset his accrued liability,[85] but a principal, who applies money of a surety which he may happen to have in his hands to the payment of the obligation, is guilty of misappropriation.[86]

§ 6. *Security held by surety and rights therein.*[87]—See 10 C. L. 1774.

§ 7. *Remedies and proceedure.*[88]—See 10 C. L. 1774.—In a proceeding in equity to recover upon a bond given to discharge liens on property, the rights and equities of all parties interested may be determined.[89] A surety must be properly within the jurisdiction of the court before a valid judgment may be rendered against him.[90] Where the obligation is joint and several, the creditor has right to proceed against

77. Burden is on cosurety to guard itself, and right of contribution may be lost by laches. Bankers' Surtey Co. v. Wyman [Iowa] 120 NW 116.

78. Chappell v. John [Colo.] 99 P 44. Mere request by one surety of another to sign or an assurance that he would not lose by so doing does not constitute him principal, such being a mere expression of opinion. Id.

79. And in a suit for an accounting, in the absence of other evidence thereon, he cannot complain that he was charged with consideration stated in deed. A sale by him under a trust deed was held to be a mere clearing of title and a purchase of a note to protect interests of all not to be considered as speculative. Leeman v. Page [Kan.] 100 P 504.

80. As executor's bonds, but surety on a new bond may undertake a primary liability as where original bond has been ordered released by the court. Bankers' Surety Co. v. Wyman [Iowa] 120 NW 116. Where additional bonds given, under Ky. St. 1909, § 4134. United States Fidelity & Guaranty Co. v. Salyer [Ky.] 115 SW 767. If an executor, against whom a judgment has been obtained, gives a supersedeas bond and recovery is had on such bond and the liability on the executor's bond is extinguished, sureties on such supersedeas bond have no right of recovery or contribution against sureties on the executor's bond. Bankers' Surety Co. v. Wyman [Iowa] 120 NW 116.

81. Downing v. Robinson [Md.] 71 A 129.

82. Purchaser no greater rights than principal. Holtzclaw v. Craynor-Smith Lumber Co. [Ky.] 114 SW 271.

83. Court of equity. Hunter v. Porter [Iowa] 120 NW 101.

84. As mortgage given for indemnity Murray v. Strother [Ala.] 48 S 72.

85. Although the principal has assigned such money to another, where money was deposited as security for a different bond since a mere technical objection, available at law will not defeat an equitable set-off. Sullivan v. Bankers' Surety Co., 59 Misc. 54, 112 NYS 173.

86. Insolvent principal maker of a note, who is named as executor in will of his surety and accepts and qualifies as such and who pays his own notes as they subsequently fall due as claims against the estate, is properly chargeable, under provisions of Rev. St., § 6069, as for so much money in his hands. Yakey v. Strunk, 7 Ohio N. P. (N. S.) 177.

87. **Search Note:** See Principal and Surety, Cent. Dig. §§ 402-412, 500-509, 524-538, 591-604; Dec. Dig. §§ 147, 174, 175, 185, 193; 27 A. & E. Enc. L. (2ed.) 468.

88. **Search Note:** See notes in 31 L. R. A. 59; 54 Id. 765; 68 Id. 736; 6 L. R. A. (N. S.) 1021; 15 Id. 484; 3 A. S. R. 749; 3 Ann. Cas. 468; 9 Id. 153.

See, also, Principal and Surety, Cent. Dig. §§ 381-650; Dec. Dig. §§ 132-200; 16 A. & E. Enc. P. & P. 925, 928.

89. The remedy to enforce the obligation of surety on bond given to discharge mechanic's lien, and conditioned for payment of any judgment which may be rendered against the property, is not by action at law upon the bond but by action in equity, in which all parties interested, including surety on the bond, are made parties, and it is not a condition precedent to the bringing of the action that lienor shall exhaust his remedy against the landowner by recovering a judgment of foreclosure. Genninger v. Frank A. Wahlig Co., 116 NYS 578.

90. One not party to a bond cannot be made defendant in suit thereon for the purpose of placing the venue in a certain county. Sullivan v. Radzuweit [Neb.] 118 NW 571. Surety not liable, where suit on bond of assignee, based on bankruptcy proceedings against assignor, where no jurisdiction was acquired over surety in such proceedings. Cohen v. American Surety Co., 129 App. Div. 166, 113 NYS 375.

the surety alone.[91] Any condition precedent that is not unreasonable, such as the commencement of action within a certain time,[92] the giving of a notice,[93] or the making of a demand before commencing suit,[94] must be complied with. If a bond does not express the intent of the parties, it must be reformed before it can be enforced, except in accordance with its terms as actually expressed.[95] An action is regarded as being only upon the contract set out.[96] A declaration incidentally mentioning a party as surety contains a sufficient allegation of suretyship.[97] Although a surety contract is not to be varied by a contemporaneous oral agreement,[98] a surety signing an obligation as joint maker may show by parol that he is surety only,[99] but the presumption of joint obligation arising from the language of the instrument must be overcome by the evidence.[1] The obligee must have conformed to the strict terms of the contract [2] and must show the default of principal [3] and the amount thereof [4] before he can recover from the surety. Where the plaintiff alleges a joint and also a several obligation on the part of sureties, he may recover on joint obligation alone,[5] but where a joint action against a principal and his surety is continued as to the former, it should also be continued as to the latter.[6] So long

91. Yerxa v. Ruthruff [N. D.] 120 NW 758.

92. Not unreasonable though time limit expired before contractor completed building. Lesler v. U. S. Fidelity & Guaranty Co., 239 Ill. 502, 88 NE 208.

93. Failure to give notice is matter of defense and need not be pleaded by plaintiff in first instance. Knight & Jillson Co. v. Castle [Ind.] 87 NE 976. Under a general provision that notice shall be given within a certain time after default, no notice as to liens for labor and material is necessary, no claim being made for damages arising out of delay. Lakeside Land Co. v. Empire State Surety Co., 105 Minn. 213, 117 NW 431. Statute requires notice, signed by person making claim, be given by a material-man, etc., to the city board for city repairs, before suit on a contractor's bond. Held that omission of "agent" after signature not a void notice, being an immaterial defect. Strandell v. Moran, 49 Wash. 533, 95 P 1106. Court may render judgment against surety without notice where he made a statutory bond conditioned for performance and satisfaction by principal of any judgment which might be rendered against him since surety has by contract of record consented thereto and assumes risk of defendant's failure to interpose a successful defense or any defense at all. Andres & Co. v. Schlueter [Iowa] 118 NW 429.

94. It is not necessary to make demand on bankrupt principal before commencing action against the surety. First Nat. Bank v. Story, 131 App. Div. 472, 115 NYS 421.

95. Kuhl v. Chamberlain [Iowa] 118 NW 776.

96. Where, in action against both contractor and sureties, the declaration set out bond and not subcontract, the suit will be regarded as a suit on bond alone, and such subcontractor may show by government building inspector's report that he was deterred by such contractor from fulfilling his guaranty. Burton v. Frank A. Seifert & Co., 108 Va. 338, 61 SE 933.

97. Prussian Nat. Ins. Co. v. Eisenhardt, 153 Mich. 198, 15 Det. Leg. N. 398, 116 NW 1097.

98. Not by sheriff's promise that liability on bail bond would be less than expressed therein. Snowden v. State, 53 Tex. Cr. App. 439, 110 SW 442.

99. Smith v. First Nat. Bank, 5 Ga. App. 139, 62 SE 826. Although name first signed is presumed to be principal, the arrangement of names is not conclusive and fact as to who is surety may be shown. Swearingen's Executor & Trustee v. Tyler [Ky.] 116 SW 331. Although fact of suretyship does not appear on face of note. Duggan v. Monk, 5 Ga. App. 206, 62 SE 1017. Signer may show that he was a surety only and that extension was without his consent as between original parties or if non-negotiable, since Code Supp. 1907, § 3060, applies only to holder of negotiable instrument in due course. Fullerton Lumber Co. v. Snouffer [Iowa] 117 NW 50. Statute discharging judgment against sureties after seven years have expired without execution being issued is available, even though record does not show defendant to have been surety. Columbia Bldg., Loan & Sav. Ass'n's Assignee v. Gregory, 33 Ky. L. R. 1011, 112 SW 608.

1. Evidence held sufficient to show defendant to be principal on note and decedent his surety only. Cotton v. Cotton's Ex'x [Ky.] 115 SW 783.

2. Since he will not be permitted to say that he paid out money in a way or to an extent not authorized by the contract, even though it went in relief of the possible obligations of the surety. Bessemer Coke Co. v. Gleason [Pa.] 72 A. 257.

3. In suit on appeal, default of principal in payment of judgment was not shown, Rabb v. Thomas, 137 Ill. App. 255. Breach of lease must be shown. Revel Realty & Sec. Co. v. Maxwell, 115 NYS 1033.

4. May show the amount of claims and that they are enforcible whether the claimants appear in the action or not. Exposition Amusement Co. v. Empire State Surety Co., 49 Wash. 637, 96 P 158.

5. Since defendant surety was not precluded by such pleading from setting up his defense to a joint obligation. Union Oil Co. v. Mercantile Refining Co. [Cal. App.] 97 P 919.

6. Medlock v. Wood, 4 Ga. App. 368, 61 SE 516.

as a judgment against a principal stands, that against the surety cannot be impeached, since his liability exists the same whether the judgment be right or wrong.[7] An execution creditor may proceed against the property of either the principal or the surety.[8] In an action of surety against principal in the same court in which the obligee has a judgment against both, the court may properly order any amount collected to be paid to the clerk of the court for the benefit of the owner of the judgment.[9] Sureties are not estopped from denying liability to the obligee by acts merely tortuous toward the principal,[10] but may waive their rights of defense by failure to disclose the suretyship,[11] or in an action may lose such rights by failure to properly select and plead their remedy.[12] In an action against the principal for reimbursement, the pleadings need to be drawn with care.[13] A surety on a materialman's bond is not thereby estopped from setting up a lien against the property.[14]

**Surface Waters; Surplusage; Surprise; Surrogates; Surveyors; Survivorship; Suspension of Power of Alienation; Taking Case From Jury,** see latest topical index.

## TAXES.

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**7.** And in case suit be brought by the surety to set aside such judgment for fraud, the principal must be party to it. Steele v. Culver, 211 U. S. 26, 53 Law. Ed. 74. Judgment against surety on bond is conclusive as to matters at issue, but liability of officer is not recoverable against his estate (United States Fidelity & Guarantee Co. v. Haggart [C. C. A.] 163 F 801), as on a bond for payment of any judgment obtained (City of Chamberlain v. Quarnberg [S. D.] 119 NW 1026) or on bond in garnishment (Jordan v. Thornton, 5 Ga. App. 537, 63 SE 601). Issues decided conclusive against surety or in action on supersedeas bond (Mershman v. Robert Field Co. [Ky.] 112 SW 1119), in the absence of fraud or collusion (Wiseman v. Swain [Tex. Civ. App.] 114 SW 145.)

**8.** Jordon v. Farmers' & Merchants' Bank, 5 Ga. App. 244, 62 SE 1024. It is not necessary in order to charge sureties on appeal bond that execution on judgment recovered in appellate court should be issued against principal, since upon affirmance surety becomes liable to same extent as principal obligor. Sandoval v. U. S. Fidelity & Guaranty Co. [Ariz.] 100 P 816.

**9.** Hutchison Wholesale Grocer Co. v. Brand [Kan.] 99 P 592.

**10.** Such as appropriating material contractor left and requesting owner not to sue until they could see what could be done about getting things in shape to go on with the building, or in acquiring property from contractor's wife under agreement to apply it to completion of work. School Dist. of Barfield v. Green [Mo. App.] 114 SW 578.

**11.** Where maker of note induces assignee to take it, by representing it to be good and that it will be paid on maturity and did not disclose fact that he was surety for the payee, he cannot afterwards assert an equity against the assignor, who is payee, to defeat the assignee in his recovery. Harris' Ex'rs v. Walker [Ky.] 115 SW 220.

**12.** Remedy is at law by plea of non est factum where surety signs with condition preventing its becoming his act until a contingency happens, unless failure to comply with such condition would constitute fraud upon him in which case his remedy would be either at law or in equity. Hunter v. First Nat. Bank [Ind.] 87 NE 734.

**13.** Proper plea is non damnificatus where condition of obligation is to indemnify and save harmless, but plea setting forth affirmatively the special manner of performance is proper where condition is to discharge and acquit. Perry v. Ward [Vt.] 71 A 721.

**14.** No privity between him and owner to prevent, though settlement made with guarantee company which lienor agreed to indemnify, before suit begun on leins, especially where lien exceeds amount of bond. Pine Bluff Lodge of Elks No. 149 v. Sanders [Ark.] 111 SW 265.

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**§ 16. License Taxes, 2088.**
**§ 17. Income Taxes, 2089.**
**§ 18. Distribution and Disposition of Taxes Collected, 2089.**

*The scope of this topic* is noted below.[15]

§ 1. *Nature and kinds, and power to tax.*[16] See 10 C. L. 1776—A tax is not a debt in the ordinary sense of that word,[17] but is, strictly speaking, an exaction of the sovereign power from the individuals subject thereto for the purpose of the support and conduct of the government,[18] and, while other exactions, more or less in the nature of taxes, are made by the sovereign power,[19] the distinguishing feature of a tax is that it is imposed for the support of the government.[20] Taxes in this sense

**15.** This topic is confined to the treatment of taxes, levied by the state and subdivisions thereof (see Internal Revenue Laws, 12 C. L. 323; Intoxicating Liquors, 12 C. L. 332, and similar topics) for the purpose of revenue. As to so called taxes imposed in the exercise of the Police Power, see Licenses, 12 C. L. 593; Foreign Corporations, 11 C. L. 1508; Animals, 11 C. L. 109; Corporations, 11 C. L. 810. As to special assessments for public improvements, see Public Works and Improvements, 12 C. L. 1478. See, also, the topics devoted to particular kinds of public works and improvements, such as Bridges, 11 C. L. 441; Highways and Streets, 11 C. L. 1720; Sewers and Drains, 12 C. L. 1830. This topic purports to cover the entire subject of taxes in the strictly proper sense of the word, when imposed by the states and subdivisions thereof, but particular topics may be referred to with advantage in many instances. See such titles as Corporations, 11 C. L. 810; Foreign Corporations, 11 C. L. 1508; Railroads, 12 C. L. 1542. Street Railways, 12 C. L. 1730. Taxes being dependent moreover upon statutes, statutes dealing with the construction and validity of statutes should also be consulted. See Constitutional Law, 11 C. L. 689; Statutes, 12 C. L. 1919.

**16. Search Note:** See notes in 6 C. L. 1603, 1604; 14 L. R. A. 474; 21 Id. 519; 60 Id. 321; 1 L. R. A. (N. S.) 153; 3 Id. 837; 5 Id. 1139; 8 Id. 314; 9 Id. 306; 10 Id. 947; 13 Id. 901, 1147; 14 Id. 1074; 15 Id. 61, 67, 142, 150, 952; 2 A. S. R. 94; 8 Id. 506; 16 Id. 365; 25 Id. 885; 1 Ann. Cas. 638; 8 Id. 535; 11 Id. 829.

See, also, Taxation, Cent. Dig. §§ 1-133; Dec. Dig. § 1-56; 27 A. & E. Enc. L. (2ed.) 578, 868.

**17.** Taxes on land are not debts nor personal charges against the owner. Lucas v. Purdy [Iowa] 120 NW 1063. See post, § 11B.

**18.** Every burden which state imposes on its citizens with view to revenue is levied under taxing power, whatsoever its name. Yomhill County v. Foster [Or.] 99 P 286. Tax is pecuniary burden imposed for support of government. City of Savannah v. Cooper [Ga.] 63 SE 138. **Special taxes** voted in favor of railroads are not special assessments. Louisiana & A. R. Co. v. Shaw, 121 La. 997, 46 S 994.

**19.** See Licenses, 12 C. L. 593; Corporations, 11 C. L. 810; Foreign Corporation, 11 C. L. 1508; Public Works and Improvements, 12 C. L. 1478. Word "tax" does not include special assessments. Board of Improvement v. Sisters of Mercy [Ark.] 109 SW 1165.

**20.** Taxation exacts money from persons as their share of public burden. Lucas v. Purdy [Iowa] 120 NW 1063. Theoretically, taxpayer receives just compensation in benefits conferred by government in proper application of taxes. Id.

may be divided into three classes; to-wit: Property taxes in general;[21] inheritance or transfer taxes;[22] and income taxes.[23] Within the first of these classes, the most natural division is according to objects or persons taxed,[24] which includes the particular methods that may be adopted as to particular objects or persons.[25] All taxation is statutory, and, while it is the duty of every citizen to bear his proportion of the public expense, he cannot be compelled to do so except as provided by statute.[26] The power to tax is an attribute of sovereignty, inherent in the legislature,[27] and subject only to constitutional limitations,[28] such as those relating to the character of the laws by which taxes may be imposed,[29] purposes of the tax,[30] equality and uni-

21. See post, § 2. Persons, Objects and Interests Taxable. Tax imposed on carrying on business, trade or profession is not direct tax on property. Salt Lake City v. Christensen Co., 34 Utah, 38, 95 P 523. See Licenses, 12 C. L. 593. Two per cent paid on premiums received by foreign insurance companies, as provided by Rev. Laws 1905, § 1625, is not a gross earnings tax. Real and personal property of the company within the state is taxable the same as property of individuals. Mutual Benefit Ins. Co. v. Martin County, 104 Minn. 179, 116 NW 572.

22. See post, § 15.

23. See post, § 16.

24. See post, § 2, Persons, Objects and Interests Taxable.

25. See post, § 2A, Taxable Property and Its Classification.

26. Schmuck v. Hartman, 222 Pa. 190, 70 A 1091. As general rule personal liability for taxes must be created by express statutory words and not by inference. Rogers v. Gookin, 198 Mass. 434, 85 NE 405. Liability to pay taxes arises from no contractual relation between taxable and taxing power, and cannot be enforced by common-law proceedings unless statute so provides. Schmuck v. Hartman, 222 Pa. 190, 70 A 1091.

27. Whole power of taxation within defined limits is with legislature. In re Lochitt, 58 Misc. 5, 110 NYS 32. A uniform tax on all real and personal property in a taxing district for the construction and repair of highways is for a governmental purpose, and if unwise, unjust or oppressive, relief must be sought from the legislative and not from the judicial department. State v. Marion County Com'rs [Ind.] 85 NE 513.

28. Powers of legislature relative to taxation is unlimited, except as restricted by state or federal constitutions. State v. Marion County Com'rs [Ind.] 85 NE 513. Where neither constitution nor statutes impose absolute restrictions on power of taxation, courts may not arbitrarily impose any unless taxing power is abused, that is, not unless a tax is clearly oppressive or discriminatory. Salt Lake City v. Christensen Co., 34 Utah, 38, 95 P 523. Taxing power, when confined to its legitimate sphere, is one which knows no stopping place until it has accomplished the purpose for which it exists, and it exists for purpose of collecting from every lawful object of taxation its proportionate share of public burden. Anderson v. Ritterbusch [Okl.] 98 P 1002. Laws 1907, c. 237, making counties liable for support of feeble minded held not to violate Const. § 174, limiting to four mill tax. State v. Lewis [N. D.] 119 NW 1037. Const. Art. 9, § 1, declaring that general assembly may provide for revenue tax on peddlers, etc., did not deprive it of authority to enact Hurd's Rev. St., c. 24, art. 5, § 1, authorizing cities to impose license tax on vehicles for revenue purposes. Harder's Fireproof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 NE 245.

**Power to tax national banks:** Before state statute denying right to deduct debts from stock in national banks, but allowing such deduction from other investments, can be held to violate Rev. St. U. S., § 5219, prohibiting state from taxing such stock at greater rate than is assessed on other moneyed capital in hands of individuals, it must appear that such other capital exists in such amount as to operate as a discrimination against such banks, and that it is of such character as to come in competiton with national banks. West Virginia Nat. Bank v. Dunkle [W. Va.] 64 SE 531.

29. That Acts 1907, p. 760, § 120, relative to special road and bridge tax, are embodied as section in printed code of 1907 imparts to it no validity, since it was adopted, after code was adopted. City of Anniston v. Calhoun County Com'rs [Ala.] 48 S 605. Statutes 1883, p. 273, is **general law** for cities of 6th class enacted pursuant to Const. art. 11, § 12, making it duty of legislature to vest in cities power to assess and collect taxes for municipal purposes. City of Escondido v. Escondido Lumber, Hay & Grain Co. [Cal. App.] 97 P 197. Gen. Laws 1907, p. 790, relating to duties of county boards of revenue, etc., held void as to that provision as not expressed in **title.** State v. Miller [Ala.] 48 S 496. Acts 1906, p. 61, amending Acts 1905, p. 425, is not unconstitutional on the ground that body of act is not expressed in its caption. Coleman v. Emanuel County Board of Education, 131 Ga. 643, 63 SE 41. Such act is not void because it fails to express the purpose of the tax. Id. Sess. Laws 1907-08, p. 729, are purely remedial. It does not attempt to levy a tax but only to confirm pre-existing rights by providing means of collecting taxes on omitted property. Such statute is not repugnant to § 19, art. 10, of the constitution providing that every statute levying a tax shall specify the purpose for which it is levied, and it shall not be devoted to any other purpose. Anderson v. Ritterbusch [Okl.] 98 P 1002.

30. Must be levied for a public purpose. Widening of a street is a public purpose (In re Lockitt, 58 Misc. 5, 110 NYS 32), under Bill of Rights, art. 9, but the legislature has large discretion in determining what

formity,[31] double taxation,[32] obligations of contracts,[33] and due process of law.[34] Absolute uniformity, however, is unattainable and impracticable and hence a reasonable classification is permissible,[35] as to both persons and property,[36] and the state

constitutes a public purpose. (City of Burlington v. Central Vermont R. Co. [Vt.] 71 A 826). Acts 1906, p. 356, No. 262, authorizing city of Burlington to raise money to construct and maintain public wharf construed to be for public purpose. Id. Taxing power cannot be used to require the taxpayers to donate to the support of an existing art museum, the constitution art. 10, §§ 3, 10, art. 4, §§ 46, 47, art. 9, § 6, being prohibitive. State v. St. Louis [Mo.] 115 SW 534.

31. Under rule of uniformity theory upon which taxes are imposed is that property shall contribute in proportion to its value and thus bear as near as may be its equal share of the burden. City of Owensboro v. Sweeney, 33 Ky. L. R. 823, 930, 111 SW 364. Rate must be equal and uniform throughout taxing district, whether state or local. Yamhill County v. Foster [Or.] 99 P 286. The fourteenth amendment to the constitution of the United States requires a system of taxation which gives equal protection of the laws to real estate located in the same district, but this constitutional provision is not violated by a special assessment to maintain a boulevard. Field v. Kansas City, 211 Mo. 662, 111 SW 129, following Corrigan v. Kansas City, 211 Mo. 608, 111 SW 115. Constitutional provision imposing equality and uniformity is limited to direct property tax which is assessed and collected in usual way, and does not apply to **occupation or license tax.** Salt Lake City v. Christensen Co., 34 Utah, 38, 95 P 523. In assessment and collection of taxes due on **omitted property,** it is uniformity of burden, and not identity of method of enforcement, which is required by constitutional principles. Anderson v. Ritterbusch [Okl.] 98 P 1002. The legislature is not bound to impose the same **franchise tax** on all corporations, the ordinary rules of taxation not applying in such case. People v. Glynn, 194 N. Y. 387, 87 NE 434.

32. As general rule, the scheme of taxation seeks to avoid double taxation. Commonwealth v. Walsh's Trustee [Ky.] 117 SW 398. State is not entitled to double taxes does not amount to double taxation. v. Allen [W. Va.] 64 SE 140. In case of double assessment, one payment is all state can require. Id.

**Held not double taxation** to tax shareholder upon shares in addition to taxing corporation on its capital. Commonwealth v. Walsh's Trustee [Ky.] 117 SW 398. That a corporation has paid taxes levied on its property, "including the value of its franchise," does not render void the initiative measure of 1906 imposing a gross earnings tax, where at the time of the assessment there was no law requiring a corporate franchise to be assessed. State v. Pacific States Tel. & T. Co. [Or.] 99 P 427. Imposition of license tax in addition to general taxes on same land under same title. State Laws 1903, p. 39, imposing annual license fee on corporations. Id. Taxation of real estate mortgage in addition to land is not double taxation in violation of Const. Art. 14, §§ 11, 12. Stumpf v. Storz [Mich.] 16 Det. Leg. N. 87, 120 NW 618. Statute providing for taxation of all shares of stock of domestic corporations wherever held does not affect right of state in which stock is owned to tax same. Central of Georgia R. Co. v. Wright, 166 F 153. An occupation tax measured by a percentage of the gross earnings of a telephone company, whose franchise is also taxed in connection with its tangible property according to its value as a going concern, is not double taxation. Nebraska Tel. Co. v. Lincoln [Neb.] 117 NW 284.

**Held double taxation:** Local tax on railroad property must be cancelled in proceeding under statute to determine whether local assessment or assessment of state board of assessors is correct. In re Lehigh Valley R. Co. [N. J. Law] 71 A 126. Where, after consolidation of number of subsidiary and leased lines under name of one railroad company, all intangible property was assessed against such company, it could not be again assessed on its intangible property. Commonwealth v. Chesapeake & O. R. Co. [Ky.] 117 SW 287.

33. Provision in charter of corporation, fixing specified sum as taxes in lieu of all other taxes, is not a contract that no greater tax shall be laid, and a statute laying a greater tax does not impair the obligation of a contract. Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361. Where town makes contract for light and water and levies tax to pay therefor, and subsequent retroactive law limits power of town to tax to lower rate, such statute is void as to such prior contract and courts will compel town to levy tax at a rate sufficient to meet it. Welch Water, L. & P. Co. v. Welch [W. Va.] 62 SE 497. Gen. Laws 1903, c. 253, p. 377, increasing gross earnings tax on railroads from 3 to 4 per cent., impairs no contractual or other vested rights. State v. Great Northern R. Co., 106 Minn. 303, 119 NW 202; State v. Chicago G. W. R. Co., 106 Minn. 290, 119 NW 211.

34. Law authorizing assessment of omitted property which affords owner opportunity to question its validity either before the amount is determined or in subsequent proceedings for collection does not violate due process limitation. Anderson v. Ritterbusch [Okl.] 98 P 1002. Laws Fla. 1907, pp. 13, 14, c. 5596, providing for assessment of property for not more than three prior years where such property has escaped taxation, held to provide for notice and hearing. Jackson Lumber Co. v. McCrimmon, 164 F 759. Notice to property owners and opportunity to be heard at some time during proceedings is requisite to validity of assessment, but statute does not violate due process clause where it provides for notice by publication. Id. Rev. St. § 2833, so far as it requires levy of per capita tax on dogs upon real estate upon which they are kept, though owner of land had no knowledge that they were there, is an arbitrary and unreasonable exercise of police power and void. Mirick v. Gims, 79 Ohio St. 174, 86 NE 880.

35. Approximate uniformity is all that is

has a wide descretion in selecting and classifying objects for taxation.[37] Nor is

required, perfect uniformity in valuation being unattainable. Yamhill County v. Foster [Or.] 99 P 286.

**Held to comply with rule of uniformity:** Laws 1907, p. 126, c. 107, imposing a **license tax on corporations** held not void as violating constitutional provision of uniformity. Blackrock Copper Min. & Mill Co. v. Tingey, 34 Utah, 369, 98 P 180. Acts 29th Leg. 1905, pp. 21, 100 c. 19, 72, imposing a **franchise tax on corporations,** imposing a like tax on all foreign corporation and is not void as discriminatory in favor of domestic corporations subject to less tax, classification being based on legitimate distinctions. Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361. Rev. Laws 1905, §§ 794, 797, providing for **taxation of stock of foreign corporations** owned by residents, is valid. State v. Nelson [Minn.] 119 NW 1058. Tax on **railroads** at average rate borne by other property is not unequal though railroad rate is not equal to saving's bank rate nor equal and proportional to rate on other property. Wyatt v. State Board of Equalization, 74 N. H. 552, 70 A 387. Act of 1870, p. 54, c. 21, authorizing city of Lawrence upon vote of qualified electors to issue **bonds in aid of university** and levy taxes to pay same, is not in violation of Const. art. 11, § 1, providing for uniform rate of taxation. State v. Lawrence [Kan.] 100 P 485. Statute permitting **deduction debts from credits** is not void under Const. art. 9, § 1, as violating rule of uniformity. Scandinavian Mut. Aid Ass'n v. Kearney County [Neb.] 118 NW 333. Deduction of debits from credits is not violation of Const. art. 14, § 11, requiring uniform rule and that property be assessed at its cash value. Stumpf v. Storz [Mich.] 16 Det. Leg. N. 87, 120 NW 618. St. 1898, § 1152, held not void because there was **no board to review** assessment under act and hence violative of requirement of uniformity. Strange v. Oconto Land Co., 136 Wis. 516, 117 NW 1023. Act April 20, 1905 (P. L. 237), relating to **appropriation of turnpikes** for public use, does not violate constitutional provision demanding uniformity of taxation. Does not involve legality of taxation. Clarion County v. Clarion Tp., 222 Pa. 350, 71 A 543. Rev. St. 1895, art. 5048, levying a **poll tax,** held not void for inequality or nonuniformity. Solon v. State [Tex. Cr. App.] 114 SW 349. Acts 1907, p. 1540, c. 460, imposing **tax on gross insurance business** to provide a fund for investigations by the insurance commissioner surplus if any to be paid into the state treasury, does not violate rule of uniformity. Rhinehart v. State [Tenn.] 117 SW 508. Classification of **businesses and professions** under Rev. St. 1898, § 206, subd. 87, for purpose of levying a license tax, while in one sense arbitrary, held not unreasonable. Salt Lake City v. Christianeen Co., 34 Utah, 38, 95 P 523.

**Held to violate rule of uniformity:** Under Const. art. 9, § 2, requiring legislature to provide for uniform and equal assessment, Laws 1907, p. 455, § 9, providing for apportionment of state taxes to be collected by several counties not based on assessed valuation thereof for current year was void. Yamhill County v. Foster [Or.] 99 P 286. Under Laws 1885 (P. L. 61), providing that whenever any person shall, subsequent to time of valuation and assessment for local taxes, bring into it taxing district any stock of goods or merchandise to be sold in a place of business temporarily occupied without intention of engaging permanently in business at such place, such stock shall be taxed at the current rate, held that "in such place" means "place of business" and creates an unsubstantial and illusory classification of property. Lang v. Berrien [N. J. Law] 71 A 117. Russell's St. § 4284, relative to discriminatory taxation of foreign insurance companies held in conflict with Const. §§ 60, 171, 180, 181, requiring equality and uniformity. Western & Southern Life Ins. Co. v. Com. [Ky.] 117 SW 376. Where foreign corporation made statement under St. 1909, § 4078, as basis for valuation of its franchise for 1905, and franchise was not assessed until 1907, an assessment under St. 1906, § 4080, whereby assessment was materially increased, held void as violating rule of uniformity. James v. American Surety Co. [Ky.] 117 SW 411. Const. pt. 2, c. 1, § 1, art. 4, authorizing levy of proportional and reasonable assessments on all inhabitants and estates within state, does not authorize tax on sales of shares of corporate stock, because if such is property tax it is not proportional. In re Opinion of the Justices, 196 Mass. 603, 85 NE 545.

36. Gen. Laws 1907, c. 328, p. 448, "mortgage registry Law," is valid. It provides for vaild classification of subjects of taxation and a uniform tax on such subjects. Mutual Benefit Ins. Co. v. Martin County, 104 Minn. 179, 116 NW 572. The subject of taxation is security or lien, and not the debt. Id. Ordinance imposing occupation tax that "the sum and amount of occupation tax or taxes on the gross receipts required to be paid under existing ordinances" may be deducted, is not void because not uniform, since all persons engaged in the same occupation are taxed upon the same basis and in like manner. Nebraska Tel. Co. v. Lincoln [Neb.] 117 NW 284.

37. Ayres v. Chicago, 239 Ill. 237, 87 NE 1073. The **apportionment** of taxation for public purposes is within the discretion of the legislature. Gubner v. McClellan, 130 App. Div. 716, 115 NYS 755. The manner of classifying property is for the legislature. Commonwealth v. Walsh's Trustee [Ky.] 117 SW 398. Legislature may select subjects of taxation and exempt classes of property not named, but it cannot limit proportion to be paid by particular property. Wyatt v. State Board of Equalization, 74 N. H. 552, 70 A 387. The legislature may tax the constitutent elements of property or tax at its full value the thing which represents those elements, as by taxing separately the corporate shares and corporate capital. Commonwealth v. Walsh's Trustee [Ky.] 117 SW 398. Nothing but express constitutional limitation on legislative authority can exclude anything to which authority extends from grasp of taxing power, if legislature selects it for revenue purposes. Harder's Fireproof Storage & Van Co. v. Chicago,

absolute equality always obtainable.[38] When the tax itself is equal and uniform, it is not invalidated as to one tax payer by reason of failure to enforce it against another.[39] The state may be divided into taxing districts.[40]

The levy of a tax is an exercise of the legislative, not the judicial power,[41] and the power to tax implies the power to collect and to prescribe the method of so doing and to define the interest to which taxes shall attach as liens, and what interest shall pass at a sale for taxes.[42] Mere nonuser by a government of its power to levy a tax is not a forfeiture of the power.[43]

*Municipal corporations* See 10 C. L. 1779 can levy only such taxes as they are authorized to levy by statute or charter,[44] and subject to constitutional limitations the legislature has unlimited descretion in the matter of delegating the taxing power to municipalities.[45] Upon the legislative grant, as thus restricted therefore, depend the territorial limits of the municipality's taxing power,[46] and also the pur-

235 Ill. 58, 85 NE 245. Under the constitution of New Hampshire as it existed from 1784 to 1903, only subjects of taxation were polls and estates. Wyatt v. State Board of Equalization, 74 N. H. 552, 70 A 387. Under Const. amend. 1903, authorizing local taxation for public schools, Acts 1905, p. 425, amended by Acts 1906, p. 61, held valid. Henslee v. McLarty, 131 Ga. 244, 62 SE 66. The question of taxibility of property is **not a matter of contract** but rests with the sovereign. Louisiana & A. R. Co. v. Shaw, 121 La. 997, 46 S 994. The state has a right to impose a tax upon the property within its borders regardless of **uses to which property is devoted.** State v. Northwestern Tel. Exch. Co. [Minn.] 120 NW 534.

**38.** Where particular item used in finding average rate on property outside of railroad property, with view to fixing rate on railroad property, is so inconsiderable as not to affect average rate so found beyond fraction of a cent, rate so found is average rate as nearly as it practically can be determined. Wyatt v. State Board of Equalization, 74 N. H. 552, 70 A 387. Assessment on railroad property appraised at $28,000,000, in the amount that taxes are assessed on average on $28,000,000 of property in general throughout state, is equal, though as between some individuals some pay more and some less than the railroad. Id.

**39.** Escape of some railroads from taxation does not entitle others to go free, where all taxpayers of other classes paid their taxes. Illinois Cent. R. Co. v. Com., 33 Ky. L. R. 326, 110 SW 265. That assessors knowingly and willingly omitted to assess another resident is no defense to an action for taxes. Inhabitants of Greenville v. Blair [Me.] 72 A 177.

**40.** Legislature may provide for taxing districts for purpose of improving public highways, without regard to town, county or municipal boundaries. State v. Marion County Com'rs [Ind.] 85 NE 513.

**41.** Yamhill County v. Foster [Or.] 99 P 286.

**42.** Lucas v. Purdy [Iowa] 120 NW 1063.

**43.** City of Norfolk v. J. W. Perry Co., 108 Va. 28, 61 SE 867.

**44.** The legislature being authorized to permit a city to impose a license tax on vehicles for privilege of using the streets, the fact that the tax was to be set aside as a special fund for improving the streets did not render void Hurd's Rev. St. c. 24, art. 5, § 1, authorizing such tax, nor the ordinance imposing it. Harder's Fireproof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 NE 245. Baltimore Charter, § 6, authorizing city to license, tax and regulate all businesses, trades and avocations, authorizes charge on commission merchants for privilege of selling in the city market; such charge is a tax for revenue and not a license or regulation tax. Meushaw v. State [Md.] 71 A 457. Tax levied prior to execution of contract for public improvement and under guise that it was for public buildings, and transferred to general fund, to meet deficiency therein, held illegal. Ault v. Hill County [Tex. Civ. App.] 111 SW 423. Ann. Code 1892, §§ 2926, 3018, 3020, 3748, 3771, authorizing municipalities to tax property acquired prior to Feb. 1st for current year, held not to authorize taxation of property included in corporate limits by extension thereof in April. City of Gulfport v. Todd [Miss.] 46 S 541.

**45.** Harder's Fireproof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 NE 245. Const. art. 9, § 9, authorizing general assembly to vest in corporate authorities of cities and towns power to levy special assessments is to assess equal and uniform taxation, applies only to taxation of property and not to intangible rights, such as use of the public streets. Id. No person or municipality can acquire as against the state a vested right to taxes or the right to collect them when levied, and since the yearly tax of $200 imposed for municipal revenue purposes on commission merchants using city market, in erection of which city had expended larger sums, **held not unreasonable.** Meushaw v. State [Md.] 71 A 457. State has right to take away power to tax and subjects of taxation, when this is done under delegated authority, it is no less effective. Gasaway v. Seattle [Wash.] 100 P 991. Where a city under the delegated power of eminsnt domain takes property for a public purpose, a sale thereof by county for unpaid taxes is void under Const. art. 7, § 2. Id.

**46.** Priv. Laws 1907, p. 1267, c. 482, held not to authorize levy of tax on citizens outside a school district who would not be benefited by the school and hence was not unconstitutional. McLeod v. Carthage Com'rs, 148 N. C. 77, 61 SE 605.

pose for which taxes may be levied [47] and the character thereof.[48] As a general rule a maximum rate of taxation is prescribed which cannot be exceeded.[49] A grant of taxing power to a municipality is strictly construed.[50]

*Construction of tax laws.* See 10 C. L. 1780—Tax laws as a rule are to be construed on the same general basis and under the same rules as laws in general,[51] and a statute imposing a tax must be construed in connection with other tax laws, prior and contemporaneous,[52] and also in the light of legislative history on the subject [53] and the practical understanding and construction placed thereon by taxing officials

47. "For county purposes" in Const. art. 10, § 11, limiting taxation to 40 cents on $100 means all subdivisions of the county for use of which taxes may be imposed. State v. Piper, 214 Mo. 439, 114 SW 1. A **library tax** may be properly made part of general city tax. City of Chicago v. Cook County, 136 Ill. App. 120.

48. Operation of Laws 1901, p. 243, § 9696x, imposing a **poll tax,** is made optional with the county court. Johnson v. Scott, 133 Mo. App. 689, 114 SW 45.

49. Estimate furnished city by school board of amount needed for current expenses was not controlling except to minimum amount provided by No. 36 of 1873, p. 73. State v. New Orleans, 121 La. 762, 46 S 798. Acts 1908, p. 56, c. 72, makes 18 mills the maximum rate counties can levy for 1908, and 1909, and applies to current as well as special extraordinary levies provided for by Code 1906, § 324. Wells v. McNeill [Miss.] 48 S 184. Bessemer City charter, § 45½, held void as in violation of Const. § 216, providing that no city shall levy a higher rate of taxation than one half of one per cent on the value as assessed for state taxes during the preceding year. City of Bessemer v. Southern R. Co. [Ala.] 48 S 103. Under Const. art. 8, § 9, fixing maximum rates for "county purposes," etc., and "other permanent improvements," power to tax for the latter purpose cannot exceed limit for former. Ault v. Hill County [Tex.] 116 SW 359. Under Const. § 157, prohibiting a taxing district from becoming indebted beyond revenue provided for year without assent of voters, fact that it exceeded such limit did not invalidate tax levy. Trustees of White School Dist. No. 15 v. Cummins, 33 Ky. L. R. 739, 111 SW 286.

50. Any fairly reasonable doubt concerning existence of such power is to be resolved against corporation and power denied. Ex parte Unger [Okl.] 98 P 999. Power to levy occupation tax on "contractors" held not to cover persons doing contract work. Id.

51. See, also, Statutes 12 C. L. 1919. Statutory provisions are **liberally construed when** irregularity complained of has not been prejudicial. State v. Several Parcels of Land [Neb.] 119 NW 21. In construing tax laws the **legislative intention** is the only guide, and court cannot extend meaning of the law so as to include things not named nor permit new names to be given old things to escape taxation. White v. Walsh, 62 Misc. 423, 114 NYS 1015. **Act relative to transit duties** (Act March 4, 1869, P. L. 226), to effect that tax thereby provided for should be paid until legislature should impose uniform tax applicable to all railroad and canal companies, refers to time when tax should be imposed and not to time when law authorizing its imposition should be enacted or take effect. State v. United New Jersey R. & Canal Co. [N. J. Err. & App.] 71 A 228.

52. Acts 1906, p. 61, amending Acts 1905, p. 425, is not void because not making certain **exemptions,** as it is to be construed in connection with sections providing for exemptions. Coleman v. Emanuel County Board of Education, 131 Ga. 643, 63 SE 41. Const. art. 5, art. 7, and amendment of November, 1900, construed and held to prohibit levy of any **poll tax** in excess of two dollars. Southern R. Co. v. Mecklenburg County Com'rs, 148 N. C. 220, 61 SE 690. Sp. Act. Jan. 4, 1859 (P. L. 828), relating to **taxation of property of railroad companies** in city of Pittsburg, was not repealed by Act March 7, 1901 (P. L. 20). Pennsylvania R. Co. v. Pittsburg, 221 Pa. 90, 70 A 271. Ann. St. 1906, p. 4315, providing that toll bridges owned or operated by railroad company, stock company, etc., shall be taxed, does not authorize taxation of a **boundary bridge** unless it is a toll bridge, since to construe it, as authorizing taxing of an interstate bridge, not a toll bridge would violate Ann. St. 1906, pp. 275, 278, requiring uniformity. State v. Louisiana & M. R. R. Co. [Mo.] 114 SW 956. Rev. Laws, c. 14, § 24, providing for **taxation of foreign and domestic insurance companies** on net value of their policies, and § 28 providing for taxation of foreign insurance companies provide two separate methods of taxation, and a foreign company which has paid taxes under the latter is not subject to taxation under the former. Metropolitan Life Ins. Co. v. Com., 198 Mass. 466, 84 NE 863. Object of Rev. Laws, c. 14, § 28, is to make taxation under such section no more burdensome on foreign companies doing business in the state than on domestic companies doing business in a foreign state. Id.

53. Burns' Ann. St. 1901, §§ 8496, 8499, 8503, 8538, 8555, providing that railroads give statement of capital stock, annual gross and net earnings, etc., considered in light of history of legislation on **railroad taxation,** requires that, in finding value of railroad property, money on hand must be considered as earnings and cannot be retaxed as money. Clark v. Vandalia R. Co. [Ind.] 86 NE 851. P. S. 713, 714, 715, imposing valuation **tax on corporate franchises** and providing that corporations may in lieu thereof pay a gross earnings tax, construed with legislative history and §§ 694, 695, and held that rate of gross earnings tax is to be determined on the gross earnings during the fiscal year for which the tax is paid. State v. Rutland R. Co., 81 Vt. 508, 71 A 197.

and the public,[54] but such construction is not binding upon the courts.[55] Tax laws are presumptively prospective and not retrospective in their operation,[56] and are construed strictly against the taxing power,[57] especially to prevent double taxation.[58] Any method of taxation prescribed which seeks to secure uniformity should receive judicial sanction.[59]

§ 2. *Persons, objects and interests taxable. A. Taxable property and its classification.*[60]—See 10 C. L. 1781.—As a general rule all property[61] within the juris-

**54.** That statute authorizing deduction of debits from credits has been in force and acted upon for 70 years requires a court to move with caution in declaring it void. Stumpf v. Storz [Mich.] 16 Det. Leg. N. 87, 120 NW 618. In view of judicial decisions and construction of Act Jan. 4, 1859 (P. L. 828), relative to taxation of railroad property in the city of Pittsburg, showing that for 50 years no attempt was made to tax rights of way, the word "real estate" as used in such act cannot be construed to include rights of way. Pennsylvania R. Co. v. Pittsburg, 221 Pa. 90, 70 A 271.

55. Court not precluded from declaring taxation statute void by fact that it had been acted upon for seventy years. Stumpf v. Storz [Mich.] 16 Det. Leg. N. 87, 120 NW 618.

**56.** Act March 15, 1906, authorizing assessing board to consider gross earnings and net income of foreign corporation in valuing its franchise, is prospective and not retrospective. James v. American Surety Co. [Ky.] 117 SW 411.

**57.** See 10 C. L. 1781.

**58.** Double taxation not presumed to have been intended. State v. Louisiana & M. R. R. Co. [Mo.] 114 SW 956.

**59.** Under Const. art. 7, §§ 1, 2, providing that all property shall be taxed, and requiring legislature to provide a uniform and equal rate. State v. Parmenter, 50 Wash. 164, 96 P 1047.

**60. Search Note:** See notes in 37 A. S. R. 747; 62 Id. 175.

See, also, Executors and Administrators, Cent. Dig. § 439; Dec. Dig. § 110; Landlord and Tenant, Cent. Dig. §§ 519-535; Dec. Dig. § 149; Life Estates, Cent. Dig. § 39; Dec. Dig. § 18; Mortgages, Cent. Dig. §§ 526-531; Dec. Dig. § 200; Taxation, Cent. Dig. §§ 134-306; Dec. Dig. §§ 57-190; Vendor and Purchaser, Cent. Dig. §§ 78-96, 106; 27 A. & E. Enc. L. (2ed.) 632.

**61.** All property is subject to taxation except such as legislature may exempt by general law. People v. Ravenswood Hospital, 238 Ill. 137, 87 NE 305. "Property" is right or interest in a thing. Commonwealth v. Walsh's Trustee [Ky.] 117 SW 398. May be imposed on all property, tangible and intangible, having a permanent situs in state. Hall v. Miller [Tex. Civ. App.] 110 SW 165. Under rule requiring all property to be taxed, what is property to a domestic corporation is property as to a foreign corporation. Commonwealth v. Walsh's Trustee [Ky.] 117 SW 398.

**Held property:** Corporate stock. State v. Hinkel, 136 Wis. 66, 116 NW 639. Capital stock of a corporation is "property" within Const. art. 9, § 1, providing for taxation. Consolidated Coal Co. v. Miller, 236 Ill. 149, 86 NE 205. Const. pt. 2, c. 1, § 1, art. 4, authorizing tax on any produce, goods, commodities, etc., brought into, produced, or in state, is only provision authorizing a tax on the sale of certificates of corporate stock. In re Opinion of Justices, 196 Mass. 603, 85 NE 545. Under Const. pt. 2, c. 1, § 1, art. 4, authorizing tax on produce, goods and commodities within state, tax may be imposed on sales of certificates of corporate stock, such a transfer being the exercise of right within meaning of "commodities." Id. Mining right to drill for oil and gas in consideration of a fixed royalty. People v. Bell, 237 Ill. 332, 86 NE 593. Under Hurd's Rev. St. 1905, p. 1399, §§ 6, 7, providing that mining rights separate from the land shall be taxed separately, the right of a lessee to mine for oil and gas on certain premises is a mining right. Id. Notes and bonds are "property" within Laws 1905, p. 436, c. 8. Hall v. Miller [Tex.] 115 SW 1168.

**Not property:** Under Mill. Act. (Rev. Laws, c. 196), treating common rights to use water by a dam for mill power as a mere potentiality until exercised, the possibility of deriving power from a stream before appropriation therefor is not taxable and when appropriated it is taxed as between different owners to the property to which it is applied. Blackstone Mfg. Co. v. Blackstone, 200 Mass. 82, 85 NE 880. A "trade mark" is not property within St. 1909, § 4020. Commonwealth v. Kentucky Distilleries & Warehouse Co. [Ky.] 116 SW 766.

**NOTE. Trademarks as taxable property:** Under a state constitution providing that "all property shall be taxed in proportion to its value, unless exempted by this constitution," it is held that tradmarks are not property within the contemplation of the constitutional section. Commonwealth v. Kentucky Distilleries & Warehouse Co. [Ky.] 116 SW 766.

A trademark, although it cannot be sold or assigned apart from the business to which it is attached (MacMahon v. Denver, 113 F 468), is today generally recognized as property, and entitled to protection as such (Derringer v. Plate, 29 Cal. 293, 87 Am. Dec. 170; Avery & Sons v. Meikle, 81 Ky. 73). The question in the principal case, however, is whether it is such property as was contemplated in the constitutional provision quoted. Such provisions are designed to secure equality in taxation (People v. Worthington, 21 Ill. 170), and the courts have generally held that they do not require the taxation of every form of property right (Arapahoe County Com'rs v. Rocky Mountain News Print. Co., 15 Colo. App. 189, 61 P 494; State v. Savage, 65 Neb. 714, 91 NW 716). When extraordinary forms of property are sought to be taxed, there is substantial unanimity that such property must be specially designated (People v. Feitner, 167 N. Y. 1, 60 NE 265 [stock exchange seat]; Willis v. Com., 97 Va. 667, 34

diction of the taxing power is subjected to taxation,[62] property intended to be relieved from the burden of taxation being protected by special exemptions based on the purposes for which it is used.[63]

The power to classify for the purpose of taxation has already been considered.[64] One of the most frequent classifications is with reference to the mode of assessment,[65] as where property is subjected to a single tax to be assessed in a certain manner in lieu of all other taxes.[66] Under this rule the method of computing or ascertaining the tax is a question of construction.[67]

SE 460 [ground rents] and a method of assessment devised (State Board v. Holliday, 150 Ind. 216, 49 NE 14.) Thus while good will, the legal characteristics of which are closely akin to those of trademarks, has been held not taxable per se under a state constitutional provision (Hart v. Smith, 159 Ind. 182, 64 NE 661, 58 L. R. A. 942), it is taxable when so designated as part of a corporation's capital (People v. Dederick, 161 N. Y. 195, 55 NE 927). The principal case correctly holds, therefore, that the trademarks are not necessarily taxable as "property" under the constitutional provision, but they would be taxable if a statute taxed the business as a unit. See Adams Exp. Co. v. Ohio, 166 U. S. 185, 41 Law. Ed. 965.—From 9 Columbia L. R. 561.

62. Under Rev. St. 1895, art. 5063, and Laws 1905, p. 436, c. 8, personalty located in state owned by nonresidents is subject to taxation. Hall v. Miller [Tex.] 115 SW 1168. Const. art. 8, § 1, requiring all property owned by natural persons or corporations to be taxed, embraces every kind of property within state, whether owned by citizens or nonresidents. Id. Rev. St. 1895, art. 5061, making all propery not exempt subject to taxation is in **harmony** with such constitutional provision. Id. Bonds and notes owned by nonresidents are taxable where they have acquired situs within state and are used in connection with business carried on for the owner. Id. Where property was part of an estate and not exempt under Acts 1906, p. 90, c. 22, art. 1, § 8, the executor properly listed it without regard to the purpose for which it was to be used afer it passed from his hands. Leavell's Adm'r v. Arnold [Ky.] 115 SW 232.

63. See post, § 2D, Public Property, § 3, Exemptions.

64. See ante, § 1.

65. Constitutional amendment of 1895 (Gen. Laws 1895, c. 7), authorizing legislature to impose either property or gross earnings tax on telephone companies and certain other corporations, held an extension to corporations named without change of system as to railroads. State v. Twin City Tel. Co., 104 Minn. 270, 116 NW 835. Laws 1897, c. 314, imposing such tax on telephone companies in lieu of all other taxes, held authorized and valid under such amendment. Id.

66. St. 1898, c. 1222K, amended by Laws 1905, p. 766, providing that license fee of corporations shall be in lieu of all taxes, except upon real estate, merely means that their general property shall be exempt from ordinary taxation. State v. Hinkel, 136 Wis. 66, 116 NW 639.

**Railroad property: "Roadway"** within Const. § 179, providing for taxation of roadway, franchise, etc., **of railroads**, includes all grounds necessary for main line switches, side tracks, station houses, freight houses, and other necessary accommodations. Minneapolis, etc., R. Co. v. Oppegard [N. D.] 118 NW 830. Laws 1890, p. 33, imposing mileage tax on **railroad lands**, does not contemplate taxation of lands not used for railroad purposes but to be so used in future. St. Paul, M. & M. R. Co. v. Howard [S. D.] 119 NW 1032. Property used as a **telegraph line** built by railroad company is not exempt as property necessary for running of trains, where such property is used for commercial purposes. Minneapolis, etc., R. Co. v. Oppegard [N. D.] 118 NW 830. That the company is not shown to have a franchise to do telegraph business is immaterial where it has assumed such franchise, and it is estopped to show as against the state that it has no franchise. Id. Under Ann. St. 1906, pp. 4294, 4295, providing for railroad taxation according to mileage, total value of a nontoll **bridge** held to have been considered in making up assessed value of the road. State v. Louisiana & M. R. R. Co. [Mo.] 114 SW 956. Bridge constituting integral part of railroad is not a toll bridge, though company illegally charges for carrying over it and is not within Ann. St. 1906, p. 4315, authorizing taxation of toll bridges. Id. **Pier** held to be used for other than railroad purposes and subject to local taxation. In re Lehigh Valley R. Co. [N. J. Law] 71 A 126.

**Gross earnings** tax of Minnesota is a tax upon the property of corporations and not upon the corporations or upon the right to engage in business. State v. Northwestern Tel. Exch. Co. [Minn.] 120 NW 534. As a method of determining what is a fair and equitable property tax, state may permit tax to be computed on basis of a fixed percentage of earnings of the property. Id. Railroad company electing to pay gross tax in lieu of ad valorem tax as provided by P. S. 713, 714, which erroneously computes the amount of the tax, is not liable for the ad valorem tax, since § 694 provides a remedy by imposing an additional tax. State v. Rutland R. Co., 81 Vt. 508, 71 A 197.

67. Under Laws 1884, p. 309, c. 252, and Railroad Laws, § 95, requiring railways to pay a gross earnings tax, a street railway company held liable for the tax on receipts from operation under trackage agreements of tracks owned by other companies. City of New York v. Fulton St. R. Co., 130 App. Div. 791, 115 NYS 410.

**Gross earnings**, which form basis for tax, under Gen. St. 1894, § 1667, is not limited to earnings derived from operation of trains, but includes all earnings received by the railway companies while performing work incidental to, or connected with, the business. State v. Minnesota & I. R. Co., 106

One who voluntarily submits his property to assessment is estopped to deny that it is taxable.[68]

(§ 2) *B. The persons liable.*[69]—See 10 C. L. 1783—It may be stated as a general rule that property is taxable to its owner,[70] but this rule is too general to be of practical value, the questions which usually arise being as to who is deemed the owner for the purpose of taxation.[71] The statutes usually designate specifically the persons liable to a poll tax.[72]

*Vendor and vendee.*See 10 C. L. 1784—Provision is sometimes made for apportionment where real estate is divided by sale.[73] Where on specific performance the vendee is allowed rents during the vendor's default, the former should not be allowed interest on taxes paid by the latter.[74]

*Lessor and lessee.*See 10 C. L. 1784—As a general rule, land held under lease is taxable to the owner,[75] but this rule does not apply when the lease is perpetual.[76]

Minn. 176, 118 NW 679. Amount received from lumber companies and others in moving, transferring, and switching cars at loading works. Id. Amount received for use of equipment, such as steam shovels, work trains, hoisting machinery, etc. Id. Amount received from other railway companies for use of its work train employed in construction work. Id. Amount received for its cars in transportation in excess of amount paid for use of cars of other companies. Id. Money received for sale of old materials, supplies, and equipment, or surplus of supplies, held **not gross earnings.** Id. Money received from otehr railway companies for repairs of cars based on actual cost according to reciprocal arrangement. Id. Amount which might have been received had the company charged itself at regular rates for shipping its own supplies and materials. Id. Income derived from interest or exchange from money deposited in banks, interest on securities, rentals upon the right of way, garnishee fees, bill board, privileges, etc. Id. Gross receipts from labor and work train service and maintaining, laying, and taking up spur tracks for private parties, is not. Id. Proportionate part of earnings of telephone companies within this state resulting from its use in interstate commerce constitutes part of gross earnings, under Gen. Laws 1897, c. 314. State v. Northwestern Tel. Exch. Co. [Minn.] 120 NW 534. Amounts which regular rates would have produced had service, rendered without charge, been paid for, is not. Id. Money received, from messenger not in company's service but employed specially to call nonsubscribers, and money collected from patrons as messenger charges actually paid, is not. Id. Money collected by a telephone company from its patrons for other companies, is not. Id.

**68.** One who voluntarily submits his property to ths jurisdiction of the assessing officer and requests that it be assessed is subsequently estopped to deny that the property was assessable. Himmer v. Chickasaw County [Iowa] 118 NW 779.

**69. Search Note:** See notes in 4 C. L. 1610.

See Taxation, Cent. Dig. §§ 160-195, 204; Dec. Dig. §§ 78-96, 106; See Executors and Administrators, Cent. Dig. § 439; Dec. Dig. § 110; Landlord and Tenant, Cent. Dig. §§ 519-535; Dec. Dig. § 149; Life Estates, Cent. Dig. § 39; Dec. Dig. § 18; Mortgages, Cent. Dig. §§ 526-531; Dec. Dig. § 200; Vendor and Purchaser, Cent. Dig. §§ 408-412; Dec. Dig. § 198; 27 A. & E. Enc. L. (2ed.) 632.

**70.** Under Pub. St. 1882, c. 11, § 13 and St. 1899, p. 837, taxes on real estate are assessed against owner or possessor and not primarily against land. Rogers v. Gookin, 198 Mass. 434, 85 NE 405. Under Const. 1879, art. 57; Const. 1898, art. 59; Act No. 67 of 1882 and No. 10 of 1886, a tax sale of **property confiscated** and sold to United States previously under Confiscation Act. Cong. July 14, 1862, made during life of confiscatee, is void as to his heirs. In re Quaker Realty Co., 122 La. 229, 47 S 536.

**71.** See post, particular subdivisions of this section. Company claiming to own real estate and being in possession of them was prima facie entitled to object to a tax though premises were assessed in the name of another. People v. Centralia Gas & Elec. Co., 238 Ill. 113, 87 NE 370.

**72.** All able-bodied men between certain ages are required by Laws 1901, p. 239, § 9696i, to pay poll tax. Johnson v. Scott, 133 Mo. App. 689, 114 SW 45.

**73.** Under Pub. St. 1882, c. 11, § 13, providing for assessment of real estate taxes to owner or person in possession, and § 81, providing for apportionment where land is divided, by sale, apportionment does not impose any new or exchanged personal liability and the tax collector is not entitled to recover apportioned tax against purchasers. Rogers v. Gookin, 198 Mass. 434, 85 NE 405. An apportionment as between an owner of land assessed and a subsequent purchaser of part of the tract under Pub. St. 1882, c. 13, § 81, does not contemplate illegality of first assessment nor a reassessment but shifts the burden from the owner at date of taxation to the several parcels into which the tract is divided, and releases the original owner from personal liability. Id.

**74.** Haffey v. Lynch, 193 N. Y. 67, 85 NE 817.

**75.** As a general rule land held under lease for usufructuary purposes is assessed as a whole, the fee owner being deemed the owner of the whole estate for purposes of taxation. Graciosa Oil Co. v. Santa Barbara County [Cal.] 99 P 483.

**76.** Lessee in perpetual lease is liable for taxes on premises. City of Norfolk v. J.

*Principal and agent.*[See 10 C. L. 1784]—An agent is not personally liable unless made so by statute.[77]

*Mortgagor and purchaser under mortgage sale.*[See 10 C. L. 1784.]

*Trust property.*[See 10 C. L. 1784]—Trust property may in a proper case be assessed to the trustee as owner,[78] but such is not the invariable rule.[79]

*Life tenant.*[See 10 C. L. 1784]—A life estate in land as such is not subject to taxation.[80]

*Estates of decedents.*[See 10 C. L. 1784]—As a general rule, an executor or personal representative is not liable.[81]

*As between pledgor and pledgee* [See 10 C. L. 1784] the property is taxable to the pledgor.[82]

*Property of nonresidents.*[83]—[See 10 C. L. 1784.]

*Tenants in common.*[See 10 C. L. 1784]

(§ 2) *C. Corporations and corporate stocks and property. Corporate franchises and privileges.*[84]—[See 10 C. L. 1784]—A tax may be levied on a corporate franchise as such,[85] though other property of the franchise holder is also taxed.[86] The

W. Perry Co., 108 Va. 28, 61 SE 867. Lease held to apply to municipal, as well as state taxes. Id.

**77.** Agent or representative of another. In re Boyd, 138 Iowa, 583, 116 NW 700.

**78.** Land held in trust is properly assessed in name of trustee. Dunham v. Lowell, 200 Mass. 468, 86 NE 951.

**79.** A receiver who holds funds awaiting distribution is not an owner or trustee for purposes of taxation. In re Boyd, 138 Iowa, 583, 116 NW 700. A referee appointed by the court to sell property in partition proceedings is not a trustee controlling and managing the property within Code, § 1312, and is not personally liable for taxes on contracts of sale made by him. Id.

**80.** The land is taxed and payment thereof is left to determination of life tenant and remainderman. White v. Marion [Iowa] 117 NW 254.

**81.** An executor who has made final settlement cannot be held personally liable for taxes due by the estate. State v. Mississippi Valley Trust Co., 209 Mo. 472, 108 SW 97. Executor of trustee is not liable for taxes on trust estate during his testator's life time, not held or administered by the executor. Id.

**82.** Money deposited with gas company by consumers to guaranty fulfillment of their contracts. Parsons Natural Gas Co. v. Rockhold [Kan.] 100 P 639. Where an Indiana railroad company held funds of an Illinois company which were erroneously assessed to the Indiana company, the fact that the two companies thereafter consolidated did not validate the taxes. Clark v. Vandalia R. Co. [Ind.] 86 NE 851.

**83.** See post, § 4, Place of taxation.

**84. Search Note:** See notes in 4 C. L. 1611; 6 Id. 1608, 1610, 1611; 45 L. R. A. 737; 57 Id. 33, 57; 58 Id. 513, 568; 60 Id. 33, 321, 641; 64 Id. 33; 3 L. R. A. (N. S.) 584; 9 Id. 885; 69 A. S. R. 32; 89 Id. 625, 652; 3 Ann. Cas. 632; 4 Id. 498; 6 Id. 523; 7 Id. 1195; 9 Id. 738; 10 Id. 107.

See Taxation, Cent. Dig. §§ 206-294; Dec. Dig. §§ 112-171½; 27 A. & E. Enc. L. (2ed.) 922.

**85.** "Franchise" means not right to do the thing, but doing of it, so the fact that the act of the company in doing it was ultra vires is immaterial. James v. Kentucky Refining Co. [Ky.] 113 SW 468. "Franchises" in Const. Art. 13, § 2, providing that all property defined to include franchises shall be taxed in proportion to value considered in connection with §§ 3, 12, and art. 12, § 7, does not mean mere right of corporation to exist but includes the right to carry on business. Black Rock Copper Min. & Mill. Co. v. Tingey, 34 Utah, 369, 98 P 180. Tax against corporate franchise under Russell's St., § 6050, is a property tax, being on all intangible property of the corporations. Commonwealth v. Walsh's Trustee [Ky.] 117 SW 398. Franchise tax imposed by Ky. St. 1903, § 4077, is not an occupation tax, nor tax on privilege of doing business, but a tax on the business. James v. Kentucky Refining Co. [Ky.] 113 SW 468.

**What franchises are taxable:** Statutes of Kentucky deal with two classes of corporations, one of which exercises some special privilege upon which St. 1909, § 4077, imposes a franchise tax in addition to other taxes, and the other class being ordinary commercial corporations not subject to such tax, but its property is taxable the same as property of individuals under § 4085. Commonwealth v. Walsh's Trustee [Ky.] 117 SW 398. Ky. St. 1903, § 4077, imposing a franchise tax on corporations, held to apply to corporation manufacturing cotton seed oil and owning cars by which the product was transferred to its customers on a mileage basis. James v. Kentucky Refining Co. [Ky.] 113 SW 468. Rights and privileges granted a **telegraph company** to construct and operate lines held a "special franchise" within Laws 1896, p. 796, amended by Laws 1899, p. 1589, defining such term. People v. Woodbury, 116 NYS 209. Corporation engaged in **business of carrying freight** is subject to the franchise tax imposed by Ky. St. 1903, § 4077, though such business is only incidental. James v. Kentucky Refining Co. [Ky.] 113 SW 468. **Street railway,** under obligation to pay a franchise tax under Laws 1890, p. 1111, c. 565, is not liable for receipts derived from its operation under trackage agreements over tracks of other companies. City of New York v. Fulton St. R. Co., 59 Misc. 630, 112 NYS 494.

**What corporations liable:** A corporation

authority of municipal corporations to impose franchise taxes has already been considered.[87] The imposition of license fees in the nature of taxes, but in the exercise of the police power, is treated elsewhere,[88] as is also licenses, and taxes upon special priviliges, and franchises as distinguished from the corporate franchise proper.[89] The taxation of a franchise as personalty is treated in a subsequent subsection.[90]

*Corporate capital and other property.* See 10 C. L. 1788.

*Stocks.* See 10 C. L. 1785—Whether corporate stock is property has already been considered.[91] Shares of corporate stock are taxable to the owner,[92] unless otherwise provided by law.[93]

*Banks and trust companies.* See 10 C. L. 1785—In some states special provision is made for the taxation of banks.[94]

*Foreign corporations.* See 10 C. L. 1788—Accounts due a foreign corporation for goods sold in original packages are taxable.[95] In Mississippi a corporation doing business in the state is taxable on credits.[96]

(§ 2) *D. Public property.*[97]—See 10 C. L. 1788—While the taxing power may,

doing business in the state is liable to taxation on its franchise. People v. Glynn, 194 N. Y. 387, 87 NE 434. To render corporation liable to imposition of franchise tax under statute, it must be doing business or exercising its corporate franchise in state and must have capital stock employed within state during year for which the tax is assessed. Laws 1901, p. 1365, c. 558, § 182, as amended by laws 1906, p. 1196, c. 474, § 2. Id.

**86.** See ante, § 1. Where part of a corporation's capital was engaged in the carrying business, it was liable to taxation on capital not so employed under Laws 1906, p. 88, c. 22, and also for the franchise tax imposed by Ky. St. 1903, § 4077. James v. Kentucky Refining Co. [Ky.] 113 SW 468.

**87.** See ante, § 1, subd. Municipal Corporations.

**88.** See Licenses, 12 C. L. 593.

**89.** See Foreign Corporations, 11 C. L. 1508; Insurance, 12 C. L. 252; Railroads, 12 C. L. 1542; Street Railways, 12 C. L. 1965; Telegraphs and Telephones, 10 C. L. 1841; Waters and Water Supply, 10 C. L. 1996, and like topics.

**90.** See post, this section, subsection F.

**91.** See ante, this section, subsection A.

**92.** Stock of trust companies which are taxed under St. 1898, § 1222k, amended by Laws 1905, p. 766, c. 442, providing that the license fee shall be in lieu of all personal taxes, held not exempt under St. 1898, § 1038, subd. 9. State v. Hinkel, 136 Wis. 66, 116 NW 639. Under the constitution requiring all non-exempt property to be assessed in proportion to its value and defining property as including corporate stock, and under Pol. Code, §§ 3608, 3627, held that stock held by citizens is taxable at full value to the extent that such value exceeds the value of the corporation's property taxed in the state. Not double taxation. Chesebrough v. San Francisco, 153 Cal. 559, 96 P 288. A part of corporate **stock held by holding company** pursuant to a plan of reorganization of corporations whereby the holding company is to acquire the entire stock is as much subject to tax as though held by any other owner. McCallum v. Corn Products Co., 131 App. Div. 617, 116 NYS 118.

**93.** Under St. 1909, § 4088, corporate shareholders shall not be taxed where corporations pay taxes on their franchise and property, and stockholders in a public service corporation so taxed are not taxable. Commonwealth v. Harris [Ky.] 118 SW 294. Under Hurd's Rev. St. 1905, c. 120, amended by Laws 1905, p. 353, capital, stock and corporate franchise is assessable against the corporation and not against the share holders. Consolidated Coal Co. v. Miller, 236 Ill. 149, 86 NE 205. Under Kirby's Dig. §§ 6872, 6873, 6902, 6906, local insurance companies are required to list their stock for taxation and such stock is not assessable to stockholders. Dallas County v. Banks [Ark.] 113 SW 37. Under St. 1909, § 4088, providing that corporate shareholders of corporations required to pay taxes on their franchises shall not be required to list their shares, held shares in a company which pays a tax on its franchise and capital are not taxable. Commonwealth v. Walsh's Trustee [Ky.] 117 SW 398.

**94.** Under Act July 15, 1897 (P. L. 292), exempting banks paying the 4 mill tax upon the value of its stock from local taxation and providing that they shall not be required to make any report to local assessor of personal property, a bank is exempt from local taxation and is not required to pay tax on personalty owned by it. Commonwealth v. Clairton Steel Co., 222 Pa. 293, 71 A 99.

**95.** Debts due a foreign corporation on open accounts for imported goods sold in original packages are taxable against corporation. People v. O'Donnel, 62 Misc. 560, 115 NYS 140.

**96.** A foreign corporation with local agencies in the state, to which salesmen reported, was doing business within the state and taxable on credits under Rev. Code Miss. § 497, but was not doing business within the state where it did business only through traveling salesmen who transmitted all business to agencies outside the state. Singer Mfg. Co. v. Adams [C. C. A.] 165 F 877.

**97. Search Note:** See notes in 23 L. R. A. 807; 1 L. R. A. (N. S.) 766; 12 Id. 1159; 33 A. S. R. 403, 406; 4 Ann. Cas. 747, 936; 6 Id. 118; 7 Id. 87; 8 Id. 26; 11 Id. 391.

See, also, Taxation, Cent. Dig. §§ 295-306;

of course, tax its own property,[98] as a general rule public property and the various instrumentalities of the government are not subject to taxation,[99] and statutes relative to taxation are to be construed in the light of this rule.[1] Within this rule comes municipal property used for a public purpose [2] and, also, property of quasi public corporations when so used,[3] and public lands.[4] The exemption of public property ceases when it is acquired by private individuals.[5]

Dec. Dig. §§ 173-190; 27 A. & E. Enc. L. (2ed.) 643.

**98.** A city having general powers of taxation has power to tax its own property, especially where it holds merely the legal title, having given a perpetual lease, under which the lessee is to pay all taxes. City of Norfolk v. J. W. Perry Co., 108 Va. 28, 61 SE 867.

**99.** Under Bill of Rights art. 28, property cannot be taxed without legislative authority, and hence where **fire district** purchased land and water rights which purchase was ratified by Laws 1903, p. 219, c. 221, which also provided that its property should be exempt, its property was not taxable by the town wherein it was situated. Canaan v. Enfield Village Fire Dist., 74 N. H. 517, 70 A 250. Laws 1907, c. 288, p. 387, creating a **hospital** farm for inebriates and authorizing the board of control to collect a 2 per cent tax on all license fees levied for the sale of intoxicants to maintain it, is valid. Such license fees are not public property and are not exempt. Leavitt v. Morris, 105 Minn. 170, 117 NW 393. Property of **city dispensary** held not exempt as public property. James v. Ray, 130 Ga. 694, 61 SE 594.

**1.** "Real estate" in taxing statutes does not include land or appurtenances necessary to the exercise of a franchise of a public corporation. Conoy Tp. Sup'rs v. York Haven Elec. Power Plant Co., 222 Pa. 319, 71 A 207.

**2.** Under Const. § 170, exempting public property, a **sinking fund** created to liquidate bonded debts for waterworks system, is but so much taxes though invested in interest bearing securities and is exempt. Commonwealth v. Sinking Fund Com'rs [Ky.] 112 SW 1128. Under Pub. St. 1906, § 496, exempting property devoted to public use, a **lighting plant** of a village is exempt. Village of Swanton v. Highgate, 81 Vt. 152, 69 A 667. Under Const. § 170, exempting public property, a municipal **waterworks** system is exempt. City of Covington v. District of Highlands, 33 Ky. L. R. 323, 110 SW 338.

**NOTE. Taxation of municipal waterworks:** A city erected waterworks to supply itself and its inhabitants with water. Held, such property was exempt from taxation under a statute providing for exemption of public property devoted to public purposes. Commonwealth v. Covington, 32 Ky. L. R. 837, 107 SW 231. While it is suggested that provisions for a water supply are more properly subjects of private enterprise, Abbott, Municipal Corporations, § 455, the courts have universally granted municipal corporations the right to provide water, as well as light, for their own use (David v. Portland Water Committee, 14 Or. 98, 12 P 174; Livingston v. Pippin, 31 Ala. 542), and they may also incidentally supply their citizens (Kane v. The Mayor, 15 Md. 240; City of Crawfordsville v. Braden, 130 Ind. 149 28 NE 849. 30 Am. St. Rep. 214), this being frequently justified as a valid exercise of the police power (Ellinwood v. Reedsburg, 91 Wis. 131, 64 NW 885; City of Crawfordsville v. Braden, supra). Property so used is everywhere considered as being employed for a public purpose (Warner v. Gunnison, 2 Colo. App. 430, 31 P 238; Smith v. Lincoln, 170 Mass. 488, 49 NE 743), and, in accord with principal case, not subject to taxation) Smith v. Nashville, 88 Tenn. 464, 12 SW 924, 7 L. R. A. 469; West Hartford v. Board of Water Com'rs, 44 Conn. 360; City of Rochester v. Rush, 80 N. Y. 302).—From 8 Columbia L. R. 414.

**3.** Real estate of a quasi public corporation necessary to its operation is not subject to local taxation in the absence of statutory authority. Conoy Tp. Sup'rs v. York Haven Elec. Power Plant Co., 222 Pa. 319, 71 A 207. Whether a corporation is public or a quasi public so as to be exempt from local taxation depends upon what it is authorized to do and may be compelled to do under its charter. Id. A corporation chartered to supply water and power to the public and to individuals in a named district is quasi public and its real estate is exempt from local taxation. Id.

**4.** Lands are not taxable while both the legal and equitable title remains in the government; title so held where one offered to exchange certain rights or lands for lien lands. Johnson v. Crook County [Or.] 100 P 294. Lands purchased from the state between February 1st and October 1st are not liable for taxes for that year. Creegan v. Hyman [Miss.] 46 S 952. Under Const. art. 10, § 4, property belonging to the state is exempt and Sess. Laws 1887, p. 336, amended by Sess. Laws 1889, p. 313, providing that land sold shall be exempt so long as title is vested in the state, is not an invalid exemption but a condition held out as an inducement to purchase. Colorado Farm & Live Stock Co. v. Beerbohm, 43 Colo. 464, 96 P 443. Under Const. art. 11, § 9, art. 7, § 6, held timber on county school lands was exempt so long as owned by the county but when sold was not exempt from taxes levied after the sale and was subject to tax imposed by Acts 1905, p. 72, c. 52. Montgomery v. Peach River Lumber Co. [Tex. Civ. App.] 117 SW 1061.

**5.** When public land has been fully paid for and final receipt issued, the equitable title of the government is transferred and the land becomes subject to taxation, though the United States holds the legal title until patent has issued. Johnson v. Crook County [Or.] 100 P 294. To uphold a tax assessed while land is held by the United States, title by relation cannot be invoked by carrying the owner's interest back to the time he applied for the land. Id. Where the government did not deny the right of the hoider of a military warrant to the land but merely suspended issuance of patent to investigate the rights of persons arising

(§ 2) *E. Realty.*[6]—See 10 C. L. 1788—Interests in land are generally taxable as realty,[7] especially when so provided by statute.[8]

(§ 2) *F. Personalty.*[9]—See 10 C. L. 1788—Taxable personalty includes money,[10] franchises,[11] mortgages,[12] contracts,[13] and credits.[14] Whether particular property comes within a particular statutory designation is a matter of construction.[15] Where whiskey is not taxable, warehouse receipt representing it is not taxable.[16]

§ 3. *Exemption from taxation.*[17]—See 10 C. L. 1789—As a general rule the taxing power may exempt certain persons and property from taxation,[18] subject, of course, to constitutional limitations.[19] One claiming an exemption must point to the

from conflicts created by assignments of the certificate, the land was subject to taxation from date of location. Herrick v. Sargent [Iowa] 117 NW 751. He who has the right of property and is not excluded from its enjoyment may not use the legal title of the government to escape payment of taxes. Id.

**6. Search Note:** See notes in 15 L. R. A. 296; 66 Id. 51; 1 L. R. A. (N. S.) 263.

See, also, Taxation, Cent. Dig. §§ 134-205; Dec. Dig. §§ 57-111; 27 A. & E. Enc. L. (2ed.) 640.

**7.** License to go on land and remove products thereof is not a taxable interest. Board of Sup'rs of Hancock County v. Imperial Naval Stores Co. [Miss.] 47 S 177. Instrument bargaining and leasing pine timber on land for turpentine purposes held to grant a mere irrevocable right to enter on the land during the life of the contract and the right was not taxable as land. Id.

**8.** Right to take oil under an oil lease is real estate within Pol. Code, § 3617, and can be assessed separately from the land. Graciosa Oil Co. v. Santa Barbara County [Cal.] 99 P 483. The oil stratum also constituting "minerals in and under the land" the rights of a lessee are "rights and privileges appertaining" to such minerals and are "real estate" within such statute. Id. "Real estate" within such statute includes mines and minerals, timber, and all rights and privileges appertaining to mining. Id. Laws 1903, c. 378, providing that mortgages on taxable real estate shall be taxed as part thereof, applies where the value of the mortgaged land in this state exceeds the debt, though the mortgage covers lands outside the state or the debt is protected by other security. State v. Hinkel [Wis.] 119 NW 815.

**9. Search Note:** See notes in 16 L. R. A. 59; 29 Id. 792; 57 Id. 57; 58 Id. 564, 566; 10 L. R. A. (N. S.) 1061; 37 A. S. R. 747; 2 Ann. Cas. 754.

See, also, Taxation, Cent. Dig. §§ 134-205; Dec. Dig. §§ 57-111; 27 A. & E. Enc. L. (2ed.) 636.

**10.** Money on deposit. New England Mut. Life Ins. Co. v. Assessors, 121 La. 1068, 47 S 27.

**11.** Franchise consisting of right to construct waterworks in city and use streets for that purpose is personal property. Adams v. Bullock & Co. [Miss.] 47 S 527.

**12.** When mortgaged land is exempt under Rev. Laws 1902, c. 12, § 5, the mortgage loan cannot be taxed as land under § 16, but is taxable as personalty under § 4. Sweetser v. Manning, 200 Mass. 378, 86 NE 897.

**13.** Under general Tax Laws, §§ 290, 293, an instrument giving a lessee an option to purchase at any time and to apply rentals as purchase money, held an executory contract of sale and taxable as such. White v. Walsh, 62 Misc. 423, 114 NYS 1015.

**14.** An enforceable contract for the sale of land is such a credit as is subject to taxation. In re Boyd, 138 Iowa, 583, 116 NW 700.

**15.** "Sheep" does not include unweaned lambs. Ex parte McCoy [Cal. App.] 101 P 419. Acts of 1896, p. 172, c. 156, § 15, providing for tax on "lint cotton" and Acts of 1894, p. 126, c. 90, § 5, providing for tax on "seed cotton" and "cotton" do not include delinted or Grabbot cotton. Mississippi Levee Com'rs v. Refuge Cotton Oil Co., 91 Miss. 480, 44 S 828.

**16.** Whether not taxable because of its situs or because it was exported from the United States. Selliger v. Kentucky, 213 U. S. 200, 53 Law. Ed. —.

**17. Search Note:** See notes in 6 C. L. 1614; 15 L. R. A. 860; 19 Id. 77, 289; 45 Id. 587; 1 L. R. A. (N. S.) 766; 5 Id. 608; 7 Id. 380, 663; 16 Id. 829, 867; 1 Ann. Cas. 839; 2 Id. 810; 4 Id. 37, 613, 388, 1203; 6 Id. 438; 7 Id. 39, 1013; 10 Id. 671, 857; 11 Id. 1102.

See, also, Taxation, Cent. Dig. §§ 307-415; Dec. Dig. §§ 191-251; 12 A. & E. Enc. L. (2ed.) 266; 27 Id. 658, 951.

**18.** Under Const. 1836, the legislature had power to exempt property. Board of Imp. Pav. Dist. No. 5 v. Sisters of Mercy [Ark.] 109 SW 1165.

**19.** Const. art. 9, § 3, providing that the legislature may exempt certain property, precludes it from exempting any property not enumerated by general or special legislation. Consolidated Coal Co. v. Miller, 236 Ill. 149, 86 NE 205. Capital stock of a corporation not being enumerated in such provision, a statute attempting to exempt it is unconstitutional. Id. The constitution makes no provision for exemption of personal property used for schools, and Code 1907, § 2061, declaring that such property shall be exempt only when "owned and used for school purposes by person to whom it is assessed," is valid. Anniston City Land Co. v. State [Ala.] 48 S 659. Under original Rapid Transit Laws: Laws 1891, p. 3, c. 4; Laws 1902, pp. 1610-1614, Laws 1896, p. 796; Laws 1894, p. 1884, special franchise to operate a subway acquired under assignment of the contract with the city is exempt. People v. State Tax Com'rs, 126 App. Div. 610, 110 NYS 577. Under Tax Laws, Laws 1896, p. 801, and Laws 1891, p. 3, c. 4, the subway or franchise to operate it is taxable to the city and not to the operator, and as the city is exempt the operator is also exempt. Id. Laws 1896, p. 796, c. 908, amended by Laws 1899, p. 1589, held not to de-

statute creating it [20] and bring himself within its terms,[21] but this rule does not relieve the court from interpreting exemption statutes under the ordinary rules of construction,[22] according to which the exemption will not be allowed unless clearly conferred;[23] but the rule that a general statute repeals all prior laws on the same subject [24] will not be indulged so as to violate an express promise of the legislature

prive the operator from exemption contained in Laws 1894, p. 1884, and re-enacted by Laws 1900, p. 1360. Id. Laws 1896, p. 715, amending Laws 1891, p. 3; Laws 1900, p. 1360, and Laws 1905, p. 1483, construed and held to be consistent only with the theory that the operator is not liable for any tax because of rights under the contract with the city for its operation which exemption, under Laws 1892, p. 1492, is not repealed by Laws 1896, p. 795. Id. Under Const. art. 3, § 18, providing that exemption shall not be granted **by special or local law,** a law intending to re-enact a provision in a special charter granting an exemption is void. People v. Raymond, 126 App. Div. 720, 111 NYS 177.

**20.** When property in general is made subject to taxation as by Code, §§ 1303, 1308, one claiming exemption must point to statute or rule giving him such right. In re Boyd, 138 Iowa, 583, 116 NW 700.

**21.** Right to exemption can be established only by strict proof of all facts necessary to authorize it. People v. Ravenswood Hospital, 238 Ill. 137, 87 NE 305. In proceedings under Code Supp. 1902, § 1407a, to assess property withheld from taxation, the taxpayer has the burden to prove that the property is exempt. Bednar v. Carroll, 138 Iowa, 338, 116 NW 315. Evidence insufficient to show one within Gen. Laws 1905, pp. 521 523, c. 11, §§ 6, 12, exempting from poll tax, persons blind or otherwise disabled. McCormick v. Jester [Tex. Civ. App.] 115 SW 278. One who claims the benefit of laws under which partial exemption is conferred on certain conditions must bring himself fairly within such laws. Coulson v. Baltimore [Md.] 71 A 990. Gen. St. 1902, §§ 2997, 2998, imposing a military tax on every person liable to military duty, does not exempt a well and strong man because of his poverty. Atwater v. O'Reilly [Conn.] 71 A 505. Under Sess. Laws 1899, p. 221, relative to exemptions of water rights, it is a question of fact whether a water right is taxable in whole or in part, or is wholly exempt. Swank v. Sweetwater Irr. & Power Co. [Idaho] 98 P 297. Bona fide sale of property two months prior to assessment day and investment of proceeds in nontaxable government bonds is not a **trick to escape taxation** within St. 1909, § 4051. Commonwealth v. Harris [Ky.] 118 SW 294.

**22.** Rule that statutes granting exemption are to be strictly construed does not relieve court from duty of interpreting exemption statutes by the ordinary rules of construction. Northwestern University v. Hanberg, 237 Ill. 185, 86 NE 734.

**NOTE. Exemption of separate interests:** By charter the land of the plaintiff was exempted from taxation "as long as said land belong to the university." Later an act was passed taxing the interest of persons holding under leases. Held, such interests were not within the exemption. Jetton v. University of the South, 208 U. S. 489, 52 Law. Ed. 584.

Exemptions from taxation are strictly construed, the presumption being that all that was to be given has been granted in express terms. Douglas County Agricultural Soc. v. Douglas County, 104 Wis. 429, 80 NW 740; Ford v. Delta & P. Land Co., 164 U. S. 662, 41 Law. Ed. 590. Where the land is owned by one person and the buildings by another, the two may be separately assessed (People v. Assessors, 93 N. Y. 308), and, though the land itself is exempt, the erections may be taxed as the property of the lessee by contract (People v. Com'rs, 80 N. Y. 573; Russell v. New Haven, 51 Conn. 259). Where the interest of the lessee has been made a separate estate, independently liable to taxation, and to sale on execution, such interest is considered taxable, notwithstanding the exemption of the fee. Philadelphia, etc. R. Co. v. App. Tax Court, 50 Md. 397; Zumstein v. Consolidated Coal & Min. Co., 54 Ohio St. 264, 43 NE 329. The common-law rule is that the landlord, unless otherwise agreed, is liable for all taxes during the term (McFarlane v. Williams, 107 Ill. 33), and must therefore reimburse the tenant for all payments made to protect the leased property. (Dawson v. Linton, 5 Barn. & A. 521). Though this may apply only to taxes affecting the reversion (Philadelphia, etc. R. Co. v. App. Tax Court, supra), here the tax is upon the only remunerative use to which the land can be put (Daugherty v. Thompson, 71 Tex. 192, 9 SW 199), and like a tax upon rents or income (Pollock v. Farmer's L. & T. Co., 157 U. S. 429, 39 Law. Ed. 759), since it must surely affect the leasable value of the land, seems in effect against the fee. But in view of the strict construction applied to such statutes, the court does not consider the indirect tax upon the fee as within the exemption.—From 8 Columbia L. R. 512.

**23.** Exemption is never inferred. There must be an express provision. City of Trenton v. Humel [Mo. App.] 114 SW 1131. The rule that taxing laws are to be construed strictly extends to exemptions as well as to impositions. In re Bull's Estate, 153 Cal. 715, 96 P 366. Exemptions must positively appear by statute, and no species of property subject to tax will be excluded if it comes within the fair purview of the act. English's Estate v. Crenshaw [Tenn.] 110 SW 210. That an owner of vehicles used on the public streets paid an advalorem tax thereon, did not exempt him from the license tax for the purpose of using such vehicles in his business. Harder's Fireproof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 NE 245. A foreign insurance company which has paid the 2 per cent tax required by Rev. Laws 1905, § 1625, is not exempt from the registry tax required by Gen. Laws 1907, c. 328. Mutual Benefit Ins. Co. v. Martin County, 104 Minn. 179, 116 NW 572.

**24.** Laws 1896, p. 797, c. 908, § 4, providing what property shall be exempt is a comprehensive enactment and repeals all prior acts, general or special, making exemptions. Peo-

relative to an exemption.[25] The rule of strict construction does not apply to exemptions from special taxes.[26] The property usually exempted is that used for religious,[27] educational,[28] charitable,[29] hospital,[30] and cemetary[31] purposes.[32] Ex-

ple v. Raymond, 126 App. Div. 720, 111 NYS 177. The fact that it repeals an exemption granted by special charter does not impair the obligations of a contract, since under the state constitution the right was reserved to alter or repeal all general laws and special acts. Id.

**25.** While General Tax Law (Laws 1896, p. 797) presumptively repeals all prior exemption statutes, such presumption will not be permitted when to do so will violate the express promise of the legislature operating to induce a person to transfer property in endowment of a corporation. People v. Raymond, 194 N. Y. 189, 87 NE 90.

**26.** Applies where exemption is claimed from general burden of taxation common on all property or on people generally, and, where tax is not such common burden but special tax, reaching only to special cases, the rule is that to subject such class of persons to tax requires a clear legislative intention. Such qualification applies to transfer tax. In re Mergentimer, 129 App. Div. 367, 113 NYS 948.

**27.** Under Const. 1874, art. 16, § 5, exempting churches adjoining lot used as water closet, held not exempt where such facilities could be best located on the church lot. Pulaski County v. First Baptist Church [Ark.] 110 SW 1034.

**28.** Const. 1901, § 91, exempts certain lots in cities and towns used for school purposes, and Code 1907, § 2061, exempts such property when it is owned and used by person to whom it is assessed for school purposes. Held, the exemption depended on the use of the property, and § 2061 was ineffective so far as it related to land and attempted to add ownership as a condition of exemption. Anniston City Land Co. v. State [Ala.] 48 S 659. Const. 1901, § 91, exempting property used for schools, exempts tract of land with buildings used as boarding school for young ladies. Id. Property owned by a private individual and used by him exclusively for educational purposes is exempt under Code 1906, § 4251, par. D. City of Jackson v. Preston [Miss.] 47 S 547. Under Act. April 8, 1903 (P. L. p. 395), exempting college buildings not conducted for profit, land belonging to such a college, necessary for use of the buildings and intended to be used for other buildings, is exempt. Stevens Institute v. Hoboken [N. J. Law] 70 A 730. Act. Feb. 14, 1855, amending Priv. Laws 1855, p. 483, exempting all property owned by Northwestern University, applies to land acquired subsequent to the amendment. Northwestern University v. Hanberg, 237 Ill. 185, 86 NE 734. Rev. St. 1898, § 1933, exempting property held by board of education, means all property "owned" by the board and cannot be held to intend only property used for school purposes. Wey v. Salt Lake City [Utah] 101 P 381. Building used as private military boarding school is not deprived of its exemption because the proprietor and his family reside in it. State v. Johnston, 214 Mo. 656, 113 SW 1083. "Exclusively used" in exemption statutes means primary and inherent use as distinguished from incidental and secondary use. Id. Where, by statute, schools maintained by public or private charity are exempt from taxation, an institution having a surplus income derived from tuition paid by students is not so exempt, though such surplus be used for improvements. Mercersburg College v. Poffenberger, 36 Pa. Super. Ct. 100. Mere fact that institution gives free tuition to certain number of pupils does not make it so exempt, where surplus derived from pay pupils is used to enlarge number of free pupils but to make improvements. Id. School lands and buildings are not exempt from taxation where tuition paid exceeds amount necessary for maintenance, and in determining such excess, rental value of lands and buildings are not included in cost of maintenance. Id.

**29.** The master, wardens, and members of the Grand Lodge of Masons being incorporated to receive, hold, and invest charitable gifts, a gift to them is not divested of its character because turned over to the corporate board of trustees of that body, which is but an administrative board. Masonic Education & Charity Trust v. Boston, 201 Mass. 320, 87 NE 602. Under Hurd's Rev. St. 1908, c. 120, § 2, exempting property of institutions of public charity when used exclusively for charitable purposes, held, to be exempt, property must belong to and stand in the name of such institution and be used exclusively for such purpose; and a public hospital organized for profit could not claim exemption. People v. Ravenswood Hospital, 238 Ill. 137, 87 NE 305.

**30.** Laws 1896, p. 797, c. 908, exempting property used for hospital purposes, real estate owned by a hospital and leased out is not exempt though the proceeds are devoted to hospital purposes. People v. Raymond, 126 App. Div. 720, 111 NYS 177. Where the legislature passed an act creating a hospital corporation and provided that all its property should be exempt, held corporate property, whether used as a hospital or not, was exempt, notwithstanding subsequent tax law (Laws 1896, p. 797), providing that property used for other than hospital purposes should not be exempt. People v. Raymond, 194 N. Y. 189, 87 NE 90. Laws 1905, p. 833, c. 377, amending Laws 1864, incorporating Roosevelt Hospital, held not to re-enact the provisions of such statute relative to exemptions. People v. Raymond, 126 App. Div. 720, 111 NYS 177.

**31.** Laws 1879, p. 397, c. 310, forbidding tax on land actually used for cemetery purposes, exempts such land. In re Jerome Ave. in New York, 192 N. Y. 459, 85 NE 755.

**32. NOTE. Tax exemption of religious, educational and charitable bodies as affected by field of operation:** It is held in Carter v. Whitcomb, 74 N. H. 482, 69 A 779, 17 L. R. A. (N. S.) 733, that a local auxiliary to a foreign missionary society is not exempt from local taxation. This case is supported by the holdings that tax exemption of religious, charitable or educational institutions does not include such as operate outside the state (Alfred University v. Hancock, 69 N. J. Eq. 470, 46 A 178; In re Speed's, 216

emptions are sometimes allowed to encourage certain industries,[33] and in favor of persons who have rendered military service.[34] Some exemptions are based upon personal disability.[35] A franchise which is made an act of congress is not subject to taxation.[36]

Whether or not an exception is transferable depends upon whether it is a personal privilege or a quality conferred upon the property itself.[37] Where exempt

Ill. 23, 74 NE 809, 108 Am. St. Rep. 189), or foreign corporations (In re Prime, 136 N. Y. 347, 32 NE 1091, 18 L. R. A. 713; In re Balleis, 144 N. Y. 132, 38 NE 1007; In re Smith, 77 Hun, 134, 28 NYS 476; People v. Western S. F. Soc., 87 Ill. 246; Minot v. Winthrop, 162 Mass. 113, 38 NE 512, 26 L. R. A. 259; Rice v. Bradford, 180 Mass. 545, 63 NE 7; Port Huron v. Wright, 150 Mich. 279, 114 NW 76; In re Rothschild's Estate, 71 N. J. Eq. 210, 63 A 615, afd. [N. J. Err. & App.] 65 A 1118; Catlin v. Trinity College, 113 N. Y. 133, 20 NE 864, 3 L. R. A. 206; In re Hickok's Estate, 78 Vt. 259, 62 A 724), even when operating in part within the state (Humphreys v. State, 70 Ohio St. 67, 70 NE 957, 101 Am. St. Rep. 888, 65 L. R. A. 776. The English rule appears to be otherwise (Com'rs v. Pemsel [1891] A. C. 531), and in In re Jones' Estate [N. J. Eq.] 67 A 1035, a foreign educational institution was exempted from taxation upon the ground that its work was for the general good of a religious denomination not confined to any state or locality, while property devoted to charitable, religious or educational purposes within the state has been held exempt from taxation though owned by a foreign corporation (Litz v. Johnston, 65 N. J. Law, 169, 46 A 776; St. Vincent de Paul v. Brakeley, 67 N. J. Law, 176, 50 A 589).—Adapted from Carter v. Whitcomb, 74 N. H. 482, 69 A 779, 17 L. R. A. (N. S.) 733.

**33.** Exemption of railroads by Const. 1898, art. 230, includes special taxes voted in favor of railroads prior to adoption of the constitution. Louisiana & A. R. Co. v. Shaw, 121 La. 997, 46 S 994. Acts 1900, p. 50, c. 48, providing a five year exemption on certain mills, does not conflict with Const. 1890, § 182, granting a 10 years exemption in certain cases. Adams v. Winona Cotton Mills [Miss.] 46 S 401. Act 1900, p. 50, c. 48, exempting certain factories in course of establishment or which should thereafter be established for 5 years, held to apply to a mill company chartered February 1st, 1900, whose mills were in process of construction that year and which did not commence operations until August, 1901. Id. **Growing ginseng,** a plant which takes from 7 to 15 years to mature, is a part of the land and not personalty and not within St. 1898, § 1638, exempting growing crops. Kuehn v. Antigo [Wis.] 120 NW 823. Rev. St. §§ 3410, 3411, 3417, providing that whenever the outstanding circulation of any **bank** does not exceed 5 per cent of its capital "said circulation shall be free from taxation," does not apply to national banks, being intended only as an inducement to state banks to be converted into national banks. Merchants' Nat. Bank v. U. S., 42 Ct. Cl. 6. State bank, converted into national bank, held required to pay tax on outstanding circulation, though such circulation was less than 5 per cent of its chartered capital, not being exempt under banking and internal revenue acts. Id.

**34.** Soldier's exemption provided for by Code Supp. § 1304, unless his property or that of his wife exceeds $5,000, is not defeated by joint ownership by both of property of that value. White v. Marion [Iowa] 117 NW 254. Where a soldier's other property was valued at $2,340 and he owned a life estate yielding $400 or $500 and had a life expectancy of 12 years, the life estate was worth more than $2,660, his property was worth more than $5,000 and he was not entitled to the exemption provided by Code Supp. 1902, § 1304. Id. Under Code Supp. 1902, § 1304, giving an exemption to a soldier unless he or his wife owns property worth $5,000, where a soldier asserts that he did not own property of that value, he makes out a prima facia case without showing that his wife did not own that much property, and the burden is on defendants to show the contrary. Id. Where on appeal to the district court from ruling of the board of review refusing to allow a soldier's exemption, under Code, Supp. 1902, § 1304, the soldiers petition recited all the facts and the taxing power went to trial without objection and stipulated that no exemption had been allowed, held the court acquired jurisdiction, though no transcript of the proceedings of the board of review was filed. Id. Under Code Supp. 1902, § 1304, giving soldiers an exemption of $800 unless they have property worth $5,000 the value of the soldiers property is to be determined by its actual value and not from the valuation on the assessment roll. Id. In determining whether he has property worth $5,000, exempt property is to be included. Id. A life estate is property to be considered in determining whether he has property of the value of $5,000. Id. Where one filed his petition for a soldier's exemption and it was admitted of record that the board of review made no allowance, after which he appealed to the district court, held sufficient to show that he made his claim before the board and that it was denied. Id. Under Rev. St. U. S. § 4747, and Code, §§ 1309, 4009, exempting **pension money** interest received on pension money loaned out is not exempt. Bednar v. Carroll, 138 Iowa, 338, 116 NW 315.

**35.** Certificate of disability granted to a party by the road overseer will exempt him from **poll tax.** Under Laws 1901, p. 4427. Johnson v. Scott, 133 Mo. App. 689, 114 SW 45. Upon rescission of certificate of disability exempting party from payment of poll tax, such party becomes liable for payment of such tax. Id.

**36.** Under organic act for Hawaii ratifying and affirming franchises granted by Hawaiian government between July 7, 1898, and Sept. 28, 1899, such franchises are not exempt, not having been made acts of congress by such act. Honolulu Rapid Transit & L. Co. v. Wilder, 211 U. S. 137, 144, 53 Law. Ed. 121, 124.

**37.** Assignable when annexed to property

and nonexempt property is so merged as to be inseparable, none is exempt.[38] A tax on exempt property wholly void may be recovered back.[39]

*Contracts of exemption,* See 10 C. L. 1791 being in derogation of a public right, are strictly construed against one claiming the benefits thereof.[40]

§ 4. *Place of taxation.*[41]—See 10 C. L. 1701—The situs of personal property for the purpose of taxation is, as a general rule, though not without exception,[42] at the owner's residence,[43] or principal place of business in case the owner is a corpora-

itself, but not when conferred upon owner as personal privilege. Morris Canal & Banking Co. v. State Board of Assessors [N. J. Err. & App.] 71 A 328. Under Morris Canal & Banking Company's Charter (P. L. 1824, p. 160), exempting property actually used and necessary for canal purposes, and Act March 14, 1871, (P. L. 444), authorizing the company to lease its franchises, held, there being no provision for exemption in the law authorizing the lease, the privilege so far as personal did not pass to the lessee. Id. A provision that the exemption should extend only to property possessed, occupied, and used by the company and necessary for canal purposes means that it is exempt only when possessed and used by the grantee of the privilege, and a lease of the property and franchises operated to suspend the exemption whether personal or annexed. Id. Exemption created by the act of congress, declaring that lands given as a bounty for military service shall be exempt for three years from date of patent, is a personal privilege to the patentee and does not pass with right of entry to his assignee. Herrick v. Sargent [Iowa] 117 NW 751.

**38.** Where lighting plant was exempt so far as used to supply light for village but not so far as it was used to furnish light for other villages. Village of Swanton v. Highgate, 81 Vt. 152, 69 A 667.

**39.** Masonic Education & Charity Trust v. Boston, 201 Mass. 320, 87 NE 602. Rev. St. 1898, § 264, providing for payment under protest and recovery back of assessment because of irregularity or error in proceedings, does not apply to assessment of exempt property nor preclude suit to annul such assessment. Wey v. Salt Lake City [Utah] 101 P 381.

**40.** Morris Canal & Banking Co. v. State Board of Assessors [N. J. Err. & App.] 71 A 328. A street railway company is not exempted by inviolable contract from the payment of a license tax to a city, unless the exemption is set out in such terms as admit of no other reasonable interpretation. St. Louis v. United R. Co., 210 U. S. 266, 52 Law Ed. 1054. Charter held by fair implication and construction of its terms not to exempt railway company from franchise tax. Honolulu Rapid Transit & L. Co. v. Wilder, 211 U. S. 137, 144, 53 Law. Ed. 121, 124.

**41. Search Note:** See note in 6 C. L. 1617; 2 L. R. A. 637, 16 Id. 729; 20 Id. 151; 29 Id. 69; 37 Id. 518; 69 Id. 431; 2 L. R. A. (N. S.) 197, 662, 1196; 5 Id. 174; 7 Id. 704; 13 Id. 800; 14 Id. 493; 62 A. S. R. 448; 1 Ann. Cas. 438; 2 Id. 850; 3 Id. 1103; 6 Id. 211; 7 Id. 446, 518, 680; 8 Id. 677; 9 Id. 602; 10 Id. 65, 355; 11 Id. 138, 739.

See, also, Taxation, Cent. Dig. §§ 416-469; Dec. Dig. §§ 252-294; 27 A. & E. Enc. L. (2ed.) 648, 662, 667.

**42.** Where property is physical in character and can acquire an actual situs, it must be taxed in county where situated. City of Galveston v. Guffey Petroleum Co. [Tex. Civ. App.] 113 SW 585. Foreign corporation owning ice houses and equipment on shore of a pond in one town, but transacting no business there except storing and cutting of ice, held not to "hire or occupy a manufacturing store or shop" in the latter town within Rev. Laws 1902, c. 12, providing for taxing of property in such town, but such property was taxable in the town where kept under St. 1903, p. 448, c. 437, § 71, Hilliard v. Fells Ice Co., 200 Mass. 331, 86 NE 773. **Vessels** may acquire an actual situs and place of enrollment and registration is not controlling if actual situs is elsewhere. City of Galveston v. Guffey Petroleum Co. [Tex. Civ. App.] 113 SW 585; State v. Higgins Oil & Fuel Co. [Tex. Civ. App.] 116 SW 617. City has no jurisdiction to tax vessels which have acquired an actual situs at another place. City of Galveston v. Guffey Petroleum Co. [Tex. Civ. App.] 113 SW 585. Rev. Laws c. 196, regulating mills and mill dams, does not affect **property in another state,** and in determinating what rights are taxable in Massachusetts, where water power created therein is used outside the state, act is without force. Blackstone Mfg. Co. v. Blackstone, 200 Mass. 82, 85 NE 880.

**43.** Personalty is taxable in the district of the owner's domicile, and if taxed in the wrong district the tax is illegal. State v. Shepperd [Mo.] 117 SW 1169. Under Ann. St. 1906, pp. 4198-4322, requiring personalty to be taxed in district where owner resides, one owning a farm and living on it held taxable there, though he staid at night with his parents in another district. Id. Under Pub. St. 1901, c. 56, § 1, providing that personal property shall be taxed to the owner at his place of residence, and under §§ 10, 12, 16, 18, excepting animals, stock in trade, and other articles, a steam derrick used in erection of a mill at a place other than the residence of the owner is not subject to tax in the latter place, as it is not within the exception. Dresser v. Hopkinton [N. H.] 71 A 534. Pulp wood held not taxable as being employed in the mechanics arts in the taxing town, within Rev. St. 1903, c. 9, § 13. Inhabitants of Bradley v. Penobscot Chemical Fibre Co. [Me.] 71 A 887. Under Ann. St. 1902, p. 2252, prescribing rules for construction of statutes, and Ann. St. 1906, pp. 4198-4322, providing that personalty shall be assessed where the owner resides, held that, as the statute makes no distinction as to place where **property of persons with families** and place where **persons without families** shall be taxed, the rule of construction under the former section did not apply. State v. Shepperd [Mo.] 117 SW 1169. Under Const. art. 8, § 11, Rev. St. 1895, art. 5068, 5072, requir-

tion,[44] but a state may tax property which has acquired a situs therein, though it is owned by nonresidents,[45] unless it is wrongfully withheld in the state.[46] The state cannot impose a tax upon receipts from carriage and freight services performed outside the state by a railroad.[47] Taxation of subjects of interstate commerce is treated elsewhere.[48] Where property is of such a nature that it cannot acquire an actual situs, the legislature may give it an artificial situs,[49] but when property is physical in character, or of such a nature that it can acquire an actual situs, it must be taxed in the county where actually located.[50]

The physical location of land is its situs for the purpose of taxation.[51]

ing property to be taxed where situated, and requiring **vessels** to be listed in the county where registered or kept, held coasting vessels enrolled in Galveston county but used to transport oil, from Jefferson county where owner lived, to points along the coast, were taxable in the latter county. State v. Higgins Oil & Fuel Co. [Tex. Civ. App.] 116 SW 617. Place of residence of owner rather than place registered controls. Shrewsbury Tp. v. Merchants' Steamboat Co. [N. J. Law] 69 A 958. Where **corporate stock** is pledged to a New York company, though delivered to it and transferred on the corporate books, and the effect of the Georgia statute is to vest the pledgee with legal title, yet the situs of the property is not transferred to New York, where the pledgor retains the right to retransfer, to vote it and receive dividends. Central of Georgia R. Co. v. Wright, 166 F 153. Where an owner having possession of **notes and mortgages** covering chattel property resides in another county, such notes and mortgages are taxable in the county of the owner's residence, and not in the county in which property is situated, notwithstanding owner has an agent in county of situs of property who is authorized to receive interest and installments on the principal as they fall due. Parish & Co. v. Kauffman, 7 Ohio N. P. (N. S.) 342.

**44.** Corporation is to be regarded as resident of place where its principal place of business is located. People v. Marens, 62 Misc. 317, 116 NYS 189. A **"water right"** held personal property within Const. art. 12, § 17, and Pol. Code 1895, §§ 16, 3680, and property assessed in the district where the principal place of business of the owner was located. Helena Waterworks Co. v. Settles, 37 Mont. 237, 95 P 838. **Vessels** owned by New Jersey corporation, having its principal office in one county, are not taxable in another county though registered there pursuant to act of congress. Shrewsbury Tp. v. Merchants' Steamboat Co. [N. J. Law] 69 A 958.

**45.** Hall v. Miller [Tex.] 115 SW 1168. Whether property is taxed by state of nonresident's domicile is immaterial on issue as to validity of tax thereon in another state. Theobald v. Clapp [Ind. App.] 87 NE 100. **Money** realized in course of business carried on in the state by a foreign corporation through a local agent and deposited in the banks of the state is taxable. New England Mut. Life Ins. Co. v. Assesor, 121 La. 1068, 47 S 27. **Loans made by foreign insurance** company to its policy holders, residents of the taxing state, as part of its business in such state, held taxable therein though notes were held abroad. Travelers' Ins. Co. v. Assessors, 122 La. 129, 47 S 439. Under Rev. St. 1881, §§ 6271, 6273, 6297, 6330; Burns' Rev. St. 1901, §§ 8410, 8429, 8458, 8421, 8460, 8463; Laws 1891, pp. 199, 201, 204, 210, 213, 212, relative to taxation of presonalty of nonresidents, **notes and mortgages** of nonresident were properly taxed against a resident agent in the county where securities were kept, loans made, and property situated. Hathaway v. Edwards [Ind. App.] 85 NE 28, Notes belonging to nonresident but held by agents in Texas for collection, and collections deposited for owner's credit, held taxable in Texas. Hall v. Miller [Tex. Civ. App.] 110 SW 165. Where nonresident sold lands and took purchase money notes secured by vendor's lien and left such notes with an agent in the state for collection, and proceeds were deposited in a local bank for owners's benefit and agents had no authority to reinvest such proceeds, the situs of the notes was within the state. Hall v. Miller [Tex.] 115 SW 1168. Funds set apart by domestic railroad company for foreign company under agreement, whereby former was to pay to latter part of gross **earnings of railroad owned by foreign company** but operated by domestic company, held taxable under Burns' Ann. St. 1901, § 8421, providing for assessment of property of residents. Clark v. Vandalia R. Co. [Ind.] 86 NE 851. Where such funds were **in hands of receiver** of Indiana corporation, who had possession of the funds set apart for the Illinois company, taxes were to be collected from property of the Illinois company found in possession of the receiver as agent, under Burns' Ann. St. 1901, § 8587. Id.

**46.** Where foreign insurance company bought out a domestic one which has secureties on deposit with state treasurer who wrongfully withheld them from purchaser, they could not be taxed while so withheld at residence of wrongful custodian. Board of Councilmen v. Illinois Life Ins. Co. [Ky.] 112 SW 924.

**47.** Tax imposed by Texas act of April 17, 1905, on gross receipts of railroad companies, whose lines are partly within state, is invalid. Galveston, etc., R. Co. v. Texas, 210 U. S. 217, 52 Law. Ed. 1031.

**48.** See Commerce, 11 C. L. 643.

**49.** City of Galveston v. Guffey Petroleum Co. [Tex. Civ. App.] 113 SW 585.

**50.** Under the state constitution. City of Galveston v. Guffey Petroleum Co. [Tex. Civ. App.] 113 SW 585.

**51.** As general rule land is taxed in district in which it is located, and any statute creating exception to this rule is to be strictly construed. People v. Marens, 62 Misc. 317, 116 NYS 189. St. 1905, p. 124, c. 193, providing that tax deed shall convey all interest of owner subject to benefit of easements, etc., does not apply to taxation on

§ 5. *Assessment, rating, and valuation. A. Necessity for assessment.*[52] See 10 C. L. 1703—"Assessment" in tax statutes includes the whole statutory mode of imposing the tax from inception to conclusion,[53] but as here used it means merely the next step after the original laying or levy of the tax.[54] The assessing of property is a ministerial act, but the determination whether it is subject to assessment is judicial.[55] A legal assessment is essential to the validity of a tax.[56]

(§ 5) *B. Assessing officers.*[57] See 10 C. L. 1793—The appointment of assessing officers,[58] their qualifications,[59] and the manner in which the office is to be resigned and filled when so vacated,[60] are regulated by statute.

(§ 5) *C. Formal requisites.*[61] See 10 C. L. 1793—The legislature may prescribe such method of assessing property as it deems proper.[62] An assessment must be made by the appropriate officers or tribunals,[63] acting with due authority[64] and in

property near boundary of state when beneficial use of land is made in connection with land in another state. Blackstone Mfg. Co. v. Blackstone, 200 Mass. 82, 85 NE 880.

**52. Search Note:** See notes in 11 Ann. Cas. 720.

See, also, Taxation, Cent. Dig. §§ 142, 470-930; Dec. Dig. §§ 109, 295-500; 27 A. & E. Enc. L. (2ed.) 658, 902.

**53.** Not merely valuation. Jackson Lumber Co. v. McCrimmon, 164 F 759. An assessment includes a list of the property to be taxed and an estimate to guide in apportioning the tax. Sullivan v. Bitter [Tex. Civ. App.] 113 SW 193.

**54.** See post, § 7.

**55.** County clerk acts ministerially in assessing property, but judicially in determining whether property is subject to assessment. Determination is conclusive unless reversed on appeal. Commonwealth v. Churchill [Ky.] 115 SW 189.

**56.** Assessment by a properly constituted authority is essential. Sullivan v. Bitter [Tex. Civ. App.] 113 SW 193.

**57. Search Note:** See notes in 4 Ann. Cas 942.

See, also, Taxation, Cent. Dig. §§ 511-548, 811. Dec. Dig. §§ 310-325.

**58.** Appointment as county assessor under Laws 1907 p. 603, c. 408, made by county commissioners in January 1908, in violation of old soldier preference law (Laws 1907, p. 541, c. 374), is rendered valid by curative act, Laws 1908, p. 101, c. 76. James v. Haynes [Kan.] 100 P 622.

**59.** County assessor is a nonconstitutional officer whose qualifications may be prescribed by the legislature. State v. Goldthait [Ind.] 87 NE 133.

**60.** Under Burns' Ann. St. 1908, §§ 9141, 10251, requiring resignations to be made to appointing power where a township assessor did not make his resignation to the county auditor, and such resignation was conditional, acts of auditor and board of county commissioners in appointing a successor held void. State v. Huff [Ind.] 87 NE 141. Ex parte judgment of county auditor that vacancy exists in office of township assessor does not create vacancy. Id. Evidence insufficient to show abandonment of office by township assessor. Id.

**61. Search Note:** See notes in 15 L. R. A. (N. S.) 691; 11 Ann. Cas. 1118.

See, also, Taxation, Cent. Dig. §§ 549-786; Dec. Dig. §§ 327-446.

**62.** Where it prescribes form of **assessor's oath,** it must be substantially complied with. Richardson v. Howard [S. D.] 120 NW 768. Assessor's oath, under Laws 1899, p. 38, attached to his return, held not to comply with the statute rendering tax sale thereunder voidable. Id. Under constitutional provision directing legislature to provide an equal and uniform rate of taxation and such regulations as will secure a just valuation of all property, the decision of the legislature as to the **method to secure uniformity** must be followed by taxing officers. Clark v. Vandalia R. Co. [Ind.] 86 NE 851. Ordinance changing **date of assessment** of taxes for municipal purposes from date specified in Pol. Code, §§ 3628, 3630, held authorized by St. 1883, p. 273, c. 49. City of Escondido v. Escondido Lumber, Hay & Grain Co. [Cal. App.] 97 P 197. Act May 18, 1906 (P. L. 571), providing that **railroad and canal property** referred to in taxation act of 1888 (P. L. 269) shall be assessed in each taxing district, is void, and such property is taxable by the state board of assessors as provided by act of 1888. United New Jersey R. & Canal Co. v. Newark [N. J. Err. & App.] 71 A 275; New York Bay R. Co. v. Newak [N. J. Err. & App.] 71 A 276.

**63.** Assessor has no jurisdiction to assess property unless it is within his county, and his description should show his jurisdiction and it cannot be presumed. Martin v. White [Or.] 100 P 290. Under Laws 1885-86, p. 882; Laws 1891-92-93, p. 299, c. 103, c. 217; Laws 1894, c. 107; Ky. St. 1903, § 4095, power to assess turnpike **franchise tax** was vested in county board of supervisors, to the exclusion of assessing officers. Campbell Turnpike Road Co. v. District of Highlands [Ky.] 114 SW 286. Under statute providing that **railroad track** is assessable by state board of equalization and other land of railroad company by local assessor, an assessment of entire lot by assessor is erroneous where track extends across one corner of it. Illinois Cent. R. Co. v. Cavins, 238 Ill. 380, 87 NE 371.

**64.** Under St. 1898, c. 548, § 331, providing that three or more assessors shall be elected and § 351 authorizing towns to fill vacancies, and Rev. Laws 1902, c. 8, providing that joint authority given to three or more public officers may be exercised by majority, where three assessors were elected and one died and the town voted not to fill the vacancy, the remaining two could make a valid assessment. Cooke v. Scituate, 201 Mass. 197, 87 NE 207.

the manner prescribed by law.[65] One claiming that property is taxable under a special law has the burden of showing such fact.[66] An assessment is not invalidated by the fact that the assessor is compensated by a commission on taxes levied.[67] Assessment in the name of a grantee, though his deed is void, saves land from forfeiture for nonassessment in the grantor's name.[68]

*Notice.* See 10 C. L. 1793—A sufficient notice [69] is essential to a valid assessment.[70] It is presumed that taxing officers performed their duty relative to giving notice.[71]

*The roll or list.* See 10 C. L. 1794—Proper listing is usually essential to a valid tax.[72] The assessment roll or list must be made up in the manner prescribed by law.[73] It must sufficiently describe the property [74] with reference to plats and

**65.** Under Act 1906, No. 182, p. 335, § 11, it is held that increase in assessment made pursuant to order of state board of equalization would be canceled when not made in method prescribed, and assessment would remain as originally returned. Natalbany Lumber Co. v. Tax Collector [La.] 48 S 879. Amos Kent Lumber & Brick Co. v. Tax Assessor [La.] 48 S 880. Police jury is not required to make out and publish estimates of expenditures within same year that it levies **taxes to meet expenditures.** Board of School Directors v. Police Jury [La.] 49 S 5. **Assessment of nonresidents** in violation of Laws 1896, p. 807, c. 908, § 29, prescribing method of assessment, held void, and there was no jurisdiction to sell. Schreiber v. Long Island R. Co., 127 App. Div. 286, 111 NYS 123. Laws 1892, p. 250, c. 143, § 68, provides method of assessment of real property of nonresident in City of Niagara Falls, and not Laws 1896, p. 807, general laws. Clinton v. Krull, 125 App. Div. 157, 111 NYS 105. Code 1887, § 472, amended by Code 1904, p. 246, relative to **separate assessment of land and timber,** held not void. Commonwealth v. Camp Mfg. Co. [Va.] 63 SE 978. Under Const. 1902, § 171, amended by Code 1904, pp. 234, 246, an assessment made in 1905, held properly made against land and timber separately without reference to Acts 1906, p. 555, c. 319. Id. Acts 1908, p. 331, c. 220, held not passed because there was no authority for making assessment provided for, but merely to change agency of state for making the assessment and duration thereof. Id.

**66.** All property being taxable under general laws unless otherwise taxable. St. Paul M. & M. R. Co. v. Howard [S. D.] 119 NW 1032. Where railway company attacks tax title on ground that land was taxable under mileage tax law, Laws 1890, p. 33, c. 21, it has burden to show that land was necessarily used in operation of its lines and so not subject to taxation under general laws. Id. Stipulation by company that there had been no actual physical use of such land for railroad purposes warrants finding that it was not actually used for railroad purposes. Id.

**67.** Jackson Lumber Co. v. McCrimmon, 164 F 759.

**68.** Kelley v. Dearman [W. Va.] 63 SE 693.

**69.** Laws 1892, p. 250, c. 143, § 68, providing method of assessment of lands to unknown owners, held sufficient to give notice to the owner of the portion intended to be assessed. Clinton v. Krull, 125 App. Div. 157, 111 NYS 105. Laws 1892, p. 250, providing that board of assessors shall assess each lot separately, giving name of owner, if known, and, if not, name of occupant, is not taking of property without due process. Id. Assessment of a tract, subdivided into lots and owned in part by a nonresident and in part by a resident as one parcel to the nonresident, constituted no notice to the owner, within Laws 1896, p. 810, c. 908, §§ 35, 36. People v. Lewis, 127 App. Div. 107, 111 NYS 398. Owner of life estate was served with notice of proposed street improvement thirty days after property was sold for taxes and two days before confirmation of sale. Held, that on day notice was served, life tenant was the owner of life estate and as such was the proper person to be served, and assessment thereafter levied was not rendered invalid for want of sufficient notice. Johnson v. Cincinnati, 11 Ohio C. C. (N. S.) 344.

**70.** Pub. St. 1906, § 566, requiring notice of place of hearing of complaints by tax listers, is mandatory and essential to the validity of the grand list. Smith v. Stannard & First Nat. Bank, 81 Vt. 319, 70 A 568. Ky. St. 1903, § 4122, requires board of supervisors to give notice to nonresident owners of raise in assessment by publication and such notice is jurisdictional. Ward v. Wentz [Ky.] 113 SW 892. Action of state board of valuation and assessment, sending out preliminary and final notices, as required, that assessment had been made against a railroad company, is final, and legal effect thereof is to be determined by what they did. Illinois Cent. R. Co. v. Com., 33 Ky. L. R. 326, 110 SW 265. **Knowledge of landowner's agent** that board of supervisors had raised his assessment did not dispense with notice required to be given by statute. Ward v. Wentz [Ky.] 113 SW 892.

**71.** In absence of showing, it is presumed that public officers complied with the statute requiring tax officers to furnish tax payers with notice to furnish a list of taxable property. Masonic Education & Charity Trust v. Boston, 201 Mass. 320, 87 NE 602. Where owner exhibits the notice actually served which does not comply with statutory requirements, he overcomes the **presumption** that proper notice was given. Ward v. Wentz [Ky.] 113 SW 892.

**72.** Before a man is chargeable for poll tax, it is ordinarily essential that he shall have first been listed as provided under Ann. St. 1906, p. 4427, but he waives such requirement by seeking his discharge from the obligation. Johnson v. Scott, 133 Mo. App. 689, 114 SW 45.

**73.** Mt. Vernon City charter, § 135, prescribing method of preparing assessment roll, held to have been substantially complied with and taxes levied were a valid lien. Wilcox v. City & County Cont. Co., 128 App. Div. 227, 112 NYS 532. Where taxes are

boundaries,[75] subdivisions,[76] and ownership.[77] Two tracts of land should not be assessed as one tract.[78] In some states assessors are required to make copies of the assessment roll for certain purposes.[79]

*Irregularities.*See 10 C. L. 1796—It is presumed that taxing officers have performed their duty, and one objecting to a tax has the burden to prove its invalidity.[80] An irregularity will not avoid an assessment unless it has worked prejudice.[81] Irregu-

brought upon assessment roll by specific kind of authority, they stand or fall by virtue of that authority alone. Board of Com'rs of Jackson County v. Kaul, 77 Kan. 715, 96 P 45. Assessment in solido to two **tracts belonging to different persons** does not invalidate the assessment, Code 1906, § 4283, directing how roll is to be made up being directory only. Moores v. Thomas [Miss.] 48 S 1025. Under Const. 1906, § 178, relative to manner of assessing corporate franchises, a **franchise** to construct waterworks in a city is taxable, under § 181, in same manner as if owned by individuals. Adams v. Bullock & Co. [Miss.] 47 S 527. Assessment of water company for **"capital invested in merchandise and manufacturing"** includes its pipes, hydrants, etc. Adams v. Vicksburg Water Works Co. [Miss.] 47 S 530. Such assessment did not include solvent credits, they being a separate kind of property which should have been listed separately. Id. Assessment of "capital invested in merchandising and manufacturing" did not include corporate franchise to construct water works, such franchise being personalty taxable by itself. Adams v. Samuel R. Bullock & Co. [Miss.] 47 S 527. Where lumber company listed its property at one-half its value, a **separate list** prepared by assessor was not objectionable as double taxation. State v. C. A. Smith Timber Co. [Minn.] 119 NW 1135.

**74.** Correct description of land is essential to valid tax. Griffin v. Denison Land Co. [N. D.] 119 NW 1041. Description in assessment roll from which property can be identified is sufficient. Cone v. Lauer, 131 App. Div. 193, 115 NYS 644. Assessment is not void for failure to designate by name many years before applied thereto, larger tract of which the land assessed was a part or to give number of the lot under which the early settler drew it in a colonial allotment. Id. Assessment of land by description unknown to government surveys and maps held void. Cassedy v. Hartman [Miss.] 46 S 536. Where there are in the state four townships, number 4, range 4, a description in assessment giving such township and range but not county is insufficient. Martin v. White [Or.] 100 P 290. Description held sufficient. Moores v. Thomas [Miss.] 48 S 1025.

**75.** Description of parcel of land as portion of entire larger tract simply by block and number without reference to map is not prima facie sufficient to identify it. Stough v. Reeves, 42 Colo. 432, 95 P 958. Description held prima facie insufficient to identify lands. Id.

**76.** Failure to certify that tract was not subdivided does not render assessment void. Cone v. Lauer, 131 App. Div. 193, 115 NYS 644.

**77.** To make either the owner or his property liable, it should be assessed in his name, if known or ascertainable, as required by Hill's Ann. Laws, § 2752, amended by Laws 1893, p. 6, and §§ 2768, 2770, 2776, and an assessment in such case in the name of another is void. Martin v. White [Or.] 100 P 290. Entry in assessment roll of names and addresses in column "remarks" does not constitute an assessment of property of such individuals nor affect the validity of the assessment; entry is merely a memorandum to aid in collection of taxes. Cone v. Lauer, 131 App. Div. 193, 115 NYS 644. Assessment of individual **interest of nonresident** is void. Id.

**Mistake in name of owner** does not necessarily render tax invalid, and hence, if assessment of land belonging to James T. under name of Jane T. did not mislead the owner, he may not avoid a sale for taxes. Yellow Popular Lumber Co. v. Thompson's Heirs, 108 Va. 612, 62 SE 358. Whether he was misled held a question for the jury. Id. Validity of assessment on land does not depend on whether person in whose name the property is assessed is the owner. Glowner v. De Alvarex [Cal. App.] 101 P 432. Under Laws 1896, p. 801, c. 908, providing that when real property is owned by a resident of the district in which it is situated, it shall be assessed to him, the assessment to the husband of lands owned by his wife is void. In re Riddell, 116 NYS 261. Under Code, § 1383, amended by Laws 1904, p. 43, and § 1387 lien of **personal** taxes held not void because of omission of auditor to list same in name of owner under proper letter on his entering on the tax lists the names of owners in alphabetical order. Watkins v. Couch [Iowa] 120 NW 485.

**78.** A tax deed based thereon is void and the holder cannot recover from the owner taxes paid under it. Griffin v. Denison Land Co. [N. D.] 119 NW 1041. Within Rev. Codes 1905, § 1480, defining "tract" as used in revenue laws as any contiguous body of land owned by the same person, "contiguous" means land which touches on the sides, and two quarter sections which touch only at the corner do not constitute one tract. Id.

**79.** Under St. 1897, p. 504, c. 277, requiring county assessor to prepare certified copies of assessment roll of cities, he is required to make such rolls as part of his official duty and he cannot delegate it to another. Alameda County v. Dalton [Cal. App.] 98 P 85. Evidence sufficient to show that assessor did not make an independent contract for doing such work but that he was personally interested in the contract. Id. Provision that assessor shall only receive actual cost incurred in preparing such rolls contemplated that he should not be required to do extra work at his own expense. Id. In action for violation of such duty, county could show by contractor the number of days he was employed, the names of persons employed in assisting him, and amounts paid for their services. Id.

**80.** People v. Hulin, 237 Ill. 122, 86 NE 666.

**81.** Chicago House Wrecking Co. v. Omaha [Neb.] 119 NW 253. **Particular irregularities**

larity in the process of taxation can be said not to amount to due process of law only when proceedings are arbitrary, oppressive or unjust.[82]

*Lists by taxpayers.* See 10 C. L. 1796—In most states provision is made for the listing of property by taxpayers,[83] and if he fails to do so it may be done by listers.[84] Such lists are not essential, however, to a valid assessment,[85] nor are they conclusive on the assessor,[86] but an assessment made in disregard of such return is erroneous.[87] In some states penalties are prescribed for failure to list,[88] and the state may make the assessment of the assessor conclusive from one who fails to furnish to the assessor a list of his property as required by statute,[89] but not where failure to make such return was without fraudulent intent, and founded on a belief

are treated in connection with the essential requirements of a valid assessment. See ante, this subsection, subdivisions Notice; The Roll or List; etc. Proceedings for collection of cash road tax are not invalidated by fact that estimate was not entered in town book and signed by commissioners, where estimate made for Bradford County under Act 1846, P. L. 199, was adopted and levy made thereon. Elsbree v. Keller, 35 Pa. Super. Ct. 497. Tax proceedings had under a land description which, though not the legal description, could represent no other parcel of land, are valid, where the owner has both record and actual notice that his property was listed and assessed by such description, land which had not been platted being described according to lot and block numbers it would have had if platted. Ontario Land Co. v. Yordy, 212 U. S. 152, 53 Law. Ed. —.

82. It is not necessary that notice be given of each step in the process of taxation. State v. Several Parcels of Land [Neb.] 119 NW 21.

83. Const. art. 13, § 8, providing that the legislature shall require each taxpayer to deliver to county assessor annually a sworn statement of his property, does not apply to **assessments by cities for local purposes.** City of Escondido v. Escondido Lumber, Hay & Grain Co. [Cal. App.] 97 P 197. **Insurance companies** being exempted from Kirby's Dig. § 6936, requiring corporations to file schedules for taxation are required to file schedules specified in §§ 6906, 6910. Dallas County v. Banks [Ark.] 113 SW 37. Laws 1896, p. 795, c. 908, Laws 1899, p. 1591, c. 712, requiring persons subject to taxation on **special franchise** to make written report to tax commissioners describing the franchise, etc., did not prohibit commission from publishing such reports, and it could exhibit them to anyone interested in inspecting them. American District Tel. Co. v. Woodbury, 127 App. Div. 455, 112 NYS 165.

84. Under Pub. St. 1906, § 565, the list of a recusant taxpayer need not contain in detail the action of the listers in making up the list. Smith v. Stannard & First Nat. Bank, 81 Vt. 319, 70 A 568. List held sufficient. Id. Pub. St. 1906, § 555, providing that real estate in last appraisal shall be appraised at such appraisal, does not apply to real estate taxable to a person willfully omitting to return an inventory, and listers, in making of list of persons of latter class, must appraise the real estate and not take last appraisal. Id. Pub. St. §§ 503, 510, 571, specifying to whom and where taxable real estate shall be set in the list, applies where list is made up by listers because of willful omission to return an inventory as well as where the list is based on an inventory. Id. Under Gen. St. 1902, §§ 2296, 2302, 2303, 2305, imposing a duty on each taxpayer to bring in a verified list, a list filed in the proper office and certified by an official having authority to administer oaths, that he had administered the oath, is admissible in **evidence.** Whalen v. Gleeson [Conn.] 71 A 908.

85. An assessment is not void because the owner's agent did not comply with the statute in listing it. Ward v. Wintz [Ky.] 113 SW 892.

86. Under a statute requiring a railroad company to return all its real estate as "track" or real estate other than track and making the "track" assessable by the state board of equalization and other real estate assessable by local assessor, the company cannot change the character of its real estate by the manner in which it is returned, and if it makes an erroneous return the local assessor is not precluded from assessing but an error of the assessor in classifying renders the assessment void. Illinois Cent. R. Co. v. Cavins, 238 Ill. 380, 87 NE 371. The values of property and securities contained in the sworn statement made by the president of a trust company, showing its capital stock and surplus and the values of property exempt, submitted to the assessor, is not binding on the assessor in assessing taxes against the company. Newton Trust Co. v. Atwood [N. J. Law] 71 A 110.

87. Where one made a return of personal property showing that it did not own any such property subject to taxation because of indebtedness, an assessment made notwithstanding such return is erroneous. People v. Odell, 129 App. Div. 475, 114 NYS 199.

88. Ky. St. 1909, §§ 4076b-4076k, providing for future for continued failure to list, does not apply where one lists a patent for a less number of acres than it purports to convey where he does not know how much he owns because of prior patents and adverse possession. Lockard v. Com. [Ky.] 118 SW 331. Where a charitable institution holds a fund which has never been taxed and no other personal property, mere failure of its trustee to make a return under Rev. Laws 1902, c. 12, §§ 5, 41, providing that in case of willful failure to make return exempt property shall be taxed for the current year, will not be deemed willful as a matter of law. Masonic Education & Charity Trust v. Boston, 201 Mass. 320, 87 NE 602.

89. Return of "no property" is no return where there is property. Travelers' Ins. Co. v. Board of Assessors, 122 La. 129, 47 S 439.

that he had no taxable property.[90] Corporate stock need not be listed by the owner where the corporation is required to list it.[91]

(§ 5) *D. Valuation of taxable property. In general.*[92]—See 19 C. L. 1797—The legislature may decide the manner in which different forms of property may be valued and the manner in which taxes may be levied,[93] but it cannot delegate its power in this regard,[94] though the power to fix the rate is sometimes delegated even to subordinate, municipal boards.[95] Special methods of valuation are sometimes prescribed,[96] and special statutory rules are sometimes prescribed for the valuation of particular kinds of property.[97] It is presumed that taxing officials acted regularly in valuing property,[98] and, while a valuation may be attacked for fraud,[99] an overvaluation is alone insufficient to show fraud,[1] and excessive valuation is not alone ground for avoiding an assessment,[2] nor is an increase in the valuation of land

**90.** Travelers' Ins. Co. v. Board of Assessors, 122 La. 129, 47 S 439. United States Fidelity & Guaranty Co. v. Board of Assessors, 122 La. 139, 47 S 442.

**91.** Owner of shares of stock of a domestic investment company is not required to list them under Cobbey's St. 1907, § 10927, as they are assessed under § 10955, which expressly provides that they shall be listed by an officer of the corporation. Bressler v. Wayne County [Neb.] 118 NW 1054.

**92. Search Note:** See Taxation, Cent. Dig. §§ 579-598, 624-673; Dec. Dig. §§ 346-358, 375-402; 27 A. & E. Enc. L. (2ed.) 689.

**93.** Consolidated Coal Co. v. Miller, 236 Ill. 149, 86 NE 205.

**94.** James v. U. S. Fidelity & Guarantee Co. [Ky.] 117 SW 406. St. 1909, §§ 4080, relative to valuation of franchises of foreign corporations construed and held not delegation of taxing power. Id.

**95.** In city of Peoria, under its charter, in power to fix the rate of tax levied for educational purposes rests with school inspectors. People v. Peoria, 139 Ill. App. 488.

**96.** Under Act April 12, § 1905 (P. L. 142), providing for levy of road tax on the "last adjusted valuation" for county purposes, there is no such valuation until county commissioners have corrected the assessors return, and board of revision has given taxpayers opportunity to object. H. C. Frick Coke Co. v. Mt. Pleasant Tp., 222 Pa. 451, 71 A 930. Under Ann. Code 1892, § 3772, providing that lands not given in by any one shall be valued by the assessor, and § 3787, providing assessment shall be conclusive after approval, etc., held, where owner leaves valuation to assessor and does not object, he is liable for the taxes. Moores v. Thomas [Miss.] 48 S 1025. Bill attacking assessment on ground that valuation had not been fixed by assessors acting together as a board is properly dismissed where it appears that though the assessors made separate estimates, they subsequently met as a body, and made final assessment. Clark v. Burschell, 220 Pa. 435, 69 A 900. Where coal is sold and conveyed after the regular decennial appraisement, it is the duty of the county board of equalizaion under § 2792a of the Rev. St., passed April 23, 1904, upon application by owner of the surface to make equitable **apportionment of the valuation** between the owner of the surface and the owner of the coal according to the relative value of their respective interests. Johnson v. Lacey, 11 Ohio C. C. (N. S.) 411.

**97.** In taxing trust companies under Act 1903 (P. L. 405), the full amount of capital and accumulated surplus must be ascertained by deducting from gross assets the liabilities of the company. Fidelity Trust Co. v. New Jersey Board of Equalization [N. J. Law] 71 A 61. From the full amount of capital and surplus thus ascertained, the true value of all assets exempt is to be deducted. The balance is the amount to be assessed less the amount of assessment on their real estate. Id. In Pennsylvania the real estate of quasi public corporations, unless exempt from taxation, is taxed by including the value thereof in the assessment of capital stock. Conoy Tp. Sup'rs v. York Haven Elec. Power Plant Co., 222 Pa. 319, 71 A 207.

**98.** In a suit to enjoin collection of railroad taxes, the court must presume that the tax commissioners performed their duty and considered money of the company in valuing its property and cannot inquire into the evidence upon which they acted. Clark v. Vandalia R. Co. [Ind.] 86 NE 851. Where one company leased and operated a certain railroad during certain years during which it made separate reports to state auditor but board of valuation and assessment made no separate assessment of the franchise of the leased road, held, the board's action was a determination that it was of no value except as included in assessment of franchise of the lessor. Commonwealth v. Chesapeake & O. R. Co. [Ky.] 117 SW 287. Presumption is that decision of comptroller as to assessment and **taxation of corporate franchises** is correct. People v. Glynn, 130 App. Div. 332, 114 NYS 460. Verified **tax returns as evidence** are not conclusive on party making them to fix valuation for jurisdictional purposes. On appeal to federal supreme court in ejectment case. Spreckles v. Brown, 212 U. S. 208, 53 Law. Ed. —.

**99.** People v. Odin Coal Co., 238 Ill. 279, 87 NE 410. Where record of an assessment showed on its face that increase was made by supervisor of assessments, and not by county board of review, it could not be impeached, in an action for taxes by allegations of fraud on part of board of review. Id. In suit for unpaid taxes, evidence insufficient to show that assessment was fraudulent. Id.

**1.** People v. Odin Coal Co., 238 Ill. 279, 87 NE 410.

**2.** An assessment may be impeached for fraud but overvaluation or undervaluation does not of itself show fraud. People v. Odin Coal Co., 238 Ill. 279, 87 NE 410.

necessarily void merely because its condition has remained unchanged,[3] nor because of an irregularity in sending notices to taxpayers to file their statements.[4] As a general rule property is taxable at its true value [5] as of the date prescribed by statute,[6] and all elements of value must be considered.[7] In determining the value of property based principally upon its earnings, average earnings and expenses for a series of years must be considered,[8] and the valuation cannot be based on the earnings of a single year.[9] In determining the gross earnings in a certain district, the income derived therein is not the criterion.[10] The value of buildings which do not belong to the owner of the soil is what it would cost to replace them.[11] The right to deduct debts from credits is purely statutory.[12]

**3.** Increase in valuation of farm land for taxation is not rendered illegal by the fact that no improvements were made and that its condition was unaltered. Anderton v. Pawtucket Tax Assessors [R. I.] 71 A 797.

**4.** Increase in valuation is not rendered illegal by the fact that notice, under Gen. Laws 1896, c. 46, § 6, to persons to bring in their sworn statements, made the time for bringing in statements include, contrary to law, days prior to assessment, where the objecting party made no statement at any time and was not prejudiced by the notice. Anderton v. Pawtucket Tax Assessors [R. I.] 71 A 797.

**5.** Water power appurtenant to land in Massachusetts but used for power in a sister state is taxable in Massachusetts on a valuation of the uses to which it could be put in that state, and the uses to which it is put in connection with an additional water fall in the sister state, and then estimating the value imputable to the land in Massachusetts. Blackstone Mfg. Co. v. Blackstone, 200 Mass. 82, 85 NE 880. The constitutional provision that all non-exempt property shall be taxed in proportion to its fair cash value is not self executing, but any deficiency is supplied by Pol. Code, § 3627, 3617, requiring property to be assessed at full cash value and defining such value as what property would be taken for in payment of a debt. Cheseborough v. San Francisco, 153 Cal. 559, 96 P 288. When it appears that one paid taxes on $3,500 worth of personalty and household furniture and it is stipulated that the property is worth less, he should not be assessed separately on a library worth $300. Commonwealth v. Harris [Ky.] 118 SW 294. There is a marked distinction between **"true value" and "cash value"** as used in tax statutes. Richardson v. Howard [S. D.] 120 NW 768. **Land subject to mortgage** may be assessed for taxation at its full value, without conflicting with U. S. Const. 14th Amend. Paddell v. New York, 211 U. S. 446, 53 Law. Ed. 275. Amount of mortgage debt on land need not be deducted from the assessment of the owner's personal estate. Id.

**6.** All taxes are assessed as of May 1st of each year, and all rights taxed with reference to that date, unless a distinct provision to the contrary appears. Rogers v. Gookin, 198 Mass. 434, 85 NE 405. Where, prior to day for assessing, a street was vacated and the bed thereof transferred to a street railway company which owned lots on both sides and intended to construct a terminal station, the lots should have been assessed as inside lots. People v. O'Donnel, 130 App. Div. 734, 115 NYS 509. In determining amount of a taxpayers balance on September 15th when he is required to make return, outstanding checks may be charged off. Commonwealth v. Kentucky Distilleries & Warehouse Co. [Ky.] 116 SW 766.

**7.** "Plottage" is a percentage added to the aggregate value of two or more contiguous lots held in one ownership, as representing an increased value pertaining to a group of lots because they admit of more advantageous disposition and improvement than as single lot. People v. O'Donnel, 130 App. Div. 734, 115 NYS 509. "Property" in Pub. St. 1901, c. 64, § 1, providing that a railroad shall pay an annual tax on the value of its property at a rate as nearly equal to the average rate on other property, construed in light of legislative history of taxation and other statutes and held that in determining average rate on savings bank deposits must be considered. Wyatt v. State Board of Equalization, 74 N. H. 552, 70 A 387. Tax on deposits in savings banks imposed by Pub. St. 1901, c. 65, is a tax on property. Id. Where one Indiana railroad company leased a part of its line to another for a percentage of the gross earnings, held, the funds set apart for the leased lines belonged to the lessor corporation to be considered in valuing its property. Clark v. Vandalia R. Co. [Ind.] 86 NE 851. The **sale and removal of timber from lands** does not entitle the owner of the land to any reduction of the decennial appraisement under Rev. St., § 2753. Johnson v. Lacey, 11 Ohio C. C. (N. S.) 411.

**8.** People v. State Tax Com'rs, 128 App. Div. 13, 112 NYS 392. Method of determining value of intangible property of a water company for assessment of franchise tax stated. Id.

**9.** The net earnings of a telephone company for a single year is not a proper criterion by which to determine the value of the system. Western Union Tel. Co. v. Dodge County, 80 Neb. 18, 117 NW 468.

**10.** Income derived from messages at station in a given district which comprises only part of a great telegraph system is not the proper measure of the gross earnings of that part of the system where the lines within such district are used for the transmission of messages having neither origin nor destination in the district. Western Union Tel. Co. v. Dodge County, 80 Neb. 18, 117 NW 468. That net earnings of a telegraph company are 13 per cent of its gross earnings does not justify the conclusion that net earnings of a particular district through which the system runs, is but 13 per cent of gross earnings of such part of the system, in the absence of proof that the ratio is the same. Id.

**11.** Tulane Imp. Co. v. Board of Assessors, 121 La. 941, 46 S 928. In such case the fact

*Valuation of corporate property, stock, and franchises.* See 10 C. L. 1709—The value of a franchise is to be determined in the same manner as the value of any other property, so far as its nature permits.[13] In some states the method of valuing corporate franchises is specifically prescribed by law,[14] and the duty to make the valuation is imposed upon specified officials.[15]

(§ 5) *E. Reassessment; omitted property.*[16]—See 10 C. L. 1861—The state has power to enact retroactive laws for reassessment of undervalued property,[17] or property which has been omitted in former assessments,[18] and the fact that there is no immediate public need of the funds is no objection to such tax,[19] but property cannot be assessed as omitted where there has been a valid assessment of it.[20] In the absence of statutory authority taxing authorities cannot assess a taxpayer

that they are on ground favorably located for commercial purposes does not add to their value. Id.

12. Rev. Laws 1905, § 836, givee such right only upon condition that the person claiming it makes the affidavit therein provided. State v. Nelson [Minn.] 119 NW 1058. Under Laws 1907, p. 69, c. 48, § 1, providing that credits shall not be taxed and no reduction allowed for debts, held, if total wealth can be once taxed without taxing credits, the constitutional provision requiring all property to be taxed is satisfied but a provision exempting money from taxation is void. State v. Parmenter, 50 Wash. 164, 96 P 1047. Credits are a mere right to demand money or property in the future and until transfer is made property is taxed wherever it is found, and total actual property in the state may be overtaxed without taxing credits. Id. Under Const. art. 13, § 14, Pol. Code, §§ 3617, 3627, 3628, 3650, held, that one having solvent assets secured by collateral security on personalty was entitled to have debts deducted therefrom, § 3629, subd. 6, not being applicable. Bank of Willows v. Glenn County [Cal.] 101 P 13.

13. People v. State Tax Com'rs, 128 App. Div. 13, 112 NYS 392. Method of fixing valuation of special franchise of water company stated. Id. Intangible property of a water company possessing no exclusive right to occupy streets is given value because it is supposed to be earning an income. Id. Value of property of a water company, especially its franchise and good will, cannot be ascertained until franchise tax and all other taxes and replacement fund have been deducted from current earnings. Id. Franchise tax is imposed on that part of capital stock which is employed within state, and not upon the dividends, though the amount of the dividends whether distributed yearly or allowed to accumulate and distributed as additional stock, may be considered to determine the value of the stock. People v. Glynn, 130 App. Div. 332, 114 NYS 460. Capital stock used for specific purposes mentioned in certificate of incorporation is "employed" rather than "invested" within the state, within the meaning of such statute, Laws 1901, p. 1365, c. 558, as amended by Laws 1906, p. 1196, c. 474, § 2. People v. Glynn, 194 N. Y. 387, 87 NE 434.

14. In fixing valuation of franchise of a foreign corporation, under St. 1909, § 4080, the gross earnings and net income must be considered. James v. U. S. Fidelity & Guarantee Co. [Ky.] 117 SW 406; James v. American Surety Co. [Ky.] 117 SW 411. Under Laws 1896, p. 803, c. 908; Laws 1899, p. 1590, c. 712, the owner of a special franchise which is assessed at full value is not entitled to a reduction of 20 per cent because real estate was erroneously assessed at but 80 per cent of its full value. People v. Woodbury, 63 Misc. 1, 116 NYS 209. Finding of board of arbitrators of Georgia as to valuation of property and franchises of a telegraph company for purposes of taxation, held not to include, as an element, any right given by 14 Stat. 221, and not to afford any ground upon which a federal court should enjoin collection of the tax based thereon. Western Union Tel. Co. v. Wright, 166 F 954.

15. Under Tax Laws, §§ 42, 45, the state board of tax commissioners must annually fix the value of each special franchise, and, where it fails to do so, village assessors have no power to determine such value and enter the same in the assessment roll. People v. Keno, 61 Misc. 345, 114 NYS 1094.

16. **Search Note:** See Taxation, Cent. Dig. §§ 142, 600-602, 611, 1164, 1319-1323; Dec. Dig. §§ 109, 361-362½, 405, 406; 27 A. & E. Enc. L. (2ed.) 698.

17. Owner of omitted property may not complain that his property is assessed at actual cash value because other property has been heretofore assessed at much less than its real value. Anderson v. Ritterbusch [Okl.] 98 P 1002.

18. Laws 1906, p. 115, c. 22, art. 3, requiring listing and payment of taxes on omitted land for 1901 to 1905, and providing for forfeiture for failure to do so, is constitutional. Eastern Kenturky Coal Lands Corp. v. Com., 33 Ky. L. R. 857, 111 SW 362. Where one seeks to avail himself of the provisions of the act by listing an entire tract without indefinite exclusions, and so far as his petition shows he is owner of the entire tract, the petition is sufficient. Id.

19. The fact that public expenses have been paid for the years in which property was omitted, or that the purpose for which the tax was levied has been met with other funds, or that collection thereof will temporarily create a surplus of public revenue, is no constitutional reason why the tax should not be collected. Andersen v. Ritterbusch [Okl.] 98 P 1002.

20. Ward v. Wentz [Ky.] 113 SW 892. Under Code 1906, § 4296, declaring that approved assessment roll has effect of final judgment, while back taxes were assessed and assessment confirmed by council and list duly filed and approved, the council could not cancel such approval at subsequent meeting. Adams v. Clarksdale [Miss.] 48 S 242.

who has neglected to make a return for a particular year after the expiration of that year,[21] but assessment of back taxes[22] and of omitted property is generally provided for by statute.[23] Proceedings to make such assessments[24] must conform to statutory requirements,[25] and the assessment must be made by the proper authorities.[26] A proceeding to assess omitted property is a supplemental means of assessing property and not an action or proceeding.[27] The right of officers whose duty it is to see that omitted property is taxed is a continuing one against every tax payer, and is not terminated by the death of a tax payer.[28] In some states, a tax ferret contract is held to be contrary to public policy.[29] As a general rule,

21. Schmuck v. Hartman, 222 Pa. 190, 70 A 1091. Taxing authorities cannot assess a taxpayer, who makes a false return for a particular year after the expiration of that year, but the only remedy is to ascertain his liability as provided by Act June 1, 1889 (P. L. 425), providing that failure to assess or make return shall not relieve the taxpayer. Id.

22. Right of state revenue agent to assess back taxes is not exclusive; Code 1906, § 3421, authorizes a municipality through its clerk to do so. Adams v. Clarksdale [Miss.] 48 S 242. Legislature may provide for assessment of property for past years which has escaped taxation for such years. Jackson Lumber Co. v. McCrimmon, 164 F 759. Where omitted real property was in July, 1901, entered by the county auditor on the duplicate carrying taxes of 1900, which was the duplicate then in the hands of the county treasurer, it became the duty of the auditor under Rev. St., § 2803, to add to taxes of 1901 the simple taxes for each preceding year in which the property had escaped taxation. Pittsburg, etc., R. Co. v. Clark County Treasurer, 78 Ohio St. 227, 85 NE 49. "Current year" in Rev. St., § 2803, construed to mean current tax year, and not current calendar year. Id. Under Act June, 1906, art. 3, requiring all owners to pay taxes assessed for 1901-1905, a **petition to list lands** held not to sufficiently describe them. Commonwealth v. Gatliff [Ky.] 116 SW 263. Under such act, lands must be listed before January 1, 1907, and makes the county court the assessing tribunal. Held, where that tribunal held a petition to list insufficient, and petitioner failed to tender a sufficient petition within the prescribed time, his right to file could not be extended. Id.

23. Taxes on property omitted from assessment and discovered by assessor in subsequent year are collectible as current year taxes. State v. Goldthait [Ind.] 87 NE 133. Burns' Ann. St. 1908, §§ 10277, 10310, 10353, requires assessors to search for omitted property, taxes then assessed against such property being collectible as current year taxes. Id. Where a taxpayer has not been assessed on credits for former years, the board of review may assess them in subsequent years. Warner v. Campbell, 238 Ill. 630, 87 NE 853. Under Laws 1906, p. 88, c. 22, providing for assessing omitted property, the **franchise of a foreign corporation** may be assessed according to the law in force when assessment should have been made. James v. American Surety Co. [Ky.] 117 SW 411. In proceeding, under Code Supp., § 1407a, to assess **withheld property**, testimony of the owner is not conclusive, and judgment of the treasurer though not supported by evidence, is not void, and the owner must follow his remedy provided by appeal to the district court and cannot enjoin the tax. Bednar v. Carroll, 138 Iowa, 338, 116 NW 315.

24. Code 1906, § 3421, authorizing a city through its clerk to assess omitted property, does not apply to a proceeding by the revenue agent for the same purpose, which is governed by ch. 131, and notice of such omitted property was properly given to the revenue agent. Adams v. Clarksdale [Miss.] 48 S 242. **Proceeding against trust company** as trustee of designated beneficiary to assess omitted property is against the trustee, and not against the trust estate, and judgment is against the trust company which is personally liable under Ky. St. 1903, §§ 4023, 4050. Commonwealth v. Churchill [Ky.] 115 SW 189. Pendency of a proceeding to have omitted property listed for a certain year is ground for **abatement of second proceeding** for same purpose, though one is instituted by county auditor's agent and the other by the state revenue agent, each being on behalf of the state. Commonwealth v. U. S. Trust Co. [Ky.] 117 SW 314.

25. A complaint against a county and officials to compel it to put alleged omitted property on the tax list, which failed to state the name of any person whose property was omitted, held insufficient. Clark v. Lawrence County [S. D.] 120 NW 764.

26. Levy of tax on omitted property by board of review held an irregularity but not void. Chicago House Wrecking Co. v. Omaha [Neb.] 119 NW 253.

27. Proceeding to assess omitted property, under St. 1909, § 4260, instituted by filing statement by revenue agent, is on behalf of the state though the revenue agent receives compensation, and the proceeding is not an action nor a special proceeding but merely a supplemental means of assessing omitted property. Commonwealth v. Glover [Ky.] 116 SW 769. It is not necessary that the revenue agent verify his statement. Id. The provision that the statement contain "a description and value of the property proposed to be assessed" is mandatory. Id. Statement held sufficient as to cash, household effects, etc. Id.

28. Proceedings in discharge of such duty may be maintained against his estate. Gamble v. Patrick [Okl.] 99 P 640. Under Const. art. 6, § 6, discovery of omitted property is **duty of assessor.** State v. Goldthait [Ind.] 87 NE 133. Under Burns' Ann S., 1908, §§ 10277, 10310, 10353, assessors are required to search for property omitted in previous years. Id.

29. Under Const. art. 6, § 6, providing that county officers shall perform such duties as

owners are entitled to notice of increase of assessment,[30] or of assessment of back taxes,[31] but the purpose of requiring notice to an owner before raising an assessment is merely to enable him to appear and be heard.[32]

*Appeals and review.*See 10 C. L. 1802—Reassessments and assessments of omitted property are usually reviewable by appeal.[33]

§ 6. *Equalization, correction, and review.*[34]—See 8 C. L. 2074—An improper assessment may be canceled,[35] providing the appropriate procedure is followed.[36] One seeking reduction of taxes cannot ask a greater reduction than prayed for in his petition.[37] An alternative demand for reduction of an assessment may be cumulated with a demand for cancellation.[38] Taxes may be abated only in the manner prescribed [39] and for statutory grounds.[40]

*The powers and jurisdiction of state and municipal boards of equalization.*See 10 C. L. 1802—The powers of boards of equalization are prescribed by statute.[41] As a general rule, such boards have no power to make an original assessment,[42] unless authorized by statute; [43] nor make a gross increase or decrease in valuation or as-

may be directed by law, and county assessors being required to search for omitted property, a tax ferret contract for such purpose is contrary to public policy. State v. Goldthait [Ind.] 87 NE 133.

**30.** Hurd's Rev. St. 1908, c. 120, requires notice to person affected of increase of assessment, and such reassessment cannot be made without such notice. People v. Centralia Gas & Elec. Co., 238 Ill. 113, 87 NE 370. In such case the owner of the property is such person and not necessarily the person in whose name it is assessed. Id.

**31.** Under Code 1906, § 4740, no time limit is fixed for serving notice on owners of assessment of back taxes, and delay in such service held not to avoid the assessment. Adams v. Clarksdale [Miss.] 48 S 242.

**32.** Failure to give notice does not invalidate the assessment where he actually appeared and had a hearing. People v. Odin Coal Co., 238 Ill. 279, 87 NE 410. Evidence held to show that notice of increase in assessment was mailed and received by some officer of defendant company. Id.

**33.** Where property, which it is sought to assess as withheld, has been in fact properly listed and taxes paid, the remedy of the owner for improper assessment is by appeal to the district court as provided by Code Supp. 1902, § 1407a. Bednar v. Carroll, 138 Iowa, 338, 116 NW 315. Remedy provided by Code Supp. 1902, § 1407a, authorizing review on appeal to district court of action of county treasurer assessing property withheld from taxation, is exclusive and one complaining cannot resort to equity unless the tax is illegal. Id. Finding by treasurer as to amount of withheld property held within his jurisdiction, and his decision was reviewable **only by appeal** as provided and not by suit to enjoin enforcement of the assessment. Id. Circuit court on appeal from county court, dismissing a proceeding to assess omitted property, may, after submission of the cause, allow **amendment of answer** to plead former judgment. Commonwealth v. Churchill [Ky.] 115 SW 189.

**34. Search Note:** See notes in 13 L. R. A. (N. S.) 716; 7 Ann. Cas. 866.

See, also, Taxation, Cent. Dig. §§ 787-930; Dec. Dig. §§ 447-500; 21 A. & E. Enc. P. & P. 434.

**35.** Where one has been assessed for money in possession when he had no such money, and so stated in his return, the assessment will be cancelled. Travelers' Ins. Co. v. Board of Assessors, 122 La. 129, 47 S 439.

**36.** After property has been adjudicated to the state for taxes, proceedings by rule against the collector alone will not lie to cancel the taxes. Webster v. Howcott, 122 La. 365, 47 S 683.

**37, 38.** New England Mut. Life Ins. Co. v. Board of Assessors, 121 La. 1068, 47 S 27.

**39.** Assessors have no power to make an abatement of taxes in any way except as specified in Pub. St. 1882, c. 11, §§ 69-77. Rogers v. Gookin, 198 Mass. 434, 85 NE 405.

**40.** Where land was taxed as a whole and purchasers of a part of it applied for an apportionment, and the assessors made an apportionment and handed the collector a slip containing a direction to "abate" the original assessment, held not an abatement as the sale afforded no grounds for abatement. Rogers v. Gookin, 198 Mass. 434, 85 NE 405.

**41.** Laws 1868, p. 131, establishing a board of review, does not exclude from review before such board extraordinary assessment provided by St. 1898, § 1152, but, on contrary, § 1061 provides generally that the assessor must lay before the board their whole assessment. Stranger v. Oconto Land Co., 136 Wis. 516, 117 NW 1023. While jurisdiction of board of review, sitting as annual board of equalization, is ordinarily confined to lots and lands in immediate vicinity of parcels as to which complaint is made, it may be exercised over lots and land in another locality or district within corporation, if not exercised for purpose of general revaluation of property in district, a purpose which may be inferred if additions are largely in excess of reduction. Mooney v. Richardson, 11 Ohio C. C. (N. S.) 111.

**42.** Under Rev. St. 1895, art. 5124, amended by Acts 1907, p. 459, c. 11, a board of equalization has no power to add to rolls property not previously assessed nor to take therefrom property contained therein. Sullivan v. Bitter [Tex. Civ. App.] 113 SW 193. Addition of property by board of equalization being void, owner was not required to show that he had applied to the board for relief in order to have the assessment annulled or enjoined. Id.

**43.** Under Kirby's Dig., § 7004, authorizing county boards of equalization to add to or

sessment where the list returned by the assessor contains several different items.[44] Such boards must hold their meetings during the time prescribed by law,[45] and must consider the evidence submitted.[46] It is presumed that a board of equalization in equalizing assessments proceeded regularly and not arbitrarily.[47] The territorial board of Arizona acts judicially and its determination is not subject to collateral attack,[48] and it may base its orders upon records furnished.[49]

*Notice* See 10 C. L. 1804 to the taxing municipality is necessary in an appeal to a county board of taxation for cancellation of an assessment.[50]

*Irregularities.* See 10 C. L. 1805—Mere irregularities in the apportionment of a tax will not vitiate it.[51]

*Review by the courts.* See 10 C. L. 1805—Decisions of boards of equalization and correction are usually reviewable by the courts,[52] more or less specific provision being also made as to the modes [53] and scope of review,[54] procedure,[55] and relief to

subtract from the value of property returned by the assessor and to add omitted property, it may add stock in insurance companies if such stock is taxable. Dallas County v. Banks [Ark.] 113 SW 37. Unless authorized by statute, a board of equalization cannot assess property not listed and valued by the assessor. Sullivan v. Bitter [Tex. Civ. App.] 113 SW 193.

44. Board of equalization may not make a gross increase in the aggregate valuation where the list returned by the assessor has several different items therein. Nashville Lumber Co. v. Howard County [Ark.] 115 SW 936. Where the record of the board of equalization shows that it erroneously made a gross increase in valuation of property, its action cannot be upheld by proof that in equalizing the assessment it added items to the list as returned by assessor, and increased items listed. Id. Under Rev. St. 1895, tit. 104, c. 3, prescribing method of assessing, the commissioner's court, sitting as board of equalization, has no power to assess. Sullivan v. Bitter [Tex. Civ. App.] 113 SW 193. The assessment of credits being as one item, where credits have been assessed, the board of review cannot in subsequent years increase the assessment because too low or erroneous in omitting certain credits. Warner v. Campbell, 238 Ill. 630, 87 NE 853.

45. Under Code 1906, §§ 4291, 4294, 3422, the mayor and aldermen have no power to equalize assessments after month of October, though meetings held in succeeding months were adjourned meetings of October. City of Biloxi v. Biloxi Real Estate Co. [Miss.] 48 S 729.

46. Where, on review of assessment, the assessor received a verified statement of the party complaining, which was undisputed, they could not reject it nor act otherwise than in accordance therewith unless the evidence before them justified it. People v. Hall, 130 App. Div. 360, 114 NYS 511. Where such statement by a telephone company showed that all its property, consisting of tools, equipment, etc., had been taxed as real estate by the board of state tax commissioners, the assessors could not fix an assessment on the real estate of the company on the ground that all tools and equipment were not in the highways of the town. Id.

47. United Globe Mines v. Gila County [Ariz.] 100 P 774.

48. The sufficiency of evidence to justify an order is not reviewable in the absence of fraud, or unless it acted arbitrarily, but the inquiry limited to ascertainment of whether the board had jurisdiction or acted arbitrarily or in bad faith. United Globe Mines v. Gila County [Ariz.] 100 P 774.

49. In equalizing assessments, the territorial board of equalization may base any order made upon abstracts of assessment rolls furnished by clerks of the county boards without inspecting the rolls from which abstracts are made. United Globe Mines v. Gila County [Ariz.] 100 P 774.

50. Shrewsbury Tp. v. Merchants Steamboat Co. [N. J. Law] 69 A 958.

51. Where one recognized the apportionment of a tax by moving for abatement, he could not object that apportionment was void because notice required by Pub. St. 1882, c. 11, § 82, was not given. Rogers v. Gookin, 198 Mass. 434, 83 NE 405. One objecting to apportionment of a tax because notice required by Pub. St. 1882, c. 11, § 82, was not given, has burden to show that he was prejudiced. Id. Where tract of land was assessed as whole and was subsequently divided by sale and purchasers requested apportionment which was made, and thereafter petitioners asked an abatement, they could not object that request for apportionment was not in writing. Id.

52. Though no right of appeal is provided in favor of a taxpayer against an assessment, yet the supreme court, **under general jurisdiction** to determine all errors, may treat an appeal as a certiorari and correct record errors. Schmuck v. Hartman, 222 Pa. 190, 70 A 1091. One aggrieved by excessive valuation of his property has a remedy by appeal to the county commissioners and court of common pleas, and not by **suit in equity.** Clark v. Burschell, 220 Pa. 435, 69 A 900. Appeal under Act April 19, 1889 (P. L. 399), authorizing an appeal by an owner dissatisfied with valuation, **does not prevent collection of tax.** H. C. Frick Coke Co. v. Mt. Pleasant Tp. [Pa.] 71 A 930.

53. The action of the county board of taxation in increasing or decreasing the assessed value of property, which in their judgment is not truly valued as authorized by Law of 1906 (P. L. 210), is not reviewable on **certiorari** unless the board violates some legal rule in adjusting the value of the land. Town of Union in Hudson County v. Hudson County Board of Taxation [N. J. Law] 71 A 46.

54. Upon review of action of board of as-

be granted.[56] Unless error is shown, it is presumed that such boards acted regularly,[57] and the appellant has the burden of proof.[58] The general rules as to saving questions for review apply.[59] Where a statute provides for an appeal from an assessment as settled by the board of review, equity will review the action of the board only when it has acted without jurisdiction.[60]

§ 7. *Levies and tax lists.*[61]—See 10 C. L. 1807—The word "levy" as applied to taxes is commonly employed to designate the several different proceedings from the laying of the tax to its collection. All of these proceedings are treated in other sections,[62] except the original imposing or laying of the tax, which is treated here. Subject to constitutional limitations,[63] the levy of taxes is entirely statutory [64] and

sessment in assessing property and franchise of a leased railroad against the lessee, the court cannot inquire whether the action of the board was proper but only whether property of the lessor was omitted. Commonwealth v. Chesapeake & O. R. Co. [Ky.] 117 SW 287. No appeal or writ of error lies from a judgment of the circuit court made on an appeal from an order of the county court in respect to an erroneous assessment involving only a **question of valuation.** Ritchie County Bank v. Ritchie County Ct. [W. Va.] 63 SE 1098. If a taxpayer has two bank accounts, one taxable and the other not, and makes no return and nothing shows that in fixing the amount of assessment the assessor considered the non-taxable account, the assessment will be treated as if the assessor overestimated the taxable account, and is not open to review. Travelers' Ins. Co. v. Board of Assessors, 122 La. 129, 47 S 439. Gen. Tax Law, § 45, added by laws 1899, p. 1592, c. 712, § 2, providing for review by certiorari of **assessments of special franchises** by the state board of tax commissioners, relates alone to assessments or valuations of different franchises and not to inequality of assessment of special franchises as compared with other kinds of property. People v. Woodbury, 63 Misc. 1, 116 NYS 209.

**55.** Under Code, § 1373, **notice of appeal** to review action of the board of review in reviewing an assessment must be given to give the court jurisdiction, and a proper transcript defining the issues must be filed, and, where the record contains neither, the supreme court will not consider merits of the controversy. Peterson v. Clarence Board of Review, 138 Iowa, 717, 116 NY 818. On appeal from board of equalization in fixing valuation, where it appeared that plaintiff had not filed the **transcript** of proceedings before the board, the court could permit the defect to be remedied. Kamrar v. Webster City [Iowa] 120 NW 120. On appeal to the district court to review the action of the board of review in reviewing an assessment, neither the consent of the parties nor silence of appellee can take the place of a proper record showing jurisdictional facts. Peterson v. Clarence Board of Review, 138 Iowa, 717, 116 NW 818. Under Code, § 1373, providing for appeals from action of the board of review in reviewing assessments, pleadings filed in the district court cannot obviate the necessity of formal appeal and proper transcript. Id. Where assessment is made without jurisdiction, failure to file **written objections** under Tax Laws, § 36, does not affect right of person taxed to review the assessment by certiorari. People v. Keno, 61 Misc. 345, 114 NYS 1094. On certiorari to review the action of the board of review in refusing to quash assessments, **findings of fact** and conclusions of law are not necessary, the theory on which proceedings before nonjudicial bodies are challenged being that the evidence does not admit of a finding but one way, and that contrary findings are jurisdictional errors of law. State v. Patterson [Wis.] 120 NW 227.

**56.** The remedy afforded by Gen. St. 1906, § 2006, has a narrow sphere and is limited to cases where payment shall be refused upon allegation of illegality of the assessment. Dade County v. Hardee [Fla.] 47 S 350. Reduction of assessment cannot be decreed in suit which is distinctly and exclusively for cancellation. Liverpool & London & Globe Ins. Co. v. Board of Assessors, 122 La. 98, 47 S 415.

**57.** In absence of evidence to contrary, it is presumed that county board of taxation in revising tax lists and decreasing or increasing assessed values, under P. L. 1906, p. 210, acted properly and on due proof. Newton Trust Co. v. Atwood [N. J. Law] 71 A 110.

**58.** Burden of showing facts decreasing valuation. Newton Trust Co. v. Atwood [N. J. Law] 71 A 110. Where taxpayer appeals from action of board of equalization in valuing his property, he has burden of showing that action of board was erroneous. Western Union Tel. Co. v. Dodge County, 80 Neb. 18, 117 NW 468. On certiorari to valuation of manufacturing property as excessive **evidence held to justify valuation.** Royal Mfg. Co. v. New Jersey Board of Equalization of Taxes [N. J. Law] 70 A 978. On appeal from board of equalization, **evidence held to warrant reduction** of valuation from $7,500 to $6,500. Kamrar v. Webster City [Iowa] 120 NW 120.

**59.** See Saving Questions for Review, 12 C. L. 1763. On appeal to district court from a decision if county board of equalization, court is without jurisdiction to consider any questions other than those presented to board. Reimers v. Merrick County [Neb.] 118 NW 113.

**60.** Peterson v. Clarence Board of Review, 138 Iowa, 717, 116 NW 818.

**61. Search Note:** See Taxation, Cent Dig. §§ 470-508, 675-786; Dec. Dig. §§ 295-308, 408-446; 27 A. & E. Enc. L. (2ed.) 729.

**62.** See ante, §§ 5, 6; post, §§ 11, 12.

**63.** See ante, § 1. Under Const. § 180, an ordinance levying a tax must state the purpose for which it is levied, and an ordinance levying an advalorum and poll tax is void for failure to so state, though Ky. St. 1903, § 1839, authorizes such tax. Chesapeake, etc. R. Co. v. Com., 22 Ky. L. R. 882, 111 SW 234.

**64.** Held that cash road tax may still be

must be made as provided by statute.[65] The amount of the levy is usually prescribed by statute,[66] but a levy slightly in excess of the estimate is not void.[67] A well defined rate must be fixed by the levying statute.[68] The presumption is that the tax was levied for a lawful purpose, and was a legal tax, and the burden is upon the objectors to overcome such presumption by competent proof.[69]

*Mandamus* See 10 C. L. 1809 will lie to compel the levy of a tax in a proper case,[70] if relief is promptly sought,[71] but will not lie to compel the exercise of discretionary powers in connection with the levy.[72] Nor will it lie to compel county commissioners to levy a tax not within their duty or power.[73] The writ will lie to compel reduction of an excessive levy.[74]

levied in Bradford county, Act 1846, P. L. 199, not being repealed by Act 1905, P. L. 142. Elsbree v. Keller, 35 Pa. Super. Ct. 497.

**65.** Statutes requiring **certification** held to have been complied with. People v. Kankakee & S. W. R. Co., 237 Ill. 362, 86 NE 742. Hurd's Rev. St. 1908, c. 120, requiring amount of **taxes for separate purposes** to be separately stated, applies only to county and not to town taxes. People v. Cairo, V. & C. R. Co., 237 Ill. 312, 86 NE 721. Levy for "court expenses" without subdivision of such purpose is sufficient under Hurd's Rev. St. 1908, c. 120, providing that, when county taxes are levied for several purposes, the county board shall state the amount for each purpose. Id. Item for "printing books and stationery" is sufficiently certain. Id. Item for "salary of county judge, mine inspector, janitor," etc., is sufficient. Id. Item for "supplies and repairs of poor farm and salary of warden," is not certain. Id. In item "for supplies, light, heat, and water for court house and jail," there should be a separation of court house and jail supplies. Id. The term "miscellaneous purposes" is not sufficient. Id. Item for "salaries of officers" is sufficient. People v. Kankakee & S. W. R. Co., 237 Ill. 362, 86 NE 242. Under Hurd's Rev. St. 1905, c. 121, § 247, providing that, if election for levy of a **tax to construct road** shall be in favor of tax the commissioners of highways shall certify same to town clerk, who shall certify it to county clerk, who shall extend it on tax books for the current year, a tax voted for three years could be included in one levy and certificate. People v. Illinois Cent. R. Co., 237 Ill. 154, 86 NE 720. Under Code 1906, § 3430, it is the duty of the mayor and aldermen of a city to submit to electors the **question of increase of taxation.** State v. Glennen [Miss.] 47 S 550. Only way **burden of future taxes** can be laid on people is that prescribed by Code 1906, § 331, providing for bond and election. Wells v. McNeill [Miss.] 48 S 184.

**66.** Act June 27, 1895 (P. L. 404), prescribing duty of controller as to annually advising commissioners as to probable expenditures for fiscal year, does not restrict power of commissioners to levying of taxes to limit of his estimate. Bradbury v. Burschell, 220 Pa. 439, 69 A 1108. Code 1906, § 1231, amended by c. 63, p. 256, acts 1907, saying that county court shall thereupon levy so many cents upon $100 valuation as will cover estimated amount necessary to be raised for county purposes, held not to limit amount to be raised for district road purposes. White v. Wirt County Court, 63 W. Va. 230, 59 SE 884.

**67.** Under Code, §§ 2806, 2807, requiring school directors to certify estimate of amount required and board of supervisors to levy taxes necessary to raise the fund, a levy which will create the fund of $277,699 is not excessive, though the estimate called for only $260,000. Giliman v. Talley [Iowa] 119 NW 144.

**68.** James v. U. S. Fidelity & Guarantee Co. [Ky.] 117 SW 406.

**69.** People v. Gunzenhauser, 237 Ill. 262, 86 NE 669.

**70.** Municipality, authorized to borrow money, issue bonds and levy tax, may be compelled by mandamus to levy tax to pay bonds given to secure funds to construct public improvement. City of Cleveland, Tenn. v. U. S. [C. C. A.] 166 F 677. County authorities may be compelled by mandamus to levy general tax up to constitutional limit if necessary to meet interest on valid county bonds. Commissioners of Pitt County v. MacDonald, McKoy & Co., 148 N. C. 125, 61 SE 643. Counsel of City of Peoria held, under the provisions of charter, required to levy taxes for educational purposes as fixed by school inspectors, not exceeding statutory limit, and mandamus allowed. People v. City Council of Peoria, 139 Ill. App. 488. In granting writ of mandamus to compel municipal corporation to levy tax, court may direct **distribution of tax** over number of years so as to prevent hardship on taxpayers. City of Cleveland, Tenn. v. U. S. [C. C. A.] 166 F 677.

**71.** When taxpayers of town have voted taxes in aid of railways, mandamus will not issue to aid in assessing and collecting such taxes, where beneficiary has delayed and no steps were taken until after lapse of several years. Louisiana R. & Nav. Co. v. Coushatta, 122 La. 1079, 48 S 532. After 30 years, creditor of school board cannot demand levy of taxes and compel such levy by writ of mandamus. State v. New Orleans, 121 La. 762, 46 S 798.

**72.** Under Const. art. 9, § 3, Revisal 1905, § 4112, duty of county board of education and county commissioners to levy tax to maintain schools is peremptory, but it involves discretion as to amount, and mandamus will not issue to compel levy of tax according to estimate. Board of Education of Cherokee County v. Cherokee County Com'rs [N. C.] 63 SE 724.

**73.** State v. Goodwin, 81 S. C. 419, 62 SE 1100.

**74.** Under Act March 10, 1891, p. 189, c. 100, amended by Comp. Laws, § 1232, providing that, if after equalization it appears that levy is in excess of county's requirements, county commissioners must meet and reduce

§ 8. *Payment and commutation.*[75]—See 10 C. L. 1809—Payment of taxes must be made to the proper official.[76] Taxes cannot be paid in instalments,[77] unless such payment is authorized by statute.[78] Taxes are not ordinarily subject to set-off or counterclaim.[79] A taxpayer may rely on information given him by the collector as to taxes due.[80] In the absence of showing to the contrary, it is presumed that taxes are paid when due,[81] and that payments are made by the person rendering the property for taxation.[82] Nonpayment may be established by any evidence sufficient to satisfy the court.[83] A receipt is not conclusive.[84] A mortgagee is entitled to pay taxes and have an additional lien upon the land, though the mortgage is silent on this question,[85] but, where one not liable pays taxes, he cannot recover from the person who is liable where no contractual relation exists between them.[86] As a general rule neither state nor municipal officers can release tax payers from liability for taxes,[87] and a tax is not liable to set-off or counterclaim.[88] In some states provision is made for the resettlement[89] and adjustment of back taxes,[90]

it, mandamus lies to compel them to do so but not to control their discretion in making a levy within limitations prescribed. State v. Baerlin [Nev.] 98 P 402.

**75. Search Note:** See Taxation, Cent. Dig. §§ 962-1016; Dec. Dig. §§ 515-543; 27 A. & E. Enc. L. (2ed.) 746.

**76.** Under Burns' Ann. St. 1908, § 9247, requiring every person making payment to state treasury to furnish the auditor with a description of the liability, etc., and § 10216, requiring foreign insurance companies to pay taxes into the treasury of the state, payment to the state auditor is not a payment. Dailey v. State [Ind.] 87 NE 4. Payment to state auditor of taxes by foreign insurance company, under Burns' Ann. St. 1908, § 10216, requiring payment into state treasury, is not payment to auditor under authority from state, and money paid does not become property of state without some act amounting to ratification. Id.

**77.** Harrington v. Dickinson [Mich.] 15 Det. Leg. N. 996, 118 NW 931.

**78.** Act for taxing railroad and canal property approved April 10, 1884 (P. L. 142) took effect immediately but did not impose a tax until Jan. 1, 1885, and until this date, tax imposed by Act March 4, 1869 (P. L. 226) continued to be payable in quarterly payments. State v. United New Jersey R. & Canal Co. [N. J. Err. & App.] 71 A 228.

**79.** Hedge v. Des Moines [Iowa] 119 NW 276.

**80.** A taxpayer may rely on information given him by the county treasurer as to taxes he is required to pay, and, if he makes timely effort to pay or redeem and is misled by the treasurer, equity will grant him relief. Burchardt v. Scofield [Iowa] 117 NW 1061.

**81.** Kirchner v. Muscatine County Board of Directors of School Tp. [Iowa] 118 NW 51. Taxes on seated land which was sold as unseated will be presumed to have been paid in absence of evidence to contrary, where defendant is in possession at time of ejectment suit. Updegraff v. Snyder, 36 Pa. Super. Ct. 30.

**82.** Ryle v. Davidson [Tex. Civ. App.] 116 SW 823.

**83.** Evidence sufficient to show that a delinquent tax had not been paid. Cavanaugh v. Roberts, 50 Wash. 265, 97 P 55.

**84.** County may recover taxes though receipts have been made out and delivered to the taxpayers, if payment has not actually been made. Graves v. Bullen [Tex. Civ. App.] 115 SW 1177.

**85.** G. F. Sanborn Co. v. Alston, 153 Mich. 463, 15 Det. Leg. N. 703, 117 NW 625.

**86.** Grantee of land who paid taxes assessed against interest of mortgagee of his grantor, which interest, under Const. art. 13, § 4; Pol. Code, § 3627, is an interest in land the tax being a lien against such interest under Pol. Code, § 3718, cannot recover from the mortgagee the sum so paid, there being no contractual relation between them. William Ede Co. v. Heywood, 153 Cal. 615, 96 P 81.

**87.** Where one was liable for military tax of $2 imposed by Gen. St. 1902, §§ 2997, 2998, a resolution of a town meeting reducing amount was ineffectual. Atwater v. O'Reilly [Conn.] 71 A 505. City council has no power to compromise claim or release lien for taxes. City of Middlesborough v. Coal & Iron Bank, 33 Ky. L. R. 469, 110 SW 355. Electors at a town meeting cannot authorize the compromise of a judgment for taxes by acceptance of less amount than that for which judgment was obtained. Parker v. People, 133 Ill. App. 118.

**88.** Hedge v. Des Moines [Iowa] 119 NW 276.

**89.** Under Act Pa. March 30, 1811, authorizing the auditor general and treasurer to revise tax settlements, except such as have been appealed from or taken out of their office by other proceedings if request is made within 12 months, held in order to prevent resettlement, the tax must have been paid and 12 months passed since date of settlement without attempt to resettle. In re Wyoming Valley Ice Co., 165 F 789. Under Act Pa. March 30, 1811, providing for revision of tax settlements by attorney general and treasurer, except such as have been appealed from or taken out of their office, held officers may revise taxes which have been settled but not taken out of their hands, if action is taken within time prescribed and final discharge has not been allowed. Id. Where, after taxes had been settled against a corporation, it became bankrupt and taxes were resettled and reduced on capital stock and corporate loans which amounts were allowed by the referee, and tax on capital stock paid but tax on loans was reversed, payment of tax on the capital stock was a discharge as to it. Id.

**90.** The supplement of April 14, 1891 (P. L. 393) to 3 Gen. St. 1895, p. 3370, re-enacts

and also, for listing persons who have paid taxes.[91] The mere payment of taxes gives no title.[92]

§ 9. *Lien and priority.*[93] See 10 C. L. 1811—Tax liens attach only upon performance of the statutory requisites thereto,[94] but having attached they are not affected by subsequent irregularities.[95] As a general rule they attach as of the date of assessment,[96] and cannot be affected by any subsequent change of ownership[97] or proceeding to which the taxing power is not a party,[98] unless the property is taken for public use[99] and the lien remains until the tax is paid or cancelled.[1] One who pays taxes to protect his interest is subrogated to the lien of the taxing power.[2] In proceedings to enforce the lien, jurisdiction must be acquired,[3] and such fact must appear from the record.[4] A complaint to enforce a lien must allege when the tax was assessed,[5] describe the property,[6] and conform to all substantial requirements

the provisions of said original act as of the later date. Its affect is to invest commissioners appointed under the original act with power to adjust arrearages in taxes existing at the date of the supplemental act, and does not invest them with power to deal independently with future arrearages. City of Jersey City v. Speer [N. J. Law] 72 A 448.

91. Under Const. art. 2, § 38, in making and filing list of persons who have paid their poll tax, treasurer should embrace therein only the names of persons who have personally paid their tax. Tazewell v. Herman, 108 Va. 416, 61 SE 752.

92. Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531.

93. **Search Note:** See notes in 15 L. R. A. 236; 29 Id. 278; 2 L. R. A. (N. S.) 1052, 1060, 1069.

See, also, Taxation, Cent. Dig. §§ 931-961; Dec. Dig. §§ 501-514½; 27 A. & E. Enc. L. (2ed.) 735.

94. Tax does not become lien until amount thereof is ascertained and determined and actual entry thereof made. Mandel v. Weschler, 128 App. Div. 505, 112 NYS 813. There can be no charge upon the property, no enforcible lien, until the proportionate share of the public burden has been officially determined. Jacobs v. Union Trust Co. [Mich.] 15 Det. Leg. N. 913, 118 NW 921. Under charter of Detroit, there is no charge upon property extinguishable by payment until tax roll is received by receiver, and vendor is not liable for taxes paid by vendee who purchased after listing but before receiver had tax roll. Id. Under Act 1889, P. L. 79, as amended by Act 1889, P. L. 122, levy by city of third class does not become lien unless entered of record in office of prothonotary. Pennsylvania Trust Co. v. Jones, 35 Pa. Super. Ct. 53. Act 1889, P. L. 79, providing that unpaid taxes shall be registered, is not in conflict with Act 1897, P. L. 277, providing that if not so registered they shall cease to be lien. Id.

95. Failure to return and certify special drainage taxes as delinquent does not affect the state's right to a lien therefor. State v. Wilson [Mo.] 115 SW 576.

96. Huckleby v. State [Fla.] 48 S 979.

97. Jacobs v. Union Trust Co. [Mich.] 15 Det. Leg. N. 913, 118 NW 921.

98. Lien of state attaches by and from date of assessment, and cannot be divested by any subsequent judicial sale in any proceeding to which the state is not a party. Huckleby v. State [Fla.] 48 S 979. City held not barred from enforcing its lien where it was not made a party to suit by state to wind up affairs of insolvent bank though its officers knew of the proceeding. City of Middlesborough v. Coal & Iron Bank, 33 Ky. L. R. 469, 110 SW 355.

99. Where land is taken under the power of eminent domain for a strictly public use, it is discharged from liens for unpaid taxes. Gasaway v. Seattle [Wash.] 100 P 991.

1. Under Code Supp. 1902, §§ 1389a-1389c, repealing Code, § 1389, delinquent personal taxes when entered on the delinquent list remain a lien until paid or cancelled. Watkins v. Couch [Iowa] 120 NW 485. City council has no power to release lien for taxes. City of Middleboro v. Coal & Iron Bank, 33 Ky. L. R. 469, 110 SW 355.

2. Where one believing he had a valid mortgage on land, in good faith, paid taxes to protect it, he was entitled to an equitable lien, though his mortgage was barred. Childs v. Smith [Wash.] 99 P 304. One who pays taxes and acquires an equitable lien is subrogated to rights of the county and state against which limitations do not run. Ball. Ann. Codes & St. § 1740, providing that they shall be a lien until paid. Id. Where he also pays special assessments and is subrogated to the lien of the city, he is barred in 10 years. Ball. Ann. Codes & St. § 1740. Id.

3. Judgment foreclosing tax lien against unknown owners rendered upon citation by publication is not binding upon persons in actual possession not served. Sellers v. Simpson [Tex. Civ. App.] 115 SW 888. Where affidavit of nonresidence for order of publication of process to foreclose a tax lien was mistakenly filed with justice of peace, who had no jurisdiction, and was then withdrawn and filed in the circuit court, such fact did not render it ineffective to sustain order of publication. Himmelberger-Harrison Lumber Co. v. Keener [Mo.] 117 SW 42. Judgment foreclosing tax lien against unknown owners held to foreclose all unknown owners made parties. Sellers v. Simpson [Tex. Civ. App.] 115 SW 888.

4. A suit to foreclose a tax lien against unknown owners is a proceeding in rem, not strictly judicial, but a step in administration proceedings, and, jurisdiction being special, it must appear from record that facts exist which give the court jurisdiction. Young v. Jackson [Tex. Civ. App.] 110 SW 74.

5. When the taxes were assessed and levy made. City of Miami v. Miami Realty, Loan & Guaranty Co. [Fla.] 49 S 55.

of the law.[7] For the purpose of enforcing its lien, the state may intervene in a suit and obtain an order for payment thereof out of the proceeds of a judicial sale.[8]

§ 10. *Relief from illegal taxes.*[9]—See 10 C. L. 1811—As a general rule the collection of an illegal tax may be enjoined,[10] especially when it is so provided by statute,[11] but equity will not interfere unless some recognized ground of equitable relief appears.[12] Hence, injunction will not issue on the ground of irregularities[13] or excessiveness of the tax.[14] Nor will it issue where a portion of the tax is legal and such portion has not been paid.[15] Enforcement of taxes against exempt property may be enjoined.[16] A petition to enjoin the collection must show grounds for equitable relief,[17] and the proof must show that the taxing authorities have acted, or are

**6.** A petition to enforce a lien for taxes against specific real property, which states the object and nature of the petition but omits the land against which the lien is claimed, is insufficient. Randall v. Snyder, 214 Mo. 23, 112 SW 529.

**7.** Sayle's Ann. Civ. St. 1897, art. 5232F, complied with, where petition was signed and verified by county attorney. Young v. Jackson [Tex. Civ. App.] 110 SW 74.

**8.** If any of the parties desire to question the validity of the tax, they should do so by answer and not by demurrer. Huckleby v. State [Fla.] 48 S 979.

**9. Search Note:** See notes in 22 L. R. A. 699; 11 L. R. A. (N. S.) 1104; 16 Id. 685; 94 A. S. R. 425; 3 Ann. Cas. 564; 8 Id. 669; 10 Id. 1050.

See, also, Taxation, Cent. Dig. §§ 991-1016; 1228-1262; Dec. Dig. §§ 535-543, 604-613; 27 A. & E. Enc. L. (2ed.) 756; 21 A. & E. Enc. P. & P. 470.

**10.** Fiscal Ct. of Owen County v. F. & A. Cox Co. [Ky.] 117 SW 296. Tax levied without authority of law. Carr v. Arnold, 239 Ill. 37, 87 NE 870. Where sole question in proceeding to assess withheld property was whether it was exempt, and it was proven to be exempt, the enforcement of the tax could be enjoined. Bednar v. Carroll, 138 Iowa, 338, 116 NW 315. Supervisors of a town may be enjoined from levying on illegal road tax where by statute there is no adequate remedy at law. H. C. Frick Coke Co. v. Mt. Pleasant Tp., 222 Pa. 451, 71 A 930. In suit to recover back taxes against a foreign corporation where it appeared that it owed no taxes, back or otherwise, and to allow assessments would either compel it to pay illegal taxes or defend a multiplicity of suits, such assessments may be enjoined. Singer Mfg. Co. v. Adams [C. C. A.] 165 F 877.

**11.** Equity may enjoin enforcement of an unauthorized tax notwithstanding the remedy at law furnished by Code 1904, § 571. Town of Wytheville v. Johnson's Ex'r, 108 Va. 589, 62 SE 328.

**12.** A town treasurer will not be enjoined from levying upon personal property under his warrant, but, if an owner deems the tax excessive, his remedy is to pay under protest and sue to recover it back. Duluth Log Co. v. Hawthorne [Wis.] 120 NW 864. Equity will not interfere solely to vacate tax assessment. Buchanan v. MacFarland, 31 App. D. C. 6.

**13.** Irregularity in the assessment. Jackson Lumber Co. v. McCrimmon, 164 F 759 Such jurisdiction is confined to cases where the tax is not authorized, or persons exacting it are without authority or have proceeded fraudulently. Yamhill County v. Foster [Or.] 99 P 286. Error in assessing property in name of lessee is not ground for enjoining the tax, where the lessee is liable for the taxes and is not prejudiced. City of Norwalk v. J. W. Perry Co., 108 Va. 28, 61 SE 867. Federal courts will not enjoin collection of taxes imposed on foreign corporations because of methods used in valuation, unless fraud is shown or it is obvious that a wrong principle has been adopted. Jackson Lumber Co. v. McCrimmon, 164 F 759.

**14.** Jackson Lumber Co. v. McCrimmon, 164 F 759. Equity will not enjoin collection of a tax because it is excessive, unless the amount due is tendered. Porter v. Boyd Pav. & Const. Co., 214 Mo. 1, 112 SW 235.

**15.** City & County of Denver. v. Hallett [Colo.] 100 P 408; Clay v. Wrought Iron Range Co. [Ind. App.] 85 NE 119. One seeking to enjoin collection of tax must pay amount legally due before he can have relief against that which is illegal. People v. Centralia Gas & Elec. Co., 238 Ill. 113, 87 NE 370. If gas company is liable for taxes on any portion of deposit made by its consumers, it may not enjoin collection of tax as levied until it has tendered payment of the portion for which it is liable. Parsons Natural Gas Co. v. Rockhold [Kan.] 100 P 639. Injunction is the proper remedy to prevent the enforcement of an illegal tax, but as a general rule a court will not enjoin the enforcement of an entire levy if the valid portion can be separated from the invalid. Southern R. Co. v. Mecklenburg County Com'rs, 148 N. C. 220, 61 SE 690.

**16.** Colorado Farm & Live Stock Co. v. Beerbohm, 43 Colo. 464, 96 P 443. Where court has acquired jurisdiction to enjoin enforcement of taxes against exempt property, the subsequent, wrongful act of defendant in selling the property for taxes will not deprive it of power to grant such ultimate relief as plaintiff may be entitled to. Id.

**17.** Complaint to enjoin collection of taxes held not to sufficiently allege unlawful assessment, and allegations of discrimination and omission from assessment roll held vague and in the nature of conclusions. Duluth Log Co. v. Hawthorne [Wis.] 120 NW 864. Petition to enjoin collection of taxes on the ground that the property was exempt held bad as showing on its face that plaintiff was not entitled to the relief sought. Montgomery v. Peach River Lumber Co. [Tex. Civ. App.] 117 SW 1061. Where a suit was brought against a tax collector to enjoin collection of taxes as illegal, and an amended bill was filed after sale to re-

about to act, illegally or fraudulently.[18] The state cannot maintain action to enjoin collection of municipal tax where no public interest is involved.[19] Sometimes special statutory provision is made in case of illegal taxes,[20] and in some states a void tax may be annulled [21] if relief is sought in proper time.[22] A property owner against whom a tax is sought to be enforced may defend without first paying the amount legally due, and judgment will be rendered for only such sum as is found legally due.[23]

*Recovery back of payments.* See 10 C. L. 1813—While taxes illegally exacted cannot be recovered in the absence of statutory provisions authorizing such a recovery,[24] as a general rule under the statutes of the various states, such taxes, when involuntarily paid,[25] may be recovered back,[26] provided, of course, the action is brought

move the sale as a cloud, such bill was one to enjoin collection of taxes and not to remove cloud. Turner v. Jackson Lumber Co. [C. C. A.] 159 F 923. In action to enjoin collection of taxes on timber on county school lands, allegations in the petition that plaintiff had become owner of the timber under conveyance from the county, held to show title in plaintiff. Montgomery v. Peach River Lumber Co. [Tex. Civ. App.] 117 SW 1061. Finding in suit to enjoin collection of taxes that plaintiff had acquired from the county, by mesne conveyances, the right to cut the timber did not show that title to standing timber was in him. Id.

18. Mead v. Turner, 60 Misc. 145, 112 NYS 127. On contention that railroad property had been omitted and that thereby rate against plaintiff's property was increased, held not error to deny injunction under the sworn answer and evidence. Cairo Banking Co. v. Ponder, 131 Ga. 708, 63 SE 218.

19. State v. Shufford, 77 Kan. 263, 94 P 137.

20. If a tax is wrongly assessed upon personalty, the taxpayer's only remedy is application for abatement, under Rev. Laws 1902, c. 12, §§ 73, 74. Sweetser v. Manning, 200 Mass. 378, 86 NE 897. Since taxes are primarily a personal liability and not a lien on the land, one who becomes the owner of land after it is assessed cannot have the tax abated, under Rev. Laws, c. 12, § 73, permitting one aggrieved to apply for abatement. Dunham v. Lowell, 200 Mass. 468, 86 NE 951.

21. In action to annual a tax against a non-resident on mortgage notes, evidence held to sustain judgment for plaintiff. Theobald v. Clapp [Ind. App.] 87 NE 100.

22. Action to annul a tax for railroad purposes held in effect one to contest an election, and was barred after three months proclamation by Acts 1892, p. 140, No. 106. Dimmick v. Opelousas, etc., R. Co. [La.] 48 S 767.

23. People v. Centralia Gas & Elec. Co., 238 Ill. 113, 87 NE 370.

24. Slimmer v. Chickasaw County [Iowa] 118 NW 779. An excess in highway taxes, paid when the town was operating under the labor system, cannot be recovered. People v. Erie County Sup'rs, 193 N. Y. 127, 86 NE 348.

25. Payment in order to be involuntary, so as to entitle the taxpayer to recover back for illegality, must be made on compulsion to prevent immediate seizure or arrest. Cincinnati, etc., P. R. Co. v. Hamilton County [Tenn.] 113 SW 361.

**Held involuntary:** Where one's goods are seized or he is threatened with arrest, etc., payment of an illegal tax is involuntary and may be recovered. Johnson v. Crook County. [Or.] 100 P 294.

**Held voluntary:** Payment made without compulsion but with comprehension of its invalidity is voluntary, preventing a recovery though made under protest. Johnson v. Crook County [Or.] 100 P 294. Where one voluntarily handed assessor list of his property and paid taxes assessed. Slimmer v. Chickasaw County [Iowa] 118 NW 779. Where personal taxes were paid without protest at rate of previous year instead of giving bond as authorized. Gibson Abstract Co. v. Cochise County [Ariz.] 100 P 453. Payment under protest before time of payment is voluntary and cannot be recovered unless payment under protest at that time is authorized. Williams v. Merritt, 152 Mich. 621, 15 Det. Leg. N. 204, 116 NW 386. Foreign corporation paying franchise tax under protest that it is illegal is not entitled to recover it back, since payment in response to a demand under statute is voluntary. Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361. Tax books in hands of county trustee, who was sole collector, and delinquent list thereafter to be furnished the constables prior to time tax became delinquent, did not have force of judgment and execution so as to render payment involuntary. Cincinnati, etc., R. Co. v. Hamilton County [Tenn.] 113 SW 361. Payment under protest before taxes became delinquent, merely to prevent imposition of penalty, was voluntary. Id. Where fund claimed to be exempt is taxed, and, in a suit to recover the tax, the defense is that by failure to furnish a list of taxable property there can be no recovery, the defendant has the burden to show that the fund was taxable, though the list had been furnished. Masonic Education & Charity Trust v. Boston, 201 Mass. 320, 87 NE 602.

**Complaint** to recover illegal tax paid under protest held demurrable for not alleging that sheriff was in the act of executing a threatened sale, or that there was no other expedient. Johnson v. Crook County [Or.] 100 P 294.

26. By virtue of Code, § 1417. Slimmer v. Chickasaw County [Iowa] 118 NW 779. Notwithstanding failure of a taxpayer to list his property, he may recover taxes wrongfully charged against him, under Gen. St. 1901, § 7599, authorizing county commissioners to correct returns of assessor where a taxpayer has under-valued his property or

in proper time.[27] General statutes providing for the recovery of interest do not apply to recoveries of taxes paid,[28] and a tax payer who sues under a statute to recover interest on taxes wrongfully exacted cannot recover independently of the statute,[29] nor can he set up the unconstitutionality of such statutes.[30] In Kentucky an action to recover taxes paid may be maintained against the collecting or disbursing officers of a county but not against the county itself.[31]

*Refunding.* See 8 C. L. 2079—In some states statutes provide for the refund of excessive taxes,[32] or taxes illegally exacted [33] or erroneously paid,[34] and in such case voluntary payment does not preclude relief,[35] but such statutes do not apply in case of mere irregularities.[36] As to the recovery of interest on taxes authorized to be refunded, it is held on the one hand that the obligation to refund excessive taxes carries with it the right to interest as a matter of course,[37] and on the other hand a statute providing for a refund does not authorize recovery of interest.[38]

§ 11. *Collection. A. Collectors; their authority, rights, and liabilities.*[39] See 10 C. L. 1815—Special statutory provisions cover most of the questions relative to ap-

failed to return it. Board of Com'rs of Jackson County v. Kaul, 77 Kan. 715, 96 P 45. Suit may be maintained against a county in proper cases to recover **taxes paid by mistake,** as where 12 acres of land was assessed as 22 acres. Puget Realty Co. v. King County, 50 Wash. 349, 97 P 226.

**27.** Action by bank against city to recover taxes paid, on ground that U. S. bonds owned by bank had been assessed, held not maintainable when not brought within time prescribed. Grayson County Nat. Bank v. Litchfield [Ky.] 114 SW 289.

**28.** Board of Com'rs of Jackson County v. Kaul, 77 Kan. 715, 96 P 45.

**29, 30.** Home Sav. Bank v. Morris [Iowa] 120 NW 100.

**31.** Action cannot be maintained against a county for taxes wrongfully collected, but where they are in the hands of the collecting or disbursing agent, direct action may be brought against them. Fiscal Ct. of Owen County v. F. & A. Cox Co. [Ky.] 117 SW 296. In action against fiscal court and county treasurer to recover tax paid under protest, where it appeared that money was in the hands of the treasurer, a judgment against him was proper, but judgment against the fiscal court was improper. Id.

**32.** Laws 1907, p. 1682, amending Laws 1896, p. 795, providing for recovery back of excessive school taxes, have no application to a proceeding to recover from a county board of supervisors a refund of the excess of a school tax. People v. Erie County Sup'rs, 193 N. Y. 127, 86 NE 348. Where a taxpayer presents his claim for a refund of excessive taxes and is allowed a refund of state, county, and town taxes, but denied as to school and road taxes, and he accepts the same, he cannot, after three years, reopen the matter and obtain a reaudit. Id.

**33.** Laws 1907, p. 1862, c. 721, providing for refund of excessive taxes determined illegal on certiorari, under Laws 1880, p. 402, c. 269, repealed by Laws 1896, p. 795, c. 908, held not obnoxious to Const. art. 7, § 6, as a state demand. People v. Haverstraw Board of Education, 126 App. Div. 414, 110 NYS 769. Such statute is not unconstitutional as imposing upon one person the debt of another, since taxes are not debts, and, if they were, the statute merely adjusts the debt and returns to the debtor excess paid by him over what was due. Id.

**34.** Laws 1907, p. 1682, amending Laws 1896, p. 795, which repeals Laws 1880, c. 402, c. 269, providing for refund of taxes erroneously paid, held retrospective as well as prospective, notwithstanding use of "shall have been levied and collected." People v. Haverstraw Board of Education, 126 App. Div. 414, 110 NYS 769. Whether "shall have been," in statute relative to refund of taxes, is to be construed as making statute prospective only, held a question of legislative intent. Id. Failure of taxpayer to avail himself of remedy given by Acts 1864, p. 1260, c. 555, for reduction of valuation held not to preclude him from seeking remedy provided by this statute. Id.

**35.** Voluntary payment of taxes held not to preclude a taxpayer from relief under a statute relative to refund of excessive taxes. People v. Board of Education, 126 App. Div. 414, 110 NYS 769. Under Code, § 1417. Slimmer v. Chickasaw County [Iowa] 118 NW 779.

**36** Under Pol. Code, § 3804, providing for refunding of taxes erroneously or illegally collected, mere irregularities, which do not invalidate the assessment, do not absolve a taxpayer from the duty of paying nor entitle him to a refund. Graciosa Oil Co. v. Santa Barbara County [Cal.] 99 P 483.

**37.** People v. Haverstraw Board of Education, 126 App. Div. 414, 110 NYS 769. That application of statute allowing refund of excessive taxes, with interest, is to give interest paying investment to taxpayer, held not ground for nullifying statute. Id.

**38.** Under Code, §§ 1417, 4341, in mandamus to compel refund interest on taxes wrongfully exacted, there could be no recovery of interest since statute does not provide for payment of interest. Home Sav. Bank v. Morris [Iowa] 120 NW 100.

**39. Search Note:** See notes in 4 L. R. A. (N. S.) 339; 11 Ann. Cas. 330.

See, also, Taxation, Cent. Dig. §§ 1017-1262, 1650-1672; Dec. Dig. §§ 544-613, 835-855; 27 A. & E. Enc. L. (2ed.) 765, 795, 903; 21 A. & E. Enc. P. & P. 366, 426.

**40.** Duty of collecting city taxes devolves upon city officers, and city has no right to employ any one else for such purpose. Kerr v. Regester [Ind. App.] 85 NE 790.

pointment,[40] term,[41] qualifications,[42] and authority.[43] One legally elected tax collector becomes entitled to the office and emoluments thereof as soon as he takes the oath.[44] A tax collector has no legal authority to agree with a tax payer to substitute his responsibility for that of the tax payer.[45] Tax collectors are held to strict accountability,[46] and frequently are penalized for failing to pay over taxes collected.[47] Where a sheriff sells property and fails to collect the price, he becomes responsible therefor to the state,[48] and, where he fails to return taxes as delinquent he may be required to account for them and be subrogated to the rights of the state against the tax payer.[49] As between an incoming and outgoing collector, the former is entitled to fees for collections actually made by him.[50] Fees collected on delinquent taxes by a deceased collector's successor are held by him in trust for the heirs of deceased.[51] Liability of sureties on a collector's bond is regulated by statute.[52]

(§ 11) *B. Methods of collection in general.*[53]—See 10 C. L. 1816—A tax not being a debt in the ordinary meaning of that term,[54] the right to enforce payment by an action at law does not exist apart from statute.[55] In some states statutes

**41.** Term of office of deputy receiver of taxes of city of Trenton is fixed by law, and is coterminous with term of receiver whose deputy he is. Sperry v. Barber [N. J. Law] 71 A 64.

**42.** Collector is not eligible until he obtains his discharge for amount of collections he has made. Const. art. 182, construed and held to exclude from right to hold office persons intrusted with public funds until they have obtained discharge. State v. Reid, 122 La. 590, 47 S 912. May be appointed after he has exhibited a discharge from proper officer. Id. Assuming that town officers must be residents of town, where town neglects or refuses to elect officers, other residents of county holding offices in adjoining towns may be authorized to collect state and county taxes. Strange v. Oconto Land Co., 136 Wis. 516, 117 NW 1023.

**43.** Under Loc. Acts 1905, p. 769, No. 577, and Id. p. 770, No. 578, §§ 1, 2, and Id. p. 1161, No. 667, township trustee held to have power to collect taxes accruing from transferred territory. Township of Stambaugh v. Iron County Treasurer, 153 Mich. 104, 15 Det. Leg. N. 368, 116 NW 569. Tax list in hands of county treasurer will authorize him to receive and collect taxes described therein, but, to authorize him to seize personal property or enforce a tax lien, clerk's warrant provided for by statute must be attached to the list, and, until such warrant is attached, there is no enforcible lien against personal property of the tax debtor. Platte Valley Milling Co. v. Malmsten, 79 Neb. 730, 116 NW 962.

**44.** County tax collector. Graves v. Bullen [Tex. Civ. App.] 115 SW 1177.

**45.** Under the rule that public officers may not bind the state beyond their actual authority. Graves v. Bullen [Tex. Civ. App.] 115 SW 1177.

**46.** Tax collector held guilty of embezzlement where he withheld taxes collected. State v. Dudenhefer, 122 La. 288, 47 S 614.

**47.** Rev. St. 1880, § 548, brought forward in Ann. Code, 1892, § 3840, penalizing tax collector 30 per cent. for failure to pay over taxes collected, was repealed by Laws 1904, p. 216, reducing the penalty. Adams v. Saunders [Miss.] 46 S 960. Where a collector collected taxes, damages, over payment of taxes, etc., and failed to pay them into treasury, he was not liable for penalty imposed for nonpayment into treasury, under the Mississippi statute. Id. Amount collected by collector and withheld bears interest at legal rate from date due. Id.

**48.** Bailey v. Napier [Ky.] 117 SW 948.

**49.** If sheriff fails to collect taxes in his hands for collection, which are not returned, and allowed to him as delinquent, he may be required to account for them, in which event he would be subrogated to rights of county and state, and sums would be due him from tax payers. Commonwealth v. Bush [Ky.] 115 SW 249.

**50.** Where an outgoing collector had executed as paid tax receipts, where taxes had not been paid, and when an incoming collector qualified the taxes had not been paid nor the receipts delivered, the incoming collector was entitled to commissions on such taxes. Graves v. Bullen [Tex. Civ. App.] 115 SW 1177.

**51.** Where fees on delinquent taxes were collected by deceased collector's successor, he held them in trust for deceased's heirs, and limitations would not run against them until they had notice that he repudiated the trust. Bond v. Poindexter [Tex. Civ. App.] 116 SW 395.

**52.** Under B. & C. Comp. §§ 2528, 3093 and Hill's Ann. Laws, § 2794, amended by B. & C. Comp. § 3094, recourse cannot be had against sureties on a sheriff's general bond for his default, as tax collector, where he has given no bond as tax collector. Wheeler County v. Keeton [Or.] 95 P 819.

**53. Search Note:** See notes in 42 A. S. R. 655; 3 Ann. Cas. 350; 7 Id. 18.

See, also, Taxation, Cent. Dig. §§ 1017-1227; Dec. Dig. §§ 544-603; 27 A. & E. Enc. L. (2ed.) 769; 21 A. & E. Enc. P. & P. 378.

**54.** See ante, § 1. Taxes due territory of Oklahoma prior to statehood on account of omitted property constituted a debt accruing to territory, under § 3 of schedule (Burns' Ed. § 452) to constitution, and legislature may make provision for recovery thereof by state. Anderson v. Ritterbusch [Okl.] 98 P 1002.

**55.** City of Boston v. Turner, 201 Mass.

190, 87 NE 634. Code 1906, § 4256, making taxes debts and providing for collection by action, held to create new obligation and not to be retroactive, and not to apply to taxes due before its passage. Delta & Pine Land Co. v. Adams [Miss.] 48 S 190. In absence of statute there is no lien for taxes. They are primarily a charge against owner, and only manner of collecting them is by demand, distress or arrest. Dunham v. Lowell, 200 Mass. 468, 86 NE 951.

**NOTE. The right of a federal or a state government to maintain an action for the recovery of taxes:** Statutes imposing taxes generally make special provisions for their collection, but, nevertheless, these provisions may fail to accomplish their purpose; again, a tax law may provide no specific method for the collection of the tax. Under either condition the question is at once suggested whether or not a tax is a debt owing to the government which imposes it, the payment of which can be enforced by the ordinary remedies at law. Because of the necessity, in any governmental system, of obtaining taxes, the answer is of considerable importance.

The question suggested was presented squarely to the circuit court of appeals for the eighth circuit, in the recent case of United States v. Chamberlin [C. C. A.] 156 F 881. The Act of Congress of June 13th 1898, provided that on a deed conveying lands the purchaser, or other person at his direction, should place revenue stamps of a value in certain proportion to the amount of the consideration for the conveyance; certain penalties were specified for failure to attach the required stamps. Defendant's testator conveyed certain lands, a consideration was expressed in the deed, and proper stamps for that sum were affixed to the deed. The government's petition alleges that the actual consideration was much greater than that expressed in the deed, and asks judgment for the stamp tax on the difference between the real and the expressed considerations. The court (Hook, J., dissenting) held that a tax is not a debt within the ordinary meaning of the term, nor in such sense that an action of indebitatus assumpsit may be maintained for its collection; there being no express authority in the statute for such a proceeding, the means of enforcing payment of the tax are limited to the penal proceedings contained therein.

The authorities on the proposition are in serious conflict. It is said in Cooley on Taxation, p. 18, that in general the conclusion has been reached that when the statute undertakes to provide remedies, and those given do not include an action at law, then a common-law action for the recovery of the tax as a debt will not lie. The assessment of the tax, although it may definitely establish a demand for the purposes of statutory collection, does not constitute a technical judgment; and taxes are not the result of contracts between parties, either express or implied. See Judson, Taxation, § 398.

This theory is supported by the decisions in City of Camden v. Allen, 26 N. J. Law, 398; Packard v. Tisdale, 50 Me. 376; Andover & M. Turnp. Corp. v. Gould, 6 Mass. 40, 4 Am. Dec. 80; Carondolet v. Picot, 38 Mo. 125; McCracken v. Elder, 34 Pa. 239.

This doctrine, however, has two apparently weak points. (1) An extremely narrow and technical definition of debt; (2) An unwarranted curtailment of the attributes of sovereignty.

In its broad sense the word "debt" includes any sort of obligation to pay money and it is not confined to obligations founded upon contract. In re Lambie's Estate, 94 Mich. 489, 54 NW 173; Chalmers v. Sheehy, 132 Cal. 459, 64 P 709, 84 Am. St. Rep. 62. It is almost a general rule in construing revenue statutes that, if a duty is charged on any article, the word "charged" means that the owner is personally indebted for that sum; and by the common-law an action of debt is the remedy for the recovery of all sums certain, or capable of being made certain, whether the liability arise from contract or be created by statute. United States v. Lyman, 1 Mason, 481, Fed. Cas. No. 15647; Stockwell v. U. S., 80 U. S. [13 Wall.] 531, 20 Law. Ed. 491. Further, it is conceded to be a general rule that if a statute create a right and provide a particular remedy for its enforcement, that remedy is usually exclusive of others. But this is not a rule for the conduct of the state. In England the king is not bound by an act of parliament unless particularly named therein, and this rule is equally applicable to the federal and state governments in the United States. Actions of debt for the recovery of taxes are frequent in England, although parliament has provided a different remedy; and the prerogatives belonging to the king as public trustee enter equally into our political system. The Dollar Sav. Bank v. U. S., 86 U. S. [19 Wall.] 227, 22 Law. Ed. 80; United States v. Erie R. Co., 107 U. S. 1, 27 Law. Ed. 385.

It would seem, then, that either by the adoption of a reasonable meaning of the term "debt," or by a more liberal recognition of sovereign attributes, such an action could be maintained. A recovery has been allowed frequently on one or both of these grounds. After a statute has imposed a tax, the definite extent of the taxpayer's liability is rendered ascertainable by the terms of the statute itself or by an assessment to be made by the designated officers. The amount thus imposed and susceptible of being reduced to a sum certain constitutes a debt owing to the goverment, for which the latter should be allowed to maintain an action. Meredith v. U. S., 38 U. S. [13 Pet.] 486, 10 Law. Ed. 258; United States v. Hazard, Fed. Cas. No. 15337; Dubuque v. Illinois Cent. R. Co., 39 Iowa, 56; Tax Court v. Western Md. R. Co., 50 Md. 274; Jonesborough v. McKee. 2 Yerg. [Tenn.] 167; Succession of Mercier, 42 La. Ann. 1135, 8 S 732, 11 L. R. A. 817; State v. Georgia Co., 112 N. C. 34, 17 SE 10, 19 L. R. A. 485; Savings Bank v. U. S. supra; United States v. Erie R. Co., supra.

The case of Meriwether v. Garrett, 102 U. S. 472, 26 Law. Ed. 197, relied on in the principal case as overruling the Savings Bank Case, and frequently cited to the same effect, scarcely justifies the citation. It was there decided only that unpaid taxes were not debts owed to a city in such a sense that they could be reached by the creditors of the city; and it is worthy of note that the court there remarked that the nature of taxes is not affected by the fact that in some jurisdictions an action of debt may be instituted for their recovery.

The right to enforce the payment of taxes through the courts is certainly one which

provide methods of collection,[56] and whether methods prescribed are exclusive or concurrent is to be determined from the language of the statute.[57] As a general rule the remedies provided are cumulative.[58] In Texas a personal claim and foreclosure of the lien on the land is maintainable.[59] In a proceeding to collect a tax, the court has no power to assess it.[60] The actual transfer of funds in specie is not always essential to constitute a collection.[61] The right to sue for taxes is not necessarily defeated by irregularities in their assessment.[61a]

should be upheld, if possible; and the better reason, as well as numerous precedents, seem to do so. The logical result is well stated by Mr. Justice Miller in United States v. Pacific R. Co., 4 Dill. 66, Fed. Cas. No. 15,983,—"It is immaterial what you call the obligation of a citizen to pay his taxes; it is very clearly an obligation which may be enforced by the courts."—From 6 Mich. L. R. 487.

**56.** Laws 1906, p. 152, c. 2, making sheriff collector of delinquent taxes and Ky. St. 1909, § 4267, making it duty of auditor of public accounts to collect back taxes, held to provide to distinct methods not conflicting, and "back taxes" means those on which ordinary process had been exhausted. Commonwealth v. Louisville Water Co. [Ky.] 116 SW 712. The auditor of public accounts could not proceed under latter method on Nov. 29th to collect taxes delinquent on the 1st of the month, where tax warrants and ordinary process by the sheriff had not yet been issued. Id. Proceeding under Gen. St. 1902, § 2395, amended by Pub. acts 1907, p. 619, authorizing commitment of persons failing to pay military tax, is special statutory proceeding and not action governed by ordinary rules of proceedure, and its purpose not to enable collector to obtain a judgment nor require him to establish the validity of the tax. Atwater v. O'Reilly [Conn.] 71 A 505. Under Pol. Code, §§ 3820, 3821, 3822, 3791 to 3796, if taxes on rights of a mining lessee are not paid and no personal property can be found, the assessor can sell the rights under lease and give immediate possession to the purchaser. Graciosa Oil Co. v. Santa Barbara County [Cal.] 99 P 483. Tax on personalty against nonresident is tax on property within state and cannot be canceled on proof that it is uncollectible for want of personal property, under Laws 1908, p. 1871, relative to cancellation of such tax against a person which is void for want of jurisdiction of the person. In re Adams, 60 Misc. 333, 113 NYS 293. Under P. L. N. J. 1884, p. 236, providing for prohibiting corporations delinquent in payment of taxes from exercising corporate powers, a proclaimed corporation is not so far destroyed as to prevent adjudication in bankruptcy against it. In re Munger Vehicle Tire Co. [C. C. A.] 159 F 901. Rev. Laws 1902, c. 13, authorizing tax collector to collect by "action" in his own name, authorizes suit in equity to enforce trust for unpaid taxes created by a common-law assignment for benefit of creditors. City of Boston v. Turner, 201 Mass. 190, 87 NE 634. In such case collector properly makes assignor party defendant as one primarily liable for tax. Id. Under Civ. Code 1901, p. 3859, providing for immediate collection of current personal taxes at rate of previous year if person assessed does not own land, where such collection is made, county has no further claim in case current rate proves to be higher. Gibson Abstract Co. v. Cochise County [Ariz.] 100 P 453.

**57.** Code 1906, § 4256, held to provide additional method to collect taxes by action and to apply to back taxes, and § 4740, providing method of collection of back taxes by sale under § 4367, does not preclude use of such additional method. Delta & Pine Land Co. v. Adams [Miss.] 48 S 190. That inconvenience would result if another method of collecting back taxes than Code 1906, § 4740, were employed is without weight in determining exclusive character of that statute as method. Id. Suit to enjoin corporation from disposing of balance of its property until taxes are paid and for personal decree for taxes is not attachment in chancery. Id.

**58.** Tax collector proving his claim in bankruptcy proceedings does not waive right created for his benefit under bankrupt's common-law assignment for benefit of creditors in trust to pay claims. City of Boston v. Turner, 201 Mass. 190, 87 NE 634. Gen. St. 1902, § 2395, amended by Pub. Acts 1907, p. 619, authorizing collection of military taxes by imprisonment, does not repeal §§ 2381, 2394, 2412, 2938, providing for collection by levy on taxable goods, and collector may proceed under latter sections, and for want of goods levy on his body and commit him to jail without hearing. Atwater v. O'Reilly [Conn.] 71 A 505. That Code 1906, § 4256, provides for recovery of taxes by "action" held not to confine remedy to courts of law, especially in view of §§ 4738, 4742, 4743, giving revenue agent authority to sue in equity or law. Delta & Pine Land Co. v. Adams [Miss.] 48 S 190. Code § 1390, requiring treasurer to collect taxes, relates solely to collection in ordinary way, and § 1906, authorizing collection by distress of personalty, does not apply to suit under Acts 32d. Gen. Assem. p. 70, authorizing an action at law for delinquent personal taxes. McCrary v. Lake City Elec. L. Co. [Iowa] 117 NW 964.

**59.** Central Hotel Co. v. State [Tex. Civ. App.] 117 SW 880.

**60.** In an action to recover personal taxes where the defendant had never listed corporate stock nor had it been assessed, it was properly excluded in determining the amount of the taxes. State v. Nelson [Minn.] 119 NW 1058.

**61.** Where bank was used by collector as medium of collection, tax receipts being delivered to bank and payments being made directly to it and by it credited to collector's account, the delivery to the bank of receipt for its taxes, followed by credit of amount of such taxes to account of collector, constituted a collection. Brown v. Sheldon State Bank [Iowa] 117 NW 289.

**61a.** Action for tax, as distinguished from levy by direct warrant, is defeasable only

(§ 11) *C. Procedure to enforce collection.*[62]—See 10 C. L. 1817—An entry canceling taxes, when void on its face, will not be permitted in any way to interfere with the collection of such taxes.[63] The collection of taxes is not a special or statutory proceeding in every sense, and when such proceedings are collaterally attacked for failure to follow the statute such failure will vitiate the proceeding only when substantial rights are denied.[64] Statutes relative to proceedings to collect have no application to proceedings to review the legality of the tax.[65]

*Limitations.*See 10 C. L. 1817—Proceedings to enforce collection must be commenced within the period prescribed.[66] The bar of limitations is available to a mortgagee.[67]

*Parties.*See 10 C. L. 1818—Where proceedings to enforce a lien for taxes are held to be in rem, they may be maintained against the present owner without joining former owners,[68] and even the name of the present owner is immaterial.[69] An action must be brought by one authorized to sue.[70] In some states statutes provide for making the assessor and collector parties.[71] The state is a necessary party only where it will be bound by the proceedings.[72]

*Notification.*See 10 C. L. 1817—Failure to make return of taxes as delinquent destroys the effect of the tax bill as prima facie evidence that the taxes are past due and payable in suit to collect taxes,[73] but does not necessarily defeat the suit.[74] No-

by defects which are jurisdictional or which deprive defendant of some substantial right or which consist in omission of some substantial prerequisite. Inhabitants of Greenville v. Blair [Me.] 72 A 177.

**62. Search Note:** See Taxation, Cent. Dig. §§ 1132-1227; Dec. Dig. §§ 572-603; 27 A. & E. Enc. L. (2ed.) 357; 782; 19 A. & E. Enc. P. & P. 397; 21 Id. 361.

**63.** Fictitous and forged entry by county clerk. Multnomah County v. Portland Cracker Co., 49 Or. 345, 90 P 155.

**64.** Miller v. Henderson, 50 Wash. 200, 96 P 1052. Under Laws 1901, p. 385, c. 178, § 3, providing for issue of certificate of delinquency by county treasurer and filing thereof with clerk of court where property remains on tax roll for five years, omission to file such certificate did not affect substantial right and did not vitiate foreclosure of tax lien. Id.

**65.** Tax Laws, § 259A, authorizing dismissal of an action to collect upon payment of such portion of the tax as is just, etc., does not afford an additional remedy to review the legality of an assessment and a motion to dismiss such an action cannot be based on such section. City of New York v. Assurance Co., 113 NYS 419.

**66.** Action by city to enforce lien for taxes is barred in five years. City of Middlesboro v. Coal & Iron Bank, 33 Ky. L. R. 469, 110 SW 355. Laws 1902, p. 40, c. 2, § 82, repealing statutes of limitations as to taxes, applies to delinquent taxes due at time of its enactment as to which limitation had not run. State v. Foster, 104 Minn. 403, 116 NW 826. A suit to collect taxes may be instituted at any time within five years after the date upon which the taxes should have been returned delinquent. State v. Wilson [Mo.] 115 SW 576.

**67.** Where city's right to recover taxes was barred by Ky. St., § 2515, a mortgagee could rely on the bar. Rissberger v. Louisville [Ky.] 118 SW 319. Mortgage is not "sale" within Ky. St. § 4021, providing that lien for taxes shall not be defeated by a sale within five years. Id.

**68.** City of Middleboro v. Coal & Iron Bank, 33 Ky. L. R. 469, 110 SW 355.

**69.** That published summons was not addressed to owner of property as he appeared on tax roll but described him as unknown did not deprive court of jurisdicton to render judgment. Tacoma Gas & Elec. Co. v. Pauley, 49 Wash. 562, 95 P 1103. Immaterial what name is used in summons against owner. Sufficient if summons describe property. Noble v. Aune, 50 Wash. 73, 96 P 688.

**70.** It is enough if written authority to collector to bring action is signed by selectmen, without addition of "selectmen" after their signatures. Inhabitants of Greenville v. Blair [Me.] 72 A 177. In action by town to recover taxes, it is not necessary for town to show that person acting as collector is collector de jure. It is enough if he is colector de facto. Id. Actions by towns to recover taxes cannot be defeated by mere irregularities in election of assessors or collector or in assessment, but only by such defects as go to jurisdiction or deprive defendant of some substantial right, or by omission of some essential prerequisite. Id.

**71.** Ann. Code 1892, § 4200, providing for making the assessor and collector parties to suits for delinquent taxes, held not to apply to suit for back taxes which taxpayer refused to pay and could not be collected because of appeals and contests. Delta & Pine Land Co. v. Adams [Miss.] 48 S 190.

**72.** State v. Enloe [Tenn.] 117 SW 223. Where state is bound by proceedings to collect taxes, it must appear by attorney general under Shannon's Code, § 5756, subsec. 5. Id.

**73.** State v. Wilson [Mo.] 115 SW 576.

**74.** Failure to return and certify special drainage taxes as delinquent does not af-

tice of delinquency must conform to statutory requirements.[75] Notice of proceedings to collect taxes is designed to acquire jurisdiction [76] and must be directed to the record owner [77] or to the true owner,[78] and must correctly describe the property.[79] Notice or summons by publication must conform to statutory requirements,[80] but presumptions are indulged in favor thereof.[81] It may be addressed directly to the defendant.[82]

*Pleading.* See 10 C. L. 1818—A complaint to enforce taxes must set out a cause of action,[83] conform to statutory requirements [84] and all material allegations,[85] must

fect the state's right to collect such taxes by suit. State v. Wilson [Mo.] 115 SW 576.

**75.** Burns' Ann. St. 1901, § 8571, providing that county treasurer shall make delinquent list certified by auditor and if he can find no personal property of delinquents not paying on demand he shall set opposite their names return setting forth such fact, does not require treasurer's returns to be verified by his oath and applies only to resident delinquents. Bivens v. Henderson [Ind. App.] 86 NE 426. Burns' Ann. St. 1901, § 8572, providing that county auditor is not authorized to credit treasurer with uncollected delinquent taxes unless he shows by proper **verified return** that he is unable to find personal property from which to satisfy them does not require verification to make the return valid but only requires it to be verified on settlement with auditor. Id. A delinquent tax return is absolutely void if it does not appear therefrom that it was verified before a person authorized to administer oaths as required by Code 1906, § 843, nor can such error be supplied or cured by the record. Wilkinson v. Linkous [W. Va.] 61 SE 125. While means of obtaining jurisdiction to enter judgment for delinquent taxes must conform to statute, not every failure to conform to recognized practice, grammatical requirement or correct phraseology, will invalidate **designation of newspaper** in which to publish the delinquent list. Resolution held to sufficiently designate "Minneapolis Tribune." Minnesota Debenture Co. v. Scott, 106 Minn. 32, 119 NW 391. Designation of newspaper in which is to be published the delinquent tax list is valid if made at an adjourned meeting. Id.

**76.** Preston v. Cox, 50 Wash. 451, 97 P 493. Under Pub. St. 1906, §§ 481, 482, requiring treasurer on receipt of tax bill to publish notice for taxpayers to pay their taxes, publication of notice is prerequisite to treasurer's authority to issue his warrant to collector. Smith v. Stannard First Nat. Bank, 81 Vt. 319, 70 A 568.

**77.** Preston v. Cox, 50 Wash. 451, 97 P 493. Notice to record owner is sufficient though he is dead. Id. Under Laws 1901, p. 383, c. 178, providing that holder of tax certificate may give to owner of property described notice that he will apply for judgment foreclosing lien and declaring that names of persons appearing on treasurer's rolls as owners shall be considered as owners, the person to whom property is assessed is only person other than true owners against whom valid foreclosure may be had. Carney v. Bigham [Wash.] 99 P 21. Insertion by treasurer of name different from that appearing on assessment roll though difference is in middle initial does not authorize holder of certificate to foreclose by making such person defendant unless he is true owner. Id.

**78.** Preston v. Cox, 50 Wash. 451, 97 P 493; Carney v. Bigham [Wash.] 99 P 21.

**79.** Under Sayles' Ann. Civ. St. 1897, art. 5232o, requiring notice in tax suits to be directed to all persons claiming an interest, a notice describing the land as "A. Wetherby survey" when it was "A. Netherly" survey is fatally defective. Harris v. Hill [Tex. Civ. App.] 117 SW 907.

**80.** Under Sess. Laws 1901, p. 384, c. 178, § 1, requiring publication of summons, in tax cases to direct appearance within 60 days after date of first publication exclusive of first day, a publication requiring appearance within 60 days after service exclusive of day of service, held void. Silverstone v. Totten, 50 Wash. 447, 97 P 491. Omission to affix **seal to jurat** held not a fatal defect where it could be amended. Young v. Jackson [Tex. Civ. App.] 110 SW 74. Notice to **unknown owners** in tax foreclosure proceedings by publication for three months as required by Sayles' Ann. Civ. St. 1897, art. 5232o, is sufficient though they be heirs of original patentee, art. 1236, notwithstanding. Id. Notice to unknown owners in tax foreclosure proceeding specifying aggregate sum due held sufficient on collateral attack. Sayles' Ann. Civ. St. 1897, art. 5232o. Id. Affidavit that owner is unknown in order to obtain service by publication under Sayles' Ann. Civ. St. 1897, art. 5232o, held sufficient. Id. Under Sayles' Ann. Civ. St. 1897, to art. 5232o, requiring notice be directed to all parties, "owning or having or claiming an interest, notice to unknown owners and all persons," etc., held sufficient though containing surplusage. Id. Affidavit of publication of notice to unknown owners held sufficient. Rev. St. 1895, art. 1457. Id. Under Sayles' Ann. Civ. St. 1897, art. 5232o, in suit to foreclose tax lien against unknown or **non-resident owner** publication of notice for three weeks meets requirement of due process of law. Id.

**81.** In a direct attack upon tax foreclosure proceeding, the presumption that new publication of summons was made where the first was insufficient is rebuttable though the decree recites regular service. Silverstone v. Totten, 50 Wash. 447, 97 P 491.

**82.** Citation by publication may be directed to defendants and need not be addressed to any officer nor require any officer to make return thereof. Gibbs v. Scales [Tex. Civ. App.] 118 SW 188.

**83.** Must show statutory liability and right to recover. City of Miami & Miami Realty Loan & Guar. Co. [Fla.] 49 S 55. It is complaint and not notice of lien which must state cause of action. Id.

**84.** Under Ann. St. 1906, pp. 4274-4277,

be definite and certain.[86] Amendments are governed by the general rules.[87] The plea of res judicata is limited to taxes actually in controversy and does not apply to taxes for other years.[88] Where there is but one application for judgment for delinquent taxes and all objections are made by the same property owner, they may all be urged in the same proceeding though several taxes are involved.[89]

*Evidence.*[See 10 C. L. 1810]—In an action for taxes, the taxing power has the burden of proving a valid tax,[90] and the taxpayer has the burden of proving the assessment to be void.[91] The entry upon the tax book of an assessment shown to be valid and the failure of the property owner to pay it when due is sufficient to make out a good cause of action.[92] The question as to the domicile of the taxpayer may be one of fact.[93] Evidence of payment of city taxes on the property in controversy is not admissible to show payment of the state and county taxes sued for.[94]

*Judgment.*[See 10 C. L. 1819]—A judgment based on defective service of process[95] or insufficient description of the property[96] is void, but is not void because it im-

providing that petition for taxes shall set forth years for which they are due, all of which shall be set forth in tax bill duly authenticated, a petition which does not comply with requirement does not state cause of action. Cooper v. Gunter [Mo.] 114 SW 943. Petition under Acts 32d Gen. Assem. p. 70, c. 62, alleging amount due, as shown by tax record a copy of which was attached, showing name of defendant and value of personalty, held to show that taxes were due on personalty. McCrary v. Lake City Elec. L. Co. [Iowa] 117 NW 964.

85. A petition in a proceeding to collect taxes on omitted property, which fails to allege that the property was of any **value**, is defective. General allegation of "Money loaned and credits" is insufficient. Clark v. Schindler [Ind. App.] 87 NE 44. Petition which fails to allege **that property was subject to taxation** is defective. Id.

86. Complaint by city to recover taxes setting forth that taxes were unpaid, etc., held sufficiently definite in alleging levy and assessment. City of Mobile v. Factors' & Traders' Ins. Co. [Ala.] 48 S 342. In action on tax bill, it is not essential that bill filed with petition be the one made out by collector or that his name appear on it. Board of Councilmen of Frankfort v. Morgan, 33 Ky. L. R. 297, 110 SW 286. Complaint under Gen. St. 1902, § 2395, amended by Pub. Acts 1907, p. 619, c. 50, authorizing collection of military taxes by imprisonment, which describes complainant as tax collector and alleges that defendant has failed to pay the tax which has been demanded, held sufficient to give court jurisdiction to commit defendant. Atwater v. O'Reilly [Conn.] 71 A 505.

87. In suit to enforce lien for taxes, claim of lien for additional taxes for a subsequent year was properly set up by amended petition under Civ. Code Prac. § 694, subsec. 3. Board of Councilmen of Frankfort v. Herndon's Adm'r [Ky.] 118 SW 347.

88. State v. Enloe [Tenn.] 117 SW 223.

89. Statutes providing that objections may be heard in a summary manner without pleadings. People v. Kankakee & S. W. R. Co., 237 Ill. 362, 86 NE 742. In a suit for delinquent taxes, technical opposition by the taxing power to objections by the taxpayer as to validity of taxes should not be considered. Id.

90. In action to enforce personal liability for taxes, penalties and costs, plaintiff has burden to show that defendant owned land when assessment was made. Central Hotel Co. v. State [Tex. Civ. App.] 117 SW 880. Collector who institutes proceedings under Gen. St. 1902, § 2395, amended by Pub. Acts 1907, p. 619, to collect military tax by imprisonment, who shows that he is collector, that rate bills and warrant were delivered to him, that payment was demanded and refused, is entitled to order of commitment where defendant shows no reason for nonpayment. Atwater v. O'Reilly [Conn.] 71 A 505. Where it was not denied that a certain person owned land, which was duly and legally assessed, and the taxes were unpaid and delinquent and that plaintiff purchased the property by deed containing an insufficient description, held the court was warranted in rendering judgment foreclosing plaintiff's tax lien. Burkam v. Kunz, 41 Ind. App. 655, 84 NE 766.

91. Under Ky. St. 1903, §§ 3396, 3397, in an action for taxes, the taxpayer has the burden to plead and prove defects rendering an assessment void. Board of Councilmen of Frankfort v. Morgan, 33 Ky. L. R. 297, 110 SW 286. Has burden of proving that tax exceeds constitutional limit. Id.

92. All other requirements and proceedings being mere formalities and intended to assist and facilitate the collection of the taxes. State v. Wilson [Mo.] 115 SW 549.

93. In assumpsit for taxes, whether defendant's domicile was in the town where he was taxed at a certain time held for the jury. Smith v. Stannard First Nat. Bank, 81 Vt. 319, 70 A 568.

94. State v. Quillen [Tex. Civ. App.] 115 SW 660.

95. Where judgment does not show that proper service has been made and record shows defective service, judgment is subject to collateral attack. Harris v. Hill [Tex. Civ. App.] 117 SW 907. Decree foreclosing tax lien held void for want of jurisdiction where no certificate of delinquency was filed as required by statute and only notice to owner was publication of summons by county attorney in which owner's name was not mentioned. Ontario Land Co. v. Wilfong, 162 F 999.

96. Decree foreclosing certificate of delinquency held void where the description did

properly decrees that the order of sale shall have the force of a writ of possession,[97] and all presumptions are indulged in its favor where it is regular on its face.[98] The scope of the judgment rests in its terms.[99] Where illegal taxes are included in a decree, it should be corrected on motion to confirm.[1] A judgment should not be vacated without notice to the purchaser thereunder [2] and is not subject to collateral attack by proof that taxes had been paid before suit began.[3]

*Execution* See 10 C. L. 1819 may not usually issue in rem against the property if the owner is known and lives within the jurisdiction of the court.[4]

*Costs.* See 10 C. L. 1820

*Appeal.* See 10 C. L. 1820

(§ 11) *D. Interest and penalties.*[5]—See 10 C. L. 1820—Interest may usually be recovered on delinquent taxes [6] but not on penalties,[7] but in the absence of statute

not apply to any property. Ontario Land Co. v. Wilfong, 162 F 999. Where tax foreclosure judgment recited that the court found that there was an outstanding certificate of delinquency on lot 23 and it was ordered that judgment be given against the property heretofore mentioned giving number of the lot in a tabulated statement following surplusage not misleading to fact that the lot was referred to as 22 was not an irregularity sufficient to defeat the judgment. Stevens v. Doohen, 50 Wash. 145, 96 P 1032.

**97.** Judgment for delinquent taxes. Gibbs v. Scales [Tex. Civ. App.] 118 SW 188.

**98.** Judgment rendered on service by publication reciting due service and regular in all respects held not subject to collateral attack by one for failure to show that he was in possession when suit was filed. Gibbs v. Scales [Tex. Civ. App.] 118 SW 188. That county treasurer failed to answer owner's inquiry as to whether there were delinquent taxes for prior years was no justification for his belief that there were no such taxes, nor was it ground for setting aside proceedings foreclosing certificates of delinquency. Tacoma Gas & Elec. L. Co. v. Pauley, 49 Wash. 562, 95 P 1103. Evidence insufficient to show that county treasurer knew or could have known from record who owned land when he issued certificate of delinquency stating that owner was unknown where certificate was regular on its face and properly filed and foreclosure and sale thereunder were regular. Id.

**99.** Decree in tax lien foreclosure suit that mortgagee "be foreclosed of all equity of redemption or other interest in said premises," held not bar in favor of owner in a suit by mortgagee's assignee to foreclose. Gibson v. Sexson [Neb.] 118 NW 77.

**1.** Where illegal taxes are included in a decree under Comp. St. 1907, art. 9, c. 77, and attention of the court is called thereto by proper objection on motion to confirm the judgment, the motion should be denied and the decree corrected. State v. Several Parcels of Land [Neb.] 116 NW 682. A proceeding which deprives one of his property by means of a void tax is gross injustice under Comp. St. 1907, § 39, art. 9. Id.

**2.** If purchaser of land sold under tax judgment was not a party to proceeding in which judgment was rendered, it should not be vacated without notice to him. Pierce County v. Bunch, 49 Wash. 599, 96 P 164.

**3.** Judgment in tax suit cannot be set aside on collateral attack on proof that taxes for year specified therein had been paid before suit began. Cooper v. Gunter [Mo.] 114 SW 943.

**4.** Where owner of land in a city is known and ownership of land is not doubtful, city officials have no power to issue execution in rem against the property. Justice v. Parkin, 130 Ga. 869, 61 SE 1044. A fi fa, issued in such case and sale thereunder it, in the city of Fitzgerald is void. Id.

**5. Search Note:** See notes in 6 L. R. A. (N. S.) 694; 5 Ann. Cas. 649.

See, also, Taxation, Cent. Dig. §§ 1650-1672; Dec. Dig. §§ 835-855; 21 A. & E. Enc. P. & P. 422.

**6.** Decree rendered in suit to enjoin collection of taxes on ground that valuation was excessive, which reduces valuation, did not render void the taxes upon reduced valuation and such taxes drew interest. State v. Several Parcels of Land [Neb.] 118 NW 465. Presentation of certified copy of decree reducing valuation with demand that treasurer reduce valuation in order that taxpayer might know amount of his tax, held not such a tender as would stop running of interest. Id.

**NOTE. Implied right to interest on taxes:** In general taxes do not hear interest either as interest or damages, unless expressly so provided by statute (Texarkana Water Co. v. State, 62 Ark. 188, 35 SW 788; Greer v. Richards, 3 Ariz. 227 32 P 266; People v. Central Pac. R. Co., 105 Cal. 576, 38 P 905; Sargent v. Tuttle, 67 Conn. 162, 34 A 1028, 32 L. R. A. 822; Georgia Railroad & Banking Co. v. Wright, 124 Ga. 596, 53 SE 251; Greenwood v. La Salle, 137 Ill. 225, 26 NE 1089; Louisville & N. R. Co. v. Christian County, 87 Ky. 605, 9 SW 497; Louisville & N. R. Co. v. Com., 89 Ky. 531, 12 SW 1064; Kentucky Cent. R. Co. v. Pendleton County, 8 Ky. L. R. 517, 2 SW 176; Danforth v. Williams, 9 Mass. 324; State v. Baldwin, 62 Minn. 518, 65 NW 80; Illinois Cent. R. Co. v. Adams, 78 Miss. 895, 29 S 996; United States Trust Co. v. Ter., 10 N. M. 416, 62 P 987; People v. Gold & Stock Tel. Co., 98 N. Y. 67; Wheeling & L. E. R. Co. v. Wolfe, 13 Ohio C. C. 374; Western Union Tel. Co. v. State, 55 Tex. 314; Edmonson v. Galveston, 53 Tex. 157; Cave v. Houston, 65 Tex. 619; McCombs v. Rockport, 14 Tex. Civ. App. 560, 37 SW 988; Shaw v. Peckett, 26 Vt. 482; City of Rochester v. Bloss, 185 N. Y. 42, 77 NE 794, 6 L. R. A. [N. S.] 694; Perry Co. v. Selma, M. & M. R. Co., 65 Ala. 391); but see contra

delinquent personal taxes do not bear interest.[8] In some states penalties are prescribed by statute.[9]

§ 12. *Sale for taxes. A. Prerequisites of sale.*[10]—See 10 C. L. 1820—The essential prerequisites of a valid tax sale are a valid,[11] unpaid, and delinquent tax.[12] The sale must be made under an existing law [13] and in strict conformity to statutory requirements,[14] such as those relating to the delinquent list,[15] jurisdiction of

Wilmington v. McDonald, 133 N. C. 548, 45 SE 864. A judgment for taxes will bear interest like any other judgment from the date thereof (United States Trust Co. v. Ter., 10 N. M. 416, 62 P 987; Wheeling & L. E. R. Co. v. Wolfe, 13 Ohio C. C. 374; St. Joseph v. Forsee, 110 Mo. App. 237, 84 SW 1138), although there are some authorities to the effect that the interest upon tax judgments begins to run from the commencement of suit (City of Rochester v. Bloss, 185 N. Y. 42, 77 NE 794, 6 L. R. A. [N. S.] 695; Henderson Bridge Co. v. Com., 27 Ky. L. R. 1104, 1177, 87 SW 1088; Louisville & N. R. Co. v. Com., 29 Ky. L. R. 666, 668, 94 SW 655; State v. Southwestern R. Co., 70 Ga. 35).—Adapted from 6 L. R. A. (N. S.) 695.

**7.** Acts 1906, p. 115, c. 22, art. 3, requiring payment of taxes on land for 1901 to 1905 inclusive, is inoperative in so far as interest and penalties are concerned. Kentucky Union Co. v. Com., 33 Ky. L. R. 587, 110 SW 398. Governor and attorney general may at any time before decree remit damages for failure of collector to turn over money collected. Adams v. Saunders [Miss.] 46 S 960.

**8.** Either from date of delinquency or date of order for judgment made to enforce payment thereof. State v. New England Furniture & Carpet Co. [Minn.] 119 NW 427.

**9.** Under St. 1909, § 4091, making one failing to pay taxes guilty of a misdemeanor and subject to fine, and § 4263, making it the duty of the revenue agent to commence suits for money due the state, held he could not sue to recover the penalty, as one charged with a misdemeanor does not owe the state any thing until convicted. Louisville Water Co. v. Com. [Ky.] 116 SW 711.

**10. Search Note:** See notes in 20 L. R. A. 487.

See, also, Taxation, Cent. Dig. §§ 1263-1391; Dec. Dig. §§ 614-694; 27 A. & E. Enc. L. (2ed.) 815.

**11.** Under Laws 1896, p. 826, c. 908, § 89, there is no jurisdiction to sell, where taxes on resident lands are returned unpaid, unless assessment first be laid against land as such. People v. Lewis, 127 App. Div. 107, 111 NYS 398. Taxes against a man are not a lien on his wife's property, and a sale thereof, therefor, is void. Brocking v. O'Bryan [Ky.] 112 SW 631.

**12.** Sale held void where taxes had been paid, and state acquired no rights and transferred none to its purchaser. Trellieu Cypress Lumber Co. v. Albert Hansen Lumber Co., 121 La. 700, 46 S 699. Sale held void where taxes had been paid. Page v. Kidd, 121 La. 1, 46 S 35; Id., 121 La. 553, 46 S 624. Payment on assessment upon tract as whole nullifies sale of parcel which has been conveyed therefrom and assessed separately. State v. Allen [W. Va.] 64 SE 140.

**13.** Rights of parties in tax proceedings are fixed and governed by law in force at time of tax sale. Lawton v. Barker, 105 Minn. 102, 117 NW 249; Bente v. Sullivan [Tex. Civ. App.] 115 SW 350.

**14.** Filing of application to court is essential. Ontario Land Co. v. Wilfong, 162 F 999. Power of tax collector to sell land for delinquent taxes is naked power specially conferred by statute, which must be substantially complied with in order to create valid title. McMahon v. Crean [Md.] 71 A 995. County treasurer cannot make valid sale unless in such sale are included all taxes, with interest and costs, then delinquent, and sale for less is only sale of taxes and not of land, and its only effect is to transfer lien of county. Barker v. Hume [Neb.] 120 NW 1131. Sale is void where county clerk's certificate is made and recorded on date of sale. American Ins. Co. v. Dannehower [Ark.] 115 SW 950. Sale is void where clerk failed to record list of delinquent lands and notice of sale and certify in what newspaper list was published, as required by Kirby's Dig. § 7086. Frank Kendall Lumber Co. v. Smith [Ark.] 112 SW 888.

**Description of property:** Sale held void where tax bills and judgment contained insufficient description of property. Turner v. Middlesboro [Ky.] 117 SW 422. Code 1906, § 4284, stating essentials of description, and § 4332, providing defects for which sale may be invalidated, declare the only matters which will invalidate a sale. Moores v. Thomas [Miss.] 48 S 1025. Where it is manifest from assessment roll that land and timber are assessed to unknown owner, though there is no separate assessment of land and timber, the purchaser of such land takes title to both. Eureka Lumber Co. v. Terrell [Miss.] 48 S 628. Sale of urban lots so misdescribed as not to identify them with lots in same square, owned by tax debtor, vests no title in purchaser. Lewis & Co. v. Brock [La.] 48 S 563.

**15.** Under Ball. Ann. Codes & St. (Wash.) 1751b, filing certificate of delinquency with clerk of court as to land delinquent for five years is prerequisite to foreclosure of tax lien by county. Ontario Land Co. v. Wilfong, 162 F 999. Under statutes of Washington, until property is listed as delinquent by description sufficiently accurate to identify it, it is not subject to foreclosure and sale for nonpayment of taxes. Id. Publication of delinquent list setting forth amount due, penalties, and costs, as required by Pol. Code, § 3764, is prerequisite to valid sale to state at time fixed in such notice. Warden v. Broome [Cal. App.] 98 P 252. Under such statute where delinquent list stated that amount due was $19.90, when correct amount was $19.40, sale to state was void. Id. Under Laws 1897, p. 134, certificate of delinquency issued by county to itself on Jan. 31, 1908, for taxes for last half of year 1895, is valid as against objection

the tax debtor or the property,[16] demand for payment,[17] and notice of sale.[18] A curative act is ineffective to validate a sale of land not subject to taxation,[19] or to validate a sale for void taxes.[20] Decrees and sales in tax foreclosure proceedings can be set aside only on the ground that taxes have been paid or that the property was exempt.[21]

(§ 12) *B. Conduct of sale.*[22]—See 10 C. L. 1821—A tax sale is administrative under the implied power of the state to enforce collection of taxes, and is not judicial in character.[23] It must be made by a duly authorized officer [24] at the time required [25] at the place designated,[26] and for the proper amount,[27] and all other stat-

that it could not be issued until after that time. Cavanaugh v. Roberts, 50 Wash. 265, 97 P 55. Fact of publication and posting of delinquent list is the jurisdictional requisite, and not proof thereof, which may be made by statutory affidavits at any time. Sternberger v. Moffat [Colo.] 99 P 560.

**16.** Court cannot enter valid decree foreclosing tax lien until it has acquired jurisdiction of person of owner by process or notice in some mode prescribed by law, or over property in rem. Ontario Land Co. v. Wilfong, 162 F 999. Defendants in suit to subject land to taxes, having procured reversal of judgment for plaintiff after sale, were properly allowed to file supplemental answer alleging that certain **infants** owning an interest were not made parties. District of Clifton v. Pfirman, 33 Ky. L. R. 529, 110 SW 406.

**17.** Under Baltimore City Code 1879, § 44, providing that no sale shall be made by tax collector unless he has first given to person in possession statement of indebtedness and 30 days' notice of intention to enforce payment, where collector's report stated that bills had been delivered and, if not paid within 30 days, property "would be subject" to distraint, etc., notice would be presumed sufficient. McMahon v. Crean [Md.] 71 A 995.

**18.** In action to set aside tax deed where plaintiffs claimed under deed to them "as joint tenants and not as tenants in common," omission in bill of "not as tenants in common" was immaterial, since in any event they were entitled to notice of sale and of time of expiration of period of redemption. Brimson v. Arnold, 236 Ill. 495, 86 NE 254. Where treasurer's affidavit of posting notice of sale was filed and contained statutory requirements, under 2 Mills' Ann. St. §§ 3883, 3884, its conclusiveness could not be impeached by treasurer's testimony that he had no recollection of facts stated therein. Sternberger v. Moffat [Colo.] 99 P 560. Publisher's affidavit of publication of delinquent list and treasurer's affidavit of posting notice of sale when filed are conclusive proof of such facts, and evidence thereof is incompetent unless affidavit filed has been lost or mislaid. Id. **Fact of notice as distinguished from proof** thereof is the jurisdictional requisite proof by statutory affidavits being permissible at any time. Id. In proceedings to sell land of unknown owner, **citation by publication** addressed "To the sheriff or any constable of El Paso County:—Greeting," and commanding sheriff to summon the owner by publication, held fatally defective. Bowden v. Patterson [Tex. Civ. App.] 111 SW 182. **Description of property,** in notice of sale as lots "1 to 24," does not exclude lot 24 as "to" is not necessarily a word of exclusion, but its meaning is to be ascertained from the sense in which it is used. Stough v. Reeves, 42 Colo. 432, 95 P 958. Prima facie insufficiency of description in notice of sale held not overcome by testimony of abstractor that he thought he could identify the land, there being no evidence that it was generally known by said description. Id. Under Laws 1897, p. 367, c. 378, providing for sale when taxes are unpaid for three years, or water rents for four years, and that notice of sale shall state that **"ownership of property"** is published, etc., "ownership of property" means person to whom assessed. People v. Moynahan, 130 App. Div. 46, 114 NYS 417. "Minnie E. Tilter" is idem sonans with "Minnie E. Tiller," in **summons** in tax sale proceeding. Kelley v. Kuhnhausen [Wash.] 98 P 603. Where record of tax foreclosure proceeding shows upon its face that only **service** attempted was upon stranger as receiver of corporation defendant, but who had never been appointed receiver, the judgment was void. Gibson v. Sexson [Neb.] 118 NW 77. Where owner of land was actual resident thereon, service by publication in tax foreclosure proceedings was unauthorized, and tax judgment and deed were void. Rust v. Kennedy [Wash.] 100 P 998.

**19.** Laws 1888, p. 40, c. 23, quieting title to lands in Yazoo Delta, does not validate sale of swamp land before the state parted with title, since such land was not subject to taxation. Creegan v. Hyman [Miss.] 46 S 952.

**20.** B. & C. Comp. § 3135, declaring tax sales valid notwithstanding certain irregularities, held not to apply to an assessment which incorrectly describes the land to one not the owner, and who does not appear to have been the owner of a parcel to which the description applied. Martin v. White [Or.] 100 P 290.

**21.** Harrington v. Dickinson [Mich.] 15 Det. Leg. N. 996, 118 NW 931.

**22. Search Note:** See Taxation, Cent. Dig. §§ 1344-1367; Dec. Dig. §§ 653-683; 27 A. & E. Enc. L. (2ed.) 830.

**23.** Lucas v. Purdy [Iowa] 120 NW 1063. Sale to state by tax collector is ministerial act and may be performed on legal holiday. Young v. Patterson [Cal. App.] 99 P 552. Act of auditor general in issuing tax deed is ministerial. Fitschen v. Olson [Mich.] 15 Det. Leg. N. 1010, 119 NW 3.

**24.** McMahon v. Crean [Md.] 71 A 995.

**25.** Sale on June 11, 1883, for taxes of 1882, instead of on June 9, 1883, as required by statute, is void. McDaniel v. Berger [Ark.] 116 SW 194. Under Pol. Code,

utory requirements must be complied with.[28] Due regard must be had for divisions and subdivisions when a separate sale is required.[29] The validity of a tax sale is to be determined by the laws in force at the time it was made.[30]

A certificate of purchase does not pass title, but only entitles the purchaser to a deed at the expiration of the period of redemption.[31] Outstanding tax certificates import an absolute and paramount right to the land, subject to the right of redemption, and constitute a cloud upon the title.[32] The validity of a tax certificate and the rights of the holder thereof are to be determined by the laws in force at the time it is acquired.[33] This rule, however, does not prevent the legislature from making changes in the manner of enforcing the lien.[34] Transfers of such certificates are regulated by statute.[35]

The proceeds of the sale are to be applied to taxes due[38] and expenses,[37] and the surplus returned to the owner,[38] or to such persons as have succeeded to the owner's rights.[39]

§ 3897, prescribing method of sale, the owner may not require it to be made on a particular day. Young v. Patterson [Cal. App.] 99 P 552. Sale void when made on wrong day. McLemore v. Anderson [Miss.] 47 S 801, afg. [Miss.] 43 S 878.

**26.** Under Acts 1878, p. 362, c. 227, and Code 1878, art. 11, § 49, relative to tax sales in Baltimore City, sales may be held at such place in the city as the collector, in his discretion, selects. McMahon v. Crean [Md.] 71 A 995.

**27.** Where unwarranted item is included in sale of land for taxes, penalty, and costs, the sale is void. Sibly v. Thomas [Ark.] 112 SW 210. Where lands were sold in 1906 for taxes for 1896 to 1905 inclusive for amount less than authorized by law, and after right to redeem was eliminated a governor's deed was executed, the sale and subsequent proceedings were governed by Rev. Laws 1905, §§ 936-940, and not by c. 2, Laws 1902. Hage v. St. Paul Land & Mort. Co. [Minn.] 120 NW 298. Such deed held valid. Id. Where state undertakes to tack taxes anterior to plaintiff's tax title to subsequent forfeiture sale, the objection of excessive amount should be interposed by answer, and, where no such objection is interposed, mere excess in amount of the judgment does not avoid it. Minnesota Debenture Co. v. Scott, 106 Minn. 32, 119 NW 391.

**28.** McMahon v. Crean [Md.] 71 A 995. Sale void for failure to comply with requirement, as to **mailing copy of application for deed to owner.** Starks v. Sawyer [Fla.] 47 S 513. Where bids at tax sale were made on Nov. 15th, just before close of offices, and full consideration was paid the day following, the rule that **payment** be made "immediately" and "forthwith" was complied with. Minnesota Debenture Co. v. Scott, 106 Minn. 32, 119 NW 391. Under Rev. Laws, c. 13, § 44, providing that, if because of irregularity in sale purchaser acquires no interest, he may within 2 years surrender his deed to city and recover money paid, and § 47, providing that sale shall be void if purchaser fails to pay collector within 20 days, and city is deemed purchaser, where bidder did not pay within 20 days, collector had no authority to extend time and substitute another as purchaser, and, where he did so, the sale was void against owner and **substituted purchaser** was entitled to recover from city. Spring v. Cambridge, 199 Mass. 1, 85 NE 160. Such substituted purchaser was "purchaser" within § 44, but not within § 43, providing that collector shall execute deed to purchaser. Id.

**29.** Deed reciting that several tracts of wild land were sold together renders sale void. Chatfield v. Iowa & Ark. Land Co. [Ark.] 114 SW 473.

**30.** Cannot be affected by subsequent legislation which impairs vested rights of the owner. Starks v. Sawyer [Fla.] 47 S 513.

**31.** Kohle v. Hobson [Mo.] 114 SW 952.

**32.** Curtis's Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853. Holder of tax certificates subject to tax deeds has equitable title if he holds adversely to owner. Id.

**33.** A statute which impairs any of such rights is void. State v. Krahmer, 105 Minn. 422, 117 NW 780.

**34.** State v. Krahmer, 105 Minn. 422, 117 NW 780. Gen. Laws 1905, p. 40[illegible], c. 271, held not to impair any obligations of the contract. Id.

**35.** Under Hurd's Rev. St. 1905, c. 120, the writing of holder's name on back of tax certificate, with delivery thereof to transferee, is effective transfer of holder's rights. Larsun v. Glos, 235 Ill. 584, 85 NE 926. "Indorsement" in such statute means writing name of holder on back of certificate. Id. The endorsement of a tax certificate in blank is not sufficient to transfer the ownership thereof under statute providing that tax certificate is assignable by endorsement and that such assignment transfers all interest of purchaser at sale. Glos v. Larson, 138 Ill. App. 412.

**36.** Bailey v. Napier [Ky.] 117 SW 948.

**37.** Where sheriff seized live stock, he was entitled to reimburse himself out of the proceeds of the sale for cost of keeping stock between seizure and sale. Bailey v. Napier [Ky.] 117 SW 948.

**38.** Where sheriff levies on property which sells for more than taxes due, he is required to pay taxes from proceeds and return the surplus to the owner. Bailey v. Napier [Ky.] 117 SW 948.

**39.** After sale and before redemption a mortgagee's interest is practically transferred to the fund, and he is entitled to any excess over the tax lien paid by the purchaser. Farmer v. Ward [N. J. Eq.] 71 A 401.

(§ 12) *C. Return of sale and confirmation thereof.*[40]—See 10 C. L. 1823—A sale in suit for foreclosure of tax lien is a judicial sale,[41] and is not complete until confirmed.[42] Confirmation of such a sale may cure irregularities in prior proceedings,[43] but confirmation is not conclusive of the validity of a sale by a collector.[44]

§ 13. *Redemption.*[45]—See 10 C. L. 1823—Where an owner has the right to redeem, his title is not extinguished until the period for redemption has expired,[46] and so long as a party has the right of redemption it cannot be said that his property was taken without due process of law.[47] Statutes providing for redemption are to be liberally construed,[48] and it is held that a constitutional right to redeem from tax sales may apply to judicial as well as administrative sales.[49] Only such persons may redeem from tax sale as come within the terms of the statute, such as the owner [50] and persons having an estate or interest in the land.[51] Redemption must be made within the period prescribed [52] and as provided for by statute.[53] On re-

**40. Search Note:** See Taxation, Cent. Dig. §§ 1369-1376; Dec. Dig. §§ 684, 685; 27 A. & E. Enc. L. (2ed.) 841; 21 A. & E. Enc. P. & P. 480.

**41.** Barker v. Hume [Neb.] 120 NW 1131. Under Acts Ark. p. 63. Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531.

**42.** Barker v. Hume [Neb.] 120 NW 1131. Purchaser at sale for overdue taxes acquires no title until such sale is confirmed. Acts Ark. 1881, p. 63. Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531.

**43.** Misdescriptions fatal to ordinary tax suit are cured by confirmation of sale under judgment foreclosing tax lien authorized by Acts Ark. 1881, p. 63. Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531.

**44.** Under Acts 1874, p. 744, relative to tax sales and requiring the collector to report sales and proceedings to the courts, which after examination and notice confirm the same, a decree of confirmation is not conclusive evidence of validity of sale, but is effectual only to cast burden of proof on party resisting same. McMahon v. Crean [Md.] 71 A 995.

**45. Search Note:** See notes in 10 L. R. A. (N. S.) 818.

See, also, Taxation, Cent. Dig. §§ 1391-1454; Dec. Dig. §§ 695-725; 27 A. & E. Enc. L. (2ed.) 849.

**46.** Bente v. Sullivan [Tex. Civ. App.] 115 SW 350.

**47.** Hence under construction given by state court, Mich. Pub. Laws 1897, Act No. 229, is not invalid. Rusch v. John Duncan Land & Min. Co., 211 U. S. 526, 53 Law. Ed. —.

**48.** Jackson v. Maddox [Tex. Civ. App.] 117 SW 185. One seeking to extinguish right must comply with all provisions enacted for its protection. Ashenfelter v. Seiling [Iowa] 119 NW 984. Right to redeem authorized by statute and city charter applies to **sale under judgment made after enactment of statute** or charter though taxes accrued prior to time that there existed any general law for redemption. Bente v. Sullivan [Tex. Civ. App.] 115 SW 350. An **order of confirmation,** a judicial sale which does not expressly deny right to redeem, will not be construed as denying such right. Smith v. Carnahan [Neb.] 120 NW 212.

**49.** Redemption may be made by paying to purchaser amount of his bid and 12 per cent interest together with subsequent taxes and interest. Butler v. Libe [Neb.] 116 NW 663. Const. art. 9, § 3, gives right to redeem within two years, and this right applies to judicial as well as to administrative sales. Smith v. Carnahan [Neb.] 120 NW 212.

**50.** In suit to redeem from tax sale, evidence held insufficient to show as required by Code, § 1445, that at the time of sale title was in plaintiff or person claiming under him. Hawkeye Savings & Loan Ass'n v. Moore [Iowa] 117 NW 51. Where two tracts belonging to different owners were assessed together, one owner would not have to pay all or redeem all, but under Ann. Code 1892, §§ 3824, 3853, he could make **redemption** of division. Moores v. Thomas [Miss.] 48 S 1025. Plaintiff in suit to redeem **from sale on assessment to ancestor** need not prove title, she being common source of title of parties. Westerfield v. Merchant [Miss.] 47 S 434. Where statute limits the right of redemption to **"owner,"** the word "owner" is not limited to person who owned land at time it was assessed but includes purchaser at tax sale. Rogers v. Lynn, 200 Mass. 162, 86 NE 889. An **owner who conveys by warranty deed after sale** for taxes has such an interest as entitled him to redeem. Douglass v. Hayes County [Neb.] 118 NW 114.

**51.** Under Sp. Acts 29th Leg. 1905, p. 147, c. 17, providing that in suits by city proper persons shall be joined, a **mortgagor** not made party to tax suit has the same right to redeem as he had before sale. Blair v. Guaranty Savings, Loan & Inv. Co. [Tex. Civ. App.] 118 SW 608. If **mortgagee** does not pay taxes before sale, he may under 3 Gen. St. 1895, p. 3370, redeem after sale. Farmer v Ward [N. J. Eq.] 71 A 401. Infants having **homestead interest** in their deceased father's land may redeem. Burel v. Baker [Ark.] 116 SW 181. **When owner is deceased** his widow and daughter holding possession by tenant have such interest as entitles them to redeem under Sayles' Ann. Civ. St. 1897, art. 5232n. Jackson v. Maddox [Tex. Civ. App.] 117 SW 185.

**52.** Under Laws 1901, p. 153, §§ 1, 2, relative to redemption of land sold for levee taxes, held the year allowed for redemption runs from date of sale and not from date of confirmation thereof especially in view of

demption, the owner is usually required to pay the amount of taxes due, with interest [54] and other charges and penalties prescribed by statute.[55] One entitled to redeem is liable to the purchaser for interest only from date of sale to date of tender.[56] Questions relative to costs are regulated by statute.[57] A redemption results from payment or tender of the amount necessary to redeem [58] but not from a tender of a less sum.[59] Where parties stipulate as to the amount necessary to redeem, it is error to decree payment of a less sum.[60] Where a petition to redeem contains an erroneous description, leave to amend should be granted.[61] If a purchaser refuses to allow redemption on legal terms, a cause of action accrues in favor of one entitled to redeem for such purpose.[62] Redemption merely restores the person redeeming to the title which he previously held.[63]

Proper parties [64] may usually redeem from the state where the land has been

Laws 1895, p. 91. Robertson v. McClintock [Ark.] 110 SW 1052. Where before administrative sale a county brings action to foreclose tax lien and obtains decree under which land is sold, the owner has two years after confirmation to redeem. Smith v. Carnahan [Neb.] 120 NW 212.

**53.** Rusch v. John Duncan Land & Min. Co., 211 U. S. 526, 53 Law. Ed. —.

**54.** In redeeming from judicial sale, purchaser is entitled to amount of his bid with interest. Douglass v. Hayes County [Neb.] 118 NW 114. On redeeming from a judicial sale, owner should pay full amount of taxes and costs paid by purchaser and 12 per cent interest thereon. Smith v. Carnahan [Neb.] 120 NW 212. **Purchaser** for less than amount of decree is entitled on redemption to 6 per cent interest on his bid if redemption is made within six months, and, for every additional month over six, 1 per cent in addition plus all taxes and assessments paid subsequently with interest. Hannold v. Valley County [Neb.] 117 NW 350. Where land sold under decree foreclosing tax lien is purchased by any other person than plaintiff in case, owner must pay purchaser amount of his bid plus 12 per cent interest. Butler v. Libe [Neb.] 117 NW 700. Gen. Laws 1905, c. 271, p. 407, does not deprive holder of tax certificate of right to refundment secured to him under prior law. State v. Krahmer, 105 Minn. 422, 117 NW 780. Statute makes no change in respect to services of notice upon persons under disability. Id.

**55.** Houston City Charter, art. 3, § 11, requiring owner redeeming from sale to pay double amount paid by purchaser, applies solely to summary sales made by collector and not to sale under judgment of foreclosure of lien. Blair v. Guaranty Savings Loan & Inv. Co. [Tex. Civ. App.] 118 SW 608.

**56.** Blair v. Guaranty Savings, Loan & Inv. Co. [Tex. Civ. App.] 118 SW 608.

**57.** Suit to redeem held within Pub. Acts 1899, p. 140, No. 97, precluding costs against either party in a suit instituted for purpose of setting aside sale for delinquent taxes. Haney v. Miller [Mich.] 15 Det. Leg. N. 770, 117 NW 745. Where bill to remove cloud and redeem from sale for delinquent drain tax is in effect a suit to set aside such taxes, the auditor general though a necessary party under Gen. Tax Law, § 144, is not entitled to costs on dismissal of the bill. Id.

**58.** If purchaser refuses to allow redemption, person desiring to redeem should make formal tender unless same is waived. Douglass v. Hayes County [Neb.] 118 NW 114. Where after sale of homestead owners filed suit to set it aside which was compromised within period of redemption and owners remained in possession, the transaction amounted to redemption. Bente v. Sullivan [Tex. Civ. App.] 115 SW 350. Payment of taxes to auditor and procuring deed from state before expiration of period of redemption operates as redemption for owner's benefit, leaving no claim in state which can mature into title and creating no title which can be confirmed. Magee v. Turner [Miss.] 46 S 544. Acts 1897, p. 294, No. 229, providing for redemption by tender of amount due within specified time, does not apply to sales made by Auditor General prior to date act took effect. McFarlane v. Simpson, 153 Mich. 193, 15 Det. Leg. N. 467, 116 NW 982. **Formal tender waived** by refusal of the purchaser to accept anything less than a greater sum than he is entitled to. Douglas v. Hayes County [Neb.] 118 NW 114.

**59.** Tender of taxes and costs without penalties and surplus paid by the purchaser is insufficient to effect a redemption. Richards v. Fuller, 122 La. 847, 48 S 285.

**60.** Where, in action to redeem, parties stipulate of record as to amount to be paid, it is error to direct payment of less sum on decree of redemption. Snider v. Smith [Ark.] 115 SW 679.

**61.** Where petition to redeem contained an erroneous description which also entered into the decree but upon discovery thereof prompt motion was made for leave to amend, held error to deny such motion. Code Civ. Proc. § 144. Banchor v. Lowe [Neb.] 120 NW 452.

**62.** Douglass v. Hayes County [Neb.] 118 NW 114.

**63.** Redemption gives no new title but simply relieves the land from the sale which has been made. This is true whether redemption is made before or after expiration of period. Bente v. Sullivan [Tex. Civ. App.] 115 SW 350. Action of state land commissioner in permitting one to redeem and executing a deed to him establishes merely his right to redeem but is no adjudication of his ownership. Meyer v. Snell [Ark.] 116 SW 208.

**64.** Owner of valid title originating by reason of first sale has in regard to subse-

sold or forfeited to it [65] or from the subsequent purchaser from the state,[66] but redemption of land, title to which has become visited in the state by forfeiture or sale, is a mere grace extended by the state and may be withdrawn at any time before actual redemption.[67]

*Notice of the expiration of period of redemption.* See 10 C. L. 1824—Statutory provision is generally made for notice of expiration of period of redemption,[68] and such acts may be retrospective as well as prospective.[69] Such notice must conform to statutory requirements,[70] and must be given to all persons entitled thereto,[71] and state the amount necessary to be paid,[72] and where given by publication statutory

quent forfeiture to or vesting in state, right of redemption superior to the former owner. State v. King [W. Va.] 63 SE 495. Under Code 1906, § 3529, owner of undivided interest in land forfeited to state may fully redeem tract in respect to which he owned such interest. State v. King [W. Va.] 63 SE 468.

**65.** Under Rev. Laws 1905, §§ 936-940, lands bid in for state and not assigned to purchasers within three years from sale at which they are offered to purchasers at highest price are subject to redemption by owner. Minnesota Debenture Co. v. Scott, 106 Minn. 32, 119 NW 391.

**66.** Under Gen. Tax Laws 1893, pp. 388, 393, 394, amended by Laws 1907, pp. 294, 295, relative to redemption from purchaser from state, owner held required to pay such purchaser amount of an invalid drainage tax paid to the state by him. Haney v. Miller [Mich.] 15 Det. Leg. N. 592, 117 NW 71.

**67.** State v. King [W. Va.] 63 SE 495. Privilege given by statute to redeem lands forfeited to state is mere grace of state and does not constitute vested property right. State v. King [W. Va.] 63 SE 468. State having no right to sell forfeited land, because it has once sold it under decree for some forfeiture or because it has been transferred to a junior claimant by Const. art. 13, § 3, the owner of forfeited title cannot redeem. Id.

**68.** Eight months and 13 days allowed by c. 271, p. 407, Laws 1905, within which holders of tax certificates may cause notices of expiration of redemption to be given, is reasonable. State v. Krahmer, 105 Minn. 422, 117 NW 780.

**69.** Acts 1903, p. 386, amending Comp. Laws, §§ 3959, 3960, by adding to persons entitled to notice of redemption and prescribing contents of notice, is retroactive and applies to deeds issued before it went into effect. Weller v. Wheelock [Mich.] 15 Det. Leg. N. 856, 118 NW 609. It affects remedy of tax purchaser and does not impair any vested right. Id. Pub. Acts 1905, p. 194, requiring notice to redeem to be served on person in actual possession, does not apply to sale made before act took effect. Curry v. Backus [Mich.] 16 Det. Leg. N. 103, 120 NW 796.

**70.** Where property was assessed to Peter Peterson, Jr., a redemption notice to Peter Peterson in whose name the property was taxed is sufficient. Peterson v. Wallace [Iowa] 118 NW 37. Where purchasers relied upon notices of redemption which were insufficient under Laws 1897, p. 294, requiring notices to entitle purchaser to possession, complainants were not barred by laches from claiming that notices were insufficient. G. F. Sanborn Co. v. Alston, 153 Mich. 456, 15 Det. Leg. N. 531, 116 NW 1099. Notice as to redemption by holder of tax deed to grantees under last recorded deed required by Acts 1903, p. 386, No. 236, held insufficient. Haden v. Closser, 153 Mich. 182, 15 Det. Leg. N. 397, 116 NW 1001. In action to determine validity of a tax title, fact that there was no evidence that holder of tax certificate presented it to auditor in order that notice to eliminate redemption should be issued did not invalidate the notice. Slocum v. McLaren, 106 Minn. 386, 119 NW 406. **Form of notice** of expiration prescribed by Laws 1902, c. 2, § 47, must be substantially followed. Lawton v. Barker, 105 Minn. 102, 117 NW 249. Notice failing to state **year for which taxes were delinquent** and rate of interest necessary to be paid on amount required to redeem held void. Id. Notice giving **description of land** by section, townships and range, but not stating whether township was north or south or range east and or west, and not specifying the state, held insufficient. G. F. Sanborn Co. v. Alston, 153 Mich. 456, 15 Det. Leg. N. 531, 116 NW 1099. Where sale is held Sept. 4, 1900, and redemption notice states that land must be redeemed before Sept. 4, 1903, such notice gives three full years as **time for redemption** and is not void. Michner v. Ford [Kan.] 98 P 273. Under Comp. Laws, § 3959, requiring as **condition to issuance of writ of assistance** under tax deed notice to owner to redeem, and § 3962, preventing owners who neglect to redeem from questioning title, owners are not barred for neglecting to redeem under notice void because of premature issue of the tax deed. Witsaten v. Olson [Mich.] 15 Det. Leg. N. 1010, 119 NW 3.

**71.** Failure to serve notice of redemption upon one in actual possession as cropper held to avoid the notice of redemption. Wallace v. Sache, 106 Minn. 123, 118 NW 360. Tax deed is void where holder of certificate failed to serve notice of redemption on person in possession in whose name land was taxed as required by Code, § 1441. Ashenfelter v. Seiling [Iowa] 119 NW 984. Under Laws 1896, p. 842, c. 908, § 134, providing that notice to redeem shall be given to actual occupant, no notice is necessary where land is unoccupied. Clinton v. Krull, 125 App. Div. 157, 111 NYS 105.

**72.** Where one purchased from the auditor general prior to passage of Acts 1897, p. 294, providing for redemption and served notice on one claiming a specified sum as necessary to redeem under the act, which did

requirements must be observed.[73] Where so required by law, service of notice must be properly established.[74] Though a purchaser's notice of redemption is defective, technically, the owner cannot redeem without reimbursing him for taxes paid subsequent to service of the notice.[75] In some states an official whose duty it is to give the notice is subject to a penalty for failure to do so.[76]

§ 14. *Tax titles. A. Who may acquire.*[77]—See 10 C. L. 1825—One under moral or legal obligation to pay the taxes cannot become a purchaser either directly or indirectly,[78] and, if he attempts to do so, his purported purchase will amount merely to payment of the taxes [79] or a redemption.[80] Where a tax deed has been set aside

not apply to such sale, such notice was at most only effective to estop the purchaser to refuse to accept redemption on the terms stated in case tender was made within reasonable time. McFarlane v. Simpson, 153 Mich. 193, 15 Det. Leg. N. 467, 116 NW 982. Tax deed held not void because notice of redemption stated an amount claimed to be in excess of the proper amount if including interest from earliest date the sum named could have been equalled. Michner v. Ford [Kan.] 98 P 273. Notice was not legally insufficient because it stated that amount required to redeem was a named sum "with interest on said sum at 12 per cent (since a named date) exclusive of costs to accrue on redemption." Slocum v. McLaren, 106 Minn. 386, 119 NW 406.

**73.** Under Sess. Laws 1901, p. 58, c. 51, where a holder of tax certificate gives notice of redemption by publication, date of last publication must be at least 90 days preceeding maturity of certificate. Flickinger v. Cornwell [S. D.] 117 NW 1039.

**74.** Under Code, § 1441, providing that service of redemption notice shall be complete only after affidavit has been filed showing service, an affidavit is fatally defective if it fails to show under whose direction service was made. Peterson v. Wallace [Iowa] 118 NW 37. Evidence sufficient to show that owner was personally served with notice to redeem. Curry v. Backus [Mich.] 16 Det. Leg. N. 103, 120 NW 796. Notice was not invalidated because there was no proof that auditor delivered it to person holding certificate or that such person ever delivered the notice to sheriff for service. Slocum v. McLaren, 106 Minn. 386, 119 NW 406. Code 1894, § 1441, requiring **affidavit** of holder of tax certificate to service of notice of redemption to show at whose direction affidavit was made, must be complied with before right of redemption is lost. Ashenfelter v. Seiling [Iowa] 119 NW 984. Code 1897, § 1341, makes entry by treasurer in sale book of return of service of notice of redemption presumptive evidence only of completed service, and if there is an omission of any material step by which right may be cut off, **presumption** is overcome. Id. Code 1897, § 1341, makes it mandatory duty of treasurer when return of service of notice of redemption is filed with him to forthwith make written report to auditor, and until this is done auditor may assume that right to redeem has not expired and may rightfully accept redemption. Id. Return of service is held to be of prima facie validity notwithstanding number of irregularities. Slocum v. McLaren, 106 Minn. 386, 119 NW 406.

**75.** G. F. Sanborn Co. v. Alston, 153 Mich. 463, 15 Det. Leg. N. 703, 117 NW 625.

**76.** Under Code 1906, § 4333, penalizing the chancery clerk for failure to notify owner of expiration of period of redemption, and § 3101, requiring action for the penalty to be commenced within one year, held an action by the owner for damages and not for the penalty was not barred in one year. McClendon v. Whitten [Miss.] 48 S 964.

**77. Search Note:** See notes in 9 L. R. A. (N. S.) 674; 16 Id. 121; 75 A. S. R. 229; 116 Id. 367; 10 Ann. Cas. 986; 11 Id. 759.

See, also, Landlord and Tenant, Cent. Dig. §§ 197, 198; Dec. Dig. § 67; Life Estates, Cent. Dig. § 14; Dec. Dig. 10; Mortgages, Cent. Dig. §§ 285-289; Dec. Dig. § 144; Taxation, Cent. Dig. §§ 1357-1362, 1455-1649; Dec. Dig. §§ 674, 679, 726-855; Vendor and Purchaser, Cent. Dig. § 388; Dec. Dig. § 190; 27 A. & E. Enc. L. (2ed.) 954.

**78.** Toliver v. Stephenson [Neb.] 120 NW 450; Anderson v. Messenger [C. C. A.] 158 F 250. **Mortgager** cannot purchase under Revisal 1905, § 2858. Cauley v. Sutton [N. C.] 64 SE 3. Under Martin Act (3 Gen. St. 1895, p. 3370), providing for sale of land for taxes, a mortgagee may not purchase so as to cut off the equity of redemption. Farmer v. Ward [N. J. Eq.] 71 A 401. Where **mortgagor** owes duty to mortgagee to pay taxes neither he nor his assigns can purchase at tax sale. Pitman v. Boner [Neb.] 116 NW 778. **Owner of mortgaged land** may not acquire tax title adverse to the mortgage. Farmer v. Ward [N. J. Eq.] 71 A 401. The grantee of a mortgagor cannot purchase at tax sale and defeat the mortgagee. Toliver v. Stephenson [Neb.] 120 NW 450. Revisal 1905, § 2860, does not authorize one **cotenant** to purchase entire estate as against others not in possession. Smith v. Smith [N. C.] 63 SE 177. Where by collusion with **life tenant** property is sold for taxes, remainderman can recover it from persons claiming under tax title. Boon v. Root, 137 Wis. 451, 119 NW 121. Payment of taxes by **lessee** held to inure to benefit of true owner, and they could not in defense of their own title invoke statute, forfeiting the land to the state for failure to have the same assessed in the name of the true owner. Miller v. Ahrens, 163 F 870. Where **husband** and wife live on land in which she has life estate, husband may not permit it to be sold for taxes and thereafter acquire title from holder. Peck v. Ayres [Kan.] 100 P 283.

**79.** Purchase at tax sale by one whose duty it is to pay the taxes operates as payment only. Gibson v. Sexson [Neb.] 118 NW 77. Where tenant, who was bound to pay

and the holder given a lien for taxes, he may purchase at a subsequent sale.[81] A statute requiring a county attorney to bid for the state does not render a purchase by him for his own use void.[82]

(§ 14) *B. Rights and estate acquired by purchaser at sale.*[83]—See 10 C. L. 1828— A tax title vests in the grantee an independent and paramount title,[84] unless otherwise provided by statute,[85] but the purchaser acts at his own peril,[86] and, where the sale is void, he acquires no rights except such as may be conferred by statute,[87] whereby, however, he is usually granted the right to recover the taxes paid by him [88]

taxes on leased premises by Code Pub. Gen. Laws 1904, art. 81, omitted to do so and purchased land at tax sale, he held the title in trust for the landlord, who could sue to set aside tax title. Lansburgh v. Donaldson, 108 Md. 689, 71 A 88. Where mortgagee without authority purchases at tax sale, he occupies same position as if he had paid the taxes before sale. Only entitled to subrogation to the tax lien. Farmer v. Ward [N. J. Eq.] 71 A 401.

80. Where purchaser, before expiration of period of redemption, assigned the certificate to a cotenant in the land, the transaction was held merely a redemption. Kohle v. Hobson [Mo.] 114 SW 952.

81. Ross v. Kelson [Kan.] 98 P 772.

82. Under Sayles' Ann. Civ. St. 1897, art. 5232g, requiring county attorney to bid for state when there are no private bidders. Gibbs v. Scales [Tex. Civ. App.] 118 SW 188.

83. **Search Note:** See notes in 42 A. S. R. 588; 7 Ann. Cas. 920.

See, also, Taxation, Cent. Dig. §§ 1455-1488; Dec. Dig. §§ 726-743; 27 A. & E. Enc. L. (2ed.) 982, 990.

84. Lucas v. Purdy [Iowa] 120 NW 1063. Tax title clothes owner not merely with title of person assessed, but with new and complete title under an independent grant from sovereign authority, which bars all prior titles and equities of private persons. McMahon v. Crean [Md.] 71 A 995. Record title cut off in tax proceedings is not cloud on tax title. Triangle Land Co. v. Nessen [Mich.] 15 Det. Leg. N. 1054, 119 NW 586. Under Revision 1860, §§ 719, 737, 756, 781, 784, and 759, amended by acts extra Sess. 8th Gen. Assem. p. 33, c. 24, § 6, a sale of land of husband divests the inchoate right of dower of wife. Lucas v. Purdy [Iowa] 120 NW 1063. Where lands have been sold for taxes, the state cannot impeach the title by a resale for taxes for prior years. Minnesota Debenture Co. v. Scott, 106 Minn. 32, 119 NW 391.

85. Purchaser at tax sale held to take only title of true owner, under Const. art. 3, § 13, and Rev. St. 1895, arts. 5232b, 5232h, and where third persons held adversely for statutory period, a grantee of such purchaser was barred from recovering possession. Patton v. Minor [Tex. Civ. App.] 117 SW 920.

86. Larson v. Peppard [Mont.] 99 P 136.

87. Invalid tax deed does not give holder constructive possession so as to render another, who takes actual possession, a trespasser. Kraus v. Congdon [C. C. A.] 161 F. 18. Holders of tax deeds cannot defend against owners where issuance of deed was enjoined and they did not make such owners parties to proceedings in which issuance was compelled. Carney v. Twitchell [S. D.] 118 NW 1030. One claiming under a void tax deed can convey no rights as against the true owner. Warden v. Glos, 236 Ill. 511, 86 NE 116. Where purchaser under void tax deed conveyed portion of tract and owner brought suit to cancel tax deed and to prevent purchaser and his grantee from asserting any rights, a decree canceling deed but not requiring any portion of taxes paid by purchaser to be paid to his grantee was proper, as it did not appear what portion of land grantee purchased. Id.

88. Sole remedy of purchaser in Illinois now is to obtain a refund of his money, former act, allowing him 100 per cent additional, having been repealed by implication. Heydecker v. Price, 136 Ill. App. 512. Owner of tax certificate of purchase may recover from owner of property, although tax sale was made upon void description. Construing § 214 of revenue act. Joliet Stove Works v. Kiep, 132 Ill. App. 457. Under Kansas City charter, art. 5, § 58, providing that defeated tax title holder shall recover from owner amounts paid for taxes and penalties, to do so his deed must have been executed substantially in accordance with art. 5, § 58, and he must have been defeated in a suit to recover the property. Russell v. Woerner, 131 Mo. App. 253, 110 SW 691. Purchaser at tax sale, who voluntarily abandoned his suit to recover posession, was not "defeated." Id. In such suit the "successful claimant" is the owner of the property and is necessary party to suit by purchaser to recover possession, in order that he may be bound for amounts paid by "defeated" tax title holder. Id. Where tax sale is set aside as void, purchaser has lien for amount of taxes paid, bring subrogated to the rights of the state. Seldon v. Dudley E. Jones Co. [Ark.] 116 SW 217. Where holder of tax deed is defeated in ejectment, he is entitled to lien for taxes paid, though his deed is based on an assessment made separately on each of three contiguous lots comprising property when it should have been made on the entire tract as single description. Lewis Academy v. Wilkinson [Kan.] 100 P 510. In suit to quiet title, defendant cannot enforce amounts paid on tax sales where lien of such payments is not established in ejectment. George E. Wood Lumber Co. v. Williams [Ala.] 47 S 202. Where grantee of tax purchaser was barred from recovering possession, he was held entitled to be subrogated to state's lien for taxes. Patton v. Minor [Tex. Civ. App.] 117 SW 920. Conveyance of part of tract claimed by grantor under void tax deed operates as assignment to grantee of proportionate share of amount refunded by owner on cancellation

and the value of improvements,[89] provided he complies with statutory requirements.[90] A purchaser at a void sale who converts the property to his own use is liable to the owner in conversion.[91] The purchaser's right to possession is regulated by statute.[92] In Michigan a purchaser must serve notice of reconveyance.[93] Equity has jurisdiction to quiet a tax title,[94] but the complainant must, of course, make out a case for such relief.[95]

(§ 14) *C. Tax deeds.*[96]—See 10 C. L. 1827—The prime essential of a valid tax deed is that it be supported by a valid sale,[97] and the deed must also be supported

of deed. Warden v. Glos, 236 Ill. 511, 86 NE 116.

89. Ross v. Kelson [Kan.] 98 P 772. Purchaser at void sale held entitled to improvements. Page v. Kidd, 121 La. 1, 46 S 35; Id., 121 La. 553, 46 S 624. Where a tax sale is held void, purchaser is entitled to taxes paid, interest, and improvements. Hamilton v. Steele [Ky.] 117 SW 378. Where one, in good faith, held state school lands under tax sale void because land was not taxable, he was entitled to improvements upon recovery of land by the owner. Edwards v. Butler [Miss.] 47 S 801. Holder of tax deed, who is defeated in ejectment and claims and receives benefit of **occupying claimant's land,** should be reimbursed for that portion only of gross taxes paid which was levied on the value of land without improvements. Hills v. Allison [Kan.] 100 P 651. If tax deed holder be defeated in ejectment, and pursuant to his demand for benefit of occupying claimant's act, value of land and of improvements are separately established, owner may elect to accept value of land without improvements, and if deed holder refuse to pay it may order the land sold and establish liens on proceeds of sale. Id. Upon adjudication of counterclaim, where one in possession under tax deed has been defeated and claims compensation for permanent improvements and taxes paid, reasonable **rent** of premises without improvements should be offset, but not rent increased by improvements. Gibson v. Fields [Kan.] 98 P 1112. In such case rent is to be determined from cash price usually paid for use of like premises. Id.

**What constitutes improvements:** As a general rule, plowing and cultivating land therefore under cultivation does not constitute permanent improvement, but breaking and reducing wild land to cultivation does. Gibson v. Fields [Kan.] 98 P 1112.

90. Under Rev. Laws, c. 13, § 44, providing that, if by reason of irregularity of tax sale purchaser has no claim on property, he may surrender his deed and have his money refunded with interest, it is not necessary to enable him to surrender and recover that he be disturbed in his possession by paramount owner. Spring v. Cambridge, 199 Mass. 1, 85 NE 160. Under such statute purchaser must make **surrender of deed,** since it may be serviceable to taxing power in enforcing its rights. Id. Evidence that purchaser has transferred his rights to another is admissible. Id. **Where holder of title goes into possession without giving notice** required by Pub. Acts 1897, p. 296, he cannot recover for improvements placed upon land. Cook Land, Const. & Producing Co. v. McDonald [Mich.] 15 Det. Leg. N. 953, 118 NW 959.

91. Brocking v. O'Bryan [Ky.] 112 SW 631.

92. Gen. Tax Laws, §§ 142, 140, relative to notice before purchaser is entitled to possession, held applicable to all cases where purchaser has acquired a tax title at public sale or by purchase from the state. G. F. Sanborn Co. v. Alston, 153 Mich. 456, 15 Det. Leg. N. 531, 116 NW 1099. Right of purchaser for term of years for unpaid water rents, to take possession at expiration of period prescribed, under P. L. 1855, p. 471, c. 48, and P. L. 1859, p. 433, § 1, is right of entry authorizing **ejectment** and is barred in 20 years under the general statute. Beatty v. Lewis [N. J. Eq.] 68 A 95.

93. Notices of reconveyance served by purchaser of tax titles, which omit name of state and county in description in body of notices, are insufficient, though indorsed on the back "State of Michigan, County of——," and in blank space is written "Presque Isle." Curry v. Larke, 153 Mich. 348, 15 Det. Leg. N. 491, 116 NW 1075.

94. Equity has jurisdiction of adverse suit to quiet tax title, irrespective of statute, and hence, in such a suit, complainant may be granted relief, though he might not be entitled to confirmation of his title, under Kirby's Dig. §§ 661-675, authorizing confirmation where purchaser has paid taxes. Knauff v. National Cooperage & Woodenware Co. [Ark.] 113 SW 28.

95. One who sues under Comp. Laws, § 448, to quiet a tax title must prove that defendants have asserted some title where there is no record evidence of a cloud upon the title. Triangle Land Co. v. Nessen [Mich.] 15 Det. Leg. N. 1054, 119 NW 586.

96. **Search Note:** See notes in 4 A. S. R. 187; 28 Id. 19; 31 Id. 233; 36 Id. 386; 9 Ann. Cas. 76.

See, also, Taxation, Cent. Dig. §§ 1489-1569; Dec. Dig. §§ 744-789; 27 A. & E. Enc. L. (2ed.) 960.

97. Tax deed, reciting that land was sold "in the county of A. and J. L. Gates to said A. county," held to show a sale to a county, and not a joint sale to the county and Gates, rendering the sale void. Maxon v. Gates, 136 Wis. 278, 116 NW 758. Tax deed, reciting that "whereas James L. Gates and assignee of A. County," etc., shows that Gates presented himself as the assignee of A. county, and held that it could not be construed to mean that there was an assignee in addition to Gates. Id. Tax deed based on a void **delinquent tax return** is void. Wilkinson v. Linkous [W. Va.] 61 SE 152. Deed from county commissioners for land sold to county without **foreclosure of cer-**

by compliance with requirements as to the expiration of the period of redemption [98] and service of notice thereof,[99] and the requirements as to sealing [1] and filing.[2] It must be executed by a duly authorized official [3] to the person entitled thereto,[4] sufficiently describe the property,[5] and must contain all the recitals required by law.[6] Tax deeds are construed strictly in favor of the tax payer,[7] and one claiming thereunder has the burden to prove the regularity of every antecedent act essential to its validity.[8] A deed will be declared void for intrinsic defects apparent on its

**tificate of delinquency** is a nullity. Smith v. Smith [N. C.] 63 SE 177. Under Code, § 1447, **record entry that sale was invalid** is official record, which cannot be changed until it is adjudged erroneous. Burchardt v. Scofield [Iowa] 117 NW 1061. Where land upon which taxes had been paid was subsequently sold for taxes, and, treasurer's attention being called to fact, he made entry upon tax sale record showing proper case for refund to purchaser, the owner could rely upon his action, and treasurer could not thereafter erase entry and issue deed to purchaser. Id.

**98.** Power to issue tax deed does not arise until after expiration of period of redemption. Yellow Poplar Lumber Co. v. Thompson's Heirs, 108 Va. 612, 62 SE 358.

**99.** Failure to comply with Laws 1899, p. 88, c. 15, §§ 63, 64, renders the deed void. Warren v. Williford, 148 N. C. 474, 62 SE 697.

**1.** Deed for levee taxes not sealed as required is void. Creegan v. Hyman [Miss.] 46 S 952.

**2.** Under Code 1906, § 4338, it is not essential to validity of tax deed that it be marked "filed" when it is lodged in the chancery clerk's office. Brannon v. Pringle [Miss.] 47 S 674.

**3.** Under Acts 1873, p. 186, c. 118, § 67, tax collector has no authority to issue tax deed, and one executed by him is void. Byrd v. Phillips [Tenn.] 111 SW 1109. Deed for levee taxes executed by sheriff, who had not given the statutory bond, is void. Creegan v. Hyman [Miss.] 46 S 952. Laws 1893, p. 167, requires that after its passage taxes in cities of the first class shall be collected by the county treasurer; § 7 provides that all taxes not levied as provided by the act shall be collected as provided by the city charters. Held, such act was prospective only, and deed was properly executed by city treasurer for taxes not levied thereunder. Silverstone v. Norton, 50 Wash. 531, 97 P 663. Tax collector of Baltimore city has no power to execute deed to mayor and city council for property sold to city by his predecessor. McMahon v. Crean [Md.] 71 A 995.

**4.** Under Civ. Code 1896, §§ 4063, 4067, 4074, assignment **of tax** sale certificate held not prima facie proved by recitals in deed. Copeland v. Bond [Ala.] 46 S 853.

**5.** Tax deed held not void for uncertainty of description or for uncertainty of recital as to whom payment of purchase price was made. Howell v. Gruber [Kan.] 97 P 467. Deed from tax collector to territory, reciting levy of taxes on "cabin and lot 6 of Block 60 and lot 7 of Block 60," and conveying all that lot last described, held to convey only lot 7. Abell v. Swain [Ariz.] 100 P 831.

**6. Where county purchases** at tax sale because there are no cash purchasers, certificate of sale as well as deed should show that there was no good faith cash purchaser on first day the property was offered for sale, and when it was thereafter offered there was no cash purchaser and that the whole amount of the property assessed was struck off to the county, and should otherwise truthfully state the facts, and a deed not setting out the facts showing why the sale was made to the county is insufficient, though it would be sufficient as to an individual. Rush v. Lewis & Clark County, 37 Mont. 240, 95 P 836. Where recitals in a deed show sale to county and deed obtained by virtue of sale to county, it must show county's **right to purchase** at such sales, and if it shows that the county was a competitive bidder, it is void. Kramer v. Smith [Okl.] 100 P 532. Deed need not recite **amount due** for each year but only gross amount necessary to redeem at the time it was executed. Hahn v. Hill Inv. Co. [Kan.] 100 P 484. Deed which does not show on its face amount for which each tract which it purports to convey was sold is void. Kramer v. Smith [Okl.] 100 P 532. Tax deed held void on its face for failure to show that four months had not elapsed since **service of notice of application to purchase,** as required by Code 1887, § 666, amended by Code 1904, c. 326. Bowe v. Richmond [Va.] 64 SE 51.

**7.** Courts are slow in cutting off rights of owners whose lands have been sold for taxes. Fitschen v. Olson [Mich.] 15 Det. Leg. N. 1010, 119 NW 3. One whose tax deed is void because of failure to serve notice of redemption cannot claim protection of Laws 1901, p. 791, c. 558, § 20, providing that when a deed substantially conforms to statute no one may question it without showing that he has paid taxes. Warren v. Williford, 148 N. C. 474, 62 SE 697. That **date** named in deed is out of harmony with other recitals does not justify assuming it to be result of clerical error, at least unless the date named is an impossible one or is in irreconcilable conflict with some other recital referring to the same matter. Price v. Barnhill [Kan.] 98 P 774. Statement in a tax deed showing that it was improperly issued is fatal to its validity, though occurring in course of **recitals not required by statute.** Id.

**8.** Purchaser held required to show that conveyance by receiver and special commissioner was confirmed by the court. Creegan v. Hyman [Miss.] 46 S 952. As against attack made before limitations have run, the fact that tax deed shows greater **consideration** than authorized by law is fatal to its validity, and it cannot be assumed that excess was occasioned by including

face,[9] but under some statutes is not invalidated by mere irregularities in prior proceedings,[10] and is itself, when regular on its face, prima facie evidence of title in

the clerk's fee for issuing deed. Glenn v. Stewart [Kan.] 97 P 863. Pol. Code, §§ 3787, 3786, 3764, 3765, 3767, 3786, relative to **presumptions** in favor of tax deed, does not include omission of jurisdictional requisite to valid sale, and deed is not conclusive that delinquent list and published notice stated correct amount due. Warden v. Broome [Cal. App.] 98 P 252. One claiming under deed for levee taxes, under Laws 1888, p. 4, c. 23, must point out sale under which he claims in order to invoke presumptions conferred by the act. Creegan v. Hyman [Miss.] 46 S 952.

**9.** Fitschen v. Olson [Mich.] 15 Det. Leg. N. 1010, 119 NW 3. Compromise tax deed which shows on its face that it is based on a tax sale certificate assigned by order of county commissioners, requiring payment of taxes which were not at the time a lien, is void on its face. Lanning v. Brown [Kan.] 98 P 771. Deed is void which recites **consideration** of 39 cents less than is necessary to redeem. Collins v. Jolley [Kan.] 100 P 477. Tax deed is void on its face where it appears that county's interest has been assigned for less than amount necessary to redeem. Wilks v. De Hart [Kan.] 95 P 836. Tax deed issued pursuant to sale held in 1892 for taxes of 1891, reciting **that land sold was least quantity that would sell for amount due,** is void on its face. Battelle v. Knight [S. D.] 120 NW 1102, following King v. Lane, 21 S. D. 101, 110 NW 37. Deed which shows on its face **that preliminary steps have not been taken** by taxing officers is void on its face. Whitehead v. Callahan [Colo.] 99 P 57. Deed of separate subdivisions of 40 acre tract, which shows on its face **that tracts were sold en masse,** is void on its face. Harris v. Brady [Ark.] 112 SW 974. Where deed showed on its face that land covered consisted of distinct, noncontiguous tracts and that they were sold en masse and not separately as required by statute, and that the tax was on the entire property but the amount against each tract did not appear, held deed was void. Whitehead v. Callahan [Colo.] 99 P 57. Where statute prohibits county from being competitive bidder, a statement in a tax deed that land was offered for sale "in accordance with Law" is a mere conclusion and can impart no validity to deed, plain **recitals containing that county was bidder.** Rush v. Lewis & Clark County, 37 Mont. 240, 95 P 836.

**NOTE. Technical flaw as avoiding tax deed:** A tax deed recited a sale to the county for the taxes of 1892 and an assignment of the certificate. The consideration was stated as "taxes, costs and interest due on said land for the years 1892, 1893, 1894, 1895 and 1896, to the treasurer paid as aforesaid." To the recital of the amount paid for the assignment of the certificate, however, was added, "being the taxes, charges and interest due on said land for the years A. D. 1891, 1893, 1894, 1895." Held, that the tax deed was defective on its face and should be set aside. Price v. Barnhill [Kan.] 98 P 774.

This decision is in accord with the general rule as to tax deeds. Black, Tax Titles, § 409, says: "A tax title is a purely technical as distinguished from a meritorious title, and depends for its validity on a strict compliance with the statutes, and a court of equity will not interfere to correct an error of the officers in making out a deed of land sold by them for taxes." Altes v. Hinckler, 36 Ill. 265, 85 Am. Dec. 406; Keepfer v. Force, 86 Ind. 81; Bowen v. Andrews, 52 Miss. 596. **Contra.** Hickman v. Kempner, 35 Ark. 505, holding that it is not a substantial objection to the clerk's deed that it falsely recites that the land was assessed in the name of unknown owners. The recital of the grantee's place of residence in a tax deed is not conclusive. Billings v. Kankakee Coal Co., 67 Ill. 489. The deed must show that the land was sold for the taxes of a particular year, and an ambiguity in this respect cannot be explained by parol testimony. Maxcy v. Clabaugh, 6 Ill. 26. A deed is void when it appears that the property was not forfeited on the date nor for the taxes stated. Waddill v. Walton, 42 La. Ann. 763, 7 S 737. Recitals in a tax deed are on general principles of law conclusive as to the facts recited. Reckitt v. Knight, 16 S. D. 395, 92 NW 1077. A tax deed cannot be upheld if a fact showing that it was improperly issued is stated in recitals which are wholly voluntary and unnecessary. Douglass v. Lowell, 60 Kan. 239, 56 P 13.—From 7 Mich. L. R. 447.

**10.** Deed held not void for failure to show that assignee paid amount necessary to redeem, or that it was assigned for an excessive amount, or that it did not appear that subsequent taxes were a lien. Hahn v. Hill Inv. Co. [Kan.] 100 P 484. That sheriff sold more property than was necessary or failed to collect purchase price does not affect purchaser's title. Bailey v. Napier [Ky.] 117 SW 948. Where land for want of bidders is taken by county and after five years certificate is assigned and deed made under Gen. St. 1901, § 7672, the fact that it shows that taxes accruing while land was held by county were charged on tax roll in September of each year instead of in November does not invalidate deed. Taylor v. Adams [Kan.] 99 P 597. Tax deed is not void because certificate was assigned by county for slightly less than amount necessary to redeem, and error is one of computation. Troyer v. Reedy [Kan.] 100 P 476. Where such discrepancy is traced to amount charged as interest, it is presumed to have resulted from error in computation. Id. Amount of such discrepancy will not be regarded as substantial if interest charged is less than would result if computations in which fractions of a cent are carried out and greater than would result if such fractions are rejected at every stage. Id. Where in computing penalty county clerk treats fraction of between five and ten mills as cent, instead of rejecting it as required by statute, a deed based thereon is not void, the excess being due to error in calculation rather than to intentional overcharge. Glenn v. Stewart [Kan.] 97 P

the purchaser,[11] and one assailing it has the burden of proving it to be void[12] and of overcoming the statutory presumption.[13] Where the testimony overcomes the effect of the prima facie regularity of the tax sale proceedings afforded by the deed, one claiming under such deed must prove its validity.[14] In some states the probative effect of a deed depends upon whether it has been recorded for a certain period.[15] Authority to issue a second deed[16] may not be exercised unless the statutory conditions exist.[17] In some states statutes prescribe grounds for vacating tax deeds.[18] Curative acts validating irregular tax deeds may be retroactive.[19]

863. Tax deed is not invalidated by failure of the **sheriff's affidavit** to show on its face that it was taken before some officer authorized to administer oaths. See Code 1906, §§ 908, 884. Wilkinson v. Linkous [W. Va.] 61 SE 152.

**11.** Tax deed is prima facie evidence of ownership without proof of assessment proceedings. T. J. Moss Tie Co. v. Myers [Ky.] 116 SW 255. Findings that no notice of intention to take out a tax deed was served except by publication did not necessarily show that notice and service were not sufficient. Bandow v. Wolven [S. D.] 120 NW 881.

**Matters presumed:** Even before limitations have run, payments of subsequent taxes by holder of certificate are presumed to have been made at a date consistent with recitals in deed, and it is also presumed that publications of notice of sale and redemption were made for less rate than named in the statute. Glenn v. Stewart [Kan.] 97 P 863. Tax deed is prima facie evidence **that property was subject to taxes** against it. St. Paul, M. & M. R. Co. v. Howard [S. D.] 119 NW 1032: Ball. Ann. Codes & St. § 1767, expressly provides that tax deed executed by county treasurer is prima facie evidence **that real estate was assessed** as required by law. Tacoma Gas & Elec. L. Co. v. Pauley, 49 Wash. 562, 95 P 1103. It is presumed **that amount stated in a deed as amount due is correct.** Hahn v. Hill Inv. Co. [Kan.] 100 P 484. On an allegation that tax deeds were issued and recorded, in absence of averments to contrary, it is presumed that they were in form required by law and entitled to presumption **of regularity of prior proceedings.** Strange v. Oconto Land Co., 136 Wis. 516, 117 NW 1023. In trespass, one claiming under tax title need not show legal assessment, advertisement for sale, nor a valid sale, in order to introduce his deed. Saunders v. Collins [Fla.] 47 S 958. Tax deed properly admitted. Id. Rev. Pol. Code, § 2213, making tax deeds regular on their face prima facie evidence of regularity of proceedings and truth of recitals, makes such deeds prima facie evidence that notice of intention to take out deed was given. Bandow v. Wolven [S. D.] 120 NW 881. Under Laws 1896, p. 850, c. 908, providing that provisions as to sales by state comptroller shall govern the county treasurer, etc., statutory presumptions as to regularity of proceedings applies to deed executed by treasurer. Clinton v. Krull, 125 App. Div. 157, 111 NYS 105.

**12.** Barnes' Ann. St. 1901, § 8624. Bivens v. Henderson [Ind. App.] 86 NE 426. In action to test validity of tax deed where plaintiff owns fee and defendant is in possession, under the deed which court holds good on its face, the plaintiff has the burden to show that the deed is ineffective. Taylor v. Adams [Kan.] 99 P 597.

**13.** Ann. St. 1906, p. 1788, making tax deed prima facie evidence that person named as defendant was the owner at time of sale, is not conclusive and may be overcome by proof to the contrary. Einstein v. Holladay-Klotz Land & Lumber Co., 132 Mo. App. 82, 111 SW 859.

**14.** Starks v. Sawyer [Fla.] 47 S 513.

**15.** Tax deed regular on its face, which has been of record for more than five years, except that it runs to executors of estate of person to whom certificate was issued and their heirs, should, under the rule of liberal construction, be admitted as a muniment of title. Robert v. Gibson [Kan.] 99 P 595. In action to try title against holder of tax deed which has been recorded for more than five years, question whether he took possession within two years after deed was recorded as he was required to do, must be presented by pleadings. Taylor v. Adams [Kan.] 99 P 597. Deed reciting that it is based on certificate issued for taxes of year prior to that in which taxes for which it was sold accrued is vulnerable on attack, even after having been of record for more than five years. Price v. Barnhill [Kan.] 98 P 774. Omission in tax deed not attacked for five years to state for what year taxes accrued held supplied by recital that total consideration was taxes of 1894, and subsequent years. Gow v. Blackman [Kan.] 96 P 799. Under Laws 1896, p. 481, c. 908, relative to presumptions in favor of tax deeds after two years. the title of the grantee is absolute. Cone v. Lauer, 131 App. Div. 193, 115 NYS 644.

**16.** Under Kirby's Dig. §§ 4729, 4730, 4897, 4732, 4898, state land commissioner may issue duplicate deed to "forfeit tax lands" in case of loss of original. Thornton v. Smith [Ark.] 115 SW 677.

**17.** Under Kirby's Dig. § 7116, providing that, where county clerk is satisfied from the records that several tracts were sold separately instead of together as recited in a deed, he may issue another deed reciting such fact, where the records did not show such fact, a corrected deed was void. Chatfield v. Iowa & Arkansas Land Co. [Ark.] 114 SW 473.

**18.** Laws 1896, p. 841, c. 908, § 123, making comptroller's deed subject to cancellation for defect in proceedings affecting jurisdiction, means jurisdictional defects. People v. Lewis, 127 App. Div. 107, 111 NYS 398. Laws 1896, p. 841, c. 908, §§ 131, 132, construed and defects enumerated in § 132, for which deed may be cancelled, etc., held to apply to all conveyances by the comp-

(§ 14) *D. Remedies of original owner, and others claiming under or through him.*[20] See 10 C. L. 1830 The remedies against a tax sale [21] are available only to those having the proper legal status.[22] In a suit to vacate a tax sale, all persons whose interests will be affected should be joined [23] or notified,[24] and all defects in the tax proceedings relied upon should be alleged.[25] In order to set aside a tax title, the complainant must show title in himself, or right to redeem,[26] unless otherwise provided by statute,[27] and defects in the tax sale proceeding, which render it void.[28]

troller executed before or after the passage of the act. Id. Comp. Laws, § 3893, providing that a tax sale shall not be set aside after confirmation, etc., refers to powers of equity to vacate the sale in the same proceeding for irregularities, and does not limit authority of courts in general to determine validity of sales. Horton v. Salling [Mich.] 15 Det. Leg. N. 1114, 119 NW 912.

**19.** St. 1903, p. 63, validating tax deeds void for failure to recite correct date when right of redemption expires, is retroactive and validates a deed previously executed void for failure to recite date of expiration of redemption, as required by Pol. Code, § 3771, amended by St. 1895, p. 327, and operates to vest title in the state and one who purchased from the state prior to the act. Peck v. Fox [Cal.] 99 P 189. Tax deed executed to city of Baltimore by collector without authority, on December 7, 1883, was validated by Acts 1904, p. 504, c. 281, § 2, validating deeds defective in the manner the deed in question was defective. McMahon v. Crean [Md.] 71 A 995. Owner's right in property sold for taxes having been divested by sale, pursuant to which a void deed was executed, such statute did not impair any vested rights. Id.

**20. Search Note:** See Taxation, Cent. Dig. §§ 1570-1618; Dec. Dig. §§ 790-818.

**21.** Remedies where purchase is by state or municipality are treated elsewhere. See post, this section, subsec. E.

**22.** Suit to confirm tax title which proceeds to final hearing as suit to cancel a tax title as cloud on another tax title, not within Kirby's Dig. § 7105, providing that no one except owner or one claiming under him, etc., may assail such title. McDaniel v. Berger [Ark.] 116 SW 194. An action to set aside a tax deed as a cloud on title should be brought by vendor, who yet has legal title, rather than by vendee who has a mere contract for title, although such contract states that property "is hereby bargained and sold," and permits vendee to take immediate possession. Gloss v. Cass, 230 Ill. 641, 82 NE 827.

**23.** In action to vacate tax deed as cloud, where a witness for the defendant produced a tax sale certificate indorsed on the back by the defendant and testified that he had purchased it from defendant prior to the suit, he was a necessary party. Complete justice cannot be done between the parties unless he is made a party. Larson v. Glos, 235 Ill. 584, 85 NE 926.

**24.** Proceeding to vacate judgment foreclosing tax certificate held void as to grantee of purchaser at foreclosure sale who had no notice thereof, though notice was given to person who foreclosed delinquent certificate. Ryno v. Snider, 49 Wash. 421, 95 P 644. In action to set aside tax deed brought against purchaser and one to whom he had transferred the land as security, as trustee, the latter, individually and other grantees were not made parties by name but were included as unknown owners and were in default, and were held not entitled to introduce quit claim deed from purchaser. Brimson v. Arnold, 236 Ill. 495, 86 NE 254.

**25.** Where bill to set aside tax deed does not refer to defects in publication of delinquent list nor to sufficiency of affidavit for publication, relief cannot be granted on such grounds, though proof shows defects. Stearns v. Glos, 235 Ill. 290, 85 NE 335. In bill to set aside tax title setting out proceedings for sale and their invalidity, a statement that deed was issued, whereby county treasurer conveyed, etc., cannot be construed as admission that title passed by conveyance. Kraus v. Congdon [C. C. A.] 161 F 18.

**26.** Despard v. Pearcy [W. Va.] 63 SE 871. Deed from plaintiffs' grantor to themselves and testimony that they had been in possession of land since date of such deed held sufficient to prove possession and to sustain a decree. Brimson v. Arnold, 236 Ill. 495, 86 NE 254. That land was distributed by probate court to heirs of tax record owner, from whom plaintiff derived title, showed sufficient title to enable them to seek to vacate tax foreclosure decrees for want of jurisdictional process. Preston v. Cox, 50 Wash. 451, 97 P 493.

**27.** In suit, under Ball. Ann. Codes & St. Wash. § 5521, by one in possession to set aside a tax deed plaintiff is not required to plead or prove title in himself. Kraus v. Congdon [C. C. A.] 161 F 18.

**28.** In trespass to try title, plaintiff must show invalidity of tax foreclosure judgment from record in order to overcome its effect as bar to his right to recover. Young v. Jackson [Tex. Civ. App.] 110 SW 74. Where defendant in ejectment claims under tax deed, plaintiff is not confined in his attack on validity of the deed to grounds specified in Burns' Ann. St. 1901, § 8639, requiring certain proof by bar claiming adversely to tax title. Bivens v. Henderson [Ind. App.] 86 NE 426. Where court can legally infer that description in tax deed conveys property described in bill to set aside deed, such deed cannot be set aside on ground of misdescription, and where description in deed, precept, and certificate of delinquency, is not sufficient legal description, there must be proof that land described in deed could not have been other property than that described in bill. Stearns v. Glos, 235 Ill. 290, 85 NE 335. In ejectment, where defendant exhibits title derived from sale for taxes regular in form and long subsequent to title exhibited by plaintiff, derived from like sale, plaintiff has burden to prove defect in defendant's title in that land was

Where both parties to the suit claim under a void tax sale, neither is precluded from showing the invalidity of the other's title,[29] but, under the rule that one deriving title from the complainant can attack the latter's title only by showing title in himself, the issue may be confined to the question as to whether the complainant's title was divested by the tax sale proceedings under which the defendant claims.[30] As a general rule, an owner who seeks to vacate a tax title is required to do equity [31] by reimbursing the purchaser for taxes paid by him,[32] interest [33] and improvements; [34] but whether tender thereof is required as a condition to maintaining action, depends upon statute,[35] and a statute requiring such tender has been held void.[36] In the absence of such a tender, the complainant cannot recover costs.[37] Equity will interfere to cancel a certificate issued to a purchaser at a void tax sale.[38]

*Limitations.* See 10 C. L. 1832—The period within which action to vacate a tax title must be commenced is prescribed by statutes in the various states,[39] but in a proper

assessed in that year as seated land and exempt from sale. Floyd v. Kulp Lumber Co., 222 Pa. 257, 71 A 13. Statute requiring owner, in order to defeat tax title, to prove assessment defective shifted burden of proof from purchaser but did not change rule that each step required by law must be taken before a tax title can be procured. Hamilton v. Steele [Ky.] 117 SW 378.

**Admissibility of evidence:** In ejectment, on an issue as to whether land was assessed for certain year as seated as well as unseated land, so as to be exempt from sale, the assessment lists for preceding year and two years following year in question are admissible. Floyd v. Kulp Lumber Co., 222 Pa. 257, 71 A 13.

**29.** Meyer v. Snell [Ark.] 116 SW 208.

**30.** As between patent and tax title, the former must prevail unless tax proceedings were sufficient to divest title. Ontario Land Co. v. Wilfong, 162 F 999.

**31.** Owner seeking to avoid sale must do equity. Larson v. Peppard [Mont.] 99 P 136. Where holder of equitable mortgage takes tax title in violation of stipulation with mortgagor to pay taxes, the mortgagor must, in order to have the tax sale vacated, pay the mortgage, though it be barred by limitations. Teich v. San Jose Safe Deposit Bank [Cal. App.] 97 P 167.

**32.** Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531. Purchase on mortgage foreclosure of land charged with tax lien held by mortgagee as prior incumbrances could not sue to vacate tax lien without paying amount represented by tax certificate. Farmer v. Ward [N. J. Eq.] 71 A 401. In action, under Rev. Codes, § 6870, to quiet title against tax deed, where answer prayed that, if plaintiff had title, taxes paid be declared lien, such decree would be made where taxes were such that owner should have paid them. Larson v. Peppard [Mont.] 99 P 136. Where, in action to foreclose equitable mortgage, plaintiff stipulated with defendant that he would redeem from tax sale, he to be reimbursed if unsuccessful in suit, defendants could have relief where he purchased from state instead of redeeming. Teich v. San Jose Safe Deposit Bank [Cal. App.] 97 P 167. In suit to quiet title against void tax deed, where taxes are declared a lien, proper **practice in entering decree** is to order plaintiff to make such payment within reasonable time, and then enter decree quieting title otherwise to deny any relief. Larson v. Peppard [Mont.] 99 P 136.

**33.** In suit to quiet title against a void tax deed, where taxes are declared a lien, it is error to allow defendant interest on taxes paid at the rate provided, as the suit is one to redeem and only legal interest is allowable. Larson v. Peppard [Mont.] 99 P 136.

**34.** See ante, this section, subsec. B.

**35.** 2 Mills' Ann. St. § 3904, providing that on recovery from purchaser at tax sale all taxes paid shall be ascertained and paid by person recovering before he shall obtain possession, did not require tender or deposit in court before suit brought. Whitehead v. Callahan [Colo.] 99 P 57. Under Ball. Ann. Codes & St. § 5679, complaint in action for recovery of land sold for taxes must allege tender to purchaser or his assignee or, grantee of all taxes, etc., paid and such tender refused. Ryno v. Snider, 49 Wash. 421, 95 P 644. Under Ball. Ann. Codes & St. § 5679, one who sues to set aside a tax deed against another in possession must plead, or at least prove, tender of taxes, interest, and costs paid by purchaser. Nunn v. Stewart [Wash.] 100 P 1004.

**36.** A statute, requiring one claiming land sold to the state for taxes in another's name to pay the taxes before suing to recover possession, is beyond the power of the legislature. Harvey v. Hoffman, 108 Va. 626, 62 SE 371.

**37.** In suit to remove tax deed as cloud, where before suit no tender was made defendant of amount due her for taxes paid, it was error on setting aside deed to decree costs against her. Bauer v. Glos, 236 Ill. 450, 86 NE 116. Before costs in suit to set aside tax deed can be taxed against holder of deed, he must have been placed by valid tender in position of refusing to do equity. Stearns v. Glos, 235 Ill. 290, 85 NE 335.

**38.** Though assessment was valid. Buchanan v. MacFarland, 31 App. D. C. 6.

**39.** The five year statute of limitations (Kirby's Dig. Ark. § 5060) will bar an attack on sale of land in foreclosure of tax lien. Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531. Code Wash. 1881, § 2939, limiting time to bring suit to recover land sold for taxes to three years, was repealed by Act March 15, 1893, p. 385. Kraus v. Congdon [C. C. A.] 161 F 18. Action brought in 1908 to set aside tax deeds duly recorded in 1883, 1885, is barred.

case the equitable doctrine of laches may be invoked.[40] The applicability of such statutes to particular cases is a matter of construction.[41] A valid title may be acquired by limitations,[42] notwithstanding irregularities in the sale,[43] but limitations cannot be invoked in aid of a deed void on its face,[44] and, where a sale is void and the purchaser is not in possession, the legislature cannot transfer title to him by lapse of time alone.[45] The limitations as to suits to avoid a tax sale is not a curative statute, but the title thus acquired is in the nature of a prescriptive title in which the deed must constitute color of title.[46] Limitations where the state or municipality is the purchaser are treated elsewhere.[47] Limitations do not commence to run in favor of purchaser until confirmation.[48]

(§ 14) *E. Acquisition of title by state or municipality and transfer thereof.*[49]—See 10 C. L. 1834—The right of the state or municipality to purchase at tax sale[50] or to forfeit property for nonpayment of taxes is statutory, and the statutes

Strange v. Oconto Land Co., 136 Wis. 516, 117 NW 1023. Under Code 1904, p. 321, providing that suit to set aside deed under Code 1904, p. 326, must be brought within two years, purchaser must comply with all provisions of Code 1904, p. 326, in order to plead the statute. Bowe v. Richmond [Va.] 64 SE 51. Where land is sold as against life tenant, limitations do not run against remaindermen until termination of the life estate. Kohle v. Hobson [Mo.] 114 SW 952.

**40.** One who delayed for seven years to attack a tax title, knowing that another held a tax deed and was willing to adjust on reasonable terms, held estopped to assail the deed for irregularity. McFarlane v. Simpson, 153 Mich. 193, 15 Det. Leg. N. 467. 116 NW 982. Doctrine of laches will not defeat complainant's suit to set aside tax deed, where land in controversy is wild and uncultivated, neither party being in possession, and aside from paying taxes, defendant has done nothing upon land. Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531.

**41.** Limitations, under St. 1898, §§ 1188, 1189a, 1189b, for recovering land sold for taxes or to avoid tax deed, do not apply to action to annul at tax deed for fraud in proceedings. Boon v. Root, 137 Wis. 451. 119 NW 121. Laws 1903, p. 75, c. 59, requiring appeals in tax proceedings to be taken within 30 days, applies to equitable action to vacate tax foreclosure judgment, and that suit is also to quiet title is immaterial. McCausland v. Bailey [Wash.] 98 P 327. As against sales not included in deed to defendants in action to quiet title against tax sales, statute does not run against right of owner. Martin v. White [Or.] 100 P 290. Limitation prescribed by Sess. Laws 1901, p. 80, providing that validity of any sale shall not be questioned unless within two years, applies to sale and proceedings thereunder, and not to subsequent proceedings under control of tax purchaser. Flickering v. Cornwell [S. D.] 117 NW 1039. Limitation in general revenue law, fixing time within which action may be brought to recover land sold for nonpayment of taxes, applies only to deeds recorded under that law, and not to proceedings under Sess. Laws 1901, p. 51. Id. Action under Revisal 1905, § 1589, to cancel a tax deed is not an action to recover land sold for taxes within three year statute. Cauley v. Sutton [N. C.] 64 SE 3.

**42.** Where purchaser is in possession, his deed may be made basis of limitations against an action to try title. Martin v. White [Or.] 100 P 290.

**43.** Acts 1897, p. 37, c. 1, § 71, limiting suits assailing tax title to three years after sale, precludes impeachment for irregularities, but not where the sale was void because of a jurisdictional defect. Harris v. Mason [Tenn.] 115 SW 1146. Action to redeem from sale made in 1881, based on objection that assessment was made in name of W. H. F. instead of A. J. F., the rightful owner, was barred in three years. Richards v. Fuller, 122 La. 847, 48 S 285. Action against one in possession under tax deed regular on its face, but based on a void assessment, is barred in four years, under Gen. St. 1906, § 591. Florida Finance Co. v. Sheffield [Fla.] 48 S 42.

**44.** Batelle v. Knight [S. D.] 120 NW 1102. Deed void for premature issue. Fitschen v. Olson [Mich.] 15 Det. Leg. N. 1010, 119 NW 3; Martin v. White [Or.] 100 P 290. B. & C. Comp. § 3135, limiting suits to quiet title to two years from date of record of tax deed, does not reach jurisdictional defects in tax proceeding. Martin v. White [Or.] 100 P 290. Recitals of deed may be conclusive as to irregularities, but, if proceedings are void, a bar to a suit by owner must be more than mere lapse of time. He must be ousted from possession or the purchaser's title quieted. Id. Act Tenn. 1899, p. 1143, providing that tax title shall not be invalidated unless within three years after date, and not except on proof that land was not liable for taxes, will not validate title where clerk was without authority to make deed because of insufficiency of list filed by county trustee. Collier v. Goessling [C. C. A.] 160 F 604. Where a sale of state tax land is void, **laches** cannot be imputed to stranger to title in delaying 12 years before seeking to cancel the sale. Horton v. Salling [Mich.] 15 Det. Leg. N. 1114, 119 NW 912.

**45.** Must be actual possession. Martin v. White [Or.] 100 P 290.

**46.** Martin v. White [Or.] 100 P 290.

**47.** See post, this section, subsec. E.

**48.** In case of sale for overdue taxes in suit authorized by Acts Ark. 1881, p. 63. Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531.

**49. Search Note:** See Taxation, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 679.

**50.** Under Act Tenn. 1899, p. 1084, requiring county trustee to make public sale of land for delinquent taxes, and strike off to

must be complied with.[51] Statutes providing for such forfeiture are valid.[52] The scope of the forfeiture [53] and extent of title acquired by the state on purchase by it [54] rests in the terms of the statute. The title acquired by the state can be assailed only by one having a proper status to do so.[55] The right to attack the title of the state may be barred by limitations [56] or lost by laches.[57] Rights acquired by the state under an adjudication to it for taxes may be waived.[58] One who seeks to cancel a void sale of state tax lands and purchase the lands himself should be required to pay the amount paid on such sale and subsequent taxes.[59] The acquisition of title by the state is usually distinguished from ordinary tax sales.[60]

A sale by the state [61] or municipality [62] must conform to statutory requirements.

the treasurer all lands sold where there is no bid sufficient to cover taxes and costs, and file with the clerk a list showing respective amounts due on each tract, a list containing figures between lines with nothing to show that they stood for dollars and cents, and no separation of state and county taxes, was void. Collier v. Goessling [C. C. A.] 160 F 604.

51. Sale by trustee of county to state was void, where trustee failed to file in office of clerk of court a certified list of land so sold, was required by Acts 1897, p. 34, c. 1, § 63. Harris v. Mason [Tenn.[ 115 SW 1146. Such defect could not be cured by filing such list after the property had been sold to an individual purchaser. Id. Where land was returned delinquent and the state bid it in at annual sale in 1893, under the tax law then in force, the state acquired absolute title. Haney v. Miller, 154 Mich. 337, 15 Det. Leg. N. 592, 117 NW 71. Rev. Laws, § 936, is a revision of Gen. Laws 1902, § 52, ch. 2, and reference to lands forfeited under § 936 is in legal effect a reference to lands forfeited under the laws of 1902. Minnesota Debenture Co. v. Scott, 106 Minn. 32, 119 NW 391. Form of certificate prescribed by attorney general for the forfeited sale in 1906 is valid. Id.

52. Art. 13, § 6, of Const., forfeiting land for nonentry on tax books, is valid. State v. King [W. Va.] 63 SE 468. If title is taken by the state subject to redemption, it cannot be said that a party is divested of title without **due process of law.** Mich. Pub. Laws 1897, Act No. 229, held valid. Rusch v. John Duncan L. & M. Co., 211 U. S. 526, 53 Law. Ed. —.

53. Under early Virginia statutes, applicable to subject, forfeiture of particular land title for nonpayment of taxes assessed upon land of nonentry thereof upon books of commissioner was complete, embracing whole title. State v. King [W. Va.] 63 SE 468; State v. King [W. Va.] 63 SE 495. Acts 1838, p. 21, c. 8, § 17, providing that interest of state in lands forfeited should vest in trustee, held to vest in such trustee complete original title of lands forfeited to state for nonpayment of taxes, except as therein provided. State v. King [W. Va.] 63 SE 468.

54. Under Pol. Code, § 3788, providing that deed to state conveys absolute title as of 5 years from date of sale, sale vests equitable and deed the legal title in the state, and the owner after five years forfeite all rights except to redeem under § 3817 before the state sells or enters. Young v. Patterson [Cal. App.] 99 P 552.

55. Where state claims title under tax deed, defendant in ejectment cannot dispute state's title without showing that he was owner at the time of assessment, or holds under one who was owner. People v. Bain, 60 Misc. 253, 113 NYS 27. Where owner contracted to convey which contract was assigned, assignee could assail title of state claimed under tax title. Id.

56. Where the state took title to land under deed from the comptroller, Laws 1896, p. 841, c. 908, operated as a statute of limitations to cure any errors in the assessment against the former owner which might have been cured under such laws. People v. Bain, 60 Misc. 253, 113 NYS 27; People v. Pulver, 60 Misc. 256, 113 NYS 139. Three years' limitation of Code 1880, § 539, cannot be invoked by pendente lite purchaser. McLemore v. Anderson [Miss.] 47 S 801, afg. on rehearing [Miss.] 43 S 878. Purchaser of void title from state could not invoke limitations prescribed by Laws 1860, such limitations having been waived by Laws 1888, p. 42, § 5. Id.

57. Original owners may not quiet title against a purchaser because the deed from state shows that less than three weeks notice of sale was given, where suit was brought 12 years after the sale and it appeared that they were unwilling to pay the amount for which the land was sold. Flannigan v. Towle [Cal. App.] 96 P 507.

58. The state is bound by acts of its taxing officers in placing property previously adjudicated to the state for taxes, on the rolls for succeeding years, and receiving taxes from the debtor in possession, and such acts are considered a waiver by the state of the prior adjudication. Gauthreaux v. Theriot, 121 La. 871, 46 S 892.

59. Horton v. Salling [Mich.] 15 Det. Leg. N. 1114, 119 NW 912.

60. In proceedings to sell lands for taxes, an order of chancery court to commissioner "to execute deeds to purchasers, conveying only such title as the decree or decrees were competent to pass," held not to apply to lands struck off to the state, as appeared from fact that state was not required to and did not pay tax commissioner amount of tax liens adjudged, and, instead of deed to state as was required to be given individual purchasers, there was merely provision for a certificate by the commissioner to the clerk of the county, whose duty it was to send copy to certain state officers. Indiana & Arkansas Lumber & Mfg. Co. v. Milburn [C. C. A.] 161 F 531.

61. Where on sale of state tax land the auditor general accepted 6 per cent interest on state's claim, instead of 1 per cent. per month, as required by Pub. Acts 1893, p. 16, No. 16, § 74, the sale is void. Horton v. Salling [Mich.] 15 Det. Leg. N. 1114, 119 NW

A grantee of the state of lands forfeited acquires only the rights of the state,[63] but he acquires all rights then held by the state,[64] and his deed is prima facie evidence of title,[65] but, where he seeks to quiet title, he has the burden of proof.[66] A sale by the state is complete when the purchase price is paid.[67] A tax deed from the state conveying delinquent state tax lands can receive no other construction than a deed between private persons.[68] Where the state actually has title, its deed is not invalidated by a misrecital of the date of the sale at which such title was acquired.[69]

§ 15. *Inheritance and transfer taxes. A. Nature of and power to impose.*[70]—See 10 C. L. 1837—An inheritance tax is not a tax on the property but upon the privilege of inheriting the same [71] and hence is not subject to constitutional limitations

912. A county auditor has authority, under Rev. Laws 1905, § 935, to execute a state assignment certificate for lands sold at regular delinquent tax sale after more than three years from date of the sale and before proceedings to sell under §§ 936, 937, Rev. Laws 1905, have been initiated in any one year. State v. Scott, 105 Minn. 69, 117 NW 417.

**62.** Code 1887, § 666, amended by Code 1904, p. 326, and Code 1904, pp. 311, 313, 324, construed with reference to the charter of the city of Richmond, under which property was bid off for nonpayment of city taxes and held to authorize sale for taxes only upon payment of city as well as state taxes. Bowe v. Richmond [Va.] 64 SE 51. Where, after land was sold to a city for prior taxes, a person purchased at subsequent tax sale, and the city conveyed to him on receipt of amount of taxes due on its lien, such transaction constituted payment of prior taxes and to that extent the conveyance was not void. Rogers v. Lynn, 200 Mass. 354, 86 NE 889.

**63.** Grantee in void commissioner's deed of land forfeited for taxes, who subdivided and platted the land and paid taxes on it as platted, held to have no title and did not, under Laws 1899, p. 133, cut off rights of the true owner. Morris v. Breedlove [Ark.] 116 SW 223. Purchaser from state did not acquire equitable title, where on sale to state county trustee did not file with clerk of court certified list of lands, as required by Acts 1897, p. 34, c. 1, § 63. Harris v. Mason [Tenn.] 115 SW 1146.

**64.** Deed from state conveying delinquent state tax lands subject to statutory right of owner to redeem conveys absolute title of state subject to such right. Haney v. Miller, 154 Mich. 337, 15 Det. Leg. N. 592, 117 SW 71. Sale of land as forfeited under decree passes to purchaser all interest vested in the state by forfeiture. State v. King [W. Va.] 63 SE 468. Transfer to other claimants made by Const. art. 13, § 3, and also conveyance under sale in suit to sell land as forfeited, constitute grants of state and create new titles. Id. Under Code 1906, §§ 3513, 3535, lands once sold as forfeited for nonentry on tax books, or transferred to junior claimants by constitution, cannot be again sold by state unless title so sold has been forfeited. State v. King [W. Va.] 63 SE 468; Id. [W. Va.] 63 SE 495. Lands once sold by state, under Code 1906, §§ 3513-3535, being again involved in suit in which it appears that title originating at first sale is again in state for failure to redeem, but that taxes have in fact been paid, are properly dismissed from suit. State v. King [W. Va.] 63 SE 495. Though failure of former owner of land conveyed by defective deed to keep land taxed in his own name and pay taxes for five years works forfeiture of title, the deed is conclusive against state that title is in tax grantee and state cannot sell the land as forfeited. State v. West Branch Lumber Co. [W. Va.] 63 SE 372; State v. Snyder [W. Va.] 63 SE 385. Though statute does not mention state as one of persons concluded, it must be construed as including it. State v. Snyder [W. Va.] 63 SE 385. Express saving in § 29, in favor of state, county and municipal corporations, does not confer upon state power to set aside deed for purpose of availing herself of forfeiture of former owner's title, but only to enforce any lien has for taxes. Id. Code 1906, § 888, by estopping state from proceeding against grantee in defective tax deed to enforce forfeiture in name of former owner, grants such forfeited title to such grantee in advance of accrual of forfeiture. State v. West Branch Lumber Co. [W. Va.] 63 SE 372; State v. Snyder [W. Va.] 63 SE 385.

**65.** Commissioner's deed of land forfeited for taxes is prima facia evidence of title. Morris v. Breedlove [Ark.] 116 SW 223.

**66.** One who seeks to quiet title in himself by virtue of a deed from the commissioner of state lands, conveying land forfeited for taxes and in his possession, has the burden to show title. Morris v. Breedlove [Ark.] 116 SW 223. Where lands were forfeited to state in 1882 and sold by void sale and in 1906 one received a donation certificate from the state and built a house in 1907, but only lived on it seven days prior to February, 1907, held, as he had no deed and was not entitled to one, he could not sue to quiet title, he having none. McDaniel v. Berger [Ark.] 116 SW 194.

**67.** Sale on proper notice by the state of land sold to it for taxes is complete when purchase money is paid; delivery of deed is not essential. Young v. Patterson [Cal. App.] 99 P 552.

**68.** Grantee is entitled to performance of conditions therein named. Haney v. Miller, 154 Mich 337, 15 Det. Leg. N. 592, 117 NW 71.

**69.** McLemore v. Anderson [Miss.] 47 S 801, afg. on rehearing [Miss.] 43 S 878. Mere proof of a sale prior to date of sale recited is not proof of misrecital. Id.

**70. Search Note:** See notes in 6 L. R. A. (N. S.) 732; 8 Id. 1180, 1210; 9 Id. 121; 16 Id. 329; 1 Ann. Cas. 30; 2 Id. 608; 6 Id. 579; 7 Id. 1061; 8 Id. 159, 218.

See, also, Taxation, Cent. Dig. §§ 1673-1677; Dec. Dig. §§ 857-862; 27 A. & E. Enc. L. (2ed.) 337.

**71.** In re Fox's Estate [Mich.] 15 Det. Leg.

applicable to property taxes.[72] Statutes providing for the tax must, however, con-

N. 674, 117 NW 558. Transfer tax is not property tax but an excise tax. In re Keeney's Estate, 194 N. Y. 281, 87 NE 428.

72. Constitutional requirements of equality and uniformity do not apply. In re Fox's Estate [Mich.] 15 Det. Leg. N. 674, 117 NW 558. Is not tax on property within Const. § 171, requiring uniformity. Booth's Ex'r v. Com. [Ky.] 113 SW 61. If it be a "special or excise" tax required to be uniform by Const. § 181, Acts 1906, p. 240, c. 22, satisfies rule as to uniformity. Id. Imposition of an inheritance tax (N. Y. Laws 1887, c. 713) upon certain bequests by nonresident decedent owning both real and personal property within the state is valid and does not deny equal protection of the laws. Lord v. Glynn, 211 U. S. 477, 53 Law. Ed. 290. Certain classes or objects may be singled out for taxation, leaving other classes exempt or at different rate providing that classification is not so purely arbitrary as to leave no reason to justify it. In re Keeney's Estate, 194 N. Y. 281, 87 NE 428. Transfer tax law imposing tax on transfer of property intended to take effect after death of donor is not void as providing an unreasonable classification. Id. Pub. Acts 1903, p. 277, exempting transfers of personalty to lineal heirs where value is less than $2,000, and taxing entire transfer where personalty is worth more, is not illegal classification. In re Fox's Estate [Mich.] 15 Det. Leg. N. 674, 117 NW 558.

**NOTE. Constitutional law—Inheritance tax—Due Process of law:** A. executed deeds in the nature of marriage settlements, conveying certain real and personal property to trustees, in trust, to pay income to his daughter D. for life, with remainder to her issue in fee; and giving her the power, in her discretion, to appoint the remainder "amongst her issue or heirs, in such manner and proportions as she may appoint by instrument in its nature testamentary, to be acknowledged by her as a deed, and in the presence of two witnesses, or published by her as a will." D. died, and by will she exercised the power of appointment in favor of the plaintiffs in error. The state of New York attempted to levy a transfer tax upon the interest appointed by D., under the Laws of N. Y. 1897, c. 284, which provide that when a person shall exercise a power of appointment derived from any disposition of property, such appointment shall be deemed a transfer, taxable in the same manner as though the property belonged absolutely to the donee of the power, and had been bequeathed or devised by such donee by will. Payment of the tax was resisted on the ground that the statute is unconstitutional because it deprives a person of property without due process of law, and because the reduction of the estate resulting from the imposition of the tax impairs contract obligations. Held, (1) that the tax is a transfer tax and, as such, within the taxing power of the state; (2) that no contract is impaired. (Holmes and Moody, JJ., dissent.) Chanler v. Kelsey, 205 U. S. 466, 51 Law. Ed. 882..

Inheritance taxes levied by the states are upheld on the ground that they are succession taxes and that a state has the power to control the devolution of property by will. Plummer v. Coler, 178 U. S. 115, 44 Law. ed. 998; Murdock v. Ward, 178 U. S. 139, 44 Law. Ed. 1009; In re Swift, 137 N. Y. 77, 32 NE 1096, 18 L. R. A. 709; United States v. Perkins, 163 U. S. 625, 41 Law. Ed. 287; United States v. Fox, 94 U. S. 315, 24 Law. Ed. 192; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 Law. Ed. 1037; Billings v. Illinois, 188 U. S. 97, 47 Law. Ed. 400; Campbell v. California, 200 U. S. 87, 50 Law. Ed. 382; In re Davis, 149 N. Y. 539, 44 NE 185; Cahen v. Brewster, 203 U. S. 543, 51 Law. Ed. 310; Snyder v. Bettman, 190 U. S. 249, 47 Law. Ed. 1035; In re Gould Estate, 156 N. Y. 423, 51 NE 287. It was contended, however, that in this case the tax was not levied on a succession to property and that the appointee did not take under the power because the estate takes effect as if it had been created by the deed which raised the power. Wash. Real Prop., p. 320; 4 Kent Comm., p. 327; Christy v. Pulliam, 17 Ill. 59; Silvers v. Canary, 109 Ind. 267, 9 NE 904; Bradish v. Gibbs, 3 Johns Ch. [N. Y.] 523. If such is the case, the vesting of the property did not depend upon the state's permission, and consequently the state had no authority to levy a succession tax. The estate created by the deed would then be a contingent remainder, the vesting of which the state would be unable to tax. In re Pell's Estate, 171 N. Y. 48, 57 L. R. A. 540, 63 NE 789, 89 Am. St. Rep. 791; In re Seaman, 147 N. Y. 69, 41 NE 401. It was urged, furthermore, in objection to the tax, that any instrument "in its nature testamentary" would be a sufficient exercise of the power, and so if the writing were void as a will, nevertheless it might be a valid appointment. Therefore, because the laws of New York in respect to wills did not give validity to the exercise of the power, the appointment, although made in the form of a will, should not be considered as such for the purposes of taxation. In re Lansing's Estate, 182 N. Y. 238, 74 NE 882; In re Stewart, 131 N. Y. 274, 30 NE 184, 14 L. R. A. 836. The two cases last named can be distinguished from the principal case, since in those cases the persons appointed by will under the power were those who would have received the property if the power had not been exercised; while in this case the plaintiffs were forced to resort to the will in order to take the property. The New York courts have invariably held that when there is a valid will which the appointee is obliged to accept in order to take the property, such appointee takes under the power and not under the instrument that created the power. In re Vanderbilt's Estate, 50 App. Div. 246, 63 NYS 1079; In re Seaver, 63 App. Div. 283, 71 NYS 544. The N. Y. Court of Appeals say this doctrine that the grantee under a power of appointment takes under the instrument which raises the power is a mere fiction of law and in substance it is the execution of the power that gives the grantee his property. In re Dows, 167 N. Y. 227, 60 NE 439, 88 Am. St. Rep. 509, 52 L. R. A. 433. The U. S. Supreme Court reviewing this decision held that the determination of the New York courts that the grantees of the reversion take under the power is not subject to review in so far as it involves a construction of the will and statutes. Orr v. Gillman,

form to such constitutional requirements as are applicable to them.[73] Municipal power to levy an inheritance tax is conferrable only by express grant,[74] but such a tax may be imposed by the legislature, without express, constitutional grant,[75] as an incident to the statutory right to inherit.[76] Statutes imposing such taxes are generally held to be prospective only.[77]

(§ 15) *B. Successions and transfers taxable and place of taxation.*[78]—See 10 C. L. 1887—The scope and applicability of statutes imposing the tax are necessarily matter of construction[79] as are also exemptions therefrom,[80] but, where the act

183 U. S. 278, 46 Law. Ed. 196. It seems, therefore, that the New York statute is valid in so far as the appointment is exercised by will, but the courts have hesitated to commit themselves as to what would be their decision if the power were exercised by deed. The contention that the law impaired the obligation of contract was disposed of summarily by showing that the remainderman had no contract with the donor or with the state, and that the state is not deprived of its sovereign right to exercise the taxing power upon the making of a will in the future by which the estate was given to the appointee.—From 6 Mich. L. R. 78.

**73.** Law taxing all property passing by will is not, where applied to surviving wife's share of community property, a violation of Const. of 1849 or 1879, or U. S. Const. art. 1, § 10, or 14th amendment, since Const. 1849, art. 11, § 14, requiring legislature to pass laws defining wife's right to community property and the laws passed make such right a mere expectancy. In re Moffitt's Estate, 153 Cal. 359, 95 P 1025

**74.** Under Code 1904, § 1043, authorizing towns and cities to levy taxes, they have no power to levy a collateral inheritance tax. Town of Wytheville v. Johnson's Ex'rs, 108 Va. 589, 62 SE 328.

**75.** Power to tax is a legislative one and legislature may impose an inheritance tax if the constitution does not prohibit it, even if it does not expressly authorize it. Booth's Ex'r v. Com. [Ky.] 113 SW 61.

**76.** Right to take property by inheritance or bequest is statutory one and may be regulated by statute and subjected to tax. Booth's Ex'r v. Com. [Ky.] 113 SW 61. Privilege of receiving by inheritance is basis of tax law and legislature measures burden by privileges conferred and not by the laws of another state. Succession of Westfeldt, 122 La. 836, 48 P 281.

**77.** Const. 1898, art. 235, and Act No. 109, p. 173, 1906, imposing an inheritance tax do not extend back to conditions anterior to the constitution. Succession of Westfeldt, 122 La. 836, 48 S 281. Statutes held not to apply to estate which vested before tax statute was enacted. In re Haggerty, 128 App. Div. 479, 112 NYS 1017.

**78. Search Note:** See 6 C. L. 1658, 1659; 4 L. R. A. (N. S.) 953; 9 Id. 1104; 10 Id. 1089; 41 A. S. R. 580; 1 Ann. Cas. 30, 239; 5 Id. 874; 6 Id. 572, 579; 8 Id. 159; 10 Id. 1036; 11 Id. 119, 143.

See, also, Taxation, Cent. Dig. §§ 1679-1712; Dec. Dig. §§ 863-891; 27 A. & E. Enc. L. (2ed.) 342.

**79. Transfers held taxable:** Transfer of certain corporate stock pursuant to sale on foreclosure held taxable under Laws 1905, p. 474, amended by Laws 1906, p. 1008, c. 414, imposing tax on such transfers. Glynn v. Conklin, 127 App. Div. 473, 111 NYS 111. **Money received by legatee on compromise of will contest** held by divided court subject to tax imposed by Code Supp. § 1467b. In re Wells' Estate [Iowa] 120 NW 713. **Gifts in contemplation of death** within Laws 1892, p. 814, are not limited to gifts causa mortis but include gifts inter vivos made in view of death. In re Price's Estate, 62 Misc. 149, 116 NYS 283. Conveyances by man 76 years of age and feeble held taxable. Id. Where preceding gift of corporate stock donor had disclosed purpose to reduce his estate by gifts so as to defeat possibility of stepson getting any of his property, and made other gifts and died shortly afterwards, the gift was within the statute. In re Benton's Estate, 234 Ill. 366, 84 NE 1026. One who deposits his own money in bank in trust for his children makes gift to take effect only at his death. In re Barbey's Estate, 114 NYS 725. **Deposit in trust** for another made by decedent with his own money. In re Rosenberg's Estate, 114 NYS 726. Money deposited by one in his own name as trustee for his son held a gift to the son which did not take effect until after the death of the father. In re Pierce's Estate, 60 Misc. 25, 112 NYS 594. **Land passed by deed** intended to take effect after the grantor's death. Lamb's Estate v. Morrow [Iowa] 117 NW 1118. **Surviving wife's share of community property** is subject to tax imposed by St. 1905, p. 341, c. 314, since she takes as heir and not as survivor. In re Moffitt's Estate, 153 Cal. 359, 95 P 653. **Bequest to foreign cemetery association,** interest to be used in keeping testator's lot in good condition. In re Fay's Estate, 62 Misc. 154, 116 NYS 423. Tax is not imposed on estate but upon its transfer and must be paid before it can become property of beneficiary, and hence argument that it is against public policy to levy tax on **funds devised to public school** is not applicable. Leavell's Adm'r v. Arnold [Ky.] 115 SW 232.

**Transfers held not taxable.** Under Acts 1893, p. 374, c. 174, imposing tax on all estates passing by will, inheritance or deed, made in contemplation of death, deeds executed by widow and sole devisee, under will in consideration of withdrawal of contest. English's Estate v. Crenshaw [Tenn.] 110 SW 210. **Money received on compromise of will** contest held not subject to the tax imposed by Code Supp. 1907, § 1467b. In re Wells' Estate [Iowa] 120 NW 713. **Joint deposit** made up of sums given decedent by his wife. In re Rosenberg's Estate, 114 NYS 726. **Estate devolving upon adopted children** held one falling to persons who by law are given the status of descendants and being of less value than $10,000 is not

makes no exception, all transfers are taxable.[81] The statute cannot be evaded by transactions made with apparent intent to evade it.[82]

*Powers of appointment.*[See 10 C. L. 1838]—Where the will of the donee of the power neither adds to nor takes, from any of the final beneficiaries, the benefits which the original will confers, such beneficiaries are not liable to the tax as taking under the will of the donee,[83] and so, also, where the beneficiary elects to take under the original the transfer by the donee of the power is not taxable,[84] but the rule is otherwise where the final beneficiaries take by virtue of the donee's will.[85]

liable to tax under Act No. 45, p. 102 of 1904. Succession of Frigalo [La.] 48 S 652. **Where legacy is waived** by collateral legatee, state cannot collect collateral inheritance thereon. Morrow v. Durant [Iowa] 118 NW 781.

**80.** Laws 1907, p. 432, c. 68, held to amend and not to repeal Laws 1905, p. 66, c. 40, and to restrict exemptions within narrower bounds. Carter v. Whitcomb, 74 N. H. 482, 69 A 779.

**Held exempt:** Under Acts 1893, p. 347, c. 174, § 1, exempting **transfers to use** of father, mother, etc., where under laws of place of decedent's domicile the property passed to his mother, it was not taxable, though under the law of Tennessee it would have passed to a brother. Fidelity & Deposit Co. v. Crenshaw [Tenn.] 110 SW 1017. Laws 1905, p. 432, c. 40, § 1, imposing tax on property passing by will excepting **gifts to charitable, educational and religious societies,** whose property is exempt from taxation, exempts gift to such institution whose property used for such purpose is exempt from taxation, though it also owns non-exempt property. Carter v. Whitcomb, 74 N. H. 482, 69 A 779. Church organization and societies connected with it are charitable institutions within Laws 1905, p. 432, excepting gifts to charitable institutions from the tax. Id. Young Woman's Christian Association incorporated to hold gospel services and teaching English to foreigners and furnishing hotel accommodations and charging those who are able to pay is a charitable institution within such law. Id. Home for aged women, which requires beneficiaries to turn over to it their property, and requires an admission fee, is a charitable institution. Id. Metropolitan museum of art is educational corporation within Laws 1896, p. 869, c. 908, amended by Laws 1905, p. 829, c. 368. In re Mergentime, 129 App. Div. 367, 113 NYS 948. Where testator died after Laws 1905, p. 827, amending Laws 1896, p. 868, exempting devises to "charitable, benevolent or religious societies legacies to Young Men's Christian Association, Young Women's Christian Association and society for prevention of cruelty to children" was exempt. In re Moses' Estate, 60 Misc. 637, 113 NYS 930. Under Act July 10, 1901 (P. L. 639), an **inheritance of an illegitimate child** from its mother is not liable for the inheritance tax thereon. Commonwealth v. Mackey [Pa.] 72 A 250. Title to Act July 10, 1901 (P. L. 639) gives sufficient notice of exemption from inheritance tax on estates passing to illegitimate children from their mother. Id. **Devise to widow of adopted son** held devise to "widow of the son" within Laws 1896, p. 869, c. 908, and not subject to tax. In re Duryea's Estate, 128 App. Div. 205, 112 NYS 611.

**Held not exempt:** Home missionary society connected with church and whose funds were used almost wholly in charities outside state, held not charitable institution within Laws 1905, p. 432, excepting gifts to such institutions. Carter v. Whitcomb, 74 N. H. 482, 69 A 779. Foreign missionary society raising funds to assist in conversion of people living in remote parts of earth. Id. The state is not charitable institution and does not authorize its representatives to expend public money by exemptions from taxation for purposes having no relation to welfare of its own people. Id.

**81.** Act makes no exception in favor of legatees indebted to estate or charitable or religious institutions. Leavell's Adm'r v. Arnold [Ky.] 115 SW 232.

**82.** Owner cannot defeat tax by device securing to him for life the income and profits or enjoyment. Lamb's Estate v. Morrow [Iowa] 117 NW 1118.

**83.** Estate created by will held vested remainder not subject to tax, notwithstanding exercise of optional power of appointment. In re Chapman's Estate, 61 Misc. 593, 115 NYS 981. Will and contract to devise construed and devisee under a second will made pursuant to contract to devise held to take under the first will so as to exempt him from the tax imposed subsequent to taking effect of the will. Winn v. Schenck, 33 Ky. L. R. 615, 110 SW 827.

**84.** Where children elected to take under will of grandfather instead of appointment exercised by their mother, such property was not taxable. In re Lewis' Estate, 60 Misc. 643, 113 NYS 1112.

**85.** Where testator devised all his property to his wife with power to dispose of it by will or otherwise but if she did not exercise power the estate should pass to her heirs; she took absolute estate and on her death the estate was subject to the tax statute enacted subsequent to her husband's death. Commonwealth v. Stoll's Adm'r [Ky.] 116 SW 687. Where decedent's father provided that on her death his executors should transfer property held in trust for her to her issue as she should appoint, and she exercised such power of appointment, the transfer was taxable. In re Lewis' Estate, 60 Misc. 643, 113 NYS 1112. Where will provided that estate should vest in trustees for testatrix's children for life and if child died trustees should transfer her share according to will of such child, where a child died leaving her share to her husband, it was taxable. In re Lowndes' Estate, 60 Misc. 506, 113 NYS 1114.

*Place of taxation.*[See 10 C. L. 1838]—While the residence of decedent is generally determinative of the place of taxation,[86] the tax attaches to all transfers within the category of the statute, regardless of his residence[87] but not, of course, to transfers not within its terms.[88]

**86.** Where nonresident testator directed his executors to sell his land, the proceeds of the sale of land in Pennsylvania were not subject to inheritance tax in that state as it was converted into personalty, the situs of which was within the state of his domicile. In re Shoenberger's Estate, 221 Pa. 112, 70 A 579.

**87.** Negotiable instrument secured by real estate in state of which decedent was resident at time of his death is taxable if located in New York. In re Gibb's Estate, 60 Misc. 645, 113 NYS 939. Under Laws 1905, p. 432, c. 40, imposing inheritance tax on all property passing by will, whether belonging to inhabitants of the state or not, a tax may be imposed on shares of a domestic corporation owned by a nonresident decedent. Gardiner v. Carter, 74 N. H. 507, 69 A 939. Stock in New Jersey corporation belonging to testator domiciled in Monico is not subject to tax imposed by 3 Gen. St. 1895, p. 3339, levying the tax on all property which shall be within this state transferred, as the act applies to general succession to the whole estate and not to the particular succession to special portion of it. Astor v. State [N. J. Err. & App.] 72 A 78. Under transfer tax law that property transferred in this state by a resident thereof in trust was in another state at the time of the grantor's death with the legal title in the trustee did not affect the liability of the transfer to the tax. In re Keeney's Estate, 194 N. Y. 281, 87 NE 428. Ground on which collection of inheritance tax by state of locus of property, when different from that of testator's domicile, is sustainable, is jurisdiction over property which is given by situs. Kingsbury v. Bazeley [N. H.] 70 A 916.

**NOTE. Property of a nonresident decedent under the New York Transfer Tax Act:** Legislatures in taxing the privilege of acquisition by will or inheritance, see 7 Columbia L. R. 293, commonly include transfers from a nonresident decedent, of property within the state. Cf. N. Y. Laws 1896, c. 908, § 220, 1; see State v. Dalrymple, 70 Md. 294, 17 A 82, 3 L. R. A. 372. Although such statutes are generally regarded as imposing a tax not on the estate but on the succession (In re Swift, 137 N. Y. 77, 32 NE 1096. 18 L. R. A. 709; In re Merriam's Estate, 141 N. Y. 479, 36 NE 505; In re Wolfe's Estate, 89 App. Div. 349, 85 NYS 949, afd. 179 N. Y. 599, 72 NE 1152), it has been said that the assessment as to a nonresident's personalty cannot be on the succession (In re Bishop's Estate, 82 App. Div. 112, 81 NYS 474), since personalty passes by the law of the domicile. But as foreign law operates only by consent of the sovereign in whose territory the property has its actual situs, Story, Confl. of Laws, §§ 18, 550, the local transfer tax is really a condition precedent to the succession under the lex domicilii. That double taxation may result is no controlling objection. Blackstone v. Miller, 188 U. S. 189, 47 Law. Ed. 439; see Greves v. Shaw, 173 Mass. 205, 53 NE 372.

The earliest Transfer Tax Act in New York, Laws 1885, c. 483, was construed, by a divided court, not to cover the personalty of a nonresident. In re Enston's Will, 113 N. Y. 174, 21 NE 87, 3 L. R. A. 464. The defect was cured by a change of phrase, Laws 1887, c. 713, § 1 (In re Romaine, 127 N. Y. 80, 27 NE 759, 12 L. R. A. 401), but it later appeared that adequate procedure had not been provided. In re Embury, 19 App. Div. 214, 45 NYS 881, afd. 154 N. Y. 746, 49 NE 1096. A line of decisions under the statute as next materially amended, however, at once established an aggressive interpretation. Thus, on the ground of the protection accorded either directly or to the ultimate assets represented (Callahan v. Woodbridge, 171 Mass 595, 597, 51 NE 176), "property within the state" was construed to embrace certificates of stock of domestic corporations, though kept by the nonresident decedent at his domicile (In re Bronson's Estate, 150 N. Y. 1, 44 NE 707, 55 Am. St. Rep. 632, 34 L. R. A. 238), bonds both of foreign (In re Morgan's Estate, 150 N. Y. 35, 44 NE 1126), and of domestic corporations, if deposited in New York (In re Whiting's Estate, 150 N. Y. 27, 44 NE 956, 55 Am. St. Rep. 640, 34 L. R. A. 332, and a New York bank account. In re Houdayer's Estate, 150 N. Y. 37, 44 NE 718, 55 Am. St. Rep. 642, 34 L. R. A. 235. And the steady course of enactment and of interpretation has ever since been towards enlarging the scope of the statute. In re Gordon's Estate, 186 N. Y. 471, 483, 79 NE 722. Contrast In re Phipps, 77 Hun [N. Y.] 325, 28 NYS 330, afd. 143 N. Y. 641, 37 NE 823, and In re Clinch's Estate, 180 N. Y. 300, 302, 73 NE 35; In re Daly's Estate, 100 App. Div. 373, 91 NYS 858, afd. 182 N. Y. 524, 74 NE 1116.

This tendency is well illustrated by a recent court of appeals decision. In re Ramsdill's Estate, 190 N. Y. 492, 83 NE 584, 18 L. R. A. (N. S.) 946. A resident of Massachusetts, dying intestate, left personalty both there and in New York. One group of distributees fell within the exemptions of the New York statute. 3 R. S. Tax Law, § 221. It was unanimously held that the Massachusetts administrator could not deprive the state of its pro rata tax on the succession of the nonexempt distributees, by paying them out of Massachusetts assets and applying the New York property wholly towards the satisfaction of the shares of the exempts. The theory was that the status both of the distributees and of the state under the Transfer Tax Act became fixed instantly at the intestate's death. In re Westurn's Estate, 152 N. Y. 93, 102, 46 NE 315. The various views to the effect that an intestate's personal estate is until the grant of administration in abeyance (Brown v. Bibb, 2 Cold. [Tenn.] 434, 437; McNearman v. Maxfield, 38 Ark. 631, 636), or for certain purposes in the administrator by relation back (Com. Dig., tit. Adm. B. 10; Babcock v. Booth, 2 Hill [N. Y.] 181; 1 Williams, Ex'rs. [7th Am. Ed.] 760), or in the custody of the law (Bartlett v. Hyde, 3 Mo. 490).

or more specifically, in the probate judge, 21 & 22 Vict. c. 95, § 19, concern the immediate legal title, and under modern law at least, in no respect the beneficial interest. The ownership of the administrator is of course purely temporary and special. Ledyard v. Bull, 119 N. Y. 62, 72, 23 NE 444; Schouler, Ex'rs & Adm'rs, § 242; Pom. Eq. Jur. § 1088. His legal title will not necessarily be enforced against the distributees, standing on their equitable rights, when there are no debts. Richardson v. Cole, 160 Mo. 372, 61 SW 182, 83 Am. St. Rep. 479. Friendly settlements without administration have been often upheld. Babbitt v. Bowen, 32 Vt. 437; In re Losee, 119 App. Div. 107, 104 NYS 1132. Some courts have even recognized a direct legal title in the distributees, loosely describing them as tenants in common. Hyde v. Stone, 7 Wend. [N. Y.] 354, 357, 22 Am. Dec. 582; Herrington v. Lowman, 22 App. Div. 266, 47 NYS 863. A distributee's interest pending administration is subject to "trustee process" (Wheeler v. Wheeler, 20 Pick. [Mass.] 563), and if he dies before distribution his share goes to his representatives. Moore v. Gordon, 24 Iowa, 158. Distribution merely ascertains rights which have already vested. Kingsbury v. Scovill, 26 Conn. 349; Perryman v. Greer, 39 Ala. 133. Although these rights do not attach to any specific property (Pritchard v. Norwood, 155 Mass. 539, 30 NE 80), a distributee takes a beneficial interest in the whole mass of personalty; that liquidation is the common practice does not mean that his interest is merely a claim for a sum of money. Cooper v. Cooper, L. R. 7 Eng. & Ir. App. Cas. 53; cf. Brown v. Bibb, supra. It follows that in the principal case, at once upon the intestate's death, each distributee, exempt and non exempt alike, took a pro rata interest in the New York personalty. Since the state's right to the transfer tax attached at the same instant, beyond the power even of the legislature to divest (In re Lander's Estate, 6 Cal. App. 744, 93 P 202), the administrator's later apportionment could not affect the statutory liability.

The administrator's contention in the principal case had been granted below, without opinion, on the authority of In re James, 144 N. Y. 6, 38 NE 961, where the executor was allowed to avoid the New York tax on a nonexempt legatee by similarly marshalling assets. The appellate division was unanimously reversed, on the ground of the "obvious distinction between testacy and intestacy." What that distinction may be does not appear. That the executor's title passes at once by the will and the administrator takes only by virtue of his later appointment, is immaterial. Touchst., 474. The title of the former is as purely administrative as the latter's. Lane v. Albertson, 78 App. Div. 607, 619, 79 NYS 947. In general there is no difference between their rights, duties and powers. 1 Williams, supra, 775; Shoenberger's Ex'rs. v. Savings Inst'n, 28 Pa. 459, 466; Redf., Surr. Pr. (6th Ed.) 515. Such differences as may exist, see 6 Columbia L. R. 15, concern their dealings with third parties, not the beneficiaries. See Minor, Confl. of Laws, § 116. And a general legatee, like a distributee, simply takes a pro rata share in the whole residual personal estate. Cf. Kingsbury v. Chapin, 196 Mass. 533, 82 NE 700, 702. That the state's right to the tax is fixed at the instant of death, as argued in the principal case, has been repeatedly held also where decedent was testate. Assessment may be made before probate. People v. Barker, 150 N. Y. 52, 44 NE 785. The assignment of a residuary legacy to an exempt legatee before administration cannot change its taxability. In re Cook's Estate, 187 N. Y. 253, 79 NE 991. Where a legatee died within three days of the testator, his share was notwithstanding subject to the tax. In re Borup's Estate, 28 Misc. 474, 59 NYS 1097. The value at the testator's death, not that at the time of transfer of actual possession, controls the appraisal of a bequest. In re Davis's Estate, 149 N. Y. 539, 44 NE 185; In re Sloane's Estate, 154 N. Y. 109, 47 NE 978.

This discrepancy of result may best be explained by the advance in the court's attitude towards the scope of the statute with respect to nonresidents, since the date of In re James, supra, and in failing frankly to overrule that case the court of appeals, it is submitted, as observed a distinction between testacy and intestacy which seems unfounded in logic or justice. That no such distinction exists appears even to have been urged in an earlier decision under the statute by one of the judges concurring in the principal case. In re Romaine, supra, 85. Later adjudications may be expected to refine the present apparent difference. Such a disposition is indicated by the terms in which In re James, supra, is in the principal case expressly affirmed. Though the reported facts give no clear warrant for such interpretation, In re James is described as holding that the tax may be avoided where a specific legatee of a foreign testator can obtain satisfaction of his legacy in a foreign jurisdiction. Clearly, to exact through the executor a tax on a specific legacy of designated foreign property merely because unrelated portions of the same estate lie within the taxing state, would be in effect an exercise of sovereignty beyond the jurisdiction. A distinction between intestacy and testacy broadly, is unsound; but the application of the doctrine expressed in In re James, supra, to cases of specific legacies of foreign property is both logical and just. Such limitation will bring consistency, both in legal principle and in practical administration, into the inheritance tax law of New York.—From 8 Columbia L. R. 398.

88. Stock of New Jersey corporation belonging to testator domiciled in England is not subject to the tax imposed by act of May 15, 1894 (P. L. 318) 3 Gen. St. 1895, p. 3339. Neilson v. Russell [N. J. Err. & App.] 71 A 286. Policies of insurance on life of a nonresident are not taxable under Laws 1896, p. 868, c. 908, where they were enforcible in state where companies were incorporated, though they were in state at time of decedent's death. In re Gibbs' Estate, 60 Misc. 645, 113 NYS 939. Real estate situated in another state cannot be considered in calculation of inheritance tax imposed by Const. 1898, art. 235, and Act No. 109, p. 173, 1906. Succession of Westfeldt, 122 La. 836, 48 S 281.

(§ 15) *C. Accrual of tax.*[89]—See 10 C. L. 1839—The law in force at the date of decedent's death controls in determining the tax.[90]

(§ 15) *D. Appraisal and collection.*[91]—See 10 C. L. 1839—A proceeding to assess the tax is not in equity.[92] The appointment of appraisers,[93] and appraisal proceedings[94] are regulated by statute. The rate[95] and whether or not particular matters and items are to be considered upon the appraisal[96] depends upon the terms of the particular statutes, but matters of general valuation are determinable by the general rules.[97] Provision is usually made for appeal,[98] and on such appeal the

**89. Search Note:** See notes in 3 Ann. Cas. 263; 5 Id. 237.

See, also, Taxation, Cent. Dig. §§ 1709; Dec. Dig. § 887.

**90.** Laws 1905, p. 432, c. 4, § 1, imposing an inheritance tax in force at death of testatrix, fixes property subject to the tax, and Laws 1907, p. 66, does not apply. Carter v. Whitcomb, 74 N. H. 482, 69 A 779. Laws 1907, p. 66, c. 68, § 1, imposing tax on property "which shall pass," etc., is not retroactive, and does not apply to estates in course of settlement when it was adopted. Id. Where testator, dying before inheritance tax law of 1908, disposed of his estate to collateral heirs by giving them remainders after death of life tenant, they were not subject to tax. Commonwealth v. Stoll's Adm'r [Ky.] 114 SW 279.

**91. Search Note:** See Taxation, Cent. Dig. §§ 1713-1736; Dec. Dig. §§ 892-906; 27 A. & E. Enc. L. (2ed.) 354.

**92.** One claiming as heir under irregular adoption proceedings cannot rely upon equitable circumstances. Lamb's Estate v. Morrow [Iowa] 117 NW 1118.

**93.** Under Laws 1900, p. 1438, c. 658, held, the state comptroller was authorized to remove, without hearing of charges, a volunteer fireman appointed as transfer tax appraiser, notwithstanding Civil Service Law, § 21, prohibiting removal of such persons without hearing. People v. Glynn, 128 App. Div. 257, 112 NYS 695.

**94.** Under St. 1905, p. 345, c. 314, where the court has heard and determined the amount of the tax, its judgment is conclusive, and the state comptroller cannot refuse to seal and countersign a receipt made by a county treasurer pursuant to such judgment. Becker v. Nye [Cal. App.] 96 P 333. Under Code Civ. Proc., § 2481, a surrogate may vacate an order fixing the transfer tax only as it would be done by a court of general jurisdiction, and prior determinations as to value are to be treated no more lightly than such matters would be treated by courts of general jurisdiction. In re Barnum's Estate, 129 App. Div. 418, 114 NYS 33.

**95.** Act March 30, 1905, § 2, provides for tax on estates exceeding $25,000, and § 3, that rates in § 2 are for convenience termed primary rates, and when the market value of the property exceeds $25,000 rates upon excess shall be one and one-half times the primary rate. Held, primary rates are to be computed in all cases. In re Bull's Estate, 153 Cal. 715, 96 P 366.

**96.** Claim in favor of decedent which has no present value must be deducted from taxable estate. In re Rosenberg's Estate, 114 NYS 726. Under Code Supp. 1907, §§ 1467, 1467a, providing that all property shall be subject to tax on its value above $1,000 after payment of debts, which includes funeral expenses; if an estate exceeds $1,000 after payment of debts, there is no exemption. Morrow v. Durant [Iowa] 118 NW 781. "Estate" within Acts 1906, p. 240, c. 22, providing that the first $500 of every estate shall not be subject to tax, is not the **estate** of deceased, but the estate passing to the beneficiary, and each legacy is entitled to the exemption. Booth's Ex'rs v. Com. [Ky.] 113 SW 61. Where provisions of will in favor of widow are stated to be in lieu of dower, and widow accepts them, the estate is not diminished for purpose of taxation by value of dower right. In re Barbey's Estate, 114 NYS 725. Where business of a decedent is continued by administrator, **good will** is an asset subject to transfer tax under term "other value in business." In re Keahon's Estate, 60 Misc. 508, 113 NYS 926. Under Code Supp. 1907, §§ 1467, 1467a, authorizing deduction of **funeral expenses** before levy of the tax, decedent may set aside a sum to erect a tomb for himself. Morrow v. Durant [Iowa] 118 NW 781. Under Code Supp. 1907, §§ 1467, 1467a, sum reserved by a testator to erect a tomb for himself is not taxable. Id. Under Code 1907, §§ 1467, 1467a, providing that all property passing by will shall be subject to tax on its value above certain sum after payment of debts and that debts include funeral expenses, where testator reserved $2,000 to erect tomb for himself, in absence of collusion the taxing power could not object that sum was unreasonable. Id.

**97.** In assessing a transfer tax on shares of stock of a railroad company incorporated under the laws of several states, only such proportion of the value of the stock should be taxed in New Hampshire as the value of the franchises and property situated there is of the total value of its property and franchises. Gardiner v. Carter, 74 N. H. 507, 69 A 939. Stock of railroad having lines in the state and also in adjoining states belonging to nonresident decedent on appraisal should be apportioned, in determining portion of property in the state on a basis of total mileage, or on valuation of all property. In re Thayer's Estate, 58 Misc. 117, 110 NYS 751. In determining the value of the good will, net earnings of a single year should be multiplied by a certain number of years, the number depending on the nature of the business. In re Keahon's Estate, 60 Misc. 508, 113 NYS 926. Under Pub. Acts 1903, p. 277, No. 195, imposing the tax upon the clear value of property, in computing the amount, the value of a mortgage on land should be deducted from the value of the land and not from value of personalty. In re Fox's Es-

usual presumptions are indulged,[99] and the usual rules of practice and procedure apply.[1]

Concurrent jurisdiction of proceedings to collect transfer taxes is sometimes vested in several courts.[2] In some states an executor is subject to a penalty for failure to pay the tax within a prescribed period.[3] Rebates are sometimes allowed.[4] Whether the tax is a charge against the estate or is to be deducted from the bequests depends on the intention of the testator.[5] In the absence of direction in the will, or by statute, a pro rata distribution among all pecuniary legacies of sums paid as foreign death duties cannot be made.[6]

§ 16. *License taxes.*[7]—See 10 C. L. 1840

tate [Mich.] 15 Det. Leg. N. 674, 117 NW 558. In assessing a transfer tax on shares of stock of a corporation incorporated under the laws of various states, the tax should be assessed on such percentage of the value of the stock as the amount of trackage within the state is of the total trackage. Gardiner v. Carter, 74 N. H. 507, 69 A 939.

**98.** Inheritance Tax Law 1895, § 11, authorizing person dissatisfied with appraisement to appeal on giving security for costs, and amendment of 1901, § 21½, making adjudication of county court conclusive as to lien of tax, subject to appeal to supreme court, held not to prevent **appeal by state,** though it was not required to give an appeal bond. People v. Sholem, 238 Ill. 203, 87 NE 390. Under Hurd's Rev. St. 1908, p. 1782, § 120, providing for appeals in tax matters, the state could appeal from order of county judge assessing value of an estate, under Inheritance Tax Law, § 11, without giving bond, though statute requires an appellant to give security for costs. Id. State may appeal from determination of superior court of amount of tax. Becker v. Nye [Cal. App.] 96 P 333.

**99.** Mode of appraisal of shares of stock of an interstate railroad for purpose of assessing transfer tax, not having been fixed by legislature, is a matter of fact and not of law, and decision of surrogate court thereon is not reviewable. In re Thayer's Estate, 193 N. Y. 430, 86 NE 462. Under transfer tax law, where in objections to appraiser's report, there was no claim to the contrary, it is assumed on appeal that a transfer was made within the state. In re Keeney's Estate, 194 N. Y. 281, 87 NE 428.

**1.** Where point in appeal from order of county judge, approving appraiser's report and assessing value of estate under Inheritance Tax Law, was merely from finding approving report was not raised below, it cannot be raised on appeal. People v. Sholem, 238 Ill. 203, 87 NE 390. Judgment of court of appeals, on appeal of an executor from such an order modifying and affirming the order, finally determines the rights of the executor even as to a tax on an interest of which he did not complain on the appeal but which he could have complained. In re Cook's Estate, 194 N. Y. 400, 87 NE 786. Under Inheritance Tax Law, § 11, providing for assessing of value of estate from report of appraiser and providing for appeal, an appeal from an order approving appraiser's report and assessing tax was from entire order. People v. Sholem, 238 Ill. 203, 87 NE 390.

**2.** Primary jurisdiction is in county court, but equity, also, has jurisdiction. Fidelity & Deposit Co. v. Crenshaw [Tenn.] 110 SW 1017. Court of equity has concurrent jurisdiction, under Act. 1906, pp. 246, 247, c. 22, §§ 13, 14, 15, to require payment of the tax out of shares of those chargeable therewith. Barrett v. Continental Realty Co. [Ky.] 114 SW 750.

**3.** An executor is responsible for interest and penalties imposed by 3 Gen. St. 1895, p. 3341, § 268, regulating payment of the inheritance tax, resulting from his neglect to pay it within the time required. Wyckoff v. O'Neil, 71 N. J. Eq. 729, 71 A 388.

**4.** Under Pub. St. 1906, §§ 822, 824, 825, relative to inheritance tax and providing that a legatee shall only be required to pay 5 per cent, and shall be allowed a rebate when he pay a tax to a foreign state held the rebate was only allowable on so much as had actually been paid elsewhere and did not include a discount allowed by the other state for prompt payment. In re Meadon's Estate, 81 Vt. 490, 70 A 1064.

**5.** Bequest to individuals for their own benefit and to other individuals for charitable purposes, directing executors to pay the tax on legacies to individuals, held to exclude beneficiaries of charitable legacies from payment of taxes. Kingsbury v. Bazeley [N. H.] 70 A 916. Gifts for charitable purposes are not gifts to individuals within a clause in a will directing payment of inheritance tax on legacies to individuals. Id. Under Laws 1905, p. 433, c. 40, requiring executor holding property subject to tax to deduct it therefrom, a tax on property distributed through the courts is to be deducted from the legacy, and a testator, who makes no provision for payment of the tax, so intends. Id. In a testamentary gift of specific property in a sister state, the inheritance tax is a charge against the legacy, because under the law the testator cannot transfer by will his entire estate. Id.

**6.** Clause in will, directing executor to pay inheritance tax on legacies given individuals, is not sufficient to require the court to administer the law of sister states in which property may be found. Kingsbury v. Bazeley [N. H.] 70 A 916.

**7.** See Licenses, 12 C. L. 593. See, also, such titles as Foreign Corporations, 11 C. L. 1508; Street Railways, 12 C. L. 1965, etc.

**Search Note:** See notes in 3 Ann. Cas. 263; 5 Id. 908.

See, also, Licenses, Cent. Dig. §§ 1-95; Dec. Dig. §§ 1-42.

**8. Search Note:** See notes in 2 Ann. Cas. 325.

§ 17. *Income taxes.*[8]—See 6 C. L. 1663.—An income tax is sometimes imposed upon corporations.[9]

§ 18. *Distribution and disposition of taxes collected.*[10]—See 10 C. L. 1841.—A tax levied by a municipality is usually payable to the municipality as distinguished from its subordinate boards.[11] Where taxes have been collected by one municipality for the benefit of another, it is the duty of the former to pay them over,[12] but no obligation to do so arises until the taxes have been paid.[13] Taxes levied for a specified purpose cannot be applied to any other purpose,[14] and cannot be applied even to their proper purpose except in the manner required by law.[15] Where an illegal tax has been voluntarily paid, officials may not refuse to apply them to the purpose for which they were levied.[16] A county has no vested rights in a public fund created by a levy of taxes under the provisions of an unconstitutional statute for the benefit of high school districts, and voluntarily paid by tax payers.[17] Taxes collected by a county are not property of the county in the sense in which property of a private person is regarded, but is public property subject to legislative control within con-

See, also, Taxation, Cent. Dig. § 128, 203; Dec. Dig. §§ 54, 104.

**9.** D. C. Code, § 650, imposing an income tax on insurance companies, has no application to domestic assessment companies. American Home Life Ins. Co. v. Drake, 30 App. D. C. 263.

**Gross earnings tax:** See ante, § 2A. Rev. St. § 2745 does not require foreign insurance company to pay 2½ per cent. annually to state in business done by it in state, or of net amount of premiums received by it from state, but only such per cent. of net amount of premiums received by it in state. Mutual Life Ins. Co. v. State, 79 Ohio. St. 305, 87 NE 259.

**10. Search Note:** See Taxation, Cent. Dig. §§ 1737-1754; Dec. Dig. §§ 906¾-917; 27 A. & E. Enc. L. (2ed.) 867.

**11.** Library tax held payable to city, and not to library board. City of Chicago v. Cook County, 136 Ill. App. 120.

**12.** When special taxes for road and bridge purposes are collected, under Gen. St. 1906, § 850, it is the duty of county commissioners to draw warrant on treasurer for portion of fund belonging to city. Hillsborough County v. State [Fla.] 48 S 976. Mandamus held to lie to compel them to draw such warrant. Id. Payment to school board of taxes for school purposes is not to be postponed until all taxes for a particular year are collected, but they are to be turned over from time to time as received. Iberia Parish School Directors v. Iberia Parish Police Jury [La.] 49 S 5. Under Acts 1905, p. 60 creating Tift County, and Acts 1905, p. 46, that county has no right to recover from Berrien county, from which it was taken, any portion of funds in latter's treasury raised by taxation, during the year Tift county was created, from the territory from which it was created. Tift County v. Berrien County, 131 Ga. 259, 62 SE 204.

**13.** St. 1903, § 2969, providing that cities shall levy and collect taxes for the credit of the school fund, held not to render the city liable to the school board for taxes levied but not actually collected. Louisville School Board v. Louisville [Ky.] 113 SW 883.

**14.** Under Const. art. 5, § 7, a county levying a tax for a special purpose cannot apply any part of it to any other purpose. Southern R. Co. v. Mecklenburg County Com'rs, 148 N. C. 220, 61 SE 690. Where a tax in excess of the purpose was levied, held, one who had not paid his tax could not enjoin collection of it but could enjoin appropriation of the fund to any other purpose. Id. Proceeds of private sale by auditor, under Code 1896, § 4104, of lands bought by state at tax sale, being less than fees in connection with such sale, held, the auditor would not be compelled to draw his warrant for such fees to exclusion of county and school taxes. Brandon v. Williams [Ala.] 47 S 199. Const. art. 9, § 3, providing that every law imposing a tax shall state the object of the same to which it is to be applied, is not violated by a statute requiring division as assets of proceeds of a special tax levied for building and repairing, where a school district is divided. Polk County School Dist. No. 61 v. School Dist. No. 32 [Or.] 98 P 523. An excess county tax levied to pay interest on bonds cannot be applied to general expenses. Southern R. Co. v. Buncombe County Com'rs, 148 N. C. 248, 61 SE 700.

**15.** Special tax levy to provide compensation for services by county auditor while serving as member of city decennial board of equalization cannot be paid except as provided by law, after the amount collected has been ascertained at semiannual settlement. State v. Richardson, 11 Ohio C. C. (N. S.) 128.

**16.** Where a municipality levied a tax for payment of a track of land for park purposes, the purchase of which created a debt in excess of the constitutional limit, and the taxes were voluntarily paid, held, the city recorder could not refuse to issue an order on the treasurer for the amount of interest due on such debt, as the money was on hand. He had been ordered by the city council to make the order and his duty was merely ministerial. State v. Hadapp, 104 Minn. 309, 116 NW 589.

**17.** Cuming County School Dist. No. 30 v. Cuming County [Neb.] 116 NW 522. Where pursuant to void statutes the county board levied taxes for the benefit of high school districts, which were voluntarily paid, held, such taxes could be distributed to high school districts and other districts under subsequent legislation. Id.

stitutional limits;[18] but the state has no such control over the funds of a county that it may direct the money received from citizens of one county for the benefit of citizens of another county.[19] Where state taxes illegally apportioned against a county have been paid into the county treasury, the county cannot enjoin the treasurer from paying the amount thereof to the state.[20] Electors at town meeting cannot give away public tax money,[21] and a bond holder may maintain an action in equity against a city for the diversion of taxes collected on special assessment to apply in the payment of such bonds.[22] Statutes generally provide a remedy to prevent misapplication of taxes collected.[23]

## TELEGRAPHS AND TELEPHONES.


**§ 1. Franchises and Licenses, Property and Contracts, and Corporate Affairs, 2090.**
**§ 2. Construction and Maintenance of Lines, and Injuries Thereby, 2095.**
**§ 3. Telegraph Messages, 2097.**
A. Duty and Care, 2097. Transmission, 2099. Delivery, 2100. Delivery to Others for Addressee, 2100. Spurious Messages, 2100.
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**§ 4. Telephone Service, 2112.**
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*The scope of this topic is noted below.*[24]

§ 1. *Franchises and licenses, property and contracts, and corporate affairs.*[25]—See 10 C. L. 1841—The occupancy of streets must be in pursuance of legislative authority, either granted directly [26] or by a municipality in pursuance of delegated power.[27] Authorization of lines along "highways" includes city streets.[28] Usually, express

18. Yamhill County v. Foster [Or.] 99 P 286. County may be required to apply all or a part of its funds to any legitimate public purposes so long as it does not conflict with some constitutional provision. Id.

19. Yamhill County v. Foster [Or.] 99 P 286.

20. Yamhill County v. Foster [Or.] 99 P 286. General scheme of assessing and collecting taxes creates relation of debtor and creditor between county and state for amount apportioned to county, for which action may be maintained whether it collects tax or not, but debt is not contract obligation but one imposed by state upon one of its governmental agencies, payment of which requires exercise of taxing power which is governed by constitutional provisions. Id.

21. By compromising a judgment for taxes. Parker v. People, 133 Ill. App. 113.

22. Olmsted v. Superior, 155 F 172

23. Claims against a town are not legal within Taxpayer's Act Laws 1892, p. 620, authorizing taxpayer's action to prevent payment of illegal claims, etc., unless they have been determined to be legal by a forum empowered to make such determination. Armstrong v. Fitch, 126 App. Div. 527, 110 NYS 736. Where board of supervisors acted without jurisdiction in auditing claims, it was no defense to a taxpayer's action to set aside the audit that the claims were lawful and might be allowed in the proper forum. Id. Under Ky. St. 1903, § 3775, authorizing any person to prosecute an action to recover of city tax officers taxes collected and misapplied, if the city solicitor fails to do so for six months, complaint by citizen held sufficient. Duncan v. Combs [Ky.] 115 SW 222.

24. This topic includes generally matters as to the construction and operation of telegraph and telephone lines. Regulation of commerce (see Commerce, 11 C. L. 643), matters applicable to all corporations (see Corporations, 11 C. L. 810), condemnation of land (see Eminent Domain, 11 C. L. 1198), municipal regulation of use of streets, (see Highways and Streets, 11 C. L. 1720), and liability for negligent injury to employes (see Master and Servant, 12 C. L. 665), are excluded.

25. **Search Note:** See notes in 24 L. R. A. 161, 311, 322; 44 Id. 565; 66 Id. 56; 1 L. R. A. (N. S.) 581; 9 Ann. Cas. 1192.

See, also, Telegraphs and Telephones, Cent. Dig. §§ 1-13; Dec. Dig. §§ 1-25; 27 A. & E. Enc. L. (2ed.) 1001, 1017.

26. Telephone company. Southern Bell Tel. & T. Co. v. Mobile, 162 F 523. Authority primarily in legislature. Id. California Civ. Code, § 536, authorizing construction of lines, did not, as originally passed March 21, 1872, nor until re-enacted, March 20, 1905, include telephone companies. Sunset Tel. & T. Co. v. Pomona, 164 F 561. Civ. Code § 536, as re-enacted March 20, 1905 (St. 1905, p. 491, c. 385), authorizing construction of lines, was repealed by implication by franchise act of March 22, 1905, (St. 1905, p. 777, c. 573), "except lines doing an interstate business." Id.

27. Southern Bell Tel. & T. Co. v. Mobile, 162 F 523. City with charter power to establish and regulate sidewalks and streets, etc., has implied power to authorize use of street by telephone company. Given general control over streets. Id.

28. Code Ala. 1896, § 2490, authorizing construction of lines along "highways," held to authorize lines upon city streets. Streets being highways. Southern Bell Tel. & T. Co. v. Mobile, 162 F 523. California Civ. Code, § 536, granting right to construct lines along "highways," includes "streets"

municipal assent can only be shown by formal municipal action,[29] but the granting of a right of way by the state may be subject to a constitutional provision requiring consent from the municipalities,[30] and such consent, not being a franchise,[31] may be express or implied.[32] The granting of telephone franchises [33] may be subject to constitutional provisions requiring their sale.[34] The duty of advertising and selling the franchise may be conferred upon a board of public works,[35] and it has been held that the city, for the purpose of preserving effective competition in the business, might limit the bidders.[36] Also, to secure effective service, a city has been held to have authority to modify the terms on which the franchise was granted,[37] and, where a franchise lapses for failure to commence work within a specific time, the forfeiture may be waived and the time extended, in consideration of reduced rates to the inhabitants.[38] The sale of the franchise, being a public duty, may be compelled by mandamus,[39] and citizens may also compel a company to exercise its franchise by operating its plant.[40] Companies securing occupation in disregard of the constitutional provisions will be denied relief in courts.[41] An ordinance granting the right to construct a telephone system which is accepted creates a contract [42]

(Pol. Code, § 2618). Sunset Tel. & T. Co. v. Pomona, 164 F 561.

**29.** Cannot be shown by mere declarations of witnesses that municipal assent had been given. Town of Pelham v. Pelham Tel. Co., 131 Ga. 325, 62 SE 186. Parol statements of witnesses held inadmissible. Id. Such evidence might be competent on theory of estoppel, but not apparent from record that it was so restricted. Id. Under evidence, city of Pomona had never consented to perpetual occupancy of streets by telephone company. Sunset Tel. & T. Co. v. Pomona, 164 F 561. Expenditure of $10,000 by telephone company not evidence of contract to use streets indefinitely. Id.

**30.** Rev. Code S. D. § 554 (Acts 1885, p. 208, c. 141, § 3), authorizes right of way for telegraph and telephone companies and Const. art. 10, § 3, requires consent of municipalities. Dakota Cent. Tel. Co. v. Huron, 165 F 226.

**31.** Consent not franchise, though necessary under constitution and statues. Dakota Cent. Tel. Co. v. Huron, 165 F 226. Consent not being franchise is not limited by provision of ordinance that "franchise be for ten years." Id.

**32.** Dakota Cent. Tel. Co. v. Huron, 165 F 226. City by ordinance and acquiescence held to have granted consent within Const. art. 10, § 3. Id.

**33.** Telephone franchise within Const. §§ 163, 164, is right to occupy some portion of public streets for maintenance of line, not right to operate telephone exchange. Bland v. Cumberland Tel. & T. Co., 33 Ky. L. R. 399, 109 SW 1180. "Granting" of franchise is in nature of contract for performance of public service. Primary object is not revenue but securing efficient terms. Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855. Municipality has power to maintain and operate plants and use public streets for public utilities as telephones for benefit of itself and inhabitants. May discharge power by others, upon terms agreed upon on form prescribed by law. Id. See, also, Franchises, 11 C. L. 1560.

**34.** Telephone franchise held granted in strict compliance with constitutional and statutory requirements. Const. § 164, requires grant on bids and Ky. St. 1903, § 3636, prescribes rule as to passage of franchise ordinances. Cumberland Tel. & T. Co. v. Hickman, 33 Ky. L. R. 730, 111 SW 311.

**35.** Within power of city council. Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855.

**36.** Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855. Ordinance for public sale of telephone franchise to owner of existing franchise, eliminating owner of another franchise as bidder, does not render it repugnant to Const. § 164, prohibiting monopolies. Id.

**37.** Relation between city and owner of telephone franchise quasi contractual, ordinance modifying terms to secure effective service in competing with another company is not within Const. § 52, preventing release of indebtedness or liability due municipality. Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855.

**38.** Not violative of Const. § 164, requiring sale of franchises. Cumberland Tel. & T. Co. v. Hickman, 33 Ky. L. R. 730, 111 SW 311. Not void as to passage, within Ky. St. 1903, § 3636. Id.

**39.** Mandamus to compel sale of telephone franchise as directed by ordinance involves enforcement of public duty; citizen and resident proper relator where other representative refuses to act. Louisville Home Tel. Co v. Louisville [Ky.] 113 SW 855. Application alleging that applicants are taxpayers, and that one expects to purchase franchise without showing how property or legal rights, or city's property or revenue, was injured, does not show applicant's private right to secure writ. Id.

**40.** Franchise granted for citizen's benefit, and in consideration of service to be furnished. Cumberland Tel. & T. Co. v. Hickman, 33 Ky. L. R. 730, 111 SW 311. Appropriate remedy an action in equity for specific performance. Id. Remedy at law inadequate. Id.

**41.** Telephone companies ignoring Const. §§ 163, 164, as to obtaining franchises, should be deprived of relief that would indirectly serve their ends. Bland v. Cumberland Tel. & T. Co., 33 Ky. L. R. 399, 109 SW 1180. See post, Line Contracts.

**42.** City of Rock Island v. Central Union Tel. Co., 132 Ill. App. 248; Southern Bell Tel.

which is irrevocable,[43] although such grant is not exclusive.[44] The carrying on of a telegraph business for compensation is not included within the duties or privileges of a railroad company.[45] The federal enactment to aid the construction of telegraph lines and to secure the same for governmental uses is inapplicable to telephone companies,[46] and such enactment does not authorize the occupation of city streets without the latter's consent.[47] The right of way granted is an easement,[48] and, being a property right, is entiled to constitutional protection.[49]

It is held that an abutting owner has no legal right to prevent the use of a public county road for a telephone line.[50] Where the title of abutting owners extends to the center of a highway, an easement does not include the grantable right for the maintenance of a telegraph line.[51] Statutory authority for the maintenance of lines does not authorize an invasion of private property,[52] but the right of way may be secured by condemnation.[53] A grant procured by fraud is ineffective,[54] and may subject a telegraph company to punitive damages.[55] A grant ambiguous as to location may be explained by parol evidence.[56]

A statute prohibiting foreign corporations from doing business in a state until the designation of a person upon whom process may be served may be inapplicable to a telegraph company.[57] The regulation of the hours of service of employes must be in compliance with constitutional provisions.[58]

& T. Co. v. Moore, 162 F 523. Where ordinance does not limit grant, it creates estate during life of corporation. Not grant in perpetuity and therefore invalid. City of Rock Island v. Central Union Tel Co., 132 Ill. App. 248. Grant of power to construct telephone system not grant of franchise or special privilege, within Const. art. 4, § 22. or art. 2, § 14. Id.

**43.** City of Rock Island v. Central Union Tel. Co., 132 Ill. App. 248.

**44.** Like privileges may be granted to other companies. City of Rock Island v. Central Union Tel. Co., 132 Ill. App. 248.

**45.** Minneapolis, etc., R. Co. v. Oppegard [N. D.] 118 NW 830.

**46.** Acts July 24, 1866, c. 230, 14 Stat. 221 (Rev. St. §§ 5263-5268; U. S. Comp. St. 1901, pp. 3579-3581). Sunset Tel. & T. Co. v. Pomona, 164 F 561. Company doing both telephone and telegraph business cannot claim benefits of act as to telephone business. Id. That lines might be used for local delivery of interstate telegraphic messages does not make them part of telegraph lines within purview of act. Id.

**47.** Act July 24, 1866, c. 230, 14 Stat. 221 (Rev. St. §§ 5263-5268; U. S. Comp. St. 1901, pp. 3579-3581). Sunset Tel. & T. Co. v. Pomona, 164 F 561.

**48, 49.** Southern Bell Tel. & T. Co. v. Mobile, 162 F 523.

**50.** Not additional burden or servitude, and does not exceed uses to which easement in public can be put by approval of county authorities. Southern Bell Tel. & T. Co. v. Nalley, 165 F 263.

**51.** Under law of New Jersey. Western Union Tel. Co. v. Polhemus, 167 F 231. Right can only be acquired by agreement with owners of fee. Id. Rev. St. § 5263 (U. S. Comp. St. 1901, p. 3579) does not authorize appropriation of right. Id.

**52.** Act July 24, 1866, c. 230, 14 Stat. 221, (Rev. St. §§ 5263-5268; U. S. Comp. St. 1901, pp. 3579-3581) does not grant to telegraph companies the right to enter private property without consent of owner. Sunset Tel. & T. Co. v. Pomona, 164 F 561. Burns' Ann. St. 1908, § 5796, authorizing maintenance of telephone poles and appliances on public roads, etc., held not to authorize stretching of wires across premises adjoining highway. Majenica Tel. Co. v. Rogers [Ind. App.] 87 NE 165.

**53.** Where land taken for right of way by telephone company, owner may recover value of land, and injury or diminution in value to remaining land. Long Distance Tel. & T. Co. v. Schmidt [Ala.] 47 S 731. Evidence of use to which land may be put competent to show value. Id. Evidence as to value of trees destroyed, admissible in determining injury to remaining land. Value of trees not to be awarded as independent injury. Id. Instruction properly refused when ignoring landowner's right to compensation for right of way outside of ground actually occupied by poles. Id. Instruction as to liability for cutting timber, refused as misleading, in regard to damages. Id. See, also, Eminent Domain, 11 C. L. 1198.

**54.** Brown v. American Tel. & T. Co. [S. C.] 63 SE 744.

**55.** Telegraph company liable for fraud of agent in securing grant without showing principals' knowledge of fraud or opportunity to repudiate same. Brown v. American Tel. & T. Co. [S. C.] 63 SE 744. Responsible for agent's fraudulent act in course of employment, though contrary to express directions. Id. Grant secured by fraud not estoppel of suit for damages caused by construction of telephone line. Id.

**56.** Grant held sufficiently ambiguous. Morison v. American Tel. & T. Co., 126 App. Div. 575, 110 NYS 801. Parol evidence admissible to explain grant of right for construction of telephone line, as to precise location of poles, height, etc., not contained in writing. Nichols v. New York & P. Tel. & T. Co., 126 App. Div. 184, 110 NYS 325 .

**57.** Hurd's Rev. St. 1903, c. 32, §§ 67b, 67c, 67d, construed. Midland Tel. Co. v. National

*License fees and taxes.*[See 10 C. L. 1843]—License fees must be reasonable.[59] The charter powers of a city may authorize the imposition of an occupation or business tax measured by the gross receipts of a telephone company,[60] though the franchise is also taxed.[61] Though a telegraph line used exclusively for moving trains and dispatching railroad business is not assessable separately from the railroad property,[62] the rule differs where the telegraph line is used for commercial purposes for compensation.[63]

*Transfers, line contracts, leases and mortgages.*[See 10 C. L. 1843]—The right under a contract to occupy the poles of telephone company for attaching wires is in the nature of an easement[64] within the statute of frauds,[65] and a parol license to use such poles is revocable at the will of the grantor.[66] The property transferred by a bill of sale must be determined from a construction of that instrument.[67] The necessity of affording proper facilities for the public will permit the combination of telephone systems,[68] and a provision against competition may be upheld.[69] A work-

Tel. News Co., 236 Ill. 476, 86 NE 107.

**58.** Laws 1907, p. 332, regulating hours for service of telegraph operators and train dispatchers, is unconstitutional and void, in so far as applicable to interstate commerce. State v. Missouri Pac. R. Co., 212 Mo. 658, 111 SW 500. Laws 1907, p. 332, regulating hours of service of telegraph operators, held inoperative as to interstate commerce, where act of congress (Act Cong. March 4, 1907, c. 2937, 24 Stat. 1415, U. S. Comp. St. Supp. 1907, p. 913) covered same subject. Id. Though act of congress became effective later than Missouri act. Id.

**59.** Finding of master that charge of rental of $3 per pole by city for occupancy of streets was reasonable held sustained by evidence. City of Memphis v. Postal Tel. & Cable Co. [C. C. A.] 164 F 600. In action by borough for license tax, an affidavit of defense that such tax was not based upon cost of inspection and was grossly excesive was sufficient to prevent judgment. Collingdale Borough v. Keystone State Tel. & T. Co., 33 Pa. Super. Ct. 351. Reasonableness of fee subject to inquiry in action for same. Id.

**60.** Nebraska Tel. Co. v. Lincoln [Neb.] 117 NW 284. Fact that tolls and rentals collected in city are in part for messages over lines partly beyond city limits does not invalidate tax. Id.

**61.** Franchise or right to occupy streets not identical with business or occupation of telephone company. Nebraska Tel. Co. v. Lincoln [Neb.] 117 NW 284. Not double taxation. Id. Provision for annual payment in franchise ordinances "in consideration of rights and privileges granted" is sum exacted by city for privilege of using its streets under proprietorship of streets. Id. Though termed "privilege tax," is in nature of rental for use of streets. Id. Exaction of percentage of gross earnings of business in ordinance granting franchise to telephone company is an exercise of taxing power of city. Is tax upon business or occupation of conducting telephone business. Id. Where franchise accepted subject to exercise of city's taxing power, telephone company cannot complain. Id. Provision in ordinance for deduction of sum of occupation tax or taxes on gross receipts required to be paid under existing ordinances, from tax levied, is not void because not uniform on persons or property. Id. Since by operation all persons engaged in same business are taxed upon same basis and in same manner. Id.

**62.** Minneapolis, etc., R. Co. v. Oppegard [N. D.] 118 NW 830.

**63.** Minneapolis, etc., R. Co. v. Oppegard [N. D.] 118 NW 830. Payment of taxes on railroad property immaterial, since property used for telegraph line not included by board of equalization in property taxed. Id. Railway estopped to show no franchise as against collection of tax, where such franchise or authority has been assumed. Id.

**64.** Streator Independent Tel. & T. Co. v. Interstate Independent Tel. & T. Co., 142 Ill. App. 183. Poles of a telephone or telegraph company are real property, except for purpose of taxation or where they preserve character of personalty by contract between parties. Id.

**65.** Streator Independent Tel. & T. Co. v. Interstate Independent Tel. & T. Co., 142 Ill. App. 183. Injunctive relief where in nature of negative specific performance of contract, for use of telephone poles, denied when contract indefinite and oral. Id.

**66.** No grant for specific period. Streator Independent Tel. & T. Co. v. Interstate Independent Tel. & T. Co., 142 Ill. App. 183.

**67.** Bill of sale transferring line of telephone poles and wires, warranting same to be free from incumbrances, that seller had authority to sell and convey and that title was warranted against lawful claim of all persons, did not convey absolute right of perpetual maintenance of system but only right enjoyed by seller at time of transfer. Lattner v. Interstate Tel. Co., 136 Iowa, 687, 112 NW, 653.

**68.** Legislature has recognized necessity by provision for mergers and combinations of such companies, contract between two telephone companies which provides for an exclusive interchange of business must be distinguished from contracts effecting mergers of gas or street railway companies, and is not void because of tendency to create monopoly or subversive of public interest and benefit; where system of lines has been built upon faith of such an interchange of business, claim on part of defendant company that contract is in restraint of trade and should be abrogated is not well founded. United States Tel. Co. v. Middle-

ing agreement whereby two telephone systems are connected may be so impressed with the interest of the public that neither party to the contract may disregard it,[70] and such agreement is not terminable at the will of the parties,[71] unless the contract expressly so provides.[72] Though the violation of constitutional provisions as to securing the right to operate a system may bar relief in the courts, severable portions of a contract will be upheld.[73] Where the relation of partnership does not exist, no damage will be allowed for the erection of a rival exchange in competition with that used together.[74] The lease of a "ticker" system and the guarantee of rent by a telegraph company will not be considered ultra vires.[75]

point Home Tel. Co., 7 Ohio N. P. (N. S.) 425.

**69.** Provision against competition during existence of contract held not against public policy, being only incidental to main purpose of contract and, also, necessary restriction for faithful performance of contract. Wayne-Monroe Tel. Co. v. Ontario Tel. Co., 60 Misc. 435, 112 NYS 424. Main object lawful and beneficial to public. Id. Where contract only incidentally prevented competition and, hence, was not void as against public policy, sale of lines by one party to third company who was active competitor to other party did not render original contract void. Id.

**70.** State v. Cadwallader [Ind.] 87 NE 644.

**NOTE. Right of telephone company to refuse connections with other companies:** It is held in a recent case that although a telephone company is a common carrier of news it may refuse to furnish another company direct connection by means of its exchange, but that by furnishing such service to one it waived its right of refusal as to all. State v. Cadwallader [Ind.] 87 NE 644.

That a telephone company doing a public business is a common carrier of intelligence is now generally held to be the rule. As such it must serve the public impartially (Central Union Tel. Co. v. State, 118 Ind. 194, 19 NE 604, 10 Am. St. Rep. 114; State v. Nebraska Tel. Co., 17 Neb. 126, 22 NW 237), even though the complaining party is engaged in a competitive business (Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co., 66 Md. 399, 7 A 402, 59 Am. St. Rep. 167; State v. Delaware, etc., Co., 47 F 633). These cases involve, however, only the question as to the right of the public to equal service, and not that of other companies to physical connection. Indeed the principal case seems to be squarely within the reasoning of the Express Cases, 171 U. S. 601, 29 Law. Ed. 805, which held that a railroad company is not a common carrier of express companies, and therefore need not supply to them the physical use of its properties.—From 7 Mich. L. R. 706.

**71.** Agreement and nature of business continuing. State v. Cadwallader [Ind.] 87 NE 644. Subject to discontinuation at any time with other party remitted to remedy of damages, unless business so impressed with public character and interest that court might say as matter of law that agreement could not be discontinued. Id. In latter case specific performance proper. Id. Where physical connection voluntarily made so that public acquires interest, voluntary act of parties is equivalent to waiver of primary right of independence, and imposes a public status not to be disregarded. Id. Where private property by consent invested with public interest, so that owner can no longer hold as private property but must be subject to rights of public. Id. Agreement of such fixed status as to be terminable only by retirement of one of parties from telephone business (Id.), though contract impressed with public character, or where subject-matter is impressed with public duty imposed by law, is enforcible by mandamus (Id.). Where two telephone systems were connected under working agreement and dispute arose as to compensation due, whereupon defendant refused to allow service, agreement could not be enforced by mandamus (Id.), there being another adequate remedy (Id.). Plaintiff's remedy was to pay compensation demanded under protest and sue for excess, he being under duty to obtain service for patrons. Id. Payment made would not be under threatened legal proceedings, mistake of law or facts, but with full knowledge of injustice in order to continue duty to public required by law. Id.

**72.** Contract between individuals owning and operating telephone systems which provides for physical connection of systems but stipulates for discontinuation after notice is not violative of public policy, patrons being bound to know that physical connection is liable to discontinuance. State v. Cadwallader [Ind.] 87 NE 644.

**73.** Where plaintiff owning rural telephone line with exchange in city of sixth class contracted for interchange of message with defendant on toll percentage basis, without obtaining permission to occupy streets (Const. §§ 163, 164), contract was severable and could be enforced as to business done without materially using streets. Bland v. Cumberland Tel. & T. Co., 33 Ky. L. R. 399, 109 SW 1180.

**74.** Where plaintiff and third person owned and operated telephone exchange as partners, toll lines owned individually being connected therewith, and defendant bought third person's interest, after which toll lines were controlled individually though long distance charges were shared equally and there was no agreement, defendant was not liable for damage to plaintiff's individual lines by erecting rival exchange in competition with firm exchange. Bishop v. Riddle [Tex. Civ. App.] 113 SW 151.

**75.** Where corporation with usual powers to transmit telegrams, leased property and business of corporation transmitting sporting news, Board of Trade quotations, etc., by means of "tickers" and guaranteed pay-

§ 2. *Construction and maintenance of lines, and injuries thereby.*[76] See 10 C. L. 1848—The authority granted to permit the construction of a system carries with it the concomitant right to use suitable appliances in the erection and maintenance of such system,[77] and such appliances are not nuisances per se.[78] The construction and operation of lines is subject to reasonable police regulations by municipalities.[79] A city may prevent the unlawful obstruction of streets,[80] but cannot remove poles and wires which are authorized and do not interfere with the safety or convenience of travel,[81] and injunction will lie for interference with the property of an authorized system.[82] Where a telephone company unlawfully occupies streets, it cannot object that city, in ordering its removal, acted by resolution rather than by ordinance.[83] A landowner's consent[84] to the maintenance of a line on certain property does not authorize a change of the line and construction on another portion of the land.[85] Damages are recoverable for the unnecessary cutting of shade trees,[86] and injuries to trees may be punished by statute.[87] The wrongful invasion of property which is remedied before trial will authorize nominal damages.[88] An abutting owner may cause the removal of a pole placed at an improper place so as to subject him to spe-

ment of rent reserved in similar lease by another corporation to third persons, contracts were not ultra vires. Midland Tel. Co. v. National Tel. News Co., 236 Ill. 476, 86 NE 107. All parties engaged in transmission of intelligence by electricity. Id. Guaranty of payment of rent not ultra vires, since it redounds to financial benefit of guarantor and advances objects and purposes for which corporation was created. Id. Where lease assigned but no provision to release lessee, latter remained liable for rent. Id.

**70. Search Note:** See notes in 28 A. S. R. 229; 106 Id. 260.

See, also, Telegraphs, and Telephones, Cent. Dig. §§ 8, 9; Dec. Dig. §§ 14, 15; 27 A. & E. Enc. L. (2ed.) 1015; 11 A. & E. Enc. P. & P. 757; 21 Id. 499.

**77.** Simonds v. Maine Tel. & T. Co. [Me.] 72 A 175.

**78.** Though likely to frighten horses. Simonds v. Maine Tel. & T. Co. [Me.] 72 A 175. Telephone company not liable for injuries occasioned by horse being frightened at inert appliance, not nuisance. Id. Large reel with lead pipe coiled about it, proper appliance for use in erecting telephone system. Not in needless place, when placed next to sidewalk. Id.

**79.** Though city franchise unnecessary, construction and operation of telephone lines subject to municipal regulation. City of Texarkana v. Southwestern Tel. & T. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 734, 106 SW 915; Bishop v. Riddle [Tex. Civ. App.] 113 SW 151. Telephone company must exercise right of entry under general powers conferred by state, subject to reasonable regulations of municipality. Village of Jonesville v. Southern Michigan Tel. Co. [Mich.] 15 Det. Leg. N. 968, 118 NW 736. Village under inherent police power may wholly exclude poles and wires from main business block of street, unless regulation would operate to prevent communication by company with persons whom it desired to reach and by law must serve. Id. Right not affected by fact that route designated by village would involve larger expenditure by telephone company. Id. Fact that route designated by village was less convenient would not affect right. Id. City may require permits for erection of poles in exercise of police power for benefit of public. Merritt v. Kinlock Tel. Co. [Mo.] 115 SW 19.

**80, 81.** Southern Bell Tel. & T. Co. v. Mobile, 162 F 523.

**82.** City of Rock Island v. Central Union Tel. Co., 132 Ill. App. 248. City subject to injunction when removing poles and wires erected under lawful authority, and no determination that same were nuisance. Southern Bell Tel. & T. Co. v. Mobile, 162 F 523. Party in lawful possession not to be ousted except by means provided by law. Id.

**83.** Or was otherwise informal. Sunset Tel. & T. Co. v. Pomona, 164 F 561.

**84.** See ante, § 1, as to procuring consent.

**85.** Russellville Home Tel. Co. v. Com., 33 Ky. L. R. 132, 109 SW 340.

**86.** Measure of damages for unnecessary cutting of trees in constructing line is difference between value of premises before and after trees were mutilated. Nichols v. New York & P. Tel. & T. Co., 126 App. Div. 184, 110 NYS 325. Admission of evidence as to right to construct cross-arms, harmless where but one cross-arm put up. Id. Evidence of statement of officer as to amount of damages owner was entitled to, harmless where undisputed evidence showed damage to extent of $150 or $200. Id.

**87.** Evidence held to authorize conviction for cutting down shade trees in violation of Ky. St. 1903, § 1257, by employes of telephone company. Russellville Home Tel. Co. v. Com., 33 Ky. L. R. 132, 109 SW 340. Oak and hickory trees bordering public highway held shade trees. Id. On trial for cutting of shade trees, evidence that supervisor of roads consented cutting of trees, accompanied with expression of opinion that same were within highway but unaccompanied by evidence that trees were in highway, was inadmissible. Id.

**88.** Plaintiff entitled to judicial affirmance and award of nominal damages and costs, in suit to enjoin invasion of property, where conditions remedied before trial. Majenica Tel. Co. v. Rogers [Ind. App.] 87 NE 165.

cial damages.[89] When using a public highway for its system ,a telegraph or telephone company must exercise due care to prevent injury to travelers,[90] and liability may be predicated upon the maintenance of defective poles,[91] obstructions in a street,[92] the failure to properly fill excavations,[93] and the negligent maintenance of wires.[94] Due care should also be exercised where appliances are placed in the house

89. Neither city nor officers can authorize maintenance of telephone poles so as to interfere with enjoyment of abutting property. Merchants' Mut. Tel. Co. v. Hirschman [Ind. App.] 87 NE 238. Loss of business by abutting property owner and depreciation in rental value of property, by maintenance of telephone pole directly in front of place of business, is injury peculiar to him, for which he is entitled to sue. Id. Rights of public in telephone system cannot prevent removal of pole located at improper place in street, causing special damage to abutting owner. Id. Whether use of street for erection of poles is reasonable, question of fact. Id. Where telephone pole so erected as to constitute an additional burden to property, property owner might either sue for damages or institute proceeding under Burns' Ann. St. 1901, § 893 et seq. Placing of pole not imposition of additional burden so as to change character of act from nuisance to appropriation of property. Id. Pole not permanent injury. Id. **Complaint** held to show damage to plaintiff by presence of telephone pole, in manner different from public at large, where pole obstruction to view, egress and ingress to plaintiff's business place. Id. Presumption that telephone pole was erected with city's consent, arising from absence of averments to contrary, held not to render complaint for abatement of nuisance bad. Id. Paragraph of complaint, sufficient to entitle complainant to injunction for removal of telephone pole improperly located, not bad for failure to ask damages. Id. No acquiescence in nuisance by grantor of plaintiff to preclude recovery, where location of telephone pole did not become nuisance until plaintiff erected building. Id. Plaintiff not bound to erect building with reference to pole, where no fixed legal rights for maintenance acquired by telephone company. Not acquired by grant or prescription. Id. Answer that pole was part of, and necessary to, operation of defendant's system was demurrable for failure to allege that precise location of pole was necessary. Id. Where pole was nuisance, **evidence** of effect of removal of same upon telephone company's business was properly excluded. Not proper defense, and question did not call for effect upon public at large. Id. Evidence of system, its extent and effect of change immaterial, since mere interference with business is no ground for removal of nuisance. Id. Number of wires attached to or connected with pole, immaterial. Id. Instruction held to sufficiently include question of egress and ingress. Id.

90. Davidson v. Utah Independent Tel. Co., 34 Utah, 249, 97 P 124. The degree of care must be proportionate to the danger to be reasonably apprehended from the location and nature of the appliances used. Greater danger, greater care. Id. Instruction in effect held to state correct duty. Id. Person passing along road crossed by telephone company need not anticipate danger at such crossings. Need not look for danger before passing under wire. Weaver v. Dawson County Mut. Tel. Co. [Neb.] 118 NW 650.

91. Where poles maintained along edge of highway, they must be sound and serviceable. Burton v. Cumberland Tel. & T. Co. [Ky.] 118 SW 287. Poles must be prevented from becoming dangerous, either by inherent defects or those occurring subsequently by decay. Id. Telephone company liable for injuries to traveler by falling of defective pole. Id. No ground for **punitive damages** where person injured by driving into telephone pole at side of road. Bevis v Vanceburg Tel. Co. [Ky.] 113 SW 811. **Complaint** properly dismissed on demurrer where alleging in substance that owner of telephone pole permitted plaintiff to climb same to remove wire, that pole broke because of "rotten condition," injuring plaintiff, and that owner was liable to plaintiff because such pole was erected "without authority or right, and contrary to law," and permitted to remain in dangerous condition. Morris v. Rounsaville Bros. [Ga.] 64 SE 473. Only acts of negligence averred referred to persons using highway for lawful purposes. Id.

92. Evidence sufficient to establish fact that telephone company placed obstruction in road. South Texas. Tel. Co. v. Tabb [Tex Civ. App.] 114 SW 448. Sayles' Ann. Civ. St. 1897, art. 698, permitting telephone company to use public roads, only permits use in such manner as not to incommode public. Id.

93. In action for injuries incurred by stepping into depression about new telephone pole, evidence held to justify finding that depression existed, where company dug hole for new pole. Merritt v. Kinloch Tel. Co. [Mo.] 115 SW 19. Instruction as to duty of care in refilling excavations, where party injured by falling into depression made by new telephone pole, held to properly present issues of negligence charged in petition. Id.

94. Telephone company maintaining wires over **navigable river** must build same at height sufficient to permit passage of boats; must exercise reasonable care to prevent obstruction to navigation. Heinberger v. Missouri & K. Tel. Co., 133 Mo. App. 452, 113 SW 730. Not insurer against injury from fallen wires to travelers on river. Id. **Evidence** that personal injury was caused by collision of boat in which plaintiff was passenger with submerged wire presents prima facie case of negligence. Id. Immaterial that wire might not have been obstruction to larger boat, or one equipped with reversible engines. Id. Evidence of number of persons on boat and number drowned, admissible as part of res gestae. Id. Negligence of telephone company held for jury. Id. **Complaint** in action against telephone

of a patron.[95] The companies are entitled to a reasonable time in which to make repairs after notice of the defect,[96] and it is essential that the negligence complained of be the proximate cause of the injury.[97] Disregard of statutes [98] or ordinances,[99] as to the maintenance of wires, establishes prima facie negligence.

§ 3. *Telegraph messages. A. Duty and care.*[1]—See 10 C. L. 1843—A telegraph company is engaged in a quasi public service,[2] and must serve the public without discrimination,[3] and conduct its business and the duties incident thereto with reasonable diligence and due care.[4] Messages to which there is no lawful objection

company for negligence in maintenance of wires, fatally defective where negligence not charged in general terms and no facts averred sufficient to compel inference of negligence as would constitute proximate cause of injuries sustained. Cumberland Tel. § T. Co. v. Pierson, 170 Ind. 543, 84 NE 1088. Complaint held to seek recovery upon breach of contract formed by company's acceptance of franchise ordinance, but insufficiently showing existence of ordinance or negligent breach of terms. Id. Ordinance defectively pleaded where averment merely embodied pleader's conclusion as to substance and effect. Id. Where telephone company and city, being joint tort feasors, were jointly and severally liable for store burned, plaintiff could sue jointly and dismiss or discontinue as to either, and afterward take nonsuit as to other without releasing liability of either or barring another action against either for same cause. Staunton Mut. Tel. Co. v. Buchanan, 108 Va. 810, 62 SE 928. Evidence held to sustain verdict for plaintiff, where store burned and fire started by negligent maintenance of telephone wires. Id. Whether wire so located as to incommode public presents question for **jury.** South Texas Tel. Co. v. Tabb [Tex. Civ. App.] 114 SW 448. Instruction predicated upon theory that unprotected guy wire was upon street, when claimed to be upon portion where sidewalk would have been, not erroneous since "street" includes sidewalk. Entire street between lot line open to travel. Davidson v. Utah Independent Tel. Co., 34 Utah, 249, 97 P 124. See, also, Electricity, 11 C. L. 1185.

**95.** Telephone company placing instrument in house of patron must exercise care of prudent man under like circumstances. Southern Tel. & T. Co. v. Evans [Tex. Civ. App.] 116 SW 418. Where reasonable grounds to apprehend that **lightning** will be conducted into house, and known devices exist for arresting same, telephone company must exercise due care in maintaining approved lightning arresters as will prevent accidents. Id. Evidence held to justify recovery for injuries by lightning conducted into house because of telephone company's failure to provide proper lightning arresters. Id. Instruction as to lightning arrester properly refused when ignoring evidence. Id.

**96.** Cumberland Tel. & T. Co. v. Pierson, 170 Ind. 543, 84 NE 1088. Averment that defect had existed "number of days or weeks" is in effect charge of number of days, insufficient to charge notice of defect and lapse of reasonable time. Id.

**97.** Where pole maintained without authority was knocked down in severe windstorm, and telephone company did not know or could not have known of accident by exercise of reasonable diligence, it was not liable to traveler injured by running over same. Burton v. Cumberland Tel. & T. Co. [Ky.] 118 SW 287. Maintenance without authority not proximate cause. Id. Allegation that plaintiff drove against and was caught by slackened wire and thrown from wagon, insufficient for failing to show that being caught by wire caused plaintiff to be thrown. Cumberland Tel. & T. Co. v. Pierson, 170 Ind. 543, 84 NE 1088.

**98.** Telephone company negligent where wires placed only 13 feet above road crossing and permitted to sag until they interfere with legitimate travel, where Cobbey's St. 1907, § 11963 required wires to be 20 feet above road crossings. Weaver v. Dawson County Mut. Tel. Co. [Neb.] 118 NW 650. Statute refers to private as well as public roads. Id.

**99.** In action against street railway and telephone company for injuries resulting from wires, an averment in the complaint that the telephone company placed wires in contravention of ordinances of city was sufficient to permit introduction of evidence of such ordinances. Southwestern Tel. & T. Co. v. Myane [Ark.] 111 SW 987. Action for injury from live wire resulting from street car-trolley pole breaking overhead telephone wire. Id.

**1. Search Note:** See notes in 6 C. L. 1669; 15 L. R. A. 129; 34 Id. 431; 53 Id. 732; 67 Id. 153; 4 L. R. A. (N. S.) 181, 678; 5 Id. 751; 16 Id. 870; 27 A. S. R. 923; 1 Ann. Cas. 578; 5 Id. 521, 734; 9 Id. 697.

See, also, Telegraphs and Telephones, Cent. Dig. §§ 25-47; Dec. Dig. §§ 35-57; 27 A. & E. Enc. L. (2ed.) 1021.

**2.** Cumberland Tel. & T. Co. v. Kelly [C. C. A.] 160 F 316. By reason of franchises and powers accorded to it, telegraph corporations perform public functions and comes under general liability of all quasi public corporations. Halsted v. Postal Tel. Cable Co., 193 N. Y. 293, 85 NE 1078. Engaged in public duty. Cordell v. Western Union Tel. Co., 149 N. C. 402, 65 SE 71. Companies are common carriers engaged in public service. Western Union Tel. Co. v. Witt, 33 Ky. L. R. 685, 110 SW 889.

**3.** Cumberland Tel. & T. Co. v. Kelly [C. C. C.] 160 F 316; Stewart. Morehead & Co. v. Postal Tel. Cable Co., 131 Ga. 31, 61 SE 1045.

**4.** Halsted v. Postal Tel. Cable Co., 193 N. Y. 293, 85 NE 1078. Owes duty to serve general public with due care. Stewart, Morehead & Co. v. Postal Tel. Cable Co., 131 Ga. 31, 61 SE 1045. Public utility corporations should be required to furnish prompt and efficient service, reasonably adequate to

must be accepted.[5] A contract is implied from the acceptance of a message for delivery [6] and, where a message in a foreign language is accepted for delivery in a foreign country, the company contracts to have agents who can intelligently receive and deliver such message.[7] Liability for the failure to furnish market reports contracted for is based upon breach of contract.[8] The state in the exercise of its police power may prescribe reasonable regulations for the conduct of the business of telegraph companies within its jurisdiction.[9]

Reasonable regulations by the company may be enforced [10] and conditions as to reasonable office hours,[11] stipulations as to the presentation of claims,[12] and life

meet just demands of public. Hildreth v. Western Union Tel. Co. [Fla.] 47 S 820. Duty to send messages with reasonable dispatch from nature of business. Western Union Tel. Co. v. Olivarre [Tex. Civ. App.] 110 SW 930. Telegraph company must give correct names of offices on line when information is sought. Western Union Tel. Co. v. Hawkins [Tex. Civ. App.] 110 SW 539.

**5.** When presented during office hours on tender of usual charges. Cordell v. Western Tel. Co., 149 N. C. 402, 63 SE 71. Refusal to transmit an actionable tort. Id. No defense to refusal to accept and transmit messages that messages were not properly addressed, when obvious that they were to be sent to two places specified below body of messages sense of which was easily descernible. Id. Objection that messages were not in proper form insufficient to excuse failure to receive, where meaning was clear, and evidence failed to show semblance of excuse for operator's refusal to send. Id. Objection that messages were not signed immaterial where nothing indicating any unlawful purpose in same. Id. Operator may refuse obscene and slanderous messages or the like. Western Union Tel. Co. v. Lillard [Ark.] 110 SW 1035. Message "No fire in depot. Is it agent's or passenger's place to make one? Wire answer," held proper. Id.

**NOTE. Right to refuse telegraph message because of its character:** While a telegraph company is liable in damages for the transmission of a message libelous upon its face (Peterson v. Western Union Tel. Co., 65 Minn. 18, 67 NW 646; 33 L. R. A. 302; Id. 72 Minn. 41, 74 NW 1022, 71 Am. St. Rep. 461, 40 L. R. A. 661; Id. 75 Minn. 368, 77 NW 985; 74 Am. St. Rep. 502, 43 L. R. A. 581; Great Northern Tel. Co. v. Archambault, 30 Lower Can. Jur. 221; Dominion Tel. Co. v. Silver, 10 Can. Sup. Ct. 238; Whitfield v. South Eastern R. Co., El. Bl. & El. 115), although there may be some question as to whether such transmission constitutes a publication (Western Union Tel. Co. v. Cashman [C. C. A.] 149 F 367, 9 L. R. A. [N. S.] 140), no such liability exists where the libelous character of the message is not manifest although it may in fact be libel (Stockham v. Western Union Tel. Co., 10 Kan. App. 580, 63 P 658; Nye v. Western Union Tel. Co., 104 F 628). It follows that, while a telegraph company is bound, as a common carrier, to transmit all proper messages delivered to it for that purpose (Peterson v. Western Union Tel. Co., supra), it is its right and duty to refuse a message which upon its face is clearly libelous or obscene (Western Union Tel. Co. v. Ferguson, 57 Ind. 495; Nye v. Western Union Tel. Co., supra; Gray v. Western Union Tel. Co., 87 Ga. 350, 13 SE 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; Peterson v. Western Union Tel. Co., supra). The company is not, however, a censor of public morals and may not go behind the language used in the message to inquire into the motives of the sender (Western Union Tel. Co. v. Ferguson, supra), nor may it refuse to transmit a message expressed in proper language simply because it is against the interest of an employe to do so (Western Union Tel. Co. v. Lillard [Ark.] 110 SW 1035, 17 L. R. A. [N. S.] 836).—Adapted from 17 L. R. A. (N. S.) 836.

**6.** Postal Tel. Cable Co. v. Moss & Co., 5 Ga. App. 503, 63 SE 590.

**7.** Western Union Tel. Co. v. Olivarri [Tex. Civ. App.] 110 SW 930.

**8.** Exercise of ordinary care in furnishing, immaterial. Western Union Tel. Co. v. Bradford [Tex. Civ. App.] 114 SW 686. See, also, post, § 3c, Procedure.

**9.** As to delivery. State v. Western Union Tel. Co. [Ind.] 87 NE 641.

**10.** However strictly held to general obligation, telegraph company may prescribe reasonable rules and regulations for conduct of its business and is entitled to protection from incidental hazards of operation. Halsted v. Postal Tel. Cable Co., 193 N. Y. 293, 85 NE 10, 78.

**11.** May prescribe reasonable office hours. Suttle v. Western Union Tel. Co., 148 N. C. 480, 62 SE 593; Western Union Tel. Co. v. Gillis [Ark.] 117 SW 749. Reasonableness of rule relative to office hours is for court. Western Union Tel. Co. v. Gillis [Ark.] 117 SW 749. Where reasonable office hours fixed, company owes no duty to accept messages for transmission or to deliver after such hours. Starkey v. Western Union Tel. Co. [Tex. Civ. App.] 115 SW 853.

**12.** Stipulation requiring claims to be presented within 60 days, valid. Sykes v. Western Union Tel. Co. [N. C.] 64 SE 177. Right of recovery barred though company guilty of inexcusable negligence. Id. Stipulation reasonable and may be legally assented to. Postal Tel. Cable Co. v. Moss & Co., 5 Ga. App. 503, 63 SE 590. Claim presented should not only be in writing, but message for nonperformance or nondelivery or miscarriage for which damages are claimed must be identified, negligence complained of must be stated, and telegraph company should be fairly informed of nature and extent of plaintiff's demands. Id. Mere notice that claim will be made not compliance with stipulation to present claim. Id. Evidence of claim too vague and indefinite to put defendant upon inquiry and, also, insufficient where assurance that claim would be filed. Id. Filing of suit and service thereon within 60 days sufficient as presentation of claim if averments of petition

conditions,[13] have been upheld. Such conditions are subject to waiver[14] and are binding only as to those who assent thereto by using the company's blank,[15] though it has been held that a telegraph operator who writes a message on the company's blank at the sender's request is the sender's agent and the latter is bound by the terms of the contract.[16] Where a sender asked the operator to write a message, not knowing how the name of the terminal office was spelled, the mistake of the operator in the address was held impatable to the company.[17]

*Transmission.* See 10 C. L. 1844—Messages must be promptly transmitted.[18] A company is not bound to transmit beyond its own lines[19] but must deliver to a connecting carrier,[20] and such connecting company is bound to receive and transmit the message upon compliance with reasonable terms and regulations.[21] A company was not liable for nontransmission of a message when offered over the telephone, and there was no proof that a written message would have been refused.[22] The company is not an insurer in the transmission of a message[23] but has been held liable for mistakes.[24] Stipulations limiting the company's liability by requiring the message to be repeated have been upheld.[25]

sufficiently inform defendant of identity, nature and extent of claim. Id. Claim limited to actual damages and insufficient to authorize mental anguish. Western Union Tel. Co. v. Nelson [Ark.] 111 SW 274. Claim to company of loss of $75 "besides all mental worry and inconvenience" insufficient to authorize recovery for mental anguish. Id.

**13.** See post, Transmission, Delivery.

**14.** Company may waive condition as to reasonable office hours. Suttle v. Western Union Tel. Co., 148 N. C. 480, 62 SE 593. Company receiving and agreeing to deliver message at time not within office hours is under legal duty to do so. Special undertaking constitutes waiver of benefit of office hours. Id.

**15.** Stipulation that messages must be presented **in writing** at transmitting office is binding on those who assent thereto by use of blank. Mines v. Western Union Tel. Co. [S. C.] 64 SE 236. Operator receiving message for transmission in violation of requirement on message blank that same be presented in writing does not become the agent of sender who has no notice of such regulation. Id. No presumption that public dealing with company has notice of stipulations. Id.

**16.** Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Receiving operator is sender's agent in writing body of message. Western Union Tel. Co. v. Haukins [Tex. Civ. App.] 110 SW 539.

**17.** Duty of company to supply correct name. Western Union Tel. Co. v. Haukins [Tex. Civ. App.] 110 SW 539. Rules required operator to aid in avoiding errors. Id. Notice of identity to telegraph company where message to "Holendville" addressed "Holenville." Id. Omission of letter "d" in address "Holendville I. T." not reasonably tend to mislead company's agents where no "Holenville." Western Union Tel. Co. v. Haukins [Tex. Civ. App.] 110 SW 539; Id. [Tex. Civ. App.] 110 SW 543.

**18.** Flagrant negligence of telegraph company in failing to transmit promptly urgent message answering, regarding sale of bank stock. Sultan v. Western Union Tel. Co. [Miss.] 46 S 827.

**19, 20, 21.** State v. Cadwallader [Ind.] 87 NE 644.

**22.** Not required to accept and send verbal message. Rich v. Western Union Tel. Co. [Tex. Civ. App.] 110 SW 93.

**23.** Telegraph company may be likened to common carrier, but, unlike common carrier, is not insurer in transmission of message. Halsted v. Postal Tel. Cable Co., 193 N. Y. 293, 85 NE 1078.

**24.** Company responsible for unrepeated message where error in transmission causing change in middle initial of sender. Postal Tel. Cable Co. v. Sunset Const. Co. [Tex.] 114 SW 98, afd. on rehearing [Tex.] 116 SW 797. Error in transmission whereby middle initial of name was changed at least ordinary, if not gross, negligence. Postal Tel. Cable Co. v. Sunset Const. Co. [Tex.] 114 SW 98. Where telegraph company made mistake in transmitting message as to price of goods resulting in purchase, buyer was entitled to recover loss sustained. Western Union Tel. Co. v. Lyons [Miss.] 47 S 344. Sender of telegram acting on faith of message negligently altered in transmission may maintain an action in tort for the damage for telegraph company's breach of duty. Stewart, Morehead & Co. v. Postal Tel. Cable Co., 131 Ga. 31, 61 SE 1045. Purchase of goods at enlarged price by sendee, where sender refused to ratify act, and telegraph company liable for damage proximately resulting. Id.

**25.** Company may by contract limit its liability for mistakes, delays or nondelivery caused by negligence of servants if not gross. Halsted v. Postal Tel. Cable Co., 193 N. Y. 293, 85 NE 1078. Stipulation limiting company's liability for unrepeated message is binding in absence of willful misconduct or gross negligence. Wheelock v. Postal Tel. Cable Co., 197 Mass. 119, 83 NE 313. Provision in contract that message should be repeated, and limiting liability in case of unrepeated messages, or, unless specially insured, to price of sending, is reasonable. Not necessary to use word "negligence" in such provision. Halsted v. Postal Tel. Cable Co. 193 N. Y. 293, 85 NE 1078. Where receiver of message has, by special request,

*Delivery.*[See 10 C. L. 1844]—The acceptance and transmission of the message carries the obligation of prompt delivery,[26] and the company must use reasonable diligence to find the addressee.[27] Reasonable rules limiting the territory in which messages are delivered free may be prescribed,[28] and extra compensation may be required when the addressee lives beyond such limits.[29]

*Delivery to others for addressee.*[See 10 C. L. 1645]

*Spurious messages.*[See 6 C. L. 1672]

(§ 3) *B. Injury and damages.*[30] *Conflict of laws.*[See 10 C. L. 1845]—The place of contract for the transmission of a telegram to another state is the place where

procured it to be sent by telegraph, he becomes bound by any reasonable contract made with the telegraph company for its transmission, by sender. Receiver is limited in claim for damages for loss where stipulations for repetition or insurance of message have not been availed of, to amount stipulated in contract. Id. Where no willful misconduct, mere error in transmission of message would not warrant jury in finding of more than ordinary negligence. Id. Evidence insufficient to establish gross negligence where telegram as to price of cloth at "three eighty" was changed by mistake to "three eighth." Id. Provision that sender have message repeated "to guard against mistakes or delays" is valid, and not against public policy. Box v. Postal Tel. Cable Co. [C. C. A.] 165 F 138. Regulation should be construed to refer to mistakes and delays as could be corrected and avoided by repetition and comparison. Id. Failure to have message repeated not to relieve company for negligent delay on transmission. Id. Provision does not relieve company from duty to send unrepeated message with reasonable promptness. Id. Company under obligation to send message with reasonable promptness for regular rate when accepted and rate paid. Id. No recovery for delay in delivery of unrepeated message sent to "H. J. Monsees" which was delivered addressed to "H. J. Monse" where blank contained stipulation exempting company from liability. Monsees v. Western Union Tel. Co., 127 App. Div. 289, 111 NYS 53. Provision in contract relieving telegraph company for liability for delay in delivery of nonrepeated message is **void** as contrary to public policy. Fox v. Postal Tel. Cable Co. [Wis.] 120 NW 399 Also violative of St. 1898, § 1778, imposing liability for damages occasioned by failure or negligence of servants in receiving, copying, transmitting, or delivering telegrams. Id.

**26.** Western Union Tel. Co. **v.** Moran [Tex. Civ. App.] 113 SW 625.

**27.** Western Union Tel. Co. v Elliott [Ky.] 115 SW 228. Must make reasonable inquiry and exercise care of prudent person in seeking to deliver message. Woods v. Western Union Tel. Co., 148 N. C. 1, 61 SE 653. Must deliver all **sufficiently addressed** messages within reasonable distance limitations when possible by use of ordinary diligence. State v. Western Union Tel. Co. [Ind.] 87 NE 641. Misdirection of telegram not excuse for nondelivery. Woods v. Western Union Tel. Co., 148 N. C. 1, 61 SE 653. Want of definite address not excuse unless it causes or contributes to failure. Western Union Tel. Co. **v.** Lewis [Ark.] 116 SW 894. Where after due search addressee could not be found, telegraph company should wire for better address. Woods v. Western Union Tel. Co., 148 N. C. 1, 61 SE 653. Where important message given to company with instructions to notify sender of delivery, and sender later called by telephone and was informed that message had been delivered when in fact not delivered until next day, it was error to render directed verdict for defendant. Box v. Postal Tel. Cable Co. [C. C. A.] 165 F 138. Evidence held to show reasonable diligence in efforts to deliver message where sent to four of twenty-four names in directory where inquiries made at various business houses and post-office, etc. Western Union Tel. Co. v. Elliott [Ky.] 115 SW 228. Company negligent in delivery where addressee lived in suburb of city, but address was plainly disclosed in city directory. Martin v. Western Union Tel. Co., 81 S. C. 432, 62 SE 833.

**28.** In absence of statute, companies may prescribe reasonable rules as to delivery of messages. State v. Western Union Tel. Co. [Ind.] 87 NE 641. Addressee entitled to free delivery where limits extended half mile though usual route from office was over that distance. Western Union Tel Co. v. Benson [Ala.] 48 S 712.

**29.** State v. Western Union Tel. Co. [Ind.] 87 NE 641. Such extra charge not unlawful discrimination. Id. Rev. St. 1852, p. 482, § 3 (Burns' Ann. St. 1908, § 5783), requiring delivery of messages within prescribed limits is not intended to regulate charges for transmission and delivery. Id. Provision for free delivery of telegram within certain distance held to impose duty to deliver message beyond such limits on payment of extra charges. Martin v. Western Union Tel. Co., 81 S. C. 432, 62 SE 833. Company liable for failure to deliver message in suburbs of city where no demand for extra charges and no opportunity for sender to pay or guarantee same. Id. Telegraph company not negligent in failing to deliver message where addressee lived six or eight miles from terminal office, had no telephone and nearest telephone was 1½ miles away, where no extra charges for messenger service paid, and where free delivery limits were within radius of half mile from office. King v. Western Union Tel. Co. [Ark.] 117 SW 521.

**30. Search Note:** See notes in 8 C. L. 2107; 53 L. R. A. 91; 65 Id. 805; 8 L. R. A. (N. S.) 249; 9 Id. 140; 11 Id. 560; 12 Id. 748, 886; 15 Id. 810; 10 A. S. R. 778; 61 Id. 214; 117 Id. 286; 1 Ann. Cas. 349, 355, 359, 361; 7 Id. 535; 8 Id. 474; 10 Id. 479, 648.

See, also, Telegraphs and Telephones,

the message is received,[31] but, where a tort is committed by the failure to deliver a message promptly after receipt, the right of action for tort grows out of the violation of the laws where the telegram is sent.[32]

*General and special damages.*[See 10 C. L. 1845]—The measure of damages, if the suit be on contract or in tort, is substantially the same.[33] Usually, the injured party is entitled to such damages as naturally and proximately result from the breach of contract or violation of duty,[34] and notice of the damages to be anticipated may be communicated by the message itself or by extrinsic facts.[35] If there has

Cent. Dig. §§ 64-74; Dec. Dig. §§ 67-71, 27 A. & E. Enc. L. (2ed.) 1059.

31. Fox v. Postal Tel. Cable Co. [Wis.] 120 NW 399.

32. Fox v. Postal Tel. Cable Co. [Wis.] 120 NW 399. Provision in contract, relieving telegraph company for delay, not available as defense when against public policy of state, though valid where contract made and where breached. Id.

33. Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789; Western Union Tel. Co. v. Merritt, 55 Fla. 462, 46 S 1024.

34. Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789. Or such as may reasonably be supposed to have been within contemplation of parties when making contract, as probable result of breach. Id.; Western Union Tel. Co. v. Witt, 33 Ky. L. R. 685, 110 SW 889; Western Union Tel. Co. v. Merritt, 55 Fla. 462, 46 S 1024; Hildreth v. Western Union Tel. Co. [Fla.] 47 S 820; Sullivan v. Western Union Tel. Co., 11 Ohio C. C. (N. S.) 129. Failure to deliver message. Western Union Tel. Co. v. Kibble [Tex. Civ. App.] 115 SW 643. Negligent delay of telegram must be proximate cause of injury. Hauser v. Western Union Tel. Co. [N. C.] 64 SE 503. Entitled to damages proximately resulting from wrongful refusal to receive message for transmission. Cordell v. Western Union Tel. Co., 149 N. C. 402, 63 SE 71. Negligence in delaying delivery of message, whereby addressee missed two trains, proximate cause of his failure to arrive at funeral, though train on which he traveled was delayed by accident. Sutton v. Western Union Tel. Co., 33 Ky. L. R. 577, 110 SW 874. Telegraph company's negligence held proximate cause of failure to give theatrical performance, where performance canceled on information of station agent that troupe was not on train, but message giving contrary information was not delivered. Western Union Tel. Co. v. Austlet [Tex. Civ. App.] 115 SW 624. Company liable for damages sustained by sender and wife from inclement weather as proximate result of failure to deliver message, whereby no one to meet sender and wife at destination. Western Union Tel. Co. v. Powell [Tex. Civ. App.] 118 SW 226. In action to recover damages for failure to properly transmit and deliver message, where punitive damages are not recoverable, plaintiff may recover compensation for injury received. Western Union Tel. Co. v. Williams [C. C. A.] 163 F 513. Evidence insufficient to show pecuniary injury from failure to transmit and deliver "death" message. Id. Where telegraph company contracted to furnish correct market reports but failed to do so, measure of damages to plaintiff relying on same was difference between incorrect price and correct price on market when price furnished. Western Union Tel. Co. v. Bradford [Tex. Civ. App.] 114 SW 686. Measure of damages against telegraph company for deviating from terms of message correctly reporting state of market for particular article, which receiver of message is induced by it to send forward for sale, is difference between actual state of market and terms of message as erroneously transmitted, providing plaintiff's actual loss amounts to that much. Western Union Tel. Co. v. Truitt, 5 Ga. App. 809, 63 SE 934. Plaintiff's duty to reship cotton seed where cost of shipping would be less than $250 diminution by sale at original point shipped. Could not dispose at expense of telegraph company. Id. Damages are ordinarily given as compensation for actual injury done. Civ. Code 1895, § 3905. Id. Where message authorized agent to purchase 200 bales of cotton at 9⅛ cents and was delivered reading 9¼ cents, but agent purchased 244 bales, company was liable for value of 200 bales at ⅛ cent per pound. Western Union Tel. Co. v. McCants [Miss.] 46 S 535. Telegraph company liable to sender for loss sustained where delay in delivery of message accepting offer results in failure of sale. Western Union Tel. Co. v. Hoyt [Ark.] 115 SW 941. Where father telegraphed superintendent, where son attended school, in regard to son's condition and latter responded "Son very well," which message was altered in transmission to read "son very ill," plaintiff could recover for negligence causing unnecessary expense of trip to school. Duncan v. Western Union Tel. Co. [Miss.] 47 S 552. Award of $345 for inconvenience and annoyance of hack ride for 20 miles, on failure to deliver telegram, excessive. Western Union Tel. Co. v. Collins [Ala.] 47 S 61.

35. Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789. Special damages not recoverable where no notice. Lewin-Cole Commission Co. v. Western Union Tel. Co., [Tex. Civ. App.] 115 SW 313. Where import of telegram is not apparent from its terms or made known to the operator receiving the same, no damages are recoverable beyond price paid for services. Holler v. Western Union Tel. Co., 149 N. C. 336, 63 SE 92. Where telegraph message addressed to married man alone, not disclosing any interest of wife in subject-matter, telegraph company is not liable for mental anguish of wife caused by inability to attend funeral of sister. Id. Company receiving telegram is bound to take notice of such facts as are brought to its attention by telegram in connection with all known circumstances. Sullivan v. Western Union

been a violation of the contract or a breach of duty, the aggrieved party is in any event entitled to nominal damages,[36] but speculative damages are not recoverable.[37] The amount paid by the sender for the transmission of the telegram is not special damages.[38] The person injured should use ordinary care to minimize the damages resulting.[39]

Tel. Co., 11 Ohio C. C. (N. S.) 129. Damages caused by incurring unnecessary expense of shipping outfit, properly recoverable where telegram notifying party of shipment was promptly countermanded, but countermand was not delivered, since both telegrams were sufficient to inform defendant of damages which would ensue. Postal Tel. Cable Co. v. Sunset Const. Co. [Tex.] 114 SW 98. Evidence that sender knew by letter that sender and sick wife were to arrive, that message was expected, and that suitable conveyance was prepared, held competent under petition. Western Union Tel. Co. v. Powell [Tex. Civ. App.] 118 SW 226. Message "meet us" notice, and operator also informed that wife was sick. Id. Notice of condition of weather. Id. Where **cypher message** delivered with no explanation as to importance, telegraph company is liable for nominal damage in incorrectly transmitting, or at most for sum paid for sending. Western Union Tel. Co. v. Merritt, 55 Fla. 462, 46 S 1024. Where message sufficiently indicates importance, though couched in unusual, abbreviated, or technical language, recovery will not be limited to nominal damages. Where message relates to business transaction, so that pecuniary loss will probably result from negligence in transmission or delivery. Id. Company liable if loss sustained should have been contemplated as probable and proximate result of negligence. Not essential that particular loss was contemplated, but as may reasonably be supposed to have been contemplated. Id. Not essential that message disclose all details of transaction or business intended. Id. Company liable for failure to send message accurately and promptly, where notice of importance is communicated from extrinsic facts, same as notified by message. Id. Message "Close" in answer to "Offer 650 Tampa Nipe Bay, answer quick," clearly showed importance, and that pecuniary loss would result if not promptly and correctly transmitted. Id. Western Union Tel. Co. v. Olivarri [Tex. Civ. App.] 110 SW 930. Telegram in **foreign language** not in same category as cipher messages. In order to defend on lack of notice of importance of telegrams, company must show that language would not convey notice of emergency and relationship of parties. Id. Even if defense, burden of proving lack of knowledge of importance of telegram rests upon telegraph company. Proof that clerk was ignorant of language used, insufficient, where clerk was not operator and nothing to show operator as unacquainted with same. Id.

36. Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789; Sullivan v. Western Union Tel. Co., 11 Ohio C. C. (N. S.) 129. No proof to support more than recovery for nominal damages. Tully v. Western Union Tel. Co., 141 Ill. App. 312. Complaint held to show damages not naturally consequent from negligence in failure to deliver message, on demurrer. Trigg v. Western Union Tel. Co., 4 Ga. App. 416, 61 SE 855. Rambling about town by sender, a woman in delicate condition, on failure to meet her husband, cause of plaintiff's injuries rather than nondelivery of message. Id. On failure to deliver message regarding funeral arrangements of deceased brother, sender could at least recover nominal damages. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349.

37. Telegraph company failing to deliver telegram not liable for profits which sender who had opportunity to make proposed contract, might have made. Western Union Tel. Co. v. Adams Mach. Co. [Miss.] 47 S 412. Telegraph company not liable for damages where plaintiff only lost opportunity to make advantageous contract by error message. Error causing award of bid to another contractor. Western Union Tel. Co. v. Webb [Miss.] 48 S 408. Failure to deliver a message, whereby a contract was not consummated, will only entitle sender to nominal damages. James v. Western Union Tel. Co. [Ark.] 111 SW 276. Mistake in transmission, whereby cotton purchased for January instead of July delivery, but contract more advantageous. Id. Not liable for damages not contemplated by contract. Postal Tel. Cable Co. v. Sunset Const. Co. [Tex.] 114 SW 98. Where contractor shipped outfit because of company's negligence in failing to deliver message, company was not liable for profits which might have been made, since no notice communicated by either message or parties. Id. Damages not to be disallowed as speculative because party can only state amount approximately. Western Union Tel. Co. v. Austlet [Tex. Civ. App.] 115 SW 624. Sufficient, if from proximate estimate of witnesses satisfactory conclusion can be reached. Id. Plaintiff's damages not so speculative as to defeat recovery, where theatrical performance was prevented by failure to deliver message, and evidence showed $170 of tickets sold and paid for, $167 worth ordered, and where opinion of manager was that admissions would be near $600, of which plaintiff's share would be thirty per cent, minus $15 for lighting. Id.

38. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349.

39. Civ. Code 1895, § 3802. Western Union Tel. Co. v. Truitt, 5 Ga. App. 809, 63 SE 934. Complaint held to show injury caused by plaintiff's negligence rather than as result of negligent failure to deliver message. Trigg v. Western Union Tel. Co., 4 Ga. App. 416, 61 SE 855. Question of contributory negligence one of fact. Western Union Tel. Co. v. Powell [Tex. Civ. App.] 118 SW 226; Western Union Tel. Co. v. Witt, 33 Ky. L. R. 685, 110 SW 889. Where telegram received too late for funeral or to

*Mental anguish.*[See 10 C. L. 1848]—Where the doctrine is recognized,[40] mental anguish is defined as intense mental suffering [41] rather than annoyance or regret,[42] and such damages must naturally and proximately result from the breach of contract or neglect of duty.[43] The recovery is ordinarily limited to certain degrees of

have same postponed, sender was not guilty of not attempting to minimize damages in failing to do such acts. Western Union Tel. Co. v. Witt, 33 Ky. L. R. 685, 110 SW 889. Where message negligently altered in transmission so that addressee, a master, understood he was not authorized to close charter offered, it was not duty of addressee to ascertain correctness of message received. Western Union Tel. Co. v. Merritt, 55 Fla. 462, 46 S 1024.

**40.** Recovery permitted. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349; Western Union Tel. Co. v. Benson [Ala.] 48 S 712; Western Union Tel. Co. v. Witt, 33 Ky. L. R. 685, 110 SW 889; Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789; Foreman v. Western Union Tel. Co. [Iowa] 116 NW 724. Damages for mental anguish not recoverable. Duncan v. Western Union Tel. Co. [Miss.] 47 S 552; Enloe v. Western Union Tel. Co., 5 Ga. App. 502, 63 SE 590.

**41, 42.** Johnson v. Western Union Tel. Co., 81 S. C. 235, 62 SE 244.

**43.** Sender may recover for mental anguish proximately caused by failure to deliver message. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349. Delayed telegram must have announced event as sickness or death. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Mental suffering caused by absence of one whose presence would be consoling in time of grief is subject of recovery. Id. Mental anguish, unaccompanied by physical injury, ground for damages. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349. Where physical injury, mental suffering cannot be dissociated from physical pain, and where latter is found former is implied. Id. Where right of recovery of anything else on contract recovery may be had in addition for mental anguish. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Physical and mental suffering proximate result of failure to deliver message, where message notified defendant that plaintiff was hurt and that sendee was plaintiff's mother necessitating prompt delivery. Postal Tel. Cable Co. v. Beal [Ala.] 48 S 676. Negligence of telegraph company, proximate result of wife's mental anguish where company after notice of urgency of message delayed delivery. Notice of escape from wreck, though husband in fact not entirely unhurt. Suttle v. Western Union Tel. Co., 148 N. C. 480, 62 SE 593. Where plaintiff informed of serious illness of son telegraphed that he would arrive on certain train, failure to deliver subsequent message concerning continued condition of son could not have caused mental anguish, when no proof that such message if delivered would have caused change in plaintiff's plans. Western Union Tel. Co. v. Leland [Ala.] 47 S 62. Telegraph company negligently delaying transmission of money, whereby corpse of plaintiff was delayed, is liable for mental anguish and humiliation arising because of plaintiff's failure to make prompt burial, and to see remains. Cumberland Tel. & T. Co. v. Quigley [Ky.] 112 SW 897. Damages recoverable where, because of delay in delivering death message to mother, no opportunity was afforded to attend funeral or have body brought home. Western Union Tel. Co. v. Arant [Ark.] 115 SW 136. Apprehension or fear that something will happen as result of delay in delivering telegram, which in fact does not happen, not basis of recovery. Where message delayed and body of dead wife shipped day late, no recovery permissible for fear that remains would not be shipped, would be buried, etc. Hart v. Western Union Tel. Co. [Tex. Civ. App.] 115 SW 638. Where message warned addressee to remain away from city infected with scarlet fever, mental anguish suffered because of exposure to desease for 18 hours was natural and probable result of delay in delivery and proper element of damages, though after events showed no danger. Rich v. Western Union Tel. Co. [Tex. Civ. App.] 110 SW 93. Damages for mental anguish recoverable where message to prepare burial for child was not transmitted, and plaintiff on arriving was not met by friends or relatives, no preparation having been made. Western Union Tel. Co. v. Crowley [Ala.] 48 S 381. Damages for mental suffering only recoverable for time between which relatives could have arrived and actually did arrive. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 5553. Measure of damage for failure to deliver message requesting husband to attend sick children, is mental anguish of wife arising from husband's absence. Damages for **increase and prolongation** of anguish not recoverable. Western Union Tel. Co. v. Steele [Tex. Civ. App.] 110 SW 546. Where person suffered mental anguish while anticipating arrival of relatives to fever stricken city and failure of telegraph company to send warning message merely prolonged anxiety, damages were not recoverable. Rich v. Western Union Tel. Co. [Tex. Civ. App.] 110 SW 93. Damages for mental suffering caused by disappointment in not being met at train and nausea caused by discomfort in having to carry child and baggage from train to waiting room, without other damage, not recoverable. Western Union Tel. Co. v. Howle [Ala.] 47 S 341. Mental anguish damages recoverable where sender deprived of presence of addressee during burial of brother, but mental anguish arising from death not to be confounded with that resulting from company's negligence. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Damages because plaintiff saw brother's body after decomposition had advanced so that features could hardly be recognized, not proper element. Wood v. Western Union Tel. Co., 148 N. C. 1, 61 SE 653. $750 recovery for failure to deliver death message, **excessive** by $350 where view of remains would afford little consolance, decomposition having set in at once. Western Union Tel. Co. v. Rhine

relationship,[44] and usually notice of the importance of the message must be communicated.[45] The question of the existence of mental anguish is usually for the

[Ark.] 117 SW 1069. $200 not excessive where, by failure to promptly transmit money, corpse of daughter was delayed in burial, etc. Cumberland Tel. & T. Co. v. Quigley [Ky.] 112 SW 897.

**44.** Parties must be closely related. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Brothers within degree. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349; Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Right to recover limited to cases of nearest relationship. Western Union Tel. Co. v. Williams [Ky.] 112 SW 657. Being deprived of receiving or bestowing the ministrations of husband or wife, father, mother, brother, sister, grandparent, and grandchild, in great sorrows of life and being deprived of their funeral rites, produces in every normal man and woman distress and severe pain, constituting mental anguish within statute. Johnson v. Western Union Tel. Co., 81 S. C. 235, 62 SE 244. Deprivation only produces annoyance, regret, or vexation when the relations of uncle and aunt, nephew and niece, or cousins are considered. Id. No presumption of mental anguish as to first cousins. Id. Must be relation of parent and child, husband and wife, sister and brother, or grandparent and grandchild. Lee v. Western Union Tel. Co. [Ky.] 113 SW 55.

**45.** Information must be imparted by message itself, by facts within its knowledge, or brought to its attention at time of reading message. Suttle v. Western Union Tel. Co., 148 N. C. 480, 62 SE 593. Telegraph company cannot disregard knowledge of facts which are apparent and plead its own ignorance as excusing the failure to deliver a message. Id. Mutual anguish damages recoverable where telegraph company fully notified of urgency of message and agreed to deliver same day. Id. Where husband sought to notify wife of escape from wreck, though in fact having sustained injuries. Id. Message to husband regarding serious illness of child held to give notice that mental anguish would result from agent's failure to receive for transmission. Cordell v. Western Union Tel. Co., 149 N. C. 402, 63 SE 71. Damages not recoverable unless telegraph company notified of importance of telegram, or by language put on inquiry. Western Union Tel. Co. v. Olivarri [Tex. Civ. App.] 110 SW 930. Message that twins were born but would probably not live, with request to send immediately, sufficient to put telegraph company on inquiry and render company liable for mental anguish. Id. Message on its face relating to sickness and death, sufficient notice of importance. Western Union Tel. Co. v. Shofner [Ark.] 112 SW 751. Telegraph company chargeable with notice of relationship by terms of message. Chargeable with notice of such purposes as may reasonably be inferred from language used on connection with subject-matter. Western Union Tel. Co. v. Hankins [Tex. Civ. App.] 110 SW 543; Western Union Tel. Co. v. Steele [Tex. Civ. App.] 110 SW 546. Presumption of mental anguish when actual notice of near blood relationship. Father and son. Western Union Tel. Co. v. Hankins [Tex. Civ. App.] 110 SW 543. Telegraph company liable where message notified of expected death of sender's wife, and because of delay son (addressee) did not arrive. Id. Message to "W. O. Steele," signed "Mrs. W. O. Steele," reasonably sufficient to indicate latter as wife of former, or to put company upon inquiry. Western Union Tel. Co. v. Steele [Tex. Civ. App.] 110 SW 546. Duty of telegraph company to inquire as to nature of message exists only where general nature of message plainly disclosed by terms or otherwise, as where collateral fact, such as relationship, is not shown. Western Union Tel. Co. v. Kibble [Tex. Civ. App.] 115 SW 643. No duty to inquire purpose of message "Come at once." Id. Message "Come at once" insufficient to inform telegraph company that mental distress would probably result from failure to promptly transmit. Id. Where message relates to serious illness or death of person, telegraph company is bound to take notice that addressee has interest in subject of message (Fass v. Western Union Tel. Co. [S. C.] 64 SE 235), and that, in case of near relative, addressee will probably respond to message and set out to attend sick bedside or funeral at once (Id.). Message "Am feeling better; don't come," sent to wife in reply to her inquiry, puts telegraph company on notice that wife will probably suffer mental anguish on failure to receive message. Id. Some damage to be anticipated from failure to deliver death message, and **not necessary** that company be advised of exact damage. Foreman v. Western Union Tel. Co. [Iowa] 116 NW 724. Not necessary that telegraph company have notice of special relations of affection and friendship, where death message is sent. Question is of presumption of pain rather than notice. Id. Where relationship is by affinity and no facts are either pleaded or proved, showing any special friendship or affection, no presumption of pain or suffering should arise. Id. Suffering from failure to deliver message relating to death of near relative is presumed and damages follow as ordinary and natural sequence. Id. Damages recoverable by sender of telegram because of failure of father to attend funeral, when message not delivered. Not necessary that company have notice that sender would suffer. Id. In action for delay in delivering message, whereby sendee with relatives was not prevented from arriving at fever stricken city, sendee could not recover mental anguish damages because of fear for relatives in absence of notice to company of relationship, whereby company could reasonably contemplate that such anguish would be caused by its delay. Rich v. Western Union Tel. Co. [Tex. Civ. App.] 110 SW 93. Because of peculiar duties of telegraph company, sending of telegram shows that expedition is required, and it is unnecessary in order to recover for delay in delivery that circumstances requiring promptness be brought to company's knowledge, or even that message be unintelligible on its face. Western Union Tel.

jury.[46] Legislative enactments imposing liability for mental anguish damages have been held constitutional.[47]

*Exemplary damages.*[See 10 C. L. 1847]—In a proper case punitive damages are recoverable,[48] but such damages are not recoverable for breach of contract to promptly deliver messages.[49]

(§ 3) *C. Procedure.*[50]—[See 10 C. L. 1848]—The right to sue may be either in the sender[51] or the sendee,[52] and may be either on the contract[53] or for the breach of duty.[54] If on contract, the right of the sendee to sue is based on the proposition that the contract is made between the sender and the company for the benefit of sendee,[55] but in tort the sendee sues as the aggrieved party.[56] Suit may also be

Co. v. Northcutt [Ala.] 48 S 553. Notice of relationship immaterial where telegram "John badly hurt; wants to see you" showed urgency of prompt transmission; charged with notice of relationship and that physical pain and suffering would naturally result from failure to deliver. Postal Tel. Cable Co. v. Beal [Ala.] 48 S 676. Death message "Come at once," notice of relationship of parties, and that mental anguish would probably result where surnames of decedent, sender, and addressee, identical. Western Union Tel. Co. v. Benson [Ala.] 48 S 712.

**46.** Western Union Tel. Co. v. Benson [Ala.] 48 S 712. To authorize mental anguish damages, there need be no direct evidence of pain, such as expressions or exclamations of suffering, but jury may apply their own knowledge of human nature and experience to attendant facts and circumstances. Id. See, also, post, § 3c, Procedure.

**47.** Acts Ark. March 7, 1903 (Acts 1903, p. 123, No. 68; Kirby's Dig. § 7947), providing that telegraph companies be liable for mental anguish or suffering on receiving, transmitting or delivering messages, is not unconstitutional, as depriving telegraph companies of equal protection of laws. Ivy v. Western Union Tel. Co., 165 F 371. Based upon reasonable classification. Id. Not unconstitutional as interference with interstate commerce, because applying incidentally to contracts for transmission of interstate messages. Id. Telegraph company being foreign corporation on doing business within state is subject to changes in laws, and such change is not unconstitutional impairment of contract. Where statute passed imposing damages for mental anguish. Id. Status of company not affected by acceptance of Act Cong. July 24, 1866, c. 230, 14 Stat. 221 (Rev. St. § 5263, et seq.; U. S. Comp. St. 1901, p. 3579). Id.

**48.** Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789. Punitive damages recoverable where telegram, notifying grandmother to prepare grave for child, disclosed on its face its importance, and was not transmitted until receiving office called for same following day, though wires open for sending. Western Union Tel. Co. v. Crowley [Ala.] 48 S 381. Punitive damages recoverable where message inquiring regarding sick mother's condition was delivered to company at 1 P. M., received at 7 P. M., given to messenger for delivery at 9 P. M., taken to wrong person, and then not delivered until next morning when addressee lived within 2 blocks of receiving office. Western Union Tel. Co. v. Hiller [Miss.] 47 S 377. Evidence insufficient to show willful or wanton neglect of duty warranting punitive damages in failing to deliver message, where undisputed evidence of effort to deliver and extraordinary circumstances of difficulty attending conduct of defendant's business at that time. Oxner v. Western Union Tel. Co. [S. C.] 63 SE 545. Delayed delivery of telegram regarding mother's condition held not such wanton and gross negligence as to warrant punitive damages for $1,000. Excessive by $500. Western Union Tel. Co. v. Hiller [Miss.] 47 S 377.

**49.** Western Union Tel. Co. v. Benson [Ala.] 48 S 712.

**50. Search Note:** See notes in 2 Ann. Cas. 398.

See, also, Telegraphs and Telephones, Cent. Dig. §§ 48-78; Dec. Dig. §§ 58-77; 21 A. & E. Enc. P. & P. 506.

**51.** Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789. Where sender of message is actual contracting party and has interest in transmission of message, he has benefit conferred in message that telegraph company will be held to have contracted in regard to extent notified either by message or extrinsic information. Western Union Tel. Co. v. Hankins [Tex. Civ. App.] 110 SW 543. Because telegraph company owes contractural duty to sender to receive and deliver message, and because sender is entitled by contract to such benefit as his interest is disclosed, sender can recover for injury which would naturally result from delay or nondelivery of message. Id.

**52.** Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789.

**53.** Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789. Action for failure to transmit or deliver message rests in contract. Western Union Tel. Co. v. Witt, 33 Ky. L. R. 685, 110 SW 889. Action for delay in delivering telegram is upon contract within Ky. St. 1903, § 2515, providing **limitations** of five years. Id. Damages for failure or delay in delivering telegram not injurious to person within Ky. St. 1903, § 2515, prescribing limitation of one year. Id.

**54.** Duty to promptly deliver, statutory. Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789. Telegraph company's failure to deliver death message is founded on breach of common-law duty, independent of contract. Woods v. Western Union Tel. Co., 148 N. C. 1, 61 SE 653.

**55.** Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789.

**56.** Action for breach of telegraph company's statutory duty to promptly deliver

brought by a person whose name appears upon the message as the beneficiary, though neither sender nor sendee,[57] and the undisclosed principal may sue.[58]

The complaint should sufficiently set forth essential elements of the cause of action such as ownership of the telegraph line,[59] proximate cause of the injury,[60] damages,[61] notice,[62] and the like.[63] The plaintiff has the burden of proving every

is in effect one for negligence. Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789. Sendee of message may recover damages for negligent delay of telegram when company has notice of benefit to sendee, either where message on face for benefit of sendee or company has knowledge. Holler v. Western Union Tel. Co., 149 N. C. 336, 63 SE 92. Under statute, sendee sues as aggrieved party. Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789.

**57.** Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789. Person not mentioned in message, or whose interest is not communicated to company cannot recover damages for negligent delay of message. Holler v. Western Union Tel. Co., 149 N. C. 336, 63 SE 92.

**58.** Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789. May sue on contract made by agent. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Rule applies where message is sent by agent for principal to third person. Western Union Tel. Co. v. Walker [Ala.] 48 S 102. Though plaintiff requested another to send telegram, if latter acted independently and not as agent, relationship was not established so as to entitle plaintiff to recovery. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Where plaintiff's relation to contract not disclosed to company and not apparent from message, being sent by undisclosed agent, damages for mental suffering caused by failure of relatives to attend funeral were not recoverable. Id. Where telegram regarding brother's illness was not sent to daughter at latter's request she was not party to contract entitling her to maintain action for breach in delivery. Heathcoat v. Western Union Tel. Co. [Ala.] 47 S 139. Fact that telegram regarding brother's illness was sent to daughter by father does not of itself show agency of sender, entitling addressee to maintain action for breach of contract to deliver it. Id. Where sender of telegram was not addressee's agent, there could be no ratification so as to entitle addressee to maintain action for breach of contract. Id. Message "Meet me at Montgomery, don't fail" discloses no relation between sender and addressee, mutual obligations or physical condition of sender, and, where no other allegations of notice to company, order of trial court limiting damages to cost of telegrams and expenses of plaintiff caused by delay was proper. Hildreth v. Western Union Tel. Co. [Fla.] 47 S 820. Where person interested in telegram is undisclosed principal of both sender and sendee, he may recover. Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789. Undisclosed principal of both sender and sendee of death message cannot recover damages for mental anguish, measure of recovery being only damages as apparent sender could recover the cost of telegram. Id.

**59.** Allegation that telegram was delivered to defendant at B. for transmission to R. is a clear and distinct allegation that defendant was owner of telegraph line between such points. Willis v. Western Union Tel. Co. [N. C.] 64 SE 11.

**60.** In action for negligent transmission of message, allegation that the offered charter would have been closed and voyage performed, if message transmitted as delivered to company, was proper to show proximate cause of injury. Western Union Tel. Co. v. Merritt, 55 Fla. 462, 46 S 1024.

**61.** Complaint insufficient to present damages consequent upon telegraph company's failure to deliver message, sustainable for nominal damages only, and defect not remedied by conclusions pleaded. Trigg v. Western Union Tel. Co., 4 Ga. App. 416, 61 SE 855. Petition alleging sending of message to telegraph office, that company refused message and ejected them from office, but failing to allege damages, held insufficient on demurrer, there being no contract relation, and if considered in tort, right of action would inhere in parties sent to send message. Enloe v. Western Union Tel. Co., 5 Ga. App. 502, 63 SE 590. In order to affect telegraph company with liability for injury arising out of special circumstance, notice of such circumstance must be brought home to the defendant by pleading and proof. Clio Gin Co. v. Western Union Tel. Co. [S. C.] 64 SE 426. Where telegram delayed and plaintiff showed that it might have purchased articles at cost, slightly in excess of telegraphed price, which was permissible, and thus have saved storage charges, the loss of storage charges was of class of special damages which were not recoverable unless alleged and proved that defendant had knowledge at time of filing of telegram. Id. Where averred in complaint as paid, proof and recovery of sum paid for transmission are authorized under general sum claimed as damages. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349. Amount paid by sender of telegram for transmission not being special damages need not be specifically claimed in complaint. Id. Petition, that by telegraph company's negligent delay in transmitting money to prepare plaintiff's daughter's remains for transportation plaintiff suffered **mental anguish** because of delay in transporting remains, lost time, and expended money, shows cause of action. Cumberland Tel. & T. Co. v. Quigley [Ky.] 112 SW 897. Special exceptions to portion of petition claiming mental anguish damages for fear and apprehension which are not recoverable, properly sustained. Hart v. Western Union Tel. Co. [Tex. Civ. App.] 115 SW 638. Pleadings relative to mental anguish construed and allegation of injury to wife because of husband's absence held not to be limited to period of his absence. Western Union Tel. Co. v. Olivarri [Tex. Civ. App.] 110 SW 930.

**62.** Petition should affirmatively disclose

requisite of his cause of action,[64] and thereupon the telegraph company has the burden of excusing its act [65] by some valid defense.[66] Only competent evidence to

as against demurrer, that defendant had sufficient notice of peculiar circumstances affecting measure of damages, from which both parties would reasonably contemplate injury which would ordinarily follow from breach. Western Union Tel. Co. v. Steele [Tex. Civ. App.] 110 SW 546. Petition held not to affirmatively disclose, as against demurrer, that defendant could have had notice that absence of husband would cause mental pain to wife during children's sickness. Id.

**63.** In action for negligent transmission of message, it was not error to refuse to strike parts of declaration explanatory of message, so as to declare cause of action. Western Union Tel. Co. v. Merritt, 55 Fla. 462, 46 S 1024.

**64.** Hauser v. Western Union Tel. Co. [N. C.] 64 SE 503. Burden upon plaintiff to show cause of action where delay and error in delivery caused mental anguish. Western Union Tel. Co. v. Lang [Ark.] 118 SW 405. Burden of showing breach of contract. Slaughter v. Western Union Tel. Co. [Tex. Civ. App.] 112 SW 688. No cause of action for delay in delivering telegram notifying common carrier to delay departure of boat, where no proof that carrier had agreed to comply with request. Tully v. Western Union Tel. Co., 141 Ill. App. 312. Undisclosed plaintiff must show that notice of her interest in message was conveyed to operator. Holler v. Western Union Tel. Co., 149 N. C. 336, 63 SE 92. In action by addressee for failure to promptly transmit and deliver message, it was incumbent upon plaintiff to offer evidence to support conjoint averment that sender was agent and acting for benefit of addressee. Heathcoat v. Western Union Tel. Co. [Ala.] 47 S 139. Where error in transmission, plaintiff has burden of showing error to be caused by misconduct, fraud, or want of due care. Postal Tel. Cable Co. v. Sunset Const. Co. [Tex.] 114 SW 98. In action for delay in delivering telegram depriving plaintiff of privilege of attending sister's funeral, plaintiff has burden of showing negligent delay. Hauser v. Western Union Tel. Co. [N. C.] 64 SE 503. Plaintiff has burden of showing that defendant could have delivered message if transmitted; so held in action for failure to transmit. Western Union Tel. Co. v. Crowley [Ala.] 48 S 381. Facts that addressee lived near telegraph office, that she had previously received message warning her of death of child and that another message would be sent sufficient to warrant inference that message could have been delivered if transmitted. Id. In action for injuries of any character, resulting from telegraph company's negligence, plaintiff should show notice to company either from message or from information imparted to company. Hildreth v. Western Union Tel. Co. [Fla.] 47 S 820. Notice such that injurious consequences alleged should have been contemplated as natural, probable results of negligence complained. Id. In action for delay in delivering death message, sender has burden of showing that addressee lived within free delivery limits of terminal office, where sending operator had no information of whether addressee lived within such limits and sender did not notify, or pay extra charge for delivery beyond such limits. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Burden of showing that negligent delay was proximate cause of injury. Hauser v. Western Union Tel. Co. [N. C.] 64 SE 503. Burden of showing that injurious consequences resulted proximately from negligence. Hildreth v. Western Union Tel. Co. [Fla.] 47 S 820. On failure to deliver telegram summoning physician, plaintiff must show that had message been delivered physician would have responded promptly, that failure to deliver was cause of failure to procure sendee's services. Slaughter v. Western Union Tel. Co. [Tex. Civ. App.] 112 SW 688. Evidence insufficient. Id. Burden of showing that he was damaged by breach. Id. In action for mental anguish, evidence that according to train schedules plaintiff could have reached funeral, if telegram promptly delivered, made prima facie case. Plaintiff not bound to negative contingencies which might have delayed arrival, as accidents. Western Union Tel. Co. v. Shofner [Ark.] 112 SW 751. In action for delay in delivering telegram depriving plaintiff of privilege of attending sister's funeral, plaintiff has burden of showing that he could not by ordinary diligence have attended funeral. Hauser v. Western Union Tel. Co. [N. C.] 64 SE 503.

**65.** Telegraph company receiving message for delivery and failing to deliver is prima facie liable and has burden of excusing failure to deliver. Woods v. Western Union Tel. Co., 148 N. C. 1, 61 SE 653. Mistake in street address, death message. Id. Where, in action against telegraph company for nondelivery of telegram entrusted to it for transmission and delivery, such nondelivery is shown, burden is on company to remove the presumption of negligence thereby raised. Western Union Tel. Co. v. Griswold, 37 Ohio St. 301, followed. Sullivan v. Western Union Tel. Co., 11 Ohio C. C. (N. S.) 129.

**66.** Benefits of different rule of law if sought must be proved or court will presume common law to prevail in sister state. Woods v. Western Union Tel. Co., 148 N. C. 1, 61 SE 653. In action against telegraph company for damages for failure to transmit message from New York to Ohio, provision of contract for transmission as to nonliability for an unrepeated message, which provision constituted good defense in New York but not in Ohio, is available to telegraph company. Plaut v. Western Union Tel. Co., 8 Ohio N. P. (N. S.) 263. Upon failure to deliver death message, it is no defense that plaintiff saw brother's body before burial. Failure to perform duty shows actionable negligence. Woods v. Western Union Tel. Co., 148 N. C. 1, 61 SE 653. Telegraph company, notified that money to be transmitted is to prepare plaintiff's daughter's remains for transportation, cannot avoid liability on theory that corpse might have been otherwise delayed, as by sendee or railroad. Cumberland Tel. & T. Co. v.

prove the mistake,[67] delay,[68] nondelivery,[69] notice,[70] probable damages,[71] or other element of the cause of action,[72] warranted by the pleadings.[73] Reasonable pre-

Quigley [Ky.] 112 SW 897. Where telegraph operator accepted message and payment tendered, without mentioning any limitation of liability, fact that strike was on was not available as defense for nondelivery. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349. In action for delay in delivering death message, whereby wife was deprived of privilege of attending funeral which might have been postponed, it was no defense that such death message was sent in name of employer, not at sending office, since business was transacted by employes. Western Union Tel. Co. v. Moran [Tex. Civ. App.] 113 SW 625. Postponement message would have been received and opened by employes. Id. Recovery for delay in delivery not prevented by fact that employer, whose name was signed to message, was in another state where agent acted for employer in sending message and would have postponed funeral if message to employer had been sent. Id.

**67.** Copy of telegram admissible only on proof of loss of original. Mims v. Western Union Tel. Co. [S. C.] 64 SE 236. Writing not brought to notice of telephone company not admissible as original of message delivered to it. Id. Where telegram dictated by girl, age 15, to defendant's receiving agent from memorandum book and agent did not require writing on message blank, such book was admissible as evidence of message sent. Id. Where telegram was written by company's agent, message was admissible against company to prove that agent made mistake causing nondelivery. Id.

**68.** In action for delay in delivering message, telegram received by sendee was admissible, meaning of letters, figures, etc., and question whether deliverer was company's agent open to proof if uncertain or disputed. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553.

**69.** Conversation between company's agent and unidentified third person concerning undelivered telegram, where nothing to indicate that statements of latter would affect or bind plaintiff, properly excluded. Mims v. Western Union Tel. Co. [S. C.] 64 SE 236. Where message to "Jay Wood, 83 Depot St.," was directed to "Jay Woods, 38 Depot St.," city directory was competent evidence as showing negligence in failure to deliver. Slight variation from true name insufficient to deprive it of its character as evidence, being insufficient to mislead person of ordinary prudence. Woods v. Western Union Tel. Co., 148 N. C. 1, 61 SE 653. Failure to wire for better address evidence of negligence of telegraph company in failing to seek addressee. Id. Statement of witness that husband was well known where message was sent not objectionable as expression of opinion. Martin v. Western Union Tel. Co., 81 S. C. 432, 62 SE 833. Where telegraph company offered evidence of inquiries for addressee at postoffice, evidence of mail carrier that he knew where addressee lived was admissible to show that telegram might have been delivered by exercise of greater diligence. Id. In action for negligent delay in delivering telegram, evidence, that husband of plaintiff told operator that he expected message and that wife wished to leave within few hours if it should arrive, was competent to show that residence of addressee could have been learned with inquiry. Bailey v. Western Union Tel. Co. [N. C.] 63 SE 1044. Evidence held to show actionable negligence in delivery of telegram received in small town at 5:33 p. m. and not delivered until 9:30. Id. Evidence of telegraph company's custom in delivering messages, where addressee lived beyond free delivery limits, properly excluded where no proof that addressee had knowledge of same or that custom was so general that knowledge might be presumed. Martin v. Western Union Tel. Co., 81 S. C. 432, 62 SE 833. Delivery sheet showing time of delivery admissible after proof of genuineness, though such proof conflicting. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Evidence that witness asked agent if message was important, that latter replied he did not know, that witness offered to deliver and said he could find addressee, was proper. Western Union Tel. Co. v. Benson [Ala.] 48 S 712.

**70.** Evidence of surrounding circumstances admissible in determining if company was informed of importance of message. Western Union Tel. Co. v. Merritt, 55 Fla. 462, 46 S 1024. As to whether operator knew or should have known nature of message from others handled. Id. Evidence of notice to company of wife's illness, on sending telegram improperly received when not alleged in complaint. Fass v. Western Union Tel. Co. [S. C.] 64 SE 235. Parol evidence of recognized and generally understood meaning in business of abbreviated expressions and figures in telegram, which were not understood by parties not in business, is admissible. Merely translate writing for benefit of jury. Western Union Tel. Co. v. Merritt, 55 Fla. 462, 46 S 1024.

**71.** Evidence of physician that nervous excitement and worry of wife due to husband's absence might possibly produce serious injury to health, improperly admitted. Western Union Tel. Co. v. Olivarri [Tex. Civ. App.] 110 SW 930. Evidence tending to render telegraph company liable for mother's death in that son was prevented from treating mother and by his presence rendering her more hopeful, properly excluded. Western Union Tel. Co. v. Williams, 33 Ky. L. R. 1062, 112 SW 651.

**72.** Reading of telegram to blind addressee proper as part of res gestae of delivery. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Evidence of mental anguish proper where delay in delivery of telegram resulting in addressee being deprived of privilege of attending funeral of sister. Bailey v. Western Union Tel. Co. [N. C.] 63 SE 1044. Conclusion erroneously admitted where witness had stated facts showing exercise of ordinary diligence to reach father after learning of illness. Western Union Tel. Co. v. Smith [Tex. Civ. App.] 113 SW 766. Where allegation of ownership of line not denied, pleadings were evidence in nature of admission of such fact.

sumptions are available,[74] and, where mental anguish forms an element of recoverable damages, direct proof of such suffering is as a general rule unnecessary.[75] Evidence of mental suffering may be precluded by the lack of notice,[76] or otherwise limited.[77] Questions of fact peculiar to these actions must be submitted to the jury.[78] Instructions must properly submit the issues,[79] be applicable to the evi-

Willis v. Western Union Tel. Co. [N. C.] 64 SE 11. Competency not affected where amended answer filed denying ownership. Id. Merely affected weight. Id. Where physician was not secured by failure to deliver telegram, evidence of whereabouts of such physician on following day was **immaterial.** Slaughter v. Western Union Tel. Co. [Tex. Civ. App.] 112 SW 688. Evidence of peculiar apprehensions, fears, and conclusions, which might be due to individual temperament, inadmissible, not being subject of direct proof, though mental anguish damages recoverable. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. In action for nondelivery of telegram where defendant introduced evidence that death of plaintiff's husband resulted from excessive use of liquor and morphine, such evidence tended to show less grief of wife than alleged because of deprivation of seeing body and rendered contrary evidence in **rebuttal** proper. Martin v. Western Union Tel. Co., 81 S. C. 432, 62 SE 833. Where child died and was promptly buried, giving rise to suggestion that burial might have been delayed, evidence that plaintiff had other sick children and that doctor advised prompt burial was at most **immaterial** and not prejudicial. Cordell v. Western Union Tel. Co., 149 N. C. 402, 63 SE 71.

**73.** Testimony of addressee that he would have gone to burial if message received in time, proper under complaint. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Evidence of sickness not cause for complaint where defendant did not avail itself of right to have allegation stricken since defendant might also have asked for instruction to disregard such evidence. Fass v. Western Union Tel. Co. [S. C.] 64 SE 235. Proof that reply telegram to postpone burial would have been sent to name of person sending death message, that such person was not at sender's office, but that same would be opened by employes, authorized by pleadings. Western Union Tel. Co. v. Moran [Tex. Civ. App.] 113 SW 625. Where complaint for nondelivery of telegram alleged that husband's body had been delivered for dissection because of company's negligence, which allegation was not stricken, evidence that condition of body was such that plaintiff could not see it on obtaining possession was proper. Martin v. Western Union Tel. Co., 81 S. C. 432, 62 SE 833.

**74.** Though no direct evidence of what addressee would have done on receiving death message, reasonable presumption is that he would take first train for funeral. Especially where addressee did in fact do so, upon receiving delayed message. Sutton v. Western Union Tel. Co., 33 Ky. L. R. 577, 110 SW 874.

**75.** May be inferred by jury from circumstances attending breach of duty or contract. Western Union Tel. Co. v. Morris [Ala.] 48 S 349. Mental anguish presumed, where telegram announcing serious illness of plaintiff's daughter not delivered, whereby plaintiff not present at death. Need not be affirmatively proved. Western Union Tel. Co. v. Blair [Tex. Civ. App.] 113 SW 164. On proof of near relationship, mental anguish is inferred. Western Union Tel. Co. v. Williams, 33 Ky. L. R. 1062, 112 SW 65. Jury might infer mental suffering, though no direct proof thereof, where message sent referred to funeral arrangement and operator knew deceased and plaintiff were brothers. Message not delivered, resulting in no preparations or notice to relatives. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349. Where operator knew relationship between sender and deceased person to be that of brotherhood, and message referred to funeral arrangements, mental suffering would be presumed to occur from failure to deliver message. Id. In such case injury natural result of failure to deliver and must have been in contemplation of parties when contract for transmission made. Id. **Evidence** tending merely to harrow feelings of jury, not admissible. Western Union Tel. Co. v. Williams, 33 Ky. L. R. 1062, 112 SW 615. Evidence tending to prove mental anguish of mother rather than plaintiff (son) properly excluded. A son prevented, because of delay in delivering a telegram, from reaching his mother before she died may not introduce evidence tending to show a more tender relation than usually exists. Id.

**76.** Evidence of mental suffering inadmissible where damages not recoverable, company not being notified by telegram sent by undisclosed agent of plaintiff's relation. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. No recovery for mental anguish where no evidence that sendees were at home or at place of business when message should have arrived. No proof that sendees would have notified relatives or made arrangements for funeral. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349. In such case, evidence of postponement of funeral and that it rained on day of funeral was inadmissible. Id.

**77.** Where recovery for mental anguish caused by delay in telegram being delivered, depriving plaintiff of father's presence in attending husband's funeral she could only recover for suffering from time he would have reached her if message delivered, and not up to time he could have reached her after receiving message. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Evidence of mental suffering since husband killed, inadmissible, since damages only recoverable for period during which plaintiff was deprived of friends. Id.

**78.** Question for jury with a message indicated its importance. Western Union Tel. Co. v. Merritt, 55 Fla. 462, 46 S 1024. Whether true with respect to operator. Id. Whether operator was informed by extrinsic facts in addition to message. Id. Where message addressed to another to be delivered to plaintiff's husband, question of whether husband would receive message if

dence [80] and pleadings,[81] and must not invade the province of the jury,[82] nor be

sent was for jury. Cordell v. Western Union Tel. Co., 149 N. C. 402, 63 SE 71. Failure of telegraph company's receiving agent to make any effort to correct address of undelivered telegram, properly submitted to jury for determination of wanton and reckless indifference justifying punitive damages. Mims v. Western Union Tel. Co. [S. C.] 64 SE 236. Jury question whether telegram received at time specified on "delivery sheet," when evidence as to genuineness of such sheet conflicting. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Where brother wired of death of father but message was changed to mother in transmission, and another brother wired of burial giving impression that both parents were dead, in seeking damages for mental anguish, question whether plaintiff exercised reasonable diligence in ascertaining truth was for jury. Western Union Tel. Co. v. Taylor [Ky.] 112 SW 844. Loss of time and money held under evidence properly for jury, in action for damages for negligent delay in transmitting money to send corpse of plaintiff's daughter. Cumberland Tel. Co. v. Quigley [Ky.] 112 SW 897. Explained by sudden illness, was not conclusive that plaintiff suffered no mental anguish, but at most raised question for jury. Western Union Tel. Co. v. Blair [Tex. Civ. App.] 113 SW 164. Where message announcing serious illness of daughter was not delivered and plaintiff prevented from being present at death, nonattendance of plaintiff at funeral, whether plaintiff should have driven nearly thirty miles and taken train, or could, by later train and drive of 14 miles, have arrived at funeral and thus mitigated mental anguish, held an issue of fact. Bailey v. Western Union Tel. Co. [N. C.] 63 SE 1044.

**79.** Instruction held to properly submit issue of damages. Western Union Tel. Co. v. Powell [Tex. Civ. App.] 118 SW 226. Proper instruction as to diligence of telegraph company in finding addressee submitted. Western Union Tel. Co. v. Lewis [Ark.] 116 SW 894. Instruction held to properly submit issue of contributory negligence. Western Union Tel. Co. v. Powell [Tex. Civ. App.] 118 SW 226. Instruction erroneous as authorizing punitive damages, not recoverable. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. In action for failure to deliver telegram, charge that negligence existed if defendant's servants failed to exercise ordinary care in delivering, or if in exercise of such care message could have been delivered in time, was sufficient though very general in absence of prayer for more specific instruction. Willis v. Western Union Tel. Co. [N. C.] 64 SE 11.

**80.** In action for delayed telegram, charge that, if telegram was delivered to plaintiff's father "before train passed his station" from time telegram was delivered to company at place sent, plaintiff could not recover, was properly refused, since train might have passed after father received telegram but before arriving at depot. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Charge that burial would be postponed if message promptly delivered, sustained by evidence. Western Union Tel. Co. v. Moran [Tex. Civ. App.] 113 SW 625. Submission of issue of damages which plaintiff sustained because of absence of brother, error, when brother was 15 miles from terminal office, and therefore his nonarrival was not caused by negligence of telegraph company. Landry v. Western Union Tel. Co. [Tex.] 113 SW 10. Instruction declaring it duty of telegraph company to deliver message received after office hours on same day, erroneous where conflicting evidence as to duty. Western Union Tel. Co. v. Gillis [Ark.] 117 SW 749. Instruction as to measure of damages for failure to sell horse, where evidence showed no market value of horse, properly refused. Western Union Tel. Co. v. Hoyt [Ark.] 115 SW 941. Instruction that if jury believed particular witness, they must find that reasonable diligence was used to deliver message, after addressee came within free delivery limits, properly refused as giving undue prominence to evidence. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Submission of issue as to whether persons in charge of body would have been advised of postponment message, if sent, justified by pleadings and evidence. Western Union Tel. Co. v. Moran [Tex. Civ. App.] 113 SW 625. No pleading or evidence to justify submission of question of damages for failure of a brother, not named as addressee, to attend sister during husband's illness and death. Landry v. Western Union Tel. Co. [Tex.] 113 SW 10.

**81.** Instructions properly refused when depending on pleas to which demurrers had been sustained. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Charge that, if message for postponment of funeral had been sent, person or persons in charge would have complied, held authorized by allegations. Western Union Tel. Co. v. Moran [Tex. Civ. App.] 113 SW 625. Charge that company's duty to make free delivery was conditioned on addressee's residence within such limits, and that until that condition was shown company was not in default under pleadings and evidence, properly refused where there was issue as to whether company had exercised reasonable diligence to make delivery within limits. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Instruction restricting plaintiff's right to recover for breach of special contract for immediate transmission and delivery of message, proper under allegations. Starkey v. Western Union Tel. Co. [Tex. Civ. App.] 115 SW 853.

**82.** Instruction that, if jury believed particular witness, they must find that reasonable diligence was used to deliver message after addressee came within free delivery limits. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Charge that there was no evidence that brother could have reached place of burial before funeral, if message had been delivered, properly refused. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Charge that, when message was delivered for sending, train had already passed, by which brother might have made connections. Id. Charge as to time of mental suffering for which plaintiff might recover. Id. Charge that there was no evidence that defendant left message claimed to have been delivered with certain person. Id.

argumentative,[83] misleading,[84] nor based on an assumption of facts.[85] The findings must be supported by the evidence,[86] and, in certain cases, a directed verdict is proper.[87] A limitation of damages recoverable may be insufficient to warrant a new trial.[88]

(§ 3) *D. Penalties.*[89]—See 10 C. L. 1848—In some states the refusal to transmit messages is penalized by statute.[90]

**83.** In action for delayed telegram claimed to have been sent by plaintiff's agent, instructions that it was possible that plaintiff understood that alleged agent was acting for her when he sent message, but that evidence must show he agreed to so act, held properly refused. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Instruction that jury consider fact that plaintiff was one of six living brothers and four sisters, all of whom were at burial except addressee, in determining whether plaintiff suffered mental anguish, properly refused. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Instruction that law does not authorize guess at amount of damages to be allowed for mental suffering, that evidence be considered carefully to first determine whether plaintiff suffered mental anguish, and that trifling suffering, such as men of ordinary suffering would overlook, would not warrant substantial damages, properly refused. Id. Instructions as to consideration of facts and circumstances in allowing damages for mental suffering, refused. Id.

**84.** Instruction requiring jury to determine what negligence charged in complaint was. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Instruction that sender could not recover unless addressee lived within free delivery limits, properly refused as misleading. Tending to make jury believe that sender could not recover unless he showed addressee's residence, though company did not exercise reasonable diligence. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Instruction properly refused as to damages for mental suffering when involved and confusing. Id. Instruction of regarding plaintiff's burden of proof as to addressee being within free delivery limits, properly refused. Id.

**85.** Instruction assuming juror's minds as confused and uncertain on issue as to when and where message delivered, properly refused. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Instruction as to free delivery limits properly refused as assuming that addressee lived outside limits. Id.

**86.** In action for delayed telegram, evidence held to support finding that, if message was promptly delivered, addressee would have shipped remains to home for interment. Western Union Tel. Co. v. Arant [Ark.] 115 SW 136. Finding of jury proper where uncontradicted evidence that, if telegram had been promptly delivered to third person for addressee, it would have been immediately sent to plaintiff, who would have promptly attended mother's funeral. Western Union Tel. Co. v. Shofner [Ark.] 112 SW 751. Finding for plaintiff in suit for failure to deliver death message sustained by evidence. Western Union Tel. Co. v. Rhine [Ark.] 117 SW 1069. Evidence held to sufficiently show that plaintiff would have attended funeral, though telegram did not state place of burial. Western Union Tel. Co. v. Shofner [Ark.] 112 SW 751. Finding of jury that plaintiff would have had funeral postponed, if death message promptly delivered, warranted by evidence. Western Union Tel. Co. v. Moran [Tex. Civ. App.] 113 SW 625.

**87.** Defendant entitled to general affirmative charge, where no tolls paid for sending telegram, no damage on estate and mental suffering damages being merely annoyance, not recoverable. Western Union Tel. Co. v. Howle [Ala.] 47 S 341. Where presumption of negligence because of nondelivery overcome, and evidence of diligence of telegraph company on finding addressee not rebutted, defendant was entitled to directed verdict. Western Union Tel. Co. v. Elliott [Ky.] 113 SW 228. Motion for nonsuit and prayer for instructions based on assumption that there was no negligence, properly refused under facts. Willis v. Western Union Tel. Co. [N. C. ] 64 SE 11. Peremptory instruction properly refused, where at that stage of case no evidence of company's diligence to deliver message was introduced. Western Union Tel. Co. v. Elliott [Ky.] 115 SW 278. Directed verdict, error where message not delivered because of company's error in spelling name of terminal office. Western Union Tel. Co. v. Hankins [Tex. Civ. App.] 110 SW 539. Error in deciding, as matter of law, that there was no evidence of actionable negligence, when evidence showed no effort to deliver telegram, having mistake in street address. Woods v. Western Union Tel. Co., 148 N. C. 1, 61 SE 653. Directed verdict, error where evidence of flagrant negligence of telegraph company in delaying answer regarding purchase of bank stock, whereby terms of such sale were raised. Sutton v. Western Union Tel. Co. [Miss.] 46 S 827. Telegraph company negligently failing to deliver telegram, entrusted to it for transmission and delivery, is liable for nominal damages, and in a case where such failure is shown, error to arrest the case from the jury and direct a verdict for the defendant company. First Nat. Bank v. Telegraph Co., 30 Ohio St. 555, followed. Sullivan v. Western Union Tel. Co., 11 Ohio C. C. (N. S.) 129.

**88.** In action for delay in delivering telegram to purchase cotton seed for shipment on Jan. 15th, where telegram sent Jan 4th, where no evidence that plaintiff could have procured necessary cars and loaded them within required time, and in view of fact that expense of handling product would entail loss equivalent, if not in excess of sum to be paid for storage, failure to permit recovery of damages for such amount was not sufficient cause for new trial. Clio Gin Co. v. Western Union Tel. Co. [S. C.] 64 SE 426.

**89. Search Note:** See notes in 2 Ann. Cas. 513.

See, also, Telegraphs and Telephones, Cent. Dig. §§ 79-81; Dec. Dig. § 78; 27 A.

§ 4. *Telephone service.*[91]—See 10 C. L. 1840—Telephone companies engaged in a quasi public service,[92] and may be regarded as common carriers of news.[93] The business may be conducted by an individual,[94] and each agency is separate from others as to the conduct of its business.[95] The public duty of impartial service[96] applies to connecting exchanges,[97] and may be enforced by statutes imposing penalties.[98] A patron can only demand the same service as rendered to other patrons of same class.[99] Mandamus on the part of a patron of a mutual telephone company

& E. Enc. L. (2ed.) 1082; 21 A. & E. Enc. P. & P. 532.

**90.** Penalty for refusal to transmit messages under Transportation Corporations Law (Laws 1890, p. 1152, c. 566), § 103, is only incurred by acts of partiality, bad faith, or discrimination. No penalty incurred where operator would only take message "subject to delay" when sender demanded delivery within an hour, but sender apparently must have known of strike of company's operators. Petze v. Western Union Tel. Co., 128 App. Div. 192, 112 NYS 516. Fact that message was with object of reporting neglect of duty of railroad's servants does not affect right to recover penalty imposed by Kirby's Dig., § 7946. Western Union Tel. Co. v. Lillard [Ark.] 110 SW 1035. Where railroad station agent performed duties of operator in latter's absence, agency of station agent was sufficiently established to authorize recovery of statutory penalty. Id. Oral evidence of contents of telegram properly admitted where contents not in issue, and copy left in possession of company. Id.

**91. Search Note:** See notes in 15 L. R. A. 322; 10 A. S. R. 128.

See, also, Telegraphs and Telephones, Cent. Dig. §§ 14-21; Dec. Dig. §§ 26-34; 27 A. & E. Enc. L. (2ed.) 1091; 21 A. & E. Enc. P. & P. 504.

**92.** Cumberland Tel. & T. Co. v. Kelly [C. C. A.] 160 F 316. A public service corporation. Buffalo County Tel. Co. v. Turner [Neb.] 118 NW 1064.

**93.** State v. Cadwallader [Ind.] 87 NE 644.

**94.** Authorized by statute to maintain system, with certain restrictions. State v. Cadwallader [Ind.] 87 NE 644. Under Burns' Ann. St. 1908, § 5802, individuals conducting telephone systems are subject to same obligations as corporations with respect to facilities, charges, service, etc. Id.

**95.** Each agency or exchange conducted by a corporation or individual, separate and distinct from others with respect to conduct of business and relation to public. Only impressed by character as quasi public agent, in respect to duty as to service. State v. Cadwallader [Ind.] 87 NE 644.

**96.** Must serve the public without discrimination. Cumberland Tel. & T. Co. v. Kelly [C. C. A.] 160 F 316. Should render equal service and upon same terms to patrons. Buffalo County Tel. Co. v. Turner [Neb.] 118 NW 1064. Telephone exchanges impressed with public use as common carriers of news and must furnish impartial service without discrimination to all persons of same class. State v. Cadwallader [Ind.] 87 NE 644. Required by common-law. Id. Under Laws 1906, p. 133, No. 124, § 1, requiring **railroads** to grant facilities and terms for installation or connection of telephones, mere refusal of railroad, on request of telephone company, to place telephone in its station on "same terms and conditions" as granted to another company, does not show violation of act. State v. Boston & M. R. Co. [Vt.] 71 A 1044.

**97.** Where business becomes that of common carrier, it becomes impressed with common-law duty of receiving and transporting commodities from connecting carrier as if offered by individual. Individual and patrons, on compliance with reasonable regulations and payment of compensation charged to others, is entitled to have his and their messages transmitted by exchanges of others having exchanges and operating systems. State v. Cadwallader [Ind.] 87 NE 644. Discrimination, where operator of system furnished immediate service to separate exchanges and patrons, and denied same service to another exchange and patrons of same class. Violative of common-law and Burns' Ann. St. 1908, § 5802. Id. Where telephone service is furnished to one, another in same town is entitled to same service, not upon ground of primary right but because, having elected to furnish to one, same obligation arises in favor of others so situated. Id.

**98.** Acts Tenn. 1885, p. 122, c. 66, § 11, only declaratory of common-law, not to discriminate and enforcing obligation by penalties. Cumberland Tel. & T. Co. v. Kelly [C. C. A.] 160 F 316. Furnishing "party" line service to other subscribers before "direct" service was installed to plaintiff held not discrimination, where company's cables for direct service to plaintiff's district were full at time of application. Id. Acts Tenn. 1885, p. 122, c. 66, § 11, imposing severe penalties for discrimination, not to be construed to compel enlargement of plant to furnish immediate service, where service demanded by applicant could not be furnished, cables being full. Id. Where installation of cable would cost $7,000 and inferior but cheaper service could be furnished. Id. No discrimination by failure to furnish direct service by means of "backing up" wires, used only in cases of urgent necessity on special application, plaintiff not having brought himself within conditions under which such connections were allowed. Id. Telephone companies are under a general common-law obligation to supply reasonably adequate facilities for supplying service. Id. Obligation may be enforced by compelling enlargement of plant or seeking damages. Id. Instruction as to discrimination, misleading where stating that refusal to serve one of two persons on line would be unlawful and definition of "discrimination" did not sufficiently emphasize fact that such two persons must be similarly situated. Id.

**99.** Can only require of another company use of system on same terms as accorded to public generally. Ivanhoe Furnace Co.

has been held not to lie to compel another company to connect lines and exchange service with the subscriber's [1] company on the same terms as it connected with a third company.[2] Unjust discrimination against a patron may result from the enforcement of a just and proper rule.[3] In determining whether a contract giving an exclusive privilege is violative of public policy, the rights of parties as well as the public should be considered.[4] A rule of a rural telephone company requiring payment of rental six months in advance has been held reasonable,[5] and an allowance for impaired service of rural companies is not be to allowed unless the delay in repair was unreasonable.[6] Where adequate service was supplied, a patron of a mutual company was not entitled to the maintenance of a switch at his home.[7] The liability of a telephone company in the transmision and delivery of long distance calls has been held to be governed by the rules applicable to telegraph companies,[8] and liability is imposed for negligence.[9] Where a patron requests an office or the phone of the person, the company's whole duty is performed on the connection with such phone,[10] but, where a company contracts to produce a certain individual at its own office to answer a call, it must exercise reasonable care to produce the proper

v. Virginia & T. Tel. Co. [Va.] 63 SE 426.

1. Ivanhoe Furnace Co. v. Virginia & T. Tel. Co. [Va.] 63 SE 426.

2. Ivanhoe Furnace Co. v. Virginia & T. Tel. Co. [Va.] 63 SE 426. Plaintiff not representative of his mutual company and cannot dictate. Matters of business policy to be determined by companies themselves, subject only to visitorial authority of state. Id. Plaintiff's mutual telephone company not party and, even if it be conceded that interchange of connections might be granted, it would not be granted in mandamus to which company is not party. Id.

3. When ignored in favor of others in like situation. Plummer v. Hattelsted [Iowa] 117 NW 680. Employe of telephone company, in charge of switchboard, subject to an action for unjust discrimination against patron. Where employe acted perversely, without authority, to gratify personal spite. Id.

4. Test whether restricting provision is unreasonable or liable to injure public. Central New York Tel. & T. Co. v. Averill, 129 App. Div. 752, 114 NYS 99. Where telephone company installed exchange in hotel in consideration of exclusive rights for ten years, and charged reasonable rates, rendering satisfactory service so that public could not complain of discrimination, contract could not be avoided by hotel company as grant of exclusive privilege in violation of public policy. Id. Especially where object was to permit rival telephone company to install exchange and enjoy exclusive privilege. Id.

5. Subscriber refusing to comply therewith, not entitled to service. Buffalo County Tel. Co. v. Turner [Neb.] 118 NW 1064. Defendant not entitled to service without prepayment of charges because of existence of asserted counterclaim, large portion of which is exorbitant and illegal. Id.

6. Nothing in record to warrant holding one week's delay, unreasonable. Buffalo County Tel. Co. v. Turner [Neb.] 118 NW 1064. Rural telephone subscriber presumed to know that telephone is liable to get out of order and that reasonable time must elapse before it is repaired. Id.

7. Where proper administration of business of telephone company required removal of switch installed with patron, court would not interfere, but if necessary would render assistance. Contract at most for adequate means of communication, and, when such means established by central switchboard, plaintiff's switch was unnecessary. Red Line Mut. Tel. Co. v. Pharris [Neb.] 117 NW 995. No right to perpetual maintenance of switch. Though contract contemplated only one line, it was not violated by construction of two lines. Id.

8. Same degree of care imposed on telephone company in undertaking to secure answers to calls over long distance lines as imposed on telegraph company in delivering messages to addressees. Southwestern Tel. & T. Co. v. McCoy [Tex. Civ. App.] 114 SW 387. "Telegraph" includes any apparatus for transmitting messages by means of electric signals. McLeod v. Pacific States Tel. & T. Co. [Or.] 95 P 1009. Telephone is telegraph. Id.

9. Telephone company liable to the addressee or persons called to the phone by patron for any negligence in transmission and delivery of message or call. McLeod v. Pacific States Tel. & T. Co. [Or.] 95 P 1009. Evidence sufficient to support verdict for plaintiff where telephone company failed to secure answer to long distance sick call. Southwestern Tel. & T. Co. v. McCoy [Tex. Civ. App.] 114 SW 387.

10. Not responsible for identity of person answering or messages passing. McLeod v. Pacific States Tel. & T. Co. [Or.] 95 P 1009. Where a telephone company carelessly connects a patron with a wrong phone, and there is no contributory negligence on the part of the patron, it may be liable. Id. The business of telephone company, not transmission of messages, but to find and bring to telephone office party for whom call was made. Southwestern Tel. & T. Co. v. Flood [Tex. Civ. App.] 111 SW 1064. Duty of telephone company to person called is personal and inquiry must be made to person addressed. if circumstances show that he may be found at place of business or residence. Southwestern Tel. & T. Co. v. McCoy [Tex. Civ. App.] 114 SW 387.

person.[11] Recovery may be had for the damages naturally and probably resulting from the breach of contract or negligent act[12] after notice of the proposed conversation,[13] and the plaintiff must not be guilty of contributory negligence.[14] Speculative damages are not recoverable,[15] and mental anguish damages are not recoverable where the plaintiff's own acts cause the suffering.[16] Liability for negligence in transmission of messages may be in tort,[17] and the company may be liable to an addressee.[18] Where based upon contract, it must appear that the contract was made by or was to inure to the plaintiff's benefit,[19] and liability for breach of contract must sufficiently appear from the petition.[20] Proper evidence should be introduced[21] and questions of fact should be submitted to the jury[22] under appropriate instructions.[23]

**11.** McLeod v. Pacific States Tel. & T. Co. [Or.] 95 P 1009. Liable for negligence in this regard if notified of interest. Id.

**12.** Measure of damages for breach of contract to supply telephone service are such as arise naturally from breach, or may reasonably be supposed to have been contemplated by parties contracting. Southwestern Tel. & T. Co. v. Solomon [Tex. Civ. App.] 117 SW 214. Where statutory right to sue for wrongful death depends upon decedent's right, husband and children cannot recover for death caused by hemorrhage. Id. Where plaintiff obliged to get up at midnight and search for doctor for sick wife because of telephone company negligently failing to answer call, loss of time, extra effort, etc., constituted annoyance, for which actual damages were recoverable. Cumberland Tel. & T. Co. v. Jackson [Miss.] 48 S 614. Must appear that injury is proximate result of negligent act. Lebanon, Louisville & Lexington Tel. Co. v. Lanham Lumber Co. [Ky.] 115 SW 824. No recovery for injury to feelings caused by breach of contract to supply telephone service. Southwestern Tel. & T. Co. v. Solomon [Tex. Civ. App.] 117 SW 214. No recovery for breach of general contract to provide telephone service, where breach resulted in delay in securing physician's attendance at childbirth, since such damage could not have been reasonably foreseen to follow breach or negligence of company. Id. In action for failure of telephone company to notify plaintiff of call whereby sale of mules was lost, measure of damages was difference in market value at time of call and when he could sell same by using ordinary diligence. Southwestern Tel. & T. Co. v. Flood [Tex. Civ. App.] 111 SW 1064.

**13.** Telephone company not liable for consequential damage caused by negligent failure to notify person of call, unless it knows in some way of nature and purpose of proposed conversation, so that damages may be said to have been within parties' contemplation. Southwestern Tel. & T. Co. v. Flood [Tex. Civ. App.] 111 SW 1964. Notice that man in mule business desired to talk to another man in same business by long-distance, insufficient to charge company with notice of contemplated contract so as to render company liable for loss of sale. Id.

**14.** Plaintiff's right of recovery not to be defeated on theory of contributory negligence, unless from facts jury might say that person of ordinary diligence would have exercised other means to reach person called. Southwestern Tel. & T. Co. v. Owens [Tex. Civ. App.] 116 SW 89. Where telephone company on long distance sick call advised sender of message that person called was not at terminal and could not be found, sender had right to rely on information, and it was not contributory negligence so as to defeat recovery that sender did not telegraph. Id. Requested charge properly refused. Id.

**15.** Facts of petition charging telephone company for loss by fire, where service was not promptly given, held too speculative and remote to sustain cause of action. Lebanon, Louisville, & Lexington Tel. Co. v. Lanham Lumber Co. [Ky.] 115 SW 824.

**16.** No cause of action against telephone company where plaintiff's own acts cause of mental anguish. Western Union Tel. Co. v. Long [Ark.] 118 SW 405. Damage for mental suffering not recoverable where notice could, by ordinary prudence, be given person called. Southwestern Tel. & T. Co. v. Owens [Tex. Civ. App.] 116 SW 89.

**17.** McLeod v. Pacific States Tel. & T. Co. [Or.] 95 P 1009.

**18.** When notified of interest. McLeod v. Pacific States Tel. & T. Co. [Or.] 95 P 1009. Addressee need not be primary beneficiary, but liability extends if he has any interest. Id.

**19.** In suit for negligence in performing contractual duty to supply telephone service, where no injury to property or person. Southwestern Tel. & T. Co. v. Solomon [Tex. Civ. App.] 117 SW 214.

**20.** Allegations of petition insufficient to present cause of action for preventing use of telephone, where alleging contract with "Alabama" telephone company, which was subsequently sold and resold to the present defendants, but under contract of absolute and unconditional bargain and sale whereby obligations and debts of seller were not imposed on buyer. Southern Bell Tel. & T. Co. v. Jacoway, 131 Ga. 483, 62 SE 640.

**21.** In action for negligence of telephone company in failing to notify plaintiff of call, evidence of previous conversation over wire was inadmissible to show notice of what later call referred to, transactions being different. Wiggs v. Southwestern Tel. & T. Co. [Tex. Civ. App.] 110 SW 179. Where defendant's superintendent testified that telephone company had no agent at receiving station authorized to accept business, plaintiff was properly permitted to show contract with another company at receiving station, whereby latter received messages for former. Southwestern Tel. &

§ 5. *Quotations and ticker service.*[24]—See 6 C. L. 1677

§ 6. *Rates, tariffs, and rentals.*[25]—See 10 C. L. 1849—The regulation of rates may be vested in municipal corporations[26] and determined by the council,[27] though ordinances should conform to constitutional restrictions.[28] Charter authority to regulate telephone charges and service does not authorize a contract disabling a city from exercising its power.[29] The determination of rates may also be vested in a commission,[30] and rates established by a state commission are presumptively correct.[31] Punitive damages were not recoverable where charges were in good faith made by a company pursuant to an order of a state commission.[32] A telephone com-

T. Co. v. Owens [Tex. Civ. App.] 116 SW 89. Contract arrangement sufficient to show operator at receiving station to be agent of both companies. Id. Where under undisputed evidence defendant was responsible for acts of agent at receiving station, exclusion of contract to show such fact was not error. Id. Where undisputed evidence showed sick call on Oct 15, as alleged in amended petition, refusal of original petition, as evidence of call "on or about" Oct. 10, was harmless. Id. Exclusion of copy of ticket as to time of receiving call not error, where under evidence such ticket might have been misplaced. Id. Ticket showing time of call, inadmissible in absence of testimony as to meaning of figures representing date of call. Id.

**22.** Whether negligence of telephone company was proximate cause of injury held for jury. Wiggs v. Southwestern Tel. & T. Col [Tex. Civ. App.] 110 SW 179. In action for failure to secure answer to long distance sick call, exercise of due diligence by company merely telephoning to place where person worked, and ceasing further efforts, held for jury. Southwestern Tel. & T. Co. v. McCoy [Tex. Civ. App.] 114 SW 387.

**23.** No error in refusing requested instruction as to office hours where call received without objection, and from evidence terminal office was open when called. Southwestern Tel & T. Co. v. Owens [Tex. Civ. App.] 116 SW 89. Where evidence conflicting, instruction as to whether existing condition was brought about by negligence of telephone company and was proximate cause of plaintiff's suffering was proper. Wiggs v. Southwestern Tel. & T. Co. [Tex. Civ. App.] 110 SW 179. Refusal of requested charge, harmless where court correctly stated law as to diligence of telephone company in finding person called by long distance. Southwestern Tel. & T. Co. v. Owens [Tex. Civ. App.] 116 SW 89.

**24. Search Note:** See notes in 7 L. R. A. (N. S.) 889; 3 Ann. Cas. 429.

See, also, Telegraphs and Telephones, Cent. Dig. §§ 16-18; Dec. Dig. §§ 28, 32; 27 A. & E. Enc. L. (2ed.) 1094.

**25. Search Note:** See notes in 33 L. R. A. 181.

See, also, Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. §§ 33, 34.

**26.** Subject to constitutional limits, power to fix charges of such business as furnishing telephone service is legislative in character, continuing in nature and capable of being vested in municipal corporation. Home Tel. & T. Co. v. Los Angeles, 211 U. S. 265, 53 Law. Ed. 176.

**27.** No valid objection to governing body of a city making rates that council is not impartial, being in effect its own judge. Home Tel. & T. Co. v. Los Angeles, 211 U. S. 265, 53 Law. Ed. 176. No valid objection that council could not act fairly being subject to recall, where such power was not exercised. Id.

**28.** Ordinance fixing telephone rates, not denial of due process of law, though enacted under section of charter not providing for notice and hearing, where such notice and hearing in fact accorded by ordinance. Home Tel. & T. Co. v. Los Angeles, 211 U. S. 265, 53 Law. Ed. 176. Rate regulation on lower scale than that of competitor, not necessarily denial of equal protection of laws, since service of competitor may be more valuable. Id.

**29.** Home Tel. & T. Co. v. Los Angeles, 211 U. S. 265, 53 Law. Ed. 176. Act Cal. March 11, 1901 (Cal. Stat. 1901, p. 265), under which company derived franchise, insufficient to authorize municipality to contract away charter power to regular rates. Id. Municipal authority to enter into contract fixing telephone rates during term of franchise must at very least be implied from controlling statutes, if it be conceded that anything less than legislative authority be sufficient to authorize same (a relinquishment of governmental powers). Id.

**30.** Under Const. art. 9, § 22 (Bunn's Ed. § 234), state corporation commission upon hearing petition to reduce telephone rates has duty of making finding of facts, upon which order is made. On appeal must certify facts found to supreme court. Pioneer Tel. & T. Co. v. Westenhaver [Okl.] 99 P 1019. Where no finding of facts, supreme court may remand case to commission with directions to find facts upon which order is based and certify same to court. Id.

**31.** Presumption obtains, though data obtains upon which commission acted was insufficient, where rates were not based entirely upon arbitrary conjecture. Railroad Com. v. Cumberland Tel. & T. Co., 212 U. S. 414, 53 Law. Ed. —. Has burden of showing what part, if any, of depreciation fund accumulated from receipts was added to capital upon which dividends are to be paid. Id. Company seeking to enjoin rates as confiscatory and unreasonable has burden of proof. Id. No part of the depreciation fund accumulated by a telephone company from its receipts can be added to the capital upon which the company is entitled to a fair return, from rates established by a state commission. Id.

**32.** Where state railroad commission abolished free telephone service, and manager of exchange pursuant to directions, fixed charges without knowing that franchise in that city required free country serv-

pany voluntarily entering into contract with city, whereby latter confers rights in streets and in consideration thereof fixes maximum rates of service, may not repudiate the latter portion of the agreement as unauthorized.[33] A city telephone franchise prescribing monthly rates does not entitle patrons to long distance service without extra charge.[34] Excessive charges for services voluntarily paid without fraud, mistake of fact, or other ground for annulling the contract, are not recoverable.[35]

§ 7. *Offenses.*[36]—See 10 C. L. 1349

## TENANTS IN COMMON AND JOINT TENANTS.

**§ 1. Definitions and Distinctions; Creation of Relation, 2116.**
**§ 2. Rights and Liabilities Between Tenants, 2117.** Discharge of Incumbrances, Purchase of Adverse Titles, Rights of Cotenants, 2117. Possession, 2118. Adverse Possession, 2118. Rents, Profits, and Proceeds, 2119. Contribution, 2120. Agency, 2120. Conversion, 2120. Trespass and Waste, 2120. Actions, 2120. The Rights and Remedy of Partition, 2121.
**§ 3. Rights and Liabilities as to Third Persons, 2121.**

*The scope of this topic* is noted below.[37]

§ 1. *Definitions and distinctions; creation of relation.*[38]—See 10 C. L. 1650—The relation of tenants in common may be created by inheritance,[39] by will,[40] or by deed [41] made to two or more parties without designating the portion each is to take,[42] by the purchase of land with joint contributions,[43] by the lease of a farm upon shares,[44] by the release of a partnership interest,[45] by divorce,[46] by the acquisition of prop-

ice, but on learning of conflict took up matter and had free service re-established, and, in refusing, country patron was courteous, telephone company was not liable for punitive damages. Cumberland Tel. & T. Co. v. Paine [Miss.] 48 S 223.

**33.** Buffalo Merchants' Delivery Co. v. Frontier Tel. Co., 112 NYS 862.

**34.** Cumberland Tel. & T. Co. v. Hickman, 33 Ky. L. R. 730, 111 SW 311.

**35.** Where rate fixed by ordinance, but excess charges paid pursuant to contract. Illinois Glass Co. v. Chicago Tel. Co., 234 Ill. 535, 85 NE 200. No compulsion. Id. Where a private citizen, for whose benefit contract is made between city and telephone company fixing rates for service, enters into contract for service at different rate with knowledge of facts, he cannot repudiate contract and demand service at franchise rates. Buffalo Merchants' Delivery Co. v. Frontier Tel. Co., 112 NYS 862.

**36. Search Note:** See Telegraphs and Telephones, Cent. Dig. § 22; Dec. Dig. § 79; 21 A. & E. Enc. P. & P. 506.

**37.** Rights of partners in firm property (see Partnership, 12 C. L. 1206), and the property rights of husband and wife (see Husband and Wife, 11 C. L. 1138), are excluded, as is partition of property held in common (see Partition, 12 C. L. 1206). As to adverse possession between tenants in common, the topic Adverse Possession, 11 C. L. 41, should also be consulted.

**38. Search Note:** See notes in 30 L. R. A. 305.

See, also, Joint Tenancy, Cent. Dig. §§ 1-4; Dec. Dig. §§ 1-6; Tenancy in Common, Cent. Dig. §§ 1-21; Dec. Dig. §§ 1-9; 17 A. & E. Enc. L. (2ed.) 648.

**39.** Heirs take as tenants in common. Tyner v. Schoonover [Kan.] 100 P 478; Hess v. Webb [Tex. Civ. App.] 113 SW 618; Kirby v. Blake [Tex. Civ. App.] 115 SW 674.

**40.** Under a will giving residue of estate to named and after born children, the children take as tenants in common and hence testator dies intestate as to the shares of predeceased children. In re Krummenacker, 60 Misc. 55, 112 NYS 596.

**41.** Evidence held insufficient to show creation of relation of tenants in common, where claim originated under deed which in no wise showed how grantor obtained land. Morgan v. White [Tex. Civ. App.] 110 SW 491.

**42.** Where conveyance is made to two or more parties, without designating portion each is to take, law presumes that they were intended to take equal shares, and they will be considered tenants in common with equal interests. Keuper v. Mette's Unknown Heirs, 239 Ill. 586, 88 NE 218. A grant simply to wife and children creates a joint estate in equal portions (Talley v. Ferguson [W. Va.] 62 SE 456), but a grant for use and benefit of wife and children will, where possible, be construed as a life estate to wife with remainder over to children so that wife may have income to support family and after born children may take (Id.).

**43.** Where brothers by joint contributions of money and labor purchased farm land taking title in all their names, they are tenants in common. Schuster v. Schuster [Neb.] 120 NW 948.

**44.** Lessor and lessee under lease of farm upon shares become tenants in common of crops. Rice v. Peters, 128 App. Div. 776, 113 NYS 40.

**45.** Where one partner purchases interest of other, taking merely general release but not transfer of legal title, and then

erty by two husbands under the community property system,[47] and by a claim of water rights through the same diversion,[48] but not by a deposit in the name of a principal and agent.[49]

§ 2. *Rights and liabilities between tenants.*[50]—See 10 C. L. 1850—A tenant in common cannot bind his cotenant by a lease,[51] conveyance,[52] dedication,[53] or by creating a lien upon the property,[54] but may only bind himself and his interest by such acts.[55] Land held by tenancy in common or joint tenancy cannot be selected or claimed as a homestead.[56]

Where a joint tenant dies without a severance of the estate, his estate vests in the survivors.[57]

*Discharge of incumbrances, purchase of adverse titles, rights of cotenants.*[See 10 C. L. 1851]—Where one tenant in common acquires a tax title or redeems land from a tax sale,[58] purchases an outstanding title or incumbrance,[59] or recovers judgment in ejectment for the whole premises against an adverse claimant,[60] his act inures to the benefit of all, and he holds the title thus acquired as trustee for the use and benefit of his cotenants [61] who may compel him to convey to them their

sells real estate to another, latter and former partner are legally tenants in common. Rosenbaum v. New York, 129 App. Div. 351, 113 NYS 364.

46. Property purchased by wife and conveyed to herself and husband as tenants by entireties is held as tenants in common after divorce. Reed v. Reed [Md.] 72 A 414.

47. Property acquired by two husbands after passage of community property acts is common property of themselves and wives and not held in joint tenancy so as to pass to survivor. Stone v. Marshall [Wash.] 100 P 858.

48. Parties claiming water rights through same diversion and from some ditch through which appropriation was originally made are tenants in common. Hough v. Porter [Or.] 98 P 1083.

49. Such deposit does not constitute joint tenancy or ownership with right to survivorship. Robinson v. Mutual Sav. Bank, 7 Cal. App. 642, 95 P 533.

50. **Search Note:** See notes in 6 C. L. 1691; 8 Id. 2115; 12 L. R. A. 484; 16 Id. 547; 28 Id. 829, 853; 29 Id. 449; 8 L. R. A. (N. S.) 559; 10 Id. 212, 863; 16 A. S. R. 660; 24 Id. 816; 35 Id. 416; 50 Id. 839; 52 Id. 924; 65 Id. 683; 100 Id. 649; 109 Id. 609; 116 Id. 367; 8 Ann. Cas. 988; 10 Id. 282.

See, also, Joint Tenancy, Cent. Dig. §§ 5-13; Dec. Dig. §§ 7-10; Tenancy in Common, Cent. Dig. §§ 22-118; Dec. Dig. §§ 10-38; 17 A. & E. Enc. L. (2ed.) 668.

51. Cannot bind cotenant as to separate interest. Chamberlain v. Brown [Iowa] 120 NW 334. Oil and gas lease of entire tract by one cotenant. Zeigler v. Brenneman, 237 Ill. 15, 86 NE 597.

52. Tenant cannot prejudice rights of cotenants by conveyance in partition proceedings. Middlecoff v. Cronise [Cal.] 100 P 232. Widow's conveyance of right of way held not to affect rights of children. Foster v. Foster, 81 S. C. 307, 62 SE 320.

53. One tenant cannot dedicate without other's consent. Heilbron v. St. Louis S. W. R. Co. [Tex. Civ. App.] 113 SW 610.

54. Widow cannot create lien on land conveyed to herself and children which can bind children. Leavell v. Carter [Ky.] 112 SW 1118.

55. Oil and gas lease by one tenant in common is binding upon him and his lessee though it is not binding upon his cotenants. Zeigler v. Brenneman, 237 Ill. 15, 86 NE 597.

56. United States Oil & Land Co. v. Bell, 153 Cal. 781, 96 P 901.

57. Best v. Tatum [Kan.] 96 P 140. Laws 1891, p. 349, c. 303, abolishing joint tenancies, held not to effect such estate where vested prior to its enactment. Id.

58. Roll v. Everitt [N. J. Err. & App.] 71 A 263. Tenant in possession and using whole can never permit property to be sold for taxes and by purchase assert title against his cotenants. Smith v. Smith [N. C.] 63 SE 177. Revisal 1905, § 2860, permitting one tenant in common to pay his share of taxes or redeem his share after sale, does not authorize one tenant to take title to whole tract nor does it apply to tenant in possession but only where all or none are in possession. Id. Title to tax deed cannot be acquired by one to injury of others. Stone v. Marshall [Wash.] 100 P 858.

59. Stevenson v. Boyd, 153 Cal. 630, 96 P 284. One tenant in common cannot purchase, for his own exclusive use and benefit, interest in real estate which is common property of himself and others. Kohle v. Hobson [Mo.] 114 SW 952. Rule applied to purchase by life tenant. Morrison v. Roehl [Mo.] 114 SW 981.

60. Cassin v. Nicholson [Cal.] 98 P 190.

61. Stevenson v. Boyd, 153 Cal. 630, 96 P 284. When one of several tenants in common recovers judgment in ejectment against an adverse claimant, judgment determines right of possession of whole premises, and recovery of possession under judgment relates to commencement of action, so, that in contemplation of law, plaintiff must be considered in possession of whole premises as of that date, and effect of recovery inures to benefit of other cotenants not suing, so as to prevent acquisition of title by adverse possession against them pending action. Cassin v. Nicholson [Cal.] 98 P 190. Purchase of husband's right of curtesy and possession thereunder is not adverse and title will be treated as if he was of cotenants. Kohle v. Hobson [Mo.] 114 SW 952.

respective interests [62] by contributing or offering to contribute their proportion of the purchase money [63] within a reasonable time.[64] In North Carolina, however, in the case of heirs, the general rule seems to have been somewhat modified.[65]

*Possession.*See 10 C. L. 1651—The possession of one tenant in common is in law the possession of all,[66] until an ouster is clearly and satisfactorily shown.[67] Only a cotenant can complain of the exclusive use of the property by the other tenant.[68]

*Adverse possession.*See 10 C. L. 1651—Since the possession of one tenant is presumed to be that of his cotenants also,[69] such possession can never become adverse to his cotenants,[70] unless it is open, notorious, hostile,[71] after an actual ouster,[72] with notice to the cotenant [73] of the hostile claim,[74] and for the full statutory period.[75]

Tenants in common by descent are placed in confidential relations to each other by operation of law as to joint property and same duties are imposed as if joint trust were created by contract between them, or act of third party. Being associated in interest as tenants in common, implied obligation exists to sustain common interest. Reciprocal obligation will be enforced in equity as trust. These relations of trust and confidence bind all to put forth their best exertions, and to embrace every opportunity to protect and secure their common interest, and forbid assumption of hostile attitude by either. Smith v. Smith [N. C.] 63 SE 177.

**62.** Kohle v. Hobson [Mo.] 114 SW 952.

**63.** Stevenson v. Boyd, 153 Cal. 630, 96 P 284; Kohle v. Hobson [Mo.] 114 SW 952; Roll v. Everitt [N. J. Err. & App.] 71 A 263. Cotenant who pays tax assessed against whole estate acquires lien on cotenant's interest for their just proportion which he may enforce in court of equity. Stone v. Marshall [Wash.] 100 P 858.

**64.** Four years delay and failure to claim benefits held fatal where cotenant had full knowledge and land had been greatly improved and increased in value. Stevenson v. Boyd, 153 Cal. 630, 96 P 284.

**65.** Any one of heirs has right to purchase entire estate to protect his interest upon foreclosure sale of common ancestor's mortgage and secure title discharged of any trust to his coheirs. Jackson v. Baird, 148 N. C. 29, 61 SE 632. Rule that one cotenant cannot purchase outstanding title affecting common estate for his own exclusive benefit does not apply Id.

**66.** Sumner v. Hill [Ala.] 47 S 565; Baumgarten v. Mitchell [Cal. App.] 101 P 43; Carpenter v. Fletcher, 239 Ill. 440, 88 NE 162; Tyner v. Schoonover [Kan.] 100 P 478; Vermillion v. Nickell [Ky.] 114 SW 270.

**67.** Tyner v. Schoonover [Kan.] 100 P 478; Vermillion v. Nickell [Ky.] 114 SW 270.

**68.** Heilbron v. St. Louis S. W. R. Co. [Tex. Civ. App.] 113 SW 610.

**69.** Cramton v. Rutledge [Ala.] 47 S 214. And see ante, this section.

**70.** Cramton v. Rutledge [Ala.] 47 S 214; Layton v. Campbell [Ala.] 46 S 775. Mere possession of one cotenant has in it no element of hostility to his cotenant. Baumgarten v. Mitchell [Cal. App.] 101 P 43. Mere possession by one tenant in common who receives all rents and profits and pays taxes assessed against property, no matter for how long period, cannot be set up as bar against cotenants. Carpenter v. Fletcher, 239 Ill. 440, 88 NE 162. Possession in absence of any hostile act held not adverse. German v. Heath [Iowa] 116 NW 1051.

**71.** Vermillion v. Nickell [Ky.] 114 SW 270. Evidence insufficient to show adverse possession. Id.

**72.** Ouster not proved. Tyner v. Schoonover [Kan.] 100 P 478. Before adverse possession can commence in favor of one tenant in common against cotenant, there must be actual ouster, or that which is equivalent to actual ouster, of such cotenant. Sumner v. Hill [Ala.] 47 S 565; Cramton v. Rutledge [Ala.] 47 S 214. Possession by joint tenant may become adverse if tenant in common by his acts and conduct disseises his cotenants by repudiating their title and claiming adversely to them. Carpenter v. Fletcher, 239 Ill. 440, 88 NE 162. To constitute disseisin there must be outward acts of exclusive ownership of unequivolent character, overt and notorious, and of such nature as by their import to impart information and give notice to cotenants that adverse possession and actual disseisin are intended to be asserted against them. Id. Evidence held sufficient to show disseisin. Id. Repudiation of cotenancy with cotenant's knowledge coupled with possession adverse to and incompatible with interest as cotenant held sufficient. Frey v. Meyers [Tex. Civ. App.] 113 SW 592.

**73.** Vermillion v. Nickell [Ky.] 114 SW 270. If it appears that he has repudiated title of his cotenant, of which latter has notice, then possession will be adverse if all other necessary elements are present. Layton v. Campbell [Ala.] 46 S 775. Unless adverse character of their possession was actually known to their cotenants on notice of its adverse character, after their rights to possession accrued. Cramton v. Rutledge [Ala.] 47 S 214. Pleading held insufficient to show requisite facts. Id. Possession of purchaser of interest of heir is not adverse unless notice is clearly brought to them that he claims entire tract as exclusive owner and unless previous actual possession and cultivation of small part of tract was such as to support statute as to entire tract. Hess v. Webb [Tex. Civ. App.] 113 SW 618. Where tenant knows that cotenants are ignorant of their interest in property, it is their duty to either inform them directly of their interest or to take such open and notorious possession of property as to make it clear that they claimed against world and, where they failed to do either, they cannot claim laches. Stone v. Marshall [Wash.] 100 P 858.

**Constructive notice from record:** Possession of one tenant in common asserting exclusive right to land under deed conveying

It has also been held that a tenant in common cannot acquire color of title in himself by procuring an outstanding adverse title,[76] though the rule is otherwise if the adverse title is acquired by one tenant in common who is out of possession and who enters into possession under and by virtue of the title so acquired.[77]

*Rents, profits, and proceeds.*[See 10 C. L. 1852]—Where one of the tenants in common ousts his cotenant,[78] or holds sole, exclusive, and adverse possession under claim of title,[79] or has received the common property,[80] he may usually [81] be held to account to them for their proportionate share of the rents and profits of the estate.[82] The amount which may be recovered in such cases varies somewhat with the different jurisdictions and circumstances. Thus in some cases the proportionate share of the rents and profits actually received, only, may be recovered,[83] in others the proportionate share of the rental value may be recovered,[84] while in case of ouster it has been held that only mesne profits may be recovered.[85] The rents thus due do not con-

land to him by specific description is adverse to his cotenants having notice of deed by its record. Residence for 50 years under recorded deed. Morgan v. White [Tex. Civ. App.] 110 SW 491. Possession under deed to specific tract is notice to cotenants of adverse character of holding. Toole v. Renfro [Tex. Civ. App.] 114 SW 450.

**Evidence held not to show notice.** Baumgarten v. Mitchell [Cal. App.] 101 P 43; Hamilton v. Steele [Ky.] 117 SW 378. Claim of exclusive right by tenant in actual possession and denial of rights of cotenant, not brought directly to notice of such cotenant, is insufficient. Sumner v. Hill [Ala.] 47 S 565.

**74.** After tenant has testified that he purchased from cotenant's grantor prior to latter's conveyance to cotenant, refusal of cross-examination to show absence of consideration in latter conveyance held error since evidence went to show exclusive hostile claim of ownership. Layton v. Campbell [Ala.] 46 S 775.

**75.** Pleading held bad for failure to state that period of limitation was complete before suit. Sumner v. Hill [Ala.] 47 S 565. Nothing less than 20 years is ouster between cotenants. Smith v. Smith [N. C.] 63 SE 177. Insufficient where tenant in possession of whole allowed it to be sold and took title in himself in absence of notice to cotenants. Id.

**76.** Title so acquired inures to benefit of all tenants in common. Carpenter v. Fletcher, 239 Ill. 440, 88 NE 162. Possession under partition decree held to be for all. Id. No tenant in common in possession for benefit of all cotenants can in any manner acquire color of title that will ripen into bar against his cotenants under seven years' statute of limitations. Id.

**77.** In such case, entry is hostile and not for benefit of cotenants. Carpenter v. Fletcher, 239 Ill. 440, 88 NE 162. Where tenant in common releases for valuable consideration to cotenant by quitclaim deed all his right, title and interest in certain land therein described, expressly including interest inherited by him from brother, then believed to be dead; and where also grantee goes into actual possession of land upon which he and his heirs make valuable improvements and continue in peaceable possession thereof for more than twenty-one years, such grantee and his heirs acquire good title to such interest as against grantor and his heirs although brother was not dead at time of execution of deed of release. Ward v. Ward, 11 Ohio C. C. (N. S.) 396.

**78.** Evidence held to show ouster. Starks v. Kirchgraber [Mo. App.] 113 SW 1149.

**79.** Accounting awarded. Schuster v. Schuster [Neb.] 120 NW 948.

**80.** German v. Heath [Iowa] 116 NW 1051.

**81.** If one tenant in common occupies whole estate without any claim on part of cotenants to be admitted into possession, and without hinderance to him of such possession, occupying tenant is not liable to his cotenants in action of account. Starks v. Kirchgraber [Mo. App.] 113 SW 1149. One in permissive possession without promise to pay rent is not liable. Cannon v. Stevens [Ark.] 115 SW 388.

**82.** Whether premises were occupied by tenant or leased. Starks v. Kirchgraber [Mo. App.] 113 SW 1149. In case of ouster it is sufficient to entitle plaintiffs to recover in their action for accounting of rents and profits to show ouster by their cotenant and his consequent possession, together with reasonable value of rents and profits for period they were precluded from enjoying fruits of premises. Id. If one tenant in common receives common property, either by consent or wrongfully, he holds it as trustee for his cotenant to extent of interest of that cotenant, and cotenant is entitled to proceed in equity for accounting. Sale of animals and retention of proceeds by one of two persons engaged in raising horses on shares. Rice v. Peters, 128 App. Div. 776, 113 NYS 40.

**83.** German v. Heath [Iowa] 116 NW 1051. In absence of agreement to contrary, tenant in possession of real property is liable to account to his cotenant only for what he usually receives, and then he is entitled to an allowance for taxes paid and for keeping premises in ordinary repair, and if he occupies premises himself same rule applies. Adams v. Bristol, 126 App. Div. 660, 111 NYS 231. Not liable for rental value but only profits made or rents actually received. Griffin v. Griffin [S. C.] 61 SE 160. Rental value will be received as evidence of profits made or rents actually received in absence of better evidence. Id.

**84.** Vermillion v. Nickell [Ky.] 114 SW 270.

**85.** Rule as to ouster does not apply where title and adverse claim against cotenants were not asserted, and cotenants

stitute an outstanding lien or incumbrance on the latter's moiety,[86] and are usually chargeable with the proper portion of the taxes paid,[87] and the increased value due to the improvements made.[88] One tenant may show in defense to such an action that he holds the entire equitable title,[89] and the right to recover may be barred by limitations.[90]

The action for an accounting for rents and profits must be distinguished from that for use and occupation.[91]

*Contribution.*See 10 C. L. 1853—A tenant in common who discharges a lien upon the common property has a right to contribution from his cotenant, and as security is entitled to a lien upon his cotenant's share of the property,[92] but the right may be barred by limitations,[93] and laches.[94]

*Agency.*See 8 C. L. 2120—The ordinary rules as to agency usually apply.[95]

*Conversion.*See 8 C. L. 2120—A tenant may be liable to his cotenant for the conversion of things readily divisible.[96]

*Trespass and waste.*See 10 C. L. 1853—Under the common law a tenant in common who has parted with estate could not sue for waste committed previous to his conveyance,[97] but such recovery is now permitted by statute.[98]

*Actions.*See 10 C. L. 1853—As against every person not claiming under a tenant one may sue for and recover the entire tract in his own name.[99] In Illinois a cotenant

did not know of their interest in property until near time of suit. Adams v. Bristol, 126 App. Div. 660, 111 NYS 231.

**86.** Vaughan v. Langford, 81 S. C. 282, 62 SE 316.

**87.** Less one-talf taxes. German v. Heath [Iowa] 116 NW 1051. Taxes may be set off against rents though paid after ouster and while claiming adverse possession. Starks v. Kirchgraber [Mo. App.] 113 SW 1149.

**88.** Vermillion v. Nickell [Ky.] 114 SW 270.

**89.** Where partner purchased from copartner and sold real estate to another. Rosenbaum v. New York, 129 App. Div. 351, 113 NYS 364.

**90.** Where actual ouster by one tenant under claim of superior right is had, right of action against ousting tenant accrues in favor of tenant ousted, and running of statute of limitations commences eo instanti. Runs against rents from time first of them are due. Starks v. Kirchgraber [Mo. App.] 113 SW 1149. Action for recovery of rents and profits from cotenant is not barred by statute of limitations until four years have elapsed from accruing of such action. Schuster v. Schuster [Neb.] 120 NW 948.

**91.** Ground upon which tenant in common is liable to be called upon by his cotenant to account in action of assumpsit for proportionate share of money he has actually received as rent from stranger is entirely different from that which makes him liable for mere use and occupation, and hence, evidence tending to show use and occupation is properly excluded where statement did not sever use and occupation but appropriation of rents to own use. Dorrance v. Ryon, 35 Pa. Super. Ct. 180.

**92.** Lien of tax deed. Lien may be enforced in equity by treating tax deed valid and subsisting for that purpose. Roll v. Everitt [N. J. Err. & App.] 71 A 263.

**93.** Right to enforce contribution for taxes accrues and statute of limitations begins to run from time of payment. Starks v. Kirchgraber [Mo. App.] 113 SW 1149.

**94.** Delay of ten years in enforcing claims for reimbursement held fatal. German v. Heath [Iowa] 116 NW 1051. Cotenants out of possession who had no knowledge of their interest in property until suit held not guilty of laches in not asserting their rights. Id.

**95.** Where one acted as representative of all in sale of certain land owned in common and ratified contract to sell made by such person with broker by signing contract of sale, he is liable with other parties for whole of commissions. Gillespie v. Dick [Tex. Civ. App.] 111 SW 664. To bind cotenants to pay commission for making lease, it is not essential that there have been mutual absolute agreement in express words to pay specified sum as commission, but only necessary that facts and circumstances show mutual understanding. Knight v. Knight, 142 Ill. App. 62. Evidence held sufficient to show such understanding. Id.

**96.** Tenant in common who sells entire timber on land in which he owns half interest, and purchaser who buys with knowledge that seller owns but half interest, are liable to cotenants for latter's share. Collier v. Cameron & Co. [Tex. Civ. App.] 117 SW 915. With respect to things so far indevisible in their nature that share of one cannot be distinguished from that of other, it is well established rule that one tenant in common cannot maintain trover against his cotenant for reason that two are equally entitled to possession; but this rule does not apply to such commodities as are readily divisible by count or measure into portions absolutely alike in quality such as grain or money. Weeks v. Hackett [Me.] 71 A 858.

**97.** Hoolihan v. Hoolihan, 193 N. Y. 197, 85 NE 1103.

**98.** Code Civ. Proc. § 1656. Section held to so provide when construed in connection with Code Civ. Proc. § 1652, and history of enactment and revisions as affecting § 1656. Hoolihan v. Hoolihan, 193 N. Y. 197, 85 NE 1103.

**99.** LeCroix v. Malone [Ala.] 47 S 725; Jett v. Hunter [Tex. Civ. App.] 111 SW 176;

may bring ejectment against one claiming exclusive right to possession.[1] An action for the surplus in the hands of a mortgagee after foreclosure must be in the name of all cotenants.[2] An action for compensation and damages,[3] or injunction, is a proper remedy in cases of unlawful injury to common property, or of interference with its use and enjoyment.[4] A decree placing cotenants out of possession in possession may properly decree an accounting.[5]

*The rights and remedy of partition.* See 10 C. L. 1854—A tenant in common who has been disseised is not entitled to partition, but, to prevent a tenant in common from having partition, there must be an actual ouster.[6] Where tenant in common in possession, makes valuable improvements therein, he will under some circumstances be entitled to an equitable partition so as to give him the benefit of the improvements,[7] but the right depends largely upon the circumstances of each case.[8] Where one tenant in common of land conveys a specific portion entire of the tract, his vendee should be allotted, in its entirety, the portion sold him, if this can be done without detriment to the rights of the other cotenants.[9] In New York there is no statutory provision limiting the time for which rents may be apportioned in actions for partition.[10]

§ 3. *Rights and liabilities as to third persons.*[11]—See 10 C. L. 1854

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**Tender; Terms of Court,** see latest topical index.

**TERRITORIES AND FEDERAL POSSESSIONS.**

**§ 1. Acquisition and Political Status, 2122.**
**§ 2. Organization and Government, 2122.**
**§ 3. Jurisdiction, Powers, Duties, and Liabilities, 2123.**
**§ 4. Local Laws and Practice; Territorial Courts, 2123.**

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Caruthers v. Hadley [Tex. Civ. App.] 115 SW 80. Purchaser from tenant in common becomes one who may so sue. Kirby v. Blake [Tex. Civ. App.] 115 SW 674.

**1.** Where exclusive right of possession is claimed adversely to cotenant, he may bring ejectment under Hurd's Rev. St. 1905, c. 45, § 26. North v. Graham, 235 Ill. 178, 85 NE 267.

**2.** Halliday v. Manton [R. I.] 69 A 847.

**3.** Tenant in common is "owner" of land within meaning of § 6448, Revised Statutes, and if ousted by railroad company cotenant may sustain action for compensation and damages under that section against such cotenant. Union Sav. Bank & Trust Co. v. Baltimore, etc., R. Co., 7 Ohio N. P. (N. S.) 497.

**4.** Hancock v. Tharpe, 129 Ga. 812, 60 SE 168. Owners of one tenth interest in land and in possession thereof may enjoin total dispossession by another. Williamson v. Fleeger, 137 Ill. App. 42.

**5.** Held to properly provide for reference to take account of waste, betterments, disbursements, rents, etc., within three years preceding action. Smith v. Smith [N. C.] 63 SE 177.

**6.** Fact that statute, authorizing sale of land for taxes as it existed when tax deed was made, authorized purchaser at tax sale to hold and enjoy real estate during term for which he purchased same does not prevent operation of rule, and hence of procuring of tax deed is not sufficient ouster to prevent partition. Roll v. Everitt [N. J. Err. & App.] 71 A 263.

**7.** Tenant in possession supposing himself to be entitled to whole premises. Adams v. Bristol, 126 App. Div. 660, 111 NYS 231. Notwithstanding strict rule that cotenant, who is disseisor, is chargeable with rents and cannot compel contribution for improvements, court of equity in partition proceedings may consider all of circumstances and somewhat modify rule in interests of justice. Though acts of one purchasing land at partition sale, who believed he was thereby sole owner, amounted to technical ouster of cotenant, he may enforce contribution for valuable improvements enhancing value of land greatly, and for payment of incumbrances. Parkhill v. Doggett [Iowa] 119 NW 689. It is not improper in such case to permit removal of inexpensive building. Id. Proper in partition to allow credit for improvements and deduct rent therefrom, statute of limitations having no application for reason that, in accounting between cotenants, betterments are to be regarded paid for pro tanto by rents. Vaughan v. Langford, 81 S. C. 282, 62 SE 316.

**8.** Adams v. Bristol 126 App. Div. 660, 111 NYS 231.

**9.** Grantee held entitled to his particular tract where granted during suit to try title to get rid of adverse claimant, secure his assistance in suit, and benefit inured to all tenants. Moonshine Co. v. Duncan [Tex. Civ. App.] 111 SW 161. In such a case, subsequent granters of undivided portions of the remainder take subject to such grantee's right to such portion of the tract on partition. Id.

**10.** Adams v. Bristol, 126 App. Div. 660, 111 NYS 231. Code Civ. Proc. § 1531, applies only to ejectment. Id.

**11. Search Note:** See notes in 18 L. R. A. 789; 6 L. R. A. (N. S.) 710.

See, also, Joint Tenancy, Cent. Dig. §§ 14-19; Dec. Dig. §§ 11-14; Tenancy in Common, Cent. Dig. §§ 119-156; Dec. Dig. §§ 39-55;

*The scope of this topic* is noted below.[12]

§ 1. *Acquisition and political status.*[13] See 10 C. L. 1854—Territories are portions of the United States not yet created into states.[14] In the case of conquest confirmed by treaty grounded on the principle of uti possidetis, the sovereignty over the acquired territory is appropriated,[15] while, if acquired by cession, the sovereignty is transferred.[16] The possession of Manila until the treaty with Spain was temporary and that of the usual occupation of belligerent territory.[17] The validity of the title of the United States to land purchased and occupied as a military fort and the identification and definite boundaries of such land are matters for the determination of the executive department of the government.[18] Real estate conveyed to the United States for a specific purpose is subject to entry upon the breach of the condition.[19]

§ 2. *Organization and government.*[20] See 10 C. L. 1854—Congress has the power to dispose of and make all needful rules and regulations as to territories.[21] The government of Manila prior to the treaty with Spain was de facto, of a military character.[22]

*Territorial officers.* See 8 C. L. 2122—Public officers of Porto Rico held their offices after the conquest and treaty by sufferance of United States.[23] The powers of a territorial governor are usually determined by the organic act,[24] and the term of office of a territorial officer may involve a construction of the statute authorizing the same.[25] A property owner and taxpayer has no such personal interest in a suit to

17 A. & E. Enc. L. (2ed.) 706; A. & E. Enc. P. & P. 771.

**12. Includes** matters relating to territories and other districts under control of the federal government. **Excludes** matters relating to public bodies generally (see Public Contracts, 12 C. L. 1442; Officers and Public Employes, 12 C. L. 1131, and like topics), and the jurisdiction of territorial courts (see Jurisdiction, 12 C. L. 458).

**13. Search Note:** See notes in 15 L. R. A. (N. S.) 922.

See, also, Territories, Cent. Dig.; Dec. Dig.; 28 A. & E. Enc. L. (2ed.) 57.

**14.** Territory v. Long Bell Lumber Co. [Okl.] 99 P 911.

**15.** Sanches v. U. S., 42 Ct. Cl. 458. Right to retain possession of territory acquired by force during war recognized by Treaty of Paris (30 Stat. L. 1754). Id. Sovereignty of Spain passed with Porto Rico when acquired by U. S. Id.

**16.** Sanches v. U. S., 42 Ct. Cl. 458.

**17.** United States could only exercise restricted right of belligerent. Ho Tung & Co. v. U. S., 42 Ct. Cl. 213.

**18.** Not subject to judicial scrutiny on trial of criminal case. United States v. Holt, 168 F 141.

**19.** Fay v. Locke, 201 Mass. 387, 87 NE 753.

**20. Search Note:** See 28 A. & E. Enc. L. (2ed.) 58.

**21.** Territory v. Long Bell Lumber Co. [Okl.] 99 P 911. Federal **employer's liability act** (Act Cong. June 11, 1906, c. 3073, 34 Stat. 232; U. S. Comp. St. Supp. 1907, p. 891), though unconstitutional in its application to interstate commerce, is valid in applying to territories. Cutierrez v. El Paso & N. E. R. Co. [Tex.] 117 SW 426. Provisions, defining liabilities of carriers engaged in commerce in territories, within constitutional power of congress to govern territories. Id. Such provisions independent of those relative to interstate commerce based on congress' power to regulate interstate commerce. Id. See, also, post, § 4.

**22.** Subject only to higher military authority. Ho Tung & Co. v. U. S., 42 Ct. Cl. 213. Upon occupation of port of Manila by our military force, it was their duty to enforce municipal laws then in force until changed by military authority. Id. Order of President as Commander in Chief not in force in Manila until received and made known there. Id.

**23.** Sanches v. U. S., 42 Ct. Cl. 458. Though office might have been property right under Spanish laws, right of property disappeared when office passed to U. S. Id. Act in pursuance of powers of U. S. as conqueror. Id. Order of military governor of Porto Rico abolishing office of solicitor not tortious though depriving claimant of office. Id. Abolition of purchasable public office held in perpetuity not prevented by Treaty of Paris (30 Stat. at L. p. 1751), providing that property right be not impaired. Id.

**24.** Under Foraker Act of April 12, 1900, (31 Stat. at L. 80, c. 191), § 14, that laws of United States be in force in Porto Rico if applicable and § 17, that governor have powers of governors of territories to U. S., governor of Porto Rico has same powers in regard to extradition of fugitive criminals under Rev. St. § 5278, U. S. Comp. St. 1901, p. 3597, as governors of any organized territory. New York v. Bingham, 211 U. S. 468, 53 Law. Ed. 286. Porto Rico a territory within U. S. Rev. St. § 5278, as to extradition of criminals. Id.

**25.** Act April 30, 1900 (31 St. at L., p. 156, § 80), as to officers of territory of Hawaii, construed and term of office of territorial judge held to be for four years and to hold until successor is appointed and qualified. Robinson v. U. S., 42 Ct. Cl. 52. Act construed in connection with Rev. St. Tit. 23, c. 1, § 1864, common to all territories. Id.

restrain the exchange of public lands by territorial officers as will sustain a writ of error to the federal supreme court.[26]

§ 3. *Jurisdiction, powers, duties, and liabilities.*[27]—See 10 C. L. 1854—The jurisdiction over places occupied and used for military purposes is vested exclusively in the national government,[28] although a state in ceding property for public uses may retain concurrent jurisdiction.[29] Government reservations throughout the District of Columbia are in the exclusive charge and control of the federal government,[30] and jurisdiction over the Potomac river is also vested in the national government.[31] The cession of Porto Rico imposed no obligation to indemnity inhabitants for losses caused thereby,[32] but the hereditary right to an office or to compensation for its extinction existing under a foreign government does not survive as against the United States upon forcible occupation of the territory by federal troops.[33]

§ 4. *Local laws and practice; territorial courts.*[34]—See 10 C. L. 1855—Territorial legislative powers are governed by the organic act[35] and are usually subject to the

**26.** McCandless v. Pratt, 211 U. S. 437, 53 Law. Ed. 271. Suit grounded on theory that exchange was illegal under territorial laws, because lands under lease and in parcels exceeding 1,000 acres. Id.

**27. Search Note:** See 28 A. & E. Enc. L. (2ed.) 58, 65.

**28.** Under Const. art. 1, § 8, when site acquired with consent of legislature in state where situated. United States v. Holt, 168 F 141. Under Acts Jan. 23, 1890, and Feb. 24, 1891 (L. Wash. 1890, p. 459; L. 1891, p. 31, c. 18; Pierce's Code 1905, pp. 1630, 1631, §§ 8900-8902, Ballinger's Ann. Codes & St. §§ 2947, 2110, 2111), legislature of Washington consented to acquisition of lands for public uses as erection of forts, by government of United States. Id. Land on which Ft. Oglethorpe is situated in Georgia was ceded by Laws Georgia 1890-91, vol. 1, p. 200, and under Const. art. 1, § 8, is subject to exclusive jurisdiction of congress. Pundt v. Pendleton, 167 F 997. Government teamster at fort cannot be required by state officers to work on state roads. Id. Detention for failure to perform road work violation of constitution and laws of U. S. Id.

**29.** Under Rev. Laws, c. 1, § 2, whereby jurisdiction of commonwealth extends to all places within boundaries, subject to concurrent jurisdiction of United States to places ceded and under Rev. Laws, c. 1, § 6, as to land acquired by United States for certain public uses, retaining concurrent jurisdiction and providing that exclusive jurisdiction revert, where such land ceases to be used, state courts have jurisdiction over writ of entry to recover property which was to revert to grantor upon breach of condition. Fay v. Locke, 201 Mass. 387, 87 NE 753.

**30.** District of Columbia not liable for injury to pedestrian who struck leg against stake in government reservation, however near sidewalk. District of Columbia v. Coale, 30 App. D. C. 143.

**31.** Compact of 1785, between Virginia and Maryland, as to fishing rights on Potomac river, never effective in District of Columbia since territory ceded to government Evans v. U. S 31 App. D. C. 544. Subsequent to cession, congress in exercise of police power might regulate fishing. Id. Easements and privileges possessed by Virginia in Potomac river within territory ceded under compact with Maryland in 1785, to United States were thereby lost. Id. No revival by implication. Id. Not revived by Act Cong. July 9, 1846, (9 Stat. at L. 35, c. 35), receding portion of territory where act silent as to rights and privileges. Id. Jurisdiction over Potomac river not devested by arbitration award setting controversy between Maryland and Virginia, which was approved by Act Cong. March 3, 1879 (20 Stat. at L. 481, c. 196), such award not applying to portion of river between District of Columbia and Virginia. Id. Citizens of Virginia fishing in Potomac river in District of Columbia subject to police regulations of congress. Id.

**32.** Sanches v. U. S., 42 Ct. Cl. 458.

**33.** Hereditary high sheriff of Havana with monopoly of business of slaughtering animals. O'Reilly De Camara v. Brooke, 209 U. S. 45, 52 Law. Ed. 676.

**34. Search Note:** See 28 A. & E. Enc. L. (2ed.) 62; 21 A. & E. Enc. P. & P. 644.

**35.** Territories have such authority to legislate as is conferred by congress, limited as both are, by the constitution. Territory v. Long Bell Lumber Co. [Okl.] 99 P 911. General prohibitions in act July 30, 1886 (24 Stat. at L. 170, c. 818) against enactment of territorial legislation of local or special laws in certain cases inapplicable where permission to contrary granted by organic act of particular territory. Ponce v. Roman Catholic Apostolic Church, 210 U. S. 296, 52 Law. Ed. 1068. Creation and control of corporations a legislative function intrusted to government of Porto Rico. Martinez v. La Asociacion De Senoras Damas Del Santo Asilo De Ponce, 213 U. S. 20, 53 Law. Ed. —. Charitable corporation held citizen of Porto Rico. Id. Organic Act of New Mexico (Act Sept. 9, 1850, 9 Stat. at L. 449, c. 49) confers authority to legislate concerning personal injuries and rights of action therefor. Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 53 Law. Ed. —. Act also provides that constitution and laws of United States not locally inapplicable, have same effect within territory as elsewhere. Id. Organic act extends legislative authority to all rightful subjects consistent with constitution of United States. Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 53 Law. Ed. —. Under express authority conferred by Foraker Act of April 12, 1900 (31 St. at

approval of congress,[36] being valid until annulled.[37] The policy of the government is to give a territory the fullest opportunity to govern itself and prepare for statehood,[38] and congress may require that territorial legislation be given full faith and credit in other states.[39]

**Testamentary Capacity; Theaters; Theft,** see latest topical index.

### THREATS.[40]

*The scope of this topic* is noted below.[41]

It is not an offense at common law to threaten another with intent by intimidating him to compel him to refrain from working for another,[42] and, unless an offense under the statute is charged, no offense is charged.[43] The Connecticut statute which provides punishment for threatening or intimidating a person from working for another, may be violated even though such person was not intimidated,[44] and the clause "with intent to intimidate him" in said statute does not qualify all the provisions preceding it.[45] The law does not authorize the collection of just debts by the malicious threatening to accuse the debtor to crime.[45a]

**Tickets; Tide Lands,** see latest topical index.

L. 277, c. 191) §§ 8. 15, 33 to legislate regarding procedure and jurisdiction of Porto Rican courts, legislative assembly had power to confer original jurisdiction upon supreme court for trial of questions affecting property rights between any municipality and Roman Catholic church. Ponce v. Roman Catholic Apostolic Church, 210 U. S. 296, 52 Law. Ed. 1068.

**36.** Legislative power of Porto Rico by organic act subject to congress. Martinez v. La Asociacion De Senoras Damas Del Santo Asilo De Ponce, 213 U. S. 20, 53 Law. Ed. —. Under Organic Act New Mexico (Act Sept. 9, 1850, c. 49, 9 St. 449), § 7, legislative enactments are to be submitted to congress and if disapproved are invalid. Denver & R. G. R. Co. v. Wagner [C. C. A.] 167 F 75. Congress may abrogate laws of any territory and legislate directly for entire local government. Territory v. Long Bell Lumber Co. [Okl.] 99 P 911.

**37.** Laws N. M. 1903, p. 51, c. 33, conferring right of action for wrongful death upon serving specified notice to defendant within 90 days, valid until disapproved by congress. Denver & R. G. R. Co. v. Wagner [C. C. A.] 167 F 75. Condition as to notice is not in nature of limitation but is condition precedent and where plaintiff disregarded act as to condition precedent and lost right to sue, subsequent disapproval of such act by congress did not confer right. Id. Act valid as to railroad, subject to service under Comp. Laws, N M. 1897, § 2963. Id. Annulment of territorial legislation, pursuant to organic act (Act of Sept. 9, 1850, 9 St. at L. 449, c. 49, establishing New Mexico), does not relate back so as to render territorial laws void from time of enactment. Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 53 Law. Ed. —.

**38.** Territory v. Long Bell Lumber Co. [Okl.] 99 P 911. Except as limited by organic act (Act May 2, 1890, c. 182, 26 Stat. 84), legislative power of local self-government is quite as extensive in territory of Oklahoma as in state. Id. Not in conflict with act on same subject applicable to territories (Act Cong. July 2, 1890, c. 647, 26 St. 209; U. S. Comp. St. 1901, p. 3200). Id. Wilson's Rev. & Ann. St. Okl. 1903, § 83, to prevent combinations in restraint of trade, is not in conflict with constitution or laws of United States. Id. Valid enactment by territory of Oklahoma. Id.

**39.** U. S. Rev. St. § 906 (Comp. St. 1901, p. 678), providing that territorial legislation be given faith and credit in other states, authorized by Const. art. 4, § 1. Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 53 Law. Ed. —. Full faith and credit given by Texas courts where provisions of New Mexico statute as to personal injury action are observed, though statute also undertook to make suit maintainable only in district court of territory. Id.

**40.** See 10 C. L. 1855.

**Search Note:** See notes in 9 Ann. Cas. 196.

See, also, Threats, Cent. Dig; Dec. Dig.; 28 A. & E. Enc. L. (2ed.) 140; 21 A. & E. Enc. P. & P. 670.

**41.** This topic excludes the crime of "extortion by threats" (see Blackmail, 11 C. L. 423). Coupled with other matters, a threat may be an assault (see Assault and Battery, 11 C. L. 285), or a false imprisonment (see False Imprisonment, 11 C. L. 1456), or a false pretense (see False Pretence and Cheats, 11 C. L. 1460), or a postal offense (see Postal Law, 12 C. L. 1404), or it may justify violent or forcible self-protection (see Assault and Battery, 11 C. L. 285; Homicide, 11 C. L. 1799),

**42, 43.** State v. McGee, 80 Conn. 614, 69 A 1059.

**44.** The gist of the offense is the threatening and following, and it is sufficient if the threatening was sufficient to put an ordinary, firm and prudent man in fear. Gen. St. 1902, § 1296. State v. McGee, 80 Conn. 614, 69 A 1059.

**45.** State v. McGee [Conn.] 72 A 141.

**45a.** Where an attorney, who was engaged to prosecute a civil action for an assault upon a girl, had a summons issued out of a magistrate's court in order to force a settlement of the civil action, held that the

## TIME.[46]

*The scope of this topic* is noted below.[46a]

A calendar year means the year from January 1st to December 31st, inclusive.[47] A day is composed of 24 hours, extending from midnight to midnight.[48] The general method of computing time, when an act is required to be performed within a certain period, is to exclude the first day and include the last day of the period,[49] but in computation of time fixed by contract, the intentions of the parties will be deduced from the subject-matter or context.[50] The general rule is that a fraction of a day will not be taken into account,[51] but the rule is subject to exceptions.[52] An act which provides that it is to be in force from and after a certain date does not include that date.[53] As a general rule Sunday will be excluded where an act would otherwise be required to be done on that day,[54] and if the time fixed is less than a week, Sunday will be excluded in computing the time,[55] and if the last day falls on that day, it is usually excluded,[56] but days of grace allowed in an insurance policy

criminal summons was taken out as a threat and that such actions constituted blackmail. In re Hart, 131 App. Div. 661, 116 NYS 193.

**46.** See 10 C. L. 1856.

**Search Note:** See note in 14 L. R. A. 120; 17 Id. 66; 38 Id. 243; 49 Id. 193; 1 L. R. A. (N. S.) 364, 835; 6 Id 1016, 1046; 15 Id. 657, 686; 78 A. S. R. 872; 2 Ann. Cas. 135, 513; 7 Id. 325; 9 Id. 329.

See, also, Time, Cent. Dig.; Dec. Dig.; 8 A. & E. Enc. L (2ed.) 737; 28 Id. 209.

**46a.** Includes only rules for measuring lapse of time. See Contracts (time as essential to performance), 11 C. L. 729, also the topics treating of particular acts, things or proceedings for the time within which they may be done, or during which they may subsist.

**47.** Liquor license. Laws 1908, p. 1113. Carroll v. Wright, 131 Ga. 728, 63 SE 260.

**48.** Muckenfuss v. State [Tex. Cr. App.] 116 SW 51.

**49.** Election held January 31st was sufficently noticed by publication on Jan. 3d, 10th, 17th, 24th, and 31st, where 4 weeks or 28 days' notice was required. State v. Cordell [Mo. App.] 117 SW 655; Richter v. State [Ala.] 47 S 163. Land patent. Baker v. Hammett [Okl.] 100 P 1114. Bill of exceptions certified on the 11th of March and served on the 21st of March is within the 10 days prescribed. Pol. Code 1895, § 4, par. 8. Bennett v. Ralf, 4 Ga. App. 484, 61 SE 887. Plaintiff left his homestead Nov. 10th and returned May 10th. Held that Nov. 10th should be excluded in computing six months allowed him to be absent. Rev. Laws 1905, § 3458. Jaenicke v. Fountain City Drill Co. 106 Minn. 442, 119 NW 60. Held, following other cases and overruling Greve v. Railway Co., 25 Minn. 327, that, in computing the 10 days' notice of argument required by rule 8 of the supreme court, the day of service should be excluded and the first day of the term included. Village of Excelsior v. Minneapolis, etc, R. Co. [Minn.] 120 NW 526.

**50.** As to whether the word "from" shall be construed as inclusive of exclusive depends upon context, subject-matter, and intention of the parties. Budds v. Frey, 104 Minn. 481, 117 NW 158. Patent to land, day on which patent was issued was included in computing five years. Baker v. Hammett [Okl.] 100 P 1114. Lease from quarter to quarter, from and after April 1st, held to include the first day, and notice to remove Sept. 30th was a valid notice. Budds v. Frey, 104 Minn. 481, 117 NW 158. Held that one who came to state December 15, 1906, could not vote at election June 15, 1907, as he lacked one day of the statutory six months' residence required. McCormick v. Jester [Tex. Civ. App.] 115 SW 278. "From and after" used in a constitution to denote when and how long the state officers should hold office held equivalent to "on and after," and therefore included the first day. People v. Nye [Cal.] 98 P 241.

**51.** Statute providing that election shall not be held within less than 30 days from the time it is ordered is complied with by given notice Nov. 9th for election on Dec. 9th. Acts 1907, p. 200. Richter v. State [Ala.] 47 S 163.

**52.** When it is essential to justice to determine the priority of acts done on the same day, courts will receive evidence on the issue. Fabien v. Grabow [Mo. App.] 114 SW 80. Judgment being obtained on same day receiver was appointed, but before said appointment, held that judgment creditor had preference. Gallagher v. True American Pub. Co. [N. J. Eq.] 71 A 741. The words "for each day he shall be actually engaged" have been construed to mean time actually consumed, though this construction necessitated a splitting up of days and a charge by the hour. Laws 1903, p. 81, c. 45. Hoffman v. Lincoln County, 137 Wis. 353, 118 NW 850. Such construction does not entitle one to more than per diem allowance for any one calendar day. Id.

**53.** Brown v. State, 137 Wis. 543, 119 NW 338.

**54.** Where ordinance provided for "ten successive days," publication held not necessary to publish on Sunday. Porter v. Boyd Pav. & Const. Co., 214 Mo. 1, 112 SW 235.

**55.** Forcible detainer, three days allowed to file a traverse after finding inquest. Civ. Code Prac. § 461. Roettger v. Reifkin [Ky.] 113 SW 88.

**56.** Filing of claim against estate. Rev. St. 1899, § 4160. Keys v. Keys' Estate [Mo.] 116 SW 537. Motion for new trial overruled May 17, 1907, transcript filed May 18, 1908. The last date was Monday. Held, filed in time. Burns' Ann. St. 1908, § 1350. Kinney v. Heuring [Ind. App.] 85 NE 369.

are not extended one day because the premium became due on Sunday.[57] The Alabama statutes provide that, when time is specified in days, four weeks' notice is equal to 30 days.[58] Standard time is usually held by the courts to control, but there are exceptions to this rule.[59]

**Time to Plead; Title and Owuership; Titie Insnrance,** see latest topical index.

### TOBACCO.[60]

*The scope of this topic* is noted below.[61]

The state in the exercise of its police power may prohibit the sale of cigarettes,[62] and a sale of coupons entitling the buyer to receive forbidden article by interstate shipment is a sale within such a statute.[63]

### TOLL ROADS AND BRIDGES.

§ 1. Franchises and Rights of Way, and Acquisition by Pubile, 2126.
§ 2. Public Aid and Immnnities, 2127.
§ 3. Establishment, Construction, Location, and Maintenunce, 2127.
§ 4. Right of Travel and Tolls, 2127.

*The scope of this topic* is noted below.[64]

§ 1. *Franchises and rights of way, and acquisition by public.*[65] See 10 C. L. 1856. The franchise ends with the corporate life of the company,[66] as also does the right to exact tolls,[67] and the company has no right to remove the bridge or destroy the highway.[68] The power granted should be strictly construed.[69] The franchise is not void because certain severable provisions of the act were not embraced in the title of the bill.[70] A toll company cannot be deprived of its right to collect tolls under the guise of police regulation.[71]

57. Premium due Oct. 1st. Oct. 2nd was Sunday. Insured died Nov. 1st. Held 30 days' grace expired Oct. 31st. Aetna Ins. Co. v. Wimberly [Tex.] 112 SW 1038.

58. Thirty days' notice required in the calling of special term of the court. Code 1896, § 3043. Richter v. State [Ala.] 47 S 163

59. Verdict and judgment rendered at 11:45 p. m. sun time and three minutes past 12 o'clock a. m., standard time, held within the jurisdiction of a court whose term expired 12 a. m. Texas & N. O. R. Co. v. Texas Tram & Lumber Co. [Tex. Civ. App.] 110 SW 140.

60. See 10 C. L. 1856.

**Search Note:** See notes in 9 Ann. Cas. 360.

See, also, Dec. Dig. Health, § 33; Infants, § 20.

61. Includes only regulation of sale. Excludes revenue tax. See Internal Revenue Laws, 12 C. L. 323.

62. Laws 1907, p. 293, c. 148, an act entitled "an act to regulate and in certain cases to prohibit the sale of cigarettes," held not unconstitutional as having a deceptive title. State v. Winsor, 50 Wash. 407, 97 P 446.

63. The sale by a retail merchant of package tobacco, which contained a coupon entitling the purchaser of the tobacco, in case of his obtaining two other like coupons and sending all to a dealer in cigarette paper outside the state, to receive therefrom a specified quantity of cigarette paper, is a violation of § 1, c. 82, p. 143, the Laws of 1905. State v. Sbragia [Wis.] 119 NW 290.

64. Matters of general highway (see Highways and Streets, 11 C. L. 1720), or bridge (see Bridges, 11 C. L. 441) law, or corporation (see Corporations, 11 C. L. 810) law, applied to toll road or bridge companies, are excluded.

65. **Search Note:** See notes in 15 L. R. A. 651, 37 Id. 711; 47 Id. 303; 58 Id. 155.

See, also, Bridges, Cent. Dig. §§ 1-36, 67-70; Dec. Dig. §§ 1-19, 25, 26; Turnpikes and Toll Roads, Cent. Dig. §§ 1-20, 67-96; Dec. Dig. §§ 1-11, 23-32; 29 A. & E. Enc. L. (2ed.) 1, 3.

66. An act which allowed company to rebuild its bridge held not to extend its corporate life beyond time prescribed in original act. Montgomery County v. Clarksville & R. Turnpike Co. [Tenn.] 109 SW 1152.

67. Thereupon the public have right to the bridge or road free of charge. Montgomery County v. Clarksville & R. Turnpike Co. [Tenn.] 109 SW 1152.

68. Montgomery County v. Clarksville & R. Turnpike Co. [Tenn.] 109 SW 1152.

69. The right to "take," that is receive, reasonable tolls cannot, in a grant by the state, imply the power to prescribe the tolls. The company can claim nothing which is not clearly given. Tallassee Falls Mfg. Co. v. Tallapoosa County Com. Ct. [Ala.] 48 S 354.

70. Acts 1865, p. 18, c. 14, incorporated a toll bridge company and also provided that resident and nonresident taxpayers of two counties should pass over the bridge free, and that said counties should pay a certain amount to the bridge company. Held that the last two provisions were void but did not effect the franchise. Somerset County Com'rs v. Pocomoke Bridge Co. [Md.] 71 A 462.

71. The franchise is a property right which cannot be taken without due process of law. City of Belleville v. St. Clair County Turnpike Co., 234 Ill. 428, 84 NE 1049.

*Abandonment and forfeiture.* See 8 C. L. 2124—A lease to a county road may be declared forfeited for failure to comply with its provisions.[72]

*Acquirement by public.* See 10 C. L. 1857—In Pennsylvania it is provided by statute that a county may condemn and appropriate a turnpike and conduct the same free of tolls,[73] and in the condemnation proceeding it is the duty of the court and grand jury, if requested, to hear and examine witnesses for and against.[74]

§ 2. *Public aid and immunities.*[75] See 10 C. L. 1857—A bridge constituting an integral part of a railroad is not a toll bridge within a taxable law.[76]

§ 3. *Establishment, construction, location, and maintenance.*[77] See 10 C. L. 1857

§ 4. *Right of travel and tolls.*[78] See 10 C. L. 1857—A statute authorizing a commissioners' court to regulate and fix the rate of toll does not confer upon said court the power to deprive the owner of the bridge of the right to receive reasonable tolls.[79] Where an action at law will lie for the collection of tolls past due, a court of equity cannot take jurisdiction.[80]

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**Torrens System,** see latest topical index.

## TORTS.

§ 1. Elements of a Tort, 2127.
§ 2. What is an Injury or Wrong, 2128.
§ 3. What is Damage, 2129.
§ 4. Parties in Torts, 2129.
§ 5. Pleading and Procedure, 2130.

*The scope of this topic* is noted below.[81]

§ 1. *Elements of a tort.*[82] See 10 C. L. 1858—In legal phraseology the word "tort" does not include all wrongful acts done by one person to another, but only those wrongs for which individuals may demand legal redress, or, in other words give rise to a course of action for damages.[83] The law requires that a person abstain from

**72.** Held that the lease was executed under B. & C. Comp. §§ 4937-4950, and under §§ 5074 and 5077, and that a suit in equity might be maintained to cancel the lease. Tillamook County v. Wilson River Road Co., 49 Or. 309, 89 P 958.

**73.** The county, city, or borough in which the turnpike is situated are required to keep it in repair. Act April 20, 1905 (P. L. 237) held constitutional. Clarion County v. Clarion Tp., 222 Pa. 350, 71 A 543, afd. Id., 36 Pa. Super Ct. 302.

**74.** If no request is made until after the report has been approved by the court and grand jury, the appellate court will not review the case. Moxham v. Ferndale Bridge, 36 Pa. Super. Ct. 298.

**75. Search Note.** See Bridges, Cent. Dig. § 35; Dec. Dig. § 16; Turnpikes and Toll Roads, Cent. Dig. §§ 22-38; Dec. Dig. § 10; 39 A. & E. Enc. L. (2ed.) 7.

**76.** Railroad company exacted an illegal charge for carrying persons over a bridge which was a part of their line. Held that this act did not make such bridge taxable under Rev. St. 1899, § 9387 (Am. St. 1906, p. 4315). State v. Louisiana & M. R. R. Co. [Mo.] 114 SW 956.

**77. Search Note:** See Bridges, Cent. Dig. §§ 9-66; Dec. Dig. §§ 6-28; Turnpikes and Toll Roads, Cent. Dig. §§ 39-96; Dec. Dig. §§ 12-32; 29 A. & E. Enc. L. (2ed.) 8; 22 A. & E. Enc. P. & P. 215.

**78. Search Note:** See notes in 4 L. R. A. (N. S.) 528; 9 Ann. Cas. 360.

See, also, Bridges, Cent. Dig. §§ 71-122; Dec. Dig. §§ 29-47; Turnpikes and Toll Roads, Cent. Dig. §§ 97-168; Dec. Dig. §§ 33-51; 28 A. & E. Enc. L. (2ed.) 241; 29 Id. 18; 21 A. & E. Enc. P. & P. 745.

**79.** The limitation of prescribing reasonable tolls will be construed as written in the statute. Tallassee Falls Mfg. Co. v. Tallapoosa County Com. Ct. [Ala.] 48 S 354.

**80.** Equity had no jurisdiction to enforce collection of tolls due by a street railway company to toll bridge company. Pittsburg & W. E. R. Co. v. Point Bridge Co. [Pa.] 72 A 348.

**81.** Includes only the more general rules applicable to all torts, matters relative to particular torts (see Assault and Battery, 11 C. L. 285; Conversion as Tort, 11 C. L. 795; Trespass, 10 C. L. 1875, and similar topics), to the liability of a principal or master for the acts of his agent or servant (see Agency, 11 C. L. 60; Master and Servant, 12 C. L. 665), negligence (see Negligence, 12 C. L. 966; Carriers, 11 C. L. 499; Master and Servant, 12 C. L. 655; Railroads, 12 C. L. 1542; Street Railways, 12 C. L. 1542), and the right to elect whether to sue in tort or on contract (see Election and Waiver, 11 C. L. 1162), being treated in separate topics.

**82. Search Note:** See notes in 6 C. L. 1700; 45 L. R. A. 87; 64 Id. 94; 1 L. R. A. (N. S.) 202; 89 A. S. R. 844; 97 Id. 923; 1 Ann. Cas. 250.

See, also, Torts, Cent. Dig. §§ 1-26; Dec. Dig. §§ 1-19; 16 A. & E. Enc. L. (2ed.) 1109; 22 Id. 1311; 28 Id. 253.

**83.** Sims v. Sims [N. J. Law] 72 A 424.

injury to others,[84] that he respect the property [85] and existing rights of others,[86] that he use due diligence to avoid causing harm,[87] unnecessary discomfort [88] or inconvenience to others, and that he do no act merely for retaliation.[89] As a general rule one cannot recover for an injury to which his own acts have contributed.[90] It is no defense that the defendant did not know that an injury or loss would result,[91] or that the general legislation to prevent the injury is inadequate,[92] but he may show that compliance with the law would not have prevented the accident.[93]

§ 2. *What is an injury or wrong.*[94]—See 10 C. L. 1861—An injury, in legal contemplation, is a violation of some right recognized by law,[95] and, hence, a tort cannot arise from the proper exercise of legal rights,[96] even where such exercise is actuated by a malicious intent,[97] although there is a modern tendency to regard acts otherwise legal as illegal when prompted solely by malice,[98] and in some torts the intent

**84.** One injured has right of action against wrongdoer. Dillon v. Great Northern R. Co. [Mont.] 100 P 960.

**85.** One is not relieved from liability for willful destruction of another's property by fact that such property was located on his private preserves through necessity, as where, while plaintiff and his family were out in a boat, they were forced by storm, in order to escape great danger, to moor at defendant's dock, thereupon defendant's servant turned the boat loose and it was destroyed. Ploof v. Putnam, 81 Vt. 471, 71 A 188. Where one brings foreign substance on his land, he must take care of it and not permit it to injure his neighbor, hence one is liable for injury to land by seepage resulting from the negligent construction of ditch. Paolini v. Fresno Canal & Irr. Co [Cal. App.] 97 P 1130.

**86.** Reilley v. Curley [N. J. Eq.] 71 A 700.

**87.** Tuttle v. Buck [Minn.] 119 NW 946.

**88.** Noise of steam engine in residence district, making it impossible to converse in adjoining house, held to be nuisance in residence district. Reilley v. Curley [N. J. Eq.] 71 A 700. It is not sufficient that noise merely annoy, it must injure and must be such as to materially interfere with and impair the ordinary comfort of existence on the part of ordinary people, and noise from engine not interfering with conversation nearby is not nuisance. Peck v. Newburgh L. H. & P. Co., 116 NYS 433.

**89.** One must resort to his legal remedies. Hence, construction of unnecessarily high board fence on ones own premises may be private nuisance, under Rev. St. c. 22, § 6, where annoyance is dominant purpose. Healy v. Spaulding [Me.] 71 A 472.

**90.** One cannot recover damages for action in which he actively participates without being induced to do so by fraud or misrepresentation. Moore v. Woodson [Tex. Civ. App.] 116 SW 608.

**Contributory negligence.** See Negligence, 12 C. L. 966.

**91.** Kentucky Heating Co. v. Hood [Ky.] 118 SW 337.

**92, 93.** Conrad v. Springfield Consol. R. Co., 240 Ill. 12, 88 NE 180.

**94. Search Note:** See notes in 2 Ann. Cas. 441, 574, 698; 3 Id. 741; 4 Id. 1026; 8 Id. 377, 889, 1176; 9 Id. 706; 11 Id. 337.

See, also, Torts, Cent. Dig. §§ 1-26; Dec. Dig. §§ 1-19; 28 A. & E. Enc. L. (2ed.) 257.

**95.** Lewis v. Huie-Dodge Lumber Co., 121 La. 658, 46 S 685. Before one can recover in action for tort, there must have actually existed a right in his favor which was infringed upon, to his injury, by defendant. Dillon v. Great Northern R. Co. [Mont.] 100 P 960.

**96.** When one is doing a lawful thing in a lawful way, his conduct is not actionable, though it may result in damage to another, being damnum absequе injuria. White v. Kincaid, 149 N. C. 415, 63 SE 109. County is not liable for property destroyed as dangerous nuisance, when county board of health, acting under Code 1904, p. 887, destroys goods infected with smallpox. Louisa County v. Yancey's Trustee [Va.] 63 SE 452. One cannot be enjoined from ordinary use of property, such as moving of a building, where every reasonable means is used of lessening inconvenience to persons in vicinity. Sommers Mercantile Co. v. Rheinfrank House Wrecking Co., 60 Misc. 340, 113 NYS 402.

**97.** Sparks v. McCrary [Ala.] 47 S 332. No recovery in tort for willful and malicious breach of insurance contract, under Civ. Code Cal. § 3294. Baumgarten v. Alliance Assur. Co., 159 F 275. An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent. J. F. Parkinson Co. v. Santa Clara County Bldg. Trades Council [Cal.] 98 P 1027. One commits no tort in performing legal acts for his own advantage, though also actuated by malice. One theater is not liable for so contracting as to deprive another of valuable contracts. Roseneau v. Empire Circuit Co., 131 App. Div. 429, 115 NYS 511.

**98.** Banker who started a barber shop with sole purpose of driving local barber out of business held liable in tort. Tuttle v. Buck [Minn.] 119 NW 946.

**NOTE: Liability in tort for maliciously destroying another's business by competition:** It is an often enunciated principle that an improper motive cannot make illegal an otherwise legal act. 2 Cooley, Torts (3rd Ed.) 1505. There has been more recently, however, a not altogether unopposed tendency toward recognizing a wider scope of civil duty. 8 Columbia L. R. 496. Cases following this trend have sought to apply the rule that an act is unlawful if it intentionally injures another without legal justification or excuse. Plant v. Woods, 176 Mass. 492, 57 NE 1011, 79 Am. St. Rep. 330, 51 L. R. A. 339; Klingel's Pharmacy v. Sharp, 104 Md. 218, 64 A 1029, 118 Am. St. Rep. 399. 7 L. R. A. (N. S.) 976. the motive prompting the actor has been regarded in these cases as an important factor in ascertain-

is of the essence of the injury.[99] On the other hand, the intent is immaterial where there is a legal injury.[1] A right may become extended into a wrong when it works injury to another without serving any useful or lawful purpose.[2] Wrongful interference with another's business is an actionable injury,[3] and so, also, wrongful interference with one's employment.[4] The unauthorized use of another's picture constitutes an actionable wrong in some states.[5] An action at law will not lie to recover damages for perjury alleged to have been committed in a former case in which the plaintiff may have been interested, nor for conspiracy to commit such perjury.[6]

§ 3. *What is damage.*[7]—See 10 C. L. 1861.

§ 4. *Parties in torts.*[8]—See 10 C. L. 1861.—When two persons cause a single and indivisible injury, they are joint tort feasors though acting separately[9] and are

ing the justification or excuse. 5 Columbia L. R. 505; Aikens v. Wisconsin, 195 U. S. 195, 49 Law. Ed. 154; London Guar. & Acc. Co. v. Horn, 206 Ill. 493, 69 NE 526, 99 Am. St. Rep. 185. The determination of justification being a question of public policy, courts have naturally reached varying results. National Protective Ass'n S. F. & H. v. Cummings, 170 N. Y. 315, 63 NE 369; Pickett v. Walsh, 192 Mass. 572, 78 NE 753, 116 Am. St. Rep. 272, 6 L. R. A. (N. S.) 1067. The principal case presents a decision on a set of facts often treated by legal writers, though with varying results. J. B. Ames, 18 Harv. L. R. at 420; Jeremiah Smith, 20 Harv. L. R. at 454. Tuttle v. Buck [Minn.] 119 NW 946 is interesting as indicating the more advanced tendency by a square holding that the shield of competition cannot be raised to protect the defendant acting only to satisfy his own malevolent purposes. Many court, however, would still insist that if the appearance of competition exists an investigation of motive is impolitic. See Passaic Print Works v. Ely, 105 F 163, 62 L. R. A. 673.—From 9 Columbia L. R. 455.

**99.** One is liable for malicious injury to business of another, injury being malicious when intentional and without legal excuse. Lohse Patent Door Co. v. Fuelle [Mo.] 114 SW 997. Attempt to interfere with lawful business of another is prima facie actionable, but defendants may plead that it was lawful, for their own advantage, and not for malice. J. F. Parkinson Co. v. Santa Clara County Bldg. Trades Council [Cal.] 98 P 1027.

**1.** Sparks v. McCrary [Ala.] 47 S 332.

**2.** Lewis v. Huie-Dodge Lumber Co., 121 La. 658, 46 S 685.

**Malicious abuse of process:** See Malicious Prosecution and Abuse of Process, 12 C. L. 638.

**3.** Willner v. Silverman [Md.] 71 A 962. Auctioneer may be liable for unnecessarily interfering with nearby merchant's business, where he molests and interferes with merchant's prospective customers, but not because he merely undersells the merchant, his business not being nuisance per se, nor has merchant any right to complain that auctioneer does not deal fairly with his customers. Gilly v. Hirsh, 122 La. 966, 48 S 422. One is liable where he attracts away barber's customers for the sole purpose of injury. Tuttle v. Buck [Minn.] 119 NW 946. A man is not liable for refusal to transact business with another, since he may engage with whom he pleases, and there is no law which forces him to part with his property, whether his refusal is based upon reasons or is result of whim, prejudice, or malice. Lewis v. Huie-Dodge Lumber Co., 121 La. 658, 46 S 685. Where one of a partnership, having become financially involved, made agreement, whereby he was not as an individual, to contract any indebtedness with any person other than defendant or companies in which he was interested, held not to constitute malicious interference with plaintiff's partnership business. McPherson v. Kenney, 198 Mass. 350, 84 NE 462.

**4.** Employe may recover from his employer for damages to his business by malicious circulation of letter by such employer. Willner v. Silverman [Md.] 71 A 962. It is actionable tort for one company to procure discharge of employe of another company in accordance with unjust rule agreed upon between them. Illinois Steel Co. v. Brenshall, 141 Ill. App. 36. Interference with lawful employment by threats is prohibited by Rev. St. 1899, § 2155, but such threat to be actionable must be of a substantial character adapted to influence a person of reasonable firmness. Carter v. Oster [Mo. App.] 112 SW 995.

**5.** Under Laws 1903, p. 308, c. 132, § 1, 2, when used for advertising purposes (Rhodes v. Sperry & Hutchinson Co., 193 N. Y. 223, 85 NE 1097), use may be restrained by statute, although no such right was given at common-law (Kunz v. Bosselman, 131 App. Div. 288, 115 NYS 650). Unauthorized use for advertising purposes is tort under Laws 1903, c. 132, p. 308, such statute being constitutional and good in part, although it were to be assumed that the requirement of written consent is unreasonable (Wyatt v. Wanamaker Supp, 110 NYS 900), and that part of law requiring prior obtaining of written consent of parent or guardian of minor being also valid (Wyatt v. James McCreery Co., 126 App. Div. 650, 111 NYS 86), use of accused person's photograph by public officers **for purpose of identification** will not be restrained (Mabry v. Kettering [Ark.] 117 SW 746).

**6.** Williams v. McClellan, 59 Misc. 620, 111 NYS 229.

**7. Search Note:** See Torts, Cent. Dig. § 5; Dec. Dig. § 5.

**8. Search Note:** See notes in 10 L. R. A. (N. S.) 375, 396, 942; 13 Id. 1193; 14 Id. 1003; 11 A. S. R. 906.

See, also, Contribution, Cent. Dig. §§ 6-9; Dec. Dig. § 5; Release, Cent. Dig. §§ 64-70; Dec. Dig. § 29; Torts, Cent. Dig. §§ 27-29; Dec. Dig. §§ 20-22; 28 A. & E. Enc. L. (2ed.) 255; 2 A. & E. Enc. P. & P. 751.

**9.** This is true though there be no common duty, design, or concert of action be-

jointly and severally liable,[10] nor is the liability of one lessened by the negligent acts of another.[11] Although defendants are not joint tort feasors, each will be liable to the full extent of the injury where the negligence of each was an efficient cause thereof.[12] A person may become liable by accepting the benefits of another's tort,[13] or lending assistance thereto,[14] but not by a reason of a lawful act [15] which does not involve a breach of duty.[16] The general rule that there is no contribution between joint wrongdoers [17] does not apply where one is blameless as between himself and another joint wrongdoer.[18] An individual and a sovereign power cannot be regarded as joint tort feasors.[19] The liability of persons acting in particular capacities and by reason of particular relationship is treated elsewhere.[20]

§ 5. *Pleading and procedure.*[21]—See 10 C. L. 1881—While the plaintiff should plead all matters essential to his recovery,[22] he need not plead matters of defense.[23]

tween them (Walton v. Miller's Adm'x [Va.] 63 SE 458), but there is no joint liability where the acts of negligence are not concurrent and injury does not grow out of common offense ,and, where one company properly loaded logs by which brakeman was killed and another company was carrier, there is no liability on loading company (Stephens v. Louisiana Long Leaf Lumber Co., 122 La. 547, 47 S 887).

10. Walton v. Miller's Adm'x [Va.] 63 SE 458. This is the general rule. Wisecarver v. Chicago, etc., R. Co. [Iowa] 119 NW 532. Either of two persons is liable for an injury which occurs through their concurrent negligence. Southwestern Tel. & T. Co. v. Bruce [Ark.] 117 SW 564. Every person who joins in committing a tort is severally liable for it, nor can he compel plaintiff to join another. Tandrup v. Sampsell, 234 Ill. 526, 85 NE 331. Each joint tortfeasors is liable for whole injury, although plaintiff can have but one satisfaction. Stuart v. Chapman [Me.] 70 A 1069. One of several joint wrongdoers is liable for entire damage where he has taken any part in planning or execution of wrongful act. Berry v. St. Louis, etc., R. Co., 214 Mo. 593, 114 SW 27.

11. As where negligence of mining company in not providing safe place for deceased to work cooperated with electric company in causing death. Byerly v. Consolidated L. P & I. Co., 130 Mo. App. 593, 109 SW 1065. The comparative degree of culpability does not affect liability of either of two joint tortfeasors, although guilty of distinct acts which together produce the injury, and judgment may go against either one or both of them. Probst v. Hinesley [Ky.] 117 SW 389.

12. Southwestern Tel. & T. Co. v. Ulyane [Ark.] 111 SW 987.

13. Acceptance of check in payment of individual obligation signed by the other in his representative capacity as executor as shown on its face is sufficient to charge party accepting as joint tort feasor. Squire v. Ordemann, 194 N. Y. 394, 87 NE 435.

14. Liability arises where, in order to obtain a personal advantage, aid was given to assist one in violating his contract with a third party. Mahoney v. Roberts [Ark.] 110 SW 225.

15. Mere payment of lawful fees and mileage of witnesses by third party is not actionable tort where witnesses were not hired to testify falsely, party complaining having been found guilty in the proceeding. Keithley v. Stevens, 142 Ill. App. 406.

16. Purchaser of bonds is not liable for buying bonds which he knew had been previously contracted to be sold to another. Sweeney v. Smith, 167 F 385.

17. No recovery can be had by one paying damage, unless he has been required to pay for damage of another where he did not concur in the wrong. Reynolds v. Alderman, 130 App. Div. 286, 114 NYS 463. Equity does not recognize any right of contribution between joint wrongdoers. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153.

18. As where employer was held for injury to employe resulting from negligence of a third party. Galveston, etc., R. Co. v. Pigott [Tex. Civ. App.] 116 SW 841. One of two joint tort feasors cannot maintain action against the other unless one does the act or creates the condition and the other does not join therein, in which case the parties are not pari delicto as to each other, though as to third parties either may be held liable. Fulton County Gas & Elec. Co. v. Hudson River Tel. Co., 130 App. Div. 343, 114 NYS 642. Where two persons liable are not in pari delicto, the one secondarily liable may recover from one primarily liable, irrespective of any contract of indemnity inter se. Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315. Principal liable through unauthorized act of his agent is entitled to **indemnity from agent.** Bradley v. Rosenthal [Cal.] 97 P 875.

19. American Banana Co. v. United Fruit Co. [C. C. A.] 116 F 261.

20. See Agency, 11 C. L. 60; Carriers, 11 C. L. 499; Husband and Wife, 11 C. L. 1838; Officers and Public Employes, 12 C. L. 1131; Partnership, 12 C. L. 1206; States, 12 C. L. 1910.

21. **Search Note:** See Torts, Cent. Dig. §§ 30-39; Dec. Dig. §§ 23-30.

22. Newport News & Old Point R. & Elec. Co. v. Nicolopoolos [Va.] 63 SE 443. Complaint is sufficient when it states that act was done for sole purpose of injuring plaintiff and not for purpose of serving legitimate purpose of defendant, the facts in themselves amounting only to an ordinary business transaction. Tuttle v. Buck [Minn.] 119 NW 946. Complaint for tortious injury, based upon violations of ordinance, should allege due enactment of such ordinance, its present force and effect, and set out its substance. Cumberland Tel. & T. Co. v. Pierson, 170 Ind. 543, 84 NE 1088. Pleading which shows that act of party was only passive and secondary is sufficent to entitle him to recover against active wrong-

A particular specification of misconduct is deemed to explain a preceding general charge.[24] Since each of the joint tort feasors is liable for the whole injury,[25] the injured party may proceed against one or all of several joint tort feasors,[26] but he is bound by whatever election he makes[27] and there can be but one satisfaction;[28] but the dismissal of an action against one,[29] or a covenant not to sue one,[30] or the obtaining of an unsatisfied judgment against one, does not operate as such release.[31] Where joint tort feasors are sued together, separate and different verdicts may be rendered,[32] but a judgment in tort is a unit and cannot be reversed as to one of two defendants and affirmed as to the other.[33]

The cause of action accrues immediately upon the commission of the injury.[34]

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**Towage,** see latest topical index.

doer. Galveston, etc., R. Co. v. Pigott [Tex. Civ. App.] 116 SW 841.

**23.** Need not plead that business interfered with was lawful. Complaint held to sufficiently state a cause of action for injury to property under Const. 1901, § 13. Sparks v. McCrary [Ala.] 47 S 332. Where action is for injury to property apparently trespassing, and facts showing general necessity for its location are alleged, it is not necessary to negative existence of other locations which would have suited necessity as well. Ploof v. Putnam, 81 Vt. 471, 71 A 188.

**24.** Thompson v. Keyes-Marshall Bros Livery Co., 214 Mo. 487, 113 SW 1128.

**25.** See ante, § 4.

**26.** Cleveland, etc., R. Co. v. Hilligoss [Ind.] 86 NE 485; Cleveland, etc., R. Co. v. Gossett [Ind.] 87 NE 723; Fulwider v. Trenton Gas, L. & P. Co. [Mo.] 116 SW 508; Sigwald v. City Bank [S. C.] 64 SE 398. One may proceed against them jointly or separately, since all are responsible without regard to degree of culpability and although part of damage may have resulted without fault of one, where separate acts of two parties are direct cause of one injury, it being impossible to apportion damage. Goldstein v. Tunick, 59 Misc. 516, 110 NYS 905. One may sue one or more of joint tort feasors or may dismiss his action against one or court may do so with his consent, and proceed against the other, and former will have no cause for complaint so long as he does not discharge the latter. Groot v. Oregon Short Line R. Co., 34 Utah, 152, 96 P 1019. Cotrespassers are jointly and severally liable. Staunton Mut. Tel. Co. v. Buchanan, 108 Va. 810, 62 SE 928.

**27.** But if party sue them all jointly and has judgment, afterwards he cannot sue any one of them separately, or vice versa. Gawne v. Bicknell, 162 F 587.

**28.** A release of one releases all joint tort feasors. Where servant was injured through defect in axle of wagon and also of street, his release of his master releases city. Mooney v. Chicago, 239 Ill. 414, 88 NE 194. Settlement with one joint tort feasor inures to benefit of all. Borchardt v. People's Ice Co., 106 Minn. 134, 118 NW 359. There can be but one recompense for a tort, and acceptance of compensation for injury from one releases others. Cleveland, etc., R. Co. v Hilligoss [Ind.] 86 NE 485.

**29.** Equitable Life Assur. Soc. v. Lester [Tex. Civ. App.] 110 SW 499. Joint tort feasors may answer jointly or separately and court may dismiss action against one or more or make any direction as to one without affecting others. Tanzer v. Breen, 131 App. Div. 654, 116 NYS 110.

**30.** Release of one reserving right to sue others is in effect a mere covenant not to sue. Authorities discussed. Edens v. Fletcher [Kan.] 98 P 784; Texarkana Tel. Co. v. Pemberton [Ark.] 111 SW 257.

**31.** Nothing short of satisfaction or valid release of one joint tort feasor is available as a defense by other wrongdoers who are jointly liable. Tandrup v. Sampsell, 234 Ill. 526, 85 NE 331. Where two or more persons are jointly and severally liable for conversion, recovery against one must be followed by payment to be available as defense for another. Squire v. Ordemann, 194 N. Y. 394, 87 NE 435. Judgment without satisfaction against one of two joint wrongdoers who are sued separately is no bar to taking judgment against others, but, if they are sued jointly, taking judgment against one not only operates as a discontinuance but constitutes a bar to obtaining judgment against others. Cameron v. Kanrich, 201 Mass. 451, 87 NE 605. Where two are joined in action, plaintiff may prosecute his case to judgment first against one and then against the other, and judgment in first instance is not bar against judgment in the other. Tanzer v. Breen, 131 App. Div. 654, 116 NYS 110. The general rule in this country is that judgment against one joint tort feasor does not release others until after satisfaction, but **in England and Virginia** the mere recovery of judgment effects such release. Staunton Mut. Tel. Co. v. Buchanan, 108 Va. 810, 62 SE 928.

**32.** Different amounts may be awarded against them, punitive damages being allowed against one but not the other. Louisville & N. R. Co. v. Roth [Ky.] 114 SW 264. Fact that action is brought against two parties jointly and that one is found not guilty does not release other from liability. Springfield Elec. L. & P. Co. v. Calvert, 134 Ill. App. 285.

**33.** Judgment in personal injury case against one street railway company and receiver of another. West Chicago St. R. Co. v. Muttschall, 131 Ill. App. 639. But the judgment when rendered must stand or fall as to all, if rendered against all. Finley v. Southern R. Co. [Ga. App.] 64 SE 312.

**34.** Sloan v. Hart [N. C.] 63 SE 1037. It is doubtful if the old English rule that a person injured by a felony can obtain no recompense therefor until after conviction

## TOWNS; TOWNSHIPS.

§ 1. Creation, Organization, Status, and Boundaries, 2132.
§ 2. General Powers and Exercise Thereof, 2132.
§ 3. Property, 2133.
§ 4. Contracts, 2133.
§ 5. Officers and Employes, 2134.
§ 6. Fiscal Management, 2135.
§ 7. Claims, 2135.
§ 8. Actions by and Against, 2136.

*The scope of this topic* is noted below.[35]

§ 1. *Creation, organization, status, and boundaries.*[36] See 10 C. L. 1863.—Townships are the lowest grade of municipal corporations,[37] having but slight corporate autonomy,[38] and being in but a limited sense governmental agencies.[39] Their charters are repealable,[40] the principle of local self-government not being inherent therein,[41] and on repeal the inhabitants thereof must be subject to such government as the state under constitutional limitations may impose.[42] Limitations as to special legislation do not apply where the township involved may be deemed different in situation from all others.[43] Where a town is divided, the apportionment of indebtedness is governed by statute,[44] and a township has no vested rights in the delinquent taxes of detached territory, so as to prevent the division and the transfer of the right to collect from one town to another.[45]

§ 2. *General powers and exercise thereof.*[46] See 10 C. L. 1863.—Townships are usually endowed with very limited powers and liabilities.[47] A township being a mere subdivision of a county,[48] constitutional limitations imposed on "counties" are applicable.[49] The issue of railroad aid bonds may be permitted,[50] and a town

of wrongdoer has any application in this country, but, in any event, it has no application to injury from crimes of lesser degree, or where recovery is sought from one standing in relation of matter to wrongdoer. Leeman v. Public Service R. Co. [N. J. Law] 72 A 8.

35. It treats of "townships," whether so-called or designated as "towns." Village and the like, though known as "towns," are treated in the topic Municipal Corporations, 12 C. L. 905. Matters common to all public corporations are treated in such topics as Public Contracts, 12 C. L. 1442; Public Works and Improvements, 12 C. L. 1473; Officers and Public Employes, 12 C. L. 1131.

36. **Search Note:** See Towns, Cent. Dig. §§ 1-19; Dec. Dig. §§ 1-14; 28 A. & E. Enc. L. (2ed.) 282, 327.

37. Posey Tp. v. Senour [Ind. App.] 86 NE 440.

38. Townships not corporate bodies; under Rev. St. 1905, § 1318, subd. 30, have only such corporate powers as are authorized by general assembly. Wittowsky v. Jackson County Com'rs [N. C.] 63 SE 275. While townships and other taxing districts are sometimes referred to as quasi municipal corporations, they are but territorial sections of counties, upon which power to perform functions of government of local application and interest is conferred. Id.

39. Wittkowsky v. Jackson County Com'rs [N. C.] 63 SE 275.

40. General assembly may repeal charter of municipal corporation so far as appeal affects merely public governmental aspect. Board of Tp. Com'rs v. Buckly [S. C.] 64 SE 163.

41. Principle of local self-government does not inhere in township. Board of Tp. Com'rs v. Buckly [S. C.] 64 SE 163.

42. Board of Tp. Com'rs v. Buckly [S. C.] 64 SE 163.

43. Act establising town government (Act Feb. 17, 1906; 25 St. at Large, p. 280) not invalid as special legislation within Const. art. 3, § 34, where art. 7, § 11, authorizes system of government, and town in question being island largely used as summer resort, in fact property of state. Board of Tp. Com'rs v. Buckly [S. C.] 64 SE 163.

44. Where town divided under St. 1898, § 671, and § 672, provided for apportionment of indebtedness, etc., duty of apportionment under latter section rested on county board, and was precedent to enforcement of right to share of credits of town. Town of Emery v. Worcester, 137 Wis. 281, 118 NW 807. Ascertainment by county board clearly condition precedent. Id. Right to share, exclusively statutory and therefore exclusive. Id. Delegation of duty to town boards clearly not compliance with statute. Id.

45. Township of Stambaugh v. Iran County Treasurer, 153 Mich. 104, 15 Det. Leg. N. 368, 116 NW 569. Under Local Acts 1905, p. 770, No. 578; Act No. 577, p. 769, and Act No. 667, p. 1161, for purpose of changing territorial boundaries of townships and school districts, otherwise identical. Id. Legislature could validly empower township treasurer to receive moneys belonging to treasury, and to take steps to obtain same. Id. County treasurer and auditor general mere conduits through whom taxes were to be paid to township treasurer. Id.

46. **Search Note:** See notes in 13 A. S. R. 550.

See, also, Towns, Cent. Dig. §§ 20-41, Dec. Dig. §§ 15-25; 28 A. & E. Enc. L. (2ed.) 298, 330.

47. Posey Tp. v. Senour [Ind. App.] 86 NE 440.

48. See ante, § 1.

49. Wittkowsky v. Jackson County Com'rs [N. C.] 63 SE 275.

50. By observing constitutional requirement. Wittkowsky v. Jackson County Com'rs

may be authorized to purchase a water system.[51] Statutory provisions govern the authority over sidewalks,[52] highways,[53] and the exercise of the taxing power.[54] Joint school districts may be authorized in the case of adjoining townships.[55] To estop a town from denying that a bridge, privately built, was part of its highway, requires evidence tending to show an adoption of the alleged highway by the town.[56]

*Town meetings.* See 10 C. L. 1803—Where the chairman declares a resolution passed, he will be presumed to have voted affirmatively.[57]

§ 3. *Property.*[58] See 4 C. L. 1686

§ 4. *Contracts*[59] See 10 C. L. 1804 by townships should be entered into by the proper officers.[60] Such officials may be authorized to contract for supplies for bridges.[61] The appropriation of material for highways by a road supervisor has been held to impose no liability upon a township.[62] An implied contract will not

[N. C.] 63 SE 275. See Municipal Bonds, 12 C. L. 897.

51. Seward v. Revere Water Co., 201 Mass 453, 87 NE 749. Vote by town to buy water system and issue bonds, under St. 1904, pp. 469, 471, 473, c. 457, §§ 1, 5, 11, is within warning notifying voters that after acceptance of statute, under § 12, they would be called on to consider purchase, and, if they decided to buy, to pass necessary votes. Id.

52. Under Comp. Laws 1897, §§ 4202, 4203, 3441, et seq. as to authority over sidewalks, township authorities have power to prevent maintenance of sidewalk in unsafe condition, by abutting owner, especially where sidewalk almost essential to use of public highway. Welton v. Crystal Tp., 152 Mich. 486, 15 Det. Leg. N. 247, 116 NW 390. Under Comp. Laws, § 3441, et seq, making municipalities liable for injuries caused by defective sidewalks, etc., townships must maintain walks open to public in reasonably safe condition. Id. Sidewalk within limits of street in unincorporated village is under control of township authorities. Id.

53. Highways property of general public, not township. Posey Tp. v. Senour [Ind. App.] 86 NE 440. Strictly speaking, in the absence of statute, there is no local ownership of public highway bridges. Part of general system of highways. Karr v. Putnam County Com'rs, 170 Ind. 671, 85 NE 1. Township has no interest in public highways except that it is required to pay damages assessed on specific cases. Posey Tp. v. Senour [Ind. App.] 86 NE 440. Under Rev. Laws, c. 51, § 18, rendering town **liable for defects** in street, recovery can only be had where town had actual or constructive notice of defect. Craig v. Leominster, 200 Mass. 101, 85 NE 855. Notice of defect in street caused by moving building held under evidence not to be imputed to town officers. Id. Under Rev. Laws, c. 52, § 13, selectmen might require persons moving building to take precautions for protection of travelers. Id. Use of street for moving building, lawful, where permission secured from selectmen, under Rev Laws, c 52, § 13. Id. Where building moved and rope attached was left stretched 1½ feet above street in dark, it was defect in street. Id.

54. Township board must exercise taxing power in subordination to authority of county court to make apportionment required in Rev. St. 1899, § 9284 (Ann. St. 1906, p. 4265). State v. Piper, 214 Mo. 439, 114 SW 1. Under statute, county court having township organization is required to apportion 80 per cent of tax to general county purposes and 20 per cent to county purposes. Id. Statute does not deprive township of right to levy road tax. Id. Statute not in conflict with Acts 1901, p. 254, authorizing road tax. Id.

55. Under Burns' Ann. St. 1901, §§ 6001, 6002a, township trustees of adjoining townships may establish joint school districts, and build joint school houses when petitioned for. Subject to appeal to county superintendent by § 6028; location, plan and cost decided under § 5920 as am'd by Acts 1901, p. 514, c. 224. Advisory Board of Harrison Tp. v. Smith, 170 Ind. 439, 85 NE 18 Power not limited by advisory board law (Acts 1899, p. 150, c. 105). Id.

56. Curtiss v. Bovina [Wis.] 120 NW 401. Town held not to have adopted bridge under evidence so as to be liable for injuries to traveler, where town board refused to extend bridge across river, to assist in building same, or to repair. Id.

57. St. 1898, § 665, required questions to be determined by majority, and where 5 voted for, and 4 against, and chairman declared resolution carried, he will be presumed to have assented and in legal effect to have voted for passage. Strange v. Oconto Land Co., 136 Wis. 516, 117 NW 1023. Transaction nearly 30 years old will be presumed regular. Id.

58. **Search Note:** See Towns, Cent. Dig. §§ 63-68; Dec. Dig. § 35; 28 A. & E. Enc. L. (2ed.) 328.

59. **Search Note:** See Towns, Cent. Dig §§ 69-77; Dec. Dig. §§ 36-42; 28 A. & E. Enc. L. (2ed.) 329.

60. See post, § 5.

61. Under Wilson's Rev. & Ann. St. Okl. 1903, §§ 6662, 6663, 6676, 6685, 6107, as to powers and duties, trustee and board of directors of township had authority to contract for lumber for building bridges and culverts. Herring Lumber Co. v. Hazel Tp. [Okl.] 97 P 612. Petition on contract held to state cause of action on demurrer. Id. Proper charge under § 6680. Id.

62. Right of supervisors to appropriate material is right of eminent domain, and supervisor represents state, not township. Posey Tp. v. Senour [Ind. App.] 86 NE 440. Township not liable for damages. Id. No liability on quantum meruit. Id. Remedy limited to assessment of damages under Burns' Ann. St. 1908, § 7775. Id. Gen. St. 1901, § 7826, does not authorize township boards to provide in whole or in part for

arise from the mere rendition of services beneficial to a township and its inhabitants.[63] A contract by a township, and private parties for the building of a road which would benefit such private parties, and whereby the latter would pay the interest on the bonds for the work, is not contrary to good morals or public policy.[64] Where a contract for the purchase of a water plant is authorized, and the action taken is irregular, it may be ratified.[65] The right to rescind a bilateral contract with a town on the ground of fraud can only be exercised by the town.[66]

§ 5. *Officers and employes.*[67] —See 10 C. L. 1664.— Townships act, like other corporations, through duly authorized officers.[68] The authority to contract may be conferred solely on the trustee,[69] and, while road supervisors are commonly designated as township officers,[70] they are in no sense representatives of township as a body corporate.[71] The duties relative to highways may be imposed upon the supervisors[72] or trustees.[73] Clearly imposed duties may be compelled by mandamus.[74] The powers of a township advisory board are governed by statutes,[75] and such board may be a continuous body.[76] In the case of an emergency, statute may

construction of bridge costing $15,000. $1,200 subscription void. Rossville Tp. v. Alma Nat. Bank [Kan.] 98 P 234.

63. Where attorneys rendered services in good faith for benefit of citizens to enforce railway franchise, believing themselves expressly employed by township and township employed other attorneys, there being no evidence that first attorneys looked to township for compensation, though entire board knew of their services, such facts were insufficient to raise an implied contract. Clark v. West, Bloomfield Tp., 154 Mich. 249, 15 Det. Leg. N. 721, 117 NW 638.

64. Agreement with owners of milldam where road would close new channel of stream and restore milldam. Electric Plaster Co. v. Blue Rapids City Tp., 77 Kan. 580, 96 P 68. Where township performed its portion of agreement, private parties could not object to liability on ground that contract was unauthorized (Id.), or was lacking in mutuality (Id.). Claim that officers declined to proceed unless mill owners would share expense, and that refusal would place them in unenviable light with patrons, insufficient to support theory that agreement was procured by duress. Id.

65. Action taken for purchase of water plant, under St. 1882, p. 103, c. 142, § 7, if irregular, may be ratified. Seward v. Revere Water Co., 201 Mass. 453, 87 NE 749.

66. Not by taxpayers, who do not represent other taxpayers or town. Seward v. Revere Water Co., 201 Mass. 453, 87 NE 749. Purchase of water company's plant not to be avoided on ground that officer of company acted as moderator at town meeting, where no proof of corruption. Id.

67. **Search Note:** See Towns, Cent. Dig. §§ 42-62; Dec. Dig. §§ 27-34; 28 A. & E. Enc. L. (2ed.) 317.

68. Posey Tp. v. Senour [Ind. App.] 86 NE 440.

69. Powers of trustees in this respect limited to those expressly, or by necessary implication, conferred by statute. Posey Tp. v. Senour [Ind. App.] 86 NE 440.

70. Elected at township election, and duties conferred within territorial limits of township. Posey Tp. v. Senour [Ind. App.] 86 NE 440.

71. No authority to bind township by any contract express or implied. Posey Tp. v. Senour [Ind. App.] 86 NE 440.

72. Duties of supervisors relate to public highways within limits of township, not to township property or business. Posey Tp. v. Senour [Ind. App.] 86 NE 440.

73. Under Code Supp. 1907, §§ 1528, 1530, 1532, 1533, 1538, trustee's duty is to exercise general supervision over highways. Theulen v. Viola Tp. [Iowa] 117 NW 26. No duty to keep in repair. Id.

74. Township supervisor failing to assess damages for materials taken in repairing highway (Burns' Ann. St. 1908, § 7775), may be compelled to perform duty by proper proceeding. Posey Tp. v. Senour [Ind. App.] 86 NE 440. Petition for mandamus to township trustee to furnish transportation for children of school age under Acts 1907, pp. 444, 445, c. 233 (Burns' Ann. St. 1908, § 6423), insufficient since Acts 1899, pp. 150-158, c. 105, as amended by Acts 1901, pp. 415, 418, c. 185 (Burns' Ann. St. 1908, §§ 9590-9602) prevents expenditure of township moneys unless approved by advisory board and prevents incurring of indebtedness, and petition did not show money on hand or authority to borrow. State v. Anderson, 170 Ind. 540, 85 NE 17.

75. Advisory board is what name imports, advisory to township trustee who makes contracts with its consent and approval, and has care and management of all township property. Burns' Ann St. 1908, § 9565. Coal Creek Tp. Advisory Board v. Levandowsky [Ind. App.] 86 NE 1024. As to joint school districts. Harrison Tp. Advisory Board v. State, 170 Ind. 439, 85 NE 18. Under advisory board law (Acts 1899, p. 150, c. 105), § 8085a, advisory board may pass upon trustee's expenditures and make appropriation in form of levy for estimates approved. Id. Under § 8085f, as amended by Acts 1901, p. 415, c. 185, township debt shall not be created by advisory board. Id. Location and character of building to be determined by trustees, in which respect advisory board merely counselor. Id.

76. Never ceases as legal entity except by legislative enactment. Harrison Tp. Advisory Board v. State, 170 Ind. 439, 85 NE 18. Where membership changed after change of venue had been taken by board to another county, board was still subject to jurisdiction invited. Id. New members assumed office impressed with duties and obligations of board and were bound to know

provide for assessments by officers of an adjoining town.[77] Usually township officers are not personally liable for torts with reference to their official duties,[78] but, where an officer acting in a dual capacity neglected his duties and received the town's money for property, but failed to secure conveyance of the same, he was liable for return of money and interest.[79]

§ 6. *Fiscal management.*[80]—See 10 C. L. 1864.—Township funds are subject to legislative control,[81] and surplus moneys should be used according to statutes relative thereto.[82] Electors at a town meeting cannot authorize the satisfaction of a judgment for taxes at less than the amount of such judgment.[83] Statutes may authorize contributions to a town where the duty to repair highways is imposed and the expense is burdensome.[84]

§ 7. *Claims.*[85]—See 10 C. L. 1885.—The statutes may require that claims disallowed by a board of auditors be accompanied by a statement of the reason for such action,[86] and the want of jurisdiction of a board of supervisors to audit claims and assess taxes for payment thereof may be questioned by a taxpayer's action.[87]

and abide by its acts. Id. Where membership of board changed pending suit, old members ceased to exist as officers. Id. No standing in court except to call attention to substitution. Id.

77. St. 1898, § 1152, providing for assessments by officers of adjoining town where people fail to elect town officers, makes temporary provision for emergency and is not violative of Const. art. 13, § 9, requiring officers to be elected by voters of town. Strange v. Oconto Land Co., 136 Wis. 516, 117 NW 1023. Town neglecting and refusing to elect officers cannot have town "authorities," and therefore officers of adjoining town may be lawfully authorized to act. Id. Statute does not violate Const. art. 4, § 23, requiring one system of town government, to be as nearly uniform as practicable, since rule is uniform for all towns. Id. Unconstitutionality not available to person assailing assessment, he not being injured. Id. Officers of adjoining town de facto. Id.

78. Officers not personally liable for damages to persons and property with respect to performance of official duties. Lienemann v. Costa, 140 Ill. App. 167. When unlawful or tortious act committed under guise of performing duty. Id. When ministerial duty performed in wrongful or negligent manner. Id. Where officers corruptly, willfully, or negligently fail to perform mandatory duty. Id. No liability attaches because of mere error or mistake or even negligence in performance of duties by township trustee. Theulen v. Viola Tp. [Iowa] 117 NW 26. Duties of township trustees quasi judicial, except duty of levying taxes. Id.

79. Town of Rolling v. Wunderlich [Wis.] 120 NW 515. Officer acting in dual capacity, receiving money for conveyance by society but failing to secure conveyance, and otherwise neglecting duties, clearly derelict in duty. Id. Where petition from association requested submission to town electors of question whether town should buy half of their half, and proposition was accepted, town prima facie purchased and association sold one-half interest in building and grounds, free from incumbrances. Id.

80. **Search Note:** See Towns, Cent. Dig. §§ 81-104; Dec. Dig. §§ 46-61; 28 A. & E. Enc. L. (2ed.) 333.

81. McSurely v. McGrew [Iowa] 118 NW 415.

82. Laws 1905, p. 925, c. 396, as to investment of damages for highways or bridges recovered from city of New York, held directory, not mandatory. McConnell v. Allen, 193 N. Y. 318, 85 NE 1082. Act construed in connection with Laws 1891, p. 346, c. 164, providing for expenditure of surplus moneys for redemption of outstanding bonds, and town board held to have power to devote moneys to improvement of highways of town. Id.

83. Parker v. People, 133 Ill. App. 118.

84. Pub. St. 1901, c. 75, § 1, requiring towns to build and keep in repair highways and bridges as modified by Pub. St. 1901, c. 73, §§ 2, 4, provides that towns may receive contributions from counties when expense is burdensome. Town of Bridgewater v. Grafton County, 74 N. H. 549, 69 A 941. Sections 2, 4, supplementary to each other and fact that town received contribution from other towns did not bar receiving contribution from county. Id. Under statute "expense" and "whole expense" mean same, and court might order payment of portion of expense by county when so required by equity and justice. Id. Whether whole expense is burdensome, a question of fact. Id. Evidence held sufficient to justify decree awarding contribution from county. Id.

85. **Search Note:** See Towns, Cent. Dig. §§ 105-110; Dec. Dig. §§ 62, 63; 28 A. & E. Enc. L. (2ed.) 334.

86. On certiorari to review proceedings of board of auditors, where slip was attached to rejection of certain items of claim, stating that claimant, as police constable, had no jurisdiction to perform the services charged, respondents could not set up that claim was passed upon on merits, and that other reasons existed for rejection. People v. Stillwater Auditors, 126 App. Div. 487, 110 NYS 745. Duty to state reasons existed and could be enforced by mandamus. Id.

87. Action to restrain authorized by Laws 1892, p. 620, c. 301. Armstrong v. Fitch, 126 App. Div. 527, 110 NYS 736. In taxpayer's action to set aside audit of claims and restrain tax levy where supervisors acted

§ 8. *Actions by and against.*[88] See 10 C. L. 1865—A township which is not a corporation cannot sue or be sued,[89] and generally a town officer cannot, merely as an officer, sue in the town's name.[90] Statutes may provide for a suit by a town against a former officer for an accounting [91] and for a suit by a parent town for contribution of indebtedness, where new towns are organized from the territory of the parent town.[92] A resolution at a town meeting instructing town officers to start an action against certain persons is sufficient to authorize the same.[93] Statutes may authorize suits by overseers of the poor with respect to poor laws,[94] and limited power to sue may be conferred on a township advisory board.[95] Where a proceeding for a public drain affects a public highway bridge, the township trustee of the township charged with the duty of repairing such bridge may properly be made a party,[96] but, in an action to enjoin a township from maintaining a ditch to the damage of property owners, the supervisors are not necessary parties defendant.[97] The imposition of costs against a town may be error.[98]

## TRADE MARKS AND TRADE NAMES.

§ 1. Definition, and Words or Symbols, Available, 2137.
§ 2. Acquisition, Transfer and Abandonment, 2138.
§ 3. Infringement and Unfair Competition, 2139.
§ 4. Remedies and Procedure, 2142.
§ 5. Statutory Registration, Regulation, and Protection, 2143.

*The scope of this topic* is noted below.[99]

without jurisdiction, it was no defense that claims were lawful and proper in proper forum. Id. Claims, however meritorious, are not legal within the taxpayer's act (L. 1892, p. 620, c. 301) unless so determined by a forum empowered by law to make such determination. Id. Action of town board in disallowing claims constitutes a judicial determination by tribunal of competent jurisdiction, conclusive until reversed or annulled as provided by law. Id. Conclusive on every one, including supervisors. Id. County Law (L. 1892, p. 1748, c. 686, § 16), providing that supervisors may correct manifest clerical errors in assessments, etc., confers no power to review action of town officers in respect to merits or legality of questions before them, but only to make clerical corrections and perform ministerial duties in reference thereto. Id.

**88. Search Note:** See Towns, Cent. Dig. §§ 111-129; Dec. Dig. §§ 64-84; 28 A. & E. Enc. L. (2ed.) 335.

**89.** Theulen v. Viola Tp. [Iowa] 117 NW 26. Township body corporate, and suable. Koeper v. Louisville, 106 Minn. 269, 118 NW 1025.

**90.** Inhabitants of Great Barrington v. Gibbons, 199 Mass 527, 85 NE 737.

**91.** Right of action exists against former town officer to compel accounting and recovery of sums due (authorized by 1 Rev. St. [1st Ed.] p. 349, pt. 1, c. 11 tit. 4, art. 1, § 5, as amended by L. 1866, p. 1146, c. 534 and Rev. St. [1st Ed.] p. 356, pt. 1, c. 11, tit. 5, § 1, which statutes were repealed by L. 1890, p. 1243, c. 569, § 240 [Town Law], but general provision of town law [§ 182] held to perpetuate right, since object of law was to codify). Town of Felham v. Shinn, 129 App. Div. 20, 113 NYS 98.

**92.** Where two towns organized from territory of existing town, and parent town brought action for contribution to indebtedness (under Gen. L. 1895, p. 509, c. 227), other town was not necessary party defendant. Town of Kettle River v. Bruno, 106 Minn. 58, 118 NW 63. Separate actions maintainable against each new town. Id. Liability separate and distinct, capable of definite ascertainment, and separate actions proper (Rev. L. 1905, § 4282). Id.

**93.** Town of Rolling v. Wunderlich [Wis.] 120 NW 515.

**94.** Under Rev. L. c. 81, § 38, overseers of poor in any place may prosecute in behalf of such place with respect to poor laws. Inhabitants of Great Barrington v. Gibbons, 199 Mass 527, 85 NE 737. "To prosecute" an action includes bringing, as well as carrying on, of action. Id. Authority not restricted by revisions of law. Id. Action to compel one to contribute to pauper kinsman's support maintainable in name of town. Id.

**95.** Under Burns' Ann. St. 1908, §§ 9595, 9597, conferring authority on advisory board as to suits on bond of trustee, etc., board has no power to sue trustee and school township to prevent contract for construction of school house. Coal Creek Tp. Advisory Board v. Levandowsky [Ind App.] 86 NE 1024. In the absence of express authority township advisory board cannot maintain an action. Id. Authority not to be implied. Id.

**96.** Karr v. Putnam County Com'rs, 170 Ind. 571, 85 NE 1. Burns' Ann. St. 1901, § 3277, provides that township trustee may appropriate portion of road tax fund for bridge where county commissioners do not deem bridge of sufficient importance to justify appropriation. Id.

**96.** Koeper v. Louisville, 106 Minn. 269, 118 NW 1015.

**98.** Town of Meacham v. Lacey, 113 Ill. App. 208.

**99.** Excludes matter relating to personal (see Names, Signatures, and Seals, 12 C. L. 949), corporate (see Corporations, 11 C. L.

§ 1. *Definition, and words or symbols available.*[1]—See 10 C. L. 1865—A trade mark, is any sign, mark, symbol, word, or words which indicate the origin or ownership of an article as distinguished from its quality, and which others have not the right to employ for the same purpose.[2] It is not a subject of taxation, within the meaning of a statute of Kentucky, providing for the taxation of all property in that state.[3] No one can appropriate as a trade mark a generic name, or one descriptive of an article of trade, its qualities, ingredients, or characteristics,[4] unless by long usage they have acquired a meaning which denotes origin and identity,[5] and as to whether some words are a trade mark or merely descriptive depends upon the manner in which they are used.[6] Neither can an exclusive right be acquired to a geographical name,[7] nor to the use of a color unless connected with some symbol or design.[8] Nor can numbers, when used to indicate styles rather than origin and manufacture, be the subject of a valid trade mark.[9] Words used upon a manufactured article are not subjects of trade mark, unless so used as to identify the articles as that of one's manufacture.[10] Although words by themselves may not be a subject of a trade name, they may become so by being used in connection with other words.[11] No one can acquire a monopoly of a word that is a near imitation of one, the use of which is open to all for the truthful description of articles of trade and commerce.[12] A design though

810), firm (Partnership, 12 C. L. 1201), and associate (see Associations and Societies, 11 C. L. 308), names and the protection of trades union labels (see Trade Unions, 10 C. L. 1872), and society emblems (see Associations and Societies, 11 C. L. 308). Reference should also be had to the topics Copyrights, 11 C. L. 808; Patents, 12 C. L. 1237, and Good Will, 11 C. L. 1657.

1. **Search Note.** See notes in 15 L. R. A. 462; 19 Id. 53; 1 L. R. A. (N. S.) 660; 4 Id. 447; 85 A. S. R. 83; 9 Ann. Cas. 763.

See, also, Trade Marks and Trade Names, Cent. Dig. §§ 1-25; Dec. Dig. §§ 1-22; 28 A. & E. Enc. L. (2ed.) 345.

2. Ball v. Broadway Bazaar, 194 N. Y. 429, 87 NE 674.

3. A trade mark has no intrinsic value, and is not property as the term is used in Const. art. 174 and St. 1909, § 4020. Commonwealth v. Kentucky Distilleries & Warehouse Co. [Ky.] 116 SW 766.

4. Trinidad Asphalt Mfg. Co. v. Standard Paint Co. [C. C. A.] 163 F 977. One company cannot gain right to exclusive use in in its company name such words as "cheese cutter," which are merely descriptive of goods to which they are applied. Computing Cheese Cutter Co. v. Dunn [Ind. App.] 88 NE 93. "Spearmint" used upon chewing gum held descriptive. William Wrigley Jr., Co. v. Grove Co., 161 F 885. "Porosknit" as a trade mark for underwear, as descriptive. Chalmers Knitting Co. v. Columbia Mesh Knitting Co., 160 F 1013. "Elastic seam," as applied to drawers with an elastic strip, held descriptive term. Price-Stix Dry Goods Co. v. Scriven Co. [C. C. A.] 165 F 639. "Flare Front," as applied to automobile lamps, held descriptive. Rushmore v. Manhattan Screw & Stamping Works [C. C. A.] 163 F 939. "Club," as applied to liquors, held discriptive. Kentucky Distilleries & Warehouse Co. v. Old Lexington Club Distilling Co., 31 App. D. C. 223. "Eureka," used upon pressboards, held not descriptive of grade. Case v. Murphey, 31 App. D. C. 245. "Monitor," used upon boiler injectors, held not descriptive but to denote origin. Edna Smelting & Refining Co. v. Nathan Mfg. Co., 30 App. D. C. 487. The termination "ota" is not a descriptive suffix, and when connected with "ceres," the name of the goddess of grain, is a valid trade mark on flour. Northwestern Consol. Milling Co. v. Mauser, 162 F 1004.

5. The word "Sunshine," used for many years to designate the origin and identity of stoves manufactured by complainant, held to be a valid trade-mark. Reading Stove Works, Orr, Painter & Co. v. S. M. Howes Co., 201 Mass. 437, 87 NE 751.

6. "Stage," used upon appellant's playing cards, held descriptive and not part of his trademark but to indicate style, class, and grade. United States Playing Card Co. v. Clark Pub. Co., 30 App. D. C. 208.

7. "Lexington," used in the term "Old Lexington Club" to designate a whisky, held geographical name. Kentucky Distilleries & Warehouse Co. v. Old Lexington Club Distilling Co., 31 App. D. C. 223. "The American Girl" is a geographical descriptive name used to designate woman's shoes. Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. [C. C. A.] 165 F 413.

8. Buff-colored strip, in connection with the light colored body of a garment, held not distinguishing feature of its manufacture, but merely descriptive. Rice-Stix Dry Goods Co. v. J. A. Scriven Co. [C. C. A.] 165 F 639.

9. Numbers held to indicate style of shoe rather than manufacture. Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. [C. C. A.] 165 F 413.

10. "Merrie Christmas" printed or woven at regular intervals in a ribbon, not a trade mark. Smith v. Krause, 160 F 270.

11. Held that the words "Lilliputian" and "Bazaar" were not a subject of a trade name standing alone, but where the words "Best & Co., Lilliputian Bazaar" were used to describe a place of business, another party could not use the words "Broadway Bazaar, Brooklyn's Best Lilliputian Store" to describe the same kind of business. Ball v. Broadway Bazaar, 194 N. Y. 429, 87 NE 674.

12. Held that "Ruberoid" was a misspelling of the word "rubberoid" and was not a

simple in form may constitute a valid trade mark,[13] and is not invalid because stamped or cut into the goods.[14] The right of every man to his own name is indisputable, but he will not be permitted to use it in such a manner as to compass a fraud,[15] or to exclude others of the same name.[16]

§ 2. *Acquisition, transfer and abandonment.*[17]—See 10 C. L. 1867—A common-law property right may be acquired in a trade mark by use,[18] and acquirement does not depend upon any particular period of user. Once a trade mark is adopted in good faith and used, the right thereto inures.[19] Likewise, an alien's right of priority must be based on use in the United States.[20] One may have more than one trade mark for the same goods provided they indicate origin or ownership,[21] and also have separate trade marks for different classes or grades of an article,[22] nor it is material that the manufacture of an article had originally two or more purposes in adopting the particular mark,[23] or that he did not advertise such mark as his trade mark.[24] The mere advertisement of words or symbol without application to the goods themselves is insufficient to constitute a trade mark.[25] Consent to the appropriation of his trade mark by another is not to be inferred from long knowledge and silence,[26] nor will consent to the use of a patentee's name be inferred from mere assignment of the patent.[27] Rights acquired to trade mark under a lease expires with the term of the lease,[28] and, in the absence of an agreement to the contrary, the interest a retiring partner has in a trade mark remains with the partner who continues the business.[29] The right to a trade mark used to identify a patented article expires

fanciful but a descriptive word. Trinidad Asphalt Mfg. Co. v. Standard Paint Co. [C. C. A.] 163 F 977.

**13.** A check formed of intersecting lines on the under or beveled face of a horseshoe nail head held a valid trademark. Capewell Horse Nail Co. v. Mooney, 167 F 575.

**14.** Capewell Horse Nail Co. v. Mooney, 167 F 575.

**15.** Wm. A. Rogers v. International Silver Co., 30 App. D. C. 97. No one should be allowed to so employ it as to convey to the public the notion that his goods are the goods of another. Rowley v. J. F. Rowley Co. [C. C. A.] 161 F 94. One cannot use his name as the part of the name of a corporation for the purpose of accomplishing deception and fraud. L. Martin Co. v. L. Martin & Wilckes Co. [N. J. Eq.] 71 A 409. Cannot use his name as an artifice to mislead the public as to the identity of the business or corporation. Sheffield-King Milling Co. v. Sheffield Mill & Elevator Co., 105 Minn. 315, 117 NW 447.

**16.** The word "Davids" alone is not the subject of a valid trademark. Thaddeus Davids Co. v. Davids, 165 F 792.

**17. Search Note:** See notes in 1 L. R. A. (N. S.) 705; 2 Id. 964; 17 A. S. R. 496; 2 Ann. Cas. 218.

See, also, Trademarks and Trade Names, Cent. Dig. §§ 26-45; Dec. Dig. §§ 23-40; 28 A. & E. Enc. L. (2ed.) 391.

**18.** Correro v. Wright [Miss.] 47 S 379.

**19.** Walter Baker & Co. v. Delapenha, 160 F 746. Does not depend upon extent of the use but upon priority. Kahn v. Gaines & Co. [C. C. A.] 161 F 495. Party claiming the right must prove that he has sold goods with such mark upon them. Walter Baker & Co. v. Delapenha, 160 F 746.

**20.** No right against citizen because of prior use in foreign country, if citizen did not have knowledge of such use. Walter Baker & Co. v. Delapenha, 160 F 746.

**21.** Complainant used one trademark upon its horseshoe nails and another upon the box in which the nails were packed. Capewell Horse Nail Co. v. Mooney, 167 F 575.

**22.** Held that complainant's trademark was valid although not used on all grades of horseshoe nails. Capewell Horse Nail Co. v. Mooney, 167 F 575.

**23.** For instance to indicate the quality and also the origin, and also to ornament the article, and, if later, his goods became known by this particular mark and he adopted it as a trademark to indicate origin solely, such trademark would be valid if no one had adopted it before he did. Capewell Horse Nail Co. v. Mooney, 167 F 575.

**24.** There is no law requiring a person to advertise his trademark or state upon the goods that such is his trademark. Capewell Horse Nail Co. v. Mooney, 167 F 575.

**25.** "Health Food," used in advertising matter, held not to constitute such a use as would bar another from registering the same. Battle Creek Sanitarium Co. v. Fuller, 30 App. D. C. 411.

**26.** Appellee did not forfeit its right to its trademark because it could have brought suit before. Michigan Condensed Milk Co. v. Kenneweg Co., 30 App. D. C. 491.

**27.** Reed Cushion Shoe Co. v. Frew [C. C. A.] 162 F 887.

**28.** A manufacturer of beer, known as "Laurer Beer," leased his premises to defendant. After the expiration of the lease, defendant continued to manufacture the beer under the same label. Held that defendant had no right to the use of the name "Laurer Beer Bottling Company." Laurer Brew. Co. v. Ehresman, 127 App. Div. 486, 111 NYS 266.

**29.** "Old Velvet," used to designate origin of a certain whisky, held the property of the remaining partner, and a transfer made by him later was valid and vested the trade-

with the patent,[30] but as to whether a right to a name which is used upon a patented article expires with the patent depends upon whether the name is used to denote source of manufacture or type.[31] The assignor of a trade mark has no special right to the name of the assignee unless the latter's name is part of the trade mark,[32] but, if the assignee has acquiesced and approved of the use of his name in a certain manner, he will be estopped from using his name in that form.[33] An agreement, whereby manufacturers of similar products agree in what manner they will conduct their business, does not confer upon either the right to use the trade mark of the other.[34] A person's right to a registered trade mark in the United States is not forfeited because such person has been deprived of the right to manufacture the article in a foreign country.[35] The right to describe an article by the trade mark or patented name passes by implication of law to the person who purchases from the inventor or his assignee.[36]

§ 3. *Infringement and unfair competition.*[37] *Infringement.* See 10 C. L. 1368—A trade mark embraces and protects the component parts of an article.[38] The test of an infringement is whether the resemblance is calculated to deceive the ordinary buyer,[39] and the facts of each case must be taken into consideration to decide

mark in the assignee. Bluthenthal v. Bigbie, 30 App. D. C. 118.

**30.** Held that elastic knitted strip in combination with the wooven body of a garment, and also the same color, became public property. Rice-Stix Dry Goods Co. v. J. A. Scriven Co. [C. C. A.] 165 F 639. "Vertical Top," which was printed upon a cigar mold, held descriptive and that exclusive right to its use expired with the patent. Sternberg Mfg. Co. v. Miller, Du Brul & Peters Mfg. Co. [C. C. A.] 161 F 318. No one can be restrained from manufacturing the article unless he palms it off as the goods of the manufacturer, whose patent has expired. Id.

**31.** Held that the word "Monitor," which was used by the plaintiffs upon boiler injectors, was not a word indicating type, but manufacture, and that defendant's act in using such name was an infrigement of the plaintiff's trademark. Nathan Mfg. Co. v. Edna Smelting & Refining Co., 130 App. Div. 512, 114 NYS 1033. "Ludlow," as applied to valves and hydrants, held to have become generic within the meaning of the decision in the Singer Case. Ludlow Valve Mfg. Co. v. Pittsburg Mfg. Co. [C. C. A.] 166 F 26. Drawers under a patent were designated by the term "Elastic seam." Held that, upon the expiration of the patent, any one had the right to use the name to discribe goods of their manufacture. Rice-Stix Dry Goods Co. v. J. A. Scriven Co. [C. C. A.] 165 F 639.

**32.** "Doctor A. Reed" printed above the design of a trademark held not part of such trademark. Reed Cushion Shoe Co. v. Frew [C. C. A.] 162 F 887.

**33.** Held that defendant could not use the phrase "Dr. A. Reed's Cushion Shoes" because of estoppel. Reed Cushion Shoe Co. v. Frew [C. C. A.] 162 F 887.

**34.** Complainant and defendant agreed that each would remove the trademark plate of the other when they refilled acetylene tanks. Held that this agreement did not constitute a license to use the tanks and was no defense to a suit for infringement. Prest-O-Lite Co. v. Post & Lester Co., 163 F 63.

**35.** The Carthusian Monks of France made a liquor, known as "Chartreuse." Said name was registered in the United States. They were expelled from France and their distillery was sold by the government to the defendants. Said defendants then manufactured and bottled liquor, using the same name, bottles, and labels as were used by the monks. The monks are manufacturing the same liquor in Spain as they did in France and selling the same in the United State, but put up in a somewhat different form. Held that defendants could not sell their product in the United States unless they used such words upon their labels and bottles that the public would not be deceived. Baglin v. Cusenier Co. [C. C. A.] 164 F 25.

**36.** The corporate name "Mills-Edisonia" is permissible if used in connection with the exhibition of Edison machines. Edison v. Mills-Edisonia [N. J. Eq.] 70 A 191. A corporation who purchases machines of another's invention has a right to use the inventor's name to describe the machines used. Id.

**37. Search Note:** See notes in 14 L. R. A. 245; 28 Id. 426; 8 L. R. A. (N. S.) 1153; 12 Id. 339, 729, 1201; 15 Id. 625; 2 Ann. Cas. 415; 3 Id. 806; 5 Id. 560; 10 Id. 71.

See, also, Trademarks and Trade Names, Cent. Dig. §§ 61-88; Dec. Dig. §§ 53-78; 28 A. & E. Enc. L. (2ed.) 408.

**38.** Claimant manufactured a stove and used the word "Sunshine" as a trademark and used the letter "SS" or "S" upon the parts. Defendant manufactured the parts using like characters. Held an infringement of the trademark. Reading Stove Works, Orr, Painter & Co. v. S. M. Howes Co., 201 Mass. 437, 87 NE 751.

**39.** To constitute a technical infringement of a trademark, the imitation must be identical, or the resemblance to the original must impart to an ordinary purchaser exercising reasonable care a misleading or false impression as to the origin of the goods he is buying. Hutchinson, Pierce & Co. v. Loewy [C. C. A.] 163 F 42. Held that the similiarity of names and the nearness of defendant's business, which was the

whether that particular case is an infringement.[40] Under the New York statutes it is an infringement of a trade mark to use the labels, marks, or name of another for the purpose of selling goods which were not manufactured by him.[41] An infringement of a name will not always be removed by merely using qualifying words.[42] *Unfair competition* consists in any marking, coloring, or advertising, by which the goods of one are sold for and on the reputation of those of another,[43]

same as that of complainant, was sufficient to constitute an infringement of complainant's trade name. Ball v. Broadway Bazaar, 194 N. Y. 429, 87 NE 674. Held that defendants had no right to use the name of complainant's hotel "St. Francie" in the name of their hotel, "St. Francis Hotel Company," although the prices charged are not the same and they cater more to transient trade. Martell v. St. Francis Hotel Co. [Wash.] 98 P 116.

**40.** Computing Cheese Cutter Co. v. Dunn [Ind. App.] 88 NE 93. Infringement is made out if the imitation is such that unwary purchasers are misled thereby. Gulden v. Chance, 163 F 447. Where one uses the name of another manufacturer of cigars and advertises his cigars so as to create a belief that they are the original brand, he may be enjoined. Portuondo Cigar Mfg. Co. v. Portuondo Cigar Mfg. Co., 222 Pa. 116, 70 A 968.

**Held to infringe:** "The Vicente P. Portuondo Cigar Manufacturing Company" held to infringe "The Juan F. Portuondo Cigar Manufacturing Company." Portuondo Cigar Mfg. Co. v. Portuonto Cigar Mfg. Co., 222 Pa. 116, 70 A 968. "High Rock Lithia Water" held to infringe "White Rock Lithia Water." The form of label and color of label and bottles were similar. National Water Co. v. O'Connell, 159 F 1001. "Broadway Bazaar, Brooklyn's Best Lilliputian Store" held to infringe "Best & Co., Lilliputian Bazaar," when used in connection with the same business and near complainant's place of business. Ball v. Broadway Bazaar, 194 N. Y. 429, 87 NE 674. Held that, taking into account the methods of the defendants, the name "The Anderson Cheese Cutter Company" infringed "The Computing Cheese Cutter Company of Anderson." Computing Cheese Cutter Co. v. Dunn [Ind. App.] 88 NE 83. "Improved Benevolent and Protective Order of Elks," composed of colored people, held to infringe "Benevolent and Protective Order of Elks," a society composed of white people. The first mentioned society used the latter's badge, emblems, ritual, and passwords. Benevolent & Protective Order of Elks v. Improved B. P. O. E. [Tenn.] 118 SW 389. The separate trademark, "Auto" and picture of a "motor car" held infringed by a design of a motor car with the word "Auto" printed upon it. Both these trademarks were used upon chocolate candy. Walter Baker & Co. v. Delapenha, 160 F 746. "L. Martin & Wilkes Company" held to infringe "L. Martin Company." Both firms were manufacturers of lampblack. L. Martin Co. v. L. Martin & Wilckes Co. [N. J. Eq.] 71 A 409. A check figure, formed of intersecting lines on the under or beveled face of a horseshoe nail, held to infringe a trademark of like design on the beveled face of a horseshoe nail. Capewell Horse Nail Co. v. Mooney, 167 F 575. "Cressota,' as a brand for flour, held to infringe "Ceresota," used also as a brand for flour. Northwestern Consol. Milling Co. v. Mauser 162 F 1004. The filling of acetylene tanks without removing trademark held an infringement. Prest-O-Lite Co. v. Avery Lighting Co., 161 F 648.

**Held not to infringe:** "Porous Underwear" not infringement of "Porosknit," where the first was printed in red Roman letters and the second written in black script. Chalmers Knitting Co. v. Columbia Mesh Knitting Co., 160 F 1013. A trademark or symbol of the figure of a black bear is not infringed by the subsequent use of a polar bear as a trademark or symbol. Bear Lithia Springs Co. v. Great Bear Spring Co., 71 N. J. Eq. 595, 71 A 383. "Don Caesar" held not to infringe "Don Carlos." These names were used upon packed olives. Chance v. [Gulden C. C. A.] 165 F 624, rvg. 163 F 447. Held that "Freundschaft Lodge" or "Humboldt Lodge" or "Hertha" was not infringed by "Humboldt Lodge No. 4, H. S. I." or "Freundschaft Lodge No. 1, H. S. I." or "Hertha Schwestern von Illinois."—All names applied to lodges. Freunderschaft Lodge, No. 72, D. O. H. v. Alchenburger, 235 Ill. 438, 85 NE 653. "Knotair" not infringement of "Holeproof," such words being used as a trademark for hosiery. Holeproof Hosiery Co. v. Wallach Bros., 167 F 373. Letters "M. M." within a diamond-shaped space and used upon plumbers' supplies held not to infringe "H. M." in a shield-shaped space with a diamond between the letters, used also upon plumbers' supplies. Mueller Mfg. Co. v. McDonald & Morrison Mfg. Co., 164 F 1001. "New York Slip Cover Company" held not to infringe "Slip Cover Company," where it was shown that the latter name had no commercial value. Woolf v. Seigenberg, 58 Misc. 322, 110 NYS 1087. Trademark consisting of a star of six points and the word Star held not infringed by a design of a five pointed star much smaller and in the form of a comet and with the name comet written in above. Hutchinson, Pierce & Co. v. Loewy [C. C. A.] 163 F 42. "S. A. Foutz Stock Food Company" held to infringe S. A. Foutz & Bros. unless modifying words were used. David E. Foutz Co. v. Foutz Stock Food Co., 163 F 408.

**41.** Pen. Code, § 364. Held that the defendant was guilty of violating this statute because of refilling a whisky bottle with the Wilson Company's mark upon it. People v. Luhrs, 127 App. Div. 634, 111 NYS 749.

**42.** There must be such a change in the name that the public will not be deceived. L. Martin Co. v. L. Martin & Wilckes Co. [N. J. Eq.] 71 A 409. "Not connected with the L. Martin Company, our competitors," used in connection with the name L. Martin & Wilcke's Company, is not sufficient to remove the infringement upon the first named firm. Id.

**43.** The filling of tanks which were patented by complainant and had the trade

but unfair competition cannot arise from the mere use of words belonging to the public, accompanied by a fair and truthful statement of the ownership and source of manufacture.[44] Courts of equity may require such form of words to be used in

mark "Prest-O-Lite" upon same held unfair competition in as much as the defendant did not remove the trademark or indicate in a proper manner that the tanks were not filled by complainant. Prest-O-Lite Co. v. Avery Lighting Co., 161 F 648. Stamp of a crescent shape, used upon drawers and boxes which contained same held not to so similate the stamp and boxes of complainant as to constitute unfair competition. Rice-Stix Dry Goods Co. v. J. A. Scriven Co. [C. C. A.] 165 F 639. Where a firm engaged in the moving business by the name Scanlan & Bartell, inserted the name "White Line Moving & Storage Company, S. Williams, Proprietor" in the telephone directory near plaintiff's name, C. C. Williams, who was in the same business, held that the name "S. Williams" was used to get plaintiff's business and was unfair competition. Scanlan v. Williams [Tex. Civ. App.] 114 SW 862. Unfair competition for a bottle of beverages to use the bottles of his competitors and put the same upon the market containing goods of inferior quality. Breimeyer v. Star Bottling Co. [Mo. App.] 117 SW 119. Bottler of drinking water enjoined because of using a label and bottle which was similar to his competitor's product in color, style and type. National Water Co. v. O'Connell, 159 F 1001. Held that one, who had obtained knowledge of a secret formula by his associations with a firm manufacturing a patent remedy, would be restrained from selling or administering such remedy. Leslee E. Keeley Co. v. Hargraves, 236 Ill. 316, 86 NE 132. Held that complainant, the "Holeproof Hosiery Company," was entitled to a preliminary injunction because of unfair competition which consisted in the defendant using the word "No-Hole" in their name. "No-Hole Hosiery Company" and in simulating complainant's guaranty card. Holeproof Hosiery Co. v. Fitts, 167 F 378. The hiring of one who had been connected with another firm and using his name which was nearly similar to the name of the firm with which he was formerly with held unfair competition. L. Martin Co. v. Martin & Wilckes Co. [N. J. Eq.] 71 A 409. Held that the use by the defendant of the words "Mill Wood," followed by "Mill Wood Distilling Co," and also labels and descriptive words, which were somewhat similar to words and labels used by the "Mellwood Distilling Co." and who used "Mell Wood" to designate their liquor, constituted unfair competition. Mellwood Distilling Co. v. Harper, 167 F 389. Druggist held chargeable with unfair competition by inviting the public to by "argyrol" of him and delivering nucleinate of silver in its place. Complainants used the artificial word "argyrol" to designate their product. Barnes v. Pierce, 164 F 213. Held that a manufacturer of hosiery by simulating the packing, labeling, dressing, use of colors, and arrangement of type of his competitor, was chargeable with unfair competition. Holeproof Hosiery Co. v. Wallach Bros., 167 F 373. Manufacture of ladies' shoes used name, figures and phrase which were similar to the name, figures and phrase used by another manufacture of ladies' shoes. Held unfair competition. Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. [C. C. A.] 165 F 413. Held unfair competition for defendant to manufacture plumbers' supplies similar to those manufactured by complainant. Mueller Mfg. Co. v. McDonald & Morrison Mfg. Co., 164 F 1001. Held unfair competition for one whose name was similar to the name of another manufacturer of stock food remedies to so use his name as to deceive the public. David E. Foutz Co. v. Foutz Stock Food Co., 163 F 408. Imitation of complainant's packages and cartons containing chewing gum held unfair competition. William Wrigley, Jr. Co. v. Grove Co., 161 F 885. Held to be unfair competition for one who had sold right to manufacture patented cushion soles to use his name in connection with the products of a later patent so as to mislead the public into believing that they were getting the product of the first patent. Reed Cushion Shoe Co. v. Frew [C. C. A.] 162 F 887. The making of an automobile search light, inclosed in a shell of graceful but unpatented design which is similar to the product of another's manufacture, is grounds for an injunction. Rushmore v. Manhattan Screw & Stamping Works [C. C. A.] 163 F 939. Held that the "Sheffield Mill & Elevator Co." because of the use of the word "Sheffield" connected with the word "Mill" and because of their false representations were chargeable with unfair competition as against the "Sheffield-King Milling Co." Sheffield-King Milling Co. v. Sheffield Mill & Elevator Co., 105 Minn. 315, 117 NW 447. Where one manufactures a particular kind of bread and makes the loaves in a certain size, shape, and color, so that such combination denotes place of manufacture, such person will be protected against one imitating the loaves and wrappers. Geo. G. Fox Co. v. Hathaway, 199 Mass. 99, 85 NE 417. Defendant was enjoined from manufacturing the "Vertical Top" cigar mold upon which the patent of complainant had expired and further from using complainant's advertising matter, catalogues, etc., unless the defendant made it appear to the public that he, the defendant, was the manufacturer of the mold. Sternberg Mfg. Co. v. Miller, Du Brul & Peters Mfg. Co. [C. C. A.] 161 F 318. "Davids Ink" or "Davids Mucilage" followed by the words "Davids Manufacturing Company" held not to constitute unfair competition as against a firm using the same terms followed by the word "Thaddeus Davids Company," it also appearing that the defendant did not imitate complainant's labels in size, design, or color. Thaddeus Davids Co. v. Davids, 165 F 792.

**44.** One who manufacturers a roofing material called "Rúberoid" cannot enjoin another, manufacturing a like material, from using the name "RubberO" where it is not evident that the last named manufacturer did anything to deceive the public. Trinidad Asphalt Mfg. Co. v. Standard Paint Co. [C. C. A.] 163 F 977.

connection with an appropriated name as will completely protect the rightful owner of that name from injury and the public from imposition.[45]

§ 4. *Remedies and procedure.*[46]—See 10 C. L. 1669—There is a common-law property right in a trade mark, the infringement of which gives rise to a cause of action.[47] In a technical trade mark case, question of deception, confusion, or injury, are unimportant,[48] and an injunction will be granted regardless of the intention of the infringer or the consequences of the infringement,[49] the question being whether there has been an injury to complainant's rights.[50] To entitle a party to an injunction, it must appear that the defendant, at the time of filing the bill, is doing, or threatening to do, that which constitutes, or will constitute, an invasion of complainant's rights.[51] Such a use of one's own name, unaccompanied by a caution or explanation so specific as to prevent confusion, may be enjoined,[52] but an averment in a bill for an injunction that the name was "calculated to deceive" is not sufficient.[53] A preliminary injunction will not be granted unless the proof is clear and conclusive,[54] but, if the essential questions involved in a suit for infringement of a trade mark were decided in another suit involving like questions, a preliminary injunction will be granted.[55] The fact that complainant allowed another than the defendant to infringe upon his rights will not deprive him of the right to an injunction.[56] Equity will withhold relief where the person asserting a grievance has not exercised reasonable diligence in seeking redress [57] and will be reluctant, except in a clear case, to enjoin a religious society,[58] but equity will not, as a general rule, refuse an injunction on account of delay, even though the delay may be such as to preclude an accounting of profits.[59] One seeking equitable relief against infringement must come into court with clean hands.[60] The decree must not be too broad.[61]

**45.** Sternberg Mfg. Co. v. Miller, Du Brul & Peters Mfg. Co. [C. C. A.] 161 F 318. Held that defendant could not use the term "Ludlow Valves," which had been used upon a patent which had expired, unless it use such words as would indicate source of manufacture. Ludlow Valve Mfg. Co. v. Pittsburg Mfg. Co. [C. C. A.] 166 F 26.

**46. Search Note:** See notes in 25 A. S. R. 191.

See, also, Trademarks and Trade Names Cent. Dig. §§ 89-115; Dec. Dig. §§ 79-101; 28 A. & E. Enc. L. (2ed.) 437.

**47.** Correro v. Wright [Miss.] 47 S 379.

**48.** Walter Baker & Co. v. Delapenha, 160 F 746.

**49.** Hutchinson, Pierce & Co. v. Loewy [C. C. A.] 163 F 42.

**50.** Actual fraud or deception is not necessary. Martell v. St. Francis Hotel Co. [Wash.] 98 P 1116.

**51.** Defendant two years before the commencement of the suit had ceased to commit acts of unfair competition held that neither an injunction nor an accounting would lie. Ferguson-McKinney Dry Goods Co. v. Scriven Co. [C. C. A.] 165 F 655.

**52.** Sheffield-King Mill. Co. v. Sheffield Mill & Elevator Co., 105 Minn. 315, 117 NW 447.

**53.** There should be a clear averment that the name is used with intent to deceive in the respects claimed in the bill. Industrial Press v. Smith Pub. Co. [C. C. A.] 164 F 842.

**54.** Held that the complainant case was so doubtful that the relief would be denied, as it was not conclusive that defendant had infringed the trademark upon his cigarettes. Anargyros & Co. v. Anargyros [C. C. A.] 167 F 753.

**55.** The questions involved had been decided in a previous suit. Carmel Wine Co. v. Palestine Hebrew Wine Co., 161 F 654.

**56.** A cigar manufacturer can enjoin the use of his name even though he allowed his brother to infringe upon his rights for a number of years, the said brother afterwards having assigned his rights. Portuondo Cigar Mfg. Co. v. Portuondo Cigar Mfg. Co., 222 Pa. 116, 70 A 968.

**57.** That complainants slept on their rights for 25 years, held to indicate no wrong in the defendants. Salvation Army in U. S. v. American Salvation Army, 62 Misc. 360, 114 NYS 1039.

**58.** It is not sufficient to show that the name and methods of such society bear a slight resemblance to another religious body. Salvation Army in U. S. v. American Salvation Army, 62 Misc. 360, 114 NYS 1039.

**59.** Held that plaintiff had not lost its right because of laches. Sheffield-King Mill. Co. v. Sheffield Mill & Elevator Co., 105 Minn 315, 117 NW 447.

**60.** The complainants advertised its water as "bottled at the spring" when in fact it was bottled in the city also declared in such advertisements that such water was a cure for certain diseases, which was contrary to the truth. Bear Lithia Springs Co. v. Great Bear Springs Co., 71 N. J. Eq. 595, 71 A 383. Equity will not apply the doctrine of estoppel to aid a person infringing another's name or trademark. Portuondo Cigar Mfg. Co. v. Portuondo Cigar Mfg. Co., 222 Pa. 116, 70 A 968. One who has had

In order to give a person a right of action for unlawful competition, it is not necessary that the public should be actually deceived, but it is sufficient if the infringement has a tendency to deceive,[62] and, in a bill to enjoin unfair competition, a court of equity upon granting an injuction may also decree an account of the profits made by the defendant by means of unfair competition;[63] but, in such case, the defendant is not also liable to account for damages suffered by complainant.[64] An exclusive or proprietary right in words is not necessary to obtain an injunction against unfair competition in trade by the deceptive use of such words.[65] Several persons can sue jointly in equity where they all suffer a common wrong at the hands of another.[66] A bill for an injunction is not demurrable because the complainant is not entitled to the full relief prayed for.[67] Where complainant and defendant are citizens of the same state, an action cannot be sustained in the federal court as one for unfair competition in trade solely.[68]

§ 5. *Statutory registration, regulation and protection.*[69] See 10 C. L. 1871—One who has a common-law right to a trade mark is entitled to have it registered,[70] and mere delay to assert one's right to a trade mark cannot be made the ground of successful opposition to its registration.[71] Such registration is prima facie evidence of ownership.[72] If in the opinion of the commissioner of patents the registration of a proposed trade mark will "be likely to cause confusion or mistake in the minds of the public" or "deceive purchasers," he is bound to reject it,[73] but, if two marks

the benefit of a patent during its life cannot set up its invalidity later for the purpose of claiming the name by, which the patent was known, as a trademark. Rice-Stix Dry Goods Co. v. J. A. Scriven Co. [C. C. A.] 165 F 639. Held not a fraud upon the public to use the fac simile of Dr. Keeley's signature on bottles although he was dead, but that its use represented that the contents was the genuine product. Leslee E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 NE 132. Complainants, manufacturers of "A. N. Chamberlain's Immediate Relief," denied an injunction to restrain defendants from infringing such trademark for the reason that complainants had misrepresented their medicine. Chamberlain Medicine Co. v. Chamberlain Medicine Co. [Ind. App.] 86 NE 1025. The assignment of a family name by a brother of a cigar manufacturer without any apparent intent to convey any particular formula or secret process is evidence of fraud upon manufacturer's rights and will deprive the assignee of the right to plead laches or estoppel. Portuondo Cigar Co. v. Portuondo Mfg. Co., 222 Pa. 116, 70 A 968.

**61.** Defendant who used complainant's trademark on stoves or parts of same could not be enjoined from selling such parts if he first removed the trademark. Reading Stove Works, Orr, Painter & Co. v. S. M. Howes Co., 201 Mass. 437, 87 NE 751.

**62.** O'Connell v. National Water Co. [C. C. A.] 161 F 545. But it is sufficient if the resemblance is such that they are likely upon comparison to mistake one article for the other. Reading Stove Works, Orr, Painter & Co. v. S. M. Howes Co., 201 Mass. 437, 87 NE 751. Where the trademarks and labels are not identical but bear such close resemblance that it is plain that they were intended to mislead, their use may be enjoined. Portuondo Cigar Mfg. Co. v. Portuondo Cigar Mfg. Co., 222 Pa. 116, 70 A 968.

**63.** L. Martin Co. v. Martin & Wilckes Co. [N. J. Err. & App.] 72 A 294. This is especially true if the defendant has acted fraudulently. Reading Stove Works, Orr, Painter & Co. v. S. M. Howes Co., 201 Mass. 437, 87 NE 751.

**64.** L. Martin Co. v. Martin & Wilckes Co. [N. J. Err. & App.] 72 A 294.

**65.** If the words are used to defraud the public, the courts will interfere. Computing Cheese Cutter Co. v. Dunn [Ind. App.] 88 NE 93.

**66.** A joint suit can be brought by several bottles of beverages against one who uses their bottles to their injury. Breimeyer v. Star Bottling Co. [Mo. App.] 117 SW 119.

**67.** Complainant, a manufacturer of hosiery, who asked relief as to the separate acts of the defendant in using names, packages, and guaranty cards, is entitled to relief so long as he makes a case entitling him to some relief. Holeproof Hosiery Co. v. Richmond Hosiery Mills, 167 F 381.

**68.** Thaddeus Davids Co. v. Davids, 165 F 792.

**69. Search Note:** See Trademarks and Trade Names, Cent. Dig. §§ 46-60; Dec. Dig. §§ 41-52; 28 A. & E. Enc. L. (2ed.) 434.

**70.** Irrespective of the so-called 10 year clause of the act of Feb. 20, 1905, c. 592, § 5, 33 Stat. 724 (U. S. Comp. Supp. 1907, p. 1010). Capewell Horse Nail Co. v. Mooney, 167 F 575.

**71.** Appellee held not to have lost its right by laches because it could have brought suit and failed to do so. Michigan Condensed Milk Co. v. Kenneweg Co., 30 App. D. C. 491.

**72.** The burden disproving such ownership rests upon the one who attacks it. Section 16 of the Trademark Act of 1905. Walter Baker & Co. v. Delapenha, 160 F 746.

**73.** Sections 2 and 4 of the trademark act (33 St. at L. 724, c. 592, U. S. Comp. Stat. Supp. 1907, p. 1008). Held proper for the commissioner of patents to reject the words

do not prima facie conflict, the burden of proof is upon the complainant to show that the defendant's mark is in fact likely to deceive purchasers.[74] A word which has been used in connection with a number of patented articles to denote origin can be registered.[75] Registration under certain conditions is not effected because the person made a false oath in obtaining the registration.[76] The patent office should not recognize a property right in a mark and accord it registration, when the courts, upon the same facts, would decline to protect the mark when registered.[77] Descriptive words[78] or geographical names cannot be registered under the federal statute.[79] Under the "ten-years clause" a surname or descriptive words may be registered if used exclusively to denote origin of goods for more than ten years next preceding the enactment of the statute of 1905,[80] but, if the use of a

"Chancellor Club" as a trademark for cocktails, as the words would be confused with a prior trademark, "Club Cocktails." In re S. C. Herbst Importing Co., 30 App. D. C. 297. Registration of "Elderwiess Maltine" held properly rejected because of intent to use it as misleading brand on intoxicant and thereby incidentally injure nonintoxicating "Maltine Plain" sold by appellee. Schoenhofen Brew. Co. v. Maltine Co., 30 App. D. C. 340. Registration of a trademark for cement consisting of an Indian's head shown in profile held properly rejected as liable to be confused with another trademark consisting of a front view of an Indian's head and also used upon cement. In re Indian Portland Cement Co., 30 App. D. C. 463. "Jewel" as applied to gasoline or vapor stoves held properly rejected as liable to be confused with "Jewel" as applied to wood and coal stoves and that both belonged to the same genus. American Stove Co. v. Detroit Stove Works, 31 App. D. C. 304. Six pointed star with the letters "G. E." inscribed in monagram in the center held properly rejected as a trademark for beer as it would be confused with a six pointed star surrounded by two circles with the words "The Celebrated Star Lager Beer" inscribed within the inner and outer circle. Ehret v. Star Brewery Co., 31 App. D. C. 507. "Victoria" associated with design used as trademark upon millinery goods held not liable to be confused with "Victor" used with entirely different design as trademark upon similar goods. Andrew McLean Co. v. Adams Mfg. Co., 31 App. D. C. 509. Held that "Old Lexington Club" as a trademark for whisky would be confused with "Lexington Club" and could not even be registered under the "ten year's clause." Kentucky Distilleries & Warehouse Co. v. Old Lexington Club Distiling Co., 31 App. D. C. 223.

74. Andrew McLean Co. v. Adams Mfg. Co., 31 App. D. C. 509.

75. Held that the word "Monitor" which the appellee had used on several forms of steam boiler injectors was a subject of trademark and had been used to denote origin and was not descriptive of any type of injector. Edna Smelting & Refining Co. v. Nathan Mfg. Co., 30 App. D. C. 487.

76. The oath was made that the use had been "exclusive" for 10 years previous. Held under the facts of the case that the words "such use had been exclusive" were surplusage and did not effect the registration. Capewell Horse Nail Co. v. Mooney, 167 F 575.

77. Held that appellee's mark should have been refused registration as the label which he used with the mark was a fraud upon the public and would not be protected in a court of equity. Levy v. Uri, 31 App. D. C. 441.

78. "Self-Loading" as applied to cartridges held descriptive word and not registerable as a trademark. Winchester Repeating Arms Co. v. Peters Cartridge Co., 30 App. D. C. 505. "Eureka" as a trademark for pressing boards held not descriptive of grade but a valid trademark. Case v. Murphey, 31 App. D. C. 245. "Club" as applied to liquors held descriptive. Kentucky Distilleries & Warehouse Co. v. Old Lexington Club Distilling Co., 31 App. D. C. 223.

79. "Orient," the letters E and I being printed as a monogram and the word inclosed in a wreath, was refused registration as a trademark for ink ribbons, it being held that the word was a geographical name under § 5, Trademark Act of Congress 1905. In re Crescent Typewriter Supply Co., 30 App. D. C. 324. "Lexington" which was used in the term "Old Lexington Club" as the name of a whisky held geographical name. Kentucky Distilleries & Warehouse Co. v. Old Lexington Club Distilling Co., 31 App. D. C. 223.

80. Held that the name "Wm. A. Rogers" as a mark applied to silverplated ware could be registered under 33 Stat. at L. 725, c. 592, U. S. Comp. Stat. Supp. 1905, p. 670, and was not a simulation of the marks "Wm. Rogers Mfg. Co." or "Wm. Rogers and Sons." Rogers v. International Silver Co., 30 App. D. C. 97. Held that the words "Shredded Whole Wheat" were descriptive of a product manufactured by different person and that appellant had not had the exclusive use of the words ten years prior to the statute. Natural Food Co. v. Williams, 30 App. D. C. 348. "Health Food" although descriptive could be registered as appellee had used the words exclusively as provided by the statute. Battle Creek Sanitarium Co. v. Fuller, 30 App. D. C. 411. "Exclusive" under this statute does not mean "the right to exclude." Held that "Sterling" was a descriptive word and that the appellant had not the exclusive use of word as provided in the statute. Worster Brew. Corp. v. Rueter & Co., 30 App. D. C. 428. Registration of the words "Old Tucker" was refused under this statute because another distilling company had used the words "J. C. Tucker Rye" as a mark for its brand of whisky. Brown-Forman Co. v. Beech Hill Distilling Co., 30 App. D. C. 485.

surname was invalid before such statute, it cannot be made valid by registration.[81] If the examiner of interferences sustains certain grounds of a demurrer and the opposition fails to ask leave to amend the allegations before the appeal to the commissioner, it is then discretionary with him to allow or refuse leave to amend.[82] Rules promulgated by the commissioner of patents and which are within his authority must be complied with,[83] and in an interference proceeding the decision of the patent office that a given words is valid as a trade mark is conclusive,[84] but if an applicant for registration of a trade mark is dissatisfied with the decision of the commissioner of patents, he may appeal to the court of appeals of the District of Columbia.[85] In a proceeding to determine the right of parties to register a trade mark, the last applicant has the burden of showing prior adoption and use.[86] A petition for the cancellation of a registered trade mark must contain a statement of fact sufficiently full to show that the petitioner has been injured by the registry of the mark he seeks to have canceled.[87] An apposition to a trade mark if filed within thirty days by the opponent's attorney may be verified by him within a reasonable time.[88]

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**Trade Secrets,** see latest topical index.

## TRADE UNIONS.

**§ 1. Nature of Trade Unions, 2145.**
**§ 2. The Union and the Public, 2146.**
**§ 3. The Union and Its Members, 2148.**

*The scope of this topic* is noted below.[89]

§ 1. *Nature of trade unions.*[90]—See 10 C. L. 1872—Men may combine and cooperate for the advantageous marketing of their skill and labor,[91] but this right is limited by the right of the public to have industrial and commercial freedom maintained and promoted.[92] An unincorporated trade union may not be made defend-

**81.** Act Cong. Feb. 20, 1905, c. 592, § 1, 33 Stat. 724 (U. S. Comp. St. Supp. 1907, p. 1008). "Davids" which had been used as a trademark ten years previous to the statute held not made valid by such statute. Thaddeus Davids Co. v. Davids, 165 F 792.

**82.** Battle Creek Sanitarium Co. v. Fuller, 30 App. D. C. 411.

**83.** Rule 49 of the rules of the patent office relating to trademarks requiring certain questions to be raised within a stated time before the examiner of interferences held valid and that one who interfered could not later contend that no interference existed. Somers v. Newman, 31 App. D. C. 193.

**84.** The parties in this suit were rival applicants for registration of the name "Stage" as a trademark. U. S. Playing Card Co. v. Clark Pub. Co., 30 App. D. C. 208.

**85.** Held that the provisions in §§ 4914, 4915, giving a remedy by a bill in equity where a patent is refused is applicable in trademark cases under § 9 of the Act of Feb. 20, 1905. Atkins & Co. v. E. B. Moore, 212 U. S. 285, 53 Law. Ed. —.

**86.** Bluthenthal v. Bigbie, 30 App. D. C. 118.

**87.** The fact must not be left to conjecture, but most affirmatively appear. Demurrer sustained because the petition did not state sufficient facts. McIlhenny's Son v. New Iberia Extract of Tobacco. Co., 30 App. D. C. 337.

**88.** Held that the opposition filed in the first place was void and that the opposition, entitled an amendment, was a new opposition and as such came too late. Hall's Safe Co. v. Herring-Hall-Marvin Safe Co., 31 App. D. C. 498.

**89.** Deals with trade unions and employes' associations as organizations, and with the legality of their acts and the acts of their members in carrying out the purpose of the organizations, but **excludes** particular aspects of such acts as giving rise to questions to which other topics are specifically devoted. See Conspiracy, 11 C. L. 675; Constitutional Law, 11 C. L. 689; Injunction, 12 C. L. 152; Master and Servant, 12 C. L. 665, Threats, 12 C. L. 2124. See, also, Building and Construction Contracts, 11 C. L. 464. This topic also excludes the organization or formation of unions as corporations (see Corporations, 11 C. L. 810), or voluntary associations (see Associations and Societies, 11 C. L. 308.)

**90. Search Note:** See notes in 29 L. R. A. 200; 5 Ann. Cas. 601.

See, also, Trade Unions, Cent. Dig. §§ 1-7; Dec. Dig. §§ 1-9; 18 A. & E. Enc. L. (2ed.) 80.

**91.** Kealey v. Faulkner, 7 Ohio N. P. (N. S.) 49.

**92.** Held that, though leading general purpose of Amalgamated Window Glass Workers of America was to protect and promote interests of its members, many of its ancillary purposes and methods plainly contravened public policy and rendered the asso-

ant in a suit to restrain acts in furtherance of a strike,[93] and such association cannot, in the absence of statutory authority, be sued in the name of its president,[94] but statutes have been enacted in many of the states modifying the common-law rule.[95] In equity, a few may be made plaintiffs or defendants for all,[96] but this rule depends upon their being members of a class who have a common interest.[97]

*Union labels.*[See 8 C. L. 2142]—Under the New York statute, others cannot use a colorable imitation of a union label, even though associated with distinguishing words or names,[98] and the question is not whether the public will be deceived but whether there is a "colorable imitation."[99]

*Employer's associations.*[See 8 C. L. 2142]—Employers may combine in unions or associations.[1] Such an association cannot collect a penalty for the disobedience of an order, unless the order was one which was rightfully and lawfully given.[2] While an individual employer may agree with a labor union to employ only its members,[3] yet, when such agreement is participated in by an association of employers, in whole or in part, in any community, it becomes oppressive and contrary to public policy.[4]

§ 2. *The union and the public.*[5]—[See 10 C. L. 1872]—The legality of a combination not to work for an employer depends upon the purpose for which the combination is formed.[6] Members of a trade union may peaceably quit their employment[7] for any ground that seems to them sufficient.[8] Thus, a demand for more wages and a shorter day is properly enforcible by a strike,[9] and to that end the strikers may seek the aid of fellow-workmen[10] employed by others,[11] but they cannot use

ciation an illegal organization. Kealey v. Faulkner, 7 Ohio N. P. (N. S.) 49.

93. Reynolds v. Davis, 198 Mass. 294, 84 NE 457.

94. Vance v. McGinley [Mont.] 101 P 247.

95. Voluntary association may be sued in the common name. Vance v. McGinley [Mont.] 101 P 247. A few may be made plaintiffs or defendants for all. Civ. Prac. Act, § 14 (Comp. Laws, § 3109). Branson v. Industrial Workers of the World [Nev.] 95 P 354.

96. Branson v. Industrial Workers of the World [Nev.] 95 P 354. Bill may be amended to conform to the rule. Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 85 NE 897.

97. Not properly joined as parties defendant. Reynolds v. Davis, 198 Mass. 294, 84 NE 457.

98. Myrup v. Friedman, 58 Misc. 323, 110 NYS 1106.

99. Baker who used label which somewhat resembled union label, although associated with distinguishing words, will be enjoined, where union has complied with Labor Law. Laws. 1897, p. 466, c. 415, §§ 15, 16. Myrup v. Friedman, 58 Misc. 323, 110 NYS 1106.

1. Willner v. Silverman [Md.] 71 A 962.

2. Not lawfully given, as association exceeded its authority in requiring that no carpenter should be employed unless he joined a particular union. McCord v. Thompson-Starrett Co., 129 App. Div. 130, 113 NYS 385. Order which requires members to conduct "closed shop" is violation of constitution of such association which requires directors to establish "open shop" in event of hostile action by trade union. Sackett & Wilhelms Lithographing & Print. Co. v. National Ass'n of Employing Lithographers, 61 Misc. 150, 113 NYS 110.

3. McCord v. Thompson-Starrett Co., 129 App. Div. 130, 113 NYS 385.

4. Requiring that employers should employ only workmen of a certain union held unlawful. McCord v. Thompson-Starrett Co., 129 App. Div. 130, 113 NYS 385.

5. **Search Note:** See notes in 4 L. R. A. (N. S.) 85; 16 Id. 85; 61 A. S. R. 706; 68 Id. 869; 1 Ann. Cas. 177, 939; 3 Id. 974; 4 Id. 782; 5 Id. 285; 6 Id. 851; 7 Id. 121, 645; 8 Id. 803, 889; 9 Id. 1222.

See, also, Conspiracy, Cent. Dig.; Dec. Dig. Injunction, Cent. Dig. §§ 172-175; Dec. Dig. §§ 99-101; Trade Unions, Cent. Dig. § 6; Dec. Dig. § 8; 18 A. & E. Enc. L. (2ed.) 84.

6. In case of persons under contract to work, a strike or combination not to work in violation of that, to secure something not due them under the contract, would be a combination interfering without justification with the employer's business. Reynolds v. Davis, 198 Mass. 294, 84 NE 457. Combination illegal which seeks to decide grievances between an individual member of a union and his employer, which are not common to the union members as a class. Id.

7. Jones v. Maher, 62 Misc. 388, 116 NYS 180; Lohse Patent Door Co. v. Fuelle [Mo.] 114 SW 997.

8. For the discharge of a fellow employe. Jones v. Maher, 62 Misc. 388, 116 NYS 180. For purpose of compelling employers to accede to their demands. Iron Molders' Union v. Allis-Chalmers Co. [C. C. A.] 166 F 45.

9. Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 85 NE 897.

10. Jones v. Maher, 62 Misc. 388, 116 NYS 180.

11. To prevent work being done by other manufacturers. Iron Molders' Union v. Allis-Chalmers Co., [C. C. A.] 166 F 45.

unlawful means to accomplish their purpose,[12] and if they do, a cause of action for damages arises.[13] It is no defense to an unlawful strike that the employer entered into an illegal combination with other manufacturers.[14] Intimidation or coercion by fines or threats of fines for the purpose of compelling members to quit work will be enjoined,[15] but unlawful acts of a few members of a union do not justify the court in enjoining the union,[16] and strikers may not be denied the right to pursue a legitimate end in a legitimate way simply because they have overstepped the mark and trespassed upon the rights of their adversary.[17] An employer has no concern with the imposition of fines by a union upon its members, unless such imposition is a violation of the right of the employer.[18] Nonunion men have a right to seek and gain employment and to come and go without being coerced by members of a union,[19] and if their dismissal is procured by the extortion of fines from their employer, or other unlawful means, they may recover damages of the union.[20] Picketing is usually held not unlawful per se,[21] but it has been held that picketing, although peaceable, is an act of intimidation and an unwarrantable interference with rights,[22] and that the slightest evidence of threats, violence, or intimidation of any character is sufficient to make picketing unlawful.[23] The boycott may be used by a labor union in furtherance of the objects of its existence,[24] provided the means by which it is enforced is not illegal,[25] but the union has no right, by unlawful means, to compel others to break off business relations with the one from whom they have withdrawn their patronage,[26] or to interfere with the business of another by means of force, menaces, or intimidation, so as to prevent others from entering into or remaining in his employ,[27] or to coerce the employer to pay a fine for breach

12. Unlawful for strikers to persuade apprentices or others to break their contracts to serve for definite time. Iron Molders' Union v. Allis-Chalmers Co. [C. C. A.] 166 F 45. Cannot use violence, threats, or even verbal abuse. Jones v. Maher, 62 Misc. 388, 116 NYS 180.

13. Liable for damages caused by unlawfully picketing plaintiff's factory. Jones v. Maher, 62 Misc. 388, 116 NYS 180.

14. Conspiracy to depreciate the market value of labor, and prevent employes from lawfully organizing, no defense. New York Cent. Iron Works Co. v. Brennan, 116 NYS 457.

15. Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 85 NE 897.

16. J. F. Parkinson Co. v. Santa Clara County Bldg. Trades Council [Cal.] 98 P 1027.

17. Barrier at the line, with punishment and damages for having crossed, is all that the adversary is entitled to ask. Iron Molders' Union v. Allis-Chalmers Co. [C. C. A.] 166 F 45.

18. Coercion by fines, whereby members are compelled to leave, is violation of such right. Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 85 NE 897.

19. Threat must be of a substantial character and adapted to influence a person of reasonable firmness and prudence. Carter v. Oster [Mo. App.] 112 SW 995.

20. Carter v. Oster [Mo. App.] 112 SW 995.

21. Jones v. Maher, 62 Misc. 388, 116 NYS 180. May persuade by proper argument so long as they do not resort to intimidation or obstruct the public thoroughfares. Jones v. Van Winkle Gin & Mach. Works, 131 Ga. 336, 62 SE 236. Prohibitions of persuasion and picketing, as such, should not be included in an injunction. Iron Molders' Union No. 125 v. Allis Chalmers Co. [C. C. A.] 166 F 45.

22. If the pickets were not guilty of actual intimidation and threats, still complainants were entitled to protection from the annoyance. Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 424, 83 NE 940.

23. Evidence held sufficient. Jones v. Van Winkle Gin & Mach. Works, 131 Ga. 336, 62 SE 236.

24. Even though financial loss results as direct consequence. Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 96 P 127.

25. Declaring a firm "unfair" and publishing circulars to that effect and asking people not to patronize such firm held not illegal means. Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 96 P 127. May cease patronizing boycotted concern. Wilson v. Hey, 232 Ill. 389, 83 NE 928. May combine to obtain lawful benefits. Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 424, 83 NE 940.

26. Notices which excite fear or reasonable apprehension of other persons that their business will be injured, unless they do break off such relations, are unlawful. Wilson v. Hey, 232 Ill. 389, 83 NE 928. Combination of carpenters, joiners and others, existing as labor union, by intimidating contractors and builders from using materials of a certain manufacture, and prohibiting their members from working for those who buy such material, is an unlawful combination. Lohse Patent Door Co. v. Fuelle [Mo.] 114 SW 997. Coercing persons not to employ plaintiff's teams to draw freight from railroad station and to deliver goods to and from merchants was unlawful. Wilson v. Hey, 232 Ill. 389, 83 NE 928.

27. Jones v. Van Winkle Gin & Mach.

of his agreement.[28] Whether the sending of "unfair" [29] notices is unlawful is not well settled.[30]

§ 3. *The union and its members.*[31] See 10 C. L. 1873.—The members of a union have no right to conspire together to suspend a member unlawfully.[32] So long as the by-laws of a union relate to matters in which no one is interested except the association and its members, and violate no rights of third parties or rule of public policy, they are valid,[33] and fines imposed upon a member for purposes of discipline may be proper and lawful,[34] but a fine imposed upon a member for the purpose of coercing him into injuring another in person or property or compelling him to do a criminal act, is unlawful.[35] The taking of an appeal from an order resulting from discipline of an association does not amount to a waiver of damages resulting from the illegal acts of the members,[36] but, where a member of an unincorporated trade union brings an action for unlawful expulsion and such further general relief, he will not be allowed to subsequently bring another action for damages for such expulsion.[37]

A stockholder in a corporation is not an employer of labor within the meaning of the by-laws of a union which admits such employers to its membership.[38]

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**Trading Stamps; Transfer of Causes; Transitory Actions,** see latest topical index.

### TREASON.[39]

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**Treasure Trove, see** latest topical index.

### TREATIES.[40]

*The scope of this topic* is noted below.[41] Treaties are solemn agreements between nations,[42] and a treaty within constitutional limits is by the express words

Works, 131 Ga. 336, 62 SE 236. Cannot compel or persuade workmen to quit. Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 424, 83 NE 940.

**28.** Evidence held sufficient to send the issue to the jury. Burke v. Fay, 128 Mo. App. 690, 107 SW 408.

**29.** "Unfair," as employed by defendants and labor organizations generally, means not that employer was guilty of fraud, etc., but that he had refused to comply with conditions upon which union men would consent to remain in his employ. J. F. Parkinson Co. v. Santa Clara County Bldg. Trades Council [Cal.] 98 P 1027.

**30.** J. F. Parkinson Co. v. Santa Clara County Bldg. Trades Council [Cal.] 98 P 1027. Held not unlawful to send such notices, but under the circumstances it was duty. Id. Not unlawful. Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 96 P 127.

**31. Search Note:** See Trade Unions, Cent. Dig. §§ 2-5; Dec. Dig. §§ 3-6; 18 A. & E. Enc. L. (2ed.) 82; 16 A. & E. Enc. P. & P. 205.

**32.** That the members had the power, and that provision was made for appeal, does not affect the question. Campbell v. Johnson [C. C. A.] 167 F 102.

**33.** Fines may be imposed, etc. Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 85 NE 897.

**34.** Chicago Federation of Musicians v. American Musicians' Union, 139 Ill. App. 65.

**35.** Fine unlawful which is inflicted for a wrongful purpose in violation of an injunction. Chicago Federation of Musicians v. American Musicians Union, 139 Ill. App 65.

**36.** Being restored to membership by the national association of the order, held not to be a waiver of damages caused of being deprived of employment by acts of members. Blanchard v. Newark Joint Dist. Council U. B. C. & J. [N. J. Law] 71 A 1131.

**37.** Schmidt v. Weyell, 60 Misc. 370, 113 NYS 630.

**38.** J. F. Parkinson Co. v. Santa Clara County Bldg. Trades Council [Cal.] 98 P 1027.

**39.** No cases have been found during the period covered.

**Search Note:** See notes in 6 A. S. R. 380. See, also, Treason, Cent. Dig.; Dec. Dig.; 28 A. & E. Enc. L. (2ed.) 457; 21 A. & E. Enc. P. & P. 776.

**40.** See 10 C. L. 1874.

**Search Note:** See Treaties, Cent. Dig. Dec. Dig; 28 A. & E. Enc. L. (2ed.) 474, 493; 21 A. & E. Enc. P. & P 779.

**41.** Treaty provisions designed to regulate the rights and status of aliens (see Aliens, 11 C. L. 90) and of neutrals and belligerents (see War, 8 C. L. 2257) are excluded. Reference should also be had to the topics Ambassadors and Consuls, 11 C. L. 108; Extradition, 11 C. L. 1452; Indians, 11 C. L. 1898, and to topics dealing with the particular matters governed by the treaty in question.

**42.** Treaties with Indians of no greater significance than acts of congress, Indians not being recognized as nations. Seneca

of the constitution, the supreme law of the land.[43] The principle that a treaty takes effect by relation as of the date when signed, though ratified subsequently, is only applicable to the contracting nations.[44]

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**Trees,** see latest topical index.

## TRESPASS.

**§ 1. Acts Constituting Trespass and Right of Action Therefor, 2149.**
**§ 2. Actions, 2150.**
A. At Law, 2150.
B. In Equity, 2154.
**§ 3. Damages and Penalties, 2155.**
**§ 4. Criminal Liability, 2157.**
**§ 5. Trespass to Try Title, 2157.**

*The scope of this topic* is noted below.[45]

§ 1. *Acts constituting trespass and right of action therefor.*[46]—See 10 C. L. 1875

The action in trespass will lie for any violation of another's right of possession [47] by any unlawful and unauthorized entry upon his premises,[48] although there be no attempt to retain exclusive possession thereof [49] and no actual malice or injury intended.[50] Such acts as an invasion accompanied by the unauthorized erection of a fence,[51] cutting of timber,[52] or entering of a dwelling house,[53] and even, in some cases, the act of blasting on one's own premises so as to throw rock upon another's,[54] or upon the public highway from which injury results,[55] the occupancy of land under a tax deed void on its face,[56] the wrongful retention of possession of real property though lawfully secured [57] or when secured through fraud and misrepresentation,[58] the unlawful procurement of an eviction in an action at law,[59] and the

Nation of Indians v. Appleby, 127 App. Div. 770, 112 NYS 177.

**43.** Binding on national and state courts being enforcible in litigation of private rights. Maiorano v. Baltimore & O. R. Co., 213 U. S. 268, 53 Law. Ed. —.

**44.** Treaty under constitution does not become law of land until ratified. United States v. Grand Rapids & I. R. Co. [C. C. A.] 165. Private rights not affected until ratification. Id.

**45.** Includes all matters relating to the remedy at law by action for damage for trespass on land. Trespass to try title under the Texas statute is also included. Trespass to the person (see Assault and Battery, 11 C. L. 285, and like topics), trespass as a taking within eminent domain laws (see Eminent Domain, 11 C. L. 1898), and degree of care owed to trespassers (see Negligence 12 C. L. 966, and topics treating of actionable negligence), are excluded.

**46. Search Note:** See notes in 28 L. R. A. 422, 519; 29 Id. 154; 40 Id. 507, 688; 50 Id. 644; 51 Id. 463; 67 Id. 124; 10 L. R. A. (N. S.) 212; 12 Id. 912; 13 Id. 209; 19 A. S. R. 543; 93 Id. 254; 4 Ann. Cas. 190; 9 Id. 860; 10 Id. 531.

See, also, Trespass, Cent. Dig. §§ 1-70; Dec. Dig. §§ 1-31; 28 A. & E. Enc. L. (2ed.) 551, 627.

**47.** At common-law, the action of trespass involved the idea of violation of possessory right as well as forceful damage, and action would not lie unless right of possession was violated. Bever v. Swecker, 138 Iowa, 721, 116 NW 704.

**48.** Hooper v. Herald, 154 Mich. 529, 15 Det. Leg. N. 814, 118 NW 3; Brame v. Clark, 148 N. C. 364, 62 SE 418.

**49.** Constitutes trespass, and not forcible entry and detainer. Preiss v. Naliborski, 133 Ill. App. 205.

**50** Since act is willful, if intended and deliberately done. Ripy v. Less [Tex. Civ. App.] 118 SW 1084.

**51.** Hooper v. Herald, 154 Mich. 529, 15 Det. Leg. N. 814, 118 NW 3.

**52.** One cutting timber from premises after time limited by his contract, therefor, is trespasser, and, if no time limit, timber must be removed within reasonable time. Beauchamp v. Williams [Tex. Civ. App.] 115 SW 130.

**53.** Bieri v. Fonger [Wis.] 120 NW 862.

**54.** Though there be no negligence. Blackford v. Heman Const. Co., 132 Mo. App. 157, 112 SW 287. Mere blasting on private premises is not necessarily a trespass but depends on circumstances. Miller v. Twiname, 129 App. Div. 623, 114 NYS 151. In blasting, measure of defendant's duty is reasonable care and prudence. Id. If one is rightfully using explosives on his own land in blasting, burden of proof to show negligence is on complainant. Birmingham Ore & Min. Co. v. Grover [Ala.] 48 S 682. Rule that one who, by blasting, throws rocks and material upon adjacent land of his neighbor is liable for injury resulting has no application when person blasting has right to use land upon which material is thrown. Miller v. Twiname, 129 App. Div. 623, 114 NYS 151.

**55.** One throwing material on traveler on highway by blasting on his own premises is ordinarily liable for trespass, irrespective of question of negligence, but this rule does not apply where plaintiff went on defendant's land on business and retreated to highway to avoid blast. Miller v. Twiname, 129 App. Div. 623, 114 NYS 151.

**56.** Whitehead v. Callahan [Colo.] 99 P 57.

**57.** Employe retaining possession of property after his discharge, which property he was only to hold during his term of service is trespasser. Mackenzie v. Minis [Ga.] 63 SE 900.

**58.** As where entry by permission secured

use of one's own property without due regard to the riparian rights of another,[60] have been held to constitute trespass. Such offense is not committed, however, by one acting within his contract rights, unless his acts be wanton, willful, and negligent.[61]

*Trespass to the person.*[62]—It is trespass to the person to commit any assault or direct physical injury.[63]

*Right of entry and matters of justification.*[See 10 C. L. 1876]—A person acting under an easement,[64] a proper license[65] or permission,[66] or necessity,[67] and the state, in cases of exigency or overwhelming necessity and in the exercise of eminent domain,[68] and municipal corporations, in some instances,[69] may invade private property without incurring a liability in trespass.

*Parties in the tort.*[See 10 C. L. 1877]—The one actually committing the trespass is liable, though he act at the instance of another.[70] A corporation is liable for a trespass committed by a vice principal in the performance of corporate business.[71]

§ 2. *Actions.*[72] *A. At law.*[See 10 C. L. 1878]—At common law, only, action on the case would lie for secondary trespass.[73] Trespass quare clausum fregit lies

through fraud. Brown v. American Tel. & T. Co. [S. C.] 63 SE 744.

**59.** Behrens v. Mountz, 37 Pa. Super. Ct. 326.

**60.** Whether use of stream constitutes trespass upon another riparian owner depends upon whether such use is reasonable. Boyd v. Schreiner [Tex. Civ. App.] 116 SW 100.

**61.** Such as person having right to construct and operate railroad over another's land. Krug v. Peale, 35 Pa. Super. Ct. 1. Overflow of water caused by construction of railroad in usual manner is not trespass, being injury which was anticipated in payment for right of way. Blunck v. Chicago & N. W. R. Co. [Iowa] 120 NW 737.

**62.** See 8 C. L. 2148. See, also, Assault and Battery, 9 C. L. 257, and False Imprisonment, 9 C. L. 1351.

**63.** See Assault and Battery, 11 C. L. 285; False Imprisonment, 11 C. L. 1456.

**64.** See Easements, 11 C. L. 1140.

**65.** See Licenses to Enter on Land, 12 C. L. 604. Verbal license to enter is good defense. Hicks v. Mississippi Lumber Co. [Miss.] 48 S 624.

**66.** No trespass exists where one is permitted to enter by employe in charge of owner's gate, or rightfully visits tenant of owner while contract of renting remains in force. Tutwiler Coal, Coke & Iron Co. v. Tuvin [Ala.] 48 S 79. There cannot be a permitted trespass. Bright v. Bacon [Ky.] 116 SW 268.

**67. NOTE. Trespass justified by necessity:** A violent storm arose, whereby a boat and its occupants were placed in great danger, and in order to save them plaintiff was compelled to moor the boat to defendant's dock. Defendant's servant unmoored the boat, whereupon it was driven ashore by the violence of the tempest, without plaintiff's fault, and destroyed, and plaintiff and the occupants of the sloop were cast into the water and upon the shore, and were injured. In an action for damages, held, that plaintiff was entitled to recover. Ploof v. Putnam, 81 Vt. 471, 71 A 188.

The cases illustrating the doctrine announced in this case are few, but there appears to be authority in support of it. Among the several defenses that may be interposed to an action of trespass is that of necessity in entering upon the land of another for the preservation of life. Jaggard, Torts, Vol. 2, 678. Personal property of another may be sacrificed to prevent loss of life. Mouse's Case, 12 Co. 63. A traveler on a highway which has become impassable by a sudden and recent obstruction may pass upon adjoining land without becoming a trespasser because of the necessity. Campbell v. Race, 7 Cush. [Mass.] 408, 54 Am. Dec. 728; Morey v. Fitzgerald, 56 Vt. 487, 48 Am. Rep. 811. An entry upon another's land may be made for the purpose of preventing the spread of fire. American Print Works v. Lawrence, 23 N. J. Law 590, 57 Am. Dec. 420. In Proctor v. Adams, 113 Mass. 376, 18 Am. Rep. 500, defendant went upon plaintiff's beach for the purpose of saving and restoring to the lawful owner a boat which had been driven ashore, and was in danger of being carried off by the sea, and there was no trespass. There is authority to the effect that the owner of a shade tree, finding another's horse hitched to it, is not liable in trespass for removing the horse to a safe place. Gilman v. Emery, 54 Me. 460. It would seem that the principal case was correctly decided.—From 7 Mich. L. R. 611.

**68.** Eminent Domain, 11 C. L. 1198.

**69.** See Municipal Corporations, 12 C. L. 905.

**70.** In case of unlawful eviction by legal proceedings. Behrens v. Mountz, 37 Pa. Super Ct. 326.

**71.** One having general powers of management held to be vice-principal and not mere agent. Union Naval Stores Co. v. Pugh [Ala.] 47 S 48.

**72. Search Note:** See notes in 47 L. R. A. 637.

See, also, Injunction, Cent. Dig. §§ 98-107; Dec. Dig. §§ 45-53; Trespass, Cent. Dig. §§ 71-127, 149-165; Dec. Dig. §§ 32-46, 64-75; 28 A. & E. Enc. L. (2ed.) 593, 633; 21 A. & E. Enc. P. & P. 780, 901.

**73.** Trespass on case or secondary trespass was where act itself did not directly produce injury but damage resulted as consequence. Bever v. Swecker, 138 Iowa, 721, 116 NW 704. Under common law, action would be on case and not quare clausum fregit, for injury resulting from trespass

alike for cursory and for prolonged trespass,[74] and, in some cases, the owner may either sue therein or have the election of other remedies.[75]

*Parties.*[See 10 C. L. 1879]—At common law, trespass could only be maintained against the immediate wrongdoer.[76] The right to maintain an action in trespass will lie in favor of such parties as a joint owner,[77] a co-tenant,[78] a life tenant where there is actual damage to his possession,[79] a wife in the exclusive possession of real property,[80] a husband in case of a trespass and assault upon his wife,[81] and a purchaser, without the grantor being made a party,[82] where such purchaser seeks to recover for trespass continuing after the purchase,[83] and not for that occurring prior thereto.[84]

*Actual possession or title.*[See 10 C. L. 1878]—The general rule, to which there are some exceptions and qualifications,[85] is that plaintiff must show actual [86] or constructive [87] possession under color of title [88] in himself or in his proper representative,[89] at the time the trespass was committed,[90] though possession at commence-

subsequent to termination of act causing such trespass, as where injury arose subsequent to completion of road bed of railroad. Willis v. White & Co. [N. C.] 63 SE 942.

74. Woll v. Voigt, 105 Minn. 371, 117 NW 608.

75. In case of timber wrongfully cut, owner may sue in trespass, or may treat cut trees as personalty and sue in trover or for specific recovery, or may sue in conversion, or may waive tort and sue in implied assumption for value. Milltown Lumber Co. v. Carter. 5 Ga. App. 344, 63 SE 270.

76. Bever v. Swecker, 138 Iowa, 721, 116 NW 704.

77. Evidence of plaintiff's joint title and possession held to justify submission of issue of defendant's right to cut timber on premises. Beauchamp v. Williams [Tex. Civ. App.] 115 SW 130.

78. The right of one cotenant to maintain trespass against another is treated elsewhere. See Tenants in Common and Joint Tenants, 12 C. L. 2116.

79. A life tenant cannot maintain an action for trespass, except for actual damages to his possession; hence may not maintain action for conversion or removal of trees but may maintain trespass quare clausum fregit. Daffin v. Zimmerman Mfg. Co. [Ala.] 48 S 109.

80. As the home. Bieri v. Fonger [Wis.] 120 NW 862.

81. Brame v. Clark, 148 N. C. 364, 62 SE 418.

82. Grantor is not necessary party even when trespasser attempts to justify under deed from him. McCulloch v. Southern R. Co., 149 N. C. 305, 62 SE 1096.

83. As where purchaser demands that trespassing telephone company remove from premises and it fails to do so. Benjamin v. American Tel. & T. Co., 196 Mass. 454, 82 NE 681.

84. A purchaser cannot recover for a trespass on land prior to its purchase by him. Boyd v. Schreiner [Tex. Civ. App.] 116 SW 100; Porter v. Aberdeen & R. Co., 148 N. C. 563, 62 SE 741.

85. Under Code 1896, § 4137, owner of land may recover in action for timber trespass whether he be in possession at time of trespass or not. Long v. Cummings [Ala.] 47 S 109. Owner of land though not in actual possession may sue for trespass thereon, under Ky. St. § 2361, and since the word "owner" in statute meaning one who owns land by title of record deducible from commonwealth or who has acquired title by adverse possession, one who has acquired title by either way cannot recover. Scroggins v. Nave [Ky. App.] 119 SW 158. Owner is not prevented from maintaining action against second trespasser by reason of wrongful possession of first, since trespasser acquires no right to property, hence fact that marshal was in possession under void process is no defense to action for damages against collector of port wrongfully taking possession of vessel. Ker v. Bryan [C. C. A.] 163 F 233. One not in actual possession at time of alleged trespass may maintain an action against mere trespasser. Beauchamp v. Williams [Tex. Civ. App.] 115 SW 130. It is not essential in New York that state as plaintiff, in order to recover, must show title as against stranger. People v. Pulver, 60 Misc. 256, 113 NYS 139. Judgment should be for plaintiff where he has established prima facie case of title, and deeds set up by defendant to show title in him do not identify the land as that described in complaint. People v. Pulver, 60 Misc. 256, 113 NYS 139.

86. Actual possession without title sufficient as against one having no title. Kraus v. Congdon [C. C. A.] 161 F 18.

87. Hobart-Lee Tie Co. v. Stone [Mo. App.] 117 SW 604. Where statute authorized one in possession to maintain suit, mere possession without title is sufficient to maintain it as against trespasser or one who establishes no title in himself. Kraus v. Congdon [C. C. A.] 161 F 18.

88. Phillips v. Babcock Bros. Lumber Co., 5 Ga. App. 634, 63 SE 808. Holder of invalid tax deed has no right to maintain action for trespass, even though he continues paying taxes on the land. Kraus v. Congdon [C. C. A.] 161 F 18.

89. One, having title and securing possession, may hold possession through his tenant sufficient to maintain action for timber trespass. McGee v. Louisiana Lumber Co. [La.] 49 S 475. Owner may set up possession of his tenant to establish prescription in himself. Moore v. Ensign-Oscamp Co. 131 Ga. 421, 62 SE 229.

90. Buck v. Louisville & N. R. Co. [Ala.] 48 S 699. Evidence held not to show pos-

ment of suit is immaterial.[91] Plaintiff must recover upon the strength of his own title as shown,[92] and the burden is on plaintiff to show title [93] especially where title without possession is relied upon,[94] it being sufficient to defeat a prima facie case resting on title alone that defendant show title in a third party.[95] A plaintiff resting his case on title alone may make a prima facie case by showing that both parties claim under the same grantor,[96] since in such case the elder is the better title,[97] but this does not prevent the showing of another title from a different source.[98] A defendant cannot set up defects in an apparently good title personal to the real or original owner.[99] While in some cases possession is presumed from legal title,[1] plaintiff cannot base his action upon the constructive possession of land in the actual possession of another.[2] Title may not be proven where possession is the only issue.[3] A mere trespasser acquires no rights by occupancy for a less time than the limitation period.[4] Where the holder of the legal title enters under the same, no subsequent constructive possession of another, even under color of title, can overlap his possession[5].

*Joint actions.* See 10 C. L. 1879—Trespasses which are a part of the same transaction may be joined in the same action.[6]

*Pleading, issues and proof.* See 10 C. L. 1880—A declaration may be sufficient which alleges possession and ownership of personal property only in general terms,[7] which described the locus in quo only with sufficient definiteness for its identification,[8] and which contains ambiguous allegations that are, nevertheless, a sufficient

session or occupancy prior to trespass by erection of fence. Hooper v. Herald, 154 Mich. 529, 15 Det. Leg. N. 814, 118 NW 3.

91. Buck v. Louisville & M. R. Co. [Ala.] 48 S 699.

92. Though defendant's title rest on void instrument. Thurman v. Leach [Ky.] 116 SW 300. Judgment should be for defendant where deeds, patent, survey and plat, introduced to prove title, do not include property claimed. Combs v. Stacy [Ky.] 113 SW 51.

93. Burden of proof is upon plaintiff to prove title when his title is put in issue. Warden v. Addington [Ky.] 115 SW 241. It is not necessary for defendant to show title in himself, since he is entitled to verdict when he shows that plaintiff never was in possession and that true title is in third person. Leverett v. Tift [Ga. App.] 64 SE 317. Burden of proof is upon a party claiming under exception in deed to show that land in question comes fully within such exception in accordance with intentions of parties. Shinnecock Hills & Peconic Bay Realty Co. v. Aldrich, 116 NYS 532. And it is not necessary that defendant show title in himself. Thurman v. Leach [Ky.] 116 SW 300.

94. Under Civ. Code 1895, § 3877, plaintiff never having been in possession must show title. Gaskins v. Gray Lumber Co. [Ga. App.] 64 SE 714.

95. Leverett v. Tift [Ga. App.] 64 SE 317.

96. In case where plaintiff has never been in possession. Leverett v. Tift [Ga. App.] 64 SE 317. Not question such former owner's title. People v. Bain, 60 Misc. 253, 113 NYS 27. This rule does not apply where controversy is over grant of part of timber, it being distinct estate apart from grant of land and remainder of timber. Gaskins v. Gray Lumber Co. [Ga. App.] 64 SE 714.

97, 98. McKoy v. Cape Fear Lumber Co., 149 N. C. 1, 62 SE 699.

99. Such as want of consideration and the like, in action to recover damages for timber cut and removed and to recover that cut and left on premises. Union Sawmill Co. v. Starnes, 121 La. 554, 46 S 649.

1. Plaintiff is presumed to be in possession of land to which he has legal title and which is not occupied by another, which presumption is sufficient basis on which to sue for timber trespass. Stone v. Perkins [Mo.] 117 SW 717.

2. Buck v. Louisville & M. R. Co. [Ala.] 48 S 699.

3. Introduction of deed between defendant and third party was improper. Diamond v. Lawyer, 117 NYS 94.

4. He does not disturb owner's right to prevail in trespass quare clausum fregit. Woll v. Voigt, 105 Minn. 371, 117 NW 608; City of Chicago v. Troy Laundry Machinery Co. [C. C. A.] 162 F 678.

5. Nearen v. State [Ala.] 47 S 338.

6. Trespass vi et armis to person, and trespass vi et armis and de bonis asportatis may be conjunctively alleged in complaint where alleged trespasses are parts of same transaction, hence, allegations of unlawful entry, assault and carrying away of goods as part of same transaction may be so joined. Stowers Furniture Co. v. Brake [Ala.] 48 S 89.

7. Allegation that defendant by agent entered plaintiff's house and took from her possession and carried away her goods, etc., is sufficient. Stowers Furniture Co. v. Brake [Ala.] 48 S 89.

8. In an action for trespass quare clausum fregit, the declaration sufficiently describes the locus in quo, where it refers to the same as a certain close in a stated county. Prussner v. Brady, 136 Ill. App. 395.

basis for an action either in strict trespass or on the case.[9] Although the items of the damage sought,[10] and the elements warranting its allowance,[11] may be plead in general terms, the declaration must show that multiple damages are sought,[12] and it is not improper for it to contain an allegation of good faith.[13] An allegation of simple negligence will not sustain an issue in trespass,[14] nor will a plea of consent raise the question of negligence.[15] Plaintiff is entitled to recover upon proof of his possession and of wrongful entry by the defendant,[16] and need not prove want of consent to the trespass,[17] nor need he even prove title where the plea is the general issue;[18] but he must confine his proof to the issues raised by the pleadings,[19] and must sustain the full burden of proof when the trespass is alleged to have been in violation of the terms of a nonspecific contract,[20] where he seeks exemplary damages,[21] although in such case malice may be presumed from a total disregard of the rights of another,[22] and where plaintiff relies on title without possession.[23]

*Evidence.*[See 10 C. L. 1881]—While circumstantial evidence is admissible to show that the trespass was committed by the defendant and with its knowledge and consent,[24] and to show the extent of an injury not susceptible of exact proof,[25] immaterial evidence[26] outside the issues is inadmissible.[27] Plaintiff's erroneous statements to a third party do not estop him from introducing evidence to prove the facts.[28]

*Instructions and jury questions.*[See 10 C. L. 1883]—The court may instruct for at

**9.** Sufficient for introduction of evidence to determine jurisdiction. Butean v. Morgan's Louisiana & T. R. & S. S. Co., 121 La. 807, 46 S 813.

**10.** Plaintiff need not state amount of each item. Woodstock Hardwood & Spool Mfg. Co. v. Charlston L. & W. Co. [S. C.] 63 SE 548.

**11.** Even when punitive damages are sought. Woodstock Hardwood & Spool Mfg. Co. v. Charleston L. & W. Co. [S. C.] 63 SE 548.

**12.** Henning v. Keifer, 37 Pa. Super. Ct. 488.

**13.** Since good faith may affect defendant's liability for damage. Backer v. Penn Lubricating Co. [C. C. A.] 162 F 627.

**14.** In case of injury to passenger, where charges of negligence are made against street car company and not against employe, the action is on the case and not in trespass. Birmingham R., L. & P. Co. v. Wright, 153 Ala. 99, 44 S 1037.

**15.** Buyken v. Lewis Const. Co. [Wash.] 99 P 1007.

**16.** May at least recover nominal damages. Steenburgh v. McRorie, 60 Misc. 510, 113 NYS 1118. The gist of action of trespass quare clausum fregit is breaking and entering by force and arms plaintiff's close, "close" signifying an interest in soil, not merely an enclosure. Prussner v. Brady, 136 Ill. App. 395. Gist of action is disturbance or violation of possession. Benjamin v. American Tel. & T. Co., 196 Mass. 454, 82 NE 681. It is essential that actual entry be shown in action of trespass quare clausum, even though entry does not seem to have been in dispute. Moore v. Archer [Me.] 71 A 863.

**17.** In case of timber trespass where inference could be drawn from testimony and plaintiff's acts. Bufford v. Little [Ala.] 48 S 697.

**18.** But need prove only possession. Prussner v. Brady, 136 Ill. App. 395.

**19.** Buyken v. Lewis Const. Co. [Wash.] 99 P 1007.

**20.** As where plaintiff claims timber was cut where not permitted by contract. Sommer v. Ross [Ky.] 116 SW 1181.

**21.** Burden of proving willfulness is on plaintiff. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270. Burden of proving that the timber was manufactured is on plaintiff seeking recovery of such value. Ripy v. Less [Tex. Civ. App.] 118 SW 1084.

**22.** Prussner v. Brady, 136 Ill. App. 395.

**23.** Porter v. Northern Pac. R. Co., 161 F 773. See ante, this section, Possession and Title.

**24.** Daffin v. Zimmerman Mfg. Co. [Ala.] 48 S 109

**25.** Evidence showing injury to business is admissible; hence employes may testify as to their employment with plaintiff and effect of trespass upon their continuance in service. Woodstock Hardwood & Spool Mfg. Co. v. Charleston L. & W. Co. [S. C.] 63 SE 548.

**26.** Letters of person wrongfully evicted, expressing willingness to move out for consideration but not admitting that she had no right to remain, should be excluded. Behrens v. Mountz, 37 Pa. Super. Ct. 326. Amount paid for property and capital stock of company owner is immaterial. Woodstock Hardwood & Spool Mfg. Co. v. Charleston L. & W. Co. [S. C.] 63 SE 548.

**27.** Value of timber not cut, immaterial. Nethery v. Nelson [Wash.] 99 P 879. Evidence of damages outside the issue raised will not be considered. Krug v. Peale, 35 Pa. Super. Ct. 1.

**28.** Where he points out wrong corner to surveyor, he is not estopped from proving true corner of land. Henning v. Keiper, 37 Pa. Super. Ct. 488.

least nominal damages where the evidence of trespass is clear,[29] and may determine undisputed boundaries to be as alleged in the petition,[30] but should refuse misleading instructions[31] and should leave the question of possession,[32] the allowance of exemplary damages,[33] the question of reasonable care in the use of one's own premises,[34] and the amount of damages where the evidence is conflicting,[35] for the determination of the jury.

*Verdict and judgment.*[See 10 C. L. 1885]—Since the validity of the estimate will be favored,[38] a verdict upon the issues raised by the pleadings[37] and sufficiently supported by the evidence is valid, although it may not appear whether the allowance made represents single or treble damages.[38] The proof must clearly sustain the allowance made in the verdict and judgment,[39] but the plaintiff is not precluded from recovering a less amount or on fewer items than alleged in the petition.[40] If the verdict fails to allow multiple damages under a proper state of facts, such allowance should be made in the judgment.[41]

(§ 2) *B. In equity.*[42]—[See 10 C. L. 1885]—Equity will not interfere to enjoin a single act of simple trespass,[43] but in the case of continued[44] and repeated trespass, injunction is the proper[45] remedy. To authorize equitable interference to restrain a threatened trespass, there must be some distinct equitable ground, such as insolvency,[46] the prevention of irreparable injury or multiplicity of suits.[47]

29. In case of injury to trees from electric wires strung without leave or license. Bathgate v. North Jersey St. R. Co., 75 N. J. Law, 763, 70 A 132.

30. In action for damages for cutting timber. Davidson v. Jenkins [Ky.] 113 SW 901.

31. Bufford v. Little [Ala.] 48 S 697.

32. Hence question as to who has been in possession since certain date is admissible. Diamond v. Lawyer, 117 NYS 94.

33. Rhodes-Burford Co. v. Gartner, 133 Ill. App. 164.

34. In exercise of riparian rights. Boyd v. Schreimer [Tex. Civ. App.] 116 SW 100.

35. Adams v. Lorraine Mfg. Co. [R. I.] 71 A 180.

36. Cassin v. Cole, 153 Cal. 677, 96 P 277.

37. Buyken v. Lewis Const. Co. [Wash.] 99 P 1007.

38. Doniphan Lumber Co. v. Case [Ark.] 112 SW 208.

39. Evidence held insufficient to sustain the amount allowed. Saunders v. Collins [Fla.] 47 S 958.

40. Bufford v. Little [Ala.] 48 S 697.

41. Before court may allow double or treble damages, under P. L. 152, it must clearly appear that jury have not done so, the presumption being verdict is for treble damages. Henning v. Kelfer, 37 Pa. Super. Ct. 488.

42. **Search Note:** See notes in 3 L. R. A. (N. S.) 205; 7 Id. 50; 13 Id. 173; 99 A. S. R. 731.

See, also, Injunction, Cent. Dig. §§ 98-107; Dec. Dig. §§ 45-53; 28 A. & E. Enc. L. (2ed.) 593, 614; 21 A. & E. Enc. P. & P. 783, 901.

43. McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 NE 174. Not restrain separate and distinct acts of cutting timber wrongfully. Sample v. Roper Lumber Co. [N. C.] 63 SE 731. Injunction is not warranted by single trespass with no showing that it will be repeated. Cox v. Sheen [Neb.] 118 NW 125.

44. Cullen v. Kscaszkiewicz, 154 Mich. 627, 5 Det. Leg. N. 844, 118 NW 496. "Continuing trespass" refers to trespass by structures of permanent nature. Sample v. Roper Lumber Co. [N. C.] 63 SE 731. Continuous injurious act committed by one obtaining possession by sharp practice or fraud may be restrained. Cullen v. Ksiaszkiewicz, 154, Mich. 627, 15 Det. Leg. N. 844, 118 NW 496. Where there is following each act, a purpose of repetition, or of returning to carry on an installed business, it is continuing trespass and not series of distinct trespasses. Union Naval Stores Co. v. Pugh [Ala.] 47 S 48.

45. Hobart-Lee Tie Co. v. Stone [Mo. App.] 117 SW 604. Attempted justification of single act is not sufficient to show defendant's intention to repeat act. Cox v. Sheen [Neb.] 118 NW 125. Where there are continuing and repeated acts of grave nature, causing irreparable injury and absolute destruction of complainant's property, equity will interfere by injunction. Illinois cases cited. McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 NE 174.

46. Where single complainant and single defendant. Illinois cases cited and discussed. Cragg v. Levinson, 141 Ill. App. 536.

47. General rule of text upheld. Gonyo v. Wilmette, 133 Ill. App. 645; Hall v. Henninger [Iowa] 121 NW 6. Equity will enjoin trespass on land to avoid multiplicity of suits, although it does not appear that defendant is insolvent or that damages caused are irreparable. Lambert v. St. Louis & G. R. Co., 212 Mo. 692, 111 SW 550; Gianelle v. Gray [Cal. App.] 96 P 329. Action is not confined to cases of irreparable injury or insolvency of defendant, but may lie where plaintiff would be required to bring a number of successive actions, and where actual damages recoverable would be disproportionate to expense and vexation of litigation, for which reason the legal remedy would not prove properly adequate. Cragg v. Levinson, 238 Ill. 69, 87 NE 121. Action will lie where defendants do not deny participation in former raid on oyster field and

Equitable remedy will be granted with reluctance where the rights of the parties have not been determined at law,[48] and not at all where other persons are not affected,[49] or where such rights are in controversy at law,[50] but, after a determination of such rights, the granting of an injunction rests in the sound discretion of the court.[51] The mere fact that ownership may be alleged in the plaintiff,[52] or that the action involves a controversy as to boundary line, will not oust the court of equity jurisdiction,[53] nor is a complaint, which specifically sets out facts showing the necessity of resorting to equity,[54] necessarily bad by reason of its failure to allege possession.[55] Plaintiff need not establish an admitted title preliminary to securing equitable relief.[56] Damages for trespass may be allowed in the equitable action in accordance with legal rules.[57]

§ 3. *Damages and penalties.*[58]—See 10 C. L. 1880—The trespasser is answerable to the party injured, either in action at law or in equity,[59] to the amount of the injury to any interest held by such party,[60] for such natural and probable consequences of his fault as reasonable prudence and forecast might have foreseen,[61] and even for damages subsequently arising from the overt act,[62] and for damages merely prospective.[63] Loss of use,[64] business[65] and profits,[66] and every injury proximately [67] resulting from trespass, may be considered in awarding damages.[68] The

assert their right to enter thereon. Sooy Oyster Co. v. Gaskill [N. J. Eq.] 69 A 1084. Not lie where adequate remedy at law exists. Whitman v. Muskegon Log Lifting & Operating Co., 152 Mich. 645, 15 Det. Leg N. 383, 116 NW 614.

**48.** Hall v. Henninger [Iowa] 121 NW 6.

**49.** Cragg v. Levinson, 238 Ill. 69, 87 NE 121.

**50.** Gonyo v. Wilmette, 133 Ill. App. 645.

**51.** Cragg v. Levinson, 238 Ill. 69, 87 NE 121.

**52.** Action is not thereby made one to quiet title. Being brought under Ky. St. 1903, § 2361. Daniel v. Trunnell [Ky.] 113 SW 51.

**53.** Cullen v. Ksiaszkiewicz, 154 Mich. 627, 15 Det. Leg. N. 844, 118 NW 496.

**54.** A general assertion, however, is sufficient as against a general demurrer, a special demurrer being essential. Gianella v. Gray [Cal. App.] 96 P 329.

**55.** In action under Ky. St. 1903, § 2361. Daniel v. Trunnell [Ky.] 113 SW 51.

**56.** General demurrer admits plaintiff's alleged title, and no action at law need be brought first to establish same. Cragg v. Levinson, 238 Ill. 69, 87 NE 121.

**57.** Not equitable rules. Duncan v. Nassau Elec. R. Co., 127 App. Div. 252, 111 NYS 210. When it has jurisdiction of cause for purpose of settling all matters in one action. Id.

**58. Search Note:** See notes in 1 A. S. R. 496.

See, also, Trespass, Cent. Dig. §§ 128-148; Dec. Dig. §§ 47-63; 28 A. & E. Enc. L. (2ed.) 603, 634.

**59.** Where grounds for equitable action lie, but legal and not equitable rules apply in determining the right to damages for trespass. Duncan v. Nassau Elec. R. Co., 127 App. Div. 252, 111 NYS 210.

**60.** In trespass for flooding land, party may recover for timber destroyed which he had right to cut for number of years. Woodstock Hardwood & Spool Mfg. Co. v. Charleston L. & W. Co. [S. C.] 63 SE 548. Life tenant may recover for value of injury to his use and enjoyment only, in case of trespass by cutting of timber where land was cut up and rendered less accessible thereby. Daffin v. Zimmerman Mfg. Co. [Ala.] 48 S 109. The law implies some damage for every trespass. Brame v. Clark, 148 N. C. 364, 62 SE 418.

**61.** Behrens v. Mountz, 37 Pa. Super. Ct. 326.

**62.** A city wrongfully building tunnel which causes water to overflow land is liable to subsequent purchaser. City of Chicago v. Troy Laundry Machinery Co. [C. C. A.] 162 F 678.

**63.** As well as past. Woodstock Hardwood & Spool Mfg. Co. v. Charleston L. & W. Co. [S. C.] 63 SE 548.

**64.** Privation of personal property may be proven to augment the damage. Graves v. Baltimore & New York R. Co. [N. J. Law] 69 A 971.

**65.** Woodstock Hardwood & Spool Mfg. Co. v. Charleston L. & W. Co. [S. C.] 63 SE 548.

**66.** Claims for mesne profits are usually consequential to and dependent upon recovery of land, yet, where disseisor has surrendered or abandoned premises before suit and rightful owner is in possession, such owner may maintain trespass for wrongful entry and have damages for same in nature of mesne profits. Wool v. Voigt, 105 Minn. 371, 117 NW 608.

**67.** Damages for lost time, expense and attorney fees, should **not be allowed** in action for trespass to personal property in absence of statute providing therefor. Malone & Grant Co. v. Hammond [Ga. App.] 64 SE 666.

**68.** Duncan v. Nassau Elec. R. Co., 127 App. Div. 252, 111 NYS 210. Owner having been disseised may, by legal fiction called relation after re-entry, maintain action of trespass quare clasum and recover therein besides his rents and profits all intermediate damages, if he lay his action with a continuendo. Pacific Live Stock Co. v. Isaacs [Or.] 96 P 460.

law will not look with favor upon a trespasser in the determination of conflicting questions as to the amount of damage [69] but will take into consideration the nature of plaintiff's interest [70] and the question of defendant's good faith.[71] In an action of trespass for taking property, the measure of damages at common law is the value of the property.[72] The measure of damages to land is the diminution in its value,[73] unless the value of the thing taken exceeds such diminution, in which case the damages are measured from the higher value.[74] Where the appropriation of timber is accidental, or without bad faith, the damage allowed is ordinarily the market value at the stump.[75]

*Nominal.* See 10 C. L. 1886—At least nominal damages will be allowed for every trespass.[76]

*Punitive.* See 10 C. L. 1888—Where the trespass has been wantonly, knowingly and willfully committed,[77] with malicious intent,[78] apparent or presumed,[79] or accompanied by an unjustifiable assault,[80] or in flagrant disregard of legal requirements,[81] punitive damages may be allowed by the jury.[82] The measure of damages for willful timber trespass is the value of the timber at the time of demand or of bringing suit, although such timber may have been manufactured into lumber.[83]

*Multiple.* See 10 C. L. 1888—In some states by statute, where the pleadings [84] and evidence show that such damages are sought and that the trespass was without reasonable excuse,[85] multiple damages for timber trespass independent of injury to the land [86] may be allowed by the jury or court.[87]

69. Conflicting evidence as to the amount of damages will ordinarily be construed against a trespasser, especially a warned trespasser. McBee v. Louisiana Lumber Co. [La.] 49 S 475. Where there is conflict in evidence as to amount and quality of sand carried away, jury may decide that larger quantity and better quality was taken, since law does not look upon the spoliator with any favor. Adams v. Lorraine Mfg. Co. [R. I.] 71 A 180.

70. In case of timber trespass. Pinkerton v. Randolph, 200 Mass. 24, 85 NE 892.

71. Backer v. Penn Lubricating Co. [C. C. A.] 162 F 627. See post "Punitive" and "Multiple."

72. Bever v. Swecker, 138 Iowa, 721, 116 NW 704.

73. But cost of restoring land to former condition may be considered, and, where evidence only goes to cost of restoration, court may adopt that as measure, limiting damages to case where landowner has used only reasonable means of restoration. Manda v. Orange [N. J. Law] 72 A 42. Measure of damages is difference in value of land before and after trespass. Buck v. Louisville & N. R. Co. [Ala.] 48 S 699.

74. Koonz v. Hempy [Iowa] 120 NW 976. Measure of damages for trespass is different from where action is brought in trover, conversion or on theory of assumption of payment and in trespass for cutting of timber is diminution in market value of real estate, unless value of trees exceeds such, in which case higher measure is allowable under Civ. Code 1895, § 3918, which incidentally states general rules applicable. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270.

75. Clevenger v. Blount [Tex. Civ. App.] 114 SW 868. Not as manufactured into lumber. Ball & Bro. Lumber Co. v. Simms Lumber Co., 121 La. 627, 46 S 674; McGee v. Louisiana Lumber Co. [La.] 49 S 475.

76. Only nominal damages were allowed where workmen entered cellar to change gas meter without permission, it not appearing that they broke in. Fortescue v. Kings County Lighting Co., 128 App. Div. 826, 112 NYS 1010.

77. Lawandoski v. Wilkes-Barre & Hazleton R. Co., 35 Pa. Super. Ct. 10. Not allowed unless acts amount to criminality. Adams v. Lorraine Mfg. Co. [R. I.] 71 A 180. Not allowed where trespasser acted on advise of attorney. McGee v. Louisiana Lumber Co. [La.] 49 S 475. Fact that trespass is willful is material only for purpose of obtaining punitive damages. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270.

78. Insulting and abusive language, inspired by malice accompanying trespass, authorize allowance of exemplary damages. Steenburgh v. McRorie, 60 Misc. 510, 113 NYS 1118.

79. Malice is presumed where it appears that party has acted with wanton, willful and reckless disregard of rights of another. Prussner v. Brady, 136 Ill. App. 395.

80. Brame v. Clark, 148 N. C. 364, 62 SE 418.

81. Allowed for appropriation by water company without condemnation. Woodstock Hardwood & Spool Mfg. Co. v. Charleston L. & W. Co. [S. C.] 63 SE 548.

82. Rhodes-Burford Co. v. Gartner, 133 Ill. App. 164.

83. Clevenger v. Blount [Tex. Civ. App.] 114 SW 868; Ripy v. Less [Tex. Civ. App.] 118 SW 1084. Evidence held not to show cutting of trees was due to mistake as to boundary line. McNaughton v. Borth, 138 Wis. 543, 117 NW 1031.

84. Declaration should clearly show that multiple damages are sought. Henning v. Keiper, 37 Pa. Super. Ct. 488.

85. Koonz v. Hempy [Iowa] 120 NW 976. Where trespass was not casual and involuntary and trespassers have not reason to be-

§ 4. *Criminal liability.*[88]—See 10 C. L. 1888.—The Louisiana statute, making timber trespass a felony, has been declared unconstitutional.[89] Unauthorized fishing on private property may be made punishable as a crime.[90] An agent who, under contract authority given to his principal, enters the premises of another so contracting is not guilty of criminal trespass.[91] Under a statute providing that before criminal action will lie the trespasser must have been warned, such warning is sufficient if given within six months previous,[92] and by the person injured or by his authorized agent,[93] and, when properly given, is conclusive against the trespasser.[94] While a complaint is sufficient if it follow the statute,[95] although it does not show when the warning was given,[96] it should definitely describe the premises.[97] Evidence is admissible to show that prosecutor was in possession of the premises,[98] but evidence concerning a place not shown to be the trespassed property is properly excluded.[99] The burden rests on the state to show criminal intent or criminal negligence,[1] and, where the complaint conjunctively charges trespass after warning and refusal to leave, the state must prove both offenses,[2] but it is under no obligation to show that the defendant had no legal excuse for being on the premises.[3] The court should ordinarily instruct that if the alleged trespass was committed under mistake it is not criminal.[4]

§ 5. *Trespass to try title.*[5]—See 10 C. L. 1889.—This action is peculiar to the procedure in the state of Texas, and may be based upon a bond for title,[6] a parol conveyance or gift[7] supported by acceptance,[8] possession, use,[9] and improvements

lieve land was their own, treble damages may be allowed. Nethery v. Nelson [Wash.] 99 P 879.

**86.** Treble damages allowed for injury to timber under Code, § 4306. Koonz v. Hempy [Iowa] 120 NW 976.

**87.** Henning v. Kelper, 37 Pa. Super. Ct. 488.

**88. Search Note:** See notes in 41 L. R. A. 657.

See, also, Trespass, Cent. Dig. §§ 166-185; Dec. Dig. §§ 76-91; 28 A. & E. Enc. L. (2ed.) 597; 21 A. & E. Enc. P. & P. 879.

**89.** Act No. 103, p. 157 of 1902, making it felony to trespass on another's timber, is unconstitutional, being in violation of Const. art. 31, providing that every law shall embrace but one object. State v. Peterman, 121 La. 620, 46 S 672; State v. Davis, 121 La. 623, 46 S 673.

**90.** The state, not having the right to permit trespass on private property, was held not to have done so in another act. Commonwealth v. Foster, 36 Pa. Super. Ct. 433.

**91.** Entry being made pursuant to stipulations in purchase money notes and machinery sold being retaken, held not criminal. Guthrie v. State [Miss.] 47 S 639.

**92.** Morrison v. State [Ala.] 46 S 646.

**93.** Warning by agent under instructions of general superintendent is sufficient under Cr. Code 1896, § 5606, providing that person who, without legal cause, enters upon premises of another after warning not to do so shall be punished. Morrison v. State [Ala.] 46 S 646. Not sufficient if given by one in his capacity as officer, though he is also agent. Templin v. State [Ala.] 48 S 1027. Warning by landlord not in possession held not sufficient. Morrison v. State [Ala.] 46 S 646.

**94.** After warning, defendant cannot justify his act by claim that premises were vacant, and by claim of title under third party where prosecutrix had had possession for several years. Randle v. State [Ala.] 46 S 759.

**95.** Complaint held to charge offense to not be vague, indefinite, or uncertain, to not state conclusions, to show manner, by whom, and time of dispossession. Cofer v. State [Ala.] 47 S 1010.

**96.** Affidavit sufficient by charges warning which stated "that the offense of trespass in the premises of H., after warning, had been committed." Randle v. State [Ala.] 46 S 759.

**97.** Where charge is violation of Penal Code, 1895, § 220, description of land as "a certain field, the cultivated land of (prosecutor), at the time being held under a contract of purchase," though previous statements in accusation locate land as being in county of prosecution is insufficient. Georgia cases cited. Heard v. State, 4 Ga. App. 572, 61 SE 1055.

**98, 99.** Morrison v. State [Ala.] 46 S 646.

**1.** Not shown. Harvey v. State [Ga. App.] 64 SE 669.

**2.** Templin v. State [Ala.] 48 S 1027.

**3.** Morrison v. State [Ala.] 46 S 646.

**4.** Under Pen. Code, arts 45, 46, although such instruction was not asked for, where evidence showed mistake in fact as to boundaries and good faith in cutting trees, omission is error. Thomas v. State [Tex. Cr. App.] 112 SW 1049.

**5. Search Note:** See, also, Trespass to Try Title, Cent. Dig; Dec. Dig.; 28 A. & E. Enc. L. (2ed.) 627; 21 A. & E. Enc. P. & P. 924.

**6.** Wright v. Riley [Tex. Civ. App.] 118 SW 1134.

**7.** One may obtain relief in equity under a **verbal conveyance or gift.** Altgelt v. Escalero [Tex. Civ. App.] 110 SW 989. Where grantee goes into possession of land not properly described in deed, pays for same and makes improvements thereon, he is entitled to benefit in equity of parol sale.

made,[10] actual,[11] prior,[12] and adverse possession[13] in good faith,[14] a vendor's lien,[15] or other sufficient evidence of title, and may resolve itself into a contest to determine the true boundary line,[16] but has not sufficient force to require the specific performance of a contract of conveyance.[17] It is in the discretion of the court to refuse to consolidate with action in trespass to try title, other matters not growing out of the same transaction.[18] The action may become barred by limitations.[19] A joint owner may recover the entire tract against one who has no interest in the corpus of the property,[20] or against one who is a mere trespasser.[21]

*Pleadings.*See 10 C. L. 1890—One claiming to be a possessor in good faith must allege facts which would justify belief in the validity of title,[22] but need not plead

Isaacks v. Wright [Tex. Civ. App.] 110 SW 970.

8. Acceptance of parol gift may be shown by immediate use and improvements made. Altgelt v. Escelero [Tex. Civ. App.] 110 SW 989.

9. Continuous and exclusive possession is essential to validity of parol conveyance. Altgelt v. Escalero [Tex. Civ. App.] 110 SW 989. In such case, continued more than five years may establish title though not ordinarily having such effect. Id. Mere delivery of possession is not sufficient to establish parol conveyance or gift of land. Id.

10. Parol conveyance or gift is not supported by trifling improvements. Altgelt v. Escalero [Tex. Civ. App.] 110 SW 989.

11. One only occasionally entering upon land is not in actual possession thereof; hence, where one entered merely to cut and haul trees for firewood, he will not prevail against the actual owner. Jackson v. Pettigrew, 133 Mo. App. 508, 113 SW 672. Occasional entering is not actual possession such as will affect constructive possession of true owner. Haynes v. Texas & N. O. R. Co. [Tex. Civ. App.] 111 SW 427.

12. Since land may be recovered from naked trespasser on showing of prior possession defendants wrongfully dispossessed by writ of sequestration are entitled to recover possession, there being no evidence showing title in plaintiffs. Knox v. McElroy [Tex. Civ. App.]] 118 SW 1142.

13. One may obtain title by adverse possession if continued for length of time required by statute. Hoencke v. Lomax [Tex. Civ. App.] 118 SW 817. Defendant's adverse possession ceases from date of possession by true owner, except as to any part of land held by him under inclosure. Haynes v. Texas & N. O. R. Co. [Tex. Civ. App.] 111 SW 427. While in order to acquire title by limitation it is essential that adverse possession shall have been claimed, it is not fatal that it shall have been claimed on mistaken theory different from that presented at trial, the question being assertion of title and not character of title asserted. Hayworth v. Williams [Tex. Civ. App.] 117 SW 1197, rvg. [Tex.] 116 SW 43.

14. To constitute one a possessor in good faith, he must have been ignorant that his title is contested by one having a better right, and he must have believed that he was the true owner and have had grounds for such belief. Kaack v. Stanton [Tex. Civ. App.] 112 SW 702.

15. Upon default in payment of purchase price, vendor may recover land having first rescinded contract, in case where deed and note showed express lien. Bolden v. Hughes [Tex. Civ. App.] 107 SW 91.

16. Shirley v. Walker [Tex. Civ. App.] 110 SW 995. Defendant may have disputed boundaries determined by prayer for such affirmative relief after plea of not guilty. Gaffney v. Clark [Tex. Civ. App.] 118 SW 606.

17. Rev. St. 1895, art. 3360, concerning limitations, does not apply in action on bond for title. Wright v. Riley [Tex. Civ. App.] 118 SW 1134.

18. In such action defendants are not entitled, as matter of right, to equitable relief by way of foreclosure of vendor's lien against them under conditional judgment giving them privilege of paying money into court. Bolden v. Hughes [Tex. Civ. App.] 107 SW 91.

19. If note, having no reservation of a vendor's lien, becomes barred, holder has no further interest in land. Laird v. Murray [Tex. Civ. App.] 111 SW 780. Defendant, who joined with another in executing deed to certain community property, is not relieved from effects of his delay to bring action by fact that such other was occupying property as homestead. Williamson v. Williamson [Tex. Civ. App.] 116 SW 370. One is not guilty of such laches as to start running of statute of limitation by reason of his failure to commence suit in trespass to try title, where he discovered error giving rise to action as soon as man of ordinary prudence would have done and commenced action thereafter. It only begins to run from time when exercise of reasonable diligence would have discovered mistake. It does not run where defendant so conducts himself as to lure plaintiff into security and to lead him to believe no mistake has been made. Isaacks v. Wright [Tex. Civ. App.] 110 SW 970. One adjudged insane is presumed to remain so until contrary is shown, although, if he have lucid intervals, the statute commences to run from commencement of such interval. Kaack v. Stanton [Tex. Civ. App.] 112 SW 702. Defendant's plea of limitations is not involved in action where plaintiff's title is invalid. Pohle v. Robertson [Tex. Civ. App.] 116 SW 861. Where marriage relation does not actually exist, the woman may acquire property by limitation as against her pretended husband. Hayworth v. Williams [Tex. Civ. App.] 117 SW 1197; rvg. [Tex.] 116 SW 43. Limitation of five years held not to apply. Poitevent v. Scarborough [Tex. Civ. App.] 117 SW 443 .

20. His only interest being in nonexistent profits. Isbell v. Southworth [Tex. Civ. App.] 114 SW 689.

21. Jett v. Hunter [Tex. Civ. App.] 111 SW 176.

22. Kaack v. Stanton [Tex. Civ. App.] 112 SW 702.

matters of defense,[23] and may recover the land described under a prayer for general relief.[24] The description of the land in the injunction suit should be the same as that in the action with which it is connected.[25] Pleas of general denial, not guilty, statute of limitations, and of want of consideration, have the effect to admit possession in the plaintiff.[26] While the plea of defendant must specially set forth his equitable rights [27] to be good as against a general demurrer,[28] no allegation need be made that he has ever examined the title or knew what it was to be good even as against a special exception.[29]

*Issues and proof.* See 10 C. L. 1802—A plea of not guilty [30] puts upon the plaintiff the burden of proving title [31] against the world,[32] unless such title be admitted by the defendant,[33] or a common source of title,[34] or the fact that defendant is not a holder in good faith against plaintiff's established equitable title, be shown by a preponderance of the evidence.[35] A like burden rests upon a defendant seeking affirmative relief [36] to show title by adverse possession,[37] to establish a disputed boundary,[38] or to show any title or parol gift under which he claims, unless he prove actual possession,[39] permanent improvements, or such other facts as force the conclusions that nonperformance would cause the transaction to work a fraud upon him.[40] A purchaser who is shown to have paid a valuable consideration will be presumed to have purchased without notice of a prior conveyance,[41] and an outstanding legal title will constitute complete defense [42] when proven by competent

**23.** Glenn v. Rhine [Tex. Civ. App.] 115 SW 91.

**24.** Hildebrandt v. Hoffman [Tex. Civ. App.] 113 SW 785.

**25.** Injunction was dissolved because not same. Jett v. Hunter [Tex. Civ. App.] 115 SW 309.

**26.** Wright v. Riley [Tex. Civ. App.] 118 SW 1134.

**27.** Glenn v. Rhine [Tex. Civ. App.] 115 SW 91. Since defendant must specially plead independent matter of equitable right his claim to have purchased an interest for which no deed has been issued is not admissible under plea of not guilty. Isbell v. Southworth [Tex. Civ. App.] 114 SW 689.

**28.** Plea of defendant, alleging valid conveyance to him for valid consideration, that he made expenditures and improvements in good faith, and that he had good reason to believe his title to be valid, is good as against general demurrer. Haney v. Gartin [Tex. Civ. App.] 113 SW 166.

**29.** Haney v. Gartin [Tex. Civ. App.] 113 SW 166.

**30.** Such plea puts plaintiff on proof as to that part of land to which plea extends. Gaffney v. Clark [Tex. Civ. App.] 118 SW 606.

**31.** Puts burden of proving title upon the plaintiff. Plaintiff cannot rely on weakness of defendant's title. Baile v. Western Live Stock & Land Co. [Tex. Civ. App.] 119 SW 325. Plaintiff cannot recover if he fails to prove title, even though defendant fails to prove a title specially plead. De Roach v. Clardy [Tex. Civ. App.] 113 SW 22. Plaintiff must show title though defendant be naked trespasser. Uvalde County v. Oppenheimer [Tex. Civ. App.] 115 SW 904. Plaintiff is not relieved from showing title because defendant relies unsuccessfully upon limitations. Id. Plaintiff's evidence must preclude possibility of tract claimed not being within limits of tract described. Charleroi Timber & Cannel Coal Co. v. Licking Coal & Lumber Co. [Ky.] 116 SW 682.

**32.** Connor v. Weik [Tex. Civ. App.] 116 SW 650.

**33.** Where such admission is made in plea for affirmative relief introduced after plea of not guilty. Gaffney v. Clark [Tex. Civ. App.] 118 SW 606. When defendant disclaims title, it is not necessary for plaintiff to prove his title, plaintiff's title being admitted by such disclaimer. Hildebrandt v. Hoffman [Tex. Civ. App.] 113 SW 785.

**34.** Caruthers v. Hadley [Tex. Civ. App.] 115 SW 80.

**35.** For one asserting prior equitable title to prevail against purchaser of legal title, he must show that such purchaser is not purchaser for value or that he had **notice** of prior equitable claim. Thomason v. Berwick [Tex. Civ. App.] 113 SW 567.

**36.** Keck v. Woodward [Tex. Civ. App.] 116 SW 75.

**37.** Burden of proof is on defendant to show **adverse possession** under which he claims, where he claims to have had pasture inclosed for more than ten years before suit was brought. Haynes v. Texas & N. O. R. Co. [Tex. Civ. App.] 111 SW 427. Burden is on defendant to prove continued occupancy or possession. Dunn v. Taylor [Tex.] 113 SW 265. Burden of proving title by **limitation** is upon party asserting it. Hayworth v. Williams [Tex. Civ. App.] 117 SW 1197.

**38.** Although plaintiff does not sustain burden of proving title in principal action. Gaffney v. Clark [Tex. Civ. App.] 118 SW 606.

**39.** Altgeld v. Escalero [Tex. Civ. App.] 110 SW 989. Burden is not on defendant in possession to show agreement or gift whereby his grantor claimed title. Pardue v. Whitfield [Tex. Civ. App.] 115 SW 306.

**40.** Altgelt v. Escalero [Tex. Civ. App.] 110 SW 989.

**41.** McCollum v. Buckner's Orphans' Home [Tex. Civ. App.] 117 SW 886.

**42.** Millwee v. Phelps [Tex. Civ. App.] 115 SW 891.

evidence,[43] but defendant cannot rely upon any other title than that which he pleads.[44] Where the pleadings consist of a general allegation of title and a plea of not guilty, either party may show any title that he may have,[45] and, where the only issue is as to title, other questions need not be considered.[46] One basing his action upon a bond for title need not prove payment in accordance with the terms of such bond, except as against the vendor.[47] The uncontradicted return on the execution may constitute sufficient proof of title without the introduction of the sheriff's deed.[48] Where the execution of a lost deed is proven, its regularity as to form and manner of execution,[49] and the validity of an official act connected therewith, will be presumed;[50] but there is no presumption as to reservations in a lost deed,[51] or of the nonpayment of an old debt,[52] or of a title based merely on inferential circumstances.[53]

*Evidence.*[See 10 C. L. 1893]—Evidence of services rendered donor by donee inducing parol gift is admissible,[54] but evidence of improvements made or possession taken after grantor's death is not.[55] While it is improper to admit evidence collaterally attacking the title of a party whose lands are not involved in the suit[56] or to admit any evidence of title coming from a party who has failed to comply with a demand for the filing of an abstract,[57] it is in other cases proper to admit any evidence which throws any light upon the title or transaction in issue, such for example as a deed from a grantor whose title has been shown,[58] a lease referred to in the deed,[59] a material court order correctly describing the land,[60] and testimony concerning the execution of a lost deed,[61] facts excusing grantee from making an in-

**43.** Mere statement by party that he has transferred tract of land is not sufficient to show any outstanding title, no deed being introduced or particulars of transfer being sworn to. Hoencke v. Lomax [Tex. Civ. App.] 118 SW 817. Insufficiently proven, where it does not appear by whom or in what right grant was made. Holland v. Nance [Tex.] 114 SW 346.

**44.** De Roach v. Clardy [Tex. Civ. App.] 113 SW 22.

**45.** He may show either legal or equitable title and any facts to his interest. Pierce v. Texas Rice Development Co. [Tex. Civ. App.] 114 SW 857.

**46.** Where each claims under foreclosure of different liens, their priority was held immaterial. West Lumber Co. v. Lyon [Tex. Civ. App.] 116 SW 652.

**47.** Sanderson v. Wellsford [Tex. Civ. App.] 116 SW 382.

**48.** Where action is brought by purchaser at execution sale. Ayres v. Patton [Tex. Civ. App.] 111 SW 1079.

**49.** Including formalities of acknowledgment. Laird v. Murray [Tex. Civ. App.] 111 SW 780.

**50.** McKee v. West [Tex. Civ. App.] 118 SW 135.

**51.** No presumption of vendor's lien. Laird v. Murray [Tex. Civ. App.] 111 SW 780.

**52.** The presumption is that an old debt for which no claim has been made for a number of years has been paid. Where it was claimed that deed never passed by reason of nonpayment of notes, payment was presumed. Millwee v. Phelps [Tex. Civ. App.] 115 SW 891.

**53.** Where defendant claimed through purchaser with notice of prior conveyance from common grantor, there was no presumption in favor of those claiming under such purchaser from their long chain of title, payment of taxes, overseeing premises, etc., that there was reconveyance from prior grantee to common grantor, or that he was holding under deed of trust. Ryle v. Davidson [Tex. Civ. App.] 116 SW 823. Date of delivery of one deed cannot be determined, as matter of law, from date of delivery of another deed to another grantee, though of same premises and executed on same date. Beall v. Chatham [Tex. Civ. App.] 117 SW 492.

**54, 55.** Altgelt v. Ascalero [Tex. Civ. App.] 110 SW 989.

**56.** McGill v. Sites [Tex. Civ. App.] 118 SW 220.

**57.** Under Rev. St. 1895, arts. 5260, 5261, but statute held not to apply as to the introduction of deed and note in evidence in action at bar on note, and to foreclose vendor's lien. Bolden v. Hughes [Tex. Civ. App.] 107 SW 91.

**58.** The grantor must be shown to have had some title before his deed is admissible in evidence, it being sufficient where evidence shows that premises descended in regular sequence from patentee to one of grantors. Haney v. Gartin [Tex. Civ. App.] 113 SW 166.

**59.** Neill v. Kleiber [Tex. Civ. App.] 112 SW 694.

**60.** Instruments introduced in evidence should sufficiently describe the land but a probate order which refers to description contained in petition is sufficient. Shirley v. Walker [Tex. Civ. App.] 110 SW 995.

**61.** Execution of lost deed by wife may be proven by circumstances. Texas Land & Cattle Co. v. Walker [Tex. Civ. App] 20 Tex. Ct. Rep. 40, 105 SW 545. Incidents of acknowledgement may be proven by circumstances where deed has been lost, the same proof not being required as to details of execution as where testimony of precise transaction is accessible. Id.

vestigation,[62] facts completing [63] or disclosing error in a chain of title,[64] an outstanding title in a third party [65] which does not rest solely in equity,[66] or concerning any matters throwing light upon the identity,[67] the title [68] or the possession of the land,[69] or the value of improvements made.[70] Where neither the issue of limitations nor that of innocent purchaser is raised by the evidence, evidence as to payment of taxes need not be admitted.[71] Errors in the admission of evidence which affect both parties alike and prejudice neither are immaterial.[72]

*Instructions and jury questions.* See 10 C. L. 1895—An instruction as to former adjudication of title,[73] or as to any other matter that is without foundation in the evidence,[74] or which improperly shifts the burden of proving a transfer of title,[75] should be refused. It is not error for the court to ignore a want of notice which is presumed,[76] to interchange terms of title which are practically synomymous,[77] or to refuse to instruct that a recorded deed does not give constructive notice.[78] Where the evidence is overwhelmingly against plaintiff's claim of title, an instruction in favor of defendant is proper.[79] In other cases the jury should be left to weigh the evidence.[80]

**62.** Evidence that grantor's agent after putting grantee in possession remained in vicinity for three years and knew of grantee's possession and improving of land admissible to excuse grantee for making investigation in case where there was misdescription in deed. Isaacks v. Wright [Tex. Civ. App.] 110 SW 970.

**63.** Chain of title may be completed by circumstantial evidence, although deeds showing title from original grantee be not in evidence. McMahon v. McDonald [Tex. Civ. App.] 113 SW 322.

**64.** Where defendant relies on title by adverse possession and connects himself in chain of title by conveyance, he will be permitted to show another deed in chain of title was not executed until time recorded, being about two years after apparent date. Dunn v. Taylor [Tex.] 113 SW 265.

**65.** Trimble v. Burroughs [Tex. Civ. App.] 113 SW 551.

**66.** Since defendant cannot show outstanding **equitable** title in third party with which he is not connected in action by purchaser of school land, defendant claiming under prior lease to another cannot show application and award to lessee. Trimble v. Burroughs [Tex. Civ. App.] 113 SW 551.

**67.** Defendant may correct calls in deed relied on by him by oral testimony although his answer makes no allegation of mistake. Moore v. Loggins [Tex. Civ. App.] 114 SW 183. Surveys of adjacent tracts may be admissible to identify land in controversy. Sullivan v. Solis [Tex. Civ. App.] 114 SW 456. Official county map made after commencement of suit may be introduced in evidence. Id. Plaintiff may introduce deeds containing uncertain descriptions providing he support them by proof making descriptions certain, hence, he may introduce deed showing 640 acres conveyed though he claim 700 but must explain discrepancy by satisfactory proof. Uvalde County v. Oppenheimer [Tex. Civ. App.] 115 SW 904. Ambiguity in description in deed may be explained by applying description to land for identification. Raley v. Magendie [Tex. Civ. App.] 116 SW 174.

**68.** Deeds from plaintiff's ancestor recorded shortly after execution are admissible in evidence as throwing light on old title in case where defendant claimed under lost deed, made by such ancestor pursuant to bond for deed previously given. Millwee v. Phelps [Tex. Civ. App.] 115 SW 891. Evidence not relevant to question of title may be excluded. Robertson v. Hefley [Tex. Civ. App.] 118 SW 1159.

**69.** Evidence held to show defendants in possession under deed. Savage v. Cowan [Tex. Civ. App.] 113 SW 319.

**70.** Evidence of value of improvements made is some evidence of the enhancement in value of land, to authorize courts finding under Rev. St. art. 5278, subd. 1. Haney v. Martin [Tex. Civ. App.] 113 SW 166.

**71.** Being immaterial. Beall v. Chatham [Tex. Civ. App.] 117 SW 492.

**72.** Admission of deed in evidence whereby common grantor derived his title is not prejudical. Robertson v. Hefley [Tex. Civ. App.] 118 SW 1159.

**73.** Since instruction should be refused which is without basis in evidence, an instruction concerning adjudication in former suit in which tract in question was not involved was properly refused. Pardue v. Whitfield [Tex. Civ. App.] 115 SW 306.

**74.** The instructions held to accord with the evidence. Pardue v. Whitfield [Tex. Civ. App.] 115 SW 306.

**75.** Instruction held not to shift burden of proof on defendant where jury were charged that before they could find for defendant they must find certain transfer to have been made, in case where plaintiff relies on resale to owner after such transfer. McCollum v. Buckner's Orphans' Home [Tex. Civ. App.] 117 SW 886.

**76.** In case of valuable consideration paid, purchaser is presumed to have bought without notice of prior conveyance. McCollum v. Buckner's Orphans' Home [Tex. Civ. App.] 117 SW 886.

**77.** "Prior claim" will be construed to refer to "prior deed" where, in the light of the evidence, there could be no misunderstanding. La Brie v. Cartwright [Tex. Civ. App.] 118 SW 785.

**78.** Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662.

**79.** Bailie v. Western Live Stock & Land Co. [Tex. Civ. App.] 119 SW 325.

**80.** Pardue v. Whitfield [Tex. Civ. App.]

*Judgment.*—A judgment for plaintiff should include all ordinary costs,[81] should describe the land in accordance with the petition and evidence[82] should not include more land than that sued for[83] under a liberal view of the petition,[84] nor, where he claims under a parol gift, should it include more land than that of which he took possession.[85] Where defendant's plea is simply not guilty, the appropriate judgment when for defendant is that plaintiff take nothing by his suit.[86] The value of material taken from the premises and used in improvements need not be deducted from the allowance to the unsuccessful defendant for improvements.[87] No judgment is necessary on an issue that has been withdrawn.[88]

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**Trespass on the Case; Trespass to Try Title,** see latest topical index.

**TRIAL.**

**§ 1. Joint and Separate Trials, 2162.**
**§ 2. Course and Conduct of Trial, 2164.**
**§ 3. Reception and Exclusion of Evidence,** 2165. The Order of Proof, 2165. Cumulative Testimony, 2167. Stipulations or Admissions, 2168. Evidence Admissible in Part or for One Purpose Only, 2168. Objection to and Striking out Evidence, 2168.
**§ 4. Custody and Conduct of the Jury, 2169.** Allowing Jury to Take out Papers, 2170. Allowance of a View, 2170.

*The scope of this topic* is noted below.[89]

§ 1. *Joint and separate trials.*[90]—See 10 C. L. 1896—It is within the discretion of courts of equity[91] and of law,[92] excepting municipal courts in some states,[93] to

115 SW 306; Uvalde County v. Oppenheimer [Tex. Civ. App.] 115 SW 904. Whether land was deeded to defendant's grantor, held to be question for jury. McMahon v. McDonald [Tex. Civ. App.] 113 SW 322. Execution of lost deed is question for jury. Texas Land & Cattle Co. v. Walker [Tex. Civ. App.] 20 Tex. Ct. Rep. 40, 105 SW 545. Evidence held sufficient to submit issue of transfer and resale. McCollum v. Buckner's Orphans' Home [Tex. Civ. App.] 117 SW 886.

81. Where defendant pleads not guilty, plaintiff is entitled to all costs, except fee of guardian ad litem of infant defendant, as provided under Sayles' Ann. Civ. St. 1897, art. 1425, 1438, 5270, although he recover only part of that sued for. Perry v. Rogers [Tex. Civ. App.] 114 SW 897.

82. Judgment for 160 acres held insufficient where petition alleged 320 and evidence showed 200. Downs v. Powell [Tex. Civ. App.] 116 SW 873.

83. Not recover land not embraced in tract though evidence may warrant. Raley v. Magendie [Tex. Civ. App.] 116 SW 174.

84. Judgment is not necessarily objectionable for giving to plaintiff more land than he claimed where it follows description in petition and undertakes to settle no question of boundary. Hildebrandt v. Hoffman [Tex. Civ. App.] 113 SW 785.

85. Although he claimed more. Combest v. Wall [Tex. Civ. App.] 115 SW 354.

86. The further adjudication of title in defendant adds nothing to it. McKee v. West [Tex. Civ. App.] 118 SW 1135. An award to defendant on plea of not guilty that he have possession is improper. Id.

87. But jury may find separately therefor. Fain v. Nelms [Tex. Civ. App.] 113 SW 1002.

88. As where an issue of damages was withdrawn by plaintiff in open court before rendition of judgment. Haynes v. Texas & N. O. R. Co. [Tex. Civ. App.] 111 SW 427.

89. Many important and distinct matters of trial procedure are given separate treatment in Current Law. See Dockets, Calendars and Trial Lists, 11 C. L. 1126; Continuance and Postponement, 11 C. L. 725; Argument and Conduct of Counsel, 11 C. L. 268; Examination of Witnesses, 11 C. L. 1420; Saving Questions for Review, 12 C. L. 1763; Jury, 12 C. L. 479; Questions of Law and Fact, 12 C. L. 1521; Instructions, 12 C. L. 218; Directing Verdict and Demurrer to Evidence, 11 C. L. 1085; Discontinuance, Dismissal and Nonsuit, 11 C. L. 1093; Verdicts and Findings, 10 C. L. 1974. Hence, this article includes principally only such matters as do not readily lend themselves to such separate treatment. The subjects of evidence (see Evidence, 11 C. L. 1346), pleading (see Pleading, 12 C. L. 1323), witnesses (see Witnesses, 10 C. L. 2079), are also fully treated elsewhere, as are also the right to physical examination (see Damages, 11 C. L. 958), matters peculiar to hearing in equity (see Equity, 11 C. L. 1235), and to criminal trials (see Indictment and Prosecution, 12 C. L. 1).

90. **Search Note:** See Trial, Cent. Dig. §§ 3-10; Dec. Dig. §§ 2-4; 28 A. & E. Enc. L. (2ed.) 636; 4 A. & E. Enc. P. & P. 673; 19 Id. 1108.

91. A court of equity has inherent power to unite suits for trial in absence of statute, except where to do so would be palpable abuse of discretion. Butler v. Secrist [Neb.] 120 NW 1109.

92. Though there be no statutory provision therefor. Vandalia Coal Co. v. Lawson [Ind. App.] 87 NE 47.

93. In New York, the municipal court cannot consolidate two actions. Hughes v. Holley, 62 Misc. 231, 114 NYS 947.

consolidate actions[94] having the same parties as plaintiff and defendant[95] and involving the same causes of action,[96] unless such consolidation has the effect of improperly changing the venue of an action.[97] Under some statutory provisions, actions may be consolidated, although separate judgments are required to be rendered,[98] and although one action is for tort and the other for breach of contract.[99] Consolidation makes the actions one for the purpose of appeal,[1] but the issues are not changed thereby.[2] The order of consolidation is not overcome by the entering of separate judgments under separate titles.[3] It is error to determine two cases on the evidence introduced in one where there is no consolidation or stipulation therefor,[4] or to recognize an invalid stipulation in this regard.[5] The defendant cannot delay the trial by request for a consolidation, the necessity of which is not shown.[6]

The court may separate causes improperly joined,[7] or may order separate trial of equitable defenses in an action at law,[8] upon proper motion[9] or demand being made therefor,[10] and may reserve matters at issue in another pending action for future determination.[11]

94. Consolidation of similar cases rests in sound discretion of court, under Rev. St. U. S. § 921. Vandalia Coal Co. v. Lawson [Ind. App.] 87 NE 47.

95. Where causes of action are different and parties not the same, the court has no power to unite actions. Code Civ. Proc. § 817, not applying in such case. Miller v. Baillard, 124 App. Div. 555, 108 NYS 973. Actions cannot be consolidated where positions of plaintiff and defendant in two actions are reverse under Code Civ. Proc. § 817, authorizing consolidation of actions having same plaintiff and defendant. Waiontha Knitting Co. v. Hecht, 58 Misc. 350, 111 NYS 10.

96. Held not error for court to refuse to join actions growing out of different transactions where defendant was not injured thereby. Bolden v. Hughes [Tex. Civ. App.] 107 SW 91. Upon motions filed respectively by trustees of mortgage for consolidation of two actions, both suits seeking subetantially same relief, motion in first suit is sustained. Bird v. People's Gas & Elec. L. Co., 158 F 903. Action to cancel deed intended as mortgage and obtained through fraud, and action with same plaintiff and defendant to recover money, may be consolidated where it appears that money sought was part of price of land. Barnes v. Johnson, 33 Ky. L. R. 803, 111 SW 372. Actions to contest local option election. McCormick v. Jester [Tex. Civ. App.] 115 SW 278. Consolidation of **cross actions** between same parties for breach of same contracts is within discretion of trial court, under Rev. St. § 921. American Trust & Sav. Bank v. Zeigler Coal Co. [C. C. A.] 165 F 34. **Improper to consolidate** actions pending in different courts, on different issues and growing out of different contracts, notwithstanding Code Civ. Proc. §§ 817, 818, permitting action pending in inferior court to be consolidated with one pending in supreme court, where between same parties and for same cause of action. Argyle Co. v. Griffith, 128 App. Div. 262, 112 NYS 773. Where plaintiff in replevin claimed lien on cow sold to defendant by H., court properly refused to consolidate such action with another pending against H. for accounting. Hight v. Oates [Ark.] 113 SW 40.

97. Defiance Fruit Co. v. Fox [N. J. Err. & App.] 70 A 460.

98. Under act May 11, 1905, p. 798, action by wife for personal injuries may be consolidated with action of husband for loss of her services and expenses. St. Louis, etc., R. Co. v. Raines [Ark.] 119 SW 266.

99. Under Act of May 11, 1905, where same evidence necessary in both causes. Ashford v. Richardson [Ark.] 113 SW 808.

1. Hence, it having been stipulated that evidence in one should be considered evidence in other as far as possible, questions of fact cannot be considered on appeal where there is no proper certificate to such evidence. Ness v. Bothell [Wash.] 101 P 702.

2. Admissions in pleadings in actions by contractors, materialmen, etc., are not rendered ineffectual by joinder. Los Angeles Pressed Brick Co. v. Higgins [Cal. App.] 97 P 420.

3. First Nat. Bank v. Fowler [Wash.] 99 P 1034.

4. Error even though actions between same parties and rest on same written guaranty. Auerbach v. Lamchick, 115 NYS 226.

5. Stipulation by parties to different actions that same facts tried at same time by same jury with same exception considered as saved, but that separate verdicts shall be rendered, does not have the effect of consolidating cases, and stipulation that all judgments shall be brought up on one transcript is invalid. Mobile Imp. & Bldg. Co. v. Stein [Ala.] 48 S 368.

6. Adams v. Mineral Development Co. [Ky.] 112 SW 624.

7. After demurrer has been sustained. Davis v. Public Service Corp. [N. J. Law] 72 A 82. In ejectment against landlord and tenant, where right of landlord is issue, plaintiff is not entitled to severance of action against tenant, who failed to answer. Lewis v. Townsend, 132 App. Div. 347, 117 NYS 48.

8. In such case the court may be required to order trials so that equitable claim will be tried first and the legal action be stayed. Goss v. Goss & Co., 126 App. Div. 748, 111 NYS 115; Cohen v. American Surety Co., 129 App. Div. 166, 113 NYS 375.

9. Wasserman v. Taubin, 129 App. Div. 691, 114 NYS 447.

10. Right to separate prior trial on some issue is matter of abatement, which is

§ 2. *Course and conduct of trial.*[12]—See 10 C. L. 1897—Matters arising in the conduct of a trial, such as the order of trial,[13] examination of witnesses,[14] continuances,[15] the admission of an attorney to the case after trial has begun,[16] the determining of what shall be read to the jury,[17] and the exclusion from the court room of witnesses not under examination,[18] are largely discretionary with the trial judge.[19] It is the duty of the trial judge to rule in accordance with his best judgment upon every question raised,[20] and causes should be permitted to be heard on their merits where, in so ruling, positive violence is not done some rule of procedure or practice.[21] Every litigant has the right to be present at the trial in person and to be represented by counsel.[22]

*Remarks and conduct of judge.*See 10 C. L. 1898—While the court is allowed some latitude in his remarks,[23] and improper remarks which are not prejudicial are not grounds for a reversal,[24] such remarks being irregularities as distinguished from errors of law,[25] such irregularities will constitute ground for reversal when they

waived by such separate trial not being demanded. City of Greensboro v. Southern Pav. & Const. Co. [C. C. A.] 168 F 880.

**11.** Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 P 225.

**12. Search Note:** See notes in 41 L. R. A. 569; 9 L. R. A. (N. S.) 277; 12 Id. 98.

See, also, Trial, Cent. Dig. §§ 37-84; Dec. Dig. §§ 18-31; 21 A. & E. Enc. P. & P. 953.

**13.** Under Laws, 1907, p. 447, § 16, what is sufficient cause for trying a case out of its order is determined in view of condition of docket, dispatch of business, saving time and expense, and other considerations, and held no abuse of discretion where no showing made against motion advancing action which had been pending nine years and of which there had been two previous trials. Richardson Fueling Co. v. Seymour, 235 Ill. 319, 85 NE 496.

**14.** Postponement of examination of witness held within court's discretion, especially where it does not appear what was sought to be proven by such witness. Chwala v. Herbert, 138 Ill. App. 371.

**15.** The court's discretion in granting a continuance should not be arbitrarily exercised, being a judicial discretion. Sun Ins. Office v. Stegar [Ky.] 112 SW 922. Plaintiff is entitled to trial when the case is ready, and no clear grounds for continuance exist where more than year transpired in which defendant had opportunity to take depositions and have survey made as he desired. Adams v. Mineral Development Co. [Ky.] 112 SW 624.

**16.** Held not error to refuse such admission where court offered to allow the continuance of the case till the next day on account of the illness of an attorney. First Nat. Bank v. Miller, 235 Ill. 135, 85 NE 312.

**17.** Held not error for court to permit counsel to read constitutional provision to jury, though it is court's province to give all proper instructions. Chesapeake & O. R. Co. v. Rowsey's Adm'r, 108 Va. 632, 62 SE 363. It is not error for the judge to read pleadings to jury before they have been explained. Cincinatti Gas & Elec. Co. v. Coffelder, 11 Ohio C. C. (N. S.) 289.

**18.** Blodgett v. Miller, 33 Ky. L. R. 682, 110 SW 864. Authorized under Kirby's Digest, § 3142. St. Louis, etc., R. Co. v. Pate [Ark.] 118 SW 260. It is not abuse of discretion for judge to exclude one of two officers of corporation litigant. Atlanta Terra Cotta Co. v. Georgia R. & Elec. Co. [Ga.] 64 SE 563. Court may permit some witnesses to remain in court room while others are excluded. Matthews' Adm'r v. Louisville & N. R. Co. [Ky.] 113 SW 459.

**19.** Chesapeake & O. R. Co. v. Rowsey's Adm'r, 108 Va. 632, 62 SE 363.

**20.** Law does not permit trial court to successfully evade ruling and leave same to another court on review. Reynolds v. McManus [Iowa] 117 NW 667. In a Georgia trial the judge is impersonation of law he expounds, construes, and enforces, but the jury is sole arbitrator. Davis v. Kirkland, 1 Ga. App. 5, 58 SE 209.

**21.** Pacific Window Glass Co. v. Smith [Cal. App.] 97 P 898.

**22.** Ziegler v. Funkhouser [Ind. App.] 85 NE 984.

**23.** It is not error on motion for directed verdict, where counsel as ground therefor states that settlement relied on is without consideration and void, for court in ruling to say "Yes, it would be binding. If a man makes a settlement he ought to be made to stick to it." Boswell v. Gillen, 131 Ga. 310, 62 SE 187.

**24.** When made in ruling on motion. Chicago City R. Co. v. Ratner, 133 Ill. App. 628. When not prejudicial and when general and applicable to both parties alike. Palmer v. Schurz [S. D.] 117 NW 150. When not such as to mislead or improperly influence jury. Eckels v. Halsten, 136 Ill. App. 111; Leighton v. Chicago Consol. Trac. Co., 235 Ill. 283, 85 NE 309. Where spectators applauded argument of counsel and judge prefaced his instruction to jury to disregard applause and not be influenced by it with remark that he gave such instruction by request, such was not sufficient ground for new trial. Central of Georgia R. Co. v. Mote, 131 Ga. 166, 62 SE 164. Under Code Civ. Proc. 1895, § 4334, it is not reversible error for court, in discussing with counsel matters arising during progress of trial, to refer to evidence, provided he does not go out of lines of legitimate discussion or express approval or disapproval thereof. Realty Co. v. Ellis, 4 Ga. App. 402, 61 SE 832.

**25.** Erroneous remarks by court during trial constitute irregularities in proceedings, and not errors of law, coming under Code Civ. Proc. subd. 1, and not subd. 7, of grounds authorizing new trial. Hopkins v. Kitts, 37 Mont. 26, 94 P 201.

are prejudicial,[26] and so, also, when the remarks disclose the court's opinion of a material issue of fact,[27] or tend to cast discredit on a witness,[28] or to coerce the jury into a verdict.[29]

§ 3. *Reception and exclusion of evidence.*[30]—See 10 C. L. 1900—The function of a judge in determining the relevancy of evidence is that of a final arbiter.[31] The court must, however, pass upon the admissibility of all evidence offered.[32] In some states evidence of doubtful admissibility must be admitted.[33] The allowance of introductory questions is within the court's discretion.[34] An offer of proof must be predicated upon some pending question or prior examination of the witness.[35] The court's power in certain cases to limit the number of witnesses should be exercised with great care.[36] Disobedience of a rule to exclude the witnesses from the court room does not disqualify a witness where the party offering him is not in fault.[37] In some instances the court may summarize the evidence.[38]

*The order of proof.*See 10 C. L. 1902—The order of the admission of evidence is within the sound discretion of the court,[39] if not in violation of statute,[40] or rule

26. Held prejudicial to determine jury question by such remarks, as where court told jury that street railway company owed no duty not provided by ordinance, and where company knew danger of its trolley wire coming in contact with telephone wire, but not error to state that witness knew nothing about certain matter when it was true and self-apparent from his testimony. Southwestern Tel. & T. Co. v. Myane [Ark.] 111 SW 987.

27. Though such opinion be disclosed by question asked by court. Bryant v. Anderson, 5 Ga. App. 517, 63 SE 638. Held error in action for delayed telegram for court, where receipt of telegram was admitted by sendee and denied by defendant, to say to defendant's counsel "You are responsible for it." Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Improper remark of court relating to admissibility rather than to weight of evidence is not serious error. Houston & T. C. R. Co. v. Shapard [Tex. Civ. App.] 118 SW 596. Court may speak of materiality and value of evidence without being charged with commenting thereon. In re City of Seattle [Wash.] 100 P 330.

28. While remarks tending to discredit witness are prejudicial, remark that counsel can examine physician as to matters disconnected with relation of physician and patient is not. Landers v. Quincy, etc., R. Co. [Mo. App.] 114 SW 543. While court should not express opinion as to whether witness is able to determine matter of expert knowledge, it is not error to state, in ruling on objection that witness had not qualified himself, "I think Mr. D. may state whether or not he (plaintiff) was of sound or unsound mind or not." Kaack v. Stanton [Tex. Civ. App.] 112 SW 702.

29. Improper though in form of instructions. Highland Foundry Co. v. New York, etc., R. Co., 199 Mass. 403, 85 NE 437. Remark by judge that he would expect jury to reach verdict by certain time was not erroneous as coercing jury, where he afterwards requested them not to consider such remark. Prince v. Lowell Elec. L. Corp. 201 Mass. 276, 87 NE 558.

30. **Search Note:** See Notes in 15 L. R. A. (N. S.) 701; 116 A. S. R. 514, 8 Ann. Cas. 828.

See, also, Trial, Cent. Dig. §§ 85-266; Dec. Dig. §§ 32-105; 1 A. & E. Enc. L. (2ed.) 670; 8 Id. 462; 15 A. & E. Enc. P. & P. 375.

31. Kansas City, M. & O. R. Co. v. Young [Tex. Civ. App.] 111 SW 764. Decision on the question of **privileged communications** is final. Stewart v. Douglas [Cal. App.] 100 P 711.

32. It is error for court to close case and refuse consideration to evidence, the admissibility of which has not been determined. Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co. [C. C. A.] 165 F 283.

33. If fact offered presents reasonable inference in favor of its relevancy, it should be admitted, and its weight left to jury. Kansas City, M. & O. R. Co. v. Young [Tex. Civ. App.] 111 SW 764. It has long been rule in Georgia, where admissibility of evidence is doubtful, to admit it and leave its weight and effect to be determined by jury. Albany Phosphate Co. v. Hugger Bros., 4 Ga. App. 771, 62 SE 533.

34. Loveland v. Perkins & Dixon Lumber Co., 55 Fla. 500, 46 S 731.

35. Pike v. Hauptman [Neb.] 119 NW 231.

36. Rule that owner may testify concerning his loss by a given act, regardless of rules limiting number of witnesses, does not apply to mere stockholder in corporation. In re City of Seattle [Wash.] 100 P 330. Held error for court to limit number of witnesses, as to value of property damaged, to six. Ellis v. St. Louis, etc., R. Co., 131 Mo. App. 395, 111 SW 839.

37. Hendelman v. Kahan, 50 Wash. 247, 97 P 109.

38. Proper summary of extensive items to be gathered from numerous depositions as to payments made for submission to jury. Fidelity & Deposit Co. v. Champion Ice Mfg. & Cold Storage Co. [Ky.] 117 SW 393.

39. Wells v. Boston & M. R. Co. [Vt.] 71 A 1103. Hence temporary sustaining of objection is not error where pertinency is left open and witness subsequently left to testify fully as to such matter. Webster v. Atlantic Coast Line R. Co., 81 S. C. 46, 61 SE 1080. Not interfered with unless clear abuse of such discretion. Wilson v. Jernigan [Fla.] 49 S 44. Introduction of tax deed as evidence out of its regular order

of court,[41] as is, also, the reopening of the case for the introduction of further testimony,[42] provided such discretion is not abused.[43] Plaintiff should introduce in chief the evidence required to maintain his action,[44] but the court may admit in rebuttal any evidence reflecting on the defense,[45] though not strictly and exclu-

is not reversible error where no harm results, though objected to. Himmelberger-Harrison Lumber Co. v. Deneen [Mo.] 119 SW 365. Introduction in chief of evidence which should have been introduced in rebuttal is not error, if not prejudicial. Camden Interstate R. Co. v. Lester [Ky.] 118 SW 268.

40. Crosby v. Portland R. Co. [Or.] 101 P 204.

41. Miller v. Leib [Md.] 72 A 466.

42. Action of court will not be disturbed on appeal unless there is clear abuse of discretion. Central Nat. Bank v. National Metropolitan Bank, 31 App. D. C. 391; Spencer v. Alki Point Transp. Co. [Wash.] 101 P 509. Court may admit, after close of evidence, evidence which might properly have been introduced in original case. Bellingham v. Linck [Wash.] 101 P 843. Party cannot reopen his case in chief after he has rested except by court's permission. Wolfort v. Hochbaum [Ark.] 117 SW 525. Witness may be recalled for purpose of **correcting testimony** previously given by him. Chicago City R. Co. v. Walsh, 136 Ill. App. 73. Even after the submission of case to court, **parol evidence** may be admitted to explain ambiguous contract. Wood v. Kelsey [Ark.] 119 SW 258. Reopening for **newly-discovered evidence.** American Stove Co. v. Detroit Stove Works, 31 App. D. C. 304.

**Reopening authorized:** Not abuse of discretion where evidence was unknown till after trial and other pary was allowed opportunity to rebut it. Lueders v. Tenino, 49 Wash. 521, 95 P 1089. Held no abuse of discretion in court permitting defendant to reopen his case in chief to introduce testimony as to sale of stock, which sale had only been touched on in previous evidence. Wolfort v. Hochbaum [Ark.] 117 SW 525. Not error to reopen unless opportunity to meet such testimony be not allowed (Carr v. Way [Iowa] 119 NW 700), although party seeking reopening has rested (Murphy v. Herold Co. [Wis.] 119 NW 294; Casey v. Richards [Cal. App.] 101 P 36; Maxwell v. Wellington [Wis.] 120 NW 505), and the evidence has closed (Chandler Bros. v. Higgins [Ala.] 47 S 284), and argument has been concluded, provided time is given in which to meet such testimony (Burke v. Burke [Iowa] 119 NW 129), or intimation has been made that nonsuit will be directed (McCoy v. Nillick, 221 Pa. 123, 70 A 577), or motion for nonsuit has been filed in which case witness may then be recalled to testify as to something inadvertently omitted, but not to start anew to make out case in chief (Buck v. McKeesport [Pa.] 72 A 514).

**Refusal authorized;** Where court with case under advisement refused admission of testimony for reason that it should have been presented at proper time. Michner v. Ford [Kan.] 98 P 273. Where attorney for corporation defendant seeks thereby to prove vital fact of which he was before ignorant, that is that corporation had filed statutory designation. O'Brien v. Big Casino Gold Min. Co. [Cal. App.] 93 P 209. Where purpose is impeachment. Leake v. King Dry Goods, Co., 5 Ga. App. 102, 62 SE 729; Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729. Where argument has been begun though witness was not obtainable before. Schwitters v. Springer, 236 Ill. 271, 86 NE 102. Where court has announced his intention to direct verdict. Currie v. Consolidated R. Co. [Conn.] 71 A 356; Stewart v. Mundy, 131 Ga. 586, 62 SE 986.

43. This discretion is judicial and not arbitrary and was wrongly exercised in refusing admission to belated deposition where time required to introduce same would have been short and short continuance asked for had been refused and where it had arrived within five minutes after argument was begun. Sun Ins. Office v. Stegar [Ky.] 112 SW 922. In action by administrator of wife's estate to recover from estate of husband property which thus passed into his possession, it is error after final submission of case to refuse to hear new evidence, discovered by chance, which is not cumulative, but relates to payment by husband of debts of his wife, and is proffered as new defense. Miller v. McLean, 11 Ohio C. C. (N. S.) 424. Court should not consider documents filed with him in absence of parties after closing of proof. Wellman v. Blackmon [Mich.] 15 Det. Leg. N. 1126, 119 NW 1102. It is abuse of discretion to not permit reopening to prevent nonsuit, except where defendant would be subjected to unfairness or undue prejudice or where plaintiff has appeared to delay and trifle with court (Ellenberg v. Southern R. Co., 5 Ga. App. 389, 63 SE 240), or to refuse reopening to admit evidence sufficient to prevent peremptory instruction, where defendant's case rested on existence of a certain custom and plaintiff desired to prove its nonexistence (Moreland v. Newberger Cotton Co. [Miss.] 48 S 187).

44. In negligence case plaintiff should show distance in which car causing injury could be stopped. Louisville R. Co. v. Gaar [Ky.] 112 SW 1130.

45. Complainant has right to rebut affirmative evidence offered by defendant in divorce action. Loftus v. Loftus, 134 Ill. App. 360. Plaintiff should be permitted to testify fully on rebuttal as to matters introduced in defense, though it be as to conversation, parts of which he touched on in presenting his case. Stanley v. Beckhan [C. C. A.] 153 F 152. Any competent evidence reflecting on evidence of defense is admissible in rebuttal, as where, in action by township against its treasurer, he testified that he paid certain order through bank, it is permissible to prove by cashier whether order was paid and method in which such treasurer carried his account. Alpena Tp. v. Mainville, 153 Mich. 732, 15 Det. Leg. N 605, 117 NW 338. Where defendant claims spark arrester to have been in good repair, plaintiff may rebut with evidence of other fires from same cause at

sively [46] rebuttal even after plaintiff has made a motion for judgment.[47] Such rebuttal, however, should be confined to the issues made or controverted by the defense,[48] and not be merely cumulative,[49] but the court's discretion in regard to the admission thereof should not be hampered by unreasonable conditions.[50] Testimony may be conditionally admitted with the stipulation that its competency will be shown, subject to its exclusion if such competency be not shown,[51] or its admission be made to depend upon the introduction of other testimony prior thereto,[52] or upon an offer to show its relevancy.[53]

*Cumulative testimony.*[See 10 C. L. 1904]—The court, in its discretion, may exclude cumulative evidence [54] of facts, otherwise conclusively proved [55] or admitted,[55a] but may not exclude evidence affecting the chief issue on the ground that it is merely cumulative.[56] An objection to a question is properly sustained where the expected answer would be a mere repetition.[57]

near same time. St. Louis S. R. Co. v. Eccles & Co. [Tex. Civ. App.] 115 SW 648.

46. Rebuttal evidence which necessarily includes greater period of time than that covered in evidence to be rebutted will not for that reason be excluded. Wilkins Adm'r v. Brock, 81 Vt. 332, 70 A 572. Where plaintiff's first evidence incidentally related to matters plead in defense, he is not thereby prevented from rebuttal. Rose v. Lewis [Ala.] 48 S 105. **Admitted.** Jaffe v. Nagel, 114 NYS 905; Horton v. Louisville & N. R. Co. [Ala.] 49 S 423. Admitted even when such rebuttal was properly admissible in the main case. Witt v. Latimer [Iowa] 117 NW 680; Crosby v. Portland R. Co. [Or.] 100 P 300; Kime v. Bank of Edgemant [S. D.] 119 NW 1003. **Excluded.** City of Marseilles v. Heister, 142 Ill. App. 299; Cleveland Seed Co. v. Moore, 142 Ill. App. 615. Evidence for first time made competent on **surrebuttal** should not be excluded on ground that it is not proper surrebuttal; construing St. 1898, § 4069 as to evidence of transactions with decedent and permitting party to examine witness who has been first examined by other party. Anderson v. Anderson, 136 Wis. 328, 117 NW 801.

47. Plaintiff by moving for judgment at close of defendant's case does not waive his right to contest defendant's affirmative defense. Frye v. Phillips, 46 Wash. 190, 93 P 668.

48. Should be confined to new matter brought out by defendant. Longino v. Shreveport Trac. Co., 120 La. 803, 45 S 732. Must be confined to facts controverted and not used to review case in chief. Wade v. Galveston, etc., R. Co. [Tex. Civ. App.] 110 SW 84. Where trial court refused to admit any evidence in support of tax title, it was error to allow plaintiff to introduce any evidence in rebuttal bearing upon validity of such tax deed. Best v. Wohlford, 153 Cal. 17, 94 P 98.

49. Scheerer & Co. v. Deming [Cal.] 97 P 155.

50. Cutter-Tower Co. v. Clement, 5 Ga. App. 291, 63 SE 58.

51. Uvalde County v. Oppenheimer [Tex. Civ. App.] 115 SW 904; Schmidt v. Kurrus, 140 Ill. App. 132. Acts of an agent may be shown before his agency is proven subject to exclusion if agency be not established. German Ins. Bank v. Martin [Ky.] 114 SW 319. In action to recover for personal injuries, amount paid for medical treatment may be proven before proof that such charges are reasonable, but if later proof be not introduced, former proof should be stricken out. Schmitt v. Kurrus, 234 Ill. 578, 85 NE 261.

52. Defenses against original payee of negotiable instrument cannot be introduced until it is shown that plaintiff is not bona fide purchaser. Stouffer v. Erwin, 81 S. C. 541, 62 SE 843.

53. Objection to question, the relevancy of which is not apparent, may be sustained, where there is no offer to make such relevancy to appear. Vaughan's Seed Store v. Stringfellow [Fla.] 48 S 410. Where objection to question as irrelevant is wrongfully sustained, it may constitute reversible error though no offer was made to show substance of proposed testimony, no offer being demanded by court. Stanley v. Beckham [C. C. A.] 153 F 152. Where court below treated offer of proof as basis for ruling on admissibility of evidence, on appeal case must be treated as though such facts were in evidence and had been disregarded by lower court. Meyer v. Doherty, 133 Wis. 398, 113 NW 671.

54. Sherman Gas & Elec. Co. v. Belden [Tex. Civ. App.] 115 SW 897; Royal Exch. Assur. v. Graham & Morton Transp. Co. [C. C. A.] 166 F 32. Where issue was mental capacity of feme grantor, questions as to her feelings, etc., at and before execution of deed was properly excluded where she had already covered matter in previous testimony by testifying as to her actions, behavior and condition at such time. United States Oil & Land Co. v. Bell, 153 Cal. 781, 96 P 901.

55. Mabry v. Citizens' Lumber Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 85, 105 SW 1156. Evidence covered in case in chief may be excluded in rebuttal, no reason being shown why court should exercise his discretion otherwise. Higgins v. Los Angeles R. Co., 5 Cal. App. 748, 91 P 344.

55a. Mabry v. Citizens' Lumber Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 85, 105 SW 1156.

56. Capron v. Douglass, 193 N. Y. 11, 85 NE 827.

57. Western Steel Car & Foundry Co. v. Cunningham [Ala.] 48 S 109.

*Stipulations or admissions.*[See 10 C. L. 1905]—Since a matter that is admitted need not be proved,[58] it is ordinarily within the discretion of the court to reject or receive evidence of a fact that is conceded.[59] An admission by the defendant does not preclude him from setting up defenses not affected by the admission,[60] nor can his absence be taken as an admission to supply a deficiency in plaintiff's proof.[61]

*Evidence admissible in part or for one purpose only.*[See 10 C. L. 1905]—Where evidence is offered in its entirety, it will be excluded unless admissible in its entirety.[62] Evidence competent for one purpose only is not rendered inadmissible because it tends to reflect on matters for which it is incompetent,[63] if its application is properly restricted,[64] but such application [65] and the existence of such special purpose [66] must first be clearly shown. A presumption is not rebutted by evidence offered solely for another purpose.[67] Evidence otherwise inadmissible is in some cases admitted to affect the credibility of the witness.[68]

*Objection to and striking out evidence.*[See 10 C. L. 1904]—Ordinarily evidence must be admitted and considered when not objected to [69] or when objection thereto is waived.[70] Objection to evidence must be made at the time of its admission,[71]

58. An admission may relieve plaintiff from necessity of proving his case, when entered under county court rule 31, and estop defendant from objecting to plaintiff's failure to offer evidence on any material point. Berry Bros. v. Fairbanks, Morse & Co. [Tex. Civ. App.] 112 SW 427. Admission by counsel during trial precludes necessity of proving fact admitted. Tananevicz v. Lamczyk, 134 Ill. App. 135.

59. But its relation to conceded fact and main issue may be such that any action of court thereon will be reversible. In re Mason's Will [Vt.] 72 A 329. Admission of all of testatrix's conversation held proper though part of it anticipated contestant's case. Id. Evidence of admitted facts properly refused. Modern Woodmen of America v. Cecil, 108 Md. 357, 70 A 331.

60. Admission of waiver of right to insist upon erection of engines under terms of contract cannot be construed as admission of waiver of any damages arising from breach of contracts so far as failure to ship engines within time for erection. Berry Bros. v. Fairbanks, Morse & Co. [Tex. Civ. App.] 112 SW 427.

61. Duffy v. Jacobson, 135 Ill. App. 472.

62. Exclusion not error though part of it may be admissible where offered in its entirety. Modern Woodmen of America v. Cecil, 108 Md. 357, 70 A 331.

63. Hubbard v. Allyn, 200 Mass. 166, 86 NE 356. Where counsel stated that it was presented only for purpose, admissible. Stronge v. Supreme Lodge, K. P., 189 N. Y. 346, 82 NE 433. That evidence, admissible in relation to only one of several issues, produced verdict is not alone cause for reversal, unless it appear that verdict resulted from improper use of such evidence. Kelland v. Jos. W. Neone's Sons Co. [N. H.] 71 A 947.

64. Remedy is to ask for restricted consideration. Hubbard v. Allyn, 200 Mass. 166, 86 NE 356. Record should show that such evidence has been so restricted. Town of Pelham v. Pelham Tel. Co., 131 Ga. 325, 62 SE 186. Jury should be told of restricted purpose and it is duty of counsel, not of court, to see that this is done. McKinney v. Carson [Utah] 99 P 660. Evidence inadmissible for other purposes may be admitted to affect credibility of the witness provided the court restrict it to that purpose. Louisville & N. R. Co. v. Stewart's Adm'x [Ky.] 115 SW 775; Illinois Cent. R. Co. v. Johnson [Ky.] 115 SW 798. Evidence admissible for impeachment only should be limited to such purpose. Georgia Home Ins. Co. v. Kelley [Ky.] 113 SW 882.

65. Uncalled for statement of counsel as to theory of case held not to limit issues. Trees v. Millikin [Ind. App.] 85 NE 123.

66. Evidence of a conversation will not be admitted to support or explain letters which are not in evidence. Phelan v. Neary [S. D.] 117 NW 142.

67. Adverse party is entitled to rely upon evidence, being limited to purpose stated. Barasch v. Kramer, 60 Misc. 475, 115 NYS 176.

68. See Witnesses, 10 C. L. 2079. Evidence of real estate conveyance not claimed under or not in issue held admissible only to affect credibility of witness and not to prove plaintiff's case. Tipton v. Tipton [Tex. Civ. App.] 113 SW 842.

69. Incompetent evidence not objected to may be considered by jury. Sutton v. Western Union Tel. Co., 33 Ky. L. R. 577, 110 SW 874. Incompetent evidence admitted without objection cannot be disregarded on motion for nonsuit. Mitchell v. Allen, 81 S. C. 340, 61 SE 1087. Incompetent evidence admitted without objection is accorded its full probative force. Hubbard v. Allyn, 200 Mass. 166, 86 NE 356.

70. Held that party waived conditions precedent to introduction of secondary evidence by introducing copy of contract evidencing transaction in question. Mullins v. Columbia County Bank [Ark.] 113 SW 206.

71. Otherwise it cannot be stricken out at close of testimony (Maryland, D. & V. R. Co. v. Brown [Md.] 71 A 1005), though incompetent (Culbertson v. Salinger [Iowa] 117 NW 6). Objection is properly overruled where not made till after question is answered. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Under Code, § 1058, when defendant is represented by counsel at taking of depositions, objection of want of proper notice comes too late if not made

otherwise it will usually be deemed waived.[72] The objections necessary to sa questions for review are treated elsewhere.[73] The effect of overruling an objecti to documentary evidence is to admit it.[74]

A motion to strike out evidence properly objected to which definitely sta the grounds [75] will lie as a remedy for an answer which is not responsive,[76] is bas on hearsay,[77] or is otherwise incompetent,[78] provided such motion raises no n issue.[79] While the trial judge, of his own motion, may strike out evidence,[80] action must not be based on the assumption that the testimony of any witness true.[81] It is not error to refuse to strike out evidence elicited by the movant and counsel should not be permitted, in the face of proper objection, to get i proper evidence before the jury and then escape the consequences of their acti by consenting that it be stricken from the record.[82] A witness improperly tes fying after a ruling should be cautioned and the jury admonished to disregard su testimony.[84] A document, received in evidence, subject to objection and not aft wards excluded, is considered in evidence.[85]

§ 4. *Custody and conduct of jury.*[86] See 10 C. L. 1905—While the court m excuse a juror for cause at any time before the introduction of evidence,[87] it h no power to discharge the jury in a civil action after the cause has been submitt except in case of necessity or by consent of the parties.[88] It is not improper the court in the presence of the jury to ask litigants if they will try the cause w a less number than the full jury.[89] A verdict is not invalidated by statements

till depositions are offered in evidence. Welch v. Lynch, 30 App. D. C. 122. Variance must be specifically pointed out at trial, since objection too late when made on appeal. Kellyville Coal Co. v. O'Connell, 134 Ill. App. 311.

**72.** Testimony not objected to will be considered as received by consent, and, if it is not irrelevant or immaterial, court errs in withdrawing it from jury. Western Union Tel. Co. v. Merritt, 55 Fla. 462, 46 S 1024. It is in discretion of the trial court to refuse to strike out incompetent evidence introduced without objection. Caldwell v. U. S. Exp. Co., 36 Pa. Super. Ct. 465. Party not objecting to evidence at time of its admission is not entitled to have it stricken out even though it be open to attack on proper grounds. Wilson v. Jernigan [Fla.] 49 S 44.

**73.** See Saving Questions for Review, 12 C. L. 1763.

**74.** Document being a decree. Bunting v. Powers [Iowa] 120 NW 679.

**75.** Motion to strike should definitely state grounds. Gaffney v. Mentele [S. D.] 119 NW 1030 (motion to strike should go only to that part which is inadmissible, motion to strike all was properly overruled where part admissible and part not). Fein v. Weir, 129 App. Div. 299, 114 NYS 426.

**76.** Stowers Furniture Co. v. Brake [Ala.] 48 S 89; Ross v. Ross [Iowa] 117 NW 1105; Elliff v. Oregon R. & Nav. Co. [Or.] 99 P 76; Chase v. Woodruff [Wis.] 120 NW 499. Answers not responsive may be excluded when contained in evidence at former trial introduced in evidence. Sherman Gas. & Elec. Co. v. Belden [Tex. Civ. App.] 115 SW 897.

**77.** Where fact of its being hearsay is disclosed on cross-examination. Greve v. Echo Oil Co. [Cal. App.] 96 P 904.

**78.** Ross v. Ross [Iowa] 117 NW 1105; Chase v. Woodruff [Wis.] 120 NW 499; Prager v. Glanzer, 110 NYS 981. Strik out of incompetent evidence is not m error by fact that it was afterwards r dered competent where no application made for reinstatement of such evide O'Mara v. Jensma [Iowa] 121 NW 518.

**79.** Motion to withdraw certain evide from jury, which motion raises a new is not in evidence, is properly overrul Knapp v. Brotherhood of Am. Yeon [Iowa] 117 NW 298.

**80.** On reconsidering after denying tion therefor. Gaebler v. Brooklyn Heig R. Co., 114 NYS 585.

**81.** Hill v. Aetna Life Ins. Co. [N. C.] SE 124.

**82.** Sims v. Sims, 131 Ga. 262, 62 SE Party will not be permitted to withdr over objection interrogatories which he voluntarily introduced. Alabama G. S. Co. v. Hardy, 131 Ga. 238, 62 SE 71.

**83.** Gandy v. Bissell's Estate [Neb.] NW 571.

**84.** United States Health & Acc. Ins. v. Jolly [Ky.] 118 SW 281.

**85.** Tax bill. German-American Bank Manning, 133 Mo. App. 294, 113 SW 25

**86. Search Note:** See notes in 16 L. R. 643; 42 Id. 268; 48 Id. 432; 11 L. R. A. (N. 178; 103 A. S. R. 589; 11 Ann. Cas. 1131.

See, also, Trial, Cent. Dig. §§ 719-7 Dec. Dig. §§ 297-317; 22 A. & E. Enc. P. P. 1053.

**87.** Quay v. Duluth, etc., R. Co., 153 M 567, 116 NW 1101.

**88.** Where record discloses no necess for such action beyond bare request plaintiff, and no consideration by court necessity for so doing, discharge is authorized and deprives court of furt jurisdiction and motion to dismiss act should be granted. Rau v. Risiden, 11 O C. C. (N. S.) 255. See Jury, 12 C. L.

**89.** Where it is last case of term, ot jurors have been discharged, and one

a juror to other jurors of extraneous matters which do not tend to prejudice them or influence their verdict.[90] It is highly improper for a juror to receive evidence except in open court,[91] to applaud an improper remark and a misstatement of the law by the trial judge,[92] or to accept a gratuity from a litigant,[93] or for the judge to confer with the foreman except in open court with all the jury present.[94] While it is the duty of litigants and their attorneys to keep away from jurors when out of the courtroom during trials and not to converse with them beyond the usual salutations of the day,[95] an incident not tinged with improper conduct on the part of the jurors is not admissible to impeach the verdict.[96] The reading of newspaper articles on the case by the jurors will not cause a verdict not influenced thereby[97] to be set aside.

*Allowing jury to take out papers.*[See 10 C. L. 1906]—What papers may be taken out by the jury is largely within the discretion of the court.[98]

*Allowance of a view.*[See 10 C. L. 1906]—A view is allowed in the discretion of the court,[99] in order that the knowledge gained thereby may aid the jury in testing the credibility of other evidence [1] or in the determination of value,[2] or may render the testimony more intelligible,[3] but a view does not authorize the jury to ignore physical facts or disregard settled rules of law,[4] and is of doubtful utility when conditions have changed.[5] The jury may be guilty of misconduct for viewing premises without order of the court,[6] or may cause a mistrial by receiving evi-

panel is sick. Crosby v. Seaboard Air Line R. Co., 81 S. C. 24, 61 SE 1064.

90. Statement that juror had had difficulties with party which were amicably settled or with which juror found no fault. Huntley v. Chicago, B. & Q. R. Co. [Iowa] 121 NW 377.

91. Held improper where plaintiff showed juror tally book and answered questions as to amounts, no witness having right to testify except in open court and juror no right to listen. Ironton Lumber Co. v. Wagner, 119 SW 197.

92. McKahan v. Baltimore & O. R. Co. [Pa.] 72 A 251.

93. As where juror is paid more than legal fees. In re Vanderbilt, 127 App. Div. 408, 111 NYS 558. Treating jurors is reversible misconduct, as where counsel for prevailing party treated them to cigars during trial and before they had retired. Steenburgh v. McRorie, 60 Misc. 510, 113 NYS 1118.

94. Irrespective of whether the verdict be affected thereby. Texas Midland R. Co. v. Byrd [Tex.] 115 SW 1163.

95. Austin v. Langlois, 81 Vt. 223, 69 A 739.

96. Shaking hands, talking and laughing with litigant or his attorney, is not such incident where it is not shown to have had any connection with case. Montgomery Trac. Co. v. Knabe [Ala.] 48 S 501. Associations of party with jury which are not prejudicial will not warrant reversal. State v. Clark [Mo. App.] 114 SW 536.

97. Held that reading of articles containing statement of matters on trial and before jury and statement that such case was similar to another in which $30,000 damages was allowed, such articles being published without knowledge or consent of plaintiff, court having not admonished jury thereon, was not sufficient ground for setting aside verdict. Texas & N. O. R. Co. v. Barwick [Tex. Civ. App.] 110 SW 953.

98. It is not error to permit the jury to take to the jury room the **pleadings** in the case. Cincinnati Gas & Elec. Co. v. Coffelder, 11 Ohio C. C. (N. S.) 289. Original petition not used in evidence should not be taken to jury room, nor is there any error in refusing to permit jury to take paper only part of which was admissible in evidence. Hall v. Cook [Tex. Civ. App.] 117 SW 449. **Documents** properly introduced in evidence may be taken out. Suiter v. Chicago, etc., R. Co. [Neb.] 121 NW 113; Phillips v. Chase, 201 Mass. 444, 87 NE 755; Dodwell v. Mound City Sawmill Co. [Ark.] 119 SW 262. Held that jury should have been allowed to take memorandum which was exhibit in case. Koosa & Co. v. Warten [Ala.] 48 S 544. Depositions may be taken to jury room. Id. Under Code Civ. Proc. 1944, jury may take **exhibits** to jury room and inspect them there with a magnifying glass. In re Thomas' Estate [Cal.] 101 P 798. Exhibits may be separated from deposition to which they are attached and sent to jury room. Blackburn v. Boston & N. St. R. Co., 201 Mass. 186, 87 NE 579.

99. Under Pub. St. 1901, c. 227, § 19. Lydston v. Rockingham County L. & P. Co. [N. H.] 70 A 385. Permissible. Ellis v. St. Louis, etc., R. Co., 131 Mo. App. 395, 111 SW 839. In action for damages. Danville & I. H. R. Co. v. Tidrick, 137 Ill. App. 553.

1. American States Sec. Co. v. Milwaukee N. R. Co. [Wis.] 120 NW 844.

2. Considered with other evidence in action for balance on building contract. Norcross Bros. Co. v. Vose, 199 Mass. 81, 85 NE 468.

4. Cunningham v. Frankfort [Me.] 70 A 441.

5. And caution is needed to prevent jury from being misled. Lydston v. Rockingham County L. & P. Co. [N. H.] 70 A 385.

6. Held misconduct where jury went to certain point to determine whether it was possible for witness to have made certain

dence while making a view.[7] A litigant is presumed to waive errors relative to a view to which he does not object.[8] No additional oath is required of the officer taking the jury to view the premises.[9]

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**Trover; Trust Companies; Trust Deeds,** see latest topical index.

**TRUSTS.**


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*The scope of this topic* is noted below.[10]

§ 1. *Definitions and distinctions.*[11]—See 10 C. L. 1907—A trust is a legal right in property held by one person for the benefit of another,[12] and must be distin-

observations as to which he swore. State Sec. Bank v. Burns [Iowa] 120 NW 626. Fact that juror visited premises does not warrant reversal when it is not shown that he did so for improper purpose, in prosecution for sodomy. State v. Gage [Iowa] 116 NW 596.

**7.** It was improper for defendant's servant to start and check car being viewed by jury to illustrate facility of its management in action for injuries to motorman resulting from improper equipment of car. Louisville R. Co. v. Hallahan [Ky.] 119 SW 200.

**8.** Plaintiff cannot after verdict complain of action of court in permitting view of premises at expense of defendant or of defendant's providing dinner for jury of which fact he had knowledge previous to such verdict, and fear that objection might tend to prejudice jury does not relieve one from making timely objection thereto. Shepherdson v. Clopine [Neb.] 120 NW 420.

**9.** Under Gen. St. 1901, § 4724. City of Emporia v. Juengling [Kan.] 96 P 850.

**10.** This article does not treat of trust deeds, so called, given as security for a debt, or, more accurately, security deeds with power of sale (see Mortgages, 12 C. L. 878; Chattel Mortgages, 11 C. L. 611; Foreclosure of Mortgages on land, 11 C. L. 1487), or of charitable gifts (see Charitable Gifts, 11 C. L. 604), or the construction of the trust as violating the laws of perpetuities and accumulations (see Perpetuities and Accumulations, 12 C. L. 1316). Trustees of bankrupts (see Bankruptcy, 11 C. L. 883), and of incompetents (see Infants, 12 C. L. 140; Insane Persons, 12 C. L. 205), are, also, elsewhere treated.

**11. Search Note:** See Trusts, Cent. Dig. §§ 1, 88, 139; Dec. Dig. §§ 1, 62, 91; 22 A. & E. Enc. L. (2ed.) 1162; 26 Id. 137; 28 Id. 858.

**12.** One cannot be trustee and beneficiary. Clark v. Sisters of Soc. of the Holy Child Jesus [Neb.] 117 NW 107. A trust, in its technical sense, is an obligation on a person arising out of confidence reposed in him to apply property faithfully and according to such confidence. Weitner v. Thurmond [Wyo.] 98 P 590. Where widow having only undivided half interest, other undivided half being in the children, executes deed to entire property, grantee does not become trustee of undivided half for children, since he

guished from cases where property is given absolutely but to be used for a particular purpose,[13] or as requested by the grantor,[14] and from other relations as principal and agent,[15] donor and donee,[16] debtor and creditor,[17] etc.

§ 2. *Express trusts.*[18] *Definition and elements.*[See 10 C. L. 1908]—While an express trust is frequently defined by statute,[19] it usually arises from an agreement of the parties fully setting forth the trust,[20] and executed with the intention of creating

never has legal title. Coe v. Sloan [Idaho] 100 P 354. Where property is deeded to creditor in payment of a debt, with understanding that he should sell same and account for surplus, trust arises to make sale, if possible, and to account for surplus. Weltner v. Thurmond [Wyo.] 98 P 590. Where will gave property in trust and provided that in certain contingency trustees should sell same and pay proceeds to certain college with instructions as to how it was to be used, held not to give to college in trust. Hasbranck v. Knoblauch, 130 App. Div. 378, 114 NYS 949. Agreement between husband and wife, reciting that all property held by them was joint property, and providing that, on death of either, it should go to survivor for life, and then to their respective heirs in equal portions, held in effect covenant to stand seised, and survivor cannot have same canceled as a cloud in absence of fraud or mistake. Robertson v. Robertson [Miss.] 47 S 675. Agreement to reconvey upon payment of borrowed money, and to allow cutting of firewood, held a secret trust. Bunker v. Manchester Real Estate & Mfg. Co. [N. H.] 71 A 866. Commissioners appointed under Sess. Laws 1907, p. 835, §§ 1, 2, 5, authorizing governor to appoint commission, whose duty it should be to close out the business of state dispensary by selling property, collecting debts due and "by paying from proceeds all just liabilities" held trustees for benefit of creditors. Murray v. Wilson Distilling Co. [C. C. A.] 164 F 1.

**13.** Deed to corporation organized for educational purposes, providing that land should be used for school purposes and that children of poor persons should be taught free, held not to create a trust. Clark v. Sisters of Soc. of the Holy Child Jesus [Neb.] 117 NW 107. Where wife bequeaths her separate property to her children, subject to obligation to furnish husband with necessities which is made a lien upon the property, held that no trust was created. Merchants' Nat. Bank v. Crist [Iowa] 118 NW 394.

**14.** Devise of residue of estate to executors "for their benefit," with a request that a part thereof be used for masses and charity, held to create no trust. In re O'Regan's Will, 117 NYS 96. Will devised all property to wife for life, remainder to children on her death, but provided that, if any daughter married, wife should give her $500 as a present and as dowry. Held not to create trust. Lesiur v. Sipherd [Neb.] 121 NW 104. Provision or suggestion in will that principal, after death of certain life beneficiaries, be paid to a college, to be invested in one fund known as the "B Fund," income to be applied as trustees of college thought best, held not to create trust. Hashrouck v. Knoblauch, 59 Misc. 99, 112 NYS 159.

**15.** Mere authority to collect claims due materialmen does not constitute one a trustee of an express trust so as to enable him to sue. Perry v. Swanner [N. C.] 63 SE 611.

**16.** Conveyance by father to son to assist in support of family held a gift, so far as other members of family are concerned, and not to create a resulting trust. Baker v. Baker [N. J. Eq.] 72 A 1000.

**17.** Writing held to create relation of creditor and debtor, and not a trust. Rice v. Crozier [Iowa] 117 NW 984.

**18. Search Note:** See notes in 6 C. L. 1739; 32 L. R. A. 373, 715; 2 L. R. A. (N. S.) 172; 7 Id. 1119; 9 Id. 758; 10 Id. 616; 11 Id. 331, 512, 520; 12 Id. 547; 34 A. S. R. 189; 49 Id. 128; 51 Id. 389; 64 Id. 634; 82 Id. 513; 115 A. S. R. 774; 2 Ann. Cas. 593; 3 Id. 588, 1010.

See, also, Trusts, Cent. Dig. §§ 1-87; Dec. Dig. §§ 1-61; 22 A. & E. Enc. L. (2ed.) 1162; 26 Id. 137; 28 Id. 865.

**19.** Where agreement is entered into between debtor, creditors and third persons, whereby, in consideration of forebearance to prosecute claims, debtor agreed to make certain payments to third persons, who were to distribute same to creditors, etc., held to create express trust within Code Civ. Proc. § 449, providing that person with whom contract is made for benefit of another is a trustee of an express trust. Heppenstall v. Baudouine, 60 Misc. 620, 113 NYS 840.

**20.** Stevens v. Fitzpatrick [Mo.] 118 SW 51. Where, pending suit relating to title to land, intervener sold his interest and agreed to prosecute suit to finish, he became trustee of express trust, and purchaser as real party in interest can recover on attachment bond. State v. Pitman, 131 Mo. App. 299, 111 SW 134. Decedent transferred certain personal property in trust, income to be paid to her during life and principal to be paid to grandchildren at her death, held that express executed trust was created, and property did not pass to decedent's executor. Harrod v. McComas [Kan.] 96 P 484. Where option to purchase is given for sole purpose of enabling optionee to offer same to a shoe company as inducement to locate in city, he becomes trustee for benefit of shoe company upon its election to locate. Boyden v. Hill, 198 Mass. 477, 85 NE 413. Where option of purchase is turned over under agreement that one-half of net profits resulting from purchase and sale should go to one turning same over, no trust in the land is created. MacDonald v. Dexter, 234 Ill. 517, 85 NE 209. Contract between defendant and B Co. licensed defendant to deal in articles involving inventions, and authorized him to assign rights to corporation approved by B. Co. Without such approval defendant assigned to N. Co., B. Co. refused to recognize N. Co. and N. Co. entered into contract with defendant, reassigning rights, defendant agreeing to furnish articles to N. Co. for sale. Defendant was unable to furnish all demanded, and sued B. Co. Held that contract was not held in trust by defendant for N. Co. so as to make him a trustee of amount recovered for N. Co. Daly v. Seaman, 130 App. Div. 432, 114 NYS 1089. Where financially embarrassed,

one.[21] An imperfect gift cannot be effectuated as a trust.[22] An executed trust is one wherein the scheme has been fully and completely declared at the outset by the trustor.[23]

*Declaring or creating the trust.* See 10 C. L. 1908—No technical language is necessary to create a trust but if it appears from the instrument that property was to be dealt with for the benefit of another,[24] the court will affix the character of a trust.[25] The instrument, however, must be definite and certain,[26] specify the property placed in trust,[27] transfer the legal title to the trustee,[28] designate the trustee [29] and the bene-

corporation transferred property to corporation formed for that purpose, under agreement with unsecured creditors that profits should go to them, the latter corporation held as trustee. Gill v. Bell's Knitting Mills, 128 App. Div. 691, 113 NYS 90. Where owners of equitable title conveyed same to one to hold in trust for certain purposes, and thereafter agreed that he should pay balance due holder of legal title and take legal title as security until he had made sufficient sales to reimburse himself and to pay off certain equitable owners, when he should reconvey the remainder, held that transaction was not merely a mortgage, but that title was held in trust for equitable owners. Perfumo v. Russell [Cal. App.] 101 P 24.

**21.** Where absolute deed is delivered to be held in trust and to be returned to grantor if demanded, and, if not demanded, to be recorded at grantor's death, under belief that it would then be effective, held not to create an express trust in land. Melvin v. Melvin [Cal. App.] 97 P 696. Bequest to a person of a sum of money to be divided among the kin of testator's mother as selected by devisee held to create no trust. Walter v. Walter, 60 Misc. 383, 113 NYS 465.

**22.** In re Ashman's Estate [Pa.] 72 A 899.

**23.** Deed of trust properly executed and delivered to trustee and accepted by him, which in express terms conveys legal title to him and charges him with duty of collecting rents, etc., and pay same to grantor during her life, and which provides that on her death he shall execute quitclaim deeds to named persons, held to create an executed trust (Miles v. Miles [Kan.] 96 P 481), and fact that legal title is not to be conveyed to beneficiaries until grantor's death or that grantor retained a beneficial interest during her life, do not render it executory (Id.).

**24.** Affixing term "trustee" to name of assignee of securities imports that he holds for benefit of another. Farrington v. Stucky [C. C. A.] 165 F 325. While intention to create trust must appear from language used, specific language declaratory of a trust is not necessary, nor is it necessary that title be expressly conveyed to trustee, since by implication he will take such title as is necessary to execute duties. Haywood v. Wachovia L. & T. Co., 149 N. C. 208, 62 SE 915. Words will be construed to create trust when possible, if necessary to effectuate testator's intent. Close v. Farmers' L. & T. Co., 195 N. Y. 92, 87 NE 1005. Executor cannot hold as trustee land devised for use of another, unless testator has expressly or impliedly created a trust or a trust is made necessary to carry out intentions. In re Buerstetta's Estate [Neb.] 119 NW 469. Will construed not to create trust. Id. Testator gave to wife in lieu of dower income from estate and provided that, on her death or remarriage, property should go to children. He gave all his property to wife, appointed executrix, and brother, appointed executor, in trust for payment of legacies specified. Held that valid trust was created. Doscher v. Wyckoff, 63 Misc. 414, 113 NYS 655.

**25.** Plaut v. Plaut, 80 Conn. 673, 70 A 52. Will held to create trust for benefit of unmarried daughters, although many precatory words were used. Id. Will giving share of testator's daughter to be invested by executors for her benefit, interest to be paid to her semiannually, held to create trust. Close v. Farmers' L. & T. Co., 195 N. Y. 92, 87 NE 1005. Where will creates trust situation and charges executrix with duty of executing same, she will be deemed a trustee, and takes such legal title as is necessary to carry out the provisions. Kemmerer v. Kemmerer, 233 Ill. 327, 84 NE 256. Codicil to will construed to give absolutely to son property placed in trust for him by will. Deppen's Trustee v. Deppen [Ky.] 117 SW 352. W. executed receipt reciting that he had received from H. 23,000 shares of capital stock of a corporation to be used * * * in procuring a paid in surplus fund for the corporation. Held that he took same as trustee. In re Halsey Elec. Generator Co., 163 F 118. Bank to administer estate, and to hold balance in trust until children reached majority. Harper v. Harper, 148 N. C. 453, 62 SE 553. Request in holographic will to certain bank "to be trustee of my children, advised by (four named persons)," followed by directions as to disposition of estate, etc., held to appoint declaration in writing by father that he gave son certain bonds, but not to be used until after father's death, held not to create trust, especially where father continued to treat bonds as own. In re Ashman's Estate [Pa.] 72 A 899.

**26.** Declaration of trust must be clear and unequivocal. In re Ashman's Estate [Pa.] 72 A 899. Under Comp. Laws, § 8839, trust must be fully expressed and clearly defined by the instrument creating it. Gilchrist v. Corliss [Mich.] 15 Det. Leg. N. 971, 118 NW 938. Where entire estate is bequeathed to named person, expressions; "Now, do as I told you, at the station when you left," and "Do for my children as I have said," referring to illigitimate children, held too indefinite to create a fidei commissum in favor of children. In re Bills' Will, 122 La. 539, 47 S 884. Must be reasonably certain as to property embraced, beneficiaries, and manner of execution. Crowley v. Crowley, 131 Mo. App. 178, 110 SW 1100.

**27.** Oral declaration of deceased just before death that he wanted wife to have all his property held too indefinite as to property. McCandless v. McCandless' Adm'rs, 33 Ky. L. R. 790, 111 SW 302. Declarations of intention to give certain bonds to plaintiff, and

ficiaries, or appoint some one to do so.[30] A consideration is usually required,[31] and the trust must be accepted by the trustee,[32] but need not be expressly accepted by the beneficiary if of a beneficial character.[33] When the instrument has been delivered [34] and the trust accepted, the legal title vests in the trustee,[35] and cannot thereafter be affected by any act of the grantor.[36] All contemporaneous papers must be considered together.[37] Where some tenants in common execute a trust agreement with the understanding that the others are to join therein, they are relieved by the failure of the others so to do.[38] Fraud vitiates a trust.[39]

*Spendthrift trusts.*See 10 C. L. 1909—Through the medium of a trust, a beneficial estate may be vested in one without the power of alienation [40] and beyond the reach of his creditors.[41] Where a spendthrift trust is created,[42] the trustee and beneficiary cannot by mutual agreement terminate the same.[43] Where, however, the trust has only the form of a spendthrift trust and vests the beneficiary with all the rights and incidents of ownership, creditors may reach the same.[44]

*Bank deposits in trust.*See 10 C. L. 1910—An ineffectual gift of bank deposit cannot be sustained as a trust in the absence of an intention to create a trust.[45]

fact that bonds were found in deceased's safety deposit box enclosed by rubber band with envelope, but not in it, bearing words "Belongs to G," plaintiff, held insufficient as declaration of trust. Gegan v. Union Trust Co., 129 App. Div. 184, 113 NYS 595.

28. Subject-matter of the trust must be transferred by owner to the trustee for the beneficial use of cestui que trust. Mahan v. Schroeder, 142 Ill. App. 538.

29. Provision that property be turned over to "the trustees of the Theosophical Society at Adyar, Madras, India, or wherever the Theosophical Society may be located," held void for uncertainty in designation of trustees. Korstrom v. Barnes, 167 F 216.

30. Where testatrix directed executors, in default of written directions left by her, to distribute a fund among such religious, charitable, and benevolent purposes, as "in their discretion shall be best and proper," held valid. In re Dulles' Estate, 218 Pa. 162, 67 A 49.

31. Naked promise by one without consideration to buy in own name, with own funds, and to hold in trust for another, is unenforcible in equity. Clallam Land & Inv. Co. v. Jackson [Wash.] 101 P 832.

32. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139.

33. A beneficial trust may be created without the knowledge of the beneficiary. City of Boston v. Turner, 201 Mass. 190, 87 NE 634.

34. Subsequent deed from grantor for same land, though to a different trustee, is admissible on issue of delivery. Mitchell v. Allen, 81 S. C. 340, 61 SE 1087.

35. Hall v. Hall [Va.] 63 SE 420.

36. Where deceased gave property in trust for children, such gift could not be affected by power of attorney thereafter given to trustee. Mollison v. Rittgers [Iowa] 118 NW 512.

37. Absolute deed from J. to R. and contemporaneous instrument executed by R., reciting that he received said premises to mortgage to pay off certain debts, held to show a trust. Cunningham v. Cunningham, 81 S. C. 506, 62 SE 845.

38. Appell v. Appell, 235 Ill. 27, 85 NE 205.

39. Evidence of existence of fidiciary relationship is admissible under general allegation of fraud. Bleyer v. Bleyer [Mo.] 117 SW 709. Evidence held to require finding that trust deeds were executed by grantor under false representation that it was a power of attorney. Id. Evidence held insufficient to show that trust was created to get possession of securities forcibly retained by father of settler. Crumlish v. Security Trust & Safe Deposit Co. [Del.] 68 A 388.

40. Mattison v. Mattison [Or.] 100 P 4.

41. Merchants' Nat. Bank v. Crist [Iowa] 118 NW 394.

42. Will creating trust estate, income payable to designated beneficiary during his life with provision that if he should attempt to alienate or anticipate the same, his interest should cease and income should be added to principal and paid to his heirs, held to create spendthrift trust, beneficiary having only an equitable life interest not within rule in Shelley's case. Nightingale v. Phillips [R. I.] 72 A 220. Trust, providing that income should be devoted to son's exclusive personal use, protected from any claim of his creditors and against any judicial process for his debts, and should not be liable for the "support, contracts, debts," etc., of son's wife, held an active spendthrift trust and not a special trust to prevent son's wife from sharing in estate and hence not terminated by divorce. Van Leer v. Van Leer, 221 Pa. 195, 70 A 716. Will placing property in trust, one-half of income to be paid to children for 10 years, other to be added to principal, one-half of principal to be paid to them at end of 10 years and balance at end of 20 years, held not to create spendthrift trust. Pearson v. Hanson, 230 Ill. 610, 82 NE 813.

43. Merchants' Nat. Bank v. Crist [Iowa] 118 NW 394.

44. In re Morgan's Estate [Pa.] 72 A 498. Where spendthrift trust in usual form is followed by provision that trustee should deed to such person as beneficiary should direct, which direction could be made at once, beneficiary's creditors could reach same. Id.

45. In re Hall's Estate [Cal.] 98 P 269. Evidence held insufficient to show intent. Id.

*Validity.*[See 10 C. L. 1910]—In some states, a trust may be created only for certain purposes [46] and must not be for the purpose of defrauding or delaying creditors.[47] The validity is usually tested by the law of the state where the trust is to take effect.[48] Where illegal trusts can be separated from the legal,[49] or the invalid portions from the valid,[50] the latter will be given effect if possible.[51] A mere reservation of power to revoke does not invalidate the trust.[52]

*Construction.*[See 10 C. L. 1910]—The construction of a deed of trust is a proper subject of equitable jurisdiction,[53] and it will be so construed as to give validity [54] and to effectuate the intention of the grantor [55] if possible. Where its terms are plain and unambiguous, the purpose and intent must be determined therefrom,[56] otherwise

46. While equity will never suffer a trust to lapse for want of a trustee, such trust by way of devise must be for a purpose authorized by St. 1898, § 2081. In re Adelman's Will [Wis.] 119 NW 929. Testator gave income of his estate to wife, and provided that on her death or remarriage property should go to children. He gave all his property to his wife and brother who were named as executors in trust to pay legacies. Held that valid trust was created under the statute of uses and trusts (1 Rev. St. [1st. Ed.] p. 2, c. 1, tit. 2, § 55, subd. 3). Doscher v. Wyckoff, 116 NYS 389. Under Civ. Code, tit. 4, §§ 847, 857, providing for what purposes an express trust may be created, trust to convey property to named persons after death of a life tenant is void. In re Leavitt [Cal. App.] 97 P 916. Where property was conveyed in trust to keep premises insured, pay taxes, to pay income to life tenant, and to convey to others at her death, the latter provision being void, only duties were to pay taxes, keep premises insured, and to collect and pay over rents. Id.

47. Conveyance in trust for benefit of third person, grantor and beneficiary intending thereby to shield it from imaginary liability under forged papers, there being in fact no such papers and beneficiary having no other debts, will not be held void under statute making deeds with intent to defraud creditors void. Criss v. Criss [W. Va.] 64 SE 905.

48. If will, directing trustees in certain events to sell property and give proceeds to certain college in New Jersey with directions as to how it should be used, be construed as creating trust in college, held that validity will be determined by laws of New Jersey and not by courts of New York construing will. Hasbrouck v. Knoblauch, 130 App. Div. 378, 114 NYS 949.

49. Where illegal trusts can be separated from legal and latter given effect without doing injustice or defeating that which maker might presumably have wished, the legal will be upheld. In re Buchner, 60 Misc. 287, 113 NYS 625.

50. Where will, given in trust for daughter during her life and then to her issue during minority, etc., was void as to latter beneficiaries as a perpetuity, trust held valid during lifetime of daughter. In re Wilcox, 194 N. Y. 288, 87 NE 497. Where it is apparent from whole will that it was testator's paramount purpose to secure to each child and his or her lineal descendants an equal share, provision, continuing trust in respect to one daughter's share after her death during lives of her children, will be rejected where in violation of statute against perpetuities. Lewine v. Gerardo, 60 Misc. 261, 112 NYS 192. Where will placed property in trust for use of E during life with provision that on his death it should be paid to his children in equal shares, unless some were infants, in which case it should be continued in trust, etc., held since it was testator's evident intent to give to children of E in equal shares, if provision continuing trust during minority be invalid, rest will be executed. Hardenberg v. McCarthy, 130 App. Div. 538, 114 NYS 1073. Where will created a complete and lawful trust, held not invalidated by a separable provision creating an invalid limitation over in event of a disconnected contingency. Schey v. Schey, 194 N. Y. 368, 87 NE 817.

51. In re McClellan's Estate, 221 Pa. 261, 70 A 737. Where an unascertainable part of a fund is given upon a void trust, and residue upon a valid trust, the whole fails. Van Syckel v. Johnson [N. J. Eq.] 70 A 657. Where property was placed in trust for 50 years for benefit of needy next of kin, held that void limitaion was integral part of scheme of distribution and rendered whole trust void. Walter v. Walter, 60 Misc. 383, 113 NYS 465.

52. Mere reservation of power to revoke does not invalidate trust where instrument otherwise manifests intent to divest declarant of her absolute control as owner or as cestui qus trust, during her life, and to deprive her of the rights of a beneficiary who has a power of disposition under the trust. McEvoy v. Boston Five Cents Sav. Bank, 201 Mass. 50, 87 NE 465.

53. Both at common law and under statute. Berger v. Butler [Ala.] 48 S 685.

54. Will, directing that proceeds of sale of real estate business, etc., be held in trust, income to be divided into three equal parts and disposed of in designated manner, construed as in effect three separate trusts, where necessary to give validity to will. Beatty v. Godwin, 127 App. Div. 98, 111 NYS 373. Trustee need not actually sever the trust fund in case of several trusts carved out of it, sufficing that each fund be made distinct, and each will be considered alone on question of legal suspension of absolute power of alienation. Post v. Bruere, 127 App. Div. 250, 111 NYS 51.

55. McNew v. Vert [Ind. App.] 86 NE 969.

56. Where testatrix provided that in certain contingency trustee should pay "all the aforesaid trust funds," mentioned in certain paragraphs to a named corporation, held that words "trust funds" meant trust estate and not trust moneys. Young v. Du Bois, 60 Misc. 381, 113 NYS 456.

surrounding facts and circumstances may be resorted to.[57] Where executor was directed to invest in a home for testator's daughter, etc., but took title under a deed specifying the trust without reference to the will, the land is held under the trust created by the deed and not by the will.[58] Where a trust depends upon an agreement between grantor and another, grantor's intention is immaterial.[59]

*Necessity of writing.* See 10 C. L. 1911—In most states an express trust must be expressed in writing.[60] Where parol trust is executed in the state where the land is situated and all the parties reside therein, its validity will be tested by the laws thereof.[61] A parol trust is sometimes merely nonenforcible and not void,[62] and hence need not be in writing if recognized by the trustee.[63] The statute of frauds is inapplicable to a fully executed trust,[64] and will not prevent the enforcement of a partly executed one where it would result in inequity.[65] Where a parol trust is enforcible, the evidence must be clear and specific.[66] Where a complaint alleges a trust agreement, it will be presumed to be in writing unless the contrary appears.[67] Independent of the statute of frauds, a parol trust cannot be ingrafted upon an absolute deed when inconsistent therewith.[68] A parol trust in personalty is usually valid.[69]

§ 3. *Implied trusts, generally.*[70] See 10 C. L. 1912—An implied trust is one which, without being expressed, is deducible from the nature of the transaction as a matter of intent,[71] and hence is frequently said to rest in agreement of the parties.[72] The

57. McNew v. Vert [Ind. App.] 86 NE 969. Where assignment of judgment does not state the purpose for which it was assigned, parol evidence is admissible to show a trust purpose. Ryan v. Logan County Bank [Ky.] 116 SW 1179.

58. Peavy v. Dure, 131 Ga. 104, 62 SE 47.

59. Michel v. Michel [Tex. Civ. App.] 115 SW 358.

60. Lancaster v. Springer, 239 Ill. 472, 88 NE 272; O'Briant v. O'Briant [Ala.] 49 S 317. Parol trust is **valid.** Gaylord v. Gaylord [N. C.] 63 SE 1028. Open question whether parol express trust is valid. Garrett v. Rutherford, 108 Va. 478, 62 SE 389. Oral agreement is insufficient, under Code Civ. Proc. § 1971, to establish express trust. Gerety v. O'Sheehan [Cal. App.] 99 P 545. Express trusts must be in writing under Rev. St. 1899, § 3416 (Ann. St. 1906, p. 1949), § 3417 being applicable only to trusts implied of law. Bosch v. Miller [Mo. App.] 118 SW 506. Constructive trust cannot be changed to an express trust by an oral declaration, under Civ. Code, § 852. Norton v. Bassett [Cal.] 97 P 894. Verified answer by trustee, under void oral trust setting out terms of trust and declaring an intention of executing same, held a declaration. Schumacher v. Draeger [Wis.] 119 NW 305.

61. In re Fisk [Conn.] 71 A 559.

62. In absence of fraud express trust cannot be established by parol. Amidon v. Snouffer [Iowa] 117 NW 44. Gen St. 1902, § 1089, providing that no action shall be maintained on agreement for sale of any interest in real estate, unless agreement is in writing, does not make parol trust void. In re Fisk [Conn.] 71 A 559. Code, § 2918, requiring declarations or creations of trusts to be executed in same manner as conveyances, does not make a parol trust void, but only prescribes the character of evidence necessary to establish same, and has no application where trust is admitted or has been executed. Johnston v. Jickling [Iowa] 119 NW 746. Complaint held to charge express trust, and hence, under Ballinger's Ann. Codes & St. § 4517 (Pierce's Code, § 4435), parol evidence is inadmissible to establish same. Spaulding v. Collins [Wash.] 99 P 306. Under Comp. Laws, § 9509, trust in land cannot be established by showing that it was deeded to defendant by complainant and wife under parol agreement to reconvey to complainant. Waldron v. Merrill, 154 Mich. 203, 15 Det. Leg. N. 708, 117 NW 631.

63. Where defendant admits that it purchased land of plaintiff at foreclosure under agreement to reconvey after selling sufficient to reimburse itself with commissions and that it intended to carry out agreement, court need not find a trust ex maleficio to authorize recovery by plaintiff. Hamnett v. Monongahela Trust Co. [Pa.] 72 A 512. That parol trust annexed to a deed absolute in form is void, does not render the deed void at the suit of an heir of grantor who has no other interest, since grantee may execute trust or may make a written declaration. Schumacher v. Draeger [Wis.] 119 NW 305.

64. Or admitted trust. Johnston v. Jickling [Iowa] 119 NW 746.

65. Mere continued possession by one claim under parol trust is insufficient part performance to take case out of statute. Spaulding v. Collins [Wash.] 99 P 306.

66. Conflicting testimony of witnesses held insufficient to establish trust in stocks. Dollar Sav. Fund & Trust Co. v. Union Trust Co. [Pa.] 72 A 558.

67. Hanson v. Svarverud [N. D.] 120 NW 550.

68. Gaylord v. Gaylord [N. C.] 63 SE 1028.

69. Crowley v. Crowley, 131 Mo. App. 178, 110 SW 1100; Carroll v. Woods, 132 Mo. App. 492, 111 SW 885.

70. **Search Note:** See notes in 58 L. R. A. 115; 106 A. S. R. 499; 5 Ann. Cas. 173; 7 Id. 295.

See, also, Trusts, Cent. Dig. §§ 88-138, 201, 202; Dec. Dig. §§ 62-90, 156; 15 A. & E. Enc. L. (2ed.) 1119.

71. Trust will be created by implication of law where necessary to effectuate the intent of testator. Haywood v. Wachovia L. & T.

common-law implied trust arising in favor of a grantor under a conveyance without consideration does not obtain where contrary to the intention of the parties.[78]

§ 4. *Constructive trusts. A. Trusts raised where property is held or obtained by fraud.*[74]—See 10 C. L. 1912—Constructive trusts are such as are raised in equity where property is fraudulently obtained,[75] or, acquired without fraud, it would be inequitable to allow holder of legal title to retain it.[76] Fraud is the prime element,[77] and a constructive trust usually arises where one occupying a fiduciary relation,[78] such as agent,[79] administrator or guardian,[80] spiritual advisor,[81] etc., to an-

Co., 149 N. C. 208, 62 SE 915. Where testator devised residue of property to his wife, followed by clause directing her to pay $500 to adopted daughter when she was 21, provided she was kind to her, held to raise an implied trust. Geisel's Estate v. Landwehr [Ind. App.] 88 NE 105.

72. Stevens v. Fitzpatrick [Mo.] 118 SW 51.

73. Absolute title is manifest. Gaylord v. Gaylord [N. C.] 63 SE 1028. Where deed recites a consideration or covenants to warrant and defend, thereby manifesting an intent to convey absolute title, trust in favor of grantor will not be implied from fact that no consideration was paid. Id.

74. **Search Note:** See notes in 6 C. L. 1745; 34 L. R. A. 532; 1 L. R. A. (N. S.) 312; 5 Id. 395; 8 Id. 628; 106 A. S. R. 94.

See, also, Trusts, Cent. Dig. §§ 139-161; Dec. Dig. §§ 91-111; 15 A. & E. Enc. L. (2ed.) 1196.

75. Where one obtains property by undue influence or duress, equity will raise a constructive trust. Morris v. Vyse, 154 Mich. 253, 15 Det. Leg. N. 722, 117 NW 639. Breach of confidence, which court of equity will consider fraud, is procurement of title by one with the consent of another on a fraudulent promise as to the disposition to be made thereof, and an attempted holding of title in violation of promise and a confidential relation is not necessary. Carr v. Craig, 138 Iowa, 526, 116 NW 720.

76. See separate subsec. B. Walker v. Bruce [Colo.] 97 P 250.

77. In view of statute of wills and frauds, equity will intervene to establish a constructive trust only to prevent fraud. Mead v. Robertson, 131 Mo. App. 185, 110 SW 1095. Where several persons conspire to defraud another out of his property and one secures legal title thereto, constructive trust may be enforced in action, to which all are parties. Gassert v. Strong [Mont.] 98 P 497. Where one having only a joint interest in a note secured by vendor's lien proceeds and forecloses the lien, his partner buying in the land and dividing the land between them, held that a trust arose in favor of other joint owner. Morris v. Smith [Tex. Civ. App.] 112 SW 130. Evidence held to sustain finding that canal properties bought at master's sale by defendant was for joint benefit of defendant and plaintiff, and hence plaintiff was entitled to accounting for one-half of money, bonds, and shares received by defendant therefor. Quirk v. Everett, 106 Minn. 474, 119 NW 63. Decedent posted notices of appropriation of water rights. Being without sufficient means, he interested defendants, and conveyed to them his rights with understanding that corporation should be formed and all rights conveyed to it. No corporation was formed and defendant individually acquired a contemplated lease of a canal and posted notices of appropriation covering substantially same right, held that defendants were trustees for partnership. (Beckwith v. Sheldon [Cal.] 97 P 867), and where lease was not definite as to rights conveyed thereby, evidence admissible of subsequent uses, etc. (Id.). First mortgagee obtained order directing sale and barring subsequent mortgagees. Third and fourth mortgagees assigned to second to procure stay of sale and to pay first mortgage, second mortgagee being unable to carry out intentions, purchased in good faith at sale under first mortgage. Held that she did not hold in trust for third and fourth mortgagees. Haag v. Baker [Kan.] 97 P 473. Where husband held in trust for sole benefit of wife and had no individual interest, agreement by wife with another to purchase at mortgage foreclosure and hold in trust, to refund to her the amount invested therein by her, is not such a fraud on husband as to prevent enforcement of a constructive trust as against such third person. Carr v. Craig, 138 Iowa, 526, 116 NW 720. Though agreement among three parties that, if any of them were awarded a city contract for removal of garbage, he should admit others to an equal share, made each the agent of the others, where one acquires contract, invests own capital and labor and assumes all risks, equity will not impress a trust. De Vita v. Loprete [N. J. Eq.] 72 A 1007. Where trust was within statute and must be maintained, if at all, as a constructive trust, held error to instruct that if grantor executed deed simply to vest legal title in grantee, intending to retain equitable title, it was trust property, etc. Henderson v. Murray [Minn.] 121 NW 214. Stakeholder of corporate stock, to be delivered to assignor if assignment is held invalid and to assignee if it is held valid, purchasing interest of either does not hold in trust for the other on his title being confirmed. Halman v. Burlen, 198 Mass. 494, 85 NE 167. Plaintiffs and defendant bought stock in corporation to be organized to operate mining claims and purchased option from one W. On discovering that W's option was unenforcible, defendant received back his money. Later he effected a compromise between W. and one holding valid option, and received 5,000 shares from W. for so doing, which were part of shares received by W. from corporation formed by optionees. All was done with knowledge of plaintiff, who took shares in new company in lieu of in proposed one. Held that defendant did not hold 5,000 shares in trust. Cranney v. McAllister [Utah] 101 P 985.

78. Where one joint optionee refused to contribute his share of advancement necessary to secure extension of option, held that there was no such fiduciary relation as to prevent the other from permitting option

other uses the knowledge or power so possessed to acquire land to the detriment of the latter.[82] Where the principal has ceased to negotiate for purchase,[83] or where the agent has fully performed his duties,[84] the latter may purchase. While a mere naked promise to purchase property for another does not make it a fraud to purchase in own right,[85] yet if a fiduciary relation exists,[86] or the promisee is induced thereby to refrain from acquiring the property for himself,[87] equity will raise a constructive trust. Likewise, a mere refusal to carry out a void parol trust is not fraud,[88] except where a confidential relation exists,[89] or the grantor has been induced [90] by fraud

to expire and securing a new one. Gaines v. Chew, 167 F 630. Agreement among persons interested in success of corporate enterprise looking toward the promotion thereof, held not to create fiduciary relation where they dealt at arm's length. Dobbins v. Peabody, 199 Mass. 141, 85 NE 102. Fiduciary relation between husband and wife is not sufficient to raise presumption of fraud. Mahan v. Schroeder, 236 Ill. 392, 86 NE 97. In action to establish a constructive trust in irregation enterprise, evidence held to show a fiduciary relation between defendants and decedent. Beckwith v. Sheldon [Cal.] 97 P 867. Where certain members of a lodge secured money from board of control under pretense that it was a loan, but bought property with it, such members will be considered trustees for the lodge. Hinsey v. Supreme Lodge K. of P., 138 Ill. App. 248.

79. Where agent purchases land in own name with own money, transaction will be regarded as a loan, and a resulting trust will arise. Schrager v. Cool, 221 Pa. 622, 70 A 889. Where one employed to negotiate a purchase acquires the property for himself, a trust will spring from the fraud. Id. Where agent to collect rents, pay taxes, insurance, etc., unbeknown to principal, hastens foreclosure of a mortgage and keeps principal in ignorance thereof, upon purchasing at foreclosure, he will be deemed trustee for principal. Enslen v. Allen [Ala.] 49 S 430. Under Civ. Code, §§ 2219, 2229, where agent purchasing bonds for principal, takes bonus stock in own name, he holds as trustee. Bone v. Hayes [Cal.] 99 P 172. Evidence that person selling bonds had stock to give as a bonus, that on same day that agent purchased bonds for principal he and his son received stock corresponding in amount seller was authorized to give with bonds, held to authorize finding that it was given as a bonus. Id.

80. Where administrator of an estate and guardian of minor children purchases at administrators sale, he will be held as a trustee thereof. Baker v. Lane [Ky.] 118 SW 963. Where administrator wrongfully takes possession of funds of complainant as estate property, and deposits it in a bank, administrator and bank are trustees in invitum. Peters v. Rhodes [Ala.] 47 S 183.

81. Where man, 70 years old, deeded land to spiritual advisor under promise by him to hold in trust and reconvey on demand, constructive trust will arise upon his refusal to keep promise. Henderson v. Murray [Minn.] 121 NW 214.

82. Where widow redeemed homestead from mortgage by buying at foreclosure and conveying a part thereof to mortgagee according to agreement, she will be held trustee of rest for children, she standing in a confidential relation to children as to homestead. Burel v. Baker [Ark.] 116 SW 181. Where husband, having money of wife in his possession, was directed by her to purchase real estate for her therewith, mere fact that unbeknown to her he gave his note therefor does not prevent trust arising in her favor, he having paid note with her money. Levy & Co. v. Mitchell [Tex. Civ. App.] 114 SW 172. Where mother, through fraudulent partition sale, acquired property of children at grossly inadequate price, held that she became trustee thereof. Markley v. Camden Safe Deposit & Trust Co. [N. J. Eq.] 69 A 1100.

83. Mackel v. Nolan [Cal. App.] 97 P 1128.

84. Where agent of vendor was directed by prospective purchaser to submit a specific offer and nothing more, which he did, and, when it was refused, agent's wife, with knowledge of all the facts, purchased same without giving prospective purchaser an opportunity to submit other offers, held that no constructive trust resulted. Rogers v. Genung [N. J. Eq.] 71 A 230.

85. Oral promise to purchase at foreclosure sale for benefit of another, and a refusal to convey to him, does not create a trust ex malificio, where promisee had no interest in land and paid no part of consideration. Lancaster Trust Co. v. Long, 220 Pa. 499, 69 A 993. Purchase, by one holding fiduciary relation to another, for himself of property, which it would have been to advantage of such other to have procured, is not fraudulent, although he had expressed intention to purchase for other, where latter did not part with anything in reliance thereon. Zeckendorf v. Steinfeld [Ariz.] 100 P 784.

86. Person under obligation to purchase and hold property for another cannot purchase in own right. Zeckendorf v. Steinfeld [Ariz.] 100 P 784. Where two agreed that either, as opportunity offered, should purchase certain stock to be equally divided between them, and one, having purchased the stock, holds it in trust. Sherman v. Herr, 220 Pa. 420, 69 A 899. Where surety agreed in certain contingencies to take property, operate mines, reimburse itself, and then reconvey, it cannot, by refusing to make agreed payments, cause property to be sold and purchase same in own right, and, if it does so, it becomes trustee ex malificio. Smith v. U. S. Fidelity & Guar. Co. [C. C. A.] 162 F 15.

87. Evidence held to show that defendant was permitted to acquire title at mortgage foreclosure, under parol agreement to refund to mortgagor amount she had invested. Carr v. Craig, 138 Iowa, 526, 116 NW 720.

88. Henderson v. Murray [Minn.] 121 NW 214.

89. Where land is conveyed to persons standing in confidential relation under oral promise to hold same in trust, refusal to do so is constructive fraud. Hansen v. Svar-

to convey under a parol trust, equity will usually intervene to give relief.[91] A constructive trust results where title is taken in the name of a third person without the knowledge of the person paying therefor.[92] The deposit of school funds by the treasurer in a private bank is not wrongful so as to create a trustee ex maleficio.[93]

(§ 4) *B. Trusts by equitable construction in the absence of fraud.*[94]—See 10 C. L. 1915—In the absence of actual fraud, equity will create a trust where necessary to prevent injustice.[95] One wrongfully acquiring the legal title to property,[96] or being vested with the same through mistake,[97] is generally held a trustee thereof for the one entitled to the same. An administrator or executor is ordinarily a trustee of the estate for the benefit of creditors.[98] In Missouri, a husband receiving and using money of his wife without her consent in writing, becomes a trustee of the property purchased.[99] A vendor under a contract for a deed, especially after receiving the money, is a trustee of the legal title for the purchaser.[1] Where life tenant converts person-

verud [N. D.] 120 NW 550. Bill alleging that parents deeded land to sons, relying upon the confidence imposed in them to fulfill their promise to hold same in trust for them during life, and upon parents' death to divide equally among all the children, held to state cause of action. Id. Where husband, through his wife's confidence in him, secures absolute deed coupled with a parol trust while she is sick and approaching the end, a trust ex malificio arises. In re Fisk [Conn.] 71 A 559.

**90.** Oral promise by heir to dispose of property in particular manner will result in a trust only when it induced ancestor to abstain from making will. Mead v. Robertson, 131 Mo. App. 185, 110 SW 1095. Conveyance on faith of parol agreement to hold for another creates an enforcible trust in favor of such person. Ryan v. Logan County Bank [Ky.] 116 SW 1179. Evidence held insufficient to show promise, heir being in adjoining room at time intestate was stating how he wished property disposed of, and it not appearing that she heard husband's promise to so dispose of property and acquiesced therein. Mead v. Robertson, 131 Mo. App. 185, 110 SW 1095. Finding in a will contest that the will was not vitiated by fraud or undue influence held not res adjudicata in a suit to establish a constructive trust on the ground that testator was induced to make will giving property to defendant by promises by defendant to give surplus income, etc., to his relatives. Smullin v. Wharton, 73 Neb. 667, 112 NW 622.

**91.** Where heir at law induces ancestor not to make a will by promises to distribute according to his wishes, constructive trust results. Mead v. Robertson, 131 Mo. App. 185, 110 SW 1095. Evidence held insufficient to show that deed from mother to daughter just prior to death was executed upon promise by daughter to execute mortgages thereon to her two sisters for their share. Licari v. McMonigle, 115 NYS 914.

**92.** If taken with his knowledge and consent, it is a resulting trust. Moultrie v. Wright [Cal.] 98 P 257. Evidence of knowledge and consent is admissible in action to impress trust as bearing on laches. Id.

**93.** Hansen v. Roush [Iowa] 116 NW 1061.

**94. Search Note:** See notes in 27 L. R. A. 468; 5 L. R. A. (N. S.) 112; 7 Id. 1094; 34 A. S. R. 194; 74 Id. 235; 2 Ann. Cas. 777.

See, also, Trusts, Cent. Dig. §§ 139-161; Dec. Dig. §§ 91-111; 15 A. & E. Enc. L. (2ed.) 1184.

**95.** Complainant purchased mineral rights from equitable owner and defendant purchased surface rights with full knowledge of complainant's purchase, and agreed to pay balance due to legal owner. In suit for specific performance by legal owner, defendant received commissioner's deed to entire land. Held that defendant was trustee of mineral rights for complainant. Steinman v. Jessee, 108 Va. 567, 62 SE 275. Sureties on note released mortgage indemnifying them under agreement that $75 of proceeds of sale he turned over to them to apply on note. Purchaser gave check for $75, which was given to one surety by cosuretles to give to payee. Surety deposited in a company's safe, intending to pay to payee later. Held that company held same in trust and could not apply to debt of maker. Elmer v. Campbell [Mo. App.] 117 SW 622.

**96.** Under Civ. Code, § 2224, providing that one gaining a thing by wrongful act is an involuntary trustee thereof, etc., grantee under deed by grantor, not possessing legal capacity to execute same, is an "involuntary trustee." Clapp v. Vatcher [Cal. App.] 99 P 549. Since action by executor for value of real estate deeded away by testator while of unsound mind is in nature of action for breach of trust, allegation of ownership by testator at time of death, and finding that sale made by defendant was made as trustee for testator, are not inconsistent. Id.

**97.** Where defendant, an employe, was directed to draw deed to himself for certain lots, and deed to plaintiff for others, and by mistake included in his deed lots intended for plaintiff, he becomes trustee for plaintiff and plaintiff may enfore trust, especially where his deed subsequently recorded also includes the lots. Lamb v. Schiefner, 129 App. Div. 684, 114 NYS 34.

**98.** Although executor is ordinarily trustee of estate for benefit of creditors, where creditor has lost right to subject property to claim as against devisee, she does not commit a breach of trust by purchasing as individual. Rivarg v. Patterson, 59 Misc. 263, 112 NYS 250.

**99.** Smith v. Settle, 128 Mo. App. 379, 107 SW 430.

**1.** Atteberry v. Burnett [Tex.] 113 SW 526. On his death it descends to his heirs charged with the trust. Id. Contract by owner to convey to named persons, provided they within a specified time should construct a certain railroad, creates a constructive trust.

alty into realty, he becomes a quasi trustee thereof for remainderman.[2] Where vendor reserved lien to secure purchase price note and died after transferring the note, his heirs hold legal title in trust for the holder of the note and for purchaser.[3]

The statute of frauds does not apply to constructive trusts,[4] but the parol evidence must be strong and convincing.[5]

§ 5. *Resulting trusts.*[6]—See 10 C. L. 1915—While resulting trusts are frequently defined by statute,[7] they generally arise where one party pays the consideration for a purchase and title is taken in the name of another.[8] There seems to be a conflict of authority as to where a resulting trust can be implied from a voluntary conveyance without consideration,[9] but such rule has no application to a conveyance of land held in trust subject thereto.[10] Resulting trusts arise by operation of law,[11] but will not prevail if contrary to the intention of the parties.[12] It is not necessary that

Lady Ensley Coal, Iron & R. Co. v. Gordon [Ala.] 46 S 983.

**2.** Small v. Hockinsmith [Ala.] 48 S 541. Where life tenant of personalty invests same in realty, remaindermen may elect to take realty, with any enhanced value, if rights of innocent third persons have not attached. Id.

**3.** Atteberry v. Burnett [Tex.] 113 SW 526.

**4.** Hanson v. Svarverud [N. D.] 120 NW 550. Parol evidence held admissible to show that defendant was allowed to purchase title at mortgage foreclosure under promise to refund to mortgagor money which she had invested. Carr v. Craig, 138 Iowa 526, 116 NW 720. Agreement of chief officer of lodge to purchase land for lodge but to take title in own name until he was reimbursed, and then to deed to lodge, held not within statute of frauds. Payne v. McClure Lodge No. 539 [Ky.] 115 SW 764. B. & C. Comp. § 797, providing that trust in real estate cannot be established by parol, is inapplicable where grantee sold lots under parol agreement to sell lots and after deducting an indebtedness account for balance. Kollock v. Bennett [Or.] 100 P 940. Gen. St. 1902, § 1089, providing that no action shall be maintained on an agreement for sale of any interest in real estate, unless in writing, does not render parol evidence incompetent to prove personal accountability arising upon sale of land held as trustee ex maleficio. In re Fisk [Conn.] 71 A 559. Constructive trust may be shown by parol in Illinois. Id.

**5.** See post, § 15.

**6. Search Note:** See notes in 6 L. R. A. (N. S.) 381; 12 Id. 493; 2 Ann. Cas. 667; 5 Id. 255; 9 Id. 249.

See, also, Trusts, Cent. Dig. §§ 88-138; Dec. Dig. §§ 62-90; 15 A. & E. Enc. L. (2ed.) 1124.

**7.** St. 1898, § 2077, providing that where grant is made to one and consideration paid by another no trust shall result, applies only to land and is inapplicable to a note secured by mortgage on land. In re Tobin's Estate [Wis.] 121 NW 144. Under Civ. Code, § 853, payment of part of consideration by one of land taken in name of another raises a presumption of a trust. Moultrie v. Wright [Cal.] 98 P 257. Under Comp. Laws, § 8835, no trust results where grant is made to, and consideration is paid by different persons. Waldron v. Merrill, 154 Mich. 203, 15 Det. Leg. N. 708, 117 NW 631.

**8.** Moultrie v. Wright [Cal.] 98 P 257; Walker v. Bruce [Colo.] 97 P 250; Amidon v. Snouffer [Iowa] 117 NW 44; Turpin v. Miles, 108 Md. 678, 71 A 440; Stevens v. Fitzpatrick [Mo.] 118 SW 51; H. B. Claflin Co. v. King [Fla.] 48 S 37. Where husband paid entire consideration for land with pension money and had title conveyed to wife for his benefit, resulting trust arises, and land is exempted. Ratliff v. Elwell [Iowa] 119 NW 740. Bill by testatrix alleging that testator paid entire consideration for land, deed of which was taken in name of another, from whom defendant acquired title with knowledge of all the facts, held sufficient to show resulting trust. Howe v. Howe, 199 Mass. 593, 85 NE 945. Woman living in meretricious relation with a man at time land was purchased and taken in his name, to establish a resulting trust, must show that she contributed to purchase price, and deals after purchase cannot create resulting trust. Hayworth v. Williams [Tex.] 116 SW 43. Woman living in meretricious relations with a man may establish a resulting trust by showing that they had worked together to a common purpose and that land was purchased with funds accummulated thereby. Id. Where one member of mining partnership negotiated purchase of mining property which partnership was leasing, and paid own money therefor but took title in partner's name, it being their intention to form corporation and convey to it, held that resulting trust arose. Walker v. Bruce [Colo.] 97 P 250. Where one party furnished the money and another bought the property, having it conveyed in the name of party who furnished the money, held that evidence showed that first party held title as security and as trustee. Thompson v. Thompson, 136 Ill. App. 28.

**9.** Where grantee in duly recorded deed knew nothing thereof, paid nothing therefor, and claims no title therein, he holds legal title in trust for grantor. Lewright v. Davis [Tex. Civ. App.] 115 SW 599.

**10.** Howe v. Howe, 199 Mass. 598, 85 NE 945.

**11.** Resulting trust does not arise from agreement but is implied of law. Stevens v. Fitzpatrick [Mo.] 118 SW 51; Pittock v. Pittock [Idaho] 98 P 719.

**12.** German v. Heath [Iowa] 116 NW 1051. Agreement of parties that one taking title shall hold in trust for fellow contributor is admissible to show intention. Moultrie v. Wright [Cal.] 98 P 257. Where wife, after insanity of husband, completed payments under contract for deed held by husband, fact that she had deed made to husband held to negative intention to claim interest because of payments. German v. Heath [Iowa] 116 NW 1051.

**13.** Not necessary, under Civ. Code, § 853.

the beneficiary should have paid the entire consideration, but a trust will result pro tanto.[13] One claiming a trust must have been the owner of the money at the time of purchase,[14] and no trust arises from the fact that he loaned the money to the one taking the legal title.[15] A void parol express trust does not prevent a resulting trust from arising.[16] A resulting trust is not affected by a sale by trustee for the benefit of creditors of legal owner, where only the interest of the legal holder is sold.[17]

The statute of frauds is inapplicable to resulting trusts,[18] and, hence, they may be established by parol evidence.[19] A resulting trust rests upon presumption and is open to rebuttal.[20]

*Presumption of gift or advancement.* See 10 C. L. 1917—Resulting trusts being based upon the improbability of a gift of the consideration to a stranger,[21] the presumption of a trust does not arise between persons of close relations,[22] but a gift is rather presumed.[23] The presumption of a gift, however, is rebuttable.[24]

§ 6. *The beneficiary.*[25] *Who may be.* See 10 C. L. 1918—An unincorporated voluntary association may be a beneficiary.[26]

that one claiming resulting trust should have paid entire purchase price. Gerety v. O'Sheehan [Cal. App.] 99 P 545. Where several contribute to purchase of farm, and title is taken in name of one, resulting trust arises. Baker v. Baker [N. J. Eq.] 72 A 1000. Where land purchased at $3,500 was paid for by $2,000 in cash and purchase price mortgage for $1,500, plaintiff contributing $600 and defendant $1,400 of the $2,000, held that plaintiff had a three-tenth's interest, subject to a lien for same portion of mortgage indebtedness. Gerety v. O'Sheehan [Cal. App.] 99 P 545.

**14.** Martin v. New York & St. L. Min. & Mfg. Co. [C. C. A.] 165 F 398. Immaterial that money was borrowed from person who took title. Howe v. Howe, 199 Mass. 598, 85 NE 945.

**15.** Evidence held to show a loan and, hence, no resulting trust from the use thereof. Martin v. New York & St. L. Min. & Mfg. Co. [C. C. A.] 165 F 398; Stevenson v. Haynes [Mo.] 119 SW 346.

**16.** Gerety v. O'Sheehan [Cal. App.] 99 P 545.

**17.** Turpin v. Miles, 108 Md. 678, 71 A 440. Resulting trust cannot be established upon exceptions to sale by the trustee for benefit of creditors of holder of legal title. Id.

**18.** Thompson v. Thompson, 136 Ill. App. 28; Walker v. Bruce [Colo.] 97 P 250; Pittock v. Pittock [Idaho] 98 P 719; Baker v. Baker [N. J. Eq.] 72 A 1000. Oral agreement by two to stake out mining claim, and to acquire title in name of one for benefit of both when executed, creates trust in nature of a resulting trust and is not within statute of frauds. Hendrichs v. Morgan [C. C. A.] 167 F 106. Under Rev. Laws, c. 147, § 1, declaring that no trust concerning land, except such as may result by implication of law, shall be declared unless by instrument in writing, a resulting trust may be established by parol. Howe v. Howe, 199 Mass. 598, 85 NE 945.

**19.** Turpin v. Miles, 108 Md. 678, 71 A 440; Amidon v. Snouffer [Iowa] 117 NW 44; Moultrie v. Wright [Cal.] 98 P 257; Pittock v. Pittock [Idaho] 98 P 719. Facts, which, if admitted, would give rise to an implied or resulting trust, may be proved orally. Schrager v. Cool, 221 Pa. 622, 70 A 889.

**20.** Where the owner of land conveyed same in payment of debt to person named by creditors, and the creditors took from such person a judgment note and cash, held that no resulting trust was created in the land in favor of creditors. Lutz v. Matthews, 37 Pa. Super. Ct. 354.

**21.** Because of improbability of a gift to a stranger, law implies that one who holds title without having paid any value for it a trustee for person who in fact paid the price. Howe v. Howe, 199 Mass. 598, 85 NE 945.

**22.** Presumption of trust does not arise between husband and wife. Herbert v. Alvord [N. J. Eq.] 72 A 946. Where husband purchases property and has it conveyed to wife or expends money in improving her property, it will not be presumed that he intended to create trust. Hamby v. Brooks [Ark.] 111 SW 277.

**23.** Where property is deeded to daughter or granddaughter, a gift is presumed. Derry v. Fielder [Mo.] 115 SW 412. Where, upon partition between heirs, husband of one paid some of the owelty money for his wife to equalize partition, it will be presumed a gift. Sprinkle v. Spainhour, 149 N. C. 223, 62 SE 910. Husband purchased land belonging to estate of wife's father and gave notes therefore, taking bond for a deed. Notes were paid partly by money borrowed and partly with wife's distributive share, title being taken in husband's name. He sold enough to pay off loans. Held that wife had no resulting trust in remainder, transaction amounting to gift or loan. Stokes v. Clark, 131 Ga. 583, 62 SE 1028. Where husband purchases land and has title taken in name of wife, a gift is presumed. Poole v. Oliver [Ark.] 117 SW 747. Use and occupancy by husband is consistent with gift. Id.

**24.** Poole v. Oliver [Ark.] 117 SW 747. Where conveyance by a trustee in a resulting trust to son of beneficiary is made at time when son is of middle age and living away from home, and beneficiary has children at home, presumption is of little weight. Howe v. Howe, 199 Mass. 598, 85 NE 945. Evidence held to sustain finding that son took as trustee. Id.

**25. Search Note:** See notes in 6 C. L. 1749. See, also, Trusts, Cent. Dig. §§ 162-199;

*His estate, rights and interest.*[See 10 C. L. 1918]—Except where executed by the statute of uses,[27] the beneficiary takes only an equitable estate, the quantum and character thereof being measured by the terms of the instrument creating the same.[28] The beneficial interest may be made to shift upon the happening of designated contingencies.[29] The rule in Shelley's Case is applicable to trusts.[30] Where life ten-

Dec. Dig. §§ 112-154; 28 A. & E. Enc. L. (2ed.) 1100.

26. Tribe of Indians. Ruddick v. Albertson [Cal.] 98 P 1045.

27. See post, this section.

28. Conveyance in trust for use, etc., of one M. T. during her natural life, and afterwards in trust for use of F. M. T. until he should arrive at full age, to receive same absolutely if M. T. dies during his minority, but if M. T. should survive his minority, then in trust to make over and dispose to F. M. T. absolutely, held that F. M. T. took absolute fee on coming of age. Mitchell v. Allen, 81 S. C. 340, 61 SE 1087. Under deed to F. in trust, for use of L. A. & E. in fee and to survivors of them, "provided, however, that if said A. or E. shall die leaving issue then to use of such issue, who shall take same per stirpes and not per capita," word "issue" includes grandchildren, so that under rule in Shelley's Case fee would not, on death of L., vest absolutely in A. and E. but on death of either use shifts to issue. Campbell v. Cronly [N. C.] 64 SE 213. Decree distributing residuary estate to trustee "in trust to manage, control, and care for said property and accumulations thereof" until youngest surviving child of testator should reach majority, and then to go one-third to widow, etc., held to decree a vested estate in remainder in widow, which descended to heirs, notwithstanding Civ. Code, § 863, providing that whole estate vests in trustee, which means estate necessary to execute trusts. Keating v. Smith [Cal.] 97 P 300. Where land was conveyed to trustee to collect rents, etc., and pay them to beneficiary for life, and to convey to her appointee by will or, in default of appointment, to her heirs, beneficiary took only an equitable life estate. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139. Deed of land to F. in trust to and for sole use of a wife for life, remainder to the husband and his heirs forever, held to create an equitable life estate in the wife and equitable remainder in husband after termination of wife's estate. Dunkerson v. Goldberg [C. C. A.] 162 F 120. Where wife gave her real and personal property in trust for benefit of her husband by instrument which contained provisions usual to spendthrift trusts with additional provision that trustee should convey property to any person designated by husband, he takes fee. In re Morgan's Estate [Pa.] 72 A 500. Where will directed executors to form trust fund and to pay to widow the interest on $40,000, during life, held that widow became entitled to interest immediately upon testator's death, but same was not payable for one year. Doherty v. Grady [Me.] 72 A 869. Where testator bequeathed to son the occupancy, use, rents and profits of land and to protection appointed two trusts with power to do whatever they deemed best to secure to son full enjoyment thereof, son is entitled to possession and rents and profits except such as is necessary to preserve property, but if he does not occupy or commits waste trustees are entitled to control same to secure son the benefits thereof. Mattison v. Mattison [Or.] 100 P 4. Deed to one as trustee for "the heirs of his body" held to create trust for such children as he had at time of execution of deed. Turner v. Barber, 131 Ga. 444, 62 SE 587. Will expressed desire that testator's children by first and second wife should ultimately share alike in property and provided that if wife did not so divide surplus income as to effectuate such desire trustees should do so out of a special fund. Held that no special provision should be made by trustees where one of children died and mother inherited share. Harris v. Harris' Estate [Vt.] 72 A 912. Where will, creating trust, provided that it was to continue during natural life of widow, provision, that if she married she was to get the same interest as if he had died intestate, construed not to give her such interest absolutely, but in the trust as a trust. In re Horn's Estate [Pa.] 72 A 791. Fact that life estate of wife may be converted into a trust by her marriage does not prevent present vesting of remainder in children. Carter v. Carter, 234 Ill. 507, 85 NE 292. Testator gave money in trust, a certain amount of income to be paid daughters during life, any surplus after death of either to be paid to designated charities, and on death of daughters, to their children. Held that surplus income during life of daughters should go to them. In re Ferguson's Estate [Pa.] 72 A 896. Words "their heirs at law," in deed directing a trustee to pay rents to decedent and his wife Ellen, and at the death of the survivor to convey to their heirs at law, means heirs of decedent and such wife and not heirs of survivor. Crandall v. Ahern, 200 Mass. 77, 85 NE 886. Will giving property in trust, income to be used for benefit of testatrix's son N and wife during their life, principal to be paid at their death to "their three children," construed to give principal to testatrix's three grandchildren, by other children it appearing that N and wife had no children which testatrix well knew. Polsey v. Newton, 199 Mass. 85 NE 574. Opinion filed and judgment entered in supreme court, February 6, 1909, amended and corrected so as to make defendant's support payable out of corpus as well as income. Smullen v. Wharton [Neb.] 121 NW 441.

29. Under deed to F. in trust, to hold for use of L. A. and E. in fee, "and to the survivors of them," upon death of one by way of shifting use, entire interest vests in other two, without right of survivorship between them. Campbell v. Cronly [N. C.] 64 SE 213. Deed, quit claiming to S, his heirs and assigns, habendum to S. for life, remainder to such of his children as arrived at age of 21, their heirs and assigns, to their use forever, held to create shifting use, fee vesting in S. for his use during life and then for use of such children as attained the age of 21, and when that class became determined, fee shifted to them under statute of uses (Simonds v. Simonds, 199 Mass. 552, 85 NE

ant is given the right of occupancy instead of receiving the income, the right to the income does not cease until occupation privilege is exercised and when once exercised [31] is not irrevocable. Judicial determination of the amount a widow is entitled to under a provision giving to her so much of income and corpus as is necessary for her support has the same effect as if written in will creating the trust.[32] Where one deposits his own money in savings bank in trust for children but does not deliver bank book, he retains ownership and children are only entitled to amount remaining at his death.[33] A trust for maintenance of wife and children, made for evident purpose of supporting family, should be construed as vesting a life estate in wife with remainder in children.[34] Possible beneficiaries in the event of the exercise of a discretionary power of appointment have no interest until such power is exercised in their favor.[35] A trust may be made to take effect in the future.[36] Where beneficiary of life use of income has power to dispose of trust estate by will, a residuary bequest or devise is an execution of the power.[37]

*Statute of uses.* See 10 C. L. 1919—The statute of uses executes a dry or passive trust [38] and vests the legal title in the beneficiary.[39] Before the statute of uses can operate there must be a beneficiary in being to receive,[40] and, where the beneficiaries are infants, the statute will not ordinarily operate although the trustee is not in terms charged with any active duties.[41]

860), and such construction held not at variance with rule that a limitation is to be construed as a remainder and not as an executory devise, if possible, even if such rule applies to springing and shifting use (Id.).

30. Where land was conveyed to trustee to collect rent, etc., and pay same to beneficiary for life, and to convey to her appointee by will or, in default of appointment, to her heirs, beneficiary took equitable fee under rule in Shelley's Case. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139.

31. Cashmon v. Bangs, 200 Mass. 498, 86 NE 932.

32. Judicial determination of amount widow is annually entitled to takes effect as if written in will, and widow is entitled to back balances. Smullen v. Wharton [Neb.] 119 NW 773.

33. In re Bartey's Estate, 114 NYS 725.

34. Rather than a joint equal interest, which would exclude afterborn children. Talley v. Ferguson [W. Va.] 62 SE 456.

35. In re Keene's Estate, 221 Pa. 201, 70 A 706.

36. Where will directed that upon youngest child coming of age, property in trust should be divided equally between the widow and children, but by codicil it was provided that in case widow survived minority of youngest child and remained unmarried, $30,000 should be set aside for her use before division, held that trust in $30,000 was not to come into existence until contingency happened. Norton Trust Co. v. Sands, 195 N. Y. 28, 87 NE 783.

37. Howland v. Parker, 200 Mass. 204, 86 NE 287.

38. **Held dry trust:** That testator directed trustee to "permit" testator's daughter to use and occupy land does not indicate that any duty is to be performed by trustee so as to prevent operation of statute of uses. Breeden v. Moore [S. C.] 64 SE 604.

**Held active trusts:** Where trustee is required to convey upon happening of a certain event. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139. Where land was deeded to trustee to collect rents, etc., and pay them to beneficiary for life and to convey to her appointee by will. Id. Patent rights may be put in trust for those interested therein, without power in trustee to sell. McDuffee v. Hestonville, etc., R. Co. [C. C. A.] 162 F 36. Devise to executors in trust, income to be paid to designated persons during their lives, corpus to their children if they die leaving any, if not, to other designated persons. Breidenbach v. Walter's Ex'rs [Ky.] 119 SW 204. Where trust authorized trustee to sell any time she thought best and invested her with absolute control. Nunn v. Peak [Ky.] 113 SW 493.

39. Employment of additional words "to the use of him and his heirs," in a deed to a named person and his heirs, to the use of him and his heirs, held to have no particular meaning since statute of uses executed the use. Brown v. Reeder, 108 Md. 653, 71 A 417. Where conveyance is made to one for use of another during life and after his death to use of another, under St. 1898, § 2073, legal title vests in first usee for life with remainder in second usee. Schumacher v. Draeger [Wis.] 119 NW 305. Under Rev. St. (1st. Ed.) p. 728, pt. 2, c. 1, tit. 2, § 49, providing that, if land is conveyed to one in trust for another, no state or interest shall vest in trustee, conveyance in trust for wife during her natural life vests a life estate in her. Scheer v. Long Island R. Co., 121 App. Div. 267, 111 NYS 569. Where trustee's deed only purports to convey interest of one trustee, there is no constructive trust in favor of which others could not be executed by statute of uses. Dunkerson v. Goldberg [C. C. A.] 162 F 120.

40. Where trustee was to convey to appointee by will of beneficiary, having an equitable life estate therein, statute cannot operate until death of such beneficiary. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139.

41. Turner v. Barber, 131 Ga. 444, 62 SE 587.

*Rights between beneficiaries.*[See 10 C. L. 1919]—Where beneficiaries have not been guilty of any fraud or unfair dealings,[42] they may ordinarily invoke an equitable division of their property according to their interests.[43] Where, in settlement of partnership affairs, one partner took a specified sum for his share, presumptively it included a trust interest in land held by the other.[44]

*Income and principal.*[See 10 C. L. 1919]—As to what constitutes income and what principal depends largely upon the character of trust estate.[45] Where bonds above par are a part of the original trust funds, the entire interest should be treated as income,[46] but where they are purchased with trust funds, a deduction from the interest must be made for depreciation in value of the bonds as they approach maturity.[47] Trust provisions for maintenance,[48] or awarding income to one and corpus to another,[49] are usually construed to take effect as of testator's death.[50] As to what expenditures are chargeable to income and what to corpus, where they are payable to different persons, depends largely the nature of the trust estate,[51] but ordinarily succession or transfer taxes are chargeable to the principal,[52] while current taxes are payable from the income,[53] unless the instrument creating the trust otherwise provides.[54] The cost of maintaining and preserving the corpus is also generally chargeable to the income,[55] but, where unproductive property is withheld from the market for the sole benefit of the remainderman, it must be charged to the

**42.** Where principal creditors spent large sums of money in preserving property in trust for all creditors, and finally, by conveyance to another trustee, excluded minor creditors, who apparently abandoned their rights therein, held that principal creditors were not guilty of such moral fraud as to defeat equitable suit by them for division. Seibel v. Higham [Mo.] 115 SW 987.

**43.** B. holding legal title in trust for himself, H. M. and S. equally, executed deed for delivery to grantee holding option and placed same in escrow. Option was not exercised. After B's death, H. secretly obtained deed and optionee quitclaimed to M., and upon sale to corporation, H. and M. received money. Held that S. and B's. heirs and corporation were on equal footing and on equitable division corporation must account for profits but is entitled to benefit of improvements. Seibel v. Higham [Mo.] 115 SW 987.

**44.** Strong evidence is required to overcome presumption. Burrows v. Williams [Wash.] 100 P 340.

**45.** In determining whether distribution of accumulated profits of joint stock company should be treated as income or principal, company must be treated as if it were a true corporation. Bishop v. Bishop [Conn.] 71 A 583. Ordinarily, one entitled to income of trust funds invested in stock is entitled only to dividends in nature of cash dividends, not including those in process of liquidation or deduction of capital. Id. "Cash dividends" include all distribution of surplus assets of corporation made pro rata to share holders through dividend declarations, whereby such surplus is separated from capital of corporation and becomes property of shareholder. Id. Stock issued by corporation under declaration of stock dividend is principal, and not income. Id. Where testator held bonds with interest coupons attached, upon which there was accrued interest at time of death, but it was not due and payable until thereafter, such interest must be considered income, and not principal. Union Safe Deposit & Trust Co. v. Dudley [Me.] 72 A 166. In giving certain beneficaries the life use of stocks, expressions "increase, income, profits and interest," "income," "income and profits," "net income, profits and interest," etc., held to mean income as distinct from principal. Bishop v. Bishop [Conn.] 71 A 583.

**46, 47.** Ballatin v. Young [N. J. Eq.] 70 A 668.

**48.** Fact that trust charged with maintenance is created out of residue, and hence not ascertainable until estate is administered, does not defeat beneficiary's right to income from testator's death when trust has been determined. In re Harris, 61 Misc. 563, 116 NYS 270.

**49.** Bishop v. Bishop [Conn.] 71 A 583.

**50.** Where a part of residue of estate was to constitute a trust, income to be devoted to maintenance of daughter, held that trust fund should be computed on net principal of estate, and executors should pay to themselves as trustees such part of income as bore to whole income the same proportion as trust fund bore to entire net principal. In re Harris, 61 Misc. 563, 116 NYS 270.

**51.** Where income is to be paid to one for life and remainder to another, life tenant is not entitled to the increase of the fund through good investment. Letcher's Trustee v. German Nat. Bank [Ky.] 119 SW 236.

**52.** In re Bass, 57 Misc. 531, 109 NYS 1084; Bishop v. Bishop [Conn.] 71 A 583.

**53.** Bishop v. Bishop [Conn.] 71 A 583.

**54.** Where use of house and lot was devised to one and taxes expressly made payable out of income of estate, transfer tax held payable from income of residue. In re Bass, 57 Misc. 531, 109 NYS 1084.

**55.** Attorney's fees and expenses incurred in management of a trust estate should be paid out of income, where will creating trust shows an intention to preserve principal intact. In re Brownell, 60 Misc. 52, 112 NYS 597.

corpus.[56] Where the trustee erroneously pays out a part of the principal as income, he is personally liable to the remainderman,[57] and may retain from income erroneously withheld as corpus enough to indemnify himself.[58]

*Rights of creditors and grantees.* See 16 C. L. 1919—Unless limited by statute [59] or the instrument creating the trust, the beneficial interest of the beneficiary is ordinarily alienable.[60] Where, however, an estate is placed in trust for the "maintenance of a family," none of the beneficiaries has any distinct and separable interest of an alienable character.[61] A beneficiary can only alienate or incumber his own interest, whatever that may be.[62] While the rights of creditors are frequently prescribed by statute,[63] they can have no greater rights than the beneficiary has.[64] In New York a beneficiary of the income from personal property in trust cannot transfer the same,[65] except that, where the beneficiary is entitled to a remainder in the whole or in part of principal sum subject to a trust estate, he may release his interest, thus merging his interest in the remainder.[66] An assignment of income takes effect as between assignee and trustee from the date of giving notice to the trustee.[67] The recordation of an instrument as a mortgage on realty, when in fact it is a mere assignment of funds in the hands of a trustee, does not give constructive notice of the assignment.[68]

*Application of statute of limitations to beneficiaries.* See 10 C. L. 1920—Where the legal title is vested in the trustee, adverse possession [69] barring the trustee will bar the benficiaries.[70]

The statute of limitations does not commence to run in favor of a voluntary trustee until he repudiates the trust [71] and knowledge thereof is brought home to

**56.** In re Coombs, 62 Misc. 597, 116 NYS 1129.

**57.** Bogard v. Planters' Bank & Trust Co. [Ky.] 112 SW 872.

**58.** Ballantine v. Young [N. J. Eq.] 70 A 668.

**59.** Under Personal Property Law (Laws 1897, p. 508, c. 417), § 3, as amended by Laws 1903, p. 239, c. 87, beneficiary, having only an interest in income, cannot transfer same, but one having a vested interest in the fund itself may do so, and, hence, his creditors may reach same. Bergmann v. Lord, 194 N. Y. 70, 86 NE 828. Under Personal Property Law (Laws 1897, p. 508, c. 417), § 3, and Real Property Law (Laws 1896 p,. 572, c. 547), § 83, held that beneficiary of income of trust estate could not give power of attorney to creditor to collect income. Seely v. Fletcher, 117 NYS 86.

**60.** Beneficial interest, reserved in settler of a trust made in contemplation of marriage, may be alienated. Newton v. Hunt, 59 Misc. 633, 112 NYS 573. Mortgage of share to which mortgagors might become entitled to under trust deeds and "as beneficial owners" held to cover interest. Newton v. Hunt, 59 Misc. 633, 112 NYS 573.

**61.** Talley v. Ferguson [W. Va.] 62 SE 456.

**62.** Where trust provided that income should be paid to settlor during life, and, on her death, principal to her children and issue of any deceased child, per stirpes, held that corpus could not be sold under mortgage not joined in by one child, since child had contingent interest in entire corpus. Newton v. Hunt, 59 Misc. 633, 112 NYS 573.

**63.** Laws 1903, p. 1071, c. 461, as amended by Laws 1905, p. 370, c. 175, amending Code Civ. Proc. § 1391, authorizing execution against income from trust estate in certain cases, held not retroactive, and not applicable to trust created in 1893. Demuth v. Kemp, 130 App. Div. 546, 115 NYS 28.

**64.** Where trustees were directed to pay so much of net income to son as in their judgment would be sufficient to maintain and support him, the rest to go to other beneficiaries, creditors of son could not reach remainder. Raymond v. Tiffany, 59 Misc. 283, 112 NYS 252.

**65.** Garrett v. Duclos, 128 App. Div. 508, 112 NYS 811.

**66.** Where income of trust estate is payable to two sisters, with power of appointment in survivors as to who shall take remainder, beneficiaries cannot by mutually appointing the other vest the remainder in themselves. Garrett v. Duclos, 128 App. Div. 508, 112 NYS 811.

**67, 68.** Lambert v. Morgan [Md.] 72 A 407.

**69.** That lodge for many years controlled lower story of building erected on land owned by lodge, by citizens of community under agreement that upper story should be used for lodge and lower for school did not bar right to use for school where right was not denied for any considerable period. Rhodes v. Maret [Tex. Civ. App.] 112 SW 433.

**70.** Though minors. Appel v. Childress [Tex. Civ. App.] 116 SW 129.

**71.** Carr v. Craig, 138 Iowa, 526, 116 NW 720. Where devisee took land charged with continuing trust for payment of a legacy, limitation does not commence to run until after demand and refusal. Geisel's Estate v. Landwehr [Ind. App.] 88 NE 105. Where county collected entire road tax but held one-half of tax collected with city in trust for city, limitation does not run. City of Chadron v. Dawes County [Neb.] 118 NW 469.

the beneficiary,[72] but it runs in favor of an involuntary trustee [73] from the time the trust arises,[74] provided the defrauded party has knowledge of facts.[75] Trusts which are not effected by the statute of limitations are only those technical and continuing trusts over which equity has exclusive jurisdiction.[76] Since trusts are established and enforced through equity, rights may be lost through laches,[77] but, ordinarily, laches cannot be predicated upon mere inactivity in the absence of knowledge of a repudiation of the trust,[78] and in no case can they be asserted where the trustee has recognized the trust.[79]

§ 7. *The trustee.*[80] *Judicial appointment.* See 10 C. L. 1920—Where no trustee is named in instrument creating a trust, the court may appoint one,[81] but where a trustee is named in a will, the probate court cannot, except for cause, appoint an-

**72.** Norton v. Bassett [Cal.] 97 P 894; Johnston v. Johnston [Minn.] 119 NW 652; Weltner v. Thurmond [Wyo.] 98 P 590. Where life tenant, who was also executrix of the estate, invested personally in real estate without making any settlement, and thus stood as trustee to remainderman, statute of limitation does not apply. Small v. Hockinsmith [Ala.] 48 S 541.

**NOTE. Ignorance of cestui as tolling limitations in action for breach of secret trust:** The defendant's testator, the trustee of a secret trust, committed breaches thereof without the knowledge of the plaintiff, the cestui. The defendant set up the statute of limitation. Held, since there was an express trust and the cestui had no knowledge of the breach, the defense failed. Russel v. Huntington Nat. Bank, 162 F 686.

The principal case accords with the rule laid down by American courts and text writers that, until there has been to the knowledge of the cestui such a breach as amounts to a repudiation, the Statute of Limitations does not act as a bar. Perry, Trusts § 863. This view is based upon the ground that the trustee is holding adversely, and from then on the statute begins to run. Kane v. Bloodgood, 7 Johns. Ch. 90; Hill v. McDonald, 58 Hun 322, 11 NYS 813. The English cases generally cited to support this proposition seem misconstrued. Wedderburn v. Wedderburn, 4 M. & C. 41, 52; Pollock v. Gardner, 1 Hare 694; Lister v. Pickford, 34 L. J. Ch. 582. They clearly hold the statute of limitations inapplicable to express trusts (Attorney General v. The Fish Monger, 5 M. & C. 16), and seem to regard the time of repudiation as important only in determining whether laches will be imputed. Further, in imputing laches, the English courts are more zealous of the cestui's interest than American courts. Thus they have held that the above rule applies, though the trust is established by parol evidence (Richefoucauld v. Boustead, 1 Ch. 196) and that an agent having a fiduciary relation to his principal (Burdick v. Garrick, L. R. 5 Ch. App. 232), one who assumes to act as a trustee (Life Ins. v. Siddal, 3 D. F. & G. 58), or one who obtains the trust res by collusion in the fraud of the trustee (Soar v. Ashwell, L. R. 2 Q. B. 390), will be looked upon as an express trustee. It would seem that the American courts following their less liberal policy would oppose such extensions of the liabilities of an express trustee. Lammer v. Stoddard, 103 N. Y. 672, 9 NE 328; McClane's Adm. v. Shepherd's Ex., 21 N. J. Eq. 76; note 7 L. R. A. 370.—From 9 Columbia L. R. 89.

**73.** Heir succeeding to land in which ancestor held legal title to an undivided part thereof in trust held involuntary trustee. Norton v. Bassett [Cal.] 97 P 894.

**74.** Norton v. Bassett [Cal.] 97 P 894. Statute of limitations run against assertion of constructive trust. Markley v. Camden Safe Deposit & Trust Co. [N. J. Eq.] 69 A 1100.

**75.** Evidence held to show such ignorance of facts as to prevent running of limitations against assertion of constructive trust resulting from fraudulent purchase by complainant's mother of property at partition sale (Markley v. Camden Safe Deposit & Trust Co. [N. J. Eq.] 69 A 1100), and also from estoppel (Id.).

**76.** Person who receives money to be paid to another, and does not, is within the statute. Dorrance v. Ryon, 35 Pa. Super. Ct. 180.

**77.** Where for 20 years after absolute deed was made grantor made no claim to land, but, on the other hand, disclaimed any interest to his creditors, he is barred by laches. Spaulding v. Collins [Wash.] 99 P 306. Mere lapse of time without inquiry into trusteeship does not of itself constitute laches. Johnston v. Johnston [Minn.] 119 NW 652.

**78.** Where repudiation of trust was not brought home to beneficiary until two days before suit was brought, there is no laches. Weltner v. Thurmond [Wyo.] 98 P 590. Laches cannot be asserted unless complainant delays an unreasonable time after learning that trustee is denying trust. Steinman v. Jessee, 108 Va. 567, 62 SE 275. Although cestue que trust of mineral rights delayed 21 years in asserting same, held not barred by laches where he did not know until within a year that surface owner and trustee was denying his rights and delay had not changed status of parties. Id.

**79.** Small v. Hockinsmith [Ala.] 48 S 541; Howe v. Howe, 199 Mass. 598, 85 NE 945.

**80. Search Note:** See notes in 14 L. R. A. 69; 24 Id. 289; 4 Ann. Cas. 405; 6 Id. 598; 7 Id. 1082; 8 Id. 1181.

See, also, Trusts, Cent. Dig. §§ 162-225; Dec. Dig. §§ 112-170; 28 A. & E. Enc. L. (2ed.) 954, 1074; 22 A. & E. Enc. P. & P. 24.

**81.** Webber Hospital Ass'n v. McKenzie [Me.] 71 A 1032. If administrator cannot execute a trust impliedly created to hold an estate to support a remainder on termination of particular estate before birth of

other unless the party named fails to qualify.[82] Ordinarily, the beneficiaries [83] must be made parties to the proceeding to appoint a trustee. In a judicial proceeding to appoint a trustee, the court cannot retain jurisdiction to administer the trust.[84] The court has large discretion in the appointment of a trustee,[85] but it is a better practice to appoint a resident trustee, unless special circumstances justify the appointment of a nonresident.[86] An adverse claimant of land has no interest which entitles him to be heard in appointment.[87] The refusal of a town council to accept a perpetual trust for the repair of testator's burial lot does not invalidate the trust, since its successors may accept.[88]

*Succession and appointment.* See 10 C. L. 1921—Where purchaser of lands buys as trustee of another, the duty devolves upon his personal representatives to execute the trust upon his death.[89] Where the order appointing a trustee directs that he shall first file a bond, he does not become a trustee until such bond is filed,[90] and a testamentary trustee is charged with notice of all orders of the probate court.[91] A testamentary trustee, who has been discharged as executor and has not qualified as trustee, cannot sustain his acts as trustee on his powers as executor.[92] If the trustee named cannot act, the court may make an appointment.[93] Whether a successor has discretionary powers given to the trustee originally named depends on the terms creating the trust.[94]

*Resignation and appointment.* See 10 C. L. 1921—Joinder in complaint for the judicial appointment of a trustee is a renunciation of the trusteeship.[95] An offer to resign upon written request signed by all stockholders who had signed trust indenture is not converted into an agreement by request duly signed where two signers withdrew signatures before the request was presented.[96] The fact that a trustee is incompetent does not invalidate the trust.[97]

*Removal.* See 10 C. L. 1921—A trustee may be removed for misconduct or abuse of powers,[98] though the trust is of a personal character and, hence, terminated by the

remainderman, court can appoint a trustee. Hayward v. Spaulding [N. H.] 71 A 219.

82. Gibney v. Allen [Mich.] 16 Det. Leg. N. 159, 120 NW 811.

83. Remainderman is a beneficiary, within Real Property Law, Laws 1896, p. 574, c. 547, § 91, providing that a substituted trustee shall not be appointed till the beneficiaries of the trust are brought into court by notice. In re Earnshaw, 112 NYS 197.

84. State v. Muench [Mo.] 117 SW 25.

85. Court held not to have abused discretion in appointing one selected by all adult beneficiaries, except one and his daughter, he being fit, over objection of dissenting beneficiary who wished a trust company appointed. Hite v. Hite's Ex'r [Ky.] 118 SW 357.

86. Dodge v. Dodge [Md.] 71 A 519. In view of location of property, unanimous request of all interested, etc., held not an abuse of discretion to appoint nonresident. Id.

87. White River Lumber Co. v. Clarke [N. H.] 70 A 247.

88. Though legacy to town council in perpetual trust for repair of testator's burial lot is authorized by Gen. Laws 1896, c. 40, § 35, court cannot compel council to accept, but this does not invalidate trust as successors may accept. Rhode Island Hospital Trust Co. v. Warwick Town Council [R. I.] 71 A 644.

89. Conaway v. Third Nat. Bank [C. C. A.] 167 F 26.

90. Talley v. Ferguson [W. Va.] 62 SE 456.

91. Order requiring statutory bond. Gibney v. Allen [Mich.] 16 Det. Leg. N. 159, 120 NW 811. Trustee who fails to file bond within 30 days after his appointment in sum fixed by probate court, as required by Pub. Acts 1899, pp. 395, 253, is not entitled to administer estate. Id.

92. Gibney v. Allen [Mich.] 16 Det. Leg. N. 159, 120 NW 811.

93. Fitchie v. Brown, 211 U. S. 321, 53 Law Ed. 202.

94. Where will directed carrying out of trust by the "trustees or trustee for the time being," held that discretionary power to select beneficiaries was attached to office, and not personal to trustees named in will. Godfrey v. Hutchins, 28 R. I. 517, 68 A 317.

95. Dodge v. Dodge [Md.] 71 A 519.

96. Barbour v. Weld, 201 Mass. 513, 87 NE 909.

97. Life tenant was made trustee and expressly authorized to act. Held she had right to act until removed. Brown v. Brown, 122 App. Div. 576, 107 NYS 864.

98. Misunderstanding of duties or mistake in discharge thereof is no ground for removal, unless trustee acts dishonestly or is incompetent. Harr v. Fordyce [Ark.] 113 SW 1033. Where control of corporation

removal.[99] Where a judicially appointed trustee goes out of the jurisdiction of the court, he may be removed.[1] It is not necessary for all parties creating the trust to join in the action for removal,[2] and, the proceedings being in personam,[3] jurisdiction must be obtained of the trustee.[4] Where the trust property is situated without the state, the trustee cannot be removed under the Massachusetts statute unless the statutory notice [5] is served upon him or unless he voluntarily submits to the jurisdiction of the court.[6] Where one entered into agreement with corporation to sell preferred stock and stockholders transferred certain stock to assist in sale, the fact that it is impossible to sell stock is no ground for removal in the absence of a cancellation of the contract with the corporation.[7]

§ 8. *Establishment and administration of trust. A. Nature of trustee's title and establishment of estate.*[8]—See 10 C. L. 1922.—The nature and character of the trustee's title depends upon the terms of the instrument creating the trust,[9] and local statute applicable thereto,[10] but he impliedly takes such title as is necessary to perform the trust,[11] and holds the same until distribution is made or the trust performed.[12] Where the trust is void, no legal title passes to the trustee.[13] Where the trust stipulates that the trustee named shall hold the property, they take title jointly though the evidence of ownership and right to physical possession is given

was vested in one by transfer to him of majority of stock in trust to assist in selling preferred stock, and he used same to elect himself director and assumed control for his own interest and intended to use stock to re-elect himself, held that grounds for removal existed. Barbour v. Weld, 201 Mass. 513, 87 NE 909.

99. Trustee may be removed for misconduct though trust cannot be canceled and though it is a personal trust and, hence, would terminate of itself. Barbour v. Weld, 201 Mass. 513, 87 NE 909.

1. Letcher's Trustee v. German Nat. Bank [Ky.] 119 SW 236.

2. Barbour v. Weld, 201 Mass. 513, 87 NE 909.

3. Parker v. Kelley, 166 F 968.

4. Jurisdiction of defendant must be secured. Holcomb v. Kelly, 114 NYS 1048. Constructive service held sufficient. Letcher's Trustees v. German Nat. Bank [Ky.] 119 SW 236.

5. Under Mass. Rev. Laws 1902, c. 147, § 11, authorizing removal of trustee after notice, such notice is jurisdictional, and since the statute does not prescribe length of notice, such notice must be given as court thinks appropriate to the case. Parker v. Kelley, 166 F 968. Notice must specify particular charge or complaint made against trustee. Id.

6. Parker v. Kelley, 166 F 968.

7. Barbour v. Weld, 201 Mass. 513, 87 NE 909. Where corporation is not a party to the suit to remove, such contract cannot be cancelled. Id.

8. **Search Note:** See Trusts, Cent. Dig. §§ 162-199; Dec. Dig. §§ 112-154; 28 A. & E. Enc. L. (2ed.) 919.

9. Where deceased willed portion of property to trustees to pay income to daughters during life and minority of their children and then in fee to them, and another portion in trust during minority of sons with power in trustee to sell, held that trustee held legal title. Appel v. Childress [Tex. Civ. App.] 116 SW 129. Where trustee is to collect rents, etc., and pay same to beneficiary for life, and is to convey the land to her appointee by will or in default of an appointment, to her heirs, he takes entire estate, and on death of beneficiary deed is necessary to pass title. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139. Land was deeded to F. in trust for a wife for life, remainder to husband and his heirs. Husband's interest was sold on execution. F. as trustee of the wife, quitclaimed property to M. in trust for wife and her heirs, free from any debt, etc., of husband. Held that deed vested M. with only such title as F. had, and left land subject to equities of execution purchaser. Dunkerson v. Goldberg [C. C. A.] 162 F 120. Where will devised property to testator's wife for life, she to have control and disposal of all the income and principal as she deemed necessary for her support, that remaining at her death to go to executor of testator in trust for daughter, held that property vested in trustee at wife's death. Hasbrouck v. Knoblauch, 130 App. Div. 378, 114 NYS 949.

10. Deed to grantor's sister "to nurture, support, and educate" grantor's children, with power to sell to "whomsoever she may think proper," etc., held to vest trustee with fee title especially in view of Ky. St. 1903, § 2342, providing that, unless a contrary intent appears, every estate created by deed without words of inheritance shall be deemed a fee, etc. Maxwell's Committee v. Centennial Perpetual Bldg. & L. Ass'n [Ky.] 114 SW 324.

11. Where trustee is required to pass a fee, he takes a fee. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139.

12. Where money was given in trust, income to be paid equally to testator's two sons until their death, then to wives and children, property to be given to grandchildren, property remains in hands of trustees as trust fund until time for distribution arrives. Wolfe v. Hatheway [Conn.] 70 A 645.

13. Trustee does not take title absolute. Ruddick v. Albertson [Cal.] 98 P 1045.

to one.[14] Where the same person is executor and testamentary trustee, he does not take the fund as trustee but it is separated from the general fund held as executor.[15] The devolution of the legal title upon the death of the surviving trustee is generally regulated by statute.[16] In South Carolina, the eldest son succeeds by operation of law.[17] A trustee under a trust deed is under no legal or moral obligation to defend title of his grantor.[18]

(§ 8) *B. Discretion and general power of trustees and judicial control.*[19]—See 10 C. L. 1922—*Instructions to trustee.* See 10 C. L. 1923—The duties and powers of a trustee depend largely upon the terms of the instrument creating the trust,[20] and, where a discretionary power is expressly given, the court cannot interfere with the exercise thereof, except in the case of abuse.[21] Where a trustee exceeds his powers, he commits a breach of his trust and does not bind the estate.[22] A trustee charged with the exercise of a power for the benefit of a particular person must exercise good faith towards him.[23] A testamentary trustee is a proper party to carry out a contract for a deed executed by the testator.[24] Where the "survivor or survivors" of the trustees is expressly authorized to exercise a power, self-interest of surviving trustee does not disqualify.[25]

Personal powers,[26] as distinct from mere ministerial powers which attach to the office of trustee,[27] cannot be exercised by a trustee appointed by the court.[28]

**14.** Caylor v. Cooper, 165 F 757.

**15.** But when his duties as executor have been fully performed, equity will regard him as holding as trustee, and cestui que trust may enforce his rights. Fenton v. Hall, 253 Ill. 552, 85 NE 936.

**16.** Under Code 1896, § 1044, providing that on death of surviving trustee of express trust fee shall not descend to his heirs, fee is in obeyance until new trustee is appointed. Lecroix v. Malone [Ala.] 47 S 725. Legal title to land held in trust does not descend to trustee's wife as one of his statutory heirs, under Rev. Laws, c. 140, § 3. Crandell v. Ahern, 200 Mass. 77, 85 NE 886.

**17.** Breeden v. Moore [S. C.] 64 SE 604.

**18.** Is not estopped to acquire adverse title as against purchase on foreclosure of trust deed by action. Cleveland v. Smith [Tex. Civ. App.] 113 SW 547.

**19. Search Note:** See notes in 6 C. L. 1756; 1 L. R. A. (N. S.) 802; 8 Id. 398; 6 A. S. R. 885; 93 Id. 615.

See, also, Trusts, Cent. Dig. §§ 226-233, 379-382; Dec. Dig. §§ 171-179, 270-271½; 28 A. & E. Enc. L. (2ed.) 981; 22 A. & E. Enc. P. & P. 60, 113.

**20.** Trustee having power to close investment, but no power to change investment, held to have power to assign mortgage and indorse matured note without recourse to one advancing money to pay same, where only purpose was to protect assignee against second mortgage. Bremer v. Columbia Nat. Life Ins. Co., 199 Mass. 344, 85 NE 439. Where securities are conveyed by trust deed and trustees are empowered to sell or pledge same to raise money to enable association to perform railroad construction work, pledging to secure money loaned but not used in construction, is unauthorized. Andrews v. Guayaquil & Q. R. Co [N. J. Err. & App.] 72 A 355. Where testator devised his estate in trust to carry on his business and directed that income should be paid to son and daughter, held that income could not be used to continue business. In re O'Reilly, 59 Misc. 136, 112 NYS 208. Where trustee was directed to convert estate into money and pay interest accruing thereon to designated beneficiary for life and principal to his children, trustee has no power to pay off incumbrance of land of life beneficiary and to take a conveyance of the land under agreement to reconvey upon being reimbursed. Metzger v. Lehigh Valley Trust & Safe Deposit Co., 220 Pa. 535, 69 A 1037.

**21.** Davis v. Davis [Tex. Civ. App.] 112 SW 948. Where trustees are expressly impowered to a particular act if they think it advisable, court cannot judicially interfere therewith so long as they act in good faith. Larkin v. Wikoff [N. J. Eq.] 72 A 98. Where reservation by grantor of cause of action against elevated railroad makes grantee trustee of the cause of action, injunction will not lie to restrain settlement between grantee and company in absence of proof of grantee's irresponsibility. Anderson v. New York & H. R. Co., 116 NYS 954.

**22.** Metzger v. Lehigh Valley Trust & Safe Deposit Co., 220 Pa. 535, 69 A 1037.

**23.** Where trustee is invested with power to sell land if necessary to the support of grantor or to the payment of trustee's compensation, but is directed to pay any remaining part of fund to designated person, trustee is bound to exercise good faith toward such person. McNew v. Vert [Ind. App.] 86 NE 969.

**24.** Hald v. Claffy, 131 App. Div. 251, 115 NYS 561.

**25.** Though will authorizes appointment when trustees become reduced to one. Davis v. Davis [Tex. Civ. App.] 112 SW 948.

**26.** Where will devised $5,000 in trust, income to be used for sister of deceased, and provided that principal could be used if trustee thought best, giving him "absolute discretion," held that power was personal. Whitaker v. McDowell [Conn.] 72 A

A trustee may ordinarily invoke the aid of a court of equity in the management of the estate and the execution of the trust,[29] and, where he unreasonably delays in making a division of the estate,[30] a partition may be had by the parties in interest. A suit for the construction of a will creating a trust is properly brought in the county of testator's residence.[31] The administration of the entire trust may be placed under the control of the court,[32] and in Illinois a partition can only be made under the orders of a court.[33]

(§ 8) *C. Management of estate and investments.*[34]—See 10 C. L. 1923—While the management of the estate is usually left largely to the discretion of the trust, he is personally responsible if he exceeds his powers,[35] and, while a decree settling an account of the trustee is a protection as to all investments shown therein,[36] it does not protect as against future unauthorized investments, though of similar character.[37] The trustee must ordinarily keep the estate so invested as to be productive,[38] but he cannot invest in bank stock[39] in the absence of an authorizing statute.[40] A trustee may ordinarily invest in securities of a foreign corporation.[41] Where a trustee has discretion as to investment in lands, a purchaser of lands sold is not charged with the duties of seeing that proceeds are invested in land as required by trust deed.[42] It is the duty of a trustee to refuse to recognize an unlawful and void alienation of beneficiary's interest in the income of an estate.[43] With the consent

938. Words "heirs, administrator and executors," or words of similar import following name of trustee, negatives personal trust, since trustor could not have known who the heirs, administrator or executor would be. Dodge v. Dodge [Md.] 71 A 519.

27. In absence of clearly expressed intention to the contrary, power of sale will be deemed ministerial and attached to the office of trustee. Dodge v. Dodge [Md.] 71 A 519. Whether a trust is personal or annexed to the office of the trustee depends upon trustor's intention as gathered from whole instrument. Id.

28. Whitaker v. McDowell [Conn.] 72 A 938. Where some of the powers are personal and others not, judicial appointment of trustee without designation thereof is good pro tanto, but does not invest personal powers. Dodge v. Dodge [Md.] 71 A 519.

29. Trustee may in proper case apply to court for order protecting him in invading corpus of estate for maintenance of beneficiary and court may ratify prior disbursements. Pfefferle v. Herr [N. J. Eq.] 71 A 689. Where a trust is reposed in executors, they may invoke aid of court of equity to assist in managing and executing same. Strawn v. Trustees of Jacksonville Female Academy, 240 Ill. 111, 88 NE 460. Upon termination of trust, trustee may envoke court of equity to partition land among those entitled to same. Rackemann v. Tilton, 236 Ill. 49, 86 NE 168.

30. Expression of willingness on part of trustee to devide does not prevent finding of unreasonable delay. Davis v. Davis [Tex. Civ. App.] 112 SW 948. Petition held not to allege unreasonable delay as ground for partition, and, hence, judgment based thereon was unauthorized. Davis v. Davis [Tex. Civ. App.] 112 SW 948.

31. Where will was probated, notwithstanding none of parties reside within state. Bartlett v. Sears [Conn.] 70 A 33.

32. Fact that will required sale by trustee to be confirmed by court does not show that testatrix intended trust to be administered under orders of court. State v. Munch [Mo.] 117 SW 25.

33. Rackemann v. Tilton, 236 Ill. 49, 86 NE 168.

34. See Trusts, Cent. Dig. §§ 279, 234-239, 293-351; Dec. Dig. §§ 176, 181-187, 207-244; 28 A. & E. Enc. L. (2ed.) 914, 981.

35. Trustee to mortgage and pay off certain debts is not entitled to credit for loss in selling mules to tenants and becoming liable for their supplies, especially where prime motive was personal gain, such enterprises being without scope of duties. Cunningham v. Cunningham, 81 S. C. 506, 62 SE 845.

36. Investments in violation of trust directions. In re Irwin's Estate, 59 Misc. 143, 112 NYS 205.

37. In re Irwin's Estate, 59 Misc. 143, 112 NYS 205.

38. Where trustee deposited money in bank of which he was principal owner, but money was kept on hand with knowledge of beneficiary ready for payment, so that neither trustee or bank received any benefit therefrom, held that trustee was not chargeable with interest. In re Sexton, 61 Misc. 569, 115 NYS 973.

39. Liable for loss irrespective of good faith and due care. Robertson v. Robertson's Trustee [Ky.] 113 SW 138.

40. Ky. St. 1903, § 4706, authorizing trustee to invest in dividend-paying securities but providing that funds should not be invested in bonds or securities of any corporation which has not been in operation for more than 10 years, does not permit investment in stock of newly organized bank. Robertson v. Robertson's Trustee [Ky.] 113 SW 138.

41. Scoville v. Brock, 81 Vt. 405, 70 A 1014.

42. Knight v. Church, 219 Pa. 184, 68 A 182.

43. Seely v. Fletcher, 117 NYS 86.

of parties in interest, the court may vary their various interests.[44] Where the disposal of bonds and stock held in trust in New York was subject to directions in the will of a testator residing and dying in Nebraska, such transfer is subject to the inheritance tax of Nebraska.[45]

(§ 8) *D. Creation of charges, mortgage and lease of estate.*[46] See 10 C. L. 1924. Although a trustee describes himself as such and signs as trustee, he will be personally bound by his contracts unless he limits the contract.[47]

(§ 8) *E. Sale of property.*[48] See 10 C. L. 1924. The power to sell,[49] especially of a surviving trustee,[50] or one in interest,[51] the terms upon which a sale may be made,[52] the manner of making the same,[53] and the persons to whom the property may be sold,[54] depend largely upon the terms of the instrument creating the trust and statutes relating to such sales.[55] Where the trustee is charged with a duty

**44.** Where land was left for use of life tenant, and after his death for use of such of his issue as should be then living, and life tenant proves unable to use estate so as to provide support for family, court may, with consent of all in interest, direct sale, payment to life tenant and one child of certain sum for their interest, and investment of rest of proceeds, income to be paid to wife of life tenant for use of family, and on her death to be paid to such issue as was then living. Kolb v. Booth, 80 S. C. 501, 61 SE 942.

**45.** In re Douglas County [Neb.] 121 NW 593.

**46. Search Note:** See notes in 7 L. R. A. (N. S.) 263; 13 Id. 496; 19 A. S. R. 67; 1 Ann. Cas. 942; 9 Id. 643; 10 Id. 255.

See, also, Trusts, Cent. Dig. §§ 280-292; Dec. Dig. §§ 205, 206; 28 A. & E. Enc. L. (2ed.) 492; 22 A. & E. Enc. P. & P. 72.

**47.** Rule does not apply to trustees appointed by court to wind up corporation. Shannon v. Mastin [Mo. App.] 114 SW 1127.

**48. Search Note:** See notes in 2 L. R. A. (N. S.) 828; 3 Id. 415; 19 A. S. R. 266; 20 Id. 858; 4 Ann. Cas. 953.

See, also, Trusts, Cent. Dig. §§ 280-292; Dec. Dig. §§ 188-204; 28 A. & E. Enc. L. (2ed.) 92, 1125; 22 A. & E. Enc. P. & P. 72.

**49.** Power to sell conferred upon executor, who was also named in will as trustee, held not to extend to his trust capacity where paragraphs making appointments were separate and distinct. Gibney v. Allen [Mich.] 16 Det. Leg. N. 159, 120 NW 811. Provision of will held to authorize trustee to sell realty when necessary to execute trust. Appeal of Gardner [Conn.] 70 A 653. Power to sell. Robinson v. Robinson [Me.] 72 A 883. Where testatrix directed that one-fourth of residuary estate "be paid," and in view of other provisions, held that trustee had implied where one, settling a trust upon himself for benefit of wife and children, provided that he and "any successor appointed by him could sell the property," power is personal and trustee appointed by court cannot sell. United States Trust Co. v. Poutch [Ky.] 113 SW 107. Where wife is given life estate in land and after her death it is to be sold by trustee and proceeds divided among children, the latter have no interest in land, hence, upon surrender of interest by life estate, trustee may sell same. Riffe v. Liddell's Trustee [Ky.] 113 SW 106.

**50.** Sole surviving trustee, who is sole beneficiary, cannot convey under power of sale, especially where it is apparent that trustor intended to vest power in trustees collectively. Weeks v. Frankel, 128 App. Div. 223, 112 NYS 562. Where wife as sole surviving trustee had power to sell under will creating trust, fact that she was beneficiary of income for life did not invalidate sale, where she sold remainderman's interest also. Doscher v. Wyckoff, 116 NYS 389. Since under Code Civ. Proc. § 2818, and Laws 1896, p. 582, c. 547, § 146, power of sale may be executed by survivors upon death of one of the trustees, invalidity of appointment of successor to deceased trustee will not affect sale in which survivors joined. Levine v. Gerardo, 60 Misc. 261, 112 NYS 192.

**51.** Where power of sale given to executrix and trustee is given for other purposes than for carrying out trust created for executrix and trustee, and other persons will be benefited thereby, mere fact that executrix and trustee may derive a benefit from sale does not deprive her of the right to execute power. Doscher v. Wyckoff, 116 NYS 389. Where wife was trustee, she being beneficiary of income from property during life, remainder to go to son, she was not trustee and beneficiary of same interest. Doscher v. Wyckoff, 63 Misc. 414, 113 NYS 655.

**52.** Where deed to agricultural society in trust authorized society to sell and "dispose" of part thereof to meet expenses of trust including expense of litigation, it was not limited to a cash sale but could convey to attorney in payment of services (Mansfield v. District Agricultural Ass'n No. 6 [Cal.] 97 P 150), and its discretion will not be interfered with in the absence of fraud or gross abuse of discretion (Id.).

**53.** Power to sell as to him might seem best, without restraint or condition, authorizes sale by acres, although agreement contemplated platting of townsite. Harr v. Fordyce [Ark.] 113 SW 1033.

**54.** Trustee having fee and power to convey "to whomsoever she thought best," her absolute deed to cestui que trust held valid. Maxwell's Committee v. Centennial Perpetual Bldg. & L. Ass'n [Ky.] 114 SW 324.

**55.** Real Property Law (Laws 1896, pp. 573, 574, c. 547), §§ 85, 87, authorizing special proceeding to sell real estate held in trust "where it is for best interest of

which can only be performed by a sale, power to sell will be implied.[56] Where sale is to be made only if necessary for certain purposes, such necessity will be presumed in favor of a sale.[57] In making a sale, the trustee is only required to exercise due diligence to obtain a fair price,[58] and a purchaser is at liberty to purchase as cheaply as possible.[59] Where deed of trust for grantor's support gives the trustee power to sell to pay the expense of his trusteeship, such power may be exercised after grantor's death.[60] Where the trustee possessed the legal title, his deed passes sufficient title to defeat ejectment, whether rightfully or wrongfully made.[61] Where an attempt has been made in good faith to exercise the power of sale, those relying thereon may invoke equity to supply defects.[62] One purchasing in good faith need not inquire into the expediency of the sale in New York or see that the proceeds are properly applied.[63]

In some states a judicial proceeding is provided, which must be followed,[64] and the sale reported back for confirmation.[65] When a sale becomes necessary in the course of managing estate, the trust attaches to the proceeds.[66]

Equity has exclusive jurisdiction to set aside a sale under a trust deed,[67] and, hence, one attacking a sale must not be guilty of laches [68] or equitable estoppel.[69]

estate," held not to authorize exchange or sale merely to effect a partition. Von Glahn v. Heins, 128 App. Div. 167, 112 NYS 565.

**56.** Robinson v. Robinson [Me.] 72 A 883. Grant of power to "invest and manage" held to imply power to sell. Id.

**57.** Appeal of Gardner [Conn.] 70 A 653.

**58.** Where trustee of land to secure debt holds under quitclaim deeds from holder of tax titles, he is only required to realize what he can under titles which he holds. Anderson v. Thero [Iowa] 118 NW 47. Evidence held to show due diligence in selling land held under questionable tax title. Id.

**59.** Purchaser who is in no way connected with the trust may purchase as cheaply as he can, and mere knowledge of trustee's misdeed in respect to funds does not affect sale unless he participates therein. Nunn v. Peak [Ky.] 113 SW 493.

**60.** McNew v. Vert [Ind. App.] 86 NE 969.

**61.** McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139.

**62.** Docher v. Wyckoff, 63 Misc. 414, 113 NYS 655. Equity will reform a trustee's deed to make it conform to the trust deed and advertisement of sale. Jones v. Levy [Miss.] 46 S 825.

**63.** Under 1 Rev. St. (1st. Ed.) pt. 2, c. 1, tit. 2, art. 2, § 66, providing that no one who shall, in good faith, pay money to a trustee shall be responsible for the proper application thereof. Doscher v. Wyckoff 116 NYS 389.

**64.** Proceeding under Real Property Law (Laws 1896, pp. 573, 574, c. 547), §§ 85, 87, to sell trust, real estate being contrary to course of common law, must be followed in all substantial particulars. Von Glahn v Heins, 128 App. Div. 167, 112 NYS 565. Court dealing with equitable estate held to have jurisdiction at chambers to order sale. Peavy v. Deure, 131 Ga. 104, 62 SE 47. Under Acts 1876, p. 103 (Civ. Code 1895, § 4987), court cannot make order for sale at chambers to sell estate of minors unless such minors have been served. Turner v. Barber, 131 Ga. 444, 62 SE 587. Where all persons in interest are parties to suit and assent to order directing sale by substituted trustee, sale is not invalid because not made by sheriff. Kolb v. Booth, 80 S. C. 501, 61 SE 942.

**65.** Where report on affidavit stated that sale was to the advantage of all parties, and that it was made with approval of testator's children, and allegations are not disputed, it is not insufficient because proof was not taken, or objectionable on ground that trust may be opened to admit unborn beneficiaries, and it does not state that it is to their advantage. Dodge v. Dodge [Md.] 71 A 519.

**66.** Plaut v. Plaut, 80 Conn. 673, 70 A 52.

**67.** Hanson v. Neal [Mo.] 114 SW 1073.

**68.** Wife was entitled to income until death or remarriage, remainder in son. Land was unimproved and unproductive. Wife, as sole surviving trustee, exercised power of sale, receiving fair and reasonable value of land, and she and son acquiesced in sale for 17 years. Held that equity would regard exercise of power as valid. Doscher v. Wyckoff, 63 Misc. 414, 113 NYS 655. Where sole remainderman in trust fund did not object to sale but received fruits thereof for several years, it will be deemed an approval of change of fund from realty to personalty (Appeal of Gardner [Conn.] 70 A 653), and persons only interested as distributees, on theory that conversion was unauthorized because not necessary to execute trust, have no standing (Id.).

**69.** Where wife was entitled to income until death or remarriage, and son, who was entitled to remainder, acquiesced in sale made by wife as sole surviving trustee for 17 years and enjoyed benefits thereof while purchasers improved property, held estopped to assert invalidity of sale Doscher v. Wyckoff, 63 Misc. 414, 113 NYS 655.

(§ 8) *F. Payments or surrender to beneficiary.*[70]—See 10 C. L. 1925—With the consent of all parties in interest, the court may order a sale and pay off some of the beneficiaries instead of reinvesting.[71] A conveyance to one of the beneficiaries in recognition of the trust need not be supported by a consideration.[72] Where trusts are directed to pay the principal to the beneficiary at such time as they think proper, he cannot demand the same at any particular time.[73] In Massachusetts a special corporation may be formed to administer a trust bequeathed to a city to found a hospital.[74]

§ 9. *Liability of trustee to estate and third person.*[75]—See 10 C. L. 1926—The trustee must exercise reasonable diligence to preserve the trust estate[76] and must observe good faith in the discharge of his duties.[77] Where he has general power to invest,[78] he is not liable for unavoidable losses,[79] but must use the care of an ordinarily prudent man in making investments.[80] While a trustee is not an insurer against the misfeasance of his cotrustees,[81] his obligation to exercise due diligence

**70. Search Note:** See Trusts, Cent. Dig. §§ 380-407; Dec. Dig. §§ 270-288.

**71.** Kolb v. Booth, 80 S. C. 501, 61 SE 942.

**72.** Fraser v. Churchman [Ind. App.] 86 NE 1029.

**73.** Where trustees are directed to pay income to son and principal at such time as they think proper, son cannot demand same immediately nor on reaching majority. Ballantine v. Ballantine [C. C. A.] 160 F 927.

**74.** Trustees having in their hands a fund bequeathed to a city to found a hospital, may pay same to corporation created under St. 1890, p. 385, c. 422, to administer the trust. Ware v. Fitchburg, 201 Mass. 61, 85 NE 951.

**75. Search Note.** See notes in 14 L. R. A. 103; 2 Ann. Cas. 556.

See, also, Trusts, Cent. Dig. §§ 336-351; Dec. Dig. §§ 231-244; 28 A. & E. Enc. L. (2ed.) 1059.

**76.** Bogard v. Planter's Bank & Trust Co. [Ky.] 112 SW 872. In preservation and management of trust fund, trustee must exercise care of ordinarily prudent man in care of his own property and is liable only for negligence. Cunningham v. Cunningham, 81 S. C. 506, 62 SE 845. Complaint held to state a cause of action against trustee of stock of certain corporations to secure payment of certain amounts for failure to exercise his control to prevent cancellation of a contract held by one which impaired security. Holmes v. Seaboard Portland Cement Co., 63 Misc. 82, 116 NYS 524.

**77.** Evidence held not to show good faith in making sales and in expending trust money in improving other real estate. Gibney v. Allen [Mich.] 16 Det. Leg. N. 159, 120 NW 811. Defendant had sold steamship to company which was indebted to complainant, and it was agreed that defendant should take back a mortgage securing first the unpaid purchase price and secondly complainant's indebtedness. The sale was never in fact consummated or mortgage executed. Thereafter defendant without notice to complainant formed new corporation, stock of which was divided between itself and the moneyed man of the purchasing company and to which steamship was sold. No efforts were made to protect complainant. Held that defendant committed breach of trust, and was liable for indebtedness. Waterhouse & Co. v. Dodge [C. C. A.] 162 F 1. Purchaser was not indispensible party to action for breach of trust. Id.

**78.** Where trustee is authorized to reinvest proceeds from sales "in such manner as he or they may think best," etc., held to extend scope of investments beyond scope of Rev. St. 1908, § 6413, specifying securities in which investments may be made. Willis v. Baucher, 79 Ohio St. 290, 87 NE 185.

**79.** Barber v. Barber [R. I.] 71 A 641. Where trustee consulted business men, probate judge, and an attorney, before investing in bank stock and received favorable advice which he verified by personal examination of bank's reports, held to have used due diligence. Willis v. Braucher, 79 Ohio St. 290, 87 NE 185.

**80.** Trustee is not ordinarily required to make special investigation of condition of company, which would involve examination of books, etc., Scoville v. Brock, 81 Vt. 405, 70 A 1014. While high rate of interest on securities, frequent increase of stock, and that securities are not of class sanctioned by savings bank law, are facts to be considered in determining negligence of trustee in investing therein, they do not charge him as a matter of law with the duty of special investigation. Id. Fact that trustee could have ascertained condition of company in which trust funds were invested is not conclusive of negligence in not so doing. Id. Admission that securities were in bad repute and knowledge of such repute is not conclusive of negligence. Id. Evidence that trustee had consulted financier is admissible, though opinion obtained was not based on personal knowledge (Id.), and was given by fellow bank officer who had no greater knowledge than trustee (Id.). Local reputation of securities is admissible, and it is immaterial that securities are not listed in general market and that there is no active trading in them. Id. Reputation for period of 12 years may be shown. Id. Rule limiting such evidence to companies in neighborhod does not apply. Id. Evidence held insufficient to raise presumption of negligence in not learning facts concerning companies in which trust funds were invested. Id.

to preserve the estate renders him responsible for misappropriation which might have been prevented by due care.[82] Where a trustee exceeds his powers, good faith is no protection,[83] and, where he wrongfully pays out the income, he is personally liable.[84] Where trustee unreasonably delays a sale to the detriment of the estate, he may be held liable.[85] Unless estopped by their own acts,[86] the beneficiaries, in case of a wrongful disposal of trust property, may ordinarily recover the profits made, the proceeds with interest[87] or the property itself, unless the rights of innocent third persons have intervened,[88] and, if a third person conspires with the trustee to the injury of the estate, he is also liable.[89] The measure of damages is the amount actually lost,[90] and where a trustee uses trust estate for personal gain he is chargeable with the reasonable rental value thereof in the absence of definite proof of the profits made.[91] A trustee is liable for maintaining a public nuisance.[92] No equitable right of contribution exists among trustees committing an intentional wrong.[93] The personal obligation of a trustee ex maleficio follows him upon a sale of the property and removal to another state.[94] No action lies against a trustee as such for torts committed in the management of the estate.[95] A complaint for breach of trust must state a clear case;[96] but no distinction exists as to the amount of damages recoverable for breach of trust whether it is a voluntary or involuntary trust.[97]

**81.** In re Adams' Estate, 221 Pa. 77, 70 A 436.

**82.** Negligence in protecting funds against misappropriations by cotrustee renders trustee liable. In re Adams' Estates, 221 Pa. 77, 70 A 436. Fact that cotrustee was a brother held not to excuse, where he imposed more confidence than an ordinarily prudent man would. Id. Illness held not to excuse trustee where he had knowledge, before being taken sick, of facts which should have caused him to take precautions. Id. Where cotrustee was financially involved and had once secretly removed securities from safety deposit box, held that trustee was negligent in not so arranging that he could not again withdraw same although defendant was a helpless invalid at time of misappropriation. Id.

**83.** Gibney v. Allen [Mich.] 16 Det. Leg. N. 159, 120 NW 811.

**84.** It is no defense to prosecution for contempt for failing to obey order to pay over to designated person certain income admittedly received that it is not available, for, if used for other purposes, trustee must pay same out of individual property. Jastram v. McAuslan [R. I.] 71 A 454.

**85.** Trustee was bound to sell within a reasonable time and if it could have been sold for more than amount of debt, but trustee kept and used same, he is chargeable with rents and profits. Weltner v. Thurmond [Wyo.] 98 P 590. Rehearing denied. Id. [Wyo.] 99 P 1128.

**86.** Infant and inexperienced deaf mute beneficiaries held not to have capacity to ratify misconduct or to estop themselves from asserting same. Gibney v. Allen [Mich.] 16 Det. Leg. N. 159, 120 NW 811. Where mother, having care of daughter's estate after her guardianship ceased, did all possible to gratify daughter's whims, etc., and to educate her, and yet estate was left more valuable than when received, daughter cannot complain, especially where whole trouble grew out of a disappointing marriage. Chirurg v. Ames, 138 Iowa, 697, 116 NW 865.

**87.** Clapp v. Vatcher [Cal. App.] 99 P 549.

**88.** Where recovery of property is impossible because it has passed into hands of innocent purchaser, beneficiary may recover proceeds of sale with interest. Clapp v. Vatcher [Cal. App.] 99 P 549.

**89.** Hall v. Houston & T. C. R. Co. [Tex. Civ. App.] 114 SW 891.

**90.** Trust officer of lodge who misappropriated lodge funds must account for all loss. Hinsey v. Supreme Lodge K. of P. 138 Ill. App. 248.

**91.** Cunningham v. Cunningham, 81 S. C. 506, 62 SE 845. Trustee is chargeable with value of cotton rent as of time of receipt, thus eliminating speculative holding. Id. But decree charging trustee with values as of time of sale will not be disturbed in absence of definite evidence of difference in value. Id.

**92.** Ireland v. Bowman [Ky.] 113 SW 56.

**93.** Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153.

**94.** In re Fisk [Conn.] 71 A 559.

**95.** He must be sued individually, but court may allow individual judgment to be paid out of trust funds if be was free from willful misconduct. Kellogg v. Church Charity Foundation, 128 App. Div. 241, 112 NYS 566. Action will not lie against trustee in his trust capacity for individual wrong in handling estate. Colonial Match Co. v. Fox, 61 Misc. 532, 115 NYS 589.

**96.** Where acts charged may or may not be a breach of trust, they must be so alleged as to constitute a breach. Burke v. Maguire [Cal.] 98 P 21. Complaint against administrator, directed to pay money over to trustees when they qualified, alleging that, trustees not qualifying, executrix retained control and possession for eight years without alleging that she converted it, etc., held insufficient. Id.

**97.** Clapp v. Vatcher [Cal. App.] 99 P 549. Where trustee took personal property as a

While the burden is usually on the party alleging a breach of trust,[98] the trustee on failure to turn over trust funds shown to have been received must show that they were lost without his fault.[99]

§ 10. *Liability on trustee's bond.*[1]—See 10 C. L. 1926—A bond not in the statutory form may be sustained as a common-law bond if properly executed.[2] Where it is evident from the order of court and from the bond itself that it was intended to secure the faithful performance of the trust, one having a pecuniary interest in the trust may recover though not named therein.[3] Bond is liable for failure to pay successor the entire trust estate.[4]

§ 11. *Personal dealings with estate.*[5]—See 10 C. L. 1926—Ordinarily a trustee cannot deal with the trust estate to his own advantage,[6] and, where he buys in the property at a sale, the beneficiaries may ratify the sale and claim the proceeds or treat the purchase as for their benefit,[7] unless they assented to the purchase [8] or procured the same.[9] Where one holds bonds in trust for the benefit of another, "subject" to his own lien thereon, he may purchase on default in the conditions of his own lien.[10] While a trustee may deal with the cestui que trust, the utmost fairness and good faith is required,[11] all such transactions being prima facie fraudulent.[12] A trustee while acting as such cannot set up an adverse claim.[13]

§ 12. *Actions and controversies by and against trustees.*[14]—See 10 C. L. 1927—Although the statutes of many states require an action to be prosecuted by the real party in interest, an exception is usually made in favor of a trustee of an express trust,[15] especially if such trust is in writing,[16] and a trustee who is vested

necessary part of trust estate, and used same in connection with farm, part of trust, he should only be charged with legal rate of interest on value, where he did not make any profit from use or let any opportunity for more profitable use pass. Barber v. Barber [R. I.] 71 A 641.

98. Burden is on one seeking to hold trustee on ground of sale at inadequate price to establish misconduct. Anderson v. Thero [Iowa] 118 NW 47.

99. Bogard v. Planter's Bank & Trust Co. [Ky.] 112 SW 872.

1. **Search Note:** See Trusts, Cent. Dig. §§ 619-632; Dec. Dig. §§ 378-387; 22 A. & E. Enc. P. & P. 115.

2. Where bond did not fix penal sum as required by Act. 1908 (Acts 1908, p. 125, c. 49), held a common-law bond and sureties are liable for full default. Hite v. Hite's Ex'r [Ky.] 118 SW 357.

3. Close v. Farmer's L. & T. Co., 195 N. Y. 92, 87 NE 1005.

4. Bogard v. Planter's Bank & Trust Co. [Ky.] 112 SW 872.

5. **Search Note:** See notes in 29 L. R. A. 622.

See, also, Trusts, Cent. Dig. §§ 230-235; Dec. Dig. § 231.

6. Enslen v. Allen [Ala.] 49 S 430. As a general rule, if trustee becomes purchaser of trust property, such purchase is voidable at instance of cestui que trust, though purchased at public sale. Marr v. Marr [N. J. Err. & App.] 70 A 375.

7. Prewitt v. Morgan's Heirs [Ky.] 119 SW 174.

8. Where cestui que trust who was fully informed of all facts assented to the purchase by trustee, he is not required to ratify same after becoming informed of law to make it binding. Ungrich v. Ungrich, 131 App. Div. 24, 115 NYS 413. Evidence held to show that trustee purchased at an adequate price, that cestui que trust was fully informed of all facts and concurred in sale. Id.

9. Ungrich v. Ungrich, 131 App. Div. 24, 115 NYS 413.

10. Shepard & Morse Lumber Co. v. Hurd, 128 App. Div. 28, 112 NYS 401.

11. Copeland v. Bruning [Ind. App.] 87 NE 1000. Transaction will be closely examined. Gassert v. Strong [Mont.] 98 P 497. Warranty deed of trust premises from cestui que trust to one of the trustees to secure him as indorser for the cestui que trust upon notes creates equitable lien upon the premises for what ever sum trustee was compelled to pay, and estopped cestui que trust from asserting title as against such mortgage. Copeland v. Bruning [Ind. App.] 87 NE 1000.

12. Copeland v. Bruning [Ind. App.] 87 NE 1000.

13. Catholic bishop receiving property in trust for a certain "congregation" cannot assert ownership by church under its rules, etc. Krauczunas v. Hoban, 221 Pa. 213, 70 A 740.

14. **Search Note:** See notes in 6 L. R. A. (N. S.) 275; 73 A S. R. 164.

See, also, Trusts, Cent. Dig. §§ 352-378; Dec. Dig. §§ 245-269; 22 A. & E. Enc. P. & P. 134.

15. Subscription contract provided that signers agreed to pay sum set opposite their names to a bank on acceptance by proper officers of United States of offer to convey certain land to be purchased with subscription for federal use. Held that bank was trustee of express trust and proper party to sue on contract. Los Angeles Nat. Bank v. Vance [Cal. App.] 98 P 58. Under Code Civ. Proc. § 369, authorizing trustee of an

with legal title of securities may enforce same.[17] All trustees are necessary parties unless the action relates to a wrong or devastavit committed by one alone,[18] and, if they refuse to join as plaintiffs, they should be made defendants.[19] In some states, the beneficiaries are also necessary parties,[20] while in others the judgment against the trustee is binding on them.[21] Where a trustee is given power to prosecute and defend suits incidental to winding up the trust, he may sue to recover a certificate for the benefit of the estate.[22]

Liability of the trust estate for the expense and cost of litigation respecting the same lies largely within legislative control,[23] but, in the absence of plain legislative authority, the fund should not be depleted to pay the expense of unsuccessful litigation,[24] especially beyond the interest of the litigant therein.[25] A trustee for co-defendants confessing judgment is liable for costs where he unsuccessfully continues the litigation.[26] Where a beneficiary is compelled to sue to recover income due, his attorney is entitled to costs.[27] The expenses of a suit for the construction of a will with respect to a particular share should be charged to that share.[28]

§ 13. *Compensation and expenses.*[29]—See 10 C. L. 1928—All expenses and indebtedness reasonably incurred by the trustee in the management of the trust may be recovered,[30] and are usually a charge upon the entire estate.[31]

A trustee and the beneficiaries may contract with respect to the compensation of the former,[32] but, in the absence thereof, he is usually entitled to a reasonable

express trust to sue, and declaring that person in whose name a contract is made for benefit of another is a trustee of an express trust, one making in his own name a contract for purchase of real estate for another may sue thereon. Tandy v. Waesch [Cal.] 97 P 69.

16. Rule that trustee of express trust cannot sue as trustee unless trust is created by writing is based upon Rev. St. 1899, § 3416 (Ann. St. 1906, p. 1949), requiring express trusts in realty to be in writing, and has no application to personalty. Carroll v. Woods, 132 Mo. App. 492, 111 SW 885.

17. Cestui qui trust not necessary party to foreclosure proceedings. Milwaukee Trust Co. v. Van Valkenburgh, 132 Wis. 638; 112 NW 1083.

18. Caylor v. Cooper, 165 F 757. All trustees holding joint title to land are necessary parties to an action concerning it. Id.

19. Caylor v. Cooper, 165 F 757.

20. In suit by trustee to recover trust property, beneficiary is necessary party. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345. In suit by trustee to recover of bank and receiver of another bank for failure to pay draft bought of former against other, beneficiaries held necessary parties. Id. In suit by trustee under will making inhabitants of city and of town cestuis que trustent, the inhabitants should be parties, they not being same as the corporations. In re Aldrich's Will, 81 Vt. 308, 70 A 566.

21. Where trustee of individed interest was made party to partition suit, judgment held binding upon beneficiary having only a contingent interest. Collins v. Crawford, 214 Mo. 167, 112 SW 538. Under Kirby's Dig. § 6002, authorizing trustee to sue without joining beneficiary, one who took title in own name to property bought with his company's money can intervene in attachment of property as belonging to another. Burke v. Sharp [Ark.] 115 SW 145.

22. Henshau v. State Bank, 239 Ill. 515, 88 NE 214.

23. Legislature may make reasonable regulations for compensating out of trust fund a guardian ad litem of an infant required to be made a party without regard to interest of infant therein. In re McNaughton's Will [Wis.] 118 NW 997.

24. Especially when he has no interest therein. In re McNaughton's Will [Wis.] 118 NW 997.

25. In re McNaughton's Will [Wis.] 118 NW 997.

26. Zeno v. Adoue [Tex. Civ. App.] 117 SW 1039.

27. In re Bass, 57 Misc. 531, 109 NYS 1084.

28. Davies v. Davies, 129 App. Div. 379, 113 NYS 872.

29. **Search Note:** See Trusts, Cent. Dig. §§ 433-479, 491-493; Dec. Dig. §§ 314-321, 330; 28 A. & E. Enc. L. (2ed.) 1032; 22 A. & E. Enc. P. & P. 207.

30. Trust estate should not be charged with costs of appeal taken in the interest of the trustee individually. In re Morton's Estate [N. J. Eq.] 70 A 680. When reputable counsel insert in a trustee's account a credit claimed by him against the trust estate, the presumption is that compensation thus claimed was for services rendered in aid of the trust, and not in effort to destroy it. Whiteside v. Whiteside, 35 Pa. Super. Ct. 481.

31. Although secured by mortgage on specific property. In re Innis [Minn.] 119 NW 48.

32. Ladd v. Pigott [Mo.] 114 SW 984. Where trustee wrote inquiring what commission would be reasonable and suggested that 1 per cent was usually allowed and beneficiary replied that 1 per cent seemed reasonable and directed him to compute on

fee,[33] unless they are specifically fixed by statute.[34] In many states, a trustee receives commissions based upon the amount of estate handled,[35] in which case a trustee succeeding another is not entitled to full commissions,[36] although his predecessor may have waived his compensation.[37] The failure to execute a new bond upon the death of the surety upon the old bond does not defeat the trustee's right to compensation.[38] A trustee who acts in bad faith forfeits all compensation as trustee.[39]

§ 14. *Accounting, distribution and discharge.*[40]—See 10 C. L. 1929—A trustee has legal capacity to maintain an action in equity to settle his accounts,[41] and such suit may be prosecuted in the supreme court of New York.[42] In the absence of an adequate remedy at law,[43] any one in interest[44] may call a trustee in an accounting,[45] and the burden rests on the trustee to make a full disclosure of all funds,[46] and, where he refuses to do so or has failed to keep an account, every presumption is against him.[47] A judicially appointed trustee must usually account to the courts

that basis and remit balance, held a contract. Id.

33. Commission of 1 per cent annually for managing personal estate held reasonable. Ladd v. Pigott [Mo.] 114 SW 984. Allowance of $10 per month for collection of $100 monthly rental and payment of insurance and taxes held liberal. In re Leavitt [Cal. App.] 97 P 916. Where, during administration, trustee deducted usual percentages, and in suit for partition will have little or nothing to do except turn over money and property, allowance of $3,000 held excessive and cut to $1,500. Rackemann v. Tilton, 236 Ill. 49, 86 NE 168. Where trustee negotiated 99 year lease which was of great value, held that $10,000 was not unreasonable. Knight v. Knight, 142 Ill. App. 62.

34. Civ. Code 1902, § 2590, providing for allowance to trustees of same commissions as are allowed executors and administrators, applies as well to commissions for extraordinary services, as provided by § 2561, as to commissions for ordinary services as provided by § 2560. Cunningham v. Cunningham, 81 S. C. 506, 62 SE 845.

35. Where trustee is also executor, he is not entitled to commissions as executor on sale made as trustee. In re Waterman, 60 Misc. 292, 113 NYS 280. Under Code Civ. Proc. §§ 2730, 2802, 3320, prescribing compensation of trustees, trustee, succeeding a deceased trustee, is not entitled to commissions on funds received from representative of deceased trustee. In re Ward's Estate, 112 NYS 763. Widow and administratrix of insolvent trustee filed an account, showing trustee indebted to trust estate, which surety was compelled to pay. Trustee assigned commissions to surety. Held that widow and administrator could not recover commissions for substituted trustee. In re Scott's Estate [Pa.] 72 A 894.

36. Where trustee is removed for incompetency and unfitness, and trust remains to be executed, commissions should not be allowed. In re Williamsburgh Trust Co., 60 Misc. 296, 113 NYS 276.

37. Such waiver resulting to benefit of beneficiaries. In re Leavitt [Cal. App.] 97 P 916.

38. Especially where beneficiaries never complained and trust has been faithfully administered. Ladd v. Pigott [Mo.] 114 SW 984.

39. Whiteside v. Whiteside, 35 Pa. Super. Ct. 481.

40. **Search Note:** See notes in 63 A. S. R. 467; 10 Ann. Cas. 515.

See, also, Trusts, Cent. Dig. §§ 408-432, 480-495; Dec. Dig. §§ 289-313, 322-333; 28 A. & E. Enc. L. (2ed.) 1675; 22 A. & E. Enc. P. & P. 90, 202.

41. Mildeberger v. Franklin, 130 App. Div. 860, 115 NYS 903.

42. Supreme court has jurisdiction to settle a trustee's accounts and to determine the terms of and enforce trust. Mildeberger v. Franklin, 130 App. Div. 860, 115 NYS 903. Under Code Civ. Proc. § 484, prescribing grounds of demurrer, it is no ground of demurrer to action in supreme court by testamentary trustee for a settlement of his accounts that it could be more expeditiously done in surrogate court. Id.

43. Where it is asserted that trustee improperly invested certain sum, there is an adequate remedy at law, and equitable interference to require an accounting is unwarranted. Mersereau v. Bennet, 62 Misc. 356, 115 NYS 20.

44. Where cestui que trust mortgaged interest to trustee and same was foreclosed, no accounting can be had. Copeland v. Bruning [Ind. App.] 87 NE 1000.

45. Gill v. Bell's Knitting Mills, 128 App. Div. 691, 113 NYS 90. Complaint held to state a cause of action for an accounting. Kuchler v. Greene, 163 F 91. Controversies as to whether testamentary trustee has properly managed personal property are triable in surrogate court on a regular accounting. Ungrich v. Ungrich, 131 App. Div. 24, 115 NYS 413.

46. Trustee must render full account (Bone v. Hayes [Cal.] 99 P 172), and show credit (Choctaw, O. & G. R. Co. v. Sittel [Okl.] 97 P 363). Burden rests on trustee to make proper and satisfactory accounting of funds coming into his hands, and he will be charged with all items not accounted for. Chirurg v. Ames, 138 Iowa, 697, 116 NW 865.

47. Mere denial by agent purchasing bonds that he received bonus stock does not meet his duty to give full account. Bone v. Hayes [Cal.] 99 P 172.

of the state appointing him.[48] Where a trustee sells property in which she has a life estate, she is not presently chargeable with the money, since she is entitled to the use thereof.[49] Surplus income arising during the payment of annuities will be retained by trustee and accounted for at time of distribution.[50] The usual rules of evidence,[51] submission of issues,[52] burden of proof,[53] etc., obtaining in general suits for an account, apply. Where the county court of Texas has decreed the interest of the respective heirs in trust property, a decree of partition in the district court following such decree is not objectionable on the theory that the county court had exclusive jurisdiction.[54]

§ 15. *Establishment and enforcement of trust and remedies of beneficiary.*[55]—See 10 C. L. 1930—Equity has general jurisdiction of suits for the establishment [56] and enforcement [57] of trusts, and such actions, being quasi in rem,[58] are properly brought in the courts of the state where the property is situated.[59] Generally, all persons claiming an interest in the property sought to be impressed with a trust are neces-

48. Testamentary trustee in Connecticut was appointed ancillary trustee in New York, but thereafter New York court appointed a resident trustee to sell lands in that state, which turned proceeds over to trustee in Connecticut, who deposited same in bank in Connecticut. Held that ancillary appointment was terminated by appointment of substitute trustee, and proceeds were received under Connecticut appointment, and hence must be accounted for in that state. Jones v. Downs [Conn.] 72 A 589

49. Chirurg v. Ames, 138 Iowa, 697, 116 NW 865.

50. Fitchie v. Brown, 211 U. S. 321, 53 Law. Ed. 202.

51. Chirurg v. Ames, 138 Iowa, 697, 116 NW 865.

52. Where purchaser at administrator's sale did not know of estate's interest in trust fund, held not error to refuse to submit to jury in accounting whether he intended to purchase same. Routledge v. Elmendorf [Tex. Civ. App.] 116 SW 156. In accounting, question held properly submitted to jury whether deceased's interest was in hands of administrator at time of sale so as to bring it within description of property sold. Id.

53. Where transfer of claims, pursuant to administrator's sale, did not, on its face, transfer deceased's interest in trust fund, burden in accounting does not rest on distributees of estate to show that such interest was excepted and preserved. Routledge v. Elmendorf [Tex. Civ. App.] 116 SW 156.

54. Routledge v. Elmendorf [Tex. Civ. App.] 116 SW 156.

55. **Search Note:** See Trusts, Cent. Dig. §§ 496-513, 554-618; Dec. Dig. §§ 334-348, 359-377.

56. Where upon disorganization of county assets thereof passed to county to which territory was annexed charged with trust for payment of creditors of disorganized county, equity has jurisdiction to declare trust and determine who is entitled thereto, and creditors need not resort to mandamus. Curtis v. Charlevoix County Sup'rs, 154 Mich. 546, 15 Det. Leg. N. 941, 118 NW 618. Equity has jurisdiction of suit by administrator to have trust declared in property purchased with money received from intestate's estate, claimed as a gift, and to restrain further disposition, and bill should not be dismissed on ground of adequate remedy at law. Chamberlain v. Eddy, 154 Mich. 593, 15 Det. Leg. N. 865, 118 NW 499. One claiming no interest or duties under a trust but asserting adverse legal title cannot invoke equity to construe trust. Warren v. Warren [N. J. Eq.] 72 A 960. Bill construed as one for enforcement of parol express trust and not for specific performance of a contract. O'Briant v. O'Briant [Ala.] 49 S 317.

57. Ryan v. Knights of Columbus [Conn.] 72 A 574. General jurisdiction of equity over private trusts includes power to construe and enforce. Warren v. Warren [N. J. Eq.] 72 A 960. When trusts are to be executed which the probate court can not enforce, chancery court may take cognizance of the settlement of an executor's or administrator's administration after it has been commenced in probate court. Peters v. Rhodes [Ala.] 47 S 183. Although tax collector cannot ordinarily resort to equity to enforce collection where he has been made beneficiary in his official capacity, equity will enforce the trust. City of Boston v. Turner, 201 Mass. 190, 87 NE 634. Where bill is for enforcement of trust, and not a creditor's suit, in funds in hands of defendant claims need not be reduced to judgment against original holders. Watson v. National Life & Trust Co. [C. C. A.] 162 F 7. Under Pub. St. 1901, c. 245, choses in action in hands of trustee as security may be reached through appointment of receiver. Musgrove v. Goss [N. H.] 72 A 371.

58. Gassert v. Strong [Mont.] 98 P 497.

59. Although trustee is absent. Gassert v. Strong [Mont.] 98 P 497. Action to impress trust upon land in Michigan on ground that money fraudulently obtained from intestate was invested therein held properly brought in Michigan under Comp. Laws, § 434, although intestate at time of death lived in Ohio, and the administrator and person fraudulently obtaining the money still resides there. Morris v. Vyse, 154 Mich. 253, 15 Det. Leg. N. 722, 117 NW 639. Where corporate stock in which trust is sought to be enforced is within the state, substituted service under Code Civ. Proc. § 637 (Rev. Codes, § 6520) on nonresident holding legal title is sufficient. Gassert v. Strong [Mont.] 98 P 497.

sary parties,[60] but, where one is not an indispensible party to all the relief demanded, a failure to make him a party is no ground of demurrer.[61] One seeking the aid of equity to establish a trust must come with clean hands [62] and not be guilty of laches.[63] Where equity decrees a trust in a fund, its decree should adjust and protect the rights of all parties.[64] The proof must support the case alleged.[65]

(§ 15) *A. Express trusts.*[66]—See 10 C. L. 1930—In an action to establish an express trust, the evidence must be clear and positive.[67] In some states parol evi-

**60.** Kinard v. Jordan [Cal. App.] 101 P 696; Beckwith v. Sheldon [Cal.] 97 P 867.

**61.** Where state auditor was indispensible party to part of relief demand but not all, bill is not demurrable. Watson v. National Life & Trust Co. [C. C. A.] 162 F 7.

**62.** Where title was conveyed to granddaughter to prevent wife from acquiring a dower interest therein, equity will not declare a trust. Derry v. Fielder [Mo.] 115 SW 412.

**63. Barred:** Where bondholder delayed 8 years after maturity of municipal bonds before bringing action to charge city as voluntary trustee for collection of taxes. Eddy v. San Francisco [C. C. A.] 162 F 441. Bill to declare trust alleged that 28½ years before filing of bill defendant's testator bought in property of plaintiff's mother at sheriff's sale under agreement to hold difference between price and certain designated sum in trust for plaintiff's father, paying 6 per cent thereon to him during life. Defendant's testator repudiated trust immediately after purchasing and that no claim was made by plaintiff's father's family. Maggini v. Jones [Pa.] 72 A 559. Defendant as physician learned that patient had conveyed all his property to plaintiff. Plaintiff was appointed administrator of patient and bought in property at low price but in good faith. He slept on right for three years and allowed plaintiff's final account to be approved without opposition. Held that he could not recover for services from plaintiff on ground of trust to pay decedent's debts. Lauridsen v. Lewis, 50 Wash. 605, 97 P 663. Where there has been a repudiation by the trustee and knowledge of the repudiation has been brought home to the cestui que trust, the laches comes within the ordinary rules of limitation and laches. Kelly's Estate, 37 Pa. Super. Ct. 320.

**64.** Where court decrees a trust in fund claimed as a donation, it may decree a lien upon personal property purchased therewith, and that sums invested in buildings should be a lien upon the land exclusive of homestead. Chamberlain v. Eddy, 154 Mich. 593, 15 Det. Leg. N. 865, 118 NW 499. Where land was conveyed in absolute payment of debt but under agreement that grantee should sell same and account for surplus, upon refusal of grantee to so do, grantor is entitled to judgment that property be sold and surplus after paying costs of sale and debt be paid to him, or that land be redeeded upon payment of debt. Weltner v. Thurmond [Wyo.] 98 P 590.

**65.** An action to establish a trust based upon title in credit through assignment of another of his interest as heir in estate of creditor is not supported by decree finding as assignment of such interest as he had as heir in rights of creditor in a certain trust. Ward v. Ward, 130 App. Div. 27, 114 NYS 326.

**66. Search Note:** See notes in 7 L. R. A. (N. S.) 370, 999.

See, also, Trusts, Cent. Dig. §§ 496-513, 554-618; Dec. Dig. §§ 334-348, 359-377; 22 A. & E. Enc. P. & P. 117.

**67. Evidence held insufficient:** Admissions by defendant of parol trust held too indefinite as to terms. Crowley v. Crowley, 131 Mo. App. 178, 110 SW 1100. Evidence held too uncertain as to subject-matter and as to distribution. Mead v. Robertson, 131 Mo. App. 185, 110 SW 1095. Evidence held insufficient to show express trust in notes and mortgage indorsed and assigned to husband in favor of legatees. Mahan v. Schroeder, 236 Ill. 392, 86 NE 97. Evidence held insufficient to show that land was conveyed to defendant in trust for plaintiff and another. Rankin v. Nottingham [Or.] 96 P 1108. Evidence held insufficient to show express trust to purchase land jointly, defendant to take title and to hold one-half in trust for plaintiff. Stevenson v. Haynes [Mo.] 119 SW 346. Testimony of conversations had with husband and wife, had more than 30 years ago, to effect that wife had money with which to buy farm and that they had selected a farm, etc., which was to be for wife's benefit, held insufficient to establish trust where wife is dead and husband incompetent to testify, especially where wife's money became husband's under existing law. Garrett v. Rutherford, 108 Va. 478, 62 SE 389. Evidence held to show that deeds were made by mother to son in consideration of support and not in trust under agreement to reconvey on demand. Baker v. Baker [Mich.] 16 Det. Leg. N. 272, 121 NW 287. Bill to declare holders of legal title trustee for equitable owner, based upon adverse possession and recorded conveyance which failed to convey because of lack of seal, should be dismissed where proof of adverse possession fails and there are grave doubts whether supposed grantor ever signed alleged conveyance. Yellow Pine Lumber Co. v. Jerigan [Fla.] 47 S 945. It is not enough that it satisfies a jury; it must also satisfy the mind and conscience of the court sitting as chancellor reviewing the testimony, and if it fails in this respect it must be withdrawn from the jury. Lutz v. Matthews, 37 Pa. Super. Ct. 354. Evidence held insufficient to show that decedent held note in trust for 30 years for plaintiff's father. Wheeler v. Bettis' Ex'rs [Ky.] 116 SW 252. Where wife gave property to attorney to be given to certain par-

dence is inadmissible to ingraft a trust upon an absolute deed,[66] but, where it is competent, it must be clear and convincing.[69] The general rules as to admissibility of evidence apply.[70]

(§ 15) *B. Implied trusts generally.*[71]—See 4 C. L. 1755

(§ 15) *C. Constructive trusts.*[72]—See 10 C. L. 1931—The persons defrauded[73] may maintain an action to establish a constructive trust, provided the right has not been lost by laches[74] or barred by limitation.[75] Laches or limitation does not ordinarily commence to run until the fraud is discovered.[76] The burden usually rests upon the one seeking to establish a trust to prove all the essential facts,[77] and the

ties at her death but subsequently withdrew such property and gave it to her husband, held that evidence did not show undue influence on the part of husband so as to constitute prior transaction an executed trust. Mahan v. Schroeder, 142 Ill. App. 538.

**Evidence held sufficient:** Evidence held to sustain finding that property was given to defendant by his mother in trust for himself and his brothers and sisters. Mollison v. Rittgers [Iowa] 118 NW 512. Evidence held to how that county bonds received by parties who had constructed bridge and incurred heavy indebtedness were conveyed to two of parties in trust to pay indebtedness. Walker v. Harris Ex'rs [Ky.] 114 SW 775. In suit to impress trust on certain notes payable to defendant and indorsed to plaintiff, evidence held to sustain finding establishing identity of notes, previously sold to defendant, to replace which the notes in question were given. Irwin v. Deming [Iowa] 120 NW 645. Where notes and mortgage originally belonging to decedent are found in her husband's possession at her death, properly indorsed and assigned to him, it will be presumed that he owns beneficial interest as well as legal. Mahan v. Schroeder, 236 Ill. 392, 86 NE 97. Evidence held to show that banks, being unable to show that funds in hands of commission firm accrued from sale of cattle covered by their respective mortgages, orally agreed to place same in trust for equal benefit of all. Carroll v. Woods, 132 Mo. App. 492, 111 SW 885. Where, after sale of land, on foreclosure of vendor's lien, to H, original grantee remained in possession until his death and his widow and children thereafter without any claim on part of purchaser, it will be presume that purchaser held title for decedent. Howard v. Howard [Ky.] 118 SW 367.

68. Doctrine that written instrument cannot be varied by proof of parol extemporary agreement is applicable to attempt to ingraft parol trust on absolute deed. Gaylord v. Gaylord [N. C.] 63 SE 1028.

69. Bollinger v. Bollinger [Cal.] 99 P 196. Evidence of transactions between deceased and defendant, father and son, and surrounding circumstances, held to show that deed absolute was accompanied by parol trust. Id.

70. Declarations of grantor after delivery of deed and not in presence of grantee, is inadmissible to show that absolute deed was accompanied by parol trust. Bollinger v. Bollinger [Cal.] 99 P 196. Instrument executed by wife directing husband to deliver notes and mortgage to her executor on her death to be used in carrying out will held inadmissible to show that subsequent absolute indorsement and delivery of notes and mortgage to husband was in trust, it not having been executed in his presence or having come to his knowledge. Mahan v. Schroeder, 236 Ill. 392, 86 NE 97.

71. **Search Note:** See Trusts, Cent. Dig. §§ 496-513, 554-618; Dec. Dig. §§ 334-348, 359-377.

72. **Search Note:** See Trusts, Cent. Dig. §§ 496-513, 554-618; Dec. Dig. §§ 334-348, 359-377.

73. Where deed by infant is disaffirmed by conveyance to another after coming of age, grantee under first deed cannot claim a constructive trust for him on ground that second gantee procured conveyance by fraud, grantor therein not complaining. Beauchamp v. Bertig [Ark.] 119 SW 75. Where husband receives conveyance from wife on death bed under parol trust for benefit of children and repudiates same under circumstances creating a trust ex maleficio, children have equitable right to enforce same. In re Fisk [Conn.] 71 A 559.

74. Unexplained delay of 20 years in bringing action to enforce constructive trust held laches, third persons having acquired rights. Lady Ensley Coal, Iron & R. Co. v. Gordon [Ala.] 46 S 983. Where trust is kept secret from beneficiary until shortly before suit for breach thereof is brought, laches does not bar recovery. Russell v. Huntington Nat. Bank [C. C. A.] 162 F 868.

75. Limitations held to bar action to enforce constructive trust in 10 years. Lady Ensley Coal, Iron & R. Co. v. Gordon [Ala.] 46 S 983.

76. Where trustee fraudulently kept trust from knowledge of beneficiary, limitations against action for breach thereof does not commence to run until fraud is discovered. Russell v. Huntington Nat. Bank [C. C. A.] 162 F 868. Where owner agreed to convey certain land provided contractees built certain railroad, a right to enforce constructive trust arose upon fulfillment of conditions. Lady Ensley Coal, Iron & R. Co. v. Gordon [Ala.] 46 S 983.

77. While burden is on one seeking to impress a trust upon stock as having been received as bonus with bonds purchased by defendant as agent for plaintiff to show that they were so received, evidence will not be strained to exculpate defendant, especially where he has not rendered full account. Bone v. Hayes [Cal.] 99 P 172. To establish a constructive trust on the ground of fraud in entering into parol arrangement whereby title was acquired without any intention of observing it, the

evidence must be clear and convincing.[78] The general rules as to pleadings[79] and evidence[80] apply.

(§ 15) *D. Resulting trusts.*[81]—See 10 C. L. 1031—The death of the holder of legal title does not prevent the establishment of a resulting trust.[82] Before a creditor can sue to impress a trust upon land as purchased with money of his debtor, he must exhaust his legal remedies.[83] The suit must be timely brought,[84] and the evidence must be strong and satisfactory[85] especially where a presumption of a gift is to be overcome.[86] A resulting trust cannot be ingrafted on an absolute deed in favor of the grantor.[87] The burden of proving a resulting trust rests upon the person asserting the same.[88] Affirmative defenses which are not connected with the transaction as pleaded and which do not arise out of the same are demurrable.[89]

§ 16. *Following trust property.*[90]—See 10 C. L. 1932—The conversion of personalty into realty, or vice versa, does not destroy the trust, but it will attach to the property in its changed form,[91] and, where trust property is wrongfully disposed of

evidence must be clear and convincing. Carr v. Craig, 138 Iowa, 526, 116 NW 720.

78. Mead v. Robertson, 131 Mo. App. 185, 110 SW 1095.

79. In action to impress constructive trust upon shares of stock and to compel delivery thereof, it is not necessary to allege value. Kinard v. Jordan [Cal. App.] 101 P 696. Allegation that grantor was in possession of land at time of execution of deed and thereafter continued in possession held sufficient averment of ownership. Hanson v. Svarverud [N. D.] 120 NW 550. Allegation that V. obtained money from intestate by fraud and undue influence and invested same in land which she caused to be placed in defendants' names for her benefit held sufficient without allegation that V. was insolvent. Morris v. Vyse, 154 Mich. 253, 15 Det. Leg. N. 722, 117 NW 639.

80. In action to impress a trust upon stock alleged to have been received by defendant as bonus with bonds purchased by him as plaintiff's agent, plaintiff may show terms upon which bonds were sold to other purchasers after showing that they were all disposed of according to general plan. Bone v. Hayes [Cal.] 99 P 172.

81. **Search Note:** See Trusts, Cent. Dig. §§ 496-513, 554-618; Dec. Dig. §§ 334-348, 359-377.

82. Stevens v. Fitzpatrick [Mo.] 118 SW 51. But great care must be exercised. Id.

83. Farrelly v. Skelly, 130 App. Div. 803, 115 NYS 522.

84. Action to establish resulting trust by heirs brought long after all parties familiar with facts have died, held barred. Geter v. Simmons [Fla.] 49 S 131.

85. Geter v. Simmons [Fla.] 49 S 131; Keuper v. Mette's Unknown Heirs, 239 Ill. 586, 88 NE 218; Freeman v. Peterson [Colo.] 100 P 600. High standard of evidence is required. Stevens v. Fitzpatrick [Mo.] 118 SW 51. Fact of payment must be established by clear and positive testimony. Turpin v. Mills, 108 Md. 678, 71 A 440. Evidence held insufficient to show that plaintiff was a partner in business conducted by her husband and another and a resulting trust in land bought with partnership money. Keuper v. Mette's Unknown Heirs, 239 Ill. 586, 88 NE 218. Evidence held insufficient to show that plaintiff and decedent were partners in saloon business, from which money was taken to buy land. Freeman v. Peterson [Colo.] 100 P 600. Proof of resulting trust held insufficient, all parties familiar with facts being dead. Geter v. Simmons [Fla.] 49 S 131. Evidence held insufficient to show trust in favor of deceased wife's heirs to property deeded to husband by her father. Colegrove v. Colgrove [Ark.] 116 SW 190. Evidence of declarations of deceased, that contract of purchase was in plaintiff's name, held to support finding that plaintiff purchased land which was taken in deceased father's name without her knowledge. Christensen v. Williams, 34 Utah, 127, 97 P 219. Evidence held to show that plaintiff contributed his share of purchase money for land, the title to which was taken in defendant's name. Gerety v. O'Sheehan [Cal. App.] 99 P 545. Evidence held to sustain finding that plaintiff's husband paid for land taken in his father's name. Stevens v. Fitzpatrick [Mo.] 118 SW 51.

86. Presumption of gift to daughter and granddaughter can be overcome only by clear and convincing evidence. Derry v. Fielder [Mo.] 115 SW 412. Evidence held insufficient to overcome presumption that land, purchased by husband and conveyed to wife, was a gift. Poole v. Oliver [Ark.] 117 SW 747.

87. Lancaster v. Springer, 239 Ill. 472, 88 NE 272; Baker v. Baker [N. J. Eq.] 72 A 1000.

88. Keuper v. Mette's Unknown Heirs, 239 Ill. 586, 88 NE 218.

89. Burling v. Page, 49 Wash. 702, 96 P 155. Mere existence of lien superior to resulting trust is not a bar to action enforcing trust against one claiming free from lien, lien having not been foreclosed. Moultrie v. Wright [Cal.] 98 P 257.

90. **Search Note:** See notes in 6 L. R. A. (N. S.) 793; 32 A. S. R. 125; 46 Id. 608; 86 Id. 801; 4 Ann. Cas. 371; 7 Id. 553.

See, also, Trusts, Cent. Dig. §§ 514-553; Cent. Dig. §§ 349-358; 28 A. & E. Enc. L. (2ed.) 1108; 22 A. & E. Enc. P. & P. 199.

91. Frank v. Firestone, 116 NYS 700; Tarnow v. Carmichael [Neb.] 116 NW 1031. Widow procured sale of land by administrator free from her homestead, although order required it to be sold subject thereto,

it may be followed in equity [92] as long as it can be identified,[93] until it reaches the hands of a bona fide purchaser.[94] One purchasing property with notice of a trust therein takes subject thereto,[95] and he is bound to execute the trust although there is no writing to that effect.[96] If the trustee, however, has any interest as a beneficiary, the conveyance will be valid as to such interest.[97] The notice need not be actual but may be imputed from the knowledge of facts which would put an ordinary man on inquiry [98] and one knowingly dealing with a trustee is charged with notice of his powers.[99] A conveyance subject to a trust merely substitutes trustees and needs no consideration to support it.[1] A conveyance of trust property in satisfaction of the trustee's private debts, with knowledge of the trust on the part of the purchaser, is void,[2] and the purchaser becomes a trustee ex maleficio.[3] Before a trust deposit can be claimed in assets of an insolvent bank, it must have increased such assets, though it is not necessary to trace the identical money.[4]

§ 17. *Termination and abrogation of trust.*[5]—See 10 C. L. 1933—Where a trust has been fully performed according to its terms,[6] or the valid portion thereof,[7] it

the widow, administrator, and purchaser being ignorant thereof. Widow received $2,000 in lieu of the homestead, which she invested in land. She sold land to purchaser and took back a mortgage. Held that she received $2,000 in trust for purchaser, and such trust attached to mortgage. Id.

92. Jurisdiction of equity to follow converted trust funds is concurrent with legal remedies. Peters v. Rhodes [Ala.] 47 S 183. Where lodge officers misapplied funds of the lodge, the property bought with such funds may be applied in payment of loss as long as such fact can be ascertained. Hinsey v. Supreme Lodge K. of P., 138 Ill. App. 248.

93. Reaves v. Coffman [Ark.] 112 SW 194. Evidence held insufficient to show that lots in wife's name were purchased by husband with ward's money. Reaves v. Coffman [Ark.] 112 SW 194. Evidence held insufficient to identify fund. Commonwealth v. Union Surety & Guaranty Co., 37 Pa. Super. Ct. 179.

94. Morris v. Vyse, 154 Mich. 253, 15 Det. Leg. N. 722; 117 NW 639. Purchaser under voluntary deed from trustee is charged with notice of trust. Metzger v. Lehigh Valley Trust & Safe Deposit Co., 220 Pa. 535, 69 A 1037. Although another is clothed with indicia of ownership, if purchaser is charged with notice that property is held in trust, true owners are not estopped from asserting ownership. Henshaw v. State Bank, 239 Ill. 515, 88 NE 214. One purchasing without notice of resulting trust takes free therefrom. Moultrie v. Wright [Cal.] 98 P 257. Where deed is taken in payment of unauthorized debt secured by mortgage, grantee cannot claim bona fide character. Gibney v. Allen [Mich.] 16 Det. Leg. N. 159, 120 NW 811. Mortgagor of land charged with resulting trust as to undivided one-half is competent witness to prove that he told mortgagee of trust, although mortgage purported to cover entire interest. Moultrie v. Wright [Cal.] 98 P 257. Innocent purchaser for value of machinery placed with parties in trust until paid for is protected. Eureka Knitting Co. v. Snyder, 36 Pa. Super. Ct. 336.

95. Moultrie v. Wright [Cal.] 98 P 257. Insufficiency of evidence to show resulting trust is no ground for excluding evidence of notice thereof to mortgagee. Id. In action to establish trust ex maleficio in property alleged to have been purchased with embezzled funds, bill of intervention setting up adverse claim in property under contract with intervenor, which does not deny allegations of the bill nor allege that intervenor was ignorant of facts, is insufficient. United States v. Greene, 163 F 442.

96. Howe v. Howe, 199 Mass. 598, 85 NE 945.

97. Conveyed in satisfaction of own debt. Jackson v. Thompson, 222 Pa. 232, 70 A 1095. Where mother took title by absolute deed from son, knowing of a resulting trust in favor of all the children, it may be asserted against her except as to grantor's interest. Baker v. Baker [N. J. Eq.] 72 A 1000.

98. Where certificate of advancements was indorsed "H. W. Christian, trustee of * * * land company," bank held charged with notice that it was held in trust. Henshaw v. State Bank, 239 Ill. 515, 88 NE 214. Where land was conveyed to "W. H. Simmons, trustee," and other land to "W. H. Simmons, trustee for M. P. Simmons and W. W. Langford," held sufficient to put judgment creditor on inquiry as to his interest. H. B. Claflin Co. v. King [Fla.] 48 S 37.

99. Gibney v. Allen [Mich.] 16 Det. Leg. N. 159, 120 NW 811.

1. Howe v. Howe, 199 Mass. 598, 85 NE 945. Evidence held to show that purchasers took property charged with trust. Id.

2, 3. Jackson v. Thompson, 222 Pa. 232, 70 A 1095.

4. Hansen v. Roush [Iowa] 116 NW 1061. Where it appears that after deposit of trust fund over $130,000 had been paid out by bank and only $1,200 remained on deposit, finding that trust deposit did not increase assets held authorized. Id.

5. **Search Note:** See notes in 18 L. R. A. 745; 100 A. S. R. 101; 6 Ann. Cas. 189.

See, also, Trusts, Cent. Dig. §§ 78-87; Dec. Dig. §§ 59-61; 28 A. & E. Enc. L. (2ed.) 945.

6. Where trust is to terminate only when all debts have been paid, existence of mortgage debt incurred by trustee in manage-

thereupon terminates, but, until so performed, a court of equity has no power except in rare cases to terminate it.[8] A voluntary settlement executed without fraud or mistake [9] is irrevocable, in the absence of a reservation of power to revoke [10] except with the consent of all parties in interest.[11] A trust agreement may usually be abandoned or terminated by the parties in interest,[12] and, where land is conveyed to one in trust, an agreement annulling the "trust" annuls the entire transaction.[13] Voluntary donations in trust for a particular purpose is terminated by the failure of the purpose,[14] and the property remaining should be returned pro rata.[15] Where money is deposited in a bank in the name of the depositor in trust for another, the death of the beneficiary terminates the trust in the absence of some unequivocal act or declaration indicating an intention to make the trust absolute.[16]

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**Turnpikes; Turntables; Ultra Vires,** see latest topical index

ment of estate prevents termination at instance of remainderman. In re Innis [Minn.] 119 NW 48. Where testator places property in trust, income to be paid to son, but provided that, on son discharging all his debts and being, in trustee's judgment, solvent, trust should terminate and corpus paid to son, debts discharged by bankruptcy or barred by limitations held discharge within provision, he not being required to "pay" the debts. Young v. Young, 127 App. Div. 130, 111 NYS 341. Where deed provides that, upon grantor's death, the trust shall cease and trustee shall execute quitclaim deeds to designated persons, trust does not terminate instantly upon grantor's death so that court cannot enforce same. Miles v. Miles [Kan.] 96 P 481. Where there was no time fixed during life of trustee for termination of trust for benefit of children, their arrival at maturity does not give right to terminate, especially where trustor's intent to contrary is manifest. Nunn v. Peak [Ky.] 113 SW 493. Where will gave full beneficial interest to one but provided that legal title was to be held by trustees until beneficiary should reach twenty-five years of age, at which time it was to be conveyed to him if trustees considered him worthy, his death shortly after reaching twenty-five terminated trust, though he was unworthy of receiving money, under Comp. Laws 1897, § 8851. Taylor v. Richards, 153 Mich. 667, 15 Det. Leg. N. 565, 117 NW 208.

**7.** Where provision directing trustee to convey to designated persons on death of beneficiary entitled to life use of income is void, trust ipso facto terminates on death of life tenant. In re Leavitt [Cal. App.] 97 P 916.

**8.** Dickey v. Goldschmidt, 60 Misc. 258, 111 NYS 1025.

**9.** Absence of power of revocation is not prima facie evidence of mistake, but a mere condition to be considered. Crumlish v. Security Trust & Safe Deposit Co. [Del.] 68 A 388. Where purpose of creating a trust by married woman was to place property beyond reach of spendthrift husband absence of power of revocation, which would have largely defeated purpose, held insufficient to show fraud or mistake. Id.

**10.** Crumlish v. Security Trust & Safe Deposit Co. [Del.] 68 A 388; Dickey v. Goldschmidt, 60 Misc. 258, 111 NYS 1025. Voluntary settlement by wife to free herself from being influenced to pay debts of husband, fully executed without fraud or mistake, held irrevocable. Id.

**11.** Where widow and heirs to settle controversy agreed that outsider should have power to sell land and distribute proceeds among them in specified proportions, it is irrevocable, though no steps have been taken under it. Goodrich v. Webster, 74 N. H. 474, 69 A 719. Where it is manifest from will that it was intention that trust created thereby should continue until fully performed by payments at the future times designated therefor, court cannot, with the consent of the trustee and beneficiaries, terminate the same. Russell v. Wright, 133 Wis. 445, 113 NW 644.

**12.** Evidence held to show that contract, providing that all moneys and evidences of indebtedness received by retail firm from sale of fertilizers should be held in trust for company selling same to them, was abandoned and that no fertilizer was sold thereunder. Southern States Phosphate & Fertilizer Co. v. Barrett, 130 Ga. 749, 61 SE 731.

**13.** And to reinvest title. Swift v. Craighead [N. J. Eq.] 70 A 666.

**14.** Persons donated money and property to establish a training school. Deed conveying real estate provided that, on failure to maintain school, land should be conveyed to trustees, to be used for purposes for which it was deeded. School was a failure by both original grantee and trustees. Held that express trust was established and failed. Taylor v. Rogers [Ky.] 112 SW 1105.

**15.** Where persons gave donations and conveyed land in trust to establish a training school, differing wholly from public graded schools, upon failure of trust, funds should be returned to donors, and should not go to public schools under doctrine of cy pres. Taylor v. Rogers [Ky.] 112 SW 1105. Where donations were made and land conveyed for a trust purpose upon failure of the trust, property should be reduced to cash and distributed among donors in proportion that each donation bore to whole sum donated. Id.

**16.** In re Duffy, 127 App. Div. 74, 111 NYS 77.

**UNDERTAKINGS**

*The scope of this topic* is noted below.[18]

In an action on a joint and several undertaking, the rule that, in an action against the personal representative of a deceased joint debtor, it must be alleged and proved the debt cannot be collected from the surviving joint debtor does not apply.[19]

**Undue Influence; Unfair Competition; Union Depots,** see latest topical index.

**UNITED STATES.**

§ 1. Proprietary Rights, 2204.
§ 2. Contracts, 2204.
§ 3. Officers and Employes, 2204.
§ 4. Claims, 2205.
§ 5. Actions by and Against, 2207.

*The scope of this topic* is noted below.[20]

§ 1. *Proprietary rights.*[21]—See 10 C. L. 1935—Adverse possession cannot run against the United States,[22] and a state legislature cannot pass title to land out of the United States.[23] A portion of a military reservation relinquished to a city and dedicated as a street by congress cannot be alienated.[24]

§ 2. *Contracts.*[25]—See 10 C. L. 1935—A contract for a building by the United States is not changed in its essential character by the omission of the government as a party.[26] No implied contract will arise on the part of the government to compensate an American corporation for the destruction of property in the enemy's country during war.[27]

§ 3. *Officers and employes.*[28]—See 10 C. L. 1935—Judicial notice will be taken of the incumbent of a cabinet office.[29] A person engaged in the department of agriculture as an assistant statistician is not a public officer of the United States,[30] but

17. See 10 C. L. 1935.
**Search Note:** See Undertakings, Cent. Dig.; Dec. Dig.; 29 A. & E. Enc. L. (2ed.) 98; 8 A. & E. Enc. P. & P. 610.

18. Includes only general rules as to form and execution of undertakings as distinguished from bonds (see Bonds, 11 C. L. 424). The necessity and sufficiency of undertakings in particular proceedings are treated in topics dealing with such proceedings, and the liabilities of sureties are treated in Suretyship, 12 C. L. 2009. See, also, generally, Recognizances, 12 C. L. 1664.

19. Erie County v. Baltz, 125 App. Div. 144, 109 NYS 304.

20. Includes only general matters relating to the organization and powers of the national government. Excludes relative powers of state and federal governments (see Constitutional Law, 11 C. L. 689), jurisdiction of federal courts proper (see jurisdiction, 12 C. L. 458), as distinguished from the court of claims, which is herein treated, federal jurisdiction over particular subject-matters (see such topics as Commerce, 11 C. L. 643; Mines and Minerals, 12 C. L. 851; Public Lands, 12 C. L. 1456; Shipping and Water Traffic, 12 C. L. 1859), matters common to all public bodies (see Public Contracts, 12 C. L. 1442; Public Works and Improvements, 12 C. L. 1478; Officers and Public Employes, 12 C. L. 1131), and war and diplomatic and spoliation claims arising therefrom (see War, 8 C. L. 2257).

21. **Search Note:** See United States, Cent. Dig. §§ 38-41; Dec. Dig. §§ 55-58; 22 A. & E. Enc. L. (2ed.) 1229; 29 Id. 143, 146.

22. Cannot be set up as against person while title to land remains in government. Price v. Dennis [Ala.] 49 S 248. No right by prescription or by virtue of statute of limitations runs against any land title to which remains in United States. State v. Blakely [Mo. App.] 115 SW 483.

23. Code 1896, § 1813, as to certificates intended to protect title of United States or that acquired thereunder through certification. Price v. Dennis [Ala.] 49 S 248. Not intended to benefit party claiming against patentee. Id. Could not operate to give title by adverse possession. Id.

24. Effectual dedication of street by Act Cong. May 9, 1876, c. 93, 19 St. 52. Rudolph Herman Co. v. San Francisco [Cal.] 99 P 169.

25. **Search Note:** See United States, Cent. Dig. §§ 42-59; Dec. Dig. §§ 59-76; 29 A. & E. Enc. L. (2ed.) 169.

26. Contract by agents for public buildings. Speir v. U. S., 31 App. D. C. 476. Contract between builder and board of commissioners for and on behalf of U. S. Soldier's Home signed by Board by president, for building is contract with United States within meaning of Act Cong. Aug. 13, 1894 (28 Stat. at L. 278, c. 280; U. S. Comp. St. 1901, p. 2523). Id.

27. Mining property in Cuba, Juragua Iron Co. v. U. S., 212 U. S. 297, 53 Law. Ed. —, afg. Id., 42 Ct. Cl. 99. See War, 8 C. L. 2257.

28. **Search Note:** See United States, Cent. Dig. §§ 1-37; Dec. Dig. §§ 1-52; 22 A. & E. Enc. L. (2ed.) 1229; 29 Id. 158.

29. Perovich v. Perry [C. C. A.] 167 F 789.

30. United States v. Haas, 167 F 211.

the board of commissioners of the Soldiers' Home in the District of Columbia are officers of the United States.[31] The Senate is the judge of the qualification of its members,[32] and, hence, a state law authorizing legislative candidates to make a declaration of their choice of United States senators, even if invalid as authorizing an election of such senators by the people instead of by the legislature,[33] cannot be attacked by an elector,[34] and such a provision is not affected by a separable provision absolutely requiring a pledge or declaration by legislative candidates as to their senatorial choice,[35] even though the latter provision be invalid.[36] The publication of information by a federal clerk or employe in respect to matter which was understood to have been kept secret, although for private gain, is not a crime.[37] Injunction will lie to prevent the manufacture of guns and carriages by a federal officer for the use of the United States, where such manufacture is an infringement of the complainant's patents,[38] but injunction will not lie where the patentee seeks by injunctive process to control property of the United States.[39] The action of a military governor in abolishing a hereditary office with its emoluments constituting a tort, in violation of the law of nations or a treaty, may be ratified by the government so as to exonerate such governor from liability.[40]

§ 4. *Claims.*[41]—See 10 C. L. 1938—Where a claim is recognized by congress, without negativing its succession in case of death, the right to enforce the demand passes to the personal representatives of the claimant.[42] Claims may be referred to certain officers,[43] and the statute may render the determination of the claim a duty enforcible by mandamus.[44]

**31.** Acting as agents in management of buildings. Speir v. U. S. 31 App. D. C. 476.

**32.** State v. Blaisdell [N. D.] 118 NW 141.

**33.** Primary election law (Laws 1907, p. 151, c. 109) does not contravene federal court, art. 1, § 3. State v. Blaisdell [N. D.] 118 NW 141. Act not void as unlawful delegation of power granted to legislature, since legislature still elects senator and only gives voters opportunity to express choice of candidates. Id. All provisions of primary election law (Laws 1907, p. 151, c. 109) are germane to subject embraced in title of act. Id. Not delegation of legislative power since legislature in electing senator acts as elective body. Id. Contention that act unlawfully attempts to bind successive legislatures not tenable. Id.

**34.** If primary election law (Laws 1907, p. 151, c. 109) contravenes federal const. art. 1, § 3, requiring U. S. senators to be elected by state legislature, fact must be decided by U. S. senate (Const. art. 1, § 5). State v. Blaisdell [N. D.] 118 NW 141. Not judicial question. Id. No right guaranteed by federal constitution to relator, an elector, with respect to election of U. S. senators. Id.

**35.** Provisions of act, providing method for permitting electors to designate choice for U. S. senator, not dependent upon other provisions requiring oath and pledge. State v. Blaisdell [N. D.] 118 NW 141.

**36.** Primary election law (Laws 1907, p. 151, c. 109) §§ 3, 4, requiring candidates for legislature to make pledge of their choice for United States senator is violative of state constitution (§ 211) in that it adds another oath of declaration and test as qualification of office. State v. Blaisdell [N. D.] 118 NW 141.

**37.** Until made so by statute. United States v. Haas, 167 F 211.

**38.** No attempt to disturb U. S. in possession of guns manufactured, and continuance of manufacture would render patents valueless. Klupp Aktiengesellschaft v. Crozier, 32 App. D. C. 1.

**39.** Haupt v. Wright, 32 App. D. C. 408. Where patentee of design for construction of jetty induced use of same for trial, and government engineers convinced congress that such jetty was impracticable, whereupon it was modified and changed, patentee could not enjoin change on ground that sufficient time had not been allowed to demonstrate utility. Id.

**40.** Abolition of office by governor of Cuba ratified by executive, congress and treaty making power. O'Reilly De Camara v. Brooke, 209 U. S. 45, 52 Law. Ed. 676.

**41. Search Note:** See United States Cent. Dig. §§ 72-111; Dec. Dig. §§ 93-123; 29 A. & E. Enc. L. (2ed.) 175.

**42.** Under Act Cong. Feb. 17, 1903, 32 Stat. at L. 1612, c. 559, where appropriation made, action of mandamus survived to personal representatives. United States v. Cortelyou, 30 App. D. C. 45, rvd. United States v. MacVeagh, 29 S. Ct. 556.

**43.** Where Act Feb. 17, 1903, 32 Stat. at L. 1612, c. 559, expresses referred claim to secretary of treasury for adjustment and payment, that officer was not bound by report of subordinate and might disapprove same. United States v. Cortelyou, 30 App. D. C. 45, rvd. United States v. MacVeagh, 29 S. Ct 556.

**44.** Act Feb. 17, 1903, (32 Stat. at L. 1612, c. 559) referring parish claim to secretary of treasury for determination, with appropriation to pay balance, conferred a duty enforcible by mandamus, which was not discretionary. United States v. MacVeagh, 29 S. Ct. 556. rvg., United States v. Cortelyou, 30 App. D. C. 45.

The court of claims has no jurisdiction of claims sounding in tort,[45] but citizens have a constitutional right to petition congress for redress of grievances, even though they do not constitute legal or equitable claims,[46] and either house of congress or a committee thereof may refer such a claim to the court of claims for investigation [47] and report,[48] the relief to be given, however, being a matter of legislative discretion.[49] Where a bill referred is for the payment of a specific amount in full payment and discharge of a claim, the findings of the court must be limited by the amount named.[50] Upon the reference of a claim for supplies taken by the federal forces during the Civil War, the loyalty of the claimant is jurisdictional under the Bowman Act [51] but not under the Tucker Act.[52] Findings of fact upon a reference under either of such statutes are res adjudicata,[53] and in the absence of newly-discovered evidence, fraud or false testimony, such questions cannot be reopened upon a subsequent reference,[54] but, where it appears upon the second reference that competent evidence was overlooked upon the first reference or that the findings thereon were based upon false testimony or procured by fraud, they may be reopened.[55] Upon a reference under the Tucker Act of a claim previously disallowed under the Bowman Act upon a finding of want of loyalty, the court may report the merits without reference to the question of loyalty.[56] Under the Tucker Act a bill authorizing suit to be brought in the court of claims cannot be referred to such court in advance of such suit.[57]

The court of claims is not bound by special rules of pleading, but will nevertheless conform to those rules deemed necessary by all courts for the orderly administration of justice and to secure to the defendants the benefit of the doctrine of res adjudicata,[58] and hence there is a misjoinder of petitioners where no one of them has any right, title or interest in or claim to the claims of the others.[59] There is some analogy, however, in special cases to the practice in chancery, and all claimants necessary to a complete disposition of the controversy must be before the court.[60]

45. Claim for compensation for unlawful destruction of property during war is one sounding in tort within Act March 3, 1887 (24 Stat. at L. 505, c. 359, U. S. Comp. St. 1901, p. 752), excluding cases of that character from court of claims. Juragua Iron Co. v. U. S., 212 U. S. 297, 53 Law. Ed.—. afg. 42 Ct. Cl. 99.

46. Widmayer v. U. S., 42 Ct. Cl. 519.

47. Bowman Act (22 Stat. 485) is to relieve congress and committees of investigation of claims and secure benefit of judicial investigation. Widmayer v. U. S., 42 Ct. Cl. 519. Act and extension thereof by Tucker Act (24 Stat. 505) founded upon necessities of congress in discharge of legislative functions. Id.

48. Report of court under Bowman or Tucker Act merely a recital of proven facts, and not as a judgment, recommendation, or award. Widmayer v. U. S., 42 Ct. Cl. 519. Congress has complete legislative control of the District of Columbia. Id.

49. Widmayer v. U. S., 42 Ct. Cl. 519.

50. Sampson v. U. S., 42 Ct. Cl. 378. Where bill referred under Tucker Act is for payment of specific sum for work and material furnished gunboat as per report of president of board which investigated same at close of Civil War, court cannot find and report larger amount than that named in bill. Id. Jurisdiction not broadened or affected by resolution of senate, since Tucker Act confers jurisdiction. Id.

51. Act March 3, 1883 (22 Stat. at L. p. 485). Daigle v. U. S., 42 Ct. Cl. 124. See, also, Chieves v. U. S., 42 Ct. Cl. 21.

52. Act March 3; 1887 (24 Stat. at L. p. 505, § 14). Daigle v. U. S., 42 Ct. Cl. 124; Chieves v. U. S., 42 Ct. Cl. 21. Const. art. 1, § 8, authorizing congress to pay "debts" of United States, authorized payment of merely normal or honorary obligations, and hence Tucker Act, authorizing payment of Civil war claims regardless of loyalty of claimant, is not unconstitutional. Id.

53. Chieves v. U. S., 42 Ct. Cl. 21. Finding upon question of loyalty. Hartiens v. U. S., 42 Ct. Cl. 42. Upon reference under Bowman Act, a dismissal of such a claim upon a finding that the claimant was not loyal is res adjudicata upon the question of loyalty. Act, March 3, 1887. Daigle v. U. S., 42 Ct. Cl. 124; Rymarkiewicz v. U. S., 42 Ct. Cl. 1.

54. Chieves v. U. S., 42 Ct. Cl. 21. Finding on question of loyalty. Hartiens v. U. S., 42 Ct. Cl. 42; Rymarkiewicz v. U. S., 42 Ct. Cl. 1; Daigle v. U. S., 42 Ct. Cl. 124.

55. Finding on question of loyalty. Rymarkiewicz v. U. S., 42 Ct. Cl. 1; Hartiens v. U. S., 42 Ct. Cl. 42.

56. Daigle v. U. S., 42 Ct. Cl. 124.

57. Tucker Act, 1887 (24 Stat. at L. p. 505, § 14), authorizes reference of bill "for payment" of claims, etc. Cahalan v. U. S., 42 Ct. Cl. 280.

58, 59. Jones v. U. S., 42 Ct. Cl. 178.

60. As where claimant is seeking to re-

An amended petition must be complete in itself.[61] Ex parte affidavits relating to matters more properly presentable by depositions cannot be rendered admissible by stipulation.[62] In proceedings before the court of claims, an order of court is essential to authorize the admission of evidence after the close of the proofs.[63] Attorney's fees may be awarded in a proper case.[64] As a general rule interest is not allowed on claims against the government,[65] the only recognized exceptions being where interest is expressly stipulated for or the right thereto conferred by congress.[66]

§ 5. *Actions by and against.*[67]—See 10 C. L. 1936—Usually courts have no jurisdiction to entertain suits against the United States,[68] but this exemption may be waived.[69] Where the United States voluntarily comes into a federal court seeking relief as an individual, her rights are those of an ordinary suitor.[70] A state court is not deprived of jurisdiction in an action against a United States officer by the latter's mere assertion that he is acting in an official capacity.[71] A state court may subject United States' bonds to the payment of an execution debt in supplementary proceedings.[72]

**United States Courts,** see latest topical index

cover an undivided interest in a common fund. Jones v. U. S., 42 Ct. Cl. 178.

61. Rule 32. Jones v. U. S., 42 Ct. Cl. 178. Under exceptional circumstances, the court may consider an original petition and new matter set up by way of amendment separately, but only upon motion and a preliminary order to that effect. Id.

62. Jones v. U. S., 42 Ct. Cl. 178.

63. Curved Electrotype Plate Co. v. U. S., 42 Ct. Cl. 268. Application for further testimony must show grounds, etc. Id. Deposition taken without leave of court under objection to be suppressed. Id.

64. Fee not to be awarded until service entirely completed and judgment roll complete. Ottawa & Chippewa Indians v. U. S., 42 Ct. Cl. 518. Portion of fee withheld. Id. Contract with Indians for services not to be considered. Id.

65. Whether claims originate in tort or contract, or arise in ordinary business of administration or under private acts of relief passed by congress on special application. Pennell v. U. S., 162 F 75.

66. Pennell v. U. S., 162 F 75. Under Rev. St. § 1091 (U. S. Comp. St. 1901, p. 747), interest is not allowed on claims up to rendition of judgment by court of claims unless expressly stipulated for in contract. United States v. Sargent [C. C. A.] 162 F 81. Interest deemed by court of admiralty on claim of damages for sinking of vessel in collision with gunboat, since act authorizing action did not expressly allow same. Pennell v. U. S., 162 F 75. Where Act Cong. Aug. 1, 1888, c. 728, 25 Stat. 357 (U. S. Comp. St. 1901, p. 2516) authorizing **condemnation** of land for public use under practice of courts in like cases in states, order properly awarded interest on damages for land taken from date of commissioners report. United States v. Sargent [C. C. A.] 162 F 81. Under Rev. St. § 3220 (U. S. Comp. St. 1901, p. 2086), interest is properly allowed **on recovery of legacy tax paid under protest.** Kinney v. Conant [C. C. A.] 166 F 720, afg. 162 F 581. Rev. St. §§ 989, 3210, 3220, 3226 (U. S. Comp. St. 1901, pp. 708, 2082, 2086, 2088), requiring immediate payment of collections into treasury and that certificate of probable cause be issued to protect collector against execution so that judgment in suit to recover inheritance taxes will be paid from treasury, does not render suit one against United States to preclude recovery of interest. Id.

67. **Search Note:** See United States, Cent. Dig. §§ 112-148 Dec. Dig. §§ 124-147; 29 A. & E. Enc. L. (2ed.) 171; 22 A. & E. Enc. P. & P. 256.

68. Individual cannot maintain an action against government. United States v. Barber Lumber Co., 169 F 184. In absence of express authority from congress. Beaulieu v. Garfield, 32 App. D. C. 398. Suit with primary purpose of preventing U. S. from carrying out agreement with state. Id. Supreme court has no jurisdiction of bill in equity by state of Louisiana against secretary of interior and commissioner of land office to establish title to swamp lands (under Act March 2, 1849), where suit raises questions of law and fact upon which United States should be heard. Louisiana v. Garfield, 211 U. S. 70, 53 Law. Ed. 92.

69. United States v. Barber Lumber Co., 169 F 184.

70. Not soverign. United States v. Barber Lumber Co., 169 F 184. Bound to comply with equity, rule 66 regulating time of filing pleadings. Id. In suit by United States to set aside certain patents to timber land where by mistake or inadvertence of attorney replication was not filed in time, successor might file replication nunc pro tunc, subject to order requiring speed in cause. Id.

71. Must show right of United States so as justifying his action. Fay v. Locke, 201 Mass. 387, 87 NE 753.

72. Proceeding only affects parties, not government. Kelley v. Bell [Ind.] 88 NE 58.

### UNITED STATES MARSHALS AND COMMISSIONERS.[73]

*The scope of this topic* is noted below.[74]

A marshal must exercise ordinary care in regard to property in his possession under process of court.[75] The duties and powers of sheriffs were imposed on marshals in Indian Territory.[76] United States commissioners are not courts of the United States.[77] Their powers and functions are defined by congress,[78] and their rules of procedure are prescribed by the courts,[79] and neither their powers nor their duties can be enlarged by implication.[80] Neither a genuine certificate or the record made by a commissioner is legal evidence of the facts on which the commissioner's decision was based,[81] and it does not create an estoppel.[82] A statute providing for a new office of commissioner with special jurisdiction over offenses committed on an Indian reservation and failing to provide for the appointment of such officer is ineffective.[83] Fees are governed by statute.[84]

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**Universities,** see latest topical index.

### UNLAWFUL ASSEMBLY.[85]

*The scope of this topic* is noted below.[86]

An unlawful assembly is sometimes defined by statute. An unlawful assembly is the meeting of three or more persons with intent to aid each other by violence or in any other manner either to commit an offense or illegally to deprive any person of any right or to disturb him in the enjoyment thereof.[87] Where not so defined, the common law will be looked to for a definition.[88] Unlawful assembly at common law is a distinct offense,[89] but, if it defined by statute and no punishment is provided, it is not a crime.[90] An acquittal of the offense of unlawful assembly is not a bar to a proscution for assault and battery based upon the same acts.[91]

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**Usages; Use and Occupation,** see latest topical index.

73. See 10 C. L. 1936.

**Search Note:** See United States Commissioners, Cent. Dig.; Dec. Dig.; United States Marshals, Cent. Dig.; Dec. Dig.; 29 A. & E. Enc. L. (2ed.) 303; 1 A. & E. Enc. P. & P. 275.

74. Includes only matters peculiar to such officers. Their powers and duties in particular proceedings are treated in topics dealing with such proceedings (see such topics as Internal Revenue Laws, 12 C. L. 323; Intoxicating Liquors, 12 C. L. 332; Aliens, 11 C. L. 90), and matters relating to officers generally are treated in a topic devoted specifically thereto (see Officers and Public Employees, 12 C. L. 1131).

75. Sharp v. Sayne [Ky.] 117 SW 292. Duties of marshal in care of property taken possession of under process of court are practically same as those of sheriff. Id. Duty of marshal not discharged by exercising care in electing custodian, and character of custodian may be considered on question of negligence. Id. Ordinary care to be determined from facts of case. Id. Evidence as to exercise of reasonable care properly submitted to jury. Id. **Instructions** as to negligence approved. Id.

76. Sanders v. Cline [Okl.] 101 P 267. As to **liability of marshal acting as sheriff,** see Sheriffs and Constables, 12 C. L. 1851.

77, 78, 79. In re Lung Wing Wung, 161 F 211.

80. Chinese exclusion proceeding. In re Lung Wing Wung, 161 F 211.

81, 82. In re Lung Wing Wung, 161 F 211.

83. 33 Stat. 187, conferring jurisdiction upon United States Commissioners of offenses committed in Hot Spring Mountain reservation, Arkansas, contemplates creation of new office of commissioner, and since there is no provision for appointment of a commissioner, it is ineffective, and the jurisdiction so conferred cannot be exercised by any commissioner. Rider v. U. S. [C. C. A.] 149 F 164.

84. Commissioner acting in extradition proceedings is not entitled to higher fees provided by Act Aug. 3, 1882 (22 Stat. at L. p. 2158, § 4), but only to fees prescribed in Act May 28, 1896 (29 Stat. at L. p. 184, § 21). Howe v. U. S., 42 Ct. Cl. 35. Congress by latter act intended to provide exclusive fee law. Id.

85. **Search Note:** See Unlawful Assembly, Cent. Dig.; Dec. Dig.; 29 A. & E. Enc. L. (2ed.) 341; 22 A. & E. Enc. P. & P. 403.

86. See, also, Disorderly Conduct, 11 C. L. 1108: Riot, 12 C. L. 1701. As to strikes and assembly of strikers, etc., see Trade Unions, 12 C. L. 2145.

87. Pen. Code 1895, arts 299-311, 313, 315. In re Jacobson [Tex. Cr. App.] 115 SW 1193. Actress, who with others gave an entertainment in a theater on Sunday by acting and singing, held not guilty of unlawful assembly. Id.

88, 89. State v. Stephanus [Or.] 99 P 428.

90. By B. & C. Comp. §§ 1913, 1914, although unlawful assembly is defined, punishment is

USES.[91]

*The scope of this topic* is noted below.[93]

The statute of charitable uses is, in so far as consistent with our institutions, a part of the common law of the states.[94] No set form of words is required in a conveyance to uses.[95] An estate in fee simple to commence in the future at the time of the happening of a contingency may be created by way of a use.[96] A deed operates under the statute of uses although the grantor was one of the grantees to uses.[97] In Florida the legal title to land is conveyed by the execution of a deed pursuant to the statute of frauds and the operation thereon of the statute of uses.[98] A use is not immediately executed by the statute of uses where the grantor contemplates the possibility of a gap intervening between the termination of a life estate and the commencement of the fee.[99] But is so executed where all persons who take under a shifting use are determined.[1] What constitutes active and passive trusts is treated elsewhere.[2]

USURY.

§ 1. Definitions, Elements and Indicia, 2209.
§ 2. The Defense of Usury, 2211.
§ 3. The Effect of Usury, 2212.
§ 4. Affirmative Relief and Procedure, 2212.
Crimes, 2213.

*The scope of this topic* is noted below.[3]

§ 1. *Definitions, elements and indicia. In general.*[4]—See 10 C. L. 1937—To constitute usury, there must be a loan or forbearance of money, with interest in excess of the rate allowed by law.[5]

*Intent.*See 10 C. L.1937—There is some conflict as to whether an unlawful intent is essential to constitute usury, it being held in some states that an intent to take unlawful interest is an essential element of usury,[6] while in other states a more or less contrary doctrine obtains,[7] but it is settled that the court will look to the real character of the transaction regardless of its form.[8] Intent is ordinarily a question

not provided. State v. Stephanus [Or.] 99 P 428.

**91.** Though acts may be same, offenses are different. State v. Jellison [Me.] 71 A 716.

**92.** See 10 C. L. 1937.

**Search Note:** See notes in 16 L. R. A. (N. S.) 1148.

See, also, Trusts, Cent. Dig.; Dec. Dig.

**93.** Includes only powers in trust arising under the statute of uses. See, generally, Trusts, 12 C. L. 2171, and as to language creating uses, see Deeds of Conveyance, 11 C. L. 1051; Wills, 10 C. L. 2035.

**94.** Though an amendment to the common law when enacted. Klumpert v. Vrieland [Iowa] 121 NW 34. In so far as statute recognizes, defines, or indicates what are "charitable uses," it is part of common law. Id. Power of disposal by sign manuel of crown under statute of uses is inconsistent with our institutions. Id.

**95.** Deed to son for life remainder to such grandchildren as should arrive at age twenty-one held sufficient. Simonds v. Simonds, 199 Mass. 552, 85 NE 860.

**96.** Simonds v. Simonds, 199 Mass. 552, 85 NE 860.

**97.** Lecroix v. Malone [Ala.] 47 S 725.

**98.** Gen. St. 1906, §§ 2448, 2455. Skinner Mfg. Co. v. Wright [Fla.] 47 S 931.

**99.** Life estate granted son, fee to grandchildren. Simonds v. Simonds, 199 Mass. 552, 85 NE 860. Under deed to son for life, fee to such grandchildren as reached age of 21, use would be springing use if none of latter were in position to take on death of former. Id. Under deed to son for life, fee to such grandchildren as reached age of 21, use held shifting where all who would share fee were not determined on death of life tenant. Id.

**1.** Simonds v. Simonds, 199 Mass. 552, 85 NE 860.

**2.** See Trusts, 12 C. L. 2171.

**3.** Treats of illegal interest, including questions of the legality of compound interest. Excludes lawful interest (see Interest, 12 C. L. 317), usury by building and loan associations (see Building and Loan Associations, 11 C. L. 475), and conflict of laws (see Conflict of Laws, 11 C. L. 665).

**4. Search Note:** See notes in 27 L. R. A. 565; 29 Id. 761; 49 Id. 550; 53 Id. 462; 3 L. R. A. (N. S.) 213; 5 Id. 592; 6 Id. 612; 10 Id. 839; 16 Id. 626; 46 A. S. R. 178; 2 Ann. Cas. 996; 4 Id. 643; 5 Id. 386; 7 Id. 480, 986; 9 Id. 548; 11 Id. 225.

See, also, Usury, Cent. Dig. §§ 1-187; Dec. Dig. §§ 1-88; 29 A. & E. Enc. L. (2ed.) 450.

**5.** Dickson v. St. Paul, 105 Minn. 165, 117 NW 426.

**6.** Covington v. Fisher [Okl.] 97 P 615; Aetna Bldg. & L. Ass'n v. Randall [Okl.] 99 P 655; Klein v. Title Guaranty & Surety Co., 166 F 365. Lender will not be guilty of usury if by **mistake** he receives more than legal rate. Covington v. Fisher [Okl.] 97 P 615.

**7.** See 10 C. L. 1937.

**8.** Court will consider whole transaction.

for the jury, unless it clearly appears from the face of the transaction or from the undisputed facts.[9]

*There must be a loan or forbearance* See 10 C. L. 1938 of or with respect to money,[10] as distinguished from a bona fide investment of money in reliance upon a guarantee of profits,[11] and as distinguished from a bona fide sale of a chose in action at a discount.[12]

*The aggregate of the exactions must exceed the legal rate.* See 10 C. L. 1939—Usurious interest cannot be said to have been collected or received until the total amount received exceeds the principal of the loan with legal interest.[13] Compound interest is not usury,[14] and while there is some conflict as to the validity of an agreement for the compounding of interest entered into at the time of the original contract upon which the interest is predicated,[15] it now seems to be well settled that an agreement to pay interest upon interest that has already accrued at the time of such agreement is valid,[16] though the contrary has been held in the past by eminent authority.[17] The deduction of interest in advance is not necessarily usury.[18] Usury will not be inferred where the opposite conclusion can be reasonably and

Knoup v. Carver [N. J. Err. & App.] 70 A 660. There is no device or shift on part of lender of money to evade statute against usury behind which law will not look to ascertain real character of transaction. Widell v. Citizens' National Bank, 104 Minn. 510, 116 NW 919. If it be proved that transaction is mere device to evade statute against excessive interest, its form will not save it. Klein v. Title Guaranty & Surety Co., 166 F 365. Contract in which one party asserted that he bought certain shares of stock of other for $287.50 and also assumed note of $200, with understanding that if other party should pay him $650, he would give him back stock, held usurious as being mere cover for usurious transaction. Dale v. Duryea, 49 Wash. 644, 96 P 223.

9. Klein v. Title Guaranty & Surety Co., 166 F 365.

10. Bond, guarantying that principal obligor will return certain securities on a certain day, is not a bond given for "loan or forbearance of money" within meaning of New York usury law. Rev. St. pt. 2, c. 4, tit. 3, § 5. Klein v. Title Guaranty & Surety Co., 166 F 365. Fact that by collateral agreement borrower of certificates has option to discharge his obligation to return same by payment of certain sum of money does not create a money obligation. Id.

11. Where one puts money in business which another is to conduct with understanding that 15 per cent or better will be returned for money invested and contract represents transaction as partnership undertaking, such contract will not be held to be tainted with usury, unless it is proven to be device to evade usury law. Crane v. Clemens, 135 Ill. App. 68.

12. See post, this section, subdivision Discounts, Commissions, etc.

13. Where loan is paid in installments. Brown v. Slocum, 30 App. D. C. 576.

14. Sanford v. Lundquist, 80 Neb. 408, 118 NW 129, on rehearing of 114 NW 279.

15. Sanford v. Lundquist, 80 Neb. 408, 118 NW 129, on rehearing of Id., 80 Neb. 408, 114 NW 279. **In Mississippi** a note providing that if interest be not paid annually it shall become principal and bear same rate of interest is not usurious. Palm v. Fancher [Miss.] 48 S 818. **In Nebraska** interest upon interest cannot be stipulated for in advance. Sanford v. Lundquist, 80 Neb. 408, 118 NW 129, vacating on rehearing Id., 80 Neb. 408, 114 NW 279. **In Oklahoma** a clause in a promissory note which reads, "with interest at 12 per cent. per annum after maturity, interest payable semi-annually, defaulting interest to draw same rate as principal," does not make such note usurious on its face. Covington v. Fisher [Okl.] 97 P 615.

16. Sanford v. Lundquist, 80 Neb. 408, 118 NW 129, vacating on rehearing Id., 80 Neb. 408, 114 NW 279; Breed v. Baird, 139 Ill. App. 15; Foley's Guardian v. Hook [Ky.] 113 SW 105. In such a case fact that principal note bears maximum rate of interest, and that such subsequent agreement to pay interest upon interest past due also stipulates for the maximum rate is immaterial. Sandford v. Lundquist, 80 Neb. 408, 118 NW 129, on rehearing of Id., 80 Neb. 408, 114 NW 279. Forebearance and giving time for the payment of money then due is a sufficient **consideration** to support the agreement and such agreement may be oral. Id. Fact that stipulation to pay interest on accrued interest is by **oral agreement** is immaterial. Id.

17. Chancellor Kent in Conneticut v. Jackson, 1 Johns. Ch. N. Y. 13, 7 Ann. Dec. 471, and in Van Benschooten v. Lawson, 6 Johns. Ch. (N. Y.) 313, 10 Am. Dec. 333. Sandford v. Lundquist, 80 Neb. 408, 118 NW 129, vacating on rehearing Id., 80 Neb. 408, 114 NW 279.

18. Cobe v. Guyer, 237 Ill. 516, 86 NE 1071. Even though highest rate is charged. Comps. St. § 1, c. 44. Sanford v. Lundquist, 80 Neb. 408, 118 NW 129, on rehearing of Id., 80 Neb. 408, 114 NW 279. Where total amount of interest charged and commission does not exceed legal rate, contract is not usurious because interest and commission is collected in advance. National Life Ins. Co. v. Donovan, 238 Ill. 283, 87 NE 356. Amount which would become due at end of term for which loan was made, not exceeding one year's interest in all, may be deducted. Covington v. Fisher [Okl.] 97 P 615.

fairly reached, though as a result of the transaction the creditor receives more than the principal and legal rate of interest.[19]

*Discounts, bonuses, commissions and other deductions and charges.* See 10 C. L. 1939—Usury cannot be predicated upon a bona fide sale at a discount,[20] but the lending of its credit by a company to its employees at a discount which amounts to more than the legal rate of interest is usury.[21] A loan is usurious where the total amount agreed to be paid exceeds the lawful rate of interest and brokerage,[22] though the usurious charge may be concealed as a charge for guaranteeing the payment of the loan,[23] but, in determining the amount of an exaction for a loan, bona fide charges in connection with collateral matters will not be considered.[24] Where the transaction is not usurious on its face but is claimed to be a device to cover up usury, the question is one of fact,[25] and the transaction will not be declared usurious where it is consistent with a contrary conclusion.[26]

*The parties may remove the taint of usury.* See 10 C. L. 1939

*Usury statutes.* See 10 C. L. 1940—Statutes providing penalties for usury[27] are strictly construed,[28] but the intention of the legislature will control rather than the letter of the statute.[29] Such statutes must, of course, conform to constitutional limitations.[30] The purpose of the Connecticut statute, providing that note and mortgage shall be void under certain conditions, is to prevent false information from being entered on the records, rather than to protect the borrower.[31]

§ 2. *The defense of usury.*[32]—See 10 C. L. 1940—The defense of usury is the personal privilege of the debtor or those standing in privity with him,[33] but it is not cut off by renewals[34] or mere substitution of securities.[35]

19. When debt, including both principal and interest, evidenced by coupons and notes, if paid according to the terms of contract, is free from usury, transaction is not rendered usurious by voluntary payment of debt before some of interest notes mature, although as result creditor would receive in aggregate a sum amounting to more than the principal and legal rate of interest. Eldred v. Hart [Ark.] 113 SW 213.

20. Sale of chose in action at discount exceeding legal interest. Dickson v. St. Paul, 105 Minn. 165, 117 NW 426. Acts 1908, p. 83, does not include absolute sale of property at discount exceeding legal rate of interest. Jackson v. State, 5 Ga. App. 177, 62 SE 726.

21. Redemption by employer of checks which were issued in payment of labor at discount. Kentucky Coal Min. Co. v. Mattingly [Ky.] 118 SW 350.

22, 23. State v. Martin [N. J. Law] 69 A 1091.

24. Deduction of **mortgage tax** without objections of borrower will not be considered, when statute makes no provision as to who should pay for recording mortgage. Moore v. Lindsay, 61 Misc. 176, 114 NYS 684. **Mortgagee's commission** for selling property covered by mortgage will not be considered as part of discount charge on note secured. Cable v. Duke, 132 Mo. App. 334, 111 SW 909. Deduction of **attorney's fees** for examining abstract of title will not be considered. Cobe v. Guyer, 237 Ill. 516, 86 N 1071. **Commissions to cover fluctuation in price** of bonds borrowed held not to be considered. Klein v. Title Guaranty & Surety Co., 166 F 365.

25. Where one purchased a bank's claim against a defunct corporation, and the amount to be paid by the receiver in dividends could not be determined, and the price of such claim included in a loan to said person, the sum paid by him in excess of the dividends did not make the debt of the bank usurious. Citizens' Sav. Bank v. Globe Brass Works [Mich.] 15 Det. Leg. N. 849, 118 NW 507. In action by broker to recover brokerage for negotiating a loan which failed because defendant's property was incumbered beyond the condition of the application, question whether the brokerage contract was a cover for usury held question for jury. Lechnyr v. Germansky, 113 NYS 969.

26. That more than 6 per cent was paid by borrower for loan of bonds was insufficient to show intent to violate usury laws, it being reasonable to suppose that part was to guard against fluctuations. Klein v. Title Guaranty & Surety Co., 166 F 365.

27. Rev. St. 1905, art. 3106 was not repealed by Laws 1907, p. 277, c. 143, as to offenses committed prior to time when act took effect. Stewart v. Lattner [Tex. Civ. App.] 116 SW 860.

28. Acts 1908, p. 83, construed. Jackson v. State, 5 Ga. App. 177, 62 SE 726.

29. Brown v. Slocum, 30 App. D. C. 576.

30. Act May 13, 1905 (Laws 1905, p. 80), invalidating assignments of wages or salaries as security for usurious loans, held unconstitutional. Massie v. Cessna, 239 Ill. 352, 88 NE 152.

31. Note and chattel mortgage for $275 to secure a loan of $250 held valid in spite of the statute. Sinclair, Scott Co. v. Miller, 80 Conn. 303, 68 A 257.

32. **Search Note:** See notes in 21 L. R. A. 321; 33 Id. 628; 56 Id. 673; 8 L. R. A. (N. S.) 814; 10 Id. 857; 16 Id. 616; 2 Ann. Cas. 46.

See, also, Usury, Cent. Dig. §§ 162-416; Dec. Dig. §§ 83-133; 29 A. & E. Enc. L. (2ed.) 552; 22 A. & E. Enc. P. & P. 415.

33. Fenby v. Hunt [Wash.] 101 P 492. Usury can only be asserted by the party in-

*Pleading and proof.* See 10 C. L. 1940—Usury must be specially pleaded,[36] and the pleading must set up the usurious contract, specifying its terms and the particular facts relied upon to bring it within the prohibition of the usury statute.[37] The burden of proving usury is on the party who pleads it [38] and the facts must be proved substantially as alleged.[39]

§ 3. *The effect of usury.*[40]—See 10 C. L. 1940—In some states legal interest may be recovered where the claim for the excess is waived.[41]

*Forfeitures.* See 10 C. L. 1940

*Application of usurious payments.* See 10 C. L. 1941—In some jurisdictions, sums paid as bonuses are entitled to be credited on the amount due.[42] So long as any part of the original debt remains unpaid, the debtor may insist upon the deduction of the usury.[43]

§ 4. *Affirmative relief and procedure.*[44]—See 10 C. L. 1941—In an action for an accounting and cancellation of a usurious mortgage, equity will require the payment of the actual money received and lawful interest.[45]

*Recovery of usury.* See 10 C. L. 1941—Where usury has been voluntarily paid, it cannot be recovered back,[46] but the rule is otherwise where the payment is compulsory.[47] Settlement of a suit which is not brought in good faith does not preclude the recovery of prior usurious payments.[48] In Texas double the amount of the entire interest paid may be recovered back when the rate was usurious.[49]

jured. Schmidt v. Gaulker [Mich.] 16 Det. Leg. N. 97, 120 NW 746. **Lienors** cannot plead usury to prevent replevin of property by holder of mortgage. Cable v. Duke, 132 Mo. App. 334, 111 SW 909. A **surety** may interpose the defense of usury in an action on a promissory note. Osborne v. Frederich [Mo. App.] 114 SW 1045. **Equitable owner of mortgaged land** has a right to plead usury under Civil Code 1902, § 1664. Cunningham v. Cunningham, 81 S. C. 506, 62 SE 845.

**34.** Renewal of note tainted with usury. Webster v. Smith, 36 Pa. Super. Ct. 281.

**35.** Cobe v. Guyer, 237 Ill. 568, 86 NE 1088.

**36.** National Life Ins. Co. v. Donovan, 238 Ill. 283, 87 NE 356; Fenby v. Hunt [Wash.] 101 P 492. Defense of usury not being pleaded and there being no evidence before court showing corrupt intent to take unlawful interest, mere fact that contract sued on provides for excessive interest will not in itself be sufficient on which to base judgment that the same was illegal and usurious. Aetna Bldg. & L. Ass'n v. Randall [Okl.] 99 P 655.

**37.** Arison Realty Co. v. Bernstein, 111 NYS 538. Affidavit of defense should state, if possible, the date, amount and rate of interest of alleged usurious notes, when they matured, and also amount of usury. King v. Curtin, 31 App. D. C. 23; King v. Curtin, 31 App. D. C. 28.

**38.** Cobe v. Guyer, 237 Ill. 516, 86 NE 1071. That bond securing return of certain securities was mere device to evade usury law was matter of defense, burden of proof of which was on surety in action on bond. Klein v. Title Guaranty & Surety Co., 166 F 365. **Instruction** that presumption of law is against usury, and burden would be upon defendant in this case to establish existence of usury in contract to satisfaction of jury, held not error when taken in connection with the whole charge. Pusser v. Thompson & Co. [Ga.] 64 SE 75.

**39.** Proving loan of $80, $90 or $127.50, uncertain which, did not prove defendant's allegation as to contract. Ariston Realty Co. v. Bernstein, 111 NYS 538. Finding and decision of trial court, to effect that notes and mortgages were usurious and that they be cancelled, held sustained by evidence. Widell v. National Citizens' Bank, 104 Minn. 510, 116 NW 919.

**40. Search Note:** See notes in 56 L. R. A. 673; 3 L. R. A. (N. S.) 715.

See, also, Usury, Cent. Dig. §§ 148-161; Dec. Dig. §§ 74-81; 29 A. & E. Enc. L. (2ed.) 513.

**41.** If in prayer for judgment interest in excess of legal rate is waived, legal interest will be allowed. Aetna Bldg. & L. Ass'n v. Randall [Okl.] 99 P 655.

**42.** Bonus given to son of maker of loan for securing said loan should be credited on amount due. Knoup v. Carver [N. J. Err. & App.] 70 A 660. Bonus should have been deducted from amount due on mortgage. Lowenthal v. Myers [N. J. Err. & App.] 72 A 80.

**43.** Cobe v. Guyer, 237 Ill. 568, 86 NE 1088.

**44. Search Note:** See notes in 54 L. R. A. 758; 3 L. R. A. (N. S.) 715; 12 Id. 659; 22 A. S. R. 41; 1 Ann Cas. 421; 2 Id. 912; 3 Id. 840.

See, also, Usury, Cent. Dig. §§ 188-416; Dec. Dig. §§ 89-133; 29 A. & E. Enc. L. (2ed.) 523, 540; 22 A. & E. Enc. P. & P. 461.

**45.** Garlick v. Mutual L. & Bldg. Ass'n, 236 Ill. 232, 86 NE 236.

**46.** Osborne v. Culver, 134 Ill. App. 612, afd. 231 Ill. 104, 83 NE 110.

**47.** But where a usurious note has been assigned before maturity to an innocent purchaser, thus cutting off the defense of usury, and the note is paid by the maker, he may sue the original holder and recover the usurious charge, payment being to innocent holder regarded as compulsory. Osborne v. Culver, 134 Ill. App. 612, afd. 231 Ill. 104, 83 NE 110.

**48.** Where person was party to all usurious

*Action to recover a penalty.* See 10 C. L. 1942—When the party elects to pursue the statutory remedy, his recovery is limited by the terms of the statute.[50] A third person to whom the usurious notes were made payable is not a necessary party to an action to recover usurious interest and penalty.[51] A cause of action for usurious interest paid does not accrue until such interest has actually been paid.[52]

*Crimes.* See 10 C. L. 1942—An averment in an indictment that defendant made loans at usurious rates of interest and at rates in excess of the amount provided by law, naturally imports the lending of money as principal and not as broker.[53]

### VAGRANTS.[54]

*The scope of this topic* is noted below.[55]

Vagrancy statutes are intended to enforce honest and reputable living,[56] and constitute a valid exercise of the police power.[57] Such statutes are not intended to compel one to earn more than his necessities require.[58] Under the New York statute one who has been convicted of vagrancy is entitled to discharge at the expiration of five days from the date of commitment, if he has not been previously committed within two years next preceding such commitment,[59] but to be entitled to discharge under this statute it is necessary that the written consent of the magistrate or court committing him be secured.[60]

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**Values; Variance; Venditioni Exponas,** see latest topical index.

### VENDORS AND PURCHASERS.

**§ 1. The Contract for the Sale of Land, 2214.**
A. General Nature, Requisites and Validity, 2214.
B. Reformation and Cancellation, 2218.
C. Statute of Frauds. 2218.
D. Options to Buy or Sell, 2218.
**§ 2. Condition, Quantity, and Description of Lands, 2220.**
**§ 3. Title, Deed, and Incumbrances, 2221.**
**§ 4. Price and Payment, 2224.**
**§ 5. Time, 2226.**

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transactions and payments amounted to more than principal and lawful interest, and suit brought by him to collect usurious note was settled by surety by giving another note, the settlement was not of a suit brought in good faith and the surety could have usurious payments applied on note. Osborne v. Fridrich [Mo. App.] 114 SW 1045.

**49.** "Usurious interest" should be construed to mean "unlawful" and to include all the interest paid on the usurious contract. Baum v. Daniels [Tex. Civ. App.] 118 SW 754.

**50.** Under Rev. St. 1895, art. 3106, authorizing recovery of double amount of usurious interest paid, interest on such payments cannot be recovered. Baum v. Daniels [Tex. Civ. App.] 118 SW 754. Interest on judgment is recoverable under § 3105. Id. Judgment rendered is a civil recovery and not a conviction for crime, and for that reason judgment bears interest. Id.

**51.** Where it was proved that another party owned the notes, loaned the money, and received the interest, held that such party was the necessary party to the action. Snyder v. Crutcher [Mo. App.] 118 SW 489.

**52.** Under D. C. Code, § 1181, 31 Stat. at L. 1377, c. 854, requiring action to be brought within year after payment of usurious interest, where loan is payable in instalments usurious interest is not deemed to have been paid until total amount paid exceeds principal of loan with legal interest. Brown v. Slocum, 30 App. D. C. 576.

**53.** Indictment held sufficient to sustain verdict for taking illegal interest. State v. Martin [N. J. Law] 69 A 1091.

**54.** See 10 C. L. 1942.

**Search Note:** See notes in 35 L. R. A. 578; 38 A. S. R. 643.

See, also, Vagrancy, Cent. Dig.; Dec. Dig.; 21 A. & E. Enc. L. (2ed.) 568; 22 A. & E. Enc. P. & P. 508.

**55.** As to arrest without warrant, see Arrest and Binding Over, 11 C. L. 278. As to vagrancy of husband as ground for divorce, see Divorce, 11 C. L. 1111. As to commitment of neglected children, see Infants, 12 C. L. 140.

**56.** Leonard v. State, 5 Ga. App. 494, 63 SE 530.

**57.** Pen. Code, § 647, subd. 5, declaring every idle, lewd, or dissolute person or associate of known thieves to be a vagrant, is a valid exercise of the legislative power. In re McCue, 7 Cal. App. 765, 96 P 110.

**58.** Though numerous witnesses testified that they had not seen the defendant work, that he had no visible means of support and that he was always loafing in idleness when they saw him, it is error to convict him when he has shown by positive evidence that he earned enough to maintain him honestly, though in a meager style. Leonard v. State, 5 Ga. App. 494, 63 SE 530.

**59.** Greater New York Charter (Laws 1901, p. 298, c. 466), § 710, as amended by Laws 1905, p. 1568, c. 638. People v. Barry, 62 Misc. 33, 115 NYS 104. **Mandamus** lies to compel compliance with this statute.

**60.** People v. Coggey, 131 App. Div. 20, 115 NYS 836, rvg. 115 NYS 195.

§ 6. Conditions, Covenants, and Warranties, 2227.
§ 7. Demand, Tender, and Default, 2227.
§ 8. Forfeiture, Rescission, and Waiver, 2229.
§ 9. Interest in the Land Created by, and Rights and Liabilities Under the Contract, 2233.
§ 10. Liability Consequent on Breach, 2236.
§ 11. Rights After Conveyance, 2239.
§ 12. Vendor's Liens and Their Enforcement, 2240.
A. Express, 2240.
B. Implied, 2242.
C. Remedies, 2243.
§ 13. Enforcement of the Contract of Sale, 2244.

*The scope of this title* is noted below.[61]

§ 1. *The contract for the sale of land. A. General nature, requisites, and validity.*[62] See 10 C. L. 1943—A contract of sale transfers the right to the title to the land, and is thus distinguished from a lease,[63] option,[64] brokerage contract,[65] or a mere easement.[66] The contract must be free from fraud,[67] although the mere ex-

**61.** Includes contracts for sale or purchase of land. Excludes form and sufficiency of deeds of conveyance (see Deeds of Conveyance, 11 C. L. 1051), notice and record of title (see Notice and Record of Title, 12 C. L. 1100), the general law of contracts (see Contracts, 11 C. L. 729), of fraud and deceit (see Deceit, 11 C. L. 1038; Fraud and Undue Influence, 11 C. L. 1583), and of mistake (see Mistake and Accident, 12 C. L. 869), the statute of frauds (see Frauds, Statute of, 11 C. L. 1609), reformation and cancellation of instruments (see Cancellation of Instruments, 11 C. L. 493; Reformation of Instruments, 12 C. L. 1671), specific performance (see Specific Performance, 12 C. L. 1886), and measure of damages for breach of the contract (see Damages, 11 C. L. 958).

**62. Search Note:** See notes in 1 L. R. A. (N. S.) 1062

Frauds, Statute of, Cent. Dig.; Dec. Dig. See, also, Vendor and Purchaser, Cent. Dig. §§ 1-137; Dec. Dig. §§ 1-81; 21 A. & E. Enc. L. (2ed.) 924; 29 Id. 584, 592, 732.

**63.** Instrument reciting that owner leased land for five years at certain annual rental, and providing that, at end of term, owner should sell and tenant should buy at specified price, lessee to have option to purchase during term on 30 days' notice and lessor being empowered upon same notice to require purchase on default by lessee in performance of any condition, held executory contract of sale. White v. Walsh, 62 Misc. 423, 114 NYS 1015.

**64. Held a Sale:** Agreement whereby first party agrees "to sell and convey" to second party specified property "and to bind the above contract, we the above contracting parties deposit sum of $1,000 each * * * same to be forfeited by party failing to fulfill contract within 30 days," is a contract of sale, and not an option. Newton v. Dickson [Tex. Civ. App.] 116 SW 143. Agreement reciting option previously given and acceptance thereof, which bound vendor to furnish abstract within specified time and to convey on terms set forth in option, held valid executory contract of sale. Sanderson v. Wellsford [Tex. Civ. App.] 116 SW 382. Writing reciting that owners had that day sold to B. for specified cash consideration certain described land, which they obligated themselves to convey on receiving purchase money, etc., held a sale, and not a mere option. Hamburger v. Thomas [Tex. Civ. App.] 118 SW 770. Contract between firm and a third person, whereby latter agreed to convey for specified sum certain land to one partner or to whom he should direct, held not a mere option to be submitted to such partner and accepted before it became binding, nor was he required to personally direct to whom it should be conveyed, but could act through agent. Slayden & Co. v. Palmo [Tex. Civ. App.] 117 SW 1054. Contract obligating owner to convey and the other party to buy, prescribing the terms, and providing that, upon default, owner would have right to re-enter and to retain payments as rent, etc., held a contract of sale. Brickell v. Atlas Assur. Co. [Cal. App.] 101 P 16.

**Held an option:** See post, this section, subsection B. Options to Buy or Sell.

**65.** Agreement authorizing broker to sell for amount net to vendor and a sale for amount in excess thereof does not create relation of vendor and purchaser between parties. Burnett v. Potts, 236 Ill. 499, 86 NE 258. Instrument in form a contract of sale was not rendered a contract of agency by clause therein "subject to owner's approval," it appearing that contracting vendor was not real owner, but intended to purchase under option, and inserted clause out of precaution. Cartwright v. Ruffin, 43 Colo. 377, 96 P 261.

**66.** Accepted option to purchase a right of way, and permanently retain the same in fee for a certain sum, etc., held contract for easement only, and not for land itself. Buffalo City Mills v. Toadvine Lumber Co. [N. C.] 63 SE 678.

**67.** Certain vendors, under contract to sell certain land to B. left it to their lawyer to prepare the necessary paper. Lawyer prepared deed to United States, with power of attorney authorizing B. to accept certain lien land in place thereof, neither the lawyer or B. intending thereby to defraud vendors, nor was an advantage obtained. Held no fraud although grantors executed instruments without understanding nature of transaction. United States v. Conklin, 169 F 177. Where vendor unqualifiedly stated that he had good title, knowledge of its falsity is not essential to fraud. Buchanan v. Burnett [Tex. Civ. App.] 114 SW 406. False representation that tract contained 160 acres is no ground for rescinding contract which only described it as containing 143 acres. Travis v. Taylor [Ky.] 118 SW 988. In ac-

pression of an opinion in respect to the land does not invalidate the contract though erroneous,[68] and, even when the vendor is guilty of fraud, the purchaser, however, must be free from fault or negligence.[69] Likewise, the contract must be free from mutual [70] mistake,[71] and must be supported by a sufficient consideration,[72] as must any subsequent or collateral agreement relating thereto.[73] In Louisiana the consideration agreed upon must exceed one-half of the value of the land.[74] The sale

tion for recovery of money paid on ground of rescission for fraud, where contract provided that premises should be taken subject to existing leases and for apportionment of rent, terms of leases become immaterial and purchaser cannot show fraudulent representations that there were no free rents. Kreshover v. Berger, 62 Misc. 613, 116 NYS 20. Evidence as to inequitableness of original contract and of subsequent settlement, together with evidence that one of vendees was very ignorant and inexperienced person and the other insane at times, held to authorize setting aside original contract and settlement on ground of fraud. Blampey v. Pike [Mich.] 15 Det. Leg. N. 1062, 119 NW 576.

**68.** Unqualified assertion of absolute title is a representation of a fact and not a mere expression of opinion. Buchanan v. Burnett [Tex. Civ. App.] 114 SW 406. Where vendee was ignorant as to value of land, representations by vendor that it was worth $30 per acre, that it would be cheap at that price, that that was its present value, etc., held affirmation of a fact, and not merely expression of opinion. Hetland v. Bilstad [Iowa] 118 NW 422. Statement that vein of coal underlying land had no faults, there being no way of ascertaining the fact, held mere opinion. Odbert v. Marquet, 163 F 892. Statement that optioned lands were underlaid with coal of certain quantity, etc., seller not claiming to have any special knowledge, held mere opinion. Id.

**69.** Purchaser may rely on representation of broker as to acreage. Farris v. Gilder [Tex. Civ. App.] 115 SW 645. Purchaser is not entitled to rescind for vendor's misrepresentations as to quantity and kind of timber and productiveness of land, where he availed himself of his ample opportunity to visit the land. Wright v. Boltz [Ark.] 113 SW 201. Where vendor unqualifiedly stated that he had absolute title, fact that he furnished abstract, which through his ignorance purchaser did not understand, does not relieve him of fraud. Buchanan v. Burnett [Tex. Civ. App.] 114 SW 406. Held for jury whether purchaser knew or should have known of misrepresentation as to acreage. Farris v. Gilder [Tex. Civ. App.] 115 SW 645. Where contract is based on map distinctly showing that lot was of depth of 71 feet, purchaser cannot show that seller represented it to be 100 feet deep. Dowling v. Miller-Kendig Real Estate Co. 115 NYS 154.

**70.** Where vendor and vendee relied upon statement of mining expert that there were 50,000 tons of mineral in place, when there was in fact but 5,000, there was a mutual mistake of fact. Johnson v. Withers [Cal. App.] 98 P 42. Where vendor entered into option to sell particular piece, forgetting that he had conveyed part thereof to his wife, he was not excused from performance on ground of mutual mistake, vendee knowing nothing thereof. Boyden v. Hill, 198 Mass. 477, 85 NE 413. In such case good faith was no defense to an action for damages. Id.

**71.** Evidence held to sustain finding that description included land not intended to be conveyed. Moore v. Pennington [Ky.] 112 SW 858. As circumstance tending to show that certain land included in contract, but which was not conveyed, was included by mistake, court may consider that, when sued on purchase money note, purchaser claimed rebate for other land not received without mentioning this land. Id. Vendor orally contracted to sell 80 acres, boundaries to be fixed by survey. Survey was made to satisfaction of both parties, and deed was executed to conform thereto, but which in fact did not. Grantee took and retained possession of land as surveyed. Circumstances held to show mutual mistake in description. Garard v. Weaver [Ind. App.] 84 NE 1092.

**72.** Vendee's promise to pay purchase price is sufficient consideration. Curtiss Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853. Refusal of voluntary tender of conveyance is no consideration for promise to convey to another. Satterly v. Dewick, 129 App. Div. 701, 114 NYS 354. Deed to grantee for life and remainder to her children, in consideration of grantor being furnished a **home and support** during life, is founded on good consideration, although minors are not parties to consideration. Strothers v. Woodcox [Iowa] 121 NW 51. Owner may sell for instalment payable for a long period, though purpose is to provide an **annuity**. Rudolph v. Gerdy, 121 La. 477, 46 S 598. Consideration by way of an annuity for limited period held sufficient though less than yearly rental. Id.

**73.** Promise of vendor to procure for vendee outstanding title of remaindermen in an entirely distinct price, made to induce vendee to carry out executory contract, is without consideration. Tarnow v. Carmichael [Neb.] 116 NW 1031. Where at time for closing vendor tendered valid title, but at vendee's request a written agreement was entered into extending time for closing, and providing that, if designated title insurance company would not insure title, vendee's deposit, with interest and costs, would be paid, it was held that agreement was without consideration. Green-Shrier Co. v. State Realty & Mortgage Co., 129 App. Div. 581, 114 NYS 49. Where vendee agreed to assume commissions to be paid broker on failure of vendor's title, consideration for assumption fails. Eckel v. Spitzer, 58 Misc. 467, 111 NYS 459.

**74.** Burden of proving lesion beyond

must be for a lawful purpose,[75] and must not be against public policy [76] or positive law.[77] The contract may be entered into through an agent,[78] the principal being responsible for any fraud of the agent.[79] An unregistered contract is good as between the parties.[80]

*Certainty and definiteness.* See 10 C. L. 1944—The minds of the parties must meet, upon all of the essential elements of the contract,[81] with definiteness and certainty.[82]

moiety is on vendor attacking sale, and highest estimates cannot be adopted as value. Succession of Witting, 121 La. 501, 46 S 606. Lesion beyond moiety must be proved by clear and convincing evidence. Hickman v. Washington, 122 La. 945, 48 S 333. In determining lesion, value must be ascertained as of date of acceptance of option, and not of giving of same. Ronaldson & Puckett Co. v. Bynum, 122 La. 687, 48 S 152. In view of vendor's recognized business ability, evidence held insufficient to show lesion beyond moiety. Hichman v. Washington, 122 La. 945, 48 S 333. Values held not proven with sufficient certainty to determine issue of lesion. Ronaldson & Puckett Co. v. Bynum, 122 La. 687, 48 S 152. In action to rescind for lesion beyond a moiety, a debt secured by mortgage on the property and assumed by the purchaser would ordinarily be taken at its face value, as part of purchase price; but when the debt has been reduced by partial payment, though not entered of record or evidenced by writing, and the **creditor,** participating in the negotiations leading to the sale, agrees, in advance to receive the balance really due in full satisfaction, the amount actually paid by the purchaser is alone to be considered in determining price paid. Brandon v. Slade, 122 La. 395, 47 S 694. When judgment fixes amount to be paid by purchaser to confirm sale attacked for lesion beyond moiety, there being no question of profit or improvements in the case, the amount to be reimbursed by seller, in event of purchaser's election to rescind, should represent difference between ascertained value of property at date of sale and amount which purchaser is decreed to pay in order to make up such value, should he elect to affirm the sale. Id.

**75.** Secret intention on part of vendees to use premises for unlawful purpose does not invalidate contract of sale. Nortnass v. Pioneer Townsite Co. [Neb.] 117 NW 951.

**76.** Contract, binding a purchaser from state of school lands to execute to another a bond for title and to complete the statutory period of occupancy necessary to get title, is not against public policy. Johnson v. Buchanan [Tex. Civ. App.] 116 SW 875. Contract by owners to allow another to prospect on land for minerals and to purchase, in case of success, at a specified price, is but a promise of sale, subject to a suspensive condition, and is not void, because no time was fixed, as in restraint of trade, and a perpetuity or contrary to public policy. Anse La Butte Oil & Mineral Co. v. Babb, 122 La. 415, 47 S 754.

**77.** Acts 1886-87, p. 93, making it a misdemeanor for owner to survey a plat and sell lots in violation of the act, does not affect the title of the purchaser. East Birmingham Realty Co. v. Birmingham Machine & Foundry Co. [Ala.] 49 S 448.

**78.** Evidence held to show that broker was agent of both parties. Dobson v. Zimmerman [Tex. Civ. App.] 118 SW 236. Contract held not only to authorize agent to find a purchaser but to enter into contract of sale with him. Peterson v. O'Connor, 106 Minn. 470, 119 NW 243.

**79.** Farris v. Gilder [Tex. Civ. App.] 115 SW 645.

**80.** Freeman v. Bell [N. C.] 63 SE 682. For general principles relating to recording, see Notice and Record of Title, 12 C. L. 1100.

**81.** Price, time of delivery, and terms of payment. Long v. Needham, 37 Mont. 408, 96 P 731. Where defendant purchased plaintiff's electric plant, paying specified amount and agreeing to pay a further sum if, upon a test, plaintiff's storage battery system proved superior to defendant's system, mere fact that they had not fully agreed upon all the conditions of the test does not render contract unenforcible, where plaintiff agreed to submit to any conditions suggested by defendant. Hopedale Elec. Co. v. Electric Storage Battery Co., 132 App. Div. 348, 116 NYS 859. Contract containing all elements of sale except that giving of deed was conditional upon vendee complying with terms of contract as to cutting timber, etc., within specified time, held valid contract. Sheridan v. Reese, 122 La. 1027, 48 S 443.

**Evidence** of various letters and telegrams held insufficient to show meeting of minds. Lopeman v. Colburn [Neb.] 118 NW 116. Evidence held to show that minds never met on disposition of rents and current insurance. Schaeffer v. Mutual Ben. Life Ins. Co. [Mont.] 100 P 225. Evidence held to show lack of mutual understanding as to spring reserved. German Sav. & Loan Soc. v. McClellan [Cal.] 99 P 194. Correspondence held to show that minds never fully met upon exact amount to be paid or condition of title to be conveyed. Phelps v. Good, 15 Idaho, 76, 96 P 216. Evidence of statements of decedent many years before, expressing an intent to give land to plaintiff, held of little weight to show contract. Boeck v. Milke [Iowa] 118 NW 874.

**82.** Thompson v. Burns, 15 Idaho, 572, 99 P 111. General statement that if child would stay with decedent he would see that she had plenty, give her clothing and educate her, held not a contract to convey particular land. Collins v. Harrell [Mo.] 118 SW 432. Contract of agency, which provided that at end of certain period principal could withdraw contract or require agent to take land remaining unsold at specific price, held not too uncertain and

*Offer and acceptance.*[See 10 C. L. 1944]—An offer must be accepted within the time specified,[83] or within a reasonable time if no limit is expressed,[84] and without modification.[85] An attempted acceptance upon different terms constitutes a counteroffer.[86] Whereon an offer has been unconditionally accepted, the contract is complete and cannot be thereafter modified except by mutual consent,[87] but an offer, not amounting to an option, may be withdrawn any time before acceptance.[88] The offer and acceptance may be through the medium of letters[89] or other written instruments.[90]

*Mutuality.*[See 10 C. L. 1945]—Like all other contracts, mutuality is required.[91]

indefinite to enforce. Wilcox Canadian Land Co. v. Stewart & Matthews Co. [Minn.] 119 NW 504. Option held not a determination of remedies in case agent refused to buy. Id.

**83.** Where written proposition expressly provides that it is withdrawn unless bid is paid before a designated date, payment thereafter to the vendor's agent does not create a binding contract, and, hence, purchaser may recover money paid. Montgomery Lodge No. 596, B. P. O. E. v. Massie [Ala.] 49 S 231.

**84.** Thompson v. Burns, 15 Idaho, 572, 99 P 111. Verbal offer of one purchasing at tax sale to sell to one claiming to own them for amount paid remains open for only a reasonable time. McFarlane v. Simpson, 153 Mich. 193, 15 Det. Leg. N. 467, 116 NW 982. **Offer by telegram** requires a quick reply. Thompson v. Burns, 15 Idaho, 572, 99 P 111. Where offer by telegram, and requesting quick reply, was received Nov. 4th, acceptance on 11th held too late. Id.

**85.** Lopeman v. Colburn [Neb.] 118 NW 116; Phelps v. Good, 15 Idaho, 76, 96 P 216. Acceptance giving more definite description is not conditional or acceptance on different terms. Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853. Insistence in letter of acceptance that vendor redeem certain outstanding tax titles is not conditional, where title agreed to be conveyed requires him to do so. Id. Where, by offer, vendor was to receive full consideration in cash and was to pay off mortgage, an acceptance, whereby vendee was to assume mortgage and pay balance in cash, does not create contract. Ross v. Craven [Neb.] 121 NW 451. Where offer referred to prior negotiations and was based on understanding that vendor's interest in land and timber amounted to absolute ownership and acceptance was of such interest as he had, being only a license, held no meeting of the mind. Hood & Co. v. Girard Lumber Co., 137 Wis. 152, 118 NW 552. Acceptance fixing another place for payment of consideration and delivery of deed is insufficient. Lopeman v. Colburn [Neb.] 118 NW 116. Reply to offer to take $5,000 cash, stating that it is accepted, and directing offerer to make deed in blank and send same, with abstract, to designated bank, to be turned over on receipt of money, held not an unconditional acceptance. Lacey v. Thomas, 164 F 623. Mere **suggestion at variance with offer** contained in the acceptance does not render it conditional, as when change in place of payment is suggested. Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853. Clause in letter of acceptance. "If it is just as satisfactory to you, will you please send your deed to" a specified bank "for collection," held a mere request. Id. Where acceptance of vendor of offer of purchase designates a bank as medium of closing deal, suggestion of a different bank by vendee relates to manner of performance and is not an element of the contract. Long v. Needham, 37 Mont. 408, 96 P 731.

**86.** Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853.

**87.** Letter, after detailing offer, said, "If this meets your approbation write me at once and say so, or better wire me and follow the letter." Telegram was sent unconditionally accepting offer. Held that minds had met and vendor could not thereafter, by letter, vary terms agreed upon. Long v. Needham, 37 Mont. 408, 96 P 731.

**88.** Instrument reciting that, in consideration of $1 and the undertaking by defendant to pay specified sum on or before a designated date, plaintiff granted and sold land to defendant, and providing that, on defendant's failing to pay specified sum within time agreed, conveyance should be void, held a mere offer which could be withdrawn any time before acceptance. Jones v. Lewis [Ark.] 117 SW 561.

**89.** Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853.

**90.** Proposal in writing, setting forth the terms and written acceptance thereof held a complete agreement. Provenzano v. Glaesser, 122 La. 378, 47 S 688.

**91.** Contract binding one party to sell and convey, but not obligating other to buy, held unilateral, though both signed and took duplicate copy thereof. Booth v. Milliken, 127 App. Div. 522, 111 NYS 791. Mere fact that contract provides that vendee shall receive back the money paid if title is not "satisfactory" does not destroy binding effect of contract, since he cannot arbitrarily reject title as unsatisfactory. Whited v. Calhoun, 122 La. 100, 47 S 415. Held for jury whether conveyance was signed with the understanding that it was to be submitted to grantee and not to be binding unless approved by him. Slayden & Co. v. Palmo, [Tex. Civ. App.] 117 SW 1054. Owner wrote prospective buyers that he would mail deeds to property to certain brokers and required plaintiffs to be present at specified time with sum in cash and receive deeds. Plaintiffs did not accept promise except by offer of performance after withdrawal. Held that there was no mutuality of obligation. Levin v. Dietz, 194 N. Y. 376, 87 NE 454.

*Signature and delivery.*See 10 C. L. 1943—The contract is incomplete without the signatures of all those named in the body of it as parties.[92] Constructive delivery is sufficient.[93]

*Construction.*See 10 C. L. 1945—The meaning of the contract must be ascertained from the contract itself, considering the subject-matter, relation of the parties, and surrounding facts.[94] While parol evidence is not admissible to alter or vary the terms of the written contract,[95] it is admissible to show the real consideration[96] and that the contract was executed and delivered upon a condition which has not been complied with,[97] but not to establish a consideration inconsistent with that expressed.[98] All contemporaneously executed instruments must be construed together.[99]

(§ 1) *B. Reformation and cancellation.*[100]—See 10 C. L. 1945

(§ 1) *C. Statute of frauds.*[101]—See 8 C. L. 2288

(§ 1) *D. Options to buy or sell.*[1]—See 10 C. L. 1945—An option is the sale of the right to purchase lands described therein upon the terms named within the time specified,[2] and differs from a sale in that it passes no interest in the land.[3] The

**92.** Schulte v. Meehan,, 133 Ill. App. 491.

**93.** Broker executed contract in duplicate and, after purchaser had signed each, sent them to vendor with instructions to sign same and return one to him for vendee. Held that, when duplicate was returned, it was delivered, under Civ. Code, § 1059, declaring that a grant shall be deemed constructively delivered where delivered for benefit of grantee. Carr v. Howell [Cal.] 97 P 885.

**94.** Donovan v. Boeck [Mo.] 116 SW 543.

**95.** Oral, prior, or contemporary statements are inadmissible to add to or vary written contract, in absence of fraud or mistake. Anthony v. Hudson [Ky.] 114 SW 782. Under contract to convey a certain quarter section at specified price per acre, parol evidence is not admissible to show that vendor is entitled to pay for 40 acres where government survey shows actual acreage to be less. Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853. Where contract provided that vendor should furnish certificates showing that building was in accordance with building laws, in action to recover money paid on ground of rescission for fraud, evidence of parol representations as to construction of wall, etc., held inadmissible. Kreshover v. Berger, 62 Misc. 613, 116 NYS 20. Where contract calls for unincumbered title, and purchaser refuses contract containing restrictions, parol evidence is not admissible to show that, previously, purchaser had accepted conveyances with like restrictions. Steele v. Guaranty Realty Co. [Cal. App.] 96 P 105. Where vendor agreed to convey privilege of taking from a certain stream sufficient water to irrigate all the meadow lands to extent of 1 cubic foot per second for each 100 acres, held that vendor could not show by parol that they were not required to furnish amount specified. Babcock-Cornish Co. v. Urquhart [Wash.] 101 P 713. Where vendor agreed to convey land according to attached plat, which described by metes and bounds, said to contain about 15 acres, parol evidence was inadmissible to show intention to convey only 15 acres, which was less than described by plat. Rivenbark v. Teachey [N. C.] 63 SE 1036.

**96.** Warwick v. Hitchings, 50 Wash. 140, 96 P 960. May show by parol that purchaser assumed debt secured by mortgage. Grace v. Gill [Mo. App.] 116 SW 442. Where contract stipulated for possession of farm house Aug. 1st, but was silent as to possession of farm, evidence of prior, parol agreement that as part of consideration vendor was to have possession of land until January 1st was admissible. Morehead v. Hering [Tex. Civ. App.] 116 SW 164. Answer admitting that only part of first payment had been made, but alleging that it was orally agreed at time of purchase that plaintiff would take certain lots for balance of first payment and that defendant would cause title to be conveyed from another, held to state good defense. Lanning v. McNeill [Wash.] 97 P 1093.

**97, 98.** Pope v. Taliaferro [Tex. Civ. App.] 115 SW 309.

**99.** Where deed and purchase price notes are executed at same time, they should be construed together. Philippi Colleries Co. v. Thompson [C. C. A.] 163 F 23.

**100. Search Note:** See Cancellation of Instruments, Cent. Dig.; Dec. Dig.; Reformation of Instruments, Cent. Dig.; Dec. Dig.

**101. Search Note:** See notes in 6 C. L. 1784; 8 L. R. A. (N. S.) 1137; 15 Id. 1087; 2 Ann. Cas. 931.

See, also, Frauds, Statute of, Cent. Dig.; Dec. Dig.

**1. Search Note:** See notes in 21 L. R. A. 127; 10 L. R. A. (N. S.) 867; 2 Ann. Cas. 423.

See, also, Vendor and Purchaser, Cent. Dig. §§ 23, 87; Dec. Dig. §§ 18, 57; 21 A. & E. Enc. L. (2ed.) 924.

**2.** Agreement construed a mere option and hence binding though not signed by optionee. Aiple-Hemmelman Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 SW 480. Sale of an option is an executed contract. Marsh v. Lott [Cal. App.] 97 P 163. Contemporaneous agreements construed and held to create merely an agency to sell and not an option to buy. Mitchel v. Gray [Cal. App.] 97 P 160.

**3.** Newton v. Dickson [Tex. Civ. App.] 116 SW 143; Sanderson v. Wellsford [Tex. Civ. App.] 116 SW 382; Slayden & Co. v. Palmo [Tex. Civ. App.] 117 SW 1054; Ham-

option must definitely describe the land upon which it is given.[4] If supported by a sufficient consideration,[5] it is irrevocable;[6] otherwise it is a mere offer which may be withdrawn any time before acceptance.[7] An option must be exercised by an unequivocal and unqualified acceptance thereof[8] within the limit prescribed[9] and upon the terms specified,[10] although negotiation for different terms does not affect the option.[11] Rules governing the construction of contracts generally are applicable to options.[12] Unless the optionor has placed performance beyond his power,[13]

burger v. Thomas [Tex. Civ. App.] 118 SW 770. Option is to be distinguished from contract of sale in that it does not bind the optionee to take the land. Brickell v. Atlas Assur. Co. [Cal. App.] 101 P 16. Option unexercised does not deprive optionor of all transferable interest. Elliott v. Delaney [Mo.] 116 SW 494. Lease containing option does not vest any title in lessee until option is accepted. Luigart v. Lexington Turf Club [Ky.] 113 SW 814.

**Held a sale and not an option:** See Ante this section, subsection A. General Nature, Requisites and Validity.

4. Test is whether it could be specifically enforced. Brickell v. Atlas Assur. Co. [Col. App.] 101 P 16. Contract headed "Savannah, Ga." describing property as "the western portion of lot forty-one (41), Flannery Ward," and stipulating that "seller is to occupy residence No. 221, 36th Street West," until Oct. 1st after sale, held sufficient compliance with rule as to description. Singleton v. Close, 130 Ga. 716, 61 SE 722. Option to buy land lying between normal low-water line on west bank of river and line level with crest of such dam as purchaser should erect, as such line would meander along the west bank of the river and the north and south lines of the place, the contract providing that area should be ascertained before dams were erected, and survey was so made. Held sufficiently definite. Wilkins v. Hardaway [Ala.] 48 S 678. Fact that area depended upon such height of dam as purchaser should elect to construct did not make contract invalid. Id.

5. Since from the very nature of things, no standard of value exists for an option any money consideration, however small, is **sufficient.** Marsh v. Lott [Cal. App.] 97 P 163. Consideration for contract of sale is sufficient to support option therein as to other lots. Noyes v. Schlegel [Cal. App.] 99 P 726. Lease is sufficient consideration to support option contained therein. Pearson v. Millard [N. C.] 63 SE 1053; Succession of Whitting, 121 La. 501, 46 S 606. Evidence of letter held to show payment of consideration to optionor's agent. Palmer v. Clark [Wash.] 100 P 749. Agreement of agent to use his best endeavors to sell certain land is **not a sufficient** consideration to support an option. Jolliffe v. Steele [Cal. App.] 98 P 544. Expenses incurred by optionee in reliance thereon is no consideration. Corbett v. Cronkhite, 239 Ill. 9, 87 NE 874. Recited payment of one dollar, if in fact made, held merely nominal and not such "proper" or "fair" consideration as to entitle optionee to specific performance. Rude v. Levy, 43 Colo. 482, 96 P 560.

6. Marsh v. Lott [Cal. App.] 97 P 163.

7. Mitchel v. Gray [Cal. App.] 97 P 160; Goodman v. Spurlin, 131 Ga. 588, 62 SE 1029; Corbett v. Cronkhite, 239 Ill. 9, 87 NE 874; Hardy v. Ward [N. C.] 64 SE 171.

8. Breen v. Mayne [Iowa] 118 NW 441. Evidence of loose statements of optionee and subsequent conduct of parties, held not to show acceptance. Id. Evidence of interview at which abstract was demanded but no payment was tendered, etc., held insufficient to show acceptance. Ward v. Davis, 154 Mich. 413, 15 Det. Leg. N. 779, 117 NW 897. Where defendant gave an option, which recited that it was made to enable optionee to offer land to shoe company contemplating locating in town to be void if company did not locate, notice by optionee advising defendant that company had decided to locate and of election to buy, followed by tender of performance, held an acceptance. Boyden v. Hill, 198 Mass. 477, 85 NE 413.

9. Time is of very essence of option, especially where property is of speculative character, as mining property. Gaines v. Chew, 167 F 630. Where contract gives another the right to become a part owner by paying a specified sum, right must be exercised within a reasonable time. Joffrion v. Gumbel [La.] 48 S 1007. Under option to expire on day certain providing that, "if accepted, the above named parties are to pay for said timbers an additional amount of $2,450, in cash upon the making of a contract for the sale of said timber," purchasers were obliged to make tender of amount before option expired. Pollock v. Riddick [C. C. A.] 161 F 280. Where contract for purchase of designated lots contains option to purchase other lots, waiver of forfeiture for nonpayment of instalments goes to whole contract and continues the option. Noyes v. Schlegel [Cal. App.] 99 P 726. Where optionee was to pay $50 at a certain time or on notice that vendor had received a bona fide offer, and, upon receiving notice naming the offeror, optionee made no objection to bona fides of offer but attempted compliance, held that he could not thereafter attack same to excuse payment in action for specific performance. Rude v. Levy, 43 Colo. 482, 96 P 560.

10. Acceptance, subject to title guaranteed by Title & T. Mortgage Guarantee Co., when right to such title was not given by option, is not a legal acceptance. Elmer v. Hart, 121 La. 537, 46 S 619. Where optionee was to pay $50 on exercise of option, payment of $37 and credit of $13 on disputed debt is not a compliance. Rude v. Levy, 43 Colo. 482, 96 P 560. Option construed and held that payment of purchase price was not essential to an acceptance. Breen v. Mayne [Iowa] 118 NW 441. Where option gives optionee privilege of purchasing for cash or on terms, acceptance must state on which terms it is purchased. Elmer v. Hart, 121 La. 537, 46 S 619. Acceptance of option by one of two

the optionee must tender performance on his part to place the former in default.[14] Upon acceptance an option becomes a contract of sale,[15] the terms of which determine the rights of the parties.[16] The optionee's financial ability to perform his contract is prima facie presumed,[17] and inability to perform subsequent obligations will not excuse the optionor's default.[18] By course of dealings with the option, the parties may estop themselves from denying its validity.[19]

§ 2. *Condition, quantity, and description of lands.*[20]—See 10 C. L. 1947.—The doctrine of caveat emptor should not be applied where it would be inequitable.[21] The contract must contain, either in terms or by reference, such a description of the property as to identify it,[22] although parol evidence is admissible to remove a

lessees held sufficient in absence of objection that it should be accepted by both. Pearson v. Millard [N. C.] 63 SE 1053.

**11.** Negotiations for credit does not destroy optionee's right to purchase for cash. Succession of Witting, 121 La. 501, 46 S 606.

**12.** Where, at time lease containing option to purchase was executed, and was placed in escrow with instructions, option and instructions should be construed together. Pollard v. Sayre [Colo.] 98 P 816. To determine manner of exercising option, the language of instrument must be construed in light of competent parol testimony to discover intent of parties. Breen v. Mayne [Iowa] 118 NW 441. Where option is ambiguous as to what is necessary to constitute an acceptance, subject-matter and surrounding facts may be looked to. Hardy v. Ward [N. C.] 64 SE 171.

**13.** Palmer v. Clark [Wash.] 100 P 749. Giving of second option which did not bind vendors to convey except upon expiration of existing option does not withdraw first if it be deemed an offer merely. Ward v. Davis, 154 Mich. 413, 15 Det. Leg. N. 779, 117 NW 897.

**14.** Although optionor has attempted to revoke option, optionee must make necessary tender to constitute acceptance, for otherwise option is never converted into a contract of purchase. Marsh v. Lott [Cal. App.] 97 P 163. Complaint construed as action for breach of option agreement and hence error to require amendment alleging what plaintiff did by way of tender. Palmer v. Clark [Wash.] 100 P 749.

**15.** Corbett v. Cronkhite, 239 Ill. 9, 87 NE 874.

**16.** Assignee of option providing that conveyance shall be at the "cost and charge" of the vendee is not liable to vendor for counsel fees for examination of assignee's title to see if he is entitled to conveyance. Hollander v. Central Metal & Supply Co. [Md.] 71 A 442.

**17.** In action by optionee for breach of option contract. Palmer v. Clark [Wash.] 100 P 749.

**18.** Palmer v. Clark [Wash.] 100 P 749.

**19.** Where optionee was induced to release option on county lands under agreement that he and defendants would buy land in specified proportion, defendants to pay bonus to him, it was held that defendants were estopped to deny validity of option. Ellerd v. Cox [Tex. Civ. App.] 114 SW 410.

**20. Search Note:** See notes in 6 C. L. 1786.

See, also, Vendor and Purchaser, Cent. Dig. §§ 91-101, 324-332; Dec. Dig. §§ 60-68, 160-167; 29 A. & E. Enc. L. (2ed.) 625.

**21.** Tarnow v. Carmichael [Neb.] 116 NW 1031.

**22.** Casey v. Luken [Ind. App.] 88 NE 347. Written agreement must contain, either in terms or by reference, such a description of the property that it can be ascertained without aid of parol evidence, but parol evidence is admissible to identify property. House v. McMullen [Cal. App.] 100 P 344. Rule that a contract for the sale and purchase of land which so describes the property that it may be identified by extrinsic evidence, is not void for uncertainty, has no application where description is wholly absent. Casey v. Luken [Ind. App.] 88 NE 347. Description of land is sufficient if, together with references and corners, lines, or other earmarks or indexes, it is sufficient to enable the land to be identified by aid of extrinsic evidence. Knight v. Knight [Wa. Va.] 63 SE 335.

**Held insufficient:** Contract held fatally defective in failing to describe land definitely. Booth v. Milliken [N. Y.] 87 NE 1115, afd. 127 App. Div. 522, 111 NYS 791. Description as "lots 11, 12, and 13, in Block 13, Lemp's addition" and which wholly fails to designate the state, county or civil or political subdivision where the land is situated, and fails to denote municipality or subdivision to which Lemp's addition is adjoined, held insufficient. Allen v. Kitchen [Idaho] 100 P 1052. Description as "70,000 acres of land situate, lying and being in" four specified counties, held too uncertain to be enforcible. Booth v. Milliken, 127 App. Div. 522, 111 NYS 791. Contract, reciting that in event that "Casey farm," not naming county or state, is sold at a vendi sale to a party to contract, he would pay to a person named therein a specified sum for interest, held unenforcible. Casey v. Luken [Ind. App.] 88 NE 347.

**Held sufficient:** Contract to sell "property Nos. 207, 209, and 211, West Second street, Little Rock, Ark., being 70 feet front by 75 feet deep." Kempner v. Gans [Ark.] 111 SW 1123. Contract dated Dallas, Texas, and describing land as "Lot twenty-seven, Block 3-929, and better known as No. 126 McKinnon street." Frazier v. Lambert [Tex. Civ. App.] 115 SW 1174. Agreement for sale of "all of the property of the deceased, in C. township, together with the H. & B. additions, including buildings and school house, and all other buildings located on the land, with appurtenance thereto, including the coal and minerals," etc. Haupt

latent ambiguity and to apply the description to particular land.[23] A false description will not defeat the contract where the error can be shown and corrected by other matter in the contract,[24] and where there are two descriptions, one of which is incorrect, the latter may be disregarded.[25]

§ 3. *Title, deed, and encumbrances.*[26] *Title sold.* See 10 C. L. 1948—In the absence of expression of the character of title sold, the contract will be preserved to contemplate a title that is good [27] and marketable,[28] and free from encumbrances,[29] unless both parties have knowledge to the contrary.[30]

*Sufficiency of title.* See 10 C. L. 1948—The sufficiency of the title tendered depends upon whether it is such as was sold, which, of course, in a particular case depends

v. Unger, 222 Pa. 439, 71 A 843. Contract given by one holding a contract for a deed, while in itself indefinite as to description, held capable of enforcement in light of surrounding facts and acts of the parties. Inglis v. Fohey, 136 Wis. 28, 116 NW 857. Description as "56 x 155 feet to an alley, on east side of Broadway between Sixth and Seventh streets" in named city, "and * * * being a part of lot 7 in block 17, Ord's survey." Parol evidence showed that vendor intended to sell and purchaser intended to buy a certain lot, which was only property which could answer description. Carr v. Howell [Cal.] 97 P 885. Designation of land in acceptance as the "Hay's place" and the "Needham desert entry" held sufficient. Long v. Needham, 37 Mont. 408, 96 P 731. Letter of grantor stating that "I am going to dispose of my undivided interest in the Chicago lots," answer, "As I understand your proposition, you sell undivided one-third interest in five lots in Chicago now owned by," naming persons, and reply of vendor stating that there were seven lots, held sufficiently definite, under extrinsic evidence, that vendor owned five lots only in Chicago, to sustain specific performance. Cumberledge v. Brooks, 235 Ill. 249, 85 NE 197.

**23.** Harten v. Loffler, 212 U. S. 397, 53 Law. Ed. —; Cumberledge v. Brooks, 235 Ill. 249, 85 NE 197. Parol evidence is admissible to identify the land and apply the description thereto, but not to complete an insufficient description. Allen v. Kitchen [Idaho] 100 P 1052.

**24, 25.** Cumberledge v. Brooks, 235 Ill. 249, 85 NE 197.

**26. Search Note:** See notes in 3 L. R. A. (N. S.) 103; 4 Id. 1170; 8 Ann. Cas. 273.

See, also, Vendor and Purchaser, Cent. Dig. §§ 234-323; Dec. Dig. §§ 128-159; 29 A. & E. Enc. L. (2ed.) 606, 700.

**27.** Davis v. Lee [Wash.] 100 P 752. Where vendor agreed to sell piece of land distinct from his interest therein, mere fact he agreed to execute quitclaim deed to convey same did not relieve him from his obligation to convey good title. Id.

**28.** Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853; Mutchnick v. Davis, 130 App. Div. 417, 114 NYS 997. Where lessor refused to permit lease to be transferred, which they had a right to do according to agreement in lease, the assignment of the lease was a contract to convey interest in land, and assignee could recover money paid on purchase price, because not marketable. Becker v. Erickson, 142 Ill. App. 133. Where property was subject to building restrictions as to value of buildings, purposes for which they could be used, etc., contract will not be specifically enforced. Shea v. Evans [Md.] 72 A 600.

**29.** Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853. Railroad right of way held an **incumbrance.** Pryor v. Buffalo, 60 Misc. 447, 112 NYS 437. Building restriction and reserved right of way for pipes and ditches for irrigation purposes held incumbrances. Tandy v. Waesch [Cal.] 97 P 69. Where contract limited application of $60,000 of price to payment of "liens," claim against vendor held not a lien where it did not appear of record. Brown v. Gordon-Tiger Mining & Reduction Co. [Colo.] 97 P 1042. Conveyance to lessee, upon his electing to purchase under his option, merged the estates, and the lease was **not an incumbrance.** Swanston v. Clark, 153 Cal. 300, 95 P 1117. Cost of installing meter in tenement house by commissioner is not a "lien" until made definite by certification of water department to city comptroller. Feder v. Rosenthal, 62 Misc. 610, 116 NYS 2. Under a contract for the sale of realty, providing that if the vendor is unable to give the stipulated title he shall refund payments and the obligation shall cease, he cannot justify nonperformance by showing existence of attachments, etc., where they are not incumbrances on the property. Rosenberg v. Hefferman, 197 Mass. 151, 83 NE 316.

**30.** Where remainder was contingent upon childless woman, 70 years old, dying without issue, and such fact was well known, it will be presumed that parties contracted with reference thereto. Bacot v. Fessenden, 130 App. Div. 819, 115 NYS 698. Where bond for sale of certain mining properties described a portion thereof as patented and portion as mineral entries for which receiver's receipts had been issued, "patent not yet issued, but to be issued," construed an agreement to convey such interest as vendor had, and words "patent not yet issued but to be issued" held no covenant. Nelson v. Wood Placer Min. Co., 167 F 206. Where vendee's possession was not disturbed or threatened and title was otherwise as agreed, vendee could not rescind because patent was not issued at time for passing of balance of consideration and deed. Id. Where map and terms of sale at public auction showed that boundary ran through a party wall, purchaser cannot reject title on the ground of an incumbrance, for he was charged with notice of party-wall agreement. Dris-

upon the construction of the terms of the contract,[31] but the purchaser may waive defects in this regard,[32] and accept such title as the vendor has,[33] and in some cases may recover for the decreased value due to such defect.[34] The waiver may rest in parol.[35] While it is difficult to define what constitutes a good [36] or a marketable [37]

coll v. Carroll, 127 App. Div. 265, 111 NYS 246. Evidence held to show that purchaser did not know of restrictive covenants. Shea v. Evans [Md.] 72 A 600.

**31.** Where alterations by vendor are in accordance with contract and comply with Tenement House Act (Laws 1901, p. 895, c. 334, § 20), vendee can not refuse to accept title on ground that alteration was made without plans having been first filed with tenement house department and its approval obtained in advance, as required by act. Umberg v. Neinken, 128 App. Div. 165, 112 NYS 618. Where contract provided that property should be conveyed **subject to mortgage** to run not less than 2½ years, vendee may refuse to take subject to a mortgage, giving mortgagee right to require payment on 30 days' notice in case state changed method of taxation, etc. Groden v. Jacobson, 129 App. Div. 508, 114 NYS 183. Agreement to convey **free from incumbrances** gives vendee right to reject title containing restrictive covenants. Krah v. Wassmer [N. J. Eq.] 71 A 404. Contract whereby vendor agreed to sell undivided one-quarter interest in remainder and to deliver deed free from all encumbrances, except life estate of life tenant and two mortgages then existing, held to mean that vendor was bound to deliver undivided one-quarter of the estate to be sold free from incumbrances, except those specified, and not that his interest should be free. Bacot v. Fessenden, 130 App. Div. 819, 115 NYS 698. Sale of city lots **subject to encroachment** onto street, if any, not exceed one inch, held to mean unlawful encroachment which city could remove. 556 & 558 Fifth Ave Co. v. Lotus Club, 129 App. Div. 339, 113 NYS 886. Where contract for sale of land, including city building, provided that any encroachment of bay-window not exceeding one foot should be accepted by vendee, vendee need not accept an encroachment of more than one foot in violation of city ordinance, though it is improbable that any action by city authorities will be taken. Heyman v. Steich, 114 NYS 603. **Party-wall restrictions** and covenants against nuisances held to justify rejection of title, which was to be free from incumbrances except those enumerated. Bacot v. Fessenden, 130 App. Div. 819, 115 NYS 698.

**Evidence:** Where vendor agreed to furnish abstract showing good title, abstract furnished is admissible on issue of compliance. Lang v. Murphy [Mo. App.] 117 SW 665.

**32.** Technical objection to want of identification of a party to a conveyance in chain held waived by failure to call vendor's attention thereto until after vendee's refusal to complete purchase. Cummings v. Dolan [Wash.] 100 P 989. When at time sale was made two unrecorded deeds in chain were missing and purchaser agreed to accept title as it was, with understanding that if deeds were found they should be recorded, he could not refuse to pay purchase price because of missing deeds. Travis v. Taylor [Ky.] 118 SW 988. Vendee may make objections to deed tendered on day for closing. Groden v. Jacobson, 129 App. Div. 508, 114 NYS 183. Where after **abstract** had been sent back for correction vendee retained same without object and based refusal to carry out contract on other grounds, there was a waiver of any remaining defect therein, which did not in fact make title defective. Prichard v. Mulhall [Iowa] 118 NW 43. No consideration for such a waiver was necessary, but even if necessary the vendor's expense in correcting abstract was sufficient. Id.

**33.** Hughes v. Adams [Tex. Cr. App.] 119 SW 134. Since vendee has right to accept within 30 days such title as vendor has, vendor cannot sell to another within 30 days though title is defective. Whited v. Calhoun, 122 La. 100, 47 S 415. On rehearing held that, where time is not of essence, vendee may refuse title containing curable defect without giving vendor right to rescind, and may thereafter waive defect and demand deed. Walton v. McKinney [Ariz.] 100 P 471.

**34.** Where vendor is unable to convey fee as required by contract, vendee may, unless it would be inequitable, accept such interest as he has and have a reasonable reduction from contract price. Campbell v. Cronly [N. C.] 64 SE 213. Where only evidence of depreciation in market value of property because of existing lease was appellee's statement that he gave $1,000 or $1,200 more than he would have given had he known of lease, finding that there was no evidence of depreciation was proper. Kuhn v. Eppstein, 239 Ill. 555, 88 NE 174.

**35.** Zempel v. Hughes, 235 Ill. 424, 85 NE 641. Evidence held to show such waiver. Id.

**36.** Agreement to furnish good title calls for marketable one. Coonrod v. Studebaker, [Wash.] 101 P 489; Summy v. Ramsey [Wash.] 101 P 506.

**Held good:** Where original deed was destroyed by a fire which destroyed county records, quitclaim deed from grantors therein to grantee makes good title. Lang v. Murphy [Mo. App.] 117 SW 665. By succession, partition, and purchase, vendor held to have good title. Metropolitan Bank v. Times-Democrat Pub. Co., 121 La. 547, 46 S 622. Mere fact that title to part was tax title does not show a defective title. Winn v. Neville [Kan.] 98 P 272. Fact that name "Hannah" was spelled with one "n" in deed to grantee in chain of title and with two "n's" in deed from her, and fact that she was described as a resident of P. county Wash. T., in first deed in 1870, and of B. county, Or., in her deed in 1880, held no valid objection to title. Kane v. Borthwick, 50 Wash. 8, 96 P 516. Deed to named grantee "and his wife," without naming her, held not to render title defective, where she was identified as party signing contract of sale with her husband. McArthur v. Weaver, 129 App. Div. 743, 113

NYS 1095. Objection that deed in chain of title signed and acknowledged by husband and wife did not contain husband's name in body held technical and frivolous where his name appeared in warranty clause, since it passed title by estoppel if not otherwise. Kane v. Borthwick, 50 Wash. 8, 96 P 516.

**Held not good:** Where, at time deed was to be delivered, the period within which land might be sold to pay debts of vendor's ancestor had not expired, and claims allowed by probate court still remained unpaid, title was not good. Lowe v. Molter [R. I.] 71 A 592. Unvacated dedication of street held a cloud on title, although unaccepted. Agens v. Koch [N. J. Eq.] 70 A 348.

**37.** Words "merchantable title" are not of such clear and definite meaning that vendor may not show that he was ignorant of meaning and purchaser induced him to execute contract by stating that all he wanted was a warranty deed. Hughes v. Adams [Tex. Civ. App.] 119 SW 134.

**Marketable:** Where title was free from legal objections, except that chain of title failed to show that certain grantors were heirs of a deceased owner, objections were met by satisfactory proof by affidavit and judicial finding of the fact. Vognild v. Voitz, 141 Ill. App. 45. Civ. Code 1895, § 2436, providing that, after separation, no transfer by husband, except bona fide in payment of pre-existing debts, shall pass title so as to avoid vesting thereof according to final verdict in cause, does not restrict bona fide transfer after separation, but before commencement of libel for divorce, and title depending thereon is marketable. Singleton v. Close, 130 Ga. 716, 61 SE 722. Abstract showing that legal title became vested in assignee of mortgage, and that he thereafter conveyed by warranty deed, held to show marketable title. Summy v. Ramsey [Wash.] 101 P 506. Recorded mortgage by stranger to title held not to render title unmarketable especially after giving of affidavits of no interest. Cummings v. Dolan [Wash.] 100 P 989. Possibility of woman 70 years old thereafter having issue held not to render title to remainder, contingent upon her dying without issue, unmarketable. Bacot v. Fessenden, 130 App. Div. 819, 115 NYS 698. Record title and undisturbed possession, under claim of title by vendor and predecessors for 50 years, of land comprising an abandoned road, held to show marketable title, although fee title was in city at time of abandonment and no conveyance by it appears. Pooler v. Sammet, 130 App. Div. 650, 115 NYS 578. Decedent conveyed three acres without wife joining, and after his death wife procured interlocutory judgment decreeing that one-third be set off as her dower, but nothing was ever done. Held that 20 years later such facts did not render title unmarketable, since it must be presumed that widow had been settled with or had died, especially where she did die before date for passing title. Port Jefferson Realty Co. v. Woodhull, 128 App. Div. 188, 112 NYS 678. Where building had openly encroached on street for 38 years and it did not appear that it was licensed by adjoining owners or that there was anything to prevent acquisition of prescriptive right, and city's right to compel removal had been indefinitely suspended by statute, it was held that encroachment did not render title unmarketable. 556 & 558 Fifth Ave. Co. v. Lotus Club, 129 App. Div. 339, 113 NYS 886. Under Code, § 2957, allowing affidavits to be filed to cure defects in title, affidavits showing that persons joining in a deed were only heirs of admitted owner held to make title marketable. Prichard v. Muihall [Iowa] 118 NW 43. Since under Real Property Law, Laws 1896, p. 610, c. 547, § 252, officer is prohibited from taking acknowledgement unless he knows or has satisfactory evidence that person making same is the person who executed same, title is not unmarketable because name of grantor in deed in chain is misspelled in acknowledgement. Veit v. Schwob, 127 App. Div. 171, 111 NYS 286. **Title by adverse possession** is marketable where fact of adverse possession is clear. Safe Deposit & Trust Co. v. Marburg [Md.] 72 A 839; Clarke v. Wollpert, 128 App. Div. 203, 112 NYS 547.

**Unmarketable:** Where statutory deed omitted "his heirs and assigns," the deed as a whole did not indicate a fee, and even if vendor did take fee such language of deed was sufficient to raise such doubt as to render title unmerchantable. Bauman v. Stoller, 139 Ill. App. 393. Vendee was under no obligation to take title which, even if it might finally be determined to be good, was in condition to involve him in litigation to establish or secure it. Srolovitz v. Margulis, 35 Pa. Super. Ct. 252. Title dependent upon scrip entry by contractor with state for recovery of lands for state held not marketable. Bodcaw Lumber Co. v. White, 121 La. 715, 46 S 782. Surrogate court refused probate of will devising land to testatrix's son for life, remainder to an infant. Supreme court appointed guardian ad litem to sue to establish will, and thereafter made order authorizing guardian to accept money offered in settlement and to discontinue suit, which was done. Held that court's jurisdiction to cut off infant's rights was of such doubtful character as to render title unmarketable. Dixon v. Cozine, 114 NYS 615. One seeking to compel another to accept a **title through escheat** to state must show that such escheated deceased person had no heirs to show a marketable title. In re Clarke, 131 App. Div. 688, 116 NYS 101. C. died, leaving husband and an alleged adopted daughter, who instituted proceedings to prove herself decedent's sole heir. Decree was rendered declaring her the sole heir, and ejectment was brought against husband. Judgment for plaintiff was reversed on ground that decree was not binding on husband, who was not a party, the court indicating that proof of heirship was insufficient. Held insufficient to show that C. was without heirs. Id. Abstract showing **title by mortgage foreclosure** by advertisement, without showing that mortgage contained power of sale, does not show merchantable title. Bryan v. Straus Bros. & Co. [Mich.] 16 Det. Leg. N. 292, 121 NW 301. Where, in suit against purchaser for specific performance, it appears that complainant had no paper title to part of lots, but relied upon **title by adverse possession,** that title to other lots was in another, although deed was procured from him after suit, and as to some of the lots they had no mineral rights, the title

title, it is only necessary that it be free from reasonable doubt,[38] as shown by the record.[39] Generally, any encumberance or restriction renders the title unmarketable.[40] Where the parties have contracted with reference to a particular defect, the court cannot hold it immaterial or frivolous.[41] Ordinarily a purchaser need not accept a title resting upon adverse possession unless it is established beyond a reasonable doubt.[42] Where the vendor has agreed to furnish a title satisfactory to the vendee[43] or designated attorneys,[44] confirmed by court,[45] or one which a named title trust company will approve,[46] it is not alone sufficient that he furnish one in fact good and marketable. A lis pendens ordinarily justifies rejection where the complaint states a good cause of action.[47] Privilege of curing defect and time therefor is controlled largely by the contract.[48]

*The deed* should usually follow the description in the contract.[49]

§ 4. *Price and payment.*[50]—See 10 C. L. 1950—The amount,[51] place,[52] and time[53]

was not merchantable. Lindsey v. Humbrecht, 162 F 548. Title depending upon **deed executed by attorney in fact** after grantor's death, as shown by recitals in papers relating to appointment of administrator, is not marketable, although land has been held adversely for 27 years, in absence of showing that grantor was alive at time of execution of deed, or that adverse possession has not been tolled by infancy or otherwise. Lalor v. Tooker, 130 App. Div. 11, 114 NYS 403.

38. Summy v. Ramsey [Wash.] 101 P 506; Connely v. Putnam [Tex. Civ. App.] 111 SW 164; Cummings v. Dolan [Wash.] 100 P 989. A **"perfect title"** is one that is good and valid beyond a reasonable doubt. Dobson v. Zimmerman [Tex. Civ. App.] 118 SW 236.

39. Purchaser need not go outside of record to see whether there may not be some minor heirs who have not been barred by limitations. Coonrod v. Studebaker [Wash.] 101 P 489.

40. Where contract calls for a perfect record title, vendee may refuse title where there are two judgments of record against vendors. Agens v. Koch [N. J. Eq.] 70 A 348. Vendee is not estopped to reject tendered contract of sale on ground of reservation and restrictions therein, because she has accepted, before becoming aware of the restrictions, part of forfeiture on resale by vendor as vendee's agent. Steele v. Guaranty Realty Co. [Cal. App.] 96 P 105. Covenant against nuisances and restrictions as to building held defense to action for specific performance of contract to convey free from incumbrances. Eckel v. Spitzer, 58 Misc. 467, 111 NYS 459.

41. Carroll v. Title Guarantee & Trust Co., 131 App. Div. 221, 115 NYS 660.

42. Lewine v. Gerardo, 60 Misc. 261, 112 NYS 192.

43. Title in fact good is not necessarily sufficient, so long as vendee acts in good faith. Hollingsworth v. Colthurst [Kan.] 96 P 851.

44. Evidence held not to warrant finding that provision that vendor's attorney should act with purchaser's attorney in passing on title was omitted through fraud or mistake. Delano v. Taylor [Ky.] 113 SW 888.

45. Where purchaser agreed to buy, "provided the titles are good and sufficient and approved by a judgment of court," he need not accept title until so confirmed by judgment. Lewis & Co. v. Brock [La.] 48 S 563. Under contract to convey good title to lands acquired by husband after wife's death with money received from father's estate, where the community had no interest in the land, he was not bound to procure a probate order authorizing the sale, even if, acting under a mistake, he agreed to do so. Dobson v. Zimmerman [Tex. Civ. App.] 118 SW 236.

46. Under contract to furnish such title that a designated title insurance company will approve and insure, vendee may reject title which such company refuses to approve and insure, although another title insurance company will approve and insure the title offered. Allen v. McKeon, 127 App. Div. 277, 111 NYS 328.

47. Murphy v. Fox, 128 App. Div. 534, 112 NYS 819. Notice of lis pendens reciting proceeding had been commenced to foreclose mortgage held not to render title unmarketable, where property was to be taken subject to the mortgage and foreclosure suit had been discontinued and order so entered. Weissberger v. Wallach, 124 App. Div. 382, 108 NYS 887.

48. Where contract of exchange provided that abstracts should be furnished by certain date to respective attorneys, each to have 30 days thereafter to cure defects, and if unable to do so within such time contract was to become void, held that, upon being unable to cure defect within such time, neither was obliged to accept other's offer of additional time but could call contract void. Carter & Co. v. Harrell [Tex. Civ. App.] 118 SW 1139. In such case, either could withdraw after time for furnishing abstract on other refusing to accept title offered. Id. Statement by purchaser that, if property which he was to give in exchange was not sold when abstract was perfected, he would go on with the deal, held to show that he did not grant further time for perfecting same. Coonrod v. Studebaker [Wash.] 101 P 489.

49. Where sale contract of lots described same by metes and bounds, and also gave the lot numbers held that purchaser was entitled also to have lot numbers inserted in deed. Myrtle Realty Co. v. Kalter, 131 App. Div. 281, 115 NYS 694.

50. **Search Note:** See notes in 6 C. L. 1789. See, also, Vendor and Purchaser, Cent. Dig. §§ 102-125, 333-375; Dec. Dig. §§ 69-78, 168-187.

51. Agreement to pay vendor "$50 an acre

of payment, are controlled by the terms of the contract, but, in the absence of a provision therein to the contrary, a cash payment is presumed as intended,[54] and parol evidence is inadmissible to show otherwise,[55] unless the transaction sought thus to be shown amounts to a subsequent agreement.[56] The amount may be contingent [57] and made payable upon the happening of a particular event.[58] Provision postponing payment for purchaser's special benefit may be waived by him.[59] Authority to sell does not give an agent implied authority to receive a partial payment before the contract is entered into.[60] The character of a payment [61] and proof thereof [62] are controlled by principles relating to payments generally.[63]

for their undivided one-half interest in said lands" held to require payment of $50 for undivided half interest in each acre. Zeno Iron Co. v. Jacobson, 105 Minn. 614, 117 NW 614. Sale by acreage of land described as bounded "by certain highways" does not require payment for land in highway, although it is sufficient to convey title thereto. Kidder v. Childs, 130 App. Div. 259, 114 NYS 561. Evidence held to show that agreed price was price paid by vendor plus amount of sewer assessment, deferred payments to bear interest. Friedman v. Enders, 116 NYS 461. Evidence of value is admissible upon the issue where agreed consideration was $100 or $1,100. Warwick v. Hitchings, 50 Wash. 140, 96 P 960. Evidence of popular subscription of $1,000 in aid of purchase of property for mill is admissible. Id.

52. Where contract fixes place of payment, mere acceptance of a partial payment elsewhere does not waive the provision as to future payments. Prairie Development Co. v. Leiberg, 15 Idaho, 379, 98 P 616.

53. Contract for sale of land on payment, 90 days after success in finding minerals, held to require payment within 90 days from such success. Anse La Butte Oil & Mineral Co. v. Babb, 122 La. 415, 47 S 754. Provision of collateral agreement, reciting the pending of a suit in the United States Circuit court for district of Montana, that final payment should not be made "until said suit is finally determined in said court," held not to delay payment until termination of an appeal. In re Grogan's Estate [Mont.] 100 P 1044. Where contract provided for delivery of deed to vendee upon paying a specified amount each year from 1904 to 1910, and in case of "default in payment" previous payments should be retained as rent, it cannot be so construed as not to put vendee in default until 1910 although he does not make prior payments. Foxley v. Rich [Utah] 99 P 666. Subsequent agreement fixing the time for payment is not admissible to illustrate time within which balance is payable (Hawkins v. Studdard [Ga.] 63 SE 852), and parol evidence is inadmissible to prove the contrary (Id).

54. Where contract contains no stipulation for credit, cash payment is contemplated. Brady v. Green [Ala.] 48 S 807; Ruggerio v. Leuchtenburg, 61 Misc. 298, 113 NYS 615. Where contract acknowledges receipt of part of purchase price and does not specify when the rest is payable, it is payable presently and not within a reasonable time. Hawkins v. Studdard [Ga.] 63 SE 852. Deed and notes for deferred payments construed together and interest on entire deferred amount held payable annually. Philippi Collieries Co. v. Thompson [C. C. A.] 163 F 23.

55. Ruggerio v. Leuchtenburg, 61 Misc. 298, 113 NYS 615.

56. Written provisions as to time and manner of payments may be orally modified. Prairie Development Co. v. Leiberg, 15 Idaho, 379, 98 P 616. Evidence held insufficient to show modification of contract as to place of payment of portion of instalment as to which time of payment was extended. Id.

57. Defendant purchased plaintiff's electric car plant, paying a specified sum therefor and agreeing to pay a further sum if upon a test plaintiff's storage battery system proved superior to defendant's system. Defendant refused to make the test. Held that, upon proving superiority to satisfaction of jury, plaintiff was entitled to recover agreed price without regard to actual value. Hopedale Elec. Co. v. Electric Storage Battery Co., 132 App. Div. 348, 116 NYS 859.

58. Provision in purchase money note, "subject to the clearing of title to the lots," which were held under tax deeds, held to contemplate some proceeding whereby all right of attack would be cut off, and hence purchase money was not payable until such proceeding was had although title was good. Pease v. Globe Realty Co. [Iowa] 119 NW 975. Where certain deferred payment was to be made when vendor presented a warranty deed "together with an abstract showing the parties of the first part to have good marketable title," presentment of abstract showing defective title did not place vendee in default so as to start interest, although title was in fact good. Brandenburg v. Phillips [N. D.] 119 NW 542.

59. Provision that final payment should not be made until termination of pending suit involving land. In re Grogan's Estate [Mont.] 100 P 1044.

60. Schaeffer v. Mutual Ben. Life Ins. Co. [Mont.] 100 P 225.

61. Payment cannot be construed earnest money where contract specifically makes it a partial payment of purchase price. Provenzano v. Glaesser, 122 La. 378, 47 S 688.

62. Where bond required vendor to give deed upon payment of purchase price, giving of deed is prima facie evidence of payment. Dodwell v. Mound City Sawmill Co. [Ark.] 119 SW 262. Note of deceased vendee with maker's name torn off found wrapped in bond for a deed of even date therewith and in same writing, and corres-

§ 5. *Time.*[64] See 10 C. L. 1951—Time is not usually of the essence of contracts for the sale of land,[65] the presumption, where the contract is silent as to time, being that performance must take place within a reasonable time,[66] and the contrary will not be held except where it is clearly so intended by the parties.[67] In ascertaining the intent, regard may be had for the purchaser's known immediate need for the premises,[68] the vendor's need of the purchase price,[69] or the fluctuating value of the property.[70] At law time, when expressly specified, is of the essence of the contract,[71] and, except in cases of very gross injustice, even equity cannot relieve from a default where time is expressly made of the essence,[72] and the other party may refuse a tender of performance thereafter made.[73] Timely performance may be waived,[74] and where an extension of time has been given, though a mere indulgence, the other party cannot be placed in default until he has had a reasonable time to perform after being notified of the revocation of the extension.[75] Where time is of the essence and the purchaser has defaulted, he cannot recover money paid.[76] In Montana the vendee may elect the date of performance where the time is expressed in the alternative.[77]

ponding with recitals except as to amount, held admissible to show payment. Pool v. Anderson [N. C.] 64 SE 593. Declarations of deceased obligee in bond for title that he had paid purchase-money note held inadmissible in favor of his heirs. Id.

**63.** See Payment and Tender, 10 C. L. 1147.

**64. Search Note:** See notes in 104 A. S. R. 265.

See, also, Vendor and Purchaser, Cent. Dig. §§ 113-126; Dec. Dig. §§ 74-78.

**65.** Jeffries v. Charlton [N. J. Err. & App.] 70 A 145.

**66.** McArthur v. Cheboygan [Mich.] 16 Det. Leg. N. 45, 120 NW 575. Where plaintiff agreed to convey or release to sons all her interest in deceased husband's real estate in consideration of certain monthly payments, she must perform within a reasonable time or at least within a reasonable time after demand. Gail v. Gail, 127 App. Div. 892, 112 NYS 96. Vendee cannot make demand for immediate possession a condition on which he would carry agreement into effect. Goldberg v. Feldman, 108 Md. 330, 70 A 245.

**67.** Time is not of the essence unless expressly so made. Acosta v. Anderson [Fla.] 48 S 260. Intention of parties controls as to whether time is of essence of contract. Zempel v. Hughes, 235 Ill. 424, 85 NE 641. Where vendor agreed to sell and purchaser to buy within specified time provided abstract showed good title, time is not of the essence in absence of express agreement. Robinson v. Collier [Tex. Civ. App.] 115 SW 915. Where contract provides that purchaser shall pay taxes legally levied on land subsequent to 1904 without specifying time of payment, time is not of the essence. Acosta v. Anderson [Fla.] 48 S 260. Where purchase price was to be paid at rate of $5 per month, in work so far as possible, held to show that time was not of the essence. Lillis v. Steinbach [Wash.] 99 P 22. Stipulation that consideration was to be paid on day named, in default of which vendee was to forfeit all his interest in the land, held to make time of the essence. Cadwell v. Smith [Neb.] 120 NW 130.

**68.** Immediate need of vendee for premises and knowledge thereof by vendors, together with the other surrounding facts, held to show that time was of essence of contract. Agens v. Koch [N. J. Eq.] 70 A 348.

**69.** Where party was without means and agreed to transfer part of certain tract of land in litigation if transferee would pay all expenses of litigation, etc., time was of essence, and where transferee failed to pay the expenses of litigation as they accrued he could not have performance by offering to reimburse after termination of litigation. Abernathy v. Florence [Tex. Civ. App.] 113 SW 161.

**70.** Time will usually be regarded as of the essence when the subject-matter is of fluctuating value. Hardy v. Ward [N. C.] 64 SE 171.

**71.** Where vendee makes a proper tender on such date, vendor cannot defeat action to recover deposit on ground that he should have been given a reasonable time to perfect title. Groden v. Jacobson, 129 App. Div. 508, 114 NYS 183.

**72.** Zempel v. Hughes, 235 Ill. 424, 85 NE 641; Souter v. Witt [Ark.] 113 SW 800.

**73.** Where time is of essence of contract and vendor is to furnish abstract, showing good title, by specified time, failure to tender such abstract within such time is such breach of contract as justifies purchaser in rejecting abstract tendered thereafter. Carrabine & Co. v. Cox [Mo. App.] 117 SW 616.

**74.** Oral extension of time of performance before breach prevents default at such time. Nissel v. Swinley [N. J. Law] 69 A 960. Where time is of the essence of the contract, express extension of time as to one instalment does not waive provision as to future payments. Prairie Development Co. v. Leiberg, 15 Idaho, 379, 98 P 616. Where both parties fail to perform mutual obligations on day named, strict performance will be deemed waived and contract remains unimpaired. Cadwell v. Smith [Neb.] 120 NW 130.

**75.** Nissel v. Swinley [N. J. Law] 69 A 960.

**76.** Poheim v. Meyers [Cal. App.] 98 P 65.

**77.** Where the purchase price is to be

§ 6. *Conditions, covenants, and warranties.*[78] See 10 C. L. 1952—In case of particular covenants,[79] and conditions precedent,[80] the obligations of the parties must be determined from deed and contemporaneous collateral agreements.[81]

§ 7. *Demand, tender, and default.*[82] See 10 C. L. 1952—Where the obligations of the respective parties are mutually dependent,[83] neither can be placed in default without a tender of performance by the other,[84] unless he has repudiated the con-

paid in two or three years, the vendee may elect the time, under Civ Code, § 1970, giving right of selection to party required to perform one of two alternative acts. Long v. Needham, 37 Mont. 408, 96 P 731.

**78. Search Note:** See notes in 18 A. S. R. 556; 75 Id. 77; 4 Ann. Cas. 977.

See, also, Vendor and Purchaser, Cent. Dig. §§ 7, 8, 127-131, 306-308; Dec. Dig. §§ 79, 153, 154.

**79.** Where contract provided that deed should contain covenant prohibiting sale of intoxicating liquors on premises which should be satisfactory to grantor, held that grantor was justified in refusing to execute deed upon advice of counsel unless covenant was expressed as a part of consideration. Goldberg v. Feldman, 108 Md. 330, 70 A 245. Tenement-house act (Laws 1901, p. 889, c. 334) not requiring all tenement houses to be provided with a water meter, but merely authorizing commissioner of water supply to require same, absence of meter until so required is not a violation of the act (Feder v. Rosenthal, 62 Misc. 610, 116 NYS 2), and failure of owner to comply with commissioner's notice is not a violation because it merely authorizes commissioner to install and charge to property (Id.).

**80.** Vendor upon agreeing to sell property and accept a mortgage upon other property as a part of the price could require delivery of mortgage to his attorney for examination as a condition precedent to his agreement to sell. Jaffe v. Nagel, 114 NYS 905.

**81.** Deed assuming payment of mortgage controlled by collateral agreement. Klemmer v. Kerns, 71 N. J Eq. 297, 71 A 332.

**82. Search Note:** See notes in 3 Ann Cas. 365.

See, also, Vendor and Purchaser, Cent. Dig. §§ 285-295, 343-348; Dec. Dig. §§ 147, 148, 169, 170; 29 A. & E. Enc. L. (2ed.) 686.

**83.** Where acts are concurrent or where particular act is to follow another, they are dependent. Gail v. Gail, 127 App. Div. 892, 112 NYS 96. Contract of sale and purchase without more contemplates that payment of purchase price and the conveyances shall be contemporaneous. Brady v. Green [Ala.] 48 S 807. Under executory contract obligations are mutual and reciprocal, vendor to execute conveyance on tender of purchase price and purchaser to pay same on tender of deed. Clifton v. Charles [Tex. Civ. App.] 116 SW 120.

**84.** Vendee cannot recover without tender of performance. Ruggerio v. Leuchtenburg, 61 Misc. 298, 113 NYS 615; Mitchem v. Wallace [N. C.] 64 SE 901. Where vendor's interest has been sold under execution, the execution purchaser cannot place vendee in default and recover possession from him until he has tendered deed and demanded payment. May v. Emerson [Or.] 91 P 454. Where purchaser has paid part of the purchase money, vendor cannot maintain forcible entry until he has tendered deed. Bowling v. Bowling [Miss.] 47 S 802. Where vendors were to deliver to a bank merchantable title by certain date, whereupon purchaser was to pay purchase price to bank upon vendor's failing to do so, purchaser was not bound to make further demand for compliance. Hughes v. Adams [Tex. Civ. App.] 119 SW 134. Even if vendor receives possession of a stock of goods in part payment, he is not entitled to retain it or to recover it in replevin after time for performance on his part, unless he was tendered performance by offering a deed conveying marketable title. Robinson v. Yetter, 238 Ill. 320, 87 NE 363. Where each makes deposit as liquidated damages, and time for performance elapses without either performing or tendering performance, neither can recover deposit of other. Wead v. Helpert [Tex. Civ. App.] 118 SW 1112. Where vendor agreed to procure extension of mortgage and vendee to execute new mortgage if necessary to effect extension, vendee was not obliged to tender vendor new mortgage to put him in default, but it was duty of vendor to make demand for such mortgage if it became necessary. Sachs v. Wachsman, 130 App. Div. 772, 114 NYS 171. Where $60,000 of price was to be applied to "liens," vendor's failure to furnish schedule thereof was no excuse for failure to instal plant as agreed, only effect, at most, being to give vendee further time for payment. Brown v. Gordon & Tiger Mining & Reduction Co. [Colo.] 97 P 1042. Where plaintiff contracted to purchase lots at $30,000 but specified payments aggregated $38,000, contract was so ambiguous that plaintiff's assignee could not be placed in default until he was advised of true consideration. Lawson v. Sprague [Wash.] 98 P 737. Where plaintiff purchased of defendant a portion of lands which he held under contract from another and was directed by defendant to make tender to such third person, he was bound only to tender amount due under his contract. Ford v. Stroud [N. C.] 64 SE 1. Where agreement was for clear title, vendee could not recover consideration advanced merely upon proof of incumbrances, for reason that vendor had until vendee tendered final payment to remove incumbrances and perfect title. Laub v. DeVault, 139 Ill. App. 398. Where vendee agreed to perform on certain date but did not, he could not in a subsequent action by vendor's executor, for specific performance, set up as a defense that contract could not have been performed on that date. Griffith v. Stewart, 31 App. D. C. 29. Purchaser was tendered properly executed warranty deed but refused it and it was left with clerk of court in action on contract and destroyed. Owner died

tract,[85] placed himself in a position where he cannot discharge his obligation,[86] or waived performance,[87] or where such tender would be useless.[88] A conditional,[89] untimely [90] or insufficient [91] tender does not place the other in default, unless the defect is waived.[92] Under some circumstances the purchaser must prepare and present to the vendor for execution a proper deed to place him in default.[93] That one party insists upon something outside of the terms of the contract does not excuse the other from carrying it out according to its terms,[94] and a repudiation of the contract does not excuse one suing for a breach thereof from alleging and proving readiness and ability on his part to perform.[95] A tender is not affected by the fact that the money was furnished by a prospective purchaser.[96] The terms of

during action. Before bringing action for specific performance, he was tendered quitclaim deed from sole heir and order of probate court for deed from administrator. **Held sufficient tender** of performance. Prichard v. Mulhall [Iowa] 118 NW 43. Vendee who did not ask for performance on date fixed could not avoid performance later on ground that vendor could not at said date have fulfilled his part of contract. Griffith v. Stewart, 31 App. D. C. 29.

85. Inglis v. Fohey, 136 Wis. 28, 116 NW 857. Repudiation by vendor. Long v. Needham, 37 Mont. 408, 96 P 731; Ronaldson & Puckett Co. v. Bynum, 122 La. 687, 48 S 152; Van Dyke v. Cole, 81 Vt. 379, 70 A 593. Repudiation by vendee. Reinach v. Jung, 122 La. 610, 48 S 124; McArthur v. Cheboygan [Mich.] 16 Det. Leg. N. 45, 120 NW 575.

86. Zempel v. Hughes, 235 Ill. 424, 85 NE 641; Thomas v. Walden [Fla.] 48 S 746; Cadwell v. Smith [Neb.] 120 NW 130. Where vendee elects to treat vendor's conveyance to third persons as a rescission, tender of balance due and demand for deed is not necessary to maintain action for recovery of money paid. Smith v. Treat, 234 Ill. 552, 85 NE 289.

87. Vendor's agent and vendee met to perform. Latter objecting to form of acknowledgment, it was agreed that new deed running to third persons should be drawn and sent to vendor for execution, agent, however, being without authority to so agree. Vendor never returned deed. Held, that tender of performance by vendee was not waived, nor was fact that vendor received an unaccepted larger offer material. Jennings v. Howard, 199 Mass. 71, 85 N9 465.

88. Where vendor absolutely refused to settle on basis of contract, formal tender of amount due thereunder was unnecessary. Babcock v. Lewis [Tex. Civ. App.] 113 SW 584. Declared inability of vendor to perform, or conduct indicating that a tender will be unavailing, excuses tender. Piazzek v. Harman [Kan.] 98 P 771. Need not make tender where vendee refuses to proceed because of alleged defects. Kane v. Borthwick, 50 Wash. 8, 96 P 516. Where assignee agreed to pay assignor of contract $5,500 upon receiving deed from vendor, his failure to tender to vendor contract price did not render agreement with assignor absolute on theory of default, where it appeared that vendor did not have title called for by contract. Lawson v. Sprague [Wash.] 98 P 737.

89. Tender, upon condition that vendor make deeds to land not covered by contract and after making arbitrary deductions of unliquidated claims, is not good. Foxley v. Rich [Utah] 99 P 666.

90. Where time is of essence, tender must be made during time limited to place vendor in default. Thompson v. Robinson [W. Va.] 64 SE 718. Where price is due in instalments, tender of aggregate amount is not a valid tender so as to put vendor in default. Hanson v. Fox [Cal.] 99 P 489. Contract bound vendor to convey on payment of specified price and on building on land of sawmill of designated capacity. It required purchaser to commence building mill in 1905 and finish January 1, 1907, but provided that, if purchaser failed to receive assurances of spur track from railroad company during 1905, it should have 14 months after receiving assurance to finish. In December, 1905, engineer expressed opinion that spur would be built by April 15, 1906, but company's rights to condemn was contested until June, 1906. Held that completion by April 27, 1907, was within terms. Bowen v. Dempsey Lumber Co., 49 Wash. 690, 96 P 427.

91. Where purchaser is authorized to make tender to his vendor's vendor and latter refuses to receive anything except total amount due under his contract, purchaser need not tender the actual cash. Ford v. Stroud [N. C.] 64 SE 1.

92. Where tender is not objected to as insufficient in amount but on other grounds, it will prevent forfeiture though in fact insufficient. Nolan v. Foley [Iowa] 120 NW 310. Under Code Civ. Proc. § 2076, providing that one to whom an instrument is tendered must specify objections or be deemed to have waived them, vendor rejecting tender of note for deferred payments under contract without giving any reason cannot thereafter question its sufficiency. Montgomery v. De Picot, 153 Cal. 509, 96 P 305.

93. Where deed tendered in good faith by vendor does not conform to contract, purchaser must either permit him to see contract or himself prepare and present a duly drawn deed to vendor for execution. Skinner v. Creasy [Ky.] 116 SW 753. **Not necessary when** vendor has refused to convey. Brady v. Green [Ala.] 48 S 807.

94. Long v. Needham, 37 Mont. 408, 96 P 731.

95. Booth v. Milliken, 127 App. Div. 522, 111 NYS 791. Evidence held to support finding that purchaser had been willing and ready to perform at all times. Maxon v. Gates, 136 Wis. 270, 116 NW 758.

96. McCullough v. Rucker [Tex. Civ. App.] 115 SW 323.

the contract control as to what constitutes a default.[97] Performance in strict accordance with the contract may be waived.[98] One alleging performance to put the other in default must prove the same.[99]

§ 8. *Forfeiture, rescission, and waiver.*[1] *Forfeiture.*[See 10 C. L. 1954]—The right of forfeiture may be reserved in the contract,[2] but provisions looking thereto are strictly construed,[3] and ordinarily no such right exists in the absence of express agreement.[4] Where the declaration of forfeiture is optional with one of the parties, the optionee must indicate his intention to declare a forfeiture,[5] promptly upon discovering a ground therefore,[6] even when time is of the essence of the contract,[7] though the rule seems to be different where the provision for forfeiture is in terms self-operative.[8] Notice, however, may be waived in any case,[9] and, where the ven-

**97.** Where purchaser was to make payments from produce of mine and agreed to instal reduction plant within specified time, failure to so instal cannot be excused on ground of defect in title to small fraction of mine where defect was not known until after time for performance. Brown v. Gordon-Tiger Mining & Reduction Co. [Colo.] 97 P 1042. Where vendor agreed to construct granolithic sidewalk in front of lot, and it appears that sale of lot was part of general enterprise and stipulation referred to general undertaking, vendor was not in default because of failure to build within two years. Dowling v. Miller-Kendig Real Estate Co., 115 NYS 154. Conflicting **evidence** of vendor and vendee as to which refused to go on with the contract held to make a question for the jury. McPherson v. Bristol, 131 Mo. App. 365, 111 SW 526. Evidence held to sustain finding that vendor and not vendee refused to go on with contract. Id.

**98.** Where defendant agreed to pay mother certain monthly sums in consideration of a release of her interest in her deceased husband's real estate, payment of instalments without a release does not waive his right to insist upon conveyance before payment of future instalment. Gail v. Gail, 127 App. Div. 892, 112 NYS 96. Where vendor is unable to perform, fact that vendee takes what he can get under his contract does not of itself show waiver of full performance. Boyden v. Hill, 198 Mass. 477, 85 NE 413. Acceptance of such land as vendor had title to, together with surrounding circumstances, held to make waiver of full performance for jury. Id.

**99.** Where contract bound plaintiff to convey all her interest in her deceased husband's real estate to defendant and bound defendant to make certain monthly payments, and in action for instalment plaintiff alleged full performance which defendant denied and alleged that he need not make further payment until plaintiff performed, plaintiff was bound to show performance. Gail v. Gail, 127 App. Div. 892, 112 NYS 96.

**1. Search Note:** See notes in 30 L. R. A. 64, 15 L. R. A. (N. S.) 1038.

See, also, Vendor and Purchaser, Cent. Dig. §§ 67, 68, 138-233; Dec. Dig. §§ 41-43, 82-127; 29 A. & E. Enc. L. (2ed.) 642.

**2.** Vendor may reserve right to declare forfeiture upon vendee's default and retain all moneys paid. Spedden v. Sykes [Wash.] 98 P 752. Where vendee covenants to place structure of certain kind on premises and does not do so, vendor cannot declare forfeiture, but, such undertaking being collateral, he may only recover damages. Tacoma Water Supply Co. v. Dumermuth [Wash.] 99 P 741.

**3.** Walker v. Burtless [Neb.] 117 NW 349.

**4.** Owner of undivided interest in land subject to mortgage agreed to convey his interest on certain day if vendee would pay his portion of mortgage. Vendee was able and willing to make payment but was unable to do so because of extension of mortgage secured by the other co-owners. Held that vendor could not forfeit vendee's rights, there being no forfeiture clause in contract. Guthrie v. Baton [Pa.] 72 A 788. Where, after notice of forfeiture, vendee tendered in good faith within 30 days the amount which he thought due, and it was not objected to on ground of insufficiency, such tender was sufficient under Code, §§ 4299, 4300, allowing vendee to pay amount due within 30 days of notice and prevent forfeiture, though in fact insufficient in amount to prevent forfeiture. Nolan v. Foley [Iowa] 120 NW 310.

**5.** McGrew v. Smith [Mo. App.] 116 SW 1117. A forfeiture cannot be enforced without reasonable notice, where vendor has led vendee to believe that time was not of the essence of the contract, and hence where contract provided forfeiture for nonpayment and vendor had not enforced such provision, but had let a number of years go by, held that forfeiture could not be enforced until reasonable notice had been given. Treat v. Smith, 139 Ill. App. 262. Where, upon vendee's default, money theretofore paid "is to be declared forfeited" to the vendor, vendor is not entitled to retain money in absence of declaration of forfeiture. Walker v. Burtless [Neb.] 117 NW 349. Mere payment of taxes by vendor for his own protection is not an election to declare a forfeiture for vendee's default in paying the same. Acosta v. Anderson [Fla.] 48 S 260. Where, after default, vendor conveys to a third person, but expressly subject to the contract, such conveyance is not an election to declare a forfeiture, but the contrary. Van Dyke v. Cole, 81 Vt. 379, 70 A 593.

**6, 7.** Van Dyke v. Cole, 81 Vt. 379, 70 A 593.

**8.** Where time is of essence, notice of intention to enforce positive provision that default shall operate as forfeiture held un-

dor has led the purchaser to believe that prompt payment will not be demanded, he cannot declare a forfeiture until he has notified the purchaser of his intention so to do and the latter has had a reasonable time to perform.[10] Equity will not permit a forfeiture where it would result in gross inequity,[11] or prevented performance,[12] as where the party asserting the same has misled the other.[13] So also a forfeiture may be waived,[14] and equity will seize upon any fact or circumstance tending to show a waiver to relieve from the harshness of forfeiture.[15] Where the

necessary. Prairie Development Co. v. Lieberg, 15 Idaho, 379, 98 P 616.

9. Where forfeiture is optional with vendor upon vendee's default, vendor must indicate his election unless vendee waives notice. Acosta v. Anderson [Fla.] 48 S 260.

10. Smith v. Treat, 234 Ill. 552, 85 NE 289; Noyes v. Schlegel [Cal. App.] 99 P 726. Payment of defaults within 10 days held within a reasonable time. Id. Under Civ. Code § 1511, subd. 3 and §§ 3512, 3515, 3516, vendor, who has stated to vendee that he did not care how the payments were made so long as he got his money within time for last payment, cannot declare forfeiture under terms of contract for failure to pay installments when due. Id.

11. Although time is made of the essence of contract, equity under peculiar circumstance may refuse to enforce forfeiture. Zempel v. Hughes, 235 Ill. 424, 85 NE 641. Vendee may excuse default and relieve himself of a default by showing equitable grounds. Noyes v. Schlegel [Cal. App.] 99 P 726. Although time is of essence of contract, equity will not enforce a forfeiture where party seeking to declare same prevented other from performing. Zempel v. Hughes, 235 Ill. 424, 85 NE 641. Although contract provided that upon default all notes should become due and obligation to convey should become void, where, after default, vendor accepted delayed payments from time to time until several notes were paid, held that forfeiture could not be asserted where assignee of contract offered to pay balance due. Turpin v. Beach [Ark.] 115 SW 404. Where vendor executes contract by giving deed and accepting notes secured by mortgage not complying with the statutory form, he cannot, without demand for formal mortgage, assert its entire validity and sue to cancel deed and declare forfeiture of original contract for nonpayment of purchase price as therein provided. Spedden v. Sykes [Wash.] 98 P 752. Where vendor in possession sues in equity to quiet title against purchaser in default, tender of amount due defeats recovery where vendor has suffered no injury by default. McCullough v. Rucker [Tex. Civ. App.] 115 SW 323.

12. Where default in tendering payment by complainant's assignor was waived and complainant made every reasonable effort to pay arrears but was prevented by inequitable conduct of vendor, latter could not claim forfeiture. Hickman v. Chaney [Mich.] 15 Det. Leg. N. 1003, 118 NW 993. Evidence held insufficient to show that vendee was prevented from preforming by fraudulent concealment of vendor's agent. Armstrong v. Campbell [Iowa] 118 NW 898.

13. Prairie Development Co. v. Lieberg, 15 Idaho, 379, 98 P 616. Although time is of essence of contract, vendor cannot insist upon forfeiture for nonpayment of first note when due, where he has told purchaser that it would be all right if it was paid by time second became due. Souter v Witt [Ark.] 113 SW 800. Although contract gives vendor right to declare forfeiture if vendee fails to pay taxes to proper officer when they become due and payable, where he has led vendee to believe that he will pay the taxes and that vendee could reimburse him, vendor cannot declare a forfeiture until vendee is given a reasonable time to perform after notice. Walsh v. Selover, Bates & Co., 105 Minn. 282, 117 NW 499. Where failure to fully perform was sole fault of vendee and he was not misled by vendor, mere fact that negotiations were pending as to subject-matter does not excuse default. Prairie Development Co. v. Lieberg, 15 Idaho, 379, 98 P 616.

14. Vendor may waive forfeiture of contract by continuing to act on contract. Noyes v. Schlegel [Cal. App.] 99 P 726. Evidence held insufficient to show a waiver of forfeiture. Souter v. Witt [Ark.] 113 SW 800. Where contract provided for forfeiture for nonpayment of notes and stipulated for rent for time occupied, failure of vendor to demand rent and return notes held not a waiver of forfeiture. Id. Where vendor habitually accepted payments after default, he thereby waived his right in equity to a forfeiture, and cannot assert same against one attaching property as belonging to purchaser, but purchaser at such execution sale is entitled to property on paying balance due. Braddock v. England [Ark.] 112 SW 883.

15. Speeden v. Sykes [Wash.] 98 P 752. Where one in possession of government land with right to buy agrees to convey land when he obtains title, and does not assert forfeiture for nonpayment until he receives title, he cannot thereafter do so until he tenders title. Tacoma Water Supply Co. v. Dumermuth [Wash.] 99 P 741. On day fixed for closing, vendor was not ready. Postponement was taken and vendor inserted new term calling for additional payment, to which vendee's agent assented without authority to do so. On postponed date vendee tendered amount originally due. Vendor asserted a forfeiture without demanding additional amount. Held no forfeiture. Rothbard v. Abels-Gold Realty Co., 128 App. Div. 887, 112 NYS 526.

forfeiture has been waived, it cannot thereafter be asserted,[16] and on the other hand, where a forfeiture is once complete, the defaulter or his creditors cannot reinstate the contract.[17] Where vendor unlawfully declares a forfeiture and enters into possession, he is liable for rent.[18] Where the vendor agrees to convey only upon making of the last payment, no tender is necessary to declare a forfeiture for nonpayment of prior instalment.[19] One asserting a forfeiture has the burden of showing grounds therefor.[20] In foreclosing a contract, equity may allow the purchaser a reasonable time to remove the default.[21]

*Rescission.* See 10 C. L. 1055—The parties to the contract may rescind by mutual agreement[22] so long as the rights of third persons are not seriously prejudiced thereby.[23] Rescission may be had for a mutual mistake[24] or for fraud,[25] if the injury therefrom is substantial.[26] The injured party, however, must have been without fault,[27] and must exercise his right within a proper time after discovery of the fraud,[28] and before he has asserted an inconsistent remedy.[29] A party may re-

16. Van Dyke v. Cole, 81 Vt. 379, 70 A 593.

17. Johnson v. Sekor [Wash.] 101 P 829. Evidence held not to shew **collusion between vendor and vendee.** Id.

18. Nolan v. Foley [Iowa] 120 NW 310.

19. Voight v. Fidelity Inv. Co., 49 Wash. 612, 96 P 162. In action by vender to recover intermediate instalments due, it is immaterial whether he has parted with the title, he being bound to convey only upon payment of last instalment. Bentley v. Hurlburt, 153 Cal. 796, 96 P 890.

20. Where vendee in possession is prohibited from committing waste by cutting trees under pain of forfeiture, but is expressly allewed te cut trees to clear land and to make repairs, vendor seeking to establish a forfeiture must show that trees were net cut for permissible purpose. Van Dyke v. Cole, 81 Vt. 379, 70 A 593. Where deed has been placed in escrow te be delivered to purchaser upon payment to depositary of money due under contract, and vendor's interest is sold under execution, payment thereafter to depositary is not a forfeiture of contract, though such payment may be a loss to him. May v. Emerson [Or.] 96 P 454.

21. Kernblum v. Arthurs [Cal.] 97 P 420. Where vendor voluntarily granted extensions, a 10 day period held not an unjustly short period. Id.

22. Parol, rental contract substituted for written contract of sale. Lewis v. Cooley, 81 S. C. 461, 62 SE 868. Where vendor conveys te third persons and vendee acquieses therein, there is rescission by mutual agreement and vendee may recever money paid. Smith v. Treat, 234 Ill. 552, 85 NE 289. Reconveyance of land under terms of contract held sufficient consideration for premise of vendor to refund money paid. Mayes v. Miller [Tex. Civ. App.] 118 SW 725. In actien on vender's lien notes which helders claimed defendant agreed to pay as consideration fer conveyance to him, the latter was entitled to specific performance of agreement for rescission of first mentioned agreement where agreement fer rescission had been partly performed, and such rescission would operate as defense to personal liability on notes. Hill v. Heeldtke [Tex. Civ. App.] 117 SW 217. Rescission **inferred from acts of parties** where vendor ceased to claim any of purchase money due and vendee ceased to claim any interest in the premises. Treat v. Smith, 139 Ill. App. 262. Selling of property by vendor to third party may be treated as rescission. Id.

23. Hill v. Heeldtke [Tex. Civ. App.] 117 SW 217. Where purchaser agreed to pay certain lien notes owed by vendor, the parties may rescind any time before the payer thereof accepts and becomes a party to the promise. Id.

24. Lewis v. Mote [Iowa] 119 NW 152. See Mistake and Accident, 12 C. L. 869.

25. McGrew v. Smith [Mo. App.] 116 SW 1117. See Fraud and Undue Influence, 11 C. L. 1583.

26. In actien to rescind for false representations as to quantity, findings as to deficiency held too indefinite te show appreciable damage. Eichelberger v. Mills Land & W. Co. [Cal. App.] 100 P 117.

27. In actien to rescind sale because of incumberance contrary to agreement, evidence that purchaser could not read or write is admissible under allegation to same effect, as explaining why he had not discovered liens on the land when he made the deal. Hudson v. Slate [Tex. Civ. App.] 117 SW 469.

28. Minter v. Hawkins [Tex. Civ. App.] 117 SW 172; Hill v. Hoeldtke [Tex. Civ. App.] 117 SW 217; State Bank v. Brown [Iowa] 119 NW 81. Where, after discevering purchaser's fraud, vendor continued te treat property received as his own, there is a **waiver** or right to rescind. Minter v. Hawkins [Tex. Civ. App.] 117 SW 172; Brown v. Gordon Tiger Mining & Reduction Co. [Colo.] 97 P 1042. Where, after discovering alleged fraud of vendor, vendee effers land for sale and attempts to realize profit during speculative boom, he cannot thereafter rescind. Kornblum v. Arthurs [Cal.] 97 P 420. Where purchaser did not rescind for fraud of bank in inducing him to purchase but relied upon bank's promise that he would not need to pay any meney but could assign papers received en resale, fraud was waived. State Bank v. Brown [Iowa] 119 NW 81. Where, after discovering fraud, purchaser settled account with

scind where the other party repudiates the contract,[30] but not on account of a breach by the other party where he himself has already broken the contract,[31] or on account of anticipated breach by the other party where he himself has not fully performed,[32] or on account of breach of independent conditions or covenants.[33] To effectuate a rescission, the right to rescind must exist,[34] and notice of rescission must be given to the other party,[35] coupled with an offer to do equity,[36] and ordinarily the purchaser must tender a deed reconveying the land received.[37] While it is difficult to define the rights of the parties after rescission, they must be placed in statu quo as near as can be.[38] A rescission terminates the contract [39] and forecloses all interest of the purchaser in the land,[40] and the deed if executed, should be cancelled.[41]

*Abandonment* See 10 C. L. 1957 is a question of intention to be ascertained from the acts of the parties and all the surrounding circumstances.[42]

bank and renewed notes, there was a waiver of fraud in absence of explanation. Id.

29. Where, after discovering fraud, purchaser prosecutes action to reform contract, he cannot thereafter rescind. Pfeiffer v. Marshall, 136 Wis. 51, 116 NW 871. Where, after discovering purchaser's fraud, vendor elects to seek damages, he cannot rescind after his land becomes valuable. Minter v. Hawkins [Tex. Civ. App.] 117 SW 172.

30. Where vendor declared forfeiture without proper notice and sold property to third party, vendee may rescind. Treat v. Smith, 139 Ill. App. 262.

31. Purchaser who first breaks contract by failure to pay price cannot rescind for vendor's default in guaranty. Williamson v. Davey [Tex. Civ. App.] 114 SW 195. Demand by vendor of additional security after vendee is in default in payments does not give vendee right to rescind. Foxley v. Rich [Utah] 99 P 666.

32. Where vendor agreed to convey upon payment of final instalment of purchase price, lack of title affords no ground for rescission until such time arrives and vendee has performed. Hanson v. Fox [Cal.] 99 P 489.

33. Under contract containing, besides covenants to convey and to pay consideration, covenants as to building restrictions, as to use of water front and that street shall be graded within one year, etc., held that covenants are independent and not conditional. Crampton v. McLaughlin Realty Co. [Wash.] 99 P 586.

34. Notices of rescission are ineffectual where no right of rescisson exists. Lillis v. Steinbach [Wash.] 99 P 22.

35. Letter, upon discovering defective title, demanding return of earnest money, held rescission. Monds v. Birchell, 59 Misc. 287, 112 NYS 249.

36. Where vendee went into possession and made improvements, allegation in suit to rescind for vendor's failure to convey good title that complainant offered to make a quitclaim deed to defendant held sufficient allegation of offer of possession, vendee not being obliged to surrender actual possession until reimbursed for improvements. Snarski v. Washington State Colonization Co. [Wash.] 101 P 839.

37. Where vendee received no title at all and such fact is conceded and was not given possession, a tender of a deed reconveying is not essential to a rescission. Lewis v. Mote [Iowa] 119 NW 152.

38. Upon rescission for vendor's inability to convey good title, purchaser is entitled to reimbursement for improvements made after taking possession and before learning of defect. Snarski v. Washington State Colonization Co. [Wash.] 101 P 839. Although vendor is required to pay for improvements made by vendee in allowing deduction for rental value, such value must be computed on promises without such improvement. Id. Where, pending contract for support in consideration of conveyance, improvements were made with consent of vendors, upon rescission for nonperformance, vendee was entitled to allowance therefor at reasonable cost not exceeding actual cost. Mootz v. Petraechefski, 137 Wis. 315, 118 NW 865. Upon rescission for fraud purchaser may recover for money spent in attempting to utilize land before he discovered fraud. Holland v. Western Bank & Trust Co. [Tex. Civ. App.] 118 SW 218; Treat v. Smith, 139 Ill. App. 262. Where, neither being in default, the parties mutually agree to rescind, payments made may be recovered. Foxley v. Rich [Utah] 99 P 666. Where vendee rescinds and ties up money paid to vendor which is deposited with trust company and drawing 4 per cent interest, he cannot recover legal rate of 6 per cent, since by tying up the fund he prevents vendor from earning more than 4 per cent. Pryor v. Buffalo, 61 Misc. 162, 113 NYS 249.

39. Where purchaser waits reasonable time for satisfactory abstract and it is not correct when he rescinds, he is justified in refusing to thereafter perform. Coonrod v. Studebaker [Wash.] 101 P 489.

40. McMillan v. Morgan [Ark.] 118 SW 407. After rescission, specific performance will not lie. Monds v. Burchell, 59 Miss. 287, 112 NYS 249.

41. Lewis v. Mote [Iowa] 119 NW 152.

42. Vendee voluntarily relinquishing all rights under a contract, cannot thereafter enforce same. Swanson v. James [Neb.] 116 NW 780. Where vendor under executory contract conveys to another in such manner as to repudiate contract or to make it impossible for him to perform, vendee

§ 9. *Interest in the land created by, and rights and liabilities under the contract.*[43] See 10 C. L. 1956 To such extent as the parties have expressed their intentions, the terms of the contract control their rights with regard to collateral and incidental matters,[44] including the right to and character of possession.[45] So also, the terms of the contract must be looked to in determining matters relative to the consideration of the contract.[46] A purchaser under a bond for title or a contract

may treat such act as abandonment, but where conveyance is subject to contract there is no abandonment. Foxey v. Rich [Utah] 99 P 666. Where purchaser withdraws deposit under contract, vendor may treat contract as **abandoned** and sell property to another. Dobson v. Zimmerman [Tex. Civ. App.] 118 SW 236. Failure of purchaser to make any payment for three years of principal, interest or taxes, and surrendered possession, held to constitute such abandonment of contract as to prevent specific performance. Voight v. Fidelity Ins. Co., 49 Wash. 612, 96 P 162. Where vendor conveyed, merely as security, land to be conveyed to vendee upon performance, the contract was **not abandoned.** Foxley v. Rich [Utah] 99 P 666. Where vendor had agreed to procure extension of mortgage, transfer of title subject to contract did not release vendor, especially where vendee had guaranteed performance. Sachs v. Wachsman, 130 App. Div. 72, 114 NYS 171. Delay in making payments and failure to pay taxes held insufficient to show abandonment of contract for purchase of vacant lots. Lillis v. Steinbach [Wash.] 99 P 22. Where upon sale of land to third person, one holding contract for purchase thereof states that he has abandoned his contract, he is prevented by **estoppel** from thereafter asserting same. Herrick v. Sargent [Iowa] 117 NW 751.

**43. Search Note:** See notes in 37 L. R. A. 150; 57 Id. 643; 13 L. R. A. (N. S.) 909, 107 A. S. R. 722; 4 Ann. Cas. 1018; 5 Id. 419; 8 Id. 935, 954; 9 Id. 1055.

See, also, Vendor and Purchaser, Cent. Dig. §§ 83-85, 376-612; Dec. Dig. §§ 52-54, 188-245; 29 A. & E. Enc. L. (2ed.) 703.

**44.** Where contract provided that vendor should have a reasonable time after **date for closing** to clear title if necessary, but that closing should not be delayed if vendor gave bond, vendor was not required to give bond to secure additional time if he wished to delay closing. Carrabind & Co. v. Cox [Mo. App.] 117 SW 616. Where vendor makes **agreement to erect building** on premises, he must furnish material therefor. Bohanan v. Thomas [Ala.] 49 S 308. Where contract provides for **survey,** payment to be made on acreage basis, vendee need not accept title under inaccurate survey and no forfeiture can be claimed where survey includes additional land, though he knows correct boundaries. Burns v. Armstrong [Tex. Civ. App.] 111 SW 1049.

**45.** Payment of part of contract price and entry without permission from all necessary parties does not give right of possession; nor does tender of balance of purchase money give such right. Coleman v. Connolly, 139 Ill. App. 383. Contract reciting that owner of premises had received $100 as deposit on purchase price, balance, $2,500, to be paid upon delivery of an unlimited certificate of title, does not confer right to possession. Winchester v. Becker [Cal. App.] 97 P 74. Possession of tenant is changed to that of vendee where during term property is sold to person in physical possession as resident agent of lessee, and he ceases to pay rent and in lieu thereof, makes cash payment and commences to pay interest on deferred payment. Sewell v. Home Ins. Co., 131 App. Div. 131, 115 NYS 345. One taking possession under contract providing that if vendor's title proved satisfactory he would take land at price and on terms agreed upon, otherwise money paid was to be refunded, held a tenant at sufferance and limitations did not run so long as he recognized vendor's title. Glenn v. Rhine [Tex. Civ. App.] 115 SW 91.

**46.** Where purchase was by acre, held that vendee was obliged to pay for land in public highway, though such highway was an easement and was not mentioned in contract. Killen v. Funk [Neb.] 120 NW 189. Where conveyance in consideration of support and care provided that if vendors decided to live with one of their other children then vendees should deliver articles to their abode, and if they could not agree then plaintiffs should pay defendants $1,000 and be released from all obligations, disagreement before vendors left held not to give right to pay $1,000 and be released. Mootz v. Petraschefski, 137 Wis. 315, 118 NW 865. Contract entered into March 24, 1904, provided that vendees agreed to pay to vendor the sum of $120 per year, after year 1905, for each year they carry a certain mortgage, said $120 representing instalment on interest note. Held that where mortgage was paid on Dec. 30, 1905, vendees were liable for $120 instalment maturing Jan. 1, 1906, being interest for 1905. Banks v. Scholz [Kan.] 100 P 625. Under contract to convey at specified price, requiring purchaser to pay $600 June 1, 1902, $600 January 2, 1903, with specified interest on deferred payments from January 1, 1902, and $1,200 on January 2 of each succeeding year, with interest from January 1, 1902, until payment of full price, held that vendor was entitled to interest on total balance due from January 2, 1902. Vance Redwood Lumber Co. v. Durphy [Cal. App.] 97 P 702. Garnishees contracted to purchase of defendants a half interest in timber land contract, under which garnishees and defendants obligated themselves to pay $90,000, garnishees paying defendants $15,000 and agreeing to pay balance to P. Contract provided that defendants should pay interest on one-half of money paid P., and that such payment should be returned on sale of land. Defendants gave garnishees option on their

for a deed is the equitable owner of the land,[47] especially after the payment of the price,[48] the vendor being a trustee of the legal title for his benefit;[49] and he has an assignable interest,[50] unless the contract involves some purely personal obligation.[51] In some states, the relation of vendor and purchaser is treated as analogous to that of mortgagor and mortgagee.[52] The legal title does not vest in the purchaser until performance of all conditions precedent[53] and concurrent.[54] As between the parties a formal deed is not necessary to pass title.[55] The purchaser, of course, gets

half and provided that if option was not exercised garnishee should loan $15,000 to defendant. Held that there was no indebtedness due from garnishees to defendants. Maury v. McDonald [Tex. Civ. App.] 118 SW 812.

47. Under a bond for a deed, vendee is the equitable owner and the vendor holds legal title in trust for him. McGregor v. Putney [N. H.] 71 A 226. Rights of vendee under agreement to pay notes before vesting of title are equitable at most and not cognizable in law. Rankin v. Dean [Ala.] 47 S 1015. E, having contracted to sell premises to intervener in 1898, conveyed property in 1901 to O, who conveyed to plaintiff in 1905, intervener receiving a new contract from plaintiff, held that legal and equitable title was in plaintiff and intervener. Huff v. Sweetser [Cal. App.] 97 P 705. Where bond for title provided for execution of deed upon payment of balance of purchase money, purchaser has equitable title and may contract with another with respect to mineral rights, and assignee of bonds having knowledge of such contract takes subject thereto. Asher v. Tennis Coal Co. [Ky.] 118 SW 955. Bond for title to school lands, stipulating that purchaser will pay part of price in cash and execute vendor's lien notes for balance, and that vendor will execute a bond for title and binding vendor to execute a deed of conveyance to school sections when they have been lived out under his contract of purchase from state, held substantially an agreement by vendor to make title, and equitable title vests in vendee upon payment of price. Johnson v. Buchanan [Tex. Civ. App.] 116 SW 875.

48. Wright v. Riley [Tex. Civ. App.] 118 SW 1134. Where purchase money is not paid, contractee entitled to deed upon payment of price has neither the equitable or legal title. Standard Leather Co. v. Mercantile Town Mut. Ins. Co., 131 Mo. App. 701, 111 SW 631. Vendee in possession under executory contract of purchase, who has paid part of consideration, is an "unconditional and sole owner" in fee simple of the equitable title within condition of insurance policy making same void if insured has other than an unconditonal and sole ownership in fee simple. Arkansas Ins. Co. v. Cox [Okl.] 98 P 552.

49. Atteberry v. Burnett [Tex.] 113 SW 526. Vendor becomes trustee of title for vendee and vendee of purchase money for vendor (Sewell v. Underhill, 127 App. Div. 92, 111 NYS 85; Rankin v. Dean [Ala.] 47 S 1015), and in case of destruction of building loss falls upon vendee (Sewell v. Underhill, 127 App. Div. 92, 111 NYS 85). Where purchase money has been paid and possession given, vendor holds legal title to use of vendee who has equitable title. Lambert v. St. Louis & G. R. Co., 212 Mo. 692, 111 SW 550.

50. Sheridan v. Reese, 122 La. 1027, 48 S 443. Assignment of contract with right to reimburse assignee and get a reassignment held an equitable mortgage, and where assignor and assignee entered into contract with third person whereby assignee assigned all his rights and assignor released right to redeem, and thereafter assignee and third party entered into contract canceling said contract, assignor is entitled to redeem upon ratifying same. Patrono v. Patrono, 127 App. Div. 29, 111 NYS 268.

51. Whether contract is assignable depends upon tenor of entire contract, and if it appears that it calls for performance of an obligation purely personal, it is not assignable. Montgomery v. De Picot, 153 Cal. 509, 96 P 305. Where it appears that vendor did not look to personal responsibility of vendee for deferred payments but rather to the mortgage security to be given on the property, and agreed to convey to vendee or his assigns, etc., contract held assignable. Id. Where vendor assents to assignment of contract, he cannot thereafter assert that it was of a personal character and nonassignable. Sheridan v. Reese, 122 La. 1027, 48 S 443.

52. Contracts for sale of land on instalments are similar to mortgages, and upon default vendee is entitled to have land sold and to receive any surplus. Hicks v. King [N. C.] 64 SE 125; Freeman v. Bell [N. C.] 63 SE 682. Where lease provided that if lessee promptly paid the rent and taxes he could purchase upon payment of 50 extra bales of cotton, and that if any instalment of rent was not promptly paid all rights should be forfeited, held that, upon attempted forfeiture, lessee had right to have property sold to pay balance due. Hicks v. King [N. C.] 64 SE 125. Where decree directed administratrix of deceased vendor to convey to vendee upon his paying agreed contract price, and that, if he failed to do so by a specified time, the land be sold for cash, retaining case for disposition of proceeds, held that conveyance by administratrix upon receiving payment after time fixed was valid. Jones v. Jones, 148 N. C. 358, 62 SE 417.

53. Where owner agrees to convey tramroad as shown by paper and company constructs same, it becomes equitable owner and entitled to a deed, but if it was first to be located by the parties as a condition precedent, title does not pass until performance thereof. Union Sawmill Co. v. Felsenthal Land & Townsite Co. [Ark.] 112 SW 205.

54. Robinson v. Yetter, 238 Ill. 320, 87 NE 363.

55. Erasure of grantees name and substi-

only such title as the vendor has,[56] and subject to all such equities in third persons as are not cut off under the doctrine of bona fide purchaser without notice.[57] An estoppel in favor of the vendor is usually available to the purchaser.[58] Upon failure of title, no recovery can be had upon purchase price notes,[59] unless such failure is due to purchaser's default.[60] Where the vendor is obligated to furnish an abstract,[61] a conditional tender is not sufficient.[62] A purchaser is entitled to damages resulting from an occasional overflow caused by a permanent embankment constructed prior to the purchase,[63] notwithstanding a release of future damages by the vendor of which he had no notice.[64]

Rights of the parties in deposits depend upon the terms of their agreement in respect thereto.[65] An acknowledgment of a deposit setting out the application to be made thereof is not a mere receipt.[66] A purchaser in possession under the contract[67] is estopped to deny the vendor's title,[68] and cannot assert adverse possession against the vendor,[69] unless the contract is executed so far as the vendee is concerned.[70] On the other hand, a vendor remaining in possession can claim adverse possession only when the adverse character of his claim is of the clearest kind.[71]

tution held sufficient. Witmer v. Shreves [Iowa] 120 NW 86.

**56.** Where vendor's interest has passed by commissioner's deed, vendee receives no title under his deed. Conley v. Breathitt Coal, Iron & Lumber Co. [Ky.] 113 SW 504. Quitclaim deed of residue of survey not previously conveyed gives purchaser no better rights against one claiming under a prior deed than grantor would have. Raley v. Magendie [Tex. Civ. App.] 116 SW 174. Where purchaser brings ejectment upon his equitable title under contract of purchase against another subsequent purchaser, it is not necessary to tender or have in court balance due vendor for defendant cannot recover of plaintiff for defective title. Ohio River Junction R. Co. v. Pennsylvania Co. [Pa.] 72 A 271.

**57.** See Notice and Record of Title, 12 C. L. 1100.

**58.** Estoppel against heirs and in favor of widow arising from fact that they allowed her to complete contract of ancestor in ignorance of their existence with undividual money, etc., held to be available to her grantee. Lewis v. Jerome [Colo.] 99 P 562.

**59.** Martin v. Turner [Ky.] 115 SW 833.

**60.** Plaintiff and partner purchased certain lands. On foreclosure of vendor's lien, the land, less 43 acres, was sold to B, defendant becoming his surety on bonds. Bonds not being paid, land was resold including 43 acres, and purchaser transferred bid to defendant. Thereafter plaintiff sold her interest in 43 acres to defendant. Held that, since failure of plaintiff's title to 43 acres was due to defendant's failure to pay bonds, he was liable on note for price. Bates v. Whitt [Ky.] 117 SW 273.

**61.** Vendor need not furnish an abstract unless obligated by express contract. Thompson v. Robinson [W. Va.] 64 SE 718.

**62.** Where vendor is to furnish abstract by specified time, offer to furnish it if purchaser will pay two notes then due and accept bond for $1,500 is not a compliance. Carrabine & Co. v. Cox [Mo. App.] 117 SW 616.

**63.** St. Louis S. W. R. Co. v. Clayton [Tex. Civ. App.] 118 SW 248.

**64.** Release of damages to accrue from construction of railroad embankment held not binding on purchaser without notice, the damage being only occasional. St. Louis S. W. R. Co. v. Long [Tex. Civ. App.] 113 SW 316.

**65.** Where deposit is made in escrow to be paid to seller if certain violations against property were dismissed and he did the work and paid therefor, and to the vendee if he did the work, held that vendee could not recover without showing that he performed the requisite work. Levy v. Freiman, 131 App. Div. 298, 115 NYS 996. Where purchaser paid full purchase price and vendor deposited sum with trust company to be paid to vendee if vendor did not procure and record a release of a condition or covenant in a remote deed that no dog should be kept on premises, the release contemplated was one from persons entitled to declare forfeiture of a condition, and damage if a covenant, and vendor's individual release was insufficient. Carroll v. Title Guarantee & Trust Co., 131 App. Div. 221, 115 NYS 660. Where deposit is wrongfully applied by depository to judgment against vendor, such judgment creditor is not proper party to action to recover deposit. Sell v. Clarkson, 129 App. Div. 473, 114 NYS 316.

**66.** Not subject to parol variation. Steele v. Guaranty Realty Co. [Cal. App.] 96 P. 105

**67.** Estoppel of vendee to deny his vendor's title does not apply where vendee was already in possession. Nashville, etc., R. v. Proctor [Ala.] 49 S 377.

**68.** Failure of title is not available as defense to action for agreed price to vendee in possession until he surrenders possession. Pugh v. Stigler [Okl.] 97 P 566.

**69.** Purchaser in possession under contract of sale cannot acquire adverse title. Finch v. Noble, 49 Wash. 578, 96 P 3.

**70.** Where contract has become executed so far as vendee is concerned, he may assert adverse possession against vendor. Cassin v. Nicholson [Cal.] 98 P 190.

**71.** Any claim of grantor, a city, that it remained in possession of part of the prop-

Rights in and to timber[72] and crops[73] are treated elsewhere, as is also liability for taxes.[74]

*Interest, rents and profits.*[See 10 C. L. 1959]—Ordinarily, all rents accruing after the purchaser becomes entitled to possession belongs to him,[75] in the absence of special contract[76] or statute[77] to the contrary. A tenant, however, may pay the current month's rent to the vendor where it is payable in advance.[78]

*Insurance.*[See 10 C. L. 1959]

§ 10. *Liability consequent on breach.*[79] *Rights of the vendor.*[See 10 C. L. 1959]—The rights of the parties depend largely upon the terms of the contract.[80] The vendor may recover purchase money by way of specific performance,[81] or recover damages for the breach.[82] He is entitled to interest from the time of default.[83] Where earnest money[84] is paid, the purchaser may recede from the contract by forfeiting the same and the vendor by returning double the amount.[85] Express provision may be made as to the right to payments made,[86] and when it is so agreed payments made may be retained as liquidated damages upon the vendee's default.[87] Contracts giving the purchaser the right to immediate possession sometimes stipulate for rent in case of default.[88] A purchaser in possession does not become

erty, must be of the clearest kind to support claim of adverse possession. Webber v. Gillies, 112 NYS 397.

**72.** See Forestry and Timber, 11 C. L. 1521.

**73.** See Emblements and Natural Products, 11 C. L. 1197.

**74.** See Taxes, 12 C. L. 2022.

**75.** While one purchasing from broker is entitled to rents and profits from time he was entitled to possession, he cannot recover same of broker who did not have possession and had not received rents. Prichard v. Mulhall [Iowa] 118 NW 43.

**76.** Mere mention in deed that premises were occupied by monthly tenants held no notice of vendor's claim to entire month's rent which had been paid in advance. Anderson v. Carell, 114 NYS 198.

**77.** Under Code Civ. Proc. § 2720, in absence of express or implied agreement, vendee is entitled to rent from date of delivery of deed, though rent was payable in advance. Anderson v. Carell, 114 NYS 198.

**78.** Leopold v. Baum, 110 NYS 1054.

**79. Search Note:** See notes in 6 C. L. 1801; 8 L. R. A. (N. S.) 137; 16 Id. 768; 106 A. S. R. 963; 4 Ann. Cas. 791.

See, also, Vendor and Purchaser, Cent. Dig. §§ 333-340, 358-364, 369-375, 844-1060; Dec. Dig. §§ 173-177, 185-187, 301-355.

**80.** Where grantee retains a part of consideration to secure him as surety for grantor, grantor is entitled to have same applied to debt, and if so applied vendor may recover same. Barnes v. Johnson, 33 Ky. L. R. 803, 111 SW 372. Where purchasers had title taken in name of one who gave his individual bond for deferred payments and executed a deed of trust, held that he was not a surety for copurchasers so as to give vendors any right based thereon. Downing v. Robinson [Md.] 71 A 129.

**81.** Clifton v. Charles [Tex. Civ. App.] 116 SW 120; Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853.

**82.** Clifton v. Charles [Tex. Civ. App.] 116 SW 120. Upon refusal of vendee to carry out contract, vendor cannot recover in an ordinary action at law the purchase price fixed by contract but can recover only actual damages. Freeman v. Paulson [Minn.] 119 NW 651.

**83.** Where vendee refuses to accept sufficient title and pay agreed price, vendor becomes entitled to interest from date of default. Metropolitan Bank v. Times Democrat Pub. Co., 121 La. 547, 46 S 622.

**84.** Earnest money is a deposit made to bind the bargain and is presumed to be a forfeiture in the absence of evidence that the parties intended to bind themselves by an irrevocable contract. Legier v. Braughn [La.] 49 S 22.

**85.** Legier v. Braughn [La.] 49 S 22.

**86.** Provision, that if purchaser refuses to take land for any cause other than insufficiency of title advancements shall be forfeited, but if title is not good money shall be refunded, held not unreasonable. Delano v. Saylor [Ky.] 113 SW 888. Where contract provided that upon breach thereof by vendee deed placed in escrow should be returned to vendor and payment made should be applied as rent, upon default vendor was entitled to return of deed and retention of payments made as rent. Foxley v. Rich [Utah] 99 P 666.

**87.** Where it was evident from contract that sale was made upon agreement that payment should be forfeited if contract was not complied with, vendor had right to declare **forfeiture** or enforce the contract. Griffith v. Stewart, 31 App. D. C. 29. Where contract recites that $1,000 in cash has been received and provides for a forfeiture of the same as liquidated damages if the purchaser refuses to perform, upon such default vendor may recover on note given as a part of the recited cash. Beauchamp v. Couch [Tex. Civ. App.] 117 SW 924. Payments may be retained though in excess of actual damages. Beveridge v. West Side Const. Co., 130 App. Div. 139, 114 NYS 521. Fact that parties have expressly stipulated that in case vendee refuses to perform all payments may be retained as liquidated damages does not make applicable the doctrine of penalties and forfeitures, so as to allow vendee to recover where payments greatly exceed actual damages. Id.

**88.** Defendant contracted to convey land

upon default a mere licensee,[89] intruder or squatter,[90] or tenant.[91] Where the purchaser refuses to go on with the contract, he is liable for buildings removed from the premises.[92] An estoppel to enforce the vendee's liability for the purchase price cannot arise out of mere matters of counterclaim.[93]

*Rights of the vendee.* See 10 C. L. 1960—The contract controls the rights of the purchaser in so far as it covers the matter in controversy.[94] The purchaser ordinarily has no affirmative rights where he has been the first to default,[95] and cannot recover a deposit made to secure performance unless nonperformance was not due to his fault.[96] Upon failure of title, the purchaser may recover damages for breach of the contract,[97] or the money paid under the contract,[98] together with taxes

on payment of annual instalments, the first note being for $100. Purchaser agreed to pay $150 rent for any year in which he failed to pay the note as it matured. When first note matured, he paid $180, but refused to pay second. Held that $80 overpaid should be applied on second year's rent. Flowers-Carruth Co. v. Moyse [Miss.] 48 S 523. Contract provided that upon default, vendee would pay stipulated sum as rental for each year he remained in possession. He failed to make payments and surrendered bond for title, giving notes for rent. There was evidence that he had stated that he had given land up. Held not to support finding that relation was that of mortgagor and mortgagee but required finding that relation of landlord and tenant existed. Lewis v. Cooley, 81 S. C. 461, 62 SE 868.

**89.** Rights cannot be terminated by notice. Stockwell v. Washburn, 59 Misc. 543, 111 NYS 413.

**90.** Vendee who has been given possession under his contract does not become intruder or squatter within Code Civ. Proc. § 2232, subd. 4, authorizing summary proceedings to recover possession upon default and notice to vacate. Stockwell v. Washburn, 59 Misc. 543, 111 NYS 413. Provision in Code, "and has continued without permission," etc., relates to one who has entered as an intruder or squatter. Id.

**91.** Giving possession to purchaser under his contract of purchase is not a "letting" so as to sustain forcible entry and unlawful detainer within Sayles' Ann. Civ. St. 1897, art. 2519. Francis v. Holmes [Tex. Civ. App.] 118 SW 881. Purchaser going into possession under his contract of purchase is not a tenant at will or by sufferance, so as to authorize forcible detainer under Sayles' Ann. St. 1897, art. 2519. Id. Summary landlord and tenant proceedings cannot be invoked to recover possession from purchaser, although contract provided that until purchase fully performed, i. e., made deferred payments, his rights should be that of a tenant and that landlord could take proceedings allowed by law to remove tenant, no tenancy in fact existing. Young v. Columbia Investment & Real Estate Co. [N. J. Law] 72 A 35.

**92.** Purchaser took possession of land and converted barn into house and, on discovering clouds on title, removed same with vendor's assent. When vendor perfected title, vendee refused to carry out contract. Held that he is liable for value of barn. Twitchell v. Benjamin [Wash.] 98 P 109.

**93.** When vender collected note belonging to vendee and retained proceeds. Warwick v. Hitchings, 50 Wash. 140, 96 P 960.

**94.** Provision in deed, that if grantor shall "not give good title and possession" to whole or any part of the premises, grantee could reconvey and receive back purchase money, held to cover railroad right of way across premises, known to both parties, but believed to be wrongful encoachment. Pryor v. Buffalo, 60 Misc. 447, 112 NYS 437. Where provision is made for application of payments made as not upon vendee's default, vendee is entitled to return of unpaid notes. Foxley v. Rich [Utah] 99 P 666. Contract providing that purchaser "agrees to comply with the above conditions" within a specified time "or forfeit **earnest money**" gives purchaser option of completing contract or forfeiting earnest money. Runck v. Dimmick [Tex. Civ. App.] 111 SW 779. Where contract provided that **purchase money paid** should be returned if vendor failed to give bond "with terms and prices" as stated in contract, held that vendee could recover same where only bond tendered contained additional stipulations as to attorney fees and as to rights in case of default. Banks & Bro. v. Hooten, 130 Ga. 789, 61 SE 854.

**95.** Where vendee was first in default, the subsequent default of vendor does not authorize recovery by vendee of payments made. Foxley v. Rich [Utah] 99 P 666. Where purchaser first breaks contract by failure to pay purchase price, he cannot recover for vendor's breach of guaranty. Williamson v. Davey [Tex. Civ. App.] 114 SW 195. Statements of secretary of corporation on refusing instalments due held not to constitute such admissions of insolvency of vendor company as to show inability to perform so as to amount to present breach and authorize recovery of money paid. Lakowschowsky v. Utopia Land Co., 111 NYS 470.

**96.** Vendee can only recover deposit in case failure to perform was not due to his fault. Sell v. Clarkson, 129 Div. 473, 114 NYS 316. Evidence held to show that vendee, who deposited money with depository for vendor in case conveyance was made, did not consent to application thereof on judgment of another against vendor. Id. Instrument reciting, "Upon receipt of $50 deposit on prop." located as described, contract to be drawn July 18, and on signing contract 10 per cent. cash to be paid, balance on delivery of deed. It then proceeded to state terms of payment. Held that deposit was in purchase price and not merely security to secure execution of contract. Lindenbaum v. Marx, 62 Misc. 310, 114 NYS 772.

**97.** Where vendor never had title and did not procure it and never delivered posses-

paid,[99] and expense of searching title,[1] but not premiums on insurance taken out for his own benefit.[2] Where specific performance cannot be had,[3] the purchaser's remedy is by action for damages,[4] and when specific performance may be had he has an election to sue therefor or for damages.[5] When specific performance is impossible, the purchaser is entitled to a reconveyance of land conveyed by him as part of the purchase price and to the net profits therefrom.[6] The vendor's liability on his bond against curable defects in his title is not affected by the purchaser's knowledge thereof at the time of contracting,[7] or by the fact that the purchaser has received rents and profits in excess of the damage resulting from the defects.[8] Where the purchaser sues to recover payments made with interest, the vendor may offset the rental value of the premises, with interest thereon, from the close of each year's possession.[9] A defect in title for the curing of which the purchaser may offset the expense thereof against the price must be such as to amount to a breach of the covenant of warranty,[10] and the burden rests upon the purchaser to show such defect.[11] Upon recovery of money paid because of vendor's refusal to convey, the purchaser has a lien therefor upon the property,[12] subject to the superior rights of third persons.[13]

sion to vendee, latter may recover on vendor's bond for title. Dunnivan v. Hughes [Ark.] 111 SW 271.

98. Davis v. Lee [Wash.] 100 P 752; Lewis v. Bergmann, 110 NYS 1047. As money had and received. Elliott v. Garvin [C. C. A.] 166 F 278. Complaint alleging conveyance with covenants and total failure of title, notice of recission and praying for damages to amount of consideration held action for recovery of consideration and not for damages for breach of covenants. Oliver v. Kneedler [Iowa] 119 NW 525. **Interest** at legal rate may be recovered. Davis v. Lee [Wash.] 100 P 752.

99. Lowe v. Molter [R. I.] 71 A 592.

1. Lowe v. Molter [R. I.] 71 A 592. Upon breach of contract by vendor, vendee is not entitled to lien for expenses in investigating title. Hugel v. Habel, 132 App. Div. 324, 117 NYS 78.

2. Anderson v. Ohnoutka [Neb.] 121 NW 577.

3. See Specific Performance, 12 C. L. 1886.

4. Where husband executes contract to convey but wife refuses to join therein, if purchaser is unwilling to accept husband's deed, his only alternative is to repudiate transaction and sue for compensatory damages. Aiple-Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 SW 480. Although specific performance is impossible because of conveyance to another, vendor is liable in damages. Freeman v. Bell [N. C.] 63 SE 682.

5. Clifton v. Charles [Tex. Civ. App.] 116 SW 120; Hamburger v. Thomas [Tex. Civ. App.] 118 SW 770. Where vendee rescinds and brings suit to recover money paid, an election is made and suit for specific performance will not lie thereafter. Whalen v. Stuart, 194 N. Y. 495, 87 NE 819.

6. Terrance v. Crowley, 62 Misc. 138, 116 NYS 417.

7. Kumblad v. Allen [Wash.] 99 P 19.

8. He being entitled to receive same. Kumblad v. Allen [Wash.] 99 P 19.

9. Anderson v. Ohnoutka [Neb.] 121 NW 577.

10. Mere cloud or a colorable claim not accompanied by a substantial, legal or equitable right capable of enforcement is insufficient. De Steaguer v. Pittman [Tex. Civ. App.] 177 SW 481. Rule that vendee in possession who acquires outstanding title cannot demand of his vendor more than amount reasonably due applies of sale of property of uncertain value, as a gas well. Bibb v. American Coal & Iron Co. [Va.] 64 SE 32. Vendee buying subject to a trust deed and paying off the debt does so for his own benefit and not for his vendor's benefit. Weston v. Livezey [Colo.] 100 P 404. Where purchaser under deed reserving vendor's lien dies and vendor and widow thereafter destroys the unrecorded deed and purchase price notes, intending thereby to terminate the widow's rights, she is estopped to assert such rights especially where she becomes a tenant, and vendee paying far release of her claim cannot offset same. De Steaguer v. Pittman [Tex. Civ. App.] 117 SW 481.

11. De Steaguer v. Pittman [Tex. Civ. App.] 117 SW 481.

12. Where part of purchase price is paid under agreement that it is to be returned in case vendor does not furnish good title, purchaser has a lien for amount upon land in case of defective title. Delano v. Saylor [Ky.] 113 SW 888. In suit against vendor and subsequent purchaser to establish lien on land for purchase money paid, evidence held insufficient to make case for equitable relief, purchaser having failed to comply with contract within time fixed. Fowles v. Bentley [Mo. App.] 115 SW 1090.

13. Villone v. Feinstein, 132 App. Div. 31, 116 NYS 384. Whereupon denial of specific performance, purchaser is entitled to return of money paid, lien therefor may be asserted against land as against subsequent purchaser with knowledge of plaintiff's purchase. Lowe v. Maynard [Ky.] 115 SW 214. Where wife of vendor has not joined in contract and her dower has become consummate, property must be sold subject to her dower unless satisfied out of proceeds of sale. Villone v. Feinstein, 132 App. Div. 31, 116 NYS 384. In action against widow and heirs of vendor upon contract signed by vendor alone or to establish lien for money

*Deficient quantity or other partial failure of consideration.* See 10 C. L. 1061 Where the sale is by the acre,[14] the purchaser may recover for any deficiency, however small,[15] but if the sale is in gross,[16] no recovery or abatement of price can be had, unless there has been fraud [17] or unless the shortage is so gross as to make it evident that the parties would not have contracted had it been known.[18] The parties, of course, may expressly contract with reference to a shortage or surplus.[19] Where one conveys a definite number of acres in common to successive purchasers, any deficiency falls upon the last purchaser,[20] but where the vendor's acreage is decreased on partition of a larger tract because of its greater value, the deficiency must be borne by the grantees in proportion to their holdings.[21] Abatement of the purchase price usually may be had also for other partial failure of consideration.[22] The right to abatement for partial failure of consideration cannot be barred by laches.[23]

§ 11. *Rights after conveyance.*[24] See 10 C. L. 1062 Ordinarily, the execution of a deed in full performance of a contract of sale [25] merges all the provisions of the

paid, held error to direct personal judgment against heirs and widow for any deficiency after sale of property under lien foreclosure. Id. Where purchaser has no actual or constructive notice of prior contract of sale, lien cannot be established against land for money paid under contract. Fowles v. Bentley [Mo. App.] 115 SW 1090. Plaintiff purchased land of widow which had belonged to her husband paying $600, which she used for her personal expenses, and $400, to satisfy a mortgage. Title was in fact in husband's heirs, who owed no debt chargeable against the land. Held that plaintiff had no lien on land for part paid to widow, though land might have been taken for widow's support. Paton v. Robinson [Conn.] 71 A. 730.

**14.** Where in reply to request for price and acreage vendor stated that she would sell for $2,700 and tract "was said" to contain 75 acres, which offer was accepted. Epes v. Saunders [Va.] 63 SE 428.

**Presumption** of sale by acre arises from agreement to pay gross sum upon estimated number of acres. Epes v. Saunders [Va.] 63 SE 428.

**15.** Anderson v. Dawson [Ky.] 118 SW 953. Anthony v. Hudson [Ky.] 114 SW 782.

**Estoppel:** That purchaser, broker, and another conspired to defraud vendor by retaining part of purchase price held not to estop purchaser from recovering for acreage shortage. Farris v. Gilder [Tex. Civ. App.] 115 SW 645.

**16.** Where deed with covenant of general warranty described land by courses and distances as "containing 74.30 acres, more or less," and vendor represented that land consisted of 74.30 acres. Anderson v. Dawson [Ky.] 118 SW 953. Where contract and deed both recited that tract contained so many acres "according to United States' survey," and that gross contract price was at rate of $105 per acre. Anthony v. Hudson [Ky.] 114 SW 782.

**17.** Where vendor broker makes misrepresentation as to acerage and purchaser relies thereon, he may recover for any material shortage, not exceeding price per acre paid. Farris v. Gilder [Tex. Civ. App.] 115 SW 645.

**18.** Travis v. Taylor [Ky.] 118 SW 988. Where sale is in gross and statement of quantity is merely descriptive, there can be no recovery for a deficiency in absence of fraud or mistake, unless substantial. Anderson v. Dawson [Ky.] 118 SW 953. No recovery can be had for shortage of 9.71 acres in sale of 560 acres. Anthony v. Hudson [Ky.] 114 SW 782. Shortage of 12 acres in tract sold for 149 acres held not to warrant abatement. Travis v. Taylor [Ky.] 118 SW 988.

**19.** Evidence held to show purchaser's agent's authority to place risk of shortage on purchaser. Wolcott v. Hayes [Ind. App.] 88 NE 111.

**20, 21.** Hudson v. Webber [Me.] 72 A 184.

**22.** Where seller of entire stock of corporation owning coal lands represented that vein was continuous and of uniform thickness of four feet over entire tract, which representation proved to be false. Odbert v. Marquet, 163 F 892. Where vendor agreed to convey by good deed and there was no reservation of existing oil lease. Carlton v. Smith, 33 Ky. L. R. 647, 110 SW 873. Where plaintiff agreed to convey land and certain chattels for specified sum and failed to deliver chattels. Slayden & Co. v. Palmo [Tex. Civ. App.] 117 SW 1054. Where vendee, sued in ejectment as to part of property, calls his vendor in warranty, judgment therein for plaintiff may be asserted as partial failure of consideration in defense of action on purchase money note, though vendee yielded possession without writ of ejectment. Meeks v. Meeks, 5 Ga. App. 394, 63 SE 270. Where abatement of purchase price is sought because of destruction of building by fire, **evidence** of value of lots several years after fire is incompetent. Kuhn v. Eppstein, 239 Ill. 555, 88 NE 174.

**23.** Right may be asserted at any time until consideration is fully paid. Odbert v. Marquet, 163 F 892.

**24. Search Note:** See note in 16 A. S. R. 622; 3 Ann. Cas. 339.

**25.** Where vendor agreed to sell land as distinct from his interest therein and to convey by quitclaim deed, execution of quitclaim deed is not full performance where title fails. Davis v. Lee [Wash.] 100 P 752.

contract,[26] unless expressly preserved [27] or a contrary intent is clearly manifest.[28] Default of the grantee does not authorize the annulment of the deed,[29] unless it amounts to a breach of a condition subsequent.[30] The right of re-entry for breach of condition subsequent is not ordinarily transferable,[31] but this rule is not invariable,[32] and after a re-entry has been made the grantor has a transferable interest.[33] The right of re-entry is not destroyed by acceptance of a deed from the grantee's referee in bankruptcy.[34]

§ 12. *Vendor's liens and their enforcement.*[35] *A. Express.* See 10 C. L. 1962 Where a lien is expressly reserved to secure the payment of the purchase price,[36] the contract remains executory [37] to the extent that the legal title so called, remains in the vendor,[38] and the purchaser can only acquire the same by paying the purchase price,[39] but the interest thus retained by the vendor is not the legal title in the strict sense of that term, and is held merely for the purpose of security, without the usual incidents of legal title strictly so called.[40] The lien is assignable,[41] and, after assignment of the purchase-money note, the vendor holds the

**26.** Although it varies from contract. Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp. [Va.] 64 SE 56. Contract is no longer efficient **evidence** between the parties. McKnight v. Mowat, 139 Ill. App. 390. Where vendor and vendee employed same attorney and he drew deed from title papers submitted to him, the quantity being described as 23 acres, evidence that contract called for 32 acres could not be introduced. Baker v. Barley, 34 Pa. Super. Ct. 169.

**27.** Where, at time of executing conveyance pursuant to contract, parties make agreement specifically reserving certain matters for future settlement, it will be presumed that conveyance satisfied contract in all other respects. Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp. [Va.] 64 SE 56. Where plant was to be turned over in good working order and purchaser was to have privilege of inspecting same before accepting conveyance, agreement executed at time of conveyance specifying certain matters for future settlement, held admissible. Id.

**28.** Davis v. Lee [Wash.] 100 P 752. Covenants to give grantor, father, one-third of crop during his life, to cultivate at least 30 acres, etc., held enforcible after execution of deed. Townsend v. Lacock, 222 Pa. 330, 71 A 187.

**29.** Failure of grantee to pay government dues as stipulated in contract does not authorize annulment of deed or invalidate title. Ryle v. Davidson [Tex. Civ. App.] 116 SW 823.

**30.** Schneider v. Miller, 129 App. Div. 197, 113 NYS 399. Where amount of timber on lands was uncertain and capacity of vendor's mills doubtful, provision in land contract requiring vendor to cut 6,000 acres of timber reserved per year will not be construed condition subsequent. Western Lime & Cement Co. v. Copper River Land Co., 138 Wis. 404, 120 NW 277. Where as condition subsequent grantee agreed to establish and operate canning factory for 10 years, burning of buildings did not justify abandonment. Fowler v. Coates, 128 App. Div. 381, 112 NYS 849.

**31.** Provision in deed for life support of grantor is a condition subsequent, and grantor alone can complain of breach, and before forfeiture declared cannot transfer right to declare a forfeiture. Strothers v. Woodcox [Iowa] 121 NW 51.

**32.** Where trustee conveys with condition subsequent, he may convey right of re-entry to the real owners. Fowler v. Coates, 128 App. Div. 381, 112 NYS 849.

**33.** Lowe v. Stepp [Ky.] 116 SW 293. After he has conveyed same by bond for title he cannot make **waiver of forfeiture** so as to affect transferee's rights. Id.

**34.** Fowler v. Coates, 128 App. Div. 381, 112 NYS 849.

**35. Search Note:** See notes in 50 L. R. A. 717; 13 L. R. A. (N. S.) 874.

See, also, Vendor and Purchaser, Cent. Dig. §§ 615-843; Dec. Dig. §§ 246-300; 29 A. & E. Enc. L. (2ed.) 779, 933.

**36.** It will not be presumed that lost deed contained an express reservation of vendor's lien. Laird v. Murray [Tex. Civ. App.] 111 SW 780.

**37.** Honaker v. Jones [Tex.] 113 SW 748.

**38.** Lacey v. Smith [Tex. Civ. App.] 111 SW 965; Atteberry v. Burnett [Tex. Civ. App.] 114 SW 159. Where vendors expressly reserved lien, superior title remained in them so that subsequent grantee of heirs in consideration of payment of notes acquired title superior to purchaser's mortgagee. Cleveland & Sons v. Smith [Tex. Civ. App.] 113 SW 547.

**39.** Atteberry v. Burnett [Tex. Civ. App.] 114 SW 159; De Sheaguer v. Pittman [Tex. Civ. App.] 117 SW 481. Where father conveyed land to daughter, reserving lien, her grantee took land subject to such lien. Nelson v. Brown [Tex. Civ. App.] 111 SW 1106.

**40.** Where vendor reserves lien, he holds legal title only as security and is not "seized" thereof within Code, § 2912, providing that all persons owning lands not in adverse possession shall be deemed seized. In re Miller's Estate [Iowa] 119 NW 977. Vendor's lien is not an "estate or right" in lands within Ann. Code 1892, § 2444, providing that conveyances purporting to convey a greater estate than vendor has shall pass such estate or right as he has, so as to pass under a deed. Howell v. Hill [Miss.] 48 S 177.

**41.** Evidence held to show absolute assignment of vendor's lien and not merely

reserved legal title in trust for the assignee.[42] Fraud of the vendor in transferring a lien note is no defense to the purchaser where the vendor and assignee have settled the claims based on such fraud.[43] There seems to be a conflict of authority as to whether it descends to the vendor's heirs upon his death.[44] Upon payment, the legal title vests immediately in the purchaser.[45] A distinction should be observed between a vendor's lien and a contract lien securing the price of realty and personalty.[46] The lien is released by payment or tender of the debt secured thereby,[47] or it may be released by subsequent agreements or transactions.[48] Where the purchaser sells a part of the land to a third party, a release of the lien as to the balance, if made with notice of such third party's rights[49] and to his prejudice, releases, so far as he is concerned and to the extent of the value of such balance, the lien upon the part of the land thus sold.[50]

for collection. Powell v. Powell [Mo.] 117 SW 1113.

**Priority between assignees:** Where assignee of vendor's lien with notice of prior assignment proceeded to foreclose same and obtained judgment, prior assignees who were not made parties and who did not mislead second assignee, were not estopped to assert their claim. Powell v. Powell [Mo.] 117 SW 1113. Where subsequent assignee has seized and sold the land, the prior assignee may enforce his claim to land in suit against subsequent assignee and purchaser at lien sale, and will not be relegated to suit against original vendee. Id.

**42.** Only to the extent, however, that he can not so dispose of it as to defeat the lien. Atteberry v. Burnett [Tex. Civ. App.] 114 SW 159.

**43.** Zan v. Clark [Tex. Civ. App.] 117 SW 892.

**44.** Descends as personalty. In re Miller's Estate [Iowa] 119 NW 977. Descends to heirs of vender. Atteberry v. Burnett [Tex. Civ. App.] 114 SW 159. Descends to heirs in trust for benefit of assignee of purchase money note. Atteberry v. Burnett [Tex.] 113 SW 526, interpreting Bledsoe v. Fitts [Tex. Civ. App.] 20 Tex. Ct. Rep. 674, 105 SW 1142, as holding merely that purchase-money note devolves as personalty, though secured by vendor's lien, and not that interest of vendor descends as personalty.

**45.** Gray v. Tribue [Tex. Civ. App.] 118 SW 808.

**46.** Where land and chattels are sold for gross sum and a lien is expressly reserved to secure payment of gross sum, a contract as distinguished for vendor's lien, is created and is security for whole amount. Honaker v. Jones [Tex.] 113 SW 748.

**47.** A. sold seven lots to B., in consideration of vendor's lien note, and five second lien notes, which B held upon lot previously sold to C. Thereafter A. purchased first lien notes, and finally cancelled them, and released C. from second lien notes in consideration of conveyance of lot sold by B. to C. Held that sale from B. to C. was rescinded, and lots sold by A. to B. were released from lien of five second lien notes of C. Wood v. O'Hanlon [Tex. Civ. App.] 111 SW 178. Where vendor, with knowledge that vendee has disposed of two of lots sold, accepted reconveyance of such interest as vendee had in lots sold, and resold lots not disposed of by vendee for more than amount due, lots sold by vendee were relieved from lien. Id. Where notes secured by lien have been placed in hands of an attorney for collection, and his fees as therein provided have accrued, **tender** of amount of note without such fees does not release lien. Honaker v. Jones [Tex. Civ. App.] 115 SW 649.

**48.** Evidence held to show that purchase-price notes under contract for sale on crop payment plan, endorsed without recourse to broker as commissions, were so endorsed under express agreement that they were to be no lien upon vendor's interest in crop or land. State Bank v. Cullen [N. D.] 121 NW 85. Where lien exists by virtue of written contract for interest on purchase money notes, such lien is not lost by taking of separate note not expressly stating that it is for interest or reserving lien. Honaker v. Jones [Tex. Civ. App.] 115 SW 649. Evidence held insufficient to show that release of vendor's lien was procured by **fraud.** Hotfil v. Deweese's Trustee [Ky.] 112 SW 1095. Where defendant's wife's contract to pay plaintiff $2,450 was conditioned upon conveying to her a certain tract, and he rescinded the contract, released his lien, and agreed to look to defendant personally for advancements, plaintiff cannot recover of wife on ground that release was fraudulently obtained by defendant. Id. Where vendor releases lien to procure court's approval of investment of infant's money in the land, infant's interest cannot be subjected to lien although release was fraudulently obtained, vendor being precluded by **estoppal.** Id. Taking of personal security and recovery of personal judgment, and the attempt to collect same by execution, does not ordinarily constitute a **waiver.** Elswick v. Matney [Ky.] 116 SW 718. Where vendor seeks to recover land for nonpayment of lien note, purchaser of vendee must show payment thereof or willingness to pay amount due, that vendor has so dealt with the lots with knowledge of his interest as to preclude recovery. Wood v. O'Hanlon [Tex. Civ. App.] 111 SW 178.

**49.** Vendor held to have had notice of subsequent purchaser's rights at time of executing release. Watson v. Vansickle [Tex. Civ. App.] 114 SW 1160.

**50.** Watson v. Vansickle [Tex. Civ. App.] 114 SW 1160. In such case lien cannot be

(§ 12) *B. Implied.*[51]—See 10 C. L. 1962—The English doctrine of implied vendor's lien has been repudiated in some of the states,[52] but such lien still exists in other states [53] unless it is negatived by the terms of the contract [54] or the surrounding circumstances,[55] and no lien will be implied where land and personal property or choses in action are sold for gross sum.[56] The lien, furthermore, is an incident to a sale as distinguished from other liens wherein the title to realty is transferred,[57] and it does not exist in favor of one advancing the purchase money for the purchaser,[58] though in some cases he may acquire an equitable lien to most intents and purposes equivalent to a vendor's lien,[59] or he may be subrogated to the vendor's lien where such was the intention of the parties.[60] The taking of a mortgage for a part of the purchase price does not waive the lien as to the balance [61] unless it is so intended.[62] The lien does not become operative until default by the vendee,[63] and being a creation of equity, it will not prevail against one having superior equity.[64] It is lost by a sale of the land before the commencement of a suit to foreclose.[65] It is not waived by mere extension of time for the payment of the purchase price.[66] One asserting a waiver has the burden of proving the same.[67] In some states the lien passes as incidental to the debt upon assignment thereof,[68] while in others the assignment of the debt constitutes of itself a waiver of the lien unless a contrary intent is indicated.[69] In California the transfer of the lien note, unless for collection only,[70] extinguishes the lien.[70a]

enforced against subsequent purchaser for benefit of either original vendor or original purchaser. Id.

**51. Search Note:** See notes in 4 A. S. R. 704; 36 Id. 174; 8 Ann. Cas. 958.

See, also Vendor and Purchaser, Cent. Dig. §§ 615-758; Dec. Dig. §§ 246-267; 29 A. & E. Enc. L. (2ed.) 933.

**52.** Doctrine repudiated in early history of jurisprudence in North Carolina. Hickson Lumber Co. v. Gay Lumber Co. [N. C.] 63 SE 1045.

**53.** Vendor has implied lien. State Bank v. Brown [Iowa] 119 NW 81.

**54.** Where, in payment of agreed cash amount vendor accepted part in cash and a covenant to convey certain lots in payment of balance, no lien attached. Welch v. Farmers' L. & T. Co. [C. C. A.] 165 F 561. Striking out of express reservation of lien from form used **held not to negative lien.** Springman v. Hawkins [Tex. Civ. App.] 113 SW 966. Vendor, who has delivered possession, has equitable lien for unpaid purchase price although deed recites full payment and no distinct agreement is made. Id.

**55.** Where vendor, knowing that vendee intended to immediately place mortgage on land to secure bonds, gave absolute warranty deed, no vendor's lien arises for unpaid balance as against mortgagee. Welch v. Farmers' L. & T. Co. [C. C. A.] 165 F 561.

**56.** Welch v. Farmers' L. & T. Co. [C. C. A.] 165 F 561. Where note given includes purchase price of personalty as well as of realty, and amount thereof is not shown, no vendor's lien exists. Snyder v. Snyder, 115 NYS 993.

**57.** Where mother conveys to son in consideration of one dollar and love and affection under oral promise of son to reconvey if he does not build on property and live thereon, such promise makes gift conditional but is not secured by a vendor's lien. Paris Grocer Co. v. Burks [Tex.] 19 Tex. Ct. Rep. 769, 105 SW 174.

**58.** Lane v. Lloyd, 33 Ky. L. R. 570, 110 SW 401. Mother advancing money to son with which to purchase land with understanding that he would give her a mortgage therefor, as no vendor's lien upon his refusal to give mortgage. Poole v. Tannis, 137 Wis. 363, 118 NW 188.

**59.** Where money is advanced to vendee under agreement to give a mortgage, and vendee refuses to give it, party making advance has equitable lien which does not differ from vender's to such extent as to require reversal. Poole v. Tannis, 137 Wis. 363, 118 NW 864.

**60.** Evidence showing that third person paid vendor's lien note and that purchaser acknowledged that such payment was made for him, and that such person was entitled to lien upon land to secure repayment of such sum, held sufficient to show subrogation to vendor's lien. Munroe v. Munroe [Tex. Civ. App.] 116 SW 878.

**61.** Bradbury v. Donnell [Mo. App.] 119 SW 21.

**62.** Evidence held to show that parties did not intend to waive vendor's lien, by taking mortgage for part of price, as to part not embraced therein. Bradbury v. Donnell [Mo. App.] 119 SW 21.

**63.** Vance Redwood Lumber Co. v. Durphy [Cal. App.] 97 P 702.

**64.** Welch v. Farmers' L. & T. Co. [C. C. A.] 165 F 561.

**65.** Leiberman v. Bowden [Tenn.] 119 SW 64.

**66.** Schmidt v. Gaukler [Mich.] 16 Det. Leg. N. 97, 120 NW 746.

**67.** Springman v. Hawkins [Tex. Civ. App.] 113 SW 966.

**68.** State Bank v. Brown [Iowa] 119 NW 81.

**69.** Snyder v. Snyder, 115 NYS 993.

(§ 12) *C. Remedies.*[71]—See 10 C. L. 1983—Upon the default of the purchaser,[72] the vendor may rescind the contract or sue on the note and foreclose the lien[73] unless the right is barred by limitations,[74] but an assignee of the purchase price note secured by a vendor's lien has only the latter remedy unless he has succeeded to the title to the land.[75] Where a part of the land has been sold, the remainder must first be applied to the satisfaction of the lien,[76] but, where the land has been resold to several persons, each must bear pro rata the burden of the unpaid purchase money.[77] A right of foreclosure must exist[78] in the person attempting to foreclose.[79] The general rules of pleading applicable to foreclosure of liens obtain.[80] Defenses waived by the purchaser cannot be asserted by one having no substantial interest in the land.[81] The judgment of foreclosure must preserve the rights of all parties.[82] The sale must be fairly conducted[83] so as to bring an adequate price.[84]

**70.** Evidence held to warrant finding that transfer of note to daughter was for collection only. Civ. Code, § 3041. Nolan v. Nolan [Cal.] 101 P 520.

**70a.** Nolan v. Nolan [Cal.] 101 P 520.

**71. Search Note:** See notes in 6 C. L. 1805; 17 A. S. R. 232; 95 Id. 663; 2 Ann. Cas. 372.

See, also, Vendor and Purchaser, Cent. Dig. §§ 759-831; Dec. Dig. §§ 268-295; 29 A. & E. Enc. L. (2ed.) 752; 22 A. & E. Enc. P. & P. 702.

**72.** One suing for breach has burden of showing breach. Dobson v. Zimmerman [Tex. Civ. App.] 118 SW 236.

**73.** Atteberry v. Burnett [Tex. Civ. App.] 114 SW 159.

**74.** Federal court of equity will follow local rule of law that where purchase price note is barred by statute of limitations action to foreclose lien is also barred. Dupree v. Mansur, 29 S. Ct. 548. Vendor suing on note and seeking foreclosure of lien may, on statute of limitations being asserted, rescind contract and, after proper amendments of pleadings, recover land. Atteberry v. Burnett [Tex. Civ. App.] 114 SW 159.

**75.** Atteberry v. Burnett [Tex. Civ. App.] 114 SW 159. Where heirs of vendor convey the reserved title to administrator of assignee of note secured by express vendor's lien, administrator may rescind contract and recover land. Id.

**76.** Martin v. Turner [Ky.] 115 SW 833.

**77.** Martin v. Turner [Ky.] 115 SW 833. Mortgagee will be considered a purchaser to the extent of his debt. Id.

**78.** Where two pieces of land, one owned by both plaintiffs who joined in a deed therefor, the other by one of them who executed a deed therefor, were sold to defendant for sum in solido or for separate amounts, but neither the relative values nor price of each, nor whether sale was by an entire contract or by separate contract, appeared, vendor's lien could not be enforced. Fostoria Gold Min. Co. v. Hazard [Colo.] 99 P 758. Where land and chattels are sold for lump sum and lien reserved therefor on the land, it may be foreclosed without showing what proportion was for the land. Honaker v. Jones [Tex. Civ. App.] 115 SW 649.

**79.** Vendor's lien may be enforced in favor of a grantor or vendor, though the latter is not the grantor or owner; but in either event only to the extent of his interest and for a definite ascertainable purchase price. Fostoria Gold Min. Co. v. Hazard [Colo.] 99 P 758.

**80.** Complaint to enforce vendor's lien, alleging that at defendant's request plaintiffs delivered deeds in escrow to be delivered to defendant upon payment of certain instalments, and that, without making such payments and while $2,500 of purchase price was due, defendant procured deed, held bad as not showing a contract to buy or sell, or whether lien was claimed as vendor's or grantor's. Fostoria Gold Min. Co. v. Hazard [Colo.] 99 P 758. **Waiver of lien** must be pleaded. State Bank v. Brown [Iowa] 119 NW 81.

**81.** Where maker of notes secured by vendor's lien conveys land to third person under agreement that latter is to pay notes and reconvey to maker upon being reimbursed, such person has no substantial interest in the land where he refuses to pay notes and cannot in suit to foreclose urge defenses of limitation and homestead waived by maker. Zeno v. Adoue [Tex. Civ. App.] 117 SW 1039.

**82.** Vendor agreed to acquire "railway switch track" right of way over other lands, one-half of purchase price being retained until such way was acquired. Vendor condemned a "tramroad" right of way, and, supposing that she had fulfilled her agreement, executed deed. In suit to enforce equitable lien for unpaid balance, it was proper to give plaintiff judgment for balance subject to costs of condemning right of way by purchaser, vendor to give bond for balance to secure defendant against costs. Norton Iron Works v. Moreland [Ky.] 113 SW 481. Vendor sued for rents, portion of consideration for conveyance to her two sons, one of whom had abandoned his interest, and other claimed whole by adverse possession. Petition claimed rents at $400 per year. Verdict was "We, the jury, find for plaintiff $200 for each year, 1904, 1905, 1906, 1907, to-wit: $800, and said lien is hereby foreclosed." Held that verdict should not be considered as finding rents for one-half interest in land and render foreclosure on whole void. Tipton v. Tipton [Tex. Civ. App.] 118 SW 842.

**83.** Evidence held to show that purchaser, at sale of special receiver in vendor's lien proceedings, paid part of price of bonds with understanding that he should receive the money back in payment of a personal in-

An order confirming a sale cannot be collaterally attacked.[85] A direct suit to set aside a sale must be timely.[86] A purchaser who has notice of any fact which may avoid the title of his vendor acquired at foreclosure accepts the risk of having his title avoided.[87] In Kentucky a successful bidder who refuses to give bond is liable for any loss resulting from a resale,[88] which liability may be asserted by the commissioner or the vendor.[89] Where an insolvent purchaser refuses to give bond the commissioner may resell without reporting the sale to the court.[90]

§ 13. *Enforcement of contract of sale.*[91]—See 10 C. L. 1964.—Action may be brought upon the primary obligation for the purchase price, as distinguished from the notes evidencing such obligation.[92] At common law, if the contract was under seal, the suit could be brought only by the party named therein,[93] and the rule still obtains in some of the states that a contract of sale of lands is not assignable at law so as to give the assignee right to sue in his own name,[94] but under the statutes of most states the suit must be brought by the real party in interest.[95] All parties affected by the action should be made defendants.[96] The general rules of pleading apply.[97] The defenses available against an assignee depend more or less upon statute.[98] The burden usually rests on the plaintiff to

debtedness of the receiver. Bowman v. Liskey, 108 Va. 678, 62 SE 942.

84. Where bank holding note merely as bailee procures foreclosure of vendor's lien securing same at time when vendor is generally known to be insane, vendor's mental capacity not being settled by the judgment will be deemed to have influenced sale and contributed to inadequacy of price. McLean v. Smith [Tex. Civ. App.] 112 SW 355.

85. Judgment confirming sale to satisfy vendor's lien cannot be collaterally attacked in suit by judgment debtor to enjoin execution of writ of possession for objections which could have been urged on exceptions to report. Bartley v. Redmon's Adm'x [Ky.] 115 SW 831.

86. Suit to set aside sale upon foreclosure of vendor's lien brought within period fixed by statute cannot be barred by laches. McLean v. Smith [Tex. Civ. App.] 112 SW 355.

87. McLean v. Smith [Tex. Civ. App.] 112 SW 355. Bank merely holding note secured by vendor's lien foreclosed same and purchased property. Vendor was insane and did not consent. Bank never paid bid and sold to defendant who acted as bank's attorney in sale of land under judgment. Held under evidence that defendant was charged with notice of invalidity of judgment and that sale was voidable at vendor's election. Id.

88. Successful bidder who refused to give bond is not relieved from liability for loss caused thereby by fact that he subsequently purchased and gave bond (Brand v. Pryor [Ky.] 115 SW 180), or by master commissioner's failure to report second sale to insolvent bidders who refused to give bond to court and secured an order requiring bond before reselling. (Id.).

89, 90. Brand v. Pryor [Ky.] 115 SW 180.

91. **Search Note:** See notes in 10 L. R. A. (N. S.) 117, 125.

See, also, Specific Performance, Cent. Dig.; Dec. Dig.; Vendor and Purchaser, Cent. Dig. §§ 144-147, 183-187, 228-233, 266, 329, 369-372, 616-942; Dec. Dig. §§ 86, 105, 124, 142, 165, 185, 246-320; 29 A. & E. Enc. L. (2ed.) 584; 22 A. & E. Enc. P. & P. 666.

92. Action held to be for original contract price and not upon notes evidencing same. Coaling Coal & Coke Co. v. Howard, 130 Ga. 807, 61 SE 987.

93. Where option under seal given to optionee to enable him to offer land to company contemplating locating in city is accepted, optionee alone can sue thereon. Boyden v. Hill, 198 Mass. 477, 85 NE 413.

94. Hence suit on such contract is properly brought in the name of the assignor, and assignor may sue without reassignment of contract to him from assignees and need not sue in his own name for use of assignee. Wey v. Dooley, 134 Ill. App. 244.

95. Broker cannot sue on contract of principal although principal was undisclosed. Davenport v. Ash, 121 La. 209, 46 S 213.

96. In action against vendor by heirs of deceased vendee for breach of contract by conveying to widow individually, she having also been administratrix, widow was proper party defendant. Lewis v. Jerome [Colo.] 99 P 562.

97. Rescission by mutual agreement must be specifically pleaded under St. 1898, § 2655. Maxon v. Gates, 136 Wis. 270, 116 NW 758. Complaint in action for breach of contract to convey alleging that plaintiff was ready, able and willing to comply with his part of contract, and that defendant refused to convey, sufficiently alleged performance of acts necessary to put defendant in default. Brady v. Green [Ala.] 48 S 807. Cause of action for breach of defendant's agreement to buy land, on which plaintiff held option, plat and sell it, and to divide profits, is inconsistent with action on implied promise to pay plaintiff for services in purchasing land and may be joined in separate counts. Symmes v. Rose [Ky.] 113 SW 97.

98. One to whom purchaser from broker assigns contract is an "assignee," within Rev. Laws 1902, c. 173, § 4, making rights of assignee subject to the defense available

prove all material allegations [99] put in issue,[1] although, if the suit is upon a promissory note given for the purchase price, defendant must show that plaintiff has not performed to defeat recovery.[2] The defendant has the burden of proving a counterclaim.[3] Where a recovery is sought upon an oral contract, such contract must be established by clear and positive evidence.[4] The general rules governing the admissibility of evidence apply,[5] and so, also, as to variance between the allegations and proof.[6] The verdict [7] and judgment [8] should be sufficiently broad to determine all the issues and settle the rights of the parties.

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**Vendor's Liens,** see latest topical index.

## VENUE AND PLACE OF TRIAL.


**§ 1. The Proper Venue, 2245.**
- A. The Nature of the Action, 2245.
- B. Local or Transitory Actions, 2246.
- C. Special Actions and Proceedings and Equitable Proceedings, 2248.
- D. Suits By and Against Corporations, 2249.
- E. Effect of Improper Venue and Taking of Objections, 2251.

**§ 2. When Change Is Allowable, Necessary, or Proper, 2252.**

**§ 3. Procedure for Change, 2253.**

**§ 4. Results of Change of Venue, 2255.**


*The scope of this topic* is noted below.[1a]

§ 1. *The proper venue. A. The nature of the action.*[2a]—See 6 C. L. 1806

against assignor. Kurinsky v. Lynch, 201 Mass. 28, 87 NE 70.

**99.** In action for damages, burden of showing **waiver of full performance** is on party asserting same. Boyden v. Hill, 198 Mass. 477, 85 NE 413. Burden rests on plaintiff to show **breach.** Mitchem v. Wallace [N. C.] 64 SE 901. Liability being same whether defendants were partners or merely joint purchasers, allegation of **partnership** need not be proved. Warwick v. Hitchings, 50 Wash. 140, 96 P 960. **Evidence held insufficient** to sustain finding that defendant refused to convey his interest. Mitchem v. Wallace [N. C.] 64 SE 901.

**1.** Where petition alleges contract made with duly authorized agent of vendor, general denial raises issue that agent's authority was not in writing. Ross v. Craven [Neb.] 121 NW 451.

**2.** When sued upon note given for purchase money, defendant is prima facie liable and burden rests on defendant to show that vendor has refused to comply with contract. Beauchamp v. Couch [Tex. Civ. App.] 117 SW 924.

**3.** Where, in action to compel vendor to convey, counterclaim set up a promise of purchaser to pay debt of vendor and failure to keep such promise, judgment thereon against purchaser is unauthorized where no consideration was shown. Thompson v. McKee [Ky. App.] 119 SW 229.

**4.** Boeck v. Milke [Iowa] 118 NW 874. Evidence held insufficient to show oral contract by decedent to give plaintiff his land if he would come and live with him. Id.

**5.** Memorandum made and kept by vendor is evidence against him, but not against his wife, of the terms of sale, but not conclusive. Friedman v. Ender, 116 NYS 461. Where vendor accepted note received by purchaser from a resale, which note was unenforcible because of failure of title, such note was only evidence of fact that purchase money remained unpaid to that extent. Martin v. Turner [Ky.] 115 SW 833. **In action to recover consideration,** on failure of title, where consideration consisted of work performed, evidence to the value thereof is admissible. Oliver v. Kneedler [Iowa] 119 NW 525. **In action to determine validity of contract** of sale made by agent, declarations of agent as to right to recover commissions are irrelevant. Peterson v. O'Connor, 106 Minn. 470, 119 NW 243. **In action for breach of contract,** evidence of conveyance to other parties held admissible to show intention on part of vendor to repudiate contract. Maxon v. Gates, 136 Wis. 270, 116 NW 758. **In action to recover balance of purchase price** of sale to one who had been agent for sale thereof, evidence that agent had received offers in excess of purchase price before buying is immaterial, although proper in action for fraud and deceit. Waters v. Phelps [Neb.] 116 NW 783.

**6.** No variance where complainant's bill to foreclose a land contract set up original contract only while proof showed supplemental agreements, where answer fully set up such agreements and reply gave complainants view of their legal effect. Schmidt v. Gaukler [Mich.] 16 Det. Leg. N. 97, 120 NW 746.

**7.** In action for breach of contract, verdict for plaintiff for $5 per acre but not specifying or finding number of acres is insufficient. Slayden & Co. v. Palmo [Tex. Civ. App.] 117 SW 1054.

**8.** Where vendee in possession sues to recover moneys paid because of failure of title, judgment should require surrender of premises in absence of showing of vendor's insolvency. Anderson v. Ohnoutka [Neb.] 121 NW 577.

**1a.** This topic is confined to venue in civil cases, venue in criminal cases being treated elsewhere. See Indictment and Prosecution, 12 C. L. 1. Jurisdictional matters other than those relating strictly to venue are also excluded. See Jurisdiction, 12 C. L. 458.

**2a. Search Note:** See notes in 9 Ann. Cas. 382.

(§ 1) *B. Local or transitory actions.*[3]—See 10 C. L. 1965—Generally, an action affecting real estate is local,[4] and must be brought in the county where the property,[5] or a part thereof,[6] is situated. Under the California statute, actions for damages to real property need not be commenced in the county where the real property injured is situated but must be tried there.[7] Venue of transitory actions[8] is largely governed by statute and is usually in the county where defendant resides at the commencement of the action,[9] or where he maintains an office,[10] or where he may be

See, also, Venue, Cent. Dig. §§ 1-31; Dec. Dig. §§ 1-17; 29 A. & E. Enc. L. (2ed.) 794.

3. **Search Note:** See notes in 22 A. S. R. 22; 59 Id. 869.

See, also, Venue, Cent. Dig. §§ 3-50; Dec. Dig. §§ 4-32; 22 A. & E. Enc. P. & P. 773.

4. Action for nuisance to lands by overflowing them with backwater. Defiance Fruit Co. v. Fox [N. J. Err. & App.] 70 A 460.

5. Action for destruction by fire of buildings belonging to plaintiff and located upon his land held to be action for **injury to real property,** and, under Code Civ. Proc. § 392, triable in county where real propery situated. Las Animas & San Joaquin Land Co. v. Fatjo [Cal. App.] 99 P 393. Action for nuisance to lands by overflowing them with backwater must be tried in county where lands lie. Defiance Fruit Co. v. Fox [N. J. Err. & App.] 70 A 460. Where there is a single injury from backwater to lands lying in two counties, or where land in one county is injured by backwater from dam in another county, the action is triable in either county. Id. Action to recover possession of deed deposited in escrow to be delivered upon performance of certain conditions is an **action for determination of interest in real property** and must, under statute, be brought in county where real property situated. Bridgers v. Ormond, 148 N. C. 375, 62 SE 422. **Mortgage forecloSure** action must be commenced in county where land situated. Code Civ. Proc. § 144. Silcox & Co. v. Jones, 80 S. C. 484, 61 SE 948. Venue of **action to quiet title** to real estate as against apparent lien of void judgment is governed by Civ. Code, § 51 (Cobbey's Ann. St. 1903, § 1050), and must be laid in county where real estate is situated. Johnson v. Samuelson [Neb.] 117 NW 470. In suit in one county to quiet title to lands lying in that county, title to lands in another county could not be quieted as against defendants who claimed no interest in lands in county of forum. Code Civ. Proc. § 47. Jones v. Redemption & Investment Co. [Kan.] 99 P 1129. Action to quiet title to water right should be brought in jurisdiction where plaintiff appropriated water, although point on stream at which defendants diverted it was in another state. Taylor v. Hulett [Idaho] 97 P 37. Action for **breach of covenant of warranty in deed** to real estate, and for fraud and misrepresentation, is properly brought in county where real estate is situated and transaction took place, although defendant resided in different county. Thomas v. Ellison [Tex. Civ. App.] 110 SW 934. **Suit to protect land from threatened sale** is properly brought where land is situated and where fraud is alleged to have been perpetrated. Thomas v. Ellison [Tex.] 116 SW 1141.

6. Partition of several parcels of land may be had in one action, although only part thereof is situated in county of forum. Middlecaff v. Cronise [Cal.] 100 P 232.

7. Code Civ. Proc. § 392, subd. 1, only requires that such actions be tried in county where realty injured is situated, and they may be tried in any other county if no application for change be made. Action for damages by diversion of water. Miller v. Madera Canal & Irr. Co. [Cal.] 99 P 502.

8. Suit held not one to quiet title, and, being brought in county other than that of defendant's residence, no jurisdiction was required by service in county of such residence. Tate v. Rakow [Neb.] 121 NW 460. **Action for personal injuries** is transitory. Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 53 Law. Ed. —; Phillips v. Baltimore [Md.] 72 A 902. **Action for specific performance** of contract to sell real estate being in personam, properly brought in District of Columbia where defendant resided, although real estate lay in Maryland. Griffith v. Stewart, 31 App. D. C. 29. Suit for **foreclosure of chattel mortgage** may be brought in county of defendant's residence. McDaniel v. Staples [Tex. Civ. App.] 113 SW 596. **Suit to cancel mortgage** on realty, executed by partnership and its members, may be brought in county of residence of deceased partners. Emmett & Co. v. Dekle [Ga.] 64 SE 682. Defendant, sued for loss of profits on shipment of shingles, was entitled to be sued in county of his residence, where evidence failed to show fraud perpetrated in county where suit brought sufficient to confer jurisdiction, under Sayle's Ann. Civ. St. 1897, art. 1194, subd. 7. McCullar Lumber Co. v. Higginbotham Bros. & Co. [Tex. Civ. App.] 118 SW 885. Action for **injury to real property,** consisting of cutting and removing trees therefrom, when tort is waived and action brought in assumpsit, is transitory and must be brought in county where defendant resides. Asher v. Cornett [Ky.] 113 SW 131.

9. Under Code Civ. Proc. § 395, providing that action must be tried in county in which defendant resides at commencement of suit, an action by State Commission of Lunacy for failure of county treasurer to pay over money due for support of feeble minded children should have been transferred to county in which defendant resided when action brought, it not being an action for interference by officer of rights of third persons. State Commission in Lunacy v. Welch [Cal.] 99 P 181.

10. Under Code, § 3500, providing that, when a person has office or agency in any county, any action growing out of business of such office may be brought in county where such office is located, a real estate dealer residing in D. county could properly be sued for commissions in W. county, where he maintained agency for care of real estate there located. Gilbert v. McCullough [Iowa] 118 NW 511.

found,[11] or where the cause of action arose.[12] In some states, a transitory action may be brought in the county of the plaintiff's residence.[13] In Texas a suit upon an obligation in writing[14] may be brought where the contract is to be performed. A civil suit in a federal court must be brought in the district wherein defendant resides,[15] or, if jurisdiction depends upon diversity of citizenship, in the district where either the plaintiff or the defendant resides.[16] Under certain statutes suit may be brought against several defendants in the county where one or more of them actually reside,[17] while other statutes limit this rule to defendants who are jointly liable.[18] In such cases failure of the suit against the nonresident defendants does

**11.** Citizen of California could bring suit in Texas against railroad for personal injuries sustained in New Mexico, it being a transitory common-law action. Atchison, etc., R. Co. v. Mills [Tex. Civ. App.] 116 SW 352. District court of El Paso county, Texas, had jurisdiction of action by passenger for **breach of contract** to carry from Pennsylvania to California. El Paso & N. E. R. Co. v. Sawyer [Tex. Civ. App.] 119 SW 107.

**12.** Sureties, on insurance company's bond joined with company in suit on policy, may, under Kirby's Dig. § 4377, be sued in county where loss occurred. Neimeyer v. Claiborne [Ark.] 112 SW 387. In damage action for fraudulent representations in sale of real estate, suit was properly brought in county where fraudulent representations were made and where purchaser consummated, although defendant resided in another county. Gordon v. Rhodes [Tex. Civ. App.] 117 SW 1023.

**13.** Under Rev. St. 1895, art. 1585, subd. 8, requiring suits against nonresidents to be brought in county and precinct of plaintiff's residence, a plea of privilege, set up by nonresident defendant, sued for work and labor performed, should have been sustained where contract did not specify where payment was to be made, and suit was not brought in county of plaintiff's residence. Kramer v. Lilley [Tex. Civ. App.] 118 SW 735. Suit on insurance policy properly brought in jurisdiction, where beneficiary resided at commencement of action and in which defendant was authorized to do business. Webster v. Columbia Nat. Life Ins. Co., 131 App. Div. 837, 116 NYS 404. Section 33 of "an act to provide for the registration, identification and regulation of motor vehicles" (99 O. L. p. 538), which provides that all actions for injury to the person or property caused by negligence of owner of any automobile, included within provisions of act, may be brought by party injured against owner in county wherein injured party resides, is an arbitrary, unjust and **unreasonable classification,** creates a burden and subjects a class of citizens only to certain liabilties and requirements to respond to a suit in any county in the state, which is required of no other class and is denial to them of equal protection of law, and such provisions in said act are, therefore, unconstitutional and void. Hoblit v. Gorman, 8 Ohio N. P. (N. S.) 270.

**14.** Under Ann. Civ. St. 1897, art. 1194, subd. 5, providing that suit may be brought upon obligation in writing in county in which such obligation is to be carried out, contract to deliver wood in either of two counties in alternative may be sued on in either, and plea of privilege on ground of defendant's residence in the other county will not lie. Gaddy v. Smith [Tex. Civ. App.] 116 SW 164. Order verbally taken on telephone for carload of mill products, not reduced to writing but made out on duplicate order sheet, and containing mere shipping directions, held not such written contract as statute requires. Bewley v. Schultz [Tex. Civ. App.] 115 SW 294. Order for shipment of shingles confirmed by seller, and containing directions to ship to certain places, held insufficient to prove contract in writing for delivery of shingles at such place. McCullar Lumber Co. v. Higginbotham Bros. & Co. [Tex. Civ. App.] 118 SW 885. Suit on general guaranty to pay note according to its tenor and legal effect, made by father of one of makers, may be brought in county where payable, although defendant resided in another county, the guaranty amounting to promise to pay at place where payable. McCauley v. Cross [Tex. Civ. App.] 111 SW 790.

**15.** Under Act March 3, 1887 (24 Stat. at L. 552, c. 373), as corrected by Act Aug. 13, 1888, 25 Stat. at L. 434, c. 866 (U. S. Comp. St. 1901, p. 508), an action on bond of public contractor brought in relation by federal government could not be brought in California when defendants were residents of Illinois. Davidson Bros. Marble Co. v. U. S., 213 U. S. 10, 53 Law. Ed. —.

**16.** Circuit court for district of Montana was without jurisdiction to entertain suit brought by resident of Utah against resident of New York, since neither party was resident in district as required by 25 Stat. at L. 433, c. 866 (U. S. Comp. St. 1901, p. 508). Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co., 210 U. S. 368, 52 Law. Ed. 1101.

**17.** Under Code, § 3501, providing that personal actions must be brought in county in which some of defendants actually reside, an equitable action to satisfy landlord's claim for rent due out of moneys deposited by tenant to meet claims of creditors might properly be maintained against all defendants, although only depositary and another resided in county where action was brought. Kean v. Rogers [Iowa] 118 NW 515. Under Rev. St. 1895, art. 1194, subd. 4, action against trustee in bankruptcy and bankrupt's agents to recover funds paid by latter to trustee may be brought in county where trustee and plaintiff reside against all parties, including nonresidents. Gardner v. Planters' Nat. Bank [Tex. Civ. App.] 118 SW 1146. Suit upon contract and guaranty thereof. Senn v. Connelly [S. D.] 120 NW 1097.

**18.** Court erred in not dismissing action, where no joint liability appeared and no liability attached to only defendant properly suable in county of forum. Southern States

not necessarily defeat jurisdiction as to the others,[19] nor does dismissal as to the resident defendants necessarily preclude against those that are nonresidents,[20] but the resident defendant must be joined in good faith, and not for the sole purpose of obtaining jurisdiction against the nonresidents.[21] The residence of a party for the purpose of determining venue is his permanent, as distinguished from his temporary, place of abode.[22]

(§ 1) *C. Special actions and proceedings and equitable proceedings.*[23] See 10 C. L. 1967.—The venue of special or extraordinary proceedings is often specifically designated by statute.[24] In some states a suit for divorce must be brought in the county of defendant's residence, and the defendant cannot by consent waive such requirement,[25] but, where the husband has abandoned his wife and removed from the state, suit may be brought against him for alimony pendente lite in any county.[26]

*Actions for penalties* See 10 C. L. 1968 are governed by statute and may be brought where the cause of action arose,[27] or, if defendant be a nonresident corporation, in the district in which it operates.[28]

Life Ins. Co. v. Statham, 4 Ga. App. 482, 61 SE 886. Suit on administrator's bond brought in county where nonresident surety company maintained office, though principal resided in another county. Civ. Code 1895, § 2145. Morris v. George, 3 Ga. App. 413, 59 SE 116. Trespass on case. Rosenthal v. Rosenthal, 151 Mich. 493, 14 Det. Leg. N. 998, 115 NW 729. Evidence held to show joint liability. Rosenthal v. Rosenthal, 154 Mich. 533, 15 Det. Leg. N. 833, 118 NW 18. Action against maker and indorser of promissory note, not payable in a particular place, must be brought in county where maker resides, although indorser resides in another county. Code § 3501. Darling v. Blazek [Iowa] 120 NW 961. In suit against makers and endorser on note, where endorser was proper party to suit, makers were not entitled to have venue changed to county of their own residence, suit being brought in county of endorser's residence. Goodwin v. Burton [Tex. Civ. App.] 118 SW 587. Suit may be brought in domicile of either drawer or acceptor of draft on joint liability for nonpayment. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

**19.** Rosenthal v. Rosenthal, 151 Mich. 493, 14 Det. Leg. N. 998, 115 NW 729.

**20.** Under statute providing that actions against more than one defendant must be tried where either of them resides, but that no judgment shall be rendered against the nonresident defendants without a recovery against the resident defendants unless the former have appeared and defended the action, held that, in action for personal injuries against a corporation, an individual and a firm, members of which resided in another county, judgment might properly be entered against the latter, they having appeared, although action was dismissed as against resident defendant. Williams v. Morris, 237 Ill. 254, 86 NE 729.

**21.** Defendant served with summons in suit on promissory note as endorser, in county other than that in which suit brought, is not bound by such service if resident defendant, sued as maker, was joined for sole purpose of obtaining jurisdiction, and not good faith to obtain judgment against him. Hawkins v. Brown [Kan.] 97 P 479. Joinder held justified when innocent party acts in good faith, believing his cause is just, but is defeated by statute of limitations after full trial. Hawkins v. Brown [Kan.] 97 P 479.

**22.** Action against insane defendant for wrongful death may be brought in county of legal residence, not in county where confined, although process served there. Stuard v. Porter, 79 Ohio St. 1, 85 NE 1062.

**23. Search Note:** See Injunction Cent. Dig. §§ 195, 196; Dec. Dig. § 111; Venue, Cent. Dig. § 18; Dec. Dig. § 9; 22 A. & E. Enc. P. & P. 828.

**24. Mandamus** to restore state oyster protector to office was properly brought in county where dismissal took place. People v. Whipple, 61 Misc. 112, 114 NYS 307. Under Code Civ. Proc. §§ 2068 and 2084, providing that proceeding in mandamus shall be triable in county where material facts took place, "unless court directs it to be tried elsewhere," where application was for writ to reinstate relator as barge canal laborer, but moving papers failed to show where appointment and dismissal took place, court, by overruling objection as to jurisdiction to proceed, in absence of motion for change of venue, directed cause to be tried in county where brought. People v. Skene, 194 N. Y. 186, 87 NE 432.

**Application for restoration of competency** of person adjudged insane must be made in the county of such person's residence. Code Civ. Proc. §§ 2323, 2343. In re Andrews, 129 App. Div. 586, 114 NYS 251.

**25.** Civ. Code 1895, § 5869. Watts v. Watts, 130 Ga. 683, 61 SE 593.

**26.** Although not herself resident in such county, the statute providing that in case of abandonment wife may bring suit either in county of residence at time of abandonment or in county of husband's residence at commencement of suit, not being intended to apply to nonresidents. MacKenzie v. MacKenzie, 238 Ill. 616, 87 NE 848.

**27.** Under Civ. Code Prac. § 63, providing that actions must be brought in county where cause of action arose, and Cr. Code Prac. § 11, providing that proceedings in penal actions are regulated by code of practice in civil cases, offense of refusing to make required reports to auditor, by corpor-

*Injunctions.*[See 10 C. L. 1968]—By statute, in some states, a suit to enjoin the enforcement of a judgment must be brought in the county where the judgment was obtained,[29] and, likewise, a suit to stay proceedings must be brought in the county where the proceedings are pending.[30] A suit to enjoin a public nuisance is properly brought in the county where the act was or is to be done.[31] Proceedings to enjoin a common carrier from establishing unreasonable rates may be brought in whatever federal judicial district the defendant may be found,[32] unless the construction of the Interstate Commerce Act is necessarily involved, in which case venue must be laid in the district of which defendant is an inhabitant.[33]

(§ 1) *D. Suits by and against corporations.*[34]—[See 10 C. L. 1968]—At common law, a corporation could be sued only in the state where created,[35] but the venue in suits by and against corporations is now usually specifically designated by statute and must be laid accordingly.[36] Suits against corporations may, under the various statutes, be brought in the county or district in which the cause of action arose,[37]

ation at his office, must be tried where office of auditor is located. Commonwealth v. Morrell Refrigerator Car Co. [Ky.] 112 SW 860.

**28.** Action to recover penalty for failure to comply with Act June 29, 1906 c. 3594, § 1, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), known as "28 hour-law," properly brought against nonresident corporation in district where defendant carries on business. St. Louis & S. F. R. Co. v. U. S. [C. C. A.] 169 F 69.

**29.** Ulber v. Dunn [Iowa] 119 NW 269. Proceedings to enjoin enforcement of judgment obtained before justice of the peace in one county could not be maintained in another county although transcript filed there. Id.

**30.** In suit to stay proceedings in suit pending in another county, court properly sustained objections to venue under Rev. St. 1895, art. 1194, subd. 17, fixing venue of actions to stay proceedings in any suit in county where suit pending, no cause of action having been stated as against defendant's nonresident in such county. Turner v. Patterson [Tex. Civ. App.] 118 SW 565. In injunction to stay pending garnishment proceedings, petition should be filed in county where proceedings pending, although no defendant against whom substantial relief is prayed resides there, provided no relief is prayed as to matters not included in the litigation. Crawley v. Barge [Ga.] 63 SE 819.

**31.** Action to restrain bull fight. State v. Canty, 207 Mo. 439, 105 SW 1078.

**32.** Federal Judiciary Act 1887 and 1888, § 1, Act March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 508) providing that suit must be brought in district of which defendant is an inhabitant, does not apply to suit to enjoin railroad companies from establishing and enforcing unreasonable rates in violation of Interstate Commerce Act, since it is a suit of which federal courts are given exclusive jurisdiction. Northern Pac. R. Co. v. Pacific Coast Lumber Mfrs'. Ass'n [C. C. A.] 165 F 1.

**33.** Bill for injunction against nonresident interstate carriers to restrain increase of freight rates presented for consideration proper construction of Interstate Commence Act, so that court's jurisdiction did not rest solely upon diversity of citizenship, and consequently defendant's objection to venue on ground of nonresidence should have been allowed. Atlanta Coast Line R. Co. v. Macon Grocery Co. [C. C. A.] 166 F 206.

**34. Search Note:** See notes in 70 L. R. A. 691.

See, also, Corporations, Cent. Dig. §§ 1935-1939, 1942-1946, 2601, 2602; Dec. Dig. §§ 503, 666.

**35.** Cunningham v. Klamath Lake R. Co. [Or.] 101 P 213.

**36.** Suit must be brought in accordance with requirements as to venue prescribed by statute. Wilson v. Louisville & N. R. Co., 33 Ky. L. R. 985, 112 SW 585. Suit against railway company held not to come within any of statutory provisions as to venue. Virginia & S. W. R. Co. v. Hollingsworth, 107 Va. 359, 58 SE 572. Corporation sued for tort arising in another county was entitled to its plea of privilege where it appeared that it came within none of exceptions to rule that defendant must be sued in county of residence, enumerated by Rev. St. 1895, art. 1194, and no joint tort liability with defendants against whom venue was properly laid appearing. Boehrens v. Brice [Tex. Civ. App.] 113 SW 782.

**37.** Action for killing of dog by **railway company** need not be brought in county where killing occurred, statute requiring actions for killing horses, mules, cattle, or other stock to be brought where cause of action arose, not including dogs. El Dorado & B. R. Co. v. Knox [Ark.] 117 SW 779. Action growing out of contract of shipment of goods may, under Civ. Code Prac. § 73, be brought in county where **carrier** agreed to deliver goods. Wilson v. Louisville & N. R. Co., 33 Ky. L. R. 985, 112 SW 585. **Insurance company** may be sued in any county in which contract of insurance was made. Code, § 3499. Petite v. Atlas Ins. Co. [Iowa] 120 NW 642. Action need not be on policy. Action to recover deposit made by policy holder comes within statute. Id. Fact that another insurance company assumed contract including obligation to return deposits to policy holder does not change rule, though such assumption was not made in county where suit brought. Id. **Surety company** organized under Gen. St. 1873, c. 33, might, under Code Civ. Proc. § 55, be sued for cause of action arising from sale of intoxicants by principal on license bond, in county where liquor was sold. Sullivan v. Radzuweit

or where the corporation has an agent,[38] or does business,[39] or is domiciled,[40] or in any county where any one of the prescribed requisites of jurisdiction exist.[41] In the absence of statute to the contrary, a foreign corporation may be sued in any county in which service can be obtained.[42] Where a statute provides that process may be issued from the county of plaintiff's residence and directed to any other county for service, suit must be brought at plaintiff's domicile.[43] If suit may be brought in either of two places, the plaintiff may elect in which county to sue.[44]

[Neb.] 118 NW 571. Suit on town mutual fire insurance policy is properly brought in county where property was destroyed under Rev. St. 1899, § 1892, providing that suit may be brought in county where cause of action originated. Wicecarver v. Mercantile Town Mut. Ins. Co. [Mo. App.] 117 SW 698. Under Code Civ. Proc. §§ 55 and 65, action for failure to deliver policy is properly brought in county where delivery was to have been made. Carter v. Bankers' Life Ins. Co. [Neb.] 120 NW 455. Under Civ. Code Proc. § 71, providing that, **where cause of action arises out of transaction with agent,** suit may be brought in county where such transaction took place, action for services may be maintained by agent upon his contract of employment in county where contract was made, the president of the company being considered the company's agent as far as the contract was concerned. Ward v. Citizen's Life Ins. Co. [Ky.] 114 SW 751. Under Rev. St. 1895, art. 1194, § 23, providing for prosecution of suits against private corporations in county in which cause or any part thereof arose, **evidence** held sufficient to prima facie show contract entered into in county of suit warranting refusal to change venue. Floresville Oil & Mfg. Co. v. Texas Refining Co. [Tex. Civ. App.] 118 SW 194.

38. Nonresident corporation having a designated agent residing in another county than that in which real estate in suit was situated may be sued in such county, although service was had upon agent in such other county, regardless of § 10 of Organic Act providing that action shall be brought in county where defendant found. Nelson v. Deming Inv. Co. [Okl.] 96 P 742. Suit for personal injuries may properly be brought in county where defendant company's agent resides, although cause of action arose in another state and defendant's principal place of business was in another county. Laws 1903, p. 39. Cunningham v. Klamath Lake R. Co. [Or.] 101 P 213.

39. If it does business to such extent as to warrant inference that through its agents it is there present. Deatrick's Adm'r v. State Life Ins. Co., 107 Va. 602, 59 SE 489. Under Kirby's Dig. § 6068, providing that action may be brought against railway company upon liability as carrier in any county through which road passes, held that railroad running train through S county over tracks of another company might be sued for carrier's liability in that county. Chicago, etc., R. Co. v. Jaber, 85 Ark. 232, 107 SW 1170.

40. Action for damages for negligence in not applying proper tools held not to come within provisions of Code Prac. art. 165, § 9, providing that, in cases of trespass or actions for damages arising from acts of commission, suit must be brought where damage or trespass was committed. Devons v. Lee Logging Co., 121 La. 518, 46 S 612. Suit for death through negligence of railway company may be brought in federal district in which defendant company is resident and in which it has an agent upon whom service may be had, and codefendant may be served with duplicate writs in another district. Act March 11, 1902, § 10 (32 Stat. at L. 68, c. 183, U. S. Comp. St. Supp. 1907, p. 163). In re Dunn, 212 W. S. 374, 53 Law Ed. —.

41. In South Carolina suit may be brought against a foreign corporation in any county that plaintiff may designate, though company have no agent in such county and cause of action did not arise there. See Code Civ. Proc. 1902, § 146, relating to suits against nonresidents generally. Berry v. Virginia State Ins. Co. [S. C.] 64 SE 859. Although pleadings failed to show by direct allegation that defendant corporation sued on fire policy was foreign corporation, such nonresidence might be established by inference. Id. Under Rev. St. 1895, art. 1194, subd. 25, foreign corporation authorized to do business in state may be sued in county other than that in which it has its principal office. Coca Cola Co. v. Allison [Tex. Civ. App.] 113 SW 308. Suit for loss of passenger's baggage through foreign railway company's negligence need not be brought in county where its principal office is located. Waechter v. Atchison, etc., R. Co. [Cal. App.] 101 P 41.

42. California statutes do not give foreign corporation any privilege to be sued in any particular county. Waechter v. Atchison, etc., R. Co. [Cal. App.] 101 P 41. Compliance with Civ. Code, § 408, relative to filing copy of charter or articles of foreign corporation with secretary of state, does not give foreign corporation status of domestic corporation with regard to establishment of residence in state and the incidental privilege to be sued at place of residence. Id. Civ. Code, § 407, does not give foreign railroad and transportation companies any special rights with regard to establishment of residence in state and consequent privilege to be sued at any particular place. Id.

43. Under 3, Practice Act, Hurd's Stat. 1905, beneficiary under accident insurance policy could not bring suit in another county than that of his residence and confer jurisdiction by service upon superintendent of insurance. Hartzell v. Maryland Casualty Co., 139 Ill. App. 366.

44. Under Civ. Code 1895, § 2334, providing that a railway company may be sued upon contract either in county where contract was made or in that in which it was to be performed, plaintiff suing for labor performed could, at his option, bring suit in county where contract made. Central of Georgia R. Co. v. Crapps, 4 Ga. App. 550, 61 SE 1126.

In Louisiana a corporation cannot be sued outside of the parish of its domicile on an implied promise to pay the debts of another.[45] Under the Texas statute, two or more connecting carriers may be sued jointly in any county in which either operates or has an agent.[46] In certain cases jurisdiction may be conferred by consent.[47] A municipal corporation can be sued in a transitory action only in its own courts,[48] but the rule requiring local actions to be brought in the jurisdiction where the cause of action arose applies to municipal corporations as well as to other corporations.[49]

That a corporation is plaintiff does not affect a statutory rule that a party may choose his forum wherever defendant may be found.[50]

(§ 1) *E. Effect of improper venue and taking of objections.*[51]—See 10 C. L. 1969 If want of proper venue appears on the face of the petition, objection may be raised by demurrer[52] or exception,[53] otherwise the objection must be raised by plea in abatement,[54] or by motion in proper form,[55] seasonably made.[56] The Texas statute makes it mandatory upon the court to change the venue to the proper jurisdiction whenever a plea of privilege to be sued in another county is sustained.[57] The privilege to be sued in a certain county cannot be enforced by injunction.[58] A defendant brought in by amendment has no right, under the Alabama statute, to object

45. Police Jury v. Texas & P. R. Co., 122 La. 388, 47 S 692.

46. Under Laws 1905, p. 29, c. 25. Texarkana & Ft. S. R. Co. v. Shivel [Tex. Civ. App.] 114 SW 196. Venue is properly laid in county through which connecting carrier operates railway lines and in which it has an agent (Id.), or in county through which one connecting carrier runs its trains over the road of domestic carrier (St. Louis & S. F. R. Co. v. Sizemore [Tex. Civ. App.] 116 SW 403) or in county where initial carrier operates lines and connecting carrier has an agent (Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767), or in county where initial carrier operates lines, has an agent and office, and in which it executes contract of carriage as agent for connecting carrier (Blanks v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 116 SW 377).

47. Suit to construe policy may be brought against foreign company in state of residence of insured company, having agreed to service of process there. Castagnino v. Mutual Reserve Fund Life Ass'n [C. C. A.] 157 F 29.

48. Rule is based upon public policy and convenience to exercise of soverign power delegated by state. Phillips v. Baltimore [Md.] 72 A 902. Suit for personal injuries against mayor, etc., of Baltimore could be brought only in courts of such city. Phillips v. Batilmore [Md.] 72 A 902. Rule that county can be sued in its own courts only was not changed by Act Feb. 27, 1907 (Local Acts 1907, p. 291), § 4, authorizing plaintiff county to bring action "in any of the courts of this state." Cullman County v. Blount County [Ala.] 49 S 315.

49. Phillips v. Baltimore [Md.] 72 A 902.

50. New Jersey corporation act of 1875 (Revision 1877, p. 175, § 1) confers upon corporations organized thereunder right to sue and complain in any court. Bigelow v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 71 A 153. Foreign corporation may bring action against nonresident under Municipal Court Act (Laws 1902, p. 1497, c. 580), § 25, subd. 3, providing that, where all parties reside outside city, action may be brought in any district. American Mfg. Co. v. Weintraub, 115 NYS 88.

51. See Jurisdiction, 12 C. L. 458; Pleading, 12 C. L. 1323.

**Search Note:** See Venue, Cent. Dig. §§ 28-31, 47-50; Dec. Dig. §§ 17, 32.

52. Lumpkin v. Blewitt [Tex. Civ. App.] 111 SW 1072.

53. Lumpkin v. Blewitt [Tex. Civ. App.] 111 SW 1072. Petition filed in C. county, alleging defendant's residence in W. county, in connection with facts not showing right to sue defendant outside of W. county, open to objection to venue by way of exception. Id. Where pleadings failed to disclose fact attempted to be shown, by evidence dehors the pleadings, that defendant sued in trespass was not liable as for trespass and could in such case only be sued at its domicile, exception improperly sustained, since trial on merits is necessary to determine whether trespass or not. Buteau v. Morgan's Louisiana & T. R. & S. S. Co., 121 La. 807, 46 S 813.

54. Lumpkin v. Blewitt [Tex. Civ. App.] 111 SW 1072.

55. Objection based solely on ground that court has no jurisdiction to proceed because application for mandamus was not filed in proper county held not an objection going to the jurisdiction of the court, but merely to its jurisdiction to proceed, and hence, not being accompanied by any application for change of venue, was properly overruled. People v. Skene, 194 N. Y. 186, 87 NE 432.

56. Plea of privilege to be sued in county of residence comes too late where an answer has been filed. Barclay v. Deyerle [Tex. Civ. App.] 116 SW 123.

57. Gen. Laws 1907, p. 249, c. 183. Johnson v. Lanford [Tex. Civ. App.] 114 SW 693.

58. Motion for change of venue is proper remedy where receiver seeks to assert privilege conferred upon corporations by Act April 2, 1887, p. 120, c. 131 (Rev. St. 1895,

to the jurisdiction except for fraud.[59] Objection to the venue is waived by failure to make it [60] or by appearance and participation in the proceedings,[61] unless such appearance is special and for the sole purpose of raising an objection to the venue.[62, 63] The doctrine of waiver is qualified by the principle that jurisdiction cannot be conferred by consent in cases where the law has not conferred jurisdiction.[64] The mere fact that a verified plea of privilege is uncontested does not operate as an admission of its allegations, or authorize the court to sustain such plea.[65]

§ 2. *When change is allowable, necessary or proper.*[66]—See 10 C. L. 1970—Whether a particular proceeding comes within the statutes authorizing change of venue is, of course, a matter of construction.[67] Change of venue is usually allowed only for cause,[68] the usual grounds for change of venue, under the various statutes, being prejudice of the trial judge,[69] the convenience of witnesses and the ends of justice,[70]

art. 1484). Paine v. Carpenter [Tex. Civ. App.] 111 SW 430.

**59.** Under Code Civ. Proc. 1896, § 676, providing in whose district alone an original bill may be filed, a defendant brought in by amendment cannot, except for fraud, object to a conceived failure to bring suit in proper district. Prestridge v. Wallace [Ala.] 46 S 970.

**60.** Failure to object on ground that suit by administratrix brought in federal circuit court to recover attorney's fees earned by intestate was not in proper district constituted waiver of objection. Ingersoll v. Coram, 211 U. S. 335, 53 Law. Ed. 208. Objection not being raised by answer held to be waived. Demurrer, under Code Civ. Proc. § 92, to petition insufficient, where petition did not show venue was improper. Richardson v. Louisville & N. R. Co., 33 Ky. L. R. 972, 112 SW 582.

**61.** Plea of general issue is waiver of objection to jurisdiction. Rosenthal v. Rosenthal, 151 Mich. 493, 14 Det. Leg. N. 998, 115 NW 729. Defendants sued at their domicile for trespass committed in other parish by answering accepted jurisdiction at their domicile. Bernstein v. Dalton Clark Stave Co., 122 La. 412, 47 S 753. Objection to jurisdiction, on ground of nonresidence of either party, waived by filing demurrer on grounds reaching to merits of controversy in addition to jurisdictional grounds, where under local practice defendant could have made special appearance. Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co., 210 U. S. 368, 52 Law. Ed. 1101.

**62, 63.** Defendants may appear specially in federal circuit court and, if objection to jurisdiction be overruled, appeal lies directly to supreme court. Davidson Bros. Marble Co. v. U. S., 213 U. S. 10, 53 Law. Ed. —. Rule 22 g federal circuit court for ninth judicial circuit, that special appearance shall be treated as general unless accompanied by stipulation to appear generally if purpose of special appearance fails, held inconsistent with 26 Stat. at L. 826, c. 517 (U. S. Comp. St. 1901, p. 488, giving right of special appearance and of direct appeal to supreme court from adverse decision Id.

**64.** Written consent of defendant in foreclosure action, that suit might be tried in different county from that in which land was situated, conferred no jurisdiction, where Code Civ. Proc. § 144 provides that such actions must be brought in county where land situated. Silcox & Co. v. Jones, 80 S. C. 484, 61 SE 948. Civ. Code 1895, § 5869, providing that divorce suit must be brought in county where defendant resides, latter could not waive such requirement by consent, it being policy of law to impede instead of to facilitate divorces. Watts v. Watts, 130 Ga. 683, 61 SE 593.

**65.** Texarkana & Ft. S. R. Co. v. Shivel [Tex. Civ. App.] 114 SW 196.

**66. Search Note:** See notes in 5 Ann. Cas. 777; 7 Id. 304; 10 Id. 265.

See, also, Venue, Cent. Dig. §§ 51-79; Dec. Dig. §§ 33-53; 4 A. & E. Enc. P. & P. 373.

**67.** Change of venue of proceedings under assignment for the benefit of creditors is authorized by Rev. St. Mo. 1899, § 818 (Ann. St. 1906, p. 789), providing for change of venue in civil suits, "Civil Suit" referring to legal proceedings by which rights and remedies of private individuals are protected or enforced. In re Heath [Mo. App.] 117 SW 125.

**68.** Act No. 309, p. 483, Pub. Acts 1905, as amended by Pub. Acts 1907, p. 212, No. 161, does not enlarge jurisdiction of courts in civil cases so as to allow change of venue in condemnation proceedings regardless of cause shown. Grand Rapids & I. R. Co. v. Kalamazoo Circuit Judge, 154 Mich. 493, 15 Det. Leg. N. 814, 117 NW 1050.

**69.** Removal of cause for prejudice of the trial judge is within sound discretion of court (Kirkwood v. Summit County School Dist. No. 7 [Colo.] 101 P 343), and refusal to grant the application is not error unless a manifest abuse of discretion (Id.). Statement in affidavit held not sufficient to show abuse of discretion. Kirkwood v. Summit County School Dist. No. 7 [Colo.] 101 P 343.

**70.** Mills v. Sparrow, 131 App. Div. 241, 115 NYS 629; Williams v. Westminster Kennel Club, 128 App. Div. 931, 113 NYS 313. Code Civ. Proc. § 987. Ends of justice best subserved in venue where speedy trial can be had. Mills v. Sparrow, 131 App. Div. 241, 115 NYS 629. Where it appears that most of witnesses must be called from another county, at large expense and resulting in inconvenience to them, venue will be changed to such county. John Hofman Co. v. Murphy, 116 NYS 506. Where occurrences out of which action arose happened in S. county and greater number of material witnesses resided there, place of trial should have been changed to that county. Wallace v. Manning, 130 App. Div. 894, 114 NYS 972. In action for

the prejudice of the trial judge,[71] and privilege to be sued in a certain place.[72] That the trial has attracted attention from the press does not necessarily furnish ground for removal.[73] If venue is originally laid in the proper county, a change in the parties does not necessitate a change of venue.[74] In some states the number of changes is limited by statute,[75] but an application for a change of venue does not deprive the moving party of his right to remove the cause to the federal courts.[78]

§ 3. *Procedure for change.*[77]—See 10 C. L. 1972—Jurisdiction of the subject-matter carries with it power to order a change of venue upon a proper showing.[78] The procedure for change of venue is usually prescribed by statute[79] or by rule of court,[80] and statutory requirements as to form and substance of the motion are controlling and must be closely followed.[81] In some states no application for a change

price of paint in which defense was breach of warranty of quality where plaintiff's material witnesses, who resided in county where action brought, did not preponderate in number over defendant's witnesses, and where all transactions took place in county to which change was sought, venue might properly be changed to such county. Ludlow v. John Single Paper Co., 132 App. Div. 601, 116 NYS 1095. Proceedings for habeas corpus against superintendent of insane asylum and sheriff will not be changed for **convenience of witnesses** merely. People v. Chanler, 116 NYS 62. Venue will not be changed from rural county to either county of New York or county of Kings merely to subserve convenience of witnesses. Mills v. Sparrow, 131 App. Div. 241, 115 NYS 629. **Competency of witness** in another jurisdiction, not sufficient to require cause to be transferred there, though he is incompetent in jurisdiction of forum. Webster v. Columbian Nat. Life Ins. Co., 116 NYS 404. Venue of proceedings for habeas corpus against sheriff and superintendent of insane asylum will not be changed on mere ground of **expense of obtaining expert witnesses.** People v. Chanler, 116 NYS 62. Venue of habeas corpus proceeding, relating to person confined in insane asylum, will not be changed for mere reason that **convenience of district attorney** representing asylum would be subserved. Id.

**71.** Prejudice of trial judge against case as distinguished from parties affords no ground for removal. In re Dolbeer's Estate, 153 Cal. 652, 96 P 266. Motion for new trial in will contest. That former trial before jury had resulted in favor of proponents would not prevent judge from hearing second trial. Id. That judge in contest on will added to jury's finding of testamentary capacity ex parte finding that testatrix was free from undue influence did not show prejudice. Id.

**72.** Under Gen. Laws 1907, p. 248, c. 133, court must, upon sustaining a plea of privilege, change the venue to the county having jurisdiction. Brant v. Lane [Tex. Civ. App.] 118 SW 229. Suit by llenor under trust deed for conversion of property sold at sheriff's sale and later resold to another, and removed from county, should have been transferred to county where property taken upon sustaining defendant's plea of privilege. Id. California statutes do not give **foreign corporation** any privilege to be sued in any certain place, and hence such corporation cannot demand change on such ground. Waechter v. Atchinson, etc., R. Co. [Cal. App.] 101 P 41.

**73.** In absence of showing that unfair statements had been published. Noonan v. Luther, 128 App. Div. 673, 112 NYS 898.

**74.** No right to a change of venue arose by reason of dismissal as to part of defendants and change in prayer for relief because of events occuring after commencement of action, where venue was originally properly laid. Thomas v. Ellison [Tex.] 116 SW 1141. Defendant substituted in place of original defendant sued in proper county is not entitled as of right to change of venue to county of his residence. Healy v. Mathews [Minn.] 121 NW 428. Lessor's successor in interest being proper party plaintiff in ejectment, his appearance in action did not so change it as to require a transfer of trial to county where land situated. Code Civ. Proc. § 396. Cassin v. Nicholson [Cal.] 98 P 190.

**75.** Appellant after having one change of venue by consent had thereby exhausted his rights and could not thereafter move for a second one. Evansville Metal Bed Co. v. Loge [Ind. App.] 85 NE 979.

**76.** Where motion to remove could not have been made where venue originally laid. Roberts v. Chicago B. & Q. R. Co., 168 F 316.

**77. Search Note:** See notes in 3 Ann. Cas. 197; 8 Id. 758; 9 Id. 177.

See, also, Venue, Cent. Dig. §§80-134; Dec. Dig. §§ 54-77; 4 A. & E. Enc. P. & P. 419.

**78.** State v. Oldfield [Okl.] 98 P 925.

**79.** Change of venue in bastardy cases is purely statutory and can be exercised only in manner prescribed by statute. Affidavit for change from municipal court to circuit court held not legitimately used, although in proper form. Goyke v. State, 136 Wis. 557, 117 NW 1027.

**80.** Circuit court rule providing that application for change of venue, not made until cause has once been set for trial, shall be granted only at discretion of court does not apply in trial de novo. Compton v. Benham [Ind. App.] 85 NE 365.

**81.** Mere verified motion containing no statement that affiant verely believed he could not obtain a fair and impartial trial in division, where action is pending, is not sufficient under Ann. St. 1899, Ind. Ter. § 3556, providing for change of venue upon verified petitions supported by affidavits stating that applicant verily believes he can-

is necessary where the venue is laid in the wrong county.[82] An order to change place of trial on ground that impartial trial cannot be had rests largely in the discretion of the court, but a prima facie case must be made before such discretion can be exercised,[83] and the burden is upon the applicant to show to the satisfaction of the court that they will not have a fair and impartial trial in that jurisdiction.[84] In all cases where the application is applied for upon affidavits, the grounds relied on must sufficiently appear therefrom.[85] An affidavit of the merits is sometimes required,[86] and in some cases the trial court has power to determine, before granting the change, whether a cause of action exists;[87] but for the purposes of the motion to change, the allegations of the complaint will be deemed denied though no denial is actually filed.[88] If removal is sought not only from the county of the forum but from the adjoining county, the application must challenge both,[89] unless the disqualifications of the county of the forum are conceded.[90] An unauthorized order

not obtain a fair and impartial trial in division where action pending. Bruner v. Kansas Moline Plow Co. [C. C. A.] 168 F 218. Mere naked averment in affidavit of general manager of foreign corporation that its principal place of business in state is in certain county is neither evidence that it has acquired such a place of business in state by complying with laws of state nor sufficient to show court that demand for removal of cause to such county is predicated upon a residence so acquired. Waechter v. Atchinson, etc., R. Co. [Cal. App.] 101 P 41. Under Hurd's Rev. St. 1905, c. 146, § 9, providing that change of venue shall not be granted unless application is made by or with consent of all parties plaintiff or defendant, petition signed only by one defendant not sufficient although reciting consent of others, being mere hearsay. Tanner v. Clapp, 139 Ill. App. 353.

82. Court must order change upon sustaining of plea of privilege to be sued in another county. Gen. Laws 1907, p. 248, c. 133. Brant v. Lane [Tex. Civ. App.] 118 SW 229. Action brought in proper county against foreign insurance company to recover upon policy was not changed by demand of claimant as substituted defendant. Rev. Law 1905, § 4096, providing for change without application, where venue laid in wrong county having no application. Healy v. Mathews [Minn.] 121 NW 428.

83. Extensive acquaintance and business and political prominence of defendant, and professional and political prominence of his attorneys, not sufficient. Noonan v. Luther, 128 App. Div. 673, 112 NYS 898.

84. Evidence held insufficient to show that defendant company in personal injury suit would be prevented by comments of local press from having fair trial. Burns v. Pennsylvania R. Co., 222 Pa. 406, 71 A 1054.

85. Motion for change of venue for local prejudice should be denied where affidavits of supporting witnesses demonstrate that they are ignorant of facts. Bruner v. Kansas Moline Plow Co. [C. C. A.] 168 F 218. Affidavit must set forth convenience of witnesses affirmatively. Burns v. Pennsylvania R. Co., 222 Pa. 406, 71 A 1054. Affidavit of what defendant expected to prove by each witness that each was a material witness without testimony of whom he could not safely proceed to trial, which facts were stated to counsel, sufficient, in connection with facts expected to be proved so stated that court could see their merit, although no formal affidavit of merit filed to change cause of action to county where parties and witnesses reside. Agne v. Schwab, 127 App. Div. 67, 111 NYS 8. Statement in affidavit of merits for change of venue that on a certain day, "being the day of the beginning of these proceedings, affiant had his place of residence in L. county" is sufficient averment that at commencement of action he resided in L. county. Jensen v. Door [Cal. App.] 98 P 45. Where convenience of witnesses is not controlling, an affidavit in opposition to change of venue is not defective in not giving names and addresses of witnesses resident in county where suit is brought. Mills v. Sparrow, 131 App. Div. 241, 115 NYS 629.

86. Averment in affidavit of merits that affiant "is advised and believes" that he has a good defense, not sufficient averment that advice was given by his counsel. Jensen v. Dorr [Cal. App.] 98 P 45. Averment in affidavit of merit that affiant "has fairly and fully stated all the facts to his counsel of record herein," not sufficient averment that "facts of the case" were stated to counsel. Id.

87. Trial judge might properly hear petition in mandamus and sustain demurrer thereto when it appeared that application for change on account of local prejudice was uncontested, and where same judge presided in county to which cause would have been transferred. Carpenter v. Kone [Tex. Civ. App.] 118 SW 203.

88. Where issue raised by such denial involves right and title to land in another county, the cause must be moved to such county. Bridgers v. Ormond, 148 N. C. 375, 62 SE 422.

89. Under Rev. St. 1895, art. 1273, providing that on change of venue cause shall be removed to some adjoining county, court house of which is nearest that of county in which suit pending, unless it appear in application that such nearest county is subject to some objection which would have authorized change therefrom in first instance, held that application must challenge both county of forum and adjoining county if removal is sought from each. Robertson & Co. v. Russell [Tex. Civ. App.] 111 SW 205.

90. Robertson & Co. v. Russell [Tex. Civ. App.] 111 SW 205.

for a change may be validated by subsequent, statutory enactment.[91] Unless an abuse of discretion is shown, the ruling of the lower court upon a motion for a change of venue will not be disturbed.[92]

§ 4. *Results of change of venue.*[93]—See 10 C. L. 1974—When the action has been transferred, the court in which it was originally begun has no further jurisdiction.[94]

**Verbal Agreements,** see latest topical index.

**VERDICTS AND FINDINGS.**


**§ 1. Definitions and Nature, 2255.**
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**§ 9. Findings by Court or Referee, 2265.** Propositions of Law Under the Illinois Practice, 2270.
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*The scope of this topic* is noted below.[95]

§ 1. *Definitions and nature.*[96]—See 10 C. L. 1974—A general verdict is a general finding of all the facts[97] necessary to sustain it,[98] and in South Dakota, its meaning has been extended by statute so as to include a judge's finding of fact.[99] The only verdict is that which the jury announces and which is received and recorded as their finding.[1]

Special verdicts are particular findings of individual facts,[2] and a verdict containing a separate finding upon each count is in effect a separate verdict upon each count.[3] The distinction between special verdicts and special interrogatories consists mainly in their purpose, the purpose of the former being to elicit facts which

91. Action against city property changed to county in which situated, although statute requiring city to be sued in such county was not operative when order was made, but was operative before trial. People v. Syracuse, 128 App. Div. 702, 113 NYS 707.

92. Motion for change of venue on ground of local prejudice properly overruled. Hinton v. Atchison & N. R. Co. [Neb.] 120 NW 431.

93. **Search Note:** See Venue, Cent. Dig. §§ 135-148; Dec. Dig. §§ 78-84; 4 A. & E. Enc. P. & P. 486.

94. When order of change made and papers transmitted, court where suit was begun had no jurisdiction to vacate such order and recall papers, although through nonpayment of costs case had not been filed in court to which transmitted. Chase v. Superior Court [Cal.] 99 P 355. Although Code Civ. Proc. § 399 provides that moving party must pay filing costs in court to which case transferred, latter court has exclusive jurisdiction to require compliance therewith. Id.

95. Treats of verdicts, general and special, and of findings of fact and conclusions of law. Excludes verdicts and findings in criminal cases (see Indictment and Prosecution, 12 C. L. 1), procedure anterior to verdict, such as selection and requisites of jury (see Jury, 12 C. L. 479), and conduct and custody of jury (see Trial, 12 C. L. 2162). Excludes, also, setting aside of verdict (see New Trial and Arrest of Judgment, 12 C. L. 1070), direction of verdict (see Directing Verdict and Demurrer to Evidence, 11 C. L. 1085), and findings of courts of appeal (see Appeal and Review, 11 C. L. 118). Excludes, also, judgments non obstane (see Judgments, 12 C. L. 408), sufficiency of evidence to sustain verdicts (see Appeal and Review, 11 C. L. 118; New Trial and Arrest of Judgments, 12 C. L. 1070; Judgments, 12 C. L. 408, as to judgments non obstante for insufficiency of evidence.) Excludes, also, variance between the evidence and the pleadings (see Pleading, 12 C. L. 1323), cure of error by or in verdicts and findings (see Harmless and Prejudicial Error, 11 C. L. 1690), and saving questions for review (see Saving Questions for Review, 12 C. L. 1763), except insofar as the right of review depends upon a prior request to the trial court.

96. **Search Note:** See Trial Cent. Dig. §§ 753-878; Dec. Dig. §§ 318-366; 29 A. & E. Enc. L. (2ed.) 1000, 1001; 22 A. & E. Enc. P. & P. 833.

97. Atchison, etc., R. Co. v. Osburn [Kan.] 100 P 473; Barrett v. Dessy [Kan.] 97 P 786.

98. Indianapolis Coal Trac. Co. v. Dalton [Ind. App.] 87 NE 552.

99. Under Rev. Code Civ. Proc. § 293. Kelly v. Wheeler [S. D.] 119 NW 994

1. Hence a memorandum of their finding brought by them into court is no part of the record. Henning v. Keiper, 37 Pa. Super. Ct. 488.

2. Atchison, etc., R. Co. v. Osborn [Kan.] 100 P 473

3. Graves v St. Louis, etc., R. Co. [Mo. App.] 112 SW 736.

will furnish the basis of the judgment, while the purpose of the latter is to secure answers with which to test the general verdict.[4] Special findings of fact by the court are specific statements of those ultimate facts upon which the law must determine the rights of the parties.[5]

§ 2. *General verdicts.*[6]—See 10 C. L. 1975—When the jury are able to determine the essential issues,[7] the parties are entitled to have a general verdict returned,[8] unless they waive their right thereto.[9] In some cases a general verdict may be sufficient, though in form and substance a special verdict.[10] All reasonable presumptions are indulged in favor of a verdict,[11] and slight consideration will be given to nonsubstantial errors in wording,[12] estimation of the amount,[13] or designation of parties by name,[14] or to mere surplusage,[15] clerical mistakes or omissions,[16] or formal defects.[17] In short a verdict is sufficient so far as concerns wording and form if it be clearly intelligible,[18] and in this connection resort may be had to such aids to construction as the pleading and the evidence[19] and the record of the case,[20] but

**4.** By special verdict no unconditional verdict is rendered, but the jury find facts and submit questions of law arising upon them to court, while by the latter answers pertinent to, and perhaps controlling, although not necessarily fully covering, an issue framed, are given, always in connection with a general verdict. Freedman v. New York, etc., R. Co. [Conn.] 71 A 901

**5.** It corresponds to special verdict of jury, is equally specific and responsive to issues and is spread at large upon record as part thereof, is like manner as is such verdict. United States v. Sioux City Stock Yards Co. [C. C. A.] 167 F 126.

**6. Search Note:** See Trial, Cent. Dig. §§ 753-820; Dec. Dig. §§ 318-345; 29 A. & E. Enc. L. (2ed.) 1002; 22 A. & E. Enc. P. & P. 839.

**7.** Not required to render general verdict when unable to determine on essential issue. Larsen v. Leonardt [Cal. App.] 96 P 395.

**8.** Without request therefor. Stanard v. Sampson [Okl.] 99 P 796.

**9.** Stanards v. Sampson [Okl.] 99 P 796.

**10.** In case where under Burns' Ann. St. 1901, § 555, only a general verdict is permissiable. Kelly v. Bell [Ind.] 88 NE 58.

**11.** South Shore Gas & Elec. Co. v. Ambre [Ind. App.] 87 NE 246; Pittsburg, etc., R. Co. v. Darlington's Adm'x, 33 Ky. L. R. 818, 111 SW 360; National Biscuit Co. v. Wilson, 169 Ind. 442, 82 NE 916. Not construed strictly as pleadings are. City Council of Montgomery v. Shirley [Ala.] 48 S 679. Verdict is to have reasonable intendment and must not be avoided except from necessity. Kelley v. Bell [Ind.] 88 NE 58.

**12.** There is no such substantial difference between "1,000 dollars" and "dollars 1,000" as to make verdict uncertain. South Chicago City R. Co. v. Alton, 137 Ill. App. 364.

**13.** Where verdict was for $300 instead of for $299. Gambrell v. Gambrell [Ky.] 113 SW 885.

**14.** Use of "et al" to designate other defendants. Pelton v. Goldberg [Conn.] 70 A 1020. Where nickname or alias such as "Pennsylvania Railroad Company" is used, it being clear that defendant, a subsidiary of "Pennsylvania Railroad Company," and owned by the "Pennsylvania Company" was meant. Pittsburg, etc., R. Co. v. Darlington's Adm'x, 33 Ky. L. R. 818, 111 SW 360.

**15.** Seal v. Goebel, 11 Ohio C. C. (N. S.) 433. That part of the verdict which is without the province of the jury will be disregarded as surplusage, as where they attempt to tax costs. Southern R. Co. v. Oliver, 1 Ga. App. 734, 58 SE 244. Fact that some parts of verdict are unnecessary and immaterial furnishes no ground for venire de novo, but they should be disregarded as surplusage. Kelley v. Bell [Ind.] 88 NE 58.

**16.** Omission of dollar mark or word "dollars" does not render verdict fatally defective. City Council of Montgomery v. Shirley [Ala.] 48 S 679. Use of "defendants" instead of "defendant" not material. Springer v. Siltz, 133 Ill. App. 552. In action of claim and delivery, where verdict did not specify in whose possession property was. Segars v. Segars [S. C.] 63 SE 891.

**17.** Verdict in form as follows: "We, the jury find that the plaintiff has sustained damages and we fix the amount of plaintiff's damages at twenty-five hundred dollars ($2,500)," held sufficient though informal. Sandoval Zinc Co. v. Hale, 133 Ill. App. 196. Verdict in ejectment taken in open court, "for plaintiff binding instructions," though informal, held to have but one meaning, that plaintiff recovers. Brewer v. Lohr, 35 Pa. Super. Ct. 461.

**18.** Sufficient if court can understand it. Kelley v. Bell [Ind.] 88 NE 58. A motion for a venire de novo will not be sustained unless the verdict is so defective and uncertain upon its face that no judgment can be pronounced upon it. Id. Finding in favor of plaintiff "upon each and all the four causes of action" in complaint is sufficient. Mize v. Rocky Mountain Bell Tel. Co. [Mont.] 100 P 971. In action in which counterclaim was filed, verdict "first for defendant; * * * and second * * * for plaintiffs * * * one suit to offset the other," held free from ambiguity. Beaumont Rice Mills v. Campbell [Tex. Civ. App.] 113 SW 971.

**19.** Clarke Bros. v. Stowe [Ga.] 64 SE 786; Slayden & Co. v. Palmo [Tex. Civ. App.] 117 SW 1054. May supply omission of dollar sign. Central of Georgia R. Co. v. Mote, 131 Ga. 166, 62 SE 164. "Five thousand" in verdict construed to mean "five thousand dollars." Cox v. High Point R. & S. R. Co., 149 N. C. 86, 62 SE 761. Verdict is construed in light of evidence though not part of rec-

the pleadings and the evidence cannot be looked to in order to ascertain facts not found,[21] nor will actual doubt as to the amount be construed against the unsuccessful party,[22] and a verdict cannot be aided by any act of the successful party.[23] The verdict must conform to the pleadings [24] and the issues presented thereby,[25] but no finding is necessary upon immaterial issues [26] or upon issues eliminated in course of trial.[27] It must also be consistent with the evidence,[28] and in conformity with the instructions.[29] It is held in some states that an instruction though erroneous is nevertheless the law of the case and must be followed by the jury,[30] but the majority rule is otherwise.[31] The verdict is presumed to include a finding upon all the issues necessary to its validity,[32] and none other,[33] and to exclude all theories

ord under Ky. St. 1903, § 4639. Pittsburgh, etc., R. Co. v. Darlington's Adm'x, 33 Ky. L. R. 818, 111 SW 360. When there is but one counterclaim and but one counterclaimant, a verdict for "counterclaimants" will be construed as a verdict for the counterclaimant. Cleveland, etc., R. Co. v. Rudy [Ind. App.] 87 NE 555.

**20.** Pittsburg, etc., R. Co. v. Darlington's Adm'x, 33 Ky. L. R. 818, 111 SW 360; Rushing v. Lanier [Tex. Civ. App.] 111 SW 1089.

**21.** Where verdict found value per acre but not total value of number of acres. Slayden & Co. v. Palmo [Tex. Civ. App.] 117 SW 1054.

**22.** If it is not apparent whether the verdict is for single or multiple damages, presumption is that jury found on basis of multiple damages. Henning v. Keiper, 37 Pa. Super. Ct. 488.

**23.** Cleveland, etc., R. Co. v. Rudy [Ind. App.] 87 NE 555.

**24.** Should not be for less amount than possible thereunder. National Fowler Bank v. Burch [Ga. App.] 64 SE 282. Where action was for recovery of money only, verdict was improper which found for a certain amount in cash and for three notes. Wiruth v. Lashmett [Neb.] 117 NW 887. In action to rescind contract, verdict should not award damages for use of land when not asked for. Woifinger v. Thomas [S. D.] 115 NW 100. Where suit is on two causes of action, one or both amounts sued for must be allowed, and allowance of less amount is not harmless to defendant unless plaintiff's cause is established beyond doubt. Burns Moore Mining & Tunnel Co. v. Watson [Colo.] 101 P 335.

**25.** Clarke Bros. v. Stowe [Ga.] 64 SE 786. Verdict cannot be based on an issue not presented or tried. Fowler v. Anderson, 132 App. Div. 603, 116 NYS 1092. Verdict held not responsive to issues. Litchfield Min. & P. Co. v. Beanblossom, 138 Ill. App. 122. When issue is taken on plea and there is no special replication thereto and plea is proven, defendant is entitled to verdict. Alabama Great So. R. Co. v. McWhorter [Ala.] 47 S 84.

**26.** Fisher v. Frank [Cal. App.] 97 P 95.

**27.** When pending trial of claim and delivery, part of property sued for is surrendered. Gambrell v. Gambrell [Ky.] 113 SW 885. Better practice in claim and delivery is to find that articles shown to belong to defendant do so belong to him, but such finding is not necessary. Id.

**28.** Clarke Bros. v. Stowe [Ga.] 64 SE 786. Verdict is sufficient unless clearly and manifestly against the weight of evidence. Chicago City R. Co. v. Phillips, 138 Ill. App. 438; Central Brew. Co. v. American Brew. Co., 135 Ill. App. 648; Yezner v. Roberts, Johnson & Rand Shoe Co., 140 Ill. App. 61. A verdict for a less amount than is possible in conformance with evidence is inconsistent. National Fowler Bank v. Burch [Ga. App.] 64 SE 282. Should not be contrary to the preponderance of the evidence, though it may be based on conflicting evidence. Wolfinger v. Thomas [S. D.] 115 NW 100. Verdict must not award damages not shown. Id. Verdict must conform to **admission of parties.** Bauer Cooperage Co. v. Shelton [Ky.] 114 SW 257. **Where answer has several paragraphs,** verdict is sufficient if it supports any one thereof. Citizens' Sav. Bank v. Halstead [Ind. App.] 84 NE 1098.

**Review of evidence** on appeal. See Appeal and Review, 11 C. L. 118.

**29.** Dubinski Elec. Works v. Lang Elec. Co. [Tex. Civ. App.] 111 SW 169; Fearson v. Mullins [Mont.] 98 P 650; Cary Mfg. Co. v. Malone, 131 App. Div. 287, 115 NYS 632. **Instructions not considered disregarded,** unless they necessarily preclude finding of such verdict. El Paso & S. W. R. Co. v. O'Keefe [Tex. Civ. App.] 110 SW 1002.

**30.** Fritz v. Sayre & Fisher Co. [N. J. Law] 72 A 425.

**31.** Verdict in consonance with law will be sustained though contrary to erroneous instruction. Dubinski Elec. Works v. Lang Elec. Co. [Tex. Civ. App.] 111 SW 169; O'Neill v. Thomas Day Co., 152 Cal. 357, 92 P 856. Where court erroneously instructed jury to disregard certain counts of complaint, defendant was not prejudiced by jury's failure to follow such instruction. Dickson v. Geo. B. Swift Co., 238 Ill. 62, 87 NE 59.

**32.** Consideration in collateral proceeding. Webb v. Houston & T. C. R. Co. [Tex. Civ. App.] 111 SW 171. **General verdict for plaintiff** includes finding of all facts necessary to his case. Barrett v. Dessy [Kan.] 97 P 786; Larsen v. Leonardt [Cal. App.] 96 P 395. In action on bond to release attachment, general verdict for plaintiff finds, upon only issue raised, that bond sued on is bond as executed. Dackich v. Barich, 37 Mont. 490, 97 P 931. Where evidence is conflicting upon various matters, but verdict is for plaintiff for full amount claimed, it is to be assumed that jury found in his favor upon them all. O'Shea v. Vaughn, 201 Mass. 412, 87 NE 616. Element of nonresidency being necessary to sustain verdict for plaintiff, it is presumed to have been found. McDowell v. Friedman Bros. Shoe Co. [Mo. App.] 115 SW 1028. When three clauses of

inconsistent therewith,[34] or with the court's instructions.[35] The verdict may relate back so as to cure a defect in the pleading.[36] A verdict is not invalid because it awards less than the plaintiff is entitled to,[37] provided such result has been reached in a proper manner.[38]

§ 3. *Special verdicts and interrogatories.*[39] *When proper.* See 10 C. L. 1976—Special interrogatories were not unknown at common law,[40] and are now quite generally authorized by statute,[41] the courts being often vested with considerable discretion in regard thereto,[42] sometimes extending even to submissions upon the court's own motion.[43] On the other hand, the court may properly refuse to submit questions covered by a special verdict,[44] or by other questions already submitted,[45] or which are evidentiary in their character,[46] or which ask the jury to construe a written instrument,[47] or to determine immaterial and undisputed facts,[48] or the answers to which could throw no light upon the general verdict.[49] It is improper for special findings to accompany a directed verdict.[50]

petition allege negligence, and answers to interrogatories as to two find no negligence, it will be presumed that jury found negligence under third clause to sustain verdict necessitating finding of negligence. National Biscuit Co. v. Wilson, 169 Ind. 442, 82 NE 916. Consideration of codefendant's **crossbill** presumed. Bowman v. Saigling [Tex. Civ. App.] 111 SW 1082. **Counterclaim** presumed to have been considered though no mention of it was made in verdict. Nowell v. Mode, 132 Mo. App. 232, 111 SW 641.

**33.** Verdict will not be presumed to have been based upon theory not essential to sustain it, and hence, where petitiin sought recovery of rent for 4 years at $400 per year, verdict reading "We the jury find for the plaintiff $200 for each year 1904, 1905, 1906, 1907, towit: $800 and said lien is hereby foreclosed," held not to conclusively appear to be rent on undivided one-half interest in land. Tipton v. Tipton [Tex. Civ. App.] 118 SW 842.

**34.** Held that verdict for defendant necessarily rejected plaintiff's theory as to the manner of the accident. Flower v. Continental Casualty Co. [Iowa] 118 NW 761.

**35.** Verdict presumed to be based upon grounds to which it is confined by instructions. Fowler v. Anderson, 132 App. Div. 603, 116 NYS 1092.

**36.** Nowell v. Mode, 132 Mo. App. 232, 111 SW 641.

**37.** Plaintiff in replevin who has secured general verdict is entitled under Act April 19, 1901, P. L. 88, to writ of retorno habendo, though there is no finding of damages. Reber v. Schroeder, 221 Pa. 152, 70 A 556.

**38.** See post, § 6, Submission to Jury, Rendition and Return.

**39. Search Note:** See Trial, Cent. Dig. §§ 821-878; Dec. Dig. §§ 346-366; 29 A. & E. Enc. L. (2ed.) 1028; 20 A. & E. Enc. P. & P. 296; 22 Id. 979.

**40.** Freedman v. New York, etc., R. Co. [Conn.] 71 A 901. Power to submit special interrogatories does not depend upon statute or consent of parties, but is discretionary with court. Id.

**41.** When so requested, the trial court should submit questions material to the issue. Steber v. Chicago & N. W. R. Co. [Wis.] 120 NW 502.

**42.** Within trial court's discretion to submit proper questions to jury Hill v. Hayes, 199 Mass. 411, 85 NE 434. It is within discretion of court to submit special questions upon any or all issues, under Rev. St. 1898, § 3163, and error cannot be imputed therein unless there be abuse of discretion. Prye v. Kalbaugh, 34 Utah, 306, 97 P 331. Submission of special questions under St. 1898, § 2858, is within discretion of court. Sufferling v. Heyl [Wis.] 121 NW 251. Conclusions of court on submission of special interrogatory will not be disturbed unless manifestly wrong as disclosed by record, due regard being had for court's superior advantages. Clemons v. Chicago, etc., R. Co., 137 Wis. 387, 119 NW 102.

**43.** Under Code, § 3727, court may submit special questions on own motion, without first submitting them to counsel. Miles v. Schrunk [Iowa] 117 NW 971.

**44.** Ryan v. Oshkosh Gaslight Co. [Wis.] 120 NW 264; Steber v. Chicago & N. W. R. Co. [Wis.] 120 NW 502. Though they differ in form and phraseology. Redepenning v. Rock, 136 Wis. 372, 117 NW 805.

**45.** Refusal to submit a special issue is not error where question is fully covered in issues presented; Pearson v. Millard [N. C.] 63 SE 1053; Farmers' & Merchants' Bank v. Germania Life Ins. Co. [N. C.] 64 SE 902; Maxwell v. Wellington [Wis.] 120 NW 505. No special interrogatory need be given on an evidentiary fact properly submitted to the jury in an instruction on another question given. Palmer v. Schulz [Wis.] 120 NW 348.

**46.** Proposed issue held not to apply to amount of damages, the true matter in controversy. Vanstory Clothing Co. v. Stadiem, 149 N. C. 6, 62 SE 778.

**47.** Reed v. Light, 170 Ind. 550, 85 NE 9.

**48.** Romans v. Thew [Iowa] 120 NW 629.

**49.** The purpose of requiring answers to special questions proposed by the defendant being to determine whether or not the jury would be able to find in favor of plaintiff upon separate elements of case. Larsen v. Leonardt [Cal. App.] 96 P 395. Refusal to give special interrogatory is not fatal error where either answer would not conflict with general verdict. Ruppel v. United Railroads [Cal. App.] 101 P 803.

**50.** But being immaterial they will be dis-

*Request for and submission of special issues or interrogatories.*[See 10 C. L. 1977]—Error cannot be predicated upon failure to submit special issues in the absence of a request therefor,[51] or where such failure is not prejudicial.[52]

*Form and requisites of special interrogatories.*[See 10 C. L. 1977]—While the form in which issues shall be submitted lies largely in the discretion of the court,[53] and is generally sufficient if in conformity with the pleadings,[54] such issues should conform to the evidence,[55] be few in number,[56] clear and concise,[57] definite and certain,[58] and specifically directed to a matter in issue,[59] with no indication as to the answer.[60] Each interrogatory should call for a single finding of fact[61] tending to limit or explain the general verdict,[62] and answerable independently if the verdict returned.[63] Questions calling for special verdicts should not be in the alternative.[64] They need not recite evidentiary facts,[65] and, so far as regards form, will be held

regarded. Missouri, K. & T. R. Co. v. Watkins Merchandise Co., 76 Kan. 813, 92 P 1102.

51. Sullivan v. Fant [Tex. Civ. App.] 110 SW 507. Under Sayles' Ann. St. 1888-89, art. 1331, appellant must have requested submission of issue in order to predicate error upon failure to find therein. Marbry v. Citizens' Lumber Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 85, 105 SW 1156. Failure to submit question not requested, even on contested matter, is not necessarily error, as by Laws 1907, p. 978, c. 346, such omitted matter shall be deemed determined by court in conformance with judgment. Bratz v. Stark [Wis.] 120 NW 396. It is duty of each party to submit for himself such special interrogatories as he may desire to have answered, and not depend upon those submitted by other party. Freedman v. New York, etc., R. Co. [Conn.] 71 A 901.

52. Rich v. Morisey, 149 N. C. 37, 62 SE 762. See, generally, Harmless and Prejudicial Error, 11 C. L. 1690.

53. Rich v. Morisey, 149 N. C. 37, 62 SE 762.

54. Western Union Tel. Co. v. Moran [Tex. Civ. App.] 113 SW 625.

55. Held that evidence warranted submission of issue of party, being innocent purchaser. Downs v. Stevenson [Tex. Civ. App.] 119 SW 315.

56, 57. Freedman v. New York, etc., R. Co. [Conn.] 71 A 901.

58. Freedman v. New York, etc., R. Co. [Conn.] 71 A 901; Second Nat. Bank v. Gibboney [Ind. App.] 87 NE 1064. Special interrogatory is sufficiently definite if its meaning is clear when viewed in light of testimony to which it plainly refers, and is not necessarily objectionable for failure to specify time and place. Ruppel v. United R. Co. [Cal. App.] 101 P 803.

59. Held that question, "Do you find that there was such a man as H?" was objectionable as not asking for fact in relation to his existence. Dorwin v. Hagerty, 137 Wis. 161, 118 NW 799. Inclusion of **immaterial questions,** if not objected to, is not fatal. Twentieth Century Co. v. Quilling, 136 Wis. 481, 117 NW 1007.

60. "Not" should be omitted in phrase "Is it not a fact, etc.?" Romans v. Thew [Iowa] 120 NW 629.

61. Freedman v. New York, etc., R. Co. [Conn.] 71 A 901. Question is not double which inquires whether a party entered on a gravel bed and took gravel therefrom. Indianapolis Coal-Trac. Co. v. Dalton [Ind. App.] 87 NE 552. Question as to whether party had right to and did do certain thing is not double, especially when answered in the affirmative. Wankowski v. Crivitz Pulp & Paper Co., 137 Wis. 123, 118 NW 643. If unchallenged, a question may be sufficient which does not of itself cover a distinct issue. Twentieth Century Co. v. Quilling, 136 Wis. 481, 117 NW 1007. Interrogatories should not be **mixed questions of law and fact,** as request for special finding whether engineer was negligent was refused as being request for special verdict and not for answer to special question and as calling for **conclusion upon all the facts.** McGuire v. Chicago, B. & Q. R. Co., 138 Iowa, 664, 116 NW 801. Question as to whether town officers had notice of light being out of repair. Town of Newcastle v. Grubbs [Ind.] 86 NE 757. Issues should be so framed that when answered they will support the general verdict and judgment,

62. Freedman v. New York, etc., R. Co. [Conn.] 71 A 901; Holler v. Western Union Tel. Co., 149 N. C. 336, 63 SE 92. Not error to exclude interrogatories to which no answers could have been made that could have overthrown general verdict. Second Nat. Bank v. Gibboney [Ind. App.] 87 NE 1064.

63. Jury, having returned verdict for defendant, are not required to answer written interrogatories submitted to them to be answered only in case they returned verdict for plaintiff. Freedman v. New York, etc., R. Co. [Conn.] 71 A 901.

64. Question "Did the defendant company have knowledge of the defective condition of the controller, or ought it to have known of such defective condition?" is objectionable. Gay v. Milwaukee Elec. R. & L. Co [Wis.] 120 NW 283.

65. Blankavag v. Badger Box & Lumber Co., 136 Wis. 380, 117 NW 852; Palmer v. Schulz [Wis.] 120 NW 348. Court need not submit questions not ultimate in their nature. Engvall v. Des Moines City R. Co. [Iowa] 121 NW 12. Held that it was not error to refuse to include question "Did defendant fail to exercise ordinary care in leaving the opening in the condition as to lights, barriers, guard rails, etc., in which it was left on the night?" and that question "Was such open space properly guarded at the time of the injury to decedent?" was rightly given in preference. Palmer v. Schulz [Wis.] 120 NW 348.

sufficient if they present the case fully [66] and substantially.[67] Questions relative to separate and distinct defenses should be submitted separately,[68] but a single question need not be submitted separately as to the several parties affected.[69]

*Form and requisites of special verdict.* See 10 C. L. 1980—While a special verdict may be sufficient in form though unskillfully framed,[70] it is important that it be specific and responsive to the special question submitted,[71] that it show the specific grounds upon which it is based,[72] and that it contain facts, as distinguished from mere evidence of facts,[73] sufficient to sustain the prevailing issue.[74] Where, however, it is difficult to differentiate conclusions, ultimate facts and evidentiary facts, the only safe plan is to put them all into the special verdict.[75] While ordinarily the special findings should be only upon the issues raised by the pleadings,[76] they are not limited to the exact extent of such issues,[77] nor will an immaterial variance therefrom be regarded as error.[78] Special findings should conform to the instructions [79] and proof,[80] and should as fully answer all interrogatories [81] as far as pos-

66. Though need not be in the form requested. Dortch v. Atlantic Coast Line R. Co., 148 N. C. 575, 62 SE 616.

67. Mere phraseology is immaterial. Uecker v. Zuercher [Tex. App.] 118 SW 149.

68. Assumption of risk and contributory negligence should be submitted separately where the jury might find different, consistent answers to each, but otherwise they may be submitted together. Campshure v. Standard Mfg. Co., 137 Wis. 155, 118 NW 633. Submission as to contributory negligence held, under evidence, sufficient to cover assumption of risk, both being dependent upon same facts. Bucher v. Wisconsin Central R. Co. [Wis.] 120 NW 518.

69. Held not error to fail to present negligence of one defendant separately from that of another. Murphy v. Herold Co. [Wis.] 119 NW 294.

70. Larson v. Foss, 137 Wis. 304, 118 NW 804. Special finding is not rendered uncertain by mere **misspelling** of word, as where "blame" is spelled "plane." Pittsburg, etc., R. Co. v. Darlington's Adm'x, 33 Ky. L. R. 818, 111 SW 360.

71. It is insufficient to answer with "did not know," or "unable to determine," proper questions to which party is entitled to have an answer, under Code Civ. Proc. § 625. Larsen v. Leonardt [Cal. App.] 96 P 395.

72. In negligence case where three grounds were alleged, on two of which there was a defense of assumption of risk, special verdict which fails to show on which of three grounds it is based held defective. Reffke v. Patten Paper Co., 136 Wis. 535, 117 NW 1004.

73. Finley v. Meadows [Ky. App.] 119 SW 216; Ives v. Newbern Lumber Co., 147 N. C. 306, 61 SE 70. Setting out of evidence is not equivalent to a finding, whether set out in whole or in part. Light v. Schneck's Estate [Ind. App.] 86 NE 442. Finding from nunc pro tunc entry that judgment of forfeiture was rendered before suit was brought on forfeited recognizance is not finding of evidentiary facts only. Axtell v. State [Ind. App.] 86 NE 999. Setting out of order verbatim in answer to special interrogatory does not necessarily make it finding of evidenciary fact. Mellett v. Indianapolis Northern Trac. Co. [Ind. App.] 86 NE 432. Evidentiary facts **unnecessary.** Rich v. Morisey, 149 N. C. 37, 62 SE 762.

74. Findings of existence of defect, that company knew or should have known thereof, and that such defect was the proximate cause of the injury, held sufficient where there was no finding that defect had existed sufficient length of time for company to have repaired it. Gay v. Milwaukee Elec. R. & L. Co. [Wis.] 120 NW 283. Every issuable controverted fact must be found by jury upon appropriate issues. Rich v. Morisey, 149 N. C. 37, 62 SE 762. Special verdict must be supported by sufficient findings of fact upon all elements essential to judgment. Finley v. Meadows [Ky. App.] 119 SW 216. Verdict finding that at commencement of suit in replevin plaintiff was owner and entitled to possession of property, but failing to find detention by defendant is insufficient. Barnes v. Plessner [Mo. App.] 119 SW 457. Special verdict should find facts necessary to enable court from pleadings and verdict to render judgment. Finley v. Meadows [Ky. App.] 119 SW 216.

75. Can do no harm if they turn out in opinion of court to be evidentiary facts, and their absence might be fatal if they should turn out to be inferential facts. Fraser v. Churchman [Ind. App.] 86 NE 1029.

76. Hahl & Co. v. Southland Immigration Ass'n [Tex. Civ. App.] 116 SW 831; Martin v. Knight, 147 N. C. 564, 61 SE 447.

77. Where, in action by railroad company to restrain owner of land from building on right of way, the question of title is raised, finding on such title need not be limited to land occupied by buildings or to time that they remained on land. Columbia, N. & L. R. Co. v. Laurens Cotton Mills [S. C.] 61 SE 1089.

78. Variance held immaterial, within Code Civ. Proc. §§ 469, 470, providing that variance between pleading and proof is immaterial where not misleading. Bollinger v. Bollinger [Cal.] 99 P 196. Finding of gross profits in answer to issue as to net profits is sufficient, where there was no evidence from which they might be distinguished. Hahl & Co. v. Southland Immigration Ass'n [Tex. Civ. App.] 116 SW 831.

79. If possible, the instructions will be so construed on review that they will not be in conflict with special verdict. Antonian v. Southern Pac. Co. [Cal. App.] 100 P 877.

80. See Appeal and Review, 11 C. L. 118.

81. Special verdict should properly cover

sible [82] under the evidence.[83] No answer is necessary, however, to questions involved in immaterial issues.[84] Special interrogatories are usually required to be answered by "yes" or "no." [85]

*Interpretation and construction.* See 10 C. L. 1980—Special verdicts and finding should be reasonably interpreted [86] in the light of the evidence,[87] instructions,[88] record,[89] and other findings in the case.[90] All necessary or reasonable inferences from a finding will be allowed,[91] but findings will not be unduly extended in this manner.[92] Findings cannot supply necessary averments of the pleadings,[93] though they may show such a state of facts as to render errors in rulings on pleadings harmless.[94] Findings upon immaterial issues [95] and upon matters not in issue [96] will be ignored. The absence from a special verdict of a finding of fact in favor of the party having the burden of proof is equivalent to a finding against him.[97]

§ 4. *Conflicts between verdicts and findings.*[98] *In general.* See 10 C. L. 1981—Although the findings may not be irreconcilable with each other and with the general verdict, when some doubt is raised from the whole record as to the correctness of the result, a new hearing will be allowed.[99]

*General verdicts and special findings.* See 10 C. L. 1981—Special findings control the general verdict [1] whenever, in the light of the evidence [2] and aided by all reason-

all the material issues covered by the interrogatories. Bratz v. Stark [Wis.] 120 NW 396.

82. Ordinarily, finding is sufficient when answer is made by jury in accordance with their best ability. Cockerill Zinc Co. v. Streets [Kan.] 101 P 475.

83. Answers are sufficient if as definite as evidence will permit. King v. King [Kan.] 100 P 503.

84. Failure to answer a question involved in an immaterial issue held not reversible error, especially when appellant did not request the submission of such issue, and hence was not, under Sayles' Rev St. 1888-89, art. 1331, entitled to urge failure to find upon same as error. Mabry v. Citizens' Lumber Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 85, 105 SW 1156.

85. Answer "not sufficient evidence," is no answer at all. Where evidence is insufficient, answer should be "no." Union Trac. Co. v. Howard [Ind. App.] 87 NE 1103. Answer "We do not know," held insufficient. Town of Newcastle v. Grubbs [Ind.] 86 NE 757.

86. "No," in answer to "Do you find there was such a man as H " means there was no such man in the transaction. Dorwin v. Hagerty, 137 Wis. 161, 118 NW 799.

87. Held that finding by jury that plaintiff was going to doctor's office was sufficient under circumstances to negative claim that he was riding for mere pastime. Ferguson v. Traux, 136 Wis. 637, 118 NW 251. Finding that plaintiff worked certain number of days as foreman is sufficient finding of how many days he worked under second contract, where evidence was that all work done as foreman was under second contract. Larson v. Foss, 137 Wis. 304, 118 NW 804.

88. Held that question of assumption of risk was sufficiently submitted by a question as to contributory negligence and instructions of court pertaining to evidentiary facts reflecting on assumption of risk. Bucher v. Wisconsin Cent. R. Co. [Wis.] 120 NW 518.

89. Howell v. Denton [Tex. Civ. App.] 113 SW 314.

90. All findings will be construed together to determine whether they are sufficiently definite. Missouri, K. & T. R. Co. v. Jenkins [Kan.] 98 P 208; Cockerill Zinc Co. v. Streets [Kan.] 101 P 475.

91. Finding that horse was not beyond control held a finding that he was under control. Clemons v. Chicago, etc., R. Co., 137 Wis. 387, 119 NW 102. Finding by jury that injury was result of accident may be interpreted as merely negativing charge against defendant of malice and willfulness contained in petition. Cincinnati, Hamilton & D. R. Co. v. Tangeman, 11 Ohio C. C. (N. S.) 379

92. The court will not draw inferences of knowledge from finding of prior opportunities to acquire it. Town of New Castle v. Grubbs [Ind.] 86 NE 757.

93. Shank v. Trustees of McCordsville Lodge No. 338, I. O. O. F. [Ind. App.] 88 NE 85.

94. See Harmless and Prejudicial Error, 11 C. L. 1690.

95. Where it conflicts with evidence. De Gottardi v. Donati [Cal.] 99 P 492.

96. Especially where findings upon real issues are so explicit that their meaning cannot be mistaken. Geer v. Thompson, 4 Ga. App. 756, 62 SE 500.

97. Light v. Schneck's Estate [Ind. App.] 86 NE 442. Where jury, in answer to question as to whether testator was under insane delusion at time of executing will or codicils, stated that he was insane at time of execution of codicils but made no mention as to will, it was a finding of no delusion at time of signing will. Snell v. Weldon, 239 Ill. 279, 87 NE 1022.

98. **Search Note:** See Trial, Cent. Dig. §§ 856-860; Dec. Dig. §§ 358, 359.

99. As where some findings conflict with one another, some with the general verdict, and others are not sustained by the evidence. Chicago I. & L. R. Co. v. Stepp [Ind. App.] 88 NE 343.

1. Stanley v. Atchison, etc., R. Co. [Kan.]

able inferences,[3] they are in irreconcilable conflict,[4] provided the special findings are not inconsistent and uncertain as between themselves.[5] The evidence will not be looked to [6] nor will any presumption be indulged to supplement answers to special interrogatories in order to defeat the general verdict.[7]

*Between special findings.* See 10 C. L. 1983—The special findings, between themselves, must not be inconsistent,[8] and they will, when clearly inconsistent,[9] nullify each other.[10]

§ 5. *Separate verdicts as to different counts, causes of action, or parties.*[11] See 10 C. L. 1983—A single verdict is sufficient where the several counts state a single cause of action between the same parties,[12] but separate verdicts should be returned where

96 P 34; Missouri, K. & T. R. Co. v. Jenkins [Kan.] 98 P 208; Mellette v. Indianapolis Northern Trac. Co. [Ind. App.] 86 NE 432. Verdict inconsistent with special findings is not binding. Roucher v. Oregon R. & Nav. Co., 50 Wash. 627, 97 P 661. Under Rev. Code 1907, § 6758. Mitchell v. Boston & M. Consol. Copper & Silver Min. Co., 37 Mont. 575, 97 P 1033. General verdict for plaintiff was set aside where jury specifically found that accident was caused by negligence of fellow-servant, such finding being held to not be a mere conclusion. Wichita Gas Elec. L. & P. Co. v. Crist [Kan.] 97 P 1134.

**2.** In determining conflict, circumstances and surroundings as disclosed by evidence may be considered. Perry v. Centralia, 50 Wash. 670, 97 P 802. Answers to interrogatories returned by jury control general verdict only when they are in irreconcilable conflict therewith upon any supposable view of evidence within issues. Mitchell Lime Co. v. Nickless [Ind. App.] 85 NE 728.

**3.** Lake Shore & M. S. R. Co. v. Brown, 41 Ind. App. 435, 84 NE 25.

**4.** Vigo Cooperage Co. v. Kennedy [Ind. App.] 85 NE 986; Indianapolis Coal Trac. Co. v. Dalton [Ind.] 87 NE 552. Judgment on special interrogatories contrary to general verdict may be sustained only because of irreconcilable conflict of special findings upon material question essential to support general verdict. Paul Mfg. Co. v. Racine [Ind. App.] 88 NE 529.

**Irreconcilable** where different conclusions are compelled. Atchison, etc., R. Co. v. Osburn [Kan.] 100 P 473. Where answers to special interrogatories exclude every conclusion that will authorize recovery for plaintiff, judgment should be rendered for defendant notwithstanding general verdict. Apperson v. Lazro [Ind. App.] 87 NE 97. Facts shown by answers to interrogatories must exclude possible existence of other controlling facts relating to same subject which might have been proven under the issues. Second Nat. Bank v. Gibboney [Ind. App.] 87 NE 1064; Lake Shore & M. S. R. Co. v. Brown 41 Ind. App. 435, 84 NE 25; Tarashonsky v. Illinois Cent. R. Co. [Iowa] 117 NW 1074.

**Not irreconcilable:** Held that presumption arising from general verdict that car approached crossing without warning was not overcome by answer to special interrogatory that there was not sufficient evidence that gong was sounded on approach to the crossing. Union Trac. Co. v. Howard [Ind. App.] 87 NE 1103. Answers held not in irreconcilable conflict with general verdict. Cleveland, etc., R. Co. v. Houghland [Ind. App.] 85 NE 369. Held that there was no antagonism between the general verdict and special findings. Reed v. Light, 170 Ind. 550, 85 NE 9. Verdict is sufficiently sustained by finding of negligence and contributory negligence in favor of plaintiff under court's instructions. Fearon v. Mullins [Mont.] 98 P 650.

**5.** Haughton v. Aetna Life Ins. Co. [Ind. App.] 85 NE 125; Louisville & S. I. Trac. Co. v. Worrell [Ind. App.] 86 NE 78; Cleveland, etc., R. Co. v. Houghland [Ind. App.] 85 NE 369; Town of Newcastle v. Grubbs [Ind.] 86 NE 757.

**6.** Louisville & S. I. Trac. Co. v. Worrell [Ind. App.] 86 NE 78; Emrich Furniture Co. v. Byrnes [Ind. App.] 87 NE 1042.

**7.** Where answer in special verdict does not show speed of train and that warning might have been given in time, it will not be assumed that conditions at crossing were such that signal could have been heard, so as to defeat general verdict. Cleveland, etc., R. Co. v. Lynn [Ind.] 85 NE 999.

**8.** Stanley v. Atchison, etc., R. Co. [Kan.] 96 P 34. If inconsistent, they will, if possible, be construed in accordance with the facts found or as must be presumed to have been finding of reasonably intelligent men. Kidd v. New York Security & Trust Co. [N. H.] 71 A 878. Rule that requires that separate questions be submitted in matter implies that answers are not necessarily inconsistent. Campshure v. Standard Mfg. Co., 137 Wis. 155, 118 NW 633.

**9.** Findings do not nullify each other unless clearly inconsistent. Hahl & Co. v. Southland Immigration Ass'n [Tex. Civ. App.] 116 SW 831.

**10.** Haughton v. Aetna Life Ins. Co. [Ind. App.] 85 NE 125; Boucher v. Oregon R. & Nav. Co., 50 Wash. 627, 97 P 661; Indianapolis Coal Trac. Co. v. Dalton [Ind.] 87 NE 552; South Shore Gas & Elec. Co. v. Ambre, [Ind. App.] 87 NE 246. Where answers to interrogatories conflict or are inconsistent with each other, or are uncertain in their meaning, they will not contol general verdict, but tend to cancel and neutralize each other. Louisville & S. I. Trac. Co. v. Worrell [Ind. App.] 86 NE 78.

**11. Search Note:** See notes in 10 L. R. A. (N. S.) 191.

See, also, Trial, Cent. Dig. §§ 771-773, 777-781½; Dec. Dig. §§ 328, 330.

**12.** Moseley v. Missouri Pac. R. Co., 132 Mo. App. 642, 112 SW 1010; Mize v. Rocky Mountain Bell Tel. Co. [Mont.] 100 P 971.

the several counts state different causes of action [13] or where the parties are different.[14] Similarly, a general verdict for the plaintiff upon a single count alleging several causes of action is proper only where all of the causes of action so alleged are sufficient.[15] So, also, separate verdicts should be rendered where separate actions are consolidated.[16]

A verdict may be rendered against one defendant and for another,[17] and apportionment of damages between joint wrongdoers is sometimes allowed.[18]

§ 6. *Submission to jury, rendition, and return.*[19]—See 10 C. L. 1984.—Only the issues which are sustained by the evidence should be submitted.[20] The jury cannot be required to return a verdict if they disagree,[21] but, where a verdict is returned, it must be the result of proper deliberation as distinguished from what is commonly called a quotient verdict,[22] though it is entirely allowable to use the quotient method of computation in course of deliberation, provided there be no prior agreement to abide by the result thus reached, and such result be afterwards properly ratified,[23] and a verdict will not be set aside as a quotient verdict in the absence of clear and satisfactory evidence to such effect.[24] The verdict must also represent the determination of the jury upon the merits, as distinguished from a compromise.[25] A

**13.** Freedman v. New York, etc., R. Co. [Conn.] 71 A 901. Such verdicts may be in form of single verdict containing separate findings. Graves v. St. Louis, etc., R. Co., 133 Mo. App. 91, 112 SW 736.

**14.** Verdict on all four counts of declaration held not responsive to issues joined where two of original plaintiffs were, by amendment after verdict, eliminated from cause as to two of such counts. Litchfield Mining & Power Co. v. Beanblossom, 138 Ill. App. 122.

**15.** Single count alleged several, distinct libels, some of which were insufficient to sustain a verdict. Flowers v. Smith 214 Mo. 98, 112 SW 499.

**16.** Where an action by wife for personal injuries and action by husband for loss of her services are consolidated. St. Louis, etc., R. Co. v. Raines [Ark.] 119 SW 266.

**17.** Held not improper to find verdict in favor of patron of grain elevator for loss of grain against association in control of elevator and to relieve the owner of elevator. Buffalo Grain Co. v. Sowerby [N. Y.] 88 NE 569. **So construed** where one defendant not mentioned. Pittsburg, etc., R. Co. v. Darlington's Adm'x, 33 Ky. L. R. 818, 111 SW 360. Jury may find for one and against the other, or may assess punitive damages against one and not the other. Louisville & N. R. Co. v. Roth [Ky.] 114 SW 264.

**18.** Civ. Code 1895, § 5915. Glore v. Akin, 131 Ga. 481, 62 SE 580. **Apportionment not allowable** in action for malicious prosecution. Id. A verdict for a stated amount "to be equally divided between them" is in effect a several verdict, and invalid in such action. Id. Such defect was not cured by writing off one-half of finding and entering up judgment for other half against both defendants. Id.

**19. Search Note:** See notes in 24 L. R. A. 272, 43 Id. 33; 105 A. S. R. 569.

See, also, Trial, Cent. Dig. §§ 757-767, 823-845; Dec. Dig. §§ 320, 321, 322-325, 349-354; 29 A. & E. Enc. L. (2ed.) 1038; 11 A. & E. Enc. P. & P. 599; 22 Id. 922.

**20.** Error to submit issue not sustained by evidence. Hobbs v. Blanchard & Sons Co. [N. H.] 70 A 1082.

**21.** Instruction that, if finding be for plaintiff, it should be "We, the jury, find for plaintiff," and, if against plaintiff it should be "We, the jury, find for defendant," held not misleading as precluding a refusal to return a verdict in case of disagreement. Southworth v. Pecos & N. T. R. Co. [Tex. Civ. App.] 118 SW 861.

**22.** Strictly quotient verdict will be set aside. Hagan v. Gibson Min. Co., 131 Mo. App. 386, 111 SW 608.

**23.** Hagan v. Gibson Min. Co., 131 Mo. App. 386, 111 SW 608; Missouri, K. & T. R. Co. v. Light [Tex. Civ. App.] 117 SW 1058.

**24.** Evidence, consisting chiefly of papers found in jury room, held insufficient to show that verdict was reached by quotient method. Hagan v. Gibson Min. Co., 131 Mo. App. 386, 111 SW 608. Refusal of new trial on ground of quotient verdict held not error as matter of law, where only evidence in support of motion was affidavit of movant, and this affidavit was contradicted by affidavits of four jurors and by affidavits of bailiff, who also swore that movant had no opportunity to hear what transpired in jury room. Model Clothing House v. Hirsch [Ind. App.] 85 NE 719.

**25.** Verdict for less than plaintiff claims or is really entitled to and for more than defendant admits is not necessarily a compromise. Hart v. Denise, 75 N. J. Law, 82, 66 A 1085. When damages are liquidated and plaintiff testifies to a certain sum as due, while defendant testifies to a smaller sum, or where it appears from evidence that plaintiff is entitled to nothing, a verdict for plaintiff for a sum different from that testified to by either party will be held to be a compromise verdict; but it is otherwise where damages are unliquidated, and testimony upon which same is based consists of expert opinions. Lawson v. Wells Fargo Co., 113 NYS 647.

party is entitled to have the jury polled upon the return of a verdict,[26] in order to determine whether it represents that unanimity of opinion which the law generally contemplates,[27] and for this purpose their presence when the verdict is received is essential.[28] The jury need not answer improper interrogatories,[29] but must return a special verdict when requested as provided by statute.[30] In some states the verdict may be returned orally,[31] but usually it must be in writing and signed.[32]

§ 7. *Amendment and correction.*[33]—See 10 C. L. 1985—The jury may correct a general [34] or special verdict,[35] or an answer to a special interrogatory,[36] upon proper request being made therefor by a dissenting juror,[37] by the court,[38] or by a party to the action,[39] at any time before the verdict has been accepted and recorded,[40] and before their discharge,[41] or after their discharge and reassembling, where the correction is upon an undisputed point,[42] but they cannot be required to make a finding more definite by repeating other findings.[43] The court may, with the consent of the plaintiff, reduce a verdict which is clearly excessive,[44] and may, after the discharge of the jury,[45] correct errors in the verdict in matters of form [46] so as to make

**26.** State Life Ins. Co. v. Postal [Ind. App.] 84 NE 1093. After return of corrected verdict. Schmidt v. Chicago City R. Co., 239 Ill. 494, 88 NE 275.

**27.** State Life Ins. Co. v. Postal [Ind.] 84 NE 1093; Alabama Great So. R. Co. v. McWhorter [Ala.] 47 S 84.

**28.** Agreement that jury may seal their verdict and separate does not dispense with their attendance when verdict is received, since right to have jury examined by poll is legal one which parties cannot be deprived of without their consent. Spoon River Drainage Dist. Com'rs. v. Connor, 134 Ill. App. 434.

**29.** Freedman v. New York, etc., R. Co. [Conn.] 71 A 901.

**30.** Court or jury has no discretion under Rev. St. 1906, § 5201. Rheinheimer v. Aetna Life Ins. Co., 77 Ohio St. 360, 83 NE 491.

**31.** Verdict may be received orally as well as in writing. Russel & Co. v. McGirr, 134 Ill. App. 428.

**32.** Should be signed by foreman. Stannard v. Sampson [Okl.] 99 P 796; McCaskey Register Co. v. Keena [Conn.] 71 A 898. Under Pub. Laws, p. 37, c. 1533, § 5, a verdict signed by the foreman only is irregular and should be set aside. Hart v. Superior Ct. [R. I.] 71 A 1057.

**33. Search Note:** See notes in 3 L. R. A. (N. S.) 1086; 5 Ann. Cas. 394; 6 Id. 545; 10 Id. 753.

See, also, Trial, Cent. Dig. §§ 791-801, 865-868; Dec. Dig. §§ 338-340, 362; 22 A. & E. Enc. P. & P. 961.

**34.** Schmidt v. Chicago City R. Co., 239 Ill. 494, 88 NE 275. Jury may correct apparent error in verdict. Hanley v. Brooklyn Heights R. Co., 127 App. Div. 355, 111 NYS 575. It is common and proper practice where informal or defective verdicts have been returned to recall jury for their correction, where same can be done promptly. Cohen v. Sioux City Trac Co. [Iowa] 119 NW 964. If corrected promptly and there is nothing from which prejudice to losing party may be inferred. Id.

**35.** Smith v. Pilcher, 130 Ga. 350, 60 SE 1000.

**36.** Hetland v. Bilstad [Iowa] 118 NW 422.

**37.** Hetland v. Bilstad [Iowa] 118 NW 422. Mere attempted explanation of verdict by juror which is not dissent thereto does not authorize court to send jury out to correct verdict, under Kirby's Dig. §§ 6203, 6204. Harris v. Graham [Ark.] 111 SW 984.

**38.** Court should call attention of jury to manifest errors in form and substance of verdict. Cox v. High Point R. & S. R. Co., 149 N. C. 86, 62 SE 761. Court may order jury to correct conflicting findings or findings which do not cover issues in a special verdict. Smith v. Pilcher, 130 Ga. 350, 60 SE 1000. Court may require jury to amend verdict defective in form. Court may order jury to retire and correct their verdict in accordance with instruction which he had forgotten to give. Id.

**39.** Proper remedy for indefinite verdict is motion to make it more definite and certain. Segars v. Segars [S. C.] 63 SE 891.

**40.** Schmidt v. Chicago City R. Co., 239 Ill. 494, 88 NE 275.

**41.** Where court in discharging jury remarked that they should have made a certain deduction from amount allowed and foreman immediately stated that they had made such deduction, a special question having been answered to contrary through misunderstanding, such correction was sufficient to abrogate agreement between parties that court should make deduction. Hetland v. Bilstad [Iowa] 118 NW 422. Jury cannot, after their discharge, be recalled to alter or amend their verdict, since then their control over case is at end. Warfield v. Patterson, 135 Ill. App. 307.

**42.** The jury, on being reassembled after their discharge, may correct an error in the verdict as to the undisputed amount. Fearnley v. Fearnley [Colo.] 98 P 819.

**43.** Cockerill Zinc Co. v. Streets [Kan.] 101 P 475.

**44.** But if plaintiff does not consent thereto, a new trial should be granted upon the request of defendant therefor. Atchison, etc., R. Co. v. Cogswell [Okl.] 98 P 923.

**Correction on appeal:** See Appeal and Review, 11 C. L. 118.

**Jurisdiction** as affected by reduction or remittitur. See Jurisdiction, 12 C. L. 458; Justices of the Peace, 12 C. L. 496; Appeal and Review, 11 C. L. 118.

**45.** Minot v. Boston, 201 Mass. 10, 86 NE 783.

it conform to the real and apparent intent of the jury,[47] or may render judgment correcting or disregarding such error;[48] but has no power to divide a verdict[49] or make joint a several verdict,[50] or to so amend a verdict as to substitute another,[51] make a material addition thereto,[52] or a material change in the substance thereof,[53] except to make it conform to the plain intention of the jury.[54] Where a finding or verdict as rendered is supported by evidence, the court cannot correct it so as to make it conform to its own conclusions upon the evidence,[55] but an answer to a special interrogatory may, if not supported by any credible evidence, be set aside without interfering with the general verdict.[56]

§ 8. *Recording, entry and effect of verdict.*[57]—See 10 C. L. 1980—The verdict becomes a part of the files,[58] and is controlling upon the judgment,[59] provided it be a proper one and according to the pleadings and the evidence.[60]

§ 9. *Findings by court or referee.*[61] *Referee.*See 10 C. L. 1966—The findings of fact by a referee should be predicated upon the issues joined by the pleadings,[62] but need not be stated separately from the conclusions of law, where the reference is only an incident to the proceedings.[63] Findings of fact by a referee will gen-

**46.** Electric Vehicle Co. v. Price, 138 Ill. App. 594; Cox v. High Point R. & S. R. Co., 149 N. C. 86, 62 SE 761; Minot v. Boston, 201 Mass. 10, 86 NE 783.

**47.** Minot v. Boston, 201 Mass. 10, 86 NE 783; Commission Co. v. Spaulding, 133 Ill. App. 43.

**48.** Mere clerical errors in verdict will be disregarded or corrected. Segars v. Segars [S. C.] 63 SE 891. Where one counterclaim and counterclaimant only, verdict in favor of "counterclaimants' warrants judgment for counterclaimant. Cleveland, etc., R. Co. v. Rudy [Ind. App.] 87 NE 555. Use of "defendants" from "defendant" may be disregarded. Springer v. Siltz, 133 Ill. App. 552. Where jury, in action to contest will, return verdict establishing its validity, but by manifest error insert date of execution of will as date of its probate, and record shows that but one paper writing purporting to be last will of decedent was exhibited to jury, and that, were date of probate as given by jury correct, the right to contest will would have been barred, it is not error for court to treat date given by jury as mere surplusage and enter judgment upon verdict correcting error and establishing validity of will. Seal v. Goebel, 11 Ohio C. C. (N. S.) 433.

**49.** Court may not divide verdict in such a way that it shall stand in that part which is satisfactory to him and shall be canceled in that part which is not satisfactory. Timpany v. Handrahan, 198 Mass. 575, 85 NE 183.

**50.** Where in action for malicious prosecution jury found in certain amount against two defendants to be divided equally between them, court cannot correct verdict by making it joint. Glare v. Akin, 131 Ga. 481, 62 SE 580.

**51.** Minot v. Boston, 201 Mass. 10, 86 NE 783.

**52.** Amendment by court adding interest to damages allowed under statute invades province of jury. Minot v. Boston, 201 Mass. 10, 86 NE 783. Where, by statute, assessment of damages is made province of jury, assessment cannot be made in part by court and in part by jury, in proceedings under St. 1897, p. 396, c. 426, to recover damages. Id.

**53.** May not add material words thereto. Electric Vehicle Co. v. Price, 138 Ill. App. 594. Material defect in verdict cannot be corrected by court after jury has been discharged. Warfield v. Patterson, 135 Ill. App. 307.

**54.** Court may correct errors in form and substance of verdict so as to make it conform with plain intention of jury. Cox v. High Point R. & S. R. Co., 149 N. C. 86, 62 SE 761.

**55.** Court cannot change answer to special verdict where there is any credible evidence to sustain it. Maxon v. Gates, 136 Wis. 270, 116 NW 758. Cannot set aside findings resting upon credible evidence and substitute own findings therefor. Dorwin v. Hagerty, 137 Wis. 161, 118 NW 799.

**56.** McManus v. Thing, 202 Mass. 11, 88 NE 442.

**57. Search Note:** See Trial, Cent. Dig. §§ 805-812, 871-874; Dec. Dig. §§ 342, 343. 365; 22 A. & E. Enc. P. & P. 938.

**58.** McCaskey Register Co. v. Keena [Conn.] 71 A 898.

**59.** It is the duty of the court to render judgment in accordance with the special findings of fact returned by the jury and in so doing exclude consideration of other questions. Paulhamus v. Security Life & Annuity Co., 163 F 554.

**60.** See Appeal and Review, 11 C. L. 118; New Trial and Arrest of Judgment, 10 C. L. 999; Judgments (non obstante), 12 C. L. 417.

**61. Search Note:** See note in 7 Ann. Cas. 380.

See, also, Trial, Cent. Dig. §§ 901, 902, 908-967; Dec. Dig. §§ 386, 388-405; 29 A. & E. Enc. L. (2ed.) 1034; 8 A. & E. Enc. P. & P. 931.

**62.** Lee v. Haizlip [Okl.] 99 P 806. See Reference, 12 C. L. 1666.

**63.** Separate statement not required where the reference is not a trial of the whole issues of fact. Teale v. Tilyou, 127 App. Div. 281, 111 NYS 165.

erally have the same force and effect as a special verdict by a jury,[64] and a conclusion of law may be treated as a finding of fact if it is such in reality.[65]

*Findings by the court.*[See 10 C. L. 1986]—Unless all the facts are agreed to[66] or the making of special findings would serve no useful purpose,[67] it is, with few exceptions[68] aside from suits in equity,[69] the duty of the court, owed especially to the defeated party,[70] to make findings,[71] in detail,[72] of ultimate facts,[73] as distinguished from mere evidentiary or probative facts upon which such findings are based,[74] upon every material issue[75] raised by the pleadings.[76] The practice is

64. Lee v. Haizlip [Okl.] 99 P 806.

65. National Cont. Co. v. Hudson River W. P. Co., 192 N. Y. 209, 84 NE 965. Court should not be astute to construe as finding of fact that which was not intended as such by referee. Id.

66. Court need make no findings where facts are all agreed to. Work v. United Globe Mines [Ariz.] 100 P 813. Decree by consent need not be supported either by specific findings or by evidence preserved by certificate of evidence, where the court has jurisdiction. Steele v. Hohenadel, 141 Ill. App. 201. No finding on facts admitted by insufficient denial is necessary. Roussin v. Kirkpatrick [Cal. App.] 95 P 1123.

67. Rights of party being in no way prejudiced thereby. In re Swick [Minn.] 119 NW 791.

68. Court is not bound to make special findings in trial without jury, though requested by party to do so. Lowell v. Bickford, 201 Mass. 543, 88 NE 1. The mere fact that the court found or neglected to find some fact is not fatal error, since, notwithstanding such error, the final judgment may be right. Dennison Bros. v. Waterville Cutlery Co., 80 Conn. 596, 69 A 1022.

69. Findings not necessary in equitable action. Clambey v. Copland [Wash.] 100 P 1031; In re City of Seattle [Wash.] 100 P 1013; Gould v. Austin [Wash.] 100 P 1029. Court need not make findings of fact in equitable proceeding, but to do so may not be prejudicial error. Tacoma Gas & Elec. L. Co. v. Pauley, 49 Wash. 562, 95 P 1103.

70. Defeated party is entitled to special findings of fact by court in action at law in circuit court without jury by stipulation, under Rev. St. § 649, when it is doubtful whether he could otherwise properly present questions of law involved to appellate court. Joline v. Metropolitan Securities Co., 164 F 650.

71. Written opinion cannot take the place of formal findings and conclusions. New York Life Ins. Co. v. McDearmon, 133 Mo. App. 671, 114 SW 57. Under Rev. St. §§ 649, 700, an opinion of the trial judge, giving the reasons for his decision in an action at law, is not a special finding. United States v. Sioux City Stock Yards Co. [C. C. A.] 167 F 126.

72. Greve v. Echo Oil Co. [Cal. App.] 96 P 904.

73. Finding of fact is the ultimate or general fact found and is generally based upon detail facts and circumstances shown by the evidence. Clambey v. Copland [Wash.] 100 P 1031. Finding that a deed was given as security is such and not a mere conclusion of law. Id.

74. Court need not make findings upon evidentiary matters, but only on ultimate facts. Maury v. McDonald [Tex. Civ. App.] 118 SW 812; Haring v. Shelton [Tex. Civ. App.] 114 SW 389; Leggat v. Blomberg, 15 Idaho, 496, 98 P 723. It is unnecessary for the court to make findings of probative facts, but such findings will not vitiate the findings of ultimate fact if evidence is sufficient to support them. Barry v. Beamer [Cal. App.] 96 P 373; American Bldg. & L. Ass'n v. Fowler [Ind. App.] 88 NE 118. **Probative facts sufficient,** if ultimate fact flows therefrom as necessary conclusion. Barry v. Beamer [Cal. App.] 96 P 373; Leggat v. Blomberg, 15 Idaho, 496, 98 P 723.

75. City of Helena v. Hale [Mont.] 100 P 611; Craigo v. Craigo [S. D.] 118 NW 712; Lyden v. Spohn-Patrick Co. [Cal.] 100 P 236. Findings must sustain all material issues of fact, or judgment based thereon will be against law. Aydelotte v. Billing [Cal. App.] 97 P 698. Findings should include all issues necessary to sustain judgment. Montgomery v. Peach River Lumber Co. [Tex. Civ. App.] 117 SW 1061. Finding that stipulation is part of contract held material to validity of contract. Butler v. Agnew [Cal. App.] 99 P 395.

**Immaterial issues:** Negligence which did not contribute to plaintiff's injury is not material. City of Bridgeport v. Bridgeport Hydraulic Co. [Conn.] 70 A 650.

**Finding outside the issues** not required. Columbia N. & L. R. Co. v. Laurens Cotton Mills [S. C.] 61 SE 1089. In action for specific performance of contract of sale, the material issue is centered in contract, and, when court finds that there was no such contract, it is **immaterial** that there is no finding as to consent given to plaintiff to enter on land, or as to knowledge of such permission and entry by third party purchaser. Gish v. Ferrea [Cal. App.] 101 P 27.

**Findings sufficient** if they substantially cover all material issues, though not in identically same language as pleadings. Aydelotte v. Billing [Cal. App.] 97 P 698. Failure to make a more complete finding is not material where it appears that it would have been unavailing. Id. Held that finding sufficed to sustain the judgment of the trial court as to amount of bonds necessary to issue in order to charge the defendant at all. Zimmermann v. Timmermann, 193 N. Y. 486, 86 NE 540.

**Findings insufficient** where court fails to find upon material issue of agency. Winchester v. Becker [Cal. App.] 97 P 74. Held that finding that no accounting had been made by defendants to plaintiff was not finding that there had been no settlement.

not uniform as to the necessity of a request for findings.[77] In some states a request is essential to the propriety of findings by the court.[78] No express finding of a fact necessarily involved in a finding made,[79] or of a fact which is implied by law,[80] is necessary, and where the evidence is conflicting, the court may be required to find only such facts as are deducible therefrom.[81] The marking of a proposed finding as "refused" on the margin does not have the effect of making it a finding in the case.[82]

The findings of fact should be confined to the issues[83] and be specific in their application thereto,[84] though they are not necessarily invalid because stated in general terms[85] or included in the judgment,[86] or are misplaced or misnamed,[87] or are not separately stated from the conclusions of law,[88] provided they be sufficiently definite and certain to indicate the intention of the court.[89] In the federal courts, the findings may be either general or special but not both.[90] Findings must be

Craigo v. Craigo [S. D.] 118 NW 712. General finding that all material allegations of answer are supported by evidence and true, and that all material allegations of complaint in conflict with foregoing findings are not supported by evidence and are not true, is insufficient. Sterrett v. Sweeney, 15 Idaho, 416, 98 P 418.

76. Wilson v. Dahler [Cal. App.] 99 P 723. Under procedure permitting no reply, matter is put in issue by answer alone. Peck v. Noee [Cal.] 97 P 865. No finding is necessary upon issue not raised by pleadings. Ward v. Sherman [Cal.] 100 P 864. Findings should be responsive to case made by pleadings. Uhrlaub v. McMahon, 15 Idaho, 346, 97 P 784. Findings are sufficient if they embrace all facts necessary to constitute particular cause of action alleged in complaint, although all allegations of complaint are not particularly found. Great Western Gold Co. v. Chambers [Cal.] 101 F 6.

77. Duty to make findings does not depend upon request of parties. Davies v. Angelo [Cal. App.] 96 P 909. Plaintiff must procure findings by the court, which will sustain a judgment in his favor if he prevails. Triest v. New York, 193 N. Y. 525, 86 NE 549. On appeal from probate court, no finding was necessary, in absence of request, upon issue as to mental capacity of appellant at time of execution of note, amount of which was deducted by administrator from appellant's share of decedent's estate, where such issue was not sole issue in case. Christians v. Christians [Minn.] 121 NW 633. In absence of request therefor, error cannot be predicated upon failure to make finding. Cornelius v. Washington Steam Laundry [Wash.] 100 P 727.

78. Not reversible error to make findings without request, if no prejudice results therefrom. Ryan v. Ryan [Tex. Civ. App.] 114 SW 464.

79. Finding of injury from certain acts of municipal corporation, causing injury from coal dust, may import a finding that such acts were unreasonable. Gordon v. Silver Creek, 127 App. Div. 888, 112 NYS 54. The court cannot be required to duplicate its findings of fact; hence, additional ones equivalent to those already made are properly refused. St. Paul, M. & M. R. Co. v. Howard [S. D.] 119 NW 1032. Where findings of fact show conclusively that plaintiff was not entitled to recover, findings on other issues are immatsrial and unnecessary. Fogg v. Perris Irr. Dist. [Cal.] 97 P 316.

80. Aydelotte v. Billing [Cal. App.] 97 P 698.

81. Maury v. McDonald [Tex. Civ. App.] 118 SW 812.

82. It merely denotes refusal to make finding. City of Helena v. Hale [Mont.] 100 P 611.

83. Finding of specific probative facts sufficient to establish public highway held to be within issue of public highway. Leverone v. Weakley [Cal.] 101 P 304. When there is no issue in respect to particular fact, it is usually unnecessary to make any findings in respect thereto. Boothe v. Farmers' & Traders' Nat. Bank [Or.] 98 P 509.

84. Finding on issues made by cross complaint, "that there is no competent evidence to sustain the facts as stated in the allegation," held not sufficient. Pittock v. Pittock, 15 Idaho, 426, 98 P 719.

85. Special finding is not necessarily erroneous for failure to make specific mention of items which are included in general description. Columbia, N. & L. R. Co. v. Laurens Cotton Mills [S. C.] 61 SE 1089. Finding that all allegations of complaint are true may be sufficient, without specifically negativing denials of answer. Needham v. Chandler [Cal. App.] 96 P 325.

86. Court may make finding of fact in judgment, and if party desires more specific finding specially made, it is his duty to request it. Maxon v. Gates, 136 Wis. 270, 116 NW 758.

87. If it is characterized a conclusion of law that does not make it one or invalidate it. Whalen v. Stuart, 194 N. Y. 495, 87 NE 819.

88. Statutory requirement that findings of fact and conclusions of law shall be separately stated is merely directory. Butler v. Agnew [Cal. App.] 99 P 395.

89. Frederickson v. Deep Creek Irr. Co., 15 Idaho, 41, 96 P 117. Finding is sufficient if it fully and clearly indicates court's conclusion upon issues. Maury v. McDonald [Tex. Civ. App.] 118 SW 812.

90. Under Rev. St. § 649, when trial is to court, nor can general finding and judgment thereon be regarded as superseded by supposed special finding not of record but

supported by credible evidence.[91] It is immaterial in an action in equity that the findings are defective or insufficient,[92] unless error appears therefrom.[93]

*Interpretation and construction.*[See 10 C. L. 1989]—Findings will be liberally construed in accordance with their substance [94] and the evident intention of the court,[95] so as to avoid unnecessary conflict between the findings [96] and to support the judgment if possible.[97] Where a party seeks to reverse a judgment based on inconsistent findings, he is entitled to the benefit of those most favorable to him.[98] Immaterial findings,[99] findings upon matters outside the issues,[1] conflicting findings wholly unsupported by the evidence and contrary to the concessions of counsel,[2] and mere evidentiary findings, will be disregarded.[3] While a general finding may be controlled by a conflicting more specific finding,[4] to which it is subsequent,[5] it may alone be sufficient [6] if its meaning be clear,[7] and such a finding includes all other

found only in bill of exceptions and not purporting to qualify or take place of general finding. United States v. Cleage [C. C. A.] 161 F 85.

**91.** See Appeal and Review, 11 C. L. 118.

**92.** Since no findings are necessary in such action. Gould v. Austin [Wash.] 100 P 1029.

**93.** Clambey v. Copland [Wash.] 100 P 1031.

**94.** Court's finding in substance that plaintiff had occupied the land for period sufficient to acquire title thereto by adverse possession will support judgment in his favor. Cudney v. Sherrard, 153 Mich. 239, 15 Det. Leg. N. 401, 116 NW 1014.

**95.** Memorandum at bottom "Found, except as indicated" will be considered, the general rule as to irreconcilable conflict being held not to apply. Stokes v. Stokes, 128 App. Div. 838, 113 NYS 142. Where court granted motion to dismiss at close of plaintiff's case but later made a decision containing findings, the decision will be treated as one on the facts. Conover v. Palmer, 123 App. Div. 817, 108 NYS 480. Failure to expressly find that tenant was constructively evicted held not ground for reversal, where court in effect so found and defect was not made subject of motion below. Rea v. Algren, 104 Minn. 316, 116 NW 580.

**96.** Findings are not inconsistent unless every reasonable construction precludes their agreement, and hence, finding that certain agreement permitting entry did not exist does not preclude existence of another agreement which might permit it. Gish v. Ferrea [Cal. App.] 101 P 27. Where paragraph in draft of finding which was marked "proven" by trial court stated that whether there were claims against estate at time of decease did not appear, this was not inconsistent with statement in finding as finally made up that she owed no debts at time and was incompetent to contract for some time past, since paragraph marked "proven" referred to evidence before the court, while statement in finding gave conclusion of court from all evidence. Appeal of Dunn [Conn.] 70 A 703. Finding in action for specific performance that contract was terminated by parties on certain day is inconsistent with another finding that one of parties on same day elected to rescind contract, and also with conclusion of law that vendee is entitled to performance. Whalen v. Stuart, 194 N. Y. 495, 87 NE 819.

**97.** Needham v. Chandler [Cal. App.] 96 P 325; Lomita Land & Water Co. v. Robinson [Cal.] 97 P 10; Murphy v. Stelling [Cal. App.] 97 P 672. Any doubt as to validity of findings as to form will be construed in favor of judgment, as when doubt exists as to whether finding is of law or of fact. Butler v. Agnew [Cal. App.] 99 P 395.

**98.** Where party seeks to reverse judgment based on inconsistent findings, he is entitled to the benefit of those which are most favorable to him. Whalen v. Stuart, 194 N. Y. 495, 87 NE 819.

**99.** Findings upon an immaterial matter not in issue, though erroneous, may not be prejudicial. Collins v. Gray [Cal.] 97 P 142. Findings not material to the issues are not binding in subsequent action. Moehlenpah v. Mayhew [Wis.] 119 NW 826.

**1.** Findings outside the issues in the case are nullities and must be disregarded. Fleming v. Greener [Ind.] 87 NE 719; McCormick-Ormand Co. v. Nofziger Bros. Lumber Co. [Cal. App.] 101 P 688. Finding upon matter not in issue has no weight in a subsequent action. Collins v. Gray [Cal.] 97 P 142.

**2.** Rule that of two irreconcilable findings the appellate court will accept one most favorable to appellant not applying. Stokes v. Stokes, 128 App. Div. 838, 113 NYS 142.

**3.** Evidenciary facts and conclusions in findings must be disregarded. Fleming v. Greener [Ind.] 87 NE 719.

**4.** Specific finding as to payment controls finding which merely recapitulates notes and dates of payment. Evans v. Claridge, 137 Wis. 218, 118 NW 803. Finding of facts constituting ownership by prescription will prevail over statement in findings that party is not owner. Collins v. Gray [Cal.] 97 P 142.

**5.** Subsequent general findings will not negative a prior specific finding, the additional finding being unnecessary and immaterial. Calderwood v. Schlitz Brew. Co. [Minn.] 121 NW 221.

**6.** Held sufficient where finding negatived existence of indebtedness set up by way of counterclaim upon either of permissible theories of evidence. Greve v. Echo Oil Co. [Cal. App.] 96 P 904.

**7.** A general omnibus finding "that all material allegations in answer and also

findings essentially inherent therein [8] of either affirmative [9] or negative matters.[10] A special finding by the court not signed by the judge and not requested by either party will be treated as a general finding.[11] While findings in an equitable action which conflict with the decree may be ignored,[12] yet, where such findings recite all the material facts and do not thus conflict, they may have an equal force and effect as in any other action.[13] The findings of fact by the trial court have the effect and force of the verdict of a jury.[14]

*Signing, filing and entering.* See 10 C. L. 1990—Findings should be signed [15] and filed during the term.[16]

*Amendment of findings.* See 10 C. L. 1991—Ordinarily the trial court may during the term, amend its findings of fact [17] to supply omission [18] or to conform to admissions [19] upon proper motion being made therefor,[20] but it is not necessary to

in amended complaint in intervention" are true held insufficient for any purpose, meaning not being clear. Holt Mfg. Co. v. Collins [Cal.] 97 P 516.

**8.** Will determine a fact necessary to support the judgment, if not in conflict with special findings. Christisen v. Bartlett [Kan.] 95 P 1130. In absence of special findings and conclusions, and of any request therefor, judgment will not be disturbed if it can be sustained upon any theory. Stoepler v. Silberberg [Mo.] 119 SW 418. In absence of findings of fact and conclusions of law, evidence will be construed in light most favorable to successful party below. New York Life Ins. Co. v. McDearmon, 133 Mo. App. 671, 114 SW 57.

**9.** Finding of ownership necessarily includes finding of validity of deed introduced as evidencing such ownership. Simonson v. Monson [S. D.] 117 NW 133. General decree carries presumption that all facts were found necessary to sustain it, of which there was evidence. Kidd v. New York Security & Trust Co. [N. H.] 71 A 878. Finding that "defendants M. D. and C. D. signed and executed written instrument with M." by which contract M. and her husband sold real estate to M. D., does not seem susceptible of any other construction than that contract was executed by M. and her husband. Smallwood v. Dunham [Ind. App.] 86 NE 489.

**10.** Finding of prior ownership negatives any such claim or rights in another. Davies v. Angelo [Cal. App.] 96 P 909. In action to set aside transfer, general decree in favor of defendants, where there was conflicting evidence upon question of fraud, includes finding that contracts were not result of fraud and conspiracy on their part, although the court did not specially find on question of fraud. Kidd v. New York Security & Trust Co. [N. H.] 71 A 878. Where findings of court upon affirmative case are necessarily a complete negative of case as pleaded by answer, such findings are sufficient. Bowers v. Cottrell, 15 Idaho, 221, 96 P 936.

**11.** Kelly v. Bell [Ind.] 88 NE 58.

**12.** Being unnecessary. Tacoma Gas & Elec. L. Co. v. Pauley, 49 Wash. 562, 95 P 1103; Gould v. Austin [Wash.] 100 P 1029; In re Seattle [Wash.] 100 P 1013; Clambey v. Copland [Wash.] 100 P 1031.

**13.** Hector v. Hector [Wash.] 99 P 13.

**14.** Smidt v. Benenga [Iowa] 118 NW 439; Dallas County v. Thomley [Iowa] 118 NW 530. Special findings of the court are no more conclusive upon the parties than the special verdict of the jury. Commercial Nat. Bank v. Gilinsky [Iowa] 120 NW 476. See Appeal and Review, 11 C. L. 118.

**15.** Special finding should be signed by court or it will be treated as a general finding. Kelley v. Bell [Ind.] 88 NE 58.

**16.** The findings of fact should be filed by the trial judge before the adjournment of the term, it not being sufficient to file later and date filing back. Sykes v. Speer [Tex. Civ. App.] 112 SW 422.

**17.** Pitser v. McCreery [Ind.] 88 NE 303.

**18.** Court, in its discretion, may make additions to its findings of meritorious matters accidentally omitted. City of Bridgeport v. Bridgeport Hydraulic Co. [Conn.] 70 A 650.

**19.** Boothe v. Farmers' & Traders' Nat. Bank [Or.] 98 P 509.

**20.** Proceeding for correction of finding by trial court, under Gen. St. 1902, § 795, held defective for want of motion in lower court to correct. Jacobs v. Reilly, 80 Conn. 275, 68 A 251. Correction of erroneous findings should be sought in trial court by motion as provided by Gen. St. 1902, §§ 794-796, for the error to be available on appeal under § 797. Dennison Bros. v. Waterville Cutlery Co., 80 Conn. 596, 69 A 1022. Remedy for failure of trial judge to make finding on material issue is by application for additional findings, and not by appeal. Eagle Min. & Imp. Co. v. Hamilton [N. M.] 91 P 718. Motion to correct findings must be in proper **form** and show exceptions taken. Greist v. Gowdy [Conn.] 71 A 555. Motion should specify definitely the amendment desired. City of Bridgeport v. Bridgeport Hydraulic Co. [Conn.] 70 A 650. Though party cannot extend **time for filing motion** to supreme court to correct findings as authorized by Gen. St. 1902, § 797, by filing motion for correction to trial court as authorized by §§ 794-796, yet where trial court after passing on motion addressed to it certifies evidence to supreme court upon motion made under § 797, the time for making such motion will be deemed to have been extended by the trial court and the motion will be considered by supreme court, though not made within time prescribed by § 797. Root v. Lathrop [Conn.] 70 A 614.

strike out immaterial matters.[21] The practice in some states does not authorize a motion to modify findings.[22]

*Conclusions of law.*[See 10 C. L. 1991]—The separate conclusions of law common to the practice in many states [23] must be based on the findings of fact.[24] They must also be definite and certain in form [25] and confined to the issues.[26] Such separate conclusions are not necessary when they are readily ascertainable from the judgment [27] or from conclusions already filed.[28] In some states the court must be requested to file such conclusions,[29] and in others a request is essential to the propriety of filing conclusions.[30] They are not necessary in equitable actions,[31] and are entirely unknown to the federal practice.[32] When authorized the order in which they are given is immaterial.[33] If the conclusions of law considered all together are not inconsistent with the judgment, the fact that some of them standing alone are incomplete is immaterial.[34] They may be amended upon proper motion,[35] but ordinarily are conclusive in subsequent proceedings.[36]

*Propositions of law under the Illinois practice.*[36a]—[See 10 C. L. 1991]

§ 10. *Objections and exceptions.*[37]—[See 10 C. L. 1991]—Objection must be made and exception taken at the trial to formal defects,[38] such as those relative to the form of the verdict,[39] its signature [40] and return,[41] and the designation of parties [42]

**21.** Motion to correct finding under Gen. St. 1902, §§ 795, 796, by striking out statement that court rejected secondary evidence for want of proof of destruction of original, held properly denied where court did not announce such opinion at time as reason for rulings, the finding in this respect being immaterial. Whalen v. Gleeson [Conn.] 71 A 908.

**22.** No such practice in Indiana. Petty v. Petty [Ind. App.] 85 NE 995.

**23.** Fowler v. Gowing [C. C. A.] 165 F 891.

**24.** Held that the conclusions of law were sustained by the findings of fact. Quirk v. Everett, 106 Minn. 474, 119 NW 63; Leggat v. Blomberg, 15 Idaho, 496, 98 P 723; Amber Petroleum Co. v. Breech [Tex. Civ. App.] 111 SW 668. Held that general conclusion indicated by special findings control over apparent discrepancy as to certain elevations, and bring case within rule of Erhard v. Wagner [Minn.] 116 NW 577. Peterson v. Lundquist, 106 Minn. 339, 119 NW. 50. Finding that defendant wrongfully and without authority in law changed grade of street is insufficient to show that proceedings were defective, so as to warrant holding, as matter of law, that plaintiff was entitled to recover on account of such defective proceedings, irrespective of a contrary provision in the city charter. Triest v. New York, 193 N. Y. 525, 86 NE 549.

**25.** Should be sufficient that intention of trial court may be ascertained. Frederickson v. Deep Creek Irr. Co., 15 Idaho, 41, 96 P 117.

**26.** Conclusions of law outside issues must be disregarded. Fleming v. Greener [Ind.] 87 NE 719.

**27.** Under Civ. Code 1901, par. 2937. Work v. United Globe Mines [Ariz.] 100 P 813.

**28.** Court is not required to duplicate its conclusions of law. St. Paul, M. & M. R. Co. v. Howard [S. D.] 119 NW 1032.

**29.** Failure to give, not error in absence of request. State v. Corgiat, 50 Wash. 95, 96 P 689.

**30.** Not reversible error to file conclusions of law without request where no prejudice results therefrom. Ryan v. Ryan [Tex. Civ. App.] 114 SW 464.

**31.** In re Seattle [Wash.] 100 P 1013. But may not be prejudicial error to give. Tacoma Gas & Elec. L. Co. v. Pauley, 49 Wash. 562, 95 P 1103.

**32.** Hence, judgment should have been directed on findings of fact under Rev. St. U. S. §§ 649, 700, where jury was waived. Parties stipulated facts in 24 articles, which the trial judge adopted with two of his own as his findings of fact, and upon these found six conclusions of law and directed judgment for defendant. Fowler v. Gowing [C. C. A.] 165 F 891.

**33.** Fact that judge's discussion of pertinent legal principles and authorities does not follow but precedes his statement of final conclusion or conclusions of law is not ground for valid objection to form of decision. Gettysburg Borough v. Gettysburg Transit Co., 36 Pa. Super. Ct. 598.

**34.** Town of Cicero v. Grisko, 240 Ill. 220, 88 NE 478.

**35.** Motion to amend conclusion of law denied because party failed to appear and present it. Jefferson v. Brundage [Minn.] 120 NW 1092.

**36.** Conclusions filed on first trial in trial court held conclusive on second transfer to supreme court, when equity and justice did not require their re-examination. Kidd v. New York Security & Trust Co. [N. H.] 71 A 878.

**36a.** See Saving Questions for Review, 12 C. L. 1781.

**37. Search Note:** See Trial, Cent. Dig. §§ 813-820, 826-864, 875-878, 963-967; Dec. Dig. §§ 344, 345, 361, 366, 405.

**38.** Sandoval Zink Co. v. Hale, 133 Ill. App. 196. Errors in verdict which are not fatal are waived if not objected to before discharge of jury. Beaumont Rice Mills v. Campbell [Tex. Civ. App.] 113 SW 971.

**39.** Where counsel remains silent while forms of verdict are explained and delivered to jury, right to object to such forms is thereby waived. Pelton v. Goldberg [Conn.] 70 A 1020. Party who allows a

or amount.[43] Objections and exceptions must also be made or taken at the trial to errors in the findings made,[44] and to failure to submit interrogatories [45] or to make requested findings.[46] Objections to the submission of issues which conform to the issue should be based upon previous, special exceptions to the pleadings.[47] The party requesting an interrogatory cannot object to its form.[48] An objection that a verdict is indefinite should be first raised by a motion to make definite and certain,[49] and, while a motion to set aside special findings objected to may take the place of a motion for a new trial,[50] a motion to reopen a case and to require special findings to be made will not serve to revive rights of appeal which have been lost.[51] Defects in the verdict are not generally available by motion in arrest of judgment,[52] nor does a motion for a venire de novo generally apply to special verdicts or findings.[53] A party by moving for judgment on the special findings waives the right to object thereto.[54]

## VERIFICATION.[55]

*The scope of this topic* is noted below.[56]

*Necessity.*See 10 C. L. 1992—The necessity of verifying pleadings is usually statutory,[57] and hence depends upon the terms of the various statutes.[58] Statutes in

**general verdict** alone to be received without objection will be deemed to have waived his right to a special verdict which he has requested. Livingston v. Taylor [Ga.] 63 SE 694. As failure to return general verdict. Stanard v. Sampson [Okl.] 99 P 796. Where jury return **joint verdict** instead of separate verdicts. St. Louis, etc., R. Co. v. Raines [Ark.] 119 SW 266. Where error consists of bringing in **separate verdicts** in same case, one for a certain defendant, and other against other defendants. Olmstead v. Noll [Neb.] 117 NW 102.

**40.** Where verdict is not signed by foreman. McCaskey Register Co. v. Keena [Conn.] 71 A 898. Failure to conform to statutory requirement as to signing special verdict may be waived by failure of parties to object thereto and by filing of motions for judgment thereon. Stanard v. Sampson [Okl.] 99 P 796.

**41.** Objection that all jury are not present at return. Ryan v. State, 10 Ohio C. C. (N. S.) 497.

**42.** Where "et al" is used after name of one defendant. Pelton v. Goldberg [Conn.] 70 A 1020.

**43.** Where error of ten cents was made in computation. Nichols & Shepard Co. v. Steinkraus [Neb.] 119 NW 23.

**44.** Findings of court. Nueces Valley Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633; Hector v. Hector [Wash.] 99 P 13.

**45.** This objection is not raised by a motion in arrest of judgment. Friedman v. New York, etc., R. Co. [Conn.] 71 A 901. No error can be predicated on failure to submit special question not requested, and in such case exception should be taken to verdict for not containing it. Bucher v. Wisconsin Cent. R. Co. [Wis.] 120 NW 618.

**46.** No error can be based on failure of the court to make findings where no request was made for such findings and no exceptions taken. Kenworthy v. Equitable Trust Co., 218 Pa. 286, 67 A 469; Keeling v. Pommer [Neb.] 120 NW 155; Nueces Valley Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633; McFarlan v. McFarlan [Mich.] 15 Det. Leg. N. 1103, 119 NW 1108; In re Seattle [Wash.] 100 P 1013; Nichol v. Ward [Mich.] 16 Det. Leg. N. 39, 120 NW 569.

**47.** Western Union Tel. Co. v. Moran [Tex Civ. App.] 113 SW 625.

**48.** Indianapolis Coal Trac. Co. v. Dalton [Ind. App.] 87 NE 552.

**49.** Segars v. Segars [S. C.] 63 SE 891.

**50.** So that party will not lose right to appeal, as in case where motion for new trial is not filed within three days, even though motion to set aside does not include request to vacate general verdict. Platte County Bank v. Clark [Neb.] 115 NW 787.

**51.** In re Dalands [Conn.] 70 A 449.

**52.** Kelley v. Bell [Ind.] 88 NE 58.

See New Trial and Arrest of Judgment, 12 C. L. 1070.

**53.** Unless they are so uncertain, ambiguous, or otherwise defective that no judgment at all can be rendered. Leimgruber v. Leimgruber [Ind.] 86 NE 73. It is no cause therefor that the findings contain the evidence and not the ultimate facts. Bright v. Justice [Ind. App.] 85 NE 794.

See New Trial and Arrest of Judgment, 12 C. L. 1070.

**54.** Stannard v. Sampson [Okl.] 99 P 796.

**55.** See 10 C. L. 1922.

**Search Note:** See Pleading, Cent. Dig. §§ 859-909; Dec. Dig. §§ 289-304; 22 A. & E. Enc. P. & P. 1015.

**56. Includes** necessity, sufficiency and effect of verification of pleadings. **Excludes** matters relating to affidavits generally (see Affidavits, 11 C. L. 58), affidavits of merits (see Affidavits of Merits of Claim or Defense, 11 C. L. 69), and verification of claims (see Estates of Decedents, 11 C. L. 1275; Bankruptcy, 11 C. L. 383, etc.).

**57.** In absence of a statute so requiring, held not necessary for revenue agent of county to verify statement describing property and value which had been omitted from the assessment roll. Commonwealth v. Glover [Ky.] 116 SW 769.

**58.** Under Civ. Code 1895, § 5055, where a petition is verified, the answer should also

many states require a verified denial in order to put in issue the genuineness of the instrument sued on,[59] the authority of an agent,[60] the capacity of a party to sue.[61] corporate existence,[62] or the consideration of written instruments.[63]

*Form, sufficiency, and effect.*[See 10 C. L. 1993]—Substantial compliance with the statute is all that is required.[64] Under the various statutes the verification may be made before counsel in the case,[65] and by a guardian ad litem,[66] or by a successor in interest,[67] or even by a person not a party to the suit[68] and not shown to have any interest therein.[69] A verification which positively affirms the facts is defective if it appear that the affiant could not have had personal knowledge as to

be verified. Neal v. Davis Foundry & Mach. Works, 131 Ga. 701, 63 SE 221. The statute of Arizona provides that, if the complaint is verified, each material allegation of the complaint which is not denied under oath shall be taken as confessed, and under Civil Code 1901, § 1359, allegation in complaint that plaintiffs were citizens of United States having been verified, such allegation was admitted by failure to deny under oath. Hankins v. Helms [Ariz.] 100 P 460. A **bill to set aside sale** made to defraud creditors need not be verified. Lamar & Rankin Drug Co. v. Jones [Ala.] 46 S 763. Pleadings in **divorce suits** in Arkansas are expressly authorized to be made without verification. Kirby's Dig. § 2676. Slocum v. Slocum [Ark.] 111 SW 806. Statement of a claim by one brought in as defendant by **interpleader**, under Code 1906, § 772, does not have to conclude with a verification. Caston v. Turner [Miss.] 48 S 721.

**59.** Error to refuse admission of notes mentioned in complaint as evidence when objections that they were not properly transferable was not verified as required by Code 1896, §§ 1801, 1802. International Harvester Co. v. Gladney [Ala.] 47 S 733. Corporation sued on a note cannot, in the absence of verified denial, claim that it was ultra vires, or was not specially authorized. Citizens' Sav. Bank v. Globe Brass Works [Mich.] 15 Det. Leg. N. 849, 118 NW 507. Under Comp. Laws 1897, § 826, a written instrument declared upon in justice's court may be used in evidence without proving its execution, unless denied under oath. Werner & Sons Co. v. Lewis [Mich.] 15 Det. Leg. N. 1053, 119 NW 431. Where execution of note was alleged in petition, its execution was admitted by failure to verify plea of non est factum. Bick v. Yates [Mo. App.] 117 SW 650.

**60.** Plea denying authority of agent as set forth in the petition held insufficient to raise the issue of authority when not in compliance with Wilson's Rev. & Ann. St. 1903, § 4318. Chicago, etc., R. Co. v. Mitchell. 19 Okl. 579, 101 P 850.

**Statute held inapplicable** where evidence was offered, not to show want of authority to execute the contract, but that the contract was not completed by reason of failure of condition. Floresville Oil & Mfg. Co. v. Texas Refining Co. [Tex. Civ. App.] 118 SW 194.

**61.** Rev. St. 1895, art. 1265, requires verified answer unless the truth of the pleading appear of record. Missouri, K. & T. R. Co. v. Allen [Tex. Civ. App.] 115 SW 1179. Where married woman's petition for personal injuries showed her legal capacity to sue, in the absence of a verified denial it was not error to assume in the charge that she had such legal capacity. Missouri, K. & T. R. Co. v. Allen [Tex. Civ. App.] 115 SW 1179. Under Rev. St. 1895, § 1265, where contestants of a local election alleged citizenship, capacity to sue was waived by failure to verify such in answer. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

**62.** Code Civ. Proc. § 1776. Existence can be attacked only by an affirmative allegation in a verified answer that the organization is not a corporation. Stroock Plush Co. v. Talcott, 129 App. Div. 14, 113 NYS 214.

**63.** Ky. St. 1903, § 472. Combs v. Combs [Ky.] 114 SW 334.

**64.** Verification "that the things therein stated are true of his own knowledge, except those things stated on information and belief, and as to those things he believes it to be true," is equivalent to the oath that allegations are true "in substance and in fact," and is sufficient. Hankins v. Helms [Ariz.] 100 P 460.

**65.** Hankins v. Helms [Ariz.] 100 P 460. Court may decline to receive affidavit made before party's attorney, but such an affidavit is not a nullity. Zichermann v. Wohlstadter, 60 Misc. 362, 113 NYS 403.

**66.** Guardian ad litem may verify complaint of an infant plaintiff, and as rule respecting verification by agent does not apply, guardian verifies as a party. Phillips v. Portage Transit Co., 137 Wis. 189, 118 NW 539.

**67.** Verified denial of execution of instrument relied upon as defense may be made by administratrix. Hartje v. Keeler, 133 Ill. App. 461.

**68.** Verification made by a person not a party to the suit must show that the affiant had information from some one who had actual knowledge of the facts. Code Civ. Proc. § 526. Nelson v. Baruch, 60 Misc. 357, 113 NYS 449.

**69.** Affidavit of forgery of deed held sufficient to raise issue of forgery, though made by one not shown to have any relation to defendant. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662. The word "party" as used in Wilson's Rev. & Ann. St. 1903, §§ 4312, 4314, 4318, requiring affidavit by **agent or attorney** to show why it was not made by the "party" himself, refers to corporations as well as to natural persons. Chicago, etc., R. Co. v. Mitchell. 19 Okl. 579, 101 P 850

such facts.[70] A stipulation to treat unverified pleadings as though they were verified must clearly appear in order to be recognized by the court.[71]

Affidavits to pleadings are not usually given the effect of evidence,[72] but in some cases the verification of a pleading may operate to rebut a presumption arising from the nature of the transaction involved.[73]

*Objections, and amendments; waiver.* See 10 C. L. 1994—If verification is omitted it may be supplied by amendment,[74] if application to amend is made in proper time.[75]

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**Veto; View; Voting Trusts; Waiver,** see latest topical index.

### WAR.[76]

*The scope of this topic* is noted below.[77]

Armed resistance to the government by Indians does not necessarily create a state of war,[78] and Indians arrested during such resistance are not necessarily prisoners of war.[79] All property found in the enemies' country [80] is liable to seizure and confiscation as property of the enemy.[81] Under the United States Confiscation laws, only the life interest in property is confiscated,[82] and the effect of confiscation is at an end at the death of the confiscatee.[83] The right of a neutral to enter a port is not effected by the proclamation of one of the belligerents that there is a blockade when in fact it is not effective or actual.[84] While certain articles are generally not considered contraband of war, yet, if one of the belligerents declare them such, it will be sufficient to impress them with that character.[85] Having been de-

**70.** Pepper Distributing Co. v. Alexander, 137 Ill. App. 369. Verification of account held insufficient where it appeared that affiant could not have had personal knowledge; and this is so although the denial was not under oath. Baggett v. Sheppard [Tex. Civ. App.] 110 SW 952.

**71.** Answer treated as unverified where only evidence of stipulation to treat answer as sworn was statement, "Answer under oath waived," at end of the answer and signed by complainant's counsel. Delta & Pine Land Co. v. Adams [Miss.] 48 S 190.

**72.** Affidavit of forgery of deed held not evidence. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662.

**73.** Any presumption arising from a restrictive covenant in a deed to a religious society, that a subsequent sale of the property by such society was for less than its real value, held rebutted by verified petition alleging that it was sold for its fair market value. St. Stephen's Protestant Episcopal Church v. Church of the Transfiguration, 130 App. Div. 166, 114 NYS 623.

**74.** On proper application the presiding judge may allow the verification to be made, even after the first term. Neal v. Davis Foundry & Mach. Works, 131 Ga. 701, 63 SE 221.

**75.** Objections that intervener's plea in attachment was not verified cannot be made after judgment. Kirby's Dig. § 6182. Burke v. Sharp [Ark.] 115 SW 145.

**76.** See 8 C. L. 2257.

**Search Note:** See War, Cent. Dig.; Dec. Dig.; 30 A. & E. Enc. L. (2ed.) 5.

**77.** Includes whole subject of war. Includes, also, spoliation claims. Excludes organization, maintainance and compensation of armed forces, martial law, and soldiers' homes, etc. (see Military and Naval Law, 12 C. L. 847), treaties (see Treaties, 12 C. L. 2148), and pensions (see Pensions, 12 C. L. 1312).

**78.** Where soldiers, sent to quell Indian disturbances, made an arrest and were fired upon by other Indians, which fire was returned by soldiers. Ex parte Bi-a-lil-le [Ariz.] 100 P 450.

**79.** Ex parte Bi-a-lil-le [Ariz.] 100 P 450. Fact that prisoners were confined at hard labor held to indicate they were not considered by military authorities as prisoners of war. Id.

**80.** Cuba, being a part of Spain, was, during the war between United States and Spain, a part of the enemy's country. Juragua Iron Co. v. U. S., 212 U. S. 297, 53 Law. Ed. —, afg. 42 Ct. Cl. 99.

**81.** Plaintiff, although an American corporation doing business in Cuba, was, during the war, to be deemed an enemy to the United States with respects to its property found in Cuba, and therefore United States was not liable for property of plaintiffs destroyed during such war. Juragua Iron Co. v. U. S., 212 U. S. 297, 53 Law. Ed. —.

**82.** Confiscating Act 1862 (Act July 17, 1862, c. 195, 12 Stat. 589; Joint Resolution No. 63, July 17, 1862, 12 Stat. 627). In re Quaker Realty Co., 122 La. 229, 47 S 536.

**83.** Heirs take property free from liability for taxes. In re Quaker Realty Co., 122 La. 229, 47 S 536.

**84.** Balfour, Guthrie & Co. v. Portland & Asiatic S. S. Co., 167 F 1010.

**85.** Flour considered contraband. Balfour, Guthrie & Co. v. Portland & Asiatic S. S. Co., 167 F 1010.

cleared contraband, they are liable to seizure and condemnation;[86] but even if they are contraband, a citizen of a neutral may lawfully contract to carry them, and his contract will be enforced by the neutral state.[87] The abandonment of a captured vessel can only take place by the voluntary act of the captor and without cause,[88] and a belligerent captor cannot by forced abandonment be deprived by a neutral of any rights acquired by virtue of the capture.[89]

*French spoliation claims.*[See 8 C. L. 2257]—The validity of French spoliation claims against the United States depends upon the liability of France in the first instance[90] and the liability of the former is coextensive only with the liability of the latter.[91] Presentation of a claim against Spain did not constitute an election to release France, where the two countries were not jointly liable.[92] Where an American vessel was illegally seized by a French prize crew, it is no defense to France that the prize crew had abandoned the vessel because of being fired upon by a Spanish man-of-war, where the captors afterwards denied the abandonment and secured the release of the vessel to themselves.[93] Memorials, affidavits, and ex parte statements of shipowners and others, made in their behalf long after the occurrence, should be excluded from consideration in[94] spoliation cases.

### WAREHOUSING AND DEPOSITS.[95]

*The scope of this topic* is noted below.[96]

*Definitions and elements.*[See 10 C. L. 1994]—Where the evidence and the inferences from the facts proved are not in conflict, the question as to whether the rela-

**86, 87.** Balfour, Guthrie & Co. v. Portland & Asiatic S.S. Co., 167 F 1010.

**88.** Forced abandonment of a vessel cannot be regarded as desertion. The Schooner Two Cousins, 42 Ct. Cl. 436.

**89.** Vessel which had been captured by the French belonged to them as prize, although forced to abandon the same because of being fired upon by a Spanish war ship. The Schooner Two Cousins, 42 Ct. Cl. 436.

**90.** Where vessel was captured by French privateer and manned by prize crew, after which she was fired upon by Spanish man-of-war, and prize crew ran her ashore, compelling Americans to go with them, while vessel was taken by Spanish to Habana and subsequently claimed by French, France was primarily liable for loss. The Schooner Two Cousins, 42 Ct. Cl. 436. Where vessel was unlawfully seized and condemned, a valid diplomatic claim against France arose, unless treaty rights could not be claimed for vessel. The Brig Sally, 42 Ct. Cl. 75. Capture of vessel with cargo of slaves held unlawful under evidence. Id. Where vessel with cargo of slaves, bound for American port via a foreign port, was captured off the foreign port, it would not be presumed that she intended to deliver cargo at foreign port, which would have been unlawful, but on contrary it would be presumed that she intended to deliver at American port, which would have been lawful at that time. Id. Condemnation of American vessel by French court because of lack of role d'equipage and invoice of cargo held illegal, where vessel carried register, sea letter, crew list, and proper clearance papers. The Sloop Townsend v. U. S., 42 Ct. Cl. 134. Owners deprived of hearing before prize court, where master's protest shows imprisonment from capture until after condemnation. Examination of master in preparatorio when in prison not legal hearing. Id.

**91.** Freight earnings could be claimed on cargo of slaves, though passenger rates could not. The Brig Sally, 42 Ct. Cl. 75. Premiums on insurance effected after capture held not valid claim. The Sloop Townsend, 42 Ct. Cl. 134. **Waiver** of value of cargo does not extend to freight earnings. The Brig Sally, 42 Ct. Cl. 75.

**92.** Presentation against Spain under treaty of 1819. The Schooner Two Cousins, 42 Ct. Cl. 436. Carrying vessel to Habana after French prize crew left her, not an unfriendly act of Spain. Id. Act of Spanish ship in firing upon vessel in possession of French captors held tortious against France, but not against United States. Id. Determination of right of possession by Spanish court not unfriendly to United States, though vessel was thereby restored to France. Id. Where French captors and American owners claimed the vessel, the question was not as to title, but as to possession of vessel; the case coming within the decision in The Tilton (5 Mason 455). Id. Delivery of vessel without trial would have been in violation of treaty between Spain and United States. Id.

**93.** The Schooner Two Cousins, 42 Ct. Cl. 436.

**94.** The Schooner Two Cousins, 42 Ct. Cl. 75.

**95.** See 10 C. L. 1994.

**Search Note:** See notes in 19 L. R. A. 302; 53 Id. 65; 16 L. R. A. (N. S.) 227; 72 A S. R. 206; 90 Id. 295; 94 Id. 220; 10 Ann. Cas. 1074.

See, also, Warehousemen, Cent. Dig.; Dec. Dig.; 30 A. & E. Enc. L. (2ed.) 35; 22 A. & E. Enc. P. & P. 1064.

**96.** Includes rights and liabilities between

tion of warehouseman and depositor exists is for the court.[97] A common carrier, which leases a room from a warehouseman and leaves goods therein without contracting with the warehouseman as such or taking a receipt, does not "store" the goods in a technical sense,[98] but, though not such a storing or warehousing as would discharge the liability of the carrier as such,[99] where the warehouseman undertakes to guard the room and take care of the goods so stored therein, he becomes at least a bailee for him,[1] and, in any case, the mere fact that the storage contract is in the form of a lease of the storage room will not necessarily prevent the contract from being one for storage.[2]

*Licensing and public regulation.*[See 19 C. L. 1994]—Equity has no jurisdiction to prescribe rates of storage charged by a public warehouseman,[3] and will not assume jurisdiction merely upon the ground of unreasonableness of rates,[4] in the absence of other grounds for equitable relief,[5] but in this connection a distinction must be noted between merely public warehouse and public service corporations.[6] Rates fixed by a lease of a warehousing business cannot be enforced by third parties.[7]

*Warehouse receipts.*[See 10 C. L. 1994]—Warehouse receipts are generally negotiable.[8] A provision of the storage contract, requiring return of the warehouse receipt as a condition to the return of the goods, is waived by a refusal to make such return on other grounds.[9] The true contents of bales, bundles and boxes may be shown by parol where they are not apparent and the receipt recites that they are not known, notwithstanding a prior recital as to the nature of such contents,[10] and, so also, articles not listed may be shown by parol to have been delivered to the warehouseman.[11]

owner and warehousemen or depositary, and the regulation of warehousing and deposits. Excludes bailment in general (see Bailment, 11 C. L. 365), symbolical delivery by warehouse receipt (see such topics as Sales, 12 C. L. 1712; Gifts, 11 C. L. 1649; etc.), taxation of property in warehouses or on deposit (see Taxes, 12 C. L. 2022; Internal Revenue Laws, 12 C. L. 323), and liability of common carriers as warehousemen (see Carriers, 11 C. L. 499). Excludes, also, measure of damages (see Damages, 11 C. L. 958).

97. Relation of bailor and bailee of meat held to exist as matter of law. Patterson v. Wenatchee Canning Co. [Wash.] 101 P 721.

98. Evans v. New York & P. S. S. Co., 163 F 405.

99. See Carriers, 11 C. L. 499.

1. Evans v. New York & P. S. S. Co., F 405.

2. Renting of cold storage room by defendant to plaintiff, for storage of meat at certain rental per month or in proportion to amount of space used, held to create relation of bailor and bailee as distinguished from relation of landlord and tenant. Patterson v. Wenatchee Canning Co. [Wash.] 101 P 721.

3. Prescribing of rates for public service corporation, or one affected with a public interest, is legislative, and not a judicial, function. Gulf Compress Co. v. Harris, Cortner & Co. [Ala.] 48 S 477.

4. Gulf Compress Co. v. Harris, Cortner & Co. [Ala.] 48 S 477.

5. Action for money had and received held adequate remedy for overcharges exacted and paid. Gulf Compress Co. v. Harris, Cortner & Co. [Ala.] 48 S 477. Comparatively inconsiderate overcharges held not ground for equitable relief on theory of irreparable injury. Id. Where all overcharges may be recovered in one action, equity will not take jurisdiction to prevent multiplicity of suits. Id.

6. Private, domestic corporation, authorized to engage in general storage and compress business, held not a public service corporation, though takes out license required by Gen. Laws 1907, p. 371 (Code 1907, § 6123 et seq.) and is thereby constituted a public warehouse. Gulf Compress Co. v. Harris, Cortner & Co. [Ala.] 48 S 477.

7. Third party had no interest in lease fixing maximum warehouse charges for storage of cotton merely because he was engaged in business of buying, selling, and shipping cotton. Gulf Compress Co. v. Harris, Cortner & Co. [Ala.] 48 S 477.

8. Warehouse receipts reciting that goods are held subject "to the order" of purchaser held negotiable, though surrender of goods was conditioned upon payment of purchase price. Pepper Distributing Co. v. Alexander, 137 Ill. App. 369.

9. Duffy v. Wilson [Colo.] 98 P 826.

10. Union Nat. Bank v. Griswold, 141 Ill. App. 464.

11. Contract for storage of property in warehouse held a receipt within warehouse Act, though signed by both parties, and hence recital of articles stored was not conclusive. Van Buren Storage & Van Co. v. Mann, 139 Ill. App. 652.

*Contracts of warehousing in general.*[See 10 C. L. 1995]—The contract of a warehouseman is one of bailment.[12]

*Care and protection of goods stored.*[See 10 C. L. 1995]—A warehouseman must exercise ordinary care and skill in caring for the goods,[13] and where the injury is caused by his default in this regard he will be liable, though the immediate cause is an unusual occurrence.[14] A warehouseman represents to the public the fitness of the storage building,[15] and must exercise reasonable care with regard to inspection of the building.[16] This duty is owed, however, by the warehouseman as such, and not by the owner of a building operated by another.[17] Where the relation of warehouseman actually exists, liability for loss is not defeated by the fact that no warehouse receipt has been issued.[18] As a general rule the burden of proving the warehouseman's negligence is upon the party asserting it,[19] and the question is one of fact for the jury,[20] but a prima facie presumption of negligence arises from unexplained [21] failure to deliver on demand. Such a presumption also arises from loss of the goods, or damage thereto while in the warehouseman's custody,[22] when such loss or damage is unaccounted for,[23] but the presumption of negligence from damage or deterioration while in storage does not arise where the injury is such as might naturally have resulted from the inherent nature of the goods.[24] The prima facie case made by proof of loss is met by a showing that the goods were lost by fire, and it then becomes the duty of the plaintiff to show that the fire would not have caused the loss had the defendant used due care.[25] Stipulations of exemption from liability will not be held to extend to negligence unless clearly intended and so expressed.[26] In some states limitation of liability is prohibited by statute.[27]

**12.** Berger v. St. Louis Storage & Commission Co. [Mo. App.] 116 SW 444.

**13.** Baltimore Refrigerating & Heating Co. v. Kreimer [Md.] 71 A 1066; Yazoo & M. V. R. Co. v. Hughes [Miss.] 47 S 662; Berger v. St. Louis Storage & Commission Co. [Mo. App.] 116 SW 444. Common-law rule and also rule under Laws 1907, p. 1711, c. 732, § 21. Buffalo Grain Co. v. Sowerby [N. Y.] 88 NE 569, afg., 124 App. Div. 928, 109 NYS 1124.

**14.** Where, by exercise of ordinary care, injury from bursting of a water-main could have been averted. Baltimore Refrigerating & Heating Co. v. Kreimer [Md.] 71 A 1066.

**15.** Held liable for barley destroyed by collapse of grain elevator. Buffalo Grain Co. v. Sowerby [N. Y.] 88 NE 569, afg. 124 App. Div. 928, 109 NYS 1124.

**16.** Buffalo Grain Co. v. Sowerby [N. Y.] 88 NE 569, afg. 124 App. Div. 928, 109 NYS 1124.

**17.** Verdict for owner of warehouse and against warehouse company, in action for loss of goods occasioned by collapse of warehouse, held not inconsistent. Buffalo Grain Co. v. Sowerby [N. Y.] 88 NE 569, afg. 124 App. Div. 928, 109 NYS 1124.

**18.** Buffalo Grain Co. v. Sowerby [N. Y.] 88 NE 569, afg. 124 App. Div. 928, 109 NYS 1124.

**19.** On bailor. Berger v. St. Louis Storage & Commission Co. [Mo. App.] 116 SW 444. Automobile storage. Wyckoff v. Landsden Co., 112 NYS 1052.

**20.** Instruction to the jury that they must give a verdict for the plaintiff in case they found that goods received in a good, were delivered in a bad condition, was held reversible error as taking from the jury the right to determine from the facts whether negligence may be inferred or presumed. Baltimore Refrigerating & Heating Co. v. Kreimer [Md.] 71 A 1066. Finding that fire which caused loss of cotton was communicated from passing engines, and that defendant was negligent in exposing cotton to danger of such fire, held sustained by evidence. Gulf Compress Co. v. Harrington [Ark.] 119 SW 249.

**21.** Porter v. Duval Co., 60 Misc. 122, 111 NYS 825; Yazoo & M. V. R. Co. v. Hughes [Miss.] 47 S 662; Evans v. New York & P. S. S. Co., 163 F 405.

**22.** Berger v. St. Louis Storage & Commission Co., [Mo. App.] 116 SW 444.

**23.** Terry v. Southern R. Co., 81 S. C. 279, 62 SE 249.

**24.** Instruction as to presumption without this qualification held erroneous. Patterson v. Wenatchee Canning Co. [Wash.] 101 P 721. Judicial notice will be taken of fact that meat in storage is subject to deterioration from natural causes aside from any negligence in storing. Id.

**25.** Yazoo & M. V. R. Co. v. Hughes [Misc.] 47 S 662.

**26.** Exemption against liability for loss "by fire" held not to extend to loss from fire occasioned by negligence. Gulf Compress Co. v. Harrington [Ark.] 119 SW 249. A provision in the contract of storage that the bailee shall not be liable for loss by fire and water does not relate to the damage resulting from exposure to the ordinary action of the elements, but to some disaster in the nature of an overwhelming catas-

Conditions relative to adjustment of claims for damages may be waived by failure to insist upon their performance.[28] When it is shown that damage resulted to the identical property stored, it is not necessary to prove damage to each particular piece, even though each piece is evidenced by a separate warehouse receipt.[29]

*Charges and lien therefor.* See 10 C. L. 1995—The lien for storage charges is regulated by statute in many states,[30] as is also the procedure for the enforcement of such lien,[31] but such provisions may be rendered inapplicable by special agreement,[32] the rights of the parties in such case being dependent upon the terms of the agreement.[33] Aside from his liability for damages to the property, the warehouseman's right to charge storage is not affected by the manner in which, and the place where, the goods are stored.[34] Equity will not entertain a prayer for relief to a party who alleges the exaction of overcharges by a public warehouseman,[35] or enforce, for the benefit of a complainant not a party thereto, the provisions of a lease naming a maximum schedule of charges for storing a certain commodity.[36]

*Trover and conversion.* See 10 C. L. 1995—Tender of storage charges must be alleged,[37] and where a carrier having charges on goods deposits them with a warehouseman, the owner cannot maintain trover against the warehouseman without showing that he tendered both the carrier's and the warehouseman's charges,[38] and also gave satisfactory evidence that he was the owner of the goods demanded.[39] A warehouseman who delivers goods to the wrong party is liable to the owner for their value.[40] He may, however, replace the goods and recover their value from the party to whom the wrong delivery was made.[41] An unauthorized sale by a ware-

trophy. Cotton stored in an open field. Grenada Cotton Compress Co. v. Atkinson [Miss.] 47 S 644.

27. Under Warehouse Act. § 10, providing that limitation of liability shall not be inserted in warehouse receipts, stipulation for exemption from liability for property not listed and for release of value of property, the actual value of which was not stated, held void. Van Buren Storage & Van Co. v. Mann, 139 Ill. App. 652.

28. Provision of special agreement, requiring adjustment of claims for damages before removal of goods, held waived where it was disregarded by parties. Grenada Cotton Compress Co. v. Atkinson [Miss.] 47 S 644.

29. Grenada Cotton Compress Co. v. Atkinson [Miss.] 47 S 644.

30. Under Civ. Code, § 1856, a warehouseman becomes a depositary for hire from date of his agreement to hold goods for a specified time, and his lien for charges is regulated by title on liens. Shedoudy v. Spreckles Bros. Commercial Co. [Cal. App.] 99 P 535.

31. Under Civil Code Cal. §§ 3002, 3003, notice of sale must be given, unless waived, or the foreclosure of the lien by a sale under the direction of the court is necessary in the absence of notice of sale or lien must be foreclosed under direction of court as provided by § 3011. Shedoudy v. Spreckles Bros. Commercial Co. [Cal. App.] 99 P 535. Private sale for charges held invalid not being in accordance with the statute relative to unclaimed property. Van Buren Storage & Van Co. v. Mann, 139 Ill. App. 652. Warehouseman who has made advances to the bailor on stored goods cannot sell them until after the maturity of the debt and notice to the bailor of his intention to sell. Georgia Civil Code 1895, § 2958. Whigham v. Fountain [Ga.] 63 SE 1115.

32. Whigham v. Fountain [Ga.] 63 SE 1115. Pol. Code, §§ 3152, 3153, authorizing sale within certain time, rendered inapplicable by agreement to hold for definite time. Shedoudy v. Spreckles Bros. Commercial Co. [Cal. App.] 99 P 535. Failure of warehouseman's agent to recollect agreement to hold property subject to demands, without insisting on payment of accrued charges, or to note such agreement on account of goods kept, held negligence of warehouseman. Id.

33. Six months held unreasonably short time to hold property before sale, under agreement to hold subject to order. Shedoudy v. Spreckles Bros. Commercial Co. [Cal. App.] 99 P 535.

34. May collect storage charges though goods were left in exposed place. Seaboard Air Line R. Co. v. Shackelford, 5 Ga. App. 395, 63 SE 252.

35. Such overcharges being recovered in an action at law. Gulf Compress Co. v. Harris, Cortner & Co. [Ala.] 48 S 477. All overcharges paid during season are recoverable in one action at law. Id.

36. Gulf Compress Co. v. Harris, Cortner & Co. [Ala.] 48 S 477.

37. Union Nat. Bank v. Griswold, 141 Ill. App. 464.

38. Zuber v. Mehrle, 112 NYS 1093.

39. Laws 1907, c. 732, § 18. Zuber v. Mehrle, 112 NYS 1093.

40, 41. National Bank v. Roundtree [Tex. Civ. App.] 115 SW 639.

houseman of goods stored, which puts it out of his power to restore them on demand, renders him liable for conversion, without demand or tender of performance by the owner.[42]

*Actions and procedure.* See 10 C. L. 1995—In an action based upon refusal to deliver the goods, it is not necessary to allege performance of a condition precedent where it is alleged that the refusal was based on other grounds,[43] and, where the property has been destroyed, a prior demand is not a condition precedent to action for the loss.[44] An action for loss of goods may be maintained in his own name by an assignee of a warehouse receipt.[45] Evidence of other goods being safely kept in the same manner as those injured is generally inadmissible,[46] nor is evidence of proper packing of other goods of the same kind upon other occasions admissible to show that the goods involved in the action were properly packed.[47] Money deposited under an illegal agreement may be recovered by the owner in an action for money had and received,[48] though the conditions of the deposit have not been fulfilled.[49] As between the plaintiff and the defendant, the title to the property held by the latter on deposit may be adjudicated without regard to the interests of other persons not parties to the suit.[50] A statutory interpleader may be had only in the cases covered by the statute.[51] Amendments to conform to the proofs are permissible as in other cases.[52] Where negligence is conceded, it is not reversible error to omit to charge thereon.[53]

*Crimes and penalties.* See 10 C. L. 1995—Statutory penalties attach only in cases covered by the statute.[54]

**Warrant of Attorney; Warrants; Warranty,** see latest topical index.

## WASTE.[55]

*The scope of this topic* is noted below.[56]

Waste is a spoil or destruction, done or permitted, with respect to lands, houses, gardens, trees, or other corporeal hereditaments by the tenant thereof, to the preju-

42. Whigham v. Fountain [Ga.] 63 SE 1115.

43. Where it appeared from complaint that refusal was based on ground other than failure to return warehouse receipt as required by contract. Duffy v. Wilson [Colo.] 98 P 826.

44. Buffalo Grain Co. v. Sowerby [N. Y.] 88 NE 569, afg. 124 App. Div. 928, 109 NYS 1124.

45. Assignment of receipt being transfer of property under R. S., c. 114, § 24, tit. Warehouses. Union Nat. Bank v. Griswold, 141 Ill. App. 464.

46. Where dressed poultry in cold storage was injured by breaking of city water main. Baltimore Refrigerating & Heating Co. v. Kreimer [Md.] 71 A 1066.

47. Baltimore Refrigerating & Heating Co. v. Kreimer [Md.] 71 A 1066.

48. Deposit by husband and wife, who were living together, to be delivered to wife upon her securing divorce. Levirie v. Klein, 58 Misc. 389, 111 NYS 174.

49, 50. Levine v. Klein, 58 Misc. 389, 111 NYS 174.

51. Act May 7, 1907 (P. L. p. 341), §§ 17, 18, authorizes warehousemen to require claimants to interplead only where warehouse receipts in conformity with statutory requirements have been issued. New Jersey Title Guar. & T. Co. v. Rector [N. J. Eq.] 72 A 968. Receipts issued held not in conformity with statutory requirements. Id.

52. Kentucky Civil Code of Practice, § 134. Paducah Ice Co. v. Hall & Co. [Ky.] 113 SW 104. Allegation of agreement to keep storage room at specific temperature may be amended to conform to proof of agreement to keep room at temperature required to preserve goods stored. Id.

53. When both parties proceeded upon theory that warehouseman was negligent. Berger v. St. Louis Storage & Commission Co. [Mo. App.] 116 SW 444.

54. Penalty provided by Pen. Laws, 1907, p. 342, § 2, relative to issuance of warehouse receipts, attaches only where negotiable receipts are issued. New Jersey Title Guar. & T. Co. v. Rector [N. J. Eq.] 72 A 968.

55. See 8 C. L. 2261.

**Search Note:** See notes in 6 C. L. 1838; 22 L. R. A. 233; 30 Id. 309; 15 L. R. A. (N. S.) 238; 14 A. S. R. 632.

See, also, Waste, Cent. Dig.; Dec. Dig.; 30 A. & E. Enc. L. (2ed.) 486; 22 A. & E. Enc. P. & P. 1093.

56. Includes what constitutes waste and remedies therefor. Substantive rights as between particular persons are treated elsewhere. See such topics as Landlord and Tenant, 12 C. L. 528; Real Property, 12 C. L. 1623.

57. Whether life tenant had done or omitted to do that which a prudent owner of

dice of him in reversion or remainder.[57] The common-law rule that one must be seised of an interest at the time the action is brought for waste has been changed by statute in some of the states.[58] In New York a tenant in common may recover against his cotenant for waste,[59] although he has parted with his interest.[60] The cause of action for waste, committed on real property of an incompetent, passes at his death to the administrator.[61] In a suit by remaindermen to forfeit the estate of a life tenant for waste, the life tenant is a necessary party.[62] If there is no attempt to declare a forfeiture of the life estate because of waste, the case will not be governed by the provisions of a statute declaring forfeiture.[63] In a proper case equity will restrain a waste.[64]

## WATERS AND WATER SUPPLY.


§ 1. Definition and Kinds of Waters, 2280.
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*The scope of this topic* is noted below.[65]

fee would have done or omitted to do held for the jury. Norris v. Laws [N. C.] 64 SE 499. Value of timber and of cleared land may be considered for the purpose of determining whether clearing by life tenant had been done in a prudent manner. Id. Use of roof for advertising purposes, in the absence of any covenant, is not waste as between landlord and tenant. Brown v. Broadway & Seventy-Second St. Realty Co., 116 NYS 306. Where evidence did not show that graveling of logging railroad impaired rental value of the land or materially affected the fee, such graveling did not constitute waste authorizing cancellation of lease of said railroad bed. Northcraft v. Blumauer [Wash.] 101 P 871.

**Voluntary waste** is active or positive, and consists in some act of destruction or devastation. Norris v. Laws [N. C.] 64 SE 499.

**Permissive waste** is such as is merely permitted by the tenant, and consists in the neglect or omission to do that which will prevent injury to the estate or freehold. Norris v. Laws [N. C.] 64 SE 499.

**58.** Owner of reversion may bring action. Hoolihan v. Hoolihan, 193 N. Y. 197, 85 NE 1103.

**59.** Code Civ. Proc. § 1652. Hoolihan v. Hoolihan, 193 N. Y. 197, 85 NE 1103.

**60.** May recover for waste committed while cotenancy existed. Hoolihan v. Hoolihan, 193 N. Y. 197, 85 NE 1103.

**61.** Guardian as such cannot maintain action. Kamman v. D'Heur & Swain Lumber Co. [Ind. App.] 88 NE 348.

**62.** Petition praying forfeiture of estate is demurrable where life tenant is not made party and there is no allegation that the acts were committed by defendants with consent of life tenant or through his negligence. Kehr v. Floyd & Co. [Ga.] 64 SE 673.

**63.** Burns' Ann. St. 1908, § 288, not applicable to proceeding for a mandatory injunction in which no attempt was made to declare forfeiture. Gleason v. Gleason [Ind. App.] 87 NE 689.

**64.** Where tenant for years is about to drill holes in brick wall for the purpose of putting up heavy sign. Hayman v. Rownd [Neb.] 118 NW 328. Injunction restraining defendant from cutting or removing timber properly granted. Roots v. Boring Junction Lumber Co., 50 Or. 298, 92 P 811. In order that owner of reversion may be granted mandatory injunction to compel life tenant to keep property in repair, he must show unlawful invasion of his rights, irreparable and continuing in its nature that there is no adequate remedy at law, and that he cannot be compensated in damages. Gleason v. Gleason [Ind. App.] 87 NE 689.

**65. It includes** the general law of waters and the use and supply thereof. **It excludes** matters relating to navigability (see Navigable Waters, 12 C. L. 958), and shipping (see Shipping and Water Traffic, 12 C. L. 1859), the rights of riparian proprietors (see Riparian Owners, 12 C. L. 1702), rivers as boundaries (see Boundaries, 11 C. L. 427), and matters relating to bridges (see Bridges 11 C. L. 441), wharves (see Wharves, 12 C L. 2320), and canals (see Canals, 11 C. L 491).

§ 1. *Definition and kinds of waters.*[66]—See 10 C. L. 1996—A watercourse consists of bed, banks, and water,[67] and it not divested of its character because it does not flow continuously,[68] nor because of the level character of the lands the waters spreads over a larger area without apparent banks,[69] nor because of its local designation.[70] A living stream with a well defined channel is a "natural watercourse."[71] An "estuary" is that part of the mouth of a river flowing into a sea, which is subject to the tides.[72] The source of a stream is the spring or fountain head from which its supply of water proceeds.[73] Floods which habitually occur, though at irregular intervals, are not extraordinary.[74]

§ 2. *Sovereignty over waters and lands beneath.*[75]—See 10 C. L. 1997—The sovereignty has jurisdiction over navigable waters and may regulate the right to fish therein.[76] The state may, in the exercise of its police power, enact laws to protect its supplies of potable waters[77] and to prevent the exhaustion of its mineral waters,[78] and the diversion of the waters of a stream into another state may be prohibited.[79] In western states it is the policy of the laws to permit no available water supply to remain unused.[80] Water flowing over the public domain is a part

66. **Search Note:** See notes in 15 L. R. A. 630; 1 L. R. A. (N. S.) 756; 6 Id. 157; 10 Ann. Cas. 1047.

See, also, Waters and Water Courses, Cent. Dig. § 30; Dec. Dig. § 38.

67. Sierra County v. Nevada County [Cal.] 99 P 371. A water course is usually referred to as one having well defined bed and banks. Quinn v. Chicago, etc., R. Co. [S. D.] 120 NW 884. Evidence held to have some tendency to show existence of a water course. Larimore v. Miller [Kan.] 96 P 852. Where one, in improving land, filled a depression along which surface water ran, there being no well defined channel, and bed being covered with sod, held error to charge, as matter of law, that it was not a water course. McGehee v. Tidewater R. Co., 108 Va. 508, 62 SE 356. After artificial channels are dug and connected with the main stream, and used for the limitation period, they become natural channels. Hough v. Porter [Or.] 98 P 1083. Where water spreads, having no well defined current, it is **not a watercourse.** Id. Where a channel has been closed and water diverted therefrom during low-water season for 10 years, it loses its riparian character for that portion of the year. Id.

68. Sierra County v. Nevada County [Cal.] 99 P 371.

69. Miller v. Madera Canal & Irr. Co. [Cal.] 99 P 502. Where during flood times waters of a stream overflowed, held they constituted but a single stream, and riparian rights attached to the whole thereof. Id.

70. A course with well defined banks, which is the natural outlet of a lake, is a natural watercourse, though called a swag, swamp, or creek, and whether the course be straight or crooked. Hastie v. Jenkins [Wash.] 101 P 495.

71. Wilson v. Pennsylvania R. Co., 129 App. Div. 381, 113 NYS 1101.

72. Especially an enlargement of a channel towards its mouth in which the movement of the tides is very prominent. Vail v. McGuire, 50 Wash. 187, 96 P 1042.

73. Sierra County v. Nevada County [Cal.] 99 P 371.

74. Miller v. Madera Canal & Irr. Co. [Cal.] 99 P 502.

75. **Search Note:** See notes in 18 L. R. A. 695; 42 Id. 161; 50 Id. 737; 58 Id. 673; 64 Id. 333.

See, also, Navigable Waters, Cent. Dig. §§ 184, 186; Dec. Dig. § 36; Public Lands, Cent. Dig. §§ 180-213, 478; Dec. Dig. §§ 58-61, 166; States, Cent. Dig. §§ 6-11; Dec. Dig. § 12; Waters and Water Courses, Cent. Dig. §§ 1-26; Dec. Dig. §§ 1-33.

76. State v. Nielson [Or.] 95 P 720. See Navigable Waters, 12 C. L. 958.

77. Act April 22, 1905, prohibiting discharge of sewage into waters of the state, does not violate the 14th amendment of the federal constitution. Commonwealth v. Emmers, 221 Pa. 298, 70 A 762. Under Public Health Law (Laws 1893, pp. 1518, 1519, amended by Laws 1904, pp. 1238-1241, providing that state may protect from contamination potable supplies of public waters, and that municipality for whose protection steps are taken shall pay damages occasioned, a city which has acquired a part of a pond cannot shut off another riparian owner from use of the water without paying him damages, though his use contaminates the water but does not create a nuisance. George v. Chester, 59 Misc. 553, 111 NYS 722; Heaton v. Chester, 59 Misc. 553, 111 NYS 725.

78. Laws 1908, p. 1221, for protection of the natural mineral springs of the state, is a valid exercise of the police power. Hathorn v. Natural Carbonic Gas Co., 60 Misc. 341, 113 NYS 458. Laws 1908, p. 1221, c. 429, prohibiting pumping from wells drilled in rock, mineral waters, held valid. Hathorn v. Natural Carbonic Gas Co., 128 App. Div. 33, 112 NYS 374. Provision thereof, authorizing attorney general to sue in name of the people to enjoin its violation, is valid exercise of the police power. People v. New York Carbonic Acid Gas Co., 128 App. Div. 42, 112 NYS 381. Act N. Y. May 20, 1908, prohibiting the pumping of mineral waters from wells drilled into the rock, held not so clearly unconstitutional as to justify enjoining a landowner from pumping gas from wells for sale. Lindsley v. Natural Carbonic Gas Co., 162 F 954.

79. Laws N. J. 1905, c. 238, valid. Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 Law. Ed. 828.

thereof, and the government may dispose of its riparian rights separate from the rest of the estate,[81] or provide for its use for irrigation.[82]

§ 3. *Rights in natural watercourses.*[83]—See 10 C. L. 1897.—Riparian proprietors[84] are entitled to the natural and unobstructed flow of the stream,[85] unimpaired in quantity[86] or quality.[87] Equity will not protect upper owners in maintaining a dam constructed without permission of the lower owners or proceeding under any statute.[88] The rule applies to navigable streams.[89] The right is a usufructuary one only,[90] but is a natural easement, inherent in the estate entitled to the benefit,[91] and is part and parcel of the land.[92] Riparian proprietors have correlative rights in the waters of a stream,[93] and such rights must be exercised with due regard to the rights of other owners.[94] Ordinarily, the question of what is a reasonable use is one of fact, depending upon the particular circumstances.[95] Use of the water

**80.** See post, § 13A. It is not the policy of the law to permit any available water supply to remain unused, or to allow one having natural advantages which gives him a legal right to use water to prevent another from using it when he himself does not desire to. Burr v. Maclay Rancho Water Co. [Cal.] 98 P 260.

**81.** Hough v. Porter [Or.] 98 P 1083.

**82.** Act June 17, 1902, 32 Stat. 388, providing for irrigation by the United States of arid public lands, is valid under Const. art. 4, § 3, giving congress power to make all needful rules and regulations as to property belonging to the United States, and it does not authorize expenditure of public money without an appropriation, since it is itself an appropriation. United States v. Hanson [C. C. A.] 167 F 881.

**83. Search Note:** See notes in 6 C. L. 1846; 21 L. R. A. 776; 24 Id. 64; 26 Id. 284; 39 Id. 589; 41 Id. 737; 48 Id. 691; 53 Id. 895, 903; 59 Id. 333, 817; 6 L. R. A. (N. S.) 136, 252; 7 Id. 344; 30 A. S. R. 551; 84 Id. 908, 918, 924; 85 Id. 707, 93 Id. 711; 2 Ann. Cas. 786; 3 Id. 24; 4 Id. 718; 8 Id. 777; 9 Id. 516, 534; 10 Id. 126, 587, 773; 11 Id. 11.

See, also, Waters and Water Courses, Cent. Dig. §§ 27-107; Dec. Dig. §§ 34-98; 13 A. & E. Enc. L. (2ed.) 686; 30 Id. 347; 22 A. & E. Enc. P. & P. 1142.

**84.** A deed of "such use as is customary and legal for riparian owners" held to constitute grantee riparian owner. City of Patterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472. A riparian owner is one who owns land on the bank of a lake or stream, or through whose land a stream runs. Stoner v. Patten [Ga.] 63 SE 897. Statutory authority to a city to use a river as a sewer outlet does not put it in the position of a riparian owner. May not restrain diversion by an upper owner on the ground that such diversion causes sewage to accumulate in the bed of the river. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

**85.** Central of Georgia R. Co. v. Champion [Ala.] 49 S 415. Both in flood times and in times of low water. Miller v. Madera Canal & Irr. Co. [Cal.] 99 P 502. Where land was flooded by discharge of water into a stream from a state canal, the state is liable. Carhart v. State, 61 Misc. 13, 114 NYS 544.

**86.** See post, this section, Diversion.

**87.** See post, this section, Nuisance and Pollution.

**88.** Radford v. Wood [Neb.] 120 NW 458.

**89.** Kuhnis v. Lewis River Boom & Logging Co. [Wash.] 98 P 655; Judson v. Tide Water Lumber Co. [Wash.] 98 P 377.

**90.** Worthen v. White Spring Paper Co. [N. J. Eq.] 70 A 468. Must not unnecessarily and unreasonably impair its usefulness by others. In re Delaware River at Stilesville, 131 App. Div. 403, 115 NYS 745.

**91.** The right to receive the natural flow of the water is a natural easement, and inheres in the estate entitled to the benefit. Atlanta & B. Air Line R. Co. v. Wood [Ala.] 49 S 426. The **right to create water power by damming a stream** and using the power for operation of a mill is inseparably connected with ownership of the land through which the stream flows. Does not depend on acquisition of rights in land abutting on the stream below the dam. Corse v. Dexter [Mass.] 88 NE 332. The **right of drainage through a natural watercourse** is a natural easement appurtenant to the land of every individual through which it runs. Every owner along such course must take notice of the easement of others along the same. Mason City & Ft. D. R. Co. v. Wright County Sup'rs [Iowa] 121 NW 39; Chicago & N. W. R. Co. v. Drainage Dist. No. 5 [Iowa] 121 NW 193.

**92.** Miller v. Madera Canal & Irr. Co. [Cal.] 99 P 502. Such rights are inseparable from the soil itself. Judson v. Tide Water Lumber Co. [Wash.] 98 P 377.

**93.** Worthen v. White Spring Paper Co. [N. J. Eq.] 70 A 468.

**94.** The use must be lawful, and must be exercised with due regard to the rights of others. Worthen v. White Spring Paper Co. [N. J. Eq.] 70 A 468. The use must be reasonable with reference to the rights of other owners. Price v. High Shoals Mfg. Co. [Ga.] 64 SE 87. Instructions approved. Id. Each riparian proprietor is entitled to a reasonable use of the waters of a stream, Worthen v. White Spring Paper Co. [N. J. Eq.] 70 A 468. Subject to reasonable use by upper proprietors. North Alabama Coal, Iron & R. Co. v. Jones [Ala.] 47 S 144. Where a riparian owner conveyed the upper portion of the tract and later the lower portion, held, the upper owner had no greater riparian rights than the lower, though such tract contained a more ancient structure. Worthen v. White Spring Paper Co. [N. J. Eq.] 70 A 468. Evidence held to show that lower owner was not injured by upper owner's use of water. Mentone Irr. Co. v. Redlands Elec. L. & P. Co. [Cal.] 100 P 1082.

**95.** Boyd v. Schreiner [Tex. Civ. App.] 116

for generating power,[96] or using the stream for drainage purposes is not unreasonable,[97] but the diversion of a perceptible quantity of water for use of nonriparian proprietors,[98] or the use of machinery not adapted to the size and capacity of the stream, is unreasonable.[99] Continuous unreasonable use may be enjoined.[1]

The doctrine that a riparian owner is limited to a reasonable use of the stream applies only as between riparian owners.[2]

The right of a riparian owner to the natural flow of the stream cannot be taken without compensation.[3]

One may lawfully take gravel from the bed of the stream on his own premises.[4] A riparian owner has not the exclusive right to fish when he does not own the bed of the stream.[5] The right to maintain a dam is subject to the rights of the public to use the waters.[6]

In South Carolina, owners are required by statute to clean the bed of the stream on their premises.[7]

*Interference and obstruction.* See 19 C. L. 1998—While water may be temporarily detained for use,[8] a lower owner may not obstruct the flow of a stream to the in-

SW 100. Whether use by an upper owner is reasonable is a question for the jury, where there is any evidence of unreasonable use. Capacity of stream, adaptation of machinery to it, general usage of the country, and other facts, are to be considered. Mason v. Apalache Mills, 81 S. C. 554, 62 SE 399. Construction of a dam across a stream, and a reasonable and ordinary use of water for power for operation of a mill by owner of land through which the stream flows, does not create an easement or right to flood land abutting on the stream below. Corse v. Dexter [Mass.] 88 NE 332.

96. He may use the power of the water for generation of electricity for use on nonriparian lands. Mentone Irr. Co. v. Redlands Elec. L. & P. Co. [Cal.] 100 P 1082.

97. A village through which flows a stream, being owner of the dominant inheritage, may collect surface waters and have them pass by way of the stream through land of a lower owner, so long as it does not cast sewage on his land and create a nuisance. It may collect and conduct the water to the stream by underground tile drains instead of by surface ditches. Crane v. Roselle, 236 Ill. 97, 86 NE 181. Injunction will not be granted against such use of the stream unless a nuisance is shown to exist. Id.

98. Where a water company diverts a perceptible quantity of water for use of its customers, some of whom live in a different water shed, the use is unreasonable. City of Patterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

99. An action by lower owner for diminution, evidence that upper owner was using stream to propel machinery not adapted to size and capacity of the stream was admissible. Price v. High Shoals Mfg. Co. [Ga.] 64 SE 87.

1. Mason v. Apalache Mills, 81 S. C. 554, 62 SE 399. Verdict held not to cover future damages so as to render granting of injunction improper. Id.

2. As against a nonriparian owner, he may prevent diversion which will deprive him of the usual flow. Miller v. Madera Canal & Irr. Co. [Cal.] 99 P 502. The rights of a nonriparian licensee of a riparian owner are not coextensive with those of other riparian owners. Stoner v. Patten [Ga.] 63 SE 897.

3. Where water of a stream is taken under power of eminent domain, damages are to be based on amount of water which may be taken, irrespective of amount actually diverted. James v. West Chester Borough, 220 Pa. 490, 69 A 1042. Where city of Boston, under St. 1896, p. 552, c. 530, empowering the city to make a new channel for Stoney Brook, has taken land for a new channel, riparian owners from whose lands the stream has been taken may recover damages. Oelschleger v. Boston, 200 Mass. 425, 86 NE 883. St. 1896, p. 552, c. 530, authorizing the city of Boston to change the channel of Stoney Brook, held not to authorize taking the waters of the stream. Id.

4. One may lawfully take gravel from the bed of a stream if he does not interfere with rights of other citizens in the gravel. Goar v. Rosenberg [Tex. Civ. App.] 115 SW 653. A city had no authority to prevent removal of a bank of gravel formed as accretion to an owner's land, though a portion of the gravel was within city limits, where such removal did not interfere with streets or create a nuisance. Id.

5. Ex parte Bailey [Cal.] 101 P 441.

6. In re Delaware River at Stilesville, 131 App. Div. 403, 115 NYS 745.

7. Under Civ. Code 1902, §§ 1465-1468, making it the duty of commissioners of health to enforce landowners to clean streams, it is their duty, and not the duty of courts, to determine whether a landowner has failed to perform his duty. Mason v. Apalache Mills, 81 S. C. 554, 62 SE 871. Where it appears that bed of river on lower owner's land has been raised by deposits of sand, an injunction against use by upper owner should be conditioned upon lower owner's permitting the upper owner to clean out the bed at his own expense, where such act would permit use by the upper owner without flooding. Mason v. Apalache Mills, 81 S. C. 554, 62 SE 399. The making of such injunction does not require the upper owner to clean the stream or affect his right to apply to the commissioners of health to enforce the lower owner to clean it out, as required by Civ. Code 1902, §§ 1465-1468. Mason v. Apalache Mills, 81 S. C. 554, 62 SE 871.

8. Water company which maintained a

jury of an upper proprietor,[9] and, a fortiori, a third person using the stream cannot do so.[10] Wrongful obstruction may be enjoined,[11] or an action will lie for the recovery of damages for injuries sustained,[12] and, if no actual damage has been sustained, nominal damages may be recovered.[13] In some states statutory remedies are provided.[14] One partially obstructing the flow of a stream must anticipate the possible consequences[15] and provide for freshets and excessive rainfall.[16]

dam held not negligent in lowering a spillway during an unprecedented flood. Deerpark Brew. Co. v. Port Jervis Waterworks Co., 129 App. Div. 420, 114 NYS 119. May detain the water so far as reasonable and necessary, but not otherwise. North Alabama Coal, Iron & R. Co. v. Jones [Ala.] 47 S 144. Instructions held insufficient. Id. Unreasonable use is not shown by decrease in volume or an increase therein by storage and subsequent use. Mason v. Apalache Mills, 81 S. C. 554, 62 SE 399.

**9.** A riparian owner who obstructs the stream and causes it to flood land of an upper owner is liable. Lancaster & J. Elec. L. Co. v. Jones [N. H.] 71 A 871. He may not obstruct the stream in the improvement of his premises no matter how high a degree of care he uses. McGehee v. Tidewater R. Co., 108 Va. 508, 62 SE 356. In action by lessee from year to year for damages by flooding caused by obstruction of a water course, it is no defense that his lease was renewed while the obstruction existed. Ramey v. Baltimore, etc., R. Co., 235 Ill. 502, 85 NE 639. **Railroad companies** must exercise due care not to obstruct streams by embankments. Central of Georgia R. Co. v. Champion [Ala.] 49 S 415. Evidence sufficient to show that flooding was caused by an obstruction placed in the stream. Southern R. Co. v. Ward, 131 Ga. 21, 61 SE 913. Railroad company held liable for injuries to crops by flooding caused by construction of a drift across a valley and creek. Missouri K. & T. R. Co. v. Cannon [Tex. Civ. App.] 111 SW 661. In action against a railroad company for damages to adjacent land by flooding, caused by widening the roadbed by filling in a stream, held a question for determination whether the company could have accomplished its purpose by some other plan without injury to plaintiff. Ferdon v. New York, O. & W. R. Co., 131 App. Div. 380, 115 NYS 352.

**10.** Evidence held to show that company **driving logs** on a stream did not exercise the necessary degree of care to prevent a jam causing flooding of riparian lands. Mandery v. Mississippi & Rum River Boom Co., 105 Minn. 3, 116 NW 1027. One who obstructs the channel of a **navigable stream** and diverts the waters against a bank and cause land to be washed away is liable. Judson v. Tidewater Lumber Co. [Wash.] 98 P 377; Ami Co. v. Tide Water Lumber Co. [Wash.] 98 P 380. Where obstruction of a stream was involved in state plan for construction of a canal, the **remedy of the riparian owner was against the state** and not against the contractor. Meneely v. Kinser Const. Co., 128 App. Div. 799, 113 NYS 183.

**11.** Obstruction by dam. Hastie v. Jenkins [Wash.] 101 P 495. Where dams by upper owner on a navigable stream injured lower owners, held, they were entitled to enjoin their maintenance. Trullinger v. Howe [Or.] 99 P 880. In suit to enjoin a dam, evidence held to show that it backed water over plaintiff's land. Wilhite v. Billings & Eastern Montana Power Co. [Mont.] 101 P 168. On question of enjoining maintenance of a dam, comparative injury held immaterial under the evidence. Id. If a railroad company by its embankment constantly pen back the water of a stream, an owner injured may abate it as a nuisance. Central of Georgia R. Co. v. Champion [Ala.] 49 S 415. As incidental relief, actual damages sustained are recoverable. Id. Defense of railroad company to granting of injunctive relief against obstruction of water of a stream held inequitable. Id. Where a dam backs water upon land of another, a decree should demand its abatement as a nuisance and not that it should be rebuilt or repaired where there is no evidence that this is necessary. Wilhite v. Billings & Eastern Montana Power Co. [Mont.] 101 P 168.

**12.** That one has partially obstructed a stream does not prevent him from recovering damages from another who further obstructs it. American Locomotive Co. v. Hoffman, 118 Va. 363, 61 SE 759. One who obstructs a water course by a dam and causes land to be flooded is liable in damages. Hastie v. Jenkins [Wash.] 101 P 495. Any obstruction of the flow of a stream which results in injury to another renders the obstructing person liable for damages no matter how carefully the work was done. Beauchamp v. Taylor, 132 Mo. App. 92, 111 SW 609.

**13.** Lower owner can recover only nominal damages for detention of the water unless he shows special damages. North Alabama Coal, Iron & R. Co. v. Jones [Ala.] 47 S 144. Evidence of rental value improperly admitted where there was no loss of rents. Id.

As to procedure in such actions, see post, § 18.

**14.** Complaint by lower owner for detention of water by upper owner held not for penalty prescribed by Code 1907, §§ 3906, for building dams without authority, nor under § 6147 authorizing damages for diverting stream from its natural channel. North Alabama Coal, Iron & R. Co. v. Jones [Ala.] 47 S 144. Liability for obstruction of water course under Laws 1903, c. 147, stated. Meneely v. Kinser Const. Co., 130 App. Div. 525, 114 NYS 1136.

**15.** One who constructs a dam is presumed to know the consequences thereof and cannot complain that an owner damaged did not give him notice. Wilhite v. Billings & Eastern Montana Power Co. [Mont.] 101 P 168.

**16.** A company which owns the bed of a srteam is bound to exercise the highest degree of care not to obstruct it and cause it to overflow in case of freshets which, though unusual, are known to have occurred in the past. City of Oroville v. Indiana Gold-Dredging Co., 165 F 550. Where an upper owner

*Bridges and culverts.*[See 10 C. L. 2000]—A railroad company in constructing its roadbed across a stream must construct bridges and culverts of sufficient capacity to accommodate the ordinary flow of water [17] and ordinary floods,[18] but it is not required to provide against unusual or extraordinary floods.[19] Municipalities are subject to a like rule.[20]

*Nuisance and pollution.*[See 10 C. L. 2000]—An upper owner may not pollute the stream to the injury of a lower owner,[21] unless he has acquired a prescriptive right to do so.[22] He may not deposit in the stream refuse matter which renders the water unfit for domestic use,[23] nor may he deposit such matter on his lands so that

was dredging for gold in the bed of a stream in such manner as to leave a ridge of sand across the bed from 10 to 30 feet high, increasing danger of overflow which had on two occasions within 50 years caused great damage to a city lower down, held such obstruction could be enjoined. Id. Where railroad company in constructing its road bed filled a ravine and substituted another course for flood waters, held that it was bound to know that excessive rains might occur at any time and damage result from inadequate provision Smith v. Chicago, B. & Q. R. Co. [Neb.] 119 NW 669. The lessee of the original owner and builder is also liable. Id. Evidence held to show that flooding of land was caused by very heavy rainfall and not by failure of railroad company to remove obstructions from a ditch on its right of way through which water passed into a creek. Bones v. Chicago, etc., R. Co. [Iowa] 120 NW 717.

**17.** In construction of an embankment across the valley of a watercourse, a railroad company must build sufficient culverts to permit the passage of such flood waters as might reasonably be expected. Hinton v. Atchison & N. R. Co. [Neb.] 120 NW 431. Proof of its failure to do so is proof of negligence for which an upper owner may recover. Id. In such case evidence is admissible to show that floods were not unprecedented and that former excessive rainfalls did not deluge the land in controversy. Id. Evidence of damages in another part of the valley than that in which plaintiff's property was destroyed was inadmissible in the absence of evidence that the rainfall was practically the same in the two places. Id. Evidence held to show that backing up of water was caused by insufficient opening left in bridge over the stream. Wilson v. Pennsylvania R. Co., 129 App. Div. 821, 113 NYS 1101. In constructing its embankment, bridges or culverts over a watercourse, a railroad company does so subject to the right of the state to provide for such use of the watercourse as may become proper for public interests. Mason City & Ft. D. R. Co. v. Wright County Sup'rs, [Iowa] 121 NW 39. Where railroad company in constructing a bridge made insufficient outlet for water reasonably to be expected to flow, it was held liable to owner injured. Wilson v. Pennsylvania R. Co., 129 App. Div. 821, 113 NYS 1101. Where a railroad is built across a stream and a culvert constructed and the company subsequently digs ditches along its roadbed and diverts the water of the stream onto adjoining land, it is liable in damages. St. Louis S. W. R. Co. v. Clayton [Tex. Civ. App.] 118 SW 248. For flooding land by negligent construction of railroad embankment, the difference in the value of the land before and after the injury may be recovered. Missouri, K. & T. R. Co. v. Chilton [Tex. Civ. App.] 118 SW 779.

**18.** In constructing a bridge over a stream the company should take notice of prior periodical floods, and guard against possible obstruction. Wilson v. Pennsylvania R. Co,. 129 App. Div. 821, 113 NYS 1101.

**19.** A company is not bound to construct openings in its embankment so as to let flood waters of a creek pass, its duty being to use ordinary care to provide other channels to carry off waters on their diverted course if the embankment diverts them to an unnatural course. St. Louis, etc., R. Co. v. Walker [Ark.] 117 SW 534. Whether damage resulted from negligent construction and wrongful obstruction of a stream by maintaining a bridge held for the jury. Crook v. Chicago, etc., R. Co. [Iowa] 119 NW 696.

**20.** A city which obstructs a stream by construction of too small a culvert is liable for the nuisance though the outlet of the culvert is outside city limits. Martin v. St. Joseph [Mo. App.] 117 SW 94. It is liable though it did not originally construct the street. Id. A city in improving a street which by its grade holds flood waters of a stream into the original channel is not liable for damages caused by flooding unless it was negligent in not constructing a culvert for such flood waters. Walters v. Marshalltown [Iowa] 120 NW 1046. Under Gen. St. 1901, § 579, held a county was not liable where a bridge constructed by it caused flooding of adjacent lands. Shawnee County Com'rs v. Jacobs [Kan.] 99 P 817.

**21.** May not make any appreciable discharge of any noisome substance into the stream. Worthen v. White Spring Paper Co. [N. J. Eq.] 70 A 468. Where owner of paper mill discharged into stream larger quantities of waste cotton fiber which discolored the water, held a lower owner could have relief in equity. Id. An owner being entitled to have water come to him unpolluted is not required to use precautions to prevent polluting of his materials used in his bleachery. Id. A lower owner is entitled to recover the water free from pulution, and for substantial injury to such right he may maintain action regardless of the motive which prompted its invasion. Straight v. Hover, 79 Ohio St. 263, 87 NE 174.

**22.** In action for pollution of a stream, an answer alleging that such stream had been polluted by other mills for 50 years held a partial defense to claim for damages, and not demurrable. Whalen v. Union Bag & Paper Co., 130 App. Div. 313, 114 NYS 220.

**23.** A miner has no right to deposit de-

it reaches the stream by percolation.[24] He may, however, facilitate the natural drainage of surface water into a stream.[25] Statutes forbidding the discharge of sewage into streams are usually held not to apply to cities having previously constructed sewer system,[26] but power granted to cities to build and maintain sewers does not authorize a public nuisance.[27] A lower proprietor may enjoin an upper from polluting the stream.[28] Such relief is available though the upper owner has installed appliances to prevent pollution.[29]

*Diversion.*[See 10 C. L. 2002]—Riparian proprietors being entitled to the natural flow of the stream, an upper owner has no right to divert the waters.[30] He may, however, divert the water from its channel within the boundaries of his land,[31] providing he does so in such manner as to cause no injury to the lower proprietor.[32] A lower owner may be estopped to complain of diversion[33] but facts constituting an estoppel must appear.[34] A lower owner may restrain diversion though he fails

bris, etc., in a stream and cause the same to be deposited on land of a lower owner, or in such manner as to cause such lower owner's land to be flooded or washed away. Salstrom v. Orleans Bar Gold Min. Co., 153 Cal. 551, 96 P 292. The owner of an oil well is not liable for injuries to land caused by pollution of a stream bordering on the land with oil and salt water, where such pollution is necessary to the enjoyment of the well. Ohio Oil Co. v. Westfall [Ind. App.] 88 NE 354. Whether he has exercised reasonable diligence to prevent injury is a question of fact. Id. Where an upper owner operates his lands for oil and pumps oil and salt water into the stream, he is liable to the lower owner for injuries resulting from the pollution, though such operations are conducted with care and in the only known practicable method. Straight v. Hover, 79 Ohio St. 263, 87 NE 174. In action for polluting a stream by sewage, where there was no evidence is to how much sewage reached the stream from a certain ditch, no recovery could be had therefor. Phillips v. Amada [Mich.] 15 Det. Leg. N. 983, 118 NW 941. For injury to land by deposit of sewage in a stream, evidence held to show that it was injured to the extent of $100 per acre. Morris v. Missouri Pac. R. Co. [Mo. App.] 117 SW 687. Where city collects sewage and discharges into stream to injury of riparian owner, latter may recover for damage. Depreciation in value of land, proper element of damages. Kellogg v. Kirkville, 132 Mo. App. 519, 112 SW 296.

**24.** He may not cast on his land foul matter, which reaches the stream by percolation and pollutes the water and renders it unfit for reasonable use by a lower owner. Atlanta & B. Air Line R. Co. v. Wood [Ala.] 49 S 426.

**25.** Village may conduct its surface water into a stream by under ground tile drains. Crane v. Roselle, 236 Ill. 97, 86 NE 181.

**26.** Act March 17, 1899 (P. L. p. 73), to secure purity of waters under proviso of first section, exempts municipalities having systems of sewers or drains constructed at time of passage. Board of Health v. Phillipsburg [N. J. Eq.] 71 A 750. Injunction to restrain discharge of sewage denied, where constructed many years previously with consent of the then owner and extended on request of joint owner, where hardship would be imposed on city, and owner could recover in one action for damages past and future. Somerset W. L. & Trac. Co. v. Hyde, 33 Ky. L. R. 866, 111 SW 1005. Injunction discretionary. Id.

**27.** Sess. Laws 1887, p. 151, c. 102, authorizes exercise of eminent domain to connect sewers with creeks, rivers, etc. State v. Concordia [Kan.] 96 P 487. In planning and maintaining a sewer system, provision must be made for what may be naturally and reasonably anticipated. Id. When authorized by legislature, it will be presumed no nuisance was intended. Id.

**28.** Is not required to seek his remedy at law. Worthen v. White Springs Paper Co. [N. J. Eq.] 70 A 468. Injunction which would close extensive mines properly refused, where it appeared that comparatively small damage was done to lower owners because of deposit of tailings in a stream which was deposited on land at flood periods, and the mining company had done all that could reasonably be done to prevent injury. McCarty v. Bunker Hill & Sullivan Min. & Concentrating Co. [C. C. A.] 164 F 927.

**29.** Such appliances may give way or the upper owner may discontinue their use. Worthen v. White Springs Paper Co. [N. J. Eq.] 70 A 468.

**30.** Evidence held to show a perceptible diversion of water to upper owner's injury. City of Patterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472. Evidence held to show that operation of mill and power plant by lower owners was interfered with by maintenance of splash dams by upper owner. Trullinger v. Howe [Or.] 97 P 548.

**31.** Mentone Irr. Co. v. Redlands Elec. L. & P. Co. [Cal.] 100 P 1082.

**32.** The rule that one may divert the waters within his own boundaries does not entitle him to make diversion in such manner as to cause the stream to flood the land of a lower owner. Wood v. Craig, 133 Mo. App. 548, 113 SW 676.

**33.** Where he stands by and sees another go to great expense in constructing a system to divert. Miller v. Madera Canal & Irr. Co. [Cal.] 99 P 502. Facts held not to show an estoppel. Id.

**34.** A lower owner is not estopped to complain of diversion by a water company by the fact that he did not object to the construction of costly works by it. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472. A claim that a lower owner is estopped to complain of diversion because it stood by while water company was con-

to show perceptible injury where such diversion may ripen into a right.[35] Diversion of flood waters will not be enjoined at the instance of a riparian owner not injured thereby,[36] but may be enjoined if he is injured.[37] In a suit to restrain diversion by a water company, injunction will not be awarded unless other water companies, which obtain their supply from defendant's reservoirs, are made parties.[38]

§ 4. *Rights in lakes and ponds.*[39]—See 10 C. L. 2003—The waters of a lake may not be polluted to the injury of a riparian proprietor.[40] Nor may they be diverted [41] unless a prescriptive right has been acquired,[42] in which case the quantity which may be taken is limited by the prescriptive right acquired.[43] Where a lower riparian owner is injured by diversion of water from a lake, he may sue either in law or equity.[44] If equitable relief cannot be awarded, the court should retain jurisdiction and adjudge his damages.[45] The legislature may permit a town to take water from a great pond without compensating owners affected thereby,[46] or it may provide for damages for such owners.[47]

§ 5. *Rights in subterranean and percolating waters.*[48]—See 10 C. L. 2003—As a general rule, percolating waters [49] are considered as a part of the land and may be

structing expensive works to effect diversion is not sustained where it appears that complainant served notice that it would object. Id. After the lower had served notice that it would object to diversion, it was not required to follow up such notice by resort to legal proceedings to prevent expenditure. Id.

35. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472. An upper owner may be enjoined from diverting the waters of a stream to the injury of a lower owner, though the diversion has not been completed and damage has not been inflicted. Wood v. Craig, 133 Mo. App. 548, 113 SW 676.

36. Miller v. Madera Canal & Irr. Co. [Cal.] 99 P 502. The maxim "de minimus non jurat lex" may be applied to prevent injunctive relief against diversion at flood stage when utilization consists of appropriation of surplus water. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472. Whether such maxim is to be applied, the condition of the stream at the time of its lowest stage must be considered. Id.

37. Where flood waters deposited fertilizing material on his lands. Miller v. Madera Canal & Irr. Co. [Cal.] 99 P 502.

38. City of Paterson v. East Jersey Water Co. [N. J. Eq.] 70 A 472.

39. **Search Note:** See Waters and Water Courses, Cent. Dig. §§ 118-125; Dec. Dig. §§ 108-114; 18 A. & E. Enc. L. (2ed.) 129.

40. Pollution which results in injury to fishing and ice harvest privileges may be enjoined. Fischer v. Missouri Pac. R. Co. [Mo. App.] 115 SW 477.

41. A city as riparian owner cannot divert water from a lake for use of its citizens and for manufacturing establishments within its limits. Stock v. Hillsdale [Mich.] 15 Det. Leg. N. 1043, 119 NW 435. Where a city diverts water from a lake to supply its water system, the damages sustained by a lower owner are measured by actual damages he sustains from failure of the water to flow past his premises. Id.

42. Where a city had for 20 years taken water from a lake for use of its citizens, held it had acquired a prescriptive right. Stock v. Hillsdale [Mich.] 15 Det. Leg. N. 1043, 119 NW 435. Where a city acquired a prescriptive right to take water from a lake to supply its system, and a lower riparian owner made no objection for 20 years, held he was not entitled to an injunction to limit the amount the city was entitled to take to the amount it had used for the statutory period. Id. Where such owner knew for 20 years that use of water by the city was increasing, held he was not entitled to enjoin further extension of the plant. Id.

43. A city which acquires a prescriptive right to take water from a lake for its waterworks plant is limited in its right to substantially the amount of water taken during the period. Stock v. Hillsdale [Mich.] 15 Det. Leg. N. 1043, 119 NW 435.

44, 45. Stock v. Hillsdale [Mich.] 15 Det. Leg. N. 1043, 119 NW 435.

46. In making a public grant, the state may impose such terms as it seems fit. It may relieve the grantee from payment of any damages or may require compensation to private persons. Dodge v. Rockport, 199 Mass. 274, 85 NE 172.

47. Under Laws 1894, p. 65, requiring a town to pay damages caused by taking water from a great pond, the rights of an owner injured held analogous to those of a riparian owner. Dodge v. Rockport, 199 Mass. 274, 85 NE 172. Damages held the proximate result of the taking. Id. The amount of the damages was exclusively for jury. Id. Interest on damages awarded held properly allowed from time waters were diverted. Id.

48. **Search Note:** See notes in 6 C. L. 1848; 19 L. R. A. 92, 99; 30 Id. 186; 64 Id. 236; 6 L. R. A. (N. S.) 266, 1099; 67 A. S. R. 663, 669; 99 Id. 66; 4 Ann. Cas. 829; 5 Id. 681; 10 Id. 846.

See, also, Waters and Water Courses, Cent. Dig. §§ 108-117; Dec. Dig. §§ 99-107; 30 A. & E. Enc. L. (2ed.) 310.

49. "Artesian" is sometimes used in reference to underground water which by reason of pressure will rise above its natural level when the startum in which it lies is pierced. Burr v. Maclay Rancho Water Co. [Cal.] 98 P 260. One who claims it as a stream has the burden to show that it is a

intercepted by an owner;[50] but in some states statutory provision is made for the preservation of such waters,[51] and in some of the western states the doctrine of correlative rights therein by adjacent owners has been announced.[52] What constitutes a reasonable use depends on the circumstances of each case.[53] The right of a landowner to percolating water for use on his land is superior to that of an adjoining owner to take such water to distant land.[54] An appropriation of subterranean water for use on distant lands is subject to reasonable use by the owner of lands lying over the basin which were purchased because of their location respecting the water.[55] Rights of landowners may be lost by estoppel.[56] A judgment fixing the rights of adjoining owners to take percolating waters from the same basin should be so framed as to prevent depletion of the basin.[57] Percolating water may be subject to contract rights independent of title in the land.[58] One may not negligently pollute the well of another.[59]

§ 6. *Rights in tide waters.*[60]

§ 7. *Rights in artificial waters.*[61]—See 4 C. L. 1831

§ 8. *Ice.*[62]—See 10 C. L. 2005—The right to take ice cannot be impaired by pollution of the waters.[63] Where a stream is a public highway, the ice thereon may be used by the public for skating.[64]

§ 9. *Surface waters and drainage or reclamation.*[65]—See 10 C. L. 2005—In the in-

stream. Arroyo Ditch & W. Co. v. Baldwin [Cal.] 100 P 874. Evidence insufficient. Id.

**50.** City has absolute right to appropriate percolating water flowing under land owned by it. Meeker v. East Orange [N. J. Law] 70 A 360. Ordinarily, percolating water belongs to the owner upon whose land it is found. Hathorn v. Natural Carbonic Gas Co., 128 App. Div. 33, 112 NYS 374. Injury to subterranean supply by lawful acts by adjacent owner is damnum absque injuria. Stoner v. Patten [Ga.] 63 SE 897.

**51.** See ante, § 2. The state under its police power may regulate the use of mineral wells to prevent injury to adjacent owners. Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326, 87 NE 504. A landowner has no vested right to unnaturally and unreasonably force the flow of percolating waters for any purpose not connected with the use or enjoyment of his land. Id.

**52.** Erickson v. Crookston Waterworks P. & L. Co., 105 Minn. 182, 117 NW 435, following 100 Minn. 481, 111 NW 391. The doctrine of correlative rights in percolating waters was a change in the law, and a clear case must be made to justify an injunction against continuance of use of such waters taken in good faith before the doctrine was enunciated. Barton v. Riverside Water Co. [Cal.] 101 P 790.

**53.** Erickson v. Crookston Waterworks P. & L. Co., 105 Minn. 182, 117 NW 435. Where a city water supply company adopts the most approved method of securing water from an artesian basin, it is not liable if another's well is so reduced that it becomes necessary to use a power pump. Pumping from an artesian basin does not constitute an artificial taking. Id. Evidence held not to show that another system than pumping was feasable. Id.

**54, 55.** Burr v. Maclay Rancho Water Co. [Cal.] 98 P 260.

**56.** Where a water company proceeded at great expense to dig additional wells to an artesian basin, and other owners stood by, they were held estopped to enjoin use of such wells. Barton v. Riverside Water Co. [Cal.] 101 P 790.

**57.** Should limit amount taken to average supply of rainfall. Burr v. Maclay Rancho Water Co. [Cal.] 98 P 260.

**58.** Where an owner of an artesian well grants a perpetual flow of water therefrom and thereafter conveys the land upon which the well is situated subject to existing rights, his grantee cannot be protected in his interference, with such flow by the rules governing percolating waters. Charon v. Clark, 50 Wash. 191, 96 P 1040.

**59.** If a landowner accumulates contaminating matter upon his land and negligently permits it to percolate through the soil and pollute a neighbor's well, he is liable for the injury. Ballantine & Public Service Corp. [N. J. Law] 70 A 167.

**60.** See 10 C. L. 2004; see, also, Riparian Owners, 12 C. L. 1702.

**Search Note:** See Navigable Waters, Cent. Dig.; Dec. Dig.; 25 A. & E. Enc. L. (2ed.) 157.

**61. Search Note:** See notes in 50 L. R. A. 836; 62 Id. 579; 16 L. R. A. (N. S.) 280.

See, also, Water and Water Courses, Cent. Dig. §§ 190-265; Dec. Dig. §§ 159-179.

**62. Search Note:** See notes in 3 L. R. A. (N. S.) 1103; 8 Ann. Cas. 30.

See, also, Waters and Water Courses, Cent. Dig. §§ 332-337; Dec. Dig. §§ 292-298; 15 A. & E. Enc. L. (2ed.) 907.

**63.** Injunction granted. Fischer v. Missouri Pac. R. Co. [Mo. App.] 115 SW 477.

**64.** Persons cutting ice bound to guard openings, under Pen. Code, § 429. Linzey v. American Ice Co., 131 App. Div. 333, 115 NYS 767.

**65. Search Note:** See notes in 6 C. L. 1852, 21 L. R. A. 593; 25 Id. 527; 27 Id. 294; 46 Id. 322, 51 Id. 930; 65 Id. 250; 1 L. R. A. (N. S.) 596; 5 Id. 831; 6 Id. 146, 154; 12 Id. 680; 15 Id. 541; 16 A. S. R. 710; 2 Ann. Cas. 197; 3 Id. 208, 847· 6 Id. 990; 7 Id. 687; 8 Id. 1024; 11 Id. 1143.

terests of good husbandry, an owner may drain ponds and basins on his land,[66] and may drain surface water into a watercourse on his land which is the natural outlet of such surface water,[67] but one may not lawfully drain a meandered lake onto another's property,[68] or drain his land across land of his neighbor,[69] in the absence of a prescriptive easement[70] or license.[71] A parol permission to dig a drainage ditch through land is a mere revocable license, though the ditch has been dug in reliance thereon.[72] One may not accumulate surface waters in such manner as to constitute a nuisance.[73] A prescriptive right to maintain a drainage ditch is not lost by temporarily obstructing it.[74] Two or more owners may join in a ditch situated wholly on the land of one to drain a pond situated on the lands of all.[75] If a ditch is constructed by agreement and recognized as a waterway, neither party is compelled to clear it of rubbish, but either may do so.[76] An owner, through whose land a ditch for the benefit of others runs, may not obstruct such ditch.[77] In some

See, also, Waters and Water Courses, Cent. Dig. §§ 126-142; Dec. Dig. §§ 115-126; 30 A. & E. Enc. L. (2ed.) 323.

66. Basins and ponds of a temporary character, which have no natural outlet, may be drained by artificial channel into a natural depression, though the flow of such natural drain is thereby increased over the lower estate. Arthur v. Glover [Neb.] 118 NW 111.

67. His land is not subject to assessment for cost of a ditch to prevent overflow of such watercourse or to benefit drainage of servient lands. Mason v. Fulton County Com'rs [Ohio] 88 NE 401.

68. Gatz v. Diessner, 106 Minn. 117, 118 NW 255. Such other may require him to fill up the ditch and restore the natural outlet to its former condition. Id.

69. Adjoining owner may not drain his land and conduct water across his neighbor's land without his consent. Morse v. Swanson, 129 App. Div. 835, 114 NYS 876. Where natural drain has been changed so that surface water flows upon land of a neighbor, a decree restraining such diversion and compelling restoration of the land to its former condition properly specifies the character of ditch to be maintained. Cronin v. Payne [Mich.] 16 Det. Leg. N. 267, 121 NW 290. An owner cannot enter a railroad right of way to dig a ditch for water discharged onto his land through the construction of an embankment on the right of way. Klopp v. Chicago etc., R. Co. [Iowa] 119 NW 377.

70. One may acquire a prescriptive easement to drain surface water collected on his land over adjacent land where such privilege is used and acquiesced in by such adjacent owner for fifty years. Blenn v. Line [Mich.] 15 Det. Leg. N. 1149, 119 NW 1097. A permanent right to maintain a drainage ditch over lands of another for the benefit of adjacent land is an easement. Passes with a grant of such adjacent land though not specially mentioned. Brown v. Honeyfield [Iowa] 116 NW 731. Action of county and township officers in throwing additional water into a private drainage ditch does not affect the rights of the owners of the ditch to have it maintained. Id. Changing course of drainage ditch dug at joint expense of owners of land benefited will not extinguish the easement unless it appears that the quantity of water thrown upon the servient estate will be unduly increased. Id.

71. A permanent right of drainage through land of another may be acquired where a ditch has been constructed jointly by owners under an oral agreement, and where time and money has been expended on faith of such agreement. Brown v. Honeyfield [Iowa] 116 NW 731. Assent of an owner to the construction of a ditch on his land is in the nature of a license, which, being acted upon, cannot be disregarded. Id.

72. McIntyre v. Harty, 236 Ill. 629, 86 NE 581. Such license is revoked by conveyance of the land executed prior to the act of 1889, relative to construction of drainage ditches by agreement of adjacent owners. Id. License to dig a ditch across land of another held a mere license, where the ditch was of no benefit to anyone except the licensee. Id. Laws 1889, p. 116, relating to drains constructed by mutual consent or agreement of owners of adjacent lands, if construed to revive licenses to construct ditches revoked before it went into effect, is void. Id. Such act, providing that when a drain has been constructed by mutual license it shall be deemed one for mutual benefit, etc., applies to ditches under agreement when the act took effect, and does not revive licenses theretofore revoked. Id.

73. Mere construction of large excavation for surface water on one's premises near another's residence held not of itself a nuisance. Sanders v. Miller [Tex. Civ. App.] 113 SW 996.

74. A prescriptive right to drain surface water across adjacent land is not forfeited by placing obstructions in the drain to enable the dominant owner to cross it during harvest time. Glenn v. Line [Mich.] 15 Det. Leg. N. 1149, 119 NW 1097.

75. Arthur v. Glover [Neb.] 118 NW 111. Where a ditch constructed jointly by several owners had been maintained for 40 years, held to sustain a finding that parties intended to make it a permanent improvement. Brown v. Honeyfield [Iowa] 116 NW 731.

76. O'Mara v. Jensma [Iowa] 121 NW 518.

77. Where owner of land, through which a drainage ditch ran for benefit of others, obstructed it, a judgment ordering him to remove obstructions and place the ditch in the same condition it was in at a certain date held sufficiently definite. Brown v. Honeyfield [Iowa] 116 NW 731. In action for constructing a levee and filling a ditch which resulted in throwing surface water upon land of another, where there was evidence that defendant's grantor had back-furrowed from the ditch which tended to drain water

states, statutory provision is made for drainage,[78] and drainage commissioners are held liable for neglect of duty.[79] A complaint for obstruction of surface waters must show defendant liable,[80] and recovery may be had for negligence alleged.[81] No duty is imposed on road commissioners to protect land along the highway from the natural overflow of water.[82]

*Common-law rule.*See 10 C. L. 2008—At common law, surface water is regarded as the common enemy of mankind, and each owner may protect his land therefrom as best he may.[83] The waters may be diverted from their course and thrown back onto the dominant estate,[84] but the right to do so may not be exercised wantonly or unnecessarily.[85] The rule which governs the right to dispose of surface water in agricultural districts does not apply to property located in populous cities.[86]

into such ditch, a charge that plowing should be considered part of the ditch was proper, if parties farmed and plowed land adjacent to it so as to drain water into it. O'Mara v. Jensma [Iowa] 121 NW 518.

78. Acts, 30th Gen. Assem. c. 70, providing that owners may drain their land in the natural course of drainage, held not to relieve an owner from damages for injuries caused by his disturbing the natural flow of surface water, though it flowed along a highway ditch before doing the damage complained of. Shefer v. Malhovec [Iowa] 116 NW 1042. Permission given by one to an adjoining landowner to a drain leading from a water tank on his land to the donor's drain, held not to bring him within protection of Acts 30th Gen. Assem. c. 70, giving one the right to drain into any natural depression. Oxley v. Corey [Iowa] 116 NW 1041. Injunction is the proper remedy to prevent wrongful flooding of land by drain commissioners, where the drain does not traverse the lands and complainants were not parties to drain proceedings. Smafield v. Smith, 153 Mich. 270, 15 Det. Leg. N. 487, 116 NW 990. Injunction held not to lie. Id.

79. Under Hurd's Rev. St. 1905, c. 42, making drainage commissioners liable for neglect of duty, held, they are liable, if by practical and feasible plan they could have furnished adequate drainage for land and failed to do so. Binder v. Langhorst, 234 Ill. 583, 85 NE 400.

80. Complaint for flooding, which does not allege that the city made the drain complained of or did any act which caused the injury, is insufficient. Harney v. Lexington [Ky.] 113 SW 115. City is not liable for injuries to abutting property caused by surface water flowing down a street, where that was the natural course of drainage and the city did not interfere with the natural course. Jung v. New York, 132 App. Div. 18, 116 NYS 368.

81. Where land was flooded partly because of heavy rainfall and partly because levee works obstructed the flow of surface waters, it was error to charge that, unless the jury believed the entire damage was done because of the levee, they should find for defendant. Corley v. Yazoo-Mississippi Delta Levee Com'rs [Miss.] 49 S 266.

82. Culverts and ditches constructed along railroads did not divert water from natural course. Padfield v. Frey, 133 Ill. App. 232.

83. McGehee v. Tidewater R. Co., 108 Va. 508, 62 SE 356. A person may rid his land of surface water as best he may, even to the injury of his neighbor, providing his efforts are reasonably necessary. Peterson v. Lindquist, 106 Minn. 339, 119 NW 50. A railroad company is not liable for flooding land with surface water, where it necessarily resulted from the construction of the roadbed, as such damages are a part of the original injury to the land. Blunok v. Chicago & N. W. R. Co. [Iowa] 120 NW 737. Lower proprietor may improve his property, though in so doing he prevents flow of surface water from upper owner's land. Sabetto v. New York Cent. & H. R. Co., 127 App. Div. 832, 112 NYS 118.

84. Owner of servient land may divert the flow of surface water and turn it back over other lands, if he does not act recklessly. Beauchamp v. Taylor, 132 Mo. App. 92, 111 SW 609. Instruction disapproved. Id. Owner of a lot may improve it, no matter if surface water is thereby diverted onto adjacent land. Mehonray v. Foster, 132 Mo. App. 229, 111 SW 882. Where one in improving his lot partially filled a ditch running between his own and an adjacent owner's lot, he was held not liable for diverting waters onto such lot. Id. Railroad incurs no liability as to surface water by constructing its embankment. Sabetto v. New York Cent. & H. R. Co., 127 App. Div. 832, 112 NYS 118. At common law, one may divert surface waters onto land of his neighbor in ordinary use of his property. Batla v. Goodell [Tex. Civ. App.] 115 SW 622. An owner may lawfully improve his property and, if he is not negligent, he is not liable to an adjoining owner for causing surface waters to be cast onto his premises. Arthur v. Glover [Neb.] 118 NW 111. Diversion of surface waters by changing their natural course in improving a lot held a mere incident to the improvement, and owner was not liable. O'Neill v. St. Paul, 104 Minn. 491, 116 NW 1114, following Brown v. Winona & S. W. R. Co., 53 Minn. 259, 55 NW 123. An owner may alter the course of surface waters by changing the surface of his land or by improving it by the construction of buildings. Field v. Gowdy, 199 Mass. 568, 85 NE 834.

85. In Virginia this rule is subject to the modification that obstruction must be in good faith and not wantonly or unnecessarily. McGehee v. Tidewater R. Co., 108 Va. 508, 62 SE 356. In action for diversion of surface water in improvement of premises, whether reasonable care was used held for jury. Id. Evidence insufficient to show that flooding of cellars was due to the city's negligence. Paterno v. New

*Civil law rule.* See 10 C. L. 2008—At civil law, an owner has the right to have surface water flowing on his land follow its natural course,[87] and a person has the right to drain his own field even if by doing so he increases the flow of water upon his neighbor's land in a natural depression;[88] but he has no right in doing so to disturb in any way the flow of waters which would pass off his premises through an outlet provided by a mutual system of drainage,[89] and is liable for damage caused by forcing water from its natural flow.[89a]

*Railroad companies*[90] in constructing their embankments must provide culverts to carry off the natural flow of surface waters,[91] and failure to do so is negligence,[92] for which an adjacent owner injured may recover damages[93] or enjoin

York, 130 App. Div. 265, 114 NYS 610. In the absence of negligence in the manner of collecting and furnishing an outlet for water through sewers, a city is not liable for flooding a cellar caused by natural flow of water along street after a heavy downpour. Punsky v. New York, 129 App. Div. 558, 114 NYS 66. Evidence held not to show that one was not entitled to maintain a dam at the borders of her land, as a reasonable means of getting rid of surface waters flowing from adjoining premises. Du Breuille v. Ripley, 106 Minn. 510, 119 NW 244. Charge that township willfully and carelessly cut and maintained a ditch to the damage of a property owner is equivalent to charging that it was unreasonably done. Koeper v. Louisville, 106 Minn. 269, 118 NW 1025. A railroad company in constructing its embankment is liable for injury resulting from interference with drainage only where it can prevent such injury without substantial additional inconvenience and expense.. Alabama & M. R. Co. v. Beard [Miss.] 48 S 405. Instructions held erroneous. Id.

**86.** Owner of a lot may improve it and protect it against surface waters, and is not liable for closing an underground drain which carries water onto his lot. Levy v. Nash [Ark.] 112 SW 173. The owner of a city lot in improving it may shut out surface water without leading it to a sewer, but he may not negligently do unnecessary damage to adjacent land or obstruct a natural channel or discharge surface water in a body on adjacent land. Reilly v. Stephenson, 222 Pa. 252, 70 A 1097. Where one improved his lot so that surface water, which previously spread over his and adjacent property, was cast over an adjacent lot alone, he was held not liable in damages. Id.

**87.** One proprietor cannot divert a natural way so that water falling upon his land shall be discharged upon land of his neighbor. Cronin v. Payne [Mich.] 16 Det. Leg. N. 267, 121 NW 290. Where one's land was drained by a well defined drainage way, which contained running water about six months per year, a lower owner who obstructs such drainage is liable. Batla v. Goodell [Tex. Civ. App.] 115 SW 622. In action against a city for flooding lots by raising grade of streets and supplying insufficient drains, testimony as to cost of raising lot to grade of street is not admissible. Mayrant v. Columbia [S. D.] 64 SE 416. Complaint for obstruction of flow of water from pond held not bad, because not alleging whether the obstruction of a watercourse. Rentz v. Southern R. Co. [S. C.] 63 SE 743.

**88, 89.** Mackey v. Wrench, 134 Ill. App. 587.

**89a.** Defendant constructed ditch which changed flow of natural water way. Ditch became clogged with sediment and water was forced onto plaintiff's crops. Ramey v. Baltimore, etc., R. Co. 140 Ill. App. 203. Evidence held insufficient to show that highway commissioners constructed ditches diverting water from its natural flow. Padfield v. Frey, 133 Ill. App. 232.

**90.** See 10 C. L. 2006. See, also, Railroads, 12 C. L. 1542.

**91.** A railway company constructing an embankment across a natural channel for surface waters must construct culverts of sufficient capacity to permit the passage of such surface waters. Quinn v. Chicago, etc., R. Co. [S. D.] 120 NW 884. Evidence sufficient to show that a railroad company was negligent in constructing an embankment. Id. Where railroad company constructs its embankment across several lead drainage ditches and several top ditches, and put in culverts for the feed ditches, but conveyed the water along the right of way in feeders to such ditches, the culverts should be sufficient to carry off all water. Davenport v. Norfolk & S. R. Co., 148 N. C. 287, 62 SE 431. A company in constructing its roadbed must provide sufficient drainage to prevent impounding of water upon adjacent land. Willis v. White & Co. [N. C.] 63 SE 942. Railroad must construct necessary culverts for free passage of surface waters. St. Louis, etc., R. Co. v. Hardie [Ark.] 113 SW 31. On an issue as to the sufficiency of culverts through a railroad embankment, statements made by plaintiff to defendant's constructing officials that in his opinion the openings were insufficient are not admissible. Suiter v. Chicago, etc., R. Co. [Neb.] 121 NW 113. Instructions as to duty of railroad company to provide for passage of surface waters through its embankment, approved. Ames Shovel & Tool Co. v. Anderson [Ark.] 118 SW 1013.

**92.** It is negligence for a railroad company to fail to provide opening in its embankment sufficient to permit the free passage of surface waters. Jonesboro, etc., R. Co. v. Cable [Ark.] 117 SW 550. Complaint for damages for obstruction of waters by a railroad embankment held sufficent. St. Louis, etc., R. Co. v. Hardie [Ark.] 113 SW 31.

**93.** As to measure of damages, see Damages, 11 C. L. 958. In action against a railroad for constructing an insufficient open-

the obstruction as a nuisance.[94] It may not leave excavations into which water accumulates and seeps into adjacent land.[95] Where a railroad company is bound to receive water from adjoining land onto its right of way, it may pass it along according to laws of gravitation.[96] A complaint for obstructing surface waters must show an obstruction [97] and that it is the result of negligence.[98]

*A landowner has no right to collect surface water in a body* See 10 C. L. 2007 and cast it in undue volume onto the land of another,[99] nor may he cause such waters to be cast upon lower land at a point which they would not otherwise reach.[1]

§ 10. *Lands under water.*[2] See 10 C. L. 2007

§ 11. *Levees, drainage, and reclamation.*[3] See 10 C. L. 2007—Levee districts are usually empowered to assess the cost of improvements on property within the dis-

ing through its embankment, plaintiff may not show that after damage complained of the opening was enlarged. St. Louis, etc., R. Co. v. Walker [Ark.] 117 SW 534. For obstruction of surface water by insufficient drain box through railroad embankment, if land is rendered valuless, the measure of damages is value of land flooded. Texas & P. R. Co. v. Ford [Tex. Civ. App.] 117 SW 201. Complaint for obstruction of surface waters by construction of a railroad embankment held sufficient to sustain verdict for permanent injury. Hart v. Wabash S. R. Co., 238 Ill. 336, 87 NE 367.

**94.** Action for damages for flooding land by construction of railroad embankment, and to enjoin it as a nuisance, are not inconsistent remedies. Steber v. Chicago & G. W. R. Co. [Iowa] 117 NW 304. Where an owner settled with a railroad company for all past and future damages for flooding land, and deeded the company a strip of land so as to permit construction of system to prevent future injury, held, where title to such strip failed and conditions reverted to their former condition, the owner could not obtain equitable relief without returning consideration received on settlement. McCabe v. New York Cent. & H. R. Co., 114 NYS 303.

**95.** Railroad company held liable, where it dug a pit on its right of way where water collected and seeped into adjoining land. Canon City & C. C. R. Co. v. Oxtoby [Colo.] 100 P 1127. The company is presumed to have known that such waters would seep into adjoining lands. Id.

**96.** Bones v. Chicago, etc., R. Co. [Iowa] 120 NW 717. An owner on both sides of a railroad could not insist that the company maintain a continuous dike to protect land on one side from overflow, and at the same time respond in damages for flooding land on the other side. Id.

**97.** Complaint for obstruction of waters by railroad embankment held bad for failure that such construction obstructed the natural flow. Graves v. St. Louis, etc., R. Co., 133 Mo. App. 91, 112 SW 736.

**98.** A verdict for negligence for failure to keep open culverts running under a canal cannot stand where it is not charged that culverts were not of sufficient capacity, and it appears that defendants kept ends of culverts clear and no other method of cleaning them is apparent. Benjamin v. Lehigh Valley R. Co. [N. J. Law] 69 A 955. It is proper to refuse to enjoin the maintenance of drains where it appeared that, though water was being delivered through the drains more rapidly than the natural flow, a third person had, by providing an outlet, relieved the plaintiff from the injurious consequences. Feuerstein v. Richter, 154 Mich. 312, 15 Det. Leg. 751, 117 NW 740.

**99.** May not discharge surface water in a body onto adjacent land. Reilly v. Stephenson, 222 Pa. 252, 70 A 1097. An owner has no right to collect water in a channel and discharge it onto a public way. If he does so and the water freezes, he is liable for whatever damage ensues. Field v. Gowdy, 199 Mass. 568, 85 NE 884. One may not permit surface water to collect on his premises and discharge it at one point in a volume onto adjacent land. Mehonray v. Foster, 132 Mo. App. 229, 111 SW 882. If a railroad which digs ditches to care for surface water allows such ditches to become obstructed, and its surface water is forced in a body onto upper land, it is liable, but is not liable where, because of such obstruction, water gathered in ditches by owner is thereby obstructed. Sabetto v. New York Cent. & H. R. Co., 127 App. Div. 832, 112 NYS 118. Evidence insufficient to show that a railroad company by constructing a drain caused unusual quantities of water to be carried from a culvert to lands of an adjacent owner. McCabe v. New York Cent. & H. R. Co., 114 NYS 303.

**1.** An owner of higher land may not discharge surface waters onto lower land from an area which would not otherwise be drained there, nor may he discharge water onto such land at a point where it would not naturally reach such land. Sheker v. Machovec [Iowa] 116 NW 1042. Instruction held proper. Id.

**2. Search Note:** See Navigable Waters, Cent. Dig. §§ 180-293; Dec. Dig. §§ 36-46; Waters and Water Courses, Cent. Dig. §§ 91-107; 118-121; Dec. Dig. §§ 89-98, 109, 111.

**3. Search Note:** See notes in 60 L. R. A. 161; 69 Id. 805.

See, also, Drains, Cent. Dig.; Dec. Dig.; Levees, Cent. Dig.; Dec. Dig.

**4.** Proceedings to restore washed out levee properly had under Pol. Code, § 3459. Reclamation Dist. No. 535 v. Clark [Cal.] 100 P 1091. Supervisor cannot modify trustee's report provided for by such statute. Id. Assessment for repair of levee held not vitiated because trustee of reclamation district acted as overseer of repair

strict.[4] The period within which redemption may be made from a sale for levee taxes is fixed by law.[5] The authority of the officers of such districts rests wholly on the statutes treating them.[6] A board of directors of a levee district in constructing a levee to protect adjacent land have a wide discretion as to choice of means and methods.[7] One whose property is injured by the construction of a levee may recover damages.[8] The secretary of the interior may lease lands withdrawn from entry for reclamation purposes, under the federal statute.[9]

§ 12. *Milling and power and other nonconsuming privileges; dams, canals, and races.*[10]—See 10 C. L. 2008—A right to flow land by the maintenance of a dam is an easement[11] to be acquired by grant[12] or prescription.[13] The extent of the right

work. Id. Assessment of cost for repair of levee held not vitiated by fraud where a trustee of the district was benefited to a greater extent than other landowners. Id. Landowner held not entitled to attack finding of trustees of reclamation district that repair work on levee had been properly done, where warrants had been issued and approved. Id.

5. Under Laws 1901, p. 153, § 1, Laws 1895, p. 91, where lands are sold for nonpayment of levee taxes in the St. Francis levee district, the one year within which to redeem runs from date of sale, and not from date of confirmation of the sale. Robertson v. McClintock [Ark.] 110 SW 1052.

6. Under Acts 1905, p. 231, §§ 16, 33, held, Red River levee district was liable where president of directors **contracted for work to protect district from overflow** and to prevent constructed levee from damage. Red River Levee Dist. No. 1 v. Russell [Ark.] 114 SW 213. If emergency work was ordered by the president and done under the supervision of the board of director's engineers who had power to bind the district, he would be acting within the scope of his authority in carrying, but the work and his action would bind the district. Id. Under Acts 1908, c. 97, § 3, the treasurer of the Yazoo-Mississippi Delta board held only **authorized to declare forfeiture of bonds** deposited to secure deposits of funds, and sell the same for purpose of collateral security. Bobo v. Yazoo-Mississippi Delta Levee Com'rs [Miss.] 46 S 819. Under Act No. 74, p. 95, of 1892, and Act No. 160, p. 242, of 1900, the board of commissioners of Caddo levee district may not make a **sale of bonds** granted to it until registration of the conveyance to it by the state. State v. Cross Lake Shooting & Fishing Club [La.] 48 S 891. Authority of levee district to **arbitrate damages** suffered by a landowner by construction of a levee being vested in the board of directors, president had no power to bind the district by agreeing to arbitrate. Plum Bayou Levee Dist. v. Harper [Ark.] 116 SW 196. The collector of levee taxes or the levee district are not owners of taxes, and **may not set off against taxes** the value of an old levee belonging to the taxpayer for which promoters of the district had promised to reimburse him in consideration of his signing petition for organizing district. State v. Dumphy [Mo.] 115 SW 573.

7. Meriwether v. St. Francis Levee Dist. Directors, [C. C. A.] 165 F 317. In determining what is necessary in constructing a levee and what authorities are empowered to do, "necessary" means whatever is appropriate and convenient, and not what is indispensable. Id.

8. Under the constitution and statutes of Arkansas, an owner who is injured by overflow as a result of construction of a levee has an adequate remedy at law for damages against the levee district, and may not proceed in equity. Meriwether v. St. Francis Levee Dist. Directors [C. C. A.] 165 F 317.

9. Under Reclamation Act, 32 Stat. 388, the secretary of interior may establish regulation relative to lands withdrawn for irrigation works and may lease them for grazing purposes. Clyde v. Cummings [Utah] 101 P 106.

10. **Search Note:** See notes in 6 C. L. 1854; 58 L. R. A. 487; 7 L. R. A. (N. S.) 289. See, also, Waters and Water Courses, Cent. Dig. §§ 33-37, 190-265, 325-331; Dec. Dig. §§ 41-47, 159-179, 267-288; 20 A. & E. Enc. L. (2ed.) 675.

11. A right acquired by grant to flow land is an easement appurtenant to every part of the grantee's land. Haigh v. Lenfesty, 239 Ill. 227, 87 NE 962. He may build his dam at any point on his land and to any height so long as he does not exceed his rights of flowage. Id. The right to flood land of another is an easement and lies only in grant or prescription. Atlanta & B. Air Line R. Co. v. Wood [Ala.] 49 S 426.

12. The bed of a river is that part between the banks worn by the regular flow of water. Haigh v. Lenfesty, 239 Ill. 227, 87 NE 962. Grant of a right to flow land by dam that height means six feet above the highest point of the river bed. Id. Grant of a right to raise a dam not exceeding 10 feet high does not require a dam every point of whose crest is 10 feet above to point of the river bottom vertically beneath it, but only a dam so constructed as to produce no more flowage than such dam. Lancaster & J. Elec. L. Co. v. Jones [N. H.] 71 A 871.

13. Where a dam has been maintained for 20 years, a prescriptive right to maintain it at such height is acquired. Tosini v. Cascade Mill. Co. [S. D.] 117 NW 1037. Evidence sufficient to show that a certain person owned land on the banks of a river where he erected a mill dam in 1874. Kregar v. Fogarty [Kan.] 96 P 845. A mill owner, who has for 20 years exercised a right to flow land for a mill pond acquires

if it rests in grant depends, of course, on the terms thereof.[14] The height and capacity of a dam fixes the extent of the owner's right to flow upper lands.[15] A right acquired by grant to flow land is not lost by nonuser alone; there must be adverse possession for the statutory period.[16]

In some states rights of mill owners are regulated by statute,[17] and limitations are prescribed for the maintenance of actions for injuries caused by dams.[18] A statute providing for new trial in real actions does not apply to action relative to flowage rights.[19] In New Hampshire, operators of water mills are authorized by law to condemn land for flowage purposes,[20] and if he fails to comply with the statute a landowner injured may recover damages.[21] A petition for the assessment of damages under the flowage act will be dismissed where the mill owner files a disclaimer.[22] Owners of water-power rights are entitled to damages for injury resulting in impairment thereof,[23] or for the filling up of their mill pond[24] or right of flowage.[25]

an easement. Atlanta & B. Air Line R. Co. v. Wood [Ala.] 49 S 426. Where a mill owner, who has a prescriptive right to a pond, grants a railroad right of way over his land, he does not revoke his rights in the pond, and the railroad could not fill in the pond but should build a bridge if necessary. Id.

14. The owner of a defective dam constructed under a grant of a right of flowage may build a new tight dam without becoming liable to upper owners, if he does not exceed his flowage rights. Haigh v. Lenfesty, 239 Ill. 227, 87 NE 962. Evidence held not to show such a clear violation of an upper owner's rights by construction of a dam that equity would enjoin its maintenance. Id.

15. Not the extent of the flowage under prior dams. Haigh v. Lenfesty, 239 Ill. 227, 87 NE 962.

16. Haigh v. Lenfesty, 239 Ill. 227, 87 NE 962. Evidence of such adverse user must be clear and positive. Id. That the grantee of flowage rights has not at all times exercised his full rights under his grant does not affect his rights. Id.

17. The constitutionality of Mill Act (Rev. Laws c. 196), regulating mills and mill dams, depends upon the power of the legislature to regulate the use of property for the best interests of owners and the public. Blackstone Mfg. Co. v. Blackstone, 200 Mass. 82, 85 NE 880. Evidence sufficient to show a mill dam had been but partially destroyed and that efforts to rebuild the same were made, and forfeiture, provided by Gen. St. 1901, § 4108, if owner does not commence to rebuild within one year, did not take effect. Kregar v. Fogarty [Kan.] 96 P 845.

18. Gen. St. 1894, § 2369, providing that no action for damages occasioned by a mill dam shall be maintained unless brought within 2 years, construed and held to apply to action for damages caused by construction of permanent dam. Priebe v. Amas, 104 Minn. 419, 116 NW 829.

19. Rev. Laws, 1905, § 4430, providing for a second trial in actions relative to land, does not apply to action to enjoin owner of water power from maintaining so much of a dam as causes water to flow back upon another's mill privileges. Tew v. Webster, 106 Minn. 185, 118 NW 554.

20. Pub. St. 1901, c. 142, § 12, authorizing such taking held valid. McMillan v. Noyes [N. H.] 72 A 759. In New Hampshire, where a mill owner constructs a dam which is a public benefit, he acquires the right to condemn flowage privileges. Wright v. Pemigewasset Power Co. [N. H.] 70 A 290.

21. If he fails to settle for damages caused by flooding, or institute condemnation proceedings within 30 days, an owner injured may maintain action for damages or to ascertain the value of rights sought to be acquired. Wright v. Pemigewasset Power Co. [N. H.] 70 A 290.

22. Landowner is remitted to an action at law for damages. Wright v. Pemigewasset Power Co. [N. H.] 70 A 290.

23. Owners of water power are entitled to damages for all injury resulting in wrongful impairment thereof, but not for subsequent occurrences of which the wrongful act furnished merely the occasion upon which other causes operated to produce the injury. Lancaster & J. Elec. L. Co. v. Jones [N. H.] 71 A 871. Whether raising water at a dam above the height to which it could lawfully be held was the proximate cause of loss of business by an upper riparian owner is a question of fact. Id. In an action for injury to water power, the owner has the burden to prove that it is more probable than otherwise that injury was caused by the act complained of. Id. The measure of damages for wrongful flowage by lower owners resulting in transfer of power developed by upper owner's dam to lower owner's dam is the rental value of the power. Id. Upon question of damages, the income received by those appropriating the power is evidence of, but not the measure of, damages. Id.

24. Complaint for filling up a mill pond construed and held to mean that place where filling occurred was on defendant's lands. Atlanta & B. Air Line R. Co. v. Wood [Ala.] 49 S 426. Complaint for filling earth into a mill pond held to state a cause of action. Id.

25. In action for interference with flow-

§ 13. *Irrigation and water supply; common-law rights and the doctrine of appropriation. A. Rights in the water.*[26]—See 10 C. L. 2009—At common law each riparian proprietor was entitled to the natural flow of the stream.[27] But the doctrine of riparian rights has been abrogated in many of the western states,[28] and in others it has been modified to the extent that proprietors may divert a reasonable amount of water for irrigation.[29] Each riparian owner has a right to reasonable use of the water for irrigation, and the common-law right to the flow without diminution is subject to such right,[30] and an upper riparian owner cannot object to diversion of water after it has passed his land.[31] Where the doctrine of prior appropriation obtains the right of appropriation is not confined to riparian owners.[32] In states where the doctrine of appropriation is recognized, the state has control of the waters [33] and may regulate their use,[34] and it is the policy of the law to prevent waste of water.[35] The right to take water from a stream for irrigation may be acquired by prescription against riparian owners.[36] Settlers on public land who assert rights by reason of prior appropriation thereby waive riparian rights.[37] The right to use water for irrigation is real estate.[38] In Washington water used for ir-

age right, evidence of labor in removing logs from the mill pond, of effect of water in preserving sunken logs, etc., held admissible. Schneider v. Brown Tp., 153 Mich. 454, 15 Det. Leg. N. 492, 116 NW 1016.

**26. Search Note:** See notes in 6 C. L. 1859, 1860; 30 L. R. A. 265, 384, 665; 46 Id. 175; 1 L. R. A. (N. S.) 208; 6 Id. 1104; 15 Id. 238; 20 A. S. R. 225; 60 Id. 802.

See, also, Waters and Water Courses, Cent. Dig. §§ 1-41, 143-157, 266-324; Dec. Dig. §§ 1-50, 127-152, 180-266; 17 A. & E. Enc. L. (2ed.) 487.

**27.** See ante, § 3. The code does not attempt to define or establish any rule respecting riparian rights. Hough v. Porter [Or.] 98 P 1083.

**28.** Riparian rights do not exist in Arizona. Arizona Copper Co. v. Gillespie [Ariz.] 100 P 465. The legal effect of desert land act (19 stat. 377) was to abrogate the doctrine of riparian rights, but it did not go so far as to effect rights originally giving rise to the doctrine of riparian rights. Hough v. Porter [Or.] 98 P 1083.

**29.** Every riparian proprietor, regardless of date of settlement, is entitled to water sufficient for domestic use to care for his stock and water his garden. Hough v. Porter [Or.] 98 P 1083. Settlement upon land bordering upon water supply is notice that water for domestic uses will be demanded. Id. The riparian right to use water for irrigation applies to waters of a lake, pond or slough, as well as to a stream. Turner v. James Canal Co. [Cal.] 99 P 520. What is a reasonable share or use of water for irrigation by each riparian owner is a question of fact. Id. Where water flows from a river into a slough or from the slough into the river as the one may be higher than the other in season, a riparian owner on the slough has an equal right with an owner on the river to divert water for irrigation. Id. Riparian owner may make reasonable use of water, but must not use more than his share for irrigation, and he must not pollute the water. Mentone Irr. Co. v. Redlands Elec. L. & P. Co. [Cal.] 100 P 1082.

**30.** Turner v. James Canal Co. [Cal.] 99 P 520. That one owners' low land would be benefited by overflow during flood season does not entitle him to enjoin diversion by upper owners for irrigation. Id. A riparian owner who has a right to take water for irrigation may do so at any point on his own land or on the land of another so long as he does not injure rights of other riparian owners between point of diversion and land to be irrigated. Id. So long as he takes no more than he is entitled to, it is immaterial at what point he diverts. Id. Riparian owner who has right to part of the water may change the flow by a dam if he does not divert more than he is entitled to. Arroyo Ditch & Water Co. v. Baldwin [Cal.] 100 P 874.

**31.** Arroyo Ditch & Water Co. v. Baldwin [Cal.] 100 P 874.

**32.** Boquillas Land & Cattle Co. v. Curtis 213 U. S. 339. 53 Law. Ed. —.

**33.** The state has control of the public waters of the state and may prescribe rules whereby they may be appropriated and applied to a beneficial use. Idaho P. & Transp. Co. v. Stephenson [Idaho] 101 P 821.

**34.** Stat. 1885, p. 95, that use of all water appropriated for sale, rental or distribution, shall be a public use and subject to regulation, is valid. San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus County, [Cal.] 99 P 365.

**35.** When prior appropriators are not using it, the canal company may sell to others. Gerber v. Nampa & Meridian Irr. Dist. [Idaho] 100 P 80.

**36.** Arroyo Ditch & W. Co. v. Baldwin [Cal.] 100 P 874. Owner of land by oral agreement as to priorities of water rights and possession and use of water for 13 years held to have title to water rights. Park v. Park [Colo.] 101 P 403.

**37.** Davis v. Chamberlain [Or.] 98 P 154.

**38.** Must be transferred by deed. Bates v. Hall [Colo.] 98 P 3. Subject to grant with or without land to which it is attached. Davis v. Randall [Colo.] 99 P 322. Since many of the earlier water rights acquired by appropriation, have not passed by deed, parol proof of possession is prima

rigation cannot be taken under the power of eminent domain.[39] The applicability of the doctrine of prior appropriation depends on the laws under which title was taken.[40]

*What may be appropriated.* See 10 C. L. 2011—As a general rule all waters not subject to prior appropriation may be appropriated,[41] but water reserved by the government may not be appropriated.[42] The current of a stream is not subject to appropriation in Idaho.[43] The general government has power to reserve waters on the public domain and exempt them from appropriation under state laws.[44] Where Indians on a reservation had a prior right to a portion of the waters of a creek, others who had appropriated and were diverting such waters were properly enjoined from diverting a certain quantity of water.[45]

*Method of appropriating.* See 10 C. L. 2011—Water may not be appropriated for the purpose of propagating fish.[46] An appropriation consists of an actual diversion from a natural stream, followed within a reasonable time by an application of the water to some beneficial use.[47] As a general rule, no certain method is essential to an appropriation,[48] but in states where the doctrine of appropriation prevails, a method of appropriating is prescribed,[49] and if an appropriation is made under such laws, statutory requirements must be observed.[50] As a general rule, to con-

facie evidence of title. Bates v. Hall [Colo.] 98 P 3.

39. Under Ball. Ann. Codes & St. § 4156, providing that water used for irrigation cannot be taken by condemnation, held where a company sought to take so much of water of a lake as was not required for irrigation, it established a definite basis for a decree. Spokane Valley Land & W. Co. v. Jones & Co. [Wash.] 101 P 515.

40. Riparian lands in Arizona taken under Mexican grants confirmed by act of Congress held subject to prior appropriation of waters as allowed by Mexican law. Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 53 Law. Ed. —.

41. Surplus water, remaining after domestic and stock demands of riparian owners on all lands entered subsequent to March 3, 1877, are supplied, is subject to appropriation. Hough v. Porter [Or.] 98 P 1083. Springs formed from seepage and percolating waters instead of subterranean stream are subject to appropriation and protected under Rev. St. U. S. § 2339. Le Quime v. Chambers 15 Idaho, 405, 98 P 415. Water in a stream used for plain mining and finding its way back to the stream may be appropriated. Head v. Hale [Mont.] 100 P 222. Under Sess. Law, 1903, p. 224, any person or association may appropriate for any useful purpose the waters of any stream, springs or seepage waters of lakes or other public waters in the state. Le Quime v. Chambers, 15 Idaho, 405, 98 P 415.

42. The effect of the language of 19 Stat. 377 "there shall be and remain and be held free for appropriation and use of the public for irrigation," etc., is a reservation to the public of all interest of the government in the water. Hough v. Porter [Or.] 98 P 1083.

43. Schodde v. Twin Falls Land & W. Co. [C. C. A.] 161 F 43. Rev. St. Idaho, 1887, § 3184, giving appropriators the right to place in the channel or on the banks of a stream machines for raising the water, gives a mere license to use an appropriate method; but such means do not attach as an appurtenance to the appropriation. Id.

44. Conrad Inv. Co. v. U. S. [C. C. A.] 161 F 829. Indian Treaty, May 1, 1888, c. 213, 25 Stat. 124, establishing Blackfeet Reservation, held to reserve to the Indians a prior right to a portion of the waters of Birch Creek. Id.

45. Conrad Inv. Co. v. U. S. [C. C. A.] 161 F 829. Settlers who had taken up land on faith of contracts with such person were not necessary parties. Id.

46. May not be appropriated to fill a series of reservoirs in which to propogate fish. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co. [Colo.] 98 P 729.

47. Evidence sufficient to show an appropriation. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co. [Colo.] 98 P 729.

48. Any successful application to a beneficial use. Hough v. Porter [Or.] 98 P 1083. Evidence sufficient to show an appropriation of 100 inches of water at a spring. Hilger v. Zabel [Mont.] 98 P 881. Evidence sufficient to show a valid appropriation by a person in 1902. City of Pocatello v. Bass, 15 Idaho 1, 96 P 120. U. S. Comp. St. 1901, p. 1437, relative to appropriation was merely a recognition of existing rights rather than creation of a new one. Hough v. Porter [Or.] 98 P 1083. Priority for storage purposes **cannot be acquired** by temporary storage for immediate use in temporary receptacles forming part of a continuous condult from carrying the water from the stream directly to the irrigated land. Windsor Reservoir Canal Co. v. Lake Supply Ditch Co. [Colo.] 98 P 729.

49. At the time of passage of desert land act (19 stat. 377) or mode of making appropriations then in use was adopted as part of the act. Hough v. Porter [Or.] 98 P 1083.

50. Riparian owners who desire to appropriate public waters must **comply with** the provision of the law the same as non-

stitute an appropriation, some steps toward diversion are necessary,[51] and a drainage ditch cannot be relied upon as work toward such end unless it was so intended.[52] One may not acquire a water right on land of another without acquiring an easement in the land,[53] unless by virtue of statute;[54] but rights may be initiated by a ditch tapping the source of supply upon lands of another from whom no easement has been acquired.[55] Settlers on public lands may acquire by prior appropriation against subsequent settlers.[56] The method of appropriating under the federal desert land act is prescribed by the act[57] as well as the lands for which water rights may be acquired.[58] The right of an appropriator on public lands cannot be tacked to the right of a squatter.[59] The rights of an appropriator take effect as of the date of appropriation.[60]

riparian owners. Idaho P. & Transp. Co. v. Stephenson [Idaho] 101 P 821. By Rev. Codes 1909, § 3253, the legislature has prescribed the method and procedure by which use of public waters of the state may be appropriated and applied. Id. Upon compliance with certain provisions of the act, the state engineer is authorized to issue the applicant a permit. Id. Upon proof of completion of works, the state engineer is required to issue a certificate of competition. Id. State Engineer may exact a fee upon issuance of such certificate. Id. Notices of appropriation posted within 200 feet of a place where another had posted notice, both intended for an extensive irrigation project, are in substantially the same place. Beckwith v. Sheldon [Cal.] 97 P 867. One who with others posts notices of appropriation may, with his associates, proceed under such notices to perfect their rights against all except those with prior rights. Id. Under Sess. Laws 1881, p. 142, requiring ditch owners prior to establishment of rights to file statement showing area to be irrigated, a decree is not void for failure to show area lying under the ditch where it fixed the volume of water represented by the carrying capacity of the ditch. Bates v. Hall [Colo.] 98 P 3. **"Certificate"** as used in Rev. Codes, § 3253 et seq., relative to appropriation of public waters and regulating issuance of certificate and license by state engineer, means the paper to be issued on proof of completion of the works. Idaho P. & Transp. Co. v. Stephenson [Idaho] 101 P 821. "License" means the paper to be issued upon proof of application to beneficial use of waters. Id.

**51.** To constitute appropriation for mining or irrigation purposes. Hough v. Porter [Or.] 98 P 1083.

**52.** One cannot for purpose of establishing prior appropriation avail himself of a ditch constructed for drainage, unless it appears that at the time it was dug it was intended for irrigation purposes. Hough v. Porter [Or.] 98 P 1083.

**53.** Prentice v. McKay [Mont.] 98 P 1081. Rev. Codes, §§ 4840-4891, regulating water rights applies only to appropriations made on public lands and to appropriations made by individuals having riparian rights. Id. Rev. St. U. S. §§ 2339, 2340 and Rev. Codes Mont. § 4840 et seq., does not authorize one person to go upon land of another to make an appropriation except by condemnation proceedings. Id.

**54.** Right to appropriate water on land of another may be acquired by condemnation proceedings under Const. art. § 15, declaring use of water to be a public use. Prentice v. McKay [Mont.] 98 P 1081. Where one attempted to make an appropriation upon land of another without condemnation or acquisition of an easement, the right amounted to a mere revocable license. Id.

**55.** Hough v. Porter [Or.] 98 P 1083. Where such owner does not complain nor revoke the license, others may not. Id.

**56.** Davis v. Chamberlain [Or.] 98 P 154. A squatter upon public land may acquire such rights in the water that he can transfer it to another in which case the rights of the purchaser relate back to time of original division. Hough v. Porter [Or.] 98 P 1083. Mere claim of right to the land accompanied by diversion of water is sufficient to entitle him to transfer his water right. Id.

**57.** One who files under the desert land Act (19 Stat. 377) and makes affidavit that lands are desert will not be permitted to assert a right to water for irrigation as having been initiated prior to date of entry. Hough v. Porter [Or.] 98 P 1083. It is necessary to the procurement of title to land under the desert land Act (U. S. Comp. St. 1901, p. 1548) that the inception of the title to the water located for such purposes depend upon a bona fide prior appropriation. Id.

**58.** When swamp lands have been reclaimed, if in an arid district, it comes within the rules respecting irrigation and riparian rights. Hough v. Porter [Or.] 98 P 1083. That lands may originally have been swamp lands and acquired as such does not preclude the acquisition of a water right for irrigation. Id.

**59.** The right of an appropriator cannot be tacked to that of a mere squatter on public lands, who, while he may have applied the water to the land subsequently owned by the appropriator, has abandoned it. Hough v. Porter [Or.] 98 P 1083. Where a squatter on public land made an appropriation and then abandoned the land, a subsequent setter on such land could appropriate a right only from the date he took possession and such right did not relate back. Head v. Hale [Mont.] 100 P 222.

**60.** Where one commences a ditch and within a reasonable time prosecutes the work to completion and applies the water,

*Limit, measure and extent of appropriation.* See 10 C. L. 2012—Under the doctrine of appropriation, he who is first in time is first in right.[61] The rights of an appropriator depend upon the amount of his appropriation,[62] the time of use [63] and the amount he can apply to beneficial purposes;[64] and the amount appropriated is determined by the capacity of his canal [65] or reservoir.[66] An appropriator must exercise his rights with due regard to the rights of others [67] and must exercise

the appropriation relates back to commencement of the work. Hough v. Porter [Or.] 98 P 1083.

**61.** So long as he applies the water to a beneficial use, he cannot be deprived of any part of his right. Arizona Copper Co. v. Gillespie [Ariz.] 100 P 465. If an appropriation was concurrent with settlement upon land above the ditch, the rights of the appropriator were superior to the riparian rights of the settler. Davis v. Chamberlain [Or.] 98 P 154. Where A enters land claimed by B under homestead entry and appropriated the waters of a spring and thereafter B's entry is cancelled and C enters the land as a homestead, he takes subject to A's appropriation which will be protected by Rev. St. U. S. § 2339, and the laws of Idaho. LeQuime v. Chambers, 15 Idaho, 405, 98 P 415. Such land held impressed by A's servitude. C. did not complain and the government could not because of the assent given by statute. Id. Evidence held to show riparian rights superior to rights of appropriation. Hough v. Porter [Or.] 98 P 1083. Where a storage company makes an appropriation of a given volume, which is junior to that of a reservoir company for its particular reservoir, it was senior as to all water of the river as against all subsequent appropriators for storage purposes. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co. [Colo.] 98 P 729. **Under desert Land Act.** 19 Stat. 377, no limit is fixed as to the time a right to the acquirement of a water right may be exercised except that he who first diverts and applies water to a beneficial use is given the better right. Hough v. Porter [Or.] 98 P 1083. Though land was patented prior to 14 Stat. 253, protecting rights of prior appropriators of water on public lands, a prior appropriator would be protected as against the patentee. Davis v. Chamberlain [Or.] 98 P 154. All lands settled upon prior to enactment of 19 stat. 377 were accepted with knowledge that the first to divert and apply waters if a stream have a superior right. Hough v. Porter [Or.] 99 P 1083. Where water rights under which one claimed were located prior to any settlement on the lands, he was entitled upon prior to enactment of 19 Stat. 2340, and under the custom in force in the territory. Driskill v. Rebbe [S. D.] 117 NW 135.

**62.** Since a priority may be measured by both volume and time, the area under the ditch which it is proposed to irrigate is immaterial. Bates v. Hall [Colo.] 98 P 3. Where priorities were fixed by a decree which did not state the area under the ditch, the extent of actual use of water, within a reasonable time after the decree is admissible on the extent of the appropriation. Id. Where water is claimed as "waste" from the farm of an adjacent user, the quantity diverted by such person in excess of his needs is the amount appropriated and the person receiving and applying it acquires a vested right in it dating from first use. Hough v. Porter [Or.] 98 P 1083. All rights are limited in their application to the number of acres and to land for which acquired except when increase on acreage or change of use will not prejudice others. Id. **"Inch"** is estimated on the basis of 40 inches to one "second foot." Id.

**63.** Where water was taken only up to June 1st, the right was limited to that period. Davis v. Chamberlain [Or.] 98 P 154.

**64.** Beneficial use by and needs of an appropriator determines the limit of his rights. Hough v. Porter [Or.] 98 P 1083. Not quantity originally diverted nor capacity of his ditches. Id. Evidence held to show that from one-third to two-thirds of an inch per acre, estimated on basis of 40 inches to one "second foot," was ample for irrigation of lands involved. Id. A bona fide intention to devote water to a beneficial use may comprehend the use to be made by or through other persons upon lands other than that of appropriator. Id. **"Duty of water"** means the quantity essential for the irrigation of a given tract. Id.

**65.** Under the constitution and laws of Idaho, a person cannot acquire a water right beyond the carrying capacity of the canal. Gerber v. Nampa & Meridian Irr. Dist. [Idaho] 100 P 80. The aggregate rights of users of water from a canal cannot exceed the capacity of the canal. Temporary deliveries at times when regular consumers are not demanding their full amount of water cannot be turned into perpetual right. Id. Where cotenants claim a right by reason of construction of a canal, the limit of their rights is determined by the capacity of the canal and not by subsequent diversion. Hough v. Porter [Or.] 98 P 1083. **"Head of water,"** as used in reference to water for irrigation purposes means quantity entering the head of any canal or ditch. Id. "Capacity" in Mills' Ann. St. § 2403, providing that reservoirs may be awarded priorities to extent of capacity for storage purpose means the amount of water the reservoir will hold. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co. [Colo.] 98 P 729.

**66.** Under Mills' Ann. St. §§ 2403, 2408, a storage reservoir is entitled to but one filling during the season. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co. [Colo.] 98 P 729. Two separate reservoir priorities of the same capacity and date may not be granted to the same reservoir as the result of the same construction and act of storing. Id.

**67.** The right to appropriate water from

reasonable care to prevent waste,[68] and, when he is not using the water, he must permit it to flow down to others.[69] An appropriator of a certain amount of water from a stream does not acquire as an appurtenant the right to use the current of the stream as a means of operating devices to raise the water from the stream.[70] Where prior and subsequent appropriators agree as to division of the waters, each will thereafter be estopped to deny the rights of the other to divert water under the agreement.[71] The dedication within the purview of the constitution of Idaho is commensurate only with the character of water dedicated.[72] Vested rights to the use of water cannot be taken away by the state engineer.[73]

As a general rule, an appropriator may change his point of division,[74] mode of collecting[75] or place of use[76] or storage,[77] providing rights of others are not thereby prejudiced.[78] In some states such right is given by statute.[79]

a stream is not an unrestricted one but must be exercised with regard to the rights of the public and other appropriators. Schodde v. Twin Falls Land & W. Co. [C. C. A.] 161 F 43. One, who has adopted, as a means of raising water from the stream, water wheels operated by the current, has no cause of action against a lower appropriator who constructs a dam which destroys the current. Id. A mining company may be required to first drain water into settling basins where its use of the water pollutes it, but the decree should not require the complainant to construct the basins at his own expense. Arizona Copper Co. v. Gillespie [Ariz.] 100 P 465.

68. The water must be used in such manner and by such economical method as will secure the greatest duty available, even though it becomes necessary to change old methods at considerable expense. Hough v. Porter [Or.] 98 P 1083.

69. As between parties whose rights are adjudicated at all times when water is not needed by one, it should, when needed by others, remain subject to their use. Hough v. Porter [Or.] 98 P 1083.

70. Schodde v. Twin Falls Land & W. Co. [C. C. A.] 161 F 43.

71. Saunders v. Robison, 14 Idaho, 770, 95 P 1057. Evidence held to show that rights were not based on appropriation but upon contract. City of Denver v. Walker [Colo.] 101 P 348.

72. Whether waste or surplus, subject to prior appropriation and not needed by them temporarily. Niday v. Barker [Idaho] 101 P 254. Where water is delivered on land and used for irrigation purposes, the right becomes a dedication within Const. art. 15, § 4. Id.

73. Lockwood v. Freeman, 15 Idaho, 395, 98 P 295. When all water of a stream has been appropriated, the state engineer cannot deprive a prior appropriator of his rights by giving another license to use the water. Id. Subsequent appropriators properly enjoined. Id.

74. One who has a right to take a certain amount of percolating waters may change his place of diversion. Barton v. Riverside Water Co. [Cal.] 101 P 790. Where new **artesian wells** drew their water from the same supply from which owners had previously taken water under a valid diversion, they constituted a mere change in the place of diversion. Id. Where one makes an appropriation on one fork of a stream and a subsequent appropriator makes his appropriation below the fork, he cannot complain because the prior oppropriator conveys his waters to the other fork where he gets full benefit of all the waters left. Saunders v. Robison, 14 Idaho, 770, 95 P 1057. In proceeding to change one's point of diversion another held not prejudiced by ruling permitting holders of the legal title to rights of one of the petitioners to consent to the change. Baltes v. Hall [Colo.] 98 P 3.

75. Where a company had for 15 years been diverting a certain amount of water from an artesian basin by means of cuts and trenches, he was entitled when the supply commenced to fail to use wells. Barton v. Riverside Water Co. [Cal.] 101 P 790.

76. Where water is conveyed through a natural channel, users may let the waters commingle and take it out at some other point, if no prejudice results to other users. Hough v. Porter [Or.] 98 P 1083. Owners of a right may change the method of conveying the water to the point of use if other rights are not prejudiced. Id. May use ravine, gulch, or natural channel of a stream. Id.

**Contra:** An appropriator from a stream for irrigation of land on one side of the stream cannot, as against subsequent appropriators, use his water on the other side of the stream. Williams v. Altnow [Or.] 97 P 539.

77. Change of place of storage from one reservoir to another, is, so far as appropriators are concerned, analogous to change of place of use. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co. [Colo.] 98 P 729.

78. Where users seek to change the point of diversion, due allowance must be made for evaporation and other incidental losses and be deducted from the quantity awarded under the original diversion and method of use. Hough v. Porter [Or.] 98 P 1083. A change of use or point of diversion will not be permitted where it will prejudice the interests of other appropriators. Id. One who inaugurates water rights in reclamation of land lost to another cannot change the use thereof to other lands where not to do so would work prejudice to other appropriators. Id. He will be treated as having abandoned such right. Id.

79. Rev. Codes, § 4842, expressly provides that an appropriator may change the point of diversion or use of water if other users

*Right to supply from water companies.*[See 10 C. L. 2012]—In some states water companies are required by law to supply consumers with water to the extent of their appropriation,[80] if the consumer complied with the conditions which entitle him to water,[81] providing their entire supply is not subject to prior appropriation[82] which fact, in Idaho, the consumer has the burden to prove,[83] and for refusal to do so the company is liable for damages sustained.[84] In California a water company is liable in punitive damages, if through fraud or malice, it refuses to supply water.[85] In Idaho a consumer cannot be deprived of his supply without his consent,[86] but a water company is prohibited from contracting to deliver more water than its canal will carry,[87] and a contract for surplus water applies only to such water.[88] In case of shortage of supply, the rights of consumers rest in the

are not prejudiced. Head v. Hale [Mont.] 100 P 222. Under Laws 1881, p. 143, the right to change a point of diversion is not absolute, where such change will injure another. Bates v. Hall [Colo.] 98 P 3. Under Laws 1903, p. 278, one, to be entitled to change his point of diversion, must show a right to the water. Id.

80. Under St. 1885, p. 95, requiring companies which appropriate water for sale to sell to the extent of the supply, a complaint alleging that a company had water and refused to supply it held to state a cause of action. Lowe v. Yolo County Consol. Water Co. [Cal. App.] 96 P 379. Complaint against water company for failure to deliver water for irrigation which does not show that Civ. Code, § 552, relative to duty of company to furnish water for irrigation applies, is not bad for failure to allege that the company has sufficient water to supply plaintiff after other consumers entitled to a preference have been supplied. Id. Where a right is dedicated under art. 15, § 4, Constitution, expense of delivery, waste, etc., cannot be charged to the consumer. Niday v. Barker [Idaho] 101 P 254.

81. Complaint which shows that prior to demand the company refused to supply plaintiff with water shows absence of necessity for demand or tender of rates. Lowe v. Yolo County Consol. Water Co. [Cal. App.] 96 P 379. Where one is entitled to water from a ditch company and does everything that the law requires to entitle him to it, the company is bound to deliver him the water and cannot require him to do things not required by law. Green v. Byers [Idaho] 101 P 79. If water has been once dedicated to land, and shut off by the company, all the user has to show is prior use and willingness to comply with regulations. Gerber v. Nampa & Meridian Irr. Dist. [Idaho] 100 P 80. The company must prove why water was shut off, or that the dedication was less than a perpetual one. Id.

82. The fact that a company has supplied water to a consumer so as to amount to a dedication within Constitution, art. 15, § 4, raises a presumption that the company had such amount over the volume subject to prior appropriation. Niday v. Barker [Idaho] 101 P 254.

83. In Idaho, one demanding water from a water company has the burden to prove that the company has sufficient water to supply him and that its canal has sufficient to carry such supply in addition to prior users. Gerber v. Nampa & Meridian Irr. Dist. [Idaho] 100 P 80. Complaint held to show facts sufficient to establish such fact. Id. Finding that there was a surplus of water carried by the canal held erroneous. Id.

84. Complaint against water company for refusal to furnish water for irrigation, which alleges that because of such refusal plaintiff's crop was destroyed, shows need of water for irrigation. Lowe v. Yolo County Consol. Water Co. [Cal. App.] 96 P 379.

85. The obligation of a company organized to sell water to furnish water is created by Const. art. 14, § 1, and not by St. 1885, p. 95, and a company which is guilty of fraud or malice in failing to furnish water is liable in exemplary damages under Code, § 3294. Lowe v. Yolo County Consol. Water Co. [Cal. App.] 96 P 379.

86. Under Const. art. 15, § 4, where water has once been sold to one who settles on agricultural land, he cannot thereafter be deprived of his annual supply without his consent. Gerber v. Nampa & Meridian Irr. Dist. [Idaho] 100 P 80. Where an owner has purchased a water right from a canal company at a specified rate, he cannot be deprived of it without just compensation by organization of an irrigation district and sale to it by the canal company. Knowles v. New Sweden Irr. Dist. [Idaho] 101 P 81. Such right is a property right. Id. A clear distinction exists between rights a party acquires by contract with a canal company for a water supply and rights acquired under Const. art. 15, § 4, making perpetual dedication of waters to lands upon which they have been once used. Id. Condemnation of the former should not interrupt the latter. Id.

87. Sess. Laws 1899, p. 382, prohibits a water company from contracting to deliver more water than its canal will carry. Gerber v. Nampa & Meridian Irr. Dist. [Idaho] 100 P 80.

88. Where all water of a canal has been dedicated and, when not needed by appropriators, is sold to others, the latter dedication extends only to the right to use the water when not required by the prior appropriator. Gerber v. Nampa & Meridian Irr. Dist. [Idaho] 100 P 80. Held a user could not acquire a perpetual water right by temporary use at times when prior users were not demanding their full amount of water. Id. In this case, held that officers of canal company could not by their acts

terms of their contracts.[89] In Colorado, distribution of waters is regulated by statute.[90] It is presumed that the superintendent of irrigation distributed the water according to priority of appropriation as he is required by law to do.[91]

*The right of appropriation may be lost only by abandonment or adverse possession.*[See 10 C. L. 2014]—To constitute abandonment there must be concurrence of intent and actual failure to use.[92] Nonuser alone is insufficient.[93] What facts will work an abandonment depends on the circumstances of each case.[94] Involuntary abandonment of land will not work a forfeiture of water rights previously initiated in connection therewith.[95]

Adverse user for the statutory period establishes an adverse claim.[96] Such user must be hostile to the rights of the owner.[97]

(§ 13) *B. Rights in ditches and canals.*[98]—[See 10 C. L. 2015]—The right to maintain a ditch across lands of another rests in grant,[99] prescription,[1] license,[2] or con-

estop the company from putting in issue the fact that its canal would not carry more water than prior users were entitled to. Id. Under Const. art. 15, § 4, a water company that already has sufficient customers to use its supply is not required to perpetually furnish water to one to whom it had furnished water when its regular customers did not require it. Id. Where a canal company furnishes one with waste water from a drain ditch supplied by water wasting from other lands, the user cannot compel it to maintain such waste water even though rental is charged. Id. Where a canal company supplies waste water under a sale contract, the same becomes a dedication of waste water only and the user can compel it to furnish only waste water and not a perpetual supply. Id.

89. Contracts between irrigation company and users held to place all users on an equality in case of shortage. Jackson v. Indian Creek Reservoir Ditch & Irr. Co. [Idaho] 101 P 814. Held error to decree one user a priority of right over others. Id.

90. Laws 1887, p. 259, providing for distribution of irrigation waters, is valid. McLean v. Farmers' Highline Canal & Reservoir Co. [Colo.] 98 P 16.

91. Mills, Ann. St. § 2448. Complaint to enjoin him from closing certain head gates held insufficient. McLean v. Farmers' Highline Canal & Reservoir Co. [Colo.] 98 P 16. Averment that plaintiff's rights were superior to rights of others in another district held insufficient since they did not represent consumers in such other district. Id.

92. Hough v. Porter [Or.] 98 P 1083. Appropriator for mining purposes, who worked diligently in developing the claims for several years, held not to have abandoned his appropriation. Thorndyke v. Alaska Perseverance Min. Co. [C. C. A.] 164 F 657.

93. Nonuser alone will not work a forfeiture unless continued for the period of limitations. Hough v. Porter [Or.] 98 P 1083.

94. Owners of mining ditch who took water therefrom for irrigation, by leasing their interest therein, abandoned their irrigation rights in the ditch. Davis v. Chamberlain [Or.] 98 P 154. Where an appropriator fails to use all water diverted, and for an unreasonable time delays increasing his use, subsequent increase of use will be subject to intervening rights. Hough v. Porter [Or.] 98 P 1083.

95. Hough v. Porter [Or.] 98 P 1083.

96. Proof of 10 years' continuous appropriation of water to a beneficial use is prima facie evidence of adverse use. Hough v. Porter [Or.] 98 P 1083. Use of water for 12 or 15 years held adverse so as to give title. Davis v. Chamberlain [Or.] 98 P 154. Evidence sufficient to show that one by actual use for more than the statutory period had acquired the right to use 25 inches of water from a stream for irrigation. Davies v. Angelo [Cal. App.] 96 P 909. Owner of land on which a lake was situated who acquiesced in appropriation of water therefrom to feed a canal for 93 years held barred to enjoin such use. Camp v. Lake Drummond Canal & W. Co. [C. C. A.] 163 F 238.

97. Use of water is not adverse until it becomes hostile to rights of another. Davis v. Chamberlain [Or.] 98 P 154. Where adverse possession is established by proof of continuous use, the onus of proof cast upon contestant is met by proof that during the period there was no shortage of supply below the adverse claimant. Hough v. Porter [Or.] 98 P 1083.

98. **Search Note:** See notes in 43 L. R. A. 130; 3 L. R. A. (N. S.) 1148.

See, also, Waters and Water Courses, Cent. Dig. §§ 197, 147, 307, 313; Dec. Dig. §§ 26, 27, 144½, 242, 244, 264; 17 A. & E. Enc. L. (2ed.) 509.

99. Where an irrigation ditch and right of way are property of one, another is not aggrieved by an order requiring that he refrain from interfering therewith. Cottonwood Ditch Co. v. Thom [Mont.] 101 P 825. Where a ditch was completed across one's land before he acquired any rights therein, he could not complain that he suffered injury because of continued use of the ditch. Id. Evidence sufficient to show that plaintiff's grantor of an interest in an irrigation ditch did not, prior to his conveyance to plaintiff, convey any interest to another. Bowen v. Webb, 37 Mont. 479, 97 P 839. Evidence sufficient to show that one had the right to carry 40 inches of water through a pipe line for four days each month. Collins v. Gray [Cal.] 97 P 142.

1. Evidence sufficient to show that one had acquired a prescriptive right to main-

demnation.[8] Federal statutes provide for ditch rights of way over public lands.[4] One who has not acquired a right of way for an irrigation ditch over public lands prior to their entry as a homestead must arrange for such right of way with the entryman.[5] The fact that one has located a water right does not give him any right to build ditches across lands of another without acquiring an easement.[6] An irrigation ditch may have two or more priorities belonging to the same or different persons.[7] An owner who negligently permits water to seep from an irrigation ditch, because of defects in the ditch, to the injury of another, is liable in damages.[8] Damages may be recovered for changing the course of an irrigation ditch.[9]

(§ 13) *C. Remedies and procedure.*[10]—See 10 C. L. 2016—Suits relative to water rights are sui generis, concerning which all questions of practice are not provided for by statute or precedent, and courts are not bound in all cases by rules of practice usually invoked.[11] A suit to determine the extent and priority of water right partakes of the nature of an action to quiet title to land.[12] The venue of such actions is fixed by statute,[13] and in some states all persons interested may be joined.[14]

tain a ditch over land of another, and the right to conduct through it a certain quantity of water. Strong v. Baldwin [Cal.] 97 P 178. Prescriptive right to a ditch held not extinguished by leases purporting to be signed by the owners of the prescriptive right, etc., under Civ. Code, § 811, providing that a servitude is extinguished by disuse for the period prescribed for acquiring title. Strong v. Baldwin [Cal.] 97 P 178. Where one had acquired a prescriptive right to a ditch and a third person subsequently claimed to own it and executed leases therefor, held that while the effect of the leases might be to prevent acquisition of title by prescription they would not divest a title already acquired. Strong v. Baldwin. [Cal.] 97 P 178.

**2.** A parol license to construct an irrigation ditch over land is irrevocable when money has been expended, etc. Miller v. Kern County Land Co. [Cal.] 99 P 179. Facts held to show that a parol license was relied upon. Id.

**3.** In Idaho, irrigation canals are a public use, and the power of eminent domain may be exercised to acquire rights of way. Portneuf Irrigating Co. v. Budge [Idaho] 100 P 1046. Where a condemnation judgment gave one the right to construct an irrigation ditch, upon payment of certain compensation, and construction of a culvert, held he was entitled to comply with the provision relative to the culvert at any time, and should not be limited as to time. Mundy v. Hart [Tex. Civ. App.] 111 SW 236.

**4.** Under Rev. St. U. S. §§ 2339, 2340, relative to irrigation rights, one who completes a ditch across public lands, and who is in possession at the time another makes entry thereon, acquires a right of way across such homestead. Cottonwood Ditch Co. v. Thom [Mont.] 101 P 825. Under 26 Stat. 1095, granting right of way over public lands for ditches, canals, reservoirs, etc., upon filing map thereof and its approval by the secretary of the interior, such approval is essential, and, where it is refused because the site has been withdrawn from sale, the company acquired no right by filing a map. United States v. Rickey Land & Cattle Co., 164 F 496. Vested rights in public lands to rights of way for ditches and canals, under Rev. St. §§ 2339, 3340, are not acquired until actual completion of the work, so that water can be applied to a beneficial use. United Sates v. Rickey Land & Cattle Co., 164 F 496.

**5.** Rasmussen v. Blust [Neb.] 120 NW 184. The construction of an irrigation canal through public lands, without first securing the consent of the general government or obtaining such right from an entryman, who afterwards abandons the land, gives the owner of the canal no rights as against a subsequent entryman. Id.

**6.** Ownership of water does not imply ownership of a ditch through which it passes. Swank v. Sweetwater Irr. & P. Co., 15 Idaho, 353, 98 P 297. Such rights may exist in different parties. Id.

**7.** Park v. Park [Colo.] 101 P 403. Possession and use of water from a ditch held constructive notice to a purchaser of rights of those in possession. Id.

**8.** Paolini v. Fresno Canal & Irr. Co. [Cal. App.] 97 P 1130. Whether land was injured by seepage from an irrigation ditch held for the jury. Id.

**9.** Verdict of $600 for changing course of irrigation ditch held not excessive. Denver & R. G. R. Co. v. Heckman [Colo.] 101 P 976.

**10. Search Note:** See Waters and Water Courses, Cent. Dig. §§ 23-26, 39, 40, 156, 157, 271, 302, 314, 324; Dec. Dig. §§ 33, 49, 152, 197, 209, 247, 263; 11 A. & E. Enc. P. & P. 589.

**11.** Where parties are summoned or ordered by the court to appear and interplead and disobey, the court may enter a decree affecting their interests. Hough v. Porter [Or.] 98 P 1083.

**12.** Taylor v. Hulett, 15 Idaho, 265, 97 P 37.

**13.** The venue of actions for injuries to land by diversion of water is governed by Code Civ. Proc. § 392, and the suit may be brought in one county though the property is situated in another. Miller v. Madera Canal & Irr. Co. [Cal.] 99 P 502.

**14.** Rev. Civ. Code, § 4852, providing that in an action for protection of water rights plaintiff may make parties all persons who have diverted water from the stream and in one action settle all rights, is permissive and not mandatory and defendants are not

In an action by an irrigation company to quiet title to water of a stream, it is immaterial whether the company owned the water or merely distributed it for owners.[15] The sufficiency[16] and amendment of pleadings is controlled by general rules.[17] In Colorado a proceeding is prescribed by law to change a point of diversion,[18] and the procedure is regulated by statute.[19]

The question of title of sundry owners of water covered by priorities awarded in the same ditch cannot be settled in the adjudication proceedings.[20] The question of exchange of water between the same or different owners cannot be determined in a statutory action to establish relative priorities to store water.[21] Rights to the use of water for irrigation are of such importance to those entitled thereto that courts should exercise great care in granting ex parte injunction.[22] The injunctive remedy to prevent continuance of diversion to the detriment of a prior appropriator operates in personam.[23]

A decree should be definite and certain in its terms[24] and be in conformity to the issues, proof[25] and findings.[26] The scope and binding force of a decree rests

required to litigate rights as between themselves. Sloan v. Byers, 37 Mont. 503, 97 P 855.

15. Arroyo Ditch & W. Co. v. Baldwin [Cal.] 100 P 874. Company whose stockholders owned water rights may maintain action to quiet title to such rights against upper riparian owners. Id.

16. Complaint in a suit to enjoin interference with water of an irrigation ditch, which sets forth facts constituting basis of the claims of the parties, held sufficient. Strong v. Baldwin [Cal.] 97 P 178.

17. Where plaintiffs in original complaint alleged that defendants were entitled to only sufficient water to irrigate 15 acres under the contract pleaded, it was proper to allow an amendment to allege that plaintiffs were owners of a certain water right and were entitled to the amount designated in notices of location. Driskill v. Rebbe [S. D.] 117 NW 135.

18. Where equitable owners of a water right petition for a change of the point of diversion, the legal owners were entitled to appear and consent to the change. Bates v. Hall [Colo.] 98 P 3.

19. In proceedings to change the point of diversion, the court should ascertain the volume of petitioner's right in cubic feet per second, but not the duration of his use, unless it necessarily results in an enlarged use. Bates v. Hall [Colo.] 98 P 3. In proceeding to change point of diversion, held, it was the duty of the court to determine whether an exhibit or the record represented the extent of petitioner's rights. Id. In proceeding to change point of diversion and place of use, other users held entitled to show that such change would alter conditions and result in an enlarged use. Id.

20. Park v. Park [Colo.] 101 P 403.

21. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co. [Colo.] 98 P 729. Where a system of exchanges of water would convert a junior right into a senior one, it cannot be sustained. Id.

22. McLean v. Farmers' Highline Canal & Reservoir Co. [Colo.] 98 P 16. A decree enjoining officers of an irrigation district from closing headgates for the benefit of owners in another district could not be rendered in the absence of consumers from such other district. Id.

23. Where personal service has been had, the court has jurisdiction to award injunctive relief, and such decree is entitled to full faith and credit in the courts of every state. Taylor v. Hulett, 15 Idaho, 265, 97 P 37. The jurisdiction of the courts of Idaho to determine appropriations within the state is not ousted by an answer setting up that defendant has an appropriation and diverts and uses the water in the state of Wyoming. Id.

24. Decree fixing water rights held not vague and uncertain as to amount of water one was entitled to as against another. Driskill v. Rebbe [S. D.] 117 NW 135.

25. In action by user of water against an irrigation company based upon a contract, it is error to render a decree for the user based upon an appropriation. Jackson v. Indian Creek Reservation Ditch & Irr. Co. [Idaho] 101 P 814. Decree that one owns a right by appropriation where the proof shows a contract right is erroneous. City and County of Denver v. Walker [Colo.] 101 P 348. Where complaint alleges a right by appropriation and proof shows a contract right, there is a fatal variance. Id. Where one claimed a prescriptive right to divert 400 cubic feet of water, but evidence showed the capacity of its canal did not exceed 175 feet and that it could not apply more than 100 feet, it was not an abuse of discretion to enjoin it from diverting more than 220 feet. Miller v. Madera Canal & Irr. Co. [Cal.] 99 P 502. Parties who claim through the same diversion from same ditch held tenants in common. Hough v. Porter [Or.] 98 P 1083. In action with other appropriators where no issues are framed between them, their relative rights will not be determined. Id. Where the real object of a suit was to declare that certain persons had not right to waters of a stream and persons not parties owned riparian lands, and the evidence was not sufficient upon which to determine the relative rights of the parties, the court did not err in failing to make such determination. Strong v. Baldwin [Cal.] 97 P 178. Where one relies on adverse possession

in its terms.[27] A decree adjudicating rights and priorities to the use of waters of a stream adjudicates the rights and priorities to waters of tributaries of such stream above the respective points of diversion.[28] In a suit involving priorities, the court may make reasonable regulations for use by the parties.[29] Owing to the difficulty in the enforcement of decrees, where there are many conflicting interests, the trial court may make such supplemental decrees as are essential to make the appellate decree effective.[30] In Montana in a suit to quiet title to a ditch, the court should administer complete relief.[31]

§ 14. *Irrigation districts and irrigation and power companies.*[32]—See 10 C. L. 2018—The procedure by which irrigation districts may be created,[33] their powers,[34] assessments,[35] and procedure by which they may be levied,[36] and the procedure by

but his evidence is insufficient but tends to show appropriation, his rights may be established under that doctrine. Hough v. Porter [Or.] 98 P 1083. Adverse possession and prior appropriation are not inconsistent. Id. Where a judgment did not purport to determine the extent of riparian rights in a stream, whether allegations were sufficiently certain as to be the extent of such rights is immaterial. Strong v. Baldwin [Cal.] 97 P 178.

**26.** Where the court found that one made two distinct appropriations, one on March 5, 1901, for 200 feet per second, and one on October 22, it was error to decree him a priority of 400 feet as of March 5. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co. [Colo.] 98 P 729. A finding that one had used a pipe line for five years, accompanied by a finding of all facts necessary to show acquisition of an adverse right, held a good finding of an interest in the pipe line. Collins v. Gray [Cal.] 97 P 142. Finding that one is owner of 25 inches of water from a stream held to negative any claim of right of another in or to such water. Davies v. Engelo [Cal. App.] 96 P 909.

**27.** Order in which claimant's names are recited in a decree did not denote determination of priorities between them, especially as Mills' Ann. St. § 2403 allows statement of claim to be made by any owner. Park v. Park [Colo.] 101 P 403. Decree in statutory proceeding that one is sole owner of ditch, even if conclusive between that ditch and other ditches taking water from the same source, is not conclusive as between several claimants to ownership of the ditch. Rollins v. Fearnley [Colo.] 101 P 345. A judgment in a prior proceeding that certain reservoir right was senior to others held not res judicata as to persons not parties, nor as to other reservoirs. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co. [Colo.] 98 P 729. A decree in an action between A. and B. adjudicating their rights in a stream for irrigation of tracts then owned is not binding upon B. as to his right to use water on a tract purchased subsequently from a stranger to the action. Josslyn v. Daly, 15 Idaho, 137, 96 P 568. A decree that does not specifically authorize the prior appropriator to take the water from the watershed permanently must be construed as not giving that right. Spokane Ranch & W. Co. v. Beatty, 37 Mont. 342, 96 P 727.

**28.** Josslyn v. Daly, 15 Idaho, 137, 96 P 568. The courts of Idaho in determining water rights may determine priorities on the same stream situated higher up and beyond the state line, in order to fairly determine the relative rights of the parties in the subject-matter located in that state. Taylor v. Hulett, 15 Idaho, 265, 97 P 37.

**29.** Fix times when each may take and quantity to be taken. Burr v. Miclay Rancho Water Co. [Cal.] 98 P 260.

**30.** Hough v. Porter [Or.] 98 P 1083.

**31.** Under Rev. Codes, § 6870, authorizing action to determine adverse claims, a court of equity in suit to quiet title to a ditch should administer complete relief. Cottonwood Ditch Co. v. Thom [Mont.] 101 P 825.

**32. Search Note:** See Waters and Water Courses, Cent. Dig. §§ 315-322; Dec. Dig. §§ 223-238, 271; 17 A. & E. Enc. L. (2ed.) 514; 11 A. & E. Enc. P. & P. 589.

**33.** Writing constituting notice and petition for organization of an irrigation district held sufficient to perform the double offices, the statute not forbidding such combination. Fogg v. Perris Irr. Dist. [Cal.] 97 P 316. Irregularities in petition for organization of irrigation district in that it was not signed by bona fide freeholders held not to render proceedings void after confirmation. Purpose of Laws 1889, p. 212, being to furnish a barrier against attacks after confirmation on the ground of prior fraud. Id. Notice of hearing for confirmation of proceedings to organize an irrigation district held to sufficiently describe the property in view of Laws 1887, p. 30. Id. Under Sess. Laws 1899, p. 408, organization of district, voting of bonds, decree confirming district, etc., are proceedings in rem. Knowles v. New Sweden Irr. Dist. [Idaho] 101 P 81. Constructive service of notice for organization of district held sufficient under Sess. Laws 1899, p. 408. Id. The fact that irrigation district boundaries were changed after original organization held not to make a reference to the district by name essential in notice of hearing for confirmation. Fogg v. Perris Irr. Dist. [Cal.] 97 P 316.

**34.** Wright Act, § 15, authorizing irrigation to purchase works constructed or being constructed, held to authorize negotiations for water systems in advance of completion. Stowell v. Rialto Irr. Dist. [Cal.] 100 P 248.

**35.** District organized under Sess. Laws 1899, p. 488, has power to levy assessments against lands within the district. Knowles v. New Sweden Irr. Dist. [Idaho] 101 P 81.

which bonds may be issued,[37] and the terms of the bonds,[38] are prescribed by statute. One who owns his own water right and would not be benefited by organization of a district may have his land excluded.[39] In all collateral proceedings, benefits assessed are not open to revisal or review.[40] In California property of an irrigation district is exempt.[41]

§ 15. *Water companies and water supply districts. Water companies.*[42]—See 10 C. L. 2019—The power of a water company under its franchise to lay pipes in the street cannot be collaterally attacked by another corporation in a suit for an injunction.[43] Where a water company is supplying water in excess of the rights given by its franchise, the remedy is a proceeding by the state.[44] The supplying of water is a public use.[45]

*Water franchises.*See 10 C. L. 2021—The grant of an exclusive right to maintain a waterworks system is the grant of a franchise.[46] As a general rule the power to grant a franchise is prescribed by statute.[47] A franchise will not be construed as exclusive unless made so by its terms.[48] Where a city grants an exclusive franchise to a water company it may not enter into competition with it,[49] but other-

Under Sess. Laws, 1899, p. 408, an irrigation company has no power to levy assessments against land within the district for which owners already own water rights, until it first purchases such rights. Id. In Idaho before a district can levy an assessment it must be in a position to render some benefits. Id.

36. Under Sess. Laws, 1899, p. 408, personal service upon landowners is not necessary to render judgment confirming an assessment binding. Knowles v. New Sweden Irr. Dist. [Idaho] 101 P 81. One dissatisfied with determination of board of directors of the district that lands will be benefited by organization of the district may have such determination reviewed. Id. One dissatisfied with judgment confirming assessment has right of appeal under Sess. Laws 1899, p. 408. Id.

37. The power of an irrigation district to issue bonds must be exercised in the manner prescribed by law. Stowell v. Rialto Irr. Dist. [Cal.] 100 P 248. Petition and notice for confirmation of proceedings to issue and sell bonds of an irrigation district held sufficient to support a decree confirming proceedings to organize the district under Laws 1889, p. 212. Fogg v. Perris Irr. Dist. [Cal.] 97 P 316. Bonds issued by an irrigation district and delivered to land and water company in payment of completed works held valid under Wright Act, § 15. Stowell v. Rialto Irr. Dist. [Cal.] 100 P 248. Bonds of irrigation held to have been issued Jan. 1, 1891, and not on nominal date and were therefore in compliance with Wright, Act, § 15. Id.

38. Wright Act., § 15, fixes time bonds of an irrigation district shall run and bonds for a different term are void. Stowel v. Rialto Irr. Dist. [Cal.] 100 P 248. Under Civ. Code, §§ 3088, 3137, bonds of an irrigation district held negotiable. Id.

39. Where he fails to appear and make such showing, he is bound by decree confirming assessment. Knowles v. New Sweden Irr. Dist. [Idaho] 101 P 81.

40. Action held a collateral attack on judgment confirming assessment, and so far as it was concerned the judgment was res judicata. Knowles v. New Sweden Irr. Dist. [Iowa] 101 P 81.

41. Under Act March 7, 1887, p. 35, amended by Stat. 1897, p. 263, held property of an irrigation district is exempt from execution. Tulare Irr. Dist. v. Collins [Cal.] 97 P 1124.

42. **Search Note:** See notes in 41 L. R. A. 177; 58 Id. 240; 59 Id. 604; 61 Id. 34; 67 Id. 369; 7 L. R. A. (N. S.) 321; 11 Id. 1163; 18 A. S. R. 380; 81 Id. 478, 486.

See, also, Waters and Water Courses, Cent. Dig. §§ 284-289; Dec. Dig. §§ 183½-188; 30 A. & E. Enc. L. (2ed.) 403; 22 A. & E. Enc. P. & P. 1137.

43. Franklin Trust Co. v. Peninsular Pure Water Co. [C. C. A.] 161 F 855.

44. A private party cannot enjoin it from delivering water for use beyond the limits of the town. Bland v. Tipton Water Co., 222 Pa. 285, 71 A 101.

45. Supplying water to a town or village is a public use. State v. Pacific County Super. Ct. [Wash.] 99 P 8. Under Act April 24, 1897 (P. L. p. 318) exempting from condemnation land held for public purpose, such immunity is not created by mere execution of deed to a city of lands for such uses. Borough of Florham Park v. Madison [N. J. Law] 72 A 4.

46. Adams v. Bullock & Co. [Miss.] 47 S. 527. Such franchise is property and taxable. Id.

47. Under Acts, 1905, c. 129, §§ 249, 253, 254, held a town has power to grant franchise for a water plant in which it is not interested for a term of 25 years. Hester v. Greenwood [Ind.] 88 NE 498. Acts 1905, p. 395, § 253, providing that where a franchise is granted to a water company the ordinance shall prescribe the terms upon which the inhabitants may obtain such services, is complied with by a provision fixing the maximum rate. Id.

48. A franchise to a water company to lay pipes in the streets will not be construed as exclusive in the absence of express words to that effect. Franklin Trust Co. v. Peninsular Pure Water Co. [C. C. A.] 161 F 855.

49. Mercantile Trust & Deposit Co. v. Co-

wise if the franchise is not exclusive.[50] In Texas a franchise which amounts to a monopoly and perpetuity is void.[51] A franchise may not be forfeited while the system is in the hands of a trustee for the city.[52]

*Water boards and districts.* See 10 C. L. 2021—The character of a water commission,[53] its powers,[54] and method of procedure,[55] are regulated by statute.

*Public ownership.* See 10 C. L. 2021—Authority to a municipality to make provisions for water supply may be included in powers given in general terms.[56] A city is not required to follow any particular method in providing for a water supply if none is indicated by law.[57] Unless a city has power to purchase a water sys-

lumbus, 161 F 135. Where a city granted an exclusive franchise to a water company, and its service becoming deficient, the city took steps to operate an opposition plant, held, it not being entitled to enter into competition, the injunction of the water company would be denied only in case the city elected to purchase its plant at fair value. Id.

50. City granted a franchise to a company, but such franchise was not exclusive and no right was given the company to take water from a certain lake, held, where city thereafter procured statutory authority to establish a system of its own and take water from the lake, it was not liable for breach of the contract embodied in the ordinance granting the franchise. Stolz v. Syracuse, 59 Misc. 600, 111 NYS 467.

51. Exclusive franchise to supply a city with water held a perpetuity and monopoly and void under Const. art. 1, § 3. Hartford Fire Ins. Co. v. Houston [Tex.] 116 SW 36. Contract by which a city granted a company an exclusive franchise to furnish water for fire hydrants held a "perpetuity" and monopoly in violation of Const. art. 1, § 26, and void, and damages could not be recovered for its breach. Hartford Fire Ins. Co. v. Houston [Tex. Civ. App.] 110 SW 973.

52. A water company shut down its plant on the ground that earnings were insufficient to meet expenses, and a receiver was appointed with consent of the city to operate the plant. Held the receiver was a trustee for the city and company, and the city could not insist on forfeiture for nonsupply while it was receiving water from the receiver. No claim of damages as if no water had been furnished. Illinois Trust & Sav. Bank v. Burlington [Kan.] 101 P 649.

53. The Metropolitan Sewerage Commission created by Laws, 1906, p. 1646, amended by Laws, 1908, p. 1208, to prevent pollution of waters, is a state commission and greater New York charter does not apply to its employes. People v. Metz, 61 Misc. 363, 113 NYS 1007. Under Manistee City Charter Loc. Acts 1882, p. 23, amended by Loc. Acts, 1903, p. 442, and by §§ 2, 5, 8, 9, 11, 13, 17, c. 33 of said amending act, and Loc. Acts 1882, pp. 33, 42, held board of water commissioners was an agency of the city subject to its general supervision and control and the council was entitled to audit and examine its books. Field v. Manistee Water Com'rs [Mich.] 16 Det. Leg. N. 63, 120 NW 610. The board may be compelled by mandamus to permit such audit. Id.

54. Water commissioners of Perth Amboy held to have power to condemn land and held, where the supreme court found that land the board contracted to purchase for $15,000 was worth but $1,000, its action in setting aside the resolution to purchase would not be reviewed. Mundy v. Fountain [N. J. Err. & App.] 71 A 693. Laws 1895, p. 2067, empowering Rochester water commissioners to close a highway on the shore of a lake to improve the city water supply taken from such lake, held void as a local law. City of Rochester v. Gray, 60 Misc. 591, 112 NYS 774.

55. Under Laws 1905, pp. 2034, 2039, authorizing commissioners of appraisal to assess compensation for lands acquired by New York for water supply, a person interested in land taken has three years within which to present his claim. In re Simmons, 116 NYS 439. Under Laws 1905, p. 2027, authorizing acquisition of land for water supply, and requiring commissioners of appraisal to determine claims presented, jurisdiction is acquired by a claimant appearing and presenting his claim. Id. The jurisdiction of the commissioners is only obtained from the statute and the order under which they are appointed. Id. Where fee owners appear and present their claim, payment should not be delayed because claimant of value of an easement failed to present his claim. Id. Under such law the report of the commissioners will be remitted to them with instructions to report separately the value of the fee and the claim of respective owners, leaving undetermined the value of an easement no claim for which had been presented. Id. Owners of the fee cannot conclude by their evidence the owner of an easement in the land as to its value, he is entitled to file his claim and have the commissioners determine its value. Id. Laws 1905, p. 2023, requiring submission of maps, etc., to state water commission before taking lands for sources of water supply, held that "sources" may refer to a lake, stream or pond or to any well defined water shed, and the statute did not exclude from its operation a whole territory in which a city has incidently procured some part of its supply. Queens County Water Co. v. O'Brien, 131 App. Div. 91, 115 NYS 495.

56. State v. Tampa Waterworks Co. [Fla.] 47 S 358.

57. State v. Tampa Waterworks Co. [Fla.] 47 S 358. The city of Tampa may establish a municipal plant or grant a franchise to a company. Id. Limitations on taxing and bonding power of a city held

tem, a contract therefor is void.[58] Where a city condemns property of a water company, the latter is entitled to compensation for both physical property taken and the franchise.[59] A provision in a contract for the purchase of waterworks by a city, that the value shall be ascertained by appraisers selected by the parties, relates to a matter of public concern and a decision of a majority of duly qualified appraisers is binding on the parties.[60] The valuation of a waterworks by appraisers selected as experts under a contract for its purchase by the city is not an arbitration, nor do the appraisers act judicially nor are they bound by rules relating to arbitration.[61] Where a contract by a city for the purchase of a system provides for the appointment of arbitrators, they may be appointed as therein prescribed.[62] Their action must be free from fraud.[63] Where a city elected to take a waterworks a portion of which was not constructed according to contract, the rule applies that the contractor is entitled to the contract price less a fair allowance to make good the defects.[64] Where purchaser of a system is authorized by an election, the election must be regular [65] and the terms of the proposition submitted must be followed; [66] but if action taken by the town is irregular, it may ratify and

not to preclude it from making provision for water supply. Id.

58. A village corporation with power only to raise money sufficient to support a suitable number of hydrants and fire apparatus has no power to enter into a contract, with a water company giving it the right after certain number of years to purchase the water works plant. Phillips Village Corp. v. Phillips Water Co. [Me.] 71 A 474. Where it has made such contract and is afterwards authorized to "vote to purchase" the plant, such legislative authority may have retroactive effect and validate the contract, but when it attempts to avail itself of the authority it must proceed according to the terms of the statute. Id.

59. In re Monongahela Water Co. [Pa.] 72 A 625.

60. Omaha Water Co. v. Omaha [C. C. A.] 162 F 225. The procedure of appraisers in causing books of the company to be examined without the presence of counsel for the parties was within their discretion and did not invalidate the appraisal. Id. An appraisal of a large system under contract of purchase will not be invalidated because title to a small part of the property not vital to the integrity of the system is defective, nor because it may include property not necessary to the system. Id.

61. So long as they act honestly and in good faith they have a wide discretion as to methods of procedure. Omaha Water Co. v. Omaha [C. C. A.] 162 F 225.

62. Where contract between city and water company provided for determination of value of the plant by arbitrators if the city desired to buy, and that notice of appointment of such appraisers could be served on the company or its assigns, service of such notice on secretary and superintendent of a company to which it had assigned its rights was sufficient. City of Eau Claire v. Eau Claire Water Co., 137 Wis. 517, 119 NW 555. In such case notice to mortgagee of the company of daily hearings before the arbitrators was not necessary, since such mortgagee had merely a lien and could exercise no control over the arbitration. Id.

63. Where contract provided for determination of price of system by arbitrators, evidence held insufficient to show such undervaluation by appraisers as to indicate fraudulent and arbitrary action by them. City of Eau Claire v. Eau Claire Water Co., 137 Wis. 517, 119 NW 555. Where a contract between a city and a water company provided that if the city purchased the plant the value should be determined by arbitrators, an item for laying certain extensions after the arbitration was commenced and payable under a separate contract need not be included in the award or tender. Id.

64. Jersey City v. Flynn [N. J. Eq.] 70 A 497. Failure to remove a rag mill in compliance with a provision in a contract to do so does not entitle the city to deduct the price of removal, where it gets a pure supply and such removal was stipulated for only for such purpose. Id.

65. Where record of town meeting called for purpose of accepting Stat. 1904, p. 469, authorizing towns to establish water systems shows that it was voted under article in the warrant to proceed to ballot as required by section 12, check list to be used, it is presumed that ballot was taken according to vote. Seward v. Revere Water Co., 201 Mass. 453, 87 NE 749. Option given a town to purchase waterworks of a company, where majority of legal voters adopt a resolution authorizing the purchase may be exercised on majority of voters voting on the question though such majority is not a majority of the electors. Town of Southington v. Southington Water Co., 80 Conn. 646, 69 A 1023. Act of city in connecting with its water system a supply purchased at the same time the entire system was purchased held not a change of the plans of the system within Ball. Ann. Codes & St. § 835, requiring submission to voters. Griffin v. Tacoma, 49 Wash. 524, 95 P 1107. Stat. 1904, c. 457, authorizing a town to establish a water system after acceptance of the act by two-thirds of voters present and voting, does not require acceptance by two-thirds of all voters of the town. Seward v. Revere Water Co., 201 Mass. 453, 87 NE 749.

66. Where electors of a city authorized purchase of all sources of water supply

adopt the contract.[67] A citizen who seeks to enjoin a town from purchasing a system on the ground that it will be a nuisance need not first apply to the town to rescind its contract.[68]

*Contracts for public supply.* See 10 C. L. 2024—In Georgia, cities have power to contract for a water supply.[69] A contract by a city is presumed to be for the benefit of the municipality as a whole, and not for the benefit of its inhabitants as individuals,[70] and, where a city has contracted for a water supply for itself and its inhabitants, the city, and not the inhabitants, is the proper party to compel performance of such contract,[71] but a contract created by ordinance by which one agrees to supply water to a city and its inhabitants, and to supply water for fire protection, is one for the benefit of the inhabitants as well as for the city.[72] Supply contracts must have a reasonable construction and be read in the light of surrounding circumstances.[73] A city and its inhabitants on one side and a water

owned or operated by the company, they authorized the purchase of certain springs from which the company had not actually drawn water, it not being necessary to specifically mention such springs in the ordinance submitting such question to the voters. Griffin v. Tacoma, 49 Wash. 524, 95 P 1107. Where the required number of voters present at town meeting ratified a contract to purchase a water system and authorized the issue of bonds under St. 1904, p. 469, c. 457, a lawful purchase was thereby affected and bonds were valid. Seward v. Revere Water Co. 201 Mass. 453, 87 NE 749.

**67.** If action taken by a town to purchase a water system under Stat. 1882, p. 103, c. 142, is irregular, the town may ratify and adopt the contract. Seward v. Revere Water Co., 201 Mass. 453, 87 NE 749. A purchase by a town of water company's system cannot be avoided on the ground that an officer of the company acted as moderator at town meeting when purchase was made, where it does not appear that he acted corruptly. Id.

**68.** A citizen who seeks to enjoin a town from purchasing a water power and pond on the ground that it will be a public nuisance need not show that he has applied to the town to have it rescind its contract to purchase. Jones v. North Wilkesboro [N. C.] 64 SE 866.

**69.** Cities in Georgia have power under the general welfare clause of their charter to contract for water supply. Mercantile Trust & Deposit Co. v. Columbus, 161 F 135.

**70.** In order that an individual may have the benefit of a provision for indemnity in case of loss by fire, he must show that it was intended that he should be the direct beneficiary of such provision. Ancrum v. Camden Water, Light & Ice Co. [S. C.] 64 SE 157. A city in contracting with a water company does not act as agent of the individual citizen, though the contract is void unless confirmed by a two-thirds vote. Id. Municipal water company held not liable to citizen for loss by fire on such ground. Id.

**71.** International Water Co. v. El Paso [Tex. Civ. App.] 112 SW 816.

**72.** Houck v. Cape Girardeau Waterworks & Elec. Light Co. [Mo. App.] 114 SW 1099. An action may be maintained by a citizen on a contract for a water supply, though such contract is in the form of ordinance, where it provides for furnishing water to a city and to its inhabitants. Houck v. Cape Girardeau Waterworks & Elec. Light Co. [Mo. App.] 114 SW 1099.

**73.** Provision that water is to be free from pollution means that supply shall be pure when it reaches the city, and not that river shall be pure from source to point of intake. Jersey City v. Flynn [N. J. Eq.] 70 A 497. Provision that water shall be pure does not require absolute purity, but only that it shall be free from deleterious pollution. Id. Provision that plan had been prepared to prevent contamination from any source requires a system capable of preventing contamination under any conditions likely to occur. Id. Under contract for city supply, contractor held not required to provide against future conditions which might contaminate the supply. Id. Evidence held to show that waterworks were so constructed that it could be relied upon to constantly furnish pure water. Id. Evidence held to show that a filter was indispensably necessary to complete performance of a contract to furnish pure water. Id. Contract construed, and time when obligation of city to pay for water terminated declared. Id. Contract for temporary supply construed and held not to require water to be furnished from new works at the same rate. Id. The prohibition against polluting a stream is against polluting it at any point above the intake, regardless of whether it is polluted at the point of intake. Id. Letter held part of water supply contract and binding. Id. Supply contract construed, and held that the city was required to pay for water by the million gallons until it took title and paid for the waterworks. Id. Bill by city praying that defendant be required to convey to it a waterworks held not equivalent to tender of price, and did not confer on the city right to possession of the plant to which it was entitled only on payment of the price. Id. Evidence sufficient to show that a water company had failed to comply with its contract to furnish a municipality with a sufficient supply of wholesome water. Mercantile Trust & Deposit Co. v. Columbus, 161 F 135.

company on the other are entitled to such damages for breach of contract between the city and the company as are fairly contemplated by the terms of the contract.[74] A contract between a city and a water company is not so unreasonable that it cannot be specifically enforced, because it gives the city a right to purchase the plant, without a corresponding right in the company to enforce purchase.[75]

§ 16. *Water service and rates.*[76]—See 10 C. L. 2024—It is primarily the duty of a water company to make necessary connections with consumers[77] and keep their ditches in repair,[78] and where it has contracted to do so mandamus will issue to compel performance,[79] and the remedy need not be applied for in each individual case.[80] Under such circumstances, contracts with consumers by which they are bound to make connections are void.[81] Mandamus is the proper remedy to compel a water company to supply a consumer with water.[82] The duty to extend mains[83] and furnish meters[84] rests in the terms of the franchise. A public water supply company is not required to furnish chemically pure water.[85] Where a city with power to maintain a system supplies water to an inhabitant for several years, an implied contract for water supply exists.[86]

**74.** Ancrum v. Camden Water, Light & Ice Co. [S. C.] 64 SE 151.

**75.** City of Eau Claire v. Eau Claire Water Co., 137 Wis. 517, 119 NW 555.

**76. Search Note:** See notes in 14 L. R. A. 669; 23 Id. 146; 33 Id. 181; 1 L. R. A. (N. S.) 771; 958, 963; 3 Id. 817; 6 Id. 198, 1171; 11 Id. 613, 12 Id. 711; 2 Ann. Cas. 479, 853; 5 Id. 507; 7 Id. 475; 9 Id. 1070.

See, also, Waters and Water Courses, Cent. Dig. §§ 290-299, 312, 329; Dec. Dig. §§ 203, 257, 258, 287; 30 A. & E. Enc. L. (2ed.) 422; 22 A. & E. Enc. P. & P. 1138.

**77.** Can be relieved from such duty only by some contract or franchise provision. International Water Co. v. El Paso [Tex. Civ. App.] 112 SW 816. Company held bound to make such connections at its own expense under the terms of its franchise. Id. Judgment compelling such duty held not objectionable as requiring company to instal connecting pipes regardless of distance of owner from the main. Id. Judgment compelling such duty was not a taking of property without due process. Id. Message of mayor to attorneys for company, not ratified by council requiring the company to prepare an itemized bill for such service for each connection made, held not to justify refusal of the company to make necessary connections. Id. In the absence of agreement, it is the duty of a water company **to furnish laterals** to connect the land of consumers with the canal. Sisk v. Gravity Canal Co. [Tex. Civ. App.] 113 SW 195. Furnish facilities for delivering the water. Id. It is the duty of a canal company to turn water out of its canal at such place as will be most convenient for the consumer and will cause least waste. Niday v. Barker [Idaho] 101 P 254.

**78.** It is the duty of canal companies to keep their ditches in repair so as to carry water to consumers. Niday v. Barker [Idaho] 101 P 254.

**79.** International Water Co. v. El Paso [Tex. Civ. App.] 112 SW 816. In mandamus to compel a company to supply water to a consumer who had refused to pay one admittedly exhorbitant bill, evidence held to show a bona fide dispute as to accuracy of the meter by which former service had been measured. Poole v. Paris Mountain Water Co., 81 SE 438, 62 SE 874.

**80.** Mandamus would lie by the city to compel the performance of the duty generally. International Water Co. v. El Paso [Tex. Civ. App.] 112 SW 816.

**81.** Where the company had contracted to make such connections, contracts by it with consumers whereby they agreed to stand such expense are void, and did not preclude mandamus by the city to compel the company to perform the duty. International Water Co. v. El Paso [Tex. Civ. App.] 112 SW 816.

**82.** Poole v. Paris Mountain Water Co., 81 S. C. 438, 62 SE 874.

**83.** Provision in ordinance that water company shall extend mains when requested by a majority of votes cast held to mean that the company was not required to make an extension unless a majority of those voting voted in favor of an extension, Illinois Trust & Sav. Bank v. Burlington, [Kan.] 101 P 649.

**84.** Where a tenant and subtenant occupied a store building and each used water separately from the other, they were "separate consumers" within an ordinance providing for installation of meters, and the company was not required to furnish a meter for their joint use. Nogales Water Co. v. Neumann [Ariz.] 100 P 794.

**85.** Sufficient if water is reasonably pure. Peffer v. Pennsylvania Water Co., 221 Pa. 578, 70 A 870. "Ordinarily pure and wholesome" means reasonably clean and free from contaminating matter. Id. Where one filed a bill alleging that a water company supplied him with impure water, held it was proper to render a decree directing the company to file a statement under Act April 29, 1874, Act June 2, 1887, and Act May 16, 1887, regulating public water supply. Id.

**86.** May not arbitrarily shut off the supply. Delaware, L. & W. R. Co. v. Buffalo, 115 NYS 657. Railroad company having large interests is an "inhabitant," within Laws 1870, p. 1161, impowering the city of Buffalo to supply its inhabitants with water. Id. A city with power to maintain

*Rules and regulations of service.*[See 10 C. L. 2025]—Municipalities [87] and water companies [88] may adopt reasonable regulations of service. The fact that a regulation of a city furnishing free water for fire protection, requiring all water for private protection to pass through a meter furnished at the expense of the owner, has been put in force gradually is no ground for enjoining its enforcement in a particular case.[89] In order to restrain a municipality from cutting off the water supply to any inhabitant, it must be shown that irreparable injury or injustice will result.[90]

*Injuries from deficient supply, equipment, or negligence.*[See 10 C. L. 2025]—The great weight of authority is to the effect that a water company is not liable to an individual citizen for loss by fire,[91] but under an ordinance granting a franchise

a system has power to deliver water to an inhabitant within the city to be stored outside the city for use partly within and partly without the city limits. Id.

87. Where an ordinance provides for disconnecting water on failure to pay rates within time, the city may not disconnect where rates have been tendered prior to shut-off. Royal v. Cordele [Ga.] 63 SE 826. Fee charged for turning on water, shut off for failure to pay rent, has no reference to failure of consumer to pay promptly. Id. Under St. 1855, p. 831, c. 435, authorizing the city of Lowell to maintain waterworks and ordinance vesting such power in a water board, a regulation requiring all waters taken from the city's mains for private fire protection to pass through a meter furnished by the city at the expense of the owner is a valid regulation. Shaw Stocking Co. v. Lowell, 199 Mass. 118, 85 NE 90. A municipality that furnishes water to its inhabitants has the right to designate the character of meter to be used. Anderson v. Berwyn, 135 Ill. App. 8.

88. Poole v. Paris Mountain Co., 81 S. C. 438, 62 SE 874. Regulation that water may be shut off without notice on failure to pay rent for 30 days is reasonable. Id. Where no bill was rendered for 1907 water until Jan. 1, 1908, the company was not entitled to shut off water until 30 days from that date. Where amount of water used by a hotel while meter was disconnected without their knowledge is approximately estimated, upon payment therefor, the hotel is entitled to enjoin cutting off of the water. Hoover v. Deffenbough [Neb.] 119 NW 1130. In mandamus to compel a company to furnish water, where it had been cut off on refusal of the consumer to pay an admittedly exhorbitant bill for prior service, it was only necessary for the consumer to show a bona fide dispute as to correctness of amount demanded. Poole v. Paris Mountain Water Co., 81 S. C. 438, 62 SE 874. The Macon Gaslight & Water Company in the exercise of its franchise is under contract to supply citizens with water at fixed rates, and is liable in damages for breach of such duty. Macon Gaslight & W. Co. v. Freeman, 4 Ga. App. 463, 61 SE 884. The citizen is under the correlative duty to pay rates in the manner prescribed, and failure to do so gives the company the right to shut off the water. Id.

89. Shaw Stocking Co. v. Lowell, 199 Mass. 118, 85 NE 90.

90. Anderson v. Berwyn, 135 Ill. App. 8.

91. Holloway v. Macon Gaslight & Water Co. [Ga.] 64 SE 330. A property owner whose property is destroyed by fire has no right of action against one who has contracted with the city to furnish water to it and its inhabitants. Houck v. Cape Girardeau Waterworks & Elec. L. Co. [Mo. App.] 114 SW 1099. City is under no obligation to furnish water for such purpose. Id. Water company held not liable to an inhabitant for failure to furnish sufficient pressure to extinguish a fire, where there was no special contract to that effect. Greenville Water Co. v. Beckham [Tex. Civ. App.] 118 SW 889. A company contracting with a city to supply water to it and to its inhabitants and to supply water to extinguish fires does not undertake a public duty so as to be liable to a citizen for failure to supply water to extinguish a fire. Id. Contract between city and water company for water supply for city and its inhabitants held not for the benefit of inhabitants, and the company owed them no duty to provide water for fire protection. Id. A city owning its own waterworks is not liable for failure to furnish sufficient water to extinguish fires. Id. Contract of company with municipality containing a general stipulation to furnish an adequate supply to extinguish fires does not render it liable to an individual citizen. Cooke v. Paris Mountain Water Co. [S. C.] 64 SE 157. Contract between city and water company by which the company did not undertake to answer to citizens for loss by fire held not to contemplate payment for such losses in case of its negligence. Ancrum v. Camden Water, Light & Ice Co. [S. C.] 64 SE 151. Individual owners of property destroyed by fire cannot maintain action against a public water supply company under contract with the city to furnish water for fire purposes. Hone v. Presque Water Co. [Me.] 71 A 769. Water company held not liable to owners of property destroyed. Id. Complaint by owners held demurrable as not sufficient in substance. Id. As the law does not require municipal corporations to maintain waterworks, but 22 Stat. 83, merely authorizes them to build and operate them, when 23 Stat. P. 1039, empowered them to grant exclusive franchises to companies, it left them free to provide as they saw fit for indemnity for losses by fire. Ancrum v. Camden Water, Light & Ice Co. [S. C.] 64 SE 151.

**NOTE. Liability of water company for loss by failure to furnish water to extin-**

and providing that sufficient pressure shall be maintained to afford fire protection without the aid of engine, the pressure must be sufficient to afford reasonable protection to all buildings whether owned by the city or its inhabitants.[92] A company supplying water for domestic purposes must keep its mains in such condition as to prevent the water from becoming polluted,[93] and a consumer has no right to use pipes in such manner as to pollute the water,[94] but, if he does, the company has no right to recklessly injure him.[95] Water companies must exercise reasonable care

**guish fire:** The great weight of authority is to the effect that a resident of a city cannot recover of a waterworks company damages for loss by fire occasioned by the failure of such company to furnish, in accordance with its contract with the city, a sufficient supply of water to extinguish the fire. Fowler v. Athens City Waterworks Co., 83 Ga. 219, 9 SE 673, 20 Am. Rep. 313; Nickerson v. Bridgeport Hydraulic Co., 46 Conn. 24, 33 Am. St. Rep. 1; Atkinson v. Newcastle & Gateshead Water works Co., L. R. 2 Ex. D. 441; Foster v. Lookout Water Co., 3 Lea [Tenn.] 42; Davis v. Clinton Waterworks Co., 54 Iowa, 59, 6 NW 126, 37 Am. Rep. 185; Ferris v. Carson Water Co., 16 Nev. 44, 40 Am. Rep. 485; Beck v. Kitanning Water Co., 8 Sadler [Pa.] 237, 11 A 300; Mott v. Cherryvale Water & Mfg. Co., 48 Kan. 12, 28 P 989, 30 Am. St. Rep. 267, 15 L. R. A. 375; Howsman v. Trenton Water Co., 119 Mo. 304, 24 SW 784, 41 Am. St. Rep. 654, 23 L. R. A. 146; Eaton v. Fairbury Waterworks Co., 37 Neb. 546, 56 NW 201, 40 Am. St. Rep. 510, 21 L. R. A. 653; Fitch v. Seymour Water Co., 139 Ind. 214, 37 NE 982, 47 Am. St. Rep. 258; Wainwright v. Queens County Water Co., 78 Hun [N. Y.] 146, 28 NYS 987; Bush v. Arteslan Hot & Cold Water Co., 4 Idaho, 618, 43 P 69, 95 Am. St. Rep. 161; Akron Waterworks Co. v. Brownless, 10 Ohio Cir. Ct. R. 620; Stone v. Uniontown Water Co., 4 Pa. Dist. R. 431; House v. Houston Waterworks Co., 88 Tex. 233, 31 SW 179, 28 L. R. A. 532; Boston Safe Dep., etc., Co. v. Salem Water Co., 94 F 238; Wilkinson v. Light, H. & W. Co., 78 Miss. 389, 28 S 877; Britton v. Green Bay & Ft. H. Waterworks Co., 81 Wis. 48, 51 NW 84, 29 Am. St. Rep. 856; Nichol v. Huntington Water Co., 53 W. Va. 348, 44 SE 290; Town of Ukiah City v. Ukiah Water, Imp. Co., 142 Cal. 173, 75 P 773, 100 Am. St. Rep. 107; 64 L. R. A. 231; Allen & Currey Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 S 980, 104 Am. St. Rep. 525, 68 L. R. A. 650; Metropolitan Trust Co. v. Topeka Water Co., 132 F 702; Blunk v. Dennison Water Supply Co., 71 Ohio St. 250, 73 NE 210; Lovejoy v. Bessemer Waterworks Co., 146 Ala. 374, 41 S 76, 6 L. R. A. (N. S.) 429; Peck v. Sterling Water Co., 118 Ill. App. 533; Metz v. Cape Girardeau Waterworks Elec. L. Co., 202 Mo. 324, 100 SW 651; Thompson v. Springfield Water Co., 215 Pa. 275, 64 A 521; Hone v. Presque Isle Water Co. [Me.] 71 A 769; Bienville Water Supply Co. v. Mobile, 112 Ala. 260-266, 20 S 742, 57 Am. St. Rep. 28, 33 L. R. A. 59; Becker v. Keokuk Waterworks, 79 Iowa, 419, 44 NW 694, 18 Am. Rep. 377; Smith v. Great South Bay Water Co., 82 App. Div. 427, 81 NYS 812. The reason for the doctrine is given in most, if not all, of these cases. This doctrine has not been adhered to in Kentucky, North Carolina, and Florida. Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 SW 554, 13 SW 249, 25 Am. St. Rep. 536, 7 L. R. A. 77; Gorrell v. Greensboro Water Supply Co., 124 N. C. 328, 32 SE 720, 70 Am. St. Rep. 598, 46 L. R. A. 513; Mugge v. Tampa Waterworks Co., 52 Fla. 371, 42 S 81, 120 Am. St. Rep. 207, 6 L. R. A. (N. S.) 1171. The Kentucky and North Carolina cases have been criticised in many of the cases wherein the doctrine above announced has been recognized and applied, and the reasoning in the Mugge Case and that of the majority of the court in Guardian Trust & Deposit Co. v. Fisher, 200 U. S. 57, 50 Law. Ed. 367, which seems to have been followed in Mugge's Case, is criticised in the editorial note on the last-mentioned case in 6 L. R. A. (N. S.) 1171.—From opinion of Fish, C. J., in Holloway v. Macon Gaslight & Water Co. [Ga.] 64 SE 330.

Bookhout, J., in Greenville Water Co. v. Beckman [Tex. Civ. App.] 118 SW 889, reasserts the general rule and cites, in addition to the above, the case of Cleburne Water, Ice & L. Co. v. Clehurne, 13 Tex. Civ. App. 141, 35 SW 733; Springfield Fire & Marine Ins. Co. v. Keesville, 148 N. Y. 46, 42 NE 405, 51 Am. St. Rep. 667, 30 L. R. A. 660.—Ed.

**92.** Houck v. Cape Girardeau Waterworks & Elec. L. Co. [Mo. App.] 114 SW 1099. If it be unfair discrimination to other tax payers for city to pay from its general revenue indemnity for fire losses, a water company could not avoid liability it assumed in such case. Ancrum v. Camden Water, Light & Ice Co. [S. C.] 64 SE 151. A water company which agreed to furnish a town sufficient water to extinguish fires held bound to exercise ordinary care to maintain its pipes and hydrants and furnish water of the pressure and volume stipulated. Inhabitants of Milford v. Bangor R. & Elec. Co. [Me.] 71 A 759. Company held liable for value of town hall, sidewalks, and apparatus ruined by fire due to failure to comply with the terms of its contract. Id.

**93.** Where it furnishes water to a laundry boiler, it must use such appliances as will keep water used in the boiler from returning through the feed pipes into the mains. Bouri v. Spring Valley Water Co. [Cal. App.] 97 P 530.

**94.** One who receives water for his laundry boiler has no right to use the feed pipes for the purpose of relieving the boiler of excessive pressure. He must provide safety valves. Bouri v. Spring Valley Water Co. [Cal. App.] 97 P 530.

**95.** Where a water company supplying water for use in a laundry boiler knew that

to keep their pipes and hydrants in a reasonably safe condition,[96] but is not liable if guilty of no negligence.[97]

*Water rates.*[See 19 C. L. 2025]—As a general rule legislatures are authorized to fix rates[98] or prescribe the manner in which maximum rates may be established.[99] Ordinance rates for meter service are prima facie reasonable,[1] and, while water companies are entitled to charge just and reasonable rates,[2] the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are plainly in violation of law.[3] Whether rates fixed by a municipality are reasonable or unreasonable is a judicial question[4] to be determined on the basis of a fair return upon the property invested.[5] A water company which binds

the owner of the boiler wrongfully used its pipes to relieve the boiler of excessive pressure, and had provided no other means for the escape of steam and it installed a check valve without notice to the owner of the boiler, held, it was liable for damages caused by explosion of the boiler. Bouri v. Spring Valley Water Co. [Cal. App.] 97 P 530. Complaint for such damages held bad on demurrer for failing to allege that the company knew that the injured person was making such use of its pipes and had provided no other exhaust. Id. A complaint for such injury must show that the water company was so flagrantly negligent as to overcome his own wrongful act. Id.

**96.** Where there was evidence that a hydrant which bursted and flooded a cellar was in a leaky condition for 48 hours prior to its collapse, whether such condition indicated the defect which caused its collapse held for the jury. O'Brien Co. v. Omaha Water Co. [Neb.] 118 NW 1110. Instructions as to negligence approved. Id.

**97.** Where a water company had a right to shut off water for 30 minutes to make repairs on hydrants, held, where such shut-off caused a gas heater to explode, the company was not liable for a fire caused, it having no notice of the heater, and failure to notify the patron of the shut-off was not actionable negligence. Brane v. Light, H. & W. Co. [Miss.] 48 S 728.

**98.** The constitutional provision that the legislature has power to prevent unjust discrimination and excessive charges by public service corporations, etc., applies to waterworks companies. State v. Tampa Waterworks Co. [Fla.] 48 S 639. Under an ordinance fixing flat rates and that company might insert a meter and charge meter rates and that a consumer might insert a meter and pay the meter rate provided it exceeded $12 per annum, held a consumer who installed a meter was required to pay the $12 though it exceeded the maximum flat rate. Charleston L. & P. W. Co. v. Lloyd Laundry & Shirt Mfg. Co., 81 S. C. 475, 62 SE 873. Under ordinance fixing maximum rate, held water company was entitled to charge a five-room householder a reasonable meter rate and that he was not entitled to a $5 flat rate. Poole v. Paris Mountain Water Co., 81 S. C. 438, 62 SE 874. Under St. 1885, p. 97, § 6, relative to establishment of rates, held a company whose rates had been fixed by county board could not, after one year from fixing of such rates, sue for redress against such rates without first resorting to the board. San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus County [Cal.] 99 P 365. Water company fixed minimum rate of a consumer at $3 per three months, and threatened to shut off water when complainant refused to pay at new rate, although offering to pay at rate prescribed by ordinance. Kerz v. Galena Water Co., 139 Ill. App. 598.

**99.** Art. 15, § 6 of Constitution authorizes the legislature to provide the manner in which reasonable maximum rates may be established. Jackson v. Indian Creek Reseroir Ditch & Irr. Co. [Idaho] 101 P 814. Act providing that maintenance charge may be fixed by contract is valid. Id. Rev. Codes, § 3288, authorizes parties to contract with reference to delivery of water from a reservoir and to fix charge for annual maintenance fee. Id.

**1.** Poole v. Paris Mountain Water Co., 81 S. C. 438, 62 SE 874.

**2.** A water company is entitled to charge rates sufficient to pay operating expenses, interest on bona fide indebtedness and reasonable dividends on the capital stock, and in addition a sum sufficient to cover depreciation of its plant. Contra Costa Water Co. v. City of Oakland, 165 F 518. Company held entitled to enjoin a resolution fixing rates which would not give 5 per cent on capital invested. Id. Rates which will enable a company to earn 5 per cent net on value of its property are neither unreasonable nor confiscatory. Spring Valley Water Co. v. San Francisco, 165 F 667. It is proper to enjoin the enforcement of an ordinance fixing a rate which would not make a net income equal to 5 per cent on the value of the plant. Spring Valley Water Co. v. San Francisco, 165 F 657.

**3.** State v. Duluth W. & L. Com'rs, 105 Minn. 472, 117 NW 827. An ordinance fixing maximum rates cannot be held invalid unless plainly confiscatory. Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 Law. Ed. —. Water charges made by company against hotel proprietors held unreasonable. Hoover v. Deffenbaugh [Neb.] 119 NW 1130.

**4.** A company may invoke the jurisdiction of the courts to determine whether such rates are such as to deprive it of property without due process of law. Spring Valley Water Co. v. San Francisco, 165 F 657; Spring Valley Water Co. v. San Francisco, 165 F 667.

**5.** Under Cal. Act March 12, 1885, St. 1885, p. 95, c. 115, authorizing boards of supervisors to fix rates of irrigation companies so as to earn not less than 6 nor more than 18 per cent on value of plant, where deductions are made for deterioration of the

itself by its franchise agreement to furnish water at a specified rate is bound by such agreement.[6] In New York no charge can be made for water not used.[7] A town will not be held to have exercised its option to change from a flat rate to a meter rate unless such intention is clearly indicated.[8] The lien for rates[9] or other charges is statutory.[10]

§ 17. *Grants, contracts, and licenses.*[11]—See 10 C. L. 2027—Contracts relative to waters and water supply must possess the essentials of other contracts.[12] The

plant, the company is entitled to an allowance of its earnings to cover cost of renewal. San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus County, 163 F 567. In fixing such rates by boards in different counties in which water is supplied by the same canal under the construction of the statute that the company is entitled to not less than 6 per cent on its investment, and its earnings in all counties must be considered in determining the legality of any particular rate, the distance of each county from the head of the canal is to be considered. Id.

**Considerations in determining reasonableness of rates:** In determining the reasonable value of property of a water company, the estimated cost of a substituted system may be considered but it is not controlling. Spring Valley Water Co. v. San Francisco, 165 F 667. In fixing just and reasonable rates, the depreciation of the plant from natural causes should be considered and cost of replacement taken from gross income. Id. Franchise of a company to collect rates is property and its value, as well as whatever value attaches to the business as a going concern, is to be considered in fixing value. Id. The market value of outstanding stock and bonds may be considered. Id. A company is not entitled to charge to current expense the cost of replacing property destroyed through its own negligence. Id. The fact that interest rates have advanced generally within a short period of time does not necessarily entitle a water company to earn a higher income than before without a corresponding adjustment of the value of its property. Id. Only such property as is at time actually in use for supplying the water to which the rates apply, is to be considered and it is to be valued at what it is worth for such purpose. Id. Deduction should be made for depreciation from age in value of plant. Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 Law. Ed. —. Capitalization no guide when shown to be excessive. Id. Fact that ordinance does not require giving of discount for prompt payment. Id. Net income under another ordinance which has not been enforced should be considered. Id.

**6.** Cannot refuse to furnish water at such rate on the ground that it is confiscatory. Condon v. New Rochelle Water Co., 116 NYS 142. But where at the time such agreement was made most of the consumers were using through three-quarter inch connections, they were not entitled to use a larger connection during the life of the contract. Id.

**7.** Under New York Charter, § 473, providing that no charge be made for water not actually used as shown by meter, no charge can be made for water used during nonoperation of meter which resulted from neglect of city officials. People v. New York, 129 App. Div. 475, 114 NYS 312. A lessee bound to pay a proportionate share of water rent is not liable for months he did not occupy the premises after abandonment, as water was metered and he could not have used any while he was out of possession. Corn v. Shapiro, 111 NYS 727.

**8.** Where regulations provided for a flat rate payable semi-annually and further provided that the town reserved the right to change from flat rate to meter service, the mere setting of meters is insufficient to indicate an election to exercise the option to change to a meter rate. Jones v. Bloomfield [N. J. Eq.] 96 A 1106.

**9.** Under Laws 1901, pp. 207, 210, 432, held water rents are not a lien on premises until amount due has been determined and actual entry made in the proper book. Mandel v. Weschler, 128 App. Div. 505, 112 NYS 813. On issue as to when water was turned on in new tenement houses, owner's testimony that he had never applied for water held not overcome by proof as to when certificate that house complied with the law was issued. Id. Under ordinance of New York, § 283, providing that water rents shall be paid in advance by applying for water and before any permit is issued, rents did not become a lien on new buildings before application was made and permit issued. Id.

**10.** Charge for installing a meter in a tenement house under Laws 1901, p. 889, is not a lien until the amount of the charge is determined. Feder v. Rosenthal, 62 Misc. 610, 116 NYS 2.

**11. Search Note:** See notes in 6 C. L. 1873.

See, also, Waters and Water Courses, Cent. Dig. §§ 158-189, 274, 275, 290-299, 311, 312, 328; Dec. Dig. §§ 153-158½, 200, 201, 203, 254, 257, 258, 284, 285.

**12.** Act. Aug. 18, 1894, c. 301, § 4, 28 Stat. 422, amended by 31 Stat. 1188 and 29 Stat. 431, granting desert land to states for reclamation purposes, and Rev. St. Wyo. 1899, § 934, relative to such lands, construed, and contract by an irrigation company by which the exclusive rights to contract with settlers was given a third party held void as against public policy and contrary to the intent of the statute. McKinney v. Big Horn Basin Development Co. [C. C. A.] 167 F 770. Transfer of property of water works to a city held valid. Ryan v. Louisville [Ky.] 118 SW 992. Contract by a town to buy a water system is equally binding whether entered into under St. 1882, c. 142, and adopted by ratification or subsequently made under St. 1904, c. 457, as a result of further negotiations embodying the same

usual rules of construction apply to contracts and grants pertaining to water and water rights,[13] and the rights and duties of the parties therein must be determined from the terms of the contract.[14] The practical construction will be given effect if not inconsistent with the terms of the contract.[15] A water right, if appurtenant,[16] passes by deed thereof without particular mention.[17] The extent of

conditions. Seward v. Revere Water Co., 201 Mass. 453, 87 NE 749.

**13.** Contract between appropriators severally taking water from a stream construed and rights determined. Miller v. California Pastoral & Agr. Co. [C. C. A.] 163 F 462. Contracts for excavation of a ditch construed and what constituted compliance therewith stated. Ranken v. Lingo [Iowa] 117 NW 274. Where proprietary grant of shore land described it as bounded on the east by the "water side," the grant was not subject to the construction that sovereign grants should be strictly construed and the grant held to pass the title to low-water mark, subject to the jus publicum on the fore shore. Bardes v. Herman, 62 Misc. 428, 114 NYS 1098.

**14.** Under **grant of a right to raise a dam** 10 feet high at a certain point or at any other point providing the flowage should not be greater than would be occasioned by a dam at the point designated, the power obtainable is not the measure of the right but the flowage that would be occasioned by a dam at the point designated. Lancaster & Jefferson Elec. L. Co. v. Jones [N. H.] 71 A 871. **Lease of surplus water** from Muskingum river, executed under 25 Stat. 417, for the purpose of operating an electric power plant, construed, and held to contemplate use of water for power purposes only, and the government could refuse to furnish it for any other purpose, and such refusal did not relieve the lessee from the obligation to pay rent. United States v. Shryock, 162 F 790. A contract between a water company and a railroad company by which the former was to supply the latter with water for a term of years and was given a right to lay a main on the right of way held, as such main was not for railroad purposes alone, the water company was necessary party to a suit to enjoin the city from interfering with its construction. Delaware L. & W. R. Co. v. Jersey City, 168 F 128. Time limit within which **excavation of a ditch** was to be completed held waived where work was continued, after expiration of the period and payments made. Rankin v. Lingo [Iowa] 117 NW 274. Under contract for excavation of a ditch where each mile was paid for as completed, the contiguous owners were required to prevent caving after completion, and contractors were not precluded from recovering balance due because of such caving. Id. A provision in a contract by which a company agreed to **lay mains and erect hydrants,** reserving to the city the right to place hydrants at its own expense and providing for a reduction of rent in such case, did not affect other provisions of the contract. People v. New Rochelle Water Co., 58 Misc. 287, 110 NYS 1089. Under **contract granting water rights** use of pumps held to be "development work" within the contract, and a proper means of restoring the flow, though such means had never been used in that locality. Garvey Water Co. v. Huntington Land & Imp. Co. [Cal.] 97 P 428. **Lease** by which one agreed to "furnish" water to another held to mean "deliver" and was not complied with where an agent of the lessor locked the well. Smith v. Hicks [N. M.] 98 P 138. Evidence sufficient to show breach of covenant to furnish water. Id. Measure of damages for breach of **contract to furnish water** defined in particular case. Gagnon v. Molden, 15 Idaho, 727, 99 P 965. Contract for **sale of water** construed and held to contemplate delivery of water prior to maturity of first instalment of price, and failure to furnish constituted a breach of the contract. Id. Where one conveyed land and agreed to furnish a certain amount of water to irrigate it, held failure to supply the water was a breach of the contract. Babcock-Cornish Co. v. Urquhart [Wash.] 101 P 713. Contract by which a city **leased certain springs** and agreed to place hydrant in lessor's yard and a fire hydrant near his residence held not to obligate the city to furnish him water. Akins v. Humansville, 133 Mo. App. 502, 113 SW 687.

**15.** Haigh v. Lenfestly, 239 Ill. 227, 87 NE 962.

**16.** The right to take water from a spring may be an appurtenance to premises and pass as such though water is carried to the premises in pails from a trough into which it ran from the spring. Corevo v. Holman [Vt.] 71 A 718. A water privilege may be made an appurtenance to land by a separate grant. Whittlesey v. Porter [Conn.] 72 A 593. Lease for 999 years of right to draw water from a canal and use it upon certain land makes such right an appurtenance. Id. Under a decree allotting to each parcel of land, sold from a tract abutting on a stream, riparian rights, held parcels not abutting on the stream were not entitled to such rights. Strong v. Baldwin [Cal.] 97 P 178. Where riparian land is partitioned by decree and riparian rights allotted to parcels of the land, such rights remain a parcel of the land so allotted. Id.

**17.** A water privilege so connected with land as to constitute an appurtenance passes by deed thereof though not expressly mentioned. Whittlesey v. Porter [Conn.] 72 A 593. A conveyance of land abutting on a stream does not require special provision in order to pass riparian rights. Strong v. Baldwin [Cal.] 97 P 178. Deed held to make riparian rights parcel of the land. Id. Where a tract abuts on a stream and a parcel thereof not contiguous to the stream is sold, the riparian rights of the parcel so conveyed may also be conveyed. Id. In such case the riparian rights remain parcel of the land. Id. Where land for which water has been appropriated is divided, it is presumed that a purchaser of one tract

a water right, described in a deed, must be determined from the deed.[18] Where a deed to land specifically describes the water rights granted, none other possess.[19] Where there are several grants to different persons of the right to take water from an artesian well, the ordinary rules as to grants apply.[20] A corporation which purchases water rights, ditches and canals, must take them subject to the duties and burdens that existed against the grantor.[21] The original owner of land for which water was appropriated is not liable to a purchaser of a portion of the tract for wrongful acts of third persons in diverting the water from such tract,[22] nor was he liable to such purchaser for wrongful diversion of the water, for shortage of water in the natural stream, nor because of such shortage for an insufficient supply to irrigate the tract.[23] A contract for water supply valid when made, is enforceable.[24]

§ 18. *Torts relating to waters.*[25]—See 10 C. L. 2027—One who is injured because of wrongful interference with his water rights,[26] or whose property in injured

owns the proportion of the water awarded to the entire tract that his tract bears to the entire tract, where the original owner recognized him as owning water rights. Booth v. Trager [Colo.] 99 P 60. Easement in use of an irrigation ditch appurtenant to an estate which was divided held to have passed to grantee of a parcel not attingent to the ditch. Tarpey v. Lynch [Cal.] 101 P 10.

**18.** Deed conveying land by **general description** "also water power and dam on said property" conveys the dam and right to flowage though part of the structure is located on an adjoining parcel owned by the grantor at the time. Wellman v. Blackmon [Mich.] 15 Det. Leg. N. 1126, 119 NW 1102. **Deed to dam and canals** held to convey a lock forming a part thereof. Winnebago Paper Mills v. Kimberly-Clarke Co. [Wis.] 120 NW 411. Deed of a certain dam, canals and water power, "it being the intention of the grantor to convey his entire interest in all of said property," passes a fee in the lock constituting part of the canals, and not simply an easement to carry water through and operate the lock. Id. **Deed of land and water** rights construed and held to convey the right to the entire power furnished by the river and not merely the power appurtenant to one bank. Lancaster & J. Elec. L. Co. v. Jones [N. H.] 71 A 871. A grant of land "including all right, title, claim and interest in and to the waters of Seaman creek, and the irrigating ditches appurtenant thereto," carries all water rights appurtenant to the tract. Josslyn v. Daly, 15 Idaho, 137, 96 P 568. The amount and extent of the water's rights depends on the extent of the appurtenant rights. Id. **Reservation** in a deed to lands of "all artesian water that may be developed on such land and not used thereon" reserves no right to enter the land to develop such waters nor does it extend to water necessary for use on the land nor to any but artesian water. Burr v. Maclay Rancho Co. [Cal.] 98 P 260. Grantee's acceptance of a deed containing a reservation of a priority or appropriation for a certain reservoir, when no appropriation had been secured, did not estop the grantee to claim an appropriation for such reservoir for his own use. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co. [Colo.] 98 P 729. A grantee of a **lot with a right to use a water main** in the street constructed by a former owner did not acquire any right to the main itself against others to whom the former owner had sold rights to connect. Hunstock v. Limburger [Tex. Civ. App.] 115 SW 327. Nor did he acquire any right to the money for rights sold by one to whom the former owner had sold rights, where such sale did not interfere with his rights. Id. Nor may he make additional sale of water rights which would interfere with rights of purchasers from his vendor. Id.

**19.** Davis v. Randall [Colo.] 99 P 322. Where land was granted to several children of the grantor with specific water rights, the fact that they did not adhere strictly to their respective rights would not increase them. Id.

**20.** Each grantee who takes with notice of prior grants holds subject thereto. Charon v. Clark, 50 Wash. 191, 96 P 1040.

**21.** Knowles v. New Sweden Irr. Dist. [Idaho] 101 P 81.

**22, 23.** Booth v. Trager [Colo.] 99 P 60.

**24.** A contract for the use of water made with a corporation organized for the purpose of supplying water for irrigation, which did not when made contravene the laws of the state, may be enforced as between the parties and their successors, subject to all reasonable regulations, provided that rights of other water users are not unlawfully curtailed. Clague v. Tri-State Land Co. [Neb.] 121 NW 570. If such corporation arbitrarily prevents a holder of a contract from using water, it is liable to him in damages. Id. In such case the measure of damages is the value of the use of such right during the time he is deprived of it. Id.

**25. Search Note:** See Waters and Water Courses, Cent. Dig. §§ 42-90, 113-117, 128-142, 203-265, 282, 283, 300-302, 313, 323, 324; Dec. Dig. §§ 51-87, 103-107, 118-126, 170-179, 195, 204-210, 246, 259-264, 288; 13 A. & E. Enc. L. (2ed.) 685; 22 A. & E. Enc. P. & P. 1144.

**26.** Complaint for violation of right to use water for irrigation held not demurrable for failure to allege that plaintiff owned the right of way, gate, and canal at the time. Miller v. Kern County Land Co. [Cal.] 99 P 179. Where one's land is flooded by lawful erection of culverts by another

because of the wrongful obstruction of the flow of waters,[27] or whose rights are interfered with by pollution of waters,[28] has a cause of action and may recover damages measured by the general rules.[29] No recovery can be had for injury resulting from contributory negligence,[30] or from lawful use of property.[31] The owner of a dam is not liable for injuries caused by extraordinary floods.[32] The obstruction of the flow of a natural channel is a nuisance.[33] Several persons who own several interests and suffer in like character from the pollution of a stream may unite in an action in equity to abate the nuisance.[34] Actions for injuries must be commenced within the period of limitations.[35] Where an obstruction is a continuous nui-

on his own land, no cause of action exists because of the construction, but the gist of the action is damage by flooding for which successive actions may be brought for continuance of the nuisance. American Locomotive Co. v. Hoffman, 108 Va. 363, 61 SE 759. One cannot recover damages for flooding land before he acquired title to it. Mississippi Cent. R. Co. v. Magee [Miss.] 46 S 716. One who sells his business is not liable for damages caused by his purchaser placing timbers in a river. Sipsey River Lumber Co. v. Gilliland [Ala.] 47 S 710.

27. See, also, ante, §§ 3, 9. A lessee of land may maintain an action for damages by flooding. Shomon v. Spring River Power Co. [Kan.] 99 P 235. Canal company is liable where it permits water to flow onto land of adjacent owner to his injury. Spence v. Lake Drummond Canal Co. [N. C.] 63 SE 729. Mills' Ann. St. § 2272, making one liable for injuries caused by seepage of storage water, applies to surface waters. Canon City & C. C. R. Co. v. Oxtoby [Colo.] 100 P 1127.

28. For pollution of a spring, the owner may recover such damages as would compensate him for diminution in value of the use of his property resulting from the pollution. Cincinnati, etc., R. Co. v. Gillespie [Ky.] 113 SW 89. In action for polluting subterranean waters by sewage, evidence of prior pollution of waters by surface water was admissible that the latter act caused no injury. Kevil v. Princeton [Ky.] 118 SW 363.

29. See Damages, 11 C. L. 958. Measure of damages for injury to crops by obstruction of surface waters by railroad embankment. Missouri, K. & T. R. Co. v. Hagler [Tex. Civ. App.] 112 SW 783. As to elements of damages for flooding land. Woodstock Hardwood & Spool Mfg. Co. v. Charleston L. & W. Co. [S. C.] 63 SE 548. Measure of damages, for injuries to property by flooding, stated. Kerns v. Kansas [Kan.] 100 P 624. Where no crop was raised on land because of the wrongful obstruction of surface water, the measure of damages is the rental value. Quinn v. Chicago, etc., R. Co. [S. D.] 120 NW 884. Instruction that the owner was entitled to recover just and fair compensation held sufficient in absence of requested charge. Id. For injuries to land by depositing thereon limestone grit, sand, etc., the measure of damages is the difference in rental value of the land before and after the injury. Perry-Matthews-Buskirk Stone Co. v. Smith [Ind. App.] 85 NE 784. In action for injuries by flooding use of "property" in instructions on damages, held erroneous as misleading the jury to allow damages for other property than crops. Tosini v. Cascade Mill. Co. [S. D.] 117 NW 1037.

30. In an action for flooding a mine by boring a well, where defendant's evidence shows that injury was caused by failure of plaintiff to leave sufficient pillars to support the room, held, defendant was not liable. Muntz v. Cottage Hill Land Co. [Pa.] 72 A 247. Where one without authority connected his cellar by drain with a city watercourse, which was not maintained as a sewer, the city was not liable to him for flooding of his cellar caused by an obstruction of the watercourse forcing water through the drain. Levasseur v. Berlin [N. H.] 71 A 628.

31. Railroad company held not liable for damages caused by flooding, where in constructing its embankment it narrowed the bed of a canal and because of a freshet the embankment gave way. Gordon v. Ellenville & K. R. Co., 195 N. Y. 137, 88 NE 14.

32. Evidence sufficient to show that a flood which caused a dam to break thereby, causing injuries by flooding, was extraordinary and unprecedented. City of Bridgeport v. Bridgeport Hydraulic Co. [Conn.] 70 A 650. Negligence in failing to inform engineers of prior freshets held not to contribute to the injury. Id.

33. One who purchases subsequent to the construction cannot recover for construction of the nuisance, but may recover for continuance of the nuisance. Beauchamp v. Taylor, 132 Mo. App. 92, 111 SW 609. Where one sued to enjoin maintenance of a dam by which his land was flooded dismissed the suit and deeded the land, held, he released defendant as to all claim for injunction relief as well as damages. Thomas v. Booth-Kelly Co. [Or.] 97 P 1078. In action against a city to abate a nuisance consisting of an old abutment left in a waterway after dams were removed, which so disposed the flow of water that it injured adjacent land, evidence held to show improper construction. Prime v. Yonkers, 131 App. Div. 110, 115 NYS 305.

34. Norton v. Colusa Parrot Mining & Smelting Co., 167 F 202. In a suit by several owners to enjoin pollution of a stream as a nuisance, complainants may not recover damages for past injury, as they have an adequate remedy at law. Id.

35. Where a railroad built permanent dikes which deflected the current of a stream against land and caused it to be washed away, the injury was permanent, and action therefor was barred in three years by Ind. T. Ann. St. 1899, § 2945. Gulf,

sance, the right to recover damages is not barred short of the time necessary to acquire a prescriptive right to maintain it,[36] but only such damages can be recovered as have accrued within the time limited for actions on tort.[37] Pleadings are governed by general rules.[38] In actions for injuries sustained because of wrongful interference with water rights, the proof must conform to the pleadings [39] and must show negligence of the party charged.[40] Municipalities [41] and water supply companies are liable for damages caused by bursting of pipes.[42] A municipal corporation which erects a pumping plant is liable for injuries to adjoining residence property caused by smoke.[43] Under the charter of the city of Buffalo, the city is liable for failure to abate the nuisance caused by periodic overflow of Buffalo River.[44] Whether an action is appealable is to be determined by the laws relative to appeal.[45]

§ 19. *Crimes and offenses relating to waters.*[46]—See 8 C. L. 2301—In some states it is an offense to deposit in streams material which will injure fish.[47] A criminal nuisance results only where an intent to create such nuisance exists.[48] The

etc., R. Co. v. Moseley [C. C. A.] 161 F 72. Cause of action for permanent nuisance in obstructing flow of water by railroad embankment accrues at the time of the construction. St. Louis S. R. Co. v. Long [Tex. Civ. App.] 113 SW 316. Limitations against an action for flooding land by straightening the channel of a creek commences to run from date of construction. Turner v. Overton [Ark.] 111 SW 270. Where by negligent construction of railroad embankment and ditches surface water is discharged on land of adjoining proprietors, other cause of action accrues at date of injury. Morse v. Chicago B. & Q. R. Co., 81 Neb. 745, 116 NW 859.

36, 37. Ireland v. Bowman [Ky.] 114 SW 338.

38. Complaint in two paragraphs for permitting limestone grit, sand, etc., from stone mill of an upper owner to be cast onto the land of a lower owner held to state a cause of action. Perry-Matthews-Buskirk Stone Co. v. Smith [Ind. App.] 85 NE 784. Complaint for flooding lands by construction of a levee held not demurrable because alleging that other lands beside plaintiff's were damaged. Bradbury v. Vandalia Levee & Drainage Dist., 236 Ill. 36, 86 NE 163.

39. Under a complaint alleging obstruction of water by both railroad bridge and embankment, recovery could be had on proof that injury resulted solely from the embankment. Nickey v. St. Louis, etc., R. Co. [Mo. App.] 116 SW 477. Where one sues on the theory of obstruction of a water course, he cannot recover on the theory of obstruction of surface waters. Alabama & M. R. Co. v. Beard [Miss.] 48 S 405. Where complaint for flooding land is based on theory of trespass, recovery cannot be had on the theory of negligence. Gordon v. Ellenville & K. R. Co., 195 N. Y. 137, 88 NE 14.

40. In order to hold a city liable for obstruction of surface water because of insufficient culverts through a street, it must appear that the work was directed by ordinance. Gleason v. Kirksville [Mo. App.] 118 SW 120.

41. Where a leakage occurs in a pipe under control of a city, a presumption of negligence is raised which must be overcome by evidence explaining the nature or cause of the break. Silverberg v. New York, 59 Misc. 492, 110 NYS 992.

42. Where a house and lot was injured by breaking of a water pipe and flooding of premises in consequence of negligent maintenance of the pipe, recovery of damages is justified. French v. West Seattle L. & W. Co., 50 Wash. 257, 97 P 60.

43. Gordon v. Silver Creek, 127 App. Div. 888, 112 NYS 54.

44. Under Buffalo City Charter, § 395, and Laws 1906, p. 1439, requiring the city to abate nuisances, and declaring periodic overflow of the Buffalo river a nuisance, the city is liable for its refusal to abate such nuisance where it can do so at reasonable cost. White v. Buffalo, 60 Misc. 611, 112 NYS 485. Under such laws, the city is not under absolute duty to abate the nuisance; the duty is discretionary. White v. Buffalo, 131 App. Div. 531, 115 NYS 1021.

45. Action for damages for obstructing a public ditch and making a new channel, and causing water falling on lands of defendant and others to be diverted from the public ditch and overflow lands of plaintiff, and annually destroy his crops, is not appealable, though injunctive relief is prayed for. Fisher v. Bower, 79 Ohio St. 248, 87 NE 256.

46. **Search Note:** See notes in 6 Ann. Cas. 739.

See, also, Waters and Water Courses, Cent. Dig. §§ 41, 303; Dec. Dig. §§ 50, 211. 212, 266; 22 A. & E. Enc. P. & P. 1171.

47. Laws 1905, pp. 163, § 28, making it an offense for one to suffer dyestuff, etc., to be drained into a stream in such quantity as to kill fish, held defective for failure to make the discharge of such substance an offense as distinguished from permitting or suffering same to be discharged into the stream. State v. Excelsior Springs L. P., H. & W. Co., 212 Mo. 101, 110 SW 1079.

48. It is no offsense where one built dams across bayous on his land for irrigating purposes, and, after the water had risen and receded, a disagreeable smell arose, where there was no intent to produce such smell. Stacey v. State, 54 Tex. Cr. R. 610, 114 SW 807

states of Washington and Oregon have concurrent jurisdiction over offenses committed on the Columbia river.[49]

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**Ways,** see latest topical index.

**WEAPONS.**

§ 1. The Crime of Carrying or Pointing Weapons, 2317.
§ 2. Other Police Regulations Concerning Weapons, 2318.
§ 3. Indictment and Prosecution, 2318.
§ 4. Civil Liability for Negligent Use of Weapons, 2319.

*The scope of this topic* is noted below.[1]

§ 1. *The crime of carrying or pointing weapons.*[2] See 10 C. L. 2030—Article 2 of the amendments to the constitution of the United States is a limitation on the federal government only.[3] The term "arms" as used in the Oklahoma constitution applies solely to such arms as are used in civil warfare.[4] Among the acts denounced as crimes by various statutes are the carrying of weapons on or about the person,[5] or the pointing or aiming of a gun,[6] or the carrying of concealed weapons,[7] or carrying a deadly weapon, concealed "in whole or in part;"[7a] but it is usually lawful to carry an unconcealed weapon for a lawful purpose,[9] or a concealed weapon for the purpose of protecting one's property, if in good faith he believes there is danger of attack and robbery.[10] Statutory exceptions are often made in favor of travelers.[11] Statutes are not usually construed to

**49.** Under Act Cong. March 2, 1853, the territories of Washington and Oregon have concurrent jurisdiction over offenses committed on the Columbia river where it forms the common boundary, and, where one territory allows seine fishing and the other does not, the most restrictive law prevails. State v. Nielsen [Or.] 95 P 720.

**1.** Includes criminal liability for unlawful keeping, bearing, or displaying and civil liability for negligent shooting. Other crimes committed with weapons are treated in such topics as Homicide, 11 C. L. 1799.

**2. Search Note:** See notes in 3 L. R. A. (N. S.) 1038; 115 A. S. R. 199; 1 Ann. Cas. 56; 7 Id. 927; 11 Id. 1105.

See, also, Weapons, Cent. Dig. §§ 5-17, 19; Dec. Dig. §§ 5-14; 5 A. & E. Enc. L. (2ed.) 729.

**3.** Right of the people to keep and bear arms. Ex parte Thomas [Okl.] 97 P 260.

**4.** Ex parte Thomas [Okl.] 97 P 260.

**5.** Evidence sufficient to sustain conviction for illegally carrying pistol, where defendant was seen at night on street with pistol in his hand, he not being able to give a good reason for having said pistol. Huff v. State, 53 Tex. Cr. App. 454, 111 SW 731. Where intent to carry deadly weapon concealed about the person exists and act is not within some of exceptions of statute, defendant is guilty, and it is immaterial that his ulterior motive or purpose in carrying the weapon is innocent or harmless. State v. Hovis [Mo. App.] 116 SW 6. That the defendant carried the pistol to shoot game is immaterial. Id. It is no defense to a prosecution for unlawfully carrying a pistol that defendant thought he had a legal right to carry it. McCallister v. State [Tex. Cr. App.] 116 SW 1154. Evidence that witness heard some one say "Look out! I am going to shoot," and thought that it was the voice of defendant, held to be insufficient upon which to base a conviction. Gay v. State [Tex. Cr. App.] 118 SW 534. One is guilty of carrying a pistol on or about the person who knowingly has a pistol under the cushion of the buggy in which he is riding. Leonard v. State [Tex. Cr. App.] 119 SW 98.

**6.** Defendant was convicted of pointing and aiming a pistol. He appealed claiming that two offenses were charged "pointing and aiming." Held that there was no substantial difference between the terms "point" and "aim" as used in § 1045 of the Code of 1906, and that only one offense was charged. Coleman v. State [Miss.] 48 S 181.

**7.** To conceal a pistol in a sack which is carried under the arm is a violation of a statute which forbids carrying concealed weapons. Warren v. State [Ga. App.] 64 SE 111. Evidence that the witness saw a pistol in defendant's pocket when he stooped was positive evidence that defendant carried a concealed weapon, and it was not necessary for the jury to infer that he did. Bivins v. State, 5 Ga. App. 434, 63 SE 523.

**8.** Under the statute (Code 1906, § 1103), the carrying of a concealed weapon, in whole or in part, is made an offense. Martin v. State [Miss.] 47 S 426.

**9.** Eads v. State [Wyo.] 101 P 946.

**10.** Defendant, by way of justification for carrying the revolver, showed that he had $195 on his person and that he feared attack by thieves on his way home. State v. Cook, 132 Mo. App. 167, 112 SW 710.

**11.** A train auditor on a passenger train making a trip from one city to another, is a traveler within the meaning of the statute, Pen. Code 1895, art. 339. Baker v. Satterfield [Tex. Civ. App.] 111 SW 437. A person in the waiting room of a depot, who is waiting for a train which he intends to take, is a "traveler" and has a right to carry arms. Texas Midland R. Co. v. Geraldon [Tex. Civ. App.] 117 SW 1004. Held error to refuse a charge that if defendant had started on his journey and, while en route to take

prohibit transportation of weapons with no view to their use,[12] but to be within this exception one must ordinarily proceed to his destination with reasonable dispatch and directness.[13] Carrying weapons at one's place of business is sometimes permitted.[14] The name by which the implement is called is in no wise controlling in determining whether it is within the purview of the statute.[15] Statutes of Oklahoma against the carrying of concealed weapons do not conflict with the provision in the constitution of that state denying infringement of the right to bear arms,[16] and said statutes are not repugnant to each other.[17] By statute in Florida the county commissioners are given power to grant license to carry arms.[18]

§ 2. *Other police regulations concerning weapons.*[19]—See 10 C. L. 2032—Statute of Alabama, prohibiting the sale or barter of deadly weapons of a described character, is void because not constitutionally passed.[20]

§ 3. *Indictment and prosecution.*[21]—See 10 C. L. 2032—An indictment charging one with carrying a pistol on "or" about his person is bad, where the statute prohibits carrying on "and" about the person.[22] The statutory offense of pointing a weapon at another may be included within the offense of assault with intent to murder.[23] Evidence that defendant attempted to kill or shoot parties at other times is inadmissible,[24] as is also facts entirely foreign to the prosecution,[25] but evidence which has been obtained through accident or inadvertence is admissible, although obtained while making an illegal arrest.[26] Evidence that the defendant had been searched by the complaining witnesses about the time the offense charged in the complaint was alleged to have been committed is immaterial.[27]

his train, he discovered that he had lost or left his pocket book at the place where he had started, and he had returned for the purpose of getting the pocketbook intending to immediately resume his journey, and up to the time he was seen with the pistol he had not made any unreasonable delay, then in contemplation of law he would be considered a "traveler" and not guilty. Goodwin v. State [Tex. Cr. App.] 115 SW 1184. Instruction that to constitute one a traveler he must be in pursuit of his journey "and" engaged in business connected therewith is erroneous. Steel v. State [Tex. Cr. App.] 113 SW 15. Instruction requiring accused to prove beyond a reasonable doubt that he was a traveler is erroneous. Id.

12. Griffin v. State [Tex. Cr. App.] 112 SW 1066.

13. Held that defendant had no right to turn aside on his way home and voluntarily engage in a quarrel. Griffen v. State [Tex. Cr. App.] 112 SW 1066. Defendant had no right to go into a saloon and engage in trouble. Garrison v. State [Tex. Cr. App.] 114 SW 128.

14. Train auditor, whose duty was to collect tickets from passengers, is at his place of business while riding on the train for the purpose of collecting said tickets. Barker v. Satterfield [Tex. Civ. App.] 111 SW 437.

15. To call a pistol a toy does not make it a toy; to call a toy pistol does not make it a pistol; nor is the essential character of the thing changed by the purpose for which it is sold, the use to which it can be reasonably put controls. Mathews v. Caldwell, 5 Ga. App. 236, 63 SE 250.

16. Held that a pistol was not of the character of arms in contemplation of the constitutional convention and of the people of the state when they declared that the right of a citizen "to carry and bear arms," etc., shall never be prohibited. Ex parte Thomas [Okl.] 97 P 260.

17. Ex parte Thomas [Okl.] 97 P 260. Sections 2502 and 2503, Wilson's Rev. & Ann. St. Okl. 1903, not repugnant to each other. Id.

18. If from the proofs offered the commissioners are not satisfied that the applicant is of good moral character, they may refuse the license. License in this case held properly refused. State v. Parker [Fla.] 49 S 124.

19. **Search Note:** See notes in 11 Ann. Cas. 723.

See, also, Weapons, Cent. Dig. §§ 1-4, 18, Dec. Dig. §§ 1-4, 15, 16.

20. Act Nov. 23, 1907 (Gen. Acts, Sp. Sess. 1907, p. 80). Tyler v. State [Ala.] 48 S 672.

21. **Search Note:** See Weapons, Cent. Dig. §§ 20-33; Dec. Dig. § 17; 3 A. & E. Enc. P. & P. 874; 16 Id. 653.

22. Lewellen v. State [Tex. Cr. App.] 114 SW 1179.

23. Where the assault is charged to have been committed by pointing and aiming a gun or pistol at another. Livingston v. State [Ga. App.] 64 SE 709.

24. Hargrove v. State, 53 Tex. Cr. App. 541, 110 SW 913.

25. Held not error for the court to refuse to admit testimony as to whether the witnesses of defendant saw him with a pistol at another place than the one charged in the indictment. Harris v. State [Ala.] 46 S 749.

26. Defendant, while resisting arrest for interferring with an officer, accidentaliy or intentionaliy disclosed a pistol in his pocket, held that the evidence could be used in trial for carrying concealed weapons. Croy v. State, 4 Ga. App. 456, 61 SE 848.

27. It not being stated when this examination took place or how long before appel-

The weight of the testimony as a whole is for the jury,[28] and the province of the jury must not be invaded by the court.[29] Where there is a statute of the state making it a misdemeanor to carry a pistol, it is not necessary to prove that there was a city ordinance to that effect.[30]

§ 4. *Civil liability for negligent use of weapons.*[31]—See C. L. 2033.—Negligent use of weapon renders one liable only when the negligence was the cause of the injury.[32]

### WEIGHTS AND MEASURES.[33]

*The scope of this topic* is noted below.[34]

In the absence of any agreement to the contrary, the weight established by law will control.[35] It is within the police power of the state to forbid the sale of an incorrect table of values when made a part of a self-computing scale.[36] The determination of the arithmetical correctness of a scale as distinguished from the commercial correctness of values indicated may be delegated to a ministerial officer,[37] but, unless expressly given by statute, a city sealer of weights has no authority to determine the accuracy of a computing device.[38] A statute providing a penalty for giving short weights is violated, although the dealer did not know of the shortage,[39] but a statute providing a penalty for "using, buying, or selling by weights or measures" which have not been inspected will not be construed to apply to cases outside of its plain terms.[40] The keeping of an article in a measure which is not standard is not a violation of a statute regulating measures for the sale and importation of such article.[41] A statute which provides that any purchaser of certain commodities, who, without express agreement with the seller, shall deduct any amount from the actual weight, shall be guilty of a misdemeanor is not applicable to sales made

lant was accused of carrying the pistol. McDonald v. State [Tex. Cr. App.] 117 SW 131.

28. Hunter v. State, 4 Ga. App. 761, 62 SE 466.

29. Held that the court erred in holding, as a matter of law, that the so called toy pistol is not a pistol within the purview of § 344 of the Pen. Code of 1905. Mathews v. Caldwell, 5 Ga. App. 336, 63 SE 250.

30. Held that the police court, under Kirby's Dig. § 5634, had concurrent jurisdiction with justices of the peace, and therefore it was not necessary to prove city ordinance. McCall v. Helena [Ark.] 111 SW 274.

31. **Search Note:** See Weapons, Cent. Dig. §§ 34, 35; Dec. Dig. § 18.

32. Evidence held insufficient to sustain the verdict where it was not certain that defendant fired the shot that did the injury. Halpin v. Duffy, 140 Ill. App. 436. In an action for injuries caused by unlawful assault and shooting, plaintiff is prima facie entitled to a verdict upon proof that he was shot by the defendant, and it is then upon defendant to prove that he was not in fault. Morgan v. Mulhall, 214 Mo. 451, 114 SW 4.

33. See 10 C. L. 2033.

**Search Note:** See Weights and Measures, Cent. Dig.; Dec. Dig.; 13 A. & E. Enc. L. (2ed.) 686; 30 Id. 449; 22 A. & E. Enc. P. & P. 1188.

34. Includes only legal establishment of standard weights and measures. Contracts concerning commodities dealt in by weight or measure, see Sales, 12 C. L. 1712, and like topics.

35. In Georgia the law fixes the weight of sweet potatoes at 55 lbs., and a verdict figured upon this basis is binding upon the parties. Fain v. Ennis, 4 Ga. App. 716, 62 SE 466.

36. Moneyweight Scale Co. v. McBride, 199 Mass. 503, 85 NE 870.

37. St. 1907, p. 517, c. 535, §§ 1, 2, providing that computing scales shall be tested by the sealer of weights and measures, is not unconstitutional, as the functions of that officer in determining the arithmetical correctness of the scale is ministerial, and not judicial. Moneyweight Scale Co. v. McBride, 199 Mass. 503, 85 NE 870.

38. The Detroit City Charter (Pub. Acts 1857, p. 105, No. 55) authorizes that city regulate weights and measures to be sealed by the city seller so as to be made conformable to the general laws of the state, but this does not confer upon such sealer the authority to inspect or condemn a computing device. Parker, Webb & Co. v. Austin [Mich.] 16 Det. Leg. N. 197, 121 NW 322.

39. Under Act March 5, 1900 (P. L. p. 27), it is no defense that shortage was given through mistake. City of Newark v. East Side Coal Co., 74 N. J. Law, 68, 70 A 734.

40. Revisal 1905, §§ 3063, 3067, 3073, relating to weights and measures, do not impose a penalty upon a railroad company for using a scale, which they refused a keeper of weights and measures to adjust, it appearing that the scale was used to weigh freight for shipment. Nance v. Southern R. Co., 149 N. C. 366, 63 SE 116.

41. Acts 1908, p. 135, No. 92, § 1, providing a penalty if oysters are sold or imported in a sack which is not of standard measure, does not apply to oysters kept in sacks not of standard measure. State v. Cibilich, 122 La. 278, 47 S 605.

without the estate.[42] Where the law provides for an official weigher of cotton, but also provides that nothing shall prevent any one from withholding his cotton from said weigher, the official weigher has no right to restrain a warehouse company from having its cotton weighed by a private weigher,[43] nor can the suit be maintained on the ground that the official weigher has sustained damage because of the acts of the private party in urging the public to withhold its patronage from that officer.[44] Where the right to condemn scales if found incorrect is given by statute to an officer, injunction will not issue to prevent him from rendering a threatened decision,[45] but if, in making such decision, he proceeds on an erroneous principle of law, his decision can be quashed on certiorari.[46]

### WHARVES.[47]

*The scope of this topic* is noted below.[48]

The state, in the absence of constitutional inhibition, can build or aid others in building wharves for public use and in aid of trade and commerce,[49] and may also authorize cities bordering on navigable waters to construct and maintain public wharves.[50] Public wharves are under the control of appropriate officers, whose powers and duties are elsewhere treated.[51] Ordinarily the grant of a pier right includes as appurtenant thereto a right of access over the adjacent lands under water,[52] but this right may be withheld by agreement.[53] If a person has acquired a right to maintain a pier, he may enjoin a municipality from making improvements which will destroy his right.[54] A building erected on piles is not a "wharfboat" within the meaning of a statute imposing a tax for the privilege of conducting a wharfboat.[55] Wharfage is a charge against a vessel for lying at a wharf,[56] and the idea of use of the private property of the wharfinger lies

42. Where seller lived in Kansas City, Kan., and purchaser in Kansas City, Mo., and sale was made in Mo., although wheat never left the state of Kansas but was stored there by purchaser, the laws of Kansas are not applicable and purchaser may deduct 100 lbs. from each car. In re Martin [Kan.] 101 P 1006.

43. Under Laws 1906, p. 269, c. 227, § 3, it is permissible for one to withhold his cotton from official weigher, and therefore permissible for him to have it weighed whenever he sees fit. Miller v. Winston County Union Warehouse Co. [Miss.] 47 S 501.

44. Miller v. Winston County Union Warehouse Co. [Miss.] 47 S 501.

45. Decision whether computing scales are correct is committed to the sealer of weights and measures by St. 1907, p. 517, c. 535, §§ 1, 2. Moneyweight Scale Co. v. McBride, 199 Mass. 503, 85 NE 870.

46. Moneyweight Scale Co. v. McBride, 199 Mass. 503, 85 NE 870.

47. See 10 C. L. 2034.

**Search Note:** See notes in 61 L. R. A. 946; 63 Id. 264; 70 Id. 193; 16 L. R. A. (N. S.) 506, 777; 27 A. S. R. 556.

See, also, Wharves, Cent. Dig.; Dec. Dig.; 30 A. & E. Enc. L. (2ed.) 467; 20 A. & E. Enc. P. & P. 260.

48. Includes right to establish and maintain wharves and rights and liabilities of public wharfingers. Matters connected with the landing and tying up of vessels are treated in Shipping and Water Traffic, 12 C. L. 1859, incidental rights of riparian proprietors in Riparian Owners, 12 C. L. 1702, and obstruction of navigation in Navigable Waters, 12 C. L. 958.

49. City of Burlington v. Central Vermont R. Co. [Vt.] 71 A 826.

50. Acts 1906, p. 356, No. 262, authorizing the city of Burlington to construct and maintain a public wharf, held valid. City of Burlington v. Central Vermont R. Co. [Vt.] 71 A 826. May authorize city of the fourth class, it not being a work of internal improvement "within Const. 1850, art. 14, § 9 (Const. 1908, art. 10, § 14), nor within prohibition of Const. 1908, art. 8, § 23. Nichols v. Charlevlox Circuit Judge [Mich.] 15 Det. Leg. N. 1047, 120 NW 343.

51. See Officers and Public Employes, 12 C. L. 1131.

52. In re City of New York, 193 N. Y. 503, 87 NE 759.

53. Where city reserved the right to fill in, the deed to the pier right cannot be construed as conferring any right of access over the land which the city had a right to fill in. In re City of New York, 193 N. Y. 503, 87 NE 759.

54. Unless city condemns such right by eminent domain proceedings, pier owner is entitled to injunction. American Ice Co. v. New York, 193 N. Y. 673, 87 NE 765.

55. Where building was so arranged by a series of floors that it answered the purpose of a wharfboat, held not a wharfboat within meaning of Code 1906, § 3780. Bluff City R. Co. v. Clarke [Miss.] 49 S 177.

56. Not a charge for caring for the goods. New York Dock Co. v. India Wharf Brew. Co., 127 App. Div. 385, 111 NYS 432.

at the root, and is the essence of a legal charge of wharfage.[57] What constitutes such use depends upon the circumstances.[58] A party in control of a dock is liable for injuries resulting from its dangerous condition,[59] or from an obstruction in the approach,[60] but he is not liable for injuries received by a vessel if the one in charge of such vessel had knowledge of the obstruction,[61] nor is he liable for an accident unless it is shown that such accident was caused by a defect in the wharf.[62] A contractor who is engaged in replacing piers which have been destroyed is not liable as a wharf owner.[63] Damages for the loss of the use of a dry dock, which has been negligently injured by a vessel, will not be allowed where no such loss actually resulted.[64]

**White-Capping,** see latest topical index.

## WILLS.


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**57.** In order to collect wharfage, some appreciable use must be made. City of St. Louis v. Eagle Packet Co., 214 Mo. 638, 114 SW 21.

**58.** Where wharf was submerged but vessel made partial use of it in taking on and discharging passengers and freight, held that such use gave city right to wharfage. City of St. Louis v. Eagle Packet Co., 214 Mo. 638, 114 SW 21.

**59.** Where master of vessel did not know of obstruction, city which owned bulkhead and collected wharfage was liable for injuries to the vessel. Shoonmaker v. New York [C. C. A.] 167 F 975. Where owners of pier, which had stood for many years, knew of the existence of a worm in the water, and its ravages to piers, was common knowledge, and they did not have the piers inspected, held that the owners were liable for damages caused by the piers giving way because of the ravages of such worms. Vogemann v. American Dock & Trust Co., 131 App. Div. 216, 115 NYS 741. Where a wharf is so situated that boats lying at the wharf become imbedded in the mud at each low tide, the owner is responsible for any injury occasioned by anything in the nature of a permanent obstruction. The Manhattan, 169 F 222.

**60.** Where lessee of wharf knew that there was a shoal in the approach, although not liable for the condition, yet it was his duty to advise vessels coming to his dock of such danger, if it was not within their knowledge. The Joseph P. Tucker, 164 F 746.

**61.** Where one in charge of vessel left it remain in the berth after he had notice of obstruction, he could only recover damage sustained before knowledge. The Manhattan, 169 F 222.

**62.** That wharf was out of repair is no ground unless it is shown that accident happened because of defect. Klein v. Philadelphia [Pa.] 72 A 845.

**63.** Must exercise due care under the circumstances. Conklin v. R. P. & J. H. Staats Co. [C. C. A.] 161 F 897. Not liable for injury to vessel resulting from grounding on submerged piles, he having exercised due care. Id.

**64.** Where damages were allowed for repairing dock, additional damage cannot be obtained for loss of use where libelant had another dock near by, which took care of the work without extra expense or loss of business. The Ferguson, 167 F 234.

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*The scope of this topic* is noted below.[65]

§ 1. *Right of disposal and contracts relating to it.*[66]—See 10 C. L. 2036.—The right to dispose of property by will is purely statutory,[67] and may be limited or withdrawn by legislation,[68] but, unless so limited or withdrawn, any person having the requisite capacity[69] and property by him devisable[70] may dispose of such prop-

**65.** This article treats of wills in general, including the validity, probate and establishment thereof. The general rules of construction are retained, but those directed solely to a determination of what estates are created (see Real Property, 12 C. L. 1623, and Property, 12 C. L. 1435), and the time of vesting of estates (see Real Property, 12 C. L. 1623; Property, 12 C. L. 1435; Perpetuities and Accumulations, 12 C. L. 1316), are elsewhere given. Trusts as such (see Trusts, 12 C. L. 2171), charitable gifts (see Charitable Gifts, 11 C. L. 604), annuities (see Annuities, 11 C. L. 117), powers (see Powers, 12 C. L. 1409), equitable conversion (see Conversion in Equity, 11 C. L. 804), and the general principles of administration and distribution (see Descent and Distribution, 11 C. L. 1078; Estates of Decedents, 11 C. L. 1275), except elections for or against wills (see post, § 5D) are also elsewhere discussed.

**66. Search Note:** See notes in 6 C. L. 1882; 11 Id. 1079; 14 L. R. A. 860; 2 L. R. A. (N. S.) 203; 7 Id. 701; 9 Id. 121; 13 Id. 484; 16 Id. 236; 8 Ann. Cas. 1150.

See, also, Wills, Cent. Dig. §§ 1-47, 162-181; Dec. Dig. §§ 1-20, 56-68; 18 A. & E. Enc. L. (2ed.) 734; 30 Id. 606, 612, 614.

**67.** Selden v. Illinois Trust & Sav. Bank, 229 Ill. 67, 87 NE 860. Right to make wills, neither natural nor constitutional, but rests only in positive law. Strand v. Stewart [Wash.] 99 P 1027.

**68.** Power of legislature over wills and manner of carrying out their provisions is absolute until death of testator. Strand v. Stewart [Wash.] 99 P 1027. Act relating to administration of estates, without intervention of probate court, held constitutional. Id.

**69.** See, also, post, § 2. Prior to March 4, 1906, Chickasaw **Indians** had right to dispose of their devisable property by wills made in accordance with laws of the Chickasaws. Hayes v. Barringer [C. C. A.] 168 F 221.

**Married woman** may dispose of her separate property by will without her husband's consent (Williford v. Phelan [Tenn.] 113 SW 365), and, at common law, she could also will property owned by her and not yet reduced to husband's possession (Id.). Rents and damages to wife's realty held wife's separate estate, where husband had released all rights in realty both in law and equity. Id. Acts 1869-70, p. 113, c. 99 (Shannon's Code, §§ 4242-4247), regulating power of married women to dispose of property by will, applied exclusively to disposition of realty and did not enlarge power to dispose of personalty. Id. Prior to the acts removing disabilities of married women, married woman had no power to dispose of her real property by will. Coleman v. Wood, 108 Va. 457, 62 SE 388. Under Acts 1876-77, p. 333, c. 329, §§ 1, 2, woman acquiring property before, and marrying after, passage of act cannot dispose of the same by will. Id.

**70.** Rights under building restrictions in deeds held inheritable and devisable. Codman v. Bradley, 201 Mass. 361, 87 NE 591. Right and equity of enrolled member of Chickasaw nation of Indians, who died testate in 1903 before receiving allotment, to share of lands of Chickasaws and Choctaws was not devisable. Hayes v. Barringer [C. C. A.] 168 F 221. Contingent estates of inheritance as well as springing and executory uses and possibilities coupled with an interest, where the person to take is certain, are transmissible by descent and are devisable. Fisher v. Wagner [Md.] 71 A 999. Remainder contingent on death of life tenant without issue. Id. Husband held entitled to ignore wife's will, disposing of property not her separate estate and to qualify as wife's representative and reduce to possession choses in action of which she died possessed. Williford v. Phelan [Tenn.] 113 SW 365. Not precluded by probate of will. Id. Testator provided by his will, "I will and direct that my wife, Dorothy Hoyle, shall be allowed to dispose of all the rest, residue and remainder of all my

erty in any way he pleases,[71] and mere unjustness or impropriety of dispositions cannot be considered by the courts.[72] A surviving spouse, however, usually has the right to elect for or against the will,[73] and in many states the right of testamentary disposition has been regulated where gifts are made for religious, charitable, or educational purposes.[74] The right is also indirectly affected by statutory provisions for posthumous children, or children not mentioned or provided for in the will.[75] A will made by one under positive disability is not rendered effective by subsequent removal of the incapacity.[76]

estate and effects (not hereinbefore disposed of) by will or otherwise as she deems just and prudent, previous to her decease, to take effect after her death." Three years afterwards wife made will disposing of residue of husband's property not specially disposed of by him, stating that disposition was made in accordance with will of husband. Wife died twelve years before her husband. Held, wife had no power to dispose of residue of estate of husband, and he dies intestate as to such residue. Thomas v. Hobson, 10 Ohio C. C. (N. S.) 351.

71. Taylor v. McClintock [Ark.] 112 SW 405; Ginter v. Ginter [Kan.] 101 P 634; Scott v. Barker, 129 App. Div. 241, 113 NYS 695; Donnan v. Donnan, 236 Ill. 341, 86 NE 279.

72. Donnan v. Donnan, 236 Ill. 341, 86 NE 279. That a child received less under will than other children, because of unreasonable dislike or prejudice of parent, held no ground for interference in absence of incapacity or undue influence. Id. That testator makes an immaterial will, or allows one to stand which is immaterial because of changed circumstances, is no reason for overthrowing it. In re Frothingham's Will [N. J. Err. & App.] 71 A 695. See, also, post, § 2.

73. See post, § 5D.

74. Gifts to a college held not void as infringing laws of 1860, c. 360, p. 607, where it was possible that college would take over 50 per cent of estate only in uncertain event a daughter should die without issue. Hasbrouck v. Knoblauch, 59 Misc. 99, 112 NYS 159. During lives of widow and daughter, court could not ascertain what amount would go to college, but on termination of trust for these, excess over 50 per cent would be treated as property undisposed of. Id. Laws 1860, p. 607, c. 360, held not applicable, decedent leaving no husband, wife, child or parent. In re Talmage's Will, 59 Misc. 130, 112 NYS 206. Burden is on person attacking will of testator leaving wife and child, on ground that he gave more than half of estate to an educational institution, in violation of c. 360, Laws of 1860. In re Durand, 194 N. Y. 477, 87 NE 677. Where testator gave life use to wife and son, court must take amount of estate as of testator's death, and compute value of life estates of wife and child under tables based on probabilities of life, rather than on lives of wife and child as actually extended. Id. Bequest in trust for benefit of a hospital held not violation of Laws 1848, p. 448, c. 319, § 6, as amended by Laws 1903, p. 1412, c. 623, § 1, because made within two months before testatrix's death, such sections relating exclusively to bequests made directly to legatee or devisee. In re Beaver's Estate, 62 Misc. 155, 116 NYS 424. Devise to a charitable institution maintained by a church with provision that, if testator died within 30 days, property should go to the bishop, held not violative of Act April 26, 1855 (P. L. 328), avoiding devises to charity within a month of testator's death, and devise to bishop was good, there being no secret agreement between bishop and testator, though bishop testified that in conscience he was bound to apply same to use of institution mentioned in will. Flood v. Ryan, 220 Pa. 450, 69 A 908. Under Act April 26, 1855 (P. L. 328), prohibiting devises or bequests of property to religious or charitable uses, except by deed or will attested by two witnesses at least one month before testator's death, attestator's must be subscribing witnesses. In re Paxon's Estate, 221 Penn. 98, 70 A 280.

75. Half of estate to wife and other half to children as a class, without naming them, held sufficient naming of children within Kirby's Dig. § 8020, declaring intestacy as to children not mentioned. Brown v. Nelms [Ark.] 112 SW 373. Object of Kirby's Dig. § 8020, providing that, where will omits to mention name of a child if living, or legal representatives of child born and living at execution of will, testator shall be deemed to have died intestate as regards such child, etc., was to give pretermitted child such share as he would have received had there been no will. Rowe v. Allison [Ark.] 112 SW 395. Where will omitted reference to deceased child or his representatives, heir of such child had absolute right to share of estate not defeasable by sale under power in will or by acts of beneficiaries. Id. Pretermitted child not limited to remedy by scire facias in probate court provided for by Kirby's Dig. § 8021, against beneficiaries under will. Id. Intention of testator to leave nothing to afterborn children held not to be drawn from fact that he devised all his property to wife and did not make new will after children were born, where statute expressly provided that children born after making of will should share where they were neither provided for nor mentioned in will. Udell v. Stearns, 125 App. Div. 196, 109 NYS 407. Bare reference to contingency of extinction of entire family held not mention of after born children so as to exclude them. Tavshanjian v. Abbott, 59 Misc. 642, 112 NYS 583; Id., 130 App. Div. 863, 115 NYS 938. Testator leaving property to wife for life for benefit of "herself and her heirs" held to die intestate as to his children, under B. & C. Comp. § 5554, providing that testator who fails to name or provide for his children dies intestate as to them. Neal v. Davis [Or.] 99 P 69.

76. Married woman's will, attempting to dispose of realty held for her separate use, held not validated by her survival of her

*Contracts to devise or bequeath.*[See 10 C. L. 2037]—Contracts to will property are valid and enforcible,[77] and recovery may be had thereon as in other cases for violations of contracts,[78] but an action at law will not lie in the lifetime of a person for breach of such contract.[79] Mutual wills between a husband and his wife do not of themselves create any contractual relation.[80] If one is induced to make or refrain from changing a will by a promise on the part of a legatee to devote his legacy to a certain purpose, equity will enforce the application of the property in accordance with the promise,[81] and the same rule applies where heirs or next of kin

husband, though act June 4, 1879 (P. L. 88) provides will shall be construed as if executed just before testator's death. Dallett v. Taggart [Pa.] 72 A 380.

77. McAllister's Adm'r v. Bronaugh [Ky.] 113 SW 821. Contract to dispose of property by will in a certain way, if on sufficient consideration and clearly established, will be enforced against those on whom legal title has descended by reason of disregard thereof by obligor. Klussman v. Wessling, 238 Ill. 568, 87 NE 544. Children's agreement waiving right to distributive shares of estate during life of widow held not construable as agreement by her to devise property to children. Hemping v. Hemping [Iowa] 120 NW 111. Oral contract to adopt a child and leave half of adoptor's property to adopted child by will **may be specifically enforced,** where proven by clear and satisfactory evidence and fully performed on complainant's part. Peterson v. Bauer [Neb..] 119 NW 764. Whether oral contract to devise realty shall be specifically enforced after performance by plaintiff depends on facts and circumstances of each case. Id. Agreement to marry a certain person and to allow cancellation of a mortgage held **sufficient consideration** for a father's agreement to devise to son an interest in father's publishing business. Sarasohn v. Kamaiky, 193 N. Y. 203, 86 NE 20. Father's agreement to will son 25 per cent of a business in consideration of son's marrying a certain person held not **unfair or unreasonable** so as to prevent specific performance, father having made provision for other relatives and mother being satisfied. Id. Father's agreement to will son 25 per cent of publishing business in which father had a third interest, and that, if estate should be insufficient to satisfy certain grandchildren plaintiff should give each a certain sum or five per cent of the business, held **not too indefinite** for specific performance. Id.

**Construction:** Promise by a grantee to make will devising **"her property, real and personal,"** to a named person, held to refer to property owned by promisor at her death precluding equitable suit by proposed devisee for waste, on theory he had a present interest as remainderman. Noble v. Metcalf [Ala.] 47 S 1007. Agreement to devise **"25 per cent of said business"** held to mean 25 per cent of entire business, and not of third interest decedent owned therein. Sarasohn v. Kamaiky, 193 N. Y. 203, 86 NE 20.

**Partial invalidity:** Where oral agreement that son should have land on death of parents was void as to homestead, but directed to be enforced as to rest of the land, value of homestead should be computed as of date of contract. Teske v. Dittburner [Neb.] 120 NW 198.

**Evidence:** Where genuineness of signature to contract by decedent to allow his property to go by descent was fully established, contract was prima facie evidence that he knew contents, and, in suit to set aside will, burden was on proponents to overcome prima facie showing. Jones v. Abbott, 235 Ill. 220, 85 NE 279. Alleged contract by testatrix to "make such provision that upon her death" property worth nearly $500,000 "owned by her should belong to plaintiff" held of a class posthumous in effect, regarded with anxiety by courts and capable of being established only by clear, credible, and satisfactory evidence. Tousey v. Hastings, 194 N. Y. 79, 86 NE 831. Oral agreement to make in effect testamentary disposition of property will not be specifically enforced solely on evidence of statements made by decedent in casual conversations with disinterested third persons. Id., 127 App. Div. 94, 111 NYS 344.

**Insufficient** to show decedent did not know contents of contract when he signed. Jones v. Abbott, 235 Ill. 220, 85 NE 279. To show oral agreement that at decedent's death plaintiff should be owner of her interest in a business. Tousey v. Hastings, 127 App. Div. 94, 111 NYS 344. Held to authorize finding against existence of contract for mutual wills. Klussman v. Nessling, 238 Ill. 568, 87 NE 544.

**Sufficient** to sustain findings that testator had agreed to will his property absolutely to complainant, that complainant had performed her part, and that testator violated his agreement by devising complainant only a life estate. Barry v. Beamer [Cal. App.] 96 P 373. Complainant held entitled to specific performance contract having been fully established and no rights of innocent parties having intervened. Id. To authorize specific performance of contract to adopt a child and leave her one-half of adoptor's estate. Peterson v. Bauer [Neb.] 119 NW 764.

78. McAllister's Adm'r v. Bronaugh [Ky.] 113 SW 821. Evidence held to establish contract to devise plaintiff's wife property in consideration of board, lodging, etc. Id. Instruction held to fairly present only issue in case. Id. Where services are rendered on promise of a definite legacy, reasonable compensation may be recovered where no provision is made by will. Walker v. Ganote [Ky.] 116 SW 689. Where services are rendered for compensation to be made by will, or by some instrument to become absolute on death of contractee, and latter dies without making provision as promised, action will lie against his estate for reasonable value of services. Pelton v. Smith, 50 Wash. 459, 97 P 460.

79. Warden v. Hinds [C. C. A.] 163 F 201.

80. Mullen v. Johnson [Ala.] 47 S 584.

81, 82. Mead v. Robertson, 131 Mo. App. 185, 110 SW 1095. Promise must have been

induce an ancestor or relative not to make a will by promising to make a certain disposition of the property.[82] To establish a constructive trust of this character, however, the evidence must be clear and indubitable.[83]

§ 2. *Testamentary capacity, fraud, and undue influence.*[84] *A. Essentials to capacity*—See 10 C. L. 2038—Testator must know the natural objects of his bounty, the character and extent of his property, and the nature of the testamentary act.[85] Great age and infirmity,[86] mental weakness,[87] or faulty reasoning,[88] will not necessarily incapacitate, nor will even partial insanity,[89] unless it amounts to an insane delusion[90] so connected with the will as to influence its provisions.[91]

cause of failure of decedent to make will and it must appear that decedent was in position to carry out, and would have carried out, his desires but for the promise. Id. Promise may consist in silence on hearing declaration of promisee's desires (Id.), but implies a conscious act of commission or omission (Id.). Decedent's statement of his wishes and silence of heir held insufficient to establish constructive trust, where decedent did not know heir was in hearing and latter did not know her rights. Id.

**83.** Mere preponderance not sufficient. Mead v. Robertson, 131 Mo. App. 185, 110 SW 1095. Evidence insufficient as to promise and too uncertain as to subject-matter. Id.

**84. Search Note:** See notes in 12 L. R. A. 161; 16 Id. 677; 17 Id. 494; 24 Id. 577; 36 Id. 721; 37 Id. 261; 39 Id. 220, 263, 715; 3 L. R. A. (N. S.) 172; 6 Id. 575; 15 Id. 673; 63 A. S. R. 94; 117 Id. 582; 9 Ann. Cas. 807, 10 Id. 617.

See, also, Wills, Cent. Dig. §§ 48-161, 368-437; Dec. Dig. §§ 21-55, 151-166; 18 A. & E. Enc. L. (2ed.) 734; 30 Id. 606.

**85.** Mullen v. Johnson [Ala.] 47 S 584; In re Ayer's Estate [Neb.] 120 NW 491. Without aid of other persons. Winn v. Grier [Mo.] 117 SW 48. Test is capacity to retain in memory, without prompting, extent and condition of property, to comprehend to whom it is given, and appreciate deserts and relations of persons excluded. Taylor v. McClintock [Ark.] 112 SW 405. Test is necessarily the same whether insanity is attributable to dementia or insane delusion. Id. Tests are intelligence to know property, disposition, natural objects of bounty, and to transact ordinary business affairs. Weston v. Hanson, 212 Mo. 248, 111 SW 44. Testator must have sufficient capacity to comprehend condition of his property, his relations to objects of his bounty, and scope of testamentary provisions, and must be able to collect and hold in his mind particulars of business to be transacted sufficient length of time to perceive at least their obvious relations to each other and to form some rational judgment with relation to them. In re Ellwanger's Will, 114 NYS 727. Not essential testator should have had complete and accurate knowledge of all items of property comprising his estate. Hanrahan v. O'Toole [Iowa] 117 NW 675. Instruction making capacity dependent on testator's ability to know and understand nature, extent and affect of his act, property he owned and wished to dispose of, and his relation to such property and beneficiaries, sustained. In re Thorp's Will [N. C.] 64 SE 379. No fixed standard of mental capacity is required, it being sufficient if testator has sufficient intelligence and mental power to understand what he is doing and legal effect of instrument he is making. In re Johnson's Will, 60 Misc. 277, 113 NYS 283. Standard of capacity does not require comparisons between testator's condition of mind at different times, or between his mental condition and that of other persons. Hoffbaur v. Morgan [Ind.] 88 NE 337. If he could know extent and value of property, names, needs, and deserts of objects of bounty, and could retain such facts in his mind long enough to have will prepared and executed, he was capable. Id. Motion for judgment sustaining will on answers to interrogatories held properly overruled, answers disclosing that testator could not understand contents of will, ordinary business affairs of life, value or extent of his estate, or natural objects of his bounty. McReynolds v. Smith [Ind.] 86 NE 1009. Instruction as to capacity required held proper. Id. Instrument evidently drawn in contemplation of suicide, and disclosing by its terms that it is product of a mind so shattered that testamentary capacity was wholly lacking, should not be allowed to stand as a will. Johnson v. Stansell [Miss.] 48 S 619. Man 70 years old capable of attending accurately and successfully to affairs of life, though unable to read or write, has testamentary capacity. Wood's Ex'r v. Wood [Va.] 63 SE 994. That testator was **an ardent spiritualist** and willed part of estate for building of spiritualist church and a public library held not incapacity. Crumbaugh v. Owen, 238 Ill. 497, 87 NE 312. Will not invalid as result of spiritualistic communications neither executor nor any medium with whom he had had communications being individually interested therein, and its having been made in accordance with a previously expressed intention. Id.

**86.** Not sufficient to justify rejection of will. In re Duffy's Will, 127 App. Div 174, 111 NYS 491.

**87.** Mere mental weakness will not incapacitate so long as testator retains reasonable comprehension of act in which he is engaged, extent of estate, and claims of family or friends. Hanrahan v. O'Toole [Iowa] 117 NW 675.

**88.** Faulty reasoning now and then is not evidence of general mental derangement. Conner v. Skaggs, 213 Mo. 334, 111 SW 1132.

**89.** Does not necessarily incapacitate. In re Ayres Estate [Neb.] 120 NW 491.

**90. What constitutes:** Where one conceives something extravagent and believes it as a fact, when it really has no existence, and the belief is so persistent and permanent as to withstand all evidence or argument to the contrary, he is possessed of an insane delusion. Taylor v. McClintock [Ark.] 112 SW 405. Belief must be adhered to against all evidence and argument. Id.

No disorder of the moral affections, feeling, or propensities, will avoid the will unless accompanied by an insane delusion.[92] It is for the court to define delusions, announce the rules for their ascertainment and declare their effects.[93] Whether a delusion exists in a given case is for the jury.[94]

*Admissibility of evidence.*—See 10 C. L. 2039—While the ordinary rules of evidence are largely applicable[95] and matters too remote are properly excluded,[96] a

Cannot be predicated on purely esoteric and abstract subjects, beliefs concerning such subjects being speculative and incapable of disproof. Id. Belief of parent that child does not love him may be an insane delusion, being capable of disproof (Id.), but belief that child does not love as much as she ought to or as much as parent wishes she should cannot be delusion in law (Id.). Erroneous beliefs based on evidence, however slight, are not delusions. Id. Idea is not delusion if anything substantial is basis thereof. Fulton v. Freeland [Mo.] 118 SW 12. Insane delusion is an unreasoning and incorrigible belief in existence of facts, either absolutely impossible or at least impossible under circumstances of the individual (Komrer v. Skaggs Mo. 111 SW 1132), is never result of reasoning or reflection, and is not generated by nor capable of being dispelled by them (Id.); hence, must not be confounded with an opinion however fantastic (Id.). Evidence held not to show insane delusion resulting in will or codicil by father disinheriting daughter for marrying against his wishes. Id. For jury whether testator's belief that his son was illegitimate was an insane delusion. O'Dell v. Goff, 153 Mich. 643, 15 Det. Leg. N. 560, 117 NW 59. Exaggerated opinion as to value and qualities of property may be insane delusion. McReynolds v. Smith [Ind.] 86 NE 1009. That testator disclaimed paternity of and disinherited his children held not to show insane delusion, if he acted on false testimony. Morgan v. Morgan, 30 App. D. C. 436. But if there was no reasonable foundation for belief, and he retained it, when under conditions shown every sane mind would reject it, he was victim of delusion. Id.

**91.** Taylor v. McClintock [Ark.] 112 SW 405. If delusion in fact affects will, latter is vitiated though decedent was perfectly sane in other respects. Id; McReynolds v. Smith [Ind.] 86 NE 1009. Where jury answered in affirmative interrogatory as to insane delusion when testator signed will or any codicil, but, on being asked to specify which papers were so executed, named three codicils, answer was equivalent to finding that there was no delusion when will was made. Snell v. Weldon, 239 Ill. 279, 87 NE 1022.

**92.** Taylor v. McClintock [Ark.] 112 SW 405. Test relates not to moral quality of disposition made but to capacity (Id.), there being a clear distinction between capacity to comprehend deserts and actually comprehending them (Id.). That testator's conduct and sentiments show a bad moral character is not ground for setting aside his will, if he was of sound mind. Snell v. Weldon, 239 Ill. 279, 87 NE 1022. Injustice, unfairness, or anger toward relatives does not invalidate will. Id. Unkindness and brutality to wife held no test of capacity. Weston v. Hanson, 212 Mo. 248, 111 SW 44.

**93.** Taylor v. McClintock [Ark.] 112 SW 405. See post, Instructions.

**94.** Taylor v. McClintock [Ark.] 112 SW 405.

**95.** See, also, Evidence, 11 C. L. 1346. Transactions or communications with persons since deceased, see Witnesses, 10 C. L. 2079.

**Evidence admissible:** Testimony of physician that testatrix was unable to comprehend value of her property and obligations to relatives held not conclusive as to matter directly in issue. In re Overpeck's Will [Iowa] 120 NW 1044. Photograph of testatrix held admissible in rebuttal of contestant's evidence as to her physical condition though it could have only slight weight on question of capacity. Spiers v. Hendershott [Iowa] 120 NW 1058. Answer that witness considered testatrix of sound mind "at that time" held to sufficiently refer to time will was made. Id. Evidence of mental unsoundness held not excludable as referring to a time when witness did not see testator. McBride v. McBride [Iowa] 120 NW 709.

**Evidence inadmissible:** Evidence by others of opinion of testator's family as to his mental condition is inadmissible, being hearsay. Hopkins v. Wampler, 108 Va. 705, 62 SE 926. Whether proponents' witnesses had ever heard decedent's sanity questioned until after his death. Taylor v. McClintock [Ark.] 112 SW 405. Whether it was understood testator owned certain realty in 1863 or earlier. Id. Error to allow experts' testimony to assume argumentative form on moral phases of testator's conduct towards daugbter and her rights. Id. Improper to allow contestant's step-mother to testify that she did not send contestant any notice of testator's last illness. Id. Judgment adjudicating mental unsoundness after execution of will and at time when proponent conceded unsoundness held property excluded. Spiers v. Hendershott [Iowa] 120 NW 1058. Record in suit by testator for divorce on ground of alleged physical malformation of wife, found by physicians not to exist, held properly excluded, as leading to inquiry as to whether statement was true and if false whether it was result of delusion or not. Turner v. American Security & Trust Co., 213 U. S. 257, 53 Law. Ed. —.

**96.** Record in divorce suit thirty years before will was made held too remote. Turner v. American Security & Trust Co., 213 U. S. 257, 53 Law. Ed. —. On daughter's contest for insane delusion of decedent, held improper to allow contestant to ask witness for proponent whether witness had found farming profitable, for purpose of contradicting testator's statement that he had made no money farming. Taylor v. McClintock [Ark.] 112 SW 405. Opinion of physician that testator was of unsound mind in 1901, and grounds for such opinion, held competent on issue of capacity in 1905.

wide range of inquiry is permissible into facts and circumstances either before or after execution of the will.[97] Thus it is proper to show any facts within the issues [98] and reasonably bearing upon the subject of mental soundness,[99] such as the contents of the will,[1] the manner in which it was written and executed,[2] the

Jenkins v. Weston, 200 Mass. 488, 86 NE 955. Telegrams sent by testator held not too remote where sent during period fixed by court, within which evidence of capacity would be received. Jenkins v. Weston, 200 Mass. 488, 86 NE 955.

**97.** Taylor v. McClintock [Ark.] 112 SW 405. Evidence showing the condition of testator's mind long prior, closely approaching, and shortly subsequent to execution of will is admissible, but should be received only for the purpose of showing condition of testator's mind at time will was made. In re Winch's Estate [Neb.] 121 NW 116. Facts occurring after execution of will, while properly considered on the question of capacity when will was made (Spiers v. Hendershott [Iowa] 120 NW 1058), do not create a legal presumption of incapacity at that time (Id.). Subsequent appointment of guardian. Id.

**98.** Allegation testator was of unsound mind and could not understand business he was engaged in, natural objects of bounty, etc., held broad enough to admit proof of senile dementia. Conner v. Skaggs, 213 Mo. 334, 111 SW 1132. Certain letters from contestants and their attorney, with reference to procuring certain testimony and depreciating family law suits, held properly excluded as having no bearing on issue of testator's capacity. Credille v. Credille, 131 Ga. 40, 61 SE 1042. Where proponents contended testator discriminated against daughter because of her marriage, and not because of alleged insane delusion as contended by her, testimony showing her husband's character and reputation was proper. Taylor v. McClintock [Ark.] 112 SW 405. Where one issue was whether testator's belief his son was illegitimate was an insane delusion, chastity of testator's wife, contestant's mother, was involved, and evidence of her chaste reputation was admissible. O'Dell v. Goff, 153 Mich. 643, 15 Det. Leg. N. 560, 117 NW 59.

**99. Evidence admissible:** That testator had said in answer to suggestion will was unjust, that he had had a revelation to make it as he had made it, that it was sacred, and that he might not have another revelation, held admissible. McReynolds v. Smith [Ind.] 86 NE 1009. Deeds executed by testator may be admitted, where the purpose is to throw light on the mental capacity of testator by showing his method of transacting business and nature of business transacted by him at about time of making of will. Wilson v. Wilson, 7 Ohio N. P. (N. S.) 435. In contest for incapacity, undue influence, and deceit, proponent could show that testatrix had spoken of contestants as having stolen certain bonds owned by her and that other children had confirmed her in her belief, in explanation of alleged unreasonableness of will asserted by contestants. In re Mason's Will [Vt.] 72 A 329. Where testator's untrue statements that he was widower and had been divorced were admitted as evidence of incapacity, agreement between him and wife, purporting to restore parties to contractual and property rights they had before marriage, was admissible in explanation. Turner v. American Security & Trust Co., 213 U. S. 257, 53 Law. Ed. —. Motive of wife in signing agreement and joining in deed held immaterial. Id.

**Evidence inadmissible:** Statements by testator as to trips taken by him for immoral purposes. Snell v. Weldon, 239 Ill. 279, 87 NE 1022. On issue of insane delusion against daughter, testimony as to general character of issues in a lawsuit in which witness was counsel and in which testator did all the work of looking up witnesses, etc., and testimony as to whether issue in such lawsuit was whether one from whom testator acquired land was a monomaniac. Taylor v. McClintock [Ark.] 112 SW 405. Evidence for proponents showing that principal charge against testator and his codirectors of a bank was that they accepted statements of officers instead of consulting bank books and bookkeepers. A witness having previously testified that testator was very painstaking and that witness thought that as bank director he went to extremes in seeking information from bookkeepers. Id. Question asked by proponents as to what difficulty testator's friends would have experienced in detecting he was insane between 1895 and 1904, based on supposition he was in first stages of paranoia in 1880, when 50 years old, and that he lived after disease developed 24 years. Id. Question asked by proponents of attorney who prepared will as to whether he intended to reduce benefit contestant would receive when he suggested to testator that he substituted an absolute gift for annuity he named in first directions as to will. Id. That some years before his death testator pleaded guilty to trespass charge, and that his counsel in argument stated in his presence that testator had recently returned from an asylum and was still of weak mind and irresponsible, held inadmissible, as made when testator was not called upon to speak. In re Thorp's Will [N. C.] 64 SE 379. Certain evidence held not admissible as showing that testator's belief a spirit brought him a $5 bill was rational from standpoint of spiritualists. O'Dell v. Goff, 153 Mich. 643, 15 Det. Leg. N. 560, 117 NW 59. **Letters to testator** are not admissible to prove his mental condition unless they explain some act of his with reference thereto. Snell v. Weldon, 239 Ill. 279, 87 NE 1022 Letters in envelope marked "spirit communications," and found among his papers after his death, held inadmissible without evidence that testator had ever acted upon or approved them. Crumbaugh v. Owen, 238 Ill. 497, 87 NE 312.

**1.** Taylor v. McClintock [Ark.] 112 SW 405. On issue of sanity, **inequality or unjustness** of provisions may be considered in connection with other circumstances (Donnan v. Donnan, 236 Ill. 341, 86 NE 279; Morgan v. Morgan, 30 App. D. C. 436), but is not of itself sufficient to show incapacity (Id.).

**2.** Taylor v. McClintock [Ark.] 112 SW 405.

nature, extent and sources of testator's estate,[3] his family and connections,[4] their condition and relative situation to him,[5] the terms on which he stood with them,[6] the claims of particular individuals,[7] the situation of testator himself,[8] and all other circumstances under which the will was made.[9] The admissions of one legatee, however, are not binding on others,[10] and the court may in its discretion limit the testimony to conduct of testator during a reasonable time before or after the execution of the will.[11] Nonexperts may give opinions after stating the facts on which they are based.[12] Full mental capacity may be shown, however much it may exceed the requirement of a disposing mind.[13]

*Sufficiency of evidence.*—See 10 C. L. 2040—Capacity is presumed.[14] Hence, the burden is on the party asserting insanity,[15] and, if testator's general capacity

**3.** Where capacity is questioned on ground of dementia, inequalities of will and nature and extent of property and sources of acquisition are properly considered. Taylor v. McClintock [Ark.] 112 SW 405. But, where only delusion is relied on, such matters can be adduced only to show that testator, if delusion be established, was dominated by it. Id. When daughter contested will on ground of testator's insane delusion that she did not have the proper feelings towards him, she could show what property of her mother passed to testator and its value. Id. Proper to receive evidence to show testator acquired his fortune through his wife from a third person and to exclude testimony of one who had examined probate records. That such person's estate was insolvent. Id.

**4, 5.** Taylor v. McClintock [Ark.] 112 SW 405.

**6.** Taylor v. McClintock [Ark.] 112 SW 405. Proper to show state of testator's feelings and thoughts as manifested by his words and acts. Id. Daughter could show friendly relations between herself and testator as bearing on issue of his sanity, where she sued to annul will. Brelsford v. Aldridge [Ind. App.] 84 NE 1090. Not precluded by statute prohibiting heirs or devisees from testifying as to matters occurring prior to ancestor's death. Id. On issue of sanity, held competent to prove manner in which testator was treated by his family. Hopkins v. Wampler, 108 Va. 705, 62 SE 926.

**7, 8, 9.** Taylor v. McClintock [Ark.] 112 SW 405.

**10.** In re Dolbeer's Estate, 153 Cal. 652, 96 P 266. Rule same, whether evidence relates to mental unsoundness or undue influence. Id.

**11.** Court may limit time after execution of will, within which evidence of acts of unsoundness of mind should be confined. In re Winch's Estate [Neb.] 121 NW 116. Where it did not appear that, before or at time of execution of will, testator was afflicted with senile dementia, inquiry should be conducted as in cases of other insanity. Id. Limitation to two years held no abuse. Id. In issue of congenital insanity, held not error to limit evidence of insanity to conduct of testatrix within six years before will was made. Hardy v. Martin, 200 Mass. 548, 86 NE 939.

**12.** Snell v Weldon, 239 Ill. 279, 87 NE 1022; Hopkins v. Wampler, 108 Va. 705, 62 SE 96; Turner v. American Security & Trust Co., 213 U. S. 257, 53 Law. Ed. —. Opinion based in part on what witness "saw" held inadmissible. Spiers v. Hendershott [Iowa] 120 NW 1058. Facts held so meager as to make it discretionary with court to permit nonexpert to give opinion on capacity. Id. Questions held properly excluded as being same in form as though witness had been expert. Id.. Nonexpert cannot give opinion not based on his own knowledge. Snell v. Weldon, 239 Ill. 279, 87 NE 1022. Proper to allow physician to state opinion testator was not competent to dispose of his property so far as contestant was concerned nor to deal with matters concerning her. Taylor v. McClintock [Ark.] 112 SW 405. Held not reversible error to ask witness' opinion as to testator's ability to understand and execute deed or contract, witness having fully disclosed his means of knowledge as to testator's mental condition and reasons for concluding testator was incapable. Macafee v. Higgins, 31 App. D. C. 355. Evidence of testator's paralyzed condition held sufficient as basis for opinion as to whether testator had capacity to talk and dictate will. Credille v. Credille, 131 Ga. 40, 61 SE 1042. Witness could consider standing of testator as to efficiency in same office in which he worked, in reaching conclusion as to testator's mental condition. Macafee v. Higgins, 31 App. D. C. 355.

**13.** Especially where contest was for both incapacity and undue influence. In re Mason's Will [Vt.] 72 A 329.

**14, 15.** Taylor v. McClintock [Ark.] 112 SW 405. See, also, post, § 4E. Burden on caveators to establish incapacity by preponderance of evidence. In re Thorp's Will [N. C.] 64 SE 379.

**Evidence insufficient** to show incapacity. In re Ayer's Estate [Neb.] 120 NW 491; Scott v. Barker, 129 App. Div. 241, 113 NYS 695; In re Tobin's Will, 127 App. Div. 373, 111 NYS 555; In re Rose's Estate [Pa.] 72 A 800. Though testatrix was physically infirm and used narcotics. Mullen v. Johnson [Ala.] 47 S 584. Held to show capacity. Weston v. Hanson, 212 Mo. 248, 111 SW 44; In re Miller's Estate, 37 Mont. 545, 97 P 935. Insufficient to go to jury. In re More's Estate, 153 Mich. 695, 15 Det. Leg. N. 609, 117 NW 329. Testimony of medical expert on incomplete hypothetical question held insufficient to take question of capacity to jury. Winn v. Grier [Mo.] 117 SW 48. Finding of incapacity held against weight of evidence, In re O'Gorman's Will, 127 App. Div. 159, 111 NYS 274. Unjust or immaterial disposition of property held not to show incapacity. Weston v. Hanson, 212

is conceded, the proof must be of the clearest and most satisfactory kind.[10] It being shown that testator had been discharged from an insane asylum, the presumption is he was discharged because he had become sane.[17]

*Instructions* See 10 C. L. 2040 must be authorized by the evidence[18] and the issues in the case,[19] should properly define testamentary capacity[20] and insane delusions,[21] must be consistent with the law in regard to unreasonable or unjust testamentary dispositions,[22] moral perversion,[23] presumptions and proof,[24] and in proper cases should limit the effect of particular evidence[25] and present a party's theory of the case.[26]

Mo. 248, 111 SW 44. Opinions based on mere casual observations held entitled to but little weight. Mullen v. Johnson [Ala.] 47 S 584. Use of narcotics by testatrix afflicted with cancerous disease held insufficient to raise presumption against capacity. Id. Testator's age or character or extent of his property is not evidence of mental incapacity or undue influence. Ross v. Ross [Iowa] 117 NW 1105. Evidence of numerous eccentricities, roaring in head and disconnected conversations, held insufficient, it appearing testator was able to carry on his business and that he understood all that was said and done when will was made. Winn v. Grier [Mo.] 117 SW 48. That testator devised to daughter land to which she already held warranty deed held not to show incapacity, where testator had furnished money for the land. Id. Evidence held not to show insane delusion as to conspiracy to injure testator. Fulton v. Freeland [Mo.] 118 SW 12.

**Evidence held to show incapacity.** McReynolds v. Smith [Ind.] 86 NE 1009. Evidence held to sustain finding of want of testamentary capacity. Mason v. Rodriguez [Tex. Civ. App.] 115 SW 868. Proof of senile dementia in 1899 held proof condition of testatrix was not better in 1902 when she attempted to make will. Id. Evidence held to show incapacity to make a second codicil. In re Ellwanger's Will, 114 NYS 727. Capacity held for jury. In re Overpeck's Will [Iowa] 120 NW 1044; In re Frederick's Estate [Neb.] 119 NW 667; Id. [Neb.] 120 NW 1131.

**16.** Taylor v. McClintock [Ark.] 112 SW 405.

**17.** In re Thorp's Will [N. C.] 64 SE 379.

**18.** Certain charges held not objectionable as not being authorized by the evidence. Credille v. Credille, 131 Ga. 40, 61 SE 1042.

**19.** Where only issue was mental capacity, held proper to refuse certain requests for instructions not bearing on such issue but calculated to distract the jury's attention. Jenkins v. Weston, 200 Mass. 488, 86 NE 955.

**20.** Instruction not erroneous for failure to define "partial insanity." McReynolds v. Smith [Ind.] 86 NE 1009. Instruction that law "does require testator to possess mind sufficient to know" extent and value of property, etc., held proper. Id. Not objectionable as excluding idea will would be valid if made during lucid interval. Hill v. Terry [Miss.] 46 S 829. Instruction testator was competent if he had intelligent knowledge of instrument he was executing, and mind enough to comprehend, "in a general way," natural objects of his bounty and nature and extent of his estate, held not erroneous. Harahan v. O'Toole [Iowa] 117 NW 675. Instruction that capacity to manage a small estate might be insufficient to dispose of a large one held improper, there being no question as to testator's ability to properly manage his large estate. Snell v. Weldon, 239 Ill. 279, 87 NE 1022.

**21.** Improper to refuse to instruct that a belief founded on any evidence is not a delusion. Taylor v. McClintock [Ark.] 112 SW 405. Held error to add to proponent's instruction on insane delusion modifying statement that will would be invalid if jury should find testator was not of sound mind and capable of comprehending daughter's deserts, statement not being germane to paragraph modified but presenting an independent proposition of law. Id.

**22.** Instruction held to unduly emphasize inequality and unreasonableness on issues of mental capacity and undue influence. Donnan v. Donnan, 236 Ill. 341, 86 NE 279. Instructions taken together held to state the law in regard to unreasonableness of provisions of will, and second one held not to be inconsistent and eliminate unreasonableness from jury's consideration. Spiers v. Hendershott [Iowa] 120 NW 1058. Error to refuse instruction that if testator had capacity to comprehend obligation to children mere disregard of such obligation would not invalidate will, court having previously instructed on effect of incapacity to understand his obligations to his daughter. Taylor v. McClintock [Ark.] 112 SW 405.

**23.** Instruction on effect of unjust prejudice, moral perversion and unnatural disposition of property, held properly refused as argumentative. Taylor v. McClintock [Ark.] 112 SW 405. Under evidence, held error to refuse to limit inquiry into incapacity brought about by alleged insane delusion, there being danger jury might take into account testator's moral perversion. Id.

**24.** Requested instruction held objectionable as implying that appointment of guardian for testatrix after execution of will gave rise to presumption that she was incapable when will was made. Spiers v. Hendershott [Iowa] 120 NW 1058. Instruction ignoring presumption in favor of testator's sanity, and requiring proponent to prove capacity by "clear and convincing proof," held erroneous and misleading. Hopkins v. Wampler, 108 Va. 705, 62 SE 926.

**25.** Failure to instruct that testator's declarations "as to how he intended to dispose of his property" should not be deemed evidence of truth or falsity of facts stated held not prejudicial, though such instruction as

(§ 2) *B. Constituents of fraud, mistake and undue influence.*[27]—See 10 C. L. 2041.—To be undue, the influence must be directly connected with the execution of the will,[28] and must amount to over persuasion, coercion or force destroying free agency,[29] mere persuasions addressed to the judgment and affections not being sufficient.[30] Usually the same considerations control when undue influence is due to misapprehensions and artifices commonly designated "fraud." [31] The question of undue influence is usually for the jury.[32] Whether the whole will must be set aside for undue influence or only a part depends on the effect on the general testamentary scheme.[33]

*Fraud and mistake* See 10 C. L. 2042 may invalidate,[34] but the presumption is against the existence of fraud or mistake,[35] and the fact that testator was in possession of the will for a long time is a strong indication that he was aware of its contents [36] and that the will was drawn according to his instructions.[37] Declarations by testator [38] or a subsequent codicil [39] may also tend to negative mistake.

to testator's declarations generally would have been proper. McBride v. McBride [Iowa] 120 NW 709.

26. Instructions designed to present proponent's theory that daughter's marriage was cause of father's discrimination, and not insane delusion, held improperly refused. Taylor v. McClintock [Ark.] 112 SW 405.

27. **Search Note:** See notes in 3 L. R. A. (N. S.) 749; 6 Id. 202; 11 Id. 554; 21 A. S. R. 94; 31 Id. 670; 10 Ann. Cas. 600.

See, also, Wills, Cent. Dig. §§ 368-437; Dec. Dig. §§ 151-166.

28. Sanger v. McDonald [Ark.] 112 SW 365; Simon v. Middleton [Tex. Civ. App.] 112 SW 441. Must be brought to bear directly on testamentary act, and particular parties must be benefited or disfavored as result of purpose and pressure of dominating mind. Ginter v. Ginter [Kan.] 101 P 634. Must be shown that either fraud or undue influence resulted in producing the will. Sanger v. McDonald [Ark.] 112 SW 365.

29. Weston v. Hanson, 212 Mo. 248, 111 SW 44; Ginter v. Ginter [Kan.] 101 P 634; Mullen v. Johnson [Ala.] 47 S 584; Haight v. Haight, 112 NYS 144; Wood's Ex'r v. Wood [Va.] 63 SE 944; Simon v. Middleton [Tex. Civ. App.] 112 SW 441. As against mere influence of attachment or affection or desire to gratify wishes of one beloved, respected and trusted. Winn v. Grier [Mo.] 117 SW 48. And must be specially asserted to procure will in favor of particular persons. Sanger v. McDonald [Ark.] 112 SW 365. Invalidating undue influence varies with strength of minds, and, if such dominion is acquired over a person with sufficient mind and discretion to regulate his affairs generally as to prevent exercise of that discretion, he does not have a disposing mind. In re Ellwanger's Will, 114 NYS 727. "Undue influence" must be directly connected with execution of will, and be exerted for purpose of procuring will in favor of particular parties to such extent as to destroy testator's freedom of will and to practically render it that of another. Snell v. Weldon, 239 Ill. 279, 87 NE 1022.

30. Mullen v. Johnson [Ala.] 47 S 584; Sanger v. McDonald [Ark.] 112 SW 365; Weston v. Hanson, 212 Mo. 248, 111 SW 44.

31. See, also, post, Fraud and Mistake. Though strictly fraud and undue influence are distinguishable, the terms are frequently used to denote the same idea, something sinister being always involved perverting testator's will by overcoming his power to truly express his real desires. Ginter v. Ginter [Kan.] 101 P 634.

32. Sanger v. McDonald [Ark.] 112 SW 365. Sufficiency of Evidence, see post, this section .

33. See post, § 5D, subd. Partial Invalidity.

34. Fraud in inducement of will consists of willful false statements of fact, inducing testator to execute instrument with full knowledge of its contents. Sanger v. McDonald [Ark.] 112 SW 365. Where fraud is in inducement as distinct from its execution, same considerations apply to validity of will as if it were executed under mistake of fact. Id. If draftsman in drawing will misinterpreted instructions given by testatrix, instrument made would not be her will. Christman v. Roesch, 132 App. Div. 22, 116 NYS 348. Unreasonable prejudice, or erroneous conviction as to unworthiness of a natural object of bounty, in order to invalidate, must have been nursed or fostered by a beneficiary and will procured wholly by his false representations made with intent to secure its execution. Simon v. Middleton [Tex. Civ. App.] 112 SW 441. Evidence held to warrant findings that testatrix knew and understood provisions of will and that her wishes and intentions were represented thereby. Freund v. Becker, 235 Ill. 513, 85 NE 610.

35. Presumed in first instance that will executed according to legal formalities was read by testator, or that he otherwise became acquainted with its provisions. Ross v. Ross [Iowa] 117 NW 1105.

36. In re Cooper's Will, [N. J. Eq.] 71 A 676.

37. Conclusively presumed will was prepared according to instructions of testatrix who retained and preserved it after ample time for examination, especially where it followed her pronounced intentions and made no unnatural disposition of her property. In re Cooper's Will [N. J. Eq.] 71 A 676.

38. Declarations of testatrix that she had made a will and remembered certain persons, that she had thought much about it, and that some people would not be satisfied,

Where the will is attacked for forgery decedent's declarations may be admitted in evidence to show they were inconsistent with statements of fact in the will.[40]

*Indicia of influence and admissibility of evidence.*—See 10 C. L. 2042—If the evidence is not too remote,[41] the relations and dealings between testator and the beneficiaries [42] and the opportunity for undue influence [43] may be considered, as well as the extent of testator's property,[44] his social and commercial standing,[45] his family connection [46] and domestic relations,[47] the claims of particular persons

held admissible to show she was aware of contents of will, contested for undue influence. In re Cooper's Will [N. J. Eq.] 71 A 676.

**39.** Fact testatrix made codicil, expressly confirming will, but making changes, tends to prove she was acquainted with will. In re Cooper's Will [N. J. Eq.] 71 A 676.

**40.** In re Thomas' Estate [Cal.] 101 P 798. But not to show testamentary intent at variance with will. Id.

**41.** Evidence as to testatrix' mental condition and her feelings towards her children during four years before executing will held not too remote. In re Mason's Will [Vt.] 72 A 329. Compromise and promise to complainant made by testatrix 15 years before will was made and 18 years before death held too remote on issues of incapacity and undue influence. Helsley v. Moss [Tex. Civ. App.] 113 SW 599. Also statements by testatrix' husband, 9 years before will was made, that plaintiff had received all she would get. Id. Evidence of illicit relations between testator and second wife before marriage held too remote to prove undue influence as to will drawn eight years later. Fulton v. Freeland [Mo.] 118 SW 12.

**42.** Sanger v. McDonald [Ark.] 112 SW 365. That husband who was in good health had agreed to will his property to testatrix, who was near death, in consideration she make similar will in his favor, held to show overreaching, rather than an agreement for mutual benefit. Betcher v. Brady [Wash.] 101 P 220. That wife was chief beneficiary held to raise no presumption of undue influence. Fulton v. Freelend [Mo.] 118 SW 12. Burden of proving undue influence is not sustained by mere showing that son-in-law drew will and that his children received valuable legacies. Hanrahan v. O'Toole [Iowa] 117 NW 675. While such facts may be grounds for suspicion, verdict for contestant cannot be upheld without proof of other facts and circumstances confirming such suspicion. Id. Existence of **confidential relation** raises presumption of undue influence only when beneficiary was in some way actively concerned in preparation and execution of will. Ginter v. Ginter [Kan.] 101 P. 634. When will is made by a patient in favor of his physician to exclusion of relatives, and no reason for such exclusion appears, will is presumed void. Hill v. Terry [Miss.] 46 S 829. Rule requiring testator to exercise judgment independent of confidence induced by confidential relationship with his legal advisor does not require proof of proper independent advice. In re Cooper's Will [N. J. Eq.] 71 A 676. Where evidence showed fixed ideas in testatrix as to disposition of her estate, and that attorney who drew will followed her instructions, it showed she exercised independent judgment essential to sustain will containing gift to attorney. Id. Existence of **meretricious relations** between testator and beneficiary is not alone sufficient to invalidate will. Parker v. Wainwright, 139 Ill. App. 458; Fulton v. Freeland [Mo.] 118 SW 12; Snell v. Weldon, 239 Ill. 279, 87 NE 1022. Existence of such relations can be considered only for purpose of determining whether influence otherwise proven was undue. Snell v. Weldon, 239 Ill. 279, 87 NE 1022. Letters from legatee to testator tending to show improper relations held inadmissible. Id. That will gave bulk of property to niece, with whom testator sustained illicit relations, held insufficient, testator being possessed of strong will and having procured execution of will without interposition of beneficiary. Weston v. Hanson, 212 Mo. 248, 111 SW 44. Where evidence of illicit relations before marriage of testator with beneficiary is admitted, it must be followed up by evidence of acts of undue influence after marriage. Fulton v. Freeland [Mo.] 118 SW 12.

**43.** Evidence that principal devisee had opportunity to exert undue influence held admissible. In re Overpeck's Will [Iowa] 120 NW 1044. Undue influence cannot be inferred from mere mental weakness, opportunity to exert undue influence or interest in so doing. Id. Power, motive, or opportunity, not alone sufficient to raise inference undue influence was in fact exercised. Ginter v. Ginter [Kan.] 101 P 634.

**44, 45, 46.** Sanger v. McDonald [Ark.] 112 SW 365.

**47.** Testatrix' belief that contestants had stolen securities from her, and confirmation of such belief by her other children, held admissible in explanation of alleged unreasonableness of will asserted by contestants. In re Mason's Will [Vt.] 72 A 329. Evidence that some time during year in which will was made, whether before or after not appearing, testator had told road superintendent, under whom disinherited son was working, to let son loose and testator would pay fine, though perhaps admissible to show kindly feeling towards son, held entitled to little force. Simon v. Middleton [Tex. Civ. App.] 112 SW 441. That disinherited son had been excluded from family table held not evidence of undue influence by other members of family, it appearing he was excluded because of vile habits and disease. Id. Testimony of disinherited child as to conversation between her and father, in which latter accused her of improper relations with a certain man and stated that one of the legatees had told him, held admissible, contest not being an action by or against heirs or legal representatives arising out of any transaction with decedent, within Rev. St. 1895, art. 2302. Id.

on his bounty,[48] the situation of the beneficiaries, social and pecuniary,[49] testator's situation and mental condition,[50] the nature and contents of the will itself,[51] and all the circumstances under which it was executed.[52] Testator's declarations are inadmissible to establish undue influence in the absence of independent evidence of such influence or of incapacity.[53] No collusion being shown, the declarations of one legatee are inadmissible where it would prejudice others.[54] The execution of prior wills disposing of the property in the same manner may be shown.[55] Irrelevant or immaterial evidence is properly excluded,[56] and also evidence calculated to prejudice or influence the jury.[57]

48. Sanger v. McDonald [Ark.] 112 SW 365.

49. Sanger v. McDonald [Ark.] 112 SW 365. Financial condition of legatees may be shown. Simon v. Middleton [Tex. Civ. App.] 112 SW 441.

50. Sanger v. McDonald [Ark.] 112 SW 365. That testatrix' husband was very determined held immaterial in absence of evidence showing he exercised undue influence. Helsley v. Moss [Tex. Civ. App.] 113 SW 599. Neither testator's age, nor character or extent of his property, is evidence of unsoundness of mind or undue influence. Ross v. Ross [Iowa] 117 NW 1105.

51. Sanger v. McDonald [Ark.] 112 SW 365. **Mere inequality of disposition** raises no presumption of undue influence. Ginter v. Ginter [Kan.] 101 P 634. May be considered on question whether instrument is testator's will, but has no weight in absence of other evidence of undue influence. Id. Is not of itself sufficient. Donnan v. Donnan, 236 Ill. 341, 86 NE 279; Wood's Ex'r v. Wood [Va.] 63 SE 994. That a daughter did not receive as much under will as she thought she would raises no presumption of undue influence. Helsley v. Moss [Tex. Civ. App.] 113 SW 599. Where testator of sound mind formed a dislike toward certain of his children and for this reason freely and of choice disinherited them, fact he was mistaken or arrived at unjust conclusions would not invalidate will. Ross v. Ross [Iowa] 117 NW 1105. May be considered in connection with other circumstances. Donnan v. Donnan, 236 Ill. 341, 86 NE 279; In re Overpeck's Will [Iowa] 120 NW 1044; Simon v. Middleton [Tex. Civ. App.] 112 SW 441. That most of property was given to strangers in blood who had been kind to testator, to exclusion of children who had been unkind, held not to show undue influence. Parker v. Wainwright, 139 Ill. App. 458.

52. Sanger v. McDonald [Ark.] 112 SW 365. Wide range of inquiry is permitted. Simon v. Middleton [Tex. Civ. App.] 112 SW 441. Undue influence is not often subject of direct proof, but may be shown, by all surrounding facts and circumstances, nature of will, family relations, health and mental condition, dependency upon and subjection to control of person supposed to have wielded the influence, opportunity and disposition of person to wield it, and his acts and declarations. In re Ellwanger's Will, 114 NYS 727.

53. Testatrix' declarations prior to making will as to her intentions held properly excluded, there being no evidence testatrix was incapable when will was made, or unduly influenced. Helsley v. Moss [Tex. Civ. App.] 113 SW 599. Evidence that testatrix had said that if she ever made a will all children should share alike held properly excluded. Id. Declarations of testator before, at time of, and after execution of will are admissible where there is independent evidence of undue influence. Stubbs v. Marshall [Tex. Civ. App.] 117 SW 1030. Letter from testator to disinherited daughter, written two years after execution of will and giving reasons for cutting of a certain allowance he had been making to her, held not admissible to show undue influence. Simon v Middleton [Tex. Civ. App.] 112 SW 441. Letters written by testatrix after making will and before and after making codicil held admissible as bearing on her mental condition, but not competent evidence of facts stated therein. In re Cooper's Will [N. J. Eq.] 71 A 676 In attempt to overthrow will on ground of spiritualistic communications, declarations of testator before and after execution of will held incompetent except as bearing on testamentary capacity. Crumbaugh v. Owen, 238 Ill. 497, 87 NE 312.

54. Declarations by deceased legatee held inadmissible to affect interests of other legatees, no collusion being shown. Helsley v. Moss [Tex. Civ. App.] 113 SW 599. Declarations by party to record, who is legatee with others, are inadmissible to prove that will was contrary to intentions of testator or was procured by undue influence. Seal v. Goebel, 11 Ohio C. C. (N. S.) 433.

55. Freund v. Becker, 235 Ill. 513, 85 NE 610; Simon v. Middleton [Tex. Civ. App.] 112 SW 441.

56. In suit to annul will for incapacity and undue influence, plaintiff's testimony that her brother had died shortly before father died and that father was ignorant thereof and bequeathed certain property to son, and that testatrix, plaintiff's mother, took interest of deceased child, held irrelevant. Helsley v. Moss [Tex. Civ. App.] 113 SW 599. Also testatrix' promise to plaintiff to make a devise. Id. Also statement by testatrix in last illness that she felt like she had all with her when she had certain persons, including plaintiff. Id. That witness had never seen any immorality on part of disinherited child held immaterial. Simon v. Middleton [Tex. Civ. App.] 112 SW 441. Evidence of false and slanderous charges by a beneficiary against one who would ordinarily be recipient of favors under will held important as bearing on fraud and undue influence. Id. Evidence that disinherited son heard two of his brothers, who were beneficiaries, say after funeral that there were three wills and that children disinherited by last will knew noth-

*Sufficiency of evidence.*—See 10 C. L. 2044—The burden is on the party who alleges undue influence or fraud,[58] though substantial gifts to a confidant is prima facie evidence.[59] To show undue influence the evidence must be direct, or all circumstances showing it must be a reasonably satisfactory and convincing character,[60] but contestant is entitled to all inferences legitimately derivable from the

ing about it, and that they would "give them five dollars and let them go to hell," held improper, knowledge of existence of other wills not being relevant on issue of undue influence as to will in question. Id.

**57.** Evidence of financial condition of disinherited daughter, 14-15 years before will was made, held inadmissible. Simon v. Middleton [Tex. Civ. App.] 112 SW 441. Evidence of altercations between disinherited daughter and a son, who was beneficiary, three years before execution of will, held improper. Id. Evidence that son of disinherited daughter had taken notes to testator from daughter in which she sought to obtain money, and of testator's suggestion she should wash and iron, held improper. Id.

**58.** Ginter v. Ginter [Kan.] 101 P 634; Wood's Ex'r v. Wood [Va.] 63 SE 994; Hanrahan v. O'Toole [Iowa] 117 NW 675; Fulton v. Freeland [Mo.] 118 SW 12. Where testator has capacity and knowledge of contents of will and is surrounded by guards prescribed by statute. Haight v. Haight, 112 NYS 144. Burden on contestants not only to establish undue influence, but to show it operated on decedent at time will was made and amounted to such coercion as resulted in disposition of property he did not wish to make. Simon v. Middleton [Tex. Civ. App.] 112 SW 441.

**59.** If a person, though possessed of testamentary capacity, is aged, infirm bodily, and mentally impaired, and confidential adviser benefits substantially under the will, presumption of undue influence arises which beneficiary has burden to rebut. Where estate was about $75,000, adviser, who was made executor and trustee and who was given a possible residuary interest in whole estate, held substantially interested within rule. In re Adams' Estate, 220 Pa. 531, 69 A 989. Rule that donee, who occupied confidential relation to donor, has burden to rebut presumption of undue influence does not apply to wills, unless beneficiary is shown to have taken an active part in preparation of the will. Mullen v. Johnson [Ala.] 47 S 584. Where will was prepared by legal adviser of testatrix and gave him and his son specific and residuary legacies, burden was on attorney to rebut presumption of undue influence. In re Cooper's Will [N. J. Eq.] 71 A 676. Every person has right to assistance of any one he may deem proper when he desires to make will (Id.), and probate should not be denied because he selects person whom he intends to make beneficiary, where selection is without improper influence and evidence shows no abuse of confidence (Id.). Contention attorney should have refused bounty held irrelevant. Id. Where facts show existence of confidential relation between testator and beneficiary, slight additional circumstances will throw on beneficiary burden of showing want of undue influence. Id. Where beneficiary is a child, burden on issue of undue influence is not on him. In re Mason's Will [Vt.] 72 A 329.

**60.** Helsley v. Moss [Tex. Civ. App.] 113 SW 599. Proof must be substantial so that it may be perceived by whom and in what manner the influence was exercised, and what effect it had on will. Ginter v. Ginter [Kan.] 101 P 634. Suspicion, conjecture, or possibility, insufficient. Id. Fraud or undue influence may be proved by circumstances, each one of which must point towards end sought, and all of which together must in a reasonably satisfactory manner establish fraud or undue influence. Simon v. Middleton [Tex. Civ. App.] 112 SW 441.

**Evidence sufficient** to sustain verdict against validity of will contested for undue influence of testator's physician, who was principal beneficiary. Hitt v. Terry [Miss.] 46 S 829. Evidence held to show undue influence exerted by husband for purpose of getting money wife had inherited. Betcher v. Brady [Wash.] 101 P 220. Evidence held to show second codicil was result of undue influence. In re Eliwanger's Will, 114 NYS 727. Evidence sufficient for jury. Frederick's Estate, In re [Neb.] 120 NW 1131. Where contestant offers sufficient evidence of undue influence to support finding thereof, court cannot refuse issue devisavit vel non because of evidence introduced by proponent, question being then for jury. In re Adams' Estate, 220 Pa. 531, 69 A 989.

**Evidence insufficient** to show undue influence. Fulton v. Frieland [Mo.] 118 SW 12; In re O'Gorman's Will, 127 App. Div. 159, 111 NYS 274; In re Tobin's Will, 127 App. Div. 373, 111 NYS 555; Haight v. Haight, 112 NYS 144; Simon v. Middleton [Tex. Civ. App.] 112 SW 441; Wood's Ex'r v. Wood [Va.] 63 SE 994. To show fraud or undue influence. Sanger v. McDonald [Ark.] 112 SW 365; Ginter v. Ginter [Kan.] 101 P 634. To show two codicils were result of undue influence. Snell v. Weldon, 239 Ill. 279, 87 NE 1022. To show husband unduly influenced wife who was ill. Mullen v. Johnson [Ala.] 47 S 584. Id. [Ala.] 47 S 584. In contest for fraud, mistake, incapacity, and undue influence, evidence held to sustain verdict for proponents. Ross v. Ross [Iowa] 117 NW 1105. Evidence of physical and mental condition of testatrix, reasonableness of gifts as compared with prior will, and of her knowledge and appreciation of disposition made, held to show absence of undue influence by principal beneficiary who was legal adviser. In re Cooper's Will [N. J. Eq.] 71 A 676. Evidence of assistance to testator, and unequal distribution of property by the will, held insufficient. Winn v. Grier [Mo.] 117 SW 48. Insufficient **to go to jury** on issue of undue influence. Umstead v. Bowling [N. C.] 64 SE 368; In re Overpeck's Will [Iowa] 120 NW 1044; Spiers v. Hendershott [Iowa] 120 NW 1058; In re Moore's Estate, 153 Mich. 695, 15 Det. Leg. N. 609, 117 NW 329; Snell v. Weldon, 239 Ill. 279, 87 NE 1022; Daugherty v. Gaffney, 239 Ill. 640, 88 NE 150. Court justified in taking issue of undue influence from jury, contestant's own evidence showing will was

facts established.[61] The interest of a witness may be considered, as in other cases, in weighing his testimony.[62] Testimony of a legatee charged with undue influence cannot be arbitrarily disregarded, where not contradicted by other credible testimony or discredited by improbability.[63]

*Instructions* See 10 C. L. 2045 are governed by the ordinary rules,[64] and the law, respecting undue influence,[65] the evidence thereof,[66] and the degree of proof required on particular issues.[67]

§ 3. *The testamentary instrument or act. A. Requisites, form and validity.*[68] See 10 C. L. 2045—A will is a properly executed instrument made by a person of testamentary capacity for the purpose of disposing of his property after his death.[69] An instrument will be held a will if properly executed whatever its form or language may be, if a final testamentary intention is sufficiently manifested.[70] An attestation clause is not essential,[71] being chiefly valuable as evidence of due execution.[72] Interlineations or marginal insertions will not invalidate unless they are below the signature,[73] and then only if they are important or material.[74] Testamentary instruments are void if not executed as required by the statute relat-

peculiarly that of testator and that contestant was disinherited for his set purpose. Conner v. Skaggs, 213 Mo. 334, 111 SW 1132.

**61.** Ginter v. Ginter [Kan.] 101 P 634.

**62.** Testimony of sole beneficiary denying undue influence. Betcher v. Brady [Wash.] 101 P 220.

**63.** In re Cooper's Will [N. J. Eq.] 71 A 676.

**64.** Charges held not unauthorized by evidence. Credille v. Credille, 131 Ga. 40, 61 SE 1042. Instruction on effect of unjust disposition, due to testator's dislike of some of his children, held not erroneous as invading province of jury. Ross v. Ross [Iowa] 117 NW 1106.

**65.** Instruction invalidating will of old and infirm man, if not his free act and in accordance with intentions previously expressed or implied from family relations, held proper. Ross v. Ross [Iowa] 117 NW 1105.

**66.** On issues of undue influence and incapacity, instruction held erroneous as placing undue emphasis on inequality and unreasonableness in disposition of the property. Donnan v. Donnan, 236 Ill. 341, 86 NE 279. Request that testator's declarations before or after making will could be considered proof of undue influence, "or that he was unduly influenced," held properly refused. O'Dell v. Goff, 163 Mich. 643, 15 Det. Leg. N. 560, 117 NW 59.

**67.** Instruction requiring proof by "clear preponderance of evidence" that testator knew contents of will held not prejudicial. Hitt v. Ferry [Miss.] 46 S 829.

**68. Search Note:** See notes in 15 L. R. A. 635; 1 L. R. A. (N. S.) 135; 13 Id. 1203; 77 A. S. R. 459; 89 Id. 486, 494; 107 Id. 70; 1 Ann. Cas. 51, 368, 395; 2 Id. 26, 730; 4 Id. 637; 11 Id. 105; 11 Id. 765, 1013.

See, also, Wills, Cent. Dig. §§ 183-367, 438-501; Dec. Dig. §§ 69-150, 167-202; 30 A. & E. Enc. L. (2ed.) 571.

**69.** Instruction that a will is an instrument executed by a person of full age and sound mind for purpose of disposing of his property after his death, which instrument must be signed by him in presence of two witnesses who must sign as such witnesses in his presence and in presence of each other, held proper. In re Brown's Will [Iowa] 120 NW 667.

**70.** Milam v. Stanley, 33 Ky. L. R. 783, 111 SW 296. Court will consider not only language of instrument but testator's situation and intention. Id. Absence of recited seal and existence of blank space of page and a half between paragraphs disposing of estate and appointing executor held to show testamentary act was left incomplete. In re McCarthy's Will, 59 Misc. 128, 112 NYS 219. Presence of pencil marks on draft of new will found in testator's desk held prima facie evidence marks were made by him and to indicate he was still undecided as to disposition of his property. In re Frothingham's Will [N. J. Err. & App.] 71 A 695. Letter by a convict, written only three days before date of his hanging, and stating he wanted "to make you and Lula a deed of that house and lot" and giving reason why he did it, held a will. Id. Letter directing cancellation of old will and that property should go in same way as another person had disposed of hers. Nightingale v. Phillips [R. I.] 72 A 220. Letter written, dated, and signed may constitute author's last will, if it contains testamentary language indicating it was intended as a will. In re Billis' Will, 122 La. 639, 47 S 884. Memorandum intended to supplement will with list of property, canceling debts of certain persons to estate, and giving son a small sum, should he reform, **held a codicil** and probatable as such with will. Simon v. Middleton [Tex. Civ. App.] 112 SW 441.

**71.** In re Sizer's Will, 129 App. Div. 7, 113 NYS 210. That attestation clause did not state witnesses signed in presence of testatrix held not fatal. Schofield v. Thomas, 236 Ill. 417, 86 NE 122. Will need not recite witnesses signed in presence of each other. In re Sizer's Will, 129 App. Div. 7, 113 NYS 210.

**72.** See post, §§ 4D, 4E.

**73.** In re Gibson's Will, 128 App. Div. 769, 113 NYS 266.

**74.** Marginal insertion extending below signature held not fatal where disposition of share of children dying before testator was same as law would have made without provision in will. In re Gibson's Will, 128 App. Div. 769, 113 NYS 266.

ing to wills.[75] Whether an instrument is testamentary or not depends on the maker's intention[76] as to its revocability and the time of its taking effect.[77] In

75. Thomas v. Williams, 105 Minn. 88, 117 NW 155.

76. The test whether instrument is deed or will is maker's intention primarily to be determined from its language. Thomas v. Williams, 105 Minn. 88, 117 NW 155. Instruments in form of deeds and bill of sale, conveying property on specified conditions and not intended to operate as a will, cannot be construed as testamentary. De Bow v. Wollenberg [Or.] 96 P 536.

77. To constitute a will no present interest must pass. In re McIntyre's Estate [Mich.] 16 Det. Leg. N. 95, 120 NW 587. Distinction between bequest and gift causa mortis is time of delivery, which in case of gift is necessarily before donor's death. Fite v. Perry [Cal. App.] 96 P 102. If right or interest passes on delivery of instrument subject only to contingencies over which grantor has no control, it is irrevocable, though enjoyment may be postponed. Thomas v. Williams, 105 Minn. 88, 117 NW 155.

**Held testamentary:** Instrument not operating inter vivos, but depending for its operation on death of maker to consummate it, can take effect only as a testament. Hearn v. Purnell [Md.] 72 A 906. Deed not to take effect until grantor's death is void as attempt to make testamentary disposition without complying with statute of wills. Ackman v. Potter, 239 Ill. 578, 88 NE 231. Deed first granting land to nephew, but later providing title should not pass until grantor's death, and that grantor should have full use and control, until his death when title should pass subject to incumbrances, taxes and debts, held testamentary and void. Boon v. Castle, 61 Misc. 474, 115 NYS 583. Held no grant of any future estate. Id. A second deed held delivered to a third person under same conditions as first, giving grantor right to withdraw so as to amount to only an attempted testamentary disposition. Burnham v. Burnham, 58 Misc. 385, 111 NYS 252. Deed deposited in bank to be delivered to grantee on grantor's death held testamentary, if intention was grantor should retain title till he died. Felt v. Felt [Mich.] 15 Det. Leg. N. 994, 118 NW 953. Agreement held to show intention father was to retain title. Id. Assignments of insurance policies to trustees to be named by assignor's will held testamentary and invalid where not witnessed as required by statute, there having been no delivery in testator's lifetime. Frost v. Frost, 202 Mass. 100, 88 NE 446. Defect not cured by consent of cestui que trust. Id. Where declarant of trust in bank deposits could at any time revoke it and do with money as she chose, and another part of trust related only to disposition of funds after her death, document was testamentary and could not be given effect under statutes permitting testamentary dispositions only by duly executed will. McEvoy v. Boston Five Cents Sav. Bank, 21 Mass. 50, 87 NE 465. Writing attached to will, testamentary in character but not executed with formalities required for wills, held inadmissible in evidence in favor of devisee in proceedings on petition for distribution. In re Benner's Estate [Cal.] 99 P 715.

**Held not testamentary:** Instrument in form a deed conveying a present interest, and unexplained by contemporaneous writing of testamentary character, cannot be probated as a will. Dexter v. Witte, 138 Wis. 74, 119 NW 891. Trust deed placed in hands of third person instructed to deliver to trustee if grantor should not survive pending illness. Id. Instrument in form a deed conveying personalty to trustees to collect and apply income for benefit of grantor for life, and distribute corpus to others at grantor's death, is a deed and not a will. Hall v. Hall [Va.] 63 SE 420. Reservation of life interest, use, and control does not render deed testamentary or prevent immediate vesting of remainder, if there has been actual delivery of deed. Ackman v. Potter, 239 Ill. 578, 88 NE 231. Instrument in form of statutory deed "to take effect at my death, and not before," held not testamentary, since estates may be made to commence in future by deed or will. Garrison v. McLain [Tex. Civ. App.] 112 SW 773. Instrument containing granting and habendum clauses common to deeds, and also covenants of warranty, and reciting that purpose was to convey property to M, but that title was to vest in grantor during his life, held a deed with reservation of life estate, and not a will. Dick v. Miller [N. C.] 63 SE 176. Instrument creating life estate to take effect at grantor's death, remainder to grantee's children, held deed according to its form. Fellbush v. Egen, 221 Pa. 420, 70 A 816. Instrument expressly granting, etc., land and reserving life estate in grantor, but also power "to mortgage, incumber, sell, lease, convey, or otherwise dispose of said real estate," and providing that land should revert to grantor should grantee predecease her, held not testamentary. Brady v. Fuller [Kan.] 96 P 854. That an instrument, in form a deed, postpones enjoyment of grant until death of grantor, and is contingent on grantees surviving him, is not conclusive. Thomas v. Williams, 105 Minn. 88, 117 NW 155. Test is whether testator intended instrument to be ambulatory and to serve no purpose until after his death, or whether he intended to convey some present, absolute, or contingent right or interest with enjoyment postponed. Id. Conveyance of all right of survivorship, "to have and hold in case he survives" grantor, held not testamentary. Id. Provision in deed that estate should revert to grantor, or his "estate" should grantee die without heirs of body, held not invalid as an attempt to dispose of grantor's estate after his death without complying with statute of wills, doctrine not applying to cases where grantor has by conveyance divested himself of his property in his lifetime. Robeson v. Duncan [N. J. Eq.] 70 A 685. Provision in deed reserving use and occupation to grantors and survivors, and providing "full title and enjoyment shall only become operative on death of survivor," held not to change instrument to a will, a present interest passing by delivery of deed. In re McIntyre's Estate [Mich.] 16 Det. Leg. N. 95, 120 NW 587. Note and mortgage held not testamentary because note recited it became due at maker's death. McCord v.

doubtful cases an instrument which cannot take effect as a will, but may as a deed, will be so construed.[78]

(§ 3) *B. Execution of will.* 1. *Mode of execution.*[79]—See 10 C. L. 2047—It is generally required that testator sign the will[80] at the end,[81] or acknowledge his signature,[82] declaring the instrument to be his will,[83] in the presence of two or more[84] credible or competent witnesses,[85] who thereupon attest[88] at the request

Thompson, 131 Ga. 126, 61 SE 1121. Assignment of insurance policy held not testamentary. Southern Mut. Life Ins. Ass'n v. Durdin [Ga.] 64 SE 264. Instrument in part testamentary held to include in contract obligation provision for payment of certain mortgages entitling plaintiff to recover accordingly, she having performed her part of contract. Porter v. Everts' Estate, 81 Vt. 517, 71 A 722. Entry on book of deposit in savings bank, reciting that money shall be payable to depositor and, in case of her death, to a third person, held not a testamentary deposition to third person, entry not being executed as law requires wills to be executed. Jones v. Crisp [Md.] 71 A 515.

**78.** Thomas v. Williams, 105 Minn. 88, 117 NW 155.

**79. Search Note:** See notes in 6 C. L. 1899; 14 L. R. A. 160; 22 L. R. A. 297, 370; 44 Id. 142; 64 Id. 849; 1 L. R. A. (N. S.) 393; 7 Id. 1193; 14 Id. 255, 968; 114 A. S. R. 209; 5 Ann. Cas. 463; 6 Id. 414.

See, also, Wills, Cent. Dig. §§ 249-367; Dec. Dig. §§ 108-150; 30 A. & E. Enc. L. (2ed.) 581.

**80.** Where testator was unable to sign, but not unable to have another do so for him, unsigned will failed though approved by him. In re Butler's Estate [Pa.] 72 A 508. Signing by holding pen with assistance of another held valid. In re Miller's Estate, 37 Mont. 545, 97 P 935.

**81.** Statutes requiring testator to subscribe at end of will are intended to prevent fraud by unauthorized additions and will be strictly construed. In re Gibson's Will, 128 App. Div. 769, 113 NYS 266. Will is signed at end though there are provisions after signature if such provisions are immaterial and do not in any manner affect the disposition of the property. Id. That after name of testatrix there appeared words importing legacies held not to invalidate, where it appeared such words were inserted after execution of will by a residuary legatee without authority. In re Gartland's Will, 60 Misc. 31, 112 NYS 718. Will consising of first page with signature, attestation clause and names of witnesses, second page blank, and third page half written and without signatures, held fatally defective. In re Diehl's Will, 112 NYS 717. Instrument with notary's signature at end of first page where testator's might be looked for, testator's name in opening part of will and at end of second page, where no names of witnesses appeared, held not subject to probate. In re Schlegel's Will, 62 Misc. 439, 116 NYS 1038.

**82.** It is not necessary that testator sign in presence of witness, it is sufficient if he acknowledge his signature. Umstead v. Bowling [N. C.] 64 SE 368; Notes v. Doyle, 32 App. D. C. 413. Under Act April 26, 1855 (P. L. 332), § 11, requiring wills containing religious or charitable bequests to be attested by two credible and at the same time disinterested witnesses, held not necessary that witness see testator sign will. In re Kesseler's Estates, 221 Pa. 314, 70 A 770.

**83.** Evidence sufficient to show testatrix declared instrument was her will, as required by statute. In re Miller's Estate, 37 Mont. 545, 97 P 935. Acts and declarations preceding and following testamentary ceremony held sufficient to show publication. In re Luthgen's Will, 61 Misc. 544, 115 NYS 861. Any communication by word, sign, motion, or conduct, indicating to witness that testator intends to give effect to instrument as his will, is sufficient publication. Direction to sign and steps taken to have will deposited with county judge held sufficient. In re Ayers' Estate [Neb.] 120 NW 491. Not necessary to expressly declare instrument to be declarant's will; all attending facts should be considered. In re Miller's Estate, 37 Mont. 545, 97 P 935. Testimony by one witness that decedent signed and published instrument as her will, by another that she published but did not subscribe or acknowledge signature, and by third that she subscribed but did not publish, held insufficient to authorize probate compliance with statute, not being shown by any two witnesses. In re Balmforth's Will, 60 Misc. 492, 113 NYS 934.

**84.** Witnesses to codicils cannot be counted to make up requisite number of signatures to will, or vise versa. Notes v. Doyle, 32 App. D. C. 413. Signature of unnecessary third witness held not to invalidate. In re Sizer's Will, 129 App. Div. 7, 113 NYS 210.

**85.** Sufficient where two of three attesting witnesses were competent. Wisehart v. Applegate [Ind.] 88 NE 501. "Credible" means "competent" to testify in court to facts attested by subscribing will. Jones v. Grieser, 238 Ill. 183, 87 NE 295. Witness called in and signing, at request of testator, will, which latter had already signed in former's absence, held credible. In re Kessler's Estate, 221 Pa. 314, 70 A 770. Witnesses must be competent at time of attestation. Bruce v. Shuler, 108 Va. 670, 62 SE 973. Attesting witness is competent if at time of attestation he could testify to facts he attests. Wisehart v. Applegate [Ind.] 88 NE 501. Fact that executor would not be competent to testify in action to contest will because of his qualification as executor, and being a necessary party, held not to impair validity of will attested by him. Id. "Competent witness," within Burns' Ann. St. 1908, § 3132, requiring two or more "competent witnesses," is one competent to testify generally in courts of justice and laboring under no legal disqualification (Hiatt v. McColley [Ind.] 85 NE 772), word "competent" being synonymous with "credible" or "disinterested," and meaning one who at time of subscribing will can testify in proper probate proceedings to facts attested (Id.). In proceeding to resist probate, nominated executor, who was also subscribing witness, held not disqualified to testifying in sup-

of testator[87] and in his presence,[88] but not necessarily in the presence of each other.[89] The will need not be read to testator in the presence of the witnesses,[90] and, at least in some states, the witnesses need not know the character or contents of the instrument.[91] The authorities conflict as to the competency of a person named as executor in the will.[92] Where the attestation clause does not state that the witnesses signed in the presence of testator, no presumption can be raised therefrom that they did so.[93]

(§ 3B) 2. *Nuncupative and holographic wills.*[94]—See 10 C. L. 2048.—That a will is found in a safe in which decedent kept his valuable papers is sufficient, under a statute requiring that a holographic will be found among decedent's valuable papers.[95]

port of will, by Burns' Ann. St. 1908, § 522, declaring that neither party to suit, by or against heirs or devisees for recovery of ancestor's property, shall be competent to testify to matters accruing before ancestor's death. Id. Competency is determinable from facts existing at time of attestation, and not when will is offered for probate. Jones v. Grieser, 238 Ill. 183, 87 NE 295. The test of **disqualifying interest** is pecuniary gain or loss as a direct result of the proceeding. Id. Executor may attest will giving property for religious or charitable uses, provided he is not benefited by will beyond commissions. In re Kessler's Estate, 221 Pa. 314, 70 A 770. Interest sufficient to disqualify under statute, requiring wills giving property to religious or charitable uses to be attested by two disinterested witnesses, is such interest as appears to exist at time of execution of will, either by terms of will itself or by reason of witness' interest in institution for which provision is made. Id. Witness who was executor and trustee under will, and officers and trustee of church benefited, and who held option to purchase stock forming part of bequest and interested in the corporation, held not "disinterested." Id. At common law and under Code 1904, § 2529, **beneficiaries are not competent** as witnesses to will. Bruce v. Shuler, 108 Va. 670, 62 SE 973. Under § 8 of Wills Act (Hurd's Rev. St. 1908, c. 148), making void legacies, devises or "interests" of subscribing witnesses, but requiring such witnesses to testify to execution of will, executor who subscribed as witness may be required to testify in support of execution. Jones v. Grieser, 238 Ill. 183, 87 NE 295. Cannot thereafter act as executor. Id. Under Wills Act (Hurd's Rev. St. 1908, c. 148), § 8, avoiding legacies or interests to subscribing witnesses and providing that witnesses may be required to testify as to portion of will not affecting them, witnesses given interests may be called to established will if not otherwise disqualified. Id. Under Code 1904, § 2529, beneficiary whose attestation is necessary to make up statutory number of attesting witnesses cannot take under will which he attests, though will may be proved by the other witness, since such other witness must prove that will was attested by two competent witnesses and beneficiary can be considered competent only by avoidance of his interest. Bruce v. Shuler, 108 Va. 670, 62 SE 973. Statute refers to competency of beneficiary, both to attest will and to testify at probate proceedings. Id.

**86.** Will must be attested in manner prescribed by law, though in opinion of court other methods would be as effective. Schofield v. Thomas, 236 Ill. 417, 86 NE 122. Attesting includes subscribing as well as observing. International Trust Co. v. Anthony [Colo.] 101 P 781. That two persons saw testator execute codicil, and heard him declare it to be such, held insufficient where only one of them subscribed in his presence. Id.

**87.** Not necessary that testator specially request witnesses to sign and witness. In re Lillibridge's Estate, 221 Pa. 5, 69 A 1121; In re Miller's Estate, 37 Mont. 545, 97 P 935. Anything conveying to witnesses idea they are desired as witnesses is good request. In re Miller's Estate, 37 Mont. 545, 97 P 935. Evidence held to show request. Id. Evidence including will read in presence of witnesses held sufficient request by testator that witnesses subscribe. In re Luthgen's Will, 61 Misc. 544, 115 NYS 861.

**88.** Signing is in presence of testator if he is in position where he might see witnesses attest. Umstead v. Bowling [N. C.] 64 SE 368. "Presence" of testator requires contiguity with such uninterrupted view between testator and witnesses that testator can see act of attestation, whether in same or adjoining room. Schofield v. Thomas, 236 Ill. 417, 86 NE 122. Evidence held to show witnesses did not sign in presence of testatrix. Id. Evidence held to show witnesses signed in testator's presence. In re Miller's Estate, 37 Mont. 545, 97 P 935; Umstead v. Bowling [N. C.] 64 SE 368.

**89.** Witnesses need not attest in each other's presence. Notes v. Doyle, 32 App. D. C. 413.

**90.** In re Lillibridge's Estate, 221 Pa. 5, 69 A 1121.

**91.** Witnesses need not know contents of will. Notes v. Doyle, 32 App. C. 413. Need not known document is a will. Id. In re Lillibridge's Estate, 221 Pa. 5, 69 A 1121.

**92.** Executor is not competent as witness. Jones v. Grieser, 238 Ill. 183, 87 NE 295.

**93.** To authorize probate other evidence must convince court testator was present. Schofield v. Thomas, 236 Ill. 417, 86 NE 122.

**94. Search Note:** See notes in 13 L. R. A. 1092; 14 Id. 968; 67 A. S. R. 572, 573; 104 Id. 22; 1 Ann. Cas. 373; 3 Id. 317; 5 Id. 636; 10 Id. 1132.

See, also, Wills, Cent. Dig. §§ 336-367; Dec. Dig. §§ 130-150; 30 A. & E. Enc. L. (2ed.) 560.

**95.** That instrument in decedent's handwriting purporting to be his will was found soon after death in locked safe in which he kept his valuable papers held sufficient, under statute requiring that holographic

(§ 3) *C. Revocation and alteration.*[96]—See 10 C. L. 2048—If possessing sufficient capacity,[97] testator may destroy or revoke his will at pleasure [98] by complying with the statutory requirements,[99] and he may alter its provisions as often as he chooses,[1] provided he has the altered instrument re-executed and re-attested according to law.[2] Physical change or destruction must be accompanied by intention to revoke,[3] and destruction of a duplicate copy will not effect a revocation if testator considers the other copy still in force.[4] Revocation may be implied [5] from subsequent acts of testator,[6] or changes in his condition or circumstances.[7]

will must be found among decedent's valuable papers, though there were no other papers in the particular drawer of the safe. Harper v. Harper, 148 N. C. 453, 62 SE 553.

**96. Search Note:** See notes in 37 L. R. A. 561; 69 Id. 940; 5 L. R. A. (N. S.) 1084; 6 Id. 1107; 14 Id. 937; 28 A. S. R. 344; 48 Id. 198; 1 Ann. Cas. 609; 3 Id. 230, 960; 5 Id. 795; 7 Id. 786; 10 Id. 535.

See, also, Wills, Cent. Dig. §§ 438-493; Dec. Dig. §§ 167-195; 6 A. & E. Enc. L. (2ed.) 174; 30 Id. 620.

**97.** Finding of capacity when will was made but that testatrix was incapable some months later when she attempted to revoke will held not inconsistent. Spiers v. Hendershott [Iowa] 120 NW 1058.

**98.** In re Johnson's Will, 60 Misc. 277, 113 NYS 283. English common law, relating to revocation and revival of wills so far as applicable and of a general nature and not repealed by statute is in force in Illinois. Phillippe v. Clevenger, 239 Ill. 117, 87 NE 858. Where husband and wife agreed that property held by them was owned jointly and that on death of either all should first go to survivor for life and then be divided between heirs of the two, wife could not revoke such agreement after husband's death as to interest disposed of by husband, though instrument be considered a mutual will. Robertson v. Robertson [Miss.] 47 S 675.

**99.** Wills are revocable only according to formula prescribed by statute, regardless of intention. In re Frothingham's Will [N. J. Err. & App.] 71 A 695. Under statute revocation by tearing is inoperative, unless act is in presence of testator. In re Hughes' Will, 61 Misc. 207, 114 NYS 929. Will not revoked by removal of signatures by third person at testator's direction, but not at time direction was given or in testator's presence. Id.

**1.** Will can be changed any time. Satterly v. Dewick, 129 App. Div. 701, 114 NYS 354.

**2.** In re Johnson's Will, 60 Misc. 277, 113 NYS 283. See post, Republication and Revival. Will revoking former will or codicil changing its terms is void, if not attested by requisite number of witnesses. Notes v. Doyle. 32 App. D. C. 413.

**3.** Managle v. Parker [N. H.] 71 A 637. Erasures, alterations and interlineations with mere intent to change will held not revocation by burning, tearing, canceling, obliterating, or destroying with intent to revoke as required by statute. In re Johnson's Will, 60 Misc. 277, 113 NYS 283. That certain gifts were inoperative because of testator's altered circumstances held not reason for holding erasures were made animo revocande. In re Frothingham's Will [N. J. Err. & App.] 71 A 695. Evidence held not to show legacy was revoked under mistaken belief that legatee was dead, word "canceled by death" having reference to other legatees who had actually died. Cummin's Estate, 37 Pa. Super. Ct. 580. Allegation of revocation held not sustained by evidence showing testator removed and tore one of several pages of will, leaving will otherwise intact and evincing intention to preserve it. Coghlin v. Coghlin, 79 Ohio St. 71, 85 NE 1058.

**4.** Managle v. Parker [N. H.] 71 A 637. Presumption of intention to revoke by destruction of copy held rebuttable. Id. Revocation for jury, there being evidence to rebut presumption of revocation. Id. Evidence held to sustain finding that testator executed will in duplicate and did not intend to cancel copy held by another by destruction of copy in her own possession. Id

**5.** Revocation by implication of law is not favored. In re Adler's Estate [Wash.] 100 P 1019. Implied revocation is possible despite Ann. Code 1892, §§ 4489, 4490, prescribing manner of revocation of wills. Hoy v. Hoy [Miss.] 48 S 903. Doctrine of partial or entire revocation by implication held not abrogated by par. 17 of wills act, declaring no will shall be revoked except by burning, tearing, etc. Phillippe v. Clevenger, 239 Ill. 117, 87 NE 858.

**6.** Testator's conveyance of devised land to devisee held revocation as to such devise. Phillippe v. Clevenger, 239 Ill. 117, 87 NE 858. Memorandum by testator in small book two years after will was made, giving list of property and allowing two persons named what they owed estate, and allowing disinherited son a small amount, held insufficient to work revocation of will. Simon v. Middleton [Tex. Civ. App.] 112 SW 441.

**7.** Common-law rule of implied revocation by changed conditions and circumstances of testator is affirmatively adopted by § 3665, Rev. Laws 1905. In re Hall's Estate [Minn.] 119 NW 219. Settlement of property rights in anticipation of divorce held to revoke will in favor of wife. Id. At common law, **subsequent marriage** did not operate to revoke a will in the absence of birth of issue. In re Adler's Estate [Wash.] 100 P 1019. Will of a man is not revoked by subsequent marriage without birth of issue. Hoy v. Hoy [Miss.] 48 S 903. Subsequent marriage revokes will made by unmarried woman. In re Neill's Estate, 222 Pa. 142, 70 A 942. Will disposing of property to intended husband held revoked by subsequent marriage to him. Id. Under Ballinger's Ann. Codes & St. § 4598 (Pierce's Code, § 2344), providing that marriage shall revoke previous wills in certain cases, "or unless" testator's wife "shall be provided for in the will," held to refer to condition existing at time of testator's death, so that marriage of woman already provided for in will, though not provided for

Pencil erasures are as effectual to cancel the portion obliterated as ink erasures[8] the crucial test always being the intention with which the marks were made.[9] A subsequent will or codicil may or may not revoke the prior one.[10] Where one attempts to cancel a will for the purpose of making a new one, the old is not revoked if no new one is made.[11]

*Evidence of revocation.*—See 10 C. L. 2050—If a will known to have been in testator's possession cannot be found after his death, the presumption is that he destroyed it with intention to revoke it.[12] The burden is on the party who asserts revocation by subsequent will.[13] Testator's declarations are admissible to show intent,[14] if relevant and material,[15] and for the purpose of showing the intent with which a portion of a will is voluntarily destroyed, it is competent to show that thereafter testator regarded the instrument as his will.[16] A specific change by codicil impliedly negatives any intention to make further change.[17]

in contemplation of marriage, does not revoke will. In re Adler's Estate [Wash.] 100 P 1019. Statute should be construed to read: "If after making any will testator shall marry, and his wife shall be living at the time of death of testator, such will shall be deemed revoked * * * unless she be therein provided for." Id. Mere fact of **divorce** held insufficient to revoke will in wife's favor. In re Brown's Estate [Iowa] 117 NW 260.

**8.** In re Frothingham's Will [N. J. Err. & App.] 71 A 695.

**9.** In re Frothingham's Will [N. J. Err. & App.] 71 A 695. Question is whether erasures were intended to be final or whether they constituted mere dependent relative revocation. Id.

**10.** Depends on terms of subsequent will. In re Brown's Will [Iowa] 120 NW 667. Will or codicil may revoke prior will, either by express revoking clause or by inconsistent provisions. Deppen's Trustee v. Deppen [Ky.] 117 SW 352. Second will revocation held to revoke prior will. In re Wear's Will, 116 NYS 304. Will made by testator of good health, and with deliberation and freedom from suspicion, will not be overthrown by evidence tending to show one made when he was feeble, and containing provisions hostile to first one, unless there is no doubt second instrument speaks testator's mind. In re Ellwanger's Will, 114 NYS 727. Where second codicil revoked all gifts made by first and made no others, will should be construed as if entirely without codicils. Ege v. Hering, 108 Md. 391, 70 A 221.

**11.** In re Frothingham's Will [N. J. Err. & App.] 71 A 695.

**12.** In re Wear's Will, 116 NYS 304; In re Hedgepeth's Will [N. C.] 63 SE 1025. But it seems that, if will is shown to have been last seen in custody of a third person, there is no presumption of revocation. In re Hedgepeth's Will [N. C.] 63 SE 1025. In proceedings for probate of lost will in solemn form, evidence held not sufficient to rebut presumption, arising from failure to find will, that testator had destroyed it with revocatory intent. Id. Where alleged will is not produced in probate proceedings and was last seen several months before testator's death, it is presumed to have been revoked, and burden is on proponent to show the contrary. Buchanan v. Rollings [Tex. Civ. App.] 112 SW 785. Evidence insufficient to overcome presumption. Id. Attorney who drew both first and second wills could testify to execution of second will and delivery to testator for purpose of showing intestacy arising from presumption that second will was destroyed, it not being found after testator's death. Id.; In re Wear's Will, 116 NYS 304.

**13.** Burden on he who contests probate on ground of revocation by later will. In re Brown's Will [Iowa] 120 NW 667. Uncontradicted evidence that second will was executed and contained a revoking clause held not conclusive that first will was thereby revoked. Id. Contestant's evidence held not necessarily and directly to prove execution of subsequent will. Id. Proof of execution of second will revoking first one need not amount to that required by Code Civ. Proc. § 1865, for establishment of provisions of last wills. In re Wear's Will, 116 NYS 304.

**Instructions:** On issue of revocation by subsequent will, held not error to refuse to submit question whether testator had made "a will" subsequent to the one offered for probate, it appearing two subsequent drafts had been made, one of which contained no revoking clause. In re Brown's Will [Iowa] 120 NW 667. Submission of question whether second will claimed to have revoked first one had a clause revoking former wills "and codicils" held properly refused, there being nothing to show existence of any codicils. Id.

**14.** Testator's declarations recognizing will after her destruction of copy held admissible on issue of revocation. Managle v. Parker [N. H.] 71 A 637. Where issue was revocation by subsequent will, court held to have sufficiently permitted attesting witnesses to second will to testify to statements made by testator when such will was executed. Id. Such statements held admissible to show testator's mental condition, and his intention and understanding of nature of the instrument (Id.), but held not evidence that instrument was in fact a will (Id.), question whether it was a will being determinable from contents as found by jury, instrument having been destroyed (Id.).

**15.** On issue of revocation by later will, testimony that at time of execution of second will testator stated he wanted young men to sign as witnesses held immaterial. In re Brown's Will [Iowa] 120 NW 667. Statements by testator at time of execution of second will as to his having made other will held irrelevant. Id.

**16.** Where testator removed and tore one

(§ 3) *D. Republication and revival.*[18]—See 10 C. L. 2050.—Republication is essential to render effective changes made after execution of the will.[19] Codicils defectively attested cannot be relied upon as a republication of the will.[20] Failure to properly republish a will after making changes therein leaves it in its original legal force, if the original language can be ascertained.[21] Where a devise is revoked by testator's conveyance of the property reconveyance is not conclusive on the question of revival.[22] Destruction of a second will revoking a first does not revive the first.[23]

§ 4. *Probating, establishing and recording. A. Place of probate and jurisdiction and powers of courts.*[24]—See 10 C. L. 2050.—Primary jurisdiction is in the court of testator's domicile at the time of his death,[25] though wills of non-resident decedents may also be probated in proper cases.[26] The powers of the court are such as the constitution or statute prescribes,[27] either expressly or by necessary implication.[28]

page, evidence that after page was restored testator regarded instrument as his will held competent. Coghlin v. Coghlin, 79 Ohio St. 71, 85 NE 1058.

**17.** In re Line's Estate, 221 Pa. 374, 70 A 791.

**18. Search Note:** See notes in 10 C. L. 2050; 76 A. S. R. 249; 1 Ann. Cas. 671; 4 Id. 313.

See, also, Wills, Cent. Dig. §§ 494-501; Dec. Dig. §§ 196-202; 30 A. & E. Enc. L. (2ed.) 655.

**19.** Erasures, interlineations or additions made after execution of will do not change it, unless made with all formalities necessary to original execution. In re Ackerman's Will, 129 App. Div. 584, 114 NYS 197. Will held entitled to admission as changed over some oral testimony that changes were made therein after execution, notary who drew it testifying that he made no changes after execution, and it appearing from face of will that changes were made by notary. Id. Testatrix' acknowledgement of her original signature and subscription by witnesses after marginal note explaining new erasures and interlineations held insufficient republication. In re Johnson's Will, 60 Misc. 277, 113 NYS 283.

**20.** Notes v. Doyle, 32 App. D. C. 413.

**21.** In re Johnson's Will, 60 Misc. 277, 113 NYS 283.

**22.** Devise revoked by implication by testator's conveyance of devised property to devisee held not revived by reconveyance to testator, there being no disclosed intention to so prefer devisee over other devisees. Phillippe v. Clevenger, 239 Ill. 117, 87 NE 858.

**23.** In re Wear's Will, 116 NYS 304.

**24. Search Note:** See notes in 1 L. R. A. (N. S.) 996; 6 Id. 617; 113 A. S. R. 211; 5 Ann. Cas. 473; 9 Id. 962.

See, also, Wills, Cent. Dig. §§ 101-110, 388-402, 502-945; Dec. Dig. §§ 52, 163, 203-434.

**25.** Wills of persons domiciled in Louisiana should be proved or probated primarily by courts of that state (Succession of Drysdale, 121 La. 816, 46 S 873), and fact they may have been made in foreign countries or sister states does not obviate necessity for such primary proof or probate (Id.). Evidence held to support finding testator was resident of county in which will was probated. In re Ayers' Estate [Neb.] 120 NW 491. Where testatrix was resident of a city during her lifetime, will was provable in court having jurisdiction in that city. Nightingale v. Phillips [R. I.] 72 A 220.

**26.** Under Code Civ. Proc. § 2611, will executed as required by laws of New York may be probated, regardless of testator's domicile in another state or country. In re Ruben's Will, 128 App. Div. 626, 112 NYS 941. Said section authorizes probate in New York of (a) wills executed as per New York laws, (b) made in any sister state or in countries therein specified, if executed according to laws of place where made, and (c) wills of nonresidents executed according to laws of his residence. Id. Decedent's interest in land situated in the county held sufficient to confer jurisdiction for probate of his will. Code Civ. Proc. § 2476, subd. 4. In re Weston, 60 Misc. 275, 113 NYS 619.

**27.** See, also, Jurisdiction, 12 C. L. 458. Probate court has exclusive original jurisdiction of all matters relating to proof of wills, and proceedings pertaining to wills belong there in first instance. Thayer v. Kitchen, 200 Mass. 382, 86 NE 952. Prior to March 4, 1906, Chickasaw Indians had right to dispose of their devisable property by wills executed in accordance with laws of Chickasaws, proper Chickasaw probate court had jurisdiction to probate these wills, and its judgments cannot be collaterally attacked. Hayes v. Barringer [C. C. A.] 168 F 221.

**28.** Trial of question whether one petitioning for revocation of probate is interested so as to be entitled under statute to contest will, or whether he has lost all by prior conveyance of his expectant estate, is within jurisdiction of probate court. In re Wickersham's Estate, 153 Cal. 603, 96 P 311. In absence of statutory authority, courts of probate cannot **construe wills** as to validity of dispositions. Clearspring Tp. v. Blough [Ind.] 88 NE 511. Surrogate, after admission of will to probate without recourse to Code Civ. Proc. § 2624, cannot construe will except as incidental to exercise of expressly imposed powers. In re Buchner, 60 Misc. 287, 113 NYS 625. Under Code Civ. Proc. § 2624, surrogate may not pass on devises of realty, but only on dispositions of personalty. In re Van Valkenburgh's Will, 60 Misc. 497, 113 NYS 1108. In proceedings for probate, surrogate's court may construe will so far as relating to personalty, though not

(§ 4) *B. Parties in will cases and right to contest.*[29]—See 10 C. L. 2051—Persons interested for or against the will may apply for[30] or resist probate[31] in the absence of estoppel[32] or concluding agreement,[33] and should be made parties in probate proceedings.[34] Persons not parties to proceedings probating an instrument in another state are not estopped from ignoring the judgment therein and presenting for probate another instrument as decedent's last will.[35]

(§ 4) *C. Duty to produce will.*[36]—See 10 C. L. 2052—One named as executor in the will should take the necessary steps to secure its probate.[37] Where the remedy for failure to produce the will is speedy and adequate in the probate court, an action will not lie at law for damages.[38] Probate will not be prevented by mere lapse of time before the will is produced.[39]

(§ 4) *D. Probate and procedure in general.*[40]—See 10 C. L. 2052—A devisee cannot assert title to the devised lands until the will has been probated[41] in the state where the land is located,[42] but, after admission to probate, the will becomes

as to realty, even where provisions disposing of the two classes of property are inseparably connected. In re Davis' Will, 59 Misc. 310, 112 NYS 265. Surrogate's court has power to construe will to determine applicability of statute against gifts to charities to prejudice of nearest relatives. In re Talmage's Will, 59 Misc. 130, 112 NYS 206. County court has jurisdiction to construe will for purpose of advising executor thereunder. Lesiur v. Sipherd [Neb.] 121 NW 104.

**29. Search Note:** See notes in 2 L. R. A. (N. S.) 643; 3 Ann. Cas. 525; 9 Id. 956; 11 Id. 1015.

See, also, Wills, Cent. Dig. §§ 527-537, 608-619; Dec. Dig. §§ 219, 220, 262-268.

**30.** Creditor is "interested in the estate" so as to entitle him to petition for probate. In re Edward's Estate [Cal.] 97 P 23. Person petitioning for probate need not be one interested in sustaining validity of will. Id.

**31.** Purchasers from heirs are interested and may resist probate. Foster v. Jordan [Ky.] 113 SW 490. Where one of two contestant's claimed under a previous will, and only issue before jury was mental capacity of testator, right of such contestant to object generally to allowance of will in question held not open for consideration, especially where his attorney also represented other contestant and was allowed to actively conduct contest and make closing argument to jury without objection. Jenkins v. Weston, 200 Mass. 488, 86 NE 955. Where children were sole heirs at law, brothers and sisters had no standing to contest probate. In re Garner's Estate, 59 Misc. 116, 112 NYS 212. Under Revisal 1905, § 3135, any person interested is entitled as of right to file a caveat and require propounder to prove will in solemn form if right has not been lost by acquiescence or unreasonable delay. In re Hedgepeth's Will [N. C.] 63 SE 1025.

**32.** Acceptance of a legacy with full knowledge of the facts bars legatee from contesting will, and agreement not to contest adds nothing to effect of such acceptance. Daugherty v. Gaffney, 239 Ill. 640, 88 NE 150. Devisee, who in writing recognized will took possession of property devised her and received monthly payments, could not assail will without offering to return what she received. Kasey v. Fidelity Trust Co. [Ky.] 115 SW 737.

**33.** A prospective heir may, in connection with a conveyance of his expectancy, agree not to contest a testamentary disposition thereof by the ancestor. In re Wickersham's Estate, 153 Cal. 603, 96 P 311.

**34.** After-born child of grandson entitled to estate at end of trust, and not represented by heirs at law seeking to break will, should be made party. Snell v. Weldon, 239 Ill. 279, 87 NE 1022. Executor is necessary party defendant to will contest after probate, authorized by Burns' Ann. St. 1908, § 3154, but is not necessary party in proceedings to resist probate, under § 3153. Hiatt v. McColley [Ind.] 85 NE 772. Though executor is proper party to contest in orphans' court before issuance of letters, he is not necessary party either as executor or administrator pendente lite. Pleasants v. McKenney [Md.] 71 A 955. Right of executor to reinstatement as party in his own right held lost by laches where he waited for months and until after verdict in law court on issues submitted. Id.

**35.** In re Sands' Estate, 62 Misc. 146, 116 NYS 426.

**36. Search Note:** See Wills, Cent. Dig. § 518; Dec. Dig. § 211; 22 A. & E. Enc. P. & P. 1221.

**37.** Duty held not to devolve on special administrator not named in will who could only conserve estate pending will contest. Zimmer v. Saier [Mich.] 15 Det. Leg. N. 1077, 119 NW 433. Duty of executor to offer will and endeavor to have it probated. Succession of Filhiol [La.] 49 S 138; In re Riviere's Estate [Cal. App.] 98 P 46; Dodd v. Anderson, 112 NYS 414.

**38.** One injured by concealment or destruction of will has speedy and adequate remedy under Rev. Laws, c. 135, §§ 14, 15, penalizing failure to deliver wills to probate court and conferring powers on that court in such cases, and he cannot sue at law for damages. Thayer v. Kitchen, 200 Mass. 382, 86 NE 952.

**39.** Evidence held to satisfactorily explain 30 year delay in offering will for probate. In re Duffy's Will, 127 App. Div. 174, 111 NYS 491.

**40. Search Note:** See notes in 38 L. R. A. 289; 57 Id. 253; 107 A. S. R. 459; 7 Ann. Cas. 313; 11 Id. 428.

See, also, Wills, Cent. Dig. §§ 502-945; Dec. Dig. §§ 203-434; 16 A. & E. Enc. P. & P. 991.

**41.** Stull v. Veatch, 236 Ill. 207, 86 NE 227.

**42.** Probate in another state held with-

good and available in law to support his title.[43] A valid and effectual probate operates to establish the will according to its tenor,[44] but does not necessarily establish its construction or validity.[45] Proceedings for probate must be commenced by proper petition[46] and process[47] in the proper court,[48] and within the time prescribed by statute.[49] Foreign proceedings involving another instrument will not necessarily constitute a bar.[50] The right to open and close should be accorded the party having the burden of establishing the only issue in the case.[51] In the absence of statute one has no right to jury trial,[52] but provision is sometimes made for submitting contested issues to a law court.[53] In strict probate proceedings the only issue is the factum of the will,[54] questions relating to the validity or construction of particular provisions being immaterial[55] and often extra-jurisdictional.[56] The statutory facts must be established[57] by competent evidence[58] adduced by the examination of competent witnesses,[59] the order of proof

out effect on title to testator's land in Kentucky, will being required to be probated in Kentucky in order to pass title there. Foster v. Jordan [Ky.] 113 SW 490.

43. Stull v. Veatch, 236 Ill. 207, 86 NE 227.

44. Del Campo v. Camarillo [Cal.] 98 P 1049.

45. In general, effect of probate of will is not to establish its construction or validity. Clearspring Tp. v. Blough [Ind.] 88 NE 511.

46. The petition need not be verified. In re Edward's Estate [Cal.] 97 P 23.

47. Publication of citation as to unknown heirs or next of kin being discretionary with court, failure to make such publication until after verdict held not fatal to final order admitting will. Lewis v. Luckett, 32 App. D. C. 188. See, also, ante, § 4B, Parties, etc.

48. See ante, § 4A, Jurisdiction and Powers of Courts.

49. Proceeding for probating will of nonresident is within Ky. St. 1903, § 2522, requiring actions for relief not otherwise provided for to be commenced within 10 years from accrual, and must be commenced within 10 years after testator's death regardless of probate in state of testator's domicile. Foster v. Jordon [Ky.] 113 SW 490.

50. Proceedings pending in another state to determine validity of will there admitted to probate held not bar to proceedings in New York to probate another instrument as decedent's last will, all parties to latter proceedings not being parties to former, and all issues not being there involved. In re Sand's Estate, 62 Misc. 146, 116 NYS 426.

51. Where two wills were offered and only issue was whether second was forged, party offering it should open and close. Green v. Hewitt [Tex. Civ. App.] 118 SW 170.

52. Constitutional right to trust by jury does not extend to probate proceedings. In re Dolbeer's Estate, 153 Cal. 652, 96 P 266. Jury trial not of right in contest in probate court against probate of will. Cartwright v. Holcomb [Okl.] 97 P 385. Jury trials on appeal, see post, § 4K.

53. Purpose of sending issues to law court for trial in will contest, pursuant to statute, being to advise orphan's court of facts, jury's findings are conclusive on orphans' court though not necessarily determinative of validity of will. Pleasants v. McKenney [Md.] 71 A 955. Where they determine invalidity of will, judgment of orphan's court must conform thereto. Id. Law court must submit issues to jury without regard to whether they were properly presented in orphan's court. Id. Issue devisavit will not be granted where positive proof of execution and evidence of numerous witnesses as to genuineness of signature is opposed only by testimony of two expert witnesses. In re Fuller's Estate, 222 Pa. 182, 70 A 1005. Since there are no parties in the usual sense in trials of issue devisavit vel non, case should be stated "In re Will of," etc. In re Bowling's Will, 150 N. C. 507, 64 SE 368.

54. In probate proceedings under Mansf. Dig. Ark. 1884, § 6521 (Ind. T. and St. 1899, § 3593), only issue triable is factum of will or question of devisavit vel non. Taylor v. Hilton [Okl.] 100 P 537.

55. Questions of construction should not be brought into contests for incapacity, undue influence or other matters going to execution of will, unless will is wholly invalid. Clearspring Tp. v. Blough [Ind.] 88 NE 511. Court cannot construe will or try validity of any devise therein. Taylor v. Hilton [Okl.] 100 P 537. Where court finds instrument to be testator's last will, it is error to reject from probate any part thereof. Id.

56. See ante, § 4A.

57. Since application for probate of will is proceeding in rem, provisions of statute as to facts, which must be established, cannot be waived. Breen v. Hewett [Tex. Civ. App.] 118 SW 170. Regardless of what the specific objection to the will may be, the court before granting probate must be satisfied that it was duly executed by a person of sound and disposing mind and without fraud or undue influence. In re Edward's Estate [Cal.] 97 P 23.

58. Will held not provable by commission where subscribing witnesses resided one in the state and other in New Jersey, and will was in District of Columbia where it had been admitted to probate. In re Weston, 60 Misc. 275, 113 NYS 619. Will cannot be proven by exemplified copy of proceedings of court which admitted it to probate. Id. Ex parte affidavits used when will was admitted in common form are not competent in proceedings for probate in solemn form, since issue is to be tried on evidence then and there introduced before jury. In re Hedgepeth's Will [N. C.] 63 SE 1025. Evidence that witness had heard some out-

being discretionary with the court.[60] Proponent may dismiss his petition at any time.[61] The common grounds of contest are fraud, mistake, undue influence and incapacity.[62] In the absence of any evidence of fraud or undue influence, the court should direct a verdict for caviatee on issues raising such questions.[63] Probate may be refused if it appears the will is invalid for any purpose.[64] If partially valid, the will must be probated.[65] Probate in solemn form may be required in some states.[66] Application therefor must be timely.[67]

side person say she had destroyed will, and that devisee therein had never had the land devised held properly excluded. Id. Will probated in common form held inadmissible for propounders in proceedings for probate in solemn form without proof of execution or testamentary capacity. Peale v. Wear, 131 Ga. 826, 63 SE 581. In proceedings to probate alleged will not produced, testator's declarations, tending to show execution and that will was in existence about 10 days before his death, held admissible. Buchanan v. Rollings [Tex. Civ. App.] 112 SW 785. Under Code Civ. Proc. § 2620, authorizing establishment of will though subscribing witnesses have forgotten the occurrance, where witnesses did not remember signing, but acknowledged their signatures, and testator's signature was proved, any other evidence direct or circumstantial could be received to prove will. In re Sizer's Will, 129 App. Div. 7, 113 NYS 210.

59. While execution may be proved by any competent evidence, Code Civ. Proc. § 2118 requires surrogate, on probate of will, to examine at least two subscribing witnesses, unless they are dead, absent from state, or otherwise incompetent. In re Sizer's Will, 129 App. Div. 7, 113 NYS 210. Though under Code 1904, § 2514, will must be attested by two competent witnesses, due execution can be proved by one, but he must prove all statutory essentials to due execution including attestation by two competent witnesses. Bruce v. Shuler, 108 Va. 670, 62 SE 973. Where one of three witnesses was dead and another was nonresident, execution of will and signature of nonresident witness could be proved by remaining witness. Scott v. Herrell, 31 App. D. C. 45. Subscribing witness may testify to capacity. Spiers v. Hendershott [Iowa] 120 NW 1058.

60. Where will was contested for incapacity, undue influence, and deceit, held discretionary with court to receive in order of occurrance all conversations by testatrix admissible on any of the issues, though part anticipated contestant's case. In re Mason's Will [Vt.] 72 A 329. Contestant's concession that testatrix was sane at time of a certain interview held not to render inadmissible account of such interview (Id.), proponent being entitled to show full mental capacity however much exceeding requirement of a disposing mind (Id.).

61. Right to dismiss petition for probate against objection of contestants is same on appeal to circuit court as in county court. Hitchcock v. Green, 235 Ill. 298, 85 NE 238. Right not denied by act 1897 (Hurd's Rev. St. 1905, c. 148, § 21), requiring petition for probate and notice, but providing that, if no petition is filed, court shall proceed to probate will on notice after will has been deposited in court for 10 days. Id. Proponent may dismiss petition for probate even after appeal taken and pending in circuit court. Greene v. Hitchcock, 139 Ill. App. 408.

62. See, also, ante, §§ 2A, 2B. In contest under Burns' Ann. St. 1908, § 3153, allegations of unsoundness of mind and undue execution permits proof of every species of unsoundness of mind, duress, fraud, or whatever tends to show undue execution. Clearspring Tp. v. Blough [Ind.] 88 NE 511. Held not error to strike following ground of caveat: "Said instrument is not the will of U. S. because the same was executed by him under a mistake of fact as to conduct of caveators, who are heirs at law and sons of said U. S., only a conclusion being averred. Sims v. Sims, 131 Ga. 262, 62 SE 192. Held not error to sustain demurrer to, and strike following grounds of caveat: "Said instrument is not will of W. S. because same was executed by him under mistaken belief that by its terms he was making his children equal objects of his bounty, whereas said instrument does not have that effect" (Id.), and "because same was executed by him under and because of belief that he had given and advanced to caveators money or property prior to execution of said will, which, taken together with what he had bequeathed to them in said alleged will, gave to them as much as he gave to his other children by terms of said alleged will; whereas, in fact he had not so given or advanced to them the amount of said gifts or advances being far less in value than the value of the property bequeathed to his other children in the said alleged will" (Id.).

63. Morgan v. Morgan, 30 App. D. C. 436.

64. Under Burns' Ann. St. 1908, § 2724, giving circuit courts, as courts of probate, exclusive and plenary jurisdiction of all matters relating to probate and contests of wills, etc. Clearspring Tp. v. Blough [Ind.] 88 NE 511. If there is a fatal defect on face of will, court may reject it without formal proof. Will not subscribed at end. In re Diehl's Will, 112 NYS 717.

65. Clearspring Tp. v. Blough [Ind.] 88 NE 511.

66. One entitled to caveat probate of will in solemn form after probate in common form need not first file petition for solemn probate and then file caveat to application separately. Peale v. Ware, 131 Ga. 826, 63 SE 581. May make application for probate in solemn form and at same time set forth purpose to caveat will and state grounds of caveat. Id. Petition sufficient. Id. Verification unnecessary. Id. Proceedings being substantially a call for probate in solemn form, caveat was sufficient to distinctly raise issue of devisavit vel non as to which burden of proof was on propounders Id.

67. In absence of controlling circum-

(§ 4) *E. Burden of proof in the whole case.*[68]—While the burden of proof is on proponent in the first instance,[69] proof of due execution is sufficient in some jurisdictions to make a prima facie case,[70] the burden of proving incapacity or undue influence then devolving on contestant;[71] but in others proponent must go further and prove, also, capacity and freedom from restraint.[72] The facts essential to probate must be established by evidence legally sufficient.[73] A full and proper attestation clause may be sufficient of itself to prove the factum of the will where the witnesses have forgotten the circumstances of its execution,[74] and though all the subscribing witnesses testify against one execution, other evidence may be sufficient to establish the will.[75]

stances, cavaet for probate in solemn form filed within seven years fixed by Acts 1907, p. 1263, c. 862, is timely. In re Hedgepeth's Will [N. C.] 63 SE 1025.

68. See 10 C. L. 2053; also, ante, §§ 2A, 2B, subds. Sufficiency of Evidence.

**Search Note:** See Wills, Cent. Dig. §§ 101-110, 388-402, 651-664; Dec. Dig. §§ 52, 163, 287-290.

69. In proceedings for probate in solemn form wherein caveat is sufficient to raise issue of devisavit vel non, burden of proof is on propounders. Peale v. Ware, 131 Ga. 826, 63 SE 581. Burden not sustained where there was no evidence to prove either execution or capacity. Id. In suit to prevent probate, as distinguished from one to set aside probate decree, burden is on proponents to prove validity of will giving them valuable rights in derrogation of statute of descent. McReynolds v. Smith [Ind.] 86 NE 1009. On appeal to district court from order refusing probate, held not error to require appellant to make prima facie showing entitling will to probate, it appearing that respondent was properly required to sustain burden of proving alleged forgery. Cartwright v. Holcomb [Okl.] 97 P 385. Propounder required to prove will in solemn form has burden of showing due formal execution, contents of will, if original is not produced, and in latter case, that original was lost or had been destroyed otherwise than by testator or by his consent or procurement. In re Hedgepeth's Will [N. C.] 63 SE 1025.

70. Only burden resting on proponent in first instance is to show due execution and attestation of will (Ross v. Ross [Iowa] 117 NW 1105), and this rule is not affected by mental or physical impairment which may bear on issues of mental incapacity, fraud, mistake, or undue influence (Id.). Burden not increased because testator's eyesight was impaired. Id. Instructions proper. Id. In consent of probate on ground of fraud and forgery, proponent must first make prima facie case as to execution, and burden of proving fraud and forgery is then on parties alleging it. Thames v. Rouse [S. C.] 62 SE 254. Decree held not to deprive contestants of right to rely on failure of proponents to establish prima facie case. Id. While in probate proceedings not only due execution but, also, capacity and freedom from restraint must be shown (Hopkins v. Wampler, 108 Va. 705, 62 SE 926), capacity is presumed after proof of due execution (Id.), presumption of sanity obtaining until overcome by contestant's evidence (Id.). When sanity is put in issue by contestant's evidence, onus probandi lies on proponent to satisfy court or jury that decedent was capable. Id.

71. Ross v. Ross [Iowa] 117 NW 1105. See, also, ante, §§ 2A and 2B.

72. Burden on proponents to prove not only due due execution but, also, testamentary capacity. Hoffbaur v. Morgan [Ind.] 88 NE 337. Instructions erroneous. Id. Under Code Civ. Proc. § 2623, it must be affirmately proven that will was duly executed, that testator was free from restraint, and that he was in all respects competent to make a will. In re Neary's Will, 61 Misc. 557, 115 NYS 971. Mere prima facie proof of genuineness of signatures and testator's handwriting held insufficient. Id.

73. Testimony of third and unnecessary witness should be considered on weight of whole evidence to show execution. In re Sizer's Will, 129 App. Div. 7, 113 NYS 210. **Evidence sufficient** to show due execution. Id. Testimony of surviving witness held to establish all facts recited in attestation clause as to execution. In re Ayers' Estate [Neb.] 120 NW 491. Evidence sufficient to show factum of old will, witnesses to which were dead. In re Leaird's Will, 58 Misc. 477, 111 NYS 631. Evidence held to show due execution, testamentary capacity, and absence of undue influence so as to authorize probate, though will was offered 30 years after death of testator. In re Duffy's Will, 127 App. Div. 174, 111 NYS 491. Mere proof of codicil is **insufficient** to establish will to which it refers. In re Weston, 60 Misc. 275, 113 NYS 619. Will could not be admitted on proof of codicil displacing one of the executors and appointing another, and making no disposition of any property without proof of execution of will in conformity with laws of state. Id. **Sufficient to identify decedent** as person who executed instrument offered for probate. Storey v. Storey, 30 App. D. C. 41. Proof that decedent accepted introduction to drafter of will and witness thereto as being a certain person and signed will as such person held prima facie evidence of her identity. Harris v. Martin [N. C.] 64 SE 126.

74. In re Duffy's Will, 127 App. Div. 174, 11 NYS 491. Attestation clause, though not essential to validity of will, is, on proof of signatures of testator and subscribing witnesses, prima facie evidence of facts therein certified. In re Sizer's Will, 129 App. Div. 7, 113 NYS 210. No probative force can be given attestation clause where it expressly appears it was not read to witnesses and latter's testimony contradicts recitals therein. In re Balmforth's Will, 60 Misc. 492, 113 NYS 934.

75. In re Sizer's Will, 129 App. Div. 7, 113

(§ 4) *F. Establishment of lost will.*[76]—See 10 C. L. 2054—A lost or destroyed will may be established and probated by courts having jurisdiction for such purpose[77] provided sufficient evidence can be adduced.[78] Testator's declarations are admissible to prove the contents of such will shown to have been executed.[79]

(§ 4) *G. Judgments and decrees.*[80]—See 10 C. L. 2055—A decree or order admitting the will is essential to probate,[81] and decrees must contain the statutory recitals[82] and be properly entered;[83] but failure to make formal entry is not necessarily fatal to the probate proceedings.[84] Orders may be made subject to future modification,[85] and decrees or judgments may be vacated for fraud, mistake or other illegality;[86] but until vacated or set aside as providd by law they will be

NYS 210. Law does not make probate depend on recollection or veracity of subscribing witnesses, and evidence of such witnesses is not conclusive either way, nor does law presume such witnesses are more or less truthful than others. Schofield v. Thomas, 236 Ill. 417, 86 NE 122.

**76. Search Note:** See notes in 38 L. R. A. 433; 110 A. S. R. 445.

See, also, Wills, Cent. Dig. §§ 560-567; Dec. Dig. §§§ 231-237; 16 A. & E. Enc. P. & P. 1065.

**77.** Probate court has authority in proper cases to allow proof of lost will by competent evidence of its contents. Thayer v. Kitchen, 200 Mass. 382, 86 NE 952. Clerk of superior court may take probate of lost will, or one destroyed by a person other than testator, or by testator not animo revocandi, it not being necessary to sue in equity for establishment of will. In re Hedgepeth's Will [N. C.] 63 SE 1025. Statute for establishment of lost or destroyed wills held not applicable to will wholly intact except that signatures had been torn therefrom. In re Hughes' Will, 61 Misc. 207, 114 NYS 929.

**78.** Though, in order to have lost will probated, it must be shown to have been executed as required by Revisal 1905, § 3113, contents may be proved by testimony of one witness if no other is attainable. In re Hedgepeth's Will [N. C.] 63 SE 1025. Corroborated affidavit showing execution and attestation by affiant and another, death of other witness and contents of will, held sufficient to entitle will to probate in common form. Id.

**79.** Buchanan v. Rollings [Tex. Civ. App.] 112 SW 785.

**80. Search Note:** See notes in 115 A. S. R. 518; 9 Ann. Cas. 422.

See, also, Wills, Cent. Dig. §§ 797-819, 895-945; Dec. Dig. §§ 338-355, 417-434.

**81.** Will is not probated until entry of a decree that it be admitted and recorded as the last will of decedent; that evidence has been introduced to sustain it held insufficient. Zeigler v. Storey, 220 Pa. 471, 69 A 894.

**82.** Decree admitting will to probate must state whether or not probate was contested. Code Civ. Proc. § 2623. In re Hasselbrook's Estate, 128 App. Div. 874, 113 NYS 97.

**83.** Sess. Laws 1895, c. 31, p. 156, § 4815, Cobbey's Ann. St. 1903, cures any defects that may theretofore have been created by county judges entering their judgments of probate in records other than record book referred to in Comp St. 1885, c. 20, § 32, div. 1. Kolterman v. Chilvers [Neb.] 117 NW 405.

**84.** Formal judgment or decree admitting a will to probate held unnecessary. Decker v. Fahrenholtz, 107 Md. 515, 72 A 339. When findings of law jury are certified to orphan's court, it should enter proper judgment or order and failure to perform this duty till more than a year later ought not to prejudice rights thereunder. Id. Failure, through inadvertance, to enter decree of probation, held not to sustain claim that will was not admitted to probate. State v. Thurston County Super. Ct. [Wash.] 100 P 198. **Certificate of probate** to be endorsed on will required by § 160 of decedent act (Cobbey's Ann. St. 1903, § 5025), is not essential to validity of probate thereof but is only one of methods of proof of probate. Kolterman v. Chilvers [Neb.] 117 NW 405.

**85.** Order fixing allowance for support of beneficiaries held properly made subject to future modification; question whether amount allowed should be increased or diminished, and when division of property could be made under will, being matters for future consideration. Long v. Mayes' Estate [Miss.] 48 S 523.

**86.** Probate court has power on subsequent petition, notice and hearing, to vacate prior decrees, even a decree probating will clearly shown to be without foundation in law or fact and in derogation of legal right. Merrill Trust Co. v. Hartford [Me.] 72 A 745. Under Gen. St. 1902, § 203, authorizing probate court to modify or revoke ex parte decrees, modification of decree admitting foreign will to probate is discretionary. Appeal of Murdock [Conn.] 72 A 290. Where notice by publication was sufficient in application of foreign executor for admission of foreign will to probate, decree therein was not ex parte. Id. Decree admitting will to probate after full trial and determination of issues as to execution of will and testator's soundness of mind will not be revoked, after lapse of nearly two years on petition of widow who was duly heard and who had withdrawn her appeal and accepted annuities under will, merely because decision was not in accordance with facts; petitioner being limited to showing fraud on court or some accident, mistake or misunderstanding in proceedings such as in justice should call for revocation and rehearing. Boardman v. Hesseltine, 200 Mass. 495, 86 NE 931. Decree of probate should be vacated and annulled if it appears will was not properly executed or witnessed or was probated without legal evidence. Merrill Trust Co. v. Hartford [Me.] 72 A 745. That no appeal was taken held no bar to petition, it not being shown petitioner had knowledge or original proceedings in time for appeal. Id. No bar that petl-

held conclusive as to facts thereby established [87] and not subject to collateral attack.[88] An order admitting a will to probate duly made by a court of probate jurisdiction cannot be vacated in equity for direct fraud in establishing it such as perjury or the production of a false will at the time of the hearing,[89] and the devisee in such will cannot be declared trustee for the heir in a suit in equity by the heir based on such fraud.[90]

(§ 4) *H. Revocation of probate.*[91]—See 10 C. L. 2056—The complaint must show plaintiff's interest,[92] and the proceedings must be prosecuted with reasonable diligence.[93] All necessary parties must be brought in.[94] The right to trial by jury is statutory only and does not exist as of right.[95]

tioner received a legacy where he returned it into court. Id. Prior insufficient petition held no obstacle. Id. No laches in absence of unreasonable delay after knowledge of facts on opposite party's change of position. Id. Record of probate court not necessarily knowledge. Id. Estate not deprived of essential witness by death of named executor and residuary legatee. Id. That deceased executor and legatee had mingled estate with his own held no bar. Id. Decree should be simply that former decree be vacated and annulled, though petition be also for decree that instrument was not decedent's will and that decedent died intestate. Id.

**87.** Order admitting will determines that will was duly executed by a testator who had legal capacity, and that it has not been revoked, under Code Civ. Proc. relative to conclusiveness of orders respecting probate. Clapp v. Vatcher [Cal. App.] 99 P 549. Probate conclusive until legally vacated, it being presumed county court had proper evidence before it. Will admissible in partition though not properly authenticated. Adams v. De Dominguez [Ky.] 112 SW 663. Judgment of orphan's court in contest of will is in rem of court of competent jurisdiction directly on subject-matter of controversy conclusively determining question at issue as to all persons whether parties or not. Pleasants v. McKenney [Md.] 71 A 955. Probate judgments and recitals therein are entitled to presumptions attaching to records of other courts of exclusive original jurisdiction. Kolterman v. Chilvers [Neb.] 117 NW 405. In suit to quiet title to land claimed under will and codicil written on same sheet of paper to which was attached certificate of probate judge that he had examined instrument, etc., and adjudged same to be testator's will, it was properly ruled that both will and codicil had been probated. McMahan v. Hubbard [Mo.] 118 SW 418. Under laws of Missouri, judgment admitting will to probate is not conclusive until expiration of period allowed for action to determine validity of will and then only if no such action is commenced. In re Sands' Estate, 62 Misc. 146, 116 NYS 426. Commencement of action immediately vacates probate decree and leaves question of validity of will open. Id. In summary proceedings by devisee wherein defendant set up property was claimed by others as heirs, plaintiff held entitled to presumption and rights under Code Civ. Proc. § 2623, making probate decree presumptive evidence of proper execution of will, competency of testator and freedom from restraint, and § 2627, providing that decree admitting will disposing of realty presumptively establishes all matters determined by surrogate, and allowing use of such decree as evidence. Drake v. Cunningham, 127 App. Div. 79, 111 NYS 199. Mere probate is conclusive only as to formal validity of will. In re Hesselbrook's Estate, 128 App. Div. 874, 113 NYS 97. Refusal of probate court to admit will to probate is not conclusive on a devise of realty (Dixon v. Cozine, 114 NYS 615), but he may assert his rights in a common-law action or in partition proceedings (Id.) or wherever and whenever his title is drawn in question (Id.) since he takes under the will and not under probate decree (Id.).

**88.** Probate proceedings held not subject to collateral attack because judge was absent from parish and no affidavit of his absence was made. Hibernia Bank & Trust Co. v. Whitney, 122 La. 890, 48 S 314. In proceedings on application for guardianship for a child, held not competent to collaterally attack will of child's father offered in evidence, same having been duly probated. Churchill v. Jackson [Ga.] 64 SE 691. Where a probate court has jurisdiction in admitting will to probate, all presumptions favor regularity of proceedings, and in collateral attack of probate, court will not inquire into degree of proof required by probate court. Kolterman v. Chilvers [Neb.] 117 NW 405.

**89.** Del Campo v. Camarillo [Cal.] 98 P 1049.

**90.** Del Campo v. Camarillo [Cal.] 98 P 1049. Fraud in producing will, introducing evidence, and avoiding material disclosures, relate to validity of will, and only remedy therefor is by proceeding to contest will and revoke probate within one year under Code Civ. Proc. § 1327. Del Campo v. Camarillo [Cal.] 98 P 1049.

**91. Search Note:** See notes in 106 A. S. R. 643.

See, also, Wills, Cent. Dig. §§ 539-541; Dec. Dig. § 221.

**92.** Complaint in action to determine invalidity of probate held insufficient for failing to show plaintiffs' interest there being no allegation that parties other than husband were the only next of kin and heirs at law, or that testatrix died seised of any property. Wood v. Fagan, 126 App. Div. 581, 110 NYS 938.

**93.** Where petition to revoke probate was filed three days before expiration of year after probate but no citiation was issued or other proceedings taken for over six months, petitioner was prima facie guilty of want of diligence authorizing dismissal on motion of

(§ 4) *I. Suits to contest or set aside*[96]—See 10 C. L. 2056 are special statutory proceedings,[97] and general statutes as to joinder of causes of action do not ordinarily apply.[98] Persons interested as heirs or next of kin are usually entitled to sue.[99] The only question triable is the validity of the will and its probate,[1] but contestant may allege any and all grounds going to invalidate the will,[2] the burden being on him to show invalidity.[3] The right to introduce evidence in rebuttal should not be denied.[4] Questions of fact are for the jury,[5] and if there is any evidence tending to establish the ground of contest, a demurrer thereto must be overruled.[6] A duly probated will should not be set aside except for cogent

executor. Focha v. Focha's Estate [Cal. App.] 97 P 321.

**94.** Refusal of court to direct citation of a nonresident heir and certain other heirs at law held not ground for complaint, Code Civ. Proc. § 1329 not requiring service of citation on persons not necessary, but only proper parties, and service having been made on executor and a member of legatees. In re Dolbeer's Estate, 153 Cal. 652, 96 P 266. Statute allowing suit or defense by one or more persons for benefit of numerous litigants, who cannot conveniently be brought into court, held not applicable to proceedings for revocation of probate under Code Civ. Proc. § 2653a, requiring all devisees, legatees, and heirs of testator and other interested persons to be made parties. Brinkerhoff v. Tiernan, 61 Misc. 586, 114 NYS 698. Failure to issue citation to executor or administrator with will annexed within one year as provided by Code Civ. Proc. § 1328, and St. 1907, p. 314, c. 250, necessitates dismissal of proceedings in absence of general appearance. In re Hite's Estate [Cal.] 101 P 8. Not necessary for movant to serve notice on all parties who might be affected by petitioner's contest, it being sufficient if petitioner himself is served. Id. Administrator with will annexed, who appeared only for purpose of moving to dismiss petition for revocation for want of citation, held not to have appeared generally though he did not designate his appearance as special. Id.

**95.** Only right to jury trial is under Code Civ. Proc. § 1330, allowing jury where will was probated without contest. In re Dolbeer's Estate, 153 Cal. 652, 96 P 266. Not abuse of discretion to refuse jury trial where probate was after contest. Id.

**96. Search Note:** See Wills, Cent. Dig. §§ 542-559; Dec. Dig. §§ 222-230; 22 A. & E. Enc. P. & P. 115.

**97.** Jurisdiction of equity to entertain bill to contest probate of a will is purely statutory, and not within the general chancery powers of the court. Selden v. Illinois Trust & Sav. Bank, 239 Ill. 67, 87 NE 860. Action to contest is special. Clearspring Tp. v. Blough [Ind.] 88 NE 511. No contest of foreign probated will, filed under Rev. St. 1895, art. 5353, making such will muniment of title and authorizing contest within four years, can be had, unless will disposes of land in county in Texas in which will is filed and recorded. Mason v. Rodriguez [Tex. Civ. App.] 115 SW 868.

**98.** Clearspring Tp. v. Blough [Ind.] 88 NE 511.

**99.** Husband and sister are within Code Civ. Proc. § 2653a, authorizing any person interested, as heir at law, next of kin, or otherwise to sue to determine validity or invalidity of will or codicil admitted to probate. Wood v. Fagan, 126 App. Div. 581, 110 NYS 938. Properly joined as plaintiffs, they having common interest in having will declared invalid. Id. Testator's only heir when will was admitted to probate held a "person interested" entitled to file bill to contest will under Hurd's Rev. St. 1908, c. 148, § 7, authorizing contest by such persons within a year after probate. Selden v. Illinois Trust & Sav. Bank, 239 Ill. 67, 87 NE 860. Person must have been interested at time of probate. Id. Right to contest is not assignable (Id.), will not pass by inheritance (Id.), and does not survive at common law (Id.). Person not deprived of rights but benefited by will held not interested within Hurd's Rev. St. 1909, c. 148 § 7. Id. Statute construed to exclude as contestants all except sharers in estate after vacation of will held not unconstitutional impairment of jury trial. Id. Heirs are interested and proper parties to action to contest though they take nothing under will, they taking as distributees if will is set aside. Hays v. Bowden [Ala.] 49 S 122. That all heirs are not joined as complainants does not affect right of some to sue to contest. Id. Held immaterial that minor children of testator were made defendants, instead of complainants, no relief being asked against them. Id.

**1.** Only questions triable in action under Code Civ. Proc. 2653a, for determination of validity of probate are validity or invalidity of will and its probate. Wood v. Fagan, 126 App. Div. 581, 110 NYS 938.

**2.** Allegation of unsoundness of mind held not inconsistent with allegation of undue influence. Hays v. Bowden [Ala.] 49 S 122.

**3.** Under Code Civ. Proc. § 2653a, relating to manner and order of proof in jury trial actions to determine validity of probated wills, burden is on attacking party. Scott v. Barker, 129 App. Div. 241, 113 NYS 695.

**4.** Error to refuse to allow widow to testify in rebuttal of contestants' evidence of undue influence though proponent had not negatived undue influence in case in chief. Jamison v. Jamison [Miss.] 46 S 945.

**5.** Scott v. Barker, 129 App. Div. 241, 113 NYS 695.

**6.** Demurrer to evidence must be overruled where there is any evidence tending to establish undue influence in action brought on that ground under Gen. St. 1901, §§ 7957, 7958. Kerr v. Kerr [Kan.] 101 P 647. Held error to sustain demurrer. Id.

reasons.[7] What relief should be awarded must be determined on final hearing and not on demurer.[8] It is discretionary with the court to postpone the hearing of a will contest until final distribution of the estate of another.[9] Equity has no jurisdiction to decree fraudulent wills void.[10]

(§ 4) *J. Suits to establish* [11]—See 10 C. L. 2057 are sometimes authorized by statute.[12] Evidence tending to show that the instrument was kept among decedent's valuable papers is admissible.[13]

(§ 4) *K. Appeals.*[14]—See 10 C. L. 2057 —Final orders are usually appealable,[15] and, where appeal is adequate, prohibition will not lie to stop unauthorized proceedings.[16] The procedure essential to bring up the case,[17] the diligence required to have it tried,[18] the questions reviewable,[19] and the right to jury trial on questions of fact,[20] are matters largely regulated by statute. Findings and judgments will be disturbed only in clear cases.[21]

**7.** Wills should not be set aside by juries except for gravest reasons. Scott v. Barker, 129 App. Div. 241, 113 NYS 695. Jury must be instructed that evidence of contestants, in order to warrant setting aside of will, should not only outweigh evidence adduced by defendant but also presumption arising from order admitting will to probate. Seal v. Goebel, 11 Ohio C. C. (N. S.) 433.

**8.** Hays v. Bowden [Ala.] 49 S 122.

**9.** In re Wickersham's Estate, 153 Cal. 603, 96 P 311.

**10.** Knikel v. Spitz [N. J. Eq.] 70 A 992.

**11. Search Note:** See Wills, Cent. Dig. §§ 542-567; Dec. Dig. §§ 222-237.

**12.** Code Civ. Proc. §§ 1861, 1867, 2653a, relating to establishment of wills in certain cases, held not to authorize appointment of guardian ad litem to sue to establish will giving property to an infant, but refused probate by the surrogate. Dixon v. Cozine, 114 NYS 615. Action including both issue of devisavit vel non and proceeding for construction of will, though unusual, presents no question of jurisdiction, since clerk, by whom alleged will was probated is part of superior court. Harper v. Harper, 148 N. C. 453, 62 SE 553.

**13.** In suit to determine whether instrument found in decedent's safe was his will, testimony that witness had seen decedent use safe for books, notes, etc., and that witness "had had papers there himself," held admissible as tending to show safe was used for valuable papers. Harper v. Harper, 148 N. C. 453, 62 SE 553.

**14. Search Note:** See Wills, Cent. Dig. §§ 820-874; Dec. Dig. §§ 356-401.

**15.** Order dismissing petition to probate a will is final and appealable. Greene v. Hitchcock, 139 Ill. App. 408. Order of county court refusing to set aside probate is final. Dean v. Dean, 239 Ill. 424, 88 NE 149.

**16.** Prohibition will not issue to stop proceedings where court, notwithstanding pendency of petition for probate, summarily orders trial by jury of issue whether decedent died intestate, court having general jurisdiction of probate matters and parties having remedy by appeal. In re Dahlgren, 30 App. D. C. 588.

**17.** Motion by will contestant to amend **notice of appeal** by adding names and addresses of claimants theretofore not parties, and to serve amended notice nunc pro tunc, is motion contemplated by Code Civ. Proc. § 2573, requiring necessary parties to be brought in by order of appellate court, and is not within § 1303, authorizing curing of defects in notices of appeal, and, being made to surrogate was properly refused. In re Mark's Will, 128 App. Div. 775, 113 NYS 104. Motion under § 2573, authorizing appellate court on appeal from surrogate's court to bring in necessary parties, is not proper until appeal is perfected by proper service on those who were parties in surrogate's court. Id. Rev. Code N. D. 1905, § 7968, absolving an administrator, executor, or guardian from giving **undertakings** in certain cases, does not apply to one appealing from order of county court revoking probate of will and also his letters under such will. Ransier v. Hyndman [N. D.] 119 NW 544.

**18.** While under Mills' Ann. St. § 1034, giving preference in district court to cases appealed from probate court, appellant is responsible for prompt assertion of preference given. In re Shapter's Estate [Colo.] 99 P 35. District court may consider circumstances of each case in determining whether appellant has acted promptly Id. Sec. 1034 held not modified by Code 1877. §§ 156, 157, substantially re-enacted in Code 1887, §§ 175, 176, requiring clerk to enter causes according to date of issue, etc. Id. Not repealed by Laws 1891, p. 109, § 3, providing that all questions relating to probate matters in county court shall be determined by it, and that appeals shall lie "to be prosecuted" as in civil cases. Id. Seventeen months' delay after remand from supreme to district court held not sufficiently excused by affidavit alleging negotiations for settlement. Id.

**19.** Appeal from order of county court refusing to set aside probate of will only removes to circuit court order refusing vacation, and jurisdiction of circuit court is limited to determination of whether probate should be set aside. Dean v. Dean, 239 Ill. 424, 88 NE 149. On appeal from order probating will or refusing probate only question adjudicable is whether writing is decedent's will; whether trust provided for is valid cannot be considered. Kasey v. Fidelity Trust Co. [Ky.] 115 SW 737.

**20.** On appeal to district court from judgment of probate court refusing to admit

(§ 4) *L. Costs.*[22]—See 10 C. L. 2050—In its discretion, the court may allow or disallow costs [23] out of the estate [24] to successful or unsuccessful parties; [25] but property not involved in a contest should not be charged.[26]

(§ 4) *M. Recording of foreign wills* [27]—See 10 C. L. 2059 and probate proceedings is authorized in many states,[28] the statute usually prescribing the essentials to such record,[29] the procedure to be followed [30] and the effect thereof.[31]

will, district court may make order for jury trial of all material questions of fact. Cartwright v. Holcomb [Okl.] 97 P 385. Under Code Civ. Proc. § 2588, where reversal by appellate court is founded on questions of fact, appellate court must, if appeal is taken from decree made on petition to admit will to probate, make an order directing jury trial of the material questions of fact. In re O'Gorman's Will, 127 App. Div. 159, 111 NYS 274. On application for probate contested for incompetency, fraud, and under influence, evidence held to require reversal of surrogate's decree, refusing probate and submission to jury of material questions of fact involved as provided by Code Civ. Proc. § 2588. In re Jeffrey's Will, 129 App. Div. 791, 114 NYS 667.

**21.** Surrogates' finding of compliance with statutory formalities will not be disturbed on appeal unless clearly against preponderance of evidence. In re Sizer's will, 129 App. Div. 7, 113 NYS 210. Duty of appellate court to set aside verdict in will contest clearly against weight of evidence. Scott v. Barker, 129 App. Div. 241, 113 NYS 695. To obtain reversal of judgment refusing probate after trial of issues of capacity, undue influence, and fraud, error must be shown in respect to all issues, and not only one. Macafee v. Higgins, 31 App. D. C. 355. While suit to contest will is action at law and appellate court cannot weigh conflicting evidence, court may examine record to see if there is any substantial testimony to authorize submission of case to jury. Winn v. Grier [Mo.] 117 SW 48. On appeal to circuit court on probate of will, case must be regarded as a law case, issue of will or no will being legal, and circuit court's findings of fact are not reviewable by supreme court. Thomas v. Rouse [S. C.] 62 SE 254.

**22. Search Note:** See, Wills, Cent. Dig. §§ 875-894; Dec. Dig. §§ 402-416.

**23.** Brother benefited by contest for reduction of share of executor held required to stand proportionate share of expenses. Clark v. Pepper's Adm'r [Ky.] 116 SW 353. Amount to be allowed for attorney's fees in probate proceedings must be determined in each case with reference to presence or absence of a variety of factors. Succession of Filhiol [La.] 49 S 138.

**24.** Statutory discretion held not abused by county court's disallowance of certain counsel and witness fees out of estate in ultimately successful contest. In re Muellenschlader's Estate, 137 Wis. 32, 118 NW 209. Expense of unsuccessful probate may be charged against estate. Dodd v. Anderson, 112 NYS 414.

**25.** Costs held properly allowed to successful party on appeal to circuit court from judgment of county court construing will. In re Moore's Estate [Wis.] 120 NW 417. On reversal of decree refusing probate and awarding costs to contestants, allowance of costs falls with decree and no allowance should then be made until end of litigation. In re Jeffrey's Will, 129 App. Div. 791, 114 NYS 667. Under Code Civ. Proc. § 2558, allowing costs to unsuccessful contestant who is special guardian appointed by court, costs cannot be awarded to committee of a lunatic unsuccessfully contesting probate, there having been no special guardian appointed. In re Davis' Will, 60 Misc. 297, 113 NYS 287.

**26.** Property named in will but conveyed to devisee by testator after will was made held not required to contribute toward expenses and attorney's fees incurred by such devisee in sucoessfully defending against contest of will, such property not being involved in contest. Smullen v. Wharton [Neb.] 119 NW 773.

**27. Search Note:** See Wills, Cent. Dig. §§ 568-583; Dec. Dig. §§ 238-246.

**28.** Probate court has jurisdiction of application of foreign executor for record of foreign probate, both as to subject-matter and rights of persons interested. Appeal of Murdoch [Conn.] 72 A 290. Act 1689, Rev. Civ. Code, authorizing execution of foreign wills on mere registration, held not applicable to will of resident decedent, though will was made out of state. Succession of Drysdale, 121 La. 816, 46 S 873. Louisiana courts cannot order execution of alleged will of person domiciled in Louisiana on production before them of order of foreign country probating same. Id.

**29.** To justify record of foreign will or of record thereof, under Code Civ. Proc. § 2703, it is sufficient if it appears from will or record that will was "executed" not "proven" according to laws of New York. Bradley v. Krudop, 128 App. Div. 200, 112 NYS 609.

**30.** Under Gen. St. 1902, § 305, providing for filing and recording of foreign probate proceedings "after public notice and such citation as said court shall order," and § 208, providing for legal notice to nonresidents of matters pending before probate courts, insufficiency of notice is not jurisdictional but merely renders proceedings ex parte as to those not properly notified. Appeal of Murdoch [Conn.] 72 A 290. If notice by publication was sufficient, decree was not "ex parte" within § 203, authorizing probate court to modify or revoke ex parte decrees before appeal. Id.

**31.** Under Gen. St. 1902, § 305, providing for record of foreign wills and probate proceedings, proceedings in competent court of Mississippi establishing will devising land in Connecticut, when proven by authenticated copies of will and proceedings, conclusively establish that will was entitled to probate in Mississippi and that executor recognized by Mississippi court was designated therein as executor. Appeal of

§ 5. *Interpretation and construction. A. General rules.*[32] See 10 C. L. 2059. Testator's intention, gathered from the whole instrument, controls if consistent with the law.[33] The well settled rules of construction should be applied in ascertaining this intention[34] but should not be allowed to subvert it,[35] and technicalities or inaccuracies may be disregarded[36] and words supplied or rejected.[37] A

Murdoch [Conn.] 72 A 290. Will thus proven held to pass all of testator's property in Connecticut. Id. Under Hurd's Rev. St. 1905, c. 148, §§ 9, 10, recorded foreign will and proof of probate thereof in sister state is as good and available as will made and probated in Illinois. Stull v. Veatch, 236 Ill. 207, 86 NE 227. Recorded will vests title without further probate, and is not merely notice or evidence. Id. Foreign probate of foreign will, authenticated copy and certificate of probate of which are duly recorded, cannot be collaterally assailed unless transcript shows on its face will was improperly admitted. Id. Plea setting up record under said statute held sufficient, though not directly averring testator resided in the foreign state and against objection it did not show foreign probate court had jurisdiction. Id. Rule domestic courts are not bound by construction of foreign courts relating to domestic lands held inapplicable, construction of will not being involved. Id. Under Rev. St. 1895, arts. 5353, 5355, authorizing filing of foreign probated wills, such will disposing of land in Texas confers title on devisee on death of testator, probate in sister state and record in Texas being required only to evidence and give effect to that right. Haney v. Gartin [Tex. Civ. App.] 113 SW 166.

**32. Search Note:** See notes in 50 A. S. R. 279; 102 Id. 366; 7 Ann. Cas. 790; 8 Id. 429, 637.

See, also, Wills, Cent. Dig. §§ 946-2225; Dec. Dig. §§ 435-872; 30 A. & E. Enc. L. (2ed.) 661.

**33.** Smith v. Smith [Ala.] 47 S 220; Gregory v. Welch [Ark.] 118 SW 404; In re Koch's Estate [Cal. App.] 96 P 100; In re Peabody's Estate [Cal.] 97 P 184; Wolfe v. Hatheway [Conn.] 70 A 645; Wey v. Dooley, 134 Ill. App. 244; Webb v. Webb, 234 Ill. 442, 84 NE 1054; Armstrong v. Barber, 239 Ill. 389, 88 NE 246; Geisel's Estate v. Landwehr [Ind. App.] 88 NE 105; Close v. Farmers' L. & T. Co., 195 N. Y. 92, 87 NE 1005; In re Ducanson's Estate [Iowa] 120 NW 88; Klumpert v. Vrieland [Iowa] 121 NW 34; McClelland's Ex'x v. McClelland [Ky.] 116 SW 730; Ege v. Hering, 108 Md. 391, 70 A 221; Jewett v. Jewett, 200 Mass. 310, 86 NE 308; Richards v. Burbank, 201 Mass. 253, 87 NE 575; Baxter v. Bickford, 201 Mass. 495, 88 NE 7; Gilchrist v. Corliss [Mich.] 15 Det. Leg. N. 971, 118 NW 938; Stewart v. Jones [Mo.] 118 SW 1; Lesiur v. Sipherd [Neb.] 121 NW 104; Harper v. Harper, 148 N. C. 453, 62 SE 553; In re Knowles' Estate, 148 N. C. 461, 62 SE 549; Lynch v. Melton [N. C.] 64 SE 497; Weathersbee v. Weathersbee [S. C.] 62 SE 838; Frank v. Frank [Tenn.] 111 SW 1119; Perry v. Rogers [Tex. Civ. App.] 114 SW 897. Intention that realty and personalty should take same course. Hayward v. Spaulding [N. H.] 71 A 219. But it is **intention expressed in will** and not otherwise. Doherty v. Grady [Me.] 72 A 869. Not that which by inference may be presumed to have existed in testator's mind. Bond v. Moore, 236 Ill. 576, 86 NE 386. Will must be considered **as a whole** and **all clauses harmonized** if possible. Stisser v. Stisser, 235 Ill. 207, 85 NE 240; McClelland's Ex'x v. McClelland [Ky.] 116 SW 730; Paxton v. Paxton [Iowa] 119 NW 284; Thayer v. Paulding, 200 Mass. 98, 85 NE 686; Moseley v. Bolster, 201 Mass. 135, 87 NE 606; In re Bresler's Estate [Mich.] 15 Det. Leg. N. 1097, 119 NW 1104; Gloede v. Rantenberg [Mich.] 16 Det. Leg. N. 125, 120 NW 989; In re Buerstetta's Estate [Neb.] 119 NW 469; In re Title Guarantee & Trust Co. [N. Y.] 88 NE 375; Haywood v. Wachovia L. & T. Co., 149 N. C. 208, 62 SE 915; Mattison v. Mattison [Or.] 100 P 4; Johnson v. Smith, 108 Va. 725, 62 SE 958. Of irreconcilable **repugnant clauses,** effect must be given to later provision. Frank v. Frank [Tenn.] 111 SW 1119; Haywood v. Wachovia L. & T. Co., 149 N. C. 208, 62 SE 915; Deppen's Trustee v. Deppen [Ky.] 117 SW 352. In case of conflict between general and special provisions, latter prevail regardless of order in which they stand. Fee simple held cut by subsequent limitations of estate for widowhood. Harning v. Shelton [Tex. Civ. App.] 114 SW 389. Where general intent is collectable from whole will, terms inconsistent therewith must be rejected. Fee cut by subsequent provision limiting estate to widowhood. Id. Of two inconsistent wills, or a will and a codicil of different dates, last will or codicil controls, though provisions of each must be given effect so far as practicable. Deppen's Trustee v. Deppen [Ky.] 117 SW 352.

**34.** Aneschaensel v. Twyman [Ind. App.] 85 NE 788; Jackson v. Littell, 213 Mo. 589, 112 SW 53.

**35.** Canons of interpretation cannot be permitted to defeat clearly expressed intention. In re Line's Estate, 221 Pa. 374, 70 A 791; Galladay v. Knock, 235 Ill. 412, 85 NE 649; Klumpert v. Vrieland [Iowa] 121 NW 34; McClelland's Ex'x v. McClelland [Ky.] 116 SW 730; Doscher v. Wyckoff, 63 Misc. 414, 113 NYS 655; Barr v. Denney, 79 Ohio St. 358, 87 NE 267; In re Poppleton's Estate, 34 Utah, 285, 97 P 138; Connely v. Putnam [Tex. Civ. App.] 111 SW 164; In re Ohse's Will, 137 Wis. 474, 119 NW 93. Intent is to be determined as question of fact from competent evidence and not by rules of law. Haywood v. Spaulding [N. H.] 71 A 219. Meaning of language used cannot be determined by arbitrary rule of legal definition, but depends in each case on peculiar provisions and character of special will in question which must to a large extent be its own interpreter. Wolfe v. Hatheway [Conn.] 70 A 645.

**36.** Technical meaning of words must yield to intention. Cook v. Hart [Ky.] 117

term should be given its ordinary meaning unless apparently used in a different sense.[38] The construction of one clause in a will cannot control another where both are clear, though they are found in the same item.[39] The testator in making his will is presumed to have had in view the law of his domicile.[40] Where a will refers to and sufficiently identifies another instrument, the latter becomes a part of the will.[41] Where by codicil a testator declares a deliberate purpose to change the will, and does so, the court must observe with care the mandates of the codicil embodying such change[42] but the will proper should not be disturbed further than to give effect to the codicil.[43] While a will and its codicil constitute but one testament, the question whether they shall be construed as a single instrument is one of

SW 357. "Heirs" held to include persons entitled to personalty. In re Line's Estate, 221 Pa. 374, 70 A 791. Law regards spirit rather than mere letter, and, from words actually used, general intent may be inferred though not particularly expressed. Smith v. Smith [Ala.] 47 S 220. Where it is apparent that codicils were not productions of a skilled draftsman or person familiar with legal terms, care should be taken not to unduly emphasize precise construction of language or phraseology. Perry v. Bulkley [Conn.] 72 A 1014. Testator's intention will be given effect regardless of form of words or absence of technical terms, provided he does not intend to create an illegal or impossible estate. Hayward v. Spaulding [N. H.] 71 A 219.

37. Court will supply words necessary to express clear intent. Wolfe v. Hatheway [Conn.] 70 A 645. Superfluous words may be eliminated when those remaining, in connection with all circumstances, indicate meaning intended. Polsey v. Newton, 199 Mass. 450, 85 NE 574. As to beneficiarie intended see post, 5 C. When strict adherence to grammer would flustrate testator's intention, or where words used are so unintelligible, obscure or absurd that they have no place in and can give no effect to manifest intent, court may transpose, reject, or supply words. Frank v. Frank [Tenn.] 111 SW 1119.

38. In re Peabody's Estate [Cal.] 97 P 184; Bartlett v. Seare [Conn.] 70 A 33; Perry v. Bulkley [Conn.] 72 A 1014; Doherty v. Grady [Me.] 72 A 869. Comp. Laws 1907, § 2777, providing that technical words shall be taken in technical sense, unless contrary is clearly indicated by context, is but declaratory of common law, and is only a rule of construction. In re Poppleton's Estate, 34 Utah, 285, 97 P 138. Word or phrase occurring more than once is presumed to be used in same sense and meaning of an ambiguous part, under Code Civ. Proc. § 1323, may be explained by reference thereto elsewhere in will. In re Vogt's Estate [Cal.] 98 P 265. Testator's intention as to meaning of particular words will be given effect. In re Hite's Estate [Cal.] 101 P 443. Though it is presumed language was used in its usual and legal sense, presumption is overthrown when will in light of circumstances clearly shows intent of testator will not be effectuated by such interpretation (Wolfe v. Hatheway [Conn.] 70 A 645) and in such case testator's meaning will be adopted (Id.).

39. Frank v. Frank [Tenn.] 111 SW 1119.

40. As to inheritance tax. Kingsbury v. Bazeley [N. H.] 70 A 916. Court will presume testator made will with knowledge of law as to effect of widow's renunciation, such law having been frequently affirmed by supreme court during period of 40 years. Rocker v. Metzger [Ind.] 86 NE 403. Presumed testator knew general law of state and was familiar with charter of his city and where he bequeathed residue to city for a hospital, it must be assumed he knew that legislature might alter form of city government, abolish existing officers and create new ones, and change duties, responsibilities and mode of selection of officers. Ware v. Fitchburg, 200 Mass. 61, 85 NE 951. Where, at execution of will, life estate to daughter and after her decease then to her children "her surviving," gave daughter's daughter a vested remainder, this will be held to have been testator's actual intention, though at his death, courts had adopted a different rule as to similar devises. Hood v. Pennsylvania Soc., 221 Pa. 474, 70 A 845.

41. Letter executed as will and referring to will of another person by directing that property go as other person had arranged for hers to go. Nightingale v. Phillips [R. I.] 72 A 220. Another existing writing clearly pointed out by will, and satisfactorily identified as paper referred to, becomes part of will though not signed or attested. Reference to account books showing advancements. In re Bresler's Estate [Mich.] 15 Det. Leg. N. 1097, 119 NW 1104. Where two instruments of different dates are admitted to probate, court, in arriving at testator's intention, must consider both, whether they are treated as wills or as will and codicil. Deppen's Trustee v. Deppen [Ky.] 117 SW 352. Codicils must be read in connection with will and as part thereof, effect being given to whole will if possible. In re Koch's Estate [Cal. App.] 96 P 100. That will referred to an extraneous paper signed by testator but not executed as a will, and stated that property therein listed should go to her friends therein named, held not ground for refusing probate. In re Reins' Estate, 59 Misc. 126, 112 NYS 203.

42. Codicil held to cut fee given by will, create other estates in devisees' children, etc. Smith v. Smith [Ala.] 47 S 220.

43. Thomas v. Owens, 131 Ga. 248, 62 SE 218.

intention.[44] Wills by different testators, though executed simultaneously, cannot be construed together if they are unambiguous and do not refer to each other.[45] Courts are inclined to sustain a will made by a person of disposing mind, unless it contravenes some statute,[46] but cannot give it a strained construction in order to uphold it,[47] or to avoid consequences not contemplated by testator.[48] While the presumption is against inequality or disherison[49] as well as intestacy.[50] A devise clearly intended will be enforced if lawful, though also unreasonable or unjust.[51] A retroactive construction is permissible where the intention will be thereby affectuated.[52] Void provisions will be treated as if stricken from the will.[53] It is for the court of testator's domicile to construe the will so far as it relates to matters within its jurisdiction.[54, 55]

*As to time.*[See 10 C. L. 2060]—Wills speak from testator's death,[56] and all dispositions of property therein must be construed with reference to that fact.[57]

*Extrinsic evidence.*[See 10 C. L. 2060]—While the circumstances and conditions surrounding testator at the time of making the will may be shown[58] and extrinsic or

**44.** "Testament" in provision against contest held to include codicil. In re Hites Estate [Cal.] 101 P 443.

**45.** Wills by husband and wife. St. Paul's Sanitarium v. Freeman [Tex. Civ. App.] 111 SW 443. Mutual wills do not of themselves create any contractual relation between the parties (see ante, § 1, subd., Contracts to Devise or Bequeath) and, in determining validity of one of the wills, existence of the other is immaterial (Mullen v. Johnson [Ala.] 47 S 594).

**46.** In re Gibson's Will, 128 App. Div. 769, 113 NYS 266. Law presumes testator intended lawful rather than unlawful disposition. In re Billis' Will, 122 La. 539, 47 S 884. Court will avail itself of every reasonable and legal means to give effect to provisions of will and will not endeavor to invalidate such provisions. Young v. Du Bois, 60 Misc. 381, 113 NYS 456. Construction rendering a bequest valid, rather than one rendering it void as a perpetuity, will be adopted. Wolfe v. Hatheway [Conn.] 70 A 645.

**47.** Testator's intention will first be sought and the question of the validity of the disposition will then be determined. Simpson v. Trust Co., 129 App. Div. 200, 113 NYS 370. Intention must be adhered to though it destroys will. Simpson v. Trust Co., 112 NYS 370; Id., 112 NYS 155. While intention is to have controlling influence, testator must conform to reasonable rules for regulation of practical affairs of life and fundamental laws which establish and secure rights of property (Bradley v. Warren [Me.] 72 A 173), and when an intention is discovered to accomplish two purposes so inconsistent that both cannot be accomplished in accordance with those rules and laws there must be a failure as to one of them (Id.).

**48.** Court must endeavor to arrive at testator's intention from language he used, uninfluenced by any desire to protect interests which, as things turned out, he may have left unprotected under the law. Bartlett v. Sears [Conn.] 70 A 33.

**49.** See post, § 5C and § 5D subd. Individual Rights in Gifts to Two or More.

**50.** See post, § 5D subd. Property Not Effectually Disposed of.

**51.** Perry v. Rogers [Tex. Civ. App.] 114 SW 897. See also, ante, § 1, and §§ 2A, 2B.

**52.** Rule forbidding retroactive construction of statutes does not apply to wills. In re Bresler's Estate [Mich.] 16 Det. Leg. N. 1097, 119 NW 1104. Provision for deduction from a legacy of "what may be owing" held to include advancements already made. Id.

**53.** Unlawful accumulation. In re Jenkins' Estate, 117 NYS 74.

**54, 55.** As whether executor is designated. Appeal of Murdoch [Conn.] 72 A 290.

**56.** Aneschaensel v. Twyman [Ind. App.] 85 NE 788; Simpson v. Trust Co., 112 NYS 370; Simpson v. Trust Co., 129 App. Div. 200, 113 NYS 370; Connely v. Putnam [Tex. Civ. App.] 111 SW 164. Unless face indicates contrary. Farley v. Farley [Tenn.] 115 SW 921. And must comply with laws then in force. Strand v. Stewart [Wash.] 99 P 1027. And determines those then entitled to the estate. In re Wells' Estate [Iowa] 120 NW 713. At common law will takes effect at death of testator unless language by fair construction indicates otherwise, and legacies will not vest until that time. Scott v. Ford [Or.] 97 P 99. Where will was evidently made in contemplation of settlement with creditors, and a conveyance for carrying out that plan was made a month after its execution, will should be read as speaking not from date of execution but from date of conveyance. Cornwall v. Hill [Ky.] 117 SW 311.

**57.** Aneschaensel v. Twyman [Ind. App.] 85 NE 788.

**58.** Court may and should consider all surrounding circumstances including testator's family, character and extent of his property, and the like. Wolfe v. Hatheway [Conn.] 70 A 645; Armstrong v. Barber, 239 Ill. 389, 88 NE 246; Stisser v. Stisser, 235 Ill. 207, 85 NE 240; Hoffner v. Custer, 237 Ill. 64, 86 NE 737; Fenton v. Hall, 235 Ill. 552, 85 NE 936; McClelland's Ex'x v. McClelland [Ky.] 116 SW 739; Whitelaw v. Rodney, 212 Mo. 540, 111 SW 560; McMahan v. Hubbard [Mo.] 118 SW 481; Odell v. Uhl, 116 NYS 185; In re Title Guaranty & Trust Co. [N. Y.] 88 NE 375; Crick's Estate, 35 Pa. Super. Ct. 39. Intention must be gathered from words.

parol evidence may be admitted to show or dispel latent ambiguities,[59] and to identify the subjects and objects of testator's bounty,[60] such evidence cannot be allowed to vary, explain, or contradict clear and explicit language.[61]

(§ 5) *B. Of terms designating property or funds.*[62]—See 10 C. L. 2061—Words will pass such property as in common use they import,[63] necessary incidentals

used as applied to subjects and objects of bounty. Collins v. Capps, 235 Ill. 560, 85 NE 934. Will is to be construed in light of all knowledge possessed by testator as to subject-matter (Polsey v. Newton, 199 Mass. 450, 85 NE 574), and oral evidence is admissible to show every material circumstance attendant on testator to ascertain meaning of words employed (Id.). Rule allowing parol evidence to show description of property described as homestead is intended to effectuate intent of testator as expressed in will, and does not infringe rule against showing by extrinsic circumstances an intention not expressed. Morrall v. Morrall, 236 Ill. 640, 86 NE 578. Court held empowered to find and description of homestead, as to which will contained, not a misdescription but an imperfect description, this not amounting to reformation of will. Id. Rule admitting extrinsic evidence in aid of construction authorizes proof of blood relationship between devisees, and also introduction of another will after which one in question was copied. Taylor v. Taylor, 7 Ohio N. P. (N. S.) 297.

**59.** To show such ambiguities. McMahan v. Hubbard [Mo.] 118 SW 481. When a word or phrase is capable of more than one meaning when read in light of whole instrument, courts must look to conditions and circumstances surrounding testator when will was made. In re Poppleton's Estate, 34 Utah, 285, 97 P 138. Evidence of condition of testator's family, estate, and surroundings at time will was made is admissible to explain latent ambiguities. Taylor v. McCowen [Cal.] 99 P 351. Latent ambiguity in description may be explained by parol testimony. In re Metzger's Estate, 222 Pa. 276, 71 A 96. Latent ambiguities may arise either when there are two persons or things answering same name or description, or when will contains a misdescription of subject or object of gifts, as where person or thing named or described is not in existence or not the one intended, or thing did not belong to testator. Taylor v. McCowen [Cal.] 99 P 351. No latent ambiguity unless extrinsic evidence establishes that description in will is equally applicable to two distinct subject-matters or persons. Hunter v. Hunter, 37 Pa. Super. Ct. 311.

**60.** Though parol evidence cannot be allowed to change language of instrument, it may be received when necessary to identify subjects and objects of testator's bounty. Collins v. Capps 235 Ill. 568, 85 NE 934. Evidence of condition of testator's property is admissible to identify subjects and objects of devise. Gano v. Gano, 239 Ill. 539, 88 NE 146. Extrinsic evidence held admissible to show what property was intended where it was uncertain to which of two plats description referred. Hoffner v. Custer, 237 Ill. 64, 86 NE 737. Declarations of testator showing he habitually used "block 5," as referring to a tract west of a railroad, held competent. Id. Evidence as to existence and identity of person named in will and distribution decree, as entitled to an estate in land, held admissible. Taylor v. McCowen [Cal.] 99 P 351. Evidence admissible to show what testator was in habit of calling an "old coal bank," testimony showing uncertainty as to what was designated. Hunter v. Hunter, 37 Pa. Super. Ct. 311. Parol evidence held admissible to show what land testator owned at death and when will was made, for purpose of showing that lands devised without section number were in section 28. McMahan v. Hubbard [Mo.] 118 SW 481.

**61.** Extrinsic evidence inadmissible in absence of ambiguity or uncertainty. Fellbush v. Egen, 221 Pa. 420, 70 A 816; Van Leer v. Van Leer, 221 Pa. 195, 70 A 716; In re Line's Estate, 221 Pa. 374, 70 A 791; Rogers v. Morrell [S. C.] 64 SE 143. Admissible only to explain latent ambiguities or to apply provisions to persons or subjects intended where description is defective, uncertain, or too general to be understood specifically. Hunter v. Hunter, 37 Pa. Super. Ct. 311. Where existence of subjects or persons fully satisfying terms of devise is shown, it cannot be shown by further parol evidence that testator actually intended what is excluded. Id. Where will referred to a "coal bank in the flat" shown to exist, it could not be proven by testator's declarations that he meant a coal bank on the hillside. Id. Evidence that testator insisted devisee should will property to another should devisee die without issue held inadmissible. St. Paul's Sanitorium v. Freeman [Tex. Civ. App.] 111 SW 443.

**Declarations of testator** indicating his intention to provide for a certain person are incompetent. Hoffner v. Custer, 237 Ill. 64, 86 NE 737. Testator's oral declarations cannot be admitted to vary the provisions of the will. Hunter v. Hunter, 37 Pa. Super. Ct. 311.

**62. Search Note:** See notes in 58 L. R. A. 722; 12 L. R. A. (N. S.) 661; 3 Ann. Cas. 420; 7 Id. 128; 9 Id. 247.

See, also, Wills, Cent. Dig. §§ 1205-1292; Dec. Dig. §§ 558-589; 30 A. & E. Enc. L. (2ed.) 712.

**63.** Joint will bequeathing all sundry goods, gear, debts, furniture with whole interest, profits and produce of premises, etc., held not to pass any realty. Paton v. Robinson [Conn.] 71 A 730. Codicil disposing of "all my **belongings**, furniture and clothes included," held not to carry money, but ornaments, books, pictures, etc., not disposed of by will. In re Koch's Estate [Cal. App.] 96 P 100. To wife for widowhood "all and every right, title and interest in and to" a plantation, "and all its belongings," held sufficient to pass not only fee to plantation but also any lesser in-

thereto,[64] and such as extrinsic evidence may show to have been intended,[65] a description being sufficient if it fairly covers the property,[66] and courts being averse to intestacy;[67] but a devise of property "owned" by testator does not include an interest held by him as conditional vendor.[68] Error of description will not avoid a devise if what was intended can be ascertained,[69] and if testator owned realty corresponding in part to a description in his will, the court will reject the incorrect part of the description, and the realty covered by the correct description will pass,[70] but the court cannot include within a description more than is reasonably embraced thereby.[71] A devise of a definite amount of land from a certain tract is not rendered invalid by testator's failure to designate the specific part which is to form the portion,[72] for by selection by the devisee the gift is reducible to certainty.[73]

terest therein, such as right to redemption money. Rue v. Connel, 148 N. C. 302, 62 SE 306. Where will gave realty to daughter and also all furniture, clothing, "and **personal effects**" daughter took all personalty owned by testatrix at her death, including money into which she had converted the land after will was made. Gallaway v. Gallaway, 22 App. D. C. 76. A devisee of **land** takes **crops** standing on land at testator's death, whether material or not. In re Anderson's Estate [Neb.] 118 NW 1108. A testator's **"estate"** includes both realty and personalty. Harper v. Harper, 148 N. C. 453, 62 SE 553; Powell v. Woodcock, 149 N. C. 235, 62 SE 1071. Estate in residuary disposition of "all rest, residue and remainder of my estate of whatsoever name and description and wheresoever situated" held to pass realty and personalty. Id. Where will provided that on death of a beneficiary **"his share of income under this will"** should be paid to his surviving cobeneficiaries and lawful issue of any deceased, quoted phrase included, in addition to original share of dying beneficiary, share received by him under will as survivor of a beneficiary who had predeceased him. Union Safe Deposit & Trust Co. v. Dudley [Me.] 72 A 166.

**64.** Provision for home for certain beneficiaries held to include everything necessary to maintain home, such as charges for taxes and repairs, but not living expenses involved in purchase of supplies. Long v. Mayes' Estate [Miss.] 48 S 523.

**65.** See, also, ante, § 5A, subd. Extrinsic Evidence. Extrinsic evidence held to show testator devised land with reference to a new and not an old plat, resulting in more property passing under description "northeast quarter." Haffner v. Custer, 237 Ill. 64, 86 NE 737.

**66.** "160 acres in T. county Texas" and "the farm in Texas" held sufficient to raise inference that certain land was that which was described in will. Haney v. Gartin [Tex. Civ. App.] 112 SW 166. Devise sufficiently describing a lot by number but adding "now occupied by my nephew, and land attached thereto" held to pass entire lot, in absence of evidence that other lots had been carved therefrom, or that nephew did not occupy entire tract. In re Metzger's Estate, 222 Pa. 276, 71 A 96.

**67.** See post, § 5D. Property not Disposed of.

**68.** "All mules, etc., now owned by me" held not to refer to mules conditionally sold by testator, but balance due therefor held to pass to executor. Hunter v. Crook [Miss.] 47 S 430. A will of all land of which testator died seised will not pass testator's interest in land previously conveyed with retention of legal title to secure price, his interest being personalty and he no longer being owner of land. In re Miller's Estate [Iowa] 119 NW 977.

**69.** However many errors may exist in description of subject of devise, it will not be rejected if enough remains after rejecting errors to show what was intended. Collins v. Capps, 235 Ill. 560, 85 NE 934; Gano v. Gano, 239 Ill. 539, 88 NE 146. "Southeast quarter of northeast quarter and northeast quarter of northwest quarter" held to mean "southeast and northeast quarter of northwest quarter," testator not owning southeast quarter of northeast quarter. Id Presumed testator intended to dispose of realty he owned and not other realty. Id. "My life insurance of $10,000 in M. company" held to pass $10,000 policy in another company, it appearing testator never had any insurance in M. company. In re Gans' Estate, 60 Misc. 282, 112 NYS 259. Where two tracts of land were described but only one section number given, and evidence showed testator owned land in two sections, one section number would be applied to each description so that will would pass land in both sections. McMahon v. Hubbard [Mo.] 118 SW 481. Relief can not be granted against incorrect description of real estate in will, unless there is something in will itself which points to property actually owned by the testator, and affords foundation for testimony identifying such property as property which the testator was attempting to devise; otherwise there can be no correction of false description, and, as to property to which it is sought to apply false description, it must be held that decedent died intestate. Gillis v. Long, 8 Ohio N. P. (N. S.) 1. **Court will strike misdescriptions** as to subject or object of gifts if enough remains to identify person or thing intended. Taylor v. McCowen [Cal.] 99 P 351. If mistake is obvious, court will read will as if corrected. Id.

**70.** Will held sufficient to pass certain land after striking word "west" used in erroneous description. Collins v. Capps, 235 Ill. 560, 85 NE 934.

**71.** Where description "northeast quarter" did not include all land in north half of a block, court could not correct it. Hoffner v. Custer, 237 Ill. 64, 86 NE 737.

**72.** Young v. Young [Va.] 63 SE 748.

**73.** Young v. Young [Va.] 63 SE 748. Right to select held not lost by laches. Id.

Money into which realty is converted by testator after execution of the will becomes part of his personal estate and passes as such.[74] A direction for the conversion of realty into cash and distribution of the proceeds amounts to a devise of the realty,[75] and a will, appointing an executor, is entitled to probate as a will of personalty though only the real estate is mentioned.[76]

(§ 5) *C. Of terms designating or describing persons or purposes.*[77]—See 10 C. L. 2082—Intent governs in determining who take[78] as members of a designated class[79] and the purposes of a gift,[80] mistake or uncertainty not being necessarily fatal,[81] and particular liberality being exercised to sustain educational or charitable bequests.[82] Heirs will be disinherited only by express words or necessary implica-

74. Galloway v. Galloway, 32 App. D. C. 76.

75. Fenton v. Hall, 235 Ill. 552, 85 NE 936.

76. In re Maccofil, 127 App. Div. 21, 111 NYS 315.

77. **Search Note:** See notes in 13 L. R. A. (N. S.) 780; 12 A. S. R. 97; 15 Id. 592; 73 Id. 413; 2 Ann. Cas. 645, 866; 4 Id. 581; 5 Id. 243, 511, 936; 7 Id. 134.

See, also, Wills, Cent. Dig. §§ 1059-1204; Dec. Dig. §§ 492-557.

78. Bequest of art collection to Art Museum of city of San Francisco held to refer to San Francisco Art Association, there being no Art Museum of city of San Francisco and a certain Park Museum not coming into existence until after testator left San Francisco. Walter v. Walter, 60 Misc. 383, 113 NYS 465. Evidence held sufficient to identify beneficiaries of money left to "women's work in foreign fields," to "women's work in home lands," and for colored people of South. Gilchrist v. Corliss [Mich.] 15 Det. Leg. N. 971, 118 NW 938. Will construed not to disclose intention that interests of childless daughters predeceasing testator should go to his grandchildren but to require that remainders go to his other children, especially in view of statute against failure of contingent remainders for want of particular estates. Golladay v. Thomas, 33 Ky. L. R. 829, 111 SW 721. Bequest to **"city insane asylum"** held to city for care of insane falling to charge of city, so as not to lapse because city ceased to permanently care for the insane. Succession of Staub [La.] 48 S 766. Where will directed sale of realty and distribution of proceeds **under intestate laws,** and also directed distribution of personalty under such laws, proceeds of realty went to those who would have inherited the land in absence of will, and did not go as personalty. In re Glentworth's Estate, 221 Pa. 329, 70 A 756. Where property was to go according to intestate laws, will held not to show testator intended to treat **half-brother** as of whole blood though he referred to him as brother, and hence half-brother was not entitled to share in realty. In re Line's Estate, 221 Pa. 374, 70 A 791. Holographic will **held to exclude son** recited to have had his full share of testator's and his mother's estate. Harper v. Harper, 148 N. C. 453, 62 SE 553.

79. Alternative gift to W. in case of death of "any one or more of **legatees herein named"** held not applicable to residuary legatees. In re Richards' Estate [Cal.] 98 P 528. Will giving all realty and personalty to children, but charging title with trust in favor of **unmarried daughters,** held to require division of income among only such daughters as should be unmarried down to time when income was earned, income to each daughter terminating on her marriage. Plaut v. Plaut, 80 Conn. 673, 70 A 52. Sons held not entitled to any part of income while trust continued. Id. Where after death of a sister, to whom life estate was given, her share should revert "to her sisters and brothers mentioned," or to their heirs, held, remainder should be distributed to **"sisters and brothers"** named in will to exclusion of a niece who had also been given a share. In re Bentz's Estate, 221 Pa. 380, 70 A 788. Where testator when he wrote will had only one sister and one half-sister and one half-brother living, but had had brothers and sisters who were dead, leaving issue, heirs of such deceased brothers and sisters were included in provision for division of property between his "sisters and brothers or their heirs." In re Edwards, 117 NYS 3. **"Wives and children"** to whom income was to go on death of sons held to include only wives of sons at testator's death, and not any who might become such thereafter. Wolfe v. Hatheway [Conn.] 70 A 645. Where testator directed application of certain dividends for benefit of **disabled firemen and indigent widows** of firemen of a volunteer fire company, but after his death company was disbanded on installation of a paid fire department, surviving members and widows of members dying after disbandment were not entitled to have fund applied for their relief, it appearing testator supposed company would continue in service, and intended to provide relief in case of death or injury of members dying in service. Johnson v. Cook Benev. Institute, 33 Ky. L. R. 772, 111 SW 294.

80. Will construed to give nephew proceeds of a farm only for purpose of education and maintenance, any surplus going to testatrix's husband. Knight v. Collins [Ky.] 113 SW 131.

81. Mistake or uncertainty in description of a legatee will not invalidate bequest if name and description used as applied to facts and circumstances will identify such person from all others. Skinner v. Hemenway, 135 Ill. App. 582. Where legacy was to "the daughter" of sister who had three daughters, evidence held sufficient to show who was intended. Id.

82. See Charitable Gifts, 11 C. L. 604.

tion,[83] mere negative words not sufficing.[84] A gift to a class[85] without naming the members is to those only who are members at testator's death[88] and competent to receive the bequest.[87] Where property is devised for life to an heir with remainder to testator's heirs the mere life use of the first taker will not exclude him from participation in the remainder,[88] unless the life tenant is sole heir and the remainder is devised to "heirs."[89] The word "living," when used with reference to legatees ordinarily, means such as are living at testator's death.[90] Such words as "survivor" or "surviving" will not be given their literal meaning where it would lead to intestacy, inequality, or distribution at variance with the scheme of the will.[91] The rights of pretermitted or posthumous children,[92] and the construction of such words as "heirs," "issue," "children," and the like, are treated elsewhere to avoid confusion and repetition.

(§ 5) *D. Of terms creating, defining, limiting, conditioning, or qualifying the estates and interests created.*[93] *Particular words and forms of expression.*[See 10 C. L. 2002]—The words "heirs,"[94] "legal heirs,"[95] "issue,"[96] "children"[97] "next

**83.** Southgate v. Karp, 154 Mich. 697, 15 Det. Leg. N. 891, 118 NW 600. Presumption is against disherison. Close v. Farmers L. & T. Co., 195 N. Y. 92, 87 NE 1005. Clear words necessary to disinherit (Bond v. Moore, 236 Ill. 576, 86 NE 386), and, even where intention is manifest, heir takes unless property is disposed of to some one else (Id.). Ambiguities should be resolved in favor of equal distribution among heirs. Southgate v. Karp, 154 Mich. 697, 15 Det. Leg. N. 891, 118 NW 600. A direction for conversion of realty into personalty will not exclude heirs unless an intention that the proceeds shall go to the next of kin is clearly manifested. In re Alabone's Estate [N. J. Eq.] 72 A 427.

**84.** Especially as to property undisposed of by the will. Southgate v. Karp, 154 Mich. 697, 15 Det. Leg. N. 891, 118 NW 600. Where remainder after widow's life estate was undevised, it went to testator's children equally, though will stated testator had already given one of such children 30 acres of land, "all I intended to give her by this instrument." Id.

**85.** See post, § 5D, subd. Individual Rights in Gifts to Two or More.

**86.** Heirs of predeceased "brothers and sisters" held not entitled to share. In re Tallmadge's Estate, 60 Misc. 394, 113 NYS 621. Limitation to testator's heirs refers to those who are his heirs at time of his death, unless contrary intention is shown. Over to testatrix's heirs after death of daughters, who had life estates, held to refer to heirs who were such at testatrix's death. Jewett v. Jewett, 200 Mass. 310, 86 NE 308. Contrary intention not manifested by fact that among such heirs were daughters themselves (Id.), or by failure of testatrix to give daughters power of disposition (Id.). "Heirs of my late husband" held to mean those who lived when testatrix died. In re Ruggles' Estate [Me.] 71 A 933.

**87.** Bequest to a class to be equally divided among them inures to benefit of such only as are competent to receive. Will construed to provide for children and issue of deceased children as one class, giving income to children to exclusion of grandchildren, who were too remote. Bartlett v. Sears [Conn.] 70 A 33.

**88.** Smith v. Winsor, 239 Ill. 567, 88 NE 482.

**89.** In such case persons taking are such as answer description of heirs on death of life tenant and latter is excluded. Smith v. Winsor, 239 Ill. 567, 88 NE 482.

**90.** Provision for division of balance among testator's "living" sisters after life tenant's death held to refer to sisters living when will was made or when testator died, and not to such as were still living at death of life tenant. Bryant v. Flanders, 201 Mass. 373, 87 NE 574.

**91.** To four daughters and, in case of death of any, to her issue, and in default of issue to her "surviving" sisters, held not to give sole surviving sister entire property to exclusion of issue of two previously deceased sisters, but one-third to her and remainder to children of deceased sisters per stirpes. In re Fox's Estate, 222 Pa. 108, 70 A 954.

**92.** See ante, § 1.

**93. Search Note:** See notes in 4 C. L. 1932; 15 L. R. A. 300; 68 Id. 353, 447; 1 L. R. A. (N. S.) 397; 2 Id. 580; 3 Id. 898; 4 Id. 948; 5 Id. 323; 7 Id. 592; 8 Id. 1038; 11 Id. 49; 12 Id. 283; 15 Id. 73; 16 Id. 483; 5 A. S. R. 141; 8 Id. 721; 10 Id. 471; 11 Id. 99; 49 Id. 219; 95 Id. 356, 368; 1 Ann. Cas. 882; 3 d. 38, 615, 950; 4 Id. 162, 458; 5 Id. 138; 6 Id. 525, 648; 7 Id. 319, 656; 9 Id. 947, 1143; 10 Id. 176, 490, 920, 1137; 11 Id. 345, 470.

See, also, Wills, Cent. Dig. §§ 1059-1955, 2139-2225; Dec. Dig. §§ 492-756, 819-872; 18 A. & E. Enc. L. (2ed.) 711; 30 Id. 718, 735.

**94.** "Heirs" and "issue" are to be given their technical meaning unless from entire will it is plain that intention of testator was different. Stisser v. Stisser, 235 Ill. 207, 85 NE 240. "Heirs" held to mean children. Cook v. Hart [Ky.] 117 SW 357. "Heirs" and "bodily heirs" held to mean children. Davenport v. Collins [Miss.] 48 S 733. "Heir" held to mean "child" in limitation of estate over should any daughter die "before having or leaving any heir." English v. McCreary [Ala.] 48 S 113. Where, after death of life beneficiary, trust fund was to be divided among testator's "heirs" in accordance with number of children each might then have, per stirpes, "heirs" held to mean children, requiring division among stocks, each stock taking

in proportion to number of children in that stock, each of three children of testator constituting one stock, and children of a deceased daughter another stock. Cook v. Hart [Ky.] 117 SW 357. Widow excluded. Bayley v. Beekman, 117 NYS 88. "Heirs" in connection with personalty means next of kin or blood relatives who take intestate personalty. In re Schnitzler, 61 Misc. 218, 114 NYS 934. To next of kin of testator's housekeeper held to exclude husband. Id. Disposition to "my 'heirs' under and according to intestate laws of Pennsylvania," held to mean not "heirs" in technical sense but those entitled to take personalty as well as realty. In re Line's Estate, 221 Pa. 374, 70 A 791. Heirs of husband taking under wife's will according to laws of descent held to include only husband's nephews and nieces living at testatrix' death, and not grandnieces and grandnephews, laws of descent calling for next of kin in equal degree. In re Ruggles' Estate [Me.] 71 A 933. To grandson for life then to his wife and on death of survivor property to be distributed to grandson's **"right heirs"** as per statute of descent, held to entitle second wife to share, "right heirs" being held to mean "statutory heirs." Peabody v. Cook, 201 Mass. 218, 87 NE 466. Gift over after niece's death to **"heirs of her body begotten"** held to mean "issue" and hence void. Perry v. Bulkley [Conn.] 72 A 1014.

**95.** "Legal heirs" entitled to share in remainder of residue held to include those who at testator's death would be entitled to take by descent in absence of will including widow. Perry v. Bulkley [Conn.] 72 A 1014. Word "legal" or "lawful" before "heirs" does not change legal effect of word "heirs." Stisser v. Stisser, 235 Ill. 207, 85 NE 240. Remainder to "legal heirs of the other children" held to include children of eldest son, testator having used words "heirs," "issue" and "children" interchangeably in sense of children. Id. Where testator bequeaths residuary estate to "legal heirs" of a deceased brother without other or further designation as to who are intended as his beneficiaries, and directs that such residuum "shall fall to and be divided in equal shares among the legal heirs of my deceased brother, and I hereby bequeath and devise the same to them," and at time of making said will one of the sons of testator's deceased brother was dead, leaving heirs, held that all persons who at time of death of "deceased brother" of those who answer description of "legal heirs" of said deceased brother at time of such brother's death are entitled to share in such residuary estate in equal proportion, and if at time of making of will any of such "legal heirs" had died leaving issue surviving testator, such issue shall take share which would have otherwise gone to such "legal heir," had he survived testator. Rev. St. § 5971, controls. Youngblood v. Youngblood, 11 Ohio C. C. (N. S.) 276. **"Heirs at law"** will be given technical meaning unless entire will shows it was used in a different sense such as would exclude widow. Smith v. Winsor, 239 Ill. 567, 88 NE 482. To testator's widow for life then to his "heirs at law," and to latter also if wife predeceased, held to exclude widow. Id. "Heirs" may mean children or some other class of heirs not including all the heirs, where will plainly shows such purpose. Id. Heirs at law held to mean "wives and children" where perpetuity was thereby avoided and context of will showed testator used words in that sense. Wolfe v. Hatheway [Conn.] 70 A 645.

**96.** Primary and usual meaning of word "issue" when used as word of purchase is descendants of every degree and is not equivalent to "immediate issue" which means only children. Bartlett v. Sears [Conn.] 70 A 33. "Issue" in devise over held words of purchase and not of limitation, though when will was made testator was 69 years old and life beneficiary only 13. Id. Where it appears testator used words "heirs," "issue" and "children" interchangeably or synonymously, court may construe them in like manner so as to carry out testator's intention. Stisser v. Stisser, 235 Ill. 207, 85 NE 240. Words held used interchangeably in sense of "children" so as to vest remainder after death of either of testator's three children without issue in his grandchildren including grandchildren who had been given a remainder by another clause of will. Id. "Issue" may mean children only, or include descendants generally, or descendants taking by right of representation, question being one of intention to be gathered from will as a whole according to established rules of construction. Union Safe Deposit & Trust Co. v. Dudley [Me.] 72 A 166. Should be held to import descendants unless will or circumstances shows restricted sense of children. Id. "Lawful issue if any of the body" held to mean lineal descendants taking by right of representation and not per capita. Id. "Their issue" is same as "heirs of their bodies." Wright v. Gaskill [N. J. Eq.] 72 A 108. Gift to "legal issue" of daughter after life estate to her, held gift to her descendants, and not only to her children. Schmidt v. Jewett, 127 App. Div. 376, 111 NYS 680. Judgment that only children were meant held not conclusive on grandchildren yet unborn, they not taking by representation. Id. "Issue" in a will means prima facie "heirs of body." Stayman v. Paxson, 221 Pa. 446, 70 A 803.

**97. "Children"** means descendants in first degree, excluding grandchildren, in absence of satisfactory evidence of contrary intent. Davies v. Davies, 59 Misc. 104, 112 NYS 157; Davies v. Davies, 129 App. Div. 379, 113 NYS 872; Scott's Estate, 37 Pa. Super. Ct. 342; McGlensey's Estate, 37 Pa. Super. Ct. 514. Share over on death of any child without issue, to testator's "children then surviving," held not to include then surviving children of predeceased children. Davies v. Davies, 129 App. Div. 379, 113 NYS 872; Davies v. Davies, 59 Misc. 104, 112 NYS 157. "Children then living" held not enlargeable to include grandchildren, there being nothing in context to authorize it. Frank v. Frank [Tenn.] 111 SW 1119. Where a remainder is given to children of a designated person, gift will go not only to objects living at testator's death but to all who may subsequently come into being before period of distribution. Clark v. Morehouse [N. J. Eq.] 70 A 307. Though as a rule "children" is word of purchase, it

of kin,"[98] "relatives,"[99] "wife,"[1] "widow,"[2] "marrying,"[3] "bequeath" or "devise,"[4] and the like will be given their ordinary meaning in the absence of statute or contrary intent.

*Gifts by implication.*[See 10 C. L. 2064]—Property may pass by necessary implication,[5] but the implication must be so strong as to preclude the idea of any other intention on the part of testator.[6]

is often used in sense of "heirs" and this may be shown by or deduced from entire instrument. Wilson v. Shumate [Ky.] 113 SW 851. Where after life use to son and his wife property was given "to their three children," but they were old and had no children whereas testatrix had three grandchildren, held permissible to construe "their three children" as meaning "my three grandchildren, the children of" the son and his wife, and to disregard as inapt the phrase "the children of my son N. and his wife." Polsey v. Newton, 199 Mass. 450, 85 NE 574. Trust for sister and three named children equally, and in case of sister's death her share to be paid to "her said children" and issue of any deceased, held to mean only children previously designated so as to exclude participation by issue of a child who died before mother. Union Safe Deposit & Trust Co. v. Dudley [Me.] 72 A 166. Where remainder of trust fund was to go to children of testator living at death of life beneficiary, children of any deceased child to take parents' share but deceased child's share to go to surviving children if deceased child left no children, and to testator's grandchildren should there be no surviving children, held, great-grandchild whose parent and grandparent both died before life beneficiary was not entitled to share in distribution of trust fund there being surviving children of testator to take. Blair v. Keese, 59 Misc. 107, 112 NYS 162. Whether **adopted children** are included depends on intention to be determined from circumstances. Lichter v. Thiers [Wis.] 121 NW 153. Granddaughter's adopted child held not included so as to be entitled to remainder after death of granddaughter. Id. Direction to hold property in trust "until the **youngest of my children** becomes of age" held to indicate youngest of entire class surviving testator. In re Mikantowicz's Will, 60 Misc. 273, 113 NYS 278.

**98.** To "next of kin" of testator's housekeeper held to exclude her husband. In re Schnitzler, 61 Misc. 218, 114 NYS 934. Where it appears testator was uncertain as to whether certain relatives were living or dead, it will be presumed, in absence of any reference to statute of descent and distribution, that he intended by use of the words "next of kin" to designate a particular class of persons related to him in an equal degree of consanguinity. Bishop v. Rider, 12 Ohio C. C. (N. S.) 72.

**99.** "Kin," "relative," and "relatives," held prima facie to refer to blood relations only and not a nephew by marriage. Boyd v. Perkins [Ky.] 113 SW 95.

**1.** Wife divorced after execution of will designating her "my wife Ida" held entitled to take under will. In re Brown's Estate [Iowa] 117 NW 260. A third of certain property to a nephew and a third "to his wife" held to mean nephew's divorced wife in view of all circumstances and Code Civ. Proc. § 1340, providing for corrections of omissions where no person exactly answers description of beneficiary. In re Gruendike's Estate [Cal.] 98 P 1057.

**2.** Complainant held entitled to take under will as "widow" though she did not become widow of person who was her husband when will was executed. Crocheron v. Fleming [N. J. Eq.] 70 A 691.

**3.** "Marrying again" in event of which an estate should terminate held to include a polygamous marriage, devisor and devisee being polygamists. In re Poppleton's Estate, 34 Utah, 285, 97 P 138.

**4.** By Ky. St. 1903, § 467, providing that "legatee" and "devisee" shall be held to convey same idea, and "bequeath" and "devise" to mean the same, and that "bequest" and "legacy" shall include either realty or personalty, such words have been made interchangeable. Roberts v. Chenoweth, 33 Ky. L. R. 1081, 112 SW 625. In direction that wife and three daughters should share equally in distribution of estate after the "bequests" already made should be complied with, "bequest" referred to devise of family residence and legacy of $400 to grandchild. Thomas' Ex'x v. Thomas' Guardian, 33 Ky. L. R. 700, 110 SW 853.

**5.** Earle v. Coberly [W. Va.] 64 SE 628. Trust to daughter for life and, in case of her death without issue, proceeds of her share to be equally divided among her brothers and sisters, held to give remainder to daughter's children, should she have any. Close v. Farmers' L. & T. Co., 195 N. Y. 92, 87 NE 1005. See, also, Real Property, 12 C. L. 1623.

**6.** Earle v. Coberly [W. Va.] 64 SE 628. Personalty held to pass absolutely under words giving daughter power to dispose of same as she thought best. Id. Devises by implication can be given effect only in cases of such clear necessity that from the will itself no reasonable doubt of intention can exist. Bond v. Moore, 236 Ill. 576, 86 NE 336. Cannot be inferred from silence of will. Id. To son for life, but over should he die without issue, held not to imply remainder in his children, should he have any. Id. To testator's widow for life, remainder to son's children, held not to infer that children should take if testator survived his wife, or that sons should take if wife survived testator and sons had no children. Haywood v. Spaulding [N. H.] 71 A 219. Where on death of widow who was life tenant, sons' children, who were remaindermen, were not yet born, sons were not entitled to income either before or after children's birth. Id. To son, and over in default of lineal descendents, held not sufficient to create interests in lineal descendents. Anderson v. United Realty Co., 79 Ohio St. 23, 86 NE 644.

*Quality of estate, whether legal or equitable, use, trust or power.* See 10 C. L. 2065 The quality of the interest conferred must be determined from the terms of the particular will.[7] An executor will not take individually unless the intention to have him do so is plainly manifested.[8]

*Estates and interests created.* See 10 C. L. 2065—Estates in realty and personalty are fully treated elsewhere.[9]

*Principal, income, and support.*[10]—Accumulations of income [10a] and interest on legacies [11] are treated elsewhere. The provisions of the will control in determining whether principal or income is given,[12] the right to interest, income, or other support,[13] the source,[14] computation and extent thereof,[15] the time of payment [16] and the right to sell or resort to the corpus.[17]

**7.** See, also, Trusts, 12 C. L. 2171; Powers, 12 C. L. 1409. Will construed not to create a trust estate but to give widow all testator's property without restriction, and daughters whatever should remain at her death. Lesiur v. Sipherd [Neb.] 121 NW 104. Devise to executors "to be transferred" by them to certain trustees held to mean only that executors should take possession of and transfer the property to trustees in due course of administration, and not to create in executors an invalid trust to convey. In re Peabody's Estate [Cal.] 97 P 184. **Precatory** words held mandatory, and trust failing for indefiniteness, property held to pass intestate as to remainder after devisee's death. Gilchrist v. Corliss [Mich.] 15 Det. Leg. N. 971, 118 NW 938.

**8.** Directions to sell realty to best advantage and that all residue should be used to best advantage of executor held not to plainly confer individual gift. Christman v. Roesch, 132 App. Div. 22, 116 NYS 348. That intestacy is not favored held not to overcome weightier reasons for not allowing executor to take unless intent is plain. Id. Residue to executors "for their use and benefit" with request that a portion be devoted to masses and charity held to executors in their own right. In re O'Regan's Will, 117 NYS 96.

**9.** See Real Property, 12 C. L. 1623. Also, Property, 12 C. L. 1435.

**10.** See 10 C. L. 2065, 2666. See, also, Property, 12 C. L. 1435, and Trusts, 12 C. L. 2171.

**10a.** See Perpetuities and Accumulations 12 C. L. 1316.

**11.** See Estates of Decedents, 11 C. L. 1275.

**12.** Widow held entitled to specific personalty in connection with realty, and not merely interest from proceeds of sale. In re Knowles' Estate, 148 N. C. 461, 62 SE 549. Where on death of wives and children of testator's sons property was to go to son's grandchildren, provision for grandchildren should be read distributively so that fund, income of which was payable to either son and thereafter to his wife and children, should go to grandchildren of that son as principal after death of his wife and children. Wolfe v. Hatheway [Conn.] 70 A 645.

**13.** Will construed to give widow interest on $40,000, part of a trust fund, as a specific bequest vesting on testator's death but not payable until one year from that date. Doherty v. Grady [Me.] 72 A 869. Widow held entitled to simple interest on amount of defaulted instalment of interest on trust fund from time it became due until paid. Id. Will held to require that, in event of death of widow within 20 years, interest on trust fund until expiration of that time be divided equally among the legal heirs of testator living on widow's decease, and paid to them in same manner as it was paid to widow. Id. Former holding refusing interest on annual allowance to defendant of $5,400 for support adhered to. Smullen v. Wharton [Neb.] 121 NW 441. Remainder to son's children at widow's death does not give sons income before or after birth of children. Hayward v. Spaulding [N. H.] 71 A 219. Surplus of income over specified sums given two daughters for life held to go to such daughters until death of one of them, not to certain charities given by way of remainder. In re Ferguson's Estate [Pa.] 72 A 896.

**14.** Former opinion amended so as to allow defendant's support from trust estate instead of from income. Smullen v. Wharton [Neb.] 121 NW 441.

**15.** Income under a will is computable from time of testator's death unless a contrary intent is shown. Bishop v. Bishop [Conn.] 71 A 583. Directions for division of estate as soon after testator's death as convenient and lawful, and payment to beneficiaries of income from such shares or sums set out of such income, held not to render rule inapplicable. Id. Trust provisions for maintenance are usually construed to intend the application of the income from testator's death. In re Harris, 61 Misc. 563, 116 NYS 270. Will held to give widow, from testator's death to time when contemplated trust should be actually established, interest on principal set apart for her equivalent to rate allowed by the trustee. Doherty v. Grady [Me.] 72 A 869. Where court fixed a stated sum per annum for support and maintenance of widow under will, legal effect was same as if such sum had been written in will by testator, and widow was entitled to such amount from testator's death subject to dedication of sums already received for support under will. Smullen v. Wharton [Neb.] 119 NW 773. Where life beneficiary under will was given privilege of occupying premises with his brothers instead of receiving a third of rents and profits, income did not cease until occupation privilege was exercised, and choice was not irrevocable. Cashman v. Bangs, 200 Mass. 498 86 NE 932.

**16.** Widow held entitled to receive interest on part of trust fund whenever trust company declared dividends of interest. Doherty v. Grady [Me.] 72 A 869. Where a sum of money was left widow to be paid as it became necessary for her needs, widow was entitled to determine character of needs

*Legacies.*See 10 C. L. 2065—A legacy is a testamentary gift of personalty,[18] and is usually created by the use of words or phrases expressing testator's intention to invest the legatee with title to some specific personal property on testator's death.[19] It may be either general or specific.[20] A specific legacy carries with it all accretions.[21] An ordinary legacy is not payable until the expiration of a year from testator's death,[22] and if money, no interest accrues thereon in the meantime,[23] but, by express provision in the will, a legacy may consist of a specified sum of money plus interest thereon from a specified date.[24] Additional legacies given by codicils become subject to the same conditions as those which apply to the original legacies,[25] unless a contrary intention is indicated.

*An annuity.*See 8 C. L. 2338

*Release of debts.*See 8 C. L. 2337—Proof of a legacy for an amount smaller than the debt owing by the legatee is not sufficient.[28] Intent controls as to who are included in a class whose debts are canceled.[27]

*Cumulative legacies.*See 8 C. L. 2337—While the general rule is that the repetition of a legacy is the same instrument, is merely substitutionary,[28] and that repetition

and time when payment was necessary to meet them. In re Oshe's Will, 137 Wis. 474, 119 NW 93.

17. Trustee substituted under statute on death of trustee named in will held not authorized to exercise discretion as to using part of principal for benefit of cestui que trust, which original trustee could exercise. Whitaker v. McDowell [Conn.] 72 A 938. Opinion in Hamilton v. Hamilton [Iowa] 115 NW 1012, did not determine right of life tenant under will to sell for his support without order of court. Hamilton v. Hamilton [Iowa] 118 NW 375. Will held to authorize trustee to take from principal for care and support of testator's son, should income of estate prove inadequate. McGill v. Young [N. H.] 71 A 637. Widow held authorized to pay annuity to testator's sister out of corpus of estate. In re Van Valkenburgh's Will, 60 Misc. 497, 113 NYS 1108. Will held not to authorize guardian of idiot children to resort to corpus. Hess v. Hess, 108 Va. 483, 62 SE 273. To six idiot children in fee, and expression of desire that defendant act as guardian and see they were taken care of, authorizing him to apply proceeds of the property to their benefit, held not to authorize appropriation of corpus. Hess v. Hess, 108 Va. 483, 62 SE 273.

18, 19. Harding's Adm'r v. Harding [Ky.] 116 SW 305. Clause held not a bequest or creation of a legacy, but only evidence of an indebtedness of testator to his wife. Id. Gift to mother if she survived testatrix held not operative, mother having predeceased. Ege v. Hering, 108 Md. 391, 70 A 221.

20. A specific legacy is a gift of a specific part of testator's estate identified, and distinguished from all things of same class and capable of being satisfied only by delivery of that particular thing. Kincaid v. Moore, 138 Ill. App. 23. Legacies of specified sums to nephews and nieces, if testatrix was at her death possessed of sufficient personalty, held general. In re Corby's Estate, 154 Mich. 353, 15 Det. Leg. N. 798, 117 NW 906. Described real estate and testatrix' household furniture held specific legacies notwithstanding residuary devise to some legatee. In re Corby's Estate, 154 Mich. 353, 15 Det. Leg. N. 798, 117 NW 906. Devise of residue to persons named in equal shares held specific as to land owned by testator at time of execution of will and at death. Rice v. Rice [Iowa] 119 NW 714. Life use of "the $500" bequeathed to testatrix by her brother held specific in form, but general if fund could not be identified when will was made. In re Getman, 128 App. Div. 767, 113 NYS 67. To niece, insurance policies held by testator on life of niece's husband, niece to pay premiums till policies matured, held specific. In re Pruner's Estate, 222 Pa. 179, 70 A 1000. Subject of legacy specific in form was presumptively identifiable when will was made, and, where legatee contends legacy is general, burden is on him to show facts existing at that time which rendered it not specific. In re Getman, 128 App. Div. 767, 113 NYS 67.

21. "My life insurance of $10,000 in M. Life Insurance Company" held specific though only insurance testator had was $10,000 in another company. In re Gan's Estate, 60 Misc. 282, 112 NYS 259. A specific legacy of shares of stock includes accretions, from time of testator's death, (Thayer v. Paulding, 200 Mass. 98, 85 NE 868), but a general legacy does not (Id.). Certain number of shares of stock, "together with all rights and privileges which may now or hereafter appertain to the same," held specific so as to entitle legatee to dividends accruing after testator's death and before distribution. Id.

22. Thayer v. Paulding, 200 Mass. 98, 85 NE 868.

23. See Estates of Decedents, 11 C. L. 1275.

24. Subsequent clauses held not to overcome express provisions for interest from date anterior to death of testator. In re Duncanson's Estate [Iowa] 120 NW 88.

25. In re Gans' Will, 114 NYS 975. See post, § 5F, Abatement, etc.

26. In action on two notes each for $500, mere proof of a legacy of $100 held not proof of extinguishment of plaintiff's claim, pro tanto or otherwise. Lynch v. Lyons, 131 App. Div. 120, 115 NYS 227.

27. Provision for cancellation of notes owing by any "kin" and giving of amounts thereof to such "relatives" held to embrace only blood connections. Boyd v. Perkins [Ky.] 113 SW 95.

28, 29. In re Moore, 131 App. Div. 213, 115 NYS 684.

in a second instrument such as a codicil is cumulative,[29] the question is always one of intention to be determined from the documents themselves and the circumstances of the case.[30]

*Vesting.*[See 10 C. L. 2066]—The time of the vesting of estates and interests is fully treated elsewhere.[31]

*Possession and enjoyment.*[See 10 C. L. 2067]—Where personalty is bequeathed for life with remainder over, only the income should be paid to the life beneficiary.[32]

*Advancements.*[See 10 C. L. 2067]—While the doctrine of advancements generally applies only in case of intestacy,[33] it may also apply where decedent leaves a will,[34] and, where testator's intention is clear that sums advanced shall be deducted from legacies or devises, such intention must control.[35] Testator may provide that no gift shall be treated as an advancement unless charged on his account books.[36] Charges on testator's books referred to as advancements may be canceled by testator without the making of any new will, and turned into absolute gifts.[37] Money advanced to others than the legatee may be directed to be deducted.[38]

*Individual rights in gifts to two or more.*[See 10 C. L. 2067]—Since in the absence of estoppel[39] the respective rights of several beneficiaries are governed by the particular expressions used,[40] they will often be materially affected according as these

30. Bequest held substitutionary and not cumulative, though codicil stated it was to be taken in addition to will. In re Moore, 131 App. Div. 213, 115 NYS 684.

31. See Property, 12 C. L. 1435; Real Property, 12 C. L. 1623; Perpetuities and Accumulations, 12 C. L. 1316.

32. Property is to be converted and invested by executors and income only paid to life tenant. Ott v. Tewksbury [N. J. Eq.] 71 A 302. Will held not to disclose intention that widow should have possession of principal though testator expressed desire that out of personalty widow make certain gifts. Id.

33. In re Bresler's Estate [Mich.] 15 Det. Leg. N. 1097, 119 NW 1104. See, also, Estates of Decedents, 11 C. L. 1275.

34. In re Bresler's Estate [Mich.] 15 Det. Leg. N. 1097, 119 NW 1104. While doctrine advancements applies primarily in distribution of intestate estates, one may in his will so refer to previous advancements and gifts that they must be considered when his estate is finally distributed. In re Harris' Estate, [Vt.] 72 A 912. Certain gift and advancement accounts held required to be considered in ascertaining advancements directed to be deducted. Id. Where testator and a son agreed that latter should transfer stock to former and receive credit on his advancement account, and agreement was carried out, subsequent erasure of the credit by testator held not to affect son's rights. In re Harris' Estate [Vt.] 72 A 912. Not so as to another son who did not transfer any stock. Id.

35. In re Bresler's Estate [Mich.] 15 Det. Leg. N. 1097, 119 NW 1104. Will bequeathing money to daughter less "the amount she may be owing on my books" held to disclose intention that sums advanced to daughter's husband should be deducted. Id. "May be owing" construed and will held to require deduction of advancements already made when will was executed, no advancements having since been made. Id. "On my books" held to refer to books of account kept in course of business. Id. Account books held admissible in evidence to show advancements made. Id. Clearly expressed intention that advances made by testator after execution of will shall be taken into account will be carried into effect. In re Harris' Estate [Vt.] 72 A 912. Subsequent advances held properly considered. Id. Testator's payment of note given by firm of which devisee, his son, was member, and indorsed by father, held an "advance" within will directing deduction of any advances made to son. Ebeling v. Ebeling, 61 Misc. 537, 115 NYS 894. Where daughter was to have one fourth of her share immediately and another part thereof on attaining $50, and will provided that any advancement should be added to and deemed part of estate and should be deducted from share of child to whom made, held, there being only two children, the one-half to go to daughter should be ascertained by dividing in two estates, plus advancement to her, and advancement should be deducted from the one-half share thus ascertained, and remainder managed and divided by trustees as prescribed. In re Ruggles' Will, 137 Wis. 439, 119 NW 97.

36. In re Harris' Estate [Vt.] 72 A 912.

37. Cancellation of interest charges appearing on books showing advances. In re Harris' Estate [Vt.] 72 A 912.

38. No legal or moral objection to direction for deduction from legacy to daughter of sums advanced to her husband. In re Bresler's Estate [Mich.] 16 Det. Leg. N. 1097, 119 NW 1104.

39. Where beneficiary only temporarily acquiesced in construction put on will by executors and speedily took steps to assert his rights as soon as advised thereof, he was not estopped to insist on judicial construction. Deppen's Trustee v. Deppen [Ky.] 117 SW 352.

40. Where will provided that, if niece should die without issue, homestead should pass to children of an uncle and that such children should participate equally with testator's legal heirs in balance, held children took half of balance, and testator's heirs other half, equally. Perry v. Bulkley [Conn.]

direct a per capita or per stirpes distribution.[41] Of two permissible constructions,

72 A 1014. Where first codicil gave half of residue which included a homestead to a sister and other half to a niece without assigning homestead, but second codicil provided that, on niece's death without issue, homestead should go to certain children, niece impliedly took homestead as part of her share, and on her death it passed to the children. Id. Will held to give widow and each of six children a one-seventh interest in estate including land mentioned in second item thereof, and to widow also privilege of remaining on place referred to in said item for life or widowhood. Black v. Nolan [Ga.] 64 SE 647. Where will directed distribution of residue among legatees "in proportion their respective legacies bear to total of all said legacies," and some legatees took land and money, others money and personalty, and others money only, held, in determining who should share in residue only, money legacies should be considered, words "devise" and bequeath being used indiscriminately, and no value having been placed by testator on land or personalty, much of which latter appeared to have been given as mementos. Roberts v. Chenoweth, 33 Ky. L. R. 1081, 112 SW 625. Church given residue up to $10,000 held entitled to share in balance. Id. "To my heirs and the heirs of my late husband H. R., 'those standing in the same degree of relationship either to myself or said H, to share alike according to the laws of descent in this state,'" held to divide estate into two equal parts, one part to go to testatrix' heirs and the other to go to her husband's heirs, and to include in each class such persons, and give to each person such share, as the laws of descent should direct. In re Ruggles' Estate [Me.] 71 A 933. Shares of trust beneficiaries, and their issue, in income from bonds, stocks, and bank deposits, determined, some of the beneficiaries having died. Union Safe Deposit & Trust Co. v. Dudley [Me.] 72 A 166. Expression of testator's "desire" that designated part of residue be held by son held not a mere provision for contingency that whole residue be divided, nor expression of hope that beneficiaries would use bounty in certain manner, nor a mere direction for occupancy of son pending division (Moseley v. Bolster, 201 Mass. 135, 87 NE 606), but an operative disposition of designated property to son vesting interests in children at death of testator, giving to son such property and rest to him and testator's two daughters, as tenants in common, in such proportions that, taking into account value of designated property, son's share should be one-half, and share of each daughter one-fourth of all (Id.). Will giving children each a third of land and buildings thereon held to create a common home for children without division of buildings or their value. Barbo v. Jeru [Mich.] 15 Det. Leg. N. 1064, 119 NW 580. Daughter held to take land on which building stood so that sons had no undivided interest therein. Id. Will construed to give wife personalty on farm given to her for life, and to give children testator's money, notes, and mortgages. Gloede v. Rautenberg [Mich.] 16 Det. Leg. N. 125, 120 NW 989. Where realty was devised to children charged with payment to widow of one-third its value and was subject to incumbrances, widow was entitled to one-third of value after deducting mortgages assumed by testator when he purchased, and without deduction for amount of a mortgage made by him and for which personalty was liable. Hetzel v. Hetzel [N. J. Eq.] 71 A 755. An estate was devised in equal parts to A, B, C, D, E, F, G, the heirs of the body of Rebecca H. Taylor per stirpes and not per capita, H, I, J. Held, it having been shown that E, F, and G are heirs of Rebecca H. Taylor, the phrase "the heirs of the body of Rebecca H. Taylor per stirpes and not per capita," must be construed as a separate bequest, and not to be descriptive of E, F, and G, who each take a separate share of the estate and also a share jointly. Taylor v. Taylor, 7 Ohio N. P. (N. S.) 297. Direction "to distribute equally to my legal heirs" held direction to distribute in accordance with statutes of descent and distribution. Barr v. Denney, 79 Ohio St. 358, 87 NE 267. Gift of third of a farm to each of three devisees held not reduced as to any of them by codicil providing that one should buy out the others and valuing farm at about $6,000. In re Moore's Estate [Wis.] 120 NW 417. Distribution in light of surrounding circumstances held proper which awarded to testator's relatives an amount equal to value of house and lot owned by wife and divided residue between estates of testator and his wife. Crick's Estate, 35 Pa. Super. Ct. 39. Will giving widow house and lot so long as she desired to occupy same, and directing that "legal share" of all property be paid to her out of estate, and that entire estate be disposed of in three years, held to give widow absolutely one-half of entire estate as personalty. In re Dull's Estate, 222 Pa. 208, 71 A 9. Testator held not to intend that trust for widow and children should terminate on widow's remarriage but that, instead of widow's receiving four-fifths of income as previously, she was thereafter to receive only one-third. In re Horn's Estate [Pa.] 72 A 791.

41. Distinction in regard to right of beneficiaries to take per stirpes or per capita depends on whether will divides them into classes in which individuals of each class take equally, or establishes only one class all members of which take equally. Doherty v. Grady [Me.] 72 A 869. Heirs of husband taking under wife's will according to laws of descent held to take **per capita.** In re Ruggles' Estate [Me.] 71 A 933. Principal of trust fund held required to be divided per capita among legal heirs. Doherty v. Grady [Me.] 72 A 869. Words "equally to be divided," "to be equally divided share and share alike," and similar expressions, usually call for per capita distribution. Brundage's Estate, 36 Pa. Super. Ct. 211. "Then to my brothers' and sisters' children, in equal proportions, share and share alike," held per capita. Id. Devise to an individual by name and to others as a class is to all per capita, and not per stirpes. Rogers v. Morrell [S. C.] 64 SE 143. To H, testator's son, and to W, L, and G, children of a predeceased daughter, "to be equally divided between them," held per capita, "between" meaning "among." Id. Where, on death of devisee given use of a house and lot for life, property was to be sold and proceeds divided "between" testator's wife's brother

that which results in equality will be adopted,[42] except where unequal division is clearly called for,[43] but the presumption is against equal shares if the beneficiaries are of different degrees of relationship.[44] A devise to "heirs" designates not only the persons who take but the manner and proportions of their taking,[45] unless a different intention is indicated.[46] Whether a gift is distributive or to a class[47] is usually a question of intention.[48] Where the gift is to a class, the right of survivorship is implied.[49] Children mentioned by name take as individuals.[50]

and children and granchildren of deceased sister, devisees took per capita. In re Kleeman, 61 Misc. 560, 115 NYS 982. Where direction was for division among testator's "heirs" in accordance with number of children each might have **per stirpes,** it required division among stocks in proportion to number of children in that stock, each of three children of testator constituting one stock and children of a deceased daughter another stock. Cook v. Hart [Ky.] 117 SW 357. "Lawful issue of body" held to mean lineal descendants taking by right of representation per stirpes and not per capita. Union Safe Deposit & Trust Co. v. Dudley [Me.] 72 A 166. Will construed to require division of estate into four parts, one each to a brother and two sisters, if alive, otherwise to their respective issues, and remainder to children of deceased brother then living, issue of any deceased child to take parents' share. In re Brownell, 60 Misc. 52, 112 NYS 597. Will construed to disclose intention to give grandchildren daughters' shares, after latter's death, per stirpes and not per capita. In re Collins, 116 NYS 243. Under direction for division among devisee's heirs at law, at his death distribution should be per stirpes, it appearing heirs were nephews and nieces and issue of a deceased nephew. Nightingale v. Phillips [R. I.] 72 A 220. Farm to nephew and niece or survivor for their lives, and after their death to their issue in fee, held to give surviving children per stirpes. Wright v. Gaskill [N. J. Eq.] 72 A 108. To nephew and "heirs" of deceased niece equally held to give nephew an undivided half, and half to heirs of niece per stirpes. Farley v. Farley [Tenn.] 115 SW 921.

**42.** Thomas' Ex'r v. Thomas' Guardian, 33 Ky. L. R. 700, 110 SW 853; Deppen's Trustee v. Deppen [Ky.] 117 SW 352. If leading feature of will is equality or impartiality, court will lean in case of doubt to such construction as will carry out scheme of equality. Wolfe v. Hatheway [Conn.] 70 A 645. Will not be presumed testator intended to prefer one child over others. Cornwall v. Hill [Ky.] 117 SW 311. Will construed in light of testator's property and contemplated settlement with creditors held to disclose intention to divide estate equally among three children so as not to entitle daughter to a third interest in a factory before division. Id. See, also, post, 5D, subd. Individual Rights in Gifts to Two or More. Residue in trust to widow for life, remainder to be divided between all children of testator's brothers and sisters and W. then living, share and share alike, issue of any deceased children to take share of parent, held to entitle children of W. to share equally with children of brothers and sisters of deceased. Gaskill v. Weeks, 154 Mich. 223, 15 Det. Leg. N. 706, 117 NW 647. Where residue was expressly given to nephews and nieces equally, fact that one preceding paragraph giving a niece a specific legacy provided it should be in addition to her share in residue while another paragraph giving another niece a specific legacy contained no such provision did not prevent equal distribution among all nephews and neices. In re Rutter, 59 Misc. 326, 112 NYS 277.

**43.** Grandchild held entitled to only $400. Thomas' Ex'x v. Thomas' Guardian, 33 Ky. L. R. 700, 110 SW 853.

**44.** Grandnieces and grandnephews held not to take equally with surviving nieces and nephews. Bayley v. Beekman, 117 NYS 88.

**45.** Law presumes intention that they take rules of descent. Doherty v. Brady [Me.] 72 A 869.

**46.** Such as is disclosed by words "in equal shares" and the like. Doherty v. Grady [Me.] 72 A 869. To "legal heirs in equal shares," "in equal shares to my legal heirs," held to designate but one class to take in equal shares. Id.

**47.** Request to a number of persons not named but answering a general description is gift to them as a class. "To my brothers' and sister's children" passed property to all the children as one class. Brundage's Estate, 36 Pa. Super. Ct. 211. Gift to a class is of an aggregate sum to a body of persons uncertain in number at time of gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions, share of each being dependent for its amount on actual number. Clark v. Morehous [N. J. Eq.] 70 A 307; In re Barret's Estate, 116 NYS 756. Where, after naming residuary legatees, testatrix added "all brothers of my deceased husband J. B.," they took as individuals, not as a class. Id.

**48.** Whether gift is to class or distributive is a question of intention. Saunders v. Saunders' Adm'rs [Va.] 63 SE 410. Remainder to be divided equally among testator's ward and children of a brother, issue of any deceased child to take parent's share, held to a class. Id. Pecuniary legatees held to take under residuary clause individually, and not as a class, where they were clearly indicated though not mentioned by name; hence, share of one dying before testatrix passed to latter's next of kin, and not to surviving residuary legatees. Dresel v. King, 198 Mass. 596, 85 NE 77.

**49.** In this connection see post, subd. Lapse, Failure and Forfeiture. Where property is given to children as a class with clear idea of survivorship, court cannot include within class descendants of deceased children. Davis v. Davis, 129 App. Div. 379, 113 NYS 872. Surviving children held not to take share of children who predeceased testator, where will created tenancy in common by devising to children by name. In re Kummenacker, 60 Misc. 55, 112 NYS 596.

**50.** Carter v. Carter, 234 Ill. 507, 85 NE 292.

*Conditions* See 10 C. L. 2068 forfeiting the interests of contesting legatees are valid,[51] and other conditions or restrictions will also be recognized,[52] if not contrary to public policy or otherwise invalid.[53]

*Election for or against will.* A beneficiary cannot claim both under and against a will,[54] but is put to an election whenever inconsistent rights exist [55] and whenever the will manifests an intention to require an election.[56] It is presumed a testator knew he could not dispose of his wife's property without her consent,[57] and also that he did not intend to make any such dispositon,[58] but for the purpose of determining the necessity for election, his actual intent must prevail over these presumptions.[59] In the absence of statute requiring written election,[60] any act

51. See post, Lapse, Failure and Forfeiture.

52. Estates on condition or limitation, see Real Property, 12 C. L. 1623. "Will and desire" held equal to "I direct" so as to prevent conveyance of realty devised to sons until oldest son should be 35. Girdler v. Girdler [Ky.] 113 SW 835. Voluntary separation of testator's daughter from her husband held not within testamentary provision entitling her to capital of trust in her favor when her husband should die or upon permanent and legal separation from him. Coe v. Hill, 201 Mass. 15, 86 NE 949. Adopted son held to have fulfilled condition that he remain with testator's wife until he should be 21 and behave himself as a son towards her. McMahan v. Hubbard [Mo.] 118 SW 481. Devise of remainder to niece, provided she lived with testatrix' husband until she became of age or married, held not defeated because husband's home was broken up because of his insanity and niece compelled to leave without her fault. Lynch v. Melton [N. C.] 64 SE 497.

53. Income from trust fund to daughter, and capital also on death of her husband or upon permanent and legal separation from him, held not invalid as founded on condition precedent intended to bring about daughter's separation from husband. Coe v. Hill, 201 Mass. 15, 86 NE 949. See 10 C. L. 2068, and, also, Election and Waiver, 11 C. L. 1162.

54. One cannot hold property under a will and at same time deny its validity and seek to have it declared void. Del Campo v. Camarillo [Cal.] 98 P 1049. Where **husband** elected to take fee title to homestead, he could not thereafter claim homestead in the property. Jarboe v. Hayden [Ky.] 117 SW 961. Where **widow** elects to take life interest in a house and lot under will, she cannot also claim compensation against will for money advanced testator for construction of house. Bradshaw v. Butler, 33 Ky. L. R. 531, 110 SW 420. Widow taking under will could not insist on repugnant homestead rights. Stoepler v. Silberberg [Mo.] 119 SW 418. Her heirs could not withdraw the acceptance and elect to take under statute. Id. Acceptance of provisions of will held bar to claim of dower in lands conveyed by husband during coverture by deed of warranty in which wife did not join. Howe Lumber Co. v. Parker, 105 Minn. 518, 117 NW 518. Widow held not entitled to take under will and yet retain her interest in land conveyed by husband without wife's joinder, such intention not clearly appearing from will as required by Gen. St. 1894, § 4472. Howe Lumber Co. v. Parker, 105 Minn. 518, 117 NW 518.

55. Surviving husband must elect between provision in wife's will and statutory rights. Robertson v. Schard [Iowa] 119 NW 529. Under Burns' Ann. St. 1901, § 2642, in order that a husband may profit by wife's will devising all her land to him, he must elect to take such devise within 90 days after probate. Aneschaensel v. Wayman [Ind. App.] 85 NE 788. Having failed, he took only one-third and could convey no more. Id. Confirmation of probate relating back to time when will was lodged with clerk, where will was offered for probate in 1893, law of 1891 (Burns' Ann. St. 1908, § 3016), controlled though probate was not confirmed until December 1901. Id. Doctrine of election applicable when testator devises A's property to B and at same time gives his own to A held not applicable where mortgagee holding legal title to land devised part of it to holder of equity of redemption, especially where devisee was feme covert and entitled to full disclosure of value of land and her right to redeem. Rich v. Morisey, 149 N. C. 37, 62 SE 762. Legacies to children recited to be in payment of residue of life estate given testator by wife's will, which gave life estate to testator with remainder to children, held not to require children to elect between the two wills, testator having reference only to income from life estate unexpended at his death. In re Pearce's Estate, 53 Misc. 215, 104 NYS 469.

56. Will held to show husband's intention to dispose of entire community property so as to require widow to elect. In re Vogt's Estate [Cal.] 98 P 265. Widow required to elect where husband's intent to dispose of entire community property is clear and where taking both under law and will would defeat intention. Id. Will devising testatrix' property to trustee to use income as they deem best for husband's benefit, and authorizing trustees to convey to husband in their discretion, puts husband to election. Robertson v. Schard [Iowa] 119 NW 529.

57, 58. Community property. In re Vogt's Estate [Cal.] 98 P 265.

59. Question as to his intention to devise entire community property. In re Vogt's Estate [Cal.] 98 P 265.

60. Under Pub. St. §§ 2925, 2935, requiring written election by widow to waive provisions of husband's will within eight months after will is proved, and providing that a husband may waive provisions of wife's will "as a widow may waive the provisions of her husband's will," verbal notification to court on presentation of will for probate held insufficient where not followed by written waiver within time allowed by statute. In re Baker's Estate, 81 Vt. 505, 71 A 190.

plainly indicating an intention to elect will suffice for that purpose.[61] Want of consideration[62] or fraud vitiates an election,[63] and an election made under and in pursuance of an illegal contract cannot be sustained,[64] but the fact that a widow elects pursuant to advice of her attorney does not invalidate her action.[65] A husband's creditors cannot control his election.[66] A widow's right of election against the will is personal and not assignable.[67] Appraisement is sometimes provided for by statute when a widow renounces the will of her deceased husband.[68] A widow who elects against the will usually takes as in case of intestacy.[69] A widow's renunciation of her deceased husband's will is ineffectual to give her dower in lands in other states.[70]

*Charges, exonerations, and funds for payment.* See 10 C. L. 2069—Property devised or bequeathed is often charged with the payment of debts,[71] legacies[72] or the per-

**61.** Husband's written consent to approve of report of trustees holding property for him under wife's will held election to take under will, statute not requiring written election. Robertson v. Schard [Iowa] 119 NW 529. Widow's acceptance of testamentary provisions, qualification as executrix, and announcement on various occasions that she had an estate under will, held election. Storpler v. Silberberg [Mo.] 119 SW 418.

**62.** If there is no property on which husband's will can operate as against widow's statutory rights, her election is without consideration, and no formal renunciation of will is necessary to confirm her title under the law. Storpler v. Silberberg [Mo.] 119 SW 418.

**63.** Old, feeble, and uninformed widow persuaded by son to make improvident election under will held entitled to equitable relief against consequences, especially where estate had not yet been closed. Eddy v. Eddy [C. C. A.] 168 F 590. Year within which widow was required to elect under Mich. Comp. Laws, § 9301, did not begin to run until discovery of fraud, hence no bar. Id. Court having jurisdiction to set aside election would also take an account and determine amount widow was entitled to, estate being still unsettled. Id. Books of business concern in which widow was interested, held admissible as bearing on disparity between widow's statutory interest and what she received. Id.

**64.** Election against husband's will held not made pursuant to contract void as against public policy merely because it appeared that widow had assigned her interest in estate to secure agreement with her attorney for contingent fee and advancements, right of election not having been assigned, agreement for contingent fee being valid, and it not appearing that but for contract election would not have been made. In re Service's Estate [Mich.] 15 Det. Leg. N. 990, 118 NW 948.

**65.** In re Service's Estate [Mich.] 15 Det. Leg. N. 990, 118 NW 948.

**66.** Robertson v. Schard [Iowa] 119 NW 529. Husband could elect to take under will creating trust for him. Id. Immaterial that the two estates are not so inconsistent as to require election. Id.

**67.** Net presumed right of election was intended to be included in widow's assignment of her interest in husband's estate as security for attorney's services. In re Service's Estate [Mich.] 15 Det. Leg. N. 990, 118 NW 948.

**68.** Under Code 1906, § 5089, any person interested in estate or connected therewith as executor may institute proceedings for valuation by commissioners of wife's estate, and determination of her portion of husband's estate should be on her renunciation of husband's will. Jones v. Jones [Miss.] 49 S 115. All interested persons must be made parties. Id. Proceedings cannot be brought within one year after grant of letters. Id.

**69.** Where widow takes dower and distributive share under statute, her share should be ascertained as if husband had died intestate leaving children and can neither be increased nor diminished by will. Geiger v. Bitzer [Ohio] 88 NE 134. Doctrine of equitable conversion can have no application in ascertaining her share. Id. Overruling Hutchings v. Davis, 68 Ohio St. 160, 67 NE 251. Laws 1901, p. 613, c. 113, § 1, amending Pub. St. 1901, c. 195, § 10, which provided that widow waiving will should have one-third of personalty if husband left issue, and one-half if he left no issue, by providing she should have all if it did not exceed $1,500, and $1,500 if it exceeded that sum but not $3,000, held applicable only to clause two relating to widow's rights in case husband should leave no issue. Healey v. Wheeler [N. H.] 72 A 753. Rule that, where a testater leaving no child or parent devises realty to wife for life remainder over and wife elects to take under statute, she takes in fee a third of testater's land, under Act May 14, 1852, §§ 17, 27, Burn's Ann. St. 1908, §§ 3014, 3029, and remaining two-thirds for life as heir, under § 26 of said act (Burns' Ann. St. 1908, § 3028), has become a rule of property which court will not now disturb. Rocker v. Metzger [Ind.] 86 NE 403.

**70.** Widow's renunciation of will in Mississippi where testator died, and will was probated, held ineffectual to give widow dower in land in Arkansas. Rannels v. Rowe [C. C. A.] 166 F 425.

**71.** Under 1 Burns' Ann. St. 1901, §§ 2640, 2642, if a surviving husband takes realty as devisee under wife's will, he takes subject to debts. Aneschaensel v. Twyman [Ind. App.] 85 NE 788. Widow's statutory interest is net within devise "free from incumbrance or liens." Rice v. Rice [Iowa] 119 NW 714. Provision directing that any balance owing on certain property should be paid from proceeds thereof held an express charge thereon of balance of price. Hessig v. Hessig's Guardian [Ky.] 115 SW 748. Not inconsistent with direction that

formance of conditions.[73] The personal estate not otherwise disposed of is the natural and primary fund for the payment of debts and legacies[74] unless exempted expressly or by necessary implication.[75] Whether a legacy is a charge on land depends on testator's intention.[76] A general legacy is presumed not to be a charge[77]

property should be preserved intact and undisposed of until a grandchild should be 21, such direction merely limiting owner's right to make voluntary disposition. Id. Will devising estate subject to widow's dower and directing sale of enough personalty to discharge incumbrances on realty expresses intention to pass realty unincumbered and to endow widow without deducting incumbrances. Pfefferle v. Herr [N. J. Eq.] 71 A 689. Devisees held to take subject to incumbrances assumed by testator when he purchased land devised, direction for sale of personalty to pay debts not including such incumbrances, but only such as testator had himself placed on land. Hetzel v. Hetzel [N. J. Eq.] 71 A 755. Will held to require charging of legatee's debts against legacies in distribution of entire estate including final distribution of trust fund after death of widow. Blair v. Keese, 59 Misc. 107, 112 NYS 162. Where on distribution of residue before termination of trust in favor of widow for life a son was exempted from payment of any indebtedness in excess of his share because of a direction in the will to that effect, such indebtedness would be considered in final distribution of trust fund after widow's death. Id.

72. Title to property devised to children held charged with trust in favor of unmarried daughters, in view of phrase "desire and direct" and other imperative statements. Plaut v. Plaut, 80 Conn. 673, 70 A 52. Will held to authorize widow to use corpus of estate for purpose of paying an annuity to testator's sister. In re Van Valkenburgh's Will, 60 Misc. 497, 113 NYS 1108. Where remainder of life trust was directed to "be paid into and form part of my residuary estate hereinafter disposed of" and residue was given to certain charities, such remainder was liable with balance of estate to payment of general legacies. In re Title Guarantee & Trust Co. [N. Y.] 88 NE 375, rvg. 127 App. Div. 118, 111 NYS 169.

73. Where widow was given residue but will directed her to pay claimant, "an adopted daughter," $500 when latter arrived at 21, provided she should be kind to widow, and widow after testator's death promised to pay claimant's legacy, husband's land was charged with continuing trust for payment. Geisel's Estate v. Landwehr [Ind. App.] 88 NE 105. Claimant at least acquired a conditional legacy which she could enforce against widow's state on performance of condition. Id. Where wife bequeathed property to children, subject to obligation to care and support husband made lien on the property, no trust was created but duty was imposed on devisees obligatory on them on acceptance of benefits under will. Merchants Nat. Bank v. Christ [Iowa] 118 NW 394. Farm and personalty to son on condition he pay annuity to testator's wife and furnish certain products from farm secured by lien, charged properly with conditions imposed and rendered devisee personally liable as on contract. Stringer v. Gamble [Mich.] 15 Det. Leg. N. 1030, 118 NW 979. Land charged for life of annuitant, and estate of devise after his death would be liable for past due payments unless barred by limitations. Id. Charge to maintain a grandchild held on residue only, and not on specific legacies. Lavaggi v. Borella [N. J. Eq.] 67 A 929. Charge that devisees should "yearly put in the stable on the premises occupied by my wife, so long as she remains my widow, as much hay as she may need to feed one horse and two cows without charge" held not to require owners to supply hay during period when widow did not reside on the land nor own or possess any of the animals named in the will. Gingrich's Estate, 36 Pa. Super. Ct. 266.

74. Legacies held payable out of testatrix' own estate rather than out of estate over which she had power of appointment, will tending to show such intention, and debts and legacies being small compared with testatrix' own estate consisting wholly of personalty, whereas estate over which she had power of appointment was realty. Farmers' L. & T. Co. v. Klp, 192 N. Y. 266, 85 NE 59. Money legacies primarily payable from personalty unless will shows intent to charge realty. In re Thomas, 61 Misc. 213, 114 NYS 931. Money legacies held payable from personalty which exceeded amount of such legacies where testator had no realty when will was made, will thus showing no intention to charge realty. Id.

75. Undevised land chargeable with debts and pecuniary legacies where personalty was exempted by being bequeathed by implication. Earle v. Coberley [W. Va.] 64 SE 628. Intention must be clear to justify exemption of personalty from payment of debts, legacies and expenses of administration. Martin v. Andrews, 59 Misc. 298, 111 NYS 40. But if it appears from will either expressly or by implication that a particular portion of estate shall be primary fund for payment of debts, remainder is exonerated. Brown v. Saathoff, 139 Ill. App. 616. "One-half of all property that I may be possessed of at time of my death, 'subject only to the first and second bequests,'" held to exonerate other half, first bequest being the one providing for payment of debts. Id. Testator may direct from what part of estate legacies or any of them shall be paid. Rutt's Estate, 35 Pa. Super. Ct. 522.

76. Smith v. Bush, 59 Misc. 648, 111 NYS 428. Where after disposal of legacies generally residue is given in one mass, legacies are a charge on residuary real and personal property. Lavaggi v. Borella [N. J. Eq.] 67 A 929. Will held to dispose of residue after legacies. Id. Will held to charge only land located in a certain county with payment of money legacies, fund for erection of a monument and expenses of administration. Kincaid v. Moore, 138 Ill. App. 23. Where lands were devised to son on condition he pay other children each a specified sum within one year after death of testator, title vested in son and legacies were made charge on the land. Spangler v. Newman, 239 Ill. 616, 88 NE 202. Will held to disclose intention to

but it is sufficient if intention to charge is clearly inferrable from the will interpreted in the light of extrinsic facts.[78] A gift of a pecuniary legacy of a fixed amount evinces an intention to benefit the legatee to the extent of such amount except as to charges imposed by the law of the testator's domicile.[78] Whether inheritance taxes shall be deducted from specific legacies or be a charge against the estate may depend on testator's intention.[80] One who takes possession of property as devisee becomes personally liable to pay legacies charged thereon,[81] and the legatee has also the right to have the land sold at foreclosure.[82] A charge against a remainder is ordinarily payable when the remainder vests in possession.[83] An action against a devisee's estate to enforce a charge on his legacy does not preclude a subsequent action to enforce a lien created by the will.[84] If there are different estates in lands charged with a legacy, such course should be pursued in enforcing payment as will involve the least loss to the owners.[85] A charge for care and support cannot be subjected to the claims of creditors of the beneficiary.[86]

*Trust estates and interests.*[See 10 C. L. 2070]—The general subject of trusts is elsewhere treated.[87]

*Powers of appointment and beneficial powers of sale.*[See 10 C. L. 2070]—Powers of appointment are elsewhere treated.[88] The existence and nature of powers of sale are commonly matters of construction.[89]

*Lapse, failure, and forfeiture.*[See 10 C. L. 2071]—At common law on death of a legatee before testator, his legacy lapses,[90] but provision has been made by statute

charge land with payment of certain pecuniary legacies after death of wife, in exoneration of personalty to her bequeathed. Rutt's Estate, 35 Pa. Super. Ct. 522.

77. Smith v. Bush, 59 Misc. 648, 111 NYS 428.

78. Smith v. Bush, 59 Misc. 648, 111 NYS 428. Legacies held charged on land testator being held to have foreseen that personalty would be used for widow's support. Id. Where legacies are given generally and residue of realty and personalty in one mass, legacies do not constitute charge on real estate (Heroy v. German Catholic Church, 62 Misc. 435, 116 NYS 39), except where it is clear that testator must have known they could be satisfied only from general estate (Id.). Held clear testator 80 years old realized personalty would be insufficient and that he did not expect to remove difficulty before his death. Id. Legacies held payable from estate generally including proceeds of realty though will specifically charged only some of them on realty. Id.

79. Where local law imposed no inheritance tax, fact that portion of property required to make up pecuniary legacy was in jurisdiction imposing such tax held not to charge legacy. Kingsbury v. Bazeley [N. H.] 70 A 916.

80. Trustee and individuals benefited by legacy for charitable purposes held not included in direction that executors should pay inheritance taxes on legacies to individuals, gifts for charity not being gifts to individuals. Kingsbury v. Bazeley [N. H.] 70 A. 916. See Taxes, 12 C. L. 2022.

81. Steele v. Korn, 137 Wis. 51, 118 NW 207. Where will did not direct a devisee who was also executor to pay a certain legacy and legacy was not expressly charged on the land devised nor devisee's title conditioned on such payment, acceptance of devise did not impose any personal obligation to pay the legacy. In re Taber, 116 NYS 960. Decree that legacy was lien on devised realty and directing executor to pay legacy in full held erroneous. Id.

82. Steele v. Korn, 137 Wis. 51, 118 NW 207.

83. Where son took certain land after death of wife "out of which" he was to pay a grandson a certain sum, grandson's cause of action did not accrue until death of wife. Keir v. Keir [Cal.] 99 P 487. Immaterial that son had purchased life estate. Id.

84. Two remedies consistent. Stringer v. Gamble [Mich.] 15 Det. Leg. N. 1030, 118 NW 979.

85. For realization of best price life estate and remainder may be sold together and value of life estate resorted to first, then remainder if necessary, remainder of proceeds of life estate, if any, to go to life tenant absolutely, and proceeds of remainder or balance thereof, if any, to be held for accumulation until death of life tenant. Steele v. Korn, 137 Wis. 51, 118 NW 207.

86. Devisees not compellable to pay money to creditors of father in lieu of personal services which they were willing and able to render. Merchant's Nat. Bank v. Crist [Iowa] 118 NW 394. Immaterial that for life support husband had surrendered statutory property which might have been subjected. Id.

87. See Trusts, 12 C. L. 2171.

88. See Powers, 12 C. L. 1409.

89. Will held to give son power to sell and pass good title to land devised to him in a certain county, on condition he reinvest proceeds, and also power to exchange land he investing in land any money received in addition to land taken in exchange, but purchasers not being required to look to reinvestment of proceeds. Broaddus v. Centers [Ky.] 116 SW 742.

90. Falls into body of estate and does not go to legatee's personal representative. Scott v. Ford [Or.] 97 P 99. Passes to the resi-

for such contingency.[91] A lapse may also result from devisee's death before the vesting of his interest.[92] Statutes for the prevention of lapses should not be permitted to operate against the intention disclosed by the will.[93] Where a gift is to a class [94] and fails as to any member of the class by reason of death, revocation or other cause, the survivors of the class will take and the interest of the deceased member will not lapse.[95] Provisions forfeiting the interests of contesting devisees are valid and will be enforced.[96] That a devisee is a minor does not necessarily prevent a forfeiture of his devise under the terms of the will.[97]

*Partial invalidity.*[See 10 C. L. 2072]—The valid provisions will be sustained if the general scheme of disposition is not thereby defeated,[98] otherwise they fall with the

duary legatees. In re Barrett's Estate, 116 NYS 756. Lapses on death of devisee or legatee before death of testator. Fisher v. Wagner [Md.] 71 A 999. Death of sister given share in proceeds of property held to lapse her legacy and result in intestacy as to sister's share. In re Keeman, 61 Misc. 560, 115 NYS 982.

**91.** Under statute where property is left to a class and one of that class dies before testator leaving issue, such issue stands instead of deceased ancestor; but if member of such class dies before testator without issue, his share is distributed as intestate estate. Under § 11, Statute of Descent, property left to grandson dying before testator descends as intestate estate. Bache v. Ward, 128 Ill. App. 614. Ky. St. 1903, § 2064, providing for descent of interests of legatees dying before testator to legatees' descendants or surviving legatees, by its terms, applies only to devises to several as a class. Galladay v. Thomas, 33 Ky. L. R. 829, 111 SW 721. Share payable into state treasury where there was no evidence of existence of person to whom bequest was made. Code Civ. Proc. § 2747. In re Beaver's Estate, 62 Misc. 155, 116 NYS 424. Where father gave residue to two daughters and one died before father leaving children, surviving gift was protected from lapsing by Act Apr. 8, 1833, § 12 (P. L. 249) and share went to such children. Spencer's Estate, 37 Pa. Super. Ct. 67. Where only five of eight children of a brother were given shares, and under terms of will remainder after death of a sister fell in part on brother, who was not otherwise provided for in will, but brother died before testator, all his children were his "surviving issue" within Act May 6, 1844 (P. L. 564) preventing lapse of legacies to brothers or sisters of testators not leaving lineal descendants and giving their shares to their "surviving issue" in case of their death before testator. In re Bentz's Estate, 221 Pa. 380, 70 A 788.

**92.** See, also, Real Property, 12 C. L. 1163. Where will provided legacies in remainder should not vest until death of wife, legacy to one who predeceased her lapsed. In re Denham, 61 Misc. 211, 114 NYS 933. Payment of a legacy was postponed until death of a life tenant and is made specific lien upon the remainder estate. Legatee died before the termination of life tenant. Held that, it appearing that postponement of payment was not personal to legatee but was for convenience of remainderman upon whose remainder estate it was charged, legacy vested at testator's death and lien of its payment did not lapse wih death of legatee. Gillis v. Long, 8 Ohio N. P. (N. S.) 1.

**93.** If testator manifests an intention that named beneficaries shall take and not persons who would otherwise take by virtue of statute against lapses by death of legatee before testator, statute will not control. Vogel v. Turnt [Md.] 72 A 661. Will held not to prevent operation of Code Pub. Gen. Laws 1904, art. 93, § 320, providing no legatee shall lapse by death of legatee before testator. Id. Where legatee died before testator, her husband was entitled to take in accordance with statute of descent. Id.

**94.** See ante, § 5C, and § 5D subd. Individual Rights in Gifts to Two or More.

**95.** Gift to testator's ward and certain children held to a class so that revocation of ward's legacy by codicil gave children all as survivors. Saunders v. Saunders' Adm'rs [Va.] 63 SE 410. Where will gave children shares not as joint tenants but as tenants in common, death of a child before testator lapsed his legacy. In re Krummenacker, 60 Misc. 55, 112 NYS 596.

**96.** Massie v. Massie [Tex. Civ. App.] 118 SW 219. Not contrary to law, public policy or good morals. Perry v. Rogers [Tex. Civ. App.] 114 SW 897; In re Hite's Estate [Cal.] 101 P 443. Testator's meaning of word "contest" is controlling. Id. Filing opposition to probate of will whose codicil reduced opposer's bequest, moving to strike parts of proponent's answer, etc., held "contest" so as to forfeit bequest. Id. Contest worked forfeiture though there was no gift over. Id. Forfeiture provision applicable to codicils and forfeiture not prevented by rule of strict construction against forfeitures or by Civ. Code § 1342, providing that testamentary dispositions shall not be divested except on accurance of precise contingency prescribed by testator. Id. Provision forfeiting rights of devisees for attempt to break or change will held to forfeit rights of all, if any devisee made such attempt, as by suing to try title. Perry v. Rogers [Tex. Civ. App.] 114 SW 897. Child contesting on ground will disposed of property formerly owned by his deceased mother held to forfeit rights under will and to elect to take as heir of mother. Massie v. Massie [Tex. Civ. App.] 118 SW 219. Mere filing of caveat held not a "contest" within provision forfeiting legacies of legatees who should contest or attempt to contest will. In re McCahan's Estate, 221 Pa. 186, 70 A 711.

**97.** Rights of all including minor held forfeiture by attempt of any devisee to break will, forfeiture not depending on act of minor. Perry v. Rogers [Tex. Civ. App.] 114 SW 897.

**98.** Only when different parts cannot be separated without upsetting general plan of

invalid ones.[99] In a proper case, part of a will may be set aside for undue influence.[1]

*Residuary clauses.* See 10 C. L. 2073—A general residuary clause carries the property not otherwise disposed of,[2] but where testator confines the gift of the residue to a particular part of the estate, such as the personalty, the residuary legatee is excluded from receiving any part of the estate not included in the residuary clause,[3] and a legacy, which is itself a part of the residue, cannot fall into the residue by lapse but must go intestate.[4]

*Property not effectually disposed of* See 10 C. L. 2073 goes intestate,[5] but, if pos-

will that whole must be stricken. Clearspring Tp. v. Blough [Ind.] 88 NE 511. Life estate in realty to sons held valid though other provisions were invalid. Id. Invalidity of provision for "issue" of life beneficiary in case she should not exercise a power of appointment given by will held not to affect her life estate or her power. Bartlett v. Sears [Conn.] 70 A 33. Remainders void under rule against perpetuities held not to affect life estates. Id. Invalid provision continuing trust after daughter's death rejected, and primary purpose of testator to give one share to each of his children and his descendants carried out. Lewine v. Gerardo, 60 Misc. 261, 112 NYS 192. Immaterial provision in margin, extending below signature held not to invalidate whole will. In re Gibson's Will, 128 App. Div. 769, 113 NYS 266. Illegal trusts may be elimated and legal ones upheld if injustice is not done or testator's wishes defeated. In re Buchner, 60 Misc. 287, 113 NYS 625. Partial invalidity of trust scheme held not fatal. Hardenbergh v. McCarty, 130 App. Div. 538, 114 NYS 1073. Trust for daughter's lifetime held valid and severable from ulterior provisions and limitations invalid as perpetuities. In re Wilcox, 194 N. Y. 288, 87 NE 497. Will creating a complete and lawful trust will not be invalidated by separable provision creating unlawful limitation over in event of a single and entirely disconnected contingency. Schey v. Schey, 194 N. Y. 368, 87 NE 817.

**99.** Entire bequest held void where it inseparably included valid charitable contribution to salary of a pastor and gift for keeping up a graveyard void as a perpetuity. Van Syckel v. Johnson [N. J. Eq.] 70 A 657. Invalid 50 year trust held to upset testamentary scheme. Walter v. Walter, 60 Misc. 383, 113 NYS 465.

**1.** In re Cooper's Estate [N. J. Eq.] 71 A 676. Where impossible to ascertain to what extent specific legacies are tainted by undue influence, whole will, if part, must be set aside. Id.

**2.** General residuary bequest of personalty carries not only such property as testator did not attempt to otherwise dispose of but all property which by lapse or otherwise is not effectually disposed of to others. In re Barrett's Estate, 116 NYS 756. Where excess over $100,000 was specifically devised but will also disposed of residue of estate, remainder, after deducting from net amount of estate excess over $100,000 and money legacies, constituted residue subject to widow's life use. Perry v. Bulkley [Conn.] 72 A 1014. **Void bequests of** personalty pass to residuary legatees. Remainder interests attempted to be disposed of by invalid appointment by life tenant. Bartlett v. Sears [Conn.] 70 A 33. **Lapsed legacy** will pass under residuary clause where will discloses intention that such clause shall carry all of testator's property not actually disposed of by other parts of will. Where will directed conversion of all residue into cash for division among pecuniary legatees proportionately. Dresel v. King, 198 Mass. 546, 85 NE 77. Where daughter, given life estate with remainder to her children died before testator, estate passed as intestate unless will disclosed contrary intent, Ky. St. 1903, § 4843, providing that where devises fail or are void, or are otherwise incapable of taking affect, they shall not be included in residuary estate but shall go intestate, unless contrary intent shall appear by will. Galladay v. Thomas, 33 Ky. L. R. 829, 111 SW 721. Devise held to pass to testator's other children under will and under statute, and grandchildren held without interest. Id.

**3.** To nephews all residue of "personal estate" did not give nephews proceeds of land directed to be sold in trust for estate. In re Alabone's Estate [N. J. Eq.] 72 A 427. Gift to widow of any surplus, after payment of debts from proceeds of some of testator's property, held not to make her chief residuary legatee so as to give her remainder in other property after her life estate therein. Sink v. Sink [N. C.] 64 SE 193. Where clause designating all personalty to be held in trust was insufficient to pass a certain fund as to which testatrix had power of appointment, subsequent clause bequeathing all personalty not "designated" to be held in trust held sufficient as a general residuary clause, so as to pass fund first excluded, "not designated to be held in trust" being held to mean "not given in trust." Howland v. Parker, 200 Mass. 204, 86 NE 287. Disposition of "all the residue" of the estate "not hereinbefore devised or bequeathed or made void," following alternative gifts, held to include all property not previously disposed of. Ege v. Hering, 108 Md. 391, 70 A 221. Broad language of residuary clause held not limited by words "of which I may die possessed" so as to exclude a contingent remainder. Fisher v. Wagner [Md.] 71 A 999.

**4.** Dresel v. King, 198 Mass. 546, 85 NE 77. No right of survivorship, where residuary legatees took as individuals and not as a class. Id.

**5.** Such property goes intestate regardless of testator's intention, this being important only in determining validity of will and construction of provisions passing other property. Knickerbocker Trust Co. v. King, 126 App. Div. 691, 111 NYS 192. That will showed intention to exclude devisees from participation in other property than that devised held not to exclude them from tak-

sible, a construction will be adopted which will avoid intestacy.[6] A construction required by the will cannot, however, be avoided because it leads to intestacy.[7]

ing as heirs property not disposed of. Vaughan v. Langford, 81 S. C. 282, 62 SE 316.

**Properly held to pass intestate:** With reference to fee of property devised to widow for life with power to sell which has not been exercised, husband will be held to have died intestate. In such a case, widow becomes owner in fee of the intestate property devised to her for life, but has only dower in property devised to her in fee. Armstrong v. Armstrong, 11 Ohio C. C. (N. S.) 474. **Trust fund** held to pass intestate on daughter's death without issue before widow. Id.; Knickerbocker Trust Co. v. King, 126 App. Div. 691, 111 NYS 192. Proper distribution directed as to realty and personalty. Id. Where precatory words failed to create trust but will sufficiently showed that devisee was not to take absolutely. Gilchrist v. Corliss [Mich.] 15 Det. Leg. N. 971, 118 NW 938. Undevised **remainder** held to pass intestate to children, and children of deceased children share and share alike. Southgate v. Karp, 154 Mich. 697, 15 Det. Leg. N. 891, 118 NW 600. After life estate to widow recital that testator had already given his children "J 23, C 20 acres, A 30 acres all I intended to give her by this instrument." held not to pass remainder. Id. Where will stated that items therein enumerated constituted all of testator's property and made reference to a **possibility of reverter,** there was no attempt to devise such possibility. Vaughan v. Langford, 81 S. C. 282, 62 SE 316. Where there was no disposition of **residue** of money after payment of bequests, it passed to heirs at law. In re Koch's Estate [Cal. App.] 96 P 100. Where gift of residue to charity failed, it went to heirs at law. Bowden v. Brown, 200 Mass. 269, 86 NE 351. Legacy to residuary legatee, who did not take as member of a class, held intestate on his dying before testatrix, and held not to pass to surviving residuary legatees. In re Barrett's Estate, 116 NYS 756. Interest in land attempted to be conveyed **by void devise** descends to person or persons who would have been entitled to take had no will been made. Kinne v. Phares [Kan.] 100 P 287. Where devise was void for remoteness. In re Adleman's Will, 138 Wis. 120, 119 NW 929. Remainder to grandchildren of sons, void as perpetuity, held to go intestate. Wolfe v. Hatheway [Conn.] 70 A 645.

**Held not intestate:** Holographic will written on envelope containing certain expired insurance policies and disposing of same held to dispose of **entire estate** of testator in view of reference to personalty and use of word "estate." Harper v. Harper, 148 N. C. 453, 62 SE 553. Husband held to take not only all of wife's property situated where wife resided but also all other property owned by her wherever situated. Gray v. Noholoa, 214 U. S. 108, 53 Law. Ed.—. Will not mentioning personalty but appointing executor and devising realty held to pass **personalty** also. In re Maccafil, 127 App. Div. 21, 111 NYS 315. Where personalty was given to wife, and to daughter if it remained at wife's death, no intestacy resulted from wife's death before testator, but daughter took, she surviving testator. In re Dillon's Will, 60 Misc. 686, 113 NYS 929. Word "any" in direction for conversion of property into money held to mean "all," so as to include besides personalty **all realty** except residence devised to wife. Thomas' Ex'x v. Thomas' Guardian, 33 Ky. L. R. 700, 110 SW 853. Direction to convert all real and personal property into cash and distribute proceeds held to amount to a devise of the realty. Fenton v. Hall, 235 Ill. 552, 85 NE 936. Devise of property, together with its increase in value by rents or otherwise, to take effect on death of a person named passes the **rents** during lifetime of such person and as to such rents, and testator does not die intestate. Weathersbee v. Weathersbee [S. C.] 62 SE 838. Will giving **residue** to sister for life, remainder to charities and on failure of charitable bequests then over, as modified by subsequent codicils reducing sister's share and changing bequests to charities, held not to result in intestacy either as to corpus or income of residue. In re Dobbin's Estate, 221 Pa. 249, 70 A 727. Residue to wife for life remainder to children or their issue, and to wife absolutely in default of children or issue, held to disclose no intestacy. In re Salisbury's Will, 61 Misc. 550, 115 NYS 976. **Remainder** over to life tenant held not thrown into intestacy by wife's divorce and remarriage after testator's death. Lavender v. Rosenheim [Md.] 72 A 669.

6. Gregory v. Welch [Ark.] 118 SW 404; In re Koch's Estate [Cal. App.] 96 P 100; In re Edward's Estate [Cal.] 97 P 23; In re Riviere's Estate [Cal. App.] 98 P 46; Hoffner v. Custer, 237 Ill. 64, 86 NE 737; In re Carney's Estate [Ind.] 86 NE 400; Close v. Farmers' L. & T. Co., 195 N. Y. 92, 87 NE 1005; Clearspring Tp. v. Blough [Ind.] 88 NE 511; In re Welen's Will [Iowa] 116 NW 791; Lavender v. Rosenheim [Md.] 72 A 669; Simpson v. Trust Co., 129 App. Div. 200, 113 NYS 370; Harper v. Harper, 148 N. C. 453, 62 SE 553; Powell v. Woodcock, 149 N. C. 235, 62 SE 1071; In re Dobbins' Estate, 221 Pa. 249, 70 A 727; Galloway v. Galloway, 32 App. D. C. 76. Especially where, after specific devises and bequests of large part of estate, there is clause disposing of residue. In re Keene's Estate, 221 Pa. 201, 70 A 706. Where residuary clause disposed of residue on same "conditions" as previous bequest, "conditions" held to mean "provisions" or "in same manner." Id. Presumption of intent to dispose of whole estate is overcome only where intention to do otherwise is plain and unambiguous or necessarily implied. Thomas' Ex'x v. Thomas' Guardian, 33 Ky. L. R. 700, 110 SW 853. To avoid intestacy cross remainders may be implied as to accretions to funds set apart for life tenants, though trusts attempted to be created might be thereby destroyed. Id.; Simpson v. Trust Co., 129 App. Div. 200, 113 NYS 370. Testator presumed to intend disposition of entire estate, and where there is a general description to that end, erroneous words of quality or value will not control. Deppen's Trustee v. Deppen [Ky.] 117 SW 352. General intent to dispose of whole estate will be given weight in deciding what was intended by particular devises which may admit of enlargement or limitation (McMahan v. Hubbard [Mo.] 118 SW 481), and court in pursuing general presump-

(§ 5) *E. Of terms respecting administration, management, control, and disposal.*[8]—See 10 C. L. 2074—The particular terms of the will must be looked to in determining the existence of power of sale[9] or partition,[10] the existence and duration of trusteeships,[11] and the powers and duties of executors or trustee.[12] A direction

tion against intestacy will supply, transform, or change words to avoid defeat of clear intent (Id.). Residuary clause will be construed so as to avoid partial intestacy unless contrary intent is apparent. Fisher v. Wagner [Md.] 71 A 999. Where under a particular construction of will portion going intestate is infinitesimal, presumption against such construction is rebutable by slight circumstances. Rackemann v. Tilton, 236 Ill. 49, 86 NE 168.

**7.** Wolfe v. Hatheway [Conn.] 70 A 645. While any reasonable construction which will dispose of entire estate will be adopted, where no intention is shown as to disposition of part of property, it must be regarded as intestate. Bond v. Moore, 236 Ill. 576, 86 NE 386.

**8. Search Note:** See Executors and Administrators, Cent. Dig. §§ 560-575; Dec. Dig. § 138; Powers, Cent. Dig. §§ 84-98; Trusts, Cent. Dig.; Dec. Dig.

**9.** Executor held authorized to sell land and reinvest for benefit of testator's children subject to limitations contained in will, it appearing land could not be advantageously divided. Christian Widows & Orphans Home v. Harber [Ky.] 113 SW 818. Will providing estate should be "kept together" and giving executor power of control, management and disposal, held to mean that while there should be no partition until fulfillment of certain conditions, executor had power to sell land for maintenance and education of children. Connely v. Putnam [Tex. Civ. App.] 111 SW 164. Will held not to authorize executors to sell realty over objection of residuary legatees, authorizing them to sell only such personalty as was necessary to pay expenses and carry out directions of will. Martin v. Andrews, 59 Misc. 298, 111 NYS 40. Trustees held empowered to sell residuary realty and give good fee title. Robinson v. Robinson [Me.] 72 A 883. Where will directed executor to sell homestead after widow's death, sale could not be had prior to that time, though widow parted with her interest in consideration of an annuity. Stewart v. Jones [Mo.] 118 SW 1. Under will giving son "full power to sell and make deeds to land in E. county but must reinvest same proceeds arising from sale in other lands as he thinks best," son had full power to convey all lands in E. county, but purchaser was not required to look to reinvestment of proceeds. Broaddus v. Centers [Ky.] 116 SW 742. Son could also exchange lands provided any money he received in addition be also reinvested in other lands. Id. Power of sale may be conferred **by implication.** Powell v. Woodcock, 149 N. C. 235, 62 SE 1071. Residue to executor "in trust to receive, hold, invest and reinvest," held to confer power to sell realty. Id. Power of sale implied when duties of trustee require it. Robinson v. Robinson [Me.] 72 A 883. "Invest and manage" held to imply power of sale in absence of contrary intent disclosed by will as a whole. Id. Executor required to pay legacies charged on realty held by implication empowered to sell realty. Lavaggi v. Borella [N. J. Eq.] 67 A 929. Devise of residue of estate, real and personal, for purpose of continuing business, held to imply power to convert realty or personalty into business capital. In re O'Reilly, 59 Misc. 136, 112 NYS 208.

**10.** Will construed to empower widow to partition some of realty among children should she deem such course for best interest of herself and them. Frantz v. Steinmetz [Ky.] 118 SW 345. Restriction against division during widowhood held for benefit of widow only. Id. Children being of age so that time for division had arrived, grandchildren could not complain of partition, where they were to take only in case of death of children before time of division. Id.

**11.** See, also, Trusts, 12 C. L. 2171. Will construed to vest legal title in executors as trustees. Appel v. Childress [Tex. Civ. App.] 116 SW 129. Held to create a trust requiring executors on settlement of estate to hold as trustee corpus given for benefit of a daughter for life, and at her death to deliver it to those entitled. Haywood v. Wachovia L. & T. Co., 149 N. C. 208, 62 SE 915. Trust in favor of daughters held terminable on marriage of last of them or by consent of all unmarried ones that income be divided among all the children. Plaut v. Plaut, 80 Conn. 673, 70 A 52. On termination of trust, legal and beneficial estates would merge in owners of legal estate. Id. "In" in provision for termination of trust as soon as daughters who were beneficiaries should find "in convenient" to allow other children to share in income, held "it." Plaut v. Plaut, 80 Conn. 673, 70 A 52.

**12. General management:** Where testator devised estate for purpose of carrying on his business and directed payment of income to son and daughter, no part of net income was applicable to continuance of business. In re O'Reilly, 59 Misc. 136, 112 NYS 208. Request to a bank held an appointment to administer estate as executor, and after payment of debts to hold surplus as trustee until minor children should become of age. Harper v. Harper, 148 N. C. 453, 62 SE 553.

**Investments:** Will held to disclose intention that pecuniary legacies to brothers and sisters be invested in real estate, though money was mentioned as cash bequests. In re Buerstetta's Estate [Neb.] 119 NW 469. Will held not to authorize executor to invest pecuniary legacies in his own name as trustee, but in name of life beneficiaries, will not having expressly or impliedly created a trust and trust not being necessary to effectuation of intentions. Id.

**Incumbrances:** Will held not to require executor to pay certain mortgages from estate other than land on which mortgages existed. Draper v. Brown, 153 Mich. 120, 15 Det. Leg. N. 424, 117 NW 213.

**Directions as to particular funds or in-**

to sell real estate and distribute the proceeds vests the legal title in the executor,[13] and the power to sell confers, by implication, power to convey.[14]

(§ 5) *F. Abatement, ademtion, renunciation and satisfaction.*[15]—See 10 C. L. 2076—If the estate prove insufficient to pay legacies in full, they should abate proportionately,[16] but the residuary estate must be first resorted to [17] and general legacies abate before specific ones.[18] Sometimes the will in terms provides for abatement.[19] Where the legacies given by the will are expressly made subject to abate-

terests: Where will provided that in case nephews should die or wander off and not be heard from for ten years the sums provided for them should go to other persons, ten-year period began to run from testator's death. Breidenbach v. Walter's Ex'rs. [Ky. App.] 119 SW 204. Direction that one-fourth of principal of residuary estate "be paid" to children of deceased child held applicable to personalty only. Robinson v. Robinson [Me.] 72 A 883. Amount to be paid to son for support and maintenance held discretionary with trustees so that court could not fix a sum certain and direct excess of income to be paid to son's creditors. Myers v. Russell, 60 Misc. 617, 112 NYS 520. Will construecd to provide that on widow's death her third should be added in equal shares to fund held by executor for brother and sister and subject to same provisions. Simpson v. Trust Co., 129 App. Div. 200, 113 NYS 370. "Trust funds" directed to be paid over by trustee in a certain contingency held to mean "trust estates" and not trust moneys. Young v. Du Bois, 60 Misc. 381, 113 NYS 456. Direction that trustees make special provision for children of first wife if widow should waive will and receive property under law held not applicable where child of second wife died and widow inherited her share. In re Harris' Estate [Vt.] 72 A 912.

**Time of distribution:** Will giving five years if necessary for settlement of estate held not to postpone, until final settlement, payment of income of certain sums left in trust, though as to residue legatees would not be entitled to interest until such settlement. Fenton v. Hall, 235 Ill. 552, 85 NE 936. Will providing for preliminary partial distribution when beneficiaries therein provided for should be reduced to two or less when condition of estate and objects to be secured by will would justify held not to justify division when income was scarcely sufficient to pay charges and sums allotted remaining beneficiaries. Long v. Mayes' Estate [Miss.] 48 S 523. Where trustee was directed on death of any child to pay proportionate part of principal to children of such deceased child, he could not ascertain true amount of estate or pay over fractional part to children of deceased child until whole estate had been converted into money. Robinson v. Robinson [Me.] 72 A 883. Evidence held to disclose testator's intention that executrix should not continue business after youngest daughter arrived at eighteen, but should then dispose of assets and settle estate. Crooke v. Hume's Ex'x, 33 Ky. L. R. 162, 109 SW 364.

**13, 14.** Griffith v. Stewart, 31 App. D. C. 29.

**15. Search Note:** See notes in 6 C. L. 1970; 4 L. R. A. (N. S.) 922; 8 A. S. R. 720; 95 Id. 342, 343; 2 Ann. Cas. 976; 4 Id. 73; 8 Id. 144; 10 Id. 158.

See, also, Wills, Cent. Dig. §§ 1957-1994, 2100-2112; Dec. Dig. §§ 757-772, 804-818; 1 A. & E. Enc. L. (2ed.) 42.

**16.** Where assets are insufficient to pay debts and expenses of administration together with legacies given, legacies must abate pro rata. In re Beaver's Estate, 62 Misc. 155, 116 NYS 424. Where personalty was insufficient to pay debts, each devisee of realty should contribute to deficiency in proportion that realty devised to him bears to value of entire realty. Hessig v. Hessig's Guardian [Ky.] 115 SW 748.

**17.** Under administration act § 79, providing for abatement of legacies in consequence of a widow's renunciation of will, no abatement of specific or general legacies should be made until after exhaustion of residuary legacies. Kincaid v. Moore, 138 Ill. App. 23. Where testator intended that specific legacies should be first paid and that only residue should go to residuary legatees and executor misappropriates part of estate, remainder must be applied to payment of specific legacies before residuary legatees can receive anything. Farmers' L. & T. Co. v. McCarthy, 128 App. Div. 621, 113 NYS 207, rvg. 57 Misc. 413, 107 NYS 928.

**18.** Under Comp. Laws, §§ 9289, et seq, providing for payment of debts and expenses of administration out of estate and abatement of legacies, burden of discharging such claims falls on general legacies and devises only where no estate remains undisposed of by will (In re Corby's Estate, 154 Mich. 353, 15 Det. Leg. N. 798, 117 NW 906), and specific devises and legacies are exempt if there is other estate (Id.). Where will gave specified sums to each of nephews and a niece, provided personalty should be sufficient, and gave to brother described realty, testatrix's household furniture and all the rest of her property, court could not under statute charge any part of expenses of administration against specific devise and legacy to brother, general legacies to nephews and niece being sufficient. Id.

**19.** Where will provided for abatement of legacies in case total estate should be valued at less than $300,000, estate should be valued after expenses of administration had been paid to determine whether general legacies should be paid in full. In re Frankenheimer [N. Y.] 88 NE 374, afg. In re Gans' Will, 114 NYS 975, which modified 60 Misc. 282, 112 NYS 259. Proper to allow general legatees to share proportionately in income earned during administration. Id. Codicil, "I direct that all my charity bequests shall be paid in full, the inheritance tax shall be paid by my estate," held not to revoke, as to charities, provision in will for abatement of all legacies should

ment, additional ones given by codicil are also subject,[20] unless the codicil manifests a contrary intent.[21] It should be assumed that testator regarded his property sufficient in amount to carry out his testamentary scheme.[22] Realty specifically devised cannot be reduced in satisfaction of the widow's dower interest in another tract.[23]

*Ademption.*See 10 C. L. 2077—Ademption is the extinction or satisfaction of a legacy by some act of testator, equivalent to revocation of the bequest or indicating an intention to revoke.[24] It may be accomplished by a gift to the legatee or by such disposition of the subject of the bequest as to make operation of the will impossible.[25] Intention to adeem cannot be inferred from the mere performance of legal obligations.[26] A general legacy may be satisfied though not strictly adeemed;[27] and while technically the doctrine of ademption does not apply to a devise of realty,[28] such devise may be revoked or satisfied by conveyance of the land.[29] An alteration of subject-matter to work an ademption, must be by testator himself after execution of the will.[30] If the change is by act of another and the property in its new form is in testator's possession at his death, there will be no ademption.[31]

*Renunciation.*See 10 C. L. 2077—Acceptance is essential to effectuate a legacy or devise.[32] Assent to a legacy or devise will ordinarily be presumed,[33] but if assent is withheld or the benefits renounced, the interest involved will not pass to the intended beneficiary.[34]

*Satisfaction of debts by legacies.*See 10 C. L. 2077—A legacy will not be held a satisfaction of a debt contracted after the will was made.[35]

(§ 5) *G. Proceedings to construe wills.*[36]—See 10 C. L. 2077—Equity will enter-

estate be valued at less than $300,000, but held to only exempt such bequests from payment of inheritance tax. Id. Under direction for abatement of legacies mentioned in preceding paragraphs of will in case estate should be valued at less than $300,000, certain legacies preceding direction for abatement held to abate but gift to executor made by codicil held not to abate. In re Gans' Estate, 60 Misc. 282, 112 NYS 259.

**20.** In re Gans' Will, 114 NYS 975.

**21.** Bequest for specified purpose which might be defeated in case of abatement held not subject. Id.

**22.** In re Title Guarantee & Trust Co. [N. Y.] 88 NE 375.

**23.** Rice v. Rice [Iowa] 119 NW 714.

**24.** In re Brown's Estate [Iowa] 117 NW 260. Ademption is an act by which testator pays legacy in his lifetime or by which a specific legacy becomes inoperative on account of testator having parted with subject of it. Rue v. Connell, 148 N. C. 302, 62 SE 306. Ademption depends on testator's intention inferred from his acts; (In re Brown's Estate [Iowa] 117 NW 260), satisfaction on extinction of thing or fund granted (Id.).

**25.** In re Brown's Estate [Iowa] 117 NW 260. Where "proceeds" of bonds were bequeathed, no ademption resulted from payment of the bonds and subsequent investment in mortgages which were paid after testator's death, proceeds still existing. In re Black's Estate [Pa.] 72 A 631. Specific legacy of stock is adeemed by testator's disposal of stock in his lifetime or by property ceasing to exist. Thayer v. Paulding, 200 Mass. 98, 85 NE 868. Bequest of life policies, "which I hold on life of A./M.," legatee to pay premiums on same till they mature, held specific, and adeemed by maturity and payment of policies to testator before latter's death. In re Pruner's Estate, 222 Pa. 179, 70 A 1000.

**26.** Provision for wife and child in divorce decree held not to adeem or satisfy legacy to wife. In re Brown's Estate [Iowa] 117 NW 260.

**27.** In re Brown's Estate [Iowa] 117 NW 260. Satisfied if testator advances to legatee even small sum with intent to discharge legacy or substitute advancement for bequest. Id.

**28.** In re Brown's Estate [Iowa] 117 NW 260.

**29.** Subsequent conveyance to devisees of land devised held complete revocation or satisfaction of devise. Rice v. Rice [Iowa] 119 NW 714. Sale of land devised held revocation of devise. In re Benner's Estate [Cal.] 99 P 715.

**30.** Adjudication after death of testator entitling third person to redeem the property, and redemption accordingly, held no ademption so as to deprive legatee of redemption money, testator being in possession of property at his death, believing himself owner in fee. Rue v. Connell, 148 N. C. 302, 62 SE 306.

**31.** Rue v. Connell, 148 N. C. 302, 62 SE 306.

**32.** In re Wells' Estate [Iowa] 120 NW 713.

**33, 34.** In re Well's Estate [Iowa] 120 NW 713.

**35.** Claim for support and services. In re Enos' Estate, 61 Misc. 594, 115 NYS 863.

**36. Search Note:** See Wills, Cent. Dig.

tain jurisdiction to construe a will,[37] but only when trusts are involved or other remedy is inadequate.[38] Whether a foreign corporate legatee is bound to comply with testamentary directions as to the use and disposition of the legacy must be determined by the courts of the state where the legatee was incorporated.[39] The general rule is that a suit for construction may be maintained by the executor or any beneficiary, but not by one who claims in hostility.[40] Persons whose rights are materially involved must be made parties.[41] Allegations relative to misconduct on the part of the executor or trustee will not be considered.[42] The decree must fully determine the rights of the parties with reference to the subject-matter of the suit.[43] The judgment rendered is as conclusive as judgments in any other litigation,[44] and the effect of a reversal on the right of nonappealing parties is the same as in similar appeals from judgments generally.[45] The executor cannot as a rule appeal

§§ 1665-1686; Dec. Dig. §§ 695-707; 22 A. & E. Enc. P. & P. 1189.

**37.** Equity has jurisdiction to construe will and direct and instruct trustee thereunder with respect to trust estate. Draper v. Brown, 153 Mich. 120, 15 Det. Leg. N. 424, 117 NW 213. Superior court has jurisdiction of suit by executors and trustees for construction of will essential to performance of their duties. Haywood v. Wachovia L. & T. Co., 149 N. C. 208, 62 SE 915. Bill in equity is maintainable to determine rights of devisee's state account between them and obtain for plaintiff's personalty to which they are entitled. Moseley v. Bolster, 201 Mass. 135, 87 NE 606. Single action may be maintained for both establishment and construction of will, clerk by whom will was probated being part of superior court. Harper v. Harper, 148 N. C. 453, 62 SE 553. Suit by trustee under will for construction thereof concerning disposition of trust fund is properly brought in county in which testator resided and in which will was probated, though none of parties reside in state. Bartlett v. Sears [Conn.] 70 A 33. Trust having been created by will of domiciled inhabitant and trustee being thus accountable to courts of state for execution of trust, such courts could advise as to construction of will and also as to that of nonresident so far as she attempted to exercise a power of appointment created by first will. Id. Immaterial that trustee had invested funds in realty in other states. Id.

**Complaint** for construction of will, made by nonresident whose property was all in another state except one tract of land, held not to state cause of action under Code Civ. Proc. § 1866, authorizing suit to determine "validity, construction, or effect" of testamentary dispositions of realty. Monypeny v. Monypeny, 131 App. Div. 269, 115 NYS 804. General prayer for construction of a will has reference only to construction as to particular questions submitted for court's decision. Hamilton v. Hamilton [Iowa] 118 NW 375.

**38.** Jurisdiction of equity court to construe wills grew out of its general control over trusts and trustees (Haywood v. Wachovia L. & T. Co., 149 N. C. 208, 62 SE 915), and it can take jurisdiction only when trusts are involved or when devises and legacies are so blended and dependent on each other as to make it necessary to construe whole will in order to ascertain legacies. (Id.). In absence of any trusts, equity will not construe will merely because devisees are uncertain or to settle merely legal estates. Strawn v. Jacksonville Trustees, 240 Ill. 111, 88 NE 460. Equity without jurisdiction of suit solely for construction of will, when titles involved are purely legal and capable of assertion at law. Frank v. Frank [Ark.] 113 SW 640. Bill to construe will is not maintainable where sole purpose is to determine who is entitled to realty devised, and all questions raised are legal and readily determinable in ejectment. Harris v. Bow [Mich.] 16 Det. Leg. N. 12, 120 NW 17. Presumed after 30 years that probate court and executors settled estate and that there are no creditors. Id. Where probate court had statutory power to direct payment of legacies and determine legal rights of legatees, equity would not determine effect of a conveyance on rights of beneficiary. Strawn v. Jacksonville Trustees, 240 Ill. 111, 88 NE 460. Equity **will not anticipate a controversy** as to property devised and will not declare rights of parties on assumption it will arise. Strawn v. Jacksonville Trustees, 240 Ill. 111, 88 NE 460.

**39.** Hasbrouch v. Knoblauch, 130 App. Div. 378, 114 NYS 949.

**40.** St. John v. Andrews Inst. 192 N. Y. 382, 85 NE 143. As to personalty and in surrogate's court, however, Code Civ. Proc. § 2624 requires surrogate on application of any party to proceeding to determine validity and construction of any disposition. Id.

**41.** Executors held necessary parties, title to personalty being in them. Lumpkin v. Lumpkin, 108 Md. 470, 70 A 238. Devisee's wife, whose marital rights might be emperiled, held necessary party. Lumpkin v. Lumpkin, 108 Md. 470, 70 A 238.

**42.** Allegations as to misconduct of executor and trustee cannot be considered by supreme judicial court construing will in equity. Webber Hospital Ass'n v. McKenzie [Me.] 71 A 1032. Are within exclusive jurisdiction of probate court in first instance, and of supreme judicial court as supreme court of probate on appeal in last instance. Id.

**43.** Decree held erroneous where it failed to pass on matters covered by prayer as to what estates were created. Lumpkin v. Lumpkin, 108 Md. 470, 70 A 238.

**44.** St. John v. Andrews Inst., 192 N. Y. 382, 85 NE 143.

**45.** St. John v. Andrews Inst., 192 N. Y. 382, 85 NE 143. Reversal at instance of

from a judgment construing the will.[48] Questions relating to costs or other allowances depend on the statute and the outcome of the case.[47]

§ 6. *Validity, operation and effect in general.*[48]—See 10 C. L. 2078—The validity of a will must be determined as of the date of testator's death, and not in the light of what has actually transpired since that date,[49] and provisions which are invalid will not be enforced.[50] The will passes the property on testator's death.[51]

*What law governs.*See 10 C. L. 2078—The disposition of realty is governed by the law of the situs.[52] Whether one dies testate or intestate is to be determined by the law of his domicile as to personalty, and as to realty by the law of the jurisdiction in which it is situated.[53]

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**Winding Up Proceedings; Withdrawing Evidence; Withdrawing Pleadings or Files,** see latest topical index.

## WITNESSES.


**§ 1. Capacity and Competency of Witnesses in General, 2376.** Husband and Wife, 2377. Insanity, 2378. Children, 2378. Persons Accused or Convicted of Crime, 2379. Persons Acting in Official Capacity at Trial, 2379.

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**§ 7. Subpoenas, Attendance, and Fees, 2409.**


*The scope of this topic* is noted below.[54]

some of next of kin held not to inure to benefit of others who did not appeal. Id. Judgment held not against a class. Id.

46. St. John v. Andrews Inst., 192 N. Y. 382, 85 NE 143.

47. Where suit between heirs of life tenant and heirs of remaindermen presented proper case for construction of a will, costs should be paid out of estate. Emert v. Blair [Tenn.] 118 SW 685. Defeated claimants of entire legacies left by will, whose claim was principal question in case, held not entitled to extra allowance of costs, Tavshanjian v. Abbott, 130 App. Div. 863, 115 NYS 938. Allowances in addition to costs cannot be made, under Code Civ. Proc. § 3253, to defendants, in action for construction of will. Walter v. Walter, 60 Misc. 570, 113 NYS 897. Could not be allowed to infant's special guardian for special services. Id. Clause in judgment construing will, that in case of appeal court retained jurisdiction to ascertain allowances for counsel fees and expenses incurred on appeal, held surplussage, judgment being final and no further judicial action being possible. Hewitt v. Wheeler School & Library [Conn.] 72 A 935.

**48. Search Note:** See notes in 2 C. L. 2162; 25 L. R. A. (N. S.) 419, 459, 467; 75 A. S. R. 154; 120 Id. 739.

See, also, Wills, Cent. Dig. §§ 2, 184-186, 101-205, 643, 947-950, 962, 963, 1340-1350, 1387-1392, 1431-1435, 1525-1545, 1593, 1608; Dec. Dig. §§ 2, 70, 81-85, 436, 446, 447, 601, 612, 617, 640-654, 678.

49. As regards perpetuities. In re Wilcox, 194 N. Y. 288, 87 NE 497.

50. Devise to church prohibited from taking or holding, by laws of state where land was situated, held void and against public policy, and no act of ratification could estop person adversely interested or render devise inforcible. Miller v. Ahrens, 163 F 870. Complainant and his mother held not estopped by signing petition asking that devise be sustained in belief they had no interest. Id. Provision for incorporation of a society to engage in loaning money for interest, without stock, held invalid as providing for a corporation not creatable under laws of state. Lyons v. Barnum, 60 Misc. 625, 112 NYS 587. Not sustainable as a charity. Id.

51. Title in devisee relates back from probate and takes effect as of date of death of testator, or if not at death of testator, devisee takes upon probate of will no more than naked legal title, and where he has made conveyance of his interest during interim between death of testator and probate of will, he takes legal title upon probate of will as trustee for grantee. Miller v. Douglass, 11 Ohio C. C. (N. S.) 205

52. Provision for withdrawal of local assets for satisfaction of foreign to exclusion of local claims held invalid. Coombs v. Carne, 236 Ill. 333, 86 NE 245.

53. Appeal of Murdoch [Conn.] 72 A 290.

54. The competency, materiality and relevancy of testimony (see Evidence, 11 C. L. 1346), the manner of eliciting same from witnesses (see Examination of Witnesses,

§ 1. *Capacity and competency of witnesses in general.*[55]—See 10 C. L. 2079—Personal knowledge of the facts to which he called to testify is essential,[56] though the adequacy of a witness' knowledge in a particular case is a question addressed largely to the discretion of the trial court.[57] That a witness cannot testify positively does not affect his competency, as he may properly be allowed to give his best judgment or recollection of the facts.[58] Evidence to show that witnesses had op-

11 C. L. 1420), and the qualification and examination of experts, are elsewhere discussed (see Evidence, 11 C. L. 1346). The scope of this article is sufficiently shown by the analysis above.

**55. Search Note:** See notes in 19 L. R. A. 605; 24 Id. 126; 31 Id. 465; 37 Id. 423; 39 Id. 265; 42 Id. 553; 63 Id. 937, 963; 3 L. R. A. (N. S.) 375; 12 A. S. R. 915; 24 Id. 663; 28 Id. 942; 106 Id. 763; 2 Ann. Cas. 881; 4 Id. 17; 5 Id. 917; 6 Id. 187, 816, 1021; 7 Id. 167, 999.

See, also, Witnesses, Cent. Dig. §§ 77-206; Dec. Dig. §§ 35-79; 9 A. & E. Enc. L. (2ed.) 410; 30 Id. 911.

**56.** See, also, Evidence, 11 C. L. 1378.

**Witness held competent:** To testify to his own age. Koester v. Rochester Candy Works, 194 N. Y. 92, 87 NE 77. Husband competent to testify to value of trunk full of wife's clothing, no accurate estimate being possible. La Compagnie Generale Transatlantique v. Persaglio [C. C. A.] 165 F 638. Wife of plaintiff competent to testify to his mental condition at time he gave deposition. Piper v. Boston & M. R. R. [N. H.] 72 A 1024. One present at conversation may testify as to what was and what was not said. McKinnon Boiler & Mach. Co. v. Central Michigan Land Co. [Mich.] 16 Det. Leg. N. 17, 120 NW 26. Witnesses acquainted with decedent, who knew of their own knowledge the returns he received from his farm, were competent to testify to his income in action for his wrongful death. Gray v. Phillips [Tex. Civ. App.] 117 SW 870. Witness qualified to state that certain company was doing work at certain places at stated times, though he said he did not know by whom men at work there were employed. McCherry v. Snare & Triest Co., 130 App. Div. 241, 114 NYS 674. It is not indispensable that witness to another's reputation should have resided in same community with him; one who had had numerous business dealings with defendant, held qualified to testify to defendant's reputation for honesty, though they lived in different cities. State v. Lambert [Me.] 71 A 1092. Objection that prosecutrix could not testify to penetration, in rape case, because she did not know meaning of word, properly overruled. Leftrick v. State [Tex. Cr. App.] 116 SW 817. Bookkeeper employed by seller at time in question, who testified that all goods were sold by him or on his order, could state amount of indebtedness of certain buyer. Jett v. Crittenden & Co. [Ark.] 116 SW 665. City engineer not incompetent as to width of city street because not present when lines were originally surveyed. International & G. N. R. Co. v. Morin [Tex. Civ. App.] 116 SW 656. Prosecution for murder of child by burning. Grandmother of child, who found bones after fire, kept them, and identified them at trial, was competent, though not an expert. Sprouse v. Com. [Ky.] 116 SW 344. Witness to prove contents of lost instrument is competent if he knows contents thereof of his own knowledge and can state its substance with precision. Rogers v. Clark Iron Co., 104 Minn. 198, 116 NW 739; Simpson Bank v. Smith [Tex. Civ. App.] 114 SW 445.

**Witnesses held not qualified:** Witness who had not seen party's cattle for two years, not competent to testify to their number. Gibbens & Roundtree v. Hart [Tex. Civ. App.] 117 SW 168. Testimony as to what happened to witness when he was 18 months old, properly stricken, since he could not have remembered it. People v. Carlin, 194 N. Y. 448, 87 NE 805. Witness incompetent as to manner of lighting station platform before he came to town. Louisville & N. R. Co. v. Payne [Ky.] 118 SW 352. Plaintiff, in action for work done, not qualified to testify to work done by men of which he had no personal knowledge. McCormack v. O'Connor, 62 Misc. 297, 114 NYS 1030. One without knowledge of value of land like plaintiff's, or knowledge of source of plaintiff's water, not competent to testify to value of land and water right. City of Florence v. Calmet, 48 Colo. 510, 96 P 183. Engine inspector, who did not make inspection himself, could not testify thereto from record made by employe. Chenoweth v. Southern Pac. R. Co. [Or.] 99 P 86. Where witness said he did not know, but stated what he thought, his testimony should have been stricken for want of knowledge. State v. Hanlon [Mont.] 100 P 1035. One who knew nothing about an alleged custom but what she had heard witnesses say was competent only to impeach such witnesses. American Locomotive Co. v. Whitlock [Va.] 63 SE 991. Where witness testified to death of another 14 years before, there was no error in rejecting his testimony that there had never been any administration of the estate, though witness was son and one of three heirs, he not being the ordinary and not having examined records. Compton v. Fender [Ga.] 64 SE 475.

**57.** Exercise of discretion of trial court in passing on qualifications of nonexpert witnesses on insanity not subject to review. Turner v. American Security & Trust Co., 213 U. S. 257, 53 Law. Ed. —. Where party refused to examine witness to show his knowledge, proper to exclude his testimony, when it seemed unlikely that he would have knowledge of facts. Eames v. New York Life Ins. Co. [Mo. App.] 114 SW 85.

**58.** That witness is unwilling to commit himself absolutely and positively does not make him incompetent; he may give his best recollection, and the weight of his testimony is for jury. Holcombe v. State, 5 Ga. App. 47, 62 SE 647. Witness may give

portunity to know the facts to which they testify is competent.[59] Previous inconsistent statements or testimony affects credibility but not competency of the witness.[60]

Some appreciation of the nature and sanctity of an oath is also necessary.[61] The competency of a person to take the prescribed oath and become a witness is for the court.[62] An interpreter is a witness, and must be competent as such.[63]

Competency is presumed and the burden is upon the objector to show incompetency.[64]

A witness is not disqualified by violation of a rule of exclusion from the court room,[65] though his testimony may be excluded in the discretion of the court, if the violation of the rule was caused by the party calling him.[66]

The competency of a witness in a criminal case in the federal courts must be determined upon common-law rules, not by reference to statutes of the states.[67]

*Husband and wife.* See 10 C. L. 2093—At common law neither was competent in any action, civil or criminal, in which the other was a party.[68] Their competency for or against each other is now generally controlled by statute,[69] and express statutory provisions cannot be evaded by connivance of the parties or indulgence of the court.[70] Under statutes making one spouse competent as to matters in which he or she acted as agent for the other, the witness must have been the actual agent,[71]

best judgment as to number of trees cut on certain land which he had seen though he had not counted stumps. Bufford v. Little [Ala.] 48 S 697. Witnesses could give substance of confession when they could not recollect exact language used. State v. Berberick [Mont.] 100 P 209.

**59.** Evidence admissible to show existence of certain condition at time to which witnesses testified. Kelland v. Noone's Sons Co. [N. H.] 71 A 947.

**60.** Former inconsistent statements affect witness' credibility but not his competency. Fuhry v. Chicago City R. Co., 239 Ill. 548, 88 NE 221. That witnesses testified on cross-examination differently from their testimony on direct, as to location of ties concerning condition of which they testified, affected only the weight of the testimony, not its competency. Hampton v. Chicago & A. R. Co., 236 Ill. 249, 86 NE 243.

**61. Chinese** held competent to take oath, where they gave clear evidence of belief in the existence of Godhead and that God was the avenger of falsehood, though they had peculiar and perhaps absurd ideas as to the source of the Godhead. Birmingham R. L. & P. Co. v. Jung [Ala.] 49 S 434.

**62, 63, 64.** Birmingham R. L. & P. Co. v. Jung [Ala.] 49 S 434.

**65.** Hendelman v. Kahan, 50 Wash. 247, 97 P 109. Violation of rule of exclusion does not disqualify witness; it only affects his credibility or subjects him to punishment for contempt. Price v. U. S. [Okl.] 97 P 1056.

**66.** Hendelman v. Kahan, 50 Wash. 247, 97 P 109.

**67.** United States v. Sims, 161 F 1008.

**68.** State v. Vaughan [Mo. App.] 118 SW 1186. At common law, husband and wife are incompetent to testify against each other. Canole v. Allen, 222 Pa. 156, 70 A 1053.

**69.** Declarations of husband incompetent against wife in suit in which they were both defendants. Kirby's Dig. § 3095, subd. 4, disqualifies husband and wife as witness for or against each other. Reaves v. Coffman [Ark.] 112 SW 194. Under Act May 23, 1887, (P. L. 158), § 5, neither can testify against other. Canole v. Allen, 222 Pa. 156, 70 A 1053. Married woman cannot testify for husband in civil suit against him except as to transactions in which she acted as his agent. Rev. St. 1899, § 4656. Fishback v. Harrison [Mo. App.] 119 SW 465. Husband cannot be called by wife to testify as to his means in order to determine amount of alimony to which she is entitled. Code, § 2281, prohibits. Nissen v. Farquhar, 121 La. 642, 46 S 679. In proceeding by judgment creditor to reach proceeds of real property sold by debtor and wife to third person, later sold back to wife and then sold by her, debtor's deposition previously taken was incompetent against wife, without her consent. Rathbone v. Maltz [Mich.] 15 Det. Leg. N. 1923, 118 NW 991. In trespass against husband and wife, husband was incompetent to testify that in doing acts complained of, he was acting as wife's agent, the object being to fasten liability on the wife. Canole v. Allen, 222 Pa. 156, 70 A 1053.

**70.** Husband and wife being defendants, former could not be called for cross-examination for purpose of fixing wife's liability. Canole v. Allen, 222 Pa. 156, 70 A 1053.

**71.** Where husband conducted negotiations as to settlement himself, his wife was not competent to testify, on ground that she was his "agent," as to whether or not she signed a note alleged to have been given by him in settlement. Fishback v. Harrison [Mo. App.] 119 SW 465. Where wife did not act as agent of her husband, held that she was incompetent witness in suit by vendor of automobile against her husband, as her testimony was not within exemption clause in Rev. St. Ill. c. 51 § 5. Electric Vehicle Co. v. Price, 138 Ill. App. 594.

and the proffered testimony must relate to the subject-matter of the agency.[72] One spouse may usually testify in his or her own behalf, though the other is also a party.[73] In Illinois a husband is a competent witness for his wife in a case concerning her separate property,[74] and in Pennsylvania, in all civil actions brought by the husband, the wife is a competent witness in rebuttal, when her character or conduct is attacked upon the trial thereof.[75]

*Insanity.*[See 10 C. L. 2080]—One who is so insane that he does not understand the nature of an oath, or who cannot give a correct or rational account of what he has seen or heard relative to matters in issue, is incompetent.[76] The presumption favors sanity and competency and the burden is upon a party objecting to show mental incompetency.[77] Merely charging that witness had been adjudged insane is not enough, when he appears rational and is at large.[78] It is proper for the court to examine a witness, claimed to be insane, in the absence of the jury, and determine the question of competency.[79] Where the record of a court showing that the witness has been adjudged insane is produced after the witness has testified, the court may still allow the witness' testimony to stand, and the credibility of his testimony only is for the jury.[80]

*Children.*[See 10 C. L. 2080]—The competency of a child to give testimony, and the manner of examining the child to determine his capacity, are questions addressed to the sound discretion of the trial court.[81] The tests of competency are general intelligence, capacity to receive and convey just and true impressions of facts, and an appreciation of the distinction between truth and falsehood, and the penalties attaching to a failure to testify truthfully after being sworn.[82] Unsworn testimony of child of tender years is inadmissible.[83]

**72.** Kirby's Dig. § 3095 makes husband or wife competent to testify for each other as to business transacted by one as agent for other. This relates to business with third persons, and does not make husband of will contestant competent to testify as copy of letter written by wife to testator. Taylor v. McClintock [Ark.] 112 SW 405.

**73.** Where actions by wife for injuries and by husband for loss of services were consolidated, husband's testimony was competent in his own behalf. St. Louis, etc., R. Co. v. Raines [Ark.] 119 SW 266. In an action for the benefit of a married woman upon the bond of a liquor dealer, who has sold liquor to her husband, an habitual drunkard, after notice not to do so, the husband is a competent witness. Action under Rev. St. 1899, § 3017. Pettis County v. De Bold [Mo. App.] 117 SW 88. Where, in divorce case husband is ruled to show cause why he should not be punished for contempt for failure to obey court's order to pay alimony, he is competent witness to testify in his own behalf to purge himself of contempt. Stoddard v. Stoddard, 122 La. 151, 47 S 446. Restriction against one spouse testifying against the other does not apply in suits for annulment of marriage on ground of fraud, but where depending spouse is in a far off country, uncorroborated testimony of plaintiff must be full and convincing. Vazakas v. Vazakas, 109 NYS 568.

**74.** In an action by wife for personal injury, husband is competent witness. City of Rock Island v. Larkin, 136 Ill. App. 579.

**75.** Under Act of May 8, 1907, P. L. 184, in an action for criminal conversation by husband, wife may rebut attack upon her character, but can be witness only in regard to character or conduct. Keath v. Shiffer, 37 Pa. Super. Ct. 573.

**76, 77, 78.** City of Covington v. O'Meara [Ky. App.] 119 SW 187.

**79.** Proper for court to have party brought into court and examined, in absence of jury, and on finding her incompetent on account of insanity, to exclude her and refuse to allow her to testify. Holland v. Riggs [Tex. Civ. App.] 116 SW 167.

**80.** City of Covington v. O'Meara [Ky. App.] 119 SW 187.

**81.** The court may itself examine a child to determine his competency or allow counsel to do so. Not abuse of discretion to allow prosecuting attorney to examine child under 12. Simmons v. State [Ala.] 48 S 606. The competency of a child of 10, less than that at time of acts to which she testified, was for court, under Code Civ. Proc. § 1880, that children under 10, who appear to be incapable of receiving just impressions, etc., cannot testify. People v. Gregory [Cal. App.] 79 P 912. Where court examined boy under 12 years, as provided in Code Cr. Proc. § 392, as to competency, and determined that he was competent, it was proper to exclude further examination by counsel as to boy's age. People v. Stanley, 130 App. Div. 64, 114 NYS 395.

**82.** No abuse of discretion to allow boy to testify when there was some evidence of competency and appreciation of nature of oath. Applebaum v. Bass [Tex. Civ. App.] 113 SW 173. Boy of 12, who went to Sunday school, had heard of God and Jesus Christ, knew that bad boys go to bad world

*Persons accused or convicted of crime.*[See 10 C. L. 2081]—Some statutes make persons convicted of certain crimes, such as perjury [94] or a felony,[95] incompetent, and certain crimes disqualify one as a witness at common law.[96] But no person who has been convicted of crime will be excluded as a witness unless settled principles or precedents force such ruling,[97] the modern tendency of courts and legislatures being to extend the field of competency and to restrict that of incompetency.[98] One jointly indicted with another is competent in the trial of his codefendant.[99] The competency of a witness, as affected by conviction of crime, must be determined solely from the record of his conviction.[90] A plea of guilty to a charge of crime does not disqualify a person who has not been sentenced.[91] The federal statute disqualifying as witnesses persons convicted of perjury disqualifies in federal courts regardless of the law of the state.[92] As to conviction of crimes other than perjury, the laws of the state prevail.[93]

*Persons acting in official capacity at trial.*[See 10 C. L. 2081]

§ 2. *Disqualification on ground of interest.*[94]—[See 10 C. L. 2081]—Except as to the matters discussed in the succeeding section,[95] interest in the controversy or in the event of the action does not disqualify one as a witness,[96] the common law rule having been changed by statute [97] in most jurisdictions.[98]

§ 3. *Disqualification of one party to transaction or communication, on death or disability of other.*[99]—[See 10 C. L. 2082]—The disqualification of a party or other interested person to testify as to conversations or transactions with a person since deceased, or who has become insane, or with a minor, is regulated entirely by statutes which vary in the different jurisdictions. Such statutes will not be extended by judicial construction.[1] In some states the statute is held inapplicable in will contests,[2] while in others it is held applicable in such proceedings.[3] In Texas, the

and good boys to heaven, and that boys who tell truth go to heaven and those who swear to lies go to bad world, held competent. Simmons v. State [Ala.] 48 S 606.

**83.** Held error to admit testimony of child of seven without administering oath and examining her to determine her qualifications. Commonwealth v. Capero, 35 Pa. Super. Ct. 392.

**84.** One convicted of making false report to U. S. comptroller is not disqualified, this not being perjury. Wise v. Williams, 162 F 161.

**85.** Illicit liquor dealing and receiving and concealing smuggled goods, punishable by penitentiary sentence under federal laws, are not felonies under Code Cr. Proc. art. 768, making one convicted of felony incompetent in criminal case. Cabrera v. State [Tex Cr. App.] 118 SW 1054.

**86.** Crime of embezzlement, as defined by U. S. Rev. St. § 5209, is misdemeanor; it does not come within disqualifying crimes at common law, treason, felony, the crimen falsi, and conviction thereof does not disqualify. United States v. Sims, 161 F 1008.

**87, 88.** United States v. Sims, 161 F 1008.

**89.** Testimony of accomplices jointly indicted is competent, though the indictment against them not dismissed. Simpson v. Com. 126 Ky. 441, 31 Ky. L. R. 769, 103 SW 332.

**90.** Oral testimony, as to nature of testimony in case, inadmissible. United States v. Sims 161 F 1008.

**91.** It is judgment, not guilt, which disqualifies. Crime was grand larceny. Owen v. State [Ark.] 111 SW 466.

**92, 93.** Wise v. Williams, 162 F 161.

**94. Search Note:** See Witnesses, Cent. Dig. §§ 207-549; Dec. Dig. §§ 80-124; 30 A. & E. Enc. L. (2ed.) 911, 978.

**95.** See post, § 3.

**96.** Indiana Union Trac. Co. v. Pheanis [Ind. App.] 85 NE 1040; Powell v. Powell, 78 Ohio, St. 331, 85 NE 541. Payee is competent to testify to execution of note by living payor. Jackson v. Tribble [Ala.] 47 S 310.

**97.** Common law rule of disqualification by interest has been changed by statute; codefendant, interested, not disqualified as witness either in legal or equitable suit. Ackman v. Potter, 239 Ill. 578, 88 NE 231. Witness is now competent to testify for as well as against his grantee, disqualification because of interest having been removed by Code 1887, § 3345. Wright v. Johnson, 108 Va. 855, 62 SE 948.

**98.** But see 10 C. L. 2081, 2082.

**99. Search Note:** See notes in 11 C. L. 1077; 5 L. R. A. (N. S.) 1009; 7 Id. 684; 14 Id. 488; 8 Ann. Cas. 147; 9 Id. 181; 10 Id. 1118.

See, also, Witnesses, Cent. Dig. §§ 550-731; Dec. Dig. §§ 125-183; 30 A. & E. Enc. L. (2ed.) 981.

**1.** Exception to competency of interested parties, contained in Rev. St. 1895, art. 2302, will not be extended by judicial construction. Simon v. Middleton [Tex. Civ. App.] 112 SW 441.

**2.** Kirby's Dig. § 3093 is held not to apply in will contests, purposes being to protect estate in matter of claims against it. Taylor v. McClintock [Ark.] 112 SW 405.

statute applies only in suits where the cause of action or defense asserted grew out of a transaction with the decedent.[4]

*The adverse party, or party against whom the witness is offered, must ordinarily represent the decedent or derive his interest from the decedent, or person under disability.* See 10 C. L. 2082—Illustrative applications of this rule are given in the note.[5] Witness is incompetent to prove execution of deed from decedent under which he claims.[6] It will be seen that a party to a transaction with an agent is usually held incompetent, after the agent's death, against the principal.[7]

Rev. St. 1895, art. 2302, does not apply in will contest, this not being an action by or against heirs or legal representatives of a decedent arising out of a transaction with decedent, but a proceeding between them growing out of an act by him alone. Simon v. Middleton [Tex. Civ. App.] 112 SW 441. Hence, testimony by a disinherited child as to conversation with testator, in which he accused her of wrong conduct with a man, her denial, and his statement that another child and legatee had told him and that he cried and said he wanted nothing to do with it, was competent. Id.

3. Party to will contest against executors cannot testify to transactions or communications with testator. Ross v. Ross [Iowa] 117 NW 1105.

4. Rev. St. 1895, art. 2302. Keck v. Woodward [Tex. Civ. App.] 116 SW 75.

5. **Georgia:** Defendant not competent to testify that **deceased grantor of plaintiff** executed, as executrix of an estate, a deed to defendant to land in suit. Fullbright v. Neely, 131 Ga. 342, 62 SE 188. Defendant, sued by corporation, is not competent to testify to **transactions or communications with deceased agent** of corporation, though they took place in presence of third persons not connected with corporation. Dolvin v. American Harrow Co., 131 Ga. 300, 62 SE 198.

6. Wilson v. Wilson [Neb.] 120 NW 147. Defendant could not testify to conversation with decedent **tending to defeat claim of intervenor**. Harrell v. Hagan [N. C.] 63 SE 952.

**Illinois:** An heir, suing to set aside will and enforce contract whereby decedent agreed that property should descend according to statute, is **suing as heir,** and not merely on contract, and persons interested cannot testify to transactions with decedent. Jones v. Abbott, 235 Ill. 220, 85 NE 279. Widow brought suit to recover fee in one-half tract of land conveyed by her husband to another and by him reconveyed to her and her husband. Children of deceased by his second wife, claiming as heirs, incompetent to testify to conversations with their father as against children by first wife and by plaintiff, who also **claimed as heirs.** Kirby v. Kirby, 236 Ill. 255, 86 NE 259. But their testimony was competent against widow, who did not claim as heir, but under **conveyance from third person.** Id. In **suit by heirs against another heir** to set aside a deed on ground of incapacity of grantor, fraud and undue influence, complainants are **competent** witnesses in their own behalf, since defendant **defends as grantee, not as heir.** Hudson v. Hudson, 237 Ill. 9, 86 NE 661. In suit by children of decedent for assignment of dower, homestead, and for partition, and to set aside deed of decedent on which defendant's children relied, widow and plaintiffs were competent, since defendants **defended as grantees, not as heirs.** Grindle v. Grindle, 240 Ill. 143, 88 NE 473. One who claimed **life insurance money** as affianced wife of deceased is a competent witness to prove such fact, since Hurd's Rev. St. 1905, c. 51, § 2, applies only where adverse party sues or defends as heir, legatee, or devisee. Farrenkoph v. Holm, 142 Ill. App. 336. Where adverse party defends in a **representative capacity,** held that the other party was incompetent to testify as to every thing occurring before the death of deceased. Kempton v. People, 139 Ill. App. 563. Where the adverse party sues or defends in a representative capacity, the wife of one financially interested is not competent witness. Wright v. Whitaker, 137 Ill. App. 598. Where the adverse party does not sue in a representative capacity, a witness is not disqualified because of financial interest. Seass v. Wright, 138 Ill. App. 6.

**Indiana:** In proceeding against administrator's bond on account of allowance of improper claims, claimant would not be competent to testify **against estate** as to validity of claim. Scott v. Smith [Ind.] 85 NE 774. In proceeding to remove administrator on account of allowing improper claims, claimant is competent to testify to validity of claim since no judgment can be rendered for or against estate. Id.

**Iowa:** Substituted beneficiary in life insurance policy is not an assignee of deceased within Code, § 4604, making other party incompetent to testify to transactions with deceased. Crowell v. Northwestern Nat. Life Ins. Co. [Iowa] 118 NW 412. Mere allegation of plaintiff that she is assignee of decedent not enough to establish fact so as to exclude defendant as witness to transaction with decedent. McAleer v. McNamara [Iowa] 117 NW 1122. A **mere donee of a decedent is not an assignee** within the meaning of Code, § 4604. Defendant in suit by donee to recover money competent to testify to transaction with decedent. Id. In **action on partnership note,** surety was made defendant, and one of partners filed crosspetition after other partner's death, asking for cancellation of notes, surety also having died. Held, crosspetitioner was competent to testify to partnership relation and conduct of firm's business. Culbertson v. Salinger [Iowa] 117 NW 6.

**Kentucky:** Action on health and accident insurance policy. Plaintiff incompetent to testify that he had not made statements contained in application, after **death of agent** who took it. United States Health

*Persons disqualified as witnesses* See 10 C. L. 2083 by statutes of this character are parties to the action, interested therein,[8] other persons not parties interested in the

& Acc. Ins. Co. v. Jolly [Ky.] 118 SW 281. Husband executed note as **agent** for his wife. After his death, payee could not testify in action on note, as to transactions with deceased. Swearingen's Executor & Trustee v. Tyler [Ky.] 116 SW 331. Under Civ. Code Proc. § 606(2), **contestant of will** could not testify that husband of testatrix, original propounder of will, also since deceased, had said that she, contestant, could not break will and that he was responsible for it. Wall's Ex'r v. Dimmitt [Ky.] 117 SW 299.

**Maryland:** In **suit against heirs** to enforce ancestor's contract for lease, uncertainties in the contract cannot be cleared up by parol, since parties cannot testify to statements by or transactions with decedent. Lanahan v. Cockey, 108 Md. 620, 71 A 314.

**Michigan:** Controversy being whether legatee, in suit against administrator, was entitled to entire legacy named in will or whether certain sums charged on testator's books should be deducted, plaintiff, legatee, and her husband, to whom testator loaned money, were **competent** witnesses; **claim not adverse to estate.** In re Bresler's Estate [Mich.] 15 Det. Leg. N. 1097, 119 NW 1104.

**Missouri:** The **death of an agent** with whom a contract was made makes the surviving party to the contract incompetent. Payors on note could not testify to cancellation when agent of payee, with whom they dealt, was dead. Columbia Brewery Co. v. Rohling, 133 Mo. App. 65, 112 SW 767. Lands were devised to defendant in trust for plaintiff's mother, proceeds to be used for her support, and remainder to go to plaintiff. In action by plaintiff after mother's death to recover land from defendant, defendant was not incompetent to testify to disposition by him of trust funds, plaintiff **not claiming through deceased.** Collins v. Crawford, 214 Mo. 167, 112 SW 538.

**North Carolina:** In suit to correct deed, proof of declarations by assignee, since deceased, of bidder at executor's sale as to how he wanted deed made out was not excluded by Rev. 1905, § 1631, where assignee had no interest in land and no one claimed under him. Condor v. Secrest, 149 N. C. 201, 62 SE 921.

**Pennsylvania:** Where payee of note was dead, and note had been acquired by another, one of makers could not testify that his purported signature was forgery, this relating to matter occurring during payee's lifetime, and adverse party being his **successor in interest.** Foster v. Allhouse, 222 Pa. 446, 71 A 915. Where executors of mortgagee were substituted as plaintiffs in scire facias upon the mortgage, which was given by one of three joint makers of certain promissory notes, as security for same, held that the other two makers of the notes were not competent witnesses on behalf of defendant as to any matter occurring before death of mortgagee. Boltz v. Muehlhof, 37 Pa. Super. Ct. 375.

**South Carolina:** Code Civ. Proc. 1902, § 400, does not make plaintiff incompetent, in action on fire policy, as witness to statements made to him by agent of insurer, since deceased. Berry v. Virginia State Ins. Co. [S. C.] 64 SE 859.

**Washington:** In suit to enjoin cutting of timber sold by plaintiff to one since deceased, whose **rights were acquired by defendant,** plaintiff cannot testify as to contract with decedent, though scrivener has testified to an omission therefrom. Preston v. Hill-Wilson Shingle Co., 50 Wash. 377, 97 P 293.

7. See cases cited supra, from Georgia, Kentucky, Missouri, and, **contra,** South Carolina.

8. **Witness held incompetent:** In **suit to set aside will as cloud on title,** daughter of deceased, **party to suit and directly interested,** could not testify to transactions with him, adverse party suing as heir. Jones v. Abbott, 235 Ill. 220, 85 NE 279. Person named as executor in will also incompetent, since he would receive commissions if will was sustained. Id. Executor's wife was also interested and disqualified. Id. In **suit to set aside will, legatee** who had accepted sum of money from another legatee in return for agreement not to contest was **incompetent** to testify in favor of complainants and contestants, her interest being with theirs, since she would receive more under will, she being also defendant. Dougherty v. Gaffney, 239 Ill. 640, 88 NE 150. In **suit to foreclose trust deed** executed to plaintiff's intestate, **defendant** was not competent to testify to agreement by intestate to surrender notes. Elwell v. Hicks, 238 Ill. 170, 87 NE 316. Fact of **agency uncoupled with financial interest** in the suit will not disqualify witness where the adverse party sues or defends in a representative capacity. Wright v. Whitaker, 137 Ill. App. 598. In **suit for partition by heirs, defendant** who claimed under oral agreement with decedent was incompetent to testify thereto. Frye v. Gullion [Iowa] 121 NW 563. Codefendants, who would share in land if defendant was successful, and who did not admit plaintiff's claim, were necessary parties in order that final decree might be entered, and were incompetent also, notwithstanding disclaimer by them as to interest of other defendant. Id. In suit by widow **to set aside deed to son of deceased,** son could not testify to communications and transactions with deceased concerning property. Dashner v. Dashner [Iowa] 120 NW 975. **Plaintiff, seeking to establish title to lands of decedent,** as against heirs, incompetent to testify that decedent promised to give him the land. Code, § 4604. Boeck v. Milke [Iowa] 118 NW 874. In action by administrator to **recover notes and securities from son of deceased** which he claimed to be holding as trustee, son was incompetent to testify to transactions, etc., with deceased. Mollison v. Rittgers [Iowa] 118 NW 512. **Action by heirs for specific performance of contract** between deceased and **defendant.** Latter incompetent to transactions with deceased. Skinner v. Creasy [Ky.] 116 SW 753.

event of the action,[9] and persons from whom a party derives his interest.[10] To

**Claimant against estate** cannot testify to anything that occurred between her and decedent. Thomas v. Hobb's Ex'r, 33 Ky. L. R. 995, 112 SW 674. **Defendant,** beneficiary in insurance policy, incompetent, in **action by administrator to recover insurance money** to testify to arrangement between himself and deceased as to payment of money. Deal v. Hainley [Mo. App.] 116 SW 1. In **suit by heirs to set aside deed** of ancestor to another heir, latter was incompetent to give testimony in support of her claim under deed. Burnett v. Smith [Miss.] 47 S 117. **Donees of corporate stock,** when **sued by administrator** of donor to set gift aside cannot testify to transactions with donor. Groff v. Stitzer [N. J. Eq.] 72 A 970. In **action to enforce decedent's contract** to sell land, **plaintiff** is incompetent, under Rev. Codes 1905, § 7252, to testify that decedent promised to go to town and fix up deal according to terms of contract. Larson v. Newman [N. D.] 121 NW 202. In **action by daughter to recover money** claimed to have been given by her deceased father, against brother and administrator of her stepmother, daughter was incompetent to testify to transaction between her father and herself. Moore v. Fingar, 131 App. Div. 399, 115 NYS 1035. In **proceeding to probate will, beneficiaries under former will,** which was revoked, became parties upon their own application and contested the probate. They were incompetent as to transactions with decedent. In re Jeffrey's Will, 129 App. Div. 791, 114 NYS 667. Plaintiffs claimed lot under will and defendant under deed left in escrow, and under contract for her benefit between testator and mortgagor, under which she paid rent payments to testator. Held, **defendant incompetent** to testify to transactions, etc., between testator and mortgagor. Shook v. Fox, 126 App. Div. 565, 110 NYS 951. In **suit to establish last deed from decedent** to his wife, who claimed land, as against his devisee, **plaintiff** was incompetent as witness. Smith v. Lurty, 108 Va. 799, 62 SE 789. In **action by administratrix** on notes given intestate, **defendant** is incompetent in first instance to testify to transactions with decedent. Anderson v. Anderson, 136 Wis. 328, 117 NW 801.

**Witness held competent:** In action against administrator of accommodation indorser of note, maker who was **neither technical nor substantial party** to suit, though ultimately liable on note, was competent to testify to indorsement by decedent. Proctor v. Blanchard [N. H.] 72 A 210. In suit by executrix to enforce subrogation to rights of mortgagee as against an heir of decedent by his first wife, executrix was not, as to matters occurring long before she married decedent, the **"other party" to contract or cause of action,** though she would benefit by successful issue of cause; she was competent witness under P. L. 1589. Wilder's Ex'x v. Wilder [Vt.] 72 A 203. Action on note by administratrix of payee's estate against executrix of estate of maker. **Children and heirs** of payee held **competent** to testify against defendant as to conversations with deceased maker concerning liability on and consideration for note, they not being "parties," under Rev. St. 1908, § 5242. Powell v. Powell, 78 Ohio St. 331, 85 NE 541. Person nominated as **executor in will** held **competent** to testify to matters occurring before testator's death in proceeding to resist probate of will; not disqualified by Burns' Ann. St. 1908, § 522. Hiatt v. McColley [Ind.] 85 NE 772.

**9. Witness held incompetent:** One who rendered services to decedent assigned her claim to her daughter, who sued thereon. It appeared mother was still beneficial owner. Held, she was interested and incompetent as witness against estate. Platner v. Ryan [N. J. Law] 69 A 1007. One who was stockholder in defendant company, and so interested, could not testify for company as to communications or transactions with decedent, in action by administrator for wrongful death. Massey's Adm'r v. Pike Consol. Coal Co. [Ky.] 116 SW 276.

**Witness held competent: Attorney** not disqualified by interest where fee did not depend on issue of suit. British & American Mortgage Co. v. Worrill, 168 F 120. In suit to recover on contract with decedent for services, **attorney who drew will** was competent to testify to declarations by decedent concerning contract and terms thereof incorporated in will. In re McCahan's Estate, 221 Pa. 186, 70 A 711. One who is **mere agent** may testify for his principal as to communications or transactions with a decedent, in an action by the administrator. Superintendent of defendant competent in action for negligent death. Massey's Adm'r v. Pike Consol. Coal Co. [Ky.] 116 SW 276. **Agent** of borrower not disqualified as to transactions between him and borrower relating to loan, as witness for lender, in suit against executrix of borrower to enforce payment. British & American Mortgage Co. v. Worrill, 168 F 120. Where contract for land was made with decedent by plaintiff's stepfather for plaintiff's benefit, stepfather would be competent witness to making of contract. Boeck v. Milke [Iowa] 120 NW 120, on rehearing, receding from position taken in former opinion in 118 NW 874. Plaintiff claimed land as daughter of deceased, and defendant as sister and sole heir. Plaintiff's mother, who had been divorced from deceased, and was not a party, was competent to testify to plaintiff's paternity and heirship. Lyon v. Lash [Kan.] 99 P 598.

**10.** Where it appears that beneficial owner of claim against estate has assigned merely to make her testimony competent, court should cause pleadings to be amended to show suit for use and benefit of assignor, and exclude her testimony. Platner v. Ryan [N. J. Law] 69 A 1007. Plaintiff asked partition claiming three-fifths of an estate under conveyance from three heirs, given on theory that widow had elected to take homestead rights instead of one-third estate. Held, plaintiff's grantors were incompetent to testify to conversations with their deceased mother. Gray v. Wright [Iowa] 119 NW 612. Where defendant claimed under deed left in escrow for her, which had been lost, and proved contract for her benefit between testator,

disqualify a person on the ground of interest, his interest must be in the event of the suit,[11] and must be certain, direct, and immediate,[12] so that he will immediately gain or lose by the event of the suit,[13] and such that the judgment rendered could be given in evidence, for or against him, in another suit,[14] and his interest must be adverse to that of the persons sought to be protected by the statute.[15] Whether a witness is interested must be determined by reference to his status at the time of trial.[16] Under some statutes one party to a contract cannot testify in regard thereto after the death of the other.[17]

under whose will plaintiffs claimed, and mortgagor, which contract required her to pay rents to testator, she did not claim under mortgagor and latter was competent witness to transaction with testator. Shook v. Fox, 126 App. Div. 565, 110 NYS 951.

**11.** The interest which disqualifies is a vested interest in the event of the suit, but not in the question involved. It must be such an interest as the judgment in the case would operate upon. Metcalf v. Buck, 36 Pa. Super. Ct. 58. Interest must be in outcome of litigation, not merely in questions involved. Mallison v. Rittgers [Iowa] 118 NW 512. One not a party, having no pecuniary interest in event, is not disqualified under Ga. Code 1895, § 5269, nor U. S. Rev. St. § 858, though interested in question at issue. British & American Mortgage Co. v. Worrill, 168 F 120. A land owner, although interested in the question involved in an ejectment suit brought by another as affecting his own land, may be a competent witness for one of the parties, though both claim from grantor who is deceased, and the testimony is in regard to conversation with deceased. Metcalf v. Buck, 36 Pa. Super. Ct. 58.

**12.** Ackman v. Patter, 239 Ill. 578, 88 NE 231. **Prospective heir not disqualified** to testify for living ancestor. In re Sloan's Estate, 50 Wash. 86, 96 P 684. Witness is **not incompetent by reason of inchoate right of dower**, dependent upon contingency that he survive his wife. Ackman v. Potter, 239 Ill. 578, 88 NE 231. **Husbands of children competent,** where litigation concerned separate property of their wives. Grindle v. Grindle, 240 Ill. 143, 88 NE 473. In suit to set aside deed against one defending as heir and grantee, a defendant who, if deed were sustained, would inherit as half-sister of grantee, and if it were set aside might acquire by will from her mother, was **not disqualified** as witness. Ackman v. Potter, 239 Ill. 578, 88 NE 231. That husband may have life tenancy in wife's property if he survives her and she does not dispose of it does not give him such an interest as to disqualify him as witness for wife in suit affecting her property. Hungerford v. Snow, 129 App. Div. 816, 114 NYS 127. Legatee under will not disqualified to testify in support of gift depending upon declarations made by testator after execution of will, since she was not directly interested in result, adversely to estate. Nelson v. Olson [Minn.] 121 NW 609. In suit against bank to recover stock pledged by decedent, **stockholder and creditor** of bank, though indirectly interested in result, was not "interested" within meaning of N. Y. Code Civ. Proc. § 829. Wise v. Williams, 162 F 161. St. 1898, § 4069, disqualifying a "party" as witness to transactions with decedent, etc., did not, prior to amendment of 1907, disqualify **stockholders, officers or trustees of a corporation,** though the amendment expressly renders them incompetent. Johnson v. Fraternal Reserve Ass'n., 136 Wis. 528, 117 NW 1019.

**13.** Under Hurd's Rev. St. 1905, c. 51, § 2. Jones v. Abbot, 235 Ill. 220, 85 NE 279.

**14.** Jones v. Abbott, 235 Ill. 220, 85 NE 279. Witnesses who would neither gain nor lose by direct legal effect of judgment and against whom record would not be legal evidence were competent. Mallison v. Rittgers [Iowa] 118 NW 512.

**15.** "Person interested" within Rev. Laws 1905, § 4663, means one who has an immediate pecuniary interest adverse to that of the party against whom he testifies. Nelson v. Olson [Minn.] 121 NW 609. Defaulting codefendant held not disqualified by interest because of possible liability for costs, especially where her testimony was adverse to her own interest so far as such liability was concerned. Ackman v. Potter, 239 Ill. 578, 88 NE 231. In suit by heirs against other heirs to set aside deeds, widow of grantor was not incompetent to testify for defendants by reason of interest, since her interests were with plaintiffs, as she would be entitled to dower if deeds were set aside. Baker v. Baker, 239 Ill. 82, 87 NE 868. In suit by son to contest father's will, widow's testimony as to husband's incompetency, adverse to her own interest, was not excluded by Hurd's Rev. St. 1905, c. 51, § 2. Donnan v. Donnan, 236 Ill. 341, 86 NE 279. On cross bill to construe will, nephew and heir of testator, whose interest was adverse to that of cross complainant, by whom he was called, was competent. Hoffner v. Custer, 237 Ill. 64, 86 NE 737. **Widow** held competent to conversations with deceased husband in suit to recover land, title to which had been in him. Cowdrey v. Cowdrey [N. J. Err. & App.] 67 A. 111. A **person, though a party, may testify in behalf of others** as to transactions or communications between himself and a decedent or lunatic; husband competent to testify for wife. Hungerford v. Snow, 129 App. Div. 816, 114 NYS 127.

**16.** Laws 1907, p. 845, c. 197, making officers, stockholders and trustees of a corporation party incompetent as to transactions, etc., with a decedent, applies to the status, when the witness is offered at the trial. In re McNaughton's Will, 138 Wis. 179, 118 NW 997. A corporate officer, made incompetent by the statute, could, by resigning, become competent, and, if he was not within terms of statute at time of trial, he could testify. Id.

**17.** One party to contract cannot contradict statement therein after death of other

*Transactions and communications to which the disqualification extends.* See 10 C. L. 2086—The disqualification extends to all personal transactions and communications between witness and deceased,[18] and under some statutes, to matters occurring in the lifetime of decedent,[19] equally within his knowledge,[20] concerning which, if living, he could testify and contradict any witness who testified falsely.[21]

party to contract. Richardson v. Isaacs [Ky.] 118 SW 1003. In suit to cancel deed, after grantee's death, grantor cannot testify to what took place between them. Jones v. Gatliff [Ky.] 113 SW 436. In suit to set aside antenuptial contract, after husband's death, wife was incompetent witness. Tilton v. Tilton [Ky.] 113 SW 134. Plaintiff, widow of deceased, in suit to recover proceeds of insurance policy from beneficiary named therein, is incompetent to testify to contract made between her and deceased relating to marriage and making over policy to her. Ables v. Ackley, 133 Mo. App. 594, 113 SW 698. Husband of plaintiff, suing claim for services against father's estate, incompetent to testify to contract which he, as agent for plaintiff, made with decedent, under Rev. St. 1899, § 4652. Jackson v. Smith [Mo. App.] 118 SW 659. In suit for possession of land, prosecuted by heirs, after plaintiff's death, defendant was not competent to testify to transaction with decedent concerning land. Rev. St. 1895, art. 2302. Duncan v. Jouett [Tex. Civ. App.] 111 SW 981. In action by depositor against bank to recover amount of checks sent by him to loan agent for supposed borrowers, whose indorsements on checks were forged by agent, real payees, whose names were forged by agent, were not incompetent after agent's death, not being in privity with agent. Lieber v. Fourth Nat. Bank [Mo. App.] 117 SW 672.

**18.** The word "transaction," in Code Civ. Proc. § 329, embraces every variety of affairs by way of negotiations, actions or contracts. Wilson v. Wilson [Neb.] 120 NW 147. Held that witness took part in conversation between decedent and another, hence incompetent to testify thereto. Wise v. Outtrim [Iowa] 117 NW 264. In suit to compel transfer of certain property of decedent on ground that it had been willed to her under agreement that she was to will it to his relatives, his nephew, who was a party, was incompetent to testify to conversation between the two persons deceased, which was intended as explanation to him of their agreement. Tebbs v. Jarvis [Iowa] 116 NW 708. Husband of proponent of will, in contest where later will was alleged, incompetent to testify that testator had often told him to have nothing to do with person who drew alleged later will. In re Brown's Will [Iowa] 120 NW 667. Defendant in ejectment, claiming under grantor under whom plaintiff claimed, was incompetent to testify that he saw deed under which plaintiff claimed, when it appeared the deed had been shown him in course of transaction with grantor, since deceased. Chase v. Woodruff [Wis.] 120 NW 499. In suit on note by trustee under will of deceased payee, defendant produced another note endorsed "'old note lost, if found canceled by this," and a receipt for interest. Held, his testimony that endorsement and receipt referred to note sued on was incompetent under Code, § 4069. Jackman v. Inman, 137 Wis. 30, 118 NW 189. In suit by executor on two notes given testator, defendant, who claimed second note was given in payment of first and for small cash payment, was incompetent to testify to the form in which he received the money —number and denomination of bills—since transaction with deceased was thus disclosed. McCandless v. Mobley, 81 S. C. 303, 62 SE 260. Where plaintiff sought to be adjudged owner of land willed by deceased to her husband, plaintiff was not competent to testify that certain book entries in evidence represented payments by her to deceased to apply on purchase price of land. Smith v. Scott [Wash.] 98 P 763. In action on note against maker's estate, plaintiff could not testify as to whether she had note in her possession at certain time, since this involved delivery, and transaction with decedent. Wilber v. Gillespie, 127 App. Div. 604, 112 NYS 20. Nor could plaintiff testify that she had seen testator write his name, in order to qualify her as witness to his signature, this also involving transactions with decedent. Id. Claimant against estate could not refresh his memory by referring to entries in books of account relating to transactions with decedent, and then testify to such transactions. Dohman v. Blum's Estate, 137 Wis. 560, 119 NW 349. Widow, seeking to participate in husband's estate, incompetent to testify that when she signed antenuptial contract, renouncing dower rights, she thought she was signing something else. In re Robinson's Estate, 222 Pa. 113, 70 A 966.

**19.** In action against executor on note executed by decedent, plaintiff could not testify to any fact occurring before death of decedent. Rooker v. Samuels [Cal. App.] 101 P 689. In malpractice action, patient having died, defendants were not competent to testify as to matters occurring before patient's death. Wilkins v. Brocks, 81 Vt. 332, 70 A 572.

**20.** In suit by trustee of decedent's estate to recover property leased by decedent, for nonpayment of rent, defendant was incompetent to prove verbal modification of lease by decedent. Goebel v. Look, 153 Mich. 204, 15 Det. Leg. N. 403, 116 NW 1078. In action to recover possession of land under deed from defendant to plaintiff's testator, defendant is not competent to testify to transactions or matters occurring at time of transfer, to prove that deed was not intended as absolute conveyance. Parker v. Case [Mich.] 15 Det. Leg. N. 1122, 119 NW 1081.

**21.** Surviving party to transaction constituting donatio causa mortis not qualified to testify to fact that closed parcel handed her remained closed until donor's death, or to contents of parcel when opened. Van Wagenen v. Bonnot [N. J. Err. & App.] 70 A 43. In suit in which it was claimed that certain conveyances were advancements, daughter of decedent was incompetent to,

It does not exclude testimony as to conversations between decedent and third persons in which witness took no part,[22] nor testimony to facts independent of any transaction or communication with decedent.[23] A party may deny a transaction with a decedent [24] but cannot give his version of it where it is conclusively shown

testify in her own behalf, under Burns' Ann. St. 1908, § 522, that certain record book was kept by her father as record of transfers and gifts to children. Stauffer v. Martin [Ind.. App.] 88 NE 363. In action on note by legatees of one who bought note in ordinary course of business (accomodation), makers could not testify to facts surrounding execution and sale of note, when there was no proof that decedent knew of such facts. Keenan v. Blue, 240 Ill. 177, 88 NE 553.

**22.** Code, § 4604, does not exclude conversation between decedent and third person in which witness did not participate. Wise v. Outtrim [Iowa] 117 NW 264; Culbertson v. Salinger [Iowa] 117 NW 6. Witnesses properly allowed to testify to conversations with decedent which they overheard but did not participate in, but should not be allowed to give statements addressed to themselves. McBride v. McBride [Iowa] 120 NW 709.

**23.** Action on note executed by married woman by her husband. After husband's death, payee could testify to any fact independent of any communication or transaction with deceased agent, as that he was solvent and knew that married woman could not be surety. Swearingen's Executor & Trustee v. Tyler [Ky.] 116 SW 331. Testimony by defendant as to disposition of trust fund, after death of beneficiary, did not involve any contract with decedent. Collins v. Crawford, 214 Mo. 167, 112 SW 538. Code, 1896, § 1794, does not exclude proof of the testimony of a party, since deceased, at a former trial, no "communication" or "transaction" with deceased in any individual sense being involved. Tutwiler v. Burns [Ala.] 49 S 455. Executor and devisee under will properly allowed to testify that he drove to store with testator, that testator entered store, and that other persons were there, and to describe the position of the paper, which testator had, and the parties. Umstead v. Bowling [N. C.] 64 SE 368. Question to administrator whether he had admitted, in statement to certain persons, that certain money borrowed by decedent had been invested by him (administrator) in certain way, did not call for matter inhibited by Civ. Code 1896, § 1794. Blue v. Blue [Ala.] 46 S 751. In an action on note executed by married woman by her husband acting as her agent, she was competent to testify, after husband's death, that she did not receive any of proceeds. Swearingen's Executor & Trustee v. Tyler [Ky.] 116 SW 331. In action on contract executed for plaintiff by his son, since deceased, plaintiff could testify that son executed contract under his direction and in his presence, and in defendant's presence. Mariner v. Wiens [Wis.] 119 NW 340. In suit to determine whether instrument was will, witness, named in purported will as member of advisory committee, was not, even if "interested," incompetent to testify that he himself kept papers in safe, where instrument was found, to show that it was proper place for will. Harper v. Harper, 148 N. C. 453, 62 SE 553. Issue in suit between father and daughter was delivery of deed running to his deceased wife. Father could testify that he kept deed in envelope, at place of business, and that wife never saw it, unless at time of its destruction, though he told her of its existence. Draper v. Brown, 153 Mich. 120, 15 Det. Leg. N. 424, 117 NW 213. One seeking to prove claim for services as domestic against estate may testify as to work required to care for decedent's household, though she cannot testify as to services performed by her. Wise v. Outtrim [Iowa] 117 NW 264. Claimant against estate (for services) may testify to independent acts done by him if he does not testify to transactions with decedent, and if he connects his acts with decedent by other competent testimony. Fitch v. Martin [Neb.] 119 NW 25. But it is improper to examine him as to his acts, assuming that they were done for decedent, this being very matter in issue. Fitch v. Martin [Neb.] 119 NW 25. In action by administrator to recover on note given decedent, his testimony as to conversation with defendant, in which conversation with decedent was incidentally mentioned by them, was not violation of Rev. Laws 1905, § 4663. Peters v. Schultz [Minn] 119 NW 385. In action for malpractice, plaintiff, husband of decedent, having testified to contract of employment made by him with defendant, defendant had right to testify thereto, since exception in Pub. St. 1906, § 1590, makes party competent as to contract made with person who is living and competent to testify. Wilkins v. Brock, 81 Vt. 332, 70 A 572. Burns' Ann. St. 1908, § 522, does not disqualify party in suit to contest validity of will from testifying to friendly relations between herself and testator, this being matter open to observation; statute is aimed at matters known only to party and decedent. Brelsford v. Aldridge [Ind. App.] 84 NE 1090. **"Transaction"** means action **participated in by witness and decedent.** Clifton v. Meuser [Kan.] 100 P 645. Party may not testify to his own conduct if in so doing he necessarily attributes to decedent same act or attitude with respect thereto; thus he may not testify to the rendition of services of such character that it is necessarily inferred that decedent acquiesced therein. Id. In action against administrator for nursing, boarding and caring for decedent, plaintiff is incompetent to testify to rendition of such services unless circumstances are shown to be such that acquiescence by decedent is not necessarily implied. Id. One prosecuting claim against estate is not incompetent to testify to **transactions with living agent** of decedent. Montague v. Priester [S. C.] 64 SE 393.

**24.** In suit by grantor to cancel record of deed after grantee's death, action being

to have occurred.[25] Matters collateral to the issue are not within the rule.[26] A party may contradict testimony of a deceased party given at a former hearing and read in evidence.[27]

*Waiver or removal of disqualification.* See 10 C. L. 2088—The disqualification may be waived by the representative of the decedent,[28] and it is waived where he himself examines the witness [29] or consents to the examination of a witness, otherwise incompetent,[30] or permits his examination without objection,[31] or offers evidence as to transactions with the decedent;[32] but such waiver removes the disqualification only as to matters brought out by the decedent's representative.[33] The Illinois statute, making a party competent when the agent of a decedent has testified, does not apply where the agent's interest is adverse to that of decedent and the estate.[34]

§ 4. *Privileged communications, and persons in confidential relations. A. Attorney and client.*[35] See 10 C. L. 2089—Confidential communications between attorney and client are privileged and cannot be testified to by the attorney without the consent of the client.[36] This rule of privilege should be strictly construed [37] and

against his heirs, grantor may testify that he never signed, executed or acknowledged the deed, since this is merely denying any transaction with deceased. Blount v. Blount [Ala.] 48 S 581.

**25.** Party may deny any transaction with decedent, claimed by others to have taken place, but if such transaction be conclusively shown he cannot give his version of it. Blount v. Blount [Ala.] 48 S 581.

**26.** Rule making other party to contract incompetent when one is dead, not applicable, where proponent of will, who was given by it land at certain price according to a contract previously made, testified, in contest by other heirs, that she waived claim against decedent in consideration of contract; contract was only collateral issue, will being main issue; proponent competent. In re Mason's Will [Vt.] 72 A 329.

**27.** Tanner v. Clapp, 139 Ill. App. 353.

**28.** Administrator may waive statute and permit other party to testify. Cowles v. Cowles' Estate, 81 Vt. 498, 71 A 191. Where an administrator's claim is set out in his account, and no other party appears at hearing or objects to claim, he may testify in his own behalf; need not, as administrator, object to his own evidence. In re Porter's Estate, 60 Misc. 504, 113 NYS 928.

**29.** Where administrator suing to recover notes and securities from son of deceased, who claimed to hold as trustee, cross-examined latter as to transactions with deceased, privilege was waived as to such matters and son was competent to testify thereto. Mollison v. Rittgers [Iowa] 118 NW 512.

**30.** Privilege waived, where administrator consented to examination of claimant by attorney for two heirs, in hearing on claim. Cowles v. Cowles' Estate, 81 Vt. 498, 71 A 191.

**31.** Where plaintiff was examined by attorney for two heirs in hearing before commissioners, administrator being present and not objecting, being interested in matter in issue, he waived privilege, and waiver bound him in hearing on appeal. Cowles v. Cowles' Estate, 81 Vt. 498, 71 A 191. Objection to competency of witness under Code, § 4604, must be made at trial, not first considered on appeal. Amidon v. Snouffer [Iowa] 117 NW 44.

**32.** Where plaintiff, in rebuttal of defendant's defense in action on notes given plaintiff's intestate, introduced evidence of transactions between defendant and decedent, defendant may testify as to such transactions in surrebuttal. Anderson v. Anderson, 136 Wis. 328, 117 NW 801.

**33.** In suit by administrator to recover funds in hands of defendant, daughter of deceased, proof of plaintiff of admissions by defendant tending to show that she claimed and had such funds did not make her competent to testify as to conversations with deceased. Campbell v. Sech [Mich.] 15 Det. Leg. N. 1105, 119 NW 922. In action against heirs for specific performance of contract with decedent, testimony of heirs as to other matters did not make party to contract competent to testify in regard to it. Richardson v. Isaacs [Ky.] 118 SW 1003. In action on contract by decedent to pay for services, representatives of the estate reproduced in evidence without objection part of plaintiff's testimony relating to the transaction with decedent, given on the hearing on her claim in the county court. Held, they waived the privilege, and plaintiff could testify as to entire transaction. Russell v. Close's Estate [Neb.] 119 NW 515. Where claimant refreshed his memory by referring to entries, and was cross-examined as to the same, it was improper to admit all in evidence, when they related to transactions with deceased; only those covered in cross-examination were competent. Fitch v. Martin [Neb.] 119 NW 25.

**34.** Where one alleged to be decedent's agent was called by party adverse to administratrix, and his interest was adverse to intestate at time in issue and at time of trial, Hurd's Rev. St. 1908, c. 51, § 2, did not apply. Elwell v. Hicks, 238 Ill. 170, 87 NE 316.

**35. Search Note:** See notes in 15 L. R. A. 268; 17 Id. 188; 6 L. R. A. (N. S.) 1082; 7 Id. 426; 66 A. S. R. 213, 217; 4 Ann. Cas. 531; 8 Id. 660, 792; 10 Id. 178, 11 Id. 877.

See, also, Witnesses, Cent. Dig. §§ 732-787; Dec. Dig. §§ 184-223; 23 A. & E. Enc. L. (2ed.) 53.

**36.** What party told attorney at time original petition was drawn and filed, as to matter in issue, was privileged. Dyer v.

should not be extended to cases not within its purpose.[38] Thus, communications should not be held privileged unless the relation of attorney and client in fact existed at the time [39] or was contemplated,[40] and unless the communications to, or knowledge gained by the attorney were in fact confidential [41] and imparted to him in his professional capacity [42] to enable him to counsel and advise his client.[43] Thus, communications in the presence of third parties,[44] or afterwards repeated in the presence of third parties,[45] or which are intended to be communicated to others,[46] are not privileged. Communications made to an attorney, who at the time is act-

McWhirter [Tex. Civ. App.] 111 SW 1053. Improper to cause wife of accused to disclose communications between her and accused's counsel. State v. Bell, 212 Mo. 111, 111 SW 24. Under Rev. Laws 1905, § 4660, subd. 2, **communications to law clerk** employed by attorney are privileged. Hillary v. Minneapolis St. R. Co., 104 Minn. 432, 116 NW 933.

37. Phillips v. Chase, 201 Mass. 444, 87 NE 755.

38. Where the controversy is to determine who shall take by succession the property of a deceased person, the reason for the privilege does not exist and neither can set up a claim of privilege against the other. Phillips v. Chase, 201 Mass. 444, 87 NE 755. Purpose of privilege is to protect free communication; has tendency to prevent disclosure of truth; hence, should not be extended to cases without purpose of rule. Hyman v. Grant [Tex.] 112 SW 1042.

39. Communications by prisoner to one not his attorney not privileged. Lonasa v. State [Md.] 71 A 1058.

40. Interviews and negotiations looking to the establishment of relation between the parties would be privileged. Communications by prisoner to lawyer not within this rule. Lonasa v. State [Md.] 71 A 1058.

41. Mere existence of relation of attorney and client does not make the attorney incompetent, except as to privileged communications. Stoddard v. Kendall [Iowa] 119 NW 138. Confidential relation not violated by attorney's affidavit that his client, erroneously named in another affidavit, was person who signed it. In re Jones [Del.] 70 A 15. Letter from party to an attorney, concerning book in latter's possession, held not to contain any confidential statement; not privileged. Taplin v. Marcy, 81 Vt. 428, 71 A 72. Statement by grantor to his attorney to show that delivery of deed in escrow to third person was intended was not privileged. Maxwell v. Harper [Wash.] 98 P 756. Attorney, who had been employed by client in several suits, asked him concerning his relation to another, who desired the attorney's services, his purpose being to avoid taking a suit in which he would represent interests adverse to his client. Held, this communication was not confidential nor privileged. Mayers v. Fogarty [Iowa] 119 NW 159. In disbarment proceedings, an attorney associated with defendant in cause in which defendant was charged with attempt to practice a fraud upon the court by making a false affidavit was called to testify to existence and use of affidavit, and conversations with their client regarding it. Held, this did not involve any privileged matter. In re Watson [Neb.] 119 NW 451.

42. Fact must have been communicated to or learned by attorney when he was acting as such for client. Hyman v. Grant [Tex.] 112 SW 1042. Statute excludes only confidential communications properly intrusted to him in his professional capacity to enable him to counsel and advise client. Stoddard v. Kendall [Iowa] 119 NW 138; Moyers v. Fogarty [Iowa] 119 NW 159. Communications between loan agent and borrower, in response to questions by agent made for his own purpose to give borrower unsolicited advice, were not privileged though agent was an attorney, no confidential relation existing between them. In re Huffman's Estate, 132 Mo. App. 44, 111 SW 848. Plaintiff and defendant called on an attorney to secure her services in negotiating a loan to plaintiff. Attorney was acting for defendant in a pending matter, but was not defendant's attorney in securing loan. Communications between plaintiff and attorney in defendant's presence not privileged. Gerety v. O'Sheehan [Cal. App.] 99 P 545. Communications to an attorney are not confidential and privileged from proof against the person making them unless made to the attorney as such. Mere casual personal conversations are not privileged. Coker v. Oliver, 4 Ga. App. 728, 62 SE 483.

43. The communications must relate to professional advice and to the subject-matter about which such advice is sought. Lanasa v. State [Md.] 71 A 1058. Attorney did not establish privilege as to letters demanded of him by merely showing their delivery to him by third person, it not appearing that they were delivered to him as an attorney nor for purpose of obtaining advice nor for use in litigation. In re Niday, 15 Idaho, 559, 98 P 845.

44. Statements by client at conference between himself and his attorney, and another party and his attorney not privileged. People v. Andre, 153 Mich. 531, 15 Det. Leg. N. 503, 117 NW 55.

45. Where a statement to an attorney is afterwards repeated in the presence and hearing of third persons, it is no longer privileged. People v. Farmer, 194 N. Y. 251, 87 NE 457.

46. Statements by a client to his attorney to be communicated to a third person are not privileged. Model Clothing House v. Hirsch [Ind. App.] 85 NE 719. Special authorization from client to attorney to compromise a suit is not privileged communication, since it is intended to be made known to other party. Trenton St. R. Co. v. Lawlor [N. J. Err. & App.] 71 A 234.

ing only as scrivener, are not privileged,[47] though there seems to be a conflict as to communications made to one engaged in drawing a will.[48] Where the privilege is claimed, it is proper for the court to take testimony on the question whether the statements were made in the course of professional employment,[49] and the determination of that question by the trial court, based on conflicting evidence, is conclusive on appeal.[50] The burden of showing that matter is privileged rests upon the party objecting [51] or the person claiming the privilege.[52] The privilege cannot be used to cover a transaction which is itself a crime [53] or which is fraudulent.[54] Disclosure of a communication is not prohibited in so far as it is necessary to enable a public officer to perform an act in his official capacity.[55] An attorney may be compelled to produce documents in his possession belonging to his client,[56] provided the party himself could be compelled to produce them.[57] It is held that an attorney may be required to disclose the name and address of a party.[58]

The privilege is for the protection and benefit of the client and may by him be waived.[59] Thus, the privilege is waived where the client himself testifies in regard to the privileged matters,[60] provided such testimony is voluntarily given.[61] Where

**47.** Testimony of one who is mere scrivener of deed not privileged. Potter v. Barringer, 236 Ill. 224, 86 NE 233. Where attorney was employed simply to write out notes, relation of attorney and client not existing, attorney could testify to consideration for note. O'Connor v. Padget [Neb.] 116 NW 1131. One acting merely as scrivener, preparing deeds according to grantor's directions, may testify though an attorney, since he was not acting as such at time. Conway v. Rock [Iowa] 117 NW 273.

**48.** Attorney for proponents in will contest **competent** to testify to writing will for testator in 1903, and to surrounding circumstances. His relation to proponents at time went to weight of his testimony, not to his competency. Ross v. Ross [Iowa] 117 NW 1105. Mere fact that attorney is employed to draw will does not render him incompetent to testify to statements then made to him, not confidential or given with view to obtaining advice. Stoddard v. Kendall [Iowa] 119 NW 138. **Attorney who drew will cannot testify** to its contents, will being lost, unless there is waiver of privilege. In re Cunnion's Will, 61 Misc. 546, 115 NYS 969.

**49, 50.** Stewart v. Douglass [Cal. App.] 100 P 711.

**51.** Burden is on party objecting to show communications to attorney, confidential and privileged. Stoddard v. Kendall [Iowa] 119 NW 138; Moyers v. Fogarty [Iowa] 119 NW 159.

**52.** When an attorney declines to testify or produce documents, the burden is upon him to show the privileged character of the communications or documents. In re Niday, 15 Idaho, 559, 98 P 845. He need not disclose the contents of the documents nor the import of the communications, but he must show the existence of the relation of attorney and client, and that the documents were received or the communications made during its existence and while he was acting in his professional capacity. Id.

**53.** Communication made to attorney and notary by person forging and falsely acknowledging deed is not priviledged. People v. Farmer, 194 N. Y. 251, 87 NE 457.

**54.** Where attorney, with no interest in land, made a deed to another and had it recorded to establish title by limitation, the act was not priviledged, but, if done in his professional character, was wrongful in aid of fraud and could be proved. Hyman v. Grant [Tex.] 112 SW 1042.

**55.** As where attorney took acknowledgment to deed as notary public. People v. Farmer, 194 N. Y. 251, 87 NE 457.

**56.** Since parties may now be compelled to produce documents, attorneys having such documents in their possession may also be compelled to disclose them; cannot refuse on ground of privilege. City of Bridgeport v. Bridgeport Hydraulic Co. [Conn.] 70 A 650.

**57.** An attorney cannot be compelled to produce copy of testimony of witnesses to will, which they could not be compelled to produce because of Pub. St. 1901, c. 224, § 14, his possession being their possession. Ex parte Snow [N. H.] 70 A 120.

**58.** It is proper to require an attorney to disclose the address of his client in order that an order of the court may be served. Order to pay alimony; motion to require disclosure by attorney granted. O'Connor v. O'Connor, 62 Misc. 53, 115 NYS 965. Where purpose of examination of attorney is to get name and address of necessary party, attorney cannot plead privilege or lack of knowledge to avoid examination as witness before trial. Schwarz v. Robinson, 129 App. Div. 404, 113 NYS 995.

**59.** Phillips v. Chase, 201 Mass. 444, 87 NE 755.

**60.** Where client testified fully to conversation with attorney, he waived privilege; attorney could thereafter testify. Corney v. Paxton & Gallagher Co. [Neb.] 119 NW 14. Where party told of transactions between himself and his attorney, latter was properly allowed to testify fully in regard thereto, when called by adverse party. Kelly v. Cummens [Iowa] 121 NW 540. Where client testifies to his version of transaction between himself, attorney, and third person, attorney may also testify as to his understanding of it. Fearnley v. Fearnley [Colo.] 98 P 819.

there is a controversy after the client's death between his estate and those claiming adversely to it, the privilege may be waived by his executor or administrator, or by his heirs.[62] Where the client requests that a communication shall be made known to others after his death, there is an implied waiver of privilege.[63] The privilege as to communications made to an attorney in course of preparation of a will can, in New York, be waived only by an express waiver at the trial or hearing, or by the attorney's becoming a subscribing witness.[64] A waiver as to the fact of execution of the will and surrounding conditions, by publishing the will to the witnesses, would not make the attorney competent as to the contents of the will, when he was not a subscribing witness.[65]

As a general rule an attorney connected with a case should not testify therein without first withdrawing from the case,[66] but, where a witness has given testimony reflecting upon the professional character of an attorney necessarily present during the trial, he should be allowed to testify.[67] Counsel for one party may be called to testify by the adverse party as to matters not privileged, when there is a reasonable necessity for so doing.[68]

(§ 4) *B. Physician and patient.*[69]—See 10 C. L. 2091—Communications to, and information acquired by, a physician while acting in his professional capacity are privileged,[70] but, a physician may testify as to the general nature and value of his services,[71] and also as to facts concerning the patient, knowledge of which was not gained while acting in a professional capacity.[72] The privilege attaches as to the physician and patient, notwithstanding the presence of others,[73] though the third persons are competent to testify to communications heard by them.[74] Some statutes make privileged information gained by a professional nurse while acting in her

61. Privilege as to attorney not waived where client testified to subject-matter of conversation with attorney, but this testimony was brought out on her cross-examination. Lauer v. Banning [Iowa] 118 NW 446.

62. Phillips v. Chase, 201 Mass. 444, 87 NE 755.

63. Client requested statement to be made known to brothers and sisters. Phillis v. Chase, 201 Mass. 444, 87 NE 755.

64, 65. In re Cunnion's Will, 61 Misc. 546, 115 NYS 969.

66. Reavely v. Harris, 239 Ill. 526, 88 NE 238. Held error not to allow attorney who had withdrawn to testify. Domm v. Hollenbeck, 142 Ill. App. 439. Fact that he is an attorney of record for the party who calls him only affects his credibility. Domm v. Hollenbeck, 142 Ill. App. 439.

67. As where witness testified that attorney had tried to induce her to give false testimony. Reavely v. Harris, 239 Ill. 526, 88 NE 238.

68. Loomis v. Norman Printers' Supply Co. [Conn.] 71 A 358.

69. **Search Note:** See notes in 4 C. L. 1955; 6 Id. 1988; 1 L. R. A. (N. S.) 1068; 14 Id. 565; 16 Id. 886; 17 A. S. R. 565; 10 Ann. Cas. 57.

See, also, Witnesses, Cent. Dig. §§ 768-777; Dec. Dig. §§ 207-214; 23 A. & E. Enc. L. (2ed.) 83.

70. Physician incompetent as to matters learned while treating patient professionally, but competent as to matters not connected with professional relation. Landers v. Quincy, etc., R. Co. [Mo. App.] 114 SW 543. Physician could not testify to communications by patient as to manner of injury without patient's consent, nor could patient be compelled to testify thereto. Indiana Union Trac. Co. v. Thomas [Ind. App.] 88 NE 356. Physician in charge of hospital where plaintiff was sent, who examined plaintiff daily, could not testify to his treatment and condition, though he did not personally treat or prescribe for plaintiff, other assistants being under physician's supervision. Beave v. St. Louis Transit Co., 212 Mo. 331, 111 SW 52. Discretion of court in excluding as privileged testimony of physicians not reviewed by appellate court. Valleroy v. Knights of Columbus [Mo. App.] 116 SW 1130. In view of Code, § 1073 (31 Stat. 1358, c. 854), in an action on a policy of life insurance, it was not error to refuse to allow a physician, who had testified generally as to the health of the patient, to answer questions as to the nature of the disease. Prudential Ins. Co. v. Lear, 31 App. D. C. 184.

71. Mageau v. Great Northern R. Co., 103 Minn. 290, 115 NW 651.

72. Physician competent to testify that when he went to patient's house to collect a bill he saw her walking about and going up flight of stairs without crutches. Chlanda v. St. Louis Transit Co., 213 Mo. 244, 112 SW 249.

73. Statements by person injured to attending physician as to manner in which injury occurred held privileged, under Burns' Ann. St. 1908, § 520, cl. 4, though others were present. Indiana Union Trac. Co. v. Thomas [Ind. App.] 88 NE 356.

74. Indiana Union Trac. Co. v. Thomas [Ind. App.] 88 NE 356.

professional capacity.[75] A death certificate, executed by the attending physician pursuant to statute, is a public record, and its contents are not privileged.[76] Information gained while examining an applicant for insurance is not privileged.[77] It has been held reversible error for counsel to comment on the refusal of plaintiff, in a personal injury action, to allow his physician to testify.[78]

*Waiver.*—See 10 C. L. 2092—The privilege is personal to the patient and may be waived by him.[79] Thus, the privilege is waived where the patient himself testifies as to the privileged matters,[80] or calls the physician to testify in his behalf,[81] or allows him to testify without objection.[82] But such waiver extends only to matters as to which the patient offers evidence, or allows it to be introduced.[83] The privilege may be waived by the personal representative of the patient, after the latter's death,[84] where the object is to conserve the interests of the estate;[85] he cannot waive it for his own benefit, as in a proceeding to remove him.[86] The privilege, once waived, cannot be recalled,[87] even in a subsequent proceeding of a different nature.[88] A contract by which an applicant for insurance waives the privilege as to attending physicians is valid and binding.[89]

(§ 4) *C. Husband and wife.*[90]—See 10 C. L. 2092—Both at common law and by statute, in many jurisdictions, confidential communications between husband and wife are privileged,[91] and the privilege is not removed by death or divorce.[92] Mat-

**75.** New York statute. Homnyack v. Prudential Ins. Co., 194 N. Y. 456, 87 NE 769.

**76.** State v. Pahst [Wis.] 121 NW 351.

**77.** Relation of physician and patient does not exist; physician acts for company. Lynch v. Germania Life Ins. Co., 132 App. Div. 571, 116 NYS 998.

**78.** Kiehlhoefer v. Washington Water Power Co., 49 Wash. 646, 96 P 220.

**79.** Burns' Ann. St. 1908, § 520, subd. 4, does not disqualify physician, but creates a privilege of patient which he may claim or waive. Pittsburg, etc., R. Co. v. O'Conner [Ind.] 85 NE 969.

**80.** Where plaintiff herself testified to what her physician told her, she waived her privilege; physician should have been allowed to testify. Lauer v. Banning [Iowa] 118 NW 446. Patient waives privilege by himself testifying to his physical condition at time in question. Capron v. Douglass, 193 N. Y. 11, 85 NE 827. Especially in **actions for malpractice** against the physician who attended him. Patient having testified fully to his condition, physician could testify fully. Capron v. Douglass, 193 N. Y. 11, 85 NE 827.

**81.** Plaintiff in personal injury action called and examined physician who treated him. Held proper to allow cross-examination of physician as to patient's condition and professional treatment prior to accident. Seaman v. Mott, 127 App. Div. 18, 110 NYS 1040. The privilege may be waived by the patient or his legal representatives by examining the physician as to the alleged privileged communication. Pittsburg, etc., R. Co. v. O'Conner [Ind.] 85 NE 969.

**82.** Where patient did not object to hospital physician's testimony as to his condition on first trial, he waived his privilege and could not exclude testimony on second. Pittsburg, etc., R. Co. v. O'Conner [Ind.] 85 NE 969.

**83.** Testimony by patient as to his condition while being treated held not waiver of privilege given by Rev. Laws 1905, § 4660, subd. 4. Physician not allowed to testify as to condition in which he found patient when he last visited him. Hillary v. Minneapolis St. R. Co., 104 Minn. 432, 116 NW 933. Plaintiff in personal injury case did not waive privilege as to knowledge of her physician by testifying that physician had treated her professionally two years before, and as to nature of her ailment. McAllister v. St. Paul City R. Co., 105 Minn. 1, 116 NW 917.

**84.** Administrator of deceased may waive privilege. Whether, once waived, it may be recalled, and whether husband may claim it, after having waived it when suing as administrator, raised but not decided. Magean v. Great Northern R. Co., 103 Minn. 290, 115 NW 651.

**85.** Scott v. Smith [Ind.] 85 NE 774.

**86.** Proceeding to remove administrator; privileged communications with physician incompetent. Scott v. Smith [Ind.] 85 NE 774.

**87.** People v. Bloom, 193 N. Y. 1, 85 NE 824. Privilege once waived cannot be recalled, information no longer privileged. Pittsburg, etc., R. Co. v. O'Conner [Ind.] 85 NE 969.

**88.** Patient having allowed physicians to testify in civil case, without objection, could not exclude their testimony as privileged in subsequent prosecution against him for perjury. People v. Bloom, 193 N. Y. 1, 85 NE 824.

**89.** Code Civ. Proc. § 323 may be thus waived. Metropolitan Life Ins. Co. v. Brubaker [Kan.] 96 P 62.

**90. Search Note:** See notes in 6 C. L. 1989, 1991; 4 Id. 1957; 11 Id. 423; 67 L. R. A. 499; 2 L. R. A. (N. S.) 619, 708, 862; 14 Id. 546; 29 A. S. R. 311, 411.

See, also, Witnesses, Cent. Dig. §§ 734-743; Dec. Dig. §§ 187-195; 23 A. & E. Enc. L. (2ed.) 93.

**91.** In suit by wife for alienation of hus-

ters not growing out of the marital relation, and communications or statements which are not of a confidential nature,[93] such as those made in the presence of third persons,[94] are not privileged, though some statutes exclude proof by husband or wife or statements made to others.[95]

*In actions by or against husband or wife* See 10 C. L. 2093 the other spouse is in many states incompetent.[96]

*In criminal prosecutions* See 10 C. L. 2094 against one spouse, the other is not usually a competent witness,[97] unless the charge is a crime against the other spouse.[98]

band's affections, wife could not prove what husband told her, no one else being present, as to defendant's acts in trying to separate them, these being confidential communications, under Civ. Code Proc. § 606. Leucht v. Leucht [Ky.] 112 SW 845. Former wife of decedent's grandson could not testify, in will contest, to contents of letter received by her husband and shown by him to her during the marriage. Wall's Ex'r v. Dimmitt [Ky.] 117 SW 299. Wife of deceased incompetent to testify to threats by her husband against accused, when no one else was present. Gant v. State [Tex. Cr. App.] 116 SW 801. Widow could not testify to transactions or communications with husband during marriage, in suit to set aside his deed, etc. ' Grindle v. Grindle, 240 Ill. 143, 88 NE 473. In action by husband for alienation of wife's affections, husband could not prove intercourse between his wife and defendant by affidavit of wife and conversations between them. Hanor v. Housel, 128 App. Div. 801, 113 NYS 163. In forgery trial, it was improper to require wife to testify concerning letters passing between them. State v. Bell, 212 Mo 111, 111 SW 24. Wife's testimony as to conversation between her husband and herself is incompetent where the interests of a third party are involved. Herd's St. 1905, c. 51, § 5. Kiolbassa v. Polish Roman Catholic Union, 141 Ill. App. 297. In an action for personal injuries commenced by the husband and carried on after his death by his representatives, the widow is not a competent witness as to matters which occurred during the marriage relation. Clark v. O'Gara Coal Co., 140 Ill. App. 207. Neither spouse can testify to any admission or conversation of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between each other. Leiserowitz v. Fogarty, 135 Ill. App. 609. Testimony of admission or conversation of either spouse not admissible, although it is a suit concerning wife's separate property. Id.

92. Clover v. Modern Woodmen of America, 142 Ill. App. 276; Clark v. O'Gara Coal Co., 140 Ill. App. 207. At common law neither spouse may testify to conversations with or admissions by the other during the marriage, whether called as witness before or after termination of relation. Baker v. Baker, 239 Ill. 82, 87 NE 868. Under Hurd's St. 1905, c. 51, § 5, in an action to recover insurance on life of deceased, wife was not competent witness as to admissions or conversations of deceased. Clover v. Modern Woodmen of America, 142 Ill. App. 276.

93. In action upon insurance policy, wife of deceased, who was insured, is competent to testify as to conversations with the beneficiary named in the certificate and as to other facts not within the rule of exclusion, as the suit was one in which neither she nor her husband's estate was a party. Clover v. Modern Woodmen of America, 142 Ill. App. 276. Widow of deceased competent witness in murder case, where she did not testify to facts growing out of marital relation or to confidential communications. Carter v. Com. [Ky.] 114 SW 1186. Widow may testify that her husband was handed, and examined, a deed executed by him, and handed it to grantee, this not involving any conversation or admission. Baker v. Baker, 239 Ill. 82, 87 NE 868. Slip of paper handed by husband to wife during conference between them and two others, containing questions and answers, not confidential; wife, after divorce, could testify thereto. Jacobs v. U. S. [C. C. A.] 161 F 694.

94. Communications between or statements by husband and wife in the presence of others are not privileged. Richards v. State [Tex. Cr. App.] 116 SW 587; Gant v. State [Tex. Cr. App.] 116 SW 801. They may be proved by the third persons present. Richards v. State [Tex. Cr. App.] 116 SW 587. Conversation between plaintiff, in suit for alienation of wife's affections, and his wife, in defendant's presence, not privileged. Rudd v. Dewey [Iowa] 116 NW 1062.

95. Under Hurd's Rev. St. 1905, c. 51, § 5, neither husband nor wife is competent to tesify to conversations with each other, or between one of them and some third person, except in suits between the spouses. Donnan v. Donnan, 236 Ill. 341, 86 NE 279. In suit by son to contest father's will, widow's testimony as to husband's condition and competency, necessarily based on conversations with him and between him and others, was incompetent. Id.

96. See ante, § 1.

97. Wife not competent against husband in criminal case. State v. Wooley [Mo.] 115 SW 417. Wife is not competent, without husband's consent, in prosecution of latter for adultery. United States v. Meyers [N. M.] 99 P 336. Accused's wife not competent witness against him in prosecution for burglary. Finklea v. State [Miss.] 48 S 1. Accused's wife incompetent in prosecution for violation of city ordinance as to sale of liquor. Barron v. Anniston [Ala.] 48 S 58. In bigamy prosecution, defendant's first wife is incompetent to testify for state. Bryan v. State [Tex. Cr. App.] 114 SW 811. State cannot use wife as witness against husband, **nor against codefendant,** while husband is still under indictment. Dobbs v. State [Tex. Cr. App.] 113 SW 921. Two persons were sepa-

Statements of the wife, not in the husband's presence,[99] and letters sent by him to her,[1] have been held incompetent, since to receive them would in effect be compelling her to testify against him. Where the wife takes the stand in behalf of her husband, she may be cross-examined as to matters relating to her examination in chief,[2] but not as to matters not covered in the direct examination.[3]

(§ 4) *D. Miscellaneous relations.*[4]—See 10 C. L. 2995—Communications to a priest are not privileged if he was acting, at the time in a different capacity.[5]

§ 5. *Credibility, impeachment, and corroboration of witnesses. A. Credibility in general.*[6]—See 10 C. L. 2995—The credibility of witnesses ' and whether they have

rately indicted, one for theft, the other for receiving stolen goods. Held, they were codefendants, and wife of one not tried could not testify in trial of other. Bowmer v. State [Tex. Cr. App.] 116 SW 798.

**98. Wife is competent** in prosecution for **crime against her person,** committed by husband. State v. Vaughan [Mo. App.] 118 SW 1186. If witness was wife of accused at time of alleged assault, she would be competent witness against him; if she became his wife afterwards, she would be incompetent without his consent, under Pen. Code, § 1322. People v. Johnson [Cal. App.] 98 P 682. Wife of defendant is **competent witness** against him in prosecution for **vagrancy,** under Acts 1903, p. 32. Thomas v. State [Ala.] 46 S 771. Rev. St. 1908, § 7284, **does not make wife competent** witness against husband on trial of latter for **failure and refusal to care for children,** under §§ 3140-2. State v. Orth, 79 Ohio St. 130, 86 NE 476. In prosecution of husband for **disturbing peace of wife,** latter was improperly compelled to testify against husband, though testimony disclosed also that he used violence and assaulted her. State v. Vaughan [Mo. App.] 118 SW 1186.

**99.** In bigamy case, conversations between defendant's legal wife and others, not in his presence, were incompetent as she was not competent witness. Knapp v. State [Tex. Cr. App.] 114 SW 836. Proof of conversation with wife of defendant, accused of murder, incompetent, since she was thus compelled to testify against her husband without opportunity to deny the alleged statements. Brummett v. Com. 33 Ky. L. R. 355, 108 SW 861.

**1.** Letters by prisoner charged with murder, to his wife, addressed and duly mailed to her, are incompetent against him, when offered by district attorney. Commonwealth v. Fisher, 221 Pa. 538, 70 A 865.

**2.** Hobbs v. State, 53 Tex. Cr. App. 71, 112 SW 308. Where wife testified to misconduct of deceased toward herself, she could be cross-examined as to whether deceased also insulted another woman at same time, and then contradicted by such other. Marsh v. State [Tex. Cr. App.] 112 SW 320. Wife could be cross-examined as to statements made by her and as to testimony on preliminary examination at variance with her testimony concerning matters touched on in her direct examination. Id. Where wife testifies for husband, everything going to her knowledge of facts testified to, her bias, her prejudice, and anything affecting her credibility, may be shown on cross-examination. Id. Cross-examination of wife of accused, proper, relating to matters testified to by her and going to show her knowledge, and opportunity to see what she testified to. Dobbs v. State [Tex. Cr. App.] 113 SW 923. Proper to cross-examine accused's wife as to previous statements, relating to matters to which she testified for purpose of laying foundation for impeachment. Young v. State [Tex. Cr. App.] 113 SW 276.

**3.** Error to allow statement of wife to neighbor concerning husband's conduct to be proved. Hobbs v. State, 53 Tex. Cr. App. 71, 112 SW 308. Statement of wife, amounting only to an opinion as to killing and cause of it, and not relating to a matter covered in her direct examination, was not proper matter of cross-examination. Marsh v. State [Tex. Cr. App.] 112 SW 320. Under Rev. St. 1899, § 2637, it was improper to allow state to cross-examine accused's wife as to matters not covered in her direct examination, such as letters and communications between them, and that she had seen money orders in his possession, charge being forgery of money orders. State v. Bell, 212 Mo. 111, 111 SW 24.

**4. Search Note:** See notes in 6 L. R. A. (N. S.) 325; 7 Ann. Cas. 109.

See, also, Witnesses, Cent. Dig. §§ 744-746, 778, 779; Dec. Dig. §§ 186, 196, 215, 216; 23 A. & E. Enc. L. (2ed.) 99.

**5.** Notary who drew deed competent to testify to mistake made by him in description of land conveyed, though he was also a priest and spiritual adviser of grantor; since he was not acting as priest at time but merely as notary. Partridge v. Partridge [Mo.] 119 SW 415.

**6. Search Note:** See notes in 21 L. R. A. 418; 82 A. S. R. 25; 6 Ann. Cas. 711.

See, also, Witnesses, Cent. Dig. §§ 1072-1289; Dec. Dig. §§ 311-416; 30 A. & E. Enc. L. (2ed.) 1062; 10 A. & E. Enc. P. & P. 316.

**7.** People v. Stanley, 130 App. Div. 64, 114 NYS 395; Dumas v. Clayton, 32 App. D. C. 566; State v. Sassamon, 214 Mo. 695, 114 SW 590. Credibility of witnesses is for jury except in extreme cases. Krenz v. Lee, 104 Minn. 455, 116 NW 832. Though court finds two witnesses whose testimony conflicts both honest and equally credible in character, he may nevertheless find the facts as testified to by one who is corroborated by other evidence. Elzy v. Adams Exp. Co. [Iowa] 119 NW 705. There is no such thing as legal equality of credibility of witnesses; the testimony of each is to be weighed and given value according to its character, the demeanor of the witnesses, and probability or improbability of testimony. Brethauer v. Schorer [Conn.] 70 A 592. If party testifies in his own behalf, the jury may consider his interest in the

been successfully impeached [8] are questions for the jury or trial court exclusively,[9] in considering which, the appearance and demeanor of the witness [10] may be considered as well as other matters shown on the issue of credibility. The uncorroborated testimony of witnesses believed to have willfully testified falsely to a material fact may be wholly disregarded.[11]

*Impeaching and discrediting in general.*—See 10 C. L. 2095—Cross-examination for the purpose of impeaching a witness is proper,[12] the extent of such examination being a matter resting in the trial court's discretion.[13] In general, the testimony

suit in determining the credit to be given his testimony. Mansfield v. Chicago B. & R. R. Co., 132 Ill. App. 552. In a prosecution for abortion, the woman having morally implicated herself in the act, the jury should consider that fact as bearing upon her credibility. Thompson v. U. S., 30 App. D. C. 352.

**Note:** The province of court and jury in this respect is fully treated in the topics Instructions, 12 C. L. 218, and Discontinuance, Dismissal, and Nonsuit, 11 C. L. 1093, while the rule that an appellate court will not reverse a verdict depending on the credibility of witnesses is treated in Appeal and Review, 11 C. L. 230.

**8.** Credibility of witnesses for jury, though they have been impeached. Equitable Life Assur. Soc. v. Kitts' Adm'r [Va] 63 SE 455. Whether witness has been successfully impeached, and whether he is corroborated, for jury; charge approved. Arnold v. State, 131 Ga. 494, 62 SE 806. Whether witness has been successfully impeached, so as to require corroboration, is for jury. Southern R. Co. v. Peek [Ga. App.] 64 SE 308. That witness gave different and inconsistent testimony on former trial tends strongly to impeach him but does not conclude him as matter of law. Krenz v. Lee, 104 Minn. 455, 116 NW 832. Though effort has been made to impeach witness by proof of contradictory statements, jury may believe him though uncorroborated. Sims v. Scheussler [Ga. App.] 64 SE 99. That witness has willfully testified falsely to any material fact does not warrant jury in totally disregarding his corroborated testimony; they may judge of his credibility and give his testimony such weight as it is entitled to. Johnson v. Johnson [Neb.] 115 NW 323.

**9.** Credibility of interested witnesses must be submitted to jury. Baker v. Hart, 129 App. Div. 511, 113 NYS 1053. No instruction on the effect of impeaching evidence is necessary where it is such that it could not be used for any other purpose. Waters v. State [Tex. Cr. App.] 114 SW 628. Instructions on credibility of witnesses not erroneous. Vails v. State [Miss.] 48 S 725.

**10.** Appearance and manner of witness may be considered on issue of credibility, but is not controlling. His testimony should be considered in determining whether he is man of ordinary intelligence. Rahles v. Thompson & Sons Mfg. Co., 137 Wis. 506, 119 NW 289.

**11.** Rule "falsus in uno, falsus in omnibus" has many limitations; it is for courts and juries to sift out true from false, corroboration being important factor in so doing. Jewell v. Kelley [Mich.] 15 Det. Leg. N. 1018, 118 NW 987. Discrepancy between testimony of witness and testimony given at another time may be considered by jury, but they are not at liberty to disregard his testimony entirely unless they find that he willfully testified falsely to a material fact. Gullen v. Battle Island Paper Co., 128 App. Div. 369, 112 NYS 934. If a witness willfully testifies falsely to any material matter, the jury may, if it sees fit, but is not bound to reject all of such witness' testimony not corroborated by other credible evidence. Miller v. State [Wis.] 119 NW 850.

**Instructions** held not erroneous. Louisville & N. R. Co. v. Seale [Ala.] 49 S 323. Instruction erroneous. Tucker v. Dudley, 127 App. Div. 403, 111 NYS 700. Instruction erroneous because omitting word "willfully" or "knowingly." Lack v. Weber, 61 Misc. 91, 113 NYS 102. Requested instructions properly refused; false swearing must be willfully done; must relate to material matters. Patton v. State [Ala.] 46 S 862. Instruction "if you believe that any witness 'knowingly' testified falsely," etc., equivalent to use of word "willfully." Peterson v. Pusey, 237 Ill. 204, 86 NE 692. Proper to instruct that testimony of witness testifying falsely as to any point could be wholly disregarded unless corroborated by other testimony, and that truth of witness' testimony was for jury alone. Malinowski v. Detroit United R. Co., 154 Mich. 104, 15 Det. Leg. N. 693, 117 NW 565. If jury finds that witness has willfully testified falsely as to any material fact, they may disregard all his testimony, except as it is corroborated by other credible evidence. Instruction omitting word "credible" properly refused. Blankavag v. Badger Box & Lumber Co., 136 Wis. 380, 117 NW 852.

**12.** See Examination of Witnesses, 11 C. L. 1420.

**13.** Extent of cross-examination for purpose of discrediting witness largely discretionary. State v. Phillips, 105 Minn. 375, 117 NW 508; Thompson v. U. S., 30 App. D. C. 352. Fact that witness is interested in result of a suit is one that may always be brought out. Crook v. International Trust Co., 32 App. D. C. 490. Held error for trial court not to allow party to prove by cross-examination that witness tried to influence one of the jurors in the case. Illinois Cent. R. Co. v. Black, 133 Ill. App. 84. Extent of cross-examination to affect credibility rests in court's discretion. Barbieri v. Messner, 106 Minn. 102, 118 NW 258. Where defendant had benefit of full cross-examination of witness, showing him to be convicted as accomplice, etc., it was not error to exclude questions asking for his true name, he having admitted an assumed name. State v. Jones [Wash.] 101 P 708. Cross interrogatories will not be allowed to

of a witness may be discredited by proving the facts to be contrary to those testified to by him,[14] or tending to show such testimony improbable,[15] or by showing acts [16] or statements [17] of the witness, or other circumstances,[18] inconsistent with his testimony [19] or tending in some manner to discredit it or the witness.[20] Intoxication of

discredit witness as to particular act and conduct having no bearing upon the issues involved. State v. Howard, 120 La. 311, 45 S 260.

**14.** Witness may be impeached by disproving facts testified to by him. Clark v. State, 5 Ga. App. 605, 63 SE 606. In action on contract, proof of payments, denied by plaintiff as witness, competent on issue of his credibility. Axel v. Kraemer, 75 N. J. Law 688, 70 A 367. Plaintiff having testified to rating with commercial agency, its report was competent to impeach him. Rainey v. Kemp. [Tex Civ. App.] 118 SW 630. Defendant having testified to certain trip, describing route and town, and having been cross-examined thereon, could be contradicted as to his description. Emerson v. State [Tex. Cr. App.] 114 SW 834. Having denied conversation with another as to turning state's evidence, accused could be contradicted by proving it. Dennis v. State [Ark.] 114 SW 926. Where accused testified to certain acts of mistreatment of his son by decedent's son, state could prove by latter that he had not done certain act testified to by accused. Stacy v. State, 53 Tex. Cr. App. 461, 110 SW 901. Proof of particular transactions may be made to contradict a witness who has testified to general custom. Rose v. Lewis [Ala.] 48 S 105. Where plaintiff claimed and testified to damage on account of burning of timber on land, it was proper to impeach him by asking if some one else did not own the timber. Gay v. Roanoke R. & Lumber Co., 148 N. C. 336, 62 SE 436.

**15.** Any evidence tending to show improbability of plaintiff's testimony, such as strained relations with one adversely interested, competent. Lord v. Rumrill, 130 App. Div. 279, 114 NYS 488. Section foreman testified that ties at place of wreck were in good condition, and that he had burned broken ties after wreck. Proper to read to him rule requiring preservation of broken ties, axles, etc., in case of wreck, to determine cause, and ask him if it was a rule of the company. Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 116 SW 365. Theory of defense in homicide case was suicide, and deceased's father testified that she had always been cheerful and happy. Error to refuse to allow accused to show on cross-examination that deceased had previously attempted suicide, and that doctor had warned witness to watch her. Sanders v. State [Tex. Cr. App.] 112 SW 68. Where accused testified that he did not know until few days before trial to whom he was accused of selling liquor, when he signed bail bond, and employed counsel, could be proved. Taylor v. State [Tex. Cr. App.] 112 SW 942.

**16.** Conduct of witness, a party, inconsistent with claims and testimony on trial, could be shown on cross-examination. Czarnecki v. Derecktor [Conn.] 71 A 354. Where plaintiff denied settlement, whether he had commenced and dismissed suit was competent as affecting his credibility. Lindstrom v. Fitzpatrick, 105 Minn. 331, 117 NW 441. Defendant having testified that he had never had any pig iron in his possession, proof that he had offered to sell some which he said he expected to receive was competent to contradict him. People v. Feinberg, 237 Ill. 348, 86 NE 584. Where plaintiff testified that land, title to which was in issue, was accretions to his land, proper to prove that he offered to buy it from county, and made application for it. Lee v. Conran, 213 Mo. 404, 111 SW 1151.

**17.** See post, § D.

**18.** Proof of loss of book, in which plaintiff claimed he had kept account, competent as contradicting him. Barnes v. Loomis, 199 Mass. 578, 85 NE 862.

**19. Held not inconsistent with testimony:** Where it was not claimed that defendant's testimony on trial was inconsistent with that given in police court, it was improper to show that he had made statement in trial that he had not made in police court. State v. Cook, 132 Mo. App. 167, 112 SW 710. Where witness testified that one contractor was employed for certain work but could not do it, evidence on cross-examination to show that contractor was sick was not competent to contradict witness, who had not testified to any reason why contractor failed. Theobald v. Shepard Bros. [N. H.] 71 A 26. Where witness testified that he entered into conspiracy to steal through fear, evidence of his reputation as an overbearing negro, and that other negroes were afraid of him, was incompetent. Choice v. State [Tex. Cr. App.] 114 SW 132. Witnesses having testified that they did not work steam on locomotive down certain grade and through certain station, they could not be contradicted by proof of custom to work steam at those places 10 years before. Chenoweth v. Southern Pac. Co. [Or.] 99 P 86. That information was voluntarily given by plaintiff to defendant that assault occurred on car 3717, when action was for assault on car 3771, was not enough to show bad faith of plaintiff, and wholly discredit his testimony. Cohen v. Brooklyn, etc., R. Co., 115 NYS 1101.

**20.** Testimony directly attacking credibility of witness competent. Tuttle v. Shutts, 43 Colo. 534, 96 P 260. Any fact or circumstance that would tend to throw light on credibility of witness or that would assist jury in weighing testimony, is proper. The age, business, condition of witness, whether married or single, and whether he has children, may be proper. Georgia So. & F. R. Co. v. Ransom, 5 Ga. App. 740, 63 SE 525. Where plaintiff testified to promise of marriage by defendant, a contract signed by her, releasing claims for damages growing out of their relations, was competent to discredit her. Lauer v. Banning [Iowa] 118 NW 446. Admission of witness that he wrote letters to creditors of insolvent, which contained falsehoods, to deceive them,

the witness at the time of the occurrence of the facts to which he testifies may be shown.[21] What takes place between an attorney and his witnesses may be shown only when some fraud or corruption is involved.[22] That a witness claimed his privilege and refused to testify at a coroner's inquest cannot be shown to impeach him in a subsequent trial.[23] Testimony should not, however, be rejected because the witness has belittled or exaggerated some material fact.[24]

*A party cannot ordinarily impeach his own witness*[25]—See 10 C. L. 2098 by attacking his reputation for veracity or by proving contradictory statements[26] unless he has been deceived and entrapped by the witness[27] who has given affirmative[28] and prejudicial[29] testimony, but he is not precluded from proving facts differing from those testified to by his witness,[30] and, if the witness is a party, so that statements

lessened effect of his testimony. Brewer v. Johnson [Ark.] 112 SW 364. That one known to be owner of valuable property has appealed in forma pauperis may be considered by jury as circumstance bearing on credibility of affiant as witness in case. Leake v. King Dry Goods Co., 5 Ga. App. 102, 62 SE 729. Impeaching evidence may be considered on credibility of witness, though it does not absolutely falsify the testimony of the witness. Schwartz v. State [Tex. Cr. App.] 114 SW 809. Action for balance due on sale. Proof that plaintiff said to his partner that there would be a law suit, and that he would give him (partner) half of what he could beat defendant out of, was competent to impeach plaintiff. Hamilton v. Dismukes [Tex. Civ. App.] 115 SW 1181. Where witness was not requested to appear at hearing on claim and had not been subpoenaed, his failure to appear and testify **could not be shown** to discredit his testimony at trial. Spring v. Perkins [Mich.] 16 Det. Leg. N. 127, 120 NW 807.

**21.** Proof of intoxication of plaintiff at time of injury, competent, on issue of credibility as witness. Pittsburg, etc., R. Co. v. O'Conner [Ind.] 85 NE 969. That witness was drunk at time concerning which he testified could be shown, this bearing on credibility of testimony. Green v. State, 53 Tex. Cr. App. 490, 110 SW 920. Proper to show intoxication of state's witness at time of occurrence of facts he testified to, but not intoxication an hour and a half later. Pollock v. State, 136 Wis. 136, 116. NW 851.

**22.** Eads v. State [Wyo.] 101 P 946.

**23.** Action for wrongful death. Conductor testified for defendant. Garrett v. St. Louis Transit Co. [Mo.] 118 SW 68.

**24.** The jury should give the testimony such weight as it deserves. Walker v. Chicago & Joliet Elec. R. Co., 142 Ill. App. 372. Testimony cannot be rejected unless witness has willfully and knowingly sworn falsely to some matter material in its character. Kinahan v. Butler, 133 Ill. App. 459.

**25.** Plaintiff could not ask her own witness, who testified differently from plaintiff, a question intended to discredit this testimony. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Plaintiff could not test accuracy of judgment of his own witness who testified how long train stopped by holding a watch on him. Dilburn v. Louisville & N. R. Co. [Ala.] 47 S 210. Prosecuting attorney may not impeach his witness, save under exceptional circumstances, but it is not improper to refresh his memory by reading from a transcript of his former testimony. People v. Iziar [Cal. App.] 97 P 685.

**26.** Lambert v. Armentrout [W. Va.] 64 SE 260. Party may cross-examine witness found to be adverse but cannot discredit him by proving previous contradictory statements. Berkowsky v. New York City R. Co., 127 App. Div. 544, 111 NYS 989.

**27.** Unless a witness has deceived and entrapped the party calling him, such party will not be permitted to impeach or discredit him by proving previous contradictory statements made, not to the party, but to others. Luke v. Cannon, 4 Ga. App. 538, 62 SE 110. Party cannot contradict his own witness unless surprised, and cannot claim surprise when witness tells counsel what effect of testimony will be before going on stand. Texas & P. R. Co. v. Crump [Tex. Civ. App.] 110 SW 1013. Must appear that party claiming to have been entrapped learned from witness, and not from hearsay, what he expected witness to testify to. Luke v. Cannon, 4 Ga. App. 538, 62 SE 110. It must appear that statements relied on to impeach witness were made to others than the party, and were unknown to the party, and that he was deceived and entrapped and damaged by testimony different from what he expected. Id.

**28.** Where a witness called by a party fails to give the expected testimony and gives no affirmative testimony, the party cannot prove previous statements made by witness. Bollinger v. Bollinger [Cal.] 99 P 196. Where witness called by defendant said he was not present at time of alleged negligent killing, defendant could not prove witness' former statement that decedent was killed trying to board a train. Texas & P. R. Co. v. Crump [Tex. Civ. App.] 110 SW 1013. Where witness does not give expected testimony, but does not give any affirmative testimony, the party calling him cannot prove statements made by him. People v. Duncan [Cal. App.] 96 P 414.

**29.** Under White's Ann. Code Cr. Proc. § 795, state may show contradictory statements of witness called by it who gives testimony injurious to prosecution. Brown v. State [Tex. Cr. App.] 114 SW 820. Though party may impeach his own witness if he can show he has been entrapped by him by a previous statement (under Civ. Code 1895, § 5290), this rule does not apply where the witness' testimony is not prejudicial to party calling him. Nathan v. State, 131 Ga. 48, 61 SE 994.

**30.** Lambert v. Armentrout [W. Va.] 64

would be competent as admissions against interest, they may be proved though they contradict his testimony.[31]

*A witness cannot ordinarily be contradicted or impeached as to collateral matters*[32]—See 10 C. L. 2090 or as to illegal testimony [33] brought out on cross-examination.

(§ 5) *B. Character and conduct of witnesses.* 1. *In general.*[34]—See 10 C. L. 2100—Proof of the general moral character or reputation of the witness is admitted

SE 260. One may contradict his own witness by showing the truth to be different from what the witness testified to. Luke v. Cannon, 4 Ga. App. 538, 62 SE 110. While party cannot impeach his witness, he is not bound by testimony, but may show different state of facts. Rudd v. Dewey [Iowa] 116 NW 1062. Plaintiff not bound by testimony of witness called by her. Where she had other testimony, she was entitled to go to jury on issue raised. Collins v. Wells. Fargo & Co. Exp. [Iowa] 118 NW 401. While one cannot impeach a witness called by him, he may prove a state of facts contrary to those testified to by the witness. Koester v. Rochester Candy Works, 194 N. Y. 92, 87 NE 77. One cannot impeach or deny credibility of witness whom he calls, though he may show different state of facts. Barr v. Sofranski, 130 App. Div. 783, 115 NYS 533. Party calling witness vouches for his general credibility but not as to matters in regard to which he is to testify, and party is not bound by testimony, though he may not impeach witness. Becker v. Hart, 129 App. Div. 511, 113 NYS 1053. Party may not impeach his own witness but is not bound by his testimony and may prove different facts. State v. Shapiro [Mo.] 115 SW 1022. Held not improper to allow state to contradict witness called by it, and for court to charge that statements out of court so proved could not be considered as substantive evidence, but only as neutralizing testimony in conflict therewith. Commonwealth v. Deitrick, 221 Pa. 7, 70 A 275.

**31.** Lambert v. Armentrout [W. Va.] 64 SE 260. A party who calls the **adverse party as witness under the statute,** may contradict his testimony and prove previous statements under Ball. Ann. Codes & St., § 6008. Thomas v. Fos [Wash.] 98 P 663.

**32.** Immaterial and irrelevant testimony not open to contradiction. Casavan v. Sage, 201 Mass. 547, 87 NE 893; Metropolitan Life Ins. Co. v. McCray [Ala.] 47 S 65; Pelham v. Chattahoochee Grocery Co. [Ala.] 47 S 172; Abbott v. Herron [Ark.] 118 SW 708; Hubbard v. Montgomery County [Iowa] 118 NW 912; Dronenburg v. Harris, 108 Md. 597, 71 A 81. Answers to collateral inquiries on cross-examination cannot be contradicted. Provencher v. Moore [Me.] 72 A 880. Party cross-examining as to collateral matters is concluded by witness' answers and cannot contradict him. State v. Dunn [Or.] 100 P 258. Impeaching evidence must relate to matter as to which witness testified. State v. Shapiro [Mo.] 115 SW 1022. Witness cannot be cross-examined and contradicted as to collateral fact which party could not prove in making his own case. Citizens' R. & L. Co. v. Johns [Tex. Civ. App.] 116 SW 62. No contradiction as to making certain immaterial statement as to what witness would have done if in plaintiff's place. Illinois Cent. R. Co. v. Smith [Ky.] 118 SW 933. In action for damages to wife, husband could not be cross-examined and impeached by proving statement as to claim by him against defendant for alleged injury at prior and different time. Citizens' R. & L. Co. v. Johns [Tex. Civ. App.] 116 SW 62. Witness cannot be impeached by proving his statement that suit was nothing but blackmail, this being mere opinion and immaterial. Georgetown W., Gas, Elec. & P. Co. v. Forwood [Ky.] 113 SW 112. Witness, who presented plaintiff's claim to defendant, could not be contradicted as to his testimony that claim did not contain item of damages for himself. St. Louis & S. F. R. Co. v. McAnellia [Tex. Civ. App.] 110 SW 936. Where witness denied making certain statements as to wholly immaterial matters, he could not be contradicted as to them. Cooper v. State [Miss.] 49 S 178. Where witness denies making statement to certain person, and such person when called also denies that statement was made to him, a third witness cannot be permitted to contradict the second's testimony. State v. Walton [Or.] 99 P 431. Where defendant's witness denied on cross-examination that he had offered to testify for plaintiff if paid $25, proof by plaintiff that witness had made such offer was incompetent. Katz v. Brooklyn, etc. R. Co., 116 NYS 562. Where witness is cross-examined as to whether he had been engaged in unlawful or degrading occupation, and denies that he has, party examining him is bound by his answer and cannot contradict him. Schnase v. Goetz [N. D.] 120 NW 553. Where witness for accused denied that he had performed an abortion on her (prosecution being for another crime), it was error to contradict her by proof of previous statements and proof of the abortion. State v. Dunn [Or.] 99 P 278.

**Held material:** Witness, having testified to certain consideration, could be asked if he had not previously stated smaller sum, consideration being material on good faith issue. Pelham v. Chattahoochee Grocery Co. [Ala.] 47 S 172.

**33.** Testimony on cross-examination of accused to show failure to testify on preliminary, being illegal, could not be contradicted. Pryse v. State [Tex. Cr. App.] 113 SW 938. When a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question. Crawford v. U. S., 30 App. D. C. 1. The test whether fact inquired of on cross-examination is collateral is would the cross-examining party be entitled to prove it as part of his case tending to establish his plea. Id.

**34. Search Note:** See notes in 14 L. R. A. (N. S.) 697, 739; 53 A. S. R. 479.

See, also, Witnesses, Cent. Dig. §§ 1111-1176; Dec. Dig. §§ 333-362; 30 A. & E. Enc. L. (2ed.) 1074; 10 A. & E. Enc. P. & P. 299.

in some jurisdictions [35] and excluded in others.[36] There is also a conflict of authority as to the competency of a witness' reputation or character as to any particular matter.[37] Proof of particular acts of wrongdoing, not amounting to crimes, conviction of which may be shown under some statutes,[38] is usually excluded,[39] particularly where the act sought to be shown does not affect credibility or general moral character.[40] It is proper to cross-examine the witness as to occupation.[41] For purposes of impeachment a witness may be asked questions, the answers to which will tend to degrade or otherwise discredit him.[42] Witnesses to reputation must be qualified.[43]

*The reputation of a witness for truth and veracity* See 10 C. L. 2101 may be shown, and the witness impeached by proof that it is bad.[44] Such proof must, however, be

**35.** Character of witnesses may be shown and considered on issue of credibility. State v. Cloninger, 149 N. C. 567, 63 SE 154. State may impeach defendant as witness by showing general bad moral character. State v. Priest [Mo.] 114 SW 949. Rule admitting character evidence recognizes gradations of character and that testimony relating thereto is opinionative; weight of this testimony is for jury. Taylor v. State, 5 Ga. App. 237, 62 SE 1048. A witness may be impeached by showing that his general reputation for truth and veracity is bad or that his moral character is such as to render him unworthy of belief. McIntosh v. McNair [Or.] 99 P 74.

**36.** Impeaching evidence must be confined to general reputation for truth and cannot extend to general moral character; hence proof that witness had been indicted for criminal conspiracy incompetent. Hazard v. Western Commercial Travelers' Ass'n [Tex. Civ. App.] 116 SW 625.

**37.** A witness' general moral character may be shown, but not his moral character in any one particular, as for peace and quiet, unless he himself has placed it in issue. Sweatt v. State [Ala.] 47 S 194. Witness cannot be impeached by showing that his general reputation for integrity is bad. McIntosh v. McNair [Or.] 99 P 74. Prosecution of druggist for violating liquor law, in which defendant testified in his own behalf. Held, proof of his general reputation as one who sold liquor in violation of law was competent. State v. Christopher [Mo. App.] 114 SW 549. Proof of reputation for lewdness may be offered to discredit the testimony of a female witness, but the jury may believe such witness to be truthful though not virtuous. Cripe v. State, 4 Ga. App. 832, 62 SE 567.

**38.** See post, § 5B2.

**39.** Witness cannot be impeached by proof of particular wrongful acts. Shields v. Conway [Ky.] 117 SW 340. Only general reputation competent, not specific acts of misconduct. State v. Sassaman, 214 Mo. 695, 114 SW 590. Impeaching evidence must be confined to general reputation of witness for honesty and integrity; details of particular offense could not be shown. State v. Sebastian [Mo.] 114 SW 522. Witness having denied that he was living in adultery with another, adverse party could not prove facts tending to show that he was. Gonzales v. State [Tex. Cr. App.] 112 SW 941. Accused having testified, state could prove his bad reputation for morality and veracity, but not that he was a gambler of the worst sort. Skaggs v. State [Ark.] 113 SW 346. Whether witness for state was not beginner at game of craps not proper inquiry. Kelly v. State [Ala.] 49 S 535. Improper to ask whom witness married for purpose of showing marriage to woman with whom he had lived in adultery. Price v. State [Okl. Cr. App.] 98 P 447. Questions may be asked concerning recent instances of misconduct by witness, but his answers are conclusive, and such acts of misconduct cannot be collaterally proved. Eads v. State [Wyo.] 101 P 946. Extent to which witness may be cross-examined as to recent acts of misconduct largely discretionary. Id.

**40.** Improper to examine witness as to violation of fishing law. Clinton v. State [Fla.] 47 S 389. Mere fact that witness was in habit of drinking beer did not affect his credibility. Lockard v. Van Alstyne [Mich.] 15 Det. Leg. N. 1132, 120 NW 1. Proof that witness ran saloon which had bad reputation, several women having been arrested there, and that place had been raided twice, inadmissible. Opper v. Davega, 126 App. Div. 941, 111 NYS 521.

**41.** That plaintiff, suing for personal injuries, was tramp, could be considered on issue of credibility. Central of Georgia R. Co. v. Moore, 5 Ga. App. 562, 63 SE 642. Occupation and business of witness may be shown, but not that he made false statements in pursuit thereof. King v. Chicago, etc., R. Co., 138 Iowa, 625, 116 NW 719. Proper to cross-examine witness for accused as to antecedents, previous occupation and past conduct, especially where defendant had offered evidence of improper conduct of deceased with witness. Cannon v. Ter. [Okl. Cr. App.] 99 P 622.

**42.** Such as whether he was running saloon without license and in violation of law. State v. Denny [N. D.] 117 NW 869. But see 10 C. L. 2100, n. 8.

**43.** To impeach a witness by proof of bad character, the predicate is a knowledge of his character in the "community" or "neighborhood" in which he resides; but these terms are not capable of exact definition, and mean generally a place where the person is well known and has established a reputation. Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92. Where person lived in Baltimore, but had an established business in Mobile, and spent much of his time there, one who knew him at Mobile, and his reputation there, could testify in regard to it. Id.

**44.** Testimony of witness, impeached by proof of bad reputation for veracity, could be disregarded. People v. Strauch, 240 Ill. 60, 88 NE 155. Where witness has been im-

confined to the general reputation of the witness for truth and veracity [45] in the community or neighborhood where he lives or is best known,[46] and the impeaching witness must be shown to have adequate knowledge of the other's reputation,[47] and must speak from general reputation or report and not from his own private or individual opinion.[48] No particular form of question is prescribed or must be used in eliciting from the impeaching witness his knowledge of the general reputation of the witness sought to be impeached.[49] Any form which does not involve a violation of the rules of evidence may be used.[50]

(§ 5 B) 2. *Accusation and conviction of crime.*[51]—See 10 C. L. 2101—Conviction of crime may be proved in most jurisdictions as affecting the credibility of the witness [52] or of a defendant who testifies in his own behalf,[53] unless the act, for

peached by proof of bad reputation for veracity, his testimony may be disregarded. Johnson v. Johnson [Neb.] 115 NW 323.

45. St. Louis S. R. Co. v. Garber [Tex. Civ. App.] 111 SW 227; Eastman v. Boston El. R. Co., 200 Mass. 412, 86 NE 793. Evidence should be confined to general reputation for truth and veracity, particular instances of untruthfulness being incompetent. Missouri K. & T. R. Co. v. Adams, 42 Tex. Civ. App. 274, 114 SW 453. Witness to party's reputation for truth and veracity said he and party had been on good terms until party had told lie to witness's son. Held proper to exclude further inquiry as what the lie was, this being collateral. McMillion v. Cook [Tex. Civ. App.] 118 SW 775.

46. St. Louis S. W. R. Co. v. Garber [Tex. Civ. App.] 111 SW 227. The term neighborhood comprises the natural radius of repute. People v. Loris, 131 App. Div. 127, 115 NYS 236. That witness lived in different town did not necessarily make him incompetent as to another's reputation. Id. Witness held to have resided in certain town sufficiently so that proof of his reputation for truth and veracity there was competent. In re Brown's Will [Iowa] 120 NW 667.

47. Proper to ask witness if he knew general reputation of another for truth and veracity in community where he lived. People v. Loris, 131 App. Div. 127, 115 NYS 236. Witness who had lived in community six months held qualified to testify to another's reputation which he said he knew. Alderson v. State, 53 Tex. Cr. App. 525, 111 SW 738. Though a stranger will not be allowed to testify to reputation, the court will not determine sufficiency of witness' knowledge but will leave the value of his testimony to the jury. People v. Loris, 131 App. Div. 127, 115 NYS 236. Held proper not to strike testimony to reputation because based on witness' own knowledge, where he also said that his testimony was based on what people said. McMillion v. Cook [Tex. Civ. App.] 118 SW 775. Where witness is asked concerning knowledge of party's general reputation for truth and veracity, party should be given opportunity to cross-examine the witness as to his knowledge before the witness' testimony to reputation is received. Id. Fact that witnesses testifying as to truthfulness of another admitted that they had not heard such reputation discussed does not render the evidence incompetent, but affects its weight. City of Chicago v. Gurrell, 137 Ill. App. 377.

48. St. Louis S. W. R. Co. v. Garber [Tex Civ. App.] 111 SW 227. Whether person had found witness truthful in dealings with her incompetent on issue of reputation for truth and veracity. Hunneman v. Phelps, 199 Mass. 15, 85 NE 169. Witness may not be asked whether he would believe the witness sought to be discredited on oath. Eastman v. Boston El. R. Co., 200 Mass. 412, 86 NE 793.

**Contra:** Witness called to impeach another may be asked if, from what he knows of the other's general reputation for truth and veracity, he would believe him on oath; though he has already testified to the other's reputation. People v. Corey [Cal. App.] 97 P 907. Foundation for impeaching testimony properly laid where witnesses based their conclusions upon knowledge of defendant's general reputation among those with whom he resided, and the form of inquiry was properly restricted to inquiry whether in view of defendant's general reputation for truth and veracity witness would believe him on oath. Duffy v. Radke, 138 Wis. 38, 119 NW 811. Opinion of witness as to truth and veracity of another is not competent for purpose of impeachment. City of Chicago v. Gurrell, 137 Ill. App. 377.

49. St. Louis S. W. R. Co. v. Garber [Tex. Civ. App.] 111 SW 227.

50. "Are you acquainted with" or "do you know" the general reputation, etc., proper. St. Louis S. W. R. Co. v. Garber [Tex. Civ. App.] 111 SW 227. Question held proper as seeking knowledge of witness as to general reputation for truth and veracity of party testifying. McMillion v. Cook [Tex. Civ. App.] 118 SW 775. Question held to call for reputation for truth and veracity and not reputation generally. Id. Where witnesses answered affirmatively, and added that they had known witness "a long time," or "always," this did not show that they were giving personal opinions and not general reputation. St. Louis S. W. R. Co. v. Garber [Tex. Civ. App.] 111 SW 227. Where, from previous questions, witness understood that inquiry was as to "general" reputation, omission of word "general" from question was not error. Id.

51. **Search Note:** See Witnesses, Cent. Dig. §§ 1126-1128; Dec. Dig. § 345; 30 A. & E. Enc. L. (2ed.) 1085.

52. May be shown on cross-examination that witness has been arrested and convicted of crime—arson. Schnase v. Goetz [N. D.] 120 NW 533. Witness may be cross-examined as to whether he has been convicted of crime. State v. Deal [Or.] 98 P 165. Record of conviction of murder com-

which conviction was had, is too remote to affect the present credibility of the witnesses.[54]

Statute permitting witnesses to be examined as to conviction of crime should be strictly construed.[55] The witness may testify as to the character of the crime of which he was convicted.[56] In some jurisdictions, only convictions of a felony or infamous crime,[57] such as would disqualify at common law, may be shown, in others, the crime must have been one involving moral turpitude.[58] The fact that witness has been accused [59] or indicted [60] cannot usually be shown, but the contrary rule obtains in some states.[61] Conviction of crime which had been set aside may not be proved as effecting the credibility of a witness.[62] In Illinois oral proof of convic-

petent to impeach witness under Civ. Code, Proc. § 597. Shields v. Conway [Ky.] 117 SW 340. Proof that witness had been convicted of murder proper; who he murdered immaterial. Choice v. State [Tex. Cr. App.] 114 SW 132. After witness denied that he had ever been convicted of felony, proper to ask if he had not been confined in certain state prison. People v. Weiss, 129 App. Div. 671, 114 NYS 236.

**53.** Previous conviction for assault competent, in prosecution for assault, on issue of credibility of accused. People v. Hoffman, 154 Mich. 145, 15 Det. Leg. N. 646, 117 NW 568. Accused may be cross-examined as to conviction for other crimes, but cannot be made to give evidence on which he was convicted. State v. Kight, 106 Minn. 371, 119 NW 56. Defendant may on cross-examination be asked as to former conviction, and state is not concluded by his answer. State v. Gordon, 105 Minn. 217, 117 NW 483. Where accused testified, state could prove former conviction of homicide by record, though he admitted conviction. Rollings v. State [Ala.] 49 S 329. **Conviction of defendant** on similar charge, **appealed from, and pending,** could not be proved. Jennings v. State [Tex. Cr. App.] 115 SW 587.

**54.** Conviction of crime 18 or 20 years before time of trial too remote to impeach witness. Richards v. State [Tex. Cr. App.] 116 SW 587. That defendant had served penitentiary sentence for manslaughter 15 years before was too remote to affect credibility. Bogus v. State [Tex. Cr. App.] 114 SW 823. In prosecution for homicide in 1908, where accused was witness in his own behalf, it was improper to show that he killed a man in 1888, and had pleaded guilty to theft of hogs in 1894, these acts being too remote. Winn v. State [Tex. Cr. App.] 113 SW 918. That witness had been convicted of horse theft, and indicted but not convicted for murder, 30 years before, incompetent. Gardner v. State [Tex. Cr. App.] 117 SW 148.

**55.** Accused may be asked if he has ever been convicted of crime, but not whether he was "confined in penitentiary for cutting a white man's throat." Dodds v. State [Miss.] 45 S 863.

**56.** Oral evidence to show the character of a witness' conviction for crime is competent to rebut the attack as to credibility. Schwarzschild & Sulzberger Co. v. Pfaelzer, 133 Ill. App. 346.

**57.** That plaintiff had been convicted, sent to jail, and served part of term, for offense, not a felony, incompetent. Missouri, K. & T. R. Co. v. Adams, 42 Tex. Civ. App. 274, 114 SW 453.

**58.** Accused cannot be impeached by showing previous conviction unless crime was felony or one involving moral turpitude; proof of previous conviction of violation of liquor law inadmissible. Merriwether v. State [Tex. Cr. App.] 116 SW 1148. Conviction of vagrancy not competent to impeach witness. Ellis v. State [Tex. Cr. App.] 117 SW 978. Proof that witness had been arrested and convicted of "various offenses" properly excluded, nature of offenses not appearing. Id. Witness may be asked if he had served term in penitentiary, how long he served, and for what offense—answer being murder. Smith v. State [Ala.] 48 S 668. In prosecution for illegal sale of liquor, prosecuting witness could not on cross-examination be asked if he had not himself been arrested for same offense. Id. Proof of conviction of violations of speed ordinances of city inadmissible, not involving moral turpitude. See v. Wormser, 129 App. Div. 596, 113 NYS 1093. Crime of carrying concealed weapons which involves neither moral turpitude nor lack of veracity cannot be shown. Eads v. State [Wyo.] 101 P 946.

**59.** That accused had been charged with other offenses, or had been guilty of acts of misconduct, inadmissible to affect his credibility. State v. La Mont [S. D.] 120 NW 1104. While witness may be asked what he has done, it is improper to ask if he has been arrested or accused, since mere accusations of misconduct are incompetent. Eads v. State [Wyo.] 101 P 946.

**60.** Accused cannot be cross-examined as to indictment, this being mere accusation. People v. Morrison, 194 N. Y. 175, 86 NE 1120. No witness, whether party or not, may, in civil or criminal action, be discredited by proof of indictment for crime, this being mere accusation. People v. Morrison, 195 N. Y. 116, 88 NE 21. Witness may be asked if he has been convicted of a felony or any crime involving want of moral character, but he cannot be asked if he has been indicted, arrested or imprisoned for any offense. Price v. U. S. [Okl. Cr. App.] 97 P 1056; Slater v. U. S. [Okl. Cr. App.] 98 P 110.

**61.** That defendant had recently been indicted for any felony or other crime involving moral turpitude could be shown, but not that he had cut a man. Knight v. State [Tex. Cr. App.] 116 SW 56.

**62.** D. C. Code, § 1067 (31 Stat. 1357, c. 854), allowing conviction of witness of crime upon cross-examination to be shown,

tion of an infamous crime is admissible,[63] and the words "indictment for rape" written on the margin of the title of the record is sufficient to show what crime witness was convicted of.[64] The names being identical, the legal presumption is that the witness and party convicted was one and the same person.[65]

(§ 5) *C. Interest and bias of witnesses.*[66]—See 10 C. L. 2100—Interest in the event of the action[67] or in its prosecution,[68] and any facts tending to show bias or prejudice on the part of the witness,[69] such as his relations with,[70] or hostility to,

does not permit conviction which had been set aside to be shown. Thompson v. U. S., 30 App. D. C. 12.

**63.** Under Hurd's Rev. St. 1905, c. 51, § 1, as construed by 167 Ill. 102, it may be proved orally, and the witness compelled to testify thereto. Pioneer Fire Proofing Co. v. Clifford, 136 Ill. App. 417.

**64, 65.** Pioneer Fire Proofing Co. v. Clifford, 135 Ill. App. 417.

**66. Search Note:** See notes in 9 A. S. R. 744; 82 Id. 25.

See, also, Witnesses, Cent. Dig. §§ 1177-1208; Dec. Dig. §§ 363-378; 30 A. & E. Enc. L. (2ed.) 1088.

**67.** Interest and motive of party testifying in his own behalf should be considered, and jury should be so instructed. Blankavag v. Badger Box & Lumber Co., 136 Wis. 380, 117 NW 852. May be shown that witness has interest direct or collateral in event of trial. Lenahan v. Pittston Coal Min. Co., 221 Pa. 626, 70 A 884. Expert whose fee is contingent on recovery is interested and his interest may be shown on his cross-examination. Indiana Union Trac. Co. v. Pheanis [Ind. App.] 85 NE 1040. Son-in-law of defendant in trespass to try title, having testified that he had no interest in suit except as an attorney, may be asked if he would not be benefited by judgment for defendant, if defendant died intestate. Combest v. Wall [Tex. Civ. App.] 115 SW 354. Cross-examination to show that witness, mother of plaintiff, would receive amount recovered, if any, was proper. Platner v. Ryan [N. J. Law] 69 A 1007. In action for damages for obstructing alley, defendant could ask witness for plaintiff if he did not have property which he considered damaged by the obstruction, though he had made no claim against defendant. Ellis v. St. Louis, etc., R. Co., 131 Mo. App. 395, 111 SW 839. That witness voted against respondent in quo warranto proceeding did not show interest in proceeding. Ham v. State [Ala.] 47 S 126. Jury not bound to believe testimony of interested witnesses. McCormick v. Kampmann [Tex.] 115 SW 24. Jury may disregard testimony of interested witness. Lounsbury v. Knights of the Maccabees of the World, 128 App. Div. 394, 112 NYS 921. **Interest of accused** may be considered in determining his credibility as witness. State v. Dower [Mo. App.] 114 SW 1104; State v. Brown [Mo.] 115 SW 967.

**68.** Prosecuting witness may be examined as to bias, interest, prejudice, or motive, which might affect credibility. Green v. State [Tex. Cr. App.] 111 SW 933. For purpose of showing bias and interest, it was proper to bring out on cross-examination of prosecuting witness in liquor case, who was employed to get evidence, that he had told another that he (witness) was in bad position on account of court business, and in position to go to penitentiary, etc. Green v. State [Tex. Cr. App.] 111 SW 933; Id., 53 Tex. Cr. App. 473, 110 SW 925. To show animus of witness for prosecution, he may be asked if he had not shown sufficient interest to follow proceedings before chancellor on application to reduce bail. Barron v. Anniston [Ala.] 48 S 58. The fact that a witness worked for police officers in detecting crime is no reason for disregarding his testimony, though it may be considered on issue of credibility. Clark v. State, 5 Ga. App. 605, 63 SE 606. That witness for defendant had tried to influence witness for state to favor defendant could be shown. State v. Carr [W. Va.] 63 SE 766. Questions on cross-examination tending to show witness for state identified with faction which was trying to drive accused out of town, decedent being also member, should have been allowed. State v. Hanlon [Mont.] 100 P 1035. The testimony of a detective and prosecuting witness should be received with caution. People v. Loris, 131 App. Div. 127, 115 NYS 236. Amount of compensation received by detective, who was sole witness in liquor sale case, could be shown. Id.

**69. Interest or bias** of witness may be shown. People v. Sheffield [Cal. App.] 98 P 67. Character witness may be impeached by showing he had sent out circulars offering reward, and written letter, describing accused as violent and dangerous man. State v. Fisher, 149 N. C. 557, 63 SE 153. Proper to ask witness for defendant if he had not said to another that if she would help defendant he could "beat his case," to lay foundation for impeachment and to show interest. Lowry v. State, 53 Tex. Cr. App. 562, 110 SW 911. In rape case, letter written by witness for accused, showing witness' feeling toward prosecutrix, was competent. Warren v. State [Tex. Cr. App.] 114 SW 380. Where, in personal injury case, witnesses for defendant testified that plaintiff was drunk at time, it was proper to ask them if they had not testified for defendant in another similar case, it appearing that they lived in different county, had free transportation, were paid for their time, and that one had free annual pass on defendant's road. Missouri, K. & T. R. Co. v. Malone [Tex. Civ. App.] 110 SW 958. Animus as to matter in controversy, or feelings toward parties, may be shown. Walker v. Rome [Ga. App.] 64 SE 310. Where witness testifies against defendant, fact that prosecutor is bail for witness on an indictment may be shown. Bates v. State, 4 Ga. App. 486, 61 SE 888. Proper to ask physician, who testified to value of services rendered by plaintiff, whether he

a party,[71] may be shown and considered as affecting his credibility; but the jury is not at liberty to disregard wholly the testimony of a witness simply because he is a party, or is interested.[72] Discredit should not be cast upon the testimony of a witness because he was paid his fees by party to the suit.[73]

(§ 5) *D. Proof of previous contradictory statements.*[74]—See 10 C. L. 2103—Previous statements of witnesses, inconsistent with their testimony[75] upon material

had not sued defendant for services and whether he had not lost. MacGuire v. Hughes, 126 App. Div. 637, 111 NYS 153. Competent to show that prosecuting witness in assault case had suit pending against accused for large amount. People v. Drolet [Mich.] 16 Det. Leg. N. 304, 121 NW 291. Where attorney testified for defendant, plaintiff was entitled to show on cross-examination that witness was also attorney for casualty company, which would have to stand loss. Lenahan v. Pittston Coal Min. Co., 221 Pa. 626, 70 A 884. That prosecuting witness was intimate friend of one whom accused had unsuccessfully defended in criminal prosecution was incompetent to show animosity toward accused. State v. Gilluly, 50 Wash. 1, 96 P 512. In action by husband for injuries to wife, what husband has said in regard to an alleged injury to himself on a former occasion was not competent to show bias on his part or an attempt to defraud defendant, there being no evidence of fraud in case of bar. Citizens' R. & L. Co. v. Johns [Tex. Civ. App.] 116 SW 62. Bad feeling between witness and another, who was neither party nor witness, could not be shown. Ham v. State [Ala.] 47 S 126. Where witness admitted having written up crime for newspaper but denied that it was published as written by him, and evidence did not show that it was published as written, the published article was inadmissible to show bias of witness. Vogel v. State, 138 Wis. 313, 119 NW 190. Testimony tending merely to show that witnesses were dissatisfied and prejudiced without showing why or with what, incompetent, since it did not go far enough to show bias or prejudice. Nagle v. Schnadt, 239 Ill. 595, 88 NE 178. Where a witness admits on cross-examination that he is unfriendly to defendant, it is improper to allow the estate, on redirect, to elicit the reasons for his unfriendliness. This procedure brings in issues likely to confuse and prejudice jury. State v. Kight, 106 Minn. 371, 119 NW 56. In personal injury action, it was error not to allow the plaintiff, after laying proper foundation, to prove that witness said that if case came to trial she would do all she could to beat plaintiff. Walker v. Chicago & Joliet Elec. R. Co., 142 Ill. App. 372.

**70.** Any fact showing relations between witness and party proper; whether witness and party "drank together and ran together" held proper. Rutledge v. Rowland [Ala.] 49 S 461. Immoral relations between deceased and witness for state could be shown, to show bias of witness. Leach v. Com., 33 Ky. L. R. 1016, 112 SW 595. Though particular wrongful acts of witness may not be shown (Civ. Code Prac. § 597) witness' immoral relations with deceased may be shown to prove bias in homicide case. Id. Where witness testified to friendly relations with plaintiff, discretionary with court to rule out letter by witness containing references to her family, but none directly concerning plaintiff. Carroll v. Boston El. R. Co., 200 Mass. 527, 86 NE 793. On cross-examination of witness for defendant, plaintiff could show that he was employe of defendant, and show relation between them, but could not show how witness performed duties, unless to show bias. South Covington & C. R. Co. v. Raymer [Ky.] 116 SW 281. Where woman testified for defendant, it was proper to ask him, on cross-examination, whether she was his wife, or related to him. Ludlow v. State [Ala.] 47 S 321. In action against city for personal injuries, not improper to cross-examine witness connected with work and related to president of company doing it, though it incidentally appeared that such company might be liable. Perry v. Centralia, 50 Wash. 670, 97 P 802.

**71.** Ill feeling and animosity between party and adverse witness may be shown. State v. Nieuhaus [Mo.] 117 SW 73. Hostility of witnesses toward accused may always be shown. Burnett v. State, 53 Tex. Cr. App. 515, 112 SW 74. Defendant may show animus against him of witness for state; no foundation necessary. Telfair v. State [Fla.] 47 S 863. Unfriendliness of witness to accused may be shown. People v. Reycraft [Mich.] 16 Det. Leg. N. 175, 120 NW 993. Witness should not be allowed to testify to hostility of witnesses toward a party unless he knows facts; his mere conclusion should not be received. Burnett v. State, 53 Tex. Cr. App. 515, 112 SW 74.

**72.** Where a witness is not impeached or discredited in any way. Giltman v. Brooklyn Heights R. Co., 129 App. Div. 654, 113 NYS 1046.

**73.** Error for court to comment upon the fact that witness was paid for attending court, as it reflected upon credibility of witness. Hughes v. Hughes, 133 Ill. App. 654. Witnesses cannot be compelled to appear in a civil suit until their fees are paid, therefore party had a right to pay lawful fees and mileage, and such fact should not cast discredit upon cause of party so paying. Keithley v. Stevens, 142 Ill. App. 406.

**74. Search Note:** See notes in 6 Ann. Cas. 715; 8 Id. 477.

See, also, Witnesses, Cent. Dig. §§ 1209-1266; Dec. Dig. §§ 379-397; 30 A. & E. Enc. L. (2ed.) 1097; 10 A. & E. Enc. P. & P. 279.

**75. Statement not contradictory to testimony, incompetent.** People v. Everett [Cal. App.] 101 P 528. Certain statements improperly proved when they did not tend to contradict testimony of witness. State v. Matheson [Iowa] 120 NW 1036. Statement of plaintiff, which did not conflict with his testimony, incompetent to impeach him. Western Coal & Min. Co. v. Buchanan [Ark.] 114 SW 694. Where witness for ac-

issues, are always competent as impeaching evidence,[76] when a proper predicate has been laid.[77] Thus, oral or written statements out of court,[78] statements made as a witness in another trial or proceeding,[79] statements in affidavits,[80] in depositions,[81] and in pleadings,[82] have been held competent. A witness cannot be discredited by

cused had not testified concerning threats, it was error to allow him to be asked whether he had not, at certain time and place, in absence of accused, stated that accused had threatened decedent; though if he had denied the making of threats, he could have been thus impeached. Ridgell v. State [Ala.] 47 S 71. Witness' testimony, as to age and height of man who assaulted her, being merely estimates, former statements relating thereto, more definite, were inadmissible to impeach her. People v. Smith [Cal. App.] 98 P 546. Previous **declaration of opinion,** inconsistent with testimony as to facts, **competent** as well as previous inconsistent statements of facts. Bates v. State, 4 Ga. App. 486, 61 SE 888.

**76.** McLeroth v. Magerstadt, 136 Ill. App. 361; Harville v. State [Tex. Cr. App.] 113 SW 283; Bridgman v. Winsness, 34 Utah, 383, 98 P 186. Declarations of witness, otherwise incompetent, are admissible to impeach him, if inconsistent with his testimony. Keyes v. Geary, etc., R. Co., 152 Cal. 437, 93 P 88.

**77.** See post, § 5E

**78.** Contradictory statements by plaintiff competent. Roussin v. Kirkpatrick [Cal. App.] 95 P 1123; Goldberg v. Weinberger, 115 NYS 1098. Written statement of witness competent to contradict him. Archbold v. Joline, 114 NYS 169. Statement clearly inconsistent with testimony on material issue competent to discredit witness. Snow v. Adams, 200 Mass. 251, 85 NE 1052. Previous contradictory statements concerning material facts testified to may be proved. Lanasa v. State [Md.] 71 A 1058. Interested witness having admitted, on cross-examination, conversation with person, proper to bring out what he said, this bearing on credibility, and matter being material. National Park Bank v. West Side Bank, 115 NYS 222. Statement by one presenting draft, indorsed by cashier of bank, except in one particular, competent to impeach cashier. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345. Statement relating to material matter, inconsistent with testimony, competent. Louisville & N. R. Co. v. Bell's Adm'r [Ky.] 114 SW 328. Where defendants are jointly indicted and tried and each testifies, declarations of each are competent to discredit him as witness in his own behalf and in behalf of codefendant. State v. Rubaka [Conn.] 72 A 566. Previous conflicting statement competent, though part of conversation in which compromise was suggested. Robinamitz v. Silverman [Pa.] 72 A 378. Where witness denied making statement to third person, making of it could be proved by third person. High v. State [Tex. Cr. App.] 112 SW 939. Father of deceased having testified to facts tending to show death of daughter by violence, competent to prove statement by him, morning after death, that he thought deceased had committed suicide. Sanders v. State [Tex. Cr. App.] 112 SW 68. Where defendant proved condition of boat by witness, plaintiff could ask witness if he had not made statement concerning boat inconsistent with testimony. Pate v. Tar Heel Steamboat Co., 148 N. C. 571, 62 SE 614. Where witness testified that accused told him, morning after homicide, only to ride over to certain house, he could be contradicted by proving that he had said that defendant said other things to him amounting to an admission or confession. State v. Hunter [S. C.] 63 SE 68. Where witness who was near deceased at time of killing testified that he could not identify man who fired shot, he could be contradicted by proof of statement to sheriff that he had the right man. State v. Suber [S. C.] 63 SE 684.

**79.** Proper to show by committing magistrate what a witness testified to before him, to impeach witness' testimony at trial. State v. Pirkey [S. D.] 118 NW 1042. Inconsistent statements in justice court on material matters could be proved. Vanhooser v. State [Tex. Cr. App.] 113 SW 285. Contradictory testimony of witness at examining trial could be shown. Sanders v. State [Tex. Cr. App.] 112 SW 68. Testimony at coroner's inquest competent to impeach witness at trial. Garrett v. St. Louis Transit Co. [Mo.] 118 SW 68. Entire testimony of witness on preliminary hearing admissible to show whether he made certain statement, given by him at trial, which he said he had also made at preliminary. Territory v. Clark [N. M.] 99 P 697. Where witness denied having made certain statements in testimony relating to same occurrence in magistrate's court, it was error to exclude proof of such statements, especially where party offered to recall witness to lay more particular predicate. Hicks v. State [Miss.] 47 S 524. Witness may be asked if he was asked certain questions and made certain answers on former trial, and may be contradicted in regard thereto. Illinois Cent. R. Co. v. Johnson [Ky.] 115 SW 798. To impeach prosecutrix in rape case, it was proper to show that she had not accused defendant for a month, but had accused her father, and had testified that her father was the man at the preliminary hearing, and to show inducements held out to her to change her story. State v. Newcomb [Mo.] 119 SW 405. Former testimony of witness, which he said he did not remember, relating to acts which he denied, competent. Carr v. American Locomotive Co. [R. I.] 70 A 196.

**80.** Affidavit of physician, accompanying order of commitment to insane asylum, competent to contradict physician's testimony. Western Union Tel. Co. v. Gillis [Ark.] 117 SW 749.

**81.** Where plaintiff testified that deed had never been delivered, his deposition in a former action, containing different testimony as to delivery, was competent to impeach him. Nash v. Yellow Poplar Lumber Co. [Va.] 63 SE 14.

**82.** Petition in suit by witness, containing statements contrary to testimony, com-

statements made while under arrest.[83] Such declarations are competent only as impeaching evidence, and not as substantive evidence of the facts.[84] Where a witness, on cross-examination, admits making a sworn statement, the entire statement is competent,[85] and counsel should not be allowed to ask witness if he made certain statements contained therein.[86] But it has been held that, where the witness admits making a statement, it cannot be proved otherwise.[87]

(§ 5) *E. Foundation for impeaching evidence.*[88] See 10 C. L. 2105—Impeaching evidence is inadmissible unless a proper predicate has been laid,[89] when such predicate is necessary, but no predicate is necessary to show facts contrary to a witness' testimony,[90] or to show animus of a witness.[91] Unless the witness is a party,[92] prior contradictory or inconsistent statements cannot be proved, unless the attention of the witness has been called thereto[93] and the circumstances, such as time, place and persons present, placed before him,[94] and this is the rule though the wit-

petent. Michel v. Michel [Tex. Civ. App.] 115 SW 358.

**83.** Statement of witness, when arrested, that he did not have a pistol cannot be introduced by the state to discredit his testimony, he having testified that he did have a pistol. Granger v. State, 50 Tex. Cr. App., 488, 17 Tex. Ct. Rep. 781, 98 SW 836.

**84.** A contradictory statement proved against a witness is not evidence of the facts, but only operates to destroy the contradicted testimony. Hobbs v. Blanchard & Sons Co. [N. H.] 70 A 1082. Where witness testified that her only knowledge on certain point was conclusion from facts, her statement out of court concerning the facts would not be substantive evidence, but would tend only to discredit her testimony. Lydston v. Rockingham County L. & P. Co. [N. H.] 70 A 385.

**85, 86.** Jones v. U. S. [C. C. A.] 162 F 417.

**87.** Where prosecutrx testified that accused had not had intercourse with her, and that she had made contrary statement to county attorney because she had been threatened, it was error to prove her statement for the purpose of impeaching her. Skeen v. State, 51 Tex. Cr. App. 39, 18 Tex. Ct. Rep. 802, 100 SW 770.

**88. Search Note:** See notes in 14 A. S. R. 157.

See, also, Witnesses, Cent. Dig. §§ 1150, 1151, 1200, 1233-1242; Dec. Dig. §§ 351, 373, 388; 30 A. & E. Enc. L. (2ed.) 1119; 10 A. & E. Enc. P. & P. 281.

**89.** Impeaching evidence properly excluded; no foundation laid. Swift & Co. v. Martine [Tex. Civ. App.] 117 SW 209. That witness had bought whisky and passed it around to accused and others, who helped pay for it, was inadmissible to impeach witness, no foundation having been laid on his examination, and no attempt being made to impeach him. State v. Tarlton [S. D.] 118 NW 706.

**90.** Where witness testified to certain conversation at certain house on certain day, no foundation was necessary to admit proof that that witness was not there that day. State v. Stockman [S. C.] 64 SE 595.

**91.** No foundation necessary to show animus of witness. Telfair v. State [Fla.] 47 S 863.

**92.** The rule that the attention of a witness must be called to the time and place when and where he made alleged statements does not apply when he is a party, where admissions sought to be proved. Conselyea v. Van Dorn, 129 App. Div. 520, 114 NYS 61.

**93.** Witness should be asked if he had made statements before they can be proved against him. People v. Hutchings [Cal. App.] 97 P 325. In personal injury action, proper to ask defendant's superintendent, to lay foundation for contradicting him, whether he had not made statement for defendant, "or an insurance company." Quigg v. Post, 131 App. Div. 155, 115 NYS 147. Allowing witness to be contradicted without first calling his attention to statements is discretionary. Rabinowitz v. Silverman [Pa.] 72 A 378. Writing inadmissible to contradict witness when no foundation was laid. Alabama Security Co. v. Dewy [Ala.] 47 S 55. Statements by conductor after accident could not be proved, no predicate being laid. Dilburn v. Louisville & N. R. Co. [Ala.] 47 S 210. Where circumstances were called to attention of witness, who recalled them but denied conversation, conversation could be proved. Nethery v. Nelson [Wash.] 99 P 879. Written statement by witness properly excluded where party did not show what it expected to prove, or that witness had made different statement. Lockwood v. Boston El. R. Co., 200 Mass. 537, 86 NE 934. Where witness had denied having certain conversation, proof of it was competent in rebuttal. Casey v. Chicago City R. Co., 237 Ill. 140, 86 NE 606.

**94.** Predicate for impeachment must be laid by asking witness to be impeached proper questions. Kyle v. State [Tex. Cr. App.] 116 SW 598. Attention of witness must be called to time and place of alleged previous statements. Luke v. Cannon, 4 Ga. App. 538, 62 SE 110. Statements must be related to witness, and time, place, and persons present must be specified. State v. Coss [Or.] 101 P 193. Contradictory statement cannot be proved unless attention of witness bas been specifically called to it, and to time and place when and where made. Lemon v. U. S. [C. C. A.] 164 F 953. Where elements of time and place were omitted in question relied on to lay foundation, impeaching proof was properly excluded. State v. Ballew [S. C.] 63 SE 688. Asking witness if he made statements to certain person does not make

ness' testimony is given by deposition.[95] But a witness may be examined, concerning inconsistent statements out of court, to test his recollection or credibility, without the same particularity as to time, place, and person, where the purpose is not to impeach him by proving such statements.[96] Alleged contradictory writings should be exhibited to the witness.[97] Failure to lay a foundation for contradiction of a witness is immaterial where he is recalled and allowed to explain them.[98]

(§ 5) *F. Corroboration and sustentation of witnesses.*[99] See 10 C L. 2107—It is not proper to attempt to sustain the credibility of a witness before it has been attacked.[1] Thus where no attempt has been made to impeach a witness, evidence which is merely corroborative of his testimony is inadmissible [2] though corroborative evidence, relevant on other issues, is proper,[3] and, where impeaching evidence has been offered, evidence to rebut it is competent.[4] Where contradictory statements have been proved, evidence in explanation of the discrepancy is competent;[5] and,

competent proof that he made statements to another person. Luke v. Cannon, 4 Ga. App. 538, 62 SE 110. Where witness admitting meeting man at certain time and place, but said he did not know whether it was person named or not, and denied making certain statements to him, statements could be proved by man whom witness met. State v. Stockman [S. C.] 64 SE 595. Error to receive proof of statement by expert that, if paid, he would testify for either party, falsely if necessary, where he had not been asked concerning such statement on his cross-examination; details, time, and place should be called to his attention. Ferguson v. Truax, 136 Wis. 637, 118 NW 251. Foundation for proof of contradictory statement must be laid by asking witness if he made it, calling attention to time, place, and persons present, so that he will not be misled; foundation held sufficient. Jaynes v. People [Colo.] 99 P 352.

95. That testimony of witness was taken by deposition does not alter rule that foundation must be laid for impeachment by proof of previous contradictory statements. People v. Garnett [Cal. App.] 98 P 247.

96. State v. Coss [Or.] 101 P 193.

97. Tonopah Lumber Co. v. Riley [Nev.] 95 P 1001.

98. Rabinowitz v. Silverman [Pa.] 72 A 378.

99. **Search Note:** See Witnesses, Cent. Dig. §§ 1284-1289; Dec. Dig. §§ 410-416; 1 A. & E. Enc. L. (2ed.) 610; 30 Id. 1140; 10 A. & E. Enc. P. & P. 324.

1. Counsel could not ask witness called by him concerning an arrest. State v. Tawney [Kan.] 99 P 268. Friendly feeling of prosecuting witness toward accused cannot be shown. That prosecuting witness bore accused no malice, and did not have him arrested of his own accord, inadmissible. State v. De Hart [Mont.] 99 P 438.

2. Where one party testified positively that he pointed out certain mining property as having certain location, and other party denied it, it was improper to prove location according to "public reputation in order to corroborate one and discredit the other." Stewart v. Douglass [Cal. App.] 100 P 711. Though defendant's witness, testifying fully to manner of accident, was asked on cross-examination if he had made a written statement concerning it, defendant was not entitled to introduce statement to corroborate witness, plaintiff having made no effort to discredit him. Texas & P. R. Co. v. Tuck [Tex. Civ. App.] 116 SW 620. Error to allow state to corroborate witness by proof of statements made by him in conformity to his testimony where no attack had been made on his testimony. McKnight v. State, 50 Tex. Cr. App. 252, 16 Tex. Ct. Rep. 681, 95 SW 1056.

3. Where prosecuting witness claimed that accused, an officer, had stolen money from him, proof that he had displayed a roll of money was proper to corroborate him. State v. McDowell, 214 Mo. 334, 113 SW 1113. Statement by decedent, with other circumstances, admissible to corroborate witness' statement concerning killing. Fleming v. State [Tex. Cr. App.] 114 SW 383. Certain evidence tending to show truthfulness of person's statement, being relevant to issues, held unobjectionable, not being contradictory to other testimony, by parties' own witness, and not tending to contradict defendant on irrelevant matter. Cumberland Glass Mfg. Co. v. Atteaux, 199 Mass. 426, 85 NE 536.

4. Where it is sought to discredit party as witness by disproving statements in pauper affidavit, used on appeal, party has right to rebut such testimony and sustain affidavit, but whether case should be reopened to admit such proof is for court. Leake v. King Dry Goods Co., 5 Ga. App. 102, 62 SE 729. Where witness in murder case testified as to res gestae, and wounds received by him during trouble, and accused sought to impeach him by referring to his position and location of his wounds, it was not improper to allow witness to show his wounds. Andrews v. State [Ala.] 48 S 858. Where incompetent evidence of conviction of an offense was introduced against plaintiff on cross-examination, it was not error to allow him to testify to facts showing he was not guilty of offense charged. Missouri, K. & T. R. Co. v. Adams, 42 Tex. Civ. App. 274, 114 SW 453. Where wife of decedent identified defendant at the trial and defendant produced a witness who testified that she failed to identify him the day after the killing, it was error to permit the state on cross-examination to prove that she was nervous and prostrated at that time. Oates v. State, 51 Tex. Cr. App. 449, 19 Tex. Ct. Rep. 285, 103 SW 859.

5. Where detached statement of witness

where a portion of a statement or conversation has been introduced, all of it is usually held competent.[6] Proof of previous similar or consistent statements is usually excluded,[7] except where some corrupt motive has been shown.[8] Proof of the good reputation of the witness for truth and veracity is competent when his credibility has been attacked,[9] as by proof of previous contradictory statements,[10] or conviction of crime,[11] or where an attack has been made upon the general character of the witness,[12] or upon his reputation for truth and veracity.[13] Proof or admission of

on former trial was proved, party calling him was not entitled to prove all his testimony, but only so much as would explain statement proved against him. Colby v. Reams [Va.] 63 SE 1009. Defense, in burglary case, was that defendant bought razor from certain person. Witness called to prove purchase denied all knowledge of it, but later testified to purchase. Held, defendant should have been allowed to show that witness had been threatened with injury if he testified against person who sold razor, to explain conflict. Cornett v. State [Tex. Cr. App.] 112 SW 1071. Where contradictory statement is proved against witness, he may explain that it related to different transaction which occurred at different date, and may give details of transaction to show correspondence with statement. Georgia R. & Elec. Co. v. Dougherty, 4 Ga. App. 614, 62 SE 158. Where witness in murder case testified that he saw decedent drop pistol, that he picked it up and hid it and later told sheriff he had not seen a pistol taken from decedent, it was error not to allow witness to explain why he had not told sheriff that he had taken pistol. State v. Hanlon [Mont.] 100 P 1035. Where testimony of witness was much stronger against defendant at trial than at inquest, it was proper to allow him to explain discrepancy by stating that he was afraid to tell all he knew at inquest. State v. Suber [S. C.] 63 SE 684. Witness should be allowed to explain his reason for making inconsistent declaration. Tonopah Lumber Co. v. Riley [Nev.] 95 P 1001.

**6.** Where an effort is made to impeach a witness by proving a previous contradictory statement, it is competent to sustain him by proving the entire conversation, so that its true drift and meaning may be understood. Turner v. State, 131 Ga. 761, 63 SE 294. Where part of conversation with defendant had been introduced to impeach him, he could prove all on surrebuttal and was not limited to what he could bring out on cross-examination of impeaching witnesses. People v. Hutchings [Cal. App.] 97 P 325.

**7.** But see Rape, 12 C. L. 1614, as to complaints by prosecutrix, after offense. State cannot, in rebuttal, recall a witness and ask her if she had not made same statements on preliminary examination as she made at trial. Bennett v. State [Ala.] 49 S 296. Improper to allow unimpeached witness to state that he had given same testimony in former hearing as on trial. Green v. State, 53 Tex. Cr. App. 534, 110 SW 929. State cannot corroborate prosecuting witness by proving statements out of court consistent with testimony where no attempt has been made to impeach her by proving contradictory statements. Attack on her virtue and general credibility does not make such corroboration proper. Pridemore v. State, 53 Tex. Cr. App. 620, 111 SW 155. Witness, impeached by proof of contradictory statements, may be sustained by proof of statements consistent with testimony. Cabrera v. State [Tex. Cr. App.] 118 SW 1054.

**8.** See 10 C. L. 2107, notes 66, 67, 68.

**9.** Where cross-examination of witness and remark of court that witness needed cross-examination tended to discredit witness, proof of his reputation for truth and veracity should have been admitted. Landers v. Quincy, etc., R. Co. [Mo. App.] 114 SW 543.

**10.** Where attempt was made to prove contradictory statements of prosecuting witness, state could prove his good reputation for truth. Alderson v. State, 53 Tex. Cr. App. 525, 111 SW 738. Where witness has been impeached by proof of contradictory statements, proof of his good reputation for truth and veracity is competent. Kansas City S. R. Co. v. Williams [Tex. Civ. App.] 111 SW 196. Prosecuting witness having been impeached by proof of contradictory statements, state could show good reputation for truth, and veracity. State v. Christopher [Mo. App.] 114 SW 549.

**11.** Impeachment of a witness by proof of conviction of crime is, in Kentucky, an attack upon his general reputation, authorizing the admission in rebuttal of evidence of his good reputation for truth and veracity. Statutes construed. Shields v. Conway [Ky.] 117 SW 340. Where plaintiff's credibility had been attacked by proof of conviction of crime, and evidence that he had simulated an injury, proof of his good reputation for truth and veracity was competent. Missouri, K. & T. R. Co. v. Adams, 42 Tex. Civ. App. 274, 114 SW 453.

**12.** Where an attempt has been made to impeach a witness by proof of general bad character, the witness may be sustained by testimony of witnesses who say they would believe the witness on oath, though they admit that his general character is bad. Taylor v. State, 5 Ga. App. 237, 62 SE 1048.

**13.** It has been held error to exclude proof of the character of a defendant for truth and veracity, after he has testified and his reputation for truth and veracity has been attacked, since terms "character" and "reputation" are sometimes used interchangeably, and ordinary witnesses do not understand the distinction. State v. Tawney [Kan.] 99 P 268. Proof that witness is related to a party, or is interested in the event of the trial, or that he has made contradictory statements, is not an attack upon the general reputation of the witness for truth and morality, so as to make com-

conviction does not make proof of a subsequent pardon competent.[14] Corroboration of accomplices is usually necessary to sustain conviction in criminal cases.[15]

§ 6. *Privilege of witnesses.*[16]—See 10 C. L. 2109—Under the federal and state constitutions, no person in a criminal case[17] can be compelled to give evidence against himself,[18] and statutes commonly prohibit any reference to failure of accused to testify.[19] Immunity from compulsory self-incrimination is not a privilege or immunity of national citizenship guaranteed against abridgement by the states by the fourteenth amendment,[20] nor does the constitutional provision as to due process affect the validity of a rule of law of a state as to failure of an accused person to testify.[21] While evidence obtained by illegal seizure and search of a defendant's person, which compels him to incriminate himself, is inadmissible against him,[22] this rule is applicable only to searches of a defendant's person, after an unlawful seizure thereof.[23] Evidence of guilt, which a defendant, either directly or indirectly, is compelled to disclose by an illegal seizure and search of his person under an unlawful arrest, is inadmissible,[24] but if his premises or belongings are searched by another, though without a vestige of authority, the evidence thus dis-

petent evidence of his good reputation. Shields v. Conway [Ky.] 117 SW 340.

**14.** Where witness admitted he had been convicted of felony and sentenced to penitentiary, defense could not show that governor had pardoned him. Parson v. Com. 33 Ky. L. R. 1051, 112 SW 617.

**15.** Corroboration of accomplice unnecessary. Lonasa v. State [Md.] 71 A 1058. Accomplice must be corroborated to sustain conviction. State v. Gordon, 105 Minn. 217, 117 NW 483. For full discussion, see, Indictment and Prosecution, 12 C. L. 57.

**16. Search Note:** See notes in 6 C. L. 2007; 14 L. R. A. 407; 26 Id. 418; 29 Id. 811; 45 Id. 586; 1 L. R. A. (N. S.) 167; 4 Id. 1144; 14 Id. 663; 75 A. S. R. 318; 2 Ann. Cas. 177; 4 Id. 692; 5 Id. 41; 11 Id. 1079.

See, also, Witnesses, Cent. Dig. §§ 1008-1068; Dec. Dig. §§ 292-310; 30 A. & E. Enc. L. (2ed.) 1154; 16 A. & E. Enc. P. & P. 968.

**17.** A proceeding to punish for contempt for violation of an injunction issued in a civil proceeding is a criminal proceeding within the meaning of the statute, U. S. Rev. § 860. Hammond Lumber Co. v. Sailors' Union of the Pacific, 167 F 809. An inquisition before the grand jury is a criminal case within the meaning of the constitutional provision that no person can be compelled to give evidence against himself. People v. Argo, 237 Ill. 173, 86 NE 679. Proceedings before grand jury, prior to indictment, are not part of criminal prosecution of person subsequently indicted. Persons summoned to testify must claim privilege as witnesses; they are not on trial and cannot refuse to testify on ground that they are on trial. United States v. Price, 163 F 904.

**18.** Accused is not compelled to give testimony against himself, where witnesses testify that during a scuffle, while officers were attempting to arrest accused, a pistol concealed on his person was exposed, though the arrest was illegal. Croy v. State, 4 Ga. App. 456, 61 SE 848.

**19.** Accused failure to testify on examining trial could not properly be shown. Pryse v. State [Tex. Cr. App.] 113 SW 938. Reversible error to ask accused, who took stand in his own behalf, if he had testified in former trial, he answering no, and for state's attorney to argue that his present testimony was false, because he had not testified before. Code Civ. Proc. 1895, art. 770, prohibits comment or reference to failure of accused to testify. Hare v. State [Tex. Cr. App.] 118 SW 544. In two of three prosecutions for illegal liquor sales, accused did not testify. In third, after death of witness who testified against him in other two, accused took stand. Held proper to ask if witness had not testified to sales in other trials, and if he, accused, had not failed to deny them. Sanders v. State, 52 Tex. Cr. App. 156, 20 Tex. Ct. Rep. 369, 105 SW 803. In forgery prosecution, material **admissions by accused** having been made, it was **not improper for court to comment** on his failure to testify. State v. Skillman [N. J. Law] 70 A 83.

As to improper reference in argument to failure of accused to testify see Indictment and Prosecution, 10 C. L. 144.

**20.** Twining v. New Jersey, 211 U. S. 78, 53 Law. Ed. 97.

**21.** New Jersey rule that jury may consider failure of accused to testify is not violation of 14th amendment to federal constitution. Twining v. New Jersey, 211 U. S. 78, 53 Law. Ed. 97.

**22, 23.** Glover v. State, 4 Ga. App. 455, 61 SE 862.

**24.** Glover v. State, 4 Ga. App. 455, 61 SE 862. Where a person has been arrested without warrant, evidence obtained by unlawful search and seizure of his person is not admissible against him. Gainer v. State, 2 Ga. App. 126, 58 SE 295. Evdence, which one is compelled, either directly or indirectly, to disclose by unlawful search of his person, is not admissible against him. Hughes v. State, 2 Ga. App. 29, 58 SE 390. Incriminating evidence obtained by unlawful seizure and search of defendant while he was under arrest will not sustain a conviction. Sherman v. State, 2 Ga. App. 686, 58 SE 1122. In such case, the state has the burden to prove search after legal arrest, and testimony amounting to a conclusion, does not establish such fact. Sherman v. State, 2 Ga. App. 148, 58 SE 393.

closed may be used against him.[25] The privilege of a person accused of crime is personal and may be waived; thus, where such a person takes the stand in his own behalf, he may be fully cross-examined [26] and impeached the same as any other witness.[27] There is a conflict as to whether the cross-examination of an accused must be confined to matters within the scope of his direct examination.[28] Proof of an involuntary confession is incompetent.[29] If accused takes the stand in his own behalf, he waives his privilege for every subsequent stage of the prosecution.[30] Thus, where a new trial is granted, the transcript of his testimony at the former trial may be introduced.[31]

Under the constitutional provisions under discussion, no witness, in any legal proceeding, can be compelled [32] to give testimony that will tend to incriminate him [33] or subject him to a criminal prosecution. That a question calls for an answer that will degrade, disgrace, or humiliate the witness does not excuse him from answering.[34] If the proposed evidence has a tendency to incriminate the witness, or to establish a link in the chain of evidence which may lead to his conviction, or if the

**25.** Glover v. State, 4 Ga. App. 455, 61 SE 862.

**26.** Defendant may be cross-examined for purpose of testing credibility, the same as any other witness. People v. Hutchings, [Cal. App.] 97 P 325. Defendant who takes the stand may be cross-examined the same as any other witness for purpose of impeachment; thus, may be asked concerning conviction of crime. State v. Deal [Or.] 98 P 165.

**27.** See, also, ante, § 5a. People v. Hinksman, 192 N. Y. 421, 85 NE 676. Accused may be impeached like any other witness. Eads v. State [Wyo.] 101 P 946. General moral character of accused could be shown, he having testified, but his character as violent and turbulent man could not be shown. Sweatt v. State [Ala.] 47 S 194. Accused having become a witness may be questioned as to former contradictory statements, whether voluntary or not, and his answers may be contradicted. Kelly v. State [Ala.] 49 S 535. In prosecution under liquor law, held not error to compel defendant to admit that he received commissions on liquor sales, and that he had retail liquor dealer's license. Coleman v. State, 53 Tex. Cr. App. 578, 111 SW 1011. Accused, testifying in his own behalf, may be cross-examined the same as any other witness to determine credibility, but it is improper to prove by him commission of other similar offenses (carrying pistol). Terrell v. State [Tex. Cr. App.] 116 SW 569. Accused, testifying for himself, may be asked by state if he has not been convicted before. State v. Benjamin [R. I.] 71 A 65. A defendant who offers himself as a witness may be interrogated concerning any vicious or criminal act of his life. People v. Hinksman, 192 N. Y. 421, 85 NE 676. But proof of his general bad character is inadmissible unless he has himself placed it in issue. Id.

**28.** The waiver of the constitutional privilege of an accused person who takes the stand in his own behalf extends only to a legal cross-examination upon the subject-matter of the direct examination. Harrold v. Oklahoma Ter. [C. C. A.] 169 F 47. When accused takes stand in his own behalf, he may be cross-examined to test credibility, and **cross-examination need not be confined to matters brought out on direct examination.** State v. Cloninger, 149 N. C. 567, 63 SE 154. Accused testifying as witness may be cross-examined as any other witness. Cross-examination need not be confined to matters brought out on direct, in Minnesota. State v. Knight, 106 Minn. 371, 119 NW 56. **Cross-examination of defendant should be confined to matters covered in examination in chief.** State v. Deal [Or.] 98 P 165. Accused may be fully cross-examined as to subject-matter of direct examination, but not as to new matter. People v. Smith [Cal. App.] 98 P 1111. Cross-examination on new matter and erroneous. Id. Cross-examination by impeaching questions relative to an involuntary confession, not treated in the direct examination, is a violation of the rights of accused. Harrold v. Oklahoma Ter. [C. C. A.] 169 F 47.

**29.** Harrold v. Oklahoma Ter. [C. C. A.] 169 F 47. An alleged confession, not shown to have been voluntarily made or taken down, after warning, in statutory manner, is incompetent to impeach accused. Brown v. State [Tex. Cr. App.] 118 SW 139.

**30, 31.** State v. Simmons [Kan.] 98 P 277.

**32.** One who gave affidavit concerning three persons being investigated for illegal registration, one of whom was himself, was not compelled to give testimony against himself, so as to bar subsequent prosecution for perjury for making false affidavit as to other two. People v. Cahill, 193 N. Y. 232, 86 NE 39. That witness swore that on former occasion he had testified under duress, and that his testimony then given was false, did not tend to sustain objection that he was under duress at time he so swore. State v. Gebbia, 121 La. 1083, 47 S 32.

**33.** The purpose of such constitutional provisions is to prohibit the compelling of self-criminating testimony from a party or witness. Ex parte Gudenoge [Okl. Cr. App.] 100 P 39.

**34.** Though witness cannot be made to give testimony that would expose him to prosecution. Leach v. Com., 33 Ky. L. R. 1016, 112 SW 595.

proposed evidence will disclose the names of persons upon whose testimony the witness might be convicted of a criminal offense or expose him to penalties or forfeitures, he cannot be compelled to answer.[35] Where the privilege is claimed by a witness under oath, it must obtain unless the court can say, as a matter of law, that any direct answer cannot tend to incriminate the witness.[36] Testimony given in obedience to a subpoena commanding the witness to appear and testify is not voluntarily given.[37] When testimony is so given, the witness need not claim the privilege of the statute at the time of giving it, when he has no idea that it will subsequently be used against him; it is sufficient if he claim his privilege at the time it is sought to be used against him in a criminal proceeding.[38] No constitutional or statutory right of a witness is violated by summoning him as placing him under oath,[39] since his privilege is personal, must be claimed by him and passed on by the court, and since he does not become a witness until sworn.[40] Where the examination is before a court in a proceeding in which the witness is not entitled to counsel, the court may postpone the hearing to allow witness to consult counsel.[41]

The privilege is personal to the witness and may be claimed or waived by him.[42] If waived, he cannot subsequently object to the use of the evidence against him.[43] It cannot be claimed for him by others as by his counsel,[44] nor can the parties exclude the testimony of a witness on the ground of privilege.[45] A corporation cannot plead the privilege against an order to produce books and papers, nor can an officer refuse to produce them on the ground of incriminating the corporation.[46]

Statutes commonly provide that witnesses may be compelled to give testimony in certain proceedings and for certain purposes,[47] and that testimony which a witness is thus compelled to give cannot subsequently be used against him.[48] The im-

35. People v. Argo, 237 Ill. 173, 86 NE 679.

36. Ex-convict, out under conditional pardon, could refuse to testify when answer might be contrary to facts stated in petition for pardon, because pardon might be revoked and he might be prosecuted for escape prior to pardon. In re Allison [Mich.] 16 Det. Leg. N. 8, 120 NW 19.

37, 38. Hammond Lumber Co. v. Sailor's Union of the Pacific, 167 F 809.

39. United States v. Price, 163 F 904. Privilege of witnesses not violated where they were called before grand jury and sworn and asked merely formal questions. Id.

40. United States v. Price, 163 F 904.

41. In re O'Shea, 166 F 180.

42. One may claim privilege and refuse to testify at coroner's inquest or may waive privilege and testify. Garrett v. St. Louis Transit Co. [Mo.] 118 SW 68.

43. Where witness was asked to give affidavit concerning residence of three persons, one of whom was himself, he should have refused to give it if he had thought it might incriminate him; having made it voluntarily, he could not in prosecuton for perjury claim he had been compelled to testify against himself. People v. Cahill, 193 N. Y. 232, 86 NE 39.

44. Privilege of witness personal; cannot be claimed by counsel. In re O'Shea, 166 F 180.

45. Witness in election contest not having claimed privilege, parties could not exclude testimony on ground that it might incriminate him. Buckingham v. Angell, 238 Ill. 564, 87 NE 285. Not error to overrule objection to question concerning illegal voting when witness did not claim privilege. Ham v. State [Ala.] 47 S 126.

46. State v. Standard Oil Co. [Mo.] 116 SW 902.

47. Laws 1907-08, p. 604, c. 69 (Enforcement Act), § 4, contemplates a proceeding based on complaint and affidavit that there has been a violation of some penal provision of the act; witness need not give criminating testimony unless proceeding is so based and is instituted for purpose of investigating some complaint made. Ex parte. Gudenoge [Okl. Cr. App.] 100 P 39. The **Interstate Commerce Commission** has power to compel witnesses to testify only when investigating complaints for violations of the interstate commerce act; it has no such power when making independent investigations to keep itself informed, and for the purpose of recommending legislation. Construing interstate commerce act. Harriman v. Interstate Commerce Commission, 211 U. S. 407, 53 Law. Ed. 253.

48. Under U. S. Rev. St. § 860, testimony given by witness under subpoena in bankruptcy proceeding cannot be used against him in criminal proceeding; prejudicial error to allow him to be cross-examined and contradicted in such prosecution, as to his testimony in bankruptcy proceeding. Alkon v. U. S. [C. C. A.] 163 F 810. Under Bankruptcy Act 1898, § 7, subd. 9, no testimony given by bankrupt at creditor's meeting can be offered in evidence against him in any criminal proceeding. Hence, cross-examination as to testimony so given was improper. Jacobs v. U. S. [C. C. A.] 161 F 694. Privision of bankruptcy act not waived by bankrupt's

munity granted by such a statute must be as broad as the constitutional privilege,[49] and must afford absolute immunity against future prosecution for the offense to which the question relates.[50] An indemnity statute should be so construed as to secure to the witness his constitutional right, and at the same time so as to aid prosecuting officers, and not to hinder unduly the administration of justice.[51] One who testifies after conviction and sentence is not entitled to be discharged under a statute providing for immunity from punishment.[52] Where a statute relating to investigations of particular crimes provides for the entry of an order by the court, making a witness immune from prosecution upon evidence given by him, the order of the court can be no broader in effect than the statute under which it is entered,[53] and, where the statute grants immunity only as to the crime being investigated, a witness may claim his privilege and refuse to answer questions when he may be exposed to prosecution for other crimes, or to actions for penalties or forfeitures.[54]

A witness is entitled to his privileges and immunities as well when his deposition is being taken as when examined in open court,[55] and a refusal to answer questions which would be an abuse of process is not contempt and cannot be punished.[56] But a refusal to obey a subpoena or to be sworn may be punished.[57]

That a party, sought to be examined prior to the trial; may not be obliged to testify, is no ground for vacating an order for his examination;[58] the proper time to claim the privilege is when the examination is had.[59]

Privileges and exemptions from service of process are elsewhere discussed.[60]

§ 7. *Subpoenas, attendance and fees.*[61] See 10 C. L. 2112—The recovery of witness fees paid by a party, or the right to have such fees taxed as costs, is treated elsewhere.[62] The amount allowed witnesses is statutory,[63] and there can be no re-

taking stand in criminal proceeding, since statute excludes all proof of testimony given by him in bankruptcy proceeding. Id.

49. People v. Argo, 237 Ill. 173, 86 NE 679. Rev. St. 1899, § 8989, grants immunity to witnesses testifying in proceedings under anti-trust act, under order of court, and to those producing books and papers, and witnesses compelled by order of court to testify or produce documentary evidence cannot set up constitutional privilege. State v. Standard Oil Co. [Mo.] 116 SW 902. Pen. Code, § 419, relating to testimony in proceedings to examine into illegal registration, grants complete immunity from prosecution; hence, constitutional rights of person making affidavit not violated. People v. Cahill, 193 N. Y. 232, 86 NE 39. Protection given by U. S. Rev. St. § 860, is not coextensive with constitutional privilege; witness may properly refuse to answer incriminating questions in pension proceeding. In re O'Shea, 166 F 180.

50. No statute which leaves witness open to prosecution after answering can supplant constitutional privilege. Ex parte Gudenoge [Okl. Cr. App.] 100 P 39. A statute which, while it compels a witness to testify, protects him if he does disclose the circumstances of his offense and the sources from which, or the means by which, evidence may be obtained against him, is sufficient. People v. Lane, 132 App. Div. 406, 116 NYS 990.

51. People v. Lane, 132 App. Div. 406, 116 NYS 990.

52. Pen. Code, § 5, bars prosecution, indictment, or "punishment" of one compelled to testify concerning violation of election laws. Held, "punishment" means act of imposing it, and one who testifies after conviction and sentence is not entitled to discharge under statute. People v. Lane, 132 App. Div. 406, 116 NYS 990.

53. People v. Argo, 237 Ill. 173, 86 NE 679.

54. S. & C. Ann. St. 1896, c. 38, p. 69, div. 1, construed. Witness could claim privilege as to questions regarding gambling in investigation of bribery, notwithstanding immunity order of court. People v. Argo, 237 Ill. 173, 86 NE 679.

55, 56. Ex parte Button [Neb.] 120 NW 203.

57. Justice of peace has power to commit for such refusal. Ex parte Button [Neb.] 120 NW 203.

58. Ely v. Perkins, 127 App. Div. 823, 112 NYS 122.

59. Ely v. Perkins, 127 App. Div. 823, 112 NYS 122. Question of privilege should be raised at examination. Solar Baking Powder Co. v. Royal Baking Powder Co., 128 App. Div. 550, 112 NYS 1013.

60. See Process, 12 C. L. 1413.

61. **Search Note:** See notes in 4 C. L. 1971; 20 L. R. A. 57; 27 Id. 669; 39 Id. 116; 8 L. R. A. (N. S.) 509; 6 Ann. Cas. 993; 6 Id. 1017; 7 Id. 163; 9 Id. 977; 10 Id. 397.

See, also, Witnesses, Cent. Dig. §§ 1-76; Dec. Dig. §§ 1-34; 30 A. & E. Enc. L. (2ed.) 910; 1171; 22 A. & E. Enc. P. & P. 1327.

62. See Costs, 11 C. L. 886.

63. Error to tax costs allowing witnesses

covery on the quantum meruit for services as witness.[64] A party testifying in his own behalf is not entitled to witness fees or mileage, whether suing or defending for himself, or in a representative capacity or testifying for another joined with him.[65]

Courts have power to summon and compel the attendance of witnesses,[66] the extent of the power [67] and the duty of the witness summoned [68] being generally controlled by statute. Penalties for failure to obey a subpoena are recoverable under some statutes.[69] A subpoena should be properly issued and signed,[70] but irregularities in its issuance may be waived by the witness.[71]

The writ of habeas corpus ad testificandum is the common-law precept issued by courts to bring a prisoner into court to testify.[72] It is the process of the court, not of the judge, though issued by a judge in chambers,[73] and a motion to quash the writ is properly addressed to the court, and not to the judge who issued it.[74] Its quashal is a matter resting largely in discretion.[75] The writ should not issue except to bring in a person competent to testify.[76]

Courts have inherent power to compel the production of documentary evidence [77] and usually are given statutory power to issue and compel obedience to subpoenas duces tecum.[78] A subpoena duces tecum should describe with reasonable certainty the documents desired.[79] A party is not entitled to have produced a mass of books or papers for the purpose of searching them for evidence.[80]

$10 per day; only $2 per day allowable. Pendroy v. Great Northern R. Co. [N. D.] 117 NW 531.

64. Witness who attended as expert in the absence of special contract could only recover the statutory fee. Chicago & M. Elec. R. Co. v. Judge, 135 Ill. App. 377.

65. Members of pilots' association, owning libelled vessel, subpoenaed as witnesses, not entitled to fees. The Philadelphia, 163 F 438.

66. "Subpoena ad testificondum" expresses the power of the court to hear and determine all causes brought before them and to summon and compel attendance of witnesses. Issuance of process is judicial act. Jackson v. Mobley [Ala.] 47 S 590.

67. In supplementary proceedings in federal court, but under state laws, as authorized by U. S. Rev. St. § 916, federal court may, under § 876, issue subpoenas to witnesses within district or within 100 miles. Meyer v. Consolidated Ice Co., 163 F 400.

68. Under Rev. St. 1899, §§ 2598, 2842, witness in criminal case subpoenaed for certain date is required to appear from time to time and term to term until matter is disposed of, and, when he fails to appear at date to which cause is continued, he may be attached. State v. Olds [Mo.] 116 SW 1080.

69. Witness who fails to obey subpoena issued by insurance commissioner, under Acts 1907, p. 1540, c. 460, § 3, is liable to penalty provided for by Shannon's Code, §§ 5608, 5609, 5610, 5613, and circuit court has jurisdiction to enforce it. Rhinehart v. State [Tenn.] 117 SW 508. Motion for penalty should be made in name of state and not in name of insurance commissioner. Id. That commissioner was exceeding his powers in investigation would not excuse nonattendance of witness. Id.

70. Subpoena, not signed by clerk or deputy, as required by statute, void. Knight v. Donnelly [Mo. App.] 115 SW 1050. Subpoenas for nonresident witnesses for defendant need not be countersigned by solicitor general. Paulk v. State, 5 Ga. App. 567, 63 SE 659. Ordinary subpoena signed by clerk and issued on behalf of defendant in a criminal case is sufficient to compel attendance of witnesses from any part of state. Subpoenas for witnesses outside county need not be countersigned by presiding judge or solicitor general. Ivey v. State, 4 Ga. App. 828, 62 SE 565.

71. Where witness responds to subpoena, regular on its face, and gives part of deposition without objection, he cannot, for the first time in an original proceeding in the appellate court for a writ of mandate to compel a judge to compel the witness to complete the deposition, object that the subpoena was irregularly issued. In re Scott [Cal. App.] 96 P 385.

72. May in proper case issue to cause inmate of state insane hospital to be brought in. In re Thaw [C. C. A.] 166 F 71.

73, 74, 75. In re Thaw [C. C. A.] 166 F 71.

76. Properly quashed when issued to bring in one confined as an insane person. In re Thaw [C. C. A.] 166 F 71.

77. American Lithographic Co. v. Werckmeister [C. C. A.] 165 F 426. In New York, a subpoena duces tecum is properly issued in proceedings for examination of a party before trial. Littlefield v. Gansevoort Bank, 62 Misc. 339, 114 NYS 769; Thayer v. Schley, 58 Misc. 352, 110 NYS 1104. See, also, Discovery and Inspection, 11 C. L. 1099. Order for examination of defendant before trial properly contained direction for production of books and papers. Grant v. Leopold, 61 Misc. 79, 113 NYS 167.

78. U. S. Rev. St. § 716 gives such power to federal courts. American Lithographic Co. v. Werckmeister [C. C. A.] 165 F 426.

79. Subpoena held too indefinite. American Car & Foundry Co. v. Alexandria Water Co., 221 Pa. 529, 70 A 867.

80. American Car & Foundry Co. v. Alexandria Water Co., 221 Pa. 529, 70 A 867.

A witness called as an expert may be required to give opinion evidence though he has not received other compensation than that paid to ordinary witnesses,[81] though he could not be required to make special preparation.[82] No implied contract to pay an expert more than statutory fees arises from the mere fact that he is subpoenaed and required to testify.[83] But if he performs special services in preparing or qualifying himself to testify, an implied contract to pay him reasonable compensation may arise,[84] and an express contract to pay will be upheld;[85] but a contract by which a patient agrees to pay extra compensation to a physician in case he is called to testify is void.[86]

In Wisconsin the mere fact that an expert is summoned to testify in a criminal case does not make the county liable for his fees.[87] The county is liable only when the statutory procedure, provided for the bringing in of witnesses by order of court, is followed.[88] Witness in a civil suit is not liable for contempt in failing to obey a subpoena unless his witness fees have been paid or tendered him [89] or he has waived the same;[90] but in Michigan fees for witnesses and service of subpoenas in criminal cases need not be paid in advance.[91] In prosecutions by a special state department, subpoenas should be issued by the county clerk in the usual way, and the question of liability of state or county adjusted after the trial and after the expenses have been incurred.[92]

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**81.** State v. Bell, 212 Mo. 111, 111 SW 24. Physician owes duty as citizen to appear in court and testify in regard to injuries to patient and cannot evade it by contract for extra pay over and above ordinary witness fees. Burnett v. Freeman [Mo. App.] 115 SW 488. All witnesses, whatever their character, are required to obey the subpoena of the court, and testify to facts within their knowledge, whether acquired by expert skill, learning or special study or not. Philler v. Waukesha County [Wis.] 120 NW 829.

**82.** State v. Bell, 212 Mo. 211, 111 SW 24. A subpoena does not require a witness to equip himself to testify by special investigation or special services. Philler v. Waukesha County [Wis.] 120 NW 829.

**83, 84, 85.** Philler v. Waukesha County [Wis.] 120 NW 829.

**86.** Against public policy. Burnett v. Freeman [Mo. App.] 115 SW 488.

**87.** Philler v. Waukesha County [Wis.] 120 NW 829.

**88.** County not liable for fees of expert, called by defendant's counsel, where statutory procedure not followed. Philler v. Waukesha County [Wis.] 120 NW 829.

**89.** People v. Healey, 139 Ill. App. 363.

**90.** Because witness who failed to appear did not, in a conversation subsequent to the service of the subpoena with the attorney who caused the subpoena to be issued, assign his reason for not appearing, he did not waive right. People v. Healey, 139 Ill. App. 363.

**91.** Chase v. Kalamazoo Circuit Judge, 154 Mich. 271, 15 Det. Leg. N. 702, 117 NW 660.

**92.** Improper to issue subpoenas with indorsement that county should not be liable for fees, in prosecution under food law. Chase v. Kalamazoo Circuit Judge, 154 Mich. 271, 15 Det. Leg. N. 702, 117 NW 660.

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